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TO
WITNESSES

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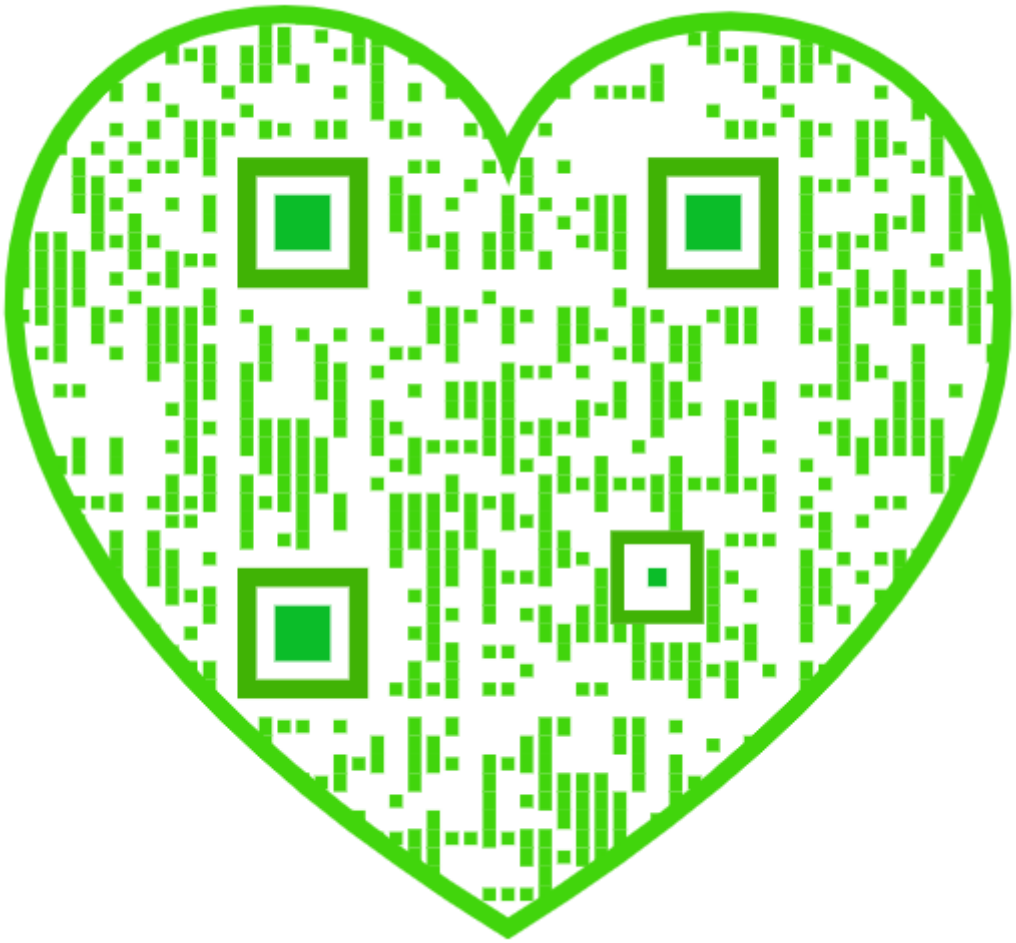

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CURRENT LAW

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HUSBAND AND WIFE.

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Scope of topic.—This topic is confined to the treatment of the rights, powers, and liabilities of husband and wife as such at common law and under the various statutes. It excludes all consideration of marriage contracts,[1] except with regard to anti-nuptial contracts;[2] the nature and validity of marriage[3] and the annulment[4] and dissolution thereof;[5] offenses against the marital relation,[6] except in so far as the rights or liabilities of the parties as such are affected thereby;[7] rights, liabilities, and procedure after dissolution of the marriage by death[8] or by divorce,[9] except under the system of community property,[10] and except such as may be incidentally involved in the treatment of the subjects herein considered; the domicile of the parties;[11] the relation of parent and child,[12] and the legitimacy of children and questions related thereto;[13] testamentary capacity of married women and questions arising under wills;[14] competency of the parties as witnesses;[15] fraud and undue influence,[16] except to such extent as such matters may be incidentally involved herein;

1. See Frauds, Statute of, 9 C. L. 1494; Breach of Marriage Promise, 9 C. L. 407.
2. See this topic, § 2.
3, 4. See Marriage, 8 C. L. 833.
5. See Divorce, 9 C. L. 997.
6. See Adultery, 9 C. L. 37; Bigamy, 9 C. L. 392.
7. See this topic, §§ 4, 11, 12.
8. See Descent and Distribution, 9 C. L. 970; Estates of Decedents, 9 C. L. 1154; Dower, 9 C. L. 1012; Curtesy, 9 C. L. 857
9. See Alimony, 9 C. L. 89; Divorce, 9 C. L. 997; Marriage, 8 C. L. 833.
10. See this topic, § 4.
11. See Domicile, 9 C. L. 1010.
12. See Parent and Child, 8 C. L. 1225.
13. See Bastards, 9 C. L. 383.
14. See Wills, 8 C. L. 2305.
15. See Witnesses, 8 C. L. 2347.
16. See Fraud and Undue Influence, 9 C. L. 1475.

and acknowledgments by married women.[17] Conveyances between husband and wife as a fraud upon creditors is considered herein.[18]

§ 1. *Disabilities of coverture in general; statutory relaxations.* See 8 C. L. 122. The emancipation of married women has been a gradual growth or evolution, the various stages or steps of which are marked by the various statutes,[19] but it may be stated generally that the common-law rule of discrimination between husband and wife has been swept away by modern legislation so that a married woman is relieved in most of the states from the ordinary disabilities of coverture.[20] Powers and disabilities with relation to particular matters are treated in the subsequent sections relating to such matters. Where a married woman is made sui juris, a public service company is obliged to serve her the same as anyone else.[21]

§ 2. *Mutual duties, obligations, and privileges. A. Inherent in the relationship.* See 8 C. L. 124—The duty of the husband to support his wife is treated in another section.[22]

(§ 2) *B. Contracts or other dealings.* See 8 C. L. 125—In some states the common-law disability of husband and wife to contract with each other still obtains,[23] and in others the power to so contract is still limited to a greater or less extent,[24] but in most of the states such disability has been entirely removed for most intents and purposes.[25] When the contract of a married woman with her husband is valid, she will be held to its performance the same as any other party to a contract.[26]

Gifts. See 8 C. L. 125—In most states, gifts between husband and wife are valid.[27]

17. See Acknowledgments, 9 C. L. 22.

18. See § 7E.

19. See Thompson v. Minnich, 227 Ill. 430, 81 NE 336, reviewing the Illinois statutes.

20. Dodge v. Rush, 28 App. D. C. 149; Bronson v. Brady, 28 App. D. C. 250.

21. Married woman entitled to have gas supplied to house rented by her and in which she conducted business in own right. Vanderberg v. Kansas City, Mo., Gas Co. [Mo. App.] 105 SW 17. Evidence held not to show that married woman was lessee of house for which she demanded supply of gas. Id.

22. See post, § 11. Proceedings to Compel Support of Wife.

23. Rev. Code 1852, as amended in 1893, p. 600 (14 Laws Del. c. 550, § 9), giving, in general terms, a married woman power to execute a bond, did not remove her common-law disability to contract with her husband and to execute bond to him. Masten v. Herring [Del.] 66 A 368.

24. The fact that a negotiable note of a wife is payable to her husband does not of itself impart invalidity because apparently made without approval of superior court of wife's domicile. Where such note does not involve a sale of the wife's separate estate to the husband, it is valid without such approval. Farmers' & Traders' Bk. v. Eubanks [Ga. App.] 59 SE 193.

25. Under D. C. Code, § 1151 (31 Stat. 1373, c. 854), a husband and wife may contract with each other. Bronson v. Brady, 28 App D. C. 250. Since act of 1893, married woman may become husband's partner. Italo-French Produce Co. v. Thomas, 31 Pa. Super. Ct. 503. Bill of sale by husband to wife held valid under P. L. Pa. 1887, No. 224, p. 332. Pedrick v. Keummell [N. J. Law] 65 A 906.

26. Partition on behalf of wife as to property purchased by husband in joint name of self and wife denied on ground of her breach of the agreement pursuant to which the property was so purchased, and relief granted to husband on his cross bill. Brixel v. Brixel, 230 Ill. 441, 82 NE 651.

27. D. C. Code, § 1151 (31 Stat. 1373, c. 854). Bronson v. Brady, 28 App. D. C. 250. Husband may make gift of personalty to his wife though she resides in the same house with him. Smith v. Sheppard [Ga. App.] 58 SE 303. Bona fide gift by wife to husband is void. Naler v. Ballew [Ark.] 99 SW 72. Wife may acquire house by **gift en paiement** from husband as against one who sold lumber for house to husband but secured no privilege of the furnisher as provided by law. Shreveport Nat. Bk. v. Maples, 119 La. 41, 43 S 905. Act No. 94, p. 137, of 1896, imposing penalty of fine and imprisonment for purchase of goods, etc., in block, unpaid for by seller, without exacting from seller a sworn statement that such goods have been paid for, does not apply to a wife who receives such goods by dation en paiement from her husband in restitution of her paraphernal property received and alienated by him. Compton v. Dietlein, 118 La. 360, 42 S 964.

Mutual and reciprocal donations between husband and wife in an act of sale to a third party even though in violation of Rev. Civ. Code, § 1751, cannot be urged by forced heirs as ground for vacating the sale, the purchaser not being a party to such donations. Rudolf v. Costa, 119 La. 781, 44 S 477. Under Rev. Laws Mass. 1902, c. 153, §§ 1, 3, transfer of stock to wife by surrender of certificates and issue of new certificates to her held valid as being **transfer through third person.** Tucker v. Curtin [C. C. A.] 148 F 929. All question as to validity of such a transfer held removed by loan of such stock by wife to husband's partner, the loan agreement being witnessed by the husband. Id.

Such gifts, however, must be clearly proved,[28] but may be inferred or presumed from the circumstances.[29] The Federal courts will not recognize a gift contrary to the laws of the state.[30]

Ante-nuptial contracts.[See 8 C. L. 128]—An agreement to marry is a sufficient consideration for an ante-nuptial contract or settlement.[31] Such contracts or settlements are usually upheld when fair and equitable [32] and executed according to law,[33] but may be rendered nugatory by reason of failure to perform,[34] and in some cases may be disaffirmed on account of disability of parties.[35] The disposition and control of future acquired property may be included,[36] and also homestead rights [37] and rights by way of inheritance or survivorship.[38] Such contracts will be liberally con-

28. Naler v. Ballew [Ark.] 99 SW 72. Must be convincing evidence of delivery with intent to vest absolute title in wife. Farrow v. Farrow [N. J. Err. & App.] 65 A 1009.

29. Former gift need not be proved in order to overcome presumption, under Kirby's Dig. § 5227, that husband who manages and controls wife's property is acting as her agent. A gift may be inferred from circumstances showing an intent on wife's part to relinquish her right in such property to her husband. Wyatt v. Scott [Ark.] 105 SW 871. Evidence held to sustain finding that **wife allowed** husband for many years **to use her property** for general domestic purposes for benefit of both, without intention that he should return it to her as her separate property. Id. Gift or advancement presumed from **payment by husband and conveyance to wife.** Van Etten v. Passumpsic Sav. Bk. [Neb.] 113 NW 163. Payment by husband of purchase money for land conveyed to wife is presumed to be a gift. Tison v. Garr [Tex. Civ. App.] 18 Tex. Ct. Rep. 298, 102 SW 751; Simpson v. Belcher, 61 W. Va. 157, 56 SE 211. When husband caused conveyance to be made to his wife so she might have a home "in case anything happened to him." Foster v. Berrier [Colo.] 89 P 787. Such gifts are not only valid if made in good faith but are encouraged by the law. Id. The relation of husband and wife is essential to such a presumption. Evidence held to sustain finding that parties were husband and wife. Id. Where property is purchased with joint earnings and deed is made to wife, gift of husband's share to wife presumed. Jentzsch v. Jentzsch [Ark.] 105 SW 572. Admissions of husband and wife that the property belonged to husband held admissible to rebut presumption of gift and to establish a trust. Casciola v. Donatelli [Pa.] 67 A 901.

30. Court of bankruptcy refused to recognize gift invalid both at law and in equity under laws of Massachusetts. In re Tucker, 148 F 928.

31. Disposing of and fixing property rights. In re Appleby's Estate, 100 Minn. 408, 111 NW 305.

32. Executors of husband held to have burden of proving fairness of antenuptial agreement which wife was induced to sign without opportunity of investigation or advice. Maze's Ex'rs v. Maze, 30 Ky. L. R. 679, 99 SW 336. In absence of actual fraud, an antenuptial agreement was not invalidated because wife was not informed that husband's marriage would invalidate his will in which he had bequeathed all his property to his children. Robbins v. Robbins, 225 Ill. 333, 80 NE 326.

33. Antenuptial contract held within statute of frauds. Frazer v. Andrews, 134 Iowa, 621, 112 NW 92. See Frauds, Statute of, 9 C. L. 1494.

34. Where husband fails to perform, the wife may assert her rights as heir which she has relinquished. In re Warner's Estate [Cal. App.] 92 P 191.

35. Where an infant femme unites with her husband in an antenuptial agreement settling her realty upon herself and contemplated issue of the marriage, her act is voidable and can be disaffirmed upon the removal of the disability of infancy and coverture where she has done nothing in the meantime to ratify or affirm such settlement. Smith v. Smith's Ex'r [Va.] 57 SE 577, making an extensive review of the cases involving right of wife to avoid antenuptial settlements entered into by her while an infant.

36. In order to restrict the wife's power to acquire property by purchase and to control it, especially since Const. 1868, the language of the instrument should be plain and the intent to restrict be unequivocal. Dunlop v. Hill [N. C.] 59 SE 112. Instrument referring to all property which wife should "be entitled to by right, devise or bequest," held to include only such lands as were received by right of inheritance, devise or bequest. Id. Methods of devolution by which realty must be acquired in order to come within terms of settlement being expressed in the deed, land acquired in other ways is excluded. Id. Relinquishment of all right and interest in property of husband, either as heir or otherwise, applies both to property owned by him at time of marriage and to that owned at time of his death. In re Warner's Estate [Cal. App.] 92 P 191.

37. In re Appleby's Estate, 100 Minn. 408, 111 NW 305.

38. Such contracts when valid exclude the operation of the law ordinarily applicable to the property of the parties so far as such rights are covered by the contract. In re Appleby's Estate, 100 Minn. 408, 111 NW 305. Contract cutting off husband's right to one-third interest in wife's property held not prohibited by statute, and hence valid. Id. Relinquishment of rights as heir relinquishes right to part of community property and to subsequent acquisition of separate property after husband's death. In re Warner's Estate [Cal. App.] 92 P 191. Settlement construed and held not to deprive widow of her inheritance from her husband.

strued,[39] but one cannot contract for release from the duty and liability to support his wife and children,[40] and provisions tending to restrain marriage or to separate husband and wife are invalid.[41] An assignment in consideration of marriage [42] is not necessarily an antenuptial settlement.[43]

Postnuptial agreements. See 8 C. L. 125—Postnuptial settlements are valid when honestly and fairly made [44] and supported by a sufficient consideration.[45] The scope of such an agreement is a matter of construction.[46]

Agreements for separation and for separate support. See 8 C. L. 127—An agreement renouncing marital rights and obligations is invalid,[47] and where an agreement adjusting mutual property rights between husband and wife is dependent upon such an agreement of renunciation, the former agreement is also void, regardless of its validity if made alone.[48] An agreement for separation and separate support, if fair and equitable [49] and actually carried into effect,[50] is valid if made as required by law,[51] and may be specifically enforced,[52] or may be pleaded in bar to statutory pro-

Rouse v. Rouse [Kan.] 91 P 45. Contract whereby wife agreed to accept whatever her husband saw fit to give her by his will, and acceptance of his will and benefits thereunder, did not bar widow's award where neither the contract nor the will provided that such award should be barred. Pratz v. Pratz, 122 Ill. App. 101. Contract held to give survivor life estate in whole estate, with remainder to husband's children. Collins v. Bauman, 31 Ky. L. R. 455, 102 SW 815. Contract executed prior to enactment of Rev. St. 1899, §§ 105, 106, 107, 111 (Ann. St. 1906, pp. 372-375), enacted in 1895, relating to husband's dower in personalty, held not affected thereby. Rougtell v. Strode [Mo. App.] 103 SW 510. Where in such case husband appropriates wife's property after her death, he became trustee for her heirs and assumed position of administrator de son tort. Id.

39. Collins v. Bauman, 31 Ky. L. R. 455, 102 SW 815. Contract not invalid because susceptible of a construction which would authorize one of the parties to render the contract inoperative, when as a matter of fact such party fully performs. In re Appleby's Estate, 100 Minn. 408, 111 NW 305.

40. Dennison v. Dennison, 52 Misc. 37, 102 NYS 621.

41. Provision for income to husband after wife's death, terminable on his second marriage, held not in restraint of marriage. In re Appleby's Estate, 100 Minn. 408, 111 NW 305. Provision for income to husband after wife's death, provided they were living together at her death, held valid. Id.

42. Not per se fraudulent as to creditors. Huntress v. Hanley [Mass.] 80 NE 946.

43. Held not antenuptial settlement within Rev. Laws, c. 153, §§ 26, 27, relating to antenuptial settlements. Huntress v. Hanley [Mass.] 80 NE 946.

44. Division of property between husband and wife after separation held valid. Branch v. Branch's Ex'r, 30 Ky. L. R. 417, 98 SW 1004. Settlement of property by husband on wife in consideration of release by wife of inchoate rights of dower and homestead in other property owned by him, if value of rights released bears reasonable proportion to value of property settled on wife, is valid as against existing and subsequent creditors of husband. State Bk. of Otterbein v. Reardon, 130 Ill. App. 383.

45. Wife's inchoate right of dower constitutes a sufficient consideration for a postnuptial settlement whereby the husband undertakes to provide for her out of his estate, and to the extent of the value of such dower right he may make such provision for his wife even to the exclusion of his creditors. Beverlin v. Casto [W. Va.] 57 SE 411. Under Code, § 3154, providing that when property is owned by husband or wife the other has no interest therein which can be subject of contract between them, a contract between husband and wife providing that their respective property shall descend to their respective children by prior marriage is void. Frazer v. Andrews, 134 Iowa, 621, 112 NW 92.

46. Postnuptial agreement held not to relate to statutory allowance, under Comp. Laws, § 8940, of year's support out of husband's estate after his death, and hence not to bar such allowance. Bliss v. Livingston Probate Judge, 149 Mich. 271, 14 Det. Leg. N. 373, 112 NW 911.

47. Hill v. Hill [N. H.] 67 A 406. Extraneous evidence held inadmissible to contradict express intent of contract that marital rights were renounced. Id. Husband and wife cannot contract to alter or dissolve the marriage or to relieve him from liability for her support. Hydecker's Gen. Laws, c. 48, p. 3954. Gray v. Butler, 116 App. Div. 816, 102 NYS 166.

48. Covenant of wife releasing property rights held dependent on covenant of husband that she might live separate and apart from him. Hill v. Hill [N. H.] 67 A 406.

49. Adams v. Adams, 32 Pa. Super. Ct. 353. Held unfair and inequitable as to wife. Bechtel v. Barton, 147 Mich. 318, 13 Det. Leg. N. 1047, 110 NW 935.

50. Adams v. Adams, 32 Pa. Super. Ct. 353. Secret agreement not carried into effect in good faith is void. Gray v. Butler, 116 App. Div. 816, 102 NYS 166.

51. Agreement for separation and separate support must be made through intervention of a trustee. Agreement made directly between the parties is void and no bar to alimony or divorce. Maney v. Maney, 104 NYS 541.

52, 53. Adams v. Adams, 32 Pa. Super. Ct. 353.

ceedings against the husband for support,[53] or in bar of the wife's rights as widow.[54] When equity has exclusive jurisdiction of contracts between husband and wife,[55] it has jurisdiction to enforce a separation agreement though the parties are divorced at the time such jurisdiction is invoked,[56] and, though such a suit is held to be a form of legal proceeding carried on in a court of equity,[57] equitable defenses are available therein.[58] The amount agreed to be paid for the wife's support is not necessarily affected by changed conditions.[59] The duration of the agreement is a matter of construction,[60] subject, of course, to rescission for cause.[61] The rights of the wife are not necessarily divested by a divorce obtained by her.[62] Parties to a suit for divorce may agree upon a division of their property,[63] and a stipulation for separate maintenance entered into upon dismissal of a divorce suit binds the husband as for alimony.[64] A conveyance by a husband to his wife pursuant to a separation agreement may be sustained as a voluntary conveyance notwithstanding void stipulations on her part.[65]

Conveyances, mortgages, and contracts concerning realty. See 8 C. L. 128—In some states a deed by a wife to her husband is void,[66] as is also an executory contract for the sale of land by a husband to his wife,[67] and such a contract, being absolutely void, cannot be sued on even in equity,[68] but when a conveyance has been executed equity may decree a reconveyance.[69]

§ 3. *Property rights inter se. A. In general.* See 8 C. L. 128

(§ 3) *B. Rights of husband in wife's property.* See 8 C. L. 120—At common law ornaments and wearing apparel acquired by a married woman from her husband remain his property during his life,[70] and the wife's personal property owned at the time of her marriage becomes the property of the husband,[71] and it will be presumed that this rule prevails in other states where the contrary does not appear.[72] Where the husband acquires title in this manner he will retain it until it is divested

54. Contract held to bar rights as widow. Bechtel v. Barton, 147 Mich. 318, 13 Det. Leg. N. 1047, 110 NW 935.

55. Such contracts are enforceable only in equity. Buttlar v. Buttlar [N. J. Eq.] 65 A 485.

56, 57. Buttlar v. Buttlar [N. J. Eq.] 65 A 485.

58. Buttlar v. Buttlar [N. J. Eq.] 65 A 485. Equitable defenses arising subsequently to a former adjudication are available. Id.

59. Agreement for support acquiesced in without objection for twelve years could not be repudiated or changed because children had grown up, occupied lucrative positions, and were no longer a charge upon the mother. Adams v. Adams, 32 Pa. Super. Ct. 353.

60. Agreement to pay wife rents during life of husband and to pay her a certain sum, term not specified, held to obligate husband to pay such sum during their joint lives. Buttlar v. Buttlar [N. J. Eq.] 65 A 485.

61. Defendant held not to have shown any grounds of rescission. Buttlar v. Buttlar [N. J. Eq.] 65 A 485.

62. Buttlar v. Buttlar [N. J. Eq.] 65 A 485. Divorce resulting in change of estate held by the entirety to one held in common did not affect agreement to pay wife certain sum per month. Id. Where agreement provided that husband was to receive all rents from property owned by him and his wife, and he was to pay her a certain sum per month, the latter obligation was not affected by a divorce obtained by the wife and a partition thereafter obtained by the husband, though he thereby lost his right to her part of the rents. Id. Where husband was not imposed on and at the time of the execution of the agreement was at least charging his wife with the things afterwards proved as ground for the divorce. Siddens v. Siddens, 31 Ky. L. R. 66, 101 SW 377.

63. Kinkead v. Peet [Iowa] 111 NW 48.

64. Shirey v. Hill [Ark.] 98 SW 731. Equity has jurisdiction under Kirby's Dig. § 2675. Id. Decree may be entered for future instalments, to be collected by execution upon default when due. Id.

65. Stipulations as to dower rights. Hellyer v. Hellyer [Iowa] 112 NW 196.

66. Deed by wife to husband in which he does not join is void at common law because to her husband, and under the statute because the husband does not join therein. Mullins v. Shrewsbury, 60 W. Va. 694, 55 SE 736. Seems that such deed would be void even if husband joins therein. Id.

67. Absolutely void, as at common law, though husband is acting in representative capacity. Atkins v. Atkins [Mass.] 80 NE 806. Where in such case a conveyance has been made to the wife and she has not paid for the property, she will be held to hold as a trustee for the husband. Id.

68, 69. Atkins v. Atkins [Mass.] 80 NE 806.

70. Farrow v. Farrow [N. J. Err. & App.] 65 A 1009. Rule not abrogated by Gen. St. p. 2012, or any other statutory provision. Id.

71, 72. Ellington v. Harris, 127 Ga. 85, 56 SE 134.

in some manner recognized by law.[73] Realty in which such property is invested after marriage, title being taken in the husband's name, becomes the property of the husband.[74] The husband cannot inherit from the wife's relations.[75] Where the marriage is void the husband acquires no rights against the wife's property by reason of his payment of an encumbrance thereon.[76]

(§ 3) *C. Rights of wife in husband's property.*[See 8 C. L. 120]—The wife acquires no title by reason of the fact that she is improperly made a grantee in a deed to the husband.[77] Under certain conditions she may acquire rights in or against her husband's property by way of subrogation,[78] or by reason of his investment or appropriation of her funds.[79] Where the wife enters and holds land under her husband, her holding after his death is not adverse to the heirs of her husband,[80] and the character of such possession is not changed by failure to have dower assigned.[81] A husband cannot dispose of his estate by gift to his children so as to defeat the just claims of his wife by virtue of her marital rights.[82]

(§ 3) *D. Estates in common, jointly, and by the entireties.*[See 8 C. L. 131]—An estate by entireties is one held by husband and wife by virtue of title acquired by them jointly after marriage, each taking the whole property and estate, with right of survivorship upon the death of the other.[83] Such an estate is created where land is conveyed to a husband and wife jointly.[84] Such an estate cannot exist as to

73. Mere **admissions** of husband that he holds for wife's heirs is insufficient to divest his title. Ellington v. Harris, 127 Ga. 85, 56 SE 134.

Removal to another state in which common-law rule does not prevail does not divest his title. Ellington v. Harris, 127 Ga. 85, 56 SE 134.

74. Ellington v. Harris, 127 Ga. 85, 56 SE 134.

75. Estate descends to wife, and husband's interest then attaches. De Hatre v. Edmonds, 200 Mo. 246, 98 SW 744.

76. Brown v. Brown [Miss.] 43 S 178.

77. Gross v. Jones, 89 Miss. 44, 42 S 802.

78. Where a widow paid balance of purchase price for land sold to her husband, she was entitled, as against the heirs of the husband, to a lien on the land for the amount so paid. Moore v. Gulley, 30 Ky. L. R. 442, 98 SW 1011. Where husband deserted wife, leaving her in possession of his homestead, she acquires no title by redemption of property from execution sale, rents and profits being used to redeem. Kenady v. Gilkey [Ark.] 98 SW 969.

79. Where wife entrusted her money to her husband to invest for her and he made an equitable and fair division of the property acquired by the investment of such money, together with his own, his estate was not chargeable with the money of the wife so invested. In re Watson, 115 App. Div. 310, 100 NYS 993.

80, 81. Moore v. Gulley, 30 Ky. L. R. 442, 98 SW 1011.

82. Change of beneficiary of insurance policy from estate to children set aside in part as being a fraud upon the wife as to such extent. Gaines v. Gaines, 30 Ky. L. R. 710, 99 SW 600. Deed executed by father to son just before father's marriage held not in fraud of the marital rights of the wife. Jenkins v. Rhodes, 106 Va. 564, 56 SE 332.

83. Alles v. Lyon, 216 Pa. 604, 66 A 81. Each owns whole interest while both live, with the right of equal enjoyment and the contingent prospect of owning the absolute title upon the death of the other. Frost v. Frost, 200 Mo. 474, 98 SW 527. The husband and wife hold as tenants in common during their joint lives. Quigley v. Monsees, 121 App. Div. 110, 106 NYS 167. Under the right of **survivorship** the survivor takes the whole fee. Naler v. Ballew [Ark.] 99 SW 72; Alles v. Lyon, 216 Pa. 604, 66 A 81. Where surviving wife paid balance of purchase price of property sold to her and her husband. Roach v. Richardson [Ark.] 104 SW 538. Since Const. art. 1, § 12, prohibits enactment of any law working a **forfeiture** of estate or corruption of blood on account of conviction of crime, Acts 1895, p 22, c. 11, relating to forfeiture of estate or interest derived from one whose death was feloniously caused by the person to whom such estate or interest would otherwise accrue on account of such death, does not affect right of survivorship in estates by entirety. Beddingfield v. Estill [Tenn.] 100 SW 108. Since survivor takes as such and not by inheritance, survivorship rights are not affected by common-law rule that one cannot inherit from another whose death was feloniously caused by the former. Id.

Differs from joint tenancy in that neither can convey his or her interest so as to destroy the other's right of survivorship. Frost v. Frost, 200 Mo. 474, 98 SW 527. Differs from joint tenancy in that, though survivorship is incident to both, where the estate is by entireties the survivor takes no new estate, being already seized of the whole estate from its inception. Alles v. Lyon, 216 Pa. 604, 66 A 81. Rule by wife to bring **ejectment** or show cause why the same cannot be brought should not be granted where petition discloses that the parties hold by the entirety, and hence a default by the husband is immaterial. Id.

84. Naler v. Ballew [Ark.] 99 SW 72. Conveyance to man and woman by name, with-

personalty.[85] A purchase by the wife at an execution sale of property held by the entirety constitutes her a trustee for her husband as a cotenant.[86] A divorce does not change the nature and quality of an estate by the entirety.[87] In some states such estates remain as at common law,[88] or still exist with more or less modification,[89] while in others they have been abolished.[90]. A judgment against one of the parties alone is not a lien on property held by the entirety,[91] and cannot be enforced against the same.[92]

(§ 3) *E. Wife's separate property.*[See 8 C. L. 132]—Under the various statutes a married woman's separate property may consist of the property owned by her at the time of her marriage and the proceeds thereof,[93] or of her earnings when replaced by her husband,[94] or property in which such earnings are invested,[95] but the burden of proving that property acquired by a married woman during coverture was her separate property is upon the party asserting such fact.[96] The duration of such an estate may depend upon her power of disposition,[97] and while under some of the statutes she may give her separate property to her husband,[98] her intention to do so must

out describing them as husband and wife, and whose marriage was void, constituted them tenants in common and not by the entirety. Wright v. Kayner [Mich.] 14 Det. Leg. N. 631, 113 NW 779.

Equitable estate by entirety is created by a contract by husband and wife to purchase land. Evidence held to show contract by husband and wife and not by husband alone. Roach v. Richardson [Ark.] 104 SW 538. Estate by entirety attaches to a trust resulting from the husband's wrongful investment of the proceeds of wife's separate property in other property, taking title in his own name, the wife not being entitled to the resulting interest as her separate property. Frost v. Frost, 200 Mo. 474, 98 SW 527.

85. In re Baum, 121 App. Div. 496, 106 NYS 113. Even though such personalty be the proceeds of a sale of realty held by the entirety, the estate by the entirety being terminated by the sale. Id.

86. Alles v. Lyon, 216 Pa. 604, 66 A 81.

87. Alles v. Lyon, 216 Pa. 604, 66 A 81, citing Lewis' Appeal, 85 Mich. 340, 48 NW 580, 24 Am. St. Rep. 94.

88. Frost v. Frost, 200 Mo. 474, 98 SW 527. Not affected by Rev. St. 1899, § 4340, relating to separate property of married woman. Id.

89. Not abolished by married woman's act of 1852. Bilder v. Robinson [N. J. Eq.] 67 A 328. Since the married woman's act gave to husband and wife the right each to one-half of rents and profits of an estate by the entirety, a purchaser at sale under execution against husband acquires the husband's right to such rents and profits. Id. One purchasing at sale under execution against the husband, his interest in property held by him and his wife by the entirety by reason of a conveyance, since the married woman's act, acquires a freehold estate of the same quality that he would have acquired by a conveyance from the husband. Id.

90. Under Gen. St. 1882, §§ 2035-2037, providing that a married woman's property shall be her separate property, and giving her absolute dominion over it, a husband and wife hold as tenants in common land conveyed to them jointly. Green v. Cannady [S. C.] 57 SE 832.

91. Under Const. art. 3, § 43, declaring that property of wife shall be protected from debts of husband, judgment against husband is not lien on property held by them by the entirety in his lifetime, and a purchaser of such property takes a deed clear of such lien. Jordan v. Reynolds [Md.] 66 A 37.

92. Sale under judgment against wife alone passes no title. Alles v. Lyon, 216 Pa. 604, 66 A 81.

93. Where wife at time of marriage occupied a farm rent free, and the husband subsequently purchased an interest therein which he sold, one-half of the proceeds being made payable to the wife, and it appeared that the proceeds of the farm during the rent free period equaled such proceeds, the one-half of such proceeds made payable to the wife belonged to her. Harris v. Harris, 31 Ky. L. R. 930, 104 SW 387.

94. An agreement between a husband and wife that she shall receive the earning from her services for a third person is valid if known and understood by the third person. Evidence of such arrangement held admissible in suit to recover for such services against estate of third person. Barclay v. Coman, 146 Mich. 650, 13 Det. Leg. N. 915, 110 NW 49. Where wife keeps boarders as her separate business, with husband's consent, her earnings are her separate property. Green v. Forney, 134 Iowa, 316, 111 NW 976. Where board is furnished to a boarder by a married woman under arrangement with her husband that she should have the pay therefor, and the same arrangement has obtained as to other boarders, a conclusion is warranted that such board is furnished on the wife's sole and separate account and was her separate business. Perry v. Blumenthal, 104 NYS 127. Whether boarder contracted with plaintiff or with her husband held for the jury. Id.

95. Property purchased with proceeds of business of keeping boarders, conducted as wife's separate business with husband's consent, was her separate property. Green v. Forney, 134 Iowa, 316, 111 NW 976.

96. Irvin v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 343, 98 SW 405.

97. Under Kirby's Dig. § 5207, the separate property of a married woman remains such so long and only so long as she may choose. Wyatt v. Scott [Ark.] 105 SW 871.

98. Wyatt v. Scott [Ark.] 105 SW 871. See ante, § 2B, subd. Gifts.

clearly appear.[99] Payment by the husband to the wife of her funds received by him will not be presumed,[1] nor will her election to accept the provisions of his will necessarily preclude her rights as a creditor of his estate for her funds received by him.[2] "Reduction to possession" by a husband of his wife's separate estate does not mean, under the Ohio statute, the acquiring of mere physical possession, but it must clearly appear that the title passed by her assent to absolute ownership of the estate or some part of it by him, and where such assent cannot be shown physical possession cannot be asserted to her prejudice.[3]

Trusteeship of husband. See 8 C. L. 132

§ 4. *Property rights under the community system.*[4] *A. What law governs.* See 6 C. L. 1676—Personal property acquired by either husband or wife in a foreign jurisdiction which is by the law of such jurisdiction the separate property of the one or the other continues to be separate property, no matter where it is carried;[5] as is also property, real or personal, in which it is invested.[6] The right of a wife to a tacit lien or mortgage for the repayment of property brought by her into the marriage community must have arisen under the law of their domicile at the date of their marriage.[7]

(§ 4) *B. What property is community and what separate.* See 8 C. L. 134—Under the various statutes proceeds of the earning power of the community,[8] business conducted by the husband and wife as partners,[9] property acquired during marriage,[10]

99. The meaning and effect of the Key Law of 1861 (58 O. L. 54), and its modification in 1871 (68 O. L. 48), was to provide a shield for a femme covert and give her a separate estate. The burden is therefore upon the husband, or those claiming under him, to show that his possession of the capital of his wife's separate estate (as distinguished from the income) was not in the capacity of agent or trustee, but that he acquired title by assent on the part of his wife to absolute ownership in him. McLean v. Miller, 5 Ohio N. P. (N. S.) 57. Inasmuch as the statute of limitations does not begin to run during coverture, it is impossible to assume that there is a presumption of payment because of lapse of time, or that the wife's silence or conduct during all the years of her husband's possession constituted laches, or that she intended to make a gift to him of the property which passed into his possession, or that she is estopped because of failure to assert her rights during coverture, since to recognize any of these defenses would be to override the statute of limitations and permit by indirection what may not be done directly. Id. The fragmentary declarations by the wife now deceased, introduced in evidence in this case, are not sufficient to establish a gift from the wife to the husband, even if a gift inter vivos can be established by a preponderance of the testimony, and much less do these declarations establish a gift clearly and convincingly. Id.

1. No presumption that husband paid over to wife money paid to him in her absence and receipted for by him as her agent. Miller's Estate, 33 Pa. Super. Ct. 20. Distinction recognized between payments to husband in wife's presence and those made in her absence. Id. No presumption of payment from lapse of time. McLean v. Miller, 5 Ohio N. P. (N. S.) 57.

2. Where a husband holds the separate property of his wife in his own name, and at his death, after directing payment of his debts, bequeaths to her in lieu of dower in "his" estate a sum greater than the value of her property which came into his hands, and she elects to take under the will, her election does not prejudice her rights as a creditor of his estate. McLean v. Miller, 5 Ohio N. P. (N. S.) 57.

3. McLean v. Miller, 5 Ohio N. P. (N. S.) 57.

4. See **Tiffany Real Property, 383.**

5. Brookman v. Durkee [Wash.] 90 P 914, citing Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrows, 136 Cal. 113, 68 P 488; Oliver v. Robertson, 41 Tex. 422; Blethen v. Bonner, 30 Tex. Civ. App. 585, 71 SW 209; Thayer v. Clarke [Tex. Civ. App.] 77 SW 1050; Tanner v. Robert, 5 Mart. (N. S.) 255; Young v. Templeton, 4 La. Ann. 254, 50 Am. Dec. 563.

6. Notwithstanding Ballinger's Ann. Codes & St. §§ 4488, 4489, 4490, defining separate and community property, and providing that property acquired after marriage is community property. Brookman v. Durkee [Wash.] 90 P 914. Property purchased in Washington by a married man domiciled in Pennsylvania with money accumulated from a business conducted by himself in such state while therein residing with his wife is his separate property as under laws of Pennsylvania. Witherill v. Fraunfelter [Wash.] 91 P 1086.

7. In re Myer [N. M.] 89 P 246. Refusal to allow wife of bankrupt such a lien or mortgage could not be disturbed on appeal where record did not show where the marriage was solemnized. Id.

8. Earnings of wife from services in management of husband's business constitute community property. See Civ. Code, §§ 162, 163, 164. Bekins v. Dieterle [Cal. App.] 91 P 173.

9. Damages from wrongful levy of execu-

and property purchased with community funds,[11] constitute community property, while property acquired prior to the marriage,[12] property purchased with separate funds[13] or paid for therewith, and the proceeds of such property,[14] and gifts made for separate use,[15] constitute separate property. In some of the states presumptions are indulged from the manner of acquisition or the character of the conveyance which must be overcome by the party relying upon a contrary theory.[16] There is no presumption that a wife's separate property is converted into community property from the fact that the purchase money on a sale thereof is made payable to the husband and wife.[17] An advancement of community funds to pay a claim against separate property does not render the latter community property.[18] Where a married woman is authorized to contract as a femme sole, a suit against her for a debt contracted by her individually involves no issue as to community property.[19] A purchaser from a married woman may be estopped to assert that the property was community.[20] In the absence of objection a general allegation of the character of the property is sufficient.[21] In Louisiana a separation of property is effected by suit.[22]

tion upon such property. Ainsa v. Moses [Tex. Civ. App.] 18 Tex. Ct. Rep. 604, 100 SW 791.

10. All property acquired during marriage, other than by gift, devise, or descent, becomes community property, regardless of whether parties live together and of their relative contributions to such acquisition. Merrell v. Moore [Tex. Civ. App.] 104 SW 514.

11. Bekins v. Dieterle [Cal. App.] 91 P 173. Property acquired during marriage is presumed to have been acquired with community funds. Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921. Property paid for in part with community funds is community property pro tanto, but to no further extent. Beneke v. Beneke [Wash.] 91 P 641. Property purchased partly with separate funds and partly with money borrowed on such property is community property to the extent that it was paid for with the borrowed money. Heintz v. Brown [Wash.] 90 P 211.

12. Under Pierce's Code 1905, §§ 3867, 3875, 3876, 3877 [Ballinger's Ann. Codes & St., §§ 4488, 4489], making property owned at marriage separate and that acquired thereafter community property, land purchased by husband prior to marriage, and partly paid for after marriage with wife's and community funds, held separate property of husband. Woodward v. Davidson, 150 F 840.

13. Property purchased by wife with separate funds is separate property, notwithstanding that husband performs labor in making improvements thereon. Donovan v. Olsen [Wash.] 92 P 276. Evidence held to show that property was purchased with wife's separate funds. Id. Where wife, by agreement with her husband, pays for land contracted for by him and which is conveyed to him, and she takes and holds possession and improves such land, the husband holds for the wife's separate use under an express trust. Allen v. Allen [Tex. Civ. App.] 17 Tex. Ct. Rep. 798, 105 SW 53.

In Louisiana such property becomes community property, and the community becomes liable for the funds so invested as for a debt. Succession of Pierce, 119 La. 727, 44 S 446.

14. Farm products raised by wife on land purchased with separate funds constitute separate property. Hester v. Stine [Wash.] 90 P 594.

15. Civ. Code, art. 2402, does not apply to a donation made specially and separately to the wife, and such donation does not become community property. Hurst v. Thompson & Co., 118 La. 57, 42 S 645.

16. Property deeded to married man is presumed to be community property. Henry v. Vaughan [Tex. Civ. App.] 18 Tex. Ct. Rep. 711, 103 SW 192. Presumption under Civ. Code, § 164, that **property conveyed to married woman** is her separate property, may be rebutted by proof that it was purchased with community funds. Bekins v. Dieterle [Cal. App.] 91 P 173. Evidence held to rebut such presumption. Id.

Property purchased during marriage is presumed to be community property. Ballard v. Slyfield [Wash.] 91 P 642. Evidence held to show that property was separate property of wife. Id.

17. Tison v. Gass [Tex. Civ. App.] 18 Tex. Ct. Rep. 298, 102 SW 751.

18. Beneke v. Beneke [Wash.] 91 P 641.

19. Freret v. Taylor, 119 La. 307, 44 S 26.

20. Where one buys property from a married woman he cannot, when sued by her to annul the contract, urge that the property was not hers, but belonged to the community between her and her husband. Keating v. Wilbert, 119 La. 461, 44 S 265.

21. Plea in trespass to try title that property sued for by heir of husband was wife's separate property held sufficient to admit proof, it being sufficient in the absence of objection to allege such fact generally. Allen v. Allen [Tex. Civ. App.] 19 Tex. Ct. Rep. 798, 105 SW 53.

22. Such suit involves all the incidents and elements of an ordinary suit, but husband may waive citation and his wife's want of authorization to bring the suit. Jones v. Jones, 119 La. 677, 44 S 429. Children of a former marriage may attack as fraudulent a judgment of separation between their deceased ancestor and his second wife. Id. Where children of first marriage, claiming as forced heirs, attack such judgment between ancestor and second wife and allege

(§ 4) *C. Rights and powers as to, and liability of, community property.* See 8 C. L. 135—In California the furniture and furnishings of the home of the community cannot be disposed of without the wife's consent.[23] A trustee of community property cannot sell the same without the consent of both parties to the community.[24] In a proper case a receiver may be appointed for such property at the instance of one of the parties to the community.[25] A putative wife may enjoy all the rights of a legal wife as to community property.[26] The rights of the respective parties in the community property continue until forfeited in some manner recognized by law.[27]

While a judgment against a wife may be collected out of community property,[28] separate debts are postponed to community debts.[29] Property purchased partly with separate and partly with community funds is liable for community debts pro tanto.[30] A voluntary conveyance of community property by the husband and wife is invalid as to creditors.[31] Community property is liable for funds of one of the spouse's separate estate used for benefit of community.[32] The husband is a necessary party to a suit upon purchase-money notes executed by the purchaser of community property and to foreclose a mortgage on such property.[33] In Texas only the husband can sue for damages to community property.[34] Where the wife is sui juris and in separate estate, she may sue alone for damages by trespass upon property held by entirety.[35]

(§ 4) *D. Rights and powers as to, and liability of, separate property.* See 5 C. L. 1739—The wife may sue alone in regard to her separate property.[36] Where a married woman is authorized to contract with regard to her separate property,[37] a judgment

prejudice to their legitime, the burden of sustaining the judgment is upon relying thereon. Id. When judgment is set aside in such suit, all property acquired after such judgment will be deemed to belong to the legitime of plaintiffs, unless affirmatively shown to be separate property of widow. Id. Unless the judgment is shown to be a mere simulation, the forced heirs take nothing under Act No. 5, p. 12, of 1884, and can succeed in their attack only to extent necessary to protection of their legitime. Id.

23. Civ. Code, § 172, as amended in 1901. Duncan v. Duncan [Cal. App.] 92 P 310. Rule applied though wife had never lived in the house. Id.

24. Norgren v. Jordan [Wash.] 90 P 597.

25. Occasion held proper for appointment of receiver for community property at instance of wife. Merrell v. Moore [Tex. Civ. App.] 104 SW 514.

26. Where woman married man in ignorance of fact that he had another wife living and undivorced. Allen v. Allen [Tex. Civ. App.] 19 Tex. Ct. Rep. 798, 105 SW 53.

27. Rights not necessarily impaired by mere existence of cause for divorce. Merrell v. Moore [Tex. Civ. App.] 104 SW 514. Rights of wife not forfeited by second marriage in belief that first husband, who had abandoned her, had obtained a divorce. Id.

28. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

29. In absence of statute changing civil law in operation in New Mexico, an antenuptial creditor of bankrupt husband is postponed to community creditors as to community property. In re Chavez [C. C. A.] 149 F 73. Acts New Mexico, March 20, 1901 [Sess. Laws 1901, p. 112], held not retroactive so as to have any effect upon such rule as applied to rights already accrued. Id.

30. Heintz v. Brown [Wash.] 90 P 211.

31. Conveyance to wife's mother. Hemenway v. Thaxter, 150 Cal. 737, 90 P 116.

32. Tison v. Gass [Tex. Civ. App.] 18 Tex. Ct. Rep. 298, 102 SW 751. Where separate funds are used to purchase property for the community. Succession of Pierce, 119 La. 727, 44 S 446.

33. Campbell v. Kerns [Idaho] 90 P 108. Where wife sued alone on such notes and mortgage, and the defendant averred that the property was community and that he had an offset against the husband, it was error to refuse his request to have the husband made a party. Id. Where court refused to make husband a party, defendant was not bound to try issue as to whether the property was community property or as to his alleged offset. Id.

34. Damages to business conducted by husband and wife as partners. Ainsa v. Moses [Tex. Civ. App.] 18 Tex. Ct. Rep. 604, 100 SW 791.

35. See Rev. St. 1899, § 4340 [Ann. St. 1906, p. 2382], and § 4335 [Ann. St. 1906, p. 2378]. Cox v. St. Louis, etc., R. Co., 123 Mo. App. 356, 100 SW 1096. Where husband had consented to the trespass, the wife could recover whole damage, though suit was by both her and her husband. Id.

36. Code Civ. Proc. § 370, subd. 1. Duncan v. Duncan [Cal. App.] 92 P 310. Suit to recover separate property sold by husband. Id. Wife who has been deserted may sue alone for furnishings and furniture of community home where such furnishings and furniture have been disposed of by her husband without her consent, contrary to Civ. Code, § 172, as amended in 1901, provided such furnishings and furniture was acquired after the enactment of such amendment. Id.

37. Wife may contract for the benefit of her separate property. Sayle's Rev. Civ. St.,

against her upon such a contract may be collected out of her separate property.[38] Separate property is not liable for community debts,[39] but both community and separate property may be liable for the same debt.[40] The husband is liable to wife where he appropriates her separate estate.[41] Where the husband receives funds belonging to his wife, it is his duty to apply them to the extinguishment of any claims he may have against her or her property.[42] The husband's claim for funds expended on his wife's separate property is merged where he acquires such property by her will.[43] Where the husband and wife are separated in property, and he mingles her affairs with his own in order to charge her with matters and accounts growing out of such mingling, he must show positively that they relate to her affairs.[44] Where a married woman sues for her separate property, a general allegation of ownership is suffiicent without alleging coverture and separate ownership.[45] The wife is a proper party to a controversy involving an issue as to whether certain property is hers separately.[46]

(§ 4) *E. Succession to and administration of the community.* See 8 C. L. 136—A married person who dies leaving an estate of less than $500 value cannot be said to have died rich within the meaning of the Louisiana statutes.[47]

Rights and powers of the survivor. See 8 C. L. 136—The survivor has the right to discharge encumbrances upon the property,[48] may pay debts of the community and appropriate community property by way of reimbursement, provided this is done fairly and without detriment to the rest of the property,[49] convey the community

art. 2970. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

38. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

39. Evidence held to sustain finding that property sold for community debt was wife's separate property, purchased with her separate funds owned prior to marriage and kept about her person after marriage, notwithstanding any question of the improbability of such funds being so kept. Dueber v. Wolfe [Wash.] 92 P 455. In suit by married woman to quiet title to separate property sold on execution for a community debt, the complaint need not allege that plaintiff was in possession of the property or that it was unoccupied, where the facts giving rise to the respective claims of the parties are alleged. Id., following Brown v. Baldwin [Wash.] 89 P 483, which overruled Spithill v. Jones, 3 Wash. 290, 28 P 531, and subsequent cases holding a contrary doctrine. In suit by wife to quiet title to separate property sold for community debt, an answer raising issue as to whether property was community or separate was not admitted by failure to deny, since it raised no new issue. Dueber v. Wolf [Wash.] 92 P 455.

40. Where goods were sold upon credit of husband and wife and of each, the wife's separate estate was liable as well as community property. Mertz v. Conrad [Wash.] 87 P 1118.

41. Tison v. Gass [Tex. Civ. App.] 18 Tex. Ct. Rep. 298, 102 SW 751. Use by the husband of the wife's paraphernal funds for the benefit of the community creates a debt against the husband for which the wife may sue at any time without asking a dissolution of the community. Jenkins v. Maier, 118 La. 130, 42 S 722.

42. He should not hold the matter open to be advanced as a claim against her succession. Succession of Barrow, 118 La. 1031, 43 S 667. Debts of wife paid during marriage are presumed to have been paid by her if, during the marriage, she receives funds from outside sources, and if such funds have come into possession of her husband such debts are presumed to have been paid out of such funds rather than out of his own. Id.

43. If the forced heir of the wife has the legacy reduced to the wife's disposable portion, the husband's claim for enhancement is merged to the extent of the interest remaining in him after such reduction. Succession of Barrow, 118 La. 1031, 43 S 667.

44. Succession of Barrow, 118 La. 1031, 43 S 667.

45. See Ballinger's Ann. Codes & St. §§ 4502, 4504, 4505. Hester v. Stine [Wash.] 90 P 594.

46. Where in suit to compel specific performance by husband of contract of sale, in which his wife did not join, there was a controversy as to whether the property was the husband's separate property, the wife was a proper party defendant. Woodward v. Davidson, 150 F 840.

47. Civ. Code, art. 2382. Crockett v. Madison, 118 La. 728, 43 S 388.

48. Discharge of equitable encumbrance by conveyance of the property. Henry v. Vaughan [Tex. Civ. App.] 18 Tex. Ct. Rep. 711, 103 SW 192. Judgment against surviving wife in suit in which she was sole defendant foreclosing vendor's lien on community property held binding upon the estate and upon minor heirs of husband. Id.

49. Wife had such right though she had not qualified as survivor. Jennings v. Borton [Tex. Civ. App.] 17 Tex. Ct. Rep. 53, 98 SW 445. In suit between heirs of both husband and wife, and heirs and executor of wife, testimony of grantee of wife as to delivery of deed held not within Rev. St. 1895, art. 2302, relating to testimony as to

property [50] to pay community debts,[51] agree for extension of time on community debts,[52] and sue to recover community property.[53] A party may by antenuptial agreement relinquish right as survivor to community property,[54] but failure of the other party to fulfill the contract will revive such rights.[55] Ordinarily the survivor is entitled to the usufruct under the laws of Louisiana [56] without giving security.[57] A widow is a necessary part to a suit by heirs to dissolve a sale by her husband of community property on the ground of nonpayment of the price,[58] and if she is estopped to seek such a dissolution the whole action must fail.[59]

Accountability to heirs and creditors. See 8 C. L. 136—Where the estate is insolvent,[60] and all the debts are paid by the survivor, the heirs of the deceased member

transactions with decedents, especially where only issue was wife's power to appropriate community property by way of reimbursement for community debts paid by her. Id. Testimony as to agreement whereby wife had accepted control and possession of property as compensation for community debts paid by her held not incompetent under Rev. St. 1895, art. 2302, or because interest of witnesses was identical with that of plaintiff, but inadmissible because not being raised by the pleadings, the only issue being the wife's power to appropriate community property as reimbursement for community debts paid. Id.

50. Deed by survivor who was also guardian for heirs of other party to community held conveyance as survivor as well as guardian. Rippy v. Harlow [Tex. Civ. App.] 18 Tex. Ct. Rep. 312, 101 SW 851, distinguishing Stone v. Siedge, 87 Tex. 49, 26 SW 1068, 47 Am. St. Rep. 65.

51. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242. Though debt is not due. Rippy v. Harlow [Tex. Civ. App.] 18 Tex. Ct. Rep. 312, 101 SW 851. False recitals as to authority from and confirmation by county court held not to invalidate such a deed by survivor who was also guardian for heir of wife. Id. Such right not affected by mingling of survivor's accounts with those of the community. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242. Disposition of estate by survivor held to have been made in **good faith.** Id.

52. In consideration of payment of interest on whole sum then due. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242. So as to extend limitations. Dashiell v. Moody & Co. [Tex. Civ. App.] 97 SW 843. Provision of agreement as to preferment of new debts created with old creditors held not to prevent presentation of original claims to administrator, who succeeded the survivor as representative of the state, upon maturity of extension. Id.

53. The widow in community, administering the succession of her deceased husband, as natural tutrix of her minor children, may bring an action for the ejectment of an alleged leseee from the succession and community property. Campbell v. Hart, 118 La. 871, 43 S 533. Where the monthly rent does not exceed $50, the action is properly brought in the justice's court, the jurisdiction of which, to entertain and decide such cause, being conferred by the constitution and being exclusive, cannot be affected by an injunction from the district court prohibiting plaintiff from disturbing defendant's possession, nor by the pendency, in the district court, of suits by the defendant, nor can such injunction or the pendency of such suits operate as a bar either in the justice's court or on appeal to district court to plaintiff's recovery of possession. Id. Defense that lessee is liquidating the commercial business of the deceased and conducting a business of his own, that he is entitled to a year to complete such liquidation, and that he has paid and is willing to pay the rent demanded, held insufficient. Id.

54. In re Warner's Estate [Cal. App.] 92 P 191. Where petition by son for administration of father's estate alleged an antenuptial agreement as ground why his mother should not be appointed, and the answer alleged that the agreement was invalid and had been waived, the probate court had jurisdiction to determine the issues thus raised. Id.

55. In re Warner's Estate [Cal. App.] 92 P 191.

56. On appeal, question of husband's right to usufruct held in abeyance until determination of question whether gestion complained of was satisfactorily accounted for. Miguez v. Delcambre, 118 La. 1062, 43 S 703.

57. Civ. Code, § 558, relating to furnishing of security by usufructuary, does not refer to usufruct of surviving spouse under usufruct laws of 1844. Succession of Dielmann, 119 La. 101, 43 S 972. The exemption from giving security extends over entire share of the deceased, including moneys then on hand, and, when stocks or notes are converted into money through maturity of notes or liquidation of corporation, the usufructuary holds the proceeds without giving security, just as if there had been money at the opening of the succession, and the usufructuary cannot be compelled by the heirs to invest them in bonds or notes under articles 563, 564, of Civil Code. Id. Purchase by widow of shares of certain heirs of husband substitutes a right of ownership for her usufructuary rights therein, but does not constitute a renunciation of her rights, a forfeiture of her usufructuary rights, or a partial portion between herself and the owners of the shares so purchased. Id.

58. Bankston v. Owl Bayou Cypress Co., 117 La. 1053, 42 S 500.

59. Bankston v. Owl Bayou Cypress Co., 117 La. 1053, 42 S 500. Widow who is made defendant cannot inject by her answer a new cause of action against her codefendants. Id. The widow cannot set up that she has acted in error or been defrauded to the prejudice of third parties who have, in good faith, acted upon her acts and declarations. Id.

60. Evidence held to show insolvency.

of the community can assert no liability against the survivor.[61] The liability of the survivor to the heirs for rents and profits [62] is a liability as tenant in common and not as trustee.[63] Prima facie a deed from the father to the son based upon a nominal consideration and conveying an interest in community lands is in discharge in whole or in part of the son's community claim.[64] A single suit may be maintained to charge community property with a claim in favor of the separate estate of one of the parties for partition of community property, and for an accounting as to the community estate.[65]

Community debts and claims. See 8 C. L. 137—Community creditors are entitled to priority as to community property.[66] Claims in favor of the separate estate of one of the parties to the community have already been considered.[67] In a suit against an administrator in which community property is sought to be subjected to a community debt, the survivor may be joined as a party defendant,[68] but a judgment therein will constitute a lien on the property regardless of any adjudication against such survivor.[69]

(§ 4) *F. Dissolution of community.* See 8 C. L. 137—After divorce the parties hold as tenants in common as to community property not disposed of by the decree for divorce.[70] The rights of the parties after divorce depend upon the terms of the statutory provisions in regard thereto.[71]

§ 5. *Liability for necessaries.* See 8 C. L. 137—A purchase of necessaries by the wife is presumed to be upon her husband's credit,[72] and while this presumption lasts he alone is liable;[73] but the wife generally may contract for necessaries furnished

Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242.

61. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242. Liability not affected by increase of community debts by survivor, where value of community was more than proportionately increased at same time. Id.

62. Survivor is not liable at all where the amount expended for improvements exceeds the amount of such rents and profits. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242.

63. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242.

64. Locust v. Randle [Tex. Civ. App.] 18 Tex. Ct. Rep. 673, 102 SW 946.

65. Petition by heir of wife against one who was legatee and devisee and executor under husband's will. Tison v. Gass [Tex. Civ. App.] 18 Tex. Ct. Rep. 298, 102 SW 751.

66. Scovel v. Levy's Heirs, 118 La. 982, 43 S 642. Creditors of the spouses and purchasers of the survivor's right of ownership are subordinated to the payment of community debts. Id. Where minors inherit from their mother a paraphernal claim against the community and their father qualifies as their tutor, the legal mortgage resulting therefrom in their favor does not absorb their claim as community creditors and alter the character of such claim from one due by the community to one due by the tutor. Id. A community creditor need not **register** his claim as against third persons who acquire rights in the property. Id.

67. See ante, this section, subsection C, Rights and Powers as to, and Liability of, Community Property.

68, 69. Dashiell v. W. L. Moody & Co. [Tex. Civ. App.] 97 SW 843.

70. Tabler v. Peverill [Cal. App.] 88 P 994; Ambrose v. Moore [Wash.] 90 P 588.

71. Under Porto Rico Civ. Code 1889, arts. 1412, 1413, Civ. Code 1902, §§ 1327, 1328, husband cannot, after dissolution of community, be held to **account** for community property wasted by him during the duration of the community. Garrozi v. Dastas, 204 U. S. 64, 51 Law. Ed. 369. Under Civ. Code Porto Rico 1889, art. 73, § 3, Civ. Code 1902, tit. 5, c. 5, § 174, a party divorced for adultery does not, as under the Spanish law, **forfeit** all right to community property, but merely forfeits all gifts from the innocent party, while the latter retains everything acquired from the former. Id. Civ. Code Porto Rico 1902, § 1330, providing that party to whose bad faith the nullity of marriage is due shall have no share in community property, applies only when the marriage is void ab initio. Id. Divorced **wife** may, under Porto Rico Civ. Code 1902, § 173, **obtain liquidation** of the community and payment of her share thereof, notwithstanding arts. 73, 1733, 1434, 1435. Id. Where rights of divorced wife arose merely from increased value of assets brought by husband into community, a **money decree** in favor of the wife was proper. Id. Amount of **alimony** decreed pendente lite and expenses incurred and allowed in divorce suit should be allowed to the wife on liquidation. Id.

Attorney's fee cannot be allowed to wife in such a suit. Garrozi v. Dastas, 204 U. S. 64, 51 Law. Ed. 369.

Appeal lies in suit by divorced wife for liquidation from district court of Porto Rico to United States supreme court, where matter in dispute exceeds $5,000. Garrozi v. Dastas, 204 U. S. 64. 51 Law. Ed. 369.

72, 73. Valois v. Gardner, 106 NYS 808.

herself and children,[74] and the husband is not liable where the credit is extended to the wife herself.[75] The husband is not liable where he furnishes his wife with necessaries and a reasonable cash allowance [76] unless he undertakes to pay for the same.[77] The husband may be liable even though he and his wife are living apart.[78] The husband and not the wife is presumably liable for rent for the house occupied by them.[79] When the law makes provision for the prosecution or defense by the wife of actions for divorce, expenses incurred by her in such prosecution or defense cannot be charged to her husband as necessaries.[80] The sole test as to what are necessaries is not utility or utility combined with ornament.[81] The power of the wife to bind the husband for necessaries, where such power exists, is for her benefit, and not for the benefit of those with whom she may deal.[82] In Illinois both the husband and wife are liable for family expenses,[83] and the husband is liable for such expenses incurred by his wife in the absence of notice to the creditor of any circumstance changing the general rule.[84]

§ 6. *Contract rights and liabilities of husband as to third persons.* See 8 C. L. 139 The law prefers the wife to other creditors of the husband,[85] especially where she secures her claim by proceedings giving her legal priority.[86] Under some circumstances the wife is entitled to subrogation to the rights of the husband's creditors.[87]

74. Sayles' Rev. Civ. St. art. 2970. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211. Where husband and wife are both jolned as required by Sayles' Rev. Civ. St. art. 1201, a judgment against wife will be presumed to be for necessaries. Id.

75. Husband not bound where contract shows on its face that it is intended to bind the wife individually and alone. Contract for attorney's fee in divorce proceedings. Zent v. Sullivan [Wash.] 91 P 1088. Evidence held insufficient to show that wife made agreement to charge herself. Valois v. Gardner, 106 NYS 808.

76. Weingreen v. Beckton, 102 NYS 520. Allowance to wife of $1,200 or $1,300 a month by husband worth $200,000, with an income of $20,000, held sufficient. Oatman v. Watrous, 105 NYS 174.

77. Evidence held not to show promise to pay. Oatman v. Watrous, 105 NYS 174.

78. Services rendered by nurse to wife during confinement held necessaries for which husband was liable, though he and wife were living apart. Schneider v. Rosenbaum, 52 Misc. 143, 101 NYS 529.

Credit held to have been **extended to wife** and not to husband where they were living apart and she was supporting herself and the seller had knowledge of the facts. Pickhardt v. Pratt, 105 NYS 236. Where the husband and wife are living apart, the **burden of proof** is upon one supplying her with necessaries to show that the circumstances were such as to render the husband liable. Id.

79. Weimer's Adm'r v. Smith, 30 Ky. L. R. 1311, 101 SW 327. Married woman living with her husband is liable for rent of premises occupied by them and family only where she has expressly agreed to charge herself personally for such rent. Vanderberg v. Kansas City, Mo., Gas Co. [Mo. App.] 105 SW 17. A month's rent for a dwelling-house occupied by a man and his family is a claim for necessaries and, as such, ground for attachment as provided in § 5521, Rev. St., and does not lose its character as a claim for necessaries by the tenants moving out during the month and renting and occupying another house. Smith v. Getz, 9 Ohio C. C. (N. S.) 321.

80. Ballinger's Ann. Codes & St. § 5722 makes such provision. Zent v. Sullivan [Wash.] 91 P 1088. Even where she, as plaintiff, is allowed to bind her husband for attorney's fees, the burden is on the attorney to prove that the suit was based on reasonable and justifiable grounds, and such grounds must exist in fact and not merely on paper. Id.

81. Waist of honiton and point lace at price of $200, bought by wife for own use. held a "family expense" within meaning of statute. Ross v. Johnson, 125 Ill. App. 65.

82. Zent v. Sullivan [Wash.] 91 P 1088.

83. Stoutenborough v. Rammel, 123 Ill. App. 487.

84. Stoughtenborough v. Rammel, 123 Ill. App. 487. Wife incompetent to testify against husband in suit on debt incurred by her. Id.

85. Hence she may receive, in settlement of claim against him, any property which he may surrender to creditors in general, including goods unpaid for but upon which no encumbrance for the price has been received. Compton v. Dietlein, 118 La. 360, 42 S 964.

86. An attachment issued in divorce proceedings by a wife against her husband's property to secure her marital rights takes precedence of subsequent attachments by the husband's creditors. Sebree v. Sebree, 30 Ky. L. R. 670, 99 SW 282. Creditor cannot complain where husband's funds attached by wife in divorce proceedings are, by agreement, applied to husband's debts on which she is surety where only such funds are applied as she is entitled to by virtue of her marital rights. Id.

87. Where transfer by husband to wife to secure money paid by her to his creditor and applied by mistake to debt for which she was not bound instead of debt for which she was surety was invalid as to husband's attaching creditor because not recorded as required by Ky. St. 1903, § 2128, the wife was

Agency of wife for husband.[See 8 C. L. 139]—A husband is not bound for his wife's debts and contracts.[88] Nor will agency of the wife for the husband be presumed [89] except in exceptional cases [90] or where the contract is for necessaries.[91] Agency may be inferred from the husband's ratification of the wife's prior acts,[92] and the husband may bind himself for his wife's acts by subsequent assent thereto.[93] Whether credit was extended to the wife or the husband [94] is ordinarily a question of fact for the jury.[95]

§ 7. *Contract and property rights of wife as to third persons. A. Agency of husband for wife.*[See 8 C. L. 139]—A husband may act as his wife's agent,[96] but such agency will not be presumed from the marital relation,[97] and when it is relied on it must be proved.[98] Such agency may be shown by previous acts and words of authorization,[99] or subsequent ratification,[1] or both,[2] or by the wife's admissions.[3]

(§ 7) *B. Contracts in general.*[See 8 C. L. 140]—At common law the contract of a married woman is absolutely void,[4] and such incapacity still prevails to a more or less extent in some of the states,[5] but in many of the states she may contract practically the same as if she were a femme sole,[6] and in such case one contracting with

entitled to subrogation to rights of first creditor as against attaching creditor. Eberhardt v. Wahl's Adm'r, 30 Ky. L. R. 412, 98 SW 994. No right of subrogation where wife redeemed husband's homestead from execution sale with rents and profits of homestead. Kenady v. Gilkey [Ark.] 98 SW 969.

88. Husband not bound for price of goods purchased by wife for her sons, though he did not protest when subsequently he became aware of the transaction. Richburg v. Sherwood [Tex. Civ. App.] 20 Tex. Ct. Rep. 383, 105 SW 524.

89. Husband held not liable on contract by wife for purchase of goods in order to set her sons up in business. Richburg v. Sherwood [Tex.] 18 Tex. Ct. Rep. 627, 102 SW 905.

90. Where wife requests medical aid for an infant, it will be presumed that she is acting as agent for her husband; but such presumption may be overcome by evidence. Howell v. Blesh [Okl.] 91 P 893.

91. See ante, § 5, Liability for Necessaries.

92. Payment of prior bill made by wife rendered husband liable for subsequent bill. Bonwit, Teller & Co. v. Lovett, 102 NYS 800.

93. Wife's purchase of hat held ratified by subsequent acts and promises of husband. Landgrof v. Tanner [Ala.] 44 S 397.

94. Complaint for price of goods furnished defendant's family upon his wife's representations and request held to show authorization of the delivery of such goods. Ponder v. Morris [Ala.] 44 S 651.

95. Held for jury. Landgrof v. Tanner [Ala.] 44 S 397.

96. Black v. McQuaid [N. J. Err. & App.] 68 A 102.

97. Black v. McQuaid [N. J. Err. & App.] 68 A 102. Wife not bound by employment of attorney by husband in behalf of himself and wife unless she authorized him to bind her or subsequently ratified or adopted the contract. Dussoulas v. Thomas [Del.] 65 A 590. Payment of board contracted for with the wife to husband who had agreed with wife that proceeds of board furnished by her should be hers did not discharge debt. Perry v. Blumenthal, 104 NYS 127.

98. Evidence held not to show agency. Cornelia Planing Mill Co. v. Wilcox [Ga.] 59 SE 223. Evidence held not to sustain dismissal of action on ground that defendant, who was doing business under a name which of itself did not impart or disclose the character of the proprietorship, was doing business as his wife's agent. Anderson v. Walsh [N. Y.] 81 NE 764. Husband held authorized to conduct negotiations for sale of wife's land so as to bind her for a deficiency of acreage. Rathke v. Tyler [Iowa] 111 NW 435.

99. Black v. McQuaid [N. J. Err. & App.] 68 A 102.

1. Black v. McQuaid [N. J. Err. & App.] 68 A 102. Evidence of other transactions with other persons in which husband's acts as wife's agent were ratified by her held not admissible to prove agency in particular case. Ham v. Brown [Ga. App.] 58 SE 316.

2. Agency of husband to employ one to do plumbing on wife's property held proved. Black v. McQuaid [N. J. Err. & App.] 68 A 102.

3. Admissions to other persons than the one asserting the agency that husband was her general agent. Ham v. Brown [Ga. App.] 58 SE 316.

4. Forsyth v. Barnes, 228 Ill. 326, 81 NE 1028.

Confession of judgment on warrant of attorney executed by a married woman during coverture is void as to her and can be attacked either directly or collaterally. Forsyth v. Barnes, 228 Ill. 326, 81 NE 1028.

5. Cannot contract to render services to another without husband's consent. State v. Robinson, 143 N. C. 620, 56 SE 918. Contract whereby married woman undertook to rent and cultivate land held not within exception mentioned in Rev. 1905, § 2094, providing that a married woman cannot, without her husband's consent, make any contract, etc., except for necessaries for self and family. Id. Can contract without joining her husband only to the extent authorized by statute, and an authorized contract can be enforced only as so required. See Sayles' Rev. Civ. St. art. 201, where husband must be joined. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

6. Order constituting wife of assignor for benefit of creditors of femme sole held valid,

her is charged with no duty of seeing that she gets the benefit of her contract as against her husband.[7] The validity of a contract by a married woman depends upon her status as defined by the statute in force at the date of such contract.[8] When a married woman has a general right to contract subject to certain restrictions, the burden is on her to show that her negotiable note falls within some of such restrictions,[9] and to show that the holder had notice of its invalidity when he took it.[10] A fully executed release by a married woman of her inchoate right of dower constitutes a sufficient consideration for a promise to pay her a sum of money.[11] Where a married woman's contract is void because of her disability, she cannot ratify it after the disability is removed.[12] Capacity to contract follows a married woman wherever he goes.[13]

(§ 7) *C. Contracts of suretyship; payment of husband's debts.*See 8 C. L. 142 In many of the states a married woman cannot become surety for her husband[14] or obligate herself for[15] or pay her husband's debts.[16] Whether or not a married woman is surety on a contract is to be determined from the evidence.[17] Where she

and **purchase by her of husband's property at commissioner's sale** held not intended to delay or defraud creditors. Potter v. Potter's Receiver, 31 Ky. L. R. 137, 101 SW 905. May **rent real estate** on own responsibility and **engage in business** in own name. Vanderberg v. Kansas City, Mo., Gas Co. [Mo. App.] 105 SW 17. Having right since 1893 to become **husband's partner,** she may contract, along with him, directly with his partner to purchase latter's interest in firm. Italo-French Produce Co. v. Thomas, 31 Pa. Super. Ct. 503. And may, as part consideration of such purchase, bind herself jointly with her husband for an antecedent debt of the firm. Id.

7. Payee of note executed by husband and wife to creditor of husband's firm in which he has purchased entire interest of other partner not bound to see that the avowed purpose of the transaction, viz., to secure her an interest in the firm, was carried out. Italo-French Produce Co. v. Thomas, 31 Pa. Super. Ct. 503.

8. Held not to have power under Laws 1861, p. 174, to adopt a child. Thompson v. Minnich, 227 Ill. 430, 81 NE 336.

9. Farmers' & Traders' Bk. v. Eubanks, [Ga. App.] 59 SE 193.

10. Farmers' & Traders' Bk. v. Eubanks [Ga. App.] 59 SE 193. Wife bound to bona fide holder of negotiable note executed as surety for or in payment of her husband's debt, though she has no capacity to make contract of suretyship or to assume her husband's debt. Id. Direction of verdict for defendant held error where evidence was in conflict on question of holder's notice of invalidity of married woman's note. Id.

11. Notwithstanding her marital status. Lyttle v. Goldberg, 131 Wis. 613, 111 NW 718.

12. Thompson v. Minnich, 227 Ill. 430, 81 NE 336.

13. Freret v. Taylor, 119 La. 307, 44 S 26.

14. Surety for husband on note given for antecedent debt of firm in which he has purchased interest of other partner. Italo-French Produce Co. v. Thomas, 31 Pa. Super. Ct. 503. Where wife conveyed property to husband through third party, and husband mortgaged it to one having notice of facts, the mortgage was valid only to extent that proceeds were used for wife's benefit. Wredman v. Falls City Sav. & Loan Ass'n [Ind. App.] 82 NE 476. Wife cannot bind her separate estate by suretyship for husband, nor sell nor pledge such property for his debt; and a **deed** executed by a wife to secure a contemporaneous loan to her husband is void though she does not bind herself as surety to pay such debt. Gross v. Whitely, 128 Ga. 79, 57 SE 94. Absolute deed by husband and wife intended as mortgage to secure husband's debt is absolutely void as a security, and therefore conveys no title at all. Harper v. Hays Co. [Ala.] 43 S 360.

Substitution of wife for husband as purchaser of stocks held a mere disguise of the transaction, which was really a purchase by the husband with the wife as his surety, regardless of whether or not the wife was separate in property. Byerley v. Walker, 118 La. 265, 42 S 931. Where the husband was not a party to a **suit** on a contract in which the wife purported to be the principal, whereas she was really only a surety for her husband, no judgment could be rendered against him, nor any inquiry made into question of title as between him and his wife. Id.

15. Rev. Civ. Code, art. 2398. Keating v. Wilbert, 119 La. 461, 44 S 265.

16. In action by wife against one who purchased her property at a fixed price to recover a sum which he was allowed to retain to pay her husband's debt, it was error to allow defendant to testify that he paid her all his net profits on the lumber, and expected to get nothing except payment of her husband's debt. Rogers v. McClure, 128 Ga. 393, 57 SE 692. Wife **not estopped** by delay of a year in suing to recover amount purchaser of her property was allowed to retain to pay her husband's debt, though husband who had property left the state in the meantime, where purchaser had knowledge of facts. Id.

17. Parol evidence admissible where contract does not disclose capacity in which it was executed. Black v. McCarley's Ex'r, 31 Ky. L. R. 1198, 104 SW 987. Held that there was **no evidence** that married woman signed note as principal or authorized her husband to receive proceeds thereof or that she received any of such proceeds. Id., distinguishing Tompkins v. Triplet, 23 Ky. L. R. 305, 62 SW 1021.

executes a mortgage on separate property to secure an open account against her husband, she becomes only a surety for the account.[18] The provisions of a note, secured by mortgage, executed by a married woman to secure her husband's debt, are entitled to such protection as the mortgage may afford.[19] Though a married woman cannot become surety for her husband, she may change her separate property in equity for his debt.[20]

(§ 7) *D. Conveyances, mortgages, contracts to convey, powers.* See 8 C. L. 143—A married woman may acquire property by conveyance to her.[21] In Louisiana proceedings to annul a purchase of land by a wife for want of authority can be instituted only by the husband or wife or their heirs.[22] In Tennessee, it is only where a conveyance to a married woman creating in her a separate estate gives her the absolute power of disposition as if she were a femme sole that she can convey without privy examination.[23] In Kentucky a married woman may receive by conveyance and may convey the same as if she were a femme sole.[24] In Missouri special provision is made for conveyances by a married woman whose husband is under guardianship.[25] There is some doubt and conflict as to the power of a married woman to convey property held in trust for her separate use,[26] but it seems to be settled that she cannot do so contrary to restrictions in the instrument creating the trust.[27] A bona fide purchaser for value of a wife's property from her husband acting as her agent is not bound to see to the application of the proceeds,[28] and is not affected by the duress of the husband in getting her to execute the deed where he, the purchaser, has no notice of such duress.[29] Though a wife cannot convey her own property without the joinder of her husband, she may convey property held by her in trust for him without such joinder.[30] A wife's use of her own land may be limited by covenants in her husband's deed where she joins therein.[31]

Presumption arising from form of contract that married woman was principal held overcome by evidence that husband received proceeds. Black v. McCarley's Ex'r, 31 Ky. L. R. 1198, 104 SW 987.

18. Such suretyship is invalid same as any other form of suretyship by married woman for husband. Indianapolis Brew. Co. v. Behnke [Ind. App.] 81 NE 119. Where, in an action upon a note and mortgage executed by a husband and wife, it appears that the property is her separate estate, it must be shown by proper allegations that she was the principal debtor, since otherwise she would be a surety only, which would be beyond her capacity. Id. Whether a married woman was a principal or surety on note and mortgage executed by her and her husband depends upon whether the debt was hers, and not upon the **form of the contract** or her understanding thereof. Id. Husband's creditor cannot assert **estoppel** to deny that debtor's wife was principal in note and mortgage given by her and husband to secure the debt. Id.

19. Provision waiving any defense on account of extension of time to the husband is within the protection of the mortgage, and valid to the extent of the security afforded by the mortgage. Fitts v. Messick Grocery Co., 144 N. C. 463, 57 SE 164.

20. Mortgage securing husband's debt is enforceable in equity. Goll v. Fehr, 131 Wis. 141, 111 NW 235.

21. Brunette v. Norber, 130 Wis. 632, 110 NW 785.

22. Civ. Code, art. 134. In re Sheehy, 119 La. 608, 44 S 315.

23. Funkhouser v. Fowler, 117 Tenn. 539, 101 SW 769.

24. Under Acts 1894, p. 176, c. 76. Noel v. Fitzpatrick, 30 Ky. L. R. 1011, 100 SW 321. She may therefore assign to her husband her bid at a commissioner's sale of land. Id.

25. Under Rev. St. 1899, § 4334 (Ann. St. 1906, p. 237), providing for conveyance by a married woman whose husband is under guardianship by joint deed executed by her and the guardian, and for release of her rights in her husband's property conveyed by the guardian, a wife may release her interests in her husband's realty conveyed by her husband's guardian without order of court or joinder of the guardian, but such a release cannot convey any title to her own property. Dooley v. Greening, 201 Mo. 343, 100 SW 43.

26. See Cameron v. Hicks, 141 N. C. 21, 53 SE 728, reviewing the North Carolina cases, but querying the point.

27. Where deed creating trust provided that she might direct the trustee to convey, power to convey by her own deed was excluded. Cameron v. Hicks, 141 N. C. 21, 53 SE 728. Deed to separate estate by wife to trustee with power to convey with her consent excluded wife's power to convey by her own deed. Dunlap v. Hill [N. C.] 59 SE 112.

28, 29. Skinner v. Braswell, 126 Ga. 761, 55 SE 914.

30. Casciola v. Donatelli [Pa.] 67 A 901. Evidence of admissions by husband and wife that property conveyed by her belonged to him held admissible to establish the trust. Id.

31. Where wife joined in deed conveying

A personal judgment may be rendered against a married woman on foreclosure of a mortgage executed while she was single,[32] but not where she was married at the time she executed the mortgage.[33]

Where a married woman is authorized to deed her property, she may contract for a sale through an agent,[34] but such agency must be constituted as required by law.[35] A wife's sole contract to convey may be valid though she can convey only with the joinder of her husband.[36] The validity of a married woman's contract to convey is controlled by laws existing at the time of the execution of such contract.[37]

Conveyance by a married woman by power of attorney [38] is prohibited in Kentucky.[39]

(§ 7) *E. Rights of creditors. Of wife.*[See 8 C. L. 144]—Property purchased by the husband and conveyed by the wife is presumptively liable for her debts.[40]

Of husband.[See 8 C. L. 145]—A wife is not liable for her husband's debts or obligations,[41] nor is her separate property liable therefor,[42] and ordinarily the husband's creditors, as such, can acquire only the husband's rights or interest in his wife's property.[43] It is held in Kentucky, however, that where a husband invests his wife's

husband's land, her dower interest in such land was sufficient to support a covenant in the conveyance limiting use of her own land which adjoined that conveyed. Wahl v. Stoy [N. J. Eq.] 66 A 176.

32, 33. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779.

34. Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651.

35. Under Civ. Code, § 2310, a wife can authorize her husband to enter into contract for exchange of her property only by a written instrument. Shanks v. Michael [Cal. App.] 88 P 596. Contract by husband for exchange of wife's property is not subject to ratification except by writing executed by the wife where the husband was not originally authorized by such writing as required by Civ. Code, § 2310. Id.

36. Fact that under Rev. 1874, § 14, a wife cannot convey her land without joinder of husband, does not render her sole agreement to convey void as contracting to perform an impossibility. Wolff v. Meyer [N. J. Law] 66 A 959. A contract by married woman for conveyance of her land, not acknowledged as required by P. L. 1898, p. 670, § 39, is not an encumbrance on such land within Rev. 1874, § 14, providing that a married woman cannot encumber her land without the joinder of her husband, and hence, under Rev. 1874, § 5, authorizing her to contract, she will be liable for a breach of an unacknowledged agreement to convey her land. Id.

37. Title bonds executed by married woman prior to statute of 1894 held void though joined in by husband. Campbell v. Virginia Iron, Coal & Coke Co., 31 Ky. L. R. 1110, 104 SW 770.

38. Shannon's Code, §§ 3764, 3765, raising presumption of validity in favor of conveyance by power of attorney, and providing that a power shall be sufficient to pass title when such conveyance or power has been registered for twenty years, apply to a conveyance by married woman by power of attorney. Kobbe v. Harriman Land Co., 117 Tenn. 315, 98 SW 175.

39. Under Ky. St. 1903, § 508, a married woman cannot dispossess herself of her property by deed executed under power of attorney. Wright v. Begley, 31 Ky. L. R. 53, 101 SW 342. Where the consideration for such a deed was received and disposed of by the grantor's husband without her consent, the grantee was not entitled to a lien upon her land for the value of such consideration upon the vacation of the deed. Id.

40. Van Etten v. Passumpsic Sav. Bk. [Neb.] 113 NW 163.

41. Wife not liable for lumber sold husband for construction of residence merely because she took interest in and made suggestions as to the work. Shreveport Nat. Bk. v. Maples, 119 La. 41, 43 S 905. Gas company could not refuse to supply married woman with gas on account of delinquency of husband. Vanderberg v. Kansas City, Mo., Gas Co. [Mo. App.] 105 SW 17. Tenant's wife not liable for damages to premises incident to occupation and not caused by wife's affirmative acts. Toohey v. Patterson, 52 Misc. 285, 102 NYS 1122. In suit by vendor against husband and wife to recover land sold to husband, wherein defendants set up as a defense a contract between vendor and both husband and wife, it was error to tax **costs** against the wife. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 SW 658.

42. Green v. Forney, 134 Iowa, 316, 111 NW 976. Husband has no interest subject to his debts in crops raised on wife's land, though he raises them. Fink v. McCue, 123 Mo. App. 313, 100 SW 549.

43. A creditor of the husband who redeems from a sale of the wife's lands under a mortgage executed by the husband and wife and then purchases at a resale acquires only the rights of the husband in such land, which is a life estate after the wife's death. Schroeder v. Bozarth, 224 Ill. 310, 79 NE 583. Creditor of husband who redeems from sale under mortgage executed by the husband and wife on her lands and then purchases at resale acquires no interest as against heirs of wife. Id. Where mortgage was executed by husband and wife on lands of both, a creditor of husband who redeemed en masse acquired no right of contribution against lands of the wife. Id.

funds in property, taking title in himself, such property is liable for his debts.[44] Where a wife claims as against a creditor of her husband, that property to which her husband holds the record title is in fact her separate property, she must allege and prove a resulting trust in her favor,[45] but where the husband's right to reduce the wife's property to possession is taken away, the burden is no longer upon her to prove whence she derived her property or that it is her separate estate.[48]

Fraudulent conveyances.[See 8 C. L. 148]—A voluntary conveyance by a husband to his wife is invalid as against his existing creditors,[47] as is also a conveyance for an inadequate consideration,[48] but gifts and voluntary conveyances by a husband to his wife are not per se fraudulent as to subsequent creditors[49] or even subsequent purchasers.[50] Where the husband owes no debts except to his wife, he may pay the same though he thereby prefers her to subsequent creditors.[51] A qualified privilege on the wife's part to deal with her husband must, in order to avail against his creditors, be exercised in accordance with the qualifying limitations.[52] A husband cannot protect his property from his creditors by holding it in his wife's name.[53]

(§ 7) *F. Estoppel.*[See 8 C. L. 148]—The doctrine of equitable estoppel is available against a married woman.[54] It may be stated as a general rule, however, that a married woman will not be estopped to assert title to her land by anything short of fraud[55] or circumstances amounting thereto,[56] and practically the same rule ap-

44. Ahlering's Ex'r v. Speckman, 30 Ky. L. R. 940, 99 SW 973.

45. Where property was deeded to wife by husband and she did not record her deed, such deed being void as to a judgment creditor of the husband, the wife has burden of pleading and proving a resulting trust. Logan v. Ballard, 61 W. Va. 474, 57 SE 142.

46. Such is effect of present married woman's act, and wife was not bound to prove that money paid by her on her husband's debt was her separate property. Kenady v. Gilkey [Ark.] 98 SW 969.

47. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855; Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921. Exchange of property, the deed to the property received being made to wife, held fraudulent as to creditors within Ky. St. 1903, §§ 1906, 1907. Ahlering's Ex'r v. Speckman, 30 Ky. L. R. 940, 99 SW 973.

48. Conveyance held in fraud of creditors. Bekins v. Dieterle [Cal. App.] 91 P 173.

49. Conveyance by husband to wife. Allen v. Caldwell, Ward & Co. [Ala.] 42 S 855.

Burden of proof is on creditor to show that purported date of deed is incorrect. Id.

Evidence held insufficient to show that purported date of deed was incorrect. Id. Husband who is not in debt may, in good faith, make gift to wife. Sawyer v. Metters [Wis.] 113 NW 682. Conveyance to wife in consideration of her payment of husband's debt with her earnings sustained as to subsequent creditors, regardless of whether such earnings were originally hers or her husband's. Id.

50. Gift of personalty by husband to wife is valid, when fully executed, as against subsequent purchaser from husband, though the husband and wife reside together, but the burden in such case is on the wife to prove the gift and its validity. Smith v. Sheppard [Ga. App.] 58 SE 303.

51. Sawyer v. Metters [Wis.] 113 NW 682. Where conveyance by husband to wife was for valuable consideration at time when he owed no debts except to her, his administrator suing to set aside the conveyance had burden of proving fraud. Id.

52. Where money paid by wife to husband's creditor was applied, by mistake, to debt for which she was not bound instead of to debt as to which she was surety, a transfer of property by the husband to the wife to secure the amount paid by her was invalid as to creditor of husband where such transfer was not recorded as required by Ky. St. 1903, § 2128. Eberhardt v. Wahl's Adm'r, 30 Ky. L. R. 412, 98 SW 994.

53. Held error to refuse to submit issue as to whether lease in wife's name was for purpose of protecting crops from husband's creditors. Fink v. McCue, 123 Mo. App. 313, 100 SW 549.

54. In a conflict between the rights of a married woman and a bona fide holder of a negotiable instrument, the one whose voluntary acts furnished the opportunity for deception and fraud must suffer any consequent loss. Farmers' & Traders' Bk. v. Eubanks [Ga. App.] 59 SE 193.

55. Texas So. R. Co. v. Harle [Tex. Civ. App.] 18 Tex. Ct. Rep. 317, 101 SW 878. Married woman was not estopped from asserting title to her land claimed by corporation organized to acquire such property by mere fact, in absence of fraud, that she participated in the organization of the corporation and received stock therein. Id. Evidence held insufficient to establish estoppel of wife, by reason of her presence during negotiations terminating in execution of notes by husband, to deny that land subsequently conveyed to her by her husband was already hers. McCormick Harvesting Mach. Co. v. Perkins [Iowa] 110 NW 15. Wife not estopped as to creditors by husband's statement in her presence to one not a creditor that he owned land which he had conveyed to her. Sawyer v. Metters [Wis.] 113 NW 682.

56. Wife estopped, as against husband's creditors, to deny his ownership of land

plies as to personalty.[57] The burden of establishing an estoppel is on the party asserting it.[58]

§ 8. *Torts by husband or wife or both.* See 8 C. L. 146—A wife is not liable for torts of husband.[59] The liability of the husband by reason of the marital relation alone does not include punitive or exemplary damages.[60]

§ 9. *Torts against husband or wife or both. A. Wrongs to the person.* See 8 C. L. 147—A husband may sue in his own name for his separate loss or damage by reason of injury to his wife,[61] and in some states the wife also may sue alone for injuries sustained by her,[62] but in others the husband must be joined in the wife's action.[63] A requirement of the joinder of the husband in the wife's suit does not require him to join with her cause of action his own cause of action for the same injury,[64] and, where the wife may sue alone and the husband has no interest in her recovery, such a joinder is improper.[65] When a married woman is sui juris, she may recover for expenses actually incurred by reason of injury to her.[66] An allegation that at the time the damages accrued the plaintiff was a femme sole is sufficient to show that

held in secret trust by him for her for over twenty years. McCormick Harvesting Mach. Co. v. Perkins [Iowa] 110 NW 15.

57. Evidence held not to show that wife had clothed husband with unreserved possession of her property so as to estop her from claiming it as against one to whom he pledged it. Kershaw v. Merritt, 194 Mass. 113, 80 NE 213. Wife not estopped from claiming her property from one to whom husband has pledged it by mere fact that she placed unreserved possession thereof in husband. Id. Finding that wife could not recover her property from husband's pledge if knowledge on her part as to her husband's acts "can be implied in law from the agency of her husband and her own acts as herein reported" held to mean if her knowledge is to be implied as a matter of law, and not as a matter of law implied from the facts, the latter being a question of fact to be determined by the master. Id.

58. Administrator of husband suing to set aside conveyance by husband to wife has burden of proving estoppel against wife to assert title. Sawyer v. Metters [Wis.] 113 NW 682.

59. Enticing away plaintiff's wife who was defendant's daughter. Multer v. Knibbs, 193 Mass. 556, 79 NE 762.

60. Price v. Clapp [Tenn.] 105 SW 864. Where husband and wife are joined, as required by law, in suit for wife's libel for which he is chargeable solely by reason of the marital relation, judgment may be rendered against both for compensatory damages, and against her alone for punitive damages. See Shannon's Code, §§ 4700, 4701, 4702, relating to separate and several judgments in actions against several. Id.

61. Kimberly v. Howland, 143 N. C. 398, 55 SE 778. Husband has independent cause of action "per quod consortium amisit." Kirk v. Middlebrook, 201 Mo. 245, 100 SW 450.

Damages: Husband may recover compensation for diminution of wife's capacity to labor and for loss of services, society, aid, and comfort. Kimberly v. Howland, 143 N. C. 398, 55 SE 778. The husband cannot maintain **assumpsit** for an injury to his wife. Plefka v. Detroit United R. Co., 147 Mich. 641, 14 Det. Leg. N. 33, 111 NW 194. Under charter of 1903, **city of Omoha liable** to husband for damages accruing in consequence of injury to wife from defective street. Wright v. Omaha [Neb.] 110 NW 754.

Notice to city by wife held sufficient to sustain action by husband. Id. As to necessity of notice, quaere. Id.

62. Code 1896, §§ 2521, 2526, 2527, 2529. Town of Elba v. Bullard [Ala.] 44 S 412. May sue in own name. McGovern v. Interurban R. Co. [Iowa] 111 NW 412. Married woman may recover for impairment or loss of her ability to labor, independently of right of her husband to recover for loss of her time. Colorado Springs & I. R. Co. v. Nichols [Colo.] 92 P 691. Under Missouri statute as construed by the decisions, a married woman may sue for impairment of her earning capacity by personal injury, regardless of how she spends her earnings. Hendricks v. St. Louis Transit Co., 124 Mo. App. 157, 101 SW 675. Under Act June 11, 1879 (P. L. 120), authorizing a deserted wife to sue as if a femme sole, and Act June 3, 1887 (P. L. 332) and Act June 8, 1893 (P. L. 344), giving her the right to her own earnings, a deserted wife may sue separately in her own name for loss of earning capacity by reason of injury to her person. Schmelzer v. Chester Trac. Co. [Pa.] 66 A 1005.

63. Under Rev. St. 1887, § 4093. Lindsay v. Oregon Short Line R. Co. [Idaho] 90 P 984.

64. Lindsay v. Oregon Short Line R. Co. [Idaho] 90 P 984.

65. Since Laws 1881, p. 108, c. 99 (St. 1898, § 2345), authorize married woman to sue in own name for personal injury and deprives husband of all right to the recovery, such a cause of action cannot be joined with one in favor of the husband for loss of services and expenses, notwithstanding St. 1898, § 2680, providing that husband and wife may, in action by them, recover all damages recoverable in separate actions, the latter section being but a continuation of the former, and hence to be construed with relation to its provisions. Brickner v. Kopmeier [Wis.] 113 NW 414.

66. Instruction held erroneous as assuming that expenses paid by husband as wife's agent were paid on his own account. Town of Elba v. Bullard [Ala.] 44 S 412.

such damages are her separate property.[67] A wife cannot recover damages for wages which her husband might have earned but for the defendant's tort.[68]

(§ 9) *B. Criminal conversation and alienation of affections.*[See 8 C. L. 148]—In a suit for alienation of affections the gist of the action is loss of consortium, and alienation of affections is matter of aggravation.[69] Desertion is therefore an essential element of the cause of action,[70] and the defendant must, to some extent at least, be to blame for the alienation.[71] Malice also must be proved,[72] especially where the action is against the parents of the party whose affections are alleged to have been alienated.[73] At common law a wife could not maintain such an action,[74] but this rule has been abrogated in most of the states.[75]

67. Western Union Tel. Co. v. Rowe [Tex. Civ. App.] 16 Tex. Ct. Rep. 863, 98 SW 228.

68. Reason being that she has no right of action to recover his earnings. Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 SE 83.

69. Dodge v. Rush, 28 App. D. C. 149.

70. Codoni v. Donati [Cal. App.] 91 P 423. Absence of husband for seven days held not desertion. Id.

71. Evidence held insufficient to show that defendant was to blame for alienation of affections of plaintiff's husband. Smith v. Gillapp, 123 Ill. App. 121.

72. Leavell v. Leavell, 122 Mo. App. 654, 99 SW 460.

73. Leavell v. Leavell, 122 Mo. App. 654, 99 SW 460. Wife's father is not liable for enticing her away from her husband in the absence of malice. Multer v. Knibbs, 193 Mass. 556, 79 NE 762. Parents liable where they maliciously cause a separation of husband and wife by alienation of affections. Klein v. Klein, 31 Ky. L. R. 28, 101 SW 382.

Instruction in action by wife against husband's parents as to alienation of plaintiff's affections by her own father held improper as not supported by evidence. Klein v. Klein, 31 Ky. L. R. 28, 101 SW 382. Instruction as to presumption of good faith on part of parent held improper where defendant merely denied the charges and made no attempt to justify them. Id.

Note: In order to properly characterize one's actions or conduct, it is necessary to consider the circumstances, situation, and relationship which exist. Thus, as affecting a married couple, acts and conduct of a stranger which would be justly characterized as those of a malicious intermedler might be but the natural impulse of the parents which would be set down to their credit by all right-thinking people. This is the view of all of the authorities which we have found where the relationship of the defendant has been considered. Hutcheson v. Peck, 5 Johns. [N. Y.] 196; Tucker v. Tucker, 74 Miss. 93, 19 S 955, 32 L. R. A. 623; Payne v. Williams, 4 Baxt. [Tenn.] 583; Rice v. Rice, 104 Mich. 371, 62 NW 833; Burnett v. Burkhead, 21 Ark. 77, 76 Am. Dec. 358; Huling v. Huling, 32 Ill. App. 519; Smith v. Lyke, 13 Hun [N. Y.] 204; Brown v. Brown, 124 N. C. 19, 32 SE 320, 70 Am. St. Rep. 574. In the case first cited Chief Justice Kent said: "If the defendant did not stand in the relation of father to the plaintiff's wife I should not, perhaps, be inclined to interfere with the verdict. But that relationship gives rise to a new and peculiar interest. * * * A father's house is always open to his children, and whether they be married or unmarried it is still to them a refuge from evil, and a consolation in distress. Natural affection establishes and consecrates this asylum, and, according to Lord Coke, it is 'nature's profession to assist, maintain, and console the child.' I should require, therefore, more proof to sustain the action against a father than against a stranger. It ought to appear, either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown, or necessarily deduced from the facts and circumstances detailed. This principle appears for me to preserve, in due dependence upon each other, and to maintain in harmony, the equally strong and sacred interests of the parent and the husband. The quo animo ought, then, in this case, to have been made the test of inquiry and the rule of decision." In the case last above cited, it was said: "It cannot be that the law disregards the tender relations of kinship and natural affection between parent and child and the duties which such relations impose, even though the child is married. In case of unhappiness and disagreements between the married couple, it is almost impossible to conceive of the indifference on the part of the parent to such conditions, and certain it is that the child naturally turns to the parent for comfort and advice under such circumstances. There are laws of natural affection and of natural duty, and municipal law will not obstruct their free operation as long as they are not abused. The presumption in fact and in law in all such cases must be, and is, that the parent will act only for the best interest of the child and for the honor of the family." Every legal presumption is that the parent acted for the best interest of the child. Reed v. Reed, 6 Ind. App. 317, 33 NE 638, 51 Am. St. Rep. 310. Can it be said that, if a parent shall advise his child in good faith, he does so at the risk of financial ruin? "It would be strange, indeed, if parents, under peril of legal consequences, must keep silence under such circumstances, or must clothe in terms of respect their expressions of outraged feeling, when even strangers would be excused for speaking with freedom." White v. Ross, 47 Mich. 172, 10 NW 188. So it has been ruled that a parent, acting in response to natural affection, may, in good faith, advise his child in favor of a separation, if justified by his information, although such information may be unfounded. Bennett v. Smith, 21 Barb. [N. Y.] 439, 443, 445. This court has ruled, in an opinion of the presiding judge, that there was a broad dis-

Defenses.[See 8 C. L. 148]—It is no defense that the plaintiff has secured a divorce,[76] or that the alienation had already been caused by the plaintiff's own conduct.[77]

Pleading and proof; admissibility of evidence.[See 8 C. L. 148]—The complaint in an action for alienation of affections [78] sufficiently alleges alienation and separation where it alleges the ultimate facts.[79] In a proper case a single action may be maintained against several defendants,[80] and in such case a conspiracy must be proved in order to sustain a joint recovery,[81] and if no conspiracy is proved a recovery may be had against the defendant found guilty of the charge,[82] but it seems that no recovery can be had against both defendants upon proof of separate causes of action unconnected by conspiracy.[83] The sufficiency of evidence [84] is usually for the jury,[85] and the court should not invade the jury's province in this regard.[86] Mere opportunity to commit adultery is not sufficient to establish the offense,[87] but there must be evidence of such circumstances as would naturally lead a man of ordinary care and prudence to the conclusion that the parties were having sexual intercourse.[88] The offense, however, may be proved by circumstantial evidence.[89] Evidence of the attitude of the defendant towards the plaintiff is admissible to show motive.[90] Admissions of the defendant are admissible,[91] and also certain declarations of the de-

tinction to be made between the acts of a stranger interfering with marital relations and acts of parents. Love v. Love, 98 Mo. App. 562, 73 SW 255. And it was likewise so stated by the St. Louis Court of Appeals in Barton v. Barton, 119 Mo. App. 507, 94 SW 574. Parents may, of course, be guilty of maliciously separating their married children, and thereby render themselves liable in damages. As in Nichols v. Nichols, 147 Mo. 387, 48 SW 947, where they took the initiative and avowedly separated them by taking them apart and writing and having published notices in the son's name forbidding any one to trust or harbor the wife.—From Leavell v. Leavell, 122 Mo. App. 654, 99 SW 460.

74. Smith v. Gillapp, 123 Ill. App. 121.

75. Dodge v. Rush, 28 App. D. C. 149; Smith v. Gillapp, 123 Ill. App. 121. Under B. & C. Comp. § 5250, removing all disabilities from wife which are not imposed on husband, a wife may sue for alienation of husband's affections. Keen v. Keen [Or.] 90 P 147.

76. Keen v. Keen [Or.] 90 P 147.

77. In action for alienation of wife's affections by seduction. Lewis v. Roby, 79 Vt. 487, 65 A 524. Such fact can be considered only in mitigation of damages. Id. See post, this section and subsection, subdivision Damages.

78. Complaint held to state cause of action. DeRonde v. Bell, 116 App. Div. 191, 101 NYS 497.

79. Action by wife. White v. White [Kan.] 90 P 1087.

80. Complaint held to state **joint** cause of action. De Ronde v. Bell, 116 App. Div. 191, 101 NYS 497.

81, 82. De Ronde v. Bell, 116 App. Div. 191, 101 NYS 497.

83. Plaintiff in such case would probably be required to elect against which he would take a recovery. De Ronde v. Bell, 116 App. Div. 191, 101 NYS 497.

84. Evidence held insufficient to support a recovery against husband's sisters and son. Park v. Park [Colo.] 91 P 830. Evidence held not to show **malice** of husband's parents. Leavell v. Leavell, 122 Mo. App. 654, 99 SW 460; Miller v. Miller, 122 Mo. App. 693, 99 SW 757. Fact that plaintiff in a subsequent suit for divorce failed to establish the adultery charged in the first suit is not ground for a **new trial** in such first suit. Lewis v. Roby, 79 Vt. 487, 65 A 524. No such **discrepancy in witnesses' testimony** as to warrant setting aside verdict for plaintiff where witness testified that he had seen defendant and plaintiff's wife go to her room together twenty-five or thirty times, and subsequently he testified in a suit by plaintiff for divorce that he had seen them go to the room together ten or fifteen times. Id.

Newly discovered evidence held insufficient to prove alibi of plaintiff's wife at time of alleged intercourse with defendant. Lewis v. Roby, 79 Vt. 487, 65 A 524.

85. Evidence in action by wife held sufficient to go to jury on nature of relation between defendant and plaintiff's husband. Dodge v. Rush, 28 App. D. C. 149. Whether defendant caused the alienation and loss of consortium is a question of act for jury where illicit relations were proved. Id. Malice and motives of father held question of fact for jury. Multer v. Knibbs, 193 Mass. 556, 79 NE 762.

86. Error in remarking that according to the court's experience and observation a woman is not liable to be seduced unless she contributes a little to the general purposes of the case held not cured by subsequent instruction. Keen v. Keen [Or.] 90 P 147.

87, 88. Brown v. Evans, 149 Mich. 429, 14 Det. Leg. N. 476, 112 NW 1079.

89. Evidence that defendant and plaintiff's wife occupied same bed during portion of one night is sufficient. Brown v. Evans, 149 Mich. 429, 14 Det. Leg. N. 476, 112 NW 1079.

90. That defendant, plaintiff's father-in-law, hated plaintiff and made improper overtures to her which she rejected and disappointed him. White v. White [Kan.] 90 P 1087.

91. Statements of the defendant after the separation of the parties are admissible when they amount to admission of responsibility for the acts alleged in the petition. White v. White [Kan.] 90 P 1087. Rejection of letters held **harmless** to plaintiff. Park v.

linquent spouse,[92] but the declarations of such spouse about the defendant are not admissible.[93] Evidence of acts prior to those charged is admissible in explanation of those charged,[94] but conditions prior to the marriage may be proved only to the extent that they entered into the cause of the alienation.[95] The competency of the husband or wife as a witness depends upon whether the action involves criminal conversation.[96] Evidence of adultery between the plaintiff's spouse and the defendant is not admissible in an action for alienation of affections not involving criminal conversation.[97]

Damages. See 8 C. L. 149—The damages awarded [98] may include exemplary or punitive damages.[99] Mental suffering is necessarily involved and may be proved without any allegation of special damages.[1] Evidence of the defendants financial condition is inadmissible [2] except as bearing on exemplary or punitive damages.[3] The defendant may plead in mitigation of damages that the alienation complained of was caused by plaintiff's own conduct.[4]

§ 10. *Remedies and procedure generally as affected by coverture.* See 8 C. L. 149—In an action against a husband and wife, evidence of the coverture is admissible under a plea of nul tiel record.[5]

Right of action; parties. See 8 C. L. 150—The right of action for wrongs to the person [6] and alienation of the affections [7] and involving community property [8] have already been considered. In many of the states a wife may sue without joining her husband.[9] Capacity to sue or be sued follows a married woman into another state

Park [Colo.] 91 P 830. Where both parties assumed that husband's declarations were inadmissible without his consent, in action, by wife, and he refused to consent, their rejection was not available on appeal. Id.

92. Letters written by wife showing that her affections had already been alienated held admissible. Merrill v. Leisenring, 149 Mich. 423, 14 Det. Leg. N. 472, 112 NW 1072.

93. Declarations by husband to wife about defendant. Dodge v. Rush, 28 App. D. C. 149.

94. Dodge v. Rush, 28 App. D. C. 149.

95. In an action by a wife for the alienation of her husband's affections, evidence of her general reputation for chastity prior to her marriage is not admissible where such reputation did not, to some extent, cause the separation. White v. White [Kan.] 90 P 1087.

96. In an action for alienation of the wife's affections by means of adultery, the husband cannot testify. Merrill v. Leisenring, 149 Mich. 423, 14 Det. Leg. N. 472, 112 NW 1072 Where count for criminal conversation and count for alienation of affections are joined, as authorized by Supreme Court Rule No. 17, testimony of husband and wife, being competent for all purposes under the second count, could not be excluded because competent under first count only to prove marriage, and hence all that court could do was to confine, as far as possible, the jury's consideration of such testimony to the proper count. Rust v. Oltmer [N. J. Err. & App.] 67 A 337. Where the second count was abandoned after close of testimony, the court should have excluded husband's testimony admitted as competent under such count, but which was incompetent under the first count. Id.

97. Merrill v. Leisenring, 149 Mich. 423, 14 Det. Leg. N. 472, 112 NW 1072.

98. Five thousand dollars held not excessive where husband's mother maliciously alienated his affections from plaintiff. Klein v. Klein, 31 Ky. L. R. 28, 101 SW 382. Damages held not excessive in action by husband against wife's parents for alienation of her affections. White v. White [Minn.] 112 NW 627.

99. White v. White [Kan.] 90 P 1087. Instruction held erroneous as taking discretion of jury in matter of exemplary damages. Eupes v. Nephue, 105 NYS 542.

1. Klein v. Klein, 31 Ky. L. R. 28, 101 SW 382.

2. Flinders v. Bailey, 133 Iowa, 616, 111 NW 27. Error in admitting such evidence, in action for alienating affections of plaintiff's wife, held not cured by instruction where verdict was rendered for $10,000. Id.

3. White v. White [Kan.] 90 P 1087.

4. Under Code Civ. Proc. § 530, authorizing the pleading of matters in mitigation of damages for personal injury, the defendant in an action for alienating plaintiff's wife's affections may plead that her affections had already been alienated by her husband's own conduct. Allen v. Besecker, 105 NYS 416.

5. Forsyth v. Barnes, 228 Ill. 326, 81 NE 1028.

6. See ante, § 9 A, Wrongs to the Person.

7. See ante, § 9 B, Criminal Conversation and Alienation of the Affections.

8. See ante, § 4 C, Rights and Powers as to, and Liability of, Community Property.

9. P. L. N. J. 1906, p. 525, giving wife right to sue alone for **torts** against her or her separate property, held not repealed by the proviso or saving clause in favor of joint right of action in favor of husband and wife, such proviso or saving clause being held applicable only to causes of action already accrued. Long v. Pennsylvania R. Co., 149 F 598. Even if the proviso or saving clause be held repugnant to preceding clause, the wife's right to sue alone is saved by

to which she goes upon a temporary sojourn unless the public policy of such state forbids.[10] The right of the assignee of a married woman to sue is not dependent upon her capacity to sue.[11] The wife is not a necessary party to suit to foreclose a mortgage executed by the husband while single,[12] or to a bill for the specific performance of a paid contract executed by her husband for the conveyance of real estate in which she has only contingent interests as wife.[13] The general practice acts may be looked to in order to determine matters of general practice, such as joinder of parties [14] and severance on judgment.[15]

Limitations.[See 8 C. L. 151]—Disability of coverture is generally included in the exceptions of statutes of limitations as to persons under disability,[16] and, under the general policy of preventing litigation between husband and wife, limitations do not run upon claims by the one against the other during the continuation of the relationship,[17] and by analogy the same principle applies as to laches.[18] This principle also applies to actions between one of the parties to a marriage and one claiming under the other.[19] Disability of a married woman cannot be tacked to that of her ancestor from whom she inherited, while married, the property in question.[20] When the disability of coverture has been removed, limitations against the claim of a married woman to property inherited by her during marriage runs from the death of the ancestor as to the whole estate, and not merely as to the estate of the husband by reason of his marital rights.[21]

§ 11. *Proceedings to compel support of wife.*[See 8 C. L. 151]—A wife cannot maintain an action for damages against her husband for failure to supply her with the necessaries of life or for any other breach of marital duty,[22] but in a proper case

section two of the act which provides that the husband need not be joined. Id. Under P. L. N. J. 1906, p. 525, providing that wife "may" maintain action alone, renders joinder of husband improper. Id. Under Rev. 1905, § 408, subd. 1, a wife may **petition for probate** of her father's will in solemn form without joining her husband, even if he were opposed. In re Beauchamp's Will [N. C.] 59 SE 687. Suit against agent in regard to plaintiff's separate property. Harvey v. Sparks Bros. [Wash.] 88 P 1108.

10. Woman from Missouri suable in Louisiana without joinder of husband. Freret v. Taylor, 119 La. 307, 44 S 26.

11. Wife may transfer note executed to her by husband and transferee may sue thereon, regardless of her right to sue. Bronson v. Brady, 28 App. D. C. 250.

12. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779.

13. Taylor v. Mathews [Fla.] 44 S 146.

14. Under Code Civ. Proc. 1902, § 138, providing that all parties interested in a contract must be joined as parties in action thereon, husband and wife may jointly sue carrier for loss of their joint baggage. Park v. Southern R. Co. [S. C.] 58 SE 931.

15. Under Pub. Acts 1899, p. 309, No. 199, as amended by Pub. Acts 1903, p. 171, No. 137, judgment may be rendered against husband alone in suit before justice against both, and rule is same on appeal as in original cases in circuit court. Hillman v. Hulett, 149 Mich. 289, 14 Det. Leg. N. 458, 112 NW 918.

16. Acts 1894, p. 176, c. 76, authorizing married woman to sue, did not remove disability so as to allow limitations as to action relating to land to run against a married woman. Dukes v. Davis, 30 Ky. L. R. 1348 101 SW 390. Code 1883, §§ 148, 163, suspending the statute of limitations as to married woman and certain others in regard to certain actions, did not include caveat of a will. In re Beauchamp's Will [N. C.] 59 SE 687.

17. Husband against wife. Bennett v. Finnegan [N. J. Eq.] 65 A 239.

18. Mere delay during continuation of marital relationship will not bar husband's claim. Bennett v. Finnegan [N. J. Eq.] 65 A 239.

19. Limitations on action to recover land from one claiming under the wife could not run against husband so long as marriage was in force. Kenady v. Gilkey [Ark.] 98 SW 969.

20. De Hatre v. Edmonds, 200 Mo. 246, 98 SW 744. Under Rev. St. 1899, §§ 4262, 4265, 4267, married woman held bound to assert right to property inherited from insane ancestor either within ten years from accrual of cause of action or three years after ancestor's death, no exception being made in sections 4262 and 4267 as to persons under disabilities. Id.

21. Reason being that estate of husband does not attach until that of wife has accrued to the whole estate. De Hatre v. Edmonds, 200 Mo. 246, 98 SW 744. Under Rev. St. 1899, § 4268, married woman held barred of right to land inherited by her by failure to pay taxes for thirty years, as against adverse possessor who paid taxes and had possession prior to accrual of husband's estate by reason of his rights in property inherited by wife while under coverture. Id.

22. Removal of common-law disability gives no such right of action. Decker v. Kedly [C. C. A.] 148 F 681.

she is entitled to separate support from her husband.[23] The prime essential of such a case is that her separation from her husband be due to his and not her fault.[24] An action for money had and received being of an equitable nature, where a husband brings such an action against his wife she may urge her right to separate support as a defense.[25]

Statutes providing for criminal prosecution against a husband for not supporting his wife are penal and must be construed as such.[26] "Abandon" as used by such a statute is equivalent to desertion [27] and must be such that if continued for the statutory period would be ground for divorce.[28] A separation agreement is held a defense,[29] but the contrary is held as to a separation by mutual consent.[30] The wife's refusal to live with her husband is no defense when she has good cause for such refusal,[31] nor can the defendant escape a judgment on the ground that he is willing to support his wife.[32]

Procedure. See 8 C. L. 153—Jurisdiction of proceedings for separate support [33] may attach without reference to a divorce.[34] Where the husband executes a conveyance in fraud of the wife's right, a subsequent decree in her favor for separate support gives her a proper status as a creditor to sue to set the conveyance aside.[35]

The procedure in criminal prosecutions against a husband for failure to support his wife is largely statutory.[36] The general rules as to instructions apply.[37]

23. Evidence held sufficient to warrant decree for separate maintenance. Bond v. Bond [Wash.] 88 P 943. A **conveyance in fraud of wife's right** to separate support will not defeat such right. Shepherd v. Shepherd [Mass.] 81 NE 897.

24. Suit for separate maintenance cannot be maintained except for a cause which would warrant a divorce. Shors v. Shors, 133 Iowa, 22, 110 NW 16. Right to separate support is not defeated by the mere fact that the plaintiff was not without fault in the quarrels preceding the separation. Jones v. Jones, 124 Ill. App. 201. Not entitled to separate support where separation is by **mutual consent.** Rosenbleet v. Rosenbleet, 122 Ill. App. 408. Where husband and wife agreed before marriage that they are to live separately for awhile, she claimed maintain action for separation under Code Civ. Proc. § 1762 until she has made an effort to get him to live with her. Dennison v. Dennison, 52 Misc. 37, 102 NYS 621.

Inhuman treatment must be such as to endanger life in order to warrant separation. Shors v. Shors, 133 Iowa, 22, 110 NW 16. Repeated charges of lewd and unchaste conduct and of adultery held in connection with other acts sufficient, though no physical injury was inflicted. Id.

Control of home belongs to wife as against all others except husband, and she does not forfeit her right to separate support by refusal to live in house controlled by husband's mother. Brewer v. Brewer [Neb.] 113 NW 161.

Offense condoned on condition of future good conduct is revived by subsequent repetitions of the acts charged as the ground of the action. Shors v. Shors, 133 Iowa, 22, 110 NW 16.

25. Where money sued for was lawfully collected by wife and applied to her own support. Whittle v. Whittle [Cal. App.] 91 P 170.

26. Strictly construed. Virtue v. People, 122 Ill. App. 223.

Not retroactive: In order to warrant a conviction under Crim. Code, § 212a (Laws 1903, p. 642, c. 137), both the "abandonment" and the "failure to support" must have occurred since the statute took effect. State v. Hoon [Neb.] 111 NW 462.

27, 28, 29. Virtue v. People, 122 Ill. App. 223.

30. Spencer v. State [Wis.] 112 NW 462.

31. Order for support may be entered under Greater New York Charter, Laws 1901, p. 279, c. 466, § 685, though the wife refuses to live with her husband, when she has a sufficient cause for her refusal, such as that he had communicated a loathesome disease to her. People v. Palminteri, 103 NYS 1068.

32. Virtue v. People, 122 Ill. App. 223. On prosecution under charter of Greater New York, Laws 1901, p. 279, c. 466, § 685, the magistrate may make an order requiring defendant to pay certain amount to commissioner of charities for the support of his wife, though defendant offers to support her himself. People v. Palminteri, 103 NYS 1068.

33. Superior court of Cook county is in legal effect a circuit court within statute conferring jurisdiction on circuit courts of proceedings for separate maintenance. Leafgreen v. Leafgreen, 127 Ill. App. 184.

34. Separate allowance may be allowed to wife deserted for period authorizing divorce in suit under Rev. Laws 1905, § 3610, to debar him from any interest in her realty. Stephen v. Stephen, 102 Minn. 301, 113 NW 913. Contrary to the law in many jurisdictions, in Nebraska a wife may sue in equity for separate maintenance without reference to whether the action is for a divorce or not. Brewer v. Brewer [Neb.] 113 NW 161.

35. Shepherd v. Shepherd [Mass.] 81 NE 897.

36. Under Greater New York Charter, Laws 1901, p. 283, c. 466, § 690, a **new information** is not necessary in proceedings to require new bond after recovery on original bond, it being sufficient and proper to show the recovery by affidavit. People v. Walsh, 54

Relief obtainable. See 8 C. L. 154—As a general rule a personal decree against the husband and the subjection of his property thereto is all that can be obtained in civil proceedings for support,[38] but suit money may be allowed,[39] and the custody and maintenance of the children may be disposed of.[40] Provision cannot be made for support beyond the life of the husband.[41] In determining the amount to be allowed, property conveyed in fraud of the wife's right to separate support may be considered.[42]

The relief in criminal prosecutions is for the indemnity of the public.[43] A deposit paid pursuant to a void order may be recovered back.[44]

Effect of decree. See 8 C. L. 155

§ 12. *Crimes and criminal responsibility.* See 8 C. L. 155—This article treats only of the effect of the marital relation on the criminal responsibility of the parties,[45] criminal prosecutions against the husband for nonsupport of the wife,[46] and such other offenses as may arise out of the marital relation and relate exclusively to the parties. Other criminal matters are excluded.[47]

ICE; ILLEGAL CONTRACTS; IMMIGRATION; IMPAIRING OBLIGATION OF CONTRACT; IMPEACHMENT, see latest topical index.

IMPLIED CONTRACTS.

§ 1. Definitions and Distinctions, 27.
§ 2. Work and Labor or Services and Material Furnished, 27. Services and Materials Furnished by Member of Family, 31. Right to Recover for Improvements Made on Lands of Another, 32.
§ 3. Moneys Had and Received and Money Paid, 33.
§ 4. Use and Occupation, 37.
§ 5. Torts Which May be Waived and Sued on as Implied Contracts, 37.
§ 6. Remedies and Procedure, 37.

Misc. 9, 105 NYS 367. Under P. L. 1898, pp. 947, 948, §§ 17, 19, the **order of conviction** as being a disorderly person in failing to support his wife must set out finding that she was or might become a public charge. Eckerson v. Mitchell [N. J. Law] 68 A 81. Under P. L. 1898, p. 948, § 21, concerning disorderly persons, an appeal from decision of magistrate to quarter sessions does not constitute waiver of legal errors of procedure before magistrate so as to bar a review thereof by certiorari unless appellant has taken steps to entitle him to trial de novo in the sessions, or unless any essential steps omitted by him have been waived by the opposite party. Id. Under P. L. 1898, p. 948, § 21, an order of quarter sessions after trial de novo on appeal from justice of peace was fatally defective in that it did not formally adjudge defendant to be a disorderly person or provide specifically the amount he was to pay for the support of his wife. Terhune v. Reed [N. J. Law] 67 A 180. Question whether parties were husband and wife not subject to **review** on appeal from order of support under Act Apr. 3, 1867, P. L. 78. Commonwealth v. Isaacman, 33 Pa. Super. Ct. 384.

37. Requested instruction as to effect of plaintiff's refusal to live with her husband held **covered by instruction given.** Spencer v. State [Wis.] 112 NW 462. Instruction as to effect of husband's lack of knowledge of wife's financial condition held properly refused where **evidence** showed that he had such knowledge. Id. Error in **definition** of abandonment by failure to support in that no reference was made to husband's ability to support wife held **harmless** in view of evidence showing such ability. Id.

38. Rosenbleet v. Rosenbleet, 122 Ill. App. 408. Under chancery act, §§ 44, 45, decree may be made **lien** on defendant's land. Leafgreen v. Leafgreen, 127 Ill. App. 184.

39. Suit money allowed for defending case on appeal held sufficient. Shors v. Shors, 133 Iowa, 22, 110 NW 16. Trial court cannot allow temporary alimony pending appeal, and this rule is not changed by Code, § 3177, relating to suit money in trial court. Id.

40. Leafgreen v. Leafgreen, 127 Ill. App. 184.

41. Johnson v. Bates [Ark.] 101 SW 412. Administrator of husband who died pending appeal from such an allowance had right to prosecute the appeal. Id. After reversal of such decree the action abates and the property descends to be distributed as required by law. Id.

42. Shepherd v. Shepherd [Mass.] 81 NE 857.

43. Undertaking given pursuant to charter of Greater New York, §§ 685 et seq. (Laws 1897, p. 289, c. 378), on conviction for failure to provide for wife and family, is for indemnity only, and no recovery can be had thereon unless the public has suffered expense by reason of defendant's failure to perform the conditions of the undertaking. Goetting v. Normoyle, 103 NYS 881.

44. Where order for bond and security was secured by fraudulent statements of jurisdictional facts, the wife being at time of her marriage to defendant married to another who was still living at time of order. Colon v. Hebbard, 105 NYS 805.

45. Contract by married woman without consent of husband, whereby she undertook to cultivate rented land, being void, she was not criminally liable under Revisal 1905, § 3367, for abandoning the land without repaying advances made by landlord. State v. Robinson, 143 N. C. 620, 56 SE 918.

46. See ante, § 11.

47. See ante, Scope of Topic.

The scope of this topic is noted below.[48]

§ 1. *Definitions and distinctions.*[See 8 C. L. 155]—Implied contracts are either implied in fact or in law.[49] An implied contract in fact arises in cases where, according to the ordinary course of business and the common understanding of men, a mutual intent to contract is implied.[50] A quasi contract, or a contract implied in law, is a mere fiction in law and arises where there is no evidence of intention to contract, but where, in the light of the circumstances of the case, the acts and conduct and verbal statement of the parties imply a duty to pay for a benefit conferred.[51] The existence of an express contract excludes an implied contract covering the same subject-matter.[52]

§ 2. *Work and labor or services and material furnished.*[See 8 C. L. 156]—Where beneficial [53] services are rendered and accepted, the law will imply a promise [54] to pay their reasonable value,[55] especially if rendered upon request [56] or with permission or

48. It includes all cases as to the implication of contract in law or fact. **It excludes** practice in the action of assumpsit (see Assumpsit, 9 C. L. 277), implied terms in express contracts (see Contracts, 9 C. L. 654), and duties and obligations implied in particular relations (see Attorneys and Counselors, 9 C. L. 300; Bailment, 9 C. L. 323, and like topics). Many cases as to right to recover on quantum meruit or quantum valebat as an option upon breach or part performance of express contracts will also be found in such topics as Brokers, 9 C. L. 413; Building and Construction Contracts, 9 C. L. 424; Contracts, 9 C. L. 654; Sales, 8 C. L. 1751. Election between tort and implied contract is treated in Election and Waiver, 9 C. L. 1037.

49. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63.

50. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63. Evidence of a contract implied in fact is generally to be found either in some writing made by the parties or in verbal communications which passed between them, or in acts and conduct considered in the light of the circumstances of each particular case. Cotnam v. Wisdom [Ark.] 104 SW 164.

51. A contract implied by law rests upon evidence and has no actual existence, but is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when in point of fact there was none. It is a legal fiction resting wholly for its support on a plain legal obligation and a plain legal right. Cotnam v. Wisdom [Ark.] 104 SW 164. Thus, in an action to recover the value of personal services rendered by plaintiff in caring for and nursing defendant's testator, it was held not error to omit from an instruction any reference to the intention of plaintiff to charge for her services. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63.

52. City of Carlinville v. Laager, 129 Ill. App. 647; Northrip's Adm'r v. Williams, 30 Ky. L. R. 1279, 100 SW 1192; Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44.

53. Fact that defendant retained in its possession results of plaintiff's labor without offering to return them held to be an admission of receipt by it of some benefit from plaintiff's labor. Stephen v. Camden & Phila. Soap Co. [N. J. Err. & App.] 68 A 69.

54. The implied promise is as efficacious as an express one. Jones & Co. v. Moore, 30 Ky. L. R. 603, 99 SW 286. In an action to recover for extra work performed and materials furnished, held that no promise to pay therefor could be implied from the facts alleged in the complaint, and a demurrer thereto was properly sustained. Beattie v. McMullen [Conn.] 67 A 488. When defendant requested and employed plaintiff as broker to sell the output of defendant's distillery, and by plaintiff's efforts defendant and purchaser were brought together, resulting in a sale, a promise on part of defendant to pay plaintiff a reasonable compensation for his services is implied. Jones & Co. v. Moore, 30 Ky. L. R. 603, 99 SW 286.

55. Leonard v. Gillette, 79 Conn. 664, 66 A 502; Hall v. Luckman, 133 Iowa, 518, 110 NW 916; Morrell v. Lawrence, 203 Mo. 363, 101 SW 571; Stephen v. Camden & Phila. Soap Co. [N. J. Err. & App.] 68 A 69. Evidence held insufficient to afford basis for determining amount of compensation for services rendered. Coons v. Coons, 106 Va. 572, 56 SE 576.

Measure of recovery is such sum as the services are reasonably worth, not exceeding amount stated in bill of particulars, with interest from time services were rendered. Dussoulas v. Thomas [Del.] 65 A 590. Where professional services are rendered, the measure of recovery is the ordinary and reasonable charge made for such services by members in similar standing in same profession. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006. Verdict of $9,800 for architect's services held unsustainable where only testimony as to value of services actually rendered was opinion of plaintiff himself that they were worth between $6,000 and $8,000. Bluemner v. Garvin, 104 NYS 1009. Evidence held sufficient to sustain verdict of $700 for architect's services, the amount of verdict being $200 less than plaintiff sought to recover, and there being much evidence conducing to prove plaintiff's skill as an architect, his employment by defendants, the value of the work performed for them, and that his compensation was to be in no way affected by fact that cost of building might or did exceed $20,000. Harms v. Sheppard, 30 Ky. L. R. 404, 98 SW 1012.

56. Leonard v. Gillette, 79 Conn. 664, 66 A 502; Hall v. Luckman, 133 Iowa, 518, 110 NW 916; Babcock v. Anson, 106 NYS 642. One rendering services as an architect for another at his request may recover quantum meruit. Bluemner v. Garvin, 104 NYS 1009.

consent [57] or pursuant to law.[58] Such services, however, must be rendered with an expectation of compensation,[59] and must be accepted with knowledge, actual or constructive, that they are so rendered.[60] The general rule is that if a person performing services knows they are not for the benefit of the person making the request, and that he is under no legal obligation to pay therefor, he cannot recover against him, in the absence of an express promise to pay for them made before the services were rendered,[61] but this rule is not of invariable application.[62] The reasonable value of serv-

In an action against a decedent's estate to establish a claim for services rendered during the six years prior to his death, it appearing that plaintiff and decedent had stood in the same relations to each other for sixteen years, fact that at commencement of these relations decedent asked plaintiff to look after him and take care of him held not to be irrelevant to fact that during last six years of this period the services of plaintiff in taking care of decedent were rendered at his request. Leonard v. Gillette, 79 Conn. 664, 66 A 502. To the general rule that, in order to recover, services must have been rendered at defendant's request, there is an exception where a person lies under a moral and legal obligation to do an act, and another does it for him under such circumstances of urgent necessity that humanity and decency admit of no time for delay. Sheridan County Com'rs v. Denebrink [Wyo.] 89 P 7. Thus, where it was both the legal and moral obligation of board of county commissioners to furnish a physician for an injured man, but it was unable to make a request therefor because not in session at time of injury, and upon its failure to do so plaintiff performed the services which the exigencies of the case required to save a human life, with expectation of being reimbursed therefor, held plaintiff was entitled to recover. Id.

57. Where services were rendered with permission of defendant and he stated that he was to pay for same and that the bill would be taken care of, held plaintiff entitled to recover. Meikleham v. Clarke [R. I.] 67 A 450. In an action to recover for work and labor in grading defendant's lot, held that, taking into consideration all surrounding circumstances and having due regard to weight of evidence, defendant was not estopped to deny that such work was done with his permission and consent. Erickson v. Hochbrune [Wash.] 91 P 485. Where the service of carrying the mail from defendant's station to the post office was performed for defendant under circumstances and conditions which showed that defendant must have known the service was for it and not another, it would be liable, for, in permitting and accepting continuous valuable service, it must be presumed there was a promise to pay for its reasonable value even though no express employment was shown. Silver v. Missouri, etc., R. Co., 125 Mo. App. 402, 102 SW 621.

58. Where, under Kirby's Dig. § 1455, authorizing the county court to allow accounts incurred by any person in preventing the spread of and in nursing and caring for persons afflicted with smallpox, plaintiffs rendered such service, held, in an action to recover compensation therefor, that plaintiffs made out their cases by proof that the charges made were reasonable for the service rendered, and not in excess of the amount prescribed by § 1457. Marion County v. Bonds [Ark.] 99 SW 532. Where, under a city ordinance, it is the duty of the chief of the fire department to assign a fireman to duty in a theatre, who shall be paid by the manager of the theatre, a fireman rendering such services may recover the reasonable value thereof, in an action against the manager of the theatre. Tannenbaum v. Rehm [Ala.] 44 S 532.

59. Where plaintiff rendered services to defendant voluntarily, without expectation of compensation, and only in expectation of an intended marriage with defendant, and defendant died before day set for marriage without having announced his intention of not fulfilling his promise of marriage, held, no contract, either express or implied, having been shown by the facts on the part of defendant to pay for any services thus rendered, there could be no recovery. Newhall v. Knowles [R. I.] 67 A 365. Services rendered by physician in emergency case with expectation of being reimbursed therefor. Sheridan County Com'rs v. Denebrink [Wyo.] 89 P 7. Fact that plaintiff did not contemplate charging for the services when rendered, but expected to be compensated for them in deceased's will, held not to prevent her recovery, the evidence showing that she expected remuneration in some form and that deceased agreed that she should be remunerated. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63.

60. Bush v. Fourcher [Ga. App.] 59 SE 459.

61. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

62. Where physician renders service to son at the request of the father, the fact of that relationship is to be considered in connection with other circumstances, if there are other circumstances, indicating to the physician that the father called him on his own account to serve his son. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571. In an action by a physician to recover of defendant the value of professional services rendered defendant's son at his (defendant's) request, evidence held sufficient to submit to jury the questions whether defendant intended plaintiff to understand, and whether plaintiff did understand that he would pay for services which a telegram sent by defendant called upon plaintiff to render. Id. Plaintiff knowing financial standing of father and son, evidence that son's fortune was considerable and sufficient to pay for services is admissible to show whether plaintiff thought the father intended to pay for the services. Id. Plaintiff's general professional reputation not having been drawn in question, evidence of his good standing in community is not admissible to show value of services. Id. Evidence of plaintiff's learning and skill admissible to show value of services. Id.

ices rendered by physicians to persons incapable of contracting by reason of injury or sickness may be recovered on an implied contract.[63] Since an express contract negatives an implied one, no recovery quantum meruit for services rendered thereunder can be had,[64] but a recovery may be had on the common counts, although the evidence discloses a special agreement, when such agreement has been executed and fully performed, and no duty remains but the payment of the price in money by the defendant.[65] Where an express contract does not fix the amount of compensation for services rendered thereunder, a promise to pay their reasonable value will be implied.[66] Where services are rendered or materials furnished under an entire contract, which before completion is abandoned by the employer,[67] or completion of which is prevented by acts of the employer,[68] or which is terminated by the enact-

63. Services rendered to person receiving injuries in street car accident which rendered him unconscious, and who died without regaining consciousness. Cotnam v. Wisdom [Ark.] 104 SW 164. Held that court properly refused to require plaintiff to prove, in addition to the value of the services, the benefit, if any, derived by the deceased from the operation. Id. Held, the patient being unconscious at time of rendition of services, his financial condition could not be considered, where there was no contract, but recovery had on a legal fiction. Id.

64. Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44; Carbon Hill Coal Co. v. Cunningham [Ala.] 44 S 1016. As a breach does not ipso facto terminate a contract, the fact that the contract has been violated does not authorize a recovery quantum meruit for work comprehended within, and done under, a special contract, in excess of the price fixed by the contract. Cleveland, etc., R. Co. v. Moore [Ind.] 82 NE 52. Additional allowances held not justified on theory that making of certain changes in plans per se worked an abrogation of the entire contract, even for purposes of damages, thus entitling plaintiff to recover the reasonable value of the entire work. Id. In an action to recover for services rendered a decedent under an alleged promise that the latter would pay plaintiff well and liberally for all services out of her estate at the time of her death, and that such allowance payment would be sufficient to keep plaintiff well during the balance of her life, it being contended by defendant that in any event plaintiff was limited to a recovery of such sum as "would be sufficient to keep her well during the balance of her life," and was not entitled to recover quantum meruit, held, the evidence of the contract being wholly oral, it was properly left to the jury to determine whether such contract was for full compensation in any event, together with a further assurance that such compensation would be sufficient for plaintiff's future support or whether it was intended that plaintiff was to be limited to a sum adequate for such support, although her services may have been worth more. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 NW 1066.

65. But so long as the contract continues executory the plaintiff must declare specially. Carbon Hill Coal Co. v. Cunningham [Ala.] 44 S 1016.

66. Where stenographic services are rendered under a contract but there was no meeting of minds as to compensation, the law will imply a promise to pay their reasonable value. Hall v. Luckman, 133 Iowa, 518, 110 NW 916. Finding that there was no agreement between parties as to sum to be paid to plaintiff for work and services performed under contract held sustained by the evidence. In re Marx's Estate [Wis.] 111 NW 1103. Where jury finds contract to be for full compensation for services rendered, the actual value of such services is the measure of recovery. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 NW 1066. Where agreement on part of decedent to compensate plaintiff for services to him during his last illness did not fix the amount to be paid, it was incumbent on the court to fix it. Weimer's Adm'r v. Smith, 30 Ky. L. R. 1311, 101 SW 327. Evidence held sufficient to sustain judgment for plaintiff. Id. Where plaintiff gave up profession of teaching to become a companion of her distant kinswoman, and lived with her some eighteen years, having her support in the meantime, and during the last five or six years was nurse as well as companion, held she should be liberally compensated, but that an allowance of twenty-five dollars a week for the whole period, in addition to five thousand dollars in property already provided, is excessive. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 NW 1066.

67. Carbon Hill Coal Co. v. Cunningham [Ala.] 44 S 1016. Where plaintiff, an architect, entered into special contract to prepare plans and specifications for, and to supervise construction of building proposed to be erected by defendant, for which he was to receive a certain percentage of the cost of the work as compensation, and subsequently defendant, without right, abandoned its purpose to erect building, held plaintiff was entitled to recover the reasonable worth of his services prior to such abandonment. Stephen v. Camden & Phila. Soap Co. [N. J. Err. & App.] 68 A 69. Final abandonment of projected building by defendant put an end to existence of special contract, and it could not be interposed by defendant so as to prevent recovery for reasonable worth of services rendered by plaintiff upon the strength of its prior existence. Id.

68. Employe wrongfully discharged during term of employment may treat contract as rescinded and recover the reasonable value of his services on a quantum meruit. Brown v. Crown Gold Mill. Co., 150 Cal. 376, 89 P 86. May recover whether contract valid or invalid. Id. Contract to macadamize streets, monthly payments to be made upon esti-

ment of a valid law,[69] a recovery quantum meruit may be had for such services rendered and materials furnished, if accepted by the employer or he has received benefit therefrom,[70] but if the employe wrongfully abandons or deliberately violates his contract and fails to perform services or furnish materials in compliance therewith, he cannot recover by way of quantum meruit.[71] Where, although there has not been an absolute compliance with the contract, a substantial part of the work has been performed, a recovery may be had on a quantum meruit for labor performed and materials furnished,[72] if accepted by the other party,[73] or he has received and retained the benefits of such work.[74] An action for the contract price may be maintained either upon the contract, upon an allegation of performance, or upon a quantum meruit, where one has substantially though not completely performed his agreement, and the other party has received and retained the benefits of such performance.[75] Where labor and materials have been furnished upon real estate under a contract which contains an illegal element under a prohibitory statute, and where the contract remains entirely executory in that part which is illegal, and is disaffirmed because of its illegality, the disaffirming party has a right to have compensation for the benefit conferred upon the real estate.[76] Where, in order to com-

mates by the city's engineer. These estimates were furnished but payment was not made and contractor abandoned his contract. Peet v. East Grand Forks [Minn.] 112 NW 1003. Where, under contracts employing plaintiff to clear a right of way, work was stopped by defendant on account of an injunction issued against him, held that plaintiff could recover for part performance in an action for work and labor done at the instance and request of defendant. Harrison v. Franklin [Mo. App.] 103 SW 585. Contracts furnish measure for valuation of work done. Id. In regard to uncompleted work, according to terms of contract, plaintiff should not recover full contract price but what such work was reasonably worth, having regard to the price fixed by the contract. Id.

69. Binz v. National Supply Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 48, 105 SW 543.

70. When labor and materials are furnished and used upon real estate under a special contract, and for reasons which are not prejudicial to the plaintiff the contract becomes of no effect, the party furnishing them may recover upon quantum meruit for their value as a benefit to the real estate. Eastern Expanded Metal Co. v. Webb Granite and Const. Co. [Mass.] 81 NE 251. Fact that defendant retained in its possession the plans and results of plaintiff's labor without offering to return them held to be admission of receipt by it of some benefit from plaintiff's labor. Stephen v. Camden & Phila. Soap Co. [N. J. Err. & App.] 68 A 69. Entire contract under which plaintiff was to construct for defendant a fuel oil plant brought to an end by the enactment of a valid ordinance. Binz v. National Supply Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 48, 105 SW 543. Evidence held to show that defendant had neither accepted nor been benefited by labor performed and materials furnished by plaintiff in partial performance of the contract. Id.

71. Carbon Hill Coal Co. v. Cunningham [Ala.] 44 S 1016. Where plaintiff refuses to complete contract with a city to perform work on a bridge on account of a dispute as to its terms, he cannot recover under a common count for the value of work done in partial performance. Douglas v. Lowell, 194 Mass. 268, 80 NE 510. Plaintiffs cannot recover value of materials left by them on bridge solely because used by the city's employes, and because to that extent the city was better off. Id. Nor can recovery be had on promise of assistant city engineer who acted without authority. Id. Where plaintiff entered into an express contract to erect for defendant a Scotch granite sarcophagus, consisting of two bases, cap, and die, and did not perform such contract but deliberately ignored and violated his agreement by substituting a lower base of native granite, and without consulting or notifying defendant when he found others were building a foundation hastily placed an inferior tombstone on the foundation which he did not erect, he cannot recover quantum meruit for work, services, and material rendered and furnished. Fish v. Carrell [Cal. App.] 88 P 489.

72. In building contracts a literal compliance with the specifications is not necessary to a recovery by the contractor. Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 NE 1038. Substantial performance in good faith is sufficient. Id. Substantial performance of contract to build railroad. Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 S 838.

73. Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 S 838.

74. Where a broker to procure a sale brings about a consolidation instead and the benefits are accepted by principal, broker may recover on quantum meruit. Close v. Browne, 230 Ill. 228, 82 NE 629.

75. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

76. Eastern Expanded Metal Co. v. Webb Granite & Const. Co. [Mass.] 81 NE 251. A contract, by general provision, required that a building, to be erected by plaintiff for defendant, should be erected in conformity with the statute, but in particular provisions as to roof it called for a building whose erection was forbidden by the statute. Evidence held to show that contract was disaffirmed by plaintiff because of its illegality,

plete work contracted for, it is necessary to do work not within the contract, additional compensation may be recovered for whatever the extra work is reasonably worth,[77] and an employe may recover reasonable compensation for services rendered on request outside of the sphere of his employment.[78] The law will usually imply a promise to pay for materials furnished and accepted, but in Kentucky no recovery may be had for board furnished by one other than the keeper of a tavern or house of private entertainment in the absence of an express contract.[79] A municipality cannot become indebted for personal services rendered it upon implied assumpsit.[80]

Services and materials furnished by member of family. See 8 C. L. 158—Where the relationship of a family exists between parties rendering and accepting beneficial services, the general rule that a promise of compensation therefor is implied does not obtain.[81] Accordingly, services rendered by a child to a parent,[82] or one in loco parentis,[83] or between others living together as a family,[84] are presumptively gratu-

and that in reference to the objectionable part it remained wholly executory. Id. Construction of lower parts of building, which were entirely in conformity with statute, held not to deprive plaintiff of right to repudiate contract before doing anything which was illegal (Id.), especially as evidence showed that plaintiff was ignorant of the illegality when it executed the contract (Id.). Fact that some work was done by plaintiff's engineer on plans for roof, which did not form a part of the construction of the building, and for which no claim was made in the suit, held immaterial. Id. Fact that evidence showed that, under the arrangement of the supporting portions of the frame, a part needed reinforcement to sustain the weight of the building, held not to prevent plaintiff's recovery, as, in working under the plans, both parties must have intended that, if reinforcement was anywhere needed to conform to the requirements of law as to strength of building, it would be furnished. Id.

77. Where under a contract plaintiff was to do the work of "surfacing" a railway track, it was legitimate to prove, by those acquainted with the doing of that class of work, what the word "surfacing" meant, and whether it included "old grading." Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 S 838. It was also proper to prove what was the custom in regard to the construction companies doing that class of work, and what the customary charges were for doing it. Id.

78. Though there is no express agreement to pay therefor. Brown v. Crown Gold Mill. Co., 150 Cal. 376, 89 P 86.

79. Ky. St. 1903, § 2178. The statute does not require any particular form of contract, and it is enough if the parties each contemplate that the lodger is to pay for his entertainment. The law then implies a contract to pay a reasonable compensation, if none other is settled upon. Bryson's Adm'r v. Biggs [Ky.] 104 SW 982. The statute relieves the implication of a promise that would otherwise arise from the mere fact of one party's furnishing the entertainment of the other. Id. Where a woman applied to her son-in-law to keep her, telling him that she was able to pay her way, that she did not expect to be kept as a pauper, that she had means of support, and asking that an account be kept, and upon these representations he agreed to keep her, held this was a contract within the statute. Id.

80. So held in case of a county, which for many purposes is deemed a municipality, and its power of contracting indebtedness is limited to matters expressly conferred by the legislature, or which are conferred by necessary implication as an incident of powers expressly conferred. McDonald's Adm'x v. Franklin County, 30 Ky. L. R. 1245, 100 SW 861.

81. Peyton v. McLennan, 129 Ill. App. 654; Coons v. Coons, 106 Va. 572, 56 SE 576; Longwell v. Mierow, 130 Wis. 208, 109 NW 943; In re Marx's Estate [Wis.] 111 NW 1103. Such services are enjoined by the reciprocal duties of the family relations, and are always presumed to have been prompted by natural love rather than by the promise or hope of pecuniary reward. Williams v. Walden [Ark.] 100 SW 898. Instruction that if jury found that plaintiff went to live at defendant's home as housekeeper, and as a member of his family, and without expectation or other reward than her support and maintenance, she could not recover for services rendered, held correct. Webster v. Armstrong [Iowa] 113 NW 549.

82. Son rendering services for his father. In re Marx's Estate [Wis.] 111 NW 1103; Quirk v. Quirk, 155 F 199. Where son remains at home after his majority and renders ordinary services to his father, no contract to pay therefor will be implied. Voss v. Voss [Wis.] 113 NW 1097; Butler v. Kent [Ala.] 44 S 863.

83. Where one is taken into the family of another, and treated as a member of the household, there is ordinarily no implied obligation to pay for services rendered by the one so taken in. McClure v. Lenz [Ind. App.] 80 NE 988. Evidence held to show that services rendered by foster daughter to foster parents were purely voluntary and without thought of compensation on her part. Id. Services by adopted son. In re Taylor's Estate [Wis.] 111 NW 229.

84. Instruction that if plaintiff lived with defendant as housekeeper and as a member of his family the law would presume that any services rendered by her, even though rendered at defendant's request, were rendered as a gratuity, held correct. Webster v. Armstrong [Iowa] 113 NW 549. Evidence

itous. This presumption, however, is not conclusive and will not be indulged where the surrounding facts and circumstances disclose a contrary intent.[85] In some states the general rule is that the presumption must be overcome by an express contract [86] proven by direct and positive evidence,[87] or by circumstantial evidence equivalent thereto,[88] but this rule is subject to the exception that, where services are rendered in reliance upon an express oral promise to deed or devise real estate, although the promise be not enforcible because not in writing, still a contract to pay the reasonable value of the services may be implied and recovered upon provided the express promise be satisfactorily proven.[89]

Right to recover for improvements made on lands of another.[90]—In order for one to recover compensation for improvements made on another's land, it is necessary that he should have made such improvements in good faith while in bona fide adverse possession of the land under color of title.[91] Under the Nebraska Occupying Claimant's Act, expenditures on land for the benefit thereof made in good faith and in honest reliance upon an apparent or presumptive record title may be recovered although the unsuccessful claimant was not in possession.[92]

held to entitle son-in-law to recover for board and lodging. Scorchfield v. Hayes [Iowa] 112 NW 1100. Evidence held not to entitle claimant to recover for services to brother with whom he was living. Hodge v. Hodge [Wash.] 91 P 764.

85. In an action quantum meruit by a son to recover for services rendered his father during his lifetime, a parol agreement for compensation, though void under the statute of frauds, is admissible in evidence as a circumstance tending to show that such services were not rendered gratuitously. Butler v. Kent [Ala.] 44 S 863; Hoskins v. Saunders [Conn.] 66 A 785; In re Taylor's Estate [Wis.] 111 NW 229. It does not follow as matter of law that there is an implied contract or obligation on the part of a parent to pay because a child rendered extraordinary services, but such services, when proved, may be considered by jury in determining question as to whether there was an implied contract for compensation. Williams v. Walden [Ark.] 100 SW 898. Instruction held erroneous, which allowed jury to consider question of the acceptance of a son's services by his father, in determining whether or not there was an implied contract to pay therefor, as whether such services were performed voluntarily or on request the burden was on the son to establish a contract expressed or implied. Id.

86. Voss v. Voss [Wis.] 113 NW 1097. Presumption must be overcome by showing that relation between parties was that of debtor and creditor evidenced by some arrangement or contract. In re Marx's Estate [Wis.] 111 NW 1103. Instruction that if plaintiff was entitled to pay for services then the presumption was that compensation was due and unpaid, and that question as to payment was a matter of defense, held correct. Id. Where plaintiff, proprietor of a millinery business, abandoned such business and became defendant's housekeeper at his request and on the mutual understanding that she was to be paid for the services so rendered, she is entitled to recover, notwithstanding the family relation thus created. Webster v. Armstrong [Iowa] 113 NW 549.

87. Voss v. Voss [Wis.] 113 NW 1097.

88. Voss v. Voss [Wis.] 113 NW 1097. Evidence that both father and son expected that the latter would receive compensation for his services rendered for the former, together with the facts and circumstances, held to show a mutual understanding or agreement between the parties to that effect. In re Marx's Estate [Wis.] 111 NW 1103. Evidence held to justify an inference of an express contract. Finch v. Green, 225 Ill. 304, 80 NE 318.

89. Only effect of void contract is to remove the otherwise conclusive presumption that the services were rendered gratuitously. Voss v. Voss [Wis.] 113 NW 1097. Held that there was positive evidence to show an express promise made by father to son, who had attained his majority, that if the latter would stay at home and work on the farm he (the father) would give him the home farm, and also to show that services rendered by the son were rendered in reliance upon such promise. Id. Fact that promise did not fix length of time for which services were to continue held immaterial, inasmuch as the sole function of the promise was to remove presumption of gratuity of services, and place parties on same footing as if they were strangers. Id.

90. See 8 C. L. 159. As to right under statute, see Accession and Confusion of Property, 9 C. L. 10.

91. Good faith held to mean an honest belief on part of occupant that he has secured a good title to property in question and is the rightful owner thereof. Bryan v. Councilman [Md.] 67 A 279. Where wife made improvements upon property in which her husband held an interest under a will, without reasonable grounds for believing that it belonged to her, but the improvements being made to serve herself, she believing it would be a home for herself and children, held she had no valid claim for moneys thus expended. Id.

92. Taxes and special assessments paid by record owner, in good faith, may be recovered, under Laws 1883, p. 249, c. 59, though claimant was not in possession. Flanagan v. Mathisen [Neb.] 110 NW 1012. Fact that special assessment, on account of irregularities and defects of procedure, was unenforceable as a legal charge or lien in

§ 3. *Moneys had and received and money paid.*[See 8 C. L. 159]—An action for money had and received, or money paid for the benefit of another is founded upon equitable principles. No privity of contract between the parties is required, except that which results from circumstances showing an equitable obligation.[93] Where one has money which in equity and good conscience belongs to and ought to be paid to another, an action for money had and received will lie for its recovery,[94] though

behalf of public, held immaterial, it not being disputed that the improvements were in fact made, that plaintiff made the payment, or that the amount paid was not in excess of their value. Id. In such case, owner of fee cannot be compelled to convey to claimant his title or interest upon being paid or tendered the appraised value, but the parties should be treated as tenants in common of indivisible real estate, and property sold and proceeds distributed in proportion to the several interests or shares. Id.

93. Commercial Nat. Bk. v. Sloman, 106 NYS 508; Crigler v. Duncan, 121 Mo. App. 381, 99 SW 61.

94. Whittle v. Whittle [Cal. App.] 91 P 170; Rhodes & Son Furniture Co. v. Jenkins [Ga. App.] 58 SE 897; Tjams v. Andrews [C. C. A.] 151 F 725.

Recovery allowed: Where it appeared that plaintiff bought of a person, who had been acting as agent of defendant carrier to sell its tickets, certain documents purporting to be passage tickets of defendant, nothing appearing at time tickets were bought to notify plaintiff of defendant's revocation of agency, if it had done so, and tickets exactly like those in question had been accepted by defendant, held plaintiff, having paid his money to defendant's agent for valid tickets, is entitled to recover it from defendant, defendant having repudiated the act of its agent and notified plaintiff that the tickets were worthless. Simmoneli v. White Star Line [R. I.] 66 A 836. Where plaintiff gave defendant money for the purpose of purchasing a saloon for him, and defendant bought the saloon with plaintiff's money, but took possession himself, operated it, received the proceeds, refused to let plaintiff have the saloon, and finally ejected him from it, held plaintiff had a cause of action against defendant as for money had and received. Manning v. Fallon [N. J. Law] 66 A 903. A surety on a note who has received credit for the amount of the debt in another transaction is liable for the amount to the principal debtor who has been compelled to pay it. McGee v. McGee, 125 Ill. App. 436. Will lie against one who being entrusted with note for collection fails to turn over proceeds. Harr v. Roome, 28 App. D. C. 214. Where contract was made for sale of real estate to defendant, but title was rejected, certain rents paid to defendant may be recovered as for money had and received. Cohen v. Jacobwitz, 52 Misc. 660, 102 NYS 519. Where a rent note, given by a tenant to his landloard, was transferred to plaintiff before maturity and subsequently to the transfer the land was sold under execution against the landlord, and the purchaser without notice of the transfer of the note, collected the rents, held plaintiff was entitled to recover in an action for money had and received the rents so collected by the purchaser. Young v. Garber [Ala.] 42 S 867. Where plaintiff in part performance of an executory contract paid money and delivered a horse, and for a reason, for which he was not responsible, the contract was not executed, he is entitled to recover the money upon an implied promise to repay it and the value of the horse as for a conversion. Tomlinson v. Bennett [N. C.] 59 SE 37. Where, on account of plaintiff's delay in making certain payments for property bought of defendant on the instalment plan, defendant rescinded the contract and retook the property, plaintiff may recover what he had paid defendant as for money had and received. Rhodes & Son Furniture Co. v. Jenkins [Ga. App.] 58 SE 897. Where plaintiff under an agreement with his mother, with whom he lived, turned over to her certain moneys to be preserved by her for him, and, after deducting their expenses for living, to be restored to him on demand, and she deposited such money in bank in her own name, which, after her death, defendant, as her executor, collected and refused to pay plaintiff on demand, held that an action for money had and received was the proper remedy for the recovery of such money, and that the evidence showed that it belonged to plaintiff. Stuyvaert v. Arnold, 122 Mo. App. 421, 99 SW 529. Complaint alleged that plaintiffs held a mortgage upon real property owned by defendants, and that the buildings on the premises were insured, loss, if any, payable to plaintiffs as mortgagees, and that the buildings were destroyed and plaintiffs consented to insurance being paid to defendants upon their express promise to use the money for the erection of like buildings on the property, which they failed to do, and that subsequently plaintiffs foreclosed the mortgage, a deficiency resulting, held allegations were sufficient to sustain action for money had and received. Miller v. Harris, 117 App. Div. 395, 102 NYS 604. Evidence of sale under judgment of foreclosure held competent to show amount due upon mortgage had not been paid, for, had amount of mortgage been realized by sale, the action for money had and received could not have been maintained. Id. Where a note held by a bank as collateral was paid to bank after the loan secured thereby had been repaid, the money so received may be recovered in an action against the bank as for money had and received. First Nat. Bk. v. Pickens [Ind. T.] 104 SW 947. Evidence held sufficient to sustain verdict against bank on the theory that the receipt of payment was the act of the bank and not the personal act of its cashier. Id. Where an internal revenue tax was erroneously assessed and collected by the government, and was paid under protest, there is an implied contract on the part of the government to make restitution thereof under the fifth amendment of the constitution, providing that private property shall not be

there be no express promise,[95] but there may be deducted, however, amounts which the same equitable considerations require plaintiff in his turn to pay.[96] Money procured by duress or compulsion,[97] or through fraud and deceit,[98] may be recovered as

taken for public use without just compensation. Armour v. Roberts, 151 F 846. Liability to refund enforcible against successor of collector wrongfully receiving such tax. Id. Plaintiff directed his daughter (defendant) to deposit certain money in bank for him and to bring him back the book. Defendant deposited the money as directed, but at same time caused all deposits and dividends standing to plaintiff's credit to be transferred to herself under an order which plaintiff had drawn on the bank, directing it to pay to her all deposits and dividends due him on account, but which he had never delivered to her and which had remained as he supposed in his custody. Held the transfer of the deposit and dividends from plaintiff to defendant were the same in legal effect as if she had actually withdrawn the money and redeposited it in her own name, and an action for money had and received would lie. Earle v. Whiting [Mass.] 82 NE 32. Action lies without previous demand. Id. Interest due from time when money was fraudulently misappropriated. Id. Where in order to pay obligations contracted for necessities of a vessel, plaintiff discounted a draft under the mistaken belief that it was a valid obligation, and the money was applied to owner's benefit under color of authority, plaintiff is entitled to recover from the owners the money so paid, in an action for money had and received. Commercial Nat. Bk. v. Sloman, 106 NYS 508. Where defendant, who was authorized under a contract to sell plaintiff's land for best obtainable price (not less than a specified sum), represented to plaintiff that he could sell and had sold it for such specified sum when in fact he had sold it for a larger sum, accounting to plaintiff for only the minimum price authorized to be received, held that the plaintiff was entitled to recover the balance in hands of defendant in an action for money had and received. Crigler v. Duncan, 121 Mo. App. 381, 99 SW 61. Certain allegations as to the contract and fraud held to have been explanatory and incidental and not preferred in order to state an action in tort or to declare on the contract. Id. The action not being on contract, plaintiff is not precluded from recovery merely because he mistakes the contract authorizing the defendant to collect. Id. Verdict of no cause of action held not sustained by pleadings or evidence. Jones v. Jones [Neb.] 112 NW 325. Finding for plaintiff in action for money had and received held reasonably supported by evidence. Hall v. Skahen [Minn.] 112 NW 865.

Recovery not allowed: In an action for money had and received defendant may show any facts that entitle him to retain the money, either upon legal or equitable grounds. The right of defendant need not necessarily be better than that of plaintiff, for if it is equal thereto defendant must prevail. Whittle v. Whittle [Cal. App.] 91 P 170. In an action for money had and received, where it appeared that defendant was the wife of plaintiff and that plaintiff had deserted her, leaving her without means, and that the money came lawfully into her possession, it being received by her in payment of a note of which she and plaintiff were joint payees, and that the money was necessarily used by her for her support and maintenance, held equity and good conscience will not permit plaintiff to recover. Id.

95. The law will imply such promise. Tomlinson v. Bennett [N. C.] 59 SE 37. Only necessary for plaintiff to prove two things, his right to the money and the defendant's possession. Rhodes & Son Furniture Co. v. Jenkins [Ga. App.] 58 SE 897. Evidence held to show plaintiffs right to money and defendant's possession thereof. Id.

96. Where, on account of plaintiff's delay in making certain payments for property bought of defendant on the instalment plan, defendant rescinded contract and seized the property, plaintiff may recover what he had paid defendant, less a reasonable amount for the use of the property while he had possession of it. Rhodes & Son Furniture Co. v. Jenkins [Ga. App.] 58 SE 897.

97. Not enough to show mere unwillingness to pay, but payment must be compulsory and under a mistake of fact. Carter v. Iowa State Business Men's Bldg. & Loan Ass'n [Iowa] 112 NW 828. Evidence held to show overpayments to building and loan association were not made under duress or through compulsion, but voluntarily. Id. No recovery allowed, especially where, there being doubt or dispute as to amount due, plaintiff pays sum claimed in settlement and not under compulsion. Id. A payment made to avoid financial loss and so made on notice and protest is regarded in law as a payment under compulsion, and where the sum so paid is illegally exacted it can be recovered back. Rowland v. Watson [Cal. App.] 88 P 495. Fact that forced payment was not made direct to defendant, but came to him through intermediary, held immaterial, as it was money which belonged to plaintiff. Id. Fees paid by candidates under protest in compliance with unconstitutional election law, in order to have their names printed on the ballots, may be recovered. Johnson v. Grand Forks County [N. D.] 113 NW 1071. Note executed under threat to bring suit on certain other matured notes held not procured by duress, as what was threatened to be done was no more than the pursuance of a legal remedy. Lilienthal v. George Bechtal Brew. Co., 118 App. Div. 205, 102 NYS 1051. Payment of note waives duress, if any, and money so paid cannot thereafter be recovered. Id. Where plaintiff was convicted of abandoning his wife and deposited with certain officials a sum of money to secure obedience to an order of court requiring him to pay his wife a certain sum weekly, and it afterward appeared that at time of his marriage his wife had been divorced and forbidden to marry again duripg lifetime of first husband, and at time of alleged marriage to plaintiff and at time of trial of action for abandonment the first husband was still living, held that plaintiff could recover the actual balance of the deposit remaining undisturbed, as having been paid under du-

for money had and received.[99] Generally, money paid under a mistake of a material fact [1] may be recovered,[2] but the rule is not applicable when, under an assumption of fact known to both parties to be doubtful, there has been a voluntary payment in extinguishment of a claim.[3] Money voluntarily paid, with full knowledge of all the facts, cannot be recovered.[4] As a general rule money voluntarily paid under a mis-

ress of a judicial order procured by fraulent statement of facts which were essential to the order of the court. Colon v. Hebbard, 105 NYS 805. Unlawful fine acquiesced in by patrolman cannot be recovered back. Gay v. Chicago, 124 Ill. App. 586. Where imports were detained by government on theory that they were subject to payment of revenue tax, and importer himself pursues the law and does, without dissent or suggestion of oppression or duress, whatever is necessary to procure his goods, he makes his own interpretation of the law, and if he interpret it mistakenly he cannot at one time affirm its application by his action and thereafter disaffirm the subjection of his property to the statute. Newhall v. Jordan, 149 F 586. Held no evidence to show that plaintiff was conscious of duress or unlawful constraint to pay what he did not owe, in the payment of revenue tax, to obtain his property. Id. Unlawful penalty exacted by customs officers may be recovered from the United States. Narciso Basso v. U. S., 40 Ct. Cl. 202.

98. A bank which pays forged checks drawn on it to another bank which has cashed them may on subsequently discovering the forgery recover from the bank which cashed them if it has not been placed in any worse position than it would have been had it refused payment when presented. Canadian Bk. of Commerce v. Bingham [Wash.] 91 P 185. Evidence held not to show overpayments to building and loan association were procured through fraud or bad faith on part of officers of association. Carter v. Iowa State Business Men's Bldg. & Loan Ass'n [Iowa] 112 NW 828. In action to recover rent paid in advance for premises, which plaintiff alleged were falsely and fraudulently represented to him as being dry when they were in fact damp, and on account of the misrepresentations he rescinded the lease and abandoned the premises, evidence that while residing in the house members of the plaintiff's family were taken sick with colds, tonsilitis, and lumbago, held inadmissible to show dampness of house. Wintersteen v. Krumbhaar, 104 NYS 665.

99. Action to recover fees paid by candidates under protest in compliance with unconstitutional election law, in order to have names printed on ballots, held proper procedure, where plaintiffs allege insufficient time before election for them to institute an action or any special proceedings, either at law or otherwise, for purpose of compelling their names to be placed on the ballot, and defendant by demurrer admits this allegation. Johnson v. Grand Forks County [N. D.] 113 NW 1071.

1. Mistake of fact as to whose account payment should be charged held from the evidence not to be material. Kessler v. Herklotz [N. Y.] 82 NE 739.

2. Portion of purchase money returned under mistake in mathematical calculation as to what amount should have been paid. Stowell v. Ames, 148 Mich. 439, 14 Det. Leg. N. 257, 111 NW 1070. Money overpaid by mistake as to amount of land sold. Peacock v. Barnes, 142 N. C. 215, 55 SE 99. Where taxes are paid and received under a mutual mistake of a fact on which the validity of the tax depends, such payment is not voluntary and is always recoverable back. Betz v. New York, 103 NYS 886. Mistake as to jurisdiction in which property taxable. Id. Pension checks or warrants, issued by a pension agent of the United States, are commercial paper within the rule entitling one, who through mistake has paid out money on a forged endorsement of commercial paper, to recover the same back, if notice of the forgery was given to the party receiving such payment within a reasonable time after its discovery. National Exchange Bk. of Providence v. U. S. [C. C. A.] 151 F 402. Held, United States having been guilty of unreasonable delay in giving notice of Id. Evidence held to show no mistake either of law or fact. Morrison v. Payton, 31 Ky. L. R. 992, 104 SW 685. Money paid under mistake of fact may be recovered back though payor was negligent. Hathaway v. Delaware County, 185 N. Y. 368, 78 NE 153. Payment by wife of husband's debt under mistaken belief that property seized therefor belonged to her cannot be recovered back. Pelletier v. State Nat. Bk, 117 La. 335, 41 S 640.

3. Where insurance policy was paid, the assured having been absent and unheard of for more than seven years, under the mistaken belief that he was dead, and under a compromise on the question whether anything was payable, and to avoid litigation plaintiff elected to make payment, held, the evidence showing that question whether assured was dead was distinctly within contemplation of both parties, that plaintiff conceded his liability by voluntarily paying the claim and there could be no recovery thereof. New York Life Ins. Co. v. Chittenden, 134 Iowa, 613, 112 NW 96.

4. Knudsen-Ferguson Fruit Co. v. Chicago, etc., R. Co. [C. C. A.] 149 F 973. Crediting of dividends on alleged indebtedness of stockholder to corporation held not a voluntary payment precluding recovery of the dividends. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 NYS 52. Where consignee, after goods had been delivered to it by carrier, and with full knowledge of all the facts, paid, without an expression of dissatisfaction, charges for transportation, including a charge for icing service in addition to the published rates, such payment is voluntary and without duress of goods, and no recovery can be had of money paid for such additional service as being exacted illegally. Knudsen-Ferguson Fruit Co. v. Chicago, etc., R. Co. [C. C. A.] 149 F 973. Evidence held to show that amount sued for was advanced in payment of taxes and not as a loan, and such payment having been made by plaintiff voluntarily through its duly constituted agents, who had authority to make such payment, cannot be recov-

take of law cannot be recovered,[5] but the rule does not apply to a payment by public officials of a claim not authorized by law,[6] though a mere voluntary payment is insufficient.[7] Where one pays money which another in equity and good conscience ought to pay, especially if compelled to do it, he may recover the same under a promise implied in law.[8] Where money has been paid in satisfaction of a judgment which is afterwards reversed, the law implies a promise to restore it to the party from whom it was exacted.[9] Money loaned may be recovered in an action for money

ered back. Fourche Planting Co. v. Brown [Ark.] 104 SW 1120. Taxes voluntarily paid cannot be recovered back. Petty v. Beers, 127 Ill. App. 593.

5. Newhall v. Jordan, 149 F 586. Where taxes are paid on imports, and importer himself pursues the law, making his own interpretation thereof, and he interprets it mistakenly, there can be no recovery of taxes so paid, as it is a pure mistake of law. Id. Draft to order of joint parties indorsed by one to his coparty. Rawson v. Bethesda Baptist Church, 123 Ill. App. 239. Voluntary payment made under mistake of law cannot be recovered back. Bobst v. Gring, 32 Pa. Super. Ct. 541. Difference between simple interest and compound interest paid under mistake of law held not recoverable. Clausen v. Puvogel, 114 App. Div. 455, 100 NYS 49. Where a child was born after making a will, devising testator's property to his wife, and widow assuming that devise was not affected by the birth of the child conveyed a part of said property which, after attempted mesne conveyances, the then assumed owner mortgaged to defendant and afterwards conveyed to plaintiff, who paid the mortgage under the mistaken belief that their deed conveyed title in fee to the premises, held plaintiffs could not recover the amount so paid, the mistake having been one of law. Belloff v. Dime Sav. Bk. of Williamsburgh, 118 App. Div. 20, 103 NYS 273. Plaintiff, a railroad, paid the full tax assessed against it, and such assessment included all its property in the county subject to taxation. Through a mistake of fact with reference to township boundaries a portion of the road was apportioned to the wrong township. After discovery of the mistake the auditor assessed such portion as omitted property in the proper township and plaintiff again paid taxes on it, which it seeks to recover. Held that the mistake gave the auditor no authority to assess omitted property, for none had been omitted, and the payment being voluntary there could be no recovery in absence of a statute authorizing it. Baltimore, etc., R. Co. v. Oregon Tp. [Ind. App.] 81 NE 105.

6. Jay County Com'rs v. Pike Civil Tp., 168 Ind. 535, 81 NE 489. Under the statutes a county auditor has no right to tax and collect any fee or compensation for procuring and delivering lists of road taxes to township trustees, and a civil township may recover back township funds paid by its trustees for such lists. Id. Such an action in court not being an action on a claim created in violation of § 25 of the County Reform Law, being § 5594e1, Burn's Ann. St. 1901, the want of an appropriation by the council to pay the claim is no defense. Id. State may recover sum paid to state bookbinder in excess of price authorized by law and erroneously allowed by the secretary of state. State v. Young, 134 Iowa, 505, 110 NW 292. An action as for money had and received properly lies in the name and on behalf of a county to recover money paid under a void warrant through the mistake of its officers and the person receiving the money. McDonald's Adm'x v. Franklin County, 30 Ky. L. R. 1245, 100 SW 861. Money paid for the use and benefit of defendant may be recovered if paid upon an actual or implied request. Babcock v. Anson, 106 NYS 642. Municipality may recover back amount paid by it under an invalid contract though it has received benefits of contract. McCarthy v. Bloomington, 127 Ill. App. 215. Payment by bank of drafts with bills of lading attached, drawn on defendant for goods sold him, and which defendant promised in writing to pay when presented. First Nat. Bk. of Redlands v. Goldsmith [Ind. App.] 82 NE 799. Plaintiff's payment through compulsion of his endorsement without value and for defendant's accommodation of sum of money of which defendants have received the benefit entitles him to reimbursement, and the law will, if necessary, imply defendants' promise to make plaintiff good. Foster v. Balch, 79 Conn. 449, 65 A 574. In an action to recover certain taxes alleged to have been paid by plaintiff for defendants and at their request, the contract under seal for the sale of land to plaintiff out of which the alleged duty of defendants to pay the taxes arose is admissible to show upon whom the obligation rested to pay them. Fry v. Talbott [Md.] 66 A 664. Question for jury to determine whether what plaintiff paid was correct amount. Id. In an action to recover money paid at request of defendant, evidence held sufficient to entitle plaintiff to recover. Menasha Wooden Ware Co. v. Nelson [Wash.] 88 P 1018.

7. One who voluntarily pays taxes on the land of another without a request or a subsequent promise to repay cannot recover (Mitchell v. Danielson, 38 Colo. 63, 89 P 823), unless subsequently ratified (Id.). Where the agent of the owners of real estate appropriates the money of another to pay taxes thereon, the refusal of the owners to repay the same without knowledge of such voluntary and unauthorized act of the agent does not amount to a ratification. Foote v. Cotting [Mass.] 80 NE 600. It not appearing that the taxes constituted a statutory lien, with notice of which the owners are chargeable, their failure to decline the benefit received thereby is not, of itself, sufficient to create an implied contract to repay. Id.

8. Foster v. Balch, 79 Conn. 449, 65 A 574. Vendor paying taxes may recover from vendee. Mangold v. Isabella Furnace Co., 31 Pa. Super. Ct. 275.

9. Henry Vogt Mach. Co. v. Lingenfelser, 30 Ky. L. R. 654, 99 SW 358.

had and received.[10] A party to a contract failing to perform cannot recover the money paid thereunder [11] though the other party thereto may recover what he has parted with.[12]

§ 4. *Use and occupation.* See 8 C. L. 164—Since the right to recover for use and occupation of real estate involves the relation of landlord and tenant, it is treated in that topic.[13] An action for use and occupation will not lie against one whose possession is tortious, for the reason that the relation of landlord and tenant does not exist by implication in such cases.[14] The use of a room in a hotel, no agreement being made as to rent, raises an implied promise to pay only the fair rental value.[15]

§ 5. *Torts which may be waived and sued on as implied contracts.*[16]

§ 6. *Remedies and procedure.*[17]—The action upon implied contract must be brought within the time prescribed by the statute.[18] An action for money had and received,[19] or for goods sold and delivered,[20] may be maintained by the person having an interest therein. All parties having a common interest in the subject-matter may be joined as plaintiffs in an action for money had and received.[21] In an action

10. Evidence held to sustain finding that amount sued for was not advanced as a loan but in payment of taxes. Fourche Planting Co. v. Brown [Ark.] 104 SW 1120. Evidence held insufficient to sustain finding that money was loaned to defendant and not a third person. Young v. Anthony, 104 NYS 87. Burden on plaintiff to prove loan to defendant. Id. In an action to recover money loaned, evidence held to establish a prima facie case rendering a nonsuit erroneous. Archibald Estate v. Matteson [Cal. App.] 90 P 723. Evidence held sufficient to sustain judgment for recovery of money loaned. Meredith v. Miller [Tex. Civ. App.] 17 Tex. Ct. Rep. 838, 99 SW 430.

11. Where, for failure of the party to comply with his contract to complete a boat at a certain time, the contract was rescinded by the other party, the former cannot recover the money expended for his labor and materials. Whiting v. Derr, 105 NYS 854.

12. Upon failure of defendant to comply with his contract with plaintiff to complete a boat in a certain time, plaintiff may rescind contract and recover money advanced thereunder by him. Whiting v. Derr, 105 NYS 854. As the allegation that defendant failed to complete and deliver boat cannot admit the implication that he constructed the boat until it was launched or was fit for launching, it was not incumbent on plaintiff to allege compliance with a condition under the contract that a payment must be made when the boat was launched. Id.

13. See Landlord and Tenant, 8 C. L. 656.

14. Trespasser. Cole v. Thompson, 134 Iowa, 685, 112 NW 178.

15. No evidence of such value. Roche v. Road Driver's Ass'n, 96 NYS 205.

16. See 8 C. L. 164. See, also, Election and Waiver, 9 C L. 1037.

17. See 8 C. L. 165. See, also, Assumpsit, 9 C. L. 277.

18. Where deceased promised to compensate plaintiff for services rendered out of her estate at the time of her death, the statute of limitations does not begin to run until such decease, and plaintiff is not limited to six years preceding death of decedent. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 NW 1066. In an action for money had and received, the statute of limitations begins to run from the time the money was received and not from date of maturity of note in payment of which money was received. Whittle v. Whittle [Cal. App.] 91 P 170. Under Revisal 1905, § 395, subsec. 9, an action to recover money overpaid by mistake as to amount of land sold is barred in three years from time mistake was discovered by plaintiff, or could have been discovered by the exercise of ordinary diligence. Peacock v. Barnes, 142 N. C. 215, 55 SE 99. Question as to whether such diligence was exercised held a question for the jury. Id. Cause of action does not, as a matter of law, accrue on delivery of deed containing an accurate description of the land by metes and bounds, so that exact quantity may be readily ascertained by calculation. Id. As against an action to recover money paid under an executory contract not executed. the statute of limitations begins to run from the time the contract is broken and not from time of receipt of money. Tomlinson v. Bennett [N. C.] 59 SE 37. Action by son to recover for boarding and caring for his mother held barred. Bryson's Adm'r v. Biggs [Ky.] 104 SW 982.

19. An action for money had and received may be brought by the party to whom the money belonged. Crane v. Phillips, 105 NYS 417. Evidence held insufficient to prevent plaintiff bringing action in her own name, and not as executrix, to recover money given to defendant to deposit in his own name for plaintiff's benefit. Crane v. Phillips, 105 NYS 417.

20. Where an express company required its driver to pay for goods which he claimed to have delivered to a purchaser but which the latter denied having received, the company having paid the consignor their value, the driver, on procuring an assignment from the consignor of his claim for the unpaid purchase price, was held entitled to recover the value of the goods from the purchaser upon proving delivery. Buchholz v. Darwick, 115 App. Div. 843, 101 NYS 17.

21. Where trustees under a will paid under protest an internal revenue tax, erroneously assessed against three cestuis que trustent under the will, such beneficiaries and trustees may join in a single suit to recover the same. Rev. St. Mo. 1899, §§ 542, 544, 717. Armour v. Roberts, 151 F 846.

for money paid, the defendants are not entitled to set off an indebtedness due from plaintiff to a third person.[22] A complaint in an action to recover the value of services rendered and materials furnished,[23] or for money paid out for defendant's benefit and at his request,[24] must allege all facts essential to a recovery. A reply to purely defensive matter is only necessary when the pleader wishes to confess and avoid.[25] Generally, in an action to recover quantum meruit for services rendered, plaintiff has the burden of showing the rendition of such services,[26] but there is a presumption that he was to be remunerated. Held instructions should have been refused requiring plaintiff, in order to recover, to show that when she rendered services she did so with expectation of being compensated therefor,[27] but in an action for labor performed and materials furnished under a building contract, the burden of proving full performance of the contract is not on the plaintiff, where the defendant has issued a final certificate which the contract provides shall be conclusive evidence of performance.[28] In an action to recover quantum meruit for services rendered, plaintiff has the burden of showing the value thereof.[29] In an action to recover quantum meruit for services rendered, the request for the service and its performance being admitted by defendant, the burden is on him to show that plaintiff undertook to render such service gratuitously or at a lower rate than alleged.[30] In an action to establish a claim for services against a decedent's estate, evidence as to the value of the estate,[31] or the value of the services, is admissible,[32] and in an action for services rendered, in securing options for the purchase of lands, evidence of the value of the lands is competent as bearing upon the value of such serv-

22. Where plaintiff indorsed a note without consideration for accommodation of both maker and payees, and is compelled to pay the note, in an action against payees to recover amount so paid, held payees not entitled to set off indebtedness due from plaintiff to maker. Foster v. Balch, 79 Conn. 449, 65 A. 574.

23. A complaint stating that plaintiff performed certain services for defendant, and alleging their reasonable value, that they were rendered at the special instance and request of defendant and were unpaid, states all the facts that are required to be stated on quantum meruit. Brown v. Crown Gold Mill. Co., 150 Cal. 376, 89 P. 86. Allegation of express promise to pay is mere surplusage not vitiating complaint. Id. Not necessary to allege that employer expressly agreed to pay for services or to pay a precise sum. If he engaged plaintiff in his service, or if he performed work at his request, the implication is that he was to pay therefor. Babcock v. Anson, 106 NYS 642. Complaint not fatally defective because of failure to allege that extra work and materials sued for, and claimed to have been ordered after execution of contract and to have been used by defendant, did or did not pass inspection of engineer as required by contract for work done thereunder. Beattie v. McMullen [Conn.] 67 A. 488.

24. Allegation that defendant's intestate became indebted to plaintiff for money paid out and expended for use and benefit of said intestate and at her instance and request and in the purchase of certain merchandise, in a certain sum, sufficiently alleges the origin of the indebtedness. Babcock v. Anson, 106 NYS 642.

25. Where, in action based on implied promise to pay for services, it is pleaded in defense that plaintiff rendered services as a member of defendant's family, a reply is not necessary under Code, § 576. Webster v. Armstrong [Iowa] 113 NW 549.

26. Error in instruction assuming rendition of services held cured by other instructions casting burden on plaintiff. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63. Error also cured by defendant's admission that plaintiff had performed such services. Id.

27. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63.

28. Certificate conclusive unless overthrown by proof of fraud or mistake. Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 NE 1038. Evidence held to show absence of fraud. Id.

29. On question of value of services, instruction that this question should be determined by a preponderance of the evidence held correct. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006.

30. Hall v. Luckman, 133 Iowa, 518, 110 NW 916.

31. Fact that decedent possessed modest competence, in connection with other facts, held not to be wholly irrelevant to fact that decedent requested plaintiff to perform for him the general duties of housekeeper and nurse, promising to pay her the reasonable value of such services (Leonard v. Gillette, 79 Conn. 664, 66 A. 502), nor to fact that for six years she performed these services without insisting upon payment (Id.).

32. Where jury finds contract to be for full compensation out of decedent's estate, evidence of value of services is admissible. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 NW 1066.

ices.[33] Where, in an action under the common counts for labor performed and materials furnished, the contract has been performed and it only remains to pay the contract price, the contract may be read in evidence to show its terms,[34] and where services are rendered and materials furnished under a contract partially performed, the latter is evidence of their value.[35] In an action to recover the value of professional services, the reasonableness of the charge cannot be established by showing what the plaintiff charged another person in a similar case,[36] but evidence showing that plaintiff's standing in the profession is high is admissible.[37] The objection of a variance may be waived.[38] The question of what is the reasonable value of professional services is peculiarly within the province of the jury.[39] A count upon a contract and one upon a quantum meruit for the same relief may be submitted to the jury together, under an instruction that there can be but one recovery,[40] but where the case was not submitted to the jury on the theory of quantum meruit, no recovery can be had thereunder, on failure to establish the express contract.[41] The recovery cannot exceed the amount stated in the bill of particulars.[42]

IMPLIED TRUSTS; IMPLIED WARRANTIES; IMPOUNDING; IMPRISONMENT FOR DEBT; IMPROVEMENTS, see latest topical index.

INCEST.[42a]

Matters common to all crimes are elsewhere treated.[43]

The crime is purely statutory [44] and is distinct from rape.[45] The information must be definite and certain,[46] and where the evidence shows more than one act of intercourse the state must elect as to which it will rely upon for conviction,[47] and in such case the jury should be restricted to a consideration of a particular act.[48] Prior

33. Services in securing options for the purchase of coal lands. Donk Bros. Coal & Coke Co. v. Stroetter, 229 Ill. 134, 82 NE 250.

34. Evidence held to show that building had been fully performed. Concord Apartment House Co. v. O'Brien, 228 Ill. 360, 81 NE 1038.

35. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

36. Evidence that plaintiff charged another customer a smaller sum, for similar services, than that demanded of defendant, held inadmissible. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006.

37. In action by veterinary surgeon to recover value of professional services, testimony of another veterinary surgeon that he considered plaintiff a competent surgeon and that his opinion would be all right to rely on held admissible. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006.

38. Where defendant, in its instruction, submitted to jury the right of plaintiff to recover on a quantum meruit, it cannot on appeal object that there was no count upon a quantum meruit in the declaration. Donk Bros. Coal & Coke Co. v. Stroetter, 229 Ill. 134, 82 NE 250.

39. Services rendered by veterinary surgeon. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006.

40. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

41. Action to recover for services rendered by architect. Bluemner v. Garvin, 104 NYS 1009.

42. Where in an action for work and labor the value of the services is stated in a bill of particulars, the recovery cannot exceed such amount with interest from the time the services were concluded. Dussoulas v. Thomas [Del.] 65 A 590.

42a. See 8 C. L. 167.

43. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 8 C. L. 189.

44. Words "within and not including the fourth degree of consanguinity" in Rev. St. 1898, § 4732, held descriptive of classes of persons prohibited from marrying, cohabiting, or having sexual intercourse, the different degrees of relationship being grouped to avoid necessity of specific enumeration. State v. James [Utah] 89 P 460.

45. Evidence that prosecutrix, a sister of accused, did not consent to particular act of intercourse relied on, held not to require conviction for rape rather than incest, there being no evidence that prosecutrix was under eighteen years of age. People v. Block, 105 NYS 275.

46. Information charging intercourse with niece with knowledge of relationship held sufficiently definite under Rev. St. 1898, § 4732, requiring information to be direct and certain as to party and offense charged. State v. James [Utah] 89 P 460.

47. Under Rev. St. 1899, § 2172 (Ann. St. 1906, p. 1394), making each act of intercourse a crime where more than one act of intercourse is shown within the statutory period, the state at the close of its case should be required to elect. State v. Pruitt, 202 Mo. 49, 100 SW 431.

48. Where evidence tended to show more than one act of incestuous intercourse, instruction which did not restrict jury to

intercourse [4] and acts of lascivious familiarity not amounting to intercourse [50] may be considered by the jury. The state must prove the commission of the crime beyond a reasonable doubt,[51] but the exact date of its commission need not be established.[52] Where one of the parties to the incestuous relationship is an accomplice,[53] corroboration is required, and the necessity for corroboration must be presented to the jury under proper instructions.[54]

INCOMPETENCY.

§ 1. Mental Weakness Sufficient to Constitute Incapacity, 40.
§ 2. Effect of Incompetency on Contracts, 41.
§ 3. Remedies and Procedure, 41.

The scope of this topic is noted below.[55]

§ 1. *Mental weakness sufficient to constitute incapacity,* See 8 C. L. 169 must be such as to render the person whose act is brought into judgment wholly incapable, at the time of the act in question, of understanding its nature and effect or the business being transacted.[56] Limited intelligence [57] or occasional weakness of the

a particular act held erroneous under Rev. St. 1899, § 2172 (Ann. St. 1906, p. 1394), making each act of intercourse a crime. State v. Pruitt, 202 Mo. 49, 100 SW 431.

49. In determining guilt or innocence of accused, jury may consider acts of intercourse prior to the one upon which state relies for conviction. State v. Pruitt, 202 Mo. 49, 100 SW 431. Where defendant on cross-examination denied confession of intercourse with sister prior to act relied on, the confession was held properly admitted not to test his credibility but to prove the issue. People v. Block, 105 NYS 275.

50. State v. Pruitt, 202 Mo. 49, 100 SW 431.

51. Improper caresses held insufficient to sustain conviction, no act of intercourse being shown. Hardin v. Com. [Ky.] 99 SW 328. Evidence held sufficient to sustain conviction of father for incestuous relation with daughter. Bridges v. State [Neb.] 113 NW 1048.

52. Under Rev. St. 1899, § 2172 (Ann. St. 1906, p. 1394), state need not prove that offense was committed on any particular day, so that it was within three years before filing of information. State v. Pruitt, 202 Mo. 49, 100 SW 431.

53. Girl under sixteen maintaining incestuous relations with father under physical and moral coercion held not an accomplice. Bridges v. State [Neb.] 113 NW 1048.

Note: "A woman who voluntarily yields herself to an incestuous intercourse is regarded as an accomplice with the man, and her testimony is governed by the law of accomplice testimony: Solomon v. State, 113 Ga. 192, 38 SE 332; State v. Kellar, 8 N. D. 663, 80 NW 476, 73 Am. St. Rep. 776; Shelly v. State, 95 Tenn. 152, 31 SW 492, 49 Am. St. Rep. 926; Freeman v. State, 11 Tex. App. 92, 40 Am. Rep. 787; Dodson v. State, 24 Tex. App. 514, 6 SW 548; Blanchette v. State, 29 Tex. App. 46, 14 SW 392; Stewart v. State, 35 Tex. Cr. R. 174, 60 Am. St. Rep. 35, 32 SW 766; Clark v. State, 39 Tex. Cr. R. 179, 73 Am. St. Rep. 918, 45 SW 576; Ratliff v. State [Tex. Cr. App.] 60 SW 666. But it is otherwise if she is the victim of force, threats, duress, fraud, or undue influence, so that she does not join in the intercourse with the same intent that he does. Smith v. State, 108 Ala. 1, 54 Am. St. Rep. 140, 19 S 306; State v. Kouhns, 103 Iowa, 720, 73 NW 353; Schwartz v. State, 65 Neb. 196, 91 NW 190; Mercer v. State, 17 Tex. App. 452; Mullinix v. State [Tex. Cr. App.] 26 SW 504; Porath v. State, 90 Wis. 527, 48 Am. St. Rep. 954, 63 NW 1061. In Whittaker v. Commonwealth, 95 Ky. 632, 27 SW 83, it is held that a father may be convicted of incest with his minor daughter on her unsupported testimony, though, perhaps, she consented, for she was not his accomplice, but his victim. Where the common-law rule concerning accomplice testimony prevails, a conviction for incest may be had on the uncorroborated evidence of the female, although she is an accomplice. Brown v. State, 42 Fla. 184, 27 S 869. For decisions considering the sufficiency of the corroborative evidence in prosecutions for incest, see State v. Streeter, 20 Nev. 403, 22 P 758; State v. Jarvis, 20 Or. 427, 23 Am. St. Rep. 141, 26 P 302; Schoenfeldt v. State, 30 Tex. App. 695, 18 SW 640; Ceasar v. State [Tex. Cr. App.] 29 SW 785."—From Stone v. State [Ga.] 98 Am. St. Rep. 145.

54. Charge on necessity for corroboration of testimony of accomplice and definition of same held correct. Bridges v. State, [Neb.] 113 NW 1048. Instruction on corroboration of accomplice held erroneous as an instruction on the weight of evidence. State v. James [Utah] 89 P 460.

55. It includes only mental incapacity to contract. Testamentary capacity (see Wills, § 2, 8 C. L. 2307), contractual incapacity other than from mental incompetence (see Infants, 8 C. L. 267, and like topics), and the disability of adjudicated lunatics to contract (see Insane Persons, 8 C. L. 319), are excluded. Expert and opinion evidence as to capacity is treated in Evidence.

56. Sbarbero v. Miller [N. J. Eq.] 65 A 472.

The test of whether a person is competent to make a deed is that he should be qualified to transact that particular business rationally, not on the one hand that he should be capable of doing all kinds of business with discretion, nor on the other that he be wholly deprived of reason. Nelson v. Thompson [N. D.] 112 NW 1058. Where

mind or wanderings of the intellect during sickness is not sufficient.[58] Extreme old age and debility, however, may raise a presumption of incapacity.[59]

§ 2. *Effect of incompetency on contracts.* See 6 C. L. 170—A contract by an incompetent will be sustained if fair and free from oppression [60] or necessary for his support,[61] but pure and honest motives will not make transactions legal.[62] The contracts of incompetent person are generally not void but voidable.[63]

§ 3. *Remedies and procedure.* See 6 C. L. 171—Findings of a lunacy commission are prima facie only.[64] Mental incapacity once shown may be presumed to continue until contrary is proven.[65] To avoid a contract on a plea of incapacity disaffirmance should be made, and [66] the consideration should generally be returned within a reasonable time [67] or liability denied thereon.[68] Incompetency must be clearly alleged [69] in the pleading seeking relief on account thereof.[70] The burden of showing

grantor is capable of understanding and did understand that he owned property and could dispose of it, held sufficient to make a deed. Chase v. Spencer [Mich.] 14 Det. Leg. N. 615, 113 NW 578.

To avoid a contract on ground of intoxication one must be incapable of understanding and comprehending the terms and conditions of the contract. Case Threshing Mach. Co. v. Meyers [Neb.] 111 NW 602. Evidence of incompetency by reason of intoxication held sufficient. Behrns v. Qualman, 147 Mich. 635, 14 Det. Leg. N. 9, 111 NW 198. Delirium tremens though suffered immediately prior to the event in question held not sufficient. Hudson v. Hudson, 144 N. C. 449, 57 SE 162. Incompetency by reason of excessive use of intoxicants. Jones v. Hughes [Iowa] 110 NW 900. Transferee gave drink of whiskey to transferror, thereby rendering him unfit to consider any business proposition or to understand his acts, and that transferee while transferror was in such condition purchased his business states a cause of action. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549. Under undue excitement from liquor not sufficient. Case Threshing Mach. Co. v. Meyers [Neb.] 111 NW 602.

Evidence held to show mental incapacity. Smith v. Gardner, 147 Mich. 670, 14 Det. Leg. N. 23, 111 NW 347; Hurley v. Kennally, 206 Mo. 282, 103 SW 937; Birdsall v. Leavitt [Utah] 89 P 397.

Evidence held to show capacity. Bishop v. Hilliard, 227 Ill. 382, 81 NE 403; McIntyre v. Bullock, 30 Ky. L. R. 261, 97 SW 1117; McClellan v. O'Connor [Wash.] 91 P 562. Grantor had received a severe and fatal injury and was unable to sign his deed except by mark, but apart from the effects of injury he had suffered the integrity of the mental processes of the decedent was not disputed. Blackmore v. Thompson, 149 Mich. 693, 14 Det. Leg. N. 583, 113 NW 307. Opinions of three lay witnesses not stating their opportunity for observation held insufficient to show incapacity. Hoffman's Estate, 32 Pa. Super Ct. 646.

57. Chase v. Spencer [Mich.] 14 Det. Leg. N. 615, 113 NW 578. Childishness but not insanity is not sufficient to show incapacity to make a deed. Schillinger v. Bawek [Iowa] 112 NW 210. Fretful or querulous disposition not sufficient. Dunaway v. Dunaway [Ky.] 105 SW 137. Mere impairment of memory by reason of advanced years insufficient. Sears v. Vaughan, 230 Ill. 572, 82 NE 881.

58. Hudson v. Hudson, 144 N. C. 449, 57 SE 162.

59. One 85 years old, blind and paralyzed, sufficient evidence of permanent and continuous incompetency. Studebaker v. Faylor [Ind. App.] 80 NE 861.

60. Dunaway v. Dunaway [Ky.] 105 SW 137.

61. Dunaway v. Dunaway [Ky.] 105 SW 137; Gross v. Jones, 89 Miss. 44, 42 S 802.

62. Jacks v. Deering, 150 Cal. 272, 88 P 909. Although the grantees be not concerned or a party to procuring the execution of a deed from an incompetent grantor, yet the instrument is not validated thereby. Id. Debtor will not be relieved from any conditions of his contract even where he honestly believes that his creditor is insane if creditor has not been found a lunatic. Gorgas v. Saxman, 216 Pa. 237, 65 A 619.

63. Jack v. Deering, 150 Cal. 272, 88 P 909. Act Pa. 1895, authorizing proceedings for protection of weak minded persons, operates prospectively. Gorgas v. Saxman, 216 Pa. 237, 65 A 619.

64. On an application to set aside an assignment of leasehold interest on account of insanity of assignor, it was held, since conveyance was made before office found, as evidence only of incapacity. Sbarbero v. Miller [N. J. Eq.] 65 A 472. Where the evidence was conflicting, acts done prior to office found under Pa. Act 1895 were held legal. Safe Deposit & Trust Co. v. Hollinger, 216 Pa. 645, 65 A 1083. An allegation in a petition stating mental imbecility and an order for appointment of a guardian reciting that such person was incompetent to have charge of property does not prove incapacity to dispose of property and execute proper conveyances. Chase v. Spencer [Mich.] 14 Det. Leg. N. 615, 113 NW 578.

65. Rogers v. Rogers [Del.] 66 A 374.

66, 67. Case Threshing Mach. Co. v. Meyers [Neb.] 111 NW 602.

68. Case Threshing Mach. Co. v. Meyers [Neb.] 111 NW 602. Restoration of consideration is unnecessary to a disaffirmance of contract if there has been notice of incapacity. Studebaker v. Taylor [Ind. App.] 80 NE 861. Mental incapacity being proved at time of giving release, consideration need not be tendered back before bringing action. St. Louis, etc., R. Co. v. Sandidge [Ark.] 99 SW 68.

69. Complaint alleging that the transferror of personalty was not in fit condition to transact business and unable to understand

incapacity is upon him who alleges it,[71] and must be proved by a preponderance of the evidence.[72] Some authorities, however, limit this rule to incapacity but temporary and occasional.[73] Evidence as to condition before and after the act in question may be relevant.[74]

INDECENCY, LEWDNESS, AND OBSCENITY.

The scope of this topic is noted below.[75]

*Prostitution.*See 8 C. L. 171—Statutes in most states make it a criminal offense to induce a female under age to enter a house of assignation or prostitution, and the fact that the accused was ignorant of her age is immaterial.[76] Consent on the part of the husband to his wife becoming an inmate of a house of prostitution is also made criminal by some statutes,[77] notwithstanding the fact that she did not take up her residence therein for the purposes of prostitution,[78] and under such a statute an information in the language of the statute is sufficient,[79] but as the husband's assent is the gist of the offense, the jury should be instructed as to the legal effect of his efforts to induce her to leave.[80]

*Obscene words or publications.*See 8 C. L. 172—Under the New York statute to render a publication indecent, it must be obscene,[81]

*Lascivious conduct.*See 8 C. L. 172—Blanket statutes in many states make criminal indecent acts not covered by other statutes,[82] and offenses thereunder must be distinguished from other offenses against morality or against the person for which specific provision is made[83] unless the violation thereof necessarily results in the

the nature and effect of his acts held insufficient. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549.

70. Incapacity cannot be alleged for the first time in the reply. Burk v. Pence, 206 Mo. 315, 104 SW 23.

71. Rogers v. Rogers [Del.] 66 A 374; Ireland v. White, 102 Me. 233, 66 A 477; Burk v. Pence, 206 Mo. 315, 104 SW 23. Undue influence must be proved by party asserting it. Rogers v. Rogers [Del.] 66 A 374. Where a fiduciary relationship is shown to exist, he who sets up contract of a person of mental weakness must prove capacity. Bishop v. Hilliard, 227 Ill. 382, 81 NE 403.

72. Ireland v. White, 102 Me. 233, 66 A 477; Behrns v. Qualman, 147 Mich. 635, 14 Det. Leg. N. 9, 111 NW 198.

73. Hudson v. Hudson, 144 N. C. 449, 57 SE 162.

74. To aid the jury in determining mental condition at the particular time of the act in question. Rogers v. Rogers [Del.] 66 A 374. Certified copies of wills made a long time before incompetency is predicated held competent evidence to show capacity of grantor to execute a deed. Bishop v. Hilliard, 227 Ill. 382, 81 NE 403.

75. It includes miscellaneous offenses against public decency and morality. **It excludes** matters common to all crimes (see Criminal Law, 9 C. L. 851; Indictment and Prosecution, 8 C. L. 189) and many specific offenses against decency (see Abduction, 9 C. L. 7; Disorderly Houses, 9 C. L. 996; Fornication, 9 C. L. 1445; Profanity and Blasphemy, 8 C. L. 1467, and the like).

76. It is not necessary under an indictment for "inducing, decoying, or procuring any female under eighteen years of age * * * to enter any house of assignation or any house of ill fame for the purpose of seduction or prostitution" that defendant shall be charged with knowledge that female so decoyed was under eighteen years of age. Studer v. State, 9 Ohio C. C. (N. S.) 185.

77. St. 1891, p. 285, c. 206, § 1. People v. Conness, 150 Cal. 114, 88 P 82, rvg. [Cal.] 88 P 815 [Advance sheets only].

78. St. 1891, p. 285, c. 206, § 1, making it a felony for a husband to leave his wife in a house of prostitution, or to connive at, consent to, or permit of, her being placed therein, applies though she is left in such a house for the purpose of engaging in an innocent occupation. People v. Conness, 150 Cal. 114, 88 P 821, rvg. [Cal.] 88 P 815 [Advance sheets only].

79. Information in language of St. 1891, p. 285, c. 206, § 1, held sufficient though it did not aver that wife was left in such house for purposes of prostitution. People v. Conness, 150 Cal. 114, 88 P 821, rvg. [Cal.] 88 P 815 [Advance sheets only].

80. Refusal of instruction that no presumption of law could arise from fact that defendant's wife resided in a house of prostitution with his knowledge held error where there was evidence of efforts on his part to induce her to leave. People v. Conness, 150 Cal. 114, 88 P 821, rvg. [Cal.] 88 P 815 [Advance sheets only].

81. Word "indecent" in Penal Code, § 317, refers to obscenity. Attack on confessional of Roman Catholic Church held not obscene. People v. Eastman, 188 N. Y. 478, 81 NE 459.

82. Okl. St. 1893, § 2552, covers only such acts as are not made punishable by other portions of the statute. Gunn v. Territory [Okl.] 91 P 861.

83. Acts sufficient to constitute an attempt to commit rape do not constitute a violation of Penal Code, § 288, prohibiting lascivious acts of a character which do not amount to

commission of another crime.[84] Statutes in some states prohibit the lascivious cohabitation [85] of persons of opposite sex, one or both of whom is married, but not to each other,[86] but the illicit relationship must be shown beyond a reasonable doubt.[87] Lascivious conduct in private is not a crime within a statute prohibiting acts tending to outrage public decency or injurious to public morals.[88]

INDEMNITY.

§ 1. Definition and Distinctions, 43.
§ 2. The Contract, 43.
§ 3. Interpretation and Effect of Contract, 44.
§ 4. Actions on Contract, 45.
§ 5. Defenses, 47.
§ 6. Measure of Recovery, 47.

The scope of this topic is noted below.[89]

§ 1. *Definition and distinctions.*See 8 C. L. 173

§ 2. *The Contract. Requisites and validity.*See 8 C. L. 173—An application for a surety bond signed by the applicant and delivered to an indemnity company and accepted and acted upon by it constitutes a complete contract between the parties.[90] An indemnity contract must be supported by a sufficient consideration,[91] but need not be in writing.[92] A promise to indemnify a stakeholder for any loss that may result from his paying the money to one of the parties to the wager is not void on the ground that it is a gambling contract or that the consideration is the performance of a gambling contract.[93] The renewal of an indemnity contract for a new consideration affirms the original contract and estops the indemnitor from asserting its invalidity.[94]

a crime as defined by other sections of the Penal Code. People v. Davis [Cal. App.] 91 P 810.

84. The crime of assault and battery is necessarily included in that taking indecent liberties with a female under fourteen years of age. People v. Sanford, 149 Mich. 266, 14 Det. Leg. N. 396, 112 NW 910.

85. Word "cohabit" in statutes relating to lewdness means dwelling together as husband and wife. State v. Dashman, 124 Mo. App. 238, 101 SW 597.

86. Information for violation of Rev. St. 2175 (Ann St. 1906, p. 1395), held sufficient. State v. Dashman, 124 Mo. App. 238, 101 SW 597.

87. Disposition and opportunity to engage in sexual intercourse while constituting circumstances from which guilt may be inferred does not warrant as a conclusion of law the existence of illicit relations. State v. Dashman, 124 Mo. App. 238, 101 SW 597.

88. Lewd and indecent acts toward an unmarried woman in guise of a physical examination committed in private office of physician held not a crime within St. 1893, § 2552. Gunn v. Territory [Okl.] 91 P 861.

89. It includes contracts for indemnification generally, including fidelity bonds to secure faithful performance by a specified servant, as distinguished from indemnity against loss by defalcation generally, which is treated in Insurance, 8 C. L. 377. **It excludes** contracts of guaranty (Guaranty, 9 C. L. 1545) and insurance (Insurance, 8 C. L. 377), security for debts generally (Chattel Mortgages, 9 C. L. 560; Mortgages, 8 C. L. 1022; Pledges, 8 C. L. 1431), matters common to bonds generally (Bonds 9 C. L. 394; Suretyship, 8 C. L. 2050), official bonds (Officers and Public Employes, 8 C. L. 1191), the right of officers to require indemnification before acting on writs (see Sheriffs and Constables, 8 C. L. 1897, and titles of particular writs), bonds given by fiduciaries (see Estates, of Decedents, 9 C. L. 1154; Guardianship, 9 C. L. 1551, and like topics), and bonds given in the course of procedure to indemnify the adverse party if such proceeding be unsuccessful (see Appeal and Review, 9 C. L. 108; Costs, 9 C. L. 812; Injunction, 8 C. L. 279, and the like).

90. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 NYS 756. And this though the application reciting that applicant signed "in consideration of the mutual covenants" of the indemnitor is not signed by latter. Id.

91. Where one advances money to promoters of a corporation to enable them to purchase land the option on which is about to expire, and agrees to receive therefor stock in the corporation when organized upon condition of being indemnified against loss thereon, a contract to so indemnify him is supported by a sufficient consideration. Harvey v. Bonta, 30 Ky. L. R. 1226, 100 SW 846.

92. Promise held to one of indemnity. McKnight v. Milford Gin Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 631, 99 SW 198. A promise to indemnify a stakeholder for any loss that may result from his paying the money to one of the parties to the wager is not within the statute of frauds. Himmelman v. Pecaut, 133 Iowa, 503, 110 NW 919.

93. Himmelman v. Pecaut, 133 Iowa, 503, 110 NW 919.

94. Where execution of an employer's bond by the servant was made neither a consideration for nor condition of the creation of liability by indemnitor, and bond was twice renewed for new and valuable con-

§ 3. *Interpretation and effect of contract.*[See 8 C. L. 173]—The contract will be given a reasonable construction according to the intention of the parties.[95] Surety on a fidelity bond is liable only for acts within the scope of the employment disclosed by the application [96] and only as to funds in the hands of the bonded employe at the time of the execution of the bond or coming into his hands during its life.[97] Every provision will be given effect if possible and practicable.[98] When the written and printed provisions cannot be reconciled, the written provisions prevail.[99] If the contract is susceptible of two constructions, one favorable and the other unfavorable to the indemnitor, the latter, if consistent with the object for which the contract was made, must be adopted.[1] Doubt and uncertainty about the effect of correspondence

sideration, indemnitor cannot escape liability on the last renewal on ground that bond was not signed by servant. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

95. An indemnity bond is simply a contract of suretyship, and the same rules apply in its construction that apply to contracts generally except that the letter of the contract should be more strictly construed. Fancher v. Kaneen, 5 Ohio N. P. (N. S.) 614.

Terms of employe's guaranty bond limiting liability to loss occasioned by employe's larceny or embezzlement. Williams v. U. S. Fidelity & Guaranty Co. [Md.] 66 A 495.

Notice of loss: Where an employer's indemnity bond against loss resulting from servant's embezzlement or larceny provides that notice of loss shall be given "immediately after the occurrence" of the crime "shall have come to the knowledge of the employer," notice required is only such as reasonable diligence, under all circumstances of case, dictates after knowledge is obtained of such facts as would justify a careful and prudent man in believing the crime to have been committed. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

Indemnity against loss of cargo: Where certificates of deposit are delivered under provision in charter party to be held "to indemnify you (the owners) in case of the loss of the cargo," etc., it is an agreement to indemnify against loss of cargo, and not an agreement of insurance, and the measure of liability is the value of the cargo at its destination less the cost of delivery there, and if this amount exceeds fund on deposit the whole fund is applicable to the indemnity. Leonard v. Bosch [N. J. Eq.] 68 A 56.

Contractor's bond to protect owner against damages for personal injuries: Under a bond by a building contractor to "keep harmless" the owner "from damages arising from accidents to persons employed in the construction of, or passing near," the building, the indemnity does not extend to damages arising from injuries resulting from the negligence of the owner or his servants. Perry v. Payne, 217 Pa. 252, 66 A 553.

Amount of indemnity under employer's liability policy: An employer's liability policy limited indemnity to $5,000 in respect to any one employe, and provided that if proceedings were taken to enforce against employer a claim covered by policy indemnitor should at its cost undertake defense in employer's behalf. Indemnitor defended legal proceedings brought to enforce claim covered by policy, and judgment was rendered for $6,000 with costs and interest. In action on policy such costs and interest were not recoverable, but only $5,000 together with amount paid physicians for services rendered for defendant in defense of the legal proceedings. National & Providence Worsted Mills v. Frankfort Marine Acc. & Plate Glass Ins. Co. [R. I.] 66 A 58.

Agreement between co-obligors on bond: Where a bond is secured by mortgage on property of one of obligors, and other obligor agrees in consideration of his co-obligor's consent to his release from liability on bond, in event of foreclosure of mortgage and deficiency judgment, to pay one-half of such judgment, co-obligor may maintain action on such agreement without having first paid deficiency judgment. Dilcher v. Nellany, 52 Misc. 364, 102 NYS 264.

Certification of damages by architects: In action on building contractor's bond, facts held to show sufficient excuse for failure to comply in absolute strictness with requirements of contract as to certification of damages by architects employed to superintend work. Tally v. Ganahl [Cal.] 90 P 1049.

96. Forgery of check not within scope of duties of clerk authorized to indorse for deposit but not to draw or otherwise indorse checks. Livingston v. Fidelity and Deposit Co., 76 Ohio St. 253, 81 NE 330.

97. Where funds received after expiration of bond were applied to prior shortage, only bond at time of such application was liable. Citizens' Sav. Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252.

98. Sinclair & Co. v. National Surety Co., 132 Iowa, 549, 107 NW 184. A provision in a contract insuring fidelity of plaintiff's brokers that plaintiff "will make frequent audits and examinations" is not invalid on the ground of vagueness and uncertainty where plaintiff's contract with such brokers obligates latter to make various reports, statements, deposits, etc., which if properly checked up and examined would show any defaults or mismanagement on their part. Id.

99. Printed from providing for payment of annual premium until proper release of indemnitor from bond overcome by written clause to effect that such payments are conditioned upon continuance of bond "from year to year at the request" of person, performance of whose agreement bond insures. American Surety Co. v. Empson [Colo.] 89 P 967.

1. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 357, 98 SW 387.

upon the contract should be resolved in favor of sustaining the contract as executed.[2] An employer's liability bond is essentially a contract of indemnity against loss, and the general rules governing the construction of insurance policies are applicable to it.[3] An indemnity company can recover only such premiums on a surety bond as are earned during the existence of its liability thereunder.[4] If the contract is silent as to the term for which it is to run, the court will determine its life from the facts and circumstances surrounding the parties at the time of its execution.[5] Where a municipal contractor's bond is to continue in force until the work is "completed and accepted," liability thereunder continues until both contingencies have occurred.[6] An agreement to indemnify another for loss sustained under a contract with a third person must be read in connection with such contract.[7] Under a bond to indemnify against loss arising from the "fraud or dishonesty" of an employe, liability extends to any loss arising from a breach of trust.[8] But a bond to insure the honesty of factor does not make the insurer liable for the factor's failure to turn over to the principal on demand property belonging to him or the proceeds thereof,[9] nor does a bond insuring the honesty of an employe cover money collected by him before the bond went into effect and afterwards dishonestly converted.[10] A subcontractor's bond cannot be construed as a special guaranty where there are no words importing an intention to create such a guaranty incorporated in the bond.[11]

§ 4. *Actions on contract.* See 8 C. L. 175—Suit may be brought by a corporation where it is the real party in interest though the contract was made with its directors.[12] Where the contract is assignable, suit may be brought by the assignee.[13] Persons for whose indemnification bond is given may sue in name of obligee for their use.[14] The petition must state facts sufficient to constitute a cause of action.[15] Allegations in complaint which are legitimate and essential to a full statement of plain-

2. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

3. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545; American Bonding and Trust Co. v. New Amsterdam Casualty Co., 125 Ill. App. 33.

4. Liability under municipal contractor's bond held to terminate twelve months after completion of building in relation to which bond was given. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 NYS 756.

5. Fancher v. Kaneen, 5 Ohio N. P. (N. S.) 614. Where bond is given by officer of a bank, appointed by finance committee to fill vacancy, its life will be held to cover period intervening between such appointment and its confirmation by election of board of directors; and laches and negligence of directors at time of such confirmation, in failing to provide new bond predicated upon such election, cannot be charged against the bondsmen. Id.

6. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 NYS 756.

7. Defendants agreed to indemnify plaintiffs for any loss sustained under contract by which plaintiffs agreed to make certain advances to a corporation upon condition that corporation's accounts were to be payable to them, and balance over advances and commissions to be remitted by them to the corporation. It was held that as corporation's bills were to be collected by plaintiffs there was no loss within meaning of indemnity agreement until accounts collected failed to realize amounts advanced by plaintiffs upon them. Nachod v. Hindley, 118 App. Div. 658, 103 NYS 801.

8. Liability not confined to loss arising from embezzlement or larceny. United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co. [C. C. A.] 148 F 353.

9, 10. Sinclair & Co. v. National Surety Co., 132 Iowa, 549, 107 NW 184.

11. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F 672.

12. Under the terms of bond given to directors of bank as directors and not as individuals, with the relations and understanding of the parties as in this case, the bank becomes real and sole party in interest with right to sue thereon, and assignee of bank succeeds to same right. Fancher v. Kaneen, 5 Ohio N. P. (N. S.) 614.

13. A subcontractor's bond given to indemnify principal contractor from loss under contract is assignable. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F 672.

14. City of Flora v. Searles, 127 Ill. App. 465.

15. In an action on bond conditioned to indemnify corporation for loss sustained through fraud or dishonesty of treasurer, petition held to state facts sufficient to constitute a cause of action. United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co. [C. C. A.] 148 F 353. Petition in action on indemnity bond held to allege facts which if true show defendant's liability, and therefore to be sufficient as against a general demurrer. American

tiff's cause of action will not be stricken out on motion.[16] The indemnitor cannot allege the obligees incapacity as an association to sue.[17] In Missouri where the answer alleges that the contract was executed on the faith of a written statement made by plaintiff, plaintiff's failure to verify its replication of general denial is not an admission that such statement formed the basis of the contract.[18] Evidence of an offer by defendant to compromise the claim is not admissible.[19] In an action upon a fidelity bond, evidence of the employe's general course of conduct in plaintiff's affairs is admissible to show the spirit and intent that moved him.[20] The ordinary rules as to the inadmissibility of immaterial [21] and opinion evidence [22] prevail. The evidence must show that happening of the contingency upon which the defendant's liability is to arise.[23] In an action on a fidelity bond, the burden of proof is upon the plaintiff to show that the loss sustained was the result of the misconduct of the employe,[24] and the burden is upon the defendant to prove a breach by plaintiff of the conditions of the bond.[25] Where it is conceded in an action on the bond of a bank cashier that certain collateral was embezzled during the term covered by his bond, the burden is on the sureties to show that any part of such collateral was subsequently returned and placed in the files of the bank.[26] Where one is responsible over to another and is notified of the pendency of a suit involving the subject-matter of the indemnity, the judgment rendered in such suit conclusively fixes his liability in an action on the contract of indemnity.[27] An instruction that is plainly repugnant to the terms of the contract is erroneous.[28] In an action on a fidelity bond an

Bonding & Trust Co. v. Burton, 30 Ky. L. R. 703, 99 SW 654.

16. In action by innkeeper to recover value of a horse not in his custody and which was wrongfully taken by defendant in whose possession it died, as a result of which an action was brought and judgment recovered against plaintiff as an innkeeper, the defendant having notice and opportunity to defend, allegations in complaint of the bringing of such action and of recovery of judgment will not be stricken. Reynolds v. Alderman, 103 NYS 863.

17. Union Pac. Lodge No. 17, A. O. U. W., v. Bankers' Surety Co. [Neb.] 113 NW 263.

18. Under Rev. St. 1899, § 746 (Ann. St. 1906, p. 731), the effect of failure to verify replication is to admit execution of instrument and to join issue on question whether it was basis of contract. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

19. McKnight v. Milford Gin Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 631, 99 SW 198. But evidence that plaintiff's attorney after judgment against plaintiff in the matter against which defendant promised to hold him harmless asked defendant if he intended to pay the judgment, to which he gave no answer, is admissible, it not being an offer to compromise. Id.

20. Bond to indemnify corporation for loss sustained through fraud or dishonesty of its treasurer. United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co. [C. C. A.] 148 F 353.

21. In an action on municipal contractor's bond conditioned to pay judgment in suit pending against municipality and contractor for damages resulting from contractor's negligence, evidence of statement by contractor to comptroller that he wanted to appeal the case, made before execution of bond and more than two years before settlement and satisfaction of judgment by municipality, held immaterial upon question of good faith in such settlement. City of New York v. Baird, 117 App. Div. 659, 102 NYS 915.

22. Testimony of witness that municipal contractor's bond was still in force not admissible where witness not shown to have knowledge whether work had been completed and accepted by municipality. Aetna Indemnity Co. v. Ryan, 53 Misc. 614, 103 NYS 756.

23. In action on a sub-building contractor's bond, evidence held to show that negligent construction and inexcusable delay by subcontractor was indirect cause of collapse of building. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F 672. In action on fidelity bond, evidence held insufficient to prove larceny or embezzlement by employe. Williams v. U. S. Fidelity & Guaranty Co. [Md.] 66 A 495.

24. Circumstantial evidence in this case was held insufficient to sustain burden. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bk. [C. C. A.] 145 F 273.

25. Sinclair & Co. v. National Surety Co., 132 Iowa, 549, 107 NW 184.

26. Fancher v. Kaneen, 5 Ohio N. P. (N. S.) 614.

27. In suit on municipal contractor's bond conditioned to save harmless municipality from suits brought against it on account of injuries sustained by anyone by reason of contractor's failure to maintain barricades in streets, judgment against municipality in action for injuries is conclusive that negligence causing injury was that of the contractors. City of Seattle v. Saulez [Wash.] 92 P 140. In action to foreclose right to stock deposited with bonding company to secure it in giving bond, defendant held estopped from setting up any defense which he might have asserted in action on bond. American Bonding Co. v. Loeb [Wash.] 92 P 282.

28. In action on bond conditioned to reimburse employer for loss sustained through

erroneous instruction that a provision in bond that plaintiff will make frequent audits and examinations is too vague to be regarded is not cured by a subsequent instruction that it was plaintiff's duty to take reasonable precautions to detect and prevent any act on the part of the employe tending to render defendant liable.[29] The verdict must be sustained by the evidence.[30]

§ 5. *Defenses.* See 8 C. L. 175—Whether the statements in the application are or are not warranties,[31] a material misrepresentation will avoid the contract.[32] It is a good defense that plaintiff has sustained no loss within the meaning of the contract [33] or that the conditions on which the contract was issued have not been performed by him,[34] as where he fails to notify the indemnitor upon discovery of loss [35] or to make stipulated periodical examination of accounts.[36] A denial of liability on a fidelity bond is a waiver of proofs of loss or of defects in those furnished,[37] and, where proofs of loss are retained by indemnitor without objection and not returned with demand for new proofs until after time for making proofs has terminated, further proofs are waived.[38] In an action on a municipal contractor's bond conditioned to pay any judgment obtained against the municipality in an action for damages for contractor's negligence, settlement and satisfaction of such a judgment by the municipality after appeal taken is no defense unless it was made in bad faith.[39] Where an indemnitor knowing the capacity in which persons were acting insured their fidelity as "brokers," he is estopped from setting up the defense that they were in fact acting as commission merchants.[40]

§ 6. *Measure of recovery.* See 8 C. L. 176—The measure of recovery is the loss proximately resulting from the happening of the contingency insured against.[41]

personal dishonesty or "culpable negligence" of employe, wherein culpable negligence is defined to mean "failure to exercise that degree of care and caution which men of ordinary prudence and intelligence usually exercise in regard to their own affairs," it is error to instruct jury that degree of care and caution, failure to exercise which will render indemnitor liable, is "the very highest, you might almost say the highest, possible," and "an extraordinary and very high degree." United Fidelity & Guaranty Co. v. Des Moines Nat. Bk. [C. C. A.] 145 F 273.

29. Sinclair & Co. v. National Surety Co., 132 Iowa, 549, 107 NW 184.

30. Evidence held sufficient to sustain verdict finding that indemnitee gave the notice of loss required by contract. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

31. Said to be warranties. Livingston v. Fidelity and Deposit Co., 76 Ohio St. 252, 81 NE 330.

32. Plaintiff's representation that certain persons were acting as his "brokers" is not shown to be fraudulent by fact that by his contract with such persons he appointed them his "brokers or commission merchants." Sinclair & Co. v. National Surety Co., 132 Iowa, 549, 107 NW 184. Misrepresentation in application as to past conduct of bonded employe. Winkler Brokerage Co. v. Fidelity & Deposit Co., 119 La. 735, 44 S 449; Livingston v. Fidelity & Deposit Co., 76 Ohio St. 253, 81 NE 330.

33. Complaint held not to show loss under agreement to indemnify plaintiff for loss sustained under contract with third person. Nachod v. Hindley, 118 App. Div. 658, 103 NYS 801.

34. Renewal contract held not executed on faith of answers made to certain interrogatories propounded to indemnitee, and therefore failure to perform promises made in such answers held not to preclude recovery. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

35. Facts held to show knowledge by employer of loss or liability to loss from dishonesty of employe and failure to notify indemnitor, precluding recovery upon fidelity bond providing that failure to notify indemnitor upon discovery of loss shall relieve it from liability on account of employe causing such loss. Supreme Ruling of Fraternal Mystic Circle v. National Surety So., 114 App. Div. 689, 99 NYS 1033.

36. Indemnitor held relieved by failure of employer to verify cash as stipulated in application. United States Fidelity & Guaranty Co. v. Downey, 31 Colo. 414, 88 P 451.

37, 38. Sinclair & Co. v. National Surety Co., 132 Iowa, 549, 107 NW 184.

39. Evidence held to support verdict that municipality acted in good faith. City of New York v. Baird, 117 App. Div. 659, 102 NYS 915.

40. Sinclair & Co. v. National Surety Co., 132 Iowa, 549, 107 NW 184.

41. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bk. [C. C. A.] 145 F 273. The loss must be a natural and probable consequence which ought to have been foreseen or reasonably anticipated in the light of attendant circumstances. Id. In an action upon a building contractor's bond covenanting to deliver a building free from liens for labor and material furnished, damages proximately caused by the breach of the covenant are recoverable. Tally v. Ganahl [Cal.] 90 1049. Such damages include fees of attorneys employed to defend suits

Where a contractor's bond covenants to indemnify for any damages resulting from failure to perform, interest is recoverable upon the amount of such damages from the date of their certification as required by the contract.[42]

INDEPENDENT CONTRACTORS.

The scope of this topic is noted below.[43]

Definition and requisites of the relation.—An independent contractor is one who renders services in the course of an occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished.[44] The terms of the contract are decisive of the question whether the relation of independent contractor or servant is created.[45] The employer must have no right of control as to the mode of doing the work contracted for,[46] but the independence of the relation may be changed by a practical construction of the contract in the performance of the work, so as to constitute the contractors mere servants of the employer.[47] A reservation by the employer of the right by himself or his agent to supervise the work merely for the purpose of seeing that the contract is complied with,[48] or of the right of making any alteration in the work that may be determined to be necessary or desirable,[49] does not affect the independence of the relation; nor is the independence of the

brought by lienholders (Id.), and, where such a bond covenants to complete building on or before a specified date, amount of rent that could have been obtained for building between that date and date of actual completion is recoverable (Id.).

42. Interest on amount certified by architects as damages resulting from building contractor's failure to perform. Tally v. Ganahl [Cal.] 90 P 1049.

42a. See 8 C. L. 176.

43. It includes liability of employer for negligence of an independent contractor. **It excludes** all matters of general contract (see Contracts, 9 C. L. 654; Building and Construction Contracts, 9 C. L. 424), and the general rules of negligence (see Master and Servant, 8 C. L. 840; Negligence, 8 C. L. 1090).

44. Johnson v. Helbing [Cal. App.] 92 P 360; McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700; Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. Where defendants contracted with a repairer of awnings to put their awnings in good condition and agreed to pay him what work was reasonably worth, relation created was that of employer and independent contractor. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700. One with whom road directors of county contract in pursuance of Acts 1904, p. 388, c. 225, for repair of highway at his own cost, and through servants selected and controlled by him, is an independent contractor. Symons v. Road Directors for Allegany County [Md.] 65 A 1067. Where in action against road directors evidence shows work was done under such act, presumption arises that contract conforms thereto, and burden is upon plaintiff to show that contract in contravention of statute gave road directors control over contractor and his servants. Id. A machinery company which prior to the acceptance of machinery by a prospective purchaser is running it upon his premises and with power furnished by him as a trial test is an independent contractor. Brown v. Rockwell City Canning Co., 132 Iowa, 631, 110 NW 12. The mere fact that one employed by a corporation to unload cars is paid by the car load and employs his own helpers does not make him an independent contractor. Foster v. National Steel Co., 216 Pa. 279, 65 A 618. One who has had some experience at breaking horses, but who does not follow vocation of horse breaking, does not in accepting another's offer to break a horse become an independent contractor. Mullich v. Brocker, 119 Mo. App. 332, 97 SW 549.

45. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700.

46. Johnson v. Helbing [Cal. App.] 92 P 360; Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. Property owners working on a city street in front of their properties in obedience to an ordinance are not independent contractors over whom the municipal authorities have no control. Meyers v. Philadelphia, 217 Pa. 159, 66 A 251.

47. Evidence held not to show such a practical construction of a railroad contract. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

48. Johnson v. Helbing [Cal. App.] 92 P 360; Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. That contract between railroad and contractors provides that work is to be done to satisfaction of railroad's engineer and according to specifications and such explanatory drawings and instructions as may be furnished by engineer does not affect independence of contractor's relation. Id. Nor is the independence of such relation affected by a provision in such contract that engineer shall decide on quality and quantity of work done, which decision shall be final and conclusive. Id. Nor by a provision that if the engineer is of opinion that force employed is insufficient to complete work within time specified he may employ such workmen as he may deem proper at such wages as he may find expedient, and charge amount of such wages to contractors. Id.

49. Reservation in contract between railroad and contractors as to alterations that

relation affected by a provision that the contractors shall not let or transfer the contract without the written consent of the employer or his agent;[50] nor, in the case of a railroad contract, by a provision that the contractors shall discharge disorderly employes when directed to do so by the engineer.[51] That the employer is a builder and is doing the woodwork on his own building does not affect the independence of the contractor for the stonework.[52]

Liability for negligence.—As a general rule an employer of an independent contractor is not liable to third persons for his negligence, or that of his subcontractors or servants,[53] but to this rule there are several exceptions, as where the employer has not used care to select a competent person as contractor,[54] or where the work is in itself unlawful [55] or a nuisance in itself,[56] or necessarily attended with danger to others,[57] or where it will of necessity result in injury to another,[58] or where the thing to be done or the manner of its execution involves a duty to the public incumbent upon the employer,[59] or where the employer interferes with the contractor in the performance of the work,[60] or where the contractor acts under the direction of the employer's

may be determined necessary or desirable by railroad's engineer. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

50. Provision that railroad contract shall not be let or transferred without written consent of engineer. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

51. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

52. Johnson v. Helbing [Cal. App.] 92 P 360.

53. Brown v. Rockwell City Canning Co., 132 Iowa, 631, 110 NW 12; Symons v. Road Directors for Allegany County [Md.] 65 A 1067; Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. An employer is not responsible for such negligence of the contractor as is entirely collateral to, and not a probable consequence of, the work contracted for. Symons v. Road Directors for Allegany County [Md.] 65 A 1067. Where an independent contractor is engaged in repairing a highway, the road directors are not liable for injuries caused by his servants in blasting in a quarry near highway if contract for repairs does not authorize such blasting, although contractor is authorized to take stone from quarry. Id. One who is erecting a building is not liable for injury to pedestrian on street adjoining caused by negligence of stone masons in employ of independent contractor. Johnson v. Helbing [Cal. App.] 92 P 360. A property owner is not liable for injury resulting from negligence of an independent contractor while engaged in running machinery upon owner's premises and with power furnished by him. Brown v. Rockwell City Canning Co., 132 Iowa, 631, 110 NW 12. A landowner is not liable for injury to adjoining premises caused by excavation made by independent contractor who was a fit and competent person. Schulhofer v. Mulhare, 50 Misc. 658, 99 NYS 489.

54. Symons v. Road Directors for Allegany County [Md.] 65 A 1067; Mullich v. Brocker, 119 Mo. App. 332, 97 SW 549. If a person intrusts performance of work of a kind likely to result in harm to third persons, unless cautiously and skillfully done, to a manifestly unfit person, as an independent contractor he will be responsible for the consequences of such contractor's incompetency. Id.

55. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902; McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700.

56. Symons v. Road Directors for Allegany County [Md.] 65 A 1067. Work expressly authorized by statute is not a nuisance. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

57. Symons v. Road Directors for Allegany County [Md.] 65 A 1067; Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. Where work contracted for on a city street involves a thing intrinsically dangerous to the public and from which injuries to those using street are probable and may reasonably be anticipated by employer, he will be liable for injury to a pedestrian resulting from contractor's negligence if he fails to take proper measures to protect the public. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700. Work under railroad contract held not necessarily attended with danger. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. Removal of heavy material from front of building abutting on crowded street. Sherman House Hotel Co. v. Gallagher, 129 Ill. App. 557.

58. White River R. Co. v. Batesville & Winerva Tel. Co. [Ark.] 98 SW 721; Symons v. Road Directors for Allegany County [Md.] 65 A 1067.

59. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700. Where, while an independent contractor employed by defendant was repairing an awning in front of his store on a city street, the awning roller fell, injuring a pedestrian, the defendant was held liable where he took no measures to protect the public while the awning was being repaired. Id. Where work of constructing subway had been let out to independent contractor, evidence held not to show that injury to pedestrian on highway was caused by failure of subway company to keep highway in reasonably safe condition for travel during progress of work. Monahan v. Empire City Subway Co., 52 Misc. 566, 102 NYS 774.

60. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700.

agent.[61] The doctrine of independent contractors applies to corporations except so far as such contractors are performing acts made lawful only by the charter power of the corporation.[62] Thus, a railroad company cannot absolve itself from liability to passengers on its depot grounds by reason of any contract with independent contractors.[63] In an action for negligence defendant may, under a general denial of liability, show that the injury was caused by the negligence of an independent contractor.[64] If defendant pleads that the injury was caused by the servants of an independent contractor, a replication by way of confession and avoidance must allege such additional facts as will defeat or obviate such defense.[65] Where injuries are shown to be due to the negligence of an independent contractor, the declaration of such contractor at the time of the injury is not admissible.[66] An independent contractor is liable to third persons for injuries resulting from his negligence,[67] and is not relieved from liability by the fact that his employer is also liable for negligence in relation to the same injury.[68] The employer is liable for an injury to a servant of the contractor resulting from his neglect to keep the place,[69] or the appliances upon which[70] the work is to be done, in proper condition and repair; and where the contract requires him to furnish and maintain the instruments for carrying on the work, he is liable for an injury to a servant of the contractor resulting from his neglect to keep such instruments in a safe condition.[71] The employer's servants are not fellow-servants of the contractor's servants,[72] and therefore the employer is liable where the negligence of his servants results in injury to a servant of the contractor,[73] But the employer is not liable for an injury to the servant of the contractor caused by the negligence of the servants of another contractor in his employ.[74] In an action for personal injuries by a servant, the burden is upon the defendant to prove that plaintiff was the servant of an independent contractor.[75] In such an action plaintiff's original petition alleging that he was in the employ of an independent contractor of defendant, is admissible in evidence in support of defendant's plea that plaintiff was in the service of an independent contractor.[76] Where a master directs his servant to aid in work upon which an independent contractor is employed, he is

61. Contractor in employ of railroad, by direction of engineer in charge of work, left down fence through which plaintiff's horses strayed and were killed. Missouri, etc., R. Co. v. Armstrong [Tex. Civ. App.] 99 SW 431.

62. Boyd v. Chicago & N. W. R. Co., 118 Ill. App. 433.

63. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

64. Brown v. Rockwell City Canning Co., 132 Iowa, 631, 110 NW 12.

65. Replication held not to allege such additional facts. Symons v. Road Directors for Allegany County [Md.] 65 A 1067.

66. Symons v. Road Directors for Allegany County [Md.] 65 A 1067.

67. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

68. Railroad company and contractor both liable for injuries to passenger falling into unguarded and unlighted excavation on depot grounds. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

69. Foster v. National Steel Co., 216 Pa. 279, 65 A 618.

70. Smith v. Twin City Rapid Transit Co., 102 Minn. 4, 112 NW 1001.

71. Injury resulting from employer's failure to exercise reasonable care to keep dolley way for moving lumber in reasonably safe condition. William Cameron & Co. v. Realmuto [Tex. Civ. App.] 100 SW 194.

72. Otis Steel Co. v. Wingle [C. C. A.] 152 F 914; Britt v. Carolina Northern R. Co., 144 N. C. 242, 56 SE 910.

73. Otis Steel Co. v. Wingle [C. C. A.] 152 F. 914. Where owner of building permits contractor to use elevator as stage for latter's workmen in painting shaft, and after painting upper part workmen leave elevator and go to bottom of shaft, and elevator operated by owner's servant is lowered and kills a workman, owner is liable. Perry v. Payne, 217 Pa. 252, 66 A 553.

74. The owner of premises upon which a building is being erected is not liable for injury to the servant of a contractor caused by brick falling from upper floor, where another contractor's men were at work, through an opening necessarily left uncovered in order to do the work of construction. Wettje v. Silverman, 52 Misc. 567, 102 NYS 783.

75. Foster v. National Steel Co., 216 Pa. 279, 65 A 618.

76. William Cameron & Co. v. Realmuto [Tex. Civ. App.] 100 SW 194. But exclusion of such evidence is harmless error where undisputed evidence shows that plaintiff's employer was not such an independent contractor as would exempt defendant from liability for negligence causing injury. Id.

liable for injury to the servant resulting from the negligence of the contractor's servants.[77]

INDIANS.

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Matters common to public lands,[78] officers,[79] and contracts[80] are elsewhere treated.

§ 1. *Who are Indians and what is their legal status.* See 8 C. L. 170—The power of congress over the matter of citizenship in the Five Civilized Tribes was plenary and it could adopt any reasonable means to ascertain who were entitled to its privileges.[81] It could authorize a review of the judgments of the United States courts of the Indian Territory in citizenship cases, although by the terms of prior legislation such judgments had become final.[82] In a test case in the Choctaw and Chickasaw citizenship court against ten persons in whose favor judgments of citizenship had been entered in the Indian Territory courts, one similarly situated, but not made a party to the proceeding, who does not transfer his case from the territorial to the citizenship court, is bound by the judgment in the latter court.[83] A regulation of the interior department making it essential to the validity of the adoption of one as a member of an Indian tribe that it be approved by the Indian office, is within the power of the department under the Federal statutes.[84] The manner of breaking off and recasting tribal affiliations depends upon the peculiar usages and customs of each particular tribe.[85] The Indian tribes have always been recognized as possessing so much of the qualities of national political independence as to enable them to make treaties with the Federal government.[86] This is especially so in respect of territory assigned to them as reservations.[87] Under the general allotment act[88] the allottees cease to be wards of the government so far as their personal acts and political status is concerned,[89] but the government may still protect their property rights in the lands allotted.[90] The Pueblo Indians of New Mexico are not wards of the government, nor are they in charge of an Indian superintendent or agent.[91] In New York any demand or right of action by an Indian, jurisdiction of which is not conferred upon a peacemaker's court, may be prosecuted and enforced in any court of the state.[92]

77. Britt v. Carolina N. R. Co., 144 N. C. 242, 56 SE 910.
78. See Public Lands, 8 C. L. 1486.
79. See Officers and Public Employes, 8 C. L. 1191.
80. See Public Contracts, 8 C. L. 1473. See, also, United States, 8 C. L. 2207.
81. Wallace v. Adams, 204 U. S. 415, 51 Law Ed. 547, afg. 143 F 716.
82. Wallace v. Adams, 204 U. S. 415, 51 Law Ed. 547, afg. 143 F 716. Act of Congress of July 1, 1902 (32 Stat. at L. 641, c. 1362), creating Choctaw and Chickasaw citizenship court and giving it power to examine judgments of Indian territory courts and determine whether they should not be annulled on account of irregularities, was a valid exercise of power. Id.
83. Wallace v. Adams, 204 U. S. 415, 51 Law. Ed. 547, afg. 143 F 716.
84. U. S. Rev. St. § 463, U. S. Comp. St. 1901, p. 262. United States v. Hitchcock, 205 U. S. 80, 51 Law. Ed. 718, afg. 26 App. D. C. 290.
85. Smith v. Bonifer, 154 F 883.
86, 87. Wadsworth v. Boysen [C. C. A.] 148 F 771.
88. Act February 8, 1887, c. 119 (24 Stat. 388).
89, 90. United States v. Dooley, 151 F 697.
91. United States v. Mares [N. M. 88 P 1128.
92. Laws 1892, p. 1575, c. 679, § 5. Under this statute, if an Indian dies intestate having debts owing him and there is no peacemaker's court or other tribal tribunal having right to administer intestate's estates, surrogates court has jurisdiction to grant letters of administration. In re Printup's Estate, 121 App. Div. 322, 106 NYS 74. But see In re Jack, 52 Misc. 424, 102 NYS 383. Where a Tuscarara Indian, which tribe has

§ 2. *Federal and state government of Indians and their habitat.*[See 8 C. L. 180] Indians are subject to the general laws of the state in which they reside unless specially expected,[93] and if any exception exists it must be shown.[94] The North Carolina statute,[95] requiring Indian children in a certain district to attend school, is not unconstitutional.[96] It does not require that the children shall be sent to the Federal government school, but authorizes sending them to any other school.[97] A state court has no jurisdiction of a controversy necessarily involving a determination of the title, and, incidentally, of right of possession of Indian allotments while the same are held in trust by the United States.[98]

§ 3. *Tribal government subject to Federal dominion.*[See 8 C. L. 181] A marriage between members of a tribe in accordance with the law of the tribe is valid.[99] Between June 28, 1898, and April 28, 1904, the courts of the Chickasaw nation had exclusive jurisdiction of all probate matters,[1] but the United States courts had jurisdiction to determine whether a Chickasaw Indian could devise allotted lands.[2] An attorney at law appointed by the principal chief of the Muskogee nation, under an act of the national council for a fixed period, to perform certain duties at a prescribed annual salary is not an officer of the nation but merely a servant.[3] An officer of an Indian nation cannot be removed until the existence of a cause for removal has been determined after notice to the officer of the charges against him and an opportunity given him to be heard in his defense.[4]

§ 4. *Indian lands and properties.*[See 8 C. L. 182] Where the language of a treaty with the Indians in regard to their lands is susceptible of more than one construction, it is to be construed in the sense in which they would naturally have understood it,[5] but due regard must be had to the construction given the treaty by the officers charged with the supervision of Indians.[6] Treaty stipulations apply to half-breeds as well as full-bloods, unless otherwise specially provided in the treaty.[7] A treaty between the United States and an Indian tribe in relation to territory assigned to the tribe as a reservation is subject to congressional revision and approval, and congress may amend such provisions as affect the United States or its subjects or entirely supersede them.[8] If a conflict is alleged to exist between the treaty and the act of amendment, the courts will endeavor to give effect to both, but, if they cannot be reconciled, will give effect to the legislative amendment.[9] The peculiar provisions of

no peacemakers' court, is ousted from possession of land which she was holding in accordance with customs and practices recognized by tribe, she may sue in state courts to recover possession. Peters v. Tallchief, 121 App. Div. 309, 106 NYS 64, rvg. 52 Misc. 617, 102 NYS 972.

93, 94. State v. Wolf [N. C.] 59 SE 40.

95. Laws 1905, p. 227, c. 213.

96. Not an excess of legislative power. Const. art. 9, § 15. State v. Wolf [N. C.] 59 SE 40. Nor is it unconstitutional on ground that it is class legislation (Id.), or because it applies to only one locality or district (Id.).

97. State v. Wolf [N. C.] 59 SE 40.

98. McKay v. Kalyton 204 U. S. 458, 51 Law. Ed. 566, rvg. 45 Or. 116, 74 P 491, 78 P 332; Parr v. U. S., 153 F 462. Neither by Act of August 15, 1894 (28 Stat. at L. 286, c. 290), nor by amendment of Feb. 6, 1901, (31 Stat. at L. 760, c. 217), was such jurisdiction conferred upon state courts. McKay v. Kalyton, 204 U. S. 458, 51 Law. Ed. 566, rvg. 45 Or. 116, 74 P 491, 78 P 332.

99. Children of such marriage entitled to inherit as heirs of their father. Ortley v. Ross [Neb.] 110 NW 982.

1. Act June 28, 1898, c. 517, 30 Stat. 495; Act April 28, 1904, c. 1824, 33 Stat. 573. Chickasaw court had jurisdiction of probate of will executed and offered for probate between such dates. Hayes v. Barringer [Ind. T.] 104 SW 937.

2. Hayes v. Barringer [Ind. T.] 104 SW 937.

3. Therefore, an action by such attorney against principal chief to recover salary and enjoin diversion of money appropriated for that purpose is not an action to try title to an office. Porter v. Murphy [Ind. T.] 104 SW 658. The nation is not a necessary party to such suit. Id.

4. Porter v. Murphy [Ind. T.] 104 SW 658.

5, 6. United States v. Moore, 154 F 712.

7. Smith v. Bonifer, 154 F 883.

8. Wadsworth v. Boysen [C. C. A.] 148 F 771.

9. Wadsworth v. Boysen [C. C. A.] 148 F 771. Agreement between United States and Shoshone and Arapahoe Indians for cession by Indians of portion of lands embraced in Wind River reservation held not in conflict with preferential right given lessee of coal mining rights in portion of reservation, by act amending agreement, by which lessee upon surrender of lease was authorized to

an act ratifying and amending an agreement with the Shoshone and Arapahoe Indians for the cession of a portion of their lands has recently been interpreted by the courts.[10] In recent years it has been the policy of the Federal government to bring about a gradual disintegration of the tribal relations among those Indians who have so far advanced in civilization as to make it expedient to do so, and in pursuance of this policy many treaties have been entered into and acts passed providing for the allotment of Indian land in severalty, what persons are entitled to allotment,[11] and when their titles vest,[12] are questions that must generally be determined from the terms of the treaty, or statute. The right to the allotment of a particular tract is in him who made the prior selection and who was in possession at the time of the allotment.[13] The decision of the secretary of the interior as to whether one is a member of an Indian tribe and as such entitled to an allotment of tribal land is final.[14] Statutory provision was made for the sale of such portions of the lands allotted to the Puyallup Indians as were not required for homes upon the written consent of the allottees.[15] Under the agreement between the United States and the Creek tribe as ratified by act of congress,[16] the decision of the secretary of the interior upon the question whether the present needs and the reasonable prospective growth of a town requires that certain lands shall be included in the town site is controlling, in the absence of a clear, unequivocal, and convincing showing that it is wrong and was induced by fraud or imposition.[17] A conveyance of the exclusive right to select certain land as an allotment and to obtain a patent therefor is a conveyance of an interest in real estate greater than a lease for a year, and must, under the statute of frauds, be in writing.[18] What passes by a grant of Indian lands must be determined, as in the case of other grants, from the terms of the conveyance.[19]

locate a certain number of acres of ceded lands and to pay cash therefor at a certain rate per acre. Id.

10. Proviso in act, giving to lessee of certain coal lands in Wind River reservation right upon surrender of lease to locate and purchase a certain number of acres of the ceded lands, did not confine such location to lands situated within boundaries of original lease. Wadsworth v. Boysen [C. C. A.] 148 F 771.

11. Under allotment act March 3, 1885, c. 318, 23 Stat. 340, purtaining to Umatilla reservation, members of confederated tribes of Walla Wallas, Cayuses, and Umatillas entitled to allotments, though not at time residing on reservation. Smith v. Bonifer, 154 F 883. Under this act construed in connection with treaty of 1855, a Walla Walla Indian woman who had never severed her tribal relations was entitled to an allotment, although she had married a white man, long lived off reservation, and adopted manners of civilization. Id. The treaty of 1855 accorded to members of confederated tribes a community of interest in right to exclusive occupancy of lands of Umatilla reservation entitling each to share in ultimate allotment of lands. Id. This community of interest was a right of property not to be divested without consent of individual Indian. Id.

12. Under Act March 2, 1889, c. 405, 25 Stat. 892, providing for allotment of lands in Old Ponca reservation, grant to persons who had selected lands became complete upon proclamation of president that act was in full force, although allotment had not then been made. Conway v. U. S., 149 F 261. After president's proclamation two Indians, who prior thereto had selected lands, were married, allotments not having yet been made. Subsequently each by separate application applied for a different allotment, but trust patent was by mistake made out to husband as head of family for amount of both selections. It was held that marriage and mistake in patent did not deprive wife of right which vested in her when proclamation was issued, and that she was entitled to one-half of land patented to husband. Id.

13. Guyett v. McWhirk, 154 F 784.

14. United States v. Hitchcock, 205 U. S. 80, 51 Law. Ed. 718, afg. 26 App. D. C. 290. Upon petition for mandamus by one claiming membership in Wichita tribe, to require secretary to approve petitioner's selection of 160 acres out of lands ceded to United States by tribe under agreement of June 4, 1891, ratified by act of March 2, 1895 (28 Stat. at L. 876, 895-897, c. 188), fact that answer gives date of decision denying application, and that reason given for denial is bad, does not open decision for consideration by the courts. Id.

15. Act March 3, 1893, c. 209, 27 Stat. 633, and Act June 7, 1897, c. 3, § 1 (30 Stat. 87 [U. S. Comp. St. 1901, p. 1618]). If allottee dies after consent, a valid sale can be made without obtaining consent of his heirs. Prichard v. Jacobs [Wash.] 90 P 922.

16. Act of March 1, 1901, c. 676, 31 Stat. 861.

17. Stanclift v. Fox, 152 F 697.

18. Taylor v. Southerland [Ind. T.] 104 SW 874.

19. Deed, parties to which were Choctaw Indians, held to convey such lands as grantees and their children might be entitled to as their allotments, with right of

An action to enjoin an Indian agent from obstructing plaintiff in selecting coal lands on reservation, as authorized by act of congress, is not a suit against the United States but one against an individual wrongdoer of which the courts have jurisdiction.[20]

Nature of title.[See 8 C. L. 184]—The United States holds the legal title to an Indian reservation in trust for the Indians thereon,[21] and is entitled to the continued flow of the waters of a public stream on which the reservation borders, so far as may be necessary for the beneficial use of the property.[22] Surplus waters in excess of such needs are subject to diversion and appropriation by any person entitled to the benefit thereof under local laws and customs and acts of congress pertaining thereto.[23] An Indian in the Indian Territory might before allotment dispose of his holdings to another Indian in order that he might select his allotment in other lands.[24] Although in allotting reservation lands among certain tribes the allottees have been given an immediate fee simple title with right of alienation,[25] the Federal allotment acts generally provide that the land allotted shall not be alienated until the expiration of a prescribed period after allotment. In the interim the government holds the lands in trust for the sole use and benefit of the allottee or his heirs,[26] and an attempted conveyance or contract to convey by the allottee [27] or his heir [28] is void, and such contract cannot be specifically enforced.[29] The restraint upon alienation does not, however, preclude an allottee from cutting timber for sale.[30] An allottee cannot during the period of restriction devise his allotment.[31] A judgment rendered during such period

occupancy and improvements, equivalent to equitable title to land. Taylor v. Southerland [Ind. T.] 104 SW 874.

20. And this though agent pretends to be acting under Federal authority. Wadsworth v. Boysen [C. C. A.] 148 F 771.

21, 22. United States v. Conrad Inv. Co., 156 F 123. What amount of water is or will eventually be necessary for this purpose is for the government, in its administrative capacity, to determine. Id.

23. United States v. Conrad Inv. Co., 156 F 123. Under acts of congress relating to public lands, an irrigation company may divert such surplus waters, and as incident to right may extend a dam to bank of stream bordering reservation. Id. Approval by secretary of interior of survey and plat of irrigation canal does not estop government from objecting to amount of water such canal will divert from stream. Id.

24. Thomason v. McLaughlin [Ind. T.] 103 SW 595. Indian holding land in excess of that allowed by Curtis bill, Act June 28, 1898, c. 517, §§ 16, 17, 30 Stat. 501, 502, might make valid sale thereof within nine months after passage of bill. Id.

25. Under the treaty of 1883 with chiefs Moses and Sar-Sarp-Kin, of Columbia reservation, and Act of July 4, 1884 (23 Stat. 79, c. 180), ratifying it, each head of family or male adult acquired fee simple title with right of alienation to land allotted him. United States v. Moore, 154 F 712.

26. Under general allotment act, Act Feb. 8, 1887, c. 119, § 5 (24 Stat. 388), government so holds lands for 25 years after allotment Beall v. Graham [Kan.] 88 P 543.

27. Under general allotment act, Act Feb. 8, 1887, c. 119, 24 Stat. 388, a conveyance by allottee within 25 years from the time of the allotment is void. United States v. Dooley, 151 F 697. Under Act June 28, 1898, c. 517, § 29, 30 Stat. 507, and Act July 1, 1902, c. 1362, 32 Stat. 642, until land has been allotted and period of restrictions upon alienation has expired, one not an Indian citizen has no authority to purchase or sell Indian lands. Kelly v. Harper [Ind. T.] 104 SW 829. Under these acts, agreement between white man and intermarried citizen of Chickasaw nation to procure title to Indian lands in citizen's name purely for purpose of speculation, and subsequent contract by which citizen agreed as soon as restrictions upon alienation were removed to convey to white man one-half interest, are illegal. Sayer v. Brown [Ind. T.] 104 SW 877. Money paid as part of the consideration of such illegal agreement cannot be recovered back. Id. Under Act June 28, 1898, c. 517, 30 Stat. 507; Act March 1, 1901, c. 676, § 7, 31 Stat. 863; and Act June 30, 1902, c. 1362, § 16, 32 Stat. 643, a contract to convey his allotment by a Creek freedman, not of Indian blood, made before period of restriction upon alienation has expired, is void. Harris v. Hardridge [Ind. T.] 104 SW 826.

28. Under Act March 2, 1895, c. 188 (28 Stat. 907), and patents issued in pursuance thereof, heir of allottee cannot alien land within 25 years after date of patent. Goodrum v. Buffalo [Ind. T.] 104 SW 942.

29. Sayer v. Brown [Ind. T.] 104 SW 877; Harris v. Hardridge [Ind. T.] 104 SW 826.

30. Indian allottees under Stockbridge and Munsee treaty of 1856 (11 Stat. at L. 663), and Act of Congress of 1871 (16 Stat. at L. 404, c. 38), are vested with sufficient title in their allotments, notwithstanding restraint upon alienation, to authorize cutting of timber for sale without approval of department of interior. United States v. Paine Lumber Co., 206 U. S. 467, 51 Law. Ed. 1139; United States v. Torrey Cedar Co., 154 F 263. And purchasers of timber from an allottee n good faith, paying fair price, are not answerable to United States for value. Id.

31. This is the rule under the general al-

against an adult heir of an allottee is not a lien upon his inherited lands situated in the county where the judgment is rendered.[32] The homestead of an Indian differs in no particular from the remainder of his allotment, called the "surplus," except in the length of time it is made inalienable.[33] An attempted conveyance by a citizen of the Creek nation before the expiration of period of restriction is not susceptible of ratification, and no rule of estoppel will prevent the assertion of its invalidity, and this whether it be of the homestead or of the surplus.[34] An illegal contract of sale of Indian lands is not rendered legal by a subsequent statute removing restrictions on sale of such lands.[35] An Indian to whom an allotment has been made in the manner required by the New York statutes acquires a substantial right in the land allotted entitling him to the exclusive possession thereof,[36] and the right to convey [37] or devise it.[38] The United States may maintain an action on behalf of an allottee to set aside a conveyance made before the expiration of the period during which alienation is prohibited, and to enjoin the grantee from occupying the premises or asserting any claim thereto adverse to the allottee,[39] but it cannot maintain an action to recover the value of timber removed from the land by a purchaser thereof.[40] In an action to determine the validity of deeds conveying allotted lands, a judgment that the grantor had complete right to convey the lands, "to the extent of his interest therein" is only a finding that he could convey such title as was permitted by law to be conveyed.[41] The illegitimate children of an allottee are his or her heirs for the purpose of inheriting the lands allotted,[42] and by express statutory provision the children of the marriage between a white man and an Indian woman who is recognized by her tribe are entitled to allotments in the distribution of the tribal property.[43] Where an Indian to whom reservation lands have been allotted, under the

lotment act, Act Feb. 8, 1887, c. 119, 24 Stat. 388. In re House's Heirs [Wis.] 112 NW 27.

32. Beall v. Graham [Kan.] 88 P 543.

33. Act July 1, 1902, c. 1362, 32 Stat. 641. Hayes v. Barringer [Ind. T.] 104 SW 937. The homestead allotment cannot be alienated by allottee until expiration of twenty-one years from date of allotment, if he live that long. Id. A devise of an allotment in Choctaw and Chickasaw nations, whether it be to convey fee of what is termed a "homestead" or the "surplus," if executed during period when land is declared inalienable, is void. Id.

34. Act June 30, 1902, c. 1323, § 16, 32 Stat. 503. Alfrey v. Colbert [Ind. T.] 104 SW 638. Act April 21, 1904, c. 1402, 33 Stat. 204, removing restrictions upon alienation by allottees who are not of Indian blood, expressly excepted minors. Therefore, fact that minor induced purchase of his allotment by misrepresenting his age will not estop him from asserting invalidity of sale and having conveyance canceled. Id. But in such case vendees are entitled to recover back money paid by them for land. Id. Transaction held not an original conveyance but an attempted ratification after reaching majority of sale made during minority, and therefore void under statute. Id.

35. Act April 21, 1904, c. 1402, 33 Stat. 204, removing restrictions upon sale of lands other than homesteads by persons not of Indian blood, did not validate prior contract of sale by intermarried citizen of Chickasaw nation. Sayer v. Brown [Ind. T.] 104 SW 877. Or prior contract by a Creek freedman. Harris v. Hardridge [Ind. T.] 104 SW 826.

36. Laws 1854, p. 369, c. 175, § 1; Laws 1892, pp. 1575, 1596, c. 679, §§ 7, 90. Peters v. Tallchief, 121 App. Div. 309, 106 NYS 64.

37. Laws 1892, p. 1574, c. 679, § 2. Peters v. Tallchief, 121 App. Div. 309, 106 NYS 64.

38. Widow of devisee of allottee who retained possession after her husband's death is entitled to possession as against daughter of allottee who ousted her. Peters v. Tallchief, 121 App. Div. 309, 106 NYS 64, rvg. 52 Misc. 617, 102 NYS 972.

39. United States v. Dooley, 151 F 697.

40. So held where timber was thus removed from lands which had been allotted to Chippewa Indians under treaty of September 30, 1854, and patented to them with restriction against alienation without consent of president of United States. United States v. Anger, 153 F 671.

41. Goodrum v. Buffalo [Ind. T.] 104 SW 942.

42. So held under general allotment act, Act Feb 8, 1887, c. 119, 24 Stat. 388, as amended by Act Feb. 28, 1891, c. 383, 26 Stat. 794, as to illegitimate children of male allottee. In re House's Heirs [Wis.] 112 NW 27. Bastard child of female allottee succeeds as her heir at law to allotment. Beam v. U. S., 153 F 474.

43. Act June 7, 1897, c. 3, 30 Stat. 90. Rule applied to allotments of land in Umatilla reservation under treaty of 1855 and act of March 9, 1885, c. 319, 23 Stat. 340. Smith v. Bonifer, 154 F 883. Inheritance among the Walla Walla Indians is through the mother; and therefore children of a woman of that tribe who have never severed their tribal relations are entitled to allotments on the distribution of the tribal property, though

act of 1887,[44] dies, the right of his widow to dower is governed by the laws of the state in which the lands are situated.[45] The husband of a deceased Indian woman who was an allottee of land upon the Umatilla reservation, is entitled to curtesy in his wife's allotment.[46] Where a trust patent was issued to an Indian for land previously allotted to him and his wife, the question whether the wife upon obtaining a divorce solely on account of his faults is equitably entitled to some share in the property is one solely within the jurisdiction of the court granting the divorce.[47]

Leases.[See 8 C. L. 186]—The period for which Indian lands may be leased, and the validity of such a lease, is determined by the statute authorizing it.[48] A lease not made in conformity with the statute is void.[49] The fact that the lessees of a Creek Indian had placed permanent improvements on the premises did not, under the Curtis Bill,[50] destroy the lease and give the lessees the right to purchase the property.[51] Leases of allotments of Indian minors in the Indian Territory approved by the trial courts of the territory after April 26, 1906, are not subject to approval or disapproval by the secretary of the interior, the order of approval being final.[52] So an order which avoids a confirmation of a sale and an approval of a lease of an allotment of an Indian minor is a final decision.[53]

Actions against intruders.[See 5 C. L. 1789]—A suit by the government for an invasion of its right to the use of the water from a stream bordering on an Indian reservation may be brought against one trespasser without joining others who are also invading the right.[54] Where allotted lands are inalienable, the owner may maintain ejectment against one who holds possession under an attempted conveyance thereof.[55] An allottee may recover, in an action for mesne profits, the rental value of his allotment from one who has used and occupied the same under a void lease.[56] Under the act of the Choctaw legislature of October 30, 1888, the title to improvements erected in the Choctaw nation by noncitizens not authorized to live therein does not become forfeited until there has been a valid enforcement of such forfeiture.[57] In an action to recover Indian lands for purpose of allotment, the

their father was a member of a different tribe, and subsequent to his death their mother married a white man. Id.

44. 24 Stat. 388, c. 119.

45. Wheeler v. Petite, 153 F 471. Widow of Indian to whom lands had been allotted in Grande Ronde reservation under treaty of January 22, 1855, and Acts of 1887, entitled to dower in allotment under laws of Oergon. Id.

46. Treaty of June 9, 1855, 12 Stat. 945; Act of Congress March 3, 1885, c. 319, 23 Stat. 340; B. & C. Comp. Or. § 5544. Parr v. U. S., 153 F 462; Beam v. U. S., 153 F 474.

47. Conway v. U. S., 149 F. 261.

48. Under Act March 1, 1889 (25 Stat. 784, c. 333), modifying Rev. St. § 2116, Chickasaw nation could make a lease for mining coal for a period not exceeding 10 years. If lease was for longer period, terms of act would restrict it to 10 years. McBride v. Farrington [C. C. A.] 149 F 114. Under Act June 7, 1897 (30 Stat. 721, c. 3), allottees of land in Inapaw agency may lease their allotments for period of three years. Goodrum v. Buffalo [Ind. T.] 104 SW 942. A lease of Indian lands in Indian Territory for grazing purposes is void. Muskogee Land Co. v. Mullins [Ind. T.] 104 SW 586.

49. Lease not made under sanction and approval of proper officers of interior department. Phillips v. Reynolds [Neb.] 113 NW 234.

50. Act June 28, 1898, c. 517, 30 Stat. 495.

51. Whitney Lumber & Grain Co. v. Rabtree [Ind. T.] 104 SW 862.

52, 53. Morrison v. Burnette [C. C. A.] 154 F 617.

54. United States v. Conrad Inv. Co., 156 F 123.

55. Goodrum v. Buffalo [Ind. T.] 104 SW 942. Where only interest that can be conveyed in allotted lands is a lease for three years, owner may maintain ejectment against one who retains possession under an attempted conveyance of fee after expiration of three years from time deed was executed. Id.

56. Petition held sufficient to sustain action. Phillips v. Reynolds [Neb.] 113 NW 234.

57. Walker v. McLoud, 204 U. S. 302, 51 Law. Ed. 495. Sheriff's sale of improvements on credit absolutely void. Id., afg. [C. C. A.] 138 F 394. Evidence held not to show consent by corporation erecting improvements, to credit sale. Id. Act of general council of nation held not to constitute ratification of credit sale. Id. Deposition of sheriff that principal chief of nation ratified credit sale, but giving no facts upon which alleged ratification was based, is inadmissible to prove ratification. Id.

complaint must state facts showing that plaintiff is entitled to recover.[58] Plaintiff's failure to deny allegations in the answer showing that she is not entitled to recover is an admission and will preclude recovery.[59]

§ 5. *Rights and liabilities of others in Indian country dealing with Indians.* See 5 C. L. 1789

§ 6. *Crimes and offenses by and relating to Indians.* See 5 C. L. 1789—It is a penal offense to sell or give intoxicants to any Indian who is a ward of the government or whose land is held in trust by the government,[60] and it is a crime to order intoxicating liquor from without the Indian Territory and receive it within the territory.[61] Under a Federal statute[62] it is a criminal offense for a clerk in the office of the commissioner of the Five Civilized tribes,[63] having the custody of a record deposited in the office of the commissioner,[64] to fraudulently withdraw it with intent to make a copy of it.[65] Cherokee Indians residing in North Carolina are subject to its criminal laws,[66] and it is a criminal offense for such Indians in a certain district to withhold their children from school.[67] When an Indian is prosecuted for a crime, as the jury may entertain racial prejudice against him the court should be especially careful to observe the rules of evidence.[68] The conviction and imprisonment of an Indian agent for malfeasance in office is not a bar to an action on his bond.[69]

§ 7. *Indian depredations.* See 8 C. L. 188

INDICTMENT AND PROSECUTION.

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58. Allegation that plaintiffs are Cherokee Indians entitled to an allotment and desire to take lands in controversy in allotment, and are not possessed of any other lands, is, as against demurrer, sufficient statement that they are holding lands for purpose of allotment. Thomason v. McLaughlin [Ind. T.] 103 SW 595. Complaint good as against demurrer though it does not allege that plaintiff is not holding in excess of what is allowed by Curtis bill, Act June 28, 1898, c. 517, §§ 16, 17. Id.

59. Failure by plaintiff, a Choctaw Indian, to deny allegations that she is now holding all lands allowed her by law, and that land sought to be recovered is segregated and cannot be claimed as an allotment. Fisk v. Arnold [Ind. T.] 104 SW 824.

60. Act Jan. 30, 1897, c. 109, 29 Stat. 506, 3 Fed. St. Ann. p. 384. This statute does not apply to the Pueblo Indians of New Mexico. United States v. Mares [N. M.] 88 P 1128.

61. Act March 1, 1895, c. 145, § 8, 28 Stat. 697. This statute has been in force in the territory since its enactment. Burch v. U. S. [Ind. T.] 104 SW 619.

62. Rev. St. § 5408 (U. S. Comp. St. 1901, p. 3658).

63. Clerk appointed by commissioner, acting on behalf of secretary of interior, if appointment is approved by secretary, is an "officer" within meaning of statute. Martin v. U. S. [Ind. T.] 104 SW 678.

64. A clerk entitled to handle and examine a record has custody of it within meaning of law. Martin v. U. S. [Ind. T.] 104 SW 678.

65. A withdrawal with such intent is a fraudulent withdrawal. Martin v. U. S. [Ind. T.] 104 SW 678.

66. State v. Wolf [N. C.] 59 SE 40.

67. Laws 1905, p. 227, c. 213, § 3. Special verdict held to require judgment of guilty. State v. Wolf [N. C.] 59 SE 40.

68. People v. Soloman, 106 NYS 1110.

69. United States Fidelity & Guaranty Co. v. U. S. [C. C. A.] 150 F 550.

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Scope of topic.—This topic includes general criminal procedure from indictment to final judgment. The substantive law of crimes[70] and procedure before indictment[71] are elsewhere treated, and matters of indictment, evidence, and procedure peculiar to particular crimes are treated under topics dealing with such crimes.[72]

*Sources of the criminal procedure; applicability of civil statutes.*See 8 C. L. 190—Common law rules of procedure are in force in Maryland except as repealed by statute.[73]

§ 1. *Limitation of time to institute.*See 8 C. L. 190—The time within which a criminal prosecution must be instituted is fixed by statute,[74] and in the absence of a limitation statute lapse of time is not a bar.[75] Whether a particular statute will apply so as to bar a prosecution,[76] and under what circumstances the statute will be

70. See Criminal Law, 9 C. L. 851.

71. See Arrest and Binding Over, 9 C. L. 249.

72. See Homicide, 9 C. L. 1636; Larceny, 8 C. L. 699, and like topics.

73. Hamilton v. U. S., 26 App. D. C. 382.

74. Illustrations: Prosecution for receiving stolen goods is barred in three years. McKay v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 755, 90 SW 653. Prosecution for selling mortgaged property held barred by three year statute. Stanford v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 375, 90 SW 167. Prosecution for assault with a deadly weapon with intent to kill is for a misdemeanor and is barred in two years. State v. Frisbee, 142 N. C. 671, 55 SE 722. Under Code, § 5165, an indictment for embezzlement must be found within three years from commission of the offense. State v. Disbrow, 130 Iowa, 19, 106 NW 263. Prosecution for embezzlement is barred in three years. Ex parte Vice [Cal. App.] 89 P 983. The fact that after the crime defendant lived in another county under an assumed name does not toll the statute. Id. A prosecution for conspiracy to defraud the United States, under Rev. St. § 5440, may be maintained if instituted within three years of the commission of an overt act. Bradford v. U. S. [C. C. A.] 152 F 617. Where on preliminary examination it appears that more than the statutory period has elapsed since the commission of the offense, defendant should be discharged. Ex parte Vice [Cal. App.] 89 P 983. For other illustrations, and for limitation of particular prosecutions, see discussion of crime in question.

75. Neither the statutes nor ordinances of city of Forsyth fix a period of limitations for prosecutions under the ordinance prohibiting keeping of intoxicating liquors for sale. Bell v. Forsyth, 126 Ga. 443, 55 SE 230.

76. Prosecution for bribery is not barred though the only act done within the statutory period was receiving the bribe. People v. Gibson, 106 NYS 590.

When the period of limitations begins to

tolled,[77, 78] depend upon the terms of the statute and the nature of the offense. Limitations are not suspended by commencement of a prosecution unless the offense for which the prosecution was instituted is the same as that for which defendant is presently prosecuted.[79]

§ 2. *Jurisdiction.*[See 8 C. L. 180]—The power and jurisdiction of committing magistrates,[80] the jurisdiction of municipal and other inferior courts, and whether the same is exclusive,[81] must be determined by reference to the statutes creating and fixing the powers of such courts,[82] the measure of jurisdiction being usually the nature and gravity of the offense and the penalty imposed.[83] Mere transmission of

run: The date of the commission of the offense determines the question of limitations in forgery, the date of instrument forged is immaterial. People v. McPherson [Cal. App.] 91 P 1098. Limitations do not run against conspiracy until commission of an overt act. United States v. Bradford, 148 F 413. Limitations run against indictment for conspiracy from the time of the last overt act. Cooke v. People [Ill.] 82 NE 863; United States v. Brace, 149 F 874. A prosecution for a conspiracy on an overt act thereunder is barred in three years after such overt act was committed. Ware v. U. S. [C. C. A.] 154 F 577. Evidence insufficient to show that an overt act had been committed within three years. Id.

77, 78. To constitute a "person fleeing from justice" so as to toll limitations under Rev. St. § 1045, it is not necessary that he should have left the United States, but only that he has left the district under circumstances indicating that he intended to evade authority. Greene v. U. S., 154 F 401.

79. King v. State [Ala.] 44 S 200.

80. A committing magistrate has in general only such jurisdiction as is given him by statute. Harris v. Rolette County [Ind.] 112 NW 971. A justice of the peace has no authority under Revised Codes to appoint counsel to defend accused brought before him for preliminary hearing. Id. Preliminary hearing is not a trial within Rev. Code 1905, § 10216. Id. Under the statutes of California a justice of the peace exercising powers of a magistrate has equal authority with magistrates, and, on examination of one charged with grand larceny, if he determines that the crime has not been committed, he must discharge him. People v. Swain [Cal. App.] 90 P 720. In Nebraska a county court or judge has the same powers and jurisdiction in criminal matters as a justice of the peace, and may entertain a complaint, issue a warrant, conduct the preliminary hearing in a case where the offense is beyond his jurisdiction, and may hold defendant to bail for his appearance in the district court. Stetter v. State [Neb.] 110 NW 761. Upon complaint duly made, the district court may sit as examining magistrate to try whether the crime has been committed and whether there is probable cause to believe that defendant committed it. Cohoe v. State [Neb.] 113 NW 532. Clerk of circuit court and ex officio clerk of the county court of Shelby county, Alabama, has authority to take the affidavit of the prosecutor in prosecution under Liquor Law (Acts 1896-97, p. 124, § 3), regulating trial of misdemeanors in that county. Roland v. State, 147 Ala. 149, 41 S 963. An affidavit on which a prosecution was based being lost, county court had power to allow a substitution thereof. Id. That jurisdiction of a police judge in forcible detainer had terminated by filing of traverse bond did not deprive it of jurisdiction to issue a warrant for violation of law in removing tenant's goods from the premises. Read v. Shipley, 31 Ky. L. R. 1258, 104 SW 1001.

81. Portland charter held not to confer exclusive power on city to prevent gambling, etc., hence, keeping house for selling pools on horse race is an offense by B. & C. Comp. § 1930, and circuit court has jurisdiction in such case. State v. Ayers [Or.] 88 P 653. Court of special sessions has not exclusive jurisdiction over offense of taking property from custody of an officer (Pen. Code, § 83), but the grand jury may indict for such offense. People v. Booth, 52 Misc. 340, 20 Crim. R. 480, 102 NYS 62.

82. Under Cr. Proc. Act, § 6, authorizing the court of quarter sessions to receive indictments in the absence of a justice of the supreme court, and requiring indictments not triable in such court to be delivered to the court of oyer and terminer, necessarily implies that cases triable by it are to be retained. State v. Spina [N. J. Law] 67 A 1049. Neither the statutes now in force nor the history of the law furnish authority for the holding of a criminal trial by a justice of the peace outside of the township in which he resides and was elected, and such authority is not conferred by consent of the accused. Ex parte Boswell, 3 Ohio N. P. (N. S.) 555. Under Const. art. 7, § 21, Civ. Code Proc. § 68, and Pen. Code, §§ 2681, 2683, 1591, a justice of the peace elected in one township has jurisdiction of a violation of a local option law committed in another township. State v. O'Brien, 35 Mont. 482, 90 P 514.

83. City justice has no jurisdiction to try a charge of cruelty to animals committed in another town. McCarg v. Burr, 186 N. Y. 467, 79 NE 715. Under Code Cr. Proc. § 64, giving court of special sessions of City of New York jurisdiction of misdemeanors committed within the city, it has jurisdiction of petit larceny which is a misdemeanor under Pen. Code, § 535. People v. Flaherty, 104 NYS 173. One who holds commission of county judge has jurisdiction under the statutes of Kentucky to try one charged with obstructing a highway. Steinbergen v. Miller, 29 Ky. L. R. 1132, 96 SW 1101. Under Const. art. 6, §§ 5, 11, Code Civ. Proc. § 115, Pen. Code, § 7, a corporation accused of an offense, the punishment of which is by fine not exceeding $200, must be prosecuted before a justice of the peace. People v. Palermo Land & Water Co. [Cal. App.] 89 P 723; Id. [Cal.] 89 P 725. In prosecution for dis-

the record of the preliminary hearing of certain persons jointly charged with others does not deprive the magistrate of jurisdiction on a subsequent hearing of another.[84] The jurisdiction of municipal courts is usually restricted to offenses committed within the limits of the corporation.[85]

No warrant of arrest is necessary to give jurisdiction where one arrested without warrant is before the court.[86] Where an accusation charges an offense within the jurisdiction of the court, an insufficient accusation of a second offense, beyond the jurisdiction of the court, will not deprive it of jurisdiction of the offense which is properly charged.[87]

A court which has jurisdiction of an offense is not deprived thereof merely because like jurisdiction is conferred upon another court.[88] A continuing crime consisting of a continuing act or series of acts set on foot by a single impulse and operated by an intermittent force, which runs through several jurisdictions, is committed and cognizable in each.[89]

States are commonly given concurrent jurisdiction over offenses committed upon navigable waters lying between them.[90] In homicide cases, courts of the state in which the homicidal act was committed have jurisdiction though death occurred in another state.[91] Under the statutes of Tennessee, where a principal felon is not subject to the jurisdiction of the courts of the state, an accessory before the fact cannot be prosecuted therein.[92]

Federal courts have jurisdiction of offenses committed on lands granted by a state to the United States, jurisdiction over which has been ceded to the United States.[93] A United States district court has jurisdiction over an offense against Federal laws [94] committed within the district,[95] and of offenses committed on board

turbing public worship, the fact that one of the witnesses was struck by a plank does not show use of weapons so as to make the offense one beyond the jurisdiction of a magistrate. State v. Jones [S. C.] 58 SE 8. The district court of the parish of New Orleans is without juvenile jurisdiction. In re Parker, 118 La. 471, 43 S 54. In Kansas the district court has no jurisdiction over a defendant under 16 years of age except to transfer the cause to the juvenile court. State v. Dunn [Kan.] 90 P 231.

84. State v. Pratt [S. D.] 112 NW 152.

85. The municipal court of Chicago has no jurisdiction outside the city limits. People v. Strassheim, 228 Ill. 581, 81 NE 1129. Under 2 Rev. St. 1899, art. 18, § 13, the St. Louis court of criminal correction has no jurisdiction to try misdemeanors committed outside the limits of the city. State v. Anderson, 191 Mo. 134, 90 SW 95.

86. People v. Markowitz, 104 NYS 872. Accused being properly before the court, it was immaterial to the court's power to try him that several terms of court had passed since the issuance of the warrant and that the warrant was functus officio. Roland v. State, 147 Ala. 149, 41 S 963.

87. Fountain v. Fitzgerald [Ga. App.] 58 SE 1129.

88. Act April 28, 1904, c. 1778, conferring jurisdiction upon municipalities to punish certain acts, does not affect the jurisdiction of the district court over the same acts, which are made offenses by Carter's Alaska Code, 30 Stat. 1253. Rosencranz v. U. S. [C. C. A.] 155 F 38. An ordinance prohibiting gambling, enacted by a town under 33 Stat. 529, does not deprive the district court of jurisdiction under the penal code which makes the same act an offense. Hornstein v. U. S. [C. C. A.] 155 F 48.

89. Though complete in the jurisdiction where first committed, it may be committed and punished in other jurisdictions. Armour Packing Co. v. U. S. [C. C. A.] 153 F 1.

90. Under Act Cong. March 6, 1820, c. 22, Kentucky and Missouri have concurrent jurisdiction over the Mississippi River, and the courts of Kentucky have jurisdiction of one who in Kentucky went on a boat and crossed to the Missouri side of the channel and purchased liquor in violation of the laws of Kentucky. Lemore v. Com. [Ky.] 105 SW 930.

91. Where deceased was shot in one state and died in another, courts of the state where he was shot have jurisdiction. Commonwealth v. Ball, 31 Ky. L. R. 887, 104 SW 325.

92. Where a physician committed in a sister state a criminal operation on a female who died in a county in Tennessee, where one who procured the operation resided, held that such person, though an accessory before the fact, could not be prosecuted in that county under Shannon's Code, §§ 6934, 6935, providing for prosecution in county where offense is commenced. Edge v. State, 117 Tenn. 405, 99 SW 1098.

93. The state of Georgia has power to cede jurisdiction to the United States over a tract of land acquired by it for erection of a public building, and Federal courts have exclusive jurisdiction of a homicide committed on such tract. United States v. Battle, 154 F 540.

94. A district court has jurisdiction of a

an American vessel on the high seas.[96] A Federal court has no jurisdiction of a habeas corpus proceeding to discharge a state prisoner where the only question involved is as to his identity.[97] A Federal district court has jurisdiction at a special term to try an indictment returned at a general term.[98] The Federal district court of Indian Territory was held to have jurisdiction of a homicide by one not a member of an Indian nation, one of the two men killed being an Indian and the other a citizen of the United States.[99]

Transfer. See 8 C. L. 191—Statutes usually govern the transfer of causes from one court to another,[1] and procedure.[2] Where the court to which a change of venue is erroneously taken retransfers the cause to the court from whence it came, the latter acquires jurisdiction.[3] In Georgia, if the evidence in a trial in a city court shows defendant to be guilty of an offense of which the court has no jurisdiction, a new trial should be granted and defendant held to await the action of the grand jury.[4]

§ 3. *Place of prosecution and change of venue.* See 8 C. L. 191—Accused has a right to be tried in the county where the offense was committed,[5] and a statute providing that one who commits larceny in a railroad car while en route may be tried in any county through which the car passes has been held to violate that right and to be invalid.[6] In the notes are given decisions as to the venue of the offense of homicide,[7] theft,[8] appropriation of deposits by a bank,[9] and embezzlement.[10]

prosecution under Rev. St. § 5395, for perjury in a naturalization proceeding, notwithstanding such proceeding was in a state court. Holmgren v. U. S., 156 F 439.

95. Under Rev. St. § 716, a Federal district court sitting in Tennessee has jurisdiction to issue summons for appearance of an Indiana corporation having neither office nor place of business in Tennessee where it was indicted for an offense committed in such district. United States v. Standard Oil Co., 154 F 728. Where offense of government contractor in permitting laborers to work over time is committed from the Ohio side of the Ohio River, the district court for the district of Ohio has jurisdiction, though the work was done in Kentucky. United States v. Sheridan-Kirk Cont. Co., 149 F 809.

96. A United States district court is not deprived of jurisdiction of an offense committed on board an American vessel on the high seas, under Rev. St. § 730, providing that such offenses shall be cognizable in the district where defendant is first found, because such defendant is arrested in Alaska, whose courts are not vested with such jurisdiction. United States v. Newth, 149 F 302.

97. Ex parte Moebus, 148 F 39.

98. Under Rev. St. § 581, providing that special terms of any district court may be ordered, and that any business may be transacted at such term that could be transacted at the regular term, the court has jurisdiction at such term to try an indictment returned at a general term. Goll v. U. S. [C. C. A.] 151 F 412.

99. On prosecution for murder of two men, one a citizen of the Choctaw nation and one of the United States, and the accused a negro and not a Choctaw citizen, the United States courts have jurisdiction. Leftridge v. U. S., 6 Ind. T. 305, 97 SW 1018.

1. Washington County Act 1907, § 3, providing for transfer of all misdemeanor cases pending in circuit court to be transferred to county court, does not violate Const. 1901, § 143, providing that circuit courts shall have jurisdiction of all civil and criminal cases. Ex parte State [Ala.] 44 S 635.

2. On transfer of case from district to county court, the transcript was vitiated where no seal was attached. Could not be affixed after papers were filed in county court. Cobb v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 178, 102 SW 1151. Code Crim. Proc. § 475, providing procedure on transfer of a cause, applies only to transfers within the county and not to transfers on change of venue. Moore v. State [Tex. Cr. App.] 96 SW 321. A judgment reciting that venue in the cause had been improperly changed to the county and that the court had no jurisdiction, and adjudging that the cause be stricken from the docket and transferred back from whence it came, is not a dismissal but a retransfer. Id.

3 Moore v. State [Tex. Cr. App] 96 SW 321.

4. So held where charge was riot and evidence showed assault with intent to murder or shooting at another without justification. Oglesby v. State, 1 Ga. App. 195, 57 SE 938.

5. Where embezzlement was committed in one county, offense could not be tried in another. Raiden v. State, 1 Ga. App. 532, 57 SE 989. A prosecution for illegal fishing on the northern shore of an island lying in a southern county is properly laid in the southern county. Overly v. State, 8 Ohio C. C. (N. S.) 390. To bring a prosecution under the Valentine anti-trust act within the venue of a particular county, the illegal combination must have been entered into in such county, or some act must have been committed therein, in furtherance of the unlawful purposes of such combination. Hughes v. State, 9 Ohio C. C. (N. S.) 369. Where the inducing, decoying, or procuring is done in one county, but the house of ill-fame which is entered is in another county, the venue of the prosecution is properly laid in the county where the inducing, decoying, or procuring was done. Studer v. State, 9 Ohio C. C. (N. S.) 185.

6. Comp. Laws, § 11633, providing that one committing larceny in a railroad car while

Change of venue.[See 8 C. L. 191]—The right to a change of venue [11] and the power to grant it [12] being statutory, statutory requirements as to procedure should be complied with.[13] In Missouri, where the prosecuting attorney appears at the hearing on an application for change of venue and offers proof, the application will not be denied for want of notice.[14] In Alabama a motion for change of venue which only alleges that a fair trial cannot be had, without setting out facts to sustain the allegation, is demurrable.[15] In some jurisdictions it is held that an application for a change of venue upon a statutory ground and in the proper form should be granted,[16]

en route may be prosecuted in any county through which the car passes, violates Const. art. 6, § 27, giving right to jury trial in the county where offense was committed. People v. Brock, 149 Mich. 464, 14 Det. Leg. N. 506, 112 NW 1116.

7. Where deceased was fatally wounded in one county and died next day in another, defendant was properly prosecuted in the latter county. Britton v. Com., 29 Ky. L. R. 857, 96 SW 556.

8. Ann. St. 1906, p. 1471, provides that where it appears before verdict or judgment that prosecution is in wrong county the court may order the case transferred, held not error to refuse to transfer where it appeared that theft was committed in the county though the goods were first seen in possession of defendant in another county. State v. Grubb, 201 Mo. 585, 99 SW 1083.

9. Under Code 1906, § 1404, where a cashier of a Mississippi bank appropriated its funds on deposit in another state by means of checks, one drawn in such other state and the other in Mississippi, he was chargeable with embezzlement in Mississippi. Richberger v. State [Miss.] 44 S 772.

10. Where two persons embezzled property and placed it on a train in one county to be shipped through another to its destination, and one codefendant accompanied the property, held the venue for trial of one remaining could be laid in county through which property was shipped. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064. Under Rev. Code Cr. Proc. § 72, that where crime is committed partly in one county and partly in another, jurisdiction is in either, defendant in embezzlement case may be tried in county in which he received and was to return property, though he took it into another county. State v. Allen [S. D.] 110 NW 92. Under Acts 28 Leg. p. 194, providing that court in which indictment is filed shall retain jurisdiction, and Code Cr. Proc. 1895, arts. 235, 240, providing that one who steals or embezzles may be prosecuted in county where he takes the property, the court in the county first indicting acquires jurisdiction, and courts of another county are deprived of jurisdiction if defendant asserts his right to be tried there. Pearce v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 447, 98 SW 861. The venue of embezzlement is the county where the act by which the money was converted or secreted was done. Knight v. State [Ala.] 44 S 585. The mere forming of an intent is insufficient. Id.

11. State v. Barrington, 198 Mo. 23, 95 SW 235. Change can be granted only on application of accused. Miller v. People, 230 Ill. 65, 82 NE 521.

12. Fitzgerald v. Com., 30 Ky. L. R. 349, 98 SW 319.

13. Notice: Accused asked for time to prepare an application for a continuance but instead prepared a motion for a change of venue. Change of venue properly denied. State v. Davis, 203 Mo. 616, 102 SW 528. Motion for change of venue not supported by **affidavits** of two compurgators properly denied. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. Accused filed an affidavit for change of venue stating he could not obtain a fair trial and that he was unable to procure compurgators. There were credible witnesses who would have made affidavit had the facts warranted it, and the judge told accused's attorneys they could sign but they declined. Held not error to refuse change of venue. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 244, 94 SW 224. Under Kirby's Dig. §§ 2317, 2318, authorizing change of venue on ground of prejudice of inhabitants, on affidavits of two credible residents of the county. The persons who made the affidavits on oral examination showed that they had been to only a few places in the county; that they did not know persons from whom they heard expressions of opinion, or whether they swore recklessly or were credible. Held not error to deny change of venue. Duckworth v. State, 80 Ark. 360, 97 SW 280. Under Ky. St. 1903, § 1096, providing that application for change of venue must be supported by **affidavits** of two credible witnesses, where change was asked for because of fear that no one would sign the affidavits, held properly denied. Fitzgerald v. Com., 30 Ky. L. R. 349, 98 SW 319. Under the rule that **statement of facts** for change of venue must be filed within the term, one filed after term will not be considered. Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921. Proper to allow **file mark** to be placed on transcript of case sent from another court on change of venue. Delaney v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 580, 90 SW 642. Where a change of venue is ordered, the jurisdiction of the court to which the case is sent does not depend upon **transmission of complete transcript** of the record. May be corrected by order of court. State v. Hibbard [Kan.] 92 P 304.

14. State v. Spivey, 191 Mo. 87, 90 SW 81.

15. Jacobs v. State, 146 Ala. 103, 42 S 70.

16. An application for a change of venue under the Missouri statute, on the ground of prejudice of the judge and that he will not afford accused a fair trial, should be granted when it complies with the statute. Application held to comply with Rev. St. 1899, § 2594. State v. Spivey, 191 Mo. 87, 90 SW 81. Change of venue should be granted where petition and affidavits comply with the statute and

in others it is held that it may be denied though a prima facie case is made, where the application is found, upon investigation, not to be sustained by the facts.[17] Thus, it is held that the decision of a trial judge upon an application for change of venue will not be disturbed on appeal unless it amounts to an abuse of discretion or is based upon a ground not authorized by statute,[18] and the same rule applies to the selection of the county to which the case is to be sent, in case a change is ordered.[19] The presumption is in favor of the propriety of the action of the trial court.[20] An application on the ground of prejudice is properly denied where it does not appear that accused will be deprived of a fair and impartial trial,[21] but should be granted if such a trial cannot be had.[22] Accused will not be heard to complain of a denial of change where he did not exhaust his peremptory challenges.[23] Error in denying a change is not cured by summoning a jury from another county.[24] Where the court has jurisdiction of the subject-matter, a motion for a change of venue on the ground that accused cannot have a fair and impartial trial is waived by going to trial upon the merits.[25] In Kentucky, where the commonwealth's attorney has filed a statement showing the existence of lawlessness in the county and has moved for a change of venue, he will not be permitted to withdraw such statement,[26] and where fact of lawlessness in the county is personally known to the judge, and also shown by statement of the commonwealth's attorney, no further showing is necessary.[27] Where an application for a change of venue refers in terms to but one of several defendant's, but is treated as applying to all, and the reason for the change applies alike to all the cases, a change of all the cases will not be disturbed.[28] An order denying a change may, in Kentucky, be subsequently set aside when the proper showing is made.[29] Where, in Missouri, a change is granted for

establish a prima facia case. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945. Petition and affidavits held sufficient on ground of local prejudice. Id.

17. Comp. Laws 1897, § 2881, authorizing change of venue for local prejudice, is not mandatory, but the court, on a showing being made in the statutory form, has power to inquire into the knowledge or disinterestedness of the supporting witnesses and deny the application if found to be unsustainable in fact. Territory v. Emilio [N. M.] 89 P 239.

18. Commonwealth v. Carnes, 31 Ky. L. R. 391, 464, 102 SW 284.

19. Upon a showing of lawlessness in county, selection of county for trial not reviewed on appeal. Commonwealth v. Carnes, 31 Ky. L. R. 391, 464, 102 SW 284.

20. To warrant the supreme court in overruling the action of the trial court in denying an application for a change of venue on the ground of bias and prejudice of the trial judge against a litigant, the evidence offered in support of the fact of such prejudice must be clear and convincing and strong enough to overthrow the presumption of the impartiality of the court. State v. Smith [Neb.] 110 NW 557.

21. Change of venue properly denied where public sentiment was not such as would deprive defendant of a fair and impartial trial. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116. Evidence sufficient to warrant change of venue on ground of prejudice. Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 336, 103 SW 918. Evidence of prejudice of inhabitants of county where defendant was tried held insufficient to show abuse of judicial discretion in denying change of venue. State v. Barrington, 198 Mo. 23, 95 SW 235.

22. Where it appeared on motion for change of venue that decedent was extensively related in the county, that his relatives and friends were extremely hostile to defendant, and had been active in framing public sentiment against him, etc., held an abuse of discretion to deny change of venue. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945. It is error to deny a change of venue in a homicide case where deceased was widely known and there was strong prejudice against defendant, and many of the jurors possessed qualified opinions. State v. Dwyer [Nev.] 91 P 305.

23. Denial of change of venue on ground of prejudice held proper where after such denial a jury was obtained after examining only 84 talesmen and all peremptory challenges were not exhausted. People v. Bonler [N. Y.] 81 NE 949.

24. Summoning of jury from another county held not to cure error in denying change of venue. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945.

25. Braisted v. People, 38 Colo. 49, 88 P 150.

26. Commonwealth v. Carnes, 31 Ky. L. R. 391, 464, 102 SW 284.

27. Ky. St. 1903, § 1112. Commonwealth v. Carnes, 31 Ky. L. R. 391, 464, 102 SW 284.

28. Statement under Ky. St. 1903, § 1112, lawlessness in the county. Commonwealth v. Carnes, 31 Ky. L. R. 391, 464, 102 SW 284.

29. Overruling of motion for change of venue is interlocutory only and is subject to control of the court at subsequent term, and if events occurring after the hearing

prejudice of the judge, defendant is not prejudiced by the fact that the case is set by such judge in the presence of the judge who is to try the case.[30] On an application for the removal of a Federal prisoner from the district where he is found to the district of the indictment, the removing judge must pass on the validity of the indictment and deny the application if the indictment is bad.[31] The filing of a certified copy of the indictment makes a prima facie case in such cases which is not overcome by the bare denial of the defendant.[32]

§ 4. *Indictment and information. A. Necessity of indictment.* See 8 C. L. 192—Whether the prosecution shall be instituted by rule,[33] by affidavit,[34] by information,[35] or by indictment,[36] depends upon the constitutional and statutory provisions of the particular jurisdiction governing the procedure therein. A written accusation of some kind is essential.[37] The amendment to the constitution of the United States providing that no person can be held to answer for a capital or otherwise infamous offense, unless on a presentment, or indictment of a grand jury,[38] applies only in the Federal courts and not in the state courts, but it is not repugnant to the Kansas statutes providing for the trial of capital and infamous crimes upon presentment by information based upon a preliminary examination.[39]

(§ 4) *B. Finding and filing and formal requisites.* See 8 C. L. 192—The formal requisites of the preliminary accusation vary in different jurisdictions.[40]

warrant such change it may set aside an order denying it and grant application though statute provides that only one change shall be permitted. Fletcher v. Com., 29 Ky. L. R. 955, 96 SW 855.

30. Under Rev. St. 1899, § 2597, providing that when change of venue is granted because of prejudice of the judge the judge of the court shall set the case for trial and notify some other judge to try it. State v. Church, 199 Mo. 605, 98 SW 16.

31. Under Rev. St. § 1014. Ex parte Black, 147 F 832.

32. Ex parte Ryan, 154 F 217.

33. One charged with criminal contempt may be proceeded against by rule and need not be prosecuted by indictment. French v. Com., 30 Ky. L. R. 98, 97 SW 427.

34. Under Acts 1905, p. 611, providing that certain offenses may be prosecuted by affidavit filed in term time except when a grand jury is in session, held the right to prosecute by affidavit existed where defendant was bound over on a preliminary affidavit and an affidavit was filed against him during adjournment of grand jury. Williams v. State [Ind.] 82 NE 790. Act 1905, p. 611, providing for prosecution by affidavit, substitutes affidavit for information authorized by the old code, and an affidavit performs all the functions of an affidavit and information under the old code. Cole v. State [Ind.] 82 NE 796.

35. Under Code Cr. Proc § 306, providing that indictment is not necessary unless punishment exceeds $100 fine, and Ky. St. 1903, § 1141, providing for prosecutions by information, prosecution for illegal sale of liquor properly brought without indictment. George H. Goodman Co. v. Com., 30 Ky. L. R. 519, 99 SW 252. An indictment is not necessary in prosecution for misdemeanor which was not an indictable offense at common law under a constitutional provision that no person shall be proceeded against criminally by information for an indictable offense. Ford v. Moss, 30 Ky. L. R. 428, 98 SW 1015. Under Ky. St. 1903, §§ 1141, 2257, prosecutions where fine is less than $100 or imprisonment not more that 40 days may be by information. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Under the fifth amendment of Federal constitution, offenses not punishable by imprisonment in the penitentiary are not infamous and may be prosecuted by information. United States v. Camden Iron Works, 150 F 214.

36. Under the statutes of North Carolina, where a case is tried in the superior court on appeal from a justice, no indictment is required. This rule applies on appeal from the recorder's court created by Pub. Laws 1907, p. 857, c. 573. State v. Jones [N. C.] 59 SE 117. Where one was brought before a justice and charged by affidavit and his case was transferred to the county court, that court could only try him after indictment was found. Jones' v. State [Ala.] 43 S 28 The recovery of a penalty by civil instead of criminal proceedings is not a violation of § 20, art. IV, of the Constitution, providing for indictments in all prosecutions. Gullbert v. Franklin Bk., 5 Ohio N. P. (N. S.) 209.

37. Where one is arrested without warrant and brought before a magistrate, a written complaint or information must be filed. Hill v. Smith [Va.] 59 SE 475. A justice has no jurisdiction to try accused in the absence of a proper affidavit. Hall v. State [Miss.] 44 S 826.

38, 39. State v. Newton, 74 Kan. 561, 87 P 757.

40. A complaint sworn to by three persons is the affidavit of each of the persons who subscribed it. State v. Plomondon [Kan.] 90 P 254. No objection to a preliminary affidavit that it was verified before a notary public instead of in open court. Hamilton v. State [Ala.] 44 S 968. Under Pen. Code, § 872, requiring magistrate to indorse on the complaint an order that it appears that the offense has been committed and there was sufficient cause to believe that defendant had

Indictment.[See 8 C. L. 192]—In Pennsylvania the district attorney may in his discretion for exceptional cause prefer a bill without a previous binding over of accused.[41] Decisions dealing with the endorsement[42] and signing[43] of the indictment, the caption thereof,[44] and the introductory and concluding portions of the accusation,[45] and separate counts thereof,[46] are given in the notes. The indictment should show that the grand jurors were properly summoned, impaneled, and sworn.[47] The return should be made to the proper court.[48] An error in the file mark may be

committed it, held sufficiently complied with People v. Blanchino [Cal. App.] 91 P 112. Complaint under ordinance referring thereto by title, number and date of approval, without setting same out either in full or in legal effect, held sufficient. Nichols v. Salem [Or.] 89 P 804.

41. Exercise of discretion will not ordinarily be reviewed. Commonwealth v. Sharpless, 31 Pa. Super. Ct. 96

42. Under Acts 1905, p. 609, c. 169, an indictment must be indorsed by the foreman of the grand jury. Cole v. State [Ind.] 82 NE 796. County attorney need not endorse his name on indictment. Nelson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 140, 101 SW 1012. Failure of foreman of grand jury to sign certificate on back of bill that "witnesses marked 'X'" had been sworn and examined is cured by Revisal 1905, § 3254, curing informalities in indictments. State v. Long, 143 N. C. 670, 57 SE 349. Want of the usual memorandum on the back of an indictment, "a true bill" signed by the foreman of the grand jury, does not vitiate the indictment. State v. Grove, 61 W. Va. 697, 57 SE 296. Rev. St. 1899, § 2517, requiring names of witnesses to be indorsed on indictment, does not impose such duty on prosecuting attorney, and it will be presumed that the names were so indorsed by the grand jury, and a plea in abatement that they were omitted by the prosecuting attorney in order to surprise accused presents no issue for the jury. State v. Barrington, 198 Mo. 23, 95 SW 235. Where the names of a large number of witnesses were so indorsed, a plea in abatement on such ground was properly overruled. Id. Mansf. Ark. Dig. § 2103, providing that names of witnesses must be on an indictment, is in force in Indian Territory, and Rev. St. U. S. § 1033, requiring indictment and names of all witnesses to be delivered to accused two days before trial, is not in force and not applicable. Leftridge v. U. S., 6 Ind. T. 305, 97 SW 1018.

43. Under Code, § 5281, indictment need not be signed by county attorney. State v. Mathews, 133 Iowa, 398, 109 NW 616. Proper for deputy to sign county attorney's name to indictment under Code, § 303. Id. That foreman of grand jury signed "foreman" and prosecuting attorney signed "prosecuting attorney" (names being signed), the indictment was not defective for failing to show their official character, the county being otherwise shown. State v. Gilson, 114 Mo. App. 652, 90 SW 400. As it is not essential that indictment have the name of the grand jury at the bottom, it was immaterial that prosecuting attorney added it after trial began. James v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 885, 105 SW 179.

44. Indictment held sufficient under Cr. Code Proc. §§ 122, 124, though caption was omitted, where it showed names of parties and court, the crime, and that it was returned by grand jury of a named county. Commonwealth v. Drewry, 31 Ky. L. R. 635, 103 SW 266.

45. Const. art. 5, § 12, requires all prosecutions to be carried on in name of state. Held that while Code Cr. Proc. arts, 256, 257, 258, do not require that complaint commence with "In the name and by the authority of the state of Texas." Where a criminal charge is brought before a justice and based solely on the complaint, it must so commence. Ex parte Jackson [Tex. Cr. App.] 17 Tex. Ct. Rep. 85, 96 SW 924. Indictment beginning "In the name and by the authority of the state of Texas" is sufficient under the constitutional provision requiring indictments to begin "In the name and by authority of state of Texas." Spencer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 594, 90 SW 638. Under Const. 1901, § 170, Code 1896, § 4893, an indictment must conclude "against the peace and dignity of the state of Alabama." Cagle v. State [Ala.] 44 S 381.

46. Each count need not conclude "against the peace and dignity of the state," it is enough if last count so concludes. Harrison v. State, 144 Ala. 20, 40 S 568. It is not necessary that each count shall begin "in the name and by the authority of the state," nor conclude "against the peace and dignity of the state." Manovitch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 712, 96 SW 1. Indictment in two counts need not conclude each count "against the peace and dignity of the state;" sufficient if last count so concludes. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 469, 98 SW 863. An indictment in several counts, concluding "against the peace and dignity of the state," is good under Const. § 169, as against the objection that the quoted clause should have followed each count. Starling v. State [Miss.] 43 S 952.

47. An indictment objected to in proper form and time as not showing that grand jury was sworn as required by statute will not sustain a conviction. State v. Hurst, 123 Mo. App. 39, 99 SW 820. Where indictment for murder showed it was returned by "grand jurors for Falls county," it was not defective for failing to show the grand jurors were returned from such county. Nelson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 140, 101 SW 1012.

48. A county had two district courts, each entitled to a grand jury. It appeared that the presiding judge of the court in which the indictment was presented was presiding judge of the court in which the case was tried. Held to sufficiently show that the indictment was returned in the proper court, though the number of the court was not shown. Outley v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 947, 99 SW 95.

corrected by the clerk under the direction of the court.[49] The presumption is in favor of the regularity of the proceedings,[50] and usually prevails when recitals in the record show compliance with the law.[51] The findings on different counts submitted should not be contradictory.[52] An indictment against several persons, described in the order, noting the finding and return thereof as an indictment against one of such persons is good as against the person named in the order.[53] An indictment is not invalidated by the fact that specially employed counsel examined witnesses before the grand jury,[54] nor by the admission of incompetent evidence,[55] nor by failure of the grand jury to appoint a foreman.[56] It is proper to employ an interpreter in examining witnesses in the grand jury room.[57] In Iowa the grand juror may act and return a verdict on the minutes of the proceedings before the committing magistrate.[58] In Arkansas a grand jury may take up a charge which has been dismissed and return an indictment of its own motion.[59] In Louisiana nine jurors may find a bill,[60] in Arkansas twelve are necessary.[61]

Information.[See 6 C. L. 193]—In the footnotes will be found decisions as to the formal requisites of information, such as signature,[62] verification,[63] and filing.[64] An

49. Error by clerk in file mark on indictment may be corrected by the clerk under direction of court. Nelson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 140, 101 SW 1012.

50. Where record of murder trial recited the presentment, return into open court, filing and recording of indictment, held sufficient, with presumptions in favor of regularity of proceedings, to meet objection that indictment was not filed and recorded, where defendant did not show that any substantial right was affected. Williams v. State, 168 Ind. 87, 79 NE 1079.

51. Where indictment recited that grand jurors were summoned from the body of the county and were duly impaneled, it showed sufficiently that their deliberations were in the county. State v. Gilson, 114 Mo. App. 652, 90 SW 400. A motion to quash the indictment on the ground that the record does not show that the grand jury were sworn by the statutory form of oath is properly denied where the recital is that the jury were "duly" sworn. O'Donnell v. People, 224 Ill. 218, 79 NE 639.

52. Grand jury found no bill on a count charging two persons with larceny, and a true bill on a count charging one with larceny and the other with receiving the stolen goods. Held not contradictory. State v. Thomas, 75 S. C. 477, 55 SE 893.

53. State v. Grove, 61 W. Va. 697, 57 SE 296.

54. On prosecution for local option law, fact that attorney employed by local option party examined witnesses before grand jury did not render indictment bad where he made no comments on evidence. McElroy v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 424, 95 SW 539.

55 An indictment will be sustained on motion to quash if there was evidence before the grand jury sufficient to support a conviction, though incompetent evidence was admitted. People v. Booth, 52 Misc. 340, 20 Crim. R. 480, 102 NYS 62.

56. Code, § 5248, providing that grand jurors shall appoint a foreman, is directory, and failure to do so does not invalidate an indictment. State v. Von Kutzleben [Iowa] 113 NW 484.

57. Where prosecuting witness and her father did not understand the English language, it was proper to swear an interpreter and allow him to remain in grand jury room. Fletcher v. Com., 29 Ky. L. R. 955, 96 SW 855. Cr. Code Proc. § 110, does not prohibit presence of an interpreter before the grand jury. Lyon v. Com., 29 Ky. L. R. 1020, 96 SW 857.

58. Code, §§ 5230, 5272, provide that grand jury may act and return a verdict on the minutes of the proceedings before the committing magistrate. Held, indictment so found is not objectionable on the ground that the return of the magistrate was informal and not certified. State v. Johnson, 133 Iowa, 38, 110 NW 170.

59. Under Kirby's Dig. §§ 2212, 2213, 2214, the dismissal of a charge does not prevent a grand jury, of its own motion, taking up a charge and returning an indictment. Marshall v. State [Ark.] 104 SW 934.

60. In Louisiana all twelve of the grand jurors need not be present in court when the bill of indictment is presented, since nine members may find a bill. State v. Griggsby, 117 La. 1046, 42 S 497.

61. Indictment for murder having been quashed, a second was presented to same grand jury except one of the 16 members who had been excused. This was signed by foreman in presence of others and no new witnesses were examined. All concurred, but twelve being necessary, held second indictment valid. Worthem v. State [Ark.] 101 SW 757.

62. Assistant circuit attorney of city of St. Louis is authorized to sign informations by Rev. St. 1899, § 4960. State v. Speritus, 191 Mo. 24, 90 SW 459. That prosecuting attorney signed only initial of first name held not to render information defective. State v. Kelley, 191 Mo. 680, 90 SW 834. Information signed by county attorney is properly based on complaint made by one acting at instance of county attorney during latter's temporary absence. Flournoy v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 730, 100 SW 151.

63. Rev. St. 1899, §§ 2477, 2750, do not require informations in justice court to be verified. State v. Webster, 206 Mo. 558, 105 SW 705. Failure of prosecuting attorney to

information is not vitiated because of misstatement of the term of its presentation.[65] A legal complaint is in some states essential to the validity of an information by the county attorney.[66] The preliminary complaint and the information must charge the same offense.[67] Different felonies need not be stated in separate counts of the complaint and warrant on which the information is based, though stated in separate counts of the information.[68] In some states affidavits on which the information is based must be filed with the information.[69] Such affidavits should be properly acknowledged.[70] Where an affidavit is filed and referred to in the information, verification by the prosecuting officer may not be necessary.[71] In New York a district attorney may file an information for any offense disclosed by the return of a magistrate.[72]

Presentment.[See 8 C. L. 194] In case of a presentment by the grand jury in Vir-

allege in an information in justice court that it was made upon his oath of office did not invalidate, his acts being presumed to have sanction of his official oath, and the statutory provision requiring such information to be filed upon oath of office being surplusage. Id. Information defective as to charging murder because not stating that it was made on the oath of prosecuting attorney is sufficient to charge manslaughter. State v. Morgan, 196 Mo. 177, 95 SW 402. An information presented to a justice of the peace need not be verified by prosecuting attorney. State v. Simpson [Mo. App.] 103 SW 592. Under Rev. St. 1899, § 2750, requiring information before justice of the peace to be made under oath of office of the prosecutors, no verification is necessary. State v. O'Kelley, 121 Mo. App. 178, 98 SW 804. Failure to verify an information avoids a conviction thereunder. State v. Weyland [Mo. App.] 105 SW 660. A verification of an information containing two counts, one of which absolutely contradicts the other, is equivalent to failure to verify. Id. The fact that the state abandoned all counts except one, which was consistent with itself, does not render the verification effectual. Id. Where affidavit is required, pleading must be such as on its face can be sworn to as true. Id. Omission of court seal in attesting prosecuting attorney's affidavit to an information does not invalidate it. State v. Fogg, 206 Mo. 696, 105 SW 618.

64. Code Cr. Proc. § 743, amended by Laws 1904, p. 1368, requiring district attorney to file information for misdemeanor within 10 days after receiving papers from magistrate, does not limit the time within which it may be filed, but was intended to provide for prompt despatch of business. People v. Spier, 105 NYS 741. Under Pen. Code, § 809, an information must be filed within 30 days after time of commitment unless for good cause shown. Ex parte Fowler [Cal. App.] 90 P 958. Facts held sufficient to excuse delay where first information was set aside and a new one filed after expiration of 30 days. Id.

65. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 868, 104 SW 899.

66. Complaint that defendant "did carry on or about his person," not mentioning what he carried, will not support an information charging carrying of a pistol. Suddeth v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 755, 100 SW 155. That complaint in local option case did not commence "In name and by authority of state of Texas" is not ground for dismissing it where there was an information based on the complaint in that form. Sessions v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 384, 98 SW 243.

67. Where several persons were held to answer for perjury on a joint complaint before a magistrate, a separate information in the circuit court as to one of the parties does not make the crime different from that charged in the complaint under Rev. Pen. Code, §§ 27, 169. State v. Pratt [S. D.] 112 NW 152. Complaint for perjury held not to vary from the information, an information not being limited by complaint as to mode of charging the offense providing it is based on same transaction. Hoffman v. Allegan Circuit Judge [Mich.] 14 Det. Leg. N. 610, 113 NW 584. The district attorney has no authority to file an information for a different offense than that for which defendant was committed. Ex parte Fowler [Cal. App.] 90 P 958. Variance between commitment and information as to date of offense is immaterial where it appears that only one offense was committed. People v. Bianchino [Cal. App.] 91 P 112.

68. State v. Miller, 74 Kan. 667, 87 P 723.

69. Defect because of fact that no affidavit accompanying the information is filed in court when the case is called and tried is not cured by subsequent filing thereof. Moore v. State [Tex. Cr. App.] 105 SW 817.

70. The fact that the assistant attorney general for a county was the notary before whom were acknowledged affidavits on which an information verified by him was based was not ground for a motion to quash when affidavits were acknowledged before he was appointed assistant attorney. State v. McCarley, 74 Kan. 879, 87 P 744.

71. Information charging obstructing an officer in service of process is not invalid for want of verification by the prosecuting attorney where the officer obstructed filed an affidavit which was filed with the information and referred to therein. Rev. St. 1899, § 2749, authorizes such procedure. State v. Ostmann, 123 Mo. App. 114, 100 SW 696.

72. Under Code Cr. Proc. § 221, providing that when a magistrate has held a defendant to answer he must within five days return the papers to the district attorney, who must file an information or move for dismissal, held, where papers are submitted to the district attorney, he may file an information for any offense disclosed by them. People v. Spier, 105 NYS 741.

ginia it is not necessary that the record show that the finding was recorded in the circuit court; it is sufficient that the presentment be set forth in extenso in the order of the court, entered of record, and made a part thereof.[73]

Affidavits.—Where prosecution is by affidavit, the statutory requirements as to form should be observed.[74] In Alabama a variance between the warrant and affidavit is immaterial.[75]

(§ 4) *C. Requisites and sufficiency of the accusation. General rules.*[See 8 C. L. 194]—A conviction can only be permitted to stand when it is predicated upon an indictment or information that substantially charges the offense.[76] The requisites of an indictment may be established by the legislature.[77] An indictment in the form prescribed by statute,[78] or which conforms to the language of the statute defining the offense charged,[79] is usually sufficient. The exact words of the statute need not be used; language of equivalent meaning and import is sufficient [80] if each essential element of the crime is stated [81] and accused is apprised of the nature and cause of the accusation against him [82] in language easily understood by the jury.[83] But the

73. Jeremy Imp. Co. v. Com., 106 Va. 482, 56 SE 224.

74. Under Acts 1905, p. 611, providing for prosecution by affidavit, the affidavit must be approved and indorsed by the prosecuting attorney and signed by him. Cole v. State [Ind.] 82 NE 796. The word "filed" in Acts 1905, p. 611, providing for prosecution by affidavit filed in term time, means "made" and the clause should read "affidavit made in term time." Id. A motion to quash an affidavit for the reason that the affidavit does not conclude with the words "contrary to the statute in such case made and provided, and against the peace and dignity of the state of Ohio," will not lie where the affidavit charges a misdemeanor and makes clear the nature of the crime charged. Fendrick v. State, 9 Ohio C. C. (N. S.) 49.

75. The affidavit is the pleading upon which defendant is to be tried. Dillard v. State [Ala.] 44 S 396.

76. State v. Heiderle, 203 Mo. 574, 102 SW 558.

77. Old forms may be abolished and new ones established provided the charge is sufficient to appraise the defendant with reasonable certainty of the nature of the offense. State v. Harris [N. C.] 59 SE 115.

78. Under Laws 1889, p. 86, establishing form of indictment for perjury, the word "feloniously" need not be used. State v. Harris [N. C.] 59 SE 115. Indictment for murder in commission of robbery in form prescribed by White's Ann. Pen. Code, § 1254, is not bad because not charging who was robbed or what was taken. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859

79. An indictment conforming to the language of the statute is sufficient. Imboden v. People [Colo.] 90 P 608; Richberger v. State [Miss.] 44 S 772; People v. Alderdice, 105 NYS 395; Commonwealth v. Sunderlin, 31 Pa Super. Ct. 349; Knoll v. U. S., 26 App. D. C. 457. Indictment for receiving stolen goods following the exact language of the statute (Rev. St. 1899, § 1916) is sufficiently definite and certain. State v. Kosky, 191 Mo. 1, 90 SW 454. Indictment for perjury in language of statute held sufficient. State v. Sargood [Vt.] 68 A 49. Indictment for burglary charging the offense substantially in the language of the statute held sufficient. Smith v. State [Md.] 66 A 678. Indictment for assault with intent to kill charging the offense in language of statute held sufficient though containing surplusage. State v. Spaugh, 199 Mo. 147, 97 SW 901. By Pen. Code, § 929, an indictment or accusation in the language of the statute, or language stating the crime "so plainly that the nature of the offense charged may be easily understood by the jury," is sufficient. Amorous v. State, 1 Ga. App. 313, 57 SE 999. Indictment alleging carrying a pistol to "a place of public worship" sufficient as to place. Id.

80. It is not essential that the words of the statute defining the offense be used if words of equivalent meaning and import are used. State v. York [N. H.] 65 A 685. Any terms may be used which unequivocally convey the same meaning. State v. Pellerin, 118 La. 547, 43 S 159. "Unlawfully," "willfully," "feloniously," embrace "wrongfully," used in the statute. Id. The exact language of a statute defining an offense need not be used if the equivalent is fully set out. State v. Presley [Miss.] 44 S 827. The use of words synonymous with those used in the statute is sufficient. Richberger v. State [Miss.] 44 S 772. Indictment for embezzlement held to charge an offense under Code 1906, § 1136. Id. Under Code 1906, § 1436, declaring that an indictment for embezzlement of money is sufficient if it describes the property as money, a description as $8,659.90 is sufficient. Id. Words "amount" and "value" are synonymous when applied to money. Id.

81. Information for assault with intent to kill in language of statute is not defective for failure to allege that the defendant was close enough to endanger the life of the prosecuting witness. State v. Wilson [Mo. App.] 103 SW 110.

82. Where an offense is charged in language substantially the same or of the same import as that required by the statute, it is sufficient if it acquaint the accused "with the nature and cause of the accusation against him" as required by the constitution. Stutts v. State [Fla.] 42 S 51. Need only furnish accused with such a description of the charge as will enable him to prepare his defense and so inform the court of

rule that an indictment in the language of the statute is sufficient applies only where all facts constituting the offense are set forth in the statute.[84] Thus, where the language of a statute is such that the acts therein stated may or may not constitute a crime, according to the intent with which they are done or the circumstances, the particular intent or circumstances must be alleged.[85] It is held in Kentucky that the words of the statute or equivalent words should be used in charging a statutory offense, and that common-law forms should be followed in charging common-law offenses.[86] The words of a statute defining crime, used in an indictment, are to be construed according to their ordinary significance and in connection with the context.[87]

In determining the sufficiency of an indictment or information, technical accuracy must yield to the fair and obvious meaning of the language employed,[88] and mere technicalities not affecting the substantial rights of accused should be ignored.[89] The offense charged must be determined from the indictment unaided by intendment or by construction supplying an omission.[90] Ambiguity and uncertainty in an indictment are taken most strongly against the pleader.[91] The indictment will not be held bad for failure to allege facts necessarily implied from those stated.[92] The facts constituting the offense must be affirmatively averred and not introduced by way of recital.[93] The allegations should not be repugnant[94] nor contradictory.[95] If a statement laid under the videlicit is material and enters into the substance of the description of the offense and is inconsistent with the premises, the indictment is void.[96] While each count of an indictment must in the charging part distinctly charge an offense, this rule has no reference to formal allegations which may be sup-

the facts that it may determine their sufficiency in law. Geist v. U. S., 26 App. D. C. 594.

83. An indictment is sufficient which states the offense in the language of the statute or so plainly that the nature of the offense may be easily understood by the jury. Anderson v. State [Ga. App.] 58 SE 401.

84. State v. Harroun, 199 Mo. 519, 98 SW 467. An information in the language of the statute is sufficient only when the words thereof set forth the elements of the offense and state the facts thereof. McGinnis v. State [Wyo.] 91 P 936. An indictment charging a physician with holding himself out as a physician without having passed the required examination, following the language of the statute, is insufficient because not stating how he was holding himself out. State v. Wilson, 79 Vt. 379, 65 A 88. Where a statute states the elements of a crime, it is generally sufficient in an information or indictment to describe such crime in the language of the statute. Applied to crime of incest. Cordson v. State [Neb.] 109 NW 764.

85. Language of statute not specific enough to charge crime of keeping wife in house of prostitution under St. 1891, p. 285, c. 206. People v. Conness [Cal. App.] 88 P 815 [Advance sheets only].

86. Under Cr. Code Proc. §§ 122-124, prescribing requisites of an indictment. Commonwealth v. Drewery, 31 Ky. L. R. 635, 103 SW 266.

87. Amorous v. State, 1 Ga. App. 313, 57 SE 999.

88. Clement v. U. S. [C. C. A.] 149 F 305. "Gunshot" wound includes one made by "pistol." State v. Barrington, 198 Mo. 23, 95 SW 235.

89. Enough if accused is fairly apprised of the charge against him. State v. Swan, 31 Utah, 336, 88 P 12.

90. State v. Von Kutzleben [Iowa] 113 NW 484.

91. Terre Haute Brew. Co. v. State [Ind.] 82 NE 81. An indictment alleging that the offense was committed in Cook County, Illinois, but did not allege that it was committed within the limits of Chicago, it is presumed that it was committed outside such limits and the municipal court of Chicago has no jurisdiction. People v. Straesheim, 228 Ill. 581, 81 NE 1129.

92. Warrant charging that defendant did bring whisky into a certain county necessarily included the charge that he had it in his possession there. McGuire v. Com., 30 Ky. L. R. 720, 99 SW 612. Reasonable implications from facts clearly charged may be indulged in in ascertaining the true meaning. Ex parte Pierce, 155 F 663.

93. Terre Haute Brew. Co. v. State [Ind.] 82 NE 81.

94. Indictment for embezzlement against an assistant financial agent of a state penitentiary alleging that he was an officer of the government, and that he was a clerk and employe of such officer, is good against a motion in arrest on the ground that allegations are repugnant. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 SW 638.

95. Ann. St. 1906, pp. 1490, 1509, providing that judgments shall not be arrested for repugnant allegations, does not authorize a conviction under an information containing such contradiction as to negative a crime. State v. Weyland [Mo. App.] 105 SW 660.

96. Neither clause can be rejected as surplusage. Maloney v. People, 229 Ill. 593, 82 NE 389.

plied by reference to the beginning or conclusion of the indictment.[97] A count may refer to and adopt matter in a previous count.[98] Where the first count referred to in other counts is afterwards dismissed, it may still be looked to to supply date and venue of offense.[99] Where the distinction between principal and accessory has been abolished, one who aids and abets may be indicted as a principal.[1] An indictment charging one as accessory must be as full and definite as to the elements of the offense as one charging accused as principal.[2] In Georgia principals in the first and second degrees in the crime of murder are punished alike and no distinction need be made between them in the indictment.[3] Where an indictment alleges former conviction of crime to subject defendant to additional punishment, the indictment may be good as to the crime charged though the former conviction cannot be shown under it.[4] An indictment charging former convictions need not allege that they have been vacated or reversed.[5] Whether an information need allege facts to avoid the statute of limitations depends upon the time of issuance of the warrant.[6]

Certainty. See 8 C. L. 194—The indictment, information or accusation, must be sufficiently definite and certain as to the offense charged [7] and each essential element thereof,[8] as to give accused notice of the particular crime with which he is charged

97. Manovitch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 712, 96 SW 1. The words "against the peace and dignity of the state" at the conclusion of an indictment belong to the entire indictment. Where a demurrer to the second count was sustained, such phrase remained and applied to the first count. Starling v. State [Miss.] 43 S 952.

98. Benson v. U. S., 27 App. D. C. 331; Hyde v. U. S., 27 App. D. C. 362.

99. Manovitch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 712, 96 SW 1.

1. Rosencranz v. U. S. [C. C. A.] 155 F 38.

2. Wright v. State, 1 Ga. App. 158, 57 SE 1050. To convict one of aiding and abetting another in a crime, it is necessary either to charge the principal with him in the indictment, or, if this be not done, to state the principal's name, or that it is unknown, and the facts showing the aiding and abetting should appear. Taylor v. Com., 28 Ky. L. R. 819, 90 SW 581.

3. Bradley v. State, 128 Ga. 20, 57 SE 237.

4. Satterfield v. Com., 105 Va. 867, 52 SE 979.

5. Gragg v. Com., 31 Ky. L. R. 873, 104 SW 285.

6. An information filed after the time limited by statute for the commencement of the prosecution need not allege facts relied upon to take the case out of the statute where the warrant was issued in good faith and was placed in the hands of an officer to be executed before, but the arrest was not made until after, the statutory period. State v. Waterman [Kan.] 88 P 1074.

7. Offense must be set forth with clearness and certainty. Armour Packing Co. v. U. S. [C. C. A.] 153 F 1. The indictment need only charge in ordinarily intelligible terms such facts as will apprise accused with reasonable certainty of the particular offense charged. Goslin v. Com., 28 Ky. L. R. 683, 90 SW 223. The criterion for judging the sufficiency of an indictment is whether the words employed make the charge clear to the "common understanding." Refinement and technicality must yield to substantial things. Ex parte Pierce, 155 F 663. Indictment under Acts 1903, p. 303, requiring railroads to maintain water closets at stations, etc., **held bad for uncertainty.** State v. St. Louis, etc., R. Co. [Ark.] 103 SW 623. Indictment under Acts 1903, p. 303, requiring railroads to maintain certain accommodations at depots. Id. [Ark.] 103 SW 625. Affidavit charging one with being an accessory before the fact to the act of a notary public in feloniously affixing her signature to a deed held insufficient to charge an offense notwithstanding Cr. Code, § 188. Riley v. State, 168 Ind. 657, 81 NE 726.

Indictment or information held good: Where there had been two local option elections in a county, an information for violation of local option law was not bad because not alleging which election was relied upon. Riggs v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 683, 96 SW 26. An indictment charging that one did embezzle certain money that came into his hands held sufficiently specific and not bad as pleading a conclusion. State v. Hoffman, 134 Iowa, 587, 112 NW 103. An indictment for homicide need not plead the statute alleged to have been violated. United States v. Battle, 154 F 540. Indictment of bank officer for making false statements with intent to deceive a bank examiner under Code, § 1887, held not bad for uncertainty. State v. Henderson [Iowa] 113 NW 328. Affidavit to complaint charging aggravated assault held not defective for failure to state character of instrument used. Shelton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 41, 100 SW 955. Affidavit for stealing chickens, reciting the facts, held sufficient though it did not give the name of the offense committed. Bates v. State [Ala.] 44 S 695. Under Gen. Acts 1903, p. 283, it is sufficient for a complaint for a misdemeanor to designate the same by name. Campbell v. State [Ala.] 43 S 743. Affidavit for falsely representing pecuniary standing and thereby obtaining credit held to state an offense. Compton v. State [Ala.] 44 S 685. Indictment for false swearing held bad. United States v. Johnson, 26 App. D. C. 136.

8. An indictment must set forth facts which the pleader claims to constitute the

and the nature thereof,[9] and enable him to properly prepare his defense,[10] and to enable him to avail himself of a judgment thereon in defense of another prosecution for the same offense,[11] and to qualify the court to determine whether or not the facts therein stated are sufficient to support a conviction.[12] The practice varies as to the right of accused to a bill of particulars.[13]

Bad spelling and ungrammatical construction See 8 C. L. 195 will not alone render an information or indictment fatally defective,[14] but this rule does not cure omission of essential language.[15]

Surplusage. See 8 C. L. 195—Nonessential averments which, if stricken, leave the offense well charged, may be rejected as surplusage [16] and may be disregarded [17] if defendant is not prejudiced thereby.[18] When an information sufficiently charges an offense, not essentially continuous, committed on a specified day and year, with an

transgression, and every essential element of it. Armour Packing Co. v. U. S. [C. C. A.] 153 F 1. Indictment for murder which does not connect the shooting with the infliction of the fatal wound is insufficient. State v. Birks, 199 Mo. 263, 97 SW 578. In Alabama the means with which the offense was committed must be alleged. Gaines v. State, 146 Ala. 16, 41 S 865. Unless the crime which it is alleged defendants conspired to commit is named, the indictment for conspiracy must set forth facts constituting every element of such offense. Imboden v. People [Colo.] 90 P 608. Under Code 1896, § 4903, in charging an offense committed in a public place, it is sufficient description to allege that it was committed in a public place. Walker v. State [Ala.] 43 S 188.

9. The indictment must be sufficiently definite and certain to give defendant notice of the particular crime with which he is charged, and the nature thereof. State v. Witherspoon, 115 Tenn. 138, 90 SW 852.

10. Armour Packing Co. v. U. S. [C. C. A.] 153 F 1. An indictment which is so vague and indefinite as to mislead defendant in preparing his defense is insufficient. Douglass v. State [Fla.] 43 S 424. Where every essential ingredient of the offense is set forth with sufficient certainty to enable defendant to prepare his defense, and the jury to understand the nature of the offense, it is sufficient. Williams v. State [Ga. App.] 58 SE 1071.

11. Armour Packing Co. v. U. S. [C. C. A.] 153 F 1. An indictment is sufficiently certain if it alleges facts sufficient to enable accused to make his defense and to plead the judgment in bar to another prosecution for the same offense. Clement v. U. S. [C. C. A.] 149 F 305. Indictment must so describe and identify the offense that the judgment in the case could be relied on in another prosecution on the same facts as a former conviction or acquittal. State v. Witherspoon, 115 Tenn. 138, 90 SW 852.

12. Armour Packing Co. v. U. S. [C. C. A.] 153 F 1.

13. See post, § 6.

14. Needless use of word "with" in information held not to render it objectionable. State v. Long, 201 Mo. 664, 100 SW 587. Where third count of an indictment referring to first count alleged that the defendant did on a certain date, at a certain place, etc., the omission of "there" from expression "then and there," in the charging part, did not render it defective. Manovitch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 712, 96 SW 1. Indictment charging that two defendants did then and there unlawfully and with "his" malice aforethought, etc., held not defective for grammatical error. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. "Farudulently" in indictment is equivalent to "fraudulently." Wells v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 443, 98 SW 851. Indictment designating date of offense as a day in "Aug." cannot be quashed because of the abbreviation. Purdy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 295, 97 SW 480. Indictment for gambling in violation of Laws 1901, p. 19, held sufficient as against a motion in arrest though defective in omitting the word "did" before "unlawfully." Church v. Territory [N. M.] 91 P 720.

15. Indictment for murder held fatally defective for omission of "did" before "kill." Hall v. State [Miss.] 44 S 810.

16. Complaint charged embezzlement of carriage and harness, and then alleged that "in the manner aforesaid did take, steal and carry away, said buggy and double harness." Held, complaint did not charge two offenses, as quoted words were immaterial and unnecessary and could be treated as surplusage. State v. Allen [S. D.] 110 NW 92. An information for failure to stop an automobile on a public highway when signaled by a person driving a horse that the signal was given by one riding for and on behalf of the driver is surplusage, as under the statute any person in the vehicle may give the signal. State v. Goodwin [Ind.] 82 NE 459. Indictment for rape not fatally defective because defendant's name was inserted in a blank space in lead pencil, nor because of certain additional words that indictment was submitted in lieu of one which had been dismissed with leave to resubmit. Jones v. Com., 30 Ky. L. R. 288, 97 SW 1118. Indictment charged "A and B, a firm," with violation of local option law. Indictment was good as against both, the words "a firm" being deemed surplusage. Rawls v. State [Tex. Cr. App.] 89 SW 1071.

17. Word "knowingly" in indictment for gaming in violation of Laws 1901, p. 19. Church v. Territory [N. M.] 91 P 720.

18. Immaterial allegations do not render an indictment bad if they do not prejudice defendant. State v. Phillips [Mont.] 92 P 299.

unnecessary continuendo, the continuendo does not injure the information but may be rejected as surplusage.[19]

*Venue.*See 8 C. L. 195—It must appear that the crime was committed within the jurisdiction.[20] In Missouri it is not necessary to state any venue in the body of the information.[21] Where a crime is alleged to have been committed on land purchased by the Federal government, an allegation of title in the government is not necessary.[22]

*Intent or knowledge.*See 8 C. L. 195—When an information charging a misdemeanor alleges that the act which constitutes the offense was done knowingly and willfully, no other or further criminal intent need be alleged or proved.[23] A charge that the act was "knowingly" done is good.[24] In charging a felony, the indictment need not include the word "felonious" or "feloniously," [25] When the word "feloniously" is used unnecessarily, it amounts only to charging that the crime is a felony and cannot be construed as meaning knowingly or with knowledge.[26] If the act done may be criminal in several aspects according to the intent or purpose in doing it, an averment of the specific intent is essential.[27]

*Time.*See 8 C. L. 195—When time is not of the essence of the offense, failure to state the time, or an imperfect statement of it, will not invalidate the information or indictment.[28] An indictment charging commission of a crime on an impossible date is fatally defective.[29] A clerical error in the statement of time will be disregarded where the time otherwise appears.[30]

*Designation of persons.*See 8 C. L. 198—The use of the ordinary abbreviation of a Christian name [31] or of initials [32] or of the name by which a person is known [33] is held sufficient. If the name specified and the name by which the person is known

19. So held of information charging adultery on Feb. 13, 1905, and divers other days thence continuously between Feb. 13, 1905, and August 1, 1905. State v. Thompson, 31 Utah, 228, 87 P 709.

20. The words "in Swainsboro, Georgia," are apt words to convey the meaning that the acts alleged occurred within the territorial limits of the municipality bearing that name. Mason v. State, 1 Ga. App. 534, 58 SE 139.

21. Under Rev. St. 1899, § 2527, the venue is sufficiently stated in the margin. State v. Moore, 203 Mo. 624, 102 SW 537.

22. United States v. Battie, 154 F 540.

23. State v. Gregory, 74 Kan. 467, 87 P 370.

24. Charge that defendant "knowingly" uttered forged check as true held sufficient. State v. Waterbury, 133 Iowa, 135, 110 NW 328.

25. State v. Judd, 132 Iowa, 296, 109 NW 892.

Contra: Indictment for murder held insufficient because not charging that it was "feloniously" committed. Wright v. U. S., 18 Okl. 510, 90 P 732.

26. State v. Judd, 132 Iowa, 296, 109 NW 892.

27. Ex parte Goldman [Cal. App.] 88 P 819. Hence, where a crime or the subject thereof has been concealed, the purpose of concealment must be charged (e. g., that it was accessory to and charged with intent to conceal the perpetration of the felony) to distinguish the crime charged from others that might be laid on the same facts (Id.), and an indictment for accessary concealment must set out acts constituting a concealment (Id.). General allegation that he knowingly "concealed" is bad. Id.

28. Under Rev. St. 1899, § 2535, an information charging a robbery on the "—— day of November, 1905," was not bad. State v. Moore, 203 Mo. 624, 102 SW 537. If the date upon which the crime was committed was not an essential element, the date need not be set forth. State v. Collins [R. I.] 67 A 796. Date of offense in a capital case is not of the essence and may be amended as crime does not fall within statute of limitations. State v. Cornelius, 118 La. 146, 42 S 754. Under Revisal 1905, § 3255, that no judgment upon any indictment for felony or misdemeanor shall be stayed or reversed for omitting to state the time at which the offense was committed where time is not of the essence, an indictment for bigamy (Revisal 1905, § 3361) is not bad for failing to state the date of either of two marriages. State v. Long, 143 N. C. 670, 57 SE 349.

29. Indictment charging that offense was committed June 31, an impossible date, is fatally defective. Stephens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 349, 103 SW 904.

30. Mere clerical error in stating year of organization of grand jury, real dates also appearing, held immaterial. Hinson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 43, 100 SW 939.

31. Sufficiency of indictment not affected by abbreviation of accused's name from "John" to "Jno." State v. Granger, 203 Mo. 586, 102 SW 498.

32. In embezzlement it is sufficient to allege the initials of the Christian name of the owner of the property embezzled. Knight v. State [Ala.] 44 S 585.

33. It is sufficient if the person assaulted was known by the name specified in the indictment. People v. Way, 104 NYS 277.

are idem sonans, the designation is sufficient.[34] In homicide cases deceased may be designated by his proper name [35] and slight errors therein are immaterial.[36] That one count sets out deceased's name, and another uses his initials and alleges that his Christian names are unknown, does not make the indictment demurrable.[37] An indictment for selling liquor to persons to the grand jury unknown is not defective for failure to set out the names of such persons.[38] Defendant may be designated by a name by which he is commonly known.[39] Insertion of the name of another in the charging clause in place of defendant's is a fatal error.[40] In prosecution of an agent of a foreign company for violating a local option law, the charge should be against defendant direct; it is not necessary to allege agency, nor that he acted for a corporation, partnership, or individual.[41] In Kentucky an error in the name of the corporation defendant may be corrected.[42]

Setting forth written or printed matter. See 8 C. L. 196—Where the basis of the offense is a written instrument, it should be set out in haec verba or the substance stated.[43]

Description and ownership of property. See 8 C. L. 197—Property which is the subject of the crime must be described with reasonable certainty as to its nature,[44] value [45] and location,[46] and, in crimes against property, ownership must be alleged [47]

34. "Ravler" is idem sonans with "Reviar" set up as true name. Howard v. State [Ala.] 44 S 95. Indictment should not be quashed on ground that prosecutor's name was spelled "Dorgan" in one place and "Durgan" in another, the names being idem sonans. O'Donnell v. People, 224 Ill. 218, 79 NE 639. Accused was indicted under name "George Rawlin" and filed a plea of misnomer alleging his true name to be "George Roland" and that he had never been known and called by the name under which he was indicted. On trial of this issue it appeared that his name was spelled "Roland," but pronounced "Rolin;" held plea was properly overruled, the name in the indictment and that by which accused was known and called being idem sonans. Roland v. State, 127 Ga. 401, 56 SE 412.

35. Deceased is sufficiently described by his proper name in indictment for murder. State v. Hogan, 117 La. 863, 42 S 352. Indictment for murder of "Asaria Simmons, alias Dummy," is not bad for failing to allege the Christian name of "Dummy," or that it was unknown to the grand jury. Falkner v. State [Ala.] 41 S 409.

36. Indictment for murder not demurrable because an "I" in name of deceased is dotted in one count and not in another. Harrison v. State, 144 Ala. 20, 40 S 568. Indictment charging that "J. E. Butt" was killed, and said "T. J. Butt" died, etc., not fatally defective. Bell v. State [Ark.] 104 SW 1108.

37. Harrison v. State, 144 Ala. 20, 40 S 568.

38. State v. Dowdy [N. C.] 58 SE 1002.

39. Where accused was known as "Mud McCue" as well as by his true name Frank McCue, the court did not err on correcting the record to show the true name in refusing to strike the alias from the face of the indictment. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. Indictment naming a defendant as "Charles Fayles, commonly called 'Happy Jack,'" is not bad because of use of term "Happy Jack." State v. Barrick, 60 W. Va. 576, 55 SE 652. Designating accused as "E. C. Morrison" sufficiently charges that he is an individual. Morrison v. State [Ala.] 44 S 43.

40. Indictment for rape is fatally defective where name of victim is inserted in charging part in place of name of defendant. State v. Stephens, 199 Mo. 261, 97 SW 860.

41. Weil v. State [Tex. Cr. App.] 90 SW 644.

42. Under Cr. Code Proc. § 125, providing that error as to name of defendant shall not vitiate indictment, and Civ. Code Proc. § 732, and Ky. St. 1903, § 457, providing that "person" shall include corporation, where corporation was indicted as a certain named company it could be corrected to read such company "of America." International Harvester Co. v. Com., 30 Ky. L. R. 716, 99 SW 637.

43. State v. Henderson [Iowa] 113 NW 328. Under Code Cr. Proc. § 275, requiring an indictment to contain a plain concise statement of the act constituting the offense, an indictment for forging a deed setting out the deed in full held sufficient. People v. Alderdice, 105 NYS 395.

44. Indictment for robbery of "one promissory note of the value of $50.85, one purse of the value of 25 cents, and one time check of the value of 50 cents," sufficiently describes the property. State v. McCoy [W. Va.] 59 SE 758. Indictment for receiving stolen goods describing goods as "1200 cigars of the value of $42" held sufficient. State v. Kosky, 191 Mo. 1, 90 SW 454. Indictment for theft of railroad tickets should state name of railroad, and that it was incorporated, whether the tickets were issued by it, and whether they entitled the holder to transportation. Patrick v. State [Tex. Cr. App.] 98 SW 840.

45. Information for swindling alleging that accused intended to defraud prosecutor of $2.70 in money sufficiently places value on the property since under the statute money has a distinctive meaning significant of value. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469.

46. An indictment which designates a house by its street number need not set

though the corporate character of the owner need not be stated.[48] Allegation of ownership in one having possession is good though he holds as agent or bailee.[49]

Description of money.[See 8 C. L. 197]—In the case of certain crimes the word "money" must be used.[50] In Arkansas an indictment for larceny must state whether money taken was gold, silver or paper;[51] but an indictment for grand larceny is not fatally defective, for failure so to do, if it also alleges the taking of other property exceeding ten dollars in value.[52] Averment of a certain amount of money is sufficient in Colorado.[53] In Texas an allegation of the taking of a certain amount of money which passed current as money of the United States is sufficient.[54] While the substitution of marks or signs in an indictment in the place of words is extremely dangerous, the dollar sign is in such common use that a court would not be justified in holding an indictment bad because the dollar mark is used in place of the word dollars.[55]

Duplicity.[See 8 C. L. 195]—While a single indictment or information may not charge more than one separate and distinct offense,[56] the allegation in different

forth the number in words. It is an arbitrary symbol and should be set forth in accordance with the fact. State v. Castle [N. J. Law] 66 A 1059.

47. Ownership of a room in a school dormitory, and especially of the goods therein, should be laid in an indictment for burglary thereof. Mays v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 720, 97 SW 703.

48. Under Act March 19, 1904, providing punishment for breaking open safe belonging to person, firm, bank or corporation, indictment need not allege that a bank whose safe was blown was a corporation. Stamper v. Com., 30 Ky. L. R. 679, 99 SW 304.

49. In **larceny** or **burglary,** ownership of the property may be laid in person having possession though he holds it as agent or bailee. Bradley v. State [Ga. App.] 58 SE 1064.

50. An indictment of an officer of a National bank under Rev. St. § 520, for misapplication of "funds and credits," is insufficient where it does not use the word "money." United States v. Smith, 152 F 542.

51. Under Kirby's Dig. § 1844, providing that in an indictment for larceny it shall not be necessary to describe kind of money taken further than to allege gold, silver or paper, an indictment which does not allege whether gold, silver or paper was taken, is insufficient. Cook v. State, 80 Ark. 495, 97 SW 683.

52. An indictment for grand larceny under Kirby's Dig. § 1844, is not fatally defective for failure to allege whether gold, silver or paper, was taken where it alleges that other property exceeding in value $10 was taken. Cook v. State, 80 Ark. 495, 97 SW 683.

53. Under Mills' Ann. St. § 1453, money is sufficiently described by alleging a certain amount of money. Imboden v. People [Colo.] 90 P 608.

54. An indictment for larceny describing money taken as $10 in money which passed current as money of the United States held sufficient. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883.

55. Rev. St. § 7215. State v. Lang, 5 Ohio N. P. (N. S.) 369.

56. Held double: Indictment under Rev. St. § 5902, against officer of National bank is bad for duplicity, where it charges embezzlement and misapplication of "funds and credits" without describing either, and without statement of amount of either. United States v. Smith, 152 F 542. Such items must be separately described. Id. An indictment charging two distinct offenses punishable by different terms of imprisonment is demurrable. State v. Freeman [Miss.] 43 S 289. Under Kirby's Dig. § 3600, forbidding the catching of fish with seine net, etc., and also prohibiting use of seine with meshes less than four inches square, and indictment charging the catching of fish with net and seine is void for duplicity. Rowe v. State [Ark.] 103 SW 613. Indictment for perjury held duplicitous where it alleged in one paragraph that there was pending a certain "Civil Suit," and that action was for "remission of a fine." Crow v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 559, 90 SW 650. Information for illegally selling liquor held bad for duplicity. Chase v. Van Buren Circuit Judge, 148 Mich. 149, 14 Det. Leg. N. 73, 111 NW 750. Complaint for repeating at election held to charge that both votes were illegal and was, therefore, bad for duplicity, as charging two offenses in a single count. State v. Custer [R. I.] 66 A 309. The right to vote in the first instance being expressly negatived, and it was, therefore, not cured by the presumption that he was entitled to vote once. Id. Indictment under Acts 1903, p. 303, requiring railroads to keep waiting rooms comfortably heated and supplied with drinking water alleging failure to keep it heated and supplied with drinking water, held bad for duplicity. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 625. Indictment under Acts 1903, p. 303, requiring railroad companies to maintain water closets at stations, with proper lettering indicating which is for ladies and which for gentlemen, held bad for duplicity. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 623. Information charging that defendant sold to "P. and R. and C. each one drink of whisky" held bad, not alleging one sale but several distinct sales. Alexander v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 203, 102 SW 1122.

Held not double: Indictment for use of mails to defraud held not bad for duplicity.

counts all of which refer to the same transaction [57] of different modes [58] or means [59]

Gourdain v. U. S. [C. C. A.] 154 F 453. Information in 11 counts for illegally selling intoxicating liquor, the last count of which charged the maintenance of a nuisance, held not bad for duplicity. State v. Giroux [Kan.] 90 P 249. In Georgia robbery by force and robbery by intimidation may both be charged in one indictment either in one or in separate counts. Pen. Code 1895. § 151. Harris v. State. 1 Ga. App. 136, 57 SE 937. An indictment which charges in a single count conjunctively several different ways of committing an offense described in the statute disjunctively is not bad for duplicity. State v. Ice Delivery Co., 5 Ohio N. P. (N. S.) 89. An indictment which charges in one count the commission of several offenses of the same general character, committed at the same time and forming part of the same transaction, is not bad for duplicity. Id. An indictment charging defendants with being a trust combination in violation of the Valentine Anti-trust law, from March 10, 1900, and continuing until March 9, 1903, and further charging violations of said law during that time, is not demurrable or subject to motion to quash on the ground of duplicity, in that each day of the existence of such an alleged combination constitutes a separate offense under section 4427-4, and that the indictment attempts to charge numerous offenses in one count. Hughes v. State, 9 Ohio C. C. (N. S.) 369. An indictment, drawn under Rev. St. § 2820, charging the accused with intent to wound, maim and kill, is not bad for duplicity because these offenses are charged in one count and in the conjunctive. Limber v. State, 9 Ohio C. C. (N. S.) 177. An indictment is not bad for duplicity because it charges several acts in a single count, each and all of which violate the penal statutes but once and incur but one penalty; nor is it defective for surplusage or repugnant allegations, when there is sufficient matter alleged to indicate the crime and the person charged therewith. State v. Lang, 5 Ohio N. P. (N. S.) 369. Information charging slander of more than one person is not duplicitous. Roberts v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 741, 100 SW 150. Complaint charging that defendant maintained, etc., a certain sign, and certain other fixture, to-wit, an illuminated sign, held to charge but one offense. City of St. Louis v. St. Louis Theatre Co., 202 Mo. 690, 100 SW 627. Where one count charged three defendants with striking, wounding, shooting and stabbing a person, and three others charged individual defendants with assaults with different weapons, and that other defendants aided and abetted, the indictment was held not bad for duplicity, only one offense being charged. Greenwell v. Com., 30 Ky. L. R. 1282, 100 SW 852. Indictment charging that one as bailee converted to his own use and stole, took away, etc., charges but one offense under Kirby's Dig. § 1839, providing that a bailee who converts property in his possession shall be guilty of larceny. Storms v. State [Ark.] 98 SW 678. Where an indictment charges selling or furnishing three or more kinds of liquor, the evidence will support a conviction if it shows a sale of either kind. The indictment is not double because alleging conjunctively that defendant did several forbidden things. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67. Indictment for maintaining a nuisance in violation of Acts 1905, p. 709, c. 169. §§ 535, 537, held not bad for duplicity. Meyers v. State [Ind.] 82 NE 763. An indictment for conspiracy in two counts, one charging confederation to injure certain persons by assaulting them, and the other charging the same act with intent to injure property, etc., held not bad for duplicity within Code § 5284. State v. Caine, 134 Iowa, 147, 111 NW 443. Information for embezzlement in the language of the statute held not bad for duplicity. Hendee v. State [Neb.] 113 NW 1050. An indictment under the Anti-trust Act of July 2, 1890, charging in separate counts a combination and conspiracy in restraint of trade is not bad for duplicity, as to either count on the theory that each overt act set out is charged as a separate offense. United States v. MacAndrews & Forbes Co., 149 F 823. Indictment under the Elkins Act, alleging that defendant offered, granted and gave a rebate, is not duplicitous. United States v. Delaware, etc., R. Co., 152 F 269. Indictment for selling petroleum without a license held to properly charge a single offense, viz: the selling by retail of petroleum by transporting and retailing the same by means of wagons without a license. Standard Oil Co. v. Com., 29 Ky. L. R. 913, 96 SW 596.

57. An indictment may properly charge in different counts the same offense in different forms. People v. Alderdice, 105 NYS 395. Indictment charging in one count burglary in nighttime, and in another burglary in daytime, is not duplicitous where both counts referred to same transaction. Martinez v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 291, 103 SW 930.

58. Indictment under White's Ann. Pen. Code, art. 787, providing for punishing of any person who shall "willfully or wantonly kill, maim, wound, disfigure, poison, or cruelly and unmercifully beat and abuse any animal," is not duplicitous though it joins in one count all the statutory modes of committing the offense. Holman v. State [Tex. Cr. App.] 90 SW 174. Where a statute denounces an offense in several ways by which it may be committed, the pleader may select either or embody in the indictment every and all means charged in the statute. Weaver v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 875, 105 SW 189. Rev. St. 1899, § 1916, makes it an offense to buy or in any way receive stolen goods. An indictment charging that accused bought, received, had and took into possession certain goods, charges only one offense. State v. Kosky, 191 Mo. 1, 90 SW 454.

59. Indictment alleging in one count that death was caused by a brick, and in another by a hard substance, unknown to the grand jury, is not bad for duplicity. Outley v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 947, 99 SW 95. Indictment charging that defendant procured an abortion by the use of drugs and medicines, and by violence internally and externally applied, held not

of committing the offense will not render the accusation duplicitous. Where only the higher degree of crime is specifically charged, an information is not bad for charging facts which if established would justify conviction for another crime of like nature but of a lower grade,[60] especially where such facts are ingredients of each crime.[61]

Exceptions and provisos.[See 8 C. L. 196]—Exceptions or provisos which qualify or describe the offense must be negatived.[62] Exceptions and provisos which do not form a part of the description of the offense need not be negatived.[63] It is sufficient to state exceptions to a limitation statute in the language of the statute.[64]

Statutory crimes.[See 8 C. L. 196]—Generally it is sufficient in charging a statutory offense to use the language of the statute [65] or equivalent terms.[66] It is only when the statute denouncing the offense is couched in generic terms that the information need go beyond the language of the statute.[67] The circumstances of the offense need be

bad for duplicity. Reum v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 857, 99 SW 1109.

60. Where an information charges in one count robbery in the first degree, and in describing the assault charges facts which constitute the crime of assault with a deadly weapon with intent to rob, such information is not by reason thereof bad for duplicity. State v. Parkhurst, 74 Kan. 672, 87 P 703.

61. State v. Parkhurst, 74 Kan. 672, 87 P 703.

62. First proviso in Revisal 1905, defining abduction of or elopement with a married woman, must be negatived. State v. Connor, 142 N. C. 700, 55 SE 787. Information charging the taking of pecan nuts from inclosed land of another held to negative consent of owner and to be sufficient. Laws 1897 p. 53, c. 55, § 1. Burrows v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 95, 101 SW 232. Under B. & C. Comp. § 1830, making it an offense for any one but an officer on lawful business to trespass, etc., an information which does not allege that defendant was not an officer on lawful business is fatally defective. Binhoff v. State [Or.] 90 P 586. Information also held defective in that it did not negative fact of ownership. Id.

63. State v. Connor, 142 N. C. 700, 55 SE 787. Indictment for selling liquor on election day in violation of Acts 28 Leg. p. 154, held bad because it did not negative the provision that it could be sold by a drug store on prescription. Thweatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 391, 95 SW 517. Code §§ 2579, 2580, makes it an offense to practice medicine without having procured a certificate from the state board, but provides that the act shall not be construed to prohibit students of medicine from prescribing under the supervision of preceptors, etc. Held, indictment need not negative the proviso. State v. Kendig, 133 Iowa, 164, 110 NW 463. An indictment for violating Revisal 1905, § 4468, prohibiting persons not graduates, and who do not hold certificates from practicing dentistry, need not negative the provision exempting persons who were practicing in the state prior to March 7, 1879, who had filed a statement prior to Feb. 25, 1890, etc. Burden is on defendant to prove that he is within the exempted class. State v. Hicks, 143 N. C. 689, 57 SE 441. An indictment for bigamy under Revisal 1905, § 3361, need not negative divorce from or seven years absence of first wife, these being matters of defense to be proved by defendant. State v. Lang, 143 N. C. 670, 57 SE 349. Exceptions and provisions in a statute need not be negatived unless they be descriptive of the offense or a necessary element in its definition. Indictment for violation of local option law held sufficient. State v. Carmody [Or.] 91 P 1081.

64. The particular facts which constitute exceptions to the bar of limitations need not be minutely alleged in an indictment. It is sufficient if any of the exceptions stated in Pen. Code 1895, § 30, be stated in the language of the statute. Cohen v. State [Ga. App.] 59 SE 4.

65. State v. Swan, 31 Utah, 336, 88 P 12. An indictment in language of Ky. St. 1903 § 3915, punishing formation of trust is sufficient. International Harvester Co. v. Com., 30 Ky. L. R. 716, 99 SW 637. Crime of making an aperture in a dam (Ball. Ann. Codes & St. § 7154) held sufficiently charged. State v. Tiffany [Wash.] 87 P 932. Indictment for violation of National Bank Laws held sufficient. Harper v. U. S. [Ind. T.] 104 SW 673. Information charging statutory offense in the language of the statute is sufficient. State v. Knost [Mo.] 103 SW 616. Information for abduction held sufficient. Id. An indictment charging violation of Ky. St. 1903, § 1585a, punishing an officer of election who shall "knowingly and willfully" certify to an improper certificate, which in its accusatory part alleges that he "unlawfully and feloniously" did, is sufficient where statutory words are used in its body. Commonwealth v. Drewry, 31 Ky. L. R. 635, 103 SW 266. Code §§ 2579, 2580, make it an offense to practice medicine without having secured a certificate from the state board, and define a practitioner as one publicly professing to be a physician and making a practice of prescribing and furnishing medicine for the sick. Held, an indictment charging the offense in the language of the statute is sufficient. State v. Kendig, 133 Iowa, 164, 110 NW 463. Complaint for disturbing peace and quiet of prosecuting witness is sufficient if it follows language of statute. State v. Brower [Kan.] 88 P 884.

66. State v. Swan, 31 Utah, 336, 88 P 12. While an indictment for a statutory offense should be in the language of the statute, the substitution of a word equivalent to one contained in the statute will not render the indictment bad. State v. Smith [Tenn.] 105 SW 68.

67. State v. Swan, 31 Utah, 336, 88 P 12.

set out only when they constitute, or are necessary to complete, the offense.[68] The conjunctive is properly used between terms used interchangeably in the statute.[69] Where the statute denounces several acts which are stated disjunctively in the statute, an information embracing all of them in one count must state them conjunctively.[70]

(§ 4) *D. Issues, proof, and variance.*[See 8 C. L. 197]—Every essential averment must be proved substantially as laid,[71] but unnecessary allegations need not be

An indictment charging a statutory offense in the language of the statute is sufficient when such language describes the acts constituting the offense sufficiently to apprise defendant of the nature of the charge. Glover v. State, 126 Ga. 594, 55 SE 592. While an indictment may be set forth in the general language of the statute, it must be accompanied by a statement of all particulars of the offense without uncertainty or ambiguity. United States v. Baltimore & O. R. Co., 153 F 997. Indictment for violation of interstate commerce act held insufficient. Id.

68. State v. Swan, 31 Utah, 336, 88 P 12.

69. Indictment for running ten-pin alley "and" bowling alley for profit without a license held not bad for use of conjunctive "and" the words "tenpin" alley and "bowling" alley being used interchangeably in the statute. O'Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 18, 100 SW 919.

70. Information charging carrying of knuckles made of metal or some hard substance was defective as charging several things disjunctively. Countryman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 886, 105 SW 181.

71. Charge of selling intoxicating liquor is sustained by proof of sale of "beer" without further proof that it is intoxicating. State v. Carmody [Or.] 91 P 446. Unnecessary description of a house burglarized as being occupied as a private residence, not being required by statute, constitutes such a description as would have to be proved. Martinez v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 291, 103 SW 930. If criminality depends on the place where the act is committed, allegation of place is material and a variance in proof as to it is fatal. Johnson v. State, 1 Ga. App. 195, 58 SE 265. The term "public highway" denoting generic term "public road" is descriptive of a species the identity of which is fixed by law and is material. Id. The rule that under an indictment for larceny variance of proof and allegations as to ownership of the property is fatal applies to an indictment for conspiracy to cheat and defraud. Lowell v. People, 229 Ill. 227, 82 NE 226. Where indictment alleged that a demurrer to a prior indictment had been sustained and that it was a continuation of the prosecution, and the offense would otherwise be barred by limitations, held proof that second indictment was in lieu of the first was necessary to sustain conviction. Hughes & Co. v. Com., 31 Ky. L. R. 179, 101 SW 1194. Evidence sufficient to prove venue of abortion as laid. State v. Hogan, 123 Mo. App. 319, 100 SW 528.

No variance where indictment charged unlawful sale of liquor and proof showed a sale by a negro porter acting in conjunction with defendant. Kittrell v. State, 89 Miss. 666, 42 S 609. No variance between an indictment for killing "Aseria Simmons, alias Dummy" and proof that decedent was generally known as Dummy. Falkner v. State [Ala.] 44 S 409. In arson proof that J. owned building burned but leased it to others was not a variance from allegation of his ownership. Dunlap v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 444, 98 SW 845. Money stolen, described in the indictment as "two dollars in money, lawful currency of the United States of America and of the value of two dollars," is sustained by proof of theft of two silver dollars. Currency includes specie as well as paper. Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817. Under Pen. Code, § 487, making larceny of horse, mare, gelding, etc., grand larceny, proof of theft of a mare is not a variance from proof of theft of horse. People v. Melandrez [Cal. App.] 88 P 372. Held no variance between charge and proof of compounding a misdemeanor. Powell v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 147, 101 SW 1006. Where a complaint charged assault on a female under 16 with intent to rape, but evidence showed only an intent to have intercourse by consent, accused was not entitled to dismissal for failure of evidence, as an information could be filed charging what the evidence showed without constituting a variance. People v. Chamblin, 149 Mich. 653, 14 Det. Leg. N. 528, 113 NW 27. Where an information charges an illegal sale of liquor made by defendant, proof that it was made on his premises by his servant is not a variance. City of Liberty v. Moran, 121 Mo. App. 682, 97 SW 948. Where indictment for perjury charged false testifying that certain persons committed certain acts, evidence that they did not held not a variance. Stanley v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 590, 95 SW 1076.

Fatal variance between charge that defendant tore down a dwelling house in block 8, and proof that house was in block 9. Martin v. State, 89 Miss. 633, 42 S 601. Fatal variance between allegation in indictment for burglary that house was owned by "W. F. Y." and proof of ownership by "F. W. E. Y." Williams v. State [Tex. Cr. App.] 90 SW 876. Where information charged sale of liquor to two persons and proof showed sale to one only, there was a fatal variance. Sessions v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 384, 98 SW 243. Allegations of conspiracy with intent to cheat and defraud a certain person are not sustained by proof of an attempt to cheat the public. Lowell v. People, 229 Ill. 227, 82 NE 226. Where defendant was indicted for displaying pistol in public place and on transfer of the case from district to county court transcript showed that he was charged with carrying a pistol, it should have been quashed. Cobb v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 178, 102 SW 1151. Indictment charging joint ownership of articles stolen is not sustained by proof of separate owner-

proved,[72] and an immaterial variance may be disregarded.[73] Proof of a crime other than that charged will not warrant conviction,[74] but where more than one crime is charged there may be a conviction of one regardless of proof of the others,[75] and where there are several counts, proof sufficient to sustain one is enough.[76] An indictment for conspiracy charging two or more overt acts is sustained by proof of one of such acts.[77] The state may prove a conspiracy between accused and a third person to commit the crime charged, though such third person is not joined with accused in the information.[78]

*Names.*See 8 C. L. 198—The name of the injured person must be proved substantially as laid,[79] but the rule of idem sonans applies.[80] In some jurisdictions a variance as to name is not fatal if the identity of the person named is otherwise established.[81]

ship in each of those alleged to be joint owners. State v. Hamilton [S. C.] 57 SE 1098.

72. Allegation that "Americus Furniture & Undertaking Company" is a corporation is surplusage and need not be proved. The admission of secondary evidence to prove such fact is therefore harmless. Ager v. State [Ga. App.] 58 SE 374.

73. "Jonestown Bank" and "Jonestown Bank of Jonestown" is an immaterial variance. Richberger v. State [Miss.] 44 S 772. Where an indictment for perjury alleged false swearing in trial for disorderly conduct and for carrying a pistol, and proof shows false swearing on trial for disorderly conduct, the variance is not fatal because not prejudicial to substantial rights. Gardner v. State, 80 Ark. 264, 97 SW 48. Indictment charging offer to bribe officer alleged that accused said "How much will you take to turn me loose and let me go and get away?" and language proved was "How much will you take to turn me loose and let me go?" Held no variance. Evans v. State [Tex. Cr. App.] 89 SW 1080.

74. One charged with running a "blind tiger" cannot be convicted of ordinary violation of local option law. Gorman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 876, 105 SW 200. It is not sufficient to prove that defendant was guilty of some other offense. Lowell v. People, 229 Ill. 227, 82 NE 226, Acts 1905, p. 720, making bartering, selling, or giving away liquor an offense, defines three offenses, and proof of one will not sustain a conviction of either of the others. State v. Reed, 168 Ind. 588, 81 NE 571.

75. Where an indictment in three counts charged both burglary and larceny, the charges though joined in each count were independent crimes and accused could be convicted of either without being found guilty of the other. Miller v. People, 229 Ill. 376, 82 NE 391.

76. Indictment for violating primary election law (20 Del. Laws 1897, p. 375), alleging in several counts the stealing, mutilation, etc., of ballots, is satisfied by proof of any one of such charges. State v. Tyre [Del.] 67 A 199. Where several counts are included in an information, a conviction on one may be sustained though the jury ignore others, and a judgment on one with no verdict as to the others operates as an acquittal as to them. Ford v. State [Neb.] 112 NW 606. Under an indictment charging that defendant forged, uttered, etc., a deed set out, it was proper to show that such deed was forged whether by defendant or another, and that defendant uttered the same with intent to defraud. People v. Alderdice, 105 NYS 395.

77. United States v. Richards, 149 F 443.

78. State v. Sykes, 191 Mo. 62, 89 SW 851.

79. Where in assault indictment gave name of injured person as "Kamegay" but proof showed it was "Konegay", there was fatal variance. Haygood v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 308, 103 SW 890. Variance between indictment for adultery that accused was married to "Mollie Garland", and proof that he was married to "M. M. A." is fatal unless it appears that they are the same. Garland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 886, 104 SW 898.

80. Where indictment alleged unlawful sale of liquor to "Morris Welton" and charges of court were based on a sale to "Maurice Walton", there was not a fatal variance. Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 175, 97 SW 316. Where indictment for murder gave name of decedent as "Roberts" and evidence showed it to be "Robert," variance was immaterial. Willis v. U. S., 6 Ind. T. 424. 98 SW 147. No variance between name "Works" in an indictment charging another with crime where he spelled his name "Worke," but witnesses called him "Works" and his affidavit stated he was so called. Gafford v. State [Tex. Cr. App.] 100 SW 375.

81. Where name of a party is necessary to description of an offense, proof of different person than one named is a variance. Bennett v. State [Ark.] 104 SW 928. Such variance is not fatal if identity is established. Id. Kirby's Dig. § 2233, expressly provides that where an offense involves commission of an injury to the person and is described in other respects with sufficient certainty to identify the act, erroneous allegation as to person injured is not material. Bennett v. State [Ark.] 104 SW 928. Under the Code of Indian Territory, a variance between allegations and proof as to person injured by the offense is not material. Under Carter's Ind. T. St. 1899, § 1454, where indictment charged that defendant stole "S. K. Canady's" horse and proof showed "Steve Kennedy's" horse, the variance was not fatal, the identity of the person injured and the owner of the horse being shown. James v. U. S. [Ind. T.] 104 SW 607.

Time See 8 C. L. 198 need be proved as laid only when it is an essential element of the offense.[82]

(§ 4) *E. Defects, defenses, and objections.* See 8 C. L. 198—Defects in the finding of the indictment or irregularities in the organization and proceedings of the grand jury,[83] and formal defects apparent on the face of the indictment,[84] are ordinarily required to be raised by motion to quash or by plea in abatement before pleading to the merits,[85] such defects being waived by failure to urge the proper and timely objection.[86] Defects in the charge may be cured by verdict.[87] The grounds of a motion to quash [88] or dismiss [89] and grounds of demurrer [90] vary in different jurisdictions.

82. Under Cr. Code Prac. § 129, if time be not a material element of the felony, it is sufficient to prove commission thereof at any time before indictment returned. Drake v. Com., 31 Ky. L. R. 1286, 104 SW 1000. In prosecution for permitting laborers on government work to work overtime, the time as laid in the indictment does not confine the proof within the limits of that period, but proof that it was committed on or about such date is sufficient. United States v. Sheridan-Kirk Cont. Co., 149 F 809.

83. Under Code 1896, § 5269, no objection can be taken to an indictment on any ground going to the formation of the grand jury. Pate v. State [Ala.] 43 S 343. A plea of not guilty waives the objection that since the preliminary hearing there have been a number of sessions of the grand jury at which no indictment was returned, and that the grand jury was in session when the affidavit on which the prosecution was based was filed. Williams v. State [Ind.] 82 NE 790. Where a defendant is held to answer, he may not object to the indictment because of defects in selecting and impaneling the grand jury. Code 1897, § 5321. State v. Johnson [Iowa] 111 NW 827. Where on motion to substitute indictment, accused was before the court and could have excepted if substitution was not correct, whether it was could not be submitted to the jury, Stevens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 936, 95 SW 505.

84. One cannot object to the verification of an information for the first time on motion for new trial. Must be made before plea. Emery v. State [Neb.] 111 NW 374. After a plea of not guilty, an objection that the information is indefinite, unintelligible, and uncertain, is not available. State v. Newman, 34 Mont. 434, 87 P 462.

85. An objection going to the form and manner of charging an offense, and not to the substance, the defect being apparent on the face of the indictment, is waived by pleading to the merits without interposing a motion to quash. Koppala v. State [Wyo.] 89 P 576.

86. Objection that indictment charges two offenses is waived where not demurred to on that ground. Mears v. State [Ark.] 104 SW 1095. Defendant having pleaded not guilty, any evidence on issues is admissible over objection that indictment is insufficient. State v. Louanis, 79 Vt. 463, 65 A 532. Failure to insert at the foot or to endorse upon an indictment the names of witnesses examined before the grand jury is ground for setting aside the indictment on motion on arraignment (Pen. Code § 862, subd. 2), but failure to raise the objection in such manner waives it. Thomas v. Territory [Ariz.] 89 P 591. A motion to dismiss a criminal complaint on the ground that complainant had not given security for costs is too late unless made before defendant pleads. State v. Sheehan [R. I.] 66 A 66. It is too late to object to formation of grand jury after case has been called for trial where accused had notice that his case was to be tried before the grand jury and made no objection. Ransom v. State, 116 Tenn. 355, 96 SW 953. Motion to quash an indictment on the ground that two of the grand jurors had not paid their poll tax for the previous year held too late when not made until ten months after the return of the indictment and at a subsequent term of court. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387. Where accused, confined in jail, makes no request to be present at the impanelling of the grand jury, the indictment will not be quashed on the ground that, if present, he would have challenged a juror on the ground of bias and prejudice. State v. Miller, 191 Mo. 587, 90 SW 767. All objections to an information except that it does not state an offense or does not show jurisdiction must be raised by demurrer or motion in arrest, or they will be deemed waived. Pen. Code, §§ 1930, 2200. State v. Gordon, 35 Mont. 458, 90 P 173. Under B. & C. Comp. § 1635, an objection that an indictment is bad for duplicity is waived unless raised by demurrer. State v. Reyner [Or.] 91 P 301. Objection that information was filed without preliminary examination as required by Rev. St. 1899, § 5273, must be raised by motion to quash if it appears from face of the record, otherwise by plea in abatement. McGinnis v. State [Wyo.] 91 P 936. If not so raised, it is deemed waived under Rev. St. 1899, § 5326. Id.

87. Indictment for unlawful taking of fish, which failed to negative a purpose to use the fish for defendant's own table, held cured by verdict Freeman v. State [Tenn.] 100 SW 723.

88. A motion to quash is addressed to the discretion of the court. Daniel v. State [Ala.] 43 S 22. Under Code 1896, § 5269, defects relating to the formation of the grand jury cannot be reached by motion to quash. Bluett v. State [Ala.] 44 S 84. Political preference given in selecting members of grand jury. Id. Failure of the foreman of the grand jury to subscribe his name to the fact that an indictment is a true bill is ground for quashing it. Coburn v. State [Ala.] 44 S 58. An indictment will not be quashed because an attorney not a member of the grand jury examined witnesses before the grand jury, where he

A motion to quash will be denied if any of the counts are good.[91] Want of particularity is not a ground for quashal where defendant is entitled to a bill of particulars,[92] but a motion to quash lies for such defect in some states.[93] In Oregon the ob-

was there at the request of the judge who was ill, and did not express an opinion unfavorable to accused. Jones v. State [Ala.] 43 S 179. An indictment will not be quashed because it was not presented to the court by the foreman of the grand jury in the presence of 11 other jurors. Williams v. State [Ala.] 43 S 182. Mistake in middle initial of grand juror is not ground for quashing indictment under Code 1896, § 5269. Harrison v. State, 144 Ala. 20, 40 S 568. A motion to quash an indictment made before pleading on the ground of illegality of the grand jury is timely. Marsh v. People, 226 Ill. 464, 80 NE 1006. Where an indictment is bad for duplicity, the court may quash it instead of requiring the state to elect. Chase v. Van Buren Circuit Judge, 148 Mich. 149, 111 NW 750. Under Rev. St. 1899, § 2517, requiring names of material witnesses to be indorsed on the indictment, but providing that others may be called, the mere fact that the names of some of the material witnesses were not endorsed on the indictment is no ground for quashing it. State v. Barrington, 198 Mo. 23, 95 SW 235. In Missouri, where the grand jury which returns an indictment for crime is in session when the crime is committed, a plea in abatement and motion to quash on the ground of irregularity in the selection of the grand jury does not lie State v. Crane, 202 Mo. 54, 100 SW 422. One indicted by a grand jury, two members of which were disqualified, cannot interpose a plea in abatement but may attach the legality of the jury by motion to quash the indictment. State v. Lang [N. J. Law] 66 A 942. Where the ground of attack on an indictment is that the crime was committed in another county, the remedy to present such objection is by plea in abatement rather than by motion to quash. State v. Lewis, 142 N. C. 626, 55 SE 600. In Oregon, a motion to quash an information will not lie on the ground that the finding of it was not justified by the records before the district attorney and the testimony of the witness whose name was indorsed thereon, nor on the ground that testimony of witnesses whose names were not on the information was received. Construing B. & C. Comp. §§ 1284, 1262. State v. Kelliher [Or.] 88 P 867. Objection to indictment on ground that negroes were excluded from grand jury on account of race must be presented by plea in abatement and not by motion to quash. Ransom v. State, 116 Tenn. 355, 96 SW 953. That affidavit upon which information is based is not signed by one who is credible is not ground for a motion to quash. Rector v. State [Tex. Cr. App.] 90 SW 41. Motion to quash because not setting out year when found, not dated, and not showing when grand jury was impaneled, is addressed to court's discretion. State v. Louanis, 79 Vt. 463, 65 A 532. Irregularity in the action of the clerk of court in acting as clerk of jury commissioners and suggesting names of persons to serve as grand jurors held insufficient to sustain a motion to quash or plea in abatement. Schultz v. State [Wis.] 113 NW 428. A motion to quash reaches defects in form only. Under Code Cr. Proc. and Rev. St. 1899, § 5418, the fact that information does not state an offense cannot be reached by motion to quash. McGinnis v. State [Wyo.] 91 P 936.

89. A person indicted has a constitutional right to move to dismiss the indictment on the ground that illegal evidence was received by the grand jury, or that the evidence presented to grand jury was insufficient to warrant a conviction (Code Cr. Proc. §§ 256, 258), though § 313 does not expressly provide such ground for the motion. People v. Sexton, 187 N. Y. 495, 80 NE 396.

90. Where an indictment is defective, the objection should be made by demurrer, and not by motion to quash. Daniel v. State [Ala.] 43 S 22. Failure to allege the means with which the offense was committed though a defect of substance must be taken advantage of by demurrer. Such defect is not an immaterial one within Cr. Code 1896, § 4895. Gaines v. State, 146 Ala. 16, 41 S 865. Defense of limitations cannot be raised by demurrer to an indictment. Greene v. U. S. [C. C. A.] 154 F 401. An objection that an indictment charges two offenses must be raised by demurrer, the objection appearing on the face of the indictment. Pen. Code, § 1004, subd. 3. People v. Chadwick [Cal. App.] 87 P 384. When not so taken, it is waived. Id. A demurrer to an information that it does not state an offense does not reach an objection to the jurat thereto. State v. Kinney [S. D.] 113 NW 77. Objection to form in which prior convictions were pleaded can be raised only by demurrer. State v. Gordon, 35 Mont. 458, 90 P 173. Assuming that an information charging an assault with a revolver by shooting with intent to kill, charged offenses under both B. & C. Comp. §§ 1771, and 1767, it was not demurrable since under a charge of assault with intent to kill, defendant may be convicted of assault with a dangerous weapon, a lesser degree. State v. Branton [Or.] 87 P 535.

91. Where an information contains specific assignments of perjury which are sufficient, an insufficient assignment is not ground for quashing, but should be raised by exception to introduction of evidence under it. Hoffman v. Allegan Circuit Judge [Mich.] 14 Det. Leg. N. 610, 113 NW 584.

92. Where indictment charging an abortion failed to describe the instrument used, and did not state that its nature was to the grand jury unknown, this was no ground for quashing, as defendant was entitled to a bill of particulars under Rev. Laws, c 218, § 39. Commonwealth v. Sinclair [Mass.] 80 NE 799.

93. In Indiana a motion to quash and not a motion for a bill of particulars is remedy where it is claimed indictment does not apprise accused of what he must meet. Sherrick v. State, 167 Ind. 345, 79 NE 193.

jection that an indictment does not state a crime may be taken at the trial under a plea of not guilty.[94] In Alabama, an oral demurrer to a warrant will not lie.[95] In Missouri where two indictments for the same offense are pending against the same defendant, the second suspends the first,[96] hence, failure to quash the first, on motion, is harmless.[97] Members of the grand jury will not be permitted to impeach an indictment duly found, returned in open court and filed as such, by testifying as to what was said by the prosecuting officer while advising with them.[98] The sufficiency of the indictment cannot be challenged for the first time on appeal unless it fails absolutely to charge an offense.[99] The objection that proceedings were had on a holiday is waived by failure to object until after verdict.[1] If the indictment is too deficient to charge any offense, habeas corpus is a proper remedy.[2] Where no question as to the right to try accused on two counts is raised until the proofs are closed, the court, in passing upon the question, is not limited to the face of the indictment, but may consider it in the light of the evidence introduced when the question is raised.[3] Procedure upon the hearing of a motion to quash is discussed in the note.[4] Upon overruling a demurrer to an indictment for a misdemeanor, the court may enter judgment at once or permit the demurrer to be withdrawn and plea interposed.[5] Where some counts of an indictment are good and others covering the same matter bad, it is not error to allow trial to proceed on all, since a conviction will be referred to a good count.[6] It is competent for the trial court to order the resubmission of a criminal charge to the grand jury where the indictment is clearly defective.[7] This is a matter resting in the court's discretion.[8] A second indictment by the same grand jury after quashal of the first is good.[9] A person indicted may inspect the minutes of the grand jury.[10] In a criminal prosecution collateral attack may be made on a judgment where the purpose of the prosecution is to punish a crime committed by means of such judgment.[11]

(§ 4) *F. Joinder, separation, and election.*[See 8 C. L. 200]—Separate and distinct

94. B. & C. Comp. § 1365, expressly so provides. State v. Reyner [Or.] 91 P 301.

95. Dillard v. State [Ala.] 44 S 396.

96. Under Rev. St. 1899, § 2522. State v. Williams, 191 Mo. 205, 90 SW 448.

97. It is quashed by operation of law. State v. Williams, 191 Mo. 205, 90 SW 448.

98. United States v. Tallmadge [N. M.] 91 P 729.

99. Duplicity cannot be first raised on appeal. State v. Brown [Iowa] 109 NW 1011. Policy of supreme court is to uphold indictments and informations where law has been substantially complied with. Barber v. State [Fla.] 42 S 86.

1. Accused may not suffer proceedings to take place on a holiday, and after verdict in a motion to quash, ask reversal on that ground. State v. Duncan, 118 La. 702, 43 S 283.

2. Ex parte Goldman [Cal. App.] 88 P 819.

3. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 NW 495.

4. Motion to quash indictment on ground that grand jury were not properly drawn, unsupported by evidence, properly denied. Morris v. State [Ala.] 39 S 608. On motion to quash an indictment and plea in abatement because of prosecuting attorney's alleged omission from indictment of names of witnesses, it is error to exclude subpoenas of witnesses before grand jury. State v. Barrington, 198 Mo. 23, 95 SW 235. On motion to quash an indictment because of race discrimination in formation of grand jury, testimony as to proceedings in other courts of the county with reference to drawing jurors is incompetent. Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879. A motion to quash an indictment on the ground that the grand jury was not selected by jury commissioners as required by law, but by the marshal by directions from the court, was properly overruled where unsupported by proof other than affidavit charging usurpation of powers by the court. Reynolds v. U. S. [Ind. T.] 103 SW 762.

5. State v. Sharp [N. J. Law] 66 A 926.

6. Reum v. State [Tex. Cr. App.] 14 Tex. Ct Rep. 857, 90 SW 1109.

7. State v. Hanlin, 134 Iowa, 493, 110 NW 162.

8. Not an abuse of discretion for court to refuse to resubmit case to grand jury under § 170 authorizing resubmission and holding defendant in custody or on bail, on sustaining demurrer to indictment. Commonwealth v. Bray, 29 Ky. L. R. 757, 96 SW 522.

9. Where an indictment failing to state the date of the crime was quashed and a new indictment returned by the same grand jury on a rereading of the testimony, held the second indictment was valid. Renfroe v. State [Ark.] 104 SW 542.

10. One indicted will be permitted to inspect the minutes of the grand jury to determine whether the indictment was properly and regularly found. People v. Klaw, 53 Misc. 158, 20 Crim. R. 531, 104 NYS 482.

11. United States v. Bradford, 148 F 413.

offenses cannot be joined in the same count,[12] but offenses of the same nature may be joined in one indictment in separate counts.[13] In such case, each count must be complete in itself.[14] In Missouri different degrees of an offense may be charged in separate counts, but the statute does not apply to crimes not divided into degrees and which cannot be divided.[15] Where the indictment charges in separate counts more than one distinct felony and the evidence develops different transactions, the state will, upon request by defendant, be forced to elect the count upon which it will prosecute.[16] When this is required, the election should as a general rule be made before the defendant enters upon his evidence, and as soon as the prosecution has developed the testimony sufficiently to identify the transaction.[17] The state, and not defendant, has the right of election when required.[18] When an election is not required, the court in its charge may submit the law only as to one of the counts, and

12. See supra. § 4 C. Duplicity.

13. Offense of keeping and maintaining a lewd house and of keeping a common ill-governed, and disorderly house may be joined. Jones v. State [Ga. App.] 58 SE 559. Adultery and fornication may be charged in separate counts. Garland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 886, 104 SW 898. Several high grade offenses may be joined but in such case only a single issue will be permitted to go to the jury. Miller v. State [Neb.] 111 NW 637. Count for burning property of another and for setting fire to one's own property with intent to defraud insurer may be joined. Posey v. U. S. 26 App. D. C. 302.

14. When different offenses are charged in the same information, they must be stated in separate counts and each count must be complete in itself. State v. Nicholas, 124 Mo. App. 330, 101 SW 618. Charge that defendants were living in "open and notorious adultery," with "lewdly and lasciviously" cohabiting with each other, and with "open gross lewdness and lascivious behavior," contained three offenses. Rev. St. 1899, § 2175. Id.

15. Ann. St. 1906, p. 1504. State v. McKee [Mo. App.] 104 SW 486.

16. Blackwell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 766, 100 SW 774. Question of duplicity may be raised by motion to require an election. Need not be raised by direct attack under Code, § 5284, declaring that an indictment must charge but one offense. State v. Von Kutzleben [Iowa] 113 NW 484. Under an indictment charging wrecking of a train with intent to rob and also with murder of one killed by the wreck, the state should elect on which count it would rely. Id. On prosecution for statutory rape where prosecuting witness testified to the particular offense charged and subsequent ones, the court should confine the jury to the consideration of but one and require the state to elect at the close of its case. State v. Palmberg, 199 Mo. 233, 97 SW 566. Where, in prosecution for incest, more than one act of intercourse is proved within three years prior to indictment, the state may be required to elect upon which act it will rely. State v. Pruitt, 202 Mo. 49, 100 SW 431. Where indictment charged that defendant unlawfully sold and retailed intoxicating liquors without a license, defendant was entitled to demand an election as to which sale the state would rely upon, that its evidence be confined thereto. Kittrell v. State, 89 Miss. 666, 42 S 609. Where several separate and distinct high grade offenses are joined, the court should require the state to elect upon which count it will proceed. Miller v. State [Neb.] 111 NW 637. Where one count charged rape on person under 16 with her consent, and another rape committed forcibly and against the will of the female, it was error to refuse to require an election at close of state's case in chief. State v. Hensley, 75 Ohio St. 255, 79 NE 462. Error in such case to instruct that jury could find general verdict of guilty upon both counts. Id. Where indictment alleged different offense and transactions in same count and evidence showed different and distinct transactions, defendant was entitled to compel the state to elect on which transaction it would proceed. Thweatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 391, 95 SW 517. In prosecution for illegal sale of liquor where several sales were proved, the state should have been required to elect on which act it would rely before defendant was required to introduce evidence. Hatcher v. Com., 106 Va. 827, 55 SE 677. It is error to try defendant upon two informations for two distinct offenses, where by timely objection he sought to ascertain for which offense he was being tried. People v. Spier, 105 NYS 741.

17. Blackwell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 776, 100 SW 774. Where on trial for statutory rape the state fully developed its case and showed several offenses and a conviction was set aside the state should be required to elect at beginning of a retrial. State v. Palmberg, 199 Mo. 233, 97 SW 566. Where in a prosecution for statutory rape the state can prove several acts, it should be required at once to elect, but if the prosecuting attorney has but little information as to what the testimony will develop, an election should not be required until close of state's case. Id.

18. Blackwell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 766, 100 SW 774. Under an indictment containing two counts both based upon the same act and charging the same offense, but in different language, the prosecution may, at the time the case goes to the jury, elect to stand upon either count. Williams v. U. S., 17 Okl. 28, 87 P 647. Where one election is made, a defendant who at a subsequent trial files a motion to require another election cannot complain that a different offense from that first indicated is elected. State v. Hibbard [Kan.] 92 P 304.

when this is done, it is tantamount to an election by the state.[19] Where an indictment contains several counts and the court elects for the state to submit the case on certain counts, the others pass out of the indictment and cannot form the basis for further prosecution under this indictment.[20] The right to require an election may be waived by defendant by proceeding with the trial to the merits without objection or requiring an election.[21] No election should be required where the different counts relate to the same transaction,[22] and charge the same offense,[23] or different offenses of the same grade, carrying the same punishment,[24] nor where but one offense can be found under the evidence.[25] In Texas, no election between counts charging misdemeanors can be required,[26] and in Illinois the court may in its discretion refuse

19. Blackwell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 766, 100 SW 774. Not error to overrule motion to compel an election between counts where the court submits only certain counts to jury. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064. Submission by court of certain counts, eliminating others, is equivalent to election by state to prosecute on mentioned counts. Id. Refusal to require the state to elect which count it will proceed upon cannot be complained of where the court makes the election by submitting only one count to the jury. Manovitch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 712, 96 SW 1. Where the court in its charge selects one of two dates in an indictment upon which violation of law is alleged to have occurred, and the jury is confined to such date, it amounts to an election by the state though the court had previously refused to require the state to elect. Wells v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 176, 105 SW 820.

20. Tracy v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 362, 90 SW 308.

21. Where rape was charged in five counts, alleging different dates, and the evidence was as to different acts, and defendant made no objection and did not move to require an election, and the court charged that the jury should convict if they found any one of the acts charged was committed within 12 months, held defendant could not claim that court elected to stand on the last count. Blackwell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 766, 100 SW 774.

22. In an indictment charging the same transaction as theft and swindling, in two counts, it was not error to refuse to require the state to elect. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 469, 98 SW 863.

23. Where two counts in an information relate to the same transaction and charge the same offense, it is not error to refuse to require the state to elect. State v. Williams, 191 Mo. 205, 90 SW 448. Indictment containing two counts, one charging that defendant killed a person and the other that he was present aiding and abetting, charges but a single offense and it was not error to refuse to compel an election. Britton v. Com., 29 Ky. L. R. 857, 96 SW 556. Counts charging embezzlement of $250 in money and draft for that amount held to charge same offense. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 NW 495. Where accused was indicted on two counts, one for cutting a fence and one for cutting part of a fence, he was not prejudiced by court's refusal to compel state to elect upon which count it would rely. Henderson v. State [Tex. Cr. App.] 96 SW 37. Indictment charging defendant with selling liquor to a certain Indian in one count and with furnishing liquor to a certain person in another held not to charge two distinct offenses. Taylor v. U. S., 6 Ind. T. 350, 98 SW 123.

24. The rule requiring an election does not apply to case where the same act may constitute two offenses or where the same act amounts to several offenses of the same grade and class subject to the same punishment. Miller v. State [Neb.] 111 NW 637.

25. In seduction where prosecuting witness testified as to four acts of intercourse, the state was not required to elect since the seduction occurred, if at all, on the earliest date. State v. Nugent, 134 Iowa, 237, 111 NW 927. Where defendant's misconduct in cursing and swearing was one continuous conversation, it was not necessary to elect as to which place such misconduct was committed. Hamilton v. State [Ala.] 44 S 968. The doctrine of election is not applicable where one count charges assault and battery, and another assault and battery with a brick Scrutching v. State [Ala.] 43 S 962. On trial of charge of an illegal sale of liquor, the prosecutor testified that he bought a bottle of liquor at accused's store from a woman who represented herself as the wife of accused, and others testified to purchases from accused at the same place (to connect accused with first sale). Held election of a particular sale was not required by the evidence. Guarreno v. State [Ala.] 42 S 833. Where one count of an indictment charged that accused committed the murder and another count that he aided in commission thereof and evidence showed a conspiracy, it was not prejudicial error to fail to compel an election. Harper v. State, 19 Ark. 594, 96 SW 1003. Under a city ordinance prohibiting selling, giving away, or otherwise disposing of liquor on Sunday, a complaint charging that defendant did give away, sell, and otherwise dispose of liquor on Sunday, was not subject to a motion to compel an election, it being proper for the charge to be in the conjunctive form. City of Liberty v. Moran, 121 Mo. App. 682, 97 SW 948. In embezzlement defendant was not prejudiced by the fact that the state elected two items embezzled the same day instead of being required to elect one. Richberger v. State [Miss.] 44 S 772. Under Code 1892, § 1058, on a prosecution for embezzlement, the state is not required to elect any particular act. Starling v. State [Miss.] 43 S 952.

26. White's Ann. Code Cr. Proc. § 405, expressly provides that no election is required

to require an election between counts for several misdemeanors.[27] Accused is not injured by an election to prosecute for a lower offense included in that shown.[28] But it has been held that where the evidence, if sufficient to convict of any offense, shows the offense charged and not an attempt to commit such offense, accused cannot, at the election of the prosecuting attorney, be tried for the attempt.[29] The county attorney is not required to state under which particular section of the code defendant is being prosecuted.[30]

In New Jersey police commissioners may be jointly indicted for neglect of their duty as such.[31] In Florida it is not a ground of objection that material witnesses for defendant were joined with him as accessories.[32]

(§ 4) *G. Amendments.*See 8 C. L. 200—An indictment may be returned to the grand jury for an addition thereto.[33] In Alabama an original affidavit may be amended to conform to the statute.[34] In Georgia a solicitor of a city court may amend an accusation at any time before defendant has pleaded provided the affidavit of the prosecutor will sustain the accusation as amended, unless such amendment is forbidden by the act creating the city court.[35] In Kentucky the court may order a warrant amended after the evidence is in, to show a fact necessarily included in the charge.[36] In Missouri an information may be amended as to matter of form or substance at any time before trial by leave of court.[37] In Mississippi an indictment can be amended only by an order of the court spread on the minutes, specifying the amendment.[38] An order authorizing amendment may be entered nunc pro tunc after motion for new trial.[39] An indictment may be amended to conform to the proof if the identity of the offense is in no way changed.[40] In Texas a mistake in the jurat of the complaint may be corrected,[41] but a complaint cannot be amended on account of misnomer of accused.[42]

between counts in an indictment for misdemeanors. Bivins v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 91, 97 SW 86. In prosecution for gaming, state was not required to elect on which of games claimed to have been played by defendant it would rely upon. Williams v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 307, 97 SW 498.

27. Johnson v. People, 124 Ill. App. 213.

28. Accused is not injured nor deprived of his right to know the nature of the charge against him by the fact that the state elects to prosecute for larceny from the person, though the evidence shows the higher and including offense of robbery in the night time. State v. Smith, 190 Mo. 706, 90 SW 440.

29. Under Ann. Code 1892, § 974, one accused of rape could not be tried for an attempt. Davis v. State, 89 Miss. 21, 42 S 542.

30. Any error in denying a motion harmless where defendant was afterwards informed before defense was commenced. State v Newman, 34 Mont. 434, 87 P 462.

31. State v. Castle [N. J. Law] 66 A 1059.

32. Especially where they testified for him. Douglas v. State [Fla.] 43 S 424.

33. Where an indictment charged an illegal sale of liquor on a certain date, it was not error to order the indictment returned to the grand jury to have added to it the amendment "and at divers other times within the twelve months last past." Hatcher v. Com., 106 Va. 827, 55 SE 677.

34. Under Code 1896, § 4306, an original affidavit may be amended to conform to the language of the statute. Hamilton v. State [Ala.] 44 S 968. Affidavit for trespass omitting a portion of the wording of the statute properly allowed to be amended before trial. Morrison v. State [Ala.] 44 S 150. Affidavit made before a justice held properly allowed to be amended. Dillard v. State [Ala.] 44 S 537. Affidavit for stealing chickens properly allowed to be amended to conform to the statute. Bates v. State [Ala.] 44 S 695. An affidavit for a misdemeanor may be amended before the court passes on demurrer by filing a sufficient affidavit. Campbell v. State [Ala.] 43 S 743. The amendment is not demurrable as setting up a new offense if the original did not state an offense. Id.

35. Goldsmith v. State [Ga. App.] 58 SE 486.

36. McGuire v. Com., 30 Ky. L. R. 720, 99 SW 612.

37. State v. Coleman, 199 Mo. 112, 97 SW 574. Information under Ann. St. 1906, p. 1386, providing that if any person shall willfully disturb peace of a neighborhood or of any person or family, was properly amended by substituting an information containing an additional count charging disturbing of individuals, since both counts deal with same transaction, are founded on same statute and call for same punishment. State v. Simpson [Mo. App.] 103 SW 592.

38. Under Code 1906, § 1509. Shurley v. State [Miss.] 43 S 299.

39. Richberger v. State [Miss.] 44 S 772.

40. McGuire v. State [Miss.] 44 S 802.

41. Where jurat to criminal complaint is by mistake dated prior to alleged commission of offense, it may be amended to show the facts. Sanders v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 364, 105 SW 803. Held proper to allow amendment of preliminary com-

(§ 4) *H. Conviction of lesser degrees and included offenses.*[See 8 C. L. 201] Conviction may be had of any offense included in that charged,[43] or any lesser degree of the offense charged,[44] or of an attempt to commit the offense charged,[45] but not of an offense containing elements not included in the offense charged.[46]

plaint on the trial by changing name of person in jurat to conform to facts, name inserted being put there by mistake. Flournoy v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 730, 100 SW 151.

42. Lazenberry v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 91, 97 SW 87. If subject to amendment on this account, it cannot be amended over the objection of accused merely because on application for a continuance he stated his name, which differed from that in complaint. Id.

43. Indictment for homicide by abortion includes murder in second degree, manslaughter, and assault. State v. Fleetwood [Del.] 65 A 772. Under indictment for murder in the first degree, state may show facts proving that or any included offense. Gregory v. State [Ala.] 42 S 829. Charge of assault with intent to ravish includes simple assault and assault and battery. Payne v. State [Ala.] 42 S 988. In prosecution for assault with intent to rape, instructions for acquittal if evidence did not show crime charged should not be given, as assault might be found. Pitman v. State [Ala.] 42 S 993. A conviction of the offense of larceny from the person in the nighttime (Rev. St. 1899, § 1900) may be had under an indictment charging the same though the evidence shows the higher offense of robbery in the nighttime. State v. Smith, 190 Mo. 706, 90 SW 440. Person charged with felonious assault may be convicted of common assault. State v. Ostmann, 123 Mo. App. 114, 100 SW 696. Though an indictment does not charge the offense intended, where it is good as a charge of a lesser offense and the punishment imposed is such as might be imposed for such lesser offenses, a verdict of "guilty" will not be reversed. Id. One indicted under Comp. Laws, § 11719, for taking indecent liberties with a female under fourteen years of age, may be convicted of assault and battery. People v. Sanford, 149 Mich. 266, 14 Det. Leg. N. 396, 112 NW 910. An information based on the South Dakota statute, Rev. Pen. Code, § 285, charging defendant with shooting with intent to kill, the lesser offense of shooting without justifiable or excusable cause with intent to injure, and a conviction for such offense may be had under it. State v. Horn [S. D.] 111 NW 552. Under the Missouri statutes upon a trial under an indictment for a felonious assault, defendant may be convicted of a common assault. State v. Wilson [Mo. App.] 103 SW 110. Where indictment was for homicide alleged to have been committed by shooting, by drowning, and by unknown means in perpetration of a robbery, a nolle of count charging murder in perpetration of robbery does not prevent court from charging to convict if he killed deceased in perpetration of robbery. State v. Barrington, 198 Mo. 23, 95 SW 235. Where indictment charges assault with intent to commit rape, it is proper to submit only that offense and simple assault. State v. Johnson, 133 Iowa, 38, 110 NW 170. Under Pen. Code, § 240, one accused of assault to rape may be convicted of assault where he was shown to be sexually impotent. People v. Bradbury [Cal.] 91 P 497. Where one was indicted under several phases of the statute denouncing robbery, including robbery with weapons, and the latter charge is dismissed, he may be tried on the other charges. Weaver v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 875, 105 SW 189.

44. One indicted for murder in first degree may be convicted of murder in the second degree. State v. Parnell, 206 Mo. 723, 105 SW 742. Under indictment for murder in first degree, that offense, murder in second degree, manslaughter, or not guilty, may be found. State v. Uzzo [Del.] 65 A 775. Verdict of murder in first or second degree or manslaughter may be rendered under indictment for murder in first degree. State v. Honey [Del.] 65 A 764. Indictment charging in one count assault with intent to commit murder in the first degree includes the second degree of that offense, assault with intent to commit voluntary manslaughter, assault and battery, and simple assault. Fuerst v. State, 115 Tenn. 357, 89 SW 955. On information charging larceny from a store, compound larceny and alleging value of property not being demurred to will sustain a verdict for simple larceny. State v. Reyner [Or.] 91 P 301.

45. See 8 C. L. 201, n. 29.

46. If a minor offense is not necessarily included in the terms of a greater offense charged, the defendant cannot be convicted of such minor offense. Aggravated assault is not included in assault to kill unless the assault was made with a deadly weapon. Lindsey v. State [Fla.] 43 S 87. Under an indictment for theft from the person, accused may be convicted of ordinary theft. Black v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 866, 104 SW 897. Under an indictment which only charges a simple assault, defendant cannot be convicted of aggravated assault. Indictment held not to charge an aggravated assault. McCutcheon v. State [Tex. Cr. App.] 95 SW 525. Under indictment for manslaughter, defendant cannot be convicted of offense defined by Act 1898 (P. L. p. 806) that two or more persons fighting together, etc., shall be guilty of a misdemeanor. State v. Scaduto [N. J. Law] 65 A 908. A judgment on a verdict of guilty of arson is invalid where the indictment is for willfully, etc., burning a building insured for the purpose of injuring the insurer, under Hurd's Rev. St. 1905, p. 669, c. 38, as the two crimes are distinct. Elgin v. People, 226 Ill. 486, 80 NE 1014. In Montana every burglary committed in the daytime is burglary in the second degree. Hence burglary with intent to commit a felony (Pen. Code, § 820) which is first degree, does not include burglary in second degree. State v. Copenhaver, 35 Mont. 342, 89 P 61. In prosecution for burglary, it was not error to refuse to submit whether accused was guilty of larceny, since that offense was not included in burglary. State v. Leonard [Iowa] 112 NW 784. A plea of abatement on the ground that the grand jury was improperly

§ 5. *Arraignment and plea.*[See 8 C. L. 201]—To sustain a conviction, accused must be arraigned [47] at some stage of the proceedings,[48] and issue made by some plea to the indictment [49] though the offense is a misdemeanor only.[50] In some states, however, formal arraignment may be dispensed with with the consent of accused.[51] Accused has a right to have counsel [52] and to have a copy of the indictment or information [53] before being required to plead, but both rights may be waived.[54] In Illinois it is improper to enter a plea of guilty until accused has been informed of his rights and the consequences of such plea.[55] Whether accused shall be allowed to change his plea is a matter largely discretionary with the court,[56] but this discretion is a judicial one which should be exercised in favor of innocence and liberty and a trial upon the merits.[57] A plea of not guilty ignorantly or inadvertently made, without legal advice, should be permitted to be withdrawn to permit the hearing of a motion to

drawn should be made at the earliest date defendant has an opportunity to enter it. Where not made for seventeen days after it could have been made, it was too late. Lowden v. U. S., 149 F. 673. Demurrer to information because facts stated did not constitute a public offense and because the particular circumstances of the offense were not stated properly overruled where no suggestion was made that any circumstances not stated were "necessary to constitute a complete offense" as required by Pen. Code, § 952. People v. Crane [Cal. App.] 87 P 239.

47. Conviction of petit larceny held without warrant of law where record showed no arraignment. State v. Ambrose, 125 Mo. App. 464, 102 SW 590. Under B. & C. Comp. §§ 1328, 1364, it is essential that defendant be arraigned and plead or refuse to plead. State v. Walton [Or.] 91 P 490. It will not be presumed that defendant was arraigned and either pleaded or refused to plead from the fact that he moved for a continuance, though under B. & C. Comp. § 1379 he is not entitled to make such motion until after issue joined. Id., [Or.] 91 P 495. It being essential to conviction that defendant be arraigned, he cannot waive arraignment by asking for a continuance and thereafter submitting to trial without arraignment. Id. Where defendant demurred to an amended information and being overruled pleaded not guilty, such amended information superseded the original and the record sufficiently showed arraignment on the amended information. State v. Gordon, 35 Mont. 458, 90 P 173.

48. Where by oversight accused was not arraigned at beginning of trial, an arraignment while trial was in progress and jury being impaneled was sufficient. Mays v. State [Tex. Cr. App.] 96 SW 329.

49. State v. Mikel, 125 Mo. App. 287, 102 SW 19. An order reciting the entry of a plea of not guilty by the prisoner, and then saying "and the attorney for the state doth the like, and issue is joined thereon," shows that the issue was made up and will sustain judgment. State v. Grove, 61 W. Va. 697, 57 SE 296.

50. Judgment reversed where record failed to show arraignment and plea. State v. Mikel, 125 Mo. App. 287, 102 SW 19.

51. Mansf. Dig. § 2154 expressly provides that arraignment may be dispensed with by defendant's consent. Roper v. U. S. [Ind. T.] 104 SW 584. Order reciting that accused was brought into court with his counsel and the court with his consent dispensed with arraignment is in conformity with Cr. Code Proc. § 155, providing that arraignment may be dispensed with by consent of accused. Bischoff v. Com., 29 Ky. L. R. 770, 96 SW 538. The right to formal arraignment and plea will be waived where defendant goes to trial on the merits and does not raise the objection until after verdict. Waller v. State [Ga. App.] 58 SE 1106.

52. Where after two postponements, at both of which accused had counsel, he was arraigned and pleaded not guilty, he could not by plea in abatement set up that he was not represented by counsel when arraigned and that his name was "Law," not "Laws." Laws v. State, 144 Ala. 118, 42 S 40.

53. One accused of murder in the first degree is entitled to a copy of the information before he is required to plead. State v. Maupin, 196 Mo. 164, 93 SW 379.

54. See Laws v. State, 144 Ala. 118, 42 S 40. Service of copy of information charging murder in first degree waived where defendant pleaded not guilty and went to trial without objection. State v. Maupin, 196 Mo. 164, 93 SW 379.

55. Hurd's Rev. St. 1905, p. 744, c. 38, § 4 construed. Krolage v. People, 224 Ill. 456, 79 NE 570. Held accused not sufficiently informed where court asked accused if he understood he could be sentenced to the penitentiary if he pleaded guilty and accused said he did. Id.

56. Where defendant pleaded not guilty and jury was drawn, and defendant then stated he wished to plead guilty and make a statement of the facts to the court and jury, but did not move to withdraw his plea of not guilty, it was within court's discretion to refuse to allow a change of plea. Coleman v. State, 145 Ala. 13, 40 S 977. Permitting withdrawal of a plea of guilty is discretionary with the trial court. Krolage v. People, 224 Ill. 456, 79 NE 570.

57. Krolage v. People, 224 Ill. 456, 79 NE 570. Where accused said he did not understand his rights nor the consequences of a plea of guilty, it was error to refuse to allow him to withdraw it. Id. Where an accused pleads guilty to a lessor offense and on arraignment for sentence makes a motion to withdraw the plea and plead not guilty, before such motion is granted the court should have before it positive evidence from the accused person that he is willing to take chances on a trial of a higher charge. State v. Boutte, 119 La. 134, 43 S 983.

quash.[58] Withdrawal of a plea of not guilty does not enlarge the statutory time in which to move to quash.[59] A plea of not guilty puts in issue every fact necessary to authorize a conviction.[60] A plea of guilty is equivalent to a finding of guilt.[61] Where an information charges no crime, a plea of guilty admits none, since the plea confesses only the truth of what is sufficiently alleged.[62] The plea of nolo contendere is an implied confession of the offense charged, and judgment of conviction follows that plea as well as the plea of guilty.[63] On such plea it is not necessary that the court should adjudge defendant guilty, for that follows by necessary legal inference from the implied confession.[64] In Washington a court commissioner has no power to accept a plea of guilty on an information for a felony and sentence the defendant to imprisonment thereon.[65] In Texas accused is not entitled to two days in which to plead where a new indictment is substituted on the day of trial.[66]

Pleas in abatement and special pleas. See 6 C. L. 292—Under a plea of former conviction or acquittal, the burden is on defendant not only to prove by the record a former conviction but to establish the identity of the parties and the offenses.[67] To sustain the plea the conviction or acquittal must be shown to have been for an offense the same both in law and fact as the one on trial.[68] Where the offense is

58. So held where plea was entered before counsel had been appointed for accused. Hill v. State, 89 Miss. 23, 42 S 380.

59. Under statute requiring such motion to be made at time of araignment or calling indictment for trial, if no arraignment. Taylor v. Com., 28 Ky. L. R. 819, 90 SW 581.

60. Hughes & Co. v. Com. [Ky.] 101 SW 1194. Under Pen. Code, §§ 1940, 1943, 1836, a plea of not guilty puts in issue charge of former convictions in the information. State v. Gordon, 35 Mont. 458, 90 P 173.

61. Leiby v. State [Neb.] 113 NW 125.

62. State v. Kelley, 206 Mo. 685, 105 SW 606.

63. State v. Herlihy, 102 Me. 310, 66 A 643.

64. Record showing such plea followed by sentence of the court held sufficient though it was not recited that defendant was adjudged guilty. State v. Herlihy, 102 Me. 310, 66 A 643.

65. State v. Philip [Wash.] 87 P 955.

66. Code Cr. Proc. 1895, art. 470, providing for substitution in case of lost indictment, is not related to clause in same article providing for presentment of new indictment in case of loss, and, on substitution of lost indictment on day of trial, defendant is not entitled to two days to plead allowed by another statute. James v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 885, 105 SW 179.

67. State v. Pianfetti, 79 Vt. 236, 65 A 84.

68. State v. Pianfetti, 79 Vt. 236, 65 A 84. In robbery a plea of former conviction for petit larceny founded on same facts is good. Floyd v. State, 80 Ark. 94, 96 SW 125. Where assaults were separate, were upon two different individuals, and were not in response to a joint attack, a plea of former conviction could not be maintained though one of the assaults immediately followed the other. Fews v. State, 1 Ga. App. 122, 58 SE 64. Where the court instructed jury to find defendant not guilty under first and third counts of an indictment, a plea of former acquittal cannot be made as against conviction under second count. Dalton v. People, 224 Ill. 333, 79 NE 669. Rev. St. U. S. § 5518 makes it an offense to conspire to prevent an officer of the United States from discharging his duties. Held, where an assault and battery had been committed on an officer, an acquittal under such statute was not a bar to a prosecution for disturbing the peace and quiet of a family in whose presence the assault occurred. Wilcox v. U. S. [Ind. T.] 103 SW 774. A plea of former jeopardy which shows that the prior prosecution was on two counts, one of which was abandoned, must show that the abandoned count charged the offense charged in the subsequent prosecution and that the two counts related to separate offenses. State v. Huff [Kan.] 90 P 279. In prosecution for practicing medicine without a license, a plea of former acquittal is bad on demurrer where it does not show an identity of both the crime and the act by which it was committed. Watson v. State [Md.] 66 A 635. The plea autrefois acquit is only available in cases where the transaction is the same and the two indictments are susceptible of and must be sustained by the same proof, while autrefois convict only requires that the transaction or facts constituting it be the same. Kellett v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 297, 103 SW 882. Prosecution for unlawfully carrying pistol not barred by former acquittal of assault to kill, alleged to have been committed on same occasion on which pistol was carried. Woodroe v. State [Tex. Cr. App.] 16 Tex. Rep. 682, 96 SW 30. Acquittal of willfully using loud and vociferous language calculated to disturb household of a certain person is not a bar to a prosecution for using loud and abusive language concerning such person calculated to provoke a breach of peace, the two offenses being separate. Kellett v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 297, 103 SW 882. In local option case, a conviction of accused for a sale made a few minutes before the sale in question was made does not sustain plea of former jeopardy, the two sales constituting separate offenses. Harris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 270, 97 SW 704. Where one charged with aggravated assault pleaded former conviction, it was error to charge that evidence of his former plea of guilty to simple assault might be considered to mitigate punishment, since

one capable of repetition, mere proof of conviction by the record and of identity of parties is not enough.[69] A plea of former conviction must allege that such conviction was by a court of competent jurisdiction at a time provided by law for holding court[70] and in California, the place where judgment was rendered.[71] Where a plea of former acquittal or conviction is determined against accused, he is entitled to plead over and to a trial on his plea of not guilty.[72] In determining whether two indictments charge the same offense, the test usually applied is whether the evidence necessary to support the second would support conviction under the first.[73] A plea of former acquittal, based on a collusive and illegal proceeding, is properly overruled.[74] Defendant is entitled to a jury trial of a plea of former acquittal[75] unless the plea presents only a question of law,[76] or unless accused consents to a trial by the court.[77]

What constitutes a former jeopardy so as to sustain a plea thereof is elsewhere fully discussed.[78] A few illustrative holdings are given in the note.[79] A

he was entitled to acquittal if he was guilty of simple assault only or if there was reasonable doubt as to such guilt. Walker v State [Tex. Cr. App.] 17 Tex. Ct. Rep. 375, 97 SW 1043. A conviction of an affray by fighting with one person cannot be pleaded in bar of a prosecution for an aggravated assault upon another. Bickham v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 77, 101 SW 210. Information charged six illegal liquor sales in different counts and on different dates and defendant was convicted on verdict not specifying count or offense. Held, verdict was not an acquittal on all but one count and, on reversal of conviction, information stood as though no trial had been had. State v. Pianfetti, 79 Vt. 236, 65 A 84.

69. So held in prosecution for illegal sale of liquor. State v. Pianfetti, 79 Vt. 236, 65 A 84.

70. Plea held demurrable. Gregory v. State [Ala.] 42 S 829.

71. A plea of former conviction must state where the judgment was rendered, as required by Pen. Code, § 1017. People v. Solani [Cal. App.] 91 P 654.

72. State v. Pianfetti, 79 Vt. 236, 65 A 84.

73. Charge of breach of trust of a certain amount on a certain day, and charge of breach of trust of funds of same person in a different amount on a later day, are same. State v. Dewees, 76 S. C. 72, 56 SE 674.

74. One indicted for a misdemeanor was arrested and gave bail. He then went to his attorney's office and the latter directed the jailer to take him into custody, which the jailer did without legal authority. Accused was then taken before county judge and discharged, no notice having been given county attorney or time for trial fixed. Held, plea of former acquittal based on these proceedings should be overruled, whole plan being designed to afford ground for such plea by collusion. McDermott v. Com., 30 Ky. L. R. 1227, 100 SW 830.

75. State v. Potter, 125 Mo. App. 465, 102 SW 668; State v. Dewees, 76 S. C. 72, 56 SE 674.

76. Whether acquittal of charge of sale on day following that of sale charged was a bar held for court. State v. Potter, 125 Mo. App. 465, 102 SW 668. Where a plea of former acquittal is bad on its face, it may be decided by the court without reference to the jury. Watson v. State [Md.] 66 A 635. Where defendant pleads a former acquittal and exhibits the former indictment as a part of his plea, and the solicitor pleads that the offenses charged are separate and distinct, requiring proof of distinct and different facts, the latter pleading is a demurrer and raises only a question of law. State v. Dewees, 76 S. C. 72, 56 SE 674.

77. State v. Dewees, 76 S. C. 72, 56 SE 674.

78. See Criminal Law, 9 C. L. 851.

79. A plea of former jeopardy based on conviction under former indictment for same offense, which conviction was set aside on motion of defendant, a nolle prosequi being thereon entered by the prosecuting attorney, is not good. Floyd v. State, 80 Ark. 94, 96 SW 125. Where a verdict of guilty was set aside on motion before judgment, it did not operate as an acquittal. Booker v. State [Ala.] 44 S 56. Where an information charged one with murder and he was convicted of manslaughter, on a new trial he could only be tried for manslaughter, since the verdict in the first trial acquitted him of murder. Huntington v. San Francisco Super. Ct. [Cal. App.] 90 P 141. Where at a prior term accused suffered a mistrial and did not demand retrial at that term, the court did not lose jurisdiction to try him at a subsequent term because the state did not apply for a continuance. State v. Tyre [Del.] 67 A 199. Where by mistake one is indicted and tried for alleged killing of a living man, it is not a former jeopardy though it was the intention of the state to indict and try for the killing of the person named in the second indictment. Moody v. State, 1 Ga. App. 772, 58 SE 262. Accused has a right to be present at every stage of the trial, and, where the court in his absence and without his consent ordered a mistrial because the jury could not agree, such fact constituted a sufficient basis for plea of former jeopardy. Bagwell v. State [Ga.] 58 SE 650, overruling Lester v. State, 33 Ga. 329. Where one charged with murder in the first degree is convicted of manslaughter, he is acquitted of murder and cannot be again tried for that offense. State v. Walker, 133 Iowa, 489, 110 NW 925. Granting motion of accused to discharge jury and continue the case because of his physical inability to proceed does not operate as an acquittal. Sacra v. Com., 29 Ky. L. R. 1010, 96 SW 858. Actual acquittal though upon

plea of former jeopardy may be interposed at any stage of the trial,[80] and in Texas a plea of former jeopardy in the same tribunal may be relied upon without presenting any formal plea.[81] The court cannot of its own motion overrule a plea of former jeopardy for defects therein or on facts within his personal knowledge.[82] A plea of former jeopardy on the ground that it did not appear affirmatively from the record that the jury were discharged because of inability to agree is properly overruled where the record is amended to show such discharge.[83]

A plea in abatement is proper where there is a defect in the record shown by facts extrinsic thereto.[84] Where a so-called plea in abatement does not state facts sufficient to constitute such a plea and contains no negation of auy element of the offense charged, it is demurrable.[85] Where defendant pleaded in abatement and

improper ground raised by the defense is a former jeopardy. Commonwealth v. Ball, 31 Ky. L. R. 887, 104 SW 325. Though the offense of a foreign corporation doing business in a state without complying with statutory requirements is a continuing one, yet, if after prosecution is commenced the defendant commits the same offense, a prosecution for one is not a bar to the other. Milburn Wagon Co. v. Com., 31 Ky. L. R. 937, 104 SW 323. A dismissal with consent of accused will not sustain a plea of former jeopardy. Where defendant demurred to indictment after jury had been sworn and was sustained and the court discharged accused and ordered the case submitted under another indictment. Jones v. Com., 30 Ky. L. R. 288, 97 SW 1118. Where accused demurred to an indictment and was sustained and the court directed the prosecution to be resubmitted to another grand jury to which defendant objected, the objection had reference only to resubmission and not to the ruling on sustaining the demurrer. Id. Under Const. § 13, declaring that a person shall not be put twice in jeopardy for same offense, and Cr. Code Proc. § 178, providing that dismissal for variance between indictment and proof shall not bar another prosecution, where one was indicted for betting on an "H. E. Knox" for election, and proof showed that his name was A. T. Knox, and the jury were charged to acquit because of variance, such acquittal was a bar because the variance was immaterial. Drake v. Com., 29 Ky. L. R. 981, 96 SW 580. Cr. Code Proc. § 178, expressly provides that dismissal of an indictment on demurrer is no bar to further prosecution unless it is dismissed or objection to form or substance is taken at trial or because of variance between indictment and proof, or because indictment contains matter which is a defense. Commonwealth v. Bray, 29 Ky. L. R. 757, 96 SW 522. Where defendant pleaded not guilty but withdrew that plea and pleaded guilty, and thereafter made a statement to the jury that he was not in fact guilty but pleaded guilty because poor and without friends, and threw himself upon the mercy of the jury, whereupon the court withdrew his plea of guilty and reassigned the case for trial, held a plea of former jeopardy was properly overruled upon the retrial of the cause. Williams v. Com., 31 Ky. L. R. 111, 101 SW 381. Where one tried under an indictment for larceny and embezzlement was acquitted of embezzlement, though the evidence warranted conviction, and convicted of larceny on insufficient evidence, he will be discharged since he cannot again be tried for embezzlement. State v. Casey [Mo.] 105 SW 645. Where jury was empaneled and sworn and state introduced its evidence, it was sufficient to constitute former jeopardy whether or not the court was correct in sustaining a demurrer to the state's evidence. State v. Webster, 206 Mo. 558, 105 SW 705. Judgment of a court having no jurisdiction will not sustain a plea of former jeopardy. Peterson v. State [Neb.] 112 NW 306. Where jury in murder case after being out twenty-four hours were discharged in absence of defendant and his counsel, the discharge operates as an acquittal and bars further prosecution. Vela v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 388, 95 SW 529. Plea of former jeopardy setting up former trial and discharge of jury without defendant's consent and in his absence may be entered at subsequent trial on same indictment after change of venue without making copy of judgment discharging jury in exhibit. Id. Under Laws 1905, c. 64, prohibiting the storing of liquor in local option territory, or permitting same to be drunk in one's place of business, where two persons were permitted to drink at the same time, a prosecution for allowing one to drink was not a bar to prosecution for allowing drinking by the other. Teague v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 214, 102 SW 1142. Where after impanelment of jury and plea of "not guilty" defendant called attention to defect in the indictment and on motion it was quashed, held, on subsequent trial, he was estopped to allege that prior indictment was valid and that jeopardy had attached. Carroll v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 789, 98 SW 859. On prosecution for betting a box of cigars on a game of pool, it was error to refuse to permit defendant to show that he had been once prosecuted for same transaction on theory that table fees due were wagered. Taylor v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 817, 98 SW 839.

80. People v. Solani [Cal. App.] 91 P 654.

81. Riggs v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 683, 96 SW 25.

82. Coburn v. State [Ala.] 44 S 58.

83. Record was amended before the plea was heard. State v. Curry, 74 Kan. 624, 87 P 745.

84. Cr. Code, § 441. Steiner v. State [Neb.] 110 NW 723.

85. Where charge was illegal sale of beer a plea that firm of which defendant was a member had a druggist's license and that sale was under such license and that such

also not guilty, he is entitled to have his plea in abatement first separately tried and determined.[88] Where a plea in abatement presents questions of law only, it is proper for the trial court to determine such questions without the intervention of a jury,[87] but defendant is entitled to a jury trial of issues of fact.[88] The grounds for the plea are sometimes fixed by statute[89] and in such case the statutory showing should be made.[90]

If defendant wishes to urge that the offense was committed in another county, his remedy is not by motion to quash or in arrest but by plea in abatement,[91] and the objection that the offense was committed outside the state must be proved as a fact under the plea of not guilty.[92] A plea alleging that the court was not lawfully constituted because the attempted act of the governor in directing the holding of the term and signing the judges' commission was a nullity[93] is not a plea to the jurisdiction but an attack on the very existence of the court.[94] It therefore cannot be considered, since a court cannot pass upon its own existence as a court.[95] In Georgia, by statute, where the grand juries at two several terms of court act upon a bill of indictment against a person charged with crime and each fails to find the bill true, it is a bar to any further prosecution of the same person for the same offense whether under the same or another name or charge, and such defense may be pleaded in bar or given in evidence under the general issue.[96] In Alabama a plea of insanity must be filed at the time of arraignment.[97] In California under the statutes relating to confession of former conviction, the act of a court in requiring a defendant to plead to a charge of a former conviction is not in excess of jurisdiction[98] and is not prejudicial to defendant.[99]

§ 6. *Preparation for, and matters preliminary to, trial.*[See 8 C. L. 203]—Proper time to prepare should be allowed.[1] The right to service of a copy of the information or indictment,[2] or to have the same read,[3] may be waived, though such statutory provisions should be complied with.[4] An immaterial discrepancy between the

sale was not punishable was demurrable. Steiner v. State [Neb.] 110 NW 723.

86. Tucker v. State [Ala.] 44 S 587. Such right is not waived by going to trial on issues raised by both pleas, but may be raised by motion in arrest. Id.

87. Stetter v. State [Neb.] 110 NW 761.

88. A plea in abatement that the defendant is under sixteen years of age raises a question of fact upon which defendant is entitled to a jury trial. State v. Dunn [Kan.] 90 P 231.

89. Under Code 1896, § 526, the fact that grand jurors were not drawn in the presence of the officers designated by law is properly raised by plea in abatement. Tucker v. State [Ala.] 44 S 587.

90. Plea in abatement for irregularity in drawing grand jury held insufficient because not alleging facts amounting to corruption as required by Gen. St. 1901, § 5521. State v. Lewis [Kan.] 90 P 763.

91, 92. State v. Long, 143 N. C. 670, 57 SE 349.

93. Because governor was out of the state at the time. State v. Hall, 142 N. C. 710, 55 SE 806.

94, 95. State v. Hall, 142 N. C. 710, 55 SE 806.

96. Elliott v. State, 1 Ga. App. 113, 57 SE 972.

97. Not an abuse of discretion to refuse to allow such plea to be filed on date of trial, after jury was impaneled, on ground that defendants attorneys were strangers to him at time of arraignment, without means of ascertaining his condition, no showing being made as to proposed proof to sustain the plea. Gordon v. State, 147 Ala. 42, 41 S 847.

98. Though Pen. Code, § 1025, has been repealed. People v. King [Cal. App.] 87 P 400.

99. People v. King [Cal. App.] 87 P 400.

1. Complaint that proper time was not given to prepare a defense and that defendant was forced to a hurried trial is not tenable where defendant was given every reasonable opportunity to file pleas and motions, and the court announced that it would sit as long as was necessary to develop the case. State v. Southern R. Co. [N. C.] 59 SE 570.

2. Right to service of copy of indictment waived where case was called, and continued to subsequent term, and accused failed to ask for service of copy and two days' time to prepare, when case was first called. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Defendant by proceeding to trial without demanding written complaint waives his right thereto in prosecution for violating city ordinance. City of Birmingham v. O'Hearn [Ala.] 42 S 836.

3. Reading of information is waived where accused accepts a copy of the information, takes time to plead, and goes to trial. State v. Gordon, 35 Mont. 458, 90 P 173.

4. Under Code Cr. Proc. 1895, art. 540, providing that in every case of felony, where accused is in custody, he shall be served with copy of indictment, where one

original and defendant's copy is not fatal.[5] Bill of particulars may be ordered where the offense is alleged in general terms.[6] The prosecution may be allowed to file an additional bill which merely adds further specification.[7] It is commonly provided that accused must be given notice of the witnesses who will be called by the state, by endorsement of their names on the indictment. In Idaho witnesses whose names are not so endorsed cannot be called even in rebuttal.[8] In Kentucky, they may be called,[9] and in Colorado, their testimony is admissible in rebuttal.[10] In some states, they may be called unless defendant establishes a claim of surprise.[11] Names of witnesses need not, in Alabama, be endorsed on defendant's copy.[12] In Iowa, where proper notice that certain witnesses will testify is duly served, their testimony is admissible though their names are not endorsed on the indictment,[13]

was served when case was set for trial, but there were one or two continuances thereafter, there was compliance with the statute. Keener v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 313, 103 SW 904. In Alabama a person accused of violating a city ordinance is entitled to a copy of a written complaint showing the nature and cause of the accusation against him, whether the cause of action was civil or criminal or in the nature of both. City of Birmingham v. O'Hearn [Ala.] 42 S 836. A defect thereof cannot be supplied by a statement of the cause of the complaint filed by the city attorney in the appellate court (Id.), not by a copy of the charge as entered on the docket of the police judge (Id.).

5. Variance between "whose" and "shooting" in indictment and "whos" and "shooling" in copy served, not fatal. Andrews v. State [Ala.] 44 S 696. Discrepancy between original indictment and defendant's copy, in date of commission of offense, held not to indicate that original had been materially changed since returned by grand jury. State v. Hatlestad, 132 Iowa, 188, 109 NW 613.

6. Where an indictment is sufficiently certain, it is within the discretion of the trial court to refuse to require the filing of a bill of particulars. Fields v. U. S., 27 App. D. C. 433. A defendant who desires fuller information in regard to matters not named in the statute as ingredients of the offense, and hence not necessary to be charged, should ask for a bill of particulars as allowed by Revisal 1905, § 3244. State v. Long, 143 N. C. 670, 57 SE 349. Under indictment for burglarizing a dwelling, accused was not entitled to a bill of particulars setting forth date of offense; it not being a material ingredient. Drake v. Com., 31 Ky. L. R. 1286, 104 SW 1000. Indictment charging conversion of moneys, bills, bank checks and drafts belonging to the state and coming into accused's hands as auditor, is sufficiently definite and certain. Accused is not entitled to a bill of particulars showing how, from whom, on what account, etc., moneys, etc., came into his hands. Sherrick v. State, 167 Ind. 345, 79 NE 193. If the indictment alone is not sufficiently full to give the defendant his constitutional right to know the nature of the charge against him, he is entitled to a bill of particulars as a matter of right. Where charge of abortion did not describe instrument used, defendant was entitled to a bill of particulars under Rev. Laws, c. 218, § 39. Commonwealth v. Sinclair [Mass.] 80 NE 799. By Rev. Laws, c. 218, § 39, the court may require the state at any stage of the proceedings to give defendant a statement of such particulars of the offense as to give him a reasonable knowledge of the offense charged. Commonwealth v. Hartford, 193 Mass. 464, 79 NE 784. Indictment against a master of a vessel for failing to provide sufficient seats and tables for immigrants in violation of 3 U. S. Comp. St. p. 2931, objectionable for failure to allege respects of deficiency, is not fatally defective but may be made definite by bill of particulars or new bill. United States v. Lavarrello, 149 F 297. Denial of bill of particulars in prosecution for conspiracy held proper where one count set out detail of facts and circumstances. Imboden v. People [Colo.] 90 P 608. In prosecution for embezzlement, a bill of particulars was properly refused where the facts were peculiarly within defendant's knowledge. Starling v. State [Miss.] 43 S 952.

7. Indictment for conspiracy to defraud county. Cooke v. People [Ill.] 82 NE 863.

8. Witnesses whose names are not endorsed on the indictment or information cannot be called as witnesses even in rebuttal. Rev. St. 1887, § 7668, and Sess. Laws 1899, p. 125. State v. Barber [Idaho] 88 P 418.

9. Witnesses not examined before the grand jury, and whose names are not on the indictment may be called, notwithstanding Cr. Code Prac. § 120. Thompkins v. Com., 28 Ky. L. R. 642, 90 SW 221.

10. Testimony of witnesses whose names were not on indictment admissible in rebuttal of evidence of alibi. Smith v. People [Colo.] 88 P 1072.

11. Where defendant is prosecuted for violation of the prohibitory law upon an information verified by the prosecuting attorney, he cannot complain that such officer is permitted to testify without his name having been indorsed thereon as a witness. State v. Thompson [Kan.] 91 P 79. Testimony of witnesses whose names were not on state's subpoena or on indictment held not objectionable where accused did not claim surprise. Thompkins v. Com., 28 Ky. L. R. 642, 90 SW 221.

12. Defendant may not object to a witness on the ground that his name was not on copy of indictment served. Nelson v. State [Ala.] 43 S 18.

13. State v Brown [Iowa] 109 NW 1011. Where state gave notice that it would call "Alec Sanders," whose name was not indorsed on the indictment, and he was the only "Sanders" called and had testified at a former trial of defendant, and defendant

and though they did not appear before the grand jury,[14] and such witnesses may testify, without notice, where accused consents at the trial.[15] Notice need not be given of the production of letters of the defendant.[16] While accused has a constitutional right to be represented by counsel, which right should not be infringed,[17] the court need assign counsel to accused only when accused requests such assignment and shows financial inability to employ counsel.[18] It is not error to inquire of accused as to his ability to employ counsel in the presence of the jurors.[19] Failure to request the appointment of counsel waives the right thereto.[20] It is error to require defendant's attorneys to deliver to the prosecuting attorney a transcript of the evidence in a habeas corpus proceeding taken and transcribed for the private use of defendant's attorneys by their own stenographer.[21] In Louisiana where accused had made the required oath, he is entitled to summon witnesses beyond the statutory six as matter of right.[22]

Right to speedy trial.[See 8 C. L. 206]—In the note are given holdings under statutes designed to secure this right.[23] Statutes violating the right of accused to a speedy

knew what his testimony would be, it was immaterial that his real name was H. S. Sanders, and that he was commonly called "Alec" when defendant had notice of this fact. State v. Mathews, 133 Iowa, 398, 109 NW 616.

14. Code, § 5373, providing that district attorney shall give accused notice of name, place of residence, and occupation of witnesses, who did not appear before the grand jury, is complied with by a notice containing the name of a person, residence Chicago, and occupation housewife. State v. Harmann [Iowa] 112 NW 632.

15. Where accused consented to introduction of testimony of witnesses whose names were not endorsed on the indictment, and concerning whom no notice had been given, in order to avoid a continuance asked by state in order to give the required notice, it was proper to allow such witnesses to testify. State v. Arthur [Iowa] 109 NW 1083.

16. Code, § 5373, relating to notice of production of witnesses, does not require notice that letters of defendant will be introduced, nor that minutes of the contents of the letters should be attached to the indictment. State v. Bennett [Iowa] 110 NW 150.

17. Instruction that jury will not consider remarks of counsel as evidence or for any purpose, unless they are justified by the evidence, does not deprive defendant of his constitutional right to be represented by counsel. Spicer v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 136, 105 SW 813. Defendant insisted he could not go to trial on account of illness, and court appointed counsel on day set for trial. Accused objected to counsel appointed but on day of trial appeared with other counsel and went on with the trial. Held, no error. State v. Kenny [S. C.] 57 SE 859.

18. State v. Sims, 117 La. 1036, 42 S 494. The court need not appoint counsel for accused if he is able to employ counsel. Rev. St. 1899, § 2560. State v. Terry, 201 Mo. 697, 100 SW 432.

19. In preliminary proceedings, it is not error to require accused charged with murder to stand up in presence of jurors and ask him as to his ability to employ counsel. Waggoner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 717, 98 SW 255.

20. Failure to request appointment of counsel is waiver by accused of his right. State v. Terry, 201 Mo. 697, 100 SW 432.

21. State v. Barnett, 203 Mo. 640, 102 SW 506.

22. State v. Freddy, 117 La. 121, 41 S 436.

23. Alabama: Where one was held without trial or order made in the case for 11 months during which one entire term passed, held he was not entitled to discharge on the ground of discontinuance or unreasonable delay. Smith v. State [Ala.] 43 S 129.

Delaware: Under Rev. Code 1852, amended 1893, p. 858, providing for release on bail unless trial be had at the term following indictment, and for discharge unless trial be had at second term, one is not entitled to discharge where he did not insist on trial at the second term. State v. Tyre [Del.] 67 A 199.

Georgia: If a defendant, with leave of the court, expressed by a formal order, has demanded a trial in accordance with the statute in Georgia, and at the succeeding term it appears that by fault of the prosecuting officer who had actual notice of the allowance of the demand, the same was not placed on the minutes, the court should upon motion cause the same to be entered nunc pro tunc (Graham v. State, 1 Ga. App. 682, 57 SE 1055), and if the state does not proceed to trial and the other statutory conditions are fulfilled, should discharge the defendant (Id.). One bound over to appear, against whom no accusation, indictment, or presentment has been preferred, cannot as a matter of right demand a trial or discharge. Order allowing demand is a nullity, and discharge may be refused at succeeding term. Williamson v. State, 1 Ga. App. 657, 57 SE 1079. One arrested on a warrant charging bastardy, and required to give bond under Pen. Code 1895, § 1250, and on failure to give bond, bound over to appear before a court of competent jurisdiction to answer to a charge of bastardy, cannot demand a trial or discharge under rule above. Id.

Iowa: Code, § 5536, providing for dismissal if case is not tried at second term after

trial are invalid.[24] Some statutes provide for the calling of a special term for the trial of a person accused of certain crimes.[25] Where there is no statutory rule as to placing of criminal cases on the trial calendar common usage prevails and persons accused may be put on trial at any time after arrest, though courts are guided by the guaranty of a speedy trial.[26]

Preliminary inquest as to sanity. See 8 C. L. 204—Under common-law rules and statutes of many states,[27] upon a suggestion of insanity at any time before or during trial, the court has power to investigate the sanity of defendant.[28] If a statute prescribes a mode of investigation, it should be followed.[29] At common law, the investigation may be by a jury, a commission, or by the court,[30] the matter being one resting in the court's discretion.[31] In some states, the court, having jurisdiction of a person charged with crime, has the exclusive right to determine his mental fitness to answer and make a proper defense.[32] In Missouri the court may refuse to summon a jury, if upon investigation it is convinced of the sanity of accused.[33] In some jurisdictions, the question of sanity is made a separate issue.[34] In others it is held that a preliminary trial of the question of defendant's

it is triable does not entitle defendant to dismissal because his case went over four terms by agreement. State v. Nugent, 134 Iowa, 237, 111 NW 927. Where defendant's case was not triable until late in the November term and the court in its discretion continued it until next term, defendant was not entitled to discharge for want of prosecution on the ground that he was not brought to trial at the next regular term after indictment as required by Code 1897, § 5536. State v. Johnson [Iowa] 111 NW 827.

Kansas: It is provided by statute in Kansas that accused shall be discharged at the end of the third term of court if not brought to trial before that time, provided the delay has not happened on his application or been caused by want of time to try the cause at such third term. "Want of time" to try the cause does not include inability to try the cause because of official neglect of duty, such as failure to have a jury. State v. Dewey, 73 Kan. 735, 85 P 796, 88 P 881. Under this statute it is held that a postponement by the court upon its own motion or upon application of the state should not be regarded as on the application of accused merely because he fails to object. Id.

24. Acts 28 Leg. p. 221, relative to seduction providing that if the parties marry the prosecution shall be suspended but not dismissed, and shall be revived if within two years the party is guilty of misconduct constituting ground for divorce, violates the guaranty of a speedy trial. Waldon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 455, 98 SW 848.

25. Under Kirby's Dig. § 1532, declaring that judge of circuit court may at any time hold special term for trial of persons confined in jail, an order directing clerk to call special term for trial of one held in custody for capital offense held to show that he was confined in jail. Beard v. State, 79 Ark. 293, 95 SW 995, 97 SW 667.

26. Murphy v. State, 131 Wis. 420, 111 NW 511.

27. No statute in Washington. See discussion in case of State v. King County Super. Ct. [Wash.] 88 P 207.

28. State v. King County Super. Ct. [Wash.] 88 P 207. Where it is asserted that a defendant is insane and unable to make a rational defense because of mental incapacity arising since the crime, it is the duty of the court to make inquiry, and if such insanity is found to exist to stop proceedings until disability is removed. In re Wright, 74 Kan. 406, 86 P 460, 89 P 678.

29. Held proper to investigate by commission of physicians under Ball. Ann. Codes & St. § 2660, no other mode being prescribed. State v. King County Super. Ct. [Wash.] 88 P 207. That affidavit of insanity did not allege that accused was at large or dangerous to be at large, as required in procedure under the statute, was immaterial, as the court had authority at common law and was following the statute as the only method provided by law. Id. Where accused pleaded guilty but during the same term an affidavit was filed stating that he was insane, a jury must be called to try the question of sanity. Ann. Code 1895, arts. 982, 983. Holland v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 172, 105 SW 812.

30. State v. King County Super. Ct. [Wash.] 88 P 207.

31. The manner in which a suggestion, that accused is so insane as to be unable to make a rational defense, shall be disposed of rests in the discretion of the court. United States v. Chisolm, 149 F 284.

32. In re Wright, 74 Kan. 406, 86 P 678, 89 P 678.

33. Under Rev. St. 1899, § 2603, providing that if defendant becomes insane after indictment, and the court has reason to believe that he is insane, he shall summon a jury to try the question, the court may refuse to summon a jury after hearing evidence convincing it that he is not insane. State v. Church, 199 Mo. 605, 98 SW 16.

34. On a separate trial of issue of insanity in homicide as required by St. 1898, § 4697, it was improper to inform the jury in response to their question whether they had any further issue to try in the case that if they found defendant sane they would pass on his guilt or innocence. Duthey v. State, 131 Wis. 178, 111 NW 222.

sanity should be ordered only when he becomes insane after the indictment; the defense of insanity at the time of commission of the crime charged is to be tried at the trial.[35] In Washington, where persons accused are found to be insane before trial, they cannot be deported to another state which is their place of residence.[36]

§ 7. *Postponement of trial.* See 8 C. L. 204—An application for a continuance is addressed to the sound discretion of the trial court[37] and its ruling will be interfered with on appeal only where a clear abuse of discretion appears.[38] Subject to this rule, lack of time for preparation,[39] absence or illness of counsel,[40] illness

35. Construing statutes on subject of insanity. State v. Crane, 202 Mo. 54, 100 SW 422.

36. Statute providing for deportation of dangerous insane persons (Ball. Ann. Codes & St. § 2660) is invalid because not enforceable outside limits of state. State v. King County Super. Ct. [Wash.] 88 P 207. Such persons should be kept within the jurisdiction so that they can be tried if they become sane. Id.

37. State v. Kenny [S. C.] 57 SE 859. Denial of continuance is largely a matter of discretion. Tedford v. U. S. [Ind. T.] 104 SW 608. Granting continuance is discretionary with the trial court. Commonwealth v. Carnes, 30 Ky. L. R. 506, 98 SW 1045.

38. State v. Sublett, 191 Mo. 163, 90 SW 374. Denial of continuance will not be reversed in absence of abuse of discretion. Nick v. State, 128 Ga. 573, 58 SE 48. Refusal to grant continuance is not ground for new trial in absence of abuse of discretion. Harper v. State, 79 Ark. 594, 96 SW 1003. In the absence of rule of court or statute, the court is not bound to follow a custom of allowing continuances without cause. Commonwealth v. Delero [Pa.] 67 A 764. Not error to refuse continuance on ground of absence of witness when court was not informed as to where or how affiant got his information as to what witness would testify to. State v. Crane, 202 Mo. 54, 100 SW 422. Refusal to allow motion for continuance for absent witness to be opened after most of jurors had been impaneled, to show that witness was only temporarily absent from the state, cannot be held an abuse of discretion. McFarland v. State [Ark.] 103 SW 169. Denial of continuance to secure information concerning jurors held not an abuse of discretion. Imboden v. People [Colo.] 90 P 608. Denial of continuance not an abuse of discretion. Territory v. Price [N. M.] 91 P 733. Where accused refused to state whether he desired to wait a day for an absent witness who telegraphed that he was on the way, the court had a right to proceed. Follis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep 120, 101 SW 242. Not an abuse of discretion to continue a case over a term where defendant had demurred to the indictment and it was understood that he was standing on the ruling on the indictment until late in the term. State v. Johnson [Iowa] 111 NW 827. Accused was forced to trial notwithstanding absence of a material witness, court assuring him that witness would be allowed to testify. Several adjournments were taken, and witness at length appeared and testified. Held, accused was not prejudiced by this procedure. Bennett v. Com., 106 Va. 834, 55 SE 698. No error in denying postponement because of inflamed local feeling where jury was procured from panel in attendance. People v. Buck [Cal.] 91 P 529. Where trial has already been postponed once, it is not an abuse of descretion to deny time to prepare a motion for continuance after the case is actually called. Williams v. State [Fla.] 43 S 428.

39. Held proper to deny application for continuance on ground of lack of time for preparation. Territory v. Emilio [N. M.] 89 P 239. Error to refuse continuance where defendant was indicted only eight days before his case was called and defendant had a material witness who was in another county and whom he agreed to have ready at next term of court. Woodward v. State, 89 Miss. 348, 42 S 167. Where complaint and information for carrying a pistol were filed six days before trial, accused was not entitled to a postponement for two days. Greer v. State [Tex. Cr. App.] 105 SW 497. Discretion in denying a continuance not abused though but 15 days elapsed between date of murder and date of trial, where witnesses were floating population. Commonwealth v. Delero [Pa.] 67 A 764. Refusal of continuance no ground for reversal where counsel for defendant had six days to prepare and it did not appear that accused were unable to obtain their witnesses or could have prepared a better defense had more time been granted. State v. Chitman, 117 La. 950, 42 S 437. Refusal of continuance not prejudicial where counsel were assigned several weeks before trial, had 12 days after refusal to continue, and case was simple. Commonwealth v. Renzo, 216 Pa. 147, 65 A 30. Where a prisoner has been arrested and complaint filed against him, the preliminary hearing may be postponed by the state for cause shown, for a reasonable time. Code 1904, § 3963. Hill v. Smith [Va.] 59 SE 475. Not error to deny continuance in homicide case for purpose of exhuming and producing decedent's skull. Moss v. State [Ala.] 44 S 498. Not error to refuse continuance until the relation of husband and wife was established between defendant and a witness so that she would be an incompetent witness against him. State v. Luper [Or.] 91 P 444.

40. Continuance properly refused on ground of absence of one of two attorneys. People v. Curtiss, 118 App. Div. 259, 103 NYS 395. Not error to refuse a continuance to permit an attorney to attend who is kept away by sickness of his family. Roper v. U. S. [Ind. T.] 104 SW 584. Continuance was asked for illness of leading counsel. It appeared that a motion on another ground had been denied, that three continuances had been granted, and notice given that more would not be granted, and counsel showed no signs of illness. Held continuance prop-

of accused [41] and surprise,[42] may or may not be ground for a continuance, according to the showing made. A postponement need not be granted to allow time to procure affidavits in support of a motion for change of venue.[43]

Continuance should be granted for the absence of a witness,[See 8 C. L. 204] when it is made to appear that due diligence has been exercised to procure the attendance of the witness [44] or his deposition,[45] and that he will probably be pres-

erly refused. Jones v. State, 128 Ga. 23, 57 SE 313. Where defendant employed his own counsel who was not present when case was called owing to unintentional misstatement by solicitor general, and court refused to postpone the trial and compelled defendant to proceed with counsel then appointed, new trial was ordered. Johnson v. State, 1 Ga. App. 729, 57 SE 1056.

41. Denial of continuance is error where it appears that accused is so weak from sickness and wounds that he cannot proceed, and such error is ground for new trial. Sacra v. Com., 29 Ky. L. R. 1010, 96 SW 858. Where the only evidence on motion for continuance was the affidavit of attending physician that defendant was in no fit condition to attend because of a wound, and evidence showed that he walked 14 miles after being shot and walked to the doctor's office, 2 blocks, every day, it was within discretion of the court to refuse continuance. Goddard v. State, 78 Ark. 226, 95 SW 476. Motion for continuance in seduction case, on ground that prosecutrix had not recovered from an illness and that her condition would excite the sympathy of the jurors and prejudice defendant's case properly denied. Rucker v. State, 77 Ark. 23, 90 SW 151.

42. Not error to deny motion for continuance where state substituted more specific indictment under which additional proof was not required and defendant could not have been surprised. O'Donnell v. People, 224 Ill. 218, 79 NE 639. In prosecution for selling liquor in Indian Territory, a witness testified that on day prior to arrest of accused he saw him and what he thought was the same liquor at a certain town. Held not error to refuse to permit continuance on ground of surprise to procure evidence to rebut such testimony. Ellis v. U. S., 6 Ind. T. 291, 97 SW 1013. Refusal of continuance on ground of surprise proper where defendant had not requested state's witness to disclose what he would testify to before trial. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 SW 1016. Names of certain witnesses were not indorsed on indictment until after jury was sworn. Held not error to allow such witnesses to testify for the state and to refuse a continuance. State v. Myers, 198 Mo. 225, 94 SW 242.

43. Postponement will not be granted to allow accused time to procure affidavits in support of motion for change of venue. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975.

44. Continuance should be allowed for a material witness where no lack of diligence is shown in attempting to procure his attendance. Watts v. State [Miss.] 44 S 36. Continuance should have been granted when due diligence was shown to get absent witness who would testify to alibi. Thomas v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 168, 101 SW 797. Showing of diligence used in effort to obtain testimony held sufficient where it appeared that process had issued but could not be executed, and that the deposition of the witness could not be obtained. Yantis v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 230, 94 SW 1019. Improper to refuse continuance for a material witness who had been subpoenaed several days before the trial but was seriously ill. People v. Fong Chung [Cal. App.] 91 P 105.

Showing as to diligence held insufficient. State v. Allen, 113 La. 705, 37 S 614; High v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 779, 98 SW 849; Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403; Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921. In the absence of exercise of due diligence to procure attendance of witnesses, a continuance will be denied. State v. Bailey [Kan.] 91 P 1066. Defendant is not entitled to have the case remain open one day to summon witnesses whom he could have had at the trial. State v. Vicknair, 118 La. 963, 43 S 635. Accused cannot complain of denial of continuance where he had ample opportunity to procure the witnesses at the trial. Id. Where diligence in obtaining witness was not shown, and his testimony on a former trial was read to the jury, denial of continuance was proper. State v. Sublett, 191 Mo. 163, 90 SW 374. Held effort to learn whereabouts of desired witness was not sufficient. Yantis v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 230, 94 SW 1019. Application denied where no effort had been made to get the witness and showing of testimony appeared improbable. Hall v. State [Tex. Cr. App.] 90 SW 176. Where subpoena was not issued for witness until two days after cause was set for trial, not error to refuse continuance on ground of witness' absence. State v. Crane, 202 Mo. 54, 100 SW 422. Affidavit for continuance should show whether absent witnesses were summoned or subpoenas issued for them. Johnson v. Com., 29 Ky. L. R. 442, 93 SW 581. Affidavit held not to show sufficient effort to procure attendance of desired witnesses. Id. Continuance properly denied where defendant made no effort to have the witness present, and had twice announced ready without him. Messer v. Com., 28 Ky. L. R. 920, 90 SW 955. That process for witness was delayed and issued only after witness was employed to take care of smallpox cases, held not to show due diligence. Yantis v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 230, 94 SW 1019. Where return to subpoena showed that witness was in another county and case was not tried for several days and no other process was issued to get him, there was such lack of diligence that absence of such witness was not ground for continuance. McNamee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 149,

ent at the time to which the continuance is taken.[46] The present whereabouts of the witness should be shown.[47] The application should further show what the testimony of the witness will be,[48] that the testimony is competent, relevant, and

97 SW 96. Where one continuance had been granted to procure absent witness and no diligence was exercised to procure his attendance, and his testimony was merely impeaching, refusal of second continuance was not error. Wright v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 312, 97 SW 699. Not error to deny continuance where diligence was not exercised to procure absent witnesses, and their testimony was of such character that it would probably not change the result. Reese v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 309, 97 SW 697. An application for a second continuance for an absent witness who was a fugitive from justice stating merely that information had recently been received that he was at a certain place in another state, and that there had not been time to get his deposition, is insufficient as not showing efforts to ascertain his whereabouts. Moore v. State [Tex. Cr. App.] 96 SW 321. Where it appeared that accused was indicted two months before date of trial, had counsel all the time, and no showing was made why absent witnesses had not been served with process before they left the county, held sufficient diligence not shown. Harper v. State, 79 Ark. 594, 96 SW 1003. Continuance to procure absent witness properly denied where no diligence was shown and evidence was cumulative and impeaching. White v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 399, 98 SW 264. Application for continuance to procure absent witnesses who had left county two or three months before the trial properly denied for want of diligence, where no effort was made to procure their testimony. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868. Motion to postpone because of absence of witnesses properly denied where not made until after trial opened and there was no sufficient showing of diligence. Welch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 522, 95 SW 1035.

45. No abuse of discretion in denying continuance where cause was postponed a month by a change of venue, and accused had secured an order allowing him to take the depositions of the absent witnesses and one was taken and no reason appeared why the other was not taken, and both witnesses were out of the state. Rucker v. State, 77 Ark. 23, 90 SW 151. No error to refuse continuance to allow deposition of absent witness to be taken in another state. State v. Crane, 202 Mo. 54, 100 SW 422. Continuance for absent witness properly denied where it appears that he is nonresident and the motion does not show why his deposition was not taken or how his testimony is to be procured. McFarland v. State [Ark.] 103 SW 169.

46. Motion for continuance properly denied where it was not shown that desired testimony could be procured at the next term of court, nor that application was not made merely for delay. Jones v. State, 128 Ga. 23, 57 SE 313. Where material witness lived eight miles from court house and could have been procured in short time, a postponement should be allowed. Stegar v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 789. Where ground is absence of witness, defendant must show diligence and probable attendance of witness at proposed time of trial. People v. Browne, 118 App. Div. 793, 103 NYS 903. It must appear that accused used proper diligence to procure witness and that it is reasonably probable that he can be secured at a later date. State v. Brown [W. Va.] 59 SE 508. Not an abuse of discretion to deny continuance where defendant was aged and infirm, where it appeared that witnesses for prosecution were also aged and infirm and that their attendance at next term was uncertain and the court directed trial in short session. Clement v. U. S. [C. C. A.] 149 F 305. Closing of trial instead of waiting for a witness is not error where it does not appear where he is or that he will be in attendance within a reasonable time. Stephens v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 292, 97 SW 483. No continuance for absent witness who was sick and had been confined for five months and it did not appear probable that his presence could ever be secured. Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921.

47. Not error to refuse to allow continuance and issue attachment for witness who was not shown to be within the jurisdiction of the court. Gaines v. State, 146 Ala. 16, 41 S 865. On application for continuance to secure absent witnesses, it is proper to receive evidence as to the whereabouts of such absent witnesses. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. Held proper to deny request for additional time to get a witness for the trial of a motion for new trial, where thirteen days had elapsed, and it did not appear that whereabouts of witness was known, and it was immaterial that witness in fact appeared the next day. State v. Johnston, 118 La. 276, 42 S 935.

48. The statement as to what absent witness will testify to must be specific. Statement held too general. Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879. On motion based on ground of absent witness, it must be made to appear that witness would testify as represented to the court. Dallas v. State [Ga.] 59 SE 279. Not error to deny continuance for witness as to alibi where it appeared that he was not with defendant at the time, and the nature or scope of his testimony does not appear. Id. On a second motion on account of absence of the same witness if there is any ground to suspect that the motion is made for delay only, it must appear what evidence the witness is expected to give. State v. Brown [W. Va.] 59 SE 508. An affidavit for continuance must show that defendant has knowledge of existence of evidence. Richberger v. State [Miss.] 44 S 772. When prisoner charged with murder applies for a continuance, he must make a strict and special showing and it must appear that the person whose testimony he wants is in fact a witness to some matter necessary to his defense,

material,[49] probably true,[50] and not merely cumulative,[51] corroborative,[52] or im-

and if he knows of this from information only, he ought to submit the affidavit of his information. Bradley v. State, 128 Ga. 20, 57 SE 237.

49. Absence of immaterial evidence is no ground for continuance. Doss v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 514, 95 SW 1040; McNamee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 149, 97 SW 96; Reyes v State [Tex. Cr. App.] 19 Tex. Ct. Rep. 219, 102 SW 1156; Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868; Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879. Not error to deny postponement to procure witness to testify that defendant had had a difficulty with companion of deceased. Doss v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 514, 95 SW 1040. Denial of continuance because of absent witness held proper where it appeared that the testimony he would give could not alter the outcome of the case. Williams v. State [Tex. Cr. App.] 19 Tex. Rep. 222, 102 SW 1147. Refusal of continuance for absent witness in a case in which insanity is a defense is harmless where it appeared that such witness heard defendant yelling in middle of night and found him in road in a fit where it does not appear whether defendant was intoxicated or what caused the condition. Young v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 178, 102 SW 1144. Unless it is reasonably certain that absent testimony would have resulted in a different verdict, denial of continuance is not reversable error. Harris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 154, 105 SW 801. Where in a local option case it was proved that witness purchased whiskey of defendant, it was proper to refuse a continuance for a witness who would testify that he gave witness no money to buy whiskey. Shaw v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 11, 105 SW 500. Where continuance was sought because of absence of witnesses one of whom would testify that defendant was at his place shortly before and one of whom would testify he was at his place shortly after the crime was alleged to have been committed, held the testimony was not material as he could have been at both places at such times and still have committed the crime. Turman v. State [Tex. Cr. App.] 16 Tex. Cr. Rep. 409, 95 SW 533. Application for continuance because of absence of witness who would testify that he met a person wearing clothes similar to those worn by defendant about two miles from scene of crime and going that way properly denied for immateriality. Id. In local option case is it not error to deny continuance to procure witnesses who would contradict payment. Riggs v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 293, 97 SW 482. Continuance in homicide case cannot be granted for witness who will testify as to uncommunicated threat. Harris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 154, 105 SW 801. Alleged new evidence on application for continuance held not material to defense. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 244, 94 SW 224. Where it did not appear that testimony of an absent witness would be material, a continuance was properly refused. White v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 816, 100 SW 941. Continuance properly refused where evidence desired was immaterial to defense. Woodrich v. State [Tex. Cr. App.] 90 SW 882. In assault case, proof of finding a knife in the place held not sufficiently material to require a continuance. Davis v. State [Tex. Cr. App.] 102 SW 1122. Denial of continuance for absence of witness who would testify in support of self-defense theory not error where defendant's testimony did not raise that issue. Laws v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 136, 101 SW 987. Application for continuance to procure witness who would testify as to threats made by decedent but not showing that they had been communicated to defendant properly denied. Harper v. State, 79 Ark. 594, 96 SW 1003. Where testimony of absent witnesses did not appear to be material to defendant's defense, a continuance was properly refused. Johnson v. Com., 29 Ky. L. R. 442, 93 SW 581. Not error to deny adjournment for testimony which would probably not change result of the trial. State v. Finn, 199 Mo. 597, 98 SW 9. Motion for continuance not supported by affidavit that the testimony is material, as required by rule of court, properly denied. State v. Pope [S. C.] 58 SE 816.

Absent testimony held material: Continuance should have been granted to procure witnesses to testify that accused, deceased, and witness for the state were together and on friendly terms shortly before homicide, and that deceased made a statement tending to exonerate accused. Phillips v. State [Tex. Cr. App.] 94 SW 1051. Testimony of absent witness for which continuance was asked held material in murder case. Yantis v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 230, 94 SW 1019. In local option case it was a material question whether the sale was made on a certain date at a certain place. Two witnesses who had been subpoenaed did not appear to testify on this point. Held error to refuse a continuance. McNamee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 149, 97 SW 96. Where in assault to rape state showed that witness found accused in a position indicating his intention to have carnal intercourse with prosecutrix, it was error to deny continuance for a witness who would testify that prosecutrix made no pretense that defendant did anything more than to frighten her. Foster v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 978, 105 SW 498. Error to refuse postponement to procure testimony to contradict state's witness in a material matter. Sessions v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 384, 98 SW 243. It is error to deny a continuance on the ground of absence of witnesses whose testimony is material and which is likely to change the result of the trial. Weaver v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 875, 105 SW 189. Error to refuse continuance for absent witnesses who would testify on question of insanity where defendant showed due diligence. State v. Von Kutzleben [Iowa] 113 NW 484.

50. Not error to refuse continuance to procure testimony probably not true. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct.

peaching,[53] and that the same facts cannot be proved by other available witnesses.[54] In some states a continuance will be granted though due diligence be not shown, if it appears that the testimony sought to be obtained is material and probably true.[55] The mere fact that the state will contradict the testimony of the absent witness is no ground for refusing a continuance,[56] and it is not proper to pass upon the credi-

Rep. 128, 97 SW 499; Purdy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 295, 97 SW 480. Continuance need not be granted where new evidence is not material and probably untrue. Crenshaw v. State [Tex. Cr. App.] 100 SW 1197. Application for a continuance properly denied where it appears that the evidence sought is probably untrue. Searles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 873, 105 SW 191. Continuance for absent witnesses properly refused where their names were not among those defendant desired summoned and it appeared that their residence was unknown and that their testimony would probably not be true. Davis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 218, 102 SW 1150. No error in refusing continuance for absence of witness when it was not shown that he would return, and the record showed his testimony would be untrue. Andrews v. State [Tex. Cr. App.] 100 SW 922. Continuance properly denied where no subpoena for absent witnesses was served, and defendant did not know where they were, and the testimony they would give was disproved by defendant's testimony and that of other witnesses. Shelton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 41, 100 SW 955. Not error to refuse continuance in order to procure nonexpert testimony to insanity of accused, where most of the witnesses were beyond the jurisdiction, and it appeared that they had not seen accused for some time, and the testimony they would give appeared, in the light of that received, to be probably untrue. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. Application for continuance properly denied where substance of it was contravened by testimony of accused and rendered improbable by testimony on trial. Baird v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 123, 101 SW 991.

51. Not error to refuse a continuance for cumulative evidence. Harper v. State, 79 Ark. 594, 96 SW 1003; Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879; Kelley v. U. S. [Ind. T.] 104 SW 604. No continuance for witness who would testify to same facts as three eyewitnesses testified to. Cravens v. State [Tex. Cr. App.] 19 Tex. Cr. Rep. 304, 103 SW 921. When testimony of absent witness would be cumulative only, held not error to refuse continuance on ground of absence of witness. State v. Crane, 202 Mo. 54, 100 SW 422. Where all of defendant's testimony eliminated question of self defense, it was not error to deny continuance to procure evidence of threats. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 222, 102 SW 1147.

52. Refusal of continuance for purpose of procuring testimony which would be only corroborative held not an abuse of discretion. Gallaher v. State, 78 Ark. 299, 95 SW 463.

53. Not error to refuse continuance for merely impeaching evidence. Rector v. State [Tex. Cr. App.] 90 SW 41; Corpus v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 225, 102 SW 1152; Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868; Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Not error to refuse a continuance to procure impeaching testimony, no foundation having been laid for impeachment. Harper v. State, 79 Ark. 594, 96 SW 1003.

54. Not error to deny continuance for a witness where one who knew the facts was present in the court room at the trial. Caddell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 275, 97 SW 705. Discretion in overruling motion for continuance for absent witnesses held not abused where it did not appear that fact could not be proved by other testimony. Renfroe v. State [Ark.] 104 SW 542. Continuance will not be granted for speculative testimony which is provable by other witnesses. Corpus v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 225, 102 SW 1152. Second application for a continuance is defective where it failed to state that absent testimony could not be obtained from any other known source. Searles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 873, 105 SW 191. Application for continuance on ground of absence of witnesses properly denied where some of the witnesses were present and testified or could have testified to the facts to be shown by absent witnesses. Lahue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 125, 101 SW 1008. Denial of postponement held not error where all witnesses except a nonresident alienist appeared and testified at the trial. People v. Buck [Cal.] 91 P 529.

55. White's Ann. Code Cr. Proc. art. 597, subd. 6. Yantis v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 230, 94 SW 1019. Where defendant set up an alibi, and asked a continuance to obtain presence of witness who would testify to his whereabouts and sustain his plea, it was error to refuse to grant it, even though due diligence was not shown. Sneed v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 820, 100 SW 922. Where absent witnesses would have given important testimony showing an attack by deceased on defendant and previous threats by deceased communicated to defendant, a continuance or new trial should have been granted though defendant had not used due diligence to procure attendance of one of them. Casey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 351, 102 SW 725. Where no reasonable diligence could have procured absent witness, a continuance should be granted though proof of diligence was not of strictest character. Stegar v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 789.

56. Court is not justified in overruling motion for continuance for absent witness because state will produce testimony to contradict absent witness. Craven v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921.

bility of the absent witness in ruling upon the application for a continuance.[57] But it is proper to deny a continuance where the affidavits in support of the motion are, on investigation, found to be false,[58] as where an affidavit of the absent witness is attached to the motion denying the showing made as to what he would testify to.[59] Refusal of a continuance is proper, in some states, where the state offers to admit that the witness will testify as stated in the application.[60] An affidavit for a continuance cannot be contradicted,[61] when the state has admitted that a certain absent witness, if present, would testify as set forth in the affidavit,[62] and where the affidavit is by accused, it is prejudicial error to admit an attachment for the absent witness with the sheriff's return showing that witness was out of the jurisdiction.[63] The rule as to diligence in procuring attendance of witnesses for whose absence a continuance is asked is less strict on a first application than on a second one.[64] A third or fourth application for a continuance because of absence of the same witness should be overruled.[65] Absence of a witness whose testimony on a former trial has been preserved by bill of exceptions is not, in Missouri, a ground for continuance.[66]

The application See 8 C. L. 206 must make the showing required by the statute [67] and be properly verified.[68] A statement by counsel that no objection is made to the form of an application does not waive matters of substance.[69]

57. In passing upon a motion for a continuance, it is error to pass upon proof of a statement by the absent witness contradictory to the testimony shown in the motion, and to weigh in advance the testimony of the absent witness. Sneed v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 820, 100 SW 922.

58. Where affidavits in support of motion for continuance to procure absent witnesses were investigated, and process issued for witnesses and it appeared that they had not been in the county for more than one year, held not error to deny continuance on ground that affidavits were false. Fitzgerald v. Com., 30 Ky. L. R. 349, 98 SW 319.

59. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231.

60. Continuance properly refused where state admitted truth of testimony of absent witnesses. Jackson v. State [Tex. Cr. App.] 90 SW 34. Accused stated what he expected to show by absent witness, and state offered to admit he would so testify if the matter was properly reduced to writing, and testimony was merely cumulative. Held not error to deny continuance. Gaines v. State, 146 Ala. 16, 41 S 865. Where there was no showing that absent witness would be present at the next term, and the state offers to admit that he would testify as stated, a refusal of a continuance is not improper. State v. Williams, 76 S. C. 135, 56 SE 783. Where state offered to admit that witnesses if present would testify to facts stated in affidavit for continuance, it was held no error to deny continuance. Foster v. State [Neb.] 112 NW 656. Not error to deny continuance where state admits that witnesses would so testify and the fact could be otherwise proven. Richberger v. State [Miss.] 44 S 772. Comp. Laws 1897, § 2987, authorizing denial of continuance for absence of witnesses if other party will admit that absent witness, if present, will testify as alleged in the application, applies in criminal cases. Territory v. Emilio [N. M.] 89 P 239.

61, 62, 63. State v. Rugero, 117 La. 1040, 42 S 495.

64. Weaver v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 875, 105 SW 189.

65. Scott v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 407, 93 SW 740.

66. Under a rule that testimony given at former trial and preserved by bill of exceptions may be read with like effect as a deposition, it is not error to deny a continuance because of absence of a witness whose testimony is so preserved. State v. Coleman, 199 Mo. 112, 97 SW 574. Under this rule it is also proper to deny continuance because of absence of stenographer on former trial where the testimony of the stenographer could be used only to impeach a witness who testified at the former trial. Id.

67. Affidavit for continuance held fatally defective because not alleging that application was not made for vexation or delay merely, nor that desired testimony could not be as readily procured by available witnesses. State v. Bond, 191 Mo. 555, 90 SW 830. Mere statement that continuance was desired to examine into the case and see what testimony could be procured is not sufficient showing. Moore v. State [Tex. Cr. App.] 96 SW 327. Accused should not be granted a continuance until after the trial of another person indicted for another crime upon a mere allegation that there is not evidence to convict such other and that he is a material witness for accused. Hinson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 43, 100 SW 939.

68. Motion for continuance must be verified by defendant; verification by his counsel is ineffective. Davis v. State [Tex. Cr. App.] 102 SW 1122.

69. Where counsel for defendant made a showing in support of a motion for continuance by stating facts in his place, adding "there being no objections raised to the form of the showing," this waiver of objections would be referred to the manner and form of the showing and not to necessary matters

§ 8. *Dismissal or nolle prosequi before trial.*[See 8 C. L. 206]—The practice as to entering a nolle prosequi varies.[70]

§ 9. *Evidence. Judicial notice.*[See 8 C. L. 206]—Judicial notice will be taken of public laws,[71] including acts of congress,[72] and of special acts of the legislature by which prohibition is in force in particular portions of the state[73] or the jurisdiction of city courts established.[74] Municipal ordinances will be judicially noticed by municipal courts,[75] but not by other courts,[76] nor will any other court take judicial notice of conditions in a city by which the reasonableness of an ordinance may be determined.[77] Upon appeal from a city court to a higher court and a trial de novo therein, the latter will take judicial notice of whatever facts the municipal court is required to judicially notice upon the trial therein.[78] But a different rule prevails in the supreme court, where such cases are not triable de novo, and such matters must be included in and made a part of the record presented for review.[79] Judicial notice will be taken of the names and signatures of officers of the court,[80] of the duties of the sheriff,[81] of facts concerning the public survey,[82] of facts of common knowledge,[83] and that a certain city is in a certain county of the state,[84] but not that a certain precinct is in a certain town.[85]

of substance. Jones v. State, 128 Ga. 23, 57 SE 313.

70. Held proper to allow prosecuting attorney to dismiss a count charging defendant as accessory without filing written reasons. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231. Held proper to allow solicitor to nolle prosequi first indictment with avowed purpose of getting out a second and coupling the trial of defendant with that of another charged with a separate offense. State v. Thomas 75 S. C. 477, 55 SE 893. Where on motion to direct a verdict of not guilty the court intimates that the evidence does not show an offense, the state may enter a nolle prosequi. State v. Hamilton [Del.] 67 A 836. A discontinuance must be the act of a prosecuting officer indicating his intention to abandon the prosecution. Does not result from omission of a ministerial officer. Smith v. State [Ala.] 43 S 129.

71. Judicial notice will be taken that common law of marriage is in force in Indian Territory. Porter v. U. S. [Ind. T.] 104 SW 855.

72. Court of criminal appeals will take judicial notice that United States has passed statute making laws of Arkansas operative in Indian Territory. Blink v. State [Tex. Cr. App.] 89 SW 1075.

73. Ball v. Com., 80 Ky. L. R. 600, 99 SW 826. Judicial notice is taken of the operation of a special act prohibiting sale of intoxicating liquors in a designated county. Combs v. Com. [Ky.] 104 SW 270. Court of appeals will take judicial notice that sale of spirituous liquors is prohibited in Morgan county. Bass v. State, 1 Ga. App. 728, 57 SE 1054. Judicial notice will be taken that a county is a prohibition county. Irby v. State, [Miss.] 44 S 801.

74. Allegation in indictment for petit larceny that accused had been formerly convicted of a like offense in the mayor's court of Danville need not allege facts showing that the court had jurisdiction; an allegation that it was a court of competent jurisdiction was enough, since judicial notice would be taken of its jurisdiction. Satterfield v. Com., 105 Va. 867, 52 SE 979.

75. In prosecutions for violations of such ordinances. Steiner v. State [Neb.] 110 NW 723.

76. Judicial notice will not be taken of existence of a municipal ordinance. Gardner v. State, 80 Ark. 264, 97 SW 48. Court cannot take judicial notice of city ordinances, hence contention that an ordinance is in conflict with others not proved cannot be considered. City of St. Louis v. Bippen, 201 Mo. 528, 100 SW 1048.

77. Court cannot take judicial notice of conditions of a city so as to determine reasonableness of ordinance prohibiting signs projecting more than eighteen inches. City of St. Louis v. St. Louis Theatre Co., 202 Mo. 690, 100 SW 627.

78. Appeal from municipal to district court. Steiner v. State [Neb.] 110 NW 722.

79. Otherwise rulings of district court will be presumed correct. Steiner v. State [Neb.] 110 NW 723.

80. Judicial notice will be taken of the clerk of court and his signature affixed to an information. State v. Kinney [S. D.] 113 NW 77.

81. Judicial notice will be taken of the fact that the sheriff is legal keeper of the county jail and custodian of prisoners. Ex parte Bargagliotti [Cal. App.] 92 P 96.

82. The court judicially knows that land lots in Turner county contained 490 acres of land. The description as 240 acres, second district, lot No. 70, would not indicate on what portion of lot 70 the premises laid, consequently evidence was inadmissable. Williams v. State [Ga. App.] 58 SE 1071.

83. Court will judicially notice that "craps" is a game played with dice and that a "quarter" means twenty-five cents. Sims v. State, 1 Ga. App. 776, 57 SE 1029. That whisky is spirituous or distilled liquor. State v. York [N. H.] 65 A 685. Judicial notice will be taken that beer is a malt liquor. Lambie v. State [Ala.] 44 S 51. Judicial notice will be taken of the fact that shaving by a barber is not a work of necessity permitted by the statute to be done on Sunday. McCain v. State [Ga. App.] 58 SE 550. Courts will judicially recognize that "dollar" is the

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Presumptions and burden of proof. See 8 C. L. 207—Innocence being presumed,[86] the burden is upon the state [87] to establish beyond a reasonable doubt [88] every essen-

money unit of the United States of the value of 100 cents, and will also recognize the different kinds and denominations of currency issued by the United States. McDonald v. State [Ga. App.[58 SE 1067. Judicial notice will be taken of what is meant by "greenback." Id.

Judicial notice cannot be taken that "Rough on Rats" contains arsenic and is always applied to the same compound. State v. Blydenburg [Iowa] 112 NW 634. The court does not judicially know that "Hop ale" and "Hop Jack" are malt liquors. Daniel v. State [Ala.] 43 S 22. Court cannot judicially notice that cotton is a thing of value to supply deficiency in indictment for larceny. Wright v. State, 1 Ga. App. 158, 57 SE 1050.

84. Judicial notice will be taken that a certain city is in a certain county. State v. Meyer [Iowa] 113 NW 322.

85. Courts cannot take judicial notice that a certain precinct is in a certain town where boundaries of such precinct are subject to change by county court. State v. Carmody [Or.] 91 P 441.

86. In every criminal case the accused is presumed to be innocent until his guilt is proved beyond a reasonable doubt. State v. Johns [Del.] 65 A 763; State v. Samuels [Del.] 67 A 164; State v. Honey [Del.] 65 A 764; State v. Wolf [Del.] 66 A 739; State v. Stewart [Del.] 67 A 786; United States v. Richards, 149 F 443; United States v. Cole, 153 F 801. The presumption of innocence is sufficient to turn the scales in a doubtful case. State v. Samuels [Del.] 67 A 164. Finding of indictment by grand jury is no evidence of guilt. United States v. Richards, 149 F 443. One accused of murder is presumed innocent and is entitled to acquittal unless guilt is proved beyond a reasonable doubt. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740. The presumption that one would not remain a party to a conspiracy to defraud after his co-conspirators had adopted a criminal course overcomes the presumption that he is still a party arising from proof of prior connection with it. Dalton v. U. S. [C. C. A.] 154 F 461. Charge that presumption of innocence casts on state burden of showing guilt beyond a reasonable doubt, and that if guilt is so proven the presumption of innocence can have no effect, held correct. Harrison v. State, 144 Ala. 20, 40 S 568. The presumption of innocence terminates upon the introduction of evidence which satisfies the jury beyond reasonable doubt. Strickland v. State [Ala.] 44 S 90.

87. Instruction held erroneous as placing the burden of proof on defendant. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 115, 89 SW 816. Under an indictment charging that defendant did "then and there" commit the assault, the state has the burden to prove such allegation, and a charge that defendant had the burden to prove an alibi set up by him is error. Glover v. U. S. [C. C. A.] 147 F 426. Instruction requiring jury to find that defendant between nine and thirteen years of age did not have sufficient discretion to understand the nature and illegality of the offense before they could acquit held improper because placing on defendant the burden of proving lack of discretion. Stewart v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 163, 101 SW 800.

88. State need not prove guilt beyond all doubt, but only beyond a reasonable doubt. Mills v. State [Ala.] 42 S 816. Instruction misleading jury to believe that proof of guilt must be conclusive properly refused. Gordon v. State, 147 Ala. 42, 41 S 847. Instruction properly refused as requiring too high a degree of proof. Id. Error to refuse to charge that jury should acquit unless the evidence excluded every reasonable supposition but that of guilt. Griffin v. State [Ala.] 43 S 197. Error to refuse to charge that if the jury have a reasonable doubt arising out of any part of the evidence they should acquit. Id. A mere doubt is insufficient; it must be a reasonable one. Davis v. State [Ala.] 44 S 561. It is not necessary to prove guilt to an exact mathematical certainty. Howard v. State [Ala.] 44 S 95. Acquittal is justified upon a reasonable hypothesis of innocence. Id. A reasonable possibility of innocence is not a proper predicate for acquittal. Id. Doctrine of reasonable doubt applies only to the question of guilt or innocence on the whole case, and not to the different items which go to establish the guilt. Butt v. State [Ark.] 98 SW 723. Preponderance of evidence is sufficient. United States v. Dexter, 154 F 890. Mere suspicions or probabilities are not sufficient upon which to base conviction. State v. McCarthy [Mont.] 92 P 521. Testimony of one robbed in the dark held insufficient as to identity of the guilty person. Walker v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 598, 96 SW 35. On trial of boy nine to thirteen years old, state must not only show history and character of accused, and the degree of intelligence, but facts showing that he knew that the offense charged was criminal and would subject him to punishment. Binkley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 799, 100 SW 780. Evidence of capacity sufficient. Id.

"Reasonable doubt" defined. United States v. Richards, 149 F 443. Definition of reasonable doubt approved. State v. Spaugh, 200 Mo. 571, 98 SW 55. A well founded doubt is the same as a reasonable doubt. Creagh v. State [Ala.] 43 S 112. A reasonable doubt is an actual and substantial one, not a mere possibility or speculation. Bluett v. State [Ala.] 44 S 84. Instruction approved Id. Instruction on reasonable doubt approved. Harrison v. State, 144 Ala. 20, 40 S 568; Gregory v. State [Ala.] 42 S 829. A reasonable doubt is more than a mere possibility of innocence. Territory v. Price [N. M.] 91 P 733. It is not error to include in the definition of "reasonable doubt" that it is a doubt for which there is some good reason arising out of the evidence or lack of evidence. State v. Wolfley [Kan.] 89 P 1046. Instruction defining reasonable doubt held correct. Vasquez v. State [Fla.] 44 S 739. A reasonable doubt is such a one as arises naturally after an impartial consideration of all the evidence, not a mere possible doubt nor one arising out of sympathy or suggestion not warranted by the evi-

tial element of the crime charged.[89] The essential facts necessary to be shown to prove the commission of the offense by the principal must also be shown on trial of an accessory.[90] The burden is upon defendant to prove any special defense,[91] but

dence. United States v. Dexter, 154 F 890. A reasonable doubt is a substantial one remaining in the minds of the jury after a consideration of all the evidence, and not a mere vague or fanciful one. State v. Tyre [Del.] 67 A 199; State v. Stewart [Del.] 67 A 786; State v. Johns [Del.] 65 A 763; State v. Adams [Del.] 65 A 510; State v. Honey [Del.] 65 A 764; State v. Uzzo [Del.] 65 A 775. A reasonable doubt entertained after a consideration of all the evidence inures to the benefit of the defendant. State v. Stewart [Del.] 67 A 786. Guilt is shown beyond a reasonable doubt if on a consideration of all the evidence the truth of the facts is shown to a reasonable and moral certainty and satisfies the judgment of those bound to act conscientiously by it. State v. Samuels [Del.] 67 A 164. Reasonable doubt is a reasonable substantial doubt remaining in the minds of the jury after careful consideration of the evidence, and such doubt as reasonable men would entertain under the circumstances. State v. Cephus [Del.] 67 A 150; State v. Briscoe [Del.] 67 A 154; State v. Wright [Del.] 66 A 364; State v. Wolf [Del.] 66 A 739.

89. State v. Stewart [Del.] 67 A 786; State v. Cephus [Del.] 67 A 150; State v. Briscoe [Del.] 67 A 154; State v. Samuels [Del.] 67 A 164; State v. Fleetwood [Del.] 65 A 772. The state must prove that the offense was committed prior to the accusation, presentment, or indictment. Askew v. State [Ga. App.] 59 SE 311; Tharpe v. State [Ga. App.] 58 SE 1070. Under indictment for passing a forged check on a bank, "a corporation," it is necessary to prove incorporation of the bank. Wisdom v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 74, 95 SW 505. The state must prove an allegation in the indictment that the robbery was committed on a person to the grand jury unknown. Floyd v. State, 80 Ark. 94, 96 SW 125. Where an offense is alleged to have been unknown to the state, it need only be shown that it was unknown to the prosecutor in order to make prima facie proof of the allegation. Cohen v. State [Ga. App.] 59 SE 4. Under Rev. Laws, c. 208, to warrant conviction of one as accessory before the fact, it must be shown that someone committed the principal felony, that is, that when he committed the act he had guilty intent. Commonwealth v. Asherowski [Mass.] 82 NE 13. Where evidence to prove an essential element of the offense is excluded on objection of defendant, no conviction can be bad. People v. Burnham, 104 NYS 725. Proof of a headline attached to a newspaper article is insufficient to sustain indictment for libel. Miller v. State [Ark.] 99 SW 533. In prosecution for obtaining money by false pretenses from a corporation, the state need not prove the fact of incorporation. State v. Briscoe [Del.] 67 A 154. In larceny it must be shown that the property taken was personal and that it was taken by defendant. State v. Wolf [Del.] 66 A 739. Asportation must be shown. Id. Intent to steal must be shown. Id. Where accused testifies that more than the statutory period has elapsed, the state has the burden to prove that the offense was committed within the period. Nelson v. State [Ala.] 43 S 966. Conviction cannot be had without proof of the **corpus delicti** beyond a reasonable doubt. Tatum v. State, 1 Ga. App. 778, 57 SE 956.

Venue is a jurisdictional fact and must be established beyond a reasonable doubt. Smith v. State [Ga. App.] 58 SE 549; Cooper v. State [Ga. App.] 59 SE 20. Proof of venue is essential. Mill v. State, 1 Ga. App. 134, 57 SE 969. Writ of certiorari should be granted by superior court where there was no proof of venue in municipal court. Strozier v. Hawkinsville, 1 Ga. App. 285, 57 SE 969. Failure to prove venue of offense is fatal to conviction. State v. Kelly, 123 Mo. App. 680, 101 SW 155. Proof held sufficient to show venue of homicide. Williams v. State, 168 Ind. 87, 79 NE 1079. State must prove county in which crime was committed; this is jurisdictional. Ward v. State, 77 Ark. 19, 90 SW 619. Evidence sufficient to sustain a finding that a crime was committed in the county where the prosecution was conducted. Foster v. State [Neb.] 112 NW 656. Evidence sufficient to establish the venue of an offense. State v. Meyer [Iowa] 113 NW 322. In prosecution for violation of local option law, it must be shown that sale occurred in county where prosecution was begun. Isom v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 431, 95 SW 518. Evidence held insufficient to prove venue of crime of rape. Boykin v. State [Ala.] 42 S 999. Proof of commission of crime of burglary in a certain city of the state is enough, since the court takes judicial notice of the county in which the city is. Dupree v. State [Ala.] 42 S 1004. The jury is authorized to find that fraudulent conversion of a team took place where it was hired, it having been hired under an assumed name and never returned nor the hirer been seen since. Jeffreys v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 334, 103 SW 886. In prosecution in district court in Nebraska, it must appear that the offense was committed in that state. United States v. Richards, 149 F 443. Venue may be proved by circumstantial evidence, but in this case such evidence was held insufficient. Smith v. State [Ga. App.] 58 SE 549.

Contra: The venue of a crime need not be proved beyond a reasonable doubt. If jury could reasonably conclude that crime was committed in county, held sufficient. Hopkins v. State [Fla.] 42 S 52.

90. Wright v. State, 1 Ga. App. 158, 57 SE 1050.

91. Defendant has the burden of establishing the defense of **insanity** by a preponderance of the evidence. People v. Willard, 150 Cal. 543, 89 P 124. Burden of proving insanity is on the defense. Fults v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 458, 98 SW 1057. Burden is on defendant to prove **intoxication** negativing intent by preponderance of evidence. State v. Yates, 132 Iowa, 475, 109 NW 1005. Accused has burden of proving **self-defense** in homicide case. State v. Honey [Del.] 65 A 764. Burden is on the

this burden is sustained by a preponderance [92] of all the evidence.[93] Where a proviso or exception does not form a part of the description of the offense, but withdraws or excepts a case or class of cases from the operation of the statute, the burden is upon defendant to bring himself within the exception; [94] if the exception or proviso merely forms a part of the description, it must be negatived by the indictment and the state must prove the negative allegation.[95] Only the absence of a reasonable doubt on the part of the whole jury will justify conviction; [96] if any individual juror entertains a reasonable doubt, accused must be acquitted.[97] The presumption of innocence is not a matter of evidence [98] but is a conclusion of law having no relation to a condition of mind produced by proof.[99] The law presumes that a person intends the ordinary consequences of his voluntary act,[1] but no such presumption arises from an accidental act.[2] The suppression of testimony raises a presumption that if produced it would be unfavorable to the party suppressing it,[3] but no presumption arises from failure to call a witness who could not have known material facts,[4] and testimony is admissible to account for the absence of a witness whose testimony is material.[5] Identity of name is presumptive evidence of identity of person.[6] A condition shown to exist is presumed to continue until its nonex-

defendant to prove **alibi.** Parham v. State, 147 Ala. 57, 42 S 1.

Contra: Burden is not upon defendant to prove alibi by a preponderance. Tucker v. Territory, 17 Okl. 56, 87 P 307. Instruction held not erroneous as placing on defendant the burden of proving alibi by preponderance of evidence. Id.

92. Defendant need prove insanity by a fair preponderance of the evidence only. State v. Johnson, 118 La. 276, 42 S 935. Instruction requiring accused to produce evidence of insanity or evidence sufficient to raise a reasonable doubt is erroneous. Duthey v. State, 131 Wis. 178, 111 NW 222. A charge on defense of alibi placing on defendant the burden of proving it beyond a reasonable doubt is erroneous. Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 110, 101 SW 245.

93. Defendant is not limited to his own evidence of defensive matter, but is entitled to the benefit of all evidence thereon regardless of its source. Keith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 516, 94 SW 1044. While defense of alibi must be made out by defendant by a preponderance of the evidence, defendant is entitled to an acquittal if all the evidence, including that relating to alibi defense, raises a reasonable doubt of guilt. Instruction approved. State v. Thomas [Iowa] 109 NW 900. In Georgia there are two branches of the rule controlling alibi. One is that the accused is only required to establish it to the reasonable satisfaction of the jury. Ransom v. State [Ga. App.] 59 SE 101. The second is that any evidence of alibi is to be considered on the general case and if a reasonable doubt is raised by the evidence as a whole defendant should be acquitted. Id.

94. State v. Connor, 142 N. C. 700, 55 SE 787. Under Gen. Laws 1896, c. 102, relative to prosecutions for unlawful sale of liquor, a defendant has the burden to prove that he comes within an exception to the statute. State v. Collins [R. I.] 67 A 796. The defendant has the burden to prove negative averments of the complaint which are a matter of defense and peculiarly within his knowledge. Gains v. State [Ala.] 43 S 137.

95. State v. Connor, 142 N. C. 700, 55 SE 787.

96. Bell v. State, 89 Miss. 810, 42 S 542.

97. Bell v. State, 89 Miss. 810, 42 S 542. But the doubt of one juror cannot properly influence the action of jurors who feel no doubt further than follows from the fact that it is the duty of the jurors to consider and weigh all the questions that arise on the evidence with due regard to each other's opinions, and that conviction can be had only upon agreement of all in the result. Commonwealth v. Sinclair [Mass.] 80 NE 799.

Contra: The jury are not required to acquit if one juror has a reasonable doubt. Howard v. State [Ala.] 44 S. 95.

98. Commonwealth v. Sinclair [Mass.] 80 NE 799.

99. Instruction on presumption properly refused. Gordon v. State, 147 Ala. 42, 41 S 847.

1. B. & C. Comp., § 788, subd. 3. Intent to injure presumed from use of deadly weapon. State v. Bock [Or.] 88 P. 318. Charge that law presumes that a man intends to do what he does held proper. Allen v. State [Ala.] 42 S 1006. Under Pen. Code, § 20, the intent is evidenced by acts of accused and presumption arising therefrom, which presumption attaches to each act as done regardless of original intent. People v. White [Cal. App.] 90 P 471.

2. It is error in an assault case where defendant claims cutting was accidental to charge that the law presumes intention from the fact of injury. Acrey v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 818, 100 SW 954.

3. Presumption is that competent and pertinent evidence within the knowledge or control of a party which he withholds is against his interest. Standard Oil Co. v. State, 117 Tenn. 618, 100 SW 705.

4. Applied to witness sworn by state but not called. Tuggle v. State, 127 Ga. 290, 56 SE 406.

5. State v. Caron, 118 La. 349, 42 S 960.

6. Nelson v. State [Ala.] 43 S 966.

istence is shown,[7] but the presumption of continuance of insanity obtains only when a permanent form is shown.[8] One presumption of fact cannot be based upon another presumption of fact.[9]

Relevancy and competency in general. See 8 C. L. 207—In general, all evidence, otherwise competent, having any tendency to prove or disprove any fact in issue,[10] is

7. In seduction where a woman is proven unchaste, the presumption is that she so continues. Kerr v. U. S. [Ind. T.] 104 SW 809.

8. The rule that insanity once shown to exist is presumed to continue applies only where such insanity or the cause thereof is permanent in nature. Sims v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 962, 99 SW 555. Where insanity in a continuing and permanent form is shown to exist, it is presumed to continue, and the burden is upon the state to show sanity at the time of committing the offense. Wooten v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 157, 102 SW 416.

9. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445.

10. Held admissible: In assault with intent to kill, evidence that defendant had a pistol at time of assault is admissible as tending to show character. State v. Spaugh, 199 Mo. 147, 97 SW 901. Certain evidence as to whereabouts of accused held properly admissible on question of alibi. People v. Pembroke [Cal. App.] 92 P 668. Where the state introduced an exclamation made by deceased as he was shot, defendant could show the basis of such exclamation. State v. Lively, 119 La. 363, 44 S 128. Where defendant claimed he had paid a fine in a certain case because it was cheaper than to stand trial, it was proper to allow justice to testify to conversation at the time showing that fine was made only $5 out of consideration for defendant's family. People v. De Camp, 146 Mich. 533, 13 Det. Leg. N. 862, 109 NW 1047. Accused should be allowed to explain away unfavorable inferences from evidence against him. Pitman v. State [Ala.] 42 S 993. Proof of keeping liquor for sale after date alleged in indictment therefor held admissible. State v. Kennard [N. H.] 65 A 376. Proof of shows going on at time admissible to fix time of killing. Nelson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 140, 101 SW 1012. In prosecution for maintaining a nuisance in conducting a saloon where it does not appear that it was conducted in a disorderly manner, evidence is admissible that accused had a license. Sopher v. State [Ind.] 81 NE 913. In prosecution, certain notes showing that defendant had a business transaction with a third person on a certain date were admissible to prove a material date. Ellington v. State [Tex. Cr. App.] 99 SW 997. Accused having pleaded insanity and introduced a judgment of the county court finding him insane, statements by persons who knew him and had dealings with him that they had not noticed anything wrong with him, etc., were admissible to show that he had become sane. Taylor v. State [Tex. Cr. App.] 90 SW 647. On prosecution for robbery, evidence that other parties might have committed it is admissible. Chancey v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 526, 96 SW 12. Where defendant attempted to prove an alibi, evidence that he was in the city where the robbery occurred before and at the time of the robbery was admissible. State v. Finn, 199 Mo. 597, 98 SW 9. Held not error to prove presence of another at a certain scene, objection being that it was attempt to prove what absent witness would testify to if present. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. Where theory of defense was that the crime was committed by a witness for the state who testified that he was present at the time, statements made by him out of court in conflict with his testimony were admissible as original evidence in defendant's behalf. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182. In homicide on an issue of self-defense, defendant was entitled to show why he cut deceased and why he threw away the razor with which he cut him. State v. Rutledge [Iowa] 113 NW 461. In prosecution of post-office clerk for embezzling mail of value where he testified that mail was open when received and he laid the articles away for proper disposition, evidence that mails were heavy and much of it in bad condition held admissible in corroboration. Chitwood v. U. S., 153 F 551. On an issue of insanity, it is competent to prove other acts and conduct of defendant previously and subsequent statements or confessions. United States v. Chisholm, 153 F 808. Where state claimed witnesses favorable to accused were conspirators, accused had a right to show acts of witnesses inconsistent with such theory. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417.

Held inadmissible: Questions which have no apparent relevancy may be refused. Douglass v. State [Fla.] 43 S 424. In prosecution for violation of ordinance, evidence must be confined to period after ordinance took effect. Bell v. Forsyth, 126 Ga. 443, 55 SE 230. Proper to exclude question to accused as to why he left the state after the crime and whether his father advised him to go. Rose v. State, 144 Ala. 114, 42 S 21. Where body of deceased was not found until Sunday afternoon at 3 o'clock, proof of statements of defendant in the morning that deceased had committed suicide was admissible to rebut defense of suicide. State v. Thomas [Iowa] 109 NW 900. That defendant had a revolver when arrested two months after commission of crime irrelevant without proof showing it was same one he had at the time. State v. Kehr, 133 Iowa, 35, 110 NW 149. Request of decedent to witness that he telegraph to decedent's mother at once inadmissible. Bice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 61, 100 SW 949. Testimony of one who passed scene of homicide shortly prior to crime but saw no one held irrelevant. State v. Darling, 199 Mo. 168, 97 SW 592. In a prosecution for arson, it is not admissible to show that certain threats were made against defendant by a third person to show compulsion which would free him from criminality where it does not appear that such acts had anything

admissible whether direct or circumstantial,[11] and its remoteness goes ordinarily to its weight and not to its admissibility,[12] though evidence only remotely relevant may be excluded in the discretion of the court.[13] Evidence is admissible which tends to connect accused with the crime,[14] to show his mental capacity and condition,[15] to

to do with the commission of the crime. Ross v. State [Ind.] 82 NE 781. Error to admit testimony that accused was man witness had seen when accused was at the time under arrest. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943. That the statutory reward has been claimed and paid by the county for the arrest of defendant in a homicide case cannot be shown. Boykin v. State, 89 Miss. 19, 42 S 601. Testimony of sheriff that he had received information that would have caused him to arrest one other than defendant not admissible. Chancey v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 526, 96 SW 12. In prosecution for seduction, evidence that prosecuting witness had been offered money to dismiss a pending civil action held inadmissible. State v. Nugent, 134 Iowa, 237, 111 NW 927. In local option case, evidence that accused had been in liquor business prior to alleged sale held inadmissible. Harris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 270, 97 SW 704. Proof that rolls of false money were found in defendant's possession some months after commission of larceny inadmissible, no connection being shown. People v. Smilie, 118 App. Div. 611, 103 NYS 348. In prosecution for burglary, testimony that about a month after alleged offense witness went to scene of burglary and tracked supposed perpetrator to certain place and there arrested defendant is not admissible. Jordan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 596, 96 SW 35. In homicide, evidence that deceased had raped a woman and was forced to marry her was inadmissible. Serna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 133, 105 SW 795. In homicide it was not error to exclude testimony that defendant's brother offered his own horse for comparison of tracks claimed to have been made by defendant's horse. Sasser v. State [Ga.] 59 SE 255. In homicide, the widow of decedent may not state number and ages of her children. State v. Rutledge [Iowa] 113 NW 461. In prosecution for unlawfully keeping liquor, a search warrant and return thereon are not admissible. State v. Collins [R. I.] 67 A 796. Evidence concerning business of deceased, that it had made him enemies who threatened him with personal violence, is irrelevant. State v. Barrington, 198 Mo. 23, 95 SW 235.

11. Circumstantial evidence is admissible though there are eye-witnesses. Commonwealth v. Karamarkovic [Pa.] 67 A 650. Conspiracy may be proved by facts from which conspiracy may be inferred. State v. Sykes, 191 Mo. 62, 89 SW 851. Proof that defendant and another who admitted guilt were recently frequently together before the crime was admissible to show conspiracy. State v. Arthur [Iowa] 109 NW 1083. Where it appeared that deceased was shot by a man standing behind a clump of bushes, evidence of tracks there was admissible though there was no evidence of size of shoes worn. Doss v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 514, 95 SW 1040. In prosecution for theft of cotton, proof of tracks on the scene was not error though they were not connected with accused. Rucker v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 167, 101 SW 804.

12. Relevant evidence should not be excluded however slight its relevancy, its weight being for the jury. Morris v. State [Ala.] 39 S 608.

13. Evidence of a statement by defendant's mother, wife of deceased, a year before a homicide, to the effect that she wished deceased was dead, etc., held too remote. Wakefield v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 558, 94 SW 1046. Proof of conversation with accused a year prior to offense charged (arson), in which accused suggested the burning of property to get insurance, held inadmissible. State v. Yates, 99 Minn. 461, 109 NW 1070.

14. In prosecution for arson, testimony as to tracks found leading from scene of crime to home of accused held admissible. Davis v. State [Ala.] 44 S 545. In homicide, evidence as to tracks leading from scene of crime held admissible, its weight being for the jury. Moss v. State [Ala.] 44 S 598. Possession of proceeds of crime by either of defendants may be shown though conspiracy has terminated. Bink v. State [Tex. Cr. App.] 89 SW 1075. In prosecution for rape, books and papers belonging to accused found at scene of crime are res gestae. Fletcher v. Com., 29 Ky. L. R. 955, 96 SW 855; Lyon v. Com., 29 Ky. L. R. 1020, 96 SW 857. Competent to ask accused (murder case) if he had deceased's watch in his possession after homicide and to contradict him on denying it. State v. Kenny [S. C.] 57 SE 859. In prosecution for stealing chickens, evidence of tracks which tended to connect defendant with the crime held admissible. State v. Norman [Iowa] 113 NW 340. What occurred at accused's home two hours after homicide admissible. People v. Tubbs, 147 Mich. 13 Det. Leg. N. 959, 110 NW 132.

15. In homicide where drunkenness is set up, the state may show in rebuttal that shortly after the killing defendant was apparently sober. Heninburg v. State [Ala.] 43 S 959. While voluntary drunkenness is not a defense, proof of drunkenness is admissible on the issue of malice or intent. Robb v. Com., 31 Ky. L. R. 246, 101 SW 918. Defense of drunkenness is material, in trial for assault with intent to kill, on issue of specific intent to kill. State v. Yates, 132 Iowa, 475, 109 NW 1005. Proof of intoxication of accused half an hour before the homicide, and of a conversation relating to his condition, admissible. State v. Rowell, 75 S. C. 494, 56 SE 23. Where insanity is the defense, the acts and conduct of accused at the time of and before the act of which he is accused may be shown. People v. Willard, 150 Cal. 543, 89 P 124. Where accused in homicide case did not deny killing but claimed he was mentally irresponsible at the time, evidence of his condition before and after the commission of the act was admissible. People v. Kaerner, 117 App. Div. 40, 20 Crim. R. 515, 102 NYS 93. A petition for a writ of habeas corpus for the discharge of accused from an asylum,

show animus, motive, or intent.[16] While the expectation of receiving money may be shown in some cases as a motive for crime,[17] proof that accused was in indigent circumstances and of his financial condition is usually excluded.[18] Proof of the conduct of a bloodhound which was put on a trail and which led the searchers to accused was held competent [19] at least in corroboration of other evidence identifying tracks as those accused.[20] Immaterial evidence should not be admitted though the court is of the opinion that it is harmless to defendant, and such evidence, if admitted, should be stricken on motion.[21] On trial of one as an accomplice, evidence inadmissible against the principal is inadmissible against the accomplice,[22] but guilt of the principal may be shown by any legitimate evidence.[23] Though an indictment may be returned not true as to one of two defendants, evidence competent against both is competent against the other defendant.[24]

Acts disclosing consciousness of guilt,[25] such as flight,[26] concealment,[27] resistance of, or attempts to prevent, arrest,[28] attempt to escape from custody,[29] failure

signed by him shortly after the homicide, held admissible on the issue of insanity, it also appearing that he had read and understood the petition. People v. Willard, 150 Cal. 543, 89 P 124. To overcome presumption that boy under fourteen is incapable of having a felonious intent, evidence that witness knew him, that he was bright, that talked with good sense, held competent. Neville v. State [Ala.] 41 S 1011.

16. In homicide, evidence tending to show animus of defendant toward deceased is admissible. Morris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 490, 98 SW 873. Proof of motive is admissible in homicide cases, as that decedent had procured an indictment against accused and had started suit for slander against him. Ball v. Com., 31 Ky. L. R. 188, 101 SW 956. Proof that deceased had large sum of money which accused took held admissible in homicide case. State v. Bailey, 79 Conn. 589, 65 A 951. In assault case, proof of other assaults at the same time and parts of the same occurrence was admissible to show motive. Greenwell v. Com., 30 Ky. L. R. 1282, 100 SW 852. In assault with intent to kill where wife of person assaulted testified that defendant insulted her, her testimony that she told her husband of the insult was admissible on question of motive. Harrall v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 360, 97 SW 1057. In prosecution for homicide committed in an attempt to produce an abortion, evidence that defendant had previously solicited patronage and held herself out as able and willing to produce an abortion was admissible. Clark v. People, 224 Ill. 554, 79 NE 941.

17. As that accused had spoken of his father, whom it was charged that he killed, having money in the bank. Johnson v. State, 128 Ga. 71, 57 SE 84.

18. May be admissible in trials for minor crimes, but not where charges are of a grave nature, such as murder. Johnson v. State, 128 Ga. 71, 57 SE 84.

19, 20. State v. Hunter, 143 N. C. 607, 56 SE 547.

21. Hisler v. State [Fla.] 42 S 692. Where defendant is an Indian, the court should be more careful than usual to observe the rules of evidence, since the jury may have been prejudiced on account of race of defendant. People v. Solomon, 106 NYS 1110.

22. On a trial of one as an accomplice to a forgery, evidence which would be inadmissible against the principal is inadmissible against the accomplice. Hinson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 43, 100 SW 939.

23. On the trial of one for aiding and abetting in commission of a homicide, the state may show guilt of the principal by any legitimate evidence. Coffman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 701, 103 SW 1128.

24. State v. Martin, 141 N. C. 832, 53 SE 874.

25. See 8 C. L. 209. Evidence tending to show consciousness of guilt of accused admissible. Pitman v. State [Ala.] 42 S 993. On trial of a charge of being connected with a gaming house, it was held competent to show that defendant had been present at the trial of another case, and that when a witness was asked to identify the party who was "dealing" defendant started to leave the room, but was brought back by order of the judge, and was then identified as the dealer. White v. State, 127 Ga. 273, 56 SE 425. Acts and conduct of accused after homicide admissible against him though no part of the res gestae. State v. Hogan, 117 La. 863, 42 S 352. Conduct of accused when attempt was made to arrest him shortly after commission of offense may be shown. State v. Jones, 118 La. 369, 42 S 967. Where wife was charged with murder of husband, the fact that she did not attend the funeral may be shown. State v. Meyers, 198 Mo. 225, 94 SW 242. Held proper to ask defendant in seduction case if he had not transferred his property to avoid the result of the indictment. State v. Kincaid, 142 N. C. 657, 55 SE 647.

26. Flight of accused and resistance of arrest admissible. State v. Spaugh, 200 Mo. 571, 98 SW 55. Evidence of flight is admissible. State v. Paisley [Mont.] 92 P 566. Circumstances, such as change of name, etc., showing flight of accused, admissible. People v. Colmey, 117 App. Div. 462, 102 NYS 714. Where defendant has been indicted and arraigned and the time fixed to plead, and then flees from the state, being apprehended and brought back, the fact of his flight may be shown. State v. Baird [Idaho] 88 P 233.

27. Evidence tending to show concealment until accused and prosecutrix could flee held admissible. State v. Kelley, 191 Mo. 680, 90 SW 834.

28. Evidence that defendant made an as-

to appear and stand trial,[30] attempts to suppress evidence,[31] or the prosecution,[32] attempt to corrupt juror on former trial,[33] accused being connected therewith,[34] may be proved. Accused should be allowed to explain or rebut inferences arising from proof of such facts.[35] Thus, the fact of flight being shown, defendant may submit evidence tending to explain the same, or showing the reasons and considerations which caused him to flee.[36] But a defendant cannot, except under peculiar circumstances, show that he did not become a fugitive, when accused or suspected of the crime.[37]

Other offenses, convictions, and acquittals.[See 8 C. L. 210]—Proof of other distinct and separate offenses is usually inadmissible.[38] Exception is made however, of

sault on witness as latter started for officers to arrest defendant admissible. Scott v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 407, 93 SW 740.

29. In homicide, it is permissible to show that in escaping defendant shot at a person who attempted to stop him. State v. Spaugh, 200 Mo. 571, 98 SW 55. Attempt to escape from posse trying to arrest accused may be shown. Taylor v. State [Tex. Cr. App.] 90 SW 647. Proof that accused made efforts to induce deputy sheriff to allow him to escape admissible. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641.

30. The state may introduce evidence of forfeiture of defendant's bond because of his failure to appear at time set for trial and that he was subsequently arrested in another state and brought back. Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921.

31. Evidence of inducements offered a witness to leave the country and not testify is admissible. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Evidence that defendant had procured a witness for the state to leave the country is admissible. Crowell v. State [Neb.] 113 NW 262. Evidence that defendant tried to spirit away witnesses for the state is admissible. State v. Hamilton [Del.] 67 A 836.

32. It may be shown that defendant begged prosecuting witness to drop the case and threatened her if she went on with it. State v. Matthews, 202 Mo. 143, 100 SW 420. In theft case, offer of accused to settle with prosecutor was admissible. Seaborn v. State [Tex. Cr. App.] 90 SW 649.

33. Gassenheimer v. U. S., 26 App. D. C. 432.

34. In prosecution for rape held error to admit evidence that brother of assaulted girl took her out of the state to prevent her testifying where it was not shown that accused had anything to do with suppressing her testimony. Jeffries v. State, 89 Miss. 643, 42 S 801.

35. Where in prosecution of a husband for murder of his wife the state showed that the wife was buried in a burglar proof vault, it was error to refuse to allow the husband to prove how he procured the vault. State v. Blydenburg [Iowa] 112 NW 634.

36. State v. Baird [Idaho] 88 P 233. Where defendant's mother testified that she told defendant to leave and that he would not otherwise have gone, it was proper to exclude her reason for telling him to go. State v. Sublett, 191 Mo. 163, 90 SW 374.

37. People v. Smilie, 118 App. Div. 611, 103 NYS 348. There being no evidence tending to show flight, proof that defendant was arrested at his home and made no resistance was properly excluded. Delaney v. State [Ala.] 42 S 815. The fact that the state proved that defendant surrendered after the killing did not warrant defendant in making such proof. Brown v. State [Ala.] 43 S 194.

38. Where in prosecution for illegal sale of liquor, state elected to rely upon a particular sale, it was error to admit proof of other sales. McClure v. State [Ala.] 42 S 813. On trial for burning of barn, it was not competent to show that shortly before the house was burned. Raymond v. Com., 29 Ky. L. R. 785, 96 SW 515. In homicide evidence of other offenses committed long prior to the homicide held inadmissible for remoteness and as having no bearing on the case. Commonwealth v. Parsons [Mass.] 81 NE 291. Evidence of other offenses not connected with the one involved not admissible. State v. Sparks [Neb.] 113 NW 154. Conversation between defendant and witness tending to show that defendant desired witness to rob the post office, after burglary on trial, was inadmissible. People v. Dixon, 118 App. Div. 593, 103 NYS 186. Proof of other burglaries not connected with offense on trial held inadmissible. Id. In homicide evidence that defendant had committed sodomy held prejudicial. State v. Hazlett [N. D.] 113 NW 374. In a prosecution for having short lobsters in his possession, evidence of prior like offenses is not admissible. State v. Sheehan [R. I.] 66 A 66. On trial for forgery, proof of other unconnected forgeries is inadmissible. Hinson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 43, 100 SW 939. Where theft of property in a certain manner was undisputed, it was error to show that accused had succeeded in getting money from others in the same way as from prosecutor. Bink v. State [Tex. Cr. App.] 89 SW 1075; Davenport v. State [Tex. Cr. App.] 89 SW 1077. In prosecution for violation of local option law, it appeared defendant received whisky in a C. O. D. express package addressed to him, held evidence that defendant had received during the month previous nine packages of whisky by express was inadmissible. Parish v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 10, 89 SW 830. Where two houses were burglarized the same night but were some distance apart, evidence as to one was not res gestae as to the other. Herndon v. State [Tex. Cr. App.] 99 SW 558. On prosecution for burglary it is error to admit evidence that defendant when arrested and taken before a justice was discovered trying to get rid of a pin and watch, and to show that they were fruit of former crimes.

necessity, where the offenses are so blended that proof of one necessarily involves proof of the other,[39] both being parts of one transaction,[40] or where evidence otherwise admissible incidentally tends to show another offense,[41] or when necessary to rebut an inference from a fact in evidence.[42] Evidence of other crimes is also admissible to show motive [43] to establish the identity of the person charged,[44] to prove knowledge or intent,[45] or where the several offenses form part of a single sys-

Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 556, 96 SW 45. In prosecution for illegal sale of beer, there being no question of the sale, proof of independent sales was inadmissible. Harris v. State [Tex. Cr. App.] 100 SW 920. In prosecution for selling whisky, states' evidence showed sale by boy employed by accused. Evidence of two sales to a third person by accused himself was inadmissible to show a system of selling without prescriptions. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 38, 101 SW 1001. Charge being carrying a pistol, evidence that deputy who arrested accused believed he was drunk was inadmissible. Irvin v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 798, 100 SW 779. In burglary evidence that defendants had in their possession fruits of a burglary committed on another house is not admissible to show intent. Herndon v. State [Tex. Cr. App.] 99 SW 558. A mere isolated transaction not shown to be similar to the one in question held inadmissible. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 SW 1016. In arson evidence of other crimes of same nature not connected with the one involved is not admissible. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 973, 105 SW 501. There being specific proof of illegal sale charged, proof of other illegal sales was inadmissible. Boughman v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 254, 90 SW 166. Where indictment charged slander of two females, evidence of use of similar language about one of them six months later was inadmissible. Roberts v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 741, 100 SW 151. To prove conspiracy to steal proof of a conspiracy with another was inadmissible. Topolewski v. State, 130 Wis. 244, 109 NW 1037.

39. The exception of the rule that evidence of other crimes is not admissible covers cases where commission of other offenses shows intent or guilty knowledge of accused, or where the two crimes are so interwoven that one cannot be proved without proving the other. Raymond v. Com., 29 Ky. L. R. 785, 96 SW 515.

40. Other offenses committed 'the same night and as part of the same transaction are admissible. In rape. Renfroe v. State [Ark.] 104 SW 542. Proof of commission of other offenses in commission of one designed is admissible. State v. Vaughan, 200 Mo. 1, 98 SW 2. Where in larceny evidence showed that accused and another jointly entered a store and one of them took money and the other took tobacco, that they left together, and money was found on one and tobacco on the other, evidence of the entire transaction was admissible. Stapleton v. State [Ark.] 97 SW 296. On trial of convicts for killing a prison guard pursuant to agreement to break prison and thereby commit a statutory felony, evidence of killing of another guard in furtherance of success of the agreement admissible. State v. Vaughan, 200 Mo. 1, 98 SW 2. This is so though there was no evidence of agreement to kill him. Id. In a prosecution for theft it is error to exclude testimony of facts constituting a part and parcel of the transaction proved by the state. Sowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 948, 105 SW 178.

41. In forgery evidence that defendant procured the return of the forged deed to himself under an assumed name is not inadmissible because it shows the offense of impersonating another. People v. McPherson [Cal. App.] 91 P 1098. Where evidence was admissible in rebuttal and was limited to the purpose for which it was admitted, an objection that it tended to show other facts was held untenable. State v. Easley, 118 La. 690, 43 S 279. Evidence to show justification for arrest held admissible though it tended to show other crimes. People v. Craig [Cal.] 91 P 997.

42. Proof that accused made another sale to witness on same day as that charged was admissible to rebut defense that accused was too drunk to know what he was doing and to show intent. Childress v. State [Tex. Cr. App.] 90 SW 30.

43. Collateral crimes may be shown where they tend to prove malice or motive. Sanderson v. State [Ind.] 82 NE 525. On prosecution for burglary it was proper to show that accused had committed embezzlement by means of cancelled checks which were in the house, on question of motive. Commonwealth v. Everson, 29 Ky. L. R. 760, 96 SW 460. Evidence of other offenses is admissible on the question of motive. Van Gesner v. U. S. [C. C. A.] 153 F 46. Evidence of other crimes is admissible where accused was connected with each by a motive and purpose common to both. State v. Sargood [Vt.] 68 A 51. Proof of other crimes is admissible when it tends to establish motive, intent, or identity of person charged. State v. Spaugh, 200 Mo. 571, 98 SW 55.

44. Other offenses admissible on an issue of identity of person charged. Dillard v. State [Ala.] 44 S 537. In prosecution for illegally selling liquor, evidence of other sales held admissible to establish identity of defendant. Scott v. State [Ala.] 43 S 181.

45. In prosecution for receiving stolen property, evidence of possession of other stolen property was admissible. Woodard v. State [Ark.] 104 SW 1109. In prosecution for burglary and larceny, evidence of prior attempt to commit the same crime was admissible. Cook v. State, 80 Ark. 495, 97 SW 683. Evidence of other offenses is admissible on question of intent. People v. Robertson [Cal. App.] 92 P 498. In prosecution for using mails in furtherance of scheme to defraud, evidence that defendant sent other mail than that described in the indictment is admissible only as bearing on intent.

tem,[46] and occasionally as part of a circumstantial case.[47] Where an offense is a

United States v. Dexter, 154 F 890. In prosecution of post office clerk for embezzling letters containing articles of value, evidence of other offenses of like nature is admissible on the question of intent. Chitwood v. U. S. [C. C. A.] 153 F 551. In Georgia, where one is prosecuted upon appeal before the mayor and aldermen of a city for a violation of an ordinance, it is not error to admit evidence of the violation of the ordinance by defendant on one or more days different from those alleged in the accusation. Bell v. Forsyth, 126 Ga. 443, 55 SE 230. In prosecution for receiving stolen goods, evidence of other like offenses held admissible to show guilty knowledge. Lipsey v. People, 227 Ill. 364, 81 NE 348. In prosecution for obtaining money by confidence game, proof of other similar transactions is admissible to show guilty knowledge. Juretich v. People, 223 Ill. 484, 79 NE 181. In prosecution for receiving stolen goods evidence that defendant had received other goods from the same thief shortly after the offense in question was admissible to show intent. Jeffries v. U. S. [Ind. T.] 103 SW 761. To show that accused had knowledge of the false character of the instrument which he is charged with uttering and passing, it is competent to show that about the time of the offense charged he possessed or uttered other similar forged instruments. State v. Calhoun [Kan.] 88 P 1079. Where charge was obtaining an exchange of property for property not owned by defendant by means of a false abstract, proof that defendant had obtained a third person's property by the same means on the same day was admissible to show a fraudulent intent. State v. Roberts, 201 Mo. 702, 100 SW 484. In prosecution for burglarizing a Pullman car, proof that defendant and his co-indictee were seen the same day in a locomotive cab breaking off brass fixtures was admissible. State v. Toohey, 203 Mo. 674, 102 SW 530. Evidence of other crimes is admissible where it tends to show intent. Clark v. State [Neb.] 113 NW 211. Other offenses admissible to show intent or where connected with the offense involved. State v. Sparks [Neb.] 113 NW 154. In prosecution for selling liquor, it was not prejudicial error to admit evidence that defendant kept other liquors than those charged in the information where it appears that liquors kept for sale were intoxicating. Feddern v. State [Neb.] 113 NW 127. In prosecution for selling articles to be used for causing abortion, evidence of other like offenses is admissible. People v. Spier, 105 NYS 741. Evidence of other crimes admissible on intent. Clark v. State [Neb.] 113 NW 804. Evidence of similar threat and act admissible to show intent in extortion case. People v. Weinseimer, 117 App. Div. 603, 20 Crim. R. 537, 102 NYS 579. Where charge was extortion in refusing to allow plumbing work to continue until contractor paid a certain sum, evidence that defendant had, before the contractor was employed and after a former one had been compelled to give up the work, requested the owner to pay $3,000 for a nonstrike guaranty, was admissible generally on the question of intent. Id. In prosecution for false pretenses, evidence of other similar offenses held admissible on question of intent. People v. Levin, 104 NYS 647. In prosecution of bank cashier for making false reports to examiner, preceding false reports are admissible on intent. State v. Jackson [S. D.] 113 NW 880. If made within a year, they are not too remote. In prosecution of physician for giving prescription for liquor, evidence of giving like prescriptions to other the same day held admissible to show intent. Weatherford v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 244, 103 SW 632. On prosecution of charge of threats to accuse of crime to extort money, proof of similar threats to others is admissible to show intent. State v. Louanis, 79 Vt. 463, 65 A 532.

46. Ryan v. U. S. 26 App. D. C. 74. In prosecution for false pretenses, evidence of other offenses held admissible on question of system of imposition and fraud. People v. Harben [Cal. App.] 91 P 398. Where two bunches of hogs were taken from same range, driven to same market at same time, and sold to same buyer, evidence of stealing a portion of the hogs at a different time was admissible in prosecution for stealing the other portion. Young v. U. S. [Ind. T.] 103 SW 771. Under Comp. Laws, §§ 11562, 11782, in prosecution for embezzlement, evidence of embezzlement within six months is admissible. People v. Messer, 148 Mich. 16, 14 Det. Leg. N. 157, 111 NW 854. Charge being having a forged deed in possession, evidence that defendant had another forged deed from the grantee of the first deed, to the same land, was admissible. State v. Stark, 202 Mo. 210, 100 SW 642. Other thefts of horses admissible where there was conspiracy to steal and sell them. State v. Allen, 34 Mont. 403, 87 P 177. Where charge was forgery of bounty claim certificates, proof of forgery of other certificates as a part of a general scheme was admissible to show intent. State v. Newman, 34 Mont. 434, 87 P 462. In prosecution for procuring illegal registration to vote, it may be shown that defendant also placed on the list a large number of unnaturalized persons. Commonwealth v. Valverdi [Pa.] 66 A 877. Evidence of other similar offenses admissible in prosecution for obtaining money by false pretenses by presenting warrants to the county for services already paid for. State v. Talley [S. C.] 57 SE 618. In prosecution for keeping place of business open on Sunday, proof that defendant was in the habit of doing so held competent. Morris v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 8, 89 SW 832. In local option case it was competent for prosecuting witness to testify as to other occasions on which he procured liquor from defendant. Introduced for purpose of showing system of conducting sale. Carnes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 252, 103 SW 403. Where prosecutor in trial for illegal sale of liquor said he was denied liquor and then went and took same, leaving money, testimony of others that they had obtained it in the same way was admissible. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 37, 101 SW 1005. On prosecution for violation of local option law, it is competent to show that defendant had for some months been accepting C. O. D. orders for sale of liquor. Taggart v. State [Tex. Cr. App.] 17

continuing one, evidence that the same state of affairs existed before and after the date laid is admissible on the question of intent.[48] The application of these rules in prosecution of crimes whose gravamen is voluntary sexual intercourse is discussed in articles dealing with those crimes.[49]

The fact of prior indictment [50] or conviction [51] is usually inadmissible, except on the issue of credibility as a witness,[52] or where former convictions are charged.[53]

Character and reputation. See 8 C. L. 212—Defendant may always offer evidence of his character at the time of the alleged offense and have the same considered as substantive evidence in his favor.[54] When defendant thus places his character in issue,[55] it is open to attack by the state.[56] Proof should be confined to traits involved,[57] and to times prior to the offense charged.[58] In prosecutions for criminal offenses against females, where the character of the female is directly involved,

Tex. Ct. Rep. 74, 97 SW 95. In prosecution for violation of local option law, in a misdemeanor proof of other sales is admissible, though such evidence would be excluded in a prosecution for a felony. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 20, 100 SW 953.

47. In prosecution for theft of a horse, evidence that another horse stolen about the same time was found in defendant's possession is admissible where defendant attempted to justify possession. Penrice v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 177, 105 SW 797. Where honest possession is relied on, possession of other stolen property is a circumstance as to reasonableness of his contention. Id.

48. The limits within which such testimony may be admitted rests in the discretion of the court. State v. Collins [R. I.] 67 A 796.

49. See Rape, 8 C. L. 1667; Adultery, 9 C. L. 37, and like topics.

50. Evidence of former indictment properly excluded where it had no bearing on the case. Clayton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 264, 103 SW 848.

51. In prosecution for maintaining a disorderly house, it was error to permit the county judge to testify that defendant had been previously convicted of similar charge in his court and to read the indictment therein to the jury. Meadows v. Com., 31 Ky. L. R. 1159, 104 SW 954. Testimony of previous conviction inadmissible in absence of plea setting up this defense. State v. Ireland, 89 Miss. 763, 42 S 797.

52. For full treatment, see topic Witnesses, 8 C. L. 2347. It is proper to charge that evidence of other offenses can be considered only in passing on credibility of witness. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 75, 95 SW 504. Under Rev. St. 1899, § 4680, providing that one convicted of crime is a competent witness, but such fact may be shown to affect credibility, accused who testifies in his own behalf may be properly required to testify that he had been convicted of a misdemeanor. State v. Barrington, 198 Mo. 23, 95 SW 235. Charge that former conviction of liquor law could be considered not only on defendant's credibility as a witness but also as to whether he was the kind of man who would violate it again is prejudicial error. People v. Myers, 115 App. Div. 864, 20 Crim. R. 451, 101 NYS 291.

53. In prosecution for robbery as an habitual criminal, record of former convictions and terms in penitentiary was admissible to establish the fact that he was a habitual criminal under Rev. St. 1899, § 2379. State v. Vaughan, 199 Mo. 108, 97 SW 879.

54. State v. Connor, 142 NC 700, 55 SE 787. Good reputation in respect to traits of character involved is to be considered in connection with all other evidence. People v. Van Gaasbeck [N. Y.] 82 NE 718.

55. Where defendant had not put his character in issue nor testified in his own behalf, in murder case, it was error to allow state to show conviction of witness and defendant under a joint indictment for a felony. State v. Kelleher, 201 Mo. 614, 100 SW 470. In prosecution for seduction, the mere fact that there is conflict between testimony of accused and prosecutrix is not such an attack on his reputation for truth and veracity as will admit testimony on his behalf as to his reputation. State v. Fogg, 206 Mo. 696, 105 SW 618. It is error to admit evidence of the bad character or reputation of accused when he has not put his character in issue. State v. Grove, 61 W Va. 697, 57 SE 296.

56. Defendant in murder case having put his character for peace and quiet in issue by evidence that it was good, it was open to attack by the state. Weaver v. State [Ark.] 102 SW 713. Where defendant puts his character in issue, it was proper to cross-examine witnesses as to whether they had heard that he had pleaded guilty to a crime. State v. O'Kelley, 121 Mo. App. 178, 98 SW 804.

57. Evidence of good reputation of conspirator in bribery held inadmissible. Schultz v. State [Wis.] 113 NW 428. In prosecution of bank officer for making false entry, his general reputation for morality and sobriety is immaterial. Harper v. U. S. [Ind. T.] 104 SW 673. In prosecution for embezzlement, accused is entitled to prove his previous good character for honesty and fair dealing. State v. Moyer, 58 W. Va. 146, 52 SE 30.

58. On issue of defendant's good character subsequent to offense charged, state may not introduce proof of subsequent delinquencies for purposes other than to impeach him as a witness. State v. Wertz, 191 Mo. 569, 90 SW 838. A character witness may not state that after the homicide he heard certain facts derrogatory to defendant's character. Powers v. State, 117 Tenn. 363, 97 SW 815.

evidence thereof is relevant.[59] In homicide cases the character of deceased for peace and quiet cannot be shown by the state, until attacked by defendant.[60] Proof of reputation must be limited to knowledge of reputation,[61] but evidence that witness never heard anything against defendant is admissible for what it is worth.[62]

Hearsay.[See 8 C. L. 212]—Unsworn statements of third persons, not in the presence of accused,[63] and testimony based on information derived from others,[64] is inadmissible, aside from a few well-known exceptions.[65]

59. As in prosecution for eloping with a married woman previously of chaste character. State v. Connor, 142 N. C. 700, 55 SE 787.

60. For discussion of evidence on this issue, see Homicide, 8 C. L. 106. In homicide the state cannot in the first instance put character of deceased in issue as being a peaceable man. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258.

61. Character evidence on behalf of defendant must be limited to the witness' knowledge of his reputation and cannot be admitted to show favorable traits from personal knowledge. People v. Van Gaasbeck [N. Y.] 82 NE 718. A witness who never heard anybody say anything about defendant but bases his opinions on dealings had with him is incompetent to testify as to his reputation. State v. Stewart [Del.] 67 A 786.

62. People v. Van Gaasbeck [N. Y.] 82 NE 718.

63. Testimony as to what a third person said. Andrews v. State [Ala.] 44 S 696. Declarations by third persons not in presence of accused. Town of Brighton v. Miles [Ala.] 44 S 394. In prosecution for statutory rape, evidence that prosecutrix had stated that she was over 16 years of age. Renfroe v. State [Ark.] 104 SW 542. Statements made to arresting officer not in presence of defendant are not admissible against him. People v. Soloman, 106 NYS. 1110. Statements and complaint made by member of prosecutrix's family to third person as to commission of offense are not admissible in prosecution for rape. State v. Fowler [Idaho] 89 P 757. Error to permit witness testifying to statement of accused against interest to repeat what he had said to accused. Kevern v. People, 224 Ill. 170, 79 NE 574. In prosecution for homicide committed in an attempt to produce an abortion, proof of what deceased had said to a physician two years before, while treating her for after effects of an abortion, was hearsay. Clark v. People, 224 Ill. 554, 79 NE 941. In prosecution for horse stealing, proof as to a statement by a codefendant as to certain facts. James v. U. S. [Ind. T.] 104 SW 607. In homicide evidence as to what was said and done by defendant's brother after the crime. State v. Blee, 133 Iowa, 725, 111 NW 19 Evidence as to what a third person said relative to the crime. State v. Hoover, 134 Iowa, 17, 111 NW 323. Affidavits for continuance alleging that absent witness would testify to hearsay facts not admissible. Huffaker v. Com., 30 Ky. L. R. 334, 98 SW 331. Proper not to allow proof of statement by third person that he and not accused had cut deceased in murder trial. Bacigalupi v. Com., 30 Ky. L. R. 1320, 101 SW 311. In trial of abortion charge, statements of woman to physician attending her that she had been operated on to avoid pregnancy and that a miscarriage resulted were inadmissible against defendant. Commonwealth v. Sinclair [Mass.] 80 NE 799. Proof that witness told a policeman that defendant and others were in an adjoining room, the door to which was ajar, and had a watch, etc., but that the officer did not dare to arrest them, was inadmissible. People v. Cahill, 147 Mich. 206, 13 Det. Leg. N. 984, 110 NW 520. In rape case, it was error to admit what assaulted girl said as to who committed the offense, in the absence of accused, the day after the assault. Jeffries v. State, 89 Miss. 643, 42 S 801. Conversation between witness and defendant's brother, not in defendant's presence, inadmissible. State v. Woodward, 191 Mo. 617, 90 SW 90. Evidence as to what another person has said relative to insanity of defendant. State v. Church, 199 Mo. 605, 98 SW 16. Remark of third person to witness. State v. Smith, 190 Mo. 706, 90 SW 440. Conversation between witness and third person. Person v. Walsh, 203 Mo. 605, 102 SW 513. Testimony that witnesses had never heard certain facts. State v. Penna, 35 Mont. 535, 90 P 787. Where an accomplice has confessed and has taken the stand and testified, it is error to permit others who have heard him tell the same story repeat it. O'Hearn v. State [Neb.] 113 NW 130. Where an accomplice has testified to all the details of the crime, it is error to allow other witnesses to repeat the story as he told it to them. Id. Evidence as to what one person told another. People v. Alderdice, 105 NYS 395. In homicide testimony that decedent's father identified the body. Elsworth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 903. Conversation between strangers, not in defendant's presence. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 115, 89 SW 816. Statement of wife of defendant as to what occurred held hearsay being out of his presence and hearing. Stevison v. State [Tex. Cr. App.] 89 SW 1072. Conversation between defendant's attorney and others held inadmissible against defendant who was not present and did not authorize his attorney to act or speak for him. Lara v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 SW 840. It is error to permit evidence of statements of two persons separately indicted with defendant, which occurred in his absence long after the crime. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. Where circumstance against one charged with murder was that he was found with decedent's grip state could show that two grips claimed by defendant and his companion were found at place where defendant was found, but a witness could not state what he heard relative to the grips. Elsworth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 903. In assault with intent to kill, testimony as to statements made by person shot that shooting was accidental

Admissions and declarations.[See 8 C. L. 212]—Self-serving declarations by accused are not admissible,[66] but incriminating statements and declarations against interest are admissible,[67] and this rule permits proof of accusations or statements incrim-

could be considered only as affecting his credibility. Jackson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 279, 103 SW 927. In prosecution for theft of horse, proof of statements by another indicted for theft of same horse, that he traded for the horse and that defendant did not steal it, it appearing that such party and defendant were together at the time of the alleged trade, held hearsay and self serving as to other party. Hall v. State [Tex. Cr. App.] 90 SW 176. In local option case testimony that a witness heard people say that defendant was selling whisky and that he could get whisky from hearing people talk. Gorman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 876, 105 SW 200. Evidence given through an interpreter before the grand jury is hearsay when given before trial court by a member of the grand jury. Cervantes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 972, 105 SW 499. In prosecution for theft evidence that on evening after defendant's arrest two witnesses met and as to what they did in defendant's absence. Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817 In prosecution for theft, proof that mother of accused offered to pay prosecuting witness for stolen property and that prosecuting witness refused saying he did not believe accused stole it, was inadmissible, no connection of accused with statement being shown. McDaniel v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 361, 90 SW 504. In local option case a reply to a question asked a witness as to how he knew he could get whisky there was that he had heard some negroes say so. Trinkle v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 950, 105 SW 201. In homicide it was incompetent to show on cross-examination of defendant that another came to him while he was in jail and said he was sorry and told him to say nothing except to his attorney. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Where state introduced no part of a conversation between third persons, defendant could not prove such conversation. Ellington v. State [Tex. Cr. App.] 99 SW 997. Evidence that two persons told a witness that prosecuting witness had told them a certain fact. Brundige v. State [Tex. Cr. App.] 95 SW 527. In prosecution for robbery, testimony as to what witness told officers as to how much money defendant ought to have. Clancey v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 526, 96 SW 12. In burglary case, stealing of tobacco being charged, it was error to admit testimony that witness' daughter had taken the road leading to defendant's house and brought back a plug of tobacco of the brand in question. Caddell v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 775, 90 SW 1013. One who was attracted to scene of crime was not entitled to relate conversation between himself and others not in presence of acused. Herndon v. State [Tex. Cr. App.] 99 SW 558.

64. In prosecution for shipping game in violation of law without making required affidavit, a witness was improperly allowed to testify that he knew by information from notary public received when defendant was not present that the affidavit had not been made. Hirsch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 704, 95 SW 513. Where prosecuting witness had stated that he did not know when he went before the grand jury, that defendant had previously testified, it was not error to refuse to permit an attempt to have him state what defendant said before the grand jury. Ellington v. State [Tex. Cr. App.] 99 SW 997. Testimony from memorandum of what receipt signed by show manager showed held hearsay as proof of total receipts. People v. Hemple [Cal. App.] 87 P 227.

65. Evidence of a witness as to what he saw held not hearsay. Doss v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 514, 95 SW 1040. Testimony of a witness as to conduct and threats he saw and heard is not hearsay. Driggers v. U. S. [Ind. T.] 104 SW 1166. In prosecution for adultery, testimony that witness understood that defendant had been married was held not objectionable as hearsay. Coons v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 319, 91 SW 1085. Proof of a statement to witness that there was a row in a cabin not erroneous in connection with witness' testimony that he went there and saw accused and prosecutrix. Thompson v. State [Tex. Cr. App.] 89 SW 1081. Testimony that witness received certain information which had previously been testified to by the person giving it, and upon which witness acted, is admissible, not as independent evidence to establish the truth of such information, but as an inducement and an explanation by the witness that acting on such information he discovered other facts connecting accused with crime charged. Colman v. State, 127 Ga. 282, 56 SE 417.

66. People v. Taylor [Cal. App.] 87 P 215; Pate v. State [Ala.] 43 S 343; West v. State [Fla.] 43 S 445. In support of an alibi defendant could not prove that on the night of the murder about six hours before the killing, he invited a third person to spend the night with him at his home three miles away. Sasser v. State [Ga.] 59 SE 255. Self-serving declaration by defendant as to threat by deceased held inadmissible. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. In prosecution for stealing a steer, testimony held not inadmissible as a self-serving declaration. Hazlett v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 603, 96 SW 36. Statements by one accused of theft of animal, after he had killed it, as to ownership, held self-serving and inadmissible. Seaborn v. State [Tex. Cr. App.] 90 SW 649.

67. What defendant said soon after burglary while standing near stolen goods admissible, proper foundation being laid. Dupree v. State [Ala.] 42 S 1004. Statement of defendant to witness (when told that deceased was shot and that he, witness, had heard that a mand named R. had done it) that his name was R. was admissible; if a confession it was voluntary, if not it showed his proximity to the scene at the time. Rose v. State, 144 Ala. 114, 42 S 21. A witness may testify that accused stated as his reason for killing decedent that decedent tried to make ac-

cused return a sum of money won from him. Butler v. State [Ark.] 103 SW 382. Admissions tending to show guilt are admissible. People v. Robertson [Cal. App.] 92 P 498. In prosecution for rape, prosecuting attorney may state defendant's declarations to her at the time with reference to his conduct with other girls. People v. Davis [Cal. App.] 91 P 810. Admissions which in connection with other facts tend to prove defendant's guilt are admissible without preliminary proof that they were voluntarily made. People v. State [Cal. App.] 89 P 997. Proof that accused had said, when accusing statements were made to him, that a person named had "thrown him down" and "given him away" held admissible though accused had previously said he knew nothing about the stolen horse. People v. Melandrez [Cal. App.] 88 P 372. Admissions and statements by the defendant, not amounting to a confession of guilt, are admissible against him whether voluntary or not. People v. Willard, 150 Cal. 543, 89 P 124. Proof that just after shooting one present said to accused that he had made a mistake and ought not to have shot the boy and that accused answered that he had done wrong, held admissible. Fuller v. State, 127 Ga. 47, 55 SE 1047. In homicide declaration by accused shortly after the killing that he had killed deceased "deader than hell" is admissible. Stacy v. Com., 29 Ky. L. R. 1242, 97 SW 39. Testimony of one that he had a conversation over the telephone with a person whom he thought was accused was sufficient identification to carry the question of identity to the jury. State v. Usher [Iowa] 111 NW 811. Where accused and another held for same crime were kept in one cell on first floor of the jail, an alleged admission of accused made to a prisoner on the second floor through a pipe was not admissible where witness was not acquainted with accused and person below did not mention his name. Clark v. Com. [Ky.] 105 SW 393. Declarations against interest are admissible. Richberger v. State [Miss.] 44 S 772. Written statement proved to have been made by accused admissible though not signed by her. State v. Myers, 198 Mo. 225, 94 SW 242. In prosecution for rape, statements by accused to third person, that prosecutrix' statement at the preliminary examination was correct except as to choking her, and that she had "fought like everything at first," held competent as an admission. State v. Wertz, 191 Mo. 569, 90 SW 838. Letters from accused to prosecutrix (rape case) held admissible as admissions and to corroborate prosecutrix. State v. Kelley, 191 Mo. 680, 90 SW 834. Acts or declarations of a defendant with respect to commission of the crime and tending to connect him with it are admissible though others are thereby implicated. State v. Roberts, 201 Mo. 702, 100 SW 484. In seduction the answer of prosecutrix that she yielded because she could not help it that he said he was not trying to fool her but was going to marry her, was competent as an admission. State v. Raynor [N. C.] 59 SE 344. Declarations of defendant are admissible to show he has made false or contradictory statements, in considering admissibility of the crime, and on appeal it will be presumed that there was evidence of the falsity of his statements, in considering admissibility of prior declarations. State v. Jennings, 48 Or. 483, 87 P 524. In prosecution for larceny, admissions consisting of statements made on former trial held admissible. State v. Glover [S. D.] 113 NW 625. Admission may be proved by testimony of a conversation between defendant and a third party, but it is for the jury to say whether such conversation was an admission. Loudenback v. Territory [Okl.] 91 P 1030. In a prosecution for theft, conversation between defendant and third persons held admissible. Welch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 522, 95 SW 1035. In theft evidence of statements made by defendant when accused are admissible, he not being under arrest. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 SW 694. Where officers seeking for person who committed the crime saw accused in hallway and remarked to him that it looked as though the Mexican had gotten the best of him, it was not error to permit the officers to testify that the accused then remarked that he was the man they were looking for. Purdy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 295, 97 SW 480. That decedent was not present when defendant and another had a conversation bearing on the homicide, the morning before it occurred was no reason for excluding it. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. Where defendant and another were charged with crime, it is admissible to show that defendant told officers having him in charge that he did not take the money but that his codefendant may have taken it. Slay v. State [Tex. Cr. App.] 99 SW 550. Part of conversation being introduced by defendant, state was entitled to show rest of it. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. Where after a homicide was committed a bystander said to defendant "that man is stabbed to death" and defendant replied that he had "already got three," and if decedent died it would make four, was admissible as an admission. Wood v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 717, 99 SW 1009. In burglary also declaration of defendant indicating his presence at the time and place of the burglary and his connection with the person shown to have done the breaking were admissible. Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 934, 89 SW 828. Statement by person charged with theft of mules as to person from whom he bought them held admissible. Taylor v. State [Tex. Cr. App.] 90 SW 647. In a prosecution by the state, **admissions in a plea of guilty** in a prosecution for the same act under a city ordinance are admissible against accused. Plea in police court admissible in prosecution for maintaining pool room. Ehrlick v. Com., 31 Ky. L. R. 401, 102 SW 289. Police court record showing plea of guilty inadmissible without proof of identity of defendant, and that charge was same. Majors v. People, 38 Colo. 437, 88 P 636. In prosecution for forging a deed, evidence that the person whose name had been forged told another that she had given certain property to a relative of defendant was **not admissible** as a declaration against interest. People v. Alderdice, 105 NYS 395. In homicide where accused defended on ground of insults offered his wife and killing took place on first meeting thereafter, evidence that after being warned accused made some statements but said nothing relative to the insults was

inating accused, made in his presence and hearing,[68] and not denied by him, where the circumstances are such as to naturally call for a denial, if innocent.[69] Ordinarily, admissions of one defendant are not competent against another, no conspiracy being shown.[70] Accused is entitled to explain declarations proved against him.[71]

Confessions.[See 8 C. L. 213]—A confession is a voluntary admission of guilt.[72] An admission, as applied to criminal cases,[72a] is the avowal of a fact or of circumstances from which guilt may be inferred, but only tending to prove the offense

not admissible. Barbee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 377, 97 SW 1058.

68. Statement of one defendant in absence of others inadmissible against latter. State v. Kennard [N. H.] 65 A 376. Mere presence of defendant when codefendant made a statement implicating him is not sufficient to authorize its admission; it must appear that he heard it. Roquemore v. State [Tex. Cr. App.] 99 SW 547. Before an implied confession arising from failure to speak when an incriminating statement is made is admissible it should appear that the statement was made to defendant or that he was near enough to hear and understood the statement. Jones v. State [Ga. App.] 58 SE 559.

69. The verbal statement of a witness alleged to have been made in presence of the defendants did not measure up to the requirements necessary to show implied confession by silence. Jones v. State [Ga. App.] 58 SE 559. Statements in defendant's presence by one who admitted guilt as a conspirator were admissible. State v. Arthur [Iowa] 109 NW 1083. Statements of other parties to the crime made in presence of accused and under circumstances calling for response are admissible against him. Lyon v. Com., 29 Ky. L. R. 1020, 96 SW 857. Remark in presence of several persons inadmissible against defendant when not addressed to him. Eaton v. Com., 28 Ky. L. R. 906, 90 SW 972. A statement made by a third person in presence of accused shortly after the offense is admissible and it is for the jury to determine whether by his silence he acquiesced in it. State v. Quirk [Minn.] 112 NW 409. Statements by decedent in defendant's presence, out when under arrest, held inadmissible. State v. Kelleher, 201 Mo. 614, 100 SW 470. Statements made in presence of accused who remains silent are admissible, if under the circumstances his silence amounted to assent to the truth thereof. O'Hearn v. State [Neb.] 113 NW 130. Where statements were made in the presence of accused and in response to a question he stated that he would not say anything, would speak at the proper time, held to show dissent rather than assent. Id. While counsel for accused has no authority to enter a plea of guilty, his admission of facts in open court in the presence of accused who offers no objection is presumptively with his consent. State v. Kinney [S. D.] 113 NW 77. Admissions made by not replying to statements made by third persons held not admissible where accused was under arrest at the time and it did not appear that she had been warned. Frazier v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 7, 105 SW 508. Conversations in presence of accused while he was under arrest and charged that his statements would be used against him are not admissible, silence not amounting to admission. Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 380, 97 SW 1052. Statements by accused or in his presence, tending to show guilt, are admissible; statements by others not in his presence are inadmissible. Barton v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 855, 90 SW 877. Ante mortem statements of deceased in presence of accused are not for that reason admissible as admissions unless they relate to matter in issue and made under circumstances calling for reply. State v. Baruth [Wash.] 91 P 977. Not admissible where accused was sitting in an adjoining room with the door open and might have heard them. Id. Ante mortem statements made by deceased after he was shot, in presence of defendant, as to his conduct toward him at other times tending to show hatred and malice are irrelevant. Id.

70. Testimony that a codefendant in homicide had said she had committed the crime inadmissible in separate trial of other defendant. State v. Jennings, 48 Or. 483, 87 P 524. When two or more accomplices are tried together for one felony, the declaration or confession of one made after the criminal act in the absence of the others, and too long after it to be a part of the res gestae, is admissible, but the court must instruct that it is not to be considered against any one except the person making it. State v. McCoy, 61 W. Va. 258, 57 SE 294.

71. Where the state proves declarations of defendant, he is entitled to show all that he said relative to the transaction in the course of the conversation. Taylor v. State [Tex. Cr. App.] 97 SW 473. In prosecution for theft of cattle, evidence of statements by prosecuting witness to defendant that he would let the matter drop if he would pay for the cattle held not error. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 SW 694.

72. Riley v. State, 1 Ga. App. 651, 57 SE 1031. Statement by accused to physician that he had given deceased too much "knock-out drops," that he did not intend to, and that it was a mistake, held to negative intent and not to constitute a confession within Code, § 5491. State v. Thomas [Iowa] 109 NW 900. The admissibility of confessions is governed by Acts 1905, p. 637, which was in force when the offense was committed. Thurman v. State [Ind.] 82 NE 64. Statement of boy returning case of stolen watches that he did not take and that another did was not a confession. Neville v. State [Ala.] 41 S 1011. Where a confession of an accomplice was read to accused and he was asked if he wanted to make a statement in regard to it and said he would make a statement at the proper time held to show dissent rather than assent to such confession. O'Hearn v. State [Neb.] 113 NW 130.

72a. See Admissions and Declarations, supra.

charged, and not amounting to a confession of guilt.[73] A confession is admissible, as substantive evidence,[74] if voluntarily made,[75] and not induced by threats, duress or improper inducements.[76] The mere fact that accused was in the custody of an officer at the time will not alone render his confession incompetent.[77] In some

73. Riley v. State, 1 Ga. App. 651, 57 SE 1031. Proof of inculpatory admission will not authorize a charge on confession. Ransom v. State [Ga. App.] 59 SE 101.

74. A confession is in the nature of positive testimony. Burke v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064.

75. Voluntary confessions admissible. Richberger v. State [Miss.] 44 S 772. Confession in prosecution for arson held admissible. Davis v. State [Ala.] 44 S 545. Where witnesses testified that confession was voluntarily made and circumstances did not indicate the contrary, this testimony, with the presumption that it was voluntary, was sufficient to warrant its admission, notwithstanding accused's testimony to the contrary. State v. Armstrong, 203 Mo. 554, 102 SW 503. Voluntary confessions by defendant that he had killed deceased, giving his reasons and detailing the circumstances, held admissible. State v. Bohanon, 142 N. C. 695, 55 SE 797. Where defendant, after a homicide, went to a neighbor and requested the neighbor to accompany him to town to surrender to the marshal, and the neighbor did so, defendant was not arrested by the neighbor, and statements made to him were admissible. Gregory v. State [Tex. Cr. App.] 94 SW 1041. Admissions or confessions not shown to be voluntary are not admissible. Campbell v. State [Ala.] 43 S 743.

76. Confession of homicide obtained by detective who falsely stated to accused that he (detective) had committed various crimes, including homicides, held admissible. Spencer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 594, 90 SW 638. Conversation between arresting officer and defendant competent, no promises, threats, or inducements having been made. Dupree v. State [Ala.] 42 S 1004. Where witnesses to whom confession was made stated that accused was not threatened nor offered clemency, and they were not contradicted, confession was admissible. State v. Hottman, 196 Mo. 110, 94 SW 237. Confession of killing held not to have been induced by threats, fear, or promise and admissible, though accused was in custody, after attempt at resistance, and was taken to where body of deceased lay. Territory v. Emilio [N. M.] 89 P 239. The fact that accused was young and excited incident to his arrest at time he was warned, just before making a confession, does not warrant a charge that a confession obtained by coercion could not be considered. Herndon v. State [Tex. Cr. App.] 99 SW 558. In order to exclude confessions, it must appear that some inducement was held out by some one in authority. State v. Spaugh, 200 Mo. 571, 98 SW 55. Confession procured by threats is involuntary per se. People v. Silvers [Cal. App.] 92 P 506. Confession held involuntary where made on urgent request and promises held out by district attorney and a detective. Id. Inducements held out by private person in presence of one in authority may render confession inadmissible. State v. Sherman, 35 Mont. 512, 90 P 981. Confessions of codefendants obtained by improper threats and cruelty of officers are inadmissible. Jackson v. State [Tex. Cr. App.] 97 SW 312. Where negroes arrested for burglary were taken by officers, pulled up by ropes around their necks, and threatened with hanging if they did not disclose hiding place of goods, and other cruel treatment resorted to, held confessions so extorted were not admissible. Id. There being evidence that confessions were induced by threats and promises, an instruction that they could not be considered unless made voluntarily and not induced by threats or promises was sufficient. Code Cr. Proc. 1895, arts. 789-790, requires that confessions must be made freely and without compulsion. Cross v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 79, 101 SW 213. Confessions by defendant to private citizens after one of them had told him he would intercede with the judge for a lighter sentence and told him he had better confess and tell the truth as it would go lighter with him, held inadmissible. Johnson v. State, 89 Miss. 773, 42 S 606. Confessions are inadmissible unless made voluntarily and induced without "the slightest hope of benefit or the remotest fear of injury." Statement held not so made, and hence inadmissible. Johnson v. State, 1 Ga. App. 129, 57 SE 934. Confession of negro boy, stupid and only twelve years old, after crime of arson, to three white persons, inadmissible, the boy having no counsel or friend to advise him and not being cautioned as to the effect of his confession. Owsley v. Com., 31 Ky. L. R. 5, 101 SW 366.

77. State v. Jones [N. C.] 59 SE 353. A confession made while in custody of an officer where no promise is held out or influence exerted to induce a confession is admissible. Id. Confession after arrest, voluntary, and after a warning, admissible. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. A confession, if otherwise unobjectionable, is admissible though made while accused was under arrest and manacled, and without his having been put on his guard not to say anything that might incriminate him. State v. Rugero, 117 La. 1040, 42 S 495. The mere fact that a confession was to or in the presence of an officer does not require its exclusion. State v. Armstrong, 203 Mo. 554, 102 SW 503. That accused was in the custody of an officer when he made admissions does not render them inadmissible. State v. Barrington, 198 Mo. 23, 95 SW 235. It is no objection to the admission of such admissions that they were made in response to questions assuming his guilt. Id. Confession is not incompetent because made after arrest where defendant was warned and no promise or threats made him. State v. Church, 199 Mo. 605, 98 SW 16. Confession voluntary though made to a police officer in response to question assuming guilt, no plan to trap accused being shown and no hope held out. Birkenfeld v. State, 104 Md. 253, 65 A 1. Where accused was told his confession could be used against him, and said it was true, it was held voluntary, though he was confined by an officer and

states it appear that accused was duly warned that a confession could be used against him,[78] but this showing is not required in the absence of statute.[79] The confession need not be contemporaneous with the warning; it is admissible if made in such proximity as to time and under circumstances reasonably showing that accused was mindful of the caution and warning when he made the statement.[80] The warning need not have been given by the person to whom the confession is made.[81] A confession will be presumed to have been voluntarily made in the absence of any showing or circumstances to the contrary.[82] The mental condition of accused at the time goes to the weight of the confession, but not necessarily to its admissibility.[83] The mere fact that accused was a foreigner,[84] or that his con-

magistrate was present and confession was elicited by questions. State v. Banusik [N. J. Err. & App.] 64 A 994. In homicide, testimony that accused when arrested stated that he expected to be arrested, that if he killed decedent he was drunk, that a third person advised him to submit to arrest and assured him that he would be protected, was admissible to show confession. Carr v. State [Ark.] 99 SW 831. Statements by one accused of horse stealing to officer while they were taking horse back to where accused said he got it, accused being then in custody of officer, **held inadmissible.** Binkley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 799, 100 SW 780.

78. Confessions or inculpatory statements made by one before a coroner's jury where they had not been informed that they were not reqnired to testify held not admissible against him. Adams v. State [Ga.] 58 SE 822. Declarations of accused to physician held admissible where accused was distinctly told that what he said would be used against him and that he might decline to answer. People v. Furlong [N. Y.] 79 NE 978. Defendant sufficiently warned to authorize admission of confession where he was told that any statement he made would be used against him. Salinas v. State [Tex. Cr. App.] 102 SW 116. Testimony that accused identified a knife as the one used at the killing admissible where he was warned before making it. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445. Confession admissible where accused was told he could make a statement if he desired, but that any statement he might make would be used against him at the trial. Salinas v. State [Tex. Cr. App.] 102 SW 116. Statement by deputy sheriff to defendant that any statement he might make could be used against him held due and proper warning. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641. Where prosecuting attorney warned defendant, it is not error to permit him to testify as to the conversation. State v. Church, 199 Mo. 605, 98 SW 16. Where, while one was in jail accused of homicide, he sent for a friend to go his bail, and he told him about the killing after he had been warned that what he said might be used against him, held admissible. Commonwealth v. Johnson, 217 Pa. 77, 66 A 233. Admission of confession to county attorney, after warning that immunity could not be granted, in presence of marshal and constable, and of subsequent confession to another, held within trial court's discretion. Howard v. Com., 28 Ky. L. R. 737, 90 SW 578. Where accused was informed that any statement he made might be used against and not for him, the fact that he said any statement made in his presence could be used did not vitiate the warning. Herndon v. State [Tex. Cr. App.] 99 SW 558. Proof that accused identified a knife as the one used in killing deceased competent, though he was under arrest at the time, where he had been warned. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445. Where sheriff stated that defendant was warned, but other witnesses present testified that they did not hear the warning given, held not error to admit confession. Flagg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 266, 103 SW 855.

79. Confession by accused to sheriff while not under arrest admissible though accused was not warned. Brisby v. State [Tex. Cr. App.] 90 SW 34. Testimony of defendant before the grand jury, when defendant was not under arrest but knew he was suspected and knew the matter was being investigated, held admissible though he was not warned. Smith v. State [Tex. Cr. App.] 90 SW 37. A free and voluntary confession made by an accused to a police officer while under arrest is admissible against him, though accused was not cautioned or warned as to the use that would be made of it. State v. Hogan, 117 La. 863, 42 S 352.

80. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 SW 545. Declarations of accused, in jail, 15 or 20 minutes after warning, admissible. Blnk v. State [Tex. Cr. App.] 89 SW 1075. Accused had been in jail several months and deputy sheriff at one time warned him that what he said would be used against him. He confessed to the sheriff. Held, confession inadmissible because there was no showing that it was made so shortly after the warning that accused had it in mind. Binkley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 799, 100 SW 780.

81. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 SW 545.

82. State v. Armstrong, 203 Mo. 554, 102 SW 503. A confession is presumed to have been voluntarily made unless the contrary be shown. Thurman v. State [Ind.] 82 NE 64. Where it did not appear but that statements were made voluntarily, they were held admissible. Stoddard v. State [Wis.] 112 NW 453.

83. Mental condition at time confession was made goes only to its weight and not to its admissibility. State v. Church, 199 Mo. 605, 98 SW 16. Intoxication, less than mania, does not exclude a confession made during its continuance, but is a fact for the jury tending to discredit such confession. State v. Hogan, 117 La. 863, 42 S 352.

fession was in a foreign language,[85] will not alone exclude proof of it. Voluntary admissions and confessions are admissible though they tend to show other crimes[86] or to implicate other persons,[87] but a confession of a wholly different crime is inadmissible.[88] Statements in connection with a confession may be admissible though the confession itself was improperly obtained.[89] A confession may be used to discredit accused as a witness though not voluntarily made.[90] Evidence is admissible to show presence of accused,[91] what was said to him,[92] but not to show what the officers believed would be done with accused if he confessed.[93] Whether a proper predicate for the consideration of a confession has been laid may be for the jury,[94] and in such case the question should be submitted under proper instructions.[95]

Acts and declarations of co-conspirators See 8 C. L. 214 in furtherance of the conspiracy,[96] prior to the accomplishment of its purpose,[97] are admissible[98] when the

84. That accused was foreigner did not make confesion inadmissible, where he was intelligent and knew effect of his act and could communicate with others in English. Birkenfeld v. State, 104 Md. 253, 65 A 1.

85. Confession in foreign language, transcribed in English, interpreted to accused, confirmed by him, and authenticated by interpreter at trial, held admissible. State v. Banusik [N. J. Err. & App.] 64 A 994.

86. Bode v. State [Neb.] 113 NW 996. Where two persons were killed at same time, confessions as to killing of either are admissible though indictment charges killing of but one. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 SW 100.

87. A confession of one indicted for aiding another in embezzlement to effect that such other was connected with the crime is admissible against him to show embezzlement by other. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064. Accused's confession implicating another in the crime is admissible against accused to show the complicity of the person so implicated. Id. Counsel for defendant cross-examined an accomplice of defendant and read portions of a confession by such accomplice and cross-examined him thereon. Held not error to allow the state to read the entire confession. State v. Myers, 198 Mo. 225, 94 SW 242.

88. In a prosecution for burglary, alleged confession by accused to burglarizing another house the same night is inadmissible as substantive evidence. Barnett v. State [Tex. Cr. App.] 99 SW 556.

89. Under Code Cr. Proc. 1895, art. 790, providing that confession shall not be used unless voluntary, or unless, in connection with the confession, accused made statements found to be true, a confession is admissible though procured by unfair means where by means of statement connected therewith property belonging to decedent was found. Jones v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 82, 96 SW 930.

90. Where charge was carrying concealed weapons and defendant denied carrying the weapon, the state could lay a predicate to contradict him by proving admissions or confessions without showing they were voluntary. Burgess v. State [Ala.] 42 S 681.

91. Testimony that defendant was present at time and place of alleged confession admissible. Gallegos v. State [Tex. Cr. App.] 90 SW 492.

92. What was said to defendant at the time is admissible to show whether he was threatened or induced to confess. Strickland v. State [Ala.] 44 S 90.

93. While officers to whom a confession was made could testify as to what was said and done at the time, they could not testify as to what they believed would be done with accused if he confessed. Follis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 120, 101 SW 242.

94. Before the jury can consider a confession, they must determine that it was freely and voluntarily made. State v. Von Kutzleben [Iowa] 113 NW 484. Before considering a confession, the jury must consider the circumstances under which it was made. Id. Testimony as to admissibility of confessions should be taken in the presence of the jury so that they may have before them the facts under which it was made. State v. Sherman, 35 Mont. 512, 90 P 981.

95. Where there is testimony that a confession was not free and voluntary, a charge should be given on the subject. Follis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 120, 101 SW 242. Error to refuse charge warranted by evidence, that if jury believe from the evidence that the confession, if any, was brought about by fear, duress. intimidation, or by hope or promise of reward, or that such confessions, if any, were untrue, then they may disregard them altogether. Johnson v. State, 89 Miss. 773, 42 S 606. Where in arson the strongest fact against accused was his request of a witness not to tell on him, the jury should be charged that before it could be considered against him, they must find it true beyond reasonable doubt. Dunlap v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 444, 98 SW 845.

96. Declarations made by a co-conspirator which are not in aid or furtherance thereof are not admissible. People v. Smith [Cal.] 91 P 511. Declarations of conspirators relative to other matters held not admissible. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Where there was evidence of a conspiracy between defendants to murder deceased, evidence of threats by one defendant before the conspiracy was entered into is not admissible. State v. Darling, 199 Mo. 168, 97 SW 592. In homicide where conspiracy is shown, evidence of threats made by one at request of another is admissible. Id. But threats made before the conspiracy was formed are not admissible. Id. Acts and declarations of a conspirator are admissible against a co-conspirator only after the existence of the conspiracy is shown

and when it appears that the acts and declarations were in furtherance of the common design. State v. Roberts, 201 Mo. 702, 100 SW 484. Conversations between witness and another relating to paying for a ranch with stolen horse, without defendant's knowledge, held inadmissible against defendant on trial for larceny, the conspiracy being planned later. State v. Allen, 34 Mont. 403, 87 P 177. Proof of agreement between alleged conspirators in absence of defendant and before formation of conspiracy held inadmissible. Green v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 31, 90 SW 1115.

97. Acts and statements of co-conspirator after consummation of conspiracy and not in presence or hearing of defendant, inadmissible. Smith v. People, 38 Colo. 509, 88 P 453. Acts and declarations after the consummation of the conspiracy are inadmissible against a co-conspirator. State v. Roberts, 201 Mo. 702, 100 SW 484. Declaration of conspirator after accomplishment of conspiracy inadmissible against co-conspirator. State v. Myers, 198 Mo. 225, 94 SW 242. Acts and declarations of conspirators in defendant's absence, after consummation of conspiracy, not admissible. Benton v. State, 78 Ark. 284, 94 SW 688. In larceny where theory of the state was that it was committed pursuant to conspiracy, statements of third person made in absence of accused after commission of offense were inadmissible. Shiflett v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 217, 102 SW 1147. In rape of an elderly woman, statements of an alleged co-conspirator several hours after commission of offense as to having had intercourse with some old woman was not admissible though made in presence of defendant. State v. Forshee, 199 Mo. 142, 97 SW 933. Fact of flight of co-conspirator jointly indicted with defendant, after indictment, inadmissible. Smith v. People, 38 Colo. 509, 88 P 453. Flight of conspirator irrelevant on trial of co-conspirator. State v. Sykes, 191 Mo. 62, 89 SW 851.

98. Evidence of statements, conversations, and conduct of alleged conspirators, not a part of the transactions charged in an indictment under the Valentine Anti-trust law, but offered to establish the existence of the alleged illegal combination, is not admissible against a defendant who was not present and did not concur in such statements, conversations, or conduct. Hughes v. State, 9 Ohio C. C. (N. S.) 369. Conversation between defendant and two others just before difficulty in which killing occurred showing a conspiracy to injure admissible. Hanners v. State, 147 Ala. 27, 41 S 973. Evidence that accused and his father had conspired to kill decedent may be shown by evidence that the father had stated that they were looking for him, etc. Ferguson v. State [Ala.] 43 S 16. Any act or declaration by one conspirator against another in perpetration of alleged conspiracy may be shown against himself and co-conspirators. Chapline v. State, 77 Ark. 444, 95 SW 477. Where conspiracy is shown, acts of one in furtherance of the common design are admissible against others. Butt v. State [Ark.] 98 SW 723. Facts which tend to establish conspiracy are not rendered inadmissible because they supply evidence tending to prove guilt of the conspirator. People v. Stokes [Cal. App.] 89 P 997. Where conspiracy is fully established, declarations of one, though made in the absence of some of the others, are admissible. United States v. Richards, 149 F 443. Where an agreement between a keeper of a house of prostitution and a procuress was shown, proof of statements of the procuress to a girl whom she induced to go to the house of prostitution was admissible in trial of a charge against such keeper for keeping a girl under 18. Raymond v. People, 226 Ill. 433, 80 NE 996. Where conspiracy is shown, evidence of the acts of one is admissible against another though he was not present. Sanderson v. State [Ind.] 82 NE 525. Declarations of one conspirator admissible against others. Id. Declarations of one conspirator in furtherance of the common design are original evidence against the others. Id. Letters or documentary evidence establishing connection between and directly connecting parties alleged to have conspired are admissible. State v. Crofford, 133 Iowa, 478, 110 NW 921. Where an abortion was committed pursuant to a conspiracy between the female and physician, declarations of the female, dying from the operation, held admissible against the physician so far as they related to the conspiracy, in trial of the physician for murder. Id. Where conspiracy is proved, evidence of acts of one in furtherance of the scheme, though done in absence of others, is admissible against them. State v. Caine, 134 Iowa, 147, 111 NW 443. Existence of conspiracy being shown, declarations of co-conspirator not in presence of accused may be shown. Hall v. Com., 31 Ky. L. R. 64, 101 SW 376. Where proof showed conspiracy to murder, evidence that one of the conspirators was seen driving toward scene of murder was admissible. Bull v. Com., 29 Ky. L. R. 949, 96 SW 817. Where proof showed a conspiracy to murder, evidence that articles found near the dead body belonged to one of the conspirators was admissible. Id. Declarations of a co-conspirator not made in presence of accused are admissible. Hall v. Com., 31 Ky. L. R. 64, 101 SW 376. Where prisoners murdered a guard pursuant to a conspiracy to escape, evidence of the conspiracy was admissible though one of the conspirators was not included in the indictment. State v. Vaughn, 203 Mo. 663, 102 SW 644. Conversations of two conspirators after formation of conspiracy, but without defendant's knowledge, admissible against him, he being a conspirator. State v. Allen, 34 Mont. 403, 87 P 177. Declarations of co-conspirators out of defendant's presence are admissible against him without fixing the time, place, and persons present. Id. Where three persons were jointly indicted and aided and abetted in the commission of the crime, the declarations of one are admissible in the separate trial of another. State v. Kenny [S. C.] 57 SE 859. Acts and declarations of conspirators though in the absence of each other are admissible when they tend to illustrate the motive which actuated either of them. Green v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1025, 89 SW 838. Acts of one conspirator are admissible against another. Whittle v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 573, 95 SW 1084. Only acts and declarations of a conspirator in furtherance of the common design are admissible against another. Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 64, 100 SW 946. Acts of a co-defendant on a

fact of conspiracy has first been shown.[99] But the existence of the conspiracy need only appear prima facie, in the first instance, to render such evidence admissible,[1] proof by circumstantial evidence being sufficient.[2] The court may, in its discretion, receive proof of declarations or acts before the conspiracy is proved.[3] In such case there should be an instruction that the proof of such acts or statements is to be disregarded if the conspiracy is not found to exist,[4] the question of the actual existence of a conspiracy being ultimately for the jury.[5]

Res gestae.[See 3 C. L. 214]—In general, all of the facts and circumstances forming a part of the entire transaction in issue may be shown,[6] and this has been held to

charge of cutting fences held admissible against accused though co-defendant was not on trial. Henderson v. State [Tex. Cr. App.] 96 SW 37. Where the evidence establishes a prima facie case of conspiracy, acts and declarations of the parties in pursuance thereof, not in the presence of each other, are admissible. State v. Grove, 61 W. Va. 697, 57 SE 296. In prosecution for bribery where conspiracy was shown, it was admissible to show that a conspirator offered bribes to other members of the board of council to influence their action on same matter. Schultz v. State [Wis.] 113 NW 428.

99. Evidence held to show conspiracy to commit abortion so that declarations of one conspirator in promotion of the common design and during its execution held admissible. State v. Crofford, 133 Iowa, 478, 110 NW 921. Evidence sufficient to show a conspiracy as foundation for admitting declarations of one conspirator in an action against another. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Evidence sufficient to show that conspiracy to murder decedent was on foot when threats were made, and hence were admissible against one entering into the conspiracy. Driggers v. U. S. [Ind. T.] 104 SW 1166. On trial of one for murder committed pursuant to conspiracy, evidence held to so connect accused with the conspiracy that declarations of others admissible against him. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Evidence held to show that conspiracy resulting in decedent's death was afoot when threats were made against him, and hence such threats were admissible against one subsequently entering into the conspiracy. Driggers v. U. S. [Ind. T.] 104 SW 1166. Evidence sufficient to show conspiracy so as to admit acts and declarations of conspirators. Schultz v. State [Wis.] 113 NW 428. Conspiracy sufficiently shown to render competent proof of acts, etc., of defendant's co-conspirators. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817. Declarations of alleged co-conspirators inadmissible without proof of formation of conspiracy unless made in presence of accused. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943.

Evidence insufficient to show a conspiracy so as to justify admission of declaration of one conspirator against another. Saye v. State [Tex. Cr. App.] 99 SW 551. Conspiracy held not sufficiently established to justify declarations of o. as to what he told another. Id. Statement of third person that he had accused after deceased, etc., inadmissible without other proof of conspiracy. Hall v. Com., 29 Ky. L. R. 485, 93 SW 904. Where homicide occurred during fight between strikers and strike breakers, evidence concerning acts of other strikers was inadmissible against defendant, no connection being shown. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943.

1. State v. Roberts, 201 Mo. 702, 100 SW 484.

2. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943. To justify submission of evidence of conspiracy in homicide case, it is not necessary that conspiracy should be shown by direct evidence. Circumstantial is sufficient. State v. Darling, 199 Mo. 168, 97 SW 592. Evidence sufficient. Id. Evidence held to prima facie establish conspiracy so as to admit evidence of acts of co-conspirators. Sanderson v. State [Ind.] 82 NE 525.

3. Proof of conspiracy may in discretion of court be made after acts and declarations of conspirator have been received. State v. Miller, 191 Mo. 587, 90 SW 767.

4. Cooper v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 115, 89 SW 816. Where statements of a third person are admitted on the theory that he is a co-conspirator, but there is no showing of a conspiracy, it is error to fail to instruct jury to that effect and to limit the testimony to such theory. Id. Court should instruct jury to disregard proof of statement of alleged conspirator unless they found a conspiracy existed. Hall v. Com., 29 Ky. L. R. 485, 93 SW 904.

5. State v. Roberts, 201 Mo. 702, 100 SW 484. Before acts and declarations of one conspirator can be considered against another, the jury must be satisfied that the conspiracy exists. The court's determination in this matter is not sufficient. Schultz v. State [Wis.] 113 NW 428.

6. The offense may be shown if part of res gestae. Pate v. State [Ala.] 43 S 343. Evidence in homicide case describing details of what took place at time of killing held res gestae. Williams v. State, 147 Ala. 10, 41 S 992. Under an indictment charging an attempt to commit mayhem by throwing red pepper in the eyes of the person attacked, proof that accused followed him and tried to strike him with her umbrella is admissible as a part of the res gestae. Dahlberg v. People, 225 Ill. 485, 80 NE 310. But proof of blows or of the effect of blows with the umbrella is inadmissible either as res gestae or as evidence to sustain the charge. Id. Where three accused killed deceased by shooting through the walls of his house, proof that one of them had sent for whisky was held admissible as a part of the res gestae. State v. Barrett, 117 La. 1086, 42 S 513. In prosecution for perjury where it appeared that defendant testified in the prior

include, in homicide and assault cases, the killing or injury of a third person.[7] Exclamations or declarations of parties to the transaction, or persons present, contemporaneous or nearly so, with facts in issue which they tend to explain or illuminate, are admissible as a part of the res gestae [8] provided they may fairly be consid-

cause as to attempt to hand a pistol to accused in that action, evidence that no attempt was made to pass such pistol is res gestae. State v. Gordon, 196 Mo. 185, 95 SW 420. In prosecution for stealing a horse, it was not error for state to show that when accused borrowed the horse he also borrowed a saddle. Richardson v. State [Tex. Cr. App.] 103 SW 852. In an action for assault, what occurred between the parties immediately after the assault held res gestae. Herd v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 829, 99 SW 1119. Where in prosecution for murder it appeared that ill feeling had existed between the parties for some time, evidence of a prior altercation was res gestae where it appeared that the two were in effect a continuous affair. McKinney v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 96 SW 48. Where, in homicide, difficulty arose over alleged failure to pay money collected by accused for deceased, and accused testified in regard thereto, it was proper for state to show that accused embezzled the money as a part of the res gestae. Lahue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 125, 101 SW 1008. Proof of battery admissible as res gestae in prosecution for assault. Davis v. State [Tex. Cr. App.] 90 SW 646. Where defendant within six minutes after shooting deceased came to his father's house, running his horses at full speed, and greatly excited, and said deceased had attacked him and that he had to shoot deceased, the statement was admissible as a part of the res gestae. Craven v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 373, 90 SW 311. On prosecution for assault with intent to rape, testimony that prosecutrix broke away from her assailant and ran and fainted after running 100 yards is res gestae.. Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 SW 533. Where homicide occurred pursuant to a conspiracy between defendant and his father and mother to resist execution of a writ of possession, what took place outside the house between father and officers while defendant was inside, and the fact that deceased was there to execute the writ, was held admissible as res gestae. Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817.

7. Declaration of victim of assault immediately afterward, while washing blood from his face. Grant v. U. S., 28 App. D. C. 169. Proof that defendant's brother, jointly indicted, had an open knife during the affray and that a third person was cut, admissible as res gestae State v. Woodward, 191 Mo. 617, 90 SW 90. Evidence of the killing of another person at the same time is res gestae. State v. Vaughan, 200 Mo. 1, 98 SW 2. In homicide all that occurred at time of killing including killing of another man is res gestae. State v. Cavin, 199 Mo. 154, 97 SW 573. In murder trial proof of shooting third person at same time decedent was shot is admissible. Nelson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 140, 101 SW 1012. In homicide evidence of killing of another person at the same time is res gestae. Menefee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 296, 97 SW 486. Killing of another person at same time is res gestae. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 SW 100. Evidence that after killing deceased defendant shot another is res gestae. Campos v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 511, 95 SW 1042. Proof of accidental shooting of child in shooting deceased is admissible as a part of the res gestae, but does not necessarily show guilt in shooting deceased. Stevison v. State [Tex. Cr. App.] 89 SW 1072.

8. Conversation between **parties** just prior to homicide is res gestae. Waggoner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 717, 98 SW 255. Conversation between defendant and deceased immediately before shooting is res gestae Fleming v. State [Ala.] 43 S 219 In homicide testimony of a witness as to what he heard of a conversation between the parties shortly before the killing was admissible, though he did not hear all that was said. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 128, 97 SW 499. Declarations by a participant during progress of a riot are not hearsay. State v. Jones [S C.] 58 SE 8. Conversation and acts of parties just prior to killing held admissible as res gestae. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403. Testimony of statements and acts of parties at time of burglary admissible. Smith v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 592, 90 SW 638. Declarations of **accused** while at scene of killing with pistol in his hand in presence of deceased held res gestae Williams v. State, 147 Ala. 10, 41 S 992. What accused did immediately after he shot decedent is res gestae. Pate v. State [Ala.] 43 S 343. In homicide testimony as to remarks made by defendant shortly after the shooting, which bear on his frame of mind and conduct, are res gestae. Young v. State [Ala.] 43 S 100. Conversation between defendant and another immediately after killing is res gestae. Pratt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 599, 96 SW 8. In homicide statements made by defendant immediately after the killing are res gestae. State v. Rutledge [Iowa] 113 NW 461. Statement to officer that defendant had come to surrender and that he had killed deceased held admissible as res gestae. Gregory v. State [Tex. Cr. App.] 94 SW 1041. Statements of **decedent** to physician attending him as to his symptoms, character, and location of his pain, and bodily condition, made while suffering, held admissible. Gregory v. State [Ala.] 42 S 829. Statements made by deceased immediately after being shot are admissible as res gestae. Commonwealth v Hargis, 30 Ky. L. R. 510, 99 SW 348. Decedent's statement just before dying "What a pity! They killed me for nothing," 15 or 20 minutes after fight held admissible as res gestae though not as a dying declaration. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Proof that he also said "What will become of my poor

ered as arising naturally from the transaction,[9] and where all idea of premeditation and design is excluded.[10] Declarations forming a part of the res gestae are admissible without showing the competency of the declarant as a witness.[11]

Expert and opinion evidence.[12]—Ordinarily, witnesses are not allowed to testify to bare conclusions of fact.[13] An opinion or conclusion is admissible, however,

wife and children?" was inadmissible. Id. Statements of decedent directly after being shot, and while his shirt was still on fire held res gestae. Bice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 61, 100 SW 949. In prosecution of a husband for murder of his wife, it was proper to show declarations of the decedent to her attending physician as to his physical condition. State v. Blydenburg [Iowa] 112 NW 634. Statement of deceased to witness that he was cut, but not saying defendant cut him, admissible. George v. State, 145 Ala. 41, 40 S 961.

Person injured: Statement made by one upon being shot as to who did it is res gestae. Mahoney v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 818, 98 SW 854. In assault to rape, it is admissible to show what **prosecutrix** said relative to the assault to a person she met a minute or so after the assault. Adams v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 735, 99 SW 1015. Proof that **third person,** during fight between deceased and defendant, told deceased to "run out of it" held admissible where it appeared that defendant heard it. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. What third person said when he came to accused's premises at time of homicide held res gestae. State v. Rutledge [Iowa] 113 NW 461. In homicide case, exclamations by son of deceased, "Don't shoot pop," proved by an eyewitness to have been made just before and at the time of the shooting, held admissible as res gestae. Kennedy v. Com., 30 Ky. L. R. 1063, 100 SW 242.

9. Held inadmissible: Statement by accused after killing not admissible as res gestae where it did not appear how long a time had elapsed nor where accused was. Mitchell v. State [Ark.] 101 SW 763. In homicide statement of deceased made shortly after the shooting which was denied by defendant held not res gestae. Johnson v. State [Miss.] 43 S 435. Defendant was asked some hours before the shooting about a difficulty with a person other than deceased, and said he had his gun with him and would shoot until it melted if they didn't quit running over him, but did not refer to deceased, or any particular person held not admissible as a part of the res gestae. Deal v. State [Ark.] 100 SW 75. That prosecutor made complaint before a justice an hour and a half after robbery, charging defendants therewith, not a part of the res gestae. Smith v. People [Colo.] 88 P 1072. Where witness called up to see decedent on night of shooting could not state how long after shooting it was, he could not testify to conversation with decedent as res gestae. State v. Uzzo [Del.] 65 A 775. In homicide case, statements of deceased three days after affray, not shown to be dying declarations, are inadmissible. State v. Barber [Idaho] 88 P 418. In homicide trial, evidence of statement by decedent's brother when disarmed of a gun which he was directing at a person other than defendant, at a time when defendant had fled and decedent was not present, not res gestae. Morello v. People, 226 Ill. 388, 80 NE 903. In prosecution for homicide committed in an attempt to produce an abortion, proof that deceased had a year before displayed a wire, and said she had produced an abortion upon herself, would do it again if necessary, and would not have children, held not a part of the res gestae. Clark v. People, 224 Ill. 554, 79 NE 941. Declarations made some time after commission of offense held not res gestae. State v. Hoover, 134 Iowa, 17, 111 NW 323. Evidence for defendant of declarations as to why he shot deceased, not a part of the res gestae, inadmissible. State v. Long, 201 Mo. 664, 100 SW 587. Where deceased was shot in one saloon and fled to another, and there made statements 2 or 3 minutes after his arrival to officers, they were not admissible as res gestae. State v. Kelleher, 201 Mo. 614, 100 SW 470. Statements made by deceased to his attending physician 15 or 20 minutes after the injury are not res gestae. State v. Birks, 199 Mo. 263, 97 SW 578. In homicide conversations between defendant and decedent which occurred long before the crime are hearsay. People v. Ferone, 105 NYS 448. Statement by defendant to sheriff after being arrested by constable, "I told you I would come to you," is not res gestae, because too remote, and not relating to the homicide. Fuller v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 413, 95 SW 541. Where a bystander was not a party to the crime, declarations made by him at the time are not res gestae. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 SW 496.

10. To render declarations admissible as a part of the res gestae, they must be substantially contemporaneous with the litigated transaction and be the instinctive spontaneous utterances of the mind under the active, immediate, influence of the transaction, under circumstances precluding the idea of reflection or design to make self-serving statements. State v. Way, 76 S. C. 91, 56 SE 653.

11. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312.

12. See 8 C. L. 215, also Evidence, 9 C. L. 1228.

13. Held mere conclusions: Whether deceased was afraid to go about alone at night. Parham v. State, 147 Ala. 57, 42 S 1. Whether lock on inside of door could have been broken from the outside. Dupree v. State [Ala.] 42 S 1004. Questions calling for reasons and intentions of a witness properly refused. Cagle v. State [Ala.] 44 S 381. Objection to question properly sustained where part of it called for conclusion. Rose v. State, 144 Ala. 114, 42 S 21. Why woman went to door held to call for uncommunicated motive. Jacobs v. State, 146 Ala. 103, 42 S 70. Proper to exclude testimony of witness that tracks seen by him were in his judgment those of defendant. Du Bose v.

State [Ala.] 42 S 862. Question asked a witness by a juror as to what caused him to suspect defendant held objectionable as calling for an opinion where witness answered that he believed so because of certain facts. Scaggs v. State [Ark.] 99 SW 1104. Question held objectionable as calling for a conclusion. People v. Robertson [Cal. App.] 92 P 498. The belief of a witness cannot supply the place of substantive material facts. Griffin v. State [Ga. App.] 58 SE 781. Error to ask defendant, "Did you go into the saloon that night for the purpose of bringing on a fight." State v. Barber [Idaho] 88 P 418. In prosecution of husband for murder of his wife, it was error to allow a certain witness to characterize certain conduct of defendant toward his wife as cruel. State v. Blydenburg [Iowa] 112 NW 634. Conclusion of witness that waiting room was not suitable and convenient. Illinois Cent. R. Co. v. Com., 28 Ky. L. R. 802, 90 SW 602. Witness to whom prosecutrix in rape case complained shortly after the act could not testify that she "understood" from the appearance of prosecutrix that she had been mistreated. State v. Wertz, 191 Mo. 569, 90 SW 838. In arson evidence describing shoes worn by accused and foot prints found near scene of crime is admissible, but a witness making the comparison may not express an opinion that the foot prints were made by accused. Heidelbaugh v. State [Neb.] 113 NW 145. Conclusion of witness, who saw blood and pieces of skull in corner of room where shooting occurred, as to where shot was fired from. State v. Jennings, 48 Or. 483, 87 P 524, 89 P 421. Mere conclusion on facts held inadmissible. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 SW 1016. Why witness was watching for defendants. Wade v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 370, 90 SW 503. Question properly excluded as calling for a conclusion. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Whether witness, from what he saw, did not think that both sides were doing the shooting. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. In prosecution on indictment for vagrancy and being a professional gambler, statement that defendant was a gambler without any facts on which conclusion was based was not competent. Leatherman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 75, 95 SW 504. A witness may state facts and even his best recollection thereof, but not his impression or opinion as to what he may have done based on his habit of doing things. Green v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 31, 90 SW 1115. In theft it was proper to sustain an objection to a question as to whether witness believed or had reason to believe that defendant found the money he lost, as it called for an opinion. Elliston v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 717, 99 SW 999. In homicide case accused claimed he collapsed and became unconscious immediately after killing, and state claimed he was shamming. Held error to allow witness to state symptoms of shamming. People v. Koerner, 117 App. Div. 40, 20 Crim. R. 515, 102 NYS 93. Harmless error where two physicians, who examined accused, testified they thought he was shamming. Id.

Held not mere conclusions: Whether there was any way that witness could tell when a ticket was sold, except from the ticket, did not call for an opinion, but for witness' own knowledge. People v. Lowrie [Cal. App.] 87 P 253. Identity of a person may be established by a witness solely from having heard his voice. This is not opinion but direct and positive evidence. Mack v. State [Fla.] 44 S 706. Whether a witness heard one use cross words toward another. State v. Rutledge [Iowa] 113 NW 461. Testimony of prosecutrix in seduction case that she determined to lead a virtuous life at a certain time. State v. Bennett [Iowa] 110 NW 150. Testimony of a witness referring to an act which took place in his presence "It seems to me that he closed the door behind him, but I cannot say positive that he did, I was so far away". Mimbs v. State [Ga. App.] 58 SE 499. Answer to question how often accused wrote to a certain person that she wrote a good deal. State v. Meyers, 198 Mo. 225, 94 SW 242. Defendant being charged as accessory, nonexpert may state opinion concerning friendly relations between accused and principal offender. State v. Turner, 143 N. C. 641, 57 SE 158. Witness properly allowed to testify that roadway near the scene of a murder was so hard that a track could not be made on it, and that he could not follow defendant's track on that account. State v. Sanders, 75 S. C. 409, 56 SE 35. Testimony that decedent did not own or have possession of a pistol at the time he was murdered. Waggoner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 717, 98 SW 255. Testimony that decedent went to place where fatal difficulty took place to attend his mule. Id. Testimony that a voice witness heard sounded mighty like defendant's. Id. Testimony that defendant and deceased were not very good friends. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 SW 521. Testimony in homicide "All he had to do was to walk up and stab her as he did", not a conclusion, witness having detailed circumstances of the killing. Armstrong v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 812, 98 SW 844. Testimony as to appearance or looks of a person may be admitted without violating the rule as to opinions and conclusions. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513. Testimony as to conduct and nature of defendant and deceased a few minutes prior to the homicide held not an opinion as to meaning of acts of deceased. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509. Testimony as to tracks found near scene of crime, that they looked as if made by the same person, is competent. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Witness may testify in issue of identity, that she believed person she saw was accused, and that he looked like accused. Coffman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 701, 103 SW 1128. It is competent for a witness to state what tone of voice was used, whether angry or otherwise. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 SW 100. Witness may state direction in which tracks appeared to be going. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. Where there was evidence that defendant had been seen in the place where certain tracks were discovered, held not error to allow witness to state that shoes shown to him would make tracks like those seen by him. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975.

where the nature of the facts on which it is founded make their adequate statement impossible, or where the matter is one involving such special knowledge, skill or experience, that it is not to be supposed that the jury can, unaided, draw a proper inference therefrom.[14] As to such matters, any person shown to be of special learning and experience may express his opinion.[15] Nonexpert opinion is received on matters adequate knowledge of which may be gained by general observation,[16] including a person's sanity or mental or physical condition, or appearance,[17] when a

14. Held proper subject for opinion evidence: Expert may testify where bullet which caused death entered the head. Williams v. State, 147 Ala. 10, 41 S 992. The sound made by pistols of different caliber is a proper subject of expert testimony. West v. State [Fla.] 43 S 445. May state with what instrument wound might have been made and about how long before his examination. Commonwealth v. Campbell, 31 Pa. Super. Ct. 9. Expert testimony is admissible to prove meaning of terms of act in an indictment. State v. Meyers [La.] 44 S 1008. Whether a 30-30 rifle would make a hole of a certain size in a fence picket is a proper subject for expert testimony. State v. Remington [Or.] 91 P 473. Physician of 15 years standing who saw and dressed wound may testify that "knucks" would be a deadly weapon. State v. Spaugh, 199 Mo. 147, 97 SW 901. Where defendant when arrested was wearing a hat belonging to deceased, a doctor who examined both may testify that location of cuts in the hat corresponded to cuts on the head. Commonwealth v. Karamarkovic [Pa.] 67 A 650. In trial for abortion, experts were properly allowed to give opinions as to kind of instrument and manner of use which would produce the condition in which they found the woman. Commonwealth v. Sinclair [Mass.] 80 NE 799. Where knife was used in homicide, it was competent for a physician to state whether an instrument of certain size was a deadly weapon. Hardin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 231, 103 SW 401. One who has qualified as an expert may testify as to what kind of instrument would produce the kind of injuries shown on infant's head. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231. Physician properly allowed to testify that character of wounds on head indicated that they were made by blunt instrument. Ozark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 69, 100 SW 927.

Held not subject for opinion evidence: Opinion of medical witness as to what constitutes practice of medicine inadmissible in trial of charge of practicing without a certificate. State v. Heffernan [R. I.] 65 A 284. The opinion of a witness is not admissible when all the facts and circumstances are capable of being clearly detailed and described so that the jury may readily form correct conclusions therefrom. Robinson v. State, 128 Ga. 254, 57 SE 315.

15. Witness held qualified: Regularly graduated, licensed, and practicing physician, is competent to testify to effect of blow on the head as described by witnesses though he has never seen or treated a case of the kind. State v. Megorden [Or.] 88 P 306. Physician specializing in mental disease competent on insanity. Hamilton v. U. S., 26 App. D. C. 382. One who testified that he was familiar with sound of feet of certain horses when driven at a lope is competent to give opinion that he heard such horses. Holder v. State [Tenn.] 104 SW 225. Graduate physicians held qualified to state whether strychnine was cause of death, though they had had no actual experience with it. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Undertaker with 20 years' experience qualified to give opinion that certain wound in deceased's back was fatal. Cecil v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 803, 100 SW 390.

Witness held not qualified: One not an expert should not be permitted to testify as to identity of signature. Jordt v. State [Tex. Cr. App.] 95 SW 514. Error to permit physician to testify to size and caliber of ball when he said he had never owned a pistol and had had no practical experience with firearms. Ripley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 49, 100 SW 943. Medical student not competent as expert on insanity. Hamilton v. U. S., 26 App. D. C. 382. A physician, who is not a graduate of a medical school, has not read any books on surgery and has had no experience with gun shot wounds is not qualified to give an opinion as to cause of death. Smith v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 948, 99 SW 100. One who is not learned in law of an Indian nation is not competent to testify as to what it is. Porter v. U. S. [Ind. T.] 104 SW 855.

16. Opinion of nonexperts is admissible on value of stolen watch. Vandergrift v. State [Ala.] 43 S 852. Opinion testimony on question of identity of a person is admissible. Williams v. State [Ala.] 43 S 720. In prosecution for selling intoxicating liquor, one who is familiar with taste of beer and has tasted liquor seized may testify that it tasted like beer. Feddern v. State [Neb.] 113 NW 127. Nonexpert may testify that bullet wound was a penetrating one. Williams v. State, 147 Ala. 10, 41 S 992. Nonexpert may be examined as to cause of death when it is such that expert knowledge is not required. State v. Caron, 118 La. 349, 42 S 960.

17. Opinion as to mental condition that defendant seemed "worried" and "acted stupid" and "as if something was wrong with him," held proper description of conduct. Till v. State [Wis.] 111 NW 1109. In homicide where the defense is intoxication, opinions of nonexperts are admissible. Commonwealth v. Eyler, 217 Pa. 512, 66 A 746. A witness, who has actual knowledge and observation of the killing, may supplement his description by his opinion as to the condition of accused. Id. Nonexpert may testify that deceased looked like a robust and stout man. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. Nonexpert may state condition of person assaulted after the

proper predicate has been laid by a statement of the facts on which the opinion is based [18] accompanied by a showing as to the extent and means of observation of the witness.[19] A nonexpert may not give an opinion on accused's mental condition based solely on his behavior in the court room.[20] An expert may base his opinion on what he himself knows and has observed,[21] and where the facts are before the jury, the opinion need not be brought out by a hypothetical question.[22] Medical witnesses may be asked if they agree with statements in standard medical works.[23] A hypothetical question must conform to the evidence,[24] should not assume facts not in evidence [25] nor require the witness to weigh the evidence.[26] The question need not embrace all the evidence; [27] it is proper to include facts embraced in the

assault. Jacobs v. State, 146 Ala. 103, 42 S 70.

18. An opinion of a nonexpert on the question of sanity is not evidence unless predicate therefor has been laid. United States v. Chisholm, 153 F 808. A nonexpert called to give his testimony on question of insanity must first relate the facts upon which he predicates his opinion. Fults v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 458, 98 SW 1057. Nonexpert cannot testify on sanity or insanity without stating all the facts on which he bases his opinion. Taylor v. State [Tex. Cr. App.] 90 SW 647. Nonexpert testimony that deceased was delirious when he made a declaration inadmissible without statement of facts on which it was based. State v. Nowells [Iowa] 109 NW 1016.

19. One who is familiar with intoxicating liquors is competent to testify as to whether a beverage he drank was intoxicating. Town of Brighton v. Miles [Ala.] 44 S 394. Nonexpert cannot give opinion as to sanity unless he shows acquaintanceship. Atkins v. State [Tenn.] 105 SW 353. One who has worked with a person a couple of days is not competent to give an opinion as to insanity. Young v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 178, 102 SW 1144. Witnesses who had seen defendant only once or twice and only within two years are incompetent to testify as to his sanity. Wells v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 443, 98 SW 851. A nonexpert, who testified that he had known defendant four months and as a rule saw him twice a day, and one who had known him two years and stated that he saw him frequently, held not sufficient predicate for admitting opinion. Sims v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 962, 99 SW 555. Witness who merely testified that he had talked with accused a number of times, without stating the subjects of conversation, held not qualified to give opinion on whether accused could harbor a criminal intent. Binkley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 799, 100 SW 780. Witness who has seen accused's shoes and certain tracks, but has not measured them, is not competent to testify that tracks were made by accused. Tankersley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 92, 101 SW 234. Nonexpert who saw and talked with a person once is not qualified to testify to his sanity. Burton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 102, 101 SW 226. One giving an opinion as to value of tools should not be permitted to use catalogue price list as basis for fixing value. Keipp v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 242, 103 SW 392. Opinion as to responsibility of accused based on facts in question and on witness' examination of accused held competent. People v. Koerner, 117 App. Div. 40, 20 Crim. R. 515, 102 NYS 93. Newspaper man who had frequently seen accused and to whom accused had submitted poem for publication properly allowed to state whether his acts impressed him as rational or irrational. Id. Official stenographer in case where accused testified properly allowed to state whether accused's answers impressed him as rational or irrational. Id. Nonexperts who are well acquainted with a person may give opinion as to his sanity. Atkins v. State [Tenn.] 105 SW 353. Proper to allow witness to identify a signature as that of defendant where he afterwards testified that he had seen defendant sign his name and that the signature looked like his. Hopkins v. State [Fla.] 42 S 52. Persons who have seen defendant write, and who believe they know his hand writing, may give an opinion. Rinker v. U. S. [C. C. A.] 151 F 755. Form of question propounded to a nonexpert on question of insanity which directed him to base his opinion in part on what he had observed in others held improper. Duthey v. State, 131 Wis. 178, 111 NW 222.

20. The question of sanity of accused depending on his conduct pending trial is for the jury, and a nonexpert cannot base an opinion thereon. State v. Von Kutzleben [Iowa] 113 NW 484. The state may not call nonexperts from bystanders in the court room to give opinion as to sanity based on observation of the accused during trial. Id.

21. Yates v. State, 127 Ga. 813, 56 SE 1017.

22. Where an expert has examined a wound and described it to the jury, it is not necessary to ask a question in a hypothetical form as to its effect. State v. Megorden [Or.] 88 P 306.

23. State v. Blackburn [Iowa] 110 NW 275.

24. Hypothetical question as to pool of water becoming colored held erroneous because not conforming to evidence. Parham v. State, 147 Ala. 57, 42 S 1.

25. Where there was no evidence as to how decedent had been killed except that he was found in bed with a bullet hole through his body, a hypothetical question assuming that he was lying in bed when shot was proper. State v. Usher [Iowa] 111 NW 811.

26. Question asked expert on insanity in homicide case held not objectionable as calling on him to weigh the evidence. Duthey v. State, 131 Wis. 178, 111 NW 222.

27. A hypothetical question propounded to a medical expert need not embrace all the evidence in the case. People v. James [Cal. App.] 90 P 561.

theory of the party propounding it.[28] It has been held error to permit physicians to visit defendant in jail and testify for the state as to his sanity.[29]

Best and secondary evidence.[See 8 C. L. 217]—The rule that the best evidence available must be produced [30] excludes oral or other secondary proof of the contents of a writing [31] or record,[32] except where it is but collaterally involved,[33] or where the writing or record has been lost or destroyed,[34] and due search made, if lost,[35] or where the writing is in possession of the other party who has failed to pro-

28. Permitting hypothetical question which omitted reference to certain facts in evidence held not error where defendant was authorized to fully question the witness relative to such facts. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513.

29. State v. Church, 199 Mo. 605, 98 SW 16.

30. Evidence held insufficient to establish proper predicate for introducing secondary evidence of testimony given at preliminary trial. Degg v. State [Ala.] 43 S 484. Parol evidence of the age of a person is not secondary evidence and is not made so by there having been a registry made of the baptism of the person. State v. Romero, 117 La. 1003, 42 S 482. The best evidence of the action of successive grand juries is the entry of their return upon the minutes of the court, but when the absence of this evidence has been accounted for, any other competent evidence, such as testimony of individual grand jurors having knowledge of the facts, is admissible. Elliott v. State, 1 Ga. App. 113, 57 SE 972. Where confession is taken down by a stenographer and transcribed, the testimony of the district attorney in whose presence it was made was the best evidence, the transcript being available as memorandum from which to refresh his memory, and under Code Civ. Proc, § 2047, could be read to the jury. People v. Silvers [Cal. App.] 92 P 506. Member of grand jury who was present and saw and heard oath administered to bailiff in open court is competent to prove such fact. Zeigler v. State [Ga. App.] 58 SE 1066. Testimony of express agent that he did not transport a corpse on a certain day admissible without producing books. Bink v. State [Tex. Cr. App.] 89 SW 1075. State may prove by witness the testimony in the examining court though the substance of such testimony may have been taken down by the magistrate as required by statute. Bennett v. State [Ark.] 104 SW 928. Statement of a witness as to what laws of an Indian Nation are is not best evidence. Porter v. U. S. [Ind. T.] 104 SW 855. It is error to permit a justice who held the preliminary examination to contradict the testimony of accused by reading from his memorandum of the testimony where such memorandum is not used to refresh his memory. Bell v. State [Miss.] 43 S 84. The record of a court and not testimony of the justice as to what a person was tried for is the best evidence. Davis v. State [Miss.] 43 S 81. Evidence as to name by which a person is known is not the best evidence of his true name but it is not hearsay. People v. Way, 104 NYS 277. In theft where owner of goods is dead, want of his consent to the taking may be proved by circumstantial evidence. Jordan v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 887, 104 SW 900. Oral testimony tending to prove that a given act occurred within three miles of a certain masonic academy is not subject to the objection that the charter of the academy is the best evidence. Mason v. State, 1 Ga. App. 534, 58 SE 139.

31. Title to land may not be proved by parol evidence. McClurg v. State [Ga. App.] 58 SE 1064.

32. Accused could not show on cross-examination that a witness had been convicted of perjury, record of conviction being best evidence. James v. U. S. [Ind. T.] 104 SW 607. Where insanity is asserted as a defense, testimony of defendant's wife as to whether his grandfather was ever adjudged insane is not the best evidence. State v. Steidley [Iowa] 113 NW 333. Parol evidence of proceedings before justice of the peace incompetent. State v. Ireland, 89 Miss. 763, 42 S 797. In perjury prosecution, the fact that the prosecution in which accused testified was pending before the county judge when he administered the oath could be shown only by the record of the court. Goslin v. Com., 28 Ky. L. R. 683, 90 SW 223. A decree of divorce and not testimony that a person had been divorced is the best evidence. Williams v. State [Ala.] 43 S 720.

33. A question whether defendant wrote prosecutrix about breaking off their illicit relations is not objectionable as not being best evidence where it was merely for the purpose of directing attention to a certain letter. State v. Bennett [Iowa] 110 NW 150. In prosecution for embezzlement where it appeared that defendant had obtained money from another bank by means of a memorandum check, the court did not err in admitting parol evidence to show that the same was mere memorandum. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 NW 854.

34. Sufficient predicate held laid for proof of contents of lost instrument. Andrews v. State [Ala.] 44 S 696. Copy of letter written by accused to his wife after commission of crime held admissible, original being lost. State v. Barrington, 198 Mo. 23, 95 SW 235. Loss of letter sufficiently shown to admit oral proof. State v. Bennett [Iowa] 110 NW 150.

Exception: In prosecution for embezzlement, by a ticket seller, the original evidence of the sales, stubs, etc., having been destroyed by one who also sold tickets, a memorandum by him of the tickets sold was inadmissible. People v. Hemple [Cal. App.] 87 P 227.

35. Testimony of an attorney that he had written to clerk of foreign country requesting certified copy of judgment and had received an answer that the clerk was unable to find the judgment was not sufficient to admit secondary evidence thereof. Grabill v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 374, 97 SW 1046.

36. An original mortgage which is in pos-

duce it after notice,[36] when notice is required.[37] An expert accountant may testify to the result of his examination of voluminous books,[38] and custodians of records are allowed to state that certain facts do or do not appear therein.[39] Instruments made in multiplicate are all originals.[40] Laying of predicate for introduction of secondary evidence may be done in absence of jury.[41]

Documentary evidence.[See 8 C. L. 217]—Public and official records or copies thereof are competent when duly authenticated.[42] To admit private writings, their nature, character, genuineness, and connection with accused, or with the offense, must be shown.[43] The execution of a written instrument need not be formally

session of defendant may be proved by a certified copy of the same unless the defendant voluntarily produces the original. Kinard v. State, 1 Ga. App. 146, 58 SE 263; Mahan v. State, 1 Ga. App. 534, 58 SE 265. Copy of liquor license admissible after notice to defendant to produce original. State v. Madeira, 125 Mo. App. 508, 102 SW 1046. Personal service on defendant of a notice to produce his license (illegal liquor sale case) held sufficient to render secondary evidence competent. Id.

37. In trial of abortion proof of contents of defendant's account book showing woman's name was admissible without notice to produce book where he denied having it. Commonwealth v. Sinclair [Mass.] 80 NE 799. Where charge was theft of a bond which was last seen in defendant's possession, notice to produce it was not necessary to render secondary proof competent. Counts v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 111, 89 SW 972. Parol evidence of the contents of documents in defendant's possession is admissible without notice to produce. O'Brien v. U. S., 27 App. D. C. 263.

38. In prosecution for embezzlement where books and records are so voluminous as to render it difficult for the jury to consider them, an expect accountant may go through them and testify. Bode v. State [Neb.] 113 NW 996. On trial for embezzlement of public funds, testimony of expert accountants appointed to examine the books as to amount of defalcation is admissible Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 SW 638.

39. In prosecution for practicing medicine without a license, it was not error to allow the clerk of the superintendent of public instruction to testify that defendant was not registered in the records of the medical council, especially as it appeared that no license from such council was filed in the office of the prothonotary. Commonwealth v. Clymer, 217 Pa. 302, 66 A 560. Oral testimony of custodian of records that such records do not show a deed to defendant is competent to disprove defendant's affidavit that he owned land in the county and his deed was recorded. Stamper v. Com., 30 Ky. L. R. 992, 100 SW 286. Testimony of an agent of a nonresident business firm that the firm kept a record of all employes, that he had examined it, and that a certain person's name was not there, is competent evidence that such person was not an employe of the firm. Jordan v. State, 127 Ga. 278, 56 SE 422. Witness who had investigated internal revenue books properly allowed to state that retail license had been issued to a certain person. Suggs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 123, 101 SW 999.

40. Railroad records made in duplicate or triplicate are all originals, no preliminary proof necessary. Hopkins v. State [Fla.] 42 S 52.

41. Degg v. State [Ala.] 43 S 484.

42. Under a rule requiring the certificate of the record of another court to be made by the clerk of court, the record of a previous conviction authenticated by the certificate of the deputy clerk in the name of the clerk is not admissible. State v. Foreman, 121 Mo. App. 502, 97 SW 269. Court records are properly received without further attestation. Nelson v. State [Ala.] 43 S 966. Certified book of town ordinances admissible. Town of Brighton v. Miles [Ala.] 44 S 394. Under Revisal 1905, §§ 1616, 1617, a list of persons who have paid special taxes, which list is kept by collector of internal revenue, is a public record and admissible. State v. Dowdy [N. C.] 58 SE 1002. In prosecution for perjury alleged to have been committed in a certain case, the clerk's record of the proceedings in such case are admissible. State v. Pratt [S. D.] 112 NW 152. Copies of marriage license and certificate purporting to be authenticated by clerk having custody of records where they were recorded in another state, held inadmissible under Ball. Ann. Codes & St. § 6040, which refers only to judicial records. State v. Kniffen [Wash.] 87 P 837. Where magistrate testified that warrant was issued on an affidavit made before him, that warrant itself issued, and a special constable was appointed by him to make the arrest, and the affidavit, the warrant, and appointment were all on one sheet, which was offered in evidence as "the warrant," it was held that the whole paper was in evidence. State v. Williams, 76 S. C. 135, 56 SE 783. Ownership of animal stolen being in issue, a certified copy of the brand from the records showing ownership of brand found on animal was admissible. Seaborn v. State [Tex. Cr. App.] 90 SW 649. Bill of sale from third person to prosecutor also admissible. Id.

43. Letters written by defendant's wife in his absence are inadmissible without proof that they were written at his request. Taylor v. State [Tex. Cr. App.] 97 SW 474. Letters from defendant, though relevant and shown to have been received in the regular course of mail, are not admissible without proof that defendant signed them or authorized his name to be signed. Id. Half-brother of accused testified that accused had sent certain letters, and had admitted doing so. Held letters admissible. State v. Hubbard, 201 Mo. 639, 100 SW 586. Where nature or character of a letter is not shown nor by whom it was written, it is not admissible. Keipp v. State [Tex. Cr. App.] 19 Tex. Ct.

proved if introduced to prove merely a collateral fact.[44] Part of an instrument being introduced by one party, the other may introduce all of it that is relevant.[45] A few decisions as to proof of handwriting are given in the note;[46] the subject is more fully discussed elsewhere.[47] The court will take no notice of how papers offered in evidence were obtained, nor will it form a collateral issue to determine whether they were legally obtained.[48]

Demonstrative evidence and experiments.[See 8 C. L. 218]—It is proper to introduce and identify[49] objects connected with the offense,[50] such as weapons used by the parties,[51] and objects tending to connect accused with the offense,[52] or which throw light on the acts in question.[53] Photographs,[54] and diagrams,[55] and maps[56] illus-

Rep. 242, 103 SW 392. A typewritten letter signed by stencil is not admissible as an admission unless it purports to have been acknowledged by the writer. Sprinkle v. U. S. [C. C. A.] 150 F 56. Such letter is not admissible as against the person who dictated it, in the absence of evidence sufficient to connect him with the offense. Id. In a prosecution under Rev. St. § 5480, for using the mails to further a scheme to defraud, letters received by defendant are admissible if it appears that they were used in connection with the scheme. Walker v. U. S. [C. C. A.] 152 F 111. Documentary evidence should not be admitted without proof of its genuineness. Jordt v. State [Tex. Cr. App.] 95 SW 514.

44. State v. Waldrop, 73 S. C. 60, 52 SE 793.

45. Where part of a written instrument is introduced by one party, all of the instrument on the same subject may be introduced. Corpus v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 225, 102 SW 1152. This rule applies as to examination of witnesses. Id. Not error to permit state to offer part of a written statement made by defendant before the grand jury, defendant being entitled to introduce the balance. Ellington v. State [Tex. Cr. App.] 99 SW 997.

46. In forgery it was admissible to submit the forged instrument and a writing of defendant executed while he was in jail where witness who testified to the writing stated that it was voluntarily done by defendant within ten minutes after he had been warned that anything he might do could be used against him. Johnson v. State [Tex. Cr. App.] 102 SW 1133. Defendant's signature on pleas filed by him held incompetent as standards of comparison with letters to prove the handwriting therein in favor of defendant. Washington v. State, 124 Ga. 423, 52 SE 910. Where charge was having in possession a forged deed, a note and chattel mortgage executed by defendant were competent as standards of comparison with signature on deed. Under Rev. St. 1899, § 4679. State v. Stark, 202 Mo. 210, 100 SW 642. Only writings admitted as his genuine handwriting by one accused are competent as standards of comparison of writings, and not such documents as might be valid though written by others at defendant's request. State v. Branton [Or.] 87 P 535.

47. See Evidence, 9 C. L. 1228.

48. Imboden v. State [Colo.] 90 P 608.

49. Where stick used by deceased in a fight with defendant was lost, it was error to exclude testimony as to how a stick exhibited to witness compared with that used. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Witness identified tie with blood on it as one he had seen defendant have shortly before a homicide. Held not error to allow witness to state that the tie looked like one he had seen defendant wear. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975.

50. In assault with intent to kill by shooting at one since deceased, the jaw bone of deceased which was fractured by the bullet is admissible. People v. Way, 104 NYS 277. In homicide bullet found in body admissible. Moss v. State [Ala.] 44 S 598.

51. In homicide a jack knife taken from pocket of deceased and which he had in his hand shortly before the homicide was admissible. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509. Proper to admit knife found near scene of homicide and to identify and describe it. Alarcon v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 383, 90 SW 179. Proper to exhibit weapon used in assault and to identify it. Jackson v. State [Tex. Cr. App.] 90 SW 34. Pistol, cartridges, and hulls, admissible in murder case. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. Evidence sufficient as to its identity and connection with crime though 100 days had passed since killing. Id.

52. Overcoat held sufficiently identified as that of accused to make it admissible. Ozark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 69, 100 SW 927. In arson where state's case depended largely on foot prints found, it was admissible to introduce defendant's shoes. Moore v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 180, 103 SW 188. Where evidence in arson consisted largely of foot prints, it was not error to show defendant's shoes to jury, exhibit peculiarities, and give description in connection with tracks found. Id. Articles found in accused's house, similar to those seen at scene of homicide, and having tendency to connect defendant therewith, admissible. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975.

53. In homicide admission of skull of decedent which had been buried two years and was decayed and broken held reversible error. Self v. State [Miss.] 43 S 945. In rape clothes worn by prosecutrix at time are admissible, though they had been washed since the crime as against objection that they had not been identified. State v. Brannan, 206 Mo. 718, 105 SW 602. Admission of **clothing of deceased** showing cuts made by knife not error. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116. Clothes worn by decedent at the time he was shot are admissible. Pate v. State [Ala.] 43 S 343. Clothes worn by decedent at the time

trative of the testimony or throwing light on the facts are competent. Whether the jury shall be allowed to inspect articles in evidence,[57] whether exhibition of wounds or scars,[58] or portions of defendant's person [59] shall be allowed, and whether proof of experiments shall be received, are questions addressed largely to the discretion of the trial court.[60]

Evidence at preliminary examination or at former trial.[See 8 C. L. 218]—Where it is shown that the witness is dead or beyond the jurisdiction or otherwise inaccessible,[61] his testimony upon the preliminary examination,[62] or upon a former trial,[63] is

he was shot are admissible to show where shots entered his body. Clark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 199, 102 SW 1136. In homicide where state's theory was that deceased was shot in the back, his clothes were admissible. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. After a showing that the clothing worn by deceased at the time of the killing was in the same condition at the time of trial, and had been in the custody of a witness continuously, it was proper to admit it. Tardiness in producing it would go to its effect only. State v. Craft, 118 La. 117, 42 S 718.

54. Photographs of defendant's hand taken with his permission held admissible where the hand was peculiar and marks made by such hand were found at scene of crime. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005. In homicide a photograph of scene of crime held admissible. People v. Grill [Cal.] 91 P 576. Skull of deceased, and photographs thereof before removal of brain, held competent evidence. State v. Bailey, 79 Conn. 589, 65 A 951.

55. Diagram admissible to explain witness testimony when shown to be correct on his cross-examination. Territory v. Emilio [N. M.] 89 P 239. Diagram of locus in quo held admissible though it appeared incorrect in some particulars. Territory v. Price [N. M.] 91 P 733.

56. Map made by witness from survey and shown by him to be correct held admissible to illustrate and explain testimony. Hisler v. State [Fla.] 42 S 692. Map of place of blasting held admissible. City of Spokane v. Patterson [Wash.] 89 P 402. Map showing subject of testimony is admissible to enable the jury to understand and apply the evidence. West v. State [Fla.] 43 S 445. In prosecution for assault with intent to kill map of locus in quo is competent though made at direction of prosecuting attorney to illustrate his theory of the case. State v. Remington [Or.] 91 P 473.

57. When objects are offered for the inspection of the jury, such inspection is allowable only when it appears that their condition is substantially the same as at the time when the act charged occurred. Certain colts, three years older than at time in question, held not proper for inspection by jury. State v. Cook [Idaho] 88 P 240. In prosecution for illegal sale of liquor, the jury may taste the liquor seized and produced in evidence to aid in determining whether it is intoxicating. Schulenberg v. State [Neb.] 112 NW 304.

58. Scar on person assaulted properly allowed to be exhibited in assault case. Mayes v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 966. 100 SW 386. Scar of wound on witness made by defendant in same fight in which deceased was killed properly allowed to be exhibited to jury as a part of the res gestae. Alarcon v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 383, 90 SW 179.

59. Proper, in rape case, to refuse to allow jury to examine defendant's private parts, where he alleged an injury resulting in loss of sexual desire. State v. Stevens, 133 Iowa, 684, 110 NW 1037.

60. A witness may testify as to experiments with a revolver as to what distances powder marks would be left on white paper. People v. Solani [Cal. App.] 91 P 654. Proof of an experiment is inadmisible unless it is shown that the conditions are similar to those of the occurrence in question. Hisler v. State [Fla.] 42 S 692. Targets into which shots have been fired from a gun should not be admitted over objection, where it does not appear that the same or a similar gun was used, or that the shot, powder, and loading where similar, or that the target was so placed as to be similar in position to the object in controversy. Id. The admissibility of such evidence is for the court and is a matter resting largely in the court's discretion, but it should be received with caution. Id. Error in admitting piece of pork, with cloth over it, into which shots had been fired, harmless, when it was not claimed to connect accused with act, but to illustrate effect of shots fired at close range. State v. Nowells [Iowa] 109 NW 1016. Issue being whether deceased committed suicide, and there being evidence that deceased's shirt was not burned, held proper to introduce pieces of the shirt into which shots had been fired from defendant's revolver, to show effect of shots at close range. Id. Such evidence not inadmissible because cartridges used were not the same as defendant's, in absence of showing that effect would have been different had such cartridges been used. Id.

61. Evidence sufficient to show that a witness had left the state so as to permit introduction of her testimony taken at the preliminary examination. People v. Grill [Cal.] 91 P 516. Proof of inability to find a witness after diligent search may be sufficient to warrant admission of testimony on a former trial, on the ground that he is inaccessible under Pen. Code, § 1001. Robinson v. State, 128 Ga. 254, 57 SE 315. Evidence of witness at former trial admissible when he was out of state or was absent at instigation of defendant. Ozark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 69, 100 SW 927. The return of an officer to a subpoena that a witness is dead establishes a prima facie case and renders admissible evidence of his testimony on the examining trial. Driggers v. U. S. [Ind. T.] 104 SW 1166. In absence of competent proof of diligent inquiry to ascertain whereabouts of absent witness, neither inquiries

admissible, and may be proved by the testimony of persons who heard it,[64] such as the judge or justice before whom it was given,[65] or by properly authenticated transcript or stenographic report.[66] The sufficiency of the search for a witness whose testimony on a former trial is desired to be introduced is a matter addressed to the discretion of the trial court.[67] Where there is an issue or doubt as to the accuracy of the predicate laid for the introduction of such testimony, the predicate should be submitted to the jury as a question of fact to be determined before such testimony is considered.[68] Former testimony of accused is sometimes excluded on the ground of privilege.[69] Records of proceedings of a commission which examined

by court in determining whether attachment should issue, nor testimony that he was last seen traveling with a show a month before, are sufficient conditions warranting secondary evidence of his testimony at the examining trial. Allen v. State [Ark.] 105 SW 70. Rev. St. 1899, § 3149, authorizing the reading of evidence given at a former trial does not authorize such reading where the witness is present in court at the time it is offered. State v. Coleman, 199 Mo. 112, 97 SW 574.

62. Where witnesses who testified at preliminary hearing were at time of trial beyond jurisdiction of the court, but accused was present and could have cross-examined at the preliminary trial, it is competent to prove their testimony. Butler v. State [Ark.] 103 SW 382. The fact that accused was not represented by counsel at preliminary hearing does not render such testimony incompetent. Id. Pen. Code, § 686, permitting testimony taken before committing magistrate to be read where witness is dead does not deny due process where defendant has had right of cross-examination. People v. Clark [Cal.] 90 P 549. Testimony of witness given at preliminary hearing held admissible where she was too ill at the time of trial to appear, notwithstanding right of accused to be confronted with witnesses. Spencer v. State [Wis.] 112 NW 462. Where witness could not be found after considerable search, transcript of testimony at preliminary examination was held admissible. People v. Melandrez [Cal. App.] 88 P 372. The introduction of testimony of one since deceased, reduced to writing at the preliminary hearing, at which time accused was confronted with the witness, does not violate the constitutional rights of accused. Neither U. S. Const. Amend. 6, nor Bill of Rights, § 10, are thereby violated. Porch v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 761, 99 SW 1122.

63. The testimony of a witness, since deceased, given at a trial in which he was cross-examined by the opposite party, or where there was opportunity for cross-examination, is admissible at a subsequent trial of the same proceeding. State v. Herlihy, 102 Me. 310, 66 A 643.

64. Ky. St. 1903, §§ 4645-4645, providing for taking of stenographic notes at trial, does not change method of proving testimony of deceased witness by by-standers, and does not make stenographer's notes best evidence on subsequent trial. Austin v. Com., 30 Ky. L. R. 295, 98 SW 295. Under statute requiring examining magistrate to make in writing only a general statement of substance of what witnesses before him testified to, testimony as to what defendant said at examining trial is not objectionable as secondary. Willis v. U. S., 6 Ind. T. 424, 98 SW 147.

65. Testimony given at preliminary hearing may be proven by the justice before whom it was had and his testimony that writings subscribed by them was the substance of their testimony. Butler v. State [Ark.] 103 SW 382. Where accused testified at examining trial, it was not error to permit the judge who conducted it to testify at subsequent trial as to what accused testified to. Freeman v. Com., 31 Ky. L. R. 639, 103 SW 274. Such testimony may be proved by the judge who presided, who states that he can give the substance of all of such testimony. State v. Herlihy, 102 Me. 310, 66 A 643. If the exact language used by the witness cannot be proved, the substance may be given. Id.

66. Transcript of testimony of a deceased witness, who testified at prior trial, may be proved by official stenographer and read by him as evidence. Austin v. Com., 30 Ky. L. R. 295, 98 SW 295. Where in rape prosecutrix died soon after examining trial, it was competent for stenographic report of her testimony at such hearing to be admitted. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003. Stenographer's report of testimony of witness, since deceased, at a former trial, held admissible, when notes were shown to be correctly taken and transcript was authenticated. Jones v. State, 128 Ga. 23, 57 SE 213. One who took down testimony on former trial in short hand held properly allowed to read defendant's testimony from his short hand notes. State v. Kendig, 133 Iowa, 164, 110 NW 463. Under Pen. Code, §§ 686, transcript of testimony given by witness at preliminary hearing held inadmissible. People v. Pembroke [Cal. App.] 92 P 668.

67. No review unless abuse shown. Robinson v. State, 128 Ga. 254, 57 SE 515.

68. Ozark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 69, 100 SW 927.

69. Under Kirby's Dig. § 3087, providing that when two or more persons are concerned in commission of a crime testimony of one relative to such offense shall not be used against him in a subsequent prosecution for same offense, testimony of one given before examining magistrate cannot be used against him, on trial under an indictment. Marshall v. State [Ark.] 104 SW 934. Statements by one accused of murder made as a witness upon a preliminary examination, before a justice, without formal complaint, upon which examination the justice commits the accused to await the action of the grand jury, must be treated as having been made upon a legal examination, and if objected to, cannot be given in evidence against him on his trial. State v. May [W. Va.] 57 SE 366.

accused and had him committed to an asylum are inadmissible to establish insanity as a defense to a criminal prosecution.[70]

Quantity required and probative effect.[See 8 C. L. 218]—The credibility of witnesses[71] and the weight to be given their testimony,[72] including testimony of experts,[73] of accomplices,[74] and of accused,[75] are questions for the jury. Ordinarily positive testimony is to be given greater weight than negative,[76] but this rule does not apply where all the witnesses had equal opportunities to observe the facts.[77] Purely impeaching evidence is not to be considered as substantive proof.[78] Evidence of good character may be of itself sufficient to raise a doubt, but if the jury on all the evidence is convinced beyond reasonable doubt, character evidence is unavailing.[79] Conviction may rest upon circumstantial evidence,[80] provided it is such

70. People v. Willard, 150 Cal. 543, 89 P 124. Such record does not constitute a judgment roll, fixing the mental status of accused and the papers, affidavits, etc., therein, are hearsay. Id.

71. Weight of testimony of witness shown to have made contradictory statements out of court is for the jury. Raymond v. People, 226 Ill. 433, 80 NE 996.

72. Weight to be given confession is for jury. State v. Adams [Del.] 65 A 510. Where testimony is conflicting, the jury must reconcile it if possible, and if they cannot they should give credit to the testimony they deem most worthy of belief. State v. Briscoe [Del.] 67 A 154. Positive evidence of one credible witness may be sufficient to support a conviction, where corpus delicti is proved. Buckley v. State [Neb.] 112 NW 283. The uncontradicted testimony of one credible witness is sufficient proof of facts testified to. Lipsey v. People, 227 Ill. 364, 81 NE 348. Where on a trial for aggravated assault the prosecuting witness testified, it was not error to refuse to require the other eyewitness to testify. Thompson v. State [Tex. Cr. App.] 89 SW 1081.

73. Opinions of experts on the question of insanity are not controlling but the jury should reach their conclusion from all the evidence. United States v. Chisholm, 153 F 808. Jury may consider expert testimony the same as other testimony and it is not error to refuse to limit it. Turner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 35, 89 SW 975. Testimony of experts and physicians is to be tested by same rules as other testimony. State v. Crane, 202 Mo. 54, 100 SW 422. Expert testimony and admissions must be considered by the jury in connection with other evidence and should receive as much weight as it is entitled to. State v. Briscoe [Del.] 67 A 154.

74. An accomplice is a competent witness, the fact that he is an accomplice going only to weight of his testimony. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005. Testimony of accomplices should be scrutinized with great care. United States v. Richards, 149 F 443. Testimony of an accomplice is to be weighed by considering his connection with the crime, his interest, appearance on stand, reasonableness and consistency of his testimony. Butt v. State [Ark.] 98 SW 723. On a prosecution for perjury, in naturalization proceedings, an applicant for citizenship is not an accomplice within the rule that testimony of an accomplice must be received with caution, where it does not appear that the false testimony was given at his investigation. Holmgren v. U. S. [C. C. A.] 156 F 439.

75. The testimony of a defendant who takes the stand on his own behalf is entitled to consideration and should be subjected to the same tests as to credibility that are applied to other witnesses. Burke v. State [Neb.] 112 NW 573.

76. Where evidence for the state is wholly negative, and that for defendant is definite, positive, and unimpeached, and clearly establishes the innocence of accused, the negative must yield to the positive testimony, and a verdict contrary to this rule must be reversed as contrary to law. Jacobs v. State, 1 Ga. App. 519, 57 SE 1063. Positive testimony must be preferred where it can be accepted as true without rejecting the negative as untrue. Id.

77. The rule that positive testimony is ordinarily to be preferred to negative is inapplicable where two witnesses flatly contradict each other as to a matter which, if it existed or occurred would have been equally known to both. Phillips v. State, 1 Ga. App. 687, 57 SE 1079. The rule that the existence of a fact testified to by one positive witness is to be believed rather than that such fact did not exist because many witnesses who had the same opportunities to observe swear that they did not see it does not apply when one of two persons having equal facilities for seeing swears that it did occur and the other swears that it did not. Wood v. State, 1 Ga. App. 684, 58 SE 271.

78. Evidence introduced merely to impeach a witness is not to be considered as substantive proof. Fizini v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 836, 100 SW 394. Admissions and contradictory statements of prosecutor in embezzlement case are not admissible as original, substantive evidence. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 NW 495.

79. Commonwealth v. Miller, 31 Pa. Super. Ct. 309.

80. The corpus delicti may be established by circumstantial evidence. Lipsey v. People, 227 Ill. 364, 81 NE 348; Miles v. State [Ga.] 59 SE 274. That some of the evidence offered to prove corpus delicti is circumstantial is no objection to its competency or conclusiveness. Commonwealth v. Sheffer [Pa.] 67 A 761. A petition for certiorari on the ground that the evidence was insufficient to show guilt is properly refused where there is ample proof though it is all circumstantial. Weldon v. State, 127 Ga. 45, 55 SE 1044.

as to exclude every reasonable hypothesis of innocence.[81] Testimony of an accomplice[82] is not ordinarily sufficient to support conviction unless corroborated[83] by other proof connecting accused with the crime,[84] though in some states uncorroborated testimony of an accomplice seems to be sufficient to support conviction of certain crimes.[85] An admission[86] or confession[87] will not alone support a con-

81. Hazelwood v. Territory, 17 Okl. 515, 87 P 470; Duckworth v. State [Ark.] 103 SW 601. Circumstantial evidence must be consistent with guilt and inconsistent with any other rational conclusion. State v. Samuels [Del.] 67 A 164; State v. Tyre [Del.] 67 A 199. Circumstantial evidence must be such as to exclude every reasonable hypothesis except that of guilt. United States v. Richards, 149 F 443; Strong v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 969, 105 SW 785. To warrant conviction on circumstantial evidence, all circumstances must be proven and when taken together must prove moral certainty of guilt. State v. Blydenburg [Iowa] 112 NW 634. Circumstantial evidence is insufficient if it does not show defendant's guilt to the exclusion of every other reasonable supposition. Amorous v. State, 1 Ga. App. 313, 57 SE 999. Circustantial evidence must be inconsistent with any theory of innocence and the facts must be affirmatively established. Griffin v. State [Ga. App.] 58 SE 781. The state must prove every material allegation necessary to constitute the offense charged, and when a given act may be done under certain circumstances without guilt, the proof must take the act out of the exception. Ferguson v. State, 1 Ga. App. 841, 58 SE 57. Circumstantial evidence will not sustain a conviction over several reasonable hypotheses of innocence. Murray v. State [Ga. App.] 58 SE 1060. In homicide where evidence is circumstantial facts and circumstances should be consistent with each other, with the guilt of defendant, and inconsistent with any reasonable theory of innocence and of such character as to produce moral conviction on an unprejudiced mind. State v. Francis, 199 Mo. 671, 98 SW 11. Instruction requiring circumstantial evidence to exclude every hypothesis instead of every "reasonable" hypothesis except guilt is erroneous. Strickland v. State [Ala.] 44 S 90.

82. Persons knowingly receiving property stolen by defendant, and concealing the fact of the theft, were accessories and corroboration of their testimony was necessary. Richard v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 832, 90 SW 1017. Mere concealment of crime or falsely denying knowledge thereof does not make an accomplice within the accomplice evidence rule. Alexander v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 878, 90 SW 1112. Coemployes of one indicted for practicing dentistry without license need not be corroborated, but were it necessary, corroboration by defendant himself is sufficient. People v. Stein, 112 App. Div. 896, 97 NYS 923. One who acted with accused with the knowledge and consent of owner and officers (in stealing cattle) held not an accomplice within the corroboration rule. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641. Refusal to charge on accomplice rule not error. Id.

83. Pen. Code, § 2089, expressly provides that uncorroborated testimony of an accomplice is insufficient. State v. McCarthy [Mont.] 92 P 521. The uncorroborated testimony of an accomplice is insufficient to support a conviction. State v. Kelliher [Or.] 88 P 867. To warrant conviction on testimony of an accomplice, such testimony should usually be corroborated in some material part though not in all particulars. United States v. Giulianai, 147 F 594. Evidence corroborating accomplice held insufficient in burglary case. Adams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 217, 102 SW 1129. Evidence held insufficient to corroborate accomplice in trial of forgery charge. People v. Colmey, 116 App. Div. 516, 20 Crim. R. 424, 101 NYS 1016. Testimony of accomplice held sufficiently corroborated to sustain conviction. Barbe v. Territory [Okl.] 91 P 783. Corroborative proof in burglary case held insufficient, not including breaking into house or room. Green v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 31, 90 SW 1115. Under Cr. Code Prac. § 241, providing that conviction cannot be had on uncorroborated testimony of an accomplice. corroboration is not sufficient if it merely shows commission of offense and circumstances thereof. Simpson v. Com., 31 Ky. L. R. 769, 103 SW 332. Testimony of accomplice held sufficiently corroborated to sustain conviction for recovering stolen goods. State v. Ozias [Iowa] 113 NW 761. In larceny evidence as to possession of stolen property and prior attempt to commit the crime held sufficient to support a conviction based largely on direct testimony of accomplice. Cook v. State, 80 Ark. 495, 97 SW 683. Defendant was charged with receiving stolen goods in two counts. Held testimony of one who was an accomplice in the first count, but not in the second, as to what defendant did in the first, was independent evidence on the second to show defendant's guilty knowledge. Commonwealth v. Brennor, 194 Mass. 17, 79 NE 799.

84. One cannot be convicted on the uncorroborated testimony of an accomplice and the corroboration required must be proof of substantial facts tending to incriminate accused. Cooper v. Territory [Okl.] 91 P. 1032. Testimony of an accomplice cannot convict unless corroborated by other evidence tending to connect accused with the offense sufficient to satisfy the jury of the truth of such evidence. Howe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 152, 102 SW 409. A conviction cannot be had upon the testimony of an accomplice unless he is corroborated by other evidence not only of the commission of the offense and the circumstances thereof but of the connection of defendant therewith. People v. Sciaroni [Cal. App.] 89 P 133. Evidence that merely excites suspicion of defendant's connection is not sufficient corroboration. Id.

85. Uncorroborated testimony of accomplice. if believed by jury, is sufficient to sustain conviction for obtaining money by confidence game. Juretich v. People, 223 Ill. 484, 79 NE 181. In Delaware conviction may be based on the uncorroborated testimony of an accomplice. State v. Stewart [Del.] 67 A 786.

viction. But a confession, coupled with independent proof of the corpus delicti [88] is sufficient without other corroboration of the confession.[89] Evidence of good character is to be considered as substantive proof,[90] but is not alone enough to show excuse, justification, or mitigation.[91]

§ 10. *Trial.*[See 8 C. L. 220]—The right to a trial by jury and matters connected with the selection of the jury are elsewhere discussed.[92]

(§ 10) *A. Conduct of trial in general.*[See 8 C. L. 220]—While accused has a right to a public,[93] fair, and impartial [94] trial, yet the regulation of the proceedings rest largely in the trial court's discretion, the exercise of which will rarely be interfered with by appellate courts.[95] To warrant such interference, it much appear that accused has been prejudiced.[96] In the notes are given decisions applying this rule as to the conduct of the trial and the order of proceedings in general,[97] as to

86. An admission is a statement of a fact or facts pertinent to the issues and tending, in connection with other facts, to prove guilt, but which is alone insufficient to authorize conviction. Ransom v. State [Ga. App.] 59 SE 101. Admission should be received with caution unless deliberately made and fully proven. Lipsey v. People, 227 Ill. 364, 81 NE 348. Testimony of accused in a former prosecution that he had been convicted of a felony held insufficient in a subsequent prosecution to prove an allegation of former conviction. People v. Chadwick [Cal. App.] 87 P 384.

87. An uncorroborated confession will not sustain a conviction. Rucker v. State [Ga. App.] 58 SE 295. A confession not being plenary and not being connected with the specific act of adultery charged held not sufficient to support a conviction. McAllister v. State [Ga. App.] 58 SE 1110. The law does not favor convictions based upon confessions and least of all upon implied confessions. Jones v. State [Ga. App.] 58 SE 559.

88. Full proof of the corpus delicti, independently of a confession, is not required. It may be proved by the confession, corroborated by other evidence. So held in homicide case. State v. Banusik [N. J. Err. & App.] 64 A 994. One may be convicted on confessions coupled with proof of commission of the crime. Marshall v. State [Ark.] 104 SW 934. Proof of corpus delicti in homicide, together with defendant's confession of complicity therein, is sufficient to support conviction. Gallegos v. State [Tex. Cr. App.] 90 SW 492. Corpus delicti cannot be established by proof of confession but where it has been proved confession may be used to connect defendant with the crime. Ex parte Patterson [Tex. Cr. App.] 16 Tex. Ct. Rep. 710, 95 SW 1061. In prosecution of juror for accepting a bribe in a will contest in which he sat as juror, his confession that he had accepted the bribe to render a verdict against the validity of the will was held sufficiently corroborated by other proof that he was a juror, that the person who he said gave him money was employed in the case, and that verdict was against the will. Commonwealth v. Killion, 194 Mass. 153, 80 NE 222.

89. Where crime is proved aside from confession, defendant may be convicted without corroboration of confession. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064.

90. Evidence of good character of accused is to be considered in connnection with all other testimony and given such weight as the jury deem it entitled to. State v. Stewart [Del.] 67 A 786; State v. Tyre [Del.] 67 A 199.

91. Instruction that if previous good character of defendant was proved it should be considered on question of guilt or innocence, but that previous good character would not excuse, justify, palliate, or mitigate the offense, if all the evidence showed the guilt of defendant, held proper. State v. Maupin, 196 Mo. 164, 93 SW 379.

92. See Jury, 8 C. L. 617.

93. What is public trial, and what persons may be excluded, and under what circumstances, discussed. State v. Hensley, 75 Ohio St. 255, 79 NE 462. Order of exclusion from court room held too sweeping. Id.

94. It is the absolute right of accused to have a fair and impartial trial and the benefit of every reasonable doubt. Jamison v. U. S. [Ind. T.] 104 SW 872.

95. The conduct of the trial rests largely in the discretion of the trial judge and an appellate court will not interfere with a judgment unless such discretion has been abused to the prejudice of accused. Esterline v. State [Md.] 66 A 269.

96. Alleged misconduct of relatives of deceased in court room, evidently to influence the jury, held not to have prejudiced defendant. Holt v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 751, 100 SW 156.

97. As to order of proof, see following paragraph. A request to charge may in the discretion of the court be received after argument. State v. Williams, 76 S. C. 135, 56 SE 783. Refusal to stop to allow counsel to reduce exceptions to writing not error where he took over 100 and court did not refuse to allow them. Taylor v. State [Tex. Cr. App.] 90 SW 647. Where it was stipulated that advantage should not be taken of a state's witness' absence but attorney for defendant commented on it in argument, it was not error to reopen the case and let in his testimony, the defendant being offered opportunity to introduce other evidence. State v. Hedican, 35 Mont. 381, 89 P 730. In homicide refusal to declare a mistrial where a child of a juror was killed and he was informed thereof before defendant's counsel had addressed the jury and the charge given was not an abuse of discretion. State v. Guthrie [N. C.] 59 SE 652. The court may declare a mistrial in all cases but in capital cases the facts must be fully found and placed of record so that on plea of former jeopardy the action of the court may be reviewed. Id. Where no demand for a ste-

what persons not connected with the trial shall be allowed in the court room,[98] as to the conduct of spectators,[99] as to guarding accused in the court room, or taking measures to prevent his escape.[1] There should be at least substantial compliance with statutes requiring the indictment and plea to be read to the jury.[2] In some states, county commissioners have no authority to employ additional counsel in criminal prosecutions,[3] but it has been held that accused cannot complain of the employment of additional counsel, notwithstanding such want of power.[4]

Order of proof See 8 C. L. 220 is discretionary,[5] and the action of the court in re-

nographer is made in a criminal trial, but a mere inquiry on behalf of the defendant as to whether one would be present, there is no prejudicial error in going to trial without a stenographer. Oberer v. State of Ohio, 8 Ohio C. C. (N. S.) 93. The three days allowed for the motion includes holidays except when the last day is a holiday. Id. Where special judge presided at opening of trial and made no memorandum of jurors on special venire who were excused and when regular judge took charge counsel could not state what jurors had been excused and the court excused absent jurors from the bench and directed sheriff to summon panel of talesmen, it was not error to overrule objection the following day to proceeding in absence of part of jurors of original special venire. Hughes v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 525, 95 SW 1034. The court has a right to hear cases as they stand on the docket. Commonwealth v. Carnes, 30 Ky. L. R. 506. 98 SW 1045. Under Code Cr. Proc. 1895, art. 697, providing the order of procedure, it was not error to refuse defendant's request to make a statement to the jury after it was impaneled where it did not appear that he was refused permission to make such statement at the time provided by statute. Owen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 974, 105 SW 513. No error in closing evidence against defendant's objection that he had other witnesses to introduce, but could not because they were not in the court room, where defendant did not inform the court as to who the witnesses were nor as to what points they would testify, and did not take steps to secure their attendance. State v. Maupin, 196 Mo. 164, 93 SW 379.

98. Not error to refuse to permit others jointly indicted with defendant to be in court room to aid defendant's counsel in cross-examination. Parnell v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 331, 98 SW 269. Where the spectators at a criminal trial of lascivious or immoral character are so obtrusive as to embarass a witness during the examination, and it becomes apparent to the trial court that the due administration of justice is being impeded, the court may temporarily clear the court room of all persons except court officers, counsel, witnesses and defendant. State v. Callahan, 100 Minn. 63, 110 NW 342. Although the record does not expressly show a withdrawal or limitation of the order, it will be inferred that it was for a temporary purpose only, and that it was not enforced after the reason for it ceased to exist. Id. An order of exclusion infringing the right to a public trial is beyond the power of the court. Held improper to exclude all except jury, defendant's counsel, members of bar, newspaper men, and one other, in trial of rape case. State v. Hensley, 79 Ohio St. 255, 79 NE 462.

99. That mother of decedent shed tears, sobbed, etc., on witness stand, held not a ground for reversal, where court could not control her conduct. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445. Misconduct of a bystander is generally not ground for discharge of the jury unless of such a nature as to necessarily influence their verdict. State v. Wimby, 119 La. 139. 43 S 984. In homicide it was not error to permit decedent's widow to sit in court room, and while weeping make unanticipated outbreak denouncing defendant, she having been immediately ejected. Stevens v. Com., 30 Ky. L. R. 290, 98 SW 284. Defendant connot complain of weeping of widow of decedent during argument of counsel. State v. Barrington, 198 Mo. 23, 95 SW 235.

1. Where accused charged with murder, had twice attempted to escape, the placing of two guards in the court room to watch him was not objectionable as unduly prejudicing the jury. State v. Kenny [S. C.] 57 SE 859. Where court ordered manacles removed from defendant during trial but allowed them to be replaced in absence of jury before he was taken from the court room, held not an abuse of discretion though defendant could have been otherwise guarded. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005.

2. Purpose of Cr. Code Prac. § 219, requiring indictment to be read and plea of accused stated to the jury is to inform the jury of the nature of charge and plea and substantial compliance, is sufficient. Combs v. Com. [Ky.] 104 SW 270. On a second trial of the charge of manslaughter, the original indictment charging murder is used and may and should be read to the jury with accused's plea thereto, though upon a former trial thereon accused was acquitted of murder by conviction for manslaughter. State v. Walker, 133 Iowa, 489, 110 NW 925.

3. Bechtel v. Fry, 217 Pa. 591, 66 A 992.

4. Where special counsel was employed to assist in the prosecution of violation of local option cases, held that accused could not complain though board of county commissioners were without authority to employ such counsel. State v. O'Brien, 35 Mont. 482, 90 P 514.

5. People v. Craig [Cal.] 91 P 997; State v. Connor, 74 Kan. 898, 87 P 703; State v. Dilts, 191 Mo. 665, 90 SW 782; Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312; State v. Gohl [Wash.] 90 P 259. B. & C. Comp. § 842, expressly provides that the order of proof is within the discretion of the trial judge. State v. Remington [Or.] 91 P 473. Conduct of trial, including order in which evidence is introduced, is discretionary. State v. Taylor, 202 Mo. 1, 100 SW 41.

jecting or receiving evidence out of its proper order,[6] or in permitting, or refusing to permit, the case to be reopened to admit further proof,[7] will be interfered with on appeal only where an abuse of discretion [8] or error of law [9] appears.

6. In assault with intent to kill, evidence of threats, offered before the nature of the defense was shown, was properly rejected. State v. Horn [S. D.] 111 NW 552. It is within the discretion of the court to grant permission to the prosecution to introduce additional evidence in chief after the close of the defnse, and after requests for instructions to the jury have been passed on. Hughes v. State, 9 Ohio C. C. (N. S.) 369. Temporary exclusion of testimony as incompetent at the time held not error though the witness was not recalled, accused being fully advised as to nature of ruling. State v. Arnold, 206 Mo. 589, 105 SW 641.

Laying predicate: Permitting reading of testimony of a witness at preliminary hearing before evidence that the witness had left the state. People v. Grill [Cal.] 91 P 515. Where connecting evidence is essential to render other evidence relevant, it is discretionary with the court to first require connecting evidence. Ross v. State [Ind.] 82 NE 781. The proper rule in examining nonexpert is to first lay a predicate for his opinion, though failure to comply with such rule is not reversible error where facts are stated in course of testimony. Atkins v. State [Tenn.] 105 SW 353. Not error to admit record showing daily sales of tickets, on statement of district attorney that he would show it to be a book of original entries by testimony of the witness who made them. People v. Lowrie [Cal. App.] 87 P 253. Court may permit acts and declarations of conspirators before proof of conspiracy. Schultz v. State [Wis.] 113 NW 428. Not material whether evidence to show conspiracy be introduced before or after acts of one conspirator are admitted against another. Butt v. State [Ark.] 98 SW 723. Acts of one conspirator should not be admitted against another until conspiracy is shown but the court in its discretion may change order of proof. Chapline v. State, 77 Ark. 444, 95 SW 477. Admission of acts and declarations of a coconspirator before proof of the conspiracy where the district attorney stated that he would show the conspiracy, and the jury were charged that unless they believed such conspiracy was established, to disregard the evidence. People v. Stokes [Cal. App.] 89 P 997.

Proof of corpus delicti: Permitting evidence before corpus delicti is established not ground for reversal unless prejudice appears. People v. Bianchino [Cal. App.] 91 P 112. In homicide death and the fact that it was brought about by some criminal agency should as a general rule, precede proof connecting defendant with the crime, but the order of proof is within the discretion of the trial court and it will not be reviewed unless substantial injustice have resulted. State v. Guthrie [N. C.] 59 SE 652. In prosecution for adultery, a contention that admissions by accused forming links in circumstantial evidence should not have been admitted until after proof of corpus delicti is without merit, not within rule as to order of proof of confessions. Till v. State [Wis.] 111 NW 1109.

Rebuttal: What evidence may be received in rebuttal after defendant has rested rests in court's discretion. State v. Boylan, 79 Conn. 463, 65 A 595. Admission in rebuttal of evidence competent in chief cannot be urged as error. People v. Willard, 150 Cal. 543, 89 P 124. It is permissible for the state, in rebuttal to meet same specific claim of the defense with further evidence. State v. Baird, 79 Vt. 257, 65 A 101. It is discretionary with the court to permit the state to introduce in rebuttal what should have been introduced in chief. Butler v. State [Ark.] 103 SW 382. Where defendant's evidence was that decedent shot himself, pieces of his shirt, into which shots had been fired to show effect of shots at close range was proper evidence in rebuttal though they would have been proper as a part of the state's main case. State v. Nowells [Iowa] 109 NW 1016. Where accused offers evidence of alibi, state may rebut. People v. Yee Foo [Cal. App.] 89 P 450. Evidence in rebuttal of alibi held admissible. Id. Where in local option case after state rested it placed a witness on the stand who testified that on a certain date he purchased a certain beverage and took the same with two bottles of beer to a chemist, held not objectionable as not rebuttal, but affirmative matter which should have been adduced before the state rested, and was calculated to take an unfair advantage of accused. Magill v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 239, 103 SW 397.

7. Refusing to reopen the case and receive other evidence is discretionary with the court. People v. McPherson [Cal. App.] 91 P 1098. Not error to permit state to offer other evidence after close of evidence. State v. Miles, 199 Mo. 530, 98 SW 25. Held within discretion of court to allow state to examine a witness after accused had closed, though the testimony should have been brought in before the state rested. Nicholson v. State [Ala.] 42 S 1015. Under Code Cr. Proc. 1895, art. 689, authorizing introduction of testimony at any time before conclusion of argument it was not error to permit the state to introduce testimony after it had closed its case. Pool v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 271, 103 SW 892. Permitting the opening of the case and admitting other evidence after argument begun not an abuse of discretion. State v. Leonard [Iowa] 112 NW 784. It is discretionary with the court to permit other witnesses to be called after motion to take case from jury. Lipsey v. People, 227 Ill. 364, 81 NE 348.

8. Exercise of discretion of court in order of proof will not be interfered with, in absence of showing of injustice and prejudice. State v. Thomas [Iowa] 109 NW 900. Admission of evidence after commencement of argument under statute so authorizing will not be disturbed on appeal unless abuse of discretion appears. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 SW 1044. No abuse of discretion to permit admission of evidence after argument commenced where the court informed the other party that he could offer any evidence he desired before argument proceeded. Id.

9. Under White's Ann. Code Cr. Proc. art. 698, providing that the court may receive

Conduct and remarks of judge.[See 8 C. L. 221]—In general the trial judge should confine himself to an enunciation of the law,[10] leaving to counsel the duty of eliciting testimony,[11] and to the jury the determination of the credibility of witnesses and the weight of their testimony,[12] and he should admit or exclude offered testimony without comment,[13] and avoid remarks or comments tending in any manner to prejudice the right of accused to a fair and impartial trial.[14] But these matters rest largely in the discretion of the trial judge, and improper conduct or remarks will be held ground for reversal only when prejudice results.[15] Thus it has been held not improper for the court to examine witnesses,[16] to caution or otherwise instruct the jury[17] or witnesses,[18] to prevent useless delays in the course of examina-

testimony at any time before argument is concluded, it is error to refuse to receive testimony not offered until closing argument was reached where it was material and necessity therefor could not be anticipated at trial. Elsworth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 903. Erroneous admission of evidence held not to entitle the state to introduce certain evidence in rebuttal thereof. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182.

10. The practice in harmony with our judicial system requires trial judges to confine themselves to an enunciation of the law, leaving to counsel the duty of elucidating the facts, and to juries the finding of the truth. Ford v. State [Ga. App.] 59 SE 88.

11. The practice of examining witnesses by the trial judge is disapproved. Such practice frequently delays and defeats justice and impairs the right to fair trial. Ford v. State [Ga. App.] 59 SE 88. Rigid and extended examination of witnesses by the trial judge upon vital points of the defense has a tendency to discredit testimony. Id. Examination of witnesses by court held to violate Civ. Code 1895. § 4334, and to constitute reversible error. Lunsford v. State [Ga. App.] 58 SE 689. Where a witness testifies positively to a fact, it is improper for the court to cross-examine him at length. Glover v. U. S. [C. C. A.] 147 F 426.

12. It is improper for the court to comment on the evidence or suggest to the jury what fact is proven or disproven. State v. Fowler [Idaho] 89 P 757.

13. Court should admit or exclude offered testimony without comment. Rutherford v. State [Tex. Cr. App.] 90 SW 172. It is error, especially in a closely contested case, for the court in making rulings to remark that he may be wrong in the ruling and state that counsel can appeal. Holt v. State [Ga. App.] 58 SE 511. While some latitude should be allowed to trial judges in stating reasons for their rulings on questions of evidence, it is never proper for them to make any statement in the hearing of the jury indicating judicial disparagement of the testimony on one side or judicial approval of that on the other. Sharpton v. State, 1 Ga. App. 542, 57 SE 929.

14. Remarks of court that he had done all in his power to do his full duty toward accused held objectionable. Duthey v. State, 131 Wis. 178, 111 NW 222. The court, in asking questions of witnesses, should carefully guard against intimating any opinion on the facts or using any expression that might prejudice the rights of either party. Sharpton v. States, 1 Ga. App. 542, 57 SE 929.

15. Where there was no lack of evidence to support conviction, impatient and improper remarks of court to counsel is not ground for reversal. Tuttle v. State [Ark.] 104 SW 135. Chance remark of court on a question of practice is not ground for reversal. State v. Cornelius, 118 La. 146, 42 S 754.

16. In directing the course of a trial, the court has a right to propound questions, without regard to objections. State v. Caron, 118 La. 349, 42 S 960. Examination of witness by court held not to violate the rule that where a witness testifies positively to a fact, the court should not question him at length as to his knowledge. Isaac v. U. S. [Ind. T.] 104 SW 588. Mere multiplicity of questions propounded to a witness by the judge does not of itself constitute error but borders dangerously near the line of prohibited judicial interference with the right of the jury. Ford v. State [Ga. App.] 59 SE 88. Though it is counsel's province to question a witness, the court may reiterate a question in order to understand him or have the witness explain his meaning. Elsworth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 903.

17. Comment of court in ruling on objection to argument of counsel to state that the jury might infer other facts if they found certain facts true. Lam Yee v. State, [Wis.] 112 NW 425. Instruction to jury before any evidence was introduced, that they should listen to the testimony, bear in mind the demeanor of witnesses and especially as to whether witness appeared credible, was not error. Heuber v. State, 131 Wis. 162, 111 NW 63. Remarks of court in ruling on admissibility of dying declarations, "the rule is this—that when a man feels like he is in a dying conditon and makes a statement it has the same weight as if made under oath upon the theory that a dying man would not represent a fact" held not error. Solomon v. State [Ga. App.] 58 SE 381. Proper for court to say to jury that state had a right to employ private counsel and that such counsel was entitled to same consideration as county attorney, where defendant's attorney had referred to a former county attorney, retained by the state, as hired counsel. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. Remarks of court that words might be circumstances as well as acts and that therefore what was said was admissible held not error. Waggoner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 717, 98 SW 255. Court properly explained that affidavit introduced was not one upon which a prosecution for perjury could be based because not a statement required to be sworn to by law. Isaac v. U. S. [Ind. T.] 104 SW 588.

18. Not error for court to direct witness

tion which do not tend to throw light on the issues,[19] to admonish counsel,[20] to explain rulings,[21] where in so doing he avoids intimating any opinion on the facts,[22] or the credibility or character of witnesses [23] or accused.[24] Reference to the failure of accused to testify is usually improper.[25] The court has no right to interrupt proper and legitimate argument.[26]

Consolidation See 8 C. L. 222 of indictments charging offenses of the same nature and degree, under the same statute, is proper.[27]

Severance See 8 C. L. 222 rests largely in discretion.[28] An application for prior

to answer "yes" or "no" to question whether he knew decedent's reputation as being peaceable and law-abiding. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445. Court held not to have initmated any opinion on the truth or falsity of a witness' testimony by informing him that willful perjury causing conviction and execution was punishable by death, and giving him an opportunity to change his testimony if he desired. People v. Soeder, 150 Cal. 12, 87 P 1016. It was not improper to allow the jury to know that a witness testified with such knowledge. Id.

19. State v. Caron, 118 La. 349, 42 S 960. Where an accused is being tried before the court without a jury, it is not error for the judge to intervene and curtail a rambling statement as to irrelevant matters, after he has said all he desires to say about the offense. Sutton v. State [Ga. App.] 58 SE 544.

20. It is proper for the court to admonish counsel whose conduct and attitude tends to disconcert and intimidate a child witness. People v. Collins [Cal. App.] 91 P 158. Remarks of court to the effect that witness had answered question as positively as he could honestly do so, held not error where counsel was endeavoring on cross-examination to draw out a more definite answer. Wilson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 365, 90 SW 312. Court discovered that accused's counsel knew of accused's absence from the court room before the court was aware of it, and said in a low voice to his counsel that he was trying to give them a fair trial but that they did not seem to appreciate it. It appeared that the remark could not have been heard by the jury. Held no ground for reversal. Vanderford v. State, 126 Ga. 753, 55 SE 1025.

21. Remark of court in overruling objection to a question, that he could not put that kind of a bridle on the district attorney, held not improper. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509.

22. The court in stopping improper argument should not express an opinion as to what has or has not been proven. Parker v. State [Ga. App.] 59 SE 204. Error for judge to elicit certain testimony and then tell jury what the effect of it would be if true. State v. Potter, 125 Mo. App. 465, 102 SW 668. Remark of judge as to what he was "inclined to think" on a disputed point held prejudicial error. State v. Turner, 125 Mo. App. 21, 102 SW 599. Remarks of court held calculated to impress the jury with the belief that the court considered certain evidence very material and error was not cured by subsequent directions to disregard the same. Rice v. State [Tex. Cr. App.[19 Tex. Ct. Rep. 353, 103 SW 1156. For the trial judge to remark in the presence of the jury that if defendant did not put in any evidence he would direct a verdict against him is reversible error, however conclusive the evidence of guilt. Barge v. State [Ga. App.] 59 SE 192. In the exercise of the right of questioning witnesses, the presiding judge should not by any form or manner intimate any opinion upon the facts. Rouse v. State [Ga. App.] 58 SE 416. Where the guilt or innocence of accused depends on whether the jury believed prosecuting witness, it is error for the court to do or say anything amounting to an expression of opinion as to what it believed to be the truth. Durham v. State [Ga. App.] 58 SE 555. Questions asked by court held prejudicial. Id Examination of witness by the court in such manner as to emphasize the weakness of the defense is ground for new trial. Civ Code 1885, § 4334. Taylor v. State [Ga App.] 59 SE 12.

23. Reference to witness for accused as "the Smith woman" not prejudicial when used in respectful manner. State v. Wright, [N. C.] 59 SE 541.

24. Remarks of judge that if witness did get drunk, etc., his testimony would not amount to much, held reversible error as reflecting on testimony of accused. Chancey v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 526, 96 SW 12.

25. Rev. St. 1906, § 7286, forbids such reference to the failure of accused to testify which would suggest an inference that if he testified he would give evidence against himself. Tate v. State, 76 Ohio St. 537, 81 NE 973. Instruction that failure of accused to testify does not relieve the state from the burden of proving his guilt beyond reasonable doubt is not reversible error. Id.

26. Parker v. State [Ga. App.] 59 SE 204. It is error for the court to needlessly interrupt counsel and by such conduct impress the jury with the fact that a certain witness upon whose testimony the case depended should be believed and the defendant discredited. Id.

27. Rev. St. § 1024. Krause v. U. S. [C. C. A.] 147 F 442.

28. Severance of trial of accused persons discretionary. State v. Kenny [S. C.] 57 SE 859. The granting or refusing of motions to sever rests entirely within the discretion of the trial court. Smith v. State [Md.] 66 A 678. The request of defendants charged in the same indictment for separate trials is addressed to the discretion of the court. Krause v. U. S. [C. C. A.] 147 F 442. In perjury where defendant had been jointly accused with others in a joint complaint before a magistrate, but was tried on a separate information, reversal will not be had on that ground alone, though the parties might have been jointly charged and tried. State v. Pratt [S. D.] 112 NW

trial of a codefendant on the ground that there was no evidence against him and that defendant desired his testimony should be granted,[20] or, in denying it, the court should guaranty immunity from future prosecution based on testimony given by co-defendant.[30] Joint trial of persons indicted for conspiracy is ordinarily proper.[31]

Production, examination, and supervision of witnesses.[See 8 C. L. 222]—Accused has the right to be confronted by the witnesses against him,[32] to cross-examine them,[33] and, by or through his counsel to be advised of all evidence submitted against him.[34] Defendant's attorney should be allowed to inspect documents submitted to witnesses for the state to refresh their recollection.[35] It is not error for the state to refuse to place a particular witness on the stand, where he was present and could have been called by accused.[36] In Minnesota the state is not required to call all the persons whose names are endorsed upon the indictment as having testified before the grand jury.[37] If not called by the state, the witness may be called by defendant,[38] and the failure of either party to call the witness may in the discretion of the court be commented upon by counsel before the jury.[39] In Louisiana the defendant has no right to have all the testimony of eyewitnesses reduced to writing in advance of any testimony being adduced or objection thereto made.[40]

Questions should be definite and certain[41] and so framed as to indicate what information is desired,[42] and should not assume facts.[43] Facts showing the relevancy of testimony offered should be disclosed,[44] but a preliminary question is not objectionable though further evidence may be necessary to render admissible the testimony sought to be elicited.[45] In the examination of ignorant and illiterate witnesses who do not understand the English language nor the procedure of courts greater latitude should be allowed than in the examination of average witnesses.[46] The allowance of leading questions,[47] allowing jurors to question witnesses,[48] allow-

152. Separate trial of a defendant under an indictment charging felony against several is not error though the record does not show an election by the state to try him separately. State v. Barrick, 60 W. Va. 576, 55 SE 652. Where a co-defendant whose case was last on the docket refused to be tried first, and turned state's evidence in defendant's trial, defendant could not complain. Jackson v. State [Tex. Cr. App.] 90 SW 34.

29, 30. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258.

31. Commonwealth v. Hartman, 31 Pa. Super. Ct. 364.

32. Morris v. U. S. [C. C. A.] 149 F 123.

33. Where testimony of a witness given at preliminary hearing was introduced at the trial, held that defendant was not denied the right of cross-examination. Spencer v. State [Wis.] 112 NW 462.

34. Morris v. U. S. [C. C. A.] 149 F 123. In prosecution for unlawfully selling liquor, the admission of public records consisting of a list of persons paying special taxes held not to violate the rule that the defendant has a right to confront the witnesses against him. State v. Dowdy [N. C.] 58 SE 1002.

35. Failure to do so, on demand, held fatal error. Morris v. U. S. [C. C. A.] 149 F 123.

36. Whitehead v. State [Tex. Cr. App.] 90 SW 876.

37, 38, 39. State v. Sheltrey, 100 Minn. 107, 110 NW 353.

40. State v. Craft, 118 La. 117, 42 S 718. Accused's rights are sufficiently protected when the court rules that he may have testimony reduced to writing as required, and where he does not avail himself of this privilege he cannot complain. Id.

41. Question whether some person had not tried to get witness to testify falsely against defendant was too general and properly disallowed. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804.

42. Form of question held erroneous. Strickland v. State [Ala.] 44 S 90.

43. Fleming v. State [Ala.] 43 S 219.

44. It is not error to exclude offered testimony which is apparently not admissible where the party introducing it does not indicate what he intends to prove. State v. Arnold, 206 Mo. 589, 105 SW 641. Where the relevancy of evidence offered is not apparent but other facts make it relevant, the party offering it must state its connection with other facts and promise to make proof thereof. Ross v. State [Ind.] 82 NE 781. In disclosing facts which a party promises to prove to establish the relevancy of certain evidence, the facts should be stated and not the conclusion. Id.

45. Golden v. State [Fla.] 44 S 948.

46. State v. Fowler [Idaho] 89 P 757.

47. People v. Way, 104 NYS 277; Territory v. Meredith [N. M.] 91 P 731; State v. Knost [Mo.] 105 SW 616.

48. The court may in its discretion allow a juror to question a witness in a criminal

ing witnesses to explain testimony,[49] allowing an interpreter to be used,[50] limiting the number of witnesses on a particular issue,[51] preventing mere repetition of testimony,[52] the exclusion of cumulative testimony,[53] allowing a witness to refresh his memory,[54] allowing testimony to be given in narrative form,[55] whether witnesses shall be excluded until called to testify,[56] whether a witness who has not been excluded,[57] or who has violated a rule of exclusion,[58] shall be allowed to testify are all matters ad-

trial. State v. Kendall, 143 N. C. 659, 57 SE 340.

49. Where a hypothetical question was propounded to an expert, it was within the discretion of the court to permit him to answer and make an explanation. Commonwealth v. Parsons [Mass.] 81 NE 291.

50. Professor at deaf mute school properly allowed to act as interpreter where prosecutrix in rape case was deaf and dumb, as against objection that he was biased because prosecutrix had been in the school as a pupil. State v. Smith, 203 Mo. 695, 102 SW 526.

51. The court may place a reasonable limit on the number of character witnesses. Limit to five on each side proper. Commonwealth v. Thomas, 31 Ky. L. R. 899, 104 SW 326. Rule limiting parties to six witnesses on a point held applicable in homicide case. State v. Uzzo [Del.] 65 A 775. Where district attorney said he would not attack defendant's reputation for peace and quiet, held not error to allow him to cross-examine witnesses to his reputation, and to limit such witnesses to eight. People v. Wright [Cal. App.] 89 P 364.

52. In seduction it was discretionary with the court to permit prosecutrix to repeat her testimony that she yielded on defendant's promise of marriage. State v. Raynor [N. C.] 59 SE 344. The court may limit the examination of a witness to prevent counsel from having him reiterate his testimony. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911.

53. Not error to sustain objections to questions calling for cumulative evidence. Morrison v. State [Ala.] 44 S 43.

54. A magistrate who heard the preliminary examination and took down a record of the testimony may, on stating such testimony, use his record to refresh his memory. Spencer v. State [Wis.] 112 NW 462. Reading of notes of a reporter as to declarations of decedent testified to by witnesses for the purpose of refreshing recollection of a witness held not an abuse of discretion. State v. Fielding [Iowa] 112 NW 539.

55. In prosecution for rape it was not error to permit prosecuting witness to tell in her own way, without questioning, all that happened at the time. People v. Davis [Cal. App.] 91 P 810.

56. Where rule as to witnesses is invoked and one witness is an officer of the court (the sheriff), it is discretionary with the court to sequester him or allow him to remain. Askew v. State [Ga. App.] 59 SE 811. Though Pen. Code 1895, § 1017, provides for the right to have witnesses examined out of hearing of each other, and directs that, the court see to this as far as practicable, yet it is a matter within the discretion of the trial court, and will not be controlled in absence of abuse. Talley v. State [Ga. App.] 58 SE 667. No abuse shown where court permitted witness for state to remain in court and assist in prosecution where he was first examined. Id. Refusal of judge to exclude witnesses while prosecutor made opening statement not a ground for reversal, no prejudice or injury to accused being shown. Hughes v. State, 128 Ga. 19, 57 SE 236. Not error to refuse to exclude witness for state from court room under Civ. Code § 201, where other witnesses for state were not called until after he testified. Joseph v. Com., 30 Ky. L. R. 638, 99 SW 311. The court may in its discretion exclude witnesses or any particular witness or spectator from the court room. State v. Quirk [Minn.] 112 NW 409. Placing of witnesses under rule or excusing certain witnesses from the rule for cause, as being officers, etc., rests in the discretion of the court. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Refusal to place officer of court guarding prisoner under rule not an abuse of discretion. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005.

57. Whether a witness who was not under rule may be allowed to testify is in the discretion of the court. Strickland v. State [Ala.] 44 S 90. An attorney is not subject to a rule requiring witnesses to be excluded from court room. Bischoff v. Com., 29 Ky. L. R. 770, 96 SW 538. Witness who had not been summoned when all other witnesses were excluded from the court room was called by the state in rebuttal. Held not an abuse of discretion to allow him to testify over objection, no fraud or wrongdoing being shown. State v. Hogan, 117 La. 863, 42 S 352. Where rule as to witnesses has been invoked, it is error to except a city marshal from the rule and allow him to testify after taking part in the prosecution. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 973, 105 SW 501. The court should permit a witness to testify, though rule had been invoked and she had not been placed under rule where necessity of her testimony was not apparent until after witness for state had testified. Sessions v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 384, 98 SW 243. Witness not under rule properly permitted to testify where on void dire he stated that he had just come into the court room and had heard none of the testimony. Lowrie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 787, 98 SW 838.

58. In Alabama it is held that where a witness for defendant violates the rule which is invoked without defendant's fault, he should be allowed to testify and then be punished. The constitution guarantees defendant the right to the testimony of his witnesses. Degg v. State [Ala.] 43 S 484. Where witnesses were sworn and put under the rule, and no mistake or misunderstanding was shown, the court properly refused to allow a witness who had been in the court room during the trial to be

dressed to the trial court's discretion. Profert may be denied where the facts can be shown by testimony.[59] It has been held not error to allow the prosecutrix, in prosecution for seduction, to have her baby with her while testifying,[60] and to allow the prosecuting attorney to call the attention of the jury to the child in his argument.[61] Prompting of witnesses should be stopped, when discovered.[62] In Texas a witness may be recalled to restate his testimony when a controversy arises in regard to it,[63] but this does not authorize calling the stenographer to state a witness' testimony where in a controversy between counsel and the jury, the jury do not desire the witness recalled.[64]

The extent to which the cross-examination of witnesses may be carried is a matter resting largely in discretion,[65] especially where accused is being examined,[66] or where the purpose is to impeach a witness,[67] though, usually the cross-examina-

sworn at the close of defendant's testimony. Martin v. Com., 30 Ky. L. R. 1196, 100 SW 872. When court did not know that a witness was in the court room during the prohibited time, and witness did not intentionally violate the rule, permitting witness to testify was not an abuse of discretion. State v. Welch, 191 Mo. 179, 89 SW 945.

59. In assault it is not an abuse of discretion to refuse profert to be made to show relative sizes of the parties. Can be shown by testimony. McFarland v. State [Ark.] 103 SW 169.

60. Not reversible error. State v. Fogg, 206 Mo. 696, 105 SW 618.

61. In seduction case, counsel for accused requested that prosecuting witness and her baby be required to remain during the arguments, which was done, and counsel argued that child favored a third person more than accused. Held not error to allow state's attorney to call attention of jury to child while prosecutrix was testifying. Howe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 152, 102 SW 409.

62. When judge believes some one in the court room is indicating answers to a witness, he should have the matter investigated in the absence of the jury. But an investigation in the presence of the jury was harmless error where court instructed jury next day to disregard the occurrence. People v. Koerner, 117 App. Div. 40, 20 Crim. R. 515, 102 NYS 93.

63, 64. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445.

65. State v. Blee, 133 Iowa, 725, 111 NW 19; State v. Quirk [Minn.] 112 NW 409. It is not proper cross-examination to ask a witness if he knows what will happen to him in another world if he testifies falsely. State v. Armstrong, 118 La. 480, 43 S 57. Refusal to permit counsel to ask witness for the state about a difficulty between himself and defendant, to show his ill feeling toward him is not error unless the witness denies such ill feeling. Sasser v. State [Ga.] 59 SE 255. Improper cross-examination to which objections were repeatedly sustained, in asking defendant's witnesses if they did not know of previous crimes of defendant, etc., held not error. Shipp v. Com., 30 Ky. L. R. 904, 99 SW 945. In a prosecution for rape, where prosecutrix testified that she had been paid for submitting, it was error to refuse to allow accused to cross-examine her for the purpose of showing that she had been threatened with imprisonment unless she swore out the complaintiff against defendant. People v. Mitchell [Cal. App.] 89 P 853. Where brother of accused testified that he himself killed decedent, it was competent cross-examination to ask questions tending to discredit his statement and show that he had fabricated a defense for his brother. Hardin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 231, 103 SW 401. Where a witness testified that he killed decedent, it was competent to show on cross-examination what his belief was as to his criminality and the probability of his being punished. Id. In murder in cross-examination of a witness who was present at the crime, it was proper to ask who else was present and if they could have seen or did see a knife in decedent's hand. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911.

66. Where accused offers himself as a witness, he subjects himself to the same rules of examination and impeachment as any other witness. Clinton v. State [Fla.] 43 S 312. Cross-examination to show defendant a vagrant held proper. People v. Craig [Cal.] 91 P 997. On prosecution for using profane language which defendant denied, he was properly cross-examined as to habitual use of profane language. Nicholson v. State [Ala.] 43 S 365. Where in homicide accused testified that the killing was accidental, it was proper cross-examination to ask "So you killed your wife accidentally?" Thomas v. State [Ala.] 43 S 371. In homicide it was not error to permit the state to examine accused as to what he knew of a defense interposed on his behalf and abandoned. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182.

67. Not error for county attorney to read from statement of facts in former trial and ask witness if she made certain statements. Pool v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 271, 103 SW 892. Cross-examination which tends to discredit the positive testimony of witness on examination in chief is proper. State v. Katon [Wash.] 91 P 250. A witness may be cross-examined for the purpose of impeachment concerning past conduct and specific acts, though such acts are collateral to the principal controversy. State v. Pugh [Kan.] 90 P 242. Proper to ask an attorney called by prosecution whether he had received a retainer by the prosecution and in what capacity he acted. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330. It is proper cross-examination for the

tion should be confined to matters brought out on the direct examination [68] and to issues in the case.[69] It is improper to allow the state to discredit a deposition, taken after due notice and read without objection, by showing that it was taken at a time and place when the prosecuting attorney could not be present.[70] Where the state has agreed that an absent witness would, if present, have testified as stated in an affidavit for continuance, it should not be allowed to show that the witness was not used at a former trial.[71]

Testimony not responsive to a question should, on motion, be stricken,[72] if incompetent or irrelevant,[73] but a motion to strike will be denied when the testimony is responsive to a question which was not objected to,[74] or where the matter admitted has been covered by the cross-examination,[75] or where the motion is directed against all of an answer, a part of which is admissible,[76] or where other similar evidence has been admitted without objection.[77] The state is not entitled to have part of the answer of its own witness stricken as not responsive.[78] It is not the duty of the court, of its own motion, to exclude testimony which was admitted provisionally.[79]

The statement of the prisoner See 8 C. L. 223 under the Georgia statute is a matter peculiar to the practice in that state.[80]

Accused must be present See 8 C. L. 223 at all stages of the trial [81] and when

purpose of impairing testimony of a witness to ask whether he contributed money to aid the prosection and his purpose in so doing. Id.

68. Where the state inquires as to part of a conversation, the defense may show it all. State v. Rutledge [Iowa] 113 NW 461.

69. Improper to allow cross-examination which has no bearing on testimony. Smith v. State [Miss.] 43 S 465. In prosecution of husband for murder of his wife, cross-examination to show ill treatment of her by him held erroneous. State v. Blydenburg [Iowa] 112 NW 634.

70. State v. Barnett, 203 Mo. 640, 102 SW 506.

71. Smith v. State [Miss.] 43 S 465.

72. To avoid an improper answer to a proper question, a motion to strike should be made. Golden v. State [Fla.] 44 S 948. An unresponsive answer is properly stricken. Fleming v. State [Ala.] 43 S 219.

73. Motions to strike testimony that has been admitted must be predicated upon some feature of irrelevancy, incompetency, or legal inadmissibility of the testimony. Marshall v. State [Fla.] 44 S 742.

74. A defendant who permits a witness to answer a question, objectionable on its face, cannot have the answer stricken. State v. Pyles, 206 Mo. 626, 105 SW 613. Not error to refuse to exclude testimony where no objection was made to the question calling for it. Dowling v. State [Ala.] 44 S 403. In prosecution for robbery, evidence relative to the taking of a revolver from person robbed admitted without objection, it was proper to overrule a motion to strike it. State v. Finn, 199 Mo. 597, 98 SW 9.

75. After cross-examination as to certain statement, it is too late to move to exclude it. Moss v. State [Ala.] 44 S 598.

76. Where an answer was unresponsive in part only, a motion to strike the entire answer was properly refused. People v. Pembroke [Cal. App.] 92 P 668. Where part only of an answer is irresponsive, a motion to strike should be confined to the objectionable part. People v. Craig [Cal.] 91 P 997.

77. Not error to refuse to exclude the entire testimony of a witness which related to the same matter as to which other witnesses had testified. Hamilton v. State [Ala.] 44 S 968.

78. State v. Rutledge [Iowa] 113 NW 461.

79. Where evidence is provisionally admitted on the promise that it will be subsequently connected, it is not incumbent on the judge of his own motion to determine whether the promise has been kept and exclude it. Thomas v. State [Ga.] 59 SE 246. It is not incumbent on the court of its own motion to exclude evidence admitted over objection under promise to connect it. Sasser v. State [Ga.] 59 SE 255.

80. Whether counsel may call attention of accused while making his statement to some subject claimed to be pertinent and as to which he has made no statement rests in the discretion of the court. Robinson v. State [Ga.] 58 SE 842. Judge interrupted accused while making his statement and told him not to include hearsay matter. Later he told him he could state anything he desired, and withdrew the admonition regarding hearsay, whereupon accused stated matters resting on hearsay. Held no ground for reversal and granting of new trial. Id.

81. A new trial must be granted if it appears that accused was absent during the taking of evidence though it does not appear what the evidence was. State v. Detwiler, 60 W. Va. 583, 55 SE 654. No error warranting reversal shown where jury and accused went to scene of crime and jury went inside of the house while defendant remained outside, especially where he did not ask to be taken inside. State v. Moore, 119 La. 564, 44 S 299. Accused and his counsel were both present when a juror handed the judge a note asking if defendant could be found guilty of murder in the second degree, and court answered affirmatively. Counsel did not ask to have the contents of the note made public. Held not objectionable as an instruction to the jury in absence of accused. Benton v. State, 78 Ark. 284, 94 SW 688.

verdict is returned,[82] but his right to be present may be waived,[83] though not by failure of his counsel to object.[84] Presence of accused is not required in misdemeanor cases in some states.[85] Absence of accused at preliminary proceedings,[86] or at subsequent proceedings having to do with correction of the record,[87] has been held not error. Error in receiving testimony during absence of accused is cured by having it repeated in his presence.[88]

Absence of judge.[See 8 C. L. 223]—The judge should be present during the taking of evidence,[89] during argument,[90] and when the verdict is received.[91] A brief absence from the court room has been held harmless error.[92] Failure of the judge to be present when the jury views premises may be waived.[93] The court is open while the judge is on the bench,[94] and a verdict will not be set aside for failure of the minutes to show affirmatively the opening of court from day to day.[95]

(§ 10) *B. Argument and conduct of counsel.*[See 8 C. L. 224]—In general the conduct [96] and argument [97] of counsel are subject to the discretionary direction and

82. Where accused was in room adjoining the court room when verdict was returned, but his view was obstructed by sheriff standing in the doorway, held he was deprived of his right to be present. Percer v. State [Tenn.] 103 SW 780.

83. Reception of verdict in absence of defendant, who was out on bail and could not be found by officers after the court waited 30 minutes, held defendant waived his right to be present. Stoddard v. State [Wis.] 112 NW 453.

84. Right of defendant to be present in court room when verdict is returned cannot be waived by failure of his counsel to make objection to the rendition of the verdict until he can be present. Percer v. State [Tenn.] 103 SW 780.

85. In Kentucky a trial of a charge of a misdemeanor may be had in the absence of defendant, and without a plea. Criminal libel; accused gave bond for appearance but failed to appear, and counsel refused to enter plea. Jury instructed to take indictment as confessed and fix punishment. Walston v. Com., 31 Ky. L. R. 378, 102 SW 275. In a misdemeanor case the verdict may be received in the absence of defendant. Loving v. State [Tex. Cr. App.] 100 SW 154.

86. Under Rev. St. § 2610, declaring that no person can be tried unless he be present during trial, he need not be present when an order is made authorizing sheriff to summon a jury for subsequent date fixed for the trial. State v. Barrington, 198 Mo. 23, 95 SW 235.

87. Personal presence of defendant in proceedings connected with the case subsequent to trial and sentence is not required where such proceedings relate only to the correction of the record. Nagel v. People, 229 Ill. 598, 82 NE 315.

88. Where a witness gave some testimony during absence of accused from the court room, and court on discovering this had him brought in and jury was told to disregard the testimony given during absence of accused, and witness then repeated his testimony, it was held that no prejudice resulted. Vanderford v. State, 126 Ga. 753, 55 SE 1025.

89. Under Pen. Code. § 1119, when jury views the place where the crime was committed, it is receiving evidence and the judge should be present. People v. White [Cal. App.] 90 P 471.

90. Where judge was out of court room several minutes during the trial and not within hearing of counsel making objections, held reversible error. Williams v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 739, 99 SW 1000. Improper for judge to absent himself from court room from 5 to 20 minutes while counsel were arguing the cause and go to a place where he could not see or hear proceedings. Anderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 633, 95 SW 1037.

91. Under Rev. Code Cr. Proc §§ 397, 415, 396, the judge must be present when verdict is received, though defendant consents to its reception in his absence. State v. Jackson [S. D.] 113 NW 880.

92. Absence of judge during trial for a period long enough to walk 68 feet to his chambers to get a book is not ground for reversal. Thomas v. State [Ala.] 43 S 371. Temporary absence of judge from room held not prejudicial where proceedings were suspended when attention was called to the fact. State v. Leonard [Iowa] 112 NW 784.

93. Right of accused to object to view of premises by jury in absence of judge may be waived by him. People v. White [Cal. App.] 90 P 471. Failure to make timely objection is a waiver. Id. Failure of judge to accompany the jury when they go to view the premises is not ground for reversal, especially where not timely urged. State v. Moore, 119 La. 564, 44 S 299.

94. Act No. 163, p. 320, 1898. State v. Griggsby, 117 La. 1046, 42 S 497.

95. Where the transcript shows the presence of accused at all material stages of the trial, and inferentially that all proceedings were in open court, the verdict will not be set aside for failure of the minutes to show affirmatively the opening of court from day to day. State v. Griggsby, 117 La. 1046, 42 S 497.

96. The conduct of counsel during the trial is subject to the direction of the trial judge, and his discretion in that respect will not be controlled by the appellate court in the absence of manifest abuse to the prejudice of one of the parties. State v. Sheltrey, 100 Minn. 107, 110 NW 353. Where after a witness had been sworn and taken

control of the trial judge. It is not the province of the prosecuting attorney to instruct as to the law,[98] but it is his duty as well as that of the judge to see that accused has a fair trial.[99] It is improper for counsel to attempt to get before the jury evidence which has been excluded [1] or which is clearly inadmissible and of a prejudicial character,[2] or to attempt to show the previous condition of a witness whose inability to appear at time of trial is shown.[3] The jury having the burden of proof on the issue being tried has the right to open and close the argument thereon.[4] In Missouri special counsel employed by the state may make the closing argument.[5]

Opening address. See 8 C. L. 224—Counsel may state the nature of the case [6] and what he expects the evidence to show,[7] and may be allowed to read the bill of particulars as part of his opening statement,[8] but argument tending to prejudice the jury should be avoided.[9]

In summing up See 8 C. L. 224 counsel may discuss the evidence fully [10] and by

the stand the county attorney stepped to the witness box and spoke to him in the presence of the court, but while defendant's counsel was absent from the room, it was not error to permit him to testify. Neal v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 733, 99 SW 1012. Where witness refused to repeat a statement, saying he had already repeated it several times, it was not error for the prosecuting attorney to say that he had repeated it to the judge but not to the jury. State v. Jones, 118 La. 369, 42 S 967.

97. The court should not hesitate of its own motion from **preventing improper argument.** Richberger v. State [Miss.] 44 S 772.

Limiting argument to one and three-fourths hours held an abuse of discretion where defendant objected and was not able to finish his argument though allowed twenty minutes more time. People v. Fernandez [Cal. App.] 87 P 1112.

98, 99. Jamison v. U. S. [Ind. T.] 104 SW 872.

1. It is improper to ask questions to elicit testimony which has been ruled out. People v. Smilie, 118 App. Div. 611, 103 NYS 348. Where a witness was disqualified under Code, § 5373, because he had not appeared before the grand jury, and objections were sustained to him, it was error for prosecuting attorney to ask him a series of questions. State v. Krug [Iowa] 113 NW 822. Where court in absence of jury excluded confession, it was error for counsel to ask relative thereto in presence of jury and require accused to object. Spicer v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 136, 105 SW 813. Where objections to questions which violated the privilege of a witness were sustained, it was error for a state's attorney to continue to ask such questions. State v. Blydenburg [Iowa] 112 NW 634. Repeating two or three times in different form a question as to which objection had been sustained held harmless. Schultz v. State [Wis.] 113 NW 428.

2. Improper to ask witness whose daughter (also a witness) was to have married defendant on day of arrest for forgery whether daughter had a child. State v. Waterbury, 133 Iowa, 135, 110 NW 328. Such conduct of county attorney held not prejudicial or reversible error. Id.

3. Where defendant showed by a physician that his wife was unable to appear and testify, it was error to allow the state's attorney to question about her condition three weeks before when a commission examined her. State v. Rutledge [Iowa] 113 NW 461.

4. On trial of an issue to a prisoner's inability because of insanity to make a rational defense, the burden of proof is on defendant and he is entitled to open and close the argument. United States v. Chisolm, 149 F 284.

5. Under Rev. St. 1899, § 2627, providing that counsel for prosecution shall open and conclude argument, concluding argument may be made by assistant counsel employed by the state. State v. Coleman, 199 Mo. 112, 97 SW 574.

6. Proper under statute for state's counsel to state the nature of the case. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641.

7. Not error to permit prosecuting attorney to state in opening that he expected to show that prosecutrix though seventeen years of age had the intelligence of a girl of ten or eleven. State v. Smith, 203 Mo. 695, 102 SW 526. Remarks of prosecuting attorney as to what he would want to show if certain evidence was admitted held not error. People v. Thorne, 148 Mich. 203, 14 Det. Leg. N. 66, 111 NW 741. It is proper for the prosecutor to state what he expects to prove, including acts of defendant showing a consciousness of guilt. White v. State, 127 Ga. 273, 56 SE 425. It is proper for the prosecuting attorney to state in his opening address the facts he expects the evidence to show. State v. Barrick, 60 W. Va. 576, 55 SE 652. It is not improper for the prosecuting attorney on a second trial under an indictment for murder, where defendant has been convicted of manslaughter, to state in his opening argument that it is his opinion that the evidence will show murder in the first degree but that only manslaughter can be found. State v. Walker, 133 Iowa, 489, 110 NW 925.

8. Cooke v. People [Ill.] 82 NE 863.

9. It is proper to sustain an objection to opening statement of defendant's counsel where remarks are argumentative and could only serve to prejudice the jury in his favor. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804.

10. Prosecuting attorney may comment on facts shown by evidence. Isaac v. U. S. [Ind. T.] 104 SW 588. Argument that testimony of certain witnesses should not be believed

way of argument[11] state his views as to the conclusions to be drawn therefrom,[12] and the fact that the argument is illogical is no ground of exception,[13] nor will verdicts be disturbed merely on account of the inadvertent mistakes of counsel as to matters of evidence.[14] His remarks should, however, be confined to the record,[15] and it is

held proper. Cook v. State [Ala.] 44 S 549. Argument based on evidence held not prejudicial. State v. Force, 100 Minn. 396, 111 NW 297. Argument predicated on statement made during a conversation which was shown by the evidence. proper. Hamilton v. State [Ala.] 44 S 968. Held proper to refer to details of homicide shown by evidence and insist on death penalty. Spencer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 591, 90 SW 638. Where defendant admitted illicit relations with another girl and there was evidence of declarations by him of similar relations with a third as an excuse for not marrying prosecutrix, it is proper for counsel for prosecution to allude to such offenses in argument. State v. Kincaid, 142 N. C. 657, 55 SE 647. In prosecution for murder of infant, it is not error for prosecuting attorney to state in presence of jury that evidence showed that defendant had debauched the infant's mother and made her a household drudge where the evidence warranted the statement. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231. Suggestion in counsel's argument, to explain discrepancies in testimony of witness at trial and on preliminary examination. that justice might have omitted parts of the testimony, having written it out in long hand, held proper. People v. De Camp, 146 Mich. 533, 13 Det. Leg. N. 862, 109 NW 1047. Proper to refer to the distinction between civil and criminal cases as to right of person to testify in his own behalf when other party to the transaction was dead. Bluett v. State [Ala.] 44 S 84. Not reversible error for prosecuting attorney in argument to refer to witness for the state as a good man. State v. Miles, 199 Mo. 530, 98 SW 25. Not error for prosecuting attorney to refer to witness for defense as a black rascal. Id.

11. Remarks by district attorney argumentatively furnish no ground for setting aside verdict. State v. Romero, 117 La. 1003, 42 S 482. Statements in argument which are legitimate deductions from the evidence are proper. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. In homicide, reference by state's attorney to testimony against defendant in pending prosecution for theft, bearing on his motive in that respect and his failure to explain the same, was legitimate argument. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Argument by way of illustration and to discredit testimony of defendant's wife that he had not been out of bed the night in question. that counsel knew of a woman so testifying in another case who later admitted the falsity of her testimony, held not erroneous. People v. De Camp, 146 Mich. 533, 13 Det. Leg. N. 862, 109 NW 1047. Argument as to defense of intoxication in rape held not erroneous. Norman v. Com., 31 Ky. L. R. 1283, 104 SW 1024.

12. Counsel may fully state his views as to what the evidence shows and as to what conclusions may reasonably be drawn therefrom. People v. Soeder, 150 Cal. 12, 87 P. 1016. Statement of prosecuting attorney that he knew defendant was guilty and that a certain witness told the truth held an expression of opinion, and proper. State v. Bricker [Iowa] 112 NW 645. Argument to effect that evidence clearly establishing guilt had been produced which had not been refuted by a particle of evidence is legitimate argument. Shaw v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 11, 105 SW 500. In prosecution for theft where evidence showed that defendant was seen near prosecuting witness' horse the night before the theft and the stolen goods were carried to a certain place that night, to argue that the state had proved that defendant took the goods to such place. Pool v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 271, 103 SW 892. Where evidence showed a conspiracy between three to kill, argument that all were present and helped do the killing and all were guilty, no matter who fired fatal shot, not ground for reversal. Harper v. State, 79 Ark. 594, 96 SW 1003. Since court takes judicial notice of coincidence of days of week and month, statement of counsel in argument that certain day was Sunday was not error. Winfield v. Jackson, 89 Miss. 272, 42 S 183. In prosecution of alleged fraudulent foot races and backers, argument of counsel that in his opinion the evidence showed defendants to be part of a gang of fake foot racers, thieves, and swindlers was not error. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933. Where the defense relies upon discrediting the state's testimony, counsel can discuss the conduct and motive of the witness himself under indictment for the same offense. who has turned state's evidence, and argue that his credibility is affected by such conduct. Parker v. State [Ga. App.] 59 SE 204. Where accused testified that he was thirty-one years of age and had been charged with several crimes argument that accused was steeped in crime for thirty-one years was not prejudicial. Purdy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 295, 97 SW 480.

13. Counsel may present to the jury their view of the evidence and the deductions to be made therefrom, and no exception lies thereto though their reasoning be faulty and illogical. People v. Willard, 150 Cal. 543, 89 P 124.

14. Mistaken statement that evidence showed that deceased had had accused committed to asylum. People v. Willard, 150 Cal. 543, 89 P 124.

15. Statement of solicitor in closing argument that good citizens of the community met after the homicide and tried to find out the guilty person, and that accused was not there, held reversible error, there being no evidence of such a meeting. Du Bose v. State [Ala.] 42 S 862. Remarks outside the evidence in prosecution for selling liquor that it is sold at churches and at all public gatherings is erroneous. Sykes v. State [Ala.] 44 S 398. It is improper to tell the jury that they would have to brand the prosecuting witness as an infamous liar, and perjurer in order to acquit. Ward v. State,

improper to state what would have been shown by evidence which was excluded [16] or by a person who did not testify,[17] though it has been held proper to refer to the fact that a witness who was called was not examined as to facts within his knowledge,[18] or that no evidence was introduced on a particular issue,[19] or that a particular witness, sworn and placed under rule, was not called.[20] It is not error to call attention to accused, his identity being in issue.[21] Direct or indirect reference to the failure of accused to testify [22] or make a statement [23] is error. Reference to extraneous matters by

77 Ark. 19, 90 SW 619. Improper argument not based on evidence held prejudicial to accused because asserting that he was in conspiracy with another to defraud prosecutor. Storms v. State [Ark.] 98 SW 678. Statement outside the record held prejudicial. People v. White [Cal. App.] 90 P 471. It is reversible error to comment on facts not in evidence and which have no bearing on the issues. Remarks calculated to excite and inflame the minds of jurors against defendant. Clinton v. State [Fla.] 43 S 312. It is error for the state's attorney to read from a paper not introduced and tend thereby to show conflict in testimony of a witness at preliminary hearing and at the trial. Danford v. State [Fla.] 43 S 593. Where no character evidence was introduced, it was error for prosecuting attorney to assume that defendant's character was bad because he had not proved the contrary. Lowdon v. U. S. [C. C. A.] 149 F 673. It is error for prosecution for state to intimate that if a verdict of guilty is not returned that neighbors of the juror would conclude that he had been bribed. Id. It was error for counsel for the state in argument to state that instead of trying the accused for adultery the jury should be determining whether the husband of the coadulterer was guilty of murder if he had killed him, and that it was immaterial whether accused bought him off. State v. Harmann [Iowa] 112 NW 632. Language and acts of counsel indicating but not directly charging that a witness had been bribed, there being no direct evidence thereof, held not reversible error. State v. Thomas [Iowa] 109 NW 900. Prosecuting attorney may in his argument refer to other offenses of which there is evidence, but should be confined by the court to the record. Greenwell v. Com., 30 Ky. L. R. 1282, 100 SW 852. Counsel should not comment on facts not in evidence, nor state what he could have proven. Persistence in so doing over objection is ground for reversal. Esterline v. State [Md.] 66 A 269. Argument not sustained by the evidence held erroneous. People v. Mix, 149 Mich. 260, 14 Det. Leg. N. 397, 112 NW 907. Remarks not based on evidence, reflecting on defendant's character, are improper. Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 110, 101 SW 245. Reference in argument to indictment of accused in Federal court held error, there being no evidence thereof. Baughman v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 254, 90 SW 166. In burglary it is not permissible for county attorney to argue that certain keys taken from accused were burglar's tools, where there is no evidence showing that keys are burglar's tools. Barnett v. State [Tex. Cr. App.] 99 SW 556.

16. It is improper for counsel to intimate that a record which he was not allowed to introduce would show that accused had been an inmate of the penitentiary. Burns v. State, 75 Ohio St. 407, 79 NE 929. Statement of prosecuting attorney that there were some things he would like to show about a certain witness' testimony, but that he had not been permitted to, and that defendant's counsel knew what they were and that they would hurt his case, held reversible error. People v. Cahill, 147 Mich. 201, 13 Det. Leg. N. 984, 110 NW 520.

17. Statement in argument that certain evidence would be corroborated by an absent witness held harmless. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 NW 854. Argument of counsel that it was unfortunate that wife of accused could not testify held not improper nor prejudicial to accused. State v. Brown, 118 La. 373, 42 S 969.

18. Where defendant called his wife who was an eye witness, but did not examine her as to facts within her knowledge, it was proper for the prosecuting attorney to refer to that circumstance. McMichael v. State [Tex. Cr. App.] 93 SW 723.

19. Where there was testimony that defendant had bad reputation it was proper to comment on his failure to produce character testimony. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003. In rape it was not error for prosecuting attorney to comment on failure of defendant to produce evidence that he was not affected with a venereal disease. Lam Yee v. State [Wis.] 112 NW 425.

20. It was competent for the state to animadvert on defendant's failure to introduce his father who was under rule as a witness. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102.

21. Identity of accused being in issue, not error for county attorney to call attention to his deep set eyes, though there was no direct evidence thereof. State v. Waterbury, 133 Iowa, 135, 110 NW 328.

22. Allusion in argument to defendant's failure to take the stand held error. Baughman v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 254, 90 SW 166. Under Rev. Code Cr. Proc. § 361, it is prejudicial error for prosecuting attorney to state that accused has not yet testified while discussing another matter. State v. Bennett [S. D.] 113 NW 78. Question asked defendant on a second trial whether he had ever testified before was a comment on his failure to testify on prior trial. Smith v. State [Miss.] 43 S 465. Where accused fails to testify in his own behalf and the prosecuting attorney comments thereon, this comment constitutes reversible error. Perkins v. Territory, 17 Okl. 82, 87 P 297. Prejudicial error for state's counsel to refer to fact that accused had not testified, such argument being prohibited by Comp. Laws, § 10,311. People v. Cahill, 147 Mich. 201, 13 Det. Leg. N. 984, 110 NW 520. Statement in argument "has not been denied by defendant" held to violate rule against commenting.

way of illustration is usually improper.[24] Argument otherwise improper may be permitted when provoked by or in answer to argument for the other side.[25] It has been held improper to use inflammatory language against accused,[26] to appeal to the jurors' emotions or prejudices,[27] to criticise acts of the court,[28] to refer to failure to

on failure of defendant to testify. State v. Jones [S. D.] 113 NW 716.

Not error for district attorney to merely refer to fact that one jointly indicted with defendant did not testify. People v. Yee Foo [Cal. App.] 89 P 450. Argument held not objectionable as alluding to defendant's failure to testify. Gallegas v. State [Tex. Cr. App.] 90 SW 492. Remarks of prosecuting attorney held not to violate rule that failure of accused to testify shall not be commented upon. State v. Miles, 199 Mo. 530, 98 SW 25. Remarks of counsel in argument held not to direct attention to failure of defendant to testify. Lipsey v. People, 227 Ill. 364, 81 NE 348. Rev. St. 1899, § 2638, prohibiting reference to defendant's failure to testify. does not prevent district attorney from referring to failure of defendant to explain certain acts which the testimony showed he was guilty of. State v. Grubb, 201 Mo. 585, 99 SW 1083. Where crime was proven by eyewitnesses and evidence of a res gestae statement of defendant was introduced but he did not testify, argument that testimony of eyewitnesses had been disputed only by such res gestae statement as not a comment on failure of accused to testify. Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921. Where accused did not testify, but introduced his res gestae statement. argument as to how much weight should be given his * * * "testimony," "not the testimony, but the statement," was not a comment on his failure to testify. Id. Argument "what is the testimony on part of defense to meet this? why * * * they are as silent as the grave" was not objectionable as alluding to failure of accused to testify. Jones v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 82, 96 SW 930. Fact that prosecuting attorney in closing argument in murder case said that no one denied that accused did the killing or that he had a knife, pointing at accused when he made the statement, held not prejudicial, as comment on failure of accused to testify. Johnson v. Com., 29 Ky. L. R. 675, 94 SW 631.

23. Improper comment on accused's failure to make a statement, according to the Georgia practice, in the presence of the jury. and calling on defendant's counsel for an explanation why the statement was not made, results in mistrial if not corrected at the time. Barker v. State, 127 Ga. 276, 56 SE 419.

24. Argument consisting of reciting and illustrating an alleged similar occurrence held improper, but not reversible error. State v. Thomas [Iowa] 109 NW 900. Argument that counsel knew of a similar case in which death penalty was inflicted held reversible error. Coleman v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 371, 90 SW 499.

25. Retaliatory statements in argument held not ground for reversal. Ham v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 451, 98 SW 875. Argument of state's attorney in reply to argument of defendant's attorney pointing out that a conspirator had not been indicted held proper. Hanners v. State, 147 Ala. 27, 41 S 973. Argument of counsel in answer to argument of defendant's attorney held not error. Nicholson v. State [Ala.] 42 S 1015. The fact that the argument of the prosecuting attorney in criticizing the argument of the defendant's attorney is illogical is no ground for a new trial. State v. Rugero, 117 La. 1040, 42 S 495. Counsel disagreed as to definition of malice aforethought as given by accused's attorney and said to jury, "Because you are country people he thinks he can ram such as that down your throats." Held, not legally objectionable. Thompkins v. Com., 28 Ky. L. R. 642, 90 SW 221. Where defendant's attorney challenged county attorney to explain why a subpoenaed witness had not testified, it was proper for county attorney to state to the jury that the witness had been indicted and had forfeited his bond. Smith v. State [Tex. Cr. App.] 90 SW 170. Attorney who had prosecuted defendant as county attorney on a former trial was employed to assist the state. and defendant's attorney referred to him as hired counsel. Held proper for state to show that counsel was retained because of his familiarity with the case. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. Where one of the attorneys for the defense referred to Judas, the prosecuting attorney had a right to comment on it, and the fact that by mistake he referred to the wrong attorney as making the reference was harmless. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 222, 102 SW 1147. Discussion by both counsel as to lynching negroes for criminal assault, which discussion was opened by attorney for defendant, held not an appeal to race prejudice. State v. Pettit, 119 La. 1013, 44 S 848. Argument of prosecuting attorney that certain argument for defense sounded as if it was intended for salted jurors held prejudicial. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258. In homicide where state's attorney in opening challenged defendant to take the stand and defendant's counsel in his opening accepted the challenge. but defendant did not take the stand, held defendant could not complain. Clefford v. People, 229 Ill. 633, 82 NE 343.

26. Inflammatory speech of prosecutor against accused not predicated on evidence In the case held reversible error. Skyes v. State, 89 Miss. 766, 42 S 875. Argument of county attorney as to characteristics of a "nigger" and that he wanted the jury to "give this nigger a plenty," etc., held improper. Neal v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 733, 99 SW 1012.

27. Argument of counsel in picturing family of deceased weeping over his newly made grave while objectionable was not reversible error. Mays v. State [Tex. Cr. App.] 96 SW 329. Statement that "this class of niggers" "had it in" for white race and cursed them in their hearts held improper. Taylor v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 765, 100 SW 393.

28. Improper for counsel to refer to action of court as "a brutal abuse of discretion and an inhuman violation of defendant's con-

call a person incompetent to testify,[29] or to apply offensive and abusive language to accused [30] or his witnesses,[31] but invective or characterization sustained by the proof is not usually held prejudicial.[32] Arguments that in order to stop or prevent crime accused should be convicted [33] and severely punished [34] have been held not improper, but there are contrary holdings.[35] The reading of extracts from [36] and discussion of other reported cases,[37] reading of the evidence in another case [38] or the decision on a former trial,[39] and the use of documentary [40] or demonstrative [41] evi-

stitutional rights." People v. Buck [Cal.] 91 P 529.

29. It is error in argument to refer to failure of accused's wife to testify, she being wholly incompetent by statute. Jamison v. U. S. [Ind. T.] 104 SW 872.

30. Prosecuting attorney stated in argument that defendant's attorney had tampered with witnesses and attempted to "buffalo and bulldoze" the court and himself, and that defendant was a scoundrel and a perjurer. Held cause for reversal, court having only requested counsel to keep within the record. State v. Clapper, 203 Mo. 549, 102 SW 560. In local option case, defendant was not prejudiced by fact that county attorney referred to these "boot leggers." Winslow v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 813, 98 SW 866. Proper for court to instruct the jury to disregard statement of attorney in argument that in his opinion the state had made the strongest case that had been made against any of the boodlers. Butt v. State [Ark.] 98 SW 723.

31. Argument of counsel in referring to Chinese society (highbinders) as an "alibi factory," etc., held not reversible error under the evidence. People v. Yee Foo [Cal. App.] 89 P 450. Criticism of defendant's witnesses calling them "nomads" and "pals" improper, but not reversible error. State v. Nowells [Iowa] 109 NW 1016.

32. Invective based on evidence and inferences legitimately to be drawn therefrom is not inhibited. Johnson v. U. S. [C. C. A.] 154 F. 445. In homicide where defendant killed his neice because she refused to submit to his embraces, reference to him as a monster in his passions, licentious in his desires, etc., held not ground for reversal. State v. Lang [N. J. Law] 66 A 942. Remarks of prosecuting attorney in prosecution for rape that prosecutrix was proven to have unimpeached character, but the brute of a defendant had introduced no proof of his, held not prejudicial. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003. That prosecuting attorney characterized testimony of a witness as a "damnable yarn" and said defendant was "vicious as a rattlesnake and active as a hornet" held not reversible error. People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132. Statement that if such affairs as that on trial were to go unrebuked and justified by verdicts, people had better discharge officers and arm and protect themselves held not reversible error. Id.

33. General discussion of evils of crime which law in issue sought to prevent held not prejudicial error. Pitman v. State [Ala.] 42 S 993. Prosecuting attorney's remarks that he had done his duty and that it remained for jury to do theirs, and that there were twenty-three murderers confined in the county jail, held not improper. Sturgeon v. Com., 31 Ky. L. R. 536, 102 SW 812. Where in prosecution for theft there was evidence of prior acquittals on similar charges, it was not error for prosecutor to state that defendant had already slipped through fingers of justice three times and to ask whether he would do so again. Welch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 522, 95 SW 1035. In homicide, argument that crack of pistol, roar of shot gun, and flash of dirk, had made state notorious for crime, is not reversible error. Austin v. Com., 30 Ky. L. R. 295, 98 SW 295.

34. Argument held not objectionable which intimated that death penalty would be proper. Thompkins v. Com., 28 Ky. L. R. 642, 90 SW 221. Not error for district attorney to state that defendant should be severely punished. Ellis v. U. S., 6 Ind. T. 291, 97 SW 1013. Argument that jury ought to administer such punishment to defendant in seduction case that a certain witness who had testified to taking liberties with prosecutrix and who had not dared to appear in court room thereafter would not follow in defendant's footsteps held not reversible error. State v. Sublett, 191 Mo. 163, 90 SW 374.

35. The state's counsel should not refer to prevalence of crime in other parts of the country. Thomas v. State [Ga.] 59 SE 246. It is error for prosecuting attorney to refer to large number of murder cases on the docket, to ask jury to convict defendant to stop murders, and to refer to him as an assassin, there being no evidence thereof. Stevison v. State [Tex. Cr. App.] 89 SW 1072. Inflammatory remarks of attorney urging death penalty held improper. Spencer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 594, 90 SW 638. Argument to effect that accused should be given death penalty because he had already been in the penitentiary and it did not reform him held reversible error. Taylor v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 765, 100 SW 393.

36. Reading of extracts from state reports is bad practice but one discretionary with trial court. Commonwealth v. Renzo, 216 Pa. 147, 65 A 30.

37. Held within discretion of trial court to permit discussion of reported case by prosecuting attorney. Hill v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 968, 100 SW 384.

38. It is within the discretion of the trial court to refuse to allow counsel to read to jury, to illustrate principle of circumstantial evidence, a certified copy of the brief of the evidence in another case. Hannley v. State, 128 Ga. 24, 57 SE 236.

39. Decision on first trial containing comments on the facts held inadmissible upon the second trial in which issues were in some respects different. State v. Rideau, 118 La. 385, 42 S 973. Reading of such decision is left largely to discretion of trial court. Id.

40. Documents offered on behalf of the state and received in evidence during the

dence in the course of the argument, are matters resting largely in the trial court's discretion.

Necessity of ruling and exception to preserve the objection to improper argument [42] and *effect of instructions and admonitions* to cure improper argument [43] are treated in succeeding sections.

(§ 10) *C. Questions of law and fact.*[See 8 C. L. 226]—The credibility of all the witnesses,[44] the weight of the testimony,[45] the sufficiency of the evidence upon the whole case,[46] and, in general, all disputed questions of fact,[47] are for the jury. The competency of a particular witness [48] and the admissibility of evidence [49] are pri-

trial of a criminal case but not then read to the jury may be read by the prosecuting attorney in his closing argument. State v. Adam, 117 La. 925, 42 S 427.

41. Where defendant used a map in testifying, but the map was not introduced in evidence, it was not error to refuse to allow his attorney to use it in his argument. Nobles v. State, 127 Ga. 212, 56 SE 125.

42. See post, § 14.

43. See post, § 15.

44. Credibility of testimony of prostitute is for jury. State v. Hill [Wash.] 89 P 160. Credibility of witness who has served term in penitentiary is for jury. State v. Hubbard, 201 Mo. 639, 100 SW 586. Credibility of defendant's testimony is for jury. Instruction held not erroneous. Harrison v. State, 144 Ala. 20, 40 S 568. It is the province of the jury to pass upon the credibility of witnesses and the weight of testimony. People v. White [Cal. App.] 90 P 471; State v. Samuels [Del.] 67 A 164; State v. Stewart [Del.] 67 A 786; Moody v. State, 1 Ga. App. 772, 58 SE 262; Cothran v. State [Ga. App.] 58 SE 544; State v. Fogg, 206 Mo. 696, 105 SW 618. The jury may believe a witness whose testimony is attacked by impeaching testimony, and though several witnesses charged him with being the perpetrator of the offense. Cothran v. State [Ga. App.] 58 SE 544. Instruction held erroneous as imposing restrictions on the power of the jury to determine the credibility of witnesses as provided by Code Civ. Proc. § 3390. State v. Penna, 35 Mont. 535, 90 P 787.

45. Davis v. State [Ala.] 44 S 561; State v. Smith, 190 Mo. 106, 90 SW 440; State v. Maupin, 196 Mo. 164, 93 SW 379. Conflicting testimony should be reconciled if possible, but if not the jury must determine to what testimony most weight shall be given. State v. Stewart [Del.] 67 A 786. The jury are not bound by opinions of experts on the question of sanity where they are satisfied that their conclusions are erroneous. United States v. Chisolm, 149 F 284. Though the jury should endeavor to reconcile conflicting testimony, it is their privilege to determine what portion is most worthy of belief. United States v. Cole, 153 F 801. In determining weight to be given testimony, the jury should consider relationship of the witness, his means of information and opportunity for knowing the facts, and his manner of testifying. Id. Weight to be given character evidence is for the jury. Miller v. People, 229 Ill. 376, 82 NE 391. The jury are the judges of the weight to be given dying declarations and also whether they were made under such circumstances as to be considered at all. Moody v. State, 1 Ga. App. 772, 58 SE 262. It is a violation of Civ. Code 1895, § 4334, to charge that threats are of little importance as evidence. Dorsey v. State [Ga. App.] 58 SE 477. It is error to direct the jury to find defendant guilty without any direction to pass on the evidence or credibility of witnesses. State v. Godwin [N. C.] 59 SE 132. The weight of corroborating evidence is for the jury. But where it is so uncertain and unsatisfactory as not to warrant an inference of guilt, a verdict should be set aside. Cooper v. Ter. [Okl.] 91 P 1032. The rule that the weight of testimony is for the jury applies to defendant's testimony. Commonwealth v. Thomas, 31 Ky. L. R. 899, 104 SW 326. In weighing testimony of accused, his interest may be considered. Sykes v. State [Ala.] 44 S 398; Davis v. State [Ala.] 44 S 561. Since defendant in homicide testified in his own behalf and was the only living eye witness, if he testified falsely the people's evidence should be taken most strongly against him. People v. Ferone, 105 NYS 448. The weight to be given the statement of accused, under the Georgia practice, is for the jury. Parker v. State, 1 Ga. App. 781, 57 SE 1028. The jury are the sole judges of weight of testimony. State v. Stewart [Del.] 67 A 786. This rules applies as to testimony of an accomplice, but great caution in weighing it is dictated by prudence. Jurors may believe or disbelieve any portion of a confession. Herndon v. State [Tex. Cr. App.] 99 SW 558.

46. It is the province of the jury to pass on the sufficiency of evidence. Miller v. People, 229 Ill. 376, 82 NE 391. Act of 1903, p 90 (procuring money on fraudulent contract for services), does not repeal Pen. Code 1895, § 1033, providing that jury are judges of the law and the facts in criminal cases. Jury determines guilt or innocence of accused upon the whole case. Vance v. State, 128 Ga. 661, 57 SE 889.

47. Whether piece of timber which decedent had was a deadly weapon. Allen v. State [Ala.] 42 S 1006. Whether weapon is deadly is usually for court, but in particular instances whether a certain weapon is deadly may be for jury. Tribble v. State, 145 Ala. 23, 40 S 938. Whether identity of defendants is established. Smith v. People [Colo.] 88 P 1072. What device or "cup" should be used to test inflammability of fluid. State v. Boylan, 79 Conn. 463, 65 A 595. Whether one claiming to have acted in self-defense had good reason to act as he did. State v. Darling, 202 Mo. 150, 100 SW 631. Where defendant pleaded misnomer and the evidence was conflicting, the question was properly submitted to the jury. Daniel v. State [Ala.] 43 S 22.

48. The question of competency of a child of tender years as a witness is for the court. People v. Collins [Cal. App.] 91 P 158.

49. Whether conspiracy has been suffi-

marily for the court, but where evidence is admitted upon a controverted predicate, the predicate should be submitted to the jury [50] with instructions to consider the evidence if they believe the predicate and to disregard it if they do not.[51] In some cases the jury must find the degree of the offense charged [52] and fix the punishment.[53] Whether an ordinance is void or valid is a question of law.[54]

(§ 10) *D. Taking case from jury.*[See 8 C. L. 226]—The case should not be taken from the jury if there is evidence to support a conviction for the crime charged [55] or an included offense;[56] if there is not such evidence the case should be withdrawn.[57] A verdict may be directed on account of defectiveness of the indictment [58] if the defect is one which would be fatal on motion in arrest.[59] A motion to dismiss for insufficiency of evidence is not waived by introducing character evidence after it is denied.[60]

(§ 10) *E. Instructions. Necessity and duty of charging.*[See 8 C. L. 227]—In some jurisdictions, the court is required of its own motion to instruct on the general features of the case.[61] In others it is not required to charge at all,[62] and in

ciently proved to admit acts and declarations of co-conspirators is a question for the court. Schultz v. State [Wis.] 113 NW 428. Under Code Civ. Proc. § 3441, the determination of admissibility of confessions is for the court. State v. Sherman, 35 Mont. 512, 90 P 981.

50. Question of existence of conspiracy so as to render acts of one admissible against others held for the jury. State v. Caine, 134 Iowa, 147, 111 NW 443. Whether a witness is an accomplice requiring corroboration in order to convict is a question of fact, and a charge under the statute that testimony of an accomplice must be corroborated in order to convict is sufficient, and it was not error to further charge that a witness was an accomplice. Driggers v. U. S. [Ind. T.] 104 SW 1166.

51. Carbough v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 241, 93 SW 738. Proper to submit confessions to jury with instructions to disregard them if they found they were induced by hope or fear. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 244, 94 SW 224.

52. Under an information for murder by poisoning, it is the province of the jury to find the degree of offense, and under Rev. St. 1887, §§ 7925, 7926, the court cannot deprive them of such right by peremptory charge that defendant is guilty of murder in the first degree if at all. State v. Quarles [Idaho] 89 P 636. In Idaho, whenever a crime is distinguished into degrees, the jury, if they convict, must find the degree of the crime of which defendant is guilty. Rev. St. 1887, § 7925. Under this act degree of murder or manslaughter must be found by jury and not by court, though homicide is by poisoning. State v. Phinney [Idaho] 89 P 634.

53. Under Mansf. Dig, § 2283, which is in force in Indian Territory, one on trial for crime is entitled to have the jury fix his punishment if it does not exceed a fine to a certain amount or imprisonment exceeding a certain term. Taylor v. U. S., 6 Ind. T. 350, 98 SW 123.

54. City of Lebanon v. Zanditon [Kan.] 89 P 10.

55. Where the evidence of the state only tends to establish guilt and defendant offers no evidence, it is error to direct verdict for state. King v. State [Ala.] 44 S 200. Refusal of general charge for defendant proper where there was evidence sufficient to warrant conviction. Gordon v. State, 147 Ala. 42, 41 S 847. Where there is evidence tending to establish guilt, it is proper to refuse to direct a verdict. Dowling v. State [Ala.] 44 S 403. Where evidence affords an inference of guilt, a verdict will not be directed for defendant. Dillard v. State [Ala.] 44 S 396. Where there is evidence which would authorize a conviction, a verdict of not guilty cannot be directed. Leonard v. State [Ala.] 43 S 214. Proper to refuse to direct a verdict where there is sufficient evidence to sustain a conviction. Barber v. State [Ala.] 43 S 808. General affirmative charge properly refused as to a conspirator where evidence was conflicting. Ferguson v. State [Ala.] 43 S 16. Where there is some evidence tending to connect accused with the crime, the case should be given to the jury. Clark v. Com. [Ky.] 105 SW 393. The question of guilt is for the jury unless there is failure to produce evidence on which they may properly find matters alleged to be true. State v. York [Iowa] 113 NW 324. Proper to refuse to withdraw case from jury where evidence of tracks and of tracing defendant with a hound and incriminating statement of accused. State v. Hunter, 143 N. C. 607, 56 SE 547.

56. It is not error to refuse to direct an acquittal where the evidence warrants conviction of an included offense. Payne v. State [Ala.] 42 S 988.

57. The presence of some proof, not sufficient to establish guilt beyond a reasonable doubt, is not sufficient to warrant submission of a criminal case to the jury. People v. Gluck, 188 N. Y. 167, 80 NE 1022.

58. In Alabama a verdict should be directed where an indictment is not sufficient to support a conviction. Cagle v. State [Ala.] 44 S 381.

59. A verdict of acquittal will not be directed because of defect in the indictment unless it is one which would be fatal on motion in arrest. Sterns v. U. S. [C. C. A.] 152 F 900.

60. Nelson v. U. S., 28 App. D. C. 32.

61. The court should cover the general features of the case, define the offense, and indicate what it is essential to prove. People v. Prinz. 148 Mich. 307, 14 Det. Leg. N.

others only on request.[63] Where instructions are given, an accused is entitled to have his theory specifically and correctly presented,[64] and to have instructions given on every defensive issue raised[65] and on all included offenses of which conviction might be had.[66] Statutory presumptions should be charged[67] and instructions given as to the consideration of particular kinds of testimony,[68] and the purposes for

82, 111 NW 739. Whether request be made or not, the controlling issue in the case must be submitted by such appropriate instructions as will direct attention to it, and by such clear exposition of the applicable rules as will enable the jury to intelligently deal with it. Glaze v. State [Ga. App.] 58 SE 1126. Failure to do so practically amounts to directing verdict. Id. It is a **sufficient compliance** with the court's duty to declare the law applicable to every phase of the case to submit statutory definitions. State v. Tracey, 35 Mont. 552, 90 P. 791. Where the case depends wholly on circumstantial evidence, the jury should be instructed without request that guilt must be shown to the exclusion of every other reasonable hypothesis. Glaze v. State [Ga. App.] 58 SE 1126; Lett v. State [Ga. App.] 59 SE 85.

62. In Maryland a court may advise the jury as to the law but is not required to do so at request of counsel. Instructions given are merely advisory and may be disregarded by the jury. Esterline v. State [Md.] 66 A 269.

63. In Mississippi the court has no authority to charge in the absence of written request. In the absence of written request the court has no authority in Mississippi to authorize a verdict for a lesser degree of the crime charged. Canterberry v. State [Miss.] 43 S 678.

64. The office of instructions is to inform the jury as to the rules of law pertinent to the issues involved in such manner as to enable them to intelligently apply the evidence thereto. Rouse v. State [Ga. App.] 58 SE 416. Defendant is entitled to have the charge fully applicable to the facts. Trinkle v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 950, 105 SW 201. Error to refuse a charge based on defendant's theory of defense. Taylor v. Com., 28 Ky. L. R. 819, 90 SW 581.

65. State v. Quirk [Minn.] 112 NW 409. A charge should be given on a defensive issue reasonably raised by evidence. Tankersley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 160, 101 SW 997. Where evidence of **insanity** is introduced under a plea of not guilty, an instruction upon insanity should be given. Carter v. State [Ga. App.] 58 SE 532. Charge on presumption of insanity when shown to exist in permanent and continuing form should be given where there is evidence that accused was insane prior to act and continued so to the time thereof. Wooten v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 157, 102 SW 416. In homicide where evidence showed that defendant had drunk heavily during day and had taken morphine held he was entitled to a charge under Pen. Code 1895, art. 41, relative to insanity produced by ardent spirits, as well as on insanity produced by drugs and ardent spirits combined. Phillips v. State [Tex. Cr. App.] 17 Ct. Rep. 757, 98 SW 868. In trial for killing of turkeys, right of accused to defend his crop from damage by them, should have been submitted, being an issue. Swinger v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 124, 102 SW 114. Where evidence showed that deceased was advancing to attack defendant, instruction on **self-defense** should have been given. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Though defendant's plea of **former conviction** was not in proper form, where the state failed to object to it, he was entitled to instructions covering the defense. Walker v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 375, 97 SW 1043. Instruction should have been given on defendant's theory of transaction in robbery case, when it constituted a defense, if true. Fanin v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 768, 100 SW 916. Error to omit to present to jury the **defense of consent** of owner in prosecutions for taking pecan nuts from inclosed land of another. Burrows v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 95, 101 SW 232.

In arson where there was an issue as to whether the house was burned or merely scorched, the court should have instructed on the subject. Moore v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 180, 103 SW 188. In homicide though **drunkenness** was not set up as a defense, it was proper to charge thereon where it appeared that defendant was intoxicated. Bleich v. People, 227 Ill. 80, 81 NE 36.

66. In assault to kill, if proof of intent is inconclusive, the charge should give the jury discretion to convict of a lower grade of offense. Prescott v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 881, 105 SW 192. In homicide where there is evidence reducing the crime to manslaughter, it is error to fail to charge thereon. Joiner v. State [Ga.] 58 SE 859.

67. It is error to omit to charge Pen. Code 1895, § 1010, that the jury may believe the defendant's statement in preference to the testimony. Fields v. State [Ga. App.] 58 SE 327. Failure to instruct that a **reasonable doubt** entertained by a single juror entitles defendant to an acquittal held not cured by general instruction on reasonable doubt which dealt with jury as a whole. Bell v. State, 89 Miss. 810, 42 S 542.

68. Where the state's case depends wholly upon confession, a charge should be given with reference to the caution with which confessions should be considered, and also that a conviction is not authorized, unless the confession is corroborated. Rucker v. State [Ga. App.] 58 SE 295. In arson where the strongest evidence was that defendant requested a witness not to tell on him, it should be instructed that accused could not be convicted alone on his extra judicial confession. Dunlap v. State [Tex. Cr. App.] 17 Tex. Rep. 444, 98 SW 845. Where the state's case is made up of **circumstantial evidence,** the defendant is entitled to a charge thereon. Gonzales v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 880, 105 SW 196; State v. Blydenburg [Iowa] 112 NW 634. Accused's confession together with other positive evidence of guilt obviates the necessity for a charge on circumstantial evi-

which particular testimony may be considered.[69] The court should uniformly charge that the jury are the exclusive judges of the facts and of the credibility of witnesses.[70] Where the court of its own motion gives instructions, they must be correct [71] and fully cover the subject to which they pertain.[72] The court in instructing is not required to see that the charge covers every feature of the case. If an instruction is not as full as desired,[73] or omits reference to particular issues,[74] subjects [75]

dence. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064. In prosecution for theft of cattle where head of animal was found in defendant's possession, it was error to refuse instruction as to identification of head though charge on circumstantial evidence had been given. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 SW 694. Where evidence is wholly circumstantial, jury should be instructed that if the proved facts are consistent with innocence, the defendant is entitled to an acquittal. Riley v. State, 1 Ga. App. 651, 57 SE 1031. Failure to give a requested instruction on the circumstances under which accused voluntarily surrendered held not cured by general instruction that flight of accused is only a circumstance to be considered. Bell v. State, 89 Miss. 810, 42 S 542. Where the intent can be derived from circumstances only, Pen. Code 1895, § 984, providing that, if circumstances from which guilty intent could be inferred are equally consistent with an innocent intent, defendant should be acquitted, should be charged. Cooper v. State [Ga. App.] 59 SE 20. Where defendant took a calf to his employer's farm and with his employer's assistance branded it with his employer's brand, the law as to an **accomplice's testimony** should have been charged as to the employer's testimony. Leak v. State [Tex. Cr. App.] 97 SW 476; Saye v. State [Tex. Cr. App.] 99 SW 661; Gonzales v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 880, 105 SW 196. Where an accomplice testifies against accused, he is entitled to an instruction that the testimony of the accomplice must be corroborated, and such instruction must include a statement that corroboration is insufficient if it merely shows the circumstances of the crime, since there must be other evidence connecting defendant with the offense. Fisher v. Territory, 17 Okl. 455, 87 P 301. In adultery where paramour of accused testifies, charge should be given on testimony of accomplices. Garland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 886, 104 SW 898. Where **evidence of defendant's good character** is introduced, court should charge in substance that they should consider this in determining guilt or innocence, but that if offense charged was found they could not acquit because of previous good character. State v. Wertz, 191 Mo. 569, 90 SW 838. Where stupid negro boy of 12 was charged with arson, failure to charge on whether he knew right from wrong, etc., was reversible error. Owsley v. Com., 31 Ky. L. R. 5, 101 SW 366.

69. The court should charge that evidence admitted or a certain purpose should be considered only for such purpose. Brundige v. State [Tex. Cr. App.] 95 SW 527. If evidence is admissible for a certain purpose only, it is the duty of accused to request an instruction restricting its consideration by the jury. Hanners v. State, 147 Ala. 27, 41 S 973.

70. Wadhams v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 727, 99 SW 1014. Defendant is entitled to a charge that jury are exclusive judges of the acts proved and the weight to be given testimony. Taylor v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 765, 100 SW 393.

71. The court may instruct on any material question on which there is evidence deserving of consideration. People v. Quimby [Cal. App.] 92 P 493.

72. State v. Rutledge [Iowa] 113 NW 461. While it is not incumbent on a trial judge to charge as to impeachment of witnesses, still where the subject is referred to in the charge, proper and adequate instructions thereon should be given. Rouse v. State [Ga. App.] 58 SE 416. A trial judge must correctly and fairly present to the jury defendant's contentions if he attempts to state them, but he is not required to give reasons which would authorize acquittal, and which as matters of law are covered in his general charge, as contentions of defendant. Moore v. State, 1 Ga. App. 502, 57 SE 1016.

73. Carter v. State [Ga. App.] 58 SE 532. The fact that charge as to extent to which character could be considered was too narrow cannot be complained of where no request was made. Powers v. State, 117 Tenn. 363, 97 SW 815. Meagerness of charge on dying declarations cannot be complained of where no request was made. Id. Where the general charge correctly states the law, a special instruction need not be given if not requested. State v. Williams, 76 S. C. 135, 56 SE 783. The court is not bound to charge on the law of a theory arising solely out of the statement of the accused. Parker v. State, 1 Ga. App. 781, 57 SE 1028. Failure to charge some other legal proposition applicable to a case is not available for assignment of error on a charge in itself correct. Howell v. State, 124 Ga. 698, 52 SE 649. Instruction correct as far as it goes cannot be urged as error when no request for modification was made. State v. Nowells [Iowa] 109 NW 1016. Where statute on self-defense was charged as far as applicable, failure to charge the entire statute is not error in the absence of a request. Morello v. People, 226 Ill. 388, 80 NE 903. Where court asked counsel if he wanted other instructions given and none were requested, failure to instruct on manslaughter in fourth degree was not error. State v. West, 202 Mo. 128, 100 SW 478.

74. Lindsey v. State [Fla.] 43 S 87. Omission to charge of particular propositions. People v. White [Cal. App.] 90 P 471. Omission to charge on **forms of verdict.** Howell v. State, 124 Ga. 698, 52 SE 649. Where counsel for accused and the state on request of the court define their positions as to issues involved, and both state that the only issue is murder, the accused cannot complain of failure to charge on voluntary manslaughter. Threlkeld v. State, 128 Ga. 660,

or theories,[76] or is deemed misleading,[77] or not sufficiently specific,[78] or if an amplification of the charge is desired,[79] or if special instructions,[80] or if definitions are desired,[81] a suitable instruction should be requested.[82] A requested instruction should be strictly correct [83] and must assert a proposition of law,[84] and be made in

58 SE 49. If all phases of the case are not covered, requests should be made. Douglass v. State [Fla.] 43 S 424. One cannot complain of failure to charge where such failure was in effect a withdrawal of the crime with which he is charged from the jury. State v. Gordon, 196 Mo. 185, 95 SW 420. Omission to give **cautionary instructions** as to evidence of accused. State v. Baruth [Wash.] 91 P 977. Reference to a certain fact in evidence without calling attention to the fact that it had been denied was not error where no request as to the latter was made. People v. Ferone, 105 NYS 448.

75. In absence of request, no error can be predicated on failure to charge on **impeaching testimony.** Moody v. State, 1 Ga. App. 772, 58 SE 262. In absence of a proper request, it is not error to fail to charge that impeaching testimony should be considered for no other purpose. Sasser v. State [Ga.] 59 SE 255. There being no evidence other than **defendant's statement** upon which to base assignment of error in failure to charge, it was not reversible error to fail to charge in absence of a request. Robberson v. State [Ga. App.] 58 SE 544. In assault to kill, failure to charge on **aggravated and simple assault.** Roper v. U. S. [Ind. T.] 104 SW 584. Failure to charge as to **credibility of witnesses.** State v. Thurman, 121 Mo. App. 374, 98 SW 819. In homicide case it was not error to omit to charge on **reasonable doubt.** Mabry v. State, 80 Ark. 345, 97 SW 285. A special charge on a particular proposition should be requested. State v. Thompson, 76 S. C. 116, 56 SE 789. Instruction on **alibi** should be specically requested where plea of not guilty was entered. State v. Bond, 191 Mo. 555, 90 SW 830. Omission to charge on **alibi.** Heidelbaugh v. State [Neb.] 113 NW 145. Omission to charge on alibi, not error where defendant admitted his presence at the time and place of the offense, and the record showed nothing to the contrary. Jones v. State [Tex. Cr. App.] 101 SW 1012. One cannot complain of omission in or failure to instruct where he made no request. State v. Gordon, 196 Mo. 185, 95 SW 420. Court having charged entire statute on voluntary manslaughter, omission of charge on cooling time was not error, no request being made. Rogers v. State, 128 Ga. 67, 57 SE 227.

76. Where there was evidence tending to show **confession** was not free and voluntary though a warning was given, a charge on the subject should have been given. Follis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 120, 101 SW 242. Assault being a **misdemeanor** if accused desired an instruction on simple assault, he should request it. High v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 779, 98 SW 849. Failure to charge that one or both defendants might be convicted or acquitted, not error in absence of request or suggestion for such instruction. State v. Barnett, 203 Mo. 640, 102 SW 506. Failure to charge on lesser and **included offenses** is not error in the absence of a request for such charge. McConnell v. State [Neb.] 110 NW 666. Omission to charge on lower offenses (robbery charge) not error in absence of request. State v. Parsons [Wash.] 87 P 349. It is the duty of the court to instruct upon lower degrees of the crime charged of which there is any reasonable theory of guilt under the evidence. State v. Newton, 74 Kan. 561, 87 P 757. Failure to give such instructions is not reversible error in the absence of a request therefor. Id.; State v. Reyner [Or.] 91 P 301; State v. Horn [S. D.] 111 NW 552. It is only in prosecutions for murder that the judge is required to instruct on lesser degrees of his own motion. In other cases such charge should not be given unless requested and called for by the evidence. State O' Connor, 119 La. 464, 44 S 265.

77. If counsel desires an instruction to be given in a particular form of words, he should make a request to that effect. Commonwealth v. Beingo, 217 Pa. 60, 66 A 153. Instruction that character evidence is positive. Id.

78. State v. Tracey, 35 Mont. 552, 90 P. 791; McCummins v. State [Wis.] 112 NW 25. Accused cannot complain that instruction to disregard certain **stricken testimony** was not sufficiently specific. Long v. State [Wyo.] 88 P 617. Omission to charge on a certain phase of evidence not error in absence of request. State v. Judd, 132 Iowa, 296, 109 NW 892.

79. Court having charged law of justifiable homicide as contained in Pen. Code, §§ 70, 71, it was not error to omit a charge on § 73, in the absence of request, since § 73 tends to limit right of self-defense, not to extend it. Williams v. State, 1 Ga. App. 508, 57 SE 939. General instructions on credibility of witnesses and the jury as judges thereof held sufficient in absence of special requests. James v. State, 1 Ga. App. 779, 57 SE 959.

80. State v. Martin, 141 N. C. 832, 53 SE 874. A request should be made where instructions on a specific defense are desired. Wiley v. State [Ga. App.] 59 SE 438. Failure to charge as to the duty of the jury to reconcile evidence and the rule of law applicable thereto held not ground for new trial where no request was made, and it appearing that the jury had been charged that they were the exclusive judges of the evidence. Joiner v. State [Ga.] 58 SE 859.

81. "Accomplices." Driggers v. U. S. [Ind. T.] 104 SW 1166.

82. If an accused desires written instructions, he should reduce them to writing and submit them to the court. Bivens v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 91, 97 SW 86. Objection to charge that jury should not fix punishment and exception thereto is equivalent to a request for a charge that the jury fix the punishment. Reynolds v. U. S. [Ind. T.] 103 SW 762.

83. Where special instructions are asked, they must be such as are correct under the evidence. State v. Pellerin, 118 La. 547, 43 S 159. In determining whether or not a requested instruction should be given, the testimony of defendant must be taken as

the form required by law.[85] If several instructions are requested in bulk, all may be refused if one is bad.[86] The court may modify a requested instruction and give it as modified.[87] A request in proper form and not covered by other instructions should be given.[88]

Relation to indictment and evidence.—Instructions should be predicated upon and be applicable to the issues raised by the indictment,[89] and evidence introduced [90]

true. People v. Williamson [Cal. App.] 92 P 313. Not error to refuse a request defective in form and language. Griffin v. State [Ala.] 43 S 197. Proper to refuse a request requiring too high a degree of proof. Boyd v. State [Ala.] 43 S 204. Not error to refuse an instruction partly erroneous. State v. McDowell [N. C.] 59 SE 690. Requested special charges requiring correction or limitation are properly refused. State v. Rideau, 118 La. 385, 42 S 973. Where a substantive proposition is desired to be presented to the jury, it should be requested as such and not as a part of another instruction. Knapp v. State, 168 Ind. 153, 79 NE 1076. A special charge though not properly drawn should be given where it covers one of the defenses. Wadhams v. State, [Tex. Cr. App.] 18 Tex. Ct. Rep. 727, 99 SW 1014.

84. Request asserting no proposition of law properly refused. Johnson v. State [Ala.] 44 S 670.

85. Charge on the effect of evidence not requested in writing as required by Code 1896, § 3326, properly refused. Morrison v. State [Ala.] 44 S 150. Defendant cannot complain of failure to give instructions not requested in writing. De Lam v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 390, 95 SW 532. Under Pen. Code, § 2070, amended by Laws 1901, p. 173, if accused is not satisfied with instructions given, it is his duty to submit one in writing more fully concerning the particular matter. State v. Gordon, 35 Mont. 458, 90 P 173.

86. Gregory v. State [Ala.] 42 S 829; Jones v. State [Ala.] 43 S 179; Andrews v. State [Ala.] 43 S 196; McCombs v. State [Ala.] 43 S 965; Morrison v. State [Ala.] 44 S 43; Morrison v. State [Ala.] 44 S 150; Burgess v. State [Ala.] 42 S 681; McClure v. State [Ala.] 42 S 813; Mills v. State [Ala.] 42 S 816.

87. Modification of requested instruction on degree of proof held proper. People v. Hemple [Cal. App.] 87 P 227. Requests need not be given in the language submitted. Commonwealth v. Kronick [Mass.] 82 NE 39. Elimination of mere commonplace statement from instruction is harmless. People v. Buck [Cal.] 91 P 529. Elimination of clause that opinion evidence should be received with caution is harmless. Id. Requests containing statements not warranted by the evidence. Bridges v. State [Neb.] 113 NW 1048. Where after argument in homicide case, the court modified its instructions to read that deceased died "within a year and a day" instead of "presently" from wounds received, it was not error to refuse to allow a reargument. Kennedy v. Com., 30 Ky. L. R. 1063, 100 SW 242. One cannot complain of modification of his requests by court where he acquiesces in the charge as modified, it being his duty to object. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509.

88. Ager v. State [Ga. App.] 58 SE 374. Under Pen. Code, §§ 1127, 1093, it is error to refuse to give a requested instruction which is applicable to the facts. People v. Williamson [Cal. App.] 92 P 313. Where there is evidence of **lower degrees of the offense,** it is error to refuse a charge relative thereto. Fields v. State [Ga. App.] 58 SE 327. Error to refuse to charge on **alibi** when there was evidence in support thereof. Harper v. State [Tex. Cr. App.] 98 SW 839. The fact that at the time reference was made to **failure of defendant to testify** the court stated that no inferences could be drawn from such fact does not warrant refusal to give an explicit charge on such fact. People v. Messer, 148 Mich. 168, 14 Det. Leg. N. 157, 111 NW 854. Request on **reasonable doubt** not covered by other instructions. Duthey v. State, 131 Wis. 178, 111 NW 222; Boyd v. State [Ala.] 43 S 204; Foglia v. People, 229 Ill. 286, 82 NE 262. Requested instruction in **homicide** held not covered by the charge given. People v. Williamson [Cal. App.] 92 P 313. Where charge requested is neither certified as refused nor read to the jury, it will be **treated on appeal as refused,** though actually handed to the jury. Error is not cured by the fact that the jury read the charge. Harrison v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 141, 105 SW 804.

89. Instruction in prosecution held erroneous as inapplicable to the facts. Kerr v. U. S. [Ind. T.] 104 SW 809. It is improper to instruct on legal propositions not presented by the issues or proof. Roberts v. People, 226 Ill. 296, 80 NE 776; State v. Caron, 118 La. 349, 42 S 960. Where time was not an essential element of the offense, an instruction not requiring a finding that it was committed on the date alleged is not error. Imboden v. State [Colo.] 90 P 608. Where but one count of an indictment was submitted, it was not error to refuse to charge to acquit if jury believed him guilty, but could not ascertain on which charge of the indictment. Manovitch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 712, 96 SW 1. Where two persons are jointly indicted, a charge on the law of conspiracy is not inappropriate, if warranted by evidence, though the indictment does not expressly charge a conspiracy. Bradley v. State, 128 Ga. 20, 57 SE 237. Under an indictment charging defendant to have committed murder jointly with two others without charging conspiracy, it was improper to instruct the jury on the subject of a supposed conspiracy between him and some other person or persons not named in the indictment. Taylor v. Com., 28 Ky. L. R. 819, 90 SW 581.

90. Bell v. State [Ark.] 104 SW 1108. Fay v. Ft. Collins [Colo.] 90 P 512; Stokes v. State [Fla.] 44 S 759; Jackson v. State, 1 Ga. App. 723, 58 SE 272; Harwell v. State [Ga. App.] 58 SE 1111; Canterberry v. State

[Miss.] 43 S 678; State v. Tyree, 201 Mo. 574, 100 SW 645; Giddings v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 84, 96 SW 926; Burnett v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 788, 100 SW 381; Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817; Jeremy Imp. Co. v. Com., 106 Va. 482, 56 SE 224. Where there was no evidence that defendant's character was good, a charge that the fact of good character could be considered was misleading. State v. Penna, 35 Mont. 535, 90 P 787. In homicide where testimony makes a clear case of murder and the theory of accused is self-defense, Pen. Code 1895, §§ 70, 72, are not applicable and failure to charge them is not error. McDonald v. State [Ga. App.] 59 SE 242. A charge submitting a manner of assault not charged, but which might have been considered is bad as not applicable to facts. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 868, 104 SW 899.

Instruction held inapplicable to evidence on **practicing medicine without certificate.** State v. Hefferman [R. I.] 65 A 284.

Error to give instruction not applicable to evidence though correct as an abstract proposition. State v. Elsey, 201 Mo. 561, 100 SW 11. Error to charge on the **law of positive and negative testimony,** where such rule is inapplicable. Mill v. State [Ga. App.] 58 SE 673. Instruction on **self-defense** held not applicable to evidence. Filippo v. People, 224 Ill. 212, 79 NE 609.

Instruction not sustained: Instruction on **provoking difficulty** prejudicial error where there was no evidence to sustain it. State v. Edwards, 203 Mo. 528, 102 SW 520. Instruction of defendant's **right to defend home** erroneous where deceased was in the highway, and not attempting to come upon defendant's premises when killed. Williamson v. Com., 31 Ky. L. R. 61, 101 SW 370. Instruction in larceny case that if several persons were interested with defendant in the act and only the defendant was on trial, this would make no difference, held prejudicial error, there being no evidence to support it. George v. U. S., 6 Ind. T. 155, 89 SW 1121. Error to charge as to character of witnesses where **no character testimony** is introduced. Johnson v. State [Ga. App.] 58 SE 684. Facts not shown should not be hypothisized, nor should inferences be drawn from facts shown. Danford v. State [Fla.] 43 S 593. In homicide it is not error to fail to charge on manslaughter where there is no evidence thereof. Robinson v. State [Ga.] 58 SE 842. Error to charge that a witness sought to be impeached may be sustained by proof of general good character, where there is no such proof. Jenkins v. State [Ga. App.] 58 SE 1063. In homicide where there was evidence that defendant stabbed decedent with a knife, it was not error to fail to charge on **simple assault.** Hardin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 231, 103 SW 401. Where defendant is guilty of a certain degree of crime or nothing, it is not error to fail to charge on lesser degrees of the crime. Webb v. Com., 30 Ky. L. R. 841, 99 SW 909; Howard v. State [Ga. App.] 59 SE 89; Powers v. State, 117 Tenn. 363, 97 SW 815. Instructions as to **threats** not shown by evidence should not be given. State v. Birks, 199 Mo. 263, 97 SW 578. In robbery where there was no element of stealth, it was not error to fail to submit larceny. People v. White [Cal. App.] 90 P 471. Charge on **manslaughter.** Reed v. State [Ga. App.] 58 SE 312. Charge in prosecution for **illegally selling intoxicating liquor** held bad as not predicated on evidence. State v. Linder, 76 Ohio St. 463, 81 NE 753. Instruction **in adultery** held erroneous as not predicated on evidence. State v. Harmann [Iowa] 112 NW 632. Instruction on **self-defense** held improper where there was no issue as to such defense. Foglia v. People, 229 Ill. 286, 82 NE 262. Instruction that crime could be proved by **circumstantial evidence** error where there was no circumstantial evidence of act alleged. Kevern v. People, 224 Ill. 170, 79 NE 574. Refusal to charge an effect of prior conspiracy followed by assault proper where there was **no evidence of such conspiracy.** State v. King, 203 Mo. 560, 102 SW 515. Where there was no testimony indicating use of **excessive force,** charge thereon in connection with self-defense should not be given. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. In assault it is error to charge law relative to **use of weapons** where there is no evidence of such use. Nenach v. State [Tex. Cr. App.] 97 SW 503. Also error to charge law of insanity caused by intoxication where testimony did not show that defendant was drunk. Id. Not error to omit charge that there was no evidence of motive, proof thereof being unnecessary. State v. Turner, 143 N. C. 641, 57 SE 158. Failure to instruct on alibi defense error where it was raised by evidence. Burns v. State, 75 Ohio St. 407, 79 NE 929.

Insufficient to sustain instruction: In burglary evidence that a witness purchased the stolen property worth $26 for $1 and gave $15 for signing his bond required a charge on accomplice's testimony. Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 380, 97 SW 1052. Proof of an inculpatory admission will not authorize a charge upon the subject of confession. Riley v. State, 1 Ga. App. 651, 57 SE 1031. Instruction on confessions prejudicial error where there was **no evidence of a confession** but only of an inculpatory statement. Shelton v. State, 144 Ala. 106, 42 S 30. Evidence held not to warrant instruction on theory of killing to prevent escape of one whom defendant was seeking to arrest. Mitchell v. State [Ark.] 101 SW 763. Evidence held not to require a charge on **alibi** when not requested. State v. Bond, 191 Mo. 555, 90 SW 830. Additional charge on alibi held not required under the evidence. Bass v. State, 1 Ga. App. 728, 790, 57 SE 1054. Evidence held not to require charge on **self-defense** on a certain theory. State v. Rugero, 117 La. 1040, 42 S 495. Evidence in burglary case held to **warrant instruction on principals.** Coleman v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 934, 89 SW 828. A charge on insanity is not necessary where testimony lacks tendency to show that mental unsoundness antedated drunken spree in course of which killing was done. State v. Kidwell [W. Va.] 59 SE 494. Testimony that defendant had drank a "lot" of wine held **too indefinite to warrant charge on drunkenness.** State v. Church, 199 Mo. 605, 98 SW 16. In prosecution for forgery, evidence that person to whom note was given was familiar with handwriting of defendant and prosecuting witness did not require special charge on intent of defend-

and not excluded,[91] and requested instructions which do not conform to this rule may be refused.[92]

ant. Abel v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 361, 97 SW 1055. Not error to **fail to define "heat of passion"** where there was no issue of manslaughter. State v. Barrington, 198 Mo. 23, 95 SW 235. Special charge on **law of accomplices** not required by the evidence in this case. Territory v. Meredith [N. M.] 91 P 731. Failure to charge on **intoxication as** motive is not error where defense is alibi. People v. White [Cal. App.] 90 P 471.

Evidence held to justify a charge on the theory that defendant, an officer, shot toward deceased to scare him. Saye v. State [Tex. Cr. App.] 99 SW 551. As to intoxication as a defense. State v. Steidley [Iowa] 113 NW 333. Where defendant's counsel referred in his argument to the nationality and families of deceased and defendant, the court properly instructed that the jury had nothing to do with these matters. People v. Taylor [Cal. App.] 87 P 215. Where in prosecution for robbery defendant was charged with **previous conviction** of burglary, held not error to charge on definition and punishment of burglary. State v. Paisley [Mont.] 92 P 566.

Charge on circumstantial evidence not required where there was both circumstantial and direct evidence. Nobles v. State, 127 Ga. 212, 56 SE 125. Charge of circumstantial evidence not required in burglary case where defendant was seen and identified in prosecutor's room as he escaped. Keith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 516, 94 SW 1044; Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 150, 102 SW 406. In prosecution for stealing a hog, charge on circumstantial evidence is not necessary because evidence as to ownership of hog is not clear, there being direct evidence that the hog belonged to prosecuting witness. Washington v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 143, 105 SW 789. Not necessary where **defendant confesses.** Gantt v. State [Tex. Cr App.] 20 Tex. Rep 371, 105 SW 799. Where direct testimony established the case. Stout v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 234, 103 SW 391. Where in theft defendant admitted the taking and was found in possession of the goods, held the only question was the one of intent and the case was not one on circumstantial evidence. Flagg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 266, 103 SW 855. Where crime is **proven by positive evidence.** Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 336, 103 SW 918. Evidence in burglary case held direct and charge on circumstantial evidence not required. Smith v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 592, 90 SW 638. Where evidence of killing was direct and positive. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231. Nor where defendant has confessed. Whitehead v. State [Tex. Cr. App.] 90 SW 876. Evidence in larceny held insufficient to authorize charge on circumstantial evidence. Richardson v. State [Tex. Cr. App.] 103 SW 852.

Charge on circumstantial evidence required: Where in homicide evidence of presence of accused at scene of crime, aside from his confession was circumstantial, and evidence of his participation in the crime was circumstantial, it was error to refuse to charge on circumstantial evidence. Early v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 78, 97 SW 82. In larceny case, on taking watch from prosecutor's possession. Bogan v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 266, 90 SW 171. Held required in theft case. Burdett v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 139, 101 SW 988. Instruction on circumstantial evidence held proper where proof was largely of that character. Morello v. People, 226 Ill. 388, 80 NE 903. No error to charge on circumstantial evidence where all evidence was direct. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933.

91. Request seeking to bring before the jury evidence which had been excluded, properly refused. Bluett v. State [Ala.] 44 S 84.

92. Strickland v. State [Ala.] 44 S 90; People v. McPherson [Cal. App.] 91 P 1098; Williams v. State [Fla.] 43 S 431; Driggers v. U. S. [Ind. T.] 104 SW 1166; State v. Hopkins, 118 La. 99, 42 S 660; State v. Rideau, 118 La. 385, 42 S 973; People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132; State v. Miller, 191 Mo. 587, 90 SW 767; State v. Megorden [Or.] 88 P 306; State v. Waldrop, 73 S. C. 60, 52 SE 793; Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817; Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 SW 174; McKinzie v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 149, 102 SW 414; State v. Johnson [Wash.] 91 P 949. Charge on lesser degrees of crime not involved. Fews v. State, 1 Ga. App. 122, 58 SE 64. Request misleading the jury to consider facts outside the evidence properly refused. Thomas v. State [Ala.] 43 S 371. In local option case where there was no evidence of irregularity in election. Luck v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 358, 97 SW 1049. Where in larceny all the evidence indicated a present intent to take it was proper to refuse charge as to subsequent intent. Black v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 866, 104 SW 897. Refusal to charge that accused could not be convicted on uncorroborated **testimony of accomplices** held not error where there were no accomplices testified. French v. Com., 30 Ky. L. R. 98, 97 SW 427. Charge for acquittal where in arson there was no other evidence against defendant than foot prints where there was evidence of motive and opportunity. Moore v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 180, 103 SW 188. In theft where there was **no evidence of return of the property,** it was not error to refuse to charge on voluntary return. Ellison v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 717, 99 SW 999. In prosecution for killing chickens while at roost, it is proper to refuse a charge based on killing them while they were depredating, there being no evidence thereof. Jones v. State [Tex. Cr. App.] 99 SW 994. Where there was sufficient direct evidence of the larceny to warrant conviction, it was not error to refuse to charge on circumstantial evidence. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. Where evidence showed that defendant was not insane, a **charge on insanity.** Best v. Com., 30 Ky. L. R. 967, 99 SW 978. Charge on **alibi.** Slaughter v. State [Tex. Cr. App.] 105 SW 199. Refusal to charge that jury should pay no at-

A requested instruction substantially covered by the charge given may be refused,[93] though in better form than the one given.[94] The court is not, however,

tention to argument of counsel relative to enforcement of law in absence of anything indicating that there was such argument. Adams v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 9, 105 SW 497. Instructions **on murder in first degree** properly refused where accused has been acquitted of that crime. Allen v. State [Ala.] 42 S 106. Charge **on former jeopardy.** Barber v. State [Ala.] 43 S 808. Not error to refuse charge on theory that defendant sold liquor as agent of purchaser when it was not presented by evidence in prosecution under local option law. Carter v. State [Tex. Cr. App.] 89 SW 835. Instruction on theory that evidence was wholly circumstantial properly refused where there was other evidence. Gordon v. State, 147 Ala. 42, 41 S 847. Refusal to give instruction that there was no **corroborative evidence** held proper. Commonwealth v. Brennor, 194 Mass. 17, 79 NE 799. Refusal to charge on **alibi** proper. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641. In murder trial, not error to refuse instructions on **murder in second** degree and manslaughter in fourth degree, where evidence would not have justified verdicts for those offenses. State v. Paulsgrove, 203 Mo. 193, 101 SW 27. Not error to refuse to charge on hypnotic influence in connection with charge on **confessions** when there was no evidence of such influence. Cross v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 79, 101 SW 213. Proper to refuse **charge on insanity** when there was no evidence thereof but only evidence that defendant was easily persuaded and of a weak mind. Id. **No circumstantial evidence** Mahoney v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 818, 98 SW 854. Where prosecution is based on positive testimony, it is not error to refuse to charge on circumstantial evidence. Herndon v. State [Tex. Cr. App.] 99 SW 558. Charge on circumstantial evidence properly refused where defendant had confessed. Welch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 522, 95 SW 1035. All the evidence being direct, it is proper to refuse an instruction **on circumstantial evidence.** State v. Paulsgrove, 203 Mo. 193, 101 SW 27.

93. Rigsby v. State [Ala.] 44 S 608; Howard v. State [Ala.] 44 S 95; Leonard v. State [Ala.] 43 S 214; Griffin v. State [Ala.] 43 S 197; Creagh v. State [Ala.] 43 S 112; Young v. State [Ala.] 43 S 100; Parham v. State, 147 Ala. 57, 42 S 1; Williams v. State, 147 Ala. 10, 41 S 992; Morris v. State [Ala.] 39 S 608; Prior v. Territory [Ariz.] 89 P 412; Bell v. State [Ark.] 104 SW 1108; Wilhite v. State [Ark.] 104 SW 531; Dempsey v. State [Ark.] 102 SW 704; Muldrow v. State [Ark.] 99 SW 383; Mabry v. State, 80 Ark. 345, 97 SW 285; Burnett v. State, 80 Ark. 225, 96 SW 1007; Richardson v. State, 80 Ark. 201, 96 SW 752; People v. Smith [Cal.] 91 P 511; People v. King [Cal. App.] 87 P 400; People v. Taylor [Cal. App.] 87 P 215; King v. State [Fla.] 44 S 941; Day v. State [Fla.] 44 S 715; Williams v. State [Fla.] 43 S 431; Butler v. State [Ga. App.] 58 SE 1114; Paulk v. State [Ga. App.] 58 SE 1109; State v. Barber [Idaho] 88 P 418; Miller v. People, 229 Ill. 376, 82 NE 391; Roberts v. People, 226 Ill. 296, 80 NE 776; Driggers v. U. S. [Ind. T.] 104 SW 1166; Green v. U. S. [Ind. T.] 104 SW 1159; Kerr v. U. S. [Ind. T.] 104 SW 809; State v. Krug [Iowa] 113 NW 822; State v. Leonard [Iowa] 112 NW 784; State v. Hoffman, 134 Iowa, 587, 112 NW 103; Stuart v. Com., 31 Ky. L. R. 1343, 105 SW 170; Goodman Co. v. Com., 30 Ky. L. R. 519, 99 SW 252; State v. Cornelius, 118 La. 146, 42 S 754; State v. Descant, 117 La. 1016, 42 S 486; McCoy v. State [Miss.] 44 S 814; State v. Edwards, 203 Mo. 528, 102 SW 520; State v. King, 203 Mo. 560, 102 SW 515; State v. Paulsgrove, 203 Mo. 193, 101 SW 27; State v. Vaughan, 200 Mo. 1, 98 SW 2; State v. Coleman, 199 Mo. 112, 97 SW 574; State v. Barrington, 198 Mo. 23, 95 SW 235; State v. Crittenden, 191 Mo. 17, 89 SW 952; State v. Paisley [Mont.] 92 P 566; State v. Phillips [Mont.] 92 P 299; State v. Tracey, 35 Mont. 552, 90 P 791; State v. O'Brien, 35 Mont. 482, 90 P 514; Wheeler v. State [Neb.] 113 NW 253; Territory v. Emilio [N. M.] 89 P 239; State v. Megorden [Or.] 88 P 306; State v. Collins [R. I.] 67 A 796; State v. Emerson [S. C.] 58 SE 974; State v. Jackson [S. D.] 113 NW 880; State v. Allen [S. D.] 110 NW 92; Atkins v. State [Tenn.] 105 SW 353; Carnes v. State [Tex. Cr. App.] 103 SW 853; Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445; Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218; Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 108, 101 SW 212; Shelton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 41, 100 SW 955; Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 41, 100 SW 952; White v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 816, 100 SW 941; Clark v. State [Tex. Cr. App.] 100 SW 155; McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879; Lewis v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 301, 97 SW 481; Wright v. State [Tex Cr. App.] 17 Tex. Ct. Rep. 316; 97 SW 92; Allen v. State [Tex. Cr. App.] 96 SW 927; Whittle v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 573, 95 SW 1084; Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024; Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870; 90 SW 1100; Selph v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 267, 90 SW 174; State v. Johnson [Wash.] 91 P 949; State v. Parsons [Wash.] 87 P 349; Schultz v. State [Wis.] 113 NW 428; Spencer v. State [Wis.] 112 NW 462; Goll v. U. S. [C. C. A.] 151 F 412. The judge cannot be required to repeat his charge to the jury. State v. Rideau, 118 La. 385, 42 S 973; State v. Chipp, 121 Mo. App. 556, 97 SW 236. Where there are two defendants, and the court instructs that a confession is binding only on the defendant making it, a further instruction on the question is not required. State v. Thomas, 75 S. C. 477, 55 SE 893. Conpiracy having been once defined, a repetition of the definition was not necessary. Hensley v. Com., 31 Ky. L. R. 386, 102 SW 268. Where court charged that if assault was committed, certain witnesses were **accomplices** and defendant could not be convicted on their testimony, it was not error to refuse to charge that an accomplice cannot corroborate another. Jackson v. State [Tex. Cr. App.] 90 SW 34. Not error to refuse requests upon **different phases of the evidence.** Gourdain v. U. S. [C. C. A.] 154 F 453. Instruction that it was not necessary

justified in refusing a correct special charge on the ground that it is covered in the general charge.[95]

Form and general substance.[See 8 C. L. 230]—It is not necessary for the judge to make introductory remarks as to the importance of the case, but the making of such remarks is not error requiring a new trial if there is no mis-statement of the law and nothing said which would prejudice the jury against accused.[96] Instructions should apply the law to the facts instead of announcing mere general rules.[97] Instructions stating merely abstract propositions should not be given.[98] They should be stated in as simple, orderly, clear, and precise manner as is possible.[99] Matters admitted

for defendant to establish self-defense beyond a reasonable doubt, covered. People v. Gatto, 105 NYS 165. Requested charges in prosecution for seduction. State v. Fogg, 206 Mo. 696, 105 SW 618. Where law of **self-defense** is once charged, it need not be repeated in charge on special phase of the case. Austin v. Com., 30 Ky. L. R. 295, 98 SW 295; State v. Arnold, 206 Mo. 589, 105 SW 641. Where in rape the court submitted the issue of consent, it was not error to refuse to further charge **conversely.** Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003. Instruction on **burden of proof** resting on state. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 76, 101 SW 449. Requested instruction **on proof required.** Covington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 55, 100 SW 368. Instructions given held to have covered requested charge on **alibi** defense. Benton v. State, 78 Ark. 284, 94 SW 688. Where court charged that jury were judges of **credibility of witnesses and weight to be given their testimony,** omission to charge that they were the judges of the facts was not error. Whitehead v. State [Tex. Cr. App.] 90 SW 876. Where court charged generally that jury should consider opportunities of witnesses to know the facts, etc., it was proper to refuse an instruction referring specifically to the intoxication of certain witnesses. Knapp v. State, 168 Ind. 153, 79 NE 1076. Cumulative request on law of **circumstantial evidence.** Roseboro v. State, 127 Ga. 826, 56 SE 991. Instruction on **presumption of innocence.** People v. Yee Foo [Cal. App.] 89 P 450. Requested charge on **circumstantial evidence** covered by charges given. Gordon v. State, 147 Ala. 42, 41 S 847. Requested instruction on reasonable doubt and presumption of innocence. State v. Wertz, 191 Mo. 569, 90 SW 838. Doubt. Goodin v. State, 126 Ga. 560, 55 SE 503; Du Bose v. State [Ala.] 42 S 862; State v. Layton, 191 Mo. 613, 90 SW 724; State v. Bond, 191 Mo. 555, 90 SW 830. Where court has fully instructed on law of reasonable doubt, it is not error to refuse a charge stating the presumption of innocence. State v. Maupin, 196 Mo. 164, 93 SW 379. When the judge has fully and fairly charged the law of reasonable doubt, he is not bound to repeat the instructions upon that subject when charging with reference to some particular or specially enumerated fact or facts. Territory v. Price [N. M.] 91 P 733; Fargerson v. State, 128 Ga. 27, 57 SE 101; Wallace v. State [Tex. Cr. App.] 97 SW 1050. Where court charged as to reasonable doubt, it was not error to refuse to charge that if there was a probability of innocence they should acquit. Campos v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 511, 95 SW 1042. Where the court charged to acquit unless the evidence satisfied the jury of guilt beyond reasonable doubt, failure to charge that the burden of proof was on the state was not error. Jones v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 874, 105 SW 341. Where cogent charge in favor of defendant on circumstantial evidence was given, also one on reasonable doubt, it was not error to refuse to charge that defendant was not required to prove anything. Searles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 873, 105 SW 191. Where the jury has been fully instructed relative to the defendant's statement, it is not necessary, in the absence of a request, to contrast the statement with the evidence, nor to charge any theory dependent on the statement only. Harris v. State [Ga. App.] 58 SE 669. Where the court charges the law appropriate to the case, it is not bound to instruct in immediate connection therewith that if they found enumerated circumstances true, they should acquit. Miles v. State [Ga.] 59 SE 274. Where a specification of a material allegation of an indictment would be no more than a repetion of the language of the indictment, it is not necessary for the court to include it in the charge. Territory v. Meredith [N. M.] 91 P 731.

94. Not error to refuse instruction subject matter of which had been charged though requested instruction was in better form. Knapp v. State, 168 Ind. 153, 79 NE 1076.

95. Snyder v. State, 145 Ala. 33, 40 S 978.

96. Vanderford v. State, 126 Ga. 753, 55 SE 1025.

97. Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817.

98. Abstract propositions of law inapplicable to the facts should not be charged. Griffin v. State [Ala.] 43 S 197; Pate v. State [Ala.] 43 S 343; Kirby v. State [Ala.] 44 S 38; Davis v. State [Ala.] 44 S 561; Hisler v. State [Fla.] 42 S 692; People v. Browne, 118 App. Div. 793, 103 NYS 903. Should not be given though they state correct propositions. State v. Altemus [Kan.] 92 P 594. The **law of preponderence of evidence** is not applicable to criminal cases and it is error to charge it. Mill v. State [Ga. App.] 58 SE 673.

99. It is not good practice to give long and involved instructions attempting to define "reasonable doubt." Titterington v. State [Neb.] 110 NW 678. Instructions should be expressed in concise and unambiguous language. Commonwealth v. Thomas, 31 Ky. L. R. 899, 104 SW 326. In any case, it is error to charge the rule relative to positive and negative testimony without stating the qualification that other things must be equal and the witnesses of equal credibility and that the rule does not

or established beyond dispute should be eliminated.[1] They must be consistent[2] and should not be argumentative in form.[3] The language should be intelligible,[4] clear, and free from ambiguity,[5] and not misleading.[6] Technical terms should be

apply to witnesses who have each given positive but contradictory testimony. Wood v. State, 1 Ga. App. 684, 58 SE 271. Not ground for exception that instruction as to statement of accused was given at the conclusion of the charge. Washington v. State, 124 Ga. 423, 52 SE 910.

1. Wilhite v. State [Ark.] 104 SW 531. Where indictment contains several counts, it is proper for the court to submit a portion of them only, eliminating others. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064.

2. Instructions on drunkenness **held not inconsistent.** State v. Yates, 132 Iowa, 475, 109 NW 1005. Instruction in prosecution for rape. People v. White [Cal. App.] 90 P 471. Instruction in homicide case as to provocation as a predicate for manslaughter held not contradictory to an instruction relative to insult offered a female relation. Barber v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 377, 97 SW 1058.

Instruction condemned as self-contradictory. State v. Thompson, 31 Utah, 228, 87 P 709. An instruction purporting to define an offense but which omits an essential element is not cured by one containing all the elements unless the first is withdrawn. Rahke v. State, 168 Ind. 615, 81 NE 584.

3. Argumentative instruction properly refused. Tribble v. State, 145 Ala. 23, 40 S 938; Skipper v. State, 144 Ala. 100, 42 S 43; Allen v. State [Ala.] 42 S 1006; Leonard v. State [Ala.] 43 S 214; Thomas v. State [Ala.] 43 S 371; Kirby v. State [Ala.] 44 S 38; Davis v. State [Ala.] 44 S 561; State v. Yates, 99 Minn. 461, 109 NW 1070; State v. Edwards, 203 Mo. 528, 102 SW 520. On circumstantial evidence. Gordon v. State, 147 Ala. 42, 41 S 847. Requested charge which is **argument against counsel's argument.** Neville v. State [Ala.] 41 S 1011. It is error to repeat testimony with argumentative deductions drawn therefrom. Rouse v. State [Ga. App.] 58 SE 416; Butler v. State [Ga. App.] 58 SE 685.

Held argumentative: Instruction that it is better that guilty should go free than that innocent or those whose guilt is not shown beyond a reasonable doubt should be punished. Parham v. State, 147 Ala. 57, 42 S 1. Instruction in homicide. Rigsby v. State [Ala.] 44 S 608. Request on reasonable doubt. Howard v. State [Ala.] 44 S 95. Instruction as to how confession should be considered. Strickland v. State [Ala.] 44 S 90. Instruction reciting testimony and drawing deductions therefrom. Butler v. State [Ga. App.] 58 SE 685.

Not argumentative: Instruction reciting facts. People v. Clark [Cal.] 90 P 549.

4. Unintelligible and incomplete request properly refused. Davis v. State [Ala.] 44 S 561. Incomplete and unintelligible. Rose v. State, 144 Ala. 114, 42 S 21; Parham v. State, 147 Ala. 57, 42 S 1. Charge that if jury did not believe beyond reasonable doubt that defendant acted in self-defense then they should give him the benefit of the doubt and acquit him held erroneous as either unintelligible or in that it shifted reasonable doubt against him. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156.

Held not objectionable because containing a phrase not in the indictment. Imboden v. State [Colo.] 90 P 608.

5. Oddo v. State [Ala.] 44 S 646. Charges referring to "deceased" in an assault case properly refused. Wright v. State [Ala.] 42 S 745. Instruction in petit larceny case condemned as involved misleading, and a comment on the evidence. State v. Stanley, 123 Mo. App. 294, 100 SW 678. An instruction that if the jury do not believe the evidence in the case they should acquit is **obscure.** Leonard v. State [Ala.] 43 S 214. Instruction held erroneous as inferring that the jury were the judges of the law. People v. Williamson [Cal. App.] 92 P 313. Instruction **as to weight of negative and positive testimony** held misleading and indefinite for failure to point out what character of testimony was to be weighed under the rule and what attendant facts should be considered. State v. McLeod, 35 Mont. 372, 89 P 831. Not error that in an instruction in homicide that "with malice aforethought" was used in first instead of last part of instruction. O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937.

6. Misleading instruction properly refused. Hanners v. State, 147 Ala. 27, 41 S 973; Andrews v. State [Ala.] 44 S 696.

Held misleading: Instructions in larceny. Miller v. People, 229 Ill. 376, 82 NE 391. Instruction on reasonable doubt held erroneous as conveying the idea that conviction could be had without being able to say just what convinced them of guilt. Bell v. State [Ark.] 98 SW 705. As to presumption that an officer does his duty held obscure and misleading. People v. James [Cal. App.] 90 P 561. Instruction **in rape** held ambiguous and misleading. Rahke v. State, 168 Ind. 615, 81 NE 584. Instructions in **homicide.** Foglia v. People, 229 Ill. 286, 82 NE 262. In homicide case held **too restrictive.** Armstrong v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 519, 96 SW 15. Because not permitting jury to find lesser degree of offense charged. Pitman v. State [Ala.] 42 S 992. Instructions in prosecution for conspiracy. Imboden v. State [Colo.] 90 P 608. Instruction on duty of railroads with reference to waiting rooms. Illinois Cent. R. Co. v. Com., 28 Ky. L. R. 802, 90 SW 602. Requested instruction properly refused because calculated to limit right of juror to join in a verdict of guilty after consulting with others though he entertained at first a reasonable doubt, since a juror may properly join in such verdict if his doubt be removed by discussion. Knapp v. State, 168 Ind. 153, 79 NE 1076. Instruction in trial of two persons held erroneous as improperly combining the two and making the guilt of one defendant dependent upon that of the other. Abbata v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 209, 102 SW 1125. Remarks of the court on the effect of certain evidence brought out by himself held erroneous because not embodied in written instruction though stating

defined,[7] but words commonly used and understood need not be,[8] and it is held that no attempt should be made to define "reasonable doubt."[9]

Instructions should state propositions of law[10] and state them correctly.[11] The evidence should be referred to only in so far as necessary to present the legal questions in the cause.[12] All defenses, whether consistent or inconsistent, should be submitted.[13] The contentions of the defendant and the state should be alike fairly stated,[14] and no charge should be given which would tend to prejudice the jury against either.[15] Under some circumstances it is held proper for the court to

a correct principle of law. State v. Patter, 125 Mo. App. 465, 102 SW 668. Instruction erroneous because limiting jury to finding of aiding and abetting as charged in indictment. Taylor v. Com., 28 Ky. L. R. 819, 90 SW 581. Under an indictment charging burglary and larceny, an instruction is properly refused which is not limited to burglary but permits a conviction of larceny. Dees v. State, 89 Miss. 754, 42 S 605.

Not misleading: Obvious use of "defense" instead of "evidence" in charge on reasonable doubt. State v. Nugent, 134 Iowa, 237, 111 NW 927. So as to prevent discussion of case by jurors. Knapp v. State, 168 Ind. 153, 79 NE 1076. In that it reiterated how the testimony of a witness for the state should be considered. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Abstract instruction. Lipsey v. People, 227 Ill. 364, 81 NE 348. Instruction held not erroneous as authorizing conviction on uncorroborated testimony of accomplices. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. Instruction as to punishment. State v. Paisley [Mont.] 92 P 566. Admonishing jurors that gravity or magnitude of the punishment for the offense should not be allowed to affect their judgment is not an argument against accused, nor does it indicate bias. State v. Baldes, 133 Iowa, 158, 110 NW 440.

7. See Instructions, 8 C. L. 369.

8. **No definition required:** "Conspiracy" in prosecution for assault to do great bodily harm. State v. Krug [Iowa] 113 NW 822. "Common design" in conspiracy. Imboden v. People [Colo.] 90 P 608. "Improper conduct." State v. Barrington, 198 Mo. 23, 95 SW 235. "Cohabit." State v. Knost [Mo.] 105 SW 616. "Actual danger" and "apparent danger." Danford v. State [Fla.] 43 S 593. No definition of conspiracy necessary in charge in murder case. Cecil v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 803, 100 SW 390. "Provoked the difficulty" and "began the quarrel." State v. Long, 201 Mo. 664, 100 SW 587. "Corroboration." Austin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 493, 101 SW 1162. Failure to define "corroborated" not error in absence of request. State v. Sublett, 191 Mo. 163, 90 SW 374. Not necessary to define word "extort" used in statute in ordinary meaning. State v. Lonanis, 79 Vt. 463, 65 A 532.

9. Barker v. State, 1 Ga. App. 286, 57 SE 989; James v. State, 1 Ga. App. 779, 57 SE 959.

10. Making mere commonplace statements in remarks is harmless. People v. Fitts [Cal. App.] 91 P 536. Requests tending to refute or set off argument properly refused. Thomas v. State [Ala.] 43 S 371. Requested instruction merely tending to refute or offset parts of argument of prosecuting attorney properly refused. Tribble v. State, 145 Ala. 23, 40 S 938; Bluett v. State [Ala.] 44 S 84. The court should not instruct as to the effect conviction will have upon defendant. Menn v. State [Wis.] 112 NW 38.

11. Not error to refuse to charge that the burden is on the state to prove all allegations and if on the whole evidence the jury have reasonable doubt they should acquit. Young v. State [Ala.] 43 S 100. Instruction as to punishment of minor who commits a capital offense held to comply with Rev. St. 1899, § 7759. State v. Darling, 199 Mo. 168, 97 SW 592. Where illegal sale of liquor is punishable by fine "or" imprisonment, it is error to charge to assess fine "and" imprisonment. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326.

12. Rouse v. State [Ga. App.] 58 SE 416; Butler v. State [Ga. App.] 58 SE 685. Instructions should contain no such summary of the testimony as might seem to be argument or intimation of opinion. Rouse v. State [Ga. App.] 58 SE 416.

13. State v. Hazlett [N. D.] 113 NW 374.

14. In stating the contentions of the parties, the contentions of each should be alike fairly stated, and if the statement of a contention be attempted it must be correctly given. Rouse v. State [Ga. App.] 58 SE 416. The court should not mix or mingle them so as to present them in form of argument; this is especially erroneous where the contention of the opposite party is more meagerly or incorrectly stated. Id. Where the trial judge undertakes to state the contentions of the defendant, he should do so accurately and not in a manner likely to disparage the defense actually set up. Instruction held erroneous. Edmondson v. State, 1 Ga. App. 116, 57 SE 947. Jury returned into court and were asked by the judge what was the trouble, whereupon he was told that some of them found defendant guilty and others not guilty. The court then asked each juror if he believed the evidence and receiving an affirmative reply from each said, "If you believe the evidence, return a verdict of guilty." Held reversible error. State v. Simmons, 143 N. C. 613, 56 SE 701. It is error to state that whether a witness for defendant is a vicious and precocious off-scouring of the street is for the jury. People v. Myers, 115 App. Div. 864, 20 Crim. R. 451, 101 NYS 291.

15. **Held erroneous:** In a **bastardy proceeding** it is error to charge that the interest of the state and county to be relieved from the charge of supporting the child was at stake. Menn v. State [Wis.] 112 NW 38. It is error to charge that **failure of defendant to testify** cannot be

comment on failure of accused to testify.[16] Too low a degree of proof should not be imposed.[17] But accused cannot complain where too high a degree of proof is imposed on the state.[18] It is not essential that the entire case be presented in a single instruction.[19] Verbal inaccuracies and inelegancies should be avoided, but are generally held not ground for reversal.[20] In charging a statutory rule, it is generally held proper to use the language of the statute,[21] and in charging a statute the terms

used against him, but that if he does take the stand he can be subjected to all forms of cross-examination. People v. Ryan, 105 NYS 160. A requested instruction as to when jury would be disregarding the court's charge was properly refused. Cox v. State [Ala.] 42 S 815.

Held proper: Instruction requiring jury to believe that accused would not pay a fine imposed before they could adjudge that he be placed at hard labor held sufficiently favorable to accused if not more so than it should have been. Day v. Com., 29 Ky. L. R. 807, 96 SW 518. An instruction in prosecution for rape is **not erroneous as urging a conviction** because it directs consideration of lesser offenses included in the indictment on failure to convict of higher offense. State v. McCausland [Iowa] 113 NW 852. Charge in capital case as to **right of jury to recommend life imprisonment** held not prejudicial as preventing them from making such recommendation. Thomas v. State [Ga.] 59 SE 246. Instruction given after jury had been out 24 hours that the court was very anxious they should agree held not an appeal to the jury to reach a decision, even at expense of honest convictions. Bell v. State [Ark.] 98 SW 705. Statement that the legislature had provided for review of cases made with a view of impressing the jury with the importance of taking the law from the court held not erroneous **as tending to make the jury less attentive** in discharging their duties. People v. Ferone, 105 NYS 448. An instruction that the **punishment** assessed should be such as will deter defendant and others from the commission of like offenses. Brown v. State [Ala.] 43 S 101.

Caution of judge to jury to watch evidence carefully, to think of it in the light of the various theories and contentions presented to them, to be sure that they arrived at the truth, and to apply the law which the judge gave them in charge, held not to furnish a ground for a new trial. Pryer v. State, 128 Ga. 28, 57 SE 93.

Proper to refuse to charge that statements read by prosecuting attorney from the bible are not evidence or law. Brown v. State [Ala.] 43 S 194. That accused should not be tried according to the bible but according to the law. Id. That if evidence was evenly balanced to lean to side of mercy. Kirby v. State [Ala.] 44 S 38.

16. It is proper for the trial judge to comment on the failure of the defendant to testify when the evidence tends to establish facts which, if true, would be conclusive of his guilt and he can disprove them by his own oath as a witness. So held when defendant moved to dismiss, his confession having been introduced and defendant not having testified, court having ruled that he could not do so and insist on his motion. State v. Banusik [N. J. Err. & App.] 64 A 994. Facts presented in bills of exception held to justify court in calling attention of jury to failure of defendants to testify. State v. Twining [N. J. Err. & App.] 64 A. 1073.

17. An instruction that if the jury believe "from the evidence" a certain fact they shall find guilty is erroneous as not requiring belief beyond a reasonable doubt. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Instruction on evidence authorizing conviction on proof which only "tends" to show guilt is erroneous as authorizing conviction on too low a degree of proof. Oates v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 285, 103 SW 859. Instruction properly refused because requiring too high a degree of proof. Parham v. State, 147 Ala. 57, 42 S 1. Instruction in homicide case on question of insanity held not to impose on defendant a greater burden than law requires. Sartin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 321, 103 SW 875.

18. Tuttle v. State [Ark.] 104 SW 135; Reyes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 219, 102 SW 1156.

19. An instruction correct so far as it goes is not erroneous because incomplete. Rahke v. State, 168 Ind. 615, 81 NE 584.

20. Minor verbal inaccuracies in the charge do not constitute fatal error. Moody v. State, 1 Ga. App. 772, 58 SE 262; Solomon v. State [Ga. App.] 58 SE 381. Verbal inaccuracy immediately corrected. Robinson v. State [Ga.] 58 SE 842. Verbal inaccuracies resulting from palpable slip of the tongue are not fatal errors, especially where such inaccuracices occurred in immediate connection with correct instructions on the subject. Wiley v. State [Ga. App.] 59 SE 438. Use of "suffered" instead of "consented" in reference to permitting persons to drink liquor about his place of business held not error. State v. Chipp, 121 Mo. App. 556, 97 SW 236. Indictment charged running tenpin alley "and" bowling alley for profit without a license, and instructions used "or" instead of "and" between the terms. Held, immaterial terms being synonymous. O'Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 18, 100 SW 919. Phrase "lack of evidence" used in charge on burden of proof held meaningless, and not ground for reversal. State v. Kelley, 191 Mo. 680, 90 S. W. 834. Instruction that if the jury believed "beyond a reasonable that defendant," etc., was erroneous for omitting the word "doubt." Lawson v. State [Ala.] 44 S 50. Instruction that "unless" jury, after weighing all the evidence, "cannot" feel an abiding conviction, etc., they must acquit, properly refused. Gordon v. State, 147 Ala. 42, 41 S 847.

21. Pen. Code 1895, § 1010, relative to the statement of the accused, is properly charged by reading all of such statute except the last sentence, without other comment. McDonald v. State [Ga. App.] 59 SE

of which are simple and plain, the court should avoid any explanation which may add to or take from them.[22] It is held in Georgia that it is error to charge the rule as to positive and negative testimony in the language of the statute.[23] Evidence admitted for a certain purpose should be limited to such purpose.[24] Belief beyond a reasonable doubt need not be incorporated into each instruction.[25] Instructions which tend to prejudice defendant should not be given.[26] The rule requiring the charge to be delivered in writing is complied with by reading from the decisions of the court of last resort.[27] It is not improper to charge that the jury should accept the law as given them by the court [28] and to consider the instructions as a whole.[29] It is not improper in instructing on the law of the case to read the statute defining the crime charged.[30]

Questions of law should not be submitted.[31] Rules of evidence especially ad-

242. Court may charge in language of statute that accused may testify but that his failure to do so shall not be considered against him. Cravens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 304, 103 SW 921. Court should charge on reasonable doubt in accordance with Cr. Code. Prac. § 238, providing that if there be reasonable doubt of guilt defendant should be acquitted. Howell v. Com., 31 Ky. L. R. 983, 104 SW 685. Where the court charges in the language of a statute which is reasonably clear, the defect therein must be specifically pointed out. Burnett v. State, 80 Ark. 225, 96 SW 1007. Instruction in form of Pen. Code, § 21, that intent is manifested by circumstances connected with the offense, etc., is not objectionable. State v. Gordon, 35 Mont. 458, 90 P 173. Giving an instruction containing Pen. Code, § 2442, that the interest of defendant should be considered in weighing his testimony, does not deprive him of the presumption of innocence which attends him until guilt is established. State v. Farnham, 35 Mont. 375, 87 P 728. Not error to charge Pen. Code, §§ 986, 987, regarding amount of mental conviction required to warrant verdict of guilty. Howell v. State, 124 Ga. 698, 52 SE 649. In Georgia it is held that the better practice in charging on the effect to be given the statement of accused is to charge the statute and nothing more. Caesar v. State, 127 Ga. 710, 57 SE 66. In charging upon the prisoner's statement, the court can use no better language than that embodied in Pen. Code 1895, § 1010. Rouse v. State [Ga. App.] 58 SE 416.

22. Where statute defines an accessory as one "who stands by, aids, abets, or assists," the court should not have added "assented." Clerget v. State [Ark.] 103 SW 381. Under a statute providing that persons under 18 years of age sentenced to the penitentiary may be sent to the reform school by board of commissioners or sentenced to penitentiary by the judge, it is error to charge that one accused of crime if convicted, would be sent to the reform school, since it did not conform to the statute which was alternative. Pittman v. State [Ark.] 105 SW 874. It would not be error to charge so much of the law as to correctly show the alternatives without indicating what disposition would be made of accused in case of conviction. Id.

23. Pen. Code 1895, § 985, is inaptly stated. Phillips v. State, 1 Ga. App. 687, 57 SE 1079.

24. Evidence of circumstances showing probability of self-defense should be limited to the effect that they could not be considered unless they had been communicated to defendant. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182. Where offer of letters was simply to prove handwriting, failure to give an instruction limiting their effect was not error. State v. Kelley, 191 Mo. 680, 90 SW 834. Under B. & C. Comp. § 852, providing that a witness may be impeached by the record of previous conviction, it is proper to charge that such evidence may be considered in determining weight of his testimony. State v. Rayner [Or.] 91 P 301.

25. Not necessary to repeat "believed beyond reasonable doubt" in every instruction. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003. It is not the duty of the court to carve up the case into different propositions and instruct the jury specifically on each as to reasonable doubt, but to submit the case as a whole upon all the evidence and instruct upon the subject of doubt in terms appropriate to whole case. Tolbert v. State, 127 Ga. 827, 56 SE 1004.

26. Where accused was only witness in his own behalf, it was error to charge the jury to consider his interest. Smith v. State [Miss.] 43 S 545. It is not error to refuse to charge that determination of defendant to introduce no evidence created no presumption against him. People v. Hummel, 104 NYS 308.

27. State v. Roy, 118 La. 485, 43 S 59.

28. People v. Crane [Cal. App.] 87 P 239.

29. It is proper to instruct the jury that they are to consider the instructions as a whole as the law governing the case and that it is a question for them to decide whether the theory of the state or defendant is true. Dempsey v. State [Ark.] 102 SW 704.

30. People v. Crane [Cal. App.] 87 P 239.

31. What constitutes an order for liquor is for the court. Mills v. State [Ala.] 42 S 816; Andrews v. State [Ala.] 43 S 196. An instruction submitting a question of law is properly refused. Morris v. State [Ala.] 39 S 608. Error to submit what would constitute an accomplice. Strickland v. State [Ala.] 44 S 90.

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dressed to the discretion of the court are not appropriate subject-matter of instructions.[32]

Form and propriety of particular charges. See 8 C. L. 232—Holdings as to the form and sufficiency of instructions as to burden of proof,[33] presumption of innocence,[34] reasonable doubt,[35] circumstantial,[36] corroborative,[37] impeaching,[38] character evi-

32. Harris v. State [Ga. App.] 58 SE 669. Requested charge that privilege of accused as witness does not extend to such physical circumstances as may exist on his body or about his person is statement of rule of evidence which does not concern jury. State v. Mehojovich, 118 La 1013, 43 S 660.

33. Erroneous because requiring defendant to prove a negative to establish innocence. Randell v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 308, 90 SW 1012. Request that before defendant could be convicted the law requires guilt to be fully proven requires too high a degree of proof. Leonard v. State [Ala.] 43 S 214.

Held not erroneous as placing burden of proof on defendant. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Instruction on trial of two guilty for murder held not objectionable as requiring the jury to find both guilty if they believed one guilty. Bull v. Com., 29 Ky. L. R. 949, 96 SW 817. Charge that if the jury believed that the crime was committed "in this county" instead of naming the county held harmless where the trial was in such county and there was no evidence that the crime was committed elsewhere. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003.

Proper to refuse to charge that before defendant could be convicted, the hypothesis of guilt should flow naturally from the facts proved and be consistent with all of them. Brown v. State [Ala.] 43 S 194. That if after subjecting the fact to the test of reason, there remained a doubt of guilt, the jury should acquit. Id. That before jury can convict they must be satisfied of guilt to a moral certainty and that the proof is not only consistent with guilt but inconsistent with any other rational conclusion. Griffin v. State [Ala.] 43 S 197. Requested instruction on degree of proof required properly refused. Shelton v. State, 144 Ala. 106, 42 S 30. Required the state to prove that defendant could not be guiltless. McEwen v. State [Ala.] 44 S 619.

It is proper to charge that intoxication as a defense must be proved by defendant. State v. Sparegrove, 134 Iowa, 599, 112 NW 83. A charge **enumerating the elements of embezzlement** and stating that if any of them were wanting, accused was entitled to acquittal properly imposed on the state the burden of proving elements of the offense. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 SW 638. Modifications of requested instructions on degree of proof that all 12 jurors must agree, etc., held proper. Williams v. State, 147 Ala. 10, 41 S 992. The words "shown" and "appear" used in an instruction on burden of proving guilt beyond a reasonable doubt held equivalent to "prove" or "proven." State v. Crofford, 133 Iowa, 478, 110 NW 921. Instruction that one of the defenses was an alibi held not erroneous as leading the jury to believe that the defendant had the burden to prove alibi where the rule of reasonable doubt was charged. State v. Paisley [Mont.] 92 P 566.

34. Instruction that presumption of innocence remains throughout the trial not error for failure to continue such presumption until verdict rendered. People v. James [Cal. App.] 90 P 561. Request that law presumes the defendant to be an honest, upright man is properly refused. Fields v. U. S. 27 App. D. C. 433. It is not error for the court, sui sponte, to charge the jury that: "The fact that the defendant has not gone upon the witness stand and testified does not excuse the state from the full measure of proof to which I have called your attention, for it is the privilege of the defendant either to testify in his own behalf or to decline to do so, resting his denial of the offense solely upon his plea of 'not guilty.'" Tate v. State, 9 Ohio C. C. (N. S.) 287. Instruction that each fact necessary to show guilt must be established beyond reasonable doubt properly refused. Olson v. People, 125 Ill. App. 460.

35. Instruction on reasonable doubt held not objectionable as unintelligible. State v. Brooks, 202 Mo. 106, 100 SW 416. Instruction on reasonable doubt approved. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116; Parham v. State, 147 Ala. 57, 42 S 1; Wright v. State [Ala.] 42 S 745; Dempsey v. State [Ark.] 102 SW 704; State v. Maupin, 196 Mo. 164, 93 SW 379; State v. Sanders, 75 S. C. 409, 56 SE 35.

Instructions held proper: A statement that reasonable doubt is one that grows out of evidence is not erroneous because of the exclusion of inference that it may arise from want of or conflict in the evidence. Thomas v. State [Ga.] 59 SE 246. Sufficient to charge on reasonable doubt in closing paragraph of charge. Teague v. State [Tex. Cr. App.] 100 SW 401. Instruction that jury must believe defendant guilty "beyond a moral certainty" is erroneous, but "beyond all reasonable doubt and to a moral certainty" is proper. Sykes v. State [Ala.] 44 S 398. A comprehensive charge on reasonable doubt that if after consideration of the whole case the jury have reasonable doubt as to guilt they should acquit sufficiently charges that the burden is on the state. Thomas v. State [Ga.] 59 SE 246. Reasonable doubt law held sufficiently and properly covered. State v. Megorden [Or.] 88 P 306. Where court instructed that state must prove defendant's guilt to the satisfaction of the jury beyond a reasonable doubt, an addition that "in other words we want your judgment, what is your honest, good judgment in this case," was not error. State v. Thomas, 75 S. C. 477, 55 SE 893. Instruction that oath imposes no duty to

doubt where no doubt would exist otherwise. Perry v. People, 38 Colo. 23, 87 P 796. Instruction as to reasonable doubt after consideration of character evidence in connection with all other evidence. Niezorawski v. State, 131 Wis. 166, 111 NW 250. Request that if any individual juror is not convinced of guilt beyond reasonable doubt they should acquit should be given. Leonard v. State [Ala.] 43 S 214. Request for acquittal if there was a probability of defendant's innocence. Fleming v. State [Ala.] 43 S 219. Proper to instruct that doubt which will justify an acquittal must be an actual and substantial and not a mere possible doubt. Tribble v. State, 145 Ala. 23, 40 S 938. Not objectionable as stating that such doubt exists only when all the jurors have a reasonable doubt. State v. Thompson, 31 Utah, 228, 87 P 709.

Not misleading. Wheeler v. State [Neb.] 113 NW 253.

Held erroneous: Taylor v. State, 89 Miss. 671, 42 S 608. Erroneous because not requiring proof of elements of charge beyond a reasonable doubt. Frazier v. State, 117 Tenn. 430, 100 SW 94. It is error to define a reasonable doubt as a "substantial" and "well-founded" doubt. Id. Request containing "all doubt" instead of "reasonable doubt." Gordon v. State, 147 Ala. 42, 41 S 847. Charge that if jury are reasonably doubtful as to proof of any material allegation of indictment they must acquit. Parham v. State, 147 Ala. 57, 42 S 1. Instruction that if a single juror has a reasonable doubt of defendant's guilt, it is his duty to stand by his conviction though every other juror disagrees with him. Ammons v. State, 89 Miss. 369, 42 S 165. Instruction that proof of defendant's good character is sufficient to raise reasonable doubt. Davis v. State [Ala.] 44 S 561. Instruction that jury must be satisfied to a moral certainty not only that proof was consistent with guilt but inconsistent with every other rational conclusion and unless they were so convinced and were willing to act on it in matters of highest importance to themselves to acquit. Kirby v. State [Ala.] 44 S 38. Request that if jury should be in doubt as to guilt to acquit and to resolve all doubts in defendant's favor is patently bad. Id. Request to construe every doubt in favor of accused. Thomas v. State [Ala.] 43 S 371. Charge that a probability of a certain fact might raise a reasonable doubt. Leonard v. State [Ala.] 43 S 214. Request to acquit if the jury have reasonable doubt as to any material facts. Id. Request to acquit if there was reasonable possibility of innocence from the evidence. Id. The word "abiding" should not be inserted in a charge on reasonable doubt. State v. Neil [Idaho] 90 P 860.

Held misleading: Instruction that reasonable doubt is one growing out of evidence for which a reason can be given held misleading but not reversible error. Rose v. State, 144 Ala. 114, 42 S 21. Requested instruction in substance, that each juror is entitled to determine for himself whether he has a reasonable doubt, and if he has, accused is entitled absolutely to his vote of not guilty properly refused as **ignoring element of consultation** with other jurors. Taylor v. State, 89 Miss. 671, 42 S 608. Instruction that probability that some other person than defendant committed the offense is sufficient to raise a reasonable doubt of guilt of accused and hence to warrant an acquittal held erroneous because not negativing guilt of accused and misleading. Pitman v. State [Ala.] 42 S 993. An instruction as to reasonable doubt that a juror should not vote for a conviction simply because a majority of the jurors did if he had a reasonable doubt should be so framed as not to admit of the construction that it was his duty to hold to his convictions even if based on an erroneous view or misconception of the evidence. State v. Hennessy [Nev.] 90 P 221. Misleading as to whether a reasonable doubt of guilt or of the truth of conflicting evidence was necessary. Rigsby v. State [Ala.] 44 S 608. Misleading as requiring a finding of malice to convict of manslaughter. Davis v. State [Ala.] 44 S 561. Properly refused as misleading. Thomas v. State [Ala.] 43 S 371. Misleading and confusing. McEwen v. State [Ala.] 44 S 619.

36. State v. Bond, 191 Mo. 555, 90 SW 830; Parham v. State, 147 Ala. 57, 42 S 1. Where state's evidence was circumstantial, a charge beginning, "the state relies to a certain extent upon circumstantial evidence," where the usual charge upon this phase of the case was refused to defendant held an improper limitation, and does not explain how the state so relies. Trinkle v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 950, 105 SW 201. Request that circumstantial evidence "is wholly inferior in cogency, force and effect to direct evidence." Gordon v. State, 147 Ala. 42, 41 S 847. Where state relied largely on foot prints to connect defendant with crime and evidence tended to show that defendant altered his shoes after arrest it was not error to refuse to charge that unless the jury believed defendant made the change to disregard the evidence. Moore v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 180, 103 SW 188. **It is misleading** to charge that circumstantial evidence is as good as direct and should be acted on as readily if it rises high enough in the scale of belief to generate conviction. Haywood v. State [Miss.] 43 S 614.

Held correct. Carr v. State [Ark.] 99 SW 831. Not prejudicially erroneous. Alexander v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 878, 90 SW 1112. Instruction that a criminal charge may be established by circumstantial as well as by direct and positive evidence held not erroneous as drawing an improper distinction between direct and circumstantial evidence. State v. Walker, 133 Iowa, 489, 110 NW 925. Where circumstantial evidence is relied on, it should be charged that each circumstance must be fairly proven and doubt resolved in favor of defendant. State v. Harmann [Iowa] 112 NW 632. Held sufficient though not as full as usually given. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Not misleading. State v. Sloan, 35 Mont. 367, 89 P 829. Instructions should include statement of satisfaction of guilt beyond a reasonable doubt to the exclusion of every other reasonable hypothesis. Mere statement that jury should convict if such evidence convinces the guarded judgment is not sufficient. State v. Allen, 34 Mont. 403, 87 P 177. Where state relied on circumstantial evidence, and the court charged the law of circumstantial evidence, it was held

dence,[39] confessions [40] and expert testimony,[41] statement of accused [42] and his interest as affecting his testimony,[43] principals and accessories,[44] insanity,[45] and defini-

not error to charge Pen. Code 1895, § 987, that "whether dependent on positive or circumstantial evidence the true question * * is, not whether it be possible that the conclusion at which the testimony points may be false, but whether there is sufficient testimony to satisfy the mind and conscience beyond a reasonable doubt." Johnson v. State, 128 Ga. 71, 57 SE 84.

37. A charge that a certain witness was an accomplice, and, on corroborative evidence and the necessity therefor, condemned. Jordan v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 78, 101 SW 247. In prosecution for forgery charge confining question of prosecuting witness being an accomplice to the fact that he advised defendant to destroy the note was not error though there was other testimony indicating that he was an accomplice but it bore on whether he gave the advice. Abel v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 361, 97 SW 1055.

38. Instruction erroneous on limitation of effect of impeaching evidence-proof of prior conviction. Taylor v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 765, 100 SW 393. Instruction held erroneous as tending to minimize impeaching testimony. State v. Rutledge [Iowa] 113 NW 461. Whenever it is necessary to charge in regard to effect of impeaching testimony, jury should be told that it can be considered only for purpose of affecting credibility of witnesses sought to be impeached. Pratt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 599, 96 SW 8.

39. In prosecution for perjury, where there is evidence of accused's good moral character, it is error to refuse a charge that such evidence was competent, and that it might be sufficient, in connection with all the evidence in the case, to raise a reasonable doubt of guilt. Taylor v. State [Ala.] 42 S 996. Instruction that proof of good character in connection with other evidence, might generate a reasonable doubt, which would entitle accused to an acquittal, even though without it the jury would convict, is proper. Id. In prosecution for assault where only issue was as to which was the aggressor, it was proper to charge that evidence of defendant's good character could be considered. State v. Krug [Iowa] 113 NW 822.

40. Held to sufficiently charge under what circumstances a confession could be considered. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. A charge that admissions should be received with caution should contain the limitation "unless deliberately made and fully proven." Lipsey v. People, 227 Ill. 364, 81 NE 348. Instruction that when confessions are "deliberately and precisely identified," they are among the most satisfactory and effectual proofs of guilt held erroneous, since a confession to so operate must be deliberately "made" and precisely identified. Shelton v. State, 144 Ala. 106, 42 S 30. The nearer an admission approaches a plenary confession the more likely is any reference in the charge to the subject of confessions to confuse the jury and harm defendant. Ransom v. State [Ga. App.] 59 SE 101. That accused controverted the proof of the confession did not require a charge that it should be disregarded if jury failed to find that defendant had admitted the taking (theft case). Whitehead v. State [Tex. Cr. App.] 90 SW 876.

41. Court should instruct that expert testimony is to be weighed by the jury the same as other testimony. State v. Wertz, 191 Mo. 569, 90 SW 838. Charge that expert testimony should be received with caution but should be given such weight as was given other testimony held not to discriminate against expert testimony. Atkins v. State [Tenn.] 105 SW 353. Instruction on effect of expert testimony held erroneous. State v. Wertz, 191 Mo. 569, 90 SW 838. Proper to refuse an instruction which calls an expert a "hired witness." People v. McPherson [Cal. App.] 91 P 1098.

42. Instruction on consideration of accused's statement approved. Howell v. State, 124 Ga. 698, 52 SE 649.

43. It is proper to charge that the interest of defendant may be considered by the jury in weighing his testimony. Wright v. State [Ala.] 42 S 745. In a criminal case an instruction that "the defendant is a competent witness in his own behalf and that they (the jury) have a right to consider his evidence," held not to imply that any consideration of defendant's evidence was optional with the jury. State v. Buffington, 71 Kan. 804, 81 P 465. Instruction on considerations in light of which defendant's testimony was to be weighed approved. State v. Walker, 133 Iowa, 489, 110 NW 925. If defendant is a witness in his own behalf, it is error to instruct that "if the defendant by his own testimony has not denied in any way any material fact proved in the case within his personal knowledge such testimony or material fact proved, if not denied by defendant, is admitted by defendant to be true." Russell v. State [Neb.] 110 NW 380. Instruction as to consideration of interest of a witness held not to permit the jury to go outside the evidence in determining weight to be given it. Wheeler v. State [Neb.] 113 NW 253.

44. Instruction on who were principals in fatal affray approved. Cecil v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 803, 100 SW 390. In a trial of one of three persons jointly charged, it is proper to instruct that the persons named are charged with the offense and with aiding and abetting therein. State v. Kenny [S. C.] 57 SE 859. Instruction authorizing conviction of one who "advised, or encouraged" instead of "advised and encouraged" held not error though "and" is used in Pen. Code, §41, defining a principal. State v. Allen, 34 Mont. 403, 87 P 177. But it is error to use expression "aids or abets" instead of "aids and abets." Id. Instruction on necessity of joint act and intent (Pen. Code, §§ 20, 21) should always be given when requested. Id.

45. Charge of insanity as a defense to charge of criminal slander held sufficient. Kelley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 80, 101 SW 230.

tions of terms,[46] the credibility of witnesses [47] and rules to be observed in the consideration of evidence in general,[48] are illustrated in the notes.

Invading province of jury or charging on the facts. See 8 C. L. 231—Instructions must not invade the province of the jury.[49] As a general rule it is erroneous to

46. Instruction on murder not bad for omission of "feloniously." State v. Miles, 199 Mo. 530, 98 SW 25. Charge defining murder is not objectionable because in two paragraphs. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Failure to define "sale" not error where it was clear that sale of liquor in violation of law had been made. Stephens v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 694, 96 SW 7.

47. Instruction as to credibility of witnesses held correct. Dawson v. State [Ga. App.] 58 SE 1065. Instruction as to credibility of witness held to properly submit the rule as to belief where his statements were contradictory. Miller v. People, 229 Ill. 376, 82 NE 391. Instructions as to credibility of witness who has testified falsely to a material fact is erroneous where it directs instead of permits the jury to disregard such testimony and excludes corroboration by circumstances and documents. Niezorawski v. State, 131 Wis. 166, 111 NW 250. Proper to refuse to charge that the fact that witnesses called by the state who refused to testify on the ground that their testimony would tend to incriminate them created no presumption against them. People v. Hummel, 104 NYS 308.

48. Instruction **on proof of identity** of accused by means of tracks held prejudicial error. Spell v. State, 89 Miss. 663, 42 S 238. Instruction **that jury should reconcile evidence** if possible, but if not, it was for them to say which to believe, held not erroneous. Shelton v. State, 144 Ala. 106, 42 S 30. It is the duty of the court in a criminal case to charge when requested to do so, that if the jury can reconcile the evidence on any reasonable hypothesis consistent with accused's innocence they should do so and acquit. Lipscomb v. State, 130 Wis. 238, 109 NW 986. In homicide case held not error for court to call attention of jury to conflict in evidence as to whereabouts of cane claimed by defendant to have been used by deceased. State v. Bailey, 79 Conn. 589, 65 A 951. Requested instructions that jury may not "look to" certain evidence properly refused. Shelton v. State, 144 Ala. 106, 42 S 30. Where accused was charged with robbery and former convictions, the court should charge positively not to consider prior convictions if they found defendant not guilty of robbery. State v. Gordon, 35 Mont. 458, 90 P 173. Requested charge that corpus delicti must be proved before confessions could be considered **erroneous because not defining corpus delicti.** Burgess v. State [Ala.] 42 S 681. Instruction on credibility of **dying declaration** held misleading. Rose v. State, 144 Ala. 114, 42 S 21. In homicide where **theory of conspiracy** is submitted, it should be submitted under instructions that if conspiracy did not exist all statements made by one in the absence of another should not be considered in determining the guilt of one not present. State v. Darling, 199 Mo. 168, 97 SW 592. Instruction on **flight of accused** after commission of the crime held proper. Thomas v. State [Ga.] 59 SE 246.

It is error to charge that important and striking contradictions in statements of witnesses should be attributed to perjury rather than to inattention or defect of memory. State v. Sloan, 35 Mont. 367, 89 P 829. As to the legal effect of evidence where no question of intent is involved and the offense is proved by undisputed evidence. State v. Kinney [S. D.] 113 NW 77. In burglary held proper to charge as to **presumption** of guilt **arising from possession of recently stolen goods.** State v. Steidley [Iowa] 113 NW 333.

Not error to charge, "You will bring to bear upon the consideration of evidence in this case all that common knowledge of men and affairs which you as reasonable men have. Marshall v. State [Fla.] 44 S 742. Not error to limit evidence to credibility where it cannot possibly be considered for any other purpose. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Proper to charge, "If there are conflicts between the witnesses which you cannot reconcile, you have a right to believe one witness and disbelieve another." Marshall v. State [Fla.] 44 S 742. Instruction that escape from jail might be considered as a circumstance tending to show guilt held sufficiently specific on the question of motive. State v. Leonard [Iowa] 112 NW 784. While the fact that **positive testimony** affirmatory, and positive testimony contradictory thereof has been introduced would without more render a charge on positive and negative testimony inappropriate, still if negative testimony was also introduced a proper charge on that subject would not be erroneous. Wood v. State, 1 Ga. App. 684, 58 SE 271. Where such rule is charged, the court should also charge that in weighing the testimony, they must consider the credibility of the witnesses. Id.; Whitfield v. State [Ga. App.] 58 SE 385.

49. Held erroneous: Instruction that a credible witness was one worthy of belief. Knapp v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 75, 101 SW 449. Instruction which deprives jury of right to pass upon bias of a witness. Wright v. Anniston [Ala.] 44 S 151. "The language and conduct of decedent taken in connection with his previous threats are evidence that defendant was in danger." Bluett v. State [Ala.] 44 S 84. Instruction impairing the weight to be given certain testimony. Clement v. Belanger, 105 NYS 537. A charge that statements of certain witnesses could be reconciled with defendant's innocence. Creagh v. State [Ala.] 43 S 112. Instruction as to how testimony should be considered and reconciled. Fleming v. State [Ala.] 43 S 219. In homicide a charge that there is no presumption that defendant's testimony is untrue because he may have made prior statements in conflict with it is properly refused, as there is no such presumption and the credibility of witnesses is for the jury. Kent v. State [Fla.] 43 S 773. Instruction that testimony of police officers and detectives should be weighed with great care because of their tendency in looking up

charge on the weight of evidence [50] or for the court to intimate an opinion thereon,[51]

evidence to construe everything against accused. State v. Palsley [Mont.] 92 P 566. Requests not to return a verdict for any higher degree of crime than manslaughter. Thomas v. State [Ala.] 43 S 371. Proper to refuse to charge that there is not sufficient evidence to prove a certain fact. Williams v. State [Ala.] 43 S 720. An instruction intimating that "prominent and striking" contradictions in the stories of witnesses should be attributed to deliberate perjury. State v. Allen, 34 Mont. 403, 87 P 177. Also instruction that coincidence in all parts of stories of two witnesses creates suspicion of practice and concert. Id. Instruction that jury should be very cautious and careful in weighing child's testimony. Gordon v. State, 147 Ala. 42, 41 S 847. In homicide case an instruction that malice was not to be inferred from use of deadly weapon if evidence showed any circumstances from which a want of malice might be inferred. Austin v. State, 145 Ala. 37, 40 S 989. Instruction invading province of jury properly refused. Shelton v. State, 144 Ala. 106, 42 S 30.

50. The only appropriate charge on the subject of the weight of evidence is that the state is required to prove guilt beyond a reasonable doubt. Mill v. State [Ga. App.] 58 SE 673. Request on the weight of evidence refused. Thomas v. State [Ala.] 43 S 371; Rigsby v. State [Ala.] 44 S 608; Fleming v. State [Ala.] 43 S 219; Davis v. State [Ala.] 44 S 561; Crowson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 728, 100 SW 782.

Held on weight of evidence. Hutchins v. State [Tex. Cr. App.] 101 SW 795. Instruction on confession as corroborative testimony. Follis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 120, 101 SW 242. Instruction on self-defense. King v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 112, 101 SW 237. Where theory of state was conspiracy of father and son to kill deceased, and that father bought cartridges, a charge that evidence of the purchase of cartridges was to be considered only if they believed that such conspiracy existed. Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 64, 100 SW 946. Where court answered affirmatively a juror's question whether accused could be found guilty of murder in the second degree, this was objectionable as an instruction on the weight of evidence where full instructions had been given on the presumption of innocence, reasonable doubt, etc. Benton v. State, 78 Ark. 284, 94 SW 688. That the character of a witness had been impeached. Strickland v. State [Ala.] 44 S 90. Instruction in prosecution for carrying weapons reciting the statute defining a traveler and charging that accused was protected as a traveler only so long as he was engaged in the pursuit of his journey. Navarro v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 86, 96 SW 932. In theft. Jordan v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 887, 104 SW 900. In adultery a charge that evidence of witness should be considered only as showing adulterous disposition of accused. Garland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 886, 104 SW 898. Charge that evidence had been introduced to prove a certain fact. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. In larceny an instruction that possession of property recently stolen, if unexplained, was sufficient upon which to convict, etc. Duckworth v. State [Ark.] 103 SW 601. The testimony should not be reviewed in such detail as to imply that the contention of one party has been established or that certain testimony is entitled to greater weight than other testimony. Rouse v. State [Ga. App.] 58 SE 416. Instruction that there was no evidence to prove a certain fact. State v. Collins [R. I.] 67 A 796. Instruction as to consideration of expert medical testimony. People v. Buck [Cal.] 91 P 529. Instruction as to corroboration of prosecutrix in seduction case. State v. Sublett, 191 Mo. 163, 90 SW 374. Instruction that no man would have right to assault prosecutor under facts shown. Jacobs v. State, 146 Ala. 103, 42 S 70. Error to charge to take secondary evidence of testimony given at the preliminary hearing as though witnesses were present. Degg v. State [Ala.] 43 S 484. Instruction on self-defense. Kirby v. State [Ala.] 44 S 38. Error to charge that a certain fact, if true, would be a strong circumstance to show guilt. State v. Kehr, 133 Iowa, 35, 110 NW 149. In local option case, charge for conviction if jury believed that manner in which defendant procured and disposed of liquor was trick to evade the law. Howard v. Com., 31 Ky. L. R. 816, 104 SW 263. Instruction that evidence that defendant had recently been guilty of another offense was admitted solely to impeach defendant as a witness and should be used for that and no other purpose. Counts v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 111, 89 SW 972. Charge requiring jury to disbelieve every statement of a witness if they found any statement untrue held erroneous. Davis v. State, 89 Miss. 119, 42 S 541. A charge that there was no evidence of any conspiracy would be a charge on the facts in violation of Const. art. 6, § 19. People v. King [Cal. App.] 87 P 400. Instructions that there is not enough evidence to authorize verdict of guilty, and that there is no evidence that deceased was murdered. Parham v. State, 147 Ala. 57, 42 S 1. An instruction which virtually tells the jury the amount of evidence necessary to warrant a finding against accused on a material issue is error. State v. James [Utah] 89 P 460. Proper to refuse instruction that evidence of good character of accused is entitled to great weight. Burns v. State, 75 Ohio St. 407, 79 NE 929. A charge that the state has proven certain facts. Campbell v. State [Ala.] 43 S 743. A charge "if you believe the evidence, defendant is guilty, and you will return a verdict of guilty" is improper under Rev. 1905, § 535, relative to charging on the fatcs. State v. Simmons, 143 N. C. 613, 56 S. E. 701.

Held not on weight of evidence though it referred to character of evidence, where facts were left to be found by jury beyond a reasonable doubt. Austin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 493, 101 SW 1162; Neal v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 733, 99 SW 1012. Where under the facts stated in an instruction a homicide

but in some jurisdictions this rule is not observed,[52] and the trial judge may point out the salient features of the evidence and state how the evidence strikes his mind both as to force and inferences he would draw from it.[53] A charge violating this rule may be harmless.[54]

The charge is to be construed as a whole, See 8 C. L. 237 and no statement therein is erroneous for incompleteness supplied by other parts.[55] Instructions are likewise

constitutes murder, it is proper to charge that they do constitute such offense. Bleich v. People, 227 Ill. 80, 81 NE 36. Instruction requiring jury to believe certain facts from evidence. State v. Hazlett [N. D.] 113 NW 374. Instruction in prosecution for robbery. Chancey v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 526, 96 SW 12. Instruction reciting facts held not a comment on them. State v. Gohl [Wash.] 90 P 259. Instruction in homicide. People v. Grill [Cal.] 91 P 515. Charge on self-defense. Logan v. State [Ala.] 43 S 10. Charge that it is not necessary to find that homicide was done on day charged. McLeod v. State, 128 Ga. 17, 57 SE 83. Charge relative to murder in second degree. Gantt v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 371, 105 SW 799. Charge that one is not in danger from a man who is running away held not a charge on the facts in a case where evidence showed that defendant was in no danger when he fired the fatal shot. State v. Thompson, 76 S. C. 116, 56 SE 789. Though there is proof that deceased had called defendant a "damned liar" shortly before the killing, a charge that calling one a vile epithet is not legal provocation for killing. State v. Way, 76 S. C. 91, 56 SE 653. Instruction on deliberation. Gregg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 89, 100 SW 1161.

51. **Erroneous:** Instruction reciting contentions of the state held to so particularize and argumentatively enforce the inference of guilt as to amount to an expression of opinion. Johnson v. State [Ga. App.] 58 SE 684. Instructions in homicide held erroneous as implying that the court believed certain facts in issue. Foglia v. People, 229 Ill. 286, 82 NE 262. Instruction carrying intimation that witness for state was to be distrusted. People v. Amer [Cal.] 90 P 698. Instruction erroneous as on the facts and intimating opinion as to truth of testimony. Johnson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 380, 90 SW 633.

Not erroneous as intimating the opinion of the court. Lindsey v. State [Fla.] 43 S 87; People v. Taylor [Cal. App.] 87 P 215.

52. It is always the right and often the duty of the judge to give the jurors the benefit of his greater experience by telling them how the testimony strikes his mind, both as to its force and as to the inferences he would draw from it. Such expressions in a charge even if erroneous or based on mistaken conceptions of testimony are not assignable as error, so long as the jury are told they must decide all disputed questions of fact for themselves. State v. Hummer, 73 N. J. Law, 714, 65 A 249.

53. State v. Schuyler [N. J. Err. & App.] 68 A 56.

54. A charge objectionable only as on the weight of evidence cannot be complained of where there was no testimony on the subject relative to which it was given. Young v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 178, 102 SW 1144.

55. State v. Mitchell, 119 La. 374, 44 S 132. Where there was testimony corroborating an accomplice, it was not error to charge that there was such evidence, if the jury believed it, where the jury were fully instructed as to reasonable doubt and what was corroboration. People v. Hummel, 104 NYS 308.

Instructions as a whole held correct. People v. James [Cal. App.] 90 P 561; Hammond v. State [Ga. App.] 58 SE 509; Willis v. U. S., 6 Ind. T. 424, 98 SW 147; State v. Moore, 119 La. 564, 44 S 299; People v. Tubbs, 147 Mich. 1, 13 Det. Leg. N. 959, 110 NW 132; State v. Megorden [Or.] 88 P 306; Smith v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 939, 89 SW 817; Johnson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 882, 104 SW 902; Till v. State [Wis.] 111 NW 1109; Johnston v. U. S. [C. C. A.] 154 F 445; Carroll v. U. S. [C. C. A.] 154 F 425. Charge **defining murder** not bad for failure to use "beyond reasonable doubt" it being sufficient to give general charge on that subject. State v. Miles, 199 Mo. 530, 98 SW 25. Held sufficient **on the subject of provoking difficulty and reasonable doubt.** O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937. Instructions **on alibi** general and special, taken as a whole, held sufficient. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Where jury were charged on **circumstantial evidence,** it is immaterial that they were not charged that the case was one in which the state relied on circumstantial evidence. Henderson v. State [Tex. Cr. App.] 96 SW 37. Instruction on **burden of proof** on self-defense. State v. Bailey, 79 Conn. 589, 65 A 951. A correct instruction as to the **rules for weighing testimony** and reconciling conflicts therein is not rendered erroneous by a failure to charge, in the same connection, the law as to the statement of accused. Howell v. State, 124 Ga. 698, 52 SE 649. Charge on **measure of proof** held proper. Washington v. State, 124 Ga. 423, 52 SE 910. Technical errors. State v. Clifford, 59 W. Va. 1, 52 SE 981.

Verbal inaccuracy in instruction on dying declarations, harmless. McMillan v. State, 128 Ga. 25, 57 SE 309.

Repetition held not necessary. Vick v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 67, 100 SW 938. Held **omission** to expressly charge that burden was on state was not error. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933. Certain **terms held sufficiently defined.** Holt v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 751, 100 SW 156. Instruction setting forth different forms of verdicts should call the attention of the jury to the necessity of any verdict being based on their belief from the evidence. But if the instructions as a whole sufficiently cover the point, the omission will not be error. State v. Clifford, 59 W.

to be construed in connection with the pleadings and evidence.[56] It is not necessary that a single charge should cover the entire case.[57] If as a whole they are correct, it is not ground for reversal that excerpts standing alone might be incomplete and obscure.[58] Especially in the absence of an appropriate request.[59]

Assumption of facts.[See 8 C. L. 231]—The court in instructing may not assume the existence of controverted facts [60] or of facts which it is the province of the jury to

Va. 1, 52 SE 981. Held to cover charges requested. Herd v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 829, 99 SW 1119. A charge on the subject of **reasonable doubt** in appropriate terms on the whole case is sufficient without charging the law on that subject in connection with each proposition submitted. Harris v. State, 1 Ga. App. 136, 57 SE 937. Charge as to what constitutes **reasonable doubt** held proper when considered in connection with other instructions. Sims v. State [Fla.] 44 S 737. Instruction on reasonable doubt not prejudicial to accused. State v. McCausland [Iowa] 113 NW 852.

Error in one instruction cured by others: Error in instruction on assault with intent to kill cured by other instructions given. Satterwhite v. State [Ark.] 100 SW 70. Where court presented defendant's contentions, failure to add that if found true he should be acquitted was not error where a later portion of the charge stated under what circumstances defendant should be found not guilty. Jordan v. State, 127 Ga. 278, 56 SE 422. Not necessary to define "adequate cause" in charge on implied malice where such definition is given in other instructions. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. Error in requiring jury to find absence of both deliberation and premeditation in order to reduce crime to murder in second degree was harmless. Beene v. State, 79 Ark. 460, 96 SW 151.

Definition of murder not erroneous for failure to prescribe penalty which is prescribed in another instruction. O'Day v. Com., 3$ Ky. L. R. 848, 99 SW 937. In theft a charge that if the jury did not find that taking was done in H. county was not error where the doctrine of reasonable doubt was applied to all the facts. Stephens v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 349, 103 SW 904.

56. State v. Pugh [Kan.] 90 P 242. Charge construed in connection with the evidence held not misleading. People v. Thorne, 148 Mich. 203, 14 Det. Leg. N. 66, 111 NW 741.

57. Davis v. State [Fla.] 44 S 757.

58. People v. Quimby [Cal. App.] 92 P 493; State v. Neil [Idaho] 90 P 860. Immaterial that isolated portions might be misleading. Davis v. State [Fla.] 44 S 757. Not ground for reversal that a single paragraph standing alone might be faulty. Bode v. State [Neb.] 113 NW 996. As a whole held proper though containing some objectionable statements. Martin v. Territory, 18 Okl. 370, 90 P 13. The correctness of a portion of the charges is to be determined from the charge as a whole. Danford v. State [Fla.] 43 S 593. Excerpts from charge held not erroneous. Lewis v. State [Ga. App.] 58 SE 1070. Error may not be predicated on a detached sentence of instructions. Green v. U. S. [Ind. T.] 104 SW 1159. Isolated portions will not be criticised. Green v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 907, 105 SW 205. If the charge as a whole fairly presents the issues made, it is sufficient. Douglass v. State [Fla.] 43 S 424; Dorsey v. State [Ga. App.] 58 SE 477; Clark v. State [Neb.] 113 NW 211. Though it consists of several paragraphs. Grisham v. State, 147 Ala. 1, 41 S 997. Instructions in prosecution for theft. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 709, 95 SW 1062. Charge on forgery, considered as a whole, sufficient as to intent necessary. State v. Berry, 76 S. C. 86, 56 SE 662. Instruction on burden of proof. State v. Way, 76 S. C. 91, 56 SE 653. Held not to assume facts as proved. State v. Hanley, 133 Iowa, 474, 110 NW 914. Held not to invade the province of the jury though a portion of it standing alone was subject to that objection. McNulty v. State [Ind. App.] 81 NE 109.

59. Charge construed as a whole proper; omissions not error in absence of appropriate requests. Handley v. State, 128 Ga. 24, 57 SE 236. Held sufficient especially where no request for further instructions was made. State v. Johnson [Iowa] 113 NW 832. Held to sufficiently present the issues, where no request for more specific charge was made. Howard v. State [Ga. App.] 58 SE 683.

60. Miller v. People, 229 Ill. 376, 82 NE 391; Barton v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 855, 90 SW 877. In charging as to use of evidence relative to collateral forgeries, the court should, in order to avoid assumption of collateral transactions, charge that such forgeries must be found to be forgeries. Taylor v. State [Tex. Cr. App.] 97 SW 474. Court should not state to jury any fact as proven. Powers v. State, 117 Tenn. 363, 97 SW 815. Whether a presumption of fact is rebutted is for the jury. Boyd v. State [Ala.] 43 S 204. Error to assume that an expert witness had been paid for his services. People v. McPherson [Cal. App.] 91 P 1098. Where defendant relied on alibi in trial for assault with dangerous weapon, whether he was armed was a controverted fact and it was error to assume in an instruction that he was so armed. State v. Rock [Or.] 88 P 318.

Rule violated: In prosecution for carrying a pistol, charge held erroneous as assuming that defendant carried a pistol. Christian v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 275, 97 SW 694; Jenkins v. State [Ga. App.] 58 SE 1063. Instructions in prosecution **for theft** of steer. Hazlett v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 603, 96 SW 36. Instruction in **homicide** held to assume that defendant brought on the difficulty. West v. State [Fla.] 43 S 445. Assumption that certain person was an accomplice **assumes commission of crime.** State v. Allen, 34 Mont. 403, 87 P 177. Held erroneous as assuming that one was an accomplice. State v. Sloan, 35 Mont. 367, 89 P 829. An instruction that defendant's **possession of stolen articles** shortly after the theft,

ascertain,[61] but uncontroverted [62] or admitted facts,[63] or facts conclusively established,[64] may be assumed. Requested instructions which violate this rule may be refused.[65]

Ignoring material evidence, theories or defenses, or giving undue prominence thereto.[See 8 C. L. 236]—Instructions should be so framed as not to withdraw from the consideration of the jury or ignore any material issue,[66] evidence,[67] defense,[68] or meritorious theory,[69] nor should they single out and give undue prominence to

"unsatisfactorily accounted for" was prima facia evidence of guilt, assumed that his explanation of possession was unsatisfactory. Miller v. People, 229 Ill. 376, 82 NE 391. Held erroneous as assuming that defendant, a boy under 14, was a bright boy, his capacity being in issue. Neville v. State [Ala.] 41 S 1011. Instruction in **local option case** held erroneous as assuming that illegal sale had been made. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Charge that evidence that defendant had influenced a witness to leave the state should be considered only for a particular purpose held objectionable as **assuming the truth of such evidence.** Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Held erroneous as assuming that statements were made by a certain witness. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Assuming fact of connivance. Randell v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 308, 90 SW 1012. Instruction on **corroboration of accomplices** erroneous as assuming that they told the truth. Barton v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 855, 90 SW 877; Dixon v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 26, 90 SW 878.

Rule not violated: Instruction in prosecution for **larceny** held not to assume the fact that defendant committed larceny. Castevens v. State, 79 Ark. 453, 96 SW 150. Instruction in larceny held not to assume that prosecutor's money was taken fraudulently. Braxton v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 737, 99 SW 994. In **prosecution for murder,** a charge that if decedent had been guilty of certain acts was not erroneous as charging that such act must have been established as a fact. Bays v. State [Tex. Cr. App.] 99 SW 561. Not objectionable as assuming that weapon named was deadly. State v. Meyers, 198 Mo. 225, 94 SW 242. As assuming that offense had been committed. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Instruction in homicide held not to assume that shooting had been proved. Robinson v. State [Ga.] 58 SE 842. An instruction to consider the fact "if such be a fact" does not assume such fact. Fletcher v. State [Ind.] 81 NE 1083. Held not to assume that defendant was to be convicted. Nash v. State, 79 Ark. 120, 95 SW 147; Imboden v. State [Colo.] 90 P 608; Stakes v. State [Fla.] 44 S 759.

61. It is error to instruct the jury to assume a fact as proven though the evidence is without conflict. People v. Craig [Cal.] 91 P 997. It is error to assume that testimony for the state is true, though uncontradicted, or to charge that it is true. Plea of not guilty implies a denial of all the testimony. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67. A plea of not guilty denies every material allegation and it is error to assume the admission of a material fact when no such admission has been made. Cooper v. State [Ga. App.] 59 SE 20. Error to assume that there was no evidence to prove a fact when there was. State v. Rutledge [Iowa] 113 NW 461.

62. Imboden v. People [Colo.] 90 P 608; High v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 779, 98 SW 849. Uncontroverted and uncontested facts. State v. Sparegrove, 134 Iowa, 599, 112 NW 83. Assumption of facts not controverted held not prejudicial. Powers v. State, 117 Tenn. 363, 97 SW 815.

63. A defendant cannot complain that the court assumed as true facts to which he himself testified. Fact of flight properly assumed as true. State v. Belknap [Wash.] 87 P 934. Where in prosecution for selling liquor it appeared that beverages kept under various names were in fact beer, it was not error to charge that beer was an intoxicating liquor. Feddern v. State [Neb.] 113 NW 127.

64. Facts proved by undisputed evidence. State v. Kinney [S. D.] 113 NW 77. No prejudicial error in charging that evidence tended to show a certain fact where the statements were correct in fact. Till v. State [Wis.] 111 NW 1109. Where undisputed evidence showed the offense and counsel for accused admitted it in open court, an instruction reciting such admission held harmless. State v. Kinney [S. D.] 113 NW 77.

65. Oddo v. State [Ala.] 44 S 646; State v. Rideau, 118 La. 385, 42 S 973. Assuming that a witness had been impeached. Worthy v. State [Ala.] 44 S 535. It is not error to refuse to give a charge which assumes facts not conceded in the evidence and which states as law matters of fact which the jury should determine. Hisler v. State [Fla.] 42 S 692.

66. An instruction assuming to state all the elements of an offense but omitting some is erroneous. Rahke v. State, 168 Ind. 615, 81 NE 584. A charge excluding material facts is misleading. Stakes v. State [Fla.] 44 S 759. Ignoring material fact. Duthey v. State, 131 Wis. 178, 111 NW 222.

67. Bonner v. State [Ga. App.] 58 SE 1123; Andrews v. State [Ala.] 43 S 196. Invading province of jury and excluding parts of evidence from their consideration. Hanners v. State, 147 Ala. 27, 41 S 973. Instruction erroneous because **ignoring presumption of innocence** of accused and not requiring absence of doubt before jury could acquit. Murphy v. State, 89 Miss. 827, 42 S 877.

68. It is reversible error to ignore a defense which is sustained by evidence and as to which a charge is requested. Mason v. State, 1 Ga. App. 534, 58 SE 139. Ignores an essential element of the crime involved. State v. McCoy [W. Va.] 59 SE 758.

69. Instruction on voluntary manslaughter omitting all reference to a sudden affray of which there was evidence was erroneous.

particular evidence,[70] witnesses,[71] or contentions.[72] Requested instructions which violate this rule may be refused,[73] but facts decisive of the case may be particularly referred to,[74] and a theory not involved may be ignored.[75]

Kennedy v. Com., 31 Ky. L. R. 546, 102 SW 863. Error to fail to submit question of cooling time in homicide case. Armstrong v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 519, 96 SW 15. An instruction to acquit upon certain evidence and under a certain count, ignoring counts under which a conviction would be warranted under the evidence. Koser v. People, 224 Ill. 201, 79 NE 615.

70. Commonwealth v. Kronick [Mass.] 82 NE 39; State v. Mehojovich, 118 La. 1013, 43 S 660; Commonwealth v. Thomas, 31 Ky. L. R. 899, 104 SW 326. Emphasizing importance of expert testimony held to require granting of new trial. Smith v. State, 127 Ga. 56, 56 SE 116. Request requiring verdict to be based on proof of a single fact. Moss v. State [Ala.] 44 S 598. It is not proper to single out a confession of defendant in the charge unless to instruct on the necessity of a warning having been given. Jordan v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 78, 101 SW 247. In homicide a charge calling particular attention to a hat introduced held erroneous as giving undue prominence to particular facts. Parnell v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 324, 103 SW 907. Where testimony in contradiction of prosecutrix was substantive in character as well as impeaching, an instruction limiting its consideration to the latter purpose is erroneous. State v. Dolan, 132 Iowa, 196, 109 NW 609. Should not single out and give prominence to particular facts. Carroll v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 789, 98 SW 859. Should not single out any portion of the evidence and predicate a charge thereon. Green v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 907, 105 SW 205. Should not single out and give undue prominence to one phase of the testimony. Degg v. State [Ala.] 43 S 484.

Rule violated: Instruction on self-defense condemned because unduly emphasizing certain facts. George v. State, 145 Ala. 4, 40 S 961. It is error for the trial court to review the evidence in an argumentative manner or to single out and give undue prominence to the testimony of particular witnesses. State v. Yates, 99 Minn. 461, 109 NW 1070. Held erroneous as singling out a particular fact which occurred long after the homicide. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Instruction directing particular attention to certain facts bearing on a particular issue and ignoring others is improper. State v. Grove, 61 W. Va. 697, 57 SE 296. Charge singling out particular facts and charging as to their weight. Miller v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 3, 105 SW 502.

Rule not violated: Instruction following allegations of indictment held not improper as pointing out particular evidence. Illinois Cent. R. Co. v. Com., 28 Ky. L. R. 802, 90 SW 602. Instruction in prosecution for rape held not to give undue prominence to matters to be considered in corroboration. State v. McCausland [Iowa] 113 NW 852.

71. Instructions giving prominence to certain testimony or witnesses. State v. Labriola [N. J. Err. & App.] 67 A 386. A charge calling particular attention to testimony of certain witnesses and has a tendency to invade the province of the jury as to the relative credibility of certain witnesses. Hisler v. State [Fla.] 42 S 692.

72. Instruction held erroneous as giving undue prominence to view that defendant was not entitled to verdict of manslaughter. Fuller v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 413, 95 SW 541. Error to give undue prominence to defendant's interest in charge as to credibility of witnesses. Burk v. State [Neb.] 112 NW 573.

73. Ignoring material evidence. Vandergrift v. State [Ala.] 43 S 852; Ferguson v. State [Ala.] 43 S 16. Ignoring reasonable doubt. Prior v. Territory [Ariz.] 89 P 412. Where in prosecution for homicide there was evidence of conspiracy, it was proper to refuse instructions taking such question from the jury. Ferguson v. State [Ala.] 43 S 16. Instruction **pretermitting consideration of all the evidence.** Pate v. State [Ala.] 43 S 343. General affirmative charge which did not submit credibility of testimony. Bates v. State [Ala.] 44 S 695. It was not error to refuse to charge that conviction cannot be had on an unsupported confession where other evidence tended to establish the crime. Sowles v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 948, 105 SW 178. Authorizing acquittal if the jury believed certain facts, though there might be sufficient evidence to warrant conviction. People v. Bradbury [Cal.] 91 P 497. A charge ignoring other testimony than that hypothesized, and tending to vary or impair the force of that included, is properly refused. Payne v. State [Ala.] 42 S 988. **Singling out and giving undue prominence** to certain features of the evidence are properly refused. Tribble v. State, 145 Ala. 23, 40 S 938. Singling out and calling attention to particular facts. Clark v. People, 224 Ill. 554, 79 NE 941; Davis v. State [Ala.] 44 S 561; Stuart v. Com., 31 Ky. L. R. 1343, 105 SW 170. Singling out evidence favorable to defendant. Barber v. State [Ala.] 43 S 808. Calling particular attention to testimony of one witness. Davis v. State [Ala.] 44 S 545. Court may properly decline to bring out particular facts having stated law applicable to them in the general charge. State v. Rideau, 118 La. 385, 42 S 973.

74. Though instructions should not single out and give undue prominence to certain facts and ignore others of equal importance, yet if facts referred to are decisive of the case, irrespective of other facts and circumstances shown in evidence, such instructions are not erroneous. State v. May [W. Va.] 57 SE 366. Where undisputed facts showed nearly all elements of the crime, an instruction calling attention to this state of the evidence was not error. People v. Mingey, 118 App. Div. 652, 103 NYS 627.

75. Ignoring of theory of manslaughter in fourth degree not ground of complaint where counsel objected to instruction on that crime and where under the evidence only a verdict for murder in the first or second degree or justifiable homicide could

Cautionary instructions.—The giving of cautionary instructions rests in the discretion of the court,[76] especially where the circumstances do not make them necessary,[77] and failure to give such instructions cannot be complained of where no request is made.[78]

(§ 10) *F. Custody of jury, conduct and deliberations.*[See 8 C. L. 237]—Whether misconduct of the jurors, or acts or language of the court or deputies, or others, during the trial and deliberations of the jurors, are such as to call for a reversal of the judgment or the granting of a new trial, depends upon the circumstances. In the notes are collected decisions dealing with such matters as separation of jurors,[79] misconduct or improper suggestions of jurors during their deliberations,[80] or before the submission of the case,[81] such as reference to a juror's personal knowledge,[82]

be found. State v. Zorn, 202 Mo. 12, 100 SW 591. Not error to ignore theory of imperfect self-defense under such facts. Id.

76. Not an abuse of discretion to charge that presence of defendant's family in the court room should not influence them in making up their verdict. Day v. State [Fla.] 44 S 715. As to the duty of jurors not to yield their conscientious convictions to will of majority, etc. State v. Phillips [Mont.] 92 P 299. Not error to refuse cautionary instructions in regard to two witnesses one aged 9 and the other 11. State v. Labriola [N. J. Err. & App.] 67 A 386. Proper to give cautionary instruction as to detective evidence but form thereof rests largely in discretion. Gassenheimer v. U. S., 26 App. D. C. 432.

Instructions held proper: The court may call attention to the fact that the jury are to try the case on the evidence and not by their sympathies. Lindsey v. State [Fla.] 43 S 87. It is proper to charge that jury must not discuss or consider failure of accused to testify. Herndon v. State [Tex. Cr. App.] 99 SW 558. It is not error to caution the jury against considering failure of defendant to testify, though it is usually not error to fail to so charge. Adams v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 9, 105 SW 497. Where counsel had suggested that prosecution was for purpose of laying foundation for civil suit, it was proper for the court to give a cautionary instruction to disregard this suggestion entirely. State v. Clark [N. J. Law] 64 A 984.

77. State v. Megorden [Or.] 88 P 306.

78. Failure to give usual cautionary instruction on testimony of an accomplice not error when no request was made therefor and attention of court was not called to its failure to give it. State v. Weatherman, 202 Mo. 6, 100 SW 482.

79. Where two jurors separated from the main body temporarily, which fact was known to defendant and his counsel, but he did not object until after verdict, he will be deemed to have waived the irregularity. Waller v. State [Ga. App.] 58 SE 1106. Momentary separation of one juror from the rest while retiring in the court room, under the eye of the judge and in the sheriff's presence, held no ground for setting verdict aside, when no misconduct was shown. State v. Sims, 117 La. 1036, 42 S 494. One juror was accidentally separated from the others while going to dinner, and others went to a barber shop in charge of a deputy. There was no showing that they had discussed the case. Held not to require new trial. State v. Williams, 76 S. C. 135, 56 SE 783. Where after jury had been sworn but before any testimony was introduced one of the jurors became separated from the rest while they were being taken to dinner, held a separation within the statute and constituted reversible error. Neal v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 733, 99 SW 1012. After case had been submitted it was improper for sheriff to permit jurors to go separately and unattended to toilet in hotel where they stayed. Barnett v. State [Tex. Cr. App.] 99 SW 556. Crime charged not being such as to require jury to be kept together, they were allowed to separate during several adjournments. Some attended to their business, others served in other cases. Held no showing of prejudice, contamination, or misconduct being shown, accused was not entitled to a reversal. Bennett v. Com., 106 Va. 834, 55 SE 698. Mere separation of jurors after selection but before they are impanelled and sworn is not ground for reversal of a conviction. Heubner v. State, 131 Wis. 162, 111 NW 63.

80. Misconduct of juror in suggesting during deliberations that codefendant who was less guilty than defendant had received certain punishment, made for purpose of influencing verdict, held prejudicial. Horn v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 271, 97 SW 822. Discussion by jurors of a former conviction of defendant, and the term of punishment given, held reversible error. Casey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 351, 102 SW 725. Where discussion of character of accused and previous convictions and pending indictments caused a juror to consent to higher punishment than he otherwise would have given, such misconduct vitiated the verdict. Kegans v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 701, 96 SW 16.

81. No ground for reversal that a juror during a recess and pending the argument said in the presence of the others that "I believe the damn scoundrel is guilty, and for my part, we will hang him." Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445.

82. Where credibility of prosecuting witness was attacked and a juror after retirement stated that he knew his reputation was not good but nevertheless believed defendant guilty, the prosecuting witness was not prejudiced. Lemmons v. State [Tex. Cr. App.] 103 SW 896. Misconduct of juror in referring to facts within his personal knowledge which influenced jury to impose greater punishment held ground for reversal. Van-

or discussion of the failure of accused to testify,[83] communication between jurors and others,[84] the reading of newspapers during the trial,[85] taking articles to the jury room and examining them,[86] conduct of deputy in charge of jury,[87] the admonishing of the jury before adjournments,[88] remarks of the court to the jury when they were unable to agree.[89] The length of time the jury should be kept together deliberating upon a verdict is a matter resting in the sound discretion of the trial court.[90] The

duran v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 397, 98 SW 247. It is not misconduct warranting reversal that a juror states to his fellow jurors that he was familiar with the facts in the case before he was called where he does not state what facts he knew. Feddern v. State [Neb.] 113 NW 127. Statement by juror to fellow members of a matter of personal knowledge contradictory of defendant's testimony was misconduct requiring reversal where it influenced verdict. Winslow v. State [Tex. Cr. App.] 98 SW 241.

83. Misconduct of jurors in commenting on failure of accused to testify held not ground for new trial when there was a showing that this was not considered in reaching their verdict. State v. Thomas [Iowa] 109 NW 900. Where failure of defendant to testify was mentioned by jury, held violative of the rule prohibiting comment or allusion to such fact. Carroll v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 789, 98 SW 859. Misconduct of jury in their deliberations in discussing failure of accused to testify in his own behalf, where it appears that on the first ballot nine stood for acquittal, held error. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 SW 694. Discussion by jury of defendant's failure to testify and statement by one that his counsel was too sharp to put him on the stand is reversible error. Fults v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 458, 98 SW 1057.

84. That a juror asked of deputy sheriff in charge what the punishment was for manslaughter and was answered that he did not know held not ground for reversal. People v. Quimby [Cal. App.] 92 P 493. Under the rule that no person shall be permitted to converse with juror after he has been impaneled except in presence of court, where a juror without permission held conversation with his family over the telephone, he is guilty of misconduct and the state must show he was not tampered with. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868.

85. Misconduct in reading newspaper accounts of trial held ground for new trial though the jurors made affidavit that they were not influenced. State v. Caine, 134 Iowa, 147, 111 NW 443. Grant of new trial for reading of newspapers by jury held discretionary. Commonwealth v. Valverdi, 32 Pa. Super. Ct. 241. It is improper for juries in murder trials to read newspaper editorials which directly or indirectly tend to influence their minds and destroy their freedom from bias. This is so though the article read does not refer to the case on trial but to cases of that character and such as to comprehend the case on trial. Styles v. State, [Ga.] 59 SE 249. The fact that jurors after being impaneled read newspaper editorials relative to the offense held ground for new trial. Id.

86. The fact that garments introduced in evidence were left in court room which was used by the jury after the case was submitted held not such misconduct as to require reversal. People v. Hower [Cal.] 91 P 507. Clothing introduced and taken to jury room should be used only for purpose for which it was introduced. Puryear v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 721, 98 SW 258. The action of the jury in a homicide case in taking clothing used in argument but not introduced to the jury room held harmless where it appears that the jury made no use of it. Vasquez v. State [Fla.] 44 S 739. The jury may be allowed to take out the bill of particulars. Cooke v. People [Ill.] 82 NE 863.

87. Conduct of deputy in charge of eight jurors, in relating to them a difficulty between a witness for the state and a witness for defendant in which former arrested latter, took a pistol from him and struck him on the head, not ground for reversal where defendant's witness was not contradicted as to material parts of his testimony. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116. The fact that officer in charge of jury in taking them to their meals conducted them along the street where the crime was committed does not show prejudicial misconduct. Crowell v. State [Neb.] 113 NW 262.

88. Where jury were properly admonished before each adjournment but one, when he told the officer in charge not to allow them to talk, etc., in the hearing of the jury, this was held a sufficient reference to previous admonitions to comply with the statute. Lee v. State, 78 Ark. 77, 93 SW 754.

89. Remarks of court to jury, when they were unable to agree, as to effect on administration of law of repeated failures of juries to agree, held prejudicial error. People v. Dixon, 118 App. Div. 593, 103 NYS 186. Where jury reported that they could not agree, it was error for court to inquire of foreman how they stood numerically without reference to how many stood for conviction and how many for acquittal. McCoy v. U. S., 6 Ind. T. 415, 98 SW 144. Where jury returned and asked if a juror could legally change his vote to a lesser degree if he believed accused guilty in a higher, and the court said that the verdict should express the true belief of each juror, it was proper to refuse a request to ask the jury if they could possibly agree. People v. Koerner, 117 App. Div. 40, 20 Crim. R. 515, 102 NYS 93. Proper thereafter to refuse to hear counsel state grounds of motion to discharge jury. Id. Remedy in such case was to ask for new trial after verdict. Id.

90. People v. Koerner, 117 App. Div. 40, 20 Crim. R. 515, 102 NYS 93. Jury not coerced into finding a verdict where they were out 57 hours and had intimated a few hours before that they could not agree, and court requested them to continue their deliberations and try to reconcile their differences. Id.

jury must be governed exclusively by the evidence,[91] and have no right to arbitrarily disregard relevant and competent evidence.[92]

(§ 10) *G. Verdict.*[See 8 C. L. 239]—While verdicts should be certain and import a definite meaning, free from ambiguity,[93] all fair intendments in support of them are made,[94] and verbal errors or omissions are held immaterial,[95] and they will be held sufficient as to form if the meaning and intention of the jury can be clearly ascertained therefrom.[96] They should be construed with reference to the indictment and the entire record.[97] It is proper to direct the jury to retire and correct an informal verdict,[98] or one not in the intended form.[99] While a correction may be made under direction of the court,[1] it is error for the court to rewrite the verdict and have the foreman sign, without sending the jury out to deliberate.[2]

The length of time a jury should be left to deliberate is within the discretion of the trial court. State v. Harris, 119 La. 297, 44 S 22. Held not error to send jury back a third time after additional instructions and admonishing them strongly as to importance of agreement. State v. Rowell, 75 S. C. 494, 56 SE 23. Where first ballot of jury was 9 to 3 and after several ballots the jury stood 11 to 1, and they reported that it was impossible to agree. At the time they had been out 30 hours and the court directed them to retire and not to report until they agreed, held insufficient to show that the jury was coerced. Terry v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 373, 97 SW 1043.

91. State v. Samuels [Del.] 67 A 164.

92. Duckworth v. State [Ark.] 103 SW 601.

93. O'Neal v. State [Fla.] 44 S 940.

94. It is sufficient if it imports definite meaning, is free from ambiguity when considered with reference to the indictment and record. Albritton v. State [Fla.] 44 S 745.

95. If the intention of the jury is clearly manifested, mere inaccuracies of expression will not vitiate it. O'Neal v. State [Fla.] 44 S 940. Verdict "We the juror find the defendant guilty and assess," etc., is sufficient since bad spelling will not vitiate a verdict and the import of the words is not that a single juror rendered the verdict. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 868, 104 SW 899. Misspelled words in verdict will not invalidate it when there is no doubt as to its meaning. State v. Beverly, 201 Mo. 550, 100 SW 463.

96. State v. Pugh [Kan.] 90 P 242. Verdict "We, the jury find the defendant 'guilty' * * * and 'sassess' his punishment at twenty years 'imprisonment,'" is not erroneous as unintelligible and because not signed by anyone as foreman. Johnson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 882, 104 SW 902. "We the jury find defendant guilty and assess his punishment at 20 days in jail and twenty-five dollars" sufficiently intelligible to sustain a judgment. Fuller v. State [Tex. Cr. App.] 98 SW 840.

97. O'Neal v. State [Fla.] 44 S 940. In prosecution for violation of National Bank Act, where the indictment contained 156 counts and the court directed acquittal as to embezzlement and charged that if the jury found guilty as to the first three counts they need go no further, the jury returned a verdict of guilty as indicted in third count. Held such verdict was not tantamount to a finding that facts requisite to conviction on other counts had not been shown. Lear v. U. S. [C. C. A.] 147 F 349.

98. Where a jury returned a verdict defective in form it was not error for the court to require them to retire and correct it. Steudle v. Ter. [Okl.] 91 P 1024. Jury may properly be sent back to put their verdict in proper form where there has been no separation such as would injure or prejudice the defendant. Gaines v. State, 146 Ala. 16, 41 S 865. Where verdict of guilty of forgery "and passing an unlawful instrument" was returned, it was not error to permit it to be altered by striking out quoted clause where the verdict as originally read and finally received appears of record and no objection was made to the proceeding until after final verdict had been received. Johnson v. State [Tex. Cr. App.] 102 SW 1133. Where a verdict as first returned fixed the punishment, which jury had no power to do, the court told them it was informal, and instructed them to eliminate the part relating to punishment, but said they could make recommendations to the court if they wished, held proper. People v. Taylor [Cal. App.] 87 P 215.

99. Where jury by mistake used wrong form of verdict and imposed punishment in excess of that allowed by law, the court properly directed them to retire and correct it. State v. Miles, 199 Mo. 530, 98 SW 25. Rev. St. 1899, § 2651, providing that where jury impose punishment greater than allowed by law the court shall disregard excess, does not require court to accept such verdict. Id. Where, when the jury is polled, it appears that the published verdict is not in the intended form, it is proper to send the jury back to correct it. State v. Daniel [S. C.] 57 SE 639.

1. Where verdict was returned finding defendant guilty as charged and fixing "punishment at two years in the penitentiary," insertion of "confinement" at direction of court did not vitiate the verdict. McMahan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 699, 96 SW 17.

2. It is error for the court to change a verdict of guilty, assessing the punishment at 99 years imprisonment, by writing a new one fixing the punishment at life imprisonment, having the foreman sign it and having it read to the jury. The jury should have been sent out to deliberate if verdict was improper. Fallis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 120, 101 SW 242.

A verdict of guilty must identify with clearness and certainty the crime found,[3] and must be responsive to the charge in the indictment,[4] and to the proof.[5] A general verdict will be presumed responsive to the proof.[6] A verdict in the language of the statute defining the offense found is good.[7] A verdict of guilty "as charged" is a verdict of guilty of the offense stated and not of any included offense.[8]

Where there are several counts, findings thereon must be consistent.[9] Where but one offense is chargd in two counts, a general verdict is sufficient.[10] A general verdict may be applied to either of several counts of an indictment,[11] and will be referred to counts which are good.[12] Where only one count was relied on, a general verdict will be referred thereto.[13] A verdict of guilty of an offense included in that

3. Pen. Code, § 2146, requiring that where defendant is found guilty of former convictions the verdict shall be "We find the charge of previous convictions true," is directory only, and a verdict finding defendant guilty of former convictions though informal is not fatally defective. State v. Gordon, 35 Mont. 458, 90 P 173. In Tennessee under an indictment charging assault with intent to commit murder in the first degree, a verdict of "guilty as charged" is sufficiently certain as a verdict finding that offense. Fuerst v. State, 115 Tenn. 357, 89 SW 955. Where an information charged burglary and larceny, crimes of the same degree, and the verdict found defendants guilty as charged and also found the value of the goods stolen, the verdict was good as finding the crime of larceny. Perry v. People, 38 Colo. 23, 87 P 796. Va. Code 1904, § 3907, makes third offense of petit larceny punishable by not less than one nor more than two years in the penitentiary. Indictment charged two former convictions. Held verdict finding defendant guilty as charged and assessing punishment at one year in the penitentiary showed a finding of two former convictions and was good. Satterfield v. Com., 105 Va. 867, 52 SE 979. "We the jury find accused guilty of an attempt to burn a dwelling" not sufficient as such attempt is not necessarily a crime. State v. Jefferson [La.] 44 S 1004.

4. A verdict for embezzlement need not state the amount embezzled. Sims v. State [Fla.] 44 S 737. A verdict must be responsive to the charge and consistent, and find everything necessary to enable the court to render judgment. Harris v. State [Fla.] 43 S 311. Where accused is charged as accomplice in the crime of murder, a verdict finding him "guilty of being an accomplice to the crime of murder in the first degree, as charged in the indictment," is not defective. Carbaugh v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 241, 93 SW 738. Prosecution for larceny from the person in the nighttime under Rev. St. 1899, § 1900. Verdict that jury "find defendant guilty of larceny from the person in the nighttime as charged in the information, and assess the punishment at imprisonment in the penitentiary for five years," was in proper form. State v. Smith, 190 Mo. 706, 90 SW 440. On prosecution for "willful murder" under Ky. St. 1903, § 1149, a verdict "guilty as charged in the indictment of murder" not defective as not conforming to the statute. Brown v. Com., 30 Ky. L. R. 505, 99 SW 236.

5. Verdict wholly unsupported by evidence cannot be sustained. Lunsford v. State [Ga. App.] 58 SE 689; Murray v. State [Ga. App.] 58 SE 1060; Bonner v. State [Ga. App.] 58 SE 1123. A verdict of voluntary manslaughter will not be sustained where the only evidence in the case was whether the crime was murder. Reeves v. State [Ga. App.] 58 SE 548. Under a charge of robbery, which is amply sustained by evidence, a verdict of guilty of larceny of which there is no proof cannot be sustained. Kemp v. State, 89 Miss. 445, 42 S 606. Where defendant is indicted in two counts and the evidence shows him guilty of the first if any, a verdict acquitting him on the first count and convicting him on the second cannot be sustained. People v. Rivers, 147 Mich. 643, 14 Det. Leg. N. 6, 111 NW 201. Upon the trial of several persons for assault and battery, the jury may find one or all of them guilty or not guilty as the evidence warrants. State v. Handy [Del.] 66 A 336.

6. Under an indictment charging larceny and receiving stolen property (punishment same for each), a general verdict of guilty is sufficient, proof being sufficient for either offense, and no objection being made until after separation of jury. Cargill v. State, 76 Ark. 550, 90 SW 618.

7. State v. Horn [S. D.] 111 NW 552.

8. State v. Yates, 132 Iowa, 475, 109 NW 1005.

9. Where an indictment under Rev. St. § 5902 charges an officer of a national bank with misapplication of funds in several counts, each based on discounting a separate instrument and another count based on discounting all of such instruments, a verdict is not inconsistent because finding guilty on the latter count and not guilty on the former. Flickinger v. U. S. [C. C. A.] 150 F 1.

10. State v. Simpson [Mo. App.] 103 SW 592.

11. Bivens v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 91, 97 SW 86.

12. Posey v. U. S., 26 App. D. C. 302. Where two counts of an indictment are good, and are sustained by evidence, a general verdict of guilty is not bad though a third count was defective. State v. Dowdy [N. C.] 58 SE 1002. Where there are several counts in an indictment and the verdict of guilty is general, it will be presumed to be based on such counts as are sufficient. Koser v. People, 224 Ill. 201, 79 NE 615.

13. Where the state elects to proceed on a certain count and the jury are charged that their verdict must respond to such count, a verdict of guilty as charged in the indictment is sufficient. Bridges v. State

charged in two different counts is not bad for failing to specify the count on which it is based.[14] Where an information in separate counts charges two distinct but similar and kindred felonies, there can be a verdict of conviction on both counts.[15] In Louisiana, on an indictment charging burglary and larceny in separate counts, a verdict of "guilty" is sufficient and will justify sentence on both counts.[16] In Mississippi, a general verdict of guilty as charged is one of guilty of burglary alone where the indictment charges burglary and larceny.[17] Where there are several defendants charged with separate and distinct offenses, conviction and punishment, may be separate,[18] and, in same states, where there are several defendants, the punishment of each must be separately fixed.[19] Where the prosecuting attorney states, and the court instructs, that only defendant is on trial, though another is jointly indicted with him a verdict of guilty will be referred to defendant.[20]

When required by statute, the degree of the offense must be found and stated,[21] and the punishment fixed.[22] An unauthorized statement as to punishment may be treated as surplusage.[23] A conviction based on a verdict fixing an excessive punishment, under erroneous instructions, must be reversed.[24] Where in Texas, a reformatory sentence is to be imposed, the verdict must find the age of accused,[25] and, in Indiana, a verdict that the prisoner be sentenced to the reform school is proper.[26]

[Neb.] 113 NW 1048. Indictment charged stealing of cattle in one count and receiving stolen cattle in another. Only the charge of larceny was tried and instructions were on that charge only. A verdict of guilty as charged, and finding the value of the cattle was found, and judgment entered convicting of larceny. Held verdict sufficient to sustain judgment. Long v. State [Wyo.] 88 P 617.

14. State v. Wilson [Mo. App.] 103 SW 110.

15. O'Neal v. State [Fla.] 44 S 940.

16. State v. Warner, 117 La. 938, 42 S 432.

17. Dees v. State, 89 Miss. 754, 42 S 605.

18. Where defendants were indicted in separate counts, one for combination and the other for monopoly in violation of the Anti Trust Law (Act July 2, 1890), such offenses are legally separate and distinct and justify separate punishment on conviction. United States v. MacAndrews & Forbes Co., 149 F 836.

19. Verdict under indictment of two, charging larceny in one count and receiving stolen goods in another "We the jury find defendant in first count not guilty, We, the jury find defendant guilty in second count, as charged and assess their punishment," etc., held not bad as too indefinite to fix punishment of each separately. Woodard v. State [Ark.] 104 SW 1109. A verdict against several persons jointly indicted assessing a fine in a specified sum is void for failing to assess separately against each. Perry v. State [Ala.] 43 S 18.

20. State v. Williams, 76 S. C. 135, 56 SE 783.

21. In West Virginia a verdict for murder which does not find the degree is fatally defective. Code 1906, c. 159, § 4584. State v. May [W. Va.] 57 SE 366. A verdict of guilty as charged in an indictment charging larceny from the person, which does not specifically find the degree of the crime is invalid, since larceny from the person is but an aggravated form of larceny, and under such charge a conviction of any lesser offense may be had. Buffehr v. Ter. [Ariz.] 89 P 415.

22. Under a statute providing that the jury shall fix the punishment in certain cases, it is error in such a case to fail to charge the jury to fix punishment where such charge is requested. Reynolds v. U. S. [Ind. T.] 103 SW 762.

23. Under the Alabama statutes (Code 1896, §§ 4343, 5415), the jury has no power to fix hard labor as a part of the punishment in a prosecution for assault and battery, but where it attempts to do so the verdict is not void in toto, but that part fixing the punishment of hard labor must be regarded as mere surplusage. Freeman v. State [Ala.] 44 S 46.

24. Under Ky. St. 1903, § 1160, conviction for robbery will be reversed where the statute prescribes a maximum penalty of two years, the jury were instructed five years, and verdict is for three years. Carpenter v. Com., 31 Ky. L. R. 674, 103 SW 260.

25. Under Code Civ. Proc. art. 1145, a verdict directing that defendant be sent to reformatory but which fails to state that he is under sixteen years of age is fatally defective. Lewis v. State [Tex. Cr. App.] 99 SW 1011. Verdict sending minor to reformatory instead of to the penitentiary held erroneous for failure to specify the age of the minor. Henderson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 750, 99 SW 1001. Under Code Cr. Proc. 1895, art. 1145, requiring that if jury find accused to be under sixteen years of age and assess punishment they may send him to reformatory or penitentiary, verdict must specify age of accused where evidence shows him under sixteen years. Bates v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 967, 99 SW 551. In prosecution of child under thirteen years of age verdict must specify place of confinement and age of child. Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 380, 97 SW 1052.

26. Under Burn's Ann. St. 1901, § 8310, providing that upon conviction of a boy under

Where a plea of not guilty and a plea in abatement are tried together, a verdict of guilty as charged is bad as not responsive to the plea in abatement.[27] A special verdict to sustain a judgment of conviction must include all the essential elements of the offense charged and must be responsive to the allegations of the indictment; a mere statement of the evidence is insufficient.[28] The Alabama statute relating to special findings by the judge does not apply in criminal cases.[29]

Agreement of all of the jurors is necessary to sustain a verdict.[30] A verdict arrived at by lot is invalid.[31] A quotient verdict disregarded by the jury, who proceeded to regular verdict, is not error.[32] That a verdict is returned with a recommendation of leniency raises no presumption that it is a compromise verdict.[33] In Florida written verdicts may be received in capital cases.[34] A juror will not be permitted to impeach his own verdict.[35]

*Receiving verdict.*See 8 C. L. 240—Absence of the clerk when the verdict is received does not vitiate it,[36] but the judge [37] and accused [38] should be present. The verdict may be received and entered on the minutes on Sunday.[39] Neither party has an absolute right to have the jury polled, this being a matter resting in the sound discretion of the trial court.[40] It is proper to refuse to ask if any juror gave up his honest convictions.[41]

§ 11. *New trial, arrest of judgment, and writ of error coram nobis.*See 8 C. L. 240 In Georgia the power to grant new trials is confined by the constitution to the superior courts and such city courts as are therein specified.[42] In the Federal courts, the successor of the judge who heard the case may pass upon the motion.[43]

New trial is not the appropriate method of raising objections to the pleadings,[44] nor to correct an erroneous verdict, judgment,[45] or sentence.[46] The granting of the

sixteen years of age the court may commit him to the reform school, a verdict that such prisoner be sentenced to the reform school is not erroneous in form. Malone v. State [Ind.] 81 NE 1099.

27. Tucker v. State [Ala.] 44 S 587.

28. State v. Hanner, 143 N. C. 632, 57 SE 154.

29. Code 1896, § 3319, providing for special finding of facts by the trial judge, does not apply to a criminal case. Lambie v. State [Ala.] 44 S 51.

30. Charge that all of the jury must agree before defendant could be acquitted or convicted held proper. Tribble v. State, 145 Ala. 23, 40 S 938.

31. Brookman v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 146, 96 SW 928.

32. Quotient verdict not objectionable where there was no advance agreement that jury would be bound by it and afterwards verdict was reached only after several efforts. Wallace v. State [Tex. Cr. App.] 97 SW 1050.

33. Niezorawski v. State, 131 Wis. 166, 111 NW 250.

34. Brewer v. State [Fla.] 43 S 423.

35. Barnes v. Ter. [Okl.] 91 P 848; State v. Vicknair, 118 La. 963, 43 S 635. A juror cannot impeach his own verdict by showing what occurred in the jury room except where verdict is reached by lot. State v. O'Brien, 35 Mont. 482, 90 P 514. A juror cannot be permitted to impeach his own verdict, and still less may the verdict be impeached by proof of statements said to have been made by him after his discharge. State v. Barrett, 117 La. 1086, 42 S 513.

36. Verdict is not vitiated by the fact that it is received in the absence of the clerk, the judge, solicitor general, accused and his counsel being present when it is received and published. Robinson v. State, 128 Ga. 254, 57 SE 315.

37. See supra, Presence of Judge.

38. See supra, Accused Must be Present.

39. Moore v. State [Tex. Cr. App.] 96 SW 321.

40. Poll of jury held proper. State v. Daniel [S. C.] 57 SE 639.

41. In polling the jury where all jurors stated that the verdict was his except the foreman, who stated that he agreed to it, it was proper to refuse to ask if any juror gave up his honest convictions. Moss v. State [Ala.] 44 S 598.

42. Sylvester city court has no such power. Crosson v. State, 124 Ga. 651, 52 SE 880.

43. On death of Federal judge before motion for new trial was passed on, his successor has power under Rev. St. § 953, amended by 31 Stat. 270, to pass upon such motion where stenographer's report of the testimony has been preserved, and having such power may render judgment. Meldrum v. U. S. [C. C. A.] 151 F 177.

44. Question of variance between indictment served and the one read to the jury cannot be raised for first time on motion for new trial. Brooks v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 386, 98 SW 244.

45. Does not reach a defect in form of verdict. Malone v. State [Ind.] 81 NE 1099. That the court erred in passing sentence after a recommendation of mercy goes to the judgment of the court and not the verdict and is not ground for a new trial.

remedy rests largely in the discretion of the trial court.[47] Where the remedy is granted, the case is for trial de novo.[48]

Grounds in general. See 8 C. L. 240—In some states the grounds upon which new trial may be had are prescribed by statute.[49] It will not be granted for any cause which the moving party might have avoided by the exercise of ordinary diligence,[50] or to determine a question which might have been raised at the trial,[51] or to correct a nonprejudicial error occurring at the trial;[52] but it will be granted for errors

Beaudrot v. State, 126 Ga. 579, 55 SE 592. Judgment sustaining a demurrer to a special plea in bar to an indictment cannot be made ground of motion for new trial. Williams v. State [Ga. App.] 58 SE 1072.

46. An improper sentence is not ground for a motion for a new trial. Howell v. State, 124 Ga. 698, 52 SE 649. That sentence is excessive cannot be made ground for new trial. Rumsey v. State [Ga. App.] 58 SE 1066.

47. Where three were jointly tried and convicted for murder, the grant of a new trial as to one, and refusal of it as to the others, was not an abuse of discretion where the two were arrested on the spot with the weapons in their hands, and the other was not arrested until some time later, some distance from the spot and unarmed. Commonwealth v. Jung Jow [Pa.] 68 A 47. The granting or refusing of a new trial is largely discretionary with the trial court. State v. Cook [Idaho] 88 P 240. New trial will be granted for overruling of motion for continuance only where it appears that a more favorable verdict would have resulted had the motion been granted and the absent testimony been before the jury. Yantis v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 230, 94 SW 1019.

48. A new trial being granted on defendant's appeal, the whole case is to be tried anew. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 NW 495. When a motion for a new trial has been granted the cause is for trial, and the court has no authority to set aside its order and reinstate the judgment of conviction. Jones v. State [Tex. Cr. App.] 100 SW 150.

49. Pen. Code, § 1181, providing that new trial may be granted only on grounds therein specified, is exclusive of other grounds. People v. Amer [Cal.] 90 P 698. Pen. Code, § 1181, does not authorize a new trial for misconduct of district attorney. Id.

50. Continuance was asked for absence of witness, which was denied, but witness was sent for and arrived before the close of the trial. The court offered to receive the testimony of the witness, but this offer was declined. Held not to require granting of new trial. McMillan v. State, 128 Ga. 25, 57 SE 309. In laying foundation for dying declaration witness gave the substance of the dying declaration, and court said, "Hold on, he didn't ask you to say that," whereupon the examination proceeded. Held this occurrence was not ground for new trial, no motion being made to strike out the statement of the substance of the declaration so given. Bird v. State, 128 Ga. 253, 57 SE 320. Motion for new trial on ground of inability to procure counsel properly denied where accused only showed inability to secure attorney at county seat, but did not show that he had offered to pay, nor what efforts he had made. Goen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 119, 101 SW 232. Right to new trial is not shown on ground that accused had no counsel where affidavits of persons show testimony which would have been given in his favor if it had been requested, where an attorney stated that he had been consulted with a view to employment and was willing to defend, but defendant evaded paying or securing his fee. Dawson v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 10, 105 SW 496. Where a girl convicted of theft testified on motion for new trial that she committed the theft at the instigation of an older person, evidence held insufficient to show that she was under duress so as to warrant a new trial on that ground. Garza v. State [Tex. Cr. App.] 102 SW 1130. Admissions made by material witnesses for the state after the trial that their testimony was false is not ground. Rogers v. State [Ga.] 59 SE 288.

51. On motion for new trial state's evidence showed an agreement that defendant was to plead guilty in one case and that another would be dismissed. Accused only showed that he misunderstood the agreement and thought he was to plead guilty at some future time. Held motion properly overruled. Allen v. State [Tex. Cr. App.] 101 SW 804. The **defense of autrefois acquit** must be specially pleaded before verdict. Cannot be raised by motion for new trial or in arrest. State v. O'Connor, 119 La. 464, 44 S 265.

52. In prosecution for misdemeanor failure to arraign defendant. State v. Forner [Kan.] 89 P 674. Failure to comply with statutory requirements in **summoning and drawing jury** is not ground for new trial where record shows that impartial jury was secured. State v. Quirk [Minn.] 112 NW 409.

Withdrawal of judge from court room during trial is not ground for new trial, where it is not shown that trial was not suspended, or that he was not in view of jury so as to retain control of proceedings. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 SW 521. That accused thought she had employed counsel, but that he did not appear for her, and that she did not hear from him for eight days after pleading guilty, held not ground for new trial. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 158, 102 SW 407. That prosecuting witness in seduction case **wept during the argument** held not a ground for new trial when no exception was taken and judge was not asked to take any action. Washington v. State, 124 Ga. 423, 52 SE 910.

Misconduct of bystanders consisting of hissing and other indications of disapproval of objections and arguments of defendant's counsel held not ground for new trial when there was no showing of popular pressure.

which affect the substantial rights of accused.[53] Improper argument [54] or conduct of counsel [55] is not ground unless prejudice results and where steps were promptly taken to counteract the error.[56] Error in rulings on evidence [57] and in instructions is not ground [58] unless prejudicial. Misconduct of or affecting the jury,[59] or incompetency of a juror, is not ground [60] unless prejudice results [61] and it is made to ap-

or undue influence on jury. State v. Thomas [Iowa] 109 NW 900.

53. Material **abridgement of the right of cross-examination** secured to a party by Civ. Code 1895, § 5282, is ground for new trial. Holt v. State [Ga. App.] 58 SE 511. New trial should be granted where **defendant failed to enter a plea** as required by Code Cr. Proc. art. 553, requiring plea of not guilty to be entered on minutes, and if defendant refuses to answer plea of not guilty will in like manner be entered. Noble v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 764, 99 SW 996.

54. Strong language by prosecuting attorney against accused not ground for new trial where verdict of guilty was only one which could be honestly rendered, and there was ground for arguing that defendant had resorted to forgery and subornation of perjury in his defense. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 NW 495.

55. Defendant is not entitled to a new trial because his counsel is fined for contempt for disregarding the admonition of the court to refrain from assuming in argument matters not in evidence and pays the fine in open court. Spears v. People, 220 Ill. 72, 77 NE 112.

56. A new trial will not be granted because of remarks of prosecuting attorney where no exception is taken at the time, either by motion to declare a mistrial or otherwise, and the language complained of is not such as to authorize conclusion that accused was injured by its use. White v. State, 127 Ga. 273, 56 SE 425.

57. Where a witness for the state on his cross-examination by defendant, by mistake or knowingly gives evidence that had previously been ruled out, the verdict will not on that account be set aside, the court having instructed the jury to disregard the objectionable evidence. State v. Rugero, 117 La. 1040, 42 S 495. The admission of testimony which is entirely immaterial and irrelevant to the issues furnishes no ground for a new trial, unless the testimony is of such nature as to prejudice the cause of accused before the jury. Johnson v. State, 128 Ga. 71, 57 SE 84.

58. In a case otherwise properly tried where verdict is supported strongly by the evidence, a new trial will not be granted merely for failure to instruct on reasonable doubt in connection with a particular proposition. Tolbert v. State, 127 Ga. 827, 56 SE 1004. Failure to instruct on impeachment of witnesses not ground for new trial in absence of a proper and pertinent request. Caesar v. State, 127 Ga. 710, 57 SE 66. New trial will not be granted for refusal to give inaccurate charge not adjusted to proof and which is fairly covered by other instructions. Moody v. State [Ga. App.] 58 SE 262.

59. **Not ground for new trial:** Where **jurors on viewing scene of crime** placed themselves in positions of parties to crime and one of them remarked, "This is all we want to see." Daughtry v. State, 80 Ark. 13, 96 SW 748.

Evidence insufficient to show misconduct of jury. State v. Steidley [Iowa] 113 NW 333. Motion for new trial based on prejudice of juror held properly denied where affidavits showed that such juror stood out alone for acquittal. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879.

Misconduct of an officer in charge of the jury in permitting them to sit on the veranda of a hotel close enough to the street to hear persons discussing the case is not ground for new trial where the jury were all the time in charge of an officer and did not enter into the discussion. Waller v. State [Ga. App.] 58 SE 1106. Evidence held to show that there was no misconduct on part of the sheriff while in charge of the jury warranting new trial. State v. Arnold, 206 Mo. 589, 105 SW 641. The **unauthorized separation of the jury** is not ground for new trial where it appears that no communication was had with any one during the separation. Waller v. State [Ga. App.] 58 SE 1106.

Separation of two or three jurors from main body is not ground for new trial in absence of showing that they did not so separate by permission of court and in charge of an officer. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 SW 521. Not ground for new trial that some of the jurors, in absence of defendant and his attorney, **examined a steel jacket and pieces of skull** introduced in evidence, and which had already been examined by the jury. Martin v. Com., 30 Ky. L. R. 1196, 100 SW 872.

Remark of juror, heard by only one, who stated it did not affect him, held not ground for new trial. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 SW 1016. That a juror stated during retirement of jury, but after the verdict had been written, that he had **read in the paper** that defendant had been previously convicted for the same offense, held not such misconduct as to require new trial. Tally v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 879, 90 SW 1113. New trial will not be granted on ground of prejudice of juror who had **said defendant ought to have 25 years,** where sentence was only five years, and there was no defense on manslaughter issue. Tyler v. State [Tex. Cr. App.] 90 SW 33. Alleged prejudice of juror no ground for new trial where guilt of accused was clearly shown. Territory v. Emilio [N. M.] 89 P 239. Misconduct of jury cannot be considered as ground for new trial where facts presenting such misconduct are not definitely presented in the motion and supported by testimony. Wright v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 312, 97 SW 699.

60. Ineligibility of juror because of service in same court the preceding term is not ground for new trial in the absence of a

pear that movant was ignorant of such fact until after verdict.[62] That the verdict is contrary to the law or evidence is ground,[63] but ordinarily if the verdict is supported by any evidence it will not be disturbed.[64] Jurors will not be permitted to impeach their verdict.[65] Surprise or accident is ground only where it results from circumstances over which the movant had no control.[66] Disqualification of the trial judge is ground.[67]

Newly-discovered evidence.[See 8 C. L. 241]—Newly-discovered evidence which is material and important is ground for new trial.[68] It must have been discovered

challenge on that ground. Brown v. State, 1 Ga. App. 518, 57 SE 1021. New trial will not be granted because of the relationship within the prohibited degrees of a juror to accused, though such relationship was unknown to accused until after verdict. Rumsey v. State [Ga. App.] 58 SE 1066.

61. New Trial Warranted. Comments by jurors on failure of defendant to take the stand. Woolley v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 605, 96 SW 27. Misconduct of jurors in **discussing defendant's character** during deliberations. Hargrove v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 966, 99 SW 1121. When it appears that one of the jurors had previously **said that he would hang accused** if he was on the jury, and this charge against the juror is unrebutted except by a statement of the judge that he knew the juror personally and by reputation and that he is worthy of belief. Glover v. State, 128 Ga. 1, 57 SE 101. Where a **juror properly rejected serves** without the knowledge or consent of the party and participates in finding and rendering a verdict. Sherman v. State [Ga. App.] 58 SE 393. Where it appears that a juror was **related** to the prosecutor **within the prohibited degrees** of consanguinity. Smith v. State [Ga. App.] 59 SE 311. Where it appears that a portion of jurors in a homicide case had stated that they believed defendant guilty and **would hang him** if they got on the jury and there is nothing to rebut such charges. Sasser v. State [Ga.] 59 SE 225.

62. Application for new trial on ground of misconduct of jurors is insufficient where it does not appear that defendant and his counsel were ignorant of such misconduct until after trial. State v. Barrington, 198 Mo. 23, 95 SW 235. Alleged incompetency of a juror is not a ground for new trial, unless it appears that defendant and his counsel did not know of his incompetency at time of making challenges. State v. Mathews, 202 Mo. 143, 100 SW 420. Where a juror stated on his voir dire that he had formed an opinion which would require evidence to remove, but no challenge was interposed, held a new trial would not be granted because of prejudice of the juror. Clefford v. People, 229 Ill. 633, 82 NE 343.

63. Should be granted where the verdict is wholly without support in the evidence. Kennedy v. State [Ga. App.] 58 SE 543. Where all the evidence in the case wholly **fails to connect accused with the commission of the offense,** but on the contrary presents a reasonable hypothesis of his innocence, a verdict of guilty is without evidence to support it, and hence contrary to law. Johnson v. State, 1 Ga. App. 129, 57 SE 934. Where brief of evidence shows **no proof of venue.** Mill v. State, 1 Ga. App. 134, 57 SE 969. Where there is **no proof that crime was committed.** Tatum v. State, 1 Ga. App. 778, 57 SE 956.

64. New trial properly refused where no error was relied upon and evidence was sufficient to support verdict. Thomas v. State, 127 Ga. 349, 56 SE 405. Where evidence demands the verdict, and no errors of law are complained of, new trial is properly denied. Richardson v. State, 1 Ga. App. 122, 57 SE 912. Not error to deny new trial where instructions fully covered the case and the verdict was sustained by the evidence. Howard v. State [Ga. App.] 59 SE 89. A verdict of guilty will be set aside only when manifest injustice has been done and the wrong is so palpable as to denote that mistake was made by the jury in applying legal principles, or to justify suspicion that they were influenced by corruption, prejudice, or partiality. State v. Buxton, 79 Conn. 477, 65 A 957.

65. Evidence of jurors tending to impeach their verdict for their own misconduct properly excluded on motion for new trial. State v. Long, 201 Mo. 664, 100 SW 587. Affidavits of jurors that they were misled by remarks of prosecuting attorney held not ground for new trial in view of the rule that such affidavits cannot be received to impeach verdict. State v. Steidley [Iowa] 113 NW 333.

66. Motion for new trial on ground of surprise held properly denied. Rice v. People [Colo.] 90 P 1031. Surprise at unexpected testimony is not ground in the absence of objection timely urged. State v. Silva, 118 La. 660, 43 S 269.

67. Defendant may successfully urge disqualification of the judge by reason of his relationship to defendant by a timely motion for new trial when it is made to appear that the disqualification was based on facts unknown to defendant and his counsel until after verdict. Rule precluding accused from complaining of disqualification of juror because of unknown relationship will not be extended to apply to disqualification of the judge. Alliff v. State, 1 Ga. App. 553, 57 SE 941.

68. Held error to refuse new trial. Davis v. State, 1 Ga. App. 794, 57 SE 934.

Held to warrant new trial: Evidence as to fact that decedent drew a pistol at the time he was shot. Clark v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 199, 102 SW 1136. Where prosecuting witness claimed to identify goods stolen by marks on them, and newly-discovered evidence showed that such marks were placed there after goods had been taken. Johnson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 270, 103 SW 893. Where only evidence of robbery was that of the injured person, evidence consisting of tes-

since the trial [69] and be of such nature that it could not have been produced at the first trial by the exercise of ordinary diligence,[70] and it must appear that due diligence was exercised.[71] It must also appear that the evidence will be produced at the new trial.[72] The granting of the motion being discretionary,[73] and the ground of

timony of an eye witness. Weaver v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 875, 105 SW 189. Newly-discovered evidence held not merely impeaching and of such nature as to require granting of new trial. State v. Speritus, 191 Mo. 24, 90 SW 459. Where one was surprised by the fact that testimony of his own eye witness was contradicted and that others testified as eye witnesses, demonstrative evidence consisting of photographs of scene of crime held ground for new trial whether or not it came within grounds of newly-discovered evidence. Lindsey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 473, 98 SW 856. Evidence in support of defendant's theory in burglary case. True v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 106, 89 SW 1066. In rape case, there was evidence tending to show prosecutrix was to be delivered of a child at the time of trial. Held that where a motion for new trial was made two weeks later on the ground that the child was not yet born, this was in the nature of newly-discovered evidence, weakening testimony as to pregnancy of prosecutrix. Austin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 493, 101 SW 1162.

69. Evidence known to accused at time of trial held not "newly-discovered." Alexander v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 878, 90 SW 1112. Not where it appears defendant knew of witnesses and what they would swear to before trial and asked for no continuance on account of their absence. Martinatis v. People, 223 Ill. 117, 79 NE 55. Not for evidence of which the defendant knew at the time, but which was then incompetent. Testimony of person who was the wife of accused at time of trial, but later obtained a divorce. State v. Sargood [Vt.] 68 A 51. Evidence that a witness was not on friendly terms with defendant is not newly-discovered, no diligence being shown, except that attorney did not know of the unfriendly feeling. Washington v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 143, 105 SW 789. Not for cumulative evidence which was known to defendant before the trial. Jones v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 874, 105 SW 349. A new trial will not be granted on account of absence of witnesses where it is apparent that the witnesses were known at the time of trial, but could not be found, and no continuance is applied for on that ground. State v. Cook [Idaho] 88 P 240.

70. A new trial will not be granted on the ground of newly-discovered evidence unless it clearly appears that the testimony is new, material, not cumulative, and that it could not with reasonable diligence have been obtained at the time of the trial. State v. Nimerick, 74 Kan. 658, 87 P 722. Where witness was placed on stand three times, new trial will not be granted for new testimony by him. Coffman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 701, 103 SW 1128. Not where it appears that the testimony could have been produced at the trial by the exercise of ordinary diligence. Rogers v. State [Ga.] 59 SE 288. Not for evidence of chemical analysis which might have been produced at first trial. State v. Sargood [Vt.] 68 A 51.

71. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 SW 1016.

Held insufficient showing made to warrant granting of new trial for newly-discovered evidence. Anderson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 750, 100 SW 153. Not without a showing of diligence and that it was not known before trial. Mayes v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 966, 100 SW 386. Where witness had been in court on a prior day and a subpoena for him had not been returned. Vanata v. State [Ark.] 101 SW 169. Where accused seeking new trial on ground of newly-discovered evidence cannot locate witness by whom he desires to prove new matter at the time of the hearing, he should ask a postponement until he can get the witness. Tyler v. State [Tex. Cr. App.] 90 SW 33. Where testimony of state indicated that such witness knew of such matter and he, though thereafter testifying, was not questioned in regard to it. Harrall v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 360, 97 SW 1057. Motion on ground of newly-discovered evidence having attached no affidavit that facts were newly-discovered, or that testimony could not have been produced at trial. Jeffreys v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 334, 103 SW 886. Where evidence is not alleged to be newly-discovered, it is presumed that defendant had knowledge of the witness in time to have procured his testimony at the former trial. State v. Reed, 122 Mo. App. 366, 99 SW 521. Will not be granted for newly-discovered evidence where defendant does not file affidavit that he was not aware of such evidence at time of trial, and that it is material. Hall v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 879, 105 SW 177. Motion to suspend an appeal, with leave to move for new trial on ground of newly-discovered evidence where no effort was made to find witnesses, and counsel went to trial without asking for a continuance. State v. Mack [S. C.] 57 SE 1107. Diligence not shown. Day v. State [Miss.] 44 S 813. New trial properly refused where due diligence was not shown, and new evidence was cumulative or impeaching. Brown v. State, 127 Ga. 285, 56 SE 417.

72. Not where it is not shown that diligence was exercised at the first trial, and it does not appear certainly that the witnesses will testify at a new trial. People v. Way, 54 Misc. 488, 106 NYS 52.

73. Rogers v. State [Ga.] 59 SE 288.

Newly-discovered evidence held insufficient. Williams v. State [Fla.] 43 S 428; Ferguson v. State, 1 Ga. App. 841, 58 SE 57; Gates v. State [Ga. App.] 58 SE 1109.

New trial properly denied: Not error to deny a new trial for newly-discovered evidence consisting of **testimony of a child** of immature intellect who did not realize nature of an oath and whose testimony was probably untrue. McDuffie v. State [Ga. App.] 58 SE 544. Res gestae statements.

newly-discovered evidence not being favored, movant must make it appear that the evidence fulfills all the requirements.[74] It will not be granted for evidence which is immaterial,[75] merely cumulative[76] or corroborative[77] hearsay,[78] or for contradictory or impeaching testimony[79] which would probably not produce a different result.[80]

Stewart v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 369, 105 SW 809.

Affidavits made up of negative statements and conclusions which do not rise to dignity of cumulative evidence. Gibbs v. U. S. [Ind. T.] 104 SW 583. It was discretionary with the court to deny new trial because of absence of witnesses jointly indicted who would testify that they, and not defendant, committed the robbery. State v. Finn, 199 Mo. 597, 98 SW 9. It was within discretion of the trial court to refuse a new trial to procure testimony of a witness who was in the court house when some of the witnesses were testifying on the original trial. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 128, 97 SW 499. Newly-discovered evidence that deceased, previously in evening of homicide, inquired as to whereabouts of defendant, was not ground for new trial, where purpose of such inquiry was not shown. Id. In larceny case defendant desired jury to view certain colts like those stolen, but case was continued, and colts strayed away during the interval and could not be again produced at time of trial. No aplication for a continuance was made. Held new trial on ground of newly-discovered evidence to allow inspection of colts properly refused. State v. Cook [Idaho] 88 P 240. Where evidence offered on motion for new trial on ground of newly-discovered evidence is not newly-discovered, the action of the court in refusing a new trial will not be disturbed. Id.

74. Newly-discovered evidence is not favored as a ground for granting a new trial. Johnson v. State, 128 Ga. 102, 57 SE 353. When a new trial is asked on that ground, it is incumbent on the applicant to satisfy the court that the evidence has come to his knowledge since the trial (Id.), that it was owing to no want of diligence that it did not come sooner (Id.), that it is so material that it would produce a different verdict if a new trial had been granted (Id.), that it is not merely cumulative (Id.), and is not of an impeaching character (Id.). New trial properly refused where only showing as to new evidence was affidavit of person who had heard witness say what was sought to be proved, and no showing was made why desired witness himself had not made an affidavit. Tyler v. State [Tex. Cr. App.] 90 SW 33. Mere statement that new and material evidence has been discovered without setting out its nature or character will not warrant granting of new trial. State v. Williams, 199 Mo. 137, 97 SW 562.

75. Fizini v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 836, 100 SW 394; Washington v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 143, 105 SW 789. Affidavit of defendant's father that at time of trial he was not aware of importance of the fact that his son was under 16 years of age (which went only to place of confinement), and that there was evidence of his birth date recorded in the bible. Reddick v. State [Tex. Cr. App.] 95 SW 516. New evidence as shown by affidavit held not to throw any light on defendant's theory of self-defense. Morello v. People, 226 Ill. 388, 80 NE 903. Where affidavit for new trial on ground of newly-discovered evidence is to effect only that decedent had made disparaging remarks about defendant's wife, and no showing is made that these remarks were communicated to defendant. Tyler v. State [Tex. Cr. App.] 90 SW 33.

76. Vanata v. State [Ark.] 101 SW 169; Crawford v. State, 128 Ga. 30, 57 SE 94; Moody v. State, 1 Ga. App. 772, 58 SE 262; Hamilton v. Com., 29 Ky. L. R. 1039, 96 SW 833; Norman v. Com., 31 Ky. L. R. 1283, 104 SW 1024; State v. Church, 199 Mo. 605, 98 SW 16; State v. Thurman, 121 Mo. App. 374, 98 SW 819; State v. O'Brien, 35 Mont. 482, 90 P 514; People v. Way, 54 Misc. 488, 106 NYS 52; Owens v. State [Tex. Cr. App.] 89 SW 837; Goen v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 119, 101 SW 232; Coffman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 701, 103 SW 1128. Code Cr. Proc. § 465. People v. Bonifacio, 104 NYS 181. Not for cumulative or impeaching testimony. Thomas v. State [Ga.] 59 SE 246; Rogers v. State [Ga.] 59 SE 288; Martin v. Ter., 18 Okl. 370, 90 P 13; White v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 399, 98 SW 264. Merely cumulative and not conclusive in character. Martinatis v. People, 223 Ill. 117, 79 NE 55. When newly-discovered evidence is all cumulative and impeaching, and denied by affidavits of the other side, new trial is properly denied. Washington v. State, 124 Ga. 423, 52 SE 910. Motion for new trial on ground of newly-discovered evidence, which is merely cumulative and would not change result, the affidavit being that of accused only, is properly denied. State v. Sims, 117 La. 1036, 42 S 494.

77. Coffman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 701, 103 SW 1128.

78. State v. Sublett, 191 Mo. 163, 90 SW 374.

79. Sims v. State, 1 Ga. App. 776, 57 SE 1029; Woods v. State, 127 Ga. 41, 55 SE 1044; Moody v. State [Ga. App.] 58 SE 262; State v. Silva, 118 La. 660, 43 S 269; State v. Sheltrey, 100 Minn. 107, 110 NW 353; Fizini v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 836, 100 SW 394; Ingersoll v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 797, 100 SW 778; Bennett v. Com., 106 Va. 834, 55 SE 698; Owens v. State [Tex. Cr. App.] 89 SW 837; Bivens v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 91, 97 SW 86; State v. Thurman, 121 Mo. App. 374, 98 SW 819; Jones v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 874, 105 SW 349. Not in order to discredit a witness whose motives are unimpeached and whose credibility is attacked only by hearsay. People v. Way, 54 Misc. 488, 106 NYS 52. A new trial of a charge of rape will not be granted on the affidavit of the prosecutrix, who testified against accused, that he was innocent. State

Practice on motion.[See 8 C. L. 242]—The motion must be made within the time prescribed,[81] but, though filed too late, the accused in a capital case is entitled to a review of the ruling thereon.[82] The granting of new trials in Federal courts follows the common law, and the court has no jurisdiction of such motion made after the term at which sentence was pronounced.[83] It must specifically state the grounds relied on.[84] It must be verified if so required [85] and be supported by affidavit as to all matters of fact involved.[86] A motion based on erroneous rulings on evidence

v. Barrick, 60 W. Va. 576, 55 SE 652. Evidence that a state's witness, since the trial, has made declaration even under oath that his testimony on the trial was false, is not ground for new trial. In seduction case accused claimed to have received a letter from the woman claiming to have been seduced that she would stop the trouble for $100 and that another person, named, was guilty. The letter was denied by her and discredited by others. Washington v. State, 124 Ga. 423, 52 SE 910.

80. Not for evidence which would not change the result. Threlkeld v.. State, 128 Ga. 660, 58 SE 49; Solomon v. State [Ga. App.] 58 SE 381; Sims v. State, 1 Ga. App. 776, 57 SE 1029; Smith v. State, 126 Ga. 803, 55 SE 1024; Flohr v. Ter. [N. M.] 91 P 712; People v. Bonifacio, 104 NYS 181. Where state's evidence showed willful murder and defendant introduced no evidence, but relied on his statement, newly-discovered evidence of threats by decedent, not communicated to defendant, will not require granting of new trial. McMillan v. State, 128 Ga. 25, 57 SE 309. Must be of such character as to probably change the result on another trial. McDuffie v. State [Ga. App.] 58 SE 544. New trial properly refused when alleged newly-discovered evidence ought not to have produced a different result. Perry v. People, 38 Colo. 23, 87 P 796. New trial should have been granted where proper showing as to newly-discovered evidence was made and it appeared that a witness would contradict every material statement of the witness on whose testimony to dying declaration the conviction rested. Turner v. State, 89 Miss. 621, 42 S 165.

81. Motions for new trial and in arrest being part of the record proper cannot be filed out of term time. State v. Brown, 206 Mo. 501, 103 SW 955. Where motion for new trial could not be made at same term owing to illness of judge, a new trial would be granted by supreme court. State v. Robinson, 143 N. C. 620, 56 SE 918. A trial court is without jurisdiction to hear a motion for a new trial in a criminal prosecution at a term of court subsequent to that at which the verdict was returned. Lisberger v. State, 10 Ohio C. C. (N. S.) 66.

82. In a capital case, though motion for new trial was filed out of term time and the trial court had no power to consider it, the accused cannot be deprived of his right to have the ruling thereon reviewed. State v. Brown, 206 Mo. 501, 103 SW 955. Ann. St. 1906, pp. 767, 1587, 1588, relative to motions for new trial and in arrest, construed. Id.

83. Notwithstanding this rule, however, where a defendant relied on a local statute, the case was remitted by the circuit court of appeals, where it was taken by writ of error to the district court for investigation as to jurisdiction and merits. Trafton v. U. S. [C. C. A.] 147 F 513.

84. Allegations in a motion for new trial that the verdict is contrary to the law and the evidence, and that the facts were not sufficiently proved, present nothing upon which court can act. State v. Chitman, 117 La. 950, 42 S 437. Ground for new trial alleging that instructions were confusing and failed to state part of the law of the case, and did not state the law attempted to be stated clearly and with precision, held too indefinite. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933. Grounds of a motion for new trial to the effect that the verdict is contrary to certain specified charges of the court are equivalent to saying that jury found contrary to law, and are included in the general ground that the verdict is contrary to law. Goodin v. State, 126 Ga. 560, 55 SE 503. Ground for new trial, merely assigning error in admission of documentary evidence without showing contents of writings is insufficient. Yates v. State, 127 Ga. 813, 56 SE 1017. Allegation in motion for new trial that court erred in admitting illegal and irrelevant testimony is insufficient where the testimony referred to is not pointed out. State v. Holden, 203 Mo. 581, 102 SW 490. That instructions are insufficient and do not cover the law cannot be first raised in motion for new trial. State v. De Witt, 191 Mo. 51, 90 SW 77.

85. Where motion for new trial was on ground of improper remarks of district attorney, but no exception was taken nor special instruction asked, and the ground of the motion was not verified, the motion was properly denied. Anderson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 750, 100 SW 153. Motion for new trial for misconduct of juror should be sworn to by accused. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 SW 1016.

86. Misconduct of the prevailing party will not be considered as a ground for a new trial unless shown by affidavit. State v. Sweeney [Kan.] 88 P 1078. New trial properly refused when affidavit was by one who said he had gone to Texas after the crime, and that he committed it, it appearing that he was at the time of making the affidavit suspiciously near the U. S. boundary. Smith v. People [Colo.] 88 P 1072. Where there is no affidavit of the witness as to what he will testify to and no process is asked to obtain him, it will not be granted. Washington v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 143, 105 SW 789. On motion for new trial, the affidavit of the absent witness as to what his testimony would be should be produced, or its absence accounted for. State v. Reed, 122 Mo. App. 366, 99 SW 521. In Arkansas the credibility of persons who have made affidavits in support of a petition

should designate each ruling and make specific reference to the evidence.[87] A defective motion for new trial will not be aided by construction,[88] but leave to amend may be granted.[89] It is the duty of the court to grant a hearing on the motion,[90] but the overruling, instanter of motions for new trial and in arrest which raised only questions considered during the trial, is not a denial of any right, nor a refusal to consider such motions.[91] In passing on the motion, the court occupies the position of a trior and his finding is conclusive.[92] In passing on the motion, only matters properly before the court will be considered.[93] Affidavits in support of motion may properly be considered though filed out of time,[94] but affidavits as to matters not referred to in the motion will not be considered.[95] The court may limit the time for arguing the motion.[96] A motion for a new trial based on alleged insufficiency of evidence is an appeal from the jury to the court on a question of law.[97] In passing on such a motion, the court does not retry the case on the evidence nor disturb any findings made by the jury on evidence sufficient in law to sustain them.[98] It simply determines whether in law the facts found or which could have been found constitute

for a change of venue may be determined by an examination in court as to their knowledge of the matters to which they have sworn. Kirby's Dig., §§ 2317, 2318, requires affidavits of two credible persons, but provides no means of determining their credibility. White v. State [Ark.] 102 SW 715.

87. A general complaint to the exclusion or admission of evidence is insufficient. Richberger v. State [Miss.] 44 S 772. A motion which simply refers to the bill of exceptions or other writing not filed with the motion for the evidence is insufficient. Id.

88. Richberger v. State [Miss.] 44 S 772.

89. A motion for new trial, defective for being vague and general in its allegations, may be amended where such amendment can be made in a few minutes. State v. Vicknair, 118 La. 963, 43 S 635. Motion for new trial, filed within two days, did not mention misconduct of juror, and later, amended motion relied on misconduct of a juror and alleged that it was not known when original motion was filed. Held, since statute allows amended motions when merit is shown, court should have investigated amended motion though filed after two days. Covington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 55, 100 SW 368.

90. Where the court overruled a motion for a few hours time to prepare a motion for new trial, and thereafter overruled motion for new trial without learning the reasons urged in support of it, held that the overruling of motion for time to prepare motion for new trial was error. Neathery v. People, 227 Ill. 110, 81 NE 16.

91. Gourdain v. U. S. [C. C. A.] 154 F 453.

92. In passing upon a ground of a motion for a new trial based upon alleged bias and expression of opinion of a juror, before trial, the judge acts as a trior, and his decision will be reversed only where a manifest abuse of discretion appears. Moore v. State, 1 Ga. App. 728, 57 SE 956. Ground of new trial being that juror expressed an opinion before trial, the court in passing thereon occupies the position of a trior, and its decision that the juror is competent will not be reviewed in the absence of an abuse of discretion. McLeod v. State, 128 Ga. 17, 57 SE 83. Motion for new trial being based on previously expressed opinion of a juror, the court, passing on it, occupies position of a trior, and his decision will not be reviewed in the absence of clear and manifest error. Crawford v. State, 128 Ga. 30, 57 SE 94. In prosecution for assault with intent to murder, defendant's motion for new trial was based on the ex parte affidavit of a codefendant, who had been convicted of aggravated assault, that he alone had committed the assault. It was shown, however, that the codefendant had not paid his fine nor served his sentence. Held refusal to grant new trial was not error. Biard v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 21, 100 SW 937. Affidavit on motion for new trial alleging that jurors were not householders or freeholders, though they had answered on their voir dire that they were, held insufficient where affiant did not show her means of information, nor offer proof of facts alleged. Reum v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 857, 90 SW 1109.

93. Under Code 1906, § 801, the court on hearing of motion for new trial is required to consider only reasons reduced to writing. Richberger v. State [Miss.] 44 S 772. Statement of facts has no place in motion for new trial. Terry v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 373, 97 SW 1043. Evidence as to the good character of accused offered after verdict to support a motion for new trial is not cause for granting the motion. Washington v. State, 124 Ga. 423, 52 SE 910. In passing upon the overruling of a motion for continuance, made a ground of request for new trial, the court may look to the testimony in the record and to that shown in the application for continuance to determine the materiality and probable truth of the absent testimony. Yantis v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 230, 94 SW 1019.

94. State v. Sublett, 191 Mo. 163, 90 SW 374.

95. Affidavits introduced upon the hearing of a motion for a new trial purporting to contain newly-discovered evidence. Washington v. State, 124 Ga. 423, 52 SE 910.

96. Not error to limit time to argue motion to one hour. People v. Buck [Cal.] 91 P 529.

97, 98, 99. State v. Clifford, 59 W. Va. 1, 52 SE 981.

the offense charged.[99] In Texas where on motion for new trial an issue is made as to the fairness and legality of the verdict, the issue should be tried and the jurors compelled to testify.[1]

A motion in arrest of judgment See 8 C. L. 242 lies only for a defect appearing on the record.[2] In some states it lies only for statutory reasons.[3] It will reach a jurisdictional error apparent from the record.[4] It will reach defects in the indictment,[5] though the better practice is to raise such questions by motion to quash [6] or demurrer.[7] It will not reach questions as to sufficiency of evidence [8] or errors in the admission thereof.[9]

1. Kannmacher v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 82, 101 SW 238. Where accused's affidavit upon motion for new trial alleged that his attorney had tried to talk with jurors about the verdict, but they had refused on the ground that they had agreed not to talk about it, and another person's affidavit stated that a juror had said he was not originally in favor of the death penalty imposed, but that they thought the wholesale killing in the county should be stopped, and the death penalty imposed to that end, an issue was made. Id.

2. Proper remedy to reach a verdict so defective that judgment could not be entered thereon. Harris v. State [Fla.] 43 S 311. As a general rule, a motion in arrest lies only for a defect apparent on the face of the record. State v. Brannan, 206 Mo. 636, 105 SW 602; State v. Burns, 79 Vt. 272, 64 A 1129; State v. Shappy, 79 Vt. 306, 65 A 78.

The bill of exceptions is not a part of the record proper. State v. Shappy, 79 Vt. 306, 65 A 78.

Denial of motion to quash indictment on the ground that it was not certified by foreman of grand jury as a true bill must be raised by motion for new trial and not in arrest, the certificate not being part of record proper. State v. Brannan, 206 Mo. 636, 105 SW 602.

3. A motion in arrest, not based on statutory ground, properly overruled. State v. Steidley [Iowa] 113 NW 333. Defect in not stating an offense may be raised by motion in arrest under Rev. St. 1899, § 5418, though not raised by demurrer. McGinnis v. State [Wyo.] 91 P 936.

4. Lack of jurisdiction of subject-matter apparent on the face of the record. State v. Shappy, 79 Vt. 306, 65 A 78. Objection that indictment does not show that crime was committed in state or county cannot be raised by objection to evidence after a plea of not guilty; must be raised by motion in arrest. State v. Louanis, 79 Vt. 463, 65 A 532.

5. An objection on an accusation that it was based on a defective affidavit must be made by demurrer or motion in arrest not ground for new trial. Rogers v. State, 1 Ga. App. 527, 58 SE 236. Under Mansf. Dig. § 2302, providing that the only ground on which judgment shall be arrested is that the indictment does not charge an offense, and § 2106, providing what an indictment shall contain, indictment for seduction held sufficient. Tedford v. U. S. [Ind. T.] 104 SW 608. Complaint signed "Horace White" by mistake of the justice, the name being "Horace Wright," is bad on motion in arrest. Abernathy v. State [Tex. Cr. App.] 19 Tex. Ct Rep. 914, 105 SW 185.

6. Clerical errors. Indictment showed on its face presentment in February, 1906, for theft committed in November, 1906, and file mark showed February, 1907. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 158, 102 SW 407. Defects in indictments and informations should be called to the attention of the trial court by motion to quash or demurrer so that the defect, if any, may be corrected by the filing of another. Barber v. State [Fla.] 42 S 86. Neither the common law nor statutes favor the policy of deferring such objections and raising them by motion in arrest of judgment, the granting of which would necessitate entirely new proceedings. Id. While a former acquittal may be proved under a plea of not guilty, the question cannot be first raised upon a motion in arrest of judgment. Dalton v. People, 224 Ill. 333, 79 NE 669. An objection that an indictment is bad for duplicity cannot be raised for the first time by motion in arrest. Morgan v. U. S. [C. C. A.] 148 F 189. Code Cr. Proc. 1895, art. 251, provides that complaint must be in writing and signed by affiant if he is able to write, otherwise by his mark. Held that fact that complaining witness made his mark when he was able to write while available on motion to quash was too late on motion in arrest. Lewis v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 301, 97 SW 481. An objection that an indictment for conspiracy to defraud the United States out of public lands does not make it clear to what lands the conspiracy related cannot be taken by motion in arrest. Stearns v. U. S. [C. C. A.] 152 F 900. That the foreman of the grand jury did not sign the entry of true bill on an indictment is not ground for motion in arrest. McAllister v. State [Ga. App.] 58 SE 1110.

7. Sufficiency of indictment may be raised by motion in arrest, but it is better practice to raise it by demurrer. Clement v. U. S. [C. C. A.] 149 F 305. Objections which go merely to the form of the indictment must be taken before joinder of issue, and cannot be raised by motion in arrest. Newsome v. State [Ga. App.] 58 SE 672. Where an indictment contains more than one count, one of which is good, and defendant waives his right to attack the defective count, a judgment is presumed based on the good count and will not be arrested on motion. Sessions v. State [Ga. App.] 59 SE 196.

8. Lack of evidence to sustain a verdict. State v. Shappy, 79 Vt. 306, 65 A 78. The evidence cannot be considered. Sessions v. State [Ga. App.] 59 SE 196.

9. Questions of variance, error in admission of testimony, or in refusing new trial. State v. Pellerin, 118 La. 547, 43 S 159.

Motion to set aside the judgment. See 8 C. L. 242—On a motion to set aside a verdict as contrary to the evidence, it will be considered as upon a demurrer to the evidence [10]

A writ of error coram nobis See 8 C. L. 242 lies to present for review matters not reviewable on appeal or error,[11] and does not lie to contradict an adjudicated issue of fact,[12] nor where a motion for new trial would present the same question.[13]

§ 12. *Sentence and judgment.* See 8 C. L. 244—The pronouncing of sentence is no part of the trial within the rule that defendant shall have the right to a speedy trial.[14] Sentences should be imposed in keeping with the spirit of the law, the object of which is to protect society and reform the criminal.[15] It is not essential that the court should formally adjudge defendant guilty before pronouncing sentence.[16] In cases not capital, it is not essential that the court, prior to sentence, should ask defendant if he has anything to say why sentence should not be passed upon him.[17] The sentence must correspond to that provided by law for the offense charged,[18] must be supported by indictment, which must appear in the record proper,[19] and must conform to the charge therein set out.[20] An additional penalty in case accused shall apply for relief from a jail sentence is illegal.[21] Palpable errors in a sentence may be disregarded.[22] Postponement of sentence is properly denied where the application is not supported by any showing.[23] Postponement of sentence to await the result of another trial is proper.[24] In some states suspension of sentence is allowable.[25]

On plea of guilty to two charges punishment should be assessed for each.[26] Cumulative sentence must be apportioned; a single sentence for a longer term than is authorized for any one of the offenses is void.[27] Where a cumulative sentence is

10. Code 1904, § 3484. Wright v. Com., 106 Va. 855, 56 SE 705.

11. Only review beyond review of events of trial on writ of error or appeal is an original proceeding in the trial court on writ, or error coram nobis, the office of which is to present for review matters not reviewable on appeal or error. Beard v. State, 79 Ark. 293, 95 SW 995, 97 SW 667.

12. Defendant is not entitled to the writ after conviction at a former term on an allegation that prosecuting witness committed perjury, and had voluntarily made affidavit of that fact since such allegation called for review of issue of fact raised by plea of not guilty. Beard v. State [Ark.] 99 SW 837. That defendant was prevented by fear of violence from obtaining his witnesses does not entitle him to writ of coram nobis after conviction at former term since that is matter which should have been set up by motion for new trial at term at which he was convicted. Id.

13. Wilson v. State [Wash.] 90 P 257.

14. Delay of 35 days did not deprive court of jurisdiction to pronounce judgment. People v. Stokes [Cal. App.] 89 P 997.

15. State v. Neil [Idaho] 90 P 860.

16. Nagel v. People, 229 Ill. 598, 82 NE 315.

17. State v. Sims, 117 La. 1036, 42 S 494.

18. Bradford v. State [Ala.] 42 S 990.

19. That the sentence is supported by an indictment set out in the bill of exceptions does not suffice, it must be supported by the indictment disclosed by the record. Andrews v. State [Ala.] 43 S 196.

20. Punishment for felony cannot be imposed for simple assault. Andrews v. State [Ala.] 43 S 196.

21. Sentence of a fine and five months' imprisonment, and three months' confinement on the chain gang in case accused applied for relief from the jail sentence, held illegal. Wallace v. State, 126 Ga. 749, 55 SE 1042.

22. Where alternative sentence of fine or imprisonment is imposed and the penitentiary instead of the jail is erroneously declared the place of imprisonment, held that such portion of the sentence might be rejected as surplusage and did not vitiate the sentence. Ex parte Tani [Nev.] 91 P 137.

23. Where verdict was returned March 21 and defendant arraigned for sentence the 24th, it was not error to deny postponement in absence of showing in support of motion for new trial for newly-discovered evidence. People v. Buck [Cal.] 91 P 529.

24. Postponement of sentence for three months to await result of another trial for similar offense is not error. People v. Robertson [Cal. App.] 92 P 498.

25. Right to suspend sentence discussed. Harris v. Lang, 27 App. D. C. 84; Harris v. Nixon, 27 App. D. C. 94.

26. Where an information charges both larceny and burglary and the statute affixes a different punishment for each, the punishment on plea of guilty should be assessed for each offense. State v. Kelley, 206 Mo. 685, 105 SW 606.

27. Where a defendant had been convicted on several counts of an indictment charging several offenses under the same statute, the court may impose cumulative sentences but a single sentence for a longer term than is authorized for one offense is void and another court cannot cure the defect by apportioning the term upon the different

imposed and the second one is void, the third term begins at expiration of the first.[28] Defendants who have been convicted and sentenced on several counts, the sentences to run concurrently, cannot complain that they have been convicted several times for the same offense.[29] Where commitment is under several concurrent judgments, they may be executed concurrently.[30] A sentence prescribing different terms of imprisonment on the same day is presumed to run concurrently, unless an intention that they shall run consecutively is expressly indicated.[31] In Florida the court has power only to fix the nature and extent of punishment; it has no power to fix the time of executing its sentence nor the time when punishment shall commence or end.[32] Where the issue of insanity is raised and tried after conviction, sentence should be enforced at once, if defendant is found sane; if found insane, he should be adjudged a lunatic and confined according to law.[33] Where the verdict fixes defendant's punishment at a certain term of imprisonment, and the court erroneously sentences defendant to a term of double that time, the error may be corrected by motion to the court rendering the judgment,[34] even though defendant has served the full term fixed by the jury.[35] The court is without power to revoke a sentence lawfully imposed after conviction and partly executed for the purpose of imposing a more severe one.[36] The power of suspending sentence is resident in certain courts and statutes conferring such power are not to be construed as trespassing on the pardoning power.[37] A suspension may be revoked after expiration of sentence for other crimes.[38] Where a new trial is granted after conviction and sentence to life imprisonment, such conviction and sentence is not a bar to a sentence of death on a subsequent conviction.[39]

The power of inferior courts to impose alternate sentences of fine or imprisonment[40] and the form of such sentences[41] must be determined by reference to the statute and charter provisions. In Alabama where defendant is sentenced to hard labor, the court must determine the time necessary to work out costs.[42] A sentence

counts. United States v. Peeke [C. C. A.] 153 F 166.

28. United States v. Carpenter [C. C. A.] 151 F 214.

29. Imboden v. People [Colo.] 90 P 608.

30. Burns' Ann. St. 1901, § 1931, provides that, where one is imprisoned for failure to pay fines or costs, one day's imprisonment shall equal one dollar of fine or costs. Held, where commitment was under several judgments amounting to $32 each, and judgments were concurrent and executed contemporaneously, 32 days' imprisonment discharged them all. Peed v. Brewster, 168 Ind. 51, 79 NE 1039.

31. Kirkman v. McClaughry, 152 F 255.

32. State v. Horns [Fla.] 42 S 388.

33. Holland v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 172, 105 SW 812.

34, 35. Petition of Channels, 30 Ky. L. R. 1248, 100 SW 214.

36. People v. Sullivan, 54 Misc. 489, 106 NYS 143.

37. People v. Flynn, 55 Misc. 639, 106 NYS 925.

38. Where sentence was suspended and within the period the defendant was twice convicted of other crimes, held, on expiration of a sentence imposed for one of such offenses, the court in which he was first convicted could revoke the suspension and inflict punishment. People v. Flynn, 55 Misc. 639, 106 NYS 925.

39. People v. Grill [Cal.] 91 P 515.

40. Mayor of city of Bainbridge held to have authority to impose a fine for violation of city ordinance; sentence of "confinement on the streets" held not unlawful for uncertainty, nor because of a provision for the discharge of the prisoner on paying his fine. Shuler v. Willis, 126 Ga. 73, 54 SE 965. Under Code 1896, §§ 5423-5425, where a fine is assessed, the trial court must either imprison defendant or sentence him to hard labor unless the fine is paid or judgment confessed. Perry v. State [Ala.] 43 S 18. In Florida defendant cannot be sentenced to the penitentiary in default of payment of fine, which is maximum penalty, but must be sentenced to jail. Douglass v. State [Fla.] 43 S 424.

41. Under Pol. Code 1895, § 712, and charter and ordinances of city of Eatonton, the mayor of that city is authorized to impose a fine of $25 for violation of an ordinance, and in default thereof that defendant be confined at labor for 60 days, but judgment for costs cannot be added. Leonard v. Eatonton, 126 Ga. 63, 54 SE 963. Judgment ordering and adjudging that defendant pay "fine of twenty-five dollars, or in default thereof that he be imprisoned in the calaboose thirty days," imposes an alternative sentence. Hardy v. Eatonton, 128 Ga. 27, 57 SE 99.

42. Code 1896, § 4532. Freeman v. State [Ala.] 44 S 46. Under Code 1896, § 4532, providing that the judge must determine the time to work out an additional sentence for costs, a sentence is defective if it fails to

erroneous because of errors in apportioning the time of imprisonment to satisfy a fine and costs is not void, but is sufficient to prevent the discharge of defendant or the sureties upon his bond.[43] A sentence imposed by a justice which is beyond his jurisdiction to impose is void.[44]

Statutes providing for indeterminate sentences for crime are constitutional.[45] Such statutes do not affect sentences already pronounced and in process of execution.[46] A prisoner is not entitled to be released at the end of a minimum sentence imposed by the court where the maximum is fixed by statute and the sentence is indeterminate.[47] A statute fixing only a minimum penalty has been held not void on that account.[48] A sentence to a reformatory for a certain term of years is a sufficient compliance with a statutory requirement that the court shall fix the maximum sentence.[49] Where defendant pleads guilty in the first degree, he is not injured by failure of the court to fix the degree.[50] In Montana the court must determine the degree of guilt only where a plea of guilty is entered.[51] Where it rests in the discretion of the court to fix the punishment, it may consider evidence in mitigation or aggravation which was not admissible on the question of guilt or innocence.[52]

Judgment.[See 8 C. L. 245]—The judgment must sufficiently designate the offense charged.[53] A judgment is final notwithstanding the omission of the word "considered" in its recitals.[54] Where judgment was not entered at the time required, the trial court was held authorized to enter it nunc pro tunc.[55] A judgment of a justice of the peace need not be signed by him in the absence of statutory requirement.[56] A recital that verdict was entered on a date which would be Sunday does not show entry of judgment on that day.[57] A judgment not responsive to the ver-

do so. Scott v. State [Ala.] 43 S 181. A judgment requiring accused to perform labor in satisfaction of costs should show an ascertainment of the cost and the determination by the court of the number of days required to work it out. Judgment held insufficient under Code 1896, § 4532. Moore v. State [Ala.] 42 S 996.

43. Under Code 1896, § 4532, imprisonment for fine may be in addition to 10 months for costs. Weinard v. State [Ala.] 42 S 991.

44. Ex parte Narvaez [Cal. App.] 89 P 857.

45. People held to have power to amend constitution so as to permit such legislation. In re Manaca, 146 Mich. 697, 13 Det. Leg. N. 919, 110 NW 75. Pub. Acts 1903, p. 168, Act No. 136, authorizing indeterminate sentences and passed pursuant to Const. art. 4, § 47, is valid. Id. Pub. Acts 1905, Act. No. 184, the indeterminate sentence law, is not objectionable as an interference with judicial or executive power. People v. Cook, 147 Mich. 127, 13 Det. Leg. N. 971, 110 NW 514. Nor as authorizing the infliction of cruel and unusual punishments. Id.

46. Pub. Acts 1905, Act. No. 184, is not retroactive though it repeals Pub. Acts 1903, No. 136. In re Manaca, 146 Mich. 697, 13 Det. Leg. N. 919, 110 NW 75.

47. Where one was sentenced to "not less than one year," he was not entitled to release at the end of that year, as under Comp. Laws, § 11784, it was the court's duty to fix the minimum penalty, only the maximum being fixed by the statute. In re Downs, 147 Mich. 477, 111 NW 81.

48. A statute fixing a minimum penalty only is not void on that account notwithstanding Pen. Code 1895, art. 3, providing that no one will be punished for any act unless it be made a penal offense and a penalty affixed by written law. Myers v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 309, 103 SW 859.

49. Such sentence for rape (Comp. Laws, § 11,489) held sufficient under Pub. Laws 1903, p. 168, Act. No. 136, § 1. In re Manaca, 146 Mich. 697, 13 Det. Leg. N. 919, 110 NW 75.

50. Under Pen. Code, § 1192, declaring that upon plea of guilty, before passing sentence, the court shall determine the degree of offense where defendant pleaded guilty to first degree under an information charging burglary in general terms, he was not prejudiced by failure of the court to determine the degree. Ex parte Haase [Cal. App.] 90 P 946.

51. Pen. Code, § 2211, providing that on a plea of guilty the court before passing sentence shall determine the degree of offense, applies only where a plea of guilty is entered. State v. Mish [Mont.] 92 P 459.

52. United States v. Standard Oil Co., 155 F 305.

53. Judgment reciting that defendant was duly convicted of unlawfully selling intoxicating liquors held to sufficiently designate the offense charged. In re Mogensen [Cal. App.] 90 P 1063.

54. Judgment recited defendant's inability to show cause why judgment should not be pronounced and concluded "it is therefore ordered," etc., leaving out the word "considered." Held judgment was final. State v. Branton [Or.] 87 P 535.

55. Where judgment was not entered on verdict of conviction at the time as required by Rev. St. 1899, § 2648, nor sentence passed as required by § 2658, subsequently, though the case was in the supreme court, the trial court could make entry nunc pro tunc. State v. Gordon, 196 Mo. 185, 95 SW 420.

56. Johnson v. State [Del.] 67 A 785.

57. Recital in judgment that on a certain date which was Sunday there was returned

dict may be corrected on appeal, in Texas,[56] and where verdict and judgment are for an offense not charged the judgment may be reformed to adjudge accused guilty of the crime charged.[59] No election being required between counts in an indictment for misdemeanors, a judgment need not show upon which count conviction was held.[60] A judgment under an ordinance void as to the penalty provided is not invalid where the judgment was in terms authorized by general law.[61] Where under erroneous instructions the jury assesses a punishment in excess of that allowed by law, the court has no power to enter judgment for the maximum punishment allowed.[62] In such case there is a mistrial, and the judgment must be reversed and the cause remanded.[63] Fixing the date of execution is not a judicial act and the governor may be authorized to fix it.[64] In Iowa the governor has power to issue a warrant for defendant's execution upon affirmance of conviction by the supreme court.[65] A judgment of conviction is conclusive evidence of facts determined when introduced in a subsequent proceeding against the same person.[66]

§ 13. *Record or minutes and commitment.* See 6 C. L. 245—The record must show every essential step, including a proper charge against defendant,[67] arraignment of accused and a plea to the indictment,[68] impaneling and swearing of the jury,[69] ruling on motion to quash the panel,[70] and all essential elements of a valid judgment.[71] Silence of the record concerning facts not customarily shown therein is not a ground for arresting or setting aside the judgment.[72] In Idaho the record

into court "and is here now entered on the minutes" a certain verdict does not show that judgment was entered on that day. Moore v. State [Tex. Cr. App.] 96 SW 321.

58. A judgment not responsive to verdict will be corrected on appeal. Byrd v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 300, 103 SW 863. Under statute giving supreme court authority to conform judgment and sentence to verdict, a judgment and sentence in theft based on a verdict of guilty of embezzlement will be reformed to conform to verdict. Brumley v. State [Tex. Cr. App.] 95 SW 503.

59. Under Code Cr. Proc. 1895, art. 904, authorizing court of criminal appeals to reform judgment as nature of case requires one found guilty of theft under an indictment for embezzlement and sentenced therefor, judgment may be reformed to adjudicate him guilty of embezzlement. Burk v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 582, 95 SW 1064.

60. Bivens v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 91, 97 SW 86.

61. Where one was convicted under an ordinance which was void as providing a penalty in conflict with general law but the judgment was in terms authorized by the general law, it is valid. Ex parte Sweetman [Cal. App.] 90 P 1069.

62. Court instructed for one to ten years, and jury assessed ten, law allowed but five, which court fixed. Thomas v. Com., 30 Ky. L. R. 1271, 101 SW 303.

63. Thomas v. Com., 30 Ky. L. R. 1271, 101 SW 303.

64. Under Cr. Code Prac. §§ 290, 346, relative to judgment of death and fixing date of execution, held not to make fixing of date a judicial act precluding the legislature from authorizing the governor to fix another day in case sentence is not enforced on a day specified. Bullitt v. Sturgeon [Ky.] 105 SW 468.

65. In Iowa, under Code, § 4746, when the governor (who issues warrants for execution) has before him a judgment of the supreme court affirming a conviction, he is authorized to issue a warrant for defendant's execution. Busse v. Barr, 132 Iowa, 463, 109 NW 920.

66. State v. Sargood [Vt.] 68 A 51.

67. Under Rev. Code 1852, amended by Laws 1893, p. 939, a judgment record failing to show that defendant was charged with "willfully" maintaining a nuisance is not sufficient to sustain a conviction. Johnson v. State [Del.] 67 A 785.

68. Even in misdemeanor cases. State v. Mikel, 125 Mo. App. 287, 102 SW 19. Record held to show that accused intended to enter a plea of murder in the first degree, so as to warrant correction of minutes to show such plea on ex parte application of district attorney. People v. O'Brien [Cal. App.] 89 P 438.

69. Record on appeal merely reciting that 12 persons were selected out of a panel, that the jury returned into court a verdict "we the jury," does not show that jury was sworn as required by statute, and a conviction based thereon cannot stand. State v. Mitchell, 199 Mo. 105, 97 SW 561.

70. Ruling denying motion to quash panel should appear in the journal and not by bill of exceptions. Delmont v. State [Wyo.] 88 P 1102.

71. Record entry of judgment held to contain all essential elements of valid judgment. State v. Williams, 191 Mo. 205, 90 SW 448.

72. Where it has never been the practice to enter on the record the fact that the prisoner and his counsel were present when the verdict was rendered, and when sentence was pronounced, and from arraignment to sentence, or that the prisoner was asked before sentence if he had any reason why sentence should not be pronounced, silence of the record as to these facts is no cause for arresting or setting aside judgment. Rawlins v. Mitchell, 127 Ga. 24, 55 SE 958.

proper need not show that the defendant was informed of his right to challenge an individual juror before the jury is sworn,[73] nor that the jury was admonished before each adjournment not to discuss or form any opinion until the case was finally submitted.[74] Omissions may be cured by amendment,[75] or by the record on appeal.[76] In Iowa a judgment for imprisonment and costs cannot be corrected six years after its entry by a nunc pro tunc order to insert a fine therein.[77] Within his statutory jurisdiction a justice has complete authority in making up his record.[78]

Commitment See 8 C. L. 246 should be properly signed [79] and should show the place of imprisonment.[80] The requisites of a commitment to the industrial school, under the Nebraska statute, are discussed in the note.[81]

§ 14. *Saving questions for review. Necessity of objection, motion, or exception.* See 8 C. L. 240—Aside from objections to the jurisdiction, of which advantage may be taken at any time,[82] and to the failure of the indictment to state an offense,[83] prompt objection and exception in the trial court is necessary to preserve the right to a review of the ruling complained of,[84] as objections not so urged [85] and

73. Though this should be done. Rev. St. 1887, § 7826. State v. Suttles [Idaho] 88 P 238; State v. O'Brien [Idaho] 88 P 425.

74. State v. Suttles [Idaho] 88 P 238.

75. The circuit court at a subsequent term may amend its record on parol evidence to show that the jury was sworn as required by law. Goddard v. State, 78 Ark. 226, 95 SW 476. A court has power to correct its record to correspond to the fact. Record properly amended to show discharge of jury. State v. Curry, 74 Kan. 624, 87 P 745. Where minutes of term at which indictment was found failed to set out the original grand jury venire, this was not a ground for quashing the indictment where the court permitted an amendment at an adjourned term to show the organization of the grand jury. Snyder v. State, 145 Ala. 33, 40 S 978.

76. Where a case was transferred from one county to another, the objection that the record as certified by the clerk of the first county court to the other county failed to show the order removing the cause is not ground for reversal where a return to a writ of certiorari in the supreme court shows the order of removal. State v. Banks, 61 W. Va. 6, 55 SE 739.

77. Construing Code, §§ 5431, 5443. Smith v. Mahaska County Dist. Ct., 132 Iowa, 693, 109 NW 1085.

78. Johnson v. State [Del.] 67 A 785.

79. Warrant of commitment signed by police judge of San Bernardino elected in 1905 but signed as "city recorder" held sufficient, construing charter provisions. Ex parte Baxter, 3 Cal. App. 716, 86 P 998. A certified copy of the sentence is a sufficient commitment under Code Cr. Proc. § 486, and accordingly failure to sign the commitment is immaterial. People v. Pitts, 118 App. Div. 457, 103 NYS 258.

80. A commitment of a justice to imprisonment in the county jail is sufficient though it does not specify the jail of what county, especially where it appears that he is authorized to commit only to the jail of one county. Ex parte Bargagliotti [Cal. App.] 92 P 96.

81. Under Cobbey's Ann. St. 1903, § 9736, a judge in committing an infant to the industrial school need not make a written finding that defendant is of sane mind and under eighteen years of age. Leiby v. State [Neb.] 113 NW 125. Where the court makes a written finding that "accused is a fit subject for the industrial school" and orders him committed there and his age is stated in the order, it is presumed that the court found all facts necessary to support the order. Id. In commiting a boy to the Industrial School, the court should not fix a definite sentence as the law fixes the time of release and it is sufficient if the warrant of commitment shows his age. Id.

82. Objection to jurisdiction of a justice of the peace having no jurisdiction over offense is available at any time. McCarg v. Burr, 186 N. Y. 467, 79 NE 715.

83. See 8 C. L. 246, n. 62.

84. Ruling not excepted to will not be reviewed. Wright v. Com., 106 Va. 855, 56 SE 705. Objections cannot be reviewed where no exception was saved. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330. Rulings will not be reviewed where no exception was saved at the trial. People v. Bianchino [Cal. App.] 91 P 112. Exceptions to rulings in criminal cases must be taken at the time. Territory v. Gonzales [N. M.] 89 P 250. Where bill of exceptions shows that no exceptions were made to overruling of motion for a new trial, rulings on impaneling jury on admission of evidence and on instructions cannot be considered. State v. Penland, 199 Mo. 152, 97 SW 561. Where trial judge refused to consider a motion for new trial because affidavits were not properly identified, the ground will not be considered on appeal, no exception having been taken to the court's ruling. Long v. State, 127 Ga. 350, 56 SE 444. Question of validity of city ordinance should be raised in city (trial) court; it cannot be first raised in a petition for certiorari from that to the superior court Hardy v. Eatonton, 128 Ga. 27, 57 SE 99. Seting a case for trial over a month in advance in the absence of defendant but in presence of his counsel held not prejudicial error, no objection being made when case was called. People v. Erwin [Cal. App.] 88 P 371.

85. Where the court directed verdict for defendant on one count but the verdict found him guilty on such count and no motion was made to set it aside, it will not be reviewed. Morrison v. State [Ala.] 44 S 43. Where no exception was saved to court's

insisted and relied upon [86] will be deemed to have been waived, and this is so notwithstanding an agreement that all errors might be taken advantage of without formal objection or exception.[87] This rule has been applied to objections to the formal sufficiency of the indictment,[88] organization of the grand jury,[89] refusal of request for special venire,[90] manner of swearing talesmen,[91] overruling challenge to juror for cause,[92] failure to admonish the jury,[93] want of service of indictment and venire,[94] denial of continuance,[95] transfer of the cause,[96, 97] dismissal of one of sev-

ruling on evidence and the matter was not referred to in motion for new trial nor brief on appeal, objection was waived. Scaggs v. State [Ark.] 99 SW 1104. Under Pen. Code, § 686, permitting testimony taken before committing magistrate "by question and answer" to be read where witness is dead, objection to reading of testimony taken in narrative form is waived where no objection is made. People v. Clark [Cal.] 90 P 549. Objection that confession was not voluntary held waived where the question was not raised until after it was gotten before the jury. People v. Silvers [Cal. App.] 92 P 506. Where accused did not ask for discharge of jury at once when counsel commented on his failure to testify, the objection was waived. State v. Buxton, 79 Conn. 477, 65 A 957. Where defendant failed to ask to have the jury admonished to disregard improper argument, he cannot raise the question of appeal. Williams v. State [Ind.] 82 NE 790. Where at the time accused made no objection that jurors had heard argument in a similar case against him, the objection would not be considered on appeal. Day v. Com., 29 Ky. L. R. 814, 96 SW 508. Objections to jury list will be deemed waived if not seasonably urged. State v. Petit, 119 La. 1013, 44 S 848. Failure to object to remarks of counsel is a waiver of the error if any. State v. De Witt, 191 Mo. 51, 90 SW 77. One convicted is not entitled to reversal on appeal because the prosecution was barred by limitations where such objection was not interposed at the trial. People v. Blake, 121 App. Div. 613, 106 NYS 319. Objection to sufficiency of proof is waived where it is raised only by a request to direct a verdict of not guilty. State v. Reyner [Or.] 91 P 301. Insufficient review of evidence not ground for reversal where attention of court is not called to it. Commonwealth v. Minney, 216 Pa. 149, 65 A 31. Bill of exceptions reserved to overruling of motion for change of venue after term time cannot be considered. Dobbs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 64, 100 SW 946. Before accused can complain that he was compelled to proceed in absence of jurors who had been summoned, he must ask to have case postponed. Mays v. State [Tex. Cr. App.] 96 SW 329. Where jury were excluded pending argument whether certain evidence admitted should be excluded, and when the jury returned counsel failed to call attention to the fact that the court ruled to exclude it, the objection was waived. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156.

86. An objection to the overruling of motion to direct a verdict on the ground of insufficiency of evidence is waived by defendant introducing evidence on his own behalf. Stearns v. U. S. [C. C. A.] 152 F 900. Where objection was made by junior counsel but was afterwards withdrawn by senior counsel, the objection is waived. Stamper v. Com., 30 Ky. L. R. 679, 99 SW 304. Objection to argument of counsel is waived where after being cautioned the attorney paid no heed but no further objection was made. State v. Thurman, 121 Mo. App. 374, 98 SW 819.

87. Bleich v. People, 227 Ill. 80, 81 NE 36.

88. Sufficiency of indictment will not be reviewed where not first raised by demurrer or motion to quash. Church v. Ter. [N. M.] 91 P 720. Objection that indictment for embezzlement charged defendant as cashier instead of as agent, director, clerk, or officer, not ground for reversal when raised for first time on appeal. Richberger v. State [Miss.] 44 S 772. An alleged error presenting a question of law to which no exception is taken in the trial court cannot be reviewed by the court of appeals. Contention that conviction of assault in first degree cannot be had under indictment for manslaughter cannot be considered where not raised below. People v. Huson [N. Y.] 79 NE 835.

89. Where the question of organization of the grand jury was not raised below, it will not be considered. Logan v. State [Ala.] 43 S 10.

90. Refusal of request for special venire cannot be reviewed, no exception to ruling being taken. Laws v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 136, 101 SW 987.

91. Appellant may not complain of the manner in which talesmen were sworn when he made no objection at the time and did not move to require them to be resworn. Preston v. State, 115 Tenn. 343, 90 SW 856.

92. Action of court in overruling challenge to juror for cause cannot be reviewed when no exception is taken and preserved. Blackwell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 766, 100 SW 774. Overruling of challenge of juror stating no ground other "than for cause" is not reviewable. State v. Miles, 199 Mo. 530, 98 SW 25.

93. Where defendant failed to object to failure of court to admonish the jury not to discuss the case before an adjournment, the error was waived. Lee v. State, 78 Ark. 77, 93 SW 754.

94. Failure of sheriff to serve copy of indictment and venire on defendant cannot be raised for first time on appeal. Strickland v. State [Ala.] 43 S 188.

95. Overruling motion for continuance cannot be reviewed in absence of bill of exceptions. Moore v. State [Tex. Cr. App.] 96 SW 327.

96, 97. Objection to jurisdiction in that the case was improperly transferred must be made before the party announces ready for trial and is too late on motion in arrest. Banks v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 139, 105 SW 821.

eral defendants in order to use him as a witness against others,[98] acts of bystanders during trial,[99] absence of judge,[1] remarks of the court,[2] failure to enter an order on the minutes,[3] argument,[4] conduct and remarks of counsel,[5] failure to swear a witness,[6] incompetency of witness,[7] violation by witness of rule of exclusion from court room,[8] admission or exclusion of evidence,[9] instructions given,[10] refusal of

98. Action of court in dismissing as to one of several defendants so as to use him as a witness after jury is impaneled and sworn to try all cannot be reviewed where no exception was saved. Steudle v. Ter. [Okl.] 91 P 1024.

99. Act of bystander, who had testified in correcting counsel so that jurors could hear him, as to extent of deceased's wound, not excepted to, held not reversible error. Holt v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 751, 100 SW 156.

1. Where no objection was made to short absence of judge during argument, it could not be raised on appeal. Thomas v. State [Ala.] 43 S 371.

2. Remarks of the court and objections thereto cannot be made part of the record by motion for new trial. State v. O'Kelley, 121 Mo. App. 178, 98 SW 804.

3. Objection that order authorizing amendment was not entered on the minutes as required by statute cannot be raised for first time on appeal. Richberger v. State [Miss.] 44 S 772.

4. Where no exception was taken to argument of counsel, it will not be reviewed. Lowrie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 787, 98 SW 838. Argument of district attorney not reviewable, no exception being taken. People v. Melandrez [Cal. App.] 88 P 372. Improper argument will not be reviewed where no exception was saved. People v. White [Cal. App.] 90 P 471. Argument though irrelevant held not reversible error where no objection was made and no ruling invoked. Thomas v. State [Ga.] 59 SE 246. Where no exceptions were taken to argument of counsel, improper argument is not ground for reversal. Day v. Com., 29 Ky. L. R. 814, 96 SW 508. Where accused neither objected to argument of counsel nor asked the court to exclude it, error is not reviewable. Sweat v. Com., 29 Ky. L. R. 1067, 96 SW 843. Objections to argument will not be reviewed where not objected to in the trial court, nor the court asked to reprove the attorney, or admonish the jury to disregard it. McIntosh v. Com., 29 Ky. L. R. 1100, 96 SW 917. Improper argument will not be reviewed where no objection or exception was taken at the time. Stevens v. Com., 30 Ky. L. R. 290, 98 SW 284. It is only in the most flagrant cases of use of improper argument even in capital cases that defendant may sit by and remain silent and raise objection after verdict. Clark v. State [Neb.] 113 NW 804.

5. Language of prosecuting attorney not being objected to at the time it was used, objection being first raised in motion for new trial, it will not be considered on appeal. France v. Com., 30 Ky. L. R. 1297, 100 SW 1193. Where no ruling below was made on objections to conduct of counsel and no request for such ruling, the matter will not be reviewed. Stinson v. Com., 29 Ky. L. R. 733, 96 SW 463. Failure of court to immediately put a stop to unseemly conduct of decedent's widow cannot be reviewed, where no objection and exception was taken at the time. Stevens v. Com., 30 Ky. L. R. 290, 98 SW 284. Objectionable remarks of attorney cannot be complained of on appeal where no exception was saved below. Johnson v. State [Ala.] 44 S 670. Error in remarks of state's counsel waived where no objection was made and the remarks were answered by counsel for defendant. Smith v. State, 79 Ark. 25, 94 SW 918. It is defendant's duty to object promptly to improper conduct or argument of counsel. State v. Thomas [Iowa] 109 NW 900. Question of alleged misconduct of counsel cannot be reviewed where no ruling was asked of or made by the court, and no exception taken to any ruling. Lipsey v. People, 227 Ill. 364, 81 NE 348. Improper remarks by state's attorney cannot be reviewed where no ruling is made and no exception to failure of court to rule is taken. McCann v. People, 226 Ill. 562, 80 NE 1061. Objections to remarks of counsel must be made at the time and embodied in bill of exceptions. Clark v. People, 224 Ill. 554, 79 NE 941. Misconduct of counsel will not be reviewed where no objection was made until after verdict. Richberger v. State [Miss.] 44 S 772. No exceptions being saved to ruling of court on objection to remarks of counsel, neither the alleged improper conduct nor the court's ruling could be reviewed. State v. Murphy, 201 Mo. 691, 100 SW 414.

6. Objection that witness was not sworn cannot be raised for first time on appeal. People v. Collins [Cal. App.] 91 P 158.

7. Objection to incompetency of a witness must be made at the time he is sworn or during trial or it will be considered waived. Bise v. U. S. [C. C. A.] 144 F 374.

8. Objection for violation of rule by witness should be made as soon as the facts are known. Palmer v. People, 112 Ill. App. 527.

9. Austin v. State, 145 Ala. 37, 40 S 989; Commonwealth v. Tryon, 31 Pa. Super. Ct. 146. Error in admission of evidence cannot be raised for the first time on appeal. Savell v. State [Ala.] 43 S 201. Objection to hypothetical question must be raised at trial. People v. James [Cal. App.] 90 P 561. Where witness in prosecution for rape gave a written answer to a question propounded on cross-examination, it could not be presumed that the court would not have required an oral answer if insisted upon. People v. White [Cal. App.] 90 P 471. Evidence admitted without objection will not be reviewed though assigned as error. Sims v. State [Fla.] 44 S 737; Marshall v. State [Fla.] 44 S 742. Parol evidence of conviction of witness not being objected to on ground that it was not the best evidence, error in admitting it is no ground for reversal. O'Donnell v. People, 224 Ill. 218, 79 NE 639. Error in admission or exclusion of evidence will not be reviewed unless exceptions have been reserved. State v. Reed, 122 Mo. App. 366, 99 SW 521. Admissibility of evidence not

instructions,[11] failure to instruct,[12] permitting jury to take improper matter to the jury room,[13] refusal to receive verdict,[14] form of verdict.[15] Irregularities or errors

passed on where no objection to its admission was made. State v. Myers, 198 Mo. 225, 94 SW 242. Rulings on evidence will not be reviewed when timely exceptions are not taken in the trial court. State v. Hubbard, 201 Mo. 639, 100 SW 586. Alleged error in receiving evidence will not be considered when no objection appears in the record. State v. Williams, 76 S. C. 135, 56 SE 783. Objection that witnesses on insanity had not testified to facts sufficient to warrant admission of their opinions could not be first raised on appeal. Taylor v. State [Tex. Cr. App.] 90 SW 647. Error in admitting confession because extorted by unfair means will not be reviewed unless presented by bill of exceptions. Jones v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 82, 96 SW 930. Where no objection was made to admission of evidence at trial, objections urged on appeal cannot be considered. Clayton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 264, 103 SW 848. Where no objection was made to introduction of evidence and no request made to exclude it, failure to do so was not error. Childress v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 329, 103 SW 864.

10. Errors in the charge must be called to the attention of the court below if relied on as error on appeal. State v. Waldrop, 73 S. C. 60, 52 SE 793; Long v. State [Wyo.] 88 P 617. Where accused fails to request special instructions on included offenses, an exception that court failed to instruct on all offenses cannot be sustained. Grisham v. State, 147 Ala. 1, 41 S 997. Instructions cannot be reviewed where not objected to at the time and no exception taken. McFarland v. State [Ark.] 103 SW 169. Where record discloses no request for written instructions nor exception to oral charge, an objection that the jury were charged partly in writing and partly oral will not be reviewed. Richardson v. State, 80 Ark. 201, 96 SW 752. Error in instructions cannot be reviewed unless the record shows that exception was taken at the time. Green v. U. S. [C. C. A.] 154 F 401. Where no objection was made or exception reserved to a charge, it cannot be reviewed. Driggers v. U. S. [Ind. T.] 104 SW 1166. Where no exceptions were taken to instructions given and none requested were refused, assignments of error directed against instructions cannot be considered. Roper v. U. S. [Ind. T.] 104 SW 584. Where defendant neither reserved exception to an instruction nor requested another in its place, it was not properly before the appellate court. Tedford v. U. S. [Ind. T.] 104 SW 608. In absence of exception to general charge, or showing that it was incorrect, it will be presumed correct. State v. Rideau, 118 La. 385, 42 S 973. No exceptions being reserved at time to instructions given, they will not be reviewed. State v. Yandell, 201 Mo. 646, 100 SW 466. Error in giving or refusing instructions not reviewable when no exceptions saved. State v. Eaton, 191 Mo. 151, 89 SW 949. Errors relating to instructions cannot be reviewed where record does not show that the court ruled or was requested to rule on them. Laws 1907, p. 187. State v. McCarthy [Mont.] 92 P 521. Presumed that jury were properly instructed as to consideration of certain evidence in absence of any exception to charge on that subject. State v. Kennard [N. H.] 65 A 376. Timely and proper exceptions must be taken and preserved or instructions will not be considered on appeal. State v. Megorden [Or.] 88 P 306. Error if any in failure to define, "mitigate, excuse, or justify," cannot be made for first time on appeal. Gantt v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 371, 105 SW 799. Instructions cannot be considered on appeal where no exceptions thereto were taken during the trial or on motion for new trial. Potts v. State [Tex. Cr. App.] 97 SW 477. Where no exception is reserved to the instructions, objection thereto cannot be considered. Mundine v. State [Tex. Cr. App.] 97 SW 490. Where failure or refusal to charge or objection to charge as given is not raised by objection, it cannot be reviewed. Outley v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 947, 99 SW 95. Failure to define certain words in charge not reviewable, no exception being taken in lower court. Vick v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 67, 100 SW 938.

11. Action of court in refusing and modifying instructions will not be reviewed, no exceptions being taken. State v. Dilts, 191 Mo. 665, 90 SW 782.

12. No exceptions being saved to failure of court to instruct on all the law of the court, the alleged error cannot be considered on appeal. State v. Beverly, 201 Mo. 550, 100 SW 463. In local option case failure of court to allow jury to fix punishment is not ground for reversal where record shows no exceptions to failure to instruct on that question. Parmenter v. U. S., 6 Ind. T. 530, 98 SW 340. In the absence of an exception or a request for more specific instructions, it will be presumed that the defendant was satisfied with the general charge given by the court. Provens v. Ter., 17 Okl. 512, 87 P 661. Where defendant was found guilty of assault with a deadly weapon and failed to request a charge on simple assault, he could not complain of failure to charge on simple assault. Territory v. Gonzales [N. M.] 89 P 250. Error in failing to charge on all the law of the case is not reviewable, when court's attention was not called to the alleged defect at the time and no exception on that ground was charged. State v. Welch, 191 Mo. 179, 89 SW 945. Failure to instruct on lower degrees of crime charged will not be reviewed when attention of trial court was not called thereto. State v. Urspruch, 191 Mo. 43, 90 SW 451. Failure to give a particular charge will not be reviewed, no exception or request appearing. State v. Maupin, 196 Mo. 164, 93 SW 379. Failure to give charge not reviewable unless charge was requested and refused and exceptions to refusal taken. Davis v. State [Tex. Cr. App.] 90 SW 646. Not necessary for accused to reserve bill of exceptions to refusal of court to give special charge. Wallace v. State [Tex. Cr. App.] 97 SW 1050. Defendant who did not request additional instructions cannot complain that his contentions were not presented to jury. State v. Bohanon, 142 N. C. 695, 55 SE 797.

13. An assignment of error in permitting

which are grounds for new trial, and which are not assigned or relied upon on a motion for new trial, will not be considered on appeal.[16] In some states no exceptions to ex parte orders are necessary.[17]

Sufficiency of objection or motion. See 8 C. L. 248—Objection must be made or exception taken when the matter arises,[18] and the objection or exception must be spe-

the jury to take improper matter to the jury room cannot be considered where not brought to the attention of the trial court until after verdict. Holmgren v. U. S. [C. C. A.] 156 F 439.

14. Objection to court's action in refusing to receive verdict will not be reviewed where no objection or exception was taken at the time. State v. Miles, 199 Mo. 530, 98 SW 25.

15. An objection to the form of the verdict cannot be urged for the first time on appeal. Rice v. People [Colo.] 90 P 1031.

16. Failure to preserve exception to instruction in motion for new trial is a waiver of it. Johnson v. State [Ark.[104 SW 929. Where the sufficiency of the proof of incorporation of the corporation from which goods were charged to have been stolen was not raised by motion to discharge at close of the people's case nor by motion for new trial or in arrest, it could not be considered on appeal. Perry v. People, 38 Colo. 23, 87 P 796. Incorporation in motion for new trial of construction placed by counsel on instruction, instead of copying the exact words, is not a sufficient identification of it to serve as an exception. Nussbaumer v. State [Fla.] 44 S 712. Misconduct of counsel not being a ground of motion for new trial and there being no affidavit as to facts (Gen. St. 1901, §§ 4754, 4757), point cannot be considered. State v. Brower [Kan.] 88 P 884. Where insufficiency of evidence is not made ground of motion for new trial, it will not be considered. Webb v. Com., 30 Ky. L. R. 841, 99 SW 909. Where one convicted of perjury did not in his motion for new trial complain of failure of the court to instruct the whole law of the case, conviction will not be reversed for failure to charge that the jury could not convict, except on testimony of two witnesses. Sweat v. Com., 29 Ky. L. R. 1067, 96 SW 843. Rulings of trial court not set up and relied upon in motion for new trial will not be reviewed. Stinson v. Com., 29 Ky. L. R. 733. 96 SW 463. Where accused did not except to failure to state his plea to jury as required by Cr. Code Prac. § 219, nor rely on it as ground for new trial, conviction could not be reversed therefor. Bischoff v. Com., 29 Ky. L. R. 770, 96 SW 538. Code Cr. Proc. 1895, art. 723, provides that to secure advantage of errors in the charge exceptions must be reserved on the trial or brought forth in motion for new trial. Reyes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 344, 102 SW 421. Objections in motion for new trial that charge was too general and not according to facts is too general. Mobley v. State [Tex. Cr. App.] 89 SW 839. Under Code Cr. Proc. 1895, art. 723, error in instructions cannot be raised on appeal where not suggested in motion for new trial nor in bill of exceptions. Ham v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 451, 98 SW 875. Error in exclusion of evidence is not reviewable where not mentioned in motion for new trial. Day v. State [Miss.] 44 S 813. Unless exception is taken at time to overruling of motion for new trial and saved by bill of exceptions, overruling of motion is not reviewable. State v. Baker, 206 Mo. 695, 105 SW 743. In order to review argument of counsel, defendant must call attention to language complained of in motion for new trial. State v. Miles, 199 Mo. 530, 98 SW 25. Errors in progress of trial and all matters of exception must be brought to attention of trial court in motion for new trial or they will be deemed waived. State v. Brannon, 206 Mo. 636, 105 SW 602. Where no objection to admission or exclusion of evidence is made on motion for new trial, such matters will not be considered on appeal. State v. Tetrick, 199 Mo. 100, 97 SW 564. Admission of expert testimony not being assigned as error in motion for new trial will not be considered on appeal. State v. Stark, 202 Mo. 210, 100 SW 642. Alleged error in opening statement of prosecuting attorney not reviewable when not assigned in motion for new trial. State v. Smith, 203 Mo. 695, 102 SW 526. Refusal of continuance is waived by not assigning it as ground for new trial. State v. Eaton, 191 Mo. 151, 89 SW 949. The filing of a motion for a new trial is a prerequisite to a review by an appellate court of any error committed below which does not appear on the face of the record. State v. Kimmons, 124 Mo. App. 498, 101 SW 683. Failure to give particular instruction not reviewable when not made ground of motion for new trial. State v. Maupin, 196 Mo. 164, 93 SW 379. Permitting prosecuting attorney to recall a subpoena for three witnesses for the state who were on the jury panel cannot be reviewed on appeal when not made a ground of a motion for a new trial. State v. Dilts, 191 Mo. 665, 90 SW 782. Neither the admission nor exclusion of evidence will be considered when no objections to rulings thereon were made in motion for new trial. State v. Yandell, 201 Mo. 646, 100 SW 466. Error in giving instructions orally and without having reduced them to writing will not be reviewed on appeal unless presented to the trial court for review by motion for new trial. Williams v. U. S., 17 Okl. 28, 87 P 647.

17. An order correcting minutes respecting the plea, made on the ex parte application of the district attorney, is appealable though no exception was taken, since under Code Civ. Proc. § 647, ex parte orders are deemed excepted to. People v. O'Brien [Cal. App.] 89 P 438.

18. Objection to evidence must be made at time it is introduced. Butt v. State [Ark.] 98 SW 723. Defendant's counsel stated that to save time of the court he objected to all acts and declarations after accomplishment of offense by witness and accomplice. Held, the objection was fatally indefinite, and did not amount to an objection and exception to evidence thereafter admitted or rulings thereafter made. Benton v. State, 78 Ark. 284, 94 SW 688. Accused having once properly presented to the trial court the question

cific and certain,[19] as to the matter objected to,[20] and the ground of the objection,[21] and some ruling of the court obtained thereon,[22] as only the particular objection

of his former jeopardy and demanded that he be discharged, it was not necessary for him to repeat the demand in order to save his rights on appeal. Gillespie v. State, 168 Ind. 298, 80 NE 829. Under Mansf. Dig. § 5157, exceptions to rulings must be reduced to writing before close of succeeding term, and are made too late when not made until bringing of writ of error. Mickle v. U. S. [Ind. T.] 98 SW 349. Where a witness was first examined in absence of the jury and the court announced that it would admit the testimony over objection of defendant, no further objection was necessary. Clark v. Com. [Ky.] 105 SW 393. Affidavit of prejudice of jurors filed with motion for new trial was too late to avail accused on appeal from conviction. Hamilton v. Com., 29 Ky. L. R. 1039, 96 SW 833. Rulings on matters presented to trial court for first time on motion for new trial will not be reviewed. Stamper v. Com., 30 Ky. L. R. 679, 99 SW 304. Objections to instructions will not be reviewed when made for first time on motion for new trial; must be made at time charge is given. State v. Decore, 199 Mo. 228, 97 SW 894. Where it was understood that proof of a series of facts was to be made, objections then made to all of such evidence were timely though no formal offer of proof was made. People v. Smilie, 118 App. Div. 611, 103 NYS 348. Objection to competency of juror is too late when made for first time on motion for new trial. Walker v. State [Tenn.] 99 SW 366.

19. Exceptions to charge in general terms will not be reviewed. Serna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 133, 105 SW 795. Objections to testimony must be specific. State v. Winslow, 102 Me. 399, 66 A 1019. Exception reserved to failure or refusal of court to instruct orally on law of self-defense held not to present question for review. Williams v. State, 147 Ala. 10, 41 S 992. An objection to evidence must be specific; an objection that it is irrelevant and immaterial is too indefinite and uncertain. Williams v. State, 168 Ind. 87, 79 NE 1079 General objections to questions put to witnesses will not be considered on appeal unless the evidence sought is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances. Hopkins v. State [Fla.] 42 S 52. An objection that evidence was "incompetent, irrelevant, and immaterial," held too general to be considered on appeal. State v. Meagher, 124 Mo. App. 333, 101 SW 634. Objection that testimony is incompetent is no objection. State v. Spaugh, 200 Mo. 571, 98 SW 55. Objection to questions asked accused that they were irrelevant, immaterial, and not proper cross-examination sufficiently specific. State v. Barrington, 198 Mo. 22, 95 SW 235. If objections to introduction of evidence are sufficiently specific to notify the trial court of the nature of the objection and the reasons therefor, a general assignment of error on motion for new trial that the court admitted improper, illegal, and irrelevant evidence was sufficient to preserve the point that evidence objected to was improper cross-examination. Id. Charges of error in instruction, on motion for new trial, held too general to be considered on appeal. Gantt v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 371, 105 SW 799. Complaint that paragraph of charge is misleading and inapplicable is too general. Dickey v. State [Tex. Cr. App.] 98 SW 269. An exception to each and every clause of charge because it is upon the weight of evidence without specifying in what way or what portion of the charge is on the weight of evidence is insufficient. McDougal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 281, 103 SW 847.

20. Objection to charge which fails to bring out particular errors claimed is too general to be considered on appeal. Woodrich v. State [Tex. Cr. App.] 90 SW 882. Counsel objected to instructions given on the ground that they did not cover all the questions in the case but on being asked by the court which questions were not covered did not reply. Held objection not reviewable. State v. West, 202 Mo. 128, 100 SW 478. Complaints that the charge does not sufficiently present the ingredients of the offense should be called to the court's attention by direct objections, and not by requested special charges which are such as to mislead the court. State v. Descant, 117 La. 1016, 42 S 486.

21. Objection that hypothetical question is not warranted by law is ineffective. People v. James [Cal. App.] 90 P 561. General objections to evidence witnout stating grounds are too vague to be reviewed unless the evidence is manifestly prejudicial. Williams v. State [Fla.] 43 S 428. Objections to the charge not erroneous in the abstract must point out its specific defect. Wiley v. State [Ga. App.] 59 SE 438. Objection without stating grounds is insufficient. State v. Harris, 199 Mo. 116, 98 SW 457. An objection to the cross-examination of a witness without stating any ground therefor is properly overruled. State v. Gilson, 114 Mo. App. 652, 90 SW 400. An exception failing to specify in what particulars a ruling is prejudicial cannot be considered. State v. Thompson, 76 S. C. 116, 56 SE 789. Where motion for new trial complains of error in admission of testimony and in the charge, but fails to point out the error, questions will not be reviewed. Lewis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 902, 105 SW 194. Objection that charge is "incorrect" is too general. Gantt v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 371, 105 SW 799. An exception to the exclusion of evidence stating no reason why it should have been omitted is insufficient. Ellington v. State [Tex. Cr. App.] 99 SW 997. Objection without stating grounds therefor is insufficient. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Exception that charge is not correct statement of law and not applicable is too general. Sartin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 321, 103 SW 875. Bill of exceptions is insufficient to raise question as to admission of evidence, where it contains no statement of any ground of exception. Hirsch v. State [Tex. Cr. App.] 96 SW 40.

22. Where the court directed attorney for defendant to dictate an offer of evidence, but the court was not asked to and did not rule on the offer, accused could not claim on

urged and passed upon below will be considered on appeal.[23] Mere exception to remarks of counsel without a motion to exclude,[24] or a request to instruct the jury to disregard them,[25] presents no question for review. A general objection to evidence part of which is admissible is insufficient.[26] To preserve error in excluding evidence, an offer of proof should be made.[27] Evidence being immaterial and irrelevant at the time it is offered, and being excluded for that reason, should be reoffered when it becomes relevant and material, otherwise no error can be predicated on its exclusion.[28] A motion to exclude or strike testimony is unavailing where no objection is made to the question,[29] unless the answer is not responsive, in which case a motion

appeal that there was error in ruling on the evidence. State v. Bricker [Iowa] 112 NW 645. It should be made to appear that the court was directly called upon to pass upon the question. State v. Johnson, 119 La. 130, 43 S 981. A mere exception or objection to argument of counsel, without calling for a ruling by the court, presents nothing for review, unless the argument was so flagrantly wrong and prejudicial that no ruling could have removed the prejudice. Taylor v. State [Ark.] 102 SW 367. To authorize review of action in changing venue, a bill of exceptions must be reserved in county from which venue was changed. Moore v. State [Tex. Cr. App.] 96 SW 321.

23. Only such questions as were presented below will be considered. People v. Prinz, 148 Mich. 307, 14 Det. Leg. N. 82, 111 NW 739. Supreme court will not on appeal enlarge complaints made by appellant. State v. Descant, 117 La. 1016, 42 S 486. The supreme court will not on a rehearing enlarge the objections urged in the trial court to the introduction of evidence. State v. Barrett, 117 La. 1086, 42 S 513. A motion to strike evidence on the ground that it does not apply to any issue goes to its relevancy and not to its competency. State v. Pyles, 206 Mo. 626, 105 SW 613. It is no objection to the admission of evidence that no reporter was present at the time to take down the testimony. Duthey v. State, 131 Wis. 178, 111 NW 222. By failing to object to secondary evidence on the ground that no proper notice to produce the original was given, that objection was waived. State v. Madeira, 125 Mo. App. 508, 102 SW 1046. An objection that instructions failed to state the law of the case is not an objection to instructions given but goes only to failure to instruct. State v. Foister, 202 Mo. 46, 100 SW 442. No objection being made that cross-examination is outside scope of direct examination, that point is not reviewable. State v. Stark, 202 Mo. 210, 100 SW 642. Where objection to admission of stenographer's minutes of testimony of deceased witness went only to the competency of the testimony and not to the authentication of the minutes, an objection on the latter ground could not be considered on appeal. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 NW 495. An objection to a question to an expert that it is incompetent, irrelevant, and immaterial, upon the ground that a proper hypothesis or foundation has not been laid, goes only to the competency of the question. State v. Megorden [Or.] 88 P 306. Where questions were objected to only because asked by the court and not by counsel, an exception thereto did not entitle defendant to object on appeal that they called for hearsay. People v. Mingey [N. Y.] 82 NE 728. On exceptions to overruling of a demurrer to an indictment, only points made below in support of demurrer will be considered. State v. Sargood [Vt.] 68 A 49.

24. Improper remarks of counsel are not ground for reversal where merely excepted to and no request made to exclude the same. Bell v. State [Ark.] 104 SW 1108. A mere exception to alleged improper remarks, without a request to have them stricken, or any ruling by the court, presents no question for review. People v. Yee Foo [Cal. App.] 89 P 450.

25. Where improper remarks were excepted to but defendant did not ask that they be withdrawn or that jury be instructed to disregard them, they are not ground for reversing conviction. People v. Wright [Cal. App.] 89 P 364.

26. A general objection to several articles offered is insufficient where some of such articles are admissible. Commonwealth v. Karamarkovic [Pa.] 67 A 650. A general objection to evidence part of which is admissible is insufficient. Wright v. Com., 106 Va. 855, 56 SE 705. General objections to the admission of evidence are insufficient unless it is not admissible under any circumstances. Sims v. State [Fla.] 44 S 737.

27. Error in the exclusion of evidence is not available where accused simply saved exceptions to exclusion of evidence, which was inadmissible, and failed to make any offer of proof or state what he expected to prove. State v. Foister, 202 Mo. 46, 100 SW 442. Sustaining an objection to a question, which shows its relevancy by its own terms, cannot be relied on as error on motion for new trial unless the expected answer was made known to the court at the time; nor will the appellate court, reviewing the judgment on writ of error, assume that a favorable answer would have been given. State v. Clifford, 59 W. Va. 1, 52 SE 981.

28. McLeod v. State, 128 Ga. 17, 57 SE 83.

29. Motion to exclude an answer is unavailable, no objection to question having been made. Dupree v. State [Ala.] 42 S 1004. One cannot sit by and allow a question to be answered and object if the answer does not suit him. State v. Harris, 199 Mo. 716, 98 SW 457. Objection to evidence should be made to the introduction thereof and not to refusal of the court to charge to disregard it. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469. A motion to exclude evidence, not directed to the question but to evidence already in the case, that it is irrelevant and immaterial and does not amount to a confession, is properly denied. Du Bose v. State [Ala.] 42 S 862.

to exclude or to instruct the jury to disregard it is the proper remedy.[30] Where matter, the inadmissibility of which is not indicated by the question, is admitted over objection a motion to strike is necessary.[31] An objection to a question after the witness has answered is too late.[32] On a motion to strike out, the moving party should specify the grounds with as great particularity as when objecting to a question.[33] An exception to the charge as a whole cannot be considered on appeal,[34] unless the charge contains but one proposition,[35] and a general exception to refusal to give instructions is insufficient.[36]

§ 15. *Harmless or prejudicial error.*[See 6 C. L. 249]—In respect to some matters of procedure, notably argument and conduct of counsel,[37] and custody and conduct of the jury,[38] the rulings usually blend the propriety of particular acts and their harmful effect in such manner that separate statement would be misleading and sections of this article dealing therewith should be consulted in connection with the holdings which clearly present a proposition of harmless error. Error is presumptively prejudicial,[39] doubt as to its harmful effect being resolved in favor of accused,[40] unless trial is by the court.[41]

30. State v. Sykes, 191 Mo. 62, 89 SW 851. In absence of motion to strike unresponsive answer, it will not be reviewed. People v. Robertson [Cal. App.] 92 P 498.

31. People v. Smith [Cal.] 91 P 571.

32. State v. Sykes, 191 Mo. 62, 89 SW 851.

33. Dickens v. State, 50 Fla. 17, 38 S 909.

34. State v. Sheehan [R. I.] 66 A 66. Where an instruction contains several propositions, some of which are incorrect, a general exception thereto is insufficient. State v. Gohl [Wash.] 90 P 259. A general exception to an entire charge containing several propositions is insufficient. State v. Katon [Wash.] 91 P 250. General exception to instructions is unavailing if any of them are correct. Johnson v. State [Ark.] 104 SW 929. An exception "to each and every part separately is too indefinite" to present any particular part of the charge. Kirby v. State [Ala.] 44 S 38. General exceptions to charge failing to specify the objectionable language are insufficient. Rigsby v. State [Ala.] 44 S 608. An exception to refusal to give four charges is bad unless all the charges should have been given. Gains v. State [Ala.] 43 S 137. Exception to oral charge, consisting of several paragraphs, as a whole, cannot be sustained unless all are bad. Grisham v. State, 147 Ala. 1, 41 S 997.

35. Stokes v. State [Fla.] 44 S 759.

36. General exception to refusal to give instructions, one of which is erroneous, will not be reviewed. Mathews v. State [Ark.] 104 SW 928.

37. See supra, § 10B.

38. See supra, § 10F.

39. Error is presumed prejudicial until it appears to have been rendered harmless. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330. Erroneous admission of evidence is presumed prejudicial unless it is shown to be harmless. Sprinkle v. U. S. [C. C. A.] 150 F 56. The exclusion of competent and admissible evidence will be presumed to be prejudicial unless it appears from the whole record that it would not have changed the result, if admitted. State v. Cremeans [W. Va.] 57 SE 405. An erroneous instruction relating to evidence under each count of an indictment under which accused was convicted will be presumed prejudicial to accused under each count. Sherrick v. State, 167 Ind. 345, 79 NE 193. Admission of hearsay evidence is presumptively prejudicial unless contrary affirmatively appears. Topolewski v. State, 130 Wis. 244, 109 NW 1037.

40. Errors held prejudicial: On an issue of self-defense, it is error to refuse to permit a physician to testify that defendant was weak with disease though defendant had so testified without contradiction. People v. Smith [Cal.] 91 P 511. Error in permitting defendant in rape to be asked if he had not been guilty of certain other crimes held not cured by negative answers. People v. Fong Chung [Cal. App.] 91 P 105. An instruction shifting burden of proof onto accused held not cured by further charge as to reasonable doubt. Glover v. U. S. [C. C. A.] 147 F 426. Error in a charge in a prosecution for assault with intent to kill in assuming the intent is not cured by a charge requiring the jury to find allegation of intent according to the indictment. Duncan v. State, 1 Ga. App. 118, 58 SE 248. In larceny case exclusion of proof of statements of owner to defendant to act for him in procuring horses held prejudicial error. George v. U. S., 6 Ind. T. 155, 89 SW 1121. Error in allowing wife of accused to testify against him is reversible. Porter v. U. S. [Ind. T.] 104 SW 855. Error in admission of evidence of other crimes held not cured by instructions. Raymond v. Com., 29 Ky. L. R. 785, 96 SW 515. Where evidence was erroneously admitted, argument of counsel based thereon held prejudicial and not cured by admonition of jury not to consider it. Shipp v. Com., 30 Ky L. R. 704, 99 SW 945. Erroneous admission of proof that defendant had previously been connected with a certain lawless band prejudicial, evidence being conflicting. Hensley v. Com., 31 Ky. L. R. 386, 102 SW 268. Incompetent evidence of other crimes admitted for purpose of impeaching accused and so charged by court is prejudicial error and ground for reversal under Cr. Code Proc. § 340. Britton v. Com., 29 Ky. L. R. 857, 96 SW 556. Exclusion of testimony as to reputation of a witness for truth and veracity held erroneous. People v. Mix, 149 Mich. 260, 14 Det. Leg. N. 397, 112 NW 907. Error in charge in larceny as to presumption of

Trivial or immaterial error, See 8 C. L. 250 not prejudicial to accused [42] and not in

guilt from the finding of goods in defendant's possession without reference to character held not cured by other instructions. State v. Wright, 199 Mo. 161, 97 SW 874. Conviction will be reversed where it is apparent that accused has not had a fair and impartial trial owing to the line of argument indulged in by attorney for state. State v. Zorn, 202 Mo. 12, 100 SW 591. A substantial right of defendant is invaded where there is unfairness in the selection of the jury. Is ground for reversal. Cook v. State [Miss.] 43 S 618. In larceny, error in charging that it was sufficient to show that taking was without color of right not cured by a charge that taking must have been with intent to steal. State v. Peterson [Mont.] 92 P 302. An instruction defining larceny, erroneous for failure to include the element of criminal intent, is not cured by other charges which use the term without any broader import. State v. Sloan, 35 Mont. 367, 89 P 829. An instruction erroneously directing the jury not to consider proper evidence is none the less prejudicial because such evidence was given by a prostitute, the weight of her testimony being for the jury. State v. Jackman [Nev.] 91 P 143. Remarks of counsel to effect that law of the case and reasonable doubt sometimes worked an injustice to the cause of right, as it had in this case, which were emphasized by the court by stating on objection by defendant's counsel that defendant had an objection and exception, held prejudicial error. People v. Dixon, 118 App. Div. 593, 103 NYS 186. Error in referring to failure of accused to testify not cured by withdrawing the remark. State v. Bennett [S. D.] 113 NW 78. Prejudicial effect of evidence to show subornation of perjury is not removed by charge that it could be considered only for purpose of impeachment. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. In rape, error in admission of testimony of mother of prosecuting witness that when she learned of the crime she went to house of accused with a pistol and would have shot him if she had seen him is not cured by her testimony that she carried a pistol wrapped in a piece of paper and was crying and excited and kept fumbling it. Adams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 953, 105 SW 197. Error in admitting certain evidence held prejudicial where the court led the jury to believe that it conclusively established the offense. Busby v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 185, 103 SW 638. The admission of hearsay evidence on a material issue is prejudicial error. O'Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 18, 100 SW 919.

41. While a question asked accused by the court would have been erroneous as intimating an opinion if the case was tried before a jury, it was harmless where it was being tried before the court. Sutton v. State [Ga. App.] 58 SE 544. In a case tried by the court, the admission of improper evidence is to be regarded on appeal as harmless unless it clearly appears that but therefor the finding would probably have been different. Topolewski v. State, 130 Wis. 244, 109 NW 1037.

42. Rulings as to original affidavit are harmless where affidavit as amended was sufficient. Bates v. State [Ala.] 44 S 695. Where a plea in abatement could have been stricken on motion, defendant could not complain that the court overruled it. Savell v. State [Ala.] 43 S 201. Under Code 1896, § 4333, it is not ground for reversal that the indictment read "Neal Rigby alias Neal Rigby," while the copy served designated him as "Neal Rigsby alias Neal Rigby." Rigsby v. State [Ala.] 44 S 608. Failure to render formal judgment on a verdict finding an issue as to former jeopardy in favor of the state held harmless. Barber v. State [Ala.] 43 S 808. Error in admitting hearsay evidence held harmless under Kirby's Dig. §§ 2605, 2209, providing that judgment shall not be affected by errors which do not prejudice substantial rights. Castevens v. State, 79 Ark. 453, 96 SW 150. Where it appears that giving oral instruction as to form of verdict of acquittal was harmless, it was not ground for reversal though request for written instructions had been made. Richardson v. State, 80 Ark. 201, 96 SW 752. Under the rule that reversal shall not be had for errors which are not prejudicial to accused, the fact that a verdict contained surplusage was harmless. People v. Hines [Cal. App.] 89 P 858. In rape, refusal of an order for appointment of physician to examine prosecuting witness held harmless. People v. Bianchino [Cal. App.] 91 P 112. Failure to serve defendant with list of jurors as required by Mill's Ann. St. § 1460, not ground for reversal unless prejudice is shown. Imboden v. People [Colo.] 90 P 608. Action of trial court in allowing to remain in the record a remark of a witness, the greater part of whose testimony was stricken, is not ground for reversal where not prejudicial. Van Deusen v. U. S. [C. C. A.] 151 F 989. Overruling of plea in abatement on the ground of former jeopardy held harmless where such evidence could be offered under the plea of not guilty. Williams v. State [Ind.] 82 NE 790. Sentencing accused without previously fixing the time for pronouncing sentence as required by statute is harmless where the court continued in session thereafter, and motion for new trial had been filed several days previous and no claim was made that it was desired to assert other error. State v. Usher [Iowa] 111 NW 811. No error from taking county attorney as witness where objection was promptly sustained. State v. Waterbury, 133 Iowa, 135, 110 NW 328. Misconduct of prosecuting attorney is not ground for new trial unless such as to deprive accused of a fair hearing. State v. Thomas [Iowa] 109 NW 900. Failure of court to order surplusage stricken from warrant for arrest held not prejudicial. Mallon v. Com., 30 Ky. L. R. 328, 98 SW 315. Under Cr. Code Proc. § 340, a conviction will not be reversed for minor errors of law appearing in record not affecting substantial rights. Stacy v. Com., 29 Ky. L. R. 1242, 97 SW 39. Refusal to require bill of particulars to be made more certain held harmless. Richberger v. State [Miss.] 44 S 772. Where prosecuting attorney made memorandum on the back of an instruction submitted, but the jury did not read it, held harmless. Gray v. State [Miss.] 43 S 289. Improper remarks of counsel will justify reversal only

any manner affecting the result,[43] is not ordinarily ground for reversal. This rule has been applied to minor defects of the indictment,[44] duplicity of the indictment,[45]

where prejudice to accused is shown. State v. Sublett, 191 Mo. 163, 90 SW 374. Where accused had counsel who fully protected his rights, it was not ground for reversal that he was not informed of his right to have counsel. People v. Markowitz, 104 NYS 872. Defendant in a misdemeanor case cannot complain that one against whom the grand jury made a return of not a true bill was nevertheless put on trial with defendant. State v. Martin, 141 N. C. 832, 53 SE 8:4. Technical errors or defects and exceptions which do not affect the substantial rights of accused will be disregarded on appeal to the supreme court. Provens v. Ter., 17 Okl. 512, 87 P 661. Case will not be reversed for failure to reduce instructions to writing before giving them, where they were reduced to writing as soon as given, and put in the record, and no objection was made or exception reserved. Williams v. U. S., 17 Okl. 28, 87 P 647. Where verdict of guilty was reversed on appeal, accused could not complain of a ruling forcing him to second trial on substituted indictment within two days after such substitution. Stevens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 936, 95 SW 505. Where facts show cruel and wanton murder authorizing conviction of first degree murder, but verdict is for second degree, refusal to grant continuance for witness who would testify as to uncommunicated threat is not reversible error. Harris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 154, 105 SW 801. Argument of counsel not predicated on testimony held harmless in view of instructions relative to the matter to which remarks referred. Ham v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 451, 98 SW 875. Omission to charge which is not prejudicial to substantial right is not ground for reversal. Bonura v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 367, 98 SW 267. An accused cannot complain of an error favorable to him. Early v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 78, 97 SW 82. Under St. 1898, § 2546a, requiring that the grand jury list be filed with and kept securely by the clerk of the superior court, held, where such list was taken to the municipal court to draw a grand jury for that court, its retention there for a month, though irregular, was harmless. Niezorawski v. State, 131 Wis. 166, 111 NW 250. Under St. 1898, §§ 4659, 4706, providing against reversal for harmless error, error if any in the stenographer filing his oath of secrecy with the clerk of court instead of with the clerk of the grand jury is harmless. Id.

43. Olson v. People, 125 Ill. App. 460. In prosecution for burglary and larceny where evidence was sufficient to warrant conviction for both, defendant cannot complain of inconsistency of verdict for larceny only. Cook v. State, 80 Ark. 495, 97 SW 683. Where defendant received the same sentence on both trials, denial of plea of former conviction interposed after instructions were given held harmless. People v. Solani [Cal. App.] 91 P 654. Alleged errors in giving or refusing charges or instructions, and in the admission or exclusion of evidence, which do not weaken the effect of admitted evidence and which do not reach the legality of the trial itself, will not be considered grounds for reversal where the evidence leaves no room for reasonable doubt of defendant's guilt. Hopkins v. State [Fla.] 42 S 52. Refusal to allow attorney for defendant to talk to state witnesses not called is harmless where they were called in rebuttal. Williams v. State [Fla.] 43 S 428. A verdict will not be disturbed for slight errors which could not have induced nor influenced the finding of the jury. Harris v. State [Ga. App.] 58 SE 669. Where verdict was demanded by the evidence, errors of law complained of were harmless. McCain v. State [Ga. App.] 58 SE 550. Improper question by state's attorney harmless where jury could not have found any other verdict under the evidence. McCann v. People, 226 Ill. 562, 80 NE 1061. Where witness admitted extreme hostility to defendant, on cross-examination, admission of testimony on redirect as to why she wanted to get defendant's family out of town was not prejudicial. State v. Judd, 132 Iowa, 296, 109 NW 892. Affidavit of witness who afterwards refused to testify to facts was published in a newspaper, but it was not shown that any juror saw it, or that the prosecuting attorney had anything to do with its publication. Held not to require reversal of conviction on ground of misconduct of prosecuting attorney. State v. Walker, 133 Iowa, 489, 110 NW 925. Where each juror said he had not heard a remark of the district attorney complained of, when attention was called to the time and circumstances, it was not an abuse of discretion to put the remark itself into the question and ask each juror if he had heard it. State v. Romero, 117 La. 1003, 42 S 482. Instruction which would lead jury to believe that unanimous verdict was required in assault where only 8 of their votes is required is harmless where the verdict was 9 to 12. State v. Farnham, 35 Mont. 375, 89 P 728. Error in requiring an election held harmless in view of the fact that all acts alleged were proven. Starling v. State [Miss.] 43 S 952. Error in refusing to quash an indictment because two members of the grand jury were disqualified is harmless where defendant was properly found guilty. State v. Lang [N. J. Law] 66 A 942. Where examination of facts on appeal establishes defendant's guilt beyond a reasonable doubt, the conviction should be affirmed, without regard to errors not affecting substantial rights. People v. Weinseimer, 117 App. Div. 603, 20 Crim. R. 537, 102 NYS 579. Where it did not appear that the state knew of an eye witness until other witnesses had testified, error based on failure to call such witness will not be sustained. Commonwealth v. Karamarkovic [Pa.] 67 A 650. Where accused had court stenographer make up a statement of facts which he incorporated in his motion for a new trial and thereafter used as a statement of facts in the case, the court's failure to award him a stenographic transcript of the evidence was not error. Terry v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 373, 97 SW 1043.

44. Conviction of murder will not be reversed because of failure of indictment to allege means with which offense was com-

granting [46] and denial of continuance,[47] irregularities in the drawing or selection of the jury,[48] misconduct of jurors [49] or officers in charge of the jury,[50] allowing communication with jurors,[51] order of proof,[52] admission [53] and exclusion [54] of evidence,

mitted. Gaines v. State, 146 Ala. 16, 41 S 865. Under Pen. Code, § 1258, where an indictment is sufficient to inform defendant of the charge against him, minor defects not prejudicial to substantial rights are not ground for reversal. People v. Collins [Cal. App.] 92 P 513.

45. Under Rev. St. 1025, providing that no indictment shall be deemed insufficient unless defendant was prejudiced, the fact that an indictment was double was harmless. Morgan v. U. S. [C. C. A.] 148 F 189.

46. Continuation of case and change from criminal court building to room in county court house no ground for reversal. People v. City Prison Warden, 117 App. Div. 154, 102 NYS 374.

47. Error in refusing continuance is harmless where the witness was present in court before argument and counsel was so informed and asked by the court if he desired to introduce him. Holmes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 972, 105 SW 508. Refusal to grant continuance for testimony which would go to show manslaughter instead of murder was not error where defendant was convicted only of manslaughter and given lowest punishment. Reese v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 309, 97 SW 697. No reversible error in refusing continuance on ground of illness of accused and absence of leading counsel, when it appears accused was not ill during trial, but was in full possession of his faculties and testified, and had three attorneys. Hopkins v. State [Fla.] 42 S 52. Refusal to continue because of absent witness is not error where the witness did in fact appear and testify. State v. Coleman, 199 Mo. 112, 97 SW 574. Refusal to continue on ground of absent witness whose testimony was wanted to impeach a witness for the state is not error where such witness for the state did not testify. Id.

48. Irregularity in drawing jury held harmless. Cook v. State [Miss.] 43 S 618. Where each member of grand jury panel was called in turn and right of challenge given, failure to comply with Code, § 5240, providing that names shall be drawn from a box, is harmless. State v. Von Kutzleben [Iowa] 113 NW 484. Irregularity in drawing jury held harmless. Johnson v. State [Fla.] 44 S 765. A defendant who does not exhaust peremptory challenges allowed him cannot predicate error on failure to allow a greater number. Krause v. U. S. [C. C. A.] 147 F 442. Harmless to overrule challenge for cause where juror did not sit and it does not appear that a peremptory challenge was used. Stokes v. State [Fla.] 44 S 759. One cannot complain of error in accepting a juror where it appears that his peremptory challenges were not exhausted. State v. Fielding [Iowa] 112 NW 539. Recital in bill of exceptions that accused was required to accept objectionable juror held insufficient to show prejudice where it did not show that peremptory challenges had been exhausted or in what manner juror was objectionable. Mays v. State [Tex. Cr. App.] 96 SW 329.

49. Inspection by jury in homicide case of scene of crime, after submission of cause but before arriving at a verdict, was harmless where the relative positions of the parties was not disputed. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509. Defendant not prejudiced by conduct of juror in speaking privately to judge where judge at once made public what had been said to him. State v. Rowell. 75 S. C. 494, 56 SE 23. Where after jury retired one left room in company with deputy to go to closet, held not reversible error. State v. Spaugh, 200 Mo. 571, 98 SW 55. That members of jury examined statutes as to their fees and one of them read portion of opinion in criminal case does not show reversible error. Id.

50. That deputy in charge gave jurors a drink of whisky does not show reversible error. State v. Spaugh, 200 Mo. 571, 98 SW 55. Conduct of bailiff in talking about the case in the presence of a juror and saying accused should be punished is not a ground for reversal, where there is no showing that the verdict was influenced thereby. State v Rowell, 75 S. C. 494, 56 SE 23.

51. State v. Sanders, 75 S. C. 409, 56 SE 35.

52. Order of proof in prosecution for rape held not prejudicial to accused. State v. Werner [N. D.] 112 NW 60.

53. Irrelevant question as to whether accused had not pleaded guilty to a former assault held harmless in view of negative answer. Hughes v. State [Ala.] 44 S 694 Admission of irrelevant testimony. Cook v. State [Ala.] 44 S 549. Harmless to permit a witness to testify to a fact already shown. Falkner v. State [Ala.] 44 S 409. Irrelevant questions held harmless being merely introductory and answered in negative. Beavers v. State [Ala.] 44 S 401. Evidence as to whether gambling was generally known to be going on in a house when decedent was killed held harmless. Strickland v. State [Ala.] 44 S 90. Admission of hearsay harmless where no injury to accused could have resulted. Morris v. State [Ala.] 39 S 608. Admission of incompetent testimony is harmless if not unfavorable to accused. Austin v. State, 145 Ala. 37, 40 S 989. That form of question is objectionable is harmless where witness gives testimony which is proper in answer thereto. Parham v. State, 147 Ala. 57, 42 S 1. Error in asking witness for defendant whether he had a contract in regard to testifying was harmless where he answered in negative. Myers v. State, 78 Ark. 302, 95 SW 771. Error in admission of evidence tending to show malice and premeditation is harmless where accused is convicted of involuntary manslaughter. Price v. State [Ark.] 100 SW 74. Admission of immaterial evidence held harmless. People v. Stokes [Cal. App.] 89 P 997. Admission of opinion that jingle of money in one's pocket sounded as if it might be gold held harmless. Id. Admission of incompetent evidence is not ground for reversal where conviction is amply sustained by other competent evidence. Majors v. People, 38 Colo. 437, 88 P 636. Harmless to exclude evidence which would be of no avail to accused.

Douglass v. State [Fla.] 43 S 424. In a prosecution for embezzlement, the admission of the record of a civil action to recover the property was held harmless even if erroneous. Sims v. State [Fla.] 44 S 737. Repetition of evidence already admitted is harmless. Marshall v. State [Fla.] 44 S 742. Where defendant is convicted on a number of counts and given concurrent sentences, none of which exceed the limit which might be imposed on any one count, error in admission of evidence relative to one or more counts, but not to all, is harmless. Goll v. U. S. [C. C. A.] 151 F 412. Admission of irrelevant and immaterial testimony held harmless. Carter v. State [Ga. App.] 58 SE 532. In seduction, admission of evidence as to character of prosecutrix after first act of intercourse was harmless. Tedford v. U. S. [Ind. T.] 104 SW 608. Error in admission of evidence is harmless where if not omitted the jury would have been required to return the same verdict. Sanderson v. State [Ind.] 82 NE 525. Admission of evidence held harmless. Clefford v. People, 229 Ill. 633, 82 NE 343. Admission of evidence of collateral matter and hearsay which would tend to prove higher degree of crime held harmless where verdict was of lesser degree and was not influenced by such testimony. Stuart v. Com., 31 Ky. L. R. 1343, 105 SW 170. Examination of accomplice as to whether he had been promised immunity and court's admonition to him that he was not required to testify, and exclusion of questions asked him in absence of jury as to his willingness to testify, held harmless. Simpson v. Com., 31 Ky. L. R. 769, 103 SW 332. In a homicide case, testimony that a negro woman and some little children lived at home of accused held harmless where the form of the questions were not such as to make it appear that he was living in adulterous relations with such woman. Humber v. Com., 31 Ky. L. R. 606, 102 SW 1179. In assault to kill, error in form of question as to how long defendant had been accustomed to carry a pistol was rendered harmless by a reply denying that it was his custom to carry one. Esterline v. State [Md.] 66 A 269. Error in admitting evidence of flight of conspirator in trial of co-conspirator held harmless. State v. Sykes, 191 Mo. 62, 89 SW 851. Nonresponsive and voluntary answers to immaterial questions cannot be complained of by defendant. State v. Barrington, 198 Mo. 23, 95 SW 235. Admission of pair of trousers for purpose of enabling witness to identify a coat held harmless. Id. Errors in admission of evidence are harmless where other evidence clearly shows guilt. O'Hearn v. State [Neb.] 113 NW 130. Erroneous admission of evidence on admitted point harmless. People v. Koerner, 117 App. Div. 40, 20 Crim. R. 515, 102 NYS 93. Any error in asking certain questions of a witness held harmless where they were answered in the negative. People v. Mingey [N. Y.] 82 NE 728. Admission of map showing place of murder held not prejudicial though containing red lines showing path followed by accused which were not identified or referred to, where presence of accused at the scene was shown by his own testimony. People v. Sexton, 187 N. Y. 495, 80 NE 396. Admission of letter as standard of comparison not prejudicial where there was other evidence in the case which was chiefly used for the purpose, this letter not being particularly used or noticed. State v. Branton [Or.] 87 P 535. Admission of hearsay immaterial where fact was admitted. State v. Sanders, 75 S. C. 409, 56 SE 35. In prosecution of agent of company for violating local option law, proof by express agent that he had on hand packages of liquor of the company was harmless. Weil v. State [Tex. Cr. App.] 90 SW 644. Any error in admitting oral proof of contents of writings held immaterial. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387. Where bill does not show how party objecting was affected by the admission of certain evidence, its admission will be considered harmless. Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 114, 101 SW 208. Proof that prosecutrix in rape case told her husband the offense had been committed, witness giving no details, held harmless error. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 72, 100 SW 924. Defendant in local option case was not prejudiced by testimony that witness went to his place for the purpose of getting beer but instead got a nonintoxicating beverage. Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 175, 97 SW 316. In local option case evidence of other sales held harmless. Harris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 270, 97 SW 704. On prosecution for violation of local option law, evidence that defendant had certain drinks in back part of his restaurant without a showing that they were intoxicating was harmless. Riggs v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 683, 96 SW 25. In assault with intent to kill where wife of person assaulted testified as to defendant insulting her, testimony that she told her husband thereof, if error, is harmless. Harrall v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 360, 97 SW 1057. Where indictment charged giving of intoxicants to minor and also a sale to him but conviction was had under count charging giving, error in permitting minor to testify as to sale was harmless. Deisher v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 680, 96 SW 28. Error in admission of evidence as to a conceded fact was harmless. Woodroe v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 682, 96 SW 30. Question asked witness whether he knew that a pistol was put in decedent's pocket when he was lying on the ground was harmless where answered in the negative. Moore v. State [Tex. Cr. App.] 96 SW 321. Where there was no question of guilt of accused in selling liquor in violation of law and his punishment was minimum, error in admitting evidence of another sale than that charged was harmless. Feige v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 425, 95 SW 506. In murder where defendant's theory was that deceased was killed by a horse, error in admitting evidence that there had been a struggle between deceased and a horse was harmless. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 SW 521. Proof of other offense harmless where accused was given minimum sentence. Irvin v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 798, 100 SW 779. In prosecution for theft error in asking witness as to other thefts was harmless where he denied them. Harding v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 422, 95 SW 528. Error in asking witness if defendant "did not swap them all a farewell for a horse" was harmless. Id. In prosecution for unlawfully car-

cross-examination of witnesses [55] or of defendant,[56] leading questions,[57] refusal to

rying a pistol where there was evidence that the pistol was found in a basket carried by defendant, testimony that defendant was carrying a pistol in a basket was not prejudicial. Johnson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 882, 104 SW 902. Admission of statements of a witness for defense that state was up against a hard proposition because of those interested in defendant's behalf was harmless. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Where it was proved that defendant unlawfully carried a pistol and the fine imposed was the minimum, admission of improper testimony was harmless. Holmes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 972, 105 SW 508. In local option case against a physician for giving a prescription without examination, a charge that if such person was not sick defendant would be guilty, erroneous in omitting element of knowledge was harmless since it is a violation of the law to give such prescription without personal examination. Weatherford v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 182, 102 SW 1146. In prosecution for theft of mules, refusal to exclude testimony that witness told his employe to take mules from one pasture and put them in another, since both pastures were in possession of the witness and it was immaterial from which pasture defendant took them. Gomez v. State [Tex. Cr. App.] 102 SW 1146. Evidence of other offenses held harmless where crime charged was emphatically established and minimum penalty imposed. Winslow v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 813, 98 SW 866. In local option case, testimony of prosecuting witness that beverages sold him on different dates tasted same held harmless. Peeples v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 719, 99 SW 1002. Questions regarding indictment against defendant in Federal court harmless where nature of charge was not brought out. Feagin v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 815, 100 SW 776. Error in admitting evidence in favor of accused cannot be complained of. Adkins v. State [Tex. Cr. App.] 95 SW 509. Asking witness if he had heard that defendant had been in the penitentiary was harmless where he answered in negative. Doss v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 514, 95 SW 1040. In murder, error in permitting defendant's wife to be asked if he did not run her off the place on a certain night is harmless where she answered in negative. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 SW 521. Asking of improper question held harmless where it was answered in negative. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. It is better to err on the side of permitting testimony to be introduced than of excluding it, and in a case involving circumstantial evidence, where some latitude in the matter of evidence is necessary, the judgment will not be reversed because evidence was admitted which was unnecessary but not prejudicial. Studer v. State, 9 Ohio C. C. [N. S.] 185.

54. Exclusion of proof of facts otherwise known to jury is harmless. Gregory v. State [Ala.] 42 S 829. Refusal to admit evidence of age of prosecutrix in trial of charge of assault with intent to rape held harmless. Pitman v. State [Ala.] 42 S 993. No error shown in refusing witness to testify in rebuttal where it appeared that his testimony tallied with what it was sought to rebut. Davis v. State [Fla.] 44 S 757. Exclusion of evidence to rebut presumption of malice in homicide is harmless where the verdict is for manslaughter. Carter v. State [Ga. App.] 58 SE 532. Exclusion of merely cumulative evidence is harmless. Newton v. Com., 31 Ky. L. R. 327, 102 SW 264. No prejudicial error in excluding evidence when jury has benefit of it. State v. Schaefer, 35 Mont. 217, 88 P 792. Under a rule that evidence of prior convictions is admissible as affecting credibility, where an accused had admitted a prior conviction, the exclusion of a question as to whether that was the only time he had been convicted was not ground for reversal. State v. Arnold, 206 Mo. 589, 105 SW 641. Where there was abundant proof of the crime, and defendant was not prejudiced by the course taken, held not cause for reversal that court excluded testimony of a witness with whom defendant's counsel had talked and who had been in the court room but was not subpoenaed, court's attention not being called to matter. State v. Hodge, 142 N. C. 676, 55 SE 791. Rejection of immaterial evidence is harmless. Commonwealth v. Curcio [Pa.] 67 A 643. Exclusion of evidence only remotely relevant held harmless. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024. Where in local option case smallest penalty was imposed, exclusion of mitigating evidence was harmless. Huff v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 237, 103 SW 629. Error in exclusion of testimony as to reputation of accused for truth and veracity held harmless where there was little conflict in the evidence. Spencer v. State [Wis.] 112 NW 462.

55. Error in cross-examination held harmless. Carr v. State [Ark.] 99 SW 831. Improper cross-examination held harmless where its consideration was limited by the court to purpose of showing animus. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102. Refusal to permit a proper question on cross-examination is harmless where the matter is subsequently shown. Danford v. State [Fla.] 43 S 593. Error in immaterial cross-examination held harmless. People v. Clark [Cal.] 90 P 549. Where question on cross-examination was objected to as calling for a conclusion but it does not appear that it was answered, no error was committed. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Error in permitting prosecuting attorney in cross-examination to show that witness for defense had spent previous night in jail for contempt is harmless. State v. Miles, 199 Mo. 530, 98 SW 25. Improper cross-examination of witness harmless where matters covered were immaterial and answers of witness were favorable to defendant. Palmer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 3, 89 SW 836.

56. Cross-examination of defendant as to where he was born, married, and lived, etc., while immaterial, was harmless. State v. Barrington, 198 Mo. 23, 95 SW 235. Question to defendant on cross-examination if he had not spit in another man's face not reversi-

strike evidence,[58] refusal to limit effect of evidence admitted,[59] conduct and argument of counsel,[60] conduct and remarks of the trial judge,[61] errors in the charge as

ble error where jurors testified they were not influenced by it. Foster v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 42, 100 SW 1159.

57. Question asked witness held not sufficiently suggestive to be prejudicial. Moore v. State [Tex. Cr. App.] 96 SW 321. Asking witness slightly leading questions held not ground for reversal. Manovitch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 712, 96 SW 1.

58. Refusal to strike irresponsive answer is harmless where guilt is clearly shown. People v. Craig [Cal.] 91 P 997.

59. Refusal to limit consideration of impeaching testimony to purpose for which it was introduced is harmless where it could not be considered for any other purpose. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509.

60. Where witness had been contradicted and impeached, a reference to him by counsel as the friend and accomplice of accused was not prejudicial error. Smith v. State, 79 Ark. 25, 94 SW 918. Argument of prosecuting attorney reviewed and held not prejudicially erroneous. Id. Misconduct in stating personal views to jury held not ground for reversal where the court charged the jury to disregard them. People v. Quimby [Cal. App.] 92 P 493. In prosecution for embezzlement, accused was not prejudiced by objectionable question seeking to bring out evidence of other offenses. People v. Robertson [Cal. App.] 92 P 498. Improper statement of state's attorney in support of a witness whose testimony was attacked held not prejudicial where the matter to which the testimony related was cleared up otherwise. People v. Wright [Cal. App.] 89 P 364. Argument not based on evidence held harmless. People v. Fitts [Cal. App.] 91 P 536. Contention of prosecuting attorney as to demeanor of witness held harmless though he still held to such contention after being admonished by the court. People v. Craig [Cal.] 91 P 997. Allowing a prosecuting attorney to state in the jury's presence what he desired to prove by witnesses whose testimony is excluded is not reversible error where the question as to the admissibility of the evidence was a debatable one, and the court instructed the jury fo consider only the evidence admitted. Misconduct of prosecuting attorney not ground for new trial under § 1181 of Cal. Pen. Code. People v. Feld, 149 Cal. 464, 86 P 1100. Absent witness was sent for and arrived during solicitor's argument, interrupting it, whereupon he said, "Rack him in." Held this alone was not enough to require granting of a new trial. McMillan v. State, 128 Ga. 25, 57 SE 309. Misconduct of prosecuting attorney in asking a series of questions of an incompetent witness held harmless where no answer was given. State v. Krug [Iowa] 113 NW 822. Reply by prosecuting attorney to defendant's attorney that accused would not be on trial if insane was not prejudicial since accused admitted present sanity by pleading not guilty and going to trial. State v. Hogan, 117 La. 863, 42 S 352. Remarks of counsel and calculated to influence the jury are not ground for reversal. State v. Silva, 118 La. 660, 43 S 269. Argument held not prejudicial. State v. Johnson, 119 La. 130, 43 S 981. Argument of counsel and statement of how the crime was committed held not ground for reversal. Gray v. State [Miss.] 43 S 289. Under Rev. St. 1899, § 2638, providing that failure of accused to testify shall not be referred to in the cause, argument that his testimony did not contradict certain other testimony was not prejudicial. State v. Miles, 199 Mo. 530, 98 SW 25. Improper conduct of prosecuting attorney in asking improper questions which were objected to and sustained held harmless. Id. Where evidence would have warranted an instruction that, if believed, the jury should find defendant guilty, any error in counsel's argument was harmless. State v. Mallard, 143 N. C. 666, 57 SE 351. Argument of prosecuting attorney referring to failure of accused to call an eye witness, who was in the court room, and referring to him as an accomplice, held not reversible error in absence of a request to charge on it, and refusal of the court to do so. White v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 816, 100 SW 941. In prosecution for illegal sale of liquor, argument that evidence not only showed that defendant made the sale charged but was engaged in the sale of liquors was harmless though there was no evidence to sustain the latter statement. Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 114, 101 SW 208. It was held not ground for reversal that the state's attorney in argument referred to defendant's former conviction of adultery in another county. Dixon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 308, 97 SW 692. Offer of counsel in argument to bet the jury his dog and gun against five cents that if the jury turned defendant loose the grand jury would have him indicted again within six days for stealing another horse was harmless where no charge to disregard it was requested. Harding v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 422, 95 SW 528. Question asked by prosecuting attorney in empaneling jury whether if taken on jury they would be influenced by and appeal to any higher law than the law of the land or the law as charged by the court is improper but not prejudicial. Fuller v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 413, 95 SW 541. Remarks of prosecuting attorney relative to matters of fact but not within the evidence held not ground for reversal. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 222, 102 SW 1147. Repetition of question as to whether witness had been offered inducements to not testify held harmless. Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509. In local option case, remarks that the local option law had been adopted in the county by a large majority is not prejudicial. Shaw v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 11, 105 SW 500. Inaccurate reference to evidence in argument held not prejudicial. Mitchell v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 45, 100 SW 930. Argument relative to handcuffs used by sheriff when he arrested defendant held harmless. Stoddard v. State [Wis.] 112 NW 453.

61. Remark of court on an immaterial matter stating opinion of court held harmless. Morrison v. State [Ala.] 44 S 43. Re-

given,[62] failure to give particular instructions,[63] informality of verdict.[64] Defendant

marks of court in refusing profert to be made to show relative sizes of the parties, that it did not suppose anyone wanted to see person assaulted, not prejudicial. McFarland v. State [Ark.] 103 SW 169. Remark of judge to attorney in the presence of the jury "Do you intend to say that when deceased was running from defendant as fast as he could when defendant shot him, that he was the aggressor," held harmless. Black v. State [Ark.] 104 SW 1104. Remark of court that principle of malice was stated incorrectly during examination of jurors held harmless. State v. Bailey, 79 Conn. 589, 65 A 951. Remarks of court on admitting certain evidence held not prejudicial in the light of the explanation made by the judge. Long v. State, 127 Ga. 350, 56 SE 444. Remarks of court as to evidence of drunkenness harmless when defense of drunkenness was fully covered by instructions. State v. Yates, 132 Iowa, 475, 109 NW 1005. Remarks of court as to bloody shirt sought to be introduced held harmless. Gray v. State [Miss.] 43 S 289. Erroneous statement of law made by court in colloquy with counsel during argument held harmless. Barnes v. Ter. [Okl.] 91 P 848. Conduct of court in giving another jury, in the presence of defendant's jury, a long lecture on the necessity of agreeing on a verdict, held not reversible error, where jurors testified they were not influenced thereby, and the first ballot was 11 to 1 for conviction. Foster v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 42, 100 SW 1159. Where counsel for accused asked the judge if he would permit witness to testify if he came, the refusal of the court though given in a manner indicating anger is not ground for reversal. Stephens v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 292, 97 SW 483. Colloquy between court and counsel as to asking of leading questions and objections thereto held harmless. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Comment of court in ruling on evidence that he would admit it for a certain purpose held harmless. Colson v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 10, 105 SW 507. Remark of court to counsel illustrative of ruling on evidence of character held not prejudicial. Mitchell v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 45, 100 SW 930.

62. Harmless to submit issue of former jeopardy with the main issue where no evidence was offered under it. Barber v. State [Ala.] 43 S 808. Inadvertent mistake in instruction on credibility of witnesses, not objected to and not prejudicial, is not reversible error. Taylor v. State [Ark.] 102 SW 367. Use of word "compel" in an instruction held not prejudicial though such word was not warranted by the evidence. Pipkin v. State [Ark.] 97 SW 61. There being no evidence in rape case that girl was married to defendant, an instruction that she could not marry if under a certain age was harmless. People v. Beatty [Cal. App.] 88 P 377. An instruction that a witness, willfully false in a material part of his testimony, is to be distrusted in other parts, is harmless. People v. Grill [Cal.] 91 P 516. An instruction stating merely a commonplace matter which the jury would know without it is harmless. People v. Hower [Cal.] 91 P 507. Instruction which could not have affected the verdict under the evidence held harmless. People v. Amer [Cal.] 90 P 698. In prosecution for conspiracy to commit embezzlement, defendants were not prejudiced by charging the entire conspiracy statute. Imboden v. State [Colo.] 90 P 608. A charge which under the evidence could not have prejudiced defendant is harmless. Vasquez v. State [Fla.] 44 S 739. Where it appears by uncontradicted evidence that the offense was committed within the limitation period, error in charge as to limitations was harmless. Harris v. State [Ga. App.] 58 SE 669. A charge on the law of preponderance of evidence is harmless error, where it is by way of illustration only, and is followed by a full and correct statement of the degree of proof required in a criminal case. McLeod v. State, 128 Ga. 17, 57 SE 83. Erroneous instruction as to proof of intent to rob not prejudicial when evidence showed such intent conclusively. O'Donnell v. People, 224 Ill. 218, 79 NE 639. Any error in not charging that it must be found that the offense was committed within the limitation period was harmless where it appeared from the indictment and evidence that it was so committed. State v. McCausland [Iowa] 113 NW 852. In prosecution of city for maintaining nuisance on lot owned by city, an instruction making city liable for acts of its lessee held harmless. City of Paris v. Com., 29 Ky. L. R. 483, 93 SW 907. Where evidence did not justify charge on self-defense, error in definition of self-defense was harmless. Freeman v. Com., 31 Ky. L. R. 639, 103 SW 274. Omission of "feloniously" in charge on murder and manslaughter is harmless. O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937. Where indictment only charged that killing was done "in sudden heat and passion" but only issue presented was self-defense, accused was not prejudiced by charge authorizing conviction if killing was done "in sudden affray" or in sudden heat and passion, etc. Stacy v. Com., 29 Ky. L. R. 1242, 97 SW 39. Giving of instruction held harmless in view of evidence. Canterberry v. State [Miss.] 43 S 678. The method of the court in correcting improper statement of counsel, in argument by stating negative thereof in instructions, not ground for reversal. State v. Miles, 199 Mo. 530, 98 SW 25. Where there was little or no evidence of intoxication, it was harmless error to charge that drunkenness was no defense. State v. Church, 199 Mo. 605, 98 SW 16. Error in omitting from or adding a word to an instruction harmless where jury could not have been misled. State v. Paulsgrove, 203 Mo. 193, 101 SW 27. Instruction on manslaughter where there was no evidence except of murder held harmless. State v. Penna, 35 Mont. 535, 90 P 787. Erroneous charge as to rejection of testimony of a witness who had knowingly testified falsely held harmless. State v. Tracey, 35 Mont. 552, 90 P 791. Failure to specifically define distinctions between assault in first, second, and third degrees, held harmless. Id. Where the jury under the instructions must have found certain facts, defendant was not prejudiced by refusal of a charge assuming the negative of such facts. Commonwealth

cannot complain of invited error,[65] of error in his favor,[66] or of conviction of a lesser or lower degree than the evidence warrants.[67]

v. Parsons [Mass.] 81 NE 291. Erroneous statement in charge as to self-defense held not prejudicial where the issues were otherwise fully covered. Craig v. State [Neb.] 111 NW 143. Where there is no conflict in the evidence, a charge that testimony of a witness who swore falsely might be disregarded unless corroborated is harmless. State v. Kinney [S. D.] 113 NW 77. Instruction on circumstantial evidence not prejudicial to defendant, notwithstanding confession of defendant where there was a slight conflict over predicate laid for introduction of confessions. Watkins v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 172, 105 SW 790. Use of "sudden transport of passion" in charge on murder whether or not it is technically correct held harmless. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879. Submission of an issue not presented by the evidence held harmless. Fields v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 815, 98 SW 867. Not prejudicial to fail to limit evidence of prior indictment to question of credibility instead of excluding it. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. Charge erroneously limiting right of accused to carry a pistol held harmless where evidence showed that he was unlawfully carrying it at the time and place in question. Banks v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 387, 98 SW 242. Where in assault to kill a witness testified that father of person assaulted had said that shooting was accidental, but in charging the court substituted name of son for that of father and charged that statements of witness were not original evidence but could be considered only in passing on credibility of son, held harmless. Jackson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 279, 103 SW 927. Where information charged judge of election with false imprisonment and alleged not only assault but also actual violence, and evidence showed arrest without warrant, error if any in charging use of other means of imprisonment than false arrest was harmless. Smyth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 338, 103 SW 899. Where in prosecution for stealing evidence as to act charged showed that enough was taken to constitute a felony, a charge as to other offenses was harmless. Keener v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 313, 103 SW 904. In prosecution for theft from the person, accused could not complain of a charge not to consider the taking of articles not alleged to have been taken. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. A charge on provoking the difficulty, not authorized by the evidence, is harmless where there was no issue of self-defense. McDougal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 281, 103 SW 847. On trial for murder of defendant's son-in-law, it was improper to ask defendant's wife if she had not written relative to his property after his death, but was harmless where she answered in negative. Fuller v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 413, 95 SW 541. In a local option case, error in charging that conviction could be had if sale was made at any time before the information was filed was harmless where the evidence showed the sale was made before making of affidavit on which the information was based. De Armon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 302, 97 SW 479. Erroneous instruction harmless in light of evidence. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 685, 93 SW 116. Where in trial for assault proof showed battery also, charge that accused was indicted for assault and battery was harmless. Davis v. State [Tex. Cr. App.] 90 SW 646. Where accused is not entitled to self-defense instruction, an erroneous charge thereon was harmless. Smart v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 141, 101 SW 989. Error in charges, and refusal to give charges, on self-defense, harmless where that was not an issue. Laws v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 136, 101 SW 987. Error in charge in forgery case in amount of check forged held immaterial. Miller v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 771, 100 SW 380. A charge commenting on facts as to which defendant and all his witnesses testified was harmless. State v. Gohl [Wash.] 90 P 259. Failure to make mere formal declaration by the court that conspiracy had been sufficiently proven to admit acts of coconspirators is harmless. Schultz v. State [Wis.] 113 NW 428. In prosecution of husband for abandoning his wife, error in a charge in not including the fact that he was able to support her held harmless where such fact was established. Spencer v. State [Wis.] 112 NW 462.

63. Failure to give cautionary instruction not reversible in the absence of error in the charge as given and of other error at the trial. Johnson v. State, 128 Ga. 102, 57 SE 353. In prosecution for assault, refusal to charge that abusive and indecent language never justifies assault was harmless. State v. Krug [Iowa] 113 NW 822. In prosecution for practicing medicine without a license, failure to charge on the subject of costs on acquittal is harmless. Commonwealth v. Clymer, 217 Pa. 302, 66 A 560. Failure to charge on manslaughter and assault not prejudicial to defendant where all theories of both sides excluded all ideas except murder or justifiable homicide. Frazier v. State, 117 Tenn. 430, 100 SW 94. On trial for theft of $72 in silver and currency, failure to charge that value of money must have been $72 was harmless. Gibson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 967, 100 SW 776. Refusal to charge that corpus delicti must be proved otherwise than by defendant's confession not reversible where the corpus delicti was abundantly shown. Gallegos v. State [Tex. Cr. App.] 90 SW 492.

64. Mere informality in the form of the verdict is harmless. State v. Gordon, 35 Mont. 458, 90 P 173.

65. Invited error is harmless. Barber v. State [Ala.] 43 S 808. Accused cannot complain of charge given in identical language of his own request. People v. James [Cal. App.] 90 P 561. An instruction in the language requested on a theory of defense cannot be complained of. Long v. State, 127 Ga. 350, 56 SE 444. Failure to charge on voluntary manslaughter not error where counsel acquiesced in court's statement that it would not be necessary. Caesar v. State, 127 Ga.

Cure of error.[See 8 C. L. 251]—Error in admitting evidence may be cured by withdrawing or striking it out and instructing the jury to disregard it,[68] or by other in-

710, 57 SE 66. Where counsel has accepted a suggestion of the court to modify a requested instruction, he cannot afterwards urge that the instruction as originally requested was correct and as given was incorrect. Morello v. People, 226 Ill. 388, 80 NE 903. Where defendant's attorney had referred to his failure to testify, the fact that state's attorney directed attention to such fact was harmless. Lipsey v. People, 227 Ill. 364, 81 NE 348. Where accused resisted a motion by the prosecuting attorney to set aside the indictment for indefiniteness and resubmit the matter to the grand jury, he could not rely on a denial of the motion as ground for reversal. State v. Hanlin, 134 Iowa, 493, 110 NW 162. Where a defendant elicits incompetent testimony, he cannot complain if the state interrogates the witness along the same line. State v. Grubb, 201 Mo. 585, 99 SW 1083. Error brought about by defendant's counsel is not ground for reversal. State v. Spaugh, 200 Mo. 571, 98 SW 55. Where, after a jury had been impaneled and sworn but before any evidence had been introduced, it appeared that the court was without jurisdiction because change of venue had not been taken in accordance with Code Cr. Proc. § 353, the defendant could not complain that the jury was discharged where he stated that he was willing to waive the question but did not recede from his position that the court did not have jurisdiction. People v. Neff, 106 NYS 747. Defendant cannot complain of instruction practically identical with one requested by him and refused. Carbaugh v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 241, 93 SW 738. An instruction similar to one requested and refused cannot be complained of. State v. Kelley, 191 Mo. 680, 90 SW 834.

66. Allowing improper question is harmless where answer is favorable to defendant. Green v. State [Ala.] 44 S 194. Error in submitting a lesser degree of crime of which there is no evidence is favorable to accused and he cannot complain. Burnett v. State. 80 Ark. 225, 96 SW 1007. Defendant cannot complain of error in withdrawing evidence which was prejudicial to himself. State v. Scott [Iowa] 113 NW 758. Objectionable question rendered harmless by negative answer. Nicholson v. State [Ala.] 43 S 365. Instructions more favorable to accused than the case warrants cannot be complained of by him. State v. Davis, 203 Mo. 616, 102 SW 528; State v. Cavin, 199 Mo. 154, 97 SW 573; Satterwhite v. State [Ark.] 100 SW 70; State v. Miller, 191 Mo. 587, 90 SW 767. Errors in instructions in favor of defendant cannot be complained of by him. State v. Holden, 203 Mo. 581, 102 SW 490. Defendant cannot complain of instructions more favorable to him than the law warrants. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403. Errors in charge favorable to accused cannot be complained of. Tyler v. State [Tex. Cr. App.] 90 SW 33; Harris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 154, 105 SW 801. In charge on manslaughter, stating as a matter of law that certain acts constituted adequate cause was beneficial to accused and he could not complain. Martin v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 63, 95 SW 501.

67. Defendant cannot complain of a verdict for manslaughter when he should have been convicted of a higher crime. Serna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 133, 105 SW 795. That jury finds defendant guilty of a lower degree of offense than that established by the evidence is not a ground or cause for reversal on appeal from a judgment of conviction. State v. Phinney [Idaho] 89 P 634. That the jury returns a verdict for a lower degre of offense than the evidence warrants cannot be complained of by defendant. State v. Quarles [Idaho] 89 P 636.

68. Error in admitting evidence is cured by striking it. Francis v. U. S. [C. C. A.] 152 F 155. Misconduct of counsel in procuring admission of testimony under promise to connect it is cured by a charge to disregard it. Krause v. U. S. [C. C. A.] 147 F 442. Improper question held harmless where at once objected to and the court charged the jury to pay no attention to it whatever the answer might be. Browning v. State [Ark.] 104 SW 1099. Error in admission of evidence cured by its withdrawal and a charge to disregard it. People v. Solani [Cal. App.] 91 P 654. Error, if any, in receiving evidence held cured where instructions were such that jury could not have considered it except in proper connection. State v. Boylan, 79 Conn. 463, 65 A 595. Error in admission of testimony cured by striking it. Lipsey v. People, 227 Ill. 364, 81 NE 348. Admission of improper evidence harmless when court ordered it stricken and it was withdrawn. State v. Nowells [Iowa] 109 NW 1016. Error in admitting testimony may be cured by withdrawing it from the jury. State v. Walker, 133 Iowa, 489, 110 NW 925; State v. Scott [Iowa] 113 NW 758. Testimony of other offenses held not prejudicial where the court charged the jury to disregard it. State v. Steidley [Iowa] 113 NW 333. Where evidence, competent if followed up, is not followed up, but is withdrawn during the trial and in the formal charge, no error results. State v. Brown [Iowa] 109 NW 1011. Admission of testimony subsequently withdrawn from the jury held harmless. Ball v. Com., 31 Ky. L. R. 188, 101 SW 956. Where after admission of evidence the court excluded it as incompetent, the court on appeal will assume that jury did not consider it and that accused was not prejudiced. Bischoff v. Com., 29 Ky. L. R. 770, 96 SW 538. Where improper testimony is introduced but is excluded from consideration of the jury immediately thereafter, its admission was harmless. Humber v. Com., 31 Ky. L. R. 606, 102 SW 1179. Admission of incompetent evidence cured by striking it and charging the jury not to consider it. State v. Armstrong, 118 La. 480, 43 S 57. When a witness for the state gives an answer which is unexpected and uncalled for by the question put to him, in that it embraces a negative statement by a third person, which cannot, however, operate to the prejudice of accused, and which the jury are instructed to disregard, the conviction will not be set aside. State v. Broxton, 118 La. 126, 42 S 721. Where jury were charged that certain evidence was withdrawn held harmless though irrelevant.

structions under which the evidence must have been disregarded,[69] or by proof of the facts by other proper evidence,[70] or evidence admitted without objection,[71] and particularly by evidence of accused or introduced on his behalf.[72] Exclusion of evidence is cured by its subsequent admission,[73] or the admission of other evidence of

State v. Spaugh, 200 Mo. 571, 98 SW 55. Error in admitting evidence may be cured by an instruction excluding it from the consideration of the jury. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641; Delaney v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 580, 90 SW 642. Admission of hearsay harmless where court and prosecuting attorney told jury to disregard it. Jackson v. State [Tex. Cr. App.] 90 SW 34. Where inadmissible evidence is admitted but subsequently excluded and jury told to disregard it, no prejudice results. Hickey v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 142, 102 SW 417. Where no objection was made to introduction of evidence and the court charged the jury not to consider the same, accused was not injured by its introduction. Speer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 297, 97 SW 469. Error in admission of testimony held cured by striking it out. Rice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 1156. Where as soon as inadmissible testimony was introduced it was excluded and the jury charged to disregard it, the error was cured. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005. No error is committed in introduction of testimony where counsel fails to object, but afterwards it is excluded and the jury charged to disregard it. Id. Error in admission of evidence cured by direction not to consider it. Lam Yee v. State [Wis.] 112 NW 425. Error in court asking witness improper question held cured by charge to disregard. Johnson v. State [Wis.] 113 NW 674. Error in admission of evidence is harmless where the jury is directed not to consider it. McCummins v. State [Wis.] 112 NW 25.

69. In prosecution for violation of local option law, error in admission of evidence as to other sales is cured by charge that particular sale charged must be proven. State v. O'Brien, 35 Mont. 482, 90 P 514. Erroneous admission of evidence cured by charge. Rice v. People [Colo.] 90 P 1031.

70. Erroneous question cured by an unresponsive answer which was admissible. Falkner v. State [Ala.] 44 S 409. Where a fact is proved by competent evidence, admission of improper evidence is harmless. Renfroe v. State [Ark.] 104 SW 542. Admission of incompetent evidence harmless where jury are otherwise informed of the facts. Smith v. People [Colo.] 88 P 1072. Error in admitting incompetent evidence is harmless where the fact is abundantly proved by other competent evidence. People v. Peck, 147 Mich. 84, 13 Det. Leg. N. 1004, 110 NW 495. Error if any in admitting testimony connecting defendant with the crime before proof or corpus delicti held cured by subsequent proof thereof. State v. Guthrie [N. C.] 59 SE 652. Error in admitting hearsay is harmless where the point is proved by proper testimony. Elsworth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 903.

71. Admission of erroneous testimony harmless where same evidence had been adduced without objection. State v. Way, 76 S. C. 91, 56 SE 653. Admission of portions of record in another case harmless where same facts were brought to jury's attention without objection. State v. Frye [Wash.] 89 P 170. Erroneous admission of testimony is harmless where the substance of it is given by another witness without objection. State v. Zorn, 202 Mo. 12, 100 SW 591.

72. Where evidence of the moral depravity of accused came into the case through his own witnesses, the fact that some evidence of the same kind was elicited by the prosecutor, and that court ruled it out but did not expressly direct that it be not introduced, accused was not prejudiced. People v. Davis, 1 Cal. App. 8, 81 P 716, 88 P 1101. Admission of secondary proof of advertisement harmless where defendant admitted on cross-examination that prosecutor had answered his advertisement.. Chilson v. People, 224 Ill. 535, 79 NE 934. No prejudicial error in admitting proof of a statement by defendant's wife indicating his guilt where it was not objected to, and was largely a repetition of the witness' testimony on cross-examination, was adduced in part by defendant's counsel, and would have been proper in rebuttal. People v. De Camp, 146 Mich. 533, 13 Det. Leg. N. 862, 109 NW 1047. Evidence of character of defendant brought out on redirect examination of a witness for the state held not ground for reversal where such testimony was justified by the cross-examination of the witness by defendant. Craig v. State [Neb.] 111 NW 143. Where testimony of defendant showed certain bad conduct on his part, other evidence of such conduct was harmless. People v. Wenzel [N. Y.] 82 NE 130. Where accused voluntarily admitted that he had been previously convicted of an offense, any error in permitting testimony of such fact was harmless. Id. Admission of testimony already given by defendant's witnesses is harmless. Walker v. State [Tex. Cr. App.] 100 SW 784. Admission of testimony against defendant is harmless where he testifies to same effect. Weatherford v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 244, 103 SW 632. Error in admitting evidence of preparations by owner of cattle and officers to detect thief harmless where accused admitted that he had conspired with a third person to steal and butcher them. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641.

73. Strickland v. State [Ala.] 44 S 90. Exclusion of testimony not error when it is subsequently given by witness. Parham v. State, 147 Ala. 57, 42 S 1. Error in sustaining objection to a question is cured where the witness subsequently answers the same question. Kirby v. State [Ala.] 44 S 38. Refusal to permit certain cross-examination held harmless where it was subsequently allowed. People v. Hower [Cal.] 91 P 507. Error in excluding testimony is cured by the court reversing its ruling while the witness is on the stand. State v. Blackburn [Iowa] 110 NW 275. Where court excludes evidence, but subsequently offers to receive it, witnesses being still in attendance, error, if

like effect.[74] Error in instructions may be cured by subsequent or other instructions,[75] or by the rendition of a verdict which the erroneous instructions could not have affected.[76] Improper conduct or argument of counsel is frequently held to

any, is cured. Horton v. State, 128 Ga. 26, 57 SE 224.

74. Exclusion of evidence offered to prove a fact otherwise proved and not denied is not error. Roberts v. People, 226 Ill. 296, 80 NE 776. Refusal to allow matter to be shown by one witness is harmless where it is afterwards shown by undisputed testimony of another. Green v. U. S. [Ind. T.] 104 SW 1159. Exclusion of evidence is harmless where its substance is afterwards given. McCoy v. State [Miss.] 44 S 814. Where proper evidence had been objected to and excluded, such error was harmless, the evidence having been previously admitted and not stricken. People v. Wenzel [N. Y.] 82 NE 130. Exclusion of testimony held harmless where it was covered by other testimony. State v. Emerson [S. C.] 58 SE 974. Exclusion of testimony held harmless where other evidence covered same point. Harris v State [Tex. Cr. App.] 20 Tex. Ct. Rep. 154, 105 SW 801. Exclusion of evidence as to decedent's reputation as a dangerous man held harmless where there was other testimony as to such fact. Gantt v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 371, 105 SW 799.

75. Refusal of an instruction which is covered by others given is harmless. Code 1896, § 4333. Pate v. State [Ala.] 43 S 343. Though instructions on "preponderance of evidence" were erroneous, accused was not injured where all the evidence introduced was by the state, and jury were correctly instructed on necessity of proof of guilt beyond a reasonable doubt. Jackson v. State, 125 Ga. 101, 53 SE 607. Failure to charge on a pertinent proposition held not error where jury returned and asked for additional instructions, whereupon the court instructed them fully on the omitted question. Wallace v. State, 126 Ga. 749, 55 SE 1042. Withdrawal from jury of erroneous portions of instructions held not prejudicial to defendant. Chilson v. People, 224 Ill. 535, 79 NE 934. Where ambiguity or uncertainty in an instruction is removed by a subsequent instruction, there is no reversible error. Morello v. People, 226 Ill. 388, 80 NE 903. Instruction to determine from all the facts whether the defense was probably true held harmless in view of the instruction as to reasonable doubt. State v. Wolfley [Kan.] 89 P 1046. An erroneous instruction may be rendered harmless by other instructions given. State v. Gregory, 74 Kan. 467, 87 P 370. An erroneous instruction may be cured by instructions subsequently given. Ball v. Com., 31 Ky. L. R. 188, 101 SW 956. Erroneous instruction on weight of witness' testimony cured by subsequent charge. State v. Sykes, 191 Mo. 62, 89 SW 851.

Exception: An instruction announcing the law directly opposite from what it is is not cured by a subsequent correct charge. Murphy v. State, 89 Miss. 827, 42 S 877.

76. Defendant acquitted of murder in first degree cannot complain that instruction relating thereto was erroneous. Gregory v. State [Ala.] 42 S 829. Where an indictment contains two counts and defendant is found guilty on both and only one sentence imposed, and the evidence authorizes the conviction, errors relating to one count only will not be considered. Anderson v. State [Ga. App.] 58 SE 401. Error in charging relative to a lesser degree of the offense is harmless where the jury return a verdict for the higher degree. Joiner v. State [Ga.] 58 SE 859. Conviction of simple assault under a charge of assault with intent to commit rape acquits as to the graver offense and errors concerning the necessity of corroboration are eliminated. State v. Hoover, 134 Iowa, 17, 111 NW 323. A charge that conviction could be had if the jury believed that defendant had been twice convicted before held harmless where the verdict of the jury found him guilty of the offense charged and of prior offenses. Gragg v. Com., 31 Ky. L. R. 873, 104 SW 285. Where defendant was convicted of murder, exceptions to instructions on manslaughter became immaterial. Commonwealth v. Parsons [Mass.] 81 NE 291. Instructions on murder are rendered harmless by a verdict for manslaughter. McCoy v. State [Miss.] 44 S 814. Where indictment contained three counts and defendant was convicted on first, only erroneous instructions on second and third were harmless. State v. Gilson, 114 Mo. App. 652, 90 SW 400. One convicted of murder in the second degree cannot complain of a charge on murder in the first degree. State v. Darling, 199 Mo. 168, 97 SW 592. Where defendant, if guilty at all, is guilty of a higher grade of offense than the one of which he is convicted and upon which the court gave an instruction, defendant is in no position to complain of an instruction on such lower grade of the offense, even if there was no evidence upon which to predicate it. State v. Edwards, 203 Mo. 528, 102 SW 520. One convicted of murder in the first degree cannot complain of instruction on second degree. State v. Spaugh, 200 Mo. 571, 98 SW 55. But if the court undertakes to give an instruction upon a grade of the offense not warranted by the evidence, the instruction must be a proper one, embracing all the essential elements of such offense; and the defendant may challenge the sufficiency of an instruction erroneously declaring that certain facts would not justify verdict of lower offense. State v. Edwards, 203 Mo. 528, 102 SW 520. Defendant, convicted of a higher grade, may complain of an erroneous instruction on a lower grade of the crime charged. State v. Barnett, 203 Mo. 640, 102 SW 506. Failure to charge not to consider prior convictions if the defendant was found not guilty of the offense charged was harmless where he was found guilty of such offense. State v. Gordon, 35 Mont. 458, 90 P 173. Error in instruction on manslaughter harmless where there was no evidence of manslaughter and accused was convicted of murder. State v. Kendall, 143 N. C. 659, 57 SE 340. Failure to fully charge as to degrees of crime held cured where the punishment was far within that prescribed for either degree. People v. Monroe, 104 NYS 675. Error in charge as to higher degrees of offense is harmless where a ver-

have been cured by its withdrawal by counsel,[77] or by a rebuke or admonition by the judge,[78] accompanied by cautionary instructions to the jury to disregard it.[79] Im-

dict for a lower degree is returned. Loudenback v. Ter. [Okl.] 91 P 1030. Where accused was found guilty of murder in second degree and his punishment assessed at the minimum, error in charge on drunkenness that it would be no excuse, but rather an aggravation of the offense, was harmless. Atkins v. State [Tenn.] 105 SW 353. Where jury gave minimum punishment, error in charge as to what punishment could be assessed was harmless. Stokes v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 25, 90 SW 179. Charge on murder will not be reviewed where accused was convicted of manslaughter. Monroe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 118, 101 SW 214. Error in charging on express malice and murder in first degree cured by verdict of manslaughter. Hardin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 231, 103 SW 401. Refusal to charge on aggravated assault was harmless where accused was convicted of simple assault. Whittle v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 573, 95 SW 1084. One found guilty of murder in first degree cannot complain of charges on second degree and manslaughter. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. Error in authorizing one charged with running a blind tiger to be convicted of ordinary violation of local option law is cured by conviction of offense charged. Gorman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 876, 105 SW 200. Errors in charge on murder are eliminated by verdict of manslaughter. Adams v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 9, 105 SW 497. Where in a prosecution the court refused to receive defendant's plea of assault with intent to rape, and defendant was convicted of rape, a charge to find guilty of assault to rape under the plea if they failed to convict for rape was harmless though the plea may have been defective. Childress v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 329, 103 SW 864. The evidence being sufficient to sustain the verdict, the question of intent was not material, hence the charge was harmless though tantamount to charging that intent was admitted. Id.

77. Commonwealth v. Striepeke, 32 Pa. Super. Ct. 82. In prosecution for assault with intent to kill, remarks to the effect that deceased was shot down and brutally murdered were not ground for reversal when immediately withdrawn. Satterwhite v. State [Ark.] 100 SW 70. Where county attorney stated in closing argument in homicide case that there had not been a day during his incumbency in office when there had not been murderers in jail awaiting trial, but at once withdrew the statement, the jury being directed by the court to disregard it, the statement was not prejudicial. State v. Mathews, 133 Iowa, 398, 109 NW 616. Improper statement in argument which was at once withdrawn held harmless. Austin v. Com., 30 Ky. L. R. 295, 98 SW 295. Improper statement held harmless where the court rebuked the attorney in the presence of the jury and he apologized and withdrew it. Esterline v. State [Md.] 66 A 269. Where prosecuting attorney called defendant "culprit" but on being cautioned corrected his statement by saying "accused," held harmless. State v. Church, 199 Mo. 605, 98 SW 16. Where prosecuting attorney, in his closing argument to the jury, in a case where the guilt of the defendant is not free from doubt, refers to a paper he supposed had been put in evidence, but on objection and investigation it was found had not been so introduced and his remarks are such, when taken in connection with the contents of the document, as would tend to create an impression of the guilt of the defendant on the minds of the jury that would not likely be removed by a mere charge by the court and a request by the prosecutor to disregard the incident, the subsequent conviction of the defendant should be set aside and a new trial granted. Spafford v. State, 10 Ohio C. C. (N. S.) 185.

78. Misconduct of prosecuting attorney in seeking to get inadmissible testimony held cured by reprimand of court and submission to its ruling. People v. Bradbury [Cal.] 91 P 497. Improper remarks of counsel are generally cured by rebuke of court. State v. Mitchell, 119 La. 374, 44 S 132. Where prosecuting attorney in argument made improper references to defendant, comparing him to Satan, and also improper references to his counsel, but was promptly reprimanded, held harmless. State v. Barrington, 198 Mo. 23, 95 SW 235. Where counsel was rebuked for argument that he would show that no more dastardly murder was ever committed on a noble and christian soul, held harmless. State v. Miles, 199 Mo. 530, 98 SW 25.

79. Improper argument is cured by prompt rebuke from bench and admonition to disregard statements. Browning v. State [Ark.] 104 SW 1099. Where improper remarks of counsel are at once withdrawn and the jury charged to disregard them, the error is cured. Renfroe v. State [Ark.] 104 SW 542. Remarks of counsel not reversible error in view of instructions. Bruchman v. U. S. [Ariz.] 89 P 413. Erroneous argument cured by charge to disregard it. People v. White [Cal. App.] 90 P 471. Referring to defendant's failure to testify and stating that he was not allowed to comment on it held harmless where the court charged that no presumption could be indulged because of such fact. People v. Fitts [Cal. App.] 91 P 536. Where counsel commented on failure of accused to testify, which comment statute prohibits, but court at once checked him, and told jury to disregard the comment and the fact commented on, and repeated the admonition in its final instructions, the error was cured. State v. Buxton, 79 Conn. 477, 65 A 957. Prejudice created by improper statements of counsel are as a general rule cured by admonition by the court to disregard them. Carroll v. U. S. [C. C. A.] 154 F 425. Statements that relative of accused had sought to influence jurors held cured. Id. Remark in argument that prosecuting attorney was willing in case of conviction that four months already spent in jail should be credited on the sentence was harmless where it was charged that the jury should pass only on question of guilt. State v. Steidley [Iowa] 113 NW 333. A mistrial will be de-

proper remarks of the court are harmless when withdrawn and proper cautionary instructions given.[80] Admission of evidence without proper foundation is cured

clared because of argument of counsel bringing extrinsic matters into the case only when such prejudice results as cannot be removed by a rebuke and instructions of the court. Wallace v. State, 126 Ga. 749, 55 SE 1042. Remarks of counsel relative to suicide of a female raped held harmless where the jury was admonished to disregard them and no testimony as to suicide was admitted. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003. Improper remarks of counsel are cured by proper instructions to disregard them. State v. Easley, 118 La. 690, 43 S 279. Where attorney for defendant commented on his custom not to put defendants on the stand and attorney for the state began to make some comments on such statement but was immediately stopped by the judge who charged the jury to draw no inferences from failure of defendant to testify, no prejudice was shown. State v. Matthews, 119 La. 665, 44 S 336. Comments on certain testimony where there was a question as to whether it had been introduced held harmless in view of the instructions that the jury were the sole judges of the testimony. Id. Argument that evidence would justify a finding of a more serious crime, but that jury could render only a verdict of manslaughter under the indictment, held harmless where court, upon objection, told the jury to disregard it, and that they were concerned only with charge of manslaughter. State v. Huff, 118 La. 194, 42 S 771. Improper argument rendered harmless by rebuke from judge and charge to disregard it. Day v. State [Miss.] 44 S 813. Where state's attorney stated that accused "must testify" to certain facts, but on objection thereto qualified it by adding "if he testifies," and court sustained the objection, and instructed jury to disregard the remark, held no prejudicial error though court did not rebuke counsel. State v. Kelleher, 201 Mo. 614, 100 SW 470. Comments by prosecuting attorney on conduct of accused held harmless where the court charged the jury to disregard them. McDougal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 281, 103 SW 847. Remarks of prosecuting attorney relative to defendant, as to who he was and where he came from and his record, held harmless where the court required counsel to desist and charged the jury not to consider the remarks. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 222, 102 SW 1147. Where prosecuting attorney in objection to evidence made improper remarks, and the court charged the jury not to consider such remarks for any purpose, held to cure the error. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 211, 102 SW 1134. Error in remarks of district attorney cured by the district attorney and court asking jury to disregard them. Davis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 218, 102 SW 1150. Argument "this defendant has shown by his own testimony that he is a professional gambler and you should not give him the lowest penalty" is harmless where defendant admitted that he had gambled since childhood and the court charged the jury to disregard the remarks. Id. Denouncing witness as perjurer, etc., held harmless where jury were charged to disregard such argument and it appeared that witness admitted to swearing falsely. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 SW 1044. Where prosecuting attorney in prosecution for violation of local option law was guilty of much improper argument but was reprimanded and the jury charged to disregard his statements, held this action of the court cured the error. Owens v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 685, 96 SW 31. In local option case argument that a man who had for some months been accepting C. O. D. orders for liquor would not hestitate to sell liquor in the territory was not reversible error where the jury were directed to exclude it. Taggart v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 74, 97 SW 95. Where witness stated he had been present at four former trials but had not before been on the stand, and counsel said, in presence of jury, that that made no difference, and court repeated the remark and then told jury that it was made to counsel and that they should disregard it, there was no reversible error. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. Conduct of counsel in asking a juror on his examination if he had heard case discussed while accused was dodging round, held not reversible error where court instructed jury to disregard it, and state later proved his flight. White v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 816, 100 SW 941. Where counsel said defendants were a set of thugs driven from northern states where laws were better enforced against such cattle than in Texas, and the court told counsel to stay within the record and told the jury not to consider the statement, there was no reversible error. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933. Interruptions by district attorney not reversible error, when court instructed him to stop, and admonished jury to disregard them. Id. Argument of prosecuting attorney in prosecution of negro that reason for social prejudice against negroes was caused by their damnable heinous crimes of murder and rape was not reversible error where the jury were charged to disregard such remarks. Brown v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 548, 95 SW 126. Improper argument not ground for reversal where trial court instructed jury to disregard it. Loyd v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 113, 89 SW 977. Remark of counsel that to fine accused would deter others not error where court specially charged that jury should not consider it. Smith v. State [Tex. Cr. App.] 90 SW 170. Where in prosecution of one for murder of her bastard child the state's attorney in opening statement stated that he expected to prove that she commited a like offense several years before but the court immediately stated that such evidence would not be admitted and no objection was made and the court was not requested to caution the jury to disregard it, it was not ground for reversal. Heuber v. State, 131 Wis. 162, 111 NW 63.

80. Remarks of court tending to discredit a witness held not prejudicial, when they were at once withdrawn and jury were fully-

by the subsequent proof of a predicate.[81] Overruling of motion to compel an election between two counts is harmless where only one is submitted to the jury.[82] Denial of motion for change of venue is cured by subsequent granting of the motion.[83] Error in permitting a view in the absence of the judge is cured by a view in his presence, and an instruction to disregard impressions on the first view.[84] Cautionary instructions have been held to cure the effect of incidents during the trial.[85, 86]

§ 16. *Stay of proceedings after conviction.*[See 8 C. L. 253]—Perfection of an appeal suspends proceedings in the court below[87] from the time of filing a proper bond.[88] Execution of judgment is thereby stayed[89] though this is the rule, in some states, only in capital cases.[90] Stay of sentence pending an investigation of the sanity of accused is proper.[91] Where person indicted was granted a writ of habeas corpus, but upon hearing was remanded to custody and then obtained a writ of error to the supreme court of the United States on the ground that the order remanding him contravened his rights under the Federal constitution, it was held that the writ of error did not stay proceedings in the court having jurisdiction.[92] In Idaho an appeal from a judgment of conviction stays execution of judgment in all capital cases.[93] In other cases, a certificate of probable cause for the appeal is necessary to stay execution.[94] "Probable cause" means only that appellant must have specified or assigned grounds of appeal which present a debatable question.[95] An

cautioned to disregard them and to consider the testimony of the witness as though they had not been made. Long v. State, 127 Ga. 350, 56 SE 444.

81. Error in permitting a witness to state a conclusion or opinion is cured by subsequent statements which would have constituted sufficient foundation therefor. State v. Renneker [Kan.] 90 P 245. Immaterial that evidence is incompetent when offered if it is subsequently made competent. Hanners v. State, 147 Ala. 27, 41 S 973. Where after introduction of copy of letter written at defendant's suggestion he identified it, he could not object to its introduction. State v. Barrington, 198 Mo. 23, 95 SW 235. Any error in allowing introduction of impeaching evidence before witness testifies is cured by appearance of witness. McCann v. People, 226 Ill. 562, 80 NE 1061.

82. Roberson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 164, 101 SW 800.

83. Denying motion for second change of venue held harmless under St. 1898, § 2829, where it was afterwards granted. Murphy v. State, 131 Wis. 420, 111 NW 511.

84. People v. White [Cal. App.] 90 P 471.

85, 86. Where a witness in a bastardy proceeding admitted that he had had unlawful relations with prosecutrix and had been convicted of drunkenness, it was not reversible error for the court to order his arrest and his naturalization papers set aside, the jury being charged to disregard the incident. Johnson v. State [Wis.] 113 NW 674.

87. An amended motion for new trial filed after an appeal has been perfected cannot be considered, since under Code Cr. Proc. 1895, art. 884, an appeal suspends all proceedings in the court below. Saufley v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 590, 90 SW 640.

88. Under Cr. Code Prac. §§ 348, 349, relative to appeals in misdemeanor cases, a judgment is suspended on execution of the required bond and not only from time of filing transcript in appellate court. Hazelrigg v. Douglass, 31 Ky. L. R. 1121, 104 SW 755.

89. Under Const. § 227, providing for indictment of judges for malfeasance, and Ky. St. 1903, § 3748, providing for appeal and vacation of office, held, on conviction for malfeasance and imposition of fine and imprisonment and declaring office vacant, where appeal is taken and bond given, the operation of the judgment both as to fine and vacation of office was suspended. Hazelrigg v. Douglass, 31 Ky. L. R. 1121, 104 SW 755. Under Rev. St. 1899, § 2698, providing that appeal shall stay execution only when an order is made, and § 2702, providing that a judge authorized to grant an appeal may on habeas corpus admit to bail, held where one convicted of misdemeanor was granted an appeal, but no stay was ordered and he was not brought before the court on habeas corpus, he having executed a bond to the approval of the trial court, it had not authority to order his commitment pending appeal. Ex parte McAnally, 199 Mo. 512, 97 SW 921. In West Virginia a person convicted of a misdemeanor is entitled, as a matter of right, to a suspension of the execution of the judgment pending his application for a writ or error. The "may" used in Code 1899, c. 160, § 2, is mandatory. Ex parte Doyle [W. Va.] 57 SE 824.

90. A sentence of 50 years in the penitentiary for rape is not a "capital case" within Rev. St. 1899, § 2698; hence the sentence is not suspended by an order granting an appeal. In re Vickers, 201 Mo. 643, 100 SW 585.

91. Upon hearing of application under Cr. Code, § 551, the judge may stay sentence until investigation of question of sanity be had. The necessity for such stay resting in the discretion of the court. In re Barker [Neb.] 113 NW 197. The sentence is not vacated, but is merely suspended by such stay. Id.

92. Ruef v. Superior Ct. of City and County of San Francisco, 150 Cal. 657, 89 P 604.

93, 94. In re Neil, 12 Idaho, 749, 87 P 881.

95. It should appear that the appeal is not frivolous and that the questions presented

application to a judge of the supreme court for such certificate will lie only after application to the judge who tried the cause, or upon an explanation why such application was not made.[96] Due notice must be given the office of the attorney for state.[97] A defendant who has appealed in good faith and not as a pretext for delay is entitled to a certificate of probable cause and a stay of proceedings.[98] But the right to admission to bail does not necessarily follow the right to a certificate of reasonable cause.[99]

§ 17. *Appeal and review. A. Right of review.*[See 8 C. L. 253]—The right to appeal is purely statutory,[1] but where guaranteed by the constitution [2] it is absolute and is not dependent upon guilt or innocence,[3] and an appellate court will be slow to infer a waiver of the right.[4] Such right cannot be taken away by giving retroactive effect to a statute.[5] A defendant who has paid a fine imposed by a police court, with the alternative of imprisonment, cannot after paying such fine prosecute a writ of error to review the judgment, unless the fine was paid under protest and under duress.[6] As a general rule the state has no right of appeal.[7] In North Carolina appeal lies by the state from judgment for defendant on motion to quash.[8] In South Carolina it is held that the state may appeal from a decision of the general sessions setting aside a conviction by a city court on the ground that a city ordinance is unconstitutional,[9] and in some states appeal lies by municipalities from municipal courts.[10]

(§ 17) *B. The remedy for obtaining review.*[See 8 C. L. 254]—Certiorari cannot be used as substitute for appeal except where the right of appeal has been unavoidably lost through no fault of petitioner.[11] Certiorari is the proper remedy to review a nunc pro tunc order to correct a judgment for imprisonment and costs by inserting

are open to a reasonable difference of opinion. In re Neil, 12 Idaho, 749, 87 P 881.

96, 97, 98, 99. In re Neil, 12 Idaho, 749, 87 P 881.

1. Miller v. Com. [Ky.] 105 SW 899. Appellate courts are restricted in exercising revisory power by the conditions and limitations imposed by the legislature. Id. No appeal lies from judgment of juvenile court committing girl to industrial school. Dinson v. Drosta, 39 Ind. App. 432, 80 NE 32. An indictment being a record of a judicial body and no method having been provided for reviewing it, it cannot be set aside on the ground that there was no evidence offered before the grand jury to show an offense. Brobeck v. San Francisco Super. Ct. [Cal.] 92 P 646.

2. Const. art. 5, § 19, provides for appeals to the county court from all criminal cases tried in a justice court. Held, accused is entitled to an appeal though he has pleaded guilty; habeas corpus is not his remedy. Ex parte De Loche [Tex. Cr. App.] 19 Tex. Ct. Rep. 39, 100 SW 923.

3. In re Neil, 12 Idaho, 749, 87 P 881.

4. In view of Code § 5462, requiring a review on the merits, the supreme court will be slow to infer a waiver of the right of appeal in the absence of an express consent to a waiver thereof, though the right is statutory. State v. Conroy, 133 Iowa, 195, 110 NW 437. Waiver of objections to testimony and rulings on trial, made when sentence was pronounced, held not a waiver of right of appeal. Id.

5. Under the organic act of the Territory of New Mexico giving the right of appeal or writ of error to the supreme court, such right cannot he taken away by the legislature and where an appeal was perfected before the repeal of a statute prescribing procedure, such repeal did not deprive the supreme court of jurisdiction. Sena v. U. S. [C. C. A.] 147 F 485.

6. White v. Tifton, 1 Ga. App. 569, 57 SE 1038. Legal imprisonment, actual or threatened, not used for an illegal purpose, is not duress, though in the given case it may be inflicted or threatened under such circumstances as to be shocking to the instincts of humanity. Id. Law in relation to supersedeas in cases of conviction for violation of ordinances held insufficient to prevent gross injustice in many cases. Id.

7. Prescott v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 881, 105 SW 192. No appeal by the state lies on the action of the court in instructing a verdict for defendant because the evidence did not support the charge. State v. Ireland, 89 Miss. 763, 42 S 797.

Under the statutes of Kentucky, an appeal by the state may lie in a misdemeanor case before final judgment. Commonwealth v. Huber, 31 Ky. L. R. 845, 104 SW 282.

8. Where plea of amnesty is sustained, it may be treated as a motion to quash so as to sustain an appeal by the state under Revisal 1905, § 3276, allowing right of appeal where judgment is given for defendant on such motion, etc. State v. Bowman [N. C.] 59 SE 74.

9. State v. Johnson, 76 S. C. 39, 56 SE 544.

10. Under Laws 1885, p. 287, creating police courts in cities of less than 25,000, and § 15 providing for appeals to the county court from "all judgments," an appeal will lie on behalf of the city. Hummel v. Ouray, 38 Colo. 322, 88 P 582.

11. Ex parte Phillips, 80 Ark. 200, 96 SW 742.

a fine where the order is made six years after entry of the judgment.[12] The fact that a motion for a new trial was made in a city court which has no power to grant new trials will not cut off the right of review by certiorari, the proper remedy,[13] if the motion for new trial is dismissed and application for writ of certiorari seasonably made.[14] In Georgia the filing of an affidavit that accused has not had a fair trial, and has been wrongfully and illegally convicted, is a condition precedent to the sanction of a petition for certiorari from a judgment of conviction in a county court.[15] A failure to comply with this statutory requirement is not cured by the sanctioning of the petition or the answer of the county judge.[16] Appeals must be prosecuted within the time prescribed by statute in order to give the court jurisdiction.[17] The time within which a writ of error may be sued out begins to run from date judgment was entered,[18] and where delay in suing out the writ is act of accused, it could not be cured by nunc pro tunc order.[19] In Wyoming no judicial authority is necessary to institute proceedings in error.[20] A writ of error lies to correct error apparent on the record though no motion in arrest was filed in the trial court.[21] A writ of prohibition will not lie in a nonappealable prosecution until sentence is imposed.[22] The remedy to test the validity of the complaint or information, under which defendant has been convicted is by appeal and not by habeas corpus.[23]

(§ 17) *C. Adjudications which may be reviewed.* See 8 C. L. 254—Appeal or error ordinarily lies only from a final judgment[24] and does not lie from a verdict before judgment entered thereon,[25] nor from a minute entry which is not equivalent to a judgment,[26] and is premature if taken before judgment entered or sentence pro-

12. Smith v. Mahaska County Dist. Ct., 132 Iowa, 603, 109 NW 1085.

13. Certiorari only way to review judgment of city court of Sylvester. Crosson v. State, 124 Ga. 651, 52 SE 880.

14. Application must be within 30 days after judgment. Crosson v. State, 124 Ga. 651, 52 SE 880.

15. Pen. Code 1895, § 765. Hogan v. State, 127 Ga. 349, 56 SE 409. Where such affidavit is not filed, the case will be dismissed. Id.

16. Hogan v. State, 127 Ga. 349, 56 SE 409.

17. Petition of Channels, 30 Ky. L. R. 1248, 100 SW 214. Where no diligence has been shown and statutory steps relative to appeal are not taken in time, it will be dismissed. People v. Cimini, 53 Misc. 525, 105 NYS 476. The six months granted by 26 Stat. 829, within which a writ of error may be taken, cannot be extended. Old Nick Williams Co. v. U. S. [C. C. A.] 152 F 925. An appeal not returned within the time prescribed by law will be dismissed. State v. Austin, 118 La. 724, 43 S 387. Where affidavit on appeal was not delivered to the magistrate within five days as required by Cr. Code § 755, the appeal must be dismissed. People v. Versage, 53 Misc. 528, 105 NYS 299. Under express provisions of Rev. St. 1899, § 837, writ of error **may be brought within one year** after final judgment. State v. Kelley, 206 Mo. 685, 105 SW 606.

Adjournment of court cannot deprive defendant of the three days allowed him for appealing. State v. Vicknair, 118 La. 963, 43 S 635.

18, 19. Old Nick Williams Co. v. U. S. [C. C. A.] 152 F 925.

20. Under Laws 1901, p. 65, providing that after final judgment, proceedings to vacate, modify, or annul, may be begun in the supreme court by petition in error, no judicial authority is necessary to institute proceedings in error. Richardson v. State [Wyo.] 89 P 1027.

21. State v. Kelley, 206 Mo. 685, 105 SW 606.

22. Sought to prevent passing of sentence on the ground that the statute under which he was convicted was void. State v. Abrams, 119 La. 981, 44 S 807.

23. Ex parte Williford [Tex. Cr. App.] 19 Tex. Ct. Rep. 40, 100 SW 919.

24. State v. Carter [La.] 44 S 997. Writ of error lies only from final judgment which in a criminal case is the sentence of the court. State v. Kelley, 206 Mo. 685, 105 SW 606. Cr. Code Prac. § 281, expressly provides that **overruling of motion to quash indictment is not reviewable** on appeal. Fletcher v. Com., 29 Ky. L. R. 955, 96 SW 855. Under Pen. Code, §§ 1237, 1173 **order denying postponement is reviewable** on appeal from the judgment but is not itself appealable. People v. Buck [Cal.] 91 P 529. Under the statutes of Kentucky, an **appeal lies from a verdict of contempt** on the ground that punishment is excessive but not to retry question of guilt. French v. Com., 30 Ky. L. R. 98, 97 SW 427.

In Alabama a judgment of conviction will support an appeal though a fine of but one cent is imposed. Morrison v. State [Ala.] 44 S 43.

25. Jury returned verdict and fixed punishment but no judgment thereon was entered. Appeal dismissed. Sharp v. State, 117 Tenn. 537, 97 SW 812.

26. Appeal will not lie where the only order or judgment made is a minute entry. "The motion filed herein by the county attorney to dismiss the action sustained and granted." State v. Barnard [Idaho] 90 P 1.

nounced.[27] No appeal lies from a judgment which has been satisfied.[28] In some states the right of appeal is determined by the amount of the fine imposed.[29] Appeal from orders made before [30] or after judgment [31] is sometimes authorized, especially if such orders affect a substantial right of the accused.[32]

(§ 17) *D. Courts of review and their jurisdiction.*[See 8 C. L. 255]—Appellate jurisdiction is generally prescribed by statute,[33] and cannot be conferred by con-

27. An appeal is prematurely taken when taken before sentence pronounced or judgment entered, though the record shows that motions for new trial and in arrest were filed and heard. State v. George [Mo.] 105 SW 598.

28. Defendant was convicted and fined and judge refused to fix a bond on appeal or to grant a certificate of probable cause, whereupon, to avoid imprisonment, defendant paid the amount of the fine as "a deposit." Held, the law made no provision for such deposit, and the payment of the fine was a satisfaction of the judgment, and no appeal would lie. Washington v. Cleland [Or.] 88 P 305.

29. No appeal lies from judgment of county court on appeal from a justice where fine imposed is less than $100. Appling v. State [Tex. Cr. App.] 95 SW 531. Conviction for carrying a pistol is not appealable unless fine exceed $100. Ritz v. State [Tex. Cr. App.] 95 SW 518.

30. Denial of a motion to dismiss an indictment on the ground that there was not sufficient evidence before the grand jury or that illegal evidence was introduced before them (Code Cr. Proc. §§ 256, 258) may be reviewed on appeal from a conviction in a capital case. People v. Sexton, 187 N. Y. 495, 80 NE 396.

31. Appeal lies from an **order denying defendant a transcript** of the evidence at the expense of the county. State v. Steidley, 133 Iowa, 31, 110 NW 147.

32. An order correcting the minutes respecting the plea entered by accused is an appealable order, under Pen. Code, § 1237, subd. 3, that any order after judgment affecting substantial rights of accused is appealable. People v. O'Brien [Cal. App.] 89 P 438. Appeal lies from an order denying application for a certificate that the charge should be prosecuted by indictment. People v. Butts, 105 NYS 677.

33. Federal courts: Under the Federal statutes, the circuit court of appeals has jurisdiction on writ of error to review a conviction for larceny in violation of territorial laws which has been affirmed by the supreme court of the territory. Miller v. Oklahoma Ter. [C. C. A.] 149 F 330. The circuit court of appeals of the eighth judicial district has jurisdiction to review judgments of the supreme court of the territory of New Mexico in cases of conviction, not capital. Sena v. U. S. [C. C. A.] 147 F 485.

Alabama: While the statutes conferring on the county court of Lawrence county jurisdiction of misdemeanors do not authorize the supreme court to review conclusions from the evidence in trials by the court without a jury, where there is no conflict, yet errors of law will be reviewed. Bradford v. State, 147 Ala. 118, 41 S 1024.

In New York: Criminal proceedings commenced before a court of special sessions are governed by Code Cr. Proc. pt. 5, tit. 3, and under § 771 limiting right of appeal to court of appeals from the judgment of the appellate division of the supreme court to cases where the original appeal was from a judgment of commitment of a child, an appeal will not lie from judgment of the appellate division affirming conviction of petit larceny in a case begun in the court of special sessions. People v. Johnston [N. Y.] 79 NE 1018. Code Cr. Prac. §§ 133-699, relate to appeals in criminal actions by indictment and have no bearing on actions prosecuted without indictment before a court of special sessions. Id.

In North Carolina: Supreme court cannot entertain motion for new trial for newly-discovered evidence. State v. Turner, 143 N. C. 641, 57 SE 158.

Missouri: Where prosecution for peddling without a license involved construction of Federal constitution and revenue laws of state, the supreme court and not court of appeals had jurisdiction of an appeal. State v. Looney [Mo. App.] 96 SW 316.

In Wyoming the supreme court has no jurisdiction of a motion for new trial as an original proceeding because defendant has been prevented by accidental loss of the testimony from obtaining a bill of exceptions, but has jurisdiction of such motion as ancillary to a writ of error to review the judgment. Richardson v. State [Wyo.] 89 P 1027. In such case under the constitution and statutes of Wyoming where a bill of exceptions was necessary to review errors assigned in the motion for new trial, the supreme court has jurisdiction to grant a new trial. Id.

In Texas: Where one was convicted in justice and county court of unlawfully carrying a pistol, he could not appeal to court of criminal appeals from levy of execution on real estate issued out of the county court and based upon such judgment. Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 400, 98 SW 247. The court of criminal appeals of Texas has jurisdiction to grant a motion requiring the transcript and all papers in a case transferred from the branch to which they had been forwarded to the end that it might determine its jurisdiction and whether the judgment should be reformed, notwithstanding motion for rehearing had been overruled and that it was after term. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879.

In Michigan: Supreme court cannot consider on exceptions before sentence a conviction for violation of city ordinance. City of Muskegon v. Hanes, 146 Mich. 385, 13 Det. Leg. N. 795, 109 NW 674. Under city charter of Forsyth, mayor and aldermen have no power in reviewing judgment of mayor in prosecution for violation of ordinance to increase or diminish the sentence imposed by the mayor. Bell v. Forsyth, 126 Ga. 443, 55 SE 230.

sent.[34] On appeal from a court of inferior jurisdiction where the case is tried de novo, the jurisdiction of the appellate court depends on the jurisdiction of the trial court.[35] In Louisiana the appellate jurisdiction of the supreme court is prescribed by statute,[36] and it cannot review a cause not within the statute upon the theory that it has general supervision over inferior courts.[37] The legislature may confer on the district court appellate jurisdiction of a cause in which there would otherwise be no appeal.[38] In Georgia writs of error in capital cases are returnable to the supreme court.[39] The court of appeals is without jurisdiction to consider grounds of a motion to dismiss a bill of exceptions predicated upon alleged errors of the trial judge antecedent to its final decision upon a motion for new trial.[40] The court of appeals is required to certify to the supreme court questions involving construction of the constitution.[41]

(§ 17) *E. Procedure to bring up the cause.*[See 8 C. L. 255]—Procedure to obtain an appeal or review are generally initiated by giving notice and bond for costs.[42] The giving of notice is jurisdictional in some states,[43] but in others failure to give it

34. A United States district court, though having original jurisdiction as well as appellate jurisdiction, cannot render a valid judgment on appeal where the commissioner below had no jurisdiction of the subject-matter. This is so though defendant took the appeal and submitted to trial. Rider v. U. S. [C. C. A.] 149 F 164.

35. Under Code Civ. Proc. § 1761, and Pen. Code § 2717, a case appealed from justice to district court is tried de novo and its jurisdiction depends on the fact of jurisdiction of the justice. State v. O'Brien, 35 Mont. 482, 90 P 514.

36. It has no jurisdiction of an appeal from a fine of less than $300 (State v. Welch, 119 La. 362, 44 S 127), but has jurisdiction of an appeal from a fine exceeding $300 (State v. Dueffechaux, 118 La. 459, 43 S 50), and has power to set aside a sentence which exceeds the amount allowed by statute (State v. Smith, 118 La. 248, 42 S 791). Supreme court has no jurisdiction of an appeal where the maximum penalty is a fine of $100 and imprisonment not at hard labor for six months. State v. Babington, 119 La. 446, 44 S 259. Where a fine has been imposed under a municipal ordinance, the supreme court has jurisdiction only to examine and determine the alleged illegality and unconstitutionality of the ordinance (Town of Ruston v. Fountain, 118 La. 53, 42 S 644); all other questions are reviewable by appeal to the district court (Id.). In a criminal prosecution for extortion in the office of justice of the peace under Act 57, p. 59, of 1888, defendant was fined $25 and sentenced to imprisonment for half an hour but not at hard labor, or to imprisonment for 30 days, if fine was not paid. Held supreme court had no jurisdiction of an appeal, though, under the statute, the conviction ipso facto, vacated the office. State v Mayer, 117 La. 945, 42 S 435.

37. Where the supreme court is not given jurisdiction of a criminal cause by express statute, it cannot review it upon appeal upon the theory that it has a general power of control and supervision over inferior courts; this argument would confer jurisdiction in all cases, civil and criminal. State v. Kramer, 117 La. 944, 42 S 435.

38. Conviction of libel in city court may be appealed to circuit court. State v. Melies, 117 La. 656, 42 S 199.

39. When a person on trial for murder is found guilty but with a recommendation for life imprisonment, he is convicted of a capital offense (Caesar v. State, 127 Ga. 710, 57 SE 66), hence, in Georgia, in such a case, a writ of error sued out to review a judgment overruling a motion for a new trial is properly returnable to the supreme court (Id.).

40. Bryan v. State [Ga. App.] 59 SE 185. The adjudication of alleged errors adverse to the state would be in effect the consideration of a cross bill of exceptions which the state is not permitted to file. Id. Alleged errors adverse to the state cannot be reviewed by motion to dismiss as such motion must be addressed to some defect in form or procedure inherent in the bill of exceptions itself and which relates back no further than the presentation of a bill of exceptions. Id.

41. No question as to the construction of the constitution is necessary to determination of this case. Hammock v. State, 1 Ga. App. 126, 58 SE 66. No question of constitutional construction involved, requiring certification to the supreme court. Burnam v. State [Ga. App.] 58 SE 683.

42. Under Code Cr. Proc. 1895, art. 890, in order to perfect appeal from judgment of justice refusing a new trial, appellant need only give notice of appeal and file bond within 10 days. Ivey v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 475, 87 SW 343. Under B. & Ct. Comp. § 2292, an appeal from a justice is taken in the same manner as in a civil case except that the notice must be served on the district attorney. State v. Connolly [Or.] 90 P 902. Under B. & C. Comp. §§ 2240, 2198, where appeal is taken by giving oral notice in open court, the giving of such notice can only be proved by certified entry of justice's record showing the same. Id. Rule to require the justice to complete the transcript so as to show notice of appeal properly denied, where there was no showing that such notice was in fact given. Id. Notice of appeal from justice's judgment held sufficient under Rev. St. 1887, § 8321, where it gave title of cause, court, date of judgment entered, etc. State v. Barnard [Idaho] 90 P 1.

43. Where record contains recognizance but no notice of appeal, appeal will be dismissed. Abrams v. State [Tex. Cr. App.] 100 SW 1160. Appeal dismissed where record

is not ground for dismissal.[44] In Missouri an affidavit for an appeal is not required as a condition precedent to an appeal by defendant from a conviction.[45] Where an affidavit is required, it cannot be made by the attorney for the appellant.[46] The transcript must show that appeal was taken,[47] and must be filed in the appellate court within the time prescribed.[48] If no time is prescribed, a reasonable time will be allowed.[49] If an accused cannot pay for a transcript, it must be ordered at the expense of the county,[50] but that the defendant has pledged all his property for attorney's fees will not authorize a transcript at the expense of the county where a reasonable fee will leave sufficient to pay for a transcript.[51] All facts necessary to a conviction must appear.[52] The record must be authenticated by the certificate of the trial judge.[53] The papers constituting the record proper must be certified up by the clerk as the record.[54] The record cannot be contradicted by the bill of exceptions.[55]

Criminal cases are reviewable in the Federal circuit court of appeals by writ of error and not by appeal.[56] Where a constitutional question is involved, the defendant must elect whether he will take the case to the supreme court on such question or take the entire case to the circuit court of appeals.[57]

contained no notice of appeal as required by Code Cr. Proc. 1895, art. 883. Love v. State [Tex. Cr. App.] 90 SW 169. Under Code Cr. Proc. art. 883, providing that an appeal is taken by giving notice thereof in open court and having the same entered of record, an appeal must be dismissed where no notice was given. Dennis v. State [Tex. Cr. App.] 99 SW 1016. Acts 26th Leg. p. 233, dispensing with notice in appeals from justice court, does not apply to appeals from county courts. Id.

44. Failure to give notice of intention to appeal as required by Rev. St. 1887, § 8321, is not ground for dismissal. State v. Barnard [Idaho] 90 P 1.

45. Rev. St. 1899, § 2696. State v. Crittenden, 191 Mo. 17, 89 SW 952. In Missouri, defendant in a criminal case is entitled to an appeal without filing an affidavit that the appeal is not taken for delay. Construing appeal statutes. State v. Smith, 190 Mo. 706, 90 SW 440; State v. Speritus, 191 Mo. 24, 90 SW 459.

46. Under Rev. St. 1899, art. 12, § 2782, providing for the filing of an affidavit by person convicted of a misdemeanor before a justice that he is aggrieved, in order to appeal to the circuit court, an attorney may not make such affidavit for the person convicted. State v. Meed, 124 Mo. App. 413, 101 SW 714.

47. Where the transcript on appeal fails to show that any appeal was taken, the cause will be stricken from the docket. State v. McGovern [Iowa] 110 NW 275.

48. Transcript on appeal from conviction of misdemeanor must be filed within 60 days after rendition of judgment or appeal will be dismissed. Stamper v. Com., 30 Ky. L. R. 1296, 100 SW 1184. Appeal dismissed where party convicted of misdemeanor neglected to file transcript for 3 months and 6 days after overruling of motion for new trial. Cr. Code Prac. § 348, requires record to be filed in court of appeals within 60 days. Farris v. Com., 31 Ky. L. R. 118, 101 SW 930.

49. Since statute does not fix time of filing transcript on appeal by a city from a police to the county court, a reasonable time will be allowed. Six days held reasonable time. Hummel v. Ouray, 38 Colo. 322, 88 P 582.

50. Under Code, § 254, and Code 1882, § 3777, if accused shows inability to pay for a transcript, the judge must order it at the expense of the county. State v. Goodsell [Iowa] 113 NW 826.

51. State v. Steidley, 133 Iowa, 31, 110 NW 147.

52. The fact of arraignment and pleading or refusing to plead must appear from the record where such facts are necessary to conviction. State v. Walton [Or.] 91 P 490.

53. Otherwise it cannot be considered. State v. Clark [N. J. Err. & App.] 68 A 114. The formal return of the record upon a writ of error will not authenticate the record or the proceedings had upon the trial. Id. The authentication of the evidence in a bill of exceptions is the signature of the judge. The certificate of the official stenographer is merely for the information of the parties and the judge in settling the bill. Richardson v. State [Wyo.] 89 P 1027. Facts asserted in motion for new trial are not substantiative but must be authenticated otherwise in the transcript of record. Oliver v. State [Fla.] 44 S 712. Defendant objected to part of district attorney's argument. Bill of exceptions contained no certificate of the judge that there was no evidence to support the argument but only an approval of the objection as the one urged by defendant. Held insufficient. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403.

54. Cannot be brought up in bill of exceptions. Pen. Code, § 2281. State v. Farriss, 34 Mont. 424, 87 P 177.

55. Recital in record that defendant was represented by attorney when arraigned controls contrary statement in bill of exceptions. Strickland v. State [Ala.] 44 S 90.

56. Sena v. U. S. [C. C. A.] 147 F 485.

57. After a judgment of conviction in a Federal court in a case which involves a constitutional question, the defendant must elect whether he will take the case direct to the supreme court on such question or take the whole case to the circuit court of appeals, and where he elects the former a

Notice of sanction of the petition for certiorari must be served within the time prescribed.[58] An answer to certiorari must verify the fact that there has been a conviction or final judgment.[59]

A recognizance on appeal[60] is not required in some states,[61] but in Texas such bond is required and it must state the punishment assessed.[62] Where such bond or recognizance is found to be defective, appellant may amend the same and file a new bond on such terms as the appellate court may prescribe.[63] The rules governing the practice upon an application to amend such bond have been laid down by the court of criminal appeals.[64] Where after dismissal of the appeal, a proper amended bond is filed, the cause will be reinstated.[65] Where each of two or more persons jointly indicted appeals, each must give a separate recognizance.[66] In Mississippi an affidavit of inability to furnish bond or deposit money to cover costs will not entitle an accused who is a fugitive to an appeal without surrendering or giving bail for appearance.[67] An appeal bond must not be more onerous than the statute requires.[68]

(§ 17) *F. Perpetuation of proceedings in the "record."* See 8 C. L. 256—The record must show the order granting the appeal,[69] and all other statutory requisites.[70]

subsequent writ of error to the court of appeals will be dismissed. Van Gesner v. U. S. [C. C. A.] 153 F 46.

58. Failure to serve the solicitor general with notice of the sanction of a petition for certiorari within the time prescribed by law is ground for dismissal, except in case of unavoidable accident. Where several months elapse between date of death of counsel for plaintiff in certiorari, and the expiration of such time, such death will not be considered an unavoidable accident. Johnson v. State [Ga. App.] 58 SE 415.

59. If the answer to a certiorari does not verify the fact that there has been a conviction or final judgment, neither the superior court nor the court of appeals can pass upon errors assigned in the petition. Rodgers v. State [Ga. App.] 58 SE 416.

60. See § 8 C. L. 256; 5 C. L. 1867. One convicted in a mayor's court cannot appeal to a circuit court until an appeal bond has been executed in accordance with Code 1892, § 86. Polk v. Seminary, 89 Miss. 293, 42 S 129. Where accused claims a bond was executed, but none is sent up, parol proof of the bond will not be received until he has tendered a new bond and disclosed by affidavit the names of his sureties in the old. Id.

61. A municipal corporation in Colorado having the right of appeal in a prosecution for violating a city ordinance under Laws 1885, p. 287, may do so without giving bond, under Mill's Ann. St. § 4444. Hummel v. Ouray, 38 Colo. 322, 88 P 582. The act of 1885 relating to bond has reference to defendant only. Id.

62. Appeal dismissed where recognizance did not state amount of punishment assessed as required by Code Cr. Prac. 1895, art. 887. Burton v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 406, 90 SW 498; Chancey v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 26, 90 SW 632.

63. Acts 29th Leg. p. 224, c. 115. Form of amended bond laid down. Burton v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 406, 90 SW 498.

64. For rules, see Burton v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 406, 90 SW 498. Same rules prescribed to govern filing of bond in justice or mayor's court for appeal to county or criminal district court. Moore v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 408, 90 SW 499. Upon giving of a new bond approved by the justice, in the terms provided by law, the criminal district court, if in session, or the judge of said court, if not in session, shall order said bond filed among the papers and the case shall be proceeded with as if there had been no defect. Id.

65. Chancey v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 26, 90 SW 632.

66. Appeal dismissed where recognizance was joint. Robertson v. State [Tex. Cr. App.] 100 SW 952.

67. Defendant was convicted in mayor's court and appealed to circuit court, and then absconded, whereupon her appeal was dismissed, and her appearance bond forfeited. She then appealed to supreme court, making affidavit of inability, because of poverty, to give bond or furnish bail (Ann. Code 1892, § 61). It appeared she was then in another state and had not surrendered to sheriff nor furnished bail as required by Ann. Code 1892, § 64. Held appeal should be dismissed. Roberts v. Port Gibson, 89 Miss. 75, 42 S 540.

68. An undertaking on appeal that in case judgment be affirmed or modified defendant will render himself into court in execution of the sentence of imprisonment is void because more onerous than required by Pen. Code, § 1273, because it requires him to render himself in execution of the original sentence. People v. Barrett [Cal. App.] 92 P 647. The fact that original sentence is affirmed does not affect sureties' right to question the bond. Id.

69. Judgment will not be reviewed where record does not disclose order granting the appeal. State v. Cook [Mo. App.] 105 SW 658.

70. Appeal dismissed where transcript did not contain notice of appeal, recognizance, or statement that defendant was in jail as required by Code Cr. Proc. 1905, art. 886. Roberts v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1028, 89 SW 828. Pen. Code, §§ 1207, 1246, requires that on appeal from conviction, the clerk must transmit the indictment, copy of

All that is a part of the record proper must appear thereby,[71] but matters not a part thereof must be brought up by bill of exceptions.[72] A writ of error sued out by accused does not become effective until deposited with the clerk of the trial court.[73] Where sued out and filed in time, the time for complying with it may be enlarged by the proper orders.[74]

Form, transmission, and filing.[See 8 C. L. 259]—The transcript should be made up in an orderly and legible manner.[75] Exhibits attached to the record and referred to therein are a part of it,[76] but pencil interlineations, unauthorized and unexplained, are not.[77] The trial judge may not dictate what shall be included in the bill of exceptions.[78] Facts certified by the judge are to be taken as true.[79] A bill of exceptions will be controlled by an explanation by the trial judge.[80]

minutes of plea, minutes of trial, instructions given, modified or refused, and transcript of court's charge. People v. McPherson [Cal. App.] 91 P 1098. Where one convicted desires to obtain a review under Crim. Proc. Act, §§ 136, 137, he must procure the return with his writ of error, of the entire record of the proceedings. State v. Clark [N. J. Err. & App.] 68 A 114.

71. Motions to quash and rulings thereon are a part of the record proper, and when presented only by bill of exceptions cannot be considered. Tipton v. State [Fla.] 43 S 684. The filing of a motion for a new trial must be shown by the record proper; a mere recital of its filing in the bill of exceptions is not enough. State v. Kimmons, 124 Mo. App. 498, 101 SW 683. As the defect urged against the accusation is apparent from the record proper, the motion suggesting diminution of the record, in order to have the affidavit sent up, will not be granted. Rogers v. State, 1 Ga. App. 527, 58 SE 236.

72. Motion to quash indictment forms no part of record proper and must be incorporated in the bill of exceptions. State v. Coleman, 199 Mo. 112, 97 SW 574. An exception to the overruling of a motion for continuance noted in the order overruling it is insufficient; the bill of exceptions must be prepared and signed by the judge. Griffith v. State [Tex. Cr. App.] 89 SW 832.

73, 74. Old Nick Williams Co. v. U. S. [C. C. A.] 152 F 925.

75. Where transcript is inexcusable confusion, costs of clerk in making it may be disallowed. Sharp v. State, 117 Tenn. 537, 97 SW 812. Where transcript has no caption and record does not disclose when case was tried and motion for new trial, case will be dismissed. Burns v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 897.

76. Affidavits relative to motion for new trial referred to therein and attacked are a part of the record. Sasser v. State [Ga.] 59 SE 255. But affidavits not referred to in the motion, nor attached as exhibits, nor filed as part of the motion, cannot be considered, though it appears that they were actually used on the motion. Id. The judge has no authority after the bill of exceptions has been certified to by an order to declare such affidavits a part of the record. Id. Page immediately preceding statement of facts and connected therewith contained filing mark and date, signed by clerk, such page was presumed to be part of the record, and to show proper filing thereof. Collins v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 138, 101 SW 992. Affidavits relating to a ground of a motion for a new trial, which are referred to therein as being attached as exhibits, and which are actually attached, and which are filed with the motion as a part thereof, are a part of the record in the case, and when transmitted under certificate of the clerk will be considered in the appellate court in determination of the case. Glover v. State, 128 Ga. 1, 57 SE 101. Affidavits not so incorporated in the motion itself, but separately filed, cannot be considered by the appellate court, even though it appear from a statement of the judge on each affidavit that it was used on the hearing of the motion below. This applies to affidavits of both sides. Id.

77. Johnson v. State [Ark.] 104 SW 929.

78. The trial judge cannot dictate what shall be included in or omitted from the pleadings of defendant. If defendant embodies in his motion for new trial a synopsis of the evidence, the judge cannot require that such synopsis be omitted from the transcript on appeal. State v. Mehojovich, 118 La. 1013, 43 S 660.

79. Ground alleged in motion for new trial which are not controverted and which are certified by the judge are to be taken as true. Styles v. State [Ga.] 59 SE 249. When a bill of exceptions is signed by the judge, its recital that objection was made, overruled and exception reserved on the trial, is conclusive in the absence of other competent evidence. State v. Griggsby, 117 La. 1046, 42 S 497. A recital in a bill of exceptions in a criminal case that a motion to quash an indictment was heard and overruled must yield to a positive contrary statement in the minutes of the court. Hill v. State, 89 Miss. 23, 42 S 380. Where bill of exceptions states that accused was not present when verdict was returned, a recital on the minutes of the court that he was present will not preclude him from showing the truth. Percer v. State [Tenn.] 103 SW 780.

80. Palmer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 3, 89 SW 836. Bill of exception stated that evidence was objected to as hearsay and a mere conclusion of the witness. Court's explanation showed that only objection was general and that defendant had not been connected with transaction. Held objection that evidence was hearsay, and not res gestae, was not raised. Id. Where error is assigned in refusing to give instructions but is conradicted by a statement per curium, the latter must be accepted in the appellate court. State v. Roy, 118 La. 485, 43 S 59.

Making, settling, and approval.[See 8 C. L. 257]—The bill of exceptions must be made up and prepared in the manner prescribed by law or rule,[81] and served on the prosecuting attorney.[82] It is the duty of an appellant to see that his transcript is properly prepared.[83] In Texas the file mark of the clerk must be indorsed on the statement of facts.[84] After a statement of facts has been agreed upon and approved, the clerk may not insert anything into it.[85]

81. Under Code Cr. Proc., §§ 756, 763, requiring that record of entire proceeding be brought up, an appeal will be dismissed where the record purports to be deficient. People v. Soloman, 106 NYS 1110. Bill of exceptions not having been prepared in the manner prescribed by rule of court held instructions were not reviewable. Albritton v. State [Fla.] 44 S 745. Assignments of error based on insufficiency of evidence not presented as required by rule of court not considered. Id. Where record is made up in disregard of rules of the supreme court, questions raised by appellate will not be considered. Johnson v. State [Ark.] 104 SW 929. In making up a bill of exceptions, either the method prescribed by special rule 6 (37 S xiv, or special rules 1, 2, 3 (37 S x, must be followed. The modes of procedure cannot be blended. Clinton v. State [Fla.] 43 S 312; Albritton v. State [Fla.] 44 S 745. Record on writ of error in criminal case including bill of exceptions should be prepared according to rules governing civil cases, as provided in Rev. St. 1899, § 5377. Koppala v. State [Wyo.] 89 P 576. Rev. St. § 927, providing that an assignment of error shall be annexed to and returned with writ of error does not necessitate the settlement of a bill of exceptions prior to filing of the writ and assignment of errors. Old Nick Williams Co. v. U. S. [C. C. A.] 152 F 925. Statement of facts should not be signed where it contains, instead of a copy of the minutes of the court, the statement "here copy the record or records." Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 114, 101 SW 208. Bills of exception should be presented at the trial, or the point should be expressly reserved and noted by the judge and after trial embodied in a bill of exception without unnecessary delay or within the time allowed by the rules of court. The mere date of filing of a bill by the clerk does not per se show that the bill was not seasonably presented. State v. Griggsby, 117 La. 1046, 42 S 497. Assignment of errors should be in writing, but in case of error apparent on the face of the record, an assignment made orally or in brief may be considered. Id. Where original indictment sent up with the record was not verified by the clerk, it could not be determined whether a variance existed between the allegations thereof and the evidence. Mendiaz v. State [Tex. Cr. App.] 19 Tex. Ct. Rsp. 204, 102 SW 1132. Refusal of change of venue cannot be reviewed where no compurgators signed the motion, and it was not in accordance with the statute and no bill of exception was taken. Elsworth v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 903. Rev. St. 1895, arts. 1379-1382, as to preparing statement of facts, not repealed by acts 29th Leg. p. 219, authorizing stenographic reports of the evidence. Baker v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 70, 97 SW 81. Duty of clerk under Act. No. 113, p. 162, 1896, is confined to noting the facts to serve as a basis for bills of exception, and his notation of objections, rulings, and exceptions, are without official authority. Stats v. Griggsby, 117 La. 1046, 42 S 497. A bill of exceptions will not be considered where it does not affirmatively show that the required two days' notice was given to the county attorney of the presentation of the bill to the court or clerk for settlement. Pen. Code, § 2172. State v. Lee, 34 Mont. 584, 87 P 977. Where court and counsel agreed that exceptions to refusal to give requested charges should be copied into the record by the stenographer, defendant was entitled to have an exception noted after each requested charge, though omitted by the stenographer. People v. Browne, 118 App. Div. 38, 103 NYS 15. Purported stenographic statement of facts not signed by stenographer, nor approved by court, nor filed in trial court, cannot be considered. Nalley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 821, 100 SW 385. Instructions may be reviewed when presented in the manner prescribed by Rev. St. 1892, §§ 1089-1091, or Gen. St. 1906 §§ 1497-1499, but they should not be presented in both ways. West v. State [Fla.] 43 S 445. Proceedings by one convicted in Alaska before a justice of the peace for perfection of an appeal held sufficient under Code Cr. Proc. Alaska, §§ 445, 449, to require the district court to try the case de novo. Cartier v. U. S. [C. C. A.] 148 F 804. Under Code Cr. Proc. 1895, arts, 882, 883, notice of appeal and recognizance must be entered on minutes during term at which conviction is had. Harkrider v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 832, 90 SW 652. Where defendant's counsel on motion for leave to appeal improperly charges that the magistrate was unfair and prejudicial in his conduct, his application will be returned for a proper statement of the facts claimed to show prejudice. People v. Harris, 55 Misc. 642, 106 NYS 1035. Though appeal in misdemeanor cases is allowed only from final judgment, yet it is proper to make a bill of exceptions to a proceeding on a trial which is set aside so that on appeal from final judgment error claimed to have been committed on the prior trial could be examined into and corrected, if permissible. Commonwealth v. Huber, 31 Ky. L. R. 845, 104 SW 282.

82. Where solicitor of city court is by law designated and required to represent the state, in the supreme court in all writs of error from said court, and the copy bill of exceptions is not served on such solicitor (unless service be acknowledged and copy waived), the writ of error will be dismissed. Johnson v. State, 1 Ga. App. 505, 57 SE 987. It should be submitted to the district attorney before it is signed. State v. Johnson, 119 La. 130, 43 S 981.

83. Clinton v. State [Fla.] 43 S 312.

84. Statement of facts approved by the

The bill of exceptions or like memorial must be approved by the judge [86] in such manner as to verify the contents [87] during the term at which the case was tried,[88] and within the time prescribed by statute or rule,[89] or an extension thereof

trial court but not bearing file mark of the clerk of the court where the case was tried will not be considered. Mayer v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 962, 99 SW 547.

85. Allen v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 450, 98 SW 869.

86. Mere technical defects in the record will be disregarded, but an unsigned record never settled as a case made cannot be considered. Walcher v. Ter., 18 Okl. 528, 90 P 887. Record of former trial copied into transcript, not authenticated or identified in any way, cannot be considered. State v. Lee, 34 Mont. 584, 87 P 977. Document purporting to be stenographic report of testimony not approved by judge nor signed by stenographer will not be considered. Roberson v. State [Tex. Cr. App.] 99 SW 1003. Stenographic report of the evidence not approved by trial court though bearing file mark of the clerk cannot be considered. Landrum v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 726, 99 SW 994. Statement of facts neither signed nor approved by the judge, nor bearing file mark, will not be considered. Benton v. State [Tex. Cr. App.] 105 SW 786. Sufficiency of evidence will not be reviewed unless the judge certifies that the bill of exceptions contains all the evidence. Stephens v. State [Fla.] 44 S 710. Where bills of exception were not signed by the judge at the term at which rulings were excepted to nor within 30 days thereafter, nor at a time agreed by consent entered of record, a writ of error will be dismissed. Midgets v. Com. [Va.] 59 SE 606. Assignments of error made in amendments to motion for new trial not being approved by the trial court cannot be considered. Harris v. State [Ga. App.] 58 SE 1072; Williams v. State [Ga. App.] 58 SE 1072. Affidavits attached to bill of exceptions after the certificate of the presiding judge and not identified by his signature, cannot be considered. Robinson v. State [Ga.] 58 SE 842. Where the record contains what is sought to be made a bill of exceptions, which is refused by the court and not proved up by bystanders, it cannot in Texas be considered. Wilson v. State [Tex. Cr. App.] 100 SW 956.

87. Sufficient approval: Where stenographic report of the evidence was properly certified and identified, the mere fact that the judge's certificate and signature preceded such report did not exclude it from consideration. Jeremy Imp. Co. v. Com., 106 Va. 482, 56 SE 224. Statement of facts seasonably filed and approved by trial court will be considered though clerk neglected to endorse the fact of filing. Monroe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 118, 101 SW 214.

Insufficient approval: A ground of objection to the admission of evidence stated in a bill of exception is not equivalent to a certificate of the judge that the facts therein stated are true. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. Mere statement of grounds of objection to the introduction of testimony is not a certificate by the judge that the facts recited are true. Scott v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 407, 93 SW 740.

Stenographer's certificate to his report is insufficient to make evidence and exceptions disclosed a part of record without being so incorporated by the trial judge. Beecher v. State, 80 Ark. 600, 97 SW 1036. Under Acts 29th Leg. p. 219, making report of official stenographer when filed and approved, the statement of facts of the oral evidence in case where a purported statement is not in form of stenographic report is not approved by court nor signed by counsel, it cannot be considered on appeal. Hughes v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 525, 95 SW 1034. Statement in bill of exceptions that cross-examination was not pertinent nor germane does not have effect of certificate of judge and so does not show that matters to which cross-examination was pertinent or germane were not drawn out on examination in chief. Fuller v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 413, 95 SW 541. Under statute requiring statement of facts to be certified as a true and correct copy by the trial judge, a statement of facts, not designated as such, and at the bottom of which the judge merely wrote "approved" with his signature, is insufficient. Esquival v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 279, 103 SW 849. Affidavits relating to a ground of motion for new trial, not referred to therein nor attached as exhibits, nor filed under order of the judge and made a part of the record, cannot be considered. McDonald v. State [Ga.] 59 SE 242.

88. A **statement of facts** filed after term time cannot be considered. Jones v. State [Tex. Cr. App.] 103 SW 849; Hernandez v. State [Tex. Cr. App.] 97 SW 92; Patterson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 1022, 88 SW 226; Paiz v. State [Tex. Cr. App.] 103 SW 856. Statement of facts consisting of stenographer's report cannot be considered where filed after adjournment of term and in absence of twenty-day order in which to file. Taft v. State [Tex. Cr. App.] 97 SW 494. Statement of facts filed 78 days after adjournment of the term. Jones v. State [Tex. Cr. App.] 97 SW 89. Acts 29th Leg. pp. 219, 221, relative to statement of facts does not repeal existing laws, nor authorize filing of stenographer's statement after term time without leave of court, but only provided an assistance in making up such statement. Mundine v. State [Tex. Cr. App.] 97 SW 490. Purported statement of facts not filed in the trial court, and not approved until after adjournment of court, held insufficient to authorize review of sufficiency of evidence to sustain conviction. Fouts v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 109, 101 SW 223. Under Code Cr. Proc. 1895, art. 621, providing that order granting or refusing change of venue shall not be revised on appeal unless the facts on which it is based are presented by bill of exceptions filed at the term of court at which the order was made, it will not be considered where bill of exceptions was filed after the term. Bink v.

properly allowed,[90] and the memorial must show that it was approved within such time.[91] As a general rule an approval after the expiration of the period allowed

State [Tex. Cr. App.] 17 Tex. Ct. Rep. 469, 98 SW 863.

Bills of exception filed out of term time without an order allowing it cannot be considered. Baker v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 70, 97 SW 81. Filing of motion in arrest which was continued to the next regular term and the filing of a bill of exceptions at such subsequent term did not preserve the action of the court in overruling motion for new trial so that such bill was unavailable to authorize review of errors at the trial. State v. Harroun, 199 Mo. 258, 97 SW 866. Where bill of exceptions was filed at term succeeding that at which accused's motion for a new trial was disposed of, it was too late though filed at subsequent term to which motion in arrest was regularly continued and determined. State v. Larew, 191 Mo. 192, 89 SW 1031.

89. Prosecution for violation of city ordinance begun by warrant for arrest is in nature of criminal prosecution and is governed by practice in criminal proceedings and failure to file transcript of record on appeal for a year requires dismissal of the appeal. City of Russellville v. Edwards, 80 Ark. 314, 97 SW 57.

A bill of exceptions will not be considered where it appears not to have been prepared and submitted within the time allowed. Strickland v. State [Ala.] 43 S 188. Where bill of exceptions was not presented to judge for approval within the twenty days and it appeared that there was ample opportunity to present it, it will not be considered. Stout v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 234, 103 SW 391. Bills of exception stricken because filed before approved and not filed within 20 days after adjournment of the term. Chancey v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 26, 90 SW 632. Supreme court cannot grant relief for failure to file bill of exceptions in time on the ground that counsel for defendant was misled by the prosecuting attorney, it not being asserted that counsel was willfully misled. State v. Moore, 203 Mo. 624, 102 SW 537. Under rule of practice 30 and Code 1896, § 4812, the time for signing bills of exception cannot be extended by stipulation beyond the first day of the next succeeding term. Holifield v. State [Ala.] 44 S 956. Where the judge refused to approve bill of exceptions and statement of facts because presented too late, neither the bill nor statement could be considered. Garrett v. State [Tex. Cr. App.] 96 SW 928. Where entries on the original bill of exceptions disclosed that it was filed in the office of the clerk of the trial court more than 15 days after it was certified by the judge, the writ of error will be dismissed. Jones v. State, 127 Ga. 281, 56 SE 453. Where bill of exceptions is not filed within the time allowed by the circuit court, the court of appeals will confine its examination of errors assigned to those going to the record proper. State v. Ostmann, 123 Mo. App. 114, 100 SW 696.

Statement of facts not filed in time will not be considered. Wilson v. State [Tex. Cr. App.] 105 SW 787; Kinchalo v. State [Tex. Cr. App.] 103 SW 394. Where no twenty-day order appears. Sanders v. State [Tex. Cr. App.] 105 SW 508; Ingram v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 856, 90 SW 1098; Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509; O'Neil v. State [Tex. Cr. App.] 103 SW 891. Statement of facts filed several months after time allowed. Bryant v. State [Tex. Cr. App.] 90 SW 883. A statement of facts in a criminal case filed and served after the expiration of thirty days after the rendition of the judgment and accrual of the right of appeal will be stricken because not filed and served in time where the record fails to show an extension of time or any application therefor. State v. Aschenbrenner [Wash.] 87 P 1118. Where statement of facts is filed too late to be considered on appeal, the supreme court cannot review grounds of motion for new trial relative to insufficiency of evidence and applicability of instructions. Jones v. State [Tex. Cr. App.] 97 SW 89. Irregularity in failing to file transcript in court of appeals within sixty days after judgment as required by Cr. Code Prac. § 336, is waived where motion to dismiss the appeal is not made until after the case is submitted for argument. Watkins v. Com., 29 Ky. L. R. 1273, 97 SW 740.

90. Extension of time to settle bill of exceptions is discretionary. Raymond v. U. S., 26 App. D. C. 250. Failure to file statement of facts within twenty days from adjournment of court allowed therefor due to laches of defendant's counsel precludes it from being considered on appeal. Baker v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 70, 97 SW 81. Where there was an extension of twenty days allowed to file statement of facts, and it was not signed by the judge in time, though presented, held that sufficient diligence on appellant's part had not been shown. Watts v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 74, 97 SW 97. A judge has **no authority to grant an extension** of time after the time allowed by law to file a bill of exceptions has expired. State v. Paul, 203 Mo. 681, 102 SW 657. Order extending time after time allowed has expired is void. State v. Cutberth, 203 Mo. 579, 102 SW 658. An order extending the time for bill of exceptions made after expiration of time previously granted is void. Prater v. State [Ala.] 44 S 655. When the court has extended beyond the trial term the time in which a bill of exceptions may be filed, neither the judge in vacation nor the court at a subsequent term can again extend the time. State v. Granger, 203 Mo. 586, 102 SW 498.

91. Where statement of facts bears no file mark showing that it was filed within the prescribed time, it cannot be considered. Waddell v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 169, 105 SW 796. Bill of exceptions cannot be considered unless it affirmatively appears that it was signed within the time required by law. Parker v. State [Ala.] 44 S 724. Statement of facts cannot be considered when it has no file mark on it, and order approving it is not dated, and record shows it was made out and signed after adjournment, but no order authorizing filing of it after adjournment. Milton v. State

is unavailing.[92] It may not be filed after expiration of the period and dated back.[93] An order granting time to file a bill of exceptions, and statement of facts after adjournment of the term, need only be entered in the judge's docket,[94] and if such order is not in fact so entered the bill of exceptions and statement of facts will, nevertheless, be considered if counsel used all possible diligence to have it entered,[95] but it must be entered on the docket.[96] If failure to file in time is the fault of the trial judge, a statement may be subsequently filed,[97] and an accused, who has exercised proper diligence, will not be deprived of his bill of exceptions by circumstances over which he had no control,[98] but it must appear that he exercised the required degree of diligence.[99] Mandamus lies to compel a trial judge to sign a bill of exceptions which presents the truth of the case.[1]

[Tex. Cr. App.] 89 SW 1065. Certificate to bill of exceptions held not to recite facts showing that judge received bill of exceptions at his home within the time and in the manner provided in Civ. Code 1895, § 5542, relating to certification after specified time when judge is away from home. Porter v. State, 127 Ga. 288, 56 SE 430.

92. Statement of facts and bill of exceptions approved by county judge after adjournment of term cannot be considered as filed in trial court, and will not be considered. Harkrider v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 832, 90 SW 652. In Missouri a judge of another circuit called in to try a case in place of a disqualified judge has no authority to sign a bill of exceptions after the expiration of his term. State v. Grant, 124 Mo. App. 129, 100 SW 1113. A bill of exceptions in a criminal case tendered to the judge and certified by him after the expiration of twenty days will be dismissed. Porter v. State, 127 Ga. 288, 66 SE 430.

93. Statement of facts, not filed within time allowed, but by agreement dated back to bring filing within the time, will be stricken on motion. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 113, 101 SW 224; Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 114, 101 SW 208. Where transcript showed that court adjourned Sept. 22, but statement was not filed until Sept. 24, but it appeared that it was not presented until long after that date and was filed back, held the filing back was unauthorized and statement could not be considered. Robinson v. State [Tex. Cr. App.] 103 SW 890.

94. Lara v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 5, 89 SW 840. Order entered on docket allowing twenty days after adjournment of term to file statement of facts is sufficient without its being carried forward on minutes of the court. Anderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 690, 96 SW 34.

95. Lara v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 5, 89 SW 840. Where counsel requested a twenty-day extension order but did not have it entered on the docket, and while he had the statement prepared he did not have it signed by the judge before adjournment, held **sufficient diligence was not shown** to justify consideration of such statement under Acts 29 Leg. pp. 219, 221, authorizing filing of stenographer's notes as a statement. Kilpatrick v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 355, 97 SW 1044.

96. Order granting twenty days after adjournment of term to file statement of facts not entered on court's docket is ineffective to permit filing after adjournment of the term. Kilpatrick v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 355, 97 SW 1044. Under Rev. St. 1899, § 728, providing that an order authorizing extension of time to file bill of exceptions shall be entered on record, failure to do so cannot be supplied by certificate of judge and ex parte affidavit. State v. Wilson, 200 Mo. 23, 98 SW 68.

97. Where counsel for the state and accused fail to agree on a statement of facts, and leave it with the judge, it is his duty to file a statement of facts, and his failure to do so within the time allowed by law does not deprive accused of the right to have a statement of facts, subsequently filed, considered. Tankersley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 92, 101 SW 234. Accused was convicted at a term which adjourned April 7. On April 28 the judge wrote the clerk that the district attorney had agreed that the statement of facts could be filed within twenty days from date of adjournment. The file mark showed that statement was filed the 30th as of the 26th by order of court. Held it could not be considered as it did not appear that delay was fault of the judge. Walker v. State [Tex. Cr. App.] 17 Tex. Ct Rep. 101, 96 SW 927.

98. Where one is deprived of a statement of facts without fault of his own, the judgment will be reversed so that he may have his case in such condition that it can be reviewed. McRuffin v. State [Tex. Cr. App.] 105 SW 811.

Sufficient diligence shown: Where a bill of exceptions to denial of change of venue was not filed during term as required by statute, but the attorney for defendant was diligent and it was through error of the court that he was deprived of his bill, held conviction would be reversed. Miller v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 3, 105 SW 502. Sufficient diligence held to have been shown in procuring a filing statement of facts when the statement left with appellant's attorney was erroneous and he had to have it corrected and approved by trial court. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 709, 95 SW 1062. Where statement of facts was filed after twenty days allowed, but had been presented for approval within ample time to have been filed within such time, and attorney for accused was not at fault, held it would be considered the same as if filed within the required time. McKenzie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 68, 96 SW 932.

99. Where statement of facts and bill of exceptions were filed too late and for that

Sufficiency of "record" to present particular questions.[See 8 C. L. 259]—Since every presumption is in favor of the correctness of the ruling below,[2] it is necessary that errors not apparent from the record proper [3] should be presented by bill of exceptions and statement of facts,[4] which must show the ruling complained of and objection and exception thereto below.[5] In the absence of a bill of exceptions and statement of facts, the action of the court in denying motion for new trial,[6]

reason are not approved, appellant **cannot rely on fact that they were mailed in due time** as showing sufficient diligence. Brooks v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 386, 98 SW 244. Where **attorneys for accused were guilty of laches** in presenting statement of facts and bill of exceptions in time to have same filed and acted upon, accused was not entitled to reversal on ground that he had been deprived of statement and bill. Walker v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 385, 98 SW 265. Application of appellant to procure statement held to show that counsel had failed to exercise required degree of diligence though it appeared that appellant was unable to pay for the transcript. Bisby v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 72, 97 SW 315. Affidavit as to diligence held insufficient to show that required effort to have approved and file statement of facts within the period prescribed had been exercised. Anderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 690, 96 SW 34. One who has shown no diligence in attempting to get statement of facts filed in time, and has not asked for the twenty-day extension which the court is authorized to allow, cannot claim benefit of Rev. St. 1895, art. 1382, providing where due diligence is shown the court shall permit the statement to remain as part of the record. Mundine v. State [Tex. Cr. App.] 97 SW 490. Failure to file statement of facts in time not excused by **ignorance of stenographer** with whom matter was left. Chancey v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 26, 90 SW 632.

1. Wright v. Com., 106 Va. 855, 56 SE 705.

2. See post, § 17 H.

3. As to what the record proper contains, see ante, Perpetuation of Proceedings in Record.

4. Matters not appearing in the record other than by exception will not be reviewed. Town of Brunson v. Youmans, 76 S. C. 128, 56 SE 651. Affidavits setting forth ground of objections to appointment of special judge, not brought into the record by a bill of exceptions, will be disregarded on appeal. Juliana v. State, 167 Ind. 421, 79 NE 359. Objections not presented by bill of exceptions will not be reviewed. State v. Gordon, 35 Mont. 458, 90 P 173. Where record contains no statement of facts, bill of exceptions, assignments of error, or motion for new trial, no question is presented for review. Malone v. State [Tex. Cr. App.] 103 SW 850; Cones v. State [Tex. Cr. App.] 90 SW 174; Brown v. State [Tex. Cr. App.] 97 SW 91.

5. Dowling v. State [Ala.] 44 S 403. Objections will not be reviewed unless ruling was excepted to below and reserved by bill of exceptions. Ramon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 468, 98 SW 872. Where bill of exceptions discloses that no objections or exceptions were taken to rulings, they will not be reviewed. State v. Miles, 199 Mo. 530, 98 SW 25. Alleged **misconduct of jury** will not be reviewed where on motion for new trial, such question was controverted and the testimony of all the jurors was taken and passed upon by the trial court. Serna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 133, 105 SW 795. Where record does not show that evidence was objected to or that objection was passed upon or that failure to do so was excepted to. Bischoff v. Com., 29 Ky. L. R. 770, 96 SW 538. Affidavit on motion for new trial that it was affiant's "impression" that an objection was overruled is not sufficient to supply omission in the record which does not show that it was passed upon or that failure to do so was excepted to. Id. In determining whether sufficient foundation for introduction of dying declaration, the appellate court will not consider evidence which the record shows was not considered by the court below for that purpose. State v. Zorn, 202 Mo. 12, 100 SW 591. Only the objection to evidence made below will be considered on appeal. State v. Thompson, 76 S. C. 116, 56 SE 789. Giving and refusing of declarations of law will not be reviewed where the record shows no objections or exceptions. State v. Morgan, 196 Mo. 177, 95 SW 402.

6. In absence of statement of facts, ruling on motion for new trial cannot be reviewed. Robinson v. State [Tex. Cr. App.] 105 SW 500. Questions presented by motion for new trial relative to sufficiency of evidence will not be reviewed. Crawford v. State [Tex. Cr. App.] 96 SW 1085. A motion for new trial forms no part of the record proper but must be brought up by bill of exceptions. Johnson v. State [Fla.] 43 S 430; Harris v. State [Fla.] 43 S 311. Where record contains no bill of exceptions to overruling of motion for a new trial and the stenographer's report does not show that such a motion was made, the ruling of the court cannot be reviewed. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Grounds relied on in motion for new trial will not be reviewed in absence of statement of facts. Robertson v. State [Tex. Cr. App.] 105 SW 507; Alexander v. State [Tex. Cr. App.] 90 SW 1017; Scott v. State [Tex. Cr. App.] 105 SW 190; Foster v. State [Tex. Cr. App.] 100 SW 156. Under Code Cr. Proc. art. 904, amended by Laws 1897, p. 11, requiring that objections to failure of defendant to plead be presented by bill of exceptions, the objection may be raised by bill of exceptions to action of the court in refusing to grant a new trial where judgment and bill of exceptions both show that no plea was entered. Noble v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 764, 99 SW 996. Grounds of motion for new trial depending on the evidence cannot be reviewed. Smith v. State [Tex. Cr. App.] 99 SW 1000. Where record contains no statement of facts or bill of exceptions and no evidence was offered in support of motion in arrest, nor grounds

or for a continuance,[7] errors in the admission [8] or exclusion of evidence,[9] or the sufficiency thereof,[10] or in ruling on the competency of witnesses,[11] or in the

of the motion in any way sustained, the motion cannot be considered. Murphy v. State [Tex. Cr. App.] 103 SW 394. Under Code Cr. Proc. §§ 273, 274, 282, providing that grounds for new trial must be stated in bill of exceptions and that exceptions must be shown where no bill of exceptions is filed, only the sufficiency of the indictment will be considered. Combs v. Com., 31 Ky. L. R. 844, 104 SW 261. While transcript contains motions for new trial and in arrest and instructions, the same cannot be reviewed in the absence of a bill of exceptions preserving rulings thereon. State v. Herron, 199 Mo. 159, 97 SW 878. Where record fails to disclose preservation by bill of exceptions or otherwise, action of court in overruling motion for new trial at term at which motion was overruled nor any extension of time given for filing such bill, errors of which advantage can be taken by motion for new trial cannot be reviewed. State v. Harroun, 199 Mo. 258, 97 SW 866. Newly-discovered evidence and misconduct of jury relied on as ground for new trial cannot be considered where there are neither affidavits nor bill of exceptions indicating such testimony nor in any way verifying either ground of the motion. Gonzales v. State [Tex. Cr. App.] 97 SW 487. Motion for new trial because of errors of law occurring on the trial can only be based on an exception taken at the time of the ruling or error complained of (Rev. St. 1899, § 3740), and such exceptions must be preserved and brought into the record by a bill of exceptions (§ 3743) to be available on writ of error. Koppala v. State [Wyo.] 89 P 576. Motion for new trial based on insufficiency of evidence cannot be considered in absence of bill of exceptions or statement of facts. Oglesby v. State [Tex. Cr. App.] 89 SW 840; Washington v. State [Tex. Cr. App.] 89 SW 840. Grounds for new trial relating to sufficiency of evidence, admission and exclusion thereof, and the charge, cannot be considered where there is no bill of exceptions. Hattel v. State [Tex. Cr. App.] 90 SW 31.

7. Denial of continuance cannot be reviewed when record contains neither statement of facts nor bill of exceptions. Daniels v. State [Tex. Cr. App.] 90 SW 28; Anderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 690, 96 SW 34; Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 76, 101 SW 449; Griffith v. State [Tex. Cr. App.] 89 SW 832; Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804; Clayton v. State [Tex Cr. App.] 19 Tex. Ct. Rep. 264, 103 SW 848. Application for continuance not incorporated in bill of exceptions will not be reviewed. State v. Gordon, 196 Mo. 185, 95 SW 420. That order denying continuance may be reviewed, the motion, evidence, and ruling must be incorporated in the bill of exceptions. Pen. Code, § 1174. People v. Buck [Cal.] 91 P 529. Bill of exceptions relating to continuance cannot be considered without the facts. Hottel v. State [Tex. Cr. App.] 90 SW 31. Error in denying continuance and refusing to quash venire cannot be considered. White v. State [Tex. Cr. App.] 105 SW 799. Denial of continuance not reviewed where application was not in the record, and no bill of exceptions was reserved. Salinas v. State [Tex. Cr. App.] 102 SW 116. Motions for continuance and new trial because of rulings on evidence cannot be considered where not preserved by bill of exceptions. Bogue v. State [Tex. Cr. App.] 97 SW 698.

8. Testimony, though copied in the transcript, will not be considered unless annexed to and made a part of a bill of exceptions. State v. Simmons, 118 La. 22, 42 S 582. A note found in the body of such testimony to the effect that certain questions asked had been objected to, and the objections thereto sustained and a bill reserved, does not take the place of a bill of exceptions. State v. Simmons, 118 La. 22, 42 S 582. Where motion for new trial complains that court erred in admission of testimony, but there are no bills of exception, question cannot be considered. Lewis v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 902, 105 SW 194. Where there are no bills of exception, alleged errors in admission of testimony and in comment on failure of accused to testify cannot be considered. Slaughter v. State [Tex. Cr. App.] 105 SW 198. In absence of bill of exceptions, objections to admission of testimony will not be reviewed. Serna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 133, 105 SW 795; Bender v. State [Tex. Cr. App.] 102 SW 408. An objection to evidence not preserved by bill of exceptions will not be considered. Wright v. Com., 106 Va. 855, 56 SE 705. In absence of statement of facts or bill of exceptions, errors in admission of evidence or the sufficiency thereof cannot be considered. Tye v. State [Tex. Cr. App.] 97 SW 701. Where objection to questions asked witness is not raised by bill of exceptions, it will not be reviewed. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Error in admission of testimony will not be considered where it appears that the court instructed not to consider it. Lowrie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 787, 98 SW 838. Matters as to admission of evidence, not presented in separate bills but occurring in the stenographic statement of facts, cannot be reviewed. Mays v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 720, 97 SW 703.

9. Ruling sustaining objection to question cannot be reviewed unless bill of exceptions shows expected answer. Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. Document excluded must appear. Commonwealth v. Sunderlin, 31 Pa. Super. Ct. 349. Where there is no bill of exceptions but in a general way exceptions are reserved in stenographic statement of facts, to the refusal of court to admit certain testimony and except in most general way the reasons why it should be admitted appear, the error cannot be reviewed. Jeffreys v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 334, 103 SW 886.

10. Sufficiency of evidence to sustain conviction will not be reviewed when record contains neither statement of facts nor bill of exceptions. Burns v. State [Tex. Cr.

giving [12] or refusal to give instructions,[13] or other error which cannot properly appear from the record proper,[14] will not be reviewed; but the review will be con-

App.] 90 SW 27; Smith v. State [Tex. Cr. App.] 103 SW 1197; Thomas v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 897; Bender v. State [Tex. Cr. App.] 102 SW 408. The sufficiency of evidence and the giving of special instructions cannot be reviewed. Cochran v. State [Tex. Cr. App.] 96 SW 924. Where statement of facts is not incorporated in the record, it is presumed that evidence was sufficient to sustain the verdict. Graham v. State [Tex. Cr. App.] 99 SW 546. Grounds of motion for new trial relating to sufficiency of evidence and failure of court to call names of witnesses. Alvia v. State [Tex. Cr. App.] 97 SW 1044. Sufficiency of evidence and denial of continuance. Gilbert v. State [Tex. Cr. App.] 97 SW 693. Where record contains no statement of facts, whether verdict is contrary to law or evidence or whether charge is erroneous, cannot be reviewed. Allen v. State [Tex. Cr. App.] 103 SW 850. Where an abstract does not fully set forth errors relied on as required by rule of court, an objection that the verdict was not supported by the evidence could not be reviewed. Imboden v. People [Colo.] 90 P 608. Where evidence is not preserved by bill of exceptions, it is not reviewable. Beard v. State, 79 Ark. 293, 95 SW 995, 97 SW 667. Sufficiency of evidence will not be reviewed where it is not all in the record. Mathews v. State [Ark.] 104 SW 928.

11. To review improper ruling on competency of witness, materiality of his proposed testimony need not appear. Palmer v. People, 112 Ill. App. 527.

12. In absence of statement of facts or bill of exceptions, court cannot review instructions. Jordan v. State [Tex. Cr. App.] 105 SW 790; Thomas v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 869, 104 SW 897; Wright v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 312, 97 SW 699. Where evidence is not brought up, the court cannot pass on **applicability** of an instruction. Dixon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 308, 97 SW 692. Where evidence is not preserved in the bill of exceptions, an exception to an instruction will be overruled if proper under any state of facts provable under the issues. State v. Phillips [Mont.] 92 P 299; Koppala v. State [Wyo.] 89 P 576. Instructions cannot be reviewed unless brought into the record by bill of exceptions, signed by the trial judge; certificate of clerk insufficient. Morgan v. U. S. [C. C. A.] 148 F 189. Objection that charge was not supported by evidence will not be reviewed where evidence is not before the court. Reese v. State [Tex. Cr. App.] 102 SW 114. No bill of exceptions having been reserved to charge on a particular ground, either by bill or motion for new trial, error in charge on that ground cannot be reviewed. Jackson v. State [Tex. Cr. App.] 90 SW 34. An assignment of error **criticizing use of a particular word** in a charge without setting out the part of charge referred to cannot be considered. Beaudrot v. State, 126 Ga. 579, 55 SE 592. Where none of the instructions objected to were set out in appellant's brief as required by supreme court Rule 10, par. 3, subd. C, instructions could not be reviewed. State v. Newman, 34 Mont. 434, 87 P 462. Instructions not reviewed where transcript does not show that instructions therein were the only ones given, or that any exceptions to any of them were taken. State v. Rourke [Wash.] 87 P 507. Where error in instructions is asserted but there is no bill of exceptions, the court will only determine whether the instructions were erroneous on any supposable state of facts which the evidence tended to establish. State v. Sloan, 35 Mont. 367, 89 P 829. Where there is no statement of facts, an instruction will be sustained if applicable to any testimony which might have been given under the allegations. Mundine v. State [Tex. Cr. App.] 97 SW 490.

13. Errors predicated on refusal to give instructions cannot be considered unless the instructions be set out. Morris v. State [Ga.] 59 SE 223. In prosecution for murder, failure to charge that under certain facts defendant would be guilty of manslaughter cannot be reviewed in absence of statement of facts. Brown v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 874, 105 SW 177. Requested charges and bills of exception cannot be considered without the facts. Patterson v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1022, 88 SW 226. Alleged error in refusing instructions will not be reviewed where instructions do not appear in the bill of exceptions which recites that court gave requested instructions, and record shows no objection or exception to the ruling. State v. Jones, 191 Mo. 653, 90 SW 465. Refusal of requests to charge cannot be reviewed when requests are not embodied in bill of exceptions, though contained in motion for new trial. Frazier v. State, 117 Tenn. 430, 100 SW 94.

14. Objection **that punishment is excessive** cannot be reviewed in absence of bill of exceptions preserving the evidence. Ex parte Phillips, 80 Ark. 200, 96 SW 742. Complaints against **improper remarks of counsel** will not be reviewed where no objection or exception is taken and preserved in the bill of exceptions. State v. Zorn, 202 Mo. 12, 100 SW 591. Remarks of district attorney will not be reviewed where there is no bill of exceptions and nothing to verify the statements contained in motion for new trial. Reese v. State [Tex. Cr. App.] 102 SW 114.

Statement of the judge cannot be reviewed where the evidence was not brought up. State v. Schuyler [N. J. Err. & App.] 68 A 56. Objection that in sending jury back the court **instructed orally as to the form of the verdict** must be presented by bill of exceptions. Mobley v. State [Tex. Cr. App.] 89 SW 839. Where the record contained no bill of exceptions, nor charge of the court, and record showed a written charge was given and no exception taken, and parties filed an agreement that the court consider the case without the charge, the only question was sufficiency of evidence. Roberts v. State [Tex. Cr. App.] 100 SW 1160. In absence of bill of exceptions, overruling of motion **for change of venue** cannot be considered. Green v. State [Tex. Cr. App.] 17

fined to the record proper,[15] and if no error appears therein, the judgment must be affirmed.[16] A bill of exceptions must be complete in itself,[17] it must explicitly state

Tex. Ct. Rep. 781, 98 SW 1059. Nor can the overruling of motion for continuance. An exception to the ruling is insufficient. Id. Assignments of error will not be considered in absence of statement of facts. Paiz v. State [Tex. Cr. App.] 103 SW 856. Laws 1903, p. 47, expressly provides that a **demurrer to an information** can only be presented by bill of exceptions. State v. Gordon, 35 Mont. 458, 90 P 173.

Errors of the court to which no bill of exceptions was preserved cannot be considered. Newby v. State [Tex. Cr. App.] 98 SW 837. Error in not **postponing** case. Horton v. State [Tex. Cr. App.] 98 SW 837. Where statement of facts was not filed below, errors depending thereon cannot be reviewed. Newby v. State [Tex. Cr. App.] 98 SW 837; Robinson v. State [Tex. Cr. App.] 103 SW 890. It will be presumed that the **waiver of a jury** was in writing. Kamorowski v. People, 113 Ill. App. 468.

Order of special venire will not be reviewed where not embraced in bill of exceptions. State v. Gordon, 196 Mo. 186, 95 SW 420. For same reason order overruling motion to disqualify sheriff and appoint another to summon special venire will not be reviewed. Id.

15. Only the record proper is reviewable where no bill of exceptions is filed. State v. McGinnis, 203 Mo. 590, 102 SW 479; State v. Lakin, 203 Mo. 548, 102 SW 479; State v. Keene, 203 Mo. 680, 102 SW 479; State v. Granger, 203 Mo. 586, 102 SW 498; State v. Heflin, 191 Mo. 178, 89 SW 1034; State v. Berry, 206 Mo. 648, 105 SW 598; State v. Terrio, 199 Mo. 256, 97 SW 893; State v. Kearney, 199 Mo. 167, 97 SW 894; State v. Phillips, 199 Mo. 278, 97 SW 947; State v. Cordray, 200 Mo. 29, 98 SW 1; Mundine v. State [Tex. Cr. App.] 97 SW 490. Where an appeal is taken on the judgment roll alone as defined by Pen. Code, § 21, an instruction on alibi which assumed the commission of the crime could not be held erroneous. State v. Gordon, 35 Mont. 458, 90 P 173. Pleas and demurrer thereto which was sustained, brought up only in bill of exceptions, are not reviewable. Williams v. State, 147 Ala. 10, 41 S 992. Upon appeal from the judgment alone, no objection or exception can be properly considered that does not arise upon and appear from the record or judgment roll, as such record is defined by Rev. St. 1887, § 7996. State v. Suttles [Idaho] 88 P 238. Where record does not contain objections or exceptions to overruling of motion for new trial. State v. Parnell, 206 Mo. 723, 105 SW 742. Errors occurring at trial cannot be reviewed. Sanders v. State [Tex. Cr. App.] 105 SW 508; Watson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 995, 105 SW 509. An appeal from the judgment alone without bill of exceptions brings up the judgment roll only. Presents for review the indictment, errors declared in the minutes, and instructions. People v. McPherson [Cal. App.] 91 P 1098. Pen. Code § 1269, expressly provides that on such appeal the court may review any intermediate order which may have affected the judgment. Id.; State v. Brown, 191 Mo. 161, 90 SW 378; State v. Troutman, 199 Mo. 255, 97 SW 873.

16. No bill of exceptions being taken and no assignment of errors filed, there is no ground of appeal. Merritt v. State, 1 Ga. App. 136, 57 SE 946; State v. Stevenson, 117 La. 937, 42 S 432; State v. Coleman, 117 La. 973, 42 S 471; State v. Chitty, 191 Mo. 652, 90 SW 726. Where record discloses no bill of exceptions, no motion in arrest, no assignment of errors, and an inspection of the record shows no reversible error in the proceedings, judgment will be affirmed. State v. Barley, 118 La. 143, 42 S 727. Where no bill of exceptions is reserved, instructions not criticized and statement of facts not brought up. Graham v. State [Tex. Cr. App.] 99 SW 546. Judgment will be affirmed where record contains no statement of facts, no motion for new trial, and no bill of exceptions. State v. Minuccani [Mo. App.] 105 SW 286; Milton v. State [Tex. Cr. App.] 89 SW 1065; Harris v. State [Tex. Cr. App.] 105 SW 498; McCurry v. State [Tex. Cr. App.] 102 SW 1132. Where no errors are made to appear and the evidence supports the verdict, the judgment will be affirmed. Chancey v. State [Fla.] 44 S 1013. When no brief is filed, no appearance made by appellant, and the record discloses no bill of exception, no motion in arrest of judgment, and no errors are patent on the face of the record, judgment will be affirmed. State v. Anderson, 118 La. 125, 42 S 721.

17. A bill of exceptions to the introduction of testimony must be complete in itself and show that there was no contingency upon which the evidence was admissible. Bill of exceptions in local option case held insufficient to present objection to evidence that consignment of beverages were not shown to have been alcoholic. Stovall v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 299, 97 SW 92. Also insufficient to show that certain evidence was not admissible as res gestae. Id.. Where a bill of exceptions is not sufficiently full, clear, and definite, as to apprise the court of the question desired to be reviewed, it must be disregarded. Jaramillo v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 796, 100 SW 921. Evidence connected with bill of exceptions must appear in immediate connection therewith; the record will not be searched to see if the bill is complete. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 SW 545.

Bill of exceptions insufficient where neither the evidence nor instructions are shown therein. State v. Banks, 61 W. Va. 6, 55 SE 739. Record as to facts relating to organization of grand jury cannot be contradicted or pieced out by recitals in the indictment. State v. Hurst, 123 Mo. App. 39, 99 SW 820. Where one takes his bill of exceptions in his statement of facts, he must do so with the same completeness as if he took a separate bill, and the court will go through the entire record to make out a bill. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Where transcript of evidence refers to defendant in masculine gender and to prosecutrix in feminine, it is inferred that they are man and woman but raises no presumption that defendant is an adult. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 868, 104 SW 899. The copying

the point and explain the ruling,[18] and must contain sufficient of the evidence and proceedings to affirmatively show the error.[19] A bill of exceptions is construed most

of purported testimony and instructions in the transcript by the clerk cannot take the place of a bill of exceptions. Cogburn v. State [Ark.] 99 SW 70. Notation on docket after application for continuance "Third application for continuance overruled to which defendant excepts" is not a bill of exceptions, and cannot be considered. Dickey v. State [Tex. Cr. App.] 98 SW 269.

Bill of exceptions held sufficiently explicit to raise objection that divorced wife of defendant had been allowed to testify to a conversation which took place while they were married. Cole v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 28, 101 SW 218. Bill of exceptions in local option case held to show with reasonable certainty that express consignments referred to in another bill of exceptions contained whiskey. Stovall v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 299, 97 SW 92. Bill of exceptions held not to show motion to quash panel was made before jury was sworn. Delmont v. State [Wyo.] 88 P 1102. Record held to show that Code 1896, §§ 5004, 5005, relative to drawing of jury in capital case, had been complied with. Brown v. State [Ala.] 43 S 194. Recital in transcript as to drawing of jurors is conclusive as to regularity of selection. People v. Collins [Cal. App.] 92 P 513.

18. Court is not required to read the statement of facts to ascertain whether appellant has a bill. Hardin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 231, 103 SW 401. Exceptions whether in bill or statement must be sufficiently full and complete to direct court's attention to alleged error without requiring resort to other parts of the record. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883.

19. An exception will not be considered unless the record shows the ruling challenged erroneous. Ware v. U. S. [C. C. A.] 154 F 577. Bill of exceptions must state facts showing irrelevancy of evidence, when its admission is objected to solely on that ground. McKinzie v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 149, 102 SW 414. After conviction of violation of an ordinance in order to make point on certiorari that the ordinance was not in force when the alleged act was committed, accused must show the date of the ordinance and facts fixing the time of the act. Bell v. Forsyth, 126 Ga. 443, 55 SE 230. Objections to evidence admitted cannot take the place of a statement of facts. Allegations of bill of exceptions held insufficient to present for review ruling admitting evidence. Holmes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 155, 102 SW 408. If the evidence is not in the record, matters depending thereon will not be considered. Commonwealth v. Miller, 31 Pa. Super. Ct. 317.

Sufficiency of Record to Present Error. Miscellaneous errors: Assignment of error held not to sufficiently set forth the facts to enable the court to pass upon it. Sasser v. State [Ga.] 59 SE 255. Failure of the record to show **that indictment was read and plea of accused thereto stated** to the jury, as required by Cr. Code Prac. § 219, does not authorize the appellate court to assume that code was not complied with unless excepted to and relied on as ground for new trial. Combs v. Com. [Ky.] 104 SW 270. A recital in the bill of exceptions that a **demurrer was overruled** does not present any question for review. Gains v. State [Ala.] 43 S 137. Where the bill of exceptions recited **overruling of motion to quash venire,** but there was no entry of such fact in judgment proper, it could not be reviewed. Thompson v. State [Ala.] 43 S 115. Bill of exceptions complaining of **refusal to place witnesses under rule** must show exception taken to their introduction and that they testified to material matters to which other witnesses testified and that the latter might have influenced their testimony. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 722, 99 SW 1005. Defendant's objection to being put on trial because **no true copy of the indictment was served** on him and the ruling thereon cannot be reviewed where the record does not show what the difference between the original and the copy served on him was. Parham v. State, 147 Ala. 57, 42 S 1. Where the record does not show original affidavit and information but only the amended one, the action of the lower court in **denying motion to quash** on the ground that original charged only manslaughter and the amended one charged a higher grade of crime. State v. Coleman, 199 Mo. 112, 97 SW 574.

In ruling on motion for continuance: Bill of exceptions to refusal of continuance for absent witness who was sick and expected to die should show that when it was filed witness was still living. Young v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 178, 102 SW 1144. Instructions and order denying continuance cannot be reviewed where instructions and affidavits for continuance are not in bill of exceptions. Holder v. State [Tenn.] 104 SW 225.

Examination of witnesses: Bill of exceptions to admission of certain questions on ground that they were not proper cross-examination to present question for review should state that they were not cross-examination on original questions or should state the testimony so the court could determine that fact. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 SW 521. Bills of exception to rulings in regard to cross-examination and attack on credibility which do not state purpose or object of testimony will not be considered. Dunlap v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 444, 98 SW 845. A bill of exceptions to cross-examination which fails to show enough of the circumstances to point out the error is insufficient. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911. Bill of exceptions to cross-examination of witness reserved to show variance between testimony at trial and at inquest, which does not show what questions were asked or whether predicate was laid for impeachment, is insufficient. Id.

Rulings admitting and excluding testimony: Ruling on admission of evidence will not be reviewed where bill of exceptions does not contain sufficient facts to show whether it was admissible or not.

Willis v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 870, 90 SW 1100. Sustaining objection to question will not be reviewed where bill of exceptions does not show what the witness would have answered. Tune v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 249, 94 SW 231. Where the court sustains objection to cross-examination, the record must show that counsel stated to the court the object and purpose of the testimony, or it cannot be reviewed. Jackson v. State, 1 Ga. App. 723, 58 SE 272. Objections to testimony will not be reviewed where bill of exceptions fails to show in what manner the testimony was prejudicial. Serna v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 133, 105 SW 795. Objection to testimony not reviewable where no reason for it appears in the bill of exceptions. Porch v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 463, 99 SW 102.

The exclusion of offered testimony will not be reviewed unless the record discloses the evidence proposed to be introduced. State v. Zorn, 202 Mo. 12, 100 SW 591. Rejection of declarations of one conspirator against another cannot be reviewed unless it appears when they were made. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 SW 348. Refusal to admit certain evidence will not be reviewed where bill of exceptions does not show its materiality. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Assignment of error on rejection of evidence is not well made unless the evidence rejected be set out. Morris v. State [Ga.] 59 SE 223. Exclusion of testimony cannot be reviewed unless it appears that the answer expected was stated at the time. Carter v. State [Ga. App.] 58 SE 532. Exclusion of a question asked a medical expert cannot be reviewed where record does not show what was intended to be proved. State v. Penna, 35 Mont. 535, 90 P 787. Where defendant objected to testimony of a witness as not germane to portion of his testimony offered by defendant, but the record does not show that it was different, it cannot be reviewed. Corpus v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 225, 102 SW 1152. Where record did not show details of transaction which court excluded, ruling could not be reviewed. Bice v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 61, 100 SW 949. Bill of exceptions on refusal to allow stenographer to be called to state the testimony of a witness where a controversy arose over it, insufficient because not showing what the testimony was. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445. Where bill of exceptions to rejection of testimony of a child fails to show the evidence regarding the capacity of the child, the alleged error will not be reviewed. Keith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 516, 94 SW 1044. Sustaining of objection to question cannot be reviewed where record does not show what answer was expected. Parham v. State, 147 Ala. 57, 42 S 1. Evidence excluded should be set forth in order that the court can determine whether it was properly excluded. Davis v. State [Fla.] 44 S 757. Assignment that court erred in sustaining objection to question asked a witness unless what was proposed to be proved is shown. Coffman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 701, 103 SW 1128. Overruling of objection to introduction of warrant cannot be reviewed, it not being set out in record and no ground of objection being stated. Chaney v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 780, 98 SW 847. Where evidence was objected to but no reasons for objection assigned and the record does not show circumstances under which it was admitted, it cannot be declared error since it might have been admissible. Clayton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 264, 103 SW 848. Bill of exceptions to admission of evidence must show its inadmissibility. Lucas v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 776, 90 SW 880. Where bills of exceptions to evidence of persons testifying as experts did not show that they had not qualified as such, a mere statement that they had not was not a certificate by the judge so as to bring the question up for review. Taylor v. State [Tex. Cr. App.] 90 SW 647. Bill of exceptions to admission of declarations of codefendant defective because not showing what declarations were. Delaney v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 580, 90 SW 642. Bill of exceptions complaining of admission of testimony failing to show facts surrounding its admission is bad. Sanchez v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 589, 90 SW 641. A bill of exceptions to admission of evidence must be sufficiently clear so that reference to stenographic report will not be necessary. Lahue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 125, 101 SW 1008. Bill of exceptions on admission of testimony must show testimony sought to be excluded and reason for its exclusion. Vaughn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 96, 101 SW 445. In prosecution for assault, defendant excepted to proof of a former difficulty, but bill of exceptions did not set out the particulars of the difficulty, nor show that defendant engaged therein; the bill could not be reviewed. Gafford v. State [Tex. Cr. App.] 100 SW 375. Bill of exception held insufficient to show that evidence objected to was inadmissible. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 SW 1024; Hurt v. State [ex. Cr. App.] 100 SW 953.

Sufficiency of evidence: Where insufficiency of evidence is asserted, facts and circumstances from which the jury could have found all essential elements of the offense must appear from the bill of exceptions or a new trial will be granted. Baker v. State [Fla.] 44 S 719. Objections that the verdict was not sustained by the evidence, was contrary to the evidence, and contrary to law, cannot be reviewed on a writ of error where all the evidence is not included in the bill of exceptions. Koppala v. State [Wyo.] 89 P 576. Under Rev. St. 1899, § 5377, the bill of exceptions must contain all the evidence where the insufficiency thereof is asserted as error. Richardson v. State [Wyo.] 89 P 1027.

Misconduct of judge: Assignment of error that judge was absent during trial will not be considered where fact of absence is not shown by the record. Kelley v. U. S. [Ind. T.] 104 SW 604.

Misconduct of counsel: From bill of exceptions reciting merely that defendant's counsel objected to remarks of prosecuting attorney on the ground that there were no remarks of defendant's counsel calling for them, it cannot be said that remarks were not provoked. Winslow v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 813, 98 SW 866. Bill

strongly against the exceptor.[20] Recitals therein prevail over assignments of error.[21]

Judicial notice See 8 C. L. 261 will not be taken of another case forming no part of the record of the case on trial,[22] nor of the existence of local option in the county.[23]

Amendment and correction. See 8 C. L. 261—Where a bill of exceptions is so made up as not to state the truth, it may on proper showing be amended.[24] But a bill of

of exceptions to refusal of court to instruct jury to disregard remarks of counsel, not showing that a written request was presented, insufficient. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403. Though alleged improper remarks of counsel were made a ground for new trial, the error will not be reviewed unless the matter complained of is contained in the bill of exceptions. State v. De Witt, 191 Mo. 51, 90 SW 77. Alleged objectionable remarks of counsel sought to be preserved by affidavits only and not by bill of exceptions not reviewable. State v. Brooks, 202 Mo. 106, 100 SW 416. Where there was nothing in the record to show that the district attorney commented on failure of defendant to testify, error was not shown in refusal of special requests to charge that the district attorney was not authorized to make such comments. Searles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 873, 105 SW 191. Argument of counsel cannot be reviewed where the record does not show what they were or that they were prejudicial. State v. Biango [N. J. Law] 68 A 125. Record on appeal held too indefinite to warrant reversal on the ground that state's attorney referred to failure of defendant to testify. Huff v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 237, 103 SW 394.

Misconduct of jury: Affidavits made after trial to determine whether a juror had made statements during deliberations in conflict with those made on his voir dire will not be reviewed where voir dire examination is not in record. Feddern v. State [Neb.] 113 NW 127. Mere statement in bill of exception that juror was objectionable to appellant does not show that he was. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 SW 100. Where it appeared in a bill of exceptions that objection was made to a juror, but what objection was not stated, held insufficient to show that the juror was partial or unfair. Id. In prosecution for burglary, bill of exceptions presenting misconduct of jurors in pointing out a negro during their deliberations as the one assaulted by defendant, but failing to show that the assault was not disclosed by the evidence, is insufficient to require a reversal. Mundine v. State [Tex. Cr. App.] 97 SW 490.

In instructions: Refusal of instructions cannot be reviewed where all instructions are not set out in the record. Birmingham v. People [Colo.] 90 P 1121; Stephens v. State [Fla.] 44 S 710. Where it does not appear whether instructions were given or refused, they will not be reviewed. Nelson v. State [Ala.] 43 S 18. Where the portion of the charge excepted to is not in the record, it cannot be reviewed. State v. Winslow, 102 Me. 399, 66 A 1019. Objections to instructions will not be considered where assignments of error do not point out wherein they are wrong. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804.

In Idaho all written charges presented and requested are deemed excepted to as a matter of law and no exception need be taken thereto and they need not be embodied in a bill of exceptions. Rev. St. 1887, § 7946. State v. Suttles [Idaho] 88 P 238; State v. O'Brien [Idaho] 88 P 425. Instructions given by the court on its own motion must be excepted to and embodied in a bill of exceptions. State v. Suttles [Idaho] 88 P 238; State v. O'Brien [Idaho] 88 P 425. No instructions need be embodied in the bill of exceptions, provided those excepted to are properly identified and referred to therein. State v. Suttles [Idaho] 88 P 238.

Rulings on motion for new trial: On appeal from order denying motion for new trial, bill of exceptions must show that motion was made. People v. Craig [Cal.] 91 P 997. Under Court Rule 29 (78 Pac. xii.) a motion for new trial contained in the transcript and not in bill of exceptions as required will not be reviewed. People v. Silvers [Cal. App.] 92 P 506. Where there is no approved brief of evidence in the record, the statutory grounds for new trial cannot be decided. Harris v. State [Ga. App.] 58 SE 1072. Grounds of motion for new trial not verified cannot be reviewed. Jordan v. State [Tex. Cr. App.] 105 SW 790. Under Code Cr. Proc. 1895, art. 723, assignments of error in record which are not included in motion for new trial or bill of exceptions will not be reviewed. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. Errors not specifically stated in motion for new trial or bill of exceptions cannot be reviewed. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933. Exceptions raised on motion for new trial and argued in brief, but not noted in the record, will not be reviewed. Bell v. State [Ark.] 104 SW 1108. A ground of a motion for new trial referring to certain excluded evidence but not referring to the place in the brief where it would be found, without searching for it, will not be considered on appeal. Smith v. State, 126 Ga. 803, 55 SE 1024.

20. Where a bill of exceptions is ambiguous, the construction which will support the judgment will be adopted. Dowling v. State [Ala.] 44 S 403.

21. Where an instruction assigned as error is given differently in the assignments of error and bill of exceptions, the latter controls on appeal. Lindsey v. State [Fla.] 43 S 87.

22. Byrd v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 300, 103 SW 863.

23. Allen v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 450, 98 SW 869.

24. Where a bill of exceptions through inadvertence or mistake has been so made up as not to state the truth, it may upon

exceptions when settled, signed, and filed, becomes a part of the record and stands on precisely the same footing as any other record,[25] and where parties have submitted a cause for decision on a record as made up, neither of them can, after the decision, cause a new or amended record to be substituted so as to add to or take from the questions presented.[26] A bill of exceptions filed and made a part of the record cannot be amended by consent,[27] but only by a nunc pro tunc order,[28] and to justify the making of such an order, the record must in some way show the facts authorizing the entries to be added thereby.[29] Such entries cannot be made from the memory of the judge nor on parol proof from other sources.[30] The trial judge has power to correct errors in the stenographic report of his charge even after it has been filed as part of the record under his approval.[31] An appellate court has no power to supply any lost portion of the record,[32] nor to alter or correct the records of the lower court.[33] Affidavits not a part of the record when the bill of exceptions is certified cannot be made a part thereof by order of the judge.[34] Evidence not discovered until after hearing on appeal cannot be made part of the record on rehearing.[35]

(§ 17) *G. Practice and procedure in reviewing court.*[See 8 C. L. 261]—The case must be tried in the reviewing court on the same theory that it was tried on below.[36] The court gathers the facts of the case from the brief of evidence as approved by the trial court.[37] In some jurisdictions the reviewing court may look to any part of the record to enable it to understand error complained of.[38] An appellate court will not presume error but will presume prejudice if error is shown.[39] Death of the defendant pending appeal abates the appeal.[40] Where an appeal from a conviction of

proper notice and showing be amended nunc pro tunc at a subsequent term and before the hearing in the appellate court so as to conform to the real facts. State v. Jennings, 48 Or. 483, 87 P 524, 89 P 421. On appeal from city to circuit court, original affidavit of arrest did not appear among the papers. Held proper to hear evidence of its original existence and contents and have it supplied. Winfield v. Jackson, 89 Miss. 272, 42 S 183. Where the transcript on appeal from a justice did not show the justice's certificate to the original complaint and warrant, it was proper to adjourn to allow the justice to certify the papers. State v. Plomondon [Kan.] 90 P 254.

25, 26. State v. Jennings, 48 Or. 483, 87 P 524, 89 P 421.

27. To add exceptions thereto. State v. Libby, 203 Mo. 596, 102 SW 641.

28. State v. Libby, 203 Mo. 596, 102 SW 641.

29. As by judge's minutes, clerk's entries, or some paper in the cause. State v. Libby, 203 Mo. 596, 102 SW 641.

30. State v. Libby, 203 Mo. 596, 102 SW 641.

31. Moody v. State, 1 Ga. App. 772, 58 SE 262.

32. Supreme court has no power to supply any lost portion of record. State v. Wilson, 200 Mo. 23, 98 SW 68. The certificate of the trial judge to the bill of exceptions cannot be amended in the appellate court by changing the date thereof. Jones v. State, 127 Ga. 281, 56 SE 453.

33. Error in record as to order extending time to file bill of exceptions cannot be corrected on appeal. State v. Eaton, 191 Mo. 151, 89 SW 949.

34. Glover v. State, 128 Ga. 1, 57 SE 101.

35. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 257, 103 SW 911.

36. The defendant may not shift his theory and put the trial court in error in not submitting certain questions. State v. Spaugh, 200 Mo. 571, 98 SW 55. Where one was tried on the theory of incest and the court charged without objection that corroboration of prosecutrix was not necessary, he could not urge on appeal that the offense proven was rape. People v. Block, 105 NYS 275. Where trial of charge of maintaining liquor nuisance was on theory that requests for sales to three persons were introduced in evidence, a conviction could not be sustained when the record failed to show the introduction of such evidence. State v. Hatlestad, 132 Iowa, 188, 109 NW 613.

37. Ferguson v. State, 1 Ga. App. 841, 58 SE 57. On appeal the defendant has the burden to show prejudice because of remarks of prosecuting attorney to the jury. Jamison v. U. S. [Ind. T.] 104 SW 872.

38. Under Civ. Code 1895, § 5526, the court may look to any part of the record to enable it to understand error complained of. It appearing that substance of affidavit asked to be sent up is identical with what appellant contended it to be, it is unnecessary to have the affidavit transmitted. Stubbs v. State, 1 Ga. App. 504, 58 SE 236. While a motion for new trial is not a part of the record, it may be reviewed for the purpose of determining whether grounds of error alleged may be reviewed without the evidence. Richardson v. State [Wyo.] 89 P 1027.

39. State v. Sloan, 35 Mont. 367, 89 P 829. Error in cross-examination is presumed prejudicial on appeal. Only technical errors are to be considered harmless. State v. Nugent, 134 Iowa, 237, 111 NW 927.

40. Burks v. State [Tex. Cr. App.] 105 SW 496.

murder and death sentence has been taken by counsel assigned to accused by the court, and counsel delay for over a year, without explanation to serve the proposed case and exceptions, their assignment will be revoked and new counsel assigned to accused.[41]

Assignments, briefs, etc.[See 8 C. L. 261]—Assignments of error must be predicated upon matter in the record,[42] and must be presented by brief or argument.[43] They must be definite and certain,[44] and must point out the specific error complained of.[45] A general objection is insufficient unless erroneous on any ground.[46] Assignment of error embracing more than one point will not be considered.[47] The brief must be made up in the manner prescribed.[48]

Dismissal.[See 8 C. L. 262]—The right of appeal being personal, defendant may waive it and have an appeal dismissed, on filing affidavit asking it.[49] The appeal will be dismissed where the appellate court is without jurisdiction,[50] or where it appears that the appeal was prematurely taken,[51] or the bond is defective,[52] or where no brief is filed within the required time,[53] but not where it has been properly

41. Code Cr. Proc. §§ 536, 539, require an appeal from death sentence to be argued within six months unless time is enlarged for cause. People v. Nelson, 188 NY 234, 80 NE 1029.

42. Oliver v. State [Fla.] 44 S 712. Matters not shown by the record but only appearing in argument not considered. People v. McPherson [Cal. App.] 91 P 1098.

43. Assignments not presented by brief or argument are considered abandoned. Hines v. State [Ga. App.] 58 SE 524. Assignments which are not argued and as to which no reference is made to any particular ruling not reviewed. State v. Johnson [Wash.] 91 P 949. Grounds of motion for new trial not urged in the brief will be treated as abandoned. Horton v. State, 128 Ga. 26, 57 SE 224. Objections not discussed are considered waived. Sanderson v. State [Ind.] 82 NE 525. Points made in the record but not referred to in the brief will be considered to have been abandoned. Graves v. State, 127 Ga. 46, 56 SE 72. Errors assigned but not mentioned in printed argument are deemed abandoned. Wilcox v. U. S. [Ind. T.] 103 SW 774. No brief being filed by appellant, appellate court can look only to grounds filed in lower court in support of new trial to ascertain errors assigned for reversal of judgment. Dowdy v. Com., 31 Ky. L. R. 33, 101 SW 338. Where motion for new trial is based on several grounds, only those argued will be reviewed. Williams v. State [Fla.] 43 S 428. Objection to charge is deemed waived where not pressed but merely assigned pro forma. Powers v. State, 117 Tenn. 363, 97 SW 815. Overruling of motion, not assigned as error, will not be reviewed. Church v. Ter. [N. M.] 91 P 720. Where there were demurrers to the entire indictment, and to each of 16 counts therein, and only the demurrer to the last count was relied on in the appellate court, that one only was considered. Fletcher v. Com., 106 Va. 840, 56 SE 149.

44. Assignments of error must be definite and certain or they will not be considered. Fargerson v. State, 128 Ga. 27, 57 SE 101.

45. An assignment of error in the remarks of the trial judge is defective for failure to point out the alleged prejudicial rulings and remarks Miller v. Ter. of Okl. [C. C. A.] 149 F 330. "Points and authorities" portion of brief should refer to failure to give requested instruction and should point out witness to whom requested instruction was applicable, where such refusal was relied on as error, and requested instruction was a special one as to intoxication of witnesses. Knapp v. State, 168 Ind. 153, 79 NE 1076. Assignment that court erred in permitting prosecuting attorney to ask immaterial, impertinent, and insolent questions, is too general to require consideration. State v. Howard, 203 Mo. 600, 102 SW 504. An assignment of error in instructions which fails to point out the defect is too general. Adams v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 9, 105 SW 497. Assignment that court erred in refusing to give instructions set out in certain folios of the transcript does not present any question for review. People v. Pembroke [Cal. App.] 92 P 668.

46. A general objection that evidence is immaterial will not be considered unless it is immaterial for any purpose. Rice v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 353, 103 SW 1156.

47. Commonwealth v. Campbell, 31 Pa. Super. Ct. 9.

48. By rule 14 every brief must contain a statement of the points and authorities relied on and must refer specifically to the page and portion of the record where the question under discussion arises. Long v. State [Wyo.] 88 P 617.

49. Rivera v. State [Tex. Cr. App.] 19 [Tex. Cr. App.] 19 Tex. Ct. Rep. 353, 103 SW 194.

50. Where an appellate court is without jurisdiction of the subject-matter of an appeal, the only judgment it can enter is one of dismissal. Sena v. U. S. [C. C. A.] 147 F 485.

51. Where it appears that no sentence was pronounced or judgment entered, submission of appeal will be set aside and the cause remanded. State v. Smith [Mo.] 105 SW 598. If record fails to show the judgment rendered, the appeal will be dismissed. State v. Pillow [Iowa] 113 NW 844.

52. Where appeal bond in misdemeanor is defective, appeal will be dismissed. Tilley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 727, 99 SW 994.

53. Appeal dismissed where appellant fails

granted.[54] Where an appeal is dismissed, the judgment of the lower court is left in full force.[55]

(§ 17) *H. Scope of review.* See 8 C. L. 262—Review is confined to matters made of record,[56] and properly assigned and argued,[57] and which have been preserved by necessary objection and exception below.[58] Hence, where the record does not disclose the error complained of,[59] and sufficient of the proceedings to show the error, it cannot be reviewed.[60] Only the ground of objection relied upon will be considered.[61] Objections which are waived [62] or abandoned [63] will not be reviewed. A purely academic question will not be reviewed.[64] Before a reviewing court is authorized to pass upon the constitutionality of a statute, it must appear that the question was passed upon in the trial court, also the alleged repugnance of the statute to some portion of the constitution must be asserted.[65] Though the court is not required to instruct, if it does, the charge, if erroneous, is reviewable.[66] Questions going to the validity of the indictment,[67] arraignment and plea,[68] or the constitutionality of the statute under

to file brief within time allowed by rules, and within extra time allowed. Poe v. U. S., 6 Ind. T. 142, 89 SW 1020.

54. Kirby's Dig. §§ 2588, 2596, 2600, provides that circuit court can grant an appeal and if it refuses the transcript may be lodged in the supreme court and one of the judges thereof may grant an appeal. The supreme court reversed a conviction for murder and ordered the trial court to sentence the accused for manslaughter which it did. A judge of the supreme court had granted an appeal after the trial court refused to do so. Held the appeal was an accomplished fact and not subject to dismissal. Darden v. State, 80 Ark. 295, 97 SW 449.

55. Where defendant after appealing filed a formal dismissal of his appeal. State v. Reed, 206 Mo. 719, 105 SW 601.

56. See ante, § 17F.

57. See ante, § 17G.

58. See ante, § 14, Saving Questions for Review.

59. Question of variance between indictment and copy served is not reviewable where neither original nor copy are brought up. Andrews v. State [Ala.] 44 S 696. Where laws of a sister state and the decisions of the courts construing them are not admitted in evidence, they will not be considered on appeal. Williams v. State [Ala.] 44 S 57. In prosecution for running saloon within prohibited district of city, on appeal from conviction, objection that ordinance was void because boundaries of district were not closed, could not be raised when the record did not show this fact. Garonzik v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 22, 100 SW 374.

60. Where bill of exceptions fails to state as required by rules of court that it contains all evidence heard on motion to discharge jury panel, ruling of court will not be reviewed. Ransom v. State, 116 Tenn. 355, 96 SW 953. Objection to admissibility of evidence not sustainable on appeal where it is admissible under the indictment as copied in the transcript as the court will look only to the record. Ramon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 468, 98 SW 872. Under Cr. Proc. Act 1898, § 136, providing for review of the entire record, held where the entire record was not brought up, appellant is confined to errors assigned. State v. Labriola [N. J. Err. & App.] 67 A 386.

61. Where evidence is objected to on certain grounds, no other ground of objection will be considered on review. Sims v. State [Fla.] 44 S 737.

62. A waiver of objections to testimony and rulings of the court includes all matters on which court was required to pass during the trial, and such waiver being express, and made with knowledge and without fraud, the objections waived will not be considered on appeal. State v. Conroy, 133 Iowa, 195, 110 NW 437.

63. Assignments of error abandoned below will not be considered on appeal. Brown v. State, 127 Ga. 287, 56 SE 405.

64. Where defendant was convicted of murder in second degree, charges on first degree murder will not be reviewed. Day v. State [Fla.] 44 S 715. Where on appeal from a mayor's court the trial is de novo in the superior court, errors in the mayor's court will be disregarded on appeal to the supreme court. State v. Brittain, 143 N. C. 668, 57 SE 352. The sustaining of demurrers to special pleas containing no matter which could not be presented in defense under a plea of not guilty, which was interposed, and on which the case was tried, will not be reviewed on appeal. Beauvoir Club v. State [Ala.] 42 S 1040. Where only abstract questions are presented, the appeal will be dismissed. In re Brooks, 104 NYS 670. Where defendant is acquitted of a charge in one count of the indictment, an instruction relating to such charge will not be considered on writ of error from conviction on other charges therein. Aldrich v. People, 224 Ill. 622, 79 NE 964.

65. Anderson v. State [Ga. App.] 58 SE 401. An allegation of repugnancy of a statute to the constitution is not sufficiently specific unless the portion of the constitution claimed to be violated is set out. Id.

66. Esterline v. State [Md.] 66 A 269.

67. An objection that an indictment is void because the grand jury was illegally impaneled. Trammell v. State [Ala.] 44 S 201. Under Cr. Code 1896, §§ 4313, 4333, an objection that the indictment failed to allege the means by which the offense was committed is reviewable on appeal from the conviction, though then first raised, since it would appear on the face of the record. Gaines v. State, 141 Ala. 16, 41 S 865.

68. The objection that accused was not arraigned and that no plea was filed to the in-

which defendant was prosecuted may be reviewed though not presented below,[69] but not questions which go only to the irregularity in an indictment.[70] In capital cases an appellate court will consider a record which in less important cases it would disregard.[71]

Every presumption is in favor of the regularity of the proceedings in the lower court,[72] and on a silent record or on one which does not disclose all that transpired in the trial court it is presumed that an accused was tried on an appropriate indictment,[73] that the jury was properly instructed,[74] that rulings on the admissibility of evidence were correct,[75] that officers have properly qualified[76] and discharged their

dictment may be raised for the first time on appeal from conviction of a misdemeanor. State v. Mikel, 125 Mo. App. 287, 102 SW 19.

69. The constitutionality of a statute authorizing a criminal prosecution may be questioned at any stage of the proceedings. Commonwealth v. Hana [Mass.] 81 NE 149.

70. Defendant cannot object for first time on appeal that foreman of grand jury failed to indorse on indictment that judge ordered special venire of petit jurors instead of causing list selected by commissioners at preceding term to be opened and jurors thus selected. Beard v. State, 79 Ark. 293, 95 SW 995, 97 SW 667.

71. Where a bill of exceptions shows upon its face that it is incomplete, it will not be considered, but in a capital case the court will carefully examine the record and determine the sufficiency of evidence. Clark v. State [Neb.] 113 NW 211. On appeal from conviction of murder in the first degree, the court will examine matters of exception as well as the record proper, notwithstanding irregularities in the transcript. State v. Paulsgrove, 202 Mo. 193, 101 SW 27.

72. In the absence of a contrary showing. State v. Suttles [Idaho] 88 P 238; State v. O'Brien [Idaho] 88 P 425. Where the record fails to show what action was taken relative to a particular matter. In re Wright, 74 Kan. 406, 86 P 460, 89 P 678. Though the caption of the indictment shows that it was returned in the court of oyer and terminer and the trial was had in the court of quarter sessions, it is presumed that all things necessary to give jurisdiction were done. State v. Davidson [N. J. Law] 66 A 945. Presumption is that charge was full and correct and that jury found facts necessary to constitute the crime. State v. Martin, 141 N. C. 832, 53 SE 874.

73. Where the court erred in trying a person on two informations for two separate offenses, it cannot be inferred on appeal that because the first witness for the state was connected with the first offense defendant was tried on the information as to such offense. People v. Spier, 105 NYS 741.

74. Where the record does not contain all instructions, it is presumed that the jury were properly charged on every branch of the case and that erroneous instructions shown were correctly modified. Johnston v. U. S. [C. C. A.] 154 F 445. Where instructions are not contained in the bill of exceptions, it is presumed that full and proper instructions were given. Commonwealth v. Asherowski [Mass.] 82 NE 13. Where the record does not contain a written charge, it will be presumed on appeal that the court charged orally and correctly. Green v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 1025, 89 SW 838. Where assault was made with a rock and the court defined deadly weapon and charged that one of the elements of assault to kill was that it must be made with a deadly weapon, the charge could not be regarded as erroneous in absence of a showing as to size of the rock. Taft v. State [Tex. Cr. App.] 97 SW 494. That instructions given were correct. State v. Paisley [Mont.] 92 P 566. Where evidence is not before the court on appeal, it will be presumed that instructions were refused because inapplicable to evidence. State v. Allen [S. D.] 110 NW 92. In the absence of a showing to the contrary, it will be presumed **that jury was properly admonished** not to discuss the case until finally submitted. People v. Lee Foo [Cal. App.] 89 P 450.

Failure to define larceny will not be presumed erroneous in burglary in the first degree case where conviction was for latter offense and the evidence is not before the court. State v. O'Brien [Idaho] 88 P 425. Charges merely requested will not be reviewed, but only the action of the court in refusing or giving them, and where it does not appear whether they were given or refused, no question is presented. Scott v. State [Ala.] 44 S 534.

75. Ruling on **exclusion of letter** presumed correct where record on appeal did not show its contents nor the substance of it. People v. Lowrie [Cal. App.] 87 P 253. On a silent record it is presumed that **preliminary proof** necessary to admit other evidence was made. State v. Shook [Kan.] 90 P 234. Where testimony preliminary to admission of confessions was taken before the court in the absence of the jury, the question whether such confession was admissible cannot be reviewed. State v. Sherman, 35 Mont. 512, 90 P 981. On a silent record it is presumed that decedent's testimony taken before examining magistrate was properly authenticated and filed as required by statute. People v. Clark [Cal.] 90 P 549. If matters might have been res gestae, it is so presumed. Manning v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 388, 98 SW 251. In absence of bill of exceptions showing facts attending **examination of child witness,** it is presumed that showing was made to sustain the ruling that it understood nature of oath. Moore v. State [Tex. Cr. App.] 96 SW 327. When predicate for admission of confessions and admissions of guilt was not shown, it was presumed to have been sufficient. Dupree v. State [Ala.] 42 S 1004. It is not error to exclude evidence irrelevant when offered, if it subse-

duties,[77] that the verdict was authorized by the evidence,[78] and that all other proceedings were proper and correct.[79] Regularity cannot be presumed when the record

quently becomes relevant, it should be reoffered, and it will be presumed that it would then have been received. Horton v. State, 128 Ga. 26, 57 SE 224.

76. In absence of showing to contrary, it is presumed that one appointed special prosecuting attorney under Rev. St. 1899, § 4955, qualified in obedience to statutory requirements. State v. Wilson, 200 Mo. 23, 98 SW 68. It is presumed that a person named as bailiff of the grand jury was duly sworn and qualified to act. Ziegler v. State [Ga. App.] 58 SE 1066.

77. The presumption is that those administering the law have properly discharged their duties, and against misconduct, until the contrary is made to appear. Montgomery v. State [Fla.] 42 S 894. On a silent record it is presumed that the sheriff served a copy of the indictment and venire on defendant as he was directed. Strickland v. State [Ala.] 43 S 188.

78. It will be presumed that evidence authorized conviction, in absence of statement of facts, notwithstanding an erroneous charge. State v. Irish [Mont.] 92 P 459; Ingram v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 856, 90 SW 1098. Where the bill of exceptions does not profess to contain all the evidence. Krause v. U. S. [C. C. A.] 147 F 442. Presumed there was evidence to support the verdict, where no transcript of evidence is furnished and no exception taken to charge under which conviction was held. State v. Burns, 79 Vt. 272, 64 A 1129. On appeal from judgment without bill of exceptions, the sufficiency of evidence and correctness of court's rulings are presumed. People v. Hallam [Cal. App.] 92 P 190.

79. That motion for new trial was properly overruled where allegations in motion are not verified, and no evidence is adduced at the hearing. State v. Burkhalter, 118 La. 657, 43 S 268. Presumed that judgment and reasons for overruling motion for new trial were filed during term time and not after adjournment, in absence of affirmative showing. Ingersoll v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 797, 100 SW 778. An ordinance defining and punishing vagrancy will be presumed to have been in existence at the time of a trial and conviction thereunder. Nichols v. Salem [Or.] 89 P 804.

That the jury obeyed instructions limiting effect of certain testimony. People v. White [Cal. App.] 90 P 471. Under Code 1896, § 5368, making it an offense to run a railroad train without a supply of drinking water, where it appeared that a railroad was operated by a street railway company, it is presumed a street railway and not within the statute. Dean v. State [Ala.] 43 S 24. That a complaint filed in a circuit court and subsequently read to a joint defendant at his preliminary hearing before a magistrate was authoritatively returned to the magistrate. State v. Pratt [S. D.] 112 NW 152. Where record does not contain a copy of the **warrant of commitment, it is presumed correct.** Leiby v. State [Neb.] 113 NW 125. On a silent record it is presumed **that defendant was present when verdict was received.** Feddern v. State [Neb.] 113 NW 127. That the abstract of the record filed in the appellate court is complete. State v. Steidley [Iowa] 113 NW 333. Under a statute requiring **change of venue** to be taken to nearest place of holding court, it is for judge to determine place to which transfer will be taken and in absence of showing to the contrary it is presumed that place to which change was taken was nearest one. Willis v. U. S., 6 Ind. T. 424, 98 SW 147. Where **defendant was present** at arraignment and pleaded prior to order for special venire to try him, it is presumed that he was present during the whole of the trial as required by statute. State v. Barrington, 198 Mo. 23, 95 SW 235. Where on appeal from **motion to quash indictment** there was nothing in the record to sustain it, it is presumed that the ruling of the court denying it was proper. State v. Gordon, 196 Mo. 185, 95 SW 420. Regular **adjournment** of regular to special term presumed. Williams v. State, 147 Ala. 10, 41 S 992. Silence of record as to whether **indictment was read or plea stated to jury** does not presume on appeal that these matters were omitted, unless exception to such omission is shown, and was relied on as ground for new trial. Herr v. Com., 28 Ky. L. R. 1131, 91 SW 666. In reviewing alleged error in **denying a continuance** where the record does not show whether the application was the first or second, it will be regarded on appeal as the second application. Woodrich v. State [Tex. Cr. App.] 90 SW 882. Where bill of exceptions does not show that **motion to quash jury panel** was made before the jury was sworn, and there is no showing that the court was authorized to entertain such motion thereafter, it will be presumed that denial of motion was proper. Delmont v. State [Wyo.] 88 P 623. Where bill of exceptions states that it contains all the evidence in support of a certain necessary fact, and also that evidence was introduced to support the "facts, averments," etc., of the indictment, it will be presumed that there was evidence to show such fact, though none appears in the bill of exceptions. People v. Beatty [Cal. App.] 88 P 377. The action of the trial court in permitting the **filing of an additional transcript** of the record is presumed correct in the absence of a bill of exceptions. Nagel v. People, 229 Ill. 598, 82 NE 315. A **demurrer is treated as waived or withdrawn** where the minutes of the court fail to show that any action was taken on it. Sherrod v. State [Miss.] 44 S 813. Where record shows that defendant was present in court when arraigned, and pleaded, and after the information was amended he again appeared and waived formal arraignment, it will be presumed that he was present when motion was made to determine his sanity. State v. Church, 199 Mo. 605, 98 SW 16. A general judgment on an indictment containing several counts and a verdict of guilty on each cannot be reversed if any count is good. Greene v. U. S. [C. C. A.] 154 F 401. Where sentence imposed is within statutory limits, its excessiveness cannot be reviewed on certiorari. Ex parte Phillips, 80 Ark. 200, 96 SW 742.

affirmatively shows an irregularity.[80] The fact that the record is conclusive as to verity of its recitals and professes to state all that occurred precludes presumption that something not stated therein in fact did occur.[81]

*Law of the case.*See 8 C. L. 263—Matters passed on on a prior appeal are the law of the case on a subsequent appeal.[82] Instructions given on former trials and approved on former appeals cannot be questioned in subsequent trials and appeals.[83] If upon a second appeal the same state of facts is presented as upon the former appeal, the former decision upon the sufficiency of evidence settles the law of the case.[84]

Rulings on matters within the discretion of the trial court [85] such as rulings on motion for a continuance,[86] change of venue,[87] or for new trial,[88] to quash an indictment [89] as to qualifications of jurors [90] and conduct of trial in general,[91] compe-

80. Order extending time to file bill of exceptions granted after previous extension had expired. State v. Eaton, 191 Mo. 151, 89 SW 949. In West Virginia it is presumed that prejudice results from the giving of an erroneous instruction, unless it otherwise appears from the record. State v. McCoy [W. Va.] 59 SE 758.

81. State v. Hurst, 123 Mo. App. 39, 99 SW 820. It cannot be presumed that grand jury was sworn from statement in record that it was impaneled. Id. Nor from the fact that the court charged them and would not have overlooked so important a feature. Id.

82. Where no new matter bearing thereon is suggested. Murphy v. State, 131 Wis. 420, 111 NW 511.

83. Messer v. Com., 28 Ky. L. R. 920, 90 SW 955.

84. Lucas v. State [Neb.] 111 NW 145.

85. See 8 C. L. 263. Rulings on matters within the discretion of the trial court are not reviewable. State v. Hopkins, 118 La. 99, 42 S 660.

86. Ruling on a motion for continuance will be interfered with only when an abuse of discretion appears. Vanata v. State [Ark.] 101 SW 169; Clinton v. State [Fla.] 43 S 312; Johnson v. Com., 29 Ky. L. R. 442, 93 SW 581; State v. Pope [S. C.] 58 SE 815; Clement v. U. S. [C. C. A.] 149 F 305. Refusal of continuance for preparation and obtaining witnesses. Commonwealth v. Delero [Pa.] 67 A 764. Refusal of mistrial and continuance after evidence was all in was within court's discretion. State v. Hunter, 143 N. C. 607, 56 SE 547.

Denial of postponement. Williams v. State [Fla.] 43 S 428.

87. Granting of change of venue discretionary. Martin v. Com., 30 Ky. L. R. 1196, 100 SW 872. Refusal to grant change of venue on ground that defendant cannot obtain a fair and impartial trial will not be reviewed in the absence of an abuse of discretion. Vanderford v. State, 126 Ga. 753, 55 SE 1025. Denial of motion for change of venue on account of prejudice. Fletcher v. Com., 29 Ky. L. R. 955, 96 SW 855; Lyon v. Com., 29 Ky. L. R. 1020, 96 SW 857. Overruling of **motion to transfer cause** for violation of ordinance from criminal to civil docket, where it does not appear from the record that the case was not on the civil docket at the time the motion was made. City of Selma v. Shivers [Ala.] 43 S 565. Rev. 1905, § 427, provides that a judge shall not remove a cause unless satisfied that the ends of justice demand it. Held action of trial judge on motion for change of venue is not reviewable on appeal. State v. Turner, 143 N. C. 641, 57 SE 158.

88. Payne v. State [Ala.] 42 S 988; Bates v. State [Ala.] 44 S 695; Nicholson v. State [Ala.] 43 S 365; Ferguson v. State [Ala.] 43 S 16; Threlkeld v. State, 128 Ga. 660, 58 SE 49; Commonwealth v. Houghton, 31 Pa. Super. Ct. 528; Holmgren v. U. S. [C. C. A.] 156 F 439. Denial of new trial for misconduct of counsel. State v. Norman [Iowa] 113 NW 340. Motions for new trial and in arrest based on inaccuracies in the order placing local option in effect will not be considered where the statement of facts concedes that local option was in effect. Beasley v. State [Tex. Cr. App.] 101 SW 993. Grant or refusal of new trial on the ground that jurors heard improper argument or read unauthorized newspaper statements. Commonwealth v. Valverdi [Pa.] 66 A 877. New trial, refused by trial court, will not be granted by appellate court except for clear error of law, or where there is manifestly no evidence to sustain the verdict. Alexander v. State, 1 Ga. App. 289, 57 SE 996. Where court granted a reasonable time to prepare for hearing of motion for new trial, and appellant was not prepared, appellate court would not interfere with trial court's discretion in dismissing the motion. Hinely v. State, 1 Ga. App. 518, 57 SE 1021. Refusal to grant a new trial upon the weight of evidence. State v. Hummer, 73 N. J. Law, 714, 65 A 249. Where evidence, though conflicting, supports the verdict, discretion of court in overruling motion for new trial. Caesar v. State, 127 Ga. 710, 57 SE 66. Refusal of new trial not disturbed where evidence, though conflicting, authorized finding. Darby v. State, 127 Ga. 46, 56 SE 91.

89. Under Ky. Cr. Code Proc, § 281, providing that decisions upon challenges to the panel and for cause shall not be subject to exception, the ruling of the trial court on a motion to quash an indictment because of discrimination against colored persons in selecting the grand jury cannot be reviewed. Miller v. Com. [Ky.] 105 SW 899.

90. Discretion in excusing national guardsman from jury duty at time when his regiment was in camp not an abuse. State v. Lang [N. J. Law] 66 A 942. Sustaining state's challenge to juror. State v. Norman [Iowa] 113 NW 340. Finding as to competency of juror. Imboden v. People [Colo.] 90 P 608. Such findings are not reviewable unless abuse of discretion be shown. Id.

91. Order of proof not reviewed. Davis v. State [Fla.] 44 S 757; State v. Crane, 202

tency [92] and examination of witnesses,[93] and as to the primary admissibility of evidence,[94] will not be disturbed in the absence of abuse of discretion.[95] In Kentucky the rule that ruling on motion for new trial will not be disturbed applies to all objections first made on the motion.[96]

On questions of fact See 8 C. L. 263 the finding of the trial court is conclusive [97]

Mo. 54, 100 SW 422. Discretion of court in **limiting argument** of counsel. Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 175, 97 SW 316. The **striking out of testimony** which has come in without objection. State v. Hummer, 73 N. J. Law, 714, 65 A 249. New trial will not be granted because of action of judge in refusing to allow counsel to read to the jury a supreme court decision foreign to the issues in the case. Rogers v. State, 128 Ga. 67, 57 SE 227.

Order of mistrial because jury could not agree. State v. Harris, 119 La. 297, 44 S 22. An appellate court will not interfere with **rules made by the trial court for the conduct of trials.** State v. Pugh [Kan.] 90 P 242.

Denial of bill of particulars. Imboden v. People [Colo.] 90 P 608; Richberger v. State [Miss.] 44 S 772. Denial of request for **separate trials** of defendants charged in the same indictment. Krause v. U. S. [C. C. A.] 147 F 442. Determination **whether a letter is too obscene to be spread upon the records.** Rinker v. U. S. [C. C. A.] 151 F 755. Decision of trial court **that there is credible evidence in support of a verdict.** Lam Yee v. State [Wis.] 112 NW 425. Decision as to alleged **misconduct of counsel** in argument. Clark v. State [Neb.] 113 NW 211.

Giving charge as to credibility of witnesses. State v. Thurman, 121 Mo. App. 374, 98 SW 819.

Conduct of judge toward witnesses will not be controlled except for such abuse of authority as would manifestly tend to influence the jury. Carter v. State [Ga. App.] 58 SE 532. Appeal from mayor's to circuit court was dismissed for failure of accused to appear. He claimed he had been at court house but left because he thought court would be engaged with another case. Held dismissal was not an abuse of discretion. White v. State, 89 Miss. 675, 42 S 164.

92. Decision as to **capacity of child witness** to testify. Clinton v. State [Fla.] 43 S 312; State v. Meyer [Iowa] 113 NW 322. Determination that a child under foureen years of age is a competent witness. State v. Labriola [N. J. Err. & App.] 67 A 386. Discretion in **permitting "intimate acquaintance" to give opinion** on question of sanity as provided by Code Civ. Proc. § 3146, not reviewed. State v. Penna, 35 Mont. 535, 90 P 787. Discretion in **allowing nonexpert to give opinion** on question of sanity. People v. Clark [Cal.] 90 P 549. Discretion of court in **permitting a witness to testify who has not been placed under rule.** Waggoner v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 717, 98 SW 255; Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059.

93. Recalling witness or introduction of testimony before argument has ceased. Reyes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 219, 102 SW 1156.

Necessity of answering a question whether witness did not "bum" his meals. State v. Reyner [Or.] 91 P 301.

Restricting cross-examination of witnesses on subject whether they had previously talked over their testimony with other persons. People v. Conness, 150 Cal. 114, 88 P 821.

Allowance of leading questions in testimony of witness at former trial, introduced at present trial. Pitman v. State [Ala.] 42 S 993; Taylor v. State [Ark.] 102 SW 367; Beaudrot v. State, 126 Ga. 579, 55 SE 592; Jones v. State, 128 Ga. 23, 57 SE 313; State v. Hill [Wash.] 89 P 160. Allowance of leading questions to prosecutrix in rape case. State v. Blackburn [Iowa] 110 NW 275; State v. Wertz, 191 Mo. 569, 90 SW 838.

94. Counsel should not be encouraged to wait until answer is in before objecting, where question shows objectionableness. Hence, no abuse of discretion to refuse to strike answer in such case. State v. Hummer, 73 N. J. Law, 714, 65 A 249.

95. While the admission of proof of an experiment rests largely in the discretion of the court, a ruling admitting such proof will be reviewed where error and prejudice appear. Hisler v. State [Fla.] 42 S 692.

96. Under Cr. Code Proc. § 281, providing that decision on motion for new trial is not reviewable, matter of misconduct of jury first brought up on motion for new trial will not be considered. Stuart v. Com., 31 Ky. L. R. 1343, 105 SW 170. Under Cr. Code Proc. § 281, providing that decisions upon motions for new trial shall not be subject to exception, the appellate court cannot consider any question presented by the motion. Commonwealth v. Huber, 31 Ky. L. R. 929, 104 SW 345.

97. Overruling of motion for new trial on ground of prejudice of juror where trial court heard evidence as to his bias will not be disturbed. State v. Spaugh, 200 Mo. 571, 98 SW 55. Refusal of new trial not reversed in murder case where finding that mother killed babe was sustained by evidence, and no error of law was complained of. Allen v. State, 128 Ga. 53, 57 SE 224. On conflicting evidence. State v. McCarthy [Mont.] 92 P 521. Courts finding on motion for new trial **as to misconduct of counsel.** People v. Clark [Cal.] 90 P 549. Where the denial of a new trial on the ground of incompetency of jurors involves the determination of a question of fact, it is only in extreme cases of abuse of discretion that ruling will be disturbed. State v. Gordon, 191 Mo. 114, 89 SW 1025. Refusal of new trial will not be disturbed where evidence was sufficient to sustain finding of jury, and no error of law was complained of in the motion except one which was abandoned. Brooking v. State, 127 Ga. 52, 56 SE 72.

Finding as to whether dying declaration was made under sense of impending death. Fogg v. State [Ark.] 99 SW 537. Finding of court on **matters of fact** is entitled to same consideration as a verdict. State v. Ozias [Iowa] 113 NW 761. Decision upon an **issue raised by challenge** as to bias of a juror.

unless manifestly erroneous.[98] In like manner the verdict of the jury will be sustained if there is any evidence to support it,[99] or where the evidence is conflicting,[1]

State v. Werner [N. D.] 112 NW 60. Denial of **change of venue** on conflicting affidavits as to prejudice. State v. Hoffman, 134 Iowa, 587, 112 NW 103. Whether **confession was made under influence of threats or fear** within acts 1905, p. 637 was an issue of fact before the trial court. Thurman v. State [Ind.] 82 NE 64. Finding as to **competency of juror.** People v. Collins [Cal. App.] 92 P 513. Finding on **misconduct of jury** on conflicting affidavits. People v. White [Cal. App.] 90 P 471. Findings **on evidence.** Millner v. State [Ala.] 43 S 194; Irish v. State [Tex. Cr. App.] 89 SW 975. No appeal lies from **judgment finding accused sane** in trial of his sanity after conviction. Holland v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 172, 105 SW 812.

98. A finding as to **competency of a juror** will be reversed if manifestly wrong. Dennis v. State [Miss.] 44 S 825.

99. Verdict supported by evidence not disturbed. Lindsey v. State [Fla.] 43 S 87; Johnson v. State [Fla.] 43 S 430; Kent v. State [Fla.] 43 S 773; Allen v. State [Ga.] 58 SE 649; Holmes v. State [Ga.] 59 SE 255; Rogers v. State, 1 Ga. App. 527, 58 SE 236; Stubbs v. State, 1 Ga. App. 504, 58 SE 236; Malan v. State, 1 Ga. App. 534, 58 SE 265; Hammond v. State [Ga. App.] 58 SE 509; Hines v. State [Ga. App.] 58 SE 524; Sutton v. State [Ga. App.] 58 SE 544; McDuffie v. State [Ga. App.] 58 SE 544; Brown v. State [Ga. App.] 58 SE 549; Sapp v. State [Ga. App.] 58 SE 667; Lee v. State [Ga. App.] 58 SE 670; Lewis v. State [Ga. App.] 58 SE 1070; Williams v. State [Ga. App.] 58 SE 1072; Ledbetter v. State [Ga. App.] 58 SE 1106; Bryan v. State [Ga. App.] 59 SE 185; Miller v. People, 229 Ill. 376, 82 NE 391; McNulty v. State [Ind. App.] 81 NE 109; Taylor v. Com., 29 Ky. L. R. 563, 93 SW 1042; Hamilton v. Com., 29 Ky. L. R. 1039, 96 SW 833; McIntosh v. Com., 29 Ky. L. R. 1100, 96 SW 917; Stevens v. Com., 30 Ky. L. R. 290, 98 SW 284; Gibson v. Com., 31 Ky. L. R. 945, 104 SW 351; State v. Smith, 190 Mo. 706, 90 SW 440; State v. Urspruch, 191 Mo. 43, 90 SW 451; State v. Jones, 191 Mo. 653, 90 SW 465; State v. Eyermann, 115 Mo. App. 660, 90 SW 1168; State v. Mathews, 202 Mo. 143, 100 SW 420; State v. Beverly, 201 Mo. 550, 100 SW 463; State v. Yandell, 202 Mo. 646, 100 SW 466; Bridges v. State [Neb.] 113 NW 1048; Steudle v. Ter. [Okl.] 91 P 1024; Loudenback v. Ter. [Okl.] 91 P 1030; Percer v. State [Tenn.] 103 SW 780; State v. Johnson [Wash.] 91 P 949; Lam Yee v. State [Wis.] 112 NW 425. Constitution excludes review of any errors except errors of "law and equity." Plummer v. State, 1 Ga. App. 507, 57 SE 969.

Evidence sufficient to support verdict of guilty of larceny. Sheffield v. State, 1 Ga. App. 135, 57 SE 969. Testimony held to authorize finding of guilt of accused. Greer v. Jackson, 127 Ga. 47, 56 SE 73. If on a review of all the evidence the verdict appears to be substantially supported, it will not be disturbed. State v. De Witt, 191 Mo. 51, 90 SW 77. Not error to overrule certiorari where testimony authorized judgment. Smith v. State, 127 Ga. 43, 56 SE 73. Verdict **supported by abundant evidence** of substantial kind. State v. Hogan, 123 Mo. App. 319, 100 SW 528. Appellate court will presume that evidence justified verdict of guilty which lower court refused to set aside, until contrary is shown. State v. Allen, 113 La. 705, 37 S 614. Judgment **refusing new trial** affirmed though evidence was weak, there being sufficient to authorize verdict. Barker v. State, 1 Ga. App. 286, 57 SE 989.

Question of motive and intent of accused are concluded by verdict. People v. White [Cal. App.] 90 P 471. A verdict **supported by legal evidence.** People v. Meyers [Cal. App.] 91 P 167. A verdict **substantially supported by evidence.** State v. Williams, 191 Mo. 205, 90 SW 448. In reviewing a summary conviction if there be legal evidence upon which the judgment can be based, it will not be reversed though the evidence would lead the reviewing court to a different conclusion. Conner v. Fogg [N. J. Law] 67 A 338. In New York an objection that the evidence is insufficient to sustain conviction will not be reviewed by the court of appeals where the decision has been affirmed by the appellate division. People v. Maggiore [N. Y.] 81 NE 775. Verdict on circumstantial evidence **from which two inferences might be drawn.** Sanderson v. State [Ind.] 82 NE 525. A verdict will **not be molested unless clearly wrong.** Craig v. State [Neb.] 111 NW 143. Verdict **as to venue of offense.** State v. Meyer [Iowa] 113 NW 322. Verdict based on some evidence will not be disturbed **though chief witness for the state was impeached.** Yancey v. State [Ga. App.] 58 SE 546. Verdict on **testimony which did not come from a very satisfactory source.** Bradley v. State [Ga. App.] 58 SE 1064. Finding of jury **as to whether jury commissioners drew list** after they subscribed the oath. Rosenblatt v. State [Ga. App.] 58 SE 1107. Verdict based upon **testimony of one witness** who was contradicted by six not disturbed. Pyle v. State [Ga. App.] 59 SE 193. Verdict based on **weak and not entirely satisfactory evidence.** Mill v. State [Ga. App.] 58 SE 673. Evidence was **weak and circumstantial.** Cooper v. State [Ga. App.] 58 SE 544; Miles v. State [Ga.] 59 SE 274. Not disturbed because some of the evidence seems improbable. Webb v. Com, 30 Ky. L. R. 841, 99 SW 909. A verdict will not be disturbed on appeal if there was evidence from which fair minded men could have reached it. State v. Hanlin, 134 Iowa, 493, 110 NW 162. Sufficiency of specifications. State v. Webster [Vt.] 67 A 1098. Where the punishment is fixed by the jury, its verdict wil not be disturbed in the absence of error in the proceedings or evidence that the verdict was improperly secured. Walston v. Com., 31 Ky. L. R. 378, 102 SW 275. Affidavit to support motion to set aside verdict stated that juror had been heard to mention former conviction and that affiant believed fact of former conviction had been considered by the juror. Held affidavit presented only a question of fact not reviewable. State v. Frazier [N. H.] 65 A 297. Conviction of manslaughter will not be reversed on appeal where there was evidence that defendant did not act in self-defense, though there was other evidence that he did. People v.

or its determination involves the credibility of witnesses.[2] As a general rule appellate courts are without power to review questions of fact.[3] If, however, the verdict or finding is clearly contrary to the evidence,[4] or indicates passion or prejudice,[5] it will not be sustained. That there is no evidence to support a verdict is a question of law and will be reviewed,[6] and the findings of the judgment do not preclude the reviewing court from an examination of the record to determine jurisdictional facts.[7]

(§ 17) *I. Decision and judgment of the reviewing court.*[See 8 C. L. 264]—The judgment of the trial court will not be reversed for a non-prejudicial error,[8] but reversal may be had where the record shows a prejudicial error of law.[9] On appeal

Wright [Cal. App.] 89 P 364. Conviction will not be reviewed when justified, though evidence is conflicting and would have warranted another verdict. Myers v. State [Tex. Cr. App.] 101 SW 1000. Judgment affirmed where no error of law appeared and verdict was well supported by evidence and approved by trial court. Davis v. State, 1 Ga. App. 331, 57 SE 924. Under Crim. Proc. Act (Act 1894, § 136), amended by Laws 1898, p. 915, the sufficiency of evidence will not be reviewed though the certification of the trial judge brings up the entire record, such certification not being treated as a writ of certiorari. State v. Lang [N. J. Law] 66 A 942.

1. Verdict based on conflicting evidence will not be disturbed. People v. Gonzalez [Cal. App.] 91 P 1013; Harper v. State [Ga. App.] 58 SE 685; State v. Cook [Idaho] 88 P 240; McCoy v. U. S., 6 Ind. T. 415, 98 SW 144; Mickle v. U. S. [Ind. T.] 98 SW 349; State v. Baker [Kan.] 90 P 1133; Tompkins v. Com., 28 Ky. L. R. 642, 90 SW 221; Wells v. Com., 30 Ky. L. R. 504, 99 SW 218; O'Day v. Com., 30 Ky. L. R. 848, 99 SW 937; Esterline v. State [Md.] 66 A 269; State v. Williams, 199 Mo. 137, 97 SW 562; State v. Fogg, 206 Mo. 696, 105 SW 618; Wheeler v. State [Neb.] 113 NW 253; Haynes v. State [Tenn.] 105 SW 251; Bailey v. State [Tex. Cr. App.] 90 SW 27; Vick v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 67, 100 SW 938; Park v. State [Tex. Cr. App.] 98 SW 264; Calk v. State [Tex. Cr. App.] 103 SW 631; Butts v. State [Tex.. Cr. App.] 97 SW 467.

Weak and conflicting. Waller v. State [Ga. App.] 58 SE 1106. Verdict is conclusive on **question of insanity.** Bischoff v. Com., 29 Ky. L. R. 770, 96 SW 538. Verdict on circumstantial evidence which is conflicting will not be disturbed where it is sufficient to bring the case within the rule as to the quantum of the circumstantial evidence required. State v. Kidwell [W. Va.] 59 SE 494. Where testimony warranted conviction, verdict will not be disturbed, though defendant's evidence as to self-defense would have warranted a finding in his favor. Loyd v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 113, 89 SW 977.

2. Credibility of witnesses and weight of testimony are for jury. State v. Urspruch, 191 Mo. 43, 90 SW 451; Freeney v. State [Tex. Cr. App.] 102 SW 113. Supreme court cannot discredit witnesses whose testimony jury has accepted. People v. King [Cal. App.] 87 P 400.

3. The supreme court of Louisiana is without jurisdiction to review a verdict. State v. Easley, 118 La. 690, 43 S 279; In re Schwartz, 119 La. 290, 44 S 20; State v. Mehojovich, 118 La. 1013, 43 S 660. Appellate court is not authorized to reverse a judgment where there is evidence to sustain it. Illinois Cent. R. Co. v. Com., 29 Ky. L. R. 756, 96 SW 467. Where a conviction is affirmed by the appellate division, the court of appeals considers nothing but alleged errors of law. People v. Mingey [N. Y.] 82 NE 728. Objection that verdict is contrary to the law and the evidence raises a mixed question of law and fact not reviewable in the supreme court. State v. Sims, 117 La. 1036, 42 S 494. Where there is evidence to support a verdict but jury decide contrary to its weight, the remedy is an application to set the verdict aside. State v. Martin, 141 N. C. 832, 53 SE 874. Sufficiency of evidence will not be reviewed though there is evidence which if believed would have successfully impeached all the state's witnesses, nor on the ground that state's testimony bears inherent indicia of untruthfulness, or that punishment inflicted is severe. Plummer v. State, 1 Ga. App. 507, 57 SE 969. On appeal, court can only pass on sufficiency of evidence, not on its credibility. Delk v. State [Ark.] 102 SW 1111. There being no error of law complained of, and the evidence though weak being legally sufficient to authorize conviction, appellate court has no power to interfere with discretion of trial court in refusing to grant a new trial. Miller v. State, 1 Ga. App. 134, 57 SE 909.

4. A verdict clearly against the great weight of the evidence, and which rests upon circumstances reasonably consistent with innocence, will be set aside. Conviction for stealing set aside. Hazelwood v. Ter., 17 Okl. 515, 87 P 470. It is duty of supreme court to reverse a judgment of conviction when the evidence shows it to be erroneous. Newman v. People, 223 Ill. 324, 79 NE 80.

5. Supreme court will not review evidence unless verdict is clearly the result of passion or prejudice. Plummer v. State, 1 Ga. App. 507, 57 SE 969; State v. Delts, 191 Mo. 665, 90 SW 782.

6. Sufficiency of verdict is reviewable under Pen. Code § 1059, though no assignment of error was made. Buffehr v. Ter. [Ariz.] 89 P 415. On appeal on the ground of insufficiency of evidence, the question is whether the evidence is legally sufficient to sustain the verdict. Chapline v. State, 77 Ark. 444, 95 SW 477.

7. Reymert v. Smith [Cal. App.] 90 P 470.

8. Under P. L. 1894, p. 246, amended by Laws 1898, providing for reversal for error in "admission or rejection of testimony," such phrase imports judicial action and does not apply to refusal to strike testimony admitted without objection. State v. Hummer [N. J. Err. & App.] 67 A 294.

9. Where evidence shows defendant guilty

from a void judgment, the cause will be dismissed.[10] Where a judgment of conviction is reversed, judgment discharging the defendant should be rendered only when it is apparent that no other or different evidence can or will reasonably be produced to sustain a conviction.[11] An even division of the appellate court constitutes an affirmance.[12] Where two or more persons are jointly indicted and tried and a judgment render against all the appellate court may affirm as to one and reverse and grant a new trial as to another,[13] but where they join in writ of error and argument, it must be affirmed or reversed as to both.[14] In Georgia where the only question brought to the court of appeals is affirmed on certification to the supreme court, the judgment will be affirmed.[15] In New York a judgment of the appellate division reversing a judgment of the trial court upon a question of law must itself be reversed where the question of law was not raised by exception in the trial court.[16] The court of appeals of Texas has power to correct a judgment which omits statutory requirements,[17] and in Tennessee the supreme court will correct an erroneous judgment.[18] Where there is doubt as to the meaning of a verdict, it cannot be modified to conform existing statute.[19] Except in cases in which capital punishment has been fixed, and the date fixed for same has expired before a final determination of the appeal,[20] the supreme court, in Alabama, need not resentence accused upon an affirmance of the judgment or dismissal of the appeal.[21] In Missouri where a conviction is affirmed by the supreme court, it is the duty of that court to execute the judgment,[22] and thereafter the circuit court has no power to grant a parole.[23]

(§ 17) *J. Proceedings after reversal and remand.* See 8 C. L. 265—Reversal of judgment and remand of case for new trial generally leaves the court free to proceed as though the case had never been tried, and it may consolidate other indictments with those upon which the first trial was had.[24] Where a judgment is reversed be-

but there is error in the instructions which might have affected the punishment inflicted, it is discretionary with the court to reverse and remand for new trial or impose the minimum sentence. Such discretion is not controlled by costs nor the fact of sufficiency of evidence on the first trial where life or liberty is involved. Pittman v. State [Ark.] 105 SW 874. Indictment for perjury also charged former conviction of a felony but last charge was not sufficiently proved. Accused was sentenced to the shortest term he could have received on conviction of both offenses. Held it could not be presumed that accused would have been given same sentence if convicted only of perjury, hence reversal necessary. People v. Chadwick [Cal App.] 87 P 384.

10. On appeal from conviction for permitting stock to run at large, the cause will be reversed and dismissed rather than remanded, the stock law being void. Peters v. State [Tex. Cr. App.] 97 SW 498.

11. State v. Elsey, 201 Mo. 561, 100 SW 11.

12. Code § 5376, requiring acquittal when there is reasonable doubt of guilt, and § 5377 requiring conviction of lesser degree when there is doubt of degree of guilt, do not conflict with § 195 requiring an affirmance by supreme court when judges are evenly divided, and a conviction will be affirmed when there is such division. Busse v. Barr, 132 Iowa, 463, 109 NW 920.

13. State v. McCoy, 61 W. Va. 258, 57 SE 294.

14. Where defendants jointly tried sued out a joint writ of error and joined in assignments and argument, the appellate court must consider both together and affirm or reverse as to both. Krause v. U. S. [C. C. A.] 147 F 442.

15. Where the only question brought up to the court of appeals was the validity of a statute and the supreme court held it valid on certification of the question to it. Cunningham v. State [Ga. App.] 58 SE 23.

16. People v. Huson [N. Y.] 79 NE 835.

17. Under Code Cr. Proc. 1895, arts. 831, 837, 904, the court of criminal appeals has authority to correct an incomplete judgment, and need not send it back. McCorquodale v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 759, 98 SW 879.

18. Where verdict is in proper form and trial court has rendered an erroneous judgment, the supreme court will on appeal by defendant make proper correction and render such judgment as the trial court should have rendered. Cowan v. State, 117 Tenn. 247, 96 SW 973.

19. Where in a prosecution for cutting timber from government land the jury might have found that the cutting was innocently done and where sentence of fine and imprisonment was illegal because of repeal of the statute for imprisonment, the circuit court of appeals could not correct the sentence by eliminating imprisonment. Morgan v. U. S. [C. C. A.] 148 F 189.

20. Code 1896, § 4334. Weinard v. State [Ala.] 42 S 991.

21. Resentence not necessary in misdemeanor case. Weinard v. State [Ala.] 42 S 991.

22, 23. Ex parte Foister, 203 Mo. 687, 102 SW 542.

24. Booth v. U. S. [C. C. A.] 154 F 836. Where a cause has been remanded to the

cause improperly entered, the cause will not be remanded for new trial but the judgment will be vacated and the record remanded for entry of judgment in accordance with statute.[25] A substantial compliance by the trial court with the mandate of the appellate court on remand of case is sufficient.[26] In New York the supreme court, may send a cause back for trial in the county court where the county court transferred it to the supreme court the first time such court sent it to the county court for trial.[27]

§ 18. *Summary prosecutions and review thereof.* See 8 C. L. 265—The city attorney is not bound to obey an order of the common council to dismiss a suit to recover the penalty for violation of an ordinance.[28] In case of summary convictions before a magistrate without a jury, the record must show on its face everything necessary to constitute a legal conviction.[29] A summary conviction must rest on a specific finding individualizing the criminal act of which conviction is had.[30] A defendant who has been convicted before a magistrate of a misdemeanor may file a motion for a new trial upon the ground of any error alleged to have occurred during the trial.[31]

Review. See 8 C. L. 266—The Pennsylvania act of April 22, 1905, relating to appeals from summary convictions, is unconstitutional.[32] The time within which a bill of exceptions may be prepared in a misdemeanor case is not less than five or more than ten days from the overruling of the motion for a new trial, if such a motion is filed; and when a proper bill of exceptions embodying the testimony is allowed, signed and filed with the petition in error, it is the duty of the court of common pleas to pass upon the weight of the evidence.[33] Where trial is without a jury, the record should state that the court was requested to "rule," not to "instruct itself." [34] Where a bill of exceptions in a prosecution before a mayor was duly signed and regularly filed in the common pleas, it is not open to objection in the circuit court on the ground that it was not filed by the mayor or noted on his docket.[35] A mayor loses jurisdiction after rendering final judgment by pronouncing sentence on the defendant, and it is thereafter without authority to fix a time for filing a bill of exceptions.[36]

INDORSING PAPERS; INFAMOUS CRIMES, see latest topical index.

INFANTS.

§ 1. Status and Disabilities in General. 239.
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trial court, it has jurisdiction though the record is still in the possession of the appellate court subject to be returned within 60 days as provided by statute. Murphy v. State, 131 Wis. 420, 111 NW 511.

25. Terhune v. Reed [N. J. Law] 67 A 180. Where a minor is erroneously sentenced to the penitentiary instead of to the reformatory, the judgment will be reversed and the case remanded for entry of proper sentence. Neathery v. People, 227 Ill. 110, 81 NE 16.

26. Where appellate court reversed a conviction for murder and ordered lower court to sentence for manslaughter, and the lower court sentenced defendant to four years in the penitentiary, held it complied with the mandate. Darden v. State, 80 Ark. 295, 97 SW 449.

27. Supreme court has jurisdiction to send an indictment back to the county court for trial a second time when the county court transferred it to the supreme court the first time it was sent by the supreme court to the county court for trial. People v. De Puy, 115 App. Div. 564, 101 NYS 81.

28. Flynn v. Springfield, 120 Ill. App. 266.

29. State v. Hankins [N. J. Law] 67 A 1057.

30. Commonwealth v. Cannon, 32 Pa. Super. Ct. 78.

31. Rev. St. § 6550, does not apply. Kimmerline v. State, 5 Ohio N. P. (N. S.) 417.

32. Commonwealth v. Luckey, 31 Pa. Super. Ct. 441.

33. Kimmerline v. State, 5 Ohio N. P. (N. S.) 417.

34. Fields v. District of Columbia, 26 App. D. C. 70.

35. Village of Silverton v. Davis, 10 Ohio C. C. (N. S.) 60.

36. Decker v. State, 5 Ohio N. P. (N. S.) 364.

Rights and duties as between parent and child,[37] powers and proceedings of guardians [38] and guardians ad litem,[39] are treated elsewhere, also the application to infants of the doctrines of contributory negligence [40] and assumption of risk.[41]

§ 1. *Status and disabilities in general.*[See 8 C. L. 207]—In some states the word "minor" is defined by statute.[42] The domicile of the infant follows that of the father [43] unless the custody of the infant has been judicially given to another.[44] The disability statute of Wisconsin exempts minors from the operation of the statute limiting the commencement of actions only.[45]

§ 2. *Custody, protection, support, and earnings.*[46]—The state as parens patriae may through its proper tribunals and agencies take custody and control of infants [47] and incidentally to this control authorize the infants to be bound out to proper service.[48] The courts of chancery generally have power to superintend the affairs of infants [49] and to provide permanently for their custody,[50] and may in the exercise of such power take them from the custody of grossly unfit parents.[51] In New Jersey

37. See Parent and Child, 8 C. L. 1225.

38. See Guardianship, 9 C. L. 1551.

39. See Guardians Ad Litem and Next Friends, 9 C. L. 1549.

40. See Negligence, 8 C. L. 1090.

41. See Master and Servant, 8 C. L. 840.

42. Civ. Code, § 25, defines "minors" as males under twenty-one years of age and females under eighteen years of age (Ex parte Wood [Cal. App.] 90 P 961), and § 26 that the age of the minor must be calculated from the first minute of the day of birth to the same minute of the corresponding day completing the period of minority (Id.), so that a female born March 17, 1889, attained majority on March 16, 1907 (Id.). In Florida both males and females are minors until they are twenty-one years of age. Beekman v. Beekman [Fla.] 43 S 923.

43. Notwithstanding the separation of the parents and the promise of the father to return the child to the mother at her request. Lanning v. Gregory [Tex. Civ. App.] 18 Tex. Ct. Rep. 210, 101 SW 484; Id. [Tex.] 17 Tex. Ct. Rep. 587, 99 SW 542. A female minor in Florida cannot acquire a domicile there if her father is domiciled in Ohio, although by the laws of that state a female over eighteen years of age may acquire a domicile independent of her father's. Beekman v. Beekman [Fla.] 43 S 923. Upon marriage, however, a female minor takes the domicile of her husband. Id.

44. A decree awarding child in his father's custody to his mother until he was twelve years old held to work a change in the child's domestic status for the time. Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 SW 542.

45. Rev. St. 1898, § 4223. It does not exempt infants from the operation of Laws 1897, p. 678, c. 304 (Rev. St. 1898, § 4222, subd. 5), requiring a notice of injury to be given within one year of the happening thereof. Hoffman v. Milwaukee Elec. R. & Light Co., 121 Wis. 76, 106 NW 808. Such notice may be given by the father. Id.

46. See 8 C. L. 267. See, also, Divorce, 9 C. L. 997, as to award of custody on grant of decree; Alimony, 9 C. L. 89, as to allowance for support.

47. Acts 1894, p. 80 (Civ. Code 1895, §§ 2372-2387), creating and regulating benevolent institutions for minors, is not repugnant to the constitutional provision relating to **titles of acts** (Kennedy v. Meara, 127 Ga. 68, 56 SE 243), nor as being a special law (Id.). The institutions become state agencies. Id. Habeas corpus lies to take child from custody of an institution on the ground that the parent is now fit to have custody (Id.), the remedy given the parent in the act by application to the authorities of the institution being cumulative merely, and does not oust the jurisdiction of the court (Id.). Civ. Code 1895, § 2505, providing for the commitment of children to charitable institutions, was not repealed by acts 1904, p. 93. Moore v. Dozier, 128 Ga. 90, 57 SE 110. Admissibility of judicial record and of evidence bearing upon the fitness of the parent to have custody in a matter arising under Civ. Code 1895, § 2505, providing for the commitment of children in proper cases to charitable institutions, considered. Id.

48. Civ. Code 1895, §§ 2372-2387, providing for placing of infants in benevolent institutions and binding them out to service, is not repugnant to the provisions of the constitutions of the United States or Georgia prohibiting slavery or involuntary labor save as a punishment for crime. Kennedy v. Meara, 127 Ga. 68, 56 SE 243. It is the duty of the institutions to see that their infants are cared for when so bound out. Id.

49. Dixon v. Dixon [N. J. Eq.] 66 A 597.

50. The writ of habeas corpus authorized by P. L. 1902, p. 263, § 12, is not a pure common-law habeas corpus proceeding (Dixon v. Dixon [N. J. Eq.] 66 A 597), but a proceeding before the chancelior under his general power to superintend the affairs of infants and to provide who shall permanently have the custody of them (Id.). In habeas corpus proceedings under P. L. 1902, p. 263, § 7, the court cannot impose upon a parent residence in New Jersey as part of the decree giving him the custody of the children. Francisco v. Francisco [N. J. Eq.] 67 A 687. Under P. L. 1902, p. 264, § 12, the court may award access to the parent to whom custody is not awarded although he does not ask for it in his petition (Id.), the right of access to be at all such proper and convenient times and places as counsel may agree upon or, on failure so to do, as the court may order (Id.). Rev. St. 1895, art. 3502, a. & b. giving county courts the right to rescue children from improper custody and providing for similar proceedings by

the court cannot remove resident infants from its jurisdiction without their consent, if of suitable age to signify it, except for cause shown.[52] The custody of children is primarily in the father if living,[53] and such primary right prevails unless relinquished [54] or unless the father is unfit,[55] and he cannot be deprived of that custody without an opportunity to be heard.[56] In determining the right to the custody of a child, the best interest of the child is the controlling consideration.[57] Where the child is of mature years, its preference will be given great weight.[58] Jurisdiction of custodial proceedings is at the place of the child's domicile.[59] Custody decrees are prima facie evidence of the legal right to custody in the person to whom it is awarded thereby [60] and are binding on the parties [61] until reversed or amended to meet changed conditions.[62] In custodial proceedings, the trial court is invested with a broad discretion which is not controllable by the appellate court except when manifestly abused.[63]

habeas corpus, held repugnant to Const. art. 5, §§ 8, 16. Ex parte Reeves [Tex.] 18 Tex. Ct. Rep. 808, 103 SW 478.

51. Hamerick v. People, 126 Ill. App. 491.

52. Laws 1902 (P. L. p. 263, § 7), giving jurisdiction of the custody of minors whose parents are living separate. Francisco v. Francisco [N. J. Eq.] 67 A 687. Children of nine, eleven, and fourteen years of age held of suitable age to signify dissent, and court powerless to remove in absence of cause shown. Id. The prohibition of this section applies to the parents, and an order giving the custody of children to the mother prohibited her from taking them beyond the limits of the state without special order of court. Id.

53. So by statute (Civ. Code 1895, §§ 2502, 2503) in Georgia. If no father, then the mother. Moore v. Dozier, 128 Ga. 90, 57 SE 110. Father held entitled to custody as against grandmother, other considerations being about equal. Wofford v. Clark [Ark.] 102 SW 216.

54. Relinquishment of the father's natural right of control must be clearly shown. Evidence held insufficient. Richards v. McHan [Ga.] 58 SE 839.

55. Kennedy v. Meara, 127 Ga. 68, 56 SE 243. In order to defeat a father's prima facie right to custody as between him and a third person in peaceable custody, evidence of his unfitness need not be overwhelming. A strong case with clear and satisfactory proof is sufficient. Walker v. Jones, 1 Ga. App. 70, 57 SE 903. Evidence held insufficient to show that father of infant was living in adultery. People v. Bishop, 117 App. Div. 445, 102 NYS 592.

56. Act 1894, p. 80 (Civ. Code, §§ 2372-2387), providing for placing of children in institutions only after a reasonable notice to parent and a hearing, held not to deprive parent of custody without due process of law. Kennedy v. Meara, 127 Ga. 68, 56 SE 243.

57. Civ. Code 1895, §§ 2452, 2503. Walker v. Jones, 1 Ga. App. 70, 57 SE 903. Discretion in habeas corpus proceeding held wisely exercised in awarding custody of the child to the mother. Pinnebad v. Pinnebad, 128 Ga. 73, 57 SE 89.

Evidence held sufficient to justify finding that a father was both an unsuitable person to have the custody and that he was unable properly to maintain and educate it. Pittman v. Byars [Tex. Civ. App.] 17 Tex. Ct. Rep. 714, 99 SW 1032.

58. Walker v. Jones, 1 Ga. App. 70, 57 SE 903; People v. Bishop, 117 App. Div. 445, 102 NYS 592.

59. Where the domicile is Louisiana, temporary presence in Texas does not give courts of latter state jurisdiction to adjudge a change in the relation between a father and child (Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 SW 542; Id. [Tex. Civ. App.] 18 Tex. Ct. Rep. 210, 101 SW 434), and the relative rights of the father and mother, neither being residents of Texas, as to the custody of a child, should be determined by the courts of Louisiana, and the domicile of the father (Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 SW 542).

60. But such a decree in a divorce proceeding is not conclusive in habeas corpus proceedings where owing to changed conditions the welfare of the child requires that it be taken from the person to whose custody the decree had awarded it. Hollenbeck v. Glover, 128 Ga. 52, 57 SE 108.

61. Judgment of commitment to an institution under Civ. Code 1895, §§ 2372-2387, held binding until reversed and evidence tending to impeach its validity properly excluded. Kennedy v. Meara, 127 Ga. 68, 56 SE 243.

62. Laws of 1902 (P. L. p. 263), § 10, gives court power to make necessary orders from time to time in relation to custody and possession. Dixon v. Dixon [N. J. Eq.] 66 A 597. Where the court had complete jurisdiction, at the beginning, of a parent and children, jurisdiction to modify the decree is not lost by their removal to another state. Id. Court refused to modify an order giving the custody of children to the mother and granting the father the right to visit them at certain times merely because the mother had taken them to Maine (Id.), it not appearing the removal was intended to be permanent and to prevent the father from visiting the children (Id.). An unauthorized letter from the maternal grandfather to the father that the mother and children had "moved" to Maine is insufficient of itself to prove a permanent change of residence. Id.

63. Walker v. Jones, 1 Ga. App. 70, 57 SE 903. No gross abuse of discretion apparent. Hollenbeck v. Glover, 128 Ga. 52, 57 SE 108. The disposition of minors in divorce proceedings is within the control and subject to the sound discretion of the trial court. Van Horn v. Van Horn [Cal. App.] 91 P 260. Evidence as to mother's character held properly excluded. Id.

A separation agreement by parents by which the father takes the child but agrees to return it to the mother at her request does not emancipate the child from the control of the father.[64] A minor without parents or anyone who stands in loco parentis is entitled to contract for and to receive his own earnings as if emancipated.[65]

§ 3. *Statutes for the protection of infants.*[See 8 C. L. 271]—In order to bring himself within the protective clauses of statutes looking to the supervision and control over the contracts, occupation, and conduct of infants and the liberty and right of those who assume to deal with them, a strict compliance with their terms is essential.[66]

Crimes against children.[See 8 C. L. 272]—The abandonment of children in a dependent and destitute condition is criminal in Georgia.[67] The word "child" in the Georgia statute for the prevention of cruelty to children is not synonymous with "minor,"[68] and whether the infant is a child is a question of fact for the jury.[69] A mere ticket taken at a theatre is not in any class named in the New York statute providing for the punishment of any person who admits children under sixteen years of age, not accompanied by parent or guardian, to places named therein.[70] The New Jersey statute for the prosecution of cruelty to children does not cover the offense of carnal abuse.[71] In Tennessee it is unlawful for one running a pool room to permit a minor to play pool without first obtaining the written consent of the parent.[72] Penal statutes of this character should be strictly construed.[73]

Juvenile courts[See 8 C. L. 272] for the protection and redemption of delinquent and incorrigible minors are not for the trial of crime,[74] the power conferred upon such courts being of the same character as the jurisdiction exercised by courts of chancery over the person of infants,[75] and, when properly enacted [76] within other constitutional

64. Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep. 587, 99 SW 542.

65. Hence in case of injury he may recover for loss of time and for diminution in his earning power during minority. Manufacturers' Fuel Co. v. White, 228 Ill. 187, 81 NE 841.

66. Requirements of P. L. 1904, p. 152, forbidding the employment of children under fourteen, but providing by § 3 for an affidavit by the child's parent that the child was above that age, for the protection of the employer, not complied with, and affidavit held no defense. Bryant v. Mandel [N. J. Law] 65 A 867.

67. Under Penal Code 1895, § 114, abandonment before the child is born and persistence in the same afterwards is criminal where the child is in a dependent and destitute condition. Moore v. State, 1 Ga. App. 502, 57 SE 1016. The misconduct and refusal of the mother to live with the father is no defense to a prosecution for abandonment by him, as the child is not responsible therefor or to be abandoned because thereof. Id.

68. Pen. Code 1895, § 708. The word is used in its ordinary signification. Stone v. State, 1 Ga. App. 292, 57 SE 992.

69. A girl of fourteen years of age is presumptively a "child" within the meaning of the Georgia statute. Stone v. State, 1 Ga. App. 292, 57 SE 992.

70. Pen. Code, § 290. Names theatres, museums, skating rinks, or any place where wines or liquors are kept. People v. Sheriff of Kings County, 54 Misc. 8, 105 NYS 387.

71. Gen. St. p. 1717, § 26, amended P. L. 1901, p. 276, § 1, declaring that any person who shall cruelly illtreat, abuse, or inflict unnecessary cruel punishment upon any infant or minor child shall be guilty of a misdemeanor with a fine of from $10 to $50 for each offense. State v. Hankins [N. J. Law] 67 A 1057. The word "abuse" means abuse of a corporal character, such as the infliction of cruel or unnecessary punishment or failure to administer to its physical needs. Id.

72. Shannon's Code, § 6826. Such permit by parent is good only for one occasion (Rhodes v. State [Tenn.] 102 SW 899), and all games played under its sanction must be played on that occasion and continuously, not part one day and part on another (Id.).

73. The persons or class of persons included therein should not be enlarged by construction. People v. Sheriff of Kings County, 54 Misc. 8, 105 NYS 387.

74. A proceeding under Acts 1903, p. 516, c. 237, and c. 35, p. 91, to commit a girl eleven years old to an industrial school for incorrigible conduct, is not a criminal action. Dinson v. Drosta, 39 Ind. App. 432, 80 NE 32. Vagrancy which may be tried in the children's court in New York is a condition, not a crime. People v. O'Neill, 117 App. Div. 826, 102 NYS 988. Such laws are in no sense criminal, not being intended as punishment, but to save children from becoming criminals. Mill v. Brown, 31 Utah, 473, 88 P 609.

75. The power flows from the general power and duty of the state parens patriae to protect those who have no other lawful protection. Dinson v. Drosta, 39 Ind. App. 432, 80 NE 32.

76. Laws Utah 1905, p. 182, c. 117, creating juvenile courts, being an independent and complete act in itself and not purporting to

limitations, statutes creating such courts are held valid.[77] In Utah the child must be found delinquent [78] and the parent incompetent or unfit because of his neglect before a child can be made a ward of the state.[79] The ordinary procedure in case of crimes is not a part of "due process of law." [80] There is no right to a jury trial [81] nor of appeal.[82]

§ 4. *Property and conveyances.*[See 8 C. L. 272]—Chancery has inherent power to protect the property affairs of infants,[83] but no power, save by statute, to dispose of their real estate.[84] A mortgage by an infant is voidable only [85] and cannot be disaffirmed before the attainment of majority.[86] Such a mortgage may not be foreclosed until and unless its status shall have been first established as that of a conveyance not subject to avoidance at the will of the mortgagee.[87] An infant may ratify a sale of real estate after attaining his majority.[88] In Louisiana notice of a tax delinqunecy must be served on the minor's tutor.[89] The title to realty by adverse possession cannot be acquired against infants.[90]

amend or modify any other law or section, is not an amending act within the provision of the constitution as to the titles of such acts, although it incidentally affects older laws. Mill v. Brown, 31 Utah, 473, 88 P 609.

77. Laws Utah 1905, p. 182, c. 117, creating juvenile courts in cities of the first and second class with exclusive jurisdiction over juvenile offenders, is not special legislation (Mill v. Brown, 31 Utah, 473, 88 P 609), nor is that statute unconstitutional as conferring on said juvenile courts jurisdiction and powers previously exercised by district courts (Id.). Section 7 of act relative to the punishing of a parent responsible for the delinquency of a child is unconstitutional in denying the parent the right of a trial as for any other crime (Id.), but as said section in no way affects the other provisions and sections of the act, the rest of the act stands (Id.). Civ. Code, §§ 2372-2387, creating special courts for the commitment of infants to institutions, is not violative of the constitutional provision contained in Civ. Code 1895, § 5859, relative to the uniformity of courts. Kennedy v. Meara, 127 Ga. 68, 56 SE 243. Act No. 82, p. 134, of 1906, conferring the duties and functions of a juvenile court on the criminal district court of the parish of Orleans, held repugnant to Const. 1898, art. 139, conferring original jurisdiction on said court. In re Parker, 118 La. 471, 43 S 54.

78. Mill v. Brown, 31 Utah, 473, 88 P 609.

79. While Laws Utah 1905, p. 182, c. 117, creating juvenile courts with jurisdiction to provide for the custody of delinquent children, does not expressly require the court to find as to the competency or neglect of the parent, the act must be construed to require it (Mill v. Brown, 31 Utah, 473, 88 P 609), since Rev. St. 1898, § 82, expressly provides that a parent cannot be deprived of a child unless it appears that he is unfit or incompetent to have custody (Id.).

80. Laws Utah 1905, p. 182, c. 117, is not unconstitutional in not providing for arraignment and plea, notice to parent, warrant and arrest of child, or because of the manner of examination and trial, where the child is required to be a witness against himself. Mill v. Brown, 31 Utah, 473, 88 P 609.

81. Dinson v. Drosta, 39 Ind. App. 432, 80 NE 32. Laws Utah 1905, p. 182, c. 117, is not unconstitutional in not providing a trial by jury. Mill v. Brown, 31 Utah, 473, 88 P 609.

82. In the absence of any statute giving such right. Dinson v. Drosta, 39 Ind. App. 432, 80 NE 32. There is no appeal in Utah. Mill v. Brown, 31 Utah, 473, 88 P 609. An appeal from the New York children's court lies to the county court under Code Cr. Proc. § 749. New York City charter, Laws 1897, p. 503, c. 378, § 1414, held not to apply. People v. O'Neill, 117 App. Div. 826, 102 NYS 988.

83. A court of equity or law will not deprive an infant of the right or privilege which is deemed essential to its proper protection of affirming a property transaction upon its arrival at majority unless some fact appears which is recognized as furnishing the basis for equitable interposition or as laying the foundation for an estoppel. Watson v. Ruderman, 79 Conn. 687, 66 A 515.

84. Court has no power to order sale of land for reinvestment in other real estate. Heady v. Crouse, 203 Mo. 100, 100 SW 1052.

85, 86. Watson v. Ruderman, 79 Conn. 687, 66 A 515.

87. Equity will not compel an infant mortgagor at the suit of a mortgagee to exercise his right to affirm or disaffirm, in the absence of fraud or concealment, especially where it does not appear that the infancy was not known. Watson v. Ruderman, 79 Conn. 687, 66 A 515.

88. Where minors after they became of age, with full knowledge, used the proceeds of the sale, they thereby ratified it and were estopped from recovering the land sold from the purchaser. Webb v. Hicks, 127 Ga. 170, 56 SE 307. Infant held bound by adopting and ratifying partition conveyances when he attained his majority. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997. Children allowed to question the validity of a deed signed by their mother under an order of court, purporting to convey her and their interests in certain land when they were minors. Moorehead v. Allen, 127 Ga. 510, 56 SE 745. Acceptance of deeds held not to be a ratification of an invalid sale. Heady v. Crouse, 203 Mo. 100, 100 SW 1052.

89. Not on major relative and co-owner with whom minor lives on the premises in question. In re Interstate Land Co., 118 La. 587, 43 S 173.

90. Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984. Failure to

§ 5. *Contracts.*[See 8 C. L. 274]—The contract of an infant, except for necessaries,[91] is voidable at his option [92] within a reasonable time after majority,[93] and he may rescind an executory or executed contract at will by restoring or offering to restore what he received thereunder.[94] The duty to make restoration exists only where the minor has received money or property under the contract which he seeks to avoid.[95] The law will not allow an infant to perpetrate a fraud by reason of his repudiation of a contract relating to the settlement of a tort.[96] If the person with whom the voidable contract is made cannot make restitution, transactions with innocent third persons will not be opened to reimburse the infant.[97] Continued payments pursuant to the terms of a contract after the infant attains majority do not necessarily amount to a ratification of the contract.[98] By statute in South Carolina, the contracts of a minor, except for necessaries, are unenforceable unless ratified in writing after attaining majority.[99] In Georgia an infant may make a binding contract in connection with the business in which he is engaged by permission of his parent or guardian.[1]

set forth in the petition the grounds of defense to the action as required by Code Civ. Proc. § 520 held no objection. Id.

91. Civ. Code 1895, § 3648. White v. Sikes [Ga.] 59 SE 228. An infant is not liable for an executory contract even for necessaries. International Textbook Co. v. McKone [Wis.] 113 NW 438.

92. Mortgage note held void and subject to disaffirmance after minor attained majority. Watson v. Ruderman, 79 Conn. 687, 66 A 515. Promissory note for a mare held voidable by infant during minority. Starr v. Watkins [Neb.] 111 NW 363. A marriage settlement made by an infant femme on the eve of her marriage is voidable. Smith v. Smith's Ex'r [Va.] 57 SE 577. An infant's contract relating to the settlement of torts is no more binding than those relating to other business affairs. Worthy v. Jonesville Oil Mill [S. C.] 57 SE 634. Acceptance by minor of pass containing release of liability does not bar his action for injuries while traveling thereon. Pennsylvania Co. v. Purvis, 128 Ill. App. 367. Upon repudiating his contract of life insurance and surrendering to the company its policy therefor, an infant may recover the whole amount of premiums paid by him thereon. Prudential Ins. Co. v. Fuller, 9 Ohio C. C. (N. S.) 441.

93. Right to elect either during minority or within a reasonable time after majority. In re Huntenberg, 153 F 768. Payments pursuant to the terms of a contract made by an infant after coming of age, but out of her bounty and not in pursuance of any legal obligation, held not to be a ratification. Parsons v. Teller, 188 N. Y. 318, 80 NE 930. Where an infant did nothing to affirm a marriage settlement, but disaffirmed soon after her disability was removed and as soon as rights adverse to hers were claimed, she was entitled to have it annulled. Smith v. Smith's Ex'r [Va.] 57 SE 577.

94. In order to disaffirm, an infant must return so much of the consideration received by him as remains in his possession at the time of such election. In re Huntenberg, 153 F 768; Starr v. Watkins [Neb.] 111 NW 363. A formal and actual tender of the property is not required as a condition precedent when it is known in advance that such tender will be refused (Starr v. Watkins [Neb.] 111 NW 363), but restoration should be made on trial as a condition of the judgment (Id.). Where infant repudiated contract and returned consideration received, held not liable. International Textbook Co. v. McKone [Wis.] 113 NW 438. Where an infant disposes of the consideration for a contract so that on attaining majority he has neither the money nor its proceeds, there is no ratification of the contract within the meaning of Civ. Code 1895, § 3648, and he may repudiate the contract. White v. Sikes [Ga.] 59 SE 228. Bill for specific performance setting out these facts is bad on general demurrer. Id. An infant who had released a liability for tort held entitled to repudiate it by bringing suit before majority without tendering back the consideration for the release. Worthy v. Jonesville Oil Mill [S. C.] 57 SE 634.

95. No restoration required where minor sues for injuries, repudiating a release of liability on the pass on which he was traveling. Pennsylvania Co. v. Purvis, 128 Ill. App. 367.

96. The jury should, where he has executed a release for value, inquire to what extent he has really been benefited by the consideration paid, and take that into account in finding a verdict in his favor for damages. Worthy v. Jonesville Oil Mill [S. C.] 57 SE 634.

97. Where an infant on being refused a preference by virtue of a bill of sale for advances to a bankrupt disaffirmed the same, he was only allowed to prove his claim as a general creditor. In re Huntenberg, 153 F 768.

98. Payments held not to be pursuant to any legal obligation, but out of the infant's bounty. Parsons v. Teller, 188 N. Y. 318, 80 NE 930.

99. Under Civ. Code 1902, § 2656, a mortgage of land in South Carolina made by an infant in Georgia can be disaffirmed by him on attempt to foreclose same, in the absence of a written ratification. Exchange Bk. of Ft. Valley v. McMillan, 76 S. C. 561, 57 SE 630.

1. A single transaction by an infant does not constitute him as one engaged in business within the meaning of Civ. Code 1895, § 3650, which authorizes an infant to make a binding contract in connection with the business in which he is engaged by permis-

§ 6. *Torts.*[See 8 C. L. 275]

§ 7. *Crimes.*[2]

§ 8. *Actions by and against.*[3]—In an action against infants, they must be made parties defendant,[4] otherwise they are not before the court or bound by its decrees.[5] The filing of an answer by a guardian ad litem of infants not made parties defendant is improper and without effect.[6] Ordinarily infants must be regularly served with process to validate proceedings in which they are interested.[7] In Louisiana a minor cannot be cited or notified except through his tutor.[8] Service of process on nonresident minors is required to be made in the same manner as that used in serving nonresident adults under the Oregon statutes.[9] Complete jurisdiction over minors is acquired upon service of the summons upon them,[10] hence a premature appointment of a guardian ad litem is not a jurisdictional defect.[11] The appointment of a guardian ad litem for minor defendants will be presumed to have been based on a showing that the minors had been duly served with process.[12] The irregular appointment of a guardian ad litem is not void,[13] and the defect may be cured by the ratification of the infant upon attaining majority.[14] The misconduct of a guardian ad litem in failing to protect his ward's interests is unavailable in an action

sion of his parent or guardian. White v. Sikes [Ga.] 59 SE 228.

2 See 8 C. L. 276. The capacity of infants to commit crime and the place of imprisonment of juvenile convicts are elsewhere treated. See Criminal Law, 9 C. L. 851.

3. See 8 C. L. 276. See, also, Guardians ad Litem and Next Friends, 9 C. L. 1549.

4. They are not so made by a bill for partition which does not name them except as wards of their guardian who is sued as such, or show how they are interested (Oneal v. Stimson, 61 W. Va. 551, 56 SE 889), nor by the appointment of a guardian ad litem for them in such case, the appointment being without authority of law (Id.). If minors are necessary parties and not joined until after the confirmation of sale, they are entitled to have it set aside, and giving them an opportunity to show cause is insufficient. French v. Vanatta [Ark.] 104 SW 141.

5. Not being parties, their rights were not adjudicated and a decree of partition void and of no effect. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889.

6. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889.

7. The court has no right to appoint a guardian ad litem until after the service of summons upon infant defendants (Gannon v. Moore [Ark.] 104 SW 139), and a guardian ad litem has no right to enter their appearance by filing an answer in the absence of such service (Id.). Appearance by guardian of minors and by attorney for all the defendants insufficient without service of process, constructive or actual, on the minors. Johnson v. Johnson [Ark.] 105 SW 869. Appointment of guardian ad litem for an infant defendant before service of process held reversible error. McQueen v. Grigsby [Ala.] 44 S 961. The court should see that proper service has been made upon infants before entering the decree. Id. Prior to the act of 1876 (Civ. Code 1895, § 4987), which requires personal service on minors, service on a guardian ad litem was in accordance with the practice and sufficient. Morehead v. Allen, 127 Ga. 510, 56 SE 745.

8. Any person who has a claim against a minor can apply for the appointment of a tutor ad hoc by Rev. Civ. Code, art. 313. In re Interstate Land Co., 118 La. 587, 43 S 173. Notice of a tax delinquency must be served on a tutor ad hoc appointed for the purpose at the suit of the tax collector. Id. Service of notice on uncle who was a co-owner and occupied locus in question with minor insufficient. Id.

9. Section 56 of B. & C. Comp. Or., providing for service by publication, includes both adults and minors. Cohen v. Portland Lodge [C. C. A.] 152 F 357. Section 55, requiring personal service on the minor under fourteen years of age and the person with whom he resides does not apply to nonresident minors (Id.), nor under § 57, requiring the mailing of a copy of the summons and complaint to the non-resident defendant, need a copy be mailed to the person with whom a nonresident minor resides (Id.).

10. The jurisdiction can only be divested by some proceeding that dismisses them from the action. Welsh v. Koch [Cal. App.] 88 P 604.

11. Appointment of guardian ad litem on day succeeding service not void even if irregular. Welsh v. Koch [Cal. App.] 88 P 604. Premature appointment of guardian ad litem by the court contrary to Rev. St. 1899, §§ 558-60 (Ann. St. 1906, pp. 589, 590), requiring the court to appoint a guardian ad litem if the infant neglects to apply for one within one day after the first day of the term in which he is to appear, held ground for new trial. Kuhrtz v. Eisenstein, 123 Mo. App. 288, 100 SW 574.

12. The order stands until reversed on a motion for new trial or an appeal. Welsh v. Koch [Cal. App.] 88 P 604.

13. Appointment of guardian ad litem not nominated by infant of sixteen years of age, in violation of Code Civ. Proc. § 373, requiring nomination by infants over fourteen years of age, is irregular, but not void, Johnston v. Southern Pac. R. Co., 150 Cal. 535, 89 P 348.

14. Johnston v. Southern Pac. R. Co., 150 Cal. 535, 89 P 348.

to set aside a judgment against them.[15] Where the guardian ad litem appears and answers for the infants, the court has jurisdiction of them.[16] In Texas by statute the court has power to approve of and enter decrees upon agreements or compromises made by the guardian ad litem or attorney of record of a minor if it deems it for the best interests of the minor.[17] A judicial sale will not be set aside where minors have been duly served with summons and properly defended by a guardian ad litem regularly appointed.[18] A minor has no further time than an adult in which to take the necessary steps to correct errors in a proceeding or judgment in California.[19] In New York special guardians may be appointed for infants over the age of fourteen years upon application therefor by surrogates in proceedings for the taxation of legacies.[20] A petition for partition of land where some of the joint owners are infants should allege their ages and the persons who have the custody or care of them.[21] An action of an infant must be brought by his guardian or next friend.[22] Although it is too late after verdict to make the objection that the action should have been brought by the next friend of an infant,[23] yet, when judgment for the infant is reversed on appeal, costs will not be entered against it.[24] An infant who comes of age pending an action for personal injuries brought by his next friend can have the record amended so as to appear as party plaintiff in his own right,[25] but cannot file an amended statement introducing a new cause of action barred by limitations.[26] In an action brought

15. Welsh v. Koch [Cal. App.] 88 P 604. In the absence of fraud, actual or constructive, the discovery that the guardian ad litem did not put in evidence certain facts then patent at a former hearing, is not a ground for setting aside a decree against minors on the ground of the "discovery of new evidence." Harris v. Bigley [Iowa] 111 NW 432. The fact that the guardian ad litem was appointed at the instance of the plaintiff does not show fraud (Id.), nor does the fact that he did not make an active defense if the substantial facts on which the infant's claim is based were fairly before the court (Id.).

16. And they are bound by the decrees entered in the case. Hansford v. Tate, 61 W Va. 207, 56 SE 372.

17. Rev. St. 1895, art. 3498. Court held to have no power under it to withhold a decree in a partition suit where there was no agreement or compromise merely because it was against the minor's interest. Morris v. Morris [Tex. Civ. App.] 17 Tex. Ct. Rep. 639, 99 SW 872.

18. Title obtained at a judicial sale held valid. Weakley v. Middleton, 30 Ky. L. R. 571, 99 SW 288. A judgment for an infant brought by his guardian will not be reversed because a guardian for the case was appointed under Rev. St. 1899, c. 8, § 672 (Ann. St. 1906, p. 686), providing that no judgment for a party under twenty-one years of age having appeared by attorney shall be reversed for defects, etc. Padgett v. Smith, 206 Mo. 303, 103 SW 943.

19. Weish v. Koch [Cal. App.] 88 P 604.

20. Laws 1899, c. 672, p. 1481, and Laws 1905, c. 368, § 231, p. 839, relative to the appointment of special guardians for infants over or under fourteen years of age, construed. In re Jones' Estate, 54 Misc. 202, 105 NYS 932. The failure to appoint special guardians on an appeal held not to oust the jurisdiction of the surrogate to tax legacies where the infants were over fourteen and at the first hearing were represented by attorney and had a general guardian. Id.

21. McQueen v. Grigsby [Ala.] 44 S 961.

22. Mansf. Dig. Ark. 1884, § 4955 (Ind. T. Ann. St. 1899, § 3160). Scroggins v. Oliver [Ind. T.] 104 SW 1161. There is no material variance or substitution of one party plaintiff for another where the original complaint states that "their next friend C., guardian," sued, and the amended complaint that C. sued as "next friend and guardian." Id. Where an infant brought suit by guardian and thereafter a guardian for the case was appointed, held the court had jurisdiction. Padgett v. Smith, 206 Mo. 303, 103 SW 943. The only proper mode of making an infant a party plaintiff to an ejectment proceeding is to bring the action in the name of his guardian ad litem. Mitchell v. Cleveland, 76 S. C. 432, 57 SE 33. Under Rev. St. 1895, art. 3498v, providing that a minor without a guardian may sue by next friend who shall have rights of guardian in regard to the action, the court could not refuse, in a partition proceeding brought by such next friend, partition merely because it was against the interest of the minor. Morris v. Morris [Tex. Civ. App.] 17 Tex. Ct. Rep. 639, 99 SW 872. An infant may contest a will by next friend, but not by guardian in Indiana. Campbell v. Fichter, 168 Ind. 645, 81 NE 661. Burns' Ann. St. 1901, §§ 252, 256, 257, 1208, 2707, 2684, 2685, relating to will contests and actions by infants and guardians construed. Id.

23. Action brought in the name of the state for use of infant for damages because of the death of its parent. Annapolis, etc., R. Co. v. State, 104 Md. 659, 65 A 434.

24. The infant cannot recover costs against the appellant, but as a next friend should have been named to secure costs, judgment was reversed without costs. Annapolis, etc., R. Co. v. State, 104 Md. 659, 65 A 434.

25. This can be done on motion. Mahoney v. Park Steel Co., 217 Pa. 20, 66 A 90.

26. Mahoney v. Park Steel Co., 217 Pa. 20, 66 A 90.

by a parent for personal injuries to a minor child, under the Minnesota statute, the amount recovered belongs to the child, and the parent is trustee.[27] In Arkansas a next friend has no authority to receive the money of an infant recovered in an action brought by him for the infant.[28] Generally, allegations in a petition against persons under a disability must be proved though not traversed.[29] Infancy is a matter of affirmative defense and in no wise reflects upon the sufficiency of a complaint.[30] It is held in Kentucky that although the defendant is an infant and a judgment is rendered against him without the appointment of or a defense by a guardian it is not void but erroneous,[31] and if the error is apparent on the face of the proceedings the remedy is by appeal,[32] otherwise by a petition to vacate or modify the judgment.[33]

INFORMATIONS; INFORMERS, see latest topical index.

INJUNCTION.

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The scope of this topic is noted below.[34]

§ 1. *Nature of remedy and grounds therefor.* See 8 C. L. 279—A mandatory injunction[35] when allowed[36] is rarely issued,[37] and should not issue except after

27. Rev. Laws 1905, § 4503. Court does not lose jurisdiction of the trust by a formal entry of judgment of dismissal under agreement for settlement made by parent without the order of the court or advice of counsel (Picciano v. Duluth, etc., R. Co., 102 Minn. 21, 112 NW 885), but may review the matter and set aside the stipulation for settlement and its former order (Id.).

28. The fact that an infant holds an unsatisfied judgment against his next friend for the money does not bar him from suing the attorneys who made the unauthorized payment to the next friend (Wood v. Claiborne [Ark.] 102 SW 219), but he is only entitled to interest from the time he made demand on them after he came of age (Id.).

29. Code Civ. Prac. § 126. The petition cannot be taken as confessed against the infant since its allegations are traversed by law. Berryhill v. Holand, 30 Ky. L. R. 831, 99 SW 902.

30. Motion to strike out allegations in a complaint which did not allege infancy denied. Reynolds v. Alderman, 103 NYS 863.

31. The infant being served with process and properly before the court, the judgment was not void but erroneous. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902.

32. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902; Spradlin v. Stanley's Adm'r, 30 Ky. L. R. 928, 99 SW 965.

33. Under Code Civ. Prac. § 518. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902; Spradlin v. Stanley's Adm'r, 30 Ky. L. R. 928, 99 SW 965. Failure to verify the petition by affidavit as required by Code Civ. Prac. § 520 is not a ground for demurrer. Id.

34. **It excludes** the general rules of equity jurisdiction and practice (see Equity, 9 C. L. 1110). Punishment for violation of injunction is also treated in a separate topic (see Contempt, 9 C. L. 640). Topics dealing with the particular rights sought to be protected should also be consulted.

35. A mandatory injunction compels the affirmative performance of an act. Carver v. San Pedro, etc., R. Co., 151 F 334.

36. Under the code in some states, the court cannot issue a purely mandatory injunction. Hart v. Atlanta Term. Co., 128 Ga. 754, 58 SE 452.

37. Injunction against lowering grade of

hearing on the merits or in aid of the enforcement of a prohibitory injunction already allowed.[38] A party seeking an injunction must state facts bringing his case under some acknowledged head of equity jurisdiction.[39] The granting of an injunction is within the discretion of the court,[40] and no injunction will be issued where the court is not indubitably satisfied of the facts claimed for its issuance.[41] Courts will balance considerations of relative convenience and inconvenience,[42] and ordinarily an injunction which bears heavily upon the defendant [43] or would cause serious injury to an individual or the community at large without materially benefiting the plaintiff will be denied and the parties left to their remedy at law.[44] Plaintiff must show that

a street where act partly performed. Hart v. Seattle [Wash.] 88 P 205. Motion to have tenant seal up a hole cut in a wall on the theory that it is a continuing wrong denied where it did not appear that safety of building was impaired or irreparable injury done. Chamberlain v. Child's Unique Dairy Co., 54 Misc. 56, 105 NYS 370.

38. Petite Anse Drainage Dist. Com'rs v. Iberia & V. R. Co., 117 La. 940, 42 S 433. Courts may issue mandatory injunctions before final hearing but usually only in cases of hardship or great necessity. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

39. Peirce v. Carlock, 224 Ill. 608, 79 NE 959.

40. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F 555.

This rule is most frequently applied to preliminary injunctions (see post, § 4) or, on appellate review (see Appeal and Review, 9 C. L. 206, § 13F 1).

41. Affidavits submitted by parties so contradictory that the plaintiff's rights are not clear. Harry Angelo Co. v. Improved Property Holding Co., 105 NYS 590. Doubt as to which of two franchises was the most favorable under an agreement by a city and a telephone company that the city would not grant to another company a more favorable franchise. Pacific States Tel. Co. v. Salem [Or.] 89 P 145. Refusal to enjoin interference with enjoyment of easement. Burrell v. Middleton [N. J. Eq.] 65 A 978.

42. Disposal of mining stock without any market value pending action for specific performance of agreement to transfer will be enjoined to prevent irreparable injury and also a preponderance of inconvenience to plaintiff. Rau v. Seidenberg, 53 Misc. 386, 104 NYS 798. Where one or the other of the parties is to suffer by the granting or refusing of an injunction pending the action, the inconvenience likely to be incurred by each from the action of the court in granting or refusing injunction should be considered. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330.

43. Where a bill to enjoin the removal by a railroad of a spur track failed to show sufficient facts, yet, where it appeared that immediate removal would cause severe injury, a temporary injunction to stand for four months would issue to allow plaintiff to fully determine his rights. Ohio River Junc. R. Co. v. Pennsylvania Co., 216 Penn. 316, 66 A 92. Where there has been no adjudication nor such public acquiescence in a patent as to establish its validity, no preliminary injunction will be granted unless there is danger of irreparable injury (Karfoil v. Rothner, 151 F 777), and, where such danger appears and it also appears that if the defendants should finally prevail the granting of such preliminary injunction would cause irreparable injury to the defendants, the better practice is to permit them to give a bond to secure any damages the complainant may recover, and on its being given to refuse injunction (Id.). Dam built by defendant across river to assist in floating logs caused slight inundation of complainant's property ten miles below when water released to float logs. Howard v. Bellows, 148 Mich. 410, 14 Det. Leg. N. 219, 111 NW 1047. Strict enforcement of a contract right will not be granted when such enforcement would impose great hardship upon one contracting party with little or no corresponding benefit to the other. Tolman v. Mulcahy, 103 NYS 936. Where there is a restriction upon land requiring buildings to be set back a certain distance and it appears that in the last few years the property has fast changed from residential to business, equity will not enforce the restriction, for it would be a great hardship on the defendant without conferring any benefit on the plaintiff. Schefer v. Ball, 53 Misc. 448, 104 NYS 1028. An injunction will not lie to compel the removal of an obstruction to a water course which cost $10,000 to erect where the title to property was not clear and where the defendant had been in possession for sixteen years and would be put to great inconvenience and expense and the property was worthless for any other use than that made by the defendant. Savage v. Port Reading R. Co. [N. J. Eq.] 67 A 436.

44. Where a bill was brought to restrain the construction of an elevated road in a highway, the court refused to grant an injunction because of the importance of the work designed for the comfort and safety of the public unless there was a threatened destruction of property of great value by acts of wanton lawlessness liable to inflict irreparable damage. Roberts v. West Jersey & S. R. Co. [N. J. Eq.] 65 A 460. Where an owner seeks to prevent the operation of a railroad because of some technical defect in the title to the right of way, equity has jurisdiction to enjoin such act on the part of the owner, since the remedy at law is insufficient, and to compel the railroad company to suspend operations until its right could be determined would destroy its rights and work an injury to the public. Nittany Valley R. Co. v. Empire Steel & Iron Co. [Pa.] 67 A 349. Inconvenience to the public is no defense to a use of a complainant's land without acquiring the land by condemnation proceedings as required by law. Construction of telephone line. Burrall v.

he will be injured by the acts sought to be restrained.[45] While the court cannot grant an injunction to allay fears and apprehensions of individuals because of threatened acts,[46] yet, where there is a threat to wrongfully enter upon one's real estate and take permanent possession thereof and effect a permanent lodgment there, the threatened injury is irreparable in itself and will be enjoined;[47] so, too, in the event of a threatened permanent interference with water rights.[48] And so a ground is presented for injunctive relief whenever there is combination of actual and threatened injury to property, coupled with allegations of facts bringing the case within a recognized ground of equitable jurisdiction, and showing that there is no adequate remedy at law.[49] One of the well known grounds of equitable jurisdiction is the want of an adequate remedy at law, and so equity will enjoin wrongful interference with rights or property which cannot be prevented or adequately compensated for at law.[50] Mere

American Tel. & T. Co., 224 Ill. 266, 79 NE 705.

45. Vickery v. Wilson [Colo.] 90 P 1034. Where a contract was not let to the lowest bidder at the time bids were called for, but was let to a bidder whose prices were lower still, a taxpayer cannot enjoin such act, for he has suffered no injury but received a benefit. Dillingham v. City Council of Spartansburg, 75 S. C. 549, 56 SE 381. Owner of property abutting on a highway upon which an elevated road is to be constructed cannot enjoin construction unless he absolutely establishes his legal private right in that part of the way which would be vacated by the construction of the elevated road. Roberts v. West Jersey & S. R. Co. [N. J. Eq.] 65 A 460.

46. Trade Dollar Consol. Min. Co. v. Fraser [C. C. A.] 148 F 585. Threatened breach of contract. Selma Water Co. v. Selma, 154 F 138.

47. Trade Dollar Consol. Min. Co. v. Fraser [C. C. A.] 148 F 585.

48. Threatened acts of defendants in taking water from a stream just above complainant's dam would lessen the efficiency, be continuing in its nature, and possibly destroy the complainant's plant. Trade Dollar Consol. Min. Co. v. Fraser [C. C. A.] 148 F 585.

49. Enjoin injury to or destruction of one's business if no law would afford complete and efficient remedy. Sailors' Union of the Pacific v. Hammond Lumber Co. [C. C. A.] 156 F 450.

50. Remedy at Law. Held adequate: Equity will not enjoin taking of land by a railroad without compensation where an action of ejectment and for damages would be an adequate remedy. Menge v. Morris & E. R. Co. [N. J. Eq.] 67 A 1028. Will not enforce by injunction contract to buy beer of plaintiff exclusively, for the loss of profits to plaintiff during pendency of action will be easily estimated from amount of beer used. George Ringler & Co. v. Mohl, 115 App. Div. 549, 101 NYS 454. But contra, see Jos. Schlitz Brew. Co. v. Nielsen [Neb.] 110 NW 746. Where land is sold, reserving for two years the right to remove timber, injunction will not lie to enjoin removal after the lapse of two years. McCarty v. Wilson [Ark.] 98 SW 682. Where a person is injured by an unlawful act and may receive further injuries by a continuance of the unlawful act, there is an adequate remedy at law, and a bill to restrain such act cannot be maintained unless it alleges the insolvency of the defendant or some other showing of cause for equitable jurisdiction. Bill to restrain railroad from granting to one hackman the exclusive privileges at a station. Cooper v. De Vall [Ark.] 98 SW 976. Breach of contract. Carlson v. Koerner, 226 Ill. 15, 80 NE 562. Will not enjoin prosecution of an action on notes for which there is an adequate remedy at law by the party sued in rights which he has against a third party. White v. Savage, 48 Or. 604, 87 P 1040. Equity will not interfere to enjoin acts where all the complainants show is a refusal to deliver to them specific articles, for the refusal to deliver which there is compensation in damages. Refusal by the railroad to deliver three cars loaded with lumber. Wallace v. Baltimore & O. R. Co., 216 Pa. 311, 65 A 665. Where a sheriff improperly levies under an execution, there is an adequate remedy at law by a correction in the court out of which execution issued, and equity will not enjoin sale. Palladino v. Hilpert [N. J. Eq.] 65 A 721. Bill to enjoin trespass which merely alleges the cutting of forest trees whose value can be easily estimated and does not allege the insolvency of the defendant fails to show that the remedy at law is not adequate. Ashburn v. Graves [C. C. A.] 149 F 968. Pending an action for the recovery of land, it is error to enjoin the removal of growing crops on the ground that if removed their value would be difficult to ascertain, for the damages are not based on the value of the crop but the rental value of the land. Lafayette v. Hood [Ind. T.] 104 SW 853. Will not enjoin a suit at law by one entitled to the benefits of a beneficiary certificate upon a bill filed by the insurer to cancel the certificate on the ground of fraud, since that is a defense in the law action. The Sailors v. Woelfle [Tenn.] 102 SW 1109.

Remedy at Law. Held inadequate: Where a road is closed which is a party's best and most available route to his market town and county seat, the damages resulting therefrom while real and substantial cannot be estimated in money, and an injunction will lie. Letherman v. Hauser [Neb.] 110 NW 745. Equity will enjoin the negotiation of a note obtained by fraud, for the remedy at law is not adequate. Monmouth Inv. Co. v. Means [C. C. A.] 151 F 159. Equity will issue an injunction where unlawful interference with contract is shown and, further, that damages will not afford an adequate

injustice due to a defect in the law does not give ground for equitable relief by injunction.[51] The adequate remedy at law to preclude equitable process must be equally complete, practical, and efficient with that remedy.[52] Equity has jurisdiction to grant injunction to avoid multiplicity of suits, dependent, however, upon the circumstances of each particular case.[53] Some courts hold that one seeking an injunction must show that he will suffer irreparable injury unless relief is granted.[54] To show that damages which are alleged to be irreparable are merely speculative is not sufficient to give jurisdiction.[55] Insolvency of the person against whom relief is sought is rarely sufficient to grant jurisdiction though some courts have granted injunctions on this ground where the insolvency of the defendant would have rendered any action against him fruitless where the remedy at law was for money damages.[56] The remedy may be extended by statute.[57] The invasion of a constitutional right

remedy. Beekman v. Marsters [Mass.] 80 NE 817. The right granted to a railroad to connect with that of another and to run its trains thereover may be enforced by an injunction, for there is no adequate remedy at law for the denial of the right. Union R. Co. v. Canton R. Co. [Md.] 65 A 409. Where a palpable fraud has been practised in the election of corporation officers, and usurpers are about to take possession of the property in violation of all justice, equity will sometimes interfere to prevent them on the ground of no adequate remedy at law. Schmidt v. Pritchard [Iowa] 112 NW 801. Enjoin enforcement of execution. Security Mut. Life Ins. Co. v. Ress [Neb.] 106 NW 1037. Lack of an adequate remedy at law justifies equity in a suit by a successful defendant in a patent infringement suit in enjoining the defeated complainant in the prior suit from interfering with the former's business by suing his customers for an alleged infringement of the patent because of their dealing in the patented object of the prior suit. Kessler v. Eldred, 206 U. S. 285, 51 Law Ed. 1065. Where plaintiff in trespass to try title sequestered the land and defendant replevied it, plaintiff may enjoin defendant from interfering with his use of wells thereon to water cattle, for defendant's replevin bond covered only damages to the land. Buchanan v. Wilburn [Tex. Civ. App.] 20 Tex. Ct. Rep. 113, 105 SW 841.

51. Determining title to property by law entailed some hardship in the matter of expense, and the statute did not provide that in the proceedings a bond should be given to protect certain claims. Cicero v. Scaife [Ga.] 58 SE 850.

52. Mendenhall v. Jewell County School Dist. No. 83 [Kan.] 90 P 773. Unless a legal remedy is so clear, practical, and efficient that the ends of justice may be reached as readily as in equity, the granting of an injunction is proper. Not adequate in case of threatened cloud on title. Hatfield v. Mahoney, 39 Ind. App. 499, 79 NE 408, 1086.

53. Whittaker v. Stangvick, 100 Minn. 386, 111 NW 295. Flowing of lands with water constantly or at frequently recurring intervals. Cobia v. Ellis [Ala.] 42 S 751. Enjoin prosecution of an action for slander pending decision of similar action by supreme court. State v. Riley [Mo. App.] 105 SW 696. Allegations in a bill to restrain trespasses upon timber lands that several trespasses have been committed by the same parties, and that an action at law has been instituted to recover damages for such trespasses, and that one of the trespasses has occurred since the action at law was brought, do not state an equity to prevent a multiplicity of suits, there being no showing of the inadequacy of the remedy at law for damages. Cowan v. Skinner [Fla.] 42 S 730. Equity will restrain a breach of restrictions in a lease by lessee without any proof of damage or irreparable injury to prevent a multiplicity of suits. No beer but a certain brew to be sold on the premises. Jos. Schlitz Brew. Co. v. Nielsen [Neb.] 110 NW 746. But contra, see, Ringler & Co. v. Mohl, 115 App. Div. 549, 101 NYS 454.

54. North Am. Cold Storage Co. v. Chicago, 151 F 120. Complainant street railway sought to enjoin use of streets by another company. Tacoma R. & Power Co. v. Pacific Trac. Co., 155 F 259. Equity may protect a vested franchise from unlawful invasion or disturbance upon the ground of irreparable injury. Franchise to supply water at rates not to exceed the maximum fixed therein for a certain period. Ordinance lowering the rates will be enjoined. City of Bessemer v. Bessemer Waterworks [Ala.] 44 S 663. May enjoin enforcement of statute which would deprive complainant of property without due process of law, but this alone does not entitle to a temporary order of injunction unless threatened irreparable injury is shown. Weir v. Winnett, 155 F 824.

55. Breach of covenant to plow land in fall held to show no definite damage though defendant was insolvent, since it might be better to plow in spring. Carlson v. Koerner, 226 Ill. 15, 80 NE 562.

56. Equity will enjoin transfer of mining stock pending an action of specific performance for its transfer where the defendant is insolvent. Rau v. Seidenberg, 53 Misc. 386, 104 NYS 798. Insolvency alone is not sufficient to give equity jurisdiction of a suit to try title and obtain possession of land. Hume v. Burns [Or.] 90 P 1009.

57. Cowan v. Skinner [Fla.] 42 S 730. A bill to enjoin enforcement of a judgment on a note given in a usurious transaction does not lie under § 7, c. 96, Code 1899 (Code 1906, § 3432), for that provides merely for a bill for discovery and relief in a case of usury. Logan v. Ballard, 61 W. Va. 526, 57 SE 143. Trespass. Baker v. McKinney [Fla.] 44 S 944.

does not give an absolute right to an injunction.[58] The mere fact that an act is in violation of law, or even that it is criminal or immoral will not warrant an injunction.[59] It is not sufficient ground for an injunction that obedience to it would not hurt the defendants, for the mere fact of the issuance of the injunction stigmatizes them as having done or threatened to do some illegal act.[60] Equity is without jurisdiction to enjoin the exercise of a political power,[61] but if there is not a constitutional right to exercise the political right and property rights might be affected and irreparable injury done, the power to issue an injunction might be exercised, but only with the greatest caution.[62] Right to an injunction may be lost by laches or acquiescence.[63] Delay, however, short of period of statute of limitations, does not prevent an injunction of a serious invasion of a valuable right,[64] nor does delay in protesting against the invasion of legal rights where no equities arise in favor of the trespasser prevent granting injunction against its continuance.[65] Parties in pari delicto cannot obtain equitable relief by injunction.[66]

§ 2. *Particular occasions for injunction; who and what may be enjoined.* *A. In general.*[See 8 C. L. 284].—Equity will prevent by injunction the threatened invasion of property rights and protect a party from exposure to the risk of litigation,[67] and will preserve the status of property in dispute pending litigation.[68] Every injunction is grounded on general rules growing out of the nature of the remedy [69] and

58. Defendant entered upon land without first condemning under the mistaken belief that complainant would accept compensation to be agreed upon. Menge v. Morris & E. R. Co. [N. J. Eq.] 67 A 1028.

59. Bill to enjoin husband from cohabiting with another woman. Ellis v. Ellis, 55 Misc. 34, 106 NYS 217.

60. International Register Co. v. Recording Fare Register Co. [C. C. A.] 151 F 199.

61. Cannot enjoin the certification by the clerk of ballots cast at an election illegally held. Vickery v. Wilson [Colo.] 90 P 1034. Right to vote. Parler v. Fogle [S. C.] 59 SE 707. A court of equity has no power or jurisdiction to restrain or enjoin the constitutional convention, its officers, or delegates from exercising any of the rights, powers, and obligations confided to it by congress or the people (Walck v. Murray, 18 Okl. 712, 91 P 238; Frantz v. Autry, 18 Okl. 561, 91 P 193), nor can the powers of the court be invoked to restrain the submission of the constitution to the people in advance of its adoption and ratification by the people and its approval by the president of the United States on the ground that the constitution or any of its provisions is unconstitutional or that the convention acted in excess of its lawful powers (Id.).

62. Parler v. Fogle [S. C.] 59 SE 707.

63. Restriction that no manufacturing be carried on on land. Complainant had not objected for five years and was held to have lost her right to prevent the carrying on of the business. Leaver v. Gorman [N. J. Eq.] 67 A 111.

64. Dam which caused overflow of complainant's land had been built for three or four years. Cobia v. Ellis [Ala.] 42 S 751.

65. Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 NE 705.

66. Complainant allowed defendant to obtain judgment against him in order to obtain jurisdiction over B., it being agreed that execution should not be enforced against him. This was a fraud on B. and the court, and enforcement of execution will not be enjoined. Wood v. Stewart [Ark.] 98 SW 711. Where a city has the right to regulate telephone rates and passed an ordinance requiring companies to submit a statement of value of plant, receipts, and disbursements, in order that reasonable rates might be fixed, complainant, while refusing to submit such report, could not seek to enjoin the enforcement of rates established by the city without such report on the ground that ordinances were void. Home Tel. & T. Co. v. Los Angeles, 155 F 554.

67. The use of a false birth certificate by means of which a child might claim an interest in the alleged parent's estate will be enjoined. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A 97.

68. Enjoin the completion of building on land the title to which is in dispute. Phenix v. Frampton [Nev.] 90 P 2. When a party asserts ownership of property or a specific lien thereon, it is within the discretion of the trial court to retain the property within its jurisdiction until the questions at issue can be determined. Receiver of a national bank may be restrained from transmitting a fund in his hands to the comptroller of currency in the usual course as required by statute. American Can Co. v. Williams [C. C. A.] 153 F 882. Where the court erroneously dissolved an order on judgment for the defendants, on a reversal of the judgment, plaintiff is entitled to a restraining order pending proceedings in accordance with the supreme court decision. Action to restrain the cutting of timber. Beaufort Lumber Co. v. Price, 144 N. C. 50, 56 SE 684. Where the general superintendent of company and its purchasing agent formed a partnership with others and sold to the company, and later sold his firm to the company, taking its notes, the company upon discovering his relations is entitled to an accounting pending which equity will enjoin negotiation of the notes and destruction of books. Lozier Motor Co. v. Ball, 53 Misc. 375, 104 NYS 771.

69. See ante, § 1.

the main principles of equity.[70] Statutory injunctions are allowable in particular situations or for the protection of particular rights.[71] The question who may be enjoined is usually reducible to one of parties,[72] or one of the nature of the remedy,[73] or one of the nature of the particular wrong.[74]

(§ 2) *B. Actions or proceedings.*[See 8 C. L. 285]—Whether one court has jurisdiction to enjoin proceedings in another court of co-ordinate jurisdiction is unsettled.[75] The possession of property by one court cannot be interfered with by another.[76] Equity may enjoin proceedings pending or threatened in another court to prevent oppressive and vexatious litigation especially when not brought in good faith,[77] and to that end will act upon parties within its jurisdiction with respect to an action in a foreign [78] state. The prosecution of an action at law will not be enjoined for matters which might be asserted in defense thereto,[79] but only where there is a defense which can be asserted only in equity,[80] or a party is entitled to some relief which can be afforded only by a court of equity.[81] Actions jeopardizing the status quo may be restrained pending the determining of rights therein.[82] Equity will en-

70. See Equity, 9 C. L. 1110.

71. See topics treating of such rights, e. g., Corporations, 9 C. L. 733; Intoxicating Liquors, 8 C. L. 486.

72. See post, § 3.

73. See ante, § 1.

74. See post, § 2B-L.

75. Gray v. South & N. R. Co. [Ala.] 43 S 859.

76. Hunt v. New York Cotton Exch., 205 U. S. 322, 51 Law. Ed. 821.

77. Will enjoin proceedings in a probate court to remove an administrator where such a step is taken in an attempt to assist in a prosecution of claims against the estate which the administrator has successfully attacked. Alderman v. Tillamook County [Or.] 91 P 298. The defendants who were insolvent under guise of an alleged law which was not in force had impounded plaintiff's animals and threatened to continue and to harass him with unfounded suits for damages. Johnson v. Tanner, 126 Ga. 718, 56 SE 80.

78. Will restrain, upon petition of a resident, another resident from proceeding in another state to garnish earnings of the complainant with a view to evade the exemption laws of the first state. Lightfoot v. Murphy [Tex. Civ. App.] 19 Tex. Ct. Rep. 661, 104 SW 511.

79. Connell v. Yost [W. Va.] 57 SE 299; Bowman v. Poppenberg, 53 Misc. 373, 103 NYS 245; White v. Savage, 48 Or. 604, 87 P 1040; Reis v. Graham, 106 NYS 645; Lott v. Lott, 146 Mich. 580, 13 Det. Leg. N. 883, 109 NW 1126; Peacock v. Irvine [Fla.] 42 S 894; Continental Compressed Air Co. v. Franklyn [N. J. Eq.] 66 A 897; Macrum v. U. S. [C. C. A.] 154 F 653. In a proceeding for a ditch improvement, an injunction will not lie because of errors apparent on the face of the record, such as a defect in the statutory bond filed with the petition for improvement, nor where there is no evidence of collusion or fraud on the part of the commissioners, nor because of injury to the lands through which the ditch passes, nor on allegations that the improvement is of an unsatisfactory character, or that there is no necessity for it, or that no benefit will result to the lands through which it passes. Anderson v. Hicksville, 4 Ohio N. P. (N. S.) 545.

80. Restrain enforcement of a replevin judgment where complainant had a set-off which by statute could not be pleaded in the replevin suit and where defendant is insolvent. De Laval Separator Co. v. Sharpless, 134 Iowa, 28, 111 NW 438. Bill showed an estate in lands, the subject of an action at law, which could only be asserted in equity. Ferrell v. Strong [N. J. Eq.] 66 A 920. Holder of note not bona fide. Butler v. Mitchell, 128 Ga. 431, 57 SE 764. Sureties on a county treasurer's bond may enjoin action against him to recover sums collected by him so as to enable them to make equitable defenses on his behalf. United State Fidelity & Guaranty Co. v. Jordan [Va.] 58 SE 567. Equity will enjoin ejectment proceedings where parties are in possession under a trust agreement to secure a note where the note has been barred by the statute of limitations, on the ground of certain irregularities where the parties in possession offer to do equity. Wall v. Harris [Miss.] 44 S 36. One having a claim against a homestead exemption made in bankruptcy proceedings may enjoin the transfer of the homestead to the trustee in bankruptcy if the claim has not been proved in bankruptcy. Keller v. Bowen, 127 Ga. 584, 56 SE 634.

81. Action on note. Butler v. Holmes, 128 Ga. 333, 57 SE 715.

82. Where a will has been probated in common form and the sole heir has called on the executor to probate it in solemn form and has filed a caveat, a suit by the executor against such heir at law to recover property devised by will may be enjoined until the issue of devisavit vel non has been determined in the discretion of the court. Foster v. Case, 126 Ga. 714, 55 SE 921. Under certain circumstances where a rule to distribute certain money received from the sale of agricultural products and in the hands of a levying officer is pending at the instance of the owner of a common law fi. fas. the landlord is not entitled to an injunction to prevent such money from being applied toward the satisfaction of such executions, even though the tenant be insolvent and the landlord without recourse for the collection of his claims other than upon such funds. Cochran v. Waits, Johnson & Co., 127 Ga. 93, 56 SE 241. Equity will not

join the prosecution of a number of simultaneous actions at law brought against a single party where all the proceedings depend upon the same law and facts so that the matter may be decided in one proceeding;[83] but the mere fact that several law actions may be tried in one action is no ground for enjoining the law actions.[84] Where the subject-matter of an action at law has been under consideration in the equity court and determined, such action at law will be enjoined.[85] Federal statutes expressly prohibit the Federal courts from enjoining actions in the state courts,[86] but this does not prevent Federal courts from enjoining a party to an action before it from prosecuting a suit in a state court when necessary to protect its own prior jurisdiction, or to make effectual its own prior judgment determining the rights of parties before it,[87] or restraining a defendant from enforcing a state court judgment where necessary to preserve the rights of parties properly before the Federal court until a final hearing,[88] or restraining parties from prosecuting other suits subsequently brought relating to the same subject-matter although such suits may be in a foreign jurisdiction.[89] Equity has no jurisdiction to enjoin the prosecution of a criminal proceeding even though it is based on a void or unconstitutional ordinance or statute,[90] unless some property right will be injured thereby.[91] A court of equity does not interfere with judgments at law unless the complaint has an equitable defense of which he could not avail himself at law or had a good defense at law which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or his agents.[92] To restrain the execution of a void judgment, it is not

restrain an ordinary from proceeding to final judgment on an application for a commission of lunacy to await the decision on the application for certiorari assigning error upon a pendente lite ruling. Hinton v. Brewer, 128 Ga. 346, 57 SE 748. It is a proper exercise of discretion by the circuit court to enjoin a receiver of a national bank from transmitting funds in his hands to the United States treasurer pending the determination by the court of a preferential claim thereto. American Can Co. v. Williams [C. C. A.] 149 F 200.

83. Suits by two of insured's creditors will be restrained at the instance of the insurer where garnishment has issued to the insured and an action by the insured to recover on the policy. Cleveland v. Insurance Co. [Ala.] 44 S 37.

84. Two suits against complainants who had set-offs in excess of amounts sued which would necessitate four suits altogether. Toole v. Lanier, 128 Ga. 279, 57 SE 516.

85. Logan v. Flattau [N. J. Eq.] 67 A 1007.

86. Rev. St. § 720. St. Louis Min. & Mill. Co. v. Montana Min. Co., 148 F 450.

87. St. Louis Min. & Mill Co. v. Montana Min. Co., 148 F 450.

88. Southern R. Co. v. Simon, 153 F 234.

89. Bill to enjoin infringment of patent. Equity will enjoin complainant from instituting a multiplicity of suits throughout country against defendant's customers. Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 F 642. Will restrain maintenance of a suit in a foreign country involving the same subject-matter between the same parties where it has first obtained jurisdiction. United Cigarette Mach. Co. v. Wright, 156 F 244.

90. City of Bessemer v. Bessemer Waterworks [Ala.] 44 S 663; White v. Tifton [Ga.] 59 SE 299; Hasbrouck v. Bondurant, 127 Ga. 220, 56 SE 241; Paulding v. Lane, 104 NYS 1051; Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701; Pleasants v. Smith [Miss.] 43 S 475. See further § 2J. Crimes.

91. Hasbrouck v. Bondurant, 127 Ga. 220, 56 SE 241. See post, Crimes.

92. To enjoin the operation of a verdict at law, a party must be able to impeach the justice and equity of the verdict and it must be upon grounds which either could not be made available to him at law or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party without any negligence or other fault on his part. Peacock v. Feaster [Fla.] 42 S 889. A judgment can not be enjoined by a party to the original action except for lack of jurisdiction, fraud, accident, surprise, or mistake. Cox v. Anderson [Neb.] 112 NW 317. A sheriff will not be enjoined from putting a purchaser at sheriff's sale in possession on the ground that the sheriff refused to accept from the applicant a claim affidavit in forma pauperis, where the affidavit was defective, and it further appears that the land was subject to the lien of the execution selling it. O'Brien v. O'Keeffe, 128 Ga. 346, 57 SE 682. Facts not sufficient to warrant enjoining a sheriff from granting a sheriff's deed. Wiles v. Northern Star Min. Co. [Idaho] 89 P 1053. Perjured testimony does not warrant setting aside for the fraud which warrants an injunction must be extrinsic or collateral. Donovan v. Miller, 12 Idaho, 600, 88 P 82. Misconduct of attorney is no ground for enjoining execution of a judgment. Peacock v. Feaster [Fla.] 42 S 889. Mistake or unskillfulness of an attorney. Failure to set up all defenses. Donovan v. Miller, 12 Idaho, 600, 88 P 82. Contract without consideration and against public policy. Id. Will not enjoin enforcement of a judgment rendered in a court of law where complainant had a fair opportunity

necessary that the judgment should disclose its invalidity on its face if it appears from the record.[93] A party not made a party to foreclosure proceedings and in possession under a claim of title may enjoin the execution of a writ of assistance.[94] Equity will not restrain the enforcement of a judgment even though irregularly obtained unless a meritorious defense is shown.[95] Injunction does not lie to set aside a judgment where it appears that no final judgment has been rendered.[96] Equity cannot decree an entry of satisfaction of judgment in a law action.[97] Injunction will not lie for the purpose of effecting a change of venue in another action, a motion for change being the proper remedy.[98] The provision of the statute that writs of injunction granted to stay proceedings or enforcement of an execution be tried in the court where suit is pending or execution was issued does not apply to a stranger or to proceedings to protect property, but does apply where the validity of the judgment is attached.[99]

(§ 2) *C. Public, official, and municipal acts.*[See 8 C. L. 288]—A tax payer or property holder may restrain municipal corporations and their officers from transcending their lawful duties in any unauthorized mode that will increase the burden of taxation or otherwise injuriously affect taxpayers or their property.[1] The discretionary powers of officers will not, however, be controlled,[2] nor will the acts of municipal

to be heard simply on the ground that it was unjust, irregular, or erroneous, or because the equity court would in deciding the case come to a different decision. Peacock v. Feaster [Fla.] 42 S 889. Where judgment has been obtained on a note, it will not be enjoined because the note was usurious. Logan v. Ballard, 61 W. Va. 526, 57 SE 143. Equity will not enjoin the enforcement of an execution because of defenses which could have been put in issue at the trial. Hollinshead v. Woodard, 128 Ga. 7, 57 SE 79. Equity may enjoin the enforcement of an execution issued in a suit upon an illegal bill. Writ of prohibition will not lie to restrain a city treasurer from paying an illegal bill upon which execution has been obtained. Injunction is the only remedy. Murphy v. Bantel [Cal. App.] 91 P 805. Enjoin enforcement of an execution where there is no adequate remedy at law. Security Mut. Life Ins. Co. v. Ress [Neb.] 106 NW 1037. And this may be done as well after judgment as before. Continental Compressed Air Co. v. Franklyn [N. J. Eq.] 66 A 897. Will not enjoin execution of a judgment on ground of newly-discovered evidence where the evidence might have been brought out on cross-examination and where the witnesses did not affirmatively mislead counsel. Neal v. Whitlock [Tex. Civ. App.] 18 Tex. Ct. Rep. 105, 101 SW 284. Equity will not restrain the attempted enforcement of a void judgment where the remedy at law is complete. If the judgment was void on its face, the remedy is complete by certiorari. If not on its face, then the judge rendering it had the power to correct it. Knight v. Creswell [Ark.] 101 SW 754. Where a party wrongfully employs process legally issued, equity will not enjoin him for there is a remedy at law in a suit for damages for malicious abuse of process. Issuance of a writ of garnishment used purely to annoy debtor and cause him to file claims of exempt property. Baxley v. Laster [Ark.] 101 SW 755. Where a bill to enjoin collection of money on an execution properly granted to a next friend for the benefit of an insane person alleges that no bond has been given to insure proper use of the money, it states no ground for an injunction for the time to urge such objection is when the money is to be paid. Crenshaw v. Kener, 127 Ga. 742, 57 SE 57. A judgment will not be enjoined on any ground that might have been set up as a defense to the action. Collier v. Allen, 128 Ga. 442, 57 SE 691.

93. Ketelsen v. Pratt [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

94. Hibernia Sav. & Loan Soc. v. Robinson, 150 Cal. 140, 88 P 720.

95. Reed v. New York Nat. Exch. Bk., 230 Ill. 50, 82 NE 341. There is no ground for equitable interference with law proceedings shown by allegations that defendants therein were not properly served with process, that suits were defective in their pleadings, and that the result of the proceedings will be four separate suits. Toole v. Lanier, 128 Ga. 279, 57 SE 516. Bill to restrain one of the defendants from collecting a judgment against which plaintiff claims to have a set-off which arises out of a liability on the part of the defendants to pay an assessment on stock and damages in an action of tort. Brown v. Pegram, 149 F 515.

96. Judgment for plaintiff but for no specified amount. Williams Cooperage Co. v. Bollinger [Mo. App.] 99 SW 812.

97. Macrum v. U. S. [C. C. A.] 154 F 653.

98. Reis v. Graham, 106 NYS 645.

99. Ketelsen v. Pratt [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

1. Appropriations for construction of a courthouse. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 S 979. Injunction will lie to prevent the making of a change of school books under an order illegally adopted by the board of education. Lenhart v. Board of Education, 5 Ohio N. P. (N. S.) 129.

2. Schley v. Lee [Md.] 67 A 252. Equity will not interfere with acts done within discretion of officers. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 S 979. A taxpayer cannot enjoin the acts of an officer because he has not performed his duties ac-

officers conducted in a reasonably judicial manner,[3] or done under the police power of the municipality [4] in the absence of evidence of fraud or collusion,[5] but unlawful ministerial acts will be enjoined,[6] especially where there is no appeal; [7] but equity cannot enjoin purely ministerial acts of an officer done in exact compliance with statute,[8] unless they amount to a trespass [9] and it is immaterial that the statute is claimed to be void,[10] unless the acts of the officers if not authorized constitutes an unlawful interference with complainant's rights,[11] or may subject one to a multiplicity of suits.[12]

cording to certain methods which the statutes make discretionary. Bids for contracts "may" be advertised for. Dillingham v. City Counsel of Spartanburg, 75 S. C. 549, 56 SE 381. An error of judgment with respect to a plan for repairing a highway adopted in good faith of itself gives no ground for enjoining the improvement. Discretion of road overseers not enjoined. Dennis v. Osborn [Kan.] 89 P 925. The discretionary act of a public officer will not be restrained where it would impose a large additional expense on the public. Award of contract to lowest bidder sought to be enjoined by a higher bidder on the ground that conditions were placed on the bidding to keep out certain parties. Nathan v. O'Brien, 117 App. Div. 664, 102 NYS 947. Road commissioners and overseers have power in their discretion to make drains along a highway, the exercise of which will not be interfered with although there may be incidental damage to abuttors. Davis v. Howell [Ark.] 104 SW 550. Where a street railway company has failed to exercise the rights granted within the prescribed time and the city has granted an extension of time, an abuttor cannot enjoin the exercise of such rights on the ground that the default could not be waived. Manton v. South Shore Trac. Co., 104 NYS 612.

3. Municipal lighting plant after properly lighting its streets will not be enjoined from supplying electricity to individuals. Crouch v. McKinney [Tex. Civ. App.] 104 SW 518.

4. An injunction will not lie to restrain municipal officers from clearing sidewalks of a private business which obstructs travel. Cordatos v. Chicago, 129 Ill. App. 471. Equity will not enjoin the destruction of property under the police power of the municipality. Condemnation and destruction of food. North Am. Cold Storage Co. v. Chicago, 151 F 120. Members of police force, having no private or personal interest in the matter, and only presumed to act officially, cannot be enjoined. Injunction to restrain defendants, police, from interfering with bucket-shop refused. Collins v. Weigselbaum, 126 Ill. App. 158. A threatened interference with an unlicensed business by a municipality will not be enjoined. Complainant not entitled to saloon license, but who has issued to him through mistake a collector's receipt for amount paid in renewal of such license, has no remedy against the threatened closing of his business by the municipality, such act being merely an enforcement of the law in such case. City of Chicago v. O'Hare, 124 Ill. App. 290.

5. In a statutory proceeding for a ditch improvement, an injunction will not lie where there is no evidence of fraud or collusion on the part of the commissioners. Anderson v. Hicksville, 4 Ohio N. P. (N. S.) 545.

6. Schley v. Lee [Md.] 67 A 252. Where council has by ordinance authorized the board of public service to meter buildings other than residences at its discretion, and has further declared that "residences shall be metered only on request of the consumer, provided that in case of waste or other improper or unauthorized use of water of which satisfactory proof has been furnished to the meter department, a meter may be set without the consent of the consumer," an injunction will lie on petition of the owner of a residence against the installation of a meter, in the absence of any evidence of waste or other improper use of water. Hutchins v. Cleveland, 4 Ohio N. P. (N. S.) 593. Taxpayer may enjoin the changing of the corporate limits of a city under a law having no application without any allegation of special damage. Town of Roswell v. Ezzard, 128 Ga. 43, 57 SE 114. The interference of city officials under an ordinance having no application will be restrained. Ordinance against rebuilding of wooden buildings within a certain district where damaged more than 25 per cent. Proof showed damage to be much less. Ironside v. Vinita, 6 Ind. T. 485, 98 SW 167. Restrain county officers from removing gates across a third class road where statute provides that gates may be maintained in the case of third class roads. Adkins v. Bumgardner [Tex. Civ. App.] 99 SW 132. Where a board appoints a committee to act for it in a matter involving discretion and judgment, it is illegal and contracts entered into may be enjoined. Board appointed a committee to secure a new site for a schoolhouse and adopt plans and award a contract for construction of a schoolhouse. Kinney v. Howard, 133 Iowa, 94, 110 NW 282. May enjoin sale of school land as leased land, upon which a lease for years has expired at the suit of a settler. Davies v. Benedict [Kan.] 88 P 536. Writ of prohibition may be issued to prevent a city council from trying a police officer for unfitness. Thomas v. Thompson, 31 Ky. L. R. 524, 102 SW 849.

7. Schley v. Lee [Md.] 67 A 252.

8. Apportionment of school tax by county auditor. Judson v. Agan, 134 Iowa, 557, 111 NW 943. Court will not restrain the acts of public officers in removing a public nuisance according to law. Tearing down the plant of a carpet cleaning concern. McQueen v. Phelan [Cal. App.] 88 P 1099.

9. Building drain in highway throwing surface water onto adjoining land. Dennis v Osborn [Kan.] 89 P 925.

10 Missouri, etc., R. Co. v. Shannon [Tex.] 17 Tex. Ct. Rep. 828, 100 SW 138.

11. Missouri, etc., R. Co. v. Shannon [Tex.] 17 Tex. Ct. Rep. 828, 100 SW 138. The rule that an action will not lie to enjoin state officers from doing acts required of them by state laws, although such acts when per-

Where an unauthorized act has been ratified pending a hearing on a bill to enjoin such act, the court cannot ignore such ratification.[13] In the absence of some special circumstance bringing the cases within some recognized head of equity jurisprudence collection of taxes will not be restrained.[14] A taxpayer's bill to restrain illegal acts of city officials may be brought by a corporation which is a resident and taxpayer.[15] Where an officer is lawfully in possession of public office, an injunction is the proper remedy to protect his possession against the interference of others,[16] but equity will not determine the title to an office and will not interfere by injunction before trial at law in favor of an officer de jure against an illegal claimant already in possession of the office.[17] Unlawful disposition of public money,[18] the incurring of an unauthorized indebtedness to be paid out of public funds and prejudicial to the complainant,[19] and the transfer of a sum voted by a municipality for a specific purpose to the payment of other liabilities, will be enjoined.[20] Equity will enjoin an unlawful assessment of taxes where the taxpayer has no appeal,[21] but it must be made clearly to appear that the party has been wrongfully assessed.[22] Equity will not restrain collection of a tax levied by persons having authority for mere irregularity or informality in levying the tax,[23] or where the property sought to be taxed is exempt,[24] or where the taxing tribunal has exceeded its power;[25] but there are exceptions to this rule where there is no law authorizing the levy sought to be made.[26] A city council will

formed will constitute a breach of a contract entered into by the state, does not apply where state officers are proceeding under color of an unconstitutional law to violate a contract with an individual to his irreparable injury. Baldwin Forging & Tool Co. v. Griffith, 5 Ohio N. P. (N. S.) 566.

12. Missouri, etc., R. Co. of Texas v. Shannon [Tex.] 17 Tex. Ct. Rep. 828, 100 SW 138.

13. Board of supervisors of a county appointed a committee to receive bids for furniture and after bids authorized it to purchase and it awarded contract to the highest bidder. Pending a suit to enjoin the contract was ratified by the board. Raymond v. McKenna, 147 Mich. 35, 13 Det. Leg. N. 935, 110 NW 121.

14. Injunction to prevent sale for taxes, on the ground that sale would operate as cloud on title, denied. City of Ensley v. McWilliams, 145 Ala. 159, 41 S 296.

15. Wolff Chem. Co. v. Philadelphia, 217 Pa. 215, 66 A 344.

16. Superintendent of a country infirmary who has qualified and been put in possession by the directors. Palmer v. Zeigler, 76 Ohio St. 210, 81 NE 234.

17. Mayor. Vette v. Byington, 132 Iowa, 487, 109 NW 1073. Bill to restrain defendants from acting on the board of county commissioners on the ground that the board was composed of but three members whereas defendants claimed it should consist of five and that they were lawfully elected. Lawson v. Hays [Colo.] 89 P 968. Equity will not enjoin the incumbent of an office from interfering with a successor duly appointed, the appointee having an adequate remedy by quo warranto. Sanders v. Belue [S. C.] 58 SE 762.

18. Where three of six aldermen voted for a resolution directing the payment of a salary claim of one never appointed, an officer and all of them voted in favor of a resolution ratifying the appointment. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600.

19. A taxpayer may enjoin the acts of commissioners which are void and illegal and which would burden him with an unlawful tax. Construction of a courthouse. Macy v. Miami County Com'rs [Ind. App.] 80 NE 553.

20. Five hundred thousand dollars appropriated to continue the construction of a boulevard cannot be used to pay claims for damages on account of the part already constructed. Wolff Chem. Co. v. Philadelphia, 217 Pa. 215, 66 A 344.

21. Unlawful assessment resulting in serious loss and injury to the taxpayers of a county due to the reduction in the basis of assessment. Schley v. Lee [Md.] 67 A 252. Where a drainage system is provided for by law but it appears that it will cause injury to the plaintiff's land, equity will enjoin an assessment and taxation of their lands. Coffman v. St. Francis Drainage Dist., [Ark.] 103 SW 179.

22. Party failing to file verified statement of debts required by law cannot complain of assessment which does not make a deduction of these. Peirce v. Carlock, 224 Ill. 608, 79 NE 959.

23. Shriver v. McGregor, 224 Ill. 397, 79 NE 706. Taxation of railroad property will not be enjoined by the Federal court except in a case of fraud or a clearly shown adoption of a fundamentally wrong principle by the assessors in arriving at the tax. Chicago, etc., R. Co. v. Babcock, 204 U. S. 585, 51 Law. Ed. 636.

24, 25. Shriver v. McGregor, 224 Ill. 397, 79 NE 706.

26. Shriver v. McGregor, 224 Ill. 397, 79 NE 706. Where there is no tax which a party is bound in equity to pay, he may invoke the aid of equity to enjoin its collection despite the provision of a statute that an injunction will not be granted to restrain the collection of a tax except such tax be levied for an unauthorized purpose. Levy of a tax on property outside the municipal boundaries void. Hemple v. Hastings [Neb.] 113 NW 187.

not be restrained from levying special taxes, equalized by it in the absence of proof of fraud, gross injustice, or mistake in such equalization.[27] In an action to enjoin a municipality from interfering with property rights, the presumption is that the defendant officials are acting within the scope of their authority,[28] and that they intend to act lawfully.[29] It is improper to litigate before election by injunction or otherwise the question of whether or not there is any constitutional provision for an office.[30]

(§ 2) *D. Enforcement of statutes and ordinances.*[See 8 C. L. 290]—The execution of a void statute or ordinance may be enjoined,[31] but this alone does not entitle to a temporary order of injunction unless threatened irreparable injury is shown,[32] and temporary injunction may be granted pending the determination of the constitutionality of a statute;[33] but courts will not enjoin the enforcement of municipal ordinances quasi-criminal in their nature except in very exceptional cases as where there is a fraudulent use or abuse of process where the applicant's rights for injunction are clear and the proceedings obviously nothing but a circuitous method of depriving him of property, or where municipalities under the pretense of seeking the good of the portion of society intrusted to their supervision are in fact attaching vested interests.[34] Other courts hold that equity will enjoin the enforcement of an invalid law or ordinance of a criminal or quasi criminal nature where property rights will be destroyed or their lawful enjoyment taken away.[35] The court will restrain an arbitrary or plainly unreasonable exercise of the police power, where there has been an attempt thereby to lay a burden upon a citizen in the use or enjoyment of his property.[36] The general ground of multiplicity of suits does not give jurisdiction to

27. Assessment according to the foot frontage rule. Richardson v. Omaha [Neb.] 110 NW 648. Federal courts will not enjoin the assessment of taxes because of inequality, unless it is shown to be the result of a scheme or agreement among the taxing officers. Chicago, etc., R. Co. v. Babcock, 204 U. S. 585, 51 Law. Ed. 636.

28. Stadler v. Cleveland, 4 Ohio N. P. (N. S.) 649. Levying taxes. Shriver v. McGregor, 224 Ill. 397, 79 NE 706.

29. Will not enjoin the issue of bonds which may cause a levy of taxation above the limit as it cannot be anticipated that such a levy will be made. Troutman v. Hays, 31 Ky. L. R. 204, 101 SW 976.

30. Bill to restrain county clerk from printing ballots for an election of county commissioners. Sherlock v. District Ct. [Colo.] 88 P 396.

31. Enjoin establishment by commissioners of a water rate which prevents a fair return upon the investment. Montezuma County Com'rs v. Montezuma Water & Land Co. [Colo.] 89 P 794. A suit for injunction in behalf of one specially interested to prevent the attempted execution of a void statute and the exercise of an office claimed to have been created thereby, but in fact and in law nonexistent, is a proper remedy to obtain relief required. A statute requiring that no injunction shall be granted to prevent the execution of a statute or to prevent the exercise of a public office by one in possession does not prevent an injunction to prevent the execution of a void statute. Wheeler v. Herbert [Cal.] 92 P 353. Ordinance providing for the removal or destruction of cotton seed storage houses. Town of Cuba v. Mississippi Cotton Oil Co. [Ala.] 43 S 706. Franchise granted to supply water, rates not to exceed a fixed maximum. An ordinance reducing that maximum could be enjoined. City of Bessemer v. Bessemer Water Works [Ala.] 44 S 663.

32. Weir v. Winnett, 155 F 824.

33. May grant a preliminary injunction against enforcement, by the mayor, of an order by commissioners for certain gas rates pending a suit to determine its constitutionality allowing bills to customers at the old rate, provision being made for impounding the difference between the old rate and the new, the gas company being otherwise subject to irreparable injury because of a statute making the fact of a higher rate charge than that fixed by the commission a complete defense in an action to collect. Buffalo Gas Co. v. Buffalo, 156 F 370. Preliminary injunction to restrain the enforcement of an order of the Interstate Commerce Commission pending hearing refused. Delaware, etc., R. Co., v. Interstate Commerce Commission, 155 F 512

34. Ordinance requiring certain stops to be made by street cars. Georgia R. & Elec. Co. v. Oakland City [Ga.] 59 SE 296.

35. Ordinance requiring a building permit. Fellows v. Charleston [W. Va.] 59 SE 623. Where property rights will be destroyed, unlawful interference by criminal proceedings under a void law or ordinance may be reached and controlled by equity. Ordinance passed to prevent operation of a ball park within certain limits where complainant had already purchased property and was commencing to construct. New Orleans Baseball & Amusement Co. v. New Orleans, 118 La. 228, 42 S 784.

36. Pittsburg, etc., R. Co. v. Hartford City [Ind.] 82 NE 787.

restrain the enforcement of quasi criminal ordinances.[37] Although the decisions are not uniform, the best rule seems to be that equity will not enjoin the enforcement of penal ordinances merely because they are alleged to be void,[38] unless prosecution under the ordinance may result in irreparable injury to property rights, and this is especially true if the ordinance has been declared void by a court of law.[39] Where there is no showing of threatened, impending, or imminent prosecutions under an ordinance, there is no ground for an injunction even if such ordinance is void.[40] Where the validity of a statute may be tested in an action of law, no injunction against its enforcement will be granted.[41] Neither will a city ordinance be enforced by injunction for there is an adequate remedy at law for enforcing it by imposing penalties,[42] but if the violation of ordinances constitute a public nuisance, equity has jurisdiction.[43] Equity will not enjoin threatened or pending legislation, or ordinances.[44] The repeal of an ordinance granting rights may be enjoined where parties have acted under it and incurred expense.[45] A Federal court of equity has jurisdiction to enjoin the enforcement of unconstitutional state statutes.[46]

(§ 2) *E. Exercise of right of eminent domain.* See 8 C. L. 291—An injunction will issue to enforce the constitutional right of a property owner against dangerous aggression.[47] A writ of injunction will issue to restrain the appropriation of lands in violation of constitutional and statutory rules and it is not necessary to show that there is no adequate remedy at law,[48] but where the party intending to comply with the law finds itself by some accident or mistake in the position of a trespasser, the

37. Georgia R. & Elec. Co. v. Oakland City [Ga.] 59 SE 296.

38. Block v. Crockett, 61 W. Va. 421, 56 SE 826. That a city ordinance is void is not alone sufficient ground for restraining its enforcement. Ordinance regulating roller skating rinks. Princess Amusement Co. v. Metzger [Ind.] 82 NE 758. It is wholly immaterial that the statute or ordinance for the violation of which prosecution is threatened is absolutely void. City of Bessemer v. Bessemer Waterworks [Ala.] 44 S 663. The question of the validity or reasonableness of the ordinance will not be considered. White v. Tifton [Ga.] 59 SE 299.

39. Block v. Crockett, 61 W. Va. 421, 56 SE 826. It might be proper for a court to enjoin the enforcement of a void penal ordinance to avoid a multiplicity of suits where in addition property rights are directly involved or where some other special ground exists in addition. City of Galveston v. Mistrot [Tex. Civ. App.] 104 SW 417.

40. Ordinance regulating construction and maintenance of roller skating rinks. Complainant who was contemplating construction of one had not proceeded because a permit was refused under the ordinance complained of. Princess Amusement Co. v. Metzger [Ind.] 82 NE 758.

41. Where a complaint does not allege a threatened continuance of the enforcement of an ordinance causing injury, it cannot be enjoined to prevent a multiplicity of suits, and there is no allegation that it is void, but it does appear that replevin may be had to recover property taken under the ordinance and to test its validity an injunction will be denied. Tinsley v. Caruthersville, 121 Mo. App. 142, 98 SW 800.

42, 43. City of New York v. De Peyster, 105 NYS 612.

44. This does not apply to an ordinance which has been passed and approved and nothing remains to be done but to publish it. Minneapolis St. R. Co. v. Minneapolis, 155 F 989.

45. Ordinance granting a street railway rights on condition of an annual payment. The repeal of this ordinance on the ground that payments have not been made will be enjoined on condition that compensation provided for is made. Asbury Park & S. G. R. Co. v. Neptune Committee [N. J. Eq.] 67 A 790.

46. Railroad rates. St. Louis, etc., R. Co. v. Hadley, 155 F 220. Federal courts have jurisdiction to enjoin the enforcement of state statutes fixing maximum railroad rates. Perkins v. Northern Pac. R. Co., 155 F. 445.

47. Restrain taking by railroad without compensation. Menge v. Morris & E. R. Co. [N. J. Eq.] 67 A 1028.

48. Nelson v. New Jersey Short Line R. Co. [N. J. Eq.] 67 A 1032. Taking by railway. Southern R. Co. v. Hayes [Ala.] 43 S 487; Mobile & W. R. Co. v. Fowl River Lumber Co. [Ala.] 44 S 471; Jackson v. Big Sandy, etc., R. Co. [W. Va.] 59 SE 749. Where complainant did not consent to the erection or operation of a railroad across its land but attempted to prevent it, it is entitled to the protection of the equity court which will enjoin the further operation of the railroad and compel the removal of the tracks unless compensation is made. Butterworth-Judson Co v. Central R. Co. [N. J. Eq.] 66 A 198. Equity will restrain the taking of land by right of eminent domain where the requirement of the statutes as to damages has not been complied with, even though damages at law may be recovered. Harman v. Caretta R. Co., 61 W. Va. 356, 56 SE 520. Certain landowners not served with notice or made parties in drainage proceedings but claiming that their lands would be flooded were not restricted to an appeal nor was certiorari the appropriate remedy. Billsborrow v. Pierce [Minn.] 112 NW 274.

reason for the general rule seems to fail and the question is governed by those considerations controlling an ordinary case of trespass.[49] An injunction may be granted to restrain a railroad from taking possession of and permanently appropriating the street in front of the abutting owner owning the fee therein until compensation is made to the owner,[50] but a preliminary injunction will not issue on a bill by a township to enjoin a railroad from appropriating a longitudinal portion of the township road to straighten and widen the railroad.[51] Where there is a fraudulent pretense that land is to be condemned for a lawful purpose when it is not, an injunction will lie to restrain the proceedings.[52] Generally speaking a petition will not lie to enjoin the proceedings for condemnation for the reason that the mere taking of such proceedings does no injury to property, and further the grounds relied upon for an injunction may be urged in defense to the proceedings.[53]

(§ 2) *F. Acts affecting rights in highways and public or quasi public places.* See 8 C. L. 291—Municipalities may restrain encroachment upon and obstruction of highways by land or water under its care and charge.[54] An officer of a town who is liable for the obstruction of highways has an interest entitling him to enjoin such obstruction,[55] but an individual cannot enjoin an obstruction without showing special damage aside from that sustained by the general public.[56]

(§ 2) *G. Acts of quasi public and private corporations or associations.* See 8 C. L. 292—Injunctions will issue to restrain corporations from high handed aggression without a show of destructive trespass or irreparable injury,[57] and this may be done

49. Where the owner of a valuable leasehold sought to be condemned by a railroad was not made a party, but the railroad had not willfully or intentionally violated his rights, he is not entitled to enjoin the railroad's use of the land until his claim has been satisfied where the railroad paid into court a sum sufficient to satisfy such claim and proceeded with reasonable diligence to condemn his rights. Nelson v. New Jersey Short Line R. Co. [N. J. Eq.] 67 A 1032.

50. Seaboard Air Line R. Co. v. Southern Inv. Co. [Fla.] 44 S 351.

51. Crescent Tp. v. Pittsburg, etc., R. Co., 216 Pa. 481, 65 A 942.

52, 53. La Plant v. Marshalltown, 134 Iowa, 261, 111 NW 816.

54. Construction of a building upon piles over a stream alongside of a dock. City of Milwaukee v. Gimbel Bros., 130 Wis. 131, 110 NW 7. Where there is an obstruction or encroachment of a permanent nature upon a public way and particularly where it is of long standing and a right to maintain it is asserted, a court of equity will entertain jurisdiction to enjoin its continuance. Excavation under a sidewalk and opening made contrary to ordinance. City of New York v. De Peyster, 105 NYS 612. A log boom across a stream which prevents use of stream by other owners of logs. Powell v. Springston Lumber Co., 12 Idaho, 723, 88 P 97.

55. Overseer of highway made liable to fine by statute could enjoin erection of a fence. Williams v. Riley [Neb.] 113 NW 136.

56. Tise v. Whitaker-Harvey Co., 144 N. C. 507, 57 SE 210; Robbins v. White [Fla.] 42 S 841. Obstructing a highway is a public nuisance but each abutting landowner has a right to go to and from the highway on easement, which if obstructed at the time that the highway is obstructed, gives him a right of action. Brown v. Rea, 150 Cal. 171, 88 P 713. The operation of a street railway is not as to abutting owners a nuisance per se and it is necessary in a complaint to enjoin its operation to allege the special facts constituting it a nuisance. Id. Encroachment by adjoining owner upon highway. Ackerman v. True, 105 NYS 12. Unlawful closing of a highway. An elector living within five miles of such highway has an independent special interest. Letherman v. Hauser [Neb.] 110 NW 745. Where a road is closed which is party's best and most available route to his market town and county seat, the damages resulting therefrom while real and substantial cannot be estimated in money and an injunction will lie. Id. An obstruction to navigable water is a public nuisance and may be enjoined by a private person who is injured thereby differently from the general public. Carver v. San Pedro, etc., R. Co., 151 F 334. Abutting owner may enjoin obstruction of a public street only when it interferes with his special easement of ingress and egress, light from the street and air, right to have an unobstructed view so that signs or goods displayed on the premises may be seen from the street. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330. Where a street railway franchise has expired, an abutting land owner may have a temporary injunction against the laying of tracks, etc., in the street pending an action for a perpetual injunction. Manton v. South Shore Trac. Co., 121 App. Div. 410, 106 NYS 82.

57. Taking land. Menge v. Morris & E. R. Co. [N. J. Eq.] 67 A 1028. Equity will enjoin the acts of a railroad where there is a persistent refusal on its part to perform its duty generally resulting in irreparable injury to the complainant's business. Refusal to deliver freight. Wallace v. Baltimore, etc., R. Co., 216 Pa. 311, 65 A 665. Water company may be compelled by injunction to supply water after proper demand and tender of

on information filed by the attorney general.[58] Equity may enjoin change of location by a railroad company without legislative authority.[59] A bill by a stockholder to enjoin the voting of stock by another corporation for the alleged purpose of changing the management in its own interest and creating an illegal monopoly to the detriment of the minority stockholders shows such threatened irreparable injury as to justify the granting of a preliminary injunction.[60] Equity will enjoin the enrollment of all voters of a certain political party for the purpose of allowing only such as are enrolled to vote at primaries, for such a proceeding may prove illegal and the nominees refused a place on the ballot thus causing great confusion, and on the other hand no harm will come to the defendants or any other voters for there seems to be no pressing necessity for an enrollment.[61]

(§ 2) *H. Breach or enforcement of contract or trust.* See 8 C. L. 293—The restraining of a breach of contract is a negative specific performance and depends on the same principles.[62] The court will not exercise its extraordinary power to restrain an apprehended breach of contract unless the petitioner is without an adequate remedy at law and the contract itself free from doubt.[63] Ordinarily it will not lie to prevent a breach of a contract which cannot be specifically enforced,[64] but many unilateral contracts are an exception to this rule, as the right to exercise options.[65] An injunction will issue to restrain the violation of express, negative provisions of a contract,[66] and where a contract contains both affirmative and negative covenants, breach of the latter may be enjoined although specific performance of the former cannot be decreed.[67] If the compainant has fully performed a breach by the defendant of negative covenants may be enjoined.[68] If the negative covenant is only implied from

established rates. Enjoin cutting off of plaintiff's water. Fellows v. Los Angeles [Cal.] 90 P 137.

58. Operation under a franchise purchased at a receiver's sale in a manner different from the operation provided by law. McCarter v. Vineland Light & Power Co. [N. J. Eq.] 65 A 1041.

59. Enjoin tearing up tracks and relocating at a different place. Atlantic & B. R. Co. v. Kirkland [Ga.] 59 SE 220.

60. Bigelow v. Calumet & Hecla Min. Co., 155 F 869.

61. Brown v. Cole, 54 Misc. 278, 104 NYS 109.

62. A contract between a turnpike company and a street railway company will be enforced by enjoining the maintenance of tracks differently from the manner provided for in the contract. Chester & Darby Telford Road Co. v. Chester, D. & P. R. Co., 217 Pa. 272, 66 A 358.

63. Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 NE 897; General Elec. Co. v. Westinghouse Elec. Co., 151 F 664. The jurisdiction of equity to enjoin a breach of contract depends upon the inadequacy of the remedy at law. Id. Evidence held insufficient to warrant enjoining the removal of a telephone for failure to pay charges. Elmore v. McMillan [Neb.] 113 NW 165. Contract between a street railway company and a turnpike regarding the height and location of the tracks of the former specifically enforced by mandatory injunction. Chester & Darby Telford Road Co. v. Chester, D. & P. R. Co., 217 Pa. 272, 66 A 358. May enjoin foreclosure of mortgage upon tender of amount of mortgage debt. Tidwell v. Wittmeier [Ala.] 43 S 782. Will enjoin foreclosure of mortgage not made in accordance with the terms of the power of sale. Sellers v. Page, 127 Ga. 633, 56 SE 1011. A complaint stating that plaintiff was engaged as attorney to the chief of an Indian Nation pursuant to an act of the council, that he was discharged without cause and another employed and that plaintiff was without adequate remedy to prevent diversion of funds in the hands of the chief to pay his salary without injunction, states sufficient facts to entitle plaintiff to equitable relief. Porter v. Murphy [Ind. T.] 104 SW 658.

64. An injunction will not be granted to restrain a breach of contract by a defendant when the complainant's promises are of such a nature that they cannot be specifically enforced, unless they have been already performed. Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 NE 897. Agreement to supply heat as long as complainant desired. Id. Contract for sale and purchase of timber contained provisions imposing certain obligations which were unilateral. Bell v. Gress Mfg. Co., 127 Ga. 15, 55 SE 1043. Contract to purchase beer of plaintiff only. No agreement to sell to defendant. George Ringler & Co. v. Mohl, 115 App. Div. 549, 101 NYS 454. Contract to play for complainant only but no definite contract to keep defendant employed, equity would not enjoin defendant from acting for other parties. Lawrence v. Dixey, 104 NYS 516.

65. Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 NE 897.

66. Sand Co. v. Fire Brick & Clay Co., 124 Ill. App. 599.

67. General Elec. Co. v. Westinghouse Elec. Co., 151 F 664.

68. Will enjoin breach of covenant not to erect stable on land purchased. Klasener v. Robinson, 30 Ky. L. R. 1032, 100 SW 255.

positive stipulations, courts are not so ready to lend their jurisdiction.[69] Equity will enjoin breach of a contract not to re-engage in business in a certain locality, if reasonable and based on sufficient consideration,[70] and plaintiff need not wait until operations have actually commenced where defendant is making preparations to engage in business.[71] An agreement not to solicit business from plaintiff's customers after leaving his employ will also be enforced.[72] There is a conflict of opinion as to whether the breach of a contract to sell only certain articles for a certain period of time may be enjoined.[73] A tenant or licensee will be restrained and confined within the scope of the tenancy or license.[74] Whether equity will enjoin the violation of a restrictive covenant as to personal services depends largely on whether a sufficient substitute for the employe can be easily obtained.[75] The mere fact that parties to a contract describe the services of the defendant as special and unique will not give equity jurisdiction to grant injunction where there is no other evidence of the special character of defendant's services.[76] A threatened breach of covenant where defendant insists on its right to do an act amounting to a breach may be enjoined.[77] The breach of restrictive covenants in a deed will be enjoined,[78] unless it would be inequitable to

No negative covenant shown. Carlson v. Koerner, 226 Ill. 15, 80 NE 562.

69. Facts did not show any negative covenant. Carlson v. Koerner, 226 Ill. 15, 80 NE 562.

70. Sale of a lumber business, vendors agreed not to re-engage in that locality. One of vendors acted as a broker but sold outside the locality entirely. No breach and could be no injunction. Jayne & Keve Bros. Lumber Co. v. Turner, 132 Iowa, 7, 109 NW 307. Agreement not to engage in the drug business in a certain city but defendant acted as manager for concern operating drug stores in that city. Court did not abuse its discretion in granting a temporary injunction. Kradwell v. Thiesen, 131 Wis. 97, 111 NW 233. May enjoin breach of contract not to re-engage in business even where liquidated damages are provided for, if it appears that they were not considered as the only damages. Contract of sale by an attorney of his practice. Heinz v. Roberts [Iowa] 110 NW 1034.

71. Contract not to engage in turpentine distilling in a certain district. Harris v. Theus [Ala.] 43 S 131.

72. Will enjoin breach of covenant not to solicit milk business from plaintiff's customers for three years after leaving his employ. Mutual Milk & Cream Co. v. Heldt, 105 NYS 661.

73. Will not enjoin the breach of a contract to sell only certain articles for a certain period for there is an adequate remedy at law. Hardy v. Allegan Circuit Judge, 147 Mich. 594, 14 Det. Leg. N. 21, 111 NW 166.

Contra: Defendant enjoined from breaking contract to sell complainant's beer exclusively for certain period, complainant having no adequate remedy at law. Christian Feigenspan v. Nizolek [N. J. Eq.] 65 A 703.

74. Operation of a railroad built on a mining right of way as a common carrier. Jackson v. Big Sandy, etc., R. Co. [W. Va.] 59 SE 749. Equity may enjoin the removal by a tenant of fixtures which it has been agreed shall become the property of the landlord at the expiration of the lease. Isman v. Hanscom, 217 Pa. 133, 66 A 329. Equity will restrain a breach of restrictions in a lease by a lessee without any proof of damage or irreparable injury to prevent a multiplicity of suits. No beer but a certain brew to be sold on the premises. Jos. Schlitz Brew. Co. v. Nielsen [Neb.] 110 NW 746. But see Ringler & Co. v. Mohl, 115 App. Div. 549, 101 NYS 454. Equity will enjoin the capricious or arbitrary termination of a lease where such a right is reserved under certain circumstances. Plaintiff leased certain land of the city with a right of renewal for a bathing establishment and had expended a large sum of money thereon. The city reserved the right to terminate the lease if the land were needed for public improvement. Where there was a mere tentative plan for improvement with little chance of its being carried out for a long time, equity will enjoin the termination of the lease by the city. Donohue v. New York, 54 Misc. 415, 105 NYS 1069.

75. Singer's part was quite ordinary and could be easily filled. Dockstader v. Reed, 106 NYS 795. An actor will not be restrained from breach of his contract where party seeking relief is not reciprocally bound by the contract. Id. Because of the special nature of contracts for the employ of actors or singers, although the affirmative contract cannot be enforced, courts have enforced negative covenants express or implied where there was no legal remedy for the breach, and where from the nature of the case the parties willing to perform have no remedy except to prevent the breach of the negative covenants. Lawrence v. Dixey, 104 NYS 516.

76. Dockstader v. Reed, 106 NYS 795.

77. Vote of town to maintain waterworks where franchise was granted to complainant not sufficient. Selma Water Co. v. Selma, 154 F 138.

78. A court of equity will restrain the violation of a covenant entered into by a grantee restrictive of the use of lands conveyed, not only against the grantee's covenantor but against all subsequent purchasers having notice of the covenant, whether it run with the land or not. Leaver v. Gorman [N. J. Eq.] 67 A 111. Where an owner maps out a plot of land into lots and streets and sells lots by reference to this map, a purchaser may enjoin any attempt by the owner to use the portion given up to streets other-

do so.[79] The breach of a contract void under the statute of frauds will not be enjoined,[80] nor will the breach of a contract which is against public policy.[81] Where liquidated damages are provided for breach of contract, this does not oust equity of its jurisdiction to enjoin a breach.[82] To obtain injunction of a breach of contract, plaintiff must show compliance with the terms of contract on his part,[83] but a slight variance from contract where it has been acquiesced in will not prevent the complainant from obtaining an injunction.[84] Equity will enjoin attempts of third persons to induce parties to break their lawful contracts.[85] Where the bankruptcy of a complainant intervenes between his original title under a contract and his title at the

wise than in the manner indicated. Herold v. Columbia Inv. & Real Estate Co. [N. J. Err. & App.] 67 A 607. Equity will enforce a restriction where land is laid out under a general building scheme. No building within ten feet of the street, erection of bay window within the ten feet restrained. Barton v. Slifer [N. J. Eq.] 66 A 899. If the owner of land enters into a covenant concerning the use of land and the land is later sold to one who has notice of the covenants, he will be restrained from violating them. Contract to supply water from certain land enforced against a purchaser of the land with notice from the covenantor. Hunt v. Jones, 149 Cal. 297, 86 P 686. Restriction against mercantile business or stable on land. Silberman v. Uhrlaub, 116 App. Div. 869, 102 NYS 299.

79. Where there is a restriction upon land requiring buildings to be set back a certain distance and it appears that in the last few years the property has fast changed from residential to business, equity will not enforce the restriction for it would be a great hardship on the defendant without conferring any benefit on the plaintiff. Schefer v. Ball, 53 Misc. 448, 104 NYS 1028. Equity will not enforce an alleged restriction on land against the vendor which does not exist where it is not alleged that the representation of such restriction was fraudulent or that grantees relied on it or were deceived. Norton v. Kain, 121 App. Div. 497, 106 NYS 129.

80. Oral contract not to be performed within one year. Platte County Independent Tel. Co. v. Leigh Independent Tel. Co. [Neb.] 113 NW 799.

81. The condition in a mortgage, given to a brewing company for a sum of money advanced by it to enable the mortgagor to build a saloon upon the mortgaged premises, that the mortgagor shall not, for a period of twelve years, sell upon the mortgaged premises any beer, ale, or porter, except that manufactured by the mortgagee, is founded upon a valuable consideration, is not against public policy as in restraint of trade, and may be enforced by injunction to prevent the sale on the premises of other brews than that of the mortgagee. Cleveland & Sandusky Brew. Co. v. Demko, 9 Ohio C. C. (N. S.) 130.

82. Agreement not to engage in turpentine distilling in a certain district. Harris v. Theus [Ala.] 43 S 131.

83. Bill to enjoin granting of street railway franchise to another company. Plaintiff had not performed conditions imposed by its own grant and there could be no injunction. South Shore Trac. Co. v. Brookhaven, 53 Misc. 392, 102 NYS 1074.

84. Chester & Darby Telford Road Co. v. Chester D. & P. R. Co., 217 Pa. 272, 66 A 358.

85. Defendant sought to induce plaintiff's customers to break contracts not to sell certain patent medicines except to parties under special terms. Dr. Miles Medical Co. v. Jaynes Drug Co., 149 F 838. Equity will issue an injunction where unlawful interference with contract is shown and damages will not afford an adequate remedy. Beekman v. Marsters [Mass.] 80 NE 817. Will enjoin defendants from inducing complainant's customers to violate their contracts by selling a patent medicine to the defendants contrary to terms of their contracts with complainants. Wells & Richardson Co. v. Abraham [C. C. A.] 149 F 408. Manufacturer of proprietary medicine sold same only to such wholesale druggists as would agree to sell only at stated prices to dealers having contracts with complainant binding them not to sell except at prices fixed by complainant. Held that, it being conceded that such contracts were valid, complainant was entitled to preliminary injunction enjoining defendants who had no such contract, from knowingly purchasing medicine from any person who had entered into such a contract or who had not done so, or from selling any medicine so obtained, or from selling medicine in any case without directions and representations appearing on labels and cartons containing bottles. Wells & Richardson Co. v. Abraham, 146 F 190. Evidence held sufficient to show connivance and participation by defendant in breach of contract by dealers from whom it purchased. Id. Defendant enjoined from disposing of wire product resulting from experiments until he had given complainant opportunity according to terms of contract to decide whether it would undertake its manufacture. Driver-Harris Wire Co. v. Driver [N. J. Err. & App.] 65 A 981. Equity will enjoin unlawful interference with contract where it further appears that damages will not afford an adequate remedy. Beekman v. Marsters [Mass.] 80 NE 817. Will enjoin officers of a union from inciting men to strike where a contract has been made between the union and employers. Barnes & Co. v. Berry, 156 F 72. Where defendant has brought about a breach of contract between the complainant and another, equity will enjoin him from obtaining any benefit therefrom. Where complainant had been appointed sole New England agent for a certain hotel and the defendant procured a breach of that contract and was also appointed agent, equity will enjoin him from acting as agent. Beekman v. Marsters [Mass.] 80 NE 817.

time the bill is brought, his right to enjoin the breach of covenants is not affected.[86] Where a bill does not allege that defendant intends to violate his contract and the answer alleges that he does not intend to violate, no injunction will issue against the breach of covenant.[87] A breach of trust will be enjoined.[88] Where contracts have been obtained by fraud, their enforcement will be enjoined,[89] and in the case of bills and notes, payment or transfer may be enjoined to protect equities.[90]

(§ 2) *I. Interference with property, business, or comfort of private persons.* See 8 C. L. 295—Injunction will issue at the suit of the attorney general to prohibit combinations in restraint of trade, though no injury to civil or property rights be alleged, injury to the public being presumed from the violation of the law.[91] Equity will enjoin the unlawful interference with one's business.[92] The great

86. Sale of good will in dental business to plaintiff with agreement to refrain from doing business. Plaintiff goes through bankruptcy and purchases the good will from the trustee. His title is sufficient to enjoin breach of covenant. Foss v. Roby [Mass.] 81 NE 199.

87. Selma Water Co. v. Selma, 154 F 138.

88. Director of a company manufacturing under a secret process for detinning tin scrap will be enjoined from using his knowledge in establishing a competing business. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A 339.

89. Where a county committee awarded a contract for furniture to the highest bidder, facts did not warrant restraining carrying it into effect because of fraud. Raymond v. McKenna, 147 Mich. 35, 13 Det. Leg. N. 935, 110 NW 121. Contract of a county board for construction of ditches at an extravagant price. No actual fraud and a discretion being lodged in the boards. Wood v. Hall [Iowa] 110 NW 270. Equity will enjoin the use of an instrument fraudulently obtained. Birth certificate falsely alleging paternity in complainant. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A 97. Equity will enjoin the issue of bonds which have been procured to be issued by fraud. Pere Marquette R. Co. v. Bradford, 149 F 492.

90. Equity will enjoin transfer of negotiable note where there are defenses between maker and payee. Notes given in payment for land of which defendant did not have title. Atkinson v. Cain, 61 W. Va. 355, 56 SE 519. Enjoin enforcement of negotiable note obtained by fraud. Monmouth Inv. Co. v. Means [C. C. A.] 151 F 159.

91. People v. Aachen & Munich Fire Ins. Co., 126 Ill. App. 636.

92. Placing in the hands of every dealer in the state by a state officer a bulletin threatening prosecution if they should use complainant's product sold in lawful form. Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701. Sending out circulars to complainant's customers alleging his goods to be infringments and threatening customers with suit. Schwanbeck Bros. v. Backus, 148 Mich. 508, 14 Det. Leg. N. 200, 111 NW 1046. Following complainant's agents about the country and interfering with attempted sales. Evenson v. Spaulding [C. C. A.] 150 F 517. Defendant which was a voluntary association composed of numerous firms and corporations in many different lines of business was formed for the purpose of competing with peddlers, and wherever a member knew of a person being in the vicinity to sell ranges or vehicles it was his duty to go and offer competition by taking similar goods and accompanying the peddler around. Complainant was a dealer in buggies made in Idaho and sent to Washington for sale by agents who took them around the country showing them to farmers. Defendant in pursuance of its scheme employed two men to follow each of complainant's agents who dogged his footsteps, interrupted conversations with prospective customers, some carrying guns. Held that such acts were not competition nor intended as such, but to suppress competition by destroying the complainant's lawful business in pursuance of an unlawful conspiracy between persons some of whom were not even competitors, and such acts would be enjoined. Spaulding v. Evenson, 149 F 913. Where a board of commissioners' decision as to the removal of tracks from a street is not final, the railway company may without waiting for a hearing before the commissioners enjoin the removal of the tracks pending the trial of the right to remove either in a court of equity or of law. North Jersey St. R. Co. v. Newark Street and Water Com'rs [N. J. Eq.] 67 A 691. Equity will enjoin one from ascertaining and using the names of the customers of a competitor. Defendants sent out threatening circulars to complainant's customers immediately on the receipt by them of goods from complainant. Schwanbeck v. Backus, 148 Mich. 508, 14 Det. Leg. N. 200, 111 NW 1046. An owner of a hotel may enjoin the police from destroying his business by unlawful trespass. Making daily and nightly visits for several weeks, going through bedrooms after midnight, stationing an officer at the door to warn people away. Olms v. Bingham, 116 App. Div, 804, 101 NYS 1106. Will not enjoin sending out of proper circulars by complainant alleging infringment of patent where action is pending. Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 F 642. Where a bill to restrain infringment of patents and a trade name is pending, the court upon petition by the defendant will not restrain the complainant from sending out notices that the bill is pending and that the defendant's goods are fraudulent imitations. Warren Featherbone Co. v. Landauer, 151 F 130. Sending notices to dealers that one party is infringing another's patents and trade marks, but not accompanied by a suit in equity to restrain infringment, is an attack upon a man's business which will be

weight of authority in the United States is in favor of the proposition that it is not unfair competition, intimidation, or coercion to interfere with a right to carry on business by persuasion or any peaceable means,[93] but it is impossible to reconcile all the decisions bearing on the power and authority of a court of equity to restrain by injunction combinations of persons having for their object an interference with the business of another.[94] Equity will enjoin the unlawful invasion of the private property rights granted by franchise.[95] The right to privacy, although an unsettled one, is becoming more and more definitely recognized in courts of equity.[96] Equity will enjoin the unauthorized exhibition of a plaintiff's photograph,[97] and will enjoin the taking of the photograph of a person arrested for a crime until after conviction if the picture is not necessary to establish guilt or for identification purposes.[98] The use of a marriage certificate fraudulently obtained will be enjoined so as to prevent a party from acquiring any advantage thereunder.[99] So, also, equity will prevent by injunction the use of a false birth certificate by means of which a child might claim an interest in the alleged parent's estate.[1]

Trade and firm name. See 8 C. L. 295—Where one acquires by use the right to use a name, whether an individual, partnership, or corporation, equity will protect its use by injunctions.[2] If an article has acquired a reputation as meritorious and is distinguished to the public by a certain trade name or by the form of package the vending of another article of like kind under an imitation of the label or package intended to deceive the public will be restrained,[3] but where a manufacturer had no name for his product and did not advertise it as his make, but put it up under the trade names and trade marks of different customers in cartons upon which was printed a representation that the powder was manufactured exclusively by the customers, he could not

enjoined. Id. A court of equity will grant relief at the instance of a manufacturer on his showing that the conduct of his business is injured by members of a union illegally preventing employes from going to work by threatening and injuring them and others who were at work. Piano & Organ Workers v. Piano & Organ Supply Co., 124 Ill. App. 353; Hey v. Wilson, 128 Ill. App. 227.

93. Publication of statements in a newspaper even though libelous. Montgomery Ward & Co. v. South Dakota Retail Merchants, etc., Ass'n, 150 F 413. An association of retail dealers will not be enjoined from agreeing among themselves that they will not purchase from wholesalers who sell to mail order houses, and informing each other as to what wholesalers did sell to such houses. Id.

94. Montgomery Ward & Co. v. South Dakota Retail Merchants, etc., Ass'n, 150 F 413.

95. Right to lay gas pipes in street will be protected as against all not having a similar right. Millville Gaslight Co. v. Vineland Light & Power Co. [N. J. Eq.] 65 A 504.

96. For a case discussing the right to privacy in name and picture, see Edison v. Edison Polyform Mfg. Co. [N. J. Eq.] 67 A 392, where the unauthorized use of both was enjoined.

97. Rhodes v. Sperry & Hutchinson Co., 104 NYS 102.

98. Pawnbroker arrested for receiving stolen goods. Schulman v. Whitaker, 117 La. 704, 42 S 227. Equity will enjoin the fraudulent use of a man's name and picture and affidavit attached to an article regardless of the fact that it is not an article competing with one manufactured by the complainant. Manufacturers of a patent medicine called it the Edison Polyform and had a picture of Edison on the label with an affidavit that the medicine was compounded according to the formula used and devised by him. Edison v. Edison Polyform Mfg. Co. [N. J. Eq.] 67 A 392. This is so despite the fact that the right to use of name is granted by charter. Use of name of Emperor Franz Josef. Von Thodorovich v. Franz Josef Beneficial Ass'n, 154 F 911.

99. Defendant procured someone to impersonate the plaintiff and went through a marriage ceremony, obtaining a certificate of marriage. Randazzo v. Roppolo, 105 NYS 481.

1. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A 97.

2. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 59 SE 123. The use of a trade name will be restrained not only in the corporate name of a competitor and in connection with competitive goods but also in connection with noncompetitive goods manufactured by it so long as it continues to manufacture any goods in competition with the company first using the name. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A 870.

3. Shelley v. Sperry, 121 Mo. App. 429, 99 SW 488. Enjoin defendant from using upon individual cigars of panatella shape bands simulating those of complainant in shape and color. Clay v. Kline, 149 F 912.

enjoin the use of similar cartons by a competitor.[4] Mere incorporation does not give the exclusive right to the use of a name.[5]

*Copyrights, trade secrets, literary property, and the like.*See 8 C. L. 296—Where an employe of one manufacturing under a secret process is enticed into another's employ for the purpose of learning the master's trade secret, equity will enjoin him from divulging to any one the secret processes which were learned in the complainant's employ [6] and restrain the second party employing him from disclosing or making use of such secrets as may have been communicated by the employe [7] and from employing such employe during the unexpired term of his contract with the complainant.[8] Equity will protect the name and reputation of an author by enjoining unauthorized changes in his work.[9] Equity will enjoin the infringement of a patent, irrespective of the invalidity of license contracts, and despite anti-trust laws.[10]

*Waste.*See 8 C. L. 296—Courts will protect one claiming to be the owner of real property who is out of possession from irreparable injury to the estate until such time as the title can be determined.[11] A tenant may be enjoined from committing waste.[12] Where waste by cutting a hole in a wall by a tenant has been completed, equity will not enjoin the use of such opening in passing to and from an adjoining building by defendants, his agents, and customers.[13] The cutting down of trees and brush growing on lands is waste which will be enjoined.[14]

*Incorporeal property.*See 8 C. L. 296

*Easements and rights of way.*See 8 C. L. 296—Equity will enjoin the obstruction of a right of way [15] or the obstruction of an easement of light and air.[16] A riparian

4. Washing powder. Shelley v. Sperry, 121 Mo. App. 429, 99 SW 488.

5. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 59 SE 123.

6. Secret process used in manufacturing manganese steel. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695. Where a corporation is operating under a secret formula fraudulently obtained by its president, it will be enjoined, for the knowledge of the president is imputable to it. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A 339. Former employes of corporation enjoined from disclosing and using trade secret learned while in employ of corporation. Id. Employes leaving a concern operating under a secret formula will be restrained from divulging the secret after leaving the employ of such concern. Id. Director of a company using a secret process cannot set up a competing business founded on his knowledge obtained as director. Id. In suit to enjoin former employe from violating contract not to disclose trade secrets and a competitor from employing him, evidence held to show that complainant possessed certain secret processes which it was entitled to have protected. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695. Where an employe of a concern learned certain business secrets and though having expressly contracted not to divulge the secret processes he went into the same business after leaving the complainant's employ and it was proved that he had made blue prints of machinery and copied some of the formulae and that he had one machine which was a direct copy of the complainant's secret apparatus, this shows a clear case of fraudulent breach of contract which may be enjoined. Sterling Varnish Co. v. Macon, 217 Pa. 7, 66 A 78.

7. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695. An injunction perpetually restraining defendants from using any information in reference to complainant's business obtained while in its employ, and which information could only have been obtained by the confidential relationship existing by such employment is too broad. International Register Co. v. Recording Fare Register Co. [C. C. A.] 151 F 199.

8. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695.

9. Defendant undertook to make changes in a play written for him by the plaintiff. Royle v. Dillingham, 53 Misc. 383, 104 NYS 783.

10. Indiana Mfg. Co. v. Case Threshing Mach. Co. [C. C. A.] 154 F 365. An application to a circuit court for a preliminary injunction to restrain infringement of a patent will not be granted where after full consideration it has been adjudged by the circuit court of appeals of another circuit not an infringement. If the record on such application contains important new matter, the court will exercise its own judgment on the whole record. Calculagraph Co. v. Automatic Time Stamp Co., 149 F 436.

11. Removal of coal, precious metals, or cutting of timber, may be enjoined, but the construction of a railroad where another claims a right of way will not be restrained. Wallula Pac. R. Co. v. Portland & S. R. Co., 154 F 902.

12, 13. Cutting hole in a wall against lessor's orders. Chamberlain v. Child's Unique Dairy Co., 53 Misc. 371, 104 NYS 912.

14. Hatton v. Gregg [Cal. App.] 88 P 594.

15. Fence built across land where there was a right of way. Dewire v. Hanley, 79 Conn. 454, 65 A 573. Complainant was given a right of way over defendant's land by

owner may enjoin his exclusion from the use of the shore.[17] Equity may enjoin the placing of an additional burden upon an existing easement.[18]

Nuisances.[See 8 C. L. 297]—A court of equity has jurisdiction to enjoin a continuing nuisance and compel its abatement.[19] A public nuisance does not furnish a ground for action by a private person unless he suffers as an individual some peculiar injury.[20] The intent to injure is not the test in nuisance cases.[21] An injunction restraining the conduct of a legitimate business should go no further than is absolutely necessary to protect the rights of him seeking the injunction.[22] In such case the establishment of plaintiff's right in an action at law will ordinarily be required.[23] The balance of convenience and injury will be considered in enjoining the continuation of a business,[24] particularly where the public interest is involved.[25]

parole and exercised this easement for over twenty years. Gyra v. Windler [Colo.] 91 P. 36.

16. An injunction will lie against the construction of a "house" by an adjoining property owner when the enjoyment of his neighbor's property is substantially affected thereby as to view, light, and air, although his neighbor may have submitted to encroachments upon portions of the street remote from him and not affecting his enjoyment in violation of a general restriction. Bader v. Walther, 5 Ohio N. P. (N. S.) 497.

17. Mobile Transp. Co. v. Mobile [Ala.] 44 S 976.

18. May enjoin an additional burden upon an easement in a public way. Construction of a telephone line in a highway. Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 NE 705. Where a railroad without authority laid five sets of tracks across a projected street under a license from the owner, and thereafter without further authority laid ten additional tracks across such street, the owner was entitled to a mandatory injunction to compel the removal of such additional tracks. Northern Cent. R. Co. v. Canton Co. of Baltimore, 104 Md. 682, 65 A 337. Where a defendant has granted a right of way to the complainant and thereafter, claiming that the burden of the easement has been increased beyond the scope of the original grant, seeks to prevent the use of the right of way, the complainant is not required to prove its right in order to be entitled to an injunction. Right to string wires on poles. Defendant cut down certain of the wires. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A 747. Where plaintiff applied for an injunction to restrain defendant from crossing its right of way and there was no immediate prospect that defendant would do so and plaintiff had not yet begun the construction of its road, there is no such threatened irreparable injury as to justify the issuance of an injunction. Washington & V. R. Co. v. Raleigh & P. S. R. Co., 144 N. C. 767, 56 SE 480.

19. City dump where decaying animal and vegetable matter. Shreck v. Coeur d'Alene, 12 Idaho, 708, 87 P 1001. Crematory and fertilizer plant. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A 387. Facts did not show a barnyard to be a nuisance which equity would restrain. Hale v. Jenkins, 55 Misc. 119, 106 NYS 282. Defendant's land contained a depression which collected surface water. Had a right to cause the same to flow in the natural course of drainage onto adjoining lands. Shaw v. Ward, 131 Wis. 646, 111 NW 671. The operation of an electric light plant in the usual manner will not be enjoined. Floyd-Jones v. United Elec. Light Co., 55 Misc. 529, 106 NYS 648. In an action against a city for turning sewage and surface water into a watercourse which flowed through the plaintiff's land, he was not entitled to an injunction pendente lite where it appeared that the water course was not overtaxed and that the city was completing a sewage system which would prevent the drainage of sewage into the watercourse. Penfield v. New York, 115 App. Div. 502, 101 NYS 442.

20. Laying tracks in a street. Brown v. Rea, 150 Cal. 171, 88 P 713. An obstruction to navigable water is a public nuisance and may be enjoined by a private person who is injured thereby differently from the general public. Carver v. San Pedro, etc., R. Co., 151 F 334. Action against an adjoining owner for encroachment on the highway. Ackerman v. True, 105 NYS 12. See further § 2F. Acts Affecting Rights in Highways, etc.

21. Shreck v. Coeur d' Alene, 12 Idaho, 708, 87 P 1001.

22. It is improper to absolutely forbid the maintenance of an ash receiving station used by a city in disposing of rubbish where, since a prior injunction against its use as a nuisance to plaintiff's property, nearly all the objectionable features have been obviated and the rest may be, and where the annoyance to plaintiff is insignificant. Saal v. South Brooklyn R. Co., 106 NYS 996.

23. A court of equity will not ordinarily grant an injunction to restrain the prosecution of a lawful business on the ground that it is a private nuisance until the plaintiff has established his right by an action at law. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

24. Where a business complained of as a nuisance is a permanent one, and the damages to adjoining property can be ascertained with reasonable certainty and assessed in solido to the complaining party, such business will not be enjoined where an injunction would be ruinous to the business of the defendant and of small benefit to the plaintiff. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

25. Where a cemetery was contemplated at a location which would pollute plaintiff's wells and cisterns, this was a threatened irreparable injury which would be enjoined.

Because certain property may constitute a nuisance, it does not follow that a party may, as the easiest way to abate the nuisance, destroy valuable private property susceptible for use for a lawful purpose.[26]

Trespass. See 8 C. L. 298—Injunction will not ordinarily issue to restrain a single act of trespass,[27] though such injunction has been sometimes allowed,[28] the right thereto being determined on the equities of the particular case,[29] but will lie, where it appears that frequent acts of trespass or a continuing trespass is threatened, to avoid a multiplicity of suits,[30] and injunction will lie also where the injury threatened is irreparable [31] or where the complainant has not an adequate remedy at law.[32]

Elliott v. Ferguson [Tex. Civ. App.] 18 Tex. Ct. Rep. 858, 103 SW 453.

26. Where tracks rightfully laid in a street do not constitute an unreasonable use thereof, a mandatory injunction will not be granted at the instance of the city to compel the removal of the entire system of tracks therefrom. City of Colorado Springs v. Colorado & S. R. Co., 38 Colo 107, 89 P 820.

27. Mendenhall v. School Dist. No. 83 Jewel County [Kan.] 90 P 773.

28. Evidence sufficient to enjoin asserting title to and trespassing on land. Crosby v. Pittman [Ga.] 59 SE 279; Collingsworth v. Enterprise Land, Mineral & Lumber Co., 30 Ky. L. R. 467, 99 SW 234.

29. Equity will enjoin trespass upon church property where nonmembers of the organization forcibly enter and change the locks and threaten to interfere with the possession of the trustees. Christian Church of Huntsville v. Sommer [Ala.] 43 S 8. Will enjoin interference with the plaintiff's oil pipe line. Brookshire Oil Co. v. Casmalia Ranch Oil & Development Co. [Cal.] 91 P 383. Where one claims a game preserve under a color of right, he is entitled to enjoin trespass thereon and need not prove title in fee. Dunker v. Field & Tule Club [Cal. App.] 92 P 502. Where one has exclusive hunting privileges over lands, he may enjoin the members of a club who were committing a continuing trespass by hunting on the land to prevent a multiplicity of suits. Id. Will enjoin hunting upon a game preserve where defendants in great number have often overrun the same, destroying fences and discharging firearms. Bolsa Land Co. v. Burdick [Cal.] 90 P 532. Equity will enjoin a trespass due to shooting guns over another's land so as to cause considerable damage. Whittaker v. Stangvick, 100 Minn. 386, 111 NW 295. It is the practice of courts in mining cases to be liberal in granting injunctive relief. Restrain interference with complainant's work on claim. Safford v. Fleming [Idaho] 89 P 827. Navigation of a private canal from a lake to a point on complainant's land enjoined. King v. Muller [N. J. Eq.] 67 A 380. Where one does damage to another by flooding his lands, the party aggrieved may enjoin him and also have damages assessed. Perry v. Reed, 147 Mich. 146, 13 Det. Leg. N. 979, 110 NW 529. And see cases in notes to the various grounds for relief against trespass. One may be enjoined from making openings for doors or windows in a party wall though there is neither allegation nor proof that the other owner ever intends to use the wall. Coggins v. Carey [Md.] 66 A 673. Injunction will lie to prevent an adjoining owner from using the wall upon the lot of another as a party wall or from cutting into it or using it in any way. Trulock v. Pearse [Ark.] 103 SW 166. May grant an injunction to compel removal of personalty from realty of another after term for which it was placed there has expired. Owner of realty stored the same on realty of another and refused to remove it at demand of owner. Bishop v. Hughes, 117 App. Div. 425, 102 NYS 595.

30. Mendenhall v. Jewell County School Dist. [Kan.] 90 P 773; Whittaker v. Stangvick, 100 Minn. 386, 111 NW 295. Injunction against trespassing hens. Keil v. Wright [Iowa] 112 NW 633. The cutting of timber may be enjoined when the defendant is solvent and the plaintiff has not the "perfect title" required in some cases by code, provided damages are irreparable and the circumstances are such as to indicate that the trespassers are constantly recurring and likely to involve a multiplicity of suits. Lewis, Robinson & Co. v. Hutchinson, 127 Ga. 789, 56 SE 998. Maintenance and user of a telephone line along a highway and the addition of new crossarms, wires, and insulators. Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 NE 705. Allegations of trespass must be that it is willful or that there is a threatened continuance. Hubenthal v. Spokane & I. R. Co., 43 Wash. 677, 86 P 955. Repeated trespassing upon land with threats of violence against the tenant. Hackney v. McIninch [Neb.] 112 NW 296. Will enjoin frequent and constantly recurring overflow of lands. Cobia v. Ellis [Ala.] 42 S 751. Cutting timber upon plaintiff's land under a claim of right is a sufficient threat to continue the trespass to warrant an injunction. Duclos v. Kelley, 106 NYS 1058. A court of equity will enjoin the commission of a trespass which by reason of its character or persistent repetition becomes or threatens to become of a permanent nature. Bill alleged that defendant, by repeated trespasses, was erecting abutments of a bridge and road bed on plaintiff's land, and that the trespass would be permanent. Injunction properly granted. McConahy v. Western Allegheny R. Co., 31 Pa. Super. Ct. 215.

31. Lewis, Robinson & Co. v. Hutchinson, 127 Ga. 789, 56 SE 998; Keil v. Wright [Iowa] 112 NW 633; Mendenhall v. Jewell County School Dist. [Kan.] 90 P 773; Hume v. Burns [Or.] 90 P 1009. Where the title to land on which defendant was erecting a building was in dispute, the court will enjoin further work on the building but will not prevent the defendant from entering upon the land. Phenix v. Frampton [Nev.] 90 P 2. Allegations in a complaint to en-

The solvency or insolvency of a trespasser is only an important matter when the nature of the injury may be adequately compensated for in money and is not important where the injury is irreparable.[33] Interference with possession will not be restrained where no entry has been made or threatened by defendants.[34] The complainant must show that he has title [35] or possession and the entire right to possession as against the defendant,[36] and in some jurisdictions, where the question of title is put in issue, it is for a jury.[37] A plaintiff not in possession may enjoin trespass by a defendant in possession.[38] Joint trespassers may be enjoined in an action begun in the county where one of the defendants lives.[39] In some states certain trespasses not cognizable in a court of equity may be enjoined by statute.[40] A suit to enjoin trespass cannot be used as a substitute for a proceeding to try the legal title to real property or to establish the boundary thereof.[41]

Conspiracies by labor unions.[See 8 C. L. 300]—Equity will enjoin unlawful acts by labor unions, such as interfering with employes or those desiring to become such

join trespass that there was a threatened destruction of the timber and trees on plaintiff's land which were not denied entitle complainant to an injunction. Crawford v. Atlantic Coast Lumber Corp. [S. C.] 57 SE 670. An allegation in a suit to enjoin trespass that defendants are continually entering upon complainant's building and are engaged in hanging and suspending ladders and falls with ropes attached thereto from an adjoining building and over the roof of complainant's building furnishes no light as to how complainant's property will be permanently injured. Bishop v. Owens [Cal. App.] 89 P 844. In an action to restrain trespass by injuring trees, it must be shown that the injury is irreparable in that the trees have some peculiar value and cannot be compensated for by money damages. Cowan v. Skinner [Fla.] 42 S 730. May enjoin the cutting of forest trees where there may be some sentiment connected therewith, but not where there is a dispute between two sawmills, each claiming the right to cut. Union Sawmill Co. v. Summit Lumber Co., 119 La. 313, 44 S 28. In Oregon the rule is that in the absence of a showing to the effect that the acts complained of amount to an irreparable injury to the estate, a court of equity will not enjoin a trespass thereon Wolfer v. Hurst [Or.] 91 P 366. Damages suffered by flooding of land is a sufficient allegation of irreparable injury to give equity jurisdiction to grant injunction. Rule requiring prima facie case of irreparable injury as a condition of granting an injunction is sometimes relaxed and modified. Bilsborrow v. Pierce [Minn.] 112 NW 274.

32. Insolvency preventing adequate remedy of law. Keil v. Wright [Iowa] 112 NW 633. Where the trespasser is insolvent or for any other reason an action at law would not furnish an adequate remedy, an injunction will lie to restrain trespass. Mendenhall v. Jewell County School Dist. [Kan.] 90 P 773. Will enjoin a threatened trespass, especially where no adequate remedy at law. Whittaker v. Stangvick, 100 Minn. 386, 111 NW 295. Where telephone poles are placed so near adjoining premises that cross bars, wires, and guys project over the premises, injunction will issue, since they constitute a continuing trespass of such a character that adequate recompense might not be obtained in an action at law. Cumberland Tel. & T. Co. v. Barnes, 30 Ky. L. R. 1290, 101 SW 301.

33. Crawford v. Atlantic Coast Lumber Co. Corp. [S. C.] 57 SE 670.

34. Enk v. McCaffrey, 128 Ill. App. 343.

35. Ownership of an estate in fee as a tenant in common is a sufficient title as against a stranger to entitle relief by injunction against trespass. Preston v. West Beach Corp. [Mass.] 81 NE 253. The cutting of timber by one showing no claim of right may be enjoined by an owner in severalty or in common of the timber where the trespass is continuous. Camp v. Garbutt Lumber Co. [Ga.] 58 SE 870. In an action to enjoin trespass it is not error to refuse an injunction where defendant shows a prior deed to land in question. Wilson v. Wilson, 128 Ga. 177, 57 SE 310. Squatter's title against the legal title. Compton v. Newton [Ga.] 59 SE 270.

36. A lessee of personalty responsible to the lessor for the condition of such may enjoin trespass upon land and injury to such property. Lessee of elevated structures in a street may enjoin entry upon the same and injury to the structures irrespective of his rights in the streets. United Trac. Co. v. Feguson Cont. Co., 117 App. Div. 305, 102 NYS 190. Where an injunction against trespass was refused, not because the damage was not deemed irreparable but because the judge believed that the defendant and not the plaintiff had title, it appeared on appeal that he was in error and the injunction should have been granted. Baker v. Davis, 127 Ga. 649, 57 SE 62.

37. Kountze v. Hatfield, 30 Ky. L. R. 589, 99 SW 262.

38. The defendant, a sporting club, was in possession and hunting over plaintiff's lands. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

39. Cutting timber by servants of one of defendants. Baker v. Davis, 127 Ga. 649, 57 SE 62.

40. Cowan v. Skinner [Fla.] 42 S 730. By statute in Florida, equity will enjoin trespass on lands by cutting of trees thereon or removing logs, or by boxing or scraping trees for the purpose of making turpentine or by the removal of turpentine. Baker v. McKinney [Fla.] 44 S 944.

41. Hume v. Burns [Or.] 90 P 1009.

by means of threats, intimidation, or personal violence on the one hand,[42] or by boycotting on the other,[43] and this may be done even though such acts may be criminally prosecuted.[44] Peaceable persuasion, however, used by workmen either singly or in combination to induce others to quit or refuse employment is lawful and may lawfully be conducted by striking workmen by means of pickets, provided their numbers are so limited that their presence does not of itself amount to intimidation, and provided they so conduct themselves as to leave the persons solicited feeling that they are not being subjected to compulsion.[45] It is essential that a strike or boycott be founded on a conspiracy to injure the complainant's business.[46] A mere conspiracy to strike is lawful and will not be enjoined.[47] Where there is a general combination to conspire to injure a complainant's business, it is not necessary to show that each defendant was guilty of a specific unlawful act in order that each may be enjoined,[48] but where it is sought to enjoin a large number of striking employes in their individual capacity from interfering with plaintiff's business, only those will be enjoined who are shown to have participated in wrongful acts.[49] Equity will not restrain the payment of money to striking workmen.[50] So, too, where a contract has

42. National Tel. Co. of West Virginia v. Kent, 156 F 173. Striking employes and local labor unions will be enjoined from congregating about their former employer's place of business or other places for the purpose of interfering with employes or those desiring to become such from attempting by means of threats, intimidation, and personal violence to induce employes to quit the service or prevent others from entering it, and from picketing for that purpose, all of which being done with an intent to injure the plaintiff's business and compel it to accede to the demands of striking employes. New York Cent. Iron Works Co. v. Brennan, 105 NYS 865. Interference by violence, by threats, or by intimidation with others who are pursuing their natural and constitutional right to labor when and where they please, will be enjoined. Pope Motor Car Co. v. Keegan, 150 F 148. Picketing for the purpose of preventing the free flow of labor to an employer, and thus affecting his business so as to force him to comply with certain demands, will be enjoined. George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n [N. J. Eq.] 66 A 953. Picketing in a threatening and intimidating manner will be enjoined. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F 155. Picketing wharves, boarding complainant's vessels, assaulting crews, threatening officers, and terrorizing passengers. Sailors' Union of the Pac. v. Hammond Lumber Co. [C. C. A.] 156 F 450. Where the action of pickets, even where no bodily harm is threatened, is such as to make the situation of a workman so disagreeable and intolerable that he is constrained to quit work, it is unlawful and may be enjoined. Allis-Chalmers Co. v. Iron Moulders' Union No. 125, 150 F 155.

43. Union provided for a strike of the employes of any employer dealing with the complainant. Booth v. Burgess [N. J. Eq.] 65 A 226. Plaintiff's was an open shop and the defendant labor unions attempted to have him employ only union help, but did not attempt to unionize the help employed. When plaintiff refused they sent out circulars to all union shops requiring that no carpenters should work on buildings where materials were furnished from nonunion shops. By threats and by calling strikes they compelled contractors to agree not to purchase of plaintiff and took other measures to drive plaintiff out of business. Shine v. Fox. Bros. Mfg. Co. [C. C. A.] 156 F 357. Evidence held sufficient to show a conspiracy to compel plaintiff to hire only union workmen. Aberthaw Const. Co. v. Cameron, 194 Mass. 208, 80 NE 478. Equity will enjoin an organized attempt to deprive another of his business by inducing the public to refrain from buying so as to force him to unionize his business. George Jonas Glass Co. v. Glass Bottle Blowers Ass'n [N. J. Eq.] 66 A 953.

44. New York Cent. Iron Works Co. v. Brennan, 105 NYS 865.

45. Pope Motor Car Co. v. Keegan, 150 F 148; Allis-Chalmers Co. v. Iron Moulders' Union No. 125, 150 F 155. Will not enjoin the peaceful enforcement of a strike upon members of a union. Jetton-Dekle Lumber Co. v. Mather [Fla.] 43 S 590. Equity will not enjoin peaceful picketing in reasonable numbers for the purpose of observation, and by argument and appeal to persuade others from becoming employes. Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 NYS 438. A simple request to do or not to do a thing made by one or more of a body of strikers may be made in such a way as to convey a threat not less obnoxious than the use of physical force. Allis-Chalmers Co. v. Iron Moulders' Union No. 125, 150 F 155.

46. Booth v. Burgess [N. J. Eq.] 65 A 226.

47. Allis-Chalmers Co. v. Iron Moulders' Union No. 125, 150 F 155. Where the contract service of members of a trade union was neither special, extraordinary, nor unique in the sense that it could not otherwise be obtained and that its loss would cause irreparable injury, an injunction cannot be maintained to prevent the individual laborers from striking. Printers. Barnes & Co. v. Berry, 156 F 72.

48. Injunction restraining acts of violence on the part of strikers. George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n [N. J. Eq.] 66 A 953.

49. Pope Motor Car Co. v. Keegan, 150 F 148.

50. George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n [N. J. Eq.] 66 A 953.

been made between employers and the union, equity will enjoin the officers of the union from inducing, influencing, inciting, or coercing the men to strike in violation thereof.[51] Whether a strike injunction will be made permanent after it appears that the strike has ended is in the discretion of the court.[52] The extreme limit to which courts have gone in granting injunctions in matrimonial actions has been to restrain the husband from disposing of his property where such disposal would result in depriving the wife of her support, or in restraining a divorced husband from interfering with the property rights of his wife.[53]

Libel.—Courts will not restrain a mere libel.[54]

Miscellaneous rights.—Parties will be restrained from dealing in non-transferable tickets issued by railroads or to be issued in the future,[55] but in Texas it has been decided that although equity will enjoin the dealing in nontransferable tickets which have been issued and are on sale, yet a general injunction against dealing in tickets which may be issued in the future will not be granted.[56] An act resulting in the casting of a cloud upon title will be enjoined.[57]

(§ 2) *J. Crimes.*[58]—Equity is without power to enjoin the commission of threatened crimes on the one hand[59] or to enjoin the threatened prosecution for alleged crimes on the other,[60] but this rule does not deprive a court of equity of its power to protect private property, nor defeat its right to enjoin a continuing injury to property.[61] Equity will enjoin the publication by a newspaper of an encouragement to the violation of law.[62] Equity will, however, in some cases, restrain the repetition of a criminal act.[63]

51. See supra, § 2H. Breach of Contract. Printers contracted with their employers as to terms of employment, one of which was for an eight hour day after Jan. 1, 1909. Printers' union elected new officers who demanded an eight hour day and closed shop at once, and upon refusal of the employers to grant there, strikes were declared. Barnes & Co. v. Berry, 156 F 72.

52. Piano & Organ Workers v. Piano & Organ Supply Co., 124 Ill. App. 353.

53. Will not enjoin husband from cohabiting with another woman. Ellis v. Ellis, 55 Misc. 34, 106 NYS 217.

54. Christian Hospital v. People, 223 Ill. 244, 79 NE 72. Allegations by an office holder that he will be irreparably injured in his reputation through the publication of a false and obscene pamphlet by one against whom a judgment in damages would be uncollectible does not give jurisdiction to a court of equity to grant an injunction where there is no allegation that people will be intimidated or prevented from dealing with him in his official capacity, or that his tenure of office is threatened or likely to be interfered with by the publication. Judson v. Zurhorst, 10 Ohio C. C. (N. S.) 289. Equity cannot enjoin a libel. Montgomery Ward & Co. v. South Dakota Retail Merchants' & Hardware Dealers' Ass'n, 150 F 413; Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701.

55. Pennsylvania Co. v. Bay, 150 F 770.

56. Lytle v. Galveston, etc., R. Co. [Tex.] 17 Tex. Ct. Rep. 482, 99 SW 396; Id. [Tex. Civ. App.] 100 SW 199.

57. Sale of lands upon an execution obtained against the grantor of the legal title to land. Austin v. Union Pav. & Cont. Co. [Cal. App.] 88 P 731.

58. See 8 C. L. 300. For decisions as to the injunction against the enforcement of quasi criminal ordinances and statutes, see supra, § 2 D. Enforcement of Statutes and Ordinances.

59. Federal courts will not enjoin commission of crime. Order of R. R. Telegraphers v. Louisville & N. R. Co., 148 F 437.

60. City of Bessemer v. Bessemer Waterworks [Ala.] 44 S 663; White v. Tifton [Ga.] 59 SE 299. The general rule is that equity will not interfere with the enforcement of criminal law nor aid or obstruct the criminal courts in the exercise of their jurisdiction. Hasbrouck v. Bondurant, 127 Ga. 220, 56 SE 241. Sunday ball playing. Paulding v. Lane, 104 NYS 1051. Court of equity will not transfer to its own jurisdiction the trial of a criminal case despite hardship suffered by the accused. Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701. Taking out affidavit against a merchant and arresting him and fining him for disturbance of the peace. Pleasants v. Smith [Miss.] 43 S 475. Acts of 1907, p. 250, c. 216, being the maximum passenger rate law. State v. Southern R. Co. [N. C.] 59 SE 570. Public nuisance. State v. Vaughan [Ark.] 98 SW 685.

61. When equity acts in such instances, it ignores the criminal features and exercises its jurisdiction solely with reference to the effect of the act on the property or business. Hasbrouck v. Bondurant, 127 Ga. 220, 56 SE 241. Ordinance prohibiting the construction of a ball park within a limited district where plaintiff had already commenced construction of one. New Orleans Baseball & Amusement Co. v. New Orleans, 118 La. 228, 42 S 784.

62. Encouraging the violation of an injunction against a conspiracy by labor unions. National Tel. Co. of W. Va. v. Kent, 156 F 173.

63. Injunction granted to restrain defend-

§ 3. *Suits or actions for injunction.*See 8 C. L. 301—A complainant is not required to perform vain and useless acts before commencing proceedings.[64] If application for an injunction is prematurely made, a court cannot grant an injunction to take effect in futuro, but should dismiss the bill.[65]

*Necessity of suit or action.*See 8 C. L. 301—No order allowing an injunction should be made until suit for an injunction has been commenced.[66]

*Jurisdiction.*See 8 C. L. 301—Jurisdiction may be dependent on the amount in controversy, as is the case in Federal courts.[67] Federal courts have jurisdiction to enjoin the enforcement of state statutes fixing maximum railroad rates.[68] A private party having suffered injury under the anti-trust law may sue in a Federal court for an injunction under the general equity jurisdiction of the court where by reason of diversity of citizenship of parties the court has jurisdiction of the suit.[69] Federal courts will not enjoin an action of tort in a state court based on the negligent operation of a vessel on the ground that the Federal courts have excessive jurisdiction because of the special defense of liability limited to the value of the vessel.[70] The pendency of a suit in a state court does not deprive a Federal court of jurisdiction.[71] Where a town and a contractor were enjoined from constructing a sewer, the contractor's absence from the state so that the preliminary injunction could not be served upon him did not deprive the court of jurisdiction to grant the injunction or compel its dissolution.[72] Having acquired jurisdiction to enjoin an act, equity will retain it to award damages.[73] A judge of the court of appeals of Kentucky has not the power to grant an injunction in any case.[74] Where a defendant in an equity suit answers to the merits, he cannot thereafter question the jurisdiction on the ground of the adequacy of the remedy at law.[75]

*Parties.*See 8 C. L. 302—Injunction cannot be granted where an indispensable party is not joined,[76] but proper parties may be brought in by amendment.[77] Parties not named may intervene and become parties any time before proceedings are definitely closed.[78] Where parties are very numerous and cannot without manifest in-

ant from the sale of oleomargarine pending a prosecution for a like offense under acts May 29, 1901, P. L. 327. Commonwealth v. Henderson, 31 Pa. Super. Ct. 383.

64. Where statute provides for application to county commissioners to fix water rates, and after once fixing such rates the commissioners refuse to consider a petition to change them, the enforcement of such rates may be enjoined and new rates fixed without first presenting a petition. Board of Com'rs of Montezuma County v. Montezuma Water & Land Co. [Colo.] 89 P 794.

65. Porter v. Speno [Idaho] 92 P 367.

66. Barnett v. Schad [Kan.] 91 P 539.

67. Amount to exceed $2,000. Evenson v. Spaulding [C. C. A.] 150 F 517. Rules for determining amount discussed. Hunt v. New York Cotton Exch., 205 U. S. 322, 51 Law. Ed. 821.

68. Perkins v. Northern Pac. R. Co., 155 F 445.

69. Bigelow v. Calumet & Hecla Min. Co., 155 F 869.

70. The Lotta, 150 F 219.

71. Federal court may enjoin the receipt and use by a party of stock quotations, despite the fact that a state court has enjoined a telegraph company from refusing to furnish such party with quotations. Hunt v. New York Cotton Exch., 205 U. S. 322, 51 Law. Ed. 821.

72. Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204, 13 Det. Leg. N. 1015, 110 NW 622.

73. Cobia v. Ellis [Ala.] 42 S 751.

74. Kelley v. Pulaski Stave Co., 31 Ky. L. R. 942, 105 SW 153.

75. Hume v. Burns [Or.] 90 P 1009.

76. Enjoin proceeding under an oil and gas lease. Landowner an inadmissible party. McConnel v. Dennis [C. C. A.] 153 F 547. A street railway company whose rights in the streets were disputed by the city having control over the same cannot, in a suit to which the city is not a party, enjoin another company from using the streets. Tacoma R. & Power Co. v. Pacific Trac. Co., 155 F 259.

77. On an appeal from a temporary injunction, a suit for an injunction to restrain the state tax commissioner from assessing the shares of stock and assets of certain corporations according to a certain method will not be held defective at that stage because the corporations were not made parties, but they should be made parties before further steps are taken, since the suit was not to control the action of the defendant in his entire assessment of corporation stock or assets. Schley v. Lee [Md.] 67 A 252.

78. Where court has jurisdiction to enjoin the acts of an executor, no subsequent change in the personnel of the executors and the substitution of an administrator with the will annexed can oust that jurisdiction. Monmouth Inv. Co. v. Means [C. C. A.] 151 F 159.

convenience and oppressive delays be all brought before the court, it may in its discretion dispense with making them all parties and proceed. But in such cases the decree is without prejudice to the rights of all absent parties.[79] A tax payer may file a bill to enjoin the construction of a sewer and to issue bonds therefor, and it need not be on the relation of the attorney general.[80] A tax-paying corporation may be a party.[81] Where municipal authorities act in behalf of the municipality and not in their individual capacities, the municipality is a proper party in an action to restrain such acts.[82] An officer of a town who is liable for the obstruction of highways has an interest entitling him to enjoin such obstruction.[83] Where a nuisance sought to be enjoined is of a public nature, the action should be instituted by the appropriate public law officer, but if private persons suffer some special injury therefrom aside from the injury to the general public they may maintain such a suit.[84] A consul may bring a bill to restrain acts in defraud of his countrymen.[85] Where boundaries of property transferred to plaintiff are disputed by an adjoining owner and the plaintiff having made a partial payment transfers the title back to his grantor, he is properly a party in a suit by the grantor to enjoin interference with her possession.[86] The officers of a labor union who organize, counsel, advise, and support a strike, are proper parties defendant to an injunction.[87] The court (obiter) says that it is not erroneous to include in injunctions of this kind some particular defendant against whom there might not be sufficient evidence to convict of conspiracy, if there is a reasonable fear, justified by his attitude and temper, that he will participate in the unlawful action.[88]

Pleading and evidence.[See 8 C. L. 304]—In a suit for injunction, the pleadings must allege clearly and definitely the facts on which complainant relies for the relief prayed.[89] A mere averment of opinion or conclusion is too general and indefinite

79. Bill against members of a voluntary association. Spaulding v. Evenson, 149 F 913. A voluntary association may be brought into court in injunction proceedings under Rule 48 by service on its officers and such members as are known and can be conveniently reached, sufficient being served to represent all diverse interests. Evenson v. Spaulding [C. C. A.] 150 F 517.

80. Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204, 13 Det. Leg. N. 1015, 110 NW 622.

81. A taxpayer's bill to restrain illegal acts of city officials may be brought by a corporation which is a resident and a taxpayer. Wolff Chem. Co. v. Philadelphia, 217 Pa. 215, 66 A 344. The fact that one of the parties to a conspiracy to compel a contractor to employ only union men was a corporation gave it no immunity from the consequences of such unlawful combination. Aberthaw Const. Co. v. Cameron, 194 Mass. 208, 80 NE 478.

82. Town of Roswell v. Ezzard, 128 Ga. 43, 57 SE 114.

83. Overseer of highway made liable to fine by statute. Williams v. Riley [Neb.] 113 NW 136.

84. See supra, § 2F, Acts Affecting Rights in Highways, etc.

85. Use of name of Emperor Franz Josef. Von Thodorovich v. Franz Josef Beneficial Ass'n, 154 F 911.

86. Amber v. Cain [Iowa] 110 NW 1053.

87, 88. Piano & Organ Workers' International Union v. Piano & Organ Supply Co., 124 Ill. App. 353.

89. Allegations of bill must be clear and definite in their statement of facts essential to the granting of an injunction. Weeks v. Turner Lumber Co. [Fla.] 44 S 173. The cause of action should be set forth with such particularity as to enable the court from an inspection of the bill alone to grant the relief sought. Not sufficient in bill to enjoin enforcement of a judgment, to merely allege a good defense without stating it. Reed v. New York Nat. Exch. Bk., 230 Ill. 50, 82 NE 341. Bill to restrain defendants from inducing complainant's customers to break their contracts held to contain sufficiently clear statement of all material facts. Dr. Miles Medical Co. v. Jaynes Drug Co., 149 F 838. Allege every fact clearly and definitely, opinions and conclusions do not suffice. Baker v. McKinney [Fla.] 44 S 944. A bill seeking an injunction should state positively the title or interest of the complainant and the facts upon which he predicates his prayer for relief. The bill must state facts, not opinions or conclusions. Hall v. Horne [Fla.] 42 S 383. To entitle a plaintiff to an injunction under the N. Y. Code, it must appear from the complaint that plaintiff demands and is entitled to judgment against the defendant restraining the commission or continuance of an act the commission or continuance of which pending the action will produce injury to the plaintiff. Section 603, Code Civ. Proc. Fleisch v. Schnaier, 104 NYS 921. When a plaintiff comes into court asking injunctive relief, there should be a full, fair, frank statement of the essential facts upon which his rights are based, so that on demurrer the court may see that it has a cause of action. Bill to

to afford a basis for relief by injunction,[90] thus a mere allegation of irreparable injury is not sufficient.[91] So, too, an allegation that the complainant will be driven to a multiplicity of suits unless injunction is granted which is not supported by facts stated in the complaint is a mere conclusion.[92] The plaintiff need not set forth in his bill the evidence upon which he expects to rely.[93] Where there is no allegation showing any right, title or interest of complainant in the subject-matter of the bill, an injunction is properly denied,[94] and so where the bill itself alleges that the defendant is committing acts of trespass under a claim of ownership of an interest and fails to negative or explain this claim, an injunction should be denied.[95] It is not essential to the grant of an injunction upon the ground of irreparable injury that there should be in terms an allegation that damages would be irreparable if the averments of the petition taken as a whole are such as to demonstrate that such would be the result of the conduct complained of in the petition.[96] So, too, where it was sought to enjoin enforcement of a city ordinance as unconstitutional, the bill need not allege that the ordinance was passed under authority granted by statute, for the court takes judicial notice of state statutes and presumes compliance therewith.[97] Amendments may be allowed which do not change the character or substance of the bill.[98] Where a certain amount must be involved in order to give equity jurisdiction, it is sufficient if damages claimed in the bill exceed that amount and no denial or showing to the contrary is made.[99] A bill for injunction that seeks to join and deal with interests as a whole which are not joint and which have no such

enjoin use of same corporate name did not state the date of plaintiff's incorporation. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 59 SE 123. It is sufficient to allege the taking and occupation of the land by the corporation seeking to exercise the right of eminent domain in respect to such land without first having complied with the provisions of the statute under which only it can exercise such right. Harman v. Caretta R. Co., 61 W. Va. 356, 56 SE 520.

90. Allegation that the construction of a street railroad would greatly lessen and diminish the value of complainant's property. Brown v. Rea, 150 Cal. 171, 88 P 713.

91. Bishop v. Owens [Cal. App.] 89 P 844. It must appear from the bill that petitioners will suffer injury from the acts prayed to be restrained. Williams v. Harper, 127 Ill. App. 619. A bill to enjoin trespass by cutting down forest trees which states that unless defendant is enjoined the complainant will suffer irreparable loss and injury merely states a conclusion, the facts showing it must be stated to grant equity. Ashburn v. Graves [C. C. A.] 149 F 968.

92. Bishop v. Owens [Cal. App.] 89 P 844.

93. McConahy v. Western Allegheny R. Co., 31 Pa. Super. Ct. 215.

94. Bill to enjoin trespass showed title to be in complainant's manager, and there was no allegation that complainant furnished the purchase money or other fact showing interest. Baker v. McKinney [Fla.] 44 S 944. Where the allegations of a petition to enjoin a breach of contract do not show any breach, a demurrer will be sustained. Purdom Naval Stores Co. v. Knight [Ga.] 59 SE 433.

95. Weeks v. Turner Lumber Co. [Fla.] 44 S 173. An injunction against cutting timber was properly denied where the bill showed that the defendant had a right to cut some timber and did not show that he was cutting more than authorized. McNair & Wade Land Co. v. Jackson [Fla.] 44 S 341.

96. Timber being disposed of by the vendor contrary to agreement and to the irreparable injury of the plaintiff. Burton v. O'Neill Mfg. Co., 126 Ga. 805, 55 SE 933.

97. North American Cold Storage Co. v. Chicago, 151 F 120.

98. Objection at argument by the defendant that bill did not allege a threatened continuance of acts. Amendment allowed during agreement. Spaulding v. Evenson, 149 F 913. Under equity rule 28, amendments to a bill may be allowed on the hearing of a motion for a preliminary injunction and before demurrer and answer. Evenson v. Spaulding [C. C. A.] 150 F 517. An amendment to a bill may be filed to support a preliminary injunction already issued. Amendment by bringing in new defendants. Tehama County v. Sisson [Cal.] 92 P 64. Where a bill to restrain competition in a business to which the complainant had exclusive rights was amended so as to pray for damages, but there was no specific allegation of damages in the bill, damages cannot be recovered. Bill to restrain the removal of condemned meat and carcasses. Barnes v. Roy, 27 R. I. 534, 65 A 277.

99. Spaulding v. Evenson, 149 F 913; North American Cold Storage Co. v. Chicago, 151 F 120. Where jurisdiction depends upon the amount involved, it is sufficient if a larger amount is alleged to be in dispute, together with further allegations showing the extent of the complainant's business interfered with and which will be interfered with in the future, tending to show that the value of the right sought to be protected largely exceeds the minimum ad damnum and there is no denial of these facts. Spaulding v. Evenson [C. C. A.] 150 F 617.

relation to each other as would justify a court of equity in adjudicating upon them in one action is demurrable.[1] A defense not pleaded in the answer cannot be set up.[2] A plea to a bill for an injunction which merely states as a defense that a certain statute was in effect, but does not allege that the defendant acted pursuant thereto, states no justification under the act.[3] In a suit by a manufacturer under a secret process to restrain a former employe from disclosing the secret, he is not required to disclose on the trial the secret process, for it would be destructive of his rights.[4] An equitable petition praying for an injunction should be verified.[5] On the hearing for an injunction, an affidavit which does not contain either a caption of the case under consideration or other facts which show that it was intended by the witness to be used as evidence in the case is not admissible as evidence.[6] If affidavit is made on information and belief, it should show why the person having personal knowledge did not make it.[7] If the affidavit for an injunction is made by the attorney, it should set forth good and sufficient reasons why he makes it or it must be shown that he has personal knowledge of the facts set forth.[8] The bill for injunction should distinguish between matters stated as upon petitioner's own knowledge and those stated on information and belief.[9] Where a bill is sworn to by the attorney for the complainant and the affidavit is positive and direct, such affidavit is sufficient.[10] It is not commendable practice to have affidavits of a client sworn to by one of the attorneys of record.[11] Where the act complained of has been consummated in part, but the bill further alleges a continuing injury, an injunction will lie.[12] Where defendants had combined for several years to carry out a design made unlawful later by statute, the presumption is, in proceedings to enjoin the carrying out of such design, that the combination and purpose still exist, and it devolves upon them to affirmatively show that their combination has terminated.[13]

Trial. See 8 C. L. 305—Complainant should be allowed to show everything relevant under his pleadings reasonably tending to entitle him to an injunction.[14] The fact that a preliminary injunction has been issued during the pendency of an action in no way affects the decision upon the merits at the trial, and the burden is on the plaintiff to maintain the issues joined.[15] A judge who is a citizen and a taxpayer of a city and interested in the city's water supply as such is not disqualified from hearing a motion to dissolve an injunction to restrain the city from proceeding to condemn land to protect its water supply.[16]

Appeals.[17]—Where a petition to reopen a case is made by the appellant after appeal from a decree on the ground of newly-discovered evidence, and the evidence

1. Williams v. Harper, 127 Ill. App. 619.
2. Hatton v. Gregg [Cal. App.] 88 P 594.
3. Barnes v. Roy, 27 R. I. 534, 65 A 277.
4. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695.
5. Civ. Code 1895, §§ 4965-4967. Petition verified after amendment was not demurrable for want of verification. McLauchlin v. McLauchlin, 128 Ga. 653, 58 SE 156.
6. Johnson v. Tanner, 126 Ga. 718, 56 SE 80. An affidavit must be entitled in the cause in which it is intended to be used or otherwise show upon its face that it is connected therewith. Attachment to another paper not sufficient always. Hicks v. Portwood [Ga.] 58 SE 837.
7, 8. Wiles v. Northern Star Min. Co. [Idaho] 89 P 1053.
9. Christian Hospital v. People, 223 Ill. 244, 79 NE 72.
10. Seaboard Air Line R. Co. v. Southern Inv. Co. [Fla.] 44 S 351.
11. Savage v. Parker [Fla.] 43 S 507.
12. Allegation that a track had been laid in a street and cars operated thereon. Seaboard Air Line R. Co. v. Southern Inv. Co. [Fla.] 44 S 351.
13. Combination in restraint of trade. State v. Omaha Elevator Co. [Neb.] 110 NW 874.
14. Whittaker v. Stangvick, 100 Minn. 386, 111 NW 295.
15. Hale v. Jenkins, 55 Misc. 119, 106 NYS 282.
16. La Plant v. Marshalltown, 134 Iowa, 261, 111 NW 816.
17. See 8 C. L. 305. See, also, Appeal and Review, 9 C. L. 115, as to appeal ability of injunction orders, and Id., 9 C. L. 206, as to extent of review thereof.
18. Sterling Varnish Co. v. Macon, 217 Pa. 7, 66 A 78.

is very material and could not have been obtained by the appellant at an earlier date by any reasonable diligence, the decree should be reversed and the case reopened for further evidence.[18] Where an injunction is granted provided no appeal is taken within thirty days, the taking of such appeal prevents any injunction from being granted, and hence no appeal can be maintained.[19] If under the law and evidence there was no error in denying an injunction, no reversal can be had on the ground that the judge refused on hearing to strike certain parts of the answer upon motion made therefor.[20] An order of a judge, indorsed on a petition for an appeal from, and supersedeas to, an order refusing to dissolve an injunction, the prayer of which is "that an appeal and supersedeas may be allowed" the petitioner "staying said injunction," reading as follows: "Appeal and supersedeas allowed as prayed for," does not purport to be an order staying the injunction. Its legal purport is merely to grant the appeal and supersedeas.[21] A bill praying for injunction and for reformation of a lease should not be dismissed on the court's own motion, on dissolution of the injunction.[22] New questions will not be considered on appeal.[23]

§ 4 *Preliminary injunction. A. Issuance and grounds.*[See 8 C. L. 806]—A preliminary injunction is not a matter of right but rests in legal discretion,[24] and the exercise of such discretion will not be disturbed on appeal unless clearly erroneous.[25] It will not issue except where the complainant's bill and moving papers present a case clearly entitling him to the remedy,[26] but on the other hand it is not necessary

19. Porter v. Speno [Idaho] 92 P 367.

20. Foster v. Case, 126 Ga. 714, 55 SE 921.

21. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

22. Enk v. McCaffrey, 128 Ill. App. 343.

23. Question of whether or not ordinances were void not raised at trial. Ironside v. Vinita, 6 Ind. T. 485, 98 SW 167.

24. Seymour v. La Furgey [Wash.] 92 P 267. Within exercise of sound discretion of a judge to issue a preliminary injunction to preserve the status quo until final determination of the cause. Restrain enforcement of judgment of state court pending a hearing in the Federal courts. Southern R. Co. v. Simon, 153 F 234. Not granted where a rate was fixed to go into effect at the end of three months but bill not brought until two days before the time for it to go into effect. Central of Georgia R. Co. v. McLendon, 155 F 974. Facts insufficient to warrant preliminary restraint of breach of contract. Stationary Engineer Pub. Co. v. Comerford, 155 F 667. Where the only object of a bill is a permanent injunction, a temporary injunction will not issue if the court is of opinion that there is no probability that the complaint will succeed on the merits. Montgomery Ward & Co. v. South Dakota Retail Merchants, etc., Ass'n, 150 ⚑ 413.

25. Shaw v. Palmer [Fla.] 44 S 953; Sellers v. Page, 127 Ga. 633, 56 SE 1011. No prayer for temporary injunction and no good reason for granting same without notice. Savage v. Parker [Fla.] 43 S 507. Where evidence conflicting, no abuse of discretion in refusing an injunction. Heibert v. Enns, 127 Ga. 378, 56 SE 406; Sheppard v. Mitchell [Ga.] 59 SE 231; Hart v. Atlanta Terminal Co., 128 Ga. 754, 58 SE 452. Where plaintiffs sued for land and obtained a temporary order restraining defendants from removing a crop therefrom, on affidavit that defendants were trespassers, had prevented plaintiffs from cultivating, threatened to remove the crop, and were insolvent, it was no error to grant injunction pendente lite where defendants appeared but made no showing against the application; the court providing that defendants might remove the crop provided a bond was given. O'Connor v. Oliver [Wash.] 88 P 1025. Where it appears that the act or procedure which is sought to be enjoined has been abandoned, there is no abuse of discretion in refusing an injunction. Use of claim check. Hart v. Atlanta Terminal Co., 128 Ga. 754, 58 SE 452. No abuse of discretion in refusing an injunction to restrain a landlord from dispossessing a tenant even though the evidence might have been sufficient to have authorized the judge in granting it. Zorn v. Murray, 127 Ga. 389, 56 SE 454. Where evidence is conflicting, the discretion of the judge will not be interfered with. Hasbrouck v. Bondurant, 127 Ga. 220, 56 SE 241. Where a temporary injunction was refused since it did not appear that the trespass would do irreparable injury or that the defendant was insolvent, the discretion of the judge will not be controlled even though it was admitted that title to land was in the plaintiff. Huguley v. Holmes, 127 Ga. 202, 56 SE 298. Unless it clearly appears that the court below abused its discretion in issuing the injunction pendente lite, the order will be affirmed. West Side Hospital v. Steele, 124 Ill. App. 534.

26. Tolman v. Mulcahy, 103 NYS 936. No proper allegations of trespass, etc. Hall v. Horne [Fla.] 42 S 383. The power of a court of equity to issue preliminary injunction is one that should be exercised with extreme caution, and the order should not be granted in doubtful cases or in new ones not coming within well established principles. Equity will not, in an action for separation, enjoin a husband from cohabiting with another woman. Ellis v. Ellis, 55 Misc. 34, 106 NYS 217. Where it is not clear that a street railway has no legal right to lay its tracks in a street, an abutting owner is not entitled to a preliminary injunction. Roberts

that he should make a showing which would entitle him to an injunction on final hearing.[27] A probable right and a probable danger that such right would be defeated in case an injunction was not issued is sufficient.[28] The relative hardships attendant upon granting or refusing the injunction will be considered,[29] and the court in de-

v. Huntington R. Co., 105 NYS 1031. The restraining power of courts of equity is exercised for the protection of clearly established rights and so far only as is necessary for the protection of those rights. Millville Gas Light Co. v. Vineland Light & Power Co. [N. J. Eq.] 65 A 504. In the protection of certain intangible property rights such as arise in actions to enjoin private nuisances, invasion of franchise, waste, infringement of patents, copyrights, or trade marks, or literary property in manuscripts, the law affords so inadequate a remedy that equity will extend its preventive writ for protection even where complainant's title is put in issue. Id. Rights of complainant in franchise held too uncertain to justify a preliminary injunction. Id. Line of a highway in dispute, but had been used as at present located for fifteen years. Obstruction will be enjoined by landowner claiming it is not located along the proper line. Williams v. Riley [Neb.] 113 NW 136. By statute in California, it is sufficient if, whilst in the possession of the property, a party out of possession claim an estate or adverse interest. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F 555. Doubt as to whether any infringement of patent, and no evidence of irreparable injury or that defendant not financially responsible. Hall Signal Co. v. General R. Signal Co. [C. C. A.] 153 F 907. In a suit to enjoin unfair competition, the showing made on the application for a preliminary injunction was not so free from doubt as to entitle complainant to an injunction before final hearing. Oliver Typewriter Co. v. American Writing Mach. Co., 156 F 177.

27. Where such facts appear as show that the complainant may at the hearing make out a case, he is entitled to such preliminary restraint as will render a decree, if finally made, effective. Dissenting stockholder suing corporation to restrain it from carrying out a contract for the sale of its property. Mitchell v. United Box Board & Paper Co. [N. J. Eq.] 66 A 938. On application for a preliminary injunction, it is not necessary to present all the evidence, but it is only essential to present sufficient evidence of wrongful acts so that the court may be satisfied of the truth of the allegations of the complaint. Complaint to enjoin strikers from interfering with business. New York Cent. Iron Works Co. v. Brennan, 105 NYS 865. Upon the question of the allowance or disallowance of an injunction pendente lite, it is not essential that there should appear anything more than that there is ground for supposing that the relief may be given. Pere Marquette R. Co. v. Bradford, 149 F 492. In looking through the pleadings and evidence for the purpose of an injunction, the plaintiff need not be entitled to relief at all events, but it is sufficient if the court finds that a case is made for an investigation by the courts of equity. Id.

28. Where to dissolve an injunction the inevitable result is to defeat plaintiff's remedy without a trial, the court must be entirely satisfied that the case is one in which by settled adjudication the plaintiff upon the facts stated is not entitled to final relief. An injunction pendente lite will be granted where it appears that otherwise the plaintiff's property in question will be rendered valueless. Robinson v. New York, etc., R. Co., 105 NYS 897. If there is any reasonable probability because of fair doubt as to law or fact that plaintiff may ultimately recover, it is the part of wise discretion to maintain the existing conditions by a properly guarded restraining order. Restrain the building of a structure which would obstruct navigation of a stream pending a final determination of the issues. City of Milwaukee v. Gimbel Bros., 130 Wis. 31, 110 NW 7. Where equity has jurisdiction and a complainant's damages would be irreparable, relief will not be postponed until final hearing. Obstruction of a navigable waterway. Carver v. San Pedro, etc., R. Co., 151 F 334.

29. Preliminary injunctions to restrain the putting into effect of a state statute fixing railroad rates denied to await a demonstration of effect of such rates by actual trial for a reasonable length of time. St. Louis, etc., R. Co. v. Hadley, 155 F 220. Where the damage or injury threatened is of a character which may be easily remedied if the injunction is refused, as where it is chiefly monetary damage and the defendant is solvent, the court in its discretion may refuse to issue an injunction. Erection of a post obstructing the highway. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330. When upon application for a preliminary injunction complainant shows a state of facts which taken with the opposing evidence shows a reasonable probability that complainant would be entitled to relief on final hearing, the court acting for the best interest of all concerned in view of the particular facts will balance the relative harm which may befall the adverse interests from the issue of the writ and grant or withhold the writ accordingly. Railroad rate statute. Seaboard Air Line R. Co. v. Alabama R. Commission, 155 F 792. While preliminary injunction is to be cautiously issued, it should not be withheld if in the exercise of a sound judgment it is deemed necessary to prevent an injustice. Infringement of patent. Continuous Glass Press Co. v. Schmertz Wire Glass Co. [C. C. A.] 153 F 577. A preliminary injunction will be granted where threatened irreparable injury is shown by the bill and affidavits, though denied by the answer, unless upon the balancing of convenience and inconvenience to the one party or the other an injunction seems inexpedient. Bigelow v. Calumet & Hecla Min. Co., 155 F 869. A court will sometimes hesitate to grant a preliminary injunction even upon a strong showing by the plaintiff when it appears that the injunction may seriously injure or disturb the use of the property or possession of the defendant. Brookshire Oil Co. v. Casmalia

termining the propriety of granting an injunction will exercise its discretion in such a manner as to safeguard the interests of both parties.[30] The only purpose of a preliminary injunction is to preserve the status quo pending a final hearing and determination of the cause,[31] and if the action is for the sole purpose of an injunction and a temporary injunction is essential to the assertion and preservation of a legal right, if established as alleged it is error of law to refuse or set aside a temporary injunction;[32] and on the other hand, unless the court can see from the papers presented that some injury may result to the plaintiff unless the injunction be granted, the application for it will always be denied.[33] Where a bill is multifarious, an injunction will not be granted to preserve the status upon which to decree relief upon the various unrelated matters which render the petition multifarious.[34] An ancillary injunction may also be granted in an action at law.[35] It is not sufficient cause for granting a temporary injunction merely that it will do no harm.[36] Motion for a temporary injunction can be based only on a complaint, and cannot be granted upon affidavits.[37] Under Massachusetts statutes a temporary injunction by a creditor creates an equitable lien on the interest of a defendant in a partnership which is valid against the trustee in bankruptcy appointed more than four months subsequent to the injunction.[38] The terms of a restraining order or temporary injunction are to be construed in the light of the allegations and the prayer of the bill on which it was granted.[39] There must be a proper order before the injunction can issue.[40] A preliminary injunction becomes merged in a final judgment granting an injunc-

Ranch Oil & Development Co. [Cal.] 91 P 383. For other cases, see ante, § 1, Nature of Remedy and Grounds Therefor.

30. Injunction against charging below a certain price for gas granted by Federal court and above such a price by the state court. Held security should be given by the gas company to refund if final finding against them, or a lower rate to be charged on the understanding that it was not in full if final finding in favor of gas company. Schneider v. New Amsterdam Gas Co., 116 App. Div. 345, 101 NYS 535. Where the complainants show an irreparable injury if an injunction be not issued and the rights of the defendant can be protected by a bond, a preliminary injunction will issue upon terms. Enjoin enforcement of railroad rate law if a bond to protect the interest of the public and refund excess fares is given. Seaboard Air Line R. Co. v. Alabama R. Commission, 155 F 792. A right to a temporary injunction does not follow automatically if the complaint states a cause of action, for the court should consider the showing made in opposition thereto and must determine whether under all the circumstances an injunction is reasonable. Crawford v. Atlantic Coast Lumber Corp. [S. C.] 57 SE 670.

31. Knight v. Cohen [Cal. App.] 90 P 145. Will preserve the status of property in dispute pending litigation. Enjoin the completion of a building on land, the title to which is in dispute. Phenix v. Frampton [Nev.] 90 P 2. Where claims of two parties are conflicting, the status quo may be preserved by granting each an injunction until final hearing. Right to use timber for turpentine purposes. Thomas v. Herrington [Ga.] 58 SE 834. A preliminary injunction to continue existing conditions and prevent a resort to force by either party pending final hearing, in a suit to determine rights in certain land and right of way adjacent to a railway station, was properly granted within the court's discretion. Southern R. Co. v. Carolina Coal & Ice Co. [C. C. A.] 151 F 477. Where a deed has been delivered in escrow, it is proper pending a suit for specific performance where it appears that the defendant has attempted to convey to another to issue a temporary injunction holding the title to property in statu quo. Wilkins v. Somerville [Vt.] 66 A 893. May restrain pendente lite the transfer of stock where it sufficiently appears from the papers that plaintiff probably will establish his right upon trial. Enright v. Boyd, 106 NYS 493.

32. Crawford v. Atlantic Coast Lumber Corp. [S. C.] 57 SE 670.

33. Motion to enjoin holding of a meeting to elect officers. Farrelly v. New York Life Ins. Co., 52 Misc. 202, 102 NYS 726.

34. Martin v. Brown [Ga.] 59 SE 302.

35. Action at law for trespass. Injunction restraining removal of timber. Kelley v. Pulaski Stave Co., 31 Ky. L. R. 942, 105 SW 153.

36. Weir v. Winnett, 155 F 824. But contra, denial that defendants threatened or assaulted complainant's employes while attempting to perform location work on a mining claim. Safford v. Flemming [Idaho] 89 P 827.

37. South Shore Trac. Co. v. Brookhaven, 116 App. Div. 749, 102 NYS 1074.

38. R. L. c. 159, § 3, cl. 7. Gay v. Ray [Mass.] 80 NE 693.

39. Sailors' Union of the Pac. v. Hammond Lumber Co. [C. C. A.] 156 F 450.

40. An endorsement on the bill to "let the writ of injunction issue as recommended upon (complainant) giving bond," etc., is not an order. Williams v. Harper, 127 Ill. App. 619.

tion,[41] as do all orders made on a hearing for a temporary injunction or on a motion to dissolve.[42] It is improper to grant a temporary injunction unless the same is specifically prayed for.[43] Where an answer denies that the complainant's apprehensions of injury are well founded, the court will as a general rule give the defendant the full benefit of the doubt and refuse an injunction against a threatened injury.[44]

*Notice of application.*See 8 C. L. 307—An injunction will not ordinarily issue without notice [45] though it is within the discretion of the court to do so,[46] but before granting an injunction without notice a clear case should be made by the bill, and it should also clearly appear that it is a case of urgent necessity and one in which irreparable mischief will be produced if the aid of the court is denied.[47] A preliminary injunction cannot be granted without notice which operates to deprive defendant of his property without due process of law.[48] By statutes in some states it is provided that no injunction shall be granted in the absence of reasonable notice, except that in cases of emergency, to be shown by the complaint, the court may grant a restraining order until notice can be given and hearing had.[49] And where notice is required, failure to give it renders the order of injunction void.[50] An affidavit asserting simply the conclusion that there is an urgent necessity for an injunction and irreparable injury will otherwise result does not warrant a dispensing with notice, for the facts must appear.[51] Where an affidavit not only states that notice will accelerate the injury, but further states facts showing that before the application could be heard the injury would be completed, a sufficient reason for granting the order without notice appears.[52] Where statutes provide that no injunction shall be issued without notice except in emergency cases when a restraining order may be issued until notice can be given, such order is only in force long enough to enable the required notice to be given and expires when the parties are before the court.[53]

(§ 4) *B. Bonds.*See 8 C. L. 308—Bonds may be required to protect the defendant where an injunction pendente lite is granted,[54] and are required by statute in some

41. Question whether or not a preliminary injunction was rightly granted is immaterial after final judgment. Tehama County v. Sisson [Cal.] 92 P 64.

42. Brown v. Donnelly [Okl.] 91 P 859.

43. Equity rule 25. Savage v. Parker [Fla.] 43 S 507.

44. Selma Water Co. v. Selma, 154 F 138.

45. An injunction will not issue without notice, unless it appear from the bill, or affidavits accompanying it, that the rights of petitioner will be unduly prejudiced if it is not issued immediately and without notice. Williams v. Harper, 127 Ill. App. 619. An affidavit stating the opinion of petitioner that he will be prejudiced is not sufficient. The facts upon which the opinion is formed must be stated. Christian hospital v. People, 223 Ill. 244, 79 NE 72.

46. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

47. Savage v. Parker [Fla.] 43 S 507.

48. Injunction against maintenance of a railroad crossing and providing that the rails and ties be taken up and held in the custody of the court. Boca & L. R. Co. v. Lassen County Super. Ct., 150 Cal. 147, 88 P 715. A mandatory injunction granted ex parte commanding destruction of property by owner or in default by sheriff within twenty-four hours held not to constitute due process of law. Petite Anse Drainage Dist. Com'rs v. Iberia & V. R. Co., 117 La. 940, 42 S 433. A preliminary injunction which deprives a party of his possession of property under good title or bona fide claim of title without a hearing is null and void being an act in excess of the jurisdiction of the court. Merely restraining the use of property on a bill setting up colorable ground therefor is not depriving a man of possession and is not beyond the power of a court of equity however erroneous the act of awarding it may be. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

49. Heman v. Rinehart [Wash.] 87 P 953. A temporary restraining order provided for by statute to be issued without notice to maintain the status quo until the parties can be heard differs from an injunction which can only be issued after notice. Kelley v. Pulaski Stave Co., 31 Ky. L. R. 942, 105 SW 153.

50. Kelley v. Pulaski Stave Co., 31 Ky. L. R. 942, 105 SW 153.

51. Savage v. Parker [Fla.] 43 S 507.

52. Seaboard Air Line R. Co. v. Southern Inv. Co. [Fla.] 44 S 351.

53. Heman v. Rinehart [Wash.] 87 P 953.

54. Injunction against transfer of notes. Lozier Motor Co. v. Ball, 53 Misc. 375, 104 NYS 771.

states before an injunction can become operative,[55] unless it appears that the complainant is unable to give one.[56] Such a provision is mandatory, and a writ issued without a proper bond is without force or effect.[57] Where the injunction order restrains defendant from issuing execution on judgment, the bond should be conditioned for the payment of all moneys and costs due defendant in the judgment.[58] The validity of a bond is not affected by the fact that it ante-dates the order where the sureties justified and the bond was filed after order made.[59] Courts before granting injunctions may, under their general equity powers, require applicants to give bonds so conditioned, in addition to statute requirements, that actions at law to recover upon them may be maintained.[60] The question as to propriety of a bond which has been given as ordered is not open on appeal.[61]

(§ 4) *C. Dissolution, modification or continuance; reinstatement.* See 8 C. L. 308 —A preliminary injunction is not res judicata and may be dissolved by the court granting it, and it is not necessary to appeal.[62] It is a matter resting largely within the discretion of the court and will not be disturbed on appeal except in cases of palpable abuse of process.[63] In Kentucky the right to grant a dissolution, modification, or reinstatement of a decree for an injunction by a judge of the court of appeals, is purely statutory, [64] and, although a temporary injunction may be dissolved on motion by a single judge of the court of appeals, there is no reason why the movant may not ask all the judges to hear his motion.[65] A party to the cause, though not enjoined with the other defendants, if his interests be affected, may move to dissolve the injunction.[66] The effect of dissolution will be considered, and if great harm would be caused by a continuance and there is nothing to show that complainant may not obtain other redress the injunction should be dissolved.[67] If the allegations of a bill do not warrant interference by injunction, the injunctions may be dissolved though the bill may be retained for other relief,[68] but if the bill states no cause for equitable relief, the injunction should be dissolved at the earliest possible moment and the bill dismissed,[69] and where an injunction is granted upon improper pleadings, it will be vacated on motion.[70] A motion to dissolve should be sustained where there is an adequate remedy at law.[71] It is the general rule that where the answer fully, fairly, distinctly, and positively denies the material allegations of the bill upon which the injunction is based the injunction should be dissolved in the absence of proof of such allegations,[72] but the rule is not of universal

55. Littleton v. Burgess [Wyo.] 91 P 832.
56. Savage v. Parker [Fla.] 43 S 507.
57. Wiles v. Northern Star Min. Co. [Idaho] 89 P 1053.
58. Williams v. Harper, 127 Ill. App. 619.
59. Sailor's Union of the Pac. v. Hammond Lumber Co. [C. C. A.] 156 F 450.
60. Buggeln v. Cameron [Ariz.] 90 P 324.
61. Reed v. New York Nat. Exch. Bk., 230 Ill. 50, 82 NE 341.
62. German Sav. & Loan Soc. v. Aldridge [Cal. App.] 89 P 1063.
63. Where evidence is conflicting will not reverse decision on appeal. Collins v. Stanley [Wyo.] 88 P 620. Within the discretion of trial judge to dissolve injunction on bond. By Code. Union Sawmill Co. v. Summit Lumber Co., 119 La. 313, 44 S 28.
64. Kelley v. Pulaski Stave Co., 31 Ky. L. R. 942, 105 SW 153.
65. Thomas v. Thompson, 31 Ky. L. R. 524, 102 SW 849.
66. Hunt v. Pronger, 126 Ill. App. 403.
67. Mobile & W. R. Co. v. Fowl River Lumber Co. [Ala.] 44 S 471.
68. Gray v. South & N. R. Co. [Ala.] 43 S 859.
69. Hall v. Horne [Fla.] 42 S 383.
70. Injunction granted on complaint and affidavit which was largely on information and belief and signed by the attorney and not the party himself for which no excuse was offered will be vacated on motion. Terry v. Green, 52 Misc. 10, 103 NYS 1014.
71. Lafayette v. Hood [Ind. T.] 104 SW 853.
72. Meyer v. Meyer, 60 W. Va. 473, 56 SE 209; Mobile & W. R. Co. v. Fowl River Lumber Co. [Ala.] 44 S 471. When the sworn answer fully and positively in unequivocal terms denies all the material allegations of the bill on which the complainants asserted equity rests, a preliminary injunction will be denied or if previously granted will be dissolved. City of Sacramento v. Southern Pac. Co., 155 F 1022. Where allegations of bill and proof are squarely met by answer and proof, it is proper to dissolve temporary injunction. Shaw v. Palmer [Fla.] 44 S 953; Robbins v. White [Fla.] 42 S 841. Where al-

application,[73] it being a matter which rests largely in the discretion of the trial court.[74] There are several specific exceptions to this general rule, as where, upon the pleadings and affidavits or proofs, if any, together with the circumstances of the case, there is a strong presumption or probability in favor of the plaintiff's equity, it is error to dissolve ancillary injunction granted to preserve the status quo, [75] or the plaintiff would lose all the benefit which would otherwise accrue to him should he finally succeed in the cause,[76] or where a dissolution would in effect amount to a complete denial of the relief sought by the bill.[77] An injunction will not be dissolved upon an answer admitting the material equities of the bill and setting up new matter in avoidance.[78] Where a petition is sworn to positively, the denials of the answer must be equally positive to warrant a dissolution of an injunction upon the petition and answer alone.[79] It is the general rule that where the main purpose of a proceeding is to obtain a permanent injunction, if the evidence raises serious question as to the existence of facts which make for the plaintiff's right and sufficient to establish it that a preliminary restraining order will be continued to the hearing.[80] Where there are no affidavits with complaint and defendant proves that he has not done and does not intend doing the acts complained of, a temporary injunction will not be continued.[81] It is proper to consider affidavits in opposition to the injunction whether defendants have filed an answer or not.[82] A motion to dissolve predicated upon matters appearing on the face of the papers is in the nature of demurrer and admits the truth of the allegations.[83] A motion to dissolve a preliminary injunction on the ground that the signature of the surety on the bond was affixed by an unauthorized person is in the nature of a peremptory exception relating to forms and should be filed before joinder of issue.[84] Upon a motion to dissolve, it is improper to proceed to an investigation of the merits of the case any further than they are put in issue by the answer.[85] An injunction once issued should not be dissolved ex parte,[86] and may be reinstated by writs of certiorari and prohibition if so dissolved.[87]

legations praying for an injunction against obstructing a highway are sufficient to warrant its issuance but are denied by the answer, a motion to dissolve heard by consent on the pleadings alone should be allowed.

73. Pere Marquette R. Co. v. Bradford, 149 F 492.

74. La Plant v. Marshalltown, 134 Iowa, 261, 111 NW 816. Court may retain injunction with its discretion despite denials of complainant's allegations. Mobile & W. R. Co. v. Fowl River Lumber Co. [Ala.] 44 S 471.

75. Meyer v. Meyer, 60 W. Va. 473, 56 SE 209.

76. Meyer v. Meyer, 60 W. Va. 473, 56 SE 209. Where bonds have been issued by fraud, equity will be slow to dissolve or deny an injunction, for as soon as the bonds pass to innocent purchasers all remedies are lost. Pere Marquette R. Co. v. Bradford, 149 F 492.

77. Meyer v. Meyer, 60 W. Va. 473, 56 SE 209.

78. Pere Marquette R. Co. v. Bradford, 149 F 492.

79. Petition sworn to positively by plaintiff. Answers on belief. Collins v. Stanley [Wyo.] 88 P 620.

80. Dispute whether or not an alley was a public way. Tise v. Whitaker-Harvey Co., 144 N. C. 507, 57 SE 210.

81. Complaint that defendant agreed to supply plaintiff with gas but refused payment tendered and threatened to turn off the supply. On motion to continue it appeared that defendant had never supplied plaintiff with gas, but another party had contracted with them and that there was no threat against plaintiff to cut off the gas. Paff v. Standard Gaslight Co., 118 App. Div. 904, 103 NYS 438. A preliminary injunction restraining one railroad from crossing another at grade will not be continued where it appears that the defendant road, used only for cars from a coal mine, will be abandoned by the time the complainant road is ready for use and that further the complainant has leased its road to another who has consented to the construction of the crossing. Brock R. Co. v. Brookville & M. R. Co. [Pa.] 68 A 46. An injunction restraining the cutting and removing of timber pending suit to quiet title is improperly dissolved where the answer merely claims fee simple title in the pine timber and making no denials as to other timber. Goodson v. Stewart [Ala.] 42 S 1019.

82. Collins v. Weigselbaum, 126 Ill. App. 158.

83, 84. Union Sawmill Co. v. Lake Lumber Co., 117 La. 930, 42 S 429.

85. Upon a motion to dissolve a preliminary injunction to restrain a municipalty from levying an improvement assessment, and issuing assessment certificates based thereon, it is improper to proceed to an investigation of the merits of the case any further than they are put in issue by the answer to the original bill. Wingert v. Snouffer, 134 Iowa, 97, 108 NW 1035.

86. It is immaterial whether the dissolu-

A district judge may in chambers, after notice, dissolve a temporary injunction, although granted upon a hearing at which both parties were present.[88] A judge may dissolve an injunction in vacation, but cannot dismiss the bill.[89] So, too, it is not error to dissolve an injunction on a holiday.[90] Where on final hearing the complainant would not be entitled to an injunction, he cannot complain on appeal that he was not notified as required by statute of a motion to modify a temporary injunction.[91] Where after preliminary injunction granted an amendment is made to support such injunction, it is not error to refuse to dissolve it on the ground that the original bill may have been defective.[92] The dissolution of a temporary injunction in no way withdraws the property from the operation of final judgment,[93] nor does the modification of a temporary injunction affect plaintiff's right to relief.[94] On dissolving an injunction, affirmative relief will not be granted in the absence of a cross bill, though where the injunction has taken property from the defendant the order should grant restitution thereof.[95] By statute in some states, preliminary injunctions are inoperative after a certain period of time unless continued by consent or the case is on the list for trial on its merits.[96] Where an injunction has been used to shield wrongdoers from police interference, it will be dissolved upon motion though no leave was reserved in the original order.[97] An injunctional order may be modified upon a motion to vacate.[98] The scope of an injunction order may be extended upon motion during pendency of action.[99] Under a general leave reserved for further instructions, a decree cannot be altered.[1] Where the wrong, to prevent which temporary injunction was issued, no longer exists or is no longer threatened, the bill will be dismissed,[2] but circumstances may alter this rule. Where a temporary injunction issued to restrain the sale of liquor, defendant, having rendered a final trial necessary, could not procure a dismissal by showing an abandonment of the business after granting of the preliminary injunction and before trial.[3]

(§ 4) *D. Damages on dissolution and liability on bond.* See 8 C. L. 810—De-

tion be effected by rule to dissolve or by a counter injunction. Petite Anse Drainage Dist. Com'rs v. Iberia & V. R. Co., 117 La. 940, 42 S 433.

87. Petite Anse Drainage Dist. Com'rs v. Iberia & V. R. Co., 117 La. 940, 42 S 433.

88. Brown v. Donnelly [Okl.] 91 P 859.

89. Logan v. Ballard, 61 W. Va. 526, 57 SE 143.

90. Labor day. Logan v. Ballard, 61 W. Va. 526, 57 SE 143.

91. Wolfer v. Hurst [Or.] 91 P 366.

92. Tehama County v. Sisson [Cal.] 92 P 64.

93. Temporary restraining order against cutting wood. Dissolution of the same left the defendant to cut timber at their peril. McCord v. Akeley [Wis.] 111 NW 1100.

94. Modification of a temporary injunction restraining the taking of land for a street on condition that rights of plaintiff in the suit should not be prejudiced thereby. Pinney v. Winsted, 79 Conn. 606, 66 A 337.

95. Trial judge dissolved an injunction restraining defendant from interfering with plaintiff's occupancy of land and restored crops to defendant. Brown v. Donnelly [Okl.] 91 P 859.

96. German Sav. & Loan Soc. v. Aldridge [Cal. App.] 89 P 1063.

97. Injunction prohibiting police from entering premises without a warrant. Under the protection of this order defendant ran a pool room. Devlin v. McAdoo, 116 App. Div. 224, 101 NYS 546.

98. Cawker v. Milwaukee [Wis.] 113 NW 419.

99. Injunction order to prohibit the soliciting of advertisements extended to include the printing and publishing of advertisements. Gardner v. The Roycrofters, 103 NYS 635.

1. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A 870.

2. On a final hearing of a complaint for a permanent injunction, the complaint will be dismissed where it appears that the time has passed during which the threatened acts of the defendant might have caused injury and it further appears that neither party claims to have any interest in the cause of action and defendant makes no threats for the future. Preliminary injunction granted to restrain enrollment of republican voters for the purpose of allowing only such to vote at primaries. After the primaries no cause of action exists. Brown v. Cole, 105 NYS 196. Where pending a bill to restrain the erection of a telephone pole in front of the plaintiff's premises contrary to ordinance an ordinance was passed permitting the erection of such poles, the bill will be dismissed and not be retained to assess damages which are purely nominal. Gannett v. Independent Tel. Co., 55 Misc. 555, 106 NYS 3.

3. Drummond v. Richland City Drug Co., 133 Iowa, 266, 110 NW 471.

fendants are entitled to damages for injunctions wrongfully obtained,[4] the measure thereof being the injury caused[5] and the expense incurred,[6] and this though the dissolution was only in part or as to certain parties only.[7] That the motion to dissolve the injunction included a demand for the discharge of receiver does not affect the right to damages.[8] A party properly before the court and subject to the injunction may recover damages resulting therefrom on its dissolution.[9] Damages on the dissolution of the injunction may be assessed during the pendancy of the undecided basic suit,[10] though, ordinarily, on the dissolution of a preliminary injunction, damages should not be assessed because of such injunction until after determination by final judgment that plaintiff was not entitled to such injunction.[11] The surety on an injunction bond is not released by the bankruptcy of his principal.[12] An independent action for damages may be had on an injunction bond if it is so conditioned as to permit it.[13] Whether a bond is properly granted or not is immaterial for it is good as a common-law obligation.[14] In an action on an injunction bond, an allegation of the complaint that the bill was dismissed and the injunction dissolved was a sufficient averment of breach.[15] A declaration in an action on an injunction bond which fails to allege any cost, damage or expense, to the plaintiff by reason of the improper suing out of the injunction, is fatally defective.[16]

(§ 4) *E. Appeal and review.*[See 8 C. L. 812]—Orders granting temporary injunc-

4. Where plaintiff wrongfully obtained injunction against cutting of timber by defendant and pending the injunction sold the land to a third party and the time of the contract for cutting also expired, he was entitled to damages despite the fact that the timber was still on the land and the market price for lumber just as high. Fidelity Deposit Co. of Maryland v. Tinsley, 30 Ky. L. R. 1095, 100 SW 272. The party procuring the injunction is liable for the damages on its dissolution. Dempster v. Lansingh, 128 Ill. App. 388.

5. The measure of damages on dissolution of an injunction to restrain the postmaster general from putting into effect a higher rate of postage is the difference between the two rates. Cortelyou v. Houghton, 27 App. D. C. 188. The measure of damages, when the effect of the injunction is to prevent the use of a dwelling, is the value of the use of it during the season of deprivation. Hutchins v. Munn, 28 App. D. C. 271. In an action on a bond, the extent to which the amount collectable on a judgment, the enforcement of which was enjoined, has been reduced in consequence of the injunction, is a proper element of damage. Stull v. Beddeo [Neb.] 112 NW 315. Where an injunction was granted against levy of execution on a person's goods and a bond given, and later the execution debtor became a bankrupt, it was a proper element of damage against the bondsman that satisfaction of the debt was prevented by the injunction and he is liable therefor. Stull v. Beddeo [Neb.] 110 NW 861.

6. Solicitors' fees necessarily incurred in procuring the dissolution of an injunction may be recoverable as damages. Dempster v. Lansingh, 128 Ill. App. 388. That services rendered by solicitors in procuring a dissolution of the injunction may lighten subsequent labors to be performed in the basic cause does not affect the right to recover for such fees. Id. The reasonableness of solicitors' fees for procuring the dissolution of an injunction will be determined by the time and interests involved. Id. Although the solicitors employed to dissolve the injunction were parties to the suit after dissolution, their interests not being directly affected by the injunction, allowance of their fees was proper. Id. Counsel fees incurred in successfully resisting the continuance of a preliminary injunction are properly recoverable in proceedings on the injunction bond. Reeves v. Sullivan, 117 App. Div. 814, 102 NYS 1003; Fidelity & Deposit Co. v. Tinsley, 30 Ky. L. R. 1095, 100 SW 272. For case where $100 attorney's fees were held improper as damages upon dissolution of a temporary injunction, see Reed v. New York Nat. Bk., 230 Ill. 50, 82 NE 341.

7. Though the injunction did not run against certain parties defendant in the bill, if their interests have been affected, and no objection raised by co-defendants, they may share in the damages on its dissolution. Hunt v. Pronger, 126 Ill. App. 403. If a party has a right to have the injunction dissolved in material matters, he is entitled to be indemnified for the necessary expense of doing it. Dempster v. Lansingh, 128 Ill. App. 388.

8. Dempster v. Lansingh, 128 Ill. App. 388.

9. Claimant for damages, not being served with notice, but appearing by attorney and filing answer, was properly before the court and subject to its order. Hutchins v. Munn, 28 App. D. C. 271.

10. Injunction granted in suit in chancery, and dissolved during the pendency of such suit. Dempster v. Lansingh, 128 Ill. App. 388.

11. Interlocutory judgment sustaining demurrer was not such final judgment. Brown v. Utopia Land Co., 118 App. Div. 190, 103 NYS 53.

12. Stull v. Beddeo [Neb.] 112 NW 315.

13. Buggeln v. Cameron [Ariz.] 90 P 324.

14, 15. Babcock v. Reeves [Ala.] 43 S 21.

16. Royal Phosphate Co. v. Van Ness [Fla.] 43 S 916.

tions are ordinarily appealable.[17] A party affected by an injunction has the right to appeal though not specifically mentioned in the restraining order.[18] The question of granting or refusing an application for a temporary injunction is addressed to the sound discretion of the court and its action will not be reversed on appeal unless there appears to be an abuse of discretion.[19] Mandamus will not lie to compel a judge to grant a suspensive appeal from his order granting a dissolution of a preliminary injunction on bond where no irreparable injury will result from dissolution of the injunction.[20] Where the Code provides for an appeal from temporary injunction proceedings and where it also provides for a temporary restraining order without notice to prevent irreparable injury, such restraining order cannot be appealed from as the provisions for appeal do not apply to such an order.[21] The perfecting of an appeal from an order refusing to dissolve an injunction together with a supersedeas does not stay the operation of the injunction nor deprive the court below of power to punish a party for his contempt in refusing to obey it.[22] Error by a judge in directing the clerk of the wrong district court to issue a temporary injunction which was in fact issued by the clerk of the right court is not cause for dissolution on appeal.[23] The question as to the propriety of a bond given as ordered is not open on appeal.[24]

§ 5. *Decree, judgment, or order for injunction.*[See 8 C. L. 313]—Relief by injunction must not be broader than is reasonably necessary for the complainant's protection,[25] or is warranted by the evidence,[26] or the pleadings and proceed-

17. See Appeal and Review, § 4C.

NOTE. Suspension of operative force pending appeal: An order granting an injunction concluded with the following words: "The injunction will not be in effect until the expiration of 30 days from the filing of this order, and will then be in effect if no appeal is then perfected to the supreme court." An appeal from this order was perfected within the thirty days and a motion was then made to dismiss the appeal on the ground that there was no injunction nor final order from which an appeal would lie: Held, that the order "never had any force or effect as a live order granting an injunction, because the right to an injunction never accrued under it," and the motion was sustained. Porter v. Speno [Idaho] 92 P 367.

A dissenting opinion maintained that the decree should be construed as a whole, that its whole force and effect was to retain the parties in statu quo until a final decision on appeal, and that such an order as this lay within the discretion of the trial court. There seems to be no conflict among the English and American authorities on this point, the cases all holding in accord with the dissenting opinion that, whenever it appears that suspending the operation of a decree pending an appeal, will work justice to the parties, an order to that effect may be made. Mayor, etc., v. Wood, 3 Hare, 131, 152; Scholey v. Central R. of Venezuela, 14 Week. Rep. 786; Walford v. Walford, 19 Law. T. (N. S.) 233; Forbush v. Bradford, Fed. Cas. No. 4,930; Ewing v. Filley, 43 Pa. (7 Wright) 384; Disbro v. Disbro, 37 How. Pr. [N. Y.] 147; Genet v. President & D. & H. C. Co., 113 N. Y. 472; Pach v. Geoffroy, 19 NYS 583; Sammons v. Gloversville, 70 NYS 284, 22 Cyc. 970.—See 6 Mich. L. R. 423.

18. Prayer for injunction against certain corporation officers, the corporation not being a party to order appealed from, though a party to the record. West Side Hospital v. Steele, 124 Ill. App. 534.

19. Obstruction of a highway. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330. Will not interfere with discretion of trial court. Sellers v. Page, 127 Ga. 633, 56 SE 1011; Savage v. Parker [Fla.] 43 S 507; Shaw v. Palmer [Fla.] 44 S 953. The court of appeals will not reverse an order made by a trial judge at chambers because of error in admitting evidence on a motion to dissolve a temporary injunction unless such error affects the substantial rights of the parties appealing. Brown v. Donnelly [Okl.] 91 P 859. Where a temporary injunction from closing a road was modified upon final hearing so as to restrain the defendant until he should comply with the orders of the commissioner's court, authorizing a change in the course of the road, the failure to make the temporary injunction permanent was not error because the defendant said he would act in derogation of the commissioner's order. Smith v. Ernest [Tex. Civ. App.] 19 Tex. Ct. Rep. 422, 102 SW 129.

20. Lewis v. Sandell, 118 La. 852, 43 S 526.

21. Kelley v. Pulaski Stave Co., 31 Ky. L. R. 942, 105 SW 153.

22. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

23. Buchanan v. Barnsley [Tex. Civ. App.] 105 SW 843.

24. Reed v. New York Nat. Exch. Bk., 230 Ill. 50, 82 NE 341.

25. Bill to enjoin practice of dentistry by one of two partners who has sold out to the other. Injunction will be limited to restraining practice within the city limits. Foss v. Roby [Mass.] 81 NE 199.

26. An injunction perpetually restraining defendants from making use of any sketches belonging to complainant or its successor and from representing themselves as its

ings.[27] A decree is to be reasonably construed,[28] and an ambiguous decree will be so construed as to uphold it.[29] Money damages for injuries may be awarded together with an injunction.[30] A court of equity may grant damages as an alternative to an injunction despite the fact that statutes require a special proceeding for damages.[31] A final decree granting injunction will not be modified by striking out words deliberately put in for reasons stated and which has been affirmed on appeal, for such an application is substantially an application to the trial court for a rehearing after affirmance on appeal.[32] Provisions of chancery act of 1902, providing for the issuance of injunction ten days after decree construed.[33]

§ 6. *Violation and punishment.*[See 8 C. L. 315]—A contempt is a willful disregard or disobedience.[34] Disobedience of an injunction, void for want of jurisdiction in the court or judge awarding it, is not a contempt.[35] The fact of a misnomer of a defendant in the pleadings does not relieve him of liability for contempt for violation of such order, where he was in fact served with process or appeared and could not have been misled as to the person intended.[36] That complainant's agent induces defendant to violate an injunction does not excuse a contempt.[37] Cases construing facts and determining the question of violation are collected in the notes.[38]

Punishment for violation.[See 8 C. L. 315]—The trial court is authorized to deter-

successor is not justified where there is no evidence that at the date of suit they had any such sketches or ever made such representations. International Register Co. v. Recording Fare Register Co. [C. C. A.] 151 F 199.

27. It is error to grant a perpetual injunction where only a temporary injunction is prayed for. Prayer that defendants be restrained from moving crops until their rights could be determined. Lafayette v. Hood [Ind. T.] 104 SW 853. Where a bill is brought to enjoin a conspiracy to compel plaintiff to hire only union men upon certain contract work, a permanent injunction against interference with any future contracts cannot be made where, disregarding the pleadings, no such question was referred to the master or passed on by him. Aberthaw Const. Co. v. Cameron, 194 Mass. 208, 80 NE 478.

28. Decree provided that certain machinery connected with a water plant or other machinery of equal effectiveness be continued in use during the remainder of the life of a contract which had 30 years to run. This was not objectionable as requiring the use of machinery beyond its life. Bounds v. Hubbard City [Tex. Civ. App.] 19 Tex. Ct. Rep. 755, 105 SW 56.

29. Decree so ambiguous that it might be construed as mandatory in decreeing construction of work destroyed or merely restraining further destruction. Atlantic & B. R. Co. v. Brown [Ga.] 59 SE 278.

30. Bill to enjoin practice of dentistry by one of two partners who had sold all his interest to the other and had then gone into business again. Foss v. Roby [Mass.] 81 NE 199.

31. Lowering of the grade of a street was partly completed. Court enjoined such an act with an option of leaving it and paying damages. City ordinance required claims for damages against the city to be presented to the council. Hart v. Seattle [Wash.] 88 P 205.

32. Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A 870.

33. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A 849.

34. Contempt should not be adjudged against defendants who have remedied nearly all the defects which constituted their plant a nuisance and minimized the rest. Saal v. South Brooklyn R. Co., 106 NYS 996.

35. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

36. Aaron v. U. S. [C. C. A.] 155 F 833.

37. Injunction against dealing in nontransferable tickets. Complainant's agent induced defendant to sell one in violation. Ex parte Cash [Tex. Cr. App.] 18 Tex. Ct. Rep. 783, 99 SW 1118.

38. A labor organization, or its officers who select members to act as pickets, may become liable for the unlawful acts of such pickets in violating an injunction, although instructed not to violate it where with knowledge that their instructions have not been obeyed by certain persons, they are still kept in the service. Allis-Chalmers Co. v. Iron Moulders' Union No. 125, 150 F 155. Facts held to show a violation of an injunction against interference and picketing. Vilter Mfg. Co. v. Humphrey [Wis.] 112 NW 1095; Allis-Chalmers Co. v. Iron Moulders' Union No. 125, 150 F 155. Where the president of a labor union with other members followed an employe, escorted through a crowd of union men by a policeman, and said to him "I see you are still doing your dirty work," his acts are in violation of an injunction against unlawful interference with the employes by the use of threats, etc., and could not be defended on the ground of persuasion. Ideal Mfg. Co. v. Ludwig, 149 Mich. 133, 14 Det. Leg. N. 378, 112 NW 723. All injunction orders are to be construed in favor of the purpose sought to be subserved by the granting of the order and no matter how general the terms, it is not to be construed so as to prevent any action on the part of the party enjoined which in no wise concerned the other party or which would have redounded to the advantage of such other party. Gibbons v. Bush Co., 115 App.

mine whether or not a defendant has been guilty of the violation of an injunction issued by it.[39] Contempt proceedings are in all cases summary before a judge, without the intervention of a jury;[40] and technical pleadings are not required, it being sufficient if, by petition, affidavit or other showing, it is made to appear that there has been a willful violation of the court's order,[41] but the affidavit must state facts sufficient to constitute a prima facie case,[42] and clearly apprise the defendant of the nature of the charge against him.[43] If the affidavit is not sufficiently specific in its charges, it may be amended by a reverification with the court's consent.[44] Contempt proceedings may be entitled in the name of the state as complainant or in the name of the complainant in the original action, the practice varying in different states.[45] The failure of a party to comply with the order of a court requiring him to perform some act for the benefit or to the advantage of the adverse party to a proceeding is a quasi or civil contempt for a violation of which a punishment is executive only, and the contemnor, if found guilty, is adjudged to stand committed until he obeys the command,[46] while disobedience or resistence of the process of a court constitutes a criminal contempt, a conviction for which incurs a penalty of fine, or imprisonment or both, and is punitive.[47] Willful disobedience of an injunction is punishable as for a criminal contempt in some states by statute.[48] In proceedings for contempt, the rules of evidence applicable to civil cases will apply.[49] In a proceeding for contempt the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void.[50] A party is rendered amenable to an injunction if he has actual notice thereof despite the fact that he was not a party and was not served with process.[51] A judgment for contempt is defective if it does

Div. 619, 101 NYS 721. An order will not be construed to restrain acts beneficial or not injurious to the rights of the party in whose behalf it was obtained unless its words clearly have that import and effect. Order restraining stockholder from disposing of his stock or exercising any right incident to ownership was not violated by the stockholder bringing suit to recover property belonging to the corporation, the purpose of the order being to keep the stock so that it might be recovered in the same condition. Maine Products Co. v. Alexander, 115 App. Div. 475, 101 NYS 464. Where during the pendency of a contest an order of injunction is issued against one of the parties from interfering with or entering upon the land embraced in the entry of the other, such injunction will not prevent the successful contestant from maintaining an action of forcible detainer after the contest has been closed. Howe v. Parker, 18 Okl. 282, 90 P 15. Evidence insufficient to show defendant guilty of contempt of an order against entering abuttor's land. Porter v. State [Wyo.] 92 P 385. Where the allegations of a petition rendered it multifarious and it is demurred to, it is error to grant an injunction and adjudge defendants in contempt. White v. North Georgia Elec. Co., 128 Ga. 539, 58 SE 33.

39. Enterprise Foundry Co. v. Iron Moulders' Union, 149 Mich. 31, 14 Det. Leg. N. 313, 112 NW 685.

40. State v. Sieber [Or.] 88 P 313.

41. Hammond Lumber Co. v. Sailors' Union of the Pac., 149 F 577. Contempt proceedings may be commenced either by petition or affidavits. Flannery v. People, 225 Ill. 62, 80 NE 60. Affidavit is sufficient if it sets out the acts done in violation of the writ and avers that the party accused thereof had knowledge of the terms of the restraining order. State v. Sieber [Or.] 88 P 313.

42. State v. Sieber [Or.] 88 P 313.

43. Aaron v. U. S. [C. C. A.] 155 F 833. The testimony offered in contempt proceedings must be confined to the case made by the affidavit. Where affidavit charged building a dam across a stream in violation of an injunction against interfering with the flow of water in the stream, it cannot be shown that water was taken by sluices. State v. Sieber [Or.] 88 P 313.

44. State v. Sieber [Or.] 88 P 313.

45. Porter v. State [Wyo.] 92 P 385.

46, 47. State v. Sieber [Or.] 88 P 313.

48. Vilter Mfg. Co. v. Humphrey [Wis.] 112 NW 1095. Comp. Laws. § 1098, subd. 3. Injunction against interference with nonunion labor. Enterprise Foundry Co. v. Iron Moulders' Union, 149 Mich. 31, 14 Det. Leg. N. 313, 112 NW 685.

49. Flannery v. People, 225 Ill. 62, 80 NE 60. Guilt to be established by a preponderance of evidence. Evidence insufficient to show violation of order against strikers interfering with complainant's employes and business. McBride v. People, 225 Ill. 315, 80 NE 306.

50. Objection made that part of decree was erroneously made, but this might be stricken out and not affect the remainder. Flannery v. People, 225 Ill. 62, 80 NE 60.

51. Injunction against violence by striking employes. Pope Motor Car Co. v. Keegan, 150 F 148. Where a defendant has notice of a writ of injunction through his attorney and through seeing a copy thereof, he is in contempt in violating it even if the sheriff has not personally served him with the writ. Anderson v. Hall, 128 Ga. 525, 58 SE 43. Injunction against interfering with

not state the reason therefor, but such defect may be remedied by looking to the moving papers for the character of the violation.[52] A trade union which is merely a voluntary association without right to sue or be sued in its own name cannot be fined for contempt for violation of an injunction although a party to the suit and having entered a general appearance.[53] Where defendants violated an injunction against interfering with plaintiff's employes, they could not complain that they were punished beyond the merits of their offense where that was the second proceeding for violation in substantially the same manner.[54] Where defendants participated in a plan to induce employes to leave their employment, etc., in violation of an injunction, an injury to the employer will be presumed.[55] In case of violation of an injunction where no money damages are shown and no overt act done, a nominal fine will be imposed under terms of the statute.[56] Contempt proceedings are regulated by statute in some states.[57]

§ 7. *Liability for wrongful injunction.* See 8 C. L. 317—Malicious prosecution of an injunction or abuse of the writ is elsewhere treated. Where in a suit for specific performance of a contract for the sale of personalty, complainant obtained an injunction restraining the foreclosure of a chattel mortgage, which was dissolved, on hearing, and bill dismissed, the defendants are entitled to a reservation in the decree of a right to file suggestions of damages for the issuance of the injunction.[58] Where grant of injunction without bond is not authorized by law under the circumstances and amounts to an abuse of process, the litigant obtaining the same is liable for damages thereby occasioned.[59] The liability on the bond has already been discussed. Where the statutes provide that upon the dissolution of an injunction to stay a judgment damages should be assessed, and in the case where money was enjoined, that should not exceed 10 per cent of the amount released, it was error to award $195 damages where the jurisdiction of the court rendering the original judgment was limited to $300.[60]

INNS, RESTAURANTS AND LODGING HOUSES.

Discrimination on account of race is excluded.[61]

Definitions. See 8 C. L. 317

Public regulation. See 8 C. L. 318—The legislature has power to regulate liens of innkeepers [62] and may impose an occupation license.[63]

Duty to receive guests. See 8 C. L. 318—Under the common law and in some cases by statute, a landlord having necessary conveniences must afford reasonable accommodation.[64]

title to property after foreclosure. Certain bondholders not parties to the foreclosure proceedings brought suit after decree to establish their title to property. Held not in contempt. Lewis v. Peck [C. C. A.] 154 F 273.

52. Ex parte Cash [Tex. Cr. App.] 18 Tex. Ct. Rep. 783, 99 SW 1118.

53. Allis-Chalmers Co. v. Iron Moulders' Union, 150 F 155.

54, 55. Flannery v. People, 225 Ill. 62, 80 NE 60.

56. St. 1898, § 3490. Vilter Mfg. Co. v. Humphrey [Wis.] 112 NW 1095.

57. Statute construed. State v. Sieber [Or.] 88 P 313.

58. Johnson v. McNellis, 228 Ill. 351, 81 NE 1035.

59. Milling v. Sulphur Timber & Lumber Co., 119 La. 585, 44 S 307.

60. Snyder v. Sherrell [Ind. T.] 103 SW 756.

61. See Civil Rights, 9 C. L. 572.

62. Laws 1897, p. 352, c. 41, § 71, giving innkeepers lien on goods owned by third party, in rightful possession of guest, held, constitutional. Waters v. Gerard [N. Y.] 82 NE 143.

63. The Pennsylvania license law requires one to take out a separate license for each separate restaurant maintained by him. Commonwealth v. Childs Dining Hall Co., 32 Pa. Super. Ct. 467. See, also, Licenses, 8 C. L. 734.

64. Code of 1896, § 2539. Landlord may select apartment and if expedient change same, but on refusal of accommodation may be held in damages. Hervey v. Hart [Ala.] 42 S 1013.

*Liability for safety of guests.*See 8 C. L. 318—An innkeeper is bound to exercise reasonable care for the safety of his guests,[65] and the innkeeper's servants may act for him in such protection.[66] The innkeeper can be held in damages for wrongful acts of servants only when wrongful acts were within authorized scope of servant's employment.[67] Although the common-law rule that obligation of innkeeper toward guests extends only to movables and not to the person still exists in some states,[68] the liability of an innkeeper under the common law[69] has been changed by statute in some states.[70] Contributory negligence will defeat the right of a guest to recover for personal injuries.[71]

Liability of guests.—Guests are responsible in damages to the innkeeper for overt acts of guests or his servants,[72] as by the creation of a nuisance in the apartments occupied by him.[73]

*Liens.*See 6 C. L. 318—By statute in some states a landlord has a lien on goods owned by a third person in rightful possession of guests.[74]

65. Regular boarder entitled to same protection as ordinary guest. Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 SW 428. Use necessary force to eject annoying party. Chase v. Knabel [Wash.] 90 P 642.

66. To prevent annoyance of female guest. Chase v. Knabel [Wash.] 90 P 642. Reasonably necessary force only to be used. Holden v. Carraher [Mass.] 81 NE 261.

67. Ejecting annoying party. Chase v. Knabel [Wash.] 90 P 642. Not trespass for innkeeper's servants to enter guest's room. De Wolf v. Ford, 104 NYS 876.

68. De Wolf v. Ford, 104 NYS 876.

69. Fire escapes not necessary. Yall v. Snow, 201 Mo. 511, 100 SW 1.

70. Laws 1901, p. 219, § 1, construed. Fire escapes required. Duty to install on owner not lessee of building. Yall v. Snow, 201 Mo. 511, 100 SW 1; Coutant v. Snow, 201 Mo. 527, 100 SW 5. Acts 1899, p. 352, ch. 178, § 2, construed. Fire escapes required on certain buildings. Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 SW 428. Where liability is severally on owner, lessees, etc., failure to have possession will not remove owner's liability. Johnson v. Snow, 201 Mo. 450, 100 SW 5. **Contra.** See Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 SW 428.

Where statute provides escapes for buildings of certain size, no escapes necessary where dimension in statute not exceeded. Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 SW 428. Contract that innkeeper will protect guests from insult as in case of common carriers has never been implied. De Wolf v. Ford, 104 NYS 876.

71. Contributory negligence must be proximate cause of injuries. Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 SW 428. Boarder continued to occupy room six months with knowledge of no fire escape. Held, did not waive compliance with statute requiring escapes. Id.

72. Parkes v. Seasongood, 152 F 583. Trained nurse not a servant. Id.

73. Dead body of child concealed in closet. Parkes v. Seasongood, 152 F 583.

74. Laws 1897, p. 352, c. 418, § 71, giving innkeeper lien on goods owned by a third person in rightful possession of guest held constitutional. Waters v. Gerard [N. Y.] 82 NE 143. Hotel keeper has lien on piano in possession of guest under conditional contract of sale, title remaining in vendor until price paid; lien takes precedence over vendor's right to retake possession by breach of guest of conditions of sale. Id. The legislature has power to regulate liens. Id.

NOTE. Property subject to lien: A state statute giving the innkeeper a lien upon the property of third persons rightfully in the possession of the guest is held to be merely declaratory of the common law and not to extend the innkeeper's lien. The constitution of New York, adopted in 1777, ordains that the common law of England, as it existed prior to April 19, 1775, shall be and continue the law of the state subject to statutory changes. English reports prior to 1775 contain few cases in point. Skipwith v. Innkeeper, 1 Bulst. 170; Robinson v. Walter, 3 Bulst. 269, 1 Rolle Rep. 449; Stirt v. Drungold, 3 Bulst. 289, 14 Jac. B. R. 650, and York v. Greenaugh, 1 Salkeld, 388, 2 Ld. Raymond, 866, seem to exhaust the list. In each of these cases, the property held was a horse belonging to a third person, and the lien claimed was for the keep of the horse. Plaintiff in the principal case argues that this indicates a special lien on animals for their keep, as the rule at common law prior to 1775. The same point was made in Turrill v. Crawley, 66 E. C. L. 197, but the lien was held to extend to a carriage as well as to a horse. Some courts deny the lien at all under such circumstances. Wyckoff v. Southern Hotel Co., 24 Mo. App. 382; McManigle v. Crouse, 1 Walk. [Pa.] 43; but when it is admitted at all, it is generally insisted that the innkeeper's lien should extend as far as his liability. The New York statute requires the goods to be "rightfully" in the possession of the guest. It does not appear that this even was required at common law. In Johnson v. Hill, 3 Starkie (3 E. C. L.) 172; Abbot, C. J., approved an assertion of counsel that it had been held by all the judges that when a robber had brought a stolen horse to an inn the innkeeper's lien attached for its keep. In Robbins v. Grey, 2 Q. B. 501, Lord Escher, Master of the Rolls, asserts that it is immaterial who owns the goods or whether the innkeeper knows whose they are or not, and that such has been the law for two or three hundred years. Therefore it would be safe to say that not only does the New York stat-

Liability for effects.[See 8 C. L. 318]—An innkeeper is liable for loss of the effects of his guests,[75] but at common law this liability extends only to movables.[76] One who by advertisement, etc., holds himself out as proprietor is liable as bailee of baggage of guests though he is not the actual owner of the establishment.[77]

INQUEST OF DAMAGES; INQUEST OF DEATH, see latest topical index.

INSANE PERSONS.

§ 1. Existence and Effect of Insanity in General, 287.
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The scope of this topic is noted below.[78]

§ 1. *Existence and effect of insanity in general.*[See 8 C. L. 319]—Sanity is, prima facie, presumed, [79] but where insanity is shown to have existed, its continuance is presumed until the contrary is shown,[80] provided it was continuing and permanent in its nature, or that the cause of the disorder was continuing and permanent.[81] Upon the question of one's sanity at the time he executed a note, evidence of his mental condition before or after that time is material only in aiding the jury to determine his condition at that time.[82] Where it is sought to prove that an alleged lunatic was sane by showing that he wrote certain letters, the letters must be produced or accounted for.[83] The opinions of nonexperts on the question of sanity are not admissible if a proper predicate has not been laid.[84]

ute not extend or enlarge the innkeeper's lien at common law, but if anything impairs it.—6 Mich. L. R. 260.

75. Is bailee thereof. Ross v. Daugherty, 127 Ill. App. 572.

NOTE. When relation exists: The plaintiff arranged with the proprietors to stop at their hotel situated at a summer resort. A reduced rate per week, but no definite time, was fixed. Held, the relation of innkeeper and guest was created, so that the proprietors were liable as insurers for the loss of valuables in the plaintiff's room. Holstein v. Phillips [N. C.] 59 SE 1037.

Where the keeper of a public house professes to supply for hire the needs of travelers, persons who receive from him the entertainment for which they have occasion are prima facie guests, Pinkerton v. Woodward, 33 Cal. 557, and this presumption continues until the contrary clearly appears. Ross v. Mellin, 36 Minn. 421; Jolie v. Cardinal, 35 Wis. 118. The fact that one has arranged to stay for a week or more, or has received a weekly instead of a daily rate does not overcome it (Beale v. Posey, 72 Ala. 223; Pinkerton v. Woodward; Pope v. Mulenbacker, 136 Michc. 611), but a contract for both a definite and a protracted stay, in return for which a special rate is given, is the strongest evidence that one is a boarder and not a guest. Moore v. Long Beach Development Co., 87 Cal. 483; Schoecraft v. Bailey, 25 Iowa, 553; Crapo v. Rockwell, 94 NYS 1122. Even where the rate is fixed in expectation of a person's protracted stay, if his profession calls for such unexpected and frequent change of location that he must live with those who provide for travelers, he is necessarily a guest. Hancock v. Rand, 94 N. Y. 1.—See 8 Columbia L. R. 230.

76. Common-law rule. De Wolf v. Ford, 104 NYS 876.

77. Ross v. Daugherty, 127 Ill. App. 572.

78. Capacity to contract before adjudication of insanity is more fully treated elsewhere (see Incompetency, 8 C. L. 169), and testamentary capacity (see Wills, 8 C. L. 2305), and capacity to commit crime (see Criminal Law, 9 C. L. 851), are likewise excluded.

79. Rogers v. Rogers [Del.] 66 A 374; United States v. Chisolm, 149 F 284. Burden of showing insanity rests upon person asserting it. Rogers v. Rogers [Del.] 66 A 374. Where insanity is defense in criminal prosecution, burden of proving it is upon defendant. Fults v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 458, 98 SW 1057.

80. Sims v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 962, 99 SW 555; State v. Snell [Wash.] 89 P 931. Rule applied where one charged with crime was acquitted on ground of insanity. State v. Snell [Wash.] 89 P 931. Where one is proved to have been insane prior to executing a note, it will be presumed he was insane at time of its execution unless contrary is shown. Rogers v. Rogers [Del.] 66 A 374.

81. Sims v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 962, 99 SW 555.

82. Rogers v. Rogers [Del.] 66 A 374.

83. Heath v. Slaughter, 127 Ga. 747, 57 SE 69.

84. Sims v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 962, 99 SW 555; Fults v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 458, 98 SW 1057.

§ 2. *Inquisitions.*[See 8 C. L. 320]—The persons whose sanity may be inquired into,[85] and what may be determined [86] in an inquisition of lunacy, are questions generally to be determined from the terms of the statute governing the proceeding. Proceedings had without notice to the person alleged to be insane are voidable by the party himself,[87] but not void as to other parties, [88] and advantage cannot be taken of such want of notice in collateral proceedings.[89] The finding upon an inquisition of lunacy is not conclusive evidence against third persons.[90] Where one has been adjudged insane, all necessary prior steps are presumed.[91] Where sufficient ground is shown therefor, the alleged lunatic's default will be opened and a new hearing granted.[92] One who after suing out a commission of lunacy voluntarily dismisses the proceeding is not compelled to pay the costs which have accrued as a condition precedent to instituting a second proceeding of the same character relative to the same person.[93]

§ 3. *Custody, guardianship, and support.*[See 8 C. L. 321]—Jurisdiction of the appointment of guardians for insane persons is generally vested in the probate courts,[94] it sometimes being expressly extended to cover the appointment of guardians for nonresident incompetents having property in the county where the court is established.[95] An insane ward cannot change his domicile,[96] and his removal to another county in which he has no property does not authorize the transfer of guardianship proceedings to the district court of such county,[97] especially where his nearest relative and his guardian object to such transfer.[98] In Rhode Island the probate court before appointing a guardian for a person confined in an asylum is required to appoint a guardian ad litem to represent him in the proceeding.[99] There must be a clear showing of mental incapacity to warrant the appointment of a guardian on that ground.[1] The legality of the appointment of a guardian, if prima facie regular, cannot be attacked collaterally.[2] Where the record of the appointment is silent upon the subject, it will be presumed that all steps essential to the acquisition of jurisdiction of the person of the ward were complied with.[3] It is the guardian's duty to

85. Under Ballinger's Ann. Codes & St. § 2660, it is not persons actually at large only, whose sanity may be inquired into, but the inquiry may be made as to any person unsafe to be at large. State v. King County Super. Ct. [Wash.] 88 P 207.

86. Proceeding under Act June 25, 1895 (P. L. 300), for protection of weak minded persons is not so far reaching as a proceeding de lunatico inquirendo, and does not confer power to find how long the person has been weak-minded. Gorgas v. Saxman, 216 Pa. 237, 65 A 619.

87, 88. Packard v. Ulrich [Md.] 67 A 246.

89. Packard v. Ulrich [Md.] 67 A 246. Proceedings finding one insane cannot be collaterally altered on ground of such want of notice, on exceptions to sale of lunatic's property by purchasers thereof. Id.

90. A return that person sought to be declared insane is not so, with entry of ordinary confirming same, is not conclusive evidence against third persons, who were not parties to proceeding, although notified thereof as next of kin. Heath v. Slaughter, 127 Ga. 747, 57 SE 69.

91. Packard v. Ulrich [Md.] 67 A 246. Thus service of notice on person adjudged insane is presumed if record is silent in respect thereto. Id.

92. It is sufficient ground that motion to adjourn the hearing on account of illness of counsel was refused. In re Hammond, 55 Misc. 124, 106 NYS 285. But in such case costs of proceeding to date should be borne by alleged incompetent or his estate. Id.

93. Hinton v. Brewer [Ga.] 58 SE 708.

94. Exclusive jurisdiction so vested under Const. 1874, art. 7, § 34. Hare v. Shaw [Ark.] 104 SW 931.

95. Under Comp. Laws, § 8729, probate court has jurisdiction to make such appointment upon application of any friend of incompetent. Griffin v. Lenawee Probate Judge, 148 Mich. 516, 14 Det. Leg. N. 182, 111 NW 1089. This statute is not unconstitutional. Id.

96, 97, 98. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

99. Court and Practice Act 1905, § 772. But the failure of the court to do this is not ground for setting aside the appointment at the suit of the ward after recovering his sanity. Bennett v. Randall [R. I.] 67 A 525.

1. Evidence held not to show such mental incapacity as to require the appointment of a guardian. Arment v. Arment, 134 Iowa, 199, 111 NW 812.

2. Legality of appointment and of letters of guardianship, if prima facie regular, cannot be challenged by ward in action instituted by guardian in name of ward and for his benefit. Hare v. Shaw [Ark.] 104 SW 931.

3. Hare v. Shaw [Ark.] 104 SW 931.

keep his ward's money and property separate from his own,[4] keep an account thereof,[5] make investments, not in his own name, but as guardian,[6] and keep such investments separate from his own.[7] In Iowa the guardian has no authority without an order of court to loan the ward's money.[8] The guardian must render his account in the proper court,[9] and such account must be properly audited and settled.[10] Ordinarily the removal of a guardian rests in the sound discretion of the court appointing him,[11] but where such discretion is abused, it may be corrected on appeal.[12] In Iowa failure of the guardian to make a yearly report, as required by statute, is ground for his removal.[13] Where a husband has been appointed committee of the person of his insane wife, only extraordinary facts will warrant his removal and the appointment of another in his stead.[14] Where disagreements between members of the committee of the estate of an incompetent have resulted in unnecessary litigation, and their continuance in office would be detrimental to the estate, the committee should be removed and a new one appointed.[15] In most states the committee has power to contract respecting the lands of the lunatic.[16] Upon the removal of a guardian he should be compelled to immediately file his final report and make settlement with his successor with the approval of the court.[17] The committee of a lunatic is entitled to reimbursement for money borrowed by him and expended for the support of the lunatic after the personal property was exhausted.[18] The statute of limitations is a bar to a claim by the committee for money expended for the lunatic's support.[19]

4, 5, 6, 7. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

8. Code, § 3200. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

9. A guardian appointed under P. L. 1899. p. 233, c. 101, should account in the court of chancery. In re Compton, 70 N. J. Eq. 556, 67 A 1077.

10. A guardian upon filing his account with clerk of court of chancery may take an order of reference to a master to audit and state the account, and upon coming in of such report, application may be made to court for rule prescribing the notice to be given to all parties in interest, of a motion to confirm report, and for settlement of account. In re Compton, 70 N. J. Eq. 556, 67 A 1077.

11. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

12. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588. Evidence considered and decree denying petition for removal of guardian reversed. Id. Upon reversing decree denying petition for removal of guardian, supreme court will not appoint a guardian, but will leave such appointment to district court upon remand. Id.

13. Code, §§ 3203, 3204. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

14. Facts held not to warrant such removal and substitution. In re Andrews, 56 Misc. 6, 106 NYS 13.

15. In re Andrews, 56 Misc. 6, 106 NYS 13, 1096. And this though the committeemen have come to an understanding, if such understanding is a mere temporary arrangement which may at any moment be abrogated, the main consideration for which is not the welfare of the incompetent. Id.

16. NOTE. Powers of committee: S. and T. were the committee of a lunatic. S. gave his consent to an adjoining landowner to underpin a party wall. In an action to compel the removal of a portion of this underpinning which encroached on the lunatic's land, held, that a committee of a lunatic is authorized within the limits of his trust to bind the lunatic by acts clearly for his benefit. Sharpless v. Boldt [Pa.] 67 A 652.

The decision in the principal case seems to be upheld in those states where the committee has power to lease the lunatic's lands. Pierce's Appeal, 13 Wkly. Notes Cas. [Pa.] 306. The following cases limit the committee's power to lease only for the life of the lunatic. De Treville v. Ellis, 1 Bailey Eq. [S. C.] 35, 21 Am. Dec. 518; Campau v. Shaw, 15 Mich. 226. That a portion of an estate covered by a mortgage may be released, see Pickersgill v. Read, 5 Hun [N. Y.] 170. That the committee may sell the lunatic's personal property, see Spaulding v. Bullock, 206 Pa. 224, 55 A 965. On the other hand, the following cases hold that a committee has no power to make a lease without leave from the court. Foster v. Marchant, 1 Vern. 262; Knipe v. Palmer, 2 Wils. 130; Alexander v. Buffington, 66 Iowa, 360, 23 NW 754; Kent v. West, 33 App. Div. 112, 53 NYS 244; Treat v. Peck, 5 Conn. 280. That a lunatic cannot be prescribed against except in cases specially provided by law, see Espinola v. Blasco, 15 La. Ann. 426; Sallier v. St. Louis W. & G. R. Co., 114 La. 1090, 38 S 868. The guardian has no power, as such, to engage in business for, or by transfer to bind the estate of, a lunatic, nor can the probate court confer such power. Michael v. Locke, 80 Mo. 548; Western Cement Co. v. Jones et al, 8 Mo. App. 373.—See 6 Mich. L. R. 346.

17. McIntire v. Bailey, 133 Iowa, 418, 110 NW 588.

18. In re Roberts, 52 Misc. 630, 103 NYS 1017.

19. Credit will not be allowed for money expended more than the statutory period prior to the filing of his petition for an accounting. In re Roberts, 52 Misc. 630, 103 NYS 1017.

The question whether the cost of caring for indigent or criminal incompetents committed to a state institution shall be borne by the state or by the county or municipality is one of which the statutes, construed in the light of the particular circumstances of the case, are generally determinative.[20] Generally speaking an insane person is bound to pay for his support as long as he can,[21] and provision is frequently made by statute for the recovery by the state or county of money spent in the support of an insane person, either from such person [22] or from the person legally bound for his support.[23] But this liability may be modified by agreement made, under statutory sanction, with the proper authorities.[24] The incarceration of an insane minor in an asylum, without his father's consent, does not emancipate him, and thus relieve the father from liability for his support.[25] In Michigan an order of the probate court requiring a father to contribute to the support of an indigent insane daughter is not invalid because it does not fix the specific amount to be paid.[26] In Kentucky the filing of a suit by the state against an insane person, to recover for his maintenance, creates a lien upon so much of his estate as is described in the petition.[27] An allowance for taking care of an incompetent person, obtained by fraud will be set aside.[28] In an action to set aside an allowance on this ground, an admission by claimant that she had been fully paid and that the incompetent did not owe her anything is admissible.[29]

§ 4. *Commitment to asylums.*[See 8 C. L. 323]—A statute providing for the commitment of an insane person to an asylum or curative hospital must conform to constitutional requirements. [30] Service of notice on the alleged lunatic is generally

20. One commited to Massachusetts School for the feeble-minded is not an "insane person," within definition given by Rev. Laws c. 8, § 5, cl. 6, and commonwealth, therefore, is not liable for his support under Rev. Laws, c. 87, §§ 6, 79. Chapin v. Lowell, 194 Mass. 486, 80 NE 618. Under Pen. Code, §§ 1368, 1373, where one charged with crime is adjudged insane and committed to state hospital prior to his arraignment, the county in which the information was filed is not liable for cost of caring for him in hospital. Napa State Hospital v. Solano County [Cal. App.] 88 P 501.

21. Chapin v. McCurdy [Mass.] 81 NE 652.

22. Commonwealth may recover claims amounting to $876 for support of insane person, where his guardian has $890 in bank, under Rev. Laws, c. 87, § 78, authorizing recovery where insane person is "of sufficient ability." Chapin v. Kelly [Mass.] 81 NE 653. So commonwealth may recover under this statute $800 from insane person having $1,200 in banks, though evidence shows that she may recover, live a few years longer, and need money for her support. Chapin v. McCurdy [Mass.] 81 NE 652. It will not preclude recovery under this statute that insane person had a settlement in commonwealth, if fact was not known to state authorities. Id.

23. Code, § 2297 does not impose a tax, and is not therefore violative of any constitutional provision relating to taxation (Guthrie County v. Conrad, 133 Iowa, 171, 110 NW 454), nor does it authorize the taxing of private property for a public use without just compensation therefor, in violation of Const. art. 1, § 18 (Id.), nor does it take property or create a liability without due process of law, in violation of Const. art. 1, § 9 (Id.). Under it a father is liable to the county for the care and maintenance in a hospital of his insane minor son. Id.

24. Under Code 1897, § 2297, and under the previous statutes (Acts 26th Gen. Assem. p. 56, c. 52), board of supervisors of a county has authority to enter into agreement with trustee of insane person confined at the county poor farm, to accept labor of such person in payment for his board and lodging. Marshall County v. Lippincott [Iowa] 111 NW 801.

25. Guthrie County v. Conrad, 133 Iowa, 171, 110 NW 454.

26. Pub. Laws 1903 (Act No. 217, p. 333, §20), construed in connection with § 38, p. 240, as amended by Pub. Acts 1905, p. 320 (Act No. 221). In re Beers, 148 Mich. 300, 14 Det. Leg. N. 105, 111 NW 915.

27. Ky. St. 1903, § 257. It is not essential that defendant's personal estate should be first subjected. Eversole v. Eastern Kentucky Asylum, 30 Ky. L. R. 989, 100 SW 300.

28. Scheer v. Ulrich [Wis.] 113 NW 661. In action to set aside allowance on this ground, evidence held to support finding that guardian of incompetent was negligent in failing to investigate as to merits of claim and to make objection thereto at time of hearing. Id.

29. Scheer v. Ulrich [Wis.] 113 NW 661.

30. Sections 11, 12, Gen. Laws 1896, c. 82, providing for confinement in curative hospitals, upon application of parents or guardian of persons declared insane by certificate of two practicing physicians, when construed in connection with §§ 15, 16, authorizing person alleged to be insane to prosecute petition for commission to determine question of sanity, and § 19, as amended by court and practice act 1905, § 1112, enlarging function of writ of habeas corpus to apply to such cases, do not violate the constitu-

essential to give the court jurisdiction to convict him.[31] Who may be committed,[32] and the requirements essential to warrant commitment,[33] are questions to be determined from the terms of the statute governing the matter. Where an order denying a petition for commitment affects neither the liberty nor property rights of the petitioner, he is not entitled to appeal therefrom,[34] nor will an appeal lie where only abstract questions are thereby presented for determination.[35] The question upon whom costs shall be imposed in proceedings for commitment is generally governed by statute.[36]

§ 5. *Property and debts.*[See 8 C. L. 824]—A widow does not by reason of insanity lose her dower interest.[37] Property of an insane person in custody of the court will not be applied to the payment of his general indebtedness as distinguished from claims for his present maintenance, until a sufficient fund is set aside for his support and that of his family.[38] An involuntary petition in bankruptcy will not abate because of the subsequent insanity of the bankrupt.[39] The fact that land is owned by an insane person will not preclude its being subjected to a street improvement lien.[40] The fact that a party to a suit for an accounting was for a time insane does not relieve him from liability for the amount due by him at the time he became insane.[41] Where after execution of a note the maker became insane, overpayments made by him on an open account with the payee during the period of his insanity should be credited on the note,[42] and where the maker after becoming insane executed a deed of trust to secure the note, payments applied to such deed should be credited on the note.[43]

§ 6. *Contracts and conveyances.*[See 8 C. L. 825]—An insane person is liable for the reasonable value of things furnished him necessary for his support or that of his family,[44] but except for such necessaries he is incapable of contracting any binding obligation.[45] It has been generally held, however, unless otherwise provided by

tional inhibition against depriving one of liberty without due process of law. In re Crosswell's Petition [R. I.] 66 A 55.

31. Evidence held to show that service of notice upon person alleged to be insane was made in time, under Pub. Acts 1903, No. 217, p. 329, § 16, to give probate court jurisdiction to commit such person to asylum. In re Schnapka, 149 Mich. 309, 14 Det. Leg. N. 448, 112 NW 949.

32. Laws 1896, c. 82, § 11, authorizing removal of persons to curative hospital upon certificate of their insanity signed by two practicing physicians, does not require that removal shall be from another hospital. In re Crosswell's Petition [R. I.] 66 A 55. Under this statute a nonresident may be confined in Butler hospital upon application of his nonresident guardian. Id.

33. Gen. Laws 1896, c. 82, § 11, authorizing persons being placed in curative hospitals upon certificate of their insanity signed by two practicing physicians, does not require that certificate be signed by physicians practicing in state, or that they should not be officials of an institution for the insane. In re Crosswell's Petition [R. I.] 66 A 55. Nor does statute require that certificate should be sworn to. Id.

34. In re Brooks, 104 NYS 670.

35. In this case alleged insane person was serving term of imprisonment for crime, and before hearing on appeal his term had expired. In re Brooks, 104 NYS 670.

36. In proceedings under Laws 1896, pp. 492, 495, c. 545, §§ 62, 63, for commitment of alleged insane person, costs cannot be imposed upon petitioner. In re Murtaugh, 117 App. Div. 302, 102 NYS 176. Petitioner's remedy where costs are imposed upon him is not by appeal, but by motion to strike from decree dismissing petition provision as to costs. Id.

37. Crenshaw v. Kener, 127 Ga. 742, 57 SE 57.

38. Lemly v. Ellis. [N. C.] 59 SE 683.

39. When jurisdiction of court attached before bankrupt was adjudged insane and retrospective findings of jury did not include period of time when acts of bankruptcy were claimed to have been committed, proceedings will not abate. In re Kehler, 153 F 235.

40. Barron v. Lexington [Ky.] 105 SW 395. In action to enforce such lien, plaintiff need not show that the lunatic's interests require sale of property, or that a sale is absolutely necessary to pay the claim. Id.

41. 42. Gross v. Jones, 89 Miss. 44, 42 S 802.

43. Not because the deed is valid, but because it has its basis in the note. Gross v. Jones, 89 Miss. 44, 42 S 802.

44. Ratliff v. Baltzer's Adm'r [Idaho] 89 P 71; Gross v. Jones, 89 Miss. 44, 42 S 802. One is so liable though is entirely without understanding. Ratliff v. Baltzer's Adm'r [Idaho] 89 P 71.

45. Gross v. Jones, 89 Miss. 44, 42 S 802. Where one who was for a time insane is a party to a suit for an accounting, he is liable during the period of his insanity only for necessaries furnished him. Id No

statute,[46] that the contract of such a person is not void in the sense that no rights or obligations can arise therefrom, but voidable merely.[47] The test of one's capacity to contract is whether he possesses sufficient mental ability to understand in a reasonable manner the nature and effect of his act or the business he is transacting.[48] Some statutes make a distinction as to capacity to contract between a person of unsound mind and one entirely without understanding.[49] Insanity, at the time it was contracted, is ground for the annulment of a marriage,[50] but mere weakness of mind is not sufficient to avoid the contract, there must be mental incapacity to understand the marriage relation and its reciprocal duties and obligations.[51] A deed [52] or mortgage [53] made by one mentally incompetent is invalid and will be cancelled. Mental incapacity to contract must be established by a preponderance of evidence.[54] Whether it is established in a particular case must be determined by the peculiar facts thereof.[55] In New York the record in lunacy proceedings, as long as it remains in force, is conclusive evidence of incapacity.[56] The finding of a commission in lunacy that one is insane is only prima facie evidence of his insanity at the time of the assignment of a lease a few months prior thereto.[57] Where a sale of lands made by an insane person is set aside, if the vendee has sold the lands to another for more than he paid for them he will be required to account for the difference.[58] The committee of a lunatic may, within the limits of their trust, bind the lunatic by acts clearly for his benefit.[59]

§ 7. *Torts.*[See 8 C. L. 827]

§ 8. *Crimes.*[See 8 C. L. 827]—An insane person cannot be put on trial for a criminal offense.[60] Unless otherwise provided by statute, the exclusive right to de-

power to appoint an agent. Amos v. American Trust & Sav. Bk., 125 Ill. App. 91.

46. In New York contracts of a lunatic made after inquisition and confirmation thereof are absolutely void. 2 Rev. St. [6th Ed.] p. 1094, pt. 2, c. 1, tit. 1, par. 10. O'Reilly v. Sweeney, 54 Misc. 408, 105 NYS 1033.

47. Schneider v. Rabb [Tex. Civ. App.] 18 Tex. Ct. Rep. 962, 100 SW 163. The contract of an insane person for the sale of land is voidable by him upon his regaining his sanity. De Vries v. Crofoot, 148 Mich. 183, 14 Det. Leg. N. 126, 111 NW 775. Where insane person, before contract of sale of lands made by him is consummated, is confined in asylum, sale made by guardian, proceedings for appointment of whom were had to enable consummation of sale, will not preclude insane person, upon his regaining his sanity, from avoiding contract and having sale set aside. Id.

48. Sharbero v. Miller [N. J. Eq.] 65 A 472.

49. Under Rev. St. 1887, § 2411, a conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission. Ratliff v. Baltzer's Adm'r [Idaho] 89 P 71. But if the incompetent comprehends the full force and effect of the contract, and no fraud or deceit is practiced upon him, the contract will not be rescinded. Id.

50, 51. Schneider v. Rabb [Tex. Civ. App.] 18 Tex. Ct. Rep. 962, 100 SW 163.

52. Kent v. La Rue [Iowa] 113 NW 547; Gross v. Jones, 89 Miss. 44, 42 S 802.

53. Gross v. Jones, 89 Miss. 44, 42 S 802.

54. So held in action for annulment of marriage on ground of insanity. Schneider v. Rabb [Tex. Civ. App.] 18 Tex. Ct. Rep. 962, 100 SW 163.

55. Evidence showing mental incapacity: Evidence held to show that grantor in deed of trust was mentally unbalanced, and incapable on that account of making a contract. Gross v. Jones, 89 Miss. 44, 42 S 802. Evidence held to prove grantor mentally incompetent to execute deed. Kent v. La Rue [Iowa] 113 NW 547.

Evidence not showing mental incapacity: Evidence held to show grantor mentally competent to make valid conveyances of his property. Chase v. Spencer [Mich.] 14 Det. Leg. N. 615, 113 NW 578. Evidence held not to show such mental impairment in assignor of lease as to warrant court in setting assigning aside. Sbarbero v. Miller [N. J.] Eq.] 65 A 472. An order of the probate court appointing a guardian for one alleged to be mentally incompetent, finding that he is incompetent to have charge of his estate, does not necessarily disprove his capacity to dispose of property, but may be considered as evidence of his condition. Chase v. Spencer [Mich.] 14 Det. Leg. N. 615, 113 NW 578.

56. 2 Rev. St. (6th Ed.) p. 1094, pt. 2, c. 1, tit. 1, par. 10. O'Reilly v. Sweeney, 54 Misc. 408, 105 NYS 1033. In action for breach of promise of marriage record in lunacy proceedings, conclusive evidence that at time of alleged marriage contract defendant was incapable of making valid contract. Id.

57. Sbarbero v. Miller [N. J. Eq.] 65 A 472.

58. De Vries v. Crofoot, 148 Mich. 183, 14 Det. Leg. N. 126, 111 NW 775.

59. Sharpless v. Boldt [Pa.] 67 A 652.

60. State v. King County Super. Ct. [Wash.] 88 P 207. A criminal prosecution should not proceed against one of whose

termine the mental fitness of the defendant is in the court having jurisdiction of the offense,[61] and if the suggestion of insanity is made pending the trial, it is entirely within the discretion of the court to determine how it shall be disposed of.[62] The burden is upon the defendant to prove insanity disabling him from fairly presenting his defense,[63] and where such issue is submitted to the jury, defendant's counsel has the opening and closing argument.[64] In determining whether a prisoner is mentally incapacitated to make defense, every fact and circumstance showing his mental condition must be considered,[65] each particular case to be determined by its own peculiar circumstances.[66] A verdict of insanity, in a proceeding under the Kansas statute [67] to determine whether one should be committed to the state hospital for the insane, does not conclusively show that such person is incapacitated to make defense to a criminal charge.[68] Where mental incapacity is alleged, and the court upon inquiry finds that it exists, it must stop further proceedings until the disability is removed.[69] If it fails to do so, the subsequent proceedings are void.[70] In Washington if one is acquitted of a criminal offense on the ground of insanity, the court may, in its discretion, order his commitment to prison.[71]

§ 9. *Actions by or against.* See 8 C. L. 327—In an action against an insane person, the statutory requirements as to issuance and service of summons must be complied with.[72] Unless it is otherwise provided by statute, a lunatic may sue by his next friend.[73] In Arkansas the statute requires, where one has been adjudged insane, that suit be brought by his guardian.[74] In a suit against an insane person, his committee may represent him in all matters, except where their interests are in conflict.[75]

ability to fairly and rationally make a defense there is just ground for reasonable doubt. United States v. Chisolm, 149 F 284. One cannot be compelled to answer to a crime who at the time is incapable of doing so in a rational manner, on account of mental disability occurring after alleged commission of offense. In re Wright, 74 Kan. 406, 86 P 460, 89 P 678.

61. In re Wright, 74 Kan. 406, 86 P 460, 89 P 678. Upon affidavit filed alleging that one charged with a capital offense is insane if there are indications of probable insanity, the court has inherent power to conduct an inquiry to determine the question. State v. King County Super. Ct. [Wash.] 88 P 207. The fact that in such case court proceeds in substantial compliance with Ballinger's Ann. Codes & St. § 2660, and that affidavit does not allege that alleged insane person is at large, or unsafe to be at large, does not deprive court of its inherent power to proceed under rules of common law. Id.

62, 63, 64. United States v. Chisolm, 149 F 284.

65. The question cannot be determined merely from the commission of the act for which he is so arraigned. United States v. Chisolm, 149 F 284.

66. United States v. Chisolm, 149 F 284.

67. Gen. St. 1901, c. 99.

68, 69, 70. In re Wright, 74 Kan. 406, 86 P 460, 89 P 678.

71. Provided it considers his discharge manifestly dangerous to safety of community. Ballinger's Ann. Codes & St. § 6959 (Pierce's Code, § 2208). State v. Snell [Wash.] 89 P 931. Ballinger's Ann. Codes & St. § 2660 (Pierce's Code, § 5546), providing for judicial inquiry as to sanity has no application in such case. Id. Section 6959 is not in conflict with state constitution, or with thirteenth and fourteenth amendments to Federal Constitution. Id. Nor is it in conflict with any subsequent statute or any principle of sound public policy. Id. One who has committed homicide and been acquitted on ground of insanity is "manifestly dangerous" within meaning of statute, unless it conclusively appears that his mental condition has undergone a radical change toward a normal condition since the killing, or his physical condition renders him incapable of doing violence. Id. Word "prison" as used in statute comprehends the penitentiary, any county jail, and any state hospital for the insane. Id.

72. In action against a lunatic who has no committee, father, guardian, or wife, requirements of Civ. Code Prac. § 53, are complied with where summons is issued against the lunatic individually and not as a lunatic, and served upon him and also upon superintendent of asylum in which he is confined. Eversole v. Eastern Kentucky Asylum, 30 Ky. L. R. 989, 100 SW 300.

73. May sue by next friend to annul his marriage, contracted while mentally incompetent. Schneider v. Rabb [Tex. Civ. App.] 18 Tex. Ct. Rep. 962, 100 SW 163.

74. Kirby's Dig. § 6021. Hare v. Shaw [Ark.] 104 SW 931. Where action is brought by guardian, and another action for same cause is brought by next friend, court should either dismiss action brought by next friend, or dismiss that brought by guardian and substitute guardian for next friend in action brought by latter. Kirby's Dig. § 6026. Id.

75. Where owner of lot upon which there was a street improvement lien conveyed part of it, with warranty against incumbrances, and subsequently upon his becoming insane grantee was appointed his committee, such committee in suit to enforce

But in Alabama it is not allowable to proceed to judgment affecting the person or estate of a non compos mentis, unless he is represented by a guardian ad litem.[76] In Kentucky it is an essential prerequisite to the enforcement of a claim against the estate of a lunatic, that it be verified or proven as required by statute.[77] Where it has been so proven, it is not essential to suit thereon that a demand be made on the lunatic or on one for him.[78] In this state if the committee of a lunatic cannot make a good defense he must file a report stating that he is unable to do so.[79] Where a guardian ad litem in defending a suit against his ward has fully complied with statutory requirements, no exception can be taken because he did not proceed in a given way.[80] In an action by the state to recover for the maintenance of a lunatic, it will be presumed, unless the contrary is alleged, that the defendant was present in person or by notice when he was adjudged insane.[81] A judgment affecting property rights will not be set aside on the ground that a party to the suit was insane and not properly represented, where such party dies before the motion to set aside is acted upon, and the interests of his heirs are in no way prejudiced.[82] A guardian ad litem cannot, by petition in the suit in which he represents the ward, press a claim for compensation for his services,[83] and in the absence of statutory authority, such compensation is not an element to taxable costs in such suit.[84]

§ 10. *Removal to residence in another state.*—A statute providing for the removal of an insane person to his home in another state is nugatory, for the reason that it cannot be enforced.[85]

INSOLVENCY.

§ 1. Effect of Federal Bankruptcy Act on State Insolvency Laws, 295.
§ 2. Procedure and Parties to Adjudicate Insolvency, 295.
§ 3. Property Passing to Assignee, 295.
§ 4. Administration of Insolvent Estate, 295.
§ 5. Rights and Liabilities Affected by Insolvency and Discharge of Insolvent, 295.

lien may represent his ward as to all matters involved, except question whether whole tax shall be paid out of his property. Barron v. Lexington [Ky.] 105 SW 395.

76. Huddleston v. Perryman & Co. [Ala.] 43 S 807.

77. Ky. St. 1903, § 2154. Eversole v. Eastern Kentucky Asylum, 30 Ky. L. R. 989, 100 SW 300. Where after suit brought to enforce a street improvement lien, owner of the property is adjudged insane, court should require verification of claim before proceeds of sale of property are withdrawn from court. Barron v. Lexington [Ky.] 105 SW 395. But failure to verify claim does not affect title of purchasers at sale. Id. In action by committee of lunatic, if defendant's counterclaim is not verified or proven as statute requires, objection should be by rule to show cause why it should not be dismissed, and not by demurrer. Sebree v. Johnson's Committee, 30 Ky. L. R. 681, 99 SW 340. Defendant in such case need not make demand of his claim before defending, but he cannot prosecute it to judgment before making required affidavit. Id.

78. Eversole v. Eastern Kentucky Asylum for the Insane, 30 Ky. L. R. 989, 100 SW 300.

79. Civ. Code Prac. § 36. No judgment can be rendered against lunatic in action to subject her land to lien for street improvement, until committee makes defense or files such report. Barron v. Lexington [Ky.] 105 SW 395. But a sale to satisfy such lien will not be set aside because committee's answer did not show that he was unable to make defense, where sale is beneficial to ward and for an adequate price, and defect in answer was supplied by answer of guardian ad litem subsequently filed. See Civ. Code Prac. § 134. Id.

80. Eversole v. Eastern Kentucky Asylum, 30 Ky. L. R. 989, 100 SW 300. In action by state to recover for maintenance of lunatic, guardian ad litem sufficiently complies with requirements of Civ. Code Prac. § 38, where he files report stating that after careful examination of case he is unable to make defense. Id.

81. Not essential to recovery that petition allege his presence. Eversole v. Eastern Kentucky Asylum, 30 Ky. L. R. 989, 100 SW 300.

82. Judgment in action by heirs for settlement of intestate's estate will not be set aside on ground that one of heirs was insane and not properly represented, where such heir died before motion to set aside was acted upon, and all his heirs had been parties to action from its inception, and were all adults. Staton v. Byron [Ky.] 105 SW 928.

83. Decree allowing such compensation is invalid. Huddleston v. Perryman & Co. [Ala.] 43 S 807.

84. Huddleston v. Perryman & Co. [Ala.] 43 S 807.

85. So held as to Sess. Laws 1905, p. 253, c. 138. State v. King County Super Ct. [Wash.] 88 P 207.

This article treats only of the general law of insolvency and insolvency procedure and settlement under state law. Matters pertinent to the national bankruptcy law,[86] assignments for the benefit of creditors,[87] composition agreements,[88] fraudulent conveyances and preferential transfers by an insolvent,[89] the appointment, rights and duties of receivers,[90] the discharge of insolvents from imprisonment for debt,[91] and release on bail,[92] and the marshalling of assets [93] are elsewhere treated.

§ 1. *Effect of Federal bankruptcy act on state insolvency laws.* See 8 C. L. 830—The suspension of state statutes by the national bankruptcy act is treated in an appropriate topic.[94]

§ 2. *Procedure and parties to adjudicate insolvency.* See 8 C. L. 838—The petitioning creditor must show that the insolvent debtor is within the class against whom proceedings may be had.[95]

§ 3. *Property passing to assignee.* See 8 C. L. 830

§ 4. *Administration of insolvent estate.* See 8 C. L. 830—By statutes in most states certain claims are entitled to priority,[96] and in the absence of statute the court may in the proper case declare claims subordinate to others of the same class.[97] Where the insolvency of a corporation is due to the gross negligence of its directors, who are also creditors, payment of their claims may be postponed until other creditors are paid in full.[98] The proceeds of the sale of trust property will not be distributed ratably among general creditors [99] except where the trust fund cannot be followed.[1] A sale by a receiver under the decree of the court is in effect under execution process.[2] Hence wage claimants lose their right to a preference by failing to give proper notice prior to the sale.[3]

§ 5. *Rights and liabilities affected by insolvency and discharge of insolvent.* See 8 C. L. 832

INSPECTION, see latest topical index.

INSPECTION LAWS.

The power to pass inspection laws vests in the legislature and when delegated to municipalities may be withdrawn.[4]

86. See Bankruptcy 9 C. L. 343.

87. See Assignments for the Benefit of Creditors, 9 C. L. 269.

88. See Composition with Creditors, 9 C. L. 593.

89. See Fraudulent Conveyances, 9 C. L. 1508.

90. See Receivers, 8 C. L. 1679.

91. See Civil Arrest, 9 C. L. 570.

92. See Bail, Civil, 9 C. L. 319.

93. See Marshalling Assets and Securities, 8 C. L. 838.

94. See Bankruptcy, 9 C. L. 343.

95. To entitle creditors to relief under Act 1881 (Civ. Code 1895, § 2716), it must appear that debtor was engaging in business as a trader at time of filing of petition. Illinois Sewing Mach. Co. v. Whilden, 128 Ga. 169, 57 SE 235. And relief will be denied where he had ceased to be a trader at that time. Id.

96. Starr & C. Ann. St. ch. 82, par. 56, making labor claims preferred, does not create a statutory lien, and hence such claims do not take precedence over a prior mortgage given by insolvent. Seymour v. Berg, 227 Ill. 411, 81 NE 339, rvg. Blocki v. People, 123 Ill. App. 369, overruling Hickman v. Tammen, 184 Ill. 144, 56 NE 361.

97. Where claims do not fall within statutory classification, court may decide questions of priority between claims of same class in accordance with equity and justice. Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 102, 99 SW 212.

98. Elliott v. Farmers' Bk. of Philippi, 61 Va. 641, 57 SE 242.

99. Where correspondent of insolvent stockbroker sold stock purchased to reimburse it for marginal advancements thereon which had been received by insolvent but retained any surplus remaining was held to constitute a trust fund for benefit of original purchaser through insolvent. Denison v. Emery, 153 F 427.

1. Stock transaction held to create relation of debtor and creditor. Denison v. Emery, 153 F 427.

2, 3. Mould v. Mould, 28 Pa. Super. Ct. 318.

4. Act July 1, 1874, Hurd's Rev. St. 1905, c. 104, §§ 1-8, withdrew from municipalities all power over oil inspection. City of Chicago v. Burke, 226 Ill. 191, 80 NE 720.

INSTRUCTIONS.

§ 1. Object and Purpose, 296.
§ 2. Province of Court and Jury, 296.
§ 3. Duty of Instructing, 297. Requests for Instructions, 298. Limiting Number of Instructions, 300. Form and Sufficiency of Request, 301. Time of Making Request, 301. Disposition of Requests, 301. Repetition, 303.
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The scope of this topic is confined to instructions in civil cases. Instructions in criminal cases are treated elsewhere.[5] It deals only with general rules. Instructions in particular actions or relating to particular subjects are treated in topics dealing with such actions and subjects. The effect of instructions withdrawing evidence or otherwise seeking to cure error is also excluded.[6]

§ 1. *Object and purpose*[See 8 C. L. 333] of instructions is to state and explain the law applicable to the case.[7] It is not the function of instructions to cure errors in the admission of evidence.[8] It is error to use instructions for the purpose of holding a party up to ridicule and contempt.[9]

§ 2. *Province of court and jury.*[See 8 C. L. 333]—It is the exclusive province of the jury to determine all issues of fact,[10] and the instructions must not assume the existence of disputed facts [11] or comment on the weight of the evidence. With respect to the credibility of witnesses the rules of law may be stated but the question of credibility must be left to the jury.[12] If the evidence is conflicting,[13] although different minds acting within the limitations prescribed by law might draw different conclusions [14] or inferences therefrom,[15] it should be submitted; but where facts are

5. See Indictment and Prosecution, 10 C. L. 57.

6. See Harmless and Prejudicial Error, 9 C. L. 1563; Argument and Conduct of Counsel, 9 C. L. 239.

7. Styles v. Chesapeake & O. R. Co. [W. Va.] 59 SE 609. Where an instruction becomes the law of the case, the jury should follow and obey it. Atchison, etc., R. Co. v. Schroll [Kan.] 92 P 596.

8. Error in admitting evidence not cured by instruction. Martin v. Walker & Williams Mfg. Co., 106 NYS 708.

9. Muhlig v. Rebhan, 105 NYS 110.

10. Choctaw, etc., R. Co. v. Thompson [Ark.] 100 SW 83; Harley v. Sanitary Dist. of Chicago, 226 Ill. 213, 80 NE 771.

11. See post, § 4.

12. See post, § 12.

13. Stanley v. Beckham [C. C. A.] 153 F 152; Field v. Winheim, 123 Ill. App. 227; Stephens v. Elkins, 126 Ill. App. 619; Coal Belt Elec. R. Co. v. Young, 126 Ill. App. 651; Harley v. Aurora, etc., R. Co., 128 Ill. App. 643; Chicago & Alton R. Co. v. Hill, 130 Ill. App. 218; Sheker v. Machovec [Iowa] 110 NW 1055. Special province of jury to settle issue where evidence conflicting. Cantelou v. Trinity & B. V. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 457, 101 SW 1017. Issues are for jury where evidence is sharply in conflict. Gallaway v. Massee [Wis.] 113 NW 1098. Question on which evidence was conflicting should have been submitted. Capital City Carriage Co. v. Moody & Son [Iowa] 110 NW 903. Request to instruct generally for defendants, where evidence conflicting, properly refused. Robinson v. Green [Ala.] 43 S 797. Error to instruct that settlement was made at a certain time when the evidence was conflicting. Thompson v. Fitzgerald [Tex. Civ. App.] 19 Tex. Ct. Rep. 967, 105 SW 334. Request for peremptory instruction properly refused where evidence on all issues conflicting. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 SW 1072. Where evidence was conflicting a request for an affirmative instruction was properly refused. Birmingham R., Light & Power Co. v. Martin [Ala.] 42 S. 618. In an action for breach of contract, the evidence on material issues being conflicting, a request that if jury believed the evidence they should find the defendant broke the contract sued on was properly refused (Fletcher v. Prestwood [Ala.] 43 S 231), as was an instruction to find for plaintiff (Id.). Where the evidence was conflicting whether a husband was doing business in his wife's name, question was for jury. Anderson v. Walsh [N. Y.] 81 NE 764.

14. On motion to nonsuit where fair mind-

undisputed [16] and only one inference can be drawn from them, a question of law is presented.[17] It is the province of the court to determine questions of law and it is error to submit them to the jury.[18] The construction of written instruments,[19] of pleadings,[20] the interpreting of statutes,[21] and the determination whether a municipal ordinance is in force,[22] are questions of law.

§ 3. *Duty of instructing.* See 8 C. L. 335—Each party is entitled to instructions presenting his theory of the case [23] when such theory is presented and supported,[24]

ed men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, held that the question should go to the jury. Dedevick v. Central R. Co. [N. J. Law] 65 A 833. Where evidence sufficient to raise issue about which reasonable men might reasonably differ held sufficient to go to the jury. United States Leather Co. v. Howell [C. C. A.] 151 F 444.

15. Where there was doubt as to whether a representation was a warranty, held proper to submit to jury. Larson v. Calder [N. D.] 113 NW 103. In an action for negligence if the evidence fairly tends to prove any wrong or neglect of duty on the part of defendant causing the injury, a requested peremptory instruction for defendant should be refused, otherwise not. Village of Montgomery v. Robertson, 229 Ill. 466, 82 NE 396.

16. Undisputed evidence showing that a fire policy was issued by insurer on application authoritatively taken, court in instruction should recognize existence of agency and determine powers and limitations of agent. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94.

17. Good v. Johnson, 38 Colo. 440, 88 P 439; Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94.

18. Miller v. Wabash R. Co., 123 Ill. App. 60; American Bonding & Trust Co. v. New Amsterdam Casualty Co., 125 Ill. App. 33; Sasse v. Rogers [Ind. App.] 81 NE 590; Universal Metal Co. v. Durham & C. R. Co. [N. C.] 59 SE 50; Desautelle v. Nasonville Woolen Co. [R. I.] 66 A 579; Antone v. Miles [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 105 SW 39. To submit to the jury whether a contract has been substantially performed, without informing them what constitutes a substantial performance, is error. Dazey v. Stairwalt, 123 Ill. App. 489. Objectionable as submitting questions of law. McEntyre v. Hairston [Ala.] 44 S 417. Erroneous as submitting both a question of law and of fact to the jury. Harrison v. Franklin [Mo. App.] 103 SW 585. Objectionable as allowing jury to say what facts were material in securing the opinion of an expert witness. Vannest v. Murphy [Iowa] 112 NW 236. An instruction leaving it to the conjecture of the jury if a certain change in the order of work excused delay in completing a contract was erroneous. First Nat. Bank of Portland v. Carroll, 35 Mont. 302, 88 P 1012. Authorizing jury to pass on materiality of facts or circumstances admitted in evidence and embodied in a hypothetical question to an expert, and to give any weight to the opinion if any of the facts assumed there be found not true, was erroneous. Ball v. Skinner, 134 Iowa, 298, 111 NW 1022. Referring to the jury questions of law and the construction of the complaint was improper. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032. Where in an action for personal injuries received in alighting from a train, if the theory of plaintiff was true, the sudden movement of the train was the cause of the injuries, and constituting negligence as a matter of law, and the court having submitted to the jury all of the issues of contributory negligence raised by the pleadings and evidence, there was no error in refusing to submit as an issue whether "under all of the circumstances of the case," the sudden movement of the train was negligence on the part of defendant. Galveston, H. & H. R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699. It was the duty of the court to determine the relation between a contractor and a third person injured while doing work let by an employe. Good v. Johnson, 38 Colo. 440, 88 P 439. Instruction **not objectionable** as submitting to the jury the question on whom burden of proof rested. Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 SW 1070.

19. Veitch v. Jenkins [Va.] 57 SE 574. Determining the **relations of parties** to a written instrument is for the court. Id.

20. Complaint. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032.

21. Instruction improper as committing to jury the judicial function of interpreting a statute. Cooper v. St. Louis, etc., R. Co., 123 Mo. App. 141, 100 SW 494.

22. It is a question of law for the court as to whether an ordinance is in force in a city. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 SW 142.

23. Louisville & N. R. Co. v. Britton [Ala.] 43 S 108; Scanlon v. Chicago Union Trac. Co., 127 Ill. App. 406; Clark v. Farmington Coal Co., 130 Ill. App. 192; Lord v. Rowse [Mass.] 80 NE 822; Patterson v. North Carolina Lumber Co. [N. C.] 58 SE 437; Painter v. Kilgore [Tex. Civ. App.] 19 Tex. Ct Rep. 380, 101 S. W. 809; Bradford v. National Benefit Ass'n, 26 App. D. C. 268. Where the court has affirmatively instructed as to plaintiff's side of the case, defendant has the right to have the negative of it presented. Kessler v. Burckell [Tex. Civ. App.] 99 SW 173. Having instructed the jury as to how the law requires them to answer a certain issue upon the facts according to plaintiff's contention, omission to state defendant's contentions respecting such phase of the evidence, and how to answer the issue should they sustain it, was error. Jarrett v. High Point Trunk & Bag Co., 144 N. C. 299, 56 SE 937. Where there was evidence on both sides of the question whether plaintiff alighted from a moving car, defendant was entitled to have its phase of the evidence submitted with the legal effect of the facts, if found, as his evidence tended to prove.

and he is entitled to have such instructions made correct,[25] and if the court's attention is called to a material omitted issue, it should instruct thereon.[26] In some jurisdictions the court is required to instruct of its own motion as to the general features of the law applicable to the case,[27] but in other jurisdictions the court is not required to instruct except upon request.[28]

Requests for instructions.[See 8 C. L. 335]—The court in instructing is not required to see that instructions cover every feature of the case; an error of omission is not ground for reversal in the absence of a request supplying it.[29] If an instruction is

Allen v. Durham Trac. Co., 144 N. C. 288, 56 SE 942. A party is entitled to a clear and distinct statement of the law in answer to every point properly drawn that is material and applicable to the case, and warranted by the facts and the evidence, if not fully covered in the general charge. Schomacker Mfg. Co. v. Yankee Club, 30 Pa. Super. Ct. 162.

24. Georgia R. & Elec. Co. v. Baker, 1 Ga. App. 832, 58 SE 88; Sampsell v. Rybczynski, 229 Ill. 75, 82 NE 244; Keokuk & Hamilton Bridge Co. v. Wetzel, 130 Ill. App. 81; Wren v. Metropolitan St. R. Co., 125 Mo. App. 604, 102 SW 1077; Chesapeake & N. R. v. Crews [Tenn.] 99 SW 368; Smith v. International & G. N. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 583, 99 SW 564; Jones v. Houston [Tex. Civ. App.] 17 Tex. Ct. Rep. 541, 99 SW 750; Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 88, 99 SW 869; Antone v. Miles [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 105 SW 39; Yellow Pine Oil Co. v. Noble [Tex.] 19 Tex. Ct. Rep. 841, 105 SW 318. If a party would be entitled to recover on proof of facts sustaining his theory, the court should instruct with reference thereto, and it is error to submit the case on a different theory than that outlined in the court's preliminary statement. Kempe v. Bennett, 134 Iowa, 247, 111 NW 926. Evidence that a road officer of a street railroad company threatened a passenger with the controller handle of the car, and the passenger was forcibly removed from a seat near the front of the car to the back platform, was sufficient to justify an instruction as to the company's liability if its servants threatened and put the plaintiff in peril of his life, and of great bodily harm, and compelled him to leave the car. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 SW 495. Plea of accord and satisfaction supported by evidence entitles party to instruction presenting such defense and embodying a hypothetical statement of the facts upon which it was founded. Singer Sewing Mach. Co. v. Lee [Md.] 66 A 628.

25. Should state the law of the case correctly. Jackson v. Citizens' Bk. & Trust Co. [Fla.] 44 S 516; Wrightsville & T. R. Co. v. Gornto [Ga.] 58 SE 769; Southern R. Co. v. Thompson [Ga.] 58 SE 1044.

26. Where the main charge fails to submit a defense, as to which there is evidence tending to prove it, it is the duty of the court to give special instructions embodying a correct enunciation of the law applicable to such defense. G. A. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 18 Tex. Ct. Rep. 416, 99 SW 715.

27. By statute imperative that court instruct jury in law applicable to case. Desautelle v. Nasonville Woolen Co. [R. I.] 66 A 579. Duty of court to instruct on all issues presented in the pleadings and evidence. Lincoln Trac. Co. v. Brookover [Neb.] 111 NW 357. The principle of law contained in Civ. Code 1895, § 3830, being clearly and distinctly raised by answer and evidence, held reversible error not to have instructed on statute, even without request to do so. Seaboard Air Line R. Co. v. Bostock, 1 Ga. App. 189, 58 SE 136. Although not suggested or presented by the parties, the court may of its own motion present any possible view of the evidence to the jury. Dusopole v. Manos, 184 Mass. 355, 80 NE 481.

28. Under Mo. Rev. St. 1899, § 748 (Ann. St. 1906, p. 733), the court is not required to give instructions in the absence of a request. Wilson v. Kansas City Southern R. Co., 122 Mo. App. 667, 99 SW 465; Hall v. St. Louis & S. R. Co., 124 Mo. App. 661, 101 SW 1137; Sowders v. St. Louis & S. F. R. Co. [Mo. App.] 104 SW 1122. That plaintiff requested no instructions and the court gave none for him is not reversible error. Till v. St. Louis & S. F. R. Co., 124 Mo. App. 281, 101 SW 624. Failure to give an instruction not demanded by the evidence was not error in the absence of written request. Shields v. Georgia R. & Elec. Co., 1 Ga. App. 172, 57 SE 980. Although Const. 1895, requires judge in instructing "to declare the law," yet court is not required to instruct in the absence of a request in accordance with rules of court. Morrison v. Mutual Ben. Ass'n [S. C.] 59 SE 27. Confining instructions to giving requests not reversible error. Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 NW 76. Failure of court to give instructions not error, unless proper instructions are specifically requested and refused. Lacey v. Bentley [Colo.] 89 P 789. Although defendant was entitled to a peremptory instruction, yet, if not requested, it was not incumbent on court to give it. Samples v. Smythe [Ky.] 105 SW 415. When no instructions are properly presented, the court is not bound to instruct as to law of case. Taylor v. Barnett [Colo.] 90 P 74. Failure to instruct where there is no occasion to do so is not error. Avery v. White, 79 Conn. 705, 66 A 517. An error of omission is not ground for complaint where the court had instructed the jury orally by consent, if its attention was not called to such omission at the time. Kelly v. Judy, 125 Ill. App. 525.

29. Georgia S. & F. R. Co. v. Stanley, 1 Ga. App. 487, 57 SE 1042; Brown v. McBride [Ga.] 58 SE 702; City of Dublin v. Dudley [Ga. App.] 59 SE 84; Wahl v. St. Louis Transit Co., 203 Mo. 261, 101 SW 1; Harbert v. Atlantic, etc., R. Co. [S. C.] 59 SE 644;

not as full as desired [30] or omits reference to particular issues,[31] or subjects,[32] or is deemed ambiguous [33] or misleading,[34] or not sufficiently explicit,[35] specific,[36] or defi-

Bridgeport Coal Co. v. Wise County Coal Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 678, 99 SW 409; St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 SW 867. Held no error for court to fail to instruct as to the province of the jury to pass on evidence and determine what was thereby established. Houghton v. New Haven, 79 Conn. 659, 66 A 509. In an action for death by wrongful act, where the facts show the "humanitarian doctrine" applicable, an instruction on the whole case was not erroneous for omitting the elements of contributory negligence. Johnson v. St. Joseph Terminal R. Co., 203 Mo. 381, 101 SW 641. Not objectionable as omitting element of discovery of an obstruction in time to avoid injury, in the absence of a request on that point. Union Pac. R. Co. v. Shovall [Colo.] 89 P 764. Where pleas are omitted which a party deems essential to a preliminary statement of the pleadings, a special instruction supplying such omission should be requested. Galveston, H. & H. R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699. In trespass to try title to land, there was no error in failure to instruct that the delivery must have been made with the knowledge and consent of defendants and with intent to pass title. Broom v. Herring [Tex. Civ. App.] 18 Tex. Ct. Rep. 540, 101 SW 1023. In an action for negligent personal injury, an instruction omitting to call attention to averments in the petition for acts of negligence not sustained by proof was not error. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 SW 675. Where the jury was instructed as to the issues raised by the pleadings, in an action under Civ. Code 1902, § 2183, relating to duties of railroads at highway crossings in protecting rails, and such statute was read, it was not error to fail to instruct that noncompliance with the statute was negligence per se, there being no request to charge. Williams v. Seaboard Air Line R., 76 S. C. 1, 56 SE 652. That the court in the opening paragraph of its charge failed to enumerate all of the defenses of defendant is no cause for reversal, in the absence of a request for a special instruction covering the issues omitted. Chicago, etc., R. Co. v. Hiltibrand [Tex. Civ. App.] 18 Tex. Ct. Rep. 93, 99 SW 707.

30. Louisville & N. R. Co. v. Simrall's Adm'r, 31 Ky. L. R., 1269, 104 SW 1011; Galveston, etc., R. Co. v. Stoy [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 99 SW 135; Baldwin v. Polti [Tex. Civ. App.] 18 Tex. Ct. Rep. 971, 101 SW 543; Burton Lumber Corporation v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 SW 822.

31. Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535; Wrightsville & T. R. Co. v. Gornto [Ga.] 58 SE 769; City of Louisville v. Knighton, 30 Ky. L. R. 1037, 100 SW 228; Scanlon v. Northwood, 147 Mich. 139, 13 Det. Leg. N. 1013, 110 NW 493; Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 NW 76; Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 SW 1072; Hooper v. Metropolitan St. R. Co., 125 Mo. App. 329, 102 SW 58; Nelson v. R. J. Reynolds Tobacco Co., 144 N. C. 418, 57 SE 127; Smith v. Western Union Tel. Co. [S. C.] 58 SE 6; San Antonio Trac. Co. v. Flory [Tex. Civ. App.] 18 Tex. Ct. Rep. 575, 100 SW 200; Thompson v. Hicks [Tex. Civ. App.] 17 Tex. Ct. Rep. 669, 100 SW 357; Scrimshire v. Smith [Tex. Civ. App.] 19 Tex. Ct. Rep. 18, 103 SW 1110.

32. Failure to charge on burden, if a transfer of chattels was without consideration, not error in the absence of a request. Major v. Brewster, 148 Mich. 623, 14 Det. Leg. N. 323, 112 NW 490. To entitle party to complain of instruction because of its not stating acts of negligence averred in the petition, he should prepare and submit special instruction to that end. Galveston, etc, R. Co. v. Patillo [Tex. Civ. App.] 18 Tex. Ct. Rep. 941, 101 SW 492. An error in failing to give instruction based on certain evidence was not available in absence of a request for instruction or such point. Joy v. Cale, 124 Mo. App. 569, 102 SW 30. In action for injuries received by premature starting of street car, if defendant desired element of deafness eliminated from estimate of damages, request should have been made. Dreyfus v. St. Louis & S. R. Co., 124 Mo. App. 585, 102 SW 53.

33. If a party fears that the language used by the court in an instruction may be taken in a broader sense than is consistent with the law, it is such party's duty to call the attention of the court thereto. Hayes v. Moulton, 194 Mass. 157, 80 NE 215. Instruction refused as too broad. Lord v. Rowse [Mass.] 80 NE 822.

34. An instruction which was misleading and not warranted by the facts was not error in the absence of a request for an explanatory instruction. Southern R. Co. v. Hobbs [Ala.] 43 S 844. If a party is apprehensive that jury might inadvertently be misled in applying instructions to different counts, specific attention of court should be called to it and further instructions requested. Baldwin v. American Writing Paper Co. [Mass.] 82 NE 1.

35. Vorhes v. Buchwald [Iowa] 112 NW 1105. If more explicit instructions than those given were desired, they should have been presented in writing with request that they be given. Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972. Where an obscurity in an instruction could have been dispelled by a special request upon the point in the absence of such request, held that instruction did not present such affirmative error as to require reversal. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 18 Tex. Ct. Rep. 345, 99 SW 577. Where the correct rule as to measure of damages was given failure to explain rule, in the absence of a special request, held not affirmative error. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 18 Tex. Ct. Rep. 376, 99 SW 587.

36. Cooney v. Com. Ave. St. R. Co. [Mass.] 81 NE 905. If specific and elaborate instructions are desired, request for them should be made at the trial. First Nat. Bank v. Pickens [Ind. T.] 104 SW 947. In the absence of a request, failure to give specific and elaborate instructions is not error. Id.

nite,[37] or if amplification of a charge is desired,[38] a suitable instruction should be requested. So, also, a party may not complain of failure to define technical terms,[39] nor of an unsatisfactory definition,[40] in the absence of a request. If he desires evidence admitted for a special purpose limited to such purpose, he must make a request.[41] If an instruction is deemed too restrictive,[42] of if he desires comment where evidence erroneously admitted is stricken,[43] or an instruction limited,[44] or form of stating defense different,[45] a suitable instruction should be requested; but where an instruction given is incorrect, the fact that no request was made does not preclude the injured party from asserting error on appeal.[46] In some jurisdictions the right of a party to move for instructions is a personal privilege and may be waived.[47]

Limiting the number of instructions.[See 6 C. L. 46]—While the practice of requesting a great number of instructions leads to confusion and is often mentioned with disapproval,[48] several instructions may be given on the same subject.[49]

If objection is that instruction submitted matter too generally, should ask for more specific instruction. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 100 SW 1175. Party cannot complain that instructions given were general principles of law where no specific instructions requested. Rochester v. Bull [S. C.] 58 SE 766. If correct so far as it goes, failure to give a more specific instruction was not erroneous, in the absence of a request therefor. New York, etc., R. Co. v. Flynn [Ind. App.] 81 NE 741; Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835. Party cannot complain of failure to give more specific instruction on damages where he did not request one. Stewart & Hoskins v. Walker [Ark.] 102 SW 696. Where an instruction fully, clearly, and correctly charged as to measure of damages, there was no material error in failing to charge specifically as to set-offs against damages proved, especially in the absence of a request to do so. City of Macon v. Daley [Ga. App.] 58 SE 540. If party desires more specific instructions as to whether acts were in scope of motorman's employment, request should be made. Wahl v. St. Louis Transit Co., 203 Mo. 261, 101 SW 1.

37. Party cannot object that an instruction correctly stating the law was too general where he presented no requests for an instruction making it more definite and certain. Henderson v. Los Angeles Trac. Co., 150 Cal. 689, 89 P 976. Where the law of the case was covered in an instruction in general and comprehensive terms, and there was no request to make more definite, held no error. Dempsey v. Western Union Tel. Co. [S. C.] 58 SE 9.

38. Tabor v. Macon R. & L. Co. [Ga.] 59 SE 225. Where the court properly instructed as to general rule, if plaintiff contended that facts of case took it out of general rule, attention of court should have been called to contention. Merrinane v. Miller, 148 Mich. 412, 14 Det. Leg. N. 242, 111 NW 1050.

39. Omission to define the meaning of "ordinary and reasonable care and diligence" was not error in the absence of a written request. Atlantic & B. R. Co. v. Smith [Ga.] 58 SE 542. The word "negligence" having been properly used by the court in its instructions, failure to define it was not error, in the absence of a request. South Covington & C. St. R. Co. v. Brown, 31 Ky. L. R. 1072, 104 SW 703.

40. If party wishes terms used in an instruction to be more clearly defined, he must present request to that effect. St. Andrew Parish Township Com'rs v. Charleston Min. & Mfg. Co., 76 S. C. 382, 57 SE 201.

41. Rosier v. Metropolitan St. R. Co., 125 Mo. App. 159, 101 SW 1111. Failure to restrict testimony to a certain purpose was not error in the absence of such a request. Bluestein v. Collins [Tex. Civ. App.] 19 Tex. Ct. Rep. 562, 103 SW 687.

42. Redmond v. Sherman Cotton Mills [Tex. Civ. App.] 17 Tex. Ct. Rep. 983, 100 SW 186.

43. Failure to instruct where immaterial evidence admitted was stricken out on discovery of immateriality, not error in absence of request. Pierson v. Illinois Cent. R. Co., 149 Mich. 167, 14 Det. Leg. N. 405, 112 NW 923.

44. Omission to give qualifying instruction was not error in absence of request for further instruction. Seivert v. Galvin [Wis.] 113 NW 680.

45. Where a party desires a defense submitted disjunctively rather than conjunctively, request should to that effect be made. Texas & P. R. Co. v. Patterson [Tex. Civ. App.] 18 Tex. Ct. Rep. 519, 102 SW 138.

46. A party may complain of an erroneous instruction in behalf of his adversary, although he did not request that a correct one be given. Dawson v. Wombles, 123 Mo. App. 340, 100 SW 547.

47. Under Rev. St. 1899, § 748 [Ann. St. 1906, p. 733]. Sowders v. St. Louis & S. F. R. Co. [Mo. App.] 104 SW 1122. Where plaintiff fails to ask instructions, it is not error to refuse to make him do so (Marion v. St. Louis & S. F. R. Co. [Mo. App.] 104 SW 1125), or to decline to instruct from plaintiff's standpoint on its own motion, even though requested ore tenus to do so by defendant (Id.). Not error to refuse to instruct for plaintiff, at defendant's request, where plaintiff requests no instructions. Sowders v. St. Louis & S. F. R. Co. [Mo. App.] 104 SW 1122.

48. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 S 903.

49. Giving several instructions on same subject was not improper. Johnston v. Beadle [Cal. App.] 91 P 1011.

Form and sufficiency of request.[See 8 C. L. 330]—Requested instructions need not be given in any set form [50] but are usually required to be made in writing.[51] They should be strictly correct [52] and should not be involved or misleading.[53] Under some circumstances the request should relate to particular issues.[54]

Time of making request.[See 8 C. L. 340]—Where instructions are handed up in apt time, it is error for the court to refuse to consider them.[55] In some jurisdictions the time within which instructions should be presented rests in the discretion of the court.[56] It is not error for a court to refuse to send instructions to the jury which were not requested until after argument.[57]

Disposition of requests.[See 8 C. L. 340]—Ordinarily, the court is not bound to give an instruction in the exact language of the request.[58] Requests may be modified,[59] if

50. See post, § 14. Sufficient to give substance, if proper. Payne v. Whatcom County R. & L. Co. [Wash.] 91 P 1084.

51. It is not error to refuse an oral request for an instruction which is not formulated in writing. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427.

52. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867. If request is not sound in its entirety, refusal is not error. Smith v. Hightower [Ga. App.] 59 SE 593. Not error to refuse instruction which purporting to quote from declaration does not accurately do so. Hirsch Iron & Rail Co. v. Coleman, 227 Ill. 149, 81 NE 21. It is proper to refuse a request for instruction that does not correctly state the law of the case. American Bonding & Trust Co. v. New Amsterdam Casualty Co., 125 Ill. App. 33; Citizens' Savings, Loan & Building Ass'n v. Weaver, 127 Ill. App. 252. A party is not entitled to an instruction which is calculated to restrict or limit liability imposed by statute. Hall v. Ditto, 128 Ill. App. 187. The jury being limited to a verdict for injuries to feelings, refusal of instruction directing them to specify in verdict amount of award for injury to feelings was not error. McArthur v. Sault News Printing Co., 148 Mich. 556, 14 Det. Leg. N. 265, 112 NW 126. Requests, the predicates of which are false, may be refused. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 18 Tex. Ct. Rep. 932, 101 SW 545. Request not being a complete statement of the law is properly refused. Nichols v. Shaw [R. I.] 67 A 429. Proper to refuse request that plaintiff must prove collision was caused directly and "solely" by defendant's negligence, though instruction would have been proper had "proximately" been used instead of "solely." Wallack v. St. Louis Transit Co., 123 Mo. App. 160, 100 SW 496. It is not error for the court to refuse a requested instruction which is faulty, and neither is it erroneous to refuse to instruct orally where no proper specific instruction on the point is requested. Williams v. State, 147 Ala. 10, 41 S 992. Request properly refused as requiring statement that there was no evidence of fact. Southern R. Co. v. Taylor [Ala.] 42 S 625. Requested instructions **need not contain independent matters** going to exonerate employer from charge of negligence, in action by employe for injuries caused by defective machinery. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637.

53. North American Restaurant & Oyster House v. McElligott, 221 Ill. 317, 81 NE 388. A request that is confused and inconsistent should be rejected. Robinson v. Duvall, 27 App. D. C. 535.

54. Proper to refuse instruction not expressly designating particular question of a special verdict to which they relate. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738.

55. If necessary court should be adjourned for such purpose. State v. Johnson, 144 N. C. 257, 274, 56 SE 922.

56. Held not too late to request written instruction after court reconvened following noon recess, and before argument. Universal Metal Co. v. Durham & C. R. Co. [N. C.] 59 SE 50.

57. Tucker v. Sherman, 9 Ohio C. C. (N. S.) 70.

58. Sufficient if given substantially in words of request. United States Leather Co. v. Howell [C. C. A.] 151 F 444. Not entitled to have request given in its exact language, though correct in law and applicable to case, giving of substance being sufficient. Lord v. Rowse [Mass.] 80 NE 822. Court may refuse to instruct in language of request, and present case in his own language, if the entire case is covered and the law correctly declared. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F 241. Where matter was covered correctly and sufficiently in general instruction, not reversible error to refuse to give in identical language of written request. Fitzgerald Cotton Oil Co. v. Farmers' Supply Co. [Ga. App.] 59 SE 713. Where the law is properly stated to the jury, the court is not bound to instruct in the language of written requests even though such language is quoted from the opinions in reported cases. Crotty v. Danbury, 79 Conn. 379, 65 A 147. No error in refusing instruction in language of request. Henderson v. Los Angeles Trac. Co., 150 Cal. 689, 89 P 976. There is no error in refusing to adopt the exact words of the request, if, in substance, the relevant rules of law proposed are covered. Cunningham v. Springer, 203 U. S. 647, 51 Law. Ed 662.

59. Georgia R. & Banking Co. v. Adams, 127 Ga. 408, 56 SE 409; Reisch v. People, 229 Ill. 574, 82 NE 321; Lord v. Rowse [Mass.] 80 NE 822; Sebesta v. Supreme Ct. of Honor [Neb.] 109 NW 166. The modification of requested instructions not affecting their legal effect held not error. Choctaw, O. & G. R. Co. v. Hickey [Ark.] 99 SW 839. Verbal modification held proper. Deer-

done correctly.[60] A requested instruction which is correct and applicable and not adequately covered by other instructions should be given.[61] Refusal to give it is reversible error unless it affirmatively appears that no prejudice resulted.[62] If an in-

ing v. Barzak, 227 Ill. 71, 81 NE 1. Erroneous request held properly modified by adding statement. St. Louis I. M. & S. R. Co. v. Smith [Ark.] 100 SW 884. Requested instruction properly modified. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 SW 1072. Adding words to a request granted that were simply explanatory, and not affecting the proposition of law given, was not error. Langston v. Cothran [S. C.] 58 SE 956. There was no error in refusing to give an instruction as offered and in giving it as amended. Southern R. Co. v. Stockdon, 106 Va. 693, 56 SE 713. In an action for slander request properly modified by adding proviso. Crafer v. Hooper, 194 Mass. 68, 80 NE 2. Modification of instruction as to waiver by inserting the word "full" before the word "knowledge," the instruction stating that knowledge of an act on which a forfeiture might be based would constitute a waiver, held not erroneous. Harley v. Sanitary District of Chicago, 226 Ill. 213, 80 NE 771. No error in modifying instruction by striking out word where modification beneficial to party complaining. St. Louis Merchants' Bridge Terminal R. Ass'n v. Schultz, 226 Ill. 409, 80 NE 879. Not erroneous to modify requested instruction which as offered was erroneous. Industrial Lumber Co. v. Bivens [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831. A modification to meet the law and the facts is proper. Instruction as to variance between pleading and proof held properly modified so as to cover evidence which if true would preclude consideration of variance. Orr v. Waterson, 228 Ill. 138, 81 NE 825. Unless the modification is prejudicial, the court will not reverse therefor. St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 SW 583. A modification repeating propositions in foregoing instructions may be made. Chicago City R. Co. v. Foster, 128 Ill. App. 571. A modification that supplies an essential element is proper. Purcell v. McKeel, 129 Ill. App. 428. A mere verbal modification which does not affect the general sense of the instruction is not objectionable. Deering v. Barzak, 227 Ill. 71, 81 NE 1.

60. Party requesting correct instructions may complain if erroneously modified. Coleman v. Yazoo, etc., R. Co. [Miss.] 43 S 473. An instruction that correctly states the law of the case should not be modified so as to nullify it. Instruction on assumed risk by servant. Pioneer Fire Proofing Co. v. Clifford, 118 Ill. App. 457. An instruction correctly stating the law should not be modified so as to impose too high a duty on a party. In action for damages for personal injuries, the defendant asked instructions stating the law with substantial accuracy. The court modified it by inserting words, the effect of which was to impose on defendant a degree of care so high as to be faultless. Id. Modification of request by adding a condition that jury should also find that the decree had not been appealed from, where there was no evidence that a decree had been appealed from, was erroneous. Murphy v. Citizens' Bk. of Junction City [Ark.] 100 SW 894. Error in modifying request. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. A modification which refers to a paper not brought to the attention of the jury should not be made. Citizens' Sav., Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252. A modification which leaves the jury to speculate as to the law should not be inserted. An instruction that "you should consider that only as law which has been given you by the court in the instructions," was modified by the insertion of the words "is not inconsistent with that." Erroneous. Chicago City R. Co. v. Mauger, 128 Ill. App. 512. An instruction which correctly states the law should not be modified so as to mislead the jury. Ashley v. Fitzwilliams, 127 Ill. App. 291.

61. Cage v. Owens [Tex. Civ. App.] 19 Tex. Ct. Rep. 6, 103 SW 1191; El Paso, etc., R. Co. v. Foth [Tex.] 19 Tex. Ct. Rep. 835, 105 SW 322. In action for damages for overflow of water, it is error to refuse a requested instruction that if the jury believe from the evidence that the whole occurrence about the alleged overflow or leakage of water was a mere accident and that it happened without any fault or negligence on the part of defendant, they should find for defendant. Halsler v. Hayden, 124 Ill. App. 264. An instruction correctly refusing the special rule of law on which a party relies and grouping the facts to establish it was refused improperly simply because the jury might infer from the general instruction that the requested rule was correct. Yellow Pine Oil Co. v. Noble [Tex.] 19 Tex. Ct. Rep. 841, 105 SW 318. Refusal of instruction containing a clear statement of the issues was erroneous, where the court had omitted to submit issues. Purcell Cotton Seed Oil Mills v. Bell [Ind. T.] 104 SW 944. Where there was no evidence to sustain plaintiff's necessary allegations of fact, refusal of defendant's instruction to that effect was error. Newsome v. Western Union Tel. Co., 144 N. C. 178, 56 SE 863. Error to refuse to instruct that neither sympathy for plaintiff nor prejudice against defendant should influence verdict, where no other point in series covered point. Jones & Adams Co. v. George, 227 Ill. 64, 81 NE 4. Request improperly refused as covered by other instructions. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44.

62. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694; Evans v. Nall, 1 Ga. App. 42, 57 SE 1020; Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 SW 142; Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 954, 101 SW 453. Error appearing in arbitrary refusal of instructions, it was ground for reversal unless the record showed that the error was without prejudice. Crane Co. v. Hogan, 228 Ill. 338, 81 NE 1032. Refusal of a requested instruction requiring proof of allegations from plaintiff as a condition precedent to verdict for him is error. Lemaster v. Southern Missouri R. Co., 122 Mo. App. 313, 99 SW 500.

struction is erroneous the court is not ordinarily required to correct and give it,[63] and if one of several joint requests is incorrect, all may be refused,[64] or those that are correct may be given and erroneous ones eliminated,[65] or if a portion of an instruction is erroneous, the court may give only the part which is correct.[66] A requested instruction which is incorrect, if sufficient to call the court's attention to the issue, may require the giving of a correct instruction.[67] A request which adds nothing more than elaboration or emphasis may be refused.[68]

Repetition.[See 6 C. L. 341]—A requested instruction substantially covered by the charge already given may be refused,[69] though correct and applicable to the case,[70]

Error not prejudicial: Refusal to submit an issue of vel non was not prejudicial where the court directed that a certain issue be answered "No," if there was an easement, and it was answered "yes." Clark v. Patapsco Guano Co., 144 N. C. 64, 56 SE 858. Error not prejudicial in refusing requests where under the pleadings and instructions given verdict found could not have been rendered without a consideration of the question submitted in the refused requests. Picard v. Beers [Mass.] 81 NE 246. Refusal of request held harmless error. Cleveland etc., R. Co. v. Schneider [Ind. App.] 80 NE 985.

63. Hayes v. Moulton, 194 Mass. 157, 80 NE 215. Court not required to reform requested instruction and to cast out such parts as render it improper as a whole. Exchange Bk. v. Moss [C. C. A.] 149 F. 340. It is not the duty of the trial court to reconstruct and frame requested instruction so as to reduce it to proper form. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 477, 100 SW 182. Not incumbent on court to separate propositions where one consists of an improper repetition. Goodloe v. Goodloe [Tex. Civ. App.] 19 Tex. Ct. Rep. 960, 105 SW 533. Instruction partly bad as a statement of law was properly refused. McDonald v. McCrabb [Tex. Civ. App.] 19 Tex. Ct. Rep. 789, 105 SW 238. Held proper to refuse altogether an instruction partly good and partly bad. Dederick v. Central R. Co. [N. J. Law] 65 A 833. Request stating incorrectly the doctrine of contributory negligence was properly refused. Jacksonville Elec. Co. v. Schmetzer [Fla.] 43 S 85. In an action for breach of a contract, a request was properly refused which was calculated to mislead the jury to conclude that defendant was liable under the contract without regard to any promise by him to the assignee to perform it. Fletcher v. Prestwood [Ala.] 43 S 231.

64. Town of Vernon v. Edgeworth [Ala.] 42 S 749. Not error to refuse instructions requested in a bulk unless all are correct. McEntyre v. Hairston [Ala.] 44 S 417.

65. Bush v. Fourcher [Ga. App.] 59 SE 459.

66. Where first portion of instruction was improper, not error to refuse to give whole instruction. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176. No error to refuse portion of an instruction where there is no evidence to which that portion would apply. Manufacturers' Fuel Co. v. White, 228 Ill. 187, 81 NE 841.

67. On refusing a requested instruction because of some defect therein, it is the duty of the court to properly instruct on point involved. Troutwine v. Louisville & N. R. Co. [Ky.] 105 SW 142. If a defective request for an instruction actually brings to the attention of the court an important principle of law which ought to be stated to the jury in order that it may render an intelligent verdict, it may be prejudicial error to disregard it; and, if an attempt be made by an instruction given to submit to the jury the matter defectively covered by the request, it should be sufficiently explicit and comprehensive to cover fairly the field of the request. Kansas City, etc., R. Co. v. Loosley [Kan.] 90 P 990. Plaintiffs being entitled to recover only a certain enclosure, a request on such issue, though incorrect in including land in controversy not within the enclosure, was sufficient to call the court's attention to the land enclosed for an instruction on such issue. McAdams v. Hooks [Tex. Civ. App.] 19 Tex. Ct. Rep. 628, 104 SW 432.

68. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 18 Tex. Ct. Rep. 624, 101 SW 1061.

69. Request may be refused where the court has sufficiently stated the issues and principles of law to the jury. Birmingham R., L. & P. Co. v. Martin [Ala.] 42 S 618; Robinson v. Green [Ala.] 43 S 797; Massey Bros. v. Dixon Bros. [Ark.] 99 SW 383; Choctaw O. & G. R. Co. v. Hickey [Ark.] 99 SW 839; Lanigan v. Neely [Cal. App.] 89 P 441; Giacomini v. Pacific Lumber Co. [Cal. App.] 89 P 1059; Colorado Midland R. Co. v. Snider, 38 Colo. 351, 88 P 453; Houghton v. New Haven, 79 Conn. 659, 66 A 509; Joyce v. Joyce [Conn.] 67 A 374; Seaboard Air Line R. v. Scarborough [Fla.] 42 S 706; Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318; Florida East Coast R. Co. v. Welch [Fla.] 44 S 250; Macon & B. R. Co. v. Parker, 127 Ga. 471, 56 SE 616; Heath v. Slaughter, 127 Ga. 747, 57 SE 69; Green v. Wright, 1 Ga. App. 194, 57 SE 965; Davidson v. Waxelbaum [Ga. App.] 58 SE 687; Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136; Deering v. Barzak, 227 Ill. 71, 81 NE 1; Hirsch Iron & Rail Co. v. Coleman, 227 Ill. 149, 81 NE 21; North American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 NE 388; Illinois Cent. R. Co. v. Stewart, 230 Ill. 204, 82 NE 590; Field v. Winheim, 123 Ill. App. 227; Chicago City R. Co. v. Gregory, 123 Ill. App. 259; American Bonding & Trust Co. v. New Amsterdam Casualty Co., 125 Ill. App. 33; Citizens' Savings, Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252; People v. Cook County, 127 Ill. App. 401; Keokuk & Hamilton Bridge Co. v. Wetzel, 130 Ill. App. 81; Clark v. Farmington Coal Co., 130 Ill. App. 192; Pittsburgh, etc., R. Co. v. Collins, 168 Ind. 467, 80 NE 415; New Jersey, etc., R. Co. v. Tutt, 168 Ind. 205, 80 NE 420; Strand v. Grinnell Automobile Garage Co. [Iowa] 113

NW 488; Chesapeake & O. R. Co. v. Nipp's Adm'x, 30 Ky. L. R. 1131, 100 SW 246; South Covington & C. St. R. Co. v. Cleveland, 30 Ky. L. R. 1072, 100 SW 283; Cairnes v. Pelton, 103 Md. 40, 63 A 105; Garrett County Com'rs v. Blackburn [Md.] 66 A 31; Baltimore Briar Pipe Co. v. Eisenhauer [Md.] 66 A 623; Hayes v. Moulton, 194 Mass. 157, 80 NE 215; Morrison v. Richardson, 194 Mass. 370, 80 NE 468; Lord v. Rowse [Mass.] 80 NE 822; Olson v. Minneapolis & St. L. R. Co., 102 Minn. 395, 113 NW 1010; Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78; Baskett v. Metropolitan St. R. Co., 123 Mo. App. 725, 101 SW 138; Coffey v. Omaha, etc., R. Co. [Neb.] 112 NW 589; Lord v. Manchester St. R. [N. H.] 67 A 639; Horton v. Seaboard Air Line R. [N. C.] 58 SE 993; Baines v. Coos Bay, etc., Co. [Or.] 89 P 371; Person & Riegel Co. v. Lipps [Pa.] 67 A 1081; Simone v. Rhode Island Co. [R. I.] 66 A 202; Mitchell v. Sayles [R. I.] 66 A 574; Taber v. New York, etc., R. Co. [R. I.] 67 A 9; Thompson v. Seaboard Air Line R. [S. C.] 58 SE 1094; National Bk. of Commerce v. Chatfield, Woods & Co. [Tenn.] 101 SW 765; International & G. N. R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 SW 660; Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 SW 1100; San Antonio, etc., R. Co. v. Timon [Tex. Civ. App.] 18 Tex. Ct. Rep. 349, 99 SW 418; Texas & P. R. Co. v. Felker [Tex. Civ. App.] 17 Tex. Ct. Rep. 745, 99 SW 439; G. A. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 SW 715; Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 17 Tex. Ct. Rep. 714, 99 SW 897; Belton & Temple Trac. Co. v. Henry [Tex. Civ. App.] 99 SW 1032; San Antonio & A. P. R. Co. v. Fisher [Tex. Civ. App.] 18 Tex. Ct. Rep. 404, 99 SW 1042; Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176; Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 18 Tex. Ct. Rep. 951, 100 SW 990; International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 17 Tex. Ct. Rep. 752, 18 Tex. Ct. Rep. 65, 100 SW 1000; St. Louis & S. F. R. Co. v. Neely [Tex. Civ. App.] 18 Tex. Ct. Rep. 258, 101 SW 481; Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529; Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 18 Tex. Ct. Rep. 248, 101 SW 541; Burton Lumber Corporation v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 SW 822; El Paso S. W. R. Co. v. Barrett [Tex. Civ. App.] 19 Tex. Ct. Rep. 418, 101 SW 1025; Southern R. Co. v. Stockdon, 106 Va. 693, 56 SE 713; Hall v. Washington Water Power Co. [Wash.] 89 P 553; Noren v. Larson Lumber Co. [Wash.] 89 P 563; Jordan v. Seattle, etc., R. Co. [Wash.] 92 P 284; Ranous v. Seattle Elec. Co. [Wash.] 92 P 382; Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59; Gallaway v. Massee [Wis.] 113 NW 1098; Robinson v. Duvall, 27 App. D. C. 535; Pickford v. Talbott, 28 App. D. C. 498. Refusal of instruction, the substance of which is contained in instruction given by court, not error. Stewart v. Walker [Ark.] 102 SW 696; Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535; Midland Valley R. Co. v. Hamilton [Ark.] 104 SW 540; Chicago City R. Co. v. Hagenback, 228 Ill. 290, 81 NE 1014; Sampsell v. Rybczynski, 229 Ill. 75, 82 NE 244; City of Bloomington v. Woodworth [Ind. App.] 81 NE 611; New York, etc., R. Co. v. Flynn [Ind. App.] 81 NE 741; Louisville & N. R. Co. v. Gollihur [Ind. App.] 82 NE 492; Cleveland, etc., R. Co. v. Schneider [Ind. App.] 82 NE 538; Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577; Oxford Junction Sav. Bk. v. Cook, 134 Iowa, 185, 111 NW 805; Dean v. Carpenter, 134 Iowa, 275, 111 NW 815; Doggett v. Chicago, B. & Q. R. Co., 134 Iowa, 690, 112 NW 171; Louisville & N. R. Co. v. Ponder, 31 Ky. L. R. 878, 104 SW 279; McIntire v. Stacy, 31 Ky. L. R. 1219, 104 SW 969; Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226, 13 Det. Leg. N. 1060, 110 NW 1057; Jenning v. Rohde, 99 Minn. 335, 109 NW 597; Detrich v. Metropolitan St. R. Co., 125 Mo. App. 608, 102 SW 1044; O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 SW 54; Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 SW 109; Hudson v. Truman [Neb.] 112 NW 325; Ellis v. Brooks [Tex.] 18 Ct. Rep. 448, 102 SW 94; Gulf, etc., R. Co. v. Cook [Tex. Civ. App.] 102 SW 121; Texas, etc., R. Co. v. Buch [Tex. Civ. App.] 19 Tex. Ct. Rep. 406, 102 SW 124; Houston Lighting Power Co. v. Hooper [Tex. Civ. App.] 19 Tex. Ct. Rep. 410, 102 SW 133; St. Louis & S. F. R. Co. v. Harrison [Tex. Civ. App.] 102 SW 140; Galveston, H. & N. R. Co. v. Morrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 449, 102 SW 143; Missouri, etc., R. Co. v. Merritt [Tex. Civ. App.] 18 Tex. Ct. Rep. 199, 102 SW 151; St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783; Missouri, K. & T. R. Co. v. Lee [Tex. Civ. App.] 19 Tex. Ct. Rep. 706, 103 SW 654; Missouri, etc., R. Co. v. Criswell [Tex. Civ. App.] 103 SW 695; Cornelison v. Ft. Worth & R. G. R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 14, 103 SW 1186; Commerce Milling & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916; Chicago, etc., R. Co. v. Stilwell [Tex. Civ. App.] 19 Tex. Ct. Rep. 760, 104 SW 1071; St. Louis, etc., R. Co. v. Payne [Tex. Civ. App.] 19 Tex. Ct. Rep. 765, 104 SW 1077; Bounds v. Hubbard City [Tex. Civ. App.] 19 Tex. Ct. Rep. 755, 105 SW 56; Warren C. & P. R. Co. v. Shine [Tex. Civ. App.] 20 Tex. Ct. Rep. 47, 105 SW 518; Ft. Worth, etc., R. Co. v. Wooldridge [Tex. Civ. App.] 20 Tex. Ct. Rep. 79, 105 SW 845; Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427; McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 NW 472; Anderson v. Arpin Hardwood Lumber Co., 131 Wis. 34, 110 NW 788; Hayes v. Chicago, etc., R. Co., 131 Wis. 399, 111 NW 471; Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694. Where an instruction in effect sufficiently states the rule that the negligence or lack of skill of a physician is not to be tested by the results of the treatment, it is not error to refuse an additional instruction stating the rule in terms. Sheldon v. Wright [Vt.] 67 A. 807. Held not proper for court to repeat same proposition in its instructions, and refusal of request to repeat over and over again same proposition not error. Grace & Hyde Co. v. Strong, 224 Ill. 630, 79 NE 967. Sufficient for court to give on its own motion instructions covering requests. Jenson v. Will & Finck Co., 150 Cal. 398, 89 P 113. There was no error in refusing an additional instruction at request of defendant as to plaintiff's negligence, where if it did not embrace acts of negligence not pleaded, it was a repetition of instructions already given. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699. Refusal of requested instruction which

and contain a repetition of the law of the case.[71] Requests merely stating in different language a proposition already stated;[72] or which state a proposition in negative form,[73] may be refused, and where instructions given are very general, it is error to refuse requests which are specific.[74]

§ 4. *Assumption of facts.*[See 8 C. L. 344]—The court in instructions may not assume the existence or nonexistence of controverted facts,[75] or facts not sustained,[76]

was simply a paraphrase of another instruction given on request of same party was not error. Way v. Greer [Mass.] 81 NE 1002. Where general instructions clearly present every issue made by the evidence, refusal of special request no error. Gilmore v. Houston Elec. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 436, 102 SW 168. Where the court gave an instruction on an issue identical with the one requested to be instructed upon, and more favorable to defendant than the one requested, defendant was not prejudiced by the refusal of his request. Galveston, H. & H. R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699.

70. Farley v. Mobile & O. R. Co. [Ala.] 42 S 747; Jacksonville Elec. Co. v. Schmetzer [Fla.] 43 S 85. Though correct, if made unnecessary by other instructions given, may be refused. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 82 NE 538. Special request refused where it was in effect the same as an instruction already given. San Antonio Brew. Ass'n v. Magoffin [Tex. Civ. App.] 17 Tex. Ct. Rep. 682, 99 SW 187.

71. Request refused where it embodied an instruction given so far as it contained a sound exposition of the law. City of Brownsville v. Arbuckle, 30 Ky. L. R. 414, 99 SW 239.

72. Party offering more than one instruction, stating, in varying language, same proposition, cannot complain of refusal to give the one he deems most favorable. East St Louis & S. R. Co. v. Zink, 229 Ill. 180, 82 NE 283. Refusal of instruction which in effect was given by the court in different language was not error. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555.

73. Held no error to refuse to instruct on negative phrase of alleged grounds of defendant's negligence, where the issues so presented had been fully submitted in the general charge, and in special instructions given at request of defendant. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 SW 867.

74. Specific acts of contributory negligence relied on should be submitted on request, although a general instruction was given submitting the alleged contributory negligence. Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535. Refusal of request for instruction containing hypothetical case based on evidence was error, although other instructions correctly stated general rules of law governing case. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694.

75. Farley v. Mobile & O. R. Co. [Ala.] 42 S 747; Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808; Green v. Brady [Ala.] 44 S 408; Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101; Lewter v. Tomlinson [Fla.] 44 S 935; Haisler v. Hayden, 124 Ill. App. 264; Harley v. Aurora, E. & C. R. Co., 128 Ill. App. 643; Chicago, B. & Q. R. Co. v. Bautsch, 129 Ill. App. 23; Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105; White v. Kiggins, 130 Ill. App. 404; Manion v. Lake Erie & W. R. Co. [Ind. App.] 80 NE 166; Pittsburg, etc., R. Co. v. Collins, 168 Ind. 467, 80 NE 415; Sasse v. Rogers [Ind. App.] 81 NE 590; Hayes v. Moulton, 194 Mass. 157, 80 NE 215; Bond v. Chicago, etc., R. Co., 122 Mo. App. 207, 99 SW 30; St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 SW 583; Crosby v. Wells, 73 N. J. Law, 790, 67 A 295; Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 18 Tex. Ct. Rep. 179, 100 SW 1033; Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A 821; Bradford v. National Ben. Ass'n, 26 App. D. C. 268.

Rule violated: Where a fact in issue was whether plaintiff had been employed for a certain purpose, an instruction assuming that he was so employed was erroneous. Stephens v. Elliott [Mont.] 92 P 45. Instruction was objectionable as assuming that plaintiff did, on the happening of a trivial occurrence, bring injury on herself. Johnston v. Beadle [Cal. App.] 91 P 1011. Request properly refused as assuming that evidence showed an "unexplained falling of engine rod." Horton v. Seaboard Air Line R. [N. C.] 58 SE 993. Assuming that a witness made a statement which in fact was not made. Herbst v. Kellogg Mfg. Co., 112 App. Div. 356, 98 NYS 444. Where the amount claimed is controverted, the court cannot assume to fix the verdict in that respect by giving binding instruction. Lenhart v. Cambria County, 29 Pa. Super. Ct. 350. A special interrogatory submitted, which assumed as a fact that a car, when it caused a switchman's injuries, was standing in the same spot it occupied when he announced it was "in the clear," was erroneous. Chicago & E. R. Co. v. Lawrence [Ind.] 82 NE 768. An instruction in an action against a railroad for killing stock was erroneous in assuming that stock belonged to the plaintiff and was struck by the locomotive. Louisville & N. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. In an action for false imprisonment, an instruction assuming that defendant's agent arrested and detained plaintiff was properly refused. Robinson v. Green [Ala.] 43 S 797. Where the evidence was conflicting as to whether logs delivered were suitable to manufacture, a request assuming that they were suitable was properly refused. Fletcher v. Prestwood [Ala.] 43 S 231. Where the evidence was conflicting as to whether a car came in contact with plaintiff, a request assuming that the car injured plaintiff was properly refused. Garth v. North Alabama Trac. Co. [Ala.] 42 S 627. Request assuming that there was a liability on defendant which it was trying to escape was properly refused. Id. Instruction assuming that the shock and excitement attendant on plaintiff's getting on the wrong train and being compelled to wait longer for an-

other train, and that this was the result of a mistake by carrier's gateman, was erroneous. Baltimore, etc., R. Co. v. Sheridan, 31 Ky. L. R. 109, 101 SW 928. Instruction assuming that an employer was not required to keep his building in safe condition every moment during the work thereon was erroneous. McCracken v. Lantry-Sharpe Cont. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 959, 101 SW 520. Instruction on measure of damages assuming loss of time from work as result of accident invaded province of jury. Muncy v. Bevier, 124 Mo. App. 10, 101 SW 157. In action by servant for injuries, instruction erroneous as assuming insufficient number of men or appliances reasonably necessary to safely do work. Texas Cent. R. Co. v. Waldie [Tex. Civ. App.] 18 Tex. Ct. Rep. 60, 101 SW 517. It being for the jury whether a stock dealer acted as a principal or broker in a transaction, a request assuming that he acted as a principal was properly refused. Picard v. Beers [Mass.] 81 NE 246. In an action for delay in shipment of corn, the evidence being conflicting as to the time when carrier received the corn, an instruction was erroneous which assumed that it was received on a particular day. St. Louis S. W. R. Co. v. Thompson [Tex. Civ. App.] 19 Tex. Ct. Rep. 644, 103 SW 684. Erroneous as assuming facts of negligence. St. Louis, etc., R. Co. v. Price [Ark.] 104 SW 157; Muncy v. Bevier, 124 Mo. App. 10, 101 SW 157. Instruction assuming that acts charged in answer were contributory negligence is erroneous as invading province of jury. International, etc., R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 SW 660. Request assuming that plaintiff was guilty of contributory negligence properly refused where such negligence was a question of fact. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032. Instruction erroneous in assuming that decedent, killed by being struck by trolley pole while on the running board of a street car, did not know the car was running in an unusual manner. Indianapolis Trac. & T. Co. v. Richey [Ind. App.] 80 NE 170. In an action for injuries alleged to be due to a defect in a sidewalk, instruction was erroneous as assuming that sidewalk was defective. City of Cleburne v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 530, 102 SW 464.

Rule not violated: Not erroneous as assuming, as established, a fact in issue. Fidelity & Casualty Co. v. Southern R. News Co., 31 Ky. L. R. 55, 101 SW 900; Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026; London v. Crow [Tex. Civ. App.] 19 Tex. Ct. Rep. 451, 102 SW 177; City of Cleburne v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 530, 102 SW 464; Missouri, K. & T. R. Co. v. Carter [Tex. Civ. App.] 19 Tex. Ct. Rep. 691, 104 SW 910. Not objectionable as assuming fact not authorized by evidence. Cahill v. Chicago & A. R. Co., 205 Mo. 393, 103 SW 532. An instruction which merely states the issues made by the pleadings is not an assumption of facts. Missouri, K. & T. R. Co. v. Kyser [Tex. Civ. App.] 15 Tex. Ct. Rep. 891, 95 SW 747. Not objectionable as presuming that a child was seen by those operating a locomotive. Norfolk & W. R. Co. v. Carr, 106 Va. 508, 56 SE 276. Instruction in action for services rendered not objectionable in assuming that services were rendered, where by other instructions the burden of proof was cast on plaintiff to show the rendition of the services. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63. In ejectment, the court having found title in plaintiff, an instruction as to compensation allowable for timber cut therefrom was not objectionable because assuming that plaintiff was owner of the land. Cowles v. Carrier, 31 Ky. L. R. 229, 101 SW 916. Where court positively instructed as a condition of plaintiff's recovery that defendant must have known of danger, or would have known of it by exercise of reasonable care, another instruction on assumed risk was not misleading as assuming that defendant knew of the danger attending the work. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529. Instruction in malicious prosecution not erroneous as assuming that false testimony was given against plaintiff in his prosecution for arson. (Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78), or as holding the insurers of the property destroyed liable for acts of their agents (Id). Not objectionable as assuming or inducing jury to take for granted that defendant had knowledge of alleged defective condition of car stirrup. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 100 SW 1175. Not objectionable as assuming that plaintiff was a passenger at the time of an injury. International & G. N. R. Co. v. Tasby [Tex. Civ. App.] 17 Tex. Ct. Rep. 932, 100 SW 1030. Not objectionable as assuming that water flowed along a certain road. Missouri, K. & T. R. Co. v. Arly [Tex. Civ. App.] 18 Tex. Ct. Rep. 38, 100 SW 963. An instruction in which appears the expression, "you have also the fact," etc., was not obnoxious to the rule, when it appeared that the instruction, fairly interpreted, was simply to the effect that here you (the jurors) have a matter which has been put in evidence as an element for your use in forming your conclusions and making up your verdict. Crosby v. Wells, 73 N. J. Law, 790, 67 A 295. Instruction directing finding if alleged acts subjected plaintiff to pain held not objectionable as assuming that plaintiff suffered pain. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 SW 495. Not objectionable as assuming that the condition of a switch was negligent. Indianapolis St. R. Co. v. Fearnaught [Ind. App.] 82 NE 102. Not objectionable as assuming that employe was exercising ordinary care. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. In an action against a street railway company for injuries to a pedestrian, an instruction was not objectionable as assuming that there was a pathway along or across the tracks. Louisville R. Co. v. Hofgesand, 31 Ky. L. R. 976, 104 SW 361. Instruction in action against railroad for injuries to switchman was not objectionable as assuming that the company and foreman were negligent. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978.

76. Assumption as to value of land where there was no evidence on the point was erroneous. Arnd v. Aylesworth [Iowa] 111 NW 407. Instruction properly refused as assuming facts of which there was no evidence. Norfolk & W. R. Co. v. Carr, 106 Va. 508, 56 SE 276. Objectionable as assuming that expenses paid for a wife by

but uncontroverted facts,[77] admitted facts,[78] facts established by uncontroverted evidence,[79] may be assumed.

§ 5. *Charging with respect to matters of fact or commenting on the weight of evidence.*[See 8 C. L. 847]—The determination of questions of fact being the exclusive province of the jury,[80] the court may not by instruction invade that province.[81] Thus, as a general rule trial courts are prohibited from charging with respect to matters of fact or commenting on the evidence,[82] or expressing or intimating an opinion as to

husband as her agent were incurred by him on his own account. Town of Elba v. Bullard [Ala.] 44 S 412. Error in instruction that ownership of stock injured was proved where evidence not conclusive. Louisville & N. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. In eminent domain proceedings for compensation for damages by a railroad, instruction assuming that abutting owners had right to put in spur track held erroneous. Taber v. New York, etc., R. Co. [R. I.] 67 A 9.

Not objectionable as assuming facts not in evidence. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978.

77. Shults v. Shults, 229 Ill. 420, 82 NE 312; Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 18 Tex. Ct. Rep. 524, 101 SW 1061. An instruction assuming the existence of facts proved by both parties was not a charge on the facts. Murdouch v. Tuten, 76 S. C. 502, 57 SE 547.

78. Shults v. Shults, 229 Ill. 420, 82 NE 312. Instruction not erroneous in assuming that services were rendered where defendant admitted such fact. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63. Civ. Code 1895, § 4334, applies to cases of conflicting evidence, hence, where the undisputed facts clearly and necessarily establish a certain legal conclusion, it is not error to so instruct. Georgia R. & Elec. Co. v. Cole, 1 Ga. App. 33, 57 SE 1026. Instructions assuming loss of wages by plaintiff as a result of injuries was not error under the evidence. Sotebler v. St. Louis Transit Co., 203 Mo. 702, 102 SW 651.

79. Reed v. Manierre, 124 Ill. App. 127. Where it was not controverted that plaintiff was entitled to recover a balance alleged to be due on the purchase price of a machine, except in so far as affected by offsets set up in cross action, no error in so instructing. Heisig Rice Co. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 1002, 100 SW 959.

80. See ante, § 2.

81. **Erroneous in invading province of jury.** Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 S 411; Duncan v. St. Louis & S. F. R. Co. [Ala.] 44 S 418; Louisville & N. R. Co. v. Sherell [Ala.] 44 S 631; Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639; Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101; Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57; Ferguson v. Truax [Wis.] 110 NW 395. Erroneous as **usurping functions** of jury. Orem Fruit & Produce Co. v. Northern Cent. R. Co. [Md.] 66 A 436. Invasion of province of the jury in deciding questions of fact. City of Covington v. Whitney, 30 Ky. L. R. 659, 99 SW 337. It is an invasion of the province of the jury for the court to instruct that from one fact proved they have a right to presume another material fact. Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 SE 650. Singling out a certain state of facts and telling the jury that if facts existed plaintiff would be guilty of conduct precluding recovery was erroneous. Jones & Adams Co. v. George, 227 Ill. 64, 81 NE 4. Erroneous in determining fact of negligence. Indianapolis Trac. & T. Co. v. Richey [Ind. App.] 80 NE 170.

Requests refused as invading province of jury: The question being one for the jury, an instruction undertaking to state what constitutes contributory negligence on the part of a pedestrian suing a municipality for injuries was properly refused. Teague v. Bloomington [Ind. App.] 81 NE 103. Request refused as invading province of jury in determining question of contributory negligence. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Request that jury could not find that a defect in the handle on hand car was the proximate cause of an injury was properly refused. Southern R. Co. v. McGowan [Ala.] 43 S 378. In an action to recover money, where defendant admitted receiving the money but claimed that it was retained by him in a certain capacity to satisfy a debt due by plaintiff, it was not error to refuse a peremptory instruction to find for defendant, as plaintiff's indebtedness was for the jury. Bailey v. Porter, 30 Ky. L. R. 915, 99 SW 932.

Province not invaded. Indiana Union Trac. Co. v. Bick [Ind. App.] 81 NE 617; Indianapolis St. R. Co. v. Fearnaught [Ind. App.] 82 NE 102; Stangair v. Roads [Wash.] 91 P 1. Hypothetical instruction, leaving to jury to determine if the facts were established by a preponderance of the evidence. Eureka Stone Co. v. Knight [Ark.] 100 SW 878. Informing jury what the declaration tended to prove. McClure v. Lenz [Ind. App.] 80 NE 988. An instruction leaving to the jury whether or not the presumption that a traveler used due care to avoid injury is destroyed, where it appears that if he had looked and listened he would have seen or heard a train, was not invasive of province of jury. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P 1124. Instruction as to the preponderance of the evidence held not to invade the province of the jury. Deering v. Barzak, 227 Ill. 71, 81 NE 1.

82. Fitch v. Martin [Neb.] 113 NW 796. Statutory prohibition to comment on weight of evidence. St. Louis & S. F. R. Co. v. Sproule [Tex. Civ. App.] 18 Tex. Ct. Rep. 209, 101 SW 268. It was error for the court during the trial and in the hearing of the jury to express or intimate an opinion as to what has or has not been proven. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 SE 1006. Propriety of comments by court in instructing on special issues. Bloch v. American Ins. Co. [Wis.] 112 NW 45.

Rule violated: Instruction as to amount

its weight,[83] but this rule is not universally followed,[84] and it does not prevent the

of evidence necessary improper as invading jury's province. State v. James [Utah] 89 P 460. Proper to refuse instructions intimating to jury the inference to be drawn from the facts therein set out. Weaver v. Southern R. Co., 76 S. C. 49, 56 SE 657. Refusal of a requested instruction containing a statement that certain acts would not constitute negligence was properly refused. Southern R. Co. v. Sheffield, 127 Ga. 569, 56 SE 838. Not error to refuse requests for instructions assuming that certain facts, if established by the evidence, would constitute contributory negligence. International & G. N. R. Co. v. Tasby [Tex. Civ. App.] 17 Tex. Ct. Rep. 932, 100 SW 1030. Instructing that exposure to the weather was the result of plaintiff's own act after knowledge of nondelivery of a telegram was a charge on the facts. Toale v. Western Union Tel. Co., 76 S. C. 248, 57 SE. 117. Where under all of the evidence it was for the jury to determine if certain land was dedicated and when, refusal to instruct that jury must find that land was a dedicated park during the time of certain grievances complained of was proper. Louisville & N. R. Co. v. Higginbotham [Ala.] 44 S 872. Instructing that jury must either find that car was not or was moving at the rate of three or four miles an hour was erroneous as invading province of jury, where evidence as to motion of car was conflicting. Devlin v. New York City R. Co., 116 App. Div. 894, 102 NYS 430. Instruction that decedent, a man 30 years of age, had no expectancy of life beyond the day of his death, and that his parents had no expectancy beyond the time of trial, and on finding for plaintiff only nominal damages could be recovered, was properly refused. National Mut. Life Ins. Co. v. Sprague [Colo.] 92 P 227. Instruction that jury might properly infer the consent of a railroad company to the placing of property on its platform from the fact that an agent has notice of its being placed there and makes no objection was error as on facts. Yarborough v. Southern R. [S. C.] 58 SE 936. Error to instruct that certain things, not directly made so by law, are or are not negligent. Atlanta, etc., R. v. McManus, 1 Ga. App. 302, 58 SE 258. Error to instruct that supreme court had passed upon fact that things set out in declaration made a case in court, especially where particular case had not been to supreme court. Georgia R. & Elec. Co. v. Baker, 1 Ga. App. 832, 58 SE 88. Under Mass. Rev. Laws, c. 173, § 80, providing that courts shall not charge jurors with respect to matters of fact, the court is not authorized to instruct that the evidence of a witness is open to the gravest doubt. Hayes v. Moulton, 194 Mass. 157, 80 NE 215. Refusal to instruct that there was no legally sufficient evidence to entitle recovery held proper. Baltimore Briar Pipe Co. v. Eisenhauer [Md.] 66 A 623.

Rule not violated: Not objectionable as a comment on facts of case. Stangair v. Roads [Wash.] 91 P 1. As commenting on evidence. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 SW 675. As stating facts constituting negligence. Indianapolis St. R. Co. v. Fearnaught [Ind. App.] 82 NE 102. Statement of court was not instruction on facts in violation of constitution. Glover v. Western Union Tel. Co. [S. C.] 59 SE 526. An instruction that fact admitted by pleading does not require affirmative proof is proper. Pittsburgh, etc., R. Co v.. Collins, 168 Ind. 467, 80 NE 415. Not objectionable on grounds that court determined as a matter of law that a lawn was a part of the depot grounds, in an action against a railroad. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738. Where the evidence tended to show that plaintiff paid full consideration for certain goods, so stating in instruction was not error. Seivert v. Galvin [Wis.] 113 NW 680. Not objectionable that it informed jury that defendant was guilty of want of ordinary care. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738. As being in effect an instruction that the proximate cause of an injury was negligence of defendant. Mulrone v. Marshall, 35 Mont. 238, 88 P 797. As charging that certain facts constitute contributory negligence. Jones v. Western Union Tel. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 384, 101 SW 808. Where, in an action for personal injuries, the defense charged exaggeration of injuries, and the medical evidence was conflicting, instruction referring specifically to the interest of plaintiff and on the weight of evidence was proper, but it was sufficient to instruct jury as to their duty in considering the weight of the evidence and the credibility of witness. Bolton v. Central Pa. Trac. Co. [Pa.] 67 A 950. In an action for injuries to an employe by a saw he was operating, an instruction was not objectionable as declaring that the employer was as a matter of law guilty of negligence if the saw was so loose that in revolving it varied. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. Not objectionable as violative of rule that court should not advise jury as to effect of their answers to questions. Horn v. La Crosse Box Co., 131 Wis. 384, 111 NW 522. Instruction that if plaintiff had established a complete and better title than defendant she was entitled to recover certain land was not erroneous as on the facts. Mitchell v. Cleveland, 76 SC 432, 57 SE 33. Instruction that court and jury do not make contracts for people, but merely carry them out, was not error, as on the fact of existence of contract. Holder v. Prudential Ins. Co. [S. C.] 57 SE 853. Rev. Laws, c. 173, § 80, providing that courts shall not "charge juries with respect to matters of fact," does not apply to remarks by court **in examination of witnesses.** Partelow v. Newton & B. St. R. Co. [Mass.] 81 NE 894.

83. Georgia S. & F. R. Co. v. Barfield, 1 Ga. App. 203, 58 SE 236; Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636; Cage & Crow v. Owens [Tex. Civ. App.] 19 Tex. Ct. Rep. 6, 103 SW 1191. Rev. 1895, § 535, expressly provides that judge must not express opinion on weight of evidence. Universal Metal Co. v. Durham & C. R. Co. [N. C.] 59 SE 50. Request containing intimation of opinion of court on weight of evidence properly refused. Baldwin v. Polti [Tex. Civ. App.] 18 Tex. Ct. Rep. 971, 101 SW 543; Galveston, H. & N. R. Co. v. Wallis [Tex. Civ. App.]

104 SW 418; Raley v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 924, 105 SW 342. Erroneous as usurping province of jury in weighing the evidence. Zander v. St. Louis Transit Co., 206 Mo. 445, 103 SW 1006.

Rule violated: Remarks of court on materiality and weight were prejudicial. Schneider v. Great Northern R. Co. [Wash.] 91 P 565. Where evidence conflicting, it was error to express opinion on material question of fact. Holtzendorff v. De Renne [Ga.] 58 SE 710. Opinion of court in charge to jury as to sufficiency of evidence is improper. Dobbins v. Dobbins, 141 N. C. 210, 53 SE 870. Erroneous as on weight of evidence in assuming a fact. Adams v. Gulf, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 507, 105 SW 526. Request intimating opinion as to quantum of proof necessary to overcome rebuttable presumption was properly refused. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44. Where evidence was conflicting as to whether plaintiff was a passenger at time of accident, instruction that testimony conceded, and evidence made clear, that plaintiff was a passenger was erroneous as on weight of evidence. Louisville R. Co. v. O'Conner, 30 Ky. L R. 1329, 101 SW 305. An instruction as to what amounted to a circumstance, and that jury should take such circumstance into consideration, held erroneous as on weight of evidence. Munk v. Stanfield [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 213. An intimation of opinion by the court that an issuable fact has been proved was error. Central of Georgia R. Co. v. Augusta Brokerage Co. [Ga. App.] 58 SE 904. In an action for unliquidated damages, it is error for court to intimate that question of amount of damages is not for jury, or to indicate amount of damages the court considers plaintiff entitled to. Douglas v. Metropolitan St. R. Co., 104 NYS 452. An instruction reciting that plaintiff's testimony was contradicted, and placing it in an unfavorable light before the jury, while that of defendant was treated with greater consideration, was erroneous as intimating the court's opinion as to weight of evidence. Withers v. Lane, 144 N. C. 184, 56 SE 855. In an action for injuries to a passenger on a street car, a request assuming that plaintiff alighted, which might have been taken by jury as an intimation that plaintiff was not thrown from car, as alleged, was properly refused. Birmingham R., Light & Power Co. v. Moore [Ala.] 43 S 841. An instruction that the jury "should" find exemplary damages, if they found an ejection willful, held erroneous, as question of exemplary damages was wholly for jury. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 SW 495. Instruction that Civil Code 1895, § 3906, was the rule under which they were to assess damages, was erroneous as containing expression of opinion by court that there were aggravating circumstances, and additional damages should be given, and as withdrawing these questions from the jury. Georgia R. & Elec. Co. v. Baker, 1 Ga. App. 832, 58 SE 88. A request that if the jury believed the evidence they would find that the amounts paid on a chattel mortgage exceeded the debt was properly refused. Speakman v. Vest [Ala.] 44 S 1021. Refusal of instructions, in an action by a servant against a railroad company for injuries, intimating that plaintiff had not been furnished a reasonably safe place to work, was not error. Houston & T. C. R. Co. v. Grych [Tex. Civ. App.] 18 Tex. Ct. Rep. 856, 103 SW 703.

Rule not violated. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 17 Tex. Ct. Rep. 685, 99 SW 200. Instruction not erroneous as on weight of evidence. Guarantee Sav. Loan & Investment Co. v. Mitchell [Tex. Civ. App.] 17 Tex. Ct. Rep. 667, 99 SW 156; El Paso Elec. Co. v. Furber [Tex. Civ. App.] 18 Tex. Ct. Rep. 605, 100 SW 1041; Darst v. Devini [Tex. Civ. App.] 19 Tex. Ct. Rep. 455, 102 SW 787. An instruction is not objectionable as being on the weight of evidence, which leaves the jury to determine if the facts embraced therein exist. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 SW 1100. Expression of erroneous opinion by court to counsel during a discussion, although in presence of jury, except in rare cases of obvious prejudice, is not reversible when the final ruling on the evidence or instructions is correct. McGowan v. Watertown, 130 Wis. 555, 110 NW 402. Instruction that a passenger on a railway train is entitled to protection from insulting or abusive conduct or language by the servants of the railway company towards such passenger, and such company is liable for the actual damages caused by insulting or abusive conduct or language used by its conductor in charge of the train towards one of its passengers, was not erroneous as being on weight of evidence. St. Louis S. W. R. Co. v. Granger [Tex. Civ. App.] 18 Tex. Ct. Rep. 169, 100 SW 987. Not objectionable as instructing what acts or omissions constituted negligence. Paris & G. N. R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Held not on weight of evidence, as telling the jury as a matter of law that any delay of cattle en route was an act of negligence. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 17 Tex. Ct. Rep. 728, 99 SW 431. Because of the use of the phrase "of course" in presenting instructions relative to plaintiff's theory, and defendant carrier's liability, held instruction not objectionable as indicating court's belief that carrier's position was not of equal weight with that of plaintiff's. St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 SW 152. Instructing that "it is the duty of employes operating a railroad to exercise ordinary care in approaching such places as they may reasonably expect people to be on, or dangerously near the track, to keep a reasonable lookout, and give such warning of the approach of the train as an ordinarily prudent person would do under like circumstances, if any, in order to avoid injuring such person, was not objectionable as on weight of evidence, in telling jury it was duty of operatives to keep a lookout. Missouri, K. & T. R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. In an action for personal injuries, an instruction was not objectionable as on weight of evidence because it failed to use qualifying words, such as "if you find he failed to use such care" after the word "care," and "if any" after the words "accident and injury." Foley v. Northrup [Tex. Civ. App.] 19 Tex. Ct. Rep. 921, 105 SW 229. Not objectionable as assuming that plaintiff should have verdict. Louisville & N. R. Co. v. Sherell [Ala.] 44 S 631.

84. The extent to which the court should comment on the evidence being matter of dis-

judge from referring to parts of the evidence and making concrete applications of the law to them,[85] nor to instructing the jury to find certain facts from the undisputed evidence,[86] or to directing them to answer certain questions submitted as special issues.[87] An instruction containing an intimation of the court's opinion, on facts conclusively shown by uncontradicted evidence, is not prejudicial.[88]

§ 6. *Form and general substance of instructions.*[See 8 C. L. 350]—It is not essential that the entire law of the case be stated in a single instruction.[89] All instructions given are to be considered as a series [90] and must constitute a consistent whole;[91] but an instruction intended to cover the entire case,[92] or a particular phase of it,[93] and upon which a finding is predicated, should embrace all the necessary elements involved.[94] The instructions should be stated in as simple, orderly, clear, and precise

cretion, error cannot be predicated on appeal on its exercise. Joyce v. Joyce [Conn.] 67 A 374. In the submission of facts to the jury, a mere expression of opinion by the court, without any direction as to how the jury should find, is not error where court's discretion not abused. Crotty v. Danbury, 79 Conn. 379, 65 A 147. Where the appellate court, in reversing a case, enjoins the trial court to give careful instructions as to the relative value of the testimony, it is not error, on the second trial, for the court to say that he would "rely on those book entries in preference to the recollection of men, no matter how honest, as to an event which happened seven years ago." Lee v. Williams, 30 Pa. Super. Ct. 349.

85. Not beyond province of court to call attention of jury to a portion of the evidence. Desautelle v. Nasonville Woolen Co. [R. I.] 66 A 579. Instruction correctly defining duty of motorman without applying law to facts held erroneous. Campbell v. St. Louis Transit Co., 121 Mo. App. 406, 99 SW 58.

86, 87. Moore v. Woodson [Tex. Civ. App.] 17 Tex. Ct. Rep. 364, 99 SW 116.

88. Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 14 Tex. Ct. Rep. 671, 91 SW 375.

89. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S. 318. It is not necessary that any one or more instructions standing alone should embrace all of the issues, if all given when read together are consistent and embrace all material issues involved. Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 SW 144. Not necessary to state issues in single paragraph of instruction, it being sufficient if taken together they explain issues, or that they so inform jury that they may intelligently decide questions of fact. Wallace v. Skinner [Wyo.] 88 P 221.

90. Painter v. Kilgore [Tex. Civ. App.] 19 Tex. Ct. Rep. 380, 101 SW 809.

91. Styles v. Chesapeake & O. R. Co. [W. Va.] 59 SE 609. And see post, this section.

92. Schofield v. Little [Ga. App.] 58 SE 666; Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 SW 340. Instruction undertaking to state material facts necessary to recovery, but omitting therefrom material facts, was fatally defective. Dudley v. State [Ind. App.] 81 NE 89. Instructions on assumed hypothesis directing a verdict for plaintiff, to be unobjectionable, should contain all ingredients essential to a right of recovery under the pleadings and evidence. Percell v. Metropolitan St. R. Co. [Mo. App] 103 SW 115. Failure to instruct with reasonable fullness was prejudicial error. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835. Instruction erroneous in not embracing all of the facts essential to sustain a verdict directed. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246. Instruction on contributory negligence pretermitting reference to willfulness or wantonness on part of defendant in action for injuries to animal was erroneous. Garth v. North Alabama Trac. Co. [Ala.] 42 S 627. In action against city for injuries caused by defective sidewalk, in the absence of knowledge by plaintiff of condition of sidewalk, an instruction on degree of care in using walk was not objectionable as omitting element of knowledge. City of Bloomington v. Woodworth [Ind. App.] 81 NE 611. Should be complete. Barnes v. Grafton, 61 W. Va. 408, 56 SE 608. Incomplete and unintelligible. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Omitting an essential view of the case is erroneous Delmar Oil Co. v. Bartlett [W. Va.] 59 SE 634; Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644.

93. In an action to recover for services rendered, an instruction that "in determining what is the reasonable value of the services rendered by the plaintiff, the jury should take into account," etc., without instructing that before they could reach the question of quantum valebat they should find for plaintiff on main issue, was erroneous. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571. An instruction which does not, in terms, require a finding that a party was a passenger, but does require a finding of facts establishing the relation of carrier and passenger, is not objectionable as not requiring jury before returning a verdict for plaintiff to find that he was a passenger when injured. East St. Louis & S. R. Co. v. Zink, 229 Ill. 180, 82 NE 283. Telling the jury to find as they may believe from the evidence **was not objectionable** for failing to require that the belief should result from a preponderance of the evidence. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 NE 857.

94. Where the abandonment of a contract is in question, the court should state the elements necessary to constitute an abandonment. Dazey v. Stairwalt, 123 Ill. App. 489. In action for damages, if the instruction authorizes a verdict which shall exclude all exemplary damages upon a finding of certain conditions therein stated, it should include all the conditions shown in evidence to warrant such damages. Coal Belt Elec. R. Co. v. Young, 126 Ill. App. 651.

manner as possible under the circumstances,[95] and should contain only a single proposition.[96] It is not improper to state a rule in the language of statute, if applicable to the case.[97] The language should be intelligible,[98] clear,[99] free from ambiguity,[1] and not misleading.[2] The meaning of instructions is to be determined by

95. Indefiniteness of instructions. Dobbins v. Little Rock R. & Elec. Co., 79 Ark. 85, 95 SW 794. Criticised as being briefly and badly stated. Ball v. Skinner, 134 Iowa, 298, 111 NW 1022. Should be stated concretely. Newport News & O. P. R. & Elec. Co. v. McCormick, 106 Va. 517, 56 SE 281.

96. The entire law on any one proposition **should, so far as practicable,** be embodied in one proposition. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815. A single instruction containing correct statement of law is sufficient in form, where the verdict, either directly or by implication, is not made to depend wholly on proposition stated, nor other questions in issues submitted excluded. St. Louis, etc., R. Co. v. Smith [Ark.] 100 SW 884. Beginning an instruction with a phrase calling attention to defendant's theory of the case is not erroneous. In actions for personal injuries, the sentence complained of was, "the court instructs the jury that the law will not and does not permit one to bring upon himself an injury and then recover damages from some other person because of such injury." Scanlan v. Chicago Union Trac. Co., 127 Ill. App. 406.

97. If in words of statute not erroneous. Reisch v. People, 229 Ill. 574, 82 NE 321. Instruction held practically a statement of the general rule expressed in Civ. Code 1895, § 2321, and being applicable to facts of case was not erroneous. Southern R. Co. v. Sheffield, 127 Ga. 569, 56 SE 838.

98. Unintelligible and erroneous. Louisville & N. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. Refusal of an instruction so incomplete and unintelligible as not to enlighten jury on any phase of the case was not error. Barnes v. Grafton, 61 W. Va. 408, 56 SE 608. Held not error to refuse to give unintelligible instruction as to whether one who knows of building material in a street must exercise more than ordinary care. Mulvey v. New York, 114 App. Div. 526, 99 NYS 1114. Request properly refused as being unintelligible. Gambill v. Fuqua [Ala.] 42 S 735. A requested charge which is both incomplete and unintelligible should be refused. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. The instruction should be given in terms that the jury will understand. The term "at his peril," while clear to a lawyer, may not be understood by an ordinary jury. Rabinowitz v. Hall, 123 Ill. App. 65.

99. Too vague to be understood by jury. Adams v. International Supply Co., 61 W. Va. 401, 56 SE 607. Should be distinct. Id. Erroneous as confusing. Chesapeake & N. R. v. Crews [Tenn.] 99 SW 368. Calculated to confuse jury. Overstreet v. Nashville Lumber Co., 127 Ga. 458, 56 SE 650. Confusing, misleading, and argumentative. Florida East Coast R. Co. v. Welch [Fla.] 44 S 250. Instructions were inaccurate and confusing, tending to lead to erroneous results. Atlantic Coast Line R. Co. v. Powell, 127 Ga. 805, 56 SE 1006.

Not confused and misleading. Smith v. Landa [Tex. Civ. App.] 18 Tex. Ct. Rep. 130, 101 SW 470. Held not confusing as containing conflicting statements. Chesapeake & N. R. v. Crews [Tenn.] 99 SW 368.

1. Refusal of request for instruction that was ambiguous was not error. Seaboard Air Line R. v. Smith [Fla.] 43 S 235. Should be so as to be understood by the plain men of a jury. Neal v. Taylor, 106 Va. 651, 56 SE 590.

Not objectionable as ambiguous and misleading. Wholesale Mercantile Co. v. Jackson [Ga. App.] 59 SE 106; Gilman v. Cochran [Or.] 90 P 1001. The use of a word not so ambiguous as to mislead the jury is not error. Houston & T. C. R. Co. v. Anglin [Tex. Civ. App] 17 Tex. Ct. Rep. 714, 99 SW 897.

2. Southern R. Co. v. McGowan [Ala.] 43 S 378; Gordon v. Park, 202 Mo. 236, 100 SW 621. If calculated to confuse, mislead, or prejudice, reversible error. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318. Objectionable as confusing and misleading. Gambill v. Fuqua [Ala.] 42 S 735; Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 S 411; Southern R. Co. v. Hobbs [Ala.] 43 S 844; Sherrell v. Louisville & N. R. Co. [Ala.] 44 S 153; Town of Elba v. Bullard [Ala.] 44 S 412; Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639; Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032; Dunham v. H. D. Williams Cooperage Co. [Ark.] 103 SW 386; Evans v. Nail, 1 Ga. App. 42, 57 SE 1020; Martin v. Trainer, 125 Ill. App. 474; Klein v. Klein, 31 Ky. L. R. 28, 101 SW 382; Powers v. St. Louis Transit Co., 202 Mo. 267, 100 SW 655; First Nat. Bk. of Portland v. Carroll, 35 Mont. 302, 88 P 1012; Tipton v. Tipton [Tex. Civ. App.] 20 Tex. Ct. Rep. 76, 105 SW 830; Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 113 NW 50; Stanley v. Beckham [C. C. A.] 153 F 152.

Held misleading: Instruction tending to mislead jury as to true nature of the defense set up should not be given. Stiles v. Shedden [Ga.] 58 SE 515. An expression referring to a paper not brought to the notice of the jury is misleading. Citizens' Sav., Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252. Misleading as calculated to throw burden on principal to show that they did not have authority. Southern Hotel Co. v. Zimmerman [Ark.] 105 SW 873. Instructions refused so worded as to mislead jury. Lake Shore, etc. R. Co. v. Enright, 227 Ill. 403, 81 NE 374. Instruction held misleading as calculated to cause jury to understand that it was the duty of a traveler in the exercise of ordinary care to use her senses in ascertaining the approach of a train. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 823, 100 SW 206. Instruction requiring jury to be reasonably satisfied by "a preponderance of the evidence" is misleading. Birmingham R., L. & P. Co. v. Martin [Ala.] 42 S 618. In an action for death by wrongful act, a request that if jury found that riding cars down a de-

what ordinary men and jurors would understand them to mean under the evidence and circumstances of the trial.[3] Instructions should state propositions of law[4] ap-

cline was perilous, and further found that such danger was obvious to deceased, was properly refused as misleading. Woodstock Iron Works v. Kline [Ala.] 43 S 362. Held misleading to instruct that law does not recognize mere mental weakness as incapacitating a person to make contract. Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 S 411. Nonresponsive instruction in reply to question by a juryman was improper as misleading. Smith v. Moore [N. C.] 59 SE 63. In an action for trespass on land by cutting timber thereon, an instruction tending to mislead the jury to believe that a certain deed was the only basis of defendant's claim to the timber was misleading. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. In action against a railroad company for damages caused by fire, it is misleading to instruct that the burden is on plaintiff to show the fire was set out by defendant, that proof of this fact is sufficient to make a prima facie case of negligence, but the presumption may be overcome by evidence, and the presumption is only sufficiently strong to shift the burden to defendant, which imposed upon him the burden to establish due care. Stewart v. Iowa Cent. R. Co. [Iowa] 113 NW 764. In an action for damages caused by negligent injury, it is error to instruct jury that as matter of law under the evidence plaintiff and defendant did not stand in the relation of master and servant, and the defendant did not owe to plaintiff a master's duty to furnish a reasonably safe place for a servant to work. Reed v. Manlerre, 124 Ill. App. 127.

Not erroneous, though misleading. Sanders v. Davis [Ala.] 44 S 979.

Not objectionable as misleading. Eureka Stone Co. v. Knight [Ark.] 100 SW 878; Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535; Possell v. Smith [Colo.] 88 P 1064; Houghton v. New Haven, 79 Conn. 659, 66 A 509; Wrightsville & T. R. Co. v. Gornto [Ga.] 58 SE 769; Chicago, etc., R. Co. v. Rathneau, 225 Ill. 278, 80 NE 119; Chicago City R. Co. v. Smith, 226 Ill. 178, 80 NE 716; Harley v. Sanitary District of Chicago, 226 Ill. 213, 80 NE 771; Hall v. Ditto, 128 Ill. App. 187; Breiner v. Nugent [Iowa] 111 NW 446; Furlong v. American Central Fire Ins. Co. [Iowa] 113 NW 1087; Furlong v. National Fire Ins. Co. [Iowa] 113 NW 1089; Scanlon v. Northwood, 147 Mich. 139, 13 Det. Leg. N. 1013, 110 NW 493; Evers v. Wiggins Ferry Co. [Mo. App.] 105 SW 306; St. Louis S. W. R. Co. v. Granger [Tex. Civ. App.] 18 Tex. Ct. Rep. 169, 100 SW 987; Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 SW 822; London v. Crow [Tex. Civ. App.] 19 Tex. Ct. Rep. 451, 102 SW 177; Kerr v. Blair [Tex. Civ. App.] 20 Tex. Ct. Rep. 71, 105 SW 548; Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694; Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59; Neumeister v. Goddard [Wis.] 113 NW 733. Not objectionable as misleading to authorize recovery for death by negligence of defendant, where the instruction did not confine it to the negligence alleged in the petition. International & G. N. R. Co. v. Howell [Tex. Civ. App.] 19 Tex. Ct. Rep. 123, 105 SW 560. An instruction submitting an issue in the negative form, and charging that the burden as to question was on defendant, was not misleading where the jury knew from the circumstances the position assumed by both parties on the matter and with reference to the question. Logeman Bros. Co. v. R. J. Preuss Co., 131 Wis. 122, 111 NW 64. Instructions not misleading or confusing in using different expressions meaning practically the same thing. Gibler v. Terminal R. Ass'n of St. Louis, 203 Mo. 208, 101 SW 37. The use of the word "accident" in instructions was not misleading as tending to cause jury to believe that injuries were not the result of defendant's negligence. Ramble v. San Antonio & G. R. Co. [Tex. Civ. App.] 100 SW 1022. Not reversible error, in action for damages to land by construction of spur track nearby, to submit issue whether track was built in street adjacent to plaintiff's land though not contradicted that three lots intervened between the land and where the track crossed the street, the use of the word "adjacent" not tending to mislead, as the evidence was clear as to where track was located. Houston & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 SW 1013. Instruction that plaintiff could recover for any mental or physical pain it was reasonably certain she "may" suffer was not erroneous as misleading, though the word "will" was preferable. South Covington & C. St. R. Co. v. Cleveland, 30 Ky. L. R. 1072, 100 SW 283. Instruction in action for injuries to passenger on street railway not erroneous as misleading jury as to degree of care required. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 NE 1049. Instruction not misleading or confusing as necessarily making wrong impression on jury and different from that intended. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. In action for personal injuries, instruction was not objectionable on ground that by using the phrase "all reasonable precautions" in the last clause, and "ordinary care" in the first, the jury were liable to understand that the law required more than ordinary care. Deering v. Barzak, 227 Ill. 71, 81 NE 1. In an action for personal injuries, the use in an instruction, of the words "by reason of" instead of "as the direct and proximate result of" held not misleading. Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 17 Tex. Ct. Rep. 714, 99 SW 897. Not erroneous as authorizing double recovery. Missouri, K. & T. R. Co. v. Merritt [Tex. Civ. App.] 18 Tex. Ct. Rep. 199, 102 SW 151. In action for death by negligence, instruction not misleading because it failed to make the finding dependent on decedent's want of contributory negligence. International & G. N. R. Co. v. Howell [Tex. Civ. App.] 19 Tex. Ct. Rep. 123, 105 SW 560. Use of word "satisfies" in instruction relating to a special interrogatory was not objectionable as causing jury to misunderstand instruction. McKone v. Metropolitan Life Ins. Co., 131 Wis. 243, 110 NW 472.

3. Neal v. Taylor, 106 Va. 651, 56 SE 590.
4. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 NE 716.

plicable to the issues as determined from the pleadings or the evidence adduced.[5] The contentions of both parties should be fairly and impartially stated.[6] The jury should be cautioned that evidence admitted for a certain purpose can be considered for no other,[7] and that they should disregard irrelevant remarks of counsel,[8] but the instruction should not be too restrictive.[9] Instructions should not impose too high a duty [10] or degree of proof upon a party.[11] The measure of damages should not be

5. See post, § 7.

6. Where each side had a theory conflicting with theory for either side, each theory being supported by evidence, and the principle of law applicable to each theory was different, it was error to instruct as to abstract proposition applicable to only one theory without reference to evidence. Delmar Oil Co. v. Bartlett [W. Va.] 59 SE 634. Defendant cannot object that abstract principle of law pertinent to issue was not given where the instruction given made clear the specific application of the principle by enumerating all defenses and stating to jury that they should find for defendant on any defense proven to their satisfaction. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 SE 222. Where defendant admitted having received certain money sued for, and claimed that, by agreement with plaintiff, defendant paid out the money in settlement of a debt of plaintiff to a corporation, an instruction to find for plaintiff unless defendant, by agreement of plaintiff, paid out the money so retained on an account, held against plaintiff, in which event to find for defendant as to the sum so paid sufficiently presented the issue raised by defendant's answer. Bailey v. Porter, 30 Ky. L. R. 915, 99 SW 932.

7. If evidence is admitted for a particular purpose, it is proper to limit consideration to purpose for which admitted. Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 18 Tex. Ct. Rep. 951, 100 SW 990. At the time evidence is introduced the court may limit the consideration thereof to the legitimate purpose for which it was introduced. Broadstreet v. Hall, 168 Ind. 192, 80 NE 145. An instruction properly limiting the purposes for which testimony is to be considered cannot be objected to on appeal. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 SW 867.

8. The jury may be instructed not to consider improper side-bar remarks. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 18 Tex. Ct. Rep. 83, 99 SW 867. Where counsel erroneously insists in argument that certain issues are before the jury, court may instruct specifically that such issues should not be considered. Tingley v. Times Mirror Co. [Cal.] 89 P 1097.

9. Request properly refused as restricting jury too narrowly in its determination of the issues of fact. J. W. Bishop Co. v. Dodson [C. C. A.] 152 F 128. In eminent domain proceedings, the jury being permitted to view the premises, an instruction that they should fix the value of the land taken and the damage to the land not taken from the **evidence,** without requiring them to consider the **knowledge** gained from their view, held erroneous. Chicago & A. R. Co. v. Scott, 225 Ill. 352, 80 NE 404. An instruction confining the investigation of the jury to a single issue, such issue being the only one in regard to which there was a conflict in the evidence, was not error. Chambless v. Melton, 127 Ga. 414, 56 SE 414. Not objectionable as limiting the care required of parents to the point of time that a child was at or near a track, where the time mentioned in the instruction was the date of the accident, which covered the whole time. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246. Not objectionable as confining jury to certain evidence as a basis of recovery to the exclusion of other facts, the latter being unimportant. Indianapolis Trac. & T. Co. v. Miller [Ind. App.] 82 NE 113. Restricting instruction on care imposed on carrier to "extraordinary diligence" was not erroneous under evidence. Georgia R. & Elec. Co. v. Cole, 1 Ga. App. 33, 57 SE 1026. Instruction inaccurate in requiring a clear preponderance of the evidence to justify a finding. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809.

10. Instruction on degree of care erroneous. Alabama City, G. & A. R. Co. v. Bates [Ala.] 43 S 98. In a personal injury suit, the complaint alleged other injuries than one claimed to have caused appendicitis. Not error to refuse to instruct that burden of proof was on plaintiff to show that injuries alleged were the proximate cause of the appendicitis. Birmingham R., L. & P. Co. v. Moore [Ala.] 42 S 1024. Request properly refused as imposing on a motorman the duty of stopping his car without regard to the suddenness with which a person came on the tracks. Garth v. North Alabama Trac. Co. [Ala.] 42 S 627. An instruction defining plaintiff's duty in entering and leaving defendant's car held not erroneous in using the expression "due diligence" when in all of the instructions the terms "reasonable diligence," "ordinary care," and "reasonable care" are used synonymously. Bond v. Chicago, B. & Q. R. Co., 122 Mo. App. 207, 99 SW 30. Proper to refuse requested instruction that defendant was only obligated to exercise ordinary care in the performance of a contract. Kerr v. Blair [Tex. Civ. App.] 20 Tex. Ct. Rep. 71, 105 SW 548. In an action by employe, a miner, for personal injuries, instruction was not objectionable as imposing absolute duty on defendant to furnish a reasonably safe entry to mine, instead of using ordinary care to keep the entry in a reasonably safe condition. Garard v. Manufacturers' Coal & Coke Co. [Mo.] 105 SW 767. In an action for personal injuries to a passenger, an instruction leaving to the determination of the jury the degree of care under the circumstances, required of defendant was proper. Galveston, H. & N. R. Co. v. Morrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 449, 102 SW 143.

11. Erroneous as requiring too high a degree of proof. Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 S 411; Helm-Van

left to the unlimited discretion of the jury.[12] General instructions should not be given when a case is submitted for a special verdict.[13] Where the evidence is close and conflicting, the jury should be perspicuously and accurately instructed.[14]

Eman v. Loveland [Iowa] 113 NW 1082; Gehlert v. Quinn, 35 Mont. 451, 90 P 168. An instruction should be so framed as to indicate the burden of proof without specially referring to it. Musselam v. Cincinnati, etc., R. Co., 31 Ky. L. R. 908, 104 SW 337.

Rule violated: Proper to instruct that party on whom burden legally rests must establish the facts by a preponderance of evidence. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246. Requiring proof by preponderance of evidence not error. Nelson v. Spence [Ga.] 58 SE 697. Instruction that burden on defendant in recoupment was correct. Sayles v. Quinn [Mass.] 82 NE 713. Instruction requiring conscience, instead of mind, of jury to be reasonably satisfied is defective. Birmingham R. L. & P. Co. v. Martin [Ala.] 42 S 618. Instruction in action for killing by railroad erroneous as placing burden on plaintiff to prove that killing was negligent in violation of Ky. St. 1903, § 809. Troutwine v. Louisville & N. R. Co. [Ky.] 105 SW 142. Requiring jury to be satisfied by a preponderance of the evidence imposed too high a degree of proof. Southern R. Co. v. Hobbs [Ala.] 43 S 844. An instruction that the jury must be "satisfied" from the evidence that defendants exercised lawful control over certain cotton was erroneous, where defendants were only required to "reasonably satisfy" the jury on such issue. Hackney v. Perry [Ala.] 44 S 1029. The word "satisfaction" in a phrase "to the satisfaction of your minds" in an instruction held objectionable. Panhandle & G. R. Co. v. Kirby [Tex. Civ. App.] 15 Tex. Ct. Rep. 827, 94 SW 173. Instruction requiring plaintiff to prove facts, the existence of which is presumed by law from the existence of the facts shown, was erroneous as imposing burden not required by law. Dawson v. Wombles, 123 Mo. App. 340, 100 SW 547. Request requiring jury to be "satisfied" of a certain fact was properly refused where plaintiff only had to establish such fact by a preponderance of evidence. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 18 Tex. Ct. Rep. 524, 101 SW 1061. In a personal injury suit, it is error to charge that plaintiff cannot recover if, after a fair consideration of all the evidence, any individual juror is reasonably satisfied by any material part of the evidence that he ought not to recover. Birmingham R., L. & P. Co. v. Moore [Ala.] 42 S 1024. Violative of Iowa Code, § 3639, as imposing on defendant the burden of proving all of the defenses set up in answer, instead of any one of them essential to a recovery. Williamson v. Robinson, 134 Iowa, 345, 111 NW 1012.

Not objectionable: Instructing that burden was on plaintiffs was not incorrect. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. "Instruction on contributory negligence 'that if defendant has satisfied you by preponderance of the evidence" was not objectionable on ground that jury might have inferred that they must be satisfied of fact by evidence coming from defendant and its witnesses. Leque v. Madison Gas & Elec. Co. [Wis.] 113 NW 946. Not error to instruct that burden of proof is on plaintiff to prove facts on which recovery based. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 19 Tex. Ct. Rep. 580, 101 SW 822. Not misleading to use word "fair" in the phrase "the burden of proof is upon plaintiff to satisfy you by a fair preponderance of the evidence." Parker v. Fairbanks-Morse Mfg. Co., 130 Wis. 525, 110 NW 409. Instructing jury to determine issues from preponderance of evidence is not objectionable as placing the burden on either party. Kerr v. Blair [Tex. Civ. App.] 20 Tex. Ct. Rep. 71, 105 SW 548. Instructing as to facts which would authorize a recovery, and authorizing jury to find for plaintiff on finding such facts true, otherwise to find for defendant, was not objectionable as placing burden on defendant to show nonexistence of facts. Paris & G. N. R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428.

12. Failure to instruct as to measure of damages was reversible error. Central of Georgia R. Co. v. Hughes, 127 Ga. 593, 56 SE 770. Instruction held erroneous as submitting the whole question of damages to the jury without any criterion for the determination of the damages allowable. Western Union Tel. Co. v. Lehman [Md.] 67 A 241. The jury should be properly instructed as to the measure of damages applicable to the facts of the particular case. Georgia R. & Elec. Co. v. Baker, 1 Ga. App. 832, 58 SE 88. Instruction giving jury complete liberty in estimating damages to consider all facts and circumstances in evidence, without regard to relevancy to or bearing on issue of damages held erroneous. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 NE 492. In every damage suit the court should instruct as to rule by which to measure and fix damages, covering the different elements for which compensation may be awarded. Southwestern Cotton Seed Oil Co. v. Stribling, 18 Okl. 417, 89 P 1129. Where the value of a horse, in an action for its injury, was for the jury, not error to instruct that if jury found for plaintiff it must be for a fixed sum. Campbell v. Ludin, 104 NYS 372. Refusal to instruct that jury is not bound by view of court, but that the determination of the amount of damages was for them, was reversible error. Douglas v. Metropolitan St. R. Co., 104 NYS 452. Instructing jury to award punitive damages if it finds grounds therefor was error. Louisville & N. R. Co. v. Cottengim, 31 Ky. L. R. 871, 104 SW 280.

13. A request for a special verdict renders it necessary that the jury should be fully instructed as to the facts which they are required to find, and this necessity is not met by the general instruction that they must find the facts necessary to determine the case. Village of Madisonville v. Rosser, 8 Ohio C. C. (N. S.) 387. **But it is not error** to give general rules of law appropriate to the particular question of a special verdict

Instructions should be certain [15] and definite.[16]

Instructions need not be numbered, in the absence of a request.[17]

Verbal inaccuracies and inelegancies See 6 C. L. 355 should be avoided,[18] but they are generally not considered ground for reversal unless prejudice results.[19]

Argumentative instructions See 6 C. L. 356 should not be given.[20] In the absence of prejudice the giving of an argumentative instruction is not reversible error.[21]

Instructions should be consistent. See 6 C. L. 356—Instructions should not be inconsistent upon material matters.[22] The giving of instructions contradictory in essential parts is reversible error,[23] unless such error is harmless.[24]

in connection with which such rules are given. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738.

14. Forney v. Melvin, 130 Ill. App. 203. Where the issue is closely controverted, the instruction should be clear so as not to confuse the jury. Register-Gazette Co. v. Larash, 123 Ill. App. 453; Dazey v. Stairwalt, 123 Ill. App. 489; Ashley v. Fitzwilliams, 127 Ill. App. 291; Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105.

15. See 8 C. L. 355. Miner v. Rickey [Cal. App.] 90 P 718.

16. Erroneous as indefinite and involved. Harrison v. Franklin [Mo. App.] 103 SW 585.

17. Failure to number instructions, there being no request, was not error. McIver v. Williamson-Halsell-Frasier Co. [Okl.] 92 P 170.

Failure to number instructions not reversible error where they were reduced to writing, stating clearly and concisely the law. Long v. Davis [Iowa] 114 NW 197; Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P 207.

18. Mere verbal inaccuracies, the ordinary and common sense meaning of which is plain, do not render it improper. Webb v. Ritter, 60 W. Va. 193, 54 SE 484. Use of the word "infectious" instead of "contagious" in an instruction in describing the characteristic of a disease of hogs was not erroneous as assuming that cholera is an infectious disease. Council v. St. Louis & S. F. R. Co., 123 Mo. App. 432, 100 SW 57. Use of the word "not" being a mere inadvertence was not error. London v. Crow [Tex. Civ. App.] 19 Tex. Ct. Rep. 451, 102 SW 177. Verbal slip placing on defendant the burden of proving contributory negligence by preponderance of evidence held not misleading. Horn v. Southern R. [S. C.] 58 SE 963. If there is a difference in verbiage in submission of request to instruct for respective parties, the courts' attention should be called to it before retirement of jury. Davis v. Michigan, Cent R. Co., 147 Mich. 479, 111 NW 76. Use of word "care" in sense of "nursing" not misleading. Johnson v. St. Paul & W. Coal Co., 131 Wis. 627, 111 NW 722.

19. A mere inadvertent use of terms will not make the instruction erroneous. It is not reversible error to use the words "civil service commission" instead of "board of county commissioners." People v. Cook County, 127 Ill. App. 401. Verbal inaccuracy insufficient to invalidate verdict if jury could not have been misled thereby. Snyder v. Stribling, 18 Okl. 168, 89 P 222. That an instruction is inartificially drawn will not affect it, if, as applied to the facts, it is not misleading. Lloyd v. Matthews, 223 Ill. 447, 79 NE 172. Where the law is correctly applied the mere use of certain words, which if stricken out leaves the meaning of the instructions intact, is not objectionable. In action for personal injury, last clause of instruction used phrase "all reasonable precautions," and first clause used phrase "ordinary care and prudence." Deering v. Barzak, 227 Ill. 71, 81 NE 1.

20. Dazey v. Stairwalt, 123 Ill. App. 489; Citizens' Sav., Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252; Belvidere City R. Co. v. Bute, 128 Ill. App. 620; Keokuk & Hamilton Bridge Co. v. Wetzel, 130 Ill. App. 81; White v. Kiggins, 130 Ill. App. 404. Not error to refuse argumentative instructions. Wickes v. Walden, 228 Ill. 56, 81 NE 798.

Properly refused because argumentative. Birmingham R., L. & P. Co. v. Martin [Ala.] 42 S 618; Woodstock Iron Works v. Kline [Ala.] 43 S 362; Loveman v. Birmington R. L. & P. Co. [Ala.] 43 S 411; Chappell v. Roberts [Ala.] 43 S 489; Bain v. Bain [Ala.] 43 S 562; Robinson v. Green [Ala.] 43 S 797; Sherrell v. Louisville & N. R. Co. [Ala.] 44 S 153; Alabama Consol. Coal & Iron Co. v. Vines [Ala.] 44 S 377; Louisville & N. R. Co. v. Sherell [Ala.] 44 S 631; Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639; Rector v. Robins [Ark.] 102 SW 209; Minot v. Boston & M. R. Co. [N. H.] 66 A 825. Requests constituting arguments in support of contentions by emphasizing certain portions of the evidence properly refused. Hayes v. Moulton, 194 Mass. 157, 80 NE 215.

Not argumentative. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694; Rambie v. San Antonio & G. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 903, 100 SW 1022; Charlton v. Kelly [C. C. A.] 156 F 433. Statement of facts being undisputed, instruction not objectionable as argumentative. Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 NW 76.

21. But though a charge given be abstract or argumentative, it is not reversible error if it correctly states the law. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808.

22. Cummings v. Holland, 130 Ill. App. 315. Inconsistent instructions are erroneous. Blake v. Miller [Iowa] 112 NW 158. Error to give instructions in irreconcilable conflict. Kansas City S. R. Co. v. Brooks [Ark.] 105 SW 93. Requests for instructions conflicting with instructions already given were properly refused. Rector v. Robins [Ark.] 102 SW 209; San Miguel Consol. Gold Min. Co. v. Stubbs [Colo.] 90 P 842; Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577. The jury should not be left to decide between conflicts in the instructions, without having their attention directed thereto by the court, and being instructed as to which

§ 7. *Relation of instructions to pleading and evidence.*[See 8 C. L. 357]—Instructions should be predicated upon and be applicable to the issues raised by the pleadings [25] which remain controverted,[26] and upon the competent [27] evidence introduced,[28]

of the antagonistic principles is correct and applicable, and which should be disregarded. Savannah Elec. Co. v. McClelland, 128 Ga. 87, 57 SE 91.

Not inconsistent or conflicting. Breiner v. Nugent [Iowa] 111 NW 446; Clark v. Van Vleck [Iowa] 112 NW 648; Provident Sav. Life Assur. Soc. v. Johnson, 30 Ky. L. R. 1031, 99 SW 1159; Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 SW 1072; Gibler v. Terminal R. Ass'n of St. Louis, 203 Mo. 208, 101 SW 37; Cahill v. Chicago & A. R. Co., 205 Mo. 393, 103 SW 532; Garard v. Manufacturers' Coal & Coke Co. [Mo.] 105 SW 767; Missouri, K. & T. R. Co. v. Arey [Tex. Civ. App.] 18 Tex. Ct. Rep. 38, 100 SW 963; International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 17 Tex. Ct. Rep. 752, 18 Tex. Ct. Rep. 65, 100 SW 1000; Womack v. International & G. N. R. Co. [Tex.] 18 Tex. Ct. Rep. 628, 100 SW 1151; Painter v. Kilgore [Tex. Civ. App.] 19 Tex. Ct. Rep. 380, 101 SW 809; Southern R. Co. v. Stockdon, 106 Va. 693, 56 SE 713. Not objectionable as self-contradictory, illogical, or misleading. Logeman Bros. Co. v. R. J. Preuss Co., 131 Wis. 122, 111 NW 64. Instructions were not conflicting but to be read together. Hunt v. St. Louis, etc., R. Co. [Mo. App.] 103 SW 133. Instructions given held not erroneous as substantially conflicting. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241.

23. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577. The giving of contradictory instructions, one correct and one erroneous, is prejudicial error. McCurry v. Hawkins [Ark.] 103 SW 600.

Not prejudicial: Defendants claiming under certain deeds were not prejudiced by conflicting instructions as to ultimate grantee's title, where the jury found against the ultimate grantee for entire property. London v. Crow [Tex. Civ. App.] 19 Tex. Ct. Rep. 451, 102 SW 177.

24. Erroneous conflict harmless. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577.

25. Jacksonville Elec. Co. v. Batchis [Fla.] 44 S 933; Lewter v. Tomlinson [Fla.] 44 S 935. Instructions of the court to the jury should be confined to the pleadings in the case. Cordele Sash, Door & Lumber Co. v. Wilson Lumber Co. [Ga.] 58 SE 860. An instruction controverted by both the pleading and proof is erroneous. Mastin v. Bartholomew [Colo.] 92 P 682. No error to refuse a request **not based on the pleadings.** Alabama City, G. & A. R Co. v. Bates [Ala.] 43 S 98; Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867; Duncan v. St. Louis & S. F. R. Co. [Ala.] 44 S 418; Green v. Brady [Ala.] 44 S 408; Mobile & O. R. Co. v. Glover [Ala.] 43 S 719; Ewing v. U. S. [Ariz.] 89 P. 593; Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815; San Miguel Consol. Gold Min. Co. v. Stubbs [Colo.] 90 P 842; Coal Belt Elec. R. Co v. Young, 126 Ill. App. 651; Swift v. Rennard, 128 Ill. App. 181; Clark v. Farmington Coal Co., 130 Ill. App. 192; Forney v. Melvin, 130 Ill. App. 203; Helm v. Loveland [Iowa] 113 NW 1082; Spinks v. Turley, 31 Ky. L. R. 676, 103 SW 321; Robinson, Norton & Co. v. Meyers [Ky.] 105 SW 428; Harrison v. Franklin [Mo. App.] 103 SW 585; State v. Allen, 124 Mo. App. 465, 103 SW 1090; Streator v. Streator [N. C.] 59 SE 112; Bolton v. Western Union Tel. Co., 76 S. C. 529, 57 SE 543; Chesapeake & N. R. v. Crews [Tenn.] 99 SW 368; Bell v. Keays [Tex. Civ. App.] 18 Tex. Ct. Rep. 597, 100 SW 813; Commerce Milling & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916; J. W. Bishop Co. v. Dodson [C. C. A.] 152 F 128. Instructions must be confined to issues and predicated on facts in proof. Griffing Bros. Co. v. Winfield [Fla.] 43 S 687. Instructions inapplicable to the pleadings and evidence should not be given. Stiles v. Shedden [Ga. App.] 58 SE 515. Instructions not sustained by pleadings or evidence properly refused. Antone v. Miles [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 105 SW 39. License to use a wall not being an issue, it was improper to submit question whether defendants gave plaintiffs license, right, or authority to use wall. Howie v. California Brew. Co., 35 Mont. 264, 88 P 1007. Whether a carrier's agent induced plaintiff to deliver stock in expectation of a shipment in a very short time, being an issue not raised by the pleadings, its submission was improper. St. Louis & S. F. R. Co. v. Vaughan [Ark.] 105 SW 573. Requests asserting a proposition not raised by the pleadings, or going beyond the issues, were properly refused. Woodstock Iron Works v. Kline [Ala.] 43 S 362. Refusal of requests not pertinent or adjusted to issues no error. Green v. Wright, 1 Ga. App. 194, 57 SE 965. Proper to refuse an instruction that under the pleadings plaintiff could not recover for her state of neurasthenia, if she was so afflicted, where the allegations of the complaint, supported by the evidence, sufficiently set forth that her suffering was due to such disease, though the technical term was not used in the complaint. Colorado Springs & Interurban R. Co. v. Nichols [Colo.] 92 P 691. The only issue being whether parties agreed to continue business under the terms of an old written contract or entered into a new verbal agreement, a request that there was no presumption of a continuance of the written contract held properly refused. Cate v. Fife [Vt.] 68 A 1. A request predicated on a defect not submitted to the jury was properly refused. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 S 1034. An instruction should not be predicated upon a state of fact not relied on as a defense. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 SW 660. Instruction predicating recovery for one plaintiff, on facts in application to others, properly refused. Beal & Doyle Dry Goods Co. v. Barton, 80 Ark. 326, 97 SW 58. Refusal of request for instruction on issue not raised by interplea was proper. Faulkner v. Cook [Ark.] 103 SW 384. Erroneous in submitting matter outside of issue. St. Louis, etc., R. Co. v. Crowder [Ark.] 103 SW 172. Refusal of request as to defense, shown by the evidence, but not pleaded by the answer, no error. Smith v. F. W. Heitman Co. [Tex.

Civ. App.] 17 Tex. Ct. Rep. 124, 98 SW 1074. A requested instruction so general as to embrace more acts of negligence on plaintiff's part than were pleaded by defendant was properly refused. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699. Instructions foreign to issues and misleading. Humphreys v. Smith, 128 Ga. 549, 58 SE 26. Issue of negligence not being raised by pleadings, it was improper to instruct on failure to exercise ordinary care in removing a wall. Howie v. California Brew. Co., 35 Mont. 264, 88 P 1007. In action on a policy of insurance, the breach of a condition, representation, or warranty, contained in a fire policy, though established by the evidence, should not be submitted, where breach not pleaded. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. Authorizing punitive damages in the absence of anything in pleadings or proof indicating more than a claim for actual damages was error. Reed v. Coughran [S. D.] 111 NW 559. An instruction, in an action for injuries caused by being thrown from a street car, was erroneous as enlarging on the particular negligence alleged. Smith v. Metropolitan St. R. Co. [Mo. App.] 103 SW 593. Refusal to submit whether the inspection of heading by vendee was fair and honest was not error, where fraud or unfairness was not alleged. Dunham v. H. D. Williams Cooperage Co. [Ark.] 103 SW 386. Request for instruction on account stated, where such defense was not embraced in pleadings, was properly refused. Bagnell Tie & Timber Co. v. Goodrich [Ark.] 102 SW 228. Instruction on a phase of contributory negligence not alleged in the answer in an action for personal injury was properly refused. Chicago, etc., R. Co. v. Stilwell [Tex. Civ. App.] 19 Tex. Ct. Rep. 760, 104 SW 1071. In an action for killing a cow, the evidence showing that a cow entered the right of way over a cattle guard, admittedly insufficient, and there being no evidence that the cow entered through a defective fence, failure to define a lawful fence was not error. Sowders v. St. Louis & S. F. R. Co. [Mo. App.] 104 SW 1122. Where no question was raised as to a married woman's rights to recover for loss of time from household duties, refusal of instruction that she could not was proper. Colorado Springs & Interurban R. Co. v. Nichols [Colo.] 92 P 691. Settlement not having been pleaded as a defense, defendant is not entitled to have it submitted as an issue. Clark v. Patapsco Guano Co., 144 N. C. 64, 56 SE 858. Although counsel in argument may have treated the case as embracing other issues between the same parties. Martin v. Nichols, 127 Ga. 705, 56 SE 995. So charging the jury as in effect to authorize them to find for plaintiff, upon a state of facts entirely different from those upon which plaintiff by his pleadings and evidence rested his right to a recovery, was erroneous. Savannah Elec. Co. v. McClelland, 128 Ga. 87, 57 SE 91. Where there was no issue as to age and discretion of plaintiff in an action for personal injuries, a request that plaintiff was of sufficient judgment and discretion to be guilty of contributory negligence was properly refused. Birmingham R., L. & P. Co. v. Moore [Ala.] 43 S 841. In action for damages for death by wrongful act, a request based on the giving of signals was properly refused, where none of the counts submitted predicated negligence on signals given by one employe to another. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 S 1034. Instructions on contributory negligence not covered by plea of contributory negligence ought not to be given. Louisville & N. R. Co. v. Mulder [Ala.] 42 S 742. Where the answer denied title in plaintiff, and set up adverse possession, refusal to charge only on question of adverse possession was proper. Langston v. Cothran [S. C.] 58 SE 956. Pleadings not tending issue of non sui juris, instruction leaving to jury whether child was non sui juris were erroneous. Indianapolis Trac. & T. Co. v. Beckman [Ind. App.] 81 NE 82. Where the declaration charged that a fire was set by an engine, held error to instruct that plaintiff could recover whether the fire was "set by some other person or by defendants' engines." Smith v. Central Vermont R. Co. [Vt.] 67 A 535. An instruction, in an action for balance due on a contract, that failed to limit the recovery for the work done to contract prices, as set forth in the declaration, held erroneous. Dick v. Biddle Bros. [Md.] 66 A 21. In an action based on statutory negligence, it is error to instruct in the common-law liability, except in so far as the statute is concurrent with the common-law liability. Chesapeake & N. R. v. Crews [Tenn.] 99 SW 368.

Rule not violated: Applicable to pleadings and evidence, not erroneous. Ranck v. Cedar Rapids, 134 Iowa, 563, 111 NW 1027. Not objectionable as not conforming to issues. Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 SW 48; Shoush v. Missouri Pac. R. Co., 125 Mo. App. 386, 102 SW 591; Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Instruction erroneous as not based on matters within issues. Eldorado, etc., R. Co. v Everett, 225 Ill. 529, 80 NE 281; Robinson v. Duvall, 27 App. D. C. 535; Ward v. Brand, 30 Ky. L. R. 827, 99 SW 626. Not objectionable as submitting issue outside of petition in malicious prosecution. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Instruction was not broader than pleadings. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. Instruction not erroneous as enlarging scope of cause of action stated in complaint. Council v. St. Louis & S. F. R. Co., 123 Mo. App. 432, 100 SW 57. Instruction not erroneous, which was a mere statement of a general principle proper to instruct upon in all cases arising under the statute requiring signals at highway crossings, although the issue was not particularly raised. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. Where petition alleged that plaintiff was a minor and not aware of the danger incident to his employment, not error to instruct concerning law applicable to an inexperienced employe. Texas Cent. R. Co. v. Waldie [Tex. Civ App.] 18 Tex. Ct. Rep. 60, 101 SW 517. No error in refusing instruction that if witness signed a certain document under duress, such fact ought not in law to affect his credibility, where there was no contention that his credibility was affected. Joyce v. Joyce [Conn.] 67 A 374. An instruction as to the liability of a carrier requiring a finding that the car was started before plaintiff "had a reasonable time to alight" did not enlarge scope of issues pleaded, although the adjective "reasonable" was omitted from the averment of the petition relating to time allotted plaintiff

to leave car. Green v. Metropolitan St. R. Co., 122 Mo. App. 647, 99 SW 28. Held within scope of allegations of negligence. Evers v. Wiggins Ferry Co. [Mo. App.] 105 SW 306. Instructing on contributory negligence, where it was pleaded by defendant and not withdrawn, was not error, though there was no evidence tending to show plaintiff's negligence. Murphy v. Metropolitan St. R. Co., 125 Mo. App. 269, 102 SW 64. Instruction held erroneous which submitted issue barely raised by the pleadings and not raised by the evidence. Graham v. Edwards [Tex. Civ. App.] 99 SW 436. The instruction must be based on evidence, and not procured upon a theory conflicting with the pleadings. Hendricks v. Allen, 128 Ga. 181, 57 SE 224.

26. Instructions submitting whether plaintiff suffered any exposure or discomfort whatever, in the absence of allegations or proof that he did, were erroneous. Baltimore, etc., R. Co. v. Sheridan, 31 Ky. L. R. 109, 101 SW 928.

Not variant from issues raised. Southern R. Co. v. Taylor [Ala.] 42 S 625. Issues submitted within pleadings. Smith v. Landa [Tex. Civ. App.] 18 Tex. Ct. Rep. 130, 101 SW 470. Instruction not erroneous as not being within issues. Eureka Stone Co. v. Knight [Ark.] 100 SW 878. Not objectionable as not within the issues. Politowitz v. Citizens' Tel. Co., 123 Mo. App. 77, 99 SW 756. Not objectionable as not responsive to issues. Jenson v. Will & Finck Co., 150 Cal. 398, 89 P 113. Where there was evidence that a slough was not closed up at its mouth at the time of an alleged overflow, an instruction that if the jury believed, from the evidence, that the slough was solidly closed up at the time of alleged injury so that no water passed through it, it was not a natural water course as alleged, held erroneous. St. Louis Merchants' Bridge Terminal R. Ass'n v. Schultz, 226 Ill. 409, 80 NE 879. The evidence showing that plaintiff assumed the risk of injury from unblocked frogs in use, held error to submit the question of defendant's negligence in failing to block frog. Choctaw, O. & G. R. Co. v. Thompson [Ark.] 100 SW 83.

27. An instruction based on evidence improperly admitted, but not excepted to, was erroneous. Latourette v. Meldrum [Or.] 90 P 503. Not error to refuse written instruction based on evidence properly excluded. Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004. A party may base his instructions upon the evidence of his opponent. Hedges v. Metropolitan St. R. Co., 125 Mo. App. 583, 102 SW 1086. Evidence, without the issues, admitted without objection, will not sustain an instruction thereon. Moody v. Rowland [Tex.] 17 Tex. Ct. Rep. 860, 99 SW 1112. Where petition for false representations alleged that representations were made by defendants as from personal knowledge, and the evidence showed that in making the representations defendants disavowed personal knowledge, the issue made by the pleadings should be disregarded, and jury instructed according to issue made by evidence. Hansen v. Kline [Iowa] 113 NW 504. Not erroneous as permitting consideration of opinion of witness, even though jury found some of the facts upon which it was based untrue. Conway v. Murphy [Iowa] 112 NW 764.

28. Must be based on evidence. Bradford v. National Ben. Ass'n, 26 App. D. C. 268; Gambill v. Fuqua [Ala.] 42 S 735; Johnson, Berger & Co. v. Hughes [Ark.] 103 SW 184; Central of Georgia R. Co v. Hughes, 127 Ga. 593, 56 SE 770; Bauchens v. Davis, 229 Ill. 557, 82 NE 365; Chicago, etc.. R. Co. v. Rathneau, 225 Ill. 278, 80 NE 119; Dean v. Carpenter, 134 Iowa, 275, 111 NW 815; Grubel v. Busche, 75 Kan. 820, 91 P 73; Hollingsworth v. Barrett, 31 Ky. L. R. 428, 102 SW 330; Louisville R. Co. v. Shulhafer [Ky.] 105 SW 449; Maysville & B. S. R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016; Smitley v. Pinch, 148 Mich. 670, 14 Det. Leg. N. 324, 112 NW 686; St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 SW 583; Langston v. Cothran [S. C.] 58 SE 956; Three States Lumber Co. v. Blanks [Tenn.] 102 SW 79; Stewart v. Smallwood [Tex. Civ. App.] 18 Tex. Ct. Rep. 502, 102 SW 159; International & G. N. R. Co. v. Stewart [Tex. Civ. App.] 18 Tex. Ct. Rep. 115, 101 SW 282; Prewitt v. S. W. Tel. & T. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 289, 101 SW 812; San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867; Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134; Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413; Texarkana & Ft. S. R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167; Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 SW 1100; Comer v. Ritter Lumber Co., 59 W. Va. 688, 53 SE 906; Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626; Chadister v. Baltimore & O. R. Co. [W. Va.] 59 SE 523; Kohl v. Bradley, Clark & Co., 130 Wis. 301, 110 NW 265; Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59; Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. If not based on evidence, it is error, although a correct legal proposition, where it has a tendency to mislead. Boesen v. Omaha St. R. Co. [Neb.] 112 NW 614. It is grounds for reversal to submit issues to the jury that are not raised by the evidence. Missouri, K. & T. R. Co. v. Harrison [Tex. Civ. App.] 17 Tex. Ct. Rep. 675, 99 SW 124. Instructions stating fellow-servant doctrine properly refused **where not applicable** to any issue in the case. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136. Instruction properly refused as **inapplicable to evidence.** Norfolk & W. R. Co. v. Stegall's Adm'x [Va.] 57 SE 657; Featherston v. Trone [Ark.] 102 SW 196; Colorado Springs & Elec. Co. v. Soper, 38 Colo. 141, 88 P 165; Vannest v. Murphy [Iowa] 112 NW 236; Belnap v. Widdison [Utah] 90 P 393. **Not open** to objection as not being applicable to evidence. Zarnik v. Reiss Coal Co. [Wis.] 113 NW 752.

Inapplicable proof. Godair v. Ham Nat. Bank, 225 Ill. 572, 80 NE 407; Garard v. Manufacturers' Coal & Coke Co. [Mo.] 105 SW 767. Not conforming to proof was properly refused. Green v. Brady [Ala.] 44 S 408. Instruction in action against street railway for injuries to passenger was objectionable as misleading, in bringing in the humanitarian doctrine, **inapplicable to the facts.** Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 SW 142. Requested instruction properly refused, unless applicable to facts as proven or to some theory of evidence of case. McLain v. Nurnberg [N. D.] 112 NW 243. A request, though containing a correct statement of the law, if inapplicable to the issues, is properly refused. De Coursey v. Rhode Island Co. [R. I.] 67 A 431; Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P 1109.

Mere giving of an instruction **inapplicable to case** does not constitute harmful error. Pelton v. Spider Lake Sawmill and Lumber Co. [Wis.] 112 NW 29. Failure to instruct on Civil Code 1895, § 5163, not erroneous, **when not applicable to case.** Shields v. Georgia R. & Elec. Co., 1 Ga. App. 172, 57 SE 980.

Not based on evidence: Instruction was objectionable as misleading, where there was no evidence on which to base it. Southern Hotel Co. v. Zimmerman [Ark.] 105 SW 873. Instruction erroneous in submitting issue not covered by evidence or pleading. Nash v. Noble [Tex. Civ. App.] 18 Tex. Ct. Rep. 543, 102 SW 736. Although a correct expression of the law. City of Bloomington v. Woodworth [Ind. App.] 81 NE 611. In an action on a note request for instruction that if the note was written without interest, and subsequent to its delivery the letters "out" in "without" were erased, interlined, or crossed out, so that the note was made to read "with interest," a fraudulent alteration by plaintiff or with his knowledge should be presumed, was properly refused, where the evidence was abundant to warrant a finding that the note, when signed, was so written as to carry interest. Wood v. Skelley [Mass.] 81 NE 872. Where verdict sustained, refusal of instruction which would have lead to a different result, not error. Long v. Johnson County Tel. Co., 134 Iowa, 336, 111 NW 984. Request properly refused as presenting issue not based on facts. Brown v. San Antonio Trac. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 936, 101 SW 526. Instructions predicated upon a statement of facts contrary to the uncontradicted and undisputed proof in the case are erroneous. Mulliken v. Harrison [Fla.] 44 S 426. Reversible error to submit material issue not raised by the evidence. Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. In the absence of evidence indicating that, by reason of age or experience, a trespasser ejected from a train was less capable than an ordinary person of looking out for his safety, held error to refer in instruction to the age and experience of the trespasser in determining his contributory negligence. Doggett v. Chicago, etc., R. Co., 134 Iowa, 690, 112 NW 171. Error to read statute in instructing jury, in the absence of evidence showing its violation. Robinson v. Crimmins, 104 NYS 1076. No evidence being offered as to medical expenses, it was error to instruct jury to consider them. Worthy v. Jonesville Oil Mill [S. C.] 57 SE 634. Where there was no evidence of negligence in respect to the place where earth was thrown, an instruction authorizing jury to consider if the excavator was negligent in throwing earth to the east of a street and across street car track was erroneous. Citizens' Gas & Elec. Co. v. Nicholson [C. C. A.] 152 F 389. There being no evidence of agreement to compensate for services, a request that if there was an agreement by which defendants were to compensate plaintiff for his services in connection with a sale, then verdict should be for plaintiff, held properly refused. Walker v. Baldwin [Md.] 68 A 25. There being no evidence of employment to sell property, request that if defendants employed plaintiff to procure purchaser, and plaintiff did procure purchaser, then he could recover, properly rejected. Id. Request on point as to which no evidence introduced, held properly refused. Id. Request to charge property refused, where there was no evidence to sustain the proposition asserted. Garrett County Com'rs v. Blackburn [Md.] 66 A 31. Instructions presenting issues not raised by the evidence are properly refused. Chicago, etc., R. Co. v. Hiltibrand [Tex. Civ. App.] 18 Tex. Ct. Rep. 93, 99 SW 707. Error to instruct where not based on evidence. Key v. Usher, 30 Ky. L. R. 667, 99 SW 324. Instructions should not contain element of damages not covered by the evidence. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694. Request for instruction, that if crops destroyed would have been destroyed by an overflow before they were gathered, the jury should consider this fact in measuring the damages, was properly refused in the absence of evidence that overflow would inevitably have destroyed crop. St. Louis S. W. R. Co. v. Graham [Ark.] 102 SW 700. Request submitting issue of limitation of two years as bar to suit was proper, where issue not raised by the evidence. Moody v. Rowland [Tex. Civ. App.] 102 SW 911. Where an unsigned memorandum, written by defendants' agent and purporting to be the substance of the agreement for the sale of a judgment, was not offered in evidence as a contract for the sale of the judgment, refusal to instruct that the memorandum was not a contract was not error. Id. In personal injury case there being no evidence of loss of earning capacity, refusal to instruct that damages were not recoverable on that account was proper. McGovern v. Interurban R. Co. [Iowa] 111 NW 412. Where there was no evidence as to value of cotton, in an action for its recovery, it was error to instruct that, if jury found for defendant, they should assess the value of the property at a certain sum, it not appearing that there was any evidence of the value of the cotton. Hooper v. Pierce [Ala.] 44 S 386. Instructing that an engineer has a right to presume that a person walking on the track towards the train will get off, was erroneous, in the absence of evidence that the injured person was walking on the track towards the train Duncan v. St. Louis & S. F. R. Co. [Ala.] 44 S 418. There being no evidence that plaintiff expended any money for medicine or for medical services, it was improper to instruct that, in assessing damages, those items could be considered. Central of Georgia R. Co. v. McNab [Ala.] 43 S 222. There being no evidence on which to base a recovery for a particular element of alleged damages, it was error to submit question of plaintiff's right to recover for such element. Southern R. Co. v. Broughton, 128 Ga. 814, 58 SE 470. Instruction on law of special deposits in the absence of evidence authorizing was error. McGregor v. Battle, 128 Ga. 577, 58 SE 28. In the absence of proof that wife was alienated from her husband, refusal of request authorizing presumption of malice on part of plaintiff's father, who took her away from her husband, if he advised or caused her to leave her husband and without making proper investigation of facts, was proper. Klein v. Klein, 31 Ky. L. R. 28, 101 SW 382. An instruction, the effect of which was to increase the duty of a railroad company to persons injured, if they were found on its track by invitation, was erroneous, where not justified by the evidence. Norfolk & W. R. Co. v. Denny's Adm'r, 106 Va. 383, 56 SE

which is sufficient to authorize an instruction.[29] It is proper to limit the instructions to the evidence adduced.[30] Where evidence is admitted without objection on a matter covered by the pleadings, the court may assume in instructing that the pleadings are as broad as the evidence.[31] Whether there is any evidence in the record tending

321. Instructing jury to take into consideration and give the proper effect to any evidence before them, if there be such, tending to show that there was a reasonable prospect of increased earnings on the part of plaintiff in case he had not been injured, was improper, where there was no evidence to warrant it. Southern R. Co. v. Scott, 128 Ga. 244, 57 SE 504. Where there was no evidence to support a claim made by defendant, failure to shape instruction with reference to it was not error. Howard Supply Co. v. Bunn, 127 Ga. 663, 56 SE 757. Instruction not supported by evidence was properly refused. Judith Inland Transp. Co. v. Williams [Mont.] 91 P 1061. Held error to submit question as to permanency of injuries, where there was no evidence justifying such submission. Perelli v. New York City R. Co., 104 NYS 1047.

29. Culberson v. Alabama Const. Co., 127 Ga. 599, 56 SE 765; Bulger v. Gleason, 123 Ill. App. 42; Dazey v. Stairwalt, 123 Ill. App. 489; Rabinewitz v. Hall, 123 Ill. App. 65; Field v. Winheim, 123 Ill. App. 227. Only the substance of an issue need be proved to authorize its submission. Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Where actual pecuniary damages are sought for loss of time, some evidence must be given showing such loss and its value to support an instruction to the jury to consider loss of time in fixing damages. Barron v. Northern Pac. R. Co. [N. D.] 113 NW 102. Instructions presenting issues not authorized by the evidence are erroneous, although, as abstract propositions of law, they may contain nothing objectionable. Bird v. Benton, 127 Ga. 371, 56 SE 450. Hypothetical instruction was proper, where there was evidence to sustain. Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P 1109.

Sufficient to authorize an instruction: Instruction to find predicated upon knowledge, not shown by positive evidence, but reasonably to be inferred from facts, was proper. Muncy v. Bevier, 124 Mo. App. 10, 101 SW 157. Refusal to give requested instruction not authorized by the evidence was not error. Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004. In trespass, where the title to land was involved, failure to instruct as to the seven-year statute, giving title, where it was not justified by the evidence, was not error. Fincannon v. Sudderth, 144 N. C. 587, 57 SE 337. An instruction only as broad as the case by the pleading and evidence is not error. Rabb v. Goodrich [Tex. Civ. App.] 18 Tex. Ct. Rep. 662, 102 SW 910. Not objectionable as not based on evidence. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 SW 142. Instruction not objectionable as based on facts not in evidence and resting on conjecture. Powers v. St. Louis Transit Co., 202 Mo. 267, 100 SW 655. An issue submitted in strict accord with the testimony is not objectionable. Ft. Worth & D. C. R. Co. v. Wooldridge [Tex. Civ. App.] 20 Tex. Ct. Rep. 79, 105 SW 845. Instruction not erroneous and misleading is imputing to defendant a theory of defense not entertained, and unsustained. Grasty v. Lindsay [Va.] 59 SE 381. Affirmative testimony, although flatly denied by other testimony, held sufficient basis for instruction. Bond v. Chicago, B. & Q. R. Co., 122 Mo. App. 207, 99 SW 30.

Insufficient: Submitting question of fact, under proper instructions where there is evidence, however slight, reasonably tending to support it, was not error. Snyder v. Stribling, 18 Okl. 168, 89 P 222. Properly refused where not sustained by the evidence. Neal v. Taylor, 106 Va. 651, 56 SE 590. Instruction properly refused where there was no evidence to support it, aside from a mere suspicion. Carmody v. St. Louis Transit Co., 122 Mo. App. 338, 99 SW 495. Not warranted by the evidence properly refused. Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 SW 1079; Bassford v. West, 124 Mo. App. 248, 101 SW 610. Instruction erroneous because not sustained by the evidence. Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 18 Tex. Ct. Rep. 11, 100 SW 977. Error in submitting issue not supported by evidence. Stoker v. Fugitt [Tex. Civ. App.] 18 Tex. Ct. Rep. 653, 102 SW 743; Drogmund v. Metropolitan St. R. Co. [Mo. App.] 98 SW 1091. Refusal of request for instruction not based on substantial evidence was proper. State v. Dickman, 124 Mo. App. 653, 102 SW 44; McDonald v. McCrabb [Tex. Civ. App.] 19 Tex. Ct. Rep. 789, 105 SW 238; Taliaferro v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 865, 103 SW 464; Paris & G. N. R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Not supported by evidence, and inapplicable to pleadings, was erroneous. First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P 1012. Refusal of request for instruction in malicious prosecution, permitting a finding for defendant if he did not begin prosecution, was proper, where instruction not authorized by the evidence. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Error to instruct on theory not sustained by the evidence. Virginia Bridge & Iron Co. v. Crafts [Ga. App.] 58 SE 322. Request not sustained by evidence properly refused as misleading. Garth v. North Ala. Trac. Co. [Ala.] 42 S 627. An instruction to consider "among other things," certain facts in evidence, was not bad as authorizing a consideration of any and all things that might occur to jury, whether shown by evidence or not. Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626. An instruction that may lead the jury to believe that they can base their verdict on a finding of fact of which there is no evidence is error. Rumsey v. Shaw, 25 Pa. Super. Ct. 386. Where defendant was entitled to general instruction because of want of evidence to support a count of complaint, it was not required that such instruction be given with hypothesis. Louisville & N. R. Co. v. Perkins [Ala.] 44 S 602.

30. No claim for damages for injury to business, and no evidence being offered in support of claim, an instruction that nothing be allowed for injury to business was properly refused. Ball v. Skinner, 134 Iowa, 298, 111 NW 1022.

31. Instruction on degree of care incumbent on railroad to look out for travlers was not

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to prove a cause of action is a question of law, and the court may instruct the jury to disregard a count or counts in the declaration if there is no evidence to support a recovery thereunder.[32] Propositions, though correct, which are merely abstract, should not be given [33] as they tend to mislead and confuse the jury.[34] Requests, abstractly correct, but which can only be understood by the jury as referring to the situation presented by the evidence, as to which it is not applicable, held properly refused,[35] but the giving of an inapplicable instruction is not reversible error [36] unless prejudice results.[37]

§ 8. *Stating issues to the jury.*[See 6 C. L. 364]—The court is not required to give a

erroneous, although question not raised by pleadings, where responsive to testimony. Harbert v. Atlantic, etc., R. Co. [S. C.] 59 SE 644. An instruction, in an action against a railroad for killing stock, on negligence in exceeding speed limit imposed by city ordinance, was not erroneous, although the ordinance was not set up in the pleading. Louisville & N. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. Instructions should be confined to the issues although evidence be admitted that is not within such issues. Jacksonville Elec. Co. v. Batchis [Fla.] 44 S 933.

32. Quincy Horse R. & Carrying Co. v. Rankin, 123 Ill. App 472.

33. Woodstock Iron Works v. Kline [Ala.] 43 S 362; Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867; Rector v. Robins [Ark.] 102 SW 209; Martin v. Hertz, 224 Ill. 84, 79 NE 558; Martin v. Trainer 125 Ill. App. 474; Swift v. Rennard, 128 Ill. App. 181; Haas v. Tegtmeier, 128 Ill. App. 280; Utter v. Curry, 130, Ill. App. 21; First Nat. Bk. v. Carroll, 35 Mont. 302, 88 P 1012. Objectionable as abstract. Belnap v. Widdison [Utah] 90 P 393; Newport News & O. P. R. & Elec. Co. v. McCormick, 106 Va. 517, 56 SE 281; Delmar Oil Co. v. Bartlett [W. Va.] 59 SE 634. Instruction, though correctly stating abstract propositions of law, properly refused, because inapplicable to the issues. Sullivan v. Fugazzi, 193 Mass. 518, 79 NE 775; State v. Caron, 118 La. 349, 42 S 960. Propositions of law should be concretely stated. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815. Refusal of instruction defining the abstract meaning of a word, apart from the connection in which the jury might find the word to be used, was not error. Way v. Greer [Mass.] 81 NE 1002. Refusal of abstract proposition of law not supported by the evidence was not error. Empire Bldg. Co. v. Hopkins, 204 Mo. 643, 103 SW 66. No error in refusing abstract principle of law without informing the jury of its application to the issues. Hayward Lumber Co. v. Cox [Tex. Civ. App.] 19 Tex. Ct. Rep. 820, 104 SW 403. Though abstractly correct, if request not fairly adjusted to evidence, court may refuse to give. Murphy v. Meacham, 1 Ga. App. 155, 57 SE 1046. Failure to charge a principle of law not applicable to the evidence was not error in the absence of a request. Mitchem v. Allen, 128 Ga. 407, 57 SE 721. Abstract propositions of law though correct are improperly given where inapplicable to issues. Hutchison v. Maysville, 30 Ky. L. R. 1173, 100 SW 331. In will contest, instruction that undue influence and mental capacity cannot be separated, where testatrix is of advanced age and suffering from a disease affecting her brain and vital powers, properly refused as abstract. Hayes v. Moulton, 194 Mass. 157, 80 NE 215.

Not objectionble as abstract. Eureka Stone Co. v. Knight [Ark.] 100 SW 878. The instruction should not state a rule that has no proper place in the trial of the cause. Martin v. Trainer, 125 Ill. App. 474.

34. Langston v. Cothran [S. C.] 58 SE 956; Nation v. Jones [Ga. App.] 59 SE 330.

35. Hanlon v. Central R. Co. [N. Y.] 79 NE 846.

36. Newport News & O. P. R. & Elec. Co. v. McCormick, 106 Va. 517, 56 SE 281; Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867. A correct abstract statement of the law, going to matters not in issue, and which could not influence the jury, are not open to serious objection. Kansas City S. R. Co. v. Davis [Ark.] 103 SW 603.

37. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867; Chadister v. Baltimore & O. R. Co. [W. Va.] 59 SE 523. No ground for reversal unless it appears that it was calculated to mislead or confuse jury. Newport News & O. P. R. & Elec. Co. v. McCormick, 106 Va. 517, 56 SE 281. Instruction containing correct statement of abstract principle of law, but not inapplicable to evidence, and tending to mislead and prejudice rights, was reversible error. Nation v. Jones [Ga. App.] 59 SE 330.

Not prejudicial. Gracy v. Atlantic Coast Line Co. [Fla.] 42 S 903. Instructions not prejudicial, which were applicable to other questions submitted in a special verdict but were not applicable to questions in connection with the reading of which they were given, where they could not mislead. Neumeister v. Goddard [Wis.] 113 NW 733. Stating abstract legal principle was not prejudicial, the facts being few and of such a nature that general principles of law might be easily applied. Mulrone v. Marshall, 35 Mont. 238, 88 P 797. An abstract instruction was not prejudicial error where, when taken with other instructions, the jury could not have been mislead. Christensen v. Floriston Pulp & Paper Co. [Nev.] 92 P 210. Not prejudicial where it could not have mislead the jury. Langston v. Cothran [S. C.] 58 SE 956. An instruction stating an abstract proposition of law held not error where it contained an accurate statement of the law and was not misleading. Chicago, etc., R. Co. v. Rathneau, 225 Ill. 278, 80 NE 119.

formal statement of issues,[38] and they need not be submitted in any particular form.[39] The issues to be tried should be submitted to the jury [40] in clear, orderly, and distinct language. All material issues should be submitted,[41] but issues not sustained,[42, 43] undisputed,[44] or abandoned,[45] need not be submitted. The jury should not be referred to the pleadings [46] to ascertain the issues, and it is not good practice to incor-

38. It is sufficient if it directs as to facts necessary to justify recovery and states what will defeat recovery. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566.

39. Clark v. Patapsco Guano Co., 144 N. C. 64, 56 SE 858. Sufficient if so framed as to present material matters in dispute and enable each party to have full benefit of his contention, and when answered, to determine rights of parties and support judgment. Id. The form and number of the issues are not material, if those submitted are germane and offer each party a fair opportunity to present his version of the facts and his view of the law, so that the case may be tried on its merits. Horne v. Consol. R., L. & P. Co., 144 N. C. 375, 57 SE 19.

40. Main v. Fields, 144 N. C. 307, 56 SE 943. Submitting all acts of negligence charged in petition was not error in view of evidence tending to show defendant guilty of all such acts, and that such acts were the proximate cause of the damages sued for. Texarkana & Ft. S. R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167.

41. St. Louis & S. F. R. Co. v. Neely [Tex. Civ. App.] 18 Tex. Ct. Rep. 258, 101 SW 481. The rule that material matters alleged on the one side and denied on the other should be submitted in the form of issues to the jury applies to new matter alleged in the answer and not mentioned in the complaint. Main v. Field, 144 N. C. 307, 56 SE 943. Evidence held sufficient to warrant submission of question to jury whether insured in application truthfully stated regularity of mensuration. Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 18 Tex. Ct. Rep. 179, 100 SW 1033. Instruction not defective in omitting to require a finding that a train was negligently operated where the facts hypothecated constituted negligence. Bond v. Chicago, B. & Q. R. Co., 122 Mo. App. 207, 99 SW 30.

42, 43. Wallack v. St. Louis Transit Co., 123 Mo. App. 160, 100 SW 496; Thompson v. Hicks [Tex. Civ. App.] 17 Tex. Ct. Rep. 669, 100 SW 357; Western Real Estate Trustees v. Hughes [C. C. A.] 153 F 560. Not error to omit submission of issues not presented by evidence. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566. Request properly refused where not sustained by evidence. Grasty v. Lindsay [Va.] 59 SE 381. Not error to refuse to submit questions of negligence where the evidence does not raise an issue on such points. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 17 Tex. Ct. Rep. 532, 99 SW 879. Held error to submit issue as to ownership of notes where there was no such issue made. Kampmann v. McCormick [Tex. Civ. App.] 18 Tex. Ct. Rep. 588, 99 SW 1147. In an action for conversion of steel rails and railroad iron, evidence held insufficient to require submission of issue whether defendant had abandoned the property. Valentine v. Long Island R. Co. [N. Y.] 79 NE 849. Where a traction company and a railway company were sued jointly for injuries received in a collision, held not error to refuse an instruction stating the duty of one defendant to the other to avoid the collision, as there were no issues between defendants. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 88, 99 SW 869. Where in an action for injuries to a passenger the evidence showed that the only warning was almost simultaneously with the starting of the car, so that in view of the evidence on both sides the liability of the carrier would not be affected, held not error in an instruction failing to require a finding that car was started without warning being given to plaintiff, although the petition contained an allegation that no warning was given. Green v Metropolitan St. R. Co., 122 Mo. App. 647, 99 SW 28.

44. Nelson v. Spence [Ga.] 58 SE 697; Paducah Trac. Co. v. Burradell, 31 Ky. L. R. 1052, 104 SW 709. Where there is no controversy about a matter, it should not be left to the jury. Hall v. Louisville, etc., R. Co., 31 Ky. L. R. 853, 104 SW 275. An instruction which submits to the jury an issue which is not disputed is erroneous. Prewitt v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 289, 101 SW 812. Not error to refuse to submit an issue not controverted. Valentine v. Long Island R. Co. [N. Y.] 79 NE 849. Improper to submit a conceded fact. Key v. Usher, 30 Ky. L. R. 667, 99 SW 324. Instruction omitting submission of uncontroverted facts held not error. Peery v. Quincy, etc., R. Co., 122 Mo. App. 177, 99 SW 14. Where the evidence that plaintiff was a holder of a certificate of deposit in due course for value before maturity without notice of any defense was uncontradicted, failure to submit question was not error. Johnson v. Buffalo Center State Bk., 134 Iowa, 731, 112 NW 165. Refusal of an instruction assuming that a surveyor located the north line of land adjacent on the south, where the survey was made without reference to such north line, concerning which there was no dispute, was proper. Taylor v. Blackwell [Tex. Civ. App.] 105 SW 214. In action for value of hog killed, where the undisputed evidence showed that a fence along the right of way where the hog was killed was not a lawful fence or sufficient to keep hogs off of the right of way, failure to instruct as to what would constitute a lawful fence was not error. Till v. St. Louis & S. F. R. Co., 124 Mo. App. 281, 101 SW 624.

45. Submitting an issue as to negligence of a defendant as to whom plaintiff had taken a nonsuit was harmless. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 SW 675.

46. Instruction that if jury believed from the evidence and under the instructions that plaintiff's case was made out as laid in the declaration, or either count thereof, they should find for plaintiff, was not objectionable as referring jury to declaration. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 NE 857. No error in instructing to the

porate the pleadings into the instructions.[47] It is within the discretion of the court to deny a request to submit a cause on special issues and to submit it in a general charge embracing all the issues and declaring the law governing them.[48] A special instruction may group the issues and submit them, although such issues were presented by the main instruction, and are presented in such manner as not to be conflicting.[49] Where issues have once been stated, a repetition is unnecessary, but not necessarily erroneous.[50]

§ 9. *Ignoring material evidence, theories, and defenses.*[See 8 C. L. 866]—Instructions should not be so framed as to withdraw from the consideration of the jury or ignore any meritorious theory,[51] material issue,[52] subjects,[53] evidence,[54] or matter of defense,[55] but issues not involved,[56] may be ignored.

effect that plaintiff was entitled to recover if case proved as alleged in declaration, though there was no evidence to sustain some of the counts of the declaration. Chicago City R. Co. v. Foster, 226 Ill. 288, 80 NE 762.

Not objectionable as referring jury to petition for issues. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636.

47. Use of pleadings in instructions. Dean v. Carpenter, 134 Iowa, 275, 111 NW 815. Court should state issues raised by the pleadings in the instructions. Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026.

48. Defendant could not demand a reversal where issues of negligence and contributory negligence were submitted in general instructions instead of specific instructions. St. Louis, etc., R. Co. v. Dupree [Ark.] 105 SW 878.

49. Galveston, etc., R. Co. v. Fink [Tex. Civ. App.] 17 Tex. Ct. Rep. 344, 99 SW 204. Submission of special issues properly refused where special verdict not asked. Kohl v. Bradley, Clark & Co., 130 Wis. 301, 110 NW 265.

50. Not objectionable as involving undue repetition. London v. Crow [Tex. Civ. App.] 19 Tex. Ct. Rep. 451, 102 SW 177.

51. Dawson v. Wombles, 123 Mo. App. 340, 100 SW 547. Instruction properly refused as ignoring contention of plaintiff. St. Louis, etc., R. Co. v. Smith [Ark.] 100 SW 884. A request predicated upon hypothesis limiting grounds of possible negligence to one, when under the evidence there may have been others for the jury to consider, was properly refused. Seaboard Air Line R. v. Smith [Fla.] 43 S 235. Instruction properly refused as ignoring any rights defendant acquired under deeds in evidence. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. Instruction ignoring theory that party had acquiesced in a boundary line contended for, and yielding precedence to a supposed intention of commissioners fixing the location of the line, was erroneous. Douglas Land Co. v. Thayer Co. [Va.] 58 SE 1101. Instructions leaving out of view the negligence of an engineer in charge of an engine causing an injury was erroneous. Chicago, I. & L. R. Co. v. Pritchard, 168 Ind. 398, 79 NE 508, 81 NE 78. An instruction for injuries to a passenger boarding a train, which denies to plaintiff the right to recover under any circumstances, even though the train was started before a reasonable or sufficient time had been allowed to get aboard, held erroneous. Choctaw, O. & G. R. Co. v. Hickey [Ark.] 99 SW 839. Where the weak condition of a box in which beer was hauled was the primary cause of an injury, yet not the sole and only cause, a request by defendant that, before plaintiff could recover the jury must first find that the weak and insecure condition of the box was the direct cause of the injury, was properly refused. Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99. The refusal of a special instruction which ignored a **theory based on evidence** held **not** error. Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 17 Tex. Ct. Rep. 714, 99 SW 897. Where defendant railroad throughout the trial proceeded on theory that it operated a car, it was not entitled to an instruction based on the ground that there was no evidence that it operated the car. Birmingham R., L. & P. Co. v. Taylor [Ala.] 44 S 580. The rule is that a peremptory instruction must not be given where there is any evidence. Provident Sav. Life Assur. Soc. v. Johnson, 30 Ky. L. R. 1031, 99 SW 1159. Not objectionable as peremptory where the conditional form left to the jury the question of negligence in starting a car. Indianapolis Trac. & T. Co. v. Miller [Ind. App.] 82 NE 113. Erroneous as ignoring principle of law applicable to case. Grubel v. Busche, 75 Kan. 820, 91 P 73. In ejectment, instruction **was not erroneous** as ignoring the principle of law requiring plaintiff to recover on the strength of his own title. Mitchell v. Cleveland, 76 S. C. 432, 57 SE 33. An instruction may ignore a matter that no evidence has been offered to support. Chicago, etc., R. Co. v. Bautsch, 129 Ill. App. 23.

52. Eckels v. Muttschall, 230 Ill. 462, 82 NE 872; Harding v. Thuet, 124 Ill. App. 437; Chicago Union Trac. Co. v. Ertrachter, 130 Ill. App. 602; Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413. Eliminating a cause of action stated in one count was erroneous. Chicago Union Trac. Co. v. Ertrachter, 228 Ill. 114, 81 NE 816.

Erroneous as ignoring question of fraud in procuring release. Duncan v. St. Louis & S. F. R. Co. [Fla.] 44 S 418. Ignoring contributory negligence. Texas Cent. R. Co. v. Waldie [Tex. Civ. App.] 18 Tex. Ct. Rep. 60, 101 SW 517. Instructions for plaintiff based upon the theory of an implied contract, and ignoring a special contract alleged in the declaration, were inopposite and should have been refused. Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 57 SE 48. Instruction that there was no evidence of any willful intent to injure plaintiff was erroneous where it was for the jury under the

evidence to determine if the motorman saw plaintiff was about to cross the track, and if the motorman's failure to stop the car thereafter was willful and wanton. Garth v. North Alabama Trac. Co. [Ala.] 42 S 627.

Erroneous as withdrawing issue. Loftus v. Green [Tex. Civ. App.] 104 SW 396. Held error to withdraw question of negligence where depending on evidence, except where there is no material conflict, and there is no room for different minds to form different conclusions. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 17 Tex. Ct. Rep. 685, 99 SW 200.

Issues not withdrawn or ignored. Moss v. Gulf, etc., R. Co. [Tex. Civ. App.] 18 Tex. St. Rep. 706, 103 SW 221. Not erroneous as ignoring issue of a fraudulent combination. Crenshaw v. A. F. Shapleigh Hardware Co. [Ark.] 100 SW 882. Instruction relating to credibility of witness not objectionable as withdrawing documentary evidence from consideration of jury. Western & A. R. Co. v. Tate [Ga.] 59 SE 266.

Request properly refused as ignoring effect of adoption or ratification of declarations by principal of agent to establish the latter's authority. Gambill v. Fuqua [Ala.] 42 S 735. Instruction omitting an issue as to whether a purchase was in the apparent scope of an agency was properly refused. Hayward Lumber Co. v. Cox [Tex. Civ. App.] 19 Tex. Ct. Rep. 820, 104 SW 403. Instruction properly refused in action for negligent death as ignoring question of defendant's negligence and elements leading up to the death. Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 SW 109. An instruction as to the barring of a cause of action on a note by the residence of defendant without the state, which ignored the fact of residence without the state, was properly refused. State v. Allen, 124 Mo. App. 465, 103 SW 1090. Where the evidence showed that plaintiff, in action for personal injuries, alighted at a place, which was not a station in accordance with an agreement with the conductor, a request was properly refused which eliminated the agreement and authorized a verdict against plaintiff on the ground of contributory negligence from the fact that she left the train at a place not a station. Galveston, H. & H. R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699. In an action by an employe for injuries caused by using a defective pinch bar, a request omitting requirement that the danger in using the bar must have been known to plaintiff was properly refused. St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783. Requests ignoring issues properly refused. Rector v. Robins [Ark.] 102 SW 209. Ignoring issue of negligence properly refused. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529. Request ignoring liability from ratification of agent's acts, in action for false imprisonment, in which arrest was made by an alleged agent of defendant, was propely refused. Gambill v. Fuqua [Ala.] 42 S 735. Ignoring material issues. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. Where plaintiff sued for balance price of an engine and defendant pleaded that the engine was not as warranted, held proper to refuse request authorizing verdict for defendant without reference to whether the engine was properly operated by defendant. Heisig Rice Co. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 1002, 100 SW 959. Request properly refused as pretermitting "any wanton misconduct" of a motorman for running a car at a high rate of speed at the place where an accident occurred. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032. Request pretermitting knowledge by defendant of defect in handle of hand car properly refused. Southern R. Co. v. McGowan [Ala.] 43 S 378. Request for an instruction which ignored the effect of defendant's negligence if found negligent was not error. Seaboard Air Line R. v. Smith [Fla.] 43 S 235.

Not erroneous as eliminating material question. Cotton v. Highland Park Mfg. Co., 142 N. C. 528, 55 SE 358. Not objectionable as omitting to submit that an act of a motorman was within the scope of his duties. Wahl v. St. Louis Transit Co., 203 Mo. 261, 101 SW 1. Instruction not erroneous as taking from jury question whether plaintiff was negligent in riding on overcrowded car. Baskett v. Metropolitan St. R. Co., 123 Mo. App. 725, 101 SW 138.

53. In instruction that plaintiff having alleged in his declaration that defendant agreed to carry him for hire and reward, and having failed to prove such allegation was not entitled to recover in an action of assumpsit, was improperly refused. Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 57 SE 48; Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99.

54. Loreman v. Birmingham R., L. & P. Co. [Ala.] 43 S 411; Turner v. Lord & Thomas, 124 Ill. App. 117; Sherrell v. Louisville & N. R. Co. [Ala.] 44 S 153; Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101. Ignoring material evidence. Louisville & N. R. Co. v. Sherell [Ala.] 44 S 631. Where the evidence was sufficient to raise an issue as to the defendant's right to recover on their cross bill, it should have been passed on by the jury and it was error not to permit it. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 338, 99 SW 128.

Evidence ignored: Where plaintiff was employed to haul and deliver bottled beer in boxes, and was injured by the box giving way while in the act of loading, an instruction ignoring the evidence and duty of defendant to use ordinary care to provide a box reasonably safe for the purpose for which it was used, and stating that, if the injury was the result of accident in the sense of misadventure, plaintiff could not recover, was erroneous. Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99. In action on accident policy where defendant relies on the defense that the injury was self-inflicted, if the court charge that there is nothing in plaintiff's testimony alone to discredit his story as to the happening of the accident and that defendant had offered no testimony to show the injury was self-inflicted, it cannot be said to ignore proof of facts and circumstances discrediting plaintiff and going to show motive for self-injury, if the court further instructs as to plaintiff's financial embarassment and the circumstances relied on by defendant. Cornelius v. Central Acc. Ins. Co. [Pa.] 67 A 840. Instruction erroneous as ignoring evidence tending to show that the box was de-

fective, that it was repaired, and that the repairing was negligently done. Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99. Where testimony of alleged partners was relied on, and an account book kept by them, failure to mention book in submitting issue, in which attention was called to testimony of alleged partners, was error. Flint v. Atlas Mut. Ins. Co., 134 Iowa, 531, 112 NW 1. Error to authorize jury to disregard expence of nursing and medical attendance in fixing amount of damages on account of such loss and expense, where there was direct evidence of the value of the time lost by plaintiff by reason of personal injuries. Platt v. Ottumwa [Iowa] 113 NW 831. Where there was circumstantial evidence of positive acts of negligence instructing that there was no evidence of positive acts of negligence. Sherrell v. Louisville & N. R. Co. [Ala.] 44 S 153. Where there was evidence of mental incapacity on the part of an executrix when she signed a release, an instruction that the law presumed that she was of sound mind and capable of executing the release was erroneous. Loveman v. Birmingham R., L. & P. Co. [Ala.] 43 S 411. Instruction that jury were not confined to the evidence in determining the value of legal services, but might rely on their own judgment, properly refused, as it had effect to discredit expert and opinion offered, and suggested that it might properly be disregarded. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 SW 340. Instruction erroneous as leading jury to ignore testimony. Savage v. Rhode Island Co. [R. I.] 67 A 633. An instruction, in action for injuries caused by defective bridge, held erroneous as ignoring evidence of road supervisor's knowledge of the dangerous condition of the bridge. Adams v. Somerset County Com'rs [Md.] 66 A 695.

Properly refused: Request ignoring ratification by principal of act of agent, of which there was evidence, was properly refused. Robinson v. Green [Ala.] 43 S 797. Request ignoring evidence of prior authority of agent to make arrest was properly refused. Gambill v. Fuqua [Ala.] 42 S 735. Request ignoring evidence tending to show authority and ratification was properly refused. Id. Request leading jury to believe that they were not to consider a written showing as to what an absent witness would testify, if present, properly refused. Garth v. North Alabama Trac. Co. [Ala.] 42 S 627. Instruction leading jury to believe that material evidence is immaterial was properly refused. North American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 NE 388. Where expert witness testifying as to testator's capacity stated that his opinion was in part based on the will which he read, held that refusal to instruct that witness' opinion should be disregarded, because not based entirely on hypothetical question, was proper. Anderson v. Husted, 79 Conn. 535, 66 A 7. Held no error in refusal to give requested instruction that there was no evidence to show plaintiff's pleurisy and miscarriage were due to an accident, where physicians attendant upon plaintiff swore that such troubles were the direct and proximate consequences of the injury. Jorden v. St. Louis, etc., R. Co., 122 Mo. App. 330, 99 SW 492. Refusal of instruction that there was no evidence to sustain action was proper. Conklin v. Consol. R. Co. [Mass.] 82 NE 23. Request properly refused where it tended to divert the attention of the jury from material testimony. Minot v. Boston & M. R. Co. [N. H.] 66 A 825.

Evidence not ignored: Not objectionable as ignoring evidence of manner of coupling cars. Hayes v. Chicago, etc., R. Co., 131 Wis. 399, 111 NW 471.

55. An instruction which ignores a defense is erroneous. Citizens' Sav., Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252; Belvidere City R. Co. v. Bute, 128 Ill. App. 620; Harley v. Aurora, E. & C. R. Co., 128 Ill. App. 643; Chicago, B. & Q. R. Co. v. Bautsch, 129 Ill. App. 23; Forney v. Melvin, 130 Ill. App. 203; Key v. Usher, 30 Ky. L. R. 667, 99 SW 324; Kirchener v. Concord Inv. Co. [Mo. App.] 104 SW 1127. Instruction which limited the defense of contributory negligence to a motorman's failure to keep a proper lookout was improper. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032.

Rule not violated: Not objectionable as ignoring defense of contributory negligence. Evers v. Wiggins Ferry Co. [Mo. App.] 105 SW 306. Instruction was not objectionable as ignoring right of defendant railroad to notice of defective condition of road bed a sufficient length of time to enable it to repair such defect before it could be held liable for an injury resulting therefrom. Illinois Cent. R. Co. v Heath, 228 Ill. 312, 81 NE 1022. Not objectionable as excluding defense of contributory negligence, where the court had fully instructed on this point. Galveston, H. & N. R. Co. v. Morrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 449, 102 SW 143. Instruction not erroneous as instructing that plaintiff's contributory negligence was no defense. Wallack v. St. Louis Transit Co., 123 Mo. App. 160, 100 SW 496. Instruction not erroneous as disregarding the defense of assumption of risk. Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 NE 136.

Requests properly refused: Where defendant claimed that a contract was illegal as an agreement to procure "straw" bail, a requested instruction eliminating that question was properly refused. Way v. Greer [Mass.] 81 NE 1002. Refusal of request ignoring explanations as to authorized departures from a contract was proper. Concord Apartment House v. O'Brien, 228 Ill. 360, 81 NE 1038. An instruction assuming that it was not within the scope of an agent's authority to buy goods, and making the question of defendant's ratification the only issue, was properly refused. Hayward Lumber Co. v. Cox [Tex. Civ. App.] 19 Tex. Ct. Rep. 820, 104 SW 403.

Defenses ignored: Ignoring an admitted payment for services, in an action to recover for services, was error. Trimble v. Moore, 125 Mo. App. 601, 102 SW 1057. It was reversible error to give an instruction involving a hypothesis having no foundation in the evidence, and tending to deprive defendant of the defense of contributory negligence. Newport News & O. P. R. & Elec. Co. v. McCormick, 106 Va. 517, 56 SE 281. An instruction ignoring the existence of a special agreement declared upon, and ignoring the statutory provisions by which subcontractors and materialmen not in privity with the owner can, under the statute, alone acquire a right of action against the

§ 10. *Giving undue prominence to evidence, issues, and theories.*[See 8 C. L. 367] Instructions should not single out and give undue prominence to particular facts in evidence,[57] issues,[58] or contentions of either party,[59] or rule of law,[60] or invite undue

owner, was erroneous. Mulliken v. Harrison [Fla.] 44 S 426. Instruction ignoring defense of contributory negligence was erroneous. Alabama City, etc., R. Co. v. Bates [Ala.] 43 S 98. Held error to instruct jury to return verdict for defendant if it had made certain representations, where in fact defendant had not made such representation, as it tended to destroy defense that no representation was made. Julius Kessler v. Burckell [Tex. Civ. App.] 99 SW 173.

56. Instruction omitting mention of element of inherent vice or natural propensity of cattle, in action against carrier of live stock, was not erroneous, there being no evidence on this point and it being a matter of defense. St. Louis S. W. R. Co. v. Kilberry [Ark.] 102 SW 894. Where exception was taken to evidence admitted, and counsel stated they would not insist on it, instruction to jury not to consider evidence was not erroneous. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176. An instruction cannot be said to ignore a doctrine when there is no question in the case to which it can apply. Lloyd v. Matthews, 223 Ill. 477, 79 NE 172. Though a fact not put in issue by the pleading, if not disputed, but conceded at the trial, its omission is not error calling for reversal. Bradford v. National Ben. Ass'n, 26 App. D. C. 268.

57. Eckels v. Muttschall, 230 Ill. 462, 82 NE 872; Turner v. Lord, 124 Ill. App. 117; Purcell v. McKeel, 129 Ill. App. 428; Pennsylvania Co. v. Barton, 130 Ill. App. 573; Bradford v. National Ben. Ass'n, 26 App. D. C. 268.

Rule violated: Instruction objectionable as giving undue prominence to certain testimony at expense of other testimony. Chappell v. Roberts [Ala.] 43 S 489. An instruction calling special attention to a part only of the evidence, and the fact that it tends to prove, and disregards other evidence material to the issue, was erroneous. Douglas Land Co. v. T. W. Thayer Co. [Va.] 58 SE 1101. Instruction erroneous as singling out plaintiff as a witness and commenting on his testimony. Zander v. St. Louis Transit Co., 206 Mo. 445, 103 SW 1006.

Rule not violated: Not objectionable as giving undue prominence to parts of evidence. Vanderveer v. Moran [Neb.] 112 NW 581. Calling attention in instruction specifically to evidence which must have been the basis of finding on the issue was not erroneous. Giacomini v. Pacific Lumber Co. [Cal. App.] 89 P 1059. In action for death by wrongful act, an instruction that after setting out every condition on which plaintiff's right to recover depended concluded with a statement that, unless jury found affirmative of every fact submitted in that paragraph of the instruction, the verdict should be for the defendant, was not erroneous as giving undue emphasis to particular feature of evidence. Houston & T. C. R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529. Held not objectionable as emphasizing certain facts. Guarantee Sav. Loan & Investment Co. v. Mitchell [Tex. Civ. App.] 17 Tex. Ct. Rep. 667, 99 SW 156. Where the effect of an instruction is to peremptorily instruct jury to disregard inadmissible evidence, complaint that evidence not properly in the case was singled out and undue prominence given to it is without merit. Citizens' Sav. Bk. v. Boswell, 31 Ky. L. R. 1259, 104 SW 1014. Not objectionable as singling out particular facts. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694.

Requests properly refused: Request laying stress on one particular fact was properly refused. Robinson v. Green [Ala.] 43 S 797. In an action for malpractice, where the evidence as to the results of the treatment did not stand alone, held proper to refuse to instruct that the results of the treatment were in themselves alone no evidence of defendant's negligence or want of skill. Sheldon v. Wright [Vt.] 67 A 807. Refusal of instructions singling out particular facts not error. Wickes v. Walden, 228 Ill. 56, 81 NE 798. Request singling out and placing stress on a particular fact in the case was properly refused. Birmingham R., L. & P. Co. v. Wright [Ala.] 44 S 1037. A request is properly refused which seeks to turn the result on a single fact, when the issues are broader. Id.

58. Improper to single out one of several issues and instruct that it is main issue. Stiles v. Shedden [Ga. App.] 58 SE 515. The repetition of a proposition in a special requested instruction giving undue prominence to the issue was error. Redmond v. Sherman Cotton Mills [Tex. Civ. App.] 17 Tex. Ct. Rep. 983, 100 SW 186. Request properly refused as giving undue prominence to testimony. Minot v. Boston & M. R. Co. [N. H.] 66 A 825.

Rule not violated: Refusal of further requested charges on issues, where it would unduly emphasize them, was not error. Galveston, etc. R. Co. v. Wallis [Tex. Civ. App.] 104 SW 418. Instruction not erroneous as giving undue prominence to issue. Rambie v. San Antonio & G. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 903, 100 SW 1022. Undue prominence not given to issue of degree of care exercisable by shipper. Smith v. Landa [Tex. Civ. App.] 18 Tex. Ct. Rep. 130, 101 SW 470.

59. Requests for instructions properly refused which gave undue prominence to contention of plaintiff. Moody v. Rowland [Tex. Civ. App.] 102 SW 911. Although a party is entitled to have his view of the evidence stated hypothetically in an instruction, he has no right to call special attention to a part only of the evidence and the facts it tends to prove to the exclusion of other evidence. Delmar Oil Co. v. Bartlett [W. Va.] 59 SE 634. Evidence on a point submitted in general instructions being conflicting, held reversible error to give special instruction on same point, as emphasizing theory of prevailing party and leading jury to believe there was merit in his contention. Aetna Ins. Co. of Hartford v. Brannon [Tex. Civ. App.] 18 Tex. Ct. Rep. 215, 101 SW 1020.

60. Expression in a special instruction of

attention thereto;[61] but it is often necessary and proper to speak of important features in the evidence and make concrete applications of the law to them.[62]

§ 11. *Definition of terms used.*See 8 C. L. 360—Technical terms employed in the instructions should be defined.[63] The definition given should be correct.[64] Failure to give such definitions is generally held not reversible error, or unless prejudice results.[65] Technical words need not be defined if the same used in the instructions as a whole are made definite and intelligible.[66] Terms in common use need not be defined.[67]

§ 12. *Rules of evidence; credibility and conflicts.*See 8 C. C. 370

The credibility of witnesses[68] and the weight to be given their testimony,[69] the

a principle of law contained in general instructions was not erroneous as giving undue prominence to the rule of law expressed. Rambie v. San Antonio & G. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 903, 100 SW 1022.

61. Instruction should not be unnecessarily repeated, thereby placing undue stress upon them before the jury. Chicago, etc., R. Co. v. Alexander [Wash.] 91 P 626. Objectionable as giving undue prominence to single feature of evidence. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Instruction on contributory negligence was misleading and erroneous as giving undue prominence to undecisive point. Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626. Where there was testimony that at the time of an accident to a passenger alighting from a street car the conductor said to the motorman, "when you stop, why in the devil don't you give people a chance to get off?" an instruction that the jury should not consider the testimony held not objectionable as directing attention to the testimony of a witness when it was sought to impeach by evidence of contrary statements. Louisville & S. I. Trac. Co. v. Leaf [Ind App.] 79 NE 1066.

Not objectionable as calling jury's attention to amount of ad damnum of declaration. Illinois Cent. R. Co. v. Heath, 228 Ill. 312, 81 NE 1022.

62. Court not forbidden o emphasize such evidence as he considers most important. Desautelle v. Nasonville Woolen Co. [R. I.] 66 A 579. Not objectionable as calling jury's attention to particular part of evidence. Darst v. Devini [Tex. Civ. App.] 19 Tex. Ct. Rep. 455, 102 SW 787. Repeating to emphasize rule of law given, not error. Davis v. Michigan Cent. R. Co., 147 Mich. 479, 111 NW 76.

63. The meaning of "residence" within the statute of limitations being a mixed question of law and fact should be defined by instructions. State v. Allen, 124 Mo. App. 465, 103 SW 1090. Error to refuse definition of abandonment where landlord was entitled to recover possession under a lease on abandonment to the tenant. Union Scale Co. v. Iowa Mach. & Supply Co. [Iowa] 113 NW 762. Instructing that remote and speculative damages were not to be considered, but only actual damages, was erroneous as confusing where the words "actual," "remote," and "speculative" were not defined. First Nat Bank v. Carroll, 35 Mont. 302, 88 P 1012. The term "proximate cause" should be made clear to the jury. Swift v. Rennard, 128 Ill. App. 181. A requested instruction stating generally that plaintiff could not recover if deceased, a boy 12 years old, failed to exercise reasonable care, held properly refused where it did not explain or define what would constitute reasonable care in one of his age. Coney Island Co. v. Dennan [C. C. A.] 149 F 687. Held **not necessary** to define specifically "wanton." Cody v. Gremmler, 121 Mo. App. 359, 99 SW 46.

64. Raley v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 924, 105 SW 342. "Preponderance of evidence" was properly defined. Whitney v. Cleveland [Idaho] 91 P 176. Definition of probable cause in malicious prosecution was correct. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78.

65. Refusal of instruction giving definition of contributory negligence was not error where the phrase was not used in any general or special instructions. Galveston, etc., Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699.

66. Failure to define "maliciously" held not error where "malice" was properly defined in another instruction given by the court of its own motion. Cody v. Gremmler, 121 Mo. App. 359, 99 SW 46. Instruction given for plaintiff was not objectionable in not defining negligence as used therein, where the court of its own motion instructed defining term. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 SW 675. A designation justified by the law will not be considered confusing. "Sidewalk or apron" not improper, the law justifying the designation of an apron or incline used for a walk down from sidewalk to street crossing as a sidewalk. City of Chicago v. Loebel, 130 Ill. App. 487.

67. Refusal to explain the meaning of the term "acting within the scope of his employment," as used in the instructions, was not error. Maysville, etc., R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016. Failure to define "delivery" and "delivered" no cause for new trial. Cordele Sash, Door & Lumber Co v. Wilson Lumber Co. [Ga.] 58 SE 860.

68. Partelow v. Newton & B. St. R. Co. [Mass.] 81 NE 894; McGinnis v. R. M. Rigby Printing Co., 122 Mo. App. 227, 99 SW 4; Vanderveer v. Moran [Neb.] 112 NW 581; Bolton v. Central Pennsylvania Trac. Co. [Pa.] 67 A 950; International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 17 Tex. Ct. Rep. 752, 18 Tex. Ct. Rep. 65, 100 SW 1000; Texas & N. O. R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Credibility of negative testimony is for jury. Van Salvellergh v. Green Bay Trac. Co. [Wis.] 111 NW 1120. It is proper to instruct the jury as to the credibility of a witness and their duty to

truth of evidence,[70] are questions for the jury, but it is proper to instruct that the interest of a witness,[71] his intelligence and capacity,[72] or his susceptibility of being influenced,[73] may be considered; and the court may characterize and compare expert with other evidence,[74] or call attention to the means of knowledge of the witness,[75] and the relative weight to be given positive and negative testimony;[76] that if witness

consider and right to determine the weight of his evidence. Hanchett v. Haas, 125 Ill. App. 111, afd. 219 Ill. 546, 76 NE 845. Instruction in substantial compliance with Code sections was not erroneous as taking from jury the right to believe a witness, although impeached by contradictory statements. Atlanta & W. P. R. Co. v. Hudson [Ga. App.] 58 SE 500. The evidence being conflicting as to the occurrence of a thing, and the jury being instructed that the existence of a fact testified to by one positive witness is rather to be believed than that such fact did not exist because many witnesses having same opportunity of observation swear that they did not see or know of its having transpired, the court should also instruct to the effect that in weighing the testimony of the witnesses the jury should pass upon their credibility. Atlantic Coast Line R. Co. v. O'Neill, 127 Ga. 685, 56 SE 986. Requested instruction properly refused as calculated to discredit subscribing witnesses. Huyck v. Rennie [Cal.] 90 P 929. Instruction intimating to jury that testimony of witness which was uncontradicted was inherently improbable, and discredited by cross-examination, such inferences being unwarranted, held erroneous. Beaumont v. Beaumont [C. C. A.] 152 F 55.

69. Anderson v. Husted [Conn.] 66 A 7; Bolton v. Central Pennsylvania Trac. Co. [Pa.] 67 A 950.

Request properly refused as on weight of evidence. International & G. N. R. Co. v. Howell [Tex. Civ. App.] 19 Tex. Ct. Rep. 123, 105 SW 560. Instruction objectionable that directs jury that special agents "must not in any sense be treated as detectives"; that as a matter of law the testimony of special agents is entitled to the same weight as that of other disinterested witnesses. Cullinan v. Furthman [N. Y.] 79 NE 989. Improper to instruct that in determining weight to be given testimony of witness his interest in litigation may be considered. St. Louis, etc., R. Co. v. Sproule [Tex. Civ. App.] 18 Tex. Ct. Rep. 209, 101 SW 268. Instructing that plaintiff was entitled to verdict if jury believed his evidence was error. Johnston v. New York City R. Co., 104 NYS 1039. Instruction that if jury believed that plaintiff was 16 years old and in good health at the time of the injury then his expectancy of life was 44 years was erroneous. Central of Georgia R. Co. v. McNab [Ala.] 43 S 222. In eminent domain proceedings to recover compensation for damages, held proper to refuse instruction that in computing the damages all doubts should be resolved in favor of claimant. Taber v. New York, P. & B. R. Co. [R. I.] 67 A 9.

70. Instruction held erroneous in assuming the truth of evidence. Orem Fruit & Produce Co. v. Northern Cent. R. Co. [Md.] 66 A 436. Improper to instruct that all statements made by plaintiff, testifying in her own behalf, which are against her interests, "must be taken as true." McGinnis v. R. M. Rigby Printing Co., 122 Mo. App. 227, 99 SW 4.

71. Proper to instruct that defendant being an interested party, jury had a right to scrutinize his evidence. Cullinan v. Furthman [N. Y.] 79 NE 989. But it is improper for the court in charging the jury to call attention specifically to the truth or falsity of a witness' testimony or to the interest of parties testifying on one side. Seitz v. Starks, 144 Mich. 448, 13 Det. Leg. N 377, 108 NW 354. An instruction may single out any one party and call the attention of the jury to his interest as affecting his credibility. Scanlan v. Chicago Union Trac. Co., 127 Ill. App. 406.

72. The court may instruct the jury to take into consideration the intelligence and capacity of witnesses, in connection with all other facts and circumstances proven. Manufacturers' Fuel Co. v. White, 130 Ill. App. 29.

73. In an action on a bond given pursuant to the liquor tax law, an instruction that plaintiff's witnesses were agents of the excise department of the state, engaged in the performance of public duties, and as such officers were entitled to be reasonably zealous in the performance of those duties, that so far as the jury should find that those considerations impaired or affected their credibility to that extent they were to subject them to that criticism, that if, on the other hand, the jury found that their stories were reasonable and probable then they had a right to give effect and credit to the evidence which the agents had given, was not objectionable. Cullinan v. Furthman [N. Y.] 79 NE 989.

74. Not error to instruct that, while expert testimony as to the genuineness of a signature should be given such weight as the jury find it entitled to, yet testimony of that character is of a low order and ought not to overthrow the positive and direct testimony of credible witnesses who testify from their personal knowledge, and is most useful in the case of conflict between witnesses as corroborating testimony. Ayrhart v. Wilhelmy [Iowa] 112 NW 782.

75. Erroneous as authorizing jury to take into consideration expert witnesses' personal knowledge of a testatrix alleged to have been of unsound mind, when will executed, independent of facts detailed on which their opinion should have been based. Vannest v. Murphy [Iowa] 112 NW 236.

76. But it is proper not only to tell jury for what purpose evidence which has been submitted may be considered, but also to explain rules of law governing relative value of different classes of evidence. In re Kah's Estate [Iowa] 113 NW 563. Where there was no substantial contradictory statement as to an insured's drinking prior to his application, but the real question being whether, conceding this, he was then intemperate, testimony based on knowledge and observation as to whether he was in-

has been successfully impeached or has willfully sworn falsely, his testimony may be disregarded except as corroborated,[77] or the means by which a witness may be contradicted.[78] The jury may be instructed to scan admissions.[79] The jury should not be led to disregard any testimony.[80] It is proper to instruct as to what constitutes the preponderance of evidence,[81] the manner of ascertaining the facts,[82] or that a fact must be established by a preponderance of the evidence.[83] It is improper to charge that the number of witnesses has nothing to do with it,[84] or to minimize the effect of the numerical inequality of the witnesses.[85] It is error to instruct the jury to reconcile conflicting evidence if possible.[86] The court in its instruction is not bound to

temperate did not call for an instruction on the weight of positive and negative testimony. Taylor v. Security Life & Annuity Co. [N. C.] 59 SE 139. Generally it is not proper to instruct as to relative weight of different items of evidence. In re Kah's Estate [Iowa] 113 NW 563. Without proper qualification as to credibility of witnesses it was error to instruct that positive testimony is to be believed in preference to negative. Central of Georgia R. Co. v. Sowell [Ga. App.] 59 SE 323.

77. Where witnesses were not so contradicted as to lead jury to believe they had been "successfully impeached," it is not prejudicial to instruct that if witness had been successfully impeached or had willfully sworn falsely as to any material matter, etc., they might disregard his testimony except as corroborated, etc. Chicago City R. Co. v. Ryan, 225 Ill. 287, 80 NE 116.

78. Instruction that witness might be contradicted, not simply by a witness swearing to the opposite but by the improbability of his story, and by anything in the testimony as given or in the circumstances of the case presented, tending in judgment of jury to discredit witness' statements, the jury being required to ascertain the truth by the exercise of common sense, held proper. Toledo, etc., R. Co. v. Connolly [C. C. A.] 149 F 398. Instruction that greater weight should be given to the positive statement of a witness than to negative statement of another witness properly refused. Cleveland, etc. R. Co. v. Schneider [Ind. App.] 82 NE 538.

79. Where admissions of a defendant who filed a plea of no partnership were offered in evidence against him, it was error to refuse a timely request to instruct that admissions should be scanned with care. Mims v. Brook & Co. [Ga. App.] 59 SE 711.

80. Improper to single out one of several issues and instruct that such issue is to be determined by a consideration of the evidence of the witnesses testifying and by interrogatories, where material documentary evidence was introduced on question. Stiles v. Shedden [Ga. App.] 58 SE 515. Where the testimony of experts was conflicting, an instruction that jury were not bound to accept witnesses' statements or conclusions, but should determine the case upon the whole evidence, held not objectionable as leaving the jury to determine the matter on their own judgment in disregard of such evidence as they saw fit. Sheldon v. Wright [Vt.] 67 A 807. Telling jury to give each witness such credit as he had shown himself entitled to was not erroneous as permitting jury to reject evidence of disinterested and unimpeached witnesses. White v. Hatton [Iowa] 113 NW 830.

81. Instruction not erroneous as invading province of jury concerning the determination of the preponderance of evidence. Deering v. Barzak, 227 Ill. 71, 81 NE 1. Instruction on preponderance of evidence, omitting reference to number of witnesses testifying pro and con, was erroneous. Chicago Union Trac. Co. v. Hampe, 228 Ill. 346, 81 NE 1027. It is proper to instruct that the preponderance of evidence does not depend on the number of witnesses but means the greater weight of the evidence. Indianapolis, St. R. Co. v. Johnson, 163 Ind. 518, 72 NE 571.

82. Erroneous as on manner in which jury should ascertain the actual loss to an insured. Georgia Co-op. Fire Ass'n v. Lanier, 1 Ga. App. 186, 57 SE 910.

83. St. Louis, etc., R. Co. v. Sparks [Ark.] 99 SW 73. An instruction stating that the burden to establish contributory negligence by a preponderance of the evidence to the satisfaction of the jury, held not erroneous because of the use of the words "to the satisfaction of the jury," where it was evident that the court did not intend to require more than a preponderance of the evidence. Id. It is not error for the court to instruct the jury to find for the party in whose favor the evidence preponderates. In action for personal injuries the court properly instructed that while the burden of proof is upon the plaintiff, still, if the jury find that the evidence bearing upon his case preponderates in his favor, although slightly, it would be sufficient to find the issue in his favor. Hancheft v. Haas, 125 Ill. App. 111, afd. 219 Ill. 546, 76 NE 845. But the method of determining preponderance not essential to instruction stating what facts will constitute a cause of action or create a liability (Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246), nor method of determining credibility of witnesses (Id.).

84. Where the evidence of plaintiff, in action for personal injuries, alleged to have been received by the sudden starting of a street car, was directly contradicted by employes and four passengers, held proper for the court to comment on the numerical inequality of the evidence. Hodder v. Philadelphia Rapid Transit Co., 217 Pa. 10, 66 A 239.

85. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57; Hodder v. Philadelphia Rapid Transit Co., 217 Pa. 10, 66 A 239.

86. An instruction which does not leave it to the jury to reconcile, if possible, the testimony, without attributing willful per-

direct attention to the fact that a witness' testimony has been contradicted.[87] The court may, in proper cases,[88] instruct as to the effect of not producing testimony or witnesses.[89]

Falsus in uno, falsus in omnibus See 8 C. L. 371 should be given when justified by law,[90] but not unless a witness is shown to have sworn falsely.[91] In charging the doctrine the word "willfully" must be used.[92]

§ 13. *Admonitory and cautionary instructions.* See 8 C. L. 372—The giving of cautionary instructions rests in the discretion of the court.[93] Courts have a reasonable discretion in urging an agreement,[94] but such discretion should not be abused.[95]

§ 14. *Necessity of instructing in writing.* See 8 C. L. 372—In some states it is required by statute that the instructions be in writing.[96] The rule does not apply

jury to any witness, is erroneous. Segaloff v. Interurban St. R. Co. 102 NYS 509.

87. Joyce v. Joyce [Conn.] 67 A 374.

88. A party not having called witnesses, and the record not indicating that any witness was in jurisdiction of court or under party's control at the time of trial, whom party knew or could call on to testify, it was error to instruct that, where a party has evidence which he can produce and fails to do so, the presumption is that it is unfavorable. Carney v. New York City R. Co., 52 Misc. 499, 102 NYS 485.

89. Instructing as to failure of defendant to produce witness was not error. Linsley v. New York City R. Co., 54 Misc. 562, 104 NYS 916.

90. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 S 1034. Instructing that, if jury believed plaintiff knowingly and intentionally gave false testimony as to a material matter, then the jury might reject his entire testimony, was not reversible error. Sanders v. Davis [Ala.] 44 S 979. Where applicable to the evidence it was proper to instruct that the testimony of one credible witness is entitled to more weight than the testimony of many others, if as to those other witnesses the jury have reason to believe, and do believe, from the evidence and all the facts before them, that such other witnesses have knowingly testified falsely, and are not corroborated by other credible witnesses or by circumstances proved in the case. Kemp v. Slocum [Neb.] 110 NW 1024.

91. To instruct that it is a rule of law that, where a witness swears falsely as to some material matter, the jury are at liberty to disregard his testimony in other respects, unless corroborated by other satisfactory evidence, is error, as such false testimony is not to be given such effect unless given knowingly and intentionally. Pittsburgh, etc., R. Co. v. Haislup, 39 Ind. App. 394, 79 NE 1035.

92. Alabama Steel Wire Co. v. Griffin [Ala.] 42 S 1034. An instruction that it is only in cases where a witness had willfully and corruptly testified falsely as to some material matter, and is not corroborated by other credible evidence, that the jury is warranted in disregarding the testimony, is not misleading in that the word "corruptly" was used. Hancheft v. Haas, 125 Ill. App. 111, afd. 219 Ill. 546, 76 NE 845.

93. Chicago Union Trac. Co. v. Goulding, 228 Ill. 164, 81 NE 833. Cautionary instruction set out in opinion, under circumstances, was not prejudicial. Oldfather v. Ericsson [Neb.] 112 NW 356. An instruction given out of abundant caution, so as to cause the jury to confine their investigation to the issues made by the pleadings, was not erroneous. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 S 903.

94. Doty v. Smith [Conn.] 67 A 885; Seivert v. Galvin [Wis.] 113 NW 680. Though discretionary with court to recall jury, which apparently cannot agree, for inquiry as to their difficulty and further instruction if necessary, yet any instruction as to their duty to agree should be carefully guarded so as not to coerce the minority. St. Louis, etc., R. Co. v. Bishard [C. C. A.] 147 F 496. Where jury has signified inability to agree, there is no impropriety in the judges' remanding them to their room with the remark, "I would regret after you have given the case as long consideration as you have, for you to fail to agree on a verdict. I will send you back to your room for you to see if you cannot agree on a verdict." Southern R. Co. v. Fleming, 128 Ga. 241, 57 SE 481. It is not erroneous, as coercing a verdict, for the court to recall the jury and ask them if they could be aided by further instructions or by reading any of the evidence, or to inquire if they were likely to agree in 20 minutes. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427.

95. Objectionable as cautioning jury in weighing expert testimony. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57. No abuse of discretion to impress upon jury the necessity of an agreement. Doty v. Smith [Conn.] 67 A 885.

96. Indiana Acts 1903, p. 338, c. 193, § 1, requiring all instructions "given by the court of its own motion" to be in writing, applies only to instructions given at the close of the argument, and not to what the court said during the trial calling the attention of the jury to the purpose for which certain evidence is admitted. Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 NE 26. Under requirements of Acts 1903, p. 338, c. 193, failure to instruct in writing is reversible error, unless parties consent to oral instructions. Molt v. Hoover [Ind. App.] 82 NE 535. Under Burns' Ann. St. 1901, § 542, subds. 4, 5, 6, and § 543, providing that special instructions be reduced to writing and delivered to court, held not error to refuse oral requests for fuller instructions on law of case. Id. [Ind. App.] 81 NE 221. Written request for particular questions of law to be

to a direction as to authority of jury to make a verdict,[97] nor to an admonition to the jury not to consider testimony stricken out.[98]

§ 15. *Presentation of instructions.*[See 8 C. L. 372]—The order of reading instructions to jury rests largely in discretion.[99]

§ 16. *Additional instructions after retirement.*[See 8 C. L. 373]—A court has a large discretion in the matter of instructing the jury,[1] and may bring the jury in at any time and give them additional instructions,[2] whether requested or not,[3] and where the jury ask for additional instructions on a particular question, the court may also further instruct on other issues.[4] After the case has been submitted only the court should give additional instructions, or explanations to the jury.[5] The court may re-read an instruction to the jury at their request.[6]

Recalling instructions.—A court may recall its instructions at any time before a verdict is reached.[7]

§ 17. *Review. Objections and exceptions below.*[8]
The record on appeal.[9]
Invited error.[10]
Harmless error.[11]

given jury should be presented to court. Wrightsville & T. R. Co. v. Gornto [Ga.] 58 SE 769; St. Louis, etc., R. Co. v. Noland, 75 Kan. 691, 90 P 273. Under Rev. St. 1899, § 748 (Ann. St. 1906, p. 733), the court is not required to instruct except upon written motion of parties embodying the instructions the party thinks should be given. Marion v. St. Louis, etc., R. Co., 124 Mo. App. 445, 101 SW 688. N. D. Rev. Codes 1905, § 7021, requiring instruction to be in writing, held mandatory. Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972. Refusal of request made orally, not error. Id. Under 2 Wilson's Rev. & Ann. St. Okl. 1903, § 4462, p. 1031, it is essential that instructions be in writing. McIver v. Williamson-Halsell-Frasier Co. [Okl.] 92 P 170. Correct oral instruction was not prejudicial, though it should have been in writing. Doyle v. Nesting, 37 Colo. 522, 88 P 862. Objection on ground that oral instruction should have been in writing was waived when not made at the time. Id. Under Rev. St. 1898, § 2853, allowing a party to present instructions applicable to case and have them given, if they state the law correctly, a rule of court requiring the submission of requests in writing before resting the case, and citation of authorities relied on, was invalid as unreasonable. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809.

97. Rev. St. 1899, § 748 [Ann. St. 1906, p. 733], does not prevent the court from verbally directing the jury respecting the authority of nine jurors to make a verdict. Baxter v. Magill [Mo. App.] 105 SW 679. Though there might be technical error in verbally directing a jury of nine respecting their authority to make a verdict, yet there was no ground for complaint where the verdict was unanimous. Id.

98. Oral admonition by court that jury must not consider testimony stricken out not violative of statutory requirement that instructions be in writing. Krause v. Redman, 134 Iowa, 629, 112 NW 91.

99. Prior to Aots 1907, c. 38, p. 223, it was not reversible error for the court to read to the jury first in order instructions asked by the defendant, and next those asked by the plaintiff. Truex v. Southern Penn Oil Co. [W. Va.] 59 SE 517.

1. Charlton v. Kelly [C. C. A.] 156 F 433. Discretionary with court to offer further instructions to jury. Seivert v. Galvin [Wis.] 113 NW 680.

2. Charlton v. Kelly [C. C. A.] 156 F 433. Before acceptance of a verdict, the court may give the jury an instruction covering a phase of the case not before included, and send them back for a further consideration. Cockrell v. Egger [Tex. Civ. App.] 17 Tex. Ct. Rep. 569, 99 SW 568. It is not reversible error for a court after the jury has retired, but before verdict, to recall the jury and correct erroneous instructions, and by written instruction withdraw improper evidence from their consideration. Long v. Kendall, 17 Okl. 70, 87 P 670.

3, 4. Charlton v. Kelly [C. C. A.] 156 F 433.

5. Under Rev. St. 1895, § 1321, after a case has been submitted to the jury, only the court should give additional instructions or explanations to the jury. Missouri, etc., R. Co. v. Moore [Tex. Civ. App.] 20 Tex. Ct. Rep. 29, 105 SW 532.

6. It is not erroneous for the court to reread an instruction to the jury at their request. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 S 903.

7. The rule that, in the absence of bill of exceptions, instructions will be presumed to be based on the evidence, does not apply to instructions recalled before verdict was reached. Hibner v. Westover [Neb.] 110 NW 732.

8. See 8 C. L. 373. The necessity of requesting additional instructions is treated in ante, § 3, but all other matters as to objection and exception are discussed in the topic Saving Questions for Review, 8 C. L. 1822.

9. See 8 C. L. 373. The manner in which instructions are brought into the record on appeal is treated in Appeal and Review, 9 C. L. (§ 9B) 146, and the presumptions arising from the state of the record in the same topic, 9 C. L. (§ 9D) 161.

10. See 8 C. L. 374. See Saving Questions for Review, 8 C. L. 1822.

11. See 8 C. L. 374. The cure of one in-

Instructions must be considered as a whole,[12] and, if when so considered they fairly and correctly present the law applicable to the case,[13] it is not ground for reversal that the instructions were subject to criticism,[14] or that a single instruction standing alone was erroneous [15] or omitted essential elements,[16] was misleading.[17]

struction by another (see post this section) is not harmless error but is based on the rule that, the charge being a whole, there is no error in such case. All matters relating to harmless error in instructions, and the use of other errors by instructions, as by the withdrawal of evidence, are treated in the topic Harmless and Prejudicial Error, 9 C. L. 1563.

12. See 8 C. L. 374. Birmingham R., L. & P. Co. v. King [Ala.] 42 S 612; Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318; Gainesville & Dahlonega Elec. R. Co. v. Austin, 127 Ga. 120, 56 SE 254; Southern R. Co. v. Dean, 128 Ga. 366, 57 SE 702; Georgia Southern & F. R. Co. v. Stanley, 1 Ga. App. 487, 57 SE 1042; Spence v. Morrow, 128 Ga. 722, 58 SE 356; Schofield v. Little [Ga. App.] 58 SE 666; Hancheft v. Haas, 125 Ill. App. 111, afd. 219 Ill. 546, 76 NE 845; Wabash R. Co. v. Warren, 125 Ill. App. 416; People v. Cook County, 127 Ill. App. 401; Eldorado Coal & Coke Co. v. Swan, 128 Ill. App. 237; Thomas v. Mosher, 128 Ill. App. 479; McMaster v. Spencer, 129 Ill. App. 131; Chicago Union Trac. Co. v. Giese, 130 Ill. App. 608; National Biscuit Co. v. Wilson [Ind. App.] 80 NE 33; Indianapolis Trac. & T. Co. v. Miller [Ind. App.] 82 NE 113; American Bonding & Trust Co. v. Progressive Bldg., Loan & Sav. Ass'n, 101 Md. 323, 61 A 199; Lee v. Wild Rice Lumber Co., 102 Minn. 74, 112 NW 887; St. Louis, etc., R. Co. v. Stewart, 201 Mo. 491, 100 SW 583; Bell v. Central Elec. R. Co., 125 Mo. App. 660, 103 SW 144; Neeley v. Trautwein [Neb.] 113 NW 141; Cornelius v. Central Acc. Ins. Co. [Pa.] 67 A 840; Hagen Co. v. Greenwood, 27 Pa. Super. Ct. 239; Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619; Ray v. Jefferson County Gas Co., 31 Pa. Super. Ct. 194; Rochester v. Bull [S. C.] 58 SE 766; Horn v. Southern R. Co. [S. C.] 58 SE 963; Missouri, K. & T. R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 936, 100 SW 182; Bell v. Keays [Tex. Civ. App.] 18 Tex. Ct. Rep. 597, 100 SW 813; Houston & T. C. R. Co. v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 662, 100 SW 1013; Brown v. San Antonio Trac. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 936, 101 SW 526; Missouri, etc., R. Co. v. Meritt [Tex. Civ. App.] 18 Tex. Ct. Rep. 199, 102 SW 151; Kohl v. Bradley, Clark & Co., 130 Wis. 301, 110 NW 265; North Jersey St. R. Co. v. Purdy [C. C. A.] 142 F 955; Washington, etc., R. Co. v. Chapman, 26 App. D. C. 472. Must be considered in entirety. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577. Should be read as a whole. Evers v. Wiggins Ferry Co. [Mo. App.] 105 SW 306. Must be interpreted by considering all on each subject or branch of case. Lincoln Trac. Co. v. Brookover [Neb.] 111 NW 357. Must be read together, each in the light of the others. Styles v. Chesapeake & O. R. Co. [W. Va.] 59 SE 609. Should be taken together, and their true meaning determined by considering all that is stated on each particular branch of case. Vanderveer v. Moran [Neb.] 112 NW 581. The part of an instruction to which exception was taken, when read in connection with the entire instruction, did not require a new trial. Howard Supply Co. v. Bunn, 127 Ga. 663, 56 SE 757.

13. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 S 903. Instructions not improper where considered together, and applied to facts they amount to a correct statement of the law. Hersberger v. Pacific Lumber Co. [Cal. App.] 88 P 587. The duty of a city respecting its sidewalks being correctly stated in several instructions, that a part of one instruction, as to such duty, was not based on any evidence in the case, did not state the correct rule, did not constitute prejudicial error. City of Bloomington v. Woodworth [Ind. App.] 81 NE 611. That an instruction did not in express terms define the care of a decedent at the time of receiving his injuries was not erroneous, where the care necessary to be exercised was sufficiently expressed by the instructions as a whole. Chesapeake & O. R. Co. v. Perkins, 31 Ky. L. R. 1350, 105 SW 148. Expressions of court that under the circumstances it was defendant's duty to furnish and maintain reasonably safe appliances held not ground for reversal where duty of defendant was elsewhere explained as not being absolute, and where at defendant's request a specific instruction was given that it was the duty of defendant only to use reasonable and ordinary care. Katahdin Pulp & Paper Co. v. Peltomaa [C. C. A.] 156 F 342. An instruction, when considered in connection with another instruction, was a correct statement of the law on the subject of presumptions. Rogers v. Rio Grande W. R. Co. [Utah] 90 P 1075. In action for injuries caused by defective sidewalk, held that care required was submitted under proper instructions. Thompson v. Poplar Bluff, 124 Mo. App. 439, 101 SW 709.

14. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784. Instruction when considered as one of a series of instructions held not erroneous. Chicago City R. Co. v. Ryan, 225 Ill. 287, 80 NE 116. Where the court instructs the jury that if they find "from the evidence" certain facts they must find a verdict for plaintiff and assess his actual damages, it is not necessary to repeat the words "from the evidence" in giving in the same instruction the rule as to punitive damages where the assault is made wantonly and maliciously. Cody v. Gremmler, 121 Mo. App. 359, 99 SW 46. An instruction as a whole clearly stating the law, so as not to mislead jury, was not insufficient because of the wording of a portion of it. Ridings v. Marion County [Or.] 91 P 22. Since an instruction must be considered as a whole, an objection to a sentence therein cannot be considered without regard to the context. Pelton v. Spider Lake Sawmill and Lumber Co. [Wis.] 112 NW 29. Where instructions as a whole properly state the law of contributory negligence, giving one which does not fully cover the question was not prejudicial error. Stephens v. Elliott [Mont.] 92 P. 45. An ambiguous or general term in one instruction may be explained in another,

Curing bad instructions. See 8 C. L. 376—An erroneous instruction is presumed to be prejudicial.[18] As a general rule a bad instruction cannot be cured by the giving of

and a partial view supplemented provided the whole be consistent and harmonious. Gibler v. Terminal R. Ass'n of St. Louis, 203 Mo. 208, 101 SW 37. An instruction which assumes a fact, and which immediately follows another instruction expressly predicated upon a finding by the jury of such fact, must be understood as referring to a finding of that fact as the basis for the rest of the instruction. Loughlin v. Brassil [N. Y.] 79 NE 854. Instruction was not prejudicial as assuming that witnesses were attesting witnesses when, read as a whole, it sufficiently showed that the witnesses appearing as attesting witnesses were meant. Carmical v. Carmical [Ky.] 104 SW 1037. Where instructions as a whole fairly give the law of the case, it is not error to omit to charge the converse of propositions therein contained. Cohankus Mfg. Co. v. Rogers' Guardian, 29 Ky. L. R. 747, 96 SW 437.

15. Christianson v. McDermott Estate, 123 Mo. App. 448, 100 SW 63; McCauley v. Darrow [Mont.] 91 P 1059; Lincoln Trac. Co. v. Brookover [Neb.] 111 NW 357; Butler v. Gazette Co., 104 NYS 637. Instruction not erroneous when taken with another instruction. Heath v. Hagan [Iowa] 113 NW 342. Statement in instruction which was incorrect when standing alone was cured by subsequent part of instruction. Seivert v. Galvin [Wis.] 113 NW 680. Improper to base error on isolated portion of instruction, as the portion objected to must be read in connection with the rest of the charge. Industrial Lumber Co. v. Bivens [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831. If instructions considered as a whole are free from error, an assignment predicated on isolated paragraphs or portions which, standing alone, might be misleading, must fail. Seaboard Air Line R. v. Scarborough [Fla.] 42 S 706. An instruction which standing alone was misleading, yet, when taken in connection with an instruction immediately preceding it and containing a full instruction on all the elements necessary to establish title by limitation, was not erroneous. Thayer v. Clark [Tex. Civ. App.] 19 Tex. Ct. Rep. 343, 104 SW 196. An instruction if erroneous as disregarding questions of defendants' negligence and plaintiff's contributory negligence was cured by subsequent instruction that jury should look solely to the evidence, the facts, and the instructions for the law. East St. Louis & S. R. Co. v. Zink, 229 Ill. 180, 82 NE 283. In libel, instructing that the amount of actual damages which may be assessed is entirely in the discretion of the jury was not prejudicial error, in view of another instruction that "it must be a sum which will fairly compensate the plaintiff for the injury" sustained by reason of publication. Butler v. Gazette Co., 104 NYS 637.

16. Error in instruction failing to state all the law on the subject, was not reversible if omission supplied by other instructions. Peoria & Pekin Terminal R. Co. v. Schantz, 226 Ill. 506, 80 NE 1041. An instruction setting forth the circumstance under which an injured passenger was entitled to recover was not erroneous in ignoring defendant's plea of contributory negligence, such defense being treated in another instruction. Chicago, etc., R. Co. v. Burns [Tex. Civ. App.] 19 Tex. Ct. Rep. 775,104 SW 1081. Instruction that punitive damages were awardable for failure to deliver telegram was not reversible error where followed by instruction that it could only be given in proof of willfulness. Dempsey v. Western Union Tel. Co. [S. C.] 58 SE 9. Defendant could not complain that an instruction given for plaintiff did not define what in law constitutes an employe, where when read with an instruction given for defendant the jury was clearly informed upon the question. Virginia-Carolina Chemical Co. v. Knight, 106 Va. 674, 56 SE 725. Instruction on degree of care was not erroneous for failing to instruct on last clear doctrine, where covered in another instruction. Hamline v. Pacific Elec. R. Co., 150 Cal. 776, 89 P 1109.

17. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318. Instruction taken in connection with other instructions held not misleading or confusing. Pittsburg, etc., R. Co. v. Collins, 168 Ind. 467, 80 NE 415. Instructions as a whole must be examined and, if it appears that jury were not misled, erroneous statements in instructions no ground for reversal. Doe v. Boston & W. St. R. Co. [Mass.] 80 NE 814. Possible misconceptions cured by other instructions. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577.

18. Where a special instruction in itself announces a patently erroneous proposition of law, it must affirmatively and clearly appear that the presumptive harm caused thereby has been entirely removed. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318. An instruction leading the jury to believe that the test of plaintiff's right to recover was his guilt or innocence held reversible error, though the law may have been stated correctly in other instructions. Radcliffe v. Hollyfield, 216 Pa. 367, 65 A 789. Unless the record clearly shows that there was no error. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 NE 492.

19. Fogarty v. Southern Pac. Co. [Cal.] 91 P 650; Walsh v. Henry, 38 Colo. 393, 88 P 449; Southern R. Co. v. Broughton, 128 Ga. 814, 58 SE 470; Second Nat. Bk. v. Thuet, 124 Ill. App. 501; Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105; Weaver v. Richards [Mich] 14 Det. Leg. N. 617, 113 NW 867; Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 18 Tex. Ct. Rep. 11, 100 SW 977; St. Louis, etc., R. Co. v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep 10, 103 SW 1176. Error in one instruction was so intensified by another instruction as to forbid conclusion that former was harmless. Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 18 Tex. Ct. Rep. 11, 100 SW 977. Errors in written instructions are not cured by correct statements in oral or other instructions of court. Louisville & N. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. Withdrawal of objectionable portion of instruction was not corrected by subsequent requested instruction. Orendorf v. New York Cent., etc., R. Co., 104 NYS 222. Instruction erroneous and misleading in omitting from consideration of jury that the question of

a correct one,[19] the two being in conflict,[20] nor by one that is incorrect;[21] it cannot be said that the jury accepted the correct and rejected the erroneous instructions,[22] but an error of omission in one instruction may be cured by other instructions,[23] and an

knowledge by city authorities of unguarded condition of excavation, although other instructions were given properly submitting question of knowledge. Muncy v. Bevier, 124 Mo. App. 10, 101 SW 157. In an action for personal injuries against a steam railroad, an instruction erroneous as on the weight of evidence on the issue whether the servants in charge of the engine had the right to assume that the servants in charge of the car would give the engine the right of way was not cured by the other part of the instruction. Horton v. Houston & T. C. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 870, 103 SW 467. An error of an instruction in putting on defendant the burden of proof before plaintiff had made out a prima facie case of negligence is not cured by an instruction that, if certain facts were found, defendant was not liable. Trotter v. St. Louis & Suburban R. Co., 122 Mo. App. 405, 99 SW 508. Instruction erroneous in imposing on traveler the duty to exercise ordinary care in the use of her senses to ascertain the approach of a train was not cured by another instruction that the duty of the traveler was only to use ordinary care. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 823, 100 SW 206. Instruction that it was conceded that plaintiff was a passenger not cured by another instruction that if plaintiff alighted in safety, and afterwards fell on the street through mischance and was injured, verdict should be for defendant. Louisville R. Co. v. O'Conner, 30 Ky. L. R. 1325, 101 SW 305. If the court assumes to fix the amount of the verdict when such matter is controverted, the error is not cured by saying the court might thereafter change it. Lenhart v. Cambria County, 29 Pa. Super. Ct. 350. Instruction invading province of jury in assuming facts proper for their determination was not cured by another instruction submitting these issues, but not referring to or correcting the former instruction. Texas Cent. R. Co. v. Waldie [Tex. Civ. App.] 18 Tex. Ct. Rep. 60, 101 SW 517. Instruction erroneous in disregarding a material issue was not cured by a written statement of court that it was to be construed as a part of main instructions which correctly submitted issue. Id. Error in instructing that defendant railroad was liable if plaintiff received a shock from its rail and was injured thereby was not cured by an instruction that plaintiff must prove that any injury was from the shock, and that on this the jury cannot speculate, but the evidence must be positive. Sullivan v. Brooklyn Heights R. Co., 117 App. Div. 784, 102 NYS 982.

20. Error in instruction was not cured by a conflicting instruction. Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1, 88 P 401. Erroneous instructior not cured by giving one contradictory thereto. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind.] 81 NE 492.

21. Instruction containing erroneous view of law was not cured by a subsequent instruction which was misleading. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902. If it is sought to cure a bad instruction by a subsequent one, the latter must state the law correctly. Bulger v. Gleason, 123 Ill. App. 42.

22. Where instructions are conflicting, it cannot be assumed on appeal that jury followed the correct ones and disregarded the erroneous ones. Platt v. Ottumwa [Iowa] 113 NW 831.

23. Failure to qualify or explain proposition of law given in an instruction may be cured by a subsequent instruction containing proper qualification. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 S 318. Omissions in plaintiff's instructions may be cured by those given at defendant's instance, if covering the case. Gibler v. Terminal R. Ass'n of St. Louis, 203 Mo. 208, 101 SW 37. An instruction that if the plaintiff "before or at the time" the engine started took his seat on the brake wheel he was negligent is cured by an instruction that, if the plaintiff afterwards or "at or immediately before" the injury took his seat on the brake he was negligent. Atchison, etc., R. Co. v. Sowers [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190. In an action for negligent death, an oral instruction allowing punitive damages if defendant was negligent, and plaintiff not, was cured when at once withdrawn, and another instruction given that such damages may not be allowed unless the negligence of defendant was gross, wanton, and willful. St. Louis, etc., R. Co. v. Stamps [Ark.] 104 SW 1114. If instruction was erroneous as omitting reference to the preponderance of evidence, it was cured by defendant's requested instruction that no recovery could be had unless plaintiff's cause was established by a preponderance of the proof. East St. Louis & S. R. Co. v. Zink, 229 Ill. 180, 82 NE 283. Failure to instruct as to what effect to give certain facts mentioned therein is not erroneous, where their effect is necessarily controlled and determined by other instructions. Choctaw, O. & G. R. Co. v. Hickey [Ark.] 99 SW 839. A defect in an instruction that if a passenger fell from the train by reason of the moving thereof and was injured thereby the presumption was that the passenger received the injury through the negligence of the carrier held obviated by an instruction if the passenger was thrown on the ground by the train's movement, without negligence of carrier in starting train, there could be no recovery, unless the movement of the train was negligent and unnecessary in the handling thereof. Id. Where in an action by a servant to recover for personal injuries the court instructed that the agency must be determined from all the circumstances of the case, but excluded impertinent evidence by further instructing that all the testimony, facts, and circumstances in the case bearing on the agency should be considered, there was no error. Broadstreet v. Hall, 168 Ind. 192, 80 NE 145. An instruction using the term "without right" may be made clear as to such term by instruction setting forth the particulars of the verbal lease which

erroneous statement may be cured by specially calling attention to it,[24] and it is held that positively erroneous instructions may be cured by others without specific mention of the inconsistency of the two.[25] Where an instruction is partly bad, it may be cured by another part of the same instruction.[26] Error in an oral instruction may be cured by such instruction being requested in writing.[27] Any error in giving [28] or refusing an instruction may be cured by the verdict.[29]

INSURANCE.

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dispels the doubt as to the meaning of the phrase. Kessel v. Mayer, 118 Ill. App. 267.

24. Atlantic & B. R. Co. v. Smith [Ga. App.] 58 SE 542. Expressions in instruction which, standing alone, were objectionable, held cured by subsequent colloquy between counsel and court from which jury must have understood that if there had been error in the charge it was then corrected. Morrison v. Richardson, 194 Mass. 370, 80 NE 468. Erroneous instruction corrected by subsequent supplementary instructions. Chicago City R. Co. v. Hagenback, 228 Ill. 290, 81 NE 1014.

25. Error in clause of instruction held cured by taking the instruction in connection with its context and the instruction given. National Biscuit Co. v. Wilson [Ind. App.] 80 NE 33; Indianapolis Trac. & T. Co. v. Beckman [Ind. App.] 81 NE 82. Cured by subsequent instruction. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 NE 716. Error in one instruction corrected by another. Seaboard Air Line R. v. Scarborough [Fla.] 42 S 706.

26. An instruction prejudicial in part may be cured by another part of the same instruction, and if not misleading will not be cause for reversal. Consolidated Kansas City Smelting & Refining Co. v. Binkley [Tex. Civ. App.] 17 Tex. Ct. Rep. 689, 99 SW 181.

27. Error in instructing orally on the effect of evidence, under Code, § 3326, was cured, where such instruction was requested in writing by one of the parties. Gambill v. Cargo [Ala.] 43 S 866.

28. Instruction on contributory negligence was erroneous, but not prejudicial and reversible, where the court could see from verdict that the jury had mitigated the damages. Louisville & N. R. Co. v. Cheatham [Tenn.] 100 SW 902.

29. In an action for the recovery of land, the refusal of an instruction enabling the

The scope of this topic is noted below.[1]

§ 1. *Insurance laws, regulations, and supervision in general.* See 8 C. L. 378—Statutes in some states limit the amount that may be expended by life insurance companies in obtaining new business.[2] The insurance commissioner has no authority other than that conferred upon him by statute.[3]

§ 2. *Corporations and associations doing an insurance business. A. Corporate existence, character, management, rights and liabilities.*[4]—The right to change the corporate name,[5] and to classify risks,[6] the character of insurance which a company or association may write,[7] who may become members of mutual companies,[8] and the necessity for a guarantee capital,[9] depend upon the statutes of the various states. The New York statutes provide for the reorganization of domestic companies under the general insurance law.[10] By-laws must be adopted,[11] elections held,[12] and divi-

jury to determine if certain statements procuring the execution of deeds to the land involved were deceitful and fraudulent held no error, where the jury found that no misleading or deceptive statements were in fact made. Bridgeport Coal Co. v. Wise Rep. 678, 99 SW 409.

1. Matters relating to corporations (see Corporations, 9 C. L. 733), and foreign corporations (see Foreign Corporations, 9 C. L. 1395) generally, marine insurance (see Shipping and Water Traffic, 8 C. L. 1903), indemnity bonds (see Indemnity, 10 C. L. 43), and all cases dealing with the insurance contracts of fraternal benefit associations (see Fraternal Mutual Benefit Associations, 9 C. County Coal Co. [Tex. Civ. App.] 17 Tex. Ct. L. 1449), have been excluded.

2. Laws 1906, p. 794, c. 326, § 97, limiting amount domestic life insurance company may expend or become liable for, or permit any person to expend on its behalf or under any agreement with it, for compensation for services in obtaining new business and expenses, held to limit amount to be paid each agent to certain proportion of first premiums received by him, and not to be merely a limitation on total expenditure of company, and hence to apply to plaintiff's contract and to reduce his compensation. Boswell v. Security Mut. Life Ins. Co., 104 NYS 130. Statute held valid as exercise of police power, which may not be limited or restricted by provisions of contracts between individuals or corporations. Id. Statute held applicable to existing contracts. Id. Statute held not invalid as impairing contract obligations when applied to contracts with agents made before its passage in view of Const. art. 8, § 1, authorizing legislature to alter or repeal charters of corporations, and fact that change was one which parties must have contemplated when contract was made. Id.

3. Mutual Life Ins. Co. v. Prewitt, 31 Ky. L. R. 1319, 105 SW 463.

4. See 8 C. L. 378. See, also, Corporations, 9 C. L. 733.

5. Personal notice of meeting called for purpose of changing name of mutual company is not required by Act May 1st, 1876, §§ 30, 31. International Sav. & Trust Co. v. Stenger, 31 Pa. Super. Ct. 294.

6. In absence of express authority, held that executive committee of defendant's board had no power to adopt classification of risks, and such classification was invalid. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566.

7. Purposes of mutual burial association cannot be made to include form of benevolence not authorized by statute under which it is organized. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

8. Infants cannot become members of a mutual burial association organized under Rev. St. § 3631a, as amended. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

9. Act May 1, 1876, P. L. 53, held not to require guarantee capital in case of mutual company organized under par. 4 of § 8 of said act. International Sav. & Trust Co. v. Stenger, 31 Pa. Super. Ct. 294.

10. Laws 1892, c. 690, § 52, as amended by Laws 1901, c. 722, providing for reincorporation of certain insurance companies, and that for purpose of estimating amount of reserve required to be carried, policies issued before accepting provisions of act shall be valued as one year term insurance at the ages attained, held applicable to defendant, which was originally organized as fraternal organization, reincorporated as mutual company, and again reincorporated as stock company, and not to violate any provisions of plaintiff's contract. Elder v. Bankers' Life Ins. Co., 117 App. Div. 722, 102 NYS 702. Reorganization without consent of members of co-operative assessment company, with change of name and increased powers, held not to have impaired contract obligations of members, it not being creation of new corporation and reorganized company being bound to perform all existing obligations. Polk v. Mutual Reserve Fund Life Ass'n, 28 S. Ct. 65. Provision of § 84 of act that outstanding policies shall be appraised as liabilities as if they were one year term insurance at the ages attained held not to in fact convert such policies into such term insurance, or authorize company to so treat them in dealings with holders thereof. Id. Statute held not void as impairing contract obligations, in view of general power of amendment and repeal reserved by state constitution. Id. Fact that change was made by majority of directors without consent of members, and that directors procured passage of law knowing that association was insolvent, and with intent to defraud members, held immaterial. Id. Neither statute nor reincorporation held to have deprived members of vested rights and privileges or property rights without due process of law, in violation of U. S. Const. Amend. 14. Id. Reincorporation of association held not to have operated to create new corporation, but simply to have continued old one under new law, so that old officers remained man-

dends declared,[13] in the manner prescribed by the charter or the general law. In New York the supreme court has power to review corporate elections.[14] The amount of reserve required to be carried is governed by the contracts of insurance and the statutory provisions on the subject.[15] The courts will interfere with directors only when there has been a manifest abuse of discretion.[16] A showing of misconduct is necessary to enable a policy holder to enjoin alleged unlawful methods of carrying on a campaign for the election of directors and the expenditure of corporate funds for that purpose.[17]

Insolvency. See 8 C. L. 381—A member of a mutual company must pay his proportion of all liabilities accruing during the continuance of his policy and up to the time of his withdrawal.[18] On insolvency of such a company equity may ordinarily

aging officers of company and had right to direct its affairs until their successors were chosen, and old by-laws continued in force in so far as they did not conflict with act under which reincorporation was effected. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 NYS 465. Executive committee of old association held to have continued in office as managing board after reincorporation until their successors were properly elected, both under Laws 1892, c. 687, § 23, and by-laws of old association, so that their status was not changed by invalid election of directors. Id.

11. Laws 1892, p. 2013, c. 690, § 209, held to confer on policy holders of mutual company organized on assessment plan the sole power to adopt by-laws for its management, so that by-laws adopted by executive committee touching number of directors to manage affairs of association, or fixing their term of office, were void. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 NYS 465. By-laws held void where policy holders were never served with copy thereof or with notice of meeting at which they were to be considered, as required by Laws 1892, p. 2013, c. 690, § 209. Id. By-laws regulating election of directors adopted by directors under § 29 of general corporation law (Laws 1892, p. 1811, c. 687) held void where no notice was published as required by Id. § 11, subd. 5. Id.

12. Notices of annual meeting of association published in its official organ held insufficient as notices of an election of directors so as to estop members not attending from questioning election. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 NYS 465. In any event would not work an estoppel, since legal election could not be held until office had been properly provided for by proper adoption of constitution or by-laws, which had not been done, and no policy holder was bound to respect call for such an election prematurely made. Id. Only duly qualified members can participate in election of trustees and officers of mutual burial association. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

13. Where neither charter nor by-laws provided by whom dividends should be declared, held that dividends actually paid to policy holder could not be recovered because they were not formally declared by directors or executive committee, but payment would be considered voluntary one. Berryman v. Bankers' Life Ins. Co., 117 App. Div. 730, 102 NYS 695. Company not being entitled to recover back such dividends, held that it could not charge them as liability against policy to be collected thereafter. Id.

14. Laws 1892, c. 687, § 27, held applicable to election of directors of an assessment insurance company which is not a stock corporation. In re Empire State Supreme Lodge, 53 Misc. 344, 118 App. Div. 616, 103 NYS 465. Requirement that notice of application be given "to the adverse party or to those to be affected thereby," held not to require notice to policy holders of assessment insurance company, but notice to corporation and to directors claimed to have been illegally elected was sufficient. Id. Policy holders of assessment company held to have right to institute proceeding under said section, proceeding by attorney general under Code Civ. Proc. § 1948, not being essential. Id. Where the question is the legality of any election at all, members of assessment company attacking election need not allege that new election would result differently. Id.

15. In absence of any contract between parties as to how policies shall be valued in order to estimate amount of reserve to be carried, legislature may determine matter. Elder v. Bankers' Life Ins. Co., 117 App. Div. 722, 102 NYS 702. Amount of reserve fund required by contracts of company originally organized as fraternal organization, and afterwards reincorporated as an assessment company, and then as stock company, determined. Kelshaw v. Bankers' Life Ins. Co., 117 App. Div. 726, 102 NYS 700.

16. In exercising power to fix assessment rates in mutual life insurance company. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F 461.

17. Showing of misconduct held insufficient to entitle policy holder to temporary injunction in suit brought by him in behalf of himself and other policy holders for injunction and for an accounting of funds so expended. Farelly v. New York Life Ins. Co., 52 Misc. 202, 102 NYS 726.

18. Losses incurred prior to his withdrawal, or cancellation of his policy. Backenstoe v. Kline, 31 Pa. Super. Ct. 268. Losses occurring during life of policy. International Sav. & Trust Co. v. Stenger, 31 Pa. Super. Ct. 294. Provision of by-laws of mutual company that neglect or refusal to pay loss dues within time specified should render policy void held not to relieve member in default from liability for assessments, he not having withdrawn from company in manner prescribed. Id.

enforce assessments against its members to the extent of their contingent liability under their contracts.[19] Assessments must, of course, be levied and enforced within the time fixed by the statute of limitations.[20] An order of court in insolvency proceedings, to which the company is a party, levying or directing the levying of an assessment on the members is conclusive on them both as to the necessity for an assessment and the amount thereof,[21] even though they are individually not made parties,[22] but not as to matters not passed upon.[23] A receiver authorized to collect assessments may sue therefor in his own name as receiver.[24] Neither the existence of the company nor the validity of its incorporation,[25] nor the validity of the appointment of the receiver,[26] can be collaterally attacked in such a suit. A member cannot set off a debt due him for a loss under a policy against assessments due from him to the company to pay losses, even though the company is a foreign corporation, and the suit to recover the assessments is brought by a foreign receiver.[27]

Taxation See 8 C. L. 383 of the property of domestic and foreign companies is governed by the provisions of the general and special revenue laws and is fully treated elsewhere.[28]

(§ 2) *B. Conditions necessary to engage in insurance business, and certification and withdrawal of right.* See 8 C. L. 383—Provision is sometimes made for the licensing of certain classes of companies and the issuance to them of certificates of authority to do business within the state.[29]

§ 3. *Foreign insurers and companies.*[30]—Foreign insurance companies[31] are

19. Ohio Rev. St. 1892, §§ 3634, 3650, construed, and held that though governing body of mutual fire insurance company failed to fix contingent liability of members by uniform rule, or to require agreement in writing by policy holders assuming such liability, court of equity on insolvency of said company had authority to enforce assessments against members not to exceed five annual premiums, failure not affecting validity of insurance contracts. Swing v. Karges Furniture Co., 123 Mo. App. 367, 100 SW 662. Fact that assessment made on petition of receiver of insolvent company was excessive held not to justify filing of bill of review, since adequate relief could be had by vacating it, or by securing proper disposition of funds so raised. Daniel v. Citizens' Mut. Fire Ins. Co., 149 Mich. 626, 14 Det. Leg. N. 525, 113 NW 17.

20. Defense that action on assessment was barred by lapse of six years from and after making of prior assessment and notice thereof served upon defendant with demand for payment held conclusive against trustee seeking to enforce such subsequent assessment. Swing v. Ohio Cultivator Co., 9 Ohio C. C. (N. S.) 45.

21. Cannot be questioned in either respect in any collateral proceeding. International Sav. & Trust Co. v Stenger, 31 Pa. Super. Ct. 294; Backenstoe v. Kline, 31 Pa. Super. St. 268.

22. Members of insolvent mutual company are not necessary parties to suit to wind up same. Swing v. American Glucose Co., 123 Ill. App. 156. Decree making assessment held binding upon both resident and non-resident members in suits to collect assessments. Id. Members of foreign mutual company held so far bound by decree of court of domicile adjudging it insolvent and directing assessment to require it to answer in suit by trustee to recover assessment for it. Swing v. Karges Furniture Co., 123 Mo. App. 367, 100 SW 662.

23. Decree ordering assessment of policy holders held not to preclude them from asserting limitations as defense in actions against them pursuant thereto, it not having undertaken to pass upon that question. Swing v. Ohio Cultivator Co., 9 Ohio C. C. (N. S.) 45.

24. Backenstoe v. Kline, 31 Pa. Super. Ct. 268. Held that defendant could not contend that action should have been brought by insurance commissioner. International Sav. & Trust Co. v. Stenger, 31 Pa. Super. Ct. 294.

25. International Sav. & Trust Co. v. Stenger, 31 Pa. Super. Ct. 294. Regularity of proceedings whereby name of mutual company was changed. Id.

26. Appointment of receiver of mutual company by court of common pleas of Dauphin county under Act June 23, 1885, P. L. 137. Backenstoe v. Kline, 31 Pa. Super. Ct. 268.

27. Stone v. New Jersey & H. R. R. & Ferry Co. [N. J. Law] 66 A 1072.

28. See Taxes, 8 C. L. 2058; Licenses, 8 C. L. 734.

29. Code 1906, §§ 897, 2559, 2582, 2564, construed, and held that mutual fire insurance company incorporated under c. 24, having power under its charter to insure its members only, and having no capital stock, was not entitled to certificate of authority to transact the business of insurance within the state, or a privilege license, since it had no right to do general insurance business. Farmers' Mut. Fire Ins. Co. v. Cole [Miss.] 43 S 949. In speaking of right to transact business of insurance in state, held that statute means right to do general business and has no reference to restricted right of mutual company to insure property of its own members. Id.

30. See 8 C. L. 383. See, also, Foreign Corporations, 9 C. L. 1395.

generally prohibited from doing business in the various states until they have complied with the state insurance statutes.[32] It is sometimes held that such statutes do not apply to contracts made outside the state by companies having no agents therein, though covering property situated in such state.[33] The insurance commissioner is often given authority to revoke the license of a foreign company if he is of the opinion that it has failed to comply with the law, or is in an unsound condition financially.[34] He is sometimes required to revoke it in case the company applies for the removal to a Federal court of any action against it growing out of, or in any way connected with, any policy of insurance.[35] The insurance commissioner cannot be controlled by injunction in the exercise of discretionary powers conferred upon him by law,[36] but the contrary is true when he undertakes to act in a state of case in which the statute gives him no authority to act.[37] He acts judicially in granting a license to a foreign company, and mandamus will not issue to compel him to reconsider his action on the same evidence originally before him.[38]

§ 4. *Agents and solicitors for insurance. A. Distinctions and kinds of agency.*[39]

31. Contract whereby corporation in consideration of stipulated amount agrees to defend physician against all suits for damages for malpractice at its own expense, not exceeding fixed amount, but not to pay any judgment recovered, is contract of insurance within meaning of Rev. Laws 1905, § 1596, and corporation making such contract is engaged in insurance business. Physicians' Defense Co. v. O'Brien, 100 Minn. 450, 111 NW 396. Essential purpose of such contract is not to render personal services but to indemnify against loss or damage resulting from defense of actions for malpractice. Id. Company agreeing for specified annual payment to defend at its own cost actions for damages against physicians for malpractice, but not obligating itself to pay any judgment recovered, held not engaged in insurance business. Vredenburgh v. Physicians' Defense Co., 126 Ill. App. 509.

32. Acts 1897, p. 332, c. 195, §§ 25, 27, held not to have relieved foreign accident associations from compliance with general law of state, except as to matters specified in said act. Phoenix Acc. & Sick Ben. Ass'n v. Lathrop [Ind. App.] 81 NE 227.

33. Delaware Laws, vol. 22, c. 99, relating to foreign companies and prohibiting them from doing business in state without having complied with its provisions, held not to apply to fire insurance contracts made in good faith outside that state by foreign company which had not complied with statute, but which had no agent and solicited no business in state, though insured property was in Delaware, laws of state where contracts were made governing their validity. Atlas Mut. Ins. Co. v. Fisheries Co. [Del.] 68 A 4. Even if held to apply, held that statute would be unconstitutional in so far as it deprived citizen of right in good faith to make contract of insurance out of state upon his property within state. Id. Where application was made and accepted and policy was issued in New York, and company was not licensed to do business in Virginia and had no agent there, held that Virginia Laws 1901-02, p. 738, c. 63, § 1269a, providing that fire insurance companies not incorporated in that state but legally authorized to do business there should not make contracts of insurance on property therein save through regularly constituted agents residing in that state, were inapplicable, though policy covered property in Virginia. Globe & Rutgers Fire Ins. Co. v. David Moffatt Co. [C. C. A.] 154 F 13.

34. "Failed to comply with the law" as used in St. 1903, § 753, means failure to do those things which law requires of foreign company before it can do business in state, and does not refer to laws of other states. Mutual Life Ins. Co. v. Prewitt, 31 Ky. L. R. 1319, 105 SW 463. Commissioner held to have no right to revoke license of company because it had discharged its state manager for becoming candidate for trustee of company in opposition to administration ticket named by trustees in office, or because of expenditure of company's funds in supporting administration ticket, its solvency not having been affected thereby. Id.

35. Revisal 1905, § 4701, held not applicable to removal of action brought against company by former agent for services. Pacific Mut. Life Ins. Co. v. Insurance Department, 144 N. C. 442, 57 SE 120.

36, 37. Mutual Life Ins. Co. v. Prewitt, 31 Ky. L. R. 1319, 105 SW 463.

38. Insurance commissioner held to act judicially in granting license to foreign company so that he could not be required, in proceeding by mandamus, to reconsider or review his action in granting a license on ground that policy issued by company to which license was granted was on its face violative of statutes of state, it not being asked that any evidence de hors the policy be looked to. Cole v. State [Miss.] 45 S 11. Nor could he be compelled, in such proceeding, to revoke license on such ground, there being no evidence de hors policy to show any wrongful or illegal conduct subsequent to granting license which might serve properly as ground for revocation, and it being plain that effect would be merely to control his discretion. Id.

39. See 6 C. L. 75. For discussion of this question as affecting waiver and estoppel see § 16C, post.

(§ 4) *B. The right to negotiate insurance and regulations thereabout.*[See 8 C. L. 385.]

(§ 4) *C. Rights and liabilities of agents.*[See 8 C. L. 386]—The general rules of contract and agency apply as between the company and its agents.[40] One cannot as agent for his principal do or transact any business for his own benefit without the principal's knowledge and consent.[41] The insurer cannot avoid the policy on the ground that its agent also acted as agent for the insured, where it has knowledge of the facts and acts on its own judgment in issuing the policy.[42] The duration of the agency,[43] and the amount of commissions to which the agent is entitled,[44] depend on the terms of the contract. An agent is not entitled to continue to act as such and to write policies after the revocation of his agency, and may be enjoined from so doing though such revocation is wrongful.[45] Contracts made by the agent are binding on the company if within the actual or apparent scope of his authority.[46]

40. See, also, Agency, 9 C. L. 58; Contracts, 9 C. L. 654. Amendment to contract held to have extended whole contract to certain date. Michigan Mut. Life Ins. Co. v. Coleman [Tenn.] 100 SW 122.

41. Where recording agent of insurer, who as such agent issued fire policy, was at the time a stockholder in insured corporation, and one of its directors and officers, and stockholder and cashier of bank which held stock in plaintiff company, of which facts insurer was not advised and had no notice, held that policy was void, even though agent acted in good faith and contract was fair and equitable. Arispe Mercantile Co. v. Capital Ins. Co., 133 Iowa, 272, 110 NW 593.

42. If company, knowing, or from surrounding circumstances being reasonably aware, that its local agent is acting or assuming to act for customers of his agency in applying for policies in their names on their property, and without depending on skill, advice, loyalty of agent in transaction, but acting on its own judgment as to desirability of particular risks, authorizes agent to write policies, it cannot complain that said agent was also agent of opposite parties to contract, but will be held bound on policy so written. Todd v. German-American Ins. Co. [Ga. App.] 59 SE 94.

43. Where duration of contract was not fixed, held that employment was at will and could be terminated at any time by either party. Wightman v. New York Life Ins. Co., 104 NYS 214; Aldrich v. New York Ins. Co., 105 NYS 493.

44. Agent held entitled to commission of 10 per cent. on premiums on business written by it at time of termination of contract, "less expense, reinsurance, return premiums, and losses," company not being entitled to make deductions for unearned premiums. Mississippi Home Ins. Co. v. Adams [Ark.] 106 SW 209. On termination of contract by giving of prescribed notice, held that computation of contingent commissions should be made, and settlement thereof had, as of date of termination. Id. Agents held entitled to commissions on business written by them, though premiums were collected by their successors. Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346, 89 P 93. Agents held chargeable with 35 per cent. of return premiums on policies written during agency and paid by company after termination of agency. Id. Only reinsurances effected during continuance of agency held to operate to reduce commissions. Id. Contract held to provide for payment of sub-agent's commissions by general agents. Id. Even if contract was one for one year held that on its termination within that time agent could not recover damages for loss of commissions on renewal premiums, where right to commissions on such premiums were expressly limited to such premiums as might be received by company during plaintiff's continuance as such agent, and no such premiums could be received during first year of plaintiff's agency. Wightman v. New York Life Ins. Co., 104 NYS 214. Agent held not entitled to commissions on renewal premiums received by company after termination of his agency. Heyn v. New York Life Ins. Co., 118 App. Div. 194, 103 NYS 20; Aldrich v. New York Ins. Co., 105 NYS 493. Agent's right to commissions on renewal premiums held not forfeited by his discharge without just cause. Michigan Mut. Life Ins. Co. v. Coleman [Tenn.] 100 SW 122.

45. His remedy is action for damages for breach of contract. Star Fire Ins. Co. v. Ring, 118 App. Div. 107, 103 NYS 137.

46. Contract made between plaintiff and defendant's general agent whereby plaintiff was appointed solicitor held the contract of defendant binding it to pay commissions provided for therein, it appearing that defendant had filed certificate with superintendent of insurance as required by law, certificate reciting that said agent was its general agent with authority to appoint soliciting agents, etc. Penn Mut. Life Ins. Co v. Ornauer [Colo.] 90 P 846. Fact that general agent did not file certificate of plaintiff's appointment held immaterial. Id. Evidence held to sustain finding that plaintiff, when contract was made, was not informed of limitations on general agent's power with reference to fixing commissions and as to requirement that appointment of sub-agents must be approved by company. Id. Where neither manager nor superintendent of agents of state branch had actual authority to bind company to pay for services rendered by solicitor, held that defendant was not liable, though they agreed that it should be, unless there was such a holding out by company of their authority as to induce plaintiff to believe and rely upon it, and to estop defendant from denying it. Gore v.

The power of agents to make contracts of insurance,[47] and to waive forfeiturers,[48] is treated in subsequent sections. The liability of sureties on a bond given by agents to secure the faithful performance of their duties depends on the terms and conditions of the bond.[49]

One agreeing to procure insurance for another in consideration of the latter's promise to pay a specified premium is bound thereby, whether he, at the time, has authority to represent an unnamed insurance company or agent or not.[50] The usual rules of construction apply to such contracts.[51]

Brokers are liable for damages resulting from their negligence in procuring policies containing warranties not in conformity to the facts,[52] or for a negligent failure to procure vacancy permits as instructed.[53] The usual rules as to the right to rescind,[54] and as to the effect of a breach or repudiation,[55] apply to contracts made with brokers for the procuring of insurance.

§ 5. *Insurable risks and interests. Fire insurance.*[See 8 C. L. 388]—The insured must have an insurable interest in the property covered by the policy.[56]

Canada Life Assur. Co., 149 Mich. 562, 14 Det. Leg. N. 552, 113 NW 367. Mere possession of one copy of blank form of contract apparently designed for contract between defendant company and agents who should contract directly with it held not such a holding out. Id. Evidence held not to show ratification of unauthorized contract. Id. Fact that solicitor's name appeared on list of agents filed with commissioner of insurance under Comp. Laws § 7246, held not evidence of ratification. Id. Requiring bonds from solicitors who received money held not an admission that company had other contract relations with them involving promise to pay for their services. Id.

47. See § 7, post.

48. See §§ 16C and 19, post.

49. Sureties on agent's bond held chargeable with 35 per cent. of return premiums on policies written during agency and repaid by company after termination of agency, where agents were liable therefor under their contract. Milwaukee Mechanics' Ins. Co. v. Warren, 150 Cal. 346, 89 P 93. Sureties held not chargeable with premiums on business written by agents where they were not collected by latter, but came into hands of their successors. Id.

50. Rainer v. Schulte [Wis.] 113 NW 396.

51. One agreeing to procure insurance "forthwith" held to have reasonable time in which to do so, what is reasonable time being question of fact. Id. Where contract was made on Oct. 18 and fire occurred on morning of Oct. 20, at which time contract had not been performed, question whether delay was unreasonable held for jury. Id.

52. Negligence held for jury. Walker v. Black, 216 Pa. 395, 65 A 799.

53. An action to recover difference between sum paid by companies by way of compromise and sum to which insured would have been entitled but for negligence of broker in failing to obtain vacancy permit as instructed, held that it was immaterial whether or not plaintiff knew that broker was dealing through insurers' agent, policies providing that permits should be obtained through proper agent of insurers, and it appearing that fire occurred before permits were obtained. Emery v. Lord, 29 App. D. C. 589. It appearing that broker could have obtained permits before fire had he communicated with agent, that he failed to do so, and that it was not necessary to actually attach them to policy, held that it was immaterial whether, if he had obtained them, they could have reached insured before fire in ordinary course of the mail. Id. Presumed that agent had authority to issue permits, in absence of showing to contrary. Id.

54. Defendant held not entitled to rescind contract with broker for fraud and false representations, where he slept on his rights for several months after discovering facts. Tanenbaum v. Federal Match Co. [N. Y.] 81 NE 565, rvg. 97 NYS 1101.

55. Fact that broker in good faith demanded more compensation for obtaining insurance than he was entitled to held not to amount to repudiation of contract, or to have justified repudiation by defendant, he not having accompanied demand with refusal to fulfill contract unless it was complied with, and such demand not being violation of any confidential relations existing between them. Tanenbaum v. Federal Match Co. [N. Y.] 81 NE 565, rvg. 97 NYS 1101. Plaintiff agreed to obtain insurance for defendant annually for ten years at specified rate per annum. He obtained said insurance for first year, but before expiration of that period defendant repudiated contract and refused to be longer bound thereby. Held that, since contract contained various mutual obligations, some of which upon defendant's part were continuously operative during entire life of contract, plaintiff might sue at once for liquidated damages without waiting until expiration of years. Id.

56. Held to have insurable interest: Vendee of land who has gone into possession under contract of purchase and has paid part of purchase price. Zenor v. Hayes, 228 Ill. 626, 81 NE 1144, afg. 130 Ill. App. 113. Widow who, on death of her husband, took life estate in his property under intestate laws with remainder in fee to children. American Cent. Ins. Co. v. Leake, 31 Ky. L. R. 1016, 104 SW 373. Owner of record title. Quackenbush v. Citizens' Ins. Co. [Mich.] 14 Det. Leg. N. 766, 114 NW 388. Husband and wife have each and both a pecuniary and

Life insurance.[See 8 C. L. 389]—Life policies issued to one having no insurable interest in the life of the insured are in the nature of wagering contracts, and hence are void as contrary to public policy.[57] One may, however, insure his own life in favor of one having no insurable interest, provided he acts in good faith and himself pays the premiums.[58] No one but the insurer can raise the question of lack of insurable interest in the beneficiary.[59] The right to assign policies to persons having no insurable interest is treated in a subsequent section.[60]

§ 6. *Application.*[See 8 C. L. 389]—The application may be oral.[61]

§ 7. *The contract of insurance in general, and general rules for its interpretation. Definitions and distinctions.*[See 8 C. L. 390]—Except in the case of life insurance,[62] the contract of insurance is a contract of indemnity.[63] The Minnesota statute defines insurance as any agreement whereby any party, for a consideration, undertakes to indemnify another to a specific amount against loss or damage from a

insurable interest in all articles comprised in furniture of their household, or which are necessary or convenient and actually in use in maintenance of their domestic relation, regardless of whose money paid for them, or by what means or from what sources they were obtained. Lenagh v. Commercial Union Assur. Co. [Neb.] 110 NW 740.

Held not to have insurable interest: Vendee under parol agreement to purchase realty void under statute of frauds. Prospect Dye Works v. Federal Ins. Co., 33 Pa. Super. Ct. 223. Simple contract creditor. Vancouver Nat. Bank v. Law, Union & Crown Ins. Co., 153 F 440.

57. Howe's Ex'r v. Griffin's Adm'r, 31 Ky. L. R. 784, 103 SW 714. If insurance is made upon application of one who has no insurable interest. Reed v. Provident Sav. Life Assur. Soc. [N. Y.] 82 NE 734, afg. 98 NYS 1111. Insured, as result of conspiracy between himself and beneficiaries, obtained life policy payable to latter by fraudulently representing that they were creditors to full amount of policy, when in fact he owed them nothing and they had no insurable interest in his life. On insured's death insurer paid amount of policy to said beneficiaries. Held that insured's administrator could not recover any part thereof from them, contract being contrary to public policy, and parties being in pari delicto. Howe's Ex'r v. Morris Griffin's Adm'r, 31 Ky. L. R. 784, 103 SW 714. Mere fact that insured could not write held insufficient to show that he was imposed upon by beneficiaries, or that any fraud was practiced upon him. Id.

Held to have insurable interest: Wife in life of her husband. Lewis v. Palmer, 106 Va. 522, 56 SE 341. Creditor, though limitations have run against note evidencing debt. Chicago Title & Trust Co. v. Haxtun, 129 Ill. App. 626. Where creditor insures life of debtor for purpose of securing his debt, amount of his insurable interest is the debt. Woody's Adm'r v. Schaaf, 106 Va. 799, 56 SE 807. Bond executed by debtor for full amount of policy, which had not been impeached, held prima facie evidence against insurance company of creditor's right to recover full amount of policy. Id. Where plaintiff, when policy was issued, had already advanced premiums on other policies, held that he had insurable interest as creditor, though advancements were made pursuant to agreement that he was to be repaid from proceeds of such other policies. Reed v. Provident Sav. Life Assur. Soc. [N. Y.] 82 NE 734, afg. 98 NYS 1111. There being insurable interest in plaintiff when policy was issued, held that liability of company was established, and that it was immaterial that plaintiff's interest as creditor was less than amount of policy, company not being in position to complain that others than plaintiff were entitled to part of proceeds under agreement pursuant to which policy was obtained. Id. Insurance was procured pursuant to contract between plaintiff, insured, and latter's children, under provisions of which insurance was to be maintained by plaintiff for children's benefit, and they were to be named as beneficiaries, but plaintiff was to be compensated by repayment from proceeds of policies of amount of his advances of premiums with interest, and by payment of substantial sum in addition. Held that plaintiff had insurable interest, policies being based on insurable interest of children, who were represented by plaintiff who could be held to performance of contract on their trustee. Id. Insurable interest held in no wise affected by fact that policy in suit was issued in plaintiff's name alone. Id.

Held not to have insurable interest: Cousins who are not dependent on, or creditors of insured. Hess' Adm'r v. Segenfelter [Ky.] 105 SW 476. Nephew. Reed v. Provident Sav. Life Assur. Soc. [N. Y.] 82 NE 734, afg. 98 NYS 1111.

58. May provide that policy shall be payable to any one whom he may appoint, or to whom he may assign policy. Reed v. Provident Sav. Life Assur. Soc. [N. Y.] 82 NE 734, afg. 98 NYS 1111.

59. Chicago Title & Trust Co. v. Haxtun, 129 Ill. App. 626.

60. See § 14, post.

61. Life insurance. Empire Mut. Annuity Life Ins. Co. v. Avery [Ga. App.] 59 SE 324.

62. Life insurance contract is not contract of indemnity, but contract to pay sum of money upon the death of the assured in consideration of certain payments being duly made at fixed periods during his life. Reed v. Provident Sav. Life Assur. Soc. [N. Y.] 82 NE 734, afg. 98 NYS 1111.

63. Indemnity is an essential element. Vredenburg v. Physicians' Defense Co., 126 Ill. App. 509.

specified cause, or to do some act of value to the assured in case of such loss or damage.[64]

Essentials and validity; acceptance. See 8 C. L. 390—Statutes in many states prescribe a standard form of fire policy and prohibit the incorporation into such contracts of any other provisions than those therein expressed.[65] In the absence of a statutory provision to the contrary, an oral contract of insurance is valid.[66]

In order to constitute a valid contract of insurance, the minds of the parties must meet as to all its essential terms.[67] The application is a mere offer which must

64. Contract whereby corporation in consideration of stipulated amount agrees to defend physician against all suits for damages for malpractice at its own expense, not exceeding fixed amount, but not to pay any judgment recovered, held contract of insurance within meaning of Rev. Laws 1905, § 1596. Physicians' Defense Co. v. O'Brien, 100 Minn. 490, 111 NW 396. Essential purpose is not to render personal services, but to indemnify against loss or damage resulting from defense of such actions. Id.

65. Even if Rev. Laws 1905, § 1640, authorizing insurance against damage by lightning, empowers company to limit risk to effects of lightning, excluding cyclones, windstorms, etc., company cannot introduce in lightning clause, or otherwise, restrictions in conflict with main purpose of standard policy to insure against loss from damage by fire. Russell v. German Fire Ins. Co., 100 Minn. 528, 111 NW 400.

66. Oral fire policy insuring property for more than a year held not void under statute of frauds since loss might occur within year. American Cent. Ins. Co. v. Leake, 31 Ky. L. R. 1016, 104 SW 373.

67. **Fire insurance:** Completed contract exists when minds of parties meet upon essential elements, to wit, subject-matter, risk insured against, amount of indemnity, duration of risk, and premium to be paid, subject to statutory limitation that policy must be written, though not necessarily delivered. Todd v. German American Ins. Co. [Ga. App.] 59 SE 94. All these essentials need not be expressly negotiated upon, but may be understood from custom, course of dealing, or other circumstances from which assent to them may fairly be implied. Id. From a general instruction by a customer to an agency to keep specified property insured in designated amount, this assent may be implied so as to give mutuality to contract of insurance, in usual form, and upon usual premium, written by said agency to replace policy which has become canceled by bankruptcy of company issuing it. Id. Nonsuiting plaintiff on ground that there was no completed contract held error, where it appeared that plaintiff directed insurance agency representing defendant and other companies to carry certain amount of insurance for him on property subsequently destroyed, that policies to amount specified were written in companies chosen by agency, and that, upon one of said companies becoming bankrupt, agent replaced insurance carried by it by writing policy for similar amount in defendant company, though it further appeared that plaintiff did not know of substitution until after fire, and that policy was never delivered to him, delivery being unnecessary under statute. Id. If one not duly authorized assumes to act as agent for another and in name of latter procures fire policy on latter's property, which is subsequently burned, person in whose name policy is procured may, upon discovery of facts, ratify assumed agency, and assert liability against insurer to same extent he could have done had he originally authorized agent to act for him. Id. Evidence held insufficient to show oral contract. Barlow v. Farmers' Mut. Fire Ins. Co., 128 Ill. App. 580. Mortgage obligated mortgagor to keep buildings insured, and provided that if he did not, mortgagee might take out insurance at his expense. Insurer sent renewal policy to mortgagor, who returned it. Insurer then left it with mortgagee's agents, who retained it, and when premium was demanded of them requested further time in which to communicate with moragagor, which was granted. Agents then sent mortgagor bill, and told him that if he did not pay, mortgagee would do so and charge him with amount thereof. Mortgagor sent money to his agent directing him to accept policy and pay premium, but building burned before agent did so. Held policy was accepted so as to make binding contract. New v. Germania Fire Ins. Co. [Ind. App.] 82 NE 1005, rvg. former opinion, Frecking v. Germania Fire Ins. Co., [Ind. App.] 81 NE 217. Evidence held insufficient to show oral contract, there being nothing to show that company ever agreed to insure property. Scanlon v. Continental Ins. Co., 101 Minn. 537, 111 NW 1134. Plaintiff authorized solicitor representing several companies to procure insurance for him. Solicitor thereupon went to office of defendant's agent, and made memorandum of terms of insurance specifying amount of risk, property covered, duration of risk, premium, and company, which was examined, approved, and agreed to by defendant's agent, who had full power in premises. Held that there was valid oral contract. Thompson v. Germania Fire Ins. Co. [Wash.] 88 P 941. In action to recover on policies issued by certain Lloyd's association of which it was alleged defendant was an underwriter, evidence held insufficient to connect defendant with association or to establish his liability as such underwriter. Keuthen v. Stache, 121 App. Div. 521, 106 NYS 198.

Life insurance: Contract held completed when policy was issued by company and mailed to its agent for unconditional delivery to insured. Equitable Life Assur. Soc. v. Perkins [Ind. App.] 80 NE 682. Evidence held to sustain finding that policy was accepted by insured. Holder v. Prudential Ins. Co. [S. C.] 57 SE 853. Instruction that

be accepted,[68] unconditionally,[69] in order to constitute a valid contract. Where it is agreed that the policy is not to become effective until the performance of certain specified conditions, compliance therewith must be shown.[70]

receipt of policy by mail was presumptive evidence of acceptance, if erroneous, held harmless where there was other evidence sufficient to sustain finding of acceptance. Id. Where insured understood that he was to have policy for certain sum in consideration of payment of fifteen annual payments, and agent, either through ignorance or through fraudulent representations, induced him to believe that application signed by him was for contract expressive of contract contemplated when it was not, held that there was no meeting of minds as to kind of policy to be issued, and hence no contract, and parol evidence was admissible to show that such was the fact. Mutual Life Ins. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580. Evidence held to show that policy found among decedent's papers was never delivered to nor accepted by him as a contract, but that it was merely left with him for examination, revenue stamps which it was duty of agent to attach and cancel before delivery, not having been attached or canceled by him, but being in separate envelope, and it appearing that first premium had not been paid. Amos-Richia v. Northwestern Mut. Life Ins. Co. 152 F 192.

68. Accident insurance: Application provided that it should not be considered binding until received and accepted at home office. Name of insurer's agent was inserted in blank space following words "send policy to" contained in application. Application was accepted, and policy mailed to agent to be delivered to insured, with no conditions attached, was no provision that policy should not take effect until delivery and payment of premium. Held that there was completed contract though insured died before policy was delivered to him and before he had paid all of first premium, but after its receipt by agent, agent being insured's agent to receive it. Bowman v. Northern Acc. Co., 124 Mo. App. 477, 101 SW 691.

Life insurance: Where has been formal application made for specified kind of insurance, all required preliminaries having been complied with, and such application has been unconditionally accepted, and acceptance signified by some definite act of the company, contract of insurance is complete, and will bind parties according to its terms. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 SE 437. Evidence held to sustain finding that application was accepted by company as it was written at time it was received and not as subsequently changed, and hence that policy was to be in force from Jan. 2, and not Jan. 12. Costello v. Grant County Mut. Fire & Lightning Ins. Co. [Wis.] 113 NW 639.

69. Fire insurance: Plaintiff applied to agent representing several companies for insurance for one year. Application was accepted by one of them for period of three years. There was no evidence that plaintiff received policy, or was informed of change, or knew name of company accepting application, until after loss. Held no contract. Costello v. Grant County Mut. Fire & Lightning Ins. Co. [Wis.] 113 NW 639.

Life insurance: Son made oral application for policy on father's life. Father afterwards, without son's knowledge, signed written application for substantially different policy. Held that tender of policy of latter kind was not compliance with contract with son, and he might refuse to accept it. Empire Mut. Annuity Life Ins. Co. v. Avery [Ga. App.] 59 SE 324. Application was rejected, and company sent amended application to agent together with policy, instructing him not to deliver policy to insured until he had signed amended application and paid certain interest on first premium. Insured died before policy was delivered to him and without having signed amended application or made said additional payment. Held that there was no contract. McNicol v. New York Life Ins. Co. [C. C. A.] 149 F 141. Receipt of first year's premium by agent with proviso that, if policy was not issued by company, it should be returned, held not to constitute contract of insurance. Id.

70. Accident insurance. Payment of premium: Defendant held in no position to invoke provision that policy should not take effect unless premium was paid prior to any accident for which claim was made as being applicable to accident occurring within time during which credit for premium had been extended. Cornell v. Travelers' Ins. Co., 104 NYS 999.

Life insurance. Payment of premium: Policy issued to company's soliciting agent provided that company assumed no obligation until first premium was paid, company's superintendent paid first premium, pursuant to rule making him responsible therefor in case policy was delivered without its being collected, and charged same against agent's commissions, company accepted payment. Held that premium was paid, and policy enforceable. Metropolitan Life Ins. Co. v. Lindsay's Adm'r, 30 Ky. L. R. 930, 100 SW 295. In view of rule that policies applied for by agents could not be returned as not taken, and rule making agents personally responsible for amount of premium where policy was delivered without its payment, with notice of which both were chargeable, when superintendent paid amount of agent's premium, he had binding obligation against agent for its repayment, and company having accepted it, there was binding contract. Id.

Delivery and payment of premium during good health: Execution and delivery by applicant of note for first premium which agent had agreed to accept in lieu of cash, or actual payment of first premium, during good health of applicant, held condition precedent to liability of insurer upon policy, so that non-suit was properly granted where it appeared from plaintiff's evidence that insured died before policy had been delivered, and without having paid or tendered premium or tendered or delivered note. Clark v. Mutual Life Ins. Co. [Ga.] 59 SE 283. Where undisputed evidence showed that at the time policy was delivered insured was affected with mortal disease which subsequently caused his death, held

Manual delivery of the policy to the insured is not essential to acceptance.[71] The unconditional delivery of a policy complying with the application is, in the absence of fraud, conclusive proof of the completion of the contract,[72] and the fact that a policy has been turned over to the insured in a particular case is prima facie evidence that there is a completed contract of insurance as contained in the policy.[73] Delivery is largely a question of intention.[74] To constitute it there must be an intention to part with control over the policy and to place it under the control of the insured, or of some one for his use.[75] A mere error in the name of the insured will not invalidate the contract.[76]

An agent may bind the company by any contract within the actual or apparent scope of his authority.[77]

that company incurred no liability upon policy. Metropolitan Life Ins. Co. v. Betz [Tex. Civ. App.] 17 Tex. Ct. Rep. 715, 99 SW 1140. Evidence held to conclusively show that when policy was delivered insured was suffering from Bright's disease, which subsequently caused his death. Id. Testimony in behalf of plaintiff that he appeared to be in good health held not to raise an issue as to whether he was in fact suffering from said disease, in view of fact that earlier stages thereof in no way affected appearance of victim. Id.

71. Life insurance: Is not physical possession of policy, hut legal right thereto, which is determinative of question. Waters v. Security & Annuity Co., 144 N. C. 663, 57 SE 437. Binding acceptance may be indicated by mailing letter, in due course, containing unconditional acceptance, or by sending policy to agent with instructions for unconditional delivery, where is no contravening provision in contract itself. Id.

Fire insurance: Under Civ. Code 1895, § 2089, delivery is not essential if contract is consummated in other respects. Todd v. German-American Ins. Co. [Ga. App.] 59 SE 94.

72. Life insurance: Delivery must be unconditional, and policy must comply with application. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 SE 437. If agent changes application without knowledge or consent of applicant, policy sent him in accordance with application so wrongfully changed is not contract until applicant has been given reasonable time to consider and has signified his assent to proposition as amended. Id. If policy is delivered on approval, and insured returns it, is no contract. Id.

73. Life insurance. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 SE 437. It is not, however, conclusive on question of delivery, and physical act of turning over policy is open to explanation by parol. Id.

Fire insurance: Proof that policy was destroyed by fire which destroyed property insured, thereby held to leave insured in same position as though it had been found in his possession after fire, and hence to raise presumption that it had been delivered. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227.

74. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 SE 437.

75. Fire insurance: Is question of fact. New v. Germania Fire Ins. Co. [Ind. App.] 82 NE 1005, rvg. former opinion, Frecking v. Germania Fire Ins. Co. [Ind. App.] 81 NE 217. Evidence held to show delivery. Id. Evidence held to sustain finding that policy was delivered. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227.

76. Fire insurance: Fact that insured's name was not properly stated in policy held not to render it void. Romano v. Concordia Fire Ins. Co., 121 App. Div. 489, 106 NYS 63. When there is no fraud, accident, or mistake, as to description or ownership of property, or articles intended to be covered by policy, and person intended to be insured and who pays premium is in fact owner of same, or has an insurable interest therein, it is immaterial by what name he is designated in policy. Lenagh v. Commercial Union Assur. Co. [Neb.] 110 NW 740. Fact that policy was insured in proposed corporate name under which husband and wife who owned insured property carried on business held not to preclude recovery, though there was in fact no such company. Id. Error in corporate name of insured will not preclude recovery if intention was to insure corporate property for benefit of corporation. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099.

77. Life insurance: In action for damages for breach of contract to insure plaintiff, evidence held to require submission of question whether person with whom plaintiff dealt was agent of company to jury. Prince v. State Mut. Life Ins. Co. [S. C.] 57 SE 766. If agent appointed by general agents exceeded his authority in agreeing to issue certain kind of policy, held that company and general agents could not, without ratifying such agreement, hold applicant liable on note executed in pursuance thereof. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580. Plaintiff, who was attorney at law and agent of defendant, procured insurance for himself. His instructions as agent were not to take applications for policies providing for weekly indemnity greater than three-fourths of weekly wages or income of insured. His income was uncertain, being sometimes more and sometimes less than would warrant application for amount of indemnity for which he applied. Company defended on ground that limitation had been exceeded. Held that instruction that if plaintiff acted in good faith with no intention to obtain over-insurance or to defraud company, he could recover, otherwise not, was sufficiently favorable to defendant. Cornelius v. Central Acc. Ins. Co. [Pa.] 67 A 840.

Fire insurance: One sending plaintiff's application to company and transmitting its

One may recover his actual damages for breach of a contract to insure.[78]

*Construction.*See 8 C. L. 394—Several documents executed contemporaneously between the same parties and in regard to the same subject-matter will be construed together in ascertaining the terms of the contract.[79] Provisions printed on the back of the policy are ordinarily not deemed a part thereof unless referred to therein.[80] The by-laws of mutual companies ordinarily form a part of their contracts.[81] The application is generally made a part of the contract.[82] By statute in some states it cannot be considered a part of the contract or be received in evidence in an action thereon, unless a copy thereof is attached to the policy.[83]

As in the case of other contracts, the expressed intention of the parties controls in the interpretation of contracts of insurance.[84] The whole contract should be construed together,[85] effect, if possible, being given to every word and expression.[86] Words should be given their ordinary meaning.[87] The meaning of a particular word or clause may be ascertained by reference to the meaning of others associated with it.[88] The provisions of the policy control over conflicting provisions in the applica-

acceptance held company's agent. St. 1898, § 1977. Costello v. Grant County Mut. Fire & Lightning Ins. Co. [Wis.] 113 NW 639.

78. Life insurance: In action for damages for failure to deliver policy agreed upon held that value of premium note which company refused to return was an element of damage. Prince v. State Mut. Life Ins. Co. [S. C.] 57 SE 766. In absence of fraud, punitive damages cannot be recovered. Id.

79. Accident insurance: Application, policy, and premium notes held to constitute parts of same transaction. North American Acc. Ins. Co. v. Bowen [Tex. Civ. App.] 18 Tex. Ct. Rep. 505, 102 SW 163.

80. Life insurance: Table purporting to show extension of insurance under non-forfeitable provisions, not referred to in policy, held no part of it, and not to control plain provision therein that term of extended insurance was to be determined by Maine non-forfeiture law. Dakan v. Union Mut. Life Ins. Co., 125 Mo. App. 451, 102 SW 634.

81. Fire insurance: By-laws of mutual co-operative company adopted in pursuance of charter, and existing at time of issuance of policy, become part thereof, and insured is presumed to have notice of them. Civ. Code 1895, § 2135. Edwards v. Farmers' Mut. Ins. Ass'n, 128 Ga. 353, 57 SE 707.

82. Life insurance: Application and policy together held to constitute contract. Mut. Life Ins. Co. v. Stegall, 1 Ga. App. 611, 58 SE 79. Plaintiff held bound by application, though he did not read it and took agent's word for its contents. Prince v. State Mut. Life Ins. Co. [S. C.] 57 SE 766. Where policy provided that it contained entire agreement between company and insured, held that application was no part of contract, and sole defense relied on being breach of provision that policy should be void if insured had certain disease or had been treated by physician for any serious disease, instruction that wrong answers to questions in application would not avoid policy if made in good faith and not material to risk was erroneous as relating to matter not in issue. Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1, 88 P 401.

83. Life insurance: St. 1903, §§ 656, 679, held to apply to life part of policy giving both life and accident insurance. Continental Casualty Co. v. Harrod, 30 Ky. L. R. 1117, 100 SW 262. Attaching copy of application to policy held sufficient compliance with Rev. Laws, c. 118, § 73, though it did not contain name of beneficiary which appeared only in so called "proposal," copy of which was not attached. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452. Under Mo. Rev. St. § 7929, held that insurer could not plead application as part of contract, where neither it nor its substance was indorsed on or attached to policy. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

84. Accident insurance: Where it is manifest that it was intention of insurer that liability should attach only in given circumstances, law will uphold contract according to true intent and meaning. Wheeler v. Fidelity & Casualty Co. [Ga.] 58 SE 709.

Fire insurance: Intention, if ascertainable, must determine sense in which terms employed are used. North British & Mercantile Ins. Co. v. Tye, 1 Ga. App. 380, 58 SE 110. If terms are clear and unambiguous, will be taken in plain and ordinary sense and no construction is necessary. Fire Ass'n of Philadelphia v. Taylor [Kan.] 91 P 1070.

Life insurance. Minnesota Mut. Life Ins. Co. v. Link, 230 Ill. 273, 82 NE 637; Bradshaw v. Mutual Life Ins. Co., 187 N. Y. 347, 80 NE 203, rvg. 95 NYS 780.

85. Accident insurance. Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 112 NW 1065.

Fire insurance. Garrebrant v. Continental Ins. Co. [N. J. Err. & App.] 67 A 90.

86. Fire insurance. Lite v. Firemen's Ins. Co., 104 NYS 434.

87. Accident insurance. Wheeler v. Fidelity & Casualty Co. [Ga.] 58 SE 709; Wood v. General Acc. Ins. Co., 156 F 982. Language given natural and ordinary meaning; and words taken in popular and ordinary sense, in absense of anything showing contrary intention. Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 112 NW 1065.

Fire insurance. North British & Mercantile Ins. Co. v. Tye, 1 Ga. App. 380, 58 SE 110.

Life insurance. Bradshaw v. Mutual Life Ins. Co., 187 N. Y. 347, 80 NE 203, rvg. 95 NYS 780.

88. Accident insurance: Rule noscitur a

tion.[89] Specific provisions control general ones.[90] Insurers are bound to know the customs of a place where they transact business, and are assumed to have made their contracts with reference to such customs.[91] In case of ambiguity, the policy will be construed liberally in favor of the insured and strictly against the insurer,[92] but this rule cannot operate to create a new contract for the parties, or to overrule their clearly expressed intention.[93] In case of doubt, a construction which will support the indemnity[94] and prevent a forfeiture[95] will be preferred. The prac-

sociis applied. Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 112 NW 1065.

89. Life insurance: Designation of beneficiaries in policy prevails over that in application. Burt v. Burt [Pa.] 67 A 210. Insured having had policy in his possession for twelve years, held that presumption was that he knew its contents and accepted it as written. Id.

90. Fire insurance: As to what property is covered. Furlong v. North British & Mercantile Ins. Co. [Iowa] 113 NW 1084.

91. Fire insurance: Custom of agents to rewrite expired policies without explicit requests from customers. Todd v. German-American Ins. Co. [Ga. App.] 59 SE 94.

92. Accident insurance. Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 112 NW 1065; Moest v. Continental Casualty Co., 104 NYS 553.

Burglary insurance. Bankers' Mut. Casualty Co. v. State Bank of Goffs [C. C. A.] 150 F 78.

Credit insurance. Peden Iron & Steel Co. v. Ocean Acc. & Guarantee Corp. [C. C. A.] 151 F 992.

Employer's liability insurance. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 SE 969. Contract limitation on time for bringing action. Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. [C. C. A.] 149 F 954, rvg. 140 F 718.

Fire insurance. Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 P 102; Goorberg v. Western Assur. Co., 150 Cal. 510, 89 P 130; Athens Mut. Fire Ins. Co. v. Toney, 1 Ga. App. 492, 57 SE 1013; Fire Ass'n of Philadelphia v. Taylor [Kan.] 91 P 1070; Preston v. Aetna Ins. Co., 118 App. Div. 784, 103 NYS 638; Lite v. Firemen's Ins. Co., 104 NYS 434; Frick v. United Firemen's Ins. Co. [Pa.] 67 A 743. Provisions relating to matters required to be done by insured after loss, which do not alter risk of insurer or increase liability, will be construed favorably to insured so far as same can be reasonably done. As to proofs of loss. Reed v. Continental Ins. Co. [Del.] 65 A 569. Provision requiring proofs of loss to be furnished. Glazer v. Home Ins. Co. [N. Y.] 82 NE 727, rvg. 98 NYS 979.

Life insurance. Provident Sav. Life Assur. Soc. v. Marshall, 125 Ill. App. 101. Provision as to what laws should govern contract. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

93. Accident insurance: Rule has no application where there is no ambiguity or uncertainty in language used. Continental Casualty Co. v. Wade [Tex.] 19 Tex. Ct. Rep. 767, 105 SW 35, rvg. [Tex. Civ. App.] 18 Tex. Ct. Rep. 410, 99 SW 877. Court must interpret contract as it finds it, and cannot add to or take from it. Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 112 NW 1065.

Fire insurance: Rule has no application where there is no ambiguity and hence no room for construction, court not being authorized to make contract for parties. Hartford Fire Ins. Co. v. Northern Trust Co., 127 Ill. App. 355. Cannot be invoked to change nature of contract, but only to resolve uncertainties or ambiguities in favor of the party who is likely to be misinformed or imposed upon. Finkbohner v. Glens Falls Ins. Co. [Cal. App.] 92 P 318. Description of property covered, prepared by insured and attached to policy as rider, held not to be expanded as against insurer beyond its plain and ordinary meaning on any theory of interpretation against insurer. Globe & Rutgers Fire Ins. Co. v. David Moffat Co. [C. C. A.] 154 F 13.

Employer's liability insurance: Rule is never carried so far as to make new contract for parties, and is not applicable when intent of parties has been clearly expressed, and their rights can with certainty be ascertained from language used. East Carolina R. Co. v. Maryland Casualty Co. [N. C.] 58 SE 906.

94. Accident insurance: Words should be given meaning which will render contract effective. North American Acc. Ins. Co. v. Trenton [Tex. Civ. App.] 18 Tex. Ct. Rep. 389, 99 SW 740.

Employer's liability insurance: Doubt or uncertainty resolved in favor of insured so as not to defeat indemnity. East Carolina R. Co. v. Maryland Casualty Co. [N. C.] 58 SE 906.

Fire insurance: While iron safe clause is promissory warranty which must be complied with, it will be given fair and liberal construction so as to effectuate contract of indemnity rather than defeat it. Aetna Ins. Co. v. Johnson, 127 Ga. 491, 56 SE 643. Where words are, without violence, susceptible of two interpretations, that which will sustain insured's claim and cover his loss must be adopted. Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 SE 1013. In case of doubt, so construed as to support rather than defeat the indemnity. Fire Ass'n of Philadelphia v. Taylor [Kan.] 91 P 1070. Where liability of insurer is general, with certain exceptions, effect should be given to any clause exempting it from liability only where case falls clearly within exception, any doubt being resolved against company. Preston v. Aetna Ins. Co., 118 App. Div. 784, 103 NYS 638. Where two interpretations possible, that will be preferred which will sustain claim to indemnity, it was object of assured to obtain. Frick v. United Firemen's Ins. Co. [Pa.] 67 A 743.

95. Fire insurance: Iron safe clause will be given reasonable, rather than narrow and close, construction so as to prevent forfeiture. Aetna Ins. Co. v. Johnson, 127 Ga. 491, 56 SE 643.

tical construction adopted by the parties themselves while engaged in the execution of the contract may be looked to,[96] the acts and conduct of the company's agent, in this regard, if within the actual or apparent scope of his authority, being deemed those of the company.[97] The interpretation placed upon the policy by one party cannot, however, be considered.[98]

*Conflict of laws.*See 8 C. L. 397—This subject is fully treated in a separate article.[99]

§ 8. *Premiums and premium notes, dues and assessments, and payment of the same.*See 8 C. L. 397—Policies generally provide that they shall be void unless the premiums are paid when due.[1] By statute in some states the giving of notice of the accrual of premiums is made a condition precedent to forfeiture for their nonpayment.[2] The entry of payments in premium receipt books provided for that purpose is sometimes required.[3] It is sometimes provided that any amount due from the insured at the time of his death may be deducted from the amount due on the policy.[4] Payment is usually a question of fact.[5] An agreement to receive the premium within a reasonable time after it becomes due may be inferred from the dealings of the parties.[6] The receipt of the company is prima facie evidence of payment.[7] In the absence of fraud, an acknowledgment of payment in the policy is

Life insurance: Warranties in application construed favorably to insured to prevent forfeiture where ambiguous. Smith v. Bankers' Life Ass'n, 123 Ill. App. 392. Warranties to be strictly construed so as to prevent a forfeiture. Owen v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 67 A 25.

96. Accident insurance. North American Acc. Ins. Co. v. Trenton [Tex. Civ. App.] 18 Tex. Ct. Rep. 389, 99 SW 740.

Fire insurance. Fire Ass'n of Philadelphia v. Taylor [Kan.] 91 P 1070.

97. Fire insurance: Acts of adjuster. Gray v. Merchants' Ins. Co., 125 Ill. App. 370 Where after fireman appears and adjusts and pays loss, taking receipt thereof in name of company, it will be presumed that he acts as agent of insurer in transacting such business, and that insurer is informed and knows of all such facts as agent is informed of and knows affecting such business. Fire Ass'n of Philadelphia v. Taylor [Kan.] 91 P 1070. Where adjuster who adjusted loss on barn treated policy as still in force on horses formerly kept therein, but which were removed to another uninsured barn after fire, held that his action in so doing would be regarded as an interpretation of contract to that effect by insurer. Id.

98. Life insurance: Evidence that insured did not pay premiums because he considered that those already paid would extend life of policy for certain length of time under non-forfeitable provisions held inadmissible for any purpose. Dakan v. Union Mut. Life Ins. Co., 125 Mo. App. 451, 102 SW 634.

99. See Conflict of Laws, 9 C. L. 596.

1. See § 16B, post.

2. Life insurance: Evidence held to show mailing of notice required by Laws 1892, p. 1930, c. 690, as amended by Laws 1897, p. 91, c. 218. Wolarsky v. New York Life Ins. Co., 104 NYS 1047. Statute held satisfied if notice was mailed, whether it was actually received or not. Id. Whether affidavit of mailing was in proper form held immaterial where mailing was shown by other evidence. Id. Failure to give notice as required by New York statute held to preclude forfeiture for non-payment, though insured was unable to pay, and absence of notice did not cause him to make default. Equitable Life Assur. Soc. v. Perkins [Ind. App.] 80 NE 682.

3. Life insurance: Evidence as to promise of agent to correct failure to enter premium, and plaintiff's payments in reliance thereon, held to authorize finding that there was sufficient explanation for failure of all payments to appear on book, so that evidence of such payment was admissible though not so entered. McNicholas v. Prudential Ins. Co. [Mass.] 82 NE 692.

4. Life insurance: Provision giving company right to set off any claim against assured against amount due on policy held not to limit right of set-off to claims against beneficiary only, but to authorize setting off of any indebtedness on account of policy as amount due on note given for premiums. Hoar v. Union Mutual Life Ins. Co., 118 App. Div. 416, 103 NYS 1059.

5. Fire insurance: Evidence held sufficient to sustain finding that insured had given assessable note for premium. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227.

Life insurance: Evidence held to show that payment was intended to be in settlement of second premium, and not as payment of note given agent for amount of first premium which latter had paid to company. Manhattan Life Ins. Co. v. Kephart, 31 Ky. L. R. 545, 102 SW 882. Evidence held sufficient to justify submission of question of payment to jury and to sustain finding of payment. Hanson v. Aetna Life Ins. Co. [Neb.] 113 NW 114, vacating former judgment, 110 NW 1000. Possession by defendant of uncanceled receipt for premium maturing before insured's death held not of itself sufficiently controlling to justify trial court in setting aside verdict for plaintiff on motion for new trial. Id.

6. Cornell v. Travelers' Ins. Co., 104 NYS 999. Evidence held to sustain finding that credit for second premium was extended for period covering time of accident. Id.

7. Accident insurance: Receipt offered without explanation. Preferred Masonic Mut.

conclusive evidence thereof.[8] The giving of note for the amount of a premium does not ordinarily amount to a payment but merely as an extension of the time of payment, and if default is made in the payment of the note the original debt with all its incidents is revived.[9] The tender by the company of a policy substantially different from that ordered, unless accepted, will not furnish a consideration for a note, executed in advance for the premium on the policy so ordered.[10]

Payment to an agent acting within the actual or apparent scope of his authority is payment to the company.[11] It is often provided that payment may only be made in exchange for an official receipt signed by certain specified officers.[12] Where the company permits agents, at their own risk, to advance the first premium and take notes of applicants therefor, the giving of such a note and the subsequent payment of the amount of the premium to the company by the agent is a payment as between the applicant and the company.[13] There seems to be a conflict of authority as to the effect in this regard of the acceptance of notes by the agent for the part of the premium to which he is entitled as his commission.[14]

Statutes in some states prohibit the allowance of rebates on life insurance

Acc. Ass'n v. Harrington, 10 Ohio C. C. (N. S.) 134.

8. Life insurance: Estops company to deny its receipt after death of insured. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

9. Life insurance: Notes held not to be payment within meaning of nonforfeiture clause, particularly where some of them provided that they should not be so regarded unless paid when due. Hoar v. Union Mut. Life Ins. Co., 118 App. Div. 416, 103 NYS 1059.

10. Life insurance: Son made oral application for policy on father's life. Father afterwards, without son's knowledge, signed written application for substantially different policy. Held that tender of policy of latter kind was not compliance with son's contract and he might refuse to accept it, and such tender did not authorize recovery on his note. Empire Mut. Annuity Life Ins. Co. v. Avery [Ga. App.] 59 SE 324. Father's application held not to estop son from proving by parol that policy was not one he ordered. Id.

11. Fire insurance: Payment of premium to broker who delivered policy held payment to company. Gosch v. Firemen's Ins. Co., 33 Pa. Super. Ct. 496.

Life insurance: Collecting agent and assistant superintendent over him held to have authority to correct errors in premium receipt books. McNicholas v. Prudential Ins. Co. [Mass.] 82 NE 692. Where policy acknowledged receipt of first premium and provided that premiums must be paid at home office, unless otherwise provided, and in any case in exchange for official receipt signed by one of certain specified officers and countersigned by person to whom payment was made, held that insured was not justified in assuming that soliciting agent had authority to receive second premium three months before it was due where he did not produce official receipt, and payment thereof to him without production and delivery of said receipt was not payment to company and did not continue policy in force. Lauze v. New York Life Ins. Co. [N. H.] 68 A 31. Where policy was left at insured's house for examination before delivery, held that he would be held to have had notice of and to have agreed to its provisions, and to be bound thereby, though he could not read English, there being no evidence of fraud or misrepresentation. Id. Apparent scope of soliciting agent's authority held not to have extended beyond acts of soliciting and negotiating contract, delivering it, and receiving first premium. Id. Pub. St. 1901, c. 171, §§ 4, 5, providing that life insurance agent who acts for person other than himself in negotiating contract of life insurance shall, for purpose of receiving the premium therefor, be held to be company's agent, whatever conditions or stipulations may be contained in the policy or contract, held to refer to initial premium only. Id.

12. In absence of evidence showing waiver of provisions as to payment or estoppel to rely on them, held that evidence showing that second premium was paid to agent when policy was delivered without production of official receipt, and that agent gave insured paper telling him that it was his receipt, was inadmissible as tending to vary terms of written contract. Id.

13. Fire insurance: Insured gave note for premium to agent, who discounted same and received proceeds. Insurer charged premium to agent in customary manner and he thereafter paid same to it. On cancellation of policy insurer credited agent with amount of unearned premium. Held, as between insured and company, premium was paid at time when credit was given to insured by agent. Buckley v. Citizens' Ins. Co., 188 N. Y. 399, 81 NE 165, rvg. 112 App. Div. 451, 98 NYS 622.

14. See 8 C. L. 400, n. 3, 4.

Life insurance: Where agent accepted notes for part of first premium to which he was entitled as commission, and company's share was paid in cash, held that notes became agent's individual property and were not subject to forfeiture provided for in policy for nonpayment of premium notes, though company afterwards acquired them from agent. Reppond v. National Life Ins. Co. [Tex.] 18 Tex. Ct. Rep. 242, 101 SW 786, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 SW 778. Evidence held sufficient to support verdict that agent made such an arrangement. Id.

premiums and provide a penalty for so doing.[15] The violation of such a statute has been held not to invalidate the policy.[16]

Mutual companies.[17]—The manner of levying assessments,[18] the purpose for which they may be levied,[19] the amount and number thereof,[20] and the necessity of giving notice that they are due,[21] depend upon the terms of the contract and the statutes of the various states. The liability of members to pay their portion of losses and liabilities under the organic law of the company cannot be varied by agreement between the company and a member.[22]

§ 9. *Warranties, conditions, and representations. In general.* See 8 C. L. 402 A warranty is a statement by the insured which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statement be literally true.[23] Whether statements are to be regarded as warranties or representations is to be determined from a construction of the contract according to the expressed intention of the parties,[24] the fact that they are

15. St. 1903, § 656, should be given a reasonable interpretation, and strict, though not oppressive, enforcement. Hilton v. Com. [Ky.] 105 SW 956. Agent who knowingly participated in act of broker in granting of rebate held guilty of violation of statute. Id. Evidence in action against agent to recover fine held to authorize submission of case to jury and to support verdict against defendant. Id. Verdict fixing fine of $350 held not excessive or so large as to indicate passion or prejudice. Id. State held, under Cr. Code Prac. § 301, to capias pro fine against defendant for fine inflicted. Id. Provision for payment of special income to insured in consideration of his agreement to furnish information in regard to fitness of agents and applicants for insurance held to violate Code 1906, § 2600. Cole v. State [Miss.] 45 S 11. Giving agent usual commission on premiums on policy on his own life held not violation of statute. People v. Penn Mutual Life Ins. Co., 126 Ill. App. 279.

16. Policy issued pursuant to agreement to give insured rebate on premiums held valid, notwithstanding St. 1898, § 1955, prohibiting discrimination in premium rates, or granting of any rebates not specified in policy, and providing for revocation of license of any company violating its provisions, and hence insured could not recover premiums paid on ground of its invalidity. Laun v. Pacific Mut. Life Ins. Co., 131 Wis. 555, 111 NW 660.

17. For levying and collection of assessments by receiver in case of insolvency, see § 2A, ante.

18. **Life insurance:** Fact that executive committee joined with directors in making assessments, held not, as pleaded, to have made assessments invalid. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F 461.

Mutual burial association held not entitled to provide for assessments not based on mutuality as to benefits. State v. Toledo & Lucas County Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

19. **Fire insurance:** Under Laws 1891, p. 276, c. 33, § 19, mutual fire companies cannot make assessments upon their members until a loss has first occurred, unless such assessment is authorized by a two-thirds vote of its directors. Wolcott v. State Farmers' Mut. Ins. Co. [Neb.] 110 NW 628, rehearing denied, 112 NW 371. Under Id., § 12, as prerequisite to valid assessment, must either be an actual loss for payment of which assessment is required, or by-law authorizing assessments at stated intervals. Wolcott v. State Farmers' Mut. Ins. Co. [Neb.] 112 NW 371, former opinion, 110 NW 628. By-law providing that assessments should be made by order of directors and prorated according to time insurance had been in force held not authority for making assessments at stated intervals. Id. Assessment levied under said act must be against entire membership, and, if levied against part only, is invalid. Id.

20. **Fire insurance:** In action to recover assessment against defendant for payment of liabilities of foreign insolvent company, held that laws of Ohio as pleaded in complaint imposed contingent liability for losses of company upon each member thereof of not less than three nor more than five annual premiums as written in policy, in all cases except those where deposit note is given, and that allegations were sufficient to constitute cause of action upon contingent liability so imposed. Swing v. Red River Lumber Co. [Minn.] 112 NW 393.

Life insurance: Certificate held not to have limited assessments to bi-monthly calls so that "special calls" were not invalid. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F 461.

21. **Fire insurance:** Company held not required to give 30 days' notice of assessment provided for by Ky. St. 1903, § 711, to member who tenders his policy for cancellation as authorized by § 716. Acton v. Farmers' Home Ins. Co., 30 Ky. L. R. 919, 99 SW 955.

22. **Life insurance:** Held that allegation that defendant stated that rate would never exceed specified sum could not be held to vary terms of certificate. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F 461.

23. Reppond v. National Life Ins. Co. [Tex.] 18 Tex. Ct. Rep. 242, 101 SW 786, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 SW 778.

24. **Accident insurance:** Statement of age held warranty. Central Acc. Ins. Co. v. Spence, 126 Ill. App. 32. Statement of insured that he was not carrying any other accident insurance held representation and

called warranties not necessarily making them so.[25] If the language used is ambiguous, or reasonably susceptible of two constructions, they will be construed as representations rather than warranties.[26] Where answers to questions in the application are made warranties, only such as are responsive to the questions asked can be so regarded.[27] Warranties will be strictly construed and not extended so as to include anything not necessarily implied in their terms.[28] Where the truthfulness of a warranty depends on the construction of a question capable of two different interpretations, the material inquiry is whether the insured truthfully answered the question as he understood it.[29] In the absence of a statutory provision to the contrary,[30] the falsity of a statement which the parties have expressly warranted to be true, or the breach of a promissory warranty, avoids the policy whether material to the risk or not,[31] and regardless of insured's good faith.[32] False representa-

not warranty, it not being material to risk. North American Acc. Ins. Co. v. Rehacek, 123 Ill. App. 219.

Fire insurance: Statement in application made part of policy as to cost of insured house held warranty so that its falsity precluded recovery. Capital Fire Ins. Co. v. King [Ark.] 102 SW 194. Iron safe clause held promissory warranty. Aetna Ins. Co. v. Johnson, 127 Ga. 491, 56 SE 643.

Life insurance: Questions and answers as to whether or not insured had ever had certain specified diseases or any other serious ailment held representations though called warranties. Minnesota Mut. Life Ins. Co. v. Link, 230 Ill. 273, 82 NE 637. Where statements in application were made warranties by policy, held that representations as to matters of fact, such as those in regard to attendance and care of a physician and treatment in hospital, presumably within knowledge of applicant, were to be treated as warranties, a breach of which would render policy void. Owen v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 67 A 25. Whether statements in application, which applies warranty clause to report of medical examiner, and which is made part of policy, are to be deemed warranties is to be determined from examination of all those instruments, fact that they are called warranties not being controlling. Reppond v. National Life Ins. Co. [Tex.] 18 Tex. Ct. Rep. 242, 101 SW 786, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 SW 778. Provision in application that insured warranted that answers in medical examination were full, complete, and true, without suppression of any fact which would tend to influence company in issuing policy, held to make answers representations and not warranties, and to mean that statements and answers were made in good faith and without intentional suppression of any material fact that would properly be given in answer to any question propounded, so that failure to name a physician who had attended applicant would not avoid policy unless material. Id. Statement as to what physicians had consulted and when and for what held representations and not warranties, so that failure to name one physician would not avoid policy unless material to risk. Id.

25. Accident. North American Acc. Ins. Co. v. Rehacek, 123 Ill. App. 219. Life. Minnesota Mut. Life Ins. Co. v. Link, 230 Ill. 273, 82 NE 637; Reppond v. National Life Ins. Co. [Tex.] 18 Tex. Ct. Rep. 242, 101 SW 786, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 SW 778.

26. Where it is contended that warranties have been inserted in policy, effect of which will inevitably be to defeat it in the end, such intention must be so clearly and unequivocally expressed as to leave court with no other alternative than to so construe the contract. Minnesota Mut. Life Ins. Co. v. Link, 230 Ill. 273, 82 NE 637.

27. Answer to question as to previous sickness and name of attending physician held not responsive to question, and hence not to be regarded as warranty. Smith v. Bankers' Life Ass'n, 123 Ill. App. 392.

28. Reppond v. National Life Ins. Co. [Tex.] 18 Tex. Ct. Rep. 242, 101 SW 786, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 SW 778.

29. Question as to previous consultation of physician held ambiguous within rule. Smith v. Bankers' Life Ass'n, 123 Ill. App. 392. Question calling for name and residence of physician held susceptible of being understood as calling for name of only one, so that answer giving name of one might be regarded as strictly true though others had been consulted. Id.

30. Kentucky: Under St. 1903, § 639, all statements or descriptions in application are to be deemed representations and not warranties, and no misrepresentations will avoid policy unless material or fraudulent. United States Health & Acc. Ins. Co. v. Bennett's Adm'r [Ky.] 105 SW 433. Test of materiality is whether reasonably careful and intelligent men would have regarded the fact, communicated at time of effecting the insurance, as substantially increasing chances of loss insured against. Id. Statement by insured that he had never had any disease or infirmity when he had had slight attacks of piles at different times held not sufficiently material to avoid policy. Id.

Missouri: Under Mo. Rev. St. 1899, § 7890, no misrepresentation avoids life policy unless matter misrepresented actually contributes to contingency on which policy is to become payable, and whether it does is for jury. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93. Breach of condition against storage of explosives held material to risk within meaning of Rev. St. 1899, § 7973, though it did not actually contribute to loss. Kenefick v. Norwich Union Fire Ins. Soc., 205 Mo. 294, 103 SW 957.

31. Accident insurance. Central Acc. Ins. Co. v. Spence, 126 Ill. App. 32; Gaines v.

tions, on the other hand, avoid the policy only if material to the risk or fraudulent.[33]

Burglary insurance.[See 8 C. L. 403]—Policies insuring banks against burglary often contain warranties as to the thickness of the doors of the safe.[34]

Employer's liability insurance.—The actual payment by the insured of a judgment against him is generally made a condition precedent to liability on the part of the insurer.[35]

Fire insurance.[See 8 C. L. 404]—Policies ordinarily provide that they shall be void in case the insured has been guilty of any fraud in procuring the policy,[36] if his interest is other than unconditional or sole ownership,[37] or if he is not the owner

Fidelity & Casualty Co., 188 N. Y. 411, 81 NE 169, afg. 111 App. Div. 386, 97 NYS 836.

Fire insurance. Capital Fire Ins. Co. v. King [Ark.] 102 SW 194.

Life insurance. Minnesota Mut. Life Ins. Co. v. Link, 230 Ill. 273, 82 NE 637.

32. Falsity of warranty as to amount of insured's income held to avoid policy though inadvertently made. Heintz v. Continental Casualty Co., 105 NYS 519.

33. Accident insurance: Does not avoid policy unless fraudulent or intentional. North American Acc. Ins. Co. v. Rehacek, 123 Ill. App. 219. Misrepresentation material to risk gives insurer same right of disaffirmation as false warranty. Central Acc. Ins. Co. v. Spence, 126 Ill. App. 32. Misstatement as to age held material. Id.

Life insurance: Will not avoid policy unless material and known to insured to be false when made. Minnesota Mut. Life Ins. Co. v. Link, 230 Ill. 273, 82 NE 637. Under Rev. Laws, c. 118, § 21, render policy voidable if made with actual intention to deceive, or if matter represented increased risk. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452.

34. Evidence held to sustain finding that warranty that door of safe was five inches thick was true. Bankers' Mut. Casualty Co. v. State Bank of Goffs [C. C. A.] 150 F 78.

35. Policy held contract of indemnity so that no recovery could be had thereon against insurer until insured had sustained loss by payment of liability. Carter v. Aetna Life Ins. Co. [Kan.] 91 P 178.

36. Contention that insured perpetrated fraud in application by representing that building was dwelling house when in fact it was hotel held untenable, where application made part of policy described it as combined rooming and frame dwelling house having two stories and containing 24 rooms. Arkansas Mut. Fire Ins. Co. v. Claiborne, [Ark.] 100 SW 751. Where application stated that insured's entire wealth was less than $15,000, and company, on being imformed that insured had added another story to building, made an amendment to policy so as to describe it as three story building, held that company was charged with notice of number of rooms in building, and contention that when it made amendment it believed that building was dwelling house only was untenable. Id. Evidence held to support finding that insured did not willfully and fraudulently misrepresent value of property. Miller v. Firemen's Fund Ins. Co. [Cal. App.] 92 P 332. Policy held avoided where insured fraudulently concealed from defendant, when he applied for and procured insurance on barn, that he intended to use it as tobacco barn, and falsely represented that it was to be used as stock barn, thereby procuring insurance at lower rate than would otherwise have been charged. Instruction approved. Moss v. Home Ins. Co., 30 Ky. L. R. 630, 99 SW 308. Evidence held to show that insured did not make the alleged false or fraudulent representations with respect to his title. Gardner v. Continental Ins. Co., 31 Ky. L. R. 89, 101 SW 908. Insured held not guilty of misrepresentation and fraud in overvaluing property, there being no evidence of intentional deception on his part, he having no knowledge of value of machinery, estimate having been made by engineer who installed machinery, and agents of insurer having examined it before writing policies. Rochester German Ins. Co. v. Schmidt, 151 F 681. A. built factory on land leased to him by C. for as long as he should maintain factory thereon. Later A. executed land contract whereby he agreed to give plaintiff bill of sale of building on completion of specified payments, and at same time manually delivered lease to plaintiff. Evidence showed that though lease prohibited underleasing, C. assented to transfer of lease. After paying purchase price, but before receiving bill of sale, plaintiff applied for insurance on building, stating in application that property to be insured was not incumbered and that it stood on leased ground. Facts were also known to agent. Held that plaintiff was assignee of lease so that his statement was literally true, and he was not guilty of fraudulently concealing facts material to risk because he failed to disclose provision against subleasing, it being insurer's duty to inquire into matter if it wished to know terms of lease. Roloff v. Farmers' Home Mut. Ins. Co., 130 Wis. 402, 110 NW 261. If more information was necessary to full understanding of risk, it was duty of insurer to seek it or at least ask for it. Id.

37. Insured held unconditional and sole owner: Fact that insured property was on government homestead, legal title to which remained in government, and final proof on which was not made until after loss, held not to defeat recovery. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245. Sole and entire burden of loss, in such case, falls on insured, and government has no interest in property destroyed and suffers no loss on account thereof. Id. One having equitable title to land by virtue of parol gift accompanied by possession and making of improvements held absolute owner within representation in application. Maas v. Anchor Fire Ins. Co., 148 Mich. 432, 14 Det. Leg. N. 232, 111 NW 1044. Vendor's interest in per-

of the premises in fee,[38] or if, without the consent of the insurer, there is any change in the title, interest, or possession of the property,[39] if the property is or becomes incumbered by a mortgage or otherwise,[40] in case of any increase in the hazard,[41]

sonality conditionally sold held in no way lessened by fact that its reserved title was supplemented by mortgage on purchaser's interest. Brunswick-Balke Collender Co. v. Northern Assur. Co. [Mich.] 14 Det. Leg. N. 651, 113 NW 1113. Recovery held not prevented by fact that household furniture insured might have been paid for partly by husband and partly by wife, or because policy named certain non-existent company as insured, name being trade or fictitious one under which husband and wife carried on business. Lenagh v. Commercial Union Assur. Co. [Neb.] 110 NW 740.

Insured held not unconditional and sole owner: One contracting to purchase realty and assuming to pay notes secured by deed of trust thereon before payment of said notes and balance of purchase price. Cole v. Niagara Fire Ins. Co. [Mo. App.] 103 SW 569. Vendee under parol contract to purchase realty which cannot be enforced under statute of rauds. Prospect Dye Works v. Federal Ins. Co., 33 Pa. Super. Ct. 223. Plaintiff held entitled to recover on policy issued to him as unconditional and sole owner, though another person gave his time and attention to business under agreement whereby he was to have half profits, if any, but was not to share in losses, and was to have option to purchase, which was not exercised though such persons were partners as to creditors. Swingle v. Sun Insurance Office, 33 Pa. Super. Ct. 261. Policy covering stock of goods was issued in name of "Mrs. C. & Daughter." Property was in their possession and they were conducting business under that name and were apparently owners thereof, but stock and business were in fact owned by husband and father. Held that there could be no recovery on policy by latter, it appearing that policy had been obtained by Mrs. C, and there being nothing to show that company had contracted or intended to contract with plaintiff, and no evidence of fraud or mistake. Chaney v. Farmers' Fire Ins. Co., 32 Pa. Super. Ct. 479. Contract of sale, effect of which was to vest purchaser at once with equitable title, held to avoid policy, whether property sold was realty or personalty. Vancouver Nat. Bk. v. Law, Union, & Crown Ins. Co., 153 F 440.

38. Evidence held to sustain finding that land was owned by insured in fee simple. Ozark Ins. Co. v. Hopson [Ark.] 101 SW 171. Fact that insured property was on government homestead, legal title to which remained in government, and final proof on which was not made until after loss held not to defeat recovery. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245. One having equitable title to land by virtue of parol gift accompanied by possession and improvements held owner in fee. Maas v. Anchor Fire Ins. Co., 148 Mich. 432, 14 Det. Leg. N. 232, 111 NW 1044.

39. Policy held avoided: By contract of sale under which vendee went into immediate possession after paying part of purchase price, whether risk was thereby actually increased or not. Finkbohner v. Glens Falls Ins. Co. [Cal. App.] 92 P 318. Word interest is broader than word title, and includes both legal and equitable rights. Id. By execution of valid contract of sale, though legal title had not been transferred at time of fire. Manning v. North British & Mercantile Ins. Co., 123 Mo. App. 456, 99 SW 1095. By contract of sale, effect of which was to vest purchaser at once with equitable title, whether property sold was realty or personalty. Vancouver Nat. Bk. v. Law, Union & Crown Ins. Co., 153 F 440. By contract between insured and chattel mortgagee whereby latter was to take possession of all insured property, both real and personal, operate mill, sell any or all of property, and apply proceeds to payment of insured's debts, etc., it being trust agreement or deed of trust vesting absolute title in mortgagee, and not mere mortgage or lien. Brecht v. Law, Union & Crown Ins. Co., 153 F 452.

Policy held not avoided: By contract giving option to purchase with right to possession for experimental purposes, but reserving to owner free access to property and its management in every respect same as though work was being done by him. Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 P 102.

40. Evidence as to mortgaging of part of personalty held not sufficient to defeat plaintiff's right to recovery or to take case from jury. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245. Existence of mortgage on insured personalty unknown to insurer defeats recovery. Meech v. Citizens' Ins. Co., 147 Mich. 343, 13 Det. Leg. N. 1033, 110 NW 1078. Mortgage given to secure original note, which note was canceled before insurance was taken out, held prima facie security for renewal note until whole amount was paid, though there was no agreement to that effect. Id. Where standard policy covering realty and personalty provided that it should be void "if the subject of insurance be personal property and be or become incumbered by a chattel mortgage," held that whole policy was avoided both as to realty and personalty where, at time it was issued, personalty covered thereby was incumbered by chattel mortgages, which fact was not disclosed to insurer, contention that policy blank was not intended for joint insurance of realty and personalty being untenable in view of fact that statute prescribed but single standard form. Fries-Breslin Co. v. Star Fire Ins. Co. [C. C. A.] 154 F 35, afg. 150 F 611.

41. Under Code, § 1743, providing that any condition or stipulation in policy making it void before loss occurs shall not prevent recovery thereon, if it shall be shown by plaintiff that failure to observe such provisions did not contribute to loss, provided that any condition referring to removal of insured property without consent of insurer shall not be affected or changed by said provision if such removal makes risk more hazardous, held that provision in policy making insured agree that any removal is per se an increase of hazard was void. Adams v. Atlas Mut. Ins. Co. [Iowa] 112 NW 651. Whether is such increase is question of fact to be determined, not only from expert opinion but from consideration of all material facts, such

if explosives are kept or used,[42] or certain inflammable substances stored,[43] on the premises, if the premises remain vacant for more than a specified period,[44] or if insured has [45] or obtains [46] additional insurance. Insured is sometimes required to state in his application whether he has any reason to fear incendiarism, or whether any threats of incendiarism have been made against him.[47] It is frequently pro-

as location and construction of buildings, etc., and other things having reasonable tendency to show relative exposure to fire and chances of loss therefrom. Id. Temporary increase of hazard does not avoid policy where it is discontinued before loss and loss is not caused thereby. Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co., 76 S. C. 76, 56 SE 654. Fact that owner leased building to tenant to be used in conducting more hazardous business held not to avoid policy where tenant moved out before fire and loss was not caused by increased hazard. Id.

NOTE. Effect of temporary increase in hazard: There is a conflict of authority as to the effect of a temporary increase in the hazard which is discontinued before the fire some courts hold that the policy is thereby finally avoided. Mead v. Ins. Co., 7 N. Y. 530; Wheeler v. Ins. Co., 62 N. H. 326; Insurance Co v. Kyle, 124 Ind. 132, 24 NE 727, 19 Am. St. Rep. 77, 9 L. R. A. 81; Ins. Co. v. Russell, 65 Kan. 373, 69 P 345, 58 L. R. A. 234. The precise point has not been decided by the Supreme Court of the United States, but the case of Kyle v. Ins. Co., 149 Mass. 116, 21 NE 361, 3 L. R. A. 508, is cited with approval in Imperial, etc., Ins. Co. v. Coos County, 151 U. S. 452, 38 Law. Ed. 231. The greater weight of authority is, however, to the contrary. Ins. Co. v. Wetmore, 32 Ill. 221; National Fire Ins. Co. v. Catlin, 163 Ill. 256, 45 NE 255, 35 L. R. A. 595; Born v. Ins. Co., 110 Iowa, 379, 81 NW 676, 80 Am. St. Rep. 300, and note; Ins. Co. v. Lawrence, 4 Ky. 9, 81 Am. Dec. 521; Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325; Angier v. Ins. Co., 10 S. D. 82, 71 NW 761, 66 Am. St. Rep. 685, and note; Doud v. Ins. Co., 141 Pa. 47, 21 A 505, 23 Am. St. Rep. 263; Adair v. Ins. Co., 107 Ga. 297, 33 SE 78, 73 Am. St. Rep. 122, 45 L. R. A. 204; Wade v. Ins. Co., 95 Tex. 598, 68 SW 977, 93 Am. St. Rep. 870, 58 L. R. A. 714; Ins. Co. v. Union Stockyards Co., 27 Ky. L. R. 852, 87 SW 285; Ins. Co. v. McLimans. 28 Neb. 846, 45 NW 171; Gates v. Ins. Co., 5 N. Y. 469, 55 Am. Dec. 360.—From Sumter Tobacco Warehouse Co. v. Phoenix Assur. Co., 76 S. C. 76, 56 SE 654.

42. Storage of powder and other explosives on premises held to preclude recovery, though it did not actually contribute to loss. Kenefick v. Norwich Union Fire Ins. Soc., 205 Mo. 294, 103 SW 957. Provision that policy should be void if fireworks were kept, used, or allowed on premises held violated by carrying fireworks on premises and there setting them off, prohibited use being sole cause of loss. Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co., 106 Va. 633, 56 SE 584. Violation by tenant held to avoid policy though insured had no knowledge thereof. Id. Where policy provided that it should be void if certain named substances "or other explosives" should be kept on premises, held that words "other explosives" included blasting powder, in absence of evidence showing that its explosive power was less than that of any of the substances specifically named and hence not ejusdem generis. St. Paul Fire & Marine Ins. Co. v. Penman [C. C. A.] 151 F 961.

43. Where by-laws of mutual co-operative company, which became part of policy, provided that "liabilities cease at once on dwellings in the association in which seed cotton or loose lint cotton is stored," held that storing of seed cotton in building avoided policy though it was done by tenant of insured without latter's knowledge. Edwards v. Farmers' Mut. Ins. Ass'n, 128 Ga. 353, 57 SE 707.

44. Ten days' vacancy clause held to mean ten days next ensuing after end of term of policy, and not that insurer was liable during any 10 days after expiration of any vacancy permit period. Emery v. Lord, 29 App. D. C. 589. Vacancy permits held not required to be attached to policy. Id. Fact that house remained vacant without permission for more than 10 days held not to have rendered policy void, but merely to have suspended insurance during period of violation, so that where it was destroyed after reoccupancy insured could recover, violation having in no way contributed to loss, and insurer not having declared forfeiture because of it. Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 SE 1013. Where property is described in policy as occupied by tenant, temporary vacancy caused by or incident to change of tenants is not within purview of vacancy clause. Id. Evidence held to justify inference that plaintiff was residing in two houses, remaining part of time in one and part of time in other, so that question of occupancy was properly submitted to jury. Maas v. Anchor Fire Ins. Co., 148 Mich. 432, 14 Det. Leg. N. 232, 111 NW 1044. Provision that policy should be void if premises remained vacant for more than 10 days without consent held to preclude recovery. Germania Fire Ins. Co. v. Werner, 76 Ohio St. 543, 81 NE 980. Provision that policy should be void if premises should become vacant, unoccupied, or uninhabited without written consent held to preclude recovery. Id. Valued policy law (Rev. St. 1906, § 3643) held to have no bearing on such provisions. Id.

45. Policy avoided regardless of validity of insurance previously obtained. Romano v. Concordia Fire Ins. Co., 121 App. Div. 489, 106 NYS 63. Fact that existence of prior invalid policy was not disclosed in answer to question whether insured had any other insurance on property held not to avoid policy, question not being whether he had any other insurance, valid or invalid. Nabors v. Dixie Mut. Fire Ins. Co. [Ark.] 105 SW 92.

46. Policy avoided by procurement of additional insurance without insurer's consent. Nahors v. Dixie Mut. Fire Ins. Co. [Ark.] 105 SW 92.

47. Inquiry as to whether applicant had any reason to fear incendiarism held material, so that false representation that she had not would avoid policy. Wells v. Glens

vided that he must use his best endeavors to protect the property from loss or damage by fire.[48] As a condition to the granting of permission for manufacturing plants to remain idle, the insured is often required to warrant that at all times when the works are idle or inoperative a competent watchman will be constantly on duty at night.[49] The right to repair the insured premises includes the right to make repairs in a reasonable, proper, and usual way, even though the risk is thereby increased.[50] Policies covering stocks of merchandise generally require the insured to take certain inventories,[51] and keep certain books,[52] and to keep them in a fire

Falls Ins. Co., 117 App. Div. 346 101 NYS 1059. Fact that insured answered question in negative held not to avoid policy, though proof showed that he had suspected incendiarism in previous destruction of other property, where it appeared that persons whom he suspected were dead when application was made. Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 102 SW 226.

48. See 6 C. L. 132, n. 38. Instruction that if jury believed from evidence that insured was guilty of gross negligence in setting up stove in barn, and in using it under circumstances and conditions existing at time of fire, he could not recover, and defining gross negligence, approved. Moss v. Home Ins. Co., 30 Ky. L. R. 630, 99 SW 308.

49. Obligation not complied with by having watchman on premises who was asleep. Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 P 102. Clause contemplates ordinary operation of works during usual and customary hours, and does not require watchman to be on duty at night when works are in operation during day, in absence of showing that it was usual or customary to operate such works at night. Id. Operation of small furnace, which was not covered by policy, by one who had permission of owner to erect and operate it for experimental purposes, held substantial operation of smelting works though large smelters were not in operation. Id. Watchman clause held not to require watchman at night where works were operated during day. Machintosh v. American Fire Ins. Co., 150 Cal. 453, 89 P 107.

50. Where policy prohibited keeping or use of gasoline on premises, and provided that it should be avoided if risk was increased, or if mechanics were employed in building, altering or repairing premises for more than 15 days, held that policy was not avoided by use of gasoline torch by painter for purpose of burning off paint from insured building where work continued for less than 15 days. Garrebrant v. Continental Ins. Co. [N. J. Err. & App.] 67 A 90.

51. Taking and preserving of inventory until after fire held substantial compliance, though few sheets, which did not materially affect amount of inventory, were missing when it was exhibited to adjuster. Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 102 SW 226. Provision that insured should take inventory at least once a year, and that unless one had been taken within year prior to date of policy, one should be taken within 30 days thereafter or policy should be void, held valid, and failure to comply therewith avoided policy. Reynolds v. German American Ins. Co. [Md.] 68 A 262. Where inventory was not taken until 14 days after expiration of 30 days allowed by policy for that purpose, held that there was not substantial compliance and insured could not recover. Id. Iron safe clause, when properly made part of contract, is valid and binding stipulation. Coggins v. Aetna Ins. Co., 144 N. C. 7, 56 SE 506. Invoices and entries in ledger made from them held not to amount to inventory. Id. Inventory cannot be supplied by invoices where business has continued long enough for difference between sum of invoices, less sales, and inventory to be material. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099. Whether invoices of goods on hand at opening of store for business, 20 days before policy was issued, was in substance an inventory held at least a question for the jury. Id. Inventory held insufficient. Monger v. Queen Ins. Co. [Tex. Civ. App.] 99 SW 887; Henry v. Green Ins. Co. [Tex. Civ. App] 17 Tex. Ct. Rep. 442, 103 SW 836. Evidence that it was such as is commonly made and kept by merchants held inadmissible. Id.

52. In view of statute making substantial compliance sufficient, held that, where books were fairly intelligible, it devolved on insurer to show that method of bookkeeping practiced was not sufficiently intelligible to enable adjuster to ascertain amount and value of property lost. Arkansas Mut. Fire Ins. Co. v. Stuckey [Ark.] 106 SW 203. Where cash and credit sales were not itemized, but day's sales were entered in gross at end of each day's business, whether there had been substantial compliance with policy held for jury. Id. Entries in regard to cash held not in violation of provision as matter of law, but question was for jury under evidence. Aetna Ins. Co. v. Johnson, 127 Ga. 491, 56 SE 643. Entries as to purchases of goods brought into stock held not sufficient compliance. Id. On adoption of new system of bookkeeping aggregate amount of footings in old books was brought forward and placed in new books, but old books were not kept in safe and were destroyed by the fire. Held that insured could not recover. Aetna Ins. Co. v. Mount [Miss.] 44 S 162. Filing and preserving original bills of goods purchased held substantial compliance with provision requiring keeping of books showing purchases. Carp v. National Assur. Co. [Mo. App.] 99 SW 523. Where policy does not require any particular set of books or method of bookkeeping, that which would enable one of average skill and intelligence in such matters to make reasonably accurate estimate of extent of loss is sufficient. McMillan v. Insurance Co. of North America [S. C.] 58 SE 1020. Where insured supplied evidence contained in missing cash book by reference to expense account shown by books remaining in safe and cash deposit account of plaintiff as shown by books kept by bank, with testimony that it was insured's custom to de-

proof safe, or some other place free from exposure to any fire which would destroy the building in which the insured property is kept, and to produce them after the fire.[53] He is also sometimes required to produce invoices of the goods or certified copies thereof as often as required.[54] A substantial compliance with this provision is generally held to be sufficient,[55] and this rule is by statute in some states made applicable to all the terms, conditions, and warranties of policies covering personalty.[56] By statute in some states a breach of condition is no defense to an action on the policy unless the loss occurs while it continues, or unless the breach is the primary or contributing cause of the loss.[57]

*Life, accident, and health insurance.*See 8 C. L. 407—Policies frequently provide that they shall be void if the applicant makes untrue answers to questions in regard to his age,[58] his health,[59] his use of intoxicants,[60] his occupation,[61] the amount of

posit in bank daily cash sales, less items for expenses paid out during day, held that question of substantial compliance was properly submitted to jury. Id. Fact that some parol evidence was necessary to make showing by book entries complete held not fatal objection. Id. Keeping of strips taken from cash register showing sales held not compliance with provision requiring keeping of books showing cash sales, etc. Monger v. Queen Ins. Co. [Tex. Civ. App.] 99 SW 887; Henry v. Green Ins. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 442, 103 SW 836. Evidence that merchants generally, in some particulars, fail to keep books but keep such strips instead held inadmissible. Id. Books held substantial compliance though cash sales were entered daily in bulk at end of day's business and did not show each item of merchandise sold for cash, evidence showing that such was customary manner of bookkeeping in locality. Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 102 SW 226.

53. Where inventory was lost after fire and after it had been exhibited to adjuster, held that witness could use summary thereof entered upon ledger to refresh his memory in testifying as to amount of stock shown by inventory, preservation of inventory until time of trial not being required by policy. Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 102 SW 226. Failure to keep book showing sales in safe and its consequent destruction in fire held to preclude recovery. Yates v. Thomason [Ark.] 102 SW 1112. Policy held not to require preservation of books showing purchases made prior to last annual inventory taken within time prescribed. Carp v. National Assur. Co. [Mo. App.] 99 SW 523. Failure to keep books in safe or in place free from exposure to fire so that they were burned and could not be produced held to preclude recovery unless waived. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099. Whether cash book was delivered to adjuster after fire or was destroyed by fire held for jury under evidence. McMillan v. Insurance Co. of North America [S. C.] 58 SE 1020. Where policy permits books to be kept out of safe in some place not exposed to a fire which would destroy building in which business is being conducted is substantial compliance if books and inventory kept in safe, together with books kept elsewhere would furnish to person of average intelligence data for fair estimate of loss, even though some particular book of set kept in safe is missing. Id. Instruction to effect that if loss of cash book or failure to produce it was accidental and not result of design or fault on part of insured, and there still remained means to ascertain accurately and fully value of stock, so that insurer would suffer no disadvantage by reason of loss, there would be substantial compliance, held proper. Id.

54. Policy did not require invoices to be kept in safe, but provided that insured should produce them, or certified copies thereof, as often as required. Invoices were not kept in safe and were burned. Evidence showed that amounts of purchases were entered in books. Held that there was no forfeiture, where no demand for production of copies of invoices was ever made and there was no refusal to produce them. Arkansas Mut. Fire Ins. Co. v. Stuckey [Ark.] 106 SW 203.

55. See, also, preceding notes. Arkansas Mut. Fire Ins. Co. v. Stuckey [Ark.] 106 SW 203; McMillan v. Insurance Co. of North America. [S C.] 58 SE 1020.

56. Kirby's Dig. § 4375a. Arkansas Mut. Fire Ins. Co. v. Stuckey [Ark.] 106 SW 203; Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 102 SW 226; Yates v. Thomason [Ark.] 102 SW 1112. Statute has no application to policies covering realty only. Capital Fire Ins. Co. v. King [Ark.] 102 SW 194.

57. Comp. Laws, § 5182. Keeping gasoline on premises. Brunswick-Balke Collender Co. v. Northern Assur. Co. [Mich.] 14 Det. Leg. N. 651, 113 NW 1113. Code, § 1743, construed. Adams v. Atlas Mut. Ins. Co. [Iowa] 112 NW 651.

58. Accident insurance: Provision that policy should not be construed or held to cover any person under age of 18 or over age of 60 years being ambiguous, held that it would be construed most strictly against company and words "60 years" would be related to date of issuing policy, so that recovery could be had where insured was 59 when policy was issued, though over 60 when accident occurred. Moest v. Continental Casualty Co., 104 NYS 553.

Life insurance: Evidence held to require submission to jury of question whether date of insured's birth as stated in application was true and to sustain finding that it was. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 18 Tex. Ct. Rep. 932, 101 SW 545. Where insured knew that it was essential that statement of his age or date of birth should be inserted in application, stated that he did not know it, referred solicitor to his father for the information, and know-

ing what information had been imparted by latter and that it had been inserted in application previously signed by him accepted policy warranting such statement to be true, held that he was as much bound by father's statement as though he had made it himself. Instruction held prejudicially erroneous. Id.

59. Evidence held to require submission of question whether statements were true to jury. Fidelity Mut. Life Ins. Co. v. Beck [Ark.] 104 SW 533; Illinois Life Ins. Co. v. De Lang, 30 Ky. L. R. 753, 99 SW 616; Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 18 Tex. Ct Rep. 179, 100 SW 1033, rvd. on other grounds, 19 Tex. Ct. Rep. 839, 105 SW 320. Where matter inquired of would affect question of assumption by company of the risk, warranty is material though insured dies from cause totally disconnected with question inquired of. Previous condition of health. Fidelity Mut. Life Ins. Co. v. Beck [Ark.] 104 SW 533. Policy avoided where insured falsely stated that she had never had a "chronic or persistent cough," she having expressly warranted truth of answers and it being provided that policy should be void if any answer was untrue. Bertrand v. Franklin Life Ins. Co., 119 La. 423, 44 S 186. Whether failure to mention in application fact that applicant had received medical attention for throat trouble constituted breach of warranty material to risk held for jury. Dulany v. Fidelity & Casualty Co. [Ind.] 66 A 614. Special finding that certain physician was treating insured at time she stated that she was in good health held not conclusive in favor of defendant on that question, where general verdict implied and jury must have found, that she did not have heart disease for which said physician claimed he was treating her, evidence as to whether she did or not being conflicting. Perry v. John Hancock Mut. Life Ins. Co., 147 Mich. 645, 14 Det. Leg. N. 19, 111 NW 195. Even if instruction authorized recovery in case insured at time of making warranty of sound health did not know of unsoundness of health, and answered question honestly, held that error, if any, was harmless, where it clearly appeared that she was in good health unless she had heart disease, and jury found, on sufficient evidence, that she did not. Id. Policy warranted that insured had never had heart disease, was in sound health, and had not within two years been under care of physician, and provided that it should be void unless she was in sound health when it was delivered. She knew that she had heart disease when application was made but stated, in answer to questions put to her in her own language by interpreter, that she was in sound health, had never been seriously ill except as stated, etc Held that verdict was properly directed for defendant, though there was evidence that she was not asked whether she had heart disease, or had been attended by physician within 2 years, examination being sufficient to appraise her of knowledge sought. Haapa v. Metropolitan Life Ins. Co. [Mich.] 14 Det. Leg. N 775, 114 NW 380. Instruction wholly ignoring defense based on provision that policy should be void if before date of policy insured had any pulmonary disease held error which was not cured by another conflicting instruction. Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1, 88 P 401. A local affection is not local disease within meaning of warranty unless it has sufficiently developed to have some bearing on the general health. Accident insurance. Cady v. Fidelity & Casualty Co. [Wis.] 113 NW 967. Question is not whether insured died of disease which he had at time he made application but whether risk which it was about to assume was fairly represented to company. Illinois Life Ins. Co. v. De Lang, 30 Ky. L. R. 753, 99 SW 616. Instructions held erroneous as leaving it to jury to judge whether if truth had been stated facts or conditions would have been disclosed which were reasonably and ordinarily calculated to shorten insured's life or increase probability of his death, and whether, if facts had been disclosed, company, acting reasonably and naturally, would have issued policy. Id. Jury should have been instructed that question was whether any of answers, setting them out, were substantially untrue, and, if so, whether, according to usual course of business of insurance, policy would have been issued if truth had been stated in application. Id. Statement concerning one's bodily condition with respect to obscure or undeveloped disease is mere matter of opinion, and insured is not responsible for a misrepresentation as to such matter unless he has reason to believe that his statement is false. Blackman v. U. S. Casualty Co., 117 Tenn. 578, 103 SW 784. Statement that insured was free from local, constitutional, functional, or organic diseases, and that he had not been treated by physician for two years except for cold, held not misrepresentation avoiding policy, though he was in incipient stage of nephritis when he consulted physician as stated, where he did not know that fact but supposed he had only a cold. Id. Warranties that applicant never has had certain obscure diseases, concerning which insurer should have known that applicant could not have certain knowledge, saving as he might be told by a physician or other expert, should be construed as warranties only of bona fide belief and opinion of the applicant. Owen v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 67 A 25.

60. Unless representation as to use of intoxicants is substantially untrue, it cannot be called such a misrepresentation as will defeat recovery. Metropolitan Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 SW 876. Inquiry in regard to previous habits of drinking intoxicants is not material unless they are used to such an extent as to affect health or physical condition of applicant and therefore render him unsatisfactory subject for life insurance. Id. Evidence held to support finding that representations were substantially true. Id. If insured used ardent spirits to excess, held that his habits of inebriety were material upon question whether he was an insurable risk. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452. Question as to use of intoxicants held to refer to habitual and not occasional use, so that applicant's statement that he used them only in sickness was not material misrepresentation, though, while not addicted to habitual use, he did take drink occasionally. Mutual Reserve Fund Life Ass'n v. Cotter [Ark.] 99 SW 67.

61. Insurance held not forfeited by temporary change of occupation, particularly where policy so provided. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566.

his income,[62] as to whether he has ever suffered any bodily injury,[63] or ever been rejected by any other company,[64] as to who is his family physician,[65] as to when he last consulted [66] or was attended by a physician,[67] his relation to the beneficiary,[68] or in case the policy is procured by fraud.[69]

Tornado insurance.—Policies covering loss due to windstorms frequently provide that they shall be void in case the insured buildings become vacant.[70]

§ 10. *The risk or object of indemnity. Accident and health insurance.*[See 8 C. L. 408]—Accident policies generally provide for an indemnity for death or injuries resulting solely and proximately [71] from external, violent, and accidental means [72]

62. Statement held warranty so that its falsity avoided policy though inadvertently made. Heintz v. Continental Casualty Co., 105 NYS 519.

63. Warranty that insured had never "had any bodily injury or wounds," and that he had never suffered certain specified injuries or been "otherwise injured," held to refer only to such serious wounds or injuries as might affect risk, particularly where medical examiner so construed it. Accident policy. North American Acc. Ins. Co. v. Trenton [Tex. Civ. App.] 18 Tex. Ct. Rep. 389, 99 SW 740.

64. Where plaintiff, who had option of continuing insurance, was informed that if he desired to do so it would be necessary for him to make new application upon new rate, and that if he did not do so his certificate would be discontinued, held not cancellation of certificate or declination to renew same. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566. Statement that insured had never been rejected or postponed by any other company, held to avoid policy if untrue and made with actual intent to deceive. Rev. Laws, c. 118, § 21. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452. Instruction that defense could not prevail unless they found constructive notice by which insured was chargeable with knowledge of his previous rejection, approved, where it appeared that previous application to another company had been rejected, but there was no direct proof that he had been informed of rejection. Id. Statement held not to avoid policy where fact of his rejection had not been communicated to him when he made application for policy in suit, notice to him in some form being necessary to constitute rejection. Instruction approved. Metropolitan Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 SW 876. In absence of proof that insured knew of his rejection, held that it would be presumed that his answer that he had not been was true. Id. Evidence held to sustain finding that insured had not been notified of rejection when statement was made. Id.

65. Truth of warranty that certain person was insured's family physician held, under evidence, for jury. Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 18 Tex. Ct. Rep. 179, 100 SW 1033, rvd. on other grounds, 19 Tex. Ct. Rep. 839, 105 SW 320.

66. Consultation not for serious complaint does not avoid policy. Perry v. John Hancock Mut. Life Ins. Co., 147 Mich. 645, 14 Det. Leg. N. 19, 111 NW 195.

67. If words "two years" in warranty as to attendance by physician were intended to specify date of attendance, held that it was intended as mere approximation, and fact that attendance was less than two years before did not avoid policy where applicant acted in good faith. Owen v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 67 A 25. Same held true of statement that applicant had not been under treatment in hospital "except two years ago." Id.

68. Falsity of warranty that beneficiary was insured's wife held to preclude recovery. Gaines v. Fidelity & Casualty Co., 188 N. Y. 411, 81 NE 169, afg. 111 App. Div. 386, 97 NYS 836.

69. Evidence held to sustain finding that another person was not substituted for insured for purpose of medical examination. Commonwealth Life Ins. Co. v. Dixon, 31 Ky. L. R. 948, 104 SW 355.

70. Stipulation is material to risk and will be enforced. Farmers' & Merchants' Ins. Co. v. Bodge [Neb.] 110 NW 1018, rvg. former opinion, 106 NW 1004. Special provisions in policy written on combination form made applicable to windstorm insurance held intended as additional conditions to those general in their terms, so that provision applied. Id.

71. Policy insuring against death from septicaemia "independently of all other causes" held to mean independently of any disease or wound other than the one producing the septicaemia, unless that latter was of such a serious character that death might have resulted had not septicaemia set in. United States Health & Acc. Ins. Co. v. Bennett's Adm'r [Ky.] 105 SW 433. Evidence held to show that death was result of septicaemia independently of all other causes. Id. Peremptory instruction for defendant held properly refused, there being some evidence that blow produced insanity which caused insured's death. Travelers' Ins. Co. v. Bingham [Ky.] 105 SW 894. If either traumatic pneumonia or cerebral hemorrage ensued as result of fall, and insured died in consequence of said disease, held that his death was caused solely and proximately by accidental violence. Johnson v. Continental Casualty Co., 122 Mo. App. 369, 99 SW 473. Evidence held to sustain finding that injuries received from fall were proximate cause of death. Id. If insured sustained accident, but at time was suffering from pre-existing disease or bodily infirmity, and if accident would not have otherwise caused death, but he died because accident aggravated effects of disease, or disease aggravated effect of accident, there can be no recovery under policy covering death resulting directly and independently of all other causes from accidental injuries. Thomas v. Fidelity & Casualty Co. [Md.] 67 A 259. Evidence held to

such as shall immediately and continuously disable the insured.[73] Death or disability resulting from blood poisoning [74] and accidental death while riding on public conveyances [75] are often specifically insured against. Increased indemnity in case of injuries or death received while riding on such a conveyance is also sometimes provided for.[76] Such policies frequently exempt the insurer from liability or provide for a reduction of the amount of the indemnity for death or injuries resulting from voluntary or unnecessary exposure to danger,[77] or for injuries intentionally

show that death did not result from injuries "independently of all other causes," but that accident would have been trifling injury if he had been otherwise healthy. Id. Where it was conceded that appendicitis caused death, held that, if insured had recovered from former attacks of that disease so that it no longer existed in his body and there was only a susceptibility to have it in case proper exciting cause should arise, and fall proved to be such exciting cause, insurer was liable; but if because of former attacks actual disease itself existed, liable to be rendered active and virulent by injury such as that suffered by insured, active disease resulting in death would not be regarded as result of fall alone, but as joint result of fall and latent disease, and hence could be no recovery. Instructions approved. New Amsterdam Casualty Co. v. Shields [C. C. A.] 155 F. 54. Question whether disease was caused solely by fall held for jury on conflicting evidence. Id.

72. Where insured was struck by post while endeavoring to board moving train, held that his death was due to accidental means, though he was guilty of contributory negligence. Fidelity & Casualty Co. v. Morrison, 129 Ill. App. 360. Evidence held to support finding that death was due to accident. Bowman v. Northern Acc. Co., 124 Mo. App. 477, 101 SW 691. Evidence that plaintiff, a railway mail clerk, suffered rupture of blood vessel in his lung while lifting mail sack in performance of his duties, held to make prima facie case, so that question was for jury. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557. Death from bite of dog held death from accident, and to be classed under accident provisions of policy rather than health provisions, regardless of way in which it operated to produce death. Farner v. Massachusetts Mut. Acc. Ass'n [Pa.] 67 A 927.

73. Immediately does not mean instantaneously. Farner v. Massachusetts Mut. Acc. Ass'n [Pa.] 67 A 927. Where insured was bitten in thumb by dog, and use of hand was interfered with at once, and continued to be more and more so until his death, held that he was immediately disabled, there being no break in continuity of consequences of injury and no intervening cause in resulting disability. Id. Where policy provided for payment of indemnity in case of accidental injuries "at once resulting in continuous total inability to engage in any business, occupation, or service," held that there could be no recovery where insured stopped work for fifteen minutes after injury and then resumed his labors and continued to work as usual for about fifty-two days, when he died, requirement of continuous disability being applicable in case of fatal as well as nonfatal injuries. Continental Casualty Co. v. Wade [Tex.] 19 Tex. Ct. Rep. 767, 105 SW 35, rvg. 18 Tex. Ct. Rep. 410, 99 SW 877.

74. Policy insuring against bodily injuries sustained through external, violent, and accidental means, and providing that it did not cover death or disability resulting from poisoning except as thereinafter stated, but that, subject to its conditions, it covered death due to septicaemia, etc., held not to cover death resulting from septicaemia not caused by "accidental means" but ensuing upon a surgical operation. Herdic v. Maryland Casualty Co. [C. C. A.] 149 F 198, afg. 146 F 396. Policy covered "blood poisoning sustained by physicians or surgeons resulting from septic matter introduced into the system through wounds suffered in professional operations." While insured, a dentist, was operating on patient, latter coughed and particles of septic matter were thereby conveyed from his mouth to insured's eye, resulting in disability. Held that wound meant abrasion, breach, or rupture of natural covering through which septic matter might gain admittance into system, and, as there was no such wound, insured could not recover. Fidelity & Casualty Co. v. Thompson [C. C. A.] 154 F 484. Refusal of requested charge defining wound and definition as given held error. Id.

75. Under policy insuring against accidental death "while actually riding as a passenger in or on any regular passenger conveyance provided by a common carrier," held that there could be no recovery where insured was killed as result of wreck while riding in postal car in performance of his duties as railway postal clerk, words quoted meaning that indemnity should apply to case of passenger in ordinary, common, every day use of that term, and to injury received while in or on regular passenger conveyance. Wood v. General Acc. Ins. Co., 156 F 982. Policy held to impose liability on company for death of beneficiary named therein only in case her death or disability resulted from an injury received by her while a passenger upon a public conveyance or an elevator. Wheeler v. Fidelity & Casualty Co. [Ga.] 58 SE 709.

76. Insured who was struck by post while attempting to board moving train held riding on public conveyance, he being a passenger. Fidelity & Casualty Co. v. Morrison, 129 Ill. App. 360.

77. Evidence held to show that insured was killed by falling from top of freight train where he was riding at night without a light, he not being there as an employe of railroad company in discharge of his duty, so that only reduced amount could be recovered. Continental Casualty Co. v. Brittner [Ark.] 99 SW 1100. Evidence held to sustain finding that death did not result from unnecessary exposure to danger or obvious risk

inflicted by insured [78] or by another,[79] or to which his own negligence contributed, or which he might have averted by the exercise of ordinary care, prudence, and foresight,[80] or received while engaged in a more hazardous occupation than that specified in the policy,[81] or while riding on a locomotive,[82] or while on the roadbed of any steam railway,[83] or resulting from disease [84] or infection of poison,[85] or shooting,[86]

of injury. Continental Casualty Co. v. Todd [Ark.] 101 SW 168. Recovery barred where insured was thrown from train as result of sudden jerk while attempting to board moving freight train by climbing up iron ladder on side of car, though he had previously committed similar negligent acts and other commercial travelers habitually took similar risks. Garcelon v. Commercial Travelers' Eastern Acc. Ass'n [Mass.] 81 NE 201. Evidence held to sustain finding that accident did not result from unnecessary exposure to danger or voluntary exposure to obvious risk of injury. Norwood v. Preferred Acc. Ins. Co., 107 NYS 104. Means intentional and unnecessary exposure to danger so obvious that prudent person exercising reasonable foresight would have avoided it. Rebman v. General Acc. Ins. Co., 217 Pa. 518, 66 A 859. Attempt of man sixty-six years old, with umbrella under his arm, to board train moving six or eight miles an hour, held voluntary exposure to unnecessary danger. Id. Finding that insured, a line repairer, who fell from limb of tree while knocking off pecans with pole, was acting as man of ordinary prudence, and that his injuries were not result of voluntary exposure to unnecessary danger or obvious risk of injury, held warranted by evidence. Continental Casualty Co. v. Jennings [Tex. Civ. App.] 17 Tex. Ct. Rep. 696, 99 SW 423.

78. Instruction, when taken in connection with other instructions, held not objectionable as ignoring proof of facts and circumstances discrediting plaintiff and warranting inference that plaintiff had intentionally injured himself to obtain insurance money. Cornelius v. Central Acc. Ins. Co. [Pa.] 67 A 840.

79. Provision for reduced indemnity where the accidental "injury" resulted from intentional act of insured or another held to refer to fatal injuries as well as non-fatal ones. Continental Casualty Co. v. Morris [Tex. Civ. App.] 18 Tex. Ct. Rep. 646, 102 SW 773. Where policy provided for diminished indemnity in event of death due to injuries intentionally inflicted on insured by another, except assaults for purpose of robbery, instruction defining word "robbery" held not erroneous. Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 113 NW 50. Requested instruction held properly refused as misleading. Id.

80. Recovery barred where insured was thrown from train by sudden jerk while attempting to board moving freight train by climbing up iron ladder on side of car, though he had previously committed similar negligent acts and other commercial travelers habitually took similar risks. Garcelon v. Commercial Travelers' Eastern Acc. Ass'n [Mass.] 81 NE 201.

81. Occupation means vocation, trade, or calling, and does not refer to acts of exercise, diversion, or recreation. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566. Where plaintiff was insured as manager of mill, held that fact that injury occurred while he was operating mowing machine as mere temporary diversion did not preclude recovery, particularly where policy provided that it should not be avoided by temporary change of occupation. Id. Under evidence, held that question whether insured, at time of receiving his injury, was engaged in occupation not substantially described in application, or so materially different as to require, as matter of law, limiting of recovery to maximum sum for which policy would have been issued had he been engaged in another occupation classified as more hazardous, was for jury. Wilder v. Continental Casualty Co. [C. C. A.] 150 F 92.

82. Riding in observation cab built on locomotive held riding in or on locomotive. Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A 821. Held that verdict could not be directed for defendant on ground that insured was killed while engaged in occupation more hazardous than that in which he was insured where was evidence fairly tending to show that he was killed while in occupation in which he was insured. Id. Where evidence showed that riding on locomotive was mode of travel covered by insurance of insured in traveling in his occupation as stated in policy, held that printed provision exempting insurer from liability in case of death while or in consequence of riding in or on a locomotive was an inconsistency and did not preclude recovery. Id.

83. Answers to interrogatories showing that insured was killed while walking upon highway over railroad crossing held not to require judgment for defendant as showing he was killed by being or walking upon roadbed of a railroad. Phoenix Acc. & Sick Ben. Ass'n v. Lathrop [Ind. App.] 81 NE 227. Double tracks ten feet apart were used for running trains in opposite directions, it appearing that there was but four feet of space between passing trains. Held that ground between tracks was part of roadbed. McClure v. Great Western Acc. Ass'n, 133 Iowa, 224, 110 NW 466. There being evidence fairly tending to show that insured was killed by falling from observation car as alleged in petition, held that verdict could not be directed on ground which assumed that cause of death was walking or being on railway roadbed. Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A 821.

84. "Disease" in provision limiting liability to less sum in case of disabling injuries leaving no external mark on body, or injuries resulting from disease in any form, or while member was affected therewith or thereby, held to mean a malady, affection, sickness, illness, or disorder, and something different from wound or hurt producing an injury and immediate functional disturbance. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566. Provision held inapplicable where was external mark on body visible to eye. Id. Evidence held to authorize finding that there was no disease following injury. Id.

or in case the insured commits suicide.[87] It is sometimes provided that insured must use all due diligence for his personal safety and protection.[88]

The payment of weekly indemnity under accident and health policies is frequently made to depend on the insured being wholly disabled from carrying on his business or occupation.[89] Confinement to the house is also sometimes required.[90] Policies of health insurance often exempt the insurer from liability unless the illness commences after the policy has been in force for a specified length of time.[91] The amount recoverable is sometimes reduced in case of illness resulting from certain specified causes.[92] The number of payments depends on the terms of the policy.[93]

*Burglary insurance.*See 8 C. L. 410—The amount of indemnity is frequently made to depend on the place from which the insured goods are stolen.[94]

*Employer's liability insurance.*See 8 C. L. 411—A policy indemnifying an employer for loss from common-law or statutory liability for injuries suffered by his employes is not contrary to public policy.[95] The insurer is often exempted from liability for losses due to injuries occasioned by the failure of the insured to observe any statute affecting the safety of persons,[96] or by the negligence of a fellow

85. Blood poisoning resulting from accidental puncturing of hand by wire held disease caused by accidental wound, alone entitling insured to recover full indemnity for loss of time, though policy provided for reduced indemnity for injuries resulting from infection or poison. United States Health & Acc. Ins. Co. v. Harvey, 129 Ill. App. 104. Where blood poisoning or infection is excepted risk, if resulting disability is effect of accident, so as to be mere link in chain of causation between accident and disability, disability must be attributed to accident alone, and is not excepted from risk. Id.

86. Policy construed, and held that where insured was shot by burglar beneficiary was only entitled to recover half of amount of ordinary indemnity for accidental death. Bader v. New Amsterdam Casualty Co., 102 Minn. 186, 112 NW 1065.

87. See Life Insurance, post, this section.

88. Insured held not entitled to recover for injuries received while attempting to board moving train. Rebman v. General Acc. Ins. Co., 217 Pa. 518, 66 A 859.

89. Accident policy construed and held not entitled to recover for alleged permanent disability resulting from injury producing hernia where he was not so disabled as to prevent him "from engaging in any productive occupation" or from "performance of one or more important daily duties pertaining to any productive occupation," it appearing that he could attend to regular duties of his occupation and had done so ever since he was hurt, and that he had lost no time from his business. Aetna Life Ins. Co. v. Lasseter [Ala.] 45 S 166. Provision insuring plaintiff for injuries which "necessarily result in his total loss of time at once arising from inability to engage in any business," etc., held not to require that loss of time should immediately follow injury. Baumister v. Continental Casualty Co., 124 Mo. App. 38, 101 SW 152.

90. "Confined to the house" in health policy held to mean confined to any part of house, either inside or upon porches or verandas attached to it on outside, where insured was suffering from consumption. Dulany v. Fidelity & Casualty Co. [Md.] 66 A 614. Evidence held insufficient to show that insured was necessarily and continuously confined strictly to his house by reason of an acute illness, or that he was regularly visited by qualified physician. Rief v. Continental Casualty Co., 131 Wis. 368, 111 NW 502.

91. Evidence held to show that defendant's illness was result of disease contracted before policy was issued, so that he was not entitled to indemnity under policy insuring against illness contracted and begun after policy had been in continuous force for thirty consecutive days. United States Health & Acc. Co. v. Jolly, 31 Ky. L. R. 232, 101 SW 1179. Where policy insured against loss of time from disease for one year, commencing on specified date, held that subsequent provision requiring that disease must have commenced not earlier than fifteen days after policy took effect was void for repugnancy. Blackman v. U. S. Casualty Co., 117 Tenn. 578, 103 SW 784.

92. "Rheumatism" held to include rheumatic fever. Holmes v. Continental Casualty Co., 102 Me. 287, 65 A 385.

93. Payment of sick benefits held limited to period of ten weeks. Courtney v. Fidelity Mut. Aid Ass'n, 120 Mo. App. 110, 101 SW 1098, former opinion 94 SW 768.

94. Separate laundry in basement of flat building set apart for use of plaintiff and used by him for various purposes held not within provision that, if insured was occupant of flat building, policy covered goods in locked storeroom provided for exclusive use of insured to extent of $50 and no more. Michaels v. Fidelity & Casualty Co. [Mo. App.] 105 SW 783.

95. Royle Min. Co. v. Fidelity & Casualty Co. [Mo. App.] 103 SW 1098.

96. Provision held not repugnant to previous provision that purpose of contract was to indemnify insured from loss from common-law or statutory liability. Royle Min. Co. v. Fidelity & Casualty Co. [Mo. App.] 103 SW 1098.

servant of an injured employe where such fellow servant's wages are not included in the schedule of estimated wages furnished to the insurer.[97]

Fire insurance. See 8 C. L. 411—The risk ordinarily attaches from the date of the policy.[98] Its duration depends on the terms of the contract.[99] What property is covered by the policy is a question of intention to be arrived at by a construction of the contract in accordance with the general rules of interpretation previously stated.[1] The insurer is often exempted from liability for losses due to explosions,[2] or caused directly or indirectly by order of any civil authority,[3] or by any ordinance or law regulating the construction of any buildings,[4] or by cyclones, tornadoes, or windstorms,[5] or resulting from any open fire built within a specified distance of the insured premises.[6] Policies covering automobiles sometimes exclude

97. Policy held to exempt insurer from liability in such case though wages of injured employe were included in schedule. East Carolina R. Co. v. Maryland Casualty Co. [N. C.] 58 SE 906.

98. Risk held to have attached from date of policy and not from date when premium was paid, though error as to amount of insurance in typewritten slip attached to policy and describing property covered thereby was not changed to conform to policy until latter date. Reynolds v. German American Ins. Co. [Md.] 68 A 262.

99. Instruction that by "noon" was meant noon by solar time, in absence of any provision showing contrary intention, held erroneous in view as to evidence of custom and conditions prevailing at place where insured property was situated. Globe & Rutgers Fire Ins., Co. v. David Moffatt Co. [C. C. A.] 154 F 13 Contract made in New York covering property in Virginia held not governed by New York statute as to standard time. Id. Evidence as to custom of place where insured property was situated as to whether solar or standard time governed held admissible, though custom was not pleaded. Id.

1. See § 7, ante. Defendants' policies held to have covered **typesetting machines.** Fireman's Fund Ins. Co. v. Palatine Ins. Co., 150 Cal. 252, 88 P 907. Policy covering stock of merchandise consisting of dry goods, etc., "and **all such other goods as are usually kept in a dry goods store,**" held to cover patterns and pictures, forming part of stock, though patterns and pictures in general were excluded. Furlong v. North British & Mercantile Ins. Co. [Iowa] 113 NW 1084. Policy held to cover **horses** though they had been removed from insured **barn** to another barn on plaintiff's premises not covered by policy. Fire Ass'n of Philadelphia v. Taylor [Kan.] 91 P 1070. Same held true of policy covering "two-story building and additions thereto occupied by assured as a dwelling only." Id. Valuation of property and premium collected may in some cases be submitted to jury in ascertaining intention as to property to be covered, in addition to intention to be drawn from words used. North British & Mercantile Ins. Co. v. Tye, 1 Ga. App. 380, 58 SE 110. What **bark in piles** was covered determined. Globe & Rutgers Fire Ins. Co. v. David Moffatt Co. [C. C. A.] 154 F 13. Policy covering "two-story frame building and its **additions adjoining and communicating**" held not to cover servant's house 150 feet distant from said building, though occupied exclusively by domestic servants employed in insured's dwelling house, and though connected therewith by system of call bells North British & Mercantile Ins. Co. v. Tye, 1 Ga. App. 380, 58 SE 110. Policy insuring against **loss of rents** held intended to secure insured against loss of income from theater and to cover its rental value, though it was not rented for specific term at time of fire. Gray v. Merchants' Ins. Co., 125 Ill. App. 370. Amount of rents recoverable determined. Id. Where building was, by extraordinary diligence, repaired so speedily that there was no actual loss of rent, held that contingency insured against never happened, and there could be no recovery, insured not being entitled under such circumstances to recover loss of rental value. Hartford Fire Ins. Co. v. Northern Trust Co., 127 Ill. App. 355.

2. Evidence held to show that cause of explosion was igniting of escaping gas by gas jet and that it was not caused by fire within meaning of policy, so that company was not liable for any loss caused by said explosion. Home Lodge Ass'n v. Queen Ins. Co. [S. D.] 110 NW 778.

3. Plea charging that loss was caused by order of building inspector of certain city directing destruction of buildings held bad for failure to show authority of officer to order destruction of buildings. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053.

4. Plea alleging that loss was occasioned by act of an officer under authority of an ordinance, title of which only was given, held bad for failure to state at least the substance of said ordinance. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053.

5. Words in lightning clause, attached to standard policy as rider, as authorized by Rev. Laws 1905, § 1640, "and in no case to include loss or damage by cyclone, tornado, or windstorm," held limited to rider itself, and not intended to vary terms of policy itself so as to preclude recovery for loss caused proximately by fire though contributed to by windstorm, such a restriction being unauthorized. Russell v. German Fire Ins. Co., 100 Minn. 528, 111 NW 400.

6. Provision that company should not be liable for loss resulting from any open fire built by insured within fifty feet of building held not condition, breach of which avoided policy, but an exception from risk. Draper v. Oswego County Fire Relief Ass'n [N. Y.] 82 NE 755, afg. 115 App. Div. 807, 101 NYS 168.

losses from fires originating within the vehicle itself.[7] Fire [8] must be the proximate cause of the damage.[9] There can be no recovery where the insured property is burned by the insured or with his connivance or procurement.[10]

*Life insurance.*See 8 C. L. 413—The insurer is frequently exempted from liability in case the insured commits suicide [11] while sane or insane.[12] By statute in some states, suicide is no defense unless it is shown to the satisfaction of the court or jury trying the case that the insured contemplated suicide when he applied for the policy, and any provision in the policy to the contrary is declared to be void.[13]

*Title insurance.*See 8 C. L. 414—Policies generally indemnify the insured against loss due to existing defects in his title to specified realty.[14]

Reformation of policy for mistake.[15] If, by reason of a mutual mistake, the

7. Where accident to automobile resulted in leakage of gasolene from tank, and fire was communicated to escaped gasolene from lamps attached to outside of vehicle, held that resulting fire loss on vehicle was not one "originating within the vehicle." Preston v. Aetna Ins. Co., 118 App. Div. 784, 103 NYS 638. Nor was it one "caused by fire originating within the automobile itself." Preston v. Union Assur. Soc., 118 App. Div. 788, 103 NYS 640.

8. Evidence held to support finding that wool was damaged by fire and not by decomposition. Liverpool & London & Globe Ins. Co. v. Western Woolen Mill. Co. [Kan.] 90 P 1132.

9. Proximate cause is not necessarily last link in chain of events, but that which is procuring, efficient, and predominant cause; that from which effect might be expected to follow without the concurrence of any unforeseen circumstances. Russell v. German Fire Ins. Co., 100 Minn. 528, 111 NW 400. To render fire proximate cause, is not essential that damage should be occasioned by direct contact with fire. Id. Where insured building was injured by fall of wall of adjacent building left unsupported by destruction of latter building by fire, held that, if, under all the circumstances, parties to contract could have reasonably foreseen that fire might leave adjacent wall unsupported, exposed to winds likely to occur, and that it might be blown over by a wind liable to occur at any time and fall upon insured building, such contingency was an element in the risk. Id. Evidence held to justify finding that wind which caused wall to fall was one liable to occur during any month, in any season of year. Id. Cause of damage held, under evidence, question of fact, and evidence held to sustain finding that fire, and not wind, was proximate cause. Id.

10. Evidence held to justify finding that building was destroyed by fire without insured's fault, connivance, or procurement, and that goods alleged to have been removed few days before fire were of inconsiderable value, and taken without fraudulent intent. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. Evidence held insufficient to show that building had been burned by assignee of policies or by her procurement. Rochester German Ins. Co. v. Schmidt, 151 F 681.

11. Mere fact that revolver was found in hand of deceased held not conclusive that he committed suicide. Kornig v. Western Life Indemnity Co., 102 Minn. 31, 112 NW 1039. Evidence held not to have shown suicide so conclusively as to make refusal to set aside verdict against suicide error. Id. Entire absence of motive is circumstance to be considered in determining whether defendant has borne burden of showing suicide. Id.

12. Words include every case where insured kills himself by voluntary act, natural, ordinary, and direct tendency of which is to produce death, and physical consequences of which he has sufficient mental capacity to foresee. Cady v. Fidelity & Casualty Co. [Wis.] 113 NW 967. Do not include death by act of insured without any mental purpose of self-destruction. Id. If one in fit of delirium or other condition of irresponsibility, without intention to take his own life, does some act from which death results, such death is by accident and not suicide. Id. Distinction between suicide by sane and insane person lies in mental capability in one case and absence of it in other to appreciate moral nature and quality of the purpose. Id. Evidence held not to require finding of suicide. Id.

13. Mo. Rev. St. 1879, § 5982; Id. 1889, § 5855; Id. 1899, § 7896, held legitimate exertion of power by state. Whitfield v. Aetna Life Ins. Co., 205 U. S. 489, 51 Law. Ed. 895, rvg. 144 F 356. Provision in accident policy limiting amount of recovery to one-tenth of principal sum in case insured committed suicide held void under said statute. Id. Provision that, in case insured committed suicide within one year, only reserve with interest would be due on surrender of policy held void, under said statute. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

14. One who in good faith claimed to be owner in fee of land by virtue of certain will obtained policy insuring him against loss due to defects in title. Subsequently it was determined in partition proceedings that insured was only entitled to half interest in land. Held that insurer was liable for difference between value of whole property and amount awarded grantee of insured out of proceeds of partition sale, contention that he suffered no loss because he never had title to property being untenable. Foehrenbach v. German-American Title & Trust Co., 217 Pa. 331, 66 A 561. Fact that plaintiff voluntarily surrendered possession to purchaser at partition sale held not to preclude recovery, defendant having had due notice of proceedings in which sale was offered, and it not being necessary for plaintiff to wait until physically expelled. Id.

15. See 8 C. L. 414. See, also, Reformation

policy fails to express the contract as actually agreed upon, it may be reformed in a court of equity, and recovery had thereon as reformed.[16] Where the same court has both legal and equitable jurisdiction, reformation and recovery may be had in the same action.[17] In order to reform a policy by reason of the alleged mutual mistake of the applicant and the agent, it must be shown that the contract claimed to have been intended was one which the agent had authority to make.[18] The proof of the mistake must be full, clear, and decisive.[19]

§ 11. *The beneficiary and the insured.* See 8 C. L. 415—The general rules of construction apply in determining who are the beneficiaries under the policy and their respective interests in the proceeds thereof.[20] The designation of beneficiaries in the policy prevails over that in the application in case the two are inconsistent.[21] Statutes in some states authorize a married woman to insure her husband's life for the exclusive benefit of herself or of her children in case her death occurs before that of her husband.[22] The insurer is sometimes given the option to pay the pro-

of Instruments, 8 C. L. 1708; Mistake and Accident, 8 C. L. 1020.

16. Accident insurance: Mistake must be mutual. Reformation of accident policy as to amount of indemnity for loss of an eye refused where no mistake on part of company was alleged. Floars v. Aetna Life Ins. Co., 144 N. C. 232, 56 SE 915.

Fire insurance: Long form of policy held issued instead of short one through mutual mistake, entitling insured to reformation. Gray v. Merchants' Ins. Co., 125 Ill. App. 370 Decree reforming policy "as prayed in the bill of complaint" held too indefinite, since it should have set out details so that it would itself show how policy was to read. Id. In action by insurer to enforce mortgage lien on theory that it had been subrogated to rights of mortgagee to whom it had paid loss, evidence held to show that addition to policy of standard mortgage clause, providing for subrogation instead of open mortgage clause, was result of mistake, warranting reformation of policy. Gardner v. Continental Ins. Co., 31 Ky. L. R. 89, 101 SW 908. Evidence held to sustain finding that it was agreed between agent and insured when policy was issued that other concurrent insurance was to be permitted whether already existing or thereafter obtained, and that provision to that effect was omitted from policy by mistake, so that insured was entitled to have policy reformed and to recover, though he obtained additional insurance after policy was issued, and policy provided that it should be void if additional insurance was obtained without permission. Kelly v. Liverpool & London & Globe Ins. Co., 102 Minn. 178, 112 NW 870, rvg. former opinion, 111 NW 395.

17. Accident insurance. Floars v. Aetna Life Ins. Co., 144 N. C. 232, 56 SE 915.

18. Accident insurance: Reformation of policy as to amount of indemnity for loss of an eye refused where there was no evidence that soliciting agent with limited powers had authority to make contract as claimed by plaintiff. Floars v. Aetna Life Ins. Co., 144 N. C. 232, 56 SE 915.

19. Fire insurance: Evidence held not to warrant reformation on ground that clause covering loss by tornado was inserted or left in policy by mistake. Arkansas Mut. Fire Ins. Co. v. Witham [Ark.] 101 SW 721.

20. Life insurance: Where wife obtained policy on husband's life payable to herself or her assigns, or to his children in case she should die before him, held that her interest was contingent on her surviving him. Morgan v. Mutual Ben. Life Ins. Co. [N. Y.] 82 NE 438, afg. 104 NYS 185. Wife's interest held contingent on her surviving her husband. Bradshaw v. Mutual Life Ins. Co., 187 N. Y. 347, 80 NE 203, rvg. 109 App. Div. 375, 95 NYS 780. Policy was payable to insured's wife and his two children if living at time of his death, otherwise his legal representatives or assigns were to be entitled in equal parts. Wife and one child died before insured. Was no change of beneficiaries or assignment of policy. Held that words "legal representatives" meant heirs and distributees and that proceeds should be divided equally between living child and child of deceased child, to exclusion of member's executors and his second wife, particularly in view of fact that under St. 1903, § 671, proceeds were not subject to payment of insured's debts. Hall v. Ayers' Guardian [Ky.] 105 SW 911.

Accident insurance: Where wife applied and paid for accident policy insuring her husband against accidental injury in which she was to be named as beneficiary, held that fact that policy as issued might be construed as making her beneficiary only in case of husband's death, and as making disability benefits payable to him, should not in equitable action to subject disability benefits to husband's debts operate to deprive her of benefits of transaction. Weckerly v. Taylor [Neb.] 110 NW 738.

21. Endowment policy was made payable to insured, his executors, administrators, and assigns. In application under head of beneficiary was written, "self, if living, if not, equally divide among" certain nieces and nephews. Held that, on death of insured, his executor was entitled to proceeds. Burt v. Burt [Pa.] 67 A 210. Application held to confer no rights on beneficiaries named therein though it was made part of policy. Id.

22. Laws 1840, c. 80, as amended by Laws 1870, c. 277, authorizing such insurance, and providing that policy shall be payable to her for her own use, or, in case of her death before that of her husband, insurance may be made payable to her children, and that she may, in case she has no children,

ceeds of the policy to any person appearing to be equitably entitled thereto by reason of having incurred expense on behalf of the insured.[23]

Where an ordinary life policy is payable to the insured's legal representatives, he may, with the consent of the company, change the beneficiaries at pleasure [24] provided such change is not in fraud of his wife's marital rights.[25] In the absence of a provision therein to the contrary,[26] however, a policy payable to a third person gives the beneficiary a vested interest [27] of which he cannot be deprived without his

or issue of deceased children, dispose of policy by will, held to apply only to insurance contract made by woman covering life of her husband, and not to policy obtained by him on his own life, and hence, where he obtained such a policy payable to wife "if living, in conformity with the statute, and if not living to their children," and she predeceased him, and there were no children, she had no interest which could pass under her will, her interest being contingent on her surviving him. Bradshaw v. Mutual Life Ins. Co., 187 N. Y. 347, 80 NE 203, rvg. 109 App. Div. 375, 95 NYS 780.

23. Provision authorizing company to make payment to any relative of insured or to any other person appearing to be equitably entitled to same held valid and binding, and settlement with such person made in good faith for less than full amount of policy relieves company from further liability. Sheridan v. Prudential Ins. Co., 128 Ill. App. 519. Policy payable to insured's administrators, etc., provided that company might make payment to any relative or connection by marriage of insured, or to any other person appearing to it to be equitably entitled to same by reason of having incurred expense in any way on behalf of insured for his burial or any other purpose. Insurer, in good faith and before appointment of administrator, paid proceeds to one not relative of insured, but with whom he had lived for several years under agreement that he should board and clothe him in return for his services until he became of age, and who had paid premiums on policy and insured's funeral expenses. It did not appear that insurer had notice that insured had relatives who might claim proceeds. Held that such payment was defense to action by administratrix subsequently appointed. Thompson v. Prudential Ins. Co., 104 NYS 257. Expense referred to held not confined to burial expenses and expense of last illness, but word was broad enough to include expense of educating and maintaining deceased, for which person to whom payment had been made had not been reimbursed, insured having run away from him when eighteen years old. Id. Payment held proper regardless of whether all or only one or more of grounds upon which equitable claim in his behalf could be predicated were known to insurer at time. Id.

24. Gaines v. Gaines, 30 Ky. L. R. 710, 99 SW 600.

25. Substitution of insured's children for his representatives held valid as to half amount of policy, but invalid as to other half as in fraud of third wife's marital rights in that it gave children more than he could justly settle on them without disregarding her just claims. Gaines v. Gaines, 30 Ky. L. R. 710, 99 SW 600.

26. Where policy authorizes change of beneficiaries at any time upon notice to insurer, original beneficiary has no standing to contest change made in exercise of that option. Alba v. Provident Sav. Life Assur. Soc., 118 La. 1021, 43 S 663. Minor child of insured and his wife, who was original beneficiary, held in no way concerned with validity of change of beneficiaries and assignment of policy to new beneficiary, since proceeds of policy could in no event have inured to his benefit. Id. Where right to change beneficiary is reserved, Act April 15, 1868, P. L. 103, does not preclude insured from substituting creditor for dependent child as beneficiary. Barner v. Lyter, 31 Pa. Super. Ct. 435. Right of beneficiary is subject to reserved right to change beneficiary or assign policy. McNeill v. Chinn [Tex. Civ. App.] 18 Tex. Ct. Rep. 147, 101 SW 465. Interest of beneficiary is subordinate to right to change beneficiary, and change may be made without consent of original beneficiary. Fuos v. Dietrich [Tex. Civ. App.] 18 Tex. Ct. Rep. 922, 101 SW 291.

27. Where policy was payable to insured's wife, her executors, administrators and assigns, held that on her death during insured's lifetime, without having made any assignment, her interest was an asset of her estate, and persons who would be entitled under intestate laws to share in her personal estate at time of her death would also be entitled to share in proceeds of policy upon insured's death. Perry v. Tweedy, 128 Ga. 402, 57 SE 782. Fact that policy might terminate by failure to pay premiums or on other grounds before insured's death held not to affect rule. Id. Estate of insured may participate in proceeds if he is, under laws of descent, entitled to share in beneficiary's estate. Id. Fact that policy was not payable until after insured's death held not to prevent him from being interested in assets of wife's estate. Id. Wife having died without leaving any child or descendants of children, held that husband was her sole heir under Civ. Code 1895, § 3354, and his administrator was entitled to recover proceeds of policy from her administrator to be distributed as assets of his estate, no question being raised as to payment of her debts, if any. Id. Policy was payable to insured's children, or in case no children or descendants of children survived him, to his legal representatives. Was no reservation of right to change beneficiary, but insured had right to surrender policy at certain specified times and in specified manner and receive its cash surrender value. Held that interest of children was vested subject to be defeated only in case they died before insured or if latter surrendered policy at time and in manner prescribed. Townsend's Assignee v. Townsend [Ky.] 105 SW 937. Where beneficiary dies before insured, and latter makes no other or further designation,

consent.[28] In any event his interest becomes vested on the death of the insured.[29] A reserved right to change the beneficiary has been held not to include a right to surrender the policy for cancellation.[30] The provision for a particular manner of evidencing a change is for the benefit of the insurer, who alone can invoke it.[31] No action on the part of the insured can, however, be construed as working a change unless it evidences a clear intent on his part that it shall so operate.[32] On the termination of a contract whereby the policy is appropriated to a particular purpose, the right to the proceeds reverts to the beneficiary named therein.[33]

*Rights of employe under employer's liability policy.*See 8 C. L. 417—Where the policy is a contract of indemnity for the benefit of the insured, an employe cannot recover thereon against the insurer on the insured becoming insolvent before a judgment recovered against him by said employe is paid.[34] Policies sometimes insure an employer as indemnity for the benefit of employes.[35]

*Rights of mortgagees, creditors, trustees, etc., under loss payable clauses.*See 8 C. L. 417—A provision making the loss payable unconditionally to a creditor of the insured amounts to an appointment of him as the person who is to receive payment in case of loss, and makes him a trustee, so that he may recover on the policy in his own name whether he has an insurable interest or not.[36] An open mortgage clause making the loss payable to a mortgagee as his interest may appear makes the latter the agent of the insurer to receive payment of the insurance to the extent of his interest in the property destroyed.[37] The mortgagee cannot, in such case, apply

proceeds go to beneficiary's estate on death of insured. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662.

28. Perry v. Tweedy, 128 Ga. 402, 57 SE 782; McNeill v. Chinn [Tex. Civ. App.] 18 Tex. Ct. Rep. 147, 101 SW 465.

29. Interest passes to his assignee where right to change beneficiaries has not been previously exercised. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452.

30. Consent of beneficiary is necessary. Holder v. Prudential Ins. Co. [S. C.] 57 SE 853.

31. Instrument assigning all insured's interest in policy to third person held in effect a substitution of new beneficiary which was effective as against original beneficiary, though substitution was not made in manner prescribed, company making no objection on that ground. Fuos v. Dietrich [Tex. Civ. App.] 18 Tex. Ct. Rep. 922, 101 SW 291. May be waived by insurer, and when so waived original beneficiary cannot object that it was not followed. McNeill v. Chinn [Tex. Civ. App.] 18 Tex. Ct. Rep. 147, 101 SW 465.

32. Neither paper executed by insured nor his action with respect thereto held to show clear intent on his part to exercise reserved right to have creditor substituted eo instanti for his children as beneficiary, or to do more than to transfer such right as he could by a bare assignment. Barner v. Lyter, 31 Pa. Super. Ct. 435. In absence of such intent, assignment of policy in payment of or as security for debt cannot be given effect of change of beneficiary, though insurer does not object that change has not been made in prescribed manner. Id.

33. In controversy over right to proceeds of life policy payable to insured's estate, but which it had been agreed between insured and his partner was to be paid to partnership, evidence held to show that partnership had been dissolved and all matters between partners settled prior to insured's death, so that proceeds were payable to insured's widow as executrix and sole legatee. Osius v. Davis [C. C. A.] 156 F 569.

34. Policy held one of indemnity for benefit of insured. Carter v. Aetna Life Ins. Co. [Kan.] 91 P 178.

35. Policy held not to inure to benefit of employe whose name did not appear in attached schedule and who was not an employe of plaintiff when policy was written. United Zinc Cos. v. General Acc. Assur. Corp., 125 Mo. App. 41, 102 SW 605. Fact that his name appeared on schedule of names covered by insurance during month commencing after his death held not to authorize recovery for his death. Id.

36. Vancouver Nat. Bank v. Law Union & Crown Ins. Co., 153 F 440. Where loss was made payable to third person, absolutely, parol evidence held inadmissible to show that it was intention to make it payable to him as his interest might appear. Brecht v. Law, Union & Crown Ins. Co., 153 F 452.

37. Gardner v. Continental Ins. Co., 31 Ky. L. R. 89, 101 SW 908. Mortgagee who had assigned note and mortgage before loss with guaranty of payment held to have insurable interest at time of loss so that it could recover on policy notwithstanding assignment, particularly where it had also advanced money to pay interest for benefit of mortgagor and there was stipulation requiring mortgagor to keep premises insured for benefit of mortgagee and its assignees. Mahoney v. State Ins. Co., 133 Iowa, 570, 110 NW 1041. Policy procured by mortgagor for benefit of mortgagee held available to mortgagee where mortgage required mortgagor to insure for his benefit, regardless of which party had possession of it. Union Institution for Savings v. Phoenix Ins. Co. [Mass.] 81 NE 994. Fact that mortgagee

the proceeds of the policy to the payment of the mortgage debt until the same becomes due unless the mortgagor consents to such a course.[38] An offer to pay the mortgagee the amount of his mortgage is not available as a defense unless made within a reasonable time.[39] One cannot recover on a policy payable to himself as his interest may appear where he has procured the policy in the name of another without the latter's knowledge or consent.[40] In the absence of a provision in the policy to the contrary,[41] any act of the insured which would avoid the policy as to him will ordinarily prevent a recovery by a mortgagee or other person to whom the loss is made payable as his interest may appear.[42] Where the policy has been forfeited as to the interest of the mortgagor, he has no interest in the proceeds thereof though it is still valid as to the mortgagee.[43] The mortgagee is sometimes required to notify the insurer of any change of ownership or occupancy.[44] The insurer's right to be subrogated to the rights of the mortgagee is treated in a subsequent section.[45]

Insurance by bailee or agent. See 4 C. L. 192—Where an agent in possession of

had not been informed at time of fire of issuance of policy held not to affect his right to recover on it. Id.

38. Mortgagee held bound to hold proceeds and apply it to mortgage debt as fast as it became due, and where he failed to make such application law would do so. Thorp v. Croto, 79 Vt. 390, 65 A 562.

39. Insurer's offer to pay mortgagee, to whom policy was payable as his interest might appear, amount of mortgage if he would assign same to it, made after mortgagee had commenced suit on policy, and without any offer to pay interest or costs of suit, held not made within reasonable time, and hence not available as defense. Union Institution for Savings v. Phoenix Ins. Co. [Mass.] 81 NE 994.

40. Holder of notes secured by deed of trust who procured insurance, payable to himself as his interest might appear, on building in name of person who had contracted to purchase building without said purchaser's knowledge or consent, held not entitled to recover thereon. Cole v. Niagara Fire Ins. Co. [Mo. App.] 103 SW 569.

41. Where policy provided that no act or default of any person other than mortgagee or his agents or those claiming under him should affect his right to recover in case of loss, held that subsequent conveyance of equity of redemption by mortgagor did not affect mortgagee's right to recover under policy. Union Institution for Savings v. Phoenix Ins. Co. [Mass.] 81 NE 994. Provision held not limited to acts or defaults before fire, but to include all acts or defaults of mortgagor which otherwise might affect mortgagee's right to recover, such as failure to furnish sworn statement setting forth particulars of loss, or to comply with provisions as to arbitration. Id. Breach of condition as to use and occupation of premises held not available against mortgagees. Moore v. Sun Ins. Office, 100 Minn. 374, 111 NW 260. In action by mortgagee on policy, containing similar provision, pleas seeking to avoid policy for various acts and defaults of mortgagor and owner, as misrepresentations, failure to furnish proofs of loss, etc., held bad on demurrer. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053. Policy provided that it should be void if interest of insured was other than sole or unconditional ownership. Property was sold and policy assigned to purchaser with consent of company. Mortgage clause provided that interest of mortgagee should not be invalidated by any change in ownership of property. Held, that, since transfer did not invalidate policy, it was immaterial so far as mortgagee was concerned whether assignee was sole and unconditional owner at time of fire. Id. Where policy provided that if, with consent of company, an interest thereunder should exist in favor of mortgagee or any person or corporation having an interest in subject of insurance other than interest of insured as described therein, " the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto," held that preceding conditions applied in all events where policy was made payable to third person, but as modified by whatever might be written upon slip attached to policy, and that it was not necessary to again set them out, particularly where policy was made payable unconditionally to creditor, and company had not agreed or stipulated that latter had any interest in property. Vancouver Nat. Bank v. Law, Union & Crown Ins. Co., 153 F 440.

42. Mortgagee in such case stands in shoes of insured, and any defense available against latter is good against former. Gardner v. Continental Ins. Co., 31 Ky. L. R. 89, 101 SW 908. Payment to mortgagee waives all defenses known to insurer, as false representations by insured in procuring policy. Id. Payment to mortgagee operates to extinguish mortgage debt and lien to extent that sum paid will satisfy it and liability of insurer to insured, and there is no right of subrogation on part of insurer or any right in mortgagee which it can assign to insurer. Id.

43. Policy taken out by mortgagee to protect his own interest. Gillespie v. Scottish Union & National Ins. Co., 61 W. Va. 169, 56 SE 213.

44. Failure to give notice of change of occupancy resulting from dispossess proceedings against tenant of insured building held to preclude recovery by mortgagee. Adolph G. Hupfel Sons v. Boston Fire Ins. Co., 104 NYS 659.

45. See § 23, post.

goods belonging to his principal is absolutely and unconditionally liable to the latter for their value in case of their destruction by fire, the proceeds of insurance procured thereon by him in his own name is not a trust fund for the benefit of the principal, but belong to the agent individually.[46]

§ 12. *Policy value in cash or loans, and right to share in surplus before loss.* See 8 C. L. 418—The right of the insured to surrender his policy and obtain the cash value thereof [47] and the amount to which he is entitled on such surrender [48] depends on the terms of the policy. The right is ordinarily personal to the insured, so that it cannot be delegated to the prejudice of a beneficiary having a vested interest,[49] and a mere delegation, even if authorized, will not affect the rights of such a beneficiary until the delegated power is actually exercised.[50]

In lending money to its policy holders, an insurance company occupies exactly the same position as any other money lender and is entitled to collect the amount of the debt with legal interest and no more,[51] and provisions of the policy giving it the right to settle on a different basis with a borrowing policy holder, in determining the amount of extended insurance to which he is entitled on default in the payment of premiums, from that adopted under similar circumstances in the case of a policy holder who is not a borrower, thereby enabling it to collect more than its debt and legal interest, are contrary to public policy and void.[52]

Dividends should be paid out of surplus and profits, and cannot lawfully be paid out of capital.[53] A resolution by a mutual company directing the distribution of a portion of its surplus among its members operates to at once separate said sum from the corporate assets, and to make it the property of those who are then members.[54]

46. Insurance held not to have affected or added to agent's obligation to principal upon his contract, but liability on policy was indebtedness to agent subject to his disposition and liable for his debts like any other money or property belonging to his estate. Bradley & Co. v. Brown [Neb.] 112 NW 331.

47. Held that, as against named beneficiaries, having vested interest, right of insured to surrender policy and receive value thereof could only be exercised at times and in manner therein specified. Townsend's Assignee v. Townsend [Ky.] 105 SW 937.

48. Policy held absolute contract to pay as cash surrender value sum specified in table printed on back of policy and called "illustration of values," and that said table was not mere estimate. Sweetland v. Bankers Life Ins. Co., 105 NYS 627.

49. Townsend's Assignee v. Townsend [Ky.] 105 SW 937.

50. Held not to give right to proceeds to assignee for creditors. Townsend's Assignee v. Townsend [Ky.] 105 SW 937.

51. Provisions requiring payment of larger sum that amount borrowed with six per cent interest will not be enforced, no matter how worded. Emig's Adm'r v. Mutual Benefit Life Ins. Co. [Ky.] 106 SW 230. Note given by insured to insurer for money borrowed on security of policy, and providing that if it was not paid at maturity insurer might cancel policy, pay note out of cash surrender value, and apply balance to purchase of paid up insurance, held usurious in so far as it authorized nsurer to deduct twenty-five per cent of reserve as surrender charge. Penn Mut. Life Ins. Co. v. Barnett's Adm'r, 30 Ky. L. R. 434, 99 SW 228, for former opinion see 29 Ky. L. R. 1234, 96 SW 1120.

52. Policy provided that in case of default in payment of premiums entire net reserve should be applied to purchase of extended insurance unless insured elected to take paid-up policy. Was further provided that if there was any loan on policy such indebtedness should be paid out of cash surrender value, and remainder paid in cash, or that a value would be allowed in form of extended or paid-up insurance, amount to be applied for that purpose being correspondingly reduced in ratio of indebtedness to full cash surrender value. Held that latter provision was void, and that, on default of borrowing member, insurer was required to deduct debt with legal interest from net reserve and apply balance to purchase of extended insurance. Emig's Adm'r v. Mutual Benefit Life Ins. Co. [Ky.] 106 SW 230.

53. Pen. Code, § 594, subd. 1, Laws 1892, c. 690, § 83. Life insurance. Berryman v. Bankers' Life Ins. Co., 117 App. Div. 730, 102 NYS 695. Policy holders held not entitled to recover dividend declared, which would necessarily have to be paid out of capital. Id.

54. Is payable to each on demand when amount to which he is entitled has been ascertained. Zinn v. Germantown Farmers' Mut. Ins. Co. [Wis.] 111 NW 1107. Each of such persons held entitled to share in proportion to sum he had at any time paid into treasury whether during term of his existing policy or any prior ones, and without regard to whether his membership had been continuous or broken by greater or less intervals, and without considering how much of his payments had at any time been in excess of expenses properly chargeable against them, and thus had directly contributed to the surplus. Id.

The right of the insurer to apply any part of the surplus in diminution of premiums [55] and whether accumulated surplus belongs to the insured or the beneficiary [56] depends on the terms of the policy. Tontine policies sometimes give the insured the right to have the tontine dividend applied in any one of several ways at his election.[57] The relation between a policy holder in a stock corporation having a contract right to share in the surplus profits and the corporation is that of debtor and creditor, and not that of a member of a mutual company and the company itself.[58] Hence the courts will take jurisdiction of a suit by a resident policy holder against a foreign stock company to enforce such right.[59]

§ 13. *Options and privileges under policy.* See 8 C. L. 420—Life policies frequently provide that on default in the payment of premiums after a certain number of premiums have been paid, the insured's share of the reserve fund shall be applied to the purchase of a paid up policy,[60] or extended insurance,[61] or that he shall be entitled to a paid up policy for a sum in proportion to the number of premiums paid.[62] Statutes in some states provide that under such circumstances the insured's proportionate share of the surplus, including dividend additions, shall be used in the purchase of extended insurance.[63] In others all policies are required to contain certain prescribed nonforfeiture provisions under penalty.[64] There is a conflict of

55. Policy held not to give society such right without consent of other parties to contract. Provident Sav. Life Assur. Soc. v. Marshall, 125 Ill. App. 101. Quarterly receipts held not to show that it was being so applied, so as to estop beneficiary by acquiescence. Id.

56. Beneficiary or her representative held proper party to recover surplus. Provident Sav. Life Assur. Soc. v. Mashall, 125 Ill. App. 101.

57. Election required to be made within specified time, held that his election was completed when insured mailed letter to company signifying it in proper form and there was complete and irrevocable contract in that respect, though insured died before letter was received by company. Northwestern Mut. Life Ins. Co. v. Joseph, 31 Ky. L. R. 714, 103 SW 317.

58. Where directors or trustees are elected by stockholders and not by policyholders, however inconsiderable amount of stock may be in comparison with other assets. Peters v. Equitable Life Assur. Soc. [Mass.] 81 NE 964.

59. However inconsiderable amount of corporate stock of corporation may be in comparison with its other assets, fact that it is corporation having capital stock and that its directors or trustees are elected by its stockholders and not by policyholders is decisive of relation between parties, which is that of debtor and creditor, and not that of member of mutual company and company itself. Peters v. Equitable Life Assur. Soc. [Mass.] 81 NE 964. Inconveniences to which corporation would be subjected by reason of multiplicity of books and complexity of accounts involved held not matters which can be taken into account by court when plaintiff is resident, and as such has standing in court as matter of right, and suit is brought to enforce contract made between him and foreign company over which court is given jurisdiction by statute. Id.

60. Held that insurer had no right to deduct twenty-five per cent of reserve as surrender charge regardless of custom to contrary but was bound to apply full reserve to purchase of paid up policy. Penn. Mut. Life Ins. Co. v. Barnett's Adm'r, 30 Ky. L. R. 434, 99 SW 228, for former opinion see 29 Ky. L. R. 1234, 96 SW 1120. Ky. St. 1894, § 659, as amended in 1892, held not to entitle insurer to deduct surrender charge of not more than one-third of reserve. Id. Statute held restricted in its application to policies issued after its enactment. Id. Indebtedness of insured to insurer held to be credited on reserve as of date of lapse. Id.

61. Where insured borrowed money from company to pay 1902 premium, and defaulted in payment of premiums due March 20, 1903, and March 20, 1904, held that he was entitled to dividend for year 1903 in computing amount available for extended insurance. Emig's Adm'r v. Mutual Benefit Life Ins. Co. [Ky.] 106 SW 230. Table showing extension of insurance construed and extension determined. Dakan v. Union Mut. Life Ins. Co., 125 Mo. App. 451, 102 SW 634.

62. Default in payment of renewal note representing unpaid part of each annual premium on policy held to have deprived beneficiary of any right to benefit under nonforfeiture clause. Hoar v. Union Mut. Life Ins. Co., 118 App. Div. 416, 103 NYS 1059. Provisions for application of advance dividends to payment of premiums, for cash loans, and for automatic nonforfeiture construed, and held that insured, having obtained 30 per cent advance on payment of two premiums, which was lien on policy, and never having paid same in cash, and being in default for third premium at time of his death, was not entitled to cash loan or automatic nonforfeiture. Shumaker v. Security Life & Annuity Co., 153 F 332.

63. Term "dividend additions" as used in N. Y. Laws 1892, p. 1969, c. 690, § 88, held to mean surplus. United States Life Ins. Co. v. Spinks, 31 Ky. L. R. 185, 103 SW 335, former opinion 29 Ky. L. R. 960, 96 SW 889.

64. Rev. St. 1901, par. 809, held not to read such provisions into any policy but merely to prescribe penalty for failure to insert

authority as to whether time is of the essence of a provision requiring the surrender of the policy within a specified time in order to entitle insured to the benefit of nonforfeiture provisions.[65] The insured is sometimes given certain optional rights in lieu of the other benefits under the policy in case he becomes permanently disabled.[66]

§ 14. *Assignments and transfers of benefits or insurance.*See 8 C. L. 421 *Accident insurance.*—An assignment after maturity of the policy is valid if based on a sufficient consideration.[67]

*Life insurance.*See 8 C. L. 421—Where the policy is payable to insured's estate, he may, with the consent of the company, assign it at his pleasure, provided such assignment is not in fraud of his creditors.[68] He may also assign a policy payable to a third person as beneficiary without the latter's consent, where the right to do so is reserved in the policy,[69] but not where the beneficiary has a vested interest.[70] There is a conflict of authority as to the validity of an assignment to one having no insurable interest in the life of the insured.[71] No particular form of words is es-

them. Equitable Life Assur. Soc. v. Babbitt [Ariz.] 89 P 531.

65. Arizona: Where insured failed within 6 months after lapse to surrender policy and request either cash value or nonparticipating paid up policy, held that there was nothing due under policy. Equitable Life Assur. Soc. v. Babbitt [Ariz.] 89 531.

Iowa: Provision making surrender of policy duly receipted within six months after default a condition precedent to issuance of paid up policy, and that premiums paid should otherwise be forfeited, held valid. Collman v. Equitable Life Assur. Soc., 133 Iowa, 177, 110 NW 444. Held that under Code, § 3447, insured's right of action to compel issuance of paid up policy was barred by limitations where suit was not commenced until more than ten years and six months after default. Id. Delay in making demand and returning policy held not to have tolled limitations. Id.

Kentucky: Time is not of essence of such a provision, and insured is entitled to paid up policy though he fails to demand one within time fixed by contract of insurance, provided demand is made within reasonable time. Dawson v. Equitable Life Assur. Soc. [Ky.] 105 SW 422. Demand must be made within five years, or recovery will be barred by laches. Id. Letter written by insurer held not an unequivocal denial of all liability to issue paid up policy after six months so as to dispense with necessity for any further demand, and did not excuse laches in not demanding policy within five years. Id. Fact that company, on expiration of six months, marked policies void and reported them to insurance commissioner as canceled held not to have excused laches, since such fact could not have influenced conduct of insured in any way had he known of it, which was not alleged. Id. Nor did such action on part of company render demand useless formality, since it could have been forced to issue policy at any time within five years. Id. Fact that demand would have been refused held immaterial for same reason. Id. Delay for more than five years held to bar right. Wilson v. Washington Life Ins. Co., 31 Ky. L. R. 717, 103 SW 339.

66. Policy provided that upon acceptance by company of due and satisfactory proof that insured had become "totally and permanently incapacitated," he should be entitled to one of two options in lieu of other benefits, one of which was that premiums payable during remaining years should cease or be remitted during continuance of incapacity and insurance should be payable as endowment at age of 80. Held that fact that insured was taken sick and died within few weeks did not excuse him from payment of premium notes falling due pending said sickness. Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 SE 892. Where neither of said options was exercised and due satisfactory proof was not made, held that benefits provided for by either of said options did not become effective. Id.

67. Where, prior to commencement of suit, husband assigned all sums of money accrued or which might accrue to wife, held that no reformation of policy was necessary if any part of benefits was by mistake payable to him under terms of policy. Weckerly v. Taylor [Neb.] 110 NW 738. Assignment held valid as to husband's creditors, no further consideration than original payment of premium by wife being necessary. Id.

68. Transfer by insolvent to his wife and children of policies payable to his estate held void as in fraud of creditors. Lytle v. Equitable Ins. Co., 5 Ohio N. P. (N. S.) 28.

69. Policy held to reserve power to assign it as security for debt without consent of beneficiary. McNeill v. Chinn [Tex. Civ. App.] 18 Tex. Ct. Rep. 147, 101 SW 465.

70. Where named beneficiaries had vested interest subject to be defeated only in case they died before insured, in which case proceeds were to go to his personal representatives, or in case insured exercised his option to surrender policy at times and in manner specified therein, and policy provided that it was not assignable, held that insured could not assign policy so as to prejudice rights of beneficiaries, and that neither his interest in policy nor his right to surrender it passed to his assignee under general assignment for benefit of creditors, proceeds being exempt from liability for his debts under St. 1903, § 655. Townsend's Assignee v. Townsend [Ky.] 105 SW 937.

71. New York: One may insure his own life and provide that policy shall be payable to any one whom he may appoint, or to whom

sential to effect an assignment.[72] The assignor must, however, part with the power of control over the policy, and the evidence of assignment must be so delivered as to be irrevocable by the assignor.[73] A form of assignment prescribed by the policy is for the benefit of the insurer and may be waived by it, and when so waived the original beneficiary cannot attack the assignment on the ground that it was not followed.[74] Since the policy is a chose in action, it may be transferred by delivery without writing,[75] but where by its terms it appears that mere delivery will not give any right as against the beneficiary named therein, the presumptions arising from bare possession are rebutted.[76] An assignment absolute in form may be shown to have been made as security, in which event it will be valid only to the extent of the indebtedness secured.[77] One to whom the policy has been assigned or pledged as security is entitled to retain possession thereof until his debt is paid, even though it is barred by limitations.[78] The rights and liabilities of the assignor and assignee depend on the terms of the contract of assignment.[79] A subsequent

he may assign the policy. Reed v. Provident Sav. Life Assur. Soc. [N. Y.] 82 NE 734, afg. 112 App. Div. 922, 98 NYS 1111.

Federal courts: One cannot assign policy on his own life to one having no insurable interest. Mutual Life Ins. Co. v. Lane, 151 F 276. Ga. Civ. Code, 1895, §§ 2114, 2116, providing that life insured may be that of the assured or of another in whose continuance the assured has an interest, and that assured may direct payment of policy to be made to his assignee, held not to authorize one to transfer policy on his own life to one having no insurable interest, notwithstanding holdings of courts of that state to contrary. Id. Statute held merely declaratory of general principle of commercial jurisprudence so that Federal court was not bound by construction adopted by highest state court writing into it fundamental change in such general law. Id. Good faith of transaction held doubtful. Id.

72. Assignment is substantially a transfer, actual or constructive, with clear intent at the time to part with all interest in thing transferred, and with full knowledge of rights so transferred. Ormond v. Connecticut Mut. Life Ins. Co. [N. C.] 58 SE 997. Evidence held sufficient to show assignment of all testator's interest in policy payable to wife and children, to children, including any interest derived by him through his wife who predeceased him. Id. Decedent took out tontine policy giving him option at end of tontine period and without consent of beneficiary, to withdraw accumulated surplus in cash. Original beneficiary died and policy thereby inured to decedent's benefit. He thereafter assigned policy to his wife, assignment providing that it should be void if he survived tontine period. At end of said period he exercised option mentioned and received certain sum in cash, and continued policy at reduced premiums, policy and assignment remaining in his custody. Evidence tended to show that wife joined in execution of papers necessary to effect option exercised, that agent stated that policy would remain in force and that she would remain beneficiary, and that it was insured's understanding that such was case. Held that wife was entitled to proceeds of policy without new assignment. In re Sanson's Estate, 217 Pa. 203, 66 A. 334. Instrument held to show intention that so much of proceeds of policy should go to defendant as might be necessary to pay insured's indebtedness to him, and that any balance should go to insured's wife instead of beneficiary named in policy, so that, where amount of indebtedness exceeded amount of policy at time of insured's death, defendant was entitled to proceeds regardless of whether instrument was to be regarded as change of beneficiaries or an assignment. McNeill v. Chinn [Tex. Civ. App.] 18 Tex. Ct. Rep. 147, 101 SW 465.

73. Evidence held to show neither actual nor constructive delivery of assignment to defendant nor to anyone for her benefit. Coffman v. Liggett's Adm'r [Va.] 59 SE 392.

74. McNeill v. Chinn [Tex. Civ. App.] 18 Tex. Ct. Rep. 147, 101 SW 465.

75. Stewart v. Gwynn [Ind. App.] 82 NE 1000.

76. Burden is on person claiming ownership to show why provisions of policy should be disregarded. Stewart v. Gwynn [Ind. App.] 82 NE 1000. Where policy was payable to executors, administrators, or assigns, and it appeared that there had been no change of beneficiary or assignment of policy in manner prescribed therein, held that, upon face of policy, insured's administrator was entitled to proceeds, and could recover possession thereof as against third person in absence of showing waiver by insurer of its rules as to change of beneficiaries or assignment, or an excuse for failure of insured to comply therewith. Id.

77. Contention that policy was not assigned for all that it called for, but was merely pledged to secure loan for smaller amount, held not supported by evidence. Alba v. Provident Sav. Life Assur. Soc., 118 La. 1021, 43 S 663.

78. Rule held not changed by Civ. Code § 2911. Puckhaber v. Henry [Cal.] 93 P 114.

79. Contract between beneficiaries of life policy and assignee held to require latter, in consideration of certain annual payments, to pay all dues and assessments until maturity of policy, and that he had no right to discontinue paying them before that time, and that where he did so he was guilty of breach of contract. Vaughan v. Reddick [Ky.] 106 SW 292. There being no agreement to that effect, neither beneficiaries nor insured was bound to send notices of assessment to assignee, and their failure to do so did not excuse latter from paying assess-

bona fide assignee of the legal title for value is entitled to priority over a prior assignee having a mere equity.[80] One procuring the issuance of a duplicate policy and a change of beneficiaries through fraud and forgery cannot recover on the policy upon its subsequent assignment to him by the new beneficiary.[81] The insurer may interpose the same defense to a suit on the policy by the assignee of the beneficiary as it could have interposed against the beneficiary.[82]

Life policies having an actual surrender value pass to the insured's trustee in bankruptcy.[83]

Fire insurance.[See 8 C. L. 424]—Policies frequently provide that they shall be void if assigned before loss without the consent of the insurer.[84] An unconditional assignment otherwise valid gives to the assignee an absolute right to the proceeds of

ments. Id. Measure of damages for breach by assignee held cash value of policy at time of his default. Id. Insured applied to defendant for endowment policy under plan whereby face of policy was paid to insured at once, he giving security for premiums and interest, and at end of endowment period or insured's previous death, he or his representative was to retain money and insurer was to return certificate. Applicant was at first refused as substandard risk, but company afterwards agreed to issue policy on condition that he obtained and assigned to it another policy on his life, which he did, assignment being unconditional. He also gave bond and assigned life estate in realty to secure payment of premiums and interest. Held that assigned policy was reinsurance of insured's life for defendant's benefit, and its assignment was not pledged to secure fulfillment of bond, and hence on insured's death proceeds belonged to defendant. New York Finance Co. v. United Security Life Ins. & Trust Co. [Pa.] 66 A 984.

80. Assignment of so much of policy as would pay insured's indebtedness to defendant was never delivered, and assignee had no knowledge thereof until after insured's death, and did not even know that insured was indebted to her. Formalities required by company were not complied with. Held that subsequent assignee for value and without notice, whose assignment was made in manner prescribed by policy, was entitled to priority. Coffman v. Liggett's Adm'r [Va.] 59 SE 392.

81. Insured falsely represented that policies had been stolen from him, when they were in fact in possession of beneficiary, and procured issuance of duplicates by forging beneficiary's name to indemnity bond. Subsequently at instance of plaintiff, he procured change of beneficiaries so as to make policies payable to his executors' administrators, and assigns, forging beneficiary's name to request for change. Thereafter plaintiff on behalf of one M. loaned money to plaintiff, taking assignment of policies to M. as collateral security, and guarantying payment for a consideration. After plaintiff learned of forgeries he was instrumental in having loan renewed, and subsequently policies were assigned to him by M. Held that plaintiff, not being an innocent purchaser, could not recover on policies Black v. Mutual Life Ins. Co., 117 App. Div. 449, 102 NYS 722. Plaintiff, having himself induced company to make change of beneficiaries, held not in position to contend that company was estopped to question its validity though he had guaranteed loan before he knew of forgeries. Id. Company held to have been under no obligation to inform plaintiff of forgeries when it discovered them, no liability having then matured against it. Id. Plaintiff held in no better position, so far as enforcing duplicates was concerned, than insured would have been, and hence defendant could not be held liable on theory that its action enabled wrong to be perpetrated. Id.

82. Right of assignee of beneficiary to recover, like that of beneficiary, is derived from insured, and rests upon validity of contract. Rev. Laws, c. 173, § 4. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452.

83. Bankrupt Act July 1, 1898, § 70, (30 St. L. 565, c. 541), providing that when bankrupt has insurance policy payable to himself, his estate, or personal representatives, he may, within 30 days after its cash surrender value has been ascertained and stated to trustee by insurer, pay or secure to trustee sum so stated, and hold policy free from claims of creditors, construed, and held that words "cash surrender value" include policies possessing cash value which would be recognized and paid by insurer on surrender of policy, though containing no express stipulation as to surrender value, as well as policies containing such a stipulation. Hiscock v. Mertens, 205 U. S. 202, 51 Law. Ed. 771, afg. In re Mertens [C. C. A.] 142 F 445. Provision held applicable to tontine policies, so that bankrupt was entitled to keep them on paying or securing to trustee amount which company would have paid on their surrender though tontine period had nearly expired, and on its expiration insured would be entitled to much larger sum. Id. Fact that policies had not lapsed, and that companies would not accept their surrender and pay cash value until they had lapsed, held immaterial. Id.

84. Assignment or hypothecation of $2,000 policy as collateral security for extension of time on debt of $300 held not to constitute such an assignment as would avoid policy, since legal title remained in insured. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245. Transfer of all assets and business of corporation, and policy to new corporation formed for that purpose, among others, held to have worked forfeiture under non-assignment clause. Cremo Light Co. v. Parker, 118 App. Div. 845, 103 NYS 710.

the policy.[85] An assignment absolute in form may be shown to have been intended as security only.[88] One to whom the policy has been assigned as collateral security may sue thereon in his own name.[87] He has, however, no power to compromise, settle, or discharge, the obligation arising under the policy beyond the extent of his own interest therein, and such an attempted settlement made with knowledge on the part of the insurer of the extent of the assignee's interest, and of the rights of the assignor, does not prejudice the assignor.[88]

§ 15. *Change or substitution of contract, or risk, or of conditions thereupon.*[See 8 C. L. 424]—The parties may at any time by mutual consent modify the terms of their contract or substitute another therefor.[89] The acts of the company's agent in this regard are binding on it if within the actual or apparent scope of his authority.[90]

The right of mutual companies to increase their assessment rates depends on the terms of their contracts.[91] A general agreement to be bound by future by-laws does not bind a member to comply with by-laws subsequently adopted which in any manner impair his contract of insurance, or impose upon him an additional burden.[92] Changes in the laws will not be given a restrospective effect unless some imperative reason demands such construction.[93]

85. Vendee of land paid part of purchase price and went into possession under contract of sale. Vendor assigned to vendee policy covering buildings on land previously procured by vendor. There was no agreement requiring premises to be insured for benefit of vendor. Held that, on destruction of buildings before balance of purchase price became due, vendee was entitled to proceeds of policy, though he was then insolvent. Zenor v. Hayes, 228 Ill. 626, 81 NE 1144, afg. 130 Ill. App. 113.

86. Parol evidence held admissible for that purpose. Munson v. German Fire Ins. Co., 33 Pa. Super. Ct. 551. Evidence held sufficient to establish that fact, even if insurer could raise question. Id. Where neither policy nor assignment, made with company's consent, contained any restriction on purposes for which assignment was made, held that assignment absolute in form would be treated as security only without necessity of reformation, when such was intention of parties. Lenagh v. Commercial Union Assur. Co. [Neb.] 110 NW 740.

87. Policy was issued to vendee, and, with company's consent, assigned to vendor as collateral security for balance of purchase price. At time of fire purchase price had been paid in full, but legal title had not been transferred to vendee. Held that company could not, in action on policy by vendor, object that vendor had no insurable interest, but that latter held policy as trustee for vendee, and could recover thereon in his own name, vendee making no objection. Munson v. German Fire Ins. Co., 33 Pa. Super. Ct. 551.

88. Policy covering building and personalty was assigned with insurer's consent to one having mortgage on building. Assignment was absolute in form, but intended as security merely, and insurer had knowledge of that fact. Held that settlement of loss with assignee and release by latter of insurer from all further liability did not preclude insured from recovering loss on personalty. Lenagh v. Commercial Union Assur. Co. [Neb.] 110 NW 740.

89. Insurer held not to have declined insured's proposition for reduction of his policy, or to have made him counter proposition, but that there was merely delay in negotiations on question whether insurer was first entitled to payment of assessment at old rate, so that where insurer canceled old policy and ordered issuance of new one for reduced amount there was completed contract, though insured died before he received new policy. Hartford Life Ins. Co. v. Milet, 31 Ky. L. R. 1297, 105 SW 144. Fact that beneficiary at first refused to receive new policy and commenced action on old one, which she subsequently dismissed without prejudice, held not to affect her right to recover on new one, which according to insurer's original contention she had right to do. Id.

90. Policy held to give agent authority to modify provisions as to other insurance, so that his acts in changing policy so as to remove limit as to other insurance and in striking out 80 per cent. clause was binding on company, and policy as so modified was valid contract, and properly admitted in evidence. Continental Ins. Co. v. Reynolds [Md.] 68 A 277.

91. Directors held to have power to readjust rates of assessment whenever necessary to carry out objects of organization, provided same was done justly and equably as between members and company. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F 461. Increase of assessments held not to have been shown to have been arbitrary, unfair, excessive, or discriminatory against defendant. Id.

92. Not bound by by-law providing that association should not be liable for accidental injuries unless they left visible marks on body. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557.

93. Policy provided that it should be void if insured committed suicide within two years from date thereof. Thereafter directors, as they concededly had power to do, adopted new forms of policies, including class issued to insured, in which limit of

§ 16. *Rescission, forfeiture, cancellation, and avoidance. A. By agreement.* See 8 C. L. 426 *Burglary insurance.*—Where no manner of giving notice of cancellation is prescribed, its actual receipt by the other party must be shown.[94]

Fire insurance See 8 C. L. 426 policies generally provide that they may be canceled at any time by the insurer on giving a specified number of days' notice[95] to the insured.[96] There may be an immediate cancellation by agreement before the expiration of the specified time.[97] Whether payment or tender of the unearned premium is a condition precedent to cancellation depends on the terms of the policy.[98] A cancellation made under mistake of fact will be set aside.[99]

Life insurance See 8 C. L. 427 contracts may be canceled at any time by mutual consent,[1] and when so canceled a concurrence of both parties is necessary to the revival of liability thereunder.[2]

nonliability in case of suicide was reduced to one year, and premium rate was increased. Held that resolution making change did not operate retrospectively, and insured's suicide during second year avoided policy. Sexton v. National Life Ins. Co. [Colo.] 90 P 58. Rule that mutual company must accord to all its members same privileges and advantages upon same terms, subject to same obligations, held not to require different construction, since to entitle existing policy holders to advantages of new policies they would have to pay increased premium, which insured was not, and could not be, required to do. Id.

94. Policy providing that insured might require its cancellation at any time. Bankers' Mut. Casualty Co. v. People's Bk., 127 Ga. 826, 56 SE 429.

95. Notice may be oral when policy does not require it to be in writing. Davidson v. German Ins. Co. [N. J. Err. & App.] 65 A 996. Where no particular form of notice is prescribed it is only necessary that company positively, distinctly, and unequivocally indicate that it is its intention that policy shall cease to be binding as such upon expiration of five days from time when such intention is made known to insured. Id. Held immaterial whether notice was to effect that policy was already canceled or that it would be canceled in 5 days. Id.

96. Notice of cancellation given to brokers who had acted as insured's agents in procuring policy held not notice to insured to whom it was not communicated, agency having ceased on delivery of policy to insured. Standard Leather Co. v. Northern Assur. Co., 156 F 689.

97. Evidence held insufficient to show cancellation before expiration of five days' notice. Globe v. Willbrandt Mfg. Co., 128 Ill. App. 262.

98. Held not condition precedent, company being only bound to return premium on surrender of policy. Davidson v. German Ins. Co. [N. J. Err. & App.] 65 A 996. Held not condition precedent to cancellation of policy at request of insured so that contract was canceled when insured surrendered it for that purpose, though unearned premium was not tendered to him until after subsequent loss. Parsons v. Northwestern Nat. Ins. Co., 133 Iowa, 532, 110 NW 907. Under New York standard policy company must pay or tender unearned premium as condition precedent to cancellation. Buckley v. Citizens' Ins. Co., 188 N. Y. 399, 81 NE 165, rvg. 112 App. Div. 451, 98 NYS 622. Payment or tender held essential part of cancellation, and without it mere notice by company of intention to cancel was ineffective to destroy policy obligation. Gosch v. Firemen's Ins. Co., 33 Pa. Super. Ct. 496. Payment of premium to broker who delivered policy held payment to company so that latter could not allege nonpayment to it as excuse for failure to tender unearned portion, even if rule is based on doctrine of estoppel or waiver. Id.

99. Plaintiff company reinsured part of risk with defendant company receiving from it a "covering note." Thereafter defendant requested plaintiff to place the reinsurance elsewhere, which it did on same day, receiving covering note from another company and surrendering the one received from defendant. Insured building had been damaged by fire the day before, but both plaintiff and defendant were ignorant of that fact. Held that cancellation of covering note, having been made under mistake of fact, would be set aside and plaintiff was entitled to recover amount of reinsurance. Trader's Ins. Co. v. Aachen & Munich Fire Ins. Co., 150 Cal. 370, 89 P 109.

1. Consent must be mutual. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 SE 437. If there was originally a valid and binding contract of insurance, and insured, acting under erroneous impression sent policy back to insurer with statement that it was not policy he ordered and that he did not intend to pay premium notes given therefor, held that his act in so doing was mere proposal to cancel, and if he died before acceptance of said proposal by insurer there was no cancellation but contract continued in force. Id. Evidence held to show cancellation of contract of reinsurance, return of renewal premium receipt marked "lapse" being an election to rescind, which was shown to have been accepted and concurred in. National Life Ins. Co. v. Metropolitan Life Ins. Co., 226 Ill. 102, 80 NE 747, afg. 127 Ill. App. 665, contract having been executed, mutual agreements held sufficient consideration for cancellation. National Life Ins. Co. v. Metropolitan Life Ins. Co., 226 Ill. 102, 80 NE 747. Provision holding reinsuring company bound in case death occurred during time limited for renewals held not to apply where reinsurance as to particular policy was canceled before insured's death. Id. Agent returning receipt held in habit of representing

(§ 16) *B. For breach of contract, condition, or warranty, or misrepresentation.*[See 8 C. L. 427]—Upon repudiating his contract of life insurance and surrendering to the company its policy therefor, an infant may recover the whole amount of premiums paid by him thereon.[5] The adjudication that a fire insurance company is insolvent ipso facto cancels all existing policies upon which no loss has previously occurred.[4] Policies generally provide that they shall be void if the premiums [6] or any instalments thereof,[6] or any premium notes,[7] shall not be paid when due, or in case of the breach of any warranty or condition contained in the contract or of any misrepresentation.[8] Nonpayment of premium notes sometimes operates merely to suspend the insurance while they remain due and unpaid.[9] Payment of illegal or void

company in such ways as to justify conclusion that he possessed authority to request cancellation, whether he in fact had it or not. Id. Nonforfeiture provision providing for application of net value of policy to purchase of extended insurance held, even if applicable, not to prevent immediate cancellation in toto by mutual agreement. Id.

2. Insured company held not entitled to revive contract of reinsurance without consent of reinsurer. National Life Ins. Co. v. Metropolitan Life Ins. Co., 226 Ill. 102, 80 NE 747, afg. 127 Ill. App. 665.

3. Prudential Ins. Co. v. Fuller, 9 Ohio C. C. (N. S.) 441.

4. Todd v. German-American Ins. Co. [Ga. App.] 59 SE 94.

5. See, also, § 8, ante.

Life insurance: Policy dated Aug. 30 provided that annual premium should be paid Aug. 30 each year, and that it should not become effective until payment of first premium and delivery of policy. Policy was delivered and first premium paid on Nov. 19. Held that time for payment of second premium was not extended to Nov. 19 of next year, but failure to pay it on Aug. 30 precluded recovery where insured died Oct. 29. Mutual Life Ins. Co. v. Stegall, 1 Ga. App. 611, 58 SE 79. Fact that policy insuring insured for specified period commencing Aug. 1, and providing that premiums after first one should be payable in quarterly instalments on or before first day of certain named months, was not issued or put in force until Aug. 18, held not to have changed times of payment provided in policy, or to have postponed them for 18 days from dates so specified. Jewett v. Northwestern Nat. Life Ins. Co., 149 Mich. 79, 14 Det. Leg. N. 340, 112 NW 734. On payment of initial premium on life policy, there is a contract for insurance for the whole of the insured's life, and company's right to terminate contract for nonpayment of premiums is a forfeiture. Murray v. State Life Ins. Co., 151 F 539.

6. Fire insurance: Contract held one for insurance for term of five years in consideration of specified sum, part of which was to be paid in cash, and balance in four equal annual instalments on first day of each succeeding January according to terms of note given therefor, and not one for insurance for five consecutive terms of one year each, each payment to cover instalment for particular year, and hence failure to pay any instalment on Jan. 1 suspended insurance during delinquency as provided in policy though policy was issued and first payment made as of March 19. McCullough v. Home Ins. Co. [Tenn.] 100 SW 104.

7. Accident insurance: Application, policy, and premium notes construed, and held that failure to pay any of said notes at maturity ipso facto put an end to contract without notice to insured or formal cancellation of policy. North American Acc. Ins. Co. v. Bowen [Tex. Civ. App.] 18 Tex. Ct. Rep. 505, 102 SW 163.

Life insurance: Failure to pay notes when due held to avoid policy. Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 SE 892. Held that fact that nonpayment was due to insured's sickness did not prevent forfeiture. Id. Where agent accepted notes for part of first premium to which he was entitled as commission, and company's share was paid in cash, held that said notes became agent's individual property and were not within provision of policy providing for forfeiture for nonpayment of premium notes, though company afterwards acquired them from agent. Reppond v. National Life Ins. Co. [Tex.] 18 Tex. Ct. Rep. 242, 101 SW 786, rvg. 16 Tex. Ct. Rep. 829, 96 SW 778.

8. See § 9, ante.

Accident insurance: Even if policy was not one with self-operating clause for its own cancellation and forfeiture of premiums paid in case warranted statement was untrue, held that it could be disaffirmed for such a breach of warranty even after insured's death, provided company exercised right to do so within reasonable time after obtaining knowledge of such breach by tendering to beneficiary premiums paid. Central Acc. Ins. Co. v. Spence, 126 Ill. App. 32.

9. Fire insurance: Plaintiff held estopped in action on policy to claim that company had no authority under charter to accept notes, and that he could not recover where note was due and unpaid at time of fire and when suit was brought. Hale v. Michigan Farmers' Mut. Fire Ins. Co., 148 Mich. 453, 14 Det. Leg. N. 214, 111 NW 1068. Provision held valid and enforcible so that no recovery could be had for loss occurring while insured was in default. McCullough v. Home Ins. Co. [Tenn.] 100 SW 104.

Life insurance: Application provided that, if any premium should be settled by note, such settlement should not be deemed payment, but only an extension of time for payment, and that, if note should not be paid when due, company should not be liable for any loss incurred while it remained unpaid. Held that where insured died while note given for premium was due and unpaid, there could be no recovery. Burnham v. Michigan Mut. Life Ins. Co., 149 Mich. 84, 14 Det. Leg. N. 369, 112 NW 704. Conceding that memorandum in note "send to office for collection" was part of note, held that office

assessments is not necessary in order to keep the policy in force.[10] Where the insurer refuses to accept a premium on the ground that it is tendered too late, the insured is not bound to make further tenders on recurring premium dates.[11] Though the policy provides that it shall become ipso facto void unless a premium note is paid when due, the insurer may, on default, at its election, continue the policy in force, and recover on the note.[12] Such an election, when once made, is final.[13] A life policy matures on the death of the insured and the subsequent refusal of one with whom the premium has been deposited to pay it to the insurer does not affect the rights of the beneficiary.[14] A forfeiture for failure to pay premiums cannot be claimed where the insurer has sufficient funds to pay them in its hands when they become due.[15] In the Federal courts a suit in equity to cancel a life policy because of the fraud of the insured cannot be maintained where the bill is not filed until after the insured's death.[16]

One who is induced to enter into a contract of insurance through the fraud of the insurer may rescind the same and recover back the consideration paid by him,[17]

referred to was that of defendant, there being no showing to contrary, and hence defendant was not in default so as to excuse insured's failure to pay because note was not sent to office where insured was employed. Id.

10. Payment of increased assessments for number of years with full knowledge of facts held not payment under duress, plaintiff being not bound to pay them to keep certificate in force if they were void. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F 461.

11. Life insurance. Reed v. Provident Sav. Life Assur. Soc. [N. Y.] 82 NE 734, afg. 112 App. Div. 922, 98 NYS 1111.

12. Life insurance. Parker v. Simpson, 107 NYS 199.

13. Where company with knowledge of facts elected to cancel life policy for nonpayment of note and demanded payment of proportionate amount thereof for time during which policy was in force, held that it could not thereafter recover full amount of note, but insured could interpose defense of partial failure of consideration. Parker v. Murphy, 107 NYS 202.

14. It was agreed between parties that money to pay premiums was to be placed in hands of railroad company by which insured was employed and to which insurer was to resort for payment. Money was so placed before insured's death, which occurred on Nov. 10, but railroad company had until Nov. 24 in which to pay it. On Nov. 24 railroad refused to pay on ground that deceased was no longer in its employ. Held that company's refusal could not affect rights of beneficiary, but insurer was only entitled to claim deduction of amount of current premium from amount due on policy. Patton v. Continental Casualty Co. [Tenn.] 104 SW 305.

15. Where, owing to extension of time for payment of notes, accident policy was in force when insured's first accident occurred, held that it was duty of company to apply so much of sum due insured under policy, by reason of said accident, to payment of unpaid notes as was necessary for that purpose so as to prevent forfeiture, and that, in subsequent action to recover indemnity for that and a subsequent accident, it would be held to have done so. North American Acc. Ins. Co. v. Bowen [Tex. Civ. App.] 18 Tex. Ct. Rep. 505, 102 SW 163. Fact that exact amount for which insurer was liable by reason of first accident was undetermined at date when notes, as extended, matured, held not to vary rule, since it was capable of being made certain and was definitely ascertained on trial, and minimum liability was greater than amount due on notes. Id.

16. Mutual Life Ins. Co. v. Griesa, 156 F 398. Fact that policy gave beneficiaries option to receive payment in bonds or cash held not to give them right to maintain bill for specific performance to compel delivery of bonds, since refusal to deliver them created mere naked money demand cognizable at law, and hence not to make case cognizable in equity so as to give company right to maintain bill for cancellation of policy for fraud after death of insured. Id. Since under Gen. St. Kan. § 4895, an executor may bring an action without joining with him person for whose benefit it is prosecuted, executors may sue on policy payable to estate without joining persons to whom bonds in which policy is payable, are bequeathed by insured, and hence equity has no jurisdiction on ground of preventing multiplicity of suits. Id.

17. Life insurance: Contract whereby company agreed to insure plaintiffs for 20 years for stipulated annual premium, and to enable them to earn part or whole of premiums by acting as local board for company and assisting soliciting agent to procure policies, held an entire one, so that failure to give them opportunity to so earn premiums was violation of whole contract entitling them to cancellation of contract and recovery of premiums paid. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 SW 686. Insured held entitled to rescind for fraudulent concealment of contingent liability by assessment company. Moore v. Mutual Reserve Fund Life Ass'n, 121 App. Div. 335, 106 NYS 255. Insurer is not entitled to be reimbursed for cost of carrying insurance for period for which it has been in force, insured's present status being in no way bettered by anything he has received thereunder. Id. Held particularly true in view of difficulty in ascertaining

provided he acts promptly,[18] and has not been guilty of negligence.[19] The company is responsible for the fraud of an agent acting within the actual or apparent scope of his authority.[20] But in order to render it liable in exemplary or punitive damages for the agent's wrongful acts there must be shown some misconduct on its part in connection with the agent's wrong.[21] It cannot claim the fruits of the agent's acts and at the same time repudiate his authority to perform them.[22]

If the company before the time for performance arrives, repudiates the contract, the insured may at once sue for damages as for a breach,[23] or he may keep the

value of protection in assessment company, and fact that insured's acceptability as risk had diminished because of increased age. Id. One induced through fraud and misrepresentation to accept policy not complying with terms of his contract held entitled to recover money paid and to cancellation of premium note, regardless of whether he was bound to accept policy in accordance with terms of application. Glassner v. Johnston [Wis.] 113 NW 977. Fact that insured might have recovered cash payment in action at law held not to deprive equity of jurisdiction, since its recovery would not re-establish status quo without cancellation of note and immediate prevention of use thereof. Id. Plaintiff held not chargeable with knowledge that policy such as he contracted for could not be sold to him at price agreed upon without rebate or discrimination in his favor so as to preclude his recovery in equity, or with knowledge as to fairness and reasonableness of rates. Id.

18. Life insurance: Delay held to preclude rescission as matter of law. Lierheimer v. Minnesota Mut. Life Ins. Co., 122 Mo. App. 374, 99 SW 525. Plaintiff held not guilty of laches. Glassner v. Johnston [Wis.] 113 NW 977.

19. Life insurance: Where insured failed to examine policy until month after he received it, held that he could not avoid payment of premium note on ground that policy was 20 payment one instead of 10 payment one for which he applied. Remmel v. Griffin [Ark.] 99 SW 70. Plaintiffs signed contract whereby they were to be given opportunity as defendant's local board to earn part of premiums on policies of insurance for which they applied on representation of agents of defendant that certain changes would be made therein before it was signed in behalf of company. Changes were not in fact made, but plaintiffs retained contract without examining it for over year after it was returned to them. Held that they would be deemed to have accepted contract as written, and were estopped to deny that it was their contract and could not have contract canceled and recover premiums paid on policies. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 SW 686. Plaintiffs held not entitled to recover premiums because of false representations of agent that after 10 years they would get back what they had paid in with interest, where they could read and did read policies and continued to pay premiums thereafter. Cathcart v. Life Ins. Co. of Virginia, 144 N. C. 623, 57 SE 390. Where there was evidence that plaintiffs were nearly illiterate and could not understand them when they attempted to read them, and that policies were taken back to agent within 30 days after they were issued when he again assured them that they were according to his representations, held that question whether fraud had been perpetrated on plaintiffs was for jury. Sikes v. Life Ins. Co. of Virginia, 144 N. C. 626, 57 SE 391. One applying for insurance who does not know truth of matters concerning which agent makes false representations, and relies on such representations, though he could have informed himself of the truth by means of information at hand, is not estopped from complaining of their falsity unless inexcusably negligent in not informing himself. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580. If applicant relied upon agent's representations that application which he signed was for kind of policy agreed upon and was induced thereby to sign it, in ignorance of fact that it was for policy of different kind, held that he would not be estopped by reason of signing application to show that policy issued was not kind contracted for, though he signed application without reading it. Id. Defense held not made out if it appeared from application and facts attending signing that insured, had he read it, would not have understood that it was for policy different from that agreed upon. Instructions approved. Id. Plaintiff held not to have been guilty of negligence in not sooner discovering that policy was not the one to which he was entitled. Glassner v. Johnston [Wis.] 113 NW 977.

20. Evidence held to show that certain of defendant's agents had authority to make contract designating plaintiffs as defendant's local board, etc., so that defendant was liable for any fraud and deceit practiced on plaintiffs in so doing. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 SW 686.

21. In action for cancellation of policy and premium note because of false representations of soliciting agent, insurer held not liable for vindictive damages where there was no evidence that agent was authorized to make false representations, or that insurer knew that he had done so. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580.

22. Company held not entitled to contend that it was not bound by promises or representations of agent because not within scope of his authority, since all rights claimed by it were based on his acts. Glassner v. Johnston [Wis.] 113 NW 977.

23. Under laws of New York rule applies to anticipatory breach by mutual company. Michaelson v. Security Mut. Life Ins. Co. [C. C. A.] 154 F 356, rvg. 150 F 224. Plaintiff surrendered his policy to company pursuant to agreement whereby another was to

contract in force for the benefit of his beneficiary.[24] The election once made is final.[25] Acquiescence by the insured in the wrongful cancellation of his policy precludes him from recovering damages therefor.[26]

There is a conflict of authority as to whether a fire policy insuring distinct items for different amounts in consideration of a gross premium is to be regarded as entire or severable.[27]

be substituted therefor, and received receipt reciting that old one should remain in force until new one was issued unless previously terminated by failure to pay premiums. Plaintiff refused to accept new policy on ground that it was not kind agreed upon. Defendant refused to return old policy on demand or to accept premium. Held an anticipatory breach of contract for which plaintiff was entitled to recover damages. Id. Where company wrongfully repudiates policy, if insured is in such a state of health that he can procure other insurance of like nature and kind, his measure of damages is difference between cost of carrying insurance which he has, for term stipulated for, and cost of new insurance at rate he would then be required to pay for like term, with all profits and accumulations to which he is entitled under his policy. Krebs v. Security Trust & Life Ins. Co., 156 F 294.

NOTE. Measure of damages for wrongful repudiation: There is a conflict of authority as to the measure of damages in case the insurer wrongfully repudiates the contract. Some courts hold that where the insurance company wrongfully revokes its policy and refuses further to be bound by it, the holder may elect whether to enforce the contract or to treat it as rescinded. If he elects to pursue the latter course, his measure of relief is the amount of premiums paid, with interest, and this though he has had the benefit of insurance under the policy from its inception to the time of revocation, and even though such revocation would not operate in law to avoid the policy. This rule is said, by the learned authors of the American and English Encyclopedia (volume 19, p. 99), to be supported by the weight of authority. See, also, Van Werden v. Equitable Life Assurance Society, 99 Iowa, 621, 68 NW 892; American Life Insurance Co. v. McAden, 109 Pa. 399, 1 A 256; Alabama Gold Life Ins. Co. v. Garmany, 74 Ga. 51; McKee v. Phoenix Insurance Co., 28 Mo. 383, 75 Am. Dec. 129; McCall v. Phoenix Mutual Life Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558; Frain v. Metropolitan Life Ins. Co., 67 Mich. 527, 35 NW 108; Aetna Life Insurance Co. v. Paul, 10 Ill. App. 431; Braswell v. American Life Insurance Co., 75 N. C. 8.

On the other hand, it is held by many authorities that, if the assured is in a state of health, that he can secure other insurance of like nature and kind, his measure of damages is the difference between the cost of carrying the insurance which he has, for the term stipulated for, and the cost of new insurance at the rate he would then be required to pay for a like term. If, however, he is unable to obtain other insurance, then his measure of damages will be the present value of his policy as of the date of death, less the estimated cost of carrying the same, from the date of cancellation, at his then age. Ebert v. Mutual Reserve Fund Life Ass'n, 81 Minn. 116, 83 NW 506, 834, 84 NW 457; Speer v. Phoenix Mutual Life Ins. Co., 36 Hun [N. Y.] 322; Brooklyn Life Ins. Co. v. Weck, 9 Ill. App. 358; Day v. Conn. General Life Ins. Co., 45 Conn. 480, 29 Am. Rep. 693; Universal Life Ins. Co. v. Binford, 76 Va. 103; Continental Life Ins. Co. v. Houser, 89 Ind. 258; New York Life Ins. Co. v. Statham, 93 U. S. 24, 23 Law. Ed. 789; Smith v. Charter Oak Life Ins. Co.,64 Mo. 330; Lovell v St. Louis Mut. Life Ins. Co., 111 U. S. 264, 28 Law. Ed. 423.—From Krebs v. Security Trust & Life Ins. Co., 156 F 294.

24. Blakely v. Fidelity Mut. Life Ins. Co. [C. C. A.] 154 F 43, afg. 143 F 619.

25. Where mutual company and insured differed as to construction of contract and insured refused to pay assessment levied in accordance with company's construction on ground that it was excessive, but tendered amount which he claimed was due and stood by said tender for 10 months, held that he thereby elected to treat contract as still in force, which election was final, and that he could not thereafter sue in disaffirmance of contract on ground of an anticipatory breach. Blakely v. Fidelity Mut. Life Ins. Co. [C. C. A.] 154 F 43, afg. 143 F 619.

26. Seven years' acquiescence and nonpayment of assessments held to have estopped plaintiff from suing for damages for cancellation of policy in mutual company for failure to pay alleged improper assessments. Brockenbrough v. Mutual Reserve Life Ins. Co. [N. C.] 59 SE 118.

27. Is question of intention. Goorberg v. Western Assur. Co., 150 Cal. 510, 89 P 130. Where property is so situated that risk on one item cannot be affected without affecting risk on other items, policy must be regarded as entire, but where it is so situated that risk on each item is separate and distinct from risk on other items, so that what affects risk on one item does not affect risk on others, policy must be regarded as severable. Id. Policy covering buildings and household goods, etc., therein in different amounts held entire so that breach of warranty as to title of land on which buildings were situated avoided entire policy. Id. Where premium is entire and there is identity of risk, the obligation is single, though the insurance is apportioned among different items. Coggins v. Aetna Ins. Co., 144 N. C. 7, 56 SE 506. Policy covered storehouse and certain goods while contained therein and not otherwise. Premium was entire, but insurance was apportioned. It was provided that breach of iron safe clause should constitute a perpetual bar to any recovery on policy. Held that obligation was indivisible so that breach of iron safe clause by failure to take inventory avoided whole insurance including that on building. Id. Breach of iron safe clause held to invalidate

Life policies frequently provide that after they have been in force for a specified time they shall be incontestable except for certain specified causes.[28] Provisions for the application of the reserve to the purchase of a paid up policy or extended insurance on default in the payment of premiums have been treated in a previous section.[29]

policy only to extent that it covered stock of goods, and not as to that part covering furniture and fixtures of store. Aetna Ins. Co. v. Mount [Miss.] 44 S 162.

NOTE. Entire or divisible contract: The courts of a number of states have laid down the rule that, where the property insured consists of different items which are separately valued or insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one item will not affect the insurance on the remainder of the property, even though the premium be entire. Merrill v. Agricultural Ins. Co., 73 N. Y. 452, 29 Am. Rep. 184; Schuster v. Dutchess County Mut. Ins. Co., 102 N. Y. 260, 6 NE 406; Phoenix Ins. Co. v. Lawrence, 4 Metc. [Ky.] 9, 81 Am. Dec. 521; Continental Ins. Co. v. Ward, 50 Kan. 346, 31 P 1079; State Ins. Co. v. Schreck, 27 Neb. 527, 43 NW 340, 20 Am. St. Rep. 696, 6 L. R. A. 524; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Loehner v. Home Mut. Ins. Co., 17 Mo. 247; Sullivan v. Hartford Fire Ins. Co., 89 Tex. 665, 36 SW 73, 59 Am. St. Rep. 84; Manchester Fire Assur. Co. v. Feibelman, 118 Ala. 308, 23 S 759; Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 P 513; Clark v. New England Mut Fire Ins. Co., 6 Cush. [Mass.] 342, 53 Am. Dec. 44; Bullman v. North Brit. & Merc. Ins. Co., 159 Mass. 118, 34 NE 169; Wright v. Fire Ins. Co., 12 Mont. 474, 31 P 87, 19 L. R. A. 211; Coleman v. New Orleans Ins. Co., 49 Ohio St. 310, 31 NE 279, 34 Am. St. Rep. 565, 16 L. R. A. 174; Light v. Greenwich Ins. Co., 105 Tenn. 480, 58 SW 851; Conn. Fire Ins. Co. v. Tilley, 88 Va. 1024, 14 SE 851, 29 Am. St. Rep. 770; Quarrier v. Peabody Ins. Co., 10 W. Va. 507, 27 Am. Rep. 582.

On the other hand, there are many cases holding that such contracts are entire, and that a breach of any condition or warranty vitiates the whole insurance, most of these decisions basing their conclusion on the ground that the premium was a single or gross sum. Gottsman v. Pennsylvania Ins. Co., 56 Pa. 210, 94 Am. Dec. 55; Day v. Charter Oak F. & M. Ins. Co., 51 Me. 91; Plath v. Minn. Farmers' Mut. Fire Ins. Ass'n, 23 Minn. 479, 23 Am. Rep. 697; Garver v. Hawkeye Ins. Co., 69 Iowa, 202, 28 NW 555; Cuthbertson v. North Car. Home Ins. Co., 96 N. C. 480, 2 SE 258; Southern Fire Ins. Co. v. Knight, 111 Ga. 622, 36 SE 821, 78 Am. St. Rep. 216, 52 L. R. A. 70; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 A 429, 51 Am. St. Rep. 457, 30 L. R. A. 633; McGowan v. People's Mut. Fire Ins., 54 Vt. 211, 41 Am. Rep. 843.

There is still another line of cases which take a middle ground between the extreme doctrines above stated and hold that the question of the severability of the contract in such cases depends upon the nature of the risk, i. e., that, where the property is so situated that the risk on one item cannot be affected without affecting the risk on the other items, the policy must be regarded as entire; but where the property is so situated that the risk on each item is separate and distinct from the risk on the other items, so that what affects the risk on one item does not affect the risk on the others, the policy must be regarded as severable. Havens v. Home Ins. Co., 111 Ind. 90, 12 NE 137, 60 Am. Rep. 689; Phoenix Ins. Co. v. Pickel, 119 Ind. 155, 21 NE 546, 12 Am. St. Rep. 393; Pickel v. Phenix Ins. Co., 119 Ind. 291, 21 NE 898; Worachek v. New Denmark Mut. Home Fire Ins. Co., 102 Wis. 88, 78 NW 411; Taylor v. Anchor Mut. Fire Ins. Co., 116 Iowa, 625, 88 NW 807, 93 Am. St. Rep. 261, 57 L. R. A. 328; Western Assurance Co. v. Stoddard, 88 Ala. 606, 7 S 379; Republic Co. Mut. Fire Ins. Co. v. Johnson, 69 Kan. 146, 76 P 419, 105 Am. St. Rep. 157; Hartshorne v. Agr'l Ins. Co., 50 N. J. Law, 427, 14 A 615; Brehm Lumber Co. v. Svea Ins. Co., 36 Wash. 520, 79 P 34, 68 L. R. A. 109; Herzog v. Palatine Ins. Co., 36 Wash. 611, 79 P 287; Aetna Ins. Co. v. Resh, 44 Mich. 55, 6 NW 114, 38 Am. Rep. 228; Phoenix Ins. Co. v. Public Parks Amusement Co., 63 Ark. 187, 37 SW 959; Baldwin v. Hartford Fire Ins. Co., 60 N. H. 422, 49 Am. Rep. 324. It has been held (sometimes even in jurisdictions where separate valuations are ordinarily regarded as rendering the contracts divisible) that the inclusion of the word "entire" makes the contract entire and indivisible. Germania Fire Ins. Co. v. Schild, 69 Ohio St. 136, 68 NE 706, 100 Am. St. Rep. 663; Germier v. Springfield F. & M. I. Co., 109 La. Ann. 341, 33 S 361; Agricultural Ins. Co. v. Hamilton, 82 Md. 88, 33 A 429, 51 Am. St. Rep. 457, 30 L. R. A. 633; Martin v. Ins. Co. of N. A., 57 N. J. Law, 623, 31 A 213; McWilliams v. Cascade F. & M. I. Co., 7 Wash. 48, 34 P 140. But there are also cases holding, in effect, that no valid distinction can be drawn between the words "this policy shall be void," and "this entire policy shall be void." Kiernan v. Dutchess County Mut. Ins. Co., 150 N. Y. 190, 44 NE 698; Fireman's Fund Ins. Co. v. Barker, 6 Colo. App. 535, 41 P 513; Kans. Farmers' Fire Ins. Co. v. Saindon, 53 Kan. 623, 36 P 983; Trabue v. Dwelling House Ins. Co., 121 Mo. 75, 25 SW 848, 42 Am. St. Rep. 523, 23 L. R. A. 719.—From Goorberg v. Western Assur. Co., 150 Cal. 510, 89 P 130.

28. Provision that policy should be incontestable after one year from date of issue provided premiums were duly paid held to bar defense that false and fraudulent answers were given by insured in application, though it was alleged that knowledge of falsity did not come to defendant until after insured's death, where no fact was alleged which would lead to conclusion that year was not ample time, in exercise of proper diligence, to ascertain whether answers were true or not, and, so far as appeared from pleas, insurer was indifferent, inactive, and unconcerned as to truth of answer during 3 1-2 years elapsing from issuance of policy until insured's death. Flanigan v. Federal Life Ins. Co., 231 Ill. 399, 83 NE 178.

29. See § 13, ante.

(§ 16) *C. Estoppel or waiver of right to cancel or avoid.*[30]—Provisions and conditions in the policy which are for the benefit of the company may be waived by it,[31] or it may estop itself from enforcing them.[32] So too the insured may waive provisions or conditions inserted for his benefit,[33] or false representations inducing him to take out a policy.[34] A waiver is the voluntary abandonment or relinquishment by a party of some right or advantage.[35] The doctrine of equitable estoppel, or estoppel in pais, is that a party may be precluded by his acts and conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it.[36] The doctrine of waiver is invoked to relieve against forfeitures, no consideration and no prejudice or injury to the other party being necessary to its application.[37] It has no application to a case where the loss is due to a cause excepted from the risk, but in such case in order to recover plaintiff must show either that the contract obligation was extended to include the loss, or that the company has estopped itself to deny that the loss falls within the terms of the policy by some acts or conduct which has misled plaintiff to his injury.[38]

Any acts, declarations, course of dealing, or conduct on the part of the insurer leading the insured to believe that a strict performance of the terms and conditions of the policy will not be insisted upon will preclude it from thereafter claiming a forfeiture for failure to strictly perform, provided it acts with full knowledge of the facts.[39] Defects in the application are waived by issuing a policy thereon with

30. See 8 C. L. 430. Waiver of provisions in regard to notice and proofs of loss (see § 19), provisions for arbitration (see § 20), and contract limitations (see § 24a), is treated in subsequent sections.

31. Where policy was not in fact forfeited for failure to pay assessments, but forfeiture, was waived, held that fact that insured applied for reinstatement would not operate to produce or establish forfeiture. Sterling Life Ins. Co. v. Rapps, 130 Ill. App. 121. Provision for particular manner of evidencing change of beneficiaries, and form prescribed for assignment of policy. McNeill v. Chinn [Tex. Civ. App.] 18 Tex. Ct. Rep. 147, 101 SW 465.

32. May by its course of conduct estop itself from setting up an otherwise good ground for forfeiture. Murray v. State Life Ins. Co., 151 F 539.

33. Evidence held to show that policy was voluntarily and unconditionally surrendered by insured pursuant to notice of cancellation, thereby waiving insured's right to have it remain in force until unearned premium was actually returned. Gorge Hotel Co. v. Liverpool & London & Globe Ins. Co., 106 NYS 732. Action of insured in voluntarily and unconditionally surrendering policy to company immediately on receiving notice of its cancellation held waiver of his right to treat policy as in full force and effect until company paid or tendered unearned premium. Buckley v. Citizens' Ins. Co., 188 N. Y. 399, 81 NE 165, rvg. 112 App. Div. 451, 98 NYS 622.

34. Insured held to have waived false representations as to amount of dividends, etc., that he would receive, and amount of premiums he would be required to pay, after certain number of years, where he continued to pay quarterly premiums for three years after discovery of fraud instead of seeking to rescind. Hartford Life Ins. Co. v. Hanlon, 31 Ky. L. R. 990, 104 SW 729.

35, 36, 37. Draper v. Oswego County Fire Relief Ass'n [N. Y.] 82 NE 755, afg. 115 App. Div. 807, 101 NYS 168.

38. Provision that company should not be liable for loss from any open fire built by insured within 50 feet of building held not condition breach of which worked forfeiture but an exception from risk. Draper v. Oswego County Fire Relief Ass'n [N. Y.] 82 NE 755, afg. 115 App. Div. 807, 101 NYS 168. Fact that directors directed insured to prepare proofs of loss, and referred him to board of directors, that being course of procedure prescribed by by-laws, and that he incurred expense in so doing, held not to estop company, they having informed him that they would not adjust loss because fire was due to excepted cause. Draper v. Oswego County Fire Relief Ass'n [N. Y.] 82 NE 755.

39. Accident insurance: Insurer held estopped to contend that death did not result from accidental means where it conceded at trial that it was liable under single indemnity clause, and only questioned its liability under double indemnity clause. Fidelity & Casualty Co. v. Morrison, 129 Ill. App. 360.

Fire insurance: Insured wrote company that he had incumbered land on which house stood and wished to remove house, and asked if his insurance had been affected. Company replied that policy would be void while house was being moved, but that after it had been moved it would send him indorsement covering insurance on it in new location, but did not mention incumbrance. Held that company thereby waived right to declare forfeiture because of incumbrance. Capital Fire Ins. Co. v. Johnson [Ark.] 100 SW 749. Right to forfeit policy for obtaining concurrent insurance in excess of amount permitted held waived where insured informed defendant's vice-president of facts and requested amendment of policy in this and certain other

knowledge of the facts,[40] or if the defects are apparent on the face of the application.[41] Some courts hold that if there is no written application for fire insurance and the insured has an insurable interest, acts in good faith, and is guilty of no misrepresentation or concealment as to his interest, and the company issues the policy and accepts and retains the premium without making any inquiry concerning it, it will be presumed to have knowledge concerning the condition of his title and to insure the property with such knowledge.[42] Others hold that, unless the in-

particulars or return of premium, and vice-president promised that amendments would be made, and policy was returned to insured with other changes but without that in regard to concurrent insurance, and without any explanation, or objection, or return of unearned premium. Arkansas Mut. Fire Ins. Co. v. Claiborne [Ark.] 100 SW 751. Instruction as to effect of knowledge of company though too broad, held harmless where only question was whether notice was given as claimed, and there was no question that waiver resulted if it was. Id. Where company was informed that another story had been added to building and that it had been changed from rooming house to hotel, and thereafter amended policy so as to describe insured property as three-story building, held that it could not claim forfeiture because building was not used as dwelling house as stated in policy. Id. Amendment of policy after addition of another story to building so as to cover it in altered form held to preclude forfeiture because mechanics had been employed for more than 15 days in making alterations. Id. Where evidence showed that defendant had several times insured buildings by description "brick and frame," and that original application was made after inspection by defendant's agent, held that defense that description of buildings in policy in suit as "brick and stone" was warranty of such construction, and that buildings of brick and wood were not within contract, was untenable. Adolph G. Huppel Sons v. Boston Fire Ins. Co., 104 NYS 659.

Life insurance: If by statements and conduct of insurer insured was given to understand and induced to believe that collector would call to collect assessments as they became due, and that if they were not then paid insured might pay them at insurer's office and insured relied on such statements and conduct, held that insurer by failing to send collector to collect certain assessment was estopped to declare forfeiture for failure to pay it when due. Sterling Life Ins. Co. v. Rapps, 130 Ill. App. 121. Allegations of complaint held to show course of dealing whereby premiums were made payable to defendant's manager at Chicago by depositing same in post office addressed to him on day they became due, thus effecting waiver of strict payment to company, in person, at its home office, on or before day on which premium became due. Krebs v. Security Trust & Life Ins. Co., 156 F 294. Forfeiture for procuring additional insurance held not waived. Huff v. Century Fire Ins. Co. [Iowa] 113 NW 1078. Held no inconsistency between statement of physician in proofs of death and statement of insured in application that she had not consulted physician for ten years and nothing in former to suggest untruthfulness of latter so as to charge company with knowledge of such untruthfulness. Security Mut. Life Ins. Co. v. Calvert [Tex.] 19 Tex. Ct. Rep. 839, 105 SW 320, rvg. [Tex. Civ. App.] 18 Tex. Ct. Rep. 179, 100 SW 1033.

Tornado insurance: Cancellation of policy after loss and notice of facts, occurring before loss, working forfeiture, coupled with return of unearned premium from date of forfeiture, held not to constitute waiver of forfeiture. Farmers' & Merchants' Ins. Co. v. Bodge [Neb.] 110 NW 1018, rvg. former opinion, 106 NW 1004.

40. Objection that application was signed by beneficiary instead of insured. Corrigan v. Cambridge Mut. Ben. Ass'n, 33 Pa. Super. Ct. 17.

41. That answers to questions are incomplete. Fidelity Mut. Life Ins. Co. v. Beck [Ark.] 104 SW 533; Sterling Life Ins. Co. v. Rapps, 130 Ill. App. 121; Owen v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 67 A 25.

42. Where policy was issued on oral application, and insurer made no inquiry of insured as to condition of his title, and insured made no representations or statements with respect to it, held that by issuance of policy with knowledge thus imputed to it that insured had only life estate, insurer waived provision that policy should be void if insured's interest was other than unconditional and sole ownership in fee simple. Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 79 NE 905, former opinion, 74 NE 964. Insurer held not prejudiced by fact that insured had only life estate, since he had insurable interest, which was only interest which insurer could be said to have insured, and value of property destroyed when tested by said interest would be measure of its liability. Glens Falls Ins. Co. v. Michael, 167 Ind. 659, 79 NE 905. Where there was no fraud or concealment in procuring policy, and no questions were asked with reference to title, widow holding life estate with remainder in fee to children held entitled to recover, though policy provided that it should be void if insured did not own property in fee. American Cent. Ins. Co. v. Leake, 31 Ky. L. R. 1016, 104 SW 373. Policy covering building on pier in Chesapeake Bay was ordered and delivered without any application or representation as to ownership. Under Code 1904, § 1338, beds of bays and shores of sea belong to state. Held, on demurrer to evidence, that company was estopped to set up as defense provision in policy that it should be void if interest of insured was other than unconditional and sole ownership, or if building was on ground not owned by insured in fee simple. Westchester Fire Ins. Co. v. Ocean View Pleasure Pier Co., 106 Va. 633, 56 SE 584. Where insured made no representation as to extent of his interest

sured has been misled by some act of the insurer, he is in such case bound by the conditions found in the policy,[43] and that the company will not be deemed to have waived the same unless it has actual or constructive notice of the facts.[44] It is generally held that if the policy is issued with knowledge on the part of the company of facts rendering it void at its inception, it cannot avail itself of them as a defense to an action theron,[45] but in order to have that effect the knowledge must be inconsistent with an intention to enforce its provisions as written.[46] The unconditional acceptance of premiums with knowledge of breach of a condition avoiding the policy precludes the company from defending on that ground.[47] The receipt and retention

in property, and no written application, and was guilty of no intentional misrepresentation or concealment and there was no ground to believe that company would have refused to insure had they known true state of title, or that premium or risk was enhanced, held that policy was not avoided because he owned only undivided third interest, though it provided that it should be void if interest of insured should be other than unconditional and sole ownership, or if subject of insurance be building on property not owned by insured in fee, it also appearing that insured believed that he was sole owner and hence would have been entitled to allotment of improved part of property on partition. Rochester German Ins. Co. v. Schmidt, 151 F 681.

43. Insured by accepting policy providing that it should be void in case property should be or become incumbered held charged with notice of and bound by such condition. Virginia Fire & Marine Ins. Co. v. J. I. Case Threshing Mach. Co. [Va.] 59 SE 369.

44. Company by issuing policy on incumbered property without written application and without any representations by insured held not to have waived provision that it should be void if property should be or become incumbered, where facts were not known to company nor agent and they were not chargeable with knowledge. Virginia Fire & Marine Ins. Co. v. J. I. Case Threshing Mach. Co. [Va.] 59 SE 369.

45. Fire insurance: If at time application was made and policy issued company, through its agent, knew that insured building was on leased ground, held that company would be precluded from relying on provision in policy that it should be void if subject of insurance was building on ground not owned by insured in fee simple. Aetna Ins. Co. v. Johnson, 127 Ga. 491, 56 SE 643. Evidence held sufficient to authorize submission of question to jury. Id. Where insured truthfully and correctly states nature and condition of his title in making his application, he will not be precluded from recovering in case of loss on account of contrary statement as to title inserted in policy by insurer. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245. Complainant and her family were in possession of premises under land contract requiring her to keep premises insured for benefit of vendor. Vendor conveyed premises to third person subject to such contract and assigned his interest in contract to grantee. Policy was taken out in name of complainant's husband, loss if any payable to vendor's grantee as his contract interest might appear. Held that company having accepted premiums paid by complainant, and agent having undertaken to insure grantee's interest, defendant could not escape liability because husband had no interest in property and no contract with said grantee. Quackenbush v. Citizens' Ins. Co. [Mich.] 14 Det. Leg. N. 766, 114 NW 388. Where president of mutual company, to whom application was made as required by by-laws, was informed that insured was not owner of premises in fee simple, and that some other person was interested in property, and policy was issued and premiums accepted, held that company could not avoid payment of loss because false representation of applicant that no other person was interested in property, president not being justified in relying on representation under such circumstances. Metcalf v. Mutual Fire Ins. Co. [Wis.] 112 NW 22. Finding that defendant had information held finding that it had knowledge of facts. Id.

Life insurance: If insurer issues policy with knowledge that warranties in application are untrue, it thereby waives right to subsequently assert their falsity to avoid liability. Iverson v. Metropolitan Life Ins. Co. [Cal.] 91 P 609. Wife insured her life for benefit of husband, and stated in application that she had never had heart disease, though both she and her husband knew that she had it. Held that husband was not in position to contend that company was estopped to avoid policy because he had told soliciting agent, who had nothing to do with making out application, that she had heart disease, contract being itself notice to him that it did not have such knowledge. Haapa v. Metropolitan Life Ins. Co. [Mich.] 14 Det. Leg. N. 775, 114 NW 380.

46. Knowledge of agent at time of issuing policy that books were kept in store without protection from fire held not to preclude reliance on iron safe clause, it not being notice that insured would continue to so keep them in violation of his contract. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099.

47. Accident insurance: Where policy did not provide that overdue premiums should be considered earned, and company failed to declare it void but refused insured's request to cancel it and to relieve him from liability, and received and retained money paid over to it after insured's death on order given by him on his employer's paymaster, held that failure to pay premiums when due was waived. Continental Casualty Co. v. Jennings [Tex. Civ. App.] 17 Tex. Ct. Rep. 696, 99 SW 423.

Fire insurance: Insurer having issued policy and received premium from plaintiff as owner of property held not entitled to question its title because of difference in cor-

of a past due premium remitted after a subsequent premium becomes due is not, however, a waiver of the failure to pay the latter when due.[48] Delivery of the policy without requiring prepayment of the first premium is a waiver of payment in advance,[49] and the extension of credit to the insured precludes a subsequent objection that the first premium was not paid in cash.[50] An extension of time for the payment of premium notes is a waiver of the right to forfeit the policy for failure to pay them when due,[51] and a subsequent attempt to collect the full amount of such a note waives a default in its payment.[52] Some courts hold that a breach of condition is waived by the failure of the insurer to return the premium and claim a forfeiture within a reasonable time after knowledge of the facts,[53] while others require an affirmative act in addition thereto.[54] A denial of liability on particular grounds

porate name as appearing in deed and in charter subsequently issued. Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co., 76 S. C. 76, 56 SE 654. Constitution of mutual company provided that any member neglecting to pay assessment for 60 days after notice should cease to have any claim against company. Policy provided for cash premium, which insured paid, and that insured would pay his proportion of losses. At time of fire insured had failed to pay assessment for more than 60 days. Company did not declare forfeiture or offer to return unearned premium, but thereafter collected and retained delinquent assessment. Held waiver of forfeiture, constitution conferring at most a right to forfeit which was not exercised. Coleman v. Caldwell County Mut. Fire Ins. Co., 125 Mo. App. 643, 103 SW 150. Fact that company continued to receive premiums from insured after notice that property had been leased held not waiver of right to avoid policy for violation by tenant, without insured's knowledge of provision prohibiting storing of seed cotton in building. Edwards v. Farmers' Mut. Ins. Ass'n, 128 Ga. 353, 57 SE 707.

Life insurance: Receiving of overdue assessments waives forfeiture because they were not paid when due. Industrial Mut. Indemnity Co. v. Thompson [Ark.] 104 SW 200. Retention of payment and its application as part payment of overdue assessment. Hartford Life Ins. Co. v. Milet, 31 Ky. L. R. 1297, 105 SW 144. Evidence held to sustain plea of waiver of provision that policy should not take effect unless insured was in good health when it was delivered. Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 18 Tex. Ct. Rep. 179, 100 SW 1033, rvd. on other grounds [Tex.] 19 Tex. Ct. Rep. 839, 105 SW 320. Issuance of policy and collection of premiums held to estop company from denying that sister named in application and policy as beneficiary had insurable interest. Baker v. Fidelity Mutual Life Ins. Co., 5 Ohio N. P. (N. S.) 383. Provision that policy should be void unless previous policies issued by company on life of insured bore indorsement permitting it to be taken out held waived, where same agent collected premiums on it and previous policy not bearing such indorsement for many weeks, two inspectors knew facts but made no attempt to cancel policy, and premium was regularly paid and received. Western & Southern Life Ins. Co. v. Oppenheimer, 31 Ky. L. R. 1049, 104 SW 721.

48. Jewett v. Northwestern Nat. Life Ins. Co., 149 Mich. 79, 14 Det. Leg. N. 340, 112 NW 734.

49. Though policy makes payment condition precedent to attaching of insurer's liability. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227.

50. Delivery of policy, taking notes for first premium and giving insured receipt for premium payable in advance containing clause "The above premium settled by note," held waiver of payment in cash and acceptance of notes in lieu thereof, but not waiver of provision that failure to pay notes when due would avoid policy. Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 SE 892.

51. North American Acc. Ins. Co. v. Bowen [Tex. Civ. App.] 18 Tex. Ct. Rep. 505, 102 SW 163.

52. Each of two premium notes provided that its nonpayment when due, and the consequent termination of insurance, should not impair validity of note, but that same should become due and payable for proportion of its face and interest that time insurance had been extended for bore to whole time covered by premium for which note was given. Held that, while mere retention of notes would not amount to waiver of forfeiture for failure to pay them when due, insurer waived such forfeiture by endeavoring to enforce full payment of notes, and writing letter to insured in which it treated policy as still in existence. Galliher v. State Mut. Life Ins. Co. [Ala.] 43 S 833. If consent of insured to waiver was necessary, held that it could be readily inferred from facts. Id.

53. See 8 C. L. 440, n. 1. Under laws of Missouri, held that company could not show that false representations contributed to contingency on which policy was to become payable as defense to action thereon after insured's death, unless it first deposited in court premiums received on policy. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

54. Mere retention of premium after loss held not to constitute either waiver of defense of breach of warranty as to title nor an estoppel, where company denied liability because of breach as soon as it discovered it and at all times thereafter. Goorberg v. Western Assur. Co., 150 Cal. 510, 89 P 130. Policy provided that if it should become void unearned premium should be returned on surrender of policy. Premium was paid when policy was issued, and breach of iron safe clause was not discovered until after

is generally a waiver of all other grounds known to the insurer.[55] An insurer who assumes a particular position with reference to a loss being within the terms of the policy cannot thereafter assume an inconsistent one to the prejudice of the insured.[56] In the absence of an agreement to the contrary,[57] the taking of steps looking to the adjustment of the loss is a waiver of any grounds of forfeiture known to the insurer.[58] A nonwaiver agreement should be strictly construed against the insurer, and will not be extended by implication.[59] It will not be held to cover past transac-

loss, when company immediately denied liability. Held that mere retention of premium was not waiver of forfeiture, tender thereof being unnecessary until insured demanded same and offered to return policy. Aetna Ins. Co. v. Mount [Miss.] 44 S 162. In such case when sued on policy held that insurer had right to tender unearned premium with its plea of breach of condition. Id. Where insurer denied liability as to all of several policies and tendered unearned premium as to all, and liability was established as to some, held that tender was nevertheless good as to that policy on which it was not liable. Id. Insurer held not obliged to return or offer to return premiums voluntarily paid before notice of violation of condition against incumbrances as condition precedent to availing itself of defense that policy was, by its terms, void because property was incumbered when it was issued. Virginia Fire & Marine Ins. Co. v. J. I. Case Threshing Mach. Co. [Va.] 59 SE 369.

55. Where policy required insured to give notice of his election to withdraw his share of accumulated reserve in cash and provided that said sum would otherwise be applied to purchase of an annuity, held that denial of liability on ground that policy had been forfeited indicated intention to waive such notice, and was supportive of finding of waiver by jury. Equitable Life Assur. Soc. v. Perkins [Ind. App.] 80 NE 682.

56. Where employer's liability policy gave insurer right to defend actions brought by injured employes against insured, held that fact that it did so did not estop it from denying liability to injured employe under its contract in subsequent action brought against it by said employe whose judgment against insured was not paid because of latter's insolvency. Carter v. Aetna Life Ins. Co. [Kan.] 91 P 178. Employer's liability policy provided that it should be void if employer's pay roll exceeded certain sum at any time unless additional premium was paid. Limit was reached in August but insured did not ascertain that fact until December, when it sent insurer additional premium which was accepted. Employe had been injured in October, of which fact, and his subsequent death, insurer was promptly notified. Evidence showed that it was agreed when insurance was taken out that date when limit would be exceeded was unknown and that additional premium was not to be paid until fact that it had been paid was ascertained. Employes were scattered over wide territory and were paid partly in commissions, which fact was known to insurer, and insured was not guilty of any bad faith. Held that acceptance by insurer of additional premium with knowledge of facts, including its liability for death of employe, rendered it liable. Instructions approved. Fidelity & Casualty Co. v. Southern R. News Co., 31 Ky. L. R. 55, 101 SW 900. Where insurer, with full knowledge of nature of liability asserted, took full charge of defense of action against insured for injuries growing out of violation of statute affecting safety of employes, held that it waived benefit of provision that it should not be liable for injuries so occasioned. Royle Min. Co. v. Fidelity & Casualty Co. [Mo. App.] 103 SW 1098.

57. Provision in policy that company should not be held to have waived any provision or condition thereof by any requirement, act, or proceeding relating to an examination as to liability and any appraisement of property held complete answer to issue of waiver. Germania Fire Ins. Co. v. McChristy [Tex. Civ. App.] 18 Tex. Ct. Rep. 62, 101 SW 822. Request for estimate of other persons as to value of insured property, demand for proof of loss, and examination of invoices, held all acts looking to ascertainment of amount of loss, and expressly covered by nonwaiver agreement. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099.

58. Requiring insured to do some act or incur some trouble or expense inconsistent with position that contract has become inoperative by breach of condition. McMillan v. Insurance Co. of North America [S. C.] 58 SE 1020. Insurer, in response to request, sent to beneficiary's attorney blank proofs containing nonwaiver provision. Blanks were not used but beneficiary sent company affidavit in regard to insured's death showing that he was killed while engaged in prohibited occupation. Affidavit was returned with new set of blanks, also containing nonwaiver provision, and letter calling attention to fact that policy required proofs to be made on blanks furnished by company. Held that letter and sending second set of blanks was not waiver of right to insist on forfeiture because insured engaged in prohibited occupation, there being nothing to show intention to waive, and nothing in insurer's conduct calculated to mislead or take advantage of beneficiary. Elhart v. Pacific Mut. Life Ins. Co. [Wash.] 92 P 419. After knowledge of fact that insured had made false representations company denied liability, but subsequently offered to pay small sum to avoid litigation, and adjuster, in course of such negotiation, suggested that he and insured should meet in certain town to consult attorney, which was done. Held not an admission of validity of contract nor waiver of forfeiture. Security Mut. Life Ins. Co. v. Calvert [Tex.] 19 Tex. Ct. Rep. 839, 105 SW 320, rvg. [Tex. Civ. App.] 18 Tex. Ct. Rep. 179, 100 SW 1033.

59. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099.

tions unless clearly so intended.[60] Such an agreement may itself be waived by express agreement or by acts and conduct.[61] Payment of the loss to a mortgagee with knowledge of the facts is a waiver of fraud and misrepresentation on the part of the mortgagor.[62]

The knowledge of the company's agent [63] acquired while acting within the scope of his authority [64] and while transacting the business of his principal [65] is imputed to it,[66] and his acts, if within the general scope of his authority, are deemed those of

60. Insured's consent to revocation of past waiver will not be implied from agreement which does not distinctly refer to past transactions but appears on its face to contemplate future action only. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099. Refusal to direct verdict for defendant held proper, there being evidence of some acts after fire and before execution of agreement from which jury might infer waiver. Id.

61. Evidence of conduct on part of company, after making of agreement, inconsistent with intention to insist on forfeiture for failure to comply with iron safe clause, held to require submission of question of waiver to jury. McMillan v. Insurance Co. of North America [S. C.] 58 SE 1020.

62. Is waiver of misrepresentation by insured as to his title, and ratification of contract of insurance made by its agent, which estopped it to complain of alleged deceit inducing issual of policy, or to recover of mortgagor money paid to mortgagee. Gardner v. Continental Ins. Co., 31 Ky. L. R. 89, 101 SW 908. Payment to mortgagee held payment to insured so as to render doctrines of waiver and ratification applicable, in view of fact that addition of standard mortgage with right of subrogation instead of open mortgage clause was mistake, and law would treat as consummated that which parties intended. Id.

63. Fire insurance: Evidence held to show that person who took application and to whom information as to existing incumbrance was given was defendant's agent. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 SW 687. Where application was transmitted to and accepted and retained by company together with premium for policy, which was promptly issued thereon, held that presumption was that person soliciting and obtaining application was duly authorized to transact the business for insurer. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. Where undisputed evidence showed that policy was issued upon application authoritatively taken, held duty of court in its charge to recognize existence of agency, and proper to determine powers and limitations of agent. Id. Local agent had procured certificate of authority from state auditor before policy was issued and was holding it at that time. He failed to procure renewal certificate in subsequent years but continued to act as company's agent, and company recognized him as such, accepted all business coming through his agency, and never canceled his contract of agency. Held that company was bound by his acts and conduct in dealing with policy holders after expiration of such certificate. Hunt v. State Ins. Co. [Neb.] 113 NW 807.

Life insurance: Provision that soliciting agent and medical examiner should be deemed agents of insured held not controlling. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 18 Tex. Ct. Rep. 932, 101 SW 545.

64. Fire insurance: Authority of agent to receive and forward application held sufficient to bind company to any information imparted to him in course of the employment. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 SW 687.

Life insurance: Knowledge of soliciting agent of falsity of warranties is knowledge of company only when he has actual or ostensible authority to waive truthfulness. Iverson v. Metropolitan Life Ins. Co. [Cal.] 91 P 609. Fact that soliciting agent, who had nothing to do with making of application, and no authority in premises, was informed that insured had heart disease, held not to preclude company from claiming forfeiture for misrepresentations as to her health in application. Haapa v. Metropolitan Life Ins. Co. [Mich.] 14 Det. Leg. N. 775, 114 NW 380. Mere silence on part of soliciting agent having nothing to do with filling out of application held not to estop defendant, where insured later misrepresented to another agent, charged with duty of receiving application, facts upon which defendant acted in issuing policy. Id.

65. Fire insurance: Company is not chargeable with information acquired by agent without the agency unless it appears that such information was remembered and in mind of agent during time of transaction upon which insured claims waiver. Cobb & Seal Shoe Store v. Aetna Ins. Co. [S. C.] 58 SE 1099. Neither company nor agent held under obligations to watch insured's employes for violations of policy and warn them against continuing violations. Id. Knowledge of agent, acquired while soliciting additional insurance, that insured had procured additional insurance held knowledge of company. Thompson v. Piedmont Mut. Ins. Co. [S. C.] 58 SE 341. Agent held more than mere soliciting agent. Id.

66. Accident insurance: Held proper, under evidence, to submit question whether agent knew insured's age to jury. Crawford's Adm'r v. Travelers' Ins. Co., 30 Ky. L. R. 943, 99 SW 963.

Fire insurance: Where notice of procuring of additional insurance was given to defendant's vice-president, contention that there was no waiver because notice was not given to board on whose recommendation alone forfeitures could be waived under company's rules held untenable, notice to vice-president being notice to company which should have required board to act. Arkansas Mut. Fire Ins. Co. v. Claiborne [Ark.] 100 SW 751. That building was on leased ground. Aetna Ins. Co. v. Johnson, 127 Ga. 491, 56 SE 643. Insurers held estopped to claim forfeiture because plant remained idle for more than 10 days without written per-

the company;[67] but this rule has been held to have no application to cases involving

mission, agents having knowledge and having been notified by insured of that fact, and having taken no action. Rochester German Ins. Co. v. Schmidt, 151 F 681.

Life insurance: Where agent who took insured's application knew that she was prostitute but gave her occupation as housewife, held that company was liable. Perry v. John Hancock Mut. Life Ins. Co., 147 Mich. 645, 14 Det. Leg. N. 19, 111 NW 195. Notice to agent having authority to deliver policy and collect premium when he delivered policy that insured was not in sound health held notice to company. Security Mut. Life Ins. Co. v. Calvert [Tex. Civ. App.] 18 Tex. Ct. Rep. 179, 100 SW 1033, rvd. on other grounds [Tex.] 19 Tex. Ct. Rep. 839, 105 SW 320.

False Representations Due to Fault of Company or Agent. Accident insurance. If actual facts are explained to agent through whom policy was issued and premiums collected, and agent undertakes to determine whether facts are material to risk, and writes or instructs insured to write answer appearing on application, company is estopped to set up such facts to defeat action on policy. Dulaney v. Fidelity & Casualty Co. [Md.] 66 A 614. Where agent authorized to solicit insurance either fraudulently or negligently inserts in application false answers to questions correctly answered by applicant, his wrong will be imputed to company and it will be estopped to defend on ground of falsity of such answers. North American Acc. Ins. Co. v. Trenton [Tex. Civ. App.] 18 Tex. Ct. Rep. 389, 99 SW 740. Agent who filled out application knew that insured had other insurance. Insured could not read or write English and testified that he did not know that any statement as to other insurance was in application. Held that company could not claim that policy was forfeited because of statement in application that insured had no other accident insurance. North American Acc. Ins. Co. v. Rehacek, 123 Ill. App. 219.

Fire insurance: Undisputed evidence that insured, who was illiterate, informed agent who wrote application that property was incumbered by mortgage held to show waiver of warranty against incumbrances. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 SW 687. Such testimony held admissible. Id. Where application is made out by agent, who writes therein untrue answers which are made from his own knowledge, or are not made by insured, and insured signs application without knowing that answers therein are untrue, insurer will be estopped to contend that such answers constitute misrepresentations which invalidate policy. Gardner v. Continental Ins. Co., 31 Ky. L. R. 89, 101 SW 908. Fact that amount of mortgage was erroneously stated in application held not to avoid policy where insured correctly stated amount to agent who filled in application, and, being unable to read English, signed application without reading it and without its being read to him. Baumler v. Farmers' Northern Mut. Fire Ins. Co., 148 Mich. 430, 14 Det. Leg. N. 209, 111 NW 1069. Where it appeared that defendant's agent himself wrote out application, that he told plaintiff that it was all right, that he and plaintiff were old acquaintances, and that plaintiff could not read except by great effort, held that statements in application would be regarded as those of agent, and fact that some were untrue would not avoid policy. Coleman v. Caldwell County Mut. Fire Ins. Co., 125 Mo. App. 643, 103 SW 150. Persons dealing with soliciting agents have right to rely on their suggestions as to what is material or what constitutes satisfactory answer to any question contained in application, and when agent is upon the ground and in possession of abundant means of knowing all facts material to risk, his statements contained in application which he presumptively fills out, though erroneous, are binding on company after premium has been paid, policy issued, and property destroyed. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. Instruction that, under such circumstances, overvaluation would not avoid policy approved. Id.

Life insurance: Where applicant answers questions correctly, but medical examiner writes answers down incorrectly, insurer is estopped to avoid policy on ground that answers are false. Mutual Reserve Fund Life Ass'n v. Cotter [Ark.] 99 SW 67.

67. Accident insurance: Managing agent having power to issue policies, take notes for premiums, and collect same, etc., held to have power to extend time of payment of notes so that his acts in so doing were acts of company. North American Acc. Ins. Co. v. Bowen [Tex. Civ. App.] 18 Tex. Ct. Rep. 505, 102 SW 163.

Fire insurance: Agent who had right to solicit applications, deliver policies, and collect premiums, and who represented company in all its dealings with plaintiffs, held such an agent that his waiver of prepayment of premium by delivery of policy would bind company. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227. Mere soliciting broker for companies generally held to have no authority to waive provision that policy should be void if insured had any other insurance, unless otherwise provided by agreement indorsed thereon or added thereto. Romano v. Concordia Fire Ins. Co., 121 App. Div. 489, 106 NYS 63.

Life insurance: Failure to instruct that waiver could only be made by agent while acting within scope of his authority held harmless, where uncontradicted evidence showed that he was so acting. Industrial Mut. Indemnity Co. v. Thompson [Ark.] 104 SW 200. Defendant's general agent, to whom policy provided premiums might be paid, held to have power to bind it relative to the business with which he was intrusted and times of remittance, and where he wrote insured that unless he paid overdue premium by specified date in future he would be compelled to return his receipt to company, and insured died before said date, insured could not be held to be in default, particularly where facts stated in letter justified finding that extension was with company's knowledge and acquiescence. Penn Mut. Life Ins. Co. v. Senhenn [Ind. App.] 81 NE 87. Policy procured by plaintiff on life of her husband provided that payments of premiums, to be recognized by company, must be entered in premium re-

the validity of contracts in which the agent has undertaken to act for his principal in dealing with himself.[68] Limitations on the authority of an agent are ineffectual unless brought to the knowledge of the insured.[69] There is a conflict of authority as to the effect of limitations in the policy as to who may waive its conditions[70] and

ceipt book when made. On discovering that premium which she claimed to have made was not so entered she complained to collecting agent, who refused to make correction, and thereupon refused to make further payments. Thereafter assistant superintendent conceded that she was right in her contention and agreed that mistake should be corrected provided she resumed payment, which she did, relying on his statements. Held that company could not thereafter repudiate liability because payment was not entered, since such defense involved fraud of its own agent. McNicholas v. Prudential Ins. Co. [Mass.] 82 NE 692. Letter written by local agent to applicant notifying him of receipt of policy and that he hoped to deliver it to him on following Sunday held not to have estopped company from denying consummation of contract, agent having received policy with special instructions not to deliver it until applicant had signed amended application and paid additional premium, applicant knowing that agent had no authority to make contract without approval of company, letter not justifying reliance upon it as acceptance of applicant's original proposition, and there being no evidence that he did so rely on it to his prejudice. McNicol v. New York Life Ins. Co. [C. C. A.] 149 F 141. Soliciting agent, having authority to collect first premium only, also collected second and remitted it to company, which accepted it without objection. He also collected third premium, which he failed to remit to company. Held that jury having found that payment was made to agent as company's agent, and that it was made in good faith, company was estopped to claim forfeiture because of its failure to receive premium. Murray v. State Life Ins. Co., 151 F 539.

68. Rule that notice to agent is notice to principal, and that agent may under certain circumstances waive effect of forfeiture clauses in policy. Arispe Mercantile Co. v. Capital Ins. Co., 133 Iowa, 272, 110 NW 593.

69. Accident insurance: Held that if agent selling policy knew when it was issued that insured was over 65 years old, insurer was bound though policy provided that it should be void as to persons over that age, unless insured knew that agent was exceeding his authority. Crawford's Adm'r v. Travelers' Ins. Co., 30 Ky. L. R. 943, 99 SW 963. Held proper, under evidence, to submit question whether insured knew that agent had no authority to jury. Id. Instructions to effect that if agent knew when he sold policy that insured was over 65, jury should find for plaintiff, unless they further found that insured knew that agent had no authority to issue policy, in which event should find for defendant, held proper. Travelers' Ins. Co. v. Crawford's Adm'r [Ky.] 106 SW 290. Limitations are not binding on insured unless actual knowledge thereof is brought home to him. North American Acc. Ins. Co. v. Bowen [Tex. Civ. App.] 18 Tex. Ct. Rep. 505, 102 SW 163.

Fire insurance: Policy provided that it should be void if there was any change in title, or if policy was assigned without consent of company indorsed thereon. Local agent, having authority to solicit insurance, receive applications and premiums, and countersign and deliver policies, but not to indorse acceptance of transfer of policy, advised insured that she might sell and assign policy to vendee of insured property, and agreed with vendees that policy should continue in force from time of purchase. Held that company was estopped to claim forfeiture, neither insured nor vendees having notice of agent's want of authority. Continental Fire Ins. Co. v. Stunston & Co., 30 Ky. L. R. 176, 100 SW 338.

70. Limitation Held to Prevent Waiver. Fire insurance: Where under terms of policy agent had no power to waive its provisions and no provision could be waived without an indorsement on policy itself, held that fact that insured notified agent of existence of other insurance did not preclude company from relying on provision that policy should be void if there was other insurance on property unless otherwise provided by agreement indorsed thereon or added thereto, where agent did not communicate his information to company. Clemments v. German Ins. Co., 153 F 237.

Life insurance: Provision that no forfeitures could be waived or premiums in arrears received except by agreement in writing signed by certain specified officers of company held valid, so that extension, by agent authorized to collect premiums, of time for their payment did not waive forfeiture for failure to pay them when due, no knowledge of such extension having been brought home to company. Cayford v. Metropolitan Life Ins. Co. [Cal. App.] 91 P 266. Possession of premium receipt, containing no limitation of its validity if delivered after its date, by agent after its date, held not to have given him implied power to deliver it after said date, person to whom extension was given having no knowledge that agent had receipt and no knowledge of its contents. Id. Insured held charged with knowledge of limitation on power of agent to accept overdue premiums which was contained in policy. Id. Authority to collect premiums does not imply authority to extend time for their payment, or to waive forfeiture resulting from nonpayment. Id. Where application provided that answers therein were basis of contract, that if any of them were untrue policy should be void, that only officers at home office had authority to determine whether policy should issue, and that no statements, promises, or information given to person soliciting application should be binding on company or in any manner affect its rights unless reduced to writing and presented to its officers at home office, held that fact that soliciting agent knew when policy was issued that insured's statement that he had never had paralysis was false did not preclude company from relying on falsity to defeat re-

of provisions that all waivers and modifications must be in writing and attached to the policy.[71]

(§ 16) *D. Reinstatement.*[See 8 C. L. 448]—An unreasonable delay in passing upon a petition for reinstatement may warrant a presumption of its acceptance.[72] So, too,

covery. Iverson v. Metropolitan Life Ins. Co. [Cal.] 91 P 609.

Limitation Held Not to Prevent Waiver. Accident insurance: Acts of agent within scope of his authority are binding on company though contract contains general clause that agents shall have no authority to change contract or waive forfeiture. North American Acc. Ins. Co. v. Bowen [Tex. Civ. App.] 18 Tex. Ct. Rep. 505, 102 SW 163. Provision that no agent should have power to change policy or waive any of its terms held to relate to provisions of contract itself after it went into effect, and not to conditions relating to the inception of the contract where it appears that agent has delivered policy and received premiums with full knowledge of the actual situation. Dulany v. Fidelity & Casualty Co. [Md.] 66 A 614.

Fire insurance: Company cannot by stipulation in application or policy escape responsibility for act of its agent in waiving falsity to answers to questions in application. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 SW 687. Stipulations and limitations regarding powers of agents and manner of waiving its conditions do not preclude waiver by conduct of authorized agents in regard to future operations upon premises. Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 P 102.

Life insurance: Superintendent of agencies having power to adjust and settle claims held to have authority to waive forfeiture for nonpayment of premiums when due by accepting overdue premiums, though policy provided that waiver could only be effected in writing signed by certain other specified officers. Industrial Mut. Indemnity Co. v. Thompson [Ark.] 104 SW 200.

71. Limitation Held to Prevent Forfeiture. Fire insurance: Provision that policy should be void if insured had any other insurance, unless otherwise provided by agreement indorsed thereon or added thereto, held not subject to oral waiver. Romano v. Concordia Fire Ins. Co., 121 App. Div. 489, 106 NYS 63. Provision that, unless otherwise provided by agreement indorsed thereon or added thereto, policy should be void if insured procured additional insurance, held not waived, nor was company estopped to enforce it because insured, having procured additional insurance after policy was issued, informed agent of fact in casual conversation on street, he having made no effort to secure indorsement either from company or such agent, who had authority to make it. Smith v. West Branch Mutual Fire Ins. Co., 31 Pa. Super. Ct. 29. Where policy provided that it should be void if certain named substances "or other explosives" were kept on premises, and that no agent of insurer should have power to waive any of its provisions except in writing indorsed thereon or added thereto, held that parol evidence was inadmissible to show that agent who placed insurance knew that building was to be occupied by miners who were accustomed to keep blasting powder in their houses, and charged higher premium on that account, and intended that blasting powder should be excluded from list of explosives in which it was not specifically mentioned. St. Paul Fire & Marine Ins. Co. v. Penman [C. C. A.] 151 F 961. Fact that insured notified agent of existence of other insurance held not to preclude forfeiture because of it. Clemments v. German Ins. Co., 153 F 237.

Life insurance: Where policy provided that its terms could not be changed or its conditions varied except by written agreement signed by company's president or secretary, held that insurer was entitled to instruction that any waiver of conditions must be in writing. Sullivan v. Metropolitan Life Ins. Co., 35 Mont. 1, 88 P 401.

Limitation Held Not to Prevent Forfeiture. Fire insurance: Policy provided that, unless otherwise provided by agreement indorsed thereon. It should be void if risk was increased, and that no agent should have power to waive any of its provisions except by writing indorsed thereon or attached thereto. In consideration of additional premium general agent authorized to issue policies gave permission to operate new smelter not covered by policy, and for change of possession. Held that company waived forfeiture and was estopped from enforcing it, though attempted indorsement of such permission on policy by said agent was insufficient. Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 P 102. Where at time of issuing policy defendant had notice that insured had applied for additional insurance in excess of amount allowed by policy, and that such additional insurance had been or was about to be issued, held that it was estopped to rely on provision that no waivers, and no privilege or permission affecting insurance, should be binding unless in writing attached to or indorsed on policy. Continental Ins. Co. v. Reynolds [Md.] 68 A 277. Demurrer to rejoinder held properly sustained. Id. Policy provided that it should be void in case there was other insurance on property, unless otherwise provided by agreement indorsed thereon or added thereto, that agent should have no power to waive its provisions, and that no provision could be waived without an indorsement on policy itself. Held that, where agent transmitted to company in his daily report a list of other insurance on property, and company permitted policy to stand without objection, company would be deemed to have contracted that policy should stand as valid notwithstanding other insurance so reported, and insured was entitled to have policy reformed in that regard. Clemments v. German Ins. Co., 153 F 237.

72. Application to revive forfeited policy was accompanied by statement of local agent that applicant was sick, but recommending revival for advertising purposes. Insured died 15 days after application was made and before it had been passed on. Held

the retention of a premium paid after a purported cancellation may operate as an election to treat the policy as still in force.[73]

§ 17. *Contracts of reinsurance and concurrent insurance. Reinsurance.* See 8 C. L. 444—Whether payment by the original insurer is a condition precedent to the liability of the reinsurer to it depends on the terms of the contract.[74] A statute authorizing reinsurance is a part of contracts of reinsurance, and stipulations in conflict with it are void.[75] Statutes in some states provide that the liability of the reinsurer shall be the same as though the original policy had been issued by it.[76] In the absence of an agreement to the contrary, the rights and duties of a policy holder in a company which reinsures its risks with another company, the latter assuming all its contracts, are measured by his original contract.[77] The Illinois statute authorizing the transfer and reinsurance of risks by assessment companies requires a transfer of all members actually in good standing when the reinsurance is effected.[78]

Concurrent insurance. See 8 C. L. 445—Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk, and the same interest.[79] There is no right of contribution between several insurers whose policies provide that the insurer shall not be liable for a greater proportion of the loss than the amount covered by its policy bears to the whole insurance on the property.[80] A

that the delay was not so unreasonable as to warrant presumption of acceptance of application and premiums accompanying it. Ryan v. Prudential Ins. Co., 33 Pa. Super. Ct. 364.

73. Retention for 13 days held election by company to treat accident policy, previously canceled on payment of loss, as still in force. North American Acc. Ins. Co. v. Rehacek, 123 Ill. App. 219.

74. Policy of reinsurance providing that loss should be payable pro rata with, and upon same conditions as "paid" by reinsured company, and that in no event should reinsurer be liable for amount in excess of ratable proportion of sum "actually paid" to insured by reinsured company, construed, and held that word "paid" meant payable, so that reinsurer was not relieved from liability because of insolvency of reinsured company and its consequent inability to pay those it had insured. Alemannia F. Ins. Co. v. Firemen's Ins. Co., 28 App. D. C. 330.

75. Federal Ins. Co. v. Kerr [Ind. App.] 82 NE 943. By suing reinsurer held that beneficiary ratified contract of reinsurance only in so far as it was authorized by statute. Id.

76. Where liability of original insurer to insured became absolute after expiration of two years, so that neither breach of warranty nor misstatement in application was available as defense, held that provision of contract of reinsurance that liability of reinsurer should be conditioned on truth of every statement, warranty, and representation in application was void as an attempt to deprive insured of vested contract interest, and in violation of Burns' Ann. St., 1901, § 4956, which confers only authority to reinsure. Federal Life Ins. Co. v. Kerr [Ind. App.] 82 NE 943. References to reinsurance contract between reinsurer and original insurer in policy of reinsurance issued to insured to be attached to original policy, held not so framed as to convey idea to insured that new contract was being made for him, and to be effective only to charge him with notice of contract such as statute authorized original insurer to make. Id.

77. Plaintiff's policy made compliance with constitution and by-laws of association issuing it condition precedent to recovery. Held that he was not bound to comply with those of an association which subsequently reinsured original insurer's risks and assumed its contracts, in absence of showing of an agreement on his part to that effect. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557.

78. Since under Laws 1893, p. 124, § 16, contract of reinsurance made by virtue of said statute transfers all members of transferring association who were in fact in good standing, without reference to records and books of said association, and power of transferring members cannot be exercised as to part or certain class of members in good standing, held that it was not incumbent on beneficiary suing reinsurer to prove that insured was in good standing on books of company at time transfer was made, though contract of reinsurance provided that defendant accepted all members in good standing when contract went into effect as shown by books, nor to prove, as part of his case in chief, that insured was in good standing in original company at time of transfer or in transferee at time of his death, fact that he was not being matter of defense. Brown v. Mutual Reserve Fund Life Ass'n, 224 Ill. 576, 79 NE 949, rvg. 124 Ill. App. 277.

79. Yanko v. Standard Fire Ins. Co., 31 Pa. Super. Ct. 1. Where partnership composed of two persons insured its property in one company, and one of the partners insured his individual interest in other companies, held that there was not double insurance, and that company issuing policy to firm was not entitled to pro rata loss with insurers of partner's interest. Id.

80. Each contract is independent of the others, each insurer is liable to insured for its proportion of loss, and its proportion only, and payment by one of them of larger proportion than it is bound to pay in no way

joint adjustment of the loss and an apportionment thereof among the several insurers may, however, give one of them a right to recover from the others excess payments made under a mistake as to the property covered by its policy.[81]

§ 18. *The loss or benefits, its extent, and extent of liability therefor.* See 8 C. L. 445—*Accident and health insurance* policies frequently provide that the amount of indemnity shall be increased or diminished in case illness, injuries, or death result from certain specified causes.[82]

Credit insurance.—The amount for which the insurer is liable in case of loss depends on the terms of the policy.[83]

Employer's liability insurance. See 8 C. L. 446—Whether the insured is entitled to recover interest and costs recovered in an action against him by an injured employe in addition to the amount of indemnity named in the policy depends on the terms of the contract.[84] Where the insurer denies liability, refuses to defend an action against the insured, and directs the latter not to incur any expense on its behalf, it cannot thereafter attack a judgment recovered against the insured in such action,[85] nor contend that its liability is limited to an amount for which the plaintiff in said action offered to settle with the insured.[86]

affects liability of others, and gives party so paying no right to recover excess from others. Firemen's Fund Ins. Co. v. Palatine Ins. Co., 150 Cal. 252, 88 P 907.

81. Several companies insured same property under policies containing pro rata clause. After loss all authorized an adjuster to adjust loss and to apportion same among them which he did, fixing total amount of loss by agreement with insured. Under mistaken belief that policies of defendant companies did not cover certain machines, he so apportioned loss that plaintiff companies were compelled to bear larger proportion thereof than they were legally bound to do. Held that adjustment and apportionment constituted new agreement as to insured on which plaintiffs were liable to him for amounts apportioned against them, and hence they could recover their excess payments from defendants. Firemen's Fund Ins. Co. v. Palatine Ins. Co., 150 Cal. 252, 88 P 907.

82. See § 10, ante.

83. Policy provided that gross aggregate of insolvent accounts coming within its provisions to be taken into calculation of losses was limited to $5,000, but that no account against any one debtor should be covered for more than $3,000, "and only 75 per cent. of the amount so covered on said accounts" should be included in calculation of losses. Held that maximum liability was $5,000, and that 75 per cent. provision applied only to accounts of individual debtors. Peden Iron & Steel Co. v. Ocean Acc. & Guarantee Corp. [C. C. A.] 151 F 992. Policy held to limit liability of insurer to $10,000 on both rated and unrated accounts, liability on latter not to exceed $5,000, and to provide for deduction of initial loss of one-third of one per cent. on whole business of insured from net loss on insolvent accounts coming within terms of contract, remainder, if any, not exceeding limit of guarantee, being amount payable to insured. Id.

84. Policy limited indemnity to $5,000, and provided that insurer should at its own cost defend claims against insured, and should have entire control of such defense. Insurer defended claim, and judgment was rendered against insured for $6,000, with interest and costs. Insurer paid insured $5,000. Held that items of interest and costs were part of loss arising from insured's liability and not part of cost of defense, and hence insurer was not liable therefor in addition to amount of policy. National & Providence Worsted Mills v. Frankfort Marine Acc. & Plate Glass Ins. Co. [R. I.] 66 A 58. Insurer held liable, in addition to indemnity provided for by policy, for sum paid physicians for services rendered at request of insurer in defense of action against insured. Id. In view of provisions insuring against expenses of defending suits for damages, and reserving to insurer control over defense of such suits, etc., held that limitation as to amount of liability for any injury did not include costs and expenses of defending suit against insured for damages for personal injuries defended by insurer, but insured was liable therefor in addition to amount of indemnity which was less than amount of damages recovered. New Amsterdam Casualty Co. v. Cumberland Tel. & T. Co., [C. C. A.] 152 F 961.

85. Plaintiff news company obtained employer's liability policy from defendant, and also agreed to hold railroad company over whose lines it operated harmless for injuries to its employes. Insurer directed plaintiff not to incur any expense on its behalf in resisting claim against railroad company for death of one of plantiff's employes, and refused to take any steps in defense of action thereon against railroad on ground that neither plaintiff nor insurer was liable. Held that insurer, in subsequent action against it by plaintiff, could not attack judgment recovered against railroad company in that action on ground that it was collusive, particularly as it failed to do so in a subsequent action by railroad company against plaintiff, in which question was in issue. Fidelity & Casualty Co. v. Southern R. News Co, 31 Ky. L. R. 55, 101 SW 900.

86. Railroad company paid judgment against it for death of one of plaintiff's employes, and agreed to settle with plaintiff, who was liable over to it under contract between them for half sum paid. Insurer,

Fire insurance.[See 8 C. L. 446]—The insured in case of loss is ordinarily entitled to recover the amount of his actual damages,[87] not exceeding the amount named in the policy.[88] The insurer is entitled to credit for a sum paid the insured for a release subsequently held to have been obtained through fraud.[89] Statutes in some states make it unlawful for the insurer to limit its liability by reason of the failure of the insured to insure his property for any certain amount or proportion of its actual cash value,[90] or to limit the amount to be paid in case of loss to a sum less than the actual cash value of the property, if within the amount of the insurance for which a premium is paid, or to require the use of any coinsurance clause except at the option of the insured.[91]

Valued policy laws.[See 8 C. L. 446]—A policy may be open as to a partial loss and

from whom plaintiff had obtained employers' liability policy, directed plaintiff not to incur any expense in settling claims of employe or railroad company, claiming that it was not liable. Plaintiff refused to settle. In subsequent suit by plaintiff against insurer, held that latter could not contend that its liability was limited to amount of proposed settlement, on ground that it was plaintiff's duty to minimize damages by making settlement. Fidelity & Casualty Co. v. Southern R. News Co., 31 Ky. L. R. 55, 101 SW 900.

87. Evidence held to show that, when calculated on correct basis, there were enough goods on hand to allow recovery of full amount of policy under three-fourths clause. Yates v. Thomason [Ark.] 102 SW 1112. Charge that jury should calculate loss by taking amount named in policy as value of goods when policy was issued held erroneous as invading province of jury. Georgia Co-Op. Fire Ass'n v. Lanier, 1 Ga. App. 186, 57 SE 910. Evidence held insufficient to show amount of loss. Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491. Introduction in evidence of policy and proofs of loss does not make out prima facie case, proofs not being admissible for purpose of showing amount of loss. Id. Where insured's interest in property is life estate only, expectancy of life calculated from annuity tables is not alone proper criterion for estimating value of his interest, but state of health may be considered, and jury may consider his age and appearance for vigor and health. American Cent. Ins. Co. v. Leake, 31 Ky. L. R. 1016, 104 SW 373. House held so nearly destroyed that part left standing was of no material value as building. Id. Evidence held to have shown with reasonable precision what insured's partial loss of profits amounted to. Lite v. Firemen's Ins. Co., 104 NYS 434. Where policy provided that company should not be liable beyond actual cash value of property at time loss occurred, and that loss should be estimated according to such actual cash value, with proper deduction for depreciation, however caused, and should in no event exceed what it would then cost insured to repair or replace same with material of like kind and quality, held that, in estimating loss, insured was entitled to cash value of property destroyed provided it did not exceed what it would cost to replace it with material of like kind and quality at date it was consumed. Frick v. United Firemen's Ins. Co. [Pa.] 67 A 743. Where insured property was whiskey, held that plaintiff's right of recovery was not limited to cost of material, expense of manufacture, charges for carrying it in bond, and interest on amount invested, but that he was entitled to have age of whiskey, which was important factor in determining its cost, taken into consideration, and, there being whiskey of several different ages, cost of replacing it could be ascertained only by ascertaining from competent evidence its actual cash value in wholesale liquor market at date of fire. Id.

88. Instruction fixing amount of recovery at three-eighths of amount of loss, not to exceed amount of policy with interest, held proper. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

89. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 SW 687.

90. Provision that in consideration of reduced rate of premium it was agreed that company should pay only such proportion of loss as sum insured by policy bore to 80 per cent. of value of property insured, and that in no case would it be liable for greater proportion of loss than amount thereby insured bore to whole insurance whether valid or not, held void under Acts 1895, p. 292 (Act. No. 153). Attorney General v. Commissioner of Ins., 148 Mich. 566, 112 NW 132. Act held not repealed. Id. Act held not an unconstitutional limitation on right to contract, power to make standard form of policy carrying with it power to make all of the terms of the policy. Id.

91. St. 1898, § 1943a, held to apply only to cases where insurer attempts without consent of insured and without reduction of premium to limit its liability thereon below face of policy for which insured has paid full premium, and where value of goods destroyed is within amount of such insurance carried on property. Bloch v. American Ins. Co. [Wis.] 112 NW 45. Is not to be taken as conflicting with standard policy law nor to prohibit permission for additional insurance, nor restriction of amount thereof, nor waiver of invalidity of additional insurance. Id. Agreement, purporting on its face to have been made at option of insured and in consideration of reduced premium, giving permission for other insurance to an amount, including policy to which it was attached, not to exceed 75 per cent. of cash value of property, provided that, if at time of fire total insurance should exceed said per cent, policy should become void only in proportion of said excess to such total insurance, held within scope of standard policy law and not in conflict with said section. Id.

valued as to a total one.[92] In the absence of express language manifesting a contrary intent, the policy will be construed as an open rather than a valued one, and recovery will be restricted to the amount of loss actually sustained.[93] Statutes in many states make the insurer liable for the full amount of insurance specified in the policy in case of a total loss or for the actual amount of a partial loss.[94] It has been held that, notwithstanding such a provision, the insured may sue as for a total loss and allege in addition thereto the actual amount of his damage, and, if he fails to establish a total loss, may recover the actual damages proven.[95]

§ 19. *Notice, claim, and proof of loss.*[See 8 C. L. 447]—Notice [96] and proof of loss containing the information required by the policy [97] must be given by the insured or the beneficiary, as the case may be,[98] to the insurer or its duly authorized agent,[99]

92. Policy insuring against loss of profits of lease held a mixed one, and to cover partial loss, so that insured was entitled to recover loss resulting from fire rendering part only of insured building uninhabitable. Lite v. Firemen's Ins. Co., 104 NYS 434.

93. Where contract is ambiguous, Georgia Co-op. Fire Ass'n v. Lanier, 1 Ga. App. 186, 57 SE 910. Policy held an open one. Id.

94. Rev. St. 1906, § 3643, providing that any person insuring any building or structure against loss by fire shall cause same to be examined by agent of insurer, and full description thereof to be made and insurable value thereof to be fixed by said agent, and that "in the absence of any change increasing the risk without consent of the insurers," etc., whole amount mentioned in policy shall be paid in case of total loss, and full amount of partial loss in case of such a loss, construed, and held that quoted words refer only to changes in insured building or structure itself, and were not intended to include or apply to anything distinct from or accidentally related to corpus of said building, such as vacancy for longer period than that allowed by policy. Germania Fire Ins. Co. v. Werner, 76 Ohio St. 543, 81 NE 980. Laws 1899, p. 332, c. 145, applies to insurance on special or limited interests in real property, and hence where plaintiff had agreed to purchase hotel and contents and deed and bill of sale was placed in escrow until certain incumbrances were removed, but plaintiff went into possession under a collateral agreement, and took out insurance in his own name, held that on total destruction of building and contents, he could recover full amount of insurance on building without proof of value of his interest. Bright v. Hanover Fire Ins. Co. [Wash.] 92 P 779. Law does not apply to personalty, so that he could not recover for personalty covered by bill of sale in absence of showing of value of his special interest therein. Id.

95. Notwithstanding Rev. Laws 1905, § 1642. Moore v. Sun Ins. Office, 100 Minn. 374, 111 NW 260. Evidence that, utilizing parts of building remaining after fire, reasonable cost of reconstructing and restoring building would be certain sum in excess of total insurance held admissible under pleadings. Moore v. Phoenix Ins. Co., 100 Minn. 393, 111 NW 263.

96. Accident insurance: Held substantial compliance with provision requiring notice of accident within ten days in view of attitude of defendant in denying liability, etc. Cornell v. Travelers' Ins. Co., 104 NYS 999. Compliance with provision requiring immediate notice is condition precedent to right to sue on policy. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 SW 124.

97. Accident insurance: Original proofs held not to be regarded as mere notice of loss in view of fact that postal card previously sent gave notice of accident within time specified. Norwood v. Preferred Acc. Ins. Co., 107 NYS 104.

Burglary insurance: Failure to prove performance of provisions as to form and contents of proof of loss held to preclude recovery. Reich v. Maryland Casualty Co., 54 Misc. 585, 104 NYS 984.

Fire insurance: Insured need only furnish such proofs as are required by policy. Modification of requested instruction held proper. Miller v. Firemen's Fund Ins. Co. [Cal. App.] 92 P 332. Reference in proofs to schedule previously furnished adjuster after loss held substantial compliance with provision requiring insured to set out in statement of loss cash value of each item of property, and amount of loss thereon. Pearce Mfg. Co. v. Lebanon Mut. Ins. Co., 216 Pa. 265, 65 A 663. Provision requiring insured to make complete inventory of personalty, stating quantity and cost of each article and amount claimed thereon, and within 60 days after fire to render sworn statement to company stating cash value of each item thereof and amount of loss thereon, held not to require insured to furnish said inventory to company. Frick v. United Firemen's Ins. Co. [Pa.] 67 A 743. Sworn statement held compliance with policy though word "price" instead of "cash value" appeared at head of column in which value per gallon of whiskey destroyed appeared, word having been manifestly used as meaning same as "cash value," as so understood by company. Id.

98. Provisions requiring statement of loss signed and sworn to by "insured," and for arbitration, held to impose duties therein specified on mortgagor alone, he being referred to by term "insured," and not by mortgagee to whom policy was payable as his interest might appear. Union Institution for Savings v. Phoenix Ins. Co. [Mass.] 81 NE 994. Though policy did not expressly authorize mortgagee to furnish sworn statement and provided that no default on part of mortgagor should defeat mortgagee's right to recover, held that, where insured failed to furnish statement, mortgagee was bound by implication to furnish to company in writing, within reasonable time, proper information in regard to loss as to such

within the time prescribed.[1] Immediate notice means notice within a reasonable time, what is a reasonable time depending upon the facts and circumstances of each case.[2] Statutes in some states prohibit the insurer in certain cases from limiting

matters as he might reasonably be expected to know, and failure precluded recovery. Id.

99. Employer's liability insurance: Where there was custom, known to defendant, in city for broker who solicited insurance for insuring company to receive notices of accidents and summons for actions brought against insured on account of such accidents, held that delivery of summons to broker was delivery to defendant company. Pringle v. Aetna Life Ins. Co., 123 Mo. App. 710, 101 SW 130. Permitting broker to receive and transmit notices and summons held recognition of his agency for that purpose. Id.

Fire insurance: Delivery of proof to soliciting agent held not delivery to company. Arkansas Mut. Fire Ins. Co. v. Clark [Ark.] 105 SW 257.

1. Accident insurance: Failure to serve notice within ten days held to preclude recovery. Heintz v. Continental Casualty Co., 105 NYS 519. Failure to furnish proofs within thirty days held to avoid policy. Id. Where policy provided that insured should give notice of accident within fifteen days after it occurred, and loss of time for which he claimed indemnity did not commence until more than fifteen days after accident, held that notice within fifteen days after such loss commenced was sufficient. Baumister v. Continental Casualty Co., 124 Mo. App. 38, 101 SW 152.

Employer's liability insurance: Provision in policy, insuring against liability for injuries resulting from accidents caused by insured's horses or vehicles in transportation of goods, requiring insured, upon occurrence of accident and upon receiving information of a claim on account of an accident, to give immediate notice in writing of such accident or claim, held to impose active duty on insured to give notice immediately after he has become appraised of accident, provided he exercises reasonable care to acquire the information, and so regulates his business that he may be appraised with reasonable celerity of any accident that may occur in its conduct. Woolverton v. Fidelity & Casualty Co. [N. Y.] 82 NE 745, rvg. 100 NYS 1151. Insured does not, in such case, discharge its whole obligation by promulgating to its servants rules adapted to appraise insurer of accidents, but is chargeable with delay and neglect on part of its agents and servants whose duty it is, either by express regulation, or by their supervision and control in natural and proper conduct of business over subordinate servants by whom accident is caused, to transmit such knowledge to their superiors or the company. Woolverton v. Fidelity & Casualty Co. [N. Y.] 82 NE 745. Knowledge of driver who caused accident held not imputable to insured, but that insured was chargeable with delay of one to whom driver reported, and whose duty it was to receive reports of accidents and transmit them to general superintendent. Id.

Fire insurance: Failure to furnish proofs within stipulated time operates as forfeiture of policy requiring sworn statement to be rendered within sixty days after fire, and containing subsequent provision that no suit should be maintained on policy until after full compliance with all foregoing requirements. Arkansas Mut. Fire Ins. Co. v. Clark [Ark.] 105 SW 257. Failure to furnish proofs within time required by policy held to preclude recovery, there being nothing to show that insured was misled. Davis v. Northwestern Mut. Fire Ass'n [Wash.] 92 P 881.

Health insurance: Provision requiring insured to give notice within ten days after contracting any of diseases insured against, symptoms of which were stated, held only to require notice when there were some symptoms sufficiently cognizable and distinct to call attention of insured to fact that he was ill, and when so construed to be valid. Blackman v. U. S. Casualty Co., 117 Tenn. 578, 103 SW 784. Giving of notice held condition precedent so that failure to give it within ten days after insured knew that he had disease insured against precluded recovery. Id. Provision requiring notice held not warranty or representation within meaning of Acts 1895, p. 322, c. 160, § 22. Id.

NOTE. Effect of failure to furnish proofs within prescribed time: There is a conflict of authority as to the effect of a failure to furnish proofs within the time prescribed by a fire insurance policy where the policy makes compliance with provisions in that regard a condition precedent to suit. Some courts hold that such failure, unless sufficiently excused, precludes recovery. Quinlan v. Insurance Co., 133 NY 356, 31 NE 31, 28 Am. St. Rep. 645; Shapiro v. Western Home Ins. Co., 51 Minn. 239, 53 NW 463; Farmers' Ins. Co. v. Frick, 29 Ohio St. 466; Scammon v. Germania Ins. Co., 101 Ill. 621; Leftwich v. Royal Ins. Co., 91 Md. 596, 46 A 1010; Hanover Fire Ins. Co. v. Johnson, 26 Ind. App. 122, 57 NE 277; White v. Home Mutual Ins. Co., 128 Cal. 137, 60 P 666; Burnham v. Insurance Co., 75 Mo. App. 394; Teutonia Ins. Co. v. Johnson, 72 Ark. 484, 82 SW 840; Missouri Pac. Ry. v. Western Ins. Co., 129 F 610. Others, however, hold that, though proofs are not furnished within such time, insured may still recover on the policy provided he furnishes them before suit is brought. Stecle v. German Ins. Co., 93 Mich. 81, 53 NW 514, 18 L. R. A. 85; Flatley v. Phenix Ins. Co., 95 Wis. 618, 70 NW 828; St. Paul Fire & Marine Ins. Co. v. Owens, 69 Kan. 602, 77 P 544; Gragg v. Home Ins. Co., 28 Ky. L. R. 988, 90 SW 1045; Hartford Fire Ins. Co. v. Redding, 47 Fla. 228, 37 S 62, 110 Am. St. Rep. 118, 67 L. R. A. 518; Northern Ins. Co. v. Hanna, 60 Neb. 29, 82 NW 97; North British Ins. Co. v. Edmundson, 104 Va. 486, 52 SE 350.—From Davis v. Northwestern Mut. Fire Ass'n [Wash.] 92 P 881.

2. Accident insurance: Without showing of good cause therefor, failure to give notice until six weeks after injury is breach of condition. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 SW 124. Notice held to have been given within reasonable time under circumstances. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557. Means notice as soon as practicable under circum-

the time within which notice must be given to less than a specified number of days.[3] It has been held that, where the insurance is upon a single building and the loss is total, no other proof of loss than the preliminary notice of loss is necessary.[4] Misstatements in the notice do not necessarily avoid the policy.[5]

False swearing.[See 8 C. L. 448]—In order that fraud or false swearing may avoid the policy under a provision therein to that effect, the statements made must be knowingly and intentionally false.[6]

Waiver.[See 8 C. L. 449]—Provisions requiring notice and proofs of loss, being for the benefit of the insurer, may be waived by it,[7] by acts and conduct inconsistent with an intention to insist on strict performance.[8] Since plaintiff must recover on the

stances, in absence of some unmistakable limitation to contrary. Cady v. Fidelity & Casualty Co. [Wis.] 113 NW 967. Service by beneficiary as soon as practicable after obtaining knowledge of existence of policy held sufficient. Id.

Employer's liability insurance: Provision that insured should give immediate notice of an accident and full information concerning it, and, if sued, should immediately forward summons, etc., to insurer, held to require such things to be done with reasonable promptness under the circumstances. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 SE 969. Evidence that delay was due to sickness and death held sufficient to support finding that it was excusable. Id.

3. Laws 1901, p. 313, c. 235, prohibiting any accident or casualty company from limiting time for insured to serve notice to less than twenty days, and providing that memorandum with respect to the matter shall be clearly and conspicuously placed on face of policy, and specifying sufficient manner of service, held not to apply to death claim made by beneficiary. Cady v. Fidelity & Casualty Co. [Wis.] 113 NW 967. Ineffective attempt to comply with said statute does not extend beyond intent so as to relate to beneficiary unless language of memorandum is unmistakably to contrary. Id.

4. Failure to furnish verified plans and specifications of building, with detailed estimate of cost of replacing same, held not to preclude recovery. Pearce Mfg. Co. v. Lebanon Mut. Ins. Co., 216 Pa. 265, 65 A 663.

5. False statement in notice of injury as to what work insured was engaged in at time of injury held not to relieve insurer from liability where it was responsible under true facts. Continental Casualty Co. v. Jennings [Tex. Civ. App.] 17 Tex. Ct. Rep. 696, 99 SW 423.

6. Must have been knowingly and intentionally made with knowledge of its falsity, and with intention of defrauding company. Instruction approved. Miller v. Fireman's Fund Ins. Co. [Cal. App.] 92 P 332. If such state of facts is presented as leaves reasonable presumption of mistake or misapprehension, such presumption should be indulged in preference to that of willful false swearing. Id. Mere discrepancy does not create presumption as matter of law that insured contemplated fraud when statements were made. Id. Evidence held to support finding that false statements were not willfully or intentionally made. Id. Insurer held not entitled to claim exemption from liability because of negligence of insured in making false statements in proof of loss where no damage resulted because mistakes were rectified at trial. Id. Evidence held to support finding that there was no fraud or concealment in stating in proofs of injury manner in which accident occurred. Norwood v. Preferred Acc. Ins. Co., 107 NYS 104. Evidence held to show that statement as to amount of loss in sworn statement was knowingly false, and policy canceled. Fire Ass'n of Philadelphia v. Allesina [Or.] 89 P 960. Evidence held insufficient to show that insured was guilty of false swearing in stating that origin of fire was unknown to him, and did not originate by his act or procurement. Rochester German Ins. Co. v. Schmidt, 151 F 681.

7. Reed v. Continental Ins. Co. [Del.] 65 A 569. Finding of waiver of proofs held not against clear preponderance of evidence. Arkansas Mut. Fire Ins. Co. v. Witham [Ark.] 101 SW 721.

8. Accident insurance: Where general agent was informed of date of plaintiff's injury by broker, and thereafter, with knowledge that notice had not been given, furnished plaintiff with blank notice, which plaintiff executed, and plaintiff submitted to physical examination at agent's request, held that there was waiver as matter of law. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 SW 124. Evidence that proofs of loss were not objected to because immediate notice of injury was not given, and that president of local branch of defendant association recommended payment, held to show either an acceptance of notice as given, or waiver of delay in giving it. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557.

Burglary insurance: Evidence held insufficient to show waiver of provision as to form and contents of proof. Reich v. Maryland Casualty Co., 104 NYS 984.

Employer's liability insurance: Fact that insurer participated in defense of action against insured held not waiver of provision of employer's liability policy requiring immediate notice of accident, where it had previously given insured explicit notice by letter that all questions as to alleged failure to give prompt notice were reserved, to which reservation insured made no objection. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 SE 969.

Fire insurance: Acts and conduct of adjuster leading plaintiff to believe that no further proofs were necessary. Reed v. Continental Ins. Co. [Del.] 65 A 569. As where adjuster, after examination of premises, offered insured certain sum in full settlement, and, after its refusal, agreed with him as to loss on goods totally destroyed,

state of facts existing at the time he brings his action, the acts relied upon to show waiver must have occurred before that time.[9] A failure to furnish proofs is waived by a distinct denial of liability on other grounds,[10] or, in the absence of a provision in the policy[11] or an agreement[12] to the contrary, by proceedings looking to an adjustment of the loss.[13] The acts of the insurer's agent in this regard, if within the general scope of his authority, are deemed those of the company.[14] There is a conflict of authority as to the effect of general limitations on his authority in the policy.[15] Where the insured in good faith attempts to comply with the terms of the policy, the retention by the company of the proofs furnished without objection may amount to a waiver of any defects therein.[16]

and demanded appraisal as to balance. Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 NE 26, afg. [Ind. App.] 73 NE 1093. Allegations held sufficient to require submission of question of waiver to jury. Id.

9. Proofs and arbitration. Cullen v. Insurance Co. of North America [Mo. App.] 104 SW 117.

10. Accident insurance. United States Health & Acc. Ins. Co. v. Harvey, 129 Ill. App. 104. Failure to give notice of death of insured and to claim indemnity held no defense, where defendant did not rely thereon, by counsel stated in open court that defense was that insured died from disease and not as result of accident. Johnson v. Continental Casualty Co., 122 Mo. App. 369, 99 SW 473.

Fire insurance. Yates v. Thomason [Ark.] 102 SW 1112. Because of alleged invalidity of policy as to tornado insurance. Arkansas Mut. Fire Ins. Co. v. Witham [Ark.] 101 SW 721. Because of alleged overestimate of amount of loss. Hartford Fire Ins. Co. v. Hammond [Colo.] 92 P 686. By refusal of company, on application for blank proofs, to pay loss on ground that there was no delivery of policy, and no payment of premium or execution of assessable note in lieu thereof. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227. Evidence held sufficient to make prima facie case of waiver and to take case to jury. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245. Where adjuster told insured that unless he would first agree to accept certain sum for goods totally destroyed, no adjustment would be made, and that he could sue on policy, etc. Cullen v. Insurance Co. of North America [Mo. App.] 104 SW 117. Failure of assignee of policy to furnish supplemental proofs held waived, where refusal to pay was based on sole ground that he had no insurable interest. Munson v. German Fire Ins. Co., 33 Pa. Super. Ct. 551. Where, before expiration of time fixed by written contracts for furnishing proofs, oral contract was repudiated on ground that there was no contract and no liability. Thompson v. Germania Fire Ins. Co. [Wash.] 88 P 941.

11. Examination of insured under oath held not waiver of proofs, where policy provided that it should not have that effect. Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491.

12. Purpose of nonwaiver agreement held to preserve rights of parties pending investigation of fire and determination of amount of loss, so that it was terminated when that purpose was served, and did not prevent denial of liability after investigation from operating as waiver of proofs of loss. Yates v. Thomason [Ark.] 102 SW 1112. Signing of agreement held not to have precluded insurer from orally waiving proofs of loss. Arkansas Mut. Fire Ins. Co. v. Witham [Ark.] 101 SW 721.

13. By appearance of adjuster and negotiations for settlement. Fire insurance. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

14. Fire insurance: Failure to furnish proofs held not waived by verbal promise of local agent that he would do whatever was necessary, and that insured need do nothing. Hottner v. Aachen & Munich Fire Ins. Co., 31 Pa. Super. Ct. 461. Act June 27, 1883 (P. L. 165), authorizing service of proofs on local agent countersigning policy within twenty days after fire, held not to confer authority on local agent to waive proofs. Id.; Kness v. Anchor Fire Ins. Co., 31 Pa. Super. Ct. 521. Evidence held not to show waiver by local agent, even conceding his authority. Kness v. Anchor Fire Ins. Co., 31 Pa. Super. Ct. 521.

15. Fire insurance: Waiver may be proved by, or inferred from, acts and conduct of duly authorized agent, though policy provides that no agent shall have power to waive any of its provisions except such as by its terms might be subject of agreement, and that in such case should be indorsed on or added to policy. Reed v. Continental Ins. Co. [Del.] 65 A 569. Provision of by-laws of mutual company that in all settlements for losses representative or adjuster should be limited in authority to visiting place of loss and investigating and reporting facts, board reserving to itself authority of determining questions as to loss and amount of same, held not to deprive adjuster of authority to waive proofs by denying liability, etc. Arkansas Mut. Fire Ins. Co. v. Witham [Ark.] 101 SW 721.

16. Fire insurance: Mere silence may so mislead him to his disadvantage as to be of itself sufficient evidence of waiver by estoppel. Pearce Mfg. Co. v. Lebanon Mut. Ins. Co., 216 Pa. 265, 65 A 663. Held duty of insurance company to expressly request sworn copy of schedule referred to in proofs if intended to insist on insured furnishing it. Id. Evidence that company retained without objection paper containing inventory of property and specifying amount claimed on each article, but not signed and sworn to as required until sixty days within which insured was required to furnish formal proofs, used it for purpose of identifying property, etc., and entered upon negotiations for settlement based upon its contents, held to require submission of

§ 20. *Adjustment and arbitration.*[See 8 C. L. 451]—Fire policies generally provide that, in case of a disagreement as to the amount of loss and damage,[17] it shall be determined by an appraisal or arbitration by disinterested appraisers,[18] who shall submit their differences to an umpire to be chosen by them.[19] Whether compliance with the provisions as to arbitration is a condition precedent to recovery is to be determined from the terms the policy.[20] It has been held that where it conclusively appears that the amount of loss exceeds the total amount of insurance, no appraisal is necessary.[21] A demand by two or more insurers for submission of their several liabilities in one appraisement or arbitration is unwarranted.[22] It is the duty of both the insured and the insurer to act in good faith and make a fair effort to carry out the appraisal, and a failure to do so by either ordinarily excuses the other from any further obligation in the matter.[23] As a general rule, on the failure of an attempted appraisal without the fault of the insured, he may immediately sue on the policy without a resubmission.[24] If both parties endeavor to prevent an appraisal, or to render abortive an

question of waiver of strict compliance with terms of policy to jury, and to justify finding of waiver. Glazer v. Home Ins. Co. [N. Y.] 82 NE 727, rvg. 113 App. Div. 235, 98 NYS 979. Defects in proofs held immaterial, where they were received without objection, though attorneys for insured, who furnished them, requested that they be notified of any insufficiency or if anything further was required, and where insurers denied liability in subsequent actions on policies. Rochester German Ins. Co. v. Schmidt, 151 F 681.

17. Plea setting up that award of appraisers was condition precedent to action by mortgagee held bad on demurrer for failure to allege existence of all conditions making award essential, such as that appraisal had been required and that there was disagreement as to amount of loss. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053.

18. Appraisers should be disinterested. Hartford Fire Ins. Co. v. Asher, 30 Ky. L. R. 1053, 100 SW 233.

19. Award made by umpire and one appraiser held valid though not signed in presence of other appraiser. German Ins. Co. v. Hazard Bk., 31 Ky. L. R. 1126, 104 SW 725. Conduct of appraiser held to amount to submission of matter to umpire so that he could not thereafter withdraw, and award by umpire and other appraiser was valid. Garrebrant v. Continental Ins. Co. [N. J. Err. & App.] 67 A 90.

20. In absence of agreement as to amount of loss, or waiver of arbitration, appointment of arbitrators held condition precedent. Union Institution for Savings v. Phoenix Ins. Co. [Mass.] 81 NE 994. Provisions held to constitute condition precedent imposing obligation on insured, in event of disagreement as to amount of loss, to procure an award or ascertainment of amount of loss by appraisers, or to show legal excuse for not doing so, before he could maintain action on policy to recover loss, except as such condition is modified as to total loss by Rev. St. 1906, § 3643, so that in suit to recover on such a loss, in absence of an award of appraisers and of demand for appraisal by either insured or insurer, no cause of action was shown. Graham v. German American Ins. Co., 75 Ohio St. 374, 79 NE 930. Provision that loss should not become payable until sixty days after ascertainment and proof of loss, etc., "including an award by appraisers when appraisal has been required," held not to impose any obligation on insurer to demand appraisal, but in event of disagreement as to amount of loss, appraisal was required by terms of contract, and in suit on policy burden was on insured to show that he had, on his part, performed or offered to perform condition as to appraisal. Id.

21. Moore v. Sun Ins. Office, 100 Minn. 374, 111 NW 260.

22. Hartford Fire Ins. Co. v. Asher, 30 Ky. L. R. 1053, 100 SW 233.

23. After provision becomes operative by execution of agreement to arbitrate and appointment of arbitrators, both parties are bound to act in good faith to have loss ascertained in accordance with provisions of policy, and if either acts in bad faith so as to defeat object of arbitration, as by refusing to proceed, other party is absolved from further obligation to arbitrate, and is not bound to enter into agreement for another arbitration. Instuctions approved. Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 NE 26, afg. [Ind. App.] 73 NE 1093. Right to any appraisal is not indefinite as to time, but must be exercised within reasonable period, what is reasonable time depending upon facts of each case and being question for jury. Id. Provision that loss was to be paid sixty days after due notice and satisfactory proof of same had been received according to terms of policy held not to have given company, after it had agreed to appraisal and named its appraiser, an absolute right to sixty days within which to commence appraisal, but it was bound to proceed within reasonable time. Instructions approved. Id. Allegations of complaint as to delay on part of insurer held sufficient to require submission of issue of waiver of arbitration to jury. Id. Failure to secure an appraisal held not to preclude recovery when it was without fault on part of insured. Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491. Evidence held to support finding that failure was fault of insurer. Hartford Fire Ins. Co. v. Hammond [Colo.] 92 P 686. Requirement of insurers that umpire should not live in county where fire occurred or its vicinity held unreasonable and improper. Hartford Fire Ins. Co. v. Asher, 30 Ky. L. R. 1053, 100 SW 233.

24. Where arbitration failed through de-

agreement for one, the appraisement clause will cease to be a condition precedent to a right of action.[25] It has been held that where an arbitration is a condition precedent to recovery, it is the duty of a mortgagee, to whom the policy is payable as his interest may appear, to take steps to procure one and that he cannot recover unless he does so.[26] In some states provisions for arbitration will not be enforced.[27] The appraisers must ordinarily exercise their own judgment in making the award, though an award is not necessarily vitiated because of their consultation with experts.[28] Insured should be given an opportunity to be present with books and other evidence to show extent of loss.[29] The award must be definite and certain,[30] uncertainty as to certain items avoiding the whole award where it is not severable.[31] The award cannot be impeached at law for misconduct of the appraisers or umpire.[32] It may be set aside in equity if based on the fraud or false testimony of the insured, and mistakes in estimating the amount of loss may be corrected.[34] The insured cannot assail an award which he has set up and relied upon in his pleadings.[35]

The right to an appraisal may be waived by acts and conduct inconsistent with an intention to demand it,[36] such as an absolute denial of liability.[37] When once waived, the insurer cannot again require a submission to arbitration.[38]

fault of insurer, held that insured was not bound to enter into new appraisement, there being no provision to that effect in policy. Fire Ass'n of Philadelphia v. Appel, 76 Ohio St. 1, 80 NE 952. Where owing to fact that appraisers were partisans of parties selecting them, and unreasonable requirement of insurer that umpire should be person not residing in vicinity of fire, appraisal broke up, and it became evident that no agreement could be reached, held that it was incumbered on insurer promptly, within reasonable time, to name another appraiser, not a partisan, and to request insured to do same, and when this was not done, after lapse of reasonable time, proposition for appraisement would be deemed abandoned and subsequent demand therefor could not be made. Hartford Fire Ins. Co. v. Asher, 30 Ky. L. R. 1053, 100 SW 233. Where first appraisers without fault of either party failed to determine amount of loss, held that it was not duty of insured to propose selection of new appraisers. Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491.

25. Carp v. National Assur. Co. [Mo. App.] 99 SW 523.

26. Though policy required insured to act in obtaining arbitration, did not expressly authorize mortgagee, to whom policy was payable as his interest might appear, to do so, and provided that no default on part of insured should affect mortgagee's right to recover, held that, where insured failed to act, mortgagee had implied right to do so, and, arbitration being condition precedent, could not recover unless he did. Union Institution for Savings v. Phoenix Ins. Co. [Mass.] 81 NE 994.

27. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

28. Award held not invalidated because umpire consulted with carpenter, who viewed premises at his request, as to amount of damage. German Ins. Co. v. Hazard Bk., 31 Ky. L. R. 1126, 104 SW 725.

29. Harth Bros. Grain Co. v. Continental Ins. Co., 31 Ky. L. R. 180, 102 SW 242.

30. Award of three months' rent under policies covering loss of rents due to fire held void for uncertainty where no sum of money was allowed, date from which rent was to run was not fixed, and rate of monthly rent was not specified. Palatine Ins. Co. v. O'Brien [C. C. A.] 152 F 922.

31. Whole award covering loss on buildings and loss of rents insured against by separate policies held void where award as to rents was void for uncertainty. Palatine Ins. Co. v. O'Brien [C. C. A.] 152 F 922.

32. Garrebrant v. Continental Ins. Co. [N. J. Err. & App.] 67 A 90.

33. Will be set aside in a suit instituted for that purpose, and he will be enjoined from maintaining an action thereon. Fire Ass'n of Philadelphia v. Allesina [Or.] 89 P 960. Evidence held to show that sworn statement, etc., was knowingly false as to amount of loss. Id.

34. Evidence held to show mistakes and errors, insured having been given no opportunity to present proof, and judgment ordered for increased amount. Harth Bros. Grain Co. v. Continental Ins. Co., 31 Ky. L. R. 180, 102 SW 242.

35. Gray v. Merchants' Ins. Co., 125 Ill. App. 370.

36. Evidence held insufficient to authorize finding of waiver, there being no proof of any word or act on part of company or its agents showing any attitude of company as to plaintiff's claim except that of standing on all its legal rights. Union Institution for Savings v. Phoenix Ins. Co. [Mass.] 81 NE 994. Where adjuster told insured that unless he would first agree to accept certain sum for goods totally destroyed no adjustment would be made and he could sue on policy, etc., held that company was estopped to invoke provision for arbitration as defense to subsequent action on policy. Culien v. Insurance Co. of North America [Mo. App.] 104 SW 117. Where appraiser selected by insurer withdrew from appraisement without fault of either party, held that his conduct did not revoke appraisement, but that it was duty of insurer to appoint another, and its refusal to do so or to proceed further with apraisal, and its demand for and insistence upon new appraisement, was

Each party is ordinarily required to pay the appraiser selected by him,[39] and half the compensation of the umpire.[40]

§ 21. *Option to pay loss or restore property, or to take damaged property at appraised value.*See 4 C. L. 219

Burglary insurance policies frequently provide that the insurer may repair any damage to property and may replace any damaged article with one of like quality and value instead of paying for the same in money.[41]

Fire insurance.—The insurer must notify the insured of its intention to repair within the time specified in the policy.[42] In case it does not do so, the insured may then proceed to make the repairs himself.[43] The notice must be clear and unambiguous.[44] The election to repair may not be accompanied with some other proposition to be accepted by insured in lieu of the exercise of the right given.[45]

The insurer is sometimes given the option to take the property at its agreed or appraised value.[46] Waiver of such a provision cannot be predicated on a demand for an appraisal where the provision for an appraisal is unenforcible.[47]

§ 22. *Payment of loss or benefits and adjustment of interests in proceeds.*See 8 C. L. 455—Matters relating to compromise and settlement,[48] and to releases,[49] are treated elsewhere. Payment in good faith and without notice to the beneficiary named in the policy generally relieves the insurer from further liability, though said beneficiary has in fact no insurable interest.[50] The proceeds of life policies are fre-

waiver of condition requiring appraisement. Fire Ass'n of Philadelphia v. Appel, 76 Ohio St. 1, 80 NE 952.

37. Moore v. Sun Ins. Office, 100 Minn. 374, 111 NW 260. By denial of liability solely because of fraud and false swearing. Miller v. Firemen's Fund Ins. Co. [Cal. App.] 92 P 332. Instruction to that effect held harmless in any event where company refused to arbitrate. Id.

38. Hartford Fire Ins. Co. v. Asher, 30 Ky. L. R. 1053, 100 SW 233.

39. Appraiser acting for insured held not entitled to recover for his services from agent of insured who brought about his selection, he having acted under written appointment signed by insurer and insured, with knowledge of provision of policy that insured should pay appraiser selected by him. Underhill v. Smith, 52 Misc. 349, 102 NYS 142. Evidence held insufficient to show any intention on part of agent to become personally bound. Id.

40. Evidence held insufficient to show that insured's agent obligated himself to personally pay umpire. Underhill v. Smith, 52 Misc. 349, 102 NYS 142.

41. Policy covered loss of money stolen from safe, damage to safe, damage to premises, etc., but there was no apportionment of indemnity between the several losses insured against. Safe was blown open and money in excess of aggregate indemnity stolen therefrom. Held that, where insured made no claim for loss on account of damage to safe, and no proof of loss therefor, but only for money stolen therefrom, insurer had no right to replace damaged safe as part payment of its liability. Bankers' Mut. Casualty Co. v. State Bk. of Goffs [C. C. A.] 150 F 78.

42, 43. German Ins. Co. v. Hazard Bk., 31 Ky. L. R. 1126, 104 SW 725.

44. Must notify the insured of its election in such manner as will leave no doubt in the latter's mind of its intention. German Ins. Co. v. Hazard Bk., 31 Ky. L. R. 1126, 104 SW 725.

45. Notice that company would exercise its right unless insured accepted certain sum offered by way of compromise held insufficient, it being an attempt to use privilege as means to force insured to accept compromise. German Ins. Co. v. Hazard Bk, 31 Ky. L. R. 1126, 104 SW 725.

46. Where defendant had ample opportunity to and did inspect damaged property for purpose of ascertaining loss before sale, and it was not contended that it did not sell for its actual value in its damaged condition, held that insured was not precluded from recovering because he sold property within time given company by policy to exercise option to take property at its value as estimated by insured and company, or by appraisers in case of disagreement, appraisement clause being unenforcible. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

47. Where law will not compel appraisal, no waiver can be predicated upon demand therefor. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152. Instruction that demand for appraisal was waiver of right to take damaged property after loss held harmless, if erroneous. Id.

48. See Accord and Satisfaction, 9 C. L. 11.

49. See Releases, 8 C. L. 1714.

50. Insured, as permitted by policy, changed beneficiary from his son to his uncle, who had no insurable interest. Company in good faith, and without notice of his want of insurable interest, paid proceeds to uncle. Held that guardian of son who was also insured's administrator, could not again recover amount of policy from company, particularly where, though he knew that uncle was taking steps to collect policy, he failed to notify company of his claim, but his remedy, if any, was against

quently exempted from liability for insured's debts.[51] The holder of a materialman's lien on a building is not entitled to the proceeds of a fire policy procured and collected by the owner, in the absence of an agreement to that effect.[52] By statute in Massachusetts a mortgagee may acquire a lien on the proceeds of a fire policy by filing a notice with the insurer and commencing suit within a specified time.[53] A tenant cannot recover from the insurer damages resulting to him from the failure of the insurer to promptly repair the leased premises in accordance with an agreement made by the insurer with the insured landlord.[54]

§ 23. *Subrogation and other secondary rights of the insurer.*[See 8 C. L. 457]—On paying the loss the insurer is ordinarily subrogated to the rights of the insured against third persons responsible therefor.[55] Fire[56] and burglary[57] policies often

uncle. Renick v. Mutual Life Ins. Co. [Ky.] 106 SW 310.

51. Under St. 1903, § 655, proceeds of policy effected by insured on his own life in favor of another person having insurable interest go to beneficiary as against creditors and personal representatives of insured. Hall v. Ayers' Guardian [Ky.] 105 SW 911. Proceeds of policy payable to named beneficiaries not liable for insured's debts. Townsend's Assignee v. Townsend [Ky.] 105 SW 937. Mansf. Dig. Ark. § 4623, put in force in Indian Territory by act of congress, authorizing insurance on husband's life for benefit of wife which shall be free from claims of husband's creditors, provided that such exemption shall not apply where amount of premiums paid annually out of funds or property of husband shall exceed $300, construed, and held that if insured was at all times before his death solvent and not financially embarrassed, statute does not limit his right of investment, and if insurance procured was reasonable provision for his wife and children, his creditors were entitled to no part of proceeds regardless of amount. Red River Nat. Bk. v. De Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 385, 105 SW. 998. In case he was at all times insolvent or embarrassed, held that he could invest but $300 annually on premiums, and amount which that sum would buy would be extent of exemption in favor of widow and children. Id. If insolvent at time of payment of some only of premiums, held that sum recoverable by creditors, if any, should be diminished by amount which $300 would have purchased at date of its investment, provided there was nothing in policy to vary rule. Id. To warrant creditors in recovering, insured's financial condition when payments were made must have been state of indebtedness which produced embarrassment and approached insolvency. Id. Widow's right to dower held not to be taken into consideration in determining husband's financial condition at any particular date, in absence of showing of ill health, or imminent death or other special circumstances. Id. Burden held on wife to show, as against creditors, that husband's financial condition warranted investment of more than $300 annually. Id. Right of creditors to recover held not to depend on whether present claims were those held by them when premiums were paid, if at all times insured was so largely in debt that he would have proved insolvent had he been forced to meet his liabilities, and such continuing indebtedness was merely shifted from one creditor to another, or from one form of indebtedness to another. Id. Subsequent creditors held also entitled to maintain action, provided there had been at all times creditors who could have done so. Id. Additional exemption of $500 allowed by laws of Indian Territory held not an annual one. Id. Evidence held insufficient to show that any part of premiums was paid out of rents of wife's separate lands. Id. Question of husband's financial condition held for jury. Id.

52. Henry Vogt Mach. Co. v. Lingenfeiser, 30 Ky. L. R. 654, 99 SW 358.

53. Where it is not stipulated in policy that insurance shall be payable to mortgagee, mortgagee acquires no lien under Rev. St. c. 49, § 54, until and unless he files with secretary of insurance company written notice briefly describing mortgage, estate conveyed thereby, and sum remaining unpaid thereon. Knowlton v. Black, 102 Me. 503, 67 A 563. If lien is thus acquired and mortgagor does not consent in writing that insurance shall be paid to mortgagee, lien is lost unless mortgagee within 60 days after loss enforces lien by suit against mortgagor and against insurance company as its trustee. Rev. St. c. 49, § 55. Id.

54. Lessor insured plate glass window of store and, on its being broken, insurer agreed to replace it. Held that lessee could not recover from insurer damages resulting to him from its failure to make repairs promptly, he not being in privity with said agreement. Munk v. Maryland Casualty Co., 107 NYS 215. Lessee held not entitled to recover in tort as for negligence., particularly where action was on contract. Id.

55. Insured property was destroyed by fire originating within railroad right of way. Insurer paid loss and took from insured subrogation receipt assigning to it her claim against railroad to extent of such payment. Held that insurer could recover from railroad amount so paid without alleging or proving that fire was due to railroad's negligence, in view of act that Code Civ. Proc. 1902, § 2135, makes railroad companies absolutely liable to owner of property for such losses, irrespective of any finding as to negligence. Aetna Ins. Co. v. Charleston & W. C. Ry. Co., 76 S. C. 101, 56 SE 788. Insurance company having paid loss, held that it became real party in interest and could maintain action against insurer in its own name. Id. Insurance company which had paid fire loss held entitled to be subrogated to right of insured to maintain action against railroad company whose negligence was alleged to have

contain express provisions to that effect, and require the assignment of such rights to the company as a condition precedent to payment.

Mortgage clauses frequently provide that the insurer shall be subrogated to any rights of the mortgagee on the payment to him of any sum.[58]

§ 24. *Remedies and procedure. A. Rights of action and defenses, parties, and limitations.* See 6 C. L. 458—Matters relating to venue [59] and process [60] are fully treated elsewhere.

Rights of action and defenses.—Assumpsit lies to recover assessments made by decree of court in proceedings to wind up a mutual company.[61] If an assessment fire insurance company denies liability and refuses to make an assessment, the insured may at once sue at law for his damages, though the policy provides that no action may be maintained thereon until an assessment has been made.[62] Equity has jurisdiction of a suit to compel the company to account for surplus in which the insured is entitled to share under the terms of his contract,[63] unless there is an adequate remedy at law by way of an action on the contract.[64] It also has exclusive jurisdiction of a suit to cancel a contract of insurance on the ground of fraud.[65]

caused fire. Svea Ins. Co. v. Vicksburg, etc., R. Co., 153 F 774. Action in such case held subject to same defenses as could have been invoked in action by insured against railroad, including insured's contributory negligence. Id.

56. Where policy stipulated that on paying loss caused by another insurer should be subrogated to rights of insured, who should assign such rights to it, held that company under such an agreement and an assignment could recover against wrongdoer, though it was member of insurance trust in violation of anti-trust law (Laws 1900, p. 125, c. 128), since agreement and assignment did not relate to business of trust. Freed v. American Fire Ins. Co. [Miss.] 43 S 947.

57. Evidence held to show that insured had never made any settlement with manufacturer of safe of any claim it had on guaranty of soundness of safe, and that it offered to assign to insurer all its rights against said manufacturer, even if offer of assignment was condition precedent to suit on policy. Bankers' Mut. Casualty Co. v. State Bk. of Goffs [C. C. A.] 150 F 78.

58. Policy procured by mortgagee at its own expense and payable to it as its interest might appear provided that insurance should not be invalidated as to mortgagee by any act or neglect of mortgagor, nor by any change in title or ownership of property, and that in case insurer paid loss to mortgagee it should be subrogated to latter's rights. Policy was forfeited as to mortgagor by sale of his interest in insured property, and by failure to furnish proofs of loss, etc. Insurer paid mortgagee amount of its debt and took assignment thereof. Held that mortgagor had no interest in proceeds of policy, but that insurer was subrogated to rights of mortgagee and might enforce debt against mortgagor. Gillespie v. Scottish Union & Nat. Ins. Co., 61 W. Va. 169, 56 SE 213.

59. See Venue and Place of Trial, 8 C. L. 2236. See, also, 8 C. L. 458, n 64.

60. See Process, 8 C. L. 1449. See, also, 8 C. L. 461, n. 3.

61. Liability is one arising by virtue of statutes under contract of insurance. Swing v. American Glucose Co., 123 Ill. App. 156.

62. Thompson v. Piedmont Mut. Ins. Co. [S. C.] 58 SE 341. Is not required to sue in equity to compel an assessment. Batson v. South Carolina Mut. Ins. Co. [S. C.] 58 SE 936.

63. Whether insured was bound by apportionment of surplus made by company held not to go to jurisdiction of court in suit in which that question was to be determined. Peters v. Equitable Life Assur. Soc. [Mass.] 81 NE 964. Argument that there could be but one division between policy holders, so that what would be given to plaintiff would be taken from others, held untenable in view of fact that corporation's capital stock would be liable for any breach of contract. Id. Demurrer to bill in equity brought by policy holder in behalf of himself and other policy holders, alleging that defendant's charter provided for issuance of stock on which limited dividends should be paid, that company was to be conducted on mutual plan and its accumulated surplus earnings were to be equitably credited or applied for benefit of policy holders by its officers, that apportionment made was not equitable, and charging officers with fraud, waste, and mismanagement, specifically alleging facts constituting same, and demanding accounting and other equitable relief, held improperly sustained, complainant having right to appeal to court of equity under such circumstances. Brown v. Equitable Life Assur. Soc. [C. C. A.] 151 F 1, rvg. 142 F 835. One holding semitontine policy held to have no remedy in equity in Federal circuit court to compel company to account and to pay over to him amount of tontine fund to which he was entitled and for damages. Peters v. Equitable Life Assur. Soc., 149 F 290. Complainant held to have remedy in equity in Massachusetts state courts by virtue of Rev. Laws, c. 159, § 3, cl. 6, conferring jurisdiction in equity on certain courts of suits upon accounts of such a nature that they cannot be conveniently adjusted and settled at law. Id.

64. Complaint alleging that plaintiff was holder of semitontine policy whereby company, among other things, agreed, at expira-

*Parties.*See 8 C. L. 459—All persons having any interest in the subject-matter of the suit are ordinarily proper parties.[66] Both the insured and the beneficiaries are necessary parties to an action for the recovery of premiums paid on a life policy which has been repudiated by the insurer.[67]

Time of commencing action.[68]—A provision that no action may be maintained on the policy until a specified time after filing proofs of loss may be waived by the insurer.[69]

*Limitations.*See 8 C. L. 460—There is a conflict of authority as to the validity of contract limitations. Some courts hold them to be contrary to public policy if for a less period than that fixed by the general statute of limitations,[70] and others hold them to be valid if reasonable.[71] The matter is regulated by statute in some states.[72] If valid the action must be commenced within the time so fixed,[73] unless the limita-

tion of tontine period, to apportion equitably among such of its policies of same class as plaintiffs as should complete their tontine dividend periods all surplus profits derived from such of its policies on semitontine plan as should not be in force at date of completion of their respective tontine periods, that plaintiff had complied with terms and conditions of policy, and, on information and belief, that defendant wrongfully and unlawfully neglected to determine just and equitable proportion of assets to be allotted to him, and arbitrarily and unjustly fixed his share at less sum than that to which he was equitably entitled, and had wrongfully diverted surplus profits to wrongful purposes, and praying for an accounting, held not to state cause of action in equity, no trust relation being involved and plaintiff having adequate remedy at law by action for breach of contract. Watts v. Equitable Life Assur. Soc., 105 NYS 363. Held particularly true in view of fact that no facts were alleged showing that apportionment was not equitable or was based an erroneous principles, or showing fraud or misconduct on part of defendant. Id.

65. Where bill to recover premiums paid on policies and to cancel contract in relation thereto alleged that contract as written was not one agreed upon, but that substitution was made without their knowledge or consent, and through fraud and imposition practiced by defendant's agents. Robertson v. Covenant Mut. Life Ins. Co., 123 Mo. App. 238, 100 SW 686.

66. Where policy procured by wife on life of her husband, and payable to herself or assigns, or to husband's children in case she died before him, was assigned to third person as collateral security for premiums paid, and wife died before husband, held that husband's children were proper and necessary parties to suit by representatives of assignee to ascertain interests of parties in policy, to establish equitable lien in favor of plaintiffs to extent of premiums advanced, and to collect policy. Morgan v. Mutual Benefit Life Ins. Co. [N. Y.] 82 NE 438, afg. 104 NYS 185. In action by executor of insured against insurer to recover share of proceeds alleged to have been acquired by insured as heir of his wife, who was named as one of several beneficiaries in policy, and who predeceased insured, held that other beneficiaries to whom insurer had paid policy were proper parties. Armond v. Connecticut Mut. Life Ins. Co. [N. C.] 58 SE 997.

67. Aetna Life Ins. Co. v. Penn, 5 Ohio N. P. (N. S.) 547.

68. See 8 C. L. 460, n. 89, 90.

69. Accident insurance: Refusal to treat cause of injury as accident and insisting that it should be treated as disease and subject to limitations relating to disability arising from that cause held waiver of provision that action could not be brought until three months after filing of final proofs. Dulany v. Fidelity & Casualty Co. [Md.] 66 A 614.

Five insurance: Evidence held to show lack of good faith and intent not to pay loss, and consequent waiver of provision that suit should not be brought within 60 days after loss. Springfield Fire & Marine Ins. Co. v. Reynolds [Md.] 68 A 281. Held that there was ample evidence tending to show refusal to pay loss, so that court properly refused to rule as matter of law that suit was prematurely brought. Continental Ins. Co. v. Reynolds [Md.] 68 A 277.

70. Provision that no suit should be brought after nine months from death of assured held void. Continental Casualty Co. v. Harrod, 30 Ky. L. R. 1117, 100 SW 262.

71. Six months' limitation in fire policy held to preclude recovery, no extrinsic facts excusing delay having been alleged. Appel v. Cooper Ins. Co., 76 Ohio St. 52, 80 NE 955.

72. Accident insurance: Provision limiting right to sue to 6 months held void under Burns' Ann. St. 1901, § 4923. Phoenix Acc. & Sick Ben. Ass'n v. Lathrop [Ind. App.] 81 NE 227. Code 1897, § 1744, providing that time within which action may be brought shall not be limited to less than one year from time cause of action accrues, held applicable to accident insurance companies, so that action brought within that time was valid though policy provided that action should be commenced within 6 months next after disability for which claim is made either terminates or assumes fixed and permanent character. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566.

Life insurance: Code 1896, § 2802, declaring void provisions limiting time of bringing action to less time than that fixed by statute, held applicable to provision in a Georgia contract, though provision would be valid under laws of that state. Galliher v. State Mut. Life Ins. Co. [Ala.] 43 S 833.

73. Accident insurance: Limitation held applicable to losses by death so that action commenced more than 9 months after insured's death was barred. Moest v. Conti-

tion is waived.[74] Negotiations looking to a settlement have been held to prevent the running of such limitations.[75]

(§ 24) *B. Pleading and practice.* See 8 C. L. 462—The usual rules of pleading apply,[76] including those as to exhibits.[77] If an ordinance is relied on, so much of its language must be stated as will enable the court to judge whether its provisions offer a ground for the action or defense in support of which the authority of the ordinance is invoked.[78]

Plaintiff must allege facts showing the making of the contract sued on,[79] and, if in writing, must set it out in full or according to its legal effect.[80] He must also

nental Casualty Co., 104 NYS 553. Limitations held to have commenced to run from date when original proofs, which were retained by insurer, were furnished, and not from date when additional proofs were furnished, it not appearing at whose request this was done. Norwood v. Preferred Acc. Ins. Co., 107 NYS 104.

Employer's liability insurance: Provision that no action should lie against company unless "brought by assured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within 60 days from the date of such judgment" held to require payment of judgment within 60 days of its date, and not the bringing of suit against insurer within that time. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 SE 969.

Fire insurance: Provision that action must be brought within 12 months after fire held condition precedent. Williams v. Fire Ass'n, of Philadelphia, 104 NYS 100. Limitations held to have commenced to run from date of fire as expressly provided, though loss was not payable until 60 days after receipt of proofs of loss. Appel v. Cooper Ins. Co., 76 Ohio St. 52, 80 NE 955.

74. Employer's liability insurance: Participation in negotiations for settlement continuing until after expiration of 30 day limitation held absolute waiver of limitation, and not to have operated merely to suspend running of said limitation until negotiations were completed. Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. [C. C. A.] 149 F 954, rvg. 140 F 718.

Fire insurance: Limitation held not to have been waived by negotiations for settlement of loss. Appel v. Cooper Ins. Co., 76 Ohio St. 52, 80 NE 955.

75. Accident insurance. Norwood v. Preferred Acc. Ins. Co., 107 NYS 104.

76. See Pleading, 8 C. L. 1355. Insurer held not entitled to rely on breach of representation in application, where there was nothing in notice attached to plea, as required by circuit court rule 7, subd. d., to indicate its intention to do so. Maas v. Anchor Fire Ins. Co., 148 Mich. 432, 14 Det. Leg. N. 232, 111 NW 1044. Fraud on insurer held not open to consideration because not set forth in notice. Baumler v. Farmers' Mut. Fire Ins. Co., 148 Mich. 430, 14 Det. Leg. N. 209, 111 NW 1069. Where petition alleged that before date of accident defendant had assumed all liabilities of association originally issuing certificate sued on, and answer alleged that it assumed all liabilities on said certificate but subject to provisions of defendant's constitution and by-laws in force when such liabilities should accrue, held that plaintiff was relieved from proving such assumption, but burden was on defendant to prove some law of association showing that plaintiff's claim was excepted from the assumption. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557. Petition in action by insured for cancellation of life policy and premium note on ground of fraud held not bad on general demurrer for failure to specifically aver absence of negligence on plaintiff's part, since such averment would, if essential, be supplied by intendment. Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580. Where certificate made application part thereof, and provided that same should be subject to provisions of constitution and by-laws, and amendments thereto, and that contract should be governed by laws of New York, held that declaration in action against company for damages for breach of contract by making illegal, unwarranted, and excessive assessments was demurrable where it failed to set out constitution, by-laws, or laws of New York, either in haec verba or in legal effect. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F 461.

77. Action held founded upon policy issued by original insurer and subsequently assumed by reinsurer, and not upon contract of reinsurance between the two insurers so that latter instrument was not necessary exhibit, under Burns' Ann. St. 1901, § 365. Federal Ins. Co. v. Kerr [Ind. App.] 82 NE 943.

78. Plea charging that loss was caused by ordinance relating to buildings, to-wit, by officer acting under authority of ordinance, held bad for failure to set out at least the substance of said ordinance, merely giving its title being insufficient. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053.

79. Counterclaim seeking to recover on employer's liability policies held demurrable. Aetna Life Ins. Co. v. North Star Mines Co., 107 NYS 140. Complaint in suit in equity to compel company to account to plaintiff and other policy holders for reserve fund, etc., of another company whose contracts defendant was alleged to have assumed, held not to state cause of action as failing to show any contract between plaintiff and old company, such a contract being basis of the action. Ovenshire v. Security Mut. Life Ins. Co., 54 Misc. 435, 104 NYS 378. Complaint held fatally defective in failing to allege whether defendant took over assets of old company pursuant to contract or under Laws 1893, c. 690, relating to reorganization of companies, and, if former was case, in failing to set out contract or its substance. Id.

80. Where it appears from complaint itself that terms or conditions of contract

plead facts showing a loss falling within the terms of the policy,[81] and allege the performance of all conditions precedent,[82] or a waiver thereof,[83] a general allegation of performance being sufficient in most states.[84] There is a conflict of authority as to whether waiver may be shown under an allegation of performance.[85] Plaintiff need not plead a waiver of breaches not alleged by defendant as a defense.[86] The petition in an action against a policy holder in a mutual company to recover an assessment due must allege facts showing a compliance with the statute in making the assessment.[87]

The breach of conditions, representations, or warranties,[88] that the loss was within the excepted causes,[89] incendiarism,[90] default in the payment of premium,[91] and failure to furnish proofs for loss [92] or to procure an appraisal,[93] must be specially pleaded in the answer if relied on as a defense. A general denial puts in issue all the allegations to which it is directed, and renders admissible all evidence which directly tends to disprove any or all of them.[94]

which may be material have been omitted, as where it is alleged that plaintiff has complied with all conditions on his part to be performed, but such conditions are not set out in haec verba or pleaded according to their legal effect, complaint is demurrable. Cross v. Home Ins. Co., 154 F 679.

81. Averment that insured was killed by being run over by locomotive held to sufficiently show that injury was caused solely by external, violent, and accidental means, leaving visible marks on the body. Phoenix Acc. & Sick Ben. Ass'n v. Lathrop [Ind. App.] 81 NE 227.

82. Contract limitation. Williams v. Fire Ass'n of Philadelphia, 104 NYS 100.

83. Facts relied on to establish waiver of provision requiring formal proofs of loss by retention of those sent held sufficiently pleaded to entitle plaintiff to avail himself of waiver if proven, though word "waiver" was not used. Glazer v. Home Ins. Co. [N. Y.] 82 NE 727, rvg. 113 App. Div. 235, 98 NYS 979. Plaintiff held not entitled to rely on waiver or estoppel by retention of premium where retention was not pleaded. Goorberg v. Western Assur. Co., 150 Cal. 510, 89 P 130.

84. General allegation of performance held sufficient to show compliance with provision that no action should be brought until after expiration of 3 months. Burns' Ann. St. 1901, § 373. Phoenix Acc. & Sick Ben. Ass'n v. Lathrop [Ind. App.] 81 NE 227.

85. Held permissible: Fire insurance. Gray v. Merchants' Ins. Co., 125 Ill. App. 370.

Held not permissible: Burglary insurance. Reich v. Maryland Casualty Co., 54 Misc. 585, 104 NYS 984. Waiver of contract limitation in fire policy. Williams v. Fire Ass'n of Philadelphia, 104 NYS 100.

86. Failure to pay premium. Fire insurance. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227.

87. Petition in action by mutual fire company organized under Ky. St. 1903, §§ 702-722, held insufficient for failure to sufficiently allege amount of assessment, nature and purpose thereof, and when and by whom it was made. Acton v. Farmers' Home Ins. Co., 30 Ky. L. R. 919, 99 SW 955. Allegations that certain sum was justly due and owing by him to company, and that he was justly indebted to it in certain sum, held mere conclusions. Id.

88. Insurer must plead condition and its breach. Fire insurance. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245. Otherwise deemed waived. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. Such defenses, when not pleaded, though established by evidence, should be ignored by court in submitting issues to jury. Id. Defendant held not entitled to rely on giving of mortgage as breach of condition where no such defense was pleaded, though matter was incidentally brought out as bearing on another matter. Id. Where petition alleges contract with substantial particularity to show liability for death by accident, it is not necessary for plaintiff to set forth clauses of contract which, if breached, would limit or exempt defendant from liability, the breach of such clauses being matter of defense to be pleaded by defendant. Accident insurance. Continental Casualty Co. v. Jennings [Tex. Civ. App.] 17 Tex. Ct. Rep. 696, 99 SW 423.

89. Plea charging that loss was caused by order of civil authority, to-wit, by order of building inspector of certain city directing destruction of insured buildings, held bad for failure to show authority of said officer to so order. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053.

90. Issue of destruction of insured property by owner held not presented by denial in answer of allegation in petition that fire did not originate by any act, design, or procurement on part of plaintiff. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

91. In absence of plea of nonpayment, is no issue as to payment. Continental Casualty Co. v. Wade [Tex. Civ. App.] 18 Tex. Ct. Rep. 410, 99 SW 877, rvd. on other grounds [Tex.] 19 Tex. Ct. Rep. 767, 105 SW 35.

92. Gray v. Merchants' Ins. Co., 125 Ill. App. 370.

93. Plea setting up that award of appraisers was condition precedent to recovery by mortgagee held bad for failure to allege existence of all conditions making award essential. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053.

94. Defendant held not entitled to prove nonpayment of first premium under general denial. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227. Plea of general denial in response to claim of waiver as-

*Variance.*See 8 C. L. 465—As in other cases, the pleadings and proof must correspond.[95]

*Practice.*See 8 C. L. 465—Equity may direct a discovery to aid an action immediately contemplated.[96] An order directing the company to allow the plaintiff to inspect its books and records bearing on the subject is properly allowed in an action by the insured to recover the amount claimed to be due him under a semitontine policy after the expiration of the dividend paying period.[97] In Maryland an action on a fire policy may be brought under the speedy judgment act.[98]

(§ 24) *C. Evidence; questions of law and fact. Presumptions and burden of proof.*See 8 C. L. 466—The presumption is against suicide,[99] and the burden is on the party seeking to establish it.[1] Plaintiff ordinarily has the burden of proving a loss within the terms of the policy.[2] The burden of proving a mistake in the policy is on the party alleging it.[3] The burden of proving breaches of conditions and promissory warranties,[4] false representations,[5] or that the loss was due to excepted causes,[6] is ordinarily on the defendant.

*Evidence.*See 8 C. L. 467—The usual rules of evidence apply,[7] including those as

serted by plaintiff held sufficient to require consideration of provision in policy that certain acts or requirements by insurer should not constitute waiver of forfeitures. Germania Fire Ins. Co. v. McChristy [Tex. Civ. App.] 18 Tex. Ct. Rep. 62, 101 SW 822.

95. Where petition simply declared on policy itself, held that plaintiff could not prove and recover on alleged subsequent oral modification thereof. United Zinc Co. v. General Acc. Assur. Corp., 125 Mo. App. 41, 102 SW 605. Cannot recover on proof of death from different cause than that alleged. Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A 821.

96. Equity held to have power to order insured's body to be exhumed and examined in aid of defense that he committed suicide by taking poison, where could be no recovery if such was case. Mutual Life Ins. Co. v. Griesa, 156 F 398.

97. Held proper to grant order, under St. 1898. § 4183, and rules of court, directing company to allow insured to inspect and copy its books, data, etc., showing reserve fund, accumulated surplus, and other funds, such examination being necessary to enable him to intelligently exercise options given him by policy. Ellinger v. Equitable Life Assur. Soc. [Wis.] 111 NW 567. Insured held not bound to accept insurer's volunteered statements as to such matters. Id.

98. May be brought under speedy judgment act of Baltimore City, Acts 1886, p. 304, c. 184. Continental Ins. Co. v. Reynolds [Md.] 68 A 277; Springfield Fire & Marine Ins. Co. v. Reynolds [Md.] 68 A 281.

99. Cady v. Fidelity & Casualty Co. [Wis.] 113 NW 967. If known facts are consistent with theory of natural or accidental death, presumption requires finding against suicide. Kornig v. Western Life Indemnity Co., 102 Minn. 31, 112 NW 1039. Where circumstantial evidence is relied on, defendant must establish facts which preclude any reasonable hypothesis of natural or accidental death. Id. Death by drowning presumed to be result of accident rather than suicide. Cornell v. Travelers' Ins. Co., 104 NYS 999. Where facts and circumstances are as consistent with death from negligence, accident, or homicide as by suicide, presumption is against suicide. White v. Prudential Ins. Co., 105 NYS 87. Presumption yields to evidence that death was self-inflicted and where no other reasonable inference may be drawn from evidence, it is duty of court to direct verdict upon theory of suicide. Id.

1. Kornig v. Western Life Indemnity Co., 102 Minn. 31, 112 NW 1039; Cady v. Fidelity & Casualty Co. [Wis.] 113 NW 967.

2. That death of insured was due to accident. Central Acc. Ins. Co. v. Spence, 126 Ill. App. 32; Bowman v. Northern Acc. Co., 124 Mo. App. 477, 101 SW 691.

3. Arkansas Mut. Fire Ins. Co. v. Witham [Ark.] 101 SW 721.

4. Where proof that it was usual or customary to operate works at night would result in forfeiture under watchman clause. Mackintosh v. Agricultural Fire Ins. Co., 150 Cal. 440, 89 P 102. Under Code, § 1743, providing that any condition or stipulation in policy making it void before loss occurs shall not prevent recovery if it shall be shown by plaintiff that failure to observe such provisions did not contribute to loss, provided that any condition referring to removal of insured property shall not be affected or changed by said section if removal makes risk more hazardous, held that, while insured is required to show that removal did not cause or contribute to loss, burden is on insured to show that it increased risk, that being matter of defense. Adams v. Atlas Mut. Ins. Co. [Iowa] 112 NW 651.

5. As to other insurance. Nabors v. Dixie Mut. Fire Ins. Co. [Ark.] 105 SW 92. That insured had been rejected by other company and that such rejection was known to him before he applied for policy in suit. Metropolitan Life Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 SW 876.

6. That accidental death resulted from unnecessary exposure to danger or obvious risk of injury. Continental Casualty Co. v. Todd [Ark.] 101 SW 168. To show voluntary exposure to unnecessary danger or lack of due diligence. Garcelon v. Commercial Travelers' Eastern Acc. Ass'n [Mass.] 81 NE 201.

7. See Evidence, 9 C. L. 1228. Fragmentary part of application held inadmissible in absence of evidence explaining fragmentary condition. Trow v. Preferred Acc. Ins. Co.

to the admission of expert evidence,[8] self-serving declarations,[9] and the declarations of agents, parties, and others.[10] Parol evidence is inadmissible to contradict or vary the terms of the contract,[11] but is admissible to explain ambiguities.[12] Proofs of loss or death are admissible against the party making them as evidence of the facts therein stated only in so far as they may be construed as admissions against interest.[13] At most they are only prima facie evidence of such facts.[14] Cases dealing with the admissibility of particular evidence to show whether there was a valid and binding contract,[15] false representations and breaches of warranty,[16] suicide,[17] the

[Vt.] 67 A 821. Exclusion held harmless in any event. Id.

8. Evidence of gas expert as to reason for presence of gas in room held incompetent as wholly speculative, and its admission on issue of suicide to have been highly prejudicial. White v. Prudential Ins. Co., 105 NYS 87.

9. Letter written by agent to insured stating that policy was kind applied for held inadmissible in action by insured to recover premium on ground of fraud. Glassner v. Johnston [Wis.] 113 NW 977.

10. Declarations of insured held admissible as against his executor on issue as to whether he had assigned interest in policy acquired by him as heir of his deceased wife. Ormond v. Connecticut Mut. Life. Ins. Co. [N. C.] 58 SE 997. Declarations of insured's deceased father as to date of insured's birth held admissible as to whether date of his birth was correctly stated in application. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 18 Tex. Ct. Rep. 932, 101 SW 545.

11. For full discussion of this question, see Evidence, 9 C. L. 1228. In absence of claim of fraud or mistake, or any foundation for reformation. Rief v. Continental Casualty Co., 131 Wis. 368, 111 NW 502. Application held part of contract and binding on insured, so that parol evidence of prior negotiations and agreements between him and agent was inadmissible. Prince v. State Mut. Life Ins. Co. [S. C.] 57 SE 766.

12. When meaning of words used is doubtful, circumstances in which parties' contract may be shown, their common knowledge and understanding being such a circumstance in certain cases. Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A 821. Company's knowledge that insured was railroad contractor held one of circumstances material to construction of words "contractor, office and traveling" used in accident policy in describing insured's occupation, and hence evidence as to knowledge of insured's general agent as to insured's occupation at time insurance was effected was admissible. Id. Knowledge of company's general agent in this regard is knowledge of company. Id.

13. **Fire insurance:** Proofs of loss are admissible only as evidence that requirements of policy have been complied with, and not as evidence of amount of loss. Lancashire Ins. Co. v. Lyon, 124 Ill. App. 491.

Life insurance: Proofs of death held admissible as admission. Haapa v. Metropolitan Life Ins. Co. [Mich.] 14 Det. Leg. N. 775, 114 NW 380. Statements of physician in certificate made part of proofs that insured had been ill between certain dates and had been treated at certain hospital held hearsay and of no probative force in view of previous statement showing that he had not attended her at that time, and fact that no relation was established between that alleged illness and tuberculosis which caused her death, and absence of evidence that illness was from any serious disease. Scott v. Metropolitan Life Ins. Co., 107 NYS 124.

14. **Accident insurance:** Insured held not estopped by statement in proofs of loss as to amount of indemnity to which he was entitled, but he could give evidence as to actual amount of time lost and recover accordingly. United States Health & Acc. Ins. Co. v. Harvey, 129 Ill. App. 104.

15. **Fire Insurance. Evidence held admissible:** That, pursuant to authority given by defendant, agent had rewritten all policies procured by him in company which subsequently became insolvent in defendant, and entered them upon register of defendant. Todd v. German American Ins. Co. [Ga. App.] 59 SE 94.

Life Insurance. Evidence held admissible: Declarations of insured, since deceased, in so far as they tended to show that application had been changed without his knowledge. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 SE 437. On issue as to whether delivery of policy was unconditional or qualified. Id.

16. **Fire insurance:** Evidence that agent had been told that property belonged to insured held admissible as part of res gestae, and as showing knowledge of agent that insured owned property though vendees had possession. Brunswick-Balke Collender Co. v. Northern Assur. Co. [Mich.] 14 Det. Leg. N. 651, 113 NW 1113. Certain questions as to ownership of property held not objectionable as calling for conclusions as to effect of contract of sale. Id. On issue as to falsity of representation that applicant had no reason to fear incendiarism, evidence as to what plaintiff's husband had said to her shortly before policy was obtained with reference to fires which had been set on farm by certain person, and as to conversations between plaintiff and another witness as to fires, held admissible. Wells v. Glens Falls Ins. Co., 117 App. Div. 346, 101 NYS 1059.

Life insurance: On issue of falsity of representation that he never used intoxicants to excess, evidence that for long time prior to application he was addicted to habits of intoxication, and had previously pleaded guilty to charge of drunkenness, held admissible, it not being too remote. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452.

17. **Accident insurance:** Evidence of insured's state of health for considerable

amount of the loss,[18] the cause of insured's injuries,[19] and waiver,[20] will be found in the notes. Plaintiff need only prove such of the allegations of his complaint as are necessary to show a right of recovery.[21]

Question of law and fact. See 8 C. L. 470—Whether there was a binding contract of insurance between the parties,[22] whether the policy was delivered,[23] the truth or falsity of representations [24] and their materiality,[25] the cause of disability,[26] whether

period prior to his death held admissible as bearing on question whether it was suicidal intent on his part when he committed act causing his death. Cady v. Fidelity & Casualty Co. [Wis.] 113 NW 967.

Life insurance: Evidence that insured carried on his person considerable sum of money shortly before his death, which was not found on his body afterwards, held admissible. Kornig v. Western Life Indemnity Co., 102 Minn. 31, 112 NW 1039. Photograph of rear of premises where insured's body was found, showing stairway from floor of building on which shooting occurred to ground, held admissible. Id.

18. Where it was contended that certain goods covered by an inventory might have been included among remnants introduced at trial as representing goods not included in said inventory, held that it was competent to show that insured agreed to sale of all goods covered by said inventory to salvage company, he being entitled to benefit of presumption that he honestly lived up to said agreement, and hence certain telegrams relating to said sale were admissible. Furlong v. North British & Mercantile Ins. Co. [Iowa] 113 NW 1084.

Fire insurance: Certain inventories taken after fire held admissible as statements of items to which witnesses referred in their testimony. Furlong v. North British & Mercantile Ins. Co. [Iowa] 113 NW 1084. Instruction held not misleading as to effect to be given inventories. Furlong v. American Central Fire Ins. Co. [Iowa] 113 NW 1087; Furlong v. National Fire Ins. Co. [Iowa] 113 NW 1089. Testimony of expert accountant as to amount of loss, based on insured's books and annual inventories for fifteen years, held not conclusive on jury so as to require their acceptance to exclusion of inventories made after fire, particularly in view of time and manner in which annual inventories were taken. Furlong v. North British & Mercantile Ins. Co. [Iowa] 113 NW 1084. Books and inventories held not such solemn admissions as to be conclusive on insured, or to preclude admission of other evidence as to amount of loss until plaintiff negatived deductions drawn therefrom by accountant, and explained wherein they were incorrect. Furlong v. American Central Fire Ins. Co. [Iowa] 113 NW 1087. Held not prejudicial error to permit witness, in rebuttal of defendant's evidence that goods carried by plaintiff in stock were cheap and inferior, to bring with her and exhibit, in connection with her testimony to effect that articles purchased by her out of plaintiff's stock were of good quality, the articles themselves. Bloch v. American Ins. Co. [Wis.] 112 NW 45.

19. Accident insurance: Where injuries were alleged to have resulted from an assault by third person, record of criminal action against latter by plaintiff in which such third person was acquitted held inadmissible. Myers v. Maryland Casualty Co., 123 Mo. App. 682, 101 SW 124. Where injury consisted of rupture of blood vessel in plaintiff's lung, evidence that he had previously procured leave to lay off work on account of illness held irrelevant. Young v. Railway Mail Ass'n [Mo. App.] 103 SW 557.

20. Accident insurance: On issue as to waiver by agent of provision that policy should be void if insured was over sixty-five years old, defendant held not prejudiced by evidence that general agent received without protest, premium paid to him by agent who sold policy, and that he at the time, examined book evidently containing insured's name, case having gone to jury on what transpired between selling agent and insured. Travelers' Ins. Co. v. Crawford's Adm'r [Ky.] 106 SW 290. Rejection of letter to company's manager from plaintiff's attorney requesting conference in regard to claim held not reversible error where none of conferences between parties resulted in adjustment. Dulany v. Fidelity & Casualty Co. [Md.] 66 A 614. Admission of offer of compromise made after institution of action on policy held prejudicial error, amount of loss being issue in case. Cullen v. Insurance Co. of North America [Mo. App.] 104 SW 117.

Employer's liability insurance: Correspondence between insured and company's agent, and between agents themselves, regarding adjustment of plaintiff's claim, together with explanation of circumstances under which and why they were written, held admissible on issue of waiver of contract limitations. Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. [C. C. A.] 149 F 954, rvg. 140 F 718.

21. Where plaintiff alleged compliance with all conditions of policy, held that denial of such allegation did not require plaintiff to prove, as part of his case, compliance with conditions subsequent in reference to forfeitures which went to defeat liability of insurer in case they were not complied with, but breach of such conditions was matter of defense. Thompson Bros. v. Piedmont Mut. Ins. Co. [S. C.] 57 SE 848.

22. Life insurance. Waters v. Security Life & Annuity Co., 144 N. C. 663, 57 SE 437.

23. Fire insurance. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227.

24. Fire insurance: Whether plaintiff had procured insurance by misstatement of purpose for which barn was to be used. Moss v. Home Ins. Co., 30 Ky. L. R. 630, 99 SW 308.

Life insurance: Where applicant's statement that he had never been rejected or postponed by any other company was false, but was no direct proof that he knew of previous rejection, questions whether he was chargeable with constructive notice. Langdeau v. John Hancock Mut. Life Ins. Co., 194 Mass. 56, 80 NE 452. As to use of intoxi-

injuries were the result of voluntary exposure to unnecessary danger,[27] the cause of death,[28] suicide,[29] whether there was a violation of the provisions against vacancy,[30] the keeping of gasoline on the premises,[31] or increase in the hazard,[32] compliance with the iron-safe clause,[33] incendiarism,[34] whether the destruction of the insured premises was due to insured's negligence,[35] what is a reasonable time,[36] waiver,[37] agency,[38] whether false statements in the proofs were willfully and intentionally made with knowledge of their falsity,[39] and the cause of the failure of an attempted arbitration,[40] have been held to be questions for the jury under conflicting evidence. The construction of the policy is for the court.[41]

(§ 24) *D. Verdict, findings, judgment, costs, and fees.*[42]—Interest ordinarily runs from the date when the loss becomes payable.[43]

Statutes in some states provide for the allowance of a specified penalty and a reasonable attorney's fee in actions on insurance contracts in case the loss is not paid within a specified time,[44] or if the insurer vexatiously refuses to pay,[45] or if its refusal to pay is not in good faith.[46]

cants. Metropolitan Life Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 SW 876. Whether insured truthfully answered question as he understood it. Smith v. Bankers' Life Ass'n, 123 Ill. App. 392.

25. Health insurance. Dulany v. Fidelity & Casualty Co. [Md.] 66 A 614. Whether previous injuries were such as might affect risk. Accident insurance. North American Acc. Ins. Co. v. Trenton [Tex. Civ. App.] 18 Tex. Ct. Rep. 389, 99 SW 740.

26. Whether traumatic neuritis was disease within provisions of policy providing for less indemnity. Kenny v. Bankers' Acc. Ins. Co. [Iowa] 113 NW 566.

27. Continental Casualty Co. v. Jennings [Tex. Civ. App.] 17 Tex. Ct. Rep. 696, 99 SW 423.

28. Accident insurance: Whether injuries resulting from fall were proximate cause of death. Johnson v. Continental Casualty Co., 122 Mo. App. 369, 99 SW 473. Whether insured was killed by falling off of observation car as alleged in declaration or by one of excepted causes. Trow v. Preferred Acc. Ins. Co. [Vt.] 67 A 821. Whether disease resulting in death was caused solely by fall. New Amsterdam Casualty Co. v. Shields [C. C. A.] 155 F 54.

29. Kornig v. Western Life Indemnity Co., 102 Minn. 31, 112 NW 1039.

30. Whether there was vacancy or mere temporary cessation of occupancy. Hunt v. State Ins. Co. [Iowa] 113 NW 807. Whether building was vacant and unoccupied at time of fire and had been for more than ten days. Maas v. Anchor Fire Ins. Co., 148 Mich. 432, 14 Det. Leg. N. 232, 111 NW 1044.

31. Whether gasoline was kept on premises and whether fire was caused by its explosion. Brunswick-Balke Collender Co. v. Northern Assur. Co. [Mich.] 14 Det. Leg. N. 651, 113 NW 1113.

32. Whether removal of insured property increases hazard within meaning of Code, § 1743. Adams v. Atlas Mut. Ins. Co. [Iowa] 112 NW 651.

33. Yates v. Thomason [Ark.] 102 SW 1112; McMillan v. Insurance Co. of North America [S. C.] 58 SE 1020. Whether method of bookkeeping was sufficient. Arkansas Mut. Fire Ins. Co. v. Stuckey [Ark.] 106 SW 203. Whether cash book was turned over to adjuster or destroyed in fire. McMillan v. Insurance Co. of North America [S. C.] 58 SE 1020.

34. Whether insured set fire. Carp v. National Assur. Co. [Mo. App.] 99 SW 523.

35. Whether barn was destroyed by reason of gross negligence of plaintiff and his servants. Moss v. Home Ins. Co., 30 Ky. L. R. 630, 99 SW 308.

36. For giving insurer notice of injury. Employer's liability. Edgefield Mfg. Co. v. Maryland Casualty Co. [S. C.] 58 SE 969. In which to complete arbitration. Fire insurance. Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 NE 26, afg. [Ind. App.] 73 NE 1093.

37. McMillan v. Insurance Co. of North America [S. C.] 58 SE 1020. Whether delay or failure to proceed with arbitration within reasonable time constitutes waiver of arbitration. Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 NE 26, afg. [Ind. App.] 73 NE 1093. Of provision requiring formal proofs signed and sworn to by insured. Glazer v. Home Ins. Co. [N. Y.] 82 NE 727, rvg. 113 App. Div. 235, 98 NYS 979.

38. Whether beneficiary in good faith paid premium to her son as agent of company, or whether she paid it to him as her agent. Murray v. State Life Ins. Co., 151 F 539.

39. Miller v. Firemen's Fund Ins. Co. [Cal. App.] 92 P 332.

40. Whether arbitration failed because of fraud of either party. Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 NE 26, afg. [Ind. App.] 73 NE 1093. Whether both parties had endeavored to prevent appraisal. Carp v. National Assur Co. [Mo. App.] 99 SW 523.

41. Instruction held not objectionable as authorizing jury to construe policy. Providence Washington Ins. Co. v. Wolf, 168 Ind. 690, 80 NE 26, afg. [Ind. App.] 73 NE 1093.

42. See 8 C. L. 471. See, also, Verdicts and Findings, 8 C. L. 2245; Judgments, 8 C. L. 530.

43. Interest is recoverable in suit on fire policy. Gray v. Merchants' Ins. Co., 125 Ill. App. 370. Where proofs of loss, which policy required to be furnished sixty days after loss, were waived, held that insured was entitled to interest on amount recovered from sixty days after date of waiver. Reed v. Continental Ins. Co. [Del.] 65 A 569.

44. Act March 29, 1905, § 1 (Acts 1905,

The subject of costs is fully treated elsewhere.[47]

(§ 24) *E. Enforcement of judgment.* See 6 C. L. 156.

INTEREST.

§ 1. Right to Interest and Demands Bearing Interest, 408. It May Rest in Contract Express, 408. Interest as Damages Ex Contractu is Recoverable, 408. Interest From the Date of the Injury May be Allowed in Torts, 410. Interest on Statutory Recoveries, 410. Interest Ceases With the Cessation or Tender of the Debt or Obligation, 410. Compound Interest, 410.
§ 2. Rate and Computation, 411.
§ 3. Remedies and Procedure to Recover Interest, 412.

Interest on judgments,[48] taxes,[49] and local assessments, is discussed in separate articles,[50] and the exaction of illegal interest is likewise excluded.[51]

§ 1. *Right to interest and demands bearing interest.* See 8 C. L. 473—The right to interest may arise from statute.[52] A statutory right thereto may be waived.[53]

It may rest in contract express See 8 C. L. 473 or implied.[54].

Interest as damages ex contractu is recoverable See 8 C. L. 474 for the improper withholding [55] of liquidated claims,[56] or claims the amounts of which may be ascer-

p 508), providing for recovery of 12 per cent. penalty and reasonable attorney's fee in case loss is not paid within time specified in policy, after demand, held not to apply to policies in force before its enactment. Arkansas Mut. Fire Ins. Co. v. Woolverton [Ark.] 102 SW 226; Arkansas Mut. Fire Ins. Co. v. Stuckey [Ark.] 106 SW 203; Arkansas Mut. Fire Ins. Co. v. Claiborne [Ark.] 100 SW 751. Rev. St. 1895, art. 3071, held not to apply to accident insurance. Continental Casualty Co. v. Wade [Tex. Civ. App.] 18 Tex. Ct. Rep. 410, 99 SW 877, rvg. on other grounds [Tex.] 19 Tex. Ct. Rep. 767, 105 SW 35.

45. Evidence held to authorize finding that there was vexatious refusal to pay, entitling plaintiff to recover damages and attorney's fees under Mo. Rev. St. 1899, § 8012. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

46. Under Tenn. St. 1901, c. 141, p. 248, court has power to impose as penalty sum not exceeding 25 per cent. of liability on insurance loss, where it is satisfied that refusal to pay loss was not in good faith, and that policy holder has been put to additional expense as a result. New Amsterdam Casualty Co. v. Shields [C. C. A.] 155 F 54. Allowance of $1,000 attorney's fees held proper. Id.

47. See Costs, 9 C. L. 812.

48. See Judgments, 8 C. L. 530.

49. See Taxes, 8 C. L. 2058.

50. See Public Works and Improvements, 8 C. L. 1506.

51. See Usury, 8 C. L. 2211.

52. At common law in the absence of an agreement to pay interest it could not be recovered. Whittemore v. People, 227 Ill. 453, 81 NE 427.

Not allowed on penal bonds: Under Revisal 1905, § 1954, excepting money due on penal bonds from the list of interest bearing contracts, interest is not allowable on the penalty sum fixed in an administrator's bond. State v. Johnson, 144 N. C. 257, 274, 56 SE 922.

Ordinarily taxes do not bear interest. Commonwealth v. Louisville & N. R. Co., 31 Ky. L. R. 819, 104 SW 267. But the rule is otherwise where the taxpayer has by his voluntary action obstructed the collection of taxes and by this means retained the money which he ought to have paid over. Taxpayer obtained injunction restraining collection of balance due for taxes. Id.

Not allowable on court costs: The compensation of a receiver is classed as court costs (Jones v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 944, 105 SW 328), and where a receiver is allowed a sum as compensation and fails to apply available funds in payment of same as provided by Sayles' Rev. Civ. St. art. 1472, he cannot claim interest (Id.). As a general rule interest is not chargeable against funds in the hands of a receiver. Id.

Municipal corporation is liable for interest on money wrongfully obtained and illegally withheld. The money improperly paid a town school district as cestui qui trust under a will. North Troy Graded School Dist. v. Troy [Vt.] 66 A 1033.

53. The acceptance of an award without interest under a statute allowing interest cuts off the right later to sue for it. An acceptance of an award without interest under Laws 1884, p. 631, c. 522, § 4, providing for interest, if the award is not paid by the mayor, etc., within four months of its confirmation, cuts off the right to sue for it subsequently (Grote v. New York, 117 App. Div. 768, 102 NYS 977), although all claims to interest are expressly reserved (Id.). Reservation of all claims to interest ineffectual. Id.

54. See 8 C. L. 473. Where interest is called for but no rate is specified, the legal rate will be implied. Patrick v. Kirkland [Fla.] 43 S 969.

55. Where a debtor of a bank in liquidation contested his debt and prevented the distribution of funds on hand, interest was properly allowed against him to the date of the decree. Gund v. Ballard [Neb.] 114 NW 420. An order for the payment of money which is drawn for immediate payment out of a fund subject to the demand is payable on demand and draws interest

tained by computation.[57] Interest should be allowed also, though the demand is unliquidated, where fairness and justice require it.[58] Statutes in some states provide for interest on liquidated claims in cases of unreasonable and vexatious delay in payment.[59] Where the amount due on a written contract is reduced by recoupment, interest is allowable on the balance from the time it came due.[60] An account stated bears interest,[61] and so does one for goods sold on a definite term of credit after it becomes due.[62] In the case of bonds where no funds have been placed in the bank to meet them, interest is allowable without demand.[63] Interest is allowable on invested capital rendered unproductive by reason of a breach of contract.[64] Interest upon the purchase price is allowed where specific performance of an agreement to convey land is decreed.[65] Interest is properly chargeable against a surety from the time its liability is determined.[66]

from the date of demand. Foley v. Houston Co-Op. & Mfg. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 224, 106 SW 160. Attorneys who wrongfully but in good faith paid over money to an infant's next friend, who misappropriated it, only held liable for interest from the time the infant demanded the money after he came of age. Wood v. Claiborne [Ark.] 102 SW 219. Interest from the date of the institution of a suit for breach of contract allowed. Griffing Bros. Co. v. Winfield [Fla.] 43 S 687. The court intimated that the true rule was to allow interest from the date when the right of action accrued. Id. Annual rental bears interest from the time it is due. Parker v. Gortatowsky [Ga.] 59 SE 286.

56. Interest not allowed on an unliquidated claim not capable of accurate ascertainment for breach of contract for failure to furnish machinery. Munson v. James Smith Woolen Mach. Co., 118 App. Div. 398, 103 NYS 502. Interest not allowed on damages for breach of a building subcontract held to be unliquidated. Stannard v. Robert H. Reid & Co., 118 App. Div. 304, 103 NYS 521. Interest not allowed against sureties on a sheriff's bond who disputed their liability, until the demand was liquidated by judgment. Baker County v. Huntington [Or.] 89 P 144. Interest on a balance due a physician allowed under Civ. Code, § 4280, providing that every person who is entitled to recover damages certain or capable of being made certain by calculation and the right to which is vested in him upon a particular day, is entitled also to recover interest thereon from that day. Leggat v. Gerrick, 35 Mont. 91, 88 P 788. Interest allowed on sum found due on an accounting although the transaction was not entirely closed. Rust v. Fitzhugh [Wis.] 112 NW 508. Claim for damages under an agreement to share expenses of drilling and operating oil wells on land owned in common held not unliquidated and interest allowed. Kervin v. Utter, 104 NYS 1061.

57. Allowance of interest held proper in a trade mark and name infringement case where the recovery was for profits only and no damages were awarded. Cutter v. Gudebrod Bros. Co. [N. Y.] 83 NE 16. Where a mere computation determines the amount due on a contract, such amount is liquidated. Bennett v. Palmer, 128 Ill. App. 626.

58. Interest allowed on quantum meruit for work and materials although the claim was unliquidated. Fleming v. Jacob, 103 NYS 209.

59. Hurd's Rev. St. 1905, c. 74, p. 1248. Case held not to be within the statute. Whittemore v. People, 227 Ill. 453, 81 NE 427. Refusal to pay until creditor should do something which he was not bound to do. American F. & M. Co. v. Lindsay Chair Co., 129 Ill. App. 548. The case of a receiver who is allowed part of his compensation and fails to apply available funds in payment of it as provided by statute is not within the rule as the allowance of interest as set forth in Sayles' Rev. Civ. St. art. 3097, providing that interest is the compensation allowed by law or fixed by the parties to a contract for the use of forbearance or detention of money. Jones v. U. S. Mexican Trust Co., [Tex. Civ. App.] 19 Tex. Ct. Rep. 944, 105 SW 328.

60. Bauer v. Jerolman, 124 Ill. App. 151.

61. Code Civ. Proc. 1902, § 1660, allows 7 per cent. interest thereon. Brown v. Rogers, 76 S. C. 180, 56 SE 680. Referee's report held not to be an account stated. Id.

62. Morrison Mfg. Co. v. Fargo Storage & Transfer Co. [N. D.] 113 NW 695. Term fixed by custom and a date was fixed from which interest could be computed under Mill's Ann. St. § 2252, allowing interest at the rate of 8 per cent. in the absence of any agreement on money due on account after its due date. Florence Oil & Refining Co. v. McRae [Colo.] 90 P 507. Under Civ. Code 1895, § 3550, providing that in the absence of contract or custom purchase money for goods is due on delivery, interest runs from that time. Howard Supply Co. v. Bunn, 127 Ga. 663, 56 SE 757. In Texas interest as damages is not allowable on an open account whether the due date is fixed or not, under Rev. St. 1895, art. 3102, providing that interest shall run from the first day of January after they are made. Erbb-Springall Co. v. Pittsburg Plate Glass Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 398, 101 SW 1165.

63. Gen. St. 1902, § 4240. Interest on coupons and bonds runs from the dates of their maturity. Parsons v. Utica Cement Mfg. Co. [Conn.] 66 A 1024.

64. In addition to loss of profits, and loss of rent, 6 per cent. interest on the capital invested in a factory made idle because of the defendant's default, allowed. Nicholls v. American Steel & Wire Co., 117 App. Div. 21, 102 NYS 227.

65. Lighton v. Syracuse, 48 Misc. 134, 96 NYS 692.

66. Appeal bond. Mossein v. Empire State Surety Co., 117 App. Div. 820, 102 NYS 1013.

Interest from the date of the injury may be allowed in torts. See 8 C. L. 475—Where money is converted or wrongfully detained,[67] its value is unlawfully diminished.[68]

Interest on statutory recoveries See 8 C. L. 473 is sometimes allowed.[69]

Verdicts. See 8 C. L. 475.

Interest ceases with the cessation or tender of the debt or obligation. See 8 C. L. 475 There must be a tender actual or constructive.[70] A continuing tender is necessary to stop interest running on instalments of rent as they fall due.[71] An offer made dependent upon performance by the creditor of a binding condition precedent to, or concurrent with, performance by the debtor will stop the running of interest.[72]

Compound interest See 8 C. L. 475 is not allowable unless contracted for.[73] By statute in Kentucky partial payments on a debt bearing interest shall first be applied to the extinguishment of the interest then due,[74] and then to the reduction of the principal.[75] A statute will not be construed to authorize the payment of interest on interest.[76]

67. Interest allowed from the date of a fraudulent settlement. Whitcomb v. Collier, 133 Iowa, 303, 110 NW 836. In an action of deceit arising out of fraudulent representations, the damages were held liquidated and interest was allowed on the value of the property sold from the date of sale. Rutherford v. Irby, 1 Ga. App. 499, 57 SE 927. Where in an action for the nondelivery of a telegram the jury award damages in a lump sum, interest thereon is not allowable from the date of the injury but only from the date of judgment in the lower court. Arkansas & L. R. Co. v. Stroude [Ark.] 100 SW 760. Where a plaintiff in replevin elects to take judgment for the value of the property, he is entitled to interest at lease from the date of the issuance of the writ (Sheffield v. Hanna [Iowa] 114 NW 24), although no specific demand therefor is made in the pleadings (Id.). Where money is fraudulently misappropriated no demand is necessary and interest due from the time of the misappropriation. Earle v. Whiting [Mass.] 82 NE 32.

68. Interest is allowable from the date of the accrual of the cause of action to the date of the time of trial. Ft. Worth & R. G. R. Co. v. Brown [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 101 SW 266. Interest allowed on damages sustained to live stock. Gulf, etc., R. Co. v. Graves [Tex. Civ. App.] 17 Tex. Ct. Rep. 848, 101 SW 488. In an action for the loss of freight, interest should be allowed on the value of the property fixed as the measure of the damages. Walker v. Southern R. Co. [S. C.] 56 SE 952.

69. In Alabama interest is allowed on money recovered in an action under the statute authorizing the recovery of money lost and paid on a wager. Code 1896, § 2163, Motlow v. Johnson [Ala.] 44 S 42.

70. No tender of any kind. Gorgas v. Saxman, 216 Pa. 237, 65 A 619.

71. Waiver of a tender by refusal to receive rent during the pendency of a suit to recover possession does not prevent interest from running from dates when instalments of rent fell due. Parker v. Gortatowsky [Ga.] 59 SE 286. A continuing tender is required to accomplish that result. Id.

72. A note for the conveyance of a clear title is due only if incumbrances are removed and a tender subject to this condition will prevent interest from running. Neely v. Williams [C. C. A.] 149 F 60.

73. A contract to compound interest is not usurious (Stanford v. Lundquist [Neb.] 114 NW 279), but will not be enforced in excess of the amount of simple interest computed at the highest rate allowed by law, on grounds of public policy (Id.). Whereas an agreement to compound interest retrospectively though not usurious will not be enforced at all. Id. While renewal notes or separate obligations may be taken for unpaid simple interest when due (Id.), an oral promise to pay interest upon interest for an indefinite forbearance is unenforceable (Id.). Agreement in renewal notes to pay interest on interest unenforceable. Id. Where there is no agreement for interest on interest, it cannot be recovered. Waldron v. Pigeon Coal Co., 61 W. Va. 280, 56 SE 492. Where a note bore interest at the rate of 8 per cent. per annum payable semi-annually until maturity and thereafter at the rate of 8 per cent. per annum after maturity, the holders were entitled to current interest only and not to interest on interest. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718.

74. Ky. St. 1903, § 2219, subsec. 3. This is merely declaratory of the common law. Commonwealth v. Louisville & N. R. Co., 31 Ky. L. R. 819, 104 SW 267. Partial payments must first be applied to the accrued interest, if the payments equal or exceed it (Id.), and where the obligor pays the principal before or pending suit, interest being still demanded, the payment will be treated as a partial payment and not as a discharge of the principal sum (Id.). The above rule applied to payments of taxes. Id. When a note called for a given rate of interest payable semi-annually till maturity and thereafter at that rate per annum and the maker paid semi-annually after maturity, these payments were properly applied to the extinguishment of interest then due and ought not to be credited on the principal. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718.

75. Ky. St. 1903, § 2219. Where the partial payment exceeds the accrued interest, the surplus should be applied to discharging the principal and the subsequent interest should be computed on the balance of the principal (Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718), but if the

§ 2. *Rate and computation.*[See 8 C. L. 476]—The statutes of many states contain regulations as to the rate and computation of interest[77] in addition to the ordinary usury laws.[78] The Massachusetts or United States rule of computing interest is commonly used.[79] Where the assumption of a mortgage by a grantee specifies the rate of interest, he is liable only for the rate stated in the assumption though the mortgage bore a higher rate.[80] A trustee who neglects to place funds where they will draw interest is personally liable for interest thereon at the customary rate allowed by responsible banks.[81] The agreement of the parties will control as to the time from which interest is to be computed,[82] unless the time of payment is definitely fixed.[83] It is often held that interest will not run until after demand of payment,[84]

payments are less than the accrued interest, they will be retained until they are sufficient to satisfy interest up to the date of the last payment and the surplus used as above (Id.).

76. Under Laws 1899, p. 177, c. 109, providing a decree rendered in a suit for the settlement of one county's indebtedness to another shall bear interest at 5 per cent. from date and until paid and giving the court power to enforce collection by such an annual levy as will pay one twentieth of the decree and interest thereon, only the decree bears interest and not unpaid instalments of interest. State v. Desha County [Ark.] 99 SW 1108.

77. Interest allowed from date of demand on an account silent as to it, under Rev. St. Mo. 1899, c. 40, § 3705 [Ann. St. 1906, p. 2073], providing that 6 per cent. interest shall be allowed where no other rate is agreed upon on accounts after they become due and demand of payment is made. Freygang v. Vera Cruz & P. R. Co. [C. C. A.] 154 F 640. In Oregon the rate is 6 per cent. and no more on all moneys after the same become due. B. & C. Comp. § 4595. Baker County v. Huntington [Or.] 89 P 144. Interest on a guaranty allowed under Mill's Ann. St. § 2252, allowing interest at the rate of 8 per cent. from the time a sum of money becomes due, when there is no agreement as to rate on instruments in writing. Doyle v. Nesting, 37 Colo. 522, 88 P 862. Judgment in action on tax bill with 10 per cent. interest thereon held proper under Kansas City charter art. 9, § 10, which provided that judgments should bear interest at the same rate of interest as tax bills which by the charter bore 10 per cent. interest when overdue. Dickey v. Porter, 203 Mo. 1, 101 SW 586. An order allowing a receiver part of his compensation is not a final judgment within Sayles' Rev. Civ. St. art. 3105, providing for interest at a given rate on final judgments and does not bear interest. Jones v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 944, 105 SW 328. Under Laws 1899, p. 177, c. 109, providing that a decree rendered in a suit to settle one county's indebtedness to another shall be enforced by an annual levy to pay the decree, interest and expenses of collection, the costs of suit are part of the expenses and as part of the decree would bear interest at the rate prescribed. State v. Desha County [Ark.] 99 SW 1108. Under the interest laws in force in 1866, only six per cent. was allowed in the absence of a stipulation in a written contract for more. Farmer v. Mitchell, 128 Ill. App. 297.

78. See Usury, 8 C. L. 2211.

79. An instruction to compute interest by calculating the interest on the face of the note to the time of the first payment indorsed thereon and then deduct the amount of such payment from the sum of the principal and interest thus found, and then calculate interest on the remainder up to the time of the second payment, etc., held to give the correct rule of computation. Russell v. Cassidy, 122 Mo. App. 565, 99 SW 781. Where the interest always remains in excess of the payments made, the proper method of determining the amount due is to calculate the interest, add it to the principal sum, and then deduct from this gross amount the total of the payments made. Holcombe v. Holcombe [N. J. Law.] 65 A 855.

80. Hicks v. Elwell, 129 Ill. App. 561.

81. Trustees of a bank in liquidation who withdraw money from interest paying banks and place it in one not paying interest are personally liable for interest thereon at the customary rate allowed by responsible banks. Gund v. Ballard [Neb.] 114 NW 420.

82. Where a guaranty contract stipulated a certain sum without interest, it was held error to include interest prior to the date of judgment. Dunlap v. Stannard [Okl.] 91 P 845. Under St. 1898, §§ 3164, 3165, the rate of interest on the amount adjudged due on a mortgage in the judgment of foreclosure and on instalments due after the date of said judgment, and on fees and costs and taxes paid by the creditor for his protection is governed by the mortgage contract limited by the minimum legal rate. Milwaukee Trust Co. v. Van Valkenburgh [Wis.] 112 NW 1083. Rule 25, § 6, of the circuit court rules allowing a higher rate of interest was inadvertently made out of harmony with the statute. Id. Interest allowed from date of judgment only on a guaranty contract which provided that it should be without interest. Dunlap v. Stannard [Okl.] 91 P 845. When a contract for the purchase of stock provided for deferred payments with interest semi-annually, interest was held to run from the date of the contract. Graham v. Burgiss [S. C.] 59 SE 29. Under a contract for the purchasing of hops for advance payments which were to bear interest at six per cent, it was held error to enter judgment for interest upon deferred payments from the time they became due. Krebs Hop Co. v. Livesley [Or.] 92 P 1084.

83. Where a guaranty binds the obligor to pay the obligee a given sum within a given time if a third person fails to do so, no demand or notice of nonpayment is necessary to start interest running within Mill's Ann. St. § 2252, allowing interest on

but under a statute allowing interest after demand, any intimation to the debtor that payment is desired is sufficient.[85] By statute in Texas in the absence of any agreement as to interest, interest is allowed on all open accounts from the first day of January after they are made.[86] Interest on a demand for work performed or materials furnished runs from the time the contract price becomes due.[87] Interest is allowable on wages from the end of each period they are earned from the date of the verdict.[88] Where a judgment of the appellate court annuls that of the lower court, interest accrues only from the date of the judgment of the appellate court.[89] An agreement to reduce the rate of interest on a note and credit the difference on accrued interest on the principal is valid as to future interest but invalid as to accrued interest.[90]

§ 3. *Remedies and procedure to recover interest.*[See 8 C. L. 478]—In New York a verdict for the full amount of the plaintiff's claim on a quantum meruit for work and material should be construed by the court, and entered by the clerk as including interest,[91] but a court has no power to amend a verdict by adding interest thereto, where neither the date from which it is to be computed[92] nor the amount thereof is given,[93] nor at a special term after the trial term had ended.[94] Interest can only be recovered as part of the damages claimed in the pleadings.[95] Instruc-

money due under instruments in writing. Doyle v. Nesting, 27 Colo. 522, 88 P 862.

84. Rev. St. Mo. 1899, c. 40, § 3705 (Ann. St. 1906, p. 2073). Interest is to be computed from the time of demand for payment of a claim under an agreement (Kerwin v. Utter, 104 NYS 1061), and the commencement of the suit will be deemed a demand, where there is no proof of a demand prior thereto (Id.). When the accounts between a principal and agent were closed in 1898 and the agent made no claim for commissions until 1901, when he was sued by the principal for balance due, interest allowed only from date of his assertion of claim by filing his answer. Orr v. Louisville Tobacco Warehouse Co., 30 Ky. L. R. 457, 99 SW 225. Where a state treasurer openly received money to which he was not entitled but did not conceal the fact or throw obstacles in the way of or cause delay to the state in making a demand for the money and no demand was made until suit was brought, interest was only allowed from the date of the suit. Whittemore v. People, 227 Ill. 453, 81 NE 427.

85. Under Rev. St. Mo. 1899, c. 40, § 3705 (Ann. St. 1906, p. 2073), allowing interest on accounts after they become due and demand is made, the institution of suit constitutes such demand. Freygang v. Vera Cruz & P. R. Co. [C. C. A.] 154 F 640. Institution of suit held sufficient under Mill's Ann. St. § 2252, allowing interest on money due under written instruments. Doyle v. Nesting, 37 Colo. 522, 88 P 862.

86. Rev. St. 1895, art. 3102. Any agreement as to when the accounts shall mature is immaterial. Erbb-Springall Co. v. Pittsburgh Plate Glass Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 398, 101 SW 1165.

87. Interest allowed for work and materials furnished under a written contract which had been substantially performed and accepted, at the rate of five per cent. from the date the contract price became due. Bauer v. Hindley, 222 Ill. 319, 78 NE 626. Interest on an unpaid balance where a final certificate issued in accordance with a building contract properly allowed under Hurd's Rev. St. 1905, c. 74, § 2, providing interest on moneys after they become due on any instrument in writing. Concord Apartment House v. O'Brien, 228 Ill. 360, 81 NE 1038. Interest allowable on a quantum meruit for work and materials from the date when payment was demanded. Fleming v. Jacob, 103 NYS 209. A verdict for the full amount of the plaintiff's claim in such case should be construed by the court and entered by the clerk as including interest. Id.

88. Where a plaintiff recovered for twenty-three months' wages from July 1, 1904, it was held error to allow interest on the entire sum from July 1, 1904; interest should have been allowed on each month's wages from the end of the month to the date of the verdict. O'Connell v. Storey [Tex. Civ. App.] 20 Tex. Ct. Rep. 223, 105 SW 1174.

89. Stolze v. St. Louis Transit Co., 122 Mo. App. 458, 99 SW 471. In an action for nondelivery of a telegram, interest allowed from the date of the judgment in the lower court. Arkansas & L. R. Co. v. Stroude [Ark.] 100 SW 760.

90. For lack of consideration. Bryson's Adm'r v. Biggs [Ky.] 104 SW 982.

91. Or it should be added to the verdict upon motion to the court at trial term. Fleming v. Jacob, 103 NYS 209. Interest on entire amount allowed by jury from date of injury held erroneous. Arkansas & L. R. Co. v. Stroude [Ark.] 100 SW 760.

92, 93. Schnaufer v. Ahr, 53 Misc. 299, 103 NYS 195.

94. Although the same judge presides at the special who presided at the trial term. Fleming v. Jacob, 103 NYS 209.

95. It is never allowed eo nomine and the damages claimed must be laid in an amount sufficient to cover the loss at the time of the accrual of the cause of action and interest thereon from that date. Ft. Worth, etc., R. Co. v. Brown [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 101 SW 266.

tions as to the correct rule for the computation of interest does not take away from the jury the right to compute interest.[96]

INTERNAL REVENUE LAWS.

§ 1. Provisions Common to All Acts, 413.
§ 2. The Tax on Liquors and Tobacco, 413.
§ 3. Oleomargarine Act, August 2, 1886, 413.
§ 4. War Revenue Acts, June 13, 1898, and March 2, 1901, 414. The Stamp Act, 414. The Legacy Tax, 414.
§ 5. Filled Cheese Act, June 6, 1896, 414.
§ 6. Tax on Playing Cards, 414.
§ 7. Civil War Revenue Laws, 414.
§ 8. Foreign Revenue Acts, 415.

§ 1. *Provisions common to all acts.* See 8 C. L. 478—The mere existence of an omission in a revenue law does not authorize the court to extend its scope,[97] but they will be so construed as to harmonize with the tariff laws.[98] Resort cannot be had to foreign trade names as an aid to interpretation.[99]

Taxes illegally imposed and collected may be recovered in a proper proceeding for that purpose,[1] except when paid without protest.[2] Such an action is in contract and not in tort.[3] Hence the death of the collector illegally imposing the tax does not abate the action.[4] Interest on the amount paid may be allowed in the proper case.[5]

A sale of property under a distraint warrant for unpaid taxes is distinguishable from a forfeiture and condemnation of property seized for violation of the revenue laws, the latter proceeding being in rem,[6] while the former is in the nature of an execution and passes only such title as the debtor possessed.[7]

§ 2. *The tax on liquors and tobacco.* See 8 C. L. 479—To justify the imposition of a tax, the liquors must be within the class of spirituous or fermented liquors described in the act.[8] Shipment of liquor under a name other than its trade name is prohibited,[9] and the existence of a fraudulent intent is not essential to conviction.[10]

An information for forfeiture on the ground of a violation of the revenue law must show the precise nature of the act charged.[11]

§ 3. *Oleomargarine act, August 2, 1886.* See 8 C. L. 481—Except as made directly applicable, the provisions of the general revenue law do not apply,[12] and accordingly

96. Russell v. Cassidy, 122 Mo. App. 565, 99 SW 781.

97. Bay rum not being subject to revenue tax, the fact that importations from Porto Rico are not subject to import duty and that bay rum is not subject to tax at home does not render it subject to tax as distilled spirits merely because it would otherwise escape taxation entirely. Newhall v. Jordan, 149 F 586.

98. Classification of "vermuth" for imposition of customs duty considered in determining whether it was wine within the revenue act. Taylor v. Treat, 153 F 656.

99. Taylor v. Treat, 153 F 656.

1. Rev. St. Mo. 1899, § 542 (Ann. St. 1906, pp. 581, 583, 745), held to authorize a single action by trustees, paying tax under protest, and cestuis que trust, against whom it was unlawfully assessed to recover same. Armour v. Roberts, 151 F 846.

2. Notwithstanding payment was a prerequisite to obtaining possession. Newhall v. Jordan, 149 F 586.

3. The obligation to repay is implied from the fifth amendment of the Federal constitution. Armour v. Roberts, 151 F 846.

4. May be continued against his successor. Armour v. Roberts, 151 F 846.

5. Where stamps were purchased in large quantities and evidently for other purposes than payment of a tax unlawfully imposed, interest will be allowed only from date of demand. Taylor v. Treat, 153 F 656.

6. Sheridan v. Allen [C. C. A.] 153 F 568.

7. Hence a third person who was not a party to the proceedings and who asserts ownership of the property may replevy same from the collector's vendee. Sheridan v. Allen [C. C. A.] 153 F 568.

8. "Vermuth" is not a "sparkling or other wine" within the act. Taylor v. Treat, 153 F 656. Bay rum not being subject to internal revenue tax, the fact that it is imported from Porto Rico where it is not taxed, free from duty, does not authorize theoretical reduction to its component parts in order to tax the distilled spirits contained therein. Newhall v. Jordan, 149 F 586.

9. Shipment of spirituous or fermented liquors in a barrel marked "groceries" constitutes a violation of Rev. St. 3449 (U. S. Comp. St. 1901, p. 2277). United States v. Liquor Dealers' Supply Co., 156 F 219.

10. United State v. Liquor Dealers' Supply Co., 156 F 219.

11. Information held insufficient. United States v. Three Packages of Distilled Spirits, 152 F 580.

12. Hence an appeal to the commissioner

the penalties and interest provided for therein cannot be imposed for a failure to comply with the oleomargarine act.[13] The tax provided cannot be imposed upon one who is not shown to be a dealer in oleomargarine within the meaning of the act.[14] When the original stamped package becomes empty, the stamps thereon must be canceled.[15]

§ 4. *War Revenue Acts June* 13, 1898, *and March* 2, 1901.—*The stamp act.* See 8 C. L. 481—The penalties provided are the exclusive means for the enforcement of the act.[16] Whether a person is an agent within the meaning of the act depends upon the circumstances of each particular case.[17]

The legacy tax. See 8 C. L. 481—The act of 1898, imposing a tax on property transferred by "deed, grant, bargain sale or gift," to take effect after the death of the transferror, applies only to conveyances without consideration,[18] and where the ultimate disposition of property is fixed by an instrument based on a valuable consideration, the fact that a similar disposition is also made by will does not render it subject to the tax on testamentary bequests.[19] The rate of the tax is determinable by blood relationship to the deceased.[20] Hence children by adoption though entitled to full rights of heirship under the state statute are not lineal descendants within the act.[21] The act limiting the time for the presentation of claims for refundment of taxes illegally collected [22] has no application to a proceeding under the act of 1902 for refundment of a legacy tax paid on a contingent interest which did not become vested prior to July 1, 1902, whether legally or illegally imposed or voluntarily paid.[23]

§ 5. *Filled Cheese Act, June* 6, 1896. See 8 C. L. 482.

§ 6. *Tax on playing cards.*—A pack of cards must show a stamp denoting payment of the tax although the cards therein are reassembled from packs upon which the tax has been paid,[24] and the duty to see that the law is complied with is incumbent upon a vendor as well as upon the manufacturer.[25]

§ 7. *Civil War Revenue Laws.*—The remedies provided for the enforcement of internal revenue taxes by the acts of 1868 [26] and 1868 [27] were concurrent.[28] The bur-

required by § 3226, Rev. St. [U. S.] Comp. St. 1901, p. 2088), is unnecessary as a condition to bringing of an action to recover taxes illegally imposed. Grier v. Tucker, 150 F 658. The Oleomargarine Acts are complete in themselves and independent of the general revenue laws except as specifically made applicable. Craft v. Schafer [C. C. A.] 153 F 175. See 154 F 1002 on rehearing.

13. The fifty per cent. penalty authorized by § 3176, Rev. St. (U. S. Comp. St. 1901, p. 2068), and the five per cent penalty and interest under §§ 3186, 3187 (U. S. Comp. St. 1901, p. 2073), were not embraced within the Oleomargarine Act. Grier v. Tucker, 150 F 658. Penalty authorized by Rev. St. § 3176 (U. S. Comp. St. 1901), cannot be imposed for violation of the act. Craft v. Schafer [C. C. A.] 153 F 175.

14. Mere fact that retailer received oleo in original package, consigned to a customer for convenience of latter, same being paid for by latter through retailer and without profit to him, held not to render retailer a wholesaler. Grier v. Tucker, 150 F 658.

15. An original stamped package held not "empty" within the meaning of the act requiring destruction of the stamp so long as it contained a pound package put up out of original contents for retail consumption. United States v. Knott, 151 F 925.

16. Hence government cannot maintain debt to recover stamp taxes due on a conveyance. United States v. Chamberlin [C. C. A.] 156 F 881.

17. Correspondent bucket shop held an independent business and not an agent for another bucket shop making transaction of both subject to separate stamp tax. Eldredge v. Ward, 155 F 253.

18. Partnership agreement providing that for a valuable consideration interest of one partner should vest in his son also a partner upon death of former held not with the act. Blair v. Herold, 150 F 199.

19. Blair v. Herold, 150 F 199.

20. Kerr v. Goldsborough [C. C. A.] 150 F 289.

21. Bequest to an adopted child is properly taxed as to a stranger to the blood under the fifth class and not under the first. Kerr v. Goldsborough [C. C. A.] 150 F 289.

22. Rev. St. § 3228 (U. S. Comp. St. 1901, p. 2089). Thatcher v. U. S., 149 F 902.

23. Claim is not barred though not presented within time limited under prior act. Thacher v. U. S., 149 F 902.

24, 25. United States v. Neusteadter, 149 F 1010.

26. Act July 13, 1866 (14 St. L. 108). Blacklock v. U. S., 41 Ct. Cl. 89.

27. Act July 20, 1868 (15 St. L. 167). Blacklock v. U. S., 41 Ct. Cl. 89.

28. Hence collector might have proceeded

den of establishing irregularities in the proceeding is upon the person asserting its invalidity.[29] The remedies provided for the protection of holders of other liens on the property proceeded against are exclusive.[30]

§ 8. *Foreign Revenue Acts.*—Failure of the vendor to affix a stamp to a bill of sale as required by the laws of Mexico does not render the instrument invalid as the vendee may affix it and require the vendor to reimburse him.[31]

INTERNATIONAL LAW.[32]

Matters concluded by decisive action of the executive department will not be judicially reviewed.[33] Rules of international law will not be applied to reopen matters which by agreement or long acquiescence have been otherwise settled.[34]

INTERPLEADER.

§ 1. Nature of Remedy and Right to It, 415. | § 2. Procedure and Relief, 417.

§ 1. *Nature of the remedy and right to it.* See 8 C. L. 483—The concurrence of four elements is essential to the right to maintain a bill of interpleader:[35] (1) The same thing, debt, or duty must be claimed by all the parties against whom the relief is demanded;[36] (2) their adverse claims must be derived from the same source;[37] (3) the complainant must claim no interest in the subject-matter;[38] and (4) complainant must stand indifferent between the claimants.[39] The right to the remedy rests upon the doubt of the complainant as to which claimant is entitled to the property.[40] Accordingly, the suit must be brought before judgment at law.[41] The appli-

against property by distress warrant or by bill in chancery. Blacklock v. U. S., 41 Ct. Cl. 89.

29, 30. Blacklock v. U. S., 41 Ct. Cl. 89

31. Sandford v. Embry [C. C. A.] 151 F 977.

32. See 6 C. L. 163. See, also, Extradition, 9 C. L. 1347; Treaties, 8 C. L. 2146; Territories and Federal Possessions, 8 C. L. 2121.

33. Right of United States to intervene in Cuba. Galban & Co. v. U. S., 40 Ct. Cl. 495.

34. Dispute as to boundary between states. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

35. Cases enumerating the essentials. Snow v. Ulrich, 126 Ill. App. 493; Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662.

36. Claimed by two or more parties by different and separate interests. Page Belting Co. v. Prince & Co. [N. H.] 67 A 401. None of the parties need claim the whole identical fund or any particular part of it definitely ascertained and designated in order to compel them to interplead. An interest in the fund generally is sufficient to authorize it. Western A. R. Co. v. Union Inv. Co., 128 Ga. 74, 57 SE 100.

37. The claims of the respective claimants must be in priority and derived from a common source. Maxwell v. Leichtman [N. J. Eq.] 65 A 1007. Where one defendant's claim is based upon the original right of the other and emanates from failure of the latter to sue within six months, interpleader will lie (Id.), but even in the more strict cases of bailees, agents, and tenants, the contractual violation with the bailor, principal, or landlord will not operate as a bar to a bill of interpleader when the opposing claim is derivative under that of the bailor, principal, or landlord (Id.).

38. Complainant must show that he has no interest in the subject-matter of the suit other than as a mere trustee or stakeholder. Page Belting Co. v. F. H. Prince & Co. [N. H.] 67 A 401. Where, in a suit in the municipal court, there is a sum of money in the hands of defendant which belongs to the plaintiff or a third person and defendant has no interest in the fund, which is the subject-matter of the suit, an order substituting the third party as defendant in place of the original defendant may be made. Rogers v. Picken Realty Co., 105 NYS 281. Such an order is provided for by § 187 of the municipal court act [Laws 1902, p. 1546, c. 580] (Id.), and such an order does not invoke equitable powers (Id.). Where the plaintiff objected to such an order being granted but took no steps to review it, and the substituted defendant consented, it was held that the court had jurisdiction of the subject-matter and that neither party was in a position to question the validity of the order. Id. Where there is a question between the party seeking relief by interpleader and a claimant as to the amount due, such question destroys the right thereto. Smith v. Grand Lodge A. O. U. W. of Missouri, 124 Mo. App. 181, 101 SW 662. The right may, however, be secured, in such a case, by proper amendments. Id.

39. Snow v. Ulrich, 126 Ill. App. 493; Smith v. Grand Lodge, 124 Mo. App. 181, 101 SW 662.

40. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662. The doubt may arise out of either law or fact. Id. A party is not entitled to maintain a bill of interpleader unless it fairly appears that without his fault he is placed in a position where it

cant for interpleader must show that he cannot pay the debt or render the duty or other thing to either of the claimants without being substantially bound for the same thing to the other.[42] Like other equitable relief it must be promptly sought.[43]

*Statutory proceedings.*See 8 C. L. 484—A case at law is not converted into an equity case by an order of substitution of parties defendant,[44] and a justice of the peace does not lose jurisdiction of a case by making such an order.[45] If a cause is one which presents only legal issues, it is not changed in character merely by the substitution, but proceeds according to law.[46]

is impossible to decide safely between adverse claimants. Vogle v. Union Cent. Life Ins. Co., 147 Mich. 333, 13 Det. Leg. N. 1040, 110 NW 1067. When defendant is sued for commissions for the sale of real estate by one of two brokers, each of whom claim to have made the sale, and there is no claim that defendant owes both of them and he concedes his liability to one but is unable to determine which, he is entitled to have the other broker interpleaded and substituted as defendant upon paying the sum claimed into court. Trembley v. Marshall, 118 App. Div. 839, 103 NYS 680. Where several persons claim from a common source equitable conflicting interests in a fund held by a stakeholder, which is insufficient to pay all, and there is doubt arising either in law or fact, as to the persons to whom the money should be paid, the stakeholder will not be required to pay at his peril, but may compel all parties at interest to interplead in one suit and enjoin the prosecution of separate suits. Western & A. R. Co. v. Union Inv. Co., 128 Ga. 74, 57 SE 100. So held where wages are assigned to several assignees, each receiving an interest in the entire fund supposedly sufficient to satisfy his demand and they are demanding payment, while other parties are seeking to recover the wages by garnishment, and the fund in the stakeholder's hands is not sufficient to satisfy all demands. Id. After a stakeholder has actually been forbidden by one of the claimants to pay over the fund to another, or after suits have actually been instituted against him by the several claimants for the same fund, debt, or duty, he is not bound to exercise any judgment on the matter whatever as to who or who is not entitled, and is permitted to discharge himself by invoking the aid of the court in his bill. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662.

41. Maxwell v. Leichtman [N. J. Eq.] 65 A 1007. The right to file the bill is not lost, however, by filing pleas in bar, in actions at law, unless the defense at law is persisted in until verdict (Id.), but terms may be imposed, in such a case, including the withdrawal of the plea and payment, costs in the action at law, and costs in equity up to the time of withdrawing the plea (Id.), though where the effect of the verdict is merely to settle the quantum of damages, this rule is not uniformly applied (Id.).

42. Page Belting Co. v. Prince & Co. [N. H.] 67 A 401. The owner of land borrowed money of an insurance company at the time insuring his life with the company for the amount of his note and securing the money borrowed and a portion of the premiums by a mortgage on the land. Subsequently, complainant purchased the land, assumed the mortgage, took an assignment of the policy, and paid all premiums until the death of the insured. Complainant sues to have the insurance applied as a fund to the payment of the mortgage. Vogel v. Union Cent. Ins. Co., 147 Mich. 333, 13 Det. Leg. N. 1040, 110 NW 1067. In its answer the insurer claimed a prior assignment of the policy to a third party and prayed that such third party and complainant be required to interplead. The policy provided that the company was entitled to withhold from the assured or his assigns the amount of any indebtedness to the company, and complainant was assured by the company after he purchased the land that the policy would pay off the mortgage. Held that the equities appeared to be with complainant and interpleader denied. Id.

43. One seeking interpleader relief must make known his condition as a stakeholder by filing his bill within a reasonable time after being advised of the several claims against him. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662. If he fails to do so, and solicits one of the claimants to institute a suit against him, on which solicitation the claimant relies and by which he is induced to and does institute such suit, and thus alters the condition by virtue of the resulting inconvenience and expense attendant upon such matters, the stakeholder is estopped from invoking the aid of equity in another and distant forum to bring the claimant before it to there interplead for the fund, and is likewise estopped from restraining by injunction the further prosecution of the suit instituted upon his solicitation, until at least the stakeholder shall have placed such claimant in statu quo by compensating him for his expenditure incurred while relying and acting upon such solicitation. Id.

44. Anderson v. Red Metal Min. Co. [Mont.] 93 P 44.

45. Anderson v. Red Metal Min. Co. [Mont.] 93 P 44. Under § 588 of the Code of Civil Procedure. Id.

46. Anderson v. Red Metal Min. Co. [Mont.] 93 P 44. Unless, as may be the case, some equitable defense is interposed which invokes the equity powers of the court. Where, at the time the substitution is made, no objection is urged that complainants did not tender an issue upon the question of right between them and plaintiff, the appellate court will disregard it. Id. The application for substitution may be made on the amended answer where the defendants become substituted without objection or protest. Id. The irregularity in the substitution is thus waived. Id. This cannot be so, however, in cases arising in justice court. Id.

§ ?. *Procedure and relief.*See 8 C. L. 484—A bill of interpleader is a proceeding in personam.[47] Granting of leave to interplead in a garnishment proceeding rests in discretion.[48] The payment of the fund into court and the interpleading are to be ordered simultaneously.[49] Since the real contest on a bill of interpleader is between the defendants, an admission by one of the averments of the bill does not dispense with proof as to the other.[50]

*Discharge.*See 6 C. L. 164

*Further proceedings.*See 8 C. L. 485—In cases of interpleader the court will not permit a general accounting between the claimants and decree payment of the balance found due out of the fund brought into court.[51] The only thing in issue is the right to the particular fund.[52] If defendants answer severally claiming the fund, no proof need be made by the complainant.[53]

*Statutory interpleaders.*See 8 C. L. 485.

*Costs.*See 8 C. L. 485—One who successfully maintains a bill of interpleader is entitled to reasonable costs.[54] Defendants who establish their right to hold a fund until complainant's right thereto is established are not chargeable with the costs of a suit by complainant to recover it.[55] Such costs are payable out of the fund.[56] One whose motion to have another interpleaded is denied is entitled, upon reversal, to costs on the motion and costs and disbursements in the appellate court.[57]

INTERPRETATION; INTERPRETERS; INTERSTATE COMMERCE; INTERVENTION, see latest topical index.

INTOXICATING LIQUORS.

§ 1. **Control of Liquor Traffic and Validity of Statutes in General, 418.**
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§ 3. **Licenses and License Taxes, 425.**
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§ 9. **Civil Liabilities for Injuries Resulting From Sale, 456.**
§ 10. **Property Rights in and Contracts Relating to Intoxicants, 460.**
§ 11. **Drunkenness as an Offense, 460.**

Scope of topic.—This topic is inclusive of all matters relating to traffic in intoxicating liquors except such as involve the Federal internal revenue laws,[58] interstate commerce,[59] and sales to Indians or in Indian territory.[60] It also treats of

47. With respect to service of process. Coe v. Garvey, 130 Ill. App. 221.

48. Paepcke-Leicht Lumber Co. v. Becker, 124 Ill. App. 311.

49. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662.

50. Gross v. Strzyzowski, 124 Ill. App. 300.

51. Dyas v. Dyas [Ill.] 83 NE 229. The contractors of a school building gave an order on the school board to a subcontractor which was accepted by the board. Thereafter the contractors went into bankruptcy and their trustee demanded the money represented by the order on the ground that it was an illegal preference. White v. Turner, 217 Pa. 25, 66 A 89. The money was paid into court. On the trial it was sought to introduce evidence of former litigation against the school board on the same order, of a new contract by the board, which was ultra vires, and the consideration. Held that as the board by paying the money into court declined to raise these questions, they were not in issue. The only matter in issue was the alleged illegal preference. Id.

52. White v. Turner, 217 Pa. 25, 66 A 89.

53. Strobil v. Union Central Life Ins. Co., 129 Ill. App. 343.

54. Mutual Life Ins. Co. v. Lane, 151 F 276. Where the proceeds of a life insurance policy, amounting to $46,133.89, were claimed by the executor and assignee respectively, and the insurance company successfully maintained a bill of interpleader against them, a counsel fee of $1,000 was allowed the company's attorney. Id.

55. Cochran v. Evans, 154 F 674.

56. Cochran v. Evans, 154 F 674. So held where a testator at the time of his death held certain money belonging to complainant, as her agent, which had been deposited in a bank in such a manner as to be earmarked, both the bank and the executrix being entitled to hold the fund until complainant's right thereto was established. Id.

57. Prembley v. Marshall, 118 App. Div. 839, 103 NYS 680.

58. See Internal Revenue Laws, 10 C. L. 413.

59. See Commerce, 9 C. L. 583.

60. See 8 C. L. 179.

property rights in and contracts relating to intoxicating liquors, and of drunkenness as an offense.

§ 1. *Control of liquor traffic and validity of statutes in general.* See 8 C. L. 486—Sale of intoxicating liquors is not per se unlawful in the absence of state or municipal regulation or prohibition,[61] but the right to engage in traffic in such liquors is subject to the power of the state, in the exercise of its police power to regulate or entirely prohibit such traffic [62] where the state constitution is silent on the subject, the power to control the sale of intoxicating liquors rests entirely in the legislature,[63] and such legislature may delegate such power of control to subdivisions of the state.[64] Delegation of power of complete control to a city does not necessarily divert the state of its power of control, and the latter may be exercised concurrently with the former,[65] unless the power of the state is restricted or excluded by the terms of the delegation [66] where there is a conflict the state regulation must control.[67] Power to prohibit is not included in the power to regulate [68] or to license,[69] nor is power to regulate included in power to suppress.[70] Regulative statutes must conform to the general rules relative to the validity of statutes,[71] and must not be in violation of the Federal constitution [72] and the same is true of course, as to regulatory ordi-

61. Sopher v. State [Ind.] 81 NE 913.

62. Reed v. Collins [Cal. App.] 90 P 973; Harrison v. People, 124 Ill. App. 519; Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632; State v. Robinson [Minn.] 112 NW 269; In re Clement, 54 Misc. 362, 105 NYS 1054; In re Brady, 106 NYS 921; De Grazier v. Stephens [Tex.] 19 Tex. Ct. Rep. 979, 105 SW 992. The doctrine that no one has an inherent or inalienable right to sell intoxicating liquor merely means that such right is subject to legislative control. Sopher v. State [Ind.] 81 NE 913.

63. Const. 1850, by failure to mention the subject, leaves matter to legislature, and hence legislature has right to license sales. Sopher v. State [Ind.] 81 NE 913. Power of legislature to regulate and control liquor traffic is unlimited. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. Former liquor laws **repealed** by Acts 30th Leg. p. 258, c. 138. Ex parte Vaccarezza [Tex. Cr. App.] 20 Tex. Ct. Rep. 425, 106 SW 392. Regulatory provisions of Dallas city charter granted at same term of legislature held not repealed by Acts 30th Leg. p. 258, c. 138. Paul v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 320, 106 SW 448.

64. General welfare clause in city charter held to confer right to regulate. Sawyer v. Blakely [Ga. App.] 58 SE 399. Acts 1902, No. 221, p. 451, granting exclusive power to parish and municipal authorities the power to make such rules and regulations relative to sale of intoxicating liquors as they deem advisable, delegates to them all regulative power inherent in legislative department of government. City of Baton Rouge v. Butler, 118 La. 73, 42 S 650. Special Laws 1905, p. 243, amending charter of city of Eugene and giving it power to regulate and prohibit sale of "spirituous, malt, vinous, or intoxicating liquors," did not change or affect power under old charter to regulate and prohibit "spirituous, malt, or vinous" liquors. Renshaw v. Lane County Ct. [Or.] 89 P 147. Blind tiger ordinance held valid. Town of Ruston v. Fountain, 118 La. 53, 42 S 644. Under Const., art. 11, § 11, authorizing towns to exercise police powers not in conflict with general laws, a town may prohibit sale of intoxicants. In re Mogensen [Cal. App.] 90 P 1063.

65. General laws not repealed as to city of Portland by charter of such city. State v. Baker [Or.] 92 P 1076.

66. Clause in Portland charter that no provisions of law concerning sale or disposition of liquor in Multnomah County shall apply to such city has no reference to regulation of places where or persons by whom liquor may be sold. State v. Baker [Or.] 92 P 1076.

67. General statutes regulating sale of intoxicating liquors operate uniformly throughout state, regardless of anything to contrary in municipal charters or ordinances. State v. Robinson [Minn.] 112 NW 269, reviewing history of regulation of sale of liquor in state.

68. Timm v. Council of Village of Caledonia Station, 149 Mich. 323, 14 Det. Leg. N. 442, 112 NW 942.

69. State v. Police Jury of Webster Parish [La.] 45 S 47.

70. Timm v. Council of Caledonia Station, 149 Mich. 323, 14 Det. Leg. N. 442, 112 NW 942.

71. P. L. 1906, p. 205, § 5, held unconstitutional because applicable only to municipalities having appointive excise officers, and hence is **special** legislation. Decker v. Daudt [N. J. Err. & App.] 67 A 375.

Title to Act March 4, 1903, (Laws 1903, p. 346), entitled "An act to prohibit the sale of spirituous, malt, or vinous liquors near public works and grading camps of canals and railroads and other kindred enterprises," held to be too narrow to include provisions for sale of liquors and regulation thereof. Gerding v. Idaho County Com'rs [Idaho] 90 P 357. Title to 3 Ballinger's Ann. Codes & St. § 2644a (Sess. Laws 1903, p. 31, c. 28) held sufficient to cover contents of act, and hence not contrary to Const. § 19, art. 2. State v. Moran [Wash.] 90 P 1044. 3 Ballinger's Ann. Codes & St. § 2644a [Sess. Laws 1903, p. 31, c. 28], held not contrary to Const. § 19, art. 2, providing that not more than **one subject** shall be embraced in a single act. Id.

nances.[73] If possible a regulatory ordinance will be construed so as to give it a uniform position and thus to uphold it.[74]

§ 2. *Local option laws.* See 8 C. L. 488—Under the various statutes, local option may be exercised in various ways, such as by remonstrance,[75] petition,[76] and election of officers pledged to a certain policy,[77] but the most common, and indeed the almost

72. Laws 1907, c. 189, p. 307, requiring registration and publication of U. S. internal revenue liquor tax receipts by persons receiving such receipts, held not invalid as contrary to the Federal constitution. State v. Hanson [N. D.] 113 NW 371. State's police power not restricted by constitutional limitations relative to privileges and immunities of citizens of several states or relative to right to equal protection of laws, provided such power is not extended beyond its legitimate scope. De Grazier v. Stephens [Tex.] 19 Tex. Ct. Rep. 979, 105 SW 992.

73. Ordinance attempting regulation outside of city limits held void as contrary to Const. § 143. Earle v. Latonia Agricultural Ass'n [Ky.] 106 SW 312.

74. Schmidt v. Indianapolis, 168 Ind. 651, 80 NE 632.

75. Act 1895, p. 251, c. 127, § 9, as amended by Acts 1895, p. 7, c. 6, providing for a blanket remonstrance by majority of votes in a township, whereby all granting of any license may be prevented for two years, held constitutional. Regadanz v. Haines, 168 Ind. 140, 79 NE 1085; Cain v. Allen, 168 Ind. 8, 79 NE 201, 896. Signer of remonstrance under Acts 1905, p. 7, c. 6, against granting of any license for two years, cannot withdraw his signature where the remonstrance has been filed three days before the session of the court and such three days has begun to run. Regadanz v. Haines, 168 Ind. 140, 79 NE 1085; Cain v. Allen, 168 Ind. 8, 79 NE 896, afg. on rehearing 79 NE 201, as to right to withdraw signature. Sufficiency of blanket remonstrance under Acts 1905, p. 7, c. 6, can be determined only in connection with an application for license. Sanasack v. Ader, 168 Ind. 559, 80 NE 151. Filing of blanket remonstrance under Acts 1905, p. 7, c. 6, amending Acts 1895, p. 251, c. 127, does not invoke a judicial decision as to the sufficiency of the remonstrance, such question being raised only in subsequently passing upon applications for license, and hence an order, neither granting nor refusing a license but merely passing upon the sufficiency of a remonstrance, is not appealable. Anderson v. Weber, 39 Ind. App. 443, 79 NE 1055.

76. Inasmuch as the power is broadly given to legislature by constitution to provide against evils resulting from liquor traffic, and no qualification is placed upon that power except that no license shall be granted for such traffic, the provisions of the Jones Law (98 O. L. 68), making a petition signed by less than an existing majority of voters sufficient to impose prohibition upon a residence district against will of a majority of voters, does not render act unconstitutional. Otte v. State, 9 Ohio C. C. (N. S.) 293. It is the manifest intention of the legislature that the signers of a petition for the suppression of the sale of intoxicating liquors in a residence district under the Jones Law shall be qualified electors of the district at the time of the signing, and that their number shall be equal to a majority of the votes cast at the last preceding municipal election, and that the petition must be filed within three months of the placing of the first signature thereon. Id. After the Jones Law has been made operative by the judicial findings therein provided for, its operation cannot be defeated by the mere neglect of some ministerial act, such as the failure of the judge to cause a certified copy of his findings, together with the original petition, to be filed with the clerk of the municipal corporation within the prescribed time. Id. If the functions conferred upon the mayor and judge by the Jones Liquor Law (98 O. L 68) are of a judicial nature, then the proceedings in error provided for in § 12 of said law come within the requirements of § 6716, Revised Statutes, and a transcript of the final record, or of the docket or journal entries, must be filed with the petition in error. If said functions are of ministerial nature; then said § 12 of the Jones Law is unconstitutional, being an attempt to confer original jurisdiction upon the circuit court in excess of that limited by § 6, Article XII, of the Constitution. In re Petition of Prohibiting Sale of Intoxicating Liquors v. Johnson, 9 Ohio C. C. (N. S.) 147. On May 21, 1907, a majority of the electors of a residence district in the city of Portsmouth signed a petition under the act, 98 O. L. 68, in favor of prohibiting the sale of intoxicating liquors in that district. This petition was filed with a judge, found sufficient, and the residence duly established prior to Oct. 24, 1907. On the latter date another petition was filed with the judge, also in favor of prohibiting the sale in the residence district described in it. The residence district described in the second petition overlapped the first and was identical with it, except that the second had an additional block attached containing forty-five electors. Held residence districts established under said act are territorial units; the act does not authorize the overlapping of a valid prior residence district by a later petition. Kilcoyne v. Hutchins, 10 Ohio C. C. (N. S.) 233.

77. One of main objects of Comp. St. 1903, c. 50, § 5, known as the "Slocumb Law," was to establish the principle of local option and to permit the people of each municipality to determine for themselves whether or not the liquor traffic should be licensed therein. Reusch v. Lincoln [Neb.] 112 NW 377. Such being the evident policy of the legislature, the amendment of Lincoln charter in 1905, by which biennial elections instead of annual elections were provided for, not being repugnant to the local option law, did not repeal the latter, but must be construed in connection therewith. Id. By term "municipal year," as used in Slocumb Law, is ordinarily meant the political year, and thus construed the principal of local option is conserved and applied. Id. Words "year" in Comp. St. 1903, c. 50, § 5, and "municipal year" in § 25 of same act, must be construed together, and

universal method, is by an election in which the question is voted on directly.[78] Provisions for such elections are made by the various statutes in more or less detail.[79] The fundamental basis of local option by way of local elections is the division of the state into local option districts,[80] and the integrity of such a district is not effected by changes in regard to such district for other purposes.[81] Where, however, such districts are themselves divided into subdivisions authorized to exercise local option, serious questions often arise relative to rights and powers of a district and its subdivision.[82] The order for the election[83] is made upon petition[84] filed[85] with the

county boards cannot grant license for more than a calendar year, their office being continuous and the principal of local option not being involved, but municipal authorities may grant license for "municipal year" which may be longer or shorter than calendar year. Id.

78. Const. § 61, providing that legislature must provide means whereby counties, etc., may determine whether liquors shall be sold therein, but that nothing in such section shall be construed to interfere with or repeal existing laws, left it to legislature to determine whether or not existing laws shall be repealed, and hence legislature could provide for repeal or modification of existing laws and allow this to be done by vote of such locality as legislature saw proper. Board of Trustees of New Castle v. Scott, 30 Ky. L. R. 894, 101 SW 944. Local option law held not in violation of Const. art. 3, § 57, prohibiting local or **special laws.** Ex parte Dupree [Tex.] 19 Tex. Ct. Rep. 851, 105 SW 493. Acts 1906, p. 114, providing for local option elections in counties in which dispensary system prevails, and for determination of status of such counties in respect to sale of intoxicating liquors after such elections, and providing for mode of changing same and for other purposes, held not unconstitutional as embracing more than one subject or as containing matter not covered by its **title.** City of Barnesville v. Means, 128 Ga. 197, 57 SE 422. Acts 1887, p. 857, amending local act of 1883, providing for local option election in Pike county, was not invalid as covering the same **subject-matter** already covered by the general local option law, since Act 1883, not being affected by passage of general local option law, was subject to repeal after passage of general law, and question of repeal could not be submitted to voters of county under the general law. Id. Laws 1906, p. 86, c. 21, amending Ky. St. 1903, § 2560, relating to local option elections, held not violative of Const. § 51, forbidding **amendment** of statutes by mere reference to title or to the context. Board of Trustees of New Castle v. Scott, 30 Ky. L. R. 894, 101 SW 944.

79. In so far as Rev. St. 1895, art. 3389, specifically relating to local option elections, conflicts with the Terrell Election Law [Sayles' Ann. Civ. St. Supp. 1906, p. 192], the former controls. Walker v. Mobley [Tex.] 18 Tex. Ct. Rep. 793, 103 SW 490.

80. School district is not such a political subdivision of county as under Const. art. 16, § 20, is authorized to adopt local option. Ex parte Haney [Tex. Cr. App.] 19 Tex. Ct. Rep. 517, 103 SW 1155; Ex parte Banks [Tex. Cr. App.] 103 SW 1156. An election precinct is not a subdivision within Const. art. 16, § 20, for purpose of holding local option elections. Ex parte Pollard [Tex. Cr. App.] 19 Tex. Ct. Rep. 320, 103 SW 878. Differentiating classification of counties, made by Ky. St. 1903, § 2560, as amended by Laws 1906, p. 86, c. 2[illegible], as to time of holding local option elections, held proper and not in violation of Const. §§ 59, 60, prohibiting special acts to provide for local option elections or to repeal any general act, etc. Board of Trustees of New Castle v. Scott, 30 Ky. L. R. 894, 101 SW 944. Validity of election in commissioners' precinct not affected by addition of territory thereto on day of election where it was not shown that the vote was affected thereby, the result in such case being that local option being voted into effect in the original precinct remained in force as to the territory covered by such precinct regardless of the addition. Ex parte Curlee [Tex. Cr. App.] 19 Tex. Ct. Rep. 293, 103 SW 896.

81. Local option once adopted in a local option district continues in force until it has been voted out by the voters of the territory in which it was originally vitalized. Ex parte Pollard [Tex. Cr. App.] 19 Tex. Ct. Rep. 320, 103 SW 878. Where local option had been put into effect in a justice's precinct, the operation of the law was not affected by determination of question whether an election precinct in such justice's precinct was or was not detached from the latter and attached to another justice's precinct. Id. Local option in operation in an election precinct by reason of such precinct being in a justice's precinct which had voted for prohibition held not repealed as to such election precinct by act of commissioners' court in changing such election precinct to another justice's precinct. Id.

82. Under Acts 1906, p. 86, c. 21, § 1, subsec. b, a separate election cannot be held in city of sixth class on same day that election is held for district in which it is situated. Washington v. Giddens, 31 Ky. L. R. 647, 103 SW 321. Meaning of amendment of 1902 to Rev. St. § 1211, is that effect of election held in one of the political subdivisions therein named continues until an election held in the same subdivision has resulted to the contrary. Police Jury of Avoyelles v. Mansura, 119 La. 300, 44 S 23. Under Rev. St. § 1211, as amended in 1892, a parish, except that it can hold only one election a year, may hold an election at any time, regardless of any elections that may have been held by the political subdivisions within its territory, and the effect of such a parish election, when in favor of prohibition, will control the result of any elections held in such subdivisions, and will continue until another parish election has resulted in a contrary sense. Id.

County and city: Const. § 61, providing that legislation shall provide means whereby

the sense of any county, city, town, district, or precinct may be taken as to whether certain liquors shall be sold therein or shall be regulated, authorizes the several units specified to finally determine that liquor shall not be sold therein, but not that it shall be sold. Board of Trustees of New Castle v. Scott, 30 Ky. L. R. 894, 101 SW 944. Under Ky. St. 1903, § 2560, the fact that a majority of the legal voters in a county and in each precinct thereof vote against sale does not effect status of city within such county that had previously to the county election voted in favor of sale, unless at the county election a majority of the legal votes cast in such city were against sale, and hence the clerk of such a city had no right to refuse a license on account of the county election, in the absence of any showing that the majority of votes in such city at such election were against sale. Kennon v. Blackburn, 31 Ky. L. R. 1256, 104 SW 968. Under Ky. St. 1903, § 2560, as amended by Act March 14, 1906, [Laws 1906, p. 86, c. 21], makes the county the unit of election, and the vote of the county will control the cities of the first, second, third and fourth class therein, unless election for whole county and for city are held on same day, in which case the vote of the county will not bind the city if vote of latter is contrary to that of former, no matter which way the respective votes of the county and city result, that is whether for or against sale. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951. Under the local option law, where an election is ordered in a county and there is no order for an election in a city therein, it is proper for canvassing officers to canvass and certify vote of whole county without making separate canvass of vote in city. Id. If the citizens of a city desire a separate vote upon the question, it must be had by separate petition upon the same day upon which the county election is held. Yates v. Nunnelly, 30 Ky. L. R. 984, 102 SW 292. Ky. St. 1903, § 2560, as amended by Laws 1906, p. 86, c. 21, giving county as a whole the right to enforce prohibition in cities, districts, and precincts therein, but leaving such subordinate units free to adopt prohibition though county as a whole votes against it, held valid. Board of Trustees of New Castle v. Scott, 30 Ky. L. R. 894, 101 SW 944; Gentry v. Peyton, 30 Ky. L. R. 894, 101 SW 944; O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951; Yates v. Nunnelly, 30 Ky. L. R. 984, 102 SW 292; Hancock v. Bingham, 31 Ky. L. R. 427, 102 SW 341. Act 1906 is applicable to any county in which sale of liquors is unlawful except through dispensaries, though such dispensaries are located in an incorporated municipality and operated solely for benefit of such municipality, the county having no interest therein. City of Barnesville v. Means, 128 Ga. 197, 57 SE 422. Violation of Local Option Law [Laws 1905, p. 47], § 10, relating to local option in counties, is a crime within Const. art. 11, § 2, making the right thereby conferred upon cities to amend their charters subject to the criminal laws of the state, and hence a city cannot, by amendment of charter, make itself independent of the local option law applicable to the county in which it is situated. Baxter v. State [Or.] 88 P 677. Fact that under Local Option Law [Laws 1905, p. 47], § 10, local option may be enforced upon a city in a precinct larger than the city limits by means of the country votes in such precinct, does not render the law inoperative as to such city. Id. Laws 1905, p. 47, § 10, relating to local option in counties and precincts, does not suspend city's licensing power generally, but merely modifies such power so as to suspend the right to grant license in a precinct which has voted for prohibition, and hence is not in violation of Const. art. 11, § 2. Id. Laws Or. 1905, p. 41, relating to local option in counties, does not divest a city of its regulative power under Laws 1893, p. 574, § 48, subd. 18, except when and to the extent that the right of local option is exercised, and hence where such right has not been exercised the city may exercise its regulative and prohibitive power to its fullest extent. Renshaw v. Lane County Ct. [Or.] 89 P 147.

County and precinct: Under Laws 1905, p. 45, § 8, and p. 47, § 10, a vote for prohibition in the whole county operates as a prohibition in all the precincts thereof, regardless of the vote in such precinct taken separately. Baxter v. State [Or.] 89 P 369. Under Laws 1905, p. 45, § 8, and p. 47, § 10, a precinct may adopt prohibition though the county as a whole votes against it. Id. Laws 1905, p. 47, § 10, authorizing prohibition in precincts voting therefor, notwithstanding the county as a whole votes against prohibition, is valid. Baxter v. State [Or.] 88 P 677. Under Laws 1905, p. 47, § 10, providing petition for election in county shall constitute petition for election in each precinct thereof, and that order of prohibition shall issue for every precinct voting for prohibition, though county as a whole votes against prohibition, the vote in each precinct stands as an independent vote for that precinct as well as a part of the county vote. Id. County is unit under act 1896, and fact that a precinct or certain precincts thereof has or have already voted on question will not deprive county at large of right to vote thereon. Hancock v. Bingham, 31 Ky. L. R. 427, 102 SW 341.

83. Where order for election was for vote as to whether "spirituous, vinous, malt or other intoxicating liquors" should be sold, etc., and the vote was taken as to whether "spirituous, vinous, or malt liquors," which is the designation used in Const, § 61, and Ky. St. 1903, § 2554, relating to local option elections, should be sold, the variance was immaterial. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951. Election held not invalid because order of commissioners' court calling for election used term "voting box" instead of "voting place," the two terms being of similar import. Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 206, 102 SW 1139. Where police jury ordered election on certain day, but provided no machinery therefor, the president of the police jury had no authority to provide such machinery by proclamation, and the election was void. Police Jury of Parish of Tangipahoa v. Ponchatoula, 118 La. 138, 42 S 725. Order of county court showing that it did not determine the jurisdictional facts was void, as was also the election thereunder. State v. McCord, 124 Mo. App. 63, 100 SW 1129.

84. Filing of sufficient petition for an election under Beal Law, and not finding of council thereon, confers jurisdiction on council to order that an election be held, and whether finding of council as spread on

proper court or tribunal,[86] by the required number of duly qualified petitioners,[87] and where the statutory requirements have been complied with the petitioners are entitled as a matter of right to an order for such election.[88] Other matters of importance in connection with local option elections are the notice[89] and date of election,[90] method of voting,[91] form,[92] authentication,[93] and count[94] of ballots, quali-

its record is sufficient or not is immaterial. State v. McClure, 5 Ohio N. P. (N. S.) 541. Petition held in substantial compliance with Rev. St. 1899, § 3027 [Ann. St. 1906, p. 1733], and sufficient, though not couched in language of statute. State v. McCord [Mo.] 106 SW 27.

85. Provisions of Beal Local Option Law, requiring that "petition shall be filed as a public document with the clerk of municipality, and preserved for reference and inspection," is directory only as distinguished from mandatory. Webber v. East Liverpool, 5 Ohio N. P. (N. S.) 468. Where it appears that through inadvertence of clerk of council, in failing to give the necessary legal notice, a local option election cannot be held under first filing of petition, it may be withdrawn and refiled with a change of date by consent of the petitioners, notwithstanding action had been taken upon it by council, and proceedings may be had de novo with reference to it, and such subsequent proceedings will not be rendered irregular nor the election invalid by such withdrawal. When such action has been taken, it will be conclusively presumed, in the absence of any evidence to the contrary, that such withdrawal and refiling as a new petition was with the consent and approval of the petitioners. Id.

86. Under Const. art. 7, §§ 11, 12, and B. & C. Comp. § 2533, an election may be ordered either by the county judge sitting alone or by him and the two commissioners provided for by the constitution and statute sitting with him. State v. MacElrath [Or.] 89 P 803.

87. Under Ky. St. 1903, § 2554, a petition for election in a magisterial district must be signed by a number of voters in each precinct thereof equal to 25 per cent. of votes cast in each of such precincts at last preceding general election, and a petition signed by 25 per cent. of the voters of the entire district is insufficient. Davis v. Henderson, 31 Ky. L. R. 1252, 104 SW 1009. The "next preceding general election" as used in the statute means the last election at which state and county officers, including those for district in question, were elected. Id. Mere fact that words "and taxpayers" follow the words "one-tenth of the qualified voters" in the order of submission did not deprive court of jurisdiction which had attached upon finding that petition was signed by "one-tenth of the qualified voters" as alleged. State v. McCord [Mo.] 106 SW 27, rvg. 124 Mo. App. 63, 100 SW 1129. Under local option law **separate petitions** presented to court at same time constitute a single petition, and the aggregate signatures of all such petitions may be counted in ascertaining whether there is the requisite number of signatures. State v. Hitchcock, 124 Mo. App. 101, 101 SW 117; Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 206, 102 SW 1139. Wheer judge stated that he knew petitioners and that they constituted the required per cent. of voters, and contestant did not deny such statements or make any allegations to contrary, **failure to hear evidence** on the question did not invalidate the election. Howard v. Stanfill, 31 Ky. L. R. 207, 102 SW 831. In absence of affirmative showing to contrary, a **finding will be preserved** and requisite number of petitioners where county court ordered the election, though there is no recital of such finding. State v. Hitchcock, 124 Mo. App. 101, 101 SW 117. Where the petition shows on its face that it was signed by the required number of legal voters, and there is no showing to the contrary, the finding of the court in conformity with the allegations of the petition in this regard are not subject to **collateral attack.** State v. McCord [Mo.] 106 SW 27.

Withdrawal of signatures: Signers may withdraw their signatures at any time before the petition is acted on. Withdrawn when petition came on for hearing. Davis v. Henderson, 31 Ky. L. R. 1252, 104 SW 1009. Withdrawal after filing of petition held allowable. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951.

88. If a county judge refuses to order a local option election when statutory requirements have been complied with, he may be compelled by mandamus to do so. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951.

89. Order of commissioners' court directing posting of copies of order for election "in the manner and for the length of time required by law" sufficiently designates, by reference, the manner and time of the posting. Magill v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 239, 103 SW 397. Order that notice of election be published for four "successive" weeks instead of four "consecutive" weeks as required by statute held sufficient, the two words being synonymous. State v. Hitchcock, 124 Mo. App. 101, 101 SW 117. Under the evidence, question of posting of notices held for jury. Wiginton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 207, 102 SW 1124. Where the notice required by statute is given, the election will not be invalidated by the adoption of other methods of notice in addition thereto, as where, in addition to notice required by local option election law, notice required by general election law was also given. Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 206, 102 SW 1139. Fact that commissioners' court ordered publication for four successive weeks did not vitiate election, though it was unnecessary. Id.

90. Under Ky. St. 1903, § 2560, as amended by Laws 1906, p. 86, c. 21, county judge may, in his discretion, fix day for election other than day specified in petition, such day to be not earlier than sixty days after filing of petition. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951. Where county judge declined to order local option election in county on ground that a town in county

fications of election judges,[95] the order declaring the result of the election,[96] and the publication thereof.[97] An election is proved by the records relating thereto.[98] Liability for costs is regulated by statute.[99]

had a short time previously voted upon question, circuit court in its judgment in mandamus proceedings directing county judge to order election did not err in fixing day for such election, although discretion is vested in county judge to fix such day. Yates v. Nunnelly, 30 Ky. L. R. 984, 102 SW 292. Under Ky. St. 1903, § 2555, providing that local option elections shall not be held within thirty days next preceding or following any regular political election, the day of such political election is to be included. Newton v. Ogden, 31 Ky. L. R. 549, 102 SW 865. Judge may be required by **mandamus** to fix city election on same day as county election where petitions for both are before him, but cannot be thus compelled to name particular day for county election. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951.

91. Requirement of Const. art. 2, § 1, that all "elections" shall be by ballot, applies to local option election. State v. State Board of Canvassers [S. C.] 59 SE 145. Constitutional requirement of secret ballot, Const. art. 2, § 1, which is made applicable to local option elections by Act Feb. 16, 1907, held violated by marking ballot boxes "For sale" and "Against sale," and requiring voters to deposit their ballots in the box corresponding to their votes. Id. Voter not estopped by his vote from attacking election on ground that ballot was not secret. Id. In absence of any showing of fraudulent intent or that result was changed thereby, an election is not vitiated by fact that a ballot was voted upon which a number had been placed in some unknown manner. State v. McClure, 5 Ohio N. P. (N. S.) 541.

92. Form of ballot is prescribed by Rev. St. 1895, § 3388, according to which the ballots contain the words "For Prohibition," and "Against Prohibition," and such form is not affected by the requirement of the Ferrell Election Law that official ballots shall be used in the form thereby prescribed. Walker v. Mobley [Tex.] 18 Tex. Ct. Rep. 793, 103 SW 490; Hash v. Ely [Tex. Civ. App.] 18 Tex. Ct. Rep. 262, 100 SW 980.

93. Terrell Election Law, Sayles' Ann. Civ. St. Supp. 1906, pp. 178-188, requiring ballots to be signed by presiding judge, does not apply to local option elections. Walker v. Mobley [Tex. Civ. App.] 19 Tex. Ct. Rep. 751, 105 SW 61. Laws 1905, p. 520, c. 11, not being applicable to local option elections, such an election was not invalidated because presiding judge did not in person sign his name upon the ballots but authorized another, in his presence, to do so for him. Ex parte Anderson [Tex. Cr. App.] 19 Tex. Ct. Rep. 23, 102 SW 727.

94. Election not invalidated by recount and change of decision. State v. McClure, 5 Ohio N. P. (N. S.) 541. Under general election law, Rev. Laws, c. 11, § 421, supreme judicial court has power to issue **mandamus** to compel proper counting of ballots. Brewster v. Sherman [Mass.] 80 NE 821. Under Rev. Laws, c. 192, § 5, mandamus is available to citizen taxpayer to prevent counting of illegal ballots. Id.

95. Election not invalidated because presiding judge was also chairman of executive committee of county for a certain political party, such latter office not being one of trust or profit. Ex parte Anderson [Tex. Cr. App.] 19 Tex. Ct. Rep. 23, 102 SW 727.

96. Need not itself show that it was made at a special session of commissioners' court held for purpose of opening polls, etc., since in absence of proof to contrary it will be presumed that all things were rightly done. Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 206, 102 SW 1139. Not necessary for order to show that notices of election were posted, etc. Id. Order not invalidated because first portion recited that the election was to determine whether "spirituous, vinous or malt liquors" should be prohibited instead of "intoxicating liquors," where order itself showed that election was to vote on question of sale of "intoxicating liquors." Id. Statute does not require county court itself to draft notice of result of election or to recite it in haec verba in the order for its publication. State v. Hitchcock, 124 Mo. App. 101, 101 SW 117. Under Sayles' Ann. Civ. St. 1897, art. 3391, entry of order putting local option into effect need not be made by county judge in person. Walker v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 399, 106 SW 376.

97. A skip of one week in the publications will not invalidate the election on ground that the publications were not **successive.** Carnes v. State [Tex. Cr. App.] 103 SW 934. Under Pol. Code, § 3184, requiring result of election in favor of prohibition to be published in **paper** in which notice of election was given, such publication is sufficient regardless of publications in other papers in which notice of election was also published. State v. O'Brien, 35 Mont. 482, 90 P 514. The publication must be made by, that is pursuant to the directions of, the county judge, and not of the commissioners' court. Rucker v. State [Tex. Cr. App.] 101 SW 802; Patton v. State [Tex. Cr. App.] 100 SW 778. Order of commissioners' court that the order putting local option into effect be published, etc., in certain paper which being "designated for that purpose by W. W. Cook, county judge of said county, present and presiding with said court," held to show that the publication was ordered to be made in such paper by the county judge as required by law. Covington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 55, 100 SW 368. Where publication ordered by county judge was postponed by district judge pending election contest and thereafter published as directed by such judge, the election was valid. Seay v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 83, 102 SW 1127. Where commissioners' court entered order for publication of order declaring result, and the county judge made certificate that such order was published in the same paper by name selected by the order of the commissioners' court, it was presumed, on prosecution for violation of local option, that the judge caused the order to be published. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 60, 101 SW 1002; Id., 19 Tex. Ct. Rep.

Local option, when put into effect, suspends the general license law,[1] whether the result is in favor of license [2] or against it,[3] but provision is usually made for the resubmission of the question after the expiration of a certain period.[4] Provision is also made for the contest of local option elections,[5] and the remedies thus provided are exclusive.[6]

58, 101 SW 1003. Publication of result **may be proved** otherwise than by copy of judge's entry as provided by Sayles' Ann. Civ. St. 1897, § 3391. Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384.

Certificate of county judge that order declaring result of election was published in a certain paper for four successive weeks, "as required by law," held sufficient compliance with Civ. Code 1895, art. 3391, though particular issues of the paper were not specified. Magill v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 239, 103 SW 397. Under Sayles' Ann. Civ. St. 1897, art. 3391, judge's certificate should not recite that election was held and that it resulted in local option going into effect. Walker v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 399, 106 SW 376. Fact that judge certified to unnecessary matters in addition to those required did not invalidate election. Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 206, 102 SW 1139. Surplus recitals in judge's certificate of publication of result held not prejudicial to defendant. Walker v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 399, 106 SW 376.

Mandamus refused to compel district judge to vacate order made by him at chambers awarding peremptory mandamus to compel county judge to publish result of election, where county judge's refusal was based on invalid agreement as to postponement between commissioners' court and contestants. Thorne v. Moore [Tex.] 19 Tex. Ct. Rep. 985, 105 SW 985.

Admission of election is involved in an insistence in a bill of exceptions that notice of the result was not duly published. Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 719, 99 SW 1002.

98. Where record of county court showed that after election the county clerk and two of the associate judges selected by the clerk opened and cast up the votes polled, and reported the result to the court, which, after reciting such report, ordered it to be spread upon the record, and then ordered the result as thus found to be published, etc., which was accordingly done, it was held that the election was sufficiently proved. State v. Hitchcock, 124 Mo. App. 101, 101 SW 117.

99. Only petitioners are liable therefor. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951. Under Ky. St. 1903, § 2559, petitioners for local option election must make deposit sufficient to cover costs of both the hand bills and the publication required by § 2555, but where the deposit required and made is not sufficient, the publisher cannot recover from either the county or the petitioners, § 1540 providing for payment by county of election costs only where such costs are not otherwise provided for, and § 2559 not making petitioners personally liable. Butler v. Fiscal Ct. of Jefferson County, 31 Ky. L. R. 597, 103 SW 251.

1. It does no more than suspend, and hence liability on bond for sale to minor, though held a penalty, may be enforced though local option became effective before trial. Kerr v. Mohr [Tex. Civ. App.] 18 Tex. Ct. Rep. 754, 103 SW 210.

2. Where local option election was in favor of license, the police jury had no power to defeat such result by imposing prohibitive license fee. State v. Police Jury of Webster Parish [La.] 45 S 47.

3. When authority to issue license has been taken away from town by result of parish election, a license from town authorities is void. State v. Laborde, 119 La. 410, 44 S 156. Provision of Revisal 1905, § 2073, for extension of license for six months beyond time when local option takes effect for purpose of closing up business, does not authorize renewal of license expiring within such six months' period. McIntyre v. Asheville [N. C.] 59 SE 1007. Where **remonstrance** under Acts 1895, p. 7, c. 6, has been filed by majority of voters of township, the circuit court on appeal cannot grant a license. Regadanz v. Haines, 168 Ind. 140, 79 NE 1085, following Cain v. Allen, 168 Ind. 8, 79 NE 201, 896.

4. Under Gen. Laws 29th Leg., p. 378, c. 158, an election held in less than two years after declaration of result of former election is invalid though held over two years after the holding of the prior election. Seay v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 183, 102 SW 1127. Ky. St. 1903, § 2560, as amended by Laws 1906, p. 86, c. 21, providing for local option elections in **counties, cities, districts, and precincts,** and giving county as whole the right to enforce prohibition on other units mentioned, but leaving such units free to adopt prohibition though county as whole votes against it, and further providing that a second vote shall not be taken within three years, prohibits such second vote only in the identical territory, but quere whether if a whole county has voted for prohibition a precinct or town therein may, after three years, have another vote to change existing conditions. Board of Trustees of New Castle v. Scott, 30 Ky. L. R. 894, 101 SW 944. Under Laws 1906, p. 86, c. 21, no vote can be taken in precincts of county within three years from vote by county at large. Hancock v. Bingham, 31 Ky. L. R. 427, 102 SW 341. Under Laws 1906, p. 86, c. 21, and Ky. St. 1903, § 2554, an election on the question of local option may be had in an entire county, including a city of fourth class in which an election upon that question had been held a few months previously. Yates v. Munnelly, 30 Ky. L. R. 984, 102 SW 292.

5. Under Sayles' Rev. Civ. St. 1895, art. 3397, irregularities in allowing voters to cast their ballots without complying with law as to presentation of poll tax tickets, etc., will not constitute **grounds of contest** where it is not shown that such voters were not in fact legal voters. Hash v. Ely [Tex. Civ. App.] 18 Tex. Ct. Rep. 262, 100

§ 3. *Licenses and license taxes. Authority to license or tax, and application of license laws.*[See 8 C. L. 491]—The validity of license statutes is determined by the same rules that are applicable to statutes in general,[7] except that the former are held not subject to certain constitutional limitations applicable to the latter.[8] The source of all licenses to sell intoxicating liquors is the state.[9] From this source cities and other subdivisions of the state derive their licensing power,[10] and the power of one subdivision may be subordinated to that of another in which the former is located.[11]

SW 980. Pol. Code, § 1546, conferring on supreme court jurisdiction in cases of contest of local option election, limits that jurisdiction to matters involved in ascertainment of true result of the election. Harris v. Sheffield, 128 Ga. 299, 57 SE 305. Unconstitutionality of act under which election is held and validity of election as dependent on compliance with prerequisites for calling election are not within scope of such contest. Id. Under Sayles' Ann. Civ. St. 1897, art. 390, the commissioners' court is only authorized to count ballots and declare result and cannot try a contest of the election, **jurisdiction** of contested elections being relegated by Const. art. 5, § 8, to the district court, and such jurisdiction being also conferred on district court by Act 1797, and the authority of the commissioners' court in the premises being denied by terms of art. 3397, giving right to contest in "any court of competent jurisdiction." Burks v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 297, 103 SW 850. Where license was granted after dismissal by contest board of contest of election resulting in favor of sale, and such dismissal was reversed by circuit court and election declared invalid, a **supersedeas on appeal** from circuit court left the licenses in operation until determination of appeal. Commonwealth v. Weisenburgh, 31 Ky. L. R. 449, 102 SW 846.

6. Under Liquor Tax Laws, Laws 1900, p. 853, c. 367, § 16, the only remedy for irregular submission is a resubmission as provided by the act, and until such resubmission the result of the irregular submission is binding. Raymond v. Clement, 118 App. Div. 528, 102 NYS 1070. Police jury having authority in the matter of elections and having acted by reconsideration of canvass of votes on special election and by declaring on such recanvass that the result was for prohibition instead of for license as declared on first canvass, **mandamus** would not issue to compel sheriff to issue license so long as action of police jury remained unimpeached in proper proceedings to set it aside. State v. Davis, 119 La. 247, 44 S 4. Where validity of election was not attacked in manner provided by law, it could not be collaterally attacked in mandamus to compel issue of license. Kennon v. Blackburn, 31 Ky. L. R. 1256, 104 SW 968.

7. Acts 1906, p. 549, entitled "An act relating to revenue and taxation," etc., held not violative of Const. § 51, requiring that an act shall relate to only one subject which shall be expressed in its title. Brown-Foreman Co. v. Com., 30 Ky. L. R. 793, 101 SW 321. Acts 1906, p. 549, imposing tax on corporations engaged in rectifying, etc., held not violative of Const. § 202, providing that no corporation organized outside of state shall be allowed to transact business in the state on more favorable terms than are accorded to domestic corporations. Id. Such act is not in violation of fourteenth amendment. Id. Inasmuch as no state can pass a law which impairs the obligation of contracts, the lien for the tax of $1,000 under the Aiken law probably does not attach to property held by the liquor seller under a lease which antedates this law. Moser v. Stebel, 9 Ohio C. C. (N. S.) 217.

8. Acts 1906, p. 549, imposing license tax on compounded, rectified, blended, or adulterated distilled spirits, held not invalid for failure to state purpose for which such tax is levied as required by Const. 1891, § 180, in regard to taxing statutes generally, the constitutional provision being held not to apply to license taxes. Brown-Foreman Co. v. Com., 30 Ky. L. R. 793, 101 SW 321. Const. § 171, requiring taxes to be operated uniformly on all property, held not applicable to Acts 1906, p. 549, § 181, imposing license tax on compounded, rectified, etc., spirits. Id.

9. State v. Maryland Club [Md.] 66 A 667.

10. Under Ky. St. 1903, X 3637, a city of fifth class may impose license on wholesale liquor dealers who sell to retail dealers. Cofer v. Elizabethtown, 30 Ky. L. R. 706, 99 SW 608. Ordinance providing for license of saloons held to apply solely to saloons where intoxicating liquors were sold, and hence invalid under Comp. Laws 1897, § 3107, limiting city's licensing authority by providing that same should not authorize licensing of saloons where intoxicating liquors are sold. Fitzpatrick v. Weaver, 147 Mich. 382, 111 NW 163. Under Const. art. 6, § 46 [Code 1906, p. lxiii], legislation may vest towns and cities with sole power to grant or refuse licenses to sell intoxicating liquors within their corporate limits. State v. Harden [W. Va.] 58 SE 715. Const. art. 8, § 24 [Code 1906, p. lxxiv], when construed in connection with § 6, does not give counties jurisdiction over liquor licenses to exclusion of power of legislation to grant such jurisdiction to towns and cities. Id. Acts 1891, p. 88, c. 40, § 35, held to vest in council of town of Point Pleasant sole liquor licensing power within corporate limits. Id. Rev. Pol. Code, § 2856, authorizing county authorities to issue licenses in precincts in which there was no incorporated town or city, was repealed by Laws 1903, thus leaving no authority whatever to issue licenses in such territory, and rendering the issue of license therein impossible, and establishing absolute prohibition therein. State v. McIlvenna [S. D.] 113 NW 878.

11. City of first class has no power to refuse license to applicant who holds county license and has filed bond with county clerk and paid amount of city license fee fixed by ordinance. Territory v. Robertson [Okl.] 92 P 144.

Power to license does not include power to prohibit,[12] and a license fee may be invalid because prohibitive where there is no power to prohibit.[13] The amount of the license fee is sometimes left to the determination of the people of the particular locality,[14] but where the fee is prescribed by statute, a valid license cannot be issued without its payment.[15] As in the case of statutes, certain constitutional limitations are held not applicable to licensing ordinances.[16]

Whether a particular business comes within the terms of the statute or ordinances is a matter of construction[17] and evidence.[18]

Procedure.[See 8 C. L. 492]—No one has vested right to have a liquor license,[19] and licensing authorities are usually vested with more or less discretion in the exercise

12. State v. Police Jury of Webster Parish [La.] 45 S 47.

13. State v. Police Jury of Webster Parish [La.] 45 S 47. Tax below maximum prescribed is presumed valid in absence of proof that it is prohibited. Johnson v. Fayette [Ala.] 42 S 621; Cofer v. Elizabethtown, 30 Ky. L. R. 706, 99 SW 608. Under Ky. St. 1903, § 3490, subsec. 27, city of fourth class is authorized to fix retail license at from $250 to $1,000, and hence license tax of $600 was valid. City of Mt. Sterling v. King, 31 Ky. L. R. 919, 104 SW 322. Test of **reasonableness** is not whether the applicant's business yields a sufficient profit to justify the payment of the fee. Cofer v. Elizabethtown, 30 Ky. L. R. 706, 99 SW 608. Fee of $250 on wholesale license held not confiscatory. Id. Tax of $750 in town of 700 population held not prohibitory where in previous year three out of four dealers made profit of from $400 to $800, though fourth went out of business. Johnson v. Fayette [Ala.] 42 S 621.

Mandamus lies to compel fixing of the license fee at a figure that is not prohibitive. State v. Police Jury of Webster Parish [La.] 45 S 47. City license of $1,00 on breweries held not excessive. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

14. Laws 1885, p. 268, c. 296 [St. 1898, § 1548], providing for determination of amount of licenses in cities by election, held applicable to Milwaukee. State v. Hinkel, 131 Wis. 103, 111 NW 217.

15. Under St. 1898, § 1548, city has no power to issue license even for part of year until payment of full license fee prescribed by the statute has been paid, though by the terms of the statute all licenses expire on a certain date thereafter, regardless of whether they have run a year or not. State v. Hammel [Wis.] 114 NW 97.

16. Ordinance imposing license tax need not specify purpose of tax. City of Mt. Sterling v. King, 31 Ky. L. R. 919, 104 SW 322, following Brown-Foreman Co. v. Com., 30 Ky. L. R. 793, 101 SW 321.

17. Under Acts 1905, p. 30, § 2, par. 28, when brewing company engaged in manufacture of beer paid special tax in county where its principal office was located, it was not liable to pay an additional tax in another county in which it stored beer and filled orders taken at its agency in such county. Whittlesey v. Acme Brew. Co., 127 Ga. 208. 56 SE 299. Acts 1906, p. 193, c. 22, subd. 4, imposing license fee on "each agency * * * established by resident brewers or resident wholesale dealers in domestic beer," etc., requires fee not only of resident brewers but also of resident wholesale dealers in domestic beers, etc., though the presiding general provision of the act omits resident wholesale dealers from its enumeration of taxable occupations. Commonwealth v. Nunan, 31 Ky. L. R. 1090, 104 SW 731. Under act prohibting municipalities from imposing license tax on brewers holding state license unless he maintains a store house or place of business therein, a manufacturing plant, cold storage room, and office, from which beer is sold at wholesale, constitute a place of business. City of Charleston v. Charleston Brew. Co., 61 W. Va. 34, 56 SE 198. Act 1906, p. 549, imposes tax on business of rectifying, etc., and not upon the spirits used in rectifying. Brown-Foreman Co. v. Com., 30 Ky. L. R. 793, 101 SW 321. A manufacturer and wholesale dealer in beer, who maintains a storage house at a place where beer is stored, and from which deliveries are made only to local retail dealers upon orders solicited by the traveling sales agent of the manufacturer, does not thereby become a trafficker in intoxicating liquors within the meaning of §§ 4364-9, and is not subject to the Dow tax. Diehl Brew. Co. v. Spencer, 9 Ohio C. C. (N. S.) 577. Since Gen. Laws 1896, c. 102, § 1, specifically excepting persons keeping liquor for sale as thereafter provided, druggists and pharmacists, being authorized by § 52 to sell liquor without license, could not be prosecuted under § 1. State v. Collins [R. I.] 67 A 796. Such authority was revoked by Pub. Laws, c. 1223. Id. Comp. St. 1907, c. 50, §§ 4221-4255h, applies only to liquors that are intoxicating. Luther v. State [Neb.] 114 NW 411.

18. A traffic in intoxicating liquors may be carried on without maintaining a bar or keeping a stock of liquor constantly on hand, and one formerly engaged in the business, but who has ostensibly retired therefrom, will be held to be still so engaged, when the evidence shows that four bottles of beer, which were obtained from a saloon at fifteen cents a bottle, were sold for one dollar a bottle at the same place where the seller formerly carried on the business, and a levy on goods and chattels in satisfaction of the tax assessed against such business will be sustained. Leonard v. Bowland, 4 Ohio N. P. (N. S.) 577. Where a liquor tax has been regularly entered by the county auditor, the duplicate becomes by operation of the statute prima facie evidence as to the amount and validity of such tax, and the burden is upon the one so assessed of proving that he was not engaged in the liquor business at the time covered by the assessment. Id.

19. Cooke v. Loper [Ala.] 44 S 78.

of their licensing power,[20] but such discretion cannot be exercised arbitrarily,[21] nor will a city itself be allowed to exercise its power in a discriminating or arbitrary manner.[22] An applicant for license must be duly qualified,[23] and the application must be made to a duly authorized tribunal [24] at the proper term [25] or time,[26] and must conform to requirements as to notice,[27] consent of property owners,[28, 29] pay-

20. Council may limit the number of licenses to be granted. Meyer v. Decatur, 125 Ill. App. 556. Authority under Bessemer city charter, Dec. 13, 1900 [Acts 1900-01, p. 44], to license and restrain and revoke where in opinion of council the public safety, peace, etc., requires it, vests council with discretion in granting. Cooke v. Loper [Ala.] 44 S 78. Ordinance may reserve power to refuse license if place is not deemed suitable. Id. Right to pass on suitability of place may be delegated by council to committee where right of appeal is given. Id. Mayor who is authorized to grant licenses to applicants complying with certain requirements has a discretionary power, and may refuse an applicant who has complied with the ordinance where there are reasonable grounds for such refusal, such as that the saloon will be located near a religious institution. City of Chicago v. Kretzmann, 130 Ill. App. 469. Held within mayor's discretion to refuse license for saloon within 125 feet of premises of reform school for girls, and 500 feet from main building and 250 feet from other buildings in course of erection on such premises. Kretzmann v. Dunne, 228 Ill. 31, 81 NE 790. Ordinance directing mayor to isue licenses when satisfied of good character of applicant, and specifying conditions, etc., held not to require mayor to issue license for neighborhood where he deemed it would be detrimental to public to have a saloon. Harrison v. People, 222 Ill. 150, 78 NE 52, rvg. 125 Ill. App. 178. That dram shop was to be located near public school held ground for refusal in exercise of discretionary power. Id. Mayor in issuing license exercises discretionary power as agent of council where his authority is conferred by ordinance. Harrison v. People, 124 Ill. App. 519.

21. Where an ordinance provides that the council "may" issue licenses, the exercise of such authority in one case renders the ordinance mandatory as to all applications within the terms of the ordinance. Meyer v. Decatur, 125 Ill. App. 556.

22. City must exercise license power through general ordinances operating upon all applicants in the same class. Meyer v. Decatur, 125 Ill. App. 556. Cannot by ordinance reserve to itself an arbitrary discretion to license one person and refuse to license another having the same qualifications. Id. Proviso that any place in city used for distribution, etc., of beer brewed outside of city shall be held to be a depot of a brewery within provision of ordinance imposing license upon such depots generally, held merely explanatory of such provision and not to discriminate between residents and nonresidents. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

23. That applicant had been fined for selling liquor without license held sufficient to sustain refusal to grant license. In re Arszman [Ind. App.] 81 NE 680. Requirement of Acts 1907, p. 260, c. 138, § 10, that applicant **shall be citizen** of state and resident of county for which the license is asked, held within police power and hence not invalid under U. S. Const. art. 4, § 2, relating to privileges and immunities of citizens of several states, or art. 14, § 1, relating to equal protection of laws. De Grazier v. Stephens [Tex.] 19 Tex. Ct. Rep. 979, 105 SW 992. Same degree of proof as in ejectment not required, but sufficient if applicant has, by record or documentary evidence or both, and in good faith believes that he has a **freehold estate** in his district. Starkey v. Palm [Neb.] 114 NW 287. Unlawful sales of articles not pertaining to business of pharmacist, such as cigars, ice cream, etc., do not disqualify a **pharmacist** from receiving license to sell intoxicants under Code, § 2387, providing that permit to sell intoxicants shall be issued only upon proof that applicant has for six months last past lawfully been conducting a pharmacy. In re Maulsby [Iowa] 113 NW 548.

Corporation: May hold dram shop license under statute making word "person" applicable to corporations. Heidelberg Garden Co. v. People, 124 Ill. App. 331. Mayor and council of city of first class have no **authority to pass on qualifications** of holder of county license. Territory v. Robertson [Okl.] 92 P 144. Laws 1899, pp. 133, 134, c. 4747, §§ 2, 4, giving county commissioner **power to hear evidence** and to pass upon qualifications of applicant, does not confer judicial powers and is not unconstitutional as conferring such powers. State v. Holmes [Fla.] 44 S 179.

24. Applications must be made to board of county commissioners of county wherein sales are proposed to be made. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P 829. Village board had no authority to grant license where there was no ordinance giving it power to do so. In re Ryan [Neb.] 112 NW 599.

25. Provision of Rev. St. 1899, § 2997 [Ann. St. 1906, p. 1720], that petition for license must remain on file "for ten days before the first day of the court to which it is presented," and be laid before the court at its "first term thereafter," does not exclude special terms. State v. Mitchell [Mo. App.] 105 SW 655.

26. Under Act May 13, 1887, P. L. 108, application for license must be filed three weeks before the first day of the session of the quarter sessions at which it is to be heard. Crawford's License, 33 Pa. Super. Ct. 338.

27. Publication of notice of application in cities of metropolitan class must be made both as required by Laws 1903, p. 348, and also as required by Sess. Laws 1903, p. 228, c. 17, § 132, the two statutes not being repugnant. In re Hedgreen [Neb.] 111 NW 786.

28, 29. Authority to require consent of property owners in vicinity of proposed

ment of fees,[30] and designation of the place where the business is to be conducted.[31]

place of sale is incident to the power to license, regulate, and restrain. City of Baton Rouge v. Butler, 118 La. 73, 42 S 650. "That legislature has power to authorize such an ordinance was affirmed in City of New Orleans v. Machea, 112 La. 559, 36 S 590, and in City of New Orleans v. Smyth, 116 La. 685, 41 S 33." Id.

Form of consents: Under Laws 1896, p. 60, c. 112, § 17, requiring filing of consent "executed" by property owners, signatures to a rider to a former consent filed with another application, not being "subscriptions" to such consent, cannot be considered. In re Griffin, 56 Misc. 21, 106 NYS 24.

Time of filing consents: Laws 1896, p. 60, c. 112, § 17, subd. 6, as amended by Laws 1897, p. 220, c. 312, requires consent of property owners to be filed "simultaneously" with the application, and hence a consent previously filed by another applicant is not sufficient. In re Griffin, 56 Misc. 21, 106 NYS 24. Prior consent filed cannot be rendered applicable by indorsements by way of amendment. Id.

Qualifications of signers of consents: Under Cobbey's Ann. St. 1903, c. 32, application must be signed by bona fide freeholders. In re Dye [Neb.] 112 NW 332. One made a freeholder for sole purpose of qualifying him to sign application is not a bona fide freeholder. Id. Lapse of time alone will not qualify one who is not a bona fide freeholder to sign application. Id. Lessee who was general real estate agent of owner not qualified to give consent by reason of his interest in profits realized from possible sale of premises. In re Rupp, 54 Misc. 1, 105 NYS 467. Under Laws 1897, p. 220, c. 312, § 17, subd. 8, relating to necessity of consent of property owners of residence buildings within certain distance of proposed place to be licensed, an ordinary double building in country village built to be used and used by two families held to be one building, though the two parts were owned by different persons. In re Clement, 118 App. Div. 575, 103 NYS 157. That signers were resident freeholders residing within certain distance of proposed saloon **need not be alleged.** Hayes v. Oceanside Trustees [Cal. App.] 92 P 492. Finding that signers of petition were resident freeholders held sustainer by **evidence.** Tattersal v. Nevels [Neb.] 110 NW 708. Code, § 2449, requires signers of statement of consent to be legal voters at last preceding general election as shown by poll books, and parol evidence is inadmissible to prove such qualification. Wilson v. Bohstedt [Iowa] 110 NW 898. On appeal from supervisors' approval of statement of consents filed as required by Code, § 2449, and approved after canvass required by § 2450, such statement and the poll books required to be kept by auditor by § 2453, when certified to district court by auditor, as required by § 2450, were admissible in behalf of appellants, though the latter had removed them from the auditor's custody and kept them for nearly thirty-six hours, where there was no evidence that they had been altered or spoliated. Id. Under Code, § 2449, requiring signers to be voters at last general election as shown by poll books, persons signing their full names will not be presumed to be same as persons registered by corresponding initials to christian names. Id.

Authority to consent: A tenant in common with another has no authority by virtue of the relation to give the latter's consent, and hence husband had no authority to consent for wife as to property owned by them by the entirety. Quigley v. Monsees, 121 App. Div. 110, 106 NYS 167. Under Code, § 2448, subd. 2, requiring consent of freeholders within certain distance where land within such distance was owned by partnership under deed in partnership name, which was composed of the surnames of all the partners, the consent of all partners was necessary. Close v. O'Brien & Co., [Iowa] 112 NW 800.

Computation of distance: Where entrance to rear building is from yard between it and front building, and access to former can be had only from street on which front building opens, the direct entrance to rear building is not the entrance contemplated by the statute. In re Rupp, 55 Misc. 313, 106 NYS 483. Door to hallway leading from street to yard upon which rear door of dwelling house opened was not entrance to such dwelling, such entrance being door opening into yard. In re Rupp, 54 Misc. 1, 105 NYS 467.

Withdrawals of consent: Seems that written withdrawals of consent need not show voting precinct of signers as required by Code, § 2452, of the original statement of consents. Dye v. Augur [Iowa] 110 NW 323.

Where consent unnecessary: Where applicant failed to answer question as to continuous occupancy of premises for liquor traffic, he could not thereafter avoid the objection that the requisite number of consents had not been secured when the license was granted by proving continuous occupancy, etc. In re Deuel, 55 Misc. 618, 106 NYS 1030. Where license was obtained for April, but none for May or June, and, the building being incomplete, no liquor was sold until July, such condition did not constitute a continuous occupation for liquor traffic so as to obviate necessity of consent of property owners. Quigley v. Monsees, 121 App. Div. 110, 106 NYS 167. Provision of Laws 1896, p. 60, c. 112, § 17, subd. 8, that consent of adjacent property owners shall not be required as to applications to conduct saloons on premises where such business was actually carried on at a certain date, no such consent was necessary to application to reopen saloon on premises on which business had been discontinued on account of destruction of building by fire, the delay in rebuilding being satisfactorily explained and it appearing that the privilege conferred by the act had not been abandoned. In re Clement, 52 Misc. 325, 20 Crim. R. 471, 102 NYS 178.

30. Applicant must produce to county commissioners the sheriff's receipt for license fees. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P 829.

31. Application to sell liquors at Winsor Hotel, in united school districts Nos. 2, 100, 103, and 14, and in colored school district

The applicant is sometimes entitled to a hearing.[32] When so required the applicant must give bond,[33] with such security and upon such conditions as is required by law.[34] Actions in such bonds are treated in other sections.[35] The validity of the license is not affected by an erroneous taxation of costs,[36] nor by the intention of the applicant as to the use of the license when granted.[37] Proceedings to list persons and places for taxes must conform to the statute authorizing such proceedings.[38]

The necessity of a new application for a renewal of a license is sometimes dispensed with.[39]

Refusal to renew a license and threatened interference with the business of the former licensee is not ground for an injunction,[40] mandamus is available in a proper case where a license is refused.[41] Provision is usually made for review by appeal or like proceedings,[42] but such is not always the case.[43] Where such review is provided for, prohibition will not lie.[44]

No. 192, held not subject to objection that hotel mentioned was actually located in white school district known as "Public Schools of Milford," and in united school district for colored children known as United Districts Nos. 163 and 192, in Milford. In re Lofland [Del. Gen. Sess.] 66 A 361. The place for which the license issues must correspond to that designated in the application. Moniteau County v. Lewis, 123 Mo. App. 673, 100 SW 1107.

32. Under an ordinance requiring "due consideration" of an application, the applicant is entitled to a hearing. Reed v. Collins [Cal. App.] 90 P 973.

33. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P 829. Under Ky. St. 1903, § 3058, giving city right to regulate and control liquor traffic, city had right to require bond of licensee conditioned upon his observance of laws and ordinances relating to such traffic. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971.

34. Must be in penal sum of $1,000 with at least two good sureties possessing certain qualifications. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P 829. Act May 1, 1907, leaving aceptance of surety bonds to discretion of city council, held constitutional. Quay v. Shepherd [Mich.] 14 Det. Leg. N. 700, 114 NW 238.

35. See post, § 5, Action For Penalties; post, § 9, Civil Liabilities For Injuries Resulting From Sale.

36. License not invalidated because county erroneously taxed certain costs. State v. Mitchell [Mo. App.] 105 SW 655.

37. Intention to allow license to be used by one not qualified to receive a license. State v. English [N. H.] 68 A 129.

38. Under Code, § 2435, as amended by Code Supp. 1902, § 2435, providing for return by citizens of lists of persons engaged in and places used for liquor business, where municipal assessor fails to make such return as required by Code, § 2433, notice of intention of citizens to make such return must be served and verified by one of such citizens as required by the act, and service and return thereof by a constable is insufficient. National Loan & Inv. Co. v. Linn County Sup'rs, 134 Iowa, 527, 111 NW 1009.

39. Under ordinance dispensing with necessity of new application on renewal unless protest is filed by one-fourth of property owners or householders, etc., on both sides of street in block on which the saloon has its main entrance, a protest is sufficient if signed by one-fourth of property owners, etc., on both sides of street on which main entrance is located, and need not be signed by one-fourth of owners, etc., on all the streets surrounding the block. City of Chicago v. O'Hare, 124 Ill. App. 290.

40. Refusal of license deprives no one of any property right. City of Chicago v. O'Hare, 124 Ill. App. 290.

41. City of Chicago v. O'Hare, 124 Ill. App. 290. Will not issue unless it clearly appears that applicant has complied with all requirements of license ordinance. Meyer v. Decatur, 125 Ill. App. 556. Petitioner must show that he possesses qualifications for license, that he showed such qualifications to licensing tribunal, or was ready and able to do so, and they refused to allow him to do it. Conlee v. Clay City, 31 Ky. L. R. 533, 102 SW 862. Where it appeared that defendants in mandamus to compel issue of license colluded with petitioner to allow the order to issue, the court properly allowed taxpayers and voters to intervene and defend. Id. Where the answer denied all the allegations of the petition and case was submitted on pleadings, it was properly dismissed. Id.

42. Nature of proceedings: Appeal to circuit court from refusal is a judicial proceeding, though no remonstrance has been filed, and hence court may appoint an amicus curae. In re Arszman [Ind. App.] 81 NE 680. Plaintiff in proceedings under Code, § 2450, by way of filing bond and general denial of statement of consent on which license was granted, acts as representative of public and need not prove such capacity by proof of citizenship until such capacity is put in issue by the defendants' pleadings. Dye v. Augur [Iowa] 110 NW 323.

Mode of trial: On proceedings to review grant of license by board of supervisors instituted by filing bond and general denial of statement of consent, as provided by Code, § 2450, the case is tried in the district court as a special proceeding and not as an equitable action. Dye v. Augur [Iowa] 110 NW 323.

Scope of review: Appeal to review refusal of license is merely a substitute for certiorari, and appellate court can consider

Nature, effect, and scope of licenses. See 8 C. L. 495—A liquor license, while sometimes made property for certain purposes, such as assignment or transfer,[45] as a general rule is a mere regulatory,[46] personal permit granted in the exercise of police power [47] and is not assignable,[48] and may be modified or annulled by the state at any time.[49] A void license is ineffective for any purpose.[50] The operation of a license is confined to the place specified therein [51] and to the business covered thereby.[52]

only whether lower court has proceeded according to law. Free's License, 33 Pa. Super. Ct. 348.

Conduct of judge on appeal from commissioners under Gen. St. 1902, § 2660, after lawful hearing, in reaching his conclusion from the evidence produced that commissioners acted illegally in issuing the license to sell at place mentioned, is not reviewable. Appeal of Cole, 79 Conn. 679, 66 A 508. On appeal by taxpayer under Gen. St. 1902, § 2660, the superior court may set aside action of commissioners in granting license which it deems to have been improperly issued because of **disqualification of licensee,** though it is not satisfied that commissioners acted improperly in other ways. Id. On appeal by taxpayer under Gen. St. 1902, § 2660, the superior court may vacate license granted by commissioners though the **evidence** on which license was granted is not before court. Id. Where the **jurisdiction** of the licensing tribunal depends upon questions of fact which are left to its determination, such determination is conclusive. Whether application was signed by requisite number of persons possessing certain qualifications, as well as qualifications of applicant and fitness of place, held questions of fact to be determined by the city trustees. Hayes v. Oceanside Trustees [Cal. App.] 92 P 492. Quarter session's refusal of wholesale license will not be reversed by superior court in absence of abuse of **discretion,** if proceedings are regular. De Haven's License, 31 Pa. Super. Ct. 335. Where more licenses are applied for than are necessary under the circumstances, the quarter sessions must necessarily determine between them. McCrory's License, 31 Pa. Super. Ct. 192. Where the proceedings are regular and no abuse of discretion is shown, the appellate court will not reverse an order of the quarter sessions refusing a license. Id. On appeal from refusal to grant license on account of a remonstrance under Burns' Ann. St. 1901, § 7276, the court cannot consider a **supplemental blanket remonstrance** filed under Acts 1905, p. 7, c. 6, enacted pending the appeal. Sanasack v. Ader, 168 Ind. 559, 80 NE 151.

Amendment: On trial in district court on proceedings under Code, § 2450, by way of filing of bond and denial of statement of consent on which license was granted, an amendment of the plaintiff's denial by inserting allegation that he was a citizen of the county did not change cause of action. Dye v. Augur [Iowa] 110 NW 323.

Presumptions: In overruling claim that court could not, on appeal under Gen. St. 1902, § 2660, upon the evidence produced, find that the commissioners acted illegally or in abuse of their power, the court implied that he found illegal conduct upon evidence deemed sufficient to support such finding, but it would have been better practice to have made an express finding to such effect. Appeal of Cole, 79 Conn. 679, 66 A 508. Where there has been a hearing it will be presumed, where it does not affirmatively appear to the contrary, that the licensing tribunal's decision was based upon legal grounds. Free's License, 33 Pa. Super. Ct. 348. Refusal to grant distiller's license sustained on appeal, in absence of affirmative showing that licensing tribunal did not act upon legal grounds. Black Diamond Distilling Co.'s License, 33 Pa. Super. Ct. 649.

43. In Gen. St. 1901, § 2452, providing that no appeal shall lie from an order of the district court on appeal from probate judge in regard to matters of discretion of latter, neither appeal nor error lies from order of district court in proceedings to obtain druggist's license. See Laws 1881, p. 233, c. 128; Laws 1885, p. 236, c. 149; Laws 1887, p. 233, c. 165. Hainer v. Burton, 75 Kan. 281, 89 P 697.

44. Will not lie though city trustees are without jurisdiction to grant license, there being adequate remedy by writ of review. Hayes v. Oceanside Trustees [Cal. App.] 92 P 492.

45. Liquor tax certificate under Laws 1896, p. 69, c. 112, § 28, subd. 2, is essentially different from license under former law, and constitutes a species of property transferable by the person to whom it is issued. In re Clement [N. Y.] 79 NE 1003, following In re Lyman, 160 N. Y. 96, 54 NE 577. Unofficial records, though made by a public officer, are not **evidence,** since Laws 1897, p. 228, c. 312, relating to transfers, makes no provision for record in office of county treasurer. In re Clement, 105 NYS 1085. Under Sayles' Rev. Civ. St. 1897, art. 5057, a liquor license is assignable with certain restrictions, and hence may be mortgaged. Nicolini v. Langermann [Tex. Civ. App.] 19 Tex. Ct. Rep. 843, 104 SW 501.

46. License is not deprived of its regulatory character because it yields **revenue.** Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

47. State v. Maryland Club [Md.] 66 A 667.

48. See St. 1899, c. 344. License of fifth class under Pub. St. c. 100, § 9, as amended by St. 1891, p. 948, c. 369, not transferable to purchaser even with consent of license commissioners. Kennedy v. Welch [Mass.] 83 NE 11. Sale or transfer of city license is illegal in Oklahoma, and a note executed in consideration therefor is void. Arnett v. Wright, 18 Okl. 337, 89 P 1116. Assignee of license not deprived of property without due process of law where trustee in **bankruptcy** of assignor procured police board to issue renewal to a third party without notice to assignee, though the number of licenses was limited by regulation of such board. Tracy v. Ginzberg, 205 U. S. 170, 51 Law. Ed. 755.

49. State v. Maryland Club [Md.] 66 A 667; Ex parte Vaccarezza [Tex. Cr. App.]

Revocation, cancellation, and surrender.[See 8 C. L. 497]—The right to revoke has already been considered.[53] Grounds of revocation may consist of either matters antedating the issue of the license,[54] or violation after the issue of the license,[55] of the laws applicable to licenses.[56] Quo warranto is held to be the proper remedy to challenge the validity of a license,[57] but revocation proceedings are entirely statu-

20 Tex. Ct. Rep. 497, 105 SW 1119. Act 30th Leg. p. 258, c. 138, held to repeal Sayles' Ann. Civ. St. 1897, arts, 5060a-5060i inclusive, and all licenses issued thereunder, such repeal to take effect from expiration of reasonable time in which holders of such licenses might comply with the new law. Ex parte Vaccarezza [Tex. Cr. App.] 20 Tex. Ct. Rep. 497, 105 SW 1119. License under former law held not to validate selling without compliance with Gen. Laws, 30th Leg. p. 258, c. 138, Act Apr. 18, 1907. Barckell v. State [Tex. Civ. App.] 106 SW 190, following Ex parte Vaccarezza [Tex. Cr. App.] 20 Tex. Ct. Rep. 497, 105 SW 1119; Ex parte Vaccarezza [Tex. Cr. App.] 20 Tex. Ct. Rep. 425, 106 SW 392. As to **procedure, grounds, and effect,** see post, this section, subdivision Revocation.

50. Where dispensary was established in city under Loc. Acts 1903, pp. 559, 562, city had no authority to grant license. Collins v. State [Ala.] 44 S 571. Where probate judge issued license pending determination of validity of dispensary act, which was afterwards held valid. Id. No defense to prosecution for sale without license. State v. McIlvenna [S. D.] 113 NW 878. A void license is no defense, as where the license was issued by a body having no authority to issue it. State v. Labrode, 119 La. 410, 44 S 156.

51. Acts 1903, p. 222, amendatory of Code 1896, § 4125. Johnson v. State [Ala.] 44 S 555. License to conduct barroom half mile from residence did not authorize sale at residence. Id.

52. Bottler license under Act May 24, 1887, P. L. 194, held not to confer right to sell intoxicating liquors other than those authorized to be sold under such a license under Act 1858, to-wit, cider, perry, ale, porter, and beer. McTaggart's Bottler's License, 32 Pa. Super. Ct. 560. Act July 30, 1897, P. L. 464, places wholesalers and bottlers in different classes and exacts different fees from each, and hence a **wholesale licensee** under such act who has no bottler's license has no right to buy liquor in barrels, and then bottle and sell it. Stambaugh's License, 31 Pa. Super. Ct. 243. Wholesalers' license authorizes sales in amounts specified to any person, regardless of whether such person is a jobber, retailer, or consumer. Terre Haute Brew. Co. v. State [Ind.] 82 NE 81. Sess. Laws 1907, pp. 297, 298, c. 82, §§ 1, 2, 3, 5, was to prevent manufacturers, wholesalers, and jobbers from selling at **retail,** and not to prevent retailers from making occasional wholesale sales. Ex parte Reusch [Neb.] 113 NW 138.

53. See ante this section, subdivision Nature, Effect, and Scope of Licenses.

54. Absence of **consent of property owners** required as condition to issue of license. In re Deuel, 55 Misc. 618, 106 NYS 1030. Since exemption in favor of premises already used for liquor traffic from necessity of consent of adjacent property owners as condition to application for license, as required by Laws 1896, p. 60, c. 112, § 17, subd. 8, was not lost by destruction of a building by fire, or by abandonment, a **false statement in application** for license at such place in new building placed thereon that a liquor business had been continuously carried on at such place was immaterial. In re Clement, 52 Misc. 325, 20 Crim. R. 471, 102 NYS 178. Where statements as to number of residences in neighborhood were false, the licensee could not show that such statements were immaterial by showing falsity of his statements that premises were not within the privileged class as having been previously used for sale of liquor. In re Clement, 53 Misc. 358, 104 NYS 905. Burden is on respondent to show that statements of applicant as to use of buildings within the specified distance were untrue by showing that such buildings were used entirely and exclusively as dwellings at the time of the application. In re Rupp, 55 Misc. 313, 106 NYS 483.

55. Respondent held holder of license within meaning of statute from date of order of court awarding same. McGinley's License, 32 Pa. Super. Ct. 324.

56. License not subject to revocation under Laws, 1896, p. 60, c. 112, § 23, subd. 7, as amended by Laws 1897, p. 219, c. 312, where slot machine was used in billiard and pool room next to and opening into saloon, but owned by a different person, the proprietor of the saloon having no control thereover and having in fact protested against the use of the slot machine. In re Clement, 104 NYS 25. On petition for revocation for sales on Sunday, contrary to Laws 1896, p. 73, c. 112, § 31, as amended by Laws 1904, p. 368, c. 205, evidence held to show that sale was not within exception relating to hotel keepers who serve liquors as part of meals. Clement v. Martin, 102 NYS 37.

Conviction under ordinance providing for revocation as an additional remedy. Harrison v. People, 124 Ill. App. 519. Where an ordinance provides for revocation for conviction for violation of the ordinance, such ground is not affected by an undetermined appeal from the conviction. Id. Under R. S. c. 24, art. 5, § 62, par. 4, authorizing council to fix the terms of revoking licenses, council had power to make conviction under ordinance ground of forfeiture in addition to penalty by way of fine as authorized by par. 96. O'Hare v. Chicago, 125 Ill. App. 73. License may be revoked for the acts of the record holder, regardless of the interests that others may have acquired by way of **transfer** or assignment not recognized by the license law. Rule applies to license of holder of liquor tax certificate, though such certificate is regarded as a species of property. In re Clement, 105 NYS 1085.

57. Dram shop license. Heidelberg Garden Co. v. People, 124 Ill. App. 331. Fact

tory,[58] and the various statutes must be looked to in the determination of matters of practice and procedure,[59] including questions relating to parties,[60] pleadings,[61] costs,[62] and right to a hearing.[63] Such proceedings are usually subject to review.[64] A revocation absolutely cancels a license.[65] When a board acts judicially in cancelling a license in proceedings of which it has jurisdiction of both the parties and the subject-matter, its decision is conclusive until set aside in appropriate proceedings.[66] The right to a statutory rebate depends entirely upon the existence of all the conditions prescribed by the statute.[67]

that proceedings are instituted upon solicitation of citizens of neighborhood in which saloon is situated is immaterial. Id. On demurrer to plea in quo warranto to vacate a license, differences between the general license law of the city and that applicable to the particular neighborhood in which the saloon is situated cannot be considered unless shown by the plea. Id.

58. Revocation of liquor tax certificate is controlled by Laws 1896, p. 69, c. 112, § 28, subd. 2, as amended by Laws 1905, p. 1737, c. 680, and cannot be revoked except in the manner and for the causes provided by the statute. In re Clement [N. Y.] 79 NE 1003.

59. Laws 1905, p. 1737, c. 680, amending Laws, 1896, p. 69, c. 112, § 28, subd. 2, makes no provision for reference where answer is filed as provided by the amended act, and hence no such **reference** can be had since the amendment. In re Clement [N. Y.] 79 NE 1003.

60. Under Act May 13, 1887, P. L. 108, the persons authorized to petition for revocation are not limited to residents of the ward in which the licensed place is situated. McGinley's License, 32 Pa. Super. Ct. 324. Allegation of ownership of property is equivalent to allegation that petitioner is a tax payer and thus entitled to maintain proceedings under Laws 1896, p. 45, c. 112, § 28, as amended by Laws 1905, p. 1737, c. 680. In re Schopp, 104 NYS 307. Executors and testamentary trustees holding legal title are taxpayers and as such entitled to petition for revocation. In re Rupp, 54 Misc. 1, 105 NYS 467. Assignee of liquor tax certificate is not a necessary party to proceedings to revoke the license for the acts of the record holder. In re Clement, 105 NYS 1085.

61. Allegation that illegal sales were made by respondent, "the holder of the said license," held to refer to license referred to in petition and to sales made after granting of such license. McGinley's License, 32 Pa. Super. Ct. 324. An objection that the allegations of the petition are on information and belief must be made in proper time. Such objection to petition in proceedings by a citizen under Liquor Tax Laws 1896, p. 69, c. 112, § 28, held too late after answer filed and consent to order of reference. In re Stedler, 52 Misc. 322, 20 Crim. R. 467, 102 NYS 147.

Amendment will be allowed to cure the defect in the allegations where objection is not made in time, and evidence sustains the petition. In re Stedler, 52 Misc. 322, 20 Crim. R. 467, 102 NYS 147.

62. Denied where facts in application were correctly stated and license was revoked upon grounds not previously adjudicated by the courts. In re Clement, 107 NYS 205.

63. License cannot be revoked by court under Act May 13, 1887, P. L. 108, § 7, without giving respondent a hearing when respondent files an answer denying all the material averments of the petition. McGinley's License, 32 Pa. Super. Ct. 324.

64. On certiorari to review action of quarter sessions in proceedings to revoke a license, the superior court can review only the authority of the quarter sessions and the regularity of its exercise. McGinley's License, 32 Pa. Super. Ct. 324. Order of quarter sessions revoking license entirely on **evidence** in criminal proceedings against respondent, though the filed answer denying allegations of petition for revocation, reversed. Id.

Appeal from order of revocation does not bring up evidence, and hence where petition states ground for revocation, an order of revocation cannot be reversed in the absence of jurisdictional defects, irregularity, or illegality. Brennan's License, 33 Pa. Super. Ct. 252.

Mandamus does not lie to review a discretionary revocation, nor in any case where the right to relief is not clear. Harrison v. People, 124 Ill. App. 519. Mandamus will not lie to compel revocation of expired license. State v. Hammel [Wis.] 114 NW 97. Mandamus will not issue to compel revocation of a void license. Id. Appellate court may, after expiration of license, review refusal of mandamus to compel revocation where license had not expired at time of decision, the question of costs still being in issue. Id.

65. License revoked for nonpayment of fees within fifteen days as required by P. L. 1887, § 9, the licensee, furthermore, having abandoned the premises, cannot be transferred by court to subsequent tenant. Daniel's Case, 313 Pa. Super. Ct. 156.

66. State board of license commissioners exercise judicial functions in deciding that a licensee has violated the law and hence is no longer entitled to exercise privileges under his license. Barry v. Little [N. H.] 68 A 40. Ex parte investigation prior to hearing will not invalidate such proceedings where it does not appear that the licensee was ignorant of or objected on hearing to the qualification of the commissioners on such ground. Id.

67. Alternative and not peremptory writ of mandamus should have been awarded to compel payment of rebate upon surrender of license as provided by Laws 1896, c. 112, p. 67, § 25, as amended by Laws 1903, p. 284, c. 115, where allegations of petition as to existence of conditions upon which the right to rebate depended were denied by the answer. People v. Clement, 117 App. Div. 539, 102 NYS 779.

*Payment and collection of fee or tax.*See 8 C. L. 495—Acceptance of a license fee is not conclusive of the rights of the licensee.[68] The Ohio liquor tax is enforced by levy.[69] Under the various statutes there is conflict as to the right to recover a license fee from one doing business without a license.[70] Liability for a license fee paid in advance on an application which is refused can be discharged only in a manner authorized by law.[71] Fees collected by county officers belong to the county.[72]

§ 4. *Regulation of traffic.*See 8 C. L. 499—Regulatory and prohibitive statutes are usually confined to liquors that are intoxicating,[73] though this is not always the case.[74] Some of the forms of regulation which have given rise to questions upon which the courts have adjudicated are: Prohibition of keeping for sale with a license;[75] prohibition of sales without a license,[76] or in prohibition territory[77]

68. Acceptance of a license fee under mistake of which the applicant is immediately notified confers no rights upon the applicant. City of Chicago v. O'Hare, 124 Ill. App. 290.

69. The fact that no demand was made at the seller's place of business for the payment of liquor tax becomes immaterial after the parties and the chattels levied on are before the court for a determination of the issues involved. Leonard v. Bowland, 4 Ohio N. P. (N. S.) 577.

70. City of third class cannot, under authority of Ky. St. 1903, § 3290, to license, tax, and regulate, recover amount of tax from one who has been engaged in liquor traffic without a license. City of Owensboro v. Fields, 31 Ky. L. R. 627, 102 SW 1184. Under Rev. St. 1887, § 1637, persons carrying on liquor traffic without license are liable to suit in name of state for recovery of such license. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P 829. Under Rev. St. 1887, § 1689, defendant in suit under § 1637, to recover license fee, will be deemed not to have procured a license, but he may rebut such presumption by proof and may plead in bar a recovery against him and payment thereof in a civil action. Id.

71. Under Ballinger's Ann. Codes & St. § 428, authorizing county treasurer to disburse moneys on orders of county auditor, the treasurer cannot, without such an order, return or make a valid promise to return money deposited as payment for license which is refused. Hemrich Bros. Brew. Co. v. Kitsap County [Wash.] 88 P 838. Obligation of county to return license fees where license is refused held novated by county treasurer's promise to return them to party who furnished them to applicant so as to render county liable to such party, where there was no order from auditor upon treasurer for such repayment, as required by Ballinger's Ann. Codes & St. § 428, as to all disbursements by treasurer, and where the applicant did not consent to such a novation. Id.

72. Where one prays a license tax and then begins business without complying with further requirements necessary to give him the right to do such business, the tax so paid belongs to the county and the sureties on sheriff's bond are liable therefor. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P 829. Sheriff and bondsmen liable to county for license tax received where portion of county in which the business is conducted is annexed to another county. Id.

73. The expression "intoxicating liquors," as used in prohibitive or regulatory statutes, in the absence of other limiting words, means any liquors intended for use as a beverage or capable of being so used, and containing alcohol obtained either by fermentation or distillation in such proportions that they will produce intoxication when taken in such quantities as may be practically drunk. Mason v. State, 1 Ga. App. 534, 58 SE 139. Intoxicating liquors, though they contain alcohol and may produce intoxication. Id. Medicinal, toilet and culinary preparations, recognized as such by standard authority, such as United States dispensatory, and not reasonably capable of being used as intoxicants, are not ordinarily regarded as being intoxicants, while patent medicines, cordials, bitters, tonics, and other articles not recognized by standard authority as being within the excepted class, are regarded as intoxicating liquors if they are capable of being used as beverages and contain such proportion of alcohol as that, if drunk to excess, will intoxicate. Id. Evidence held sufficient to sustain finding that "Swedish malt" was intoxicating. State v. Schagel, 102 Minn. 401, 113 NW 1014. Where party to whom sale was alleged to have been made testified that the liquor was not an intoxicant, testimony of his companion that he also took a drink at same time and thought the liquor, which was called hot cider, was whiskey, was insufficient to convict. Wales v. State [Tex. Cr. App.] 100 SW 370. Where the defendant introduced evidence that liquor sold was not intoxicating, the question was for the jury. Luther v. State [Neb.] 114 NW 411.

74. Under Acts 1892-93, pp. 15, 16, sale of liquor containing malt is illegal, whether intoxicating or not. Lamble v. State [Ala.] 44 S 51. Statute prohibiting sale of "malt liquors" includes any liquor containing malt, though not intoxicating and though malt is not the predominant element. Dinkins v. State [Ala.] 43 S 114. Under Pub. St. 1901, c. 112, § 15, as amended by Laws 1905, p. 528, c. 116, forbidding sale of "spirituous or distilled liquors," etc., or "any beverage, by whatever name called, containing more than one per cent of alcohol," the actual intoxicating character of the liquor is immaterial. State v. York [N. H.] 65 A 685.

75. Verdict of guilty held sustained by evidence. State v. Collins [R. I.] 67 A 796.

76. Under Pen. Code, § 435, making it a misdemeanor to carry on without a license any business for which a license is required by the laws of the state, a municipal ordinance is a law of the state. Ex parte

or in local option territory;[78] prohibition against giving or furnishing liquors in

Sweetman [Cal. App.] 90 P 1069. One carrying on liquor traffic without a license is liable both civilly for the amount of the license fee and criminally for violation of the law. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P 829.

What constitutes a sale: No sale where C. O. D. consignee agrees with another that if he will pay part of price he may have proportionate part of whiskey and the consignee pays the C. O. D. charges with the money thus obtained and his own and receives the whiskey, whereupon both parties take and use separate bottles in each other's presence in express office. State v. Johnson [W. Va.] 57 SE 371. Whether **agent for foreign liquor dealer** through whom orders were sent to principal who shipped direct to purchaser was guilty of selling in state, held question of fact for jury, and hence conviction would not be disturbed. Commonwealth v. Tynnauer, 33 Pa Super. Ct. 604. Held for jury whether **restaurant keeper** who purchased liquors for her customers, making no profit thereon, was guilty of selling within meaning of license law. People v. Journeau, 147 Mich. 520, 111 NW 95.

Procuring liquor for another who furnishes money with which to buy it, the buyer receiving no compensation, is not a sale, though buyer at same time buys some for himself, mixes it in same bucket with that bought for the other person, and afterwards divides it. Meadows v. State, 127 Ga. 283, 56 SE 404.

Express agent delivering liquor, shipped from without the state, to C. O. D. consignee and collecting therefor, is not guilty of selling such liquor, though he knows at the time that the consignee did not order such liquor. State v. Kenney [W. Va.] 57 SE 823. Sales by **social and athletic club** to members, without profit, is a sale within statute requiring license to make keeping of dramshops or selling of liquors legal. South Shore Country Club v. People, 228 Ill. 75, 81 NE 805. On prosecution for unlawful sale, the **ownership of liquor** by defendant is not essential to the offense but is proper to be considered by the jury. Whitfield v. State [Ga. App.] 58 SE 385.

Loan of whiskey to be repaid with whiskey ordered with money furnished to lender by borrower soon after the loan held a sale, though nothing was said at time of loan as to time or manner of repayment. State v. Brown [Ark.] 102 SW 394.

Knowledge and intent: Defendant's ignorance of intoxicating qualities of liquors sold is no defense, even though the liquors are sold to him under guaranty that they are not intoxicating. Haynes v. State [Tenn.] 105 SW 251. Belief that purchaser is member of a club does not justify sale to him though club has right to sell to members. State v. Warcholik [Conn.] 68 A 379.

77. Pen. Code 1895, § 423, as amended by Acts 1897, p. 39, is by its terms confined to counties wherein sale of intoxicating liquors is prohibited by law, high license, or otherwise. Rose v. State, 1 Ga. App. 596, 58 SE 20. Such statute does not therefore apply to Bartow county. Id.

What constitutes sale: Purchasing liquor in place where sale was lawful, and delivery to another, at his request, in place where sale was unlawful and receiving back the price paid, held not a sale. Tate v. State [Miss.] 44 S 836. Pub. Laws 1903, p. 851, c. 498, making place of delivery of whiskey in Pender county the **place of sale,** held valid exercise of regulating power. State v. Herring [N. C.] 58 SE 1007. Pub. Laws 1903, p. 851, c. 498, making place of delivery of whiskey in Pender county the place of sale, was not repealed by Revisal 1905, § 2080, since § 5458 expressly provides that the revisal shall not repeal existing prohibitive or regulative acts. Id. Evidence held to show that defendant aided and abetted unlawful sale of whiskey in Pender county by aiding delivery, the place of delivery being made the place of sale by Pub. Laws 1903, p. 851, c. 498. Id.

Evidence held sufficient to sustain finding that defendant made the sale charged and did not, as he claimed, act merely for accommodation in having the liquor furnished to purchaser by another. Gibbs v. U. S. [Ind. T.] 104 SW 583. Mere fact of receipt of money from another and procuring whiskey for him held not alone to constitute a selling, the probative value of such evidence being solely for the jury. Bonner v. State [Ga. App.] 58 SE 1123. Mere receipt of express charges on liquor and obtaining liquor from express office for consignee and taking it home where consignee called and got it, held not a sale. Id. Whether express agent through whom beer was obtained from brewery in another county was guilty of selling beer in the county, held, under the evidence, a question of fact for jury, and hence conviction would not be disturbed. Commonwealth v. Pollak, 33 Pa. Super. Ct. 600.

78. Offense under Ky. St. 1903. § 2557, of selling, bartering, or loaning, directly or indirectly, involves a sale of some kind direct or indirect, and is different from offense under § 2557b, of selling, lending, giving, or procuring, etc., and it was error on prosecution for former offense to instruct as to latter. Hoskins v. Com., 31 Ky. L. R. 309, 102 SW 276. Pen. Code 1895, art. 402, providing punishment for selling in prohibited territory, held not repealed by Sayle's Ann. Civ. St. 1897, art. 5060j, providing for giving of bond and obtaining license in such territory, there being no double penalty, the violation of the bond and the illegal sale of whiskey being entirely different things. Oliver v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 141, 105 SW 811. Where an agreement to purchase was made at defendant's warehouse, and the price also paid there, but the particular liquor purchased was not separated from the stock or otherwise identified, the place of delivery was the **place of sale.** F. W. Cook Brew. Co. v. Com., 30 Ky. L. R. 598, 99 SW 354. Under Ky. St. 1903, § 2557, prohibiting sales in local option territory, the **purpose of purchaser is** immaterial, as distinguished from offense under § 2557b, in which the sale must be made for purpose of resale. Combs v. Com. [Ky.] 104 SW 270.

Intention of seller is not necessarily an element of sale. Walker v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 399, 106 SW 376. Evi-

dence held such as to require instruction as to defendant's intent, there being evidence that if liquor sold was whiskey, he did not know it. Covington v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 787, 100 SW 370.

What constitutes sale: Receipt of price of liquor and agreement to ship same in local option district, followed by shipment from outside, held sale. McDermott v. Com., 30 Ky. L. R. 1227, 100 SW 830. Held sale where C. O. D. consignee received money from another, procured liquor, and gives part to such person. Walker v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 399, 106 SW 376. Bona fide collection of money on account in order to pay charges on whiskey in depot, and then giving debtor some of the whiskey, held not a sale by borrowing money and repaying it with whiskey. Britton v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 790, 100 SW 148. Finding of guilty held authorized where defendant who had paid third party $1 for a share of whiskey in express office C. O. D. agreed with prosecuting witness to let latter have such share for $1, received the $1, got the whiskey from express office and delivered it to prosecutor. Hawkins v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 811, 100 SW 956. Where one orders whiskey through another which is kept for former by latter at a **club house,** the former has right to drink it and give it to his friends without being liable for selling. Alexander v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 203, 102 SW 1122. An **express company** is not necessarily guilty of a violation of the local option law becaues it carries whiskey into a local option district and collects therefor in the usual course of its business as a common carrier. Adams Exp. Co. v. Com., 31 Ky. L. R. 812, 103 SW 721. In such case the instructions should be limited to the question of a sale by the express company. Id.

Loan by club member of whiskey to stranger to be used as beverage held a sale under local option law. Tombeaugh v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 472, 98 SW 1054; Henderson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 809, 98 SW 1055. Loan or exchange of whiskey is a sale within local option statute as is also exchange of any other commodity for whiskey. Sparks v. State [Tex. Cr. App.] 99 SW 546. Where it appeared that defendant took prosecutor's order for whiskey and then prosecutor borrowed whiskey from a third person who had previously ordered it through defendant, the loan to be repaid when prosecutor's whiskey came, whereupon the defendant delivered to prosecutor the whiskey so borrowed, it was error to refuse to instruct that defendant was not guilty unless he participated in the exchange otherwise than as a mere matter of accommodation. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 235, 103 SW 631. Held error to refuse instruction embodying special defense that defendant did not sell the whiskey to prosecutor but merely took his **order** for same, delivered the order to third party, and afterwards delivered whiskey to prosecutor which defendant thought was the whiskey so ordered. Byrd v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 300, 103 SW 863. Where goods are ordered from a distance, the sale is made where the order is accepted and the goods are shipped to purchaser. Commonwealth v. Price & Lucas Cider & Vinegar Co., 31 Ky. L. R. 1350, 105 SW 102.

Evidence held sufficient to show sale and not gift. Feagin v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 815, 100 SW 776. Evidence held sufficient to support conviction for violation of local option statute. Baughman v. State [Tex. Cr. App.] 99 SW 1165. Evidence held to sustain finding of sale of intoxicating liquor called "Vivo" in local option territory. Dowdy v. Com., 31 Ky. L. R. 33, 101 SW 338. Evidence held not to show a sale by delivery of whiskey followed by a loan of money to the person who furnished the whiskey. Scott v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 168, 105 SW 796. Evidence held sufficient to go to jury on question of sale in local option district. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Evidence held to sustain finding of sale of liquor from cold storage house and not mere payment of storage. Loving v. State [Tex. Cr. App.] 100 SW 154. Evidence held sufficient to sustain finding that transaction was sale and not merely procuring for another as matter of accommodation. Hood v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 106, 101 SW 229; Gaston v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 130, 102 SW 116. Evidence of furnishing of whiskey by hotel porter to guest and payment by latter to former of money for services held not to sustain conviction of porter for making sale. Cooper v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 331, 105 SW 1126.

NOTE. What constitutes sales: "In Keaton v. State, 36 Tex. Cr. R. 259, 38 SW 522, we held that an exchange is a sale, and this was without any limitation. In Ray v. State, 46 Tex. Cr. App. 176, 79 SW 535, it was held that a mere accommodation loan by one neighbor to another, to be returned in kind, is not such an exchange as would constitute a sale. In Buckner v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 12, 89 SW 829, it was held that the circumstances there showed a subterfuge and not a loan. In Stanley v. State [Tex. Cr. App.] 64 SW 1051, it was held that an exchange of peaches for brandy with a distiller is a sale. See, also, Barnes v. State [Tex. Cr. App.] 13 Tex. Ct. Rep. 623, 88 SW 805; Parker v. State [Tex. Cr. App.] 8 Tex. Ct. Rep. 865, 77 SW 783. While the doctrine of an accommodation exchange seems to have been recognized by this court in Ray v. State, 46 Tex. Cr. App. 176, 79 SW 535, in our opinion that case should be overruled. There might be a case —to illustrate, where some member of a family should be bitten by a snake, or some venomous insect—that would require the immediate use of whiskey, with no time to send for a physician to obtain a prescription. In such case, it might be allowable to borrow whiskey from a neighbor on account of such emergency. We do not believe the doctrine should be extended beyond some pressing necessity.—From Tombeaugh v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 472, 98 SW 1054.

Principal and agent: Druggist not liable for sale by boy in his employ contrary to his instructions and without his knowledge. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 38, 101 SW 1001. Evidence held insufficient to sustain finding that defendant was responsible for sale made by boy in his employment. Id. Evidence held insuffi-

certain territories;[79] prohibition of the possession of liquors in certain territory,[80] or the bringing or shipping of liquors into such territory;[81] regulation of carriers;[82] designation of persons who may sell and regulation of such sales;[83] prohibiting

cient where it showed that person got it who was charged with getting it and gave it to another, and the one who got it swore that it was his before he got it from defendant. Frazier v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 7, 105 SW 508. Evidence held insufficient to authorize charge based on theory of defendant's being agent for person from whom he procured whiskey for another, or that he was interested in the sale. Gaston v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 130, 102 SW 116. Held a sale in prohibition town where defendant's agent took order therein and telephoned it to principal, and liquor was sent to the town for delivery. George H. Goodman Co. v. Com., 30 Ky. L. R. 519, 99 SW 252.

79. Ky. St. 1903, § 2557b, subd. 2, does not prohibit the giving, procuring, or furnishing of liquors except for purpose of resale. Hoskins v. Com., 31 Ky. L. R. 309, 102 SW 276.

80. Under a general welfare clause in a city charter, the city may prohibit possession of liquor kept for illegal sale. Sawyer v. Blakely [Ga. App.] 58 SE 399. Proof of possession of liquor and an illegal sale held sufficient to convict of being in possession of liquor kept for unlawful sale. Id. Ky. St. 1913, § 2557b, subsec. 2, prohibiting possession of liquors in local option territory for purpose of sale. McGuire v. Com., 30 Ky. L. R. 720, 99 SW 612. Const. art. 16, § 20, requiring submission to people of governmental subdivisions, the question whether liquors shall be sold therein does not invalidate Laws 1907, p. 156, c. 77, prohibiting storing of liquors in any such subdivision in which prohibition has been or shall be adopted by the vote of the people. Ex parte Dupree [Tex.] 19 Tex. Ct. Rep. 851, 105 SW 493. Such act is not violative of Const. art. 3, § 57, prohibiting local or special laws. Id.

81. Prohibition against common carriers bringing liquor into local option territory. Acts 1906, p. 320, c. 63. Cincinnati, etc., R. Co. v. Com., 31 Ky. L. R. 954, 104 SW 394. Sess. Acts 1906, p. 320, § 63, applies only to common carriers or carriers for hire. McGuire v. Com., 30 Ky. L. R. 720, 99 SW 612. Act March 21, 1906 [Acts 1906, p. 320, c. 63], § 1, prohibiting the bringing of liquors into territory where their sale is prohibited, held not to apply to bringing of liquors to one whose license has not expired and to whom the prohibition of sales does not apply until such license has expired. Sheehan v. Louisville & N. R. Co., 31 Ky. L. R. 113, 101 SW 380. Where defendant brought into local option community four jugs of whiskey on ice wagon, in nighttime, it was for jury to say whether he brought it in to sell, in absence of any explanation of the circumstances. McGuire v. Com., 30 Ky. L. R. 720, 99 SW 612. Single act may constitute violation of Code 1896, § 5087, prohibiting solicitation or receipt of orders within certain district for liquors to be shipped or sent into such district. Mills v. State [Ala.] 42 S 816. Evidence held to sustain conviction of soliciting or receiving orders within prohibition district for liquors to be sent into such district in violation of Code 1896, § 5087. Id. Instruction on prosecution under Code 1896, § 5087, prohibiting solicitation or receipt of orders within prohibition district for liquor to be sent into such district, held erroneous as leaving jury to determine what constituted receipt of such an order. Id.

82. Knowledge or intent is not essential to violation of Rev. Laws, c. 100, § 50, requiring carriers to keep record of liquors delivered in certain class of towns. Commonwealth v. Riley [Mass.] 81 NE 881. Violation of Rev. Laws, c. 100, § 50, requiring carriers to keep certain record of liquors delivered in certain class of towns, by an agent, is not alone sufficient to render principal liable, where it does not appear that the latter participated or countermanded the agent's act, though such act was within scope of agent's duties. Id. On indictment under Code 1906, § 954, relating to delivery by railroad agents of liquor to persons not ordering the same in good faith, etc., the defendant may introduce evidence that before delivering a C. O. D. package of liquor he inquired as to whether the consignee had ordered the liquor for his personal use, and that defendant acted in good faith in delivering the same. State v. Smith, 61 W. Va. 329, 56 SE 528.

83. With respect to quantity that may be sold by **wholesalers,** the general local option law governs as against local or special acts. Stamper v. Com., 31 Ky. L. R. 707, 103 SW 286. Conviction for selling in less than certain quantities cannot be sustained where it did not appear that defendant knew of sale or that person who made it was defendant's agent or employe. State v. Midkiff, 125 Mo. App. 397, 102 SW 590. Under Acts 1904, p. 160, c. 76, **manufacturers** may sell their products by wholesale in local option precinct in which the manufactory is situated, but not in other local option precincts where sales of liquor are prohibited. Lexington Brew. Co. v. Com., 30 Ky. L. R. 758, 99 SW 618. Acts 1904, p. 160, c. 76, prohibits manufacturers from selling liquor in local option districts. F. W. Cook Brew. Co. v. Com., 30 Ky. L. R. 598, 99 SW 354. Sale by distiller to partner, on division of product, of more than five gallons held within Ky. St. 1903, § 2558, expressly allowing **distillers** to sell product at wholesale at place of distillation in quantities of not less than five gallons, not to be drunk on same or adjacent premises. Stamper v. Com., 31 Ky. L. R. 707, 103 SW 286. 1 Acts 1883-84, p. 1404, c. 789, and acts amendatory thereof, do not restrict the right of distillers to sell in quantities of not less than five gallons to sales to licensed wholesalers or retailers. Farris v. Com., 31 Ky. L. R. 847, 104 SW 288. Sale to several persons in such manner that each may obtain less than five gallons held not violation of 1 Acts 1883-84, p. 1404, c. 789, and acts amendatory thereof, unless sale is with knowledge of purchaser's intention to so divide it. Id. Instruction as to scheme of

persons in possession of premises from allowing liquors to be sold thereon;[84] pro-

seller to sell to several persons in order to avoid prohibition against sale in less quantities than five gallons held subject to criticism that it did not sufficiently connect purchasers with such scheme. Id. Proper instructions suggested for case where defendant was charged with selling to several persons in quantities less than five gallons. Id. Whether sale by distiller was of three gallons and hence authorized by Rev. St. 1899, § 3014 [Ann. St. 1906, p. 1727], or was of one-half gallon, held under evidence for jury. State v. Turner, 125 Mo. App. 21, 102 SW 599. Sale from warehouse operated near distillery and on same tract held sale at place of manufacture. Commonwealth v. Oldham, 30 Ky. L. R. 1273, 100 SW 1184. Under Kirby's Dig. §§ 5093, 5100, 5101, 5129, **growers of grapes or berries** in the state may sell wine made therefrom anywhere, except where expressly prohibited in three mile districts by order of the county court, provided the sale is in such quantities and in such manner as is prescribed by the statute. Bates v. State [Ark.] 99 SW 388. Only method of preventing sales of such wines in quantities not less than one-fifth of a gallon is by order of court upon petition of majority of adult inhabitants praying specially for prohibition against native wines. Id. Whether sale was within Kirby's Dig. § 5100, authorizing grape growers to sell wine made on own premises in original packages of not less than five gallons, held for jury. Sluder v. State [Ark.] 106 SW 486. Exemption of sales by **hotel keepers** in connection with meals served from the operation of prohibitive provisions is not a violation of constitutional provision with reference to uniformity of operation of laws. In re Kidd [Cal. App.] 89 P 987. Regulation of sales by **druggists** in local option territory is within police power. Hutson v. Com. [Ky.] 105 SW 955. Authorizing druggists to sell for medicinal purposes in local option territory is not unconstitutional. Edgar v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 309, 102 SW 439. Legislation may prescribe form of prescription. Hutson v. Com. [Ky.] 105 SW 955. Druggist not protected where prescription failed to give name of patient and was not dated, as required by Ky. St. 1903, § 2558, and eight ounces were sold while prescription called for only two, though it appeared that the prescription was given in good faith and was administered to the sick patient for whom it was intended. Id. Conviction of sale without prescription in local option territory sustained where evidence was conflicting. Norris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 527, 106 SW 137. Sale by druggist on valid prescription after demand upon him, under Code 1895, as amended, art. 5060j, to file new bond, and before compliance with such demand, is not a criminal offense. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 58, 101 SW 1003. Error to emphasize good faith required of druggists in making sales by instruction that good faith is not enough, but there must have been perfect good faith. People v. Thompson, 147 Mich. 444, 111 NW 96. Where sale by druggist is bona fide, the use to which the purchaser thereafter puts the liquor is immaterial. Id. On a charge of sales for illegal purposes, a plea that the sales were made under a druggist's permit set up no defense either in abatement or in bar. Steiner v. State [Neb.] 110 NW 723. Under Burns' Ann. St. 1901, § 1709, providing that an act made punishable as an offense against the state shall not be made punishable by any municipal ordinance, an ordinance providing for punishment of sales of liquor in less quantities than a quart, etc., does not apply to such a sale by a drug store, such sale being an offense against the state under § 7383j. Cooper v. Greenfield [Ind.] 81 NE 56. Violation of Pub. Acts 1899, p. 280, No. 183, § 25, requiring druggists to make certain **reports of sales,** does not per se render the sales illegal, though it may be evidence of illegality. People v. Thompson, 147 Mich. 444, 111 NW 96. Intent no part of offense of druggist's failure to keep records required by statute. Rizer v. Tapper, 133 Iowa, 628, 110 NW 1038; Peak v. Bidinger, 132 Iowa, 127, 110 NW 292.

Physician not liable for giving prescription unless he knew the patient was not sick or gave the prescription without personal examination of patient. Weatherford v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 182, 102 SW 1146. Since physician is liable if he gives prescription on which intoxicating liquor is obtained in local option territory, knowing patient not to be sick or without personal examination of patient, error in charging that defendant was guilty if he gave prescription to one who was not sick was harmless where evidence showed that defendant made no personal examination of patient. Id.

84. Under Ky. St. 1903, § 2872, a railroad company cannot be rendered liable on account of acts of express company which latter has legal right to do. Louisville & N. R. Co. v. Com., 31 Ky. L. R. 683, 103 SW 349; Adams Exp. Co. v. Com., 31 Ky. L. R. 813, 103 SW 353. Delivery by express company of whiskey in ignorance of fact that it is whiskey or that it has not been ordered will not render the railroad company liable under such act. Louisville & N. R. Co. v. Com., 31 Ky. L. R. 683, 103 SW 349; Adams Exp. Co. v. Com., 31 Ky. L. R. 811, 103 SW 353. Under Ky. St. § 2572, pronouncing penalty against owner in possession of premises on which liquor is unlawfully sold, persons in possession of drug store will not be liable for acts, unknown to them, of trespassers, but partners in such possession will be liable if they or either of them, or their employes, in the course of their duties or scope of their authority, or if anyone with the knowledge of such partners, are guilty of violation of the act. Commonwealth v. Smith [Ky.] 105 SW 397. Term "owner in possession," as used by the statute, includes tenant for term of years or of any freehold or greater estate. Id. Where it merely appeared that defendant was in possession of the store, and that the liquor was obtained by a boy in charge of the store, a conviction was authorized. See Ky. St. 1903, § 2571. Noble v. Com. [Ky.] 105 SW 413.

visions against evasion of liquor laws;[85] regulations as to place of consumption;[86] prohibition of adulteration;[87] denunciation of places where liquors are sold as nuisances;[88] regulations of manner in which licensees[89] must conduct their places of business;[90] limitation of number of licenses to be issued;[91] prohibition against

85. Under Ky. St. 1903, § 2570, providing that no trick, device, subterfuge, or pretense shall be allowed to evade the operation or defeat the policy of the license or local option law, held violated where a boat took on a passenger in Kentucky, carried him to Missouri side of river, where he was sold whiskey, and brought him back to Kentucky, no fare being charged. Lemore v. Com. [Ky.] 105 SW 930.

86. Allowing two or more persons to drink out of same bottle constitutes so many separate offenses under Laws 1905, c. 64, prohibiting persons engaged in storage of liquors in local option territory from allowing liquors to be drunk in their place of business. Teague v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 214, 102 SW 1142. Room in which defendant allowed liquors to be drunk held to be his place of business. Id. While the purpose of purchaser may be an element of the offense of selling liquor for an unlawful purpose, it cannot be made the basis of a conviction, such basis being the purpose of the seller. Houtz v. People, 123 Ill. App. 445. Instruction held to make purpose of purchaser to drink the liquor on adjacent premises instead of being based on purpose of seller. Id.

87. Rev. St. 1899, c. 15, art. 7 [Ann. St. 1906, pp. 1389-1452], prohibiting sale of adulterated liquors, applies only to sale of liquors as such, and under this construction applies to sales by druggists without reference to powers of druggists to compound medicines. State v. Potter, 125 Mo. App. 465, 102 SW 668.

88. At common law neither sales nor keeping places for sale of intoxicating liquors constituted a nuisance per se. Sopher v. State [Ind.] 81 NE 913. Id. An unlawful sale does not per se render the place where such sale is made a public nuisance and as such subject to restraint by injunction. Territory v. Robertson [Okl.] 92 P 144. Illegal sales of liquor constitute a public nuisance. Lee County Dispensary Com'rs v. Hooper, 128 Ga. 99, 56 SE 997. Unlawful sale and keeping for sale declared by statute to be nuisance. 1 Ballinger's Ann. Codes & St. § 3085; Town of Kirkland v. Ferry [Wash.] 88 P 1123. Laws 1903, p. 524, c. 338. State v. Plamondon, 75 Kan. 269, 89 P 23. Acts Apr. 6, 1907 [Gen. Laws 30th Leg. p. 166, c. 81], making selling without license and payment of tax a nuisance, held valid. Barckell v. State [Tex. Civ. App.] 106 SW 190. Gen. Laws 30th Leg. p. 166, c. 81, § 1, subd. 2, making nuisance to sell in prohibited territory, applies to all prohibited territory. Paul v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 320, 106 SW 448. Illegal sale held nuisance under Gen. Laws 30th Leg. p. 166, c. 81, § 1, subd. 2. Id. Whether one has a **druggist's permit** is not material where the offense charged is the keeping of a nuisance where liquors are sold as a beverage. State v. Giroux, 75 Kan. 695, 90 P 249.

Intent is no part of offense designated as nuisance by statute requiring druggists to comply with certain requirements in regard to sales of liquors. Rizer v. Tapper, 133 Iowa, 628, 110 NW 1038. Good faith of permit holder in selling liquors of one in habit of using them as beverage and in keeping incorrect record of purchasers, and failure to file reports required by Code, § 2397, will not prevent injunction against him as maintaining a liquor nuisance. Peak v. Bidinger, 132 Iowa, 127, 110 NW 292.

Evidence held to sustain conviction for being keeper of nuisance. State v. Corn [Kan.] 91 P 1067; State v. Thompson [Kan.] 91 P 79; State v. Jepson [Kan.] 92 P 600.

89. Sales under a license by one other than the licensee or his agent constitute a violation of the general prohibitory law and not the license law. State v. English [N. H.] 68 A 129.

90. City may restrict the exercise of the license to **certain rooms** in the same building. Price v. Lincoln, 130 Ill. App. 254. License to conduct dram shop in "lower room" of building held not to authorize sale in other rooms on same floor. Id. Room used in connection with saloon business held a part of the saloon, within Laws 1905, p. 327, prohibiting allowance of **females** under 21 in or about saloons. State v. Baker [Or.] 92 P 1076. Laws 1905, p. 327, prohibiting allowance of females under 21 in or about saloons, does not violate any constitutional limitation, though under the general law women attain their majority at 18. Id. Laws 1905, p. 327, prohibiting allowance of females under 21 in or about saloons, not special legislation because open and public restaurants are excepted. Id. Fact that law makes it crime to allow women in or about saloon, regardless of her business, does not render the law invalid as being unreasonable. Id. A **wine room,** within Sess. Laws 1891, p. 315, § 1, must be kept in connection with or as part of saloon, intention of statute being to designate and prohibit a place which patrons might use for private tippling purposes instead of drinking at the bar. Ellis v. People, 38 Colo. 516, 88 P 461. Back door three feet from ground used primarily for ventilation, but not always kept locked, held violation of Code, § 2448, requiring saloons to have but one **entrance.** State v. Roney, 133 Iowa, 416, 110 NW 604. Ticket taken at theater held not within Pen. Code, § 290, prohibiting persons from admitting **minors** under sixteen to theaters, etc., and places where intoxicants are kept. People v. Kings County Sheriff, 54 Misc. 8, 105 NYS 387. Knowledge and intent is not an element of offense under Laws 1901, p. 19, c. 3, § 3, of allowing minors to **gamble** in saloon. Church v. Ter. [N. M.] 91 P 720. Evidence held sufficient to sustain conviction under Laws 1901, p. 19, c. 3, § 3, for allowing minor to gamble in saloon. Id. Instruction based on view that the person who operated the gambling device was not an employe, and limiting the issue to such person, was properly refused. Id.

91. Police board of Boston had power to

opening places of sale and against selling or furnishing liquors on certain days or at certain times;[92] designation of saloon limits;[93] and prohibition of sale in certain

impose such limitation. Tracy v. Ginzberg, 205 U. S. 170, 51 Law. Ed. 755.

92. Laws 1897, p. 234, c. 312, § 31, subd. g, relating to admission of persons to saloons on certain days and times, does not cover rooms adjoining and opening into saloons but not constituting a part thereof. People v. Lupton, 52 Misc. 336, 20 Crim. R. 476, 103 NYS 172.

Sunday: Title of Act Feb. 23, 1903, entitled "An act to prohibit the sale of liquor on Sunday," held to cover prohibition against keeping places open for sale of liquor on Sunday. Beauvoir Club v. State [Ala.] 42 S 1040. Sale of liquor at a **private club** is included in a prohibitory act, Gen. Acts 1903, p. 64. Id. Under Const. art. 4, § 23, prohibiting suspension of general laws for benefit of corporations, Acts 1890-97, p. 1160, authorizing social club to furnish intoxicating liquors to members on Sunday, is invalid, though the act provides that such furnishing shall not constitute a sale, it being the general law that such acts do constitute a sale. Id. Club incorporated under Acts 1892, p. 19, c. 22, held brought by Acts 1898, p. 778, c. 246, and Acts 1906, p. 474, c. 278, within provisions of subtitle of Baltimore city charter relating to intoxicating liquors which in their nature are applicable thereto, and that such a club to which license has been granted by board of license commissioners is a licensee within subdivision of charter relating to sales by licensees on Sunday. State v. Maryland Club [Md.] 66 A 667. Bar room is a **"tippling house"** within Sunday closing law. Kolman v State [Ga. App.] 58 SE 1070. Ordinance prohibiting liquor dealer from **keeping open** on Sunday any part of his house means any part of house connected with the liquor business, and thus construed is valid. Orme v. Tuscumbia [Ala.] 43 S 584. Fact that between lunch counter on one side of room and bar on other there was on day alleged a heavy duck curtain, which obstructed the view of the bar but permitted passage thereto and therefrom, did not prevent opening of front door from being violative of statute. Id. A stock room in the rear of and opening into the bar room of a saloon, used as the stock room in this case was used, is a "place" within the meaning of the statute, and the opening of such a room on Sunday (by an alley entrance in this case) is in violation of the statute. State v. Stumpf, 5 Ohio N. P. (N. S.) 137. The requirement of §§ 4364-20, that all places where intoxicating liquors are on other days sold or exposed for sale, excepting regular drug stores, shall be closed on Sunday, applies not only to the room in which the liquor is actually sold but to all other rooms actually used in connection with the traffic in intoxicants on other days of the week. Id. Saloon is "open" within Mills' Ann. St. [Rev. Supp.] § 1346d, if access may be had to it by persons other than employes. Birmingham v. People [Colo.] 90 P 1121.

Entrance of saloon by employes to clean it held violation of law prohibiting absolutely the opening of saloons on Sunday. People v. Tolman, 148 Mich. 305, 14 Det. Leg. N. 107, 111 NW 772. Licensee liable for **acts of subordinates** in regard to Sunday opening where such acts are within scope of authority of latter, regardless of knowledge or intent of former. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971. No defense that saloon was opened by defendant's barkeeper against defendant's instructions and without his knowledge, where statute required positively the saloon to be closed. State v. Kinney [S. D.] 113 NW 77. Where sale was made by one behind defendant's bar, in his shirt sleeves and with an apron on, a finding that sale was by defendant's authorized agent was sustained. State v. Madeira, 125 Mo. App. 508, 102 SW 1046. Saloon was not **closed** within meaning of Comp. Laws 1897, § 5395, where defendant, who lived over his saloon, went into same in order to reach his kitchen, which could only be entered from the saloon which itself could not be entered from above without opening outside door, though no drinks were ever served in the kitchen and no one else entered the saloon on the day in question. People v. Henze, 149 Mich. 130, 14 Det. Leg. N. 291, 112 NW 491.

Evidence held to sustain conviction of violation of Sunday closing law. Kolman v. State [Ga. App.] 58 SE 1070. Evidence, though conflicting, held to sustain finding of sale on Sunday and not a gift. Ellicott v. State [Tex. Cr. App.] 99 SW 546. Under Mills' Ann. St. [Rep. Supp.] § 1346d, relating to Sunday closing, evidence that a person was allowed to remain in a saloon makes a prima facie case of the violation of all the provisions of the statute. Birmingham v. People [Colo.] 90 P 1121.

NOTE. Necessity as defense: "This court has never held that an overruling necessity may not excuse entrance to a saloon on Sunday. It has expressly determined that the proprietor must, at his peril, see that no necessity exists for keeping the same open by carrying on any other business therein which would require the doors to be open or for persons to enter therein. People v. Waldvogel, 49 Mich. 337, 13 NW 620; People v. Blake, 52 Mich. 566, 18 NW 360; People v. Cummerford, 58 Mich. 328, 25 NW 203; People v. Schottey, 116 Mich. 1, 74 NW 209; People v. Kriesel, 136 Mich. 80, 98 NW 850; People v. Crowley, 90 Mich. 366, 51 NW 517; People v. James, 100 Mich. 522, 59 NW 236; People v. Bowkus, 109 Mich. 360, 67 NW 319."—From People v. Tolman, 148 Mich. 305, 14 Det. Leg. N. 66, 111 NW 772.

Length of time is immaterial. Richardson v. State [Ga. App.] 59 SE 916. Charge held erroneous in that it excluded all consideration of **purpose** for which defendant opened and entered his saloon. Id.

Election day: Under Rev. St. 1899, § 3011 [Ann. St. 1906, p. 1726], requiring saloons to be closed on general "election day," the **word day means** twenty-four hours, commencing and terminating at midnight, though polls open at sunrise and close at sunset. State v. Meagher, 124 Mo. App. 333, 101 SW 634. Evidence held to show that defendant who was charged with keeping dram shop open on election day, contrary to Rev. St. 1899, § 301, was a **licensee** and

vicinities;[94] prohibition of sale or furnishing to certain persons;[95] prohibiting certain persons from frequenting saloons.[96]

hence within the statute. Id. Ky. St. 1903, § 1575, enacted pursuant to Const. § 154, prohibiting sale on general or primary election days, applies to general **school elections**. Ford v. Mass, 30 Ky. L. R. 428, 98 SW 1015. A **special election** for a justice of the peace in a militia district is a state election within Pen. Code 1895, § 446, prohibiting the selling and furnishing of liquors on days of election, state, county, or municipal, within two miles of an election precinct. Long v. State, 127 Ga. 285, 56 SE 424.

93. County license held not to authorize saloon outside of city saloon limits. Paul v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 320, 106 SW 448. Judgment of county court granting license in city held not res adjudicata of right to conduct business at place designated. Id. Where the place where the order for liquor is given and the place of delivery are different, the former is the **place of sale.** McClure v. State [Ala.] 42 S 813. Applicant for county license must take **notice of city ordinance** prescribing portions of city in which liquor may and may not be sold, where such ordinance has been properly enacted and published. Territory v. Robertson [Okl.] 92 P 144. Dallas city charter, § 108, held not to exempt both sides of certain streets named as **boundary of district** in which city might prohibit sales of liquor. Garonzik v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 22, 100 SW 374. Such regulation is **not local option** within Const. art. 16, § 20, relating to local option. Cohen v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 460, 101 SW 1052.

Power to fix saloon limits may be delegated to a city. Cohen v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 460, 101 SW 1052. Limitations as to place may lawfully be made under power to regulate, restrain, etc. Cooke v. Loper [Ala.] 44 S 78. Implied from authority to regulate. Timm v. Common Council of Village of Caledonia Station, 149 Mich. 323, 14 Det. Leg. N. 442, 112 NW 942. Not implied from power to suppress. Id. Dallas city charter, c. 108, authorizing city to prohibit sales in certain places, held to authorize mere regulation, and hence was not violation of Const. art. 1, § 28, as being a suspension of Sayle's Rev. Civ. St. art. 5060a, providing for occupation tax on sales of liquor. Garonzik v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 22, 100 SW 374. Charter provision not void because it inhibits city from prohibiting sale on city property and authorizes such prohibition as to certain other places. Id. No authority in general municipal incorporation act to fix saloon limits, and hence city incorporated under such act has no such authority. Ex parte Smith [Tex. Cr. App.] 19 Tex. Ct. Rep. 165, 102 SW 115; Id. [Tex. Cr. App.] 102 SW 1124.

94. Under Laws 1896, p. 66, c. 112, § 24, as amended by Laws 1905, p. 1728, c. 677, § 3, the exemption of places already used for liquor traffic from prohibition as to such traffic within 200 feet of a **church** does not apply to an application for renewal of license at such place. In re Clement, 107 NYS 205. Unfinished church held not a church within meaning of prohibition. In re Rupp, 54 Misc. 1, 105 NYS 467. Subsequent dedication as a church of a building within the prohibited distance will not invalidate a license previously granted. In re Rupp, 55 Misc. 313, 106 NYS 483. Laws 1896, p. 66, c. 112, § 24, subd. 2, prohibits liquor traffic within certain distance of buildings used exclusively for religious worship, and does not apply to building used for occasional church entertainments. Id. Words "new place" within P. L. 1905, p. 42, regulating sale of liquors, means place for which license has not previously been granted on direct application, and transfer of license to a place does not take away the character of such place as a new place. Wright v. Board of Excise of City of Elizabeth [N. J. Law] 66 A 1061. On prosecution for sale within four miles of a **school house,** defendant's ignorance of the intoxicating qualities of the liquors sold is no defense, though they are sold to him under guaranty that they are not intoxicating. Haynes v. State [Tenn.] 105 SW 251. Act 1877, p. 18a, making it unlawful to sell intoxicating liquors within three miles of the Masonic Academy in the town of Swainsboro, was not repealed by § 26 of the charter of Swainsboro, approved December 6, 1900. Mason v. State, 1 Ga. App. 534, 58 SE 139. Local prohibition of sale within certain distance of a school was not affected by change of school to another building a short distance away. Id. Under authority conferred by Acts 1905, p. 327, c. 129, § 7279, to abate any offensive or dangerous business within 500 feet of any **park,** etc., park commissioners have authority to prohibit saloon within such limits. In re Arszman [Ind. App.] 81 NE 680. Exclusion of sales from **residence district** is valid regulation though parts of such district are unsettled and unimproved. Cohen v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 460, 101 SW 1052. Under Acts 1905, p. 252, c. 129, § 53, subd. 40, authorizing city council to prohibit sales of liquor in suburban and residence parts of city and to confine same to business parts of city, and to define such localities, such definition is within the council's discretion, the exercise of which will not be interfered with in absence of abuse. City of Greencastle v. Thompson, 168 Ind. 493, 81 NE 497. Prohibition of liquor traffic within certain distance of any building, premises, or lands occupied as a state **hospital** includes contiguous portions of such lands used and cultivated for garden truck. In re Clement, 54 Misc. 362, 105 NYS 1054; In re Brady, 106 NYS 921.

95. Minors: Under Pen. Code 1895, § 444, the offense of personally or through agent selling or furnishing liquor to minors is different from offense of allowing delivery of liquor furnished by another, and an instruction confusing the two offenses is erroneous. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67. Where defendant in Arkansas received money from a minor with which to purchase whiskey for latter, and subsequently, in Texas, purchased the whiskey and delivered it to the minor, he could not be punished in Arkansas as being

Dispensary system.[See 8 C. L. 500]—Dispensary acts are usually upheld.[97] License laws are usually superseded by the dispensary system.[98] A dispensary authorized to put liquors into packages before sold may bottle such liquors.[99] Sales by dis-

guilty of selling, giving, etc., liquor to minor contrary to Kirby's Dig. § 1943. Anderson v. State [Ark.] 101 SW 1152. Indictment charging that defendant willfully and unlawfully carried around intoxicating liquors on his person, etc., for the purpose of disposing of same to a certain minor, held to charge no crime. State v. Smith [Iowa] 113 NW 336. Code 1897, § 2403, prohibiting the furnishing of liquors to minors and providing for a forfeiture for violation of the act, to be collected by action, creates only civil liability. Id. Acts 32nd General Assembly, c. 122, p. 125, repealing Code, § 2403, and making it a crime to furnish liquors to minors, did not take effect until April 13, 1907, and did not apply to acts prior to such date. Id. Evidence held to sustain verdict of guilty of selling to minors. Ellis v. State [Ind.] 82 NE 758. No one but **dram shop keeper,** that is a licensed retailer of liquors [Rev. St. 1899, § 2990, Ann. St. 1906, p. 1714], is liable to prosecution and for penalty under Gen. St. 1899, § 3009, as amended by Ann. St. 1906, p. 1724. State v. Gallagher [Mo. App.] 106 SW 111. Quere whether clerk of license would be liable under such statute. Id.

Express company is liable under Pen. Code 1895, § 444, for delivering whiskey to minor only where the delivery is by its agent or is permitted by such agent. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67.

Corporation is person within Pen. Code 1895, § 444, relating to furnishing liquors to minors. See Pen. Code 1895, § 2. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67. Acceptance of money from another and procuring liquor, as a mere matter of accommodation, for such person from a saloon in which defendant had no interest, held not within Code, § 2382, as amended by Acts 28th. Gen. Assem., p. 59, c. 74, prohibiting **selling or taking orders for sale** or delivery of liquors. State v. Smith [Iowa] 113 NW 336. Word **"give"** is synonymous with **"deliver,"** which is meaning of word "furnish" in Pen. Code 1895, § 444, relating to furnishing liquor to minors. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67. Sale to **minor acting as agent** for third person, the minor in fact carrying the liquor to his principal without consuming any part of it, and the fact of the agency being disclosed to the seller, held not a sale or furnishing of liquor to a minor within the statute. Harley v. State, 127 Ga. 308, 56 SE 452. Liquor dealer shipping to one whom he does not know **assumes risk** of consignee being a minor, and if he is a minor the dealer is liable under Pen. Code 1895, § 444, regardless of his ignorance or knowledge of consignee's age. Newsome v. State, 1 Ga. App. 790, 58 SE 71.

Ignorance of law is no defense to prosecution under Ann. St. 1906, p. 1397, making "any person" criminally liable for selling intoxicating liquors to minor without consent of parent or guardian. State v. Gallagher [Mo. App.] 106 SW 111.

Persons of certain habits: Acts 1905, p. 720, c. 169, § 573, prohibiting the selling, bartering, or giving of intoxicating liquors to an intoxicated person, defines three separate crimes, and former jeopardy as to one will not bar prosecution as to another of such crimes. State v. Reed, 168 Ind. 588, 81 NE 571. A permit holder's **good faith** in selling liquor to one in habit of using it as a beverage is immaterial. Peak v. Bidinger, 132 Iowa, 127, 110 NW 292. Ignorance of druggist of purchaser's habits will not render sale legal under Code, § 2394. Bistline v. Ney Bros., 134 Iowa, 172, 111 NW 422.

96. A city may, in the exercise of its police power, prohibit minors from frequenting saloons or from procuring intoxicants therein. City of Lewistown v. Fitch, 130 Ill. App. 170. Ill. St., c. 43, § 14, providing that persons to whom liquor is sold in violation of the dram shop act shall be competent witnesses in prosecutions therefor, does not render invalid an ordinance imposing a penalty upon minors for frequenting dram shops, purchasing liquor, etc. Id.

97. Local act abolishing one of several dispensaries in same county does not cover same matter as Acts 1906, p. 114, providing for local option elections in counties in which sale of liquor is not lawful except through dispensaries, and hence is not unconstitutional as being a special act covering same matters as a general act, even though it be admitted that the act of 1896 is a general act. Lee County Dispensary Com'rs v. Hooper, 128 Ga. 99, 56 SE 997. Act Feb. 25, 1904, 24 St. at Large, 485, amending Dispensary Act 1896, § 7, 22 St. at Large p. 128, providing for levy of tax on counties voting out dispensary for purpose of creating fund for enforcement of the dispensary act, held not unconstitutional as not being of uniform operation in law that it does not apply to counties which have never had dispensaries. Murph v. Landrum, 76 S. C. 21, 56 SE 850. Such amendatory act held unconstitutional so far as it declares that any county voting out a dispensary shall not thereafter receive any part of surplus of dispensary school funds, such provision being in violation of Const. art. 11, § 12. Id. But such provision is separable and does not affect validity of balance of act. Id. Such act held not unconstitutional as being a special act, the act being a general act with special provisions. Id.; Collins v. State [Ala.] 44 S 571.

98. A license granted pending decision of the validity of a dispensary act is void ab initio when the act is subsequently declared valid. Dispensary act, Loc. Acts 1903, pp. 559, 562, takes away authority of city in which dispensary is located to issue license. Collins v. State [Ala.] 44 S 571.

99. Under authority under Dispensary Act, §§ 6, 12, to cause liquors to be put into packages before sale, a dispensary has authority to bottle beer for sale. State v. Cain [S. C.] 58 SE 937. Bottler's license under Dispensary Act, § 36, is not exclusive of power of dispensary under §§ 6, 12, to bottle for sale. Id.

pensary commissioners after the abolition of the dispensary, are not even colorably legal.[1] Intent is not an element of the offense of violation of the dispensary laws.[2] The exercise by the governor of a discretionary power of removal of dispensary commissioners is not reviewable.[3]

§ 5. *Penalties and forfeitures.* See 8 C. L. 500—Summary proceedings at the instance of the state are considered in a subsequent section.[4] Indefiniteness of the complaint in an action for a penalty is not ground of demurrer.[5] The question of parties is largely a matter of statutory construction,[6] as is also the penalty recoverable.[7] In Ohio a sale on Sunday forfeits a lease of the premises on which the sale is made.[8]

Under the various statutes liability on liquor bonds may be either to private persons[9] or to the state or municipality,[10] and this section treats of only the latter. Violation of the terms of his bond[11] by a licensee[12] gives rise to liability for the whole amount of the penalty.[13] An action on such a bond is independent of proceed-

1. Lee County Dispensary Com'rs v. Hooper, 128 Ga. 99, 56 SE 997.

2. Voluntary sale held violation of dispensary act regardless of good faith of seller. Collins v. State [Ala.] 44 S 571.

3. Supreme court has no jurisdiction by certiorari to require governor to certify to it the record on which his act in removing dispensary commissioners under Cr. Code 1902, § 556, was exercised for the purpose of review, such act being executive and discretionary and not judicial. State v. Ansel, 76 S. C. 395, 57 SE 185.

4. See post, § 7, Summary Proceedings.

5. Remedy is by motion to make more definite. Weiss-Chapman Drug Co. v. People [Colo.] 89 P 778.

6. Attorney general has authority to enforce penalty imposed by Rev. St. 1905, § 1562, for failure of state officers to observe and enforce liquor law, the duty imposed on county attorney by § 1561 of enforcing such penalty not being exclusive of attorney general's powers in the premises. State v. Robinson [Minn.] 112 NW 269.

7. Code 1892, § 1590, providing that state, county, and city may recover for unlawful sales therein "each" the sum of $500, authorizes the recovery of only one penalty each up to filing of suit by state, county, and city, word "each" not referring to the unlawful sale but to state, county, and city. Town of Flora v. American Exp. Co. [Miss.] 45 S 149.

8. The sale of liquor on Sunday invalidates, eo instanti, the lease of the premises upon which the sales are made, notwithstanding the selling of liquor on Sunday had not been declared unlawful at the time of the enactment of R. S. § 4361. Moser v. Stebel, 9 Ohio C. C. (N. S.) 217. R. S. § 4361, in so far as it provides for the forfeiture of the lease of premises upon which intoxicating liquor has been sold contrary to law, is declaratory of a principle that existed at common law and which exists independent of the statutory enactment. Id.

9. See post, § 9, Civil Liabilities, etc.

10. Bond given under liquor tax law, Laws 1896, p. 61, c. 112, § 18, as amended by Laws 1903, p. 1120, c. 486, is for benefit of state and not of private individuals. People v. United Surety Co. of Baltimore [Md.] 105 NYS 72.

11. Where breach charged was Sunday opening by clerk, it was error to exclude evidence of previous opening with knowledge and consent of licensee, such evidence being admissible on question of scope of clerk's authority. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971. Exclusion of evidence of what was seen on premises as tending to show that premises were disorderly, thus constituting a breach, held not cured by other testimony as to character of premises. Clement v. Federal Union Surety Co., 106 NYS 1061. Affidavit of licensee's manager and keeper of his prescription house was admissible to identify the prescriptions filed with county clerk with the affidavit and to show sales under such prescriptions. Edgar v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 309, 102 SW 439. Affidavit of such manager that no intoxicating liquors had been sold from said prescription house other than that stated in the accompanying prescriptions held, in connection with the canceled prescriptions, to make prima facie showing that sales called for by the prescriptions were made. Id.

12. Though Liquor Tax Law [Heydecker's Gen. Laws, p. 2372, c. 29], § 17, subd. 11, makes liquor tax certificate prima facie evidence of facts recited therein, the issue of such certificate may be proved by parol testimony by issuing officer. Cullinan v. Horan, 116 App. Div. 711, 102 NYS 132. Evidence that liquor tax certificate was displayed in licensee's window at time of alleged violation of bond held admissible to show issue of certificate that licensee was acting under such certificate at such time. Id. Evidence that acts complained of were within period covered by natural life of liquor tax certificate, that no new certificate had been issued, that certificate was displayed in licensee's place, and that licensee admitted he had a "growler's" license, held sufficient to show that licensee was acting under the certificate to which the bond related. Id.

13. Sureties are liable for full amount of the penalty. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971. Violation of terms of bond under Laws 1896, p. 61, c. 112, § 18, forfeits total amount of penalty to state, and hence costs in revocation proceedings for violations of law constituting grounds of forfeiture of bond cannot be enforced against surety on bond. People v. United Surety Co. of Baltimore, 105 NYS 72.

ings to forfeit the license.[14] The conditions of the bond need not be set out in each count of the declaration in such an action.[15] A suit on a bond necessarily involves sufficiency and validity of the bond,[16] and also its interpretation and scope.[17] A defense[18] must deny all acts any one of which would constitute a breach of the bond.[19] Sureties are not estopped by their principal's confession of guilt or his conviction for an offense constituting a breach of the bond.[20] Sureties are relieved from further liability by a bona fide sale of his business by their principal.[21] As in other

14. Hence affidavit for continuance under Super. Court Rule No. 29 [71 N. H. 680], alleging that such proceedings had been decided against defendant but that they were null and void and he wished time to have them so declared on certiorari, stated no defense to action on pond. State v. Cote [N. H.] 65 A 693.

15. Conditions of bond may be set out in first count and incorporated in other counts by reference. Moniteau County v. Lewis, 123 Mo. App. 673, 100 SW 1107.

16. Bond conditioned that licensee would not sell except on prescription, but not specifying what it was that he would not sell, held sufficient under Rev. St. 1895, art. 5060j. Edgar v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 309, 102 SW 439.

17. Sureties not liable where bond varies from application for license and from the petition, as to the **place** where the business was licensed to be conducted. Moniteau County v. Lewis, 123 Mo. App. 673, 100 SW 1107. The interpretation of the words "vulgar" and "obscene" as used in Gen. Laws, p. 177, c. 121, as amended by Gen. Laws, p. 314, c. 136, requiring liquor dealer's bond to be conditioned against **exhibiting "vulgar" or "obscene" pictures** in his place of business, should be left to the jury, but where the court attempts to define them it should do so correctly and confine their meaning to some such idea as that of immorality or indecency, and it was error to make word "vulgar" synonymous with "rustic," "rude," "low," unrefined, unenlightened, and unscientific, or to make word "obscene" synonymous with indelicate. Raley v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 924, 105 SW 342. On other hand it was proper to refuse instruction limiting meaning of "vulgar" and "obscene" to "something more than nature in its simplicity, as God created it." Id. Requested instruction that words "vulgar" and "obscene," as used in statute requiring liquor dealer's bond to be conditioned against exhibition of "vulgar" or "obscene" pictures, meant "something more than nature in its simplicity, as God created it," was properly refused as being on weight of evidence. Id. Where several of the pictures exhibited might have been considered by jury as "vulgar" or "obscene," a conviction will not be disturbed because another picture exhibited was a copy of a masterpiece which was not vulgar or obscene. Id. "We are not prepared to say as a matter of law that the exhibition of one of the masterpieces of art, or of a reproduction thereof, in a liquor saloon, could not, under any circumstances, be a violation of the dealer's bond. United States v. Chesman, 19 F 497; United States v. Smith, 45 F 476. Whether in a given case such a picture should be held to be 'vulgar' or 'obsceene' or not within certain well understood legal rules would always be a question for the jury to determine in the light of the evidence submitted to them. United Sates v. Harmon, 45 F 414; United States v. Clarke, 38 F 500. Under a given state of facts the exhibition of such a picture might not make a question for submission to a jury, while under another given state of facts it might be entirely proper to submit to a jury the issue of whether such a picture was vulgar or obscene or not within the meaning of the statute." Id. Bond given under Rev. St. 1895, art. 5060j, covers sales by **agents** and employes of druggist as well as those made by himself. Edgar v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 309, 102 SW 439. Evidence held to fail to show that act of licensee's clerk in opening on Sunday was within scope of latter's authority or with knowledge of consent of the former, but on contrary showed that a clerk was acting for himself. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971. Bond conditioned **against sale on prescription** by same physician, bearing same number and dated during the same year, held violated though the two prescriptions are given to different persons. Edgar v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 309, 102 SW 439.

18. Fact that owner did not know that premises were disorderly is no defense, he having failed to perform an affirmative duty the performance of which was secured by the bond. Clement v. Federal Union Surety Co., 106 NYS 1061. Certificate on conviction of violation of liquor license recommending, as authorized by Pub. Acts 1903, p. 67, c. 99, such conviction, being the first, should not constitute a forfeiture of the bond as provided by Gen. St. 1902, § 2661, held defense to action on bond, though such certificate was not filed at time of conviction or until after clerk had reported the conviction to the county treasurer and the latter had sued on the bond. Jacobs v. Reilly [Conn.] 68 A 251. Payment of fine imposed for the offense constituting the breach of the bond does not satisfy the obligation of the bond. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971.

19. Under Superior Court Rule No. 29 [71 N. H. 680], providing for continuance on satisfying court by affidavit that he has good defense, the nature of which must be disclosed by the affidavit, defendant in action on liquor license bond was not entitled to continuance on allegation that he did not make sale charged and that his agent, who was charged by complaint as having made sale, had told defendant that he did not make it, and that defendant wanted to use agent as witness, there being no denial of the sale. State v. Cote [N. H.] 65 A 693.

20. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971.

21. Where saloonkeeper testified that he

actions the credibility of witnesses is affected more or less by their interest in the action.[22]

§ 6. *Criminal prosecutions. A. General rules of criminal responsibility.* See 8 C. L. 500—One sought to be charged with responsibility for violation of the liquor laws must be connected with such violation,[23] but for this purpose the doctrine of principal and agent may be invoked.[24] Both a corporation[25] and its

bought the saloon from former proprietor, receiving a power of attorney from, and conducted the business in his name, it was for the jury to determine whether there was a bona fide sale, relieving the sureties of the former proprietor from liability for acts of purchaser, or whether the transaction was a feigned sale which would not relieve the sureties. Hilliker v. Farr, 149 Mich. 444, 14 Det. Leg. N. 497, 112 NW 1116. Testimony of alleged purchaser as to whether he was the real agent of the former proprietor, and as to disposition of proceeds of business, was admissible. Id. Alleged purchaser was not required to incriminate himself by being required to produce the power of attorney. Id. Sureties had right to prove that the sale was real and that the power of attorney was a mere sham to evade license law. Id.

22. Charge calling attention to fact that witnesses were excise officers and cautioning jury to consider that fact, but telling jury that they had the right to believe their testimony if they deemed same reasonable, etc., held not error. Cullinan v. Furthman [N. Y.] 79 NE 989. Instruction forbidding jury to consider that plaintiff's witnesses were special agents of state commissioner of excise appointed pursuant to Laws 1896, p. 50, c. 112, § 10, held erroneous, though compensation of such agents was not dependent upon the result of the trial. Id. Instruction that jury might consider fact that defendant was interested in result held not improper. Id. Held error to leave question of public officer's interest in suit instituted by him to jury without explaining that it was his duty to institute the suit and that he had no pecuniary interest therein. Clement v. Federal Union Surety Co., 16 NYS 1061.

23. Unlawful sale. Guarreno v. State [Ala.] 42 S 833. Postmaster, express and depot agent, not liable as seller merely because he issued money order to purchaser and then delivered to him whiskey consigned to him, in absence of evidence to show that the money order was a mere device according to which postmaster, etc., collected for the whiskey. England v. State [Ark.] 102 SW 373.

24. Sale by clerk by defendant's authority held sale by defendant. State v. Potter, 125 Mo. App. 465, 102 SW 668. Proprietor who while in his store heard clerk tell customer that they had liquors for sale held liable, though he did not know of sale and did not authorize it. Lambie v. State [Ala.] 44 S 51 Sale by clerk insufficient to charge principal criminally in absence of proof of latter's connection with sale. Daniel v. State [Ala.] 43 S 22. The proprietor of a store, not a saloon or liquor store, is not liable for sales of liquor made or abetted by his clerks and agents, in charge of such store, without his knowledge. Kittrell v. State, 89 Miss. 666, 42 S 609.

Evidence held to support finding that sale by defendant's bartender, within certain hours in violation of Burns' Ann. St. 1901, was made with defendant's knowledge and consent. McNulty v. State [Ind. App.] 81 NE 109.

Note: "The decisions are conflicting upon the question whether or not the master or principal is liable to a criminal prosecution for violation of statutory laws committed by the agent or servant acting within the scope of his employment. In Massachusetts the rule seems to be that generally the master is not responsible unless in some way he participates in, countenances, or approves the criminal act of his servant (Commonwealth v. Stevens, 153 Mass. 421, 26 NE 992, 25 Am. St. Rep. 647, 11 L. R. A. 357), although in that jurisdiction there are exceptions to the rule; the court saying in Commonwealth v. Nichols, 10 Metc. [Mass.] 259, 43 Am. Dec. 433: 'It seems to us that in the case of the sale of liquors prohibited by law at the shop or establishment of the principal by the agent or servant usually employed in conducting his business, is one of that class of cases in which the master may properly be charged criminally for the acts of the servant.' And it is ruled in both the foregoing cases that, if the sale is made by the servant, in opposition to the will of the master, and is in no way approved by him, he is not liable. In North Carolina, the court in an exhaustive opinion in State of North Carolina v. Kittelle, 110 N. C. 560, 15 SE 103, 28 Am. St. Rep. 698, 15 L. R. A. 694, after reviewing fully all of the authorities, came to the conclusion that the principal is criminally liable for the conduct of his clerk acting within the scope of his employment in selling liquor in violation of law. And this rule prevails in Maryland (Carroll v. State, 63 Md. 551, 3 A 29); Georgia (Snider v. State, 81 Ga. 753, 7 SE 631, 12 Am. St. Rep. 350); Arkansas (Mogler v. State, 47 Ark. 110, 14 SW 473); Mississippi (Riley v. State, 43 Miss. 397); Iowa (Dudley v. Sautbine, 49 Iowa, 650, 31 Am. Rep. 165); Michigan (People v. Roby, 52 Mich. 577, 18 NW 365, 50 Am. Rep. 270). In the Iowa Case, the court very aptly said: 'The argument briefly stated is that the agent is employed for a lawful purpose and no other. If he does an unlawful act and especially forbidden by his principal, he acts outside of his agency. And so it is argued that the statute which imposes a penalty for selling in prohibited cases by the agent has no application to this case. The clerk was employed to sell wine and beer, and, while it is true that in one sense he was not employed to sell to persons in the habit of becoming intoxicated, he was employed to determine who among those applying to purchase were in such habit and to sell to persons who were not. We think, then, that the agent's fault did not consist in doing what was beyond the scope of his agency, but in doing

officers[26] may be held criminally liable under the liquor laws. Several sales on different days without complying with the license and regulation laws constitute separate offenses.[27] Ignorance of the character of the liquor sold is ordinarily no defense.[28] Aiders and abettors are liable as principals.[29] Liability for violation of particular regulations is treated in a prior section.[30]

(§ 6) *B. Indictment and prosecution. Jurisdiction.*[See 8 C. L. 508]—The jurisdiction of the various courts depends upon statute.[31] An indictment sometimes may lie in any one of several counties[32] or even several states.[33]

Indictment, information, or complaint.[See 8 C. L. 509]—While in some states a general allegation of a sale contrary to law is sufficient,[34] and while an indictment or information under the liquor laws may often be sufficient if in the language of the statute,[35] as a general rule the facts constituting the offense must be alleged,[36] and

improperly what was within it. Most certainly a principal cannot escape civil liability for his agent's negligence by instructing him not to be guilty of negligence.' The Iowa statute under which this prosecution was had provided that it should be unlawful for any person 'by agent or otherwise' to sell intoxicating liquors to persons in the habit of becoming intoxicated; but the court did not rest its decision on the wording of this statute, but upon the general principle that in cases of this character the master is liable for the acts of his servant within the scope of his employment. In the Michigan Case the keeper of a hotel was prosecuted for the act of his clerk in selling liquor on Sunday. The point was made that, as there was no evidence to show that the proprietor consented to the sale or to the opening of the bar, he was not liable for the acts of his clerk. But Judge Cooley, writing for the court said: 'I agree that as a rule there can be no crime without a criminal intent; but this is not by any means a universal rule. Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible.' And this court in Locke v. Com., 113 Ky. 864, 69 SW 763, 101 Am. St. Rep. 374, 38 L. R. A 237, and Ellison v. Com., 24 Ky. L. R. 657, 69 SW 765, approved an instruction which told the jury that, if the sale was made by an authorized agent or clerk in the regular course of business, the defendant was guilty."—From City of Paducah v. Jones, 31 Ky. L. R. 858, 104 SW 971.

25. Liable where agent, in course of business, delivers or knowingly allows to be delivered, intoxicating liquors to a minor. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67.

26. Responsible, regardless of purpose for which corporation was organized. State v. Collins [R. I.] 67 A 796. One cannot evade responsibility for violation of the liquor statutes by organizing a corporation and acting as its agent or officer, and in such case he will be liable for violations by other corporate agents. Id.

27. Hence, plea of former conviction of sale on another day than the one charged presents on its face merely question of law upon which defendant was not entitled to jury trial. State v. Potter, 125 Mo. App. 465, 102 SW 668.

28. State v. Rennaker, 75 Kan. 685, 90 P 245.

29. One aiding and abetting in an unlawful sale is liable as a principal, under B. & C. Comp. § 2153, providing that one who aids and abets a crime is a principal. State v. Carmody [Or.] 91 P 446.

30. See ante, § 4.

31. Under Ky. St. 1903, § 1141, circuit court has jurisdiction of prosecution for selling on election day. Ford v. Moss, 30 Ky. L. R. 428, 98 SW 1015.

32. Under Act Cong., March 6, 1820, c. 22, 3 Stat. 545, giving Missouri and Kentucky concurrent jurisdiction over Mississippi river, Kentucky courts had jurisdiction of offense of evading its liquor laws by taking one on a boat in Kentucky, carrying him across the river to Missouri, and there selling him liquor, and then bringing him back to Kentucky, no fare being charged. Lemore v. Com. [Ky.] 105 SW 930.

33. One shipping liquor to minor from one county to another is indictable under Pen. Code 1895, § 444, in either county for furnishing liquor to such minor. Newsome v. State 1 Ga. App. 790, 58 SE 71.

34. McClure v. State [Ala.] 42 S 813. Indictment that defendant did "sell, give away, or otherwise dispose of" certain liquors "without a license and contrary to law," held sufficient. Id. Indictment in conformity with Acts 1892-93, pp. 15, 16, held sufficient. Lambie v. State [Ala.] 44 S 51. Court alleging that "defendant sold spirituous, vinous or malt liquors without a license and contrary to law, is in code form and unobjectionable. Daniel v. State [Ala.] 43 S 22.

35. Indictment for violation of Acts 1901-02, p. 765, c. 653, prohibiting liquor traffic in Matthews county. White v. Com. [Va.] 59 SE 1101. Where the prohibiting statute does not use the word "unlawfully," a sale need not be charged as "unlawfully" made. Code 1899, c. 32, § 1, Code 1906, § 913, merely declares that no one shall sell without a license. State v. Johnson [W. Va.] 57 SE 371.

36. Terre Haute Brew. Co. v. State [Ind.] 82 NE 81. Facts must be charged with such certainty as to fully inform defendant of charge against him. Id.

Facts implied: Under Comp. St. 1903, prohibiting keeping of liquors for sale without a license, and providing for the punishment of anyone "found in possession" of such liquors with intention of disposing of same without a license, an indictment need not allege that defendant was found in posses-

the facts must be proved as alleged.[37] Whether or not it is necessary to allege any particular fact depends upon whether such fact is an element of the offense.[38] Ex-

sion of such liquors, an allegation of keeping being sufficient, since it implies possession, and being found in possession being merely evidence of the keeping. Ford v. State [Neb.] 112 NW 606. Allegation that place where liquor was sold was **nuisance,** held insufficient in absence of allegations as to legality and manner of such sales keeping of such place. Sopher v. State [Ind.] 81 NE 913.

37. Indictment under Acts 1900, p. 141, c. 104, § 3, for occupying house in which unlawful sales of liquor were made, not sustained by proof of occupancy of a house owned by a person other than alleged owner of house described in indictment. Levy v. State, 89 Miss. 394, 42 S 875. No variance, where indictment charges defendant as principal and evidence shows that he aided and abetted the offense. Kittrell v. State, 89 Miss. 666, 42 S 609. Distinction by direct and indirect sale within statute forbidding both is as to manner and not as to whether made by a person or his agent, and hence there was no variance where direct sale was charged and sale by agent proved. State v. O'Brien, 35 Mont. 482, 90 P 514. Where the indictment charges the furnishing of three or more kinds of liquor, evidence showing that any one kind was furnished is sufficient. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67.

38. Character of liquors: Where the statute expressly prohibits the sale or keeping for sale of a particular class of liquors, an indictment thereunder need not allege that such liquors are intoxicating. State v. York [N. H.] 65 A 685. Allegation that defendant kept for sale "wine," "whiskey" and "cider." held sufficient under Pub. St. 1901, c. 112, § 15, as amended by Laws 1905, p. 528, c 116, relating to sale of "spirituous or distilled liquors." Id.

Knowledge or intent: Allegation of knowledge in indictment under Laws 1901, p. 19, c. 3, § 3, for allowing minors to gamble in saloon, is surplusage. Church v. Territory [N. M.] 91 P 720. Under Rev. St. 1899, § 3050 [Ann. St. 1901, p. 1750], denouncing issue of prescription for intoxicating liquors to be used otherwise than for medicinal purposes, an information which failed to allege that the prescription was issued for the purpose denounced was fatally defective. State v. Davis [Mo. App.] 102 SW 1103.

Time: Code, § 5077, dispenses with necessity of alleging particular time of sale without license. Coleman v. State [Ala.] 43 S 715. Gen. Laws 1896, c. 102, § 57, expressly provides that time of sale or keeping need not be alleged, and, where the offense is laid with a continuando, proof may be made of any violation of statute within times mentioned. State v. Collins [R. I.] 67 A 796. Under Acts 1901-02, p. 765, c. 653, prohibiting liquor traffic in Matthews county, where offense was charged as having been committed within "two years last past," the state was not bound to elect to prosecute for sale on any particular day within such two years. White v. Com. [Va.] 59 SE 1101. Under Gen. Laws 1896, c. 102, § 57, relating to sales and keeping for sale, manufacture, etc., the true date of offense need not be alleged. State v. Collins [R. I.] 67 A 796. On prosecution for maintaining **nuisance** the time of the sales is, subject to the statute of limitations, immaterial. State v. Giroux, 75 Kan. 695, 90 P 249. Although there may have been some vagueness as to the "when" and "where" of the commission of the offense as charged in the affidavits upon which the prosecutions were based, the charge being that the defendants kept certain places from a certain date and at various times until a certain other date, the period being one week, yet the affidavits were good in that they at least charged one offense, and the defendants were not prejudiced by them. Otte v. State, 9 Ohio C. C. (N. S.) 293. Time of sale **without license** need not be alleged. Lawson v. State [Ala.] 44 S 50. Where indictment filed August 16, 1905, alleged violation of **Sunday** closing law on the —— day of August, 1905, and there was no proof as to the particular Sunday in August, 1905, when the offense was committed, it was held that it did not appear that offense was prior to crime. State v. Madeira, 125 Mo. App. 508, 102 SW 1046.

Business: Allegation that purchasers were not retailers held not to show that they were consumers, since they might have been jobbers or wholesale dealers. Terre Haute Brew. Co. v. State [Ind.] 82 NE 81. Information alleging that defendant was proprietor of saloon and licensed to sell liquor therein sufficiently charged that he was engaged in the liquor business under the license law so as to render him liable for violation of such law. State v. Gilbert [S. D.] 111 NW 538. Under Acts 1901-02, p. 765, c. 653, prohibiting liquor traffic in Matthews county, the place within the county where the sales charged were made is immaterial, and hence need not be charged. White v. Com. [Vá.] 59 SE 1101. Under Code 1896, § 5077, making general allegation of sale without license and contrary to law sufficient to charge violation of general law and of special laws applicable to particular places, such general allegation is sufficient to charge violation of § 5076, relating to license and also violation of a special prohibition law, without allegation of place of sale. Guarreno v. State [Ala.] 42 S 833. Code, § 5077, dispenses with necessity of alleging particular place of sale without license. Coleman v. State [Ala.] 43 S 715. Sufficient to allege sale in parish generally without specifying particular place in parish where it was unlawful to sell anywhere in parish. State v. Buckhalter, 118 La. 657, 43 S 268.. Place in county where sale without license was made need not be alleged. Lawson v. State [Ala.] 44 S 50.

Name of purchaser not necessary where sale to any person is unlawful. State v. Buckhalter, 118 La. 657, 43 S 268. Code, § 5077, dispenses with necessity of alleging name of purchaser in indictment for sale without license. Coleman v. State [Ala.] 43 S 715. Purchaser of liquor sold without license need not be alleged. Lawson v. State [Ala.] 44 S 50. Indictment under Rev. St. 1899, c. 15 [Ann. St. 1906, pp. 1389-1452], for sale contrary to law, the name of the pur-

ceptions not contained in the enacting clause of the statute need not be negative.[39] Whether it is duplicity to charge more than one violation of the law in a single count depends upon whether the several violations constitute separate offenses.[40] An indictment may be broad enough to cover the violation of several laws by a single act.

Prosecution may, in some states, be upon information or complaint.[42] Indictments under the liquor laws may be amended as in other cases.[43] The same technical accuracy is not required as in cases of final prosecution.[44]

Indictments for violation of the local option laws are subject to the same general rules that control other indictments under the liquor laws,[45] but the de-

chaser need not be alleged though the defendant was a druggist, the prosecution, however, not being against a druggist as such. State v. Potter, 125 Mo. App. 465, 102 SW 668. Indictment must charge sale to named person or to person expressly stated to be unknown. State v. Tisdale [N. C.] 58 SE 998. Revisal 1905, § 2060, making possession of United States license prima facie evidence of guilt of act authorized by such license, does not dispense with necessity of stating name of purchaser or that he is unknown. Id. Allegation of sale to persons unknown is sufficient. State v. Dowdy [N. C.] 58 SE 1002.

39. Negativing exceptions. by allegation that sale was not made through a dispensary, held not to affect validity of indictment, such exception not being contained in the enacting clause. Scott v. State [Ala.] 43 S 181. Allegation in indictment, charging unlawful sale in Wilcox county in which sales of liquors are prohibited by Acts 1882-83, p. 234, that sale was outside of Camden precinct, held not to affect validity of indictment, but only to circumscribe venue, whether the allegation was to negative the idea that the sale was through a dispensary authorized in such precinct by Acts 1900-01, p. 1082, or was intended for some other purpose. Id.

40. Allegation that defendant sold P., R., and C., each one drink of whiskey, held bad as alleging three distinct sales to three distinct parties. Alexander v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 203, 102 SW 1122. Sale by druggist without making record required by Comp. Laws 1897, § 5381, and failure to report sale to prosecuting attorney as required by Acts 1899, No. 183, p. 280, § 25, are separate offenses and cannot be joined in a single count. Chase v. Van Buren Circuit Judge, 148 Mich. 149, 14 Det Leg. N. 73, 111 NW 750. Offense defined by Pen. Code 1895, § 444, may be alleged by alleging sale to more than one minor. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67. On prosecution for nuisance, allegation of several sales on different dates does not render the information duplicitous. State v. Giroux, 75 Kan. 695, 90 P 249. Evidence held not to require **election** between sales testified to as being made by defendant's wife at his store and sales testified to as being made by defendant in person, since frequency of sales by wife might authorize inference that she was acting as his agent. Guarreno v. State [Ala.] 42 S 833. Where indictment charged unlawful sale without license, defendant could, under law obtaining prior to enactment of Code 1906, § 1762, compel state to elect the particular sale that it would rely on. Kittrell v. State, 89 Miss. 666, 42 S 609. Act 1906 did not affect previous trials. Id.

41. Indictment held broad enough to support conviction under either Code Pub. Gen. Laws, art. 27, § 385, prohibiting sales of liquor on Sunday by any person, or under Baltimore City Charter, § 682, prohibiting liquor licensees from selling on Sunday. State v. Maryland Club [Md.] 66 A 667.

42. Under Code Cr. Proc. 306, and Ky. St. 1903, § 1141, sale in prohibition may be prosecuted by information in city police court, indictment being unnecessary. George H. Goodman Co. v. Com., 30 Ky. L. R. 519, 99 SW 252. Under Code Cr. Proc. §§ 310, 311, 330, failure to file written information on prosecution in city police court for sale in prohibition city **held waived** by defendant's appeal to circuit court. Id.; Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Where complaint is verified by prosecuting attorney, the **sources of information** cannot be inquired into. State v. Taylor, 75 Kan. 417, 89 P 672. May be upon the information of a **hired detective** as spotter. State v. O'Brien, 35 Mont. 482, 90 P 514.

43. Affidavit alleging selling, giving, or otherwise disposing of liquors, held properly amended by additional affidavit alleging sale alone. Dillard v. State [Ala.] 44 S 537.

44. Complaint that defendant engaged in business of selling, etc., "without first having procured a license therefor in the manner and as required by law," held sufficient. State v. McIlvenna [S. D.] 113 NW 878. Information held sufficient to charge violation of Rev. Pol. Code, § 2856, as amended by Laws 1903, p. 191, c. 166, prohibiting sale of liquors in unorganized territory. Id.

45. Crim. Code Prac., §§ 122, 1241, requiring indictments to state facts in such manner as to enable person of common understanding to know what is intended, held sufficiently complied with where indictment charged defendant with selling to a certain person, on a certain day, in a certain county where local option was in force, intoxicating, etc., liquors, by the drink, pint, quart, gallon, and in other quantities less than five gallons. Combs v. Com. [Ky.] 104 SW 270. Indictment against **express company** for violation of local option laws held insufficient on demurrer. Adams Exp. Co. v. Com., 31 Ky. L. R. 811, 103 SW 353; Id., 31 Ky. L. R. 810, 103 SW 352; Id., 31 Ky. L. R. 813, 103 SW 353; Id., 31 Ky. L. R. 812, 103 SW 721; Harrison v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 718, 99 SW 1166. Indictment for running **"blind tiger"** will not sustain conviction for ordinary violation of local option law, but an instruction authorizing

cision of the various states are in conflict as to the necessity of alleging compliance with the conditions and requirements necessary to put the local option law into effect in a particular community.[46]

such conviction is harmless where defendant is convicted of offense charged. Gorman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 876, 105 SW 200. Under Cr. Code 1896, § 5077, violation of local law may be shown under indictment in **code form**. Tonsey v. State [Ala.] 44 S 183. Indictment under local option law, § 15 [Laws 1905, p. 48], in **language of statute** held sufficient, the offense charged being only a misdemeanor. State v. Carmody [Or.] 91 P 1081. Indictment for sale in local option district may allege sale **without license**. Dowdy v. Com., 31 Ky. L. R. 33, 101 SW 338. Affidavit that defendant did sell, in certain county, "spirituous, vinous, or malt liquors, without a license and **contrary to law**," held sufficient to charge offense under local option law. Dillard v. State [Ala.] 44 S 537. Code 1896, § 5077, provides that charge of sale contrary to law is sufficient to charge violation of general law and also of special laws applicable to particular places. Guarreno v. State [Ala.] 42 S 833. In indictment under Local Option Law [Laws 1905, p. 48], § 15, **exceptions** and provisions need not be alleged. State v. Carmody [Or.] 91 P 1081. Allegation of selling, giving or otherwise disposing of intoxicating liquors "without a license and contrary to law and being manifestly framed with respect to local prohibition law applicable to Jefferson county, Acts 1888-89, p. 417, sufficiently negatived the exception in such statute of certain town and cities in such county from operation of the law. Guarreno v. State [Ala.] 42 S 833. Only exception to provisions of Ky. St. 1903, §§ 2557, 2557a, forbidding sale of vinous, etc., liquors in local option territory being under § 2558 authorizing sale by manufacturers at place of manufacture in quantities not less than five gallons, an indictment for sale in local option territory need not specify that sale was at retail. Dowdy v. Com., 31 Ky. L. R. 33, 101 SW 338. General allegation of sale without specifying **place** held not bad because there were incorporated towns and cities in the county not subject to the county prohibition act, and that it did not appear whether the charge was for violation of city or county laws. McClure v. State [Ala.] 42 S 813. Indictment for selling spirituous, vinous and malt liquors, and a "mixture thereof" held not defective as failing to give sufficient **description of liquor** in that it did not specify whether such mixture contained all or only one or more of the liquors named. Dowdy v. Com., 31 Ky. L. R. 33, 101 SW 338. An indictment for **carrying liquor into local option district** contrary to Acts 1906, p. 320, c. 63, must allege that defendant was a common carrier or received pay for the service. Commonwealth v. Hardy, 30 Ky. L. R. 532, 99 SW 239. Charge that defendant brought whiskey into local option community for purpose of sale necessarily included charge that he had it in his possession for such purpose, and hence a conviction on such charge would not be disturbed, the matter implied being an offense under Acts 1903, § 2557b, subd. 2, though the express charge did not, under Acts 1906, p. 320, c. 63, apply to defendant, who was not a common carrier or carrier for hire. McGuire v. Com., 30 Ky. L. R. 720, 99 SW 612.

46. State v. O'Brien, 35 Mont. 482, 90 P 514. Complaint held to state sufficient compliance with requirements necessary to make local option statute applicable. Id. Sufficient if facts are alleged necessary to valid **election** and to put law in force. State v. Hitchcock, 124 Mo. App. 101, 101 SW 117. Where prosecutor unnecessarily alleged election in 1903, and defendant proved that at time of offense charged the law of 1906, repealing law of 1903, was in effect, the prosecution under law of 1903 could not be maintained. Byrd v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 300, 103 SW 863. Under Laws 1905, p. 47, c. 2, § 10, the **order of county court declaring result of election** is prima facie evidence that all steps were properly taken, and it is only necessary to allege and produce such order. State v. Carmody [Or.] 91 P 446. Allegation that order of county court declaring result of election was published according to direction of such court renders the indictment defective, the county judge being the only authority authorized to cause such publication. Carnes v. State [Tex. Cr. App.] 103 SW 394; Graf v. State [Tex. Cr. App.] 102 SW 1133; Doyal v. State [Tex. Cr. App.] 102 SW 1123; Green v. State [Tex. Cr. App.] 102 SW 416; Killman v. State [Tex. Cr. App.] 102 SW 404; Rucker v. State [Tex. Cr. App.] 101 SW 802; Rogers v. State [Tex. Cr. App.] 101 SW 803; Parr v. State [Tex. Cr. App.] 101 SW 803; Cliff v. State [Tex. Cr. App.] 101 SW 803; Wharton v. State [Tex. Cr. App.] 101 SW 803; Brown v. State [Tex. Cr. App.] 101 SW 803; Adams v. State [Tex. Cr. App.] 101 SW 803; Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 20, 100 SW 953; King v. State [Tex. Cr. App.] 100 SW 924; Loving v. State [Tex. Cr. App.] 100 SW 154; Patton v. State [Tex. Cr. App.] 100 SW 778; Powell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 719, 99 SW 1002; Peeples v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 719, 99 SW 1002; Carnes v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 526, 99 SW 98; Silvey v. State [Tex Cr. App.] 17 Tex. Ct. Rep. 528, 98 SW 1058; Luck v. State [Tex. Cr. App.] 98 SW 1058; Gunning v. State [Tex. Cr. App.] 98 SW 1057. Allegation should be that local option order was published by order of county judge, or that it was published "as required by law." King v. State [Tex. Cr. App.] 100 SW 924. Allegation that the order putting local option into effect had been published as required by law held sufficient. Covington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 55, 100 SW 268.

Note: "The courts of the different states differ widely, however, upon the question whether in charging a violation of the statute it is incumbent upon the state to allege in detail the observance of these conditions. In Kentucky and Texas this is the rule. Commonwealth v. Throckmorton, 17 Ky. L. R. 550, 1124, 32 SW 130; Commonwealth v. Cope, 107 Ky. 173, 53 SW 272; Commonwealth v. McCarty, 25 Ky. L. R. 585, 76 SW 173; Stewart v. State, 35 Tex. Cr. R. 391, 33 SW 1081; Hall

Pleas and defenses.—A plea of charter power to sell on Sunday sets up matter available under the general issue.[47]

Trial.[See 8 C. L. 511]—Arguments of counsel must be confined to the evidence.[48]

Evidence.[See 8 C. L. 511]—The courts will take judicial notice of the character of certain liquors,[49] and that liquor traffic in certain counties is prohibited by act.[50] There is some conflict as to whether notice will be taken as to whether local option has been put into effect in certain territories.[51]

Where the law violated applies to a particular class, the state must show that defendant belongs to such class.[52] So, also, where an unlawful sale of a certain kind of liquor is charged, the state must prove the character of the liquor.[53] The defendant must prove that he comes within an exception or proviso,[54] or that he had a

v. State, 37 Tex. Cr. R. 219, 39 SW 117. In Michigan, Missouri, Georgia, Pennsylvania, and Virginia the rule is otherwise. People v. Adams, 95 Mich. 541, 55 NW 461; People v. Whitney, 105 Mich. 622, 63 NW 765; Crouse v. State, 57 Md. 327; Slymer v. People, 62 Md. 238; Mackin v. State, 62 Md. 244; Combs v. State, 81 Ga. 780, 8 SE 318; Rauch v. Com., 78 Pa. 490; State v. Searcy, 39 Mo. App. 393; s. c., 111 Mo. 236, 20 SW 186; Thomas v. Com., 90 Va. 92, 17 SE 788. In Maryland, Virginia, and Georgia, an indictment in the ordinary form, concluding, 'contrary to the form of the statute,' etc., is deemed sufficient. The courts of these states proceed upon the theory that the fact that an election has been had making the law operative in the particular county, and the regularity of the proceedings in connection with it, including the proclamation of the result, are matters to be determined by the court, and issues upon them may not properly be submitted to the jury. In Combs v. State, supra, the court took judicial notice of the fact that the law had become operative. The supreme courts held this to be proper, and hence that an instruction to the jury that the law was operative in the county where the sale was made was correct. The same rule is recognized in Pennsylvania and Virginia. See cases cited. In Maryland, while it is held that the court may not take judicial notice of the result of the election (Whitman v. State, 80 Md. 410, 31 A 325), yet the rule is well established that the evidence touching the election proceedings is addressed to the court, and not to the jury, because it is exclusively the province of the court to ascertain and determine what the law is in order that it may instruct the jury. In Missouri and Mississippi it is held sufficient if the indictment alleges that the law has become operative by reason of an election held in pursuance of its provisions and the general election laws of the state. This is the rule in Florida, also (Cook v. State, 25 Fla. 698, 6 S 451), though the burden is upon the state to show that the law has been put in force by a valid election, which, it seems, requires proof of all the successive steps necessary to show such fact, as is the case in Kentucky and Texas."—From State v. O'Brien, 35 Mont. 482, 90 P 514.

47. Hence, sufficiency of such plea may be tested by objections to evidence. Beauvoir Club v. State [Ala.] 42 S 1040.

48. Statement of prosecuting counsel that evidence not only showed that defendant made the sale charged but that he was engaged in the liquor traffic held harmless though there was no evidence to sustain the latter part of the statement. Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 114, 101 SW 208. Remarks that defendant had been "boot-legging" liquor held error not rendered harmless by instruction not to consider where there was no evidence to sustain such remarks and defendant's character was not in issue. McKinley v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 350, 106 SW 342.

49. That **beer** is intoxicating. State v. Carmody [Or.] 91 P 446. Held not error to instruct jury that beer is an intoxicating liquor within meaning of act prohibiting sale of such liquors. State v. Moran [Wash.] 90 P 1044. That beer is a malt liquor. Lambie v. State [Ala.] 44 S 51. That **whiskey** is a spirituous or distilled liquor. State v. York [N. H.] 65 A 685. That **wine** is intoxicating. Nussbaumer v. State [Fla.] 44 S 712. Court could not take judicial notice that **"hop-ale"** or **"hop-jack"** was a malt or intoxicating liquor, the question being for the jury. Daniel v. State [Ala.] 43 S 22. Whether "hop-jack" or "hop-ale" was beer and intoxicating held question of fact for determination of court, under Acts 1892-93, pp. 15, 16. Lambie v. State [Ala.] 44 S 51.

50. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Act 1884, prohibiting liquor traffic in Perry county. Combs v. Com. [Ky.] 104 SW 270.

51. Notice not taken. State v. O'Brien, 35 Mont. 482, 90 P 514. Notice taken. Irby v. State [Miss.] 44 S 801.

52. Under Rev. St. 1897, § 3015 [Ann. St. 1906, p. 1728], forbidding wine growers to sell to minors without consent of parent or guardian, state must prove that defendant was a wine grower. State v. Gary, 124 Mo. App. 175, 101 SW 614.

53. Instruction as whole held not to place on defendant the burden of showing that liquor sold was cider, as claimed by him, and not whiskey, as charged by the state. Covington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 55, 100 SW 368. In the absence of evidence to the contrary, it may be inferred that a liquor called for and paid for as whiskey was whiskey. Tompkins v. State [Ga. App.] 58 SE 1111.

54. Under Gen. Laws 1896, c. 102, § 23, dispensing with necessity of proving negative allegation, defendant must prove that he comes within exceptions to § 1 prohibiting keeping of liquor for sale. State v. Collins [R. I.] 67 A 796. Where intoxicating liquor is proved to have been furnished to a minor,

license.[55] The burden is on the defendant to show that a local option election was invalid.[56]

As in other cases, the evidence must be relevant[57] and competent.[58] Evidence of receipt of liquors about the time of the offense charged is admissible on a prosecution for a sale,[59] and evidence that defendant took orders for liquors is admissible to show a storage of such liquors,[60] but evidence that he was a whiskey drummer and

it is incumbent upon the defendant to prove that he had written authority from the parent or guardian of such minor. Southern Exp. Co. v. State, 1 Ga. App. 700, 58 SE 67. Under Rev. St. 1899, § 3015 [Ann. St. 1906, p. 1728], proof of sale by wine grower to minor makes prima facie case, and defendant must show consent of parent, master, or guardian. State v. Gary, 124 Mo. App. 175, 101 SW 614. Fact that parents were dead and there was no master or guardian was no defense. Id. In a prosecution under the Jones Law, it is not required that the state make proof in the first instance of negative averments in the affidavit. Otte v. State, 9 Ohio C. C. (N. S.) 293.

55. Where the sale is proved, the burden is on the defendant to show that he had a license. Lambie v. State [Ala.] 44 S 51.

56. Where judge's certificate certifies the facts required by law to be certified, the burden is on one attacking the validity of the election to show that preliminary matters were not performed as required by statute. Neal v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 206, 102 SW 1139. Where orders of commissioners' court showed legal election and the result in favor of prohibition, and were sufficient to put local option into effect, it was not necessary for state to introduce parol evidence of publication or posting of **notices of election.** Id. Burden is on defendant to show that notice of the election was not properly given, and hence, though state introduced evidence on the subject, the court was not required to submit the question to the jury, where defendant introduced no evidence on such question. Id. Where state showed valid election resulting against sale, the burden was on defendant to show **prior election within two years** and that it was in favor of sale. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 60, 101 SW 1002; Id. [Tex. Cr. App.] 19 Tex. Ct. Rep. 58, 101 SW 1003. Where defendant proves that there was a prior election within two years, but did not produce complete record showing that it was valid, the court would presume in favor of the subsequent election that something happened to render the prior election nugatory. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 60, 101 SW 1002; Id. [Tex. Cr. App.] 19 Tex. Ct. Rep. 58, 101 SW 1003.

57. Since **anyone who sells to minor** without consent of parent or guardian is criminally liable under Ann. St. 1906, p. 1397, on a **prosecution against a clerk** for such a sale, evidence that his employer was a licensed dramshop keeper was irrelevant, regardless of whether clerk would be liable under Gen. St. 1905, § 3009, as amended by Ann. St. 1906, p. 1724, which is held applicable only to licensed dramshop keepers. State v. Gallagher [Mo. App.] 106 SW 111. Exclusion of evidence as to character of room charged to be **wine room** within Sess. Laws 1891, p. 315, § 1, held error, such evidence tending to show that such room was a restaurant. Ellis v. People, 38 Colo. 516, 88 P 461. Testimony of witness that he went into "his place of business," etc., held to refer to defendant's place of business. Lambie v. State [Ala.] 44 S 51.

58. Testimony that witness heard people say that whiskey could be obtained from defendant and that latter was selling it. Gorman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 876, 105 SW 200. Hearsay inadmissible to prove running of "blind tiger." Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384. On prosecution for running a "blind tiger," original express or freight books may be introduced to show that defendant received liquors consigned to him, but such fact cannot be shown, freight receipts merely showing that liquors were received by the carrier in defendant's name or by testimony of express or freight agent. Gorman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 876, 105 SW 200. Slips taken from express books held inadmissible to show receipt of liquor. Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384. Evidence held to authorize inference that defendant heard conversation and admissions made by his clerk when the latter made the sale, so as to render such conversations and admissions admissible. Lambie v. State [Ala.] 44 S 51. Secondary evidence of license is admissible after due notice on defendant to produce it and his refusal to do so. State v. Madeira, 125 Mo. App. 508, 102 SW 1046.

59. State v. Gillispie [W. Va.] 59 SE 957. Evidence of receipt of packages indicating by their markings that they contained whiskey. Bonner v. State [Ga. App.] 58 SE 1123. In the absence of a definite showing that the sale charged was made on the exact date charged, evidence that ten days before such date defendant had received an express consignment of a half barrel of whiskey was admissible. Carnes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 252, 103 SW 403. Evidence that liquors of same kind charged to have been sold were delivered to defendant at his place of business was inadmissible where there was no evidence that defendant had made sales at his place of business. Town of Brighton v. Miles [Ala.] 44 S 394. Where evidence showed straight sale in violation of local option, and minimum punishment was imposed, any error in allowing defendant on cross-examination to be questioned as to whether he had signed freight receipts for certain liquors was **harmless.** Suggs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 123, 101 SW 999.

60. On prosecution under Laws 1905, c. 64, p. 91, against one engaged in storage of liquors in local option territory, for allowing liquors to be drunk on premises, evidence that defendant took orders for liquors was admissible as tending to show that he kept the same in storage. Teague v. State [Tex.

received free samples is not admissible on prosecution under the local option law.[61] Evidence of things found upon a search and seizure is admissible on a prosecution for an unlawful keeping for sale,[62] or for conducting a liquor nuisance,[63, 64] or for a sale without a license,[65] but a search warrant and the return thereon is not admissible to show what was found on the defendant's premises.[66] The character of liquor may be proved by either direct [67] or circumstantial evidence.[68] It may be proved by expert testimony as to chemical composition,[69] or by nonexpert testimony as to its effect.[70] On such an issue testimony as to the look and taste of the liquor is admissible,[71] as is also testimony as to the conduct of persons near the place of sale.[72] Analysis of other liquors is not admissible upon an issue of the intoxicating character of a particular liquor,[73] but evidence of sales by others of the same liquor and that it was intoxicating is admissible.[74] Refusal to violate the law at other times is inadmissible in defendant's behalf.[75] Evidence of complaints of other sales by

Civ. App.] 19 Tex. Ct. Rep. 215, 102 SW 1141. On prosecution under Laws 1905, c. 64, against one engaged in storage of liquors in local option territory, for allowing liquor to be drunk in his place of business, evidence that defendant took orders for whiskey and stored it for the purchasers was admissible to show that defendant stored whiskey at his place of business where the act charged was committed. Teague v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 214, 102 SW 1142.

61. Held error to require defendant to testify as to fact that he had for some time previous to alleged sale been whiskey drummer to whom free samples were furnished in proportion to sales by him. McKinley v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 350, 106 SW 342.

62. Where there was evidence tending to show that defendant was in control of the premises, evidence that bills found there at time of his arrest for liquor and other goods apparently relating to the business were made out in his name held admissible as tending to show that he was the proprietor. State v. Ford [Kan.] 91 P 1066.

63, 64. Exhibition to jury of articles taken from place charged to be a nuisance held not error, though it was not shown that some of the bottles exhibited contained intoxicants. State v. Giroux, 75 Kan. 695, 90 P 249. Bills and accounts found in place alleged to be public nuisance are admissible against defendant charged with keeping such nuisance, without further evidence connecting him therewith, to show the kind of business conducted. State v. Corn [Kan.] 91 P 1067. Evidence that empty bottles were found in and about defendant's premises held admissible for what it was worth. State v. Collins [R. I.] 67 A 796. Held proper to admit evidence of acts and conditions between June 1 and Oct. 7, where date laid was Oct. 7. Id. No error **to allow the jury to taste** liquors siezed at the place where the unlawful keeping for sale is charged. Weinandt v. State [Neb.] 113 NW 1040.

65. Bottle of whiskey forcibly taken from defendant's person is not admissible if he was illegally arrested, but if he be legally arrested whiskey found at his residence or place of business is admissible. Smith v. State [Ga. App.] 59 SE 934. One seeing another selling whiskey without a license may arrest him without a warrant and seize the whiskey to be used in evidence. Id. It is only an unlawful search and seizure under illegal arrest that violates defendant's immunity from testifying against himself. Id.

66. Weinandt v. State [Neb.] 113 NW 1040; State v. Collins [R. I.] 67 A 796. Cannot even be used to refresh memory of officer who executed it until he has stated to court that such use is necessary. State v. Collins [R. I.] 67 A 796.

67, 68. Nussbaumer v. State [Fla.] 44 S 712.

69. Nussbaumer v. State [Fla.] 44 S 712. Where the liquor is such that the court cannot judicially notice its character, the **testimony of manufacturer** is admissible. As to character of "Hop-ale" or "Hop-jack." Daniel v. State [Ala.] 43 S 22.

70. Nussbaumer v. State [Fla.] 44 S 712. The purchaser is competent to testify as to whether the liquor purchased was intoxicating. Town of Brighton v. Miles [Ala.] 44 S 394.

71. Evidence that liquor looked and tasted like beer is admissible. Wiginton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 207, 102 SW 1124. Where expert had testified, from analysis, as to composition of liquors, showing that they were malt liquors and light beers, it was competent for witnesses familiar with beer to testify that such liquors tasted like beer. Feddern v. State [Neb.] 113 NW 127.

72. That persons who gathered on highway near premises where liquor was sold were loud and profane. Houtz v. People, 123 Ill. App. 445.

73. An analysis of other liquors purchased from defendant was not admissible where the sale charged was admitted and the only issue was as to the character of the particular liquor, the sale of which was charged. Magill v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 239, 103 SW 397.

74. Evidence that others two years previously had purchased goods of same name from same manufacturers and had handled and sold it and that it was intoxicating held admissible. State v. Gillispie [W. Va.] 59 SE 957.

75. Error to admit, on prosecution under Rev. St. 1906, §§ 4364-25, for keeping place where liquors were sold or furnished as beverages, evidence of defendant's refusal to sell or give away liquors at other times to same or different persons. State **v.** Linder, 76 Ohio St. 463, 81 NE 753.

defendant is inadmissible.[76] A sale to one person cannot be predicated upon a sale to another,[77] and where a single sale is in issue, evidence of other sales is not admissible,[78] but such evidence is admissible to show an unlawful selling and keeping for sale [79] or to prove system,[80] or defendant's identity.[80a] So, also, evidence of other transactions is usually admissible on an issue of intent on prosecution for other offenses,[81] and evidence of keeping for sale at prior dates is admissible as a basis for inference of keeping on the day charged.[82] On such a prosecution evidence of the keeping of other kinds of liquors than those charged is admissible.[83] Questions as to the admissibility of other transactions also arise on prosecution for other offenses.[84] Defendant must be connected with any acts proved.[85] Where the par-

76. Town of Brighton v. Miles [Ala.] 44 S 394.

77. Sale of whiskey to one person cannot be predicated solely upon sale of whiskey to his companion at same time. Walls v. State [Tex. Cr. App.] 100 SW 370.

78. On prosecution for selling without a license and contrary to law, evidence must be confined to a sale. Code 1896, § 5077. Guarreno v. State [Ala.] 42 S 833.

Prior to election to prosecute for a single offense the range of testimony as to other sales need not be limited. Dillard v. State [Ala.] 44 S 537. On prosecution for misdemeanor under local option law, there was no error in admitting evidence of other sales where prosecution was not required to elect upon which sale a conviction would be asked. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 20, 100 SW 953.

After such election such testimony must be limited to the exceptional cases in which and purposes for which it is admissible. Dillard v. State [Ala.] 44 S 537. Evidence of other sales is not admissible where the state elects to prosecute for a specific sale. McClure v. State [Ala.] 42 S 813. Where several sales constitute a **single transaction,** evidence of all of them is admissible though only one is specifically charged. Sales made to prosecutor and a witness who went to defendant's place to secure evidence against him. State v. O'Brien, 35 Mont. 482, 90 P 514. Error in ruling that evidence of other sales would be admitted held **harmless** where the evidence produced related only to sale charged. Rice v. People [Colo.] 90 P 1031. Evidence of prior sales of same or similar kind of liquor held not prejudicial error in trial by court without jury, it appearing that purpose of such evidence was to show kind of liquor sold. Peeples v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 719, 99 SW 1002.

79. Evidence of previous sales of same goods held admissible on prosecution for selling and offering for sale. State v. Gillispie [W. Va.] 59 SE 957. Offense is continuous and hence evidence of similar conditions before and after date named is admissible to show intent, and while such evidence must be confined to reasonable limits, such limits are usually left to the discretion of the trial judge. State v. Collins [R. I.] 67 A 796. Evidence of other sales admissible on prosecution for running **"blind tiger."** Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384.

80. On prosecution of druggist for sale by boy in his employ without prescription, evidence of other sales by defendant without prescription held not admissible to show system. Holland v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 38, 101 SW 1001. Evidence of other sales held admissible to show system according to which sale charged was made and to connect defendant with the sale, his defense being that he merely directed prosecuting witness as to how to procure the liquor. Carnes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 252, 103 SW 403.

80a. Dillard v. State [Ala.] 44 S 537. Where defendant attempts to show that he was not person who made sale which prosecution had elected to prove, evidence of other sales made at same time and place are admissible on issue of identity. Scott v. State [Ala.] 43 S 181.

81. On prosecution of railroad company, under Ky. St. 1903, § 2572, as owner of premises on which express company made sale of liquor by delivery, etc., evidence of other transactions was admissible as bearing on good faith of express company in making the delivery specified in the indictment. Louisville & N. R. Co. v. Com., 31 Ky. L. R. 683, 103 SW 349; Adams Exp. Co. v. Com., 31 Ky. L. R. 811, 103 SW 353. Where sheriff had testified that he saw the transaction between prosecutor and defendant, prosecutor's testimony that directly after the transaction he went directly across the street to where sheriff was, held admissible to identify the transaction. Henderson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 114, 101 SW 208.

82. State v. Collins [R. I.] 67 A 796.

83. Weinandt v. State [Neb.] 113 NW 1040. Where defendant was charged with keeping several kinds of intoxicating liquors, there was no prejudicial error in allowing proof of keeping of other liquors of same class, especially where court limited jury to consideration of the kinds charged. Feddern v. State [Neb.] 113 NW 127.

84. Evidence of **other gifts** of liquor to minor harmless where same evidence had been introduced by defendant. Walker v. State [Tex. Cr. App.] 100 SW 784. Where defendant testified that on day of his arrest he made more bonds than one in similar cases, there was no error in allowing him to be asked if he had not been arrested in other cases for violation of **local option law.** Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 113, 101 SW 224. Evidence that defendant sold female beer in his saloon held admissible to prove offense under Laws 1905, p. 327, of allowing **women in and about saloons.** State v. Baker [Or.] 92 P 1076.

85. On indictment for running a blind tiger, evidence that one could go to almost any closet in the town and put down money and get whiskey, was inadmissible where

ticipation or countenance of the principal is essential to his liability, evidence of instructions given to the agent is admissible.[86] In some instances the possession of a United States internal revenue license is a proper subject of inquiry,[87] and in some state such license is rendered admissible by statute.[88] Certified copies of records are admissible to prove that the local option statute was in effect in a certain county.[89] Evidence of the statements of the purchaser as to the purpose for which he wanted the liquor is admissible as bearing on the punishment,[90] but the exclusion of such evidence is harmless to the defendant where he receives the minimum punishment.[91] A question asked the prosecuting witness whether he was out looking for evidence is too indefinite to require an answer.[92]

The same degree of proof is required as in other criminal cases.[93] Sufficiency of the evidence to show violation of particular prohibitory or regulatory laws is treated in a prior section.[94] When the evidence makes a prima facie case of an illegal sale, the question of guilt is for the jury.[95] The court is not required to make the result of the case depend upon whether other sales proved by the state were of intoxicating liquor.[96] Presence of liquor in a place charged to be a nuisance where

defendant was not connected with such transactions. Gorman v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 876, 105 SW 200.

86. On prosecution under Rev. Laws, c. 100, § 50, requiring carriers to keep certain records of liquors delivered in certain class of towns. Corn v. Riley [Mass.] 81 NE 881.

87. Where, on prosecution for violation of local option law, defendant testified that he was only running a pool room and selling cigars and tobacco, it was permissible to allow him to be asked on cross-examination if he did not have an internal revenue license. Benson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 113, 101 SW 224. Where defendant and another were doing business together, it was competent to prove that latter had Federal liquor license. Suggs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 123, 101 SW 999. Since weight of evidence that defendant had taken out a Federal license depends upon the **intent** with which such license was taken out, defendant should be allowed to testify as to his intent in such regard. State v. Morin, 102 Me. 290, 66 A 650. Where offense was charged as having been committed within past two years, but United States license covered only last part of such two years, it was error to give **instruction** that possession of such license within such two years was evidence of selling, since instruction might be true and yet there be no evidence of sales between the beginning of the two-year period and the date of the United States license. White v. Com. [Va.] 59 SE 1101.

88. Revisal 1905, § 2060. State v. Dowdy [N. C.] 58 SE 1002; White v. Com. [Va.] 59 SE 1101. Under Acts 1901-02, p. 765, c. 653, relating to suppression of liquor traffic in Matthews county, defendant's possession of a United States license **may be proved by** a duly authenticated certificate of collector of internal revenue. White v. Com. [Va.] 59 SE 1101. Possession of Federal liquor license may be proved by one who has examined the internal revenue books. Suggs v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 123, 101 SW 999. Under Revisal 1905, § 2060, making possession of United States license prima facie evidence of guilt of acts authorized by such license, an internal revenue collector's list of special taxpayers, showing name of defendant as liquor dealer, date of payment and issue of certificate, is admissible. State v. Dowdy [N. C.] 58 SE 1002. Such list, being an official paper or record by virtue of Rev. St. U. S. § 3240 [U. S. Comp. St. 1901, p. 2093], is rendered admissible by Revisal 1905, §§ 1616, 1617. Id. Since officers of internal revenue department are prohibited by rules of such department from testifying as to contents of records, defendant is not deprived of constitutional right to be confronted with witnesses against him by introduction of such records. Id. There being no statute making certificate of internal revenue collector admissible, such certificate that license was issued to certain person was inadmissible to prove that defendant kept a blind tiger. Kirby's Dig. § 5144, only makes such license prima facie evidence when found in defendant's place. Peyton v. State [Ark.] 102 SW 1110.

89. Copy of order of commissioners declaring result of election and of publisher's affidavit as to publication. State v. O'Brien, 35 Mont. 482, 90 P 514.

Objection that record of county court offered to prove granting of license was "incompetent, irrelevant, and immaterial," held too general to save question for review. State v. Meagher, 124 Mo. App. 333, 101 SW 634.

90. That purchaser wanted it for sick family. Huff v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 237, 103 SW 629.

91. Huff v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 237, 103 SW 629.

92. Question asked prosecuting witness whether he was out looking for evidence held too indefinite to require answer. Lambie v. State [Ala.] 44 S 51.

93. Guilt must be proved beyond reasonable doubt. Ellis v. State [Ind.] 82 NE 758. Instruction not requiring proof beyond reasonable doubt held erroneous. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Instruction on prosecution for keeping tippling house open on Sunday held erroneous as leaving impression that it required less weight of evidence to convict than in other criminal cases. Veruki v. State, 127 Ga. 289, 56 SE 408.

94. See ante, § 4, Regulation of Traffic.

95. State v. O'Brien, 35 Mont. 482, 90 P 514.

96. Covington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 55, 100 SW 368.

liquors are kept for sale makes a prima facie case that such liquor was kept for unlawful use or sale.[97] The possession of a United States internal revenue license is given more or less probative force by the statutes of some states.[98] The testimony of special agents of the excise commissioner who have operated gambling devices in saloons in order to obtain evidence of violations of the law is not to be treated as the testimony of gamblers.[99] An order granting license is conclusive evidence of issue of license but not of its delivery to licensee.[1] Even where the court does not judicially notice that a local option statute has become effective in a particular locality, the state need not prove that the election was in all respects regular,[2] and the court, and not the jury must inquire as to whether the statute had become effective in the locality of the offense charged.[3] Review of evidence by an appellate court is confined to same limits as in other cases.[4]

Instructions. See 8 C. L. 515—The sufficiency and propriety of instructions as to particular matters are considered in a prior section.[5] Instructions must be material,[6] must be confined to the evidence [7] and the issues,[8] and must not invade the province of the jury.[9] Instructions should submit the defendant's case as well as that of the

97. State v. Giroux, 75 Kan. 695, 90 P 249.

98. Mere possession of internal revenue license is not conclusive that defendant was selling the liquors covered thereby. Denton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 952, 105 SW 199. Under Acts 1901-02, p. 765, c. 653, relating to suppression of liquor traffic in Matthews county, the possession of a United States license is made merely "evidence," and its probation value is for the jury. White v. Com. [Va.] 59 SE 1101. Revisal 1905, § 2060, making possession of United States license prima facie evidence of doing of acts authorized thereby, is not unconstitutional. State v. Dowdy [N. C.] 58 SE 1002. Under Laws 28 Leg., p. 57, c. 40, § 407a, possession of United States internal revenue license is evidence only that defendant was engaged in business covered by the license. Gorman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 406, 106 SW 384.

99. Instruction designating such agents as gamblers held erroneous. Clement v. Belanger, 105 NYS 537.

1. State v. Madeira, 125 Mo. App. 508, 102 SW 1046.

2. State v. O'Brien, 35 Mont. 482, 90 P 514.

3. State v. O'Brien, 35 Mont. 482, 90 P 514. Must determine whether result of election was duly **published.** Id.

4. Appellate court, not having evidence before it, could not pass on question whether lines and calls specified in complaint inclosed prohibited district in which sale was charged to have been made. Garonzik v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 22, 100 SW 374.

5. See ante, § 4, Regulation of Traffic.

6. Instruction making defendant's guilt dependent upon purpose of organization of corporation for which he purported to be acting where act of keeping liquors for sale was alleged to have been committed held properly refused as immaterial. State v. Collins [R. I.] 67 A 796.

7. Where on prosecution under Rev. St. 1906, §§ 4364-25, for keeping a place where liquors were sold or furnished as a beverage, there was no evidence that the room where the alleged offense was committed was anything but a store room or barroom, it was misleading to charge that the law was not intended to prevent a man from, in his own home, treating a friend to a drink of liquor, etc. State v. Linder, 76 Ohio St. 463, 81 NE 753.

8. Instructions held erroneous as failing to limit conviction to keeping of liquors specified in the information, but authorized conviction upon proof of keeping liquors generally. Weinandt v. State [Neb.] 113 NW 1040. Where on prosecution for selling intoxicating liquor as a beverage the only issue was whether the liquor sold was beer or malt, it was error to instruct on theory that a conviction might be had if the liquor was malt or any other intoxicating compound or mixture susceptible to use as a beverage or as substitute for ordinary intoxicants. State v. Seelig [N. D.] 112 NW 140.

9. Error to charge for conviction where it was questionable whether sale for which state elected to prosecute was made before or after the institution of the prosecution. Dillard v. State [Ala.] 44 S 537. Instruction that jury might infer from certain facts that defendant had knowledge of a sale by his barkeeper on Sunday held not invasion of jury's province when construed in connection with other parts of instruction. McNulty v. State [Ind. App.] 81 NE 109. Instruction that there was no evidence to warrant finding that corporation for which defendant was acting was not organized in good faith to do its charter business or that it was organized to shield defendant held properly refused as on **weight of evidence.** State v. Collins [R. I.] 67 A 796. Where issue was whether purchase from distiller was of three gallons or of the actual amount which purchaser obtained at the time of purchase, it was prejudicial error for judge to remark that he was inclined to think that it was not a sale of three gallons, that it was a sale of what the purchaser got. State v. Turner, 125 Mo. App. 21, 102 SW 599. Instruction that if jury believe that manner of sale constituted a trick or device, etc., held erroneous as **assuming fact** of sale. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326. Instruction that if jury believed that the manner in which the whiskey was disposed of was a mere trick to evade the local option law they must find defendant guilty, held erroneous as assuming fact that sale was made. Howard v.

state.[10] Where a local option election resulting in prohibition is duly proved, the court should instruct that local option was in effect.[11] Failure to give a pertinent definition is not necessarily reversible error.[12]

Punishment.[See 8 C. L. 515]—The punishment imposed for the violation of liquor laws must be such as is authorized by the statute[13] applicable to the particular violation proved,[14] and must not be excessive.[15] Several penalties are sometimes provided for the same offense.[16] Municipal charter provisions as to punishment may be invalid because in conflict with general laws.[17]

§ 7. *Summary proceedings.*[See 8 C. L. 518]—Provision is sometimes made for the seizure of liquors used in violating the liquor laws.[18]

Com., 31 Ky. L. R. 816, 104 SW 263. Instruction that question to be determined was whether defendant permitted a certain woman, "who was, in fact, under the age of 21 years," to remain in saloon held not to assume that the woman was under 21. State v. Baker [Or.] 92 P 1076.

10. Held error to refuse charge that defendant was not guilty of violating local option law if he gave the whiskey and did not sell it. Harrison v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 141, 105 SW 804. It was error to ignore in an instruction a specific contention that a particular patent medicine was not capable of being used as a beverage, where evidence was produced to sustain such contention. Mason v. State, 1 Ga. App. 534, 58 SE 139. No error to refuse to charge as to necessity of defendant's intention to make the sale charged, where evidence showed delivery of liquor following payment of money for which defendant did not thereafter regard himself as bound to return or repay. Harrison v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 718, 99 SW 1166. Where on prosecution under Laws 1905, c. 64, p. 91, against one engaged in storage of liquor in local option territory, for allowing liquor to be drunk on premises, it appeared that the act charged was done by defendant's employe, and evidence of defendant's knowledge or permission of such act was entirely circumstantial, it was not sufficient to give affirmative charge that defendant was guilty if he permitted the act, but the court should have charged also that he was not guilty, unless he knew or had reason to know of such act at the time of its commission. Teague v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 215, 102 SW 1141; Id. [Tex. Cr. App.] 102 SW 1144.

11. An instruction that local option was in effect is proper where the order putting the result of the election into force was regular and was duly published. Teague v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 215, 102 SW 1141. Not error to instruct that sale of liquor is prohibited by law in certain county instead of reading the prohibitive statute to the jury. Yancey v. State [Ga. App.] 58 SE 546. Where the county judge had made proper certificate that local option was in effect in a certain county, it was the duty of the trial judge, on prosecution for violation of local option, to inform jury that local option was in effect in such county. Carnes v. State [Tex. Cr. App.] 103 SW 934.

12. Held not reversible error to fail to define sale where there was no question under state's view as to whether transaction charged was a sale and defendant denied whole transaction. McKinley v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 350, 106 SW 342.

13. Instruction for punishment for sale in local option district by fine "and" imprisonment was error, the punishment, under Ky. St. 1903, § 2557, being by fine or imprisonment or both. Ball v. Com., 30 Ky. L. R. 600, 99 SW 326.

14. General local option law controls as to penalties for violation of act by wholesalers as against local or special acts. Stamper v. Com., 31 Ky. L. R. 707, 103 SW 286. Violation of Ky. St. 1903, § 2557, is punishable by fine or imprisonment or both, in the discretion of jury, and hence it was error to instruct that if defendant was found guilty he should be fined and imprisoned, such being the punishment for violation of § 2557b, and not for violation of § 2557. Howard v. Com., 31 Ky. L. R. 816, 104 SW 263. Laws 1903, c. 95, p. 81, does not prohibit sale or keeping for sale of fermented cider by nonlicensees, but under Pub. St. c. 112, as amended by Laws 1903, p. 123, c. 122, § 2, the sale and keeping of cider in less quantities than one barrel, with certain exceptions, and penalty therein prescribed, applies to sales, etc., by nonlicensees in license towns as well as in nonlicense towns. State v. Kidder [N. H.] 67 A 405.

15. Imprisonment for two years held not excessive where evidence showed deliberate violation of law prohibiting sales and evident intent to persist in such violation. State v. Dowdy [N. C.] 58 SE 1002.

16. Under Rev. Pol. Code, §§ 2848-2860, keeping place where liquors are sold on Sunday, is punishable as for a misdemeanor under § 14, and may also have his license forfeited and be prohibited from engaging in liquor business. State v. Gilbert [S. D.] 111 NW 538.

17. Charter provisions adopted prior to 1896, authorizing a municipality to prescribe any punishment for carrying on liquor traffic without a license, is in conflict with general laws prescribing such punishment and hence is void. Ex parte Sweetman [Cal. App.] 90 P 1069. Fact that ordinance prescribing penalty or punishment was adopted after 1896 does not validate it, since the charter authority to enact such ordinance was void. Id.

18. Where, pursuant to Acts 30th Leg. 1907, p. 156, liquors stored in local option territory are seized by officers and replevied by owner, a suit on the replevy bond, being a suit by state to declare a forfeiture, is, under Const. art. 5, § 8, cognizable only by the district **court,** but the provision of the statute attempting to confer jurisdiction on other courts is severable, and hence does not af-

§ 8. *Abatement of traffic as a nuisance; injunction.*[See 8 C. L. 516]—Where traffic in liquors is declared to be a nuisance,[19] it may be enjoined [20] at the instance of any proper party.[21] No notice of an application for a temporary injunction is necessary.[22] The same formality as to notice, however, is required by statute as in other cases.[23] Defensive matter need not be alleged by the petitioner,[24] nor is it necessary for the complainant in contempt proceedings for the violation of such an injunction to prove such matter.[25] Abandonment of the business sought to be enjoined after a preliminary injunction has been rightfully granted will not necessarily prevent a final injunction from issuing.[26] Costs, including attorney's fees, are taxable on the grant of an injunction,[27] and also in contempt proceedings for the violation of the injunction,[28] and in proceedings to enjoin the enforcement of such injunction.[29] The injunction, when granted, is in the nature of an incumbrance upon the use of the place enjoined.[30]

§ 9. *Civil liabilities for injuries resulting from sale.*[See 8 C. L. 517]—Under the various statutes a sale or furnishing of liquors [31] to certain persons or persons who

fect the validity of the rest of the act. Meyers v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 800, 105 SW 48. No **petition** is necessary to authorize a seizure under the act, jurisdiction being acquired upon filing of **complaint** as provided in § 1. Id. Complaint must allege that local option is in effect in the territory where liquors are stored. Id. Laws 1907, p. 156, c. 77, authorizing searches and seizures with relation to liquors stored in local option territory, does not deprive any one of property without **due process of law.** Ex parte Dupree [Tex.] 19 Tex. Ct. Rep. 851, 105 SW 493. Though circuit clerk is not authorized under Kirby's Dig. § 5137, to issue warrant for seizure of liquor kept in prohibited district, yet, where such liquor was seized under such a warrant and thus brought into the court's possession, the only **remedy of owner** was by way of the hearing provided for by such section, and where the result of such a hearing was against him the liquor was properly held forfeited. O'Neal v. Parker [Ark.] 103 SW 165. Owner may **replevy** as soon as liquor is seized. Id.; Meyers v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 800, 105 SW 48.

19. See ante, § 4, Regulation of Traffic.

20. Lee County Dispensary Com'rs v. Hooper, 128 Ga. 99, 56 SE 997; Town of Kirkland v. Ferry [Wash.] 88 P 1123. See Laws 1903, p. 524, c. 338. State v. Plamondon, 75 Kan. 269, 89 P 23. Under Act. Apr. 6, 1907 [Gen. Laws 30th Leg. p. 166, c. 81, § 2], **temporary** injunction may be awarded against selling without license. Barckell v. State [Tex. Civ. App.] 106 SW 190. Decree for injunction presumed proper on **review** in absence of evidence in record. Id.; State v. Jepson [Kan.] 92 P 600.

Statutes authorizing injunctions against intoxicating liquor nuisances will be liberally construed with a view of upholding and promoting their object. Acts Apr. 6, 1907 [Gen. Laws 30th Leg., p. 166, c. 81], authorizing injunction against selling without license, held not unconstitutional. Barckell v. State [Tex. Civ. App.] 106 SW 190. Provisions of Laws 1907, p. 156, c. 77, authorizing searches and seizures of liquors stored in local option territory, are severable from provisions relating to injunctions against such storage, and validity of latter is not affected by the question of validity of former. Ex parte Dupree [Tex.] 105 SW 493. Act not invalid because it authorizes injunction on unverified petitions of state officials. Id.

21. No jurisdiction where notice shows that suit was not instituted by county attorney as required by Code, § 2406. Beck v. Vaughn, 134 Iowa, 331, 111 NW 994. Fact that plaintiff's attorney was not employed by him but by another, and that others were interested in prosecution of suit, held no defense, where petitioner was duly qualified and personally conducted the proceedings as plaintiff. Rizer v. Tapper, 133 Iowa, 628, 110 NW 1038. The **motive** of the petitioner is immaterial. Id.

22. No notice of application by state for a temporary injunction in a suit for a permanent injunction is necessary. State v. Jepson [Kan.] 92 P 600.

23. Code, § 2405. Beck v. Vaughn, 134 Iowa, 331, 111 NW 994. Notice held insufficient. Id.

24. That place alleged to be nuisance was not a drug store. Town of Kirkland v. Ferry [Wash.] 88 P 1123.

25. That defendant was not a druggist. State v. Plamondon, 75 Kan. 269, 89 P 23.

26, 27. Drummond v. Richland City Drug Co., 133 Iowa, 266, 110 NW 471.

28. In **contempt** proceedings costs, including attorney's fees, may be allowed. State v. Plamondon, 75 Kan. 269, 89 P 23. Attorney's fee of $100 held not unreasonable. Id.

29. On injunction against enforcement of decree enjoining liquor nuisance, costs are properly taxed against one who was the active party securing the decree enjoined, Code, § 2412, relating to costs in suits to abate liquor nuisance having no application. Beck v. Vaughn, 134 Iowa, 331, 111 NW 994.

30. All subsequent owners, tenants, and occupants of such place must take notice of such injunction at their own peril. State v. Porter [Kan.] 91 P 1073. In prosecution of subsequent tenant or occupant of such building for contempt, no actual knowledge or notice of the injunction is essential to a conviction. Id.

31. Under Comp. Laws 1897, § 5398, giving cause of action against persons "selling, giving, or furnishing" liquors, etc., it is not essential that such persons receive compensa-

became intoxicated as a result of such sale [32] gives rise to a cause of action either in favor of specified persons [33] or any person injured by such sale,[34] or by the person who became intoxicated by reason of such sale.[35] Under some of the statutes the usual rules as to casual connection seem to obtain,[36] while under others such rules are more or less relaxed,[37] but in all cases some casual connection is essential.[38] Where the

tion or a promise of compensation or expected compensation for the liquor. Hilliker v. Farr, 149 Mich. 444, 14 Det. Leg. N. 497, 112 NW 1116.

32. Saloonkeeper not liable under Cobbey's Ann. St. § 7165, where he furnished liquor to third person who furnished it to person who became intoxicated and caused the injury complained of, where saloonkeeper did not know and had no reason to believe that the liquor was to be furnished to such person. Sullivan v. Conrad [Neb.] 112 NW 660.

33. Under Civ. Code 1895, § 3871, a father, or, if he be dead, a mother, has right of action against anyone who sells or furnishes spirituous liquors to his or her son under age, for his own use, without his or her permission. Wright v. Smith, 128 Ga. 432, 57 SE 684.

34. Gist of action by wife is loss of means of support and not personal injuries to husband. Nelson v. Nevels [Neb.] 113 NW 119. Any legal obligation to which one is subjected by reason of the sale of intoxicating liquors gives rise to a cause of action under the civil liability statutes as being a consequence of such sale, as where son became pauper and a legal charge upon his mother for support. Danley v. Hibbard, 123 Ill. App. 666. Though son had no right of support enforcible in his own name. Id. Evidence held to show that son was habitual drunkard and a charge upon his mother for support. Id.

35. Where injury was an assault by husband, evidence held to sustain verdict without considering evidence of husband which was contended to be unworthy of belief. Reisch v. Foster, 125 Ill. App. 509. Whether intoxication was proximate cause of death of plaintiff's intestate by being run over by train. Lahey v. Crist, 130 Ill. App. 152.

36. Mere fact that decedent was intoxicated and fell to ground where he perished held insufficient without proof of causal connection. Dudley v. State [Ind. App.] 81 NE 89. In suit for loss of support, a fall of plaintiff's husband while intoxicated and subsequent incapacitation cannot be considered unless latter is traceable to the traffic in liquors, but if so traceable it is provable without specific proceeding. Nelson v. Nevels [Neb.] 113 NW 119. Failure of evidence in regard to husband's fall and consequent incapacitation affected only amount of damages and not right of recovery. Id.

37. Under Code, § 2418, giving right of action to persons "injured by any intoxicated person," plaintiff in suit for injury to support by suicide of husband had only to prove that he committed suicide while intoxicated. Bistline v. Ney Bros., 134 Iowa, 172, 111 NW 422. Where court was requested to instruct that if they believed that decedent "assaulted" another and was killed by the latter in repelling the assault they must find defendant who sold the whiskey to the latter not guilty, though the latter was intoxicated, it was not error to insist the words "first wrongfully" before the word "assaulted." Reisch v. People, 229 Ill. 574, 82 NE 321. Need not be **sole cause,** but sufficient if it materially assists or contributes to habitual intoxication of son, under Dram Shop Act, § 9. Danley v. Hibbard, 123 Ill. App. 666. In instruction that it was sufficient if the liquor "materially contributed or assisted" in producing habitual intoxication, etc., the word "materially" qualified both the word "contributed" and the word "assisted." Id. Since under express provisions of dram shop act liability accrues if the furnishing of liquor shall have "caused the intoxication in whole or in part," an instruction that it must have been the "proximate cause" of such intoxication was confusing and properly refused. Hall v. Ditto, 128 Ill. App. 187.

Note: "While cases may be found in which the ordinary rule of proximate cause is spoken of as applicable to claims for recovery for injury done by an intoxicated person, there is scarcely one in which a recovery has been sustained that such rule is not ignored or treated as superseded by the statute. For instance, where the owner of a building let his property for saloon purposes, and the tenant sold liquor to a third person who became intoxicated thereon, and in such a condition abused and caused the death of a horse owned by a fourth person, the latter was permitted to recover damages from the landlord. Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323. See, also, Dunlap v. Wagner, 85 Ind. 529, 44 Am. Rep. 42. Again, where the intoxicated person undertook to drive home, and fell in such manner as to be beaten to death by the wheel of his own wagon, the wife was held entitled to recover. Mead v. Stratton, 87 N. Y. 493, 41 Am. Rep. 386. The seller has been held liable for damages suffered by reason of an assault committed by the intoxicated person. English v. Beard, 51 Ind. 489; Mastad v. Swedish Brethren, 83 Minn. 40, 85 NW 913, 85 Am. St. Rep. 446, 53 L. R. A. 803; Pickard v. Tearo, 34 Ill. App. 398; Doty v. Postal, 87 Mich. 143, 49 NW 534; McClay v. Worrall, 18 Neb. 44, 24 NW 429. Injury to the wife's means of support by the suicide of the husband while intoxicated affords a right of action. Lawson v. Eggleston, 28 App. Div. 52, 52 N. Y. Supp. 181, affirmed in 164 N. Y. 600, 59 NE 1124; Blatz v. Rohrbach, 42 Hun (N. Y.) 402. This case was reversed upon appeal, but not upon the point here referred to. In Indiana, it is held that a wife may recover damages for injury to her means of support occasioned by the imprisonment of her husband for a crime committed while intoxicated upon liquors sold him by the defendant. Homire v. Halfman, 156 Ind. 470, 60 NE 154. She may recover for an assault upon her by her husband while intoxicated. Wilson v. Booth, 57 Mich. 249, 23 NW 799; Schlosser v. State, 55 Ind. 82. So also where the injury is occasioned by the reckless driving of a horse by an intoxicated person. Aldrich v. Sager, 9 Hun (N. Y.) 538; Hackett v. Smelsey, 77

statute does not recoznize degrees of intoxication, the degree of intoxication which caused the injury is immaterial.[39] Knowledge or intent is not ordinarily an element of the cause of action.[40] A cause of action may arise for loss of support though the person to whom the liquor was sold was already an habitual drunkard.[41] The doctrine if in pari dilicto cannot usually be invoked to defeat a recovery,[42] but may be invoked in mitigation of damages.[43] Evidence of the conduct and habits of the person to whom the sale is made [44] as affected by liquor is admissible,[45] and in this connection evidence of other sales than the one charged is admissible.[46] For certain purposes only, evidence of the illegality of other sales to such person is admissible,[47] but evidence of sales to other persons is inadmissible.[48] Damages not claimed cannot be allowed.[49] In some cases both general and special damages may be recovered,[50] and also punitive or exemplary damages.[51] The question of excessiveness of dam-

Ill. 109; Mulcahey v. Givens, 115 Ind. 286, 17 NE 598. For other illustrative cases, see Boos v. Sliney, 39 NE 197, 11 Ind. App. 257; Stafford v. Levinger, 16 S. D. 118, 91 NW 462, 102 Am. St. Rep. 686; King v. Haley, 86 Ill. 106, 29 Am. Rep. 14; Peterson v. Knoble, 35 Wis. 80; People v. Brumback, 24 Ill. App. 501; Smith v. People, 141 Ill. 447, 31 NE 425; Curran v. Percival, 21 Neb. 434, 32 NW 213; McCarty v. Wells, 51 Hun (N. Y.) 171, 4 NYS 672; Bacon v. Jacobs, 63 Hun, 51, 17 NYS 323; Bodge v. Hughes, 53 N. H. 614; Fortier v. Moore, 67 N. H. 460, 36 A 369; Weick v. Lander, 75 Ill. 93. Not all of these authorities state the rule as broadly as do the cases from Michigan and New York; but the logical tendency of all is in the same direction. As already noted, there are among them opinions which profess to apply the rule of proximate cause, but in each instance the term 'proximate' is used in the sense of an originating cause, from which the injurious effect is logically traced through an intervening series of acts or events. This rule is, of course, properly applicable where the right of recovery is based upon the second clause of the civil damage statute which makes the liquor dealer liable for injury sustained 'in consequence' of the intoxication of any person. But where recovery is sought under the first clause for injury done 'by an intoxicated person' the adjudicated cases are practically unanimous that when the plaintiff has proved the unlawful sale to a person on whom she is dependent for support, and the intoxication of such person thereby produced an injury done by him while in that condition to her means of support, she has made the case for which the statute provides."—From Bistline v. Ney Bros., 134 Iowa, 172, 111 NW 422.

38. Instruction not adverting to necessity of causal connection held erroneous. James A. Dudley v. State [Ind. App.] 81 NE 89.

39. Lahey v. Crist, 130 Ill. App. 152.

40. A malicious intent to injure is not essential to the cause of action for injuries inflicted by an intoxicated person. Instruction held not erroneous. Howard v. McCabe [Neb.] 112 NW 305. Under Code, § 2394, fact that druggist who sold liquor to one addicted to use thereof was ignorant of the purchaser's habits and made sale in good faith was no defense to civil action under § 2418. Bistline v. Ney Bros., 134 Iowa, 172, 111 NW 422.

41. Under dram shop act. Leverenz v. Stevens, 124 Ill. App. 401.

42. Leverenz v. Stevens, 124 Ill. App. 401.

43. In action under Dram Shop Act, § 9, fact that plaintiff drank with her husband in defendant's saloon and gave defendant written order to let him have liquor may be considered in mitigation of damages but not as a bar to recovery. Leverenz v. Stevens, 124 Ill. App. 401. Where, in action under Rev. St 1905, c. 43, § 9, by father and mother for damages caused by sale of liquor to plaintiff's minor son, plaintiffs claimed exemplary damages, evidence that father drank with son at other saloons was admissible. Beckerlie v. Brandon, 229 Ill. 323, 82 NE 266.

44. Evidence of son that father would stop at defendant's saloon on way from work and spend most of his money held admissible in action by wife for loss of support. Hall v. Ditto, 128 Ill. App. 187.

45. Evidence that plaintiff's husband had been a drinking man for a long time, but had always supported his family until he began to drink to excess, held admissible in action for loss of support to show husband's conduct and habits as affected by liquor. Hall v. Ditto, 128 Ill. App. 187.

46. Under allegation that defendant furnished liquor to plaintiff's husband on and after a certain date, evidence of sales to him prior to such date was admissible to show the conduct and habits of her husband as affected by the use of intoxicants. Hall v. Ditto, 128 Ill. App. 187.

47. Evidence of the illegality of sales, other than the illegality upon which the action is based, is admissible only upon the issue of wantonness or recklessness in making such sales, as where sales to one addicted to using liquor to excess, the basis of the action, were made at or on prohibited hours or days. Merrinane v. Miller, 148 Mich. 412, 14 Det. Leg. N. 242, 111 NW 1050.

48. Hilliker v. Farr, 149 Mich. 444, 14 Det. Leg. N. 497, 112 NW 1116.

49. Instruction that plaintiff was not seeking to recover for money spent by her husband for liquor held not error, where there was no specific claim in declaration for such damages and no evidence thereof. Merrinane v. Miller, 148 Mich. 412, 14 Det. Leg. N. 242, 111 NW 1050.

50. Under Civ. Code 1895, § 3871, a father, or, if he be dead, a mother, may recover both special and general damages for sale to son under age. Wright v. Smith, 128 Ga. 432, 57 SE 684. Where petition alleges special damages amounting in the aggregate to the exact amount sued for, the recovery must be limited to the special damages alleged. Id.

51. Proper where sale was to plaintiff's husband with knowledge that he had been

ages depends, of course, upon the circumstances of each case.[52] In an action by a wife for loss of support, the loss of the comfort afforded her by her husband when sober cannot be considered.[53] Instructions not supported by the evidence need not be given.[54] An instruction in the language of the statute is proper.[55] Counsel should not endeavor to create prejudice against the defendant.[56] A juror is not necessarily disqualified by his prejudice against the liquor traffic.[57]

Under some of the statutes an action may be maintained on a liquor dealer's bond [58] by persons aggrieved by a sale [59] or by violation of the conditions of the bond.[60] The plaintiff in such an action must prove that defendant was a licensee.[61] Where two persons have a cause of action for the same breach, the death of one does not abate the cause of action in favor of the other.[62] Where the action is to recover liquidated damages, it is in the nature of an action to recover a penalty,[63] and the statute giving the right of action may be repealed at any time.[64]

to insane asylum as insane from drink and had been discharged as cured. Leverenz v. Stevens, 124 Ill. App. 401. Under Hurd's Rev. St. 1905, c. 43, § 9, landlord held jointly liable with saloonkeeper for exemplary damages for injuries caused by sale of liquor to boy seventeen years old. Beckerle v. Brandon, 229 Ill. 323, 82 NE 266. Peremptory instruction for exemplary damages held proper where defendant willfully and recklessly sold liquor to plaintiff's husband while he was intoxicated and with knowledge that he was drinking to excess, and at prohibited times. Merrinane v. Miller, 148 Mich. 412, 14 Det. Leg. N. 242, 111 NW 1050.

52. $3,000 damages in action by wife for loss of support of husband who was well digger addicted to excessive use of intoxicants and who earned only $300 a year, a large part of which he spent for intoxicants, held excessive, and judgment reversed unless $1,000 be remitted. Lahey v. Crist, 130 Ill. App. 152. $500 held not excessive where plaintiff's husband, to whom defendant sold liquor, assaulted plaintiff, causing her to miscarry and to suffer nervous prostration, etc. Reisch v. Foster, 125 Ill. App. 509.

53. Leverenz v. Stevens, 124 Ill. App. 401.

54. Held not erroneous as ignoring theory that plaintiff was, when injured, engaged in a friendly struggle with the person who injured him. Howard v. McCabe [Neb.] 112 NW 305.

55. Reisch v. People, 229 Ill. 574, 82 NE 321. In suit under Dram Shop Act, § 9. Danley v. Hibbard, 123 Ill. App. 666.

56. Remark of counsel that this was first case he ever knew of in which counsel for liquor dealers asked jury to go by the evidence held improper. Hilliker v. Farr, 149 Mich. 444, 14 Det. Leg. N. 497, 112 NW 1116.

57. Juror who stated that he was a prohibitionist and had prejudice against liquor traffic and men engaged therein to extent of the liquor traffic, but not against individuals, and that he could render a fair and impartial verdict in the case, held not disqualified. Ellis v. Brooks [Tex.] 18 Tex. Ct. Rep. 448, 102 SW 94.

58. In action on saloonkeeper's bond for injuries inflicted by an intoxicated person, **evidence** held to show that such person was intoxicated in defendant's saloon when injury was inflicted. Howard v. McCabe [Neb.] 112 NW 305.

Instruction as to preponderance of evidence requested in action on bond for selling to plaintiff's minor son held covered by instruction already given. Ellis v. Brooks [Tex.] 18 Tex. Ct. Rep. 448, 102 SW 94.

59. Rev. St. 1895, art. 5060g, giving right of action on bond to parties "aggrieved" by sale, includes mother of unmarried son, though she has given no notice not to sell to him. Coughtry v. Haupt [Tex. Civ. App.] 19 Tex. Ct. Rep. 940, 105 SW 516.

60. Plaintiff presumed to be aggrieved where liquor dealer allowed plaintiff's minor son to remain in saloon and sold liquor to him, contrary to law. White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 SW 1160. In action on bond for selling beer to defendant's son, failure to prove that beer was intoxicating was not fatal to recovery. Id. Variance in that bond alleged used word "spiritous" instead of "spirituous" held immaterial. Id. Evidence held to show that plaintiff's minor son was allowed to remain in defendant's saloon longer than was necessary merely to drink liquor sold to him. Id. Fact that father had occasionally allowed minor son to drink beer in his presence was no **defense** in action on bond for selling liquor to such son. Id.

61. Application for license being necessary, under Rev. St. 1895, art. 5060c, to issuance of license, a recital in the bond that an application was made is presumed to be true, where it is proved that a license was issued. White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 SW 1160. In action on bond for selling to minor, there was no error in admitting proof of license by county records, defendants being prima facie estopped by recitals of the bond to deny the license. Moniteau County v. Lewis, 123 Mo. App. 673, 100 SW 1107.

62. Where action by father on liquor dealer's bond for selling to minor son abates on account of death of father, the mother may sue on her own cause of action under the statute, giving right of action to anyone aggrieved. Ellis v. Brooks [Tex.] 18 Tex. Ct. Rep. 448, 102 SW 94.

63. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 104 SW 1011. One who voluntarily gives liquor dealer's bond, whereby he obligates himself to the state for benefit of all persons aggrieved by his violation of his obligation that he will not commit certain acts, under penalties provided by law, cannot complain that such

§ 10. *Property rights in and contracts relating to intoxicants.*[See 9 C. L. 519]—The courts will not enforce contracts of sale in violation of law,[65] but since a license to sell liquor is a personal trust, one may presume that a person whom he finds in charge of a saloon is the proprietor and licensee or his agent and may deal with him accordingly.[66] In order to invalidate a sale made in another state,[67] it must appear that the seller intended by the sale to aid the buyer in his unlawful design.[68] Where the illegality does not appear upon the face of the contract or in the plaintiff's evidence necessary to prove the same, the defendant must specifically allege such illegality.[69]

§ 11. *Drunkeness as an offense.*[See 6 C. L. 208]—Drunkenness is a statutory offense [70] and punishable as such.[71]

INTOXICATION; INVENTIONS; INVESTMENTS; IRRIGATION; ISLANDS; ISSUE; ISSUES TO JURY; JEOFAIL; JEOPARDY; JETTISON; JOINDER OF CAUSES, see latest topical index.

JOINT ADVENTURES.

The scope of this topic is noted below.[72]

What constitutes.[See 8 C. L. 520]—A joint adventure is a combination of two or more persons in a single enterprise.[73]

penalties are **excessive.** White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 SW 1160.

Judgment in action on retail liquor dealer's bond being in effect for penalty cannot allow interest. White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 SW 1160.

64. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011. Rev. St. 1895, art. 5060g, giving parties aggrieved by violation of liquor bond the right to sue thereon, **held not repealed** by Laws 1907, p. 262, c. 138, § 15. Id.; Coughtry v. Haupt [Tex. Civ. App.] 19 Tex. Ct. Rep. 940, 105 SW 516. Suit commenced prior to Act 1907 was not abated, and defense of bona fides of sale allowable by such act but not by former act, relating as it did merely to rules of evidence, was available without subjecting the Act of 1907 to the objection that it was retroactive. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011.

65. Sales without license. Moise v. Weymuller [Neb.] 110 NW 554. Note and mortgage given to secure payment of price of interest in unlawful intoxicating liquor business cannot be enforced. Singer v. McNamara [Iowa] 111 NW 925. Evidence held such as to render error a refusal to sanction petition for certiorari to **review** judgment for defendant on ground that liquor, the price of which was sued for, was sold in violation of law. Weischelbaum v. Hayslip, 127 Ga. 417, 56 SE 413.

66. Moise v. Weymuller [Neb.] 110 NW 554.

67. Under Rev. Codes 1899, § 7621, making sales of intoxicating liquor void, a sale f. o. b. cars in Minnesota pursuant to an order sent to such state was a sale in Minnesota, and hence not invalidated by the statute. Frankel v. Hillier [N. D.] 113 NW 1067.

68. Intention of seller in another state to aid buyer in North Dakota to violate Rev. Codes 1905, § 9390, prohibiting sale of liquor in North Dakota, will invalidate the sale, no matter what the method of aiding is or how slight is the aid, but mere knowledge that buyer intends to resell in violation of the statute is not sufficient to defeat an action for the price. Frankel v. Hillier [N. D.] 113 NW 1067. Sale of liquor consummated in another state not invalidated because made to a partnership formed for purpose of violating prohibition against liquor traffics, in absence of proof that seller was in some way connected with such illegal contract of partnership. Id.

69. Frankel v. Hillier [N. D.] 113 NW 1067.

70. Offensive or boisterous manifestation of drunkenness is the gist of the offense under the Georgia statute. Evidence held to sustain conviction under Acts 1905, p. 114, for being drunk within the curtilage of the private residence of another, and of making his drunken condition offensively evident. Coleman v. State [Ga. App.] 59 SE 829. Under Acts 1905, § 114, prohibiting drunkenness on public highways, the state must show that the place where the alleged offense was committed was a public highway by legislative enactment, action of proper county authorities, dedication, or prescription. Johnson v. State, 1 Ga. App. 195, 58 SE 265.

71. Under Acts 1906, No. 200, p. 210, § 8, drunkenness is punishable by imprisonment in county jail, and this being inconsistent with V. S. 5206, 5210, the latter is repealed pro tanto. Ex parte Bowers [Vt.] 66 A 713.

72. It includes rights and liabilities between parties to joint enterprises for profit. **It excludes** partnerships (see Partnership, 8 C. L. 1261), joint estates (see Tenants in Common and Joint Tenants, 8 C. L. 2114), joint contracts (see Contracts, 9 C. L. 654), and joint tort feasors (see Torts, 8 C. L. 2125).

73. Contract for manufacture and sale by defendant of logs owned by plaintiff, latter to be paid certain price per thousand for same and cost of manufacture to be deducted from proceeds of sale of lumber, net

*Rights and liabilities of parties.*See 8 C. L. 520—The relation being contractual its duration,[74] the interest of the parties in the property forming the basis of the venture[75] and the credits to which the parties are entitled thereunder,[76] are determinable from the contract creating it. Such contracts frequently provide for the payment of interest,[77] segregation of the property involved, and separate accounting,[78] and provision for repayment of moneys advanced in the event of the venture proving unsuccessful, in which case the withdrawing party must tender his interest in the undertaking.[79] The parties to a joint undertaking occupy a fiduciary relationship toward each other and must act in the highest good faith,[80] and, though not a partnership, the relative rights and duties of the parties toward each other are the same[81] and are governed by the same principles as are applied by courts of equity to partnership transactions.[82] Accordingly, a concealed profit arising out of the transaction in favor of one accrues to all.[83] It follows that one of the parties may not convert the joint property to his own use.[84] Where the contract provides a method for the settlement of the accounts of the parties, such method, in the absence of fraud,

balance to be divided equally between parties, held a joint adventure. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237. Contract for sale of mining stock under agreement to share profits and losses equally held to constitute parties joint adventurers. Jones v. McNally, 53 Misc. 59, 103 NYS 1011. Contract under which parties agreed to share receipts, expenses and profits arising out of transfer of certain property, held a joint adventure. Voegtlin v. Bowdoin, 54 Misc. 254, 104 NYS 394. Evidence held insufficient to show that plaintiff and defendants, real estate brokers, holding an option for the purchase of land, purchased same as joint adventurers and hence a concealed profit to defendants did not entitle plaintiff to impose a trust on the land. Scott v. White [Or.] 91 P 487.

74. Time held of essence of joint venture for sale of land owned by one party to the agreement, the contract fixing a definite time during which sufficient land to reimburse such party for his investment with interest should be sold and providing that the other party should be entitled to a certain commission instead of half the profits in the event of a failure to dispose of land during such period. Corbin v. Holmes [C. C. A.] 154 F 593.

75. Contract of joint venture in sale of land owned by one of the parties providing for a compensation of half the profits to the other party if sufficient land were sold during prescribed time to reimburse former for his investment with interest held not to give latter a lien on land entitling him to a judicial sale of undisposed of land to secure return to former of amount invested. Corbin v. Holmes [C. C. A.] 154 F 593.

76. Where contract for manufacture and sale by defendant of logs owned by plaintiff provided that former should be credited with "actual cost" of manufacture, the reasonable or usual cost cannot be considered. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237.

77. Contract construed and held to entitle one of the parties to interest on investment at agreed rate and also upon all disbursements made by him and to charge him with interest upon all receipts at the same rate. Corbin v. Holmes [C. C. A.] 154 F 593.

78. Contract for manufacture and sale by defendant of plaintiff's logs held not to require former to keep a separate set of books showing the transaction or to sell the property separately from mere fact that contract required logs to be separately kept and lumber separately piled. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237.

79. Under contract guaranteeing repayment of amount invested by party to joint venture upon request of such party, notice of acceptance of such provision held a sufficient tender of his interest to require repayment, the contract not providing for the purchase and sale of specific property. Delaware Trust Co. v. Calm, 107 NYS 313.

80. Neither may obtain an advantage of the other by concealment or misrepresentation. Humburg v. Lotz [Cal. App.] 88 P 510.

81. Church v. Odell, 100 Minn. 98, 110 NW 346.

82. Hence, municipal court of New York City has no jurisdiction over an action by one of the parties against the other. Voegtlin v. Bowdoin, 54 Misc. 254, 104 NYS 394.

83. Where real estate agent induced others to join with him in purchase of land representing that all stood on same footing but concealing fact that he was to receive a commission for effecting a sale, held that each of the parties to the venture was entitled to share therein proportionate to his interest. Church v. Odell, 100 Minn. 98, 110 NW 346. Where one of the parties obtained a secret commission on the purchase of property and actually contributed less than he represented to have contributed, held injured party could recover his share of the excess irrespective of financial loss on his part (Humburg v. Lotz [Cal. App.] 88 P 510), and the fact that a corporation was subsequently formed and that the injured party sold his shares therein at a profit does not affect his right to recover his share of such concealed profit (Id.).

84. Evidence held insufficient to show fraudulent conversion by defendant of substantial portion of property constituting basis of joint adventure. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237.

bad faith or mistake, must be followed,[85] and unless absolutely untrustworthy cannot be rejected.[86] Joint adventurers are liable for money advanced for their use though the means by which it was procured by a party to the venture were unauthorized,[87] and payment by one of the parties of a joint liability entitles him to credit therefor upon settlement.[88] Noncompliance with terms of the contract which results in no injury to the other parties is not actionable.[89]

Actions. See 8 C. L. 520—An action of debt cannot be maintained to recover losses sustained on a joint adventure, the fact of a loss and its amount not being conceded.[90] Evidence as to whether a party would have entered a joint venture if he had known of a secret profit obtained by a coparty is admissible.[91] The court must find upon all issues presented,[92] and the relief which may be awarded is limited to that demanded.[93]

JOINT EXECUTORS AND TRUSTEES; JOINT LIABILITIES OR AGREEMENTS, see latest topical index.

JOINT STOCK COMPANIES.[94]

A joint stock company cannot maintain an action at law in the name of the association nor in the name of its officers as trustees.[95]

JOINT TENANCY, see latest topical index.

JUDGES.

§ 1. **The Office; Appointment or Election; Qualifications and Tenure, 463.** The Acts of a De Facto Judge, 463. Salaries, 463.
§ 2. **Special, Substitute, and Assistant Judges, 463.**
§ 3. **Powers, Duties, and Liabilities, 464.** Powers During Vacation or at Chambers, 464. Powers After Term of Office, 465. Immunities and Exemptions, 465. Disability to Practice or Hold Other Office, 465.
§ 4. **Disqualification in Particular Cases, 465.** Interest and Kinship, 466. Disqualification Because of Having Been Counsel, 466. Bias and Prejudice, 466. Procedure and Trial of Fact of Disqualification, 466.

This article treats of judges as such and as distinguished from the courts over which they preside. The organization[96] and jurisdiction[97] of courts and matters common to the election, salary and tenure of officers generally,[98] are excluded.

85. Defendant's books of account held to constitute basis for settlement. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237.

86. Mere errors in book accounts held not to warrant resort to another method in settlement between parties. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237.

87. Party to venture who was also cashier of bank loaning money held to have acted as agent for his co-adventurers in procuring loan. Ijams v. Andrews [C. C. A.] 151 F 725.

88. Payment of taxes. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237.

89. Failure to keep and present vouchers for expenses and monthly statements and remittances and annual settlements resulting in no injury. Wisconsin Sulphite Fibre Co. v. D. K. Jeffris Lumber Co. [Wis.] 111 NW 237.

90. Allegation that stock was worthless held not an allegation of loss admitted by demurrer. Jones v. McNally, 53 Misc. 59, 103 NYS 1011.

91. Humburg v. Lotz [Cal. App.] 88 P 510.

92. Where in an action to recover plaintiff's share of a secret profit obtained by a coparty in the purchase of property, the court found that the parties had agreed to purchase from the owner, held a finding against an allegation in the answer that defendant was the owner of the property and agreed to sell a half interest therein to plaintiff at a certain price. Humburg v. Lotz [Cal. App.] 88 P 510.

93. Where the prayer for relief is for a money judgment only as in debt, the complaint cannot support a cause of action for accounting and contribution. Jones v. McNally, 53 Misc. 59, 103 NYS 1011.

94. See 8 C. L. 521. See, also, the related topics Associations and Societies, 9 C. L. 274; Partnership, 8 C. L. 1261. See, also, the forthcoming article on Negotiable Instruments for annotation on negotiability of joint stock association bonds exempting shareholders from liability.

95. Weir v. Metropolitan St. R. Co. [Mo. App.] 103 SW 583.

96. See Courts, 9 C. L. 839.

97. See Jurisdiction, 8 C. L. 579.

98. See Officers and Public Employes, 8 C. L. 1191.

§ 1. *The office; appointment or election; qualifications and tenure.*[See 8 C. L. 522]—The legislature has general power under most constitutions to fix the terms of judges,[99] and alter the mode of designation,[1] and provide for the filling of vacancies.[2] Where one is named to fill a vacancy ad interim until an election can be had, and he is then legally elected, he is judge without intermission.[3] Before a judge can assume full control of his office he must qualify as required by law.[4] Judges of inferior courts may be temporarily suspended and temporary appointment to vacancies made by higher courts under statutory power.[5]

The acts of a de facto judge [See 8 C. L. 523] are generally held valid,[6] and judges appointed under an unconstitutional statute,[7] or under a mistake of law by the appointive power,[8] are de facto judges. An appointment without restriction where only an interim appointment is authorized makes the incumbent a de facto judge.[9]

Salaries.[See 8 C. L. 523]—The legislature may ordinarily fix salaries and allowances,[10] subject to the usual constitutional provision that no change shall affect any judge in office at the time it is made.[11] Where a judge is a holdover until successor is elected or qualifies and the salary of successor is fixed at an increase over the incumbent, the latter can only claim his old salary.[12] A judge de facto but not de jure is not entitled to compensation.[13]

§ 2. *Special, substitute, and assistant judges.*[See 8 C. L. 524]—In case of the absence or disqualification of a judge, another judge of the same court,[14] or of another court [15] may be called in, or the parties may consent that another person pre-

99. Under its general power to provide for the election of judges, the legislature may fix the term of a temporary judge sitting until a new judge is elected. Const. art. 6, § 9. Bush v. Nye [Cal. App.] 92 P 108.

1. The legislature in most states also has power to shorten or lengthen terms. Where a change is made the incumbents remain in office until successors are elected and qualify. Court changed from appointive to elective. Drake v. Beck [Ga.] 59 SE 306.

2. Where judge dies, date of death is not to be reckoned in computing time to next election where statute provided that general election shall be held not earlier than six months after death of previous judge. Foster v. State [Ala.] 43 S 179.

3. Mayes v. Palmer, 206 Mo. 293, 103 SW 1140.

4. Bush v. Nye [Cal. App.] 92 P 108.

5. Rev. Stat. 1895, art. 3550, and Const. art. 5, §§ 15, 24, and 28. Griner v. Thomas [Tex.] 19 Tex. Ct. Rep. 680, 104 SW 1058.

6. Butler v. Phillips, 38 Colo. 378, 88 P 480; State v. Ely [N. D.] 113 NW 711.

7. Butler v. Phillips, 38 Colo. 378, 88 P 480. Particularly where no objection was made by the parties to his sitting. Louisville & N. R. Co. v. Herndon's Adm'r, 31 Ky. L. R. 1059, 104 SW 732.

8. Law created new judicial district and date of effect was in doubt. The appointee of the governor took office and quashed a writ of habeas corpus. The former judges had withdrawn from the district and later court held that the act did not go into effect until new judge was elected. Held de facto judge and acts are valid. State v. Ely [N. D.] 113 NW 711.

9. Cobb v. Hammock [Ark.] 102 SW 382.

10. Under Const. art. 8, § 20, as amended by Laws 1903, p. 71, c. 86, legislature could increase salary and cut off mileage. Marioneaux v. Cutler [Utah] 91 P 355.

11. Woods v. Bragaw [Idaho] 92 P 576; McNew v. Nicholas County, 30 Ky. L. R. 1147, 100 SW 324. Const. § 235, acts 1906, p. 443, c. 26. McCracken County v. Reed, 31 Ky. L. R. 31, 101 SW 348, Ky. Stat. 1903, § 3356. Where pay for extra services voted before judge entered upon office, held not within statute prohibiting increase during incumbency in case of police judges in cities of the third class. Gorin v. Bowling Green, 30 Ky. L. R. 1160, 100 SW 833.

12. Drake v. Beck [Ga.] 59 SE 306.

13. Money is only due for actual time served not for term appointed. Cobb v. Hammock [Ark.] 102 SW 382.

14. Usually, where there are several judges of a district, they may sit in each other's places during one's absence. Judges of civil court of New Orleans. Paulk v. State [Ga. App.] 58 SE 1109; Bolden v. Barnes, 118 La. 273, 42 S 934. Where a judge of a district court has power to try both civil and criminal cases, he may take the place of another judge with only civil jurisdiction in trial of a criminal case in the latter's court. Act July 23, 1870 (6 Laws Tex. p. 211, Rev. St. 1895, art. 1519), and Const. art. 5, §§ 8, 11. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403.

15. A judge of a city court is qualified to preside at the trial of a cause in the circuit court. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784. The fact that there are other circuit judges not disqualified trying causes in the county does not render it error to call a judge of the city court to replace a recused judge of the circuit court. Id. Where a statute provides that certain judges may on disqualification of one interchange courts, a judge of an inferior court may sit in place of a judge of a higher tribunal. Const. 1877, art. 6, § 5. "He becomes the impersonation of the superior

side,[16] though the regular judges may be holding a regular term of court in the same district.[17] Where a statute provides that where a judge is excused for interest he shall appoint a lawyer of judicial qualification, the judge cannot assign a judge from an adjoining district to try the case.[18] Where statute provides for election of a special judge in absence of regular incumbent, the question of notice necessary to interested attorneys is one which the statute usually cares for.[19] The special judge need not necessarily live in the same district if his other qualifications are proper.[20] In some cases notices of election must be given to attorneys of record before special judges can be named.[21] A special [22] or substitute [23] judge has the same powers as the regular judge, but his rights expire with his term of service.[24] The same is true where judges interchange districts by order of snpreme court justice.[25] Where because of disqualification of judges others are called in on a rehearing of case, the decision of the new court will not be reversed because it did not hear the entire case.[26] Where a judge makes an order as to allow amendment to pleadings, a succeeding judge to have right to pass on legality of such amendment, and said order was made to prevent delay, it is proper for the succeeding judge to strike out the amendment.[27] A special judge elected according to statute is a judge de jure during the time the actual judge is disqualified.[28] It is immaterial whether or not a special judge has acted on his independent judgment or consulted with the regular judge.[29] In Louisiana the substitute judge must proceed within a specified time to try the case.[30]

§ 3. *Powers, duties, and liabilities.* See 8 C. L. 526—Except in cases of substitution properly made,[31] a judge cannot act in any other court than his own,[32] nor can he, except as jurisdiction exists to issue supervisory writs,[33] control the action of another court.[34]

Powers during vacation or at chambers See 8 C. L. 526 usually extend to all pro-

court for that case during the term." Paulk v. State [Ga. App.] 58 SE 1108.

16. Where record shows consent and one attorney present when selected and no objection to special judge made until after judgment was entered, held judgment could not be set aside. Tabor v. Armstrong, 30 Ky. L. R. 938, 99 SW 957.

17. He is at least a de facto judge. Louisville & N. R. Co. v. Herndon's Adm'r, 31 Ky. L. R. 1059, 104 SW 732.

18. Act No. 185, p. 430, of 1898. Judge was defendant and he named another judge from adjoining circuit to try case. Held void, as he should have appointed an attorney from his own district. Wells v. Blackman, 118 La. 287, 42 S 939.

19. Notice unnecessary in certain cases. Code 1899, § 11, ch. 112 (§ 3630, Ann. Code 1906). Fulton v. Messenger, 61 W. Va. 477, 56 SE 830.

20. Stat. 1903, § 971. Commonwealth v. Carnes, 30 Ky. L. R. 506, 98 SW 1045.

21. Fulton v. Messenger, 61 W. Va. 477, 56 SE 830.

22. Gen. St. 1906, § 1481. May fix amount and conditions of supersedeas bond. Hathcock v. Societe Anonyme La Floridienne [Fla.] 45 S 22. May call a special term of court. Commonwealth v. Carnes, 30 Ky. L. R. 506, 98 SW 1045.

23. Right to make all proper orders in granting extension of time for preparing or presenting statements or bills of exception or filing affidavits on motion for new trial. Morris v. Lemp [Idaho] 88 P 761. May grant an appeal from decision of absent judge. Bolden v. Barnes, 118 La. 273, 42 S 934. Where after findings objections to judge were made and a new judge called in, held he could further try case and enter findings on the whole case. Everitt v. Jones [Utah] 91 P 360.

24. Judge who sat in place of another and signed bill of exceptions after term expired held no valid signing. State v. Grant, 124 Mo. App. 129, 100 SW 1113.

25. Barbe v. Ter. [Okl.] 91 P 783.

26. Green County v. Wright, 127 Ga. 150, 56 SE 288.

27. Keys v. Winnsboro Granite Co., 76 S. C. 284, 56 SE 949.

28. He may vacate a judgment of former judge to prevent an injustice. Scott v. Joffee, 125 Mo. App. 573, 102 SW 1038.

29. Before vacating an order of regular judge. Scott v. Joffee, 125 Mo. App. 573, 102 SW 1038.

30. Dismissal on pleading held trial. In re Stewart, 118 La. 476, 43 S 56.

31. See ante, § 2.

32. A judge cannot order entry of judgment in a court of higher jurisdiction than his own. Judgment entered in supreme court by order of circuit judge held void. McConnell v. Alpha Portland Cement Co. [N. J. Err. & App.] 67 A 346. A judge in Iowa holding court in one county, cannot correct records of court in another county. Williams v. Dean, 134 Iowa, 216, 111 NW 931.

33. See Mandamus, 8 C. L. 810; Prohibition, Writ of, 8 C. L. 1467.

34. Where duties are imposed on one judge of a court, another judge of that court has no power to issue a writ of mandamus to compel performance of those duties. Shreve v. Pendleton [Ga.] 58 SE 880.

visional and interlocutory matters,[35] and in some states full power is given to act during vacation on all matters not requiring trial of an action.[36] And where such rights are given by statute enforcement of obedience can also be made.[37] The jurisdiction of Federal judges for chambers business is extended to any place within his circuit without regard to the district in which cause is pending.[38] Court commissioners are by statute given chambers powers of a circuit judge in Wisconsin.[39]

*Powers after term of office.*See 8 C. L. 526—The powers of a substitute judge terminate with his term of service,[40] and those of a regular judge with his term of office,[41] his successor having full power to complete all unfinished business.[42]

*Immunities and exemptions.*See 8 C. L. 528—A judicial officer cannot be held liable for damages in a civil action for his judicial acts no matter how mistaken or erroneous they may be.[43]

*Disability to practice or hold other office.*See 8 C. L. 528—In Wisconsin the office of justice of the peace cannot be filled by county judge acting in both capacities at the same time.[44]

§ 4. *Disqualification in particular cases.*See 8 C. L. 528—Though a decision is reversed because the judge made a personal examination of premises involved, he is not thereby disqualified to sit on a retrial.[45]

A judge of one district usually cannot restrain the acts of a court of another district. Judge of one district, where cause was pending, granting injunction to restrain acts of receiver in similar action in another district, held without authority. Ray v. Trice [Fla.] 42 S 901.

35. Federal judges in the exercise of general equity powers and those given by Federal statutes have authority in chambers to make an order appointing a receiver in a pending cause or on a bill and an answer by defendant joining in the prayer for appointment. Horn v. Pere Marquette R. Co., 151 F 626. The Iowa statutes give judges in vacation the right to appoint receivers on proper showing made. Code § 3822. McKee v. Murphy [Iowa] 113 NW 499. In the various states, judges in chambers have powers to hear various forms of arguments just as they might hear them in open court. Right to dissolve a temporary injunction. Brown v. Donnelly [Okl.] 91 P 859. This is not an arbitrary power but the judge acts judicially after a hearing. May issue writs of habeas corpus, mandamus, injunction, certiorari, etc., after a hearing. Thorne v. Moore [Tex.] 19 Tex. Ct. Rep. 985, 105 SW 985. To dissolve an injunction but not dismiss a cross bill. Logan v. Ballard, 61 W. Va. 526, 57 SE 143. In Kentucky though a single judge may issue or dissolve a temporary injunction, a motion to dissolve an injunction can be argued before a whole court. Thomas v. Thompson, 31 Ky. L. R. 524, 102 SW 849. May hear not only the application for an injunction but application for temporary alimony. Edmondson v. Edmondson, 128 Ga. 53, 57 SE 308. In Georgia, court in vacation cannot sustain demurrer to an equitable petition or motion to dismiss it for want of equity. Ivey v. Rome [Ga.] 58 SE 852.

36. In re Potter [Wis.] 112 NW 1087. The Iowa Code, § 247, authorizes judge to enter decree during vacation only with consent of parties. Marengo Sav. Bk. v. Byington [Iowa] 112 NW 192. In South Carolina a judge in chambers cannot set aside a judgment on account of surprise or excusable neglect. Code Civ. Proc. 1902, § 195. Sarratt v. Gaffney Carpet Mfg. Co. [S. C.] 57 SE 616.

37. As to punish contempt for violating order made in vacation. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

38. Horn v. Pere Marquette R. Co., 151 F 626.

39. Wis. St. 1898, § 3409. May grant writs of habeas corpus. In re Potter [Wis.] 112 NW 1087.

40. See ante, § 2.

41. A judge has no power to sign an order after adjournment of term and expiration of his term of office (Waite v. People, 228 Ill. 173, 81 NE 837), though ordered to do so by his successor in office (Id.). Motion for removal of action to another county as authorized by Revisal of 1905, § 425. cannot be made out of term. Garrett v. Bear, 144 N. C. 23, 56 SE 479.

42. Upon the death of a Federal judge before whom a criminal case was tried, a successor in power, who succeeds before deceased judge could render an opinion on application for a new trial, may pass upon and overrule the motion upon his reading of official stenographic notes, and he can thereupon render a judgment. Rev. St. § 953, as am. 1900 (Act June 5, 1900, 31 Stat. 270, c. 717, § 1 [U. S. Comp. Stat. 1901, p. 696]) Meldrum v. U. S. [C. C. A.] 151 F 177. Where the trial judge dies intermediate the trial and the appeal, his successor may settle the bill of exceptions. Linderman Box & Veneer Co. v. Thompson, 127 Ill. App. 134. Where a case is tried and determined and, before appeal for new trial can be made, the judge goes out of office, his successor can hear the argument and grant a new trial. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 NW 161.

43. Mayor acting as justice of the peace. Burgin v. Sullivan [Ala.] 44 S 202.

44. State v. Jones, 130 Wis. 572, 110 NW 431.

45. Atlantic & B. R. Co. v. Cordele, 128 Ga. 293, 57 SE 493.

*Interest and kinship.*See 8 C. L. 528—A judge is disqualified by interest when his interest is apparent.[46] The interest must be more than a casual one.[47] It must be in the subject-matter of the suit and not merely to a legal question involved.[48] In Texas it has been held that a judge holding an insurance policy is disqualified for interest from trying suit in which insurance company is a party.[49] A judge, who is a citizen taxpayer and indirectly interested in city water supply, is not disqualified from trying an action involving injunction to restrain condemnation of lands for city water supply.[50] A judge whose father is first cousin to the grandfather of a defendant cannot sit at trial of defendant in Georgia.[51] Where the statute debars a judge from trial by reason of affinity or consanguinity, it must be shown that the relationship was an immediate relationship of blood.[52] A judge need not go into a minute investigation to determine his own disqualification on account of relationship to attorney.[53]

*Disqualification because of having been counsel.*See 8 C. L. 529—The question of the disqualification of a judge by reason of his having acted as counsel for either of the litigants is generally cared for by statute.[54]

*Bias and prejudice.*See 8 C. L. 529—The bias will not extend to disqualify a judge from sitting in judgment upon an attorney charged with contempt based on an affidavit of bias filed against the judge in support of a change of judges.[54a] One cannot assert bias in his own favor as a disqualification [55] but the rule is otherwise as to disqualification by kinship.[56] The rule of disqualification of judges must yield to the demands of necessity as in cases where, if applied, it would destroy the only tribunal in which relief may be had.[57] One judge having been recused, a second petition for change of trial judge will not be granted.[58]

*Procedure and trial of fact of disqualification.*See 8 C. L. 529—An affidavit filed, against a judge alleging bias, in some states makes mandatory a change of judges.[59] But proof of the bias and prejudice may be required and it is often discretionary with the court as to granting request for another justice.[60] In the absence of statu-

46. Where judge was called on to issue order to secretary of state to put certain ticket on ballot and judge was a candidate on the ticket, held disqualified for interest. Cowie v. Means [Colo.] 88 P 485.

47. Where the judge was interested in same water rights but had no part in present suit whatever, held, even though he was interested and had to weigh evidence of rights of litigants, he was not disqualified. Lassen Irr. Co. v. Lassen County Super. Ct. [Cal.] 90 P 709.

48. Judge had years before acted as counsel for one party in one of the legal matters now in controversy. Cheuvront v. Horner [W. Va.] 59 SE 964. Where judge in suit involving title to lands had been a partner of a man who proved title for former owner notwithstanding plaintiff's equity, held disqualified for interest. Priddy v. Mackenzie, 205 Mo. 181, 103 SW 968.

49. Was a mutual company and policy was for fixed sum at death or fixed sum for number of years, if living at maturity, with share of profits. New York Life Ins. Co. v. Sides [Tex. Civ. App.] 101 SW 1163.

50. La Plant v. Marshalltown, 134 Iowa, 261, 111 NW 816.

51. Civ. Code 1905, § 4045. Even though judge did not know of relationship until after the trial. Olliff v. State, 1 Ga. App. 553, 57 SE 941.

52. Husband is related by affinity to all the blood relatives of his wife and vice versa, but held, where wife of judge is a second cousin of wife of a party, not disqualified. Bliss v. Caille Bros. Co., 149 Mich. 601, 14 Det. Leg. N. 590, 113 NW 317.

53. Improper to start inquiry regarding contingent fee to be paid to one of counsel in case where he was distant kinsman of judge. Dunbar v. Wallace [Ark.] 105 SW 257.

54. Code Civ. Proc. § 170. Does not apply where advice in similar action is given to litigants not parties to this action. Lassen Irr. Co. v. Lassen County Super. Ct. [Cal.] 90 P 709. Judge having once been counsel for one party in the legal matters now in controversy, held not disqualified. Cheuvront v. Horner [W. Va.] 59 SE 964.

54a. Lamberson v. Tulare County Super. Ct. [Cal.] 91 P 100.

55. Lassen Irr. Co. v. Lassen County Super. Ct. [Cal.] 90 P 709.

56. Olliff v. State, 1 Ga. App. 553, 57 SE 941.

57. Bliss v. Caille Bros. Co., 149 Mich. 601, 14 Det. Leg. N. 590, 113 NW 317.

58. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784.

59. After affidavit was filed and trial before new judge had, held bar to affiant alleging defect in affidavit. State v. Crane, 202 Mo. 54, 100 SW 422.

60. Bias and prejudice plea was based on

tory authority on the part of a mayor who has judicial powers, to certify a case to another court for trial, he cannot be ousted of jurisdiction by the filing of an affidavit of prejudice.[61]

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JUDGMENTS.

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This topic excludes all matters relating to foreign [62] or criminal [63] judgments, and the conclusiveness of judgments [64] and the specific modes of enforcing judgments.[65]

§ 1. *Definition, nature, and classification of judgments.*[66]—A judgment is defined to be a final determination of the rights of the parties to an action.[67] It affirms that a legal duty or liability does or does not exist and cannot be granted for any other purpose.[68]

Judgments on offer, consent, stipulation or confession.[69]

Defaults and office judgments.[70]—A judgment by default cannot be rendered on a plea to the jurisdiction.[71]

Final and interlocutory judgments.[See 6 C. L. 531]—The word "final" is used of a judgment in several senses, and when used in any qualified sense that fact must

a statement in a newspaper denied by judge, with additional denial of any prejudice. Case tried and appeal on ground of refusal to turn case over to new judge. No evidence of bias found during trial. Held, no new trial necessary. People v. Wolverine Mfg. Co., 149 Mich. 580, 14 Det. Leg. N. 542, 113 NW 19; Kruegel v. Bolanz [Tex.] 18 Tex. Ct. Rep. 439, 102 SW 110.

61. Decker v. State of Ohio, 5 Ohio N. P. (N. S.) 364.

62. See Foreign Judgment, 9 C. L. 1405.

63. See Indictment and Prosecution, 10 C. L. 57.

64. See Former Adjudication, 9 C. L. 1422.

65. See Creditors' Suit, 9 C. L. 849; Executions, 9 C. L. 1328; Sequestration, 8 C. L. 1874; Supplementary Proceedings, 8 C. L. 2046.

66. See 8 C. L. 530.

This section is definite in its nature, the manner of taking and the requisites of the various kinds of judgments enumerated being treated later on in this article or in separate articles. See topics Confession of Judgment, 9 C. L. 594; Defaults, 9 C. L. 960, etc.

67. Nelson v. Schmoller [Neb.] 110 NW 658; Merritt v. Pritchard, 4 Ohio N. P. (N. S.) 571. An entry of judgment by a justice of the peace, although informal and not technically exact, is sufficient as against collateral attack, if his docket entry taken as a whole shows that he reached and entered a conclusion as a final determination of the action then pending before him. Nelson v. Schmoller [Neb.] 110 NW 658. Court's findings, orders, and decrees, to which exceptions by both parties were overruled, held judgments. Hutchins v. Berry [N. H.] 66 A 1046.

68. Merritt v. Pritchard, 4 Ohio N. P. (N. S.) 571. Special or qualified judgments, for a particular purpose, are unknown in Ohio. Id.

69. See 6 C. L. 215. See, also, Confession of Judgment, 9 C. L. 594; Stipulations, 8 C. L. 2001.

70. See 8 C. L. 531. See, also, Defaults, 9 C. L. 960.

71. Davis v. Robinson [Mo. App.] 102 SW 1048.

be kept clearly in mind.[72] A judgment which terminates and completely disposes of the action is final,[73] the test being whether an appeal lies therefrom.[74]

§ 2. *Requisites. A. In general.* See 8 C. L. 531—In order to have a valid judgment the court must have jurisdiction of the cause of action and the subject-matter thereof,[75] and except in actions in view of all necessary parties[76] who must be competent to appear in the courts.[77] Having such jurisdiction, mere irregularities of procedure do not invalidate the judgment.[78] There must be a legal service of valid process or its equivalent.[79] Personal service within the jurisdiction of the court or

72. What judgments are final for the purposes of appeal and res judicata is treated respectively in Appeal and Review, 9 C. L. 108, and Former Adjudication, 9 C. L. 1422. A judgment or decree may be final as to some things and not as to others. See topics just cited.

73. An order, "Judgment is directed nonobstante veredicto in favor of" the garnishee is not a final judgment and is not appealable. Keystone Brew. Co. v. Canavan [Pa.] 67 A 48. Judgment against a former administrator which does not dispose of the sureties who were also parties is not final and the action continues pending as to them. State v. Canterbury, 124 Mo. App. 241, 101 SW 678. An interlocutory order which practically disposes of the subject-matter of the action will not prevent the entry of final judgment. Carlson v. Koerner, 129 Ill. App. 168. Under Code Civ. Proc. §§ 1221, 1222, final judgment cannot be entered upon an order overruling a demurrer to the counterclaim where the issues of fact raised by the answer remain undisposed of. Selley v. Irish Industrial Exposition & Amusement Co., 53 Misc. 46, 102 NYS 1006. Order overruling demurrer filed with clerk but not signed by him as required by Code Civ. Proc. § 1236, held not to constitute an interlocutory judgment. Id.

74. Malone v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 255, 101 SW 503.

75. Judgment rendered by state court after removal of cause to Federal court held error not to vacate it on motion. Tomson v. Iowa State Traveling Men's Ass'n [Neb.] 110 NW 997. Judgment in excess of amount over which court had jurisdiction is void. Louisville & N. R. Co. v. Sutton [Fla.] 44 S 946.

76. In action of assumpsit judgment is properly entered against only such defendants as were served with process. Swannell v. Byers, 123 Ill. App. 545. Under Hurd's Rev. St. 1905, c. 110 (Practice Act, § 2), where a party resident in the county is made a defendant in good faith and under a reasonable belief that a cause of action exists against him, and the defendants not resident in the county appear and defend the action, the court has jurisdiction to render judgment against the nonresident defendants, even though verdict is directed in favor of the resident defendant. Lehigh Valley Transp. Co. v. Post Sugar Co., 228 Ill. 121, 81 NE 819. Under Civ. Code, § 80, where the venue of an action against several defendants is laid in the county of the residence of one of them, no judgment can be recovered against defendants not residents of the county if no recovery can be had against the resident defendant, and this section applies to actions against carriers. Louisville Home Tel. Co. v. Beeler's Adm'r, 31 Ky. L. R. 19; 101 SW 397. Where judgment is sought against a firm and a plea of privilege is sustained as to one of the partners, the court is thereafter without jurisdiction to enter judgment against the firm and such a judgment is void, the other partners being nonresidents. Ketelsen & Degeteau v. Pratt Bros. & Seay [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

77. Judgment on counterclaim after action had been dismissed for want of capacity in plaintiff to sue is void. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 SW 329.

78. Failure to comply with rule of secretary of interior requiring contestant before townsite trustees, appointed under act May 14, 1890, c. 207, § 1, 26 Stat. 109 (U. S. Comp. St. 1901, p. 1463), to deposit $32 with treasurer of board before hearing of cause, held not to affect judgment of court of general jurisdiction having jurisdiction over person and subject-matter. Thurston v. Washington, 18 Okl. 362, 90 P 16.

79. Judgment entered without service of proper summons is void. True & True Co. v. Killough, 107 NYS 27. Judgment against a substituted defendant who was never served with process is void. Ziegler v. George Schleicher Co., 107 NYS 85. Answer of garnishee, a foreign corporation, held to give court jurisdiction over it for all purposes. Hockwald v. American Surety Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181. To authorize judgment by default. Rev. St. 1895, art. 1214, requiring citation to set out nature of plaintiff's demand, must be complied with. Carlton v. Mayner [Tex. Civ. App.] 18 Tex. Ct. Rep. 873, 103 SW 411. Judgment by default held erroneous where citation described nature of plaintiff's cause of action as for hire and petition alleged cause of action for conversion and demanded judgment for a less amount. Id. Where defendant appeared on return day, denial of plaintiff's motion to open his default based on the ground that the court was without jurisdiction held error. Vessell v. Schrelber, 104 NYS 915. Direction in citation to deliver copy of original petition, and delivery thereof, held not to render service insufficient to sustain judgment, though original petition was insufficient, plaintiff having filed an amended petition and citation requiring an answer to same. Mahan v. McManus [Tex. Civ. App.] 19 Tex. Ct. Rep. 490, 102 SW 789. Evidence held sufficient to sustain finding that defendant did not have notice of pendency of action and did not appear therein. City of Dearborn v. Gann [Mo. App.] 105 SW 14. Variance between petition in action for divorce and for the adjudication of property rights, alleging ownership of separate property in plaintiff and citation averring own-

an appearance is essential to a judgment in personam.[80] It is essential that the court speak through a properly qualified judge.[81] A judgment must be supported by pleadings [82] and by valid and consistent findings [83] or verdict [84] or all the material issues, and this presupposes an issue or a default.[85] An issue being raised the judgment must be supported by proof.[86]

(§ 2) *B. Conformity to process, pleading, proof and verdict of findings.*[See 8 C. L. 534]—A judgment must conform to the process in the action, and, except where the issues have been changed by statute, agreement, or a consent decree the judgment must conform to the pleadings,[87] the verdict [88] or finding,[89] and should be

ership in plaintiff and defendant, held not to render judgment a nullity, defendant being a resident of the county. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419.

80. David Bradley Mfg. Co. v. Burrhus [Iowa] 112 NW 765. See Process, 8 C. L. 1449. Personal service on a nonresident without the state does not authorize a judgment in personam against him. Richardson v. Richardson, 134 Iowa, 242, 111 NW 934. Personal decree against a nonresident served only by publication and who has not appeared is void. Personal decree for deficiency in action to enforce vendor's lien. Sweeney v. Tritsch [Ala.] 44 S 184.

81. Judgments made by a disqualified judge are void. Bliss v. Caille Bros. Co., 149 Mich. 601, 14 Det. Leg. N. 590, 113 NW 317.

82. Judgment in favor of plaintiff and another not a party to the action is void. Houston, etc., R. Co. v. Skeeter Bros. [Tex. Civ. App.] 16 Tex. Ct. Rep. 941, 17 Tex. Ct. Rep. 538, 98 SW 1064. A decree which dismisses all pleadings in the action and at the same time adjudicates the property rights of the parties is erroneous as it leaves no pleading in the record to sustain it. Nathan C. Dow Co. v. Deist, 123 Ill. App. 364. Where in action for wrongful death name of minor son appeared as plaintiff and relationship was proved by uncontroverted evidence, clerical omission of his name in paragraph alleging relationship of other plaintiffs to deceased held not to vitiate judgment. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 18 Tex. Ct. Rep. 566, 99 SW 144.

83. No judgment can properly be rendered until there has been a finding on all material issues. Dillon Implement Co. v. Cleaveland [Utah] 88 P 670. Judgment dependent upon contradictory findings on special issues cannot be sustained. Brown Hardware Co. v. Catrett [Tex. Civ. App.] 18 Tex. Ct. Rep. 167, 101 SW 559. An opinion filed by a trial judge, on a writ of certiorari to review a justice's judgment, deciding the points raised and concluding with the statement that none of the objections were well taken and that the writ might be dismissed, held a determination upon which judgment might properly be based. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 NW 161. Judgment entered by clerk on unsigned findings held void. Rev. St. 1898, § 2894. Sackett v. Price County, 130 Wis. 637, 110 NW 821. Order overruling demurrer may be made the basis of a judgment as it is in effect a decision. Nachod v. Hindley, 118 App. Div. 658, 103 NYS 801.

84. Pressed Steel Car Co. v. Steel Car Forge Co. [C. C. A.] 149 F 182. Injunction decree entered by clerk, which was unsupported by verdict of jury or order therefor, held void on its face. Berry v. Equitable Gold Min. Co. [Nev.] 91 P 537.

85. Dickinson v. Simms, 128 Ill. App. 18.

86. Upon withdrawal of demand for relief by plaintiff, court is without power to render judgment for defendant on counterclaim interposed without hearing evidence in support of it. Balleisen v. Schiff, 105 NYS 692.

87. Hookey v. Greenstein, 104 NYS 621. Defendant is not entitled to recover offsets not pleaded in his answer. White v. Davenport [Tex. Civ. App.] 18 Tex. Ct. Rep. 463, 101 SW 1036. Decree including matters not in issue held objectionable. City of Colorado Springs v. Colorado & S. R. Co., 38 Colo. 107, 89 P 820. Plaintiff cannot recover upon a cause of action not pleaded or litigated. Dunne v. Robinson, 53 Misc. 545, 103 NYS 878. Where answer admits portion of indebtedness sued for, plaintiff is entitled to judgment for such amount and it is error to dismiss the complaint. Lobel-Andrews Co. v. P. J. Carlin Const. Co., 105 NYS 356. Judgment dismissing action on the ground of former adjudication held to dispose of all issues raised by complaint. MacArdell v. Olcott [N. Y.] 82 NE 161. In an action for waste, where the answer pleaded equitable title in the defendant and a replication pleaded legal and equitable title in plaintiff, a judgment quieting plaintiff's title was not proper. Erbes v. Smith, 35 Mont. 38, 88 P 568. Where in an action for goods, the complaint alleged only the sale and delivery of "goods, wares, and merchandise consisting of liquors, provisions, china, glassware, and cigars," a judgment based on the sale of a liquor tax certificate was erroneous. Oldmixon v. Severance, 104 NYS 1042. A judgment cannot be recovered against defendants jointly where their liability and the measure of recovery is expressly stated in the declaration to be proportional to their respective interests in certain land. Foote v. Cotting [Mass.] 80 NE 600. Where in an action for services, plaintiff's counsel, on being granted leave to amend his complaint, stated that the theory of his action was quantum meruit, plaintiff was thereby precluded from recovering on an express or implied contract fixing the value of his services, but could only recover such sum as his services were reasonably worth. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335. Where in a suit to enforce specific performance defendant denied the contract, but prayed no affirmative relief, it was error to grant a decree dismissing complainant's bill and ordering her to surrender possession of

supported by the proof,[90] though this latter has been held not essential in so far as

both the real and personal property in controversy to defendant. Johnson v. McNellis, 228 Ill. 351, 81 NE 1035. Judgment in excess of amount claimed in counterclaim held erroneous. Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20. Where plea in reconvention admits plaintiff's title to property sought to be recovered and defendant recovers damages under plea, held error to enter judgment against plaintiff denying recovery of such property. Barker v. Broadus [Tex. Civ. App.] 18 Tex. Ct. Rep. 675, 103 SW 191. Held error to allow interest on value of property destroyed where same would allow recovery in excess of amount sued for. St. Louis S. W. R. Co. v. Guthrie [Tex. Civ. App.] 18 Tex. Ct. Rep. 708, 103 SW 211. Where in trespass to try title plaintiff sought the recovery of land but petition did not show that he was entitled to a decree protecting an easement, he cannot recover on a judgment introduced in evidence establishing his right to an easement. Pouns v. Zachery [Tex. Civ. App.] 18 Tex. Ct. Rep. 687, 103 SW 234. Where in action against state officers to restrain collection of tax defendants answered praying recovery of same, the state not being a party and the answer being interposed to obtain a construction of the statute, held defendants had no such right of action for recovery of tax as to entitle them to an ordinary money judgment therefor. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481. Judgment granting prayer of petition and setting aside deed upon a cause of action, portion of which was stated in petition and remainder in reply, held erroneous as not responsive to issue. Burk v. Pence, 206 Mo. 315, 104 SW 23. Where waiver of a cause of action alleged in the complaint does not appear in the judgment roll, though referred to in opinion of court, judgment of no cause of action is improperly entered. Duclos v. Kelley, 106 NYS 1058. Decree for plaintiff on failure of defendant to perform compromise agreement on assignment for benefit of creditors held within the issues. Saulsberry v. Brown, Payne, Deaver & Co., 31 Ky. L. R. 855, 104 SW 257. Decree against person allowed to become a party but who did not avail himself of permission by filing pleadings, and as to whom no issue was tendered, held erroneous. Powell v. Crow, 204 Mo. 481, 102 SW 1024. Plaintiff in action to recover part of abandoned streets cannot recover as an abutting owner where he relied in pleadings on reversion to original owner and conveyance from him. Bothwell v. Denver Union Stockyard Co. [Colo.] 90 P 1127. Where an issue is properly pleaded and evidence is introduced tending to substantiate same, it is error to render judgment disregarding such issue. Rankin v. Trickett, 75 Kan. 306, 89 P 698. Where issue was whether transaction was an absolute sale or a purchase on memorandum, judgment permitting defendant to retain entire invoice and to pay for only a portion held erroneous. Tuttman v. Trigger, 103 NYS 724. Where instrument in form of deed was treated by pleadings as a valid mortgage, only issue being as to amount for which it was security, judgment requiring its surrender and destruction on the ground that it was champertous held erroneous as outside the issues raised. Bradt v. McClenahan, 118 App. Div. 768, 103 NYS 884. Where an assignee of a bond refused to join with other assignees in an action thereon and was therefore made a defendant, filing an answer demanding no affirmative relief against his codefendant, judgment could not be entered in his favor against the latter. Bluwett v. Hoyt, 118 App. Div. 227, 103 NYS 451.

88. Tipton v. Tipton [Tex. Civ. App.] 20 Tex. Ct. Rep. 76, 105 SW 830. Judgment referring to tract as descriptive of controverted boundary held error where no mention of same is made in the verdict. Battles v. Barnett [Tex. Civ. App.] 17 Tex. Ct. Rep. 827, 100 SW 817. Under Burns' Ann. St. 1901, §§ 573-574, court must render judgment in conformity with the verdict and special findings. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021. Where more than one issue is presented by the evidence, the court is not limited to a single finding in rendering judgment without rendering it subject to the objection that it does not conform to the verdict. Montgomery v. Montgomery [Tex. Civ. App.] 17 Tex. Ct. Rep. 1018, 99 SW 1145. Where jury brings in verdict for plaintiff less amount claimed in counterclaim it is error to enter judgment for plaintiff for the amount of the verdict less the counterclaim and for the defendant for the amount of the counterclaim as it is in effect a double charge. Treakle v. Vaughan Abstract Co. [Ark.] 103 SW 174. Where in a suit by the assignee of a judgment to set aside a conveyance as a fraudulent conveyance of land by the debtor it is determined that the conveyance was fraudulent but that the land is in the hands of a bona fide purchaser for value, the plaintiff is entitled to a decree against the judgment debtor for the balance due on the judgment with interest and costs. Briggs v. Manning, 80 Ark. 304, 97 SW 289. Where only issue in case was as to validity of note sued on and jury found for plaintiff in sum less than amount due, action of court in rendering judgment for amount actually due instead of requiring amendment of verdict, as provided by Mill's Ann. Code, § 196, held harmless. Harris v. McLaughlin [Colo.] 90 P 93.

89. See Jacquelin v. Jacquelin, 104 NYS 701. Judgment entered by clerk on disallowance of claim against decedent's estate held in accordance with order. Nichols v. Nichols' Estate [Vt.] 67 A 531. Where at conclusion of trial court orally announced that it would make certain provisions in decision and judgment thereafter to be given, failure to insert same in subsequent judgment held not to affect its validity. Gates v. Green [Cal.] 90 P 189.

90. Judgment on the merits for defendant is improperly rendered upon denial of his motion to dismiss for failure of proof, the proper judgment being one of dismissal. Eidlin v. State Bk., 107 NYS 53. A decree based entirely upon the evidence contained in a master's report and decreeing partition of property described in bill but not mentioned in master's findings, and which there was no evidence in report to sustain, held erroneous. Brixel v. Brixel, 230 Ill. 441, 82 NE 651. In a suit against master and its

the character of the relief granted is concerned.[91] While the judgment should properly conform to the relief prayed for,[92] still, at least after a contested trial, the prevailing party is entitled to any relief which the facts alleged and proved entitle him to.[93] That the judgment awards excessive relief does not render it void,[94] and it may be modified only by proceedings in the court of rendition or in equity.[95] It is sufficient if the judgment is warranted by one of several grounds.[96] As to whether a several judgment may be taken against one or more joint defendants depends upon the character of the liability,[97] as does the right to have a joint judgment against two or more defendants.[98] The failure of one asking affirmative relief to

master mechanic for personal injuries, judgment in the master mechanic's favor held not necessarily inconsistent with a judgment against the master. Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 81 NE 411, rvg. 126 Ill. App. 297. Plaintiff's evidence warranting a recovery of $150 and defendant's evidence nothing, a judgment for $75 is unsustainable. Bernstein v. Goodman, 102 NYS 751. Where in action against state officers to enjoin collection of tax the answer was by "the defendants" praying that the state recover, etc., but there was nothing to indicate intent on part of attorney general to make state a party, held state was not a party and judgment in its favor was unauthorized. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481. Held error to render judgment against carrier for failure to safely carry and deliver goods in absence of any evidence as to value of goods. Putzel v. Fargo, 103 NYS 766.

91. A judgment or decree of a court of general jurisdiction is valid and enforcible according to its tenor, notwithstanding the court may have erred in granting equitable relief where only a cause of action at law was disclosed by the proof. Smith v. Phillips, 5 Ohio N. P. (N. S.) 502.

92. General prayer for relief held insufficient to authorize court to declare a lien on property of defendant. Russell v. Deutschman [Tex. Civ. App.] 18 Tex. Ct. Rep. 896, 100 SW 1164. A complaint for divorce contained no allegations concerning property on the husband's ability to pay alimony, and prayed for divorce and general relief. A default judgment awarding allmony held not void as in excess of the relief prayed for. Cohen v. Cohen, 150 Cal. 99, 88 P 267. Judgment, in action for damages for discharging water on plaintiff's premises, requiring defendant to install gutters to prevent future injury, held proper as in conformity to prayer. Davis v. Smith, 144 N. C. 297, 56 SE 940. In a bill containing prayer for specific and general relief, the court, though not authorized to grant the specific relief, may grant such relief as it may be found, under the allegations of the bill and the proof in support thereof, the complainant is entitled to. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709.

93. McCulloch v. North Carolina R. Co. [N. C.] 59 SE 882. Mistake in prayer for specific relief does not preclude granting of such relief as allegations of pleading and facts proved warrant under prayer for general relief. Missouri, etc., R. Co. v. Murphy, 75 Kan. 838, 90 P 290. Under Burns' Ann. St. 1901, § 388, providing that where there is no answer the relief granted cannot exceed the relief demanded, applies to the amount where pecuniary relief is sought, and hence the amount of recovery is not limited by the prayer of the complaint where an answer is filed. Southern R. Co. v. Bulleit [Ind. App.] 82 NE 474.

94. Divorce decree. Cohen v. Cohen, 150 Cal. 99, 88 P 267.

95. Cohen v. Cohen, 150 Cal. 99, 88 P 267.

96. A judgment, though in terms based only on one of the grounds of demurrer, is not erroneous if any of the grounds alleged are well taken. Converse v. Aetna Nat. Bk., 79 Conn. 603, 65 A 1064. Where the jury find separately on two counts, it is not necessary that the evidence sustain both counts to uphold the judgment. Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586, 81 NE 691.

97. Under Code 1896, § 44, where defendants are sued individually and as partners for wrongful death, judgment may be rendered against a single defendant. Nevers Lumber Co. v. Fields [Ala.] 44 S 81. In an action against two defendants severally liable, judgment may be taken against one only. Doody Co. v. Jeffcoat, 127 Ga. 301, 56 SE 421. Under Burns' Ann. St. 1901, §§ 577-579, plaintiff in an action on contract against more than one defendant is entitled to judgment against a single defendant against whom a cause of action is proved, notwithstanding complaint alleged joint liability. Brandt v. Hall [Ind. App.] 82 NE 929. On a declaration charging joint negligence on the part of two corporations and on a verdict finding joint liability, the court, on the motion of plaintiff for judgment against one alone, may enter judgment against that one and dismiss the action as to the other. Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 NE 136. Under Mill's Ann. Code, §§ 222, 223, in suit on contract alleged to have been entered into by several defendants, where proof sustains contract except that liability of only one or more defendants is established, judgment may be rendered against such defendants and in favor of defendants against whom no liability is shown. Duncan v. Capehart [Colo.] 90 P 1033. In actions ex delicto plaintiff may recover judgment against one or both of two defendants sued jointly. St. Louis, etc., R. Co. v. Noland, 75 Kan. 691, 90 P 273. In action on a joint and several contract against two defendants, only one of whom answers, no objection being made to proceeding with trial against answering defendant only, held under Code Civ. Proc. § 579, court was authorized to enter judgment against him alone. Bell v. Adams, 150 Cal. 772, 90 P 118.

98. Held error to award joint judgment where contracts sued on imposed only an

appear and establish his rights has merely the effect of a nonsuit and does not entitle the other party to affirmative relief on the issue so raised.[99] The granting of a motion to dismiss a complaint being in effect a nonsuit, a judgment on the merits as improper.[1] Where the court has no jurisdiction, the proper judgment is one of dismissal for want of jurisdiction or without prejudice.[2] Where two demurrers are interposed to a complaint, the court should render but one decision and one judgment.[3] Since the filing of an amended petition amounts to the withdrawal of the original, plaintiff cannot recover upon the cause of action set out in the original petition.[4] If the complaint can be construed as to uphold judgment, such construction must be adopted.[5] Until an order is made setting aside the verdict or rendering judgment for the party against whom a general verdict has been rendered upon answers to interrogatories, it is the court's duty to follow the general verdict by judgment in conformity therewith without motion.[6]

Judgment non obstante.[See 8 C. L. 533]—Where it conclusively appears that the verdict is contrary to the evidence, the trial court is frequently warranted in rendering judgment non obstante.[7] Mere insufficiency of the evidence is not enough.[8] A judgment notwithstanding a verdict will not be granted in every case where a directed verdict is erroneously denied. It is only when there is no reasonable probability that the defects in proof or pleading necessary to sustain the verdict can be remedied on another trial that such judgment will be ordered.[9] Irreconcilable conflict between general verdict and special finding is ground for judgment for defendant notwithstanding the general verdict for plaintiff.[10] The evidence being conflicting, a judgment non obstante will not be granted,[11] the defeated party

individual obligation. Johnson v. Eversole [Ky.] 104 SW 1026.

99. So held as to issue raised by intervenors in foreclosure action. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 188 N. Y. 38, 80 NE 568; afg. 116 App. Div. 78, 37 Civ. Proc. R. 359, 101 NYS 241.

1. The granting of a motion to dismiss a complaint being in effect a nonsuit, a judgment on the merits is improper. Molloy v. Whitehall Portland Cement Co., 116 App. Div. 839, 102 NYS 363.

2. A general judgment for defendant is erroneous. Maxwell v. Federal Gold & Copper Co. [C. C. A.] 155 F 110.

3. Pritz v. Jones, 117 App. Div. 643, 102 NYS 549.

4. Ingwerson v. Chicago & A. R. Co., 205 Mo. 328, 103 SW 1143. Amendment of complaint in action on contract so as to make same on quantum meruit held to preclude recovery on the contract. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335.

5. San Gabriel Valley Bk. v. Lake View Town Co. [Cal. App.] 89 P 360.

6. Masterson v. Southern R. Co. [Ind. App.] 81 NE 730.

7. Evidence held insufficient to support defense of compromise and settlement and to justify the court in ordering judgment for plaintiff non obstante. Wright v. Lynch, 102 Minn. 96, 112 NW 892. The facts negativing an implied warranty and the jury finding there was no express warranty, a judgment non obstante held properly refused. Logeman Bros. Co. v. R. J. Preuss Co., 131 Wis. 122, 111 NW 64. Where a material issue raised by a good plea is determined by the jury upon the evidence, a judgment non obstante veredicto cannot properly be rendered. Goedecke v. People, 125 Ill. App. 645.

8. Judgment non obstante veredicto cannot properly be rendered for mere insufficiency of the evidence to sustain a material issue raised by a good plea. Goedecke v. People, 125 Ill. App. 645. Judgment non obstante cannot be awarded on the ground of the insufficiency of the evidence to establish a cause of action. Kirk v. Salt Lake City [Utah] 89 P 458.

9. Kerr v. Anderson [N. D.] 111 NW 614.

10. General verdict that plaintiff was entitled to recover at common law held irreconcilable with special finding that injury was due to neglect of statutory duty by defendant. Bemis Indianapolis Bag Co. v. Krentler, 167 Ind. 653, 79 NE 974.

11. Where the evidence required submission of the question whether a servant had assumed the risk or was guilty of contributory negligence, it was error on a verdict for plaintiff to enter judgment non obstante. Johnson v. Atwood Lumber Co. [Minn.] 112 NW 262. Where reasonable minds might differ as to whether work which servant was ordered to do was imminently dangerous, judgment non obstante cannot be ordered. Withiam v. Tenino Stone Quarry [Wash.] 92 P 900. Where right to recover depends upon disputed questions of fact and the inferences to be drawn therefrom, the court is without power to order judgment for defendant non obstante veredicto. Ackley v. Bradford Tp., 32 Pa. Super. Ct. 487. Act April 22, 1905 (P. L. 286), does not change the rule. Bond v. Pennsylvania R. Co. [Pa.] 66 A 983.

being relegated to a motion for a new trial.[12] Questions cannot be raised for the first time on the motion for judgment non obstante.[13] The motion must precede the rendition or entry of judgment on the verdict.[14] Upon denial of the motion it is proper to move for a rehearing and for an order setting aside the former order.[15]

§ 3. *Arrest of judgment.* See 8 C. L. 538—The grounds for the procedure on, and the effect of a motion for an arrest of judgment, are treated elsewhere.[16]

§ 4. *Rendition, entry, and docketing.* See 8 C. L. 538—Judgment cannot properly be rendered until all material issues have been disposed of by the finding.[17] Where one defends in two capacities, judgment may be entered against him in one, while the issues in the other are undetermined.[18] A judgment should be rendered within the time authorized by law,[19] though the requirements thereof may usually be waived by the parties.[20] Where the cause of action survives the rendering of judgment after the death of the plaintiff is a mere irregularity.[21] Under the statutes of some states the findings, conclusions, and decree may be made simultaneously.[22] Notification of counsel before rendering the decision is not essential,[23] unless a continuance has been granted.[24] It is not necessary for the order to contain the exact language of the entry of judgment to be made. The clerk is supposed to understand the order with reference to the case and to make the entry in proper form.[25] Prior to entry the court, by the judge making the order or his successor, may correct the same,[26] but a full and complete entry being made, the court is without power to treat it as ineffective.[27]

Form and contents. See 8 C. L. 539—The judgment must describe the subject-

12. In such case motion for a new trial is the proper remedy. Bond v. Pennsylvania R. Co. [Pa.] 66 A 983.

13. Where in a suit to recover a preferential payment by a bankrupt defendants did not raise the point that another was interested in the fund as the bankrupt's partner by plea in abatement, affidavit of defense, or notice of special matter, it is too late to raise the question for the first time on a motion for judgment non obstante. Speckman v. Smedley Bros., 153 F 771.

14. Ex parte Dean [Ala.] 45 S 152. A motion for judgment on the general verdict and answers to interrogatories must be made before the court renders judgment for the opposing party on the interrogatories without exception. Masterson v. Southern R. Co. [Ind. App.] 81 NE 730.

15. Sim v. Rosholt [N. D.] 112 NW 50.

16. See New Trial and Arrest of Judgment, 8 C. L. 1153.

17. Everitt v. Jones [Utah] 91 P 360.

18. Where party defends as executor and individually as devisee of the maker of a note and mortgage, and files same answer in both capacities, judgment may be rendered against him as executor while demurrer to the other answer is still pending. Mosnat v. Uchytil, 129 Iowa, 274, 105 NW 519.

19. A judgment rendered in vacation is void. Jaqua v. Harkins [Ind. App.] 82 NE 920. Consent decree entered in vacation held void, there being no order in term authorizing same and Civ. Code 1895, §§ 4323 et seq., not having been complied with. Sapp v. Williamson, 128 Ga. 743, 58 SE 447.

20. By consent of the parties a judgment in a term case may be rendered after the term. Comp. St. 1903, c. 20, § 7, construed. Hayward v. Fisher [Neb.] 110 NW 984. A rule prohibiting rendition of judgment within two days of the close of the term may be waived by the parties. Rendition one day prior to close of term held waived where defendant stood by and made no protest. Rowe v. Gohlman [Tex. Civ. App.] 17 Tex. Ct. Rep. 40, 539, 98 SW 1077.

But see Sapp v. Williamson, 128 Ga. 743, 58 SE 447, where a consent decree entered in vacation was held void.

21. Foreclosure decree. Wardrobe v. Leonard [Neb.] 111 NW 134. In an adversary proceeding where a party seeks to recover, a judgment or decree rendered after the death of one of the parties does not render it void or subject to collateral attack. Hotchkin v. Bussell [Wash.] 89 P 183.

22. Code Civ. Proc. §§ 1115, 1116, construed. Gans & Klein Inv. Co. v. Sanford, 35 Mont. 295, 88 P 955.

23. So held where a demurrer was heard and the decision reserved. Morrison & Trammell Brick Co. v. McWilliams, 127 Ga. 159, 56 SE 306.

24. Rendition of decree for plaintiff without notice to defendant after entering order of continuance held error. Hayes v. Kirby [Ark.] 103 SW 1152; Simmons v. Kirby [Ark.] 103 SW 1153.

25. Nichols v. Nichols' Estate [Vt.] 67 A 531.

26. Where on the determination of a writ of certiorari the court directed the entry of a judgment not authorized by statute, and judgment was not entered by the clerk under Comp. Laws, § 10,269, the successful party was entitled to apply to the judge who heard the writ or his successor for the entry of the proper judgment. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 NW 161.

27. See next section.

matter with certainty.[28] In a judgment for money the sum must be specified in words or figures with some mark or character designating the precise sum.[29] That the decree fails to mention the names of the prevailing parties does not affect its validity, the names being ascertainable from the record.[30] So, too, suit against one by a wrong name will not avail after appearance and answer.[31] Clerical mistakes will be disregarded.[32] A decree overruling demurrer to bill need not recite facts essential to sustain it.[33] A judgment against plaintiff prior to a hearing on the merits should be without prejudice.[34] In an action at law for the recovery of money where there is but one count in the petition and one in the counterclaim filed, there can be but one judgment.[35]

Entry, docketing, and recording. See 8 C. L. 549—A judgment, on conclusions of law as well as on findings of fact,[36] must be entered upon the judgment record of the court,[37] and failing to be so entered it is not enforcible.[38] There is a distinction between the rendition and the entry of judgment, the former being a judicial act which must be performed while the court is in session, while the latter is a mere ministerial act which may be performed at any time provided the record is afterwards examined, approved, and signed by the judge.[39] The right to have judgment entered is an absolute one[40] and may be enforced by mandamus.[41] To authorize

28. A patent is sufficiently identified in a decree by giving the number and name of the patentee, and the decree is not rendered void for uncertainty because the description of the invention is not given in the language of the title head of the patent, which is merely used for the purposes of classification in the patent office. Maginn v. Standard Equipment Co. [C. C. A.] 150 F 139.

29. Omission of word "dollars" or character indicating it renders judgment void for uncertainty. Boyne v. Vandalia R. R. Co. 128 Ill. App. 191.

30. Dixon v. Hunter, 204 Mo. 382, 102 SW 970. A judgment in favor of one party by name "et al" does not operate to annul the judgment as to thp arties not named, they never having been eliminated as parties to the action. Garrigan v. Huntimer [S. D.] 111 NW 563.

31. Where corporation appears and answers in name by which it was sued and did business, it cannot question the validity of a judgment entered against it in that name though it had previously changed its name. Robbins v. Midkiff [Tex. Civ. App.] 18 Tex. Ct. Rep. 477, 102 SW 430.

32. Where in copying verdict into judgment question answered "yes" was written "no," held a clerical mistake which did not invalidate judgment. Moore v. Woodson [Tex. Civ. App.] 17 Tex. Ct. Rep. 364, 99 SW 116.

33. All material averments are admitted by demurrer. Joseph N. Eisendrath v. Gebhardt, 124 Ill. App. 325.

34. Default judgment against plaintiff upon failure to proceed on denial of adjournment should be without prejudice to a new action. Burnstine v. Reddy, 107 NYS 626.

35. Rev. St. 1899, § 726. Dunnevant v. Mocksoud, 122 Mo. App. 428, 99 SW 515.

36. Comp. Laws, §§ 10,260, 10,261, 10,297, require the entry of judgment by the clerk on a decision of questions of law as well as on findings of fact. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 NW 161.

37. The appearance docket is not the judgment record book required to be kept under Code, § 288, subd. 1, and in which entry of judgment must be spread. Thompson v. Great Western Acc. Ass'n [Iowa] 114 NW 31. Judgment entered on sustaining demurrer to complaint and striking out portions thereof, plaintiff electing to stand thereon, held a final judgment and hence required by Code Civ. Proc. § 668, to be entered in judgment book and not sufficient where entered on minutes of court under § 58, relating to dismissals. Wood, Curtis & Co. v. Missouri Pac. R. Co. [Cal.] 92 P 868. B. & C. Comp. § 921, requiring business of county court to be docketed and disposed of in a certain order, and to be entered and kept in certain books, held directory merely and an order or judgment of the court entered in any of its books of record is valid. State v. MacElrath [Or.] 89 P 803.

38. An entry in the judge's calendar is a mere order for judgment and there is no enforcible judgment until an entry thereof has actually been spread upon the judgment record of the court. Thompson v. Great Western Acc. Ass'n [Iowa] 114 NW 31.

39. Where judgment was rendered in open court two days prior to end of term in presence of attorneys and parties, subsequent entry after adjournment of term under agreement of parties as of date of rendition held valid, same being approved and signed by trial judge and on third day of next term reread in open court and approved. Jaqua v. Harkins [Ind. App.] 82 NE 920.

40. Under Code Civ. Proc. § 1774, as amended by Laws 1902, ch. 364, p. 951, and Laws 1905, ch. 537, p. 1205, postponing entry of final judgment of annulment of marriage three months after decision, upon failure of defendant to comply with terms imposed on opening default within that time, court is without power to deny entry of final judgment. Bernzott v. Bernzott, 107 NYS 424.

41. Mandamus lies to compel the clerk to enter judgment after an order therefor has been made. Oliver v. Kootenai County [Idaho] 90 P 107.

entry by the clerk there must be a judgment rendered by the court.[42] The judgment must not be prematurely entered,[43] the entry of judgment pending the consideration of the case by the court being erroneous,[44] though not rendering it a nullity.[45] There being no issue for trial, judgment may be entered,[46] but a final judgment should not be entered the day a default is made.[47] A money judgment may be entered over twenty years after its rendition, the presumption, if any, of its payment being rebutted.[48] In some states a notice of entry is required.[49] A judgment cannot be entered in the name of a deceased party.[50] After the record has been extended, docket entries cannot be considered a part thereof.[51] In order to be effective for the purpose of a lien, a judgment must be properly indexed.[52] Mere delay in docketing the judgment will not ordinarily deprive the judgment creditor of the benefit of the lien when the judgment is properly docketed.[53] Rules providing that where a judgment is not entered on a verdict it shall be considered as entered on the last day of the term are applicable only to verdicts which are sufficient to support a judgment.[54] Clerical mistakes in making the entry may be corrected on motion.[55]

Nunc pro tunc entries. See 8 C. L. 541—A person interested in the proceeding of a court of record may appear before the court at any time and ask to have the journal of the court made correct and complete as of the date such record should have been made, and the court should entertain and hear such motion upon notice given to those adversely interested,[56] and upon a proper showing the court may correct its record nunc pro tunc at a subsequent term [57] or pending an appeal.[58] Be-

42. Kansas City Pump Co. v. Jones [Mo App.] 104 SW 1136.

43. Judgment on plea to jurisdiction held not prematurely entered, summons being served 30 days before first day of term on which it was returnable, and on motion for change of venue being granted transcript being filed in court to which venue was changed ten days before the first day of term. Davis v. Robinson [Mo. App.] 102 SW 1048.

44. Judgment of dismissal without disposing of motion to refer to a commissioner, after a continuance had been granted, and without notice, held error. Samples v. Rankin, 30 Ky. L. R. 845, 99 SW 908.

45. Entry of judgment before motion for new trial and in arrest had been disposed of does not nullify it as the judgment does not become final until their disposition. Warren v. Chicago, etc., R. Co., 122 Mo. App. 254, 99 SW 16.

46. Where defendant's answer has been stricken and he has elected not to amend, judgment may be entered. Need not pass on motion for security of costs. Pilant v. Hirsch [N. M.] 88 P 1129.

47. Oakdale Heat & L. Co. v. Seymour [Neb.] 110 NW 541.

48. Held rebutted by moving papers of judgment debtor's stating that nothing had been paid. Puls v. New York, etc., R. Co., 54 Misc. 303, 104 NYS 374.

49. A notice entry of an interlocutory judgment held sufficiently show that the judgment was entered in the office of the clerk of the city court of the city of New York. Fourteenth Street Bk. v. Strauss, 54 Misc. 588, 104 NYS 956. An objection to the notice of entry of an interlocutory judgment, in that the cover when folded concealed the notice of entry, held frivolous. Id. Notice of entry of judgment in city court of New York reciting that judgment was "entered herein in the office of the clerk of the court within named" held sufficient. Leer v. Wormser, 52 Misc. 455, 103 NYS 562.

50. Young v. Davidson, 129 Ill. App. 657.

51. City of Cambridge v. Foster [Mass.] 81 NE 278.

52. Judgments are not a lien on real estate of debtor as against subsequent bona fide purchase without notice unless properly indexed. Citizens' Bk. of Stanton v. Young [Neb.] 110 NW 1003. Judgment against "Alex Simon" held no notice as against purchasers of real estate of "Simon Alexander." Id.

53. So held under B. & C. Comp. § 205, providing that "immediately" after entry of judgment the clerk shall docket same. Budd v. Gallier [Or.] 89 P 638.

54. Circuit Court rule 16, so construed. Pressed Steel Car Co. v. Steel Car Forge Co. [C. C. A.] 149 F 182.

55. Clerk failing to enter the judgment as of the proper date, either party may on motion have the same corrected. Greazel v. Price [Iowa] 112 NW 827.

56. Board of Comr's of Day County v. Kansas [Okl.] 91 P 699.

57. May correct judgment of dismissal so as to make it conform with the motion. Bernard v. Abel [C. C. A.] 156 F 649.

58. Where court directed verdict in favor of one of two defendants and jury brought in verdict against the other whereupon court rendered judgment against it but did not dispose of the other defendant, held that after appeal the court had power to amend the judgment nunc pro tunc so as to make it conform to the verdict. El Paso & N. E. R. Co. v. Campbell [Tex. Civ. App.] 18 Tex. Ct. Rep. 593, 100 SW 170.

fore the entry nunc pro tunc of an order or judgment may be made, it must appear that there was a failure to record an order as judgment which the trial court intended as the disposition of the question considered.[59] An order nunc pro tunc will be made only in the furtherance of justice, and will not be allowed for the entry of an order announced when the evidence shows that the order was vacated by the court at the term of rendition.[60] The fact that the motion to modify is not made on as many days' notice as the rules of the court require for ordinary motions does not render the modification erroneous.[61] Where the default was that of the court or its officers, it is the duty of the court to make its record complete at any subsequent date when the default is called to its attention without the formality of a motion.[62] As a general rule the power to correct by nunc pro tunc entries extends only to clerical misprisions [63] and should be distinguished from the other amendatory powers of the court.[64] The power is a judicial one and cannot be exercised by the clerk.[65] Generally a judgment nunc pro tunc relates back to the time when it should have been entered and completes the record [66] except as to intervening rights.[67] One may become estopped to oppose the entry nunc pro tunc.[68]

Contents of the judgment roll See 8 C. L. 542 is largely statutory.[69]

Filing transcripts in other courts or offices. See 8 C. L. 542—In most states the judgment of an inferior court becomes the judgment of a superior court from the date of the filing of the transcript therein.[70] Cases dealing with the sufficiency of "certificates" are shown in the notes.[71]

§ 5. *Occasion and propriety of amending, opening, vacating, or restraining enforcement. A. Before finality.* See 8 C. L. 543—During the term or until the judgment has became a finality,[72] the court has the inherent,[73] exclusive, plenary [74]

59, 60. Central West. Inv. Co. v. Barker Co. [Neb.] 112 NW 291.

61. Bernard v. Abel [C. C. A.] 156 F 649.

62. Day County Com'rs v. Kansas [Okl.] 91 P 699. The court on motion of any person interested or on its own motion may correct its records nunc pro tunc. Id.

63. Although a judgment may not be entered on the verdict at the proper time, the court may allow this to be done nunc pro tunc at a later date on proper application made. Walden v. Walden, 128 Ga. 126, 57 SE 323. Where by misprision of clerk judgment was not entered of record at term of its rendition at a subsequent term, same may be ordered entered nunc pro tunc. Snyder v. Sherrell [Ind. T.] 103 SW 756. The circuit court, having by mistake included in its order affirming an order of the county court matters not before the court, held on vacation of same to have properly entered a new order nunc pro tunc. In re Skelly's Estate [S. D.] 113 NW 91.

64. See post, § 5.

65. The clerk neglecting to enter judgment pursuant to the direction of the court during the term, he had no power thereafter to enter judgment nunc pro tunc. Pressed Steel Car Co. v. Steel Car Forge Co. [C. C. A.] 149 F 182.

66. Walden v. Walden, 128 Ga. 126, 57 SE 323. A court finding it necessary to amend its record in the interest of truth, the amendment should be made as of the day of the first decision. Ashaway Nat. Bk. v. Super. Ct. [R. I.] 67 A 523. The entry of judgment nunc pro tunc is restrospective in its operation and has the same effect as if entered at the time of rendition, except as to intervening rights. Davidson v. Richardson [Or.] 91 P 1080.

67. Holder of inchoate right of dower in land who has parted with nothing in reliance on record held not injuriously affected by entry of judgment nunc pro tunc. Davidson v. Richardson [Or.] 91 P 1080.

68. Where both parties to divorce proceedings remarry in belief that decree had been entered, neither can subsequently object to an entry of the decree nunc pro tunc. Scase v. Johnson, 130 Ill. App. 35.

69. Idaho: Under Rev. St. 1887, § 4456, on default the judgment roll consists of the summons, proof of service, complaint, with memorandum endorsed thereon that default of defendant in not answering was entered, and a copy of the judgment and the fact the service was by publication does not require the affidavit and order for publication to be made part thereof. O'Neill v. Potvin [Idaho] 93 P 20.

70. So held under Code, § 4538. Miller v. Rosebrook [Iowa] 113 NW 771. Under Hurd's Rev. St. 1905, c. 79, § 135, a judgment of a justice of the peace becomes the judgment of the circuit court from the date of the filing of a transcript therein. Young v. Zacher, 226 Ill. 327, 80 NE 945.

71. Certificate that transcript is a correct copy of "judgment lien docket" while such record is denominated "judgment docket" in B. & C. Comp. § 584, held sufficient, it appearing that it was made in a book in which judgments and decrees of circuit court were docketed and that it contains information required to be entered in judgment docket. Budd v. Galliher [Or.] 89 P 638.

72. A decree in a partition suit adjudging

power, in the exercise of its judicial discretion, to vacate, alter, revise, or amend [75] the judgment for clerical, judicial or other errors,[76] and this power is not taken away by statutory provisions regulating the granting of new trials and the setting aside of default.[77] Though, except where the verdict has been procured by fraud,[78] an exception has been made where the judgment is based on a verdict and the motion is based on defects not appearing of record.[79] Opening a judgment and striking it are two entirely different things.[80] No court has power to strike off a judgment regular on its face.[81] The courts differ as to the trial court's power over the judgment during the term and after the determination of an appeal.[82] There being no terms in the bankruptcy court, it has full power to re-examine its orders upon timely application in an appropriate form.[83] An exercise of the power will not be disturbed in the absence of an abuse of discretion.[84] Where a motion to vacate a judgment is filed during the term, the fact that the hearing thereon was

the property susceptible of partition in kind and appointing commissioners to make the same is interlocutory and not final, and may be reopened, set aside, or modified on motion by the court which entered it. Dangerfield v. Caldwell [C. C. A.] 151 F 554.

73. Ayers v. Lund [Or.] 89 P 806; Ehrhart's Estate, 31 Pa. Super. Ct. 120; Cohen v. Moore [Tex.] 19 Tex. Ct. Rep. 742, 104 SW 1053. Court of general jurisdiction possesses power to vacate its judgments during term of rendition when convinced that injustice has been done. Scott v. Joffee, 125 Mo. App. 573, 102 SW 1038.

74. Patterson Produce & Provision Co. v. Wilkes, 1 Ga. App. 430, 57 SE 1047; Georgia R. & Elec. Co. v. Hamer, 1 Ga. App. 673, 58 SE 54; Wagner Nat. Bk. v. Welch [Ind. T.] 104 SW 610; Scott v. Joffee, 125 Mo. App. 573, 102 SW 1038; Cochran v. Moriarty [Neb.] 111 NW 588; State v. Several Parcels of Land [Neb.] 113 NW 243; Miocene Ditch Co. v. Moore, 150 F 483. An order setting aside a decree entered at the same term pursuant to a settlement made by the attorney for one of the parties without the knowledge or authority of his client held within the proper discretion of the court under the facts shown. Id. Default judgment. Peck v. Kamsler, 104 NYS 346. Vacation of decree on day of entry to permit of introduction of further evidence held not an abuse of discretion. Ayers v. Lund [Or.] 89 P 806.

75. During term court may amend or correct the record and judgment so as to make it conform to the rulings of the court. Decree confirming special assessment. McChesney v. Chicago, 226 Ill. 238, 80 NE 770. Irregularities in the rendition of judgment may be corrected by motion. Olson v. Mattison [N. D.] 112 NW 994.

76. Judgment against garnishee or answer admitting indebtedness held properly set aside on showing that at time answer was filed garnishee did not know that note on which indebtedness was founded had been transferred. Patterson Produce & Provision Co. v. Wilkes, 1 Ga. App. 430, 57 SE 1047. The court having rendered a judgment sustaining a special demurrer to the plea and allowing time for filing an amendment, a subsequent order extending the time prevented said judgment from becoming conclusive as against the defendants until after the expiration of such time. Lovelace v. Browne, 126 Ga. 802, 55 SE 1041. During term may be vacated because procured by perjured testimony. Nelson v. Meehan [C. C. A.] 155 F 1. Court may, in the exercise of a sound discretion and in furtherance of justice, set aside a judgment, allow a party to withdraw his rest, and introduce further evidence. Cochran v. Moriarty [Neb.] 111 NW 588. Decree by mistake making distribution according to the law of the forum when it should have been according to the law of the state of decedent's domicile held properly corrected. Ehrhart's Estate, 31 Pa. Super. Ct. 120. May modify a judgment either in form or substance. Chapman v. Western Irr. Co., 75 Kan. 765, 90 P 284.

77. Cohen v. Moore [Tex.] 19 Tex. Ct. Rep. 742, 104 SW 1053.

78. Entry of judgment notwithstanding promise to withdraw suit, relying on which defendant did not interpose defense, held ground for vacation. Ford v. Clark [Ga.] 58 SE 818.

79. Georgia R. & Elec. Co. v. Hamer, 1 Ga. App. 673, 58 SE 54.

80. Johnson v. Royal Ins. Co. [Pa.] 67 A 749.

81. Johnson v. Royal Ins. Co. [Pa.] 67 A 749. On such motion court cannot consider facts dehors the record. Id. Rule applied to judgment entered under Act April 22, 1889 (P. L. 41). Id.

82. The fact that an appeal has been taken and the decree affirmed does not necessarily take away the power of the lower court to vacate the decree during the term. Nelson v. Meehan [C. C. A.] 155 F 1. New York city court has no power at special term to correct a judgment in a material particular after an appeal from the judgment has been heard and determined. Ferguson v. Bien, 54 Misc. 88, 104 NYS 715. A bill impeaching a decree on the ground of fraud and seeking to enjoin its enforcement does not seek the same relief as an appeal on a bill of review and hence may be filed during the pendency of an appeal. Dowagiac Mfg. Co. v. McSherry Mfg. Co. [C. C. A.] 155 F 524.

83. In re First Nat. Bk. of Belle Fourche [C. C. A.] 152 F 64. Held not an abuse of discretion to refuse to vacate adjudication of bankruptcy where no action was taken until nearly two months after filing of petition for adjudication. Id.

84. Scott v. Joffee, 125 Mo. App. 573, 102 SW 1038. Will not be disturbed in the absence of a clear showing of fraud, accident,

continued to a subsequent term does not affect the jurisdiction of the court to grant relief.[85]

(§ 5) *B. Right to relief after the judgment has become final, as by the expiration of the term of rendition or of the statutory extension thereof.* See 8 C. L. 544—Except as to matters of form [86] or as to clerical misprisions,[87] a final [88] judgment [89] cannot be altered, amended, or vacated after it has become a finality,[90] unless it is void [91]

or mistake. Wagoner Nat. Bk. v. Welch [Ind. T.] 104 SW 610.

85. Stark Bros. v. Glaser [Okl.] 91 P 1040.

86. Where party is known by more than the one name designated in the judgment, the court may, upon proper notice given the parties interested and upon sufficient facts being shown, amend the order by inserting the other **names** by which the incompetent was known. Order appointing committee for insane person. Sporza v. German Sav. Bk., 104 NYS 260. Judgment held properly amended so as to insert plaintiff's **true given name** therein, same being a mere clerical error and defendant not being harmed thereby. Tim v. Berrick, 107 NYS 665.

Mistakes in the description or names of parties may be corrected after the term during which judgment was rendered so as to make it conform to the decision. Chapman v. Western Irr. Co., 75 Kan. 765, 90 P 284.

87. Sweeney v. Tritsch [Ala.] 44 S 184. Where the clerk failed to enter a judgment as of the proper date, the court should correct the judgment entry on motion made as required by statute and within one year after the expiration of the term of rendition, though the mistake was not evident. Code 1897, §§ 4091, 4093, 244, construed. Greazel v. Price [Iowa] 112 NW 827. A judgment may always be reformed for the purpose of correcting computations made under it, regardless of whether the term at which it was entered has ended. Woodruff v. U. S., 154 F 861. Where a party has filed with the prothonotary of the common pleas a certified transcript on appeal from a decree of the orphan's court, the latter court may modify its decree and reduce the balance due from the accountant, but is without jurisdiction to strike off the transcript from the record of the common pleas. In re Ashman's Estate [Pa.] 67 A 842. May correct judgment entry so as to make the judgment that which the court in fact rendered. Davison v. Davison [Mo.] 106 SW 1.

88. Rule prohibiting amendments of substance after the close of the term applies only to final judgments. Decree in foreclosure providing for appointment of commissioner, a sale by him, and a report of his doings under the order appointing him, held not a final judgment. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

89. Where the superior court entered on its docket, in an action to charge an administrator with unfaithful administration, the words, "Nov. 19, 1906, Heard and decision for appellant. Exceptions." Such entry was a full and complete record of the decision that the appellee administrator was guilty of unfaithful administration, and hence court had no power to treat it as ineffective and to enter a new decision as of February 12, 1907, after vacating the former Court and Practice Act 1905, § 303, considered. Ashaway Nat. Bk. v. Rhode Island Super. Ct. [R. I.] 67 A 523.

90. After expiration of term. Sweeney v. Tritsch [Ala.] 44 S 184; Grider v. Corbin, 116 App. Div. 818, 102 NYS 181; Hockwald v. American Surety Co. of New York [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181. Rule applies to judgments in original actions in Supreme Court. Code Civ. Proc. §§ 602-609, construed. State v. State Journal Co. [Neb.] 111 NW 118. After the term and after the remission of the cause to another court. Nichols v. Nichols' Estate [Vt.] 67 A 531. After the expiration of term a court of law is without power to amend its record so as to show that which did not take place. eBrnard v. Abel [C. C. A.] 156 F 649. Judgment against principal cannot be amended at subsequent term so as to include sureties, no proceeding having been brought for breach of bond. Giddens v. Alexander, 127 Ga. 734, 56 SE 1014. Judgment fixing plaintiff's lien against all parties to the proceeding held final and not subject to vacation at a subsequent term. Harry Bros. Co. v. Thompson Davis Power Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 901, 99 SW 720. Judgment against a receiver which disposed of all the parties and issues involved and provided appropriate means for its execution is a final judgment which cannot be set aside on motion or plea in intervention at a subsequent term and its finality is not affected by the fact that the suit was continued on the docket for the purpose of winding up the business of the receivership. Malone v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 255, 101 SW 503. Agreed judgment that party in addition to other relief shall recover all unpaid costs of suit held a final adjudication of unpaid costs, including an amount subsequently allowed a guardian which could not be set aside at a subsequent term in the absence of equitable grounds therefor. Kuteman v. Carroll [Tex. Civ. App.] 19 Tex. Ct. Rep. 900, 105 SW 222.

91. Sackett v. Price County, 130 Wis. 637, 110 NW 821. Want of jurisdiction. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 SW 680. Judgment entered without service of process on or appearance by defendant. Flowers v. King [N. C.] 58 SE 1074. Judgment affecting title to land based on constructive service on a resident of the state is absolutely void and should be set aside. Payne v. Anderson [Neb.] 114 NW 148. Partition decree held void as to owner who was not a party thereto and error to refuse to vacate same. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889. Personal decree against nonresident who has not appeared and who was served only by publication. Sweeney v. Tritsch [Ala.] 44 S 184. Default judgment based on an order for substituted service improvidently granted held unsustainable, it being shown that defendant was a nonresident to the

or was procured by the fraud [92] of an adverse, prevailing party, his counsel or agents,[93] or by accident, surprise, or mistake of fact,[94] extrinsic of the matters decided,[95] or unless the vacation or modification is ordered by an appellate court.[96] Neither error [97] nor mere irregularities [98] will warrant relief in the trial court.

knowledge of plaintiff's attorney. Wolter v. Liebmann, 52 Misc. 577, 102 NYS 487. Entry by clerk of judgment not rendered by court held a nullity which court could set aside at a succeeding term. Kansas City Pump Co. v. Jones [Mo. App.] 104 SW 1136. That defendant a nonresident corporation had knowledge of the pendency of a suit attempted to be commenced by service on a stranger held not to bar relief by it from judgment by default. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 89 P 535. A decree in equity dismissing a bill, entered by mistake on bill and answer, when in fact the case had not been set down for hearing on bill and answer, is without jurisdiction and void and may be set aside on a bill in the nature of a bill of review. Perkins v. Hendryx, 149 F 526. If a state court renders judgment in a cause which has been removed to the Federal courts, held error to refuse to vacate such judgment upon a motion therefor accompanied by a proper showing although at the time of its rendition the records of the state court did not show that it had been deprived of jurisdiction. Tomson v. Iowa State Traveling Men's Ass'n [Neb.] 110 NW 997.

92. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076; Boggs v. Inter-American Min. & Smelting Co. [Md.] 66 A 259; Scheer v. Ulrich [Wis.] 113 NW 661. Consent decree. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076. Code Civ. Proc. § 602, considered. State v. Omaha Country Club [Neb.] 110 NW 693. A defendant being wrongfully precluded from having her day in court, she is entitled as a matter of right to have the judgment vacated. Fallon v. Crocicchia, 52 Misc. 503, 102 NYS 541.

93. Scheer v. Ulrich [Wis.] 113 NW 661. Code Civ. Proc. § 602, considered. State v. Omaha Country Club [Neb.] 110 NW 693. Fraud of husband in concealing service of process in action against wife on debt for which he alone was liable held insufficient to warrant setting aside judgment. Lanier v. Nunnally, 128 Ga. 358, 57 SE 689.

94. Upon the expiration of the term of its rendition a judgment becomes final and will not thereafter be set aside except for fraud, accident, mistake, or other uncontrollable circumstances depriving a party of an opportunity to present his case. Hockwald v. American Surety Co. of New York [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181. Consent decree. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076. Where word "ten" in provision of will bequeathing ten thousand dollars to certain legatees was by mistake read as "two" and subsequent proceedings including decree of distribution were based on such mistake, held decree was properly set aside, no laches or negligence being shown. Bacon v. Bacon, 150 Cal. 477, 89 P 317. Court having jurisdiction and judgment being regularly entered, it will not be stricken on motion of defendant, unless the latter was prevented from appearing and defending or upon some ground of fraud, surprise, or mistake. Boggs v. Inter-American Min. & Smelting Co. [Md.] 66 A 259. Only errors of fact affecting validity or regularity of proceedings may be corrected at a subsequent term. Davis v. Robinson [Mo. App.] 102 SW 1048. A judgment regular in appearance but of no effect because of some error of fact not made to appear may be set aside at a subsequent term. City of Dearborn v. Gann [Mo. App.] 105 SW 14. Where a parcel of land sought to be condemned was by mistake omitted from the petition, but hearing and award proceeded upon theory that it was included therein, damages assessed therefor being received by defendant, plaintiff was entitled to have judgment referring to description contained in petition reformed so as to conform to true facts on ground of mutual mistake, though term at which judgment was entered had expired. Getzendaner v. Trinity & B. V. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 511, 102 SW 161.

95. Where owing to misapprehension of the facts on the part of all parties there was no contest, the mistake was held collateral. Bacon v. Bacon, 150 Cal. 477, 89 P 317.

96. See Appeal and Review, 9 C. L. 108.

97. Welsh v. Koch [Cal. App.] 88 P 604; Lewis v. Woodrum [Kan.] 92 P 306; Hockwald v. American Surety Co. of New York [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181. Error of law in the rendition of judgment cannot be corrected at a subsequent term where the judgment rendered is that which the court intended to render. Davison v. Davison [Mo.] 106 SW 1. Facts stated in findings not true. Welsh v. Koch [Cal. App.] 88 P 604. The sufficiency of the evidence to sustain a judgment cannot be considered on a motion to vacate. Amestoy Estate Co. v. Los Angeles [Cal. App.] 90 P 42. Error in decreeing foreclosure of property not mentioned in complaint or mortgage held subject to correction, on appeal only and not in an action to annul the decree on the ground of want of jurisdiction. Venner v. Denver Union Water Co. [Colo.] 90 P 623. Erroneous judgment on appeal from land department will not be set aside in absence of showing that determination on appeal was different from that of the department, as the vacation of the decree would not reinstate the appeal but would only relegate parties to their rights under the determination from which the appeal was taken. Hotchkin v. Bussell [Wash.] 89 P 183. The correction of errors of law occurring at the trial, or in forming or receiving special verdicts or in entering judgments thereon, can only be made by appeal on motion for a new trial. Olson v. Mattison [N. D.] 112 NW 994. See, also, Wetmore v. Karrick, 205 U. S. 141, 51 Law. Ed. 745.

98. Hockwald v. American Surety Co. of New York [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181. Where judgment is by nil dicit. D. C. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 SW 680. Variance between name of defendant in bond used on and judgment held immaterial and

Statutory enumerations of grounds of relief are generally deemed exclusive.[99] Unwarranted levy under the judgment does not warrant the vacation of the latter.[1] A court should not ordinarily amend a valid decision in an action tried to the court merely for the purpose of amplifying it,[2] and a new decision or a substantial change in the judgment cannot be made after the expiration of the term under the guise of an amendment.[3] In many states the rule has been enlarged by statutes providing for the correction or vacation of a judgment,[4] and especially a default judgment [5] taken against a party through his mistake, inadvertence, surprise, or excusable neglect.[6] There is an apparent conflict as to the extent to which such statutes are rendered applicable to the Federal courts by the Federal conformity statute.[7]

not ground for opening judgment. Blake Tobacco Co. v. Posluszsy, 31 Pa. Super. Ct. 602. Neither defect in the advertisement nor omission in the list of creditors are ground for the vacation of a judgment homologating a receiver's account. Not ground under Code Prac. art. 606. Payne v. Schaefer-Gaiennie Co., 119 La. 382, 44 S 134. That the affidavit showing noncompliance by a party with an order, authorizing the judgment against him, was merely left with the clerk and not filed, does not require vacation of the judgment. Nichols v. Nichols' Estate [Vt.] 67 A 531. Where no error is claimed it is not ground for vacating a judgment that the costs were taxed without notice. Id.

99. The grounds enumerated in Code Civ. Proc. §§ 602-604, for vacating a judgment after the term of rendition, are exclusive. Amell v. Fisher [Neb.] 113 NW 260. Jurisdiction to vacate other than void decree after term of rendition is limited by § 2832, St. 1898, as to grounds and time. Uecker v. Thiedt [Wis.] 113 NW 447. Where all remedies against a judgment are barred by lapse of time, the same rules apply to a direct attack upon it as upon collateral attack, and the judgment cannot be vacated unless it is a nullity. Judgment on constructive service based on false affidavit of nonresidence of defendant. Davis v. Vinson Land Co. [Kan.] 90 P 766. Judgment of the municipal court of the city of New York cannot be vacated for the sole purpose of allowing a traverse to the return of service of summons. Mann v. Meryash, 107 NYS 599.

1. Where, under an ejectment clause in a lease, a judgment is confessed and reference made therein to certain personal property, and on a return to a writ of habere facias possessionem the sheriff includes personal property in the return, defendant's remedy is by a common-law action and not by rule to have the judgment opened and the writ set aside as to the personal property. Keystone Coal Co. v. Williams, 216 Pa. 217, 65 A 407.

2. Ashaway Nat. Bk. v. Rhode Island Super. Ct. [R. I.] 67 A 523.

3. Judgment rendered against one defendant cannot be modified so as to substitute another defendant. Chapman v. Western Irr. Co., 75 Kan. 765, 90 P 284.

4. Judgment entry bearing date as of date of rendition instead of date of entry held properly corrected on application within one year under Code, § 4093. Thompson v. Great Western Acc. Ass'n [Iowa] 114 NW 31.

5. In Minnesota a default judgment rendered on service by publication only must be set aside as a matter of right on application by a party within one year after its entry. Fink v. Woods, 102 Minn. 374, 113 NW 909. Under Rev. St. 1899, § 777 (Ann. St. 1906, p. 752), a party not served with summons and who did not appear in the action is entitled to relief under a petition for review notwithstanding actual knowledge of the pendency of the suit. Miners' Bk. v. Kingston, 204 Mo. 687, 103 SW 27. Under Code Civ. Proc. § 473, authorizing vacation of default judgments where defendant was constructively served on application made within one year, defendant need not present any excuse for failure to appear other than that he was not personally served, and if there was any neglect on his part the burden is on plaintiff to show it. Gray v. Lawlor [Cal.] 90 P 691. Words "on such terms as may be just" in Code Civ. Proc. § 473, providing for vacation of default judgments where defendant was constructively served on such terms as may be just, held not to give court discretion to refuse relief when statutory conditions are complied with. Id. Where defendant served with summons outside of the state appeared in the action prior to judgment, he is not entitled to have same set aside under Code Civ. Proc. § 473, authorizing vacation of judgment within one year where defendant is not personally served. Zobel v. Zobel [Cal.] 90 P 191.

6. Affidavits on motion to set aside a default judgment under Rev. St. 1887, § 4229, muts show that the default occurred through mistake, surprise, or excusable neglect. Western Loan & Sav. Co. v. Smith, 12 Idaho, 94, 85 P 1084. Under Rev. Civ. Code Proc. § 151, providing that a court may, within a year after notice thereof, relieve a party from a judgment or order taken against him through his mistake, inadvertence, etc., an order of the circuit court affirming an order of the county court, but through inadverence or mistake including matters not properly before the court, held properly vacated and a new order entered. In re Skelly's Estate [S. D.] 113 NW 91.

7. The conformity act Rev. St. § 914 (U. S. Comp. St. 1901, p. 683), does not authorize Federal courts to set aside a default judgment after the expiration of the term of its rendition because authorized by the state statute. United States v. One Trunk Containing Fourteen Pieces of Embroidery, 155 F 651. The power conferred on judges by Code N. C. 1883, § 274 (Revisal 1905, §§ 512, 513), to set aside a judgment after the term of rendition and within one year for mistake, surprise, inadvertence, or excusable neglect, by virtue of the conformity statute, Rev. St. § 914, may be exercised by a Federal

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JUDGMENTS—Cont'd.

Fraud in the procurement of a judgment does not render the judgment void but only voidable and is ineffective unless taken advantage of by motion or a proceeding in equity.[8] Relief should be sought in the court of rendition.[9] The granting of relief,[10] especially in the case of a default judgment,[11] is discretionary with the court, though in the latter class of judgment the discretion of the courts should be liberally exercised in setting aside the default.[12] Also the trial court is allowed wider control over the annulment or modification of judgments which, outside of the merits of the controversy, pertain to rules of practice and are rendered upon formal matters of procedure, than over judgments upon substantial matters affecting the merits.[13] In all cases, except where the judgment is void,[14] the establishment of a meritorious defense is essential,[15] and this requirement would seem to have been made essential in some states even in the case of a void judgment.[16] So, also, a judgment by default,

court sitting in that state in an action of ejectment. Virginia T. & C. Steel & Iron Co. v. Harris [C. C. A.] 151 F 428.

8. Entry of judgment after payment of debt. Deadman v. Yantis, 230 Ill. 243, 82 NE 592.

9. Regardless of residence of parties. Trimble v. M. V. Corey & Son [Neb.] 111 NW 376.

10. Riddle v. Quinn [Utah] 90 P 893.

11. Western Loan & Sav. Co. v. Smith, 12 Idaho, 94, 85 P 1084; Hitchings v. Simmons, 53 Misc. 399, 104 NYS 794; Cutler v. Haycock [Utah] 90 P 897. Though judgment by default is irregular, defendant is not entitled to have same vacated as a matter of right. Default final entered on unverified complaint Cowan, McClung & Co. v. Cunningham [N. C.] 59 SE 992.

12. Montijo v. Robert Sherer [Cal. App.] 91 P 261. In all doubtful cases the general rule of the courts is to incline toward granting relief from a default. Cutler v. Haycock [Utah] 90 P 897.

13. Strachan v. Wolf [Ga. App.] 58 SE 492.

14. Flowers v. King [N. C.] 58 SE 1074.

15. Default judgment. Peterson v. Plunkett [Cal. App.] 88 P 283; Fink v. Woods, 102 Minn. 374, 113 NW 909; Steyermark v. Landau, 121 Mo. App. 402, 99 SW 41; Cowan, McClung & Co. v. Cunningham [N. C.] 59 SE 992; Bartlett v. S. M. Jones Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 551, 103 SW 705. Where judgment was rendered in an action to quiet title, defendant and applicant must set forth what he can prove in support of his title. Peterson v. Plunkett [Cal. App.] 88 P 283. Will not be opened to admit a demurrer. Bowen v. Webb, 34 Mont. 61, 85 P 739. Proposed answer must state a defense. Wills v. James Rowland, 117 App. Div. 122, 102 NYS 386. Answer held to contain meritorious defense in part justifying setting aside default, the judgment being permitted to stand as security. W. R. Lynn Shoe Co. v. Schunk, 101 Minn. 22, 111 NW 729. Held error to set aside default without finding that defendant had a meritorious defense. Stockton v. Wolverine Gold Min. Co., 144 N. C. 595, 57 SE 335. If defendant's affidavits show a prima facie defense, it is the duty of the court to open a judgment by confession on warrant of attorney. Vennum v. Carr, 130 Ill. App. 309. Answer held to allege meritorious defense to action to enjoin setting up against judgment of claim accruing subsequent to its rendition. Benjamin Schwarz v. Kennedy, 156 F 316. Must establish a meritorious defense and submit and serve a proposed answer. Kuh v. Goldman, 104 NYS 255. Complaint in action to annul a judgment held subject to demurrer for failure to show existence of complete defense. Snyder v. Sherrell [Ind. T.] 103 SW 756. Under Kirby's Dig. § 4434, requiring showing of meritorious defense as condition to setting aside default judgment, a controverted defense unsubstantiated by proof does not warrant vacation. Knights of Maccabees of the World v. Gordon [Ark.] 102 SW 711. Answer alleging ownership in defendant held to present a meritorious defense to action to quiet title. Gray v. Lawlor [Cal.] 90 P 691. Under Code Civ. Proc. § 473, providing for vacation of default judgments against defendant constructively served and permitting him to answer "to the merits of the original action," defendant must present a meritorious defense as a condition to relief. Id. Moving papers held not to allege facts showing defendant to have a meritorious defense. Cook v. Empire Furniture Co., 103 NYS 581. Grounds which would not constitute a defense to the action, the decree in which is sought to be annulled, cannot be asserted as ground to be annulment. Venner v. Denver Union Water Co. [Colo.] 90 P 623. Where proposed answer contains a good defense to items of damages claimed and evidence justifying default judgment for same is not satisfactory, defendant should be allowed to defend against claim for damages. Bishop v. Hughes, 117 App. Div. 425, 102 NYS 595. Where upon conceded facts there was no defense to the action, a judgment by default will not be vacated. Id. Application to open judgment for want of a plea held properly denied, same issue having been tried and determined adversely to defendant's contentions in several other suits, records of such suits being introduced with little additional evidence. Johnson v. Royal Ins. Co. [Pa.] 68 A 55.

16. Though void a court is not bound to set aside the judgment upon motion unless it appeared to be inequitable. Reeves v. Kroll [Wis.] 113 NW 440. Hence an application to set it aside always appeals to the equitable power and discretion of the court. Id. A showing that judgment was obtained without the service of process does not dispense with the necessity of showing a meritorious defense as a condition to equitable

will not be set aside in absence of showing by moving party that it was without fault on his part and the result of fraud, accident, or mistake.[17] The court should weigh the evidence,[18] consider the credibility of the witnesses,[19] and may or may not send the case to a jury.[20] The decision of the court will not be reversed on appeal unless its discretion has been manifestly abused.[21] In some states the jurisdiction of inferior courts in this matter is regulated by statute.[22] The courts do not look with favor upon judgments perpetuating illegal acts.[23] The rules as here stated do not prohibit the postponement of enforcement of the judgment even though the term of rendition has expired.[24]

Courts of equity.[See 8 C. L. 548]—A court of general equity jurisdiction has the inherent, discretionary[25] power to set aside or enjoin the enforcement of a void[26] judgment at law, or one procured by fraud of an adverse party,[27] or by accident or mistake rendering its enforcement unconscionable,[28] unaccompanied by unexcused negligence,[29] or laches,[30] or fault[31] on the part of him who invokes the remedy or

relief. Complaint alleging merely want of service of process held not to allege a meritorious defense. Reed v. New York Nat. Exch. Bk., 230 Ill. 50, 82 NE 341.

17. Wagner Nat. Bk. v. Welch [Ind. T.] 104 SW 610.

18. Groninger v. Acker, 32 Pa. Super. Ct. 124; Doyle v. Reiter, 32 Pa. Super. Ct. 251. On an application to open a judgment, the court may properly weigh the evidence and decide according to the preponderance thereof. McCullough v. Kinnan, 31 Pa. Super. Ct. 557.

19, 20. Groninger v. Acker, 32 Pa. Super. Ct. 124; Doyle v. Reiter, 32 Pa. Super. Ct. 251.

21. McCullough v. Kinnan, 31 Pa. Super. Ct. 557; Blake Tobacco Co. v. Posluszsy, 31 Pa. Super. Ct. 602. The appellate court will examine the record only to determine whether the discretion vested in him over application to open was properly exercised. Bastian v. Paulhamus, 33 Pa. Super. Ct. 341. Refusal to set aside default entered 16 months after filing of answer and cross complaint held not an abuse of discretion, application for vacation not being made until 8 months thereafter and there being no showing that default was not due to plaintiff's negligence. Bannerot v. McClure [Colo.] 90 P 70. Held an abuse of discretion to refuse to vacate default due to failure to file pleading in time, country being sparsely settled and communication difficult and defendant presenting a sufficient excuse. Cutler v. Haycock [Utah] 90 P 897.

22. Under Municipal Court Act, § 253, the municipal court of New York City has power to set aside default entered upon failure of defendant to appear on return day of summons. Hinds v. Calamaras, 107 NYS 28. Prior to amendment of Municipal Court Act, § 253, by Laws 1907, ch. 304, p. 554, the municipal court of New York City was without power to set aside a judgment on the ground of nonservice of summons, the only available remedy being by appeal. Mann v. Meryash, 107 NYS 599. Motion to open default and to permit defendant to traverse return unaccompanied by proposed answer, or affidavit of merits, held not a motion to open a default provided for by Municipal Court Act, § 253, and hence properly denied. Id. Acts 1902, p. 117, authorizing city court of Atlanta to open defaults, does not authorize opening of default judgment rendered prior to passage of act. Morris v. Duncan, 126 Ga. 467, 54 SE 1045.

23. Where it appeared by affidavit that provision for attorney's fees in note on which judgment was entered by confession was a cloak to disguise evasion of usury laws, held error to refuse to set aside judgment. Blue v. Keenan, 130 Ill. App. 312.

24. United States & Mexican Trusts Co. v. Young [Tex. Civ. App.] 18 Tex. Ct. Rep. 451, 101 SW 1045. See post, § 14, Enforcement of Judgment.

25, 26. Enforcement of a void judgment may be restrained though it does not disclose its invalidity if it appears affirmatively from the record. Ketelsen v. Pratt Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172. Judgment by default entered without proof of publication, defendant, a nonresident, alleging that no notice had been received by him and that plaintiff knew his postoffice address. Oliver v. Baird [Miss.] 44 S 35. Judgment against wife alone on an obligation void because of disability of coverture of which judgment neither husband nor wife had notice until levy of execution held a nullity and subject to vacation on direct attack in equity. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

27. Fraud extrinsic to record. Welsh v. Koch [Cal. App.] 88 P 604. There is no adequate remedy at law. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 NW 187. To warrant equitable relief the fraud must be in procuring jurisdiction (Wilson v. Anthony [N. J. Eq.] 66 A 907), or in preventing defendant by fraudulent means from presenting his defense (Id.). Probate decree set aside where procured by fraudulent concealment of will. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 NW 187. Perjured testimony. Sargent Co. v. Baublis, 127 Ill. App. 631. Rule that decision of probate court cannot be reviewed in chancery has no application to a decision procured by fraud, especially where it is being enforced to the prejudice of one who was not a party. Babcock v. Babcock [Mich.] 14 Det. Leg. N. 750, 114 NW 352.

28. See Sargent Co. v. Baublis, 127 Ill. App. 631.

29. Rowland v. Standiford [Neb.] 110 NW 1021. Failure to appear in answer to suggestion of claim of mesne profits based on assurance of plaintiff's attorney in ejectment

those representing him,[32] either as attorney[33] or guardian ad litem.[34] The rule has been denied where the courts are of co-ordinate jurisdiction.[35] That the judgment at law was unjust, irregular, and erroneous, or that equity would have arrived at a different conclusion, is not ground for equitable interference.[36] It follows that relief will not be granted where there is no claim of want or jurisdiction or of fraud or mistake, and where the situation of the parties remains unchanged.[37] A court of equity will not interfere with the enforcement of judgments at law unless the same are shown to be unjust and inequitable,[38] and unless the complainant has an equitable defense of which he could not avail himself at law,[39] or had a good defense or

suit that defendant's interests would be protected held a bar to relief in equity on ground of negligence. Kretschmar v. Ruprecht, 230 Ill. 492, 82 NE 836. Notice of the pendency of the suit bars equitable relief against a default judgment and objections to the form and sufficiency of same are not available. McDonald v. Cawhorn [Ala.] 44 S 395. Evidence held to show that defaulting defendant had notice of pendency of suit. Id. Action in equity to vacate judgment adjudicating rights of one not a party cannot be maintained by such party where, though not summoned, he knew of existence of judgment in time to have moved for a new trial or to have appealed therefrom and did neither. Cage v. Owens [Tex. Civ. App.] 19 Tex. Ct. Rep. 6, 103 SW 1191.

30. Welsh v. Koch [Cal. App.] 88 P 604. Complaint held defective in not showing that knowledge of evidence alleged to have been suppressed was not obtained until after trial and the expiration of the term. Moore v. Gulley, 144 N. C. 81, 56 SE 681. See post, subdivision D.

31. See Rowland v. Standiford [Neb.] 110 NW 1021.

32. That **administrator** failed to plead statute of limitations to claim presented against estate held not ground for equitable relief against order allowing claim. Williams v. Risor [Ark.] 104 SW 547.

33. Fraud, laches, or blunders of party or attorneys no ground for relief. Welsh v. Koch [Cal. App.] 88 P 604. Ignorance, unskillfulness, or mistake of party's attorney, unless caused by adverse party, or neglect or inattention of counsel, or failure on his part to plead proper defense, attend the trial or assign errors, etc., is not ground for enjoining enforcement of judgment, being attributable to party himself. Peacock v. Feaster [Fla.] 42 S 889.

34. Misconduct of guardian ad litem in failing to produce evidence not ground for setting aside judgment against the minors. Welsh v. Koch [Cal. App.] 88 P 604.

35. A judgment or order of one circuit court will not be set aside nor restrained by another circuit court of co-ordinate jurisdiction upon a suit subsequently commenced therein. Salter v. Cook, 131 Wis. 20, 110 NW 823; Pleshek v. McDonnell, 130 Wis. 445, 110 NW 269; Jackson Mill. Co. v. Scott, 130 Wis. 267, 110 NW 184.

36. Gorman v. Bonner, 80 Ark. 339, 97 SW 282; Peacock v. Feaster [Fla.] 42 S 889; Harris v. Bigley [Iowa] 111 NW 432. Appointment of sheriff as syndic when at same time a creditor was applying for appointment. Conery v. His Creditors, 118 La. 864, 43 S 520. Where new trial was granted at term, held under unconstitutional statute under a prior act, the court then being in vacation and the order therefrom void, equity is without power to restrain enforcement of the judgment, the mistake as to the constitutionality of the statute being one of law. Norwood v. Louisville & N. R. Co. [Ala.] 42 S 683. That claim against estate allowed by court was unjust or barred by limitations held not ground for equitable interference in the absence of fraud, accident or mistake. Williams v. Risor [Ark.] 104 SW 547. Decree of county court on appeal from justice of peace on interlocutory judgment, court by mistake believing same to be final, held merely irregular and hence not subject to injunction. Jennings v. Munden [Tex. Civ. App.] 18 Tex. Ct. Rep. 661, 102 SW 945.

37. Cox v. Anderson [Neb.] 112 NW 317. Relief against a judgment cannot be had in equity in the absence of fraud, accident, or mistake. Jones v. Messenger [Colo.] 90 P 64. Where papers were lost and there was nothing to show whether plaintiff sued as a corporation, partnership, or individual, held not ground for enjoining enforcement of judgment, there being no evidence that plaintiff was required to show in what capacity it sued. Ver Steeg Shoe Co. v. Morrow [Ark.] 103 SW 166.

38. Peacock v. Feaster [Fla.] 42 S 889; Uecker v. Thiedt [Wis.] 113 NW 447. Where a confessed judgment against a corporation is just or founded upon a valid indebtedness, equity will not grant relief against it at the suit of the corporation, a stranger, though the officer who made the confession acted without express authority. Gilman v. Heitman [Iowa] 113 NW 932. A showing of a meritorious defense is none the less necessary in an independent action in equity to vacate a judgment alleged to have been obtained without jurisdiction, especially where lack of jurisdiction does not appear of record. Brandt v. Little [Wash.] 91 P 765. To justify relief in equity against a judgment on the ground of fraud preventing trial on the merits, plaintiff must show that if tried on the merits judgment would probably be rendered in his favor. Reich v. Cochran, 102 NYS 827.

39. Peacock v. Feaster [Fla.] 42 S 889. A court of equity will enjoin the enforcement of a judgment at law, rendered in an action of ejectment, when it appears that the defendant in the legal action had an equitable estate in the locus in quo which was sufficient to afford him equitable protection against dispossession at the instance of the plaintiff, and the existence of which equitable estate afforded no defense in the court of law. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A 719.

remedy at law which he was prevented from availing himself of by fraud or accident unmixed with negligence of himself or agents.[40] Equity will control and restrain the enforcement of a judgment at law where otherwise such judgment would operate to give the judgment creditor an unfair advantage and render the court at law an instrument of justice,[41] and this rule applies where the judgment at law is relied on as a defense.[42] The denial of an application to open a judgment by a court of law after it has lost jurisdiction to grant it does not bar relief in equity.[43] Equity may restrain the enforcement of a judgment at law in order to give effect to an equitable set-off,[44] a judgment debtor is not debarred from the right to maintain a suit in equity to enjoin its collection or an allegation of set-offs against the beneficial owners which would render its enforcement inequitable by the fact that such set-offs are legal demands or unliquidated, especially where the defendants against whom they exist are nonresidents of the United States or are insolvent.[45] Where the judgment assailed is of such a character that equity may not properly set it aside, it may prevent an inequitable advantage being taken of it by adjudging the guilty beneficiary or his successor with notice a trustee for the defrauded party.[46] In this, or in other suits, equity acts in personam and not in rem.[47] Statutory regulations are sometimes encountered.[48] Statutes extending the powers of trial courts in granting relief against judgments when application therefor is made within a limited time do not broaden powers of courts of equity to grant relief in an independent prosecution.[49] In those states where one court possesses both law and

40. Peacock v. Feaster [Fla.] 42 S 889; Rowland v. Standiford [Neb.] 110 NW 1021. A judgment will not be enjoined in equity on grounds which could have been urged in defense in the action. Peacock v. Feaster [Fla.] 42 S 889. Rule applied to judgment in forcible entry and detainer. Connelly v. Omaha [Neb.] 112 NW 360. Inadvertent entry of judgment by court contrary to stipulation or after expiration of statutory time after decision held remediable by appeal and hence not ground for relief in equity. Barron v. Feist, 107 NYS 494. Defensive matters known to a party at the time of the trial cannot be made the basis of enjoining enforcement of a judgment at law. Cox v. Anderson [Neb.] 112 NW 317. A court of equity will not grant relief against a judgment on a legal liability where the equitable grounds were known to the parties before the rendition of judgment and could have been set up in the action. Gorman v. Bonner, 80 Ark. 339, 97 SW 282. Complaint showing on its face that plaintiff had an adequate remedy at law by appeal, which had been lost by failure to take advantage of it, held demurrable. Barron v. Feist, 107 NYS 494. Equitable relief against outlawed claim against estate allowed by court without objection on part of administrator denied where plaintiff had a remedy in probate court by compelling administrator to account. Williams v. Risor [Ark.] 104 SW 547.

41. Scoville v. Brock, 79 Vt. 449, 65 A 577; Ordway v. Farrow, 79 Vt. 192, 64 A 1116. Where deed of standing timber was held a mortgage and grantee given the right to redeem, held grantor would be restrained from enforcing a judgment in trespass and trover for cutting down and converting timber after default. Ordway v. Farrow, 79 Vt. 192, 64 A 1116. Judgment by confession based on a power contained in a note tainted with usury may be set aside in equity. Hightower v. Coalson [Ala.] 44 S 53.

42. Scoville v. Brock, 79 Vt. 449, 65 A 577.

43. Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196.

44. Judgment for defendant in replevin. Code, § 4164, provides that no counterclaim shall be allowed in replevin. Enforcement restrained defendant in replevin being insolvent and indebted to plaintiff for a sum exceeding the amount of his judgment. De Laval Separator Co. v. Sharpless, 134 Iowa, 28, 111 NW 438.

45. Brown v. Pegram, 149 F 515.

46. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184.

47. A suit to set aside an order of distribution of a decedent's estate and to prevent the dissipation of the fund and declare the parties holding it trustees is against the persons, so that the court is not deprived of jurisdiction though the property involved is without the state. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 NW 187.

48. Equitable relief against a judgment alleged to have been erroneously entered can be given in an action at law only in the cases and in the manner prescribed by Rev. Laws, c. 173, §§ 28-32 (Corbitt v. Craven [Mass.] 82 NE 37), and a litigant desiring such relief must show by his pleadings that he seeks equitable relief (Id.). Vt. St. 2810, prescribing a remedy after a guardian's discharge for the correction of errors in his account, relates to a further hearing in the probate court and does not prevent a ward from maintaining a suit to set aside a decree allowing his guardian's final accounts, based on the fraud of the guardian. Scovill v. Brock, 79 Vt. 449, 65 A 577.

49. Code Civ. Proc. § 473, construed. Amestoy Estate Co. v. Los Angeles [Cal. App.] 90 P 42.

chancery powers, it is not essential that the injunction proceeding be tried by the court rendering the judgment complained of.[50]

(§ 5) *C. Fraud, accident, mistake, surprise, and other particular grounds.*—See 8 C. L. 551—Fraud must lie in the procurement of the decree[51] and must be

50. Rev. St. 1895, art. 2996, relating to injunctions to stay proceedings in a suit or execution on a judgment, does not apply unless invalidity is not apparent from record. Ketelsen v. Pratt Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

51. The fraud must have directly induced the rendition of judgment and not merely have brought about a condition on the existence of which the court acted as the basis of its judgment. Scheer v. Ulrich [Wis.] 113 NW 661; Dorman v. Hall, 124 Mo. App. 5, 101 SW 161; Uecker v. Thiedt [Wis.] 113 NW 447. That husband procured separation by fraud, held to warrant setting aside divorce granted on ground of five years' voluntary separation.. Uecker v. Thiedt [Wis.] 113 NW 447. Also fact that wife was induced by her husband's fraud to accept a specified sum in satisfaction of her share of his property does not warrant setting aside decree. Id. Petition alleging facts from which a remote inference of raud in procuring judgment might arise held insufficient to show ground for relief. Dorman v. Hall, 124 Mo. App. 5, 101 SW 161. The fraud must consist in the procurement of the judgment and not in the matter on which the decree was rendered (Lancaster v. Springer, 126 Ill. App. 140), and not fraud in the account upon which the cause of action is based (Boldenweck v. Bullis [Colo.] 90 P 634). To entitle a party to relief against a decree on the ground of fraud, it must appear that he had a defense on the merits and that he was prevented from interposing such defense by the fraud of the prevailing party without fault on his part. Venner v. Denver Union Water Co. [Colo.] 90 P 623. To warrant relief on ground of fraud, it must not only be shown that cause of action was tainted with fraud but that judgment was obtained by fraud. Williams v. Risor [Ark.] 104 SW 547. It is fraud to deprive a party of his right to be heard in the trial court on questions of law. Wagner v. Whitmore [Neb.] 113 NW 238. That guardian ad litem for infant was appointed on motion of opposing party does not constitute fraud authorizing vacation of judgment against infant. Harris v. Bigley [Iowa] 111 NW 432. In the absence of collusion or fraud, the fact that the guardian ad litem did not use evidence patent at the time of the trial does not warrant setting side judgment against infant. Id. Suit on note, after crediting amount realized on foreclosure sale instead of suing on deficiency decree, held not to constitute fraud authorizing equity to grant relief. Ranch v. Werley, 152 F 509. Fact that attaching plaintiff did not make an earnest endeavor to ascertain defendant's address to inform him of the pendency of the action held not evidence of fraud justifying setting aside of judgment based on constructive service. Slattery v. Stevens, 125 Ill. App. 67. Petition to set aside allowance for widow's support held insufficient to sustain charge of fraud in procuring order. Reynolds v. Norvell [Ga.] 59 SE 299. Allegations of complaint held insufficient to show fraud in suppression of evidence. Moore v. Gulley, 144 N. C. 81, 56 SE 681. Allegations that evidence was presented to court at a time when it was busy winding up business of term and represented to show liability of garnishee and that no stenographer was called and the evidence not preserved held insufficient to show fraud. Hockwald v. American Surety Co. of New York [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181. False recitals in judgment that garnishee appeared by attorneys of its own selection and employment and announced ready for trial held not ground for vacation. Id. Facts alleged in complaint held sufficient to show ground for relief though no direct charge of fraud was made. Riddle v. Quinn [Utah] 90 P 893. Petition held insufficient to show fraud in procuring judgment, facts alleged showing that plaintiff had notice sufficient to have put it on inquiry. City of Guthrie v. McKennon [Okl.] 91 P 851. Evidence held to show procurement of decree by fraud. Wagner v. Whitmore [Neb.] 113 NW 238. In an action to set aside allowance of claim against incompetent's estate, evidence held to warrant relief for fraud. Scheer v. Ulrich [Wis.] 113 NW 661. Evidence held to show that judgment sought to be vacated was fraudulently entered after matter in dispute had been compromised. Martin v. Conley, 30 Ky. L. R. 728, 99 SW 613. Evidence held insufficient to establish fraud in procuring decree sought to be annulled. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

Perjury: False testimony given at the trial (Kretschmar v. Ruprecht, 230 Ill. 492, 82 NE 836), or false assertions as to liability (Id.), or the presentation of a claim without disclosing a defense, do not constitute grounds for setting aside a judgment (Id.). That judgment was procured by perjury affords no ground for equitable relief. Wilson v. Anthony [N. J. Eq.] 66 A 907. Equity may enjoin enforcement of judgment obtained on perjured testimony. Sargent Co. v. Baublis, 127 Ill. App. 631. While perjured testimony will not warrant the setting aside of the judgment, yet, where a person obtains a divorce from an insane defendant on false allegations and evidence which had been formerly adjudicated to be false by the very court entering the decree, that fact being concealed from its knowledge, a fraud is perpetrated upon the court justifying a vacation of the decree. Wood v. Wood [Iowa] 113 NW 492. Perjury no ground for relief after term. Nelson v. Meehan [C. C. A.] 155 F 1. Alaska Code Civ. Proc. § 93, held not to change rule. Id. Under the Georgia statute, perjury is not ground for vacation unless the party charged therewith has been convicted. Civ. Code 1895, § 5366. Thomason v. Thompson [Ga.] 59 SE 236. Perjury does not constitute ground for relief unless conviction therefor has been had (Moore v. Gulley, 144 N. C. 81, 56 SE 681), and failure to allege conviction is fatal (Id.). Obtaining judgment by perjured testimony constitutes such fraud as will warrant restraining of judgment, where not having been discovered until after trial it could not have been liti-

extrinsic or collateral to the questions examined and determined in the action.[52] Cases in which the facts are deemed to show or not to show surprise,[53] accident,[54]

gated therein. Sargent Co. v. Baublis, 127 Ill. App. 631.

Note: The general rule as to what constitutes extrinsic fraud or mistake is clearly stated by the United States supreme court in U. S. v. Throckmorton, 98 U. S. 65, 25 Law. Ed. 93. After stating the general rule that a bill in equity will not lie to set aside a judgment obtained by means of perjured testimony, or forged documents, introduced in evidence in support of a contested issue of fact, that court says: "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to the suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced upon him by his opponent, as by keeping him away from court; a false promise of a compromise, or where the defendant had never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interests to the other side—these, and similar cases which show that there never has been a real contest at the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside the former judgment or decree and open the case for a new and fair hearing." This statement was approved in Pico v. Cohn, 91 Cal. 135, 25 P 970, 27 P 537, 25 Am. St. Rep. 159, 13 L. R. A. 336. These cases refer to fraud as the preventing cause of the real contest, adversary trial, or fair submission. The cases related to fraud, and hence the discussion was confined to that subject, but the rule is the same where the preventing cause is mistake, influencing the action, or inaction, of the injured party. Bibend v. Kreutz, 20 Cal. 114; Merrill v. Bank, 94 Cal. 59, 29 P 242; Marine Ins. Co. v. Hodgson, 7 Cranch [U. S.] 336, 3 Law. Ed. 362; Ford v. Ford, 1 Walk. [Miss.] 505, 12 Am. Dec. 587; Wilson v. Boughton, 50 Mo. 17; Drew v. Clarke, Cooke [Tenn.] 373, 5 Am. Dec. 698; Rust v. Ware, 6 Grat. [Va.] 50, 52 Am. Dec. 100; Currier v. Esty, 110 Mass. 536; Epes v. Williams, 89 Va. 794, 17 SE 235; Busey v. Moraga, 130 Cal. 586, 62 P 1081; note to Oliver v. Pray, 19 Am. Dec. 605—From Bacon v. Bacon, 150 Cal. 477, 89 P 317.

52. Nelson v. Meehan [C. C. A.] 155 F 1; Welsh v. Koch [Cal. App.] 88 P 604; Amestoy Estate Co. v. Los Angeles [Cal. App.] 90 P 42; Mahoney v. State Ins. Co., 133 Iowa, 570, 110 NW 1041. Concealing evidence of fraud not ground where the fraud which such evidence tended to establish was one of the issues in the case. Thomason v. Thompson [Ga.] 59 SE 236. Equity will not grant relief where the fraud charged relates to matters upon which the judgment was regularly obtained and where the adverse party had an opportunity to contest the issue raised. Flood v. Templeton [Cal.] 92 P 78. Inducing mortgagor not to plead valid set-off in action to foreclose mortgage on promise to devise property to her at his death, which promise mortgagee did not keep and had no intention of keeping, held collateral fraud warranting relief against decree of foreclosure. Id. Sham sale by trustees under a void trust in a will on order of probate court obtained by concealment of facts, and decree of distribution of pretended proceeds to themselves pursuant to scheme to defraud nonresident heirs, held an extrinsic fraud justifying relief in equity. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184. Where the claim averred to be fraudulent was one of the issues passed upon and determined by the court, it is not collateral and is not available as ground for relief against the judgment. Amestoy Estate Co. v. Los Angeles [Cal. App.] 90 P 42.

53. In absence of fraud or perjury, mere surprise in **unexpected character of adversary's testimony** is not ground for relief. Moore v. Gulley, 144 N. C. 81, 56 SE 681.

Failure to give notice of trial as required by rules of court held ground for vacating judgment. Riddle v. Quinn [Utah] 90 P 893.

Judgment entered as by agreement which **does not conform to the agreement** may be vacated. Sebree v. Sebree, 30 Ky. L. R. 670, 99 SW 282. Proof of **want of notice** of suit and a meritorious defense is ground for equitable relief against a default judgment. McDonald v. Cawhorn [Ala.] 44 S 395. Where an **answer is timely sent by mail** which is not returned, and no notice, application for judgment, or entry of judgment is served on defendant, entry of judgment by default is premature and the default should be set aside. Auto Lighter Co. v. Wickes, Hughes & Co., 114 App. Div. 110, 99 NYS 611. Facts held to require vacation of judgment entered by default on ground of accident and surprise, **process being served on laborer in employ of defendant** and no notice of pendency of suit having been received by it. Barnard Leas Mfg. Co. v. Washburn, 30 Ky. L. R. 813, 99 SW 664. Default **judgment entered while compromise negotiations were pending** should be set aside. Bushnell v. Louisville & N. R. Co. [Mo. App.] 103 SW 1101. Judgment of dismissal for want of prosecution **entered after agreement for continuance** between counsel for respective parties on motion of party who had no knowledge thereof, held properly set aside. Logan v. Anderson County Tel. Co., 31 Ky. L. R. 838, 104 SW 256. Where defendant, one of two sureties, relying on **assurances of plaintiff that no judgment would be entered** against him, did not press defense alleged in plea and judgment was entered against him, held ground for equitable relief on ground of surprise, both as against plaintiff in such action and her attorneys asserting a lien thereon. Hall v. Lockerman, 127 Ga. 537, 56 SE 759. After formal entry of judgment of nonsuit, court is without power to amend same by providing for maintenance of plaintiff, same not being a judgment taken by surprise or excusable neglect of a party within Code Civ. Proc. § 473. Mann v. Mann [Cal. App.] 92 P 740. Where action in assumpsit commenced under Act 1846, P. L. 413, did not show that it was brought under that act, judgment by default for failure to comply with such act held properly set aside, affidavit showing good defense and defendants believing it to be an

and mistake,[55] or excusable neglect,[56] are shown in the notes. The casualty and misfortune must be such as reasonable skill and diligence could not have avoided.[57] The courts differ as to the effect of mistaken advice of counsel.[58]

ordinary action of assumpsit under Act 1887, P. L. 271. Commonwealth v. Perrego, 31 Pa. Super. Ct. 126.

54. Held not error to open default due to **sickness of defendant and his attorney.** Brawner v. Maddox, 1 Ga. App. 332, 58 SE 278. Default for failure to file pleading held properly set aside, defendant's **counsel in good faith believing he had filed a demurrer** to the bill. Schwarz v. Kennedy, 156 F 316.

55. A mistake which is available as a ground for equitable relief against a judgment must be a mutual mistake of both parties. Corbett v. Craven [Mass.] 82 NE 37. **Misapprehension of attorney, as to extension of time to answer,** held ground for opening default, motion being made during same term and a meritorious defense being presented. United States Fidelity & Guaranty Co. v. Com., 31 Ky. L. R. 35, 101 SW 360.

56. **Neglect of agent to retain counsel** not ground for setting aside default. Leinhart v. Kirkwood, 130 Ill. App. 398. Where judgment was rendered after due notice, **absence of one of party's attorneys** in Europe does not warrant opening the judgment. Sarratt v. Gaffney Carpet Mfg. Co. [S. C.] 57 SE 616.

Difficulty of attorney in communicating with client held not to excuse default in failing to answer, as extension could have been procured. Bishop v. Hughes, 117 App. Div. 425, 102 NYS 595. Default of defendants held due to **misunderstanding of counsel** warranting relief. Elliott v. Quinn [Colo.] 90 P 607. Motion to open default held properly denied, defendant's **attorney having knowingly permitted** same to be entered for the purpose of compelling plaintiff to sue in another jurisdiction. Lowenthal v. Hodge, 105 NYS 670. Held error to deny motion of open default, where day before inquest defendant's attorney was notified to proceed with **case in another court** and on day of inquest was required to appear in answer to a motion at special term. Gumbinner v. Burns, 53 Misc. 642, 103 NYS 218. Denial of motion to open default on ground counsel had **verbally agreed to postponement** held not erroneous. Jones v. Morrison Shirt Waist Co., 52 Misc. 561, 102 NYS 769. Where **pleadings were mailed** to attorney but **not sufficiently prepaid** and hence refused, held no grounds for opening default. Kuh v. Goldman, 104 NYS 255. That **office clerk** of plaintiff's attorney **thought case would not be reached** because of its position on list on ready section of day calendar, held not a sufficient excuse to warrant opening of default. Loehr v. Brooklyn Ferry Co., 115 App. Div. 666, 101 NYS 209.

Failure to file answer held inexcusable, defendant being represented by local counsel to whom duty of filing answer was not entrusted, nonresident counsel, to whom it was, having had ample time. Stockton v. Wolverine Gold Min. Co., 144 N. C. 595, 57 SE 335.

Pressure of business on the part of counsel, calling him out of the office a great deal of the time and causing him to make a mistake as to the date of appearance, held insufficient. Bowen v. Webb, 34 Mont. 61, 85 P 739. Where **nonanswering defendant was in employ of his codefendants** and on informing them of service of summons on him was told that matter would be taken care of by them, held default was due to an excusable mistake. Montijo v. Sherer [Cal. App.] 91 P 261. Default upon failure of defendant to file undertaking or continuance held due to excusable mistake, **each of two defendants relying on other** to procure undertaking and necessity for continuance being due to the fault of plaintiff. Julius Johnson's Sons v. Buellesbach, 107 NYS 6. Default judgment held improperly set aside on affidavit as to **sickness of attorney;** evidence showed **neglect in allowing default.** Rosenfeld v. Central Vermont R. Co., 116 App. Div. 851, 102 NYS 322. Judgment set aside where counsel left the court during the term at which judgment was rendered with the understanding and belief that the **case was not to be tried at that term,** and where a prima facie defense was shown. Virginia T. & C. Steel & Iron Co. v. Harris [C. C. A.] 151 F 428.

Attendance of attorney on another court held not to authorize vacation of default. Rogg v. Simelowitz, 102 NYS 535.

Negligence of plaintiff in failing to discover that legacy given him by will **was ten thousand** dollars **instead of two,** as read to him and as contained in final decree until after entry of latter, held not shown as a matter of law. Soule v. Bacon, 150 Cal. 495, 89 P 324.

Illness of party preventing him from attending trial held not ground for vacation at a subsequent term, no continuance having been requested and there being no showing that adverse party or court knew of his condition. Davis v. Robinson [Mo. App.] 102 SW 1048. Failure to ascertain, from justice's docket, date for which case had been set, held not to constitute negligence barring relief against default judgment based on breach of agreement by plaintiff's **counsel to notify defendant** of such date after continuance granted at former's request. Steyermark v. Landau, 121 Mo. App. 402, 99 SW 41.

Forgetfulness or oversight of counsel does not constitute ground for setting aside a default. Where defendant's attorneys requested continuance of an equity suit to which plaintiff's counsel assented by letter, having prior thereto entered judgment by default in a law action against same party, held not ground for setting aside default in latter action. Wilson v. Jump [Iowa] 110 NW 25. Showing held insufficient to authorize the setting aside of the default, especially in view of the fact that the attorneys who best knew the real situation presented no affidavits. Western Loan & Sav. Co. v. Smith, 12 Idaho, 94, 85 P 1084. Motion to open a default after appearance and answer held properly denied. North Side Iron Works v. Thacke, 104 NYS 365.

57. Partial search of records held insufficient to warrant relief on ground of want of knowledge that order that new matter in answer should be deemed controverted had

(§ 5) *D. Procedure to amend, open, vacate, or enjoin.*See 8 C. L. 552—The general rules of venue apply.[59] A judgment cannot be set aside at chambers for fraud or surprise.[60]

*Time for application.*See 8 C. L. 552—Application must be seasonably made[61] and within the statutory time.[62] Lapse of time does not bar vacation of a void

not been filed pursuant to alleged agreement of counsel, though records were improperly indexed, assistance of clerk not being requested. Louisville & N. R. Co. v. Paynter's Adm'x, 31 Ky. L. R. 163, 101 SW 935.

58. Inadvised consent to entry of compromise, judgment, or advice of counsel, not ground for vacation of judgment. Painter v. Norfolk & W. R. Co., 144 N. C. 436, 57 SE 151. Held error to deny opening of default where defendant relied on mistaken advice of counsel that error in stating its name in summons rendered it fatally defective and that no attention need be paid to it. Cainen v. New York Contracting Co., 53 Misc. 540, 103 NYS 725. The ignorance, blunders, or ill advice of a party's attorney is not ground for relief against a judgment, the selection of the attorney not being induced by any act of the adverse party and the complaining party having a full knowledge of the facts. Amestoy Estate Co. v. Los Angeles [Cal. App.] 90 P 42. Code Civ. Proc. § 473, held sufficiently broad to entitle a party to relief on the ground of mistake of law on the part of his attorney preventing him from making a defense where application is made thereunder. Id.

59. Action to restrain enforcement of judgment against land of a stranger held properly brought in county in which land is situated. Horvets v. Dunman [Tex. Civ. App.] 18 Tex. Ct. Rep. 212, 102 SW 462.

60. Sarratt v. Gaffney Carpet Mfg. Co. [S. C.] 57 SE 616.

61. Applicant must proceed with reasonable diligence. Cowan, McClung & Co. v. Cunningham [N. C.] 59 SE 992. Application to vacate a void judgment held not too late because it was then too late to obtain relief in the action against a default. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P 335. Discovery of fraud before disposition of case on appeal does not preclude injured party from seeking relief in court below upon entry of mandate, such ground not being available on appeal. Louisville & N. R. Co. v. Paynter's Adm'x, 31 Ky. L. R. 163, 101 SW 935. Notwithstanding four year bar, probate court may set aside orders procured by fraud, action therefor being direct and brought in time after timely discovery of fraud. Jesse French Piano & Organ Co. v. Williams [Tex. Civ. App.] 102 SW 948. Eight months held not to bar relief. Wagner v. Whitmore [Neb.] 113 NW 238. Four years' delay, during which time proceedings were pending, held not to bar setting aside probate decree for fraud. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 NW 187. Delay of three years held fatal laches barring motion to vacate irregular judgment, partial payment having been meanwhile made thereon. Herrold v. Union Tp. Poor Dist., 31 Pa. Super. Ct. 43. Delay of ten years held fatal. Deadman v. Yantis, 230 Ill. 243, 82 NE 592. Delay of four months after notice of entry of default in moving to vacate it held unreasonable. Smith v. Pelton Water Wheel Co. [Cal.] 90 P 934. Vacation of judgment by default held properly denied where application therefor was not made until six months after entry of judgment, defendant having notice thereof, and until after his examination in supplementary proceedings had disclosed property. Park v. Regan, 105 NYS 253. Delay of slightly more than a year held not fatal laches, it not appearing that delay in instituting proceeding to have judgment vacated was for the purpose of injuring adverse party or that such a result followed therefrom. City of Dearborn v. Gann [Mo. App.] 105 SW 14. Where delay of two years in seeking equitable relief against judgment was caused by proceedings to quash a default judgment, and on appeal to the supreme court from an order refusing relief laches was not shown, defendant not having been served with process. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 89 P 535. Decree in adversary proceeding rendered after death of one of the parties being voidable merely must be attached within the time and in the manner provided for setting aside erroneous decrees. Hotchkiff v. Bussell [Wash.] 89 P 183.

62. California: Filing and service of notice of motion within six months after default that application to set it aside would be made on a day after the expiration of the six months is not the making of an application within six months as required by Code Civ. Proc. § 473. Thomas v. San Francisco Super. Ct. [Cal.] 92 P 739. Code Civ. Proc. § 473, requiring application to vacate default to be made within a reasonable time but not more than six months, held a limitation on power of court to grant any relief after that period, and hence a delay of less than six months might be unreasonable. Smith v. Pelton Water Wheel Co. [Cal.] 90 P 932, 934, 1135. Under Code Civ. Proc. § 473, requiring application to the trial court for relief against judgment to be made within six months, an application made a year after entry of judgment does not entitle a party to the relief provided for therein. Amestoy Estate Co. v. Los Angeles [Cal. App.] 90 P 42.

Florida: Opening of default on motion for rehearing of motion to vacate after previous denial thereof made more than sixty days after entry of default held error. Zapf v. Lasseter [Fla.] 44 S 171.

Idaho: Under Rev. St. 1887, § 4229, the court has no power to vacate a judgment after six months. Vane v. Jones [Idaho] 88 P 1058.

Kentucky: Judgment obtained by fraud may be vacated on application made within ten years under Ky. St. 1903, § 2519. Estep v. Estep, 30 Ky. L. R. 577, 99 SW 280. Civ. Code Pr. § 745, authorizes appeal within two years after right accrues. Section 763 requires motion to set aside void judgment

decree.[63] The time within which relief may be had commences to run from the time of the entry of judgment and is not affected by an agreement staying execution pending determination of another case on appeal.[64] The disability of an insane person is terminated by death.[65] Limitations do not begin to run against a ward seeking to set aside a decree because of the fraud of the guardian, until the influence of the confidential relation has ceased,[66] and until something has occurred to raise a doubt in the mind of the ward as to the guardian's conduct.[67]

Parties. See 8 C. L. 553—All necessary parties must be joined.[68] In some states an administrator or heirs of a person may prosecute an application for the vacation of a decree against the deceased and affecting property rights.[69] A surviving plaintiff is not entitled to move to set aside judgment dismissing complaint on the ground of the death of a coplaintiff,[70] such judgment being in effect against the deceased party and the right is consequently only available to his personal representatives.[71]

Modes and manner of procedure. See 8 C. L. 554—A final judgment can be vacated

as condition to right of appeal. Held such a motion may be made at any time within two years. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 SW 329. An application to vacate a judgment under Civ. Code Prac. § 518, on the ground of fraud or unavoidable casualty, may be made at any time within five years after the entry of judgment. Louisville & N. R. Co. v. Paynter's Adm'x, 31 Ky. L. R. 163, 101 SW 935.

Minnesota: Held error to open default seventeen months after judgment, Rev. Laws 1905, authorizing same within one year after obtaining notice of judgment, and defendant's showing of want of notice being insufficient. Hoffman v. Freimuth, 101 Minn. 48, 111 NW 732.

Nebraska: Decree rendered after death of plaintiff must be set aside within three years or it becomes final. Wardrobe v. Leonard [Neb.] 111 NW 134.

New York: Municipal Court Act, § 254, authorizes an amendment of judgment only either at close of trial or upon two days' notice of motion. Musica v. Amalfitano, 107 NYS 179. Time within which motion to vacate judgment must be made under Municipal Court Act, § 254, cannot be extended by proceeding in guise of reargument. Applebaum v. Bonagur, 107 NYS 635. That a motion to vacate a judgment was not made within the five days prescribed by Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, is unimportant, when no objection to the hearing of the motion was made on that ground in the lower court. Fallon v. Crocicchia, 52 Misc. 503, 102 NYS 541. Under Laws 1895, p. 1599, c. 751, § 137, a motion to vacate a default judgment of the city of Hudson is made too late after the time to appeal has expired. People v. Tilden, 121 App. Div. 352, 106 NYS 247.

Oklahoma: Code, §§ 562, 569 (Wilson's Rev. & Ann. St. 1903, §§ 4760, 4767), requiring proceedings for relief against judgment to be instituted within two years after entry thereof, held not to apply to a judgment obtained by fraud. Code, § 182 (Wilson's Rev. & Ann. St. 1903, § 4216), authorizing actions for relief against fraud within two years of discovery of fraud applying to relief against judgment on such ground. City of Guthrie v. McKennon [Okl.] 91 P 851.

Texas: Rev. St. 1895, art. 2991, prohibiting injunction to stay execution on valid judgment after expiration of year from time of its rendition, held not to apply to an equitable action to vacate a judgment, such a proceeding being governed by art. 3358. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

63. Perkins v. Hendryx, 149 F 526. Personal decree against nonresident defendant served only by publication and who did not appear. Sweeney v. Tritsch [Ala.] 44 S 184. Statutes of limitations barring relief against irregular judgments have no application where the judgment is void. Entry of judgment on referee's report held a nullity. Cartier v. Spooner, 118 App. Div. 342, 103 NYS 505.

64. City of Guthrie v. McKennon [Okl.] 91 P 851.

65. A proceeding to vacate a judgment fraudulently obtained against such a person must be commenced within a year thereafter, under the express provisions of Code, § 4094. Wood v. Wood [Iowa] 113 NW 492.

66, 67. Scoville v. Brock, 79 Vt. 449, 65 A 577.

68. Petition to set aside default in which judgment plaintiffs were not made parties held properly dismissed. Kinney v. Owens [Wyo.] 89 P 573. The party in whose favor the judgment was entered or his legal representative is a necessary party. Reynolds v. Norvell [Ga.] 59 SE 299. The administrators of a deceased partner who were without the jurisdiction held not indispensable parties to a bill in the nature of a bill of review to vacate a decree in favor of the firm. Perkins v. Hendryx, 149 F 526. Administratrix held not a necessary party to proceeding by heirs at law to have judgment against her set aside, she having been discharged and her dower and other rights being in no way affected thereby. King v. Dekle [Fla.] 43 S 586. Trustee in bankruptcy held a necessary party to a motion to vacate judgment purporting to perfect a prior lien and to enforce same against funds in his hands. Wise Coal Co. v. Columbia Lead & Zinc Co., 123 Mo. App. 249, 100 SW 680.

69. Divorce decree. Wood v. Wood [Iowa] 113 NW 492.

70, 71. Hawkes v. Claffy, 107 NYS 534.

and set aside only on some proceeding authorized by law. Besides error and appeal,[72] the common-law remedies were on the law side error coram nobis and audita querela and later a motion during term to vacate, and on the chancery side by bill of review or by other bill appropriate to the case.[73] The judgment being void, certiorari may be employed.[74] Where the error in a judgment is apparent from the face of the record, the remedy is by appeal,[75] but when not so apparent a proceeding to vacate the judgment is proper.[76] In equity the ordinary remedy, when a decree is improperly entered, is by bill of review.[77] If the bill of review or other remedy is unavailable to vacate an erroneous judgment, relief may be had by suit in equity aided by injunction.[78] If a default judgment is illegal, defendant's remedy is by motion to open the default.[79] If it is erroneously entered, the proper motion is to vacate it.[80] Mandamus is not the proper remedy to annul a judgment on the ground of conspiracy and fraud.[81] An action in nullity of judgment on the ground of fraud cannot be brought by rule.[82] Statutory provisions control.[83]

Pleadings and practice. See 8 C. L. 555—Proceedings for correction are not generally deemed essential before bringing suit to restrain the enforcement of the judgment.[84] In Ohio a motion to set aside a default judgment and revive the cause for further consideration may be heard at a term subsequent to that of the entry of the judgment only when the motion has been filed during the term of the entry and duly continued.[85] A judgment cannot properly be modified or vacated without notice to the party affected thereby,[86] and when a modified judgment is entered without notice same should on motion be set aside.[87] This rule has, however, been altered in some states by statute.[88] Motions to modify must state the grounds upon which they are based.[89] A motion to correct the record so as to show the true date of the entry of judgment covers both the appearance docket and the judgment record.[90] The complaint should show the fraud[91] and diligence on the part of the

72. See Appeal and Review, 9 C. L. 108.

73. Audita Querela, see post, § 15. Bill of review, see Equity, 9 C. L. 1110.

74. See Certiorari, 9 C. L. 542.

75. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902.

76. Entry of decree pro confesso against infant sued without a guardian, infancy not appearing in the petition. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902. Where there is an erroneous award of costs, the remedy is for an order striking the erroneous portion from the judgment. Ljungquist v. Hartmetz, 54 Misc. 87, 104 NYS 498. Where judgment rendered without jurisdiction recites voluntary appearance and trial remedy is by motion to set aside the judgment and not by appeal or error. American Surety Co. v. Bernstein [Tex.] 20 Tex. Ct. Rep. 1, 105 SW 990, rvg. 102 SW 181.

77, 78. Corbett v. Craven [Mass.] 82 NE 37.

79, 80. Fourteenth Street Bk. v. Strauss, 54 Misc. 588, 104 NYS 956.

81. State v. New Orleans Police Dept. Comr's, 119 La. 515, 44 S 283.

82. Richardson v. Moore, 119 La. 149, 43 S 988.

83. Where a default judgment was based on an order for substituted service which had been improvidently granted, defendant's remedy was by appeal, as provided by Municipal Court Act, Laws 1902, p. 1578, c. 580, §§ 310, 311, and not by motion for an order to set aside the order for substituted service. Wolter v. Liebmann, 52 Misc. 517, 102 NYS 487.

84. So held where judgment was rendered in favor of plaintiff and another not a party defendant. Rev. St. 1899, art. 1357 considered. Houston, etc., R. Co. v. Skeeter Bros. [Tex. Civ. App.] 16 Tex. Ct. Rep. 941, 17 Tex. Ct. Rep. 538, 98 SW 1064.

85. Frazier v. Walker, 10 Ohio C. C. (N. S.) 224.

86. Payne v. Martin [Colo.] 89 P 46. Vacation of erroneous judgment of dismissal on ex parte application at a subsequent term and without notice to defendant and entry of a personal judgment against him held error as in contravention of due process clause of Federal constitution. Wetmore v. Karrick, 205 U. S. 141, 51 Law. Ed. 745.

87. Payne v. Martin [Colo.] 89 P 46.

88. Where defendant appeared in the action, he is bound under Rev. St. 1895, art. 1458, to take notice of a motion to set aside a judgment to permit of the filing of an amended petition upon the filing and docketing of the motion during the term and the amended petition need not be served on him. Tammen v. Schaefer [Tex. Civ. App.] 18 Tex. Ct. Rep. 293, 101 SW 468.

89. Masterson v. Southern R. Co. [Ind. App.] 81 NE 730.

90. Thompson v. Great Western Acc. Ass'n [Iowa] 114 NW 31.

91. The acts constituting the fraud must be alleged. Dorman v. Hall, 124 Mo. App. 5, 101 SW 161. Complaint in a proceeding to vacate a judgment held to sufficiently aver fraud where it set out certain rules of court regarding notice of trial and al

applicant.[92] Conclusions of law should be avoided.[93] Statutory requisites, when applicable, should be followed.[94] In many states an affidavit of merits is not essential and may be dispensed with in the discretion of the court,[95] provided the application is accompanied by an answer setting up a good defense on the merits and the party has not been guilty of laches in making the motion.[96] Also, under the statutes of some states, an allegation as to the existence of a meritorious defense is not essential, the judgment being against a minor.[97] The pleading must not be uncertain nor multifarious.[98] A demurrer only reaches facts apparent on the face of the pleadings.[99] If attacked by motion or demurrer, an allegation that one has a meritorious and valid cause of action without more is insufficient,[1] though sufficient in the absence of such an attack.[2] The failure to allege date of entry of judgment or court in which it was rendered does not render complaint bad on general demurrer.[3] A bill for relief being for discovery it must allege want of evidence to establish defense and demand discovery.[4] A verification of a bill in equity to set aside a decree by one or more complainants, though not by all, is sufficient.[5] The petition averring fraud and false testimony, a verification on information and belief is insufficient.[6]

leged that they were disregarded. Riddle v. Quinn [Utah] 90 P 893. Allegation that attorney for defendant became interested for plaintiff and used his influence to obtain judgment for latter held indefinite. Estep v. Estep, 30 Ky. L. R. 577, 99 SW 280. Allegation of falsity of testimony not sufficient to charge perjury in absence of allegation of scienter. Moore v. Gulley, 144 N. C. 81, 56 SE 681. General allegations that judgment was procured by fraud which plaintiff can show by evidence which with reasonable diligence could not have been discovered at the trial held insufficient. Burgess v. Grief, 31 Ky. L. R. 215, 101 SW 984. Petition alleging that in reliance on certain unfulfilled promises of plaintiff defendant did not attend trial, which did not aver that promises were made with design to cheat and defraud and with no intention of keeping them, held not to allege fraud. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419. Petition alleging falsity of testimony as ground for vacation must show what testimony was introduced and wherein it was untrue, the better practice being to attack affidavits of witnesses showing such facts. Id. Affidavit basing relief against default on ground of "fraud of defendants and words and actions of defendants' attorneys" held insufficient in absence of allegation that "words and actions" were fraudulently made. Wagoner Nat. Bk. v. Welch [Ind. T.] 104 SW 610.

92. Petition to set aside judgment three months after expiration of term held not to show due diligence in ascertaining facts asserted as ground for relief. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419.

93. Complaint alleging that plaintiff has a complete defense without alleging facts showing in what it consists held bad on demurrer as a mere conclusion of law. Reed v. New York Nat. Exch. Bk., 230 Ill. 50, 82 NE 341. Petition to set aside judgment in action for divorce and for adjudication of property rights, alleging that testimony that property was separate property of plaintiff did not aver facts showing it to be community property, held to state a mere conclusion. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419.

94. Texas: Sayles' Rev. Civ. St. § 1266, specifying requisites of a plea of payment, held not to apply to an action to restrain enforcement of a judgment on the ground of payment. Horvets v. Dunman [Tex. Civ. App.] 18 Tex. Ct. Rep. 212, 102 SW 462.

95. Fink v. Woods, 102 Minn. 374, 113 NW 909.

96. Fink v. Woods, 102 Minn. 374, 113 NW 909. A verified answer denying all material allegations of the complaint is sufficient in lieu of an affidavit of merits. Montijo v. Sherer [Cal. App.] 91 P 261.

97. In a proceeding to vacate a judgment pro confesso against an infant sued without a guardian, no evidence being taken, it is not necessary to allege a meritorious defense, as under Civ. Code Pr. § 126, the allegations of the petition are deemed traversed and no judgment can be taken against an infant without proof. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902.

98. A bill in equity by a judgment debtor to restrain collection of the judgment on the ground that it was held by the judgment plaintiff in trust for his codefendants, against whom complainant had valid setoffs, held not insufficient for uncertainty or multifariousness. Brown v. Pegram, 149 F 515.

99. Bill to set aside judgment held not to show laches on its face so as to render it subject to demurrer. King v. Dekle [Fla.] 43 S 586.

1, 2. Wagner v. Whitmore [Neb.] 113 NW 238.

3. Flood v. Templeton [Cal.] 92 P 78.

4. So held as to bill for relief against judgment on ground of usury in demand sued on under Code 1899, § 7, c. 96 (Code 1906, § 3432). Logan v. Ballard, 61 W. Va. 474, 57 SE 143.

5. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 NW 187.

6. Verification to petition averring fraud and fasity of testimony as ground for vacation on information and belief held insufficient. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419.

Failure to verify the petition to vacate is not ground for demurrer.[7] Equitable grounds for vacation cannot be set up in a motion in law, being triable only in equity.[8] In action to vacate a judgment on the ground that plaintiff was not a party, plea of res adjudicata is not applicable.[9] On a motion to vacate a default the court cannot consider matters going to the merits of the case other than to determine that the defense presented is meritorious.[10]

Burden of proof and evidence.[See 8 C. L. 556]—All reasonable intendments will be indulged in to support the regularity of proceedings of courts of general jurisdiction,[11] though there is a conflict as to the application of this rule to judgments based on constructive or substituted service.[12] The only service appearing in the record being insufficient to confer jurisdiction, another sufficient service will not be presumed,[13] though if the judgment recites due service of process the presumption of jurisdiction is not overcome by any defects in the record.[14] An amendment of a decree by a court of general jurisdiction is presumably within its power and made before the expiration of the term at which the cause was finally disposed of.[15] To open a judgment there must be a prima facie showing from which the court itself may infer that the relief asked would be in furtherance of justice.[16] It is not sufficient for the moving party to say as a legal conclusion that the judgment is improper or unjust.[17] Where the petition is traversed by a general denial, evidence to sustain the allegations of the petition is essential.[18] The proof of fraud, surprise or mistake must be clear and convincing.[19] The applicant must prove that he was free from

7. Berryhill v. Holland, 30 Ky. L. R. 831, 99 SW 902.

8. Davis v. Robinson [Mo. App.] 102 SW 1048.

9. Cage v. Owens [Tex. Civ. App.] 19 Tex. Ct. Rep. 6, 103 SW 1191.

10. Cutler v. Haycock [Utah] 90 P 897.

11. Fishburn v. Londershausen [Or.] 92 P 1060. Every fact necessary to the validity of a judgment will be presumed in its favor. Medlin v. Downing Lumber Co., 128 Ga. 115, 57 SE 232. That notice of application for certiorari was given before issuance of writ. City of Chicago v. Condell, 124 Ill. App. 64. Where the affidavit of service of summons is defective, it will be presumed in support of a judgment based thereon that the court received other evidence which established that service was properly made. Welsh v. Koch [Cal. App.] 88 P 604. After a lapse of thirty-five years it will be presumed that court required all to be done that was necessary to confer jurisdiction, the records being destroyed. Roberts' Adm'r v. Eastern Kentucky Insane Asylum, 31 Ky. L. R. 477, 102 SW 818.

12. Burden is on complainant alleging want of jurisdiction to show that service was made in another state. McDonald v. Cawhorn [Ala.] 44 S 395. Upon one who seeks to have a judgment, obtained on service by publication, set aside on the ground that no actual notice of the pendency of the suit was had, is imposed the burden of proving that he had no such notice, and a record showing that no evidence or proof was produced on the hearing of such application would disclose that the court did not err in overruling the same. Casto v. Casto, 10 Ohio C. C. (N. S.) 268. Jurisdiction will not be presumed where judgment was entered on substituted service. Fishburn v. Londershausen [Or.] 92 P 1060. The ordinary presumptions to support a judgment do not apply to a judgment based on constructive service. To sustain judgment entered on service by publication, record must show compliance with statutory provisions authorizing publication. Schaller v. Marker [Iowa] 114 NW 43. Where defendant is without the territorial limits of the court, the record must show service, jurisdiction not being presumed in support of the judgment. Foreign corporation. Knapp v. Wallace [Or.] 92 P 1054.

13. Thompson v. Great Western Acc. Ass'n [Iowa] 114 NW 31.

14. Defective affidavit for service by publication. Peterson v. Investors' Trust Co. [Wash.] 90 P 596. Defect in summons. Bock v. Sanders [Wash.] 90 P 597.

15. Maginn v. Standard Equipment Co. [C. C. A.] 150 F 139. Amendment of decree held not void nor subject to collateral attack, although entered at a term subsequent to the decree, where the record does not affirmatively show that such decree was a final disposition of the case. Id.

16, 17. Sarratt v. Gaffney Carpet Mfg. Co. [S. C.] 57 SE 616.

18. Trimble v. Corey [Neb.] 111 NW 376.

19. Boggs v. Inter-American Min. & Smelting Co. [Md.] 66 A 259. The burden being on the party seeking relief and where the weight of evidence is equal and there are no extraneous circumstances to aid the court in arriving at the truth, relief will be denied. Where only evidence of alleged fraud was affidavit of plaintiff's attorney that continuance was agreed to on condition that defendant should procure an order that new matter in answer should be deemed controverted, which was denied by attorney for defendant, held insufficient to establish fraud. Louisville & N. R. Co. v. Paynter's Adm'x, 31 Ky. L. R. 163, 101 SW 935. Unsupported testimony of defendant in a confessed judgment admitting execution of instrument on which judgment was entered, but alleging fraud in procurement or use

negligence.[20] Cases dealing with the sufficiency of the evidence are shown in the notes.[21]

Questions of law and fact. See 8 C. L. 558.

Judgment or order of vacation and extent and effect thereof. See 8 C. L. 558—The imposition of conditions on opening the judgment is largely discretionary with the court.[22] A conditional order setting aside a judgment merely suspends it until the conditions are fulfilled or broken.[23] Compliance with terms imposed in order granting motion to vacate judgment absolutely vacates it,[24] but the converse of this rule has not been applied in all cases.[25] Entry of judgment after the making of a conditional order of vacation raises a presumption that the conditions were not complied

controverted by testimony of plaintiff, is insufficient to warrant opening or to require submission to jury on trial of an issue awarded. Groninger v. Acker, 32 Pa. Super. Ct. 124. In a proceeding to open a judgment, valid on its face, upon a petition alleging that the instrument on which the judgment is founded is a forgery, to which there is a fully responsive answer, the defendant is the actor and the failure of plaintiff to call the subscribing witness upon defendant's denial of the genuineness of the signature does not constitute ground for opening judgment. Blake Tobacco Co. v. Posluszsy, 31 Pa. Super. Ct. 602. Evidence held insufficient to warrant setting aside of a judgment at law by a court of equity on the ground of the alleged misconduct, fraud, and collusion of the complainant's attorney. Sanford v. White [C. C. A.] 150 F 724.

20. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 111 NW 606. Failing to show that he could not have discovered evidence before, by the exercise of reasonable diligence, the application will be denied. Id.

21. A showing for the vacation of an order of the circuit court affirming an order of the county court appointing an administrator held sufficient though there was no affidavit of merits. In re Skelly's Estate [S. D.] 113 NW 91. Evidence held insufficient to show abuse of discretion in refusing to open judgment on ground that instrument on which it was based was a forgery. Blake Tobacco Co. v. Posluszsy, 31 Pa. Super. Ct. 602. Evidence held insufficient to show that note upon which confessed judgment was entered was a forgery and rule to open held properly discharged. Light v. Sholl, 32 Pa. Super. Ct. 133. Controverted testimony tending to show failure of consideration for judgment note held insufficient to require reopening of confessed judgment thereon. Doyle v. Reiter, 32 Pa. Super. Ct. 251. Opening of judgment entered by confession on note for medical services held properly denied, defense being malpractice and not being established. Bastian v. Paulhamus, 33 Pa. Super. Ct. 341. Judgment note held signed by proper officers and rule to open properly discharged. Kline v. Saint Mary of Czestochow Polish Nat. Catholic Church, 33 Pa. Super. Ct. 578. Evidence on motion to vacate default judgment in a tax foreclosure proceeding on the ground of fraud and want of proper service held sufficient to warrant granting of motion. Pyatt v. Hegquist [Wash.] 88 P 933. Evidence held to show that judgments had been procured by willfully false testimony given by the judgment plaintiffs. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 111 NW 606.

22. Opening default on condition of payment of costs and the placing of the action on the short cause calendar held proper. Peck v. Kamsler, 104 NYS 346. Inequitable judgment procured by plaintiff's fault held properly set aside without requiring the payment of costs by defendant. Reeves v. Kroll [Wis.] 113 NW 440. Where a default judgment is entered notwithstanding an answer was served in time, the judgment should be opened unconditionally. An opening order requiring defendant to accept five days' notice of trial and that the cause be put immediately on the short cause calendar held erroneous. Auto Lighter Co. v. Wickes, Hughes & Co., 114 App. Div. 110, 99 NYS 611. Imposing term costs of $100 as condition to vacation of default held an abuse of discretion, defendant being clearly entitled to vacation. Colean Mfg. Co. v. Feckler [N. D.] 112 NW 993. Where a judgment was paid to an unauthorized person and was not received by the party entitled thereto, an order requiring the latter to refund the money as a condition to setting aside the judgment is erroneous. Payment to clerk of court. Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196. Where on a motion to open a decree in the first of two similar suits it appears that an appeal in the second suit is pending and that the first suit was practically undefended, the decree therein will be opened on condition that a new trial in the second suit is granted on the appeal, and on the further condition that defendants will consent in such event to the consolidation of the two suits. Sparks v. Fortescue [N. J. Eq.] 67 A 391. An order sustaining a petition for review of a judgment should provide for the vacation of the judgment on condition that defendant answer or demur to the petition of plaintiff upon which judgment was rendered within a reasonable time to be allowed by the court. Miners' Bk. v. Kingston, 204 Mo. 687, 103 SW 27.

23. Order setting aside judgment on condition costs were paid within 60 days. Condition not being fulfilled, held execution properly issued. United States v. Noojin, 155 F 377.

24. Where order requiring deposit of amount of judgment is complied with, court cannot thereafter require deposit of costs on motion, nor can it direct payment of deposit to plaintiff for failure to comply therewith. Richman v. Bonewur, 107 NYS 675.

25. Failure to pay costs imposed on granting motion to vacate judgment does not warrant setting order of vacation aside, as same may be included in judgment for plaintiff if

with.[26] Where both trial and appellate courts have concurrent jurisdiction over the opening of defaults, the granting of an application made to one on terms not complied with, bars a similar application to the other.[27] The court should only grant such relief as is consistent with the pleadings, facts, and nature of the proceeding.[28] The vacation of a judgment against one of several judgment debtors whose interests are inseparable vacates it as to the other judgment debtors,[29] but the rule is otherwise where the judgment is severable.[30] A judgment ceases to exist upon vacation and thereafter proceedings to give it vitality are ineffective.[31] The effect of opening a judgment may be somewhat controlled by stipulation.[32] In some cases the court may on vacating the judgment finally fix and determine the rights of the parties,[33] thus, where relief is granted in equity on the ground of fraud, the court has full power to adjust the equities of the parties.[34]

Appeal or review. See 8 C. L. 559—The appealability of an order is largely statutory.[35] Certiorari is the proper remedy to review an order setting aside a default judgment.[36] The trial judge's findings of fact as to whether default was due to excusable neglect are conclusive on appeal.[37] Error cannot be predicated on an

successful. Matthews v. Carmen, 107 NYS 694.

26. North Baltimore Bottle Glass Co. v. Altpeter [Wis.] 113 NW 435. Where a judgment is vacated on condition and is re-entered after the lapse of the time set for the performance of the condition, it will be presumed that the conditions were not complied with. Id.

27. Court and Practice Act 1905, § 428, empowers trial court to set aside default within six months after entry, § 471 empowers supreme court to order trial within year after entry of default, held both courts have concurrent jurisdiction within six months' period. Moore v. Stillman [R. I.] 68 A 419.

28. Where the referee in bankruptcy who had been allowed to intervene in a mortgage foreclosure suit defaulted upon the trial, the fact of an order opening a default which required the trustee to furnish an undertaking to meet any deficiency occasioned by the default held improper. McLoughlin v. Collins Bldg. & Const. Co., 104 NYS 620. Where a void judgment entered on alleged unsigned findings and a transcript was filed in the county clerk's office after motion to vacate the judgment, orders directing the striking of such findings and the withdrawal of the transcript after vacation of the judgment were proper. Sackett v. Price County, 130 Wis. 637, 110 NW 821. On a motion to retax costs the court has no right to reduce or modify the judgment, but merely to direct that the amount disallowed, if any, be credited on the execution. Ost v. Salmanowitz, 54 Misc. 547, 104 NYS 849.

29. Sturgis, Cornish & Burn Co. v. Miller [Neb.] 112 NW 595. So held as to judgment against principal and sureties. Id. Where after the consolidation of two suits separate decrees are entered, they are in effect one decree and an order vacating one vacates both. Schallenberg v. Kroeger [Neb.] 110 NW 664.

30. Where judgment is entered on verdict finding in favor of plaintiff against defendants sued jointly in separate amounts, the court may thereafter on motion of plaintiff dismiss as to one defendant and render judgment against the remaining defendant alone. Nashville R. & L. Co. v. Trawick [Tenn.] 99 SW 695.

31. Where judgment entered in vacation on a judgment note was set aside and vacated and defendant allowed to plead, held error to subsequently attempt to reduce such judgment and to strike pleas so interposed from files. Smith v. Dazey, 124 Ill. App. 399.

32. Where by stipulation between the plaintiff and the judgment defendant a judgment is opened but allowed to stand as security for the benefit of an assignee of the judgment until trial on the merits, a subsequent dismissal without a trial on the merits leaves the judgment in force as to the assignee. City of Chicago v. Lynch, 129 Ill. App. 232.

33. Civ. Code Pr. § 522. On vacating judgment fraudulently entered after compromise court may enforce the terms of the compromise. Martin v. Conley, 30 Ky. L. R. 728, 99 SW 613.

34. Decree of foreclosure obtained by fraudulently inducing mortgagor not to plead valid set-off. Flood v. Templeton [Cal.] 92 P 78.

35. A motion to vacate a judgment based on exceptions duly taken to the ruling of the court in denying the defendant the right to defend the action is appealable and may be reviewed. Municipal Court Act, Laws 1902, p. 1562, c. 580, § 253, and p. 1563, c. 580, § 257, construed. Fallon v. Crocicchia, 52 Misc. 503, 102 NYS 541. An order of a municipal court opening a default is not appealable. Wolter v. Liebmann, 52 Misc. 517, 102 NYS 487. An order refusing to set aside a judgment is a special order after final judgment and appealable. Oliver v. Kootenai County [Idaho] 90 P 107. An order refusing to set aside a judgment rendered after a trial and verdict is not appealable, when such order is based on a motion to set aside the judgment on the ground that the special verdict on which the judgment was entered did not warrant the entry of judgment therein. Olson v. Mattison [N. D.] 112 NW 994.

36. State v. Thompson [Tenn.] 102 SW 349.

37. Stockton v. Wolverine Gold Min. Co., 144 N. C. 595, 57 SE 335.

order correcting a record making it show expressly what it already shows by necessary implication.[38] Where an order vacating a judgment against defendant gives him a certain time to comply with its terms, the defendant may appeal before the time for compliance has expired.[39]

§ 6. *Construction, operation, and effect of judgment.* See 8 C. L. 559—The construction of a decree is for the court and it is error to submit it to the jury.[40] When the terms of a decree are plain and free from ambiguity, their ordinary meaning and effect may not be lawfully extended or contracted by construction, in the absence of proof to a reasonable certainty that such was the purpose of the court, for the legal presumption is that the judge carefully expressed his deliberate intention therein.[41] The judgment should be construed with reference to its language, the record, the pleadings, and the subject-matter of the suit.[42] In determining the construction of a decree, evidence as to what parties understood its scope to be [43] and of customs [44] is inadmissible. The absence from a decree of any limitation or exception to general terms of known significance raises a persuasive legal presumption that the court intended to make none.[45] Surplusage [46] and words which are merely descriptio personae [47] should be disregarded. The judgment should not be inconsistent or double.[48] In some states a judgment against two or more parties is not considered an entirety unless the interests of the judgment debtors are inseparable.[49]

§ 7. *Collateral attack. What is collateral.*[50]—A collateral attack is an at-

38. Schallenberg v. Kroeger [Neb.] 110 NW 664.

39. Fallon v. Crocicchia, 52 Misc. 503, 102 NYS 541.

40. Charles v. St. Louis, etc., R. Co., 124, Mo. App. 293, 101 SW 680.

41. St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F 849. Railroad right of way decree construed. Id.

42. Judgment that mortgagee recover nothing construed as an adjudication that he had agreed to enforce mortgage only for amount actually due him and that at time of bringing action he had received all that was due him. Simmons v. Rowe [Cal. App.] 89 P 621. A judgment for costs accrued to its date which is not excepted to nor appealed from is not annulled by a subsequent final judgment for all costs. Collins v. Hines [Tex. Civ. App.] 18 Tex. Ct. Rep. 37, 100 SW 359. Where under law an Indian allottee of land could convey only a leasehold interest, a judgment that an allottee could convey land to extent of his interest and directing release of same and conveyance of good and valid title construed as directing a conveyance of a leasehold interest and not the fee. Goodrum v. Buffalo [Ind. T.] 104 SW 942. Judgment that plaintiff, an Indian, had right to convey certain allotted land to extent of his interest therein and directing him to release same and the conveyance of a good and valid title, but which did not state the extent of the title to be conveyed, construed as directing conveyance of such title as the law permitted to be conveyed and hence not a conveyance of the fee. Id. Decree establishing water rights of parties construed and held to entitle defendants to exclude water from certain sloughs during certain periods of the year and thus prevent it from entering plaintiff's land. Hartson v. Dill [Cal.] 90 P 530.

43. Hartson v. Dill [Cal.] 90 P 530.

44. Evidence of custom respecting use of water in locality prior to decree fixing water rights held inadmissible in construction of decree. Hartson v. Dill [Cal.] 90 P 530.

45. St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F 849.

46. Recital that all matters of fact as well as of law were submitted to the court held mere surplusage which does not impair or strengthen judgment. Hockwald v. American Surety Co. of New York [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181.

47. Word "executrices" in judgment following names of judgment plaintiffs is merely descriptio personae and adds nothing to the force and effect of the judgment. Corzine v. Brents, 123 Ill. App. 613.

48. In a decree in a suit to restrain defendant from interfering with the waters of an irrigation ditch, provisions declaring that plaintiff had an easement in the waterway and granting defendant the right to use them jointly with plaintiff held not inconsistent. Hoyt v. Hart, 149 Cal. 722, 87 P 569. Decree in accounting construed and held not bad as a double judgment. Costello v. Scott [Nev.] 93 P 1.

49. Sturgis, Cornish & Burn Co. v. Miller [Neb.] 112 NW 595.

50. See 8 C. L. 560.

NOTE: Scope of section: While from many points of view there is no distinction between a collateral attack on a judgment and a plea of res judicata, the latter being in effect a collateral attack, still there is a distinction in that a collateral attack is directed at the validity of the judgment while in res judicata the object of the plea is generally to limit the effect of the judgment. This latter subject is treated in a separate article, i. e., Former Adjudication [Ed.]

tempt to impeach a judgment in a proceeding not instituted for the express purpose of annulling, correcting, or modifying such judgment.[51]

Grounds.[See 8 C. L. 561]—A court having jurisdiction over the parties, the subject-matter,[52] and over the precise question the judgment assumes to determine or the particular relief which it assumes to grant,[53] its judgment is not subject to collateral attack. A judgment void for want of jurisdiction [54] or for other reasons [55] may be collaterally attacked at any time [56] by any person who has not by his conduct estopped himself from questioning its validity,[57] though, being a court of general jurisdiction, want or jurisdiction must affirmatively appear on the face of the record.[58] The reason for this is that, as to a court of general jurisdiction, all

51. See 17 A. & E. Ency. of Law [2nd. Ed.] 848. To constitute a direct attack the main object of the proceeding must be the setting aside of the judgment. O'Neil v. Potvin [Idaho] 93 P 20. Hence, where independent relief is sought, though it may require the vacation of the judgment, the attack is collateral. Action to quiet title against sale on execution held a collateral attack. Id. An attempt by an independent proceeding to impeach a foreclosure decree rendered in another court is a collateral attack on such decree. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357. A proceeding to vacate a judgment after the term of rendition, under Code, § 4091, is not a collateral attack. Wood v. Wood [Iowa] 113 NW 492. Proceedings to enjoin enforcement are collateral. Cox v. Anderson [Neb.] 112 NW 317. Suit to vacate judgment and to enjoin its enforcement held a direct and not a collateral attack. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211. Attack in ejectment or decree quieting title held collateral. Caldwell v. Bigger [Kan.] 90 P 1095. Evidence that one was mistaken as to issues involved in former suit held a collateral attack. Corbett v. Craven [Mass.] 82 NE 37. Where judgments were rendered against a county on certain county bonds, an attack made by the county on the validity of the bonds, in a mandamus proceeding to compel payment of the judgments, is collateral. Territory v. Santa Fe County Com'rs [N. M.] 89 P 252. An attack on the jurisdiction of the court by answer in a proceeding to revive the judgment is a direct and not a collateral attack. Waterman v. Bash [Wash.] 89 P 556. Defense to proceeding to revive default judgment that process was never served and original proceeding never heard of until notice of attempt to revive held not a collateral attack. Kaufman v. Foster, 89 Miss. 388, 42 S 667. Action to obtain decree that defendants hold property as trustees for plaintiffs on the ground that title thereto was procured by fraud in the administration of decedent's estate held a direct and not a collateral attack on the judgment of the probate court. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184.

52. In re Throckmorton [C. C. A.] 149 F 145. Where record of county court in a proceeding to establish a "private way" of necessity shows that the court acted within its jurisdiction, its judgment cannot be collaterally attacked. Hartzfeld v. Taylor [Mo.] 105 SW 599.

53. Sache v. Gillette [Minn.] 112 NW 386.

54. Mortgage Trust Co. of Pennsylvania v. Redd, 38 Colo. 458, 88 P 473; Sache v. Gillette [Minn.] 112 NW 386; Grider v. Corbin, 116 App. Div. 818, 102 NYS 181. Parent not a party to adoption proceedings held entitled to collaterally attack same by a habeas corpus proceeding for the possession of the children. Beatty v. Davenport [Wash.] 88 P 1109.

55. Judgment made by disqualified judge being void may be collaterally assailed. Bliss v. Caille Bros. Co. [Mich.] 14 Det. Leg. N. 590, 113 NW 317. Divorce decree void for **insufficiency of petition** held subject to collateral attack. Hinkle v. Lovelace, 204 Mo. 208, 102 SW 1015.

Judgment imprisoning person for contempt entered **in absence of such person** is void and may be attacked on habeas corpus. Ex parte Mylius, 61 W. Va. 405, 56 SE 602.

Judgment against a dissolved corporation is void and may be collaterally impeached by stockholders though the action was dismissed as to them. Crossman v. Vivienda Water Co., 150 Cal. 575, 89 P 335. Entry of a **deficiency decree in an action to enforce a vendor's lien** is absolutely void and may be collaterally attacked. Johnson v. McKinnon [Fla.] 45 S 23.

Judgment entered by clerk, notwithstanding due appearance by defendant, no prior default being taken, is void on its face and subject to collateral attack. King v. Dekle [Fla.] 43 S 586. Entry of **order of fiat after expiration of life of writ of scire facias** held void and subject to collateral attack, no new writ having been issued within twelve years from last renewal of judgment. Collins v. McBlair, 29 App. D. C. 354.

56. Either before or after time for appeal. Sache v. Gillette [Minn.] 112 NW 386.

57. By a person not a party to the action, but who is affected thereby in his property rights. Sache v. Gillette [Minn.] 112 NW 386. A stranger to a judgment obtained by fraud or collusion who is injured thereby may attack it collaterally. Surety on appeal bond to secure payment of judgment fraudulently obtained may attack same in a collateral proceeding. Brownell v. Snyder, 106 NYS 771. A grantee of a husband surviving his wife, who died siezed of a homestead, held entitled to collaterally attack an order of the probate court directing the sale of the premises as the estate of the deceased wife. Fisher v. Bartholomew [Cal. App.] 88 P 608.

58. O'Neill v. Potvin [Idaho] 93 P 20; Sache v. Gillette [Minn.] 112 NW 386. Court of ordinary is a court of general jurisdiction. Medlin v. Downing Lumber Co., 128 Ga. 115, 57 SE 232. Where want of jurisdiction over the subject or a person appears

jurisdictional facts as to which the record is silent will be presumed.[59] Recitals of jurisdictional facts are conclusive [60] unless contradicted by the record.[61] A decision on jurisdictional questions has the same binding force as against collateral attack as a decision upon any other question.[62] It is sometimes held that the presumptions in favor of jurisdiction are lacking where the service of summons is made by publication.[63] It will be presumed that all matters in controversy were disposed of by the

from the record, the judgment is subject to collateral attack. Order of county judge decreasing amount of guardian's bond held void under Rev. St. 1895, §§ 1949-1952, 2606. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665. Where the record shows on its face that the court was without jurisdiction, the judgment is void. Franklin County v. Crow, 128 Ga. 458, 57 SE 784. Where the complaint was sufficient to give the court jurisdiction and the record shows due service of summons and entry of default, the judgment cannot be held to be void on its face. Robinson v. Blood [Cal.] 91 P 258. Want of service cannot be shown on collateral attack except where it appears on the record. Waterman v. Bash [Wash.] 89 P 556. Insanity of a party, not appearing on the face of the record, does not render the judgment subject to collateral attack. Wilkinson v. Lehman-Durr Co. [Ala.] 43 S 857. In a proceeding to revive a dormant judgment its validity cannot be collaterally assailed by showing want of service where same does not appear on the record. Smathers v. Sprouse, 144 N. C. 637, 57 SE 392.

59. Service. Page v. Garver [Cal. App.] 90 P 481; Knapp v. Wallace [Or.] 92 P 1054. Jurisdiction of defendant presumed unless judgment roll shows contrary on its face. Welsh v. Koch [Cal. App.] 88 P 604. Presumed that petition for sale of ward's real estate was filed before publication of notice. Mortgage Trust Co. of Pa. v. Redd, 38 Colo. 458, 88 P 473. Failure of record to show that father was absent from state when service was had on minors. Kaylor v. Hiller [S. C.] 58 SE 2. Proceedings for appointment of committee for insane convict in a court of general jurisdiction. Trust Co. of America v. State Deposit Co. [N. Y.] 79 NE 996. Presumed that service prayed for in the petition was had though record contains no recitals of service. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 SW 537. Presumed that probate court inquired into mental condition of alleged imbecile before appointing guardian. Hare v. Shaw [Ark.] 104 SW 931. On collateral attack it will not be presumed that service by publication described defendant by his initials only merely because he was so described in the judgment and order of sale. Williams v. Lobban, 206 Mo. 399, 104 SW 58. Decree entered in action by de facto corporation cannot be collaterally attacked on ground of nonexistence of such corporation. Whipple v. Tuxworth [Ark.] 99 SW 86. Decree bearing date of day following adjournment held not void on its face as made in vacation so as to render it subject to collateral attack, court having been in session on day fixed for hearing and for three days thereafter. Temple v. Preston [Mich.] 14 Det. Leg. N. 772, 114 NW 336. Presumption of jurisdiction will not be indulged in on collateral attack where want of jurisdiction affirmatively appears from the pleadings. Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8, 51 Law. Ed. 345.

60. Recital of service. Ballard v. Hunter, 204 U. S. 241, 51 Law. Ed. 461. Where a judgment of a court of general jurisdiction recites actual service of process in apt time and record contains nothing contradicting such finding or return, same cannot be impeached by evidence dehors the record in an action at law. Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 NE 188.

61. Recital in judgment that defendants were duly notified by publication held not to prevent showing in a collateral action that order of publication did not comply with statutory requirements. Davis v. Montgomery, 205 Mo. 271, 103 SW 979. Where the record contained a return of service and a recital of due service, the latter must be considered as referring to the return. Return held to show want of service on foreign corporation, which was not aided by recital of jurisdiction rendering default decree based thereon void on collateral attack. Knapp v. Wallace [Or.] 92 P 1054.

62. Where inferior court is required to ascertain and determine facts essential to its jurisdiction, its decision thereon is conclusive against collateral attack unless want of jurisdiction is apparent on the face of the proceedings. Baltimore & O. R. Co. v. Freeze [Ind.] 82 NE 761. Where a court of equity decides that it has jurisdiction and renders a decree, its decision though erroneous is not void and cannot be collaterally assailed. Morgan v. Haley [Va.] 58 SE 564. Determination of court that petition for local option was signed by requisite number of petitioners cannot be collaterally attacked in a criminal proceeding for violation of the local option law thereupon put in force, the petition being sufficient to confer jurisdiction. State v. McCord [Mo.] 106 SW 27. Though no person under 16 years of age can be sentenced to State Industrial Reformatory, where judgment recites that defendant was over sixteen, such determination cannot be attacked on habeas corpus to procure release. In re Wallace, 75 Kan. 432, 89 P 687.

63. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357. On collateral attack on a judgment rendered on service by publication, the affidavit for the order of publication will be understood to speak the truth, and it will not be presumed that there was other evidence respecting the fact or that it was otherwise averred. Id. Where a foreclosure decree was based on service by publication authorized by an order granted on affidavit, the affidavit is the only record that can be considered on collateral attack on such decree for the purpose of ascertaining whether the facts authorized the order of publication. Id.

judgment.[64] For the purposes of collateral attack a transcribed judgment is generally deemed the judgment of the superior court.[65] Want of jurisdiction cannot be shown by extrinsic evidence.[66] Fraud, unless perhaps when it goes to the jurisdiction of the court,[67] is not ground for collateral attack.[68] An erroneous judgment,[69] or one voidable for mere irregularities of procedure,[70] cannot be collaterally at-

64. Towne v. Towne [Cal. App.] 92 P 1050.

65. Since under Hurd's Rev. St. 1905, c. 79, § 135, a judgment of a justice of the peace becomes the judgment of the circuit court from the date of the filing of the transcript therein, same cannot be attacked in an action under the Torrens act where it is valid on its face. Young v. Zacher, 226 Ill. 327, 80 NE 945.

66. Judgment confirming municipal assessment cannot be attacked by stipulation that lots as to which objections were filed did not abut upon street improved. People v. Second Ward Sav. Bk., 224 Ill. 191, 79 NE 628.

67. Judgment cannot be impeached in collateral proceedings except for fraud. Irish v. Daniels, 100 Minn. 189, 110 NW 968. Unless the fraud goes to the procurement of the judgment, it is not ground for collateral attack. Pratt v. Griffin, 223 Ill. 349, 79 NE 102. Rendering judgment void. Mahoney v. State Ins. Co., 133 Iowa, 570, 110 NW 1041. Going to the method of acquiring jurisdiction or to the fraudulent creation of the cause of action. Id. Erasures of certain assignments on a note and mortgage introduced by the mortgagee in an action on a policy of insurance held not to invalidate judgment for mortgagee. Id. Same as to cancellation of certain assignments. Id. Evidence that defendant's attorney knew of such erasures and cancellation held inadmissible. Id.

68. A party to a judgment cannot collaterally assail it for fraud or perjury in the procurement. Bleakley v. Barclay, 75 Kan. 462, 89 P 906.

69. Welsh v. Koch [Cal. App.] 88 P 604; Mortgage Trust Co. of Pa. v. Redd, 38 Colo. 458, 88 P 473; Ayres v. Deering [Kan.] 90 P 794. Erroneous construction of the law. Geodrum v. Buffalo [Ind. T.] 104 SW 942. Facts stated in findings not true. Welsh v. Koch [Cal. App.] 88 P 604. Whether the facts proved in an adoption proceeding justified a decree of adoption granted, could not be inquired into in a collateral proceeding. Kennedy v. Borah 226 Ill. 243, 80 NE 767. Erroneous judgment, in a criminal proceeding over which court had jurisdiction, cannot be collaterally attacked by an action to recover the fine imposed and paid. Holloman v. Tifton [Ga. App.] 59 SE 828. Defensive matters known to a party at the time of the trial will not warrant collateral attack. Cox v. Anderson [Neb.] 112 NW 317. Where jurisdiction depends upon matters presented to and decided by the court, its decision thereon cannot be collaterally attacked though erroneous. In re Wallace, 75 Kan. 432, 89 P 687. Validity of trust established by judgment cannot be questioned in an action to quiet title based thereon. Gable v. Page [Cal. App.] 91 P 339. Validity of tax deed upon which decree quieting title was based cannot be questioned, collaterally in ejectment. Caldwell v. Bigger [Kan.] 90 P 1095. Validity of grant of letters of administration cannot be collaterally attacked in an action by the administrator. Griesel v. Jones, 123 Mo. App. 45, 99 SW 769. Regularity of the appointment of a guardian cannot be attacked by the next friend of the ward in an action instituted by the guardian in behalf of the ward. Hare v. Shaw [Ark.] 104 SW 931.

70. Sache v. Gillette [Minn.] 112 NW 386. Mere irregularities in the service of process. Hansford v. Tate, 61 W. Va. 207, 56 SE 372. Defective service not affecting jurisdiction of court. Ayres v. Deering [Kan.] 90 P 794. Service on foreign corporation doing business in state held sufficient to support jurisdiction as against collateral attack. Brown v. Lewis [Or.] 92 P 1058. Irregularity in service of process or failure to comply with the statute does not render the judgment subject to collateral attack. McDonald v. Cawhorn [Ala.] 44 S 395. Where service was obtained by publication, the nonresident defendants could not, on a collateral attack, rely on mere imperfections or uncertainty of statement of jurisdictional facts in the affidavit for the order of publication. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357. Defect in petition held not ground for collateral attack on adjudication in bankruptcy. Edelstein v. U. S. [C. C. A.] 149 F 636. Justice's judgment cannot be collaterally attacked by showing that an adjournment was unauthorized, that security fo rcosts was not furnished upon issuance of a commission to take a deposition, and that no notice of the issuance of the commission was given. American Copying Co. v. Stern, 148 Mich. 281, 14 Det. Leg. N. 83, 111 NW 766. Lapse of time between death of husband and application for allowance for support, while it may constitute good ground for resisting application, does not render the allowance void so as to render it subject to collateral attack. Reynolds v. Norvell [Ga.] 59 SE 299. Amendable defects do not render a judgment void so as to render it subject to collateral attack. Chapman v. Taliaferro, 1 Ga. App. 235, 58 SE 128. Awarding relief in excess of that prayed for does not render judgment void and hence open to collateral attack. Cohen v. Cohen, 150 Cal. 99, 88 P 267. That the foreclosure decree was rendered after the death of the plaintiff but after the jurisdiction of the court had attached is a mere irregularity. Wardrobe v. Leonard [Neb.] 111 NW 134. On a petition by a guardian for permission to sell the ward's real estate, failure to give the three weeks' notice by publication, required by Mills' Ann. St. § 2083, is not a jurisdictional defect. Mortgage Trust Co. of Pa. v. Redd, 38 Colo. 458, 88 P 473. Under Civ. Code Prac. §§ 517-519, making premature rendition of judgment a clerical misprision which may be corrected by motion made not later than first three days of succeeding term, same cannot be collaterally attacked after the expiration of such period. Potter v. Potter's Receiver, 31 Ky. L. R. 137, 101 SW 905. Civ. Code, § 5371, authorizing collateral attack

tacked. The courts are not in full harmony as to what constitutes an irregularity within the meaning of the rule referred to. Generally speaking, however, an irregularity may be defined as a failure to follow appropriate and necessary rules of practice or procedure, omitting some act essential to the due and orderly conduct of the action or proceeding or doing it in a proper manner.[71] Errors or defects of this character, that may be amended without prejudice to the absolute rights of the parties, do not affect the jurisdiction of the court to the extent that its final action is a nullity,[72] but proceedings outside the authority of the court, or in violation or contravention of statutory prohibitions, are, whether the court has jurisdiction of the parties and subject-matter of the action or proceedings or not, utterly void.[73] A collateral attack on the ground of fraud must be made within a reasonable time after the discovery of the fraud.[74] The same general principles apply to probate[75] and bankruptcy[76] decrees, to judgments by confession,[77] and to judgments of courts of competent jurisdiction in special statutory proceedings.[78]

§ 8. *Lien. When and to what it attaches.* See 8 C. L. 586—The lien of a judgment does not attach in favor of persons not parties to the action.[79] Until levy a judgment for money is not a lien on the property of the judgment debtor.[80] The lien covers all the real property of the judgment debtor, reaching, however, only the interest of the latter therein.[81] A judgment against an adult Indian is not a lien upon his inherited trust lands situated in the county where the judgment was ren-

by creditors for any defect appearing on the face of the record, must be taken in connection with § 3536, prohibiting such attack for mere irregularity. Chapman v. Taliaferro, 1 Ga. App. 235, 58 SE 128.

71, 72. Sache v. Gillette [Minn.] 112 NW 386.

73. Sache v. Gillette [Minn.] 112 NW 386. In an action to determine adverse claims, a default judgment awarding relief beyond the scope of the allegations is void. Rev. Laws 1905, § 4262, construed. Id.

74. Mahoney v. State Ins. Co., 133 Iowa, 570, 110 NW 1041.

75. A decree admitting a will to probate is not subject to collateral attack. Cohen v. Herbert, 205 Mo. 537, 104 SW 84. Judgment of probate court allowing claim against estate cannot, in the absence of a showing of fraud, be attacked in a proceeding to enjoin the sale of property to satisfy it. Williams v. Risor [Ark.] 104 SW 547. Under Const. art. 5, § 21, the probate court is a court of record as to matters of probate and its records, judgments, and proceedings import absolute verity. In re McVay's Estate [Idaho] 93 P 28.

76. Adjudication in bankruptcy imports absolute verity. Edelstein v. U. S. [C. C. A.] 149 F 636.

77. Judgment by confession is not subject to collateral attack in the absence of fraud, want of jurisdiction, or other defect rendering it void. Gilman v. Heitman [Iowa] 113 NW 932. Judgment entered on consent cannot be collaterally attacked by party alleging want of consent. Hollenbeck v. Glover, 128 Ga. 52, 57 SE 108. Want of authority to confess judgment appearing on the face of the record renders the judgment subject to collateral attack. Rasmussen v. Hagler, 15 N. D. 542, 108 NW 541.

78. A judgment of a court of competent jurisdiction, although rendered in a special statutory proceeding, is entitled to the same presumptions of jurisdiction of subject-matter and parties as judgments of the same court when proceeding according to the course of the common law. Sale of ward's realty. Mortgage Trust Co. of Pa. v. Redd, 38 Colo. 458, 88 P 473.

79. Walker v. O'Neill Mfg. Co., 128 Ga. 831, 58 SE 475.

80. Low v. Skaggs, 31 Ky. L. R. 1292, 105 SW 439.

81. Land deeded as "collateral security" held subject to lien. Graves Elevator Co. v Seitz, 54 Misc. 552, 104 NYS 852. A judgment against a vendor who has sold by articles of agreement but who still retains the legal title becomes a lien upon any interest remaining in the vendor evidenced thereby. McCleery v. Stoup, 32 Pa. Super. Ct. 42. Where prior to the entry of judgment against a vendor who has sold by articles of agreement, the unpaid purchase price is assigned in good faith and for a valuable consideration, no interest remains in him to which the lien of a judgment can attach. Id. The filing of an abstract of a judgment rendered in another county creates no lien against land where the debtor had previously conveyed it and the deed had been recorded. Nicholdson v. Nesbitt [Cal. App.] 88 P 725. Upon payment of purchase price of land purchased under Timber and Stone Act (Act Cong. June 3, 1878, c. 151, 20 Stat. 89, U. S. Comp. St. 1901, p. 1545), and receipt of a certificate of such payment, land becomes subject to lien of judgment under B. & C. Comp. § 205, providing that judgment shall become a lien on all real property of defendant after date of docketing. Budd v. Gallier [Or.] 89 P 638. Where a judgment had been recovered against the purchaser of certain real estate and execution had been issued thereon within a year after its rendition, the judgment becomes a lien on the premises for seven years by Hurd's Rev. St. 1905, c. 77, § 1, as soon as the purchaser ac-

dered.[82] Under the Illinois Chancery Act, decrees in equity constitute liens on realty to the same extent as judgments at law.[83] To constitute a lien the judgment must be recorded in the manner provided by statute.[84] The indexing and transcribing of a judgment for the purposes of a lien is treated elsewhere.[85] Where a dormant judgment has been revived, it is a lien on defendant's property only from date of revival.[86]

*Duration of lien.*See 8 C. L. 566—A judgment lien is created by statute and is destroyed by statute.[87]

*Rank and priority of lien.*See 8 C. L. 567—The judgment lien is superior to the rights of the grantee of an unrecorded deed.[88] Cases determining the rank of the judgment lien with reference to other liens and rights are shown in the notes.[89]

*Mode of asserting lien.*See 8 C. L. 568.

*Release.*See 8 C. L. 252.

*"Judicial mortgages."*See 8 C. L. 258—In a hypothecary action to enforce a judicial mortgage, parol evidence is not admissible to prove that the purchase price of the property was not paid in cash, as recited in the deed to defendants' author, but that the true consideration was partly cash, a special mortgage held by the purchaser, and his assumpsit of a vendor's lien and mortgage held by a third person.[90] Using the purchase price to pay pre-existing mortgages which were extinguished and canceled of record, gives no right of subrogation to the purchaser or his assigns.[91]

§ 9. *Suspension, dormancy, and revival.*See 8 C. L. 568—The life of a judgment is generally regulated by statute and varies in the different states.[92] In some states

quired title, subject, however, to a trust deed given for the unpaid portion of the price. Wehrheim v. Smith, 226 Ill. 346, 80 NE 908.

82. Beall v. Graham, 75 Kan. 98, 88 P 543.

83. Chancery Act, §§ 44-45. Decree for alimony may be made a lien on realty of defendant. Leafgreen v. Leafgreen, 127 Ill. App. 184.

84. Entry of tabulated or abstract statement of contents of clerk's certificate held insufficient under Code 1896, § 1920. Edinburgh American Land Mortg. Co. v. Grant [Ala.] 44 S 554. Judgment under B. & C. Comp. § 205 becomes a lien on property of the judgment debtor from the date of its docketing. Budd v. Gallier [Or.] 89 P 638. Under Municipal Court Act (Laws 1902, p. 1565, c. 580, § 263), a judgment of the municipal court of the city of New York does not become a lien until docketed in the office of the county clerk of the county in which the property is situated. Taylor v. Bell, 121 App. Div. 437, 106 NYS 273.

85. See ante, § 4.

86. McLendon v. Shumate, 128 Ga. 526, 57 SE 886. Though a possessory title in a person other than the defendant may not ripen into prescription so as to defeat the judgment lien, yet, where the judgment becomes dormant and is revived, if the title has ripened into prescription prior to the revival, it will be superior to the judgment lien. Id.

87. Glenn v. Glenn [Neb.] 112 NW 321. Under Code Civ. Proc. § 509, a judgment creditor failing to have execution issued and levied before the expiration of five years next after the rendition of the judgment, loses the priority of his lien as against other bona fide judgment creditors or purchasers. Id. A mortgagee is a purchaser within the meaning of such statute. Id. Under Code, § 1268, a judgment lien attaching to land before the owner's adjudication as a bankrupt is not removed by the order canceling the record of the judgment after his discharge in bankruptcy. Graves Elevator Co. v. Seitz, 54 Misc. 552, 104 NYS 852.

88. Under Code 1906, § 3106. Logan v. Ballard, 61 W. Va. 474, 57 SE 142.

89. Judgment lien or charge held prior to the mortgage lien. Smith v. Phillips, 5 Ohio N. P. (N. S.) 502. Judgment confessed by father to son and subsequently paid in full and after payment assigned to mother without consideration cannot participate in distribution of sheriff's sale of real estate to exclusion of judgment creditor whose lien was prior at date of son's judgment, but which had lost its priority by reason of failure to revive. Graybill v. Deitrich, 32 Pa. Super. Ct. 482. Purchaser of land subject to lien of a judgment properly docketed at the date of his purchase cannot complain because judgment was not docketed immediately after entry of judgment, as required by B. & C. Comp. § 205. Budd v. Gallier [Or.] 89 P 638.

90. Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 S 453.

91. Since the price thus used was the money of the vendor. Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 S 453.

92. California: Code Civ. Proc. § 685, as amended by act April 9, 1895, construed as an extension of the period of limitations in judgments, and as such held to apply to a judgment existing at the date of its passage not barred by limitation. Weldon v. Rogers [Cal.] 90 P 1062.

Georgia: Entries by the sheriff of an execution issued on a judgment of the county court are not sufficient to prevent dormancy under Civ. Code 1895, § 4185, the judge alone being authorized to make them. Dunlap Hardware Co. v. Tharp [Ga. App.] 58 SE 398.

the judgment dies with the judgment debtor unless revived against his legal representatives.[93] Where pending equitable proceedings in which it is involved a judgment becomes dormant, its revival is not essential to the protection of the judgment creditor's rights.[94] A judgment, though an obligation, is not within a statute making all joint obligations joint and several,[95] hence a several revival of a joint judgment cannot be had.[96] A void judgment cannot be validated by an order of revival.[97] A proceeding to revive a dormant judgment is a continuation of an action previously commenced, and in case of an assignment of the judgment such proceeding may be had in the name of the judgment creditor, if living or in the name of the assignee as the real party in interest.[98] In most states statutes regulate the time and manner of procedure for reviving a judgment.[99] Scire facias to revive a judgment is treated elsewhere.[1] The general law as to the statute of limitations does not apply to a proceeding to revive a dormant judgment.[2] In most states a transcribed judgment being deemed a judgment of the superior court from the date of the filing of the transcript therein, the period of limitations begins to run from such date,[3] and extends for the same length of time applicable to other judgments of the superior court.[4] An acknowledgment of the debt evidenced by the judgment will not prevent the running of the statute of limitations so as to permit of revival.[5] The general rules of pleading apply.[6] A return to a summons in an action to revive a judgment that the time within which the judgment could have been revived has long

The entry as it appears on the execution should be recorded in the docket. Id. Noncompliance with Civ. Code 1895, § 3761, providing for entries on execution, held not to render judgment dormant where during entire period of limitations judgment creditor constantly endeavored to enforce judgment, but was restrained from doing so by legal proceedings set in motion by judgment debtor and his wife. Smith v. Zachry, 1 Ga. App. 344, 57 SE 1011.

Ohio: Decrees charging specific property do not become dormant, but rights given thereby may be lost by laches in permitting them to remain inactive for a great length of time to the prejudice of innocent parties. However, where there is a valid excuse for not enforcing the decree (as in this case, the assertion and allowance of a homestead), it will continue a charge upon the property as against the entire world. Smith v. Phillips, 5 Ohio N. P. (N. S.) 502. A decree in equity charging specific property with the payment of a debt, and ordering a sale thereby, does not become dormant at the expiration of five years unless execution is issued. Not being a personal judgment, it is not enforcible by execution, and therefore § 5380, relating to dormancy of personal judgment, is not applicable to it. Id.

93. People's Bk. of Kentucky's Assignee v. Barbour, 30 Ky. L. R. 712, 99 SW 608. In the absence of a revival, an execution issued on the judgment is void as to his estate and does not prevent the running of the statute of limitations. Under Ky. St. 1903, § 2514, the period of limitations is to be computed from the date of the last execution on the judgment. Id.

94. Judgment and lien thereof involved in foreclosure suit. Wehrheim v. Smith, 226 Ill. 346, 80 NE 908, rvg. 126 Ill. App. 328.

95. Hurd's Rev. St. § 3, ch. 76, does not apply to judgments. Eastman v. Crawford, 126 Ill. App. 320.

96. Revival must be had as to all parties. Eastman v. Crawfrod, 126 Ill. App. 320.

97. Cottingham v. Smith [Ala.] 44 S 864.

98. Moline Milburn & Stoddart Co. v. Van Boskirk [Neb.] 111 NW 605. Revival of judgment in name of transferee instead of in name of original plaintiff for use of transferee, as required by Civ. Code 1896, § 5384, does not render it void. Chapman v. Taliaferro, 1 Ga. App. 235, 58 SE 128.

99. California: Code Civ. Proc. § 685, as amended by St. 1895, p. 38, c. 33, providing for revival of dormant judgments, held to apply to all judgments in force at time of its passage which were not then barred by limitation. Doehla v. Phillips [Cal.] 91 P 330. Under Code Civ. Proc. § 686, and § 685, as amended by Act April 9, 1895, personal representative of deceased judgment creditor need not bring an action at law to enforce a judgment after the expiration of the time specified in the latter section, but is entitled to an execution on motion, the words "motion" in § 686 and "application" in § 685 having the same significance. Weldon v. Rogers [Cal.] 90 P 1062.

South Carolina: Under Code Civ. Proc. 1902, § 309, providing that a final judgment may be revived within 10 years from the original entry, a summons to show cause served after the ten years is too late. Smith v. Ellison [S. C.] 58 SE 966.

1. See Scire Facias, 8 C. L. 1870. See, also, Judgments, § 9, 8 C. L. 568 et seq.

2. Moline Milburn & Stoddart Co. v. Van Boskirk [Neb.] 111 NW 605.

3. Code, § 4538. Justice of peace judgment transcribed to district court. Miller v. Rosebrook [Iowa] 113 NW 771.

4. Miller v. Rosebrook [Iowa] 113 NW 771.

5. Brooks v. Preston [Md.] 68 A 294.

6. Demurrer held properly sustained to plea alleging that no process had been served on defendant but which did not negative submission to jurisdiction by appearance or

since expired is a sufficient plea of the statutory bar.[7] The construction placed on various judgments of revival are shown in the notes.[8] A scire facias to revive a judgment is a continuation of the former proceeding,[9] but it so far partakes of the nature of an original action that the defendant may appear and plead thereto.[10] In Maryland scire facias to renew a judgment is a judicial writ which may, however, be converted into an action by appearance and plea thereto by the defendant.[11] It is not the equivalent of an action on the judgment, its function being to continue the effect of and to have execution on a former judgment.[12] It must be brought within the statutory time.[13] State statutes cannot restrain or limit the power of the Federal courts to issue writs of scire facias to revive judgments and to provide a reasonable method of service without the district where the judgment debtor has departed therefrom.[14] The conformity act does not require the Federal courts to adopt the method of service of writs of scire facias to revive judgments prescribed by state statutes where such methods are insufficient.[15] Rules of court applicable to ordinary actions at law have no application.[16] The plaintiff in scire facias must produce the record,[17] and his right to a revival of the judgment depends upon its showing as to the jurisdiction of the court,[18] but a defense predicated upon want of jurisdiction must fail, if the showing is dependent upon facts dehors the record.[19] The only defenses which can be set up in scire facias are that no judgment was rendered, or if one was rendered that it has been satisfied or discharged.[20] The consideration of the judgment cannot be inquired into on scire facias to revive it.[21] In scire facias to revive a judgment, a plea of nul tiel records raises only the question whether there is a record of a judgment corresponding to that set out in the writ.[22] The general rules of pleading [23] and evidence [24] are to some extent applicable.

otherwise. Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 NE 188.

7. Smith v. Ellison [S. C.] 58 SE 966.

8. Adjudication of total sum due on judgment which was in excess of amount for which judgment was revived held not a new judgment but a determination of the amount due under the old one with interest and costs. Doehla v. Phillips [Cal.] 91 P 330. Recital in judgment of revival that judgment "stand in full force and effect as of the date of the rendition of said judgment" held surplusage and properly disregarded. Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 NE 188. Judgment directing that original judgment be revived and that plaintiff have execution for amount of same with costs held sufficient in form. Id.

9. Brooks v. Preston [Md.] 68 A 294. Is not an original suit or proceeding. Collin County Nat. Bk. v. Hughes [C. C. A.] 152 F 414.

10. Brooks v. Preston [Md.] 68 A 294.

11. If not so converted its life expires a year and a day from date of issuance. Collins v. McBlair, 29 App. D. C. 354.

12. Collins v. Mc Blair, 29 App. D. C. 354.

13. Under Sayle's Rev. Civ. St. art. 3361, scire facias to revive a judgment may be brought within ten years from its date, the four years' statute of limiations not being applicable. Henry v. Red Water Lumber Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 216, 102 SW 749.

14, 15. Collin County Nat. Bk. of McKinney v. Hughes [C. C. A.] 155 F 389.

16. Rule 61 of supreme court of District of Columbia relating to notices to plead and summons in ordinary actions at law held not to apply to scire facias. Collins v. McBlair, 29 App. D. C. 354.

17. Mellon v. Sawyer, 31 Pa. Super. Ct. 416.

18. Record of inferior court held to show jurisdiction affirmatively. Mellon v. Sawyer, 31 Pa. Super. Ct. 416.

19. Facts which if true would defeat jurisdiction but as to which record is silent cannot be shown. Mellon v. Sawyer, 31 Pa. Super. Ct. 416.

20. Demurrer held properly sustained to plea alleging judgment to have been in excess of amount due. Waterbury Nat. Bk. Reed, 231 Ill. 246, 83 NE 188. In scire facias to revive a judgment, no defense can be made except matters arising subsequent to judgment. Merits of original judgment cannot be inquired into. Mellon v. Sawyer, 31 Pa. Super. Ct. 416.

21. Griesmere v. Thorn, 32 Pa. Super. Ct. 13.

22. And is to be determined from an inspection of the record itself. Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 NE 188.

23. Petition in scire facias alleging ownership of judgment sought to be revived by purchase from person in whose favor it was rendered held to show interest in plaintiff entitling him to revival. Henry v. Red Water Lumber Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 216, 102 SW 749. Petition in scire facias to revive judgment of court of civil appeals alleging original judgment of district court, appeal and its reversal, rendition of judgment on appeal, and entry thereof in minutes of district court and that plaintiff was the legal owner thereof, held good against general demurrer. Id.

24. In scire facias to revive judgment of

§ 10. *Assignment of judgment.*[See 8 C. L. 570]—With reference to assignment, a judgment is simply a chose in action and the assignee takes subject to any defense or right of set-off, legal or equitable, which was available in favor of the judgment debtor as against the assignor [25] at the time of the assignment,[26] even though the assignee had no notice thereof.[27] An assignee of a part interest in a judgment has no lien or interest on property attached in the action [28] and cannot maintain an action at law against his assignor.[29] He has however an equitable interest therein sufficient to enable him to hold his assignor to account in equity as trustee for his share of the proceeds of the enforcement of the judgment.[30] The property sold to satisfy the judgment being deeded to the judgment creditor and his assignee of a half interest jointly, the latter is not entitled to further relief.[31] Assignment of judgment being doubtful in its terms, parol eveidence is admissible to show the assignee's interest.[32] Specific performance of an agreement to purchase a worthless judgment will not be decreed.[33] The general rules of pleading [34] and of evidence [35] apply.

§ 11. *Payment, discharge, and satisfaction.*[See 8 C. L. 570]—Payment to an unauthorized person does not discharge the judgment, the creditor not receiving the funds.[36] Payment to the party of record without notice of the interests of others satisfies the judgment.[37] The presumption of payment from lapse of time is generally deemed prima facie only [38] and does not arise where the facts are inconsistent with such a presumption.[39] The effect of statutory presumption depends upon their terms.[40] Defendant in replevin cannot demand satisfaction pro tanto upon a return of a portion of the chattels in a damaged condition.[41] A discharge of a defendant

court of civil appeals, record of same as entered in minutes of trial court held admissible in evidence. Henry v. Red Water Lumber Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 216, 102 SW 749.

25. De Laval Separator Co. v. Sharpless, 134 Iowa, 28, 111 NW 438; Small v. Usher [S. C.] 57 SE 623. A judgment is not a negotiable instrument, and a purchaser stands merely in the shoes of his assignor. Judgment for alimony. Cohen v. Cohen, 150 Cal. 99, 88 P 267.

26. Assignee does not take subject to judgment against his assignor assigned to judgment debtor subsequent to assignment to him and satisfaction thereof on execution sale. Miller v. Rosebrook [Iowa] 113 NW 771.

27. De Laval Separator Co. v. Sharpless, 134 Iowa, 275, 111 NW 438.

28. Gebhardt v. Merchant [Ark.] 105 SW 1036.

29. Kirby's Dig. §§ 391-393, 425-429, and 6012, giving a remedy to person having an interest in the property itself, do not apply. Gebhardt v. Merchant [Ark.] 105 SW 1036.

30. Gebhart v. Merchant [Ark.] 105 SW 1036.

31. Where court directed that land ordered sold in satisfaction of judgment should be deeded to judgment creditor purchasing same and his assignee of a half interest in the judgment, jointly, held that assignee obtained all the relief to which he was entitled. Gebhardt v. Merchant [Ark.] 105 SW 1036.

32. First Nat. Bk. of Payette v. Miller, 48 Or. 587, 87 P 892.

33. Agreement to purchase judgment for $900 against an insolcent at its face value. Spotts v. Eisenhauer, 31 Pa. Super. Ct. 89.

34. Where in **action for wrongful release** of judgment after its sale to plaintiff defendant **did not plead failure of consideration,** plaintiff's want of title to land forming consideration for transfer cannot be shown. W. L. Moody & Co. v. Rowland [Tex. Civ. App.] 102 SW 911.

35. Evidence that plaintiff in **action for wrongful release of judgment** after sale to him did not have title to land forming **part consideration** for transfer, and that defendants had knowledge thereof, held inadmissible on issue as to whether judgment was sold. W. L. Moody & Co. v. Rowland [Tex. Civ. App.] 102 SW 911.

36. Payment to sheriff who held no process for the collection of the debt. Brooks Oil Co. v. Weatherford [Miss.] 44 S 928. In the absence of a law authorizing it, the payment of a judgment to the clerk of the court rendering it is ineffective unless received by the party entitled to it. Spring Valley Coal Co. v. Donaldson, 123 Ill. App. 196.

37. An execution issued in the name of a successful plaintiff satisfies the judgment though persons not parties possessed an interest in the chose in action upon which the judgment was based. Walker v. O'Neill Mfg. Co., 128 Ga. 831, 58 SE 475.

38. Judgment may be enforced more than 20 years after its rendition on proof that it remains unpaid. Rev. Laws, c. 202, § 19, construed. Haynes v. Blanchard, 194 Mass. 244, 80 NE 504.

39. Where in 1871 creditors obtained judgment, and an action to set aside a conveyance of the judgment debtor as fraudulent commenced in 1875, had been pending since, held no presumption of payment would arise. St. Francis Mill Co. v. Sugg, 206 Mo. 148, 104 SW 45.

40. The conclusive presumption of payment arising under Code Civ. Proc. § 376 relates only to the remedy by action. Puls v. New York, L. & W. R. Co., 54 Misc. 303, 104 NYS 374.

from execution not appearing to have been by authority of the plaintiff or to have been acquiesced in or approved by him does not discharge the judgment.[42] A court of equity is without jurisdiction of a suit for a decree requiring the entry of satisfaction of a judgment at law, the court which rendered such judgment having full power over it, and to grant any relief in respect thereto which justice may require.[43] To vacate the record of a satisfaction of judgment, however, either upon motion or in an independent action, involves the cancellation of a written instrument, one of the recognized subjects of equity jurisdiction, and involves the exercise of a sound discretion.[44] Whatever mode of procedure he pursued, the remedy sought is governed by equitable principles, the ultimate question being whether it is inequitable for the person relying thereon to avail himself of the entry of satisfaction.[45] Where equitable conditions may be imposed,[46] notice sent by registered mail and receipted for by addressee is generally deemed sufficient.[47]

Restitution after reversal.[See 8 C. L. 572]—Payment of judgment pursuant to stipulation as condition to appeal to determine solely certain questions of liability raised by defendants, amount to be repaid in case of reversal, held a mere deposit as security and not a payment of the judgment.[48]

§ 12. *Set-off.*[See 8 C. L. 572]—Mutual judgment[49] may be set off against each other, especially where one of the judgment debtors is insolvent.[50] The right is lost by the assignment of the judgment in good faith and for a valuable consideration prior to the rendition of judgment against the assignor.[51] "Claims" may, in some states, be set off against a judgment.[52] Though as a general rule a mere contract debt cannot be set off against a judgment,[53] the rule is different where the parties agree that work to be performed by the judgment debtor shall be applied toward the satisfaction of the judgment.[54] Equitable grounds of a set-off must be pleaded and proved.[55]

§ 13. *Interest.*[See 8 C. L. 572]—In New York, by statute, a judgment of a court

41. Horses rendered in a diseased condition. Jones v. Messenger [Colo.] 90 P 64.

42. Wood v. Tyrrell [R. I.] 67 A 429.

43. Macrum v. U. S. [C. C. A.] 154 F 653.

44. Plano Mfg. Co. v. Thompson [S. D.] 112 NW 149.

45. Plano Mfg. Co. v. Thompson [S. D.] 112 NW 149. Where defendant's property was sold by direction of the plaintiff and the proceeds applied in partial satisfaction of a judgment obtained against him, willfully ignoring his claim of exemption and putting him to expense and inconvenience so that the parties would not be restored to the position they occupied prior to the entry of satisfaction if it were canceled, held the court acted within its discretion in refusing to cancel the record of partial satisfaction, notwithstanding the defendant had recovered a judgment against the sheriff for his conversion of the goods wrongfully sold, which the plaintiff had to pay as his indemnitor. Id. Partial satisfaction entered upon purchase by judgment creditor at execution sale under erroneous belief that property was owned by debtor is ground for vacation of satisfaction. Bailey v. Buchanan [Mo. App.] 102 SW 36. Where on motion to vacate a satisfaction entered by clerk on an insufficient showing, under Rev. St. 1887, § 4461, it is the duty of the court to examine into and determine whether the judgment was in fact paid. Tanner v. Wood [Idaho] 90 P 733.

46. Where each parcel at an execution sale was sold separately, one parcel of which did not belong to debtor, creditor held not required to surrender his title to property owned by debtor as condition to vacation of satisfaction of judgment pro tanto based on parcel not so owned. Bailey v. Buchanan [Mo. App.] 102 SW 36.

47. People v. Parker, 231 Ill. 478, 83 NE 282.

48. Persons v. Gardner, 106 NYS 616.

49. Where judgment debtor did not acquire judgment sought to be set off until after judgment against him had been assigned and satisfied by execution sale, there was no mutuality requiring set off. Miller v. Rosebrook [Iowa] 113 NW 771.

50, 51. Walton v. Catron, 125 Mo. App. 501, 102 SW 1058.

52. Under Civ. Code Prac. § 19, and § 96, subsec. 2, a claim held by a judgment debtor against a creditor arising before assignment of judgment may be set off against the judgment creditor or his assignee. Clark v. Raison, 31 Ky. L. R. 905, 104 SW 342.

53. Lilly v. Cox, 61 W. Va. 547, 56 SE 900.

54. Items of work and services performed under such an agreement held properly set off. Lilly v. Cox, 61 W. Va. 547, 56 SE 900.

55. Held not error to refuse to set off judgment for costs in favor of defendant against assignee of judgment for plaintiff, grounds for equitable relief not being pleaded or proved. Missouri, K. & T. R. Co. v. Cassinoba [Tex. Civ. App.] 17 Tex. Ct. Rep. 431, 99 SW 888.

directing the payment of money bears interest from its entry.[56] Interest on a judgment though due in instalments does not compound.[57] Costs becoming part of the decree, interest should be allowed thereon.[58] Where on appeal judgment is affirmed conditioned on remittitur, interest runs on amount of judgment from date of entry of judgment in supreme court and not from date of that of lower court.[59] A deposit as security for payment pending appeal not being a payment of the judgment, the fact that it earned less than the legal rate does not bar the prevailing party on affirmance from recovering the difference between the amount earned and the legal rate.[60]

§ 14. *Enforcement of judgment.*[See 8 C. L. 572]—In many cases it is essential to obtain an order or decree of enforcement from the court.[61] A court of equity may condition its decree for the enforcement of a former decree by equitable terms, or may refuse to enforce it, where subsequent to the entry of the original decree such radical changes in the situation, rights, or relations of the parties have been wrought that equity demands such terms or forbids its enforcement;[62] but in the absence of such changes the original decree concludes the rights and remedies of the parties and must be enforced.[63] When application is made to collect a judgment by process not contained in itself, and requiring, in order to be sustained, reference to the alleged cause of action upon which it is founded, the aid of the court should not be granted when upon the face of the record it appears that the judgment rests upon no cause of action whatever.[64] The jurisdiction of a Federal court over a controversy once lawfully acquired includes the power to enforce its judgment or decree, and this power may not be destroyed or restrained by the legislation or lack of legislation of the states.[65] A court may postpone enforcement of its judgment even though the term of rendition has expired.[66] The Federal government in seeking to enforce a judgment is not bound by any statute of limitations nor barred by any laches of its officers, however gross.[67] In some states judgments against a political subdivision of the state remaining unsatisfied, a special tax may be levied to pay the same.[68]

56. Code Civ. Proc. § 1211. The fact that on an appeal the judgment is modified in other respects is immaterial. In re Ryer, 104 NYS 804.

57. Under Laws 1899, p. 177, c. 109, directing that decree rendered in settlement of indebtedness of certain counties should bear interest until paid, and empowering court to direct annual tax levy sufficient to pay one-twentieth of the decree and interest thereon, only the decree bears interest, and instalments of interest though not paid do not bear interest. State v. Desha County [Ark.] 99 SW 1108.

58. Under Laws 1899, p. 177, c. 109, providing for the enforcement of a decree for settlement of indebtedness of certain counties and the expenses of collection, costs become part of the decree and bear interest as well as the indebtedness. State v. Desha County [Ark.] 99 SW 1108.

59. Stolze v. St. Louis Transit Co., 122 Mo. App. 458, 99 SW 471.

60. Persons v. Gardner, 106 NYS 616.

61. Where judgments rendered on certain railroad aid bonds issued by a township contained orders making it the duty of the county commissioners of the county in which the township was located to annually levy a necessary tax to make the annual interest payments on the bonds, but such judgments did not direct the clerk to thereafter issue writs of mandamus if defaults should occur in the levy of the tax, they did not contain process within themselves for their own enforcement, so that on the board's default it was necessary for the owner of the judgment to obtain orders of the court to compel performance. Board of Com'rs of Hartford County v. Tome [C. C. A.] 153 F 81.

62, 63. St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F 849.

64. Mandamus to compel county to levy tax. Brunson v. Caskie, 127 Ga. 501, 56 SE 621.

65. Collin County Nat. Bk. v. Hughes [C. C. A.] 155 F 389.

66. Where in an action against a railway company to establish validity of its bonds to foreclose mortgage securing them and to appoint a receiver such relief was granted, held that upon appointment of receiver court might postpone enforcement of judgment of foreclosure pending the administration of the receivership, though the term at which judgment was entered had expired. United States & Mexican Trust Co. v. Young [Tex. Civ. App.] 18 Tex. Ct. Rep. 451, 101 SW 1045.

67. United States v. Noojin, 155 F 377.

68. Graham v. Tuscumbia, 146 Ala. 449, 42 S 400; Territory v. Santa Fe County Com'rs [N. M.] 89 P 252. See Counties, 9 C. L. 827; Municipal Corporations, 8 C. L. 1056; Taxes, 8 C. L. 2058; Mandamus, 8 C. L. 810.

Statutory proceedings are peculiar.[69] Execution, other final process, and creditors' suits, are treated elsewhere.[70]

§ 15. *Audita querela.* See 8 C. L. 259—The writ of audita querela does not lie where the party has had a legal opportunity to defend but has neglected it,[71] and being a suit in equity to which the parties may plead and take issue on the merits, it cannot be sued against the United States.[72]

§ 16. *Actions on judgment; merger.* See 8 C. L. 572—Whenever it is made to appear that a second judgment may be in any respect more available than the first, an action on it may be maintained regardless of whether it is dormant or not.[73] The judgment sued on must be a final one.[74] An action or a judgment is an action of debt,[75] and though the state practice in such case permits assumpsit, the principles applicable to the common-law action of debt govern;[76] hence an action can be maintained on a decree in equity only where it requires the payment of a specific sum of money absolutely and unconditionally.[77] The action must be prosecuted by the real or beneficial owner of the judgment,[78] and must be brought within the statutory time.[79] As a general rule a judgment is not deemed a "contract" within the meaning of statutes of limitation.[80] Statutes limiting the time for suing on judgments are generally deemed to apply to final judgments only.[81] In Minnesota an action upon any judgment, domestic or foreign, must be brought within ten years from the rendition thereof without reference to the residence of the judgment debtor during the ten years.[82] The general rules of pleading apply.[83] Though jurisdiction will be presumed still where facts upon which jurisdiction is predicated are pleaded, and are insufficient to sustain it, the presumption will not avail to cure the insufficiency.[84]

JUDICIAL NOTICE, see latest topical index.

69. A proceeding under Cal. Code Civ. Proc. § 685, which provides for the enforcement of a dormant judgment by execution, is a remedy entirely independent of an action upon the judgment and such execution may be awarded at any time in the discretion of the court and without notice to the defendant. In re Rebman [C. C. A.] 150 F 759.

70. See separate articles, Creditors' Suit, 9 C. L. 849; Executions, 9 C. L. 1328, etc.

71. Judgment by default. United States v. One Trunk Containing Fourteen Pieces of Embroidery, 155 F 651.

72. United States v. One Trunk Containing Fourteen Pieces of Embroidery, 155 F 651.

73. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756.

74. Order awarding weekly allowance of alimony "pendente lite and until further order" is not a final judgment on which an action may be attained. Geisler v. Geisler, 30 Ky. L. R. 430, 98 SW 1023.

75, 76. Du Bois v. Seymour [C. C. A.] 152 F 600.

77. Decree in equity authorizing substitution of counsel upon payment of sum named as reasonable attorney's fee held provisional merely and not a final adjudication of amount due counsel for services in the action upon which suit could be maintained. Du Bois v. Seymour [C. C. A.] 152 F 600.

78. Party to whom divorce decree directed payment of money by husband for support of minor children should be made cannot maintain an action thereon. Hunt v. Monroe [Utah] 91 P 269.

70. Kentucky: Equitable action for discovery of assets may be maintained on a judgment under Civ. Code Prac. § 439, permitting same on return of "no property found" though no execution was issued within fifteen years after last execution, as required by Ky. St. 1903, § 2514, fixing the period of limitations, such action being pending at the expiration of the fifteen years' period. H. A. Thierman Co. v. Wolff, 31 Ky. L. R. 376, 102 SW 843.

Wisconsin: Under St. 1898, §§ 2900, 2902, action on judgment of municipal court transcribed in the circuit court must be brought during its effectiveness as a lien, or, in other words, within ten years from the date of rendition. J. C. Lewis Co. v. Adamski, 131 Wis. 311, 111 NW 495. Action on judgment of municipal court held barred in six years. St. 1898, § 4222, subd. 1, construed. Id.

80. Rev. Laws, c. 202, §§ 1 and 19, construed. Haynes v. Blanchard, 194 Mass. 244, 80 NE 504.

81. Revisal 1905, § 391, held not to apply to foreclosure decree of vendor's lien or to right to a sale of the property. Williams v. McFayden's Adm'r [N. C.] 58 SE 1005.

82. Rev. Laws 1905, §§ 4071, 4075, 4082, construed. Gaines v. Grunewald, 102 Minn. 245, 113 NW 450.

83. Answer held to sufficiently plead statute of limitations. J. C. Lewis Co. v. Adamski, 131 Wis. 311, 111 NW 495. Answer relying on both ten and six year statutes of limitations held not because of such fact to prevent reliance on ten year statute if applicable to the facts. Id.

84. Failure to allege proper foundation

JUDICIAL SALES.

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This topic excludes matters peculiar to special kinds of sales under order or process of court.[85]

§ 1. *Occasion for and nature of judicial sales.* See 8 C. L. 574—A sale by a trustee under order of the court at a price and on terms agreed on by the parties prior to the order of sale is a judicial sale though made privately.[88]

§ 2. *The petition, order, writ, or decree.* See 8 C. L. 574—The order for sale or appointing the officer to conduct it must comply with statutory requirements.[87] It may be modified where the best interests of the parties demand it,[88] though in Virginia land will not be sold until the priority of subsisting liens has been fixed and determined.[89] Where strict compliance with the rule would work an injury rather than a benefit, the court may properly modify its application in the particular case to promote the object sought to be gained by the rule.[90] A deposit of a portion of the bid may properly be required.[91]

§ 3. *Levy, seizure, appraisal, and the like.* See 8 C. L. 575

§ 4. *Notice and advertisements of sale.* See 8 C. L. 575—An advertisement of sale by the sheriff prior to receipt of the commission is ineffective,[92] but with the consent of the parties the court may change the time for advertising notwithstanding stipulations in instrument foreclosed.[93] Mere irregularities are not fatal [94] and are cured by confirmation.[95]

§ 5. *Sale and conduct of it and return.* See 8 C. L. 575—The rule that a purchase of the trust property by the trustee renders the sale voidable at the instance of the cestui que trust applies to judicial sales.[96] The commission to the officer making the

for substituted service held fatal. Fishburn v. Londershausen [Or.] 92 P 1060.

85. See Bankruptcy, 9 C. L. 343; Executions, 9 C. L. 1328; Estates of Decedents, 9 C. L. 1154; Foreclosure of Mortgages on Land, 9 C. L. 1378; Guardianship, 9 C. L. 1551; Mechanics' Liens, 8 C. L. 954; Partition, 8 C. L. 1246; Taxes, 8 C. L. 2058.

86. Richardson v. Jones, 106 Va. 540, 56 SE 343.

87. Order of Federal court appointing its clerk special master to conduct sale without assigning the reasons therefor is erroneous. Act. Cong. Mar. 3, 1879 (20 St. c. 183, p. 415 [U. S. Comp. St. 1901, p. 595]). But such an error is an amendable defect. Quinton v. Neville [C. C. A.] 154 F 432.

88. Decree staying sale until further order of court on application of party in interest showing that parties are unable to agree on time of sale held properly modified so as to require sale within six months, on showing that objecting party refused to assent on ground that time was not favorable. Mariner v. Ingraham, 230 Ill. 130, 82 NE 577.

89. First Nat. Bk. of Richmond v. William R. Trigg Co., 106 Va. 327, 56 SE 158.

90. Priorities held properly reserved in case of sale of shipbuilding plant where delay would cause depreciation. First Nat. Bk. of Richmond v. William R. Trigg Co., 106 Va. 327, 56 SE 158.

91. Requiring deposit of 20 per cent. of bid, same to be forfeited and applied to payment of costs of case if bid is not made good, held proper. Quinton v. Neville [C. C. A.] 154 F 432.

92. Doucet v. Fenelon [La.] 44 S 908.

93. Change of time for advertisement of sale from that fixed in trust deed harmless where all parties interested consent. Parsons v. Little, 28 App. D. C. 218.

94. Publication of notice of sale under heading "Surrogates Notices" held harmless, objecting parties having received notice and being represented at sale. State Realty & Mortgage Co. v. Villaume, 106 NYS 698. Where sale was to highest bidder, that advertisement was to "highest and best" bidder, was immaterial though order required property to be sold to "highest bidder." Schulz v. Hasse, 227 Ill. 156, 81 NE 50, afg. 129 Ill. App. 193.

95. Advertising sale to be held "June 1, 1093," instead of "1903." Neff v. Elder [Ark.] 105 SW 260.

96. Purchase by partner of partnership property on partition sale. Cresse v. Loper [N. J. Eq.] 65 A 1001.

sale constitutes his sole guide as to the manner in which the property must be disposed of.[97] Where the sale was commenced within the hours prescribed, the fact that it was continued beyond the prescribed time until all the property was disposed of does not affect the validity of the sale.[98]

§ 6. *Confirmation and setting aside sales.* See 8 C. L. 575—Confirmation of a sale is discretionary with the court,[99] but it must be exercised in accordance with established principles of law,[1] and when made is conclusive as to all objections which were raised or which might have been raised thereto;[2] and though a sale may be irregular as not in compliance with the decree, it may be ratified by confirmation where the variance consists in something which the court could have initially required.[3] Facts sufficient to warrant the court in setting aside the sale justify a refusal of confirmation.[4] Objectors to confirmation should be required to give a guaranty that there will be no loss on resale.[5]

Reversal of the judgment on which the decree of sale was based does not affect the title of bona fide purchasers,[6] but the rule has no application to a party of record[7] or one in privity with him.[8]

Setting aside a sale. See 8 C. L. 576—Fraud in the conduct of the sale[9] or failure to comply with the order of sale[10] constitute grounds upon which confirmation may be refused and the sale set aside in the discretion of the court.[11] Mistake of a prospective bidder,[12] when asserted by him,[13] may also warrant such action, but in the absence of irregularity or misconduct affecting the validity of a judicial sale it will not be set aside to allow the purchaser's bid to be advanced by another person,[14] nor

97. Sale in separate tracts of property declared by order of sale to be indivisible in kind held void. Doucet v. Fenelon [La.] 44 S 908.

98. Sale required to be held within the hours prescribed for judicial sales commenced at ten A. M. and continued until five P. M. Culver Lumber Co. v. Culver [Ark.] 99 SW 391.

99. Parsons v. Little, 28 App. D. C. 218.

1. Interests of insane heir in partition proceedings held fully protected and refusal to confirm held an abuse of discretion. Abbott v. Beebe, 226 Ill. 417, 80 NE 991. The highest and best bidder acquires a legal right to confirmation in the absence of facts which would justify the court in setting it aside. Rule has no application to private sale by guardian without competition under general order. In re Berryhill's Estate [Ind. T.] 104 SW 847.

2. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076.

3. Sale en masse. Bechtel v. Wier [Cal.] 93 P 75.

4. See Setting Aside a Sale, post, this section.

5. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076.

6. On reversal of a judgment, restitution cannot be had against bona fide purchasers who were strangers to the record (Simms v. Tampa [Fla.] 42 S 884), and this is particularly true where restitution is sought in a summary manner, by motion, rule, or petition (Id.). Errors in trial of proceeding requiring reversal of judgment upon which decree of sale was based do not constitute ground for setting aside sale to third person purchasing without notice. Hansford v. Tate, 61 W. Va. 207, 56 SE 372.

7. Simms v. Tampa [Fla.] 42 S 884.

8. Knowledge of defects in legal proceedings for the sale of property is imputed to an attorney under whose direction they were taken, and who purchases at such sale and his title falls upon reversal. Johnson v. McKinnon [Fla.] 45 S 23. Next friend of an infant complainant held not such a bona fide purchaser as to be entitled to protection upon reversal of judgment on which sale was based. Carroll v. Draughon [Ala.] 44 S 553.

9. Fraud on part of purchaser preventing competition or neglect of duty on part of officer which brings about that result is ground for setting sale aside. Evidence held to establish fraud. Kennedy v. Afdal, 229 Ill. 295, 82 NE 291. That sale was at grossly inadequate price because of purchaser's fraud in preventing competitive bidding held not established. Locke v. Friedman, Keiler & Co. [Miss.] 43 S 673.

10. See § 5, ante. Under a decree requiring master to sell property to highest and best bidder, a sale to the second highest bidder, the master's son, at a price $500 below that of the highest bidder, after the latter had failed to execute a bond, being insolvent, should be set aside. Brashears v. Holliday, 30 Ky. L. R. 913, 99 SW 951.

11. Vacation for irregularity in the conduct of the sale is discretionary. Sale en masse, though decree required separate sale. Bechtel v. Wier [Cal.] 93 P 75.

12. Mistake preventing a bidder willing to pay more than the price for which property was sold from attending the sale is not ground for setting aside the sale unless the mistake is established by competent evidence. Wilber v. Wilber, 104 NYS 179.

13. Will not be set aside on ground of mistake at instance of receiver. Wilber v. Wilber, 104 NYS 179.

14. "Upset" bid of $300 held properly rejected where property was twice sold and

on account of inadequacy of the price, unless so great as to raise a presumption of fraud.[15] After confirmation a sale will not be set aside except for causes which would warrant a court of equity in setting aside a like sale between private parties,[16] and thereafter the court is without power to set aside the sale without cause, even during the term at which it was confirmed,[17] but during the same term the court may for cause shown, upon notice, set aside the sale without the filing of a formal bill for that purpose.[18] A proceeding to set aside a judicial sale may be barred by laches of the complaining party[19] or by his presumptive ratification,[20] and where the result complained of is caused by the party's negligence, relief will be denied.[21] An order of confirmation cannot be set aside by an order entered at a subsequent term unless fraud has entered into it,[22] and when entered is final and hence appealable.[23] The purchaser is a necessary party to the proceeding.[24] Upon setting aside a void sale an innocent purchaser is entitled to reimbursement for taxes paid and for improvements,[25] and when based on the fraud of the purchaser the latter is entitled to a return of the money paid thereon less costs properly charged against him.[26]

Costs. See 6 C. L. 264—Where a sale is set aside for fraud on the part of the purchaser, all costs thereof, together with the costs of the vacation proceedings, are properly charged against him.[27]

Proceedings on resale. See 8 C. L. 576

§ 7. *Completion of sale; deeds, payments, and credits.* See 6 C. L. 576—Until conveyance the title of the purchaser is only an equitable one,[28] and hence may be

sale was regularly conducted, bidder being present at both sales. Watkins v. Jones [Va.] 57 SE 608.

15. Wilber v. Wilber, 104 NYS 179; State Realty & Mortgage Co. v. Villaume, 106 NYS 698. Inadequacy of the price is not of itself sufficient ground to set aside a sale unless so grossly inadequate as to establish fraud. Abbott v. Beebe, 226 Ill. 417, 80 NE 991. Mere inadequacy of price will not justify refusal to confirm unless so gross as to raise presumption of fraud. Schulz v. Hasse, 227 Ill. 156, 81 NE 50, afg. 129 Ill. App. 193. Before confirmation, mere inadequacy of price, unless very great, is not sufficient to warrant reopening of sale (Morrison v. Burnette [C. C. A.] 154 F 617), but if the inadequacy is great, slight circumstances of unfairness on the part of the party benefited will prevent confirmation (Id.). Inadequacy of price in connection with insufficiency of assets for payment of creditors does not constitute ground for interfering with a sale. Wilber v. Wilber, 104 NYS 179. Sale for inadequate price coupled with fact that holders of legal title were not parties constitutes ground for setting sale aside. Nickels v. Mineral Development Co., 31 Ky. L. R. 1224, 104 SW 1033.

16. Inadequacy of price or offers of better price not sufficient. Morrison v. Burnette [C. C. A.] 154 F 617; In re Perryman [Ind. T.] 104 SW 804.

Note: Files v. Brown, 59 C. C. A. 403, 407, 408, 124 F 133, 137, 138; Berlin v. Melhorn, 75 Va. 639, 641; Pewabic Mining Co. v. Masin, 145 U. S. 349, 367, 36 Law. Ed. 732; Thompson v. Ritchie, 80 Md. 247, 30 A 708, 710; Ins. Co. v. Cottrell, 85 Va. 857, 9 SE 132, 133, 17 Am. St. Rep. 108; Fidelity Ins. & Safe-Deposit Co. v. Roanoke St. R. Co., 98 F 475, 476; Trull v. Rice, 92 N. C. 572, 574; Pritchard v. Askew, 80 N. C. 86; Bank v. Jarvis, 28 W. Va. 805; In re Third National Bank, 9 Biss. [U. S.] 535, 4 F 775; Collier v. Whipple, 13 Wend. [N. Y.] 224, 226; Watson v. Birch, 2 Ves. Jr. 51, 54; Williamson v. Dale, 3 Johns. Ch. [N. Y.] 290, 291; Ware v. Watson, 7 De Gex M. & G. 739, 741; Condon v. Maynard, 71 Md. 601, 18 A 957, 958; Smith v. Black, 115 U. S. 308, 317, 29 Law. Ed. 398; Barling v. Peters, 134 Ill. 606, 25 NE 765, 768; Graffam v. Burgess, 117 U. S. 180, 191, 192, 29 Law. Ed. 839; Evans v. Maury, 112 Pa. 300, 312, 3 A 850.—From Morrison v. Burnette, 154 F 617.

17. Rule that courts have power of their judgments, etc., during term at which they were rendered, does not give them such power. Morrison v. Burnette [C. C. A.] 154 F 617.

18. Morrison v. Burnette [C. C. A.] 154 F 617.

19. Proceedings to set aside sale voidable at most for fraud of commissioner held barred by laches where no action was taken for twenty-eight years, during which period many of those having knowledge of facts had died. Webb v. Borden [N. C.] 58 SE 1083.

20. A presumption of ratification of nullities in the sale arises from silence of the interested party during the prescriptive period. Doucet v. Fenelon [La.] 44 S 908.

21. A sale will not be set aside on motion of an interested party merely to protect him against result of his own negligence where he is under no disability to protect his own rights. Abbott v. Beebe, 226 Ill. 417, 80 NE 991.

22, 23. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076.

24. Schulz v. Hasse, 227 Ill. 156, 81 NE 50, afg. 129 Ill. App. 193.

25. Doucet v. Fenelon [La.] 44 S 908.

26, 27. Kennedy v. Afdal, 229 Ill. 295, 82 NE 291.

28, 29. Noel v. Fitzpatrick, 30 Ky. L. R. 1011, 100 SW 321.

transferred by assignment.[29] Upon conveyance title relates back to the date of the sale.[30] The description of the property sold need be no more definite than that required in a voluntary deed.[31] The terms of payment are discretionary with the court,[32] and a voluntary payment of the purchase prior to the time required will not relieve the purchaser from the payment of interest.[33]

§ 8. *Title and rights under sales and deed. A. Defects and collateral attack.*[See 8 C. L. 577]—Unless the judgment upon which the sale was based[34] or the sale itself is absolutely void,[35] it is not subject to collateral attack;[36] and though a sale may be a nullity as to holders of the legal title who were not made parties, it is not for that reason void as to parties who were before the court.[37] All matters necessarily determined by the judgment are concluded.[38]

(§ 8) *B. Outstanding titles and interests.*[See 8 C. L. 578]—A purchaser at a sale at which certain liens have been deducted in the appraisement purchases subject thereto[39] and is estopped to question their validity in subsequent proceedings,[40] and the rule is equally applicable to a purchaser who is also a judgment plaintiff.[41] A mere stipulation as to the invalidity of such liens does not constitute a waiver of the estoppel.[42]

The rule of caveat emptor[See 8 C. L. 578] applies to judicial sales,[43] and is applicable to a purchaser who was a party to the proceedings as well as a stranger,[44] but it does not apply to secret equities in favor of third persons,[45] nor to errors in the trial upon which the judgment and order of sale were based.[46]

30. Howard v. Brown, 197 Mo. 36, 95 SW 191.

31. Description held sufficient. Gallup v. Flood [Tex. Civ. App.] 18 Tex. Ct. Rep. 861, 103 SW 426. Description in deed following judgment held sufficient to pass title. Guffy v. Anderson, 31 Ky. L. R. 407, 102 SW 321.

32. Decree requiring payment of one-third cash balance in one, two, and three years held properly modified so as to permit purchaser to pay all cash or to defer such payments at his option. Mariner v. Ingraham, 230 Ill. 130, 82 NE 577.

33. Decree permitted purchaser to pay purchase price on confirmation by electing to do so on date of sale, interest to run from date of sale. Held payment on latter date was voluntary and did not release interest. Haggin v. Montague, 31 Ky. L. R. 408, 102 SW 337.

34. A judgment is not void so as to be subject to collateral attack if from the whole record it can be ascertained what property was sold. Guffy v. Anderson, 31 Ky. L. R. 407, 102 SW 321. Sale based on a void judgment may be attacked collaterally. Davis v. Montgomery, 205 Mo. 271, 103 SW 979.

35. An absolutely void sale is subject to collateral attack. Sale not in conformity with commission held void. Doucet v. Fenelon [La.] 44 S 908.

36. A sheriff's deed is not void and hence not subject to collateral attack merely because owner of judgment wrote sheriff to return order of sale, same not being received until after confirmation of the sale. Caldwell v. Bigger [Kan.] 90 P 1095. A sale irregularly conducted is voidable merely and hence not subject to collateral attack. Sale in gross, decree requiring separate sale. Bechtel v. Wier [Cal.] 93 P 75. Irregularities in notice and conduct of sale cannot be asserted in an injunction proceeding to restrain issuance of sheriff's deed. Thomassen v. De Goey, 133 Iowa. 278, 110 NW 581.

37. Nickels v. Mineral Development Co., 31 Ky. L. R. 1224, 104 SW 1033.

38. A party to the action cannot attack the validity of a sheriff's deed upon the ground that the judgment plaintiff was without authority to maintain the action. Power v. Snow, 75 Kan. 182, 88 P 1083.

39. State v. Several Parcels of Land [Neb.] 110 NW 544.

40. Invalid, outstanding tax liens. State v. Several Parcels of Land [Neb.] 110 NW 544. Where outstanding liens were deducted in appraisement and recognized as valid, purchaser is estopped to assert their invalidity. Merrick County v. Stratton [Neb.] 111 NW 136.

41. State v. Several Parcels of Land [Neb.] 110 NW 544.

42. Amounts to a mere waiver of evidence to prove invalidity. State v. Several Parcels of Land [Neb.] 110 NW 544.

43. Purchases at his peril where holders of legal title were not parties to the action. Nickels v. Mineral Development Co., 31 Ky. L. R. 1224, 104 SW 1033. Defects in title. Hitchcock County v. Cole [Neb.] 114 NW 276. The purchaser at a judicial sale is chargeable with notice of every fact appearing upon the face of the record affecting the title acquired by him. Board of Education of Flatwoods Dist. v. Berry [W. Va.] 59 SE 169. Though the purchaser's title relates back to the inception of the lien, the doctrine of caveat emptor is, nevertheless, applicable as to injuries to the property between such time and the sale. Hence, purchaser cannot recover from owner therefor. Van Buskirk v. Summitville Min. Co., 38 Ind. App. 198, 78 NE 208.

44. Van Buskirk v. Summitville Min. Co., 38 Ind. App. 198, 78 NE 208.

45. An innocent purchaser at a judicial

(§ 8) *C. Rights of parties under sale and in proceeds.*See 8 C. L. 578—The rights of a purchaser at a judicial sale vest upon confirmation [47] and relate back to the accrual of the lien under which the property was sold, consequently, intervening purchasers take subject thereto.[48] The title of all persons who were made parties to the proceeding passes to the purchaser [49] who acquires all the title and rights which they possessed [50] and no more.[51] While the title passing will as a rule be limited to the terms of the decree,[52] the question may be materially affected by agreement between the original owner and the purchaser,[53] and evidence to prove such an agreement is admissible.[54] The statute of limitations runs in favor of the purchaser only as to parties to the proceeding in which the sale was made.[55] As a general rule the redemption allowed by statute cannot be affected after the expiration of the statutory period allowed therefor,[56] though equity may in the proper case grant relief upon terms.[57] A mere tender, under a decree allowing redemption after the expiration of the statutory period therefor, does not stop the running of interest as it constitutes a mere option to redeem.[58]

*Rights in proceeds and on bid.*See 8 C. L. 579—A successful bidder at a sale subject to confirmation becomes a purchaser upon the announcement of the sale to him by the officer [59] and thereafter may be compelled to pay the purchase price.[60] A rule to the purchaser to show cause why the property purchased by him should not be resold at his cost and risk is a proper proceeding to compel performance.[61] The decree in such a proceeding must be certain.[62] A purchaser desiring to except to a sale must do so before confirmation,[63] and his exceptions are not available when not

sale is not bound by a secret equity in favor of a third person. Scarborough v. Holder, 127 Ga. 256, 56 SE 293.

46. A purchaser is not bound to take notice of errors in trial of proceeding leading up to judgment under which he purchased, and where court had jurisdiction, and sale was made pursuant to decree, he will be protected. Hansford v. Tate, 61 W. Va. 207, 56 SE 372.

47. Morrison v. Burnette [C. C. A.] 154 F 617.

48. Title acquired, subsequent to attachment, subject to title acquired on execution sale thereunder. Martinovich v. Marsicano, 150 Cal. 597, 89 P 333.

49. Where deed gave surviving husband of grantee a life estate and he joins with her in a proceeding for sale, his inchoate interest thereby passes. Cosby v. Newby, 30 Ky. L. R. 1375, 101 SW 306.

50. Nickels v. Mineral Development Co., 31 Ky. L. R. 1224, 104 SW 1033. Purchaser on partition sale succeeds to right of remainderman to enjoin maintenance of elevated railroad in front of land purchased. Muller v. Manhattan R. Co., 53 Misc. 133, 102 NYS 454.

51. Purchaser of property incumbered by mortgage acquires merely the right to redeem. White v. McSorley [Wash.] 91 P 243.

52. Though the word "lease," when referring to a lease in operation, means the whole plant, that is, the lease in its technical sense, together with equipment and appurtenances in use in its operation, the title obtained by purchase of such a lease at judicial sale would ordinarily be limited to terms of decree of sale. Niece v. Percy, 9 Ohio C. C. (N. S.) 233.

53. Where the evidence goes to show that there was such a community of interest between the original owner and the purchaser, and that the understanding between them was that the appurtenances as well as a lease proper was being sold, the original owner will be estopped from thereafter claiming that the purchaser took only the bare lease under the decree of sale, and this is true without regard to his ignorance of the possible fact that the sheriff would be unable to convey title to the appurtenances. Niece v. Percy, 9 Ohio C. C. (N. S.) 233.

54. Where the purchaser was acting somewhat in the interest of the defendant owner and was thereby relieved as between the defendant and himself from the application of the doctrine of caveat emptor, evidence as to the understanding between the original owner and himself at the time of the sale, as to whether the appurtenances were included with the lease, is admissible in a subsequent action by the original owner to recover from the purchaser the value of the appurtenances. Niece v. Percy, 9 Ohio C. C. (N. S.) 233.

55. Gaither v. Gage [Ark.] 100 SW 80.

56, 57. Bunting v. Haskell [Cal.] 93 P 110.

58. Civ. Code, § 1504, providing that tender shall stop running of interest on **obligations**, held not to apply. Bunting v. Haskell [Cal.] 93 P 110.

59, 60. Morrison v. Burnette [C. C. A.] 154 F 617.

61. Richardson v. Jones, 106 Va. 540, 56 SE 343.

62. But uncertainties as to amount to be paid which can easily be ascertained are not fatal. Richardson v. Jones, 106 Va. 540, 56 SE 343.

63. Thompson v. Thompson's Adm'r [Ky.] 105 SW 1185.

made until the attempted collection of the purchase price.[64] Where the particular interest offered is not expressed, the purchaser has a right to assume that he is to receive a conveyance of the fee [65] and that the title is marketable,[66] and where such is not the case he is entitled to be relieved from his bid. Such relief will not be granted for mistake of law,[67] and the person seeking it must offer to place the parties in statu quo.[68] Where affidavits are filed tending to show the unmarketability of the title, the court may permit the filing of affidavits in rebuttal,[69] and in such case it is not the duty of the court on its own motion to order a reference.[70] A purchaser relieved from his bid on the ground of defects in the title is not entitled to damages as for breach of contract [71] but must rely upon the court to do equity.[72]

JURISDICTION.

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Scope of title.—This topic deals with the principles of civil jurisdiction in general. Criminal jurisdiction is elsewhere discussed.[73] Equity jurisdiction as dependent upon the inadequacy of legal remedies or the existence of some principle of equity falls more properly under another title,[74] and the articles on process [75] and appearance [76] should also be consulted in connection herewith.

§ 1. *Definitions and distinctions.*[See 8 C. L. 580]—Jurisdiction being the power of a court to hear and determine a cause or question, it is not dependent upon the regularity of the exercise of that power, or upon the correctness of the decision made,[77] hence a distinction must be observed between jurisdictional facts and facts

64. Though judgment on which sale was based was erroneous, but not void and sufficient to sustain title. Thompson v. Thompson's Adm'r [Ky.] 105 SW 1185.

65. Wanser v. De Nyse, 188 N. Y. 378, 80 NE 1088.

66. Unmarketability of the title is a defense to a proceeding to compel performance. Wanser v. De Nyse, 188 NY 378, 80 NE 1088. Affidavits held insufficient to show marketability of title. Id. Where walls of building on property purchased encroached from one to three inches on adjoining property on three sides, purchaser was entitled to be relieved from bid, such encroachments not being mentioned in terms of sale. Moser v. Ellis, 106 NYS 1075. Purchaser cannot assert defects in a prior sale where same could not have been asserted by persons injured thereby because of laches. Rudolph v. Sales [Ky.] 105 SW 975.

67. That purchaser, widow of mortgagee, bid double the value of the property under mistake as to her rights in her husband's estate does not entitle her to relief. Fraser v. Fraser, 128 Ill. App. 73.

68. Fraser v. Fraser, 128 Ill. App. 73.

69, 70. Wanser v. De Nyse, 188 N. Y. 378, 80 NE 1088.

71. People v. New York Building-Loan Banking Co. [N. Y.] 82 NE 184.

72. Allowance of compensation for reasonable expenses is discretionary, and refusal held not an abuse where purchase was made at private sale by a receiver. People v. New York Building-Loan Banking Co. [N. Y.] 82 NE 184.

73. See Indictment and Prosecution, 8 C. L. 189.

74. See Equity, 9 C. L. 1110.

75. See Process, 8 C. L. 1449.

76. See Appearance, 9 C. L. 232.

77. Wrong decision not jurisdictional. Weishaar v. Haenky, 75 Kan. 848, 90 P 1134.

essential to a cause of action.[78] Facts which merely condition the character of the judgment or decree or the nature of the relief which should be granted are not jurisdictional.[79] Where a court has jurisdiction of the parties to an action and the cause is of a kind triable therein, it has jurisdiction of the subject of the action and power to render any rightful judgment therein.[80] If a court having jurisdiction of subject-matter and parties renders an order or judgment not within its power, the act is one in excess of its jurisdiction.[81]

§ 2. *Elements and extent in general.* See 8 C. L. 580—Essential to jurisdiction is a subject-matter upon which adjudication is regularly invoked [82] in a competent forum,[83] either against adversary parties or in respect to the subject-matter itself, which must be at least constructively in court.[84] Jurisdiction to afford a particular kind of relief carries with it by implication power to do all things necessary to effectuate the purpose for which the jurisdiction was conferred.[85] A reserved jurisdiction is limited by the purposes and objects for which it was retained.[86]

§ 3. *Legislative power respecting jurisdiction.* See 8 C. L. 581—Constitutional jurisdictions cannot be limited or enlarged by statute or rule unless the constitution so authorizes.[87] A law of one state or territory attempting to restrict the jurisdiction

Power of court to decide erroneously respecting matters within its jurisdiction is as undoubted as power to decide correctly. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257. Mandamus will not lie to compel a Federal circuit court to remand to state court a cause which it refused to remand because of opinion that case presented a separable controversy. In re Pollitz, 206 U. S. 323, 51 Law. Ed. 1081.

78. In re First Nat. Bk. of Belle Fourche [C. C. A.] 152 F 64. Failure of declaration setting up contract made in Italy to be performed there and there broken, to allege right of action under Italian law, did not go to jurisdiction of subject-matter (Massuco v. Tomasi [Vt.] 67 A 551), neither did omission to lay action in county under videlicet affect court's jurisdiction to try the case (Id.).

79. Issue whether or not a corporation was subject to adjudication in bankruptcy is not jurisdictional but is concluded by the adjudication. In re First Nat. Bk. of Belle Fourche [C. C. A.] 152 F 64.

80. Mechanic's lien proceeding. Crutcher v. Block [Okl.] 91 P 895.

81. Injunction depriving of property without hearing. Powhatan Coal & Coke Co. v. Ritz, 60 W. Va. 395, 56 SE 257.

82. See Process, 8 C. L. 1449; Appearance, 9 C. L. 232. See, also, post, § 13. When a court is approached in respect to a matter within its authority but not in a manner reasonably appropriate, according to the written or unwritten law, it should ordinarily refuse to act on jurisdictional grounds. In re Potter [Wis.] 112 NW 1087. If it does not do so its determination when directly challenged on review should be regarded as jurisdictionally defective. Id. Under statute authorizing special terms for trial of chancery cases, court at such term had jurisdiction of petition for judgment empowering married woman to trade as feme sole on petition being filed and notice given, though order for special term did not specify the causes to be tried. Potter v. Potter's Receiver, 31 Ky. L. R. 137, 101 SW 905.

83. Court of appeals was established October 12, 1906, when governor proclaimed that constitutional amendment creating it had been ratified, hence it had jurisdiction of writ of error signed in December, though judges thereof did not qualify until following January. Gainesville Midland R. v. Jackson, 1 Ga. App. 632, 57 SE 1007.

84. Court obtained no jurisdiction to entertain attachment suit and order statement of accounts where facts did not show that there was any property of nonresident in hands of third person at time attachment was served. Louis Werner Sawmill Co. v. Sheffield, 89 Miss. 12, 42 S 876. In suit to enforce an attorney's lien on proceeds of a settlement in hands of a foreign corporation defendant, fund was within court's jurisdiction where corporation was personally served in the state and appeared, and jurisdiction was complete on client being brought in by substituted process. Oishei v. Bonaddio, 117 App. Div. 110, 102 NYS 368.

85. On petition for registration of title, land court had jurisdiction to determine whether omission of a testator to provide for his children was intentional. Woodvine v. Dean, 194 Mass. 40, 79 NE 882. Probate court had power to determine question whether a woman who filed claim as widow had been married to testator. Bechtel v. Barton, 147 Mich. 318, 13 Det. Leg. N. 1047, 110 NW 935. Where a decedent's son contested widow's right to letters of administration on ground that under antenuptial contract she was not entitled to any personal estate, and widow set up fraud, mistake, and inadequacy of consideration, superior court sitting in probate had power to hear and determine such defenses. In re Warner's Estate [Cal. App.] 92 P 191.

86. Injunctional order in order confirming foreclosure sale prohibiting all persons from asserting claims adverse to purchaser's title held beyond power reserved by court to enforce provisions of decree and void as against bondholders not parties. Lewis v. Peck [C. C. A.] 154 F 273.

87. Under Const. art. 7, § 1, as amended in 1881, providing that judicial power shall

of the courts of another state or territory will not be recognized by those courts.[88] State statutes cannot enlarge or impair the jurisdiction of Federal courts,[89] though they may enlarge equitable rights and these rights will be enforced by the Federal courts.[90]

§ 4. *Territorial limitations.* See 8 C. L. 583—All jurisdictions are bounded territorially either by the limits of the state [91] or nation, or by those of the district or circuit in which they are established.[92]

§ 5. *Limitations resting in situs of subject-matter or status of litigants.* See 8 C. L. 583—While power to adjudicate upon a subject-matter which can have no existence save at a fixed place pertains to the courts erected for that place,[93] other

be vested in supreme court, circuit courts and such "other courts" as general assembly might establish, legislature could create a superior court with same jurisdiction as circuit courts were then exercising. Board of Com'rs of Elkhart County v. Albright, 168 Ind. 564, 81 NE 578. Under Const. art. 5, § 22, authorizing legislature to increase diminish, or change jurisdiction of county courts, a special act increasing jurisdiction of such courts in proceedings for street benefit assessments is valid. Nalle v. Austin [Tex. Civ. App.] 18 Tex. Ct. Rep. 54, 103 SW 825. While legislature is exclusive judge as to extent of appellate jurisdiction it will confer on district courts (In re McVay's Estate [Idaho] 93 P 28), it cannot grant such courts original jurisdiction in matters of probate, probate court having exclusive, constitutional, original jurisdiction therein (Id.). Rule of practice of supreme court requiring application to circuit court for writ of habeas corpus before application to supreme court is invalid. Ex parte Doyle [W. Va.] 57 SE 824. Under Const. 1895, art. 6, § 4, conferring on supreme court jurisdiction to issue writs of injunction, such court has power to restrain collection of illegal tax notwithstanding Civ. Code 1902, § 412, taxpayer. Ware, Shoals Mfg. Co. v. Jones providing that collection of taxes shall not be prevented by injunction, where there is no other adequate remedy for protection of [S. C.] 58 SE 811. While the legislature may by the establishment of intermediate courts or other appropriate legislation limit or regulate the right of litigants to invoke the jurisdiction of a court of last resort, it may not unreasonably interfere with or embarrass its ultimate constitutional revisory powers. Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460. Determination as to whether an appeal has been properly brought up precedes consideration whether the appellate court had jurisdiction of it (Bolden v. Barnes, 118 La. 273, 42 S 934), and hence a statute requiring an appellate court to inquire whether an appeal not within its jurisdiction has been properly brought up in order to determine whether the appeal shall be dismissed or transferred to another court is not invalid as attempting to confer s jurisdiction not granted by the constitution (Id.). Act No. 56, p. 135, 1904, relative to transfers between supreme court and court of appeals. Id.

88. New Mexico statute confining suits for personal injuries received in that territory to courts of that territory. Atchison, etc., R. Co. v. Sowers [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190. Citizen of Arizona could sue in Texas though injured in New Mexico. Id. But see Coyne v. Southern Pac. Co., 155 F 683.

89. Federal jurisdiction may not be impaired by state law. Butler Bros. Shoe Co. v. U. S. Rubber Co. [C. C. A.] 156 F 1; Dunlop v. Mercer [C. C. A.] 156 F 545. State may not strike down right of litigants to relief in Federal courts (Morrill v American Reserve Bond Co. of Kentucky, 151 F 305), or take away plenary power of such courts to administer their remedies and take possession of subject-matter of suit in accordance with established practice (Id.). Federal court by virtue of plenary power as court of equity to enforce trusts could take possession of securities of insolvent corporation deposited with state treasurer for benefit of creditors and have same subjected to their claims, though state statute conferred jurisdiction only on state courts. Id. Jurisdiction of Federal court over subject-matter and parties to a judgment includes power to enforce it and may not be impaired or destroyed by state legislation. Collin County Nat. Bank v. Hughes [C. C. A.] 152 F 414; Id. [C. C. A.] 155 F 389. State statute barring maintenance of suits by unqualified foreign corporations does not affect power of Federal courts to determine controversies in bankruptcy or other controversies of which they have jurisdiction under constitution and acts of congress. Dunlop v. Mercer [C. C. A.] 156 F 545.

90. Statute authorizing suit to determine adverse claim to realty. North Carolina Min. Co. v. Westfeldt, 151 F 290.

91. Court could not adjudge in contempt person who failed to appear in response to summons of receiver served outside the state. Fidelity & Casualty Co. v. MacAfee Co. [N. J. Eq.] 65 A 879. Courts of one state cannot compel officers of foreign corporation residing in another to obey their decrees respecting management of affairs of corporation. Mock v. Supreme Council of Royal Arcanum, 121 App. Div. 474, 106 NYS 155.

92. Judicial powers of probate judges confined to territorial limits of county in which they are elected. Rainey v. Ridgway [Ala.] 43 S 843. Indian Territory never having been assigned to the eighth circuit, circuit court of appeals of that circuit cannot revise orders of courts of original jurisdiction in that territory sitting in bankruptcy. In re Crawford [C. C. A.] 152 F 169.

93. Court had no jurisdiction of action for damages from trespass to land outside state. Doherty v. Catskill Cement Co., 72 N. J. Law, 315, 65 A 508. Suit to enjoin trespass by sec-

courts may have jurisdiction for the purpose of adjudicating personal rights of parties present in court which are in respect to, but do not directly affect, such subject-matter.[94] Jurisdiction is often affected by the nonresidence or alienage of the parties,[95] or by the place where the cause of action arose.[96] Mere transitory actions,[97] however, are not controlled by these matters,[98] though alienage or diversity of citizenship may often draw the case into the Federal courts.[99] If matters essential to a transitory action arose within the jurisdiction of the court,[1] jurisdiction of the cause exists though other matters involved arose beyond that jurisdiction.[2] The or-

retary of interior on lands in Arizona held not maintainable in District of Columbia where principal question related to title, though secretary was resident of that district and could only be there served. Irrigation L. & I. Co. v. Hitchcock, 28 App. D. C. 587. Bill in equity to enjoin dredging held not maintainable in District of Columbia, though defendants resided there, where principal question was title to gravel bar in bed of creek in Maryland. Columbia N. S. D. Co. v. Morton, 28 App. D. C. 288. Federal court without jurisdiction to foreclose lien and order sale of land in another state. Jones v. Byrne, 149 F 457. Court of equity in Virginia cannot decree sale of land lying in West Virginia. Roller v. Murray [Va.] 59 SE 421. Principal question involved determines whether action is local or transitory. If such question relates to land, action is local and must be brought where land is located. Columbia N. S. D. Co. v. Morton, 28 App. D. C. 288. Suit to administer for benefit of creditors of railroad company its property situated in different districts of the state is local and may be brought in any of the districts, and appointment of receiver therein equitably attaches all property within the state. Horn v. Pere Marquette R. Co., 151 F 626.

94. Jurisdiction of person gives court of equity plenary power in cases of contract, fraud, or trust to compel action in relation to property in his control beyond its territorial jurisdiction. Wilhite v. Skelton [C. C. A.] 149 F 67. Has power to compel conveyance of land situated in another state or county. Fall v. Fall [Neb.] 113 NW 175. Decree requiring conveyance of land so situated cannot directly affect the title, but imposes a mere personal obligation enforcible by the usual weapons of chancery. Id. That subject-matter of suit is situated in a foreign country will not deprive equity court of this country of jurisdiction to grant relief against fraud with reference thereto where defendants are within its jurisdiction. Vacuum Oil Co. v. Eagle Oil Co. of New York [C. C. A.] 154 F 867. Suit to set aside probate order of distribution and prevent dissipation of funds is against the persons, and court has jurisdiction though property involved is without the state. Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 NW 187. In suit against foreign corporation, so much of plea to jurisdiction as alleged that defendant had no estate or debts due it within jurisdiction was immaterial, there being no attempt to acquire jurisdiction by attachment of particular property but to acquire general jurisdiction of defendant so as to authorize a personal judgment. Deatrick's Adm'r v. State Life Ins. Co. [Va.] 59 SE 489.

95. Though a citizen may be restrained from proceeding in another state to attach wages due another citizsn of the state in order to avoid exemption laws of the state, courts cannot at suit of nonresident restrain another nonresident from proceeding to attach wages. Lightfoot v. Murphy [Tex. Civ. App.] 19 Tex. Ct. Rep. 661, 104 SW 511. Where a creditor and debtor are both residents of Pennsylvania, in which state the debt was incurred, and the debtor is an employe of a railroad operating in both Ohio and Pennsylvania, and the employment is along the line of the road in both states, the creditor cannot come into Ohio and maintain an action in this state for the purpose of subjecting his debtor to attachment for necessaries as provided by the laws of Ohio, and thus obtain a presumable advantage over the debtor which the state of Pennsylvania did not provide. Boyd v. Hewitt, 5 Ohio N. P. (N. S.) 332. See Conflict of Laws, 9 C. L. 596.

96. Georgia court held to have jurisdiction of suit for injury to passenger in that state due to negligent starting and operation of train from Tennessee. Parris v. Atlanta, K. & N. R. Co., 128 Ga. 434, 57 SE 692.

97. See Venue and Place of Trial, 8 C. L. 2236.

98. As a general rule neither citizenship nor residence is requisite to entitle one to sue in the courts of Texas. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Nonresidence of parties does not in absence of statute of forum deprive court of jurisdiction of tort committed in another state. Id. Action for injury to person or personalty is transitory and right to sue is not confined to place where cause of action arises. Id. Alabama corporation suable in Alabama courts for injuries sustained by plaintiff in sawmill operated by defendant in Florida. Watford v. Alabama & Florida Lumber Co. [Ala.] 44 S 567.

99. See post, § 11B.

1. Evidence held to show that certain acts of unfair competition in using complainant's trade names on oils sold in foreign country were not committed solely in that country but were conceived and partly performed in this country so as to give our courts jurisdiction to grant relief. Vacuum Oil Co. v. Eagle Oil Co. [C. C. A.] 154 F 867.

2. Court in Vermont had jurisdiction of suit by United States on public bond executed by Maryland corporation doing business in Vermont for benefit of New York resident who furnished material in Vermont to New York contractor doing business in Vermont. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 66 A 809.

dinary of the county in which a testator resided at the time of his death has jurisdiction to probate his will though the property devised is situated in another county and all the interested parties reside there.[3] Jurisdiction to adjudge rights with respect to a child is vested in the courts of the state where the child is held in lawful custody.[4]

§ 6. *Limitations resting in amount or value in controversy.* See 8 C. L. 584 Division of jurisdiction between courts is often accomplished by fixing a maximum [5] or minimum [6] amount or value "demanded" or "involved" [7] "in controversy" [8] or

3. Godwin v. Godwin [Ga.] 58 SE 652. See Estates of Decedents, 9 C. L. 1154.

4. Where an infant was in lawful custody of father domiciled in Louisiana; relative rights of father and mother to custody should be determined by Louisiana courts. Lanning v. Gregory [Tex.] 17 Tex. Ct. Rep 587, 99 SW 542. Texas courts did not acquire jurisdiction of child by reason of his temporary presence in that state. Id. Lanning v. Gregory [Tex. Civ. App.] 18 Tex. Ct. Rep. 210, 101 SW 484. That a child was in Texas and temporarily resident there held sufficient to give Texas courts power to determine question of her custody. Campbell v. Stover [Tex.] 19 Tex. Ct. Rep. 720, 104 SW 1947.

5. City court has no jurisdiction to cancel mechanic's lien for more than $2,000. Steiger v. London, 52 Misc. 462, 102 NYS 497. Under Rev. St. 1895, art. 996, providing that in civil cases appealed from district court which county court would have had jurisdiction to try except in certain cases, judgment of court of appeals is final, supreme court was without jurisdiction of appeal from court of appeals in suit in district court for breach of liquor dealer's bond wherein amount named was $1,000. Long v. Green [Tex.] 18 Tex. Ct. Rep. 179, 101 SW 786.

6. No appeal lies from final judgments in district court rendered on appeal from city courts unless judgment in district court exceeds $100 exclusive of costs. McCashland v. Keogh [Utah] 88 P 680. Const. art. 8, § 9, authorizing appeal from all final judgments of district court, does not apply to suits not originally brought in such court. Id. Circuit court had jurisdiction in replevin where property was worth $323 though note on which seizure was based was for only $66.66. Brumfield v. Hoover [Miss.] 43 S 951. Circuit court has no jurisdiction of action on note for $100 though another note for $130 of which it has jurisdiction is sued on in same action. Skillern v. Baker [Ark.] 100 SW 764.

7. If record in court of county judge shows that amount demanded or actually put in controversy exceeds $100, county judge is without jurisdiction and his judgment is void. Seaboard Air Line R. v. Ray [Fla.] 42 S 714. Declaration against carrier for damages to property shipped held to show the amount demanded or value of property involved exceeded $100. Id. Costs no part of demand or value of property involved in suit in court of county judge. Louisville N. R. Co. v. Sutton [Fla.] 44 S 946. Where a statute requires judgment to be entered for double the amount found to be due the amount of the judgment constitues the demand or damages claimed, and the county judge has jurisdiction only when such demand or damages do not exceed $100. Id. Supreme court had no jurisdiction of appeal from judgment for costs against plaintiff affirmed in appellate court in suit sounding in damages, though parties agreed that plaintiff, if entitled to recover, was entitled to more than $1,000. Wheeler v. Pullman Palace Car Co., 228 Ill. 28, 81 NE 789.

8. **Federal Courts:** Provision of Rev. St. § 631, limiting appeals from district to circuit court in equity and admiralty to cases where sum in dispute exceeded $50, is not applicable to appeals to circuit court of appeals, but was superseded by act establishing such courts. The Joseph B. Thomas [C. C. A.] 148 F 762. Bill for injunction to restrain interference with complainant's business alleging that value of matter in dispute exceeds $25,000 and that complainant has been damaged by acts of defendant's in more thon such sum, held sufficient in absence of denials. Spaulding v. Evenson, 149 F 913; Evenson v. Spaulding [C. C. A.] 150 F 517. Creditors' suit by two complainants, one of whom had claim of over $2,000, to subject property worth over $2,000, involved sufficient amount though claim of other was less than $2,000. Huff v. Bidwell [C. C. A.] 151 F 563. Suit by surety to cancel bond on which if valid complainant would be liable for more than $2,000 held to involve sufficient amount. Fidelity & Deposit Co. of Maryland v. Moshier, 151 F 806. Sufficient amount involved in suit for breach of contract for sale of drug business. Markell v. Matteson [C. C. A.] 153 F 564. In suit involving undivided half of a patent. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F 820. Case not within court's jurisdiction where bill for partition showed value of complainant's interest to be less than $2,000. Southern Land & Timber Co. v. Johnson, 156 F 246. Appeal will not lie from decree of **court of claims** providing for per capita distribution of a fund among New York Indians under act Jan. 28, 1893, unless amount in controversy between an individual and United States is $3,000, or unless right of appeal is given by that act irrespective of Revised Statutes. New York Indians v. U. S., 41 Ct. Cl. 462.

Indiana: Under Acts 1907, p. 238, c. 148, § 1, subd. 14, authorizing appeals directly to supreme court where amount in controversy exclusive of interest and costs exceeds $6,000, amount in controversy must be determined from amount of judgment and supreme court has no jurisdiction of appeal from judgment sustaining demurrer to complaint demanding $200,000. Cronin v. Zimmerman [Ind.] 81 NE 1083.

Kansas: Supreme court has no jurisdiction where only amount in controversy is $35.

"recovered."[9] The amount demanded by the pleadings determines the amount involved or in controversy,[10] unless it is clear that as a matter of law such amount cannot be in dispute or that it is merely colorable or fictitious.[11] In injunction

Liljestrom v. Anderson, 75 Kan. 857, 88 P 1076.

Kentucky: Appeal from order setting aside judgment for costs amounting to $33.95 held to involve only the costs which being less than $200, court of appeals had no jurisdiction. Tillie v. Payne, 30 Ky. L. R. 664, 99 SW 322. In suit by husband and wife for injury to a mule, wife's interest being a lien on the mule, amount in controversy as between her and defendant held less than $200 so that court of appeals had no jurisdiction of her appeal. Craft v. Chesapeake & O. R. Co., 30 Ky. L. R. 1367, 101 SW 342. Where in equity an agreed order eliminated all issues raised in law actions between the parties except as to amount of damages, and plaintiffs recovered only $125 each, court of appeals had no jurisdiction. Cincinnati, etc., R. Co. v. Slaughter, 31 Ky. L. R. 875, 104 SW 317.

Louisiana: On appeal from judgment declining to set aside order appointing receiver, amount of assets is test of jurisdiction. Perkins v. Crystal Ice & Pop Mfg. Co., 119 La. 519, 44 S 284. Appeal by sheriff from order rejecting claim for fees and commissions amounting to less than $2,000 held not within jurisdiction of supreme court. Robson v. Beasley, 119 La. 387, 44 S 136. Supreme court is without jurisdiction of appeal in suit where appointee to office seeks by mandamus to compel district attorney to bring suit to oust the incumbents and where it appears that the fees of such office would exceed $100 but not $2,000. State v. Parsons [La.] 45 S 125. Of appeal in suit by citizens and taxpayers to compel filing of list of persons who have paid their poll taxes, same not involving amount sufficient to confer it. State v. Briede, 119 La. 161, 43 S 992. Affidavit as to amount involved held a mere conclusion. Id.

Missouri: Supreme court could not entertain motion to establish attorney's lien which could not exceed $4,000. Wait v. Atchison, etc., R. Co., 204 Mo. 491, 103 SW 60. Had no jurisdiction of appeal in injunction proceeding since amount in dispute did not exceed $4,500, where decree simply perpetuated injunction against defendants and adjudged costs against them. Moffatt v. Kansas City Board of Trade, 203 Mo. 277, 101 SW 6.

Pennsylvania: Appeal lies to supreme court from allowance of claim of creditor of decedent for more than $1,500, though appealing legatee has interest in fund in controversy to amount less than $1,500. In re May's Estate [Pa.] 67 A 120.

Texas: County court had jurisdiction though ad damnum exceeded $1,000 where damages alleged and sought to be recovered was only $500. Ainsa v. Moses [Tex. Civ. App.] 18 Tex. Ct. Rep. 604, 100 SW 791. Has exclusive jurisdiction of suit to recover an office and its emoluments alleged to be of value of $400, brought directly by claimant against person in possession, and not by quo warranto, matter in controversy exceeding $200 and not exceeding $500. Harris v. Williamson [Tex. Civ. App.] 17 Tex. Ct. Rep. 638, 99 SW 713. District court has jurisdiction of suit to restrain assessor from making a certain tax levy, amount of tax not being stated or in controversy. Lowrance v. Schwab [Tex. Civ. App.] 18 Tex. Ct. Rep. 224, 101 SW 840.

West Virginia: Supreme court without jurisdiction of appeal from decree enjoining board of education from letting a school house where amount in controversy does not exceed $100 exclusive of costs (Carskadon v. Keyser School Dist. Board of Education, 61 W. Va. 468, 56 SE 834), nor does appeal lie from order overruling motion to dissolve and perpetuating an injunction where purely pecuniary interests are involved, unless amount in controversy exceeds $100 (Id.). While error lies to supreme court of appeals in unlawful entry and detainer, action of lower court in allowing damages for detention cannot be reviewed unless such damages exceed $100, there being no error in awarding possession. Montgomery v. Economy Fuel Co., 61 W. Va. 620, 57 SE 137.

9. Under Const. art. 4, § 28, conferring upon superior, common pleas, and city courts of Baltimore concurrently all the jurisdiction which superior and common pleas courts "now have," such jurisdiction has reference to that conferred by constitution of 1864, test of which, in suits ex contractu, is not merely amount claimed but also amount recovered which must exceed $100. Legum v. Blank [Md.] 65 A 1071.

10. That recovery was defeated on alleged assigned claims leaving recovery on plaintiff's original claim not amounting to $300 did not prevent judgment, amount claimed in complaint being controlling. Calloway v. Oro Min. Co. [Cal. App.] 89 P 1070. Amount involved must be determined from pleadings (Pratt v. Welcome [Cal. App.] 92 P 500), and where suit is brought in good faith for sum exceeding $300, only penalty for recovering less than jurisdictional amount is loss of costs (Id.). Complaint for failure to deliver $2 worth of whisky ordered for plaintiff's ill mother, wherefor plaintiff suffered mental anguish and asked over $1,000 damages, held within court's jurisdiction. Thompson v. Southern Exp. Co., 144 N. C. 389, 57 SE 18. Sum in good faith demanded or actually put in controversy controls as to jurisdiction of county judge. Seaboard Air Line R. v. Ray [Fla.] 42 S 714; Louisville & N. R. Co. v. Sutton [Fla.] 44 S 946. In suit to establish lien on goods sold, district court had jurisdiction though sales as to certain defendants amounted to less than $500, where amount of sales to each were alleged to be $600. Freeman v. Collier Racket Co. [Tex. Civ. App.] 105 SW 1129.

11. Hampton Stave Co. v. Gardner [C. C. A.] 154 F 805; Smithers v. Smith, 204 U. S. 632, 51 Law. Ed. 656. Suit for recovery of land of alleged value of $5,000 and damages for detention held not dismissible by Federal circuit court under authority of act March 3, 1875, because after hearing evidence court determined that defendants did not act jointly, and that land taken by each was worth less than $2,000. Id. In suits for

proceedings the value of the object to be gained by the bill determines the question of jurisdiction.[12] Separate and distinct claims cannot be added so as to confer jurisdiction.[13] When a suit is brought for an amount within the jurisdiction of the court, the accrual of further damages pending the action will not deprive the court of power to render judgment within its jurisdictional limits,[14] but if the amount demanded or originally involved is beyond the jurisdiction of a court, entry of judgment for a smaller amount will not confer jurisdiction.[15] Under some statutes a plaintiff may waive any excess of his demand over the jurisdictional amount.[16] The amount claimed is immaterial where jurisdiction attaches on other grounds.[17]

damages Federal courts are required to take note of the fact, when it exists, that plaintiff cannot under his petition possibly recover the jurisdictional amount (Clement v. Louisville & N. R. Co., 153 F 979), and in such case allegations as to the quantum of damages must be regarded as merely colorable (Id.). Allegation that plaintiff was entitled to $2,000 punitive damages. Id. Averment as to jurisdictional amount in suit to restrain dealing in nontransferable excursion tickets held not fictitious or colorable when considered in connection with other averments. Bitterman v. Louisville & N. R. Co., 28 S. Ct. 91. An appellate court in determining its jurisdiction will not be controlled alone by the pleadings and judgment but will examine the whole record. Supreme court without jurisdiction where amount in dispute did not exceed $4,500, though from pleadings, and judgment amount apparently in dispute exceeded that sum. Pittsburg Bridge Co. v. St. Louis Transit Co., 205 Mo. 176, 103 SW 546. Charge on theory that court was without jurisdiction if plaintiff did not have reasonable ground to believe that she was entitled to punitive damages held properly refused, it not appearing that allegation as to such damages was fraudulently made for purpose of conferring jurisdiction. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 18 Tex. Ct. Rep. 534, 101 SW 1061. Where recovery could only be nominal though summons claimed $300, supreme court could not review, since amount in controversy did not exceed $100. Oppenheimer v. Triple-State Natural Gas & Oil Co. [W. Va.] 57 SE 271. No appellate jurisdiction where if proper pleadings had been filed jurisdictional amount would not have appeared. Id. Where plaintiff's own evidence showed that he could not recover $100 in trespass for cutting timber, supreme court could not entertain error. Dickinson v. Mankin, 61 W. Va. 429, 56 SE 824.

12. Suit to enjoin defendant from receiving and using exchange quotations. Hunt v. New York Cotton Exch., 205 U. S. 322, 51 Law. Ed. 821. Testimony that value of right to control quotations exceeded $2,000 held not impaired by evidence that value of quotations varied with volume of business. Id. In injunction proceding to restrain execution sale of indivisible property, value of property is "matter in dispute" and not amount of judgment. Welborn v. Edwards, 31 Ky. L. R. 270, 102 SW 235. In suit to restrain enforcement of taxes against alleged exempt property value of matter in dispute is not limited to amount of particular tax, but is value of right to exemption claimed. Whitman College Board of Trustees v. Berryman, 156 F 112. In suit to restrain interference with a business, amount in dispute is value of right to conduct the business, and allegation that complainant will be damaged in sum exceeding $2,000 is sufficient. Rocky Mountain Bell Tel. Co. v. Montana Federation of Labor, 156 F 809.

13. Separate claims of creditors of alleged owner of a judgment could not be added so as to confer jurisdiction on court of appeals. Covington Bros. v. Jordan, 30 Ky. L. R. 1135, 100 SW 326. Where numerous libelants join in suit in admiralty for wages, their claims are several, not joint, and cannot be added to give appellate jurisdiction. The Joseph B. Thomas [C. C. A.] 148 F 762. Supreme court cannot review decree in suit to enforce mechanics' liens which are separate and distinct except as to individual liens exceeding $100. Wees v. Elbon, 61 W. Va. 380, 56 SE 611. Though same evidence was relied on to defeat several district mechanics' liens, appeal would not lie from appellate court to supreme court as against lienor whose claim was for less than $1,000, no certificate of importance having been granted. Merritt v. Crane Co., 225 Ill. 181, 80 NE 103. Mineral lease held indivisible so as to make jurisdictional amount. Murray v. Barnhart, 117 La. 1023, 42 S 489. In suit by several plaintiffs to restrain collection of assessments and cancel sales, aggregate amount of plaintiff's claims determines right to appeal. Comstock v. Eagle Grove City, 133 Iowa, 589, 111 NW 51. Value of two steers killed by same locomotive within few seconds of same time could be added to make jurisdictional amount there being only one cause of action. Chicago, etc., R. Co. v. Ramsay, 168 Ind. 390, 81 NE 79.

14. County court could render judgment not to exceed $1,000, though when amended petition was filed damages with accrued interest exceeded that amount. Ft. Worth & D. C. R. Co. v. Underwood [Tex.] 17 Tex. Ct. Rep. 420, 99 SW 92.

15. There being no relinquishment. Seaboard Air Line R. Co. v. Ray [Fla.] 42 S 714.

16. Statutory waiver of excess of a demand over $300 relates only to excess on particular claim in suit and does not prevent the bringing of several suits on different notes. Paton v. Doyne [N. J. Law] 65 A 843.

17. When superior court acquires jurisdiction by filing of suit to enforce lien of mechanics and others, it has jurisdiction to render a personal judgment for amount claimed though lien is denied and amount claimed is less than $300. Mannix v. Tryon [Cal.] 91 P 983. Supreme court has appellate jurisdiction of suit of equitable cognizance

§ 7. *Limitations resting in character of subject-matter or object of action.* See 8 C. L. 588—Particularly with respect to courts below those of general original jurisdiction and in cases of appeals is jurisdiction denied or conferred where the action involves the title to land,[18] a freehold,[19] homestead exemptions,[20] constitutional questions [21] properly raised and passed upon below,[22] saved for review [23]

though amount in controversy is less than $200. Agnew v. Barto & Sons Bk. [Wash.] 92 P 885.

18. Title involved: Petition held to show case "respecting title to land" and outside jurisdiction of city court. Daniels v. Chambers, 1 Ga. App. 607, 57 SE 1022. Where in county court right to partition land is contested or title involved, action must be removed to circuit court on motion of either party for trial of question of title, hence such case must be so removed where right claimed in petition is contested by demurrer, raising question of title. Hunt v. Phillips [Ky.] 105 SW 445. Constitutional provisions considered and held to confer upon court of common pleas of Baltimore jurisdiction of suit by vendee to recover deposit of less than $100, based on failure of title to land which was thus necessarily involved. Legum v. Blank [Md.] 65 A 1071. Justice of peace without jurisdiction of suit to recover deposit for realty, title to which was alleged to have failed. Id.

Not involved: In suit to have contract for sale of trees declared a first lien on land and to foreclose. Stark v. Martin, 204 Mo. 433, 102 SW 1089. In ejectment, action dealing only with right to possession. Hough v. Jasper County L. & Fuel Co [Mo. App.] 106 SW 547. In action to recover amount paid for void city tax deed, subsequent taxes, etc. Russell v. Woerner [Mo.] 106 SW 49. Suit for breach of contract to construct and maintain a ditch. Not transferable to supreme court. Withers v. Wabash R. Co., 122 Mo. App. 282, 99 SW 34. Question whether one had homestead right in land exempting it from execution. Snodgrass v. Copple, 203 Mo. 480, 101 SW 1090; Sperry v. Cook [Mo.] 105 SW 1088. Action of trespass quare clausum is not a controversy concerning title or boundary of land giving jurisdiction to supreme court or error therein. Dickinson v. Mankin, 61 W. Va. 429, 56 SE 824. Suit by unsuccessful ejectment defendant to recover value of improvements is not a continuation of ejectment suit so as to give supreme court jurisdiction. Bristol v. Thompson, 204 Mo. 366, 102 SW 991. Right of owner of water system to recover for water supplied does not involve title to realty so as to authorize further appeal from superior court from judgment for less than $300. Hesperia Land & Water Co. v. Gardner [Cal. App.] 88 P 286. Where under common counts plaintiff could offer evidence of other claims within court's ordinary jurisdiction, fact that special count showed that title to realty was involved did not bring case within court's special jurisdiction of actions for less than $100 involving title to realty. Legum v. Blank [Md.] 65 A 1071.

19. To give jurisdiction to supreme court, freehold must be directly and not merely collaterally or incidentally involved. Burroughs v. Kotz, 226 Ill. 40, 80 NE 728. Must be involved in questions assigned for error. Miller v. Rich, 231 Ill. 416, 83 NE 187.

Freehold involved: In suit involving perpetual easement. Snyder v. Baker, 125 Ill. App. 482. In suit of trustee in bankruptcy to set aside fraudulent transfer of realty. Daly v. Kohn, 230 Ill. 436, 82 NE 828. Suit to remove as a cloud deed to secure alleged gambling debt, complainant's title being denied. Pratt v. Ashmore, 127 Ill. App. 331. Where title was directly in issue in proceeding by administrator or sale of realty to pay debts, appeal from order denying application was properly brought to supreme court. In re Stahl's Estate, 227 Ill. 529, 81 NE 531.

Not involved: Where not involved in points assigned for error. Gilmore v. Lee, 227 Ill. 127, 81 NE 26. Where in suit involving freehold below heirs merely assigned errors to statement of account. Miller v. Rich, 231 Ill. 416, 83 NE 187. In suit for specific performance where only question assigned related to plaintiff's damages. Kuhn v. Eppstein, 231 Ill. 314, 83 NE 233. Petition by executors to sell land to pay debts, after foreclosure sale to another. Wachsmuth v. Penn Mut. Life Ins. Co., 231 Ill. 29, 83 NE 85. Where only question was whether widow's award should be paid out of proceeds of sale of realty. Miller v. Hammond, 126 Ill. App. 267. In decree in foreclosure proceeding providing that certain defendants pay mortgags debt and that land be sold under terms of a will upon their failure to pay, where other defendants claimed they owned no part of the land but were entitled to portion of proceeds, and denied right of court to decree sale under will. Harney v. Ross, 227 Ill. 539, 81 NE 687. Right to redeem under assignment claimed to be a mortgage, though decree provided that upon redemption being made appellee should receive a deed. Burroughs v. Koltz, 226 Ill. 40, 80 NE 728.

20. Supreme court has appellate jurisdiction in all suits "involving homestead exemptions." Reily v. Johnston, 119 La. 119, 43 S 977.

21. For constitutional questions in Federal practice, see post, § 11C.

Colorado: Appeal in action involving constitutional question was properly taken directly from trial court to supreme court before consolidation of latter and court of appeals. City of Denver v. Iliff, 38 Colo. 357, 89 P 823.

Illinois: If want of jurisdiction is claimed because of unconstitutionality of act purporting to confer jurisdiction, appellate court cannot decide question and appeal properly goes direct to supreme court. City of Aurora v. Schoeberlein, 230 Ill. 496, 82 NE 860.

Indiana: No constitutional question though constitutionality of § 1, of Employer's Liability Act of 1893 (Burns' Ann. St. 1901, § 7083), was raised, since question had been settled by previous decisions, hence appeal should have been to appellate court. Pittsburg, etc., R. Co. v. Rogers, 168 Ind. 483, 81 NE 212.

Louisiana: Supreme court has appellate

and assigned as error in the appellate court,[24] questions of law decided erroneously or contrary to other decisions,[25] the construction of a statute,[26] elections,[27] office fees,[28] taxes or revenue,[29] penalties,[30] certain tort liabilities,[31] and where any kind

jurisdiction when there is drawn in question the legality or constitutionality of a fine imposed by a municipal corporation, or where an ordinance or law of the state has been declared unconstitutional. Town of Ruston v. Fountain, 118 La. 53, 42 S 644; Town of Minden v. Crichton, 118 La. 747, 43 S 395. Where a fine has been imposed under municipal ordinance, appellate jurisdiction of supreme court is limited to determination as to its alleged invalidity. Id.

Missouri: Where motion for new trial and in arrest raised constitutional questions and movant appealed, court of appeals would certify cause to supreme court though it was of opinion that constitutional point was not well taken. Wabash R. Co. v. Flannigan, 118 Mo. App. 124, 100 SW 661. Supreme court had jurisdiction of appeal by city of St. Louis from judgment for defendant in action to recover a fine for violation of an ordinance which court below adjudged unconstitutional. City of St. Louis v. De Lassus, 205 Mo. 578, 104 SW 12. Constitutional questions involved where motion to quash execution on constitutional grounds was overruled and petitioner appealed. Overton v. White, 124 Mo. App. 489, 105 SW 309. Where up to time of erroneous appeal to St. Louis court of appeals no steps had been taken to eliminate a consitutional question, court of appeals properly transferred case to supreme court, jurisdiction of which was not affected because defendant, on motion to retransfer, waived the constitutional question. Taylor v. St. Louis Merchant's Bridge Terminal R. Co. [Mo.] 105 SW 740. Where in suit to restrain maintenance of toll road defendant set up impairment of contract obligation, denial of due process, etc., and that it had a fee in the road, constitutional questions were sufficiently raised though complainant sought only to nforce right of public to travel free. State v. Scott County Macadamized Road Co. [Mo.] 105 SW 752. Where a section of a city charter had been declared unconstitutional, question could not be raised in a subsequent action so as to give supreme court jurisdiction of appeal. Dickey v. Holmes [Mo.] 106 SW 511.

22. Must appear that constitutional question was raised below and ruled to disadvantage of appellant. Shell v. Missouri Pac. R. Co., 202 Mo. 339, 100 SW 617. Hence supreme court was without jurisdiction where suit for loss of a mare on railroad right of way was not treated as being brought under certain statutes and constitutionality of such statutes was not raised in motion for new trial. Id. Specific constitutional provision infringed must be pointed out, mere general allegation that statute is unconstitutional made on demurrer or in motion for new trial insufficient. State v. Kuehner [Mo.] 106 SW 60. Supreme court without jurisdiction where plaintiff in suit for injury from defective sidewalk relied on statute below and did not there raise question of its constitutionality. Jacobs v. St. Joseph [Mo.] 102 SW 988.

23. See Saving Questions for Review, 8 C. L. 1822.

24. See Appeal and Review, 9 C. L. 108.

25. Under Laws 1899, p. 170, c. 98, requiring certification of a cause to supreme court, where decisions of court of civil appeals conflict, that decision of court of civil appeals conflicts with decision of supreme court is not ground for certification. Newnom v. Neill [Tex.] 19 Tex. Ct. Rep. 678, 104 SW 1040.

26. Question of whether under a statute determination of a coroner that a case warranted holding of an inquest was conclusive on county on his presenting claim for fees held to involve construction of statute and to authorize appeal directly to supreme court. Stults v. Allen County Com'rs, 168 Ind. 539, 81 NE 471. Construction of statute is not involved where case arises upon the evidence, unless evidence shows that court construed a statute. Id. Sustaining of objections to questions propounded to coroner on redirect examination did not necessarily present question as to construction of coroner statute. Id. Construction of revenue laws not involved in suit to recover amount paid for void city tax deed, subsequent taxes, costs, etc. Russell v. Woerner [Mo.] 106 SW 49.

27. A suit to enjoin county clerk from certifying to election judges fraudulent and fictitious registrations made by said clerk is not an action to supervise or control an election, hence is not within rule restricting jurisdiction to supreme court, but may be brought in district court. Aichele v. People [Colo.] 90 P 1122. General election law, Rev. Laws, c. 11, § 421, confers jurisdiction on supreme judicial court to issue mandamus in a proper case to prohibit counting of invalid ballot. Brewster v. Sherman [Mass.] 80 NE 821.

28. Suit by appointee to office to compel district attorney to sue to oust incumbents may reasonably be said to involve the fees of the office, hence supreme court being without jurisdiction of appeal therein may transfer it to court of appeal. State v. Parsons [La.] 45 S 125.

29. Revenue must be directly involved. People v. City Council of Peoria, 229 Ill. 225, 82 NE 225. Test is whether some recognized authority of state or some of its municipalities authorized by law to assess or collect taxes are attempting to proceed under the law, and questions arise between them and those of whom the taxes are demanded. Id. Not involved where question was merely what branch of city government was authorized to fix rate of school tax. Id. Supreme court has jurisdiction of appeal irrespective of amount involved in suit for a license in which defense is that license statute does not apply to defendant's business. State v. Wenar, 118 La. 141, 42 S 726. Proceeding to review action of justices of a county in selecting depositary of public funds held to involve revenue laws and without jurisdiction of court of appeals. State v. Adkins [Mo. App.] 100 SW 661.

30. Suit on bond given to replevy liquor and other articles under acts 30th Leg. 1907, p. 156, held suit on behalf of state to recover a penalty and forfeiture and cognizable only

of equitable relief or cognizance is sought.[32] More often the statute merely prescribes what jurisdiction inferior courts shall have, impliedly excluding all else.[33] By statute, such jurisdictions as those exercised by courts of bankruptcy,[34] courts of probate and the like,[35] often becomes exclusive or at least primary.[36] Special statutory or constitutional jurisdictions are limited to occasions and objects contemplated by the law creating them.[37]

Courts have no power to control or supervise legislative or official administrative discretion.[38] A purely criminal court has no jurisdiction of civil matters.[39] A statute providing that injunctions to stay proceedings in a suit or execution on a judgment, shall be returnable and tried in the court where such suit is pending or judgment was rendered, does not apply in proceedings to restrain execution of a judgment affirmatively appearing from the record to be void.[40]

§ 8. *Limitations resting in character or capacity of parties litigant.*[See 8 C. L. 592] —Where a receiver is authorized to sue by the court which appointed him, an objec-

in district court. Meyers v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 800, 105 SW 48.

31. Under Act Nev. March 23, 1905, liability for personal injury caused by wrongful acts or negligence exists only in so far as adjudged by a state or Federal court in Nevada and an action is not maintainable in any other court. Coyne v. Southern Pac. Co., 155 F 683. New Mexico statute limiting suits for personal injuries to courts of that territory will not bar suit in a Texas court by an Arizona citizen injured in New Mexico. Atchison, etc., R. Co. v. Sawers [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190. When an action can be fairly treated as based either on contract or in tort, the courts in favor of jurisdiction will sustain the election made by plaintiff. Complaint treated as election to sue in superior court in tort for conversion of proceeds of sale of horse left with defendant to sell. White v. Eley [N. C.] 58 SE 437.

32. Injunctions being matters of chancery cognizance, county courts have no power to issue them though constitution authorizes county judge to grant them in certain cases. Randolph v. Abbott [Ark.] 105 SW 576. Appellate jurisdiction in all cases in equity is given to supreme court, hence district court of appeals has no jurisdiction where suit is to restrain diversion of water. Rickey Land & Cattle Co. v. Glader [Cal. App.] 91 P 414. Appeal erroneously taken to court of appeals is not lost but will be transferred to supreme court. Id. Where suit for infringement of trade mark was brought in city court of Atlanta for damages alone, held error to dismiss because matters complained of were cognizable in equity. Hagan & Dodd Co. v. Rigbers, 1 Ga. App. 100, 57 SE 970. To require municipal court of St. Paul to certify a case to district court on ground that equitable defense or equitable relief is interposed, answer must set forth facts sufficient to constitute a defense. Selover v. Williams, 98 Minn. 155, 107 NW 960. A proceeding in equity seeking determination of questions under trust deed and will should be addressed to superior court having sole jurisdiction in equity in such matters and not to supreme court. Angell v. Angell [R. I.] 67 A 325.

33. See post, § 9C.

34. See Bankruptcy, 9 C. L. 343.

35. Circuit court as court of equity had jurisdiction concurrent with orphans' court to dispose of trust property under will for purpose of distribution, where executors authorized to sell were dead. Noble v. Birnie's Trustee [Md.] 65 A 823. Circuit court has plenary jurisdiction of actions to construe wills and aid executors, and fact that a question may arise in county court on distribution is no objection to its determination in suit for construction. Pabst v. Goodrich [Wis.] 113 NW 398. Could determine number of shares of stock executors must transfer to beneficiary under will. Id.

36. See post, § 9A.

37. See post, § 9C.

38. See Constitutional Law, 9 C. L. 610; Compare Elections, 9 C. L. 1041; Highways and Streets, 9 C. L. 1588; Eminent Domain, 9 C. L. 1673; Municipal Corporations, 8 C. L. 1056; Public Works and Improvements, 8 C. L. 1506, and kindred topics. Supreme court without power in habeas corpus to admit petitioner to bail where governor objects and declares that petitioner's detention is a military necessity, and adjutant general declares that he has been commanded by governor not to surrender petitioner on habeas corpus or otherwise. In re Moyer, 35 Colo. 154, 91 P 738. Pol. Code, § 1546, conferring on superior court jurisdiction of local option election contests, limits that jurisdiction to matters involved in ascertaining true result of election. Harris v. Sheffield, 128 Ga. 299, 57 SE 305. Jurisdiction conferred on supreme court by act creating board of railroad commissioners, to compel obedience to orders of the board, is not legislative or nonjudicial. State v. Missouri Pac. R. Co. [Kan.] 92 P 606. State courts are powerless to enjoin an applicant from proceeding to obtain title to public lands and require him to relinquish his claims, title not having yet passed from the government. Columbia Canal Co. v. Benham [Wash.] 91 P 961.

39. Criminal district court of parish of Orleans held without jurisdiction to exercise functions of a juvenile court as provided by Act 82, p. 134, of 1906. In re Parker, 118 La. 471, 43 S 54.

40. Suit maintainable in county where it was sought to levy execution despite Rev. St. 1895, art. 2996. Ketelsen v. Pratt Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

tion to the jurisdiction of the court in which he sues cannot be sustained.[41] A suit to enjoin an Indian agent from unlawfully interfering with prospecting on reservation land is not unauthorized as one against the United States, though defendant claims to represent the government.[42]

§ 9. *Original jurisdiction. A. Exclusive, concurrent, and conflicting.*[See 8 C. L. 592]—When by reason of any of the statutes or rules discussed in the preceding sections only one tribunal can act authoritatively, its jurisdiction is exclusive [43] or primary.[44] If two or more courts have jurisdiction, this is concurrent.[45] When two courts of concurrent jurisdiction both assume to act, there is a conflict,[46] and the court which first acquired jurisdiction retains it to the exclusion of the other,[47]

41. Demurrer for want of jurisdiction not sustainable in suit by receiver of insolvent bank where declaration alleged that chancery court had empowered receiver to bring suit. Kretschmar v. Stone [Miss.] 43 S 177.

42. Wadsworth v. Boysen [C. C. A.] 148 F 771.

43. Where jurisdiction is conferred by the constitution over cases involving designated kinds of subject-matter, the grant is exclusive and such subject-matter must be litigated in the court designated unless a contrary intent appears from the context. Meyers v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 800, 105 SW 48. Suit on bond given to replevy liquor and other articles seized under Acts 30th Leg. 1907, p. 156, held suit on behalf of state to recover penalties and forfeitures within Const. art. 5, § 8, and hence could only be brought in district court. Id. Probate court has exclusive jurisdiction in matters of probate. In re McVay's Estate [Idaho] 93 P 28. Under Code, § 225, district court has original and exclusive jurisdiction of probate of wills, administration of estates of deceased persons, distribution of their property, etc. Neimand v. Seemann [Iowa] 114 NW 48. Issuance of injunction to restrain removal of administratrix for purpose of preventing her from successfully defending claim against the estate held no interference with exclusive jurisdiction of county court to appoint and remove administrators. Alderman v. Tillamook County [Or.] 91 P 298. Exclusive jurisdiction of justice court in suit to eject a lessee from succession and community property could not be affected by injunction from district court prohibiting plaintiff from disturbing defendant's possession nor by pendency in district court of suits brought by defendant, and recovery was not barred thereby either in justice court or in district court on appeal. Campbell v. Hart, 118 La. 871, 43 S 533.

44. Suit to compel interstate carrier to receive goods for transportation which it wholly refuses to do is one to compel performance of duty imposed by general law and complainant is not required to resort in first instance to interstate commerce commission. Danciger v. Wells-Fargo & Co., 154 F 379.

45. Supreme and surrogate courts have concurrent jurisdiction to require executors and trustees or their representatives to account so far as property has come into their hands. In re Fogartys' Estate, 117 App. Div. 583, 102 NYS 776. While ordinarily supreme court will not exercise its jurisdiction if that of surrogate is adequate, it will do so in other cases as where title to realty is involved. Id.

For concurrent jurisdiction of state and Federal courts, see post, § 11A.

46. Where single creditor of insolvent corporation sued in state court to require state treasurer to pay him amount due from securities deposited with treasurer for creditors' benefit, but no receiver was appointed and no action was taken by court to obtain possession of the securities, Federal court was not deprived of power to take possession for benefit of all creditors. Morrill v. American Reserve Bond Co., 151 F 305. Replevin will not lie in state court against officer of Federal court to recover property in his possession as such officer, property being in custodia legis and remedy being in Federal court. Druhe Hardware Lumber Co. v.Fishbein, 101 Minn. 81, 111 NW 950. Where court of appeal and superior courts had concurrent jurisdiction to issue mandamus to compel a board to issue an occupation permit and a proceeding has already been instituted in superior court, court of appeal would not allow the writ. Goytino v. McAleer [Cal. App.] 88 P 991. Mere possibility of change in personnel of board before an appeal can be heard is not sufficient reason. Id.

47. Terry v. State [Neb.] 110 NW 733. Where a child was in prior custody of court of rightful jurisdiction. Id. When the power of a court of jurisdiction is first invoked to administer property. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 840, 103 SW 836. Federal court in which is first raised question of constitutionality of state statute may decide to exclusion of state courts and may enjoin subsequent state criminal proceedings under it (Ex parte Young, 28 S. Ct. 441), but the enforcement of a state railroad rate law alleged to be unconstitutional should not be enjoined by a Federal court unless the case is reasonably free from doubt (Id.). While the general rule is that a court first acquiring jurisdiction of property for administration or foreclosure purposes may retain exclusive custody until such purposes are accomplished (Brun v. Mann [C. C. A.] 151 F 145), the fact that an estate is in process of administration will not prevent a Federal court from decreeing a sale of land belonging thereto in satisfaction of a Federal decree, where under the state law the custody of the county court is subject to the power of the district court to sell the land during administration (Id.). Exclusive jurisdiction of Federal court in suit to foreclose railroad mortgage held reserved by the decree after delivery of property to the purchasers so as to pre-

and litigants may be restrained from interfering,[48] this rule not applying, however, where the objects of two suits are different.[49] Where similar proceedings are pending in courts of concurrent jurisdiction, the later proceeding should be stayed,[50] but courts will not indulge in considerations of comity where it would disown their own jurisdiction of a matter over which they have exclusive control, or work injury to residents of their own state.[51] That a court of bankruptcy has possession of the proceeds of a sale of chattels covered by a mortgage given by the bankrupt does not deprive a state court of jurisdiction of a suit by the trustee to set aside the mortgage as fraudulent.[52] A state court has no power to enjoin a proceeding or judgment of a Federal court,[53] and the power of Federal courts over suits in state courts is re-

vent state court from decreeing sals to satisfy lien of certain equipment bonds in suit begun before Federal court took possession. Wabash R. Co. v. Adelbert College, 28 S. Ct. 182. Receivership proceeding in suit to oust a foreign corporation and for penalties held to be in rem and court held to have acquired complete jurisdiction when corporation was served and appeared and receiver was appointed, though receiver had not taken possession of the property. Waters Pierce Oil Co. v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 840, 103 SW 836. On appeal under supersedeas bond, appellats court acquired same full jurisdiction of the res. Id. Decree of Federal court requiring Federal receiver to take possession of the res held to materially affect jurisdiction of state appellate court. Id. Though after supersedeas appeal in state receivership proceeding state receiver was unable to take possession of the property, he was so far subject to appellate court's jurisdiction as to permit that court to direct him to appear before Federal court whose receiver had interfered and insist upon the right of the state and jurisdiction of state court. Id. Where question of title and right of possession of property arises in both a state and a Federal court, the court first obtaining possession has jurisdiction. Ayers v. Farwell [Mass.] 82 NE 35. Replevin would lie in state court to recover property in possession of bankrupt where nothing had been done to obtain possession in Federal court. Id. Facts held to show that court in one county had acquired jurisdiction for recovery of certain staves so as to preclude suit by defendant in another county. Loveland-Garrett Co. v. Day, 30 Ky. L. R. 879, 99 SW 924. Where bills were tendered for filing in Federal court and restraining orders issued based thereon, court obtained jurisdiction over subject-matter though suits were instituted in state courts before formal filing of such bills. St. Louis & S. F. R. Co. v. Hadley, 155 F 220. Where court acquires jurisdiction in suit to subject property to satisfaction of a claim, later proceedings by any of the parties in other courts without leave of first court are ineffectual to establish claims adverse to complainants. Brun v. Mann [C. C. A.] 151 F 145. But it is the duty of the court first acquiring jurisdiction to hear and determine adverse claims when seasonably presented. Id. Where, while realty was in custody of Federal court, administratrix sought allowance for expenses. Id. Where suit was instituted on demand of a stockholder for accounting against lessee of a railroad and court acquired full jurisdiction, stockholder, though not a party to such suit, was not entitled to maintain bill for similar relief and receiver in court of concurrent jurisdiction, and to have first proceeding enjoined. Gray v. South & N. R. Co. [Ala.] 43 S 859.

48. Where question of validity of franchises of gas companies was pending in Federal courts, state court should restrain action on such question in suit by attorney general to dissolve the corporations until adjudication by Federal courts. In re Consol. Gas Co., 56 Misc. 49, 106 NYS 407. Suit in Federal court to quiet title to water would be protected by injunction as against similar actions subsequently brought by defendant for same purpose in another state. Rickey Land & Cattle Co. v. Miller [C. C. A.] 152 F 11. Where parties and greater part of property involved is within court's jurisdiction, it has power to enjoin maintenance of a subsequent suit in a foreign country between same parties and involving same subject-matter. United Cigarette Mach. Co. v. Wright, 156 F 244.

49. That receivers had been appointed in Federal court, in suit by general creditors, to protect franchises and property and preserve corporate existence, did not prevent suit in state court for dissolution of corporation. People v. New York City R. Co., 107 NYS 247.

50. See, also, Abatement and Revival, 9 C. L. 1; Stay of Proceedings, 8 C. L. 1999. Temporary Federal injunction restraining enforcement of a rate held not to require stay of state mandamus proceedings to compel observance instituted prior thereto by shipper not a party in Federal court. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429. Exercise of power to stay suits on principle of comity between courts of different sovereignties is purely discretionary where neither court is in possession of res. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 510. Action in state court, involving title to oil lands, will not be stayed because after its institution parties claiming under principal defendant raise issue of title in Federal court instead of intervening in pending suit. Id.

51. Would forfeit charter of and appoint receiver for domestic corporation, though in suit in Federal court by general creditors receivers had been appointed to protect property and franchises and preserve corporats existence. People v. New York City R. Co., 107 NYS 247.

52. Where proceeds were deposited as special fund to which mortgage lien, if any, was to be transferred. Frank v. Vollkommer, 205 U. S. 521, 51 Law. Ed. 911.

53. Without power to enjoin execution of deed to purchaser of land pursuant to decree

stricted by statute.[54] A court of concurrent jurisdiction cannot ordinarily review the orders or judgments of another such court.[55]

(§ 9) *B. Ancillary or assistant jurisdiction* See 8 C. L. 594 is that which is incident to or in aid of a primary one.[56]

(§ 9) *C. General or inferior, limited and special jurisdiction.* See 8 C. L. 594—A general jurisdiction is one which within the territorial bounds is not limited as to nature of subject-matter, amount in controversy, or character of parties.[57]

The jurisdiction of probate,[58] county,[59] justice,[60] city,[61] municipal,[62] and other

in bankruptcy or enjoin purchaser from acquiring title. Henderson v. Henrie, 61 W. Va. 183, 56 SE 369.

54. See post, § 11A, and also Injunction, 8 C. L. 279.

55. One of two district judges of concurrent authority held without power to set aside order of other appointing referee in bankruptcy. In re Steele, 156 F 853. An order of one court cannot be set aside or restrained by another court of co-ordinate jurisdiction in an action subsequently instituted. Proceedings to incorporate city lying partly within jurisdiction of two circuit courts. Salter v. Cook, 131 Wis. 20, 110 NW 823.

56. Where execution was levied and claim filed in superior court, it had jurisdiction of ancillary petition in aid of levy instituted by plaintiff against an adverse claimant irrespective of such claimant's residence. Thomason v. Thomason [Ga.] 59 SE 236.

57. Connecticut: Supreme court of errors has no power to issue mandamus in exercise of either original or appellate jurisdiction. In re Ansonia Water Co. [Conn.] 68 A 378.

Idaho: District court has no original jurisdiction in matter of probate, jurisdiction of probate court being exclusive. In re McVay's Estate [Idaho] 93 P 28.

Missouri: Circuit court having general common-law and equity jurisdiction has jurisdiction of suit involving a resulting trust and partition. Padgett v. Smith, 206 Mo. 303, 103 SW 943.

Nebraska: The district courts of Nebraska are courts of general equity jurisdiction in the exercise of which they are not limited by statute. Rhoades v. Rhoades [Neb.] 111 NW 122.

Wyoming: District court has original equity jurisdiction. Littleton v. Burgess [Wyo.] 91 P 832.

58. Idaho: Probate court has exclusive original jurisdiction in all matters of probate, and its judgments, records, and proceedings as to such matters import absolute verity. In re McVay's Estate [Idaho] 93 P 28.

Kansas: Probate court no equitable jurisdiction. Ross v. Wollard, 75 Kan. 383, 89 P 680.

Massachusetts: Under Rev. Laws, c. 137, § 1, and c. 162, § 3, probate court has jurisdiction to appoint an administrator of a nonresident decedent whose only property in the state is a claim in a trust estate created by a will admitted to probate in the state and in process of settlement in a court having jurisdiction of subject-matter and of the trustee. Vinton v. Sargent [Mass.] 80 NE 826.

Nebraska: Probate court has no jurisdiction to determine title to land by adjudging that devisees in entryman's will were owners to exclusion of heirs at law to whom patent was issued. Walker v. Ehresman [Neb.] 113 NW 218.

New York: Surrogate's court has power to construe a provision of a will and determine its meaning and validity in order to make a proper decree of distribution. In re Thistlethwaite, 104 NYS 264. Had jurisdiction to settle administratrix's account where she returned money as assets but also claimed it as a gift from decedent. In re Cavanagh, 105 NYS 850. Has jurisdiction to settle accounts of administrators and fix amount of their liability to creditors or next of kin but not to determine validity of their bond as between sureties and creditors or next of kin. Fidelity & Deposit Co. of Maryland v. Moshier, 151 F 806. Without jurisdiction to pass on claim that executrix should be surcharged with value of certain securities, assignment of which was alleged to have been procured by fraud. In re Dittrich, 53 Misc. 511, 105 NYS 301. Has no jurisdiction to determine validity of alleged debt due a testator pleaded by executor and trustee as counterclaim to claim for income of trust fund where claimant disputes indebtedness. Meeks v. Meeks, 106 NYS 907. Where will required trustee to pay over the income, determination of right of offset would require equitable jurisdiction not possessed by surrogate. Id. Where surrogate's court had no jurisdiction to try title to land involved in proceeding to compel accounting by representatives of executor and trustee, application for accounting should have been dismissed. In re Fogarty's Estate, 117 App. Div. 583, 102 NYS 776.

Oklahoma: Probate courts have no jurisdiction to hear and determine original proceedings in mandamus and issue writs therein. Starkweather v. Kemp, 18 Okl. 28, 88 P 1045.

Pennsylvania: Orphans' court without jurisdiction of claim based on negligence and malfeasance of decedent as officer of trust company, it not being shown he received any money. In re Locher's Estate [Pa.] 67 A 953.

United States: Prior acts considered and held that prior to act Cong. April 28, 1904, 33 St. 573, United States courts had no jurisdiction to appoint a guardian for a Chickasaw minor. In re Poff's Guardianship [Ind. T.] 103 SW 765.

59. Arkansas: County courts have no power to issue injunctions. Randolph v. Abbott [Ark.] 105 SW 576.

Georgia: County court may hear and determine issue formed by counter affidavit to warrant issued against one as tenant holding over. Harper v. Tomblin, 127 Ga. 390, 56 SE 433. So much of law of this state as attempts to confer on county courts jurisdiction in suits where principal sum claimed is less than $50 is unconstitutional. De

inferior courts varies with the statutes of the different states. A court of general jurisdiction may have special statutory jurisdiction conferred upon it not exercised according to the common-law and not belonging to it as a court of general jurisdiction,[63] and in such cases its decisions are treated as those of courts of special jurisdiction.[64] A constitutional grant of power to issue designated writs is construed and applied in connection with the settled rules of law controlling the use of the writs.[65]

Lamar v. Dallor [Ga.] 57 SE 85; Id. [Ga. App.] 57 SE 1054; Gower v. Fowler, 1 Ga. App. 814, 57 SE 1054.

60. See Justices of the Peace, 8 C. L. 635.

61. Georgia: The jurisdiction of a city court is limited and restricted to powers expressly conferred by the act creating the court, and such as are necessarily incident to its existence and proper operation. Woolsey v. Lewshe, 1 Ga. App. 817, 57 SE 1039. Neither judge nor clerk of city court of Fayetteville has authority to issue a distress warrant. Id. Under Act 1895, creating city court of Brunswick in Glynn county, a justice of the peace of Ware county could issue attachment against a nonresident for sum exceeding $100 and make it returnable to that court. Howard Supply Co. v. Bunn, 127 Ga. 663, 56 SE 757. City Court of Macon has no jurisdiction of matters involving equitable rights except purely by way of defense. Butler v. Holmes, 128 Ga. 333, 57 SE 715.

Illinois: City court organized under Hurd's Rev. St. 1905, c. 37, § 240, has concurrent jurisdiction with circuit court only in all civil and criminal cases arising in the city and in appeals from justices of the peace therein. Supreme Hive Ladies of Maccabees of World v. Harrington, 227 Ill. 511, 81 NE 533. See Konow v. Nichols, 128 Ill. App. 409.

New York: City court has jurisdiction of actions against natural persons not only individually but also in their representative capacity, hence may take cognizance of an action against receiver for goods sold him for use in carrying on business as receiver. John C. Orr Co. v. Cushman, 54 Misc. 121, 104 NYS 510. Action involving review of surrogate's decree, readministration, and determination of right to participate in funds, held to involve exercise of equity powers not possessed by city court. Ambrose v. Reilly, 105 NYS 1036. Code Civ. Proc. § 635, providing for issuance of attachment against a domestic corporation, does not apply to the city court. Granieri v. New York Shoe Repairing Co., 56 Misc. 121, 106 NYS 1107.

62. New York: Municipal court **has jurisdiction** of action for money paid under duress. Wilkenfeld v. Lynn, 105 NYS 71. Of action for loss of plaintiff's wife's services from personal injury received by her through defendant's negligence. Leyden v. Brooklyn Heights R. Co., 106 NYS 769. Of action by street car passenger against carrier for aggravated assault and arrest committed and caused by carrier's conductor. Baumstein v. New York City R. Co., 107 NYS 23. Order of interpleader in suit for broker's commissions (Rogers v. Picken Realty Co., 105 NYS 281), and suit to recover money deposited in escrow as security for plaintiff's benefit (Harris v. Snyder, 105 NYS 502), held not to involve equitable powers (Id.). Defense that property had been transferred to plaintiff in fraud of creditors held available in municipal court, no affirmative relief being asked. Schollars v. Coghlan, 54 Misc. 612, 104 NYS 742. Municipal court **has no jurisdiction** to determine title to real estate. Bowen v. Ludvik, 103 NYS 948. Being without equity jurisdiction, action will not lie therein by one partner to recover from another his share of profits from a contract, there having been no accounting. Voegtlin v. Bowdoin, 54 Misc. 254, 104 NYS 394. Has no jurisdiction of action for assault and battery. Schwartz v. Interborough Rapid Transit Co., 53 Misc. 289, 103 NYS 80. Without jurisdiction of action on written contract of conditional sale of personalty. Rosenthal v. Riesser, 107 NYS 563. Action by conditional sale vendor who had established his lien to recover the property from one holding it in storage for vendee. Laws 1902, c. 580, § 139. Jacob v. Columbia Storage Warehouses, 105 NYS 276. Jurisdiction in actions against foreign corporations is limited to actions against such corporations as have offices in that city. Epstein v. S. Weisberger Co., 52 Misc. 572, 102 NYS 488. Complaint defective where it failed to state that defendant had such office. Id. Complaint not alleging that defendant, a foreign corporation, had an office in city of New York held not to show jurisdiction. McKeever v. Supreme Ct. I. O. F., 106 NYS 1041. Municipal court act did not confer jurisdiction on municipal court of action against foreign corporation by a nonresident on cause of action arising out of state, such action not being authorized by Code Civ. Proc. § 1780. Sommese v. Florence Distilling Co., 107 NYS 630. In proceeding against tenants involving lease authorizing renewal by notice to landlord, municipal court of Rochester could not determine what were the equitable rights of the parties or what should be eliminated or inserted in lease because of fraud or misunderstanding. Ocumpaugh v. Engel, 105 NYS 510.

63. Calkins v. Calkins, 229 Ill. 68, 82 NE 242.

64. Calkins v. Calkins, 229 Ill. 68, 82 NE 242. In suit in equity to contest a will, defendants could not have purported will declared in equitable assignment, such relief invoking general equity jurisdiction. Id.

65. Thorne v. Moore [Tex.] 19 Tex. Ct. Rep. 985, 105 SW 985. Const. art. 5, § 8, empowering district court and judges thereof to issue mandamus, injunction, etc., is a grant of distinct jurisdiction giving substantive power to issue the writs in all proper cases, whether necessary to enforce some jurisdiction given by other provisions or not. Id. Cannot be construed to give judges in vacation only power to issue alternative writs, but they

(§ 9) *D. Original jurisdiction of courts of last resort.*[See 6 C. L. 596]—This includes the prerogative common-law jurisdiction necessary to the proper control and supervision of the courts below,[66] and in its more common sense such as the constitution and statutes enumerate.[67] Except in these cases their jurisdiction is

may issue peremptory writs. Id. No objection that right of trial by jury is guaranteed by bill of rights (Id.), or that no appeal is provided for (Id.).

66. Supreme court is not simply a court of common-law jurisdiction but has general supervision of all courts of inferior jurisdiction to prevent and correct errors and abuses, and may issue writ of **certiorari to** superior **court sitting in equity** when abuses or errors exist therein without other remedy expressly provided, and when such issue is necessary for furtherance of justice. Hyde v. Superior Ct. [R. I.] 66 A 292. Certiorari would lie from interlocutory decree from which there was no appeal where parties, by reason of action of court and after having spent time and money in partition proceedings, were thrown back to position where all would otherwise have to be done over again. Id. Exercise of general supervisory control by supreme court over inferior courts as provided by art. 94, Const., is discretionary. State v. Summit Lumber Co., 117 La. 643, 42 S 195. Mandamus lies to control the action of an inferior court acting beyond its jurisdiction or where it refuses to take jurisdiction when it is its duty to do so and there is no other adequate remedy, but not to control its action in matters within its jurisdiction to determine. Dowagiac Mfg. Co. v. McSherry Mfg. Co. [C. C. A.] 155 F 524. Supreme court cannot issue mandamus against court of civil appeals except to enforce its own jurisdiction (Newnom v. Neill [Tex.] 19 Tex. Ct. Rep. 678, 104 SW 1040), hence cannot compel reinstatement of cause over which jurisdiction of court of civil appeals is final (Id.). To enforce its own jurisdiction, it may issue mandamus to court of civil appeals (Gordon v. Wilson [Tex.] 19 Tex. Ct. Rep. 679, 104 SW 1043), but court of civil appeals for sixth judicial district not established until after perfecting of an appeal to court of civil appeals for fifth district could not be compelled to assume jurisdiction of that appeal (Id.). Circuit court of appeals of United States has no power to interfere by mandamus with action of circuit court where question involved relates to its jurisdiction as a circuit court of the United States (Dowagiac Mfg. Co. v. McSherry Mfg. Co. [C. C. A.] 155 F 524), but the rule is otherwise where question involved relates to its jurisdiction as a judicial tribunal of original jurisdiction and has no relation to limitations upon it as a national court (Id.). Where constitutional supervisory control over inferior courts or tribunals is coupled with a designation of the common-law writs for its exercise, failure to use the appropriate writ is jurisdictional error. In re Potter [Wis.] 112 NW 1087. Application to circuit court to prevent court commissioner from proceeding without jurisdiction should be made by writ of prohibition or other appropriate common-law writ. Id.

67. Colorado: Authority of supreme court to issue writ of habeas corpus is derived from the constitution and not from statute. In re Moyer, 35 Colo. 154, 91 P 738.

Kansas: Supreme court has original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus only. Has no original jurisdiction to issue injunctions or appoint receivers. State v. Anheuser-Busch Brew. Ass'n [Kan.] 90 P 777. It may, however, in order to protect and render effectual its own jurisdiction, restrain the use and transfer of property and appoint a receiver for property owned and employed by a foreign brewing company unlawfully conducting its business in this state, pending proceedings in quo warranto to oust it. Id. Has original jurisdiction in mandamus to compel obedience to order of board of railroad commissioners. State v. Missouri Pac. R. Co. [Kan.] 92 P 606.

Kentucky: Jurisdiction of judge of court of appeals is purely statutory and he has no power to reinstate a restraining order, as distinct from an injunction, granted under Civ. Code Prac. § 276, and dissolved below, such order not being within §§ 296, 297. Kelley v. Pulaski Stave Co., 31 Ky. L. R. 942, 105 SW 153.

Louisiana: Under present constitution supreme court has such "original jurisdiction as may be necessary to enable it to determine questions of fact affecting its own jurisdiction." Riney v. Hemenway Furniture Co., 119 La. 329, 44 S 116.

Missouri: Where, pending appeal by defendants from judgment against them, the parties settle, supreme court has no original jurisdiction to determine issues raised by plaintiff's attorney on his motion for a lien and execution based on his contract for a percentage of the recovery which the parties ignored. Wait v. Atchison, etc., R. Co., 204 Mo. 491, 103 SW 60.

Nebraska: Supreme court has no original jurisdiction of action to compel a former manager of a private charitable corporation to account. State v. Tabitha Home [Neb.] 111 NW 586.

North Dakota: Supreme court's jurisdiction to issue original writs, except those necessary to proper exercise of its appellate jurisdiction and to aid in its supervision over inferior courts, extends only to prerogative writs, viz., in cases publici juris directly involving sovereignty of state, its franchises, or prerogatives or liberty of a citizen. State v. Holmes [N. D.] 114 NW 367. Whether the supreme court will exercise its extraordinary jurisdiction to issue prerogative writs in cases where it has the power is a matter within its sound judicial discretion, but in other cases it has no discretion. Id. County treasurer held not entitled to writ of mandamus to compel state auditor to deliver to state treasurer a warrant pursuant to c. 139, p. 185, Laws 1903. Id. When the governor appoints a judge of the district court though the law provides that the office shall be filled by a general election, and a private relator applies for a writ of quo warranto on

appellate only.[68] The existence of original jurisdiction in a court of last resort does not imply that a litigant has always an absolute right to invoke it.[69]

§ 10. *Appellate jurisdiction.* See 8 C. L. 597—Appellate jurisdiction is the power of a superior court to rehear and determine causes tried in inferior courts.[70] It depends upon the existence of a judgment or order of which the court below had jurisdiction,[71] and which is subject to review independently of other judgments.[72] This jurisdiction also varies in the different states and territories,[73] especially where there

the ground that he has suits pending and that the public are interested and the sovereignty of the state is affected, the supreme court will assume original jurisdiction under the constitution though attorney general refuses to consent that relator may apply for leave to file application in name of state. State v. Burr [N. D.] 113 NW 705. Supreme court has no jurisdiction, while plaintiff's action for divorce is still pending in district court, to entertain motion for allowance of counsel fees to enable her to appeal from order of district court requiring husband to pay alimony pendente lite, and for counsel fees in main action. Tonn v. Tonn [N. D.] 111 NW 609.

South Carolina: Supreme court has original jurisdiction in suit by state to restrain persons from using premises as place for sale of liquor not tested and found pure. State v. Riddock [S. C.] 58 SE 803. Has power to restrain collection of an illegal tax notwithstanding Civ. Code 1902, § 412, providing that collection of taxes shall not be prevented by injunction, there being no other adequate remedy. Ware Shoals Mfg. Co. v. Jones [S. C.] 58 SE 811.

Texas: Supreme court has no jurisdiction to grant mandamus where case depends upon questions of fact. Davis v. Terrell [Tex.] 99 SW 404; Oldham v. Terrell [Tex.] 104 SW 1040; Parker v. Terrell [Tex.] 19 Tex. Ct. Rep. 985, 105 SW 491. Without jurisdiction to compel acceptance of application to purchase school lands, question of fact being presented as to whether the land had been leased for five or ten years. Shell v. Terrell [Tex.] 18 Tex. Ct. Rep. 445, 102 SW 109. Held without original or appellate jurisdiction to appoint receiver of corporation against which judgment had been rendered for violation of anti-trust laws, pending review of order appointing receiver. Waters-Pierce Oil Co. v. State [Tex.] 20 Tex. Ct. Rep. 279, 106 SW 326.

Wisconsin: Review by certiorari of decision of superintendent of public instruction in creating a school district is not within original jurisdiction of supreme court (State v. Cary [Wis.] 112 NW 428), but where alternative writ has been issued and return made, and no objection taken to jurisdiction of court by either party, and case has been argued and submitted, court may in its discretion entertain the cause (Id.).

68. Jurisdiction of supreme court is appellate only, Const. art. 6, § 2, referring alone to powers which it may exercise to enforce that jurisdiction. Memphis Street R. Co. v. Byrne [Tenn.] 104 SW 460.

69. Proceeding to remove a sheriff from office should be brought first in district court. State v. Welfelt, 73 Kan. 791, 85 P 583.

70. Waters-Pierce Oil Co. v. State [Tex.] 20 Tex. Ct. Rep. 279, 106 SW 326.

71. City court having no equitable jurisdiction, district court on trial of action appealed therefrom had none. Ferguson-McKinney Dry Goods Co. v. Grear [Kan.] 90 P 770. District court on appeal de novo from probate court has such jurisdiction only as had court below. Ross v. Wollard, 75 Kan. 323, 89 P 680. Superior court acquired no jurisdiction on appeal of case in which justice court had no jurisdiction. Western Union Tel. Co. v. Cooper [Ga. App.] 58 SE 517. Mandamus will not issue to compel signing of bill of exceptions complaining of ruling made in a case, when want of jurisdiction in court below appears from application for writ. Harris v. Sheffield, 128 Ga. 299, 57 SE 305. Judgment of circuit court affirming judgment of county judge in cause without his jurisdiction held quashable on certiorari as not being in accordance with essential requirements of the law. Seaboard Air Line R. v. Ray [Fla.], 42 S 714. Where the lower court was without jurisdiction, the appellate court has jurisdiction for the purpose of reversing the erroneous judgment. Rule relating to costs, where appeal is dismissed for want of jurisdiction, relates only to want of jurisdiction on appeal. Columbia Nat. Sand Dredging Co. v. Morton, 28 App. D. C. 288. Where land court had jurisdiction to determine whether a testator intentionally omitted to provide for his children, superior court on appeal also had jurisdiction. Woodvine v. Dean, 194 Mass. 40, 79 NE 882.

72. See Appeal and Review, 9 C. L. 108.

73. Arizona: Bankruptcy Act confers no jurisdiction on supreme court of a territory of proceedings for review of order refusing to vacate adjudication of bankruptcy and permit intervention, but petition should be addressed to United States circuit court of appeals. In re American Copper Co. [Ariz.] 89 P 516.

Indian Territory: Under Act 3, 1905, c. 1479, 33 St. 1081 (U. S. Comp. St. Supp. 1905, p. 150), court of appeals of Indian Territory has no jurisdiction of an appeal in a law case. United States Fidelity & Guaranty Co. v. Shirk [Ind. T.] 103 SW 773.

Kansas: Gen. St. 1901, § 2452, denies any review by supreme court, either by appeal or error, of judgment of district court on application for druggist's permit to sell intoxicants. Hainer v. Burton, 75 Kan. 281, 89 P 697.

Kentucky: Under Ky. St. 1903, § 950, court of appeal has jurisdiction of appeal from judgment of circuit court reversing order of county court granting a liquor license. Simpson v. Com., 31 Ky. L. R. 821, 104 SW 269.

Massachusetts: Under Rev. Laws, c. 162, § 18, providing that a person aggrieved by order or decree of probate court on petition for separate support may appeal to superior court, appeal from order of probate court

are courts of intermediate appellate jurisdiction.[74] Whether the jurisdictional facts exist in the particular case and the tests thereof are considered in preceding sections.[75] In certain classes of cases courts of intermediate appeals are given final jurisdiction and as to such it is exclusive of the courts of last resort.[76] As between two appellate courts the one which rendered a judgment in the exercise of its appellate jurisdiction is the proper tribunal to interpret and enforce it.[77] Where an inferior court has exclusive original jurisdiction of matters involved in an action or proceeding, appellate jurisdiction in a superior court to try the case de novo implies power only to retry on the original papers and on the same issues that were tried below.[78] Appellate jurisdiction cannot be conferred by waiver or consent,[79] and a statute conferring appellate jurisdiction is inapplicable to suits already merged in final judgment.[80]

§ 11. *Federal jurisdiction. A. Generally.* See 8 C. L. 599—The constitution of the United States vests in the Federal courts generally the entire judicial power of the nation[81] circumscribed only by limitations in that instrument contained,[82] though the courts inferior to the supreme court possess only such powers as are expressly granted to them by congress.[83]

Rights and remedies created by state statutes may be enforced and administered in the national courts,[84] and rights under Federal laws may be enforced by state

dismissing petition for revocation of decree ordering payment of money for separate support should be taken to superior court. § 9, providing that person aggrieved by order or decree of probate court may appeal to supreme judicial court, except as otherwise provided. Penno v. Penno [Mass.] 81 NE 293.

Texas: Since right of appeal to supreme court is given only from judgments of district and county "courts," supreme court cannot review judgment of court of civil appeals affirming judgment of district judge in chambers denying writ of habeas corpus. Pittman v. Byars [Tex.] 18 Tex. Ct. Rep. 228, 101 SW 789.

Washington: The jurisdiction of the superior court to review a determination by the land department of a preference right to purchase tide lands is wholly appellate. Hotchkin v. Bussell [Wash.] 89 P 183.

74. Georgia: Court of appeals has no jurisdiction of writ of error sued out, complaining of judgment of superior court in a civil action originally instituted therein, irrespective of amount involved. Harrell v. Nusbaum [Ga. App.] 59 SE 8. Habeas corpus proceeding carried from ordinary to superior court by certiorari is a civil suit carried to superior court from the ordinary within constitutional amendment of 1906, so that further appellate jurisdiction is in supreme court and not in court of appeals. Hendley v. Adams [Ga.] 59 SE 227.

Tennessee: Act 1907, p. 232, c. 82, amending acts, 1895, p. 113, c. 76, which created court of chancery appeals by increasing size and jurisdiction of the court, changing its name, etc. is not unconstitutional on the ground that the subject is not expressed in the title. Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460. Act construed and held to mean that the primary appellate jurisdiction of court of civil appeals extends to cases from courts of equity involving not more than $1,000, and to all cases from circuit and common-law courts except those involving constitutional questions or election contests, and state revenue and ejectment suits. Id.

75. See ante, §§ 4-8.

76. Under Rev. St. 1905, art. 996, supreme court held without jurisdiction of appeal from court of appeals in suit in district court for breach of a liquor dealer's bond wherein amount named was $1,000. Long v. Green [Tex.] 18 Tex. Ct. Rep. 179, 101 SW 786.

77. Court of appeal is proper tribunal to review action of district court fixing amount of costs of appeal from the one tribunal to the other. Globe Realty Co. v. Vix [La.] 44 S 997.

78. On appeal from probate to district court. In re McVay's Estate [Idaho] 93 P 28. Procedure defined on appeal on questions of law and on questions of law and fact. Id.

79. See also, post, § 13. Appellate jurisdiction of supreme court depends on statute and cannot be conferred by stipulation. People v. Peoria City Council, 229 Ill. 225, 82 NE 225.

80. Error to supreme court of Hawaii, which would not lie when final judgment was rendered, held not sustainable under Act March 3, 1905, merely because petition for rehearing was not denied until after statute went into effect. Harrison v. Magoon, 205 U. S. 501, 51 Law. Ed. 900.

81. Const. art. 3, § 1. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law. Ed. 956.

82. Power granted by Const. art. 3, § 1, is not limited by § 2, declaring that "judicial power shall extend to all cases in law and equity arising under this constitution," etc. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law. Ed. 956. Judicial power of nation extends to all controversies of a judiciable nature arising within its territorial limits, no matter who may be parties thereto except so far as there are limitations expressed in the constitution on the general grant of national judicial power. Id.

83. Lewis Pub. Co. v. Wyman, 152 F 200.

84. Where state court had power to decree sale of realty during administration of

courts unless congress has given the Federal courts exclusive jurisdiction.[85] A state court has jurisdiction of a suit to enforce a lien given by state statute for materials furnished in the construction of a vessel.[86] State courts have no jurisdiction of controversies involving a determination of title to and right of possession of Indian allotments still held in trust by the United States.[87]

A Federal court has no jurisdiction of an action against a state brought by a citizen of another state,[88] nor can it issue any injunction to stay proceedings in a

estate of a decedent, Federal court had like jurisdiction in proper case. Brun v. Mann [C. C. A.] 151 F 145. Where in state court creditors of insolvent corporation could avail themselves of securities deposited with state treasurer for their benefit, they could also do so in Federal court. Morrill v. American Reserve Bond Co. of Kentucky, 151 F 305. Though state statutes cannot enlarge the equitable jurisdiction of Federal courts, they may enlarge equitable rights and these rights may be enforced by a Federal court in the same manner as they are enforced by state courts. State statute authorizing bringing of suit to determine adverse claim to realty. North Carolina Min. Co. v. Westfeldt, 151 F 290.

85. State courts may take cognizance of causes arising under postal laws. Lewis Pub. Co. v. Wyman, 152 F 200. A state court has jurisdiction of an action by stockholders of a banking association to compel an agent elected by them, after the comptroller of currency has paid claims allowed as provided by the Federal statute to distribute to them property collected by him though the Federal statute provides that such agent may sell or compromise debts due association with consent of Federal court, and requires him to account to such court at conclusion of his trust. Ingold v. Gilmore, 118 App. Div. 727, 103 NYS 373. Act Cong. Feb. 4, 1905, providing a remedy in Federal courts to materialmen suing on Federal contractors' bonds, is not retrospective, hence did not preclude action in state court on bond to enforce rights acquired prior thereto. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 66 A 809. The civil liability of national bank officers, imposed by U. S. Rev. St. § 5239, for making false reports as to the bank's financial condition, may be enforced in state courts though exclusive jurisdiction is conferred on Federal courts to declare a forfeiture of the bank's charter as result of acts committed. Yates v. Jones Nat. Bk., 206 U. S. 158, 51 Law. Ed. 1002. State court has jurisdiction of action to recover an unjust and unauthorized exaction as distinct from a suit to recover an overcharge under the interstate commerce act, as where plaintiff, who had shipped too many cattle in an emigrant car, was compelled to pay the carload price of a car of stock in addition to the charge for the emigrant car as a condition to the right to remove his stock, there being nothing in the classification or schedule authorizing such charge. Banner v. Wabash R. Co., 131 Iowa, 405, 108 NW 759.

86. Not in conflict with Federal admiralty jurisdiction. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 205 U. S. 354, 51 Law. Ed. 836. That certain materials had been furnished after vessel was launched held immaterial where they were fairly a part of her original construction. Id.

87. Not conferred by act Aug. 15, 1894, delegating to Federal circuit courts power to determine such questions. McKay v. Clayton, 204 U. S. 458, 51 Law. Ed. 556.

88. Prohibition extends to suit by citizen of state sued. Ex parte Young, 28 S. Ct. 441.

What constitutes a suit against the state: If the state is the real party against which relief is asked and the judgment will operate, a suit is not maintainable against its officers though it is not named in the pleadings. Western Union Tel. Co. v. Andrews, 154 F 95. A state is the real party in interest in a suit brought against its officers when the relief sought is that which inures to the state alone or when the suit will operate to deprive the state of funds or property in its possession. Id. A suit to restrain or direct a state officer in a matter intrusted to his discretion and involving the pecuniary interest of the state is a suit against the state itself (Morrill v. American Reserve Bond Co. of Kentucky, 151 F 305), but where no official discretion or pecuniary interest of the state is involved and the suit would not violate any statute indicative of the public policy of the state, relief may be had in the Federal court (Id.). Suit by corporate creditors to require state treasurer to turn over to receivers securities deposited with him for their benefit. Id. Suit may also be maintained even though state pecuniary interests are involved if the act of the officer is purely ministerial. Id. A suit against individuals, though they be state officials, to prevent them from affecting the destruction of property or the impairment of property rights under color of an unconstitutional law is not a suit against the state. Seaboard Air Line R. Co. v. Railroad Commission of Alabama, 155 F 792; Morrill v. American Reserve Bond Co., 151 F 305. Hence, a suit is maintainable against a state officer claiming under an invalid state law where he holds possession, or is about to take possession of, or commit trespass on, property belonging to plaintiff or in his possession (Western Union Tel. Co. v. Andrews, 154 F 95), and a suit to restrain state revenue officers from enforcing taxes against exempt land (University of the South v. Jetton, 155 F 182), or to enjoin a state officer from taking action to forfeit franchise rights of a corporation under a satute alleged to be unconstitutional, is not one against the state (Chicago, etc., R. Co. v. Ludwig, 156 F 152). A suit to prevent the enforcement of an unreasonable or confiscatory tariff by mere administrative agents of the state is not a suit against the state if the act is unconstitutional as to complainant (Western Union Tel. Co. v. Andrews, 154 F 95), but where the proceeding is

state court,[89] but this prohibition is inapplicable where it acts in aid of its own jurisdiction already rightfully acquired.[90] Federal courts of equity have jurisdiction of suits to determine the constitutionality of state railroad rate laws attacked as being unremunerative or confiscatory,[91] or to enjoin a railroad company from putting into effect a proposed rate alleged to be unjust in itself or discriminatory.[92]

A suit in equity dependent upon a former action of which a Federal court had jurisdiction may be maintained in that court without diversity of citizenship, or a Federal question to aid, enjoin, or regulate the original suit,[93] to restrain, avoid, explain, or enforce the judgment or decree therein,[94] or to enforce or adjudicate liens upon or claims to property in the custody of the court in the original action.[95] The power and duty of Federal courts to enforce their own judgments and decrees is conferred and imposed by the constitution and laws of the United States,[96] and may not be lawfully destroyed, limited, or diminished by legislation of the states or decisions of their courts.[97] Hence, though a Federal court has no jurisdiction of the estates of deceased persons, as such [98] it has jurisdiction of all controversies in an administration which involve the enforcement of its judgments.[99] Federal statutory power to issue writs of scire facias to revive judgments includes power to prescribe the methods of their service [1] and to cause them to be served either within or without the district in which the court sits.[2]

The district court of Alaska, created by the organic act of 1884, was supplanted by the court created by the Alaska Code of 1900, and the jurisdiction of the latter court is governed by the provisions of the code.[3]

Circuit courts have jurisdiction of civil cases in which the matter in contro-

against the officers of the state to test the constitutionality of a statute in the enforcement of which such officers will act only by formal judicial proceedings as attorneys for the state, the suit is one against the state itself (Id.). Suit by foreign corporation to restrain prosecuting attorneys of different state circuits from proceeding to recover penalties for complainant's violation of alleged unconstitutional state law, relative to its doing business in state, held suit against state and not maintainable. Id.

A suit to restrain enforcement of a state railroad rate law in which state officers charged with the duty of enforcing the law are made defendants is not a suit against the state. Poor v. Iowa Cent. R. Co., 155 F 226; Perkins v. Northern Pac. R. Co., 155 F 445; Southern R. Co. v. McNeill, 155 F 756; Seaboard Air Line R. Co. v. Railroad Commission, 155 F 792; Ex parte Young, 28 S. Ct. 441. **Contra.** State v. Southern R. Co. [N. C.] 59 SE 570.

89. Suit to restrain state revenue officers from enforcing taxes against exempt land held not to enjoin action of state court. University of the South v. Jetton, 155 F 182. Federal suit to enjoin defendant from receiving and using exchange quotations held not suit to enjoin proceedings in state court because defendant had there obtained injunction restraining a telegraph company from refusing to furnish him the quotations. Hunt v. New York Cotton Exch., 205 U. S. 322, 51 Law. Ed. 821.

90. May restrain resort to state courts which would defeat or impair complete Federal jurisdiction first obtained. Rickey Land & Cattle Co. v. Miller [C. C. A.] 152 F 11. May grant preliminary injunction restraining enforcement of state court judgment where necessary to preserve rights of parties in suit properly before it. Southern R. Co. v. Simon, 153 F 234.

91. And such suits are appropriate for determining the question. St. Louis & S. F. R. Co. v. Hadley, 155 F 220.

92. Where requisite amount was involved and rate was alleged to violate interstate commerce act. Suit by shipper. Jewett v. Chicago, etc., R. Co., 156 F 160. Not an interference with functions of commerce commission. Id. Circuit court may take cognizance of suit by stockholders of a railroad company to enjoin it from putting in force confiscatory rates and as preliminary thereto to inquire whether rates are in fact too low. Ex parte Young, 28 S. Ct. 441.

93. Brun v. Mann [C. C. A.] 151 F 145.

94. Proceeding to subject land of decedent to satisfaction of Federal judgment. Brun v. Mann [C. C. A.] 151 F 145.

95, 96, 97, 98. Brun v. Mann [C. C. A.] 151 F 145.

99. Had jurisdiction to subject land of a decedent to satisfaction of prior Federal decree notwithstanding pendency of administration in state county court. Brun v. Mann [C. C. A.] 151 F 145.

1. While Federal courts may follow state methods, they are not restricted to them but may prescribe their own and follow them according to course of common law. Collin County Nat. Bk. v. Hughes [C. C. A.] 152 F 414; Id., 155 F 389.

2. Collin County Nat. Bk. v. Hughes [C. C. A.] 152 F 414; Id., 155 F 389.

3. Alaska courts without jurisdiction to try offense committed on high seas. United States v. Newth, 149 F 302.

versy exceeds in value $2,000, and arises under the constitution or laws of the United States,[4] but the amount in controversy is immaterial where the United States is plaintiff,[5] and it has jurisdiction of an action by a receiver of a national bank to recover assets without regard to citizenship or amount involved.[6] An action for rent brought against the agent for the stockholders of an insolvent national bank to whom the comptroller has released the estate is one to wind up the affairs of the bank and as such within the jurisdiction of the circuit court.[7] The circuit court sitting in equity has no jurisdiction of a bill by insured under a tontine policy against the insurance company for an accounting.[8] While circuit courts have jurisdiction in habeas corpus to discharge from custody a person restrained of his liberty in violation of the constitution or any treaty of the United States [9] such jurisdiction should be exercised with a legal discretion controllable by principles applicable in the particular case.[10] A suit to administer for the benefit of creditors of a railroad company, its property situated in different districts, may be brought in any of the districts.[11] The circuit court has no power to enjoin the suing out of a writ of error from the circuit court of appeals to review a judgment rendered on its law side.[12] Citizenship or amount in controversy is immaterial in proceedings ancillary to litigation already pending.[13]

The circuit court of appeals has no power to issue a writ of prohibition either as an original or independent proceeding or as ancillary to a contemplated appeal or writ of error.[14]

The supreme court has original jurisdiction of controversies between states [15] or between a state and the United States.[16]

Court of claims.[See 8 C. L. 603]—Prior to the passage of the Tucker Act this court was without equity jurisdiction.[17] By that statute equity jurisdiction was conferred

4. Circuit court has jurisdiction of suit to compel interstate carrier to perform contract to issue free passes where carrier refused to do so because of Act Cong., June 29, 1906, prohibiting granting of free interstate transportation, and complainants also alleged that value to each of them of right sought to be enforced exceeded $2,000. Mottley v. Louisville & N. R. Co., 150 F 406.

5. United States is real and not mere nominal plaintiff in suit on bond of public contractor under Act August 13, 1894, for protection of materialmen. United States Fidelity & Guaranty Co. v. U. S., 204 U. S. 349, 51 Law. Ed. 516.

6. Suit is one by officer of United States suing under authority of act of congress. Murray v. Chambers, 151 F 142.

7. International Trust Co. v. Weeks, 203 U. S. 364, 51 Law. Ed. 224.

8. Peters v. Equitable Life Assur. Soc. of the U. S., 149 F 290.

9. Ex parte Collins, 149 F 573.

10. Would not discharge convict pending appeal in state court to which error would lie to Federal supreme court. Ex parte Collins, 149 F 573.

11. And appointment of receiver equitably attaches all the property in the state. Horn v. Pere Marquette R. Co., 151 F 626.

12. Macrum v. U. S. [C. C. A.] 154 F 653.

13. Suit by Federal receiver for insolvent corporation to recover assessments against stockholders is ancillary and cognizable, regardless of citizenship or amount in controversy. Brown v. Allebach, 156 F 697.

14. Except in cases reviewing bankruptcy proceedings, its jurisdiction can be invoked only by error or appeal. Zell v. Judges of Circuit Ct. of U. S. for Eastern Dist. of Virginia [C. C. A.] 149 F 86.

15. Original jurisdiction of United States supreme court extends to a controversy between states of Kansas and Colorado and United States presenting questions whether Kansas has right to continuous flow of waters of Arkansas rivers without appropriation of such waters by Colorado or whether flow is subject to control of United States. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law. Ed. 956. Extends to suit by Virginia against West Virginia for amount due as equitable proportion of public debt of original state of Virginia assumed by West Virginia at time of its creation as a state. Commonwealth v. State, 206 U. S. 290, 51 Law. Ed. 1068. Question not so left to West Virginia legislature as to defeat Federal jurisdiction by provision of West Virginia constitution that legislature should ascertain the equitable proportion to be assumed by the state and provide for its liquidation. Id.

16. Supreme court without original jurisdiction of bill by attorney general on behalf of state of Kansas as trustee for railway company of lands in Indian Territory alleged to have been granted by congress to state for benefit of railway company where name of state was used simply for prosecution of claim of railway company. State of Kansas v. U. S., 204 U. S. 331, 51 Law. Ed. 510.

17. Milliken Imprinting Co. v. U. S., 40 Ct. Cl. 81.

when the party would be entitled to redress against the United States in law, equity, or admiralty if the United States were suable.[18] An action to recover back duties collected at Manila after the signature of the treaty with Spain and during the Philippine insurrection does not sound in tort so as to prevent the court of claims from assuming jurisdiction.[19] If from the language of a bill referred by the senate to the court of claims under the Tucker Act that court can determine that a claim exists against the United States which congress desires it to investigate to aid it in determining whether it should be allowed, the court may take jurisdiction though the bill does not in express terms provide for the payment of the claim.[20]

(§ 11) *B. As affected by diversity of citizenship.* See 8 C. L. 603—The circuit court has original jurisdiction of controversies between citizens of the state where suit is brought and citizens of other states,[21] provided the requisite amount is involved.[22] All the parties on one side of the suit must have a citizenship different from that of any of the parties on the other side,[23] but the real matter in dispute determines the arrangement of the parties,[24] and hence, if a defendant is not an indispensable party, although a proper one, plaintiff may dismiss as to him.[25] The suit must be between citizens of different "states." [26] A suit between aliens [27] or one between a citizen of a state and a citizen of a territory cannot be maintained on the ground of diversity of citizenship.[28] For purposes of Federal jurisdiction a corporation is a citizen only of the state in which it was incorporated,[29] and where the state contains more than one district a domestic corporation is at least prima facie a resident and inhabitant of the district in which it has its principal office.[30] Diversity of citizenship is not essential to jurisdiction in suits relating to patents,[31] or in proceed-

18. The equity jurisdiction of the court of claims is not general in the sense that it can grant injunctions or decree the performance of contracts (Milliken Imprinting Co. v. U. S., 40 Ct. Cl. 81), but where a suit will result merely in a decree for the payment of money, it has jurisdiction as fully as other equity courts (Id.), hence, it may reform a contract and adjudicate rights under it as reformed (Id.).

19. Warner, Barnes & Co. v. U. S., 40 Ct. Cl. 1.

20. Leahy Receiver v. U. S., 41 Ct. Cl. 265.

21. Suit to require interstate carrier to receive and transport property held cognizable on ground of diversity of citizenship alone, and maintainable in district of which either complainant or defendant was inhabitant. Danciger v. Wells-Fargo & Co., 154 F 379. Affidavits held insufficient to show that complainant was a citizen of Washington so as to be able to sue in South Dakota. Jones v. Subera, 150 F 462. Testimony that plaintiff was "at home" in a certain town and lived there held sufficient proof of citizenship to sustain suit against corporation of another state, though averment of citizenship was defective. Baltimore, etc., R. Co. v. Davis [C. C. A.] 149 F 191. Evidence held to show that plaintiff was a citizen of Pennsylvania though he was engaged in business in Ohio, and hence he could not sue another citizen of Pennsylvania. Harton v. Howley, 155 F 491.

22. See, ante, § 6.

23. Blunt v. Southern R. Co., 155 F 499; Barnes v. Berry, 156 F 72.

24. The parties will be arranged on one side or the other according to their interests or the facts and regardless of the places they occupy in the pleadings. Gage v. Riverside Trust Co., 156 F 1002. In suit by one executor against another to prevent injury to the estate, a certain investment holding company held properly made defendant as having interests adverse to complainants. Monmouth Inv. Co. v. Means [C. C. A.] 151 F 159. In a stockholder's suit to remove an alleged fraudulent lien from corporate property, where Equity Rule 94 has not been complied with, the corporation will be placed on the side of complainants. Gage v. Riverside Trust Co., 156 F 1002.

25. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606; Barnes v. Berry, 156 F 72. Suit to quiet title. North Carolina Min. Co. v. Westfeldt, 151 F 290.

26. Maxwell v. Federal Gold & Copper Co. [C. C. A.] 155 F 110.

27. Where there are several plaintiffs and defendants, all necessary parties on one side must be citizens of a state and all on the other side must be citizens of another state or foreign country. Federal courts have no jurisdiction of a suit between aliens when no Federal question is involved. Gage v. Riverside Trust Co., 156 F 1002.

28. Maxwell v. Federal Gold & Copper Co. [C. C. A.] 155 F 110. Where a corporation defendant was a citizen of Arizona, court was without jurisdiction though requisite diversity of citizenship existed between complainant and two other alien respondents. McClelland v. McKane, 154 F 164.

29. That it has office and does business in another state does not prevent suit against it by citizens of that state. Haight & Freese Co. v. Weiss [C. C. A.] 156 F 328.

30. Firestone Tire & Rubber Co. v. Vehicle Equipment Co., 155 F 676.

31. Circuit court being given exclusive jurisdiction by Federal statute. Thomson-Houston Elec. Co. v. Electrose Mfg. Co., 156 F 543.

ings ancillary to pending litigation.[32] That a nonresident executor suing to prevent injury to the estate qualified in the state of situs will not preclude resort to the Federal court.[33] The court cannot entertain a cross bill by an intervenor whose presence as a party to the original bill would have defeated its jurisdiction, unless the intervenor represents an interest already before the court or claims an interest in property in its possession.[34] Colorable transfers of property or arrangements of parties will not be tolerated.[35]

An action depending on diversity of citizenship cannot be maintained without the consent of the parties in a district in which neither plaintiff nor defendant resides;[36] but a suit to enforce a claim to land and remove a cloud therefrom may be instituted in the state where the property is located though the parties are not residents of that state,[37] and the inhibition of the judiciary acts against the bringing of suits in a district whereof defendant is not an inhabitant is inapplicable where exclusive jurisdiction has been conferred by special acts of congress.[38]

A suit will not lie in a Federal court by an assignee to recover the contents of a chose in action payable to bearer and not made by a corporation, unless it might have been prosecuted if no transfer had been made.[39]

(§ 11) *C. As affected by existence of Federal question.*[See 8 C. L. 605]—A Federal question exists whenever a Federal statute,[40] a treaty, or the Federal constitution [41]

32. Cross bill for relief ancillary to that sought in original suit held maintainable by resident of District of Columbia. Ulman v. Jaeger's Adm'r, 155 F 1011.

33. Monmouth Inv. Co. v. Means [C. C. A.] 151 F 159.

34. Newton v. Gage, 155 F 598.

35. Evidence insufficient to establish fraud or collusion in suit by nonresident stockholder of local corporation to enjoin a city from enforcing an ordinance. City of Chicago v. Mills, 204 U. S. 321, 51 Law. Ed. 504. Foreclosure of land owned by domestic corporation and purchase by corporation organized in another state and having in part same officers and stockholders held not a collusive transfer to enable foreign corporation to sue in respect to the land. Accord v. Western Pocahontas Corp., 156 F 989. Joinder held collusive where persons interested in a corporation and desiring to sue for receiver transferred stock and bonds to stenographer, who was citizen of another state, in consideration that he should sign bill. Kreider v. Cole [C. C. A.] 149 F 647.

36. State action could not be removed to Federal court in such district without waiver or consent on plaintiff's part. Southern Pac. Co. v. Burch [C. C. A.] 152 F 168. No jurisdiction where neither party is resident of district. Baxter, Straw & Storrs Const. Co. v. Hammond Mfg. Co., 154 F 992.

37. Act Mar. 3, 1875, c. 137, § 8, and Act Aug. 13, 1888, § 5. Miller v. Ahrens, 150 F 644.

38. In prosecution under Sherman law, nonresident coconspirators could be brought in from without district. United States v. Standard Oil Co. of New Jersey, 152 F 290.

39. But where owner of chose assigns and thereafter takes reassignment, citizenship of his assignee is not material where requisite citizenship exists between palintiff and defendant (Moore Bros. Glass Co. v. Drevet Mfg. Co., 154 F 737), and where assignor, assignees, and defendant are citizens of different states, assignee may sue in the district of which he is a resident and it is no objection that assignor could not have sued in that district (Stimson v. United Wrapping Mach. Co., 156 F 298). Action against carriers for breach of duty as such held in tort and not to recover on chose in action and could be brought by assignee without regard to citizenship of assignor. Muller v. Chicago, etc., R. Co., 149 F 939.

40. Case held to involve construction of Act Cong. Mar. 3, 1875, granting railroad companies right of way over public lands. Wallula Pac. R. Co. v. Portland & S. R. Co., 154 F 902. Action to recover on government contractor's bond under Act Cong. Aug. 13, 1894, arose under constitution or laws of United States. United States v. Axman, 152 F 816. Suit held not to arise under interstate commerce law where it was not alleged that a charge was not in accordance with schedules filed with Interstate Commerce Commission, nor that any application had been made to commission to correct the alleged discrimination. Clement v. Louisville & N. R. Co., 153 F 979.

41. Federal question involved: Suit by street railway company to enjoin city from impairing alleged contract granting right to operate in streets. Des Moines City R. Co. v. Des Moines, 151 F 854; Missouri & K. I. R. Co. v. Olathe, 156 F 624. Bill alleging that state legislature had transferred to defendant an oyster bed previously leased by complainant from state under state law, and seeking injunctive relief, held to present Federal question of impairment of contract. Green v. Oemler, 151 F 936. Suit by landowner to restrain state revenue officers from enforcing taxes under state statute alleged to impair contract with state exempting the lands from taxation. University of the South v. Jetton, 155 F 182. Suit by corporation to restrain enforcement of taxes against property claimed exempt under charter. Whitman College Trustees v. Berryman, 156 F 112. Claim that action of state board of equalization in making assessment of tax

is to be construed, or its effect or operation is involved. The laws enacted by the legislature of a territory are not laws of the United States so as to confer Federal jurisdiction of suits arising under them.[42] That the state constitution prohibits the passage of laws impairing the obligation of contract does not deprive one of the right to invoke the similar provision of the Federal constitution.[43] That the case involves a Federal question must be plainly shown by the record and it is not enough that such question may arise.[44] In addition to a Federal question, the jurisdictional amount must also be involved.[45] Federal questions as affecting review of state decisions are treated in the next section.[46]

(§ 11) *D. Averments and objections as to jurisdiction.*See 8 C. L. 606—Every fact essential to bring a cause within the limited jurisdiction of a Federal court must affirmatively appear on the record,[47] whether the suit was originally brought in a state or in the Federal court,[48] but jurisdiction will not be renounced or denied where the requisite facts so appear, either directly or by just inference from any part of the record,[49] and a suit may not be properly dismissed as not involving a controversy within the court's jurisdiction unless the facts appearing on the record create a legal certainty of that conclusion.[50] A bill alleging that the matter in dispute exceeds in value the requisite jurisdictional amount and disclosing no contradictory facts is not demurrable on the ground that the requisite amount is not involved.[51] It is not necessary to allege matters of which the court takes judicial notice or matters which the law presumes.[52] A bill may be amended so as to show the jurisdictional amount where at the time of the motion the record shows that such amount is involved and the defect is merely one of pleading.[53] An amendment to show citizenship must al-

pursuant to command of writ of mandamus was action of state, and if carried out would take property without due process and deny equal protection of laws. Raymond v. Chicago Union Trac. Co., 28 Sup. Ct. 7. Suit to restrain enforcement of state **railroad rate laws** as confiscatory and depriving carriers of property without due process, and denying equal protection of laws, arises under constitution of United States. Perkins v. Northern Pac. R. Co., 155 F 445. Whether enforcement of state railroad rate law will take property of railroad companies without due process held a Federal question though incidentally involving question of fact. Ex parte Young, 28 S. Ct. 441. Whether enormity of penalties prescribed would deprive of equal protection of laws and of property without due process held also a Federal question. Id.

Not involved: Suit to enjoin enforcement of city ordinance alleged to deprive of property without due process involves no Federal question as to acts clearly not authorized by the ordinance, and which if committed would be mere private trespasses. North American Cold Storage Co. v. Chicago, 151 F 120. Calling out of militia under provisions of constitution and statutes of Colorado to suppress insurrection is lawful, and to give Federal courts jurisdiction of action against state officers for acts done under such provisions, as in violation of constitutional rights, defendants must have been guilty of wanton abuse of the power conferred. Moyer v. Peabody, 148 F 870.

42. As where corporation organized under them is party. Maxwell v. Federal Gold & Copper Co [C. C. A.] 155 F 110.

43. Des Moines City R. Co. v. Des Moines, 151 F 854.

44. City of Louisville v. Cumberland Tel. & T. Co. [C. C. A.] 155 F 725. Bill to enjoin enforcement of ordinance alleged to impair obligation of contract held not to show Federal question where it stated that state had granted municipality no power to enact the ordinance. Id. See, also, post, § 11D.

45. See, ante, § 6.

46. See, post, § 12C.

47. Goepfert v. Compagnie Generale Transatlantique, 156 F 196; Southern Land & Timber Co. v. Johnson, 156 F 246.

48. As to service on foreign corporation. Goepfert v. Compagnie Generale Transatlantique, 156 F 196.

49. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F 820.

50. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F 820. Where matter in dispute was undivided half of a patent, evidence held sufficient to show jurisdictional amount and diversity of citizenship. Id. Where the jurisdictional facts properly appear on the record and the parties proceed to the merits, a case ordinarily will not be dismissed for want of jurisdiction unless the proof shows to a legal certainty that it is not cognizable. William H. Perry Co. v. Klosters Aktie Bolag [C. C. A.] 152 F 967.

51. North American Cold Storage Co. v. Chicago, 151 F 120.

52. Bill to enjoin enforcement of city ordinance on ground that it deprives of property without due process need not allege that ordinance was enacted under state authority where there is a state statute authorizing its enactment. North American Cold Storage Co. v. Chicago, 151 F 120.

53. Thompson v. Automatic Fire Protection Co., 151 F 945.

lege its existence not only at the time it is filed but also at the time the action was commenced.[54] Proof in support of an averment as to the jurisdictional amount need not be offered when defendant does not formally plead to the jurisdiction.[55] A defendant may waive as a mere personal privilege his right to be sued only in the district of his residence.[56] Objection to jurisdiction by bill of review setting up a collusive transfer of the subject-matter cannot be made for the first time after final decree and end of term.[57]

§ 12. *Federal appellate jurisdiction. A. Inquiry into jurisdiction.* See 8 C. L. 668—A circuit court of appeals is bound to inquire first as to its own jurisdiction,[58] and second as to the jurisdiction of the court from which the record came, though the question is not raised by the parties.[59]

(§ 12) *B. Appeals between Federal courts.* See 8 C. L. 668—A United States circuit court has no appellate jurisdiction over a district court.[60] The jurisdiction of the circuit court of appeals to review contempt proceedings prior to termination of the main suits is limited to proceedings criminal in their nature.[61] An appeal lies directly to the supreme court in cases in which the jurisdiction of the circuit or district court is in issue,[62] or those directly and substantially involving the construction or application of the Federal constitution.[63] Failure of the certificate of a circuit court to show the exact nature of a jurisdictional question relied on to sustain a direct appeal is not fatal where the record aided by the opinion below

54. Failure of amended bill to allege citizenship at time of commencement of suit held fatal. Cochran v. Pittsburg, etc., R. Co., 150 F 682.

55. Bitterman v. Louisville & N. R. Co., 28 S. Ct. 91.

56. Objection to jurisdiction of cause brought to Federal court by removal on ground that neither party was resident of district held waived where after removal plaintiff appeared generally. Corwin Mfg. Co. v. Henrici Washer Co., 151 F 938. Appearance, pleading to merits, etc., held to waive privilege of surety of government contractor of being sued in district where bond was made or in which it had its office. United States v. California Bridge & Construction Co., 152 F 559. In suit for infringement of patent, objection that suit was in wrong district held waived by general demurrer or other acts constituting a general appearance. Thomson-Houston Elec. Co. v. Electrose Mfg. Co., 155 F 543. Where a corporation waives objection that it is sued in district where neither it nor any other parties are inhabitants by joining in complainant's prayer for a receiver, such waiver is conclusive upon persons not parties and these cannot claim that appointment of receiver was without jurisdiction. Horn v. Pere Marquette R. Co., 151 F 626.

57. Acord v. Western Pocahontas Corporation, 156 F 989.

58. Puget Sound Nav. Co. v. Lavendar [C. C. A.] 156 F 361.

59. Puget Sound Nav. Co. v. Lavendar [C. C. A.] 156 F 361. See post, § 14.

60. Cannot review its proceedings for errors or irregularities on petition for habeas corpus where district court had jurisdiction. Ex parte Bick, 155 F 908.

61. Could not review order adjudging defendants in contempt for failure to produce books and papers, and imposing fine or imprisonment for failure to produce within a certain time. Doyle v. London Guarantee & Acc. Co., 204 U. S. 599, 51 Law. Ed. 641.

62. The circuit court of appeals cannot pass on questions challenging the jurisdiction of circuit courts. Boston & M. R. Co. v. Gokey [C. C. A.] 149 F 42. Direct appeal from circuit court not allowable where jurisdiction challenged was not that of court rendering decree appealed from but of court which rendered a former decree set up in bill as basis of title in suit. Empire State-Idaho Min. & Developing Co. v. Hanley, 205 U. S. 225, 51 Law. Ed. 779. Questions whether circuit court by appearance or process had power to proceed against a nonresident defendant held jurisdictional and reviewable only by supreme court. Davis v. Cleveland, etc., R. Co. [C. C. A.] 156 F 775.

63. Error from supreme to circuit court held sustainable where, as well with respect to first as with respect to other counts of declaration, there was color for contention as to unconstitutionality of Illinois mining act of April, 1899. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Construction on application of constitution not directly and necessarily involved in case in which it was contended that a decree which was the basis of the suit was void as violating right to jury trial and due process, where real issue was as to whether such decree was res judicata between the parties. Empire State Idaho Min. & Devel. Co. v. Hanley, 205 U. S. 225, 51 Law. Ed. 779. Contention that congressman was exempt from arrest and punishment for a criminal offense while congress was not in session held not too frivolous to sustain error direct to circuit court. Williams v. U. S., 28 S. Ct. 163. Jurisdiction not ousted because the congress of which accused was member had ceased to exist, jurisdiction being dependent upon existence of constitutional question when writ was sued out. Id.

clearly shows the nature of the question passed upon.[64] The United States supreme court may review decisions of the Federal district court for Porto Rico under the same conditions prescribed for review of decisions of the supreme courts of the territories.[65] The act of March 3, 1905, did not authorize a writ of error to the supreme court of Hawaii as to suits which had merged in final judgment before its passage.[66] Error lies from the supreme court of the United States to the supreme court of the Philippine Islands in cases where a right claimed under an act of congress is denied.[67] On appeal from the supreme court of a territory, the jurisdiction of the Federal supreme court is limited to considering rulings on evidence and determining whether the findings of fact support the judgment.[68]

(§ 12) *C. Control over state courts.*[See 8 C. L. 610]—Final judgments of the highest court of a state in which a decision in the suit could be had,[69] where any title, right, privilege, or immunity is claimed under the constitution or statutes of the United States and the decision is against such rights,[70] specially set up and claimed,[71] may be reviewed by writ of error in the Federal supreme court.[72] It must

64. City of Chicago v. Mills, 204 U. S. 321, 51 Law. Ed. 504.

65. Act Apr. 30, 1900, § 35. Appeal lay from decree in suit by wife to obtain liquidation of community, in which matter in dispute exceeded $5,000. Garrozi v. Dastas, 204 U. S. 64, 51 Law. Ed. 369. Contention that changes made by Porto Rico legislature in boundaries of judicial districts and in number of judges deprived the courts affected of validity under act of April 12, 1900, § 33, legalizing existing tribunals, held too frivolous to sustain error to supreme court of Porto Rico under § 35. Kent v. People of Porto Rico, 28 S. Ct. 55. Errors assigned with respect to action of trial court with reference to confession of guilt held no basis for error to Porto Rican supreme court record not showing assertion or denial of right under Federal constitution. Id.

66. Though a petition for rehearing had not been denied. Harrison v. Magoon, 205 U. S. 501, 51 Law. Ed. 900.

67. Conviction for falsification of documents held not reviewable in Federal supreme court as involving denial of protection under Philippine Bill of Rights, where the most that could be gathered from the record was that accused contended that complaint was bad by rules of criminal pleading. Paraiso v. U. S., 28 S. Ct. 127. Denial of motion for rehearing could not serve to bring Federal questions into record so as to sustain error. Id.

68. Arizona: Crowe v. Trickey, 204 U. S. 228, 51 Law. Ed. 454; Crowe v. Harmon, 204 U. S. 241, 51 Law. Ed. 461.

69. Court of civil appeals of Texas held highest court for purpose of Federal review where state supreme court had disclaimed jurisdiction. Sullivan v. State of Texas, 28 S. Ct. 215. No decision in highest court of state where that court dismissed appeal for defect in parties thereto. Newman v. Gates, 204 U. S. 89, 51 Law. Ed. 385.

70. Federal question involved: Judgment of state court upholding, as valid exercise of police, a statute alleged to violate Federal constitution. Western Turf Ass'n v. Greenberg, 204 U. S. 359, 51 Law. Ed. 520. Denial of immunity claimed under Rev. St. § 5239, U. S. Comp. St. 1901, p. 3515, by officers of a national bank in respect to liability for making false reports as to bank's condition. Yates v. Jones Nat. Bk., 206 U. S. 158, 51 Law. Ed. 1002. State court judgment in favor of trustee in bankruptcy in action to recover value of voidable preference, where state court answered some of defendant's contentions by construction it gave to bankrupt act. Eau Claire Nat. Bk. v. Jackman, 204 U. S. 522, 51 Law. Ed. 596. Contention that state statute was authorized by enabling act and hence valid though contravening state constitution held to present a claim of right under authority exercised under the United States State of Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490.

Not involved: State law merely directing change of entry of bonds on books of state treasurer held to present no ground for contention that contract obligations were impaired. Smith v. Jennings, 206 U. S. 276, 51 Law. Ed. 1061. Request for finding that state statutes could not under Federal consituation prohibit defendant from obtaining insurance outside the state held not to authorize review of judgment barring foreign, unqualified insurance company from suit to recover assessments from a policy holder. Swing v. Weston Lumber Co., 205 U. S. 275, 51 Law. Ed. 799. No Federal question presented by contention that second conviction of public officer for failing to pay over public moneys on demand deprived him of liberty without due process by twice subjecting him to jeopardy for same offense, where state court decided that accused was not put in jeopardy by prior conviction because such conviction was reversed on ground that there had then been no legal demand. Shoener v. Com. of Pennsylvania, 28 S. Ct. 110. Carrier's denial that "it was bound by law" to receive and forward as a connecting and ultimate carrier an interstate shipment held not to amount to assertion of a right under interstate commerce act. Louisville & N. R. Co. v. Smith, Huggins & Co., 204 U. S. 551, 51 Law. Ed. 612. Reference in state court opinion to Dartmouth College Case held not to show that contract clause of Federal constitution was relied on to invalidate state legislation. Osborne v. Clark, 204 U. S. 565, 51 Law. Ed. 619.

71. A right is "specially set up or claimed" where it clearly appears from opinion of state court that Federal question was assumed to be in issue, that decision was against the

appear that a substantial Federal question [73] and not merely a local one [74] was necessarily involved.[75] If a Federal question was necessarily involved, Federal review may

Federal claim, and essential to judgment rendered. State of Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490; Chambers v. Baltimore & O. R. Co., 28 S. Ct. 34. Federal right held "specially set up and claimed" where probate proceedings in New Jersey were clearly relied upon in New York, by executors as defense to assessment of New York transfer tax, though such right was not in terms stated to be claimed under Federal constitution. Tilt v. Kelsey, 28 Sup. Ct. 1. Contentions that state court had no power to foreclose a lien because res was in possession of a Federal court and that former Federal decree was also barred, held properly raised and sufficiently substantial to sustain error to state court. Wabash R. Co. v. Adelbert College of the Western Reserve University, 28 S. Ct. 182. Federal question **raised in time** where distinctly presented in petition to state court for rehearing, considered and decided adversely. Sullivan v. State of Texas, 28 S. Ct. 215; McKay v. Kalyton, 204 U. S. 458, 51 Law. Ed. 566. Held too late where petition was denied without opinion. Barrington v. State of Missouri, 205 U. S. 483, 51 Law. Ed. 890. Raising Federal question for first time in petition for writ of error to state court and in accompanying assignments is not sufficient to enable supreme court to consider that question, though other Federal questions are properly brought up by same writ. State of Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490.

72. State decision reviewable where rights were claimed under Federal statute and statute was referred to by state court and was an element in its decision. Hammond v. Whittredge, 204 U. S. 538, 51 Law. Ed. 606. Question whether state court, consistently with interstate commerce act, could grant relief to shipper because of exaction of freight rate filed with interstate commerce commission and not found unreasonable by it, will sustain error to state court where presented by pleadings, passed on by trial court, necessarily decided and essentially involved in case. Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 Law. Ed. 590.

73. Questions of impairment of contract obligations and denial of due process because of additional taxation, imposed on citizens of lesser city annexed to larger city under authority of state law held not too unsubstantial. Hunter v. Pittsburgh, 28 S. Ct. 40.

74. Where case is disposed of on nonfederal grounds, supreme court will not ordinarily inquire whether decision on them was correct. Leathe v. Thomas, 28 S. Ct. 30.

Local questions: Contest over state office dependent exclusively on application of state constitution or construction of state law. Elder v. People of State of Colorado, 204 U. S. 85, 51 Law. Ed. 381. Conformity with state constitution of proceedings of state legislature in enactment of a law. Smith v. Jennings, 206 U. S. 276, 51 Law. Ed. 1061. Decision of state court that state statute is repugnant to state constitution. State of Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490. Decisions on questions of fact. Chapman & Dewey Land Co. v. Bigelow, 206 U. S. 41, 51 Law. Ed. 953. Exclusion of evidence in suit to quiet title. Id. Objections that information in contempt was not supported by affidavit until after it was filed, that suits referred to in the published articles were not pending, and that decisions therein were wrong and contrary to previous decisions. Patterson v. People of State of Colorado, 205 U. S. 454, 51 Law. Ed. 879. Claim of constitutional right to prove truth of published articles held insufficient. Id. Objections by one convicted of capital offense that he was refused change of venue for local prejudice and compelled to be a witness against himself that court erroneously admitted certain evidence and overruled objections to indictment and that accused was a subject of Great Britain and entitled to know who were the witnesses against him, held not sufficient to sustain erfor to state court. Barrington v. State of Missouri, 205 U. S. 483, 51 Law. Ed. 890. Decision of state court in suit to quiet title, that grantee from United States through state of Arkansas and other grantors took no title to certain other lands by virtue of riparian rights. Chapman & Dewey Land Co. v. Bigelow, 206 U. S. 41, 51 Law. Ed. 953.

75. Question of validity of state law under Federal constitution is not necessarily involved so as to sustain error to state court merely because state law logically might have been assailed as invalid under Federal constitution on grounds more or less similar to those taken (Osborne v. Clark, 204 U. S. 565, 51 Law. Ed. 619), hence, if case is carried through state courts on arguments drawn from state constitution only, defeated party may not for first time when he takes his writ of error assert that decision was wrong under Federal constitution (Id.). Supreme court could not review state decision stating that Federal questions involved in mandamus proceedings were entirely put out of the case by facts set forth in return to alternative writ, there being nothing to justify suspicion that Federal questions were sought to be avoided or were avoided by giving an unreasonable construction to the pleadings. Vandalia R. Co. v. State of Indiana, 28 S. Ct. 130. Judgment against carrier for wrongful delivery of goods not reviewable in United States supreme court where, though state court upheld a statute against objection to repugnancy to Federal constitution, liability was based on common-law obligation arising out of contract of shipment. Arkansas Southern R. Co. v. German Nat. Bank, 28 S. Ct. 78. Supreme court without jurisdiction where on rehearing state court decided that though a judgment of a Federal court set up by plaintiff was good as against two of defendant's pleas, judgment for defendant could be upheld on two other pleas referring to earlier stages of same transaction. Leathe v. Thomas, 28 S. Ct. 30. Where state supreme court upheld validity of a banking act despite objection that same denied equal protection of laws, where record left it doubtful whether state court might not have held the act applicable to all banking institutions. Bachtel v. Wilson, 204 U. S. 36, 42, 51 Law. Ed. 357, 360.

be authorized though the decision purports to deal only with local law.[76] The certificate of the state court cannot help out a total failure of the record to show that a Federal question was raised.[77] Review will be limited in extent to questions within the jurisdiction of the supreme court.[78]

§ 13. *Acquisition and divestiture.*[79]—Jurisdiction in a particular case is usually acquired either by process or appearance.[80] Constructive service is authorized in a Federal court in suits to remove an incumbrance lien or cloud on title to property within the district where suit is brought.[81] While jurisdiction of the person may be conferred either by acts or consent of the parties,[82] jurisdiction of the subject-matter cannot be so conferred.[83] In a suit based on substituted process, only the res can be affected.[84]

76. State court could not oust Federal jurisdiction by deciding that one killed by attempting to make coupling with car not equipped with automatic coupler as required by Federal statute was guilty of contributory negligence, where that statute was especially invoked as excluding assumption of risk. Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1, 51 Law. Ed. 681.

77. Louisville & N. R. Co. v. Smith, Huggins & Co., 204 U. S. 551, 51 Law. Ed. 612.

78. See Appeal and Review, 9 C. L. 108.

79. See 8 C. L. 611. For manner of obtaining jurisdiction over corporations, see Corporations, 9 C. L. 733; Foreign Corporations, 9 C. L. 1395.

80. See Appearance, 9 C. L. 232; Process, 8 C. L. 1449. Court having jurisdiction of subject-matter acquires jurisdiction of person either by process or appearance. Continental Life Ins. & Inv. Co. v. Jones, 31 Utah, 403, 88 P 229. Jurisdiction in a suit in equity by a wife to subject realty of her husband situated in county where suit is brought to payment of alimony and support of child may be acquired by service of process by publication and placing the property in hands of a receiver. Rhoades v. Rhoades [Neb.] 111 NW 122. Residence of wife in county where property is situated not required. Id.

81. Suit to cancel deeds and leases of railway property lying wholy within eastern district of Illinois held maintainable in Federal court for that district against defendants who were inhabitants of northern district. Citizens' Sav. & Trust Co. v. Illinois Cent. R. Co., 205 U. S. 46, 51 Law. Ed. 703.

82. See, also, Appearance, 9 C. L. 232. The fact that judgment is rendered in favor of a resident defendant will not prevent the rendition of judgment against a nonresident defendant who appeared and defended the action. Lehigh Valley Transp. Co. v. Post Sugar Co., 128 Ill. App. 600. Where municipal court lost jurisdiction by failure to set case for jury trial within statutory time, subsequent stipulation of parties and consent to adjournment held to reinvest court with jurisdiction, it having jurisdiction of subject-matter. Berliner v. M. Zimmermann Co., 54 Misc. 246, 104 NYS 407. Where municipal court wrongfully transferred cause to another district but defendant appeared and consented to adjournment, court thereby acquired jurisdiction. Universal Cutter Co. v. Emden, 107 NYS 669. Though a statute provides that counterclaims cannot be filed in response to claims for unliquidated damages, the court may entertain jurisdiction if the parties consent that the issues may be determined in one suit. Where plaintiff's right to interpose special demurrer was waived by delay. Puckett v. Page [Tex. Civ. App.] 100 SW 346. Lack of service on foreign corporation did not defeat jurisdiction of Federal circuit court where answer set up demand in recoupment. Merchants' Heat & Light Co. v. Clow, 204 U. S. 286, 51 Law. Ed. 488. Foreign administrator voluntarily instituting original proceeding to review judgment subjecting to attachment lands of intestate held to have submitted himself to jurisdiction of court. Benker v. Meyer [C. C. A.] 154 F 290. In cases involving matters of contract and the like which lack only some equitable element to authorize equity to take jurisdiction, one may estop himself by agreement or action to question the jurisdiction of equity on the ground of adequacy of remedy at law. Darst v. Kirk, 230 Ill. 521, 82 NE 862.

83. Western Union Tel. Co. v. Cooper [Ga. App.] 58 SE 517; City of Aurora v. Schoeberlein, 230 Ill. 496, 82 NE 860. Where court was not in legal session, parties could not confer jurisdiction by agreement. Myers v. East Bench Irr. Co. [Utah] 89 P 1005. General appearance does not confer jurisdiction of subject-matter. West v. Martin [Wash.] 92 P 334. Where court had no jurisdiction because amount claimed was too large, defendant's appearance did not confer jurisdiction. Seaboard Air Line R. v. Ray [Fla.] 42 S 714. A provision in a contract between a legatee and the executor that the former might apply to the probate court for an allowance in addition to that fixed by the contract is invalid as an attempt to confer on probate court jurisdiction of a subject-matter not within its jurisdiction. Hull v. Hull, 149 Mich. 500, 14 Det. Leg. N. 512, 112 NW 1126. Where suit to recover for injury to vessel was cognizable only in admiralty, jurisdiction was not conferred on superior court because defendants gave a bond merely substituting bondsmens' liability for that of vessel. West v. Martin [Wash.] 92 P 334. Laws 1903, p. 76, c. 92, § 1, providing that transitory actions arising without the state in favor of a nonresident and against a corporation shall be brought in the county where corporation has its principal place of business, does not go to subject-matter but may be waived by appearance. Farnsworth v. Union Pac. Coal Co. [Utah] 89 P 74.

84. Judgment in suit against nonresident by substituted process can operate only on property seized. W. K. Henderson Iron

After a court has acquired jurisdiction, it ordinarily retains it until the cause is disposed of,[85] unless its power is divested by failure to take steps necessary to preserve it [86] by a transfer of the cause,[87] the making of unauthorized orders,[88] the conduct or substitution of parties,[89] or by otherwise permitting the case to pass beyond further cognizance.[90] Jurisdiction cannot be ousted by the agreement of contracting parties not to sue on the contract in the state courts.[91] Provision is generally made for the preservation or transfer of existing jurisdictions upon the establishment of new courts [92] or districts.[93]

§ 14. *Objections to jurisdiction, inquiry thereof, and presumptions respecting it.* See 8 C. L. 615—Courts will at all stages entertain objections to the jurisdiction and inquire thereof,[94] and the duty of spontaneous investigation is particularly empha-

Works & Supply Co. v. Howard, 119 La. 555, 44 S 296.

85. Where court obtained jurisdiction in proceeding to adjudge one an idiot, appointed guardian, ordered and approved sale of ward's property, it retained jurisdiction until final disposition of cause, and could on motion of ward, who was not present at hearing, order guardian to show cause why sale should not be set aside and enjoin disposition of the property. In re Propst, 144 N. C. 562, 57 SE 342. During term all proceedings are under control of court and may be stricken, altered, or amended without notice. Hansford v. Tate, 61 W. Va. 207, 56 SE 372.

86. Judge of court of Coffeyville need not be present or act on day fixed by summons for answer, and no adjournment need be taken on that day to preserve jurisdiction. Schockman v. Williams [Kan.] 91 P 64. Where a stipulation extending the time of the trial justice in an action in the municipal court was made October 1st, but inadvertently dated October 2d, and judgment rendered on the 8th, jurisdiction was held by virtue of the stipulation. Roth v. Goodman, 52 Misc. 509, 102 NYS 683. Municipal court held to have lost jurisdiction by failure of judge before whom case was tried to set it for jury trial on ground of conflicting evidence within 8 days from time of making order for jury trial as provided by Laws 1902, c. 580, § 232. Berliner v. M. Zimmermann Co., 54 Misc. 246, 104 NYS 407. Where a justice of the peace fails to render judgment until ten days after the return of a verdict by a jury, such failure works a discontinuance of the action, the judgment so rendered by the justice is absolutely void, and a court of equity will enjoin any further proceedings upon such judgment. Sigler v. Shaffer, 9 Ohio C. C. (N. S.) 267.

87. See, also, Removal of Causes, 8 C. L. 1722. Jurisdiction of action brought in proper municipal court district lost by transfer to another district over defendant's objection. Federal Sign System Elec. v. Bloyen, 53 Misc. 294, 103 NYS 205.

88. Granting time to plead in municipal court more than eight days after overruling of defendant's demurrer and without his consent held to divest jurisdiction. Evers v. Gould, 105 NYS 150. Order dismissing a partner held to deprive court of jurisdiction of the firm rendering judgment against it void. Ketelsen v. Pratt Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172. Calling of case for trial in municipal court, introduction of a commission, and objection to its admission because not properly executed, held not such commencement of trial that court lost jurisdiction of case by ordering adjournment to permit commission to be corrected. Winquist v. Preston, 18 App. Div. 564, 102 NYS 1023.

89. Plaintiff by withdrawing demand for specific performance did not oust jurisdiction of defendant's counter-claim for his deposit and damages. Balleisen v. Schiff, 105 NYS 692. The jurisdiction of a Federal court of a suit by one executor against another to prevent the spoliation of the estate cannot be ousted by any subsequent change in the personnel of the executors and the substitution of an administrator with the will annexed. Monmouth Inv. Co. v. Means [C. C. A.] 151 F 159.

90. Where judgment was entered by clerk pursuant to order of court, on appeal from probate to county court, and then certified to probate court as required by statute, county court had no jurisdiction at succeeding term to vacate judgment. Nichols v. Nichols' Estate [Vt.] 67 A 531.

91. Gitler v. Russian Co., 55 Misc. 553, 106 NYS 886.

92. Although court of appeals came into existence October 12, 1906, supreme court retained jurisdiction of writs of errors from city courts until January 1, 1907, and it still has jurisdiction of such writs to extent that it may cause transfer to court of appeals. Durant Lumber Co. v. Sinclair Lumber Co. [Ga. App.] 58 SE 485. Had jurisdiction of error suit from Dawson city court brought up Oct. 18, 1906. Strickland v. Thornton [Ga. App.] 58 SE 540. Case originally brought in justice court held transferred by operation of law to municipal court under municipal court act so as to confer jurisdiction on date of transfer, though justice in continuing case to municipal court had set hearing for later date. Williams v. Gottschalk, 231 Ill. 175, 83 NE 141.

93. Order of district court of Alaska consolidating Douglas Island and Juneau precincts and directing commissioner of former to deliver records to commissioner of latter held to transfer to latter all probate cases pending in Douglas Island precinct so as to justify order appointing a new administrator. Cheney v. Alaska Treadwell Gold Min. Co. [C. C. A.] 148 F 808.

94. Objection to jurisdiction of subject-matter may be raised for first time on appeal (City of Aurora v. Schoeberlein, 230 Ill. 496, 82 NE 860; Schaller v. Marker [Iowa] 114

sized in the Federal courts.[95] A state court must construe the law and determine the facts upon which its own jurisdiction depends,[96] and unless a principle controlled by the Federal constitution is involved, it need not follow the decisions of the Federal courts.[97] Where jurisdiction is dependent upon a fact which the court is required to ascertain, its determination of the existence of such fact is conclusive until set aside or reversed by a direct proceeding.[98] The Federal full faith and credit clause does not prevent the courts of one state from examining the records of the courts of a sister state to ascertain whether or not that court had jurisdiction of the subject-matter.[99]

Jurisdictional questions are usually raised by motion, plea in abatement, or other proper pleading [1] seasonably made or filed.[2] A demurrer for want of jurisdiction of the person raises only the question whether defendant is such a person as can be subjected to the process and jurisdiction of the court.[3] A party invoking the power of a court of general jurisdiction by obtaining an injunction cannot in avoidance of damages therefrom assert that the court had no jurisdiction.[4] When a court has no jurisdiction there should be a judgment of dismissal for want thereof and not a general judgment for defendant.[5]

Evidence and presumptions. See 8 C. L. 616—An objection to jurisdiction must be supported by evidence when the record does not show facts going to support it.[6]

NW 43; West v. Martin [Wash.] 92 P 334), and will be noticed by appellate court on its own motion (Western Union Tel. Co. v. Cooper [Ga. App.] 58 SE 517; Columbia N. S. D. Co. v. Morton, 28 App. D. C. 288). Supreme court must notice its own want of appellate jurisdiction whether question is raised by the parties or not. McCashland v. Keogh [Utah] 88 P 680.

95. Whenever a Federal court becomes satisfied that it is without jurisdiction, it is its duty to dismiss or remand the suit of its own motion. Gage v. Riverside Trust Co., 156 F 1002. Jurisdiction is fundamental and may be inquired into in any manner, at any stage, by court of own motion, or by parties. Kreider v. Cole [C. C. A.] 149 F 647. Cause erroneously removed to Federal court should be remanded at any stage at instance of any party or on court's own motion. International, etc., R. Co. v. Hoyle [C. C. A.] 149 F 180. Appellate court will notice without objection or assignment lack of jurisdiction of lower court. Morrison v. Burnette [C. C. A.] 154 F 617; Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606. In inquiring into its own jurisdiction, Federal court may not determine questions on merits, hence dismissal was not authorized under act March 3, 1875, § 5, because of finding that defendants did not act jointly and that value of land withheld by each was less than $2,000, question whether defendants acted jointly in withholding land of alleged value of $5,000 being in issue. Smithers v. Smith, 204 U. S. 632, 51 Law. Ed. 656.

96, 97. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441.

98. Adjudication as to age of one imprisoned in a reformatory not open to attack in habeas corpus. In re Wallace, 75 Kan. 432, 89 P 687. Every court has power to determine its own jurisdiction both as to parties and subject-matter (Baltimore & O. R. Co. v. Freeze [Ind.] 82 NE 761), and the decision of an inferior tribunal on facts essential to its jurisdiction is not subject to collateral attack unless want of jurisdiction is apparent on the face of the proceedings (Id.). As to garnishment proceeding in another state. Id.

99. Fall v. Fall [Neb.] 113 NW 175.

1. Proper way to raise question of jurisdiction of subject-matter is by demurrer or answer, and such question cannot be raised on motion to set aside service, at least where it does not clearly appear that court has not jurisdiction. Manning v. Canadian Locomotive Co., 105 NYS 662. Objection that complaint does not state that defendant, a foreign corporation, has an officer in New York City so as to confer jurisdiction on municipal court may be raised by answer. Epstein v. S. Weisberger Co., 52 Misc. 572, 102 NYS 488. Objection to jurisdiction properly raised by demurrer where want of jurisdiction of subject-matter appeared on face of declaration. Legum v. Blank [Md.] 65 A 1071. A plea negativing every ground of jurisdiction enumerated in the statute is not bad for duplicity (Deadrick's Adm'r v. State Life Ins. Co. [Va.] 59 SE 489), nor is a plea objectionable for failure to show a more proper jurisdiction in some other court where it shows facts under which no court in the state has jurisdiction (Id.).

2. Where replevin is brought in state court against officer of Federal court to recover possession of property in his possession as such officer, objection to jurisdiction of state court is seasonably taken by answer, facts showing want of jurisdiction not appearing on face of complaint. Druhe Hardwood Lumber Co. v. Fishbein, 101 Minn. 81, 111 NW 950.

3. Continental Life Ins. & Inv. Co. v. Jones, 31 Utah, 403, 88 P 229.

4. Littleton v. Burgess [Wyo.] 91 P 832.

5. Maxwell v. Federal Gold & Copper Co. [C. C. A.] 155 F 110.

6. Objection based on wrong venue or irregularity in service of process. Martin v. Fraternal Life Ass'n of Hastings [Neb.] 114 NW 159.

Courts of general jurisdiction will be presumed to have acted within their jurisdiction,[7] but such presumption does not obtain as to courts which exercise only a limited or special jurisdiction.[8]

JURY.

§ 1. Necessity or Occasion for a Jury Trial, 541.
- A. As "Preserved" by the Constitutions, 541. Denial of the Right; Conditions, 542. The Character of the Jury Guaranteed, 543.
- B. As Conferred Where the Common Law Did Not Give It, 543.
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- D. Examination of Jurors and Trial and Decision of Challenges, 551. Scope of Examination, 551. Review of Trial of Challenges, 551. Improper Overruling or Sustaining of a Challenge as a Ground for Reversal, 552.

§ 9. Talesmen, Special Venires and Additional Jurors, 552.

§ 10. Special and Struck Juries and Juries of Less than Twelve, 553.

§ 11. Swearing, 553.

§ 12. Custody and Discharge of Jurors and Jury, 553.

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The scope of this topic is noted below.[9]

§ 1. *Necessity or occasion for a jury trial. A. As "preserved" by the constitutions,* See 8 C. L. 617 the right to trial by jury cannot be abridged by legislative enactment,[10] but a general guaranty that the right "shall remain inviolate" only preserves the right as it existed at the time of adoption of the constitution,[11] and creates no

7. While national courts have only a limited jurisdiction, they are not inferior courts and their judgments possess every attribute of finality and estoppel appertaining to courts of general jurisdiction (In re First Nat. Bk. [C. C. A.] 152 F 64), hence failure of their records to affirmatively show jurisdictional facts is not fatal (Id.). United States district court being a court of record, proof of order discharging a bankrupt raises presumption that court acquired jurisdiction and that proceedings were legal. New York Institution for Instruction of Deaf and Dumb v. Crockett, 117 App. Div. 269, 102 NYS 412.

In this connection, see Judgments, 8 C. L. 530.

8. As to validity of foreign justice of peace judgment. Geruld v. Baltimore & O. R. Co., 105 NYS 110. The rule that no presumptions are indulged in favor of the jurisdiction of an inferior court is inapplicable where a judge of such court acts in the special capacity of an officer whose duties are presumed to have been regularly performed. Inquest by justice of peace. Morgan v. San Diego County, 3 Cal. App. 454, 86 P 720.

9. It includes generally all matters relating to necessity of jury trial and the selection and service of petit jurors in both civil and criminal cases. **It excludes** grand juries (Grand Jury, 9 C. L. 1540), feigned issues out of chancery (see Equity, 9 C. L. 1110), the custody and conduct of juries during the trial (see Trial, 8 C. L. 2161, as to civil trials; Indictment and Prosecution, 10 C. L. 57, as to criminal trials), misconduct as ground for new trial (see New Trial and Arrest of Judgment, 8 C. L. 1153, as to civil trials; Indictment and Prosecution, 10 C. L. 57, as to criminal trials), and the rendition and reception of verdicts (see Verdicts and Findings, 8 C. L. 2245; Indictment and Prosecution, 10 C. L. 57). As to powers and province of jury, see Questions of Law and Fact, 8 C. L. 1566, and topics there referred to.

10. Gen. St. of 1906, § 1950, enlarging jurisdiction of courts of equity in quieting title to realty, cannot be construed so as to destroy constitutional right to jury. Briles v. Bradford [Fla.] 44 S 937.

11. County court act of 1879, now contained in Civ. Code 1895, § 4193 et seq., in so far as it denies party right to trial by jury in case involving $50 or less, is unconstitutional. De Lamar v. Dollar, 1 Ga. App. 687, 57 SE 85. Laws 1907, p. 1123, c. 538, providing for hearing and determination by supreme court of election contest, if treated as substitute for quo warranto to try title to office, is unconstitutional as not preserving, trial by jury as required by Const. art. 1, § 2. Metz v. Maddox [N. Y.] 82 NE 507. Legislature cannot create a new right to injunctive relief for trespass and award damages therein, unless grounds thereof are sufficient to support injunction independent of statute. Cowan v. Skinner [Fla.] 42 S 730. Petition to enjoin removal of turpentine, which fails to allege that trees are being destroyed or that irreparable injury is being sustained, held not to state cause for injunctive relief independent of statute. Id.

new rights.[12] Hence the right to trial by jury does not exist in equitable suits,[13] the primary relief sought characterizing the action,[14] unless the equitable relief is asserted in the answer, in which case its defensive or affirmative nature controls.[15] Where an equitable action involves distinct legal issues, the latter are triable by jury.[16] The right to a jury does not exist in special proceedings,[17] such as contempt,[18] nor in prosecutions for misdemeanors,[19] and violations of municipal ordinance,[20] though it is usually constitutionally guaranteed in criminal actions.[21]

Denial of the right; conditions. See 8 C. L. 619—While the exaction of a jury fee as a condition precedent is not a denial of the constitutional right to a trial by jury,[22] it has been held that where a statute gives the right absolutely,[23] such condition cannot be imposed.[24] The granting of a nonsuit, where the court would be obliged to set aside a verdict for plaintiff,[25] and the limiting of matters triable in a jury court upon appeal from nonjury court to those specified in the appeal,[26] is not unconstitu-

Where levy for costs is made upon property of plaintiff in execution, who filed affidavit of illegality on ground that Civ. Code 1895, § 4161, had not been complied with so as to render him liable, held error to overrule motion to dismiss and to refuse an appeal to a jury. Payne v. Stevens, 1 Ga. App. 266, 57 SE 916.

12. Laws 1907, c. 538, providing for trial of election contests by supreme court, being a new procedure, jury is not necessary under Const. art. 1, § 2. Metz v. Maddox, 105 NYS 702. Hurd's Rev. St. 1905, p. 1984, c. 133, providing a procedure for establishing disputed boundaries, held not unconstitutional because denying right to trial by jury. Hood v. Tharp, 228 Ill. 244, 81 NE 861.

13. Costello v. Scott [Nev.] 93 P 1. Where action which should have been brought in equity is placed on law docket and contains issues of fact triable by jury on demand, it is not error to submit issues to jury, there being no motion to transfer. Kineon v. Rich, 30 Ky. L. R. 1107, 100 SW 249.

Actions in equity: Action to cancel physician's license as obtained by fraud. Gulley v. Ter. [Okl.] 91 P 1037. Cancellation of note for fraud. Siploa v. Winship [N. H.] 66 A 962. Action for removal of building encroaching upon street. City of Columbus v. Philbrick, 5 Ohio N. P. (N. S.) 449. Under Rev. St. 1878, § 3323, as amended by Laws 1897, p. 130, c. 80, and Rev. St. 1898, § 3323, proceedings to enforce mechanics' liens. Spafford v. McNally, 130 Wis. 537, 110 NW 387. Code 1906, § 4005, giving creditor right to attack fraudulent conveyance before judgment on his claim, being equitable, does not deny right of trial by jury. Cheuvront v. Horner [W. Va.] 59 SE 964. Action in support of an adverse claim to mining location is in effect a suit in equity, hence discharge of jury before return of verdict is not ground of complaint. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P 302.

Construed as legal: Action against tenant for waste, conversion of property, etc., held legal, though accounting was asked in prayer. Gandy v. Wiltse [Neb.] 112 NW 569. In conversion for grain sold under mortgage given by tenant, title to which was to remain in landlord until advances were paid, intervention of tenant raising issues as to advances made does not create equitable issues. Aronson v. Oppegard [N. D.] 114 NW 377.

14. Mogollon Gold & Copper Co. v. Stout [N. M.] 91 P 724. Jury trial is not of right in cases within the jurisdiction of equity though legal issues arise as incident thereto. Shedd v. Seefeld, 230 Ill. 118, 82 NE 580.

15. Pitts v. Pitts, 201 Mo. 356, 100 SW 1047.

16. In action to enjoin trespass and for appointment of receiver to take charge of timber cut by defendant, issue as to ownership of land is legal and either party may have it submitted to jury. Kountze v. Hatfield, 30 Ky. L. R. 589, 99 SW 262.

17. Motion to discharge exempt property from attachment. Cassady v. Morris [Okl.] 91 P 888. Proceedings for deportation of Chinese person, under Act Cong. Sept. 13, 1888, c. 1015, 25 Stat. 476 (U. S. Comp. St. 1901, p. 1312). United States v. Ngum Lun May, 153 F 209.

18. O'Flynn v. State, 89 Miss. 850, 43 S 82.

19. Greater New York Charter, Laws 1901, p. 604, c. 466, § 1410, providing for trial of misdemeanors without jury, held constitutional. People v. Flaherty, 104 NYS 175.

20. Miller v. Birmingham [Ala.] 44 S 388.

21. Proceeding under Acts 1903, p. 516, c. 237, and p. 91, c. 35, to commit incorrigible girl to industrial school, held not criminal entitling her to jury trial. Dinson v. Drosta. 39 Ind. App. 432, 80 NE 32. Though one charged with crime has a constitutional right to trial by jury, he has no constitutional right to commit crime that he may avail himself of right. State v. Canty [Mo.] 105 SW 1078.

22. Municipal Court Act, § 56, subd. 5 (Hurd's Rev. St. 1905, c. 37, § 319), held constitutional. Williams v. Gottschalk, 231 Ill. 175, 83 NE 141.

23. Word "may" as used in § 12, borough act of April 24, 1897 (P. L. p. 291), providing that in certain cases "there may be a trial by jury," held mandatory. City of Vineland v. Denoflio [N. J. Law] 65 A 837. Conviction by recorder sitting without jury, after same has been regularly demanded, set aside. Id.

24. City of Vineland v. Denoflio [N. J. Law] 65 A 837.

25. Not violative of Const. art. 1, § 7, declaring that right to trial by jury shall remain inviolate, or of Code Civ. Proc. § 2101, requiring all questions of fact to be decided by jury, etc. Bohn v. Pacific Elec. R. Co. [Cal. App.] 91 P 115.

26. St. 1904, p. 450, c. 488, § 8, relating to appeals from land court and providing that

tional as a denial of the right to jury, and while a statute creating a disputable presumption of fact from the proof of other facts, does not deny the right,[27] one providing for proof of guilt from reputation is unconstitutional.[28]

The character of the jury guaranteed. See 8 C. L. 819—The constitutional jury of Texas is one composed of twelve men,[29] and a verdict cannot be returned by less than the full jury except by consent,[30] which consent cannot be given by accused in a felony case,[31] unless a juror during the trial dies or is disabled from sitting.[32]

(§ 1) *B. As conferred where the common law did not give it.* See 8 C. L. 620—The right to trial by jury as existing at common law has been modified [33] and extended [34] in many states, but, to be available, case must come clearly within the statute.[35]

(§ 1) *C. Demand, loss, or waiver of right.* See 8 C. L. 621—The right to a trial by jury in some courts is withheld [36] or given [37] absolutely, and can be waived only by written stipulation,[38] but in others it is dependent upon a timely demand.[39] In

"no matters shall be tried in superior court except those specified in the appeal," held constitutional. Mead v. Cutler, 194 Mass. 277, 80 NE 496.

27. Act of Aug. 15, 1903 (Acts 1903, p. 90), held not violative of par. 5, § 1, art. 1, Const., providing for a public and speedy trial by an impartial jury, because it raises a rebutable presumption of fraudulent intent from proof of certain facts (Vance v. State, 128 Ga. 661, 57 SE 889), nor does it repeal § 1033, of Pen. Code of 1905, which provides that "on the trial of all criminal cases the jury shall be the judges of the law and the facts" (Id.).

28. Under Valentine Anti-Trust law, §§ 4427-6, which provides for proof of existence of illegal combination by establishment of its general reputation as such. Hughes v. State, 9 Ohio C. C. (N. S.) 369.

29. Impartial jury guaranteed by Const. art. 1, § 10, is one composed of twelve men, as required by Const. art. 5, § 13. Jones v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 519, 106 SW 345.

30. Archer v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 969, 100 SW 769.

31. Code Cr. Proc. 1895, § 22. Jones v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 519, 106 SW 345.

32. Death of brother of juror held not to disable him from sitting within Const. art. 5, § 13, providing that if, pending trial, one or more jurors, not exceeding three, die or be disabled from sitting, remainder shall render a verdict. Jones v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 519, 106 SW 345.

33. Under Const. 1868, authorizing judgment by court in cases founded upon contract, where there is no issuable defense filed on oath, judgment in attachment case founded on contract may be rendered by court. Parham v. Potts-Thompson Liquor Co. [Ga.] 56 SE 460. Under Const. 1877, such contract must be unconditional. Id.

34. In suit for specific performance, court could submit particular questions of fact to jury, under Rev. St. 1899, § 692 (Ann. St. 1906, p. 702), and pass on other issues of fact itself and make own finding upon all the facts. Waddington v. Lane, 202 Mo. 387, 100 SW 1139. In action for money fraudulently obtained by defendant while acting as real estate broker for plaintiff, issues held properly submitted to jury under Rev. St. 1899, § 691 (Ann. St. 1906, p. 700), providing that issues of fact in actions for money only must be submitted to jury unless jury trial is waived. Van Raalte v. Epstein, 202 Mo. 173, 99 SW 1077. In action for nuisance under Code Civ. Proc. § 1660, in which final judgment is demanded under § 1662, providing for damages and order of removal, right to trial by jury exists under § 968, subd. 2, such action not being equitable because praying that "defendant" be directed to remove nuisance. Heughes v. Galusha Stove Co., 106 NYS 606. Contest over granting of letters of administration is a "cause" within Const. art. 5, § 10, providing that in all causes in district court parties may have jury trial upon application, hence jury must be allowed on appeal to district court when properly demanded. Tolle v. Tolle [Tex.] 19 Tex. Ct. Rep. 679, 104 SW 1049.

35. Rev. St. 1899, § 654 (Ann. St. 1906, p. 670), providing that where a release is pleaded as a bar, plaintiff may allege facts in reply showing that same was fraudulently obtained and issue thus raised shall be submitted to jury, held inapplicable where plaintiff seeks to set aside release as part of original relief. Magnuson v. Continental Casualty Co., 125 Mo. App. 206, 101 SW 1125.

36. Since county court act of 1879, now contained in Civ. Code 1895, § 4193 et seq., makes no provision for impanelling jury in civil case, trial by jury cannot be had on demand. De Lamar v. Dollar, 1 Ga. App. 687, 57 SE 85.

37. Action at law must be sent to trial term unless parties consent to trial by court. Colon v. Hebbard, 105 NYS 805.

38. Rev. St. § 649 (U. S. Comp. St. 1901, p. 525), requiring stipulation in writing waiving jury to authorize trial of issues of fact before court, does not apply to default cases, and Federal court under Illinois practice act (3 Starr & C. Ann. St. Ill. 1896, c. 110, p. 41), may assess damages in default in replevin suit without jury. Midland Cont. Co. v. Toledo Foundry & Mach. Co. [C. C. A.] 154 F 797. Written stipulation waiving jury to assess damages on bond after default is not necessary under Rev. St. § 961 (U. S. Comp. St. 1901, p. 699), declaring that jury may be had upon request. Brock v. Fuller Lumber Co. [C. C. A.] 153 F 272.

39. Under Code Civ. Proc. § 1009, failure to claim right to jury before any evidence

Oklahoma one charged with a crime triable by jury at common law [40] cannot waive the right, and a conviction by the court is void,[41] but such right may be waived in a proceeding to punish for refusal to testify before a general military court martial.[42]

What constitutes waiver. See 8 C. L. 621—Waiver of the right to trial by jury may arise from the acts of the parties,[43] as where they fail to object to an order of reference,[44] or where they treat the action as one in equity,[45] but the prosecution of exceptions to the overruling of a demurrer,[46] or the failure to except to a submission to a master in chancery in Texas,[47] does not waive the right. Though the right is preserved by proper exceptions to an order of reference, it is waived unless properly asserted in exceptions to his report.[48]

§ 2. *Eligibility to and exemption from jury service.* See 8 C. L. 622—Bona fide residence in the county or parish where the trial is held,[49] full possession of the senses,[50] and ability to read and write the English language,[51] are required in some states, but the fact that a juror is operating a gambling house does not disqualify in Louisiana.[52] Prior service within a specified time exempts or disqualifies in some jurisdictions.[53] Public officers are frequently exempted or disqualified.[54] Personal privilege of exemption is no ground for challenge.[55]

is received waives right. Ross v. McCaldin, 107 NYS 381. Under Municipal Court Laws 1902, p. 1557, c. 580, § 231, giving right to jury trial where demanded on joinder of issue, failure to demand upon joinder by two defendants waives jury as to them. Spencer v. Adams Dry Goods Co., 54 Misc. 614, 104 NYS 867. Where, in suit on contractor's bond, defendant admitted default but stated that he "would like to be heard on the question of damages," and suggested that case be sent to auditor and no demand for jury was made, held that jury was waived and defendant could not request jury under Rev. St. § 961 (U. S. Comp. St. 1901, p. 699), upon learning that auditor's report was unfavorable. Id.

40. One charged by information before probate court with violation of game law, in shipping 3,000 quail during closed season, held entitled to trial by jury. In re McQuown [Okl.] 91 P 689.

41. Wilson's Rev. & Ann. St. 1903, § 5142 et seq. In re McQuown [Okl.] 91 P 689.

42. In proceeding to punish civilian for refusal to testify before a general military court martial, under Act Cong. March 2, 1901, c. 809, 31 Stat. 950 (U. S. Comp. St. 1901, p. 965), held that parties may waive trial by jury. United States v. Praeger, 149 F 474.

43. Where some of defendants in suit to foreclose mortgage had not been before court more than fifteen or twenty days at time court sustained motion for submission of case for judgment and indicated what its judgment would be, and had not had time to take proof by deposition, held not chargeable with laches or waiver of right to jury trial where no appreciable time elapsed between ruling and indication of what the judgment should be. Howard v. Maxwell's Ex'r, 30 Ky. L. R. 448, 98 SW 1013.

44. Not entitled to jury trial upon issues arising upon exception to referee's report. Roughton v. Sawyer, 144 N. C. 766, 56 SE 480. An exception, "Defendant's counsel excepts to the above order of reference," while general, held sufficient to save right to trial by jury. Ogden v. Apalachian Land & Lumber Co. [N. C.] 59 SE 1027.

45. Where in suit to establish partnership and for accounting parties treat whole proceeding as equitable, held right to submit legal issue to jury was waived and court could disregard jury's conclusion. Costello v. Scott [Nev.] 93 P 1.

46. Since repeal of provision forbidding prosecution of exceptions and claim for jury trial. Ryer v. Lee [R. I.] 66 A 199.

47. Const. art. 5, §§ 8, 10, and Rev. St. 1895, arts. 3189, 1485, 1493, construed and held that where, in receivership proceedings, a master in chancery was appointed to ascertain debts, etc., fact that insolvent debtor did not object to submission, appeared before master and contested claims held not to waive right to trial by jury upon exceptions to report. San Jacinto Oil Co. v. Culberson [Tex.] 18 Tex. Ct. Rep. 30, 101 SW 197.

48. Ogden v. Apalachian Land & Lumber Co. [N. C.] 59 SE 1027. Mere statement, as each exception is taken, that "as to the matters and issues embraced in said finding, they and each of them demanded a jury trial," wtihout specifying particular facts controverted, held insufficient. Id. Right held waived by failure to assert such right definitely and specifically in each exception and to point out in each exception specific fact excepted to upon which jury trial was demanded. Roughton v. Sawyer, 144 N. C. 766, 56 SE 480.

49. Temporary absence from parish, without intent to change abode, for purpose of teaching, held not to disqualify under Act No. 135, 1898, p. 216, § 1. State v. Wimby, 119 La. 139, 43 S 984.

50. Defect in eye not materially affecting the sight does not disqualify under Code, § 332. State v. Norman [Iowa] 113 NW 340.

51. Heid not an abuse of discretion to overrule challenge based upon inability to write English language, as required by Code, § 332, where it appeared that juror could write only the common words. Harris v. Moore, 134 Iowa, 704, 112 NW 163.

52. State v. Petit, 119 La. 1013, 44 S 848.

53. Service at next preceding term in same court is good ground of objection in city court. Kinard v. State, 1 Ga. App. 146, 58 SE 263. Rev. St. 1899, § 6547, provides that

§ 3. *Disqualifications pertaining to the particular cause. Right to an unbiased and unprejudiced jury.*[See 8 C. L. 623]—The parties are entitled to a jury that will decide the case upon the evidence adduced, hence an opinion upon a material issue [56] disqualifies.[57] Such opinion, however, must be fixed,[58] and such as will prevent the juror from trying the case on the evidence,[59] and, consequently, an opinion based exclusively [60] upon public rumors,[61] conversations,[62] and newspaper reports,[63] is generally not a ground for challenge where the juror testifies that he can render a fair and impartial verdict notwithstanding,[64] although one based upon a conversation with a material witness,[65] or formed from hearing the evidence of another case involving the same issues,[66] usually disqualifies. If a juror is actually biased, how-

any person who has served on any jury within twelve months shall be excused from service in cities of over 100,000 upon challenge; § 6566 provides for special juries in such cities; § 6567), provides that no person shall be required to serve more than once a year. Held that § 6547 controls party's right to challenge jurors called under § 6566, and service within twelve months, though not in current calendar month, is ground of challenge, § 6567 furnishing personal privilege to juror. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 SW 1072. Under express terms of Code 1896, § 4988, service as juror during previous week does not disqualify **a special venireman** in murder trial. Andrews v. State [Ala.] 44 S 696.

54. Wilson's Rev. & Ann. St. Okl. 1903, § 3308, disqualifying sheriffs from performing jury service, applies to deputies. Robirson v. Oklahoma Ter. [C. C. A.] 148 F 830.

55. Fact that juror is a justice of the peace, a constable, or a deputy sheriff, is no ground of challenge under express terms of Act. No. 135, p. 217, of 1898, § 2. State v. Petit, 119 La. 1013, 44 S 848.

56. In action on insurance policy, opinion as to plaintiff's right to recover does not disqualify where only issue is measure of damages. Furlong v. American Cent. Fire Ins. Co. [Iowa] 113 NW 1087. Fact that jurors had believed that deceased was murdered and had made up their minds as to the punishment which should be inflicted held not to disqualify where they had no opinion as to guilt of accused and could give him a fair trial. Cason v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 339, 106 SW 337.

57. In summary hearing of challenge for predetermined opinion, question is whether he knows facts or has received information of facts which he believes to be true and has formed a settled opinion therefrom upon a material issue. State v. Smith, 74 Kan. 383, 85 P 1020, 89 P 21. Statement by juror that from fact that indictment had been returned against accused he presumed that there was more chance of him being guilty than one against whom no indictment had been returned held not to disqualify in view of whole examination. Niezorawski v. State, 131 Wis. 166, 111 NW 250. Where juror stated that he had no opinion, that he had been informed of homicide by persons whom he did not know, that same had made no impression on his mind and that he could give accused a fair trial, held competent. Gregg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 89, 100 SW 1161.

58. Voir dire examination held to show such fixed opinions as to disqualify. Rosencranz v. U. S. [C. C. A.] 155 F 38. Possession of opinion requiring evidence to remove held to sustain challenge. Commonwealth v. Curcio [Pa.] 67 A 643.

59. B. & C. Comp. § 123, providing that opinion shall not disqualify unless court is satisfied that juror cannot try case impartially, is not violative of Const. art. 1, § 11, giving accused a right to impartial jury. State v. Megorden [Or.] 88 P 306. Juror held competent although he stated that he would consider fact that grand jury had indicted accused as evidence of guilt where, upon question being explained, he changed answer. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Where juror stated that he had an opinion which might bias his verdict but that he could try case on evidence, he was competent. Strickland v. State [Ala.] 44 S 90.

60. Pen. Code, § 1076, providing that no juror shall be disqualified because of opinion founded on public rumor, newspaper reports, or common notoriety, provided he can act impartially has no application where opinion is derived only partially from such sources. People v. Helm [Cal.] 93 P 99.

61. Opinions on public rumor held not to disqualify. St. Louis, etc., R. Co. v. Stamps [Ark.] 104 SW 1114; Territory v. Emilio [N. M.] 89 P 239. Opinion based upon truth of report heard where juror stated that he would disregard same if it developed that report was false and that he could try case impartially. State v. Megorden [Or.] 88 P 306.

62. Ann. Code 1892, § 2355. Cook v. State [Miss.] 43 S 618. Juror positively affirmed his ability to discard opinion. State v. Fielding [Iowa] 112 NW 539.

63. Held not to disqualify. Thomas v. State [Ala.] 43 S 371; Cooke v. People, 231 Ill. 9, 82 NE 863; Bridges v. State [Neb.] 113 NW 1048. Though requiring evidence to remove same. State v. Werner [N. D.] 112 NW 60.

64. Juror who had heard of accused's prior trial, conviction, and term of punishment, but who would not be influenced thereby in arriving at verdict, held competent. Early v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 272, 103 SW 868.

65. Though he testified that he could render a fair and impartial verdict. Quinn v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 74, 101 SW 248.

66. Though they thought they could try case impartially. Barnett v. St. Francis Levee Dist., 125 Mo. App. 61, 102 SW 583.

ever, it is immaterial from what source he received his information.[67] A prejudice of any kind which materially affects the case,[68] as against a party,[69] a material witness,[70] or a prejudice growing out of the nature of the charge,[71] renders a juror incompetent. Likewise, conscientious scruples against capital punishment in convictions on circumstantial evidence[72] is a ground for challenge on the part of the prosecution.[73] While friendships[74] and any relationship[75] which creates actual bias disqualifies, certain relations ipso facto renders a juror incompetent,[76] while a general interest as a citizen or taxpayer does not usually disqualify for service in an action in which the county is financially concerned,[77] one who is directly interested,[78] or in the employ of one interested,[79] is incompetent.

§ 4. *Discretion of court to excuse juror.*[See 8 C. L. 625]—By statute in some states a broad discretion is vested in the court to excuse jurors for cause,[80] and it is no abuse thereof to excuse member of national guard when his regiment is in camp.[81]

§ 5. *The jury list and drawing for the term.*[See 8 C. L. 625]—In many states the list is made by a juror commission, the qualifications,[82] manner of appointment or

67. Pen. Code, § 1076, relating to opinions based on rumors, etc., held inapplicable where juror is actually biased. People v. Helm [Cal.] 93 P 99.

68. Court and not juror must be satisfied that latter is without bias. State v. Caron, 118 La. 349, 42 S 960. In prosecution of bank officials for conspiracy to defraud bank, creditors of bank who positively testify that they are without prejudice held competent. Imboden v. People [Colo.] 90 P 608. Although juror in homicide case had known deceased and had read accounts of homicide and had talked about same, held competent where he stated he could try case on the evidence though he had formed an opinion. Gregg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 89, 100 SW 1161. In a prosecution for vagrancy, mere fact that juror is witness in another vagrancy case against accused does not disqualify him. Jacobs v. State, 1 Ga. App. 519, 57 SE 1063.

69. In action on liquor dealer's bond for sales to plaintiff's minor son, fact that juror was an active prohibitionist and was prejudiced against retail liquor business, and men engaged therein, to the extent of the liquor traffic, but not against individuals, held not to disqualify where he stated that he could render fair and impartial verdict. Ellis v. Brooks [Tex.] 18 Tex. Ct. Rep. 448, 102 SW 94.

70. Questions asked by juror of witness while evincing possible disbelief held not to show such prejudice as to require withdrawal of a juror. Chicago City R. Co. v. Shreve, 128 Ill. App. 462.

71. Discovery by juror after trial had begun that he entertained a prejudice growing out of incident occurring in father's family, which was revived by evidence of case, held an accident within § 281, Civ. Code Proc. (Gen. St. 1905, p. 5176), justifying discharge of jury. State v. Hansford [Kan.] 92 P 551.

72. Coleman v. State [Ala.] 44 S 184; Commonwealth v. Curcio [Pa.] 67 A 643. May be examined in respect thereto, especially where punishment is fixed by jury. Strickland v. State [Ala.] 44 S 90.

73. Accused cannot object. Gregory v. State [Ala.] 42 S 829.

74. Close neighbor and friend of accused. State v. Caron, 118 La. 349, 42 S 960.

75. Cousin of accused. Family of juror related to family of accused. State v. Caron, 118 La. 349, 42 S 960. Where juror was related to accused by affinity but marriage has been dissolved by death, disqualification is thereby removed. Gillespie v. State, 168 Ind. 298, 80 NE 829.

76. Relation of attorney and client between juror and attorney for state held not a ground of implied bias under Rev. Cr. Code Proc. § 339. State v. Glover [S. D.] 113 NW 625.

77. Action by county to recover damages for injury to highway. Big Sandy R. Co. v. Floyd County, 31 Ky. L. R. 17, 101 SW 354. **Contra.** Multnomah County v. Willamette Towing Co. [Or.] 89 P 389.

78. In suit against fraternal benefit society which would affect assessments, members thereof are disqualified. Edmonds v. Modern Woodmen of America, 125 Mo. App. 214, 102 SW 601. In action for failure to deliver stock as agreed, fact that jurors owned stock in corporations held not to disqualify in absence of showing that stock sued for and stock owned was issued in violation of Const. art. 17, § 8. Rogers v. Gladiator Gold Min. & Mill. Co. [S. D.] 113 NW 86.

79. Servant of party held disqualified. Atlantic Coast Line R. Co. v. Bunn [Ga. App.] 58 SE 538; Pearce v. Quincy Min. Co., 149 Mich. 112, 14 Det. Leg. N. 367, 112 NW 739. In action against cotton mill, employes therein and in another mill owned by separate corporation but operated by same president, while not legally disqualified, may in discretion of court be excused. Tucker v. Buffalo Cotton Mills [S. C.]. 57 SE 626.

80. In action by clerk of circuit court against county to recover for services, held within court's discretion as given by Code 1896, § 5020, to excuse jurors employed by county commissioners. Calhoun County v. Watson [Ala.] 44 S 702. In exercise of discretion conferred by Act No. 135, p. 216, 1898, § 1, judge may excuse juror for cause and, if erroneous. It is no ground for complaint. State v. Huff, 118 La. 194, 42 S 771.

81. State v. Lang [N. J. Law] 66 A 942.

82. St. 1898, § 2533a, providing that jury commissioners shall be citizens of United States, qualified electors, possessed of natural faculties and not infirm, of good character,

election,[83] and the terms[84] of its members being regulated largely by statute. A statute authorizing a specific number of the members to act contemplates that all shall be qualified.[85] In South Carolina the superintendent of education may act in the place of an absent member.[86]

The legal number must be drawn[87] at the designated place,[88] under the prescribed oath,[89] and pursuant to a sufficient order, if one is necessary,[90] and the list prepared as required.[91] After a jury has been drawn it must be preserved in the manner prescribed.[92] Juries existing at the time a statutory change in the manner of drawing becomes operative are usually not affected thereby.[93]

Jurors must be drawn from the appropriate district.[94]

of approved integrity and sound judgment, able to read and write English language, and freeholders of county, held not to impose unconstitutional tests. State v. Anson [Wis.] 112 NW 475. Fact that jury commissioners selected jurors for term which was never held does not disqualify for selection for new term, under Laws 1903, p. 218, c. 112, § 1, providing that every jury commissioner shall be disqualified to select for two successive terms. Territory v. Emilio [N. M.] 89 P 239.

83. Jury commissioner is not county officer within Const. art. 13, § 9, relating to election and appointment of such officers, and St. 1898, § 2533a, authorizing appointment by circuit judge, held not in violation thereof (State v. Anson [Wis.] 112 NW 475), or of Const. art. 6, § 4, requiring all county officers, except judicial officers, to be chosen by electors (Id.). Neither is it unconstitutional as imposing executive duties upon judiciary. Id.

84. Once appointed continues to hold office until displaced by judge. State v. Bradley [La.] 45 S 120. Office of jury commissioner created by Sess. Acts 1879, p. 28, embodied in Rev. St. 1899, §§ 6539, 6541 (Ann. St. 1906, p. 3272), in cities having a specified population, is not within Const. art. 9, § 14, limiting term of office of county, township, and municipal officers to four years. State v. Corcoran, 206 Mo. 1, 103 SW 1044. Sess. Acts 1879, p. 28, embodied in Rev. St. 1899, §§ 6539, 6541 (Ann. St. 1906, p 3272), and Act March 3, 1857 (Laws 1856-57, p. 661), as amended by Act Nov. 14, 1857 (Laws 1857, p. 487), construed and held that jury commissioner appointed to fill vacancy caused by death holds for four years from May 1st of year of appointment, notwithstanding his appointment is for the unexpired term of decedent. Id.

85. Act No. 135, p. 216, 1898, providing that the "Jury Commission" shall consist of five members and the clerk of court, and that "three members * * * with the clerk, shall be sufficient number to perform duties, * * * providing all the members shall be notified," held not to authorize four to act where fifth had not qualified. State v. McClendon, 118 La. 792, 43 S 417.

86. Act February 7, 1902. State v. Smith [S. C.] 57 SE 868.

87. Where neither certified list nor boxes returned by court levy commissioners contained 300 names as required, term panel drawn therefrom must be quashed. In re Petit Jurors for New Castle County [Del.] 65 A 769.

88. Fact that jury commission did not repair to clerk's office and there supplement jury list is no ground for quashing venire under § 15, Act. 135, p. 223, of 1898, requiring fraud, etc. State v. Bradley [La.] 45 S 120.

89. District clerk, who is ex officio a jury commissioner, is not required to take oath as jury commissioner in addition to oath as clerk. State v. Bradley [La.] 45 S 120. Const. art. 160, requiring oath to support Federal and state constitution and law, is not complied with by oath of jury commissioner to discharge duties according to particular statute (State v. McClendon, 118 La. 792, 43 S 417), but where proper oath is taken, additional oath to discharge duties according to such statute does not render oath ineffective (Id.).

90. Order directing jury commissioners to convene on particular day to discharge duties is not affected by failure of clerk to spread order on minutes. State v. McClendon, 118 La. 792, 43 S 417.

91. Where, in violation of Ky. St. 1903, § 2241, providing that jury commissioners shall select specified number of citizens from assessor's book, write names on separate slips and place in drum, and that no person shall be permitted to be present, commissioners merely check names which clerks of court write and place in drum, the array may be quashed and without a showing of prejudice. Louisville, etc., R. Co. v. Schwab, 31 Ky. L. R. 1313, 105 SW 110.

92. Under 1 Code of Laws 1902, § 2912, providing that three separate locks shall be placed on jury box, each lock having a special key to be kept by specified officer, it is an irregularity only that one key opened two locks. State v. Smith, [S. C.] 57 SE 868, Where names of jurors from different supervisors' districts were placed in separate boxes without covers, and put into a ballot box which was sealed and locked, there was a sufficient compliance with Laws 1896, p. 93, c. 84, providing that names from different districts shall be placed in separate boxes and sealed, etc. Cook v. State [Miss.] 43 S 618.

93. Changes made by Sess. Acts 1906, p. 519, c. 156, in manner of drawing juries, held not to affect juries existing when it became operative, but that such parts as required no further time to put into operation, such as right to challenge for service within one year, became effective at once. Eichman's Committee v. South Covington & C. St. R. Co., 31 Ky. L. R. 880, 104 SW 316; Louisville, etc., R. Co. v. Milby, 31 Ky. L. R. 1197, 104 SW 785.

94. Where police court exercises its jurisdiction to try misdemeanor committed without city limits but within four miles thereof,

While the Federal constitution does not insure one a jury drawn from his own race or even a mixed one,[95] it entitles him to one drawn without race discrimination,[96] and any statute making such a discrimination [97] is void. The presumption is that a jury was lawfully drawn,[98] and one alleging discrimination must establish the same [99] by competent evidence [1] if controverted.[2]

The jury for the term must be drawn in the prescribed manner [3] and at the proper time,[4] and where it has not been regularly drawn, the court is usually authorized to draw or summon one.[5]

Statutes regulating the drawing of juries are usually construed as directory only, and an irregularity vitiates the drawing only when fraudulent.[6] The fact that jurors for the term are withdrawn from the box in an illegal manner does not

jury may be drawn wholly from within city. State v. Fendrick [Ohio] 82 NE 1078. Jurors for trial of criminal case in Federal courts may be drawn from entire state of Minnesota, which constitutes the "judicial district," and need not be drawn from subdivision thereof where case is triable. Clement v. U. S. [C. C. A.] 149 F 305.

95. Montgomery v. State [Fla.] 42 S 894; Miller v. Com. [Ky.] 105 SW 899; State v. Laborde [La.] 45 S 38.

96. Under Const. U. S. Amend. 14, § 1, forbidding any state to deny to any person equal protection of the laws, statute excluding negroes from juries is invalid. Miller v. Com. [Ky.] 105 SW 899.

97. Equal protection of law is not denied by law which makes no discrimination against colored race merely because discretion vested in certain officers may be used to discriminate. Montgomery v. State [Fla.] 42 S 894. Ky. Cr. Code Prac. § 281, providing that decisions upon motion to set aside indictment shall not be subject to exception, though prohibiting appeal from motion to set aside because of race discrimination in selection of grand jury, held valid. Miller v. Com. [Ky.] 105 SW 899.

98. Montgomery v. State [Fla.] 42 S 894. Louisville, etc., R. Co. v. Schwab, 31 Ky. L. R. 1313, 105 SW 110.

99. Evidence as to negro population, proportion subject to jury duty, and of the jury commission that no discrimination was made, held not to show discrimination. Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879. Mere fact that sheriff, in summoning a venire, summoned only white persons and failed and refused to select any colored men, does not of itself show discrimination solely on account of color. Montgomery v. State [Fla.] 42 S 894.

1. Evidence of proceedings in other courts of county is irrelevant. Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879.

2. Where challenge to array on ground of discrimination against colored race is verified by affidavit of defendant, evidence in support thereof is not admissible until challenge is controverted. Montgomery v. State [Fla.] 42 S 894. Demurrer admits allegations. Id. Challenge held to sufficiently show that there were colored men in county subject to jury duty and that they were discriminated against solely because of color. Id.

3. Jury drawn for term by pouring from jury box all names selected by supervisors and selecting particular names therefrom is in violation of Laws, 1896, p. 93, c. 84, providing that names shall be drawn from the small boxes contained in jury box, notwithstanding § 2389, declaring provisions for summoning jurors directory. Cook v. State [Miss.] 43 S 618. Under St. 1903, § 2244, judge should make up panel for special term by opening list prepared for next regular term and should not summon bystanders. Commonwealth v. Carnes, 30 Ky. L. R. 506, 98 SW 1045. Under Rev. St. 1887, § 3961, it is discretionary with court to order open venire for such number as may be required or to draw jury from jury box made up by county commissioners. State v. Barber [Idaho] 88 P 418. Method of selecting and summoning jurors not being fixed by constitution, Act 1895 (Priv. Laws, c. 158, § 10), creating mayoralty of Morganton a special court and providing for summoning of jury by marshal, held valid. State v. Brittain, 143 N. C. 668, 57 SE 352. Fact that name of incompetent juror is on list does not avoid venire, as where minor is included. State v. Brown, 118 La. 373, 42 S 969.

4. Panel drawn only 18 days before term which by statute should have been drawn 20 days prior thereto must be quashed. In re Petit Jurors for New Castle County [Del.] 65 A 770. Preparing jury list for term more than 15 days before term held a mere irregularity, under Ann. Code 1892, § 2389, making provisions for drawing juries directory. Cook v. State [Miss.] 43 S 618.

5. Under Laws 1891, pp. 248-253, where no grand jury has been summoned for a term of court, court may order them summoned by open venire as at common law instead of drawing from box. Imboden v. People [Colo.] 90 P 608. Laws 1874, p. 174, § 13, providing that nothing herein contained shall impair power of court to summon jurors where none have been selected, held applicable to grand as well as petit jurors. Id.

6. To warrant quashing jury box, it is not sufficient that it was possible to substitute names for those drawn by supervisors, but fraud or such flagrant abuse as to constitute fraud in law must be shown. Cook v. State [Miss.] 43 S 618. Under Code 1896, § 4997, providing that no objection can be taken to venire except for fraud in drawing or summoning, it is no ground for quashing that commissioners drew list sufficient for grand and petit jurors, and selected petit therefrom. Pate v. State [Ala.] 43 S 343. Where unfairness in method of drawing jurors is shown, substantial right of litigant is invaded and verdict will be set aside

vitiate the box,[7] and irregularity in drawing the term panel is harmless where the trial jury is not drawn therefrom.[8]

§ 6. *The venire and like process.*[See 8 C. L. 628]—The venire must be served by the proper officer,[9] who must have qualified for his office,[10] and be duly sworn.[11] Where the sheriff is disqualified because of prejudice, his deputies are also disqualified.[12] The venire for a special term need not be published in Louisiana.[13]

§ 7. *Empaneling the trial jury.*[See 8 C. L. 628]—The trial jury must be empaneled substantially[14] in the manner prescribed by statute.[15] Until a talesman has been sworn he may be discharged to make place for a regular venireman.[16] The granting of a continuance to allow counsel time to investigate a list of jurors furnished is largely discretionary,[17] especially where such list is unnecessarily served.[18]

§ 8. *Arraying and challenging. A. Challenge to the array or panel.*[See 8 C. L. 629]—The ground of challenge to the array must be one which affects the entire panel and not particular jurors,[19] and must be timely made.[20] In some states the grounds of challenge are specified.[21]

notwithstanding Ann. Code 1892, § 2389, making provisions for drawing jurors directory. Cook v. State [Miss.] 43 S 618.

7, 8. Cook v. State [Miss.] 43 S 618.

9. Under Mills' Ann. St. § 2613, providing that venires shall be served by sheriff, or, if disqualified, by coroner, special venire summoned by bailiff held void. Burnside v. People [Colo.] 90 P 97. Writ for special venire, directed to sheriff or any constable of county, need not be served entirely by sheriff, but part may be served by constable. Hull v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 772, 100 SW 403.

10. Where deputy sheriff had been duly appointed and sworn, fact that his commission had not been filed held not a ground for challenge to special venire summoned by him. Smith v. People [Colo.] 88 P 1072.

11. Though officer summoning talesmen was not sworn in accordance with law, the irregularity is not available after trial, it not appearing that appellant did not know thereof at the time. San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 18 Tex. Ct. Rep. 978, 101 SW 554.

12. State v. Barber [Idaho] 88 P 418. Fact that sheriff was related to accused held no ground of objection to talesmen summoned by deputy under immediate orders of the court, the sheriff being absent and taking no part therein. Freeney v. State [Ga.] 59 SE 788.

13. Rev. St. § 1932, held repealed by Act 135, p. 216, of 1898. State v. Armstrong, 118 La. 480, 43 S 57.

14. Fact that jurors were drawn from hat instead of from box as required by statute held no ground for quashing panel in absence of showing of fraud intended to prejudice accused. Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879.

15. Under Code Cr. Proc. 1895, arts. 682, 683, providing that, when parties have announced ready for trial in criminal action less than capital, clerk shall write names of regular jurors for week on slips and place in box from which trial jury shall be drawn, it is reversible error to prepare list from box before case is called. Adams v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 735, 99 SW 1015.

16. State v. Freeman, 119 La. 663, 44 S 334; Tankersley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 92, 101 SW 234.

17. Where jurors are prominent men and well known to counsel, held not an abuse to refuse continuance longer than until 10 o'clock next day for investigation. Imboden v. People [Colo.] 90 P 608.

18. Action thereon will not be inquired into in absence of proof of prejudice. State v. Laborde [La.] 45 S 38.

19. It is no cause of challenge that some of the jurors had served on the trial of another jointly indicted, which case involved same witnesses and evidence. Paulk v. State [Ga. App.] 58 SE 1109. Where accused moves to quash panel because prejudicial newspaper account of crime had appeared since impaneling, but does ask privilege of examining individual jurors, motion is properly overruled. State v. Crane, 202 Mo. 54, 100 SW 422. Fact that some of jurors summoned did not appear is no ground for quashing special venire, though their absence was not explained and forfeitures were not issued against them. Young v. State [Ala.] 43 S 100. Where colored persons are discriminated against in summoning of a venire, array may be challenged. Montgomery v. State [Fla.] 42 S 894. Where solicitor for state said: "If any member of the jury had formed or expressed the opinion that the prisoner was not guilty, to let it be known, no juror answering thereto, the prisoner thereupon admits the cause as a challenge to the array," held not a challenge to the array. State v. Walker [N. C.] 59 SE 878.

20. Motion to quash venire made before entering into trial is timely under § 16, Act No. 135, p. 224, of 1898. State v. Bradley [La.] 45 S 120. Challenge to panel should precede poll challenges, and if not so interposed is waived. Eichman's Committee v. South Covington & C. St. R. Co., 31 Ky. L. R. 880, 104 SW 316. Where jury is sworn without objection, accused waives all irregularities in manner and method of selecting panel known at the time. Delmont v. State [Wyo.] 88 P 623.

21. Act of court in resetting case not tried during jury week and ordering sheriff to summon jury to try case held no ground for challenge to array under Rev. St. 1895, art. 3202. Hayward Lumber Co. v. Cox [Tex. Civ. App.] 19 Tex. Ct. Rep. 820, 104 SW 403. Only grounds of challenge to civil panel in California are material departures in draw-

(§ 8) *B. Challenge for cause.*See 8 C. L. 629—Challenge for cause may be expressly waived by stipulation,[22] or it may be waived as to known disqualifications,[23] or such as could have been ascertained by reasonable examination [24] by failure to object [25] at the proper time.[26] A challenge must be sufficient to disclose the ground thereof.[27]

Right to list of jurors See 8 C. L. 630 from which the trial jury is to be selected [28] is controlled largely by statute.[29] While the names of jurors drawn but not served need not be placed on the list,[30] the placing of them thereon does not vitiate the panel.[31]

(§ 8) *C. Peremptory challenges and standing jurors aside.*See 8 C. L. 630

*Peremptory challenges.*See 8 C. L. 631—The right to challenge peremptorily is absolute [32] and exists only by statute.[33]

*Number allowed.*See 8 C. L. 631—The number of peremptory challenges to which a party is entitled is statutory, and usually dependent upon the punishment which may be inflicted.[34] Where separate actions are consolidated merely for convenience but are so far distinct as to require separate verdicts, each party is entitled to the same number of challenges as if they were not consolidated,[35] although joint parties are usually entitled in the aggregate only to the number allowed to a single party.[36] A party may waive his right to the statutory number,[37] but the

ing and returning jury, and complaint cannot be made that jurors were from expired panel. People v. Collins [Cal. App.] 92 P 513.

22. Oral stipulation in open court to waive challenge for implied bias does not apply to subsequent trials. Multnomah County v. Willamette Towing Co. [Or.] 89 P 389.

23. To justify court in sustaining motion for new trial because of incompetency of juror, it must appear that accused and his counsel were ignorant of the incompetency at time accused made his challenges. State v. Mathews, 202 Mo. 143, 100 SW 420. Where on his voir dire juror clearly disclosed his state of mind, conviction will not be reversed because of prior opinion. Clefford v. People, 229 Ill. 633, 82 NE 343.

24. Failure to ask juror direct question as to whether he had formed or expressed an opinion as to guilt of accused does not waive his incompetency in that respect where he was asked tantamount questions. Dennis v. State [Miss.] 44 S 825. Record held not to show sufficient diligence to justify reversal on ground that juror was related to one of plaintiff's attorneys, and that attorney was to receive portion of land recovered. Cowan v. Brett [Tex. Civ. App.] 16 Tex. Ct. Rep. 776, 97 SW 330.

25. Juror accepted without challenge is presumed qualified. State v. Megorden [Or.] 88 P 306.

26. Laws 1905, p. 176, §§ 10, 11, 16, prescribing what persons shall not be permitted to serve and declaring that statute is mandatory, does not repeal Rev. St. 1899, § 3763 (Ann. Stat. 1906, p. 2095), hence objection that juror cannot read or write as required by former act cannot be raised after jury is sworn. Orr v. Bradley [Mo. App.] 103 SW 1149. Objection that juror, though resident of county and otherwise qualified, lived outside territorial jurisdiction of court and within that of special court created for portion of county, is too late when made on motion for new trial. Walker v. State [Tenn.] 99 SW 866.

27. General challenge for cause together with examination held sufficient to show that it was based on juror's inability to read, as required by Code, § 332. Harris v. Moore, 134 Iowa, 704, 112 NW 163.

28. List headed, "Petit jurors for Monday, Oct. 15, 1906," is sufficient, since defendant is presumed to know that jurors are drawn for different weeks of term and not for different days, and hence that list was for week beginning on Oct. 15. State v. Jones, 118 La. 369, 42 S 967.

29. List of tales jurors summoned by sheriff need not be served on accused two days before trial as in case of venires drawn by jury commission. State v. Laborde [La.] 45 S 38. Failure to furnish accused with jury list before arraignment, as required by Mills' Ann. St. § 1460, held not ground for reversal of conviction in absence of showing of prejudice. Imboden v. People [Colo.] 90 P 608. List being furnished before trial held under facts, no prejudice being shown. Id.

30. Harris v. State, 144 Ala. 61, 40 S 571.

31. It appearing that they could not be found in county. Young v. State [Ala.] 43 S 100.

32. May be exercised on mere caprice. People v. Helm [Cal.] 93 P 99.

33. North American Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 NE 388.

34. Under Act No. 135, p. 223, of 1898, § 14, where punishment may be at hard labor for more than 12 months, state has six and accused twelve peremptory challenges. State v. Caron, 118 La. 349, 42 S 960. Where accused had previously served term in penitentiary for burglary and larceny, he was punishable on second conviction of burglary by life imprisonment, hence entitled to 20 peremptory challenges under Rev. St. 1899, § 2619 (Ann. St. 1901, p. 1553). State v. Yandell, 201 Mo. 646, 100 SW 466.

35. Butler v. Evening Post Pub. Co. [C. C. A.] 148 F 821.

36. Statute allowing three peremptory challenges to each side. North American

failure of the state to use its full number in the city court of Jeffersonville does not entitle the accused to use the same.[38]

Time for challenge. See 8 C. L. 631—A juror may be peremptorily challenged until accepted by both sides,[39] but not thereafter,[40] except in the discretion of the court.[41]

(§ 8) *D. Examination of jurors and trial and decision of challenges.* See 8 C. L. 632—In some states, upon request,[42] the court is required to put certain statutory questions or their equivalents.[43] In Kansas a summary hearing on questions of fact raised by challenges is prescribed by statute.[44] Courts should be liberal in excluding challenged jurors.[45]

Scope of examination. See 8 C. L. 632—The scope of examination rests largely within the discretion of the court.[46] In an action for injuries to a servant, jurors may be examined as to their connection with any employer's casualty insurance company,[47] but such examination must be prosecuted in good faith.[48] Jurors may be questioned as to any prejudice [49] or opinion [50] which may prevent a fair and impartial trial.

Review of trial of challenges. See 8 C. L. 633—The right of review is largely regulated by statute,[51] but generally only such objections as are made below can be urged

Restaurant & Oyster House v. McElligott, 227 Ill. 317, 81 NE 388. Under Code, art. 51, § 13, providing that in civil cases list of jurors furnished the parties shall contain 20 names, and that each party may strike four therefrom, remaining 12 to constitute jury, individual members of a party are not each entitled to strike four names. Diamond State Tel. Co. v. Blake [Md.] 66 A 631. Under express provisions of statute where several defendants are tried together on misdemeanor charges, they are entitled to only three peremptory challenges among them. Wilcox v. U. S. [Ind. T.] 103 SW 774. Where M., as administrator, was made codefendant in action brought by himself and another as executors, he cannot as defendant, over objection of his codefendants, challenge jurors passed by plaintiffs. Medlin v. Simpson, 144 N. C. 397, 57 SE 24.

37. Where panel of qualified jurors from which trial jurors are to be selected is required to equal number of peremptory challenges and 12 additional, and accused accepts panel of 30 drawn on assumption that he has 12 peremptory challenges, he waives right to 20 challenges. State v. Yandell, 201 Mo. 646, 100 SW 466.

38. Under Acts 1905, p. 248, fixing number of peremptory challenges in city court of Jeffersonville. Epps v. State [Ga. App.] 58 SE 381.

39. Had not been accepted by defendant. State v. Cornelius, 118 La. 146, 42 S 754.

40. Cagle v. State [Ala.] 44 S 381. Cannot be peremptorily challenged by state, especially where no reason for untimely action is shown. Andrews v. State [Ala.] 44 S 696.

41. Court in homicide case may permit state to peremptorily challenge accepted juror. Carr v. State [Ark.] 99 SW 831.

42. Not required in absence of motion. Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626. One charged with misdemeanor may have jurors tested if he makes proper request before jury is sworn. Jacobs v. State, 1 Ga. App. 519, 57 SE 1063.

43. Where in misdemeanor prosecution challenge to poll is properly made, court may ask or cause to be asked statutory questions prescribed for use in trial of felonies or such other question as will test impartiality. Jacobs v. State, 1 Ga. App. 519, 57 SE 1063. Where juror stated that he had never been indicted, not error to refuse to ask whether he had been indicted within last 12 months, which fact would disqualify. Gregory v. State [Ala.] 42 S 829.

44. Trial provided by Gen. St. 1901, §§ 5647, 5648, of a challenge to juror for cause, is a summary hearing on questions of fact, and decision thereon is analogous to finding of fact on a motion. State v. Smith, 74 Kan. 383, 85 P 1020, 89 P 21. Rule that finding will not be disturbed if there is any supporting evidence does not obtain. Id.

45. Where answers are conflicting. People v. Ryan [Cal.] 92 P 853.

46. Cross-examination. State v. Cornelius, 118 La. 146, 42 S 754. On trial for homicide, fact that case arose out of violations of local option law, and that certain witnesses for prosecution were adverse to accused because of previous local option cases, does not entitle accused to examine jurors as to how they voted on the local option question to enable him to exercise peremptory challenges. Yardley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 759, 100 SW 399.

47. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577.

48. Examination of defendant's attorney as to casualty insurance held not shown to be in bad faith. Granrus v. Croxton Min. Co., 102 Minn. 325, 113 NW 693.

49. In prosecution for homicide caused by spring gun, defendant may examine jurors as to prejudice against one using such guns. State v. Marfaudille [Wash.] 92 P 939.

50. Where juror states that he has opinion touching guilt of accused of another murder, he may be asked whether he believes him guilty thereof, and whether, if so, he had formed adverse opinion in present case. People v. Helm [Cal.] 93 P 99.

51. Under Ky. Cr. Code Prac. § 281, court of appeals cannot review ruling of circuit court in refusing to set aside indictment because of alleged race discrimination in selecting of grand jurors. Miller v. Com. [Ky.] 105 SW 899.

on appeal.[52] The court being vested with a broad discretion in passing on the fitness of a jury, his decision will be reversed only in case of abuse,[53] but where a rejected juror serves without the knowledge of the party or his counsel, a new trial will be granted.[54]

Improper overruling or sustaining of a challenge as a ground for reversal. See 8 C. L. 633—An improper ruling will work a reversal only upon a showing of prejudice,[55] and hence no error can be predicated upon the overruling of a challenge where such juror is thereafter exeluded,[56] or could have been peremptorily challenged,[57] or who votes in favor of the challenger.[58] Since litigants are bound to use their peremptory challenges to exclude objectionable jurors, the jury is conclusively presumed acceptable if any challenges remain.[59] Some states hold that not only must the peremptory challenges be exhausted, but an objectionable juror must thereafter be called.[60] Failure to exercise peremptory challenges does not preelude a review of rulings on challenges to the array.[61]

§ 9. *Talesmen, special venires and additional jurors.* See 8 C. L. 633—Where through inadvertenee of the eourt,[62] as distinct from willful action,[63] or for any reason,[64] the jury eommissioners fail to seleet regular jurors, or where the regular panel is quashed[65] or is waived,[66] the court is usually authorized to summon a

52. Objection to jury list served, based upon small number present for duty. State v. Petit, 119 La. 1013, 44 S 848.

53. Exclusion of juror because of opinion State v. Norman [Iowa] 113 NW 340. Decision on conflicting answers is conclusive. People v. Ryan [Cal.] 92 P 853. Finding as to impartiality based on conflicting statements. People v. Collins [Cal. App.] 92 P 513. Where juror was sworn, after stating that he had formed and expressed no opinion, and affidavits stating that juror had expressed adverse opinion were filed, which affidavits were denied by juror, court's refusal to excuse will not be reversed. Gregg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 89, 100 SW 1161. Finding of court that juror is not prejudiced is conclusive on writ of error under Mills' Ann. St. § 2592, except in case of gross abuse of discretion. Imboden v. People [Colo.] 90 P 608. Supreme court will reverse where court manifestly erred in holding juror competent. Dennis v. State [Miss.] 44 S 825. Evidence held insufficient to sustain finding that juror was unbiased. Id.

54. Sherman v. State [Ga. App.] 58 SE 393.

55. State v. Smith, 74 Kan. 383, 85 P 1020, 89 P 21. Exclusion of juror not ground for reversal unless unsatisfactory jury is thereafter impaneled. State v. Norman [Iowa] 113 NW 340. Excusing of juror after acceptance on account of sickness in family held not prejudicial where court allowed extra peremptory challenge. State v. Fielding [Iowa] 112 NW 539. Each party to civil suit is entitled to panel of 24 impartial men from which to select jury, and refusal to strike incompetent man and to fill his place is reversible error. Atlantic Coast Line R. Co., v. Bunn [Ga. App.] 58 SE 538. Where sufficient number were left on venire of grand jurors to complete panel, defendant cannot complain that minor and four others were excused by judge and that one failed to appear, leaving only 13 members. State v. Jones, 118 La. 369, 42 S 967.

56. Record failed to show that juror sat. Furlong v. American Central Fire Ins. Co. [Iowa] 113 NW 1087.

57, 58. Williamson v. St. Louis Transit Co., 202 Mo. 345, 100 SW 1072.

59. Reisch v. People, 130 Ill. App. 164; Harris v. Moore, 134 Iowa, 704, 112 NW 163; State v. Fielding [Iowa] 112 NW 539; Furlong v. American Central Fire Ins. Co. [Iowa] 113 NW 1087; Medlin v. Simpson, 144 N. C. 397, 57 SE 24.

60. State v. Fielding [Iowa] 112 NW 539; Pearce v. Quincy Min. Co., 149 Mich. 112, 14 Det. Leg. N. 367, 112 NW 739; San Antonio Trac. Co. v. Davis [Tex. Civ. App.] 18 Tex. Ct. Rep. 978, 101 SW 554. Must not only show that an objectionable juror was called but that he was not impartial. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Where party whose peremptory challenges are exhausted accepts jurors thereafter empaneled without challenge, erroneous overruling of challenges will be deemed harmless, as jurors are presumed qualified. State v. Megorden [Or.] 88 P 306. **Contra.** People v. Helm [Cal.] 93 P 99.

61. Jury unlawfully summoned. State v. Barber [Idaho] 88 P 418.

62. Under Code Crim. Proc. 1895, § 695, court could direct summoning of designated number of persons. Hurt v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 159, 101 SW 806.

63. Statute authorizing selection of talesmen where, through inadvertence or accident, jury commission had failed to select regular jurors, does not authorize summoning of talesmen where judge had instructed commissioners not to select jury for that week. Bickham v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 77, 101 SW 210.

64. Where new term of court followed immediately upon close of another and no jury commissioners had been appointed, court was authorized to order sheriff to summon a jury, under Mansf. Dig. § 4003 (Ind. T. Ann. St. 1899, § 2683). Burch v. U. S. [Ind. T.] 104 SW 619.

65. Where regular panel of petit jurors is quashed, district court may, under § 1681,

special venire, talesmen,[67] or additional jurors,[68] but he must do so in the manner prescribed by statute.[69] The court may order a special panel before trial where he has reason to believe that regular panel will prove insufficient.[70] In a criminal case in Texas, the accused is entitled to a jury drawn from a special venire unless he waives the right,[71] and after the regular special venire is exhausted, the court cannot over his objection draw another venire from the special venire list,[72] but may summon talesmen.[73] Where, however, a second venire is drawn from the special venire list, the names previously drawn need not be replaced.[74]

§ 10. *Special and struck juries and juries of less than twelve.*[See 8 C. L. 635]

§ 11. *Swearing.*[See 8 C. L. 635]

§ 12. *Custody and discharge of jurors and jury.*[75]

§ 13. *Compensation, sustenance, and comfort of jurors.*[See 8 C. L. 635]

JUSTICES OF THE PEACE.

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§ 1. *The office.*[See 8 C. L. 635]—An election to fill positions resulting from a redistricting may be held at a time when the redistricting statute has not yet taken effect.[76] In case of annexation the justice may perform his duties until the end of his term.[77] Constitutional provisions as to municipal "home rule" may not pre-

Cobbey's Ann. St. 1903, direct sheriff to summon 24 qualified jurors from county to serve for term. Russell v. State [Neb.] 110 NW 380.

66. Where party consents to set case for trial at time when counsel knew that trial must be before picked up jury, he waives right to trial before regular jury for the week. Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 18 Tex. Ct. Rep. 75, 99 SW 1052.

67. Judge of criminal court. Johnson v. State [Fla.] 44 S 765.

68. Where court discharged jury drawn and sworn because of failure to file certified copy of order changing venue, which left court without jurisdiction, court was authorized under Code Civ. Proc. §§ 1058, 1059, to draw additional jurors to constitute new jury, such jury not constituting a new panel to be drawn as provided by §§ 1042, 1043. People v. Neff, 106 NYS 747.

69. Special venire in homicide case drawn out of list of regular jurors for term at preceding term is drawn in accordance, with law. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 SW 1059. Under § 11, Act No. 135, p. 222, of 1898, judge may order sheriff to summon jurors from parts of parish remote from scene of crime. State v Laborde [La.] 45 S 38. Under Laws 1906, p. 532, § 156, where judge at special term exhausts panel, he should draw from wheel, and if, after reasonable effort, jury cannot be thus obtained in county, he may, under Crim. Code, § 194, summon jury from adjoining county. Commonwealth v. Carnes, 30 Ky. L. R. 506, 98 SW 1045.

70. Accused cannot challenge same as premature and made in his absence and without his consent. Scoville v. State [Ark.] 105 SW 72.

71. Accused does not waive his right by refusing to make call therefor prior to trial upon demand of court. Murdock v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 588, 106 SW 374.

72. Gregg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 89, 100 SW 1161.

73. Blackwell v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 766, 100 SW 774.

74. Gen. Laws 29th Leg. p. 18, c. 14, art. 647a. Saye v. State [Tex. Cr. App.] 99 SW 551.

75. See 6 C. L. 331. See, also, Trial, 8 C. L. 2161, as to custody and conduct; New Trial and Arrest of Judgment, 8 C. L. 1153, as to misconduct as ground for new trial.

76. At regular election pursuant to constitution and general statutes. Maxey v. Powers, 117 Tenn. 381, 101 SW 181.

77. Rev. St., § 568, as amended in 91 O. L. 78, and in 92 O. L. 60, by reason of the exception in favor of certain counties, is unconstitutional and void, and the repealing sections are also inoperative. Section 568, as originally enacted in 51 O. L. 405, is still in force. By reason of annexation and by force of the last part of § 568, a justice of

vent the state from establishing justices' courts in cities,[78] but cities cannot be required to furnish offices for such justices.[79] Courts will take judicial notice of a justice's term of office.[80] A justice is sometimes allowed to hold another office,[81] and other officers are sometimes ex officio justices,[82] but in some states the acceptance of an office in another department of the state vacates the office of justice,[83] or vice versa.[84] Justices of the peace, when clothed with judicial power, are courts from which removal may be had to the Federal courts.[85] There is no such office as clerk of a justice court.[86]

§ 2. *Compensation, duties, and liabilities.*[See 8 C. L. 636]—The legislature may compensate some justices by fees, and others in more populous districts by salaries.[87] A justice will be entitled to his fees though he holds another office.[88] He is not liable for his judicial acts though improper and erroneous.[89] The sureties on his bond are not liable for acts not done in his official capacity.[90] A justice may be indicted [91] or removed for misconduct in office.[92]

the peace is authorized to perform the duties of his office in the township to which the territory in which he resides has been annexed, but only until the end of the term of three years for which he was elected. State v. Mackelfresh, 9 Ohio C. C. (N. S.) 324. In such a case no new office of justice of the peace is created for which a successor should be elected and qualified; it is only by application to and determination by the probate judge of the county, in accordance with the provisions in the first part of § 568, that the number of justices of the peace can be permanently increased. Id.

78. As part of the state system, although the city by charter was authorized under the constitution to provide as to the constitution and jurisdiction of police courts. Graham v. Fresno [Cal.] 91 P 147.

79. Where provision already made for a police court under the charter. Graham v. Fresno [Cal.] 91 P 147.

80. Will refuse a writ directing him to proceed where he is no longer justice. First Nat. Bk. v. Rowland [Tex. Civ. App.] 18 Tex. Ct. Rep. 85, 99 SW 1043.

81. Const. art. 14, § 7, excepts justice from prohibition against holding two offices, and so may be recorder of a city court. State v. Lord [N. C.] 59 SE 656.

82. As mayor of a city. Burgin v. Sullivan [Ala.] 44 S 202. Recorder ex officio justice, held entitled to fees of justice where he heard a warrant made returnable before him by another justice. State v. Lord [N. C.] 59 SE 656. County judge is also the justice of the peace, but in trying cases in the capacity of a justice of the peace, damages cannot be recovered in excess of the jurisdiction of a justice of the peace. Wilson v. White [Neb.] 109 NW 367. Action in probate court within justice of peace jurisdiction. St Louis, etc., R. Co. v. Bradford, 18 Okl. 154, 88 P 1050.

83. Ceased being justice on accepting office of mayor, which belongs to executive department, as the judicial powers of that office were only incidental. State v. Armstrong [Miss.] 44 S 809.

84. County judge vacates his office by accepting office of justice of the peace. State v. Jones, 130 Wis. 572, 110 NW 431.

85. Constitute part of the judicial system. Katz v. Herschel Mfg. Co., 150 F 684.

86. Though a person may be employed by justice to do clerical work, his statements that a case would not be tried will not prevent the entry of a valid judgment, although the party relied on the statement and was absent from the trial. Park v. Callaway, 128 Ga. 119, 57 SE 229.

87. Salaries of justices were fees allowed by law, except in townships having a population of more than 100,000, and less than 300,000, where a salary of three thousand per year was given in lieu of fees. Summerfield v. Dow [Cal. App.] 91 P 156.

88. Recorder ex officio a justice. State v. Lord [N. C.] 59 SE 656.

89. Civil action for damages against mayor, acting as a justice of the peace, for sentencing one to pay a fine for violating a city ordinance. Burgin v. Sullivan [Ala.] 44 S 202.

90. Not liable for moneys collected without suit as he is only authorized to receive money on claims in suit. State v. Wells [W. Va.] 59 SE 743.

91. An indictment charging that the defendant **engaged in the business of a collecting agency,** which he was prohibited from doing by reason of his office of justice of the peace, does not charge an offense under § 6909, Revised Statutes, inasmuch as there are no common-law offenses in Ohio, and there is no statute prohibiting a justice of the peace from engaging in said business, nor does his oath of office amount to such a prohibition. State v. Mackelfresh, 5 Ohio N. P. (N. S.) 43.

Taking illegal fees: Where illegal fee has been charged, tender of excess does not release from penalty prescribed by Act of May 26, 1897, P. L. 100. Whitmore v. Craig, 32 Pa. Super. Ct. 292. Where there is no dispute as to taking of the fee or the amount, legality thereof is for the court and its reasonableness has nothing to do with it. Id. Legal fee for drawing affidavit required by Act of March 25, 1903, P. L. 61, and administering the oath thereto, is 25 cents and a charge of 50 cents is illegal. Id. Fact that justice thought fee correct and had no intention to extort is no defense in prosecution under Act of May 26, 1897, P. L. 100, for taking an illegal fee (Id.), nor is a defense that he charge less than he might for another item (Id.).

92. Committed persons charged with an offense until the day following, and then

§ 3. *Civil jurisdiction.*[See 8 C. L. 637]—Justices have limited jurisdiction and only such powers as are conferred by statute.[93] It is essential that the jurisdictional facts appear of record, for they will not be presumed.[94] In an action on a justice's judgment, it is necessary to prove that the justice had jurisdiction over the subject-matter.[95] The consent of the parties cannot give a justice jurisdiction of a subject-matter where he has none by law,[96] but within the limits of his jurisdiction he is free from the control of any other court.[97] His jurisdiction is sometimes limited to the township,[98] and he has no right to preside elsewhere except in special cases,[99] though statutes sometimes permit a justice of another district to act for an absentee.[1] There must be proper service [2] of the summons by a competent person,[3] though slight defects in the copy of the summons left with defendant is not jurisdictional.[4] In suits against nonresidents the justice has jurisdiction only within the county and town where the property is attached.[5] When jurisdiction is dependent on an attachment the affidavit must be sufficient,[6] and a bond [7] and proper inventory must be filed.[8] In Georgia a justice may issue attachments returnable before a superior court.[9] A justice may issue a distress warrant for rent,[10] and he has exclusive juris-

discharged without entering his reasons, presented falsified bills for services, did not keep a record in his criminal docket nor enter cases, but hired another to write up entries in order to corroborate his bills to town. In re Whyard, 106 NYS 400.

93. Statutes must be construed liberally to effect their object. State v. Houston [Mont.] 92 P 476.

94. In summary proceeding the description of petitioner's interest as landlord is insufficient. Matthews v. Carman, 107 NYS 694.

95. Foreign judgment. Bick v. Lanham, 123 Mo. App. 268, 100 SW 530.

96. Western Union Tel. Co. v. Cooper [Ga. App.] 58 SE 517. Consent to trial of case in another town. Eisenberg v. Lape, 52 Misc. 329, 103 NYS 169.

97. Justice having authority to discharge an imprisoned debtor, the circuit judge might not in advance, on an agreed case, rule whether defendants had a right to apply for a discharge. McGovern v. Hoffman [Ky.] 105 SW 458.

98. Burns' Ann. St. 1901, § 1498, but where nonresident defendant maintained an office in the township, service might be made on an agent therein. Worthington v. Qualkinbush [Ind. App.] 82 NE 534.

99. Unless justice or notary of district is disqualified or parties consent, otherwise the judgment is a nullity. Simpkins v. Hester [Ga. App.] 59 SE 322. He cannot try a case in an adjoining town before a jury even with the consent of the parties. Eisenberg v. Lape, 52 Misc. 329, 103 NYS 169.

1. Statute providing that where justice is absent the nearest justice may perform his duties only authorizes justice to act in his own precinct and not in that of the absent justice. Stewart v. Smallwood [Tex. Civ. App.] 18 Tex. Ct. Rep. 502, 102 SW 159.

2. A constable's return that he served the summons on "the within named defendant" naming another, is insufficient. Morse v. McQuade, 54 Misc. 166, 105 NYS 862.

3. Mere showing of service by a private person was insufficient. Marr v. Cook, 147 Mich. 425, 111 NW 116.

4. Last figure in year of return day was omitted and defendant ignored the summons. Lenham Mercantile Co. v. Herke, 105 NYS 472.

5. Situs of a judgment is the place of its record entry. Gilman v. Heitman [Iowa] 113 NW 932. The amendment of § 584, Revised Statutes, passed April 18, 1894 (93 O. L. 146), excepting Cuyahoga and Franklin counties from the general provisions of said section as to the jurisdiction of justices of the peace in said counties, as well as in all the counties of the state, have jurisdiction coextensive with their counties "to issue attachments and proceed against the goods and effects of debtors in certain cases." Oakman v. Rose Furniture Co., 10 Ohio C. C. (N. S.) 247.

6. One stating conclusions and not facts is insufficient. Morse v. McQuade, 54 Misc. 166, 105 NYS 862. Under § 6489, Revised Statutes, which is amendatory of § 28 of Justice's Act (S. & C. 776), a foreign corporation may be proceeded against before a justice of the peace the same as a domestic corporation, but subject to the same statement in the affidavit that such corporation has no officer in the county upon whom summons may be served or no place of doing business within the county. Cartmell v. Wurlitzer, 5 Ohio N. P. (N. S.) 604. In a proceeding in attachment before a justice of the peace, a domestic corporation may be proceeded against either as a corporation or as a nonresident of the county in which the affidavit is filed, but in either case it must appear from the affidavit that such corporation has no officer in the county upon whom summons may be served, or no place of doing business within the county. Id.

7. Otherwise the justice does not obtain jurisdiction. Marr v. Cook, 147 Mich. 425, 111 NW 116.

8. "One car load household furniture" is not a sufficient inventory and justice had no jurisdiction, though another gave a bond and received the property. Knack v. Berlin [Mich.] 14 Det. Leg. N. 754, 114 NW 342.

9. Against nonresident for a sum exceeding $100 returnable before the city court. Howard Supply Co. v. Bunn, 127 Ga. 663, 56 SE 757.

diction of suits for recovery of leased premises.[11] A justice has no equity jurisdiction but he may consider a separate legal question,[12] and equitable defenses may be interposed,[13] or the principles of equitable estoppel may be involved.[14] He may entertain suits brought by a receiver under a chancery court,[15] also suits against a carrier for overcharge,[16] or for failure to deliver goods in time.[17] Such action must be brought in the township where the injury happened,[18] but a justice has no jurisdiction of suits against a carrier for failure to perform a public duty,[19] or of suits by a sendee for failure to deliver a telegram.[20] A justice may lose jurisdiction even after once acquired, as by failing to proceed according to statute,[21] or by unauthorized adjournments.[22]

Residence determining jurisdiction.[See 8 C. L. 637]—Only the justice of the district of defendant's residence has jurisdiction;[23] thus a suit on a judgment must be brought where defendant resides, not where the judgment was rendered.[24] Sometimes the justice of an adjoining town also has jurisdiction.[25] If defendants are nonresidents of the state, suit may be brought in any county or township where found,[26] or where an office or agency is maintained.[27] Foreign corporations may be sued in the county where the cause of action arose or where plaintiff resides.[28] Before the suit can be dismissed where the want of jurisdiction does not appear on the face of the record,[29] the defendant must establish the material averment of his plea of privilege.[30]

The amount in controversy.[See 8 C. L. 638]—A justice has no jurisdiction[31] where

10. Unless amount claimed exceeds $100, he may try any issue made by counter affidavit. Dean v. Donaldson [Ga. App.] 58 SE 679.

11. Where rental does not exceed $50 a month. Campbell v. Hart, 118 La. 871, 43 S 533.

12. Under constitutional limitation, Const. art. 8, § 21. Anderson v. Red Metal Min. Co [Mont.] 93 P 44.

13. Action to recover possession of leased land, lessee may plead right to demand a renewal. Barbee v. Greenberg, 144 N. C. 430, 57 SE 125.

14. Ultra vires advertising by a corporation. Kansas City Star Pub. Co. v. Standard Warehouse Co., 123 Mo. App. 13, 99 SW 765.

15. Suit against a stockholder for dividends paid while the bank was insolvent. Kretschmar v. Stone [Miss.] 43 S 177.

16. Claim for overcharges of freight may be sued on in justice's court as open account under Civ. Code 1895, § 4130. Seaboard Air-Line R. v. Coursey, 1 Ga. App. 662, 57 SE 968.

17. To determine if in jurisdiction must look not only at pleading but at summons and proof. Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 SE 1066.

18. Otherwise in an action for destruction of crops caused by stock escaping from a right of way. Rosentingle v. Illinois S. R. Co., 122 Mo. App. 492, 99 SW 788.

19. Failure to promptly furnish cars to move freight. Savannah, etc., R. Co. v. Snider, 1 Ga. App. 14, 57 SE 898.

20. For a tort arising from breach of a legal duty. Western Union Tel. Co. v. Cooper [Ga. App.] 58 SE 517.

21. Failure to enter judgment at the close of the trial. State v. Houston [Mont.] 92 P 476.

22. After joinder of issue on account of failure to serve a bill of particulars. Smith v. Denton, 103 NYS 882. Where may adjourn for not more than eight days, an adjournment of seven days, followed by justice holding the case open seven days longer on his own motion, will deprive him of jurisdiction. Sherer v. Cannon, 104 NYS 709. Where no complaint on the return day, there was nothing before the justice which he could adjourn. Id.

23. But another justice may transfer an attachment to the proper justice. Rhodes, Dolvin & Co. v. Continental Furniture Co. [Ga. App.] 58 SE 293.

24. Defendant had changed his residence to another county. Smith v. Eubanks, 89 Miss. 838, 43 S 81.

25. Where the city of Lockport lies entirely within the town of Lockport, action cannot be maintained before a city justice against a resident of a town adjoining the town but not the city of Lockport. Sutphen v. Clark, 104 NYS 129.

26. May sue in township of residence, though service made in another township in the same county. Jonas v. Weires, 134 Iowa, 47, 111 NW 453.

27. Nonresident owned a farm and maintained an office thereon, and service on agent therein was good. Worthington v. Qualkinbush [Ind. App.] 82 NE 534.

28. As required to maintain a process agent in the state. Allen-Fleming Co. v. Southern R. Co. [N. C.] 58 SE 793.

29. Parties did not reside in city adjoining that in which suit brought. Appleman v. Hahn, 149 Mich. 245, 14 Det. Leg. N. 450, 112 NW 917.

30. If it did not appear that the place where the contract was performed was not in the county, that was defendant's neglect and did not prevent jurisdiction. Houston Rice Mill Co. v. Wilcox [Tex. Civ. App.] 17 Tex. Ct. Rep. 1017, 100 SW 204.

31. Sought to recover the value of prop-

the complaint demands more than the jurisdictional amount.[32] If each separate cause of action is within the jurisdiction of the justice, it is immaterial that the aggregate is beyond.[33] The amount claimed inclusive of interest is the criterion,[34] but the plaintiff may sue for less than his full claim in order to bring his case within the jurisdiction of the justice.[35] A verdict in excess of the jurisdictional amount may be reduced.[36] A plea cannot be entertained which involves amounts outside of a justice's jurisdiction.[37] Statute requiring consolidation of independent demands susceptible thereto has no application where the consolidation would deprive the justice of jurisdiction.[38] The limit as to amount in controversy applies also on appeal.[39] The appellate court may allow amendments to the complaint increasing the sum demanded, but not so as to exceed the jurisdictional amount of the justice.[40]

Title to realty.[See 8 C. L. 639]—A justice has no jurisdiction of summary proceedings except where there is the relation of landlord and tenant.[41] A mere claim of title, however, will not oust him of jurisdiction.[42] He has no jurisdiction to declare a lien on a coal mine,[43] or of a suit to recover earnest money on account of breach of contract to convey land.[44] Where title to realty is involved the justice may send the case to a higher court on the filing of a bond.[45] This must appear on plaintiff's own showing or by verified answer,[46] and application must be made for removal at the earliest opportunity.[47]

erty of $500 which had been levied on as the property of another. Weisenborn v. Evans, 30 Ky. L. R. 781, 99 SW 629. Suit for $200 on a promissory note, and consent therein, not effectual to give the justice jurisdiction. Leathers v. Geitz [Iowa] 112 NW 191. Fact that plaintiff sought to recover $420 for same services of school board held not to show that he reduced claim to $300 for sole purpose of giving jurisdiction, he never having demanded more of defendant, and though such amount was asked on advice of counsel. Givens v. Ledebrink, 31 Pa. Super. Ct. 298. Record of alderman in city of Pittsburg held not to show a "case of real contract, where the title to lands or tenements may come in question" of which court has no jurisdiction, so as not to support action of scire facias. Mellon v. Sawyer, 31 Pa. Super. Ct. 416. The jurisdiction of a justice is determined by the amount demanded. Young v. Mueller Bros. Art & Mfg. Co., 124 Ill. App. 94.

32. Complaint asked $300, where jurisdictional amount was $200, and a judgment for $100 was reversed. Cook v. Cook, 107 NYS 384.

33. Suit on four notes of $200 each, secured by vendor's lien on personal property, and justice might order sale of property, though the amount was beyond his jurisdiction. Smith v. Davis [Ark.] 103 SW 746.

34. Claim of $99.99 with interest for 8 days and costs is in excess of jurisdiction. Evans v. Murphy, 133 Iowa, 550, 110 NW 1025.

35. Account showed $132.50 due and below was subtracted $32.50 "written off and unclaimed to bring case within J. P. jurisdiction." Jennings v. Stripling, 127 Ga. 778, 56 SE 1026.

36. On appeal to supreme court. Wilson v. White [Neb.] 109 NW 367.

37. In action on notes for $75, plea that they were part consideration for a piano valued at $280, that the same was worthless, and sought cancellation of notes and the recovery of the amount paid, was in effect for a rescission of a contract for $280, and justice had no jurisdiction though no exception was taken. Cable Co. v. Rogers [Tex. Civ. App.] 99 SW 736.

38. Calverley v. Steckler, 126 Ill. App. 586.

39. Limit was $300, and, on appeal, plaintiff secured a verdict for $302.25, and the judgment was vacated. Smith v. Clark, 38 Colo. 89, 88 P 636.

40. Plaintiff, after appeal from judgment in his favor, may interpose additional claims. Toledo, etc., R. Co. v. Smith, 130 Ill. App. 11.

41. Where mortgagor and mortgagee, or vendor and purchaser, there is the right to account, or an adjustment of equities and proceeding should be dismissed. Hauser v. Morrison [N. C.] 59 SE 693.

42. Must proceed until it is shown by competent evidence that defendant is in possession under bona fide claim of title. Connelly v. Omaha [Neb.] 112 NW 360.

43. Neither was any jurisdiction acquired by circuit court on appeal. Hoye Coal Co. v. Colvin [Ark.] 104 SW 207.

44. Where plaintiff bought land subject to ground rents, on condition that they were original and not subground rents, and on breach he sued to recover earnest money. Legum v. Blank [Md.] 65 A 1071.

45. Failure to give bond precludes defendant from raising question of title before the justice, but on appeal and trial de novo he may raise the question of title. Dreger v. Budde [Wis.] 113 NW 950.

46. Before justice can certify case to district court. State v. Carson Tp. Justice Ct. [Nev.] 89 P 24. In forcible detainer proceedings, mere denial of paragraph of complaint alleging ownership is not enough to justify justice to certify the case. Bonnell v. Gill [Colo.] 92 P 13.

47. May not raise question, after trial on merits and an appeal, that answer showed title to realty was in dispute. Bonnell v. Gill [Colo.] 92 P 13.

Objections to the jurisdiction See 8 C. L. 639 may be made on special appearance,[48] or, where not apparent of record, must be raised by plea or motion to quash.[49] They are not waived by proceeding to trial.[50] Where the justice did not acquire jurisdiction, the judgment may be attacked collaterally.[51]

§ 4. *Procedure in justices' courts.* See 8 C. L. 639—Where no form of procedure is prescribed, the course of the common law must be followed as nearly as possible.[52] The proceedings will be presumed regular except as to matters required to be of record.[53] The defendant is not entitled to a continuance as a matter of right,[54] but it is addressed to the justices' discretion [55] when there is a case before him.[56] It is sometimes provided that the defendant [57] or either party shall bring forward all demands existing at the commencement of the suit which can be consolidated into one action or defense or be debarred,[58] but an action for rent cannot be united with an action against a tenant and sureties on an appeal bond in an unlawful detainer action.[59]

The docket and other records See 8 C. L. 640 need not be technically exact.[60] The statutory requirement that docket entries shall be made at the time is directory only.[61] They may not be varied by parol,[62] but evidence contradicting a docket in anothed action is not necessarily incompetent.[63] The justice of peace is regarded as his own clerk in making the entries on his docket.[64]

Change of venue. See 8 C. L. 641—An action may be tried in the wrong county unless defendant demands a change of venue,[65] and a defendant as to whom the venue is proper cannot complain as to the propriety of venue as to another defendant.[66] The justice to whom a cause is sent shall cause the parties to be notified of the time of trial by notice served as the original summons.[67]

Transfer of cause. See 8 C. L. 641—Where the papers show on their face that the

48. Though no objection was specified, might show no bond filed in the attachment, or that summons was served by a private person. Marr v. Cook, 147 Mich. 425, 111 NW 116.

49. Motion to dismiss ineffectual where facts as to residence of the parties did not appear of record. Appleman v. Hahn, 149 Mich. 245, 14 Det. Leg. N. 450, 112 NW 917.

50. May be urged on appeal that no jurisdiction of the amount in controversy. Leathers v. Geitz [Iowa] 112 NW 191.

51. Jurisdiction founded on the attachment of a judgment which was rendered in another township. Gilman v. Heitman [Iowa] 113 NW 932.

52. Enforcement of mechanics' lien. There must be suit and an attachment against the property. Warner v. Yates [Tenn.] 102 SW 92.

53. Where suit might be brought in adjoining township and no requirement that the reason should be of record, a judgment will be sustained. Jonas v. Weires, 134 Iowa, 47, 111 NW 453.

54. Suit upon an unconditional contract in writing. Williams v. Fain [Ga. App.] 58 SE 307.

55. No abuse to refuse where asked at second term because of unexplained absence of plaintiff. Young v. Darien & W. R. Co., 1 Ga. App. 317, 57 SE 921.

56. Where no complaint filed on return day, there was nothing to adjourn. Sherer v. Cannon, 104 NYS 709.

57. Different from law as to counterclaims in other courts. Walter v. Cox [Mont.] 91 P 1063.

58. But unlawful detainer not a common-law action, and so may sue for rent in a separate action. Mackenzie v. Porter [Colo.] 91 P 916.

59. Were against different parties in different interests. Mackenzie v. Porter [Colo.] 91 P 916.

60. Entry of judgment will be good against collateral attack if it is apparent that a final determination of the action was made. Nelson v. Schmoller [Neb.] 110 NW 658.

61. Summons served but nonappearance not noted, and eight years later a default judgment was entered. Hall v. San Francisco Justices' Ct. [Cal. App.] 89 P 870.

62. Where the docket of a justice of the peace shows that judgment was rendered ten days after the return of the verdict by the jury, parol evidence is not admissible to show that the judgment in fact was rendered immediately upon the return of the verdict. Sigler v. Shaffer, 9 Ohio C. C. (N. S.) 267.

63. Evidence that plaintiff was not drunk was admitted before the introduction of the docket entries showing plaintiff's plea of guilty to drunkenness before a justice. Baltimore, etc., R. Co. v. Twilley [Md.] 67 A 265.

64. Acts in a ministerial capacity. Carter v. Louisiana Purchase Exposition Co., 124 Mo. App. 530, 102 SW 6.

65. Will not dismiss the same. Allen-Fleming Co. v. Southern R. Co. [N. C.] 58 SE 793.

66. Two railroad defendants. Allen-Fleming Co. v. Southern R. Co. [N. C.] 58 SE 793.

67. Where nonresident and not found, may post in the justice's office. Richards v. Heger, 122 Mo. App. 512, 99 SW 802.

justice has not jurisdiction, he may order the proceedings transferred to the proper court.[68] A case may be removed to the Federal courts where there is the proper diversity of citizenship and the value in controversy exceeds $2,000.[69]

Process and appearance.[See 8 C. L. 641]—There must be proper service [70] of the summons returnable in the time prescribed by statute,[71] and a copy of the cause of action must be attached thereto.[72] Defendant may be designated by a fictitious name where his real name is unknown,[73] and subsequently defendant's name in the summons may be amended to conform to the proof.[74] Where technical defects in the summons will be no ground for a reversal.[75] Plaintiff has the burden of proof to sustain his attachment.[76] The provisions for arrest in civil cases do not apply to justices' courts.[77] Defendant may waive the nonservice of process [78] as by a general appearance.[79] There is a common statutory provision that the justice shall wait one hour for the appearance of defendant.[80] Defendant may appear specially to object to irregularities,[81] and where dismissal is refused defendant may proceed to trial without prejudicing his rights on appeal.[82] In cases where there has been no personal service or appearance, failure to continue a case for the statutory time will cause the justice to lose jurisdiction.[83]

Pleadings, issues, and proof.[See 8 C. L. 642]—As written pleadings are not required [84] the pleadings may be oral,[85] but there must be pleadings of some kind.[86] The form is of little consequence so long as the rights of the parties may be ascertained,[87] and a statement of facts is sufficient,[88] but not a mere affidavit of indebted-

68. Affidavit recited the residence of the defendant in another district. Rhodes, Dolvin & Co. v. Continental Furniture Co. [Ga. App.] 58 SE 293.

69. Unlawful detainer wherein amount in controversy exceeded $2,000. Katz v. Herschel Mfg. Co., 150 F 684.

70. Return in summary proceeding insufficient to sustain service by affixing a copy of the precept to the property. Matthews v. Carman, 107 NYS 694. Where it appears that there was an attempt at service and the petitioner for the writ of certiorari was negligent in not learning the particulars of the summons, a writ of certiorari which seeks to review the judgment upon the ground that there was no service of summons is properly quashed. Allegretti v. Stubbert, 126 Ill. App. 171.

71. Moore v. Southern R. Co., 76 S. C. 333, 56 SE 971. Under a statute authorizing the court to shorten the time for return upon a showing that plaintiff is apprehensive of losing his debt, the affidavit must set out facts from which apprehension may be reasonably inferred. Statement that a suit had been brought against plaintiff in another state not sufficient. Id.

72. But the pleading is sufficient if it puts defendant on notice of the character of claim. Georgia, S. & F. R. Co. v. Barfield, 1 Ga. App. 203, 58 SE 236; Southern R. Co. v. Oliver, 1 Ga. App. 734, 58 SE 244.

73. "Italian number 37, whose name is unknown." Coal & Coke R. Co. v. Taylor [W. Va.] 59 SE 941.

74. Name of corporation defendant changed to firm name, and judgment thereon binds partnership property and that of the individual served. Pierce v. Varn, Byrd & Co., 76 S. C. 359, 57 SE 184.

75. Summons undated. Butler Bros. v. Welch, 76 S. C. 130, 56 SE 668.

76. Where the statements of the affidavit for an attachment are denied by the affidavit of the defendant, the burden of proof is upon the plaintiff to substantiate the averments, and where it appears from the original papers transmitted by the justice of the peace that no additional affidavits have been filed by the plaintiff to overcome the affidavit by the defendant, the plaintiff must fail on the burden of proof. Cartmell v. Wurlitzer, 5 Ohio N. P. (N. S.) 604.

77. Connor v. Philo, 117 App. Div. 349, 102 NYS 427.

78. By appearance taking benefit of continuances, appealing, filing appeal bond, and moving to dismiss the same. Donaghy v. McCorkle [Tenn.] 98 SW 1050.

79. Unlawful detainer action. State v. Schweitzer, 131 Wis. 138, 111 NW 219.

80. Does not require him to wait where both parties appear sooner. State v. Schweitzer, 131 Wis. 138, 111 NW 219.

81. An agreemnt for a continuance made before the return day is not a general appearance. Woodard v. Tri-State Mill. Co., 142 N. C. 100, 55 SE 70.

82. Woodward v. Tri-State Mill. Co., 142 N. C. 100, 55 SE 70.

83. In attachment suit, defendant only specially appeared, and as suit was not continued 30 days the justice lost jurisdiction. Knack v. Berlin [Mich.] 14 Det. Leg. N. 764, 114 NW 342.

84. Lafitte v. Vanderwark [Colo.] 92 P 694.

85. Rulings of court thereon can only be reviewed on bill of exceptions. Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134.

86. In suit on note, defendant made no plea but paid money in court, and a judgment against plaintiff for costs was unauthorized. Stanley v. King [Tex. Civ. App.] 17 Tex. Ct. Rep. 940, 101 SW 524.

87. Plaintiff pleaded that he was the owner of rice and that it was converted.

ness.[89] The most liberal interpretation is to be given pleadings,[90] especially in absence of a special demurrer [91] or on general demurrer,[92] or where objection is first made after verdict.[93] Technical pleading [94] or precision in form is not required,[95] and the strict requirements as to pleading special damages are not enforced.[96] It is sufficient if the pleading is intelligible,[97] and informs defendant of the nature of the demand,[98] or puts him on notice of the character of the claim.[99] An informal statement of a material fact is sufficient, but the complete omission to state an essential fact is fatal.[1] Defendant may demur where the statement of facts is insufficient,[2] or where no cause of action at all is stated, but not for mere formal defects.[3] A demurrer is sometimes treated as an exception to the complaint.[4] Where an action is founded on a written instrument the same should be filed,[5] but in a plea of bankruptcy it is not necessary to attach certified copies of the proceedings.[6] The answer in forcible detainer must be one in specific denial.[7] Equitable defenses may be pleaded.[8] Where a complaint was verified, an unverified denial may be stricken out.[9]

Evidence showed that he had a landlord's lien and was sufficient to entitle him to recover its value. Rector v. Orange Rice Mill Co. [Tex.] 18 Tex. Ct. Rep. 487, 102 SW 402.

88. Statement that street railway was indebted to plaintiff for damages, sustained by collision at a specified date and place in breaking a vehicle, for a certain amount, sufficiently charges negligence and is good after judgment. Hall v. St. Louis, & S. R. Co., 124 Mo. App. 661, 101 SW 1137.

89. Must file evidence of debt, statement of account, or other written statement of cause of action. Greenburg v. Massey [Miss.] 43 S 1.

90. Including bill of particulars in a trespass case. Hopkinson v. Conley, 75 Kan. 65, 88 P 549. Action of debt on an account, proof showed an express contract which was held to be the subject-matter from which the debt arose. Chapman v. Conwell, 1 Ga. App. 212, 58 SE 137. Statement that defendant owes plaintiff $10 for a trip to a certain place for the examination of an abstract was sufficient. Moore v. Harmes, 123 Mo. App. 34, 99 SW 764. A plain bill without dollar mark, and another paper stating action on account for same amount, were together held sufficient. Steele v. Ancient Order of Pyramids, 125 Mo. App. 680, 103 SW 108. Statement that for a consideration defendant guaranteed payment of a bill and demand and refusal was good. Great Western Printing Co. v. Belcher [Mo. App.] 104 SW 894.

91. Suit for death benefit due to "sole heir at law." Jackson v. Brothers & Sisters of Promise [Ga. App.] 59 SE 11.

92. Fairly construed statement showed cause of action ex contractu. Jennings v. Stripling, 127 Ga. 778, 56 SE 1026.

93. Statement that plaintiff worked for defendant at so much a day, without giving number of days, was sufficient after verdict. Redel v. Missouri Valley Stone Co. [Mo. App.] 103 SW 568.

94. The summons and proof must also be considered to determine if case is within the jurisdiction of the justice. Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 SE 1066.

95. Sufficient if a person of common understanding may know what was intended. Totman v. Drake, 52 Misc. 60, 102 NYS 379.

96. In action for injury to horse from automobile collision, may recover for amount expended in endeavoring to heal the horse and value of his services while disabled. Long v. Nute, 123 Mo. App. 204, 100 SW 511.

97. State of demand set forth the nature of the claim in a manner not liable to misapprehension. Deyo v. Keighley [N. J. Law] 67 A 347.

98. "A. to B. Dr. to commissions on sales of real estate to Dr. Grove, as per agreement, $75.00," is sufficient to authorize amplifying amendment. Hendrix v. Elliott [Ga. App.] 58 SE 495.

99. Merely alleged goods were damaged by negligence of railroad. Georgia, etc., R. Co. v. Barfield, 1 Ga. App. 203, 58 SE 236; Southern R. Co. v. Oliver, 1 Ga. App. 734, 58 SE 244.

1. In statutory action against railroad for killing stock on account of failure to fence, such failure must be alleged in some manner. St. Louis, etc., R. Co. v. Hoff [Kan.] 92 P 539.

2. Where no demurrer, cannot object on appeal that a complaint on another judgment did not show that jurisdiction was obtained of person or subject-matter. Totman v. Drake, 52 Misc. 60, 102 NYS 379.

3. Firm sued telegraph company for failure to transmit message but did not aver that company was advised that the message was intended for the benefit of the partners. Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134.

4. Grant v. Wyatt, 61 W. Va. 133, 56 SE 187.

5. Action founded on a guaranty endorsed on a bill which was filed. Great Western Printing Co. v. Belcher [Mo. App.] 104 SW 894.

6. This is matter of proof. Hunter v. Lissner, 1 Ga. App. 1, 58 SE 54.

7. Laws 1885, p. 227, § 12, required answers to specifically admit or deny all material facts, and a denial that defendant had forfeited any rights under an option was a mere denial of a conclusion of law. Bonnell v. Gill [Colo.] 92 P 13.

8. In action to recover leased premises, may plead right to a renewal. Barbee v. Greenberg, 144 N. C. 430, 57 S. E. 125.

9. And judgment entered for plaintiff. Seaboard Air-Line R. v. Coursey, 1 Ga. App. 662, 57 SE 968.

The court should be liberal in allowing amendments,[10] even where damages are increased,[11] and this may be permitted though the complaint was not properly verified.[12] The case must come to issue,[13] and jurisdiction is lost by an adjournment thereafter except where it was necessary to procure a material witness.[14] The pleadings must be such as to authorize a judgment.[15] A slight variance between the process and proof is immaterial,[16] but one cannot recover on a different action from that set out in the pleadings,[17] though the justice may permit an amendment on an adjourned day charging cause of action.[18]

Verdict and judgment. See 8 C. L. 644—A verdict will be sustained where the issues were fairly submitted to the jury.[19] Where the jury fails to agree,[20] or where the verdict is invalid, the justice may set the case for retrial.[21] The justice may grant a new trial [22] only within a fixed time from the rendition of the judgment.[23] The same principles apply as govern courts of record.[24] In some states he has no power to grant new trials.[25] The action may be dismissed for the nonappearance of plaintiff,[26] or where the matter appears to be res judicata.[27] The justice may enter a default judgment [28] provided the return shows proper service of summons.[29] This may be done where an answer was stricken out.[30] In case of an unliquidated claim for damages, judgment cannot be rendered without proof.[31] A justice may set aside a de-

10. Where plaintiff had transposed the words "defendant" and "plaintiff" in his statement so as not to state a cause of action, the appellate court held he should have been allowed to amend. Macon, etc., R. Co. v. Calhoun [Ga. App.] 59 SE 327. Action to recover penalty for failure to transport freight amended to show under what statute penalty claimed. Stone & Co. v. Atlantic Coast Line R. Co., 144 N. C. 220, 56 SE 932.

11. Suit for stock killed by railroad value increased from $50 to $60. Western & A. R. Co. v. Clark, 1 Ga. App. 235, 57 SE 916.

12. Forcible entry complaint verified by an agent without disclosing his agency or authority. School Dist. No. 1 v. Holt [Mo. App.] 105 SW 32.

13. Mere filing of demurrer or answer does not show case was at issue so as to justify the justice in dismissing the same for the nonappearance of plaintiff. Mulkey v. Day [Or.] 89 P 957.

14. No right to adjourn because a bill of particulars had not been served. Smith v. Denton, 103 NYS 882.

15. On appeal the judgment was reversed because pleadings in assumpsit did not authorize a judgment, proper remedy being case. Plefka v. Detroit United R. Co., 147 Mich. 641, 14 Det. Leg. N. 33, 111 NW 194.

16. Action on note dated Jan. 20, 1904, proof of note dated Jan. 27, 1904. Williams v. Manix [Tex. Civ. App.] 20 Tex. Ct. Rep. 74, 105 SW 520.

17. Pleadings for conversion, facts showed sale at an agreed price, and judgment reversed as defendant had been deprived of his right of set-off. Harrington Lumber Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 119, 99 SW 110.

18. Facts same but action on an account changed to one for conversion. Oney v. Pomfrey, 54 Misc. 171, 105 NYS 860.

19. Certiorari refused. James v. Bowser, 1 Ga. App. 446, 57 SE 1017.

20. Inherent right of court to declare a mistrial. Chapman v. Conwell, 1 Ga. App. 212, 58 SE 137.

21. Where jury returned in replevin what was in form a verdict, but which was not responsive to the issues, it was not a lawful verdict and the case was set for retrial. Johnson v. Glaspey [N. D.] 113 NW 602.

22. Set aside a judgment by default the day after it was rendered. Cohen v. Moore [Tex. Civ. App.] 17 Tex. Ct. Rep. 917, 103 SW 422; Id. 19 Tex. Ct. Rep. 742, 104 SW 1053.

23. Within 10 days and before his term of court has expired. First Nat. Bk. v. Rowland [Tex. Civ. App.] 18 Tex. Ct. Rep. 85, 99 SW 1043.

24. Must be on motion made within 10 days of entry of judgment, but no time fixed within which the motion must be decided. State v. Ritchie [Utah] 91 P 24.

25. Consequently certiorari will lie from the verdict without regard to the judgment. Southern R. Co. v. Chestnut Mountain Merchandise Co., 1 Ga. App. 731, 58 SE 247.

26. When issue has been taken and case ready for trial. Mulkey v. Day [Ore.] 89 P 957.

27. Appeared by counsel's opening statement that the matter had been tried before and the judgment satisfied. Lafitte v. Vanderwark [Colo.] 92 P 694.

28. Will not be set aside on appeal, unless a satisfactory excuse shown, and there was a manifest injustice. Coleman v. Keady, 53 Misc. 520, 105 NYS 299. Even where defendant did not appear because last figure in year of return day had been omitted in copy of summons left with him. Lenham Mercantile Co. v. Herke, 105 NYS 472.

29. Return stated service on "the within named defendant," naming one who was not defendant, was insufficient. Morse v. McQuade, 54 Misc. 166, 105 NYS 862.

30. Where account is proven by affidavit of plaintiff and defendant has filed an unverified general denial, plea may be stricken and judgment entered for plaintiff. Seaboard Air-Line R. Co. v. Coursey, 1 Ga. App. 662, 57 SE 968.

31. Illegal on the mere affidavit of plaintiff. Maddox v. Central of Georgia R. Co., 1 Ga. App. 46, 57 SE 1062. Though com-

fault judgment on the same day as entered without notice.[32] The judgment must be authorized by the evidence,[33] but a judgment entered for a sum in excess of that for which it was rendered is not void.[34] An informal entry of judgment is good [35] even on appeal,[36] but the judgment must be rendered at the close of the trial [37] or within the statutory period [38] and for a definite and ascertained amount [39] which should include costs.[40] An entry made by another purporting to be a judgment is a mere memorandum where not signed by the justice.[41] Where the invalidity of a judgment does not appear on its face, the remedy is to appeal in case the justice refuses to make the correction.[42] A judgment is not liable to collateral attack for irregularities of procedure [43] where jurisdiction was originally acquired, but where no process was served the judgment is void.[44] A default judgment may be set aside in a separate equity suit where the proper showing is made.[45] A dormant judgment cannot be used for purposes of garnishment.[46]

Execution See 8 C. L. 646 will only issue on strict compliance with the statutory provisions.[47] It will be void unless made returnable within the statutory limits.[48] A levy will be dismissed where there are sufficient entries to show payment in full.[49] If the return is substantially correct, that is sufficient.[50] The advertisement and sale must be in the manner prescribed by statute for executions issued from a justices'

plaint verified, action for killing hogs by train. Georgia, etc., R. Co. v. Shepard [Ga. App.] 59 SE 717.

32. An inherent power in every court. Cohen v. Moore [Tex.] 19 Tex. Ct. Rep. 742, 104 SW 1053.

33. Open account not verified or proved by the evidence. Hardy v. Hardy [Ga. App.] 58 SE 779.

34. Where defeated party took no steps to secure relief, he will not be entitled to an injunction to restrain its collection. Gum Carbo Co. v. New Orleans German Gazette [Miss.] 43 S 82.

35. Good against collateral attack if docket entry, taken as a whole, shows that he had made a final determination of the action, though the entry was not technically exact. Nelson v. Schmoller [Neb.] 110 NW 658.

36. It is not wholly void. Rains v. Reasonover [Tex. Civ. App.] 18 Tex. Ct. Rep. 515, 102 SW 176.

37. On failure to do so, without consent of parties, the court loses jurisdiction. State v. Houston [Mont.] 92 P 476.

38. Where a justice of the peace fails to render judgment until ten days after the return of a verdict by a jury, such failure works a discontinuance of the action, the judgment so rendered by the justice is absolutely void, and a court of equity will enjoin any further proceedings upon such judgment. Sigler v. Shaffer, 9 Ohio C. C. (N. S.) 267.

39. A judgment in 1903 for goods sold in 1902 may provide that judgment shall draw interest from date of demand in 1902. Thomas v. Mariner, 5 Pen. (Del.) 571, 66 A 99.

40. Statutes as to offers of judgment apply to justices. Palmer v. Styles [Neb.] 110 NW 1004.

41. Made by a person employed to do clerical work. Park v. Callaway, 128 Ga. 119, 57 SE 229.

42. Invalid because summons not served. Knight v. Cresswell [Ark.] 101 SW 754.

43. Unauthorized adjournments, or failure to furnish security for costs on issuance of a commission to take a deposition. American Copying Co. v. Stern, 148 Mich. 281, 14 Det. Leg. N. 83, 111 NW 766. In action for seizure of property under an execution issued under the judgment. Richards v. Heger, 122 Mo. App. 512, 99 SW 802. Injunction will not lie to restrain its enforcement, the remedy was by removal to county court. Cohen v. Moore [Tex. Civ. App.] 17 Tex. Ct. Rep. 917, 103 SW 422; Id. [Tex.] 19 Tex. Ct. Rep. 742, 104 SW 1053. Grossly irregular to try case at same term without notice where party entitled to continuance, but judgment not void. Cohen v. Moore [Tex.] 19 Tex. Ct. Rep. 742, 104 SW 1053.

44. No notice nor appearance and cannot be vitalized by an order of revivor. Cottingham v. Smith [Ala.] 44 S 864.

45. Incurred through breach of an agreement by plaintiff's attorney to notify defendant of resetting, but no sufficient showing made as to a valid defense. Steyermark v. Landau, 121 Mo. App. 402, 99 SW 41.

46. Dormant where execution issued thereon is more than seven years old and no entry upon the superior court execution docket. Ingram v. Jackson Mercantile Co. [Ga. App.] 58 SE 372.

47. Error to overrule affidavit of illegality of execution against plaintiff for costs where one had already been issued against defendant. Payne v. Stevens, 1 Ga. App. 266, 57 SE 916.

48. Code 1896, § 1932, requires execution to be returnable in not less than 20 nor more than 60 days from date. Pruitt v. Gunn [Ala.] 44 S 569.

49. No evidence introduced to show the value of the property embraced in these levies. American Harrow Co. v. Banks Bros., 127 Ga. 203, 56 SE 300.

50. A return on May 2 of "no property found to levy this execution" endorsed on execution issued Feb. 1, and made returnable in 90 days, was sufficient. Scharff v. McGaugh, 205 Mo. 344, 103 SW 550.

court.[51] To levy on land the papers must be filed in the circuit court for further proceedings.[52] Sometimes the filing of the transcript of the judgment in a higher court is conditional on the issue of an execution which has been returned nulla bona.[53] Where the transcript of the judgment may be filed in a higher court, the latter has power to correct the same.[54] One may not enjoin execution on an erroneous judgment until legal remedies are exhausted.[55]

§ 5. *Appeal and error and remedies extraordinary.*[See 6 C. L. 640]—Appeal is a statutory remedy,[56] and must be taken within the statutory time from the rendition of the judgment.[57] The appellate court has only the same jurisdiction as the justice,[58] which is determined by the law at the time of the appeal.[59] No appeal can be taken until a motion for a new trial has been overruled.[60] In all cases except on a judgment by confession, an appeal lies, as from a judgment for appellant,[61] or from a dismissal, as they are final judgments.[62] To what court an appeal may be taken may depend on the amount recovered or whether there was a jury trial.[63] An appeal is perfected by giving notice and filing an undertaking,[64] within the statutory time.[65] The written notice of appeal[66] must be filed before or contemporaneously with its service,[67] on the adverse party.[68] The notice of appeal is not fatally defective on account of variance in the corporate name of appellant.[69] The venue of an appeal may be changed where a judge is disqualified.[70] An appeal vacates the judgment.[71] The substantial rights[72] and all jurisdictional questions, though not raised below, will be considered by the court.[73] Appeal and not mandamus is the proper remedy from an

51. Whether levied by a sheriff or a constable. Hatton v. Brown, 1 Ga. App. 747, 57 SE 1044.

52. Warner v. Yates [Tenn.] 102 SW 92.

53. After filing clerk of circuit court may issue execution without further proceedings. Scharff v. McGaugh, 205 Mo. 344, 103 SW 550.

54. Erroneous entry of judgment in replevin may be corrected though there was the remedy by appeal. Carter v. Louisiana Purchase Exposition Co., 124 Mo. App. 530, 102 SW 6.

55. Minton v. Palmer [Neb.] 112 NW 610. Remedy by appeal or error, or if justice conspired with party and refused to make transcript, mandamus would lie. Id.

56. Law construed and held to authorize appeal to district and not to probate court. Loewen v. Myers, 18 Okl. 300, 88 P 1046.

57. Ten days by a resident, twenty days by a nonresident, a foreign corporation doing business in the state was a resident for this purpose. Young v. Niles & Scott Co., 122 Mo. App. 392, 99 SW 517.

58. Interpleader will not necessarily convert the action into an equitable one, and so beyond the jurisdiction of the court. Anderson v. Red Met. Min. Co. [Mont.] 93 P 44.

59. Not affected by an amendment passed two years later. State v. Third Judicial Dist. Ct. [Utah] 91 P 133.

60. Motion suspends the judgment. State v. Ritchie [Utah] 91 P 24.

61. Plaintiff may appeal from a judgment for a nominal sum even though the statutory form of bond runs to the successful party. Zahnen v. Stender [Colo.] 89 P 793.

62. Was a final determination of the forcible entry and detainer action, though it did not preclude the bringing of another action. Van Vlissingen v. Oliver, 102 Minn. 237, 113 NW 383.

63. Appeal to probate court where judgment by confession, or where jury trial and neither claimed more than $20. In all other cases the district court. Canadian Coal Co. v. Eldridge [Okl.] 92 P 151.

64. It is justice's duty to file the return. Morgan v. Zimmer, 105 NYS 914. Failure to transmit transcript not cause for dismissal. Haessly v. Thate [N. D.] 114 NW 311.

65. Notice of appeal must be given ten days before the second term after the appeal is taken and adjourned. Term not included in the reckoning. McGuffin v. McQuary, 124 Mo. App. 701, 102 SW 3.

66. Docket entry that defendant gives oral notice of appeal is insufficient, and is not cured by filing and approval of bond, and allowance of appeal by the justice. Eggart v. Dunning [Wyo.] 89 P 1022. Oral notice entered on justice's docket is insufficient. McCormick v. Sells Co., 76 Ohio St. 83, 81 NE 154.

67. That is on same day. State v. Third Judicial Dist. Ct. [Utah] 91 P 133.

68. On one who has interest in opposing the object sought to be accomplished, unnecessary on one who disclaims any interest. Anderson v. Red Met. Min. Co. [Mont.] 93 P 44.

69. Appeal by "Standard Life & Accident Insurance Company" from judgment entered against "Standard Life & Accident Insurance Company of Detroit, Mich." Taff v. Standard Life & Accident Ins. Co. [Mo. App.] 105 SW 274.

70. In accord with provisions of general law as to the change of venue. Town of Del Norte v. Weiss, 38 Colo. 269, 88 P 581.

71. Subject to revival by dismissal of appeal on order of the court. Mayott v. Knott [Wyo.] 92 P 240.

72. Appellate court will look beyond errors in pleadings and proceedings. Hopkinson v. Conley, 75 Kan. 65, 88 P 549.

73. Judgment for $100 was reversed where jurisdictional amount was $200, but com-

erroneous judgment.[74] A party on special appeal may raise any objection to the process, pleadings, proceedings, or decision which would not be allowed to be made on the trial of the appeal.[75] Error may be only prosecuted from a final judgment.[76] One may have remedy by petition,[77] or by a separate proceeding in equity to set aside a default judgment.[78] Injunction will not lie to restrain the enforcement of a void judgment,[79] where there is a remedy at law.[80] Where the justice had jurisdiction, prohibition will not lie to prevent enforcement of a judgment.[81] In Kentucky a case may be removed by a traverse and joinder of issue thereon to the circuit courts.[82]

Bonds.[See 8 C. L. 849]—An appeal is not effectual until a sufficient undertaking is filed,[83] within the statutory limit. This cannot be waived,[84] but one may be relieved therefrom on an affidavit of poverty.[85] Frequently fiduciaries,[86] or municipalities, are exempt from giving bond.[87] If bond is not given, there is no stay of proceedings.[88] It is sufficient if the bond substantially conforms to the statute;[89] if there is not such compliance, any judgment rendered will be void.[90] On filing the

plaint had demanded $300. Cook v. Cook, 107 NYS 384.

74. Based on claim of unliquidated damages set up by defendant, without notice to petitioner. Cohen v. Moore [Tex.] 19 Tex. Ct. Rep. 742, 104 SW 1053.

75. Where nothing on the summons, or showing made, to show defendant was a nonresident, he could not question the jurisdiction on special appeal on the ground that a short instead of a long summons should have been issued. Courtis v. Garrison, 148 Mich. 226, 14 Det. Leg. N. 103, 111 NW 770.

76. Section 6494, as amended, does not give jurisdiction of the entire case in an appeal from an order by a magistrate overruling a motion to discharge an attachment, but the decision by the common pleas is to be sent to the justice to be entered by him in his docket as the final judgment of the matter in the justice's court, and this judgment of the justice is the only final judgment in the action and the only one from which error may be prosecuted. Lyon v. Phares, 9 Ohio C. C. (N. S.) 614. Where property is held by a justice of the peace under attachment and an appeal is taken from the overruling of the motion to dissolve the attachment, the proper procedure under § 6494 is for the common pleas to determine within three days whether the action of the justice in overruling the motion was right and the decision with the original papers returned to the justice to be entered by him on his docket as the final determination of the motion. Williams v. McCartney, 10 Ohio C. C. (N. S.) 161.

77. Must show fraud, accident or mistake, and be accompanied by a proper affidavit of defense on the merits. Collins v. Farley [Vt.] 66 A 713.

78. To set aside a default judgment suffered by reason of reliance on agreement of plaintiff's attorney to notify defendant of re-setting of case, but insufficient showing as to valid defense. Steyermark v. Landau, 121 Mo. App. 402, 99 SW 41.

79. Summons not served and might appeal. Knight v. Creswell [Ark.] 101 SW 754.

80. If execution issued on entry of judgment not made by justice, it could be met by affidavit of illegality. Park v. Callaway, 128 Ga. 119, 57 SE 229.

81. Defendant had ignored summons where last figure in year of return day was omitted, and judgment had been entered. Lenham Mercantile Co. v. Herke, 105 NYS 472.

82. Appearance of traversee in circuit court is all that is necessary to constitute a joinder of issue. Check v. Reiter, 31 Ky. L. R. 249, 102 SW 287.

83. Undertaking filed within 30 days, but sureties failed to justify, and new undertaking filed after the 30 days, but appeal must be dismissed. Lane v. Kings County Super. Ct. [Cal. App.] 91 P 405.

84. Must be filed within 30 days of rendition of judgment. Deardoff v. Thorstenson [N. D.] 113 NW 616.

85. But where a firm appealed and each member filed an affidavit that he was unable to give security, that was not enough, as it did not appear that the firm was unable to give a bond, and accordingly the appeal was dismissed on oral motion. Livingston v. King [Ga. App.] 58 SE 395.

86. But he must give written notice of appeal within the time limited, oral notice and entry on the justice's docket being insufficient. McCormick v. Sells Co., 76 Ohio St. 83, 81 NE 154.

87. General law as to exemption from necessity of giving a supersedeas applied to appeals from justice's court. Town of Del Norte v. Weiss, 38 Colo. 269, 88 P 581.

88. On appeal from a judgment adjudging property not exempt where no bond is given, the property may be levied on and sold, and if judgment is reversed the only claim of defendant is against the sheriff for the proceeds in his hands. Fultz v. Castleberry [Ark.] 99 SW 71.

89. Code Civ. Proc. § 978, required undertaking for payment of costs "on appeal." Bond filed conditioned to pay judgment appealed from, and all costs that might be recovered. Jones v. Kern County Super. Ct. [Cal.] 91 P 505. The filing of a bond signed by the surety sufficiently satisfies the requirement that the justice shall make an entry which shall be signed by the sureties. Richardson v. Wilmington & Brandywine Nat. Bk. [Del. Super.] 67 A 157. Furnishing an undertaking in the nature of a supersedeas for all costs was sufficient. Johnson v. Glaspey [N. D.] 113 NW 602.

90. Statute required bond to be conditioned to prosecute "his appeal," and one

undertaking, notice thereof must be given the adverse party so that he may except to the sufficiency of the sureties.[91] A defective justification of the sureties is not ground for dismissal of the appeal.[92] In proper cases an appellant may be authorized to file a new bond.[93] Where judgment is rendered against appellant, it may also be awarded against the surety,[94] when properly authorized by the court,[95] for not more than the penalty.[96] One may recover against a surety in a separate action on the bond.[97, 98]

Process or appearance. See 8 C. L. 650—The court will acquire jurisdiction [99] on an appeal taken of a corporation by its agent from a judgment against the corporation, when it appeared the latter was the real party.

The transcript See 8 C. L. 651 must be made and filed by the justice trying the case,[1] for it is the duty of the officer and not of the appellant to transmit the transcript,[2] though an appeal is not vitiated by delivering the transcript to the appellant's attorney, if it is filed in the county court within the right time.[3] An appeal will not be dismissed for the justice's failure to file his return.[4] though if appellant is responsible for the failure, the judgment may be affirmed.[5] Where a cause was pending before one justice but was tried by another, the transcript may be certified to by the former.[6] The time for filing transcript may be extended where appellant not at fault,[7] and if the return is lost, appellant by order of court may be allowed to file a copy.[8] The appellate court acquires jurisdiction upon the filing of the appeal bond and the transcript of the justice.[9] When the return appears defective, the justice may be compelled to amend the same,[10] or to make additional returns,[11] and by a general appear-

conditioned to prosecute "this trial" was insufficient to confer jurisdiction on the county court and its judgment was a nullity. Wood Grocery Co. v. Pace Grocery Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 638, 99 SW 180.

91. Notice of intention to file is insufficient. State v. Third Judicial Dist. Ct. [Utah] 91 P 133.

92. In absence of showing that sureties were not financially qualified, for the requirement of justification, is to protect the officers approving the bond rather than to benefit the parties secured. Porter v. Western Union Tel. Co., 133 Iowa, 747, 111 NW 322.

93. Party had deposited $100 as a cash bond, which the statute did not authorize. Todenhoft v. De Roos [S. D.] 111 NW 550.

94. Where statutory authority, this may be done, though no authorization in the undertaking. Mayott v. Knott [Wyo.] 92 P 240.

95. Statute authorizes, but the clerk's act is a nullity. Kansas City Pump Co. v. Jones [Mo. App.] 104 SW 1136.

96. Where judgment for a greater sum, the appellee may file a remittitur. Grant v. Wyatt, 61 W. Va. 133, 56 SE 187.

97, 98. Not necessary to allege that the judgment of the district court was never reversed, modified, or set aside. Cochran v. Moriarty [Neb.] 111 NW 588.

99. An individual served and sued as agent of a corporation, but justice treated it as a suit against the corporation, and gave judgment accordingly, and the recitals of the appeal bond showed that the corporation was really taking the appeal. Western Tie & Timber Co. v. Thomas [Ark.] 101 SW 730.

1. In case of resignation by his successor. Tedford v. Shell [Tex. Civ. App.] 18 Tex. Ct. Rep. 275, 100 SW 970.

2. On failure appellant entitled to order of district court requiring justice to transmit his transcript. Haessly v. Thate [N. D.] 114 NW 311.

3. Mills' Ann. St. § 2681, required the justice to file the transcript with the clerk of the county court. Town of Del Norte v. Weiss, 38 Colo, 269, 88 P 581.

4. Appellant not responsible where he had perfected the appeal by giving notice of appeal and filing a sufficient undertaking, and he will not be liable for witness' fees for having the case consequently stricken from the calendar. Morgan v. Zimmer, 105 NYS 914. Appellant had duly served notice of appeal and undertaking. Haessly v. Thate [N. D.] 114 NW 311.

5. Appellate court will not disturb ruling of lower court in absence of showing of abuse of discretion. Brown v. Gorman [Ind. T.] 104 SW 1163.

6. Kenyon v. Manley, 125 Ill. App. 615.

7. Justice had resigned. Tedford v. Shell [Tex. Civ. App.] 18 Tex. Ct. Rep. 275, 100 SW 970.

8. Error to dismiss the appeal without reciting in order the restoration order and exhibits filed as and for the return. Duclos v. Kelley, 106 NYS 1085.

9. Marshall v. Lufkin, 127 Ill. App. 595.

10. But not where there is nothing on the face of the certified copy of the docket to show that it was incomplete, and no evidence was introduced. Walton v. Spinner [Wyo.] 88 P 650. Return showed judgment was rendered on a verified complaint, affidavit that it was given on oral testimony. Pikin v. Clifford, 118 App. Div. 509, 103 NYS 511.

11. One of the parties cannot object because the justice was not paid. Marr v. Cook, 147 Mich. 425, 111 NW 115.

ance, a party does not waive his right thereto.[12] The failure of the justice to sign the return may be waived by further proceedings.[13]

The record.[See 8 C. L. 651]—The court will assume that the state of the case,[14] or the papers filed, are complete.[15] It will only review the denial of a new trial,[16] or the giving of a peremptory instruction, where the record contains the entire evidence.[17]

Dismissal.[See 8 C. L. 651]—The appeal will be dismissed where the notice of appeal was served before it was filed with the justice,[18] where the transcript failed to show that there were any pleadings oral or written,[19] where the appeal was not docketed before the next regular term,[20] or where two terms pass without a hearing,[21] or where no undertaking was filed. In such case the court cannot take jurisdiction on the ground that title to realty is involved.[22] But where the sureties are insufficient,[23] or there is a defective affidavit, the appellant will first be given an opportunity to correct the matter.[24] Neither will an appeal be dismissed on account of irregularities for which the respondent was responsible.[25] The appeal should not be dismissed because of absence of either party, but the court may dismiss the case.[26] The appellant is entitled to a dismissal up to the end of the trial,[27] but not after the defendant has recovered on a counterclaim.[28] He must procure an order of court dismissing the appeal,[29] which recites the papers used on the motion.[30] On dismissal on appellant's motion, the judgment below must be affirmed with costs.[31]

Pleadings on appeal.[See 8 C. L. 662]—The pleadings must be filed within time limited.[32] A reply is unnecessary where it was unnecessary below.[33] Amendments to make pleadings more definite,[34] or to make them conform to the proof introduced

12. Marr v. Cook, 147 Mich. 425, 111 NW 116.

13. Defendants appeared and secured a change of venue, and were not entitled to urge this objection for the first time in the supreme court. Roblin v. Jenkins [Ark.] 104 SW 203.

14. It will not examine the original papers in the clerk's office. Edwards v. Currie [N. J. Law] 66 A 962.

15. On appeal from the ruling of a justice of the peace on motion to discharge attachment, the court, or a judge thereof in vacation, can only review the proceedings of the justice of the peace from the original papers filed with said court, or judge, by said justice. Cartmell v. Wurlitzer, 5 Ohio N. P. (N. S.) 604.

16. Where there is an exception evidenced by a bill of exceptions. Moore v. Harmes, 123 Mo. App. 34, 99 SW 764.

17. Abstract only showed defendant's version of the evidence. Moore v. Harmes, 123 Mo. App. 34, 99 SW 764.

18. Supreme court will dismiss though the point was not urged in district court. McCauley v. Jones, 35 Mont. 32, 88 P 572.

19. Rev. St. 1899, § 4401, provides for trial de novo on issues and pleadings of court appealed from. Walton v. Spinner [Wyo.] 88 P 650.

20. Though the term is for the trial of criminal cases. Lentz v. Hinson [N. C.] 59 SE 144.

21. But court has discretion to extend the time, subject to appellant's paying costs. Brickner v. Kopmeier [Wis.] 113 NW 414.

22. Supreme court will issue writ prohibiting superior court from taking jurisdiction. Lane v. Kings County Super. Ct. [Cal. App.] 91 P 405.

23. McGuffin v. McQuary, 124 Mo. App. 701, 102 SW 3.

24. Did not appear in affidavit that affiant was agent for defendants. Evans v. Dyke Automobile Supply Co. [Mo. App.] 101 SW 1132. Should not dismiss the appeal provided the other party is not delayed. McGuffin v. McQuary, 124 Mo. App. 701, 102 SW 3.

25. Justice had struck notice of appeal from files, and it had not been refiled, sureties on undertaking had failed to justify, and appellant guilty of laches in filing papers. McCauley v. Jones, 35 Mont. 32, 88 P 572.

26. As an appeal is merely a de novo investigation, and its dismissal would affirm the judgment of the lower court. Rousch v. Green [Ga. App.] 58 SE 313.

27. After introduction of evidence and while the judge was charging the jury. Donaghy v. McCorkle [Tenn.] 98 SW 1050.

28. Defendant entitled to judgment for amount recovered before justice with costs. Hess v. Hess [Neb.] 110 NW 999.

29. Party cannot of his own act dismiss appeal and deprive the court of jurisdiction. Mayott v. Knott [Wyo.] 92 P 240.

30. Reversed for failure to recite order allowing substituted return in place of lost one. Duclos v. Kelley, 106 NYS 1085.

31. Where circuit court erroneously refused to dismiss the appeal, the supreme court may do so, and affirm the justice's judgment with costs. Doughy v. McCorkle [Tenn.] 98 SW 1050.

32. Where plaintiff failed to file petition within twenty days of appeal, judgment was entered against him without notice. Hess v. Hess [Neb.] 110 NW 999.

33. In forcible entry and detainer, statute only required a verified complaint and answer. Joss v. Hallett [Colo.] 89 P 809.

34. Suit for death benefit, plaintiff desired to amend by making more definite her re-

before the justice,[35] will be allowed. New issuable facts may be pleaded, if the identity of the cause of action is preserved,[36] but the cause of action cannot be changed [37] by increasing the damages claimed to an amount beyond the justice's jurisdiction,[38] by setting up a sufficient cause of action,[39] by adding a new cause of action,[40] or by adding new parties, unless necessary to a determination of the appeal.[41] In some states the court may allow amendments or new pleas as fully as if the case had originally been brought in that court.[42] A clerical error in the pleadings will not prevent the entry of a valid judgment.[43]

The case is tried de novo on appeal. See 8 C. L. 653—Under the constitution,[44] or statute, an appeal commonly vacates the judgment and the case must be tried de novo,[45] on the issues and pleadings of the lower court.[46] The case must be of the jurisdictional amount,[47] or, if smaller, appellant may only have a trial de novo on filing a proper affidavit.[48] On trial de novo, the question of title to realty may be tried.[49] Where no affidavit for a new trial is filed, the case will be tried on the testimony returned by the justice,[50] on the exceptions duly taken,[51] for one cannot raise a new objection on appeal [52] for the first time.[53] The verdict will not be disturbed where there was conflicting evidence.[54]

Judgment See 8 C. L. 654 should be given as the right of the matter may appear without regard to technical omissions.[55] It may be entered without notice for the

lationship to deceased. Jackson v. Brothers & Sisters of Promise [Ga. App.] 59 SE 11. In action to recover penalty for issuing marriage license without reasonable inquiry, amendment permitted after demurrer adding the allegation "without reasonable inquiry" which had been omitted. Laney v. Mackey, 144 N. C. 630, 57 SE 386.

35. Originally sued for $175 rental, and recovered $91.25, and amended so as to claim only the latter amount. Bishop v. Lawson [Tex. Civ. App.] 20 Tex. Ct. Rep. 214, 105 SW 1008.

36. Facts may be pleaded with more particularity, as that one of defendant partners was substituted for a deceased partner. Jacob North v. Angelo [Neb.] 110 NW 570.

37. Statement showing trespass by defendant's bull on account of a defective fence cannot be amended to show a trespass based on the bull's vicious propensities. Engle v. Ferrell [Mo. App.] 105 SW 23.

38. Sued for $200 before justice of peace; in district court claimed and recovered $246, which the supreme court reduced to $200. Wilson v. White [Neb.] 109 NW 367.

39. Leathers v. Geitz [Iowa] 112 NW 191.

40. Each month's rent constitutes a separate cause of action, and on appeal complaint cannot be amended to include another month's rent which had then accrued. Williams v. Houston Cornice Works [Tex. Civ. App.] 18 Tex. Ct. Rep. 240, 101 SW 839.

41. In suit against a railroad to recover overcharge for freight, may not join two other railroads, since any joint liability was also several and plaintiff's remedy was complete. Bushnell v. Louisville, etc., R. Co. [Mo. App.] 103 SW 1101.

42. If not dilatory, where general issue in trover, may answer setting up that title was in defendant. Willet v. Clark [Me.] 67 A 566.

43. The pleadings used the date "Oct. 10." while the itemized account referred to and included in the transcript used "Nov. 10." Houston Rice Mill. Co. v. Wilcox [Tex. Civ. App.] 17 Tex. Ct. Rep. 1017, 100 SW 204.

44. Perfection of appeal annuls and sets aside the judgment of the justice. Harter v. Curry [Tex. Civ. App.] 19 Tex. Ct. Rep. 685, 103 SW 445.

45. May file new pleadings, provided they are not dilatory. Willet v. Clark [Me.] 67 A 566.

46. Where no pleadings before justice, appeal dismissed. Walton v. Spinner [Wyo.] 88 P 650. Writ of replevin is not a pleading. Walton v. Spinner [Wyo.] 89 P 575.

47. Defendant cannot bring the appeal within the jurisdiction of the district court, by pleading a counterclaim for more than $20, which is sham as to the amount. St. Louis, etc., R. Co. v. Bradford, 18 Okl. 154, 88 P 1050.

48. Affidavit of valid claim made by the attorney of a corporation plaintiff was sufficient. Norwich Pharmacal Co. v. Abaly [Wis.] 113 NW 963.

49. Though it could not be raised before justice, and case was not transferred because of failure of defendant to furnish the bond. Dreger v. Budde [Wis.] 113 NW 950.

50. But the circuit court will give judgment without regard to the findings of the justice. Brunkow v. Waters, 131 Wis. 31, 110 NW 802.

51. No exception to final judgment in forcible detainer, so court could not consider the sufficiency of the evidence. Bonnell v. Gill [Colo.] 92 P 13.

52. Defendant cannot claim there was no demand in a replevin action, where he gave a redelivery bond, contested the case on its merits before the justice. Denver Live Stock Com. Co. v. Parks [Colo.] 91 P 1110.

53. That complaint on a judgment recovered before another justice did not show that the latter had jurisdiction. Totman v. Drake, 52 Misc. 60, 102 NYS 379.

54. Error must be apparent to justify a reversal. Spears v. Sorge, 106 NYS 141.

55. But court cannot affirm a judgment in assumpsit, where the form of the action ought to have been in case. Plefka v. Detroit United R. Co., 147 Mich. 641, 14 Det.

amount recovered before the justice,[56] where the appellant is in default.[57] It cannot be rendered for an amount greater than that within the jurisdiction of the justice.[58] The judgment may be valid, though the judgment of the justice was defective,[59] or the appeal was improper.[60] The court may reduce or may modify judgment,[61] and refuse costs.[62] Appellant must stand all costs where he recovers less than he recovered before the justice.[63] The clerk has no authority to enter a judgment not pronounced by the court.[64]

Further appeal or error. See 8 C. L. 654—The right of further appeal is frequently limited by the amount in controversy.[65] Only errors of law can be reviewed,[66] for the finding of fact of the lower court will not be reversed unless contrary to the clear preponderance of the evidence,[67] or where there has been an abuse of discretion.[68] So the court will not interfere where the pleadings were permitted to be amended.[69] Points may be raised which were not considered in the lower court,[70] but new issues cannot be tried.[71]

§ 6. *Certiorari* See 8 C. L. 655 will lie where a party has lost the right of appeal without being at fault,[72] but not where he has been guilty of laches.[73] It is a proper remedy where no process was served on defendant,[74] or where a judgment by default has been erroneously entered,[75] or in some states where a judgment appears on its

Leg. N. 33, 111 NW 194. That the summons was undated is immaterial. Butler Bros. v. Welch, 76 S. C. 130, 56 SE 668. A default will not be set aside on the mere showing that defendant's attorney forgot on account of press of business, and that "defendant was not indebted to plaintiff" without stating facts. Coleman v. Keady, 53 Misc. 520, 105 NYS 299.

56. Plaintiff had appealed but failed to file his petition in the district court. Hess v. Hess [Neb.] 110 NW 999.

57. Judgment record on appeal is conclusive on this point, and cannot be impeached by bill of exceptions. Roblin v. Jenkins [Ark.] 104 SW 203.

58. Judgment on appeal for $302.25 vacated. Smith v. Clark, 38 Colo. 89, 88 P. 636. Where verdict in excess of $200, it was reduced on appeal to supreme court. Wilson v. White [Neb.] 109 NW 367.

59. Was only entered against one party, though both appealed and took part in the proceeding, and judgment entered against both in the appellate court. Rains v. Reasonover [Tex. Civ. App.] 18 Tex. Ct. Rep. 515, 102 SW 176.

60. Appeal from an interlocutory judgment of justice, the county court believing it was a final judgment. Jennings v. Munden [Tex. Civ. App.] 18 Tex. Ct. Rep. 661, 102 SW 945.

61. Where incompetent evidence was admitted, plaintiff's judgment for $82.40 was reduced to $59.12, the amount defendant had admitted to be due. Dugan v. Longstaff, 52 Misc. 288, 102 NYS 1120.

62. Where recovery was less than the offer of judgment, justice had erroneously entered two judgments, instead of one for the difference. Spears v. Sorge, 106 NYS 141.

63. Kessler v. Burckell [Tex. Civ. App.] 99 SW 173.

64. A mere nullity and court may correct at a subsequent term. Kansas City Pump Co. v. Jones [Mo. App.] 104 SW 1136.

65. Where limit was $100, though plaintiff had originally claimed $175, yet where on recovering $91.25, he had amended accordingly, there was no right of further appeal, and appeal was dismissed. Bishop v. Lawson [Tex. Civ. App.] 20 Tex. Ct. Rep. 214, 105 SW 1008.

66. Cannot retry on merits, or decide on the weight of evidence. Deyo v. Keighley [N. J. Law] 67 A 347.

67. Circuit court had reversed the justice. Brunkow v. Waters, 131 Wis. 31, 110 NW 802.

68. Refused to set aside a judgment of affirmance because of appellant's failure to file transcript. Brown v. Gorman [Ind. T.] 104 SW 1163.

69. In action against carrier for failure to deliver egg cases, variance between allegation of complaint in justice's court that 200 cases were not delivered, and allegation of complaint on appeal to circuit court, where trial was de novo, that twenty cases were not delivered, held not available on appeal to supreme court. Southern R. Co. v. Moody [Ala.] 44 S 94.

70. Appeal should have been dismissed where notice of appeal was served before it had been filed with the justice. McCauley v. Jones, 35 Mont. 32, 88 P 572.

71. As to whether filing mark on bill of exceptions had been altered. McGuffin v. McQuary, 124 Mo. App. 701, 102 SW 3.

72. After justice promised to send papers to another court, judgment was rendered in favor of an intervenor without notice to the other parties. J. W. Butler Paper Co. v. Scarff [Tex. Civ. App.] 18 Tex. Ct. Rep. 713, 102 SW 1168. Petitioner was a garnishee in another action where he had answered that he had no property or effects of defendant, and judgment had been rendered against him without his knowledge, and the time for appeal had expired. State Bk. of Ft. Morgan v. Harcourt, 38 Colo. 243, 88 P 855.

73. Hall v. San Francisco Justices' Ct. [Cal. App.] 89 P 870.

74. To quash judgment of justice, where no pleading of appearance. Cottingham v. Smith [Ala.] 44 S 864.

75. Rendered against a garnishee who filed his answer before expiration of term

face to be void.[76] It will not be granted as a matter of right,[77] it must be applied for within the limited time,[78] but it will not be dismissed for laches where issued within that time.[79] Before the writ will issue, appellant must produce a certificate that all costs have been paid.[80] The defendant may waive notice of the sanction of the writ.[81] The application must contain more than general statements of a good defense.[82] It will be refused when not verified in the proper manner,[83] but where the answer supports the petition, it will not be dismissed for a defect in the affidavit.[84] Where the application is verified, the allegations of fact are to be taken as true.[85] The petition must be answered by magistrate,[86] and if not verified by the answer of magistrate,[87] or the admissions of defendant, it will be dismissed.[88] The plaintiff in certiorari may except to the answer of the magistrate where parts of the record have been omitted,[89] but the exception must be specific.[90] No question is raised unless there is a transcript of the record of the justice,[91] and one cannot on a rehearing introduce an amended record.[92] The petition will be overruled unless the rulings are shown to be harmful as well as erroneous.[93] For a reversal will not be granted for mere irregularities.[94] The office of the writ is to bring up the record for review on questions of law,[95] and only matters specified in the petition [96] and raised in the

to which the summons was returnable. O'Donovan v. Ocean S. S. Co., 1 Ga. App. 190, 57 SE 982.

76. Because of want of service of summons. Knight v. Creswell [Ark.] 101 SW 754.

Contra: Given by a justice presiding outside of his district. Simpkins v. Hester [Ga. App.] 59 SE 322.

77. Will not lie to permit a party to avail himself of a defense which he could have urged but neglected to do so. McBurnett v. Lampkin [Tex. Civ. App.] 17 Tex. Ct. Rep. 988, 101 SW 864.

78. Dismissed where not applied for within thirty days of final determination of case, and outside proof not admissible to show that application was in fact made in time. Landrum v. Moss, 1 Ga. App. 216, 57 SE 965.

79. Issued just before statutory limitation of eighteen months would have expired. Reeves v. Jones [N. J. Law] 66 A 113.

80. Must be certificate of officer whose decision is reviewed and not of clerk. Davis v. Joiner, 1 Ga. App. 106, 58 SE 62.

81. Written notice of sanction may be amended by inserting the date when the notice was waived. Maddox v. Georgia Cent. R. Co., 1 Ga. App. 46, 57 SE 1062.

82. Petition must state facts on which it is expected to recover, and where it fails to do so the appellate court will order the petition to be dismissed. McBurnett v. Lampkin [Tex. Civ. App.] 17 Tex. Ct. Rep. 988, 101 SW 864.

83. No affidavit to petition. Hobbs v. Hunter, 1 Ga. App. 329, 57 SE 922.

84. Where verdict set aside because the ends of justice require it, the voice of the evidence would have to be very loud to be heard in this court. Epperson v. Kitchens [Ga. App.] 58 SE 501.

85. Where appeared verdict was greater than the amount sued for, and the account was not proved, the writ should have been ordered. Linder v. Renfroe, 1 Ga. App. 58, 57 SE 975.

86. "The facts set forth * * * are substantially true * * * so far as come under the knowledge of respondent" is a sufficient verification of petition. Hunter v. Lissner, 1 Ga. App. 1, 58 SE 54.

87. No exceptions were taken to require the answer to be more specific. Southern R. Co. v. Chestnut Mountain Merchandise Co., 1 Ga. App. 731, 58 SE 247.

88. Final judgment against plaintiff in certiorari erroneous. Southern R. Co. v. Stone [Ga. App.] 58 SE 502. Answer did not disclose what disposition was made of the case. Western, etc., Co. v. Clark [Ga. App.] 58 SE 510.

89. Where they were necessary to a proper decision. Payne v. Stevens, 1 Ga. App. 266, 57 SE 916. Return of the magistrate should include all the proceedings. Hardy v. Hardy [Ga. App.] 58 SE 779.

90. Answer failed to disclose that a final judgment had been rendered, but as no exception, writ dismissed. Landrum v. Moss, 1 Ga. App. 216, 57 SE 965.

91. An agreed statement of facts is insufficient. Edwards v. Currie [N. J. Law.] 66 A 962.

92. Review by certiorari of justices' judgment on ground title to real estate was involved, and party sought to amend the record by showing that a general denial was entered in the lower court. State v. Carson Tp. Justice Ct. [Nev.] 89 P 24.

93. Johnson v. Douglas, 1 Ga. App. 218, 57 SE 914.

94. It will be presumed that justice did his duty, that the referees were residents of the county, and that the service on the referee was good, though a person of that name was constable. Jacoby v. Bolen [Del.] 67 A 199.

95. Questions of fact cannot be retried on new affidavits. Appelman v. Hahn, 149 Mich. 245, 14 Det. Leg. N. 450, 112 NW 917.

96. Justice had entered judgment for rent in unlawful detainer action without statutory authority. State v. Schweitzer, 131 Wis. 138, 111 NW 219. Petition after setting up evidence and judgment said that the judgment was contrary to law and evidence, and that the contract was usurious, unconstitutional, and illegal, was held only sufficient

court below will be reviewed.[97] But in some cases an applicant will be entitled to a trial de novo.[98] On dismissal of the writ, the court may enter a new judgment for the amount recovered below with the aggregate costs,[99] and it may also enter judgment against surety.[1] The court may not render final judgment where there is conflicting evidence,[2] but it may remand the case [3] for granting a new trial.[4] But where no fact is involved,[5] or where the petition is overruled, the court may make a final disposition of the case.[6]

§ 7. *Criminal jurisdiction and procedure.*[See 6 C. L. 656]—The criminal jurisdiction includes offenses committed by corporations.[7] The general subject is elsewhere treated.[7a]

KIDNAPPING.[8]

Abduction of females for the purpose of prostitution or concubinage is elsewhere treated.[9] Where consent to leave the state is accomplished by intimidation of such a character as to arouse fear and overcome the will, and without which consent would not have been given, the offense is complete.[10] In North Carolina removal from the state is not an essential element of the offense.[11] Under the Georgia statute creating the offense of inveighling or decoying away children under eighteen years of age without the consent of the parents, a conviction authorized on showing that the child was enticed away from parental control without the consent of the parent.[12] The indictment need not allege matters of evidence [13] and is sufficient if in the language of the statute.[14] It is incumbent on the state to prove that the person alleged to have been kidnapped was actually carried away,[15] and it may be established by circumstantial evidence.[16] Where the state relies on circumstantial evidence to establish guilt, evidence that defendant who was a neighbor of the parents of the boy alleged to have been kidnapped did not join in the search for him is admissible.[17]

to raise the question as to whether the finding was supported by the evidence. Gilbert v. King, 1 Ga. App. 572, 57 SE 991.

97. Action dismissed as to one defendant because of defective return, and objection not made that he had appeared and asked for an adjournment. Reeves v. Jones [N. J. Law] 66 A 113.

98. To review a justices' judgment rendered against a garnishee without notice. Ft. Morgan State Bk. v. Harcourt, 38 Colo. 243, 88 P 855.

99. Statute authorized entry of judgment as might be right, and where a judge had concluded his decision by dismissing the writ, he or his successor might authorize a proper judgment. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 NW 161.

1. Statute authorizing entry in case of appeals construed to cover certiorari. Knack v. Wayne Circuit Judge, 147 Mich. 485, 111 NW 161.

2. Plaintiff recovered judgment in justice court, while defendant erroneously was given judgment in superior court, instead of the case being remanded. Beard v. Hammock [Ga. App.] 59 SE 335.

3. Court of opinion that verdict against plaintiff was without evidence to support it. Simons v. Burt [Ga. App.] 58 SE 689.

4. Stands on same footing as ordinary grant of a new trial. Jeffers v. Georgia Central R. Co., 1 Ga. App. 331, 57 SE 923.

5. Unwarranted judgment rendered by magistrate. Fulton Land & Improvement Co. v. National Inv. & Sav. Corp. [Ga. App.] 59 SE 828.

6. Entered judgment for costs against petitioner. Monk v. Gay [Ga.] 59 SE 1117.

7. Included in the term person. People v. Palermo Land & Water Co. [Cal. App.] 89 P 723.

7a. See Indictment and Prosecution, 10 C. L. 238.

8. See 8 C. L. 656.

9. See Abduction, 9 C. L. 7.

10. State v. Altemus [Kan.] 92 P 594.

11. State v. Harrison [N. C.] 59 SE 867.

12. Pen. Code 1895, § 110, need not be shown that the accused forcibly or maliciously carried the child away. Arrington v. State [Ga. App.] 59 SE 207. Evidence held sufficient to sustain conviction. Id.

13. Indictment for inveigling a child under eighteen without the consent of the father under Pen. Code 1895, § 110, alleging same to have been without the consent of his "parents," held sufficient though the parents were not named. Arrington v. State [Ga. App.] 59 SE 207.

14. Need not allege facts and circumstances attending commission of the offense. State v. Harrison [N. C.] 59 SE 867.

15. State v. Harrison [N. C.] 59 SE 867.

16. Evidence that woods surrounding home of boy had been scoured for miles by hundreds of searchers, and that nearby water was much frequented, held admissible to rebut theory that boy had been lost or drowned. State v. Harrison [N. C.] 59 SE 867.

17. State v. Harrison [N. C.] 59 SE 867.

Evidence of the acts and conduct of defendant prior to the kidnapping should be limited to such acts as evince an intent to take or send the person, alleged to have kidnapped, out of the state against his will.[18] The instructions must be based upon facts shown by the evidence [19] and must correctly state the essentials to conviction.[20]

LABELS; LABOR UNIONS; LACHES; LAKES AND PONDS, see latest topical index.

LANDLORD AND TENANT.

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§ 1. *Definitions and distinctions.* See 8 C. L. 656—The relation of landlord and tenant exists where one person occupies the land of another in subordination to his title and with his consent.[21] It is to be distinguished from a sale [22] and from a contract of hiring carrying the right to possession of particular premises as an incident thereto.[23]

§ 2. *The contract of lease and creation of tenancy. How created or established.* See 8 C. L. 657—The relation of landlord and tenant, being contractual, the general rules of contract law,[24] such as assent,[25] mutuality,[26] and those relating to false

18. Evidence of illicit sexual relations between parties held inadmissible. State v. Altemus [Kan.] 92 P 594.

19. Instruction on fraud and undue influence alleged to have been exercised by defendant in inducing woman with whom he had had illicit relations to leave state erroneous where evidence showed intimidation only. State v. Altemus [Kan.] 92 P 594.

20. Instruction on essentials to conviction for inveigling children under eighteen years of age without the consent of the father under Pen. Code 1895, § 110, held correct. Arrington v. State [Ga. App.] 59 SE 207.

21. Express or implied. Hawkins v. Tanner [Ga.] 59 SE 225. Where one transferred property subject to trust deed made to secure loan and reserved to himself rents and control of property to secure him as surety, held that he sustained relation of landlord to tenant leasing property. Meyers v. Russell, 124 Mo. App. 317, 101 SW 606. Contract by which one street railway company divested itself of use and possession of its road and appliances in consideration of specific rent, etc., held to be lease and not to create partnership or agency. Moorshead v. United R. Co., 203 Mo. 121, 100 SW 611, afg. 119 Mo. App. 541, 96 SW 261.

22. Relation between parties to conveyance of standing timber is vendor and vendee and not landlord and tenant, although time for removal is limited. Jackson v. Aripeka Saw Mills, 53 Fla. 578, 43 S 601; McLendon Bros. v. Finch [Ga. App.] 58 SE 690.

23. Cropper's contract whereby one agrees to cultivate land of another and is to receive portion of crop as compensation does not create relation of landlord and tenant. Moore v. Linn [Okl.] 91 P 910. Under contract allowing defendant to occupy house free of rent and to carry on farm, held that occupancy was merely incidental to carrying on farm and possession could not be recovered under V. S. 1560, which relates to landlord and tenant. Mead v. Owen [Vt.] 67 A 722. Where owner of farm and dairy route let same to one on condition that he furnish horses, etc., and divide crops, held not a lease. Olden v. Mather [N. J. Eq.] 67 A 435.

24. Landlord signing lease without fraud or improper conduct on tenant's part held estopped to deny knowledge of terms. Mueller v. Rhein [Conn.] 66 A 770.

25. Defaulting purchaser of land in pos-

representations and warranties,[27] etc., apply. The relation may be created by express agreement [28] and be evidenced by a written instrument,[29] or may be implied from the acts of the parties.[30] A lease under seal can be executed only by an agent under sealed authority.[31] After the commencement of a partition suit, a lease of the premises can be made only under the authority of the court.[32] The contract must identify the property leased,[33] but need not be signed by the lessee if he enters thereunder.[34] A lease signed by one not a party thereto is not binding on him.[35] In some states leases for more than specified terms must be recorded or filed.[36] A lease under seal cannot be modified by a subsequent parol agreement.[37]

Construction of leases and proof of the terms of tenancy.[See 8 C. L. 659]—A lease as a contract is governed by the rules of construction applicable to contracts generally,[38] being interpreted most strongly against the party drafting the same.[39] The

session is a trespasser under claim of title and seller cannot effect forfeiture of contract of purchase by mere service of notice and thereafter treat purchaser as a tenant liable for rent, unless assent on his part to be so regarded can be shown. Geil, Jr. v. Lehr, 4 Ohio N. P. (N. S.) 638. Evidence held to show that although plaintiff, a married woman, intended to lease in her own right, lessor did not so understand, and hence no meeting of minds so as to make her a tenant. Vanderburg v. Kansas City Gas Co. [Mo. App.] 105 SW 17.

26. Fact that lease was terminable by lessee on due notice but not by lessor held not to render it void for lack of mutuality. Morris v. Healy Lumber Co. [Wash.] 91 P 186.

27. Where lessor had just built, representations that it was built in certain manner and of certain materials so as to be suitable for leased purposes held representations of facts and not mere opinion (Hinsdale v. McCune [Iowa] 113 NW 478), and where lessee notified lessor of breach of warranty, fact that he remained for a time in reliance on lessor's promise to make building comply held not a waiver of breach as matter of law (Id.).

28. Where tenant expressly refused to renew lease for another year but offered to rent from month to month and landlord after seeking to lease premises acquiesced in his occupancy, held that tenacy from month to month was established. Lally v. The New Voice, 128 Ill. App. 455. Trust deed providing that upon sale thereunder grantor, her assigns, or legal representatives, who might be in possession, would become tenant or tenants at will of purchaser held to create relation of landlord and tenant upon sale. Parsons v. Palmer, 124 Mo. App. 50, 101 SW 609. Presumption of possession from ownership together with allegation of possession on day after sale held sufficient showing of possession on date of sale. Id. Evidence held insufficient to show oral lease to commence at end of current term. Jones v. Com., 31 Ky. L. R. 1148, 104 SW 782. Evidence held sufficient to sustain finding that lessor and lessee entered into oral lease after expiration of written one. Gabel v. Page [Cal. App.] 92 P 749. Evidence held sufficient to show that defendant in trespass to try title held possession as plaintiff's tenant. Berry v. Jagoe [Tex. Civ. App.] 18 Tex. Ct. Rep. 81, 100 SW 815.

29. Receipt for rent, reciting that within a week landlord will give and tenant will take a written lease covering specific term at fixed rental, held to operate as lease, no formal lease having been executed. Feust v. Craig, 107 NYS 637. Instrument reciting that owner had received a certain sum on account of designated premises at a monthly rental for a year held to constitute a lease. Dodd v. Pasch [Cal. App.] 91 P 166. Instrument reciting receipt from defendants of $10 for deposit on rent of two specific lofts, "rent to be $65 per month and to run for two years," held not to constitute a lease. Finkelstein v. Fabyik, 107 NYS 67.

30. Where tenant was notified by another whose term was to commence at expiration of his term that if he held over he would be treated as a tenant for another year, his holding over created conventional relation of landlord and tenant. United Merchant's Realty & Improvement Co. v. Roth, 107 NYS 511. Where tenant remains in possession after being told that he must rent under old lease or not at all, held to remain under old lease and to have leased entire premises although he worked only part thereof. Rader v. Huffman, 125 Ill. App. 554. Acceptance of part of crop from one in possession claiming as tenant on shares held not prima facie evidence of relation of landlord and tenant where owner denied occupant's right of possession and claimed title to whole crop. Myer v. Roberts [Or.] 89 P 1051.

31. Though seal was unnecessary. Hayes v. Atlanta, 1 Ga. App. 25, 57 SE 1087.

32. Graham v. Ford, 125 Ill. App. 578.

33. Where tenant has enjoyed premises under lease for full term, he cannot object that premises are insufficiently described in lease. Haynes v. Sherwin-Williams Co., 126 Ill. App. 414.

34. Dodd v. Pasch [Cal. App.] 91 P 166.

35. Brown v. O'Bryne [Ala.] 45 S 129. And parol evidence is not admissible to show that he intended to bind himself. Id. Under statute of frauds, parol evidence is not admissible to show that third party signing lease signed as guarantor. Id.

36. Omission to record lease for five years held not to affect its validity for first year. Wilson v. Griswold [Conn.] 66 A 783.

37. Kenyon v. Manley, 125 Ill. App. 615.

38. Hinsdale v. McCune [Iowa] 113 NW 478.

39. Under Civ. Code, § 1654, providing that contract shall be interpreted most strongly against party causing uncertainty, and that promissor is presumed to be such party, am-

entire instrument must be looked to and all terms be given effect,[40] and must be construed in connection with contracts contemporaneously executed,[41] and in the light of existing statutes.[42] Printed provisions are controlled by written ones in conflict therewith.[43] The expression of particular purposes for which the premises may be used impliedly excludes other uses.[44] Since the written contract is presumed to express the real agreement of the parties, it cannot be varied by parol,[45] although parol evidence is admissible to show that lease was subject to a condition that it was to be one inoperative if premises were unfit for leased purposes.[46] The term,[47] obligations of the parties,[48] right of renewal,[49] and the property covered by the lease,[50] must be determined from the recitals of the contract.

The statute of frauds. See 8 C. L. 662—In most states a lease for more than a year,[51] or for a year from a future date,[52] is within the statute of frauds and void,[53]

biguity in lease will be construed against lessor. Butt v. Maier & Zobelein Brewery [Cal. App.] 92 P 652.

40. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279.

41. Postponing delivery under certain conditions. Alexander v. Loeb, 230 Ill. 454, 82 NE 833. Evidence of statement by wife of lessor at time of leasing as to right of lessee to use roof of barn for hanging out washing held properly stricken where it is not shown that she was agent of lessor. Saffer v. Molter, 124 Ill. App. 21.

42. Lease under which lessee under written lease is to remain in possession of agricultural lands until summer following expiration of written lease in October is not within Civ. Code, § 1943, providing that hiring of real property other than lodging and dwelling houses is presumed to be for a year unless otherwise expressed. Gabel v. Page [Cal. App.] 92 P 749.

43. Printed provision to quit and surrender at end of term held qualified by typewritten provision for renewal. Butt v. Maier & Zobelein Brewery [Cal. App.] 92 P 652.

44. Where property was leased "for the purpose of conducting a saloon business," it could not be used as a restaurant. Sullivan v. Monahan, 123 Ill. App. 467.

45. Smith v. Green, 128 Ga. 90, 57 SE 98; Slaughter v. Johnson, 128 Ill. App. 417. That lease for year was in fact from month to month. Dodd v. Pasch [Cal. App.] 91 P 166. Especially to show a condition which would defeat it. Morris v. Healy Lumber Co. [Wash.] 91 P 186. Where written lease was for three years, parol evidence of prior agreement that lease should be for five years is not admissible on theory that lease did not cover entire contract. Mageon v. Alkire [Colo.] 92 P 720. Proof of a parol lease to take effect after expiration of written one is not inadmissible as varying terms of written lease. Gabel v. Page [Cal. App.] 92 P 749.

46. Hinsdale v. McCune [Iowa] 113 NW 478.

47. Lease executed April 5th, 1901, for "the term of three years, with the privilege of two years additional from and after" July 1st, 1901, at monthly rental commencing July 1st, 1901, held not to mean that additional two years was to commence July 1st, 1901, but at end of three years. Heffron v. Treber [S. D.] 110 NW 781.

48. Liability of one guaranteeing payment of rent during term of lease, which is for three years with option of tenant to occupy for two additional years, covers payment of rent during such additional years. Heffron v. Treber [S. D.] 110 NW 781.

49. Lease construed and held that lessee was not bound to waive his right of renewal upon election of lessor to terminate lease at end of term and pay for improvements. Butt v. Maier & Zobelein Brewery [Cal. App.] 92 P 652. Word "prior" in provision that lessee shall have prior right to a lease for a further term of five years held not to qualify right of renewal. Id. Lease giving option to renew or to purchase, provided in connection with leasing part for right of way, held that provision for right of way was limited to lease. Wright v. Kayner [Mich.] 14 Det. Leg. N. 631, 113 NW 779.

50. Lease of hotel, describing property as "Buildings numbered 625 and 631, inclusive, together with basement under such premises, meaning thereby the entire buildings containing stores and all floors over said stores, meaning all real estate I now own on W. street except building known as Park Theater," held not to include court between theater and buildings used primarily as exit from theater. Crabtree v. Miller, 194 Mass. 123, 80 NE 225. Under Laws 1892, p. 905, c. 684, lease for ninety-nine years, renewable forever, reserving ground rent redeemable at pleasure of lessee, extending to and along east side of alley, etc., held to extend to center of alley. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358.

51. Under Ky. St. 1903, § 470, a verbal contract for five years' rental is unenforcible. Poole v. Johnson, 31 Ky. L. R. 165, 101 SW 955. Parol agreement modifying terms of lease and intended to cover its unexpired term of more than two years held within statute of frauds, 3 Rev. St. (7 Ed.) p. 2326, pt. 2, c. 7, tit. 1, § 6. Seymour v. Hughes, 105 NYS 249.

52. Rader v. Huffman, 125 Ill. App. 554. Oral lease for one year from future date is void, but a lease at monthly rental without agreement as to duration is valid. Gabel v. Page [Cal. App.] 92 P 749.

53. Where lease is taken by one for benefit of three persons jointly engaged in mining operations, only partners interested can complain that their interests were not evidenced by written assignments. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151. Where lessee enters into possession under unenforcible oral lease, he has re-

unless taken out by a part performance.[54] Likewise, written authority is usually necessary to enable an agent to execute a lease for more than one year,[55] although it has been held that a lessee signing a lease is estopped to assert that agent's authority in writing has not been shown.[56] Changes in a lease which do not affect the interest in the realty passed by the lease may rest in parol.[57]

*Covenants.*See 8 C. L. 662—In many states there is an implied covenant that the premises will be open for entry at the time fixed for the commencement of the term [58] and for quiet enjoyment of the same thereafter,[59] but there is no implied covenant that the premises are in good repair or are fit for the intended use.[60] The consideration supporting the lease generally is sufficient to sustain covenants for renewal or for sale,[61] and such covenants are not void for lack of mutuality.[62] They must be definite and certain.[63]

*Breach of contract to make lease.*See 8 C. L. 662—Where a tenant has been in possession for considerable time under an imperfectly executed lease, it will be treated as a contract for a lease.[64] Where a contract for a lease is contingent, such contingency must happen before contractee becomes entitled to a lease.[65]

§ 3. *The different kinds of tenancies and their incidents. Periodical tenancies.*See 8 C. L. 663—A periodical tenancy may result from an express agreement,[66] by holding over after expiration of a fixed term,[67] or by entry under a verbal lease.[68]

sisting equity for improvements made. Poole v. Johnson, 31 Ky. L. R. 165, 101 SW 955.

54. Where possession has been taken under parol lease and money expended, it will be enforced. Cole v. Ellwood Power Co., 216 Pa. 283, 65 A 678. Where oral lease came within statute of frauds, it was permissible for lessee to show that wheat sown by him was required by lease and hence part performance. Jones v. Com., 31 Ky. L. R. 1148, 104 SW 782. Verbal lease for term not exceeding three years, when accompanied by possession, is taken out of the statute of frauds, and it follows that duration and terms of parol lease may be shown by evidence of verbal agreement between the parties. Dominick v. Kane, 4 Ohio N. P. (N. S.) 583.

55. Laws 1896, p. 592, c. 547, § 207. Finkelstein v. Fabyik, 107 NYS 67. Letters authorizing lessor's agent to lease for three years which was not consummated held not admissible to show written authority required by Code 1896, § 2152, subd. 5, to execute lease for six years (Elliott v. Banksston [Ala.] 45 S 173), and evidence of other leases executed by him is inadmissible to show authority (Id.). Evidence that witness had seen writing purporting to have been signed by defendant, authorizing defendant's agent to rent, etc., held insufficient to show authority to execute particular lease in absence of proof of its date and that it was in force at the time. Id. Code 1896, § 2152, subd. 5, provides that every contract for sale of land or any interest therein for term not longer than one year shall be in writing, unless purchase money be paid and the purchaser be put into possession by the seller, etc. Held that putting of lessee in possession by agent without written authority is insufficient. Id.

56. Bowman v. Powell, 127 Ill. App. 114.

57. Written lease may be modified with respect to manner and terms of paying rent by an oral agreement and same may be proven. Wilson v. People's Gas Co., 75 Kan. 499, 89 P 897.

58. Lessor and not lessee must oust prior tenant unlawfully holding over. Horpolsheimer v. Christopher [Neb.] 111 NW 359. Measure of damages for breach of implied covenant to have premises open for entry is difference between rental value and rent reserved, together with special damages. Id.

59. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151.

60. Keroes v. Richards, 28 App. D. C. 310.

61. Overall v. Madisonville, 31 Ky. L. R. 278, 102 SW 278; Wright v. Kayner [Mich.] 14 Det. Leg. N. 631, 113 NW 779.

62. Wright v. Kayner [Mich.] 14 Det. Leg. N. 631, 113 NW 779.

63. Option to purchases at price not to exceed $75 per acre, held not void for uncertainty of price. Wright v. Kayner [Mich.] 14 Det. Leg. N. 631, 113 NW 779. Covenant to renew without specifying terms is not void for indefiniteness, since renewal upon terms of original lease will be implied. Hoff v. Royal Metal Furniture Co., 117 App. Div. 884, 103 NYS 371.

64. And as against purchaser of property having knowledge who is seeking to oust tenant, a decree will be granted directing that a valid lease be executed. Raitz v. Dow, 10 Ohio C. C. (N. S.) 249. Fact that lease was made to R, who subsequently with knowledge of lessor brought in another as partner with him, would not operate under statute to invalidate agreement for occupancy. Id.

65. Provision in lease giving tenant right to lease certain store on premises should it become vacant does not entitle him to lease where occupying tenant holds over. Bedell v. Edgett, 104 NYS 1013.

66. Under Gen. Laws 1896, c. 269, § 6, providing that in case of letting at certain rate per month, without any other reference as to time, letting shall be deemed from month to month, where premises were rented at certain sum per month until wanted by landlord, fact that landlord stated that he was thinking of putting in shoe store about July 1st held not to change tenancy. J. B.

*Tenancy at will.*See 8 C. L. 864—Where leased property is sold under a trust deed antedating the lease,[69] or where a tenant enters and pays rent under a void lease,[70] a tenancy at will is created and a tenancy at the will of one is at the will of the other.[71]

*Tenancy at sufferance.*See 8 C. L. 664

§ 4. *Rights and interests remaining in the landlord. A. Reversion, seisin, and right of re-entry.*See 8 C. L. 664—The landlord may assign or sell his reversion,[72] notwithstanding the lease gives the tenant an option to purchase,[73] but after he has done so, the option cannot be varied without the consent of the purchaser.[74] Where attornment is unnecessary, the assignee or purchaser immediately succeeds to all of the landlord's interest and rights,[75] the lessee becoming his tenant.[76] A tenant is bound by the written lease, knowingly signed, although it is not the true contract where the reversion has been purchased in reliance thereon.[77] The statutes of some states prohibit attornment by the tenant to a stranger without lessor's consent.[78] Upon the surrender of the leasehold, the landlord's estate becomes perfect.[79]

(§ 4) *B. Estoppel of tenant to deny title.*See 8 C. L. 664—A tenant[80] in posses-

Barnaby Co. v. Johnston [R. I.] 65 A 613. Lease for one year and so on from year to year until same should be terminated at end of a year by lessee by due notice, forfeitable for nonpayment of rent, held not a lease for indefinite term, within Ballinger's Ann. Codes St. § 4570. Morris v. Healy Lumber Co. [Wash.] 91 P 186.

67. Lessee remaining in possession for over year after expiration of five year lease and paying rent held a tenant from year to year. Streit v. Fay, 230 Ill. 319, 82 NE 648. Evidence that defendant rented premises for a month and remained from one month to another held to establish a tenancy from month to month. Hanks v. Workmaster [N. J. Law] 66 A 1097.

68. Where after sale of urban property under trust deed purchaser and tenant, holding tenancy inferior to deed, agree orally to continue same, under Rev. St. 1899, § 4110 (Ann. St. 1906, p. 2234), tenancy from month to month is created. McFarland Real Estate Co. v. Joseph Gerardi Hotel Co., 202 Mo. 597, 100 SW 577. Where possession is taken under oral lease for a year, rent payable monthly, under Ballinger's Ann. Codes & St. § 4569, tenancy from month to month is created. Mades v. Howaldt [Wash.] 90 P 588. Rev. St. 1899, § 4110 (Ann. St. 1906, p. 2234), declaring that under verbal contract for occupation of town property tenancy shall be one from month to month, cannot be invoked where plaintiff constructed building on defendant's land under agreement that defendant will either pay him for such building or rent to him till rents equal cost. Adams v. Bonnefon, 124 Mo. App. 457, 101 SW 693.

69. McFarland Real Estate Co. v. Joseph Gerardi Hotel Co., 202 Mo. 597, 100 SW 577.

70. Hayes v. Atlanta, 1 Ga. App. 25, 57 SE 1087. In action for taking of tenancy at will by eminent domain, void lease is admissible to aid in establishing tenancy. Id. Action of lower court examined and held in conformity with directions of supreme court to determine right of parties to avoid lease for years as tenancy at will. La Rue v. Parmele [Neb.] 111 NW 121.

71. Lease was sufficiently executed by lessee but not by lessor. Hayes v. Atlanta, 1 Ga. App. 25, 57 SE 1087.

72. Assignment of lease to "Felix Isman, agent," held to assign lease so as to enable him to restrain removal of chattels which passed to lessor on termination of lease. Isman v. Hanscom, 217 Pa. 133, 66 A 329.

73. Purchaser stands in lessor's place. Millard v. Martin [R. I.] 68 A 420.

74. Millard v. Martin [R. I.] 68 A 420.

75. Where lessor assigned his right to control occupancy and possession for more than four years beyond term of lease, assignee may elect to treat tenant holding over as lessee for another year. United Merchants' Realty & Improvement Co. v. Roth, 53 Misc. 92, 103 NYS 1112. Assignment of lease by lessor does not release lessee from his covenants. Bowman v. Powell, 127 Ill. App. 114.

76. All rights remain the same. Hammond v. Jones [Ind. App.] 83 NE 257. Where leased lands are conveyed, rents accruing thereafter belong to grantee. Id.

77. Where lessee claiming oral lease for year admits signing a monthly lease to oblige lessor, it is error in summary proceedings by vendee of lessor to refuse to permit plaintiff to show that he purchased in reliance on written lease. Realty Mortg. Co. v. Byrnes, 54 Misc. 235, 104 NYS 370.

78. Where property had been sold to state for taxes prior to execution of lease and was resold to bank during term, held that bank was not a stranger within Civ. Code, § 1948, providing that attornment to stranger is void unless with consent of lessor, etc. Teich v. Arms [Cal. App.] 90 P 962.

79. Where an unchallenged title to land has been enjoyed for a great many years, the court, as against lease for 2,000 years created in 1682, will presume whatever grant is necessary to quiet title. Townsend v. Boyd, 217 Pa. 386, 66 A 1099.

80. Payment of annuity by one in possession to holder of legal title held not to estop former from denying latter's title where relation of landlord and tenant did not exist, though annuity is called rent. Whetsler v. Sprague, 224 Ill. 461, 79 NE 667. Where one enters into possession of land under proceeding of record under which title is openly avowed as in fee simple, and continues in undisturbed possession for over sixty years, the rule of estoppel does not apply. Townsend v. Boyd, 217 Pa. 386, 66 A 1099.

sion cannot deny his landlord's title [81] though his term has expired,[82] nor can he change the character of his possession to the prejudice of the latter,[83] and the benefit of this doctrine inures to all who succeed to the lessor's estate,[84] and is binding on all who claim under the lessee.[85] This estoppel, however, relates to the title as it existed at the time of leasing and does not preclude lessee from showing that such title has terminated.[86]

§ 5. *Mutual rights and liabilities in demised premises.*[See 8 C. L. 665]—Contractual rights between the parties are measured by the terms of the lease [87] as are stat-

81. Haynes v. Sherwin-Williams Co., 126 Ill. App. 414; Washington v. Moore [Ark.] 105 SW 253. Cannot assert that he is only owner in common. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687. Cannot purchase and assert outstanding title. McCutchen v. McCutchen, 77 S. C. 129, 57 SE 678. Cannot maintain action to quiet title. Engle v. Tennis Coal Co., 30 Ky. L. R. 1269, 101 SW 309. Where tenant has failed to pay rent, he cannot defend against dispossession proceeding on plea of title on himself or another. McFarlane v. Kirby, 28 App. D. C. 391. Tenant held estopped to deny lessor's interest under contract giving her use of land during widowhood. Henderson v. Henderson [Iowa] 114 NW 178. In trespass to try title, plaintiff need not establish a valid title where defendant is shown to be his tenant. Berry v. Jagoe [Tex. Civ. App.] 18 Tex. Ct. Rep. 81, 100 SW 815. Subtenant is estopped to assert as against his lessor that subleasing was void for lack of landlord's consent. Boyd v. Kinzy, 127 Ga. 358, 56 SE 420. Where grantee in defectively acknowledged deed claimed to own land described therein, one leasing from him is not estopped to deny title of grantor. Vincent v. Means [Mo.] 106 SW 8.

82. Cannot show paramount title in himself existing prior to lease to excuse surrender of possession. Thomas v. Young, 79 Conn. 493, 65 A 955.

83. Lessee attempting to assert possession as liquidator of partnership business. Campbell v. Hart, 118 La. 871, 43 S 533.

84. Purchased property. Hackney v. McIninch [Neb.] 112 NW 296.

85. Assignee of lease. Hackney v. McIninch [Neb.] 112 NW 296.

86. Teich v. Arms [Cal. App.] 90 P 962. Where property had been sold to state for taxes prior to execution of lease and resold to bank during term, proof of such facts did not deny lessor's title as it existed at time of leasing, since resale by state divested lessor of title and right to possession. Id. Sold under foreclosure of trust deed and came into hands of lessee through mesne conveyances. Spafford v. Hedges, 231 Ill. 140, 83 NE 129.

87. Where lease of space between trees of an orchard provided that lessee was to care for the trees, it was no defense to action for negligence that he gave trees better care than others not included in contract. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687. Lease of building for laundry purposes, requiring lessor to furnish tenant "with right to connect with sewer drain at rear of store building with drainage and fall sufficient to carry off water, imposes duty to furnish drain sufficient to carry quantity used in laundry. Marks v. Chapman [Iowa] 112 NW 817. Where lessor agreed "to furnish the necessary seed rice and water for irrigating the rice crop, or so much water as can be furnished by well now on the place," held that he was only obliged to furnish water to full capacity of well. Duson v. Dodd [Tex. Civ. App.] 18 Tex. Ct. Rep. 303, 101 SW 1040. Where right to use movable scenery in theater depends upon construction of building and not upon whether license is first or second class, covenant to furnish lessee a first class license does not require that landlord provide building in which movable scenery could be used. Kiernan v. Bush Temple of Music Co., 229 Ill. 494, 82 NE 410. Lessee is presumed to have equal knowledge with lessor as to such building regulations. Id. Where lease, providing that premises were to be used for sales and stock room of embroideries, laces, etc., same business to be carried on therein as was carried on by lessee at its former place of business, also stipulated that lessor was not to rent any part of building to firm handling line of goods similar to lessee's, held that restrictive covenant was only to exclude those engaged in business similar to that conducted by lessee at former place of business. Harry Angelo Co. v. Improved Property Holding Co., 105 NYS 590. Where lease provided that tenant should leave premises set with 1,000 trees or in lieu of missing trees nursery stock, lessor may sue for failure to deliver nursery stock, notwithstanding sale of land where contract has been reassigned to him before breach. Pogue v. Ball [Cal. App.] 88 P 376.

Damages: Measure of damages for breach of lessor's covenant to properly heat premises leased for restaurant, and to supply sufficient hot water and steam for cooking, is falling off in receipts, less value of any food that can thereafter be used. Nemrow v. Assembly Catering & Supply Co., 121 App. Div. 481, 106 NYS 109. Under terms of farm lease, lessors were to receive one-third of crop. Lessees were to advance on demand $54 per month during term, to be repaid at time of harvest. Before last monthly advance was due, flood rendered raising of crop impossible. Held that lessees were not obliged to make last payment before suing for money advanced. Carstenbrook v. Wedderien [Cal. App.] 91 P 117. Where premises are kept for rental and not for sale, measure of damages for breach of covenant to keep same free from burrs is decrease rental value during period necessary to eradicate and expense of restoration and not depreciation in market value (Brown Land Co. v. Lehman, 134 Iowa, 712, 112 NW 185), hence, evidence of length of time necessary to destroy burrs (Id.), and of the cost of a special

utory rights by the provisions of the statute.[88] Where the landlord agrees to furnish water for a particular purpose, it is immaterial that he has no water for that purpose,[89] and his liability is not dependent upon negligence.[90] Performance of covenants is frequently secured by a deposit.[91] With the exception of negative covenants,[92] violations of covenants will be enjoined only in the absence of an adequate remedy at law,[93] and upon a showing of irreparable injury.[94] In Ohio, where illegal selling of liquor by tenant may subject the landlord's title to a statutory lien, injunction will issue to restrain such sale.[95] A right of way over adjoining premises which did not exist at time of leasing does not pass under the word "appurtenance."[96] The landlord is under no obligation to furnish heat and hot water in the absence of express contract.[97] A lessee of a farm with live stock, tools, and utensils thereon, who is to return similar personalty of equivalent value at end of term has only a qualified interest,[98] and neither he nor the lessor has perfect title to particular property until set off by agreement or legal action.[99]

(§ 5) *A. Occupation and enjoyment.*[See 8 C. L. 666]—By express agreement, lessee may obligate himself to use the premises for a particular business,[1] or limit

treatment, which evidence tends to show is necessary, is admissible (Id.).

88. New York City Building Code, § 22, providing that persons making excavations of ten feet or more must support walls of contiguous buildings, does not apply to lessor making excavations on lot adjacent to leased premises. Paltey v. Egan, 107 NYS 444. Acts 1899, p. 352, c. 178, § 1, requiring keeper or proprietor of every hotel, etc., to provide ropes and rope ladders, does not impose duty on owner leasing hotel. Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 SW 428.

89. Water for irrigation. Stockton v. Brown [Tex. Civ. App.] 20 Tex. Ct. Rep. 678, 106 SW 423.

90. Duty is absolute. Duson v. Dodd [Tex. Civ. App.] 18 Tex. Ct. Rep. 303, 101 SW 1040.

91. Lease provided that sum deposited should be as liquidated damages for failure to repair and as security for rent and performance of covenants, also that if premises became vacant, or if tenant should be dispossessed by summary proceedings, lessor might relet and hold lessee for deficiency. Held that deposit survived the dispossession and that tenant was liable for deficiency in rent and expense incurred by reason of breach of covenants. Colderaro v. Kempner, 107 NYS 41.

92. Covenant by lessee to allow lessor to fall plow held not a negative covenant, enforcible by injunction without regard to irreparable injury. Carlson v. Koerner, 226 Ill. 15, 80 NE 562. Continued violation of restrictive covenant may be enjoined without showing of irreparable injury. Jos. Schlitz Brew. Co. v. Nielsen [Neb.] 110 NW 746. Fact that lessor has declared forfeiture under terms of lease for violation of restrictive covenant does not preclude enjoining further violation while lessee is in possession. Id.

93. Where landlord had right to declare lease null and void upon breach of covenant by lessee, she has adequate remedy at law for breach of covenant to allow her to fall plow. Carlson v. Koerner, 226 Ill. 15, 80 NE 562. Where lessee is damaged by lessor's failure to furnish first class theater license as covenanted, his remedy is at law, and he cannot enjoin lessor from shutting off light and heat for nonpayment of rent. Kiernan v. Bush Temple of Music Co., 229 Ill. 494, 82 NE 410.

94. Damages to landlord caused by breach of covenant of lessee to allow her to fall plow held too speculative and dependent upon season to constitute irreparable injury. Carlson v. Koerner, 226 Ill. 15, 80 NE 562.

95. Position of tenant whose tenancy has been forfeited by his own unlawful act is analogous to that of one holding over his term, and if his continued possession and use of premises for selling liquor is likely to endanger his landlord's title by placing a statutory lien thereon, tenant being insolvent, ground is afforded for protection of landlord by injunction. Moser v. Stebel, 9 Ohio C. C. (N. S.) 217.

96. Georke Co. v. Wadsworth [N. J. Eq.] 68 A 71. Easement of necessity. See Easements, 9 C. L. 1017.

97. Slaughter v. Johnson, 128 Ill. App. 417.

98. Held that, although he sold and bartered same as his own, creditors obtained no rights as against lessor. Wilson v. Griswold [Conn.] 66 A 783.

99. Hence lessee's trustee in insolvency could not maintain action in conversion until property was set off (Wilson v. Griswold [Conn.] 66 A 783), but where lessor attached some of property as that of lessee and lessee's trustee in insolvency sued lessor for conversion, held that there was implied agreement that property belonged to lessee (Id.).

1. Where rent reserved is one-third of crop raised, and there is no reservation of pasturage, held under Civ. Code, § 819, lessees were entitled to use land for pasturage after it became impossible to raise crop thereon. Carstenbrook v. Wedderien [Cal. App.] 91 P 117. Provision in lease that it was understood that lessee desires building for purpose of conducting a general banking business and alterations to be made were such as would fit building for that purpose, etc., held not to limit use of building. Boozer v. Loan & Exch. Bk. [S. C.] 58 SE 934. Complaint alleging covenant by lessee to continuously use premises for a bakery, that premises were chiefly valuable for its bakery equipment and good will connected there-

himself in conducting such business.[2] While ordinarily a tenant is entitled to enjoy the premises free from disturbance of the landlord,[3] the latter may enter to comply with health ordinance or order.[4]

Right to enter. See 6 C. L. 666—A landlord is bound to put his tenant in possession according to the terms of the lease [5] and it is no defense that an existing lease prevents.[6] A tenant must accept a belated tender of possession where he can do so without serious prejudice,[7] but he does not thereby waive accrued damages.[8] While a tenant holding over after the end of his term is liable to a tenant who is thereby excluded from possession,[9] one whose tenancy has not been terminated incurs no liability.[10] The measure of damage for failure to give possession is the difference between the market value of the lease and the reserved rent.[11]

A covenant for quiet enjoyment See 6 C. L. 666 does not protect the tenant against the police power of the state or of a city,[12] but only against tortious acts of the landlord,[13] and those claiming under him or over him by paramount title.[14]

with, that lessee suspended baking, etc., held to state cause of action. Stillman v. Thompson [Conn.] 67 A 528. Plea that premises did not comply with statute relating to such business without alleging facts or that it could not be made to comply by slight changes, held demurrable. Id. Evidence that premises were chiefly valuable for such purpose, that they could have been so leased, that they were in fact contracted to be leased, held admissible on issue of damages though not specifically pleaded. Id. Evidence as to character, capacity, and value of oven held admissible as bearing on decreased value of property because of breach, though cost of oven and installation were not alleged and were incurred by one not a party. Id. Question to witness who had formerly run bakery at that place, as to mortgaging property, held too remote to show that business was unprofitable. Id.

2. Lease restricting sale of beer on premises to particular kind held not affected by fact that lessor was member of combination to control trade in city (Jos. Schlitz Brew. Co. v. Nielsen [Neb.] 110 NW 746), nor by fact that excepted beer cannot be obtained especially where parties knew of such fact when contracting (Id.).

3. Held that tenant in large office building who had given notice, although insufficient, to terminate her tenancy, had no right to remove "For Rent" sign placed outside of window, its presence not interfering with her use and enjoyment. Whipple v. Gorsuch [Ark.] 101 SW 735. Such removal, however, held not a violation of Kirby's Dig. § 1901, prohibiting the malicious severance from freehold of another of anything attached thereto. Id. Where lessor unlawfully reentered although lessee was entitled to possession until rent equalled cost of building constructed by him, a judgment in unlawful detainer decreeing that lessor should pay $12 per month, amount of rent, until he surrendered possession, was not erroneous, as when rents so paid equalled the cost, term ended. Adams v. Bonnefon, 124 Mo. App. 457, 101 SW 693. Where lessor wrongfully threatened to throw lessee out, piled building material in street, and made it appear reasonably necessary to employ guards, held that measure of damages was not merely depreciation in market value of lease during disturbance, but lessee was entitled to damages for injury caused by piling of material, expense of guards, etc. (Gray v. Linton, 38 Colo. 175, 88 P 749), and to punitive damages (Id.).

4. Lantry v. Hoffman, 105 NYS 353.

5. Where loans are made by lessee to lessor to be repaid by occupancy of leased premises and lessor fails to give possession and is defaulted, lessee may recover loans made. Bijou Co. v. Lehmann, 118 La. 956, 43 S 632. Lessee prevented from obtaining possession by prior lessee may sue lessor for breach of agreement to give possesion. Need not sue for possession. Hammond v. Jones [Ind. App.] 83 NE 257. Held question for jury whether lessee rescinded lease upon failure of lessor to give possession, in accepting back notes, etc. Herpolsheimer v. Christopher [Neb.] 111 NW 359.

6. Lessor knew of existing lease at time he contracted. Hammond v. Jones [Ind. App.] 83 NE 257.

7, 8. Huntington Easy Payment Co. v. Parsons [W. Va.] 57 SE 253.

9. In action by lessee against prior lessee holding over for damage to his goods and business, allegations by plaintiff that he was a merchant conducting a store business, and being desirous of increasing his business, he entered into the lease and was injured because he could not remove his goods thereto, etc., held sufficient allegation of ownership of business intended to be carried on in leased premises as against general demurrer. Snyder v. Regan [Cal. App.] 89 P 852. Allegation of damage that "the goods depreciated in value to plaintiff's business" held sufficient allegation of loss to the business in relation to such goods as he would have been able to sell but for tortious act of defendant. Id.

10. Lessor failed to give notice. Hammond v. Jones [Ind. App.] 83 NE 257.

11. Palmer v. Ingram [Ga. App.] 58 SE 362. Allowance of gross value of products for year of lease less rent held erroneous. Id. Rental value for particular purpose for which plaintiff intended to use same is not measure of damage unless both parties contemplated such use at time of leasing. Rothman v. Kosower, 107 NYS 2.

12. Closing of theater by police authorities for using movable scenery contrary to ordinance (Kiernan v. Bush Temple of Music Co., 229 Ill. 494, 82 NE 410), hence, one

Nature of tenant's estate.[See 8 C. L. 667]—A leasehold interest for three years is personalty.[15] An entry under the lease is no longer necessary in many states to create the relation of landlord and tenant.[16]

(§ 5) *B. Assignment and subletting.*[See 8 C. L. 667]—An assignment must identify the leasehold,[17] comply with the statute of frauds,[18] and be recorded if required by statute.[19] An assignment under seal and duly delivered is sufficient without entry thereunder.[20] A conveyance of lessee's entire interest will usually be construed an assignment though in form a sublease.[21] The lessee's common-law right of assignment may be restricted by statute,[22] or by covenant,[23] the landlord's consent usually being required.[24] Where landlord's consent is necessary, such consent may be made the basis of a new contract,[25] and, likewise, the assignment may be made the subject of contract between lessee and assignee.[26] While assignment of lease does not of itself pass collateral agreements,[27] they may be conveyed by parol with the assignment.[28] Lessor cannot assert fraud in the procurement of a recorded lease against a bona fide assignee.[29] Where lessee performs all the covenants and obligations of

seeking to off-set damages for breach of warranty against rent must show a disturbance by other superior right (Id.).

13. Broken by lessor's refusal to allow lessee to enter until he paid one-half of cost of certain repairs. Garrison v. Hutton, 118 App. Div. 455, 103 NYS 265.

14. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151. Where after defect in title became known to lessees they did not notify lessor thereof until institution of suit to rescind, eighteen months after discovery, and lessor immediately cured defect, held that lease should not be rescinded. Finch v. Causey [Va.] 57 SE 562.

15. General rule as to fraudulent sale of personal property applies. Joseph Speidel Grocery Co. v. Stark [W. Va.] 59 SE 498.

16. Lessee whose term has commenced under terms of lease is a tenant within Cr. Code 1902, § 186, making it a misdemeanor to enter after notice of owner or tenant, though he has not taken possession. State v. Gay, 76 S. C. 83, 56 SE 668.

17. Where lessee's agent wrote on back of assignment which had reverted "We hereby transfer all our right and title and interest in this lease to M," the assignment describing original lease, words "this lease" refers to such lease and is sufficient. Alexander v. Morris [N. C.] 58 SE 600.

18. Verbal assignment of lease with three years to run is void under Revisal 1905, § 976. Alexander v. Morris [N. C.] 58 SE 600.

19. Sale or assignment of lease for term of three years need not be recorded to be good as against vendor's creditors. Joseph Speidel Grocery Co. v. Stark [W. Va.] 59 SE 498.

20. Donaldson v. Strong [Mass.] 81 NE 267.

21. Lease by lessee before beginning of his term in exact form and words, except as to date and names of parties, of original lease, held assignment. Herzig v. Blumenkrohn, 107 NYS 570.

22. Assignment without lessor's consent, being void under Sayles' Civ. St. 1897, art. 3250, creates no privity of contract between lessor and assignee. Morrow v. Camp [Tex. Civ. App.] 18 Tex. Ct. Rep. 153, 101 SW 819.

23. Covenant against assignment of lease to two persons is broken by assignment of undivided moiety of one to other. Tober v. Collins, 130 Ill. App. 333. Bequest to executors and their transfer to themselves as trustees held not a violation of covenant not to assign, especially where lease provides that leasehold shall go to lessee's "personal representatives" and the covenant not to assign binding the lessee "or others having his estate in the premises." Squire v. Learned [Mass.] 81 NE 880.

24. Proviso in lease to two persons that either could sell to other, if an exception to covenant against assignment without lessor's consent, does not operate in favor of two assignees of lease with lessor's consent. Tober v. Collins, 130 Ill. App. 333. Consent of landlord to subletting does not include consent to assign. Necessary under Sayles' Civ. St. 1897, art. 3250. Morrow v. Camp [Tex. Civ. App.] 18 Tex. Ct. Rep. 153, 101 SW 819.

25. Where lessor, who had agreed to lower storerooms of leased building to new grade to be established, consented to assignment of lease under agreement absolving her from all liability occasioned by change of grade, held that she was relieved from original undertaking. Hoppe v. Rosenberg [Wash.] 88 P 1114. Question held for jury whether lease was assigned under option as modified or under substituted agreement which was silent as to payment of certain professional fees. Tallman v. Edwards, 32 Pa. Super. Ct. 273.

26. Contract of sale of leasehold construed and held that failure to pay interest monthly on note given and ground rent and insurance did not constitute a forfeiture. Teltey v. McElmurry, 201 Mo. 382, 100 SW 37.

27. Offer to take lease of certain repairs were made and acceptance thereof held to create independent contract to make repairs. Keeley Inst. Co. v. Shaw, 149 Mich. 519, 14 Det. Leg. N. 499, 113 NW 30.

28. Depending upon intention of parties. Keeley Inst. Co. v. Shaw, 149 Mich. 519, 14 Det. Leg. N. 499, 113 NW 30. Evidence of business relations between lessee and his assignee held admissible to show intent. Id.

29. Hubbard v. Cook [C. C. A.] 153 F 554.

his lease notwithstanding an assignment in violation of his contract, he is entitled to all the benefits thereof.[30]

At common law a tenant may sublet his estate,[31] but this right has been restricted by statute in some states[32] and may be prohibited or limited by express agreement.[33] Where landlord's consent is necessary to a valid subletting, the lease must come within the consent given.[34] Where by statute leased premises cannot be sublet without landlord's consent, they cannot be sold under a forced sale.[35] In Missouri a landlord cannot re-enter for subletting by a tenant for less than two years without giving the statutory notice.[36]

(§ 5) *C. Repairs and improvements.* See 8 C. L. 670—While the law imposes no duty upon the landlord to make repairs,[37] he may obligate himself to do so by express agreement,[38] but an agreement to make outside repairs will not be implied from the fact that the lease expressly requires lessee to make inside repairs.[39] A collateral covenant to put the premises in good repair is personal and does not pass with the reversion.[40] Whether landlord's covenant to make repairs obligates him to search for defects or merely to repair on notice depends upon the intention of the parties.[41] Where a building is leased to several tenants, parts thereof remaining under the control of the landlord for their common use must be repaired by him.[42]

30. May recover for money expended after assignment for which he could have recovered if no assignment had been made. Morrow v. Camp [Tex. Civ. App.] 18 Tex. Ct. Rep. 13, 101 SW 819.

31. Where lease does not prohibit subletting, fact that lessee was going to sublet to negroes and Chinamen and to other undesirable persons held no ground for injunction. Fleisch v. Schnaier, 104 NYS 921. Where assignee reassigned lease to original lessee and thereafter continued in possession, it will be presumed that his occupancy was as tenant of lessee. Donaldson v. Strong [Mass.] 81 NE 267. Lease by lessee for a part of term is a subletting and not an assignment. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151. Arrangement by corporation lessee whereby officer was allowed to transact private business on premises upon paying one-half of janitor, gas, and telephone bills, held subletting. Levey v. Hockwald [Cal. App.] 92 P 872. Arrangement whereby one selling steamship tickets was permitted to occupy premises upon payment of commission held a subletting. Id.

32. Under Ky. St. 1903, § 2292, a sublease without lessor's consent of wall for advertising purposes is void where lessee has a term for less than two years, and landlord may recover actual damages (Louisville Gunning System v. Parks, 31 Ky. L. R. 923, 104 SW 331; Louisville Gunning System v. Knighton, 31 Ky. L. R. 923, 104 SW 332), but not punitive damages where sublessee acted in good faith in painting sign thereon (Louisville Gunning System v. Parks, 31 Ky. L. R. 923, 104 SW 332).

33. Where lessee covenanted not to sublet premises for any purpose other than for "lodge use" or "lodge purposes" without lessor's consent, and premises were leased to various lodges which conducted dances therein, parol evidence of usage among lodges in respect to social dances and of acts and conduct of parties is admissible to show meaning of term "lodge use" and "lodge purpose." O'Neill v. Ogden Aerie No. 118, F. O. E. [Utah] 89 P 464.

34. Permission to sublet in these words: "I would not have any objection to your subletting the whole or any part (of the premises) to a reputable business concern which would not affect the property" to authorize subletting to automobile company for a garage, though insurance rate was increased (Dodd v. Ozburn, 128 Ga. 380, 57 SE 701), and subletting being within consent given, lessor cannot complain that rate of insurance on adjoining property was increased (Id.).

35. Rev. St. Tex. 1895, art. 3122. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 F 217.

36. Rev. St. 1899, § 4107 (Ann. St. 1906, p. 2233). Adams v. Bonnefon, 124 Mo. App. 457, 101 SW 693.

37. Dustin v. Curtis [N. H.] 67 A 220.

38. Repair of stone ledge under window sill held a repair of wall within lease requiring lessor to make wall repairs. Cohn v. Naughton [Mo. App.] 104 SW 1158. Allegation that lessor agreed, when lease was made, to repair front window held sufficient to allow recovery for repair of defective construction not known when lease was executed. Id. Where lessor was to repair roof but was to be liable for leakage only upon failure to repair within reasonable time after notice, held liable for leakage where skylight repeatedly became out of order, repairing was defective, and roof imperfectly protected while repairing was being done. Reilly v. Tull, 102 NYS 522.

39. Schiavone v. Callahan, 52 Misc. 654, 102 NYS 538.

40. Tobey v. Mattimore, 54 Misc. 231, 104 NYS 393.

41. To be determined from all the circumstances and the language used. Miles v. Janvrin [Mass.] 82 NE 708.

42. Damage from overflow of closets under exclusive control of lessor. Kecoughtan Lodge No. 29, K. P. v. Steiner, 106 Va. 589, 56 SE 569. Lessor is as much bound to keep

Without lessee's consent,[43] landlord has no right to enter upon leased premises and make changes therein,[44] even though beneficial to lessee,[45] and if he does so, lessee may sue in tort though it also violates the contract.[46] In reconstructing the premises of one tenant, the landlord owes an absolute duty not to injure the property of another.[47] The taking and retaining of possession by lessee does not waive damages for lessor's breach of covenant to repair.[48]

While it is the duty of a tenant to repair defects arising during the term,[49] an express covenant to keep old premises in repair obligates him to remedy defects existing at the time of leasing.[50] The duty to make "repairs,"[51] to pay for the same,[52] and to return the premises "in good repair," etc.,[53] is frequently the subject of express agreement. Acceptance of surrender of premises with knowledge of its condition does not waive recovery for breach of covenant to repair,[54] especially where a contrary intent is manifest.[55] A tenant cannot improve the premises without the landlord's consent and make him a debtor therefor,[56] his right to compensation resting wholly in contract.[57]

*Waste.*See 3 C. L. 673—Although the tenant wrongfully cut an archway through the wall, its use will not be enjoined in the absence of special damages.[58]

(§ 5) *D. Insurance and taxes.*See 8 C. L. 673—The duty to insure and the rights of the parties in the proceeds are largely governed by the terms of the lease.[59]

approaches to apartments in repair as apartments themselves. Glain v. Sparandeo, 119 La. 339, 44 S 120. Must exercise reasonable care to keep common stairway in repair. Johnson v. Lembeck & Betz Eagle Brew. Co. [N. J. Law] 68 A 85.

43. Lessor has burden of showing assent when sued in trespass. Wood v. Monteleone, 118 La. 1005, 43 S 657. Evidence held insufficient to show assent, especially in view of inconvenience to which it would put lessee. Id.

44, 45. Wood v. Monteleone, 118 La. 1005, 43 S 657.

46. Action construed ex delicto. Wood v. Monteleone, 118 La. 1005, 43 S 657.

47. Immaterial that work was being done through independent contractor (Blickley v. Luce's Estate, 148 Mich. 233, 14 Det. Leg. N. 121, 111 NW 752), and at expense of tenant (Id.). Instruction limiting recovery to personal negligence of landlord held erroneous. Id.

48. Uhlfelder v. Loughran, 54 Misc. 593, 104 NYS 891.

49. Especially where landlord at time of letting expressly refused. Clapp v. Donaldson [Mass.] 80 NE 486.

50. Especially if defects are open to observation. Keroes v. Richards, 28 App. D. C. 310.

51. Replacement of terra cotta drain with iron one, as required by building regulations, held a "repair" within provision requiring lessee to make repairs, and not an improvement (Keroes v. Richards, 28 App. D. C. 310), and it is duty of lessee to pay therefor, at least to extent of cost of a terra cotta drain (Id.).

52. Where lease requires lessee to pay for all repairs and municipal authorities compel lessor to repair drain, lessee must reimburse him. Keroes v. Richards, 28 App. D. C. 310.

53. Covenant to surrender premises "in as good condition as reasonable use thereof would permit" and to "keep" premises in as good repair as they now are held not to require lessee of property for laundry purposes to repair changes necessarily made to carry on business. Marks v. Chapman [Iowa] 112 NW 817. Breaking of window due to defect in construction of building held ordinary wear and tear within exception to covenant to return in as good condition as when received. Drouin v. Wilson [Vt.] 67 A 825. Carpenter of thirty years standing, who had some experience in setting and repairing plate glass, held competent as expert to testify to cause of breaking. Id. Damages held properly awarded for failure to repair holes made in cellar for drainage purposes, as required by express covenant. Marks v. Chapman [Iowa] 112 NW 817.

54. Especially where parties agree to contrary. Herrman v. Laemmle, 107 NYS 73.

55. Instrument accepting surrender of premises and releasing tenant "of and from all obligation to pay rent" held not to release liability for breach of covenant to take good care of premises. Herrman v. Laemmle, 107 NYS 73.

56. Put in window. Critcher v. Watson [N. C.] 59 SE 544.

57. Diederich v. Rose, 228 Ill. 610, 81 NE 1140. Stipulation that if premises were not relet new tenant should take improvements at appraised value held not to entitle tenant to compensation from purchaser. Id.

58. Chamberlain v. Childs' Unique Dairy Co., 53 Misc. 371, 104 NYS 912. Will not be compelled pendente lite to seal up same, where complaint is based on theory of continuing trespass and no irreparable injury is shown. Chamberlain v. Child's Unique Dairy Co., 54 Misc. 56, 105 NYS 370.

59. Where tenant was to put in certain improvements which were to remain his property until end of term, when it should become property of landlord, insurance thereon in case of destruction to be used towards replacing improvements in new building, held that where lease was forfeited after destruction of property, lessor could recover proportion of insurance which

(§ 5) *E. Injuries from defects and dangerous condition.* See 8 C. L. 673—In the absence of a covenant to repair, the landlord [60] is not liable for lack of repairs arising during the term,[61] but knowledge [62] at the time of leasing [63] of latent defects renders him liable for resulting injuries, unless the same are disclosed.[64] The landlord is not liable for injuries resulting from the wrongful act of a cotenant,[65] or for an improper use of the premises by such cotenant, unless he authorizes or causes such use or let the premises for that particular purpose.[66] Where landlord undertakes to make repairs, he is liable for negligence in prosecuting the work.[67] Lessor is not responsible for injury due to extraordinary use of the premises,[68] nor is he liable except as a licensee to a tenant using property not leased [69] with his consent.

A covenant to repair does not ordinarily render the landlord liable in tort for failure so to do.[70]

A landlord is liable for injuries result from his negligence [71] in failing to keep in a reasonably safe condition portions of a building leased to several tenants over which he retains control for their common use.[72] In the absence of statute,[73] no

portion of term before destruction bore to entire term. Lincoln Trust Co. v. Nathan, 122 Mo. App. 319, 99 SW 484.

60. Evidence held insufficient to show defendant's ownership or control of premises and responsibility for defect. Rosenstein v. Deffaa, 107 NYS 90.

61. Jones v. Brumme, 104 NYS 1038. Where coal had several times been put through coal hole after letting proof that edges had been broken by prying cover off so that cover did not fit, held insufficient to show that it was in that condition when let. Clapp v. Donaldson [Mass.] 80 NE 486.

62. Knowledge of agent is knowledge of lessor. Holzhauer v. Sheeny, 31 Ky. L. R. 1238, 104 SW 1034.

63. Knowledge must exist at time of leasing, and hence knowledge thereafter acquired does not impose duty to notify lessee. Holzhauer v. Sheeny, 31 Ky. L. R. 1238, 104 SW 1034. Admissions of agent tending to show that he had knowledge prior to injury is inadmissible in absence of evidence that such knowledge existed at time of leasing. Id.

64. Holzhauer v. Sheeny, 31 Ky. L. R. 1238, 104 SW 1034. Especially where premises were represented as being in good repair. Meyers v. Russell, 124 Mo. App. 317, 101 SW 606. Blind fell and injured pedestrian on street. Gronlund v. Forsman, 124 Ill. App. 362.

65. Where lease of upper floor of building obligated lessee to keep and return premises in good repair, landlord is not responsible to tenant of lower floor for damage due to overflow of water closet on top floor which was in good repair when leased. Lebensburger v. Scofield [C. C. A.] 155 F 85.

66. Peterson v. Bullion-Beck & Champion Min. Co. [Utah] 91 P 1095. To render lessor liable to lessee for injury caused by another tenant's use of premises, the interference must be such as would necessarily result from use of premises for purposes for which it was leased. Id. Fact that lease provided that lessee should use premises with due regard to rights of other lessees and that lessor should have right to prohibit interfering uses held not to render lessor liable to a tenant damaged by improper use. Id.

67. Collapse of building while being reconstructed in part by landlord held prima facie evidence of negligence. Blickley v. Luce's Estate, 148 Mich. 233, 14 Det. Leg. N. 121, 111 NW 752.

68. Lowering furniture over railing of gallery is not an ordinary use thereof, and lessor is not liable if it gives way. Glain v. Sparandeo, 119 La. 339, 44 S 120.

69. Saffer v. Molter, 124 Ill. App. 21.

70. Dustin v. Curtis [N. H.] 67 A 220. To render lessor liable in tort for failure to repair steps which are part of leased premises, it must appear that he agreed to keep them in safe condition for tenant's use as distinct from a mere agreement to repair leased premises. Miles v. Janvrin [Mass.] 82 NE 708. Fact that steps are out of repair when leased held not to increase lessor's liability for injuries for failure to repair as he had agreed. Id.

71. Duty not absolute. Rehbach v. Vogt, 126 Ill. App. 613. Must exercise reasonable care. Timlan v. Dillworth [N. J. Law] 67 A 433. Landlord held negligent in failure to repair dumb waiter though he had only owned premises four days, it appearing that he had examined same while negotiating. Id. Held not liable for injury to stock caused by fall of building due to "water logged" condition of cellar partition, which was not leased, such defect not being apparent to ordinary person and landlord being ignorant thereof, and especially where lessee using same was in much better position to discover same. American Exch. Nat. Bk. v. Swope [Tex. Civ. App.] 18 Tex. Ct. Rep. 328, 101 SW 872. Lessor held not negligent in failing to provide hook for holding open front door of tenement house, there having been no request therefor. Ten Broeck v. Deinhardt, 105 NYS 59.

72. Elevator. Hamilton v. Taylor [Mass.] 80 NE 592. Dumb waiter used in common by various tenants in apartment house held to remain in control of landlord. Timlan v. Dillworth [N. J. Law] 67 A 433. Fact that lessor provided steps whereby roof could be reached held not to increase liability to one falling through skylight, roof being used for hanging out clothes. Mospens v. Konz [Ky.] 105 SW 381.

duty rests on the landlord to light the hallways of a tenement, though he retains control.[74] As in other actions for personal injury, contributory negligence defeats recovery.[75]

*To strangers.*See 8 C. L. 677—The landlord[76] is not liable to third persons for injuries caused by defects which do not constitute a nuisance,[77] but is liable for all damages resulting from a nuisance created,[78] or permitted by him,[79] or under his supervision,[80] or which is the necessary and probable result of the use for which the premises are leased.[81] The party injured must be rightfully on the premises or the defective part thereof.[82] A member of the tenant's family can recover for the landlord's negligence under circumstances which would warrant a recovery by the tenant if injured.[83] A direct recovery is often allowed against the landlord to avoid circuity of action.[84]

(§ 5) *F. Emblements and fixtures.*See 8 C. L. 678—In the absence of contract,[85] a tenant may remove trade fixtures,[86] but an improvement made under a void lease cannot be removed where made under protest.[87] Many leases, however, regulate the rights of the parties in respect to improvements[88] and crops,[89] and where landlord

73. Held error for court to read to jury entire statute relating to lighting tenement hallways when only a part was applicable. Robinson v. Crimmins, 104 NYS 1076.

74. Robinson v. Crimmins, 104 NYS 1076.

75. Where person, who was inspecting tenement after deciding that it would not answer, without waiting for janitor who was showing the premises, opened door off hallway and stepped into darkness, she assumed all risks of injury. Robinson v. Crimmins, 104 NYS 1076. See Negligence, 8 C. L. 1090; Buildings and Building Restrictions, 9 C. L. 441.

76. Lease by city of dock space for public float is made in private and not governmental capacity, and liabilities are same as those of an individual. Commercial Wharf Corp. v. Boston, 194 Mass. 460, 80 NE 645.

77. Uggla v. Brokaw, 117 App. Div. 586, 102 NYS 857.

78. Complaint in action against landlord for injuries held sufficient to sustain recovery on theory of nuisance as distinct from negligence. Uggla v. Brokaw, 117 App. Div. 586, 102 NYS 857.

79. Which under terms of lease he could abate. Chosen Freeholders of Hudson County v. Woodcliffe Land Imp. Co. [N. J. Law] 65 A 844.

80. Fact that building which is so constructed as to constitute a nuisance was built by tenant does not relieve landlord where he maintained control and supervision. Uggla v. Brokaw, 117 App. Div. 586, 102 NYS 857.

81. Chosen Freeholders of Hudson County v. Woodcliffe Land Imp. Co. [N. J. Law] 65 A 844.

82. Evidence examined and held that one seeking employment had no implied invitation to use elevator which was marked "for freight only." Missel v. Lennox [C. C. A.] 156 F 347. Evidence of use of elevator floor as completing rear passage to restaurant for purpose of delivering provisions, etc., together with direct testimony that lessor authorized such use, held to make question for jury whether iceman had implied invitation to use same. Hamilton v. Taylor [Mass.] 80 NE 592.

83. Failed to repair common hallway. Domenicis v. Fleisher [Mass.] 81 NE 191.

84. Where party injured by failure of lessor to make repairs as agreed is wife of lessee, question of under what circumstances one can sue lessor to avoid circuity of action is not involved, since wife cannot sue husband. Miles v. Janvrin [Mass.] 82 NE 708.

85. Where lease stipulates as to ownership of chattels placed on premises, law of trade fixtures does not apply. Isman v. Hanscom, 217 Pa. 133, 66 A 329.

86. See Fixtures, 9 C. L. 1367.

87. Where lessees did nothing until other parties acting under prior lease went onto premises, when they temporarily enjoined them and went onto land under protest of owner, improvement cannot be removed upon lease proving void. Brune v. Hicks, 230 Ill. 536, 82 NE 888.

88. Provision that "all alterations, additions, and improvements," except movable furniture, should at option of lessor become his property, held to include electric light apparatus, gallery, vestibules, dumb waiters, and toilet rooms placed in building. Isman v. Hanscom, 217 Pa. 133, 66 A 329. Where railroad company puts down side-tracks at request of coal company upon its leasehold estate for purpose of removing coal, lease providing that, upon abandonment of premises upon part of such coal company, it shall have right to remove mining appliances, such railroad company has right to remove such side-tracks, upon abandonment of premises by coal company, over objection of lessor, provided it does so without doing substantial injury to freehold, and before such abandonment takes place. Ambler v. Erie R. Co., 9 Ohio C. C. (N. S.) 81. Where lessee constructed building and placed machinery therein, lease providing that lessor should renew lease or purchase building upon condemnation, lessee was entitled to receive reasonable value of such machinery as has become a part of building and is used in connection with leasehold, but not as to machinery readily removed and posesssing substantial value separate from building. In re Acquiring Certain Property on North River in New York, 118 App. Div. 865, 103 NYS 908.

is given the option to claim fixtures but no time is fixed for the exercise thereof, he must elect within a reasonable time.[90] Under an agreement permitting tenant to remove buildings "at expiration of the term" unless landlord elected to purchase, he cannot remove upon forfeiture of the lease.[91] Where tenant is entitled to remove an improvement, a promise by landlord to pay therefor is not without consideration.[92] Where the lease is forfeited by the lessee and the landlord makes an entry, title to the growing crops vests the landlord.[93]

(§ 5) *G. Options of purchase or sale.*See 8 C. L. 879—An option to purchase[94] is frequently given.[95] Where the right can be exercised at any time during the term, "provided the tenant promptly pays the rent," a default in the rent forfeits the option,[96] although such forfeiture may be waived by the landlord.[97]

(§ 5) *H. Actions.*—In an action against the landlord for failure to furnish water for irrigation as required by the lease, an irrigation company which had undertaken to furnish him with the water is not a necessary or proper party.[98] One holding a leasehold as a trustee of an express trust may sue thereon in Missouri without joining the beneficiaries.[99] An allegation that default sued for occurred before expiration of notice terminating the lease is sufficient without setting out the notice.[1]

The plea of non infregit contionem cannot be used where the breach charged is also in the negative.[2] Where lessee relies on breach of a covenant, such covenant should be set out in the pleadings and a breach thereof be alleged in accordance with legal requirements.[3]

A stranger suing the landlord for personal injuries has the burden of showing that the premises were let in a state of nuisance,[4] or of establishing his negligence where negligence is relied upon.[5] A lease for less than three years cannot be proven

89. Where defendant leased farm to plaintiff upon the agreement that on sale of premises during term plaintiff would vacate upon notice, and that defendant would pay for crops, no recovery can be had for crops where lessor is compelled to resort to action to remove plaintiff after due notice. Outhouse v. Baird, 121 App. Div. 556, 106 NYS 246. Agreement that upon termination of lease by notice lessor was to pay for crops planted prior to notice does not authorize recovery for crops planted after notice. Id.

90. Notice of election four weeks before end of term held sufficient. Isman v. Hanscom, 217 Pa. 133, 66 A 329.

91. West Shore R. Co. v. Wenner [N. J.] 68 A 225.

92. Critcher v. Watson [N. C.] 59 SE 544.

93. Myer v. Roberts [Or.] 89 P 1051.

94. Contract held not agreement to sell but a lease with option to purchase. Brown v. Larry [Ala.] 44 S 841.

95. Held that tenant remaining in possession after term held possession under contract of purchase. Des Moines Nat. Bk. v. Council Bluffs Sav. Bk. [C. C. A.] 150 F 301.

96. Brown v. Larry [Ala.] 44 S 841. Where lessee makes a payment in excess of rent but does not direct that it shall be so applied and accepts receipts showing that it has been applied to advances, he defaults in rent. Id.

97. Brown v. Larry [Ala.] 44 S 841. Acceptance of rent does not waive forfeiture. Id.

98. Stockton v. Brown [Tex. Civ. App.] 20 Tex. Ct. Rep. 678, 106 SW 423.

99. Where lease was taken in plaintiff's name for the benefit of himself and another, and thereafter an interest was assigned to a third, plaintiff held leasehold as trustee of an express trust, and under Rev. St. 1899, § 541, could sue for breach of covenants without joining beneficiaries. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151.

1. B. Roth Tool Co. v. Champ Spring Co., 122 Mo. App. 603, 99 SW 827.

2. Plea to complaint charging failure to surrender premises in as good condition as when received, ordinary wear excepted, held not proper, being a negative to a negative, but sufficient where no demurrer was interposed. Drouin v. Wilson [Vt.] 67 A 825. And under such plea, burden of showing that defect was not due to excepted cause is on plaintiff. Id.

3. Cassidy v. Richardson [N. H.] 66 A 641. Complaint held insufficient, it being uncertain whether action was for breach of covenant or for trespass to person or property. Id.

4. Where basis of alleged nuisance is that skylight was unsecurely attached to roof, proof that it was insufficiently attached in first instance cannot be supplied by doctrine of "res ipsa loquitur." Uggla v. Brokaw, 117 App. Div. 586, 102 NYS 857. Inference of negligence arising from blowing off of portion of skylight does not relate to landlord, especially where tenant has been in possession for a long time. Id.

5. In suit for injury to tenant caused by

by certified transcript in New York.[6] There must be no variance between the contract alleged and the one proven.[7]

Where an action involves the question of abandonment, the court should define the word.[8]

§ 6. *Rent and the payment thereof, and actionable use and occupation.* See 8 C. L. 679—The obligation to pay rent is contractual.[9] Where the landlord has elected to treat a lessee holding over as a tenant, he cannot thereafter increase the rent by notice.[10] Rents are personalty and the right to collect and distribute the same passes to the personal representative.[11] A conveyance of the fee by operation of law transfers to grantee all rents thereafter accruing,[12] and an assignee of rent without the reversion may maintain an action for rent accruing.[13] While the parties may stipulate for payment of rent in advance,[14] in the absence thereof rent is payable at the end of the rent paying period.[15] Where rent is payable in advance, an eviction for default,[16] or a surrender of the lease [17] does not relieve the tenant from liability for accrued rent for the current rent paying period, although under the New York statute the issuance of a warrant of distress terminates the lease and relieves from further liability,[18] in the absence of an express agreement to the contrary.[19] Where the landlord elects to terminate the lease for nonpayment of rent, he is not entitled to rent for the current month,[20] nor to the time of eviction in the absence of an agreement,[21] nor is the tenant liable for the difference between the rent reserved and the rental received on a release.[22] Where the landlord has followed a practice of collecting and receiving the rent in a particular manner, he cannot put the tenant in default and

collapse of building while being reconstructed by landlord, fact that work was being done without building permit as required by ordinance may be considered on issue of negligence. Blickley v. Luce's Estate, 148 Mich. 233, 14 Det. Leg. N. 121, 111 NW 752.

6. Under Laws 1896, p. 607, c. 547, § 240, lease for less than three years is not a conveyance, and hence cannot be proved by certified transcript under Code, § 935. Goodman v. Greenberg, 53 Misc. 583, 103 NYS 779.

7. Where tenants sued their landlords for breach of latter's contract to furnish water for irrigation purposes, they cannot recover on proof of contract whereby landlords had warranted that another who had undertaken to furnish water would perform such contract. Stockton v. Brown [Tex. Civ. App.] 20 Tex. Ct. Rep. 678, 106 SW 423. Where lease sued on was executed by H as lessor, fact that joint answer of H and his wife admitted that he was acting as her agent did not make her a proper party so as to render a judgment against her proper, there being no facts authorizing introduction of evidence to vary express provisions of lease. Thurman v. Henderson [Ind. T.] 104 SW 936.

8. Union Scale Co. v. Iowa Mach. & Supply Co. [Iowa] 113 NW 762.

9. Where tenant, upon receiving notice to quit or to consent to increase of rental, elects to pay increase, lessor may recover rent as on an express contract. Columbia Brew. Co. v. Miller, 124 Mo. App. 384, 101 SW 711. Where lessor notifies lessee of increase of rent if he holds over, presumed acquiescense of lessee from continued possession may be rebutted by proof of dissent or of counter proposition. Appleton Water Works Co. v. Appleton [Wis.] 113 NW 44.

10. Appleton Water Works Co. v. Appleton [Wis.] 113 NW 44.

11. Strickland v. Thornton [Ga. App.] 58 SE 540.

12. Taylor v. Southerland [Ind. T.] 104 SW 874.

13. Groos v. Chittim [Tex. Civ. App.] 18 Tex. Ct. Rep. 906, 100 SW 1006.

14. Goesse & Remmers Bldg. & Cont. Co. v. Kinnerk [Mo. App.] 105 SW 673.

15. Yearly rental payable at end of year. Parker v. Gortatowsky [Ga.] 59 SE 286.

16. Coro v. Greenwald, 52 Misc. 548, 102 NYS 752.

17. Stern v. Murphy, 102 NYS 747.

18. Under express provisions of Code Civ. Proc. § 2253, eviction by summary proceedings cancels the lease and terminates lessee's liability for rent. Slater v. Von Chorus, 104 NYS 996; Slater v. Bonfiglio, 106 NYS 861.

19. Slater v. Bonfiglio, 106 NYS 861. Where lease provided for dispossession by force or otherwise upon default and for reletting on tenant's account, lessee to pay any deficiency, liability is not terminated by dispossession under code. Id. Parties may stipulate for damages caused by lessee's violation of his covenants notwithstanding eviction under summary proceedings. Slater v. Von Chorus, 104 NYS 996. Complaint construed as action for damages for breach of covenants and not for rent. Id.

20. Sutton v. Goodman, 194 Mass. 389, 80 NE 608.

21. Where lessee covenants to pay rent during term and for such further time as he shall occupy premises, he is liable for rent between termination of lease for nonpayment of rent and eviction. Sutton v. Goodman, 194 Mass. 389, 80 NE 608.

22. Sutton v. Goodman, 194 Mass. 389, 80 NE 608.

claim a forfeiture by discontinuing without notice.[23] Where rent is payable monthly, each month's rent constitutes a distinct and separate cause of action,[24] and where the tenant wrongfully abandons the premises, the lessor may sue for each month's rent as it becomes due.[25] A married woman is not liable for rent on the premises occupied by the family in the absence of an express agreement.[26] To stop interest on rent due, a continuous tender must be made.[27] The payment of rent is frequently secured by a deposit [28] or by a surety bond.[29] Covenant to return the deposit does not run with the land.[30]

Defenses, set-offs, and reductions. See 8 C. L. 882—Payment [31] to one authorized to receive payment [32] discharges the tenant from further obligation, but not the fact that excavations on adjoining property renders the leased premises of less value.[33] Fact that landlord takes possession upon default and relets does not relieve the tenant from liability for accrued rents,[34] nor does a default on the landlord's part giving the lessee a right to surrender the premises relieve from future rents unless such surrender is made.[35] An assignment of the lease does not discharge the tenant from his personal obligation to pay the rent unless the landlord accepts the assignee as his tenant with such intent,[36] and the lessor must be notified of the assignment although the lease provides for assignment to a particular corporation.[37] The covenant to pay rent runs with the land and hence an assignee is liable by reason of his privity of estate,[38] but not after reassignment.[39]

23. Where lessor under lease calling for payment of rent in advance has for many years called at lessee's office and accepted check, he cannot without notice discontinue such practice and claim a forfeiture. Kentucky Lumber Co. v. Newell [Ky.] 105 SW 972.

24. Hence, under Sayles' Rev. Civ. St. art. 358, pleadings on appeal from justice court to county court cannot be amended so as to include additional rent. Williams v. Houston Cornice Works [Tex. Civ. App.] 18 Tex. Ct. Rep. 240, 101 SW 839.

25. Recovery of one month's rent is not res judicata. Davidson v. Hirsh [Tex. Civ. App.] 18 Tex. Ct. Rep. 159, 101 SW 269.

26. Vanderberg v. Kansas City, Mo. Gas Co. [Mo. App.] 105 SW 17.

27. Parker v. Gortatowsky [Ga.] 59 SE 286.

28. Under lease for four years at rental of $12,800 per year, a deposit of $2,200 as security for performance of covenants held not so disproportionate to rent reserved as to be a penalty. Slater v. Bonfiglio, 106 NYS 861. Deposit to secure performance of covenants, upon which lessor agreed to pay interest, which deposit was to be applied to last six month's rent if lessee fully performed his covenants, held not to entitle lessee to cease to pay rent upon bankruptcy of lessor and threatened foreclosure of a prior mortgage. In re Banner, 149 F 936. Where lessor terminates lease for nonpayment of rent, lessee becomes immediately entitled to surplus of security deposited. Sutton v. Goodman, 194 Mass. 389, 80 NE 608.

29. Covenant by lessee to put in a heating plant, electric light plant, and make certain specified improvements in lieu of rent, held covenant to pay for same, and surety on board conditioned on fulfillment of obligations assumed as lease is liable. American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F 17. Demand by surety for rent that tenant be dispossessed and offer to pay costs and advanced rental made at time tenant is not in default or insolvent does not relieve surety for subsequent defaults. Raved v. Kibbe, 102 NYS 490.

30. Hence lessor's grantee cannot be held where he never received the deposit. Joseph Fallert Brew. Co. v. Blass, 103 NYS 865.

31. Evidence as to dealings in respect to certain securities held to show payment of rent. Chicago R. Equipment Co. v. Nat. Hollow Brake Beam Co., 123 Ill. App. 533.

32. Evidence held insufficient to show that party alleged to have taken possession of crop and converted proceeds thereof was agent of lessor so as to constitute payment of rent. Johnson v. Georgia Loan & Trust Co., 1 Ga. App. 839, 57 SE 1078.

33. Especially where lessee is obligated to make repairs. Seymour v. Hughes, 105 NYS 249. Hence agreement to accept a lower rent on account thereof is without consideration. Id.

34. Americus Mfg. & Imp. Co. v. Hightower [Ga. App.] 59 SE 309.

35. Higbie Co. v. Weeghman Co., 126 Ill. App. 97.

36. That landlord consented to subletting did not make subtenant his lessee. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151. Acceptance of rent from subtenant does not of itself work a substitution so as to relieve lessee from liability. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 SE 983; Americus Mfg. & Imp. Co. v. Hightower [Ga. App.] 59 SE 309. Evidence held insufficient to show release of lessee and acceptance of sublessee. Americus Mfg. & Imp. Co. v. Hightower [Ga. App.] 59 SE 309.

37. Assignable to a named corporation or to a company having capital of $50,000. Wynkoop v. Argue, 33 Pa. Super. Ct. 26.

38. Donaldson v. Strong [Mass.] 81 NE 267.

39. Held not liable after removal. Fechter

Damages accruing from breach of the landlord's covenants may be set off against the rent,[40] but not damages arising from independent torts.[41] Where the tenant grants the landlord a license, he cannot set off against the rent the rent received by the latter for a license within the one granted.[42] A deposit to secure performance of the covenants for the entire term cannot be set off until the end of the term.[43] Where the landlord is entitled to interest on his rent, the tenant should be allowed interest on his set-offs.[44]

In Kentucky a tenant is entitled to a proportional abatement of the rent where one or more of several leased buildings are destroyed by fire during the term,[45] unless the lease otherwise provides.[46] A tenant is not entitled to an abatement of rent during a temporary surrender of possession to enable landlord to make repairs voluntarily undertaken on the tenant's request,[47] unless the lessor consumes an unreasonable length of time.[48] While a tenant wrongfully abandoning the premises is entitled to reduction of rents in the amount of the rents received from a reletting, landlord is not bound to relet.[49] The parties may stipulate for an abatement upon the happening of specified contingencies.[50]

Ground rents and perpetual leases. See 8 C. L. 684

Use and occupation. See 8 C. L. 684—An action will not lie for use and occupation against one adversely or tortiously in possession.[51]

§ 7. *Rental on shares.* See 8 C. L. 684—Whether one letting a farm on shares has a specific undivided interest in the crops when gathered or only a lien depends upon the terms of the agreement.[52] While a creditor of a tenant on shares may levy upon his interest in the crop,[53] a creditor of a hireling who is to receive a portion of the crop merely as compensation[54] cannot levy until division.[55] Where a landlord renting on shares prevents the tenant from raising a crop, the measure of damages is the market value of tenant's share of the expected crop, less the cost of growing and harvesting the same, and the earnings of lessee during the season.[56] Where one furnishes land and a team and another labor, latter has only a lien on crop.[57]

v. Schonger, 53 Misc. 648, 103 NYS 738. Assignee may destroy privity of estate by assignment to original lessee without notice to lessor even though there is a covenant against assigning without lessor's consent. Donaldson v. Strong [Mass.] 81 NE 267.

40. Covenant to repair. Uhlfelder v. Loughran, 54 Misc. 593, 104 NYS 891. Fact that lease is oral is immaterial. Id. Lessee may prove that lessor has violated lease and set off damages against rent without filing other pleadings than statutory affidavit. Smith v. Green, 128 Ga. 90, 57 SE 98.

41. Smith v. Green, 128 Ga. 90, 57 SE 98.

42. Where lessee granted to lessor a license, at least, "for people" to pass "with egress to and from a bath," a license to city for bath at end of dock held within license granted. Pierson v. Hughes, 102 NYS 528.

43. Slater v. Bonfiglio, 106 NYS 801.

44. Morrow v. Camp [Tex. Civ. App.] 18 Tex. Ct. Rep. 153, 101 SW 819.

45. Ky. St. 1903, § 2297, providing that tenant shall not be liable for rent of any building destroyed by fire during term, etc., held to entitle tenant to proportional abatement of rent when one of several buildings is destroyed. Scott Bros. v. Flood's Trustee, 30 Ky. L. R. 955, 99 SW 967.

46. Provision in lease relieving tenant from rent where premises are rendered untenantable by fire does not apply to partial destruction which does not render them untenantable, and hence does not render Ky. St. 1903, § 2297, inapplicable. Scott Bros. v. Flood's Trustee, 30 Ky. L. R. 955, 99 SW 967.

47, 48. Chambers v. Mattingly [Tex. Civ. App.] 19 Tex. Ct. Rep. 643, 103 SW 663.

49. Feust v. Craig, 107 NYS 637. May recover rent without deducting amount for which it could be rented to others. Davidson v. Hirsh [Tex. Civ. App.] 18 Tex. Ct. Rep. 159, 101 SW 269.

50. Where lease for annual rental of $2,000 provided that, in event of a partial overflow, lessees should notify lessors on June 1st that they claimed damages, and if no agreement could be made as to amount of reduction in rent, lessor was to have a share of crop, lessees were not required to affirmatively attempt to bring about an agreement. Morton v. Lacy Bros. & Kimball [Ark.] 106 SW 200.

51. Trespasser. Cole v. Thompson, 134 Iowa, 685, 112 NW 178. Must sue in trespass. Carrigg v. Mechanics' Sav. Bk. [Iowa] 111 NW 329.

52. Antone v. Miles [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 105 SW 39.

53. Interest in poultry. Wanamaker v. Buchanan, 33 Pa. Super. Ct. 138.

54. Where by terms of contract cropper was to work land and get one-half of crop, held a hireling. Wanamaker v. Buchanan, 33 Pa. Super. Ct. 138.

55. Wanamaker v. Buchanan, 33 Pa. Super. Ct. 138.

56. Petition alleging net value of expected crop is sufficient without allegations of ex-

§ 8. *The term, termination of tenancy, renewals, holding over.* See 8 C. L. 665—A lease may be made to commence in future,[56] and where it is for a definite term, it expires at the end thereof,[59] and a provision giving the tenant a right to remove improvements does not extend his right of possession.[60] The bankruptcy of the tenant does not of itself terminate the lease.[61] A sale of the property under a deed of trust or a mortgage extinguishes postdated leases,[62] especially if lessee had notice thereof,[63] but does not affect those which antedate the deed or mortgage.[64] By express provision a lease may be made terminable at a particular time [65] by a named person [66] upon notice,[67] or upon the happening of a designated contingency,[68] and the performance of certain conditions precedent.[69] Where a lease of municipal property is terminable if needed for improvements, the right must be exercised in good faith.[70] By statute in some states, a lease is and by agreement may be made terminable, upon being rendered "unfit of occupancy" by fire, etc.[71] Although a lease is terminable on notice, a party condemning the land cannot exercise the right where the tenant's rights become fixed at the same moment that such party succeeds to the landlord's interest.[72] Where one claiming under a lessee is not estopped to deny his title or the lease, he may acquire the fee by adverse possession.[73]

penses, etc., in producing. Waggoner v. Moore [Tex. Civ. App.] 18 Tex. Ct. Rep. 490, 101 SW 1058.

57. Code 1896, § 2712. Cannot mortgage same, notwithstanding § 1064, making mortgage on unplanted crops a valid conveyance if given after Jan. 1st. Carleton v. Kimbrough [Ala.] 43 S 817.

58. United Merchants' Realty & Imp. Co. v. Roth, 107 NYS 511.

59. Where term extends "from" December 1st, 1904, "to" December 1st, 1906, a term of "two years," it expires on November 30, 1906, or December 1st, 1906, according as possession was intended to be taken on December 1st or 2nd, 1901. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279.

60. Gave right of re-entry at most. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279.

61. Mayer v. Clarke, 129 Ill. App. 424.

62. McFarland Real Estate Co. v. Joseph Gerardi Hotel Co., 202 Mo. 597, 100 SW 577.

63, 64. Gross v. Chittim [Tex. Civ. App.] 18 Tex. Ct. Rep. 906, 100 SW 1006.

65. Under lease for five years, "with the privilege * * * to terminate the lease at the expiration of one year on sixty days' notice," lease cannot be terminated by notice after first year. M. Fine Realty Co. v. New York, 53 Misc. 246, 103 NYS 115.

66. Lease construed to expressly provide for cancellation by superintendent of public buildings and grounds at end of five years. (Tips Foundry & Mach. Co. v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 568, 103 SW 686), and lessee claiming under such lease cannot deny validity of such provision (Id.).

67. Acceptance of rent due held not a waiver of refusal to vacate on notice. Outhouse v. Baird, 121 App. Div. 556, 106 NYS 246.

68. Where lease was terminable upon sale with immediate right of possession, fact that sale did not expressly call for immediate possession did not prevent termination thereof where vendee understood that he was to be put in immediate possession. Thomason v. Oates [Tex. Civ. App.] 18 Tex. Ct. Rep. 996, 103 SW 1114. Where landlord accepted check for year's rent in advance upon condition that lease was terminable on sale, purchaser was not estopped to terminate lease because he cashed the check, having first offered to return it, and subsequently tendered unearned rent. Id. Where landlord was entitled to take possession on tenant's abandonment or for hreach of other conditions, instruction requiring lessor to establish abandonment and breach of other conditions as defense of action for eviction is erroneous. Union Scale Co. v. Iowa Mach. & Supply Co. [Iowa] 113 NW 762.

69. To find tenant another place equally as good. Lewis v. Taylor [Tex. Civ. App.] 18 Tex. Ct. Rep. 306, 101 SW 846.

70. Donohue v. New York, 54 Misc. 415, 105 NYS 1069. Held that mere approval of plans for improvement, which might never be carried out, and which if carried out would not require use of such property for several months, did not entitle city to terminate lease. Id.

71. Amount of insurance received held admissible as bearing upon issue whether fire had rendered building "unfit for occupancy." Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 908, 99 SW 723. As is expert testimony that dampness would have bad effect on goods, building being used for dry goods. Id. Where proof of anchoring of wall is admitted to show that wall was weakened, rebuttal evidence that it was in accordance with rules of good building to anchor without regard to weakened condition is admissible. Id.

72. Bond to secure landlord and bond to secure tenant are approved at same time. Shipley v. Pittsburg, C. & W. R. Co., 216 Pa. 512, 65 A 1094.

73. Lease for 2,000 years was entered into in 1682 and recognized for 145 years, but in 1823 allotments in partition suit were made in fee and title was thereafter treated as one in fee. Held that sale under mortgage given by one claiming as fee owner passed fee as against purchaser of unexpired term of lease. Townsend v. Boyd, 217 Pa. 386, 66 A 1099.

Surrender, abandonment, and eviction.[See 8 C. L. 888]—To effect a surrender there must not only be an offer of surrender [74] or an abandonment, but there must also be an acceptance thereof [75] by one having authority to accept.[76] A surrender destroys all rights conditioned on the continuance of the lease,[77] but does not affect accrued rights.[78]

A tenant may abandon [79] the premises where rendered untenantable through lessor's failure to repair as required by the lease,[80] or through breach of his other covenants.[81]

To constitute constructive eviction, the actions of the landlord must be of a grave and permanent character and such as to deprive tenant of the enjoyment of the premises.[82] Uninhabitable condition of premises due to tenant's own default does

74. Letter asking whether lessee desired to vacate on certain date or to release held to show that lessor mistakenly believed that lease expired on such date, and hence was not an officer to modify lease (Auer v. Hoffmann [Wis.] 112 NW 1090), nor does it estop lessor from claiming rent for remainder of term where lessee was notified of mistake before he had leased other property (Id.).

75. Dagett v. Champney, 106 NYS 892; Higgins v. Street [Okl.] 92 P 153. Mere sending of keys to landlord does not constitute a surrender. Dagett v. Champney, 106 NYS 892; Snyder v. Henry, 32 Pa. Super. Ct. 167.

Surrender accepted: Releasing and putting of new tenant in possession. Dagett v. Champney, 106 NYS 892. Reletting of premises after surrender thereof by lessee will be deemed an acceptance in absence of rebutting facts. Stern v. Murphy, 102 NYS 797. Where after lessee abandoned lessor took possession, turned off water to keep from freezing, cleaned and papered rooms, acceptance held a question for jury. Sessinghaus v. Knocke [Mo. App.] 105 SW 283.

Held not an acceptance: Where lessor expressly refused to accept assignee as tenant and look to her for rent. Higgins v. Street, [Okl.] 92 P 153. Putting up of a "For Rent" sign. Sessinghaus v. Knocke [Mo. App.] 105 SW 283. Fact that landlord takes possession and repairs house after tenant has vacated same. Snyder v. Henry, 32 Pa. Super. Ct. 167. Re-entry and attempts to relet in own name held not to constitute acceptance as a matter of law. Feust v. Craig, 107 NYS 637. Mere taking of keys by agent. Id. Evidence held insufficient to show acceptance. Schwarzwalder v. Eckert, 103 NYS 730.

76. Authority of one accepting keys not shown. Feust v. Craig, 107 NYS 637. Delivery of key to landlord's agent does not terminate lease unless accepted by landlord. Jackson v. Stewart, 31 Pa. Super. Ct. 58.

77. American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F 17. Surrender between rent days releases lessee from current rents. Id. Tenant agreeing to pay taxes when they become due held not liable for 1904 taxes which became due in 1905, where lease was surrendered Dec. 1903. Id.

78. Where lien for labor and material in making improvements, which lessee was to make in lieu of rent, was fastened upon premises prior to surrender, lessee held liable though foreclosure decree was not entered until after surrender. American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F 17.

79. Lease of part of dock and flats for a public float and landing place for boats held under facts of case not abandoned by removal of float for repair although not replaced. Commercial Wharf Corp. v. Boston, 194 Mass. 460, 80 NE 645. Prima facie case of abandonment shown by removal of goods from business block and nonpayment of rent. Parnass v. Ryerson, 128 Ill. App. 489. Lease of premises for a logging road or railroad to be thereafter constructed, not obliging lessee to build such road, is not abandoned by mere failure to build. Morris v. Healy Lumber Co. [Wash.] 91 P 186.

80. May abandon without notice. Rutledge v. Quinlan [Mo. App.] 105 SW 653.

81. Breach of covenant in lease of building for laundry purposes to furnish sewerage. Marks v. Chapman [Iowa] 112 NW 817. In action by lessee against lessor of certain mining dumps which were to be worked over, on royalty basis for alleged violation of lease in excluding lessee from premises, evidence held to show that lessee had abandoned operations as unprofitable. Bunker Hill & Sullivan Min. & Concentrating Co. v. Safford [C. C. A.] 156 F 446. Where, in action against lessee and sublessee for rent, abandonment is justified on ground of breach of covenant by lessor, it is immaterial to such defense whether lessee had right to transfer leasehold interest and thereby escape further liability, where lessor impliedly consented by acceptance of rent. Marks v. Chapman [Iowa] 112 NW 817.

82. Evidence held not to show such failure to furnish heat as to constitute eviction. Parke v. Proby, 130 Ill. App. 571. Defective plumbing allowing waste water from flat above to back up into bath tub, and the escape of sewer gas, and a hot water system which would furnish only lukewarm water, held such defects as to constitute eviction. Krausi v. Fife, 105 NYS 384. Establishment and maintenance of public bowling alley immediately under leased flat which was operated all day and until late at night, making it impossible for tenant to peacefully enjoy premises, held an eviction. Donovan v. Koehler, 103 NYS 935. Failure to furnish steam power as provided in lease of premises for manufacturing purposes, thereby bringing plant to standstill, held a constructive eviction. Myers v. Bernstein, 104 NYS 348. Taking possession of abandoned property, repairing same and reletting on lessee's account, held not an eviction relieving lessee from further liability. Higgins v. Street [Okl.] 92 P 153.

NOTE. Constructive eviction by act of servant: The superintendent of an apartment

not relieve him.[83] A subtenant yielding possession in good faith to the paramount title of the original landlord asserting a forfeiture may recover of his lessor,[84] but not if he participates in securing the forfeiture.[85] A landlord is not liable as for an eviction unless the premises are surrendered,[86] which surrender must be made while the conditions constituting the eviction continue,[87] and within a reasonable time after the commencement thereof.[88] A provision authorizing the landlord to terminate lease upon payment of a specified sum is not a covenant to pay such sum as liquidated damages upon eviction.[89] Lessee cannot recover punitive damages for an eviction where he is using the premises for an unlawful purpose.[90] Only the tenant can recover for a wrongful eviction.[91]

Forfeiture.[See 8 C. L. 698]—As a general rule, forfeitures are not favored in equity.[92] While one succeeding to the landlord's interest may usually exact a forfeiture under circumstances which would authorize the latter to terminate the lease,[93] a purchaser subject to the lease cannot declare a forfeiture for nonpayment of rent reserved to the vendor.[94] The acts which constitute a forfeiture depend largely upon statute[95] and the terms of the lease,[96] but are usually nonpayment of rent,[97] or

house habitually listened to the telephone conversations of the defendant's wife, and made use of the information thus acquired frequently to insult her. Despite complaint, the landlord neglected to dismiss the superintendent, whereupon the defendant abandoned the premises. Held, the rent could not be recovered. Fox v. Murdock, 38 N. Y. Law Jour., No. 55. The doctrine of constructive eviction was established in an early case where the landlord harbored immoral persons near the demised premises. Pendleton v. Dyett, 8 Cow. [N. Y.] 727. Though criticized for a time (Ogilvie v. Hull, 5 Hill [N. Y.] 52, 54; Royce v. Guggenheim, 106 Mass., 201, 205, 8 Am. Rep. 322), the doctrine has persisted (Cohen v. Dupont, 1 Sandf. [N. Y.] 260; Sully v. Schmitt, 147 N. Y. 248, 49 Am. St. Rep. 659, 5 Columbia L. R. 548), and has been applied to the maintenance of a long series of minor nuisances (Cohen v. Dupont, 1 Sandf. [N. Y.] 260), or of single major nuisances (Duff v. Hunt, 16 NYS 163; Tallman v. Murphy, 120 NY 345; Wade v. Herndl, 127 Wis. 544). The retention of an improper servant may, therefore, constitute a constructive eviction, that is, when the servant's acts constitute a material impairment of the tenant's beneficial enjoyment of the premises (Humes v. Gardner, 22 Misc. [N. Y.] 333), and from the landlord's knowledge thereof an intention on his part to evict may be implied (Haas v. Ketcham, 87 NYS 411). The courts have properly refused to extend the doctrine to extreme limits (Seaboard Realty Co. v. Fuller, 33 Misc. [N. Y.] 109), and the proof of the principal case would not seem to justify its application.—From 8 Columbia L. R. 55.

83. Became damp because of flow of water into house during heavy rain, or because retaining wall became dilapidated. Jackson v. Stewart, 31 Pa. Super. Ct. 58.

84. Though he secretly wished to get rid of lease. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151. But where no resistance was made, burden is on subtenant in action against his lessor on covenant of quiet enjoyment to show that original landlord had a paramount right of entry. (Id).

85. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151.

86. Where, in tearing down, excavating, and reconstructing of building on adjacent lot, wall on one side of leased hotel was rendered unsafe and some of rooms temporarily unfit for use, but furniture was not removed and lessee remained in possession and paid rent for a part of time, held that there was no eviction. Kinney v. Libbey, 54 Misc. 595, 104 NYS 863.

87. Parke v. Proby, 130 Ill. App. 571.

88. Where plumbing and hot water system were so defective as to constitute an eviction, remaining in possession for five months, held not a waiver where lessor was attempting to repair. Krausi v. Fife, 105 NYS 384.

89. Harrison v. Jordan, 194 Mass. 496, 80 NE 604.

90. Especially where lease prohibits such use. Schultz v. Lewis [Colo.] 90 P 1030.

91. Where lessee husband terminated lease by due notice, wife living separate from husband is not a tenant, and hence cannot recover for eviction where she voluntarily left after goods were removed. Butler v. Smith, 121 App. Div. 441, 106 NYS 46.

92. Strict and technical forfeiture for nonpayment of rent is not favored in equity. Pattison v. Northern Trust Co., 230 Ill. 334, 82 NE 837. Forfeiture of lease will not be sustained in equity where rent, for nonpayment of which forfeiture is demanded, has been paid in securities which were accepted by officer of lessor corporation having discretionary power. Chicago R. Equipment Co. v. National Hollow Brake Beam Co., 123 Ill. App. 533.

93. Where lessee fails to pay purchase money which under lease would entitle him to a deed, assignee of lessor who also secured deed may recover possession for nonpayment of rent. McFarlane v. Kirby, 28 App. D. C. 391.

94. Moulton v. Lawson [Neb.] 113 NW 244.

95. Rev. St. § 4361, in so far as it provides for forfeiture of lease of premises upon which intoxicating liquor has been sold contrary to law, is declaratory of principle that existed at common law, and which exists independent of statutory enactment. Moser v. Stebel, 9 Ohio C. C. (N. S.) 217.

96. Lease providing that tenant should use premises for a theater of first class for pro-

taxes,[88] assignment, or subletting without landlord's consent,[99] failure to make repairs,[1] etc. The use of the word "re-enter" in a lease of modern form does not rebut the presumption that the parties contracted with reference to existing laws.[2] A subletting of a part of the premises does not work a division of the covenants of the original lease.[3]

While the acceptance of rent up to the time of notice declaring the forfeiture,[4] or to the time of issuing the writ for possession where a specific number of days must elapse after notice,[5] does not waive the forfeiture, acceptance of rent occurring after the acts of forfeiture,[6] or the commencement of an action for the collection thereof,[7] with full knowledge of the facts,[8] constitutes a waiver.

A strict forfeiture is usually required unless waived,[9] but one seeking a forfeiture for an unlawful sale of liquors on the premises need only produce proof required in civil actions generally.[10]

The forfeiture of a lease under its terms does not release the sureties on the tenant's bond as depriving them of security in that they could not exercise the option of purchase.[11]

Notice to vacate and demand of possession. See 8 C. L. 689—Where a notice is necessary to terminate a lease,[12] such notice must be given [13] by the proper person.[14]

duction of plays of highest order held not satisfied by production of melodramas, vaudeville, and burlesque, though of highest order of kind. In re Schoelkopf, 54 Misc. 31, 105 NYS 477. Where breach of covenant to use theater only for first class plays gave right to terminate lease, it was immaterial that rent was being paid. Id.

97. Where lessor brought suit to recover possession, claiming that lease was at an end, and refused a tender of rent, such tender need not be continued during litigation to prevent forfeiture. Parker v. Gortatowsky [Ga.] 59 SE 286. Tender of rent, due at time of service of written notice of demand under R. S. Hurd, § 8, ch. 80, defeats forfeiture of lease. Lasher v. Graves, 124 Ill. App. 646. Where lease provides for forfeiture for nonpayment of rent, amount of which is fixed and payable at designated place, demand is not a condition precedent. Union Scale Co. v. Iowa Mach. & Supply Co. [Iowa] 113 NW 762. Demand for rent and commencement of summary proceedings, before remittitur from supreme court in a prior dispossession action was filed in trial court, is premature. Parker v. Gortatowsky [Ga.] 59 SE 286.

98. Tax deed held insufficient in itself to show that taxes had not been paid by tenant as provided in lease. Streit v. Fay, 230 Ill. 319, 82 NE 648.

99. Where lease for possession and cultivation of a hopyard is a personal contract and nonassignable, assignment works a forfeiture. Myer v. Roberts [Or.] 89 P 1051.

1. In action for possession because of breach of lessee's covenant to pay for repairs, lessor is entitled to possession, though lessee is only liable for a proportion of the cost, where he denied all liability. Keroes v. Richards, 28 App. D. C. 310.

2. Pannuto v. Foglia, 105 NYS 495. And hence, where upon abandonment lessor is given right to "re-enter, either by force or otherwise," and to relet as agent of lessee, re-entry by summary process is authorized. Id.

3. Hence, forfeiture under terms of original lease terminates sublease. Greer v. Boston Little Circle Zinc Co. [Mo. App.] 103 SW 151.

4. In re Schoelkopf, 54 Misc. 31, 105 NYS 477.

5. Rich v. Rose, 30 Ky. 925, 99 SW 953.

6. Acceptance of rent, with knowledge of facts entitling landlord to declare a forfeiture, waives right. Kenny v. Seu Si Lun [Minn.] 112 NW 220; Levy v. Blackmore [N. J. Eq.] 67 A 1022. Fact that lease provided for liquidated damages in amount of rent, until premises should be relet, held immaterial where payment was accepted as rent. Kenny v. Seu Si Lun [Minn.] 112 NW 220.

7. Rich v. Rose, 30 Ky. 925, 99 SW 953.

8. Acceptance of rent without knowledge of cause for forfeiture does not waive right. Taber v. Collins, 130 Ill. App. 333. Knowledge of agent authorized only to collect rent is not knowledge of landlord. Id.

9. One signing agreement, waiving a strict forfeiture and authorizing bill of foreclosure, waives notice to forfeit and cannot, years afterward, insist on strict forfeiture. Patterson v. Northern Trust Co., 231 Ill. 22, 82 NE 840.

10. Need not bring a criminal prosecution nor prove sale beyond a reasonable doubt. Moser v. Stebel, 9 Ohio C. C. (N. S.) 217.

11. American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F 17.

12. Under Burns' Ann. St. 1901, § 7090, notice is necessary to terminate tenancy from year to year. Hammond v. Jones [Ind. App.] 83 NE 257.

13. Where monthly lease provided for 30 days' notice and tenant left at end of month without notice, fact that property was sold during month did not relieve from liability for succeeding month's rent. Bernstein v. Koch, 52 Misc. 550, 102 NYS 524.

14. Lease of land does not divest landlord of such right of possession as is necessary to terminate current tenancy from year to year. Hammond v. Jones [Ind. App.] 83 NE 257. Where lease, terminable on notice, provides that its covenants and agreements should be

The notice must be unqualified [15] and must clearly and unequivocally show an intention to terminate the tenancy.[16] It must begin and end at the proper time,[17] the length of notice depending largely upon statute and the nature of the tenancy.[18] A notice may be waived by the subsequent acts of the party giving the same.[19]

Renewal or extension under express agreement. See 8 C. L. 690—A covenant for renewal must be definite as to the terms of the new lease,[20] but if so a perpetual right of renewal may be given.[21] The option to renew passes with the leasehold [22] and is binding upon one succeeding to the landlord's interest.[23] The equity rule disfavoring forfeitures has no application to the loss of the right of renewal,[24] and hence the option must be timely exercised,[25] unless the default is caused by the landlord [26] or is waived by him,[27] and in strict conformity with the offer.[28] Equitable right of renewal may be asserted before a justice of the peace in North Carolina.[29] Election to exercise the option may be implied from the tenant's acts,[30] must be brought home to the landlord,[31] and possession to be equivalent to notice of election must be

binding on parties and their "personal representatives," lessor's grantee may terminate on notice. Adler v. Lowenstein, 52 Misc. 556, 102 NYS 492.

15. Notice giving lessee the option of quitting or of continuing at increase rental is insufficient. Columbia Brew. Co. v. Miller, 124 Mo. App. 384, 101 SW 711.

16. Letters to landlord stating that tenant would have to vacate premises, as a part thereof was to be taken by city, with request to accept rent to a day mentioned with suggestion of an agreement for future, held insufficient. Fotterall v. Armour [Pa.] 66 A 1001.

17. Under Hurd's Rev. St. 1895, c. 80, § 5, providing for 60 days' notice to terminate tenancy from year to year, notice for immediate possession is insufficient. Streit v. Fay, 230 Ill. 319, 82 NE 648. Notice to terminate tenancy from month to month must correspond with beginning and end of term. Hanks v. Workmaster [N. J. Law.] 66 A 1097.

18. Where tenant enters into possession under a lease unenforcible under statute of frauds, a month's notice is sufficient. Poole v. Johnson, 31 Ky. L. R. 165, 101 SW 955.

19. Payment of rent to agent after notice to quit held not to bind landlord. Finkelstein v. Fabyik, 107 NYS 67.

20. Covenant providing for advanced rent to be based upon revaluation, without stating how or when such revaluation should be determined, held void for indefiniteness. Streit v. Fay, 230 Ill. 319, 82 NE 648.

21. Hoff v. Royal Metal Furniture Co., 117 App. Div. 884, 103 NYS 371.

22. Where lease to partnership contained unrestricted option of renewal, and one partner assigned his interest in partnership to other, latter could exercise option. Barbee v. Greenberg, 114 N. C. 430, 57 SE 125.

23. Covenant of lessor to renew is a covenant real passing with reversion. Parker v. Gortatowsky, 127 Ga. 560, 56 SE 846.

24. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279.

25. Where lease is renewable upon lessee's election "at the expiration of the term," election must be made before or at the very time of expiration and cannot be made thereafter. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279. Where lease provides for additional term on written notice of election on or before a certain day, time is of the essence of the contract (Doepfner v. Bowers, 55 Misc. 561, 106 NYS 932), and equity can give no relief, though lessee was prevented from giving timely notice by detention in foreign country due to sickness and inability to secure return passage (Id., rvg. 53 Misc. 7, 102 NYS 920). Where lessee through mere inadvertence failed to give timely notice of election, option will not be enforced though lessor knew of his intention to renew. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279.

26. Silence of lessor as to time of expiration of lease held not an equity excusing lessee from failure to timely renew lease, since he knew he could have ascertained when it expired. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279.

27. Evidence held insufficient to show waiver of required notice of election. Ocumpaugh v. Engel, 105 NYS 510.

28. Where offer of renewal closed with words: "P. S. if satisfactory, kindly advise by return mail. M. Z. W.," and lessee remained in possession and paid rent after expiration of term, held for jury to determine from action of parties whether acceptance by return mail was a condition of offer and, if so, whether it had been waived. White v. Sohn [W. Va.] 59 SE 890.

29. Barbee v. Greenberg, 144 N. C. 430, 57 SE 125.

30. Where lessee notified lessor that he would not lease house for another year unless certain improvements were made, held that holding over for two months under promise of lessor to make the repairs was not an exercise of option to keep house for another year. Williams v. Houston Cornice Works [Tex. Civ. App.] 18 Tex. Ct. Rep. 240, 101 SW 839.

31. Where lessees of theater with right of renewal wrote lessor, "we will continue the theater," to which he replied, "I understand this to mean that you will continue the rent of opera house as per terms of contract," and lessees thereafter continued in possession, held renewal was effected. Parker v. Gortatowsky, 127 Ga. 560, 56 SE 846. Where water rents were payable in advance by lessee, payment by mistake before expiration of term of rents for period extending beyond term held not to renew lease. Mageon v. Alkire [Colo.] 92 P 720.

actual, visible, and exclusive.[32] Where tenants in common join in lease as parties of the first part, notice of election served upon survivor is sufficient.[33] Whether a written lease is necessary to effectuate the right depends upon the intent of the parties.[34] Where the lease gives the tenant an option to occupy for two additional years, possession after expiration of the term will be deemed pursuant thereto.[35] An option of renewal may be waived.[36] Where the tenant fails to exercise the option, his rights and obligations after expiration of his term are governed by the general principles relating to holding over.[37] The exercise of an option to extend a lease does not create a new lease.[38] An assignee under an invalid assignment cannot exercise the option.[39] Breach of covenant not to assign precludes lessee from exercising the option.[40]

Holding over without agreement. See 8 C. L. 691—Where a tenant holds over after the expiration of his term,[41] the landlord may treat him as a trespasser,[42] or as a tenant from year to year,[43] unless a different contract of leasing has been made,[44] but a notice of increased rental will not bind the tenant where he dissents thereto.[45] Where, under the terms of the lease, a holding over continues the lease for another year, the lessee cannot limit the effect of such holding over.[46] The option of treating a tenant holding over as a tenant for a new term is available only to one sustaining to the tenant the conventional relation of landlord,[47] and hence is unassignable

32. Uninclosed and unoccupied land. Wright v. Kayner [Mich.] 14 Det. Leg. N. 631, 113 NW 779. Possession through one employed to watch land and who did nothing but trim trees held insufficient. Id.

33. Joint contractors. Wright v. Kayner [Mich.] 14 Det. Leg. N. 631, 113 NW 779.

34. Practical construction placed thereon by parties in not requiring held controlling. Kentucky Lumber Co. v. Newell [Ky.] 105 SW 972.

35. Not for term under Rev. Civ. Code, § 1437, relating to holding over. Heffron v. Treber [S. D.] 110 NW 787.

36. Evidence held insufficient to show a waiver. Eppstein v. Kuhn, 225 Ill. 115, 80 NE 80.

37. Ocumpaugh v. Engel, 105 NYS 510.

38. Hence, assignment of rents accruing under lease entitles assignee to rents for extended period. Swan v. Inderlied, 187 N. Y. 372, 80 NE 195.

39. Assigned without lessor's consent contrary to terms of lease. Tober v. Collins, 130 Ill. App. 333.

40. Squire v. Learned [Mass.] 81 NE 880.

41. Letter written by mayor of city tending to show a holding over is prima facie admissible. Commercial Wharf Corp. v. Boston, 194 Mass. 460, 80 NE 645.

42. Lessor refusing to accept proposition of tenant by the year, who holds premises after expiration of year, may eject tenant. Puckett v. Scott [Tex. Civ. App.] 18 Tex. Ct. Rep. 269, 100 SW 969. Tenant at will does not become a trespasser until day after notice. Hence, in action of trespass and ejectment, proof that notice was given on date of alleged ouster is fatal variance. Kenyon v. Fidler [R. I.] 66 A 63. Notice of forfeiture of lease for nonpayment of rent without entry does not terminate lease so as to make lessee a trespasser. Mayer v. Clarke, 129 Ill. App. 424.

43. Eppstein v. Kuhn, 225 Ill. 115, 80 NE 80. Tenant for a year may be treated as a tenant for another year. Dagett v. Champney, 106 NYS 892. In action against city for rent for boat landing, it was competent for plaintiff to show that it had recognized holding over by refraining from charging for landing. Commercial Wharf Corp. v. Boston, 194 Mass. 460, 80 NE 645.

44. Puckett v. Scott [Tex. Civ. App.] 18 Tex. Ct. Rep. 269, 100 SW 969. Held under evidence a question for jury whether lessee was holding over under terms of old lease or under a new contract. Id.

45. Lasher v. Heist, 126 Ill. App. 82. Negotiations held to show a dissent. Id.

46. Fact that lessee sent notice that he did not wish to renew lease but would rent from month to month does not relieve him from lease for year in absence of acceptance. Snyder v. Henry, 32 Pa. Super. Ct. 167. Conversation held insufficient to show acceptance. Id.

47. United Merchants' Realty & Imp. Co. v. Roth, 107 NYS 511. Not available to lessee whose term commences at expiration of occupying tenant's term. Id.

Note: The right of a landlord to sue the lessee holding ovr as his tnant for another term is in the earlier cases based on a contract implied in fact. Osgood v. Dewey, 13 Johns. [N. Y.] 239. In England and a few states the actual assent of the lessee must be shown. Jones v. Shears (1836) 4 A. & E. 832; Edwards v. Hale, 9 Allen [Mass.] 462, while in some states the holding over is regarded as conclusive evidence of such assent. Parker v. Page, 41 Or. 579. But in the United States generally the right exists independently of consent, the new tenancy being implied by law (Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609), to protect the landlord from the tenant's breach of his duty to surrender the premises (Wolffe v. Wolffe, 69 Ala. 549, 44 Am. Rep. 526; Hemphill v. Flynn, 2 Pa. St. 144; Herter v. Mullen, 159 N. Y. 28, 7 Am. St. Rep. 517, opinion of Martin J.). There being no breach of duty to a subsequent lessee, a tenancy under him should not be implied (cf. Heirs of Balfour v. Balfour, 33 La. Ann. 297), nor is there a privity of estate

separate from the reversion.[48] In Illinois a tenant willfully [49] holding over is liable in double damages, and the fact that the premises had been leased to another does not prevent landlord from recovering such damages, where possession was not to be given to new tenant until defendant surrendered.[50] The fact that the landlord has leased the premises to another to take effect at the expiration of the current term does not prevent recovery of stipulated damages for holding over.[51]

§ 9. *Landlord's remedies for recovery of rent and advancements. Parties and procedure generally.* See 8 C. L. 692—Rent for a dwelling house occupied by a tenant and his family is a claim for necessaries for which attachment may issue in Ohio.[52] An action for rent [53] may be maintained by lessors as copartners though the word "incorporated" appears after their name in the lease where the same is not signed as by a corporation and no one was misled.[54] On appeal to the circuit court in Missouri from an action for rent and possession in the justice court, judgment may be rendered for rent accruing up to the time of hearing.[55] A provision waiving the right of appeal in an action for rent held applicable though eviction was set up as a defense.[55]

Distress. See 8 C. L. 692—Distress lies to recover rent [57] due,[58] though a note therefor has been accepted by the landlord,[59] but in Illinois it will not issue to recover damages for breach of covenants other than for payment of rent.[60] While furniture sold to the tenant under an instalment contract and placed in the leased house as a part of the equipment is subject to distress,[61] goods held under judicial process,[62] or which have been held by the tenant as bailee but which have been re-

between them, for there is none even between the holdover and the landlord before the latter has exercised his option (Smith v. Littlefield, 51 N. Y. 539), nor will the law raise an assumpsit from the mere occupation of the premises (Hill v. U. S., 149 U. S. 593, 37 Law. Ed. 862; Hurley v. Lamereaux, 29 Minn. 138), and since summary proceedings in New York can be brought only by a landlord against a tenant (Imbert v. Hallock, 23 How. Pr. [N. Y.] 456), and no action lies against the lessor, who does not covenant to give actual possession (Gardner v. Keteltas, 3 Hill [N. Y.] 330, 38 Am. Rep. 637, contra, Coe v. Clay, 5 Bing. 440), the lessee's proper remedy is ejectment (Gardner v. Keteltas, 3 Hill [N. Y.] 330, 38 Am. Rep. 637).—From 8 Columbia L. R. 323.

48. United Merchants' Realty & Imp. Co. v. Roth, 107 NYS 511.

49. To render tenant liable under Hurd's Rev. St. 1905, p. 1296, c. 80, § 2, holding over must be willful. Alexander v. Loeb, 230 Ill. 454, 82 NE 833.

50. Alexander v. Loeb, 230 Ill. 454, 82 NE 833.

51. Thomas v. Wightman, 129 Ill. App. 305.

52. As provided in § 5521, Revised Statutes, and does not lose its character as a claim for necessaries by tenants moving out during month and renting and occupying another house. Smith v. Getz, 9 Ohio C. C. (N. S.) 321.

53. Complaint held to state cause of action for rent though improperly blended with action against tenant and his sureties on stay bond given in summary proceedings. Blackmore v. Winders, 144 N. C. 212, 56 SE 874.

54. Julicher v. Connelly, 52 Misc. 655, 102 NYS 620.

55. Statutes construed, Goesse & Remmers Bldg. & Cont. Co. v. Kinnerk [Mo. App.] 105 SW 673. Where, in action for rent and possession, there is no issue raised as to possession by tenant, it is proper to render judgment for rent to date of judgment without affirmative proof of possession. Id.

56. Rovno v. Lorentz, 32 Pa. Super. Ct. 162. Where there are special facts which preclude lessor from claiming waiver of right to appeal, and lessee fails to assert same in response to rule to show cause why appeal should not be stricken, the rule may be made absolute (Id.), and motion to reinstate rule is addressed to discretion of court (Id.).

57. Where land adjoining lessor's canal was leased as a mill site, together with sufficient water to operate same, at $2,300 per year, $275 being apportioned to land and $2,025 to the water, aggregate sum constituted rent. Wickham v. Richmond Standard Steel Spike & Iron Co. [Va.] 57 SE 647.

58. Where bill of sale of crops is given, landlord is not obliged to inquire whether it is in fact a sale or only mortgage before issuing distress warrant (Cummings v. Holland, 130 Ill. App. 315), and, after levy is made, it is immaterial that it was only intended as a mortgage and debt has been paid (Id.).

59. Hilley v. Perrin [Ga. App.] 59 SE 342.

60. Breach of covenant to farm in husbandlike manner. Bates v. Hallinan, 123 Ill. App. 59, afg. 77 NE 115. See 8 C. L. 692, n. 61.

61. Pickering v. Breen, 31 Pa. Super. Ct. 280.

62. Lessor's lien may be asserted upon rule to distribute funds. Mulherin v. Porter, 1 Ga. App. 153, 58 SE 60. Marshaling of assets, see Marshaling Assets and Securities, 8 C. L. 838.

delivered to the bailor,[63] are not. Where mortgaged chattels moved by the mortgagor onto the premises are seized in distress and sold, the proceeds in Delaware must be applied to the payment of rent first.[64] Goods clandestinely or fraudulently removed from the demised premises may be followed and distrained.[65] In Georgia the writ will issue before the rent is due where the tenant is removing the crop from the premises.[66] Replevin lies to recover property wrongfully seized for rent.[67]

The warrant must be issued [68] and the issues created by a counter affidavit tried [69] by a court having jurisdiction. The warrant must be served as provided by law.[70] An abandonment of a levy under a mistaken belief that it is irregular does not bar a subsequent levy.[71] A distress warrant operates as a judgment and a fi. fa.,[72] unless a counter affidavit is filed, in which case the proceedings becomes an action for rent.[73] After the warrant has been converted into mesne process by counter affidavit, it is amendable as other such processes.[74] Tenant cannot dismiss a levy on the ground that it is excessive.[75] A lien obtained in good faith by levy of distress warrant pursuant to a lease giving the landlord a lien and the right to distrain is not affected by filing of petition in bankruptcy by tenant.[76]

Liens and securities for the payment of rent. See 3 C. L. 693—The landlord's lien given by the Iowa Code attaches as soon as the personal property is brought onto the premises and becomes security for the entire rent.[77] While the priority of the landlord's lien given by state statute for rent due at the time proceedings in bankruptcy are begun is preserved by the bankruptcy act, it has preference only over claims not specified therein to be of higher right.[78] The landlord owes no duty to enforce his lien against any particular property.[79] The landlord's lien on the crop for rent [80] is enforcible against a purchaser with notice,[81] the burden resting on the

63. Walsh v. Philadelphia Bourse, 32 Pa. Super. Ct. 348.

64. Rev. Code 1852, amended 1893, p. 874, § 41. State v. Frick [Del.] 65 A 781.

65. Open removal of tenant's goods from demised premises in daytime is not a clandestine or fraudulent removal, and, without more, is not sufficient to justify landlord in following and distraining same. McCrossen v. Reilly, 33 Pa. Super. Ct. 628.

66. Affidavit for distress warrant, which alleges that tenant "is removing his crops from the premises so rented whereby said rent is now due and unpaid," complies with Civ. Code 1895, § 3124, authorizing lessor to distrain before rent is due where tenant is removing crop from premises. Smith v. Green, 128 Ga. 90, 57 SE 98.

67. Act of April 19, 1901, P. L. 88, held applicable. Drumgoole v. Lyle, 30 Pa. Super. Ct. 463.

68. Any justice of the peace in county where debtor resides or has property may issue warrant. Dean v. Donalson [Ga. App.] 58 SE 679. Held that neither city court of Fayetteville nor clerk thereof has jurisdiction to issue. Woolsey v. Lawshe, 1 Ga. App. 817, 57 SE 1039. Distress being a harsh remedy, inferior courts cannot issue same without express authority. Id.

69. Justice issuing distress warrant may try issue made by counter affidavit unless amount claimed exceeds $100, whether debtor resides or has property within his district or not. Dean v. Donalson [Ga. App.] 58 SE 679.

70. Execution of distress writ after sundown is valid where tenant prevents service between sunrise and sunset. Pickering v. Breen, 31 Pa. Super. Ct. 280.

71. Wickham v. Richmond Standard Steel Spike & Iron Co. [Va.] 57 SE 647.

72. Dismissal of counter affidavit terminates case and no judgment can be entered. Haines v. Chappell, 1 Ga. App. 480, 58 SE 220.

73. Distress warrant operating as a declaration and affidavit as a plea. Swain v. Nasworthy [Ga. App.] 58 SE 492.

74. Affidavit for distress warrant on ground that rent is due is amendable by alleging that rent was not due but that lessee was removing goods, where it has been converted into mesne process by filing of counter affidavit. Collins v. Taylor, 128 Ga. 789, 58 SE 446.

75. Swain v. Nasworthy [Ga. App.] 58 SE 492. Remedy if any, is action in damages for abuse of process. Id.

76. Being preserved by § 67d of Bankruptcy Act July 1, 1898, c. 541. In re Robinson & Smith [C. C. A.] 154 F 343.

77. Landlord's lien given by Code Iowa, § 2992. Des Moines Nat. Bk. v. Council Bluffs Sav. Bk. [C. C. A.] 150 F 361.

78. In re Consumers' Coffee Co. 151 F 933.

79. Hence proceeds of mortgage foreclosure sale need not first be applied to payment of rent (Citizens' Sav. Bk. v. Woods, 134 Iowa, 232, 111 NW 929), nor need it be so applied as to clear exempt property from rent lien (Id.).

80. Rev. St. 1899, § 4123 (Ann. St. 1906, p. 2239), providing that, if any person shall buy a crop grown on demised premises on which rent is unpaid with knowledge that crop was so grown, he shall be liable for value thereof, does not affect liens other than for rent. Saunders v. Ohlhausen [Mo. App.] 106 SW 541.

81. Actual knowledge is not necessary. Mangum v. Stadel [Kan.] 92 P 1093. Knowl-

landlord to show notice.[82] Merchant's goods sold in good faith and in regular course of business are relieved from the lien in Texas.[83] In North Carolina the lien exists only for rent on lands leased for agricultural purposes.[84] Ownership and a lien are inconsistent.[85] The lien may be waived [86] or limited.[87] Before distress warrant has been levied, bailor may remove bailed property from the premises without paying rent due.[88] In New Jersey rent, if certain in amount,[89] must be paid by officer levying execution before chattels can be removed from the premises.

The lien must be enforced by the proper proceedings.[90] A copy of the lease need not be attached to a complaint to enforce the lien.[91] Where in foreclosure of landlord's lien a receiver is appointed and takes possession of a store, a complainant who has been paid in full has no interest in an accounting.[92] In foreclosing a lien, questions not within the province of the jury must not be submitted.[93]

In many states the landlord has a lien on the crop for advancements made in the production thereof [94] which is frequently made superior to mortgages,[95] but such preference may be waived.[96] Such lien has been held analogous to a chattel mortgage in Missouri,[97] and hence must be recorded or filed for record or possession taken

edge that crop was grown on leased premises held to put on inquiry. Maelzer v. Swan, 75 Kan. 496, 89 P 1037. Where purchaser has notice of facts which would put reasonably prudent man on inquiry, he is charged with notice of all that inquiry would disclose. Id; Mangum v. Stadel [Kan.] 92 P 1093. Fact that purchaser resided in neighborhood of leased property held sufficient to take question of notice to jury. Mangum v. Stadel [Kan.] 92 P 1093.

82. Mangum v. Stadel [Kan.] 92 P 1093.

83. Rev. St. 1895, art. 3238, providing that lessor's lien for rent shall not attach to goods sold and delivered in good faith in the regular course of business "to the tenant" construed to read "by the tenant." Freeman v. Collier Racket Co. [Tex. Civ. App.] 105 SW 1129. Sale of entire stock for purpose of going out of business, some being offered in bulk or at retail, held not a sale in "regular course of business." Id., afg. Freeman v. Collier Racket Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 98, 101 SW 202.

84. Instruction on question whether lease of agricultural lands and a store building for $40 and share of crops was indivisible or severable held to lay too much stress on fact that contract was for whole property and made at same time. Reynolds v. Taylor, 144 N. C. 165, 56 SE 871.

85. Landlord cannot claim undivided interest in crop and also a lien thereon. Antone v. Miles [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 105 SW 39.

86. Where landlord forecloses mortgage upon property which is subject to his lien for rent, he waives lien. Citizens' Sav. Bk. v. Woods, 134 Iowa, 232, 111 NW 929. Fact that lessor permits lessee to sell a part of crop without objection is insufficient to authorize conclusion that he had waived his lien on entire crop. Antone v. Miles [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 105 SW 39. Where in action to foreclose lien on crop purchaser claims that lessor gave authority to lessee to sell, he has burden of proving such fact. Id. Evidence of permission of lessor to sell cotton held insufficient to submit issue. Id.

87. Where lessor agreed with a merchant that if latter would furnish tenant with supplies he would only hold crop for the land rent, lessor could not increase rent by adding thereto unpaid balance of rent for previous year. Beattie v. Hughes [Ark.] 101 SW 170.

88. Boilers leased. Wetherill v. Gallagher, 217 Pa. 635, 66 A 849.

89. Must be certain for which landlord might at law distrain. Olden v. Mather [N. J. Eq.] 67 A 435. Statute relating to distraints and that requiring officer to pay rent before moving tenant's goods under execution are contemporaneous and to be construed together. Id.

90. Lien given by statute upon crops cannot, except as for actual rent, be enforced by distress proceedings. Cummings v. Holland, 130 Ill. App. 315. Landlord's remedy by attachment to enforce lien is not exclusive. May proceed by any remedy. Citizens' Sav. Bk. v. Woods, 134 Iowa, 232, 111 NW 929.

91. Maelzer v. Swan, 75 Kan. 496, 89 P 1037.

92. Patterson v. Northern Trust Co., 230 Ill. 334, 82 NE 837.

93. Instruction, in action to foreclose lien, that uncontradicted evidence showed that lessor had undivided half interest in cotton involved, and was entitled to have his lien foreclosed thereon, held equivalent to instruction to either foreclose lien or to find that it should be foreclosed, which was not within province of jury. Antone v. Miles [Tex. Civ. App.] 17 Tex. Ct. Rep. 748, 105 SW 39.

94. Where affidavit claims lien for use of horse and counter affidavit contradicts by alleging a sale, no issue is formed, since counter affidavit shows a lien. Boyce v. Day [Ga. App.] 59 SE 930.

95. Under Kirby's Dig. § 5033, landlord has no such superior lien where he merely became surety on note given in payment of horse purchased of another. Kaufman v. Underwood [Ark.] 102 SW 718.

96. Landlord may orally waive the preference given by Kirby's Dig. § 5033, to his lien for supplies furnished and make mortgage superior thereto. Griggs v. Horton [Ark.] 104 SW 930.

97. Saunders v. Ohlhausen [Mo. App.] 106 SW 541.

of crop to be effective against bona fide purchaser.[98] In Kentucky the lien must be enforced within 120 days after end of the term.[99]

When executions issue to foreclose a landlord's special lien, the foreclosure is final unless converted into mesne process by counter affidavit.[1] After issue has been formed affidavit may be amended as other pleadings.[2] After issue has been created by a counter affidavit, the general rules of evidence are admissible.[3]

§ 10. *Landlord's remedies for recovery of premises.*[See 8 C. L. 696]—A tenant in peaceable possession cannot be forcibly dispossessed though his term has expired.[4] Injunction to restrain trespass cannot be invoked to recover possession of a tenant holding over.[5] Where a tenant repudiates his tenancy and denies his landlord's title,[6] the latter may commence an action to recover possession without waiting for expiration of the lease.[7] A lessee condemned in ejectment to vacate is not entitled to a suspensive appeal unless he has set up a special defense duly verified,[8] and the appeal must be taken within twenty-four hours after rendition of judgment,[9] and the statutory bond be given.[10] A dispossession in an action based upon a complaint failing to allege jurisdictional facts renders the landlord liable in trespass.[11] A judgment of dispossession in New York for nonpayment of rent and taxes should be modified where the taxes were paid pending the proceedings.[12] Where an amicable judgment in ejectment carrying costs is entered pursuant to the terms of the lease, the tenant may claim a debtor's exemption under the Pennsylvania statute.[13]

Summary proceedings.[See 8 C. L. 696]—Summary proceedings for the recovery of possession of the premises upon the expiration of the term[14] or the nonpayment of rent[15] are provided in many states. To authorize these proceedings the conventional

98. Hence, where it was neither recorded nor filed for record as required by Rev. St. 1899, § 2404 (Ann. St. 1906, p. 1936), nor possession of crop taken. Saunders v. Ohlhausen [Mo. App.] 106 SW 541. Fact that lessee requested lessor to assist in harvesting crop held not to show that tenant surrendered possession of crop. Id.

99. Under Ky. St. 1903, § 2323, providing that landlord's lien for advances shall not extend more than 120 days beyond term, and § 2324, that same may be enforced by distress or attachment, delivery of possession of crop to landlord held equivalent to legal proceedings to enforce lien. Marquess v. Ladd, 30 Ky. L. R. 1142, 100 SW 305.

1. Boyce v. Day [Ga. App.] 59 SE 930. To be effective counter affidavit must affirmatively show that no lien exists, or that amount claimed is too large. Id.

2. Affidavit in foreclosure of landlord's special lien given under Civ. Code 1895, § 2800, may be amended so as to claim for horse sold instead of for use thereof. Boyce v. Day [Ga. App.] 59 SE 930.

3. Where lessee under crop lease, which provided that title to crop should remain in lessor until sold and that lessor should deduct advance, assigned his interest on issue between assignee and lessor as to lessee's liability for an advancement, question whether another was joint owner or partner with lessee is immaterial. Louie Chung v. Stephenson [Or.] 89 P 386. Where landlord forecloses special lien for supplies furnished tenant to make the crop, and a counter affidavit is filed by creditor of tenant, execution issued in foreclosure is not admissible in proof of claim. Martin v. Nichols, 127 Ga. 705, 56 SE 995.

4. Where buildings and goods of tenant are forcibly removed, lessee may recover for damages occasioned thereby. Whitney v. Brown, 75 Kan. 678, 90 P 277.

5. Montague v. Hood [S. C.] 58 SE 767.

6. Where tenants in injunction suit against landlord allege that landlord had given quitclaim deed prior to lease and asserted title thereunder, held denial of title. Sass v. Thomas [C. C. A.] 152 F 627.

7. Sass v. Thomas [C. C. A.] 152 F 627.

8. Verification after judgment is insufficient. Audubon Hotel Co. v. Braunig, 119 La. 1070, 44 S 891.

9. Construing Act No. 52, p. 84, 1900, with § 2157, Rev. St. Audubon Hotel Co. v. Braunig, 119 La. 1070, 44 S 891.

10. Bond to be given is regulated by § 2157, Rev. St., and ordinary appeal bond is insufficient. Audubon Hotel Co. v. Braunig, 119 La. 1070, 44 S 891. Order purporting to grant appeal on applicant's furnishing bond as required by law does not divest court of jurisdiction where no such bond is filed. Id.

11. Proceeding under Act March 21, 1772 (1 Smith's Laws, p. 370). Sperry v. Seidel [Pa.] 66 A 853.

12. Peabody v. Long Acre Square Bldg Co., 188 N. Y. 103, 80 NE 657.

13. Judgment based on contract within Act of April 9, 1849, P. L. 533. Morris Run Coal Min. Co. v. Chrazan, 31 Pa. Super. Ct. 184.

14. Where lease provided that on violation of its terms and notice term of lease should expire, tenant may be removed by summary process. In re Schoelkopf, 54 Misc. 31, 105 NYS 477.

15. Summary proceedings based on demand for rent which included rent not yet

relation of landlord and tenant must not only exist [16] but must be alleged [17] and proven.[18] In New York the complaint must describe petitioner's interest in the premises.[19] Where the exclusive jurisdiction of such actions is vested in a particular court, the exercise thereof cannot be restricted by process from other courts.[20] The precept must be served [21] in the manner prescribed by statute [22] upon the person served with the notice terminating the lease.[23] Before summary proceedings for possession for nonpayment of rent or taxes can be instituted in New York, a demand for the rent due must be made [24] by a person duly authorized to make the same and to receive payment.[25] Where the answer raises a material issue, a continuance may be allowed to enable defendant to prepare for trial.[26]

Forcible entry and unlawful detainer. See 8 C. L. 697—In many states a landlord [27] or his successor in interest,[28] may maintain an action of forcible entry and unlawful detainer to recover possession upon nonpayment of rent [29] on demand, if demand is necessary,[30] and after service of notice to quit.[31] The action will not lie in Iowa to

due and excessive interest are premature. Parker v. Gortatowsky [Ga.] 59 SE 286.

16. Meyerhoffer v. Baker, 51 Misc. 598, 101 NYS 24; Robertson v. Birdle, 107 NYS 75. Hence there can be no recovery where, if lease is valid, lessee has right to remain. Robertson v. Birdie, 107 NYS 75.

17. Proceedings under landlord and tenant act (P. L. 1903, p. 27, § 2). Binder v. Azzaro [N. J. Law] 65 A. 849. Affidavit of present ownership of premises in plaintiff and that defendant is in possession under agreement with former owner, without a showing as to how ownership was transferred, held insufficient. Id. Such showing being jurisdictional, cannot be supplied by proof on trial. Id. Affidavit held insufficient to support oath as assigns of lessor. Id.

18. Where summary proceedings to recover real estate is based on relation of landlord and tenant, plaintiff must establish such relation. Nagelspach v. Shaw [Mich.] 14 Det. Leg. N. 35, 111 NW 343.

19. Failure of petition to show petitioner's interest is jurisdictional under Code Civ. Proc. § 2235, and hence not waived by answer. Eldaen Realty & Construction Co. v. Bensamon, 107 NYS 128. Petition showing that petitioner is lessee under lease bearing date prior to time lessor is alleged to have acquired title held defective. Id. Under Code Civ. Proc. § 2235, averment that petitioner was the "lessor" and "leased" premises to defendant is insufficient. Matthews v. Carman, 107 NYS 694.

20. Since exclusive jurisdiction of dispossessory actions by landlords where monthly or yearly rent or rent for unexpired term does not exceed $50 as vested in the justice court, exercise thereof cannot be affected or barred by process from other courts. Campbell v. Hart, 118 La. 871, 43 S 533.

21. Where, on appeal from final order in summary proceedings in municipal court of New York, defendant presents duly served affidavits of nonservice of precept and there are no counter affidavits, order must be reversed. Faruolo v. Zahga, 102 NYS 757.

22. Return reciting that constable was unable to find defendant "or any one on the property" was insufficient to authorize service of precept by posting on property under Code Civ. Proc. § 2240, subd. 3. Matthews v Carman, 107 NYS 694.

23. Where it appears in summary proceedings that notice to terminate was served on one tenant who was not served with the precept, while tenant served with precept was not served with notice, not being a copartnership, action was properly dismissed. Adler v. Lawenstein, 52 Misc. 556, 102 NYS 492.

24. Under Code Civ. Proc. § 2231 (2), demand after institution of proceedings is insufficient. Glanz v. Schaefer, 102 NYS 518.

25. Iroquois Realty Co. v. Iroquois Hotel & Apartment Co., 104 NYS 748.

26. Held error to refuse one day continuance to enable defendant to prepare for trial where a material issue was raised by answer. Trunk v. Howard Laundry Co., 107 NYS 66.

27. Under Mills' Ann. St. § 1973, subd. 5, held that lessor could maintain forcible entry and detainer against tenant whose term has expired, though he has leased premises to another. Mageon v. Alkire [Colo.] 92 P 720. Where lessee agrees to surrender possession at end of term and expressly gives right of entry to lessor with or without legal process, lessee held precluded from asserting that new lessee only could maintain action for forcible entry. Id.

28. Held under unlawful detainer statute action will lie in favor of vendee to recover possession though lessee has never attorned to him and he has never been in possession. Thomason v. McLaughlin [Ind. T.] 103 SW 595.

29. Under Rev. Codes 1905, § 8406, subd. 4, nonpayment of rent for three days after same is due is a ground for invoking action of forcible detainer. McLain v. Nurnberg [N. D.] 112 NW 243.

30. Ordinarily, demand is not necessary to enable lessor to recover premises under Code, § 4208, for nonpayment of rent. Union Scale Co. v. Iowa Mach. & Supply Co. [Iowa] 113 NW 762.

31. Under Rev. Codes 1905, § 8406, requiring service of notice to quit before commencing action for possession for nonpayment of rent, failure to file such notice does not affect justice's jurisdiction. McLain v. Nurnberg [N. D.] 112 NW 243. Objection that notice to quit does not specify ground on which possession is demanded is waived by going to trial without raising objection. Id. Notice to quit is not waived

recover of a tenant at will by operation of law.[32] Tenant cannot complain that suit is for unearned rent and for possession where the judgment is not entered until the expiration of the period for which rent is claimed.[33] The relationship of landlord and tenant must be shown,[34] and evidence of nonexistence is admissible under the plea of not guilty.[35] There must be no material variance between the allegations and proof.[36] Where action for rent is joined with a suit for unlawful detainer, surrender of possession terminates latter action but not former.[37]

§ 11. *Rights and liabilities between landlord or tenant and third persons.* See 8 C. L. 698—Since the right of possession is vested in the tenant and not in the landlord, the former[38] may recover for a disturbance thereof,[39] even though the latter consented to the entry,[40] but where the landlord is to receive a part of the crop as rent, he may recover for the destruction thereof.[41] A bailor is not bound by an unknown agreement between lessor and lessee that the latter and those claiming under him should not remove property from building without the lessor's consent.[42] Where the landlord converts the goods of a bailor before he distrains the same,[43] the latter is not limited to an action of replevin.[44] The landlord cannot recover of the wife of the tenant for injury to the premises from the use thereof without proof of affirmative negligence.[45]

§ 12. *Crimes and penalties.* See 8 C. L. 699—In Mississippi one willfully enticing away a renter is criminally liable,[46] and by statute in Georgia a cropper is prohibited from selling any part of the crop without the landlord's consent until all advancements in producing the same[47] and the rent have been paid.[48] Where the

by failure to commence action for possession for 60 days Id.

32. St. 1898, § 3358. Where one takes possession pending negotiations which fail to materialize, recovery cannot be had thereunder. Maxham v. Stewart [Wis.] 113 NW 972.

33. Goesse & Remmers Bldg. & Cont. Co. v. Kinnerk [Mo. App.] 105 SW 673.

34. In forcible entry and detainer by landlord against subtenant, admission by defendant that he had no greater right to premises than was obtained under original lease, held that lease to subtenant was still admissible to show privity between plaintiff and defendant. Joss v. Hallett [Colo.] 89 P 809.

35. Sodini v. Gaber, 101 Minn. 155, 111 NW 962.

36. Where in unlawful detainer proceedings petition proceedings allege that a certain person was owner of property prior to sale thereof under trust deed, and that he conveyed property to plaintiff, plaintiff cannot show that it was beneficial owner. McFarland Real Estate Co. v. Joseph Gerardi Hotel Co., 202 Mo. 597, 100 SW 577.

37. Court may ascertain the rent due without passing on question of right to possession at beginning of suit. McLain v. Nurnberg [N. D.] 112 NW 243.

38. Where lease is taken in name of a partner for the firm, firm may sue. Painter v. Stahley Bros. [Wyo.] 90 P 375.

39. Destruction of pasturage by trespassing animals. Painter v. Stahley Bros. [Wyo.] 90 P 375. Diverted water onto land. Louisville & N. R. Co. v. Moore, 31 Ky. L. R. 141, 101 SW 934.

40. Permission to erect telephone pole. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358.

41. Gulf, etc., F. R. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 539, 102 SW 461.

42. Boiler placed in building. Walsh v. Philadelphia Bourse, 32 Pa. Super. Ct. 348.

43. Where bailor has removed goods with consent of tenant, landlord has no authority to take possession thereof and return to office merely because they were brought down stairway instead of elevator as required by rules of building. Walsh v. Philadelphia Bourse, 32 Pa. Super. Ct. 348.

44. Walsh v. Philadelphia Bourse, 32 Pa. Super. Ct. 348.

45. Newly papered rooms were left dirty and smoky at close of tenancy. Toohey v. Patterson, 52 Misc. 285, 102 NYS 1122.

46. Mere leasing of land to a tenant does not constitute an enticing away within Laws 1903, p. 140, c. 102. Sneed v. Gilman [Miss.] 44 S 830. Defendant held not guilty or willfully enticing away renter where it appears that at time of leasing land to him she did not know of prior lease and upon learning thereof tried to induce lessee to go back and desisted only upon being informed that he had made satisfactory arrangements with plaintiff by substituting another tenant. Id.

47. Pen. Code 1895, § 680, applies only to advances in making crop. Brown v. State [Ga. App.] 58 SE 1070.

48. Sale of seed by tenant held not a violation of Pen. Code of 1895, § 672, where it appears that rent was paid and that tenant turned over property of sufficient value to pay for advances had it been so applied, and it was not shown that rejected tender of entire crop was not sufficient to meet all indebtedness. Kellam v. State [Ga. App.] 58 SE 695.

lease is void the tenant is not criminally liable for abandoning the crops before payment of advances.[49] A successful defendant in a prosecution for employing another's cropper is entitled in Georgia to costs and attorney's fees if properly demanded and allowed.[50]

LAND PATENTS, see latest topical index.

LARCENY.

§ 1. Common-Law Larceny, 600.
§ 2. Statutory Larceny, Theft, etc., 601.
§ 3. Indictment and Prosecution, 602.
A. Indictment, 602.
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The offenses of embezzlement[51] and obtaining money by false pretenses,[52] though denominated larceny by the statute, and matters common to all crimes,[53] are elsewhere treated.

§ 1. *Common-law larceny.* See 8 C. L. 699—Larceny is the taking[54] and carrying away[55] of the personal property[56] of another[57] without his consent,[58] unlawfully,[59] and with a felonious intent,[60] entertained at the time of taking,[61] to deprive the

49. Married woman cannot be held criminally liable under Revisal 1905, § 3367. State v. Robinson, 143 N. C. 620, 56 SE 918.

50. He must present such issue on trial and have same allowed by jury. Jones v. Roughton, 1 Ga. App. 759, 57 SE 1061.

51. See Embezzlement, 9 C. L. 1067.

52. See False Pretenses and Cheats, 9 C. L. 1353.

53. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 10 C. L. 57.

54. State v. Wolf [Del.] 66 A 739; State v. Stewart [Del,] 67 A 786; Franklin v. State [Ga. App.] 59 SE 835; State v. Weatherman, 202 Mo. 6, 100 SW 482. Where one acquires possession of check by promising to deliver it to owner, his subsequent appropriation of it to his own use, whether or not he intended to appropriate it when he received it, is a taking. State v. Levine, 79 Conn. 714, 66 A 529. One who did not participate in the original taking and whose only connection with offence is as a hand hired to haul property taken is not guilty of larceny. Burdett v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 139, 101 SW 988.

55. State v. Wolf [Del.] 66 A 739; State v. Stewart [Del.] 67 A 786; State v. Weatherman, 202 Mo. 6, 100 SW 482.

56. State v. Wolf [Del.] 66 A 739; State v. Stewart [Del.] 67 A 786; State v. Weatherman, 202 Mo. 6, 100 SW 482. A warehouse receipt is the subject-matter of larceny. Currie v. State [Ga. App.] 59 SE 926. Where one detaches a fixture from its connection with the realty, retains possession of it and carries it away with intent to steal it, he is guilty of larceny, although the severance, taking, and carrying away are one continuous transaction. State v. Wolf [Del.] 66 A 739.

57. State v. Wolf [Del.] 66 A 739; State v. Stewart [Del.] 67 A 786; State v. Weatherman, 202 Mo. 6, 100 SW 482. Where an agent entrusted with a check to purchase property for principal deposits it in bank to his own credit and purchases property with his own money, and principal acquires possession thereof with his consent, the property belongs to principal, and if agent subsequently takes and carries it away with felonious intent, he is guilty of larceny. State v. Soper [Mo.] 106 SW 3. Larceny may be committed by the wrongful taking of property by its general owner from the possession of one having a lien upon it. Atchison, etc., R. Co. v. Hinsdell [Kan.] 90 P 800. As where goods are taken by general owner from possession of carrier with intent to defeat lien for transportation charges. Id. One may be guilty of larceny of his own property from an officer who has seized it under levy. Ayers v. State [Ga. App.] 59 SE 924.

58. State v. Wolf [Del.] 66 A 739; State v. Stewart [Del.] 67 A 786; State v. Weatherman, 202 Mo. 6, 100 SW 482; Cohoe v. State [Neb.] 113 NW 532.

59. State v. Wolf [Del.] 66 A 739.

60. State v. Wolf [Del.] 66 A 739; Simmons v. State [Ga. App.] 58 SE 1066; Malone v. State [Ind.] 81 NE 1099; State v. Weatherman, 202 Mo. 6, 100 SW 482; State v. Casey [Mo.] 105 SW 645. It must be shown that the property was taken and carried away by accused with intent to steal it. State v. Wolf [Del.] 66 A 739. Where defendant takes community property of husband and wife at latter's request, under belief that he has right to do so, he is not guilty of larceny. Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 268, 103 SW 853. Where under contract for purchase of ring purchaser after default in payment of instalment was entitled to retain possession until money already paid or its equivalent in goods was returned, his refusal to return ring upon default in payment and demand by seller does not constitute larceny, where selier does not tender money or goods, as element of felonious intent is absent. People v. Gluck, 188 N. Y. 167, 80 NE 1022.

61. State v. Casey [Mo.] 105 SW 645; People v. Neff, 106 NYS 747. One who obtains possession of another's property by some trick, fraudulent device, or artifice, animo furandi, with the intention at the time of

owner thereof[62] and to convert the same to the use of the taker.[63] The taking need not be from the actual possession of the owner, if it is without his consent and the other elements of the offense are present.[64] The property must have some value,[65] but it is immaterial that the owner suffered no loss, or that the property was recovered,[66] or that part of it was returned.[67] When the property is taken and carried away with felonious intent, the larceny is complete, and what defendant may thereafter have done with it is immaterial except in so far as it tends to show his guilt.[68] One who was not present when the crime was committed is not a principal.[69] A wife cannot be an accomplice to the larceny of her and her husband's community property.[70] A receiver of stolen goods is not an accomplice of the principal thief.[71] It is no defense that defendant committed forgery in accomplishing the larceny.[72] The distinction betwen larceny and embezzlement is that in larceny the felonious intent must exist at the time of the taking, while embezzlement is the felonious appropriation of property the possession of which has been lawfully acquired.[73]

§ 2. *Statutory larceny, theft, etc.*[See 6 C. L. 701]—This section includes only those statutory larcenies which are mere variations of common-law larceny, and not those which are logically embraced in the definition of another offense.[74] Some statutes merely prescribe the punishment for larceny without defining the crime.[75] Other statutes specify the property which may be the subject of larceny,[76] make special provision relative to larceny of particular kinds of property,[77] define particular kinds of larceny,[78] and grade the offense according to the value of the property

subsequently appropriating it to his own use, is guilty of larceny. People v. Neff, 106 NYS 747. Where one obtains property by promise to deliver it to the owner, animus furandi at time of the subsequent conversion by him is sufficient. State v. Levine, 79 Conn. 714, 66 A 529.

62. Malone v. State [Ind.] 81 NE 1099.

63. State v. Wolf [Del.] 66 A 739; State v. Stewart [Del.] 67 A 786; State v. Weatherman, 202 Mo. 6, 100 SW 482.

64. Rose v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 526, 106 SW 143.

65. State v. Stanley, 123 Mo. App. 294, 100 SW 678. It must be shown that property was of some value, either generally or specifically, to prosecutor. Ayers v. State [Ga. App.] 59 SE 924.

66. Currie v. State [Ga. App.] 59 SE 926.

67. Cohoe v. State [Neb.] 113 NW 532.

68. State v. Soper [Mo.] 106 SW 3.

69. Fruger v. State [Tex. Cr. App.] 99 SW 1014.

70. Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 268, 103 SW 853.

71. Bradley v. State [Ga. App.] 58 SE 1064.

72. Currie v. State [Ga. App.] 59 SE 926.

73. Facts held not to constitute larceny but to constitute embezzlement. State v. Casey [Mo.] 105 SW 645

74. See Embezzlement, 9 C. L. 1067; False Pretenses and Cheats, 9 C. L. 1353.

75. Where a statute merely prescribes the punishment for "stealing" property without defining the crime, resort must be had to the common law to ascertain its constituent elements. Cohoe v. State [Neb.] 113 NW 532.

76. Dog subject of larceny. State v. Soward [Ark.] 103 SW 741.

77. In prosecution under Laws 1897, p. 53, c. 55, § 1, for taking pecan nuts from another's land, want of consent of owner of the pecans must be shown to warrant conviction. Burrows v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 95, 101 SW 232.

78. Defendant proposed to F an exchange of vests, and upon receiving F's vest turned his back and took therefrom and retained a roll of bills and then returned vest to F. It was held that if taking was without F's knowledge or consent, or so suddenly as to preclude resistance before asportation, it constituted **larceny from the person** under B. & C. Comp. § 1800. State v. Reyner [Or.] 91 P 301. But taking a watch from prosecuting witness' vest pocket but not severing chain from vest is not such reduction to possession as to constitute theft from the person. Herr v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 902, 105 SW 190. Nor was such offense committed where money was taken from prosecutor's pants, which were taken from under head of his bed. Gibson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 967, 100 SW 776. There is a "private" stealing from the person within meaning of Texas statute, though committed in presence of others, if prosecutor is asleep or stupefied and spectators are misled by defendant's assertion that prosecutor is his brother. Black v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 866, 104 SW 897.

Larceny from the house under Pen. Code 1895, § 178, is the breaking or entering any house with intent to steal, or, after breaking or entering, stealing therefrom anything of value. Glaze v. State [Ga. App.] 58 SE 1126. The offense is complete when one steals from any house anything of value. Wiley v. State [Ga. App.] 59 SE 438. A house or building within meaning of Pen. Code 1895, §§ 178, 179, is a structure having a roof and lateral inclosure in which persons live or work, animals are confined, or property is stored or contained. McCabe v. State, 1 Ga. App. 719, 58 SE 277. A wharf or landing place for vessels, where freight is placed awaiting removal, covered by a roof, but otherwise wholly uninclosed, is not a house or building within meaning of statute. Id. Stealing articles of value from the porch of a building

stolen.[79] In Minnesota an attempt to commit larceny is a crime.[80] Criminal intent is always a necessary element of statutory larceny.[81] The question whether property was stolen is to be determined by the law of the state into which it is brought.[82]

§ 3. *Indictment and prosecution. A. Indictment.* See 8 C. L. 703—An issue not raised by the indictment cannot be submitted to the jury.[83] What may be charged in an indictment under a statute,[84] and the mode of charging the offense in such case,[85] must be determined by the terms of the statute. Where simple larceny is included in a crime of greater magnitude, a conviction may be had of the former under an indictment for the latter,[86] the test being that the evidence required to establish the greater offense would prove simple larceny as a necessary element.[87] Thus, under an indictment on information for larceny from the person[88] or from a store,[89] conviction may be had for simple or petit larceny. In Texas it is competent to prove theft by fraudulent pretext under an ordinary indictment for theft.[90] Under the Oregon statute[91] an information stating facts constituting two different kinds of larceny is demurrable,[92] but a failure to demur waives the defect.[93] Where an indictment contains two counts charging burglary and larceny from the house, a conviction may be had of the latter offense, although the evidence also shows defendant guilty of former.[94] Where one person has the general ownership of property and another person a special ownership therein, the property may be alleged to be in

used as a restaurant, if such porch is used as part of restaurant, is larceny from the house. Johnson v. State [Ga. App.] 58 SE 684.

Value of property taken not an ingredient of offenses of larceny from dwelling house, etc., and larceny from person under B. & C. Comp. §§ 1799, 1800. State v. Reyner [Or.] 91 P 301.

79. Market value is not sole criterion in determining grade of offense. Vandergrift v. State [Ala.] 43 S 852. The value of a level is to be determined by its market value at time and place it was taken, in its condition at that time, and if it had no market value at such place by what it would cost to replace it. Keipp v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 242, 103 SW 392.

80. Rev. Laws 1905, § 4771. State v. Miller [Minn.] 114 NW 88. An attempt under this statute is an overt act done with intent to deprive owner of his property or of use and benefit thereof or to appropriate same to use of taker and tending to effect commission of crime but failing to accomplish it. Id.

81. A felonious intent to deprive or defraud the owner of his property or of its use is an essential element of **larceny** under Pen. Code, §§ 528, 548. People v. Moss, 187 N. Y. 410, 80 NE 383; People v. Burnham, 104 NYS 725. One who appropriates property openly and avowedly under claim of title preferred in good faith is not guilty of larceny under this statute even though claim is untenable. People v. Moss, 187 N. Y. 410, 80 NE 383. Intent to deprive or defraud owner of his property, or of use and benefit thereof, or to appropriate same to use of taker or any other person, is an essential element of larceny under Rev. Laws 1905, § 5078. State v. Miller [Minn.] 114 NW 88. One is not guilty of **theft** under Pen. Code, art. 861, unless he intended at time of taking to appropriate property. Flagg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 266, 103 SW 855. Felonious intent is an essential element of **grand larceny** under Montana statute. State v. Sloan, 35 Mont. 367, 89 P 829; State v. Peterson [Mont.] 92 P 302. Intent to steal is an essential element of **larceny from the house** under either § 178 or § 182 of Pen. Code 1895. Glaze v. State [Ga. App.] 58 SE 1126.

82. State v. White [Kan.] 92 P 829. Thus one who in another state brands or changes brand on cattle with intent to steal them, and would, if act were done in Kansas, be guilty of larceny under Gen. St. 1901, § 2076, may, if he brings cattle into Kansas, be convicted under Gen. St. 1901, § 2286. Id.

83. Under indictment charging larceny of cattle in L. county, issue whether defendant drove cattle which he stole in G. county into L. county is properly submitted to jury. Warren v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 136, 105 SW 817.

84. An indictment charging that defendant stole one head of cattle is authorized by Pen. Code 1895, art. 882. Warren v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 136, 105 SW 817.

85. In a prosecution under Gen. St. 1901, § 2286, for larceny committed in Kansas by bringing stolen property into state, the crime may be charged in the information as simple larceny. State v. White [Kan.] 92 P. 829.

86. State v. Reyner [Or.] 91 P 301.

87. Buffehr v. Ter. [Ariz.] 89 P 415.

88. Buffehr v. Ter. [Ariz.] 89 P 415. But upon an indictment under Texas statute charging theft from the person, there cannot be a conviction for ordinary theft. Black v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 866, 104 SW 897.

89. State v. Reyner [Or.] 91 P 301.

90. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933.

91. B. & C. Comp. 1357, subd. 3.

92. State v. Reyner [Or.] 91 P 301.

93. B. & C. Comp. 1305. State v. Reyner [Or.] 91 P 301.

94. Cannon v. State, 125 Ga. 785, 54 SE 692.

either,[95] and ownership may be alleged in one who had the lawful possession and control of the property at the time it was taken,[96] although no responsibility rested on him for the loss thereof.[97] Where community property of husband and wife is stolen while in the care and possession of the wife, the indictment should allege possession and ownership in her.[98] In a prosecution for horse theft under the Washington statute,[99] if the owner of the animal is unknown, the information may aver ownership in the state.[1] An indictment or affidavit charging a single theft is not vitiated by the allegation that the property stolen belonged to different owners.[2] The indictment must allege every essential fact necessary to constitute the crime,[3] and the property must be described with such certainty as will advise the defendant of the charge against him and furnish a bar against a future prosecution.[4] Generally the place of taking [5] and the quality of the goods [6] are not required to be alleged.

(§ 3) *B. Admissibility of evidence.*See 8 C. L. 706—The general rules of criminal evidence apply, including those relating to materality and relevancy,[7] and gov-

95. Martin v. State [Neb.] 112 NW 285.

96. Bradley v. State [Ga. App.] 58 SE 1064; King v State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387. Ownership may be laid in one holding as agent or bailee. Bradley v. State [Ga. App.] 58 SE 1064.

97. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387.

98. Miles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 311, 103 SW 854.

99. Ballinger's Ann. Codes & St. § 6861.

1. State v. Eddy [Wash.] 90 P. 641. In such case if proof discloses name of owner, it will not be deemed a variance or failure of proof. Id. Where there is doubt as to real ownership, case falls within purview of this statute. Id.

2. Ward v. State [Miss.] 43 S 466; State v. Dalton [Miss.] 44 S 802.

3. Indictment held to allege every essential fact necessary to constitute **attempt to commit grand larceny in second degree** under Minnesota statutes. State v. Miller [Minn.] 114 NW 88. In an indictment for **larceny by a bailee,** it is necessary to allege the name of the bailor, and in concise terms the purpose or use for which the property was intrusted to defendant. State v. Schoemperlen, 101 Minn. 8, 111 NW 577. In a prosecution for **larceny after trust,** under Pen. Code 1895, § 194, the indictment need only allege the bailment, the purpose of the trust, and fraudulent conversion. It need not allege that demand was made for property before indictment was found. Goodman v. State [Ga. App.] 58 SE 558. Indictment which charges that accused was intrusted with "a ring of the value of $80," for purpose of pawning same for owner and bringing money to him, and "fraudulently converted the said ring to his own use," is a good indictment under this statute. Birt v. State, 1 Ga. App. 150, 57 SE 965. In a prosecution under Laws 1897, p. 53, c. 55, § 1, for taking pecan nuts from another's land, an information which negatives **want of consent** of the owner of the pecans is good. Burrows v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 95, 101 SW 232. Indictment held to sufficiently charge a felonious intent to convert. Barbe v. Ter. [Okl.] 91 P 783.

4. The description of the property should be simply such, as in connection with other allegations, will affirmatively show defendant to be guilty, reasonably inform him of instance meant, and put him in position to make needful preparations to meet charge. Ayers v. State [Ga. App.] 59 SE 924. An indictment for theft of "$10 in money which passed current as money of the United States of America of the value of $10," sufficiently describes the money alleged to have been stolen. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. In indictment for larceny from house, description of thing stolen as "twenty-seven hundred dollars in money, of the value of twenty-seven hundred dollars," is sufficient to withstand a special demurrer. Cannon v. State, 125 Ga. 785, 54 SE 692.

5. Under Texas statutes where prosecution for larceny of cattle is instituted in county to which cattle were carried after being taken in another county, indictment need not allege that they were taken in latter county and carried into former. Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 268, 103 SW 853; Id. [Tex. Cr. App.] 20 Tex. Ct. Rep. 136, 105 SW 817.

6. An indictment for larceny of a belt, alleging its value, need not allege its kind and quality. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883.

7. Where defense is honest possession, evidence is admissible of **possession of other property stolen** at same time in same vicinity. Penrice v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 177, 105 SW 797.

Evidence as to place of theft: Where indictment under Texas statute alleges cattle were stolen in L. county, evidence that they were stolen in G. county and driven into L. county is admissible. Warren v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 136, 105 SW 817. Where **defendant identified stranger at bank** as a stock buyer named E. to enable him to cash draft received in payment of cattle alleged to have been stolen, **evidence of cashier** that he knew all stockmen in region, but no such man as E. was held competent in connection with other evidence in case. State v. Grubb, 201 Mo. 585, 99 SW 1083.

In a prosecution against vice-president of life insurance company for statutory larceny in feloniously appropriating to his own use a certain check the property of company, it was held proper to investigate for purpose of throwing light upon charge the ownership of certain bank stock, validity of its assignment to defendant, whether board of d-

erning the admission of evidence of intent,[8] ownership of property,[9] value,[10] coercion of defendant,[11] declarations,[12] opinions of witnesses,[13] hearsay,[14] and res gestae.[15]

rectors had knowledge thereof, manner in which dividends were paid and appropriated by defendant, character of company reports, method of bookkeeping, defendant's connection with company, his operations and deals with other officers, and his contracts for salaries and commissions. State v. Force, 100 Minn. 396, 111 NW 297.

In prosecution of officer of corporation for misappropriating company's funds, admission in evidence of receipt given by defendant for deposit of certain canceled checks, and the checks themselves, such exhibits having no connection with corporation or with transaction under investigation, is error. People v. Burnham, 104 NYS 725.

In prosecution for larceny of a mare and some cattle purchased by defendant for prosecuting witness, evidence of purchase by defendant of another mare with proceeds of check given him by prosecuting witness for purchase of animals alleged to have been stolen is irrelevant. State v. Soper [Mo.] 106 SW 3. Evidence of witness that he saw stolen property conveyed toward defendant's home is admissible **though witness did not recognize parties.** Miller v. People, 229 Ill. 376, 82 NE 391.

8. Evidence of a woman that she had understanding with defendant that she should induce men to drink so that upon their becoming intoxicated he could take their money is admissible to show criminal intent. State v. McCarthy [Mont.] 92 P 521. Upon trial of one charged with larceny of calf bearing brand which owner did not have recorded until subsequent to alleged larceny, evidence is admissible that owner had used brand for ten years as bearing on felonious intent of defendant in taking calf. Territory v. Meredith [N. M.] 91 P 731. In prosecution of officer of corporation under Pen. Code, § 528, subd. 2, for misappropriating company's money in paying it out in settlement of certain claims, record of meetings of board of directors admissible to show authority of executive committee to act in settlement of such claims, as bearing upon good faith of defendant in obeying instructions of such committee. People v. Burnham, 104 NYS 725. Testimony of defendant as to publicity in shipping the property alleged to have been stolen after it was taken and carried away is inadmissible to show good faith as to his claim of ownership. State v. Soper [Mo.] 106 SW 3.

9. Jury may consider fact that cattle alleged to have been stolen bore brand of complaining witness as some evidence that he owned them. State v. Wolfley, 75 Kan. 406, 89 P 1046, 93 P 337. In prosecution for larceny of calf bearing brand unrecorded at time of theft, evidence is admissible that owner had used brand for ten years as bearing on his good faith in claiming it, and subsequently having it recorded as his own. Territory v. Meredith [N. M.] 91 P 731. Check held, under circumstances environing it, admissible to sustain defendant's contention that he purchased property alleged to have been stolen. Tankersley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 160, 101 SW 997. Where defendant told witness that he bought cattle alleged to have been stolen from certain persons, evidence of such persons that they did not sell to defendant is admissible. State v. Grubb, 201 Mo. 585, 99 SW 1083. It is error to sustain objection to question whether witness knew whose furniture it was defendant sold her, if affirmative answer would have led up to question as to who did own property, a material inquiry. Coburn v. State [Ala.] 44 S 58.

10. In prosecution for theft of a level, a letter showing that dealers in levels give a discount is not admissible if its character and by whom or to whom it was written is not shown. Keipp v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 242, 103 SW 392.

11. Where state relied in part on alleged confession, it was error to reject evidence that prosecuting witnesses shut defendant in their meat market and threatened to punish him if he did not pay money alleged to have been stolen, that he protested his innocence but said rather than have trouble he would pay it and borrowed money and paid it. Sowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 948, 105 SW 178.

12. Defendant's declarations offered to explain his possession of property alleged to have been stolen held admissible. Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817. In prosecution for larceny of cattle, evidence of station agent is admissible that he asked defendant why he did not use all three cars ordered by him and that defendant answered that one carload of cattle stampeded. State v. Grubb, 201 Mo. 585, 99 SW 1083. Where after defendant denies possession of stolen property it is found upon him, he will not be permitted to testify in explanation of such possession as to what he told others or what they told him. Lohrey v. State [Miss.] 45 S 145.

13. In prosecution for theft of $10, following question on cross-examination of owner, "did you believe or from the surrounding circumstances did you have reason to believe, that Jim Elliston found the $10 bill that you lost," was properly excluded. Elliston v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 717, 99 SW 999. To determine grade of offense in prosecution for larceny of a watch, opinions of nonexperts are admissible as to its value though given without knowledge of market value Vandergrift v. State [Ala.] 43 S 852. Facts held not to constitute predicate authorizing nonexpert witnesses to give opinions as to capacity of defendant, who was 11 years old, to entertain criminal intent necessary to constitute theft. Binkley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 799, 100 SW 780.

14. Evidence held to be hearsay. Ellington v. State [Tex. Cr. App.] 99 SW 997; Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817. Admission of hearsay evidence, if not harmful to defendant, is not reversible error. Cannon v. State, 125 Ga. 785, 54 SE 692.

15. In a prosecution for obtaining money by false representations, minor representations connected with the principal one alleged in indictment, and made at the same time, are part of res gestae, and evidence of

Evidence relating to facts remote from the time of the offense is not admissible.[16] Evidence that human footprints were found around the place from which the property was taken is admissible, although they are not identified as defendant's.[17] In the prosecution of an officer of a corporation, the books of the corporation are not admissible as evidence against him without proof of his further connection with such books or the entries therein.[18] In a prosecution for theft of a horse, it is not error to admit evidence that defendant when he borrowed the horse also borrowed a saddle.[19] Evidence is admissible to show that another than defendant had au opportunity to commit the theft without the aid or knowledge of the latter.[20] A question of law cannot be propounded to a witness.[21]

(§ 3) *C. Effect of possession of stolen property.*[See 8 C. L. 707]—The possession of stolen property recently after the larceny raises a prima facie presumption of guilt[22] which will sustain conviction if unexplained,[23] though it does not cast the burden of proof upon the defendant.[24] The prima facie case so established may be rebutted by a satisfactory explanation of how defendant came into possession thereof.[25] Whether such explanation is sufficient to raise a reasonable doubt of guilt is a question of fact.[26] The strength of the presumption depends to some extent upon the period that elapses between the theft and the finding of the property in defendant's possession.[27]

(§ 3) *D. Sufficiency of evidence.*[See 8 C. L. 708]—The burden is upon the state to prove the guilt of the accused beyond a reasonable doubt;[28] it must prove by competent and satisfactory evidence[29] every essential ingredient of the offense.[30] Thus, it must prove the corpus delicti,[31] that the property taken was personal property,[32] that neither ownership nor right of possession was in defendant,[33] and that the taking was with felonious intent to deprive the owner of his property.[34] Value must

their falsity is admissible. People v. Calmey, 117 App. Div. 462, 102 NYS 714.

16. Evidence of accomplice that he went out with accused on night following larceny admissible, but he cannot testify as to what was in his mind or as to knowledge of their purpose or what they did. State v. Stewart [Del.] 67 A 786.

17. Rucker v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 167, 101 SW 804.

18. People v. Burnham, 104 NYS 725. Motion for reargument denied 120 App. Div. 388, 106 NYS 57.

19. Richardson v. State [Tex. Cr. App.] 103 SW 852.

20. Where larceny was alleged to have occurred in defendant's wineroom while alleged victim was intoxicated, evidence that latter while there had sexual intercourse with a woman is competent to show that woman had opportunity to take money. State v. McCarthy [Mont.] 92 P 521.

21. In prosecution for theft of mule, it was proper to refuse to permit prosecuting witness to answer as to who had management, care, and control of mule while one W. was working it, witness being permitted to tell all facts relating to matter. Ellington v. State [Tex. Cr. App.] 99 SW 997.

22. State v. Wolf [Del.] 66 A 739; Miller v. People, 229 Ill. 376, 82 NE 391; State v. White [Kan.] 92 P 829; State v. Stanley, 123 Mo. App. 294, 100 SW 678; State v. Toohey, 203 Mo. 674, 102 SW 530.

23. State v. White [Kan.] 92 P 829; State v. Stanley, 123 Mo. App. 294, 100 SW 678. Unexplained possession of recently stolen property is sufficient to warrant conviction where the circumstances call for explanation. Pool v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 271, 103 SW 892.

24. Instruction held erroneous as indicating that burden is on defendant to explain recent possession of stolen goods. Miller v. People, 229 Ill. 376, 82 NE 391.

Contra: Throws upon the possessor the burden of explaining his possession. State v. White [Kan.] 92 P 829. The possession of stolen property immediately after it is stolen puts upon the possessor the burden of proving that his is not a guilty possession. Wiley v. State [Ga. App.] 59 SE 438.

25. State v. Wolf [Del.] 66 A 739; Miller v. People, 229 Ill. 376, 82 NE 391. If his explanation ralses a reasonable doubt he should be acquitted. Id.

26. Miller v. People, 229 Ill. 376, 82 NE 391. Explanation held to overcome prima facie presumption. State v. McKinney [Kan.] 91 P 1068. Presumption overcome by uncontradicted testimony of owner that possession was acquired by his authority. Franklin v. State [Ga. App.] 59 SE 835.

27. State v. McKinney [Kan.] 91 P 1068.

28. State v. Wolf [Del.] 66 A 739; State v. Force, 100 Minn. 396, 111 NW 297.

29. State v. Wolf [Del.] 66 A 739.

30. State v. Wolf [Del.] 66 A 739; State v. Stewart [Del.] 67 A 786.

31. Evidence held not to establish corpus delicti. Franklin v. State [Ga. App.] 59 SE 835.

32. State v. Wolf [Del.] 66 A 739.

33. Prosecution for horse theft. State v. Eddy [Wash.] 90 P 641.

34. Malone v State [Ind.] 81 NE 1099;

be shown but direct proof thereof is not essential. It may be shown inferentially.[85] Defendant's guilt may be proved by circumstantial evidence,[86] but if the evidence is entirely circumstantial, it must be shown to the exclusion of every other reasonable hypothesis.[87] While a conviction cannot be had simply upon a confession of guilt, a confession may be used in making out the corpus delicti.[88] The evidence must conform to and sustain the allegations of the indictment. In the notes are collated cases applying or illustrating this rule.[89] In the notes also are collated cases involving the sufficiency of the evidence as a whole to warrant conviction.[90]

State v. Eddy [Wash.] 90 P 641. Felonious intent must be proved beyond a reasonable doubt. Malone v. State [Ind.] 81 NE 1099. A conviction cannot be sustained when all circumstances are inconsistent with existence of an animus furandi. Simmons v. State [Ga. App.] 58 SE 1066.

Evidence held sufficient to show felonious intent to deprive owner of his property. Malone v. State [Ind.] 81 NE 1099; Stoddard v. State [Wis.] 112 NW 453. Evidence held sufficient to sustain finding that defendant obtained property with fraudulent intent to convert it to his own use. Thompson v. State [Ala.] 43 S 115. In prosecution of county auditor for grand larceny in auditing and receiving part of proceeds of claims made against county by a contractor, evidence held to warrant finding against claim made by defendant that he honestly believed that contractor was entitled to sum for which warrant was drawn. People v. Neff, 106 NYS 747. Evidence held sufficient to prove that a boy eleven years old had **capacity to entertain the criminal intent** necessary to constitute theft. Binkley v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 799, 100 SW 780. In a prosecution under Pen. Code, § 528, for larceny of funds of insurance company, **evidence held not to show felonious intent** to deprive or defraud company or its property. People v. Moss, 187 NY 410, 80 NE 383. Finding that payment by officer of corporation of company's money in settlement of litigation was in bad faith, with intent to defraud company, held not supported by evidence. People v. Burnham, 104 NYS 725.

35. Ayers v. State [Ga. App.] 59 SE 924. Evidence of price paid in connection with exhibition of article to jury is sufficient to warrant finding that article has some value. State v. Stanley, 123 Mo. App. 294, 100 SW 678. The fact that the thing stolen was a $10 bill of United States currency proves its value. Sowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 948, 105 SW 178. Evidence that amount of money stolen was $72 is sufficient evidence that $72 was the value of the money. Gibson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 967, 100 SW 776. Evidence held sufficient to prove value. Currie v. State [Ga. App.] 59 SE 926.

36. State v. Wolf [Del.] 66 A 739. Felonious intent to deprive owner of his property may be shown by circumstantial evidence. Malone v. State [Ind.] 81 NE 1099.

37. Glaze v. State [Ga. App.] 58 SE 1126. The proved facts to warrant conviction in such case must be inconsistent with innocence. Riley v. State, 1 Ga. App. 651, 57 SE 1031. Where defendant admits the taking and was found in possession of the stolen property, the case is not one of circumstantial evidence. Flagg v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 266, 103 SW 855.

38. Sowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 948, 105 SW 178.

39. Description of property: The proof must show that the property stolen answers to the description given in the accusation. McDonald v. State [Ga. App.] 58 SE 1067. Indictment charging theft of "two dollars in money, lawful currency of the United States of America, and of the value of two dollars," is sustained by proof of theft of two dollars in silver. Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817. Description of property in accusation as "ninety dollars of the lawful currency of the United States of America," sufficiently proven by evidence that money was in $10 and $20 bills; that one of the bills had word "gold" on it, and rest of money was "greenbacks." McDonald v. State [Ga. App.] 58 SE 1067. Evidence held to show taking of property described in indictment. Rose v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 526, 106 SW 143.

Ownership or possession: Where indictment alleges ownership in one having charge of entire freight department at railroad depot, and evidence shows that a subordinate clerk was in charge of part of depot from which goods were stolen, there is no variance. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387. A conviction may be had under affidavit charging larceny of eight chickens, the property of B., although evidence shows that only seven of chickens belonged to B. Bates v. State [Ala.] 44 S 695. An allegation of ownership in A. B. as to two gallons of whisky is not sustained by proof that four gallons of whisky contained in two gallon jugs had been purchased jointly by A. B. and two others, and was in custody of C. D. and A. B. at time of larceny, in absence of any proof that there had been a division of the whisky or of any evidence by which one of the jugs could be identified or distinguished from the other. Riley v. State, 1 Ga. App. 651, 57 SE 1031. In prosecution for theft of heifer where possession is alleged in K., conviction cannot be had upon evidence showing that at time of theft W. had actual possession and control of animal. Tankersley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 160, 101 SW 997. But conviction will be sustained in such case if evidence merely showed that heifer was taken from pasture of W. into which it had escaped. Id. Evidence held not to sustain allegations of affidavit as to ownership. Ward v. State [Miss.] 43 S 466.

Nonconsent of Owner. Where indictment alleges ownership in one having charge of entire freight department at depot, state need not prove nonconsent to taking by

(§ 3) *E. Instructions.* See 8 C. L. 709—An instruction defining larceny must include the element of felonious intent,[41] and where the question of intent is the only material issue, the instruction in relation thereto must be so specific that the jury will be able to pass upon it intelligently under pertinent rules of law and evidence.[42] In the absence of request, the different degrees of larceny need not be defined.[43] Where the offense is properly defined in the indictment, the definition need not be repeated in the instructions.[44] Instructions should connect the facts proved with the indictment.[45] They must conform to the evidence [46] and exclude all issues not raised by it,[47] but all issues raised by the evidence,[48] and all defenses supported by competent

underclerk having charge of part of depot from which goods were stolen. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387.

In prosecution for theft from the person, evidence held to support allegation in indictment that theft was privately committed. Black v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 866, 104 SW 897.

40. Held sufficient. People v. Meyers [Cal. App.] 91 P 167; Miller v. People, 229 Ill., 376, 82 NE 391; State v. McKinney [Kan.] 91 P 1068; State v. Arthur, 206 Mo. 720, 105 SW 600; Titterington v. State [Neb.] 110 NW 678; Martin v. State [Neb.] 112 NW 285; Territory v. Meredith [N. M.] 91 P 731; People v. Kipp, 121 App. Div. 692, 106 NYS 307; Barbe v. Ter. [Okl.] 91 P 783; Elliston v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 717, 99 SW 999; King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387; Rucker v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 167, 101 SW 804; Miles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 311, 103 SW 854; Warren v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 136, 105 SW 817.

Possession of stolen property in connection with other circumstances. Ross v. State [Tex. Cr. App.] 100 SW 1198.

Circumstantial evidence held sufficient to warrant conviction. Sheffield v. State, 1 Ga. App. 135, 57 SE 969. Evidence held to prove that defendant, a **county auditor,** conspired with others to steal money of county and that their design was successfully executed, defendant aiding and assisting. People v. Neff, 106 NYS 747.

Grand larceny. State v. Force, 100 Minn. 396, 111 NW 297; People v. Colmey, 117 App. Div. 462, 102 NYS 714; People v. Madden, 105 NYS 554.

Theft of horses. Pool v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 271, 103 SW 892; Slaughter v. State [Tex. Cr. App.] 105 SW 198; Penrice v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 177, 105 SW 797.

Larceny from the house. Cannon v. State, 125 Ga. 785, 54 SE 692; Wiley v. State [Ga. App.] 59 SE 438; Currie v. State [Ga. App.] 59 SE 926.

Larceny after trust, under Pen. Code 1895, § 194. Birt v. State, 1Ga. App. 150, 57 SE 965; Goodman v. State [Ga. App.] 58 SE 558.

Bringing stolen property into state. State v. White [Kan.] 92 P 829.

Attempt to commit larceny. Tinker v. State, 125 Ga. 743, 54 SE 662.

Held Insufficient. Circumstantial evidence. Wilson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 792, 100 SW 153.

Grand larceny. State v. McCarthy [Mont.] 92 P 521; People v. Ryan, 105 NYS 160. Evidence held not to justify conviction of officer of corporation of grand larceny in first degree, under Pen. Code, § 528, subd. 2, for misappropriating company's funds. People v. Burnham, 104 NYS 725.

Theft of cattle. Rios v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 135, 101 SW 988.

Theft from the person. Thomas v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 168, 101 SW 797.

41. Grand larceny under Montana statute. State v. Sloan, 35 Mont. 367, 89 P 829. Failure to include element of felonious intent is not cured by use in other parts of charge of words "larceny" and "steal," where they are used synonymously and without broader import than is given to term "larceny" in definition. Id.

42. Glaze v. State [Ga. App.] 58 SE 1126.

43. Buffehr v. Ter. [Ariz.] 89 P 415.

44. Territory v. Meredith [N. M.] 91 P 731.

45. Where indictment joined burglary and larceny, an instruction as to the presumption created by recent possession of stolen goods is erroneous for failure to connect the stealing of the goods with the crimes charged in the indictment. Miller v. People, 229 Ill. 376, 82 NE 391.

46. Instruction as to presumption arising from possession of property recently stolen held to conform to evidence. State v. Stanley, 123 Mo. App. 294, 100 SW 678. Evidence held sufficient basis for instruction in regard to flight of defendant after commission of alleged offense. State v. Soper [Mo.] 106 SW 3. Evidence held not to warrant charge that if prosecutor loaned money alleged to have been stolen to one of defendants it was no longer his property. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933.

47. Where all evidence indicates that defendant had present intent to appropriate property at time of taking, court need not instruct that it was not theft if defendant did not have intent to appropriate at time of taking, it being sufficient to instruct that to warrant conviction there must have been intent to deprive owner of value of property. Black v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 866, 104 SW 897. It is proper to refuse to charge in regard to law of voluntary return of stolen property when it is not shown that same property that was taken was returned. Elliston v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 717, 99 SW 999.

48. Where indictment charges theft of $10 and there is evidence that prosecutor had a $10 bill and some silver money about his person, it is not error to refuse to confine issue to question whether the bill was stolen. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. It is improper to instruct that jury are not authorized to con-

evidence,[49] must be submitted. They should not assume facts[50] and must not be upon the weight of the evidence.[51] In Georgia a charge which so particularizes and argumentatively enforces upon the jury the inference of guilt as to amount to an intimation of opinion is reversible error.[52] The court must charge upon the burden of proof.[53] Where the case is one of positive testimony the court need not charge on circumstantial evidence,[54] but where the question of guilt is wholly dependent on circumstantial evidence, an instruction thereon should be given[55] without request.[56] The court need not instruct that conviction cannot be had simply upon a confession of guilt if the confession is supported by corroborative evidence.[57] An instruction must not be involved or misleading.[58] An incorrect statement of the evidence will vitiate an instruction.[59] The charge must be considered as a whole.[60] An erroneous instruction is not reversible error if not prejudicial to defendant.[61] Defendant

vict defendant for any action done by him in regard to stolen property subsequent to theft, where there is evidence as to his subsequent conduct bearing upon question of his guilt. Vandergrift v. State [Ala.] 43 S 852. Where it is proved that part of property stolen was returned to the owner, it is not error to instruct that such return does not preclude conviction. Cohoe v. State [Neb.] 113 NW 532.

49. People v. Burnham, 104 NYS 725, Where defendant testified that his connection with stolen property was merely as a hired man to haul it, and that he did not participate in original taking, court should instruct that if this is so he cannot be convicted. Burdett v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 139, 101 SW 988. In prosecution under Laws 1897, p. 53, c. 55, § 1, for taking pecan nuts from another's land, charge must present defendant's defense that he had consent of persons owning pecans and having control of land on which they were growing. Burrows v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 95, 101 SW 232. Where there is testimony which reasonably raises the issue of purchase, the court must instruct upon that issue. Tankersley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 160, 101 SW 997.

50. Instruction held erroneous as assuming explanation of recent possession of stolen goods unsatisfactory. Miller v. People, 229 Ill. 376, 82 NE 391.

51. Charge held unobjectionable in this respect. Braxton v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 737, 99 SW 994.

52. Civil Code 1895, § 4334. So held as to following charge: "The state contends * * * that this defendant was seen by a certain witness to take and start away and carry away this basket containing the articles testified to you about, that it was afterwards found in a wagon he was in charge of and driving, and that this is the only way possible to account for the theft." Johnson v. State [Ga. App.] 58 SE 684.

53. Instruction that jury must find defendants guilty beyond a reasonable doubt sufficient. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933.

54. Glascow v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 34, 100 SW 933; McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. Where evidence shows that defendant borrowed horse to go to a certain place but went to another place and sold horse, and upon purchaser's expressing dissatisfaction returned money and authorized nephew to sell horse, which he did, paying money to defendant, no charge on circumstantial evidence is required. Richardson v. State [Tex. Cr. App.] 103 SW 852.

55. Glaze v. State [Ga. App.] 58 SE 1126; Riley v. State, 1 Ga. App. 651, 57 SE 1031. Where evidence merely shows that defendant had possession of goods after taking and his statement claiming honest possession, court should instruct on circumstantial evidence. Burdett v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 139, 101 SW 988.

56. Glaze v. State [Ga. App.] 58 SE 1126.

57. Sowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 948, 105 SW 178. Instruction that state must prove taking without consent of owner, wihout reference to any statement defendant may have made in nature of confession, was properly refused where owner testified that he did not consent to taking. King v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 833, 100 SW 387.

58. Instruction as to character of evidence required to prove criminal intent held to be involved and misleading. State v. Stanley, 123 Mo. App. 294, 100 SW 678. Instruction as to bearing of certain testimony on question of defendant's intent held not misleading. People v. Thorne, 148 Mich. 203, 14 Det. Leg. N. 66, 111 NW 741.

59. Instruction basing defendant's right to acquittal on explanation made by him as to possession of property alleged to have been stolen, and not correctly stating such explanation, held erroneous. Brittain v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 175, 105 SW 817.

60. Charge considered as a whole held not open to objection that it only required of jury one thing, that is, if they found defendant was principal with one T. in obtaining money from prosecutor to convict him. Glascow v. State [Tex. Cr. App.] 19 Tex Ct. Rep. 34, 100 SW 933.

61. Defendant cannot complain of an instruction which is favorable to him and which cannot result to his prejudice. McCue v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 289, 103 SW 883. Where indictment charges theft of $72 in silver and currency, failure to charge that value of money stolen must be $72 is not prejudicial error. Gibson v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 967, 100 SW 776. Instruction that if jury believed from evidence that property taken was partnership property between prosecutrix and defendant, or had any reasonble doubt of that fact, they should acquit, was more favor-

cannot complain of erroneous instructions as to embezzlement where he was convicted of larceny and not of embezzlement.[62] In the notes are collated cases involving instructions and refusals to instruct in regard to ownership of the property taken,[63] the defendant's intent,[64] and the location from which property must be taken to constitute larceny from the house.[65]

(§ 3) *F. Trial, sentence, and review.*See 8 C. L. 712—Under a Texas statute the theft of cattle taken in one county and carried into another may be prosecuted in the district court of the latter county.[66] Where there is evidence which would authorize a verdict of guilty, it must be submitted to the jury.[67] The question of the ownership of the property is for the jury.[68] Upon an information for stealing several domestic animals taken at the same time, the state is not required to elect upon which property it will proceed to trial.[69] Where burglary and larceny are charged in the same count, conviction may be had for either.[70] What findings of fact are involved in a verdict of guilty is to be determined in the light of the instructions given.[71] In Arizona upon an indictment charging grand larceny, a verdict of "guilty as charged in the indictment" without specifically finding the degree of the crime is invalid.[72]

LASCIVIOUSNESS; LATERAL RAILROADS; LATERAL SUPPORT; LAW OF THE CASE; LAW OF THE ROAD; LEASES; LEGACIES AND DEVISES; LEGAL CONCLUSIONS; LEGATEES; LETTERS; LETTERS OF CREDIT; LEVEES; LEWDNESS, see latest topical index.

LIBEL AND SLANDER.

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§ 1. *Definition and distinctions, nature of tort, and persons liable or damnifiable.*See 8 C. L. 713—Libel is a malicious defamation, expressed either in printing or writing, tending to blacken the reputation of one who is alive and to expose him to

able to defendant than was justified by Pen. Code, art. 865. Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 41, 100 SW 952.

62. State v. Soper [Mo.] 106 SW 3.

63. Instruction as to evidence of ownership held as favorable to defendant as evidence warranted. Titterington v. State [Neb.] 110 NW 678.

64. Instructions upon question of defendant's good faith in taking and carrying away property held not erroneous. State v. Soper [Mo.] 106 SW 3; Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 268, 103 SW 853. Where material question is intention of defendant, it is error to refuse a written request, timely made, to charge that jury cannot convict if defendant's intention was not to commit larceny but some other offense not set out in indictment. Paulk v. State [Ga. App.] 58 SE 1108.

65. Instruction held not erroneous. Johnson v. State [Ga. App.] 58 SE 684.

66. This is so whether defendant carried cattle or had some one else to do it for him. Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 268, 103 SW 853.

67. In prosecution for larceny of campaign contributions, evidence held to require submission to jury. Commonwealth v. Proctor [Mass.] 81 NE 148. In prosecution for statutory larceny, sufficient evidence of conversion of property with fraudulent intent to warrant submission to jury. People v. Thorne, 148 Mich. 203, 14 Det. Leg. N. 66, 111 NW 741.

68. Where there is substantial evidence that it belonged to complaining witness. State v. Soper [Mo.] 106 SW 3.

69. The taking in such case constitutes but one offense. State v. Soper [Mo.] 106 SW 3.

70. Miller v. People, 229 Ill. 376, 82 NE 391.

71. Verdict of guilty held, in view of instructions given, to involve finding that accused took property with felonious intent of depriving owner of it permanently. Stoddard v. State [Wis.] 112 NW 453.

72. Pen. Code, §§ 443, 444, 972. Buffehr v. Ter. [Ariz.] 89 P 415.

public hatred, contempt, or ridicule.[73] A state legislature cannot authorize one citizen to libel or slander another without making compensation.[74] A corporation may be sued for libel,[75] but is not liable for slander by one of its officers unless it authorized or ratified the act of the agent in uttering the particular slander,[76] and a telegraph company has no right to receive nor transmit a message libelous on its face.[77] To render the principal liable for slander committed by his agent the tort must have been expressly authorized or subsequently ratified.[78] An injury to a firm by libel is an injury to each partner and each may maintain an action to recover the damage caused thereby to his interest.[79] Persons may sign a certificate as to character of plaintiff without becoming liable for libelous statements in petition to which it refers but which is not incorporated therein.[80]

§ 2. *Elements of tort. A. Actionable words.* See 8 C. L. 714—Words which have a tendency to injure a person in his business or occupation, or expose him to public hatred, contempt, ridicule, or disgrace, are defamatory.[81] Words actionable per se without proof of special damage include words imputing crime[82] or want of

73. Horton v. Binghamton Press Co., 106 NYS 875.

74. Thus it would be unconstitutional to construe act (P. L. 1898, p. 476) so as to exclude, in the absence of proof of express malice, or the failure to retract the libel upon request, all allowance of compensation for general injury to plaintiff's reputation. Neafie v. Hoboken Printing & Pub. Co. [N. J.] 68 A 146.

75. Empire Cream Separator Co. v De Laval Dairy Supply Co. [N. J. Law] 67 A 711.

76. Thus where the agent of a sewing machine company in his office and in the presence of others said to plaintiff, "You are a thief I know you," the corporation is not liable unless it approved or ratified such words. Singer Mfg. Co. v. Taylor [Ala.] 43 S 210.

77. Western Union Tel. Co. v. Cashman [C. C. A.] 149 F 367.

78. Singer Mfg. Co. v. Taylor [Ala.] 43 S 210.

79. Tobin v. Alfred M. Best Co., 105 NYS 294.

80. Thus, where certain parties signed such a certificate, in a divorce suit which requested therein that plaintiff's petition for a rehearing be granted, they are not liable for defamatory statements in such petition, the latter being signed only by plaintiff, though it commenced "We, the undersigned, etc.," the reference to the petition being only to show for what purpose certificate given. Fernald v. Shepard [Mass.] 81 NE 274.

81. Bergstrom v. Ridgway-Thayer Co., 53 Misc. 95, 103 NYS 1093.

82. Schaefer v. Schoenborn, 101 Minn. 67, 111 NW 843.

Held actionable per se: Words spoken of plaintiff that he swore a lie imports crime of perjury. Gillis v. Powell [Ga.] 58 SE 1051. "Turn your searchlights on your treasurer and you will find the money," written concerning a county treasurer after his safe had been blown open at his store, containing a large amount of public money, imputes a crime. Logan v. Hodges [N. C.] 59 SE 349. The words "I hope you will think tonight of all these lies you swore," addressed to plaintiff. Moore v. Dodd, 31 Ky. L. R. 843, 104 SW 224. Publication of an article charging plaintiff with having betrayed interests of a branch fraternal order in favor of rival branch for which he accepted a bribe and for which he was expelled from the order. Doherty v. Lynett, 155 F 681. Words charging plaintiff with maliciously and without cause poisoning all the cats and dogs in the neighborhood, which act, if true, would be a misdemeanor. Baxter v. Mohr, 52 Misc. 558, 102 NYS 844. Denouncing plaintiff as a thief. Dallin v. Mayer, 107 NYS 316. To publish an article stating that a woman is a defendant in an action for divorce which can only be brought upon the ground of adultery. Rivers v. New York Evening Journal Co., 104 NYS 1081; O'Neil v. Star Co., 106 NYS 973. A defamatory article charging plaintiff with drunkenness in a public place, which was a crime and tended to degrade and rendered him odious. Morse v. Star Co., 118 App. Div. 256, 103 NYS 496. Where defendant says to plaintiff in presence of others, "When you get ready to steal any more of my oats, let me know," he thereby charges plaintiff with theft (Ladwig v. Heyer [Iowa] 113 NW 767), and the fact that defendant intended thereby to charge only an ordinary trespass or conversion, would not be available as a defense unless at the time the words were spoken defendant made some explanation modifying the natural defamatory significance of this language, or unless there was some fact or circumstance known to his hearers fro mwhich they could properly infer that he did not intend to charge plaintiff with a criminal offense (Id.). A newspaper publication which charges a policeman with having taken money from a prisoner for which he had refused to account charges a crime involving moral turpitude. Todd v. East Liverpool Pub. Co., 9 Ohio C. C. (N. S.) 249. Charge that plaintiff was seen in apple orchard shaking down and picking up apples is actionable per se, particularly where statutes makes this criminal trespass and larceny. Skaer v. Schwartz, 127 Ill. App, 48.

Held not actionable per se: Charge that plaintiff threatened to assault and kill does not impute crime. Mitchell v. Donanski [R. I.] 65 A 611. A newspaper article stating that plaintiff appeared in a criminal court against her husband on the charge of nonsupport, that she wore costly gems

chastity,[83] or exposing one to scorn, ridicule, contempt [84] or injuring one in his business or occupation.[85] In determining whether or not a publication is libelous per se, the article must be read as a whole,[86] the language given its ordinary meaning,[87] and the question is whether the natural import of the language complained of is defama-

while taking the stand, and that her jewelry were mute opposing witnesses to her testimony of poverty, does not charge plaintiff with perjury. O'Neill v. Star Co., 106 NYS 973.

83. A publication charging plaintiff with being housekeeper of a man who was a criminal does not authorize the inference that she was his mistress or that she was a person of immoral character. Horton v. Binghamton Press Co., 106 NYS 875. A publication that plaintiff lived with her parents on a block which was known to be a resort for prostitutes is insufficient to warrant a jury in inferring that she was charged with being a prostitute, such inference being counterbalanced by the fact that she was living with her husband and children. Id.

84. Held actionable per se: Publication of an article purporting to give a humorous account of an interruption of a street parade by an altercation between two of its musicians and accusing plaintiff of being connected with a string of amusing lawsuits following thereupon. Pascone v. Morning Union Co., 79 Conn. 523, 65 A 972. A publication imputing to plaintiff fraudulent conduct, acts of cruelty, gross immoralities, and dishonest practices. Tingley v. Times Mirror Co. [Cal.] 89 P 1097. An article charging plaintiff with transferring his property to defraud creditors represents him to be a dishonest man. Todd v. Every Evening Printing Co. [Del.] 66 A 97. To falsely publish of a wife that her husband has instituted an action for divorce against her. O'Neill v. Star Co., 106 NYS 973. Article published of partnership held actionable per se as injuring plaintiffs in their business and exposing them to public hatred, ridicule, and contempt. Bergstrom v. Ridgeway-Thayer Co., 53 Misc. 95, 103 NYS 1093. Publication held libelous as calculated to create a disturbance of the peace and to bring a clerk of the court into contempt. Commonwealth v. Duncan, 31 Ky. L. R. 1277, 104 SW 997.

Held not actionable per se: Advertisement in newspaper consisting of portrait of woman, together with statement calculated to convey impression that she, for herself, and as nurse, used certain whiskey not libelous per se. Peck v. Tribune Co. [C. C. A.] 154 F. 330.

85. Bergstrom v. Ridgway-Thayer Co., 53 Misc. 95, 103 NYS 1093.

Held actionable per se: Language which imputes to one fraud or want of integrity in his business. Empire Cream Separator Co. v. De Laval Dairy Supply Co. [N. J. Law] 67 A 711. Words charging unprofessional conduct. Marion v. Courier Pub Co., 125 Ill. App. 349. An article entitled "Bucket Shop Sharks" which read, "One of M.'s most intimate friends and active lieutenants is K., founder of the New York Bureau of Information, now managed by his brother, K. K. is a tout, sleek enough in his methods to have corralled bankers and brokers of unimpeachable legitimacy as clients for the New York Bureau of Information. His portrait, until it was surreptitiously removed, was No. 295-G, in the Chicago Rogues' Gallery, and he has the distinction of having served a penal sentence for the larceny of goods from such masters of merchantry as L. and F." is libelous per se as to New York Bureau of Information, whether the publication had reference to K. or his brother. New York Bureau of Information v. Ridgeway-Thayer Co., 104 NYS 202. A complaint which alleges that an article published by defendant charged either directly or inferentially that the firm of which plaintiff was member was connected in business with one who according to the article had been notorious for years as a broker of bogus insurance, that he was convicted for selling "fake" policies, and served a sentence in jail, states facts which are libelous per se. Tobin v. Alfred M. Best Co., 105 NYS 294. Where defendant wrote to plaintiff's client that plaintiff was "only taking the matter up in order to get a fee out of you, as he is not looking after your interests at all." Weber v. Credit Office, 55 Misc. 386, 106 NYS 583. Article charging partnership with dishonesty in conduct of its business. Weitershausen v. Croatian Printing & Pub. Co., 151 F 947. Defendant circulating reports that plaintiff had infringed certain patent rights. Central Imp. & Cont. Co. v. Grasser Cont. Co., 119 La. 263, 44 S 10. Statements relative to excessive charges by attorney. Reynolds v. Holland [Wash.] 90 P 648.

Not actionable per se: No one is answerable, in libel upon a charge of criticism of an artist's work where he does not go out of his way to misstate material facts or attack the artist. Outcault v. New York Herald Co., 117 App. Div. 534, 102 NYS 685. Words spoken of plaintiff, a police officer, that "He is no account," "He is always at home asleep," "I am prepared to prove it," "There is something rotten about him," are not in themselves actionable. Gatewood v. Garrett, 106 Va. 552, 56 SE 335. Publication by a college magazine concerning music director of such college after he had resigned and opened a school of his own that the change was made for the good of the department and in the interest of the college. Hubbard v. Furman University, 76 S. C. 510, 57 SE 478. In an action for libel evidence held insufficient to show that a letter written by defendant caused plaintiff to lose his position. Taylor v. Ziem, 148 Mich. 329, 14 Det. Leg. N. 235, 111 NW 1076.

86. Daily v. New York Herald Co., 151 F 114. And a charge that defendant published a libelous newspaper article concerning plaintiff cannot be sustained by proof only of a head line or index to such article. Miller v. State [Ark.] 99 SW 533.

87. Daily v. New York Herald Co., 151 F 114. Publication in a newspaper that plaintiff had been placed upon "unfair list" by a labor union and that paper had instructions to publish the list "until the parties named have decided to set themselves square with organized labor" construed, and held not to impute that plaintiff was dishonest, unreliable, or not worthy of confidence. Labor Review Pub. Co. v. Gallher [Ala.] 45 S 188.

tory as it strikes the mind of an average man.[88] What is intended to be understood by the use of words slanderous per se is a question of fact.[89] A man's goods may be slandered as well as his good name.[90] Words which misrepresent the quality of any single article which a person has for sale are not actionable per se.[91]

(§ 2) *B. Publication.*[See 8 C. L. 718]—Publication is essential and consists in making known a defamatory statement to any person other than the object thereof,[92] but there is no publication when the words are only communicated to person defamed,[93] but the fact that defamatory words are addressed to plaintiff does not prevent publication where they are spoken in presence of others.[94] Every utterance of defamatory matter is a separate publication.[95] A husband may be libeled by a letter written to his wife and vice versa.[96] Publication of an article referring to a dead man may be made libelous by publication in a subsequent article of a statement by another party that the former article refers to plaintiff.[97] One cannot set up the defense that he merely repeated a defamatory statement.[98]

(§ 2) *C. Malice.*[See 8 C. L. 718]—Malice is an essential ingredient to the action

88. Commercial Pub. Co. v. Smith [C. C. A.] 149 F 704. Words imputing a crime need not be made in direct terms, for such words are actionable if they would naturally and presumably be understood by those who hear them as charging a crime. Schaefer v. Schoenborn, 101 Minn. 67, 111 NW 843. Where a newspaper article describing a system of police blackmail by which, through corruption of police officers, crime was permitted to go practically unpunished, it was held that the facts as published would import to the ordinary mind that plaintiff was connected with the blackmailers. Breen v. New York Herald Co., 55 Misc. 567, 106 NYS 872.

89. Conwisher v. Johnson, 127 Ill. App. 602.

90. And where the article which he was to sell derives its special value from the individual skill, experience, and qualifications for its compilation of the editor or compiler, or from the fact of its having been authorized to be used in the courts by the legislature, a serious wrong may be committed by false and damaging statements as to these particulars. Cobbey v. State Journal Co. [Neb.] 113 NW 224.

91. Thus a letter published in a fruit growers' magazine stating that writer had used a certain powder for his fruit trees which was recommended by plaintiff to prevent brown rot, but that it had proven disastrous to them, is not libelous per se. Dust Sprayer Mfg. Co. v. Western Fruit Grower [Mo. App.] 103 SW 566.

92. Western Union Tel. Co. v. Cashman [C. C. A.] 149 F 367. A postal containing libelous matter sent through the mails, passing through the hands of carriers and others, amounts to publication. Logan v. Hodges [N. C.] 59 SE 349.

93. Where there was no evidence that a libelous message was read by anyone after it came into the hands of an authorized agent of the telegraph company, and before it was delivered to plaintiff, held not to constitute publication (Western Union Tel. Co. v. Cashman [C. C. A.] 149 F 367), and the fact that the messenger boy took a letter press copy before delivery of message to plaintiff is no publication thereof where there is no evidence that he read it. (Id.), even though the matter reach the hands of a third person, where this was not intended nor reasonably expected by sender. Buckwalter v. Gossow, 75 Kan. 147, 88 P 742. An admission of defendants in their answer that they mailed the alleged libelous matter to plaintiff in a sealed envelope addressed to her does not admit the publication of the libel. Id. Sending a libelous communication to a married woman respecting herself, enclosed in a sealed envelope, is not a publication of the libel. Id.

94. The words "I hope you will think tonight of all these lies you swore" addressed to plaintiff in presence of others are actionable. Moore v. Dodd, 31 Ky. L. R. 843, 104 SW 224.

95. And a joint action cannot be maintained against two or more persons. Parr v. Thompson [Tex. Civ. App.] 18 Tex. Ct. Rep. 599, 100 SW 792. Where a mortgagee of certain cattle told his agent in B. county that mortgagor was driving cattle away, that he would look after them and not to say anything about it, held that a repetition of these statements by agent in C. county was not an utterance by mortgagee in that county and that he could not be sued there in slander under Rev. St. 1895, art. 1194, subd. 9. Id.

96. Defendant wrote a letter to wife of plaintiff who received it from carrier, opened and read a portion addressed to himself, then handed it to his wife and they both read it together, held a publication. Kramer v. Perkins, 102 Minn. 455, 113 NW 1062.

97. Where defendant published an article stating therein that one Charles S. Quinn of Atlantic Highlands, N. J., was asphyxiated at a lodging house under disgraceful circumstances, and the next day in another article published that a woman who refused to give her name called up the morgue and stated that judging from picture of dead man she thought it was Rev. Francis Quinn, the plaintiff, held that, although plaintiff was not mentioned in first article, the two taken together were libelous (Quinn v. Sun Printing & Pub. Co., 105 NYS 1092), and the fact that the person to whom both articles referred was dead does not relieve defendant of responsibility for publishing the woman's statement that plaintiff was the person (Id.).

98. Bennett v. Crumpton, 1 Ga. App. 476, 58 SE 104; Todd v. East Liverpool Pub. Co., 9 Ohio C. C. (N. S.) 249.

of libel,[99] but it has been held that malice or the want thereof is only material in slander as bearing on amount of damages.[1] Where the publication is libelous per se, the law presumes malice in fact in its publication,[2] and in the absence of evidence rebutting such presumption plaintiff is entitled to exemplary damages.[3] Express malice is never presumed but must be proved by indirect as well as direct evidence.[4] The age of the party making the defamatory statement may not under some circumstances be an immaterial fact in determining the presence of malice.[5] Repetition of slander whether before or after suit brought is admissible to show malice.[6] An offer to retract defamatory matter after publication thereof may be shown as negativing presence of malice.[7]

§ 3. *Privilege and justification.*[See 8 C. L. 719]—At common law, the publication in good faith of a fair, correct[8] report of a judicial or legislative proceeding is absolutely privileged[9] when pertinent or relevant,[10] but pleadings which have never been presented to the court for its action are not judicial proceedings,[11] and the

99. Where an alleged libelous message is received and transmitted by an unauthorized person over wires of defendant telegraph company, and thereafter handled as a matter of routine business by its agents who were bound to secrecy, evidence held to show no malice on part of defendant. Western Union Tel. Co. v. Cashman [C. C. A.] 149 F 367.

1. Where in an action for slander charging plaintiff with having sexual intercourse defendant admits that he spoke the slanderous words but said he only repeated what he heard and that he had no malice, held that case should have been submitted to jury, on question of damages, as good faith was not a defense and want of malice is only material as bearing on amount of damages. McHugh v. Ambrose [Iowa] 113 NW 1080.

2. Tingley v. Times Mirror Co. [Cal.] 89 P 1097; Todd v. Every Evening Print. Co. [Del.] 66 A 97; Conwisher v. Johnson, 127 Ill. App. 602. An instruction that, if jury find that slanderous words were spoken as alleged in declaration, the law presumes they were spoken maliciously, and that if defendant uttered slanderous statements or some of them in good faith and in honest belief that they were true, that is no defense, sufficiently states that malice may be inferred from a false charge. Hammond v. Porter [Mich.] 14 Det. Leg. N. 733, 114 NW 64.

3. Civ. Code Cal. § 3294. Malice necessary for recovery of such damages may be either express or implied. Tingley v. Times Mirror Co. [Cal.] 89 P 1097. A complaint alleging that defendant "wickedly and maliciously, and with intent and design to injure, disgrace, and defame plaintiff, and to bring her into public discredit and obliquy, printed and published" the article complained of and "that said publication was false, malicious, and defamatory," sufficiently alleges a case of malice in fact. Id

4. Todd v. Every Evening Print. Co. [Del.] 66 A 97. Express malice is proved where it is shown that publication was made wantonly, maliciously, and with intent to injure, degrade, or destroy one's reputation. Id.

5. Gillis v. Powell [Ga.] 58 SE 1051.

6. Cain v. Shutt [Md.] 66 A 24; Tingley v. Times Mirror Co. [Cal.] 89 P 1097; Vest v. Speakman [Ala.] 44 S 1017. Such repetition need not be in the same language as the original charge, provided they are words of like import, even though the words declared on are actionable per se. Ladwig v. Heyer [Iowa] 113 NW 767.

7. Dalziel v. Press Pub. Co., 52 Misc. 207, 102 NYS 909.

8. A false charge that husband had instituted divorce proceedings against his wife held not to be privileged. O'Neil v. Star Co., 106 NYS 973. Defamatory judicial allegations are not libelous and actionable, unless shown to have been false, malicious, and without probable cause. Allegations held to be made in good faith, without malice, and on probable cause. Lescale v. Joseph Schwartz Co., 118 La. 718, 42 S 385.

9. St. 1898, § 4256a, which was enacted subsequent to a decision of the supreme court of Wisconsin, denying privilege to reports of city council proceedings, does not change common law defining privilege of publication of judicial proceedings. Ilsley v. Sentinel Co. [Wis.] 113 NW 425. In an acton to quiet title, publication of notice to nonresident defendants under authority of statutes and in obedience to court of competent jurisdiction based upon a proper showing in the pending cause is privileged. Maginn v. Schmick [Mo. App.] 105 SW 666. Publication in a newspaper of an account of a proceeding before a judge concerning one convicted of gambling held to be privileged. Blodgett v. Des Moines Daily News Co. [Iowa] 113 NW 821.

10. Meyers v. Hodges, 53 Fla. 197, 44 S 357. In a suit to quiet title, if statements and allegations made in petition are pertinent and relevant, they do not constitute actionable libel by defendant whose title is claimed to be besmirched thereby. Maginn v. Schmick [Mo. App.] 105 SW 666. Allegations in pleadings relevant to the issues are privileged. Thus, upon petition by guardian of one of two legatees for review of accounts by executors, the latter are informed by the other legatee that he is the only legitimate child of his mother through whom they claim, held that executors were not liable in an action for libel in setting up such matter in their answer. Kemper v. Fort [Pa.] 67 A 991. A witness is not liable in an action for slander for statements made on the stand concerning the matter under consideration while testifying under oath. Sebree v. Thompson, 31 Ky. L. R. 642, 103 SW 374.

11. Publication of conplaint filed in action begun but not brought to trial not privi-

privilege does not extend to ex parte proceedings where plaintiff had no opportunity of being heard.[12] The report of a judicial proceeding need not be stated in the identical language used, provided it be the same in substance.[13] Occasions when a qualified privilege may be invoked extend to communications made in good faith from honest motives,[14] such as honest criticism of official conduct [15] if made to the proper party,[16] to recover missing property,[17] publications made in endeavor to bring suspected criminals to justice,[18] communications between public officials,[19] replies of an employer to inquiries by a parent [20] or child as to his reasons for the discharge of the child.[21] Privilege will not avail as a defense where malice is shown on part of defendant, the presumption being that he believed the statements to be true,[22] and it is sufficient to make a general allegation that words are maliciously spoken or published even though they may be otherwise privileged.[23] A plea in justification must be as broad as the charge attempted to be justified.[24]

leged. Nixon v. Dispatch Print Co. [Minn.] 112 NW 258.

12. Facts held not to constitute privilege. Todd v. Every Evening Print. Co. [Del.] 66 A 97.

13. Blodgett v. Des Moines Daily News Co. [Iowa] 113 NW 821. The report of a proceeding privileged under St. 1898, § 4256a, may be expressed in the words of the reporter, yet that does not permit him to declare as on his own authority the existence of facts which are only asserted in the proceeding, and is limited to reporting the fact of the assertion. Ilsley v. Sentinel Co. [Wis.] 113 NW 425.

14. Gatewood v. Garrett, 106 Va. 552, 56 SE 335.

15. Words spoken of plaintiff, a police officer. "He is no account." "He is always at home asleep." "I am prepared to prove it." "There is something rotten about him," are not in themselves actionable (Gatewood v. Garrett, 106 Va. 552, 56 SE 335), and failure to give proper instructions relative to criticism of such officers held reversible error (Id.). A libelous charge against a public officer cannot be defended by the newspaper printing it on the ground that it was of public interest and as such was privileged, but to make the defense of privilege available it must be shown that reasonable diligence was used to ascertain the truth of the charge and that it was published in good faith. Todd v. East Liverpool Pub. Co., 9 Ohio C. C. (N. S.) 249. A libelous publication addressed to grand jury while in session concerning an officer whose acts are to be investigated is not privileged and is as libelous as though addressed to the public. Commonwealth v. Duncan, 31 Ky. L. R. 1277, 104 SW 997. Criticism of foreign consul held so malevolent as to be as a matter of law beyond the privilege. Commonwealth v. Di Silvestro, 31 Pa. Super. Ct. 537.

16. A postal card sent to the superintendent of public instruction of the county, imputing to the county treasurer the theft of public money in his care, is not privileged under such rule, the superintendent having no duty in regard to the matter. Logan v. Hodges [N. C.] 59 SE 349.

17. In an action for slander in charging plaintiff with larceny, held that a request that a certain communication was made by defendant to plaintiff under such circumstances as to constitute privilege was properly modified by adding that it was made under such excitement as was naturally aroused by the circumstances (Crafer v. Hooper, 194 Mass. 68, 80 NE 2), and, if jury find that there was intemperance and excess in such communication beyond such as was aroused by the circumstances, they should consider that fact in connection with the defense of privilege and express malice which destroys that defense (Id.). Instructions construed to mean that if defendant made accusations of theft to humiliate plaintiff and not for purpose of recovering missing money, it would destroy defense of privilege. Id.

18. Taylor v. Chambers [Ga. App.] 58 SE 369. Communications which would otherwise be slanderous are protected as privileges, if made in good faith by the injured person in the prosecution of an inquiry regarding a crime which he believes to have been committed upon his property, and for the purpose of detecting the criminal or bringing him to punishment. Id. Words uttered in good faith for the sole purpose of securing or preserving evidence to be used in the prosecution of one for a crime of which the speaker was the victim are privileged. Gillis v. Powell [Ga.] 58 SE 1051.

19. Letter from school trustees to county superintendent containing defamatory words concerning plaintiff, a school trustee, held to be privileged. Rauson v. West, 31 Ky. L. R. 101 SW 885.

20. Thus, where a father requests employer of his daughter, who is living with her father and under his care and protection, why he discharged her, the reply of the employer is privileged, but not if voluntarily made on part of employer. Rosenbaum v. Roche [Tex. Civ. App.] 18 Tex. Ct. Rep. 386, 101 SW 1164.

21. And, where the daughter requests the employer to state the reasons he made to another, his reply will not support an action for slander. Rosenbaum v. Roche [Tex. Civ. App.] 18 Tex. Ct. Rep. 386, 101 SW 1164.

22. Gatewood v. Garrett, 106 Va. 552, 56 SE 335.

23. Empire Cream Separator Co. v. De Laval Dairy Supply Co. [N. J. Law] 67 A 711.

24. While it need not justify every word, it must meet the substantial imputations as the ordinary reader would understand it to be made. Tingley v. Times Mirror Co [Cal.] 89 P 1097.

Truth. See 8 C. L. 721—The publication of defamatory statements is not actionable if true,[25] but when coupled with other circumstances may render the publisher liable.[26] A plea of guilty is sufficient to establish the truth of a charge of crime made by defendant,[27] but proof of the truth of a part only of the charge is not a complete defense.[28] In Nebraska, the truth when published with good motives and justifiable ends is a sufficient defense to an action for libel.[29] The fact that it is the common report and belief in the neighborhood that plaintiff is guilty is not sufficient.[30]

§ 4. *Damages and the aggravation and mitigation thereof.*[31]—In case of publication of matter libelous per se, the law presumes damage to the plaintiff,[32] and it is not necessary for plaintiff to show special damage in order to recover.[33] Nor intent or desire on part of defendant to injure plaintiff by such publication.[34] Compensatory damages may be recovered for injury to reputation,[35] good name, or fame, or for any mental suffering caused by reason of publication.[36] Punitive damages may in general be allowed in actions for libel,[37] but only where malice is shown,[38] as distinguished from malice in law which will support a verdict for compensatory damages only,[39] or that the libel was carelessly or recklessly published in disregard of plaintiff's rights.[40] Husband is not liable in punitive damages for libel uttered by his wife.[41] Reiteration of slander in answer,[42] and evidence of prior publications in

25. Publication charging plaintiff with crime. Commercial Pub. Co. v. Smith [C. C. A.] 149 F 704. To justify a repetition of an accusation of crime, the proof must show not only the fact of the accusation but the truth of the accusation. Bennett v. Crumpton, 1 Ga. App. 476, 58 SE 104.

26. Thus, if there is added by way of comment words which amount to accusation that charge is true, or assume guilt of party arrested by head lines or otherwise, the fact that such party was arrested upon the charge is no justification, Commercial Pub. Co. v. Smith [C. C. A.] 149 F 704.

27. In an action for libel for publication of article charging plaintiff with theft, where it appeared that he had been charged with theft and had entered a plea of guilty, evidence is inadmissible to show that even though such plea had been entered he was in fact not guilty. Register Newspaper Co. v. Stone, 31 Ky. L. R. 458, 102 SW 800.

28. Thus, where publication charged plaintiff with being a thief, arrested for larceny and while in jail stole from a fellow prisoner, and that after being released began stealing again and that he seemed to have a mania for stealing, held that the fact that plaintiff pleaded guilty to the charge of stealing from fellow prisoner is not a complete defense to the whole article. Register Newspaper Co. v. Stone, 31 Ky. L. R. 458, 102 SW 800.

29. Soundness of doctrine that truth alone is not sufficient defense to an action for libel, but it must appear that publication was made with good motives, etc., not determined, but instruction submitting question to jury, not prejudicial to plaintiff when supported by evidence. Fordyce v. Richmond [Neb.] 111 NW 850.

30. Thus, where A. used of B. the following language, "It is the general belief among the negroes and a great many white people that A. broke open the smoke house of C., a negro, and stole therefrom a quantity of meat and syrup," a plea of justification is insufficient which only alleges that A. had used such words, and that his statement as to existence of such belief was the truth. Bennett v. Crumpton, 1 Ga. App. 476, 58 SE 104.

31. Sec 8 C. L. 721. The amount and excessiveness of damages is more fully treated in the topic, Damages, 9 C. L. 869.

32, 33, 34. Todd v. Every Evening Printing Co. [Del.] 66 A 97.

35. So held under Pub. Acts 1895, p. 497, Act No. 216, § 1 (Comp. Laws 1897, § 10,423), in an action by plaintiff for publication of a charge that he burned, or caused to be burned, buildings for purpose of defrauding insurance company. Andrews v. Booth, 148 Mich. 333, 14 Det. Leg. N. 241, 111 NW 1059.

36. Neafie v. Hoboken Printing & Pub. Co. [N. J.] 68 A 146; Todd v. Every Evening Printing Co. [Del.] 66 A 97.

37. Where an anonymous letter written by defendant attacking plaintiff's honesty caused plaintiff to lose confidence of his employer, he will not be confined to recovery of nominal damages, though he remained for some time in his employment. Price v. Clapp [Tenn.] 105 SW 864.

38. Todd v. Every Evening Printing Co. [Del.] 66 A 97. Where newspaper publisher retained clippings from another newspaper for three days, which were libelous if true, then paraphrased and republished them without making inquiries as to truthfulness of same, held to show a sufficient disregard of plaintiff's rights as would justify a jury in finding that there was malice in fact within meaning of Gen. St. Conn. 1902, § 767. Morning Union Co. v. Butler [C. C. A.] 151 F 188.

39. Tingley v. Times Mirror Co. [Cal.] 89 P 1097.

40. Logan v. Hodges [N. C.] 59 SE 349. Evidence of care used by defendant's press agents in endeavoring to ascertain truth of statements contained in article may be shown. Butler v. Gazette Co., 104 NYS 637. But thie may be unnecessary where such investigation would have tended to deceive the person making it into belief that article was true and that such vigilance would have been of no avail. Id.

41. Where a husband on account of marital

other newspapers than defendant's, are admissible on the question of exemplary damages.[43] One may bear a bad reputation and still recover for injuries to feelings caused by a publication.[44] Upon waiver of actual damages, plaintiff may recover nominal damages.[45] The jury need not specify in their verdict the amount of damages awarded for injury to feelings where they are limited to such injury alone.[46] Damages assessed by the jury will not be interfered with in absence of abuse of discretion.[47] To constitute a good plea in mitigation, defendant must allege and prove that he had knowledge of the facts set up in mitigation prior to the publication.[48] Loss of reputation may be considered in estimating damages.[49] Good motives and lack of malice,[50] an offer to retract after publication,[51] general bad character [52] and reputation of plaintiff,[53] or facts going to show justification, may all be shown in mitigation of damages,[54] but not that plaintiff has commenced actions against other papers for publishing the same libel.[55]

§ 5. *Actions and procedure. A. Conditions precedent.* See 8 C. L. 723—In Alabama notice must be given a newspaper publisher five days before the beginning of a suit against him for libelous publication of a newspaper article.[56]

relation is joined in a suit against his wife for libel uttered by her without his knowledge or consent, he is not liable for punitive damages, though jointly liable with her for such compensatory damages as may be awarded. Price v. Clapp [Tenn.] 105 SW 864. In such case verdict may be rendered against husband and wife for the joint liability and against wife for exemplary damages. Id.

42. An instruction that an allegation in defendant's answer that the charge is true may be considered by jury in aggravation of damages should be qualified by a direction that the reiteration of the slander in the answer shall be considered in aggravation of damages, provided that the circumstances evince that such reiteration was done maliciously and without probable cause for believing it true. Bellis v. Roberts, 52 Misc. 493, 102 NYS 575.

43. Dalziel v. Press Pub. Co., 52 Misc. 207, 102 NYS 909.

44. Where defendant publishes of plaintiff that she bore a bad reputation, it is not necessary to a recovery that it be worse after publication tha nbefore. McArthur v. Sault News Printing Co., 148 Mich. 556, 14 Det. Leg. N. 265, 112 NW 126.

45. Where defendant does not justify the truth of slanderous words spoken, the plaintiff, having waived recovery of actual damages, is entitled to nominal damages. Slater v. Watte, 148 Mich. 650, 14 Det. Leg. N. 314, 112 NW 682.

46. And it is not error for court to refuse such instruction. McArthur v. Sault News Printing Co., 148 Mich. 556, 112 NW 126.

47. In an action for slander upon a charge that plaintiff, a white woman, had criminal intercourse with a negro, a verdict for $1,000 damages is not excessive. Smitley v. Pinch, 148 Mich. 670, 14 Det. Leg. N. 324, 112 NW 686. In slander for calling plaintiff a thief, a verdict for $200 was not such as to indicate any passion or prejudice or other improper motive. Dallin v. Mayer, 107 NYS 316. In an action for slander for words reflecting on plaintiff's chastity, the fact that she is "a woman extremely common if not coarse" is an insufficient reason for setting aside a verdict for $500. Flannigan v. Stauss, 131 Wis. 94, 111 NW 216. A verdict for $500 will not be disturbed on the ground that slanderous words were spoken in a quarrel, where it does not appear that verdict was so excessive as to create the belief that jury were misled either by passion, prejudice, or ignorance. Id.

48. Such knowledge must be procured from reliable sources, or ascertained after due investigation, and believed to be true. Tingley v. Times Mirror Co. [Cal.] 89 P 1097. And an allegation of mere rumors, or proof of them, without any allegation that defendant had any knowledge or had investigated and believed them to be true, does not constitute a plea of mitigation. Id.

49. Rosenbaum v. Roche [Tex. Civ. App.] 18 Tex. Ct. Rep. 386, 101 SW 1164.

50. Neafie v. Hoboken Printing & Pub. Co. [N. J.] 68 A 146; Logan v. Hodges [N. C.] 59 SE 349. Applicable to punitive but not compensatory damages. Todd v. Every Evening Printing Co. [Del.] 66 A 97.

51. Dalziel v. Press Pub. Co., 52 Misc. 207, 102 NYS 909.

52. Logan v. Hodges [N. C.] 59 SE 349.

53. Testimony to the effect that it was "the general belief and report of the neighborhood that B was guilty of breaking open the smoke house of C. and stealing his meat and syrup," held admissible. Bennett v. Crumpton, 1 Ga. App. 476, 58 SE 104.

54. In an action for libel, an allegation in the answer that plaintiff falsely represented certain medicine to cure incurable diseases and that defendant had procured an analysis showing its fraud, etc., if properly alleged as partial defense, is relevant in mitigation of damages. W. T. Hanson Co. v. Collier, 104 NYS 787.

55. Butler v. Gazette Co., 104 NYS 637.

56. Act Feb. 20, 1899 (Gen. Acts 1898-99, p. 32), amending Code 1896, § 1441, such notice shall specify the statements in the article alleged to be defamatory, and if it appear at trial that article was published in good faith, that its falsity was due to mistake, and that a retraction was published, plaintiff shall recover only actual damages and notice unnecessary where plaintiff waives punitive damages. Comer v. Age Herald Pub. Co. [Ala.] 44 S 673. Such act does not apply to a person other than a publisher of a news-

(§ 5) *B. Pleading.*[See 8 C. L. 723]—Plaintiff must allege sufficient facts to constitute a cause of action [57] and the complaint must sufficiently identify plaintiff with the defamatory statements,[58] but it is not necessary to allege in the language of the statute that defamatory words were published concerning plaintiff if from the facts stated it necessarily appears that such was the case.[59] Where the language is doubtful, the court on demurrer will ascertain if there is anything in the language which by reasonable intendment is actionable.[60] When the words of a publication are capable of a defamatory or innocent meaning, dependent on extrinsic facts, the complaint must allege the defamatory meaning to state a cause of action,[61] and if not the innocent meaning will be adopted.[62] The alleged defamatory words must be set forth in full and it is not sufficient to state the substance and effect of the words.[63] Words having local and special meaning must be set out by inducement.[64] In an action by a partnership for libel, it is sufficient to allege and prove that the defamatory article was published of and concerning the partners individually.[65] Plaintiff may allege her chaste character and good reputation.[66] When the words of an alleged defamatory publication are capable of more than one meaning, the innuendo must explain or point out the sense in which it is claimed they were used,[67] but an innuendo does not enlarge the sense of the words used in a libelous publication and they should be given a fair and reasonable interpretation.[68] Where an innuendo has to be resorted to in order to show the libelous import of the language, special damages must be alleged,[69] and where plaintiff by his innuendo ascribed to a publication a par-

paper, who prepares an article and has it published therein at his own expense. Comer v. Louisville & N. R. Co. [Ala.] 44 S 676.

57. A complaint which charges that defendant falsely published that plaintiff's husband had instituted an action for divorce states a good cause of action in libel. O'Neil v. Star Co., 106 NYS 973. Where the complaint alleged that defendant circulated reports that plaintiff had infringed certain patent rights, an exception of no cause of action was erroneously sustained. Central Imp. & Cont. Co. v. Grasser Cont. Co., 119 La. 263, 44 S 10.

58. A complaint which set forth a publication charging that a street car conductor was in complicity with pickpockets on a car and that the matter was published concerning the plaintiff, who was conductor of the car on which the theft took place, held to be a sufficient identification of plaintiff, the conductor, in the article published. Lyons v. New York Herald Co., 55 Misc. 570, 106 NYS 874.

59. Code Civ. Proc. § 535. Article complained of referred to Wm. Pitt Rivers' "suit for divorce" and spoke of "his divorce complaint," showing that he was plaintiff. In an action for libel against publishers of the article plaintiff alleges that she was, at time of publication, and now is, wife of Wm. Pitt Rivers. Held sufficient since a man can sue only his wife for divorce. Rivers v. New York Evening Journal Pub. Co., 104 NYS 1081.

60. Petition held sufficient on demurrers to state a cause of action for libel for publication in a fruit grower's magazine of a letter concerning a dust powder made by plaintiff. Dust Sprayer Mfg. Co. v. Western Fruit Grower [Mo. App.] 103 SW 566.

61. Where complaint alleged that defendant wrote a letter concerning plaintiff that there was a fellow who used to be a "friend" of plaintiff, states a good cause of action where it also alleges that the word which was in quotation marks was used in a defamatory sense. Irving v. Irving, 105 NYS 609.

62. Irving v. Irving, 105 NYS 609.

63. Plaintiff, a hotel guest, alleging that defendant's servant broke into her room against her will and used defamatory language, insufficient without stating the exact language. DeWolf v. Ford, 104 NYS 876. A complaint which merely alleges the sending of obscene and anonymous letters is insufficient, it being necessary to set forth the contents of such letters in order that it may appear on face of pleadings that they were of that character. McNamara v. Goldan, 118 App. Div. 221, 103 NYS 160.

64. Words having such meaning of charging one with adultery held actionable per se where such meaning is properly set out by way of inducement. Schaefer v. Schoenborn, 101 Minn. 67, 111 NW 843.

65. Bergstrom v. Ridgway-Thayer Co., 53 Misc. 95, 103 NYS 1093.

66. An averment that defendant "maliciously" intending to injure the plaintiff in her good name, fame, and reputation," published a libel concerning her does not amount to an averment tendering an issue as to her chaste character and good reputation. Oakes v. Star Co., 104 NYS 244.

67. Words published of an artist which may be interpreted as criticisms of his work not libelous in absence of innuendo. Outcault v. New York Herald Co., 117 App. Div. 534, 102 NYS 685. In an action upon an alleged libelous newspaper publication, article held to be capable of two constructions, and a verdict for plaintiff would not be sustained in absence of any innuendo. Daily v. New York Herald Co., 151 F 114.

68. Todd v. Every Evening Printing Co. [Del.] 66 A 97.

69. A petition alleging that defendant

ticular meaning he is bound thereby and its correctness must be found or he fails.[70] In New Jersey it may be averred that the words were used in a defamatory sense, specifying such defamatory sense without a prefatory averment to show how such words were used in that sense.[71] Where a defamation is actionable per se, special damages need not be alleged,[72] and, conversely, special damage must be alleged where the words are not actionable per se.[73] The necessity for allegation and proof of special damage does not inhere in the form of the action but in the nature of the alleged defamatory words.[74] The defense of justification must be specially pleaded.[75] A petition showing on its face that the defamatory matter was a report by an officer to his superior within scope of his authority must show that there were reasonable grounds to believe such report to be true.[76] An action for slander may be joined with an action for malicious prosecution,[77] but in New York an action for slander cannot be united with an action for assault.[78] A joint action against two or more persons for slander cannot be maintained since an utterance by each is a separate publication.[79]

(§ 5) *C. Evidence.*[See 8 C. L. 725]—In the absence of any plea of justification alleging the truth of an alleged slanderous charge, the law presumes it to be false,[80] and the burden is upon defendant to prove the truth of the alleged libelous publication,[81] and to sustain such a plea defendant must prove plaintiff's guilt as imputed to him by a preponderance of the evidence.[82] Evidence is inadmissible which does not

wrote of plaintiff that without concerted action on part of better people, plaintiff would be next judge, and that would mean doom of "our Prohibition and Temperance cause, and would leave us almost at the mercy of the Blind Tiger Thugs, Bootleggers, etc," is insufficient, the letter not being libelous per se and there being no allegation of special damage. Morrison v. Dean [Tex. Civ. App.] 19 Tex. Ct. Rep. 657, 104 SW 505.

70. Labor Review Pub. Co. v. Galliher [Ala.] 45 S 188.

71. A count is within the meaning of § 106, p. 568, Act 1903, which charges that the defendant spoke or published certain words concerning the plaintiff and that he spoke them meaning that the plaintiff was guilty of certain specified fraudulent conduct. Empire Cream Separator Co. v. DeLaval Dairy Supply Co. [N. J. Law] 67 A 711.

72. Empire Cream Separator Co. v. De Laval Dairy Supply Co. [N. J. Law] 67 A 711; Baxter v. Mohr, 52 Misc. 558, 102 NYS 844; Doherty v. Lynett, 155 F 681. Request to require proofs of special damages in an action for slander in charging plaintiff with larceny properly refused. Crafer v. Hooper, 194 Mass. 68, 80 NE 2.

73. Peck v. Tribune Co. [C. C. A.] 154 F 330. In an action for libel upon an alleged libelous newspaper publication, article construed and held not libelous per se and a verdict in favor of plaintiff not sustained in absence of allegation of special damages. Daily v. New York Herald Co., 151 F 114. Complaint alleging that because a publication was read by several of plaintiff's customers they declined to enter into business with him does not state special damages. Pascone v. Morning Union Co., 79 Conn. 523, 65 A 972. In an action for libel alleged to consist of statements concerning plaintiff's machines, held that where the only averment of special damages in a count setting out defamatory statements respecting quality and value of such machines, consisted of expenses unnecessarily incurred by plaintiff, such damages are insufficient to sustain the action. Lanston Monotype Mach. Co. v. Merganthaler Linotype Co. [C. C. A.] 154 F 42. If a publication is not libelous per se, malicious purpose to injure plaintiff is not enough without an allegation that it effected the evil purpose by conveying to those to whom it was sent a charge injuriously affecting the character or business of plaintiff. Hubbard v. Furman University, 76 S. C. 510, 57 SE 478. Under P. L. 1898, p. 476, an averment that plaintiff was injured in his good name, fame, and credit, and brought into public scandal, infamy, and disgrace, is sufficient special allegation to warrant award of substantial compensation against newspaper publisher, there being no request for retraction nor evidence of express malice. Neafie v. Hoboken Printing & Pub. Co. [N. J.] 68 A 146.

74. Where a libelous article charges a partnership with dishonesty in its business, the partner may sue either jointly or severally, and, if the article is libelous, per se, it is no more necessary to allege special damage in the joint action than in the several suits. Weitershausen v. Croatian Printing & Pub. Co., 151 F 947.

75. Logan v. Hodges [N. C.] 59 SE 349. Truth inadmissible under general issue. Pickford v. Talbott, 28 App. D. C. 498.

76. An allegation that the words were published without a lawful justification or excuse is not an allegation that they were published without such reasonable grounds. Rauson v. West, 31 Ky. L. R. 82, 101 SW 885.

77. Slater v. Walter, 148 Mich. 650, 14 Det. Leg. N. 314, 112 NW 682.

78. So held under Civ. Code Proc. § 484. Paul v. Ford, 117 App. Div. 151, 102 NYS 359.

79. Parr v. Thompson [Tex. Civ. App.] 18 Tex. Ct. Rep. 599, 100 SW 792.

80. Ladwig v. Heyer [Iowa] 113 NW 767.

81. Reynolds v. Holland [Wash.] 90 P 648.

82. The court erred in instructing the jury

tend to show the truth of the alleged libelous statement,[83] but evidence of attempts to ascertain the truth as admissible,[84] and plaintiff may introduce evidence tending to prove his own contention.[85] Where upon a charge of lewdness defendant pleads truth in justification, he cannot show particular acts to sustain such plea,[86] but plaintiff may introduce evidence of her chastity.[87] The party claiming a privileged communication has the burden of proving it.[88] Where there is no plea of justification, evidence is admissible to prove such fact.[89] Malice is presumed from publication of matter libelous per se.[90] Upon the question of punitive damages, any evidence is admissible tending to prove or disprove presence of malice on part of defendant.[91] Evidence of plaintiff's reputation is admissible on the question of damages.[92] Evidence is admissible to show intent of defendant to charge plaintiff with crime,[93] or dishonesty.[94] Where the words used are capable of an innocent and defamatory meaning and the latter meaning is specially alleged, any evidence is admissible to show

that the plea of justification would be established by a preponderance of the evidence that the statement made by defendant as to the existence of the general belief that plaintiff was guilty of the crime imputed to him was true. Bennett v. Crumpton, 1 Ga. App. 476, 58 SE 104. Defendant must show that the publication is substantially true, but need not establish guilt of plaintiff beyond a reasonable doubt that would warrant his conviction in a criminal court. Under § 2, act of April 11, 1901 [P. L. 74], providing that a plea of justification must be pleaded and proved to satisfaction of jury as in other cases, requires only proof by a preponderance of the evidence. Sacchetti v. Fehr, 217 Pa. 475, 66 A 742.

83. Where defendant published of plaintiff that he had charged an excessive fee as an attorney in a foreclosure proceeding, evidence was inadmissible to show that such fee was excessive as the allowance was to client and not to attorney, and even though it had been regarded as awarded to attorney it was inadmissible. Reynolds v. Holland [Wash.] 90 P 648.

84. Evidence of defendant's press agents as to care used by them in endeavoring to ascertain truth of statements in libelous article held admissible as going to show whether defendant carelessly or recklessly published same. Butler v. Gazette Co., 104 NYS 637.

85. Where defendant published of plaintiff that he charged a larger fee as an attorney than his services were worth, and that attorney for defendant had looked after the transaction, evidence was admissible to show that plaintiff had not been released from responsibility as attorney of record in the case. Reynolds v. Holland [Wash.] 90 P 648.

86. Smitley v. Pinch, 148 Mich. 670, 14 Det. Leg. N. 324, 112 NW 686.

87. Plaintiff may prove by a newspaper reporter who had lived in same town as plaintiff for three years that he had heard no suspicion against her chastity. Smitley v. Pinch, 148 Mich. 670, 14 Det. Leg. N. 324, 112 NW 686.

88. Logan v. Hodges [N. C.] 59 SE 349.

89. Evidence held inadmissible where there was no particular justification pleaded to which it could be addressed. Tingley v. Times Mirror Co. [Cal.] 89 P 1097.

90. Tingley v. Times Mirror Co. [Cal.] 89 P 1097. Malice is not presumed upon publication by defendant of libelous allegations in due course of legal procedure, even though such allegations are not pertinent, and the plaintiff must prove express malice. Myers v. Hodges, 53 Fla. 197, 44 S 357. Thus malice may be inferred from the language of the publication itself, or may be proven by extrinsic circumstances. It is not inferable from the mere fact that the defendant used strong words, and the expressions are angry and intemperate, is not enough to show malice. Id.

91. Butler v. Gazette Co., 104 NYS 637. Evidence of facts and circumstances relating to a plaintiff, unknown to a defendant at the time of the publication of a libel, cannot be shown for the purpose of proving that the publication was without malice. But by stipulation of parties to a libel suit that depositions taken for use in another suit might be used, they are admissible to show that publication was without malice. Id.

92. But such reputation cannot be established by singling out particular acts or facts, but is established by testimony of those who are familiar with and know the people among whom the one whose reputation is assailed associates. Register Newspaper Co. v. Stone, 31 Ky. L. R. 458, 102 SW 800.

93. In an action of slander for charging plaintiff with being a thief, evidence of statements, which, though not corresponding with the allegation, upon which the jury would be justified in finding that defendant intended thereby to charge plaintiff with larceny, is permissible. Ladwig v. Heyer [Iowa] 113 NW 767. In an action for slander charging plaintiff with larceny, witness, after repeating alleged statement by defendant that plaintiff had taken certain stuff belonging to defendant, was allowed to state remainder of conversation as going to show that defendant intended witness to understand that plaintiff had stolen property referred to. Id.

94. In an action for libel upon the charge that defendant wrote an anonymous letter attacking plaintiff's honesty, evidence is admissible going to show that defendant had previously admitted to the writing of other anonymous letters, which represented herself as being something like a white cap, as going to show knowledge, purpose, and intent. Price v. Clapp [Tenn.] 105 SW 864.

that such meaning was meant and understood.[95] Where defendant charged plaintiff with theft, evidence of prior indictments for other misdemeanors is inadmissible.[96] Evidence is inadmissible to show plaintiff's susceptibility to mental suffering.[97] An article previously published is admissible in evidence only in aggravation of damages.[98] In an action for libel, where the falsity of the publication has been admitted in the answer, the introduction by the plaintiff of evidence having reference to such falsity brings it within the discretion of the court to permit the defendant to also introduce evidence on the same subject, provided the question of the truth or falsity of the charge is not submitted to the jury.[99] Where exemplary damages are claimed, evidence of value of defendant's property is admissible.[1]

(§ 5) *D. Trial.*[See 8 C. L. 728]—A partial plea of justification will not entitle the defendant in a slander suit to open and conclude.[2] Where the words are capable of but one interpretation, it is for the judge to determine whether they are defamatory or not,[3] but if capable of two meanings, one of which would render the words libelous and the other not, the question is for the jury,[4] and whether or not words are actionable per se is a question of fact for jury.[5] When the facts are uncontroverted the court is to determine whether or not the publication is privileged,[6] and if they are controverted it should instruct the jury as to what circumstances would render the publication privileged,[7] and leave it to the jury to determine the character of the publication.[8] What is a lawful justification is a question of law.[9] If there is evidence of malice the question should be submitted to the jury.[10] If a publication be conditionally privileged, it is a matter of law for the court to determine whether there is any evidence of malice, if not he should direct a verdict for defendant.[11] The amount of damages in a libel suit are entirely within the discretion of the jury,[12]

95. Irving v. Irving, 105 NYS 609.

96. In an action for libel for publication of an article charging plaintiff with theft, evidence of indictments against plaintiff for misdemeanors other than theft are inadmissible. Register Newspaper Co. v. Stone, 31 Ky. L. R. 458, 102 SW 800.

97. Tingley v. Times Mirror Co. [Cal.] 89 P 1097.

98. Blodgett v. Des Moines Daily News Co. [Iowa] 113 NW 821.

99. Todd v. East Liverpool Pub. Co., 9 Ohio C. C. (N. S.) 249. The burden of proving publication of an alleged libelous communication respecting a married woman sent to her in a sealed envelope is upon plaintiff. Proof that she received letter from her husband without showing how it came into his possession is insufficient. Buckwalter v. Gossow, 75 Kan. 147, 88 P 742.

1. Tingley v. Times Mirror Co. [Cal.] 89 P 1097.

2. Taylor v. Chambers [Ga. App.] 58 SE 369.

3. Commercial Pub. Co. v. Smith [C. C. A.] 149 F 704.

4. A publication in a newspaper under the heading "Murderer Arrested" stated that plaintiff had been arrested by the sheriff, that he was wanted for the killing of another man, the incentive being robbery that rewards had been offered for his arrest and that he did not deny being the man wanted and stated that he did the killing. The declaration admitted the arrest by sheriff but denied the rest. Held a question for jury whether or not readers would understand the article to so charge and therefore libelous, and that judge erred in charging that it was libelous per se. Commercial Pub. Co. v. Smith [C. C. A.] 149 F 704.

5. So held in an action upon the charge that plaintiff had passed or attempted to pass counterfeit money. Richardson v. Reps [Iowa] 112 NW 788; Hubbard v. Furman University, 76 S. C. 510, 57 SE 478. Whether an allegation that plaintiff's husband had obtained a divorce from her, which was false, did impute to her a fault or wrong which would tend to hold her up to contempt and scorn in the community, is a question for jury. Horton v. Binghamton Press Co., 108 NYS 875. Whether an allegation that plaintiff resided in a block which was the resort of prostitutes tended to hold plaintiff up to ridicule or contempt is question for jury. Id. In an action for slander upon the charge that plaintiff had passed or attempted to pass counterfeit money, whether or not a communication to the police imputing such crime amounted to a qualified privilege, held under the facts to be a question for the jury. Richardson v. Reps [Iowa] 112 NW 788. Where it appeared that defendant called plaintiff thief and a liar, it was held to be a question of fact for jury as to whether the language used imputed a crime. Cain v. Shutt [Md.] 66 A 24.

6. Myers v. Hodges, 53 Fla. 197, 44 S 357; Sebree v. Thompson, 31 Ky. L. R. 642, 103 SW 374.

7, 8. Myers v. Hodges, 57 Fla. 197, 44 S 357.

9. Rauson v. West, 31 Ky. L. R. 82, 101 SW 885.

10, 11. Myers v. Hodge, 53 Fla. 197, 44 S 357.

12. Butler v. Gazette Co., 104 NYS 637.

and the court should give proper instructions to the jury regarding quantum of damages,[13] and refusal to so give after request therefor is reversible error.[14] It is for the jury to determine whether the meaning ascribed to the publication by the innuendo was intended by the defendant.[15] Whether or not a libelous petition is incorporated into a certificate so as to make the parties signing the certificate liable for the libelous statements in the petition is a question for the court.[16] Whether certain facts stated in an answer to an action for libel constitute a justification should be determined by demurrer and not by motion to strike out,[17] and if defendant fails to sustain the answer he may be allowed to amend and allege the matter as a partial defense or amplify it so as to make it a justification.[18]

§ 6. *Criminal libel and slander.*[See 8 C. L. 781]—An indictment in slander must show that the alleged libelous statements were used concerning the plaintiff.[19] In Kentucky, to show the application of defamatory matter to person libeled, it is sufficient to state in the indictment generally that the same was published concerning him.[20] It is sufficient if indictment charges defendant with having used language concerning plaintiff, which in its ordinary acceptation amounts to charging an offense.[21] A charge to the jury that they shall convict if they find that defendant used the language as laid down by the statute is not error.[22] Remote and irrelevant

13. It is not error for court to instruct jury that under law of this state punitive damages cannot be recovered, when instruction sufficiently defines meaning of such term and jury are further instructed as to true measure of damages. Fordyce v. Richmond [Neb.] 111 NW 850. Nor is it error for court to instruct jury that plaintiff's damages are limited and restricted to the geographical territory in which the newspaper circulated where it also charged that if jury found for plaintiff, she should recover a fair compensation for all injury to her reputation, feelings, and good name by reason of the publication. Butler v. Gazette Co., 104 NYS 637. An instruction that "the amount of actual damages which may be assessed in a libel case is entirely in the discretion of the jury, etc.," is not prejudicial to plaintiff where it also charges that "it must be a sum which will fairly compensate plaintiff for the injury which she sustained by reason of the publication." Id. Upon a charge that defendant had published, after burning of a house conducted by plaintiff, that it sustained a bad reputation, it was not error to refuse an instruction to jury that if the house had no worse reputation after than it had before publication of article plaintiff could not recover. McArthur v. Sault News Printing Co., 148 Mich. 556, 14 Det. Leg. N. 265, 112 NW 126. Where defendant does not plead truth in justification of two of five charges made, it is not error for court to refuse an instruction that if jury find either of these charges to be true, they shall find for plaintiff nominal damages as to that charge, but if they find them both to be untrue and the other charges to be true, they shall find for defendant. Smitley v. Pinch, 148 Mich. 670, 14 Det. Leg. N. 324, 112 NW 686.

14. Under Ann. Code Miss. 1892, § 1301, making it a misdemeanor for an employe of a telegraph company to divulge contents of message except to sendee, in an action against telegraph company for publication of libelous telegram, it was error for court to refuse an instruction that as there was no evidence that contents were known to any one save four employes, and no evidence that these had disclosed contents, jury should take this into consideration in assessing damages. Western Union Tel. Co. v. Cashman [C. C. A.] 149 F 367.

15. But the question is submitted only as bearing on the matter of actual malice and in mitigation of punitive damages and not as a defense that would prevent recovery. Irving v. Irving, 105 NYS 609; Todd v. East Liverpool Co., 9 Ohio C. C. (N. S.) 249.

16. Fernald v. Shepard [Mass.] 81 NE 274.

17, 18. W. T. Hanson Co. v. Collier, 104 NYS 787.

19. An indictment which charges that defendant published "a certain false scandalous and malicious article or publication containing words and sentences of, and concerning L. E. Pearce, as follows," and then copies entire article, is a sufficient charge that such words and statements were published of L. E. Pearce. Commonwealth v. Duncan, 31 Ky. L. R. 1277, 104 SW 997.

20. Under Cr. Code Proc. § 132, it is sufficient after charging that publication was made concerning party libeled to set out the publication. Commonwealth v. Duncan, 31 Ky. L. R. 1277, 104 SW 997.

21. Language held to charge plaintiff with being guilty of fornication with defendant. Morphew v. State [Ark.] 106 SW 480. Evidence held sufficient to convict. Id. Where the information charged that certain persons were "nothing but a set of whores," no further innuendo averment is necessary. Roberts v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 741, 100 SW 150. Information held not to charge defendant with such language as would impute to plaintiff unchastity. Fox v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 177, 101 SW 808.

22. It being the language of the statute, a charge giving to the jury in the alternative the terms "falsely and maliciously," or "falsely and wantonly," and authorizing the jury to convict in case they found that defendant used the expressions in either case,

evidence is inadmissible,[23] under the constitution of Kentucky, in all indictments for libel, the jury shall have the right to determine the law and the facts under the direction of the court as in other cases.[24] In determining whether words spoken or written are libelous, the entire conversation or writing must be considered.[25] Upon a charge of imputing to plaintiff unchastity, accused may offer evidence of specific acts of illicit intercourse.[26] An information charging two or more females with unchastity is not duplicitous.[27]

§ 7. *Jactitation or slander of title.*[See 8 C. L. 733]—An action in jactitation cannot be maintained unless plaintiff is in possession.[28]

LIBRARIES, see latest topical index.

LICENSES.

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This article includes only the general principles applicable to police regulation of various occupations or taxes imposed upon the privilege of engaging therein in the exercise of the power to raise revenue. Rights appurtenant to the use of land[29] or relating to specific occupations are treated elsewhere.[30]

§ 1. *Definition and nature.*[See 8 C. L. 734]—A license has none of the elements of a contract, and does not confer an absolute right but only a personal privilege to be exercised under existing restrictions and such as may thereafter be reasonably imposed,[31] and statutes authorizing the issuance of a license may ordinarily be repealed at the pleasure of the legislature.[32] A municipal corporation is without power to deprive itself of the right to license under its police power.[33]

§ 2. *Power to require and validity of statutes.*[See 8 C. L. 735]—Any business or occupation which endangers the public health, morals, safety, or general welfare is

is correct, and the fact that the indictment charged that defendant used the language falsely and maliciously and wantonly did not change the rule. Kelley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 80,101 SW 230.

23. In a prosecution for slander in charging certain females with unchastity, evidence that defendant imputed unchastity to one of such females six months after the alleged offense held inadmissible to show intent of defendant as to whom he had reference to when he used the language as alleged in the information. Roberts v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 741, 100 SW 150.

24. In a prosecution for criminal libel, the fact that the court charged the jury, as to the law is not a violation of § 9, Bill of Rights. Walston v. Com. [Ky. App.] 106 SW 224.

25. And an indictment charging defendant with publication of a libelous newspaper article cannot be sustained by proof only of a headline or index to such article. Miller v. State [Ark.] 99 SW 533.

26. Under Rev. St. § 6828, on an indictment charging that the accused used, uttered, and published a false and malicious slander of and concerning a female of good repute with intent to cause it to be believed that such female was unchaste, evidence offered by the accused of specific acts of illicit carnal intercourse on the part of the female which came to his knowledge immediately before the speaking of the words is admissible. Lambright v. State, 9 Ohio C. C. (N. S.) 151.

27. Roberts v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 741, 100 SW 150.

28. Facts held to show possession of lands in defendant. South Louisiana Land Co. v. Riggs Cypress Co., 119 La. 193, 43 S 1003.

29. See Easements, 9 C. L. 1017. Licenses to Enter on Land, 8 C. L. 753. Liability to licensees for negligence, see Negligence, 8 C. L. 1090.

30. See Intoxicating Liquors, 10 C. L. 417. Attorneys and Counselors, 9 C. L. 300; Peddling, 8 C. L. 1338; Pawnbrokers and Secondhand Dealers, 8 C. L. 1327; Medicine and Surgery, 8 C. L. 972. Licenses to teach, see Schools and Education, 8 C. L. 1851. Licensing of pilots, see Shipping and Water Traffic, 8 C. L. 1903.

31. License to teach in public schools. Stone v. Fritts [Ind.] 82 NE 792.

32. Stone v. Fritts [Ind.] 82 NE 792.

33. Cannot in authorizing erection of poles in its streets deprive itself of the right to impose a license tax thereon under its police power. Coatesville Borough v. Coatesville Elec. L. H. & P. Co., 32 Pa. Super. Ct. 513.

subject to police regulation.[34] Valid license legislation may be directed toward an act neither malum in se or malum prohibitum,[35] and may properly limit the scope of the occupation licensed to less than that which naturally pertains to it.[36] Both the state and its municipalities may require a license from the same person to engage in the same business,[37] and the exercise by the Federal government of its right to tax and to prescribe the method of its enforcement in no way affects the right of the state under its police power to regulate the business then taxed.[38] In Louisiana the right of the parish to levy license taxes is subordinate to any action in respect thereto which may be taken by the various municipalities within its borders,[39] and where a village levies a license tax equal in amount to that levied by the parish, its effect is to operate ipso facto as an exemption from parish license taxation.[40] The usual rules as to the separability of constitutional from unconstitutional provisions,[41] repeal by subsequent enactments,[42] and certainty in the description of the acts required to be performed thereunder,[43] and of the offense created for a violation thereof,[44] apply to licensing statutes and ordinances. Constitutional inhibitions against the abridgment of natural rights of citizens,[45] the passage of ex post facto laws,[46] granting privileges to citizens of the state not accorded to citizens of

34. Occupations operating directly on the person are subject to police regulation. Act March 18, 1901, Laws 1901, p. 349, c. 172, requiring **barbers** to procure a license, held a valid exercise of the police power. State v. Walker [Wash.] 92 P 775. Licensing business of conducting **a theater** held within police power. People v. Steele, 231 Ill. 340, 83 NE 236.

Dog license ordinance held a proper exercise of municipal police power. Ex parte Ackerman [Cal. App.] 91 P 429. Dealers in **milk** held subject to regulation. People v. New York Health Department, 117 App. Div. 856, 103 NYS 275. Licensing of business of **peddling** held a proper exercise of police power. Commonwealth v. Hana [Mass.] 81 NE 149. License imposed upon breweries, distilleries, depots, or other agencies engaged in the manufacture or storage of **intoxicating liquors,** held within the police power. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. Business of selling **fire sale,** auction sale, damaged, or bankrupt stocks of goods, held subject to police regulation. City of Emporia v. Endelman, 75 Kan. 428, 89 P 685. Hurd's Rev. St. p. 403, c. 24, providing for examination and licensing of **plumbers** held constitutional. Douglas v. People, 225 Ill. 536, 80 NE 341.

35. Dog license ordinance held not invalid because not prohibiting ownership of dogs within municipal limits. Ex parte Ackerman [Cal. App.] 91 P 429.

36. Ordinance providing for licensing of auctioneers prohibiting the selling of jewelry and watches at auction held valid. State v. Bates [Minn.] 112 NW 67.

37. Practice of medicine. City of Fairfield v. Shallenberger [Iowa] 113 NW 459.

38. Laws 1907, c. 189, p. 307, making it an offense to fail to register and publish receipt showing payment of Federal revenue tax on intoxicants, held valid. State v. Hanson [N. D.] 113 NW 371.

39. So held under Act No. 142, p. 313, of 1904. Parish of Calcasieu v. Avery, 119 La. 143, 43 S 986.

40. Parish of Calcasieu v. Avery, 119 La. 143, 43 S 986.

41. Invalid provision in act March 18, 1901, relating to licensing of barbers requiring two years' apprenticeship under one practicing as a barber as condition to registration, held not to render entire act void. State v. Walker [Wash.] 92 P 775. Rev. Laws, c. 65, § 19, providing for the licensing of peddlers, held unconstitutional as a whole because of the invalidity of its provisions discriminating between agricultural products of the United States and those of other countries. Commonwealth v. Hana [Mass.] 81 NE 149.

42. Ordinance providing generally for the licensing of any and all kinds of business and occupation carried on within city, making no mention of dogs, held not to repeal a dog license ordinance. Ex parte Ackerman [Cal. App.] 91 P 429. Acts 26 Leg. p. 320, c. 180, specifically repealing Acts 25th Leg. 1897, p 49, c. 18, subd. 14, providing for the licensing of local physicians, held not to repeal subdivision 13 of such act requiring physicians traveling as specialists to procure a license. Fouts v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 109, 101 SW 223.

43. Dog license ordinance held not uncertain for failure to specify particular time at which tax must be paid or in failing to definite term "current year." Ex parte Ackerman [Cal. App.] 91 P 429.

44. Dog license ordinance held not invalid as not providing with certainty what acts shall constitute a violation, making the violator amenable to punishment, or whether a violation of all or only a portion thereof was necessary to bring about that result. Ex parte Ackerman [Cal. App.] 91 P 429.

45. Act March 18, 1901 (Laws 1901, p. 349, c. 172), requiring barbers to procure license, held not invalid as an abridgement of liberty and natural rights of a citizen. State v. Walker [Wash.] 92 P 775. Ordinance authorizing arbitrary refusal of license to peddle water held unconstitutional as an unlawful interference with the right to pursue a lawful calling. City of La Junta v. Health, 38 Colo. 372, 88 P 459.

46. License ordinance which does not impose punishment for doing business prior to the time at which it took effect is not ex

other states,[47] interference with interstate commerce,[48] or depriving a person of property without due process of law,[49] are binding, but a constitutional restriction upon municipal power does not affect the power of the state,[50] and a license proper not being a tax limitation upon the power of taxation are not applicable.[51] Classification of different occupations for the purpose of regulation is proper but it must not be unreasonable or arbitrary,[52] must bear some substantial relation to the public welfare,[53] and must apply also to all persons within the same class.[54] Subclassification

post facto. City of Louisville v. Roberts [Ky.] 105 SW 431.

47. Ordinance imposing license fee on breweries and other agencies engaged in manufacture or storage of intoxicants held to apply to residents as well as nonresidents, and hence not unconstitutional as granting privileges to citizens of the state not accorded citizens of other states. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

48. Deliveries outside of state held properly included in determining amount of business of wholesale dealer in oils for the purpose of fixing the amount of the tax imposed by Acts 29th Leg. p. 358, c. 148, such business being located wholly within the state. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481.

49. Dog license ordinance held not invalid as taking property without due process of law, because providing for destruction of dog, without notice to owner, unless tax is paid within two days after impounding (Ex parte Ackerman [Cal. App.] 91 P 429), or as authorizing marshal to go upon private property to impound an unlicensed dog without process (Id.).

50. Const. art. 8, § 6, held to relate only to municipalities, and hence, license tax act of 1904 (24 St. at Large, p. 462), as amended by act 1905 (24 St. at Large, p. 827), imposing annual tax of one-half mill on each dollar of capital stock of certain corporations, is not invalid because not graduated so as to secure a just imposition of the tax upon all classes subject. Ware Shoals Mfg. Co. v. Jones [S. C.] 58 SE 811.

51. In the exercise of the police power a separate license for each place of business may be required without rendering the act obnoxious to a constitutional inhibition against double taxation. Conklin Lumber Co. v. Chicago, 127 Ill. App. 103.

52. Peddlers and hawkers constitute a class by themselves to which police legislation may be directed. Servonitz v. State [Wis.] 113 NW 277. Business of **selling fire sale,** auction sale, damaged or bankrupt **stocks** of goods, held subject to separate classification and regulation. City of Emporia v. Endelman, 75 Kan. 428, 89 P 685. Provision in act March 18. 1901, Laws 1901, p. 349, c. 172, relating to licensing of **barbers** requiring as a prerequisite to obtaining a certificate of registration that applicant "has studied the trade for two years as an apprentice under or as a qualified and practicing barber in this state or other states," held arbitrary and void, it being immaterial in what manner the applicant acquired his knowledge. State v. Walker [Wash.] 92 P 775.

53. Ordinance authorizing arbitrary refusal to grant license to **peddle water** held void as discriminating against the right to pursue a lawful calling. City of La Junta v. Heath, 38 Colo. 372, 88 P 459.

54. Held discriminative: Ordinance imposing license tax on milk **dealers using vehicles** in their business. Read v. Graham, 31 Ky. L. R. 569, 102 SW 860. Ordinance providing for licensing of grocers levying tax on only such grocers as use delivery wagons. City of Covington v. Dalheim, 31 Ky. L. R. 466, 102 SW 829. Privilege Tax Law (Laws 1898, p. 23. c. 5), § 66, imposing tax of $10 per mile on **railroads claiming exemption** from state supervision, under maximum and minimum provisions of charter, held discriminatory as imposing burdens on railroads availing themselves of a contract right not imposed on other railroads. Gulf, etc., R. Co. v. Adams [Miss.] 45 S 91. Regulation by board of health providing for registration of master **plumbers,** making no provision for journeymen plumbers, held invalid as lacking uniformity. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497. Act imposing a license tax upon persons **soliciting** orders for enlargement of photographs exempting from its operation merchants having a permanent place of business within the state. Ex parte Hull, 153 F 459. Rev. Laws, c. 65, § 19, **exempting** residents of a city or town, who pay taxes on a stock in trade, and who are qualified to vote, or who are over seventy years of age, from payment of license fee to **peddle,** held unconstitutional as denying equal protection. Commonwealth v. Hana [Mass.] 81 NE 149.

Not discriminative: License tax upon persons engaged in business of **selling fire sale,** auction sale, damaged, or bankrupt **stocks,** held not void as discriminating in favor of persons selling such goods without advertising them as such. City of Emporia v. Endelman, 75 Kan. 428, 89 P 685. Code 1906, § 3790, imposing privilege tax on bottling, distribution, and sale of coca-cola, and similar **proprietary drinks,** held not to violate any provision of state or Federal constitution, though there may be other proprietary drinks than those enumerated upon which no tax is imposed. Coca-Cola Co. v. Skillman [Miss.] 44 S 985. Laws 1903, p. 162, providing for the licensing and regulating use of **automobiles** on public highways, held not unconstitutional as class legislation because not applying to other vehicles. State v. Swagerty, 203 Mo. 517, 102 SW 483. License tax on all **corporations** of same class held not discriminatory because not applying to individuals engaged in a similar occupation. Ware Shoals Mfg. Co. v. Jones [S. C.] 58 SE 811. Ordinance requiring **itinerant physicians** to procure a license held not void as discriminating against nonresidents, since traveling physicians who were residents as well as those who were nonresidents are required to procure a license. City of Fairfield v. Shallenberger [Iowa] 113 NW 459. Acts 1903, pp. 682-689, requiring license as condition to right to **haul logs,** lumber, or other

of members of the same class is proper when substantial reasons exist therefor.[55] Thus the license fee may be graded according to the magnitude of the business conducted and the opportunities for harm resulting therefrom.[56] Constitutional provisions as to uniformity in taxation have no application to license taxes,[57] the only uniformity required being the imposition of a like tax upon all who engage in the occupation and who exercise the privilege taxed.[58] The validity of the license act is frequently determinable by reference to whether it was imposed under the police power,[59] or under the power to raise revenue by means of taxation.[60] Where a fee is imposed for the purpose of regulation under the police power and compliance with prescribed conditions is required in addition to the payment of the fee, such sum is a license imposed by virtue of the police power,[61] but where a fee is imposed solely for revenue purposes and payment thereof gives the right to carry on the business without the performance of any other conditions, it is a tax,[62] and as a general rule license fees imposed upon useful occupations, not hurtful or pernicious to society, and not calling for regulation, are in fact taxes exacted under the revenue power.[63] The amount which may be exacted for a license proper under the police power must be limited and reasonably measured by the cost of the issuance of the license and the regulation and inspection for which provision is made,[64] while a wider latitude is al-

timber over public roads, held not unconstitutional as discriminating against persons engaged in such business, as the act operates equally upon all in that class. Kennamer v. State [Ala.] 43 S 482. Provision of Rev. Laws, c. 65, § 19, prohibiting issuance of license to **peddle** to any one who has not declared his intention of becoming a citizen, held not in violation of the fourteenth amendment of the Federal constitution. Commonwealth v. Hana [Mass.] 81 NE 149. Acts 29 Leg. p. 364, c. 148, § 9, held not invalid as denying equal protection because act imposed similar taxes on **wholesalers** of other goods at less rate than on wholesalers of petroleum products. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481. Regulation applying to all **plumbers** in cities of certain class held not discriminative. Douglas v. People, 225 Ill. 536, 80 NE 341. Acts 29th Leg. p. 358, c. 148, § 12, imposing tax on owners of **pipe lines** using same for conveyance of products to others for hire, held not unconstitutional because not imposing such tax on persons using such lines for their own purposes exclusively (Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481), or because requiring that amount upon which occupation tax against pipe line companies transporting oil is to be calculated, includes not only amount received for service to others but also a sum calculated as the cost of transporting their own oil, while such latter burden is not placed on owners of any other pipe line business mentioned in the section (Id.).

55. Peddlers may be classified according to their facilities for going from place to place and carrying their wares. Servonitz v. State [Wis.] 113 NW 277. That all persons owning or controlling pipe lines are included in the first part of Acts 29th Leg. p. 358, c. 148, § 12, held to not preclude legislature from making a further classification and applying different rules among them (Id.).

56. Laws 1905, c. 490, p. 858, dividing peddlers into those using a team, motor vehicle, single horse, push cart, or pack carried on foot for the distribution of their wares for the purpose of determining amount of license fee, each class being charged a different fee, held valid. Servonitz v. State [Wis.] 113 NW 277. Tax of fifty cents per cow on **dairymen** held a method of differentiating dairymen according to the amount of business done, and not void as arbitrary classification. City of Birmingham v. Goldstein [Ala.] 44 S 113.

57. City of Birmingham v. Goldstein [Ala.] 44 S 113.

58. Tax on dairymen of fifty cents per cow held not unconstitutional as lacking uniformity. City of Birmingham v. Goldstein [Ala.] 44 S 113.

59. Dog license ordinance held an exercise of municipal police and not of the taxing power. Ex parte Ackerman [Cal. App.] 91 P 429.

60. Annual license fee imposed on railroads under Rev. St. 1898, §§ 1211-1213, held valid as an exercise by the state of its taxing power. State v. Chicago, etc., R. Co. [Wis.] 112 NW 515. License fee of $50 per year on dealers in fresh meat in less quantities than a quarter held void as a taxing measure in guise of regulation, ordinance making no provision for regulation other than payment of a license fee. Incorporated Town of Stamps v. Burk [Ark.] 104 SW 153.

61. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

62. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. License fee imposed upon breweries, distilleries, depots, or other agencies engaged in the manufacture or storage of intoxicating liquors, held a valid exercise of the police and not of the taxing power. Id.

63. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

64. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. The reasonableness of a license fee imposed upon any person making an excavation in a macadamised public streets is not to be determined by the cost of repairing the pavement but by the cost of subsequent inspection. Pottsville Borough v. Pottsville Gas Co., 33 Pa. Super. Ct. 480.

lowed in imposing a special tax upon a particular occupation or business as a source of revenue,[65] but this doctrine applies only to licenses imposed upon useful occupation and not to lines of business harmful to public morals or productive of disorder in which case the police power may be rightfully exercised in the levy of such a license tax as will limit and discourage the business.[66] The fact, however, that the revenue derived is in excess of that required for the purpose of regulation does not render it a tax under the revenue power when properly imposed under the police power.[67]

To be valid as a license tax, it must be imposed upon the privilege of engaging in the particular business and not on the property pertaining thereto,[68] or upon a mere mode of advertising;[69] but the fact that the value of the property or extent of the business is considered in determining the amount of the tax does not constitute it a tax upon the property,[70] nor does the fact that the property may be also subject to taxation under the general tax laws,[71] or that the amount derived by both means may be in excess of the constitutional rate,[72] invalidate it. Lawfully delegate to municipal corporation or boards power to make such licensing regulations as the exigencies of the situation require.[73] The legislature may by a general law, in states where special legislation is prohibited,[74] and the latter possess only such powers in the premises as are delegated to them [75] and may exercise same only for the purposes authorized,[76] but in some states lack of legislative authority does not invalidate a

65. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

66. Annual license fee of $1,000 upon breweries and other agencies engaged in the manufacture and storage of intoxicating liquors held reasonable. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

67. Licenses imposed upon the liquor traffic and other occupations calling for police regulation are none the less licenses proper, because they yield revenue in excess of that required for the purpose of regulation. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

68. Acts 1906, p. 549, imposing tax on each gallon of blended spirits known as single stamp spirits, held an occupation tax and not on the property itself, and hence not invalid because not ad valorem. Brown-Foreman Co. v. Com., 30 Ky. L. R. 793, 101 SW 321. Ordinance providing for occupation tax on different kinds of business, imposing tax on dairymen of fifty cents per cow, held a tax on the business and not on the property. City of Birmingham v. Goldstein [Ala.] 44 S 113.

69. License imposed upon business of selling fire sale, auction sale, damaged or bankrupt stocks, held a tax upon the business itself and not upon a method of advertising. City of Emporia v. Endelman, 75 Kan. 428, 89 P 685.

70. That amount of tax to be determined in prescribed methods from value, or extent of business, cannot convert it into an ad valorem tax upon property of the person conducting it. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481.

71. A tax on the privilege of doing business does not involve double taxation because the property which is the subject-matter of the business is also taxed. Ware Shoals Mfg. Co. v. Jones [S. C.] 58 SE 811.

72. Acts 29th Leg., p. 364. c. 148, § 9, imposing occupation tax on wholesalers of petroleum products in addition to general taxes, held not invalid because not general tax levy the total taxes due exceeded the constitutional rate of taxation. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481.

73. Act. June 24, 1895, P. L. 282, providing for licensing of plumbers, held not unconstitutional as special legislation because applying only to boroughs having a sewerage system. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497.

74. Act June 24, 1895, P. L. 282, authorizing municipal board to make rules for licensing of plumbers and providing penalties for a violation of rules so made, held not unconstitutional as an invalid delegation of power. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497.

75. Municipality held to have power to impose reasonable license fee upon placing of appliances in **streets** or highways. Pottsville Borough v. Pottsville Gas. Co., 33 Pa. Super. Ct. 480. Charter of city of Birmingham held to confer upon it power to impose occupation tax on **dairymen.** City of Birmingham v. Goldstein [Ala.] 44 S 113. Ky. St. 1903, §§ 3011, 3012, held to empower municipalities to license business of **merchandising.** City of Louisville v. Roberts [Ky.] 105 SW 431. Under Ky. St. 1903, § 3058, subsec. 2, authorizing cities of second class to tax **vehicles** used for hire, such cities have no power to impose license tax on grocery delivery wagons. City of Covington v. Daiheim, 31 Ky. L. R. 466. 102 SW 829.

76. Under Act April 28, 1905 (P. L. 1905, p. 360), township committees may impose license fees in the cases mentioned therein for the purposes of revenue. Buck v. Douglass [N. J. Law] 65 A 848. A license tax may be imposed under legislative authority upon any trade or occupation for the purpose of raising revenue. License tax of $60 per year on business of bill posting held valid. Otting v. Bellevue [Ky.] 105 SW 375.

municipal licensing act which is not in conflict with any general law of the state.[77] While, under power to regulate a license, fee may be required sufficient to cover the cost of licensing and regulating,[78] a municipality has no right to use the power to license and regulate as a means of raising revenue.[79] In Georgia a municipality is without power to levy an occupation tax upon a commercial railroad doing business therein,[80] nor can it seggregate from such business a necessary incident and classify it as an occupation and tax it as such.[81] The power and authority to license necessarily implies the right to fix the amount of the license fee,[82] same being limited only by the requirement that the fee imposed must be reasonable and not oppressive,[83] except where it is imposed under the revenue and not under the police power,[84] but in any event the unreasonableness of the amount is not ground for judicial interference except where it is manifestly oppressive.[85]

§ 3. *Issuance and revocation.* See 8 C. L. 746—The application for a license must recite such facts as the law requires to appear [86] and its issuance is usually a mere ministerial act,[87] which, when discretionary with the commission to whom power of issuance is delegated, cannot be compelled by mandamus notwithstanding the fact that the applicant possesses all essential qualifications,[88] but in ascertaining the power of office to issue or refuse a license, occupations subject to prohibition in the discretion of the legislature must be distinguished from those subject to regulation merely.[89]

A license may be revoked upon only such grounds as are specified in the statute requiring it,[90] and then only after notice and opportunity to be heard.[91] The dele-

77. Under the California constitution a municipal licensing ordinance passed in the exercise of the police power of the municipality is valid though not authorized by the legislature, so long as it is not in conflict with any general law of the state. Dog license ordinance held valid. Ex parte Ackerman [Cal. App.] 91 P 429.

78. Incorporated Town of Stamps v. Burk [Ark.] 104 SW 153.

79. License fee of $50 per year on dealers in fresh meats in less quantities than a quarter held exorbitant, and a taxing measure in the guise of regulation there being no provision for regulation other than the payment of a license fee. Incorporated Town of Stamps v. Burk [Ark.] 104 SW 153.

80. Town of Arlington v. Central of Georgia R. Co., 127 Ga. 721, 56 SE 1015. This decision was based on a prior decision which court questions but does not overrule, as leave to review was not asked [Ed.].

81. Railroad which merely stores uncalled for goods of consignees and charges therefor only the amount authorized by railroad commission, held not taxable as a warehouseman. Town of Arlington v. Central of Georgia R. Co., 127 Ga. 721, 56 SE 1015.

82. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

83. Ordinance requiring license on **dogs** during calendar year held not unreasonable because requiring same fee of one owning a dog during but one day of the year as of owning one during the entire year. Ex parte Ackerman [Cal. App.] 91 P 429. Ordinance imposing license fee of $100 for each six months or part thereof upon any person engaged in the business of **selling fire sale,** auction sale, damaged or bankrupt **stocks** of goods, held not oppressive. City of Emporia v. Endelman, 75 Kan. 428, 89 P 685. License tax of $10 per day on **transient merchants** held not so excessive as to be restrictive or oppressive. City of Lebanon v. Zanditon, 75 Kan. 273, 89 P 10. Annual license fee of $50 on **itinerant physicians** held not unreasonable per se. City of Fairfield v. Shallenberger [Iowa] 113 NW 459.

84. Where the legislature delegates to a municipality power to levy occupation taxes for revenue purposes, the unreasonableness of the tax does not invalidate it. Tax of $60 per year on business of bill posting held valid. Otting v. Bellevue [Ky.] 105 SW 375.

85. Where the power to license and to fix the fee is lodged in a municipality, the amount to be exacted is not strictly a judicial question and its action in fixing the fee will be disturbed only in case of a manifest abuse of power. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

86. License to engage in business of loaning money on salaries and household furniture at two places in certain city under different names, neither of which disclosed who was the licensee, held properly refused under acts 1906, p. 185, art. 12, § 9. Rothschild v. Semonin, 31 Ky. L. R. 223, 101 SW 977.

87. Where power to license and fee is fixed, act of issuance is purely ministerial and may be performed by the official designated for that purpose. Buck v. Douglass [N. J. Law] 65 A 848.

88. Laws 1895, p. 373, c. 570, held to confer absolute discretion upon racing commission in the matter of granting or refusing a license to conduct races, which was not affected by amendment made by Laws 1902, p. 679, c. 257, § 1. People v. State Racing Commission, 103 NYS 955.

89. License cannot be arbitrarily refused to one engaged in latter. People v. Department of Health, 117 App. Div. 856, 103 NYS 275.

90. Where statute or ordinance authorizes

gation of power to a municipal board to require a license does not confer power to revoke it at will.[92] Unauthorized acts of an agent of the licensee constituting a violation of the conditions upon which the license was granted may be ground for revocation.[93] The petition for revocation must be brought in a court having jurisdiction,[94] run in the name of the proper party,[95] join all necessary parties [96] and must allege the ground therefor with sufficient certainty [97] which must be proved by competent [98] and sufficient [99] evidence. An action to cancel a license on the ground of fraud in procuring it is equitable in its nature,[1] hence, the parties are not entitled to a jury trial as a matter of right.[2]

§ 4. *Interpretation of statutes and ordinances and persons subject.* See 8 C. L. 747—The time within which a licensing statute becomes operative,[3] the powers of the officer to whom the carrying out of its provisions is delegated,[4] the meaning of the terms used therein,[5] the occupations to which it is applicable,[6] the persons exempt,[7]

revocation for enumerated causes, license cannot be revoked on any ground other than one of the causes specified. License to teach in public schools. Stone v. Fritts [Ind.] 82 NE 792.

91. Department of health held without power to revoke milk dealers' license upon conviction for offense against sanitary law without notice and hearing. People v. Department of Health, 117 App. Div. 856, 103 NYS 275.

92. There being no ordinance authorizing revocation of milk dealers' license for conviction for offense against sanitary law, board of health held without power to revoke his license. People v. Department of Health, 117 App. Div. 856, 103 NYS 275.

93. Under Greater New York Charter, § 1481, Laws 1897, c. 378, p. 522, a licensee of a theater is responsible for the acts of his agents and hence his license may be revoked, though acts constituting ground for revocation were contrary to his orders. In re City of New York, 52 Misc. 606, 102 NYS 950.

94. District court held to have jurisdiction over proceeding to revoke license to practice medicine procured by fraud under St. 1893, § 14, c. 8. Gulley v. Ter. [Okl.] 91 P 1037.

95. Petition to revoke license to conduct concert room running in name of police commissioner held proper under Greater New York Charter, § 1476. In re City of New York, 52 Misc. 606, 102 NYS 950. That statute required complaint to be made by member of territorial board of health held not to require action to revoke physician's license, procured by fraud, to be brought by that body. Gulley v. Ter. [Okl.] 91 P 1037.

96. Territory held a necessary party to an action to revoke a physician's license procured by fraud. Gulley v. Ter. [Okl.] 91 P 1037.

97. Petition to revoke concert room license alleging belief of police commissioner in whose name petition ran of alleged violations, and the grounds thereof, and the sources of his information, consisting of affidavits of witnesses of violations, held sufficient though no claim of personal knowledge was made. In re City of New York, 52 Misc. 606, 102 NYS 950.

98. Record of court of another state held properly admitted, in action to revoke physician's license on ground of fraud in procuring it, to show that college from which defendant claimed to have been graduated was in fact a fraudulent institution. Gulley v. Ter. [Okl.] 91 P 1037.

99. Evidence held sufficient to show fraud in procuring physician's license on strength of diploma from a reputed medical college, which was in fact a mere "diploma mill." Gulley v. Ter. [Okl.] 91 P 1037.

1. Action to revoke physician's license. Gulley v. Ter. [Okl.] 91 P 1037.

2. Gulley v. Ter. [Okl.] 91 P 1037.

3. Ordinance going into effect December 1st, 1906, making fiscal year begin September 1st, and reducing fee for those going into business January 1st, held to become operative before beginning of fiscal year and to apply to one going into business after January 1st, 1907. City of Louisville v. Roberts [Ky.] 105 SW 431.

4. Act June 24, 1895, P. L. 282, authorizing board of health to "provide for registration" of plumbers, held not to confer power on board to examine into qualifications of applicants. Commonwealth v. Shafer, 32 Pa. Super. Ct. 497.

5. Term "use" in an ordinance regulating use of vehicles on streets of municipality, and requiring payment of certain license fees therefor, has reference to continued or repeated use, and ordinance applies to all who use streets with vehicles described whether residents or nonresidents of municipality. Pegg v. Columbus, 10 Ohio C. C. (N. S.) 199, rvg. 5 Ohio N. P. (N. S.) 436. Word "dealer" as used in a statute relating to license is synonymous with "trader." State v. Rosenbaum [Conn.] 68 A. 250. Acts 29th Leg., p. 358, c. 148, imposing tax on wholesale dealers in oil products, construed, and one engaged in the wholesale oil business held a wholesale dealer within the act whether oil was bought for sale or purchased in a crude state and refined into various petroleum products. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481.

6. Meeting trains at depot with hacks and conveying passengers therefrom to various parts of city held not the operation of a **hack line** under acts 1906, p. 200, requiring a license therefor. Commonwealth v. Walton, 31 Ky. L. R. 916, 104 SW 323. Acts 29th Leg. p. 358, c. 148, § 12, requiring **pipe line companies** to report as part of gross receipts, upon which occupation tax is to be levied, such sums as it would have been compelled to pay for conveying oil owned by it and conveyed for itself, if it had employed some other pipe line company to convey it, held

and the manner of computing the amount of the license fee,[8] depend largely upon the construction placed on the particular statute. One engaged in several distinct taxable occupations is subject to a license for each,[9] but mere incidents of a single occupation are not taxable as distinct occupations.[10] A license to maintain a business at one place gives no right to maintain it at another.[11] Proof of a single act is sufficient to create a presumption that a person is engaged in an occupation requiring a license,[12] and an exemption may be predicated upon evidence constituting a mere

applicable to a company having no connection between its pipe lines and lines of others carrying oil for hire, and which could not therefore have employed the lines of others. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481. Retail mercantile company giving discount checks redeemable at its store only in cash or merchandise held not a **trading stamp company,** within Ky. St. 1903, § 4224, imposing a license on such companies. Commonwealth v. Gibson Co., 31 Ky. L. R. 51, 101 SW 385. Agent representing surety company exclusively held liable for tax of $5 only, under Code 1906, § 3828, notwithstanding other sections imposing a greater tax on **insurance agents** in cities having a certain population and other provisions bringing surety companies under operation of insurance laws. Cole v. American Surety Co. [Miss.] 44 S 771. One who did not solicit insurance for himself but only as agent for foreign insurance companies, which had already procured a license under ordinance requiring every person, firm, or corporation soliciting insurance for himself or as agent for any person, etc., to take out a license, held not to be required to take out an individual license. Town of Dothan v. Hornsby [Ala.] 43 S 714. One who, by virtue of contract with firm of general agents, solicits insurance for their office alone, receiving as compensation portion of commissions paid by insurance companies on business so solicited, and who does not otherwise engage in any insurance business, is not an **insurance broker.** Girardeau v. Atlanta [Ga. App.] 58 SE 314.

Employe of licensed junk dealer, acting as such in good faith in the purchase and sale of junk for his employer, held **not a dealer** in junk within Gen. St. 1902, § 4654, and § 4653, as amended by Pub. Acts 1903, p. 30, c. 43, and acts 1905, p. 305, c. 88, and therefore not to require a license. State v. Rosenbaum [Conn.] 68 A 250. The Pennsylvania statute requiring **real estate brokers** to procure a license held not to apply to a broker residing in New Jersey effecting a sale in the former state of property situated in the latter. Callaway v. Prettyman [Pa.] 67 A 418.

7. Statute exempting **old soldiers** from taking out license to peddle held not to exempt them from ordinance providing that any one selling meat in less quantities than a quarter should be regarded as a butcher and licensed as such. Incorporated Town of Stamps v. Burk [Ark.] 104 SW 153. Rev. St. 1899, §§ 1051-1054, construed, and held to exempt proprietor of a **theater** in a city of the third class having more than 5,000 inhabitants from payment of tax. Hodkins v. McDonald, 123 Mo. App. 566, 100 SW 508. One who, by extracting medicinal properties from various drugs and making a chemical combination in which various ingredients lose their identity, creates a distinct product which is used by public for a distinct use, held a **manufacturer** and exempt from license tax. State v. Tichenor Antiseptic Co., 118 La. 685, 43 S 277. Under constitutional provision exempting all but specified manufacturers from license tax, a gas company, not being one of the enumerated exceptions, cannot be taxed, as the exemption cannot by interpretation be limited to manufacturers of articles of commerce. State v. New Orleans Lighting Co., 118 La. 440, 43 S 44. Rev. St. 1895, art. 5049, subd. 3, exempting from tax on itinerant **peddlers of medicine,** commercial travelers, or salesmen making sales for wholesalers of drugs, held to exempt only such as sell at wholesale for wholesalers and not salesmen selling at retail though representing wholesalers. Needham v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 294, 103 SW 857.

8. Including sales to retailers as well as to wholesalers held proper in computing volume of business of wholesalers of oil under Acts 29th Leg. p. 358, c. 148, imposing tax of 2 per cent. on gross value of receipts of wholesales in oil products. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481. Under Acts 29th Leg. (Laws 1905, p. 358), c. 148, § 9, providing for taxes on gross receipts from wholesale sales of petroleum products and on cash market value of all articles received, possessed, handled, or disposed of in any other manner than by sale, the value of undisposed of refined products of crude oil held properly included in ascertaining tax to be paid during such period. Southwestern Oil Co. v. State [Tex.] 103 SW 489.

9. Persons engaged in several occupations subject to license tax imposed by Acts 29th Leg. p. 364, c. 148, are subject to tax for each business as though same were conducted by different persons. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481. Under Act 1902, p. 20, providing for a tax on **bank presidents,** one who is president of more than one bank may be taxed separately for each bank of which he is president. Witham v. Stewart [Ga.] 58 SE 463. Operator of a **band sawmill,** and a box and roller factory, held engaged in two distinct occupations, separately taxable under an act imposing a tax on sawmills and box or roller factories, though owned by the same company. City of Washington v. Eureka Lumber Co. [N. C.] 58 SE 436.

10. Where an occupation is taxed as a whole, mere incidents thereof are not subject to the tax as distinct occupations. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481.

11. Conklin Lumber Co. v. Chicago, 127 Ill. App. 103.

12. Purchase of a single note held to render purchaser prima facie a dealer therein

conclusion where to require a disclosure of the facts would involve the publication of a secret formula acquired at great cost.[13]

§ 5. *Assessment and recovery of license fees; prosecutions for failure to pay.* See 8 C. L. 750—An unpaid license may be recovered in an action as for debt [14] providing the claim is not barred by the statute of limitations,[15] but an action to recover a penalty for violation of a licensing ordinance cannot be maintained in behalf of a municipality without its consent.[16] The general laws have no application to a breach of a municipal ordinance requiring a license where the city was incorporated under a special act and not under the general laws,[17] but a municipal ordinance is a state law within the meaning of an act making the violation of a state licensing law a crime.[18] To justify a conviction, an actual violation of the law must be shown.[19] Under a statute empowering cities to license merchants and to provide for the enforcement of the tax imposed, a city may impose a penalty upon an agent or employe of an unlicensed merchant who assists in carrying on the business,[20] and such an ordinance places upon the employe the responsibility of ascertaining whether the tax was paid and the business licensed,[21] and where intent to disregard the ordinance is not made an element of the offense, intention is immaterial.[22]

§ 6. *Effect of failure to obtain.* See 8 C. L. 752—Nonprocurement of a license precludes recovery on contracts arising out of the business for which a license is required,[23] but where a person has complied so far as he is able with the provisions of an ordinance requiring payment of an occupation tax, and has tendered the fee and demanded of the proper official a license which is refused through no fault of his, it is not unlawful for him to carry on a business which is otherwise lawful and which requires no supervision or regulation,[24] and he need not seek to compel issuance of a license by mandamus as a condition to recovery for work performed or material furnished.[25]

§ 7. *Disposition of license moneys.* See 8 C. L. 752

LICENSES TO ENTER ON LAND.

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and subject to license as such, and places the burden on him to show the contrary. Gilley v. Harrell [Tenn.] 101 SW 424.

13. Where the formula for the manufacture of a product is a secret which cost the owner a large sum of money to procure, he will not be required to disclose same in order to avail himself of the exemption in favor of manufacturers. State v. Tichenor Antiseptic Co., 118 La. 685, 43 S 277.

14. A debt to the municipality is incurred for a license fee required by ordinance to be paid by carrying on the business for which such license fee is imposed, and this is so though the ordinance may prescribe penalties for the carrying on of the business without a license, and though no license has been applied for or issued. Kopelman v. Toledo, 9 Ohio C. C. (N. S.) 545.

15. Action to recover license fee imposed on railroads, under Rev. St. 1898, § 1213, held a claim created by statute and barred after six years under §§ 4222, 4229. State v. Chicago, etc., R. Co. [Wis.] 112 NW 515.

16. Action cannot be maintained in the name of the city of Pittsburgh without its consent, under Act June 7, 1901, P. L. 493, to recover penalty provided for therein, for engaging in business of plumber without a license. Clauchs v. Pittsburg, 31 Pa. Super. Ct. 331.

17. City of Ensley v. Cohn [Ala.] 42 S 827.

18. Municipal ordinance held a law of the state, within Pen. Code, § 435, making it a misdemeanor to carry on a business without obtaining a license, when one is required by any law of the state. Ex parte Sweetman [Cal. App.] 90 P 1069.

19. Mere preparation to carry on a business in violation of an ordinance requiring a license held not sufficient to warrant a conviction in absence of evidence showing a sale. City of Bessemer v. Dickens [Ala.] 43 S 21.

20, 21, 22. City of Emporia v. Becker [Kan.] 90 P 798.

23. Under Laws 1900, p. 699, c. 327, §§ 45, 46, requiring master plumbers to procure a license, a firm composed of nonregistered plumbers cannot recover for work done and materials furnished, and the fact that they employed as general manager and superintendent a registered plumber does not alter the rule. Bronold v. Engler, 105 NYS 508.

24. Business of selling lumber and building material. Fossett v. Rock Island Lumber & Mfg. Co. [Kan.] 92 P 833.

25. Fossett v. Rock Island Lumber & Mfg. Co. [Kan.] 92 P 833.

§ 1. *Nature, creation, and indicia of a license and distinction from easements and other estates.*See 8 C. L. 753—A license is authority to enter on the land of another for the purpose of doing some act thereon, without passing any estate in the land,[26] but a license founded upon a valuable consideration may be such as to confer an irrevocable interest in the license.[27] Unless an interest in land is created,[28] a parol license is valid.[29] A license being a mere privilege is personal to the licensee [30] and is ordinarily revokable at the will of the licensor [31] in the absence of an agreement as to its duration; [32] but equity will not allow a licensor to withdraw his consent without compensating a licensee who has expended money on the licensor's land by reason of the license,[33] and in Oregon, where the licensee erects improvements on the land of another on the faith of a parol license, same cannot be revoked to the prejudice of the party making the improvements.[34] Being a mere permissive use, lapse of time does not create an estoppel to revoke.[35] A license operates to estop the licensee from denying the licensor's title only during its existence and while rights are exercised thereunder.[36]

§ 2. *Rights and liabilities of licensees.*See 8 C. L. 755—Substantial compliance with the terms of the license is all that is required.[37]

26. One erecting a building on premises of another under agreement is at least a licensee. Iowa-Minnesota Land Co. v. Connor [Iowa] 112 NW 820.

27. Grant in praesenti of right to lay pipes for conveyance of petroleum in land based on valuable consideration held to convey an interest in the land and not revocable as a mere license. Standard Oil Co. v. Buchi [N. J. Eq.] 66 A 427. Agreement by owner of land permitting another to build thereon and use same so long as building erected was used for certain purpose held to create more than a mere license revocable at will, but terminable only on death of such person or the cessation of such use. Frederic v. Mayers, 89 Miss. 127, 43 S 677.

28. Agreement held to create a perpetual license in land which on death of licensee would descend to his heirs, and hence required to be in writing under Rev. St. 1895, art. 624. Adams v. Wier [Tex. Civ. App.] 17 Tex. Ct. Rep. 905, 99 SW 726.

29. A parol contract permitting entry on land for the purpose of removing certain buildings held valid as a license. Volk v. Olsen, 54 Misc. 227, 104 NYS 415.

30. Where a grantor attempted to reserve an easement in land conveyed, but the grantee did not sign nor seal the deed and hence did not convey an easement, the grantor possessed a mere parol license to enjoy an easement on part of the land conveyed which did not pass to his assignee Dawson v. Western Maryland R. Co. [Md.] 68 A 301. Under a provision in a license agreement rendering it nontransferable without the consent of the licensee, a **silent partner** of the licensees is not entitled to benefits thereunder in the absence of such assent. Conqueror Gold Min. & Mill. Co. v. Ashton [Colo.] 90 P 1124. Permit to box and gather turpentine on lands owned by corporation held a mere license terminated by **appointment of receiver** for corporation. McKinnon-Young Co. v. Stockton, 53 Fla. 734, 44 S 237. Agreement by owner of fee in street, reciting consent to operation of previously erected elevated road, held a mere license which was revoked by **conveyance** of the abutting premises. Smythe v. Brooklyn Union El. R. Co., 105 NYS 601.

31. Evidence held to show mere parol license to **right of way** over land revocable at will of owner. Detroit, etc., R. Co. v. Hartz, 147 Mich. 354, 13 Det. Leg. N. 1086, 110 NW 1089. Statement of owner that he would be glad to give plaintiff a right of way over land, as it would prevent stock from bothering him, held a mere permission revocable at will. McBride v. Bair, 134 Iowa, 661, 112 NW 169. Aid and consent of owner to erection of walk over his premises held to create a mere license which owner was not estopped to revoke. Van Siclen v. Muir [Wash.] 89 P 188. Agreement under which **drain** was constructed by plaintiff over defendant's land for benefit of former and to remain as long as satisfactory to defendant held to constitute a mere revocable license. Thompson v. Normanden, 134 Iowa, 720, 112 NW 188. Agreement permitting plaintiff to **use side wall** of defendant's premises for advertising purposes "until said wall is obstructed so it is not available for advertising purposes" held a mere license revocable at will. Manheimer v. Gudat, 55 Misc. 330, 106 NYS 461.

32. Parol license making no provision for its duration held terminable by parties on reasonable notice. Adams v. Wier [Tex. Civ. App.] 17 Tex. Ct. Rep. 905, 99 SW 726.

33. Dawson v. Western Maryland R. Co. [Md.] 68 A 301.

34. License to construct logging spur track held not revocable until all timber contemplated to be removed at time of its construction was removed. Sumpter R. Co. v. Gardner [Or.] 90 P 499.

35. Drain constructed and maintained for ten years. Thompson v. Normanden, 134 Iowa, 720, 112 NW 188.

36. Tise v. Whitaker Harvey Co., 144 N. C. 507, 57 SE 210.

37. Agreement permitting erection of telephone "on line of fence" held complied with by erecting them on road from five to seven feet from fence, where strict compliance would have resulted in injury to shade trees along fence line. Bowerman v. Inter-Ocean Tel. & T. Co., 105 NYS 565.

LIENS.

§ 1. Definition and Nature, 632.
§ 2. Common-Law, Equitable, and Statutory Liens, 632.
A. Common-Law Liens, 632.
B. Equitable Liens, 632.
C. Statutory Liens, 633.
§ 3. Rank and Priorities of Liens, 633.
§ 4. Waiver, Extinguishment, Discharge, and Revival, 634.
§ 5. Enforcement and Protection of Liens, 634.

Scope of topic.—This article treats only of liens in general, particular kinds of liens being discussed in articles devoted specifically thereto or articles devoted to the subject-matter to which the particular liens relate.[38]

§ 1. *Definition and nature.* See 8 C. L. 755—A personal liability does not result from the mere existence of a lien.[39]

§ 2. *Common-law, equitable, and statutory liens. A. Common-law liens.* See 8 C. L. 756

(§ 2) *B. Equitable liens.* See 8 C. L. 758—An equitable lien may be created by a contract showing an intention to charge some particular property,[40] provided it does not involve a fraud upon creditors.[41] Such a contract will create a lien on personal property though only verbal.[42] Where a part of the consideration for land purchased by the committee of a lunatic in his own name is paid out of the funds of the lunatic, the latter has an equitable lien in the land for the amount so expended.[43] A tenant who takes possession under a contract void under the statute of frauds has a resisting equity for any outlay or valuable improvement he puts upon the land by reason of the tenancy.[44] A mere volunteer without interest who pays a mortgage on another's property does not thereby acquire an equitable lien thereon.[45] The wrongful conversion of property does not entitle the owner to a lien either on the property converted or other property belonging to the wrongdoer.[46] One in possession and claiming title to another's land cannot create an equitable lien thereon in favor of a person loaning money for the erection of improvements, with knowledge that the title is disputed, that can be enforced against the land in the possession of the real owners.[47]

38. See Agency, 9 C. L. 58; Agriculture, 9 C. L. 82; Animals, 9 C. L. 100; Attachment, 9 C. L. 282; Attorneys and Counselors, 9 C. L. 300; Auctions and Auctioneers, 9 C. L. 318; Brokers, 9 C. L. 413; Carriers, 9 C. L. 466; Corporations, 9 C. L. 733; Executions, 9 C. L. 1328; Factors, 9 C. L. 1349; Forestry and Timber, 9 C. L. 1408; Inns, Restaurants, and Lodging Houses, 10 C. L. 285; Judgments, 10 C. L. 467; Landlord and Tenant, 10 C. L. 571; Mechanics' Liens, 8 C. L. 954; Mortgages, 8 C. L. 1022; Pawnbrokers and Secondhand Dealers, 8 C. L. 1327; Pledges, 8 C. L. 1431; Railroads, 8 C. L. 1590; Sales, 8 C. L. 1751; Shipping and Water Traffic, 8 C. L. 1903; Vendors and Purchasers, 8 C. L. 2216.

39. Windt v. Covert [Cal.] 93 P 67.

40. Goodnough Mercantile & Stock Co. v. Galloway, 156 F 504. Where a son loaned money to his mother to enable her to purchase land upon her promise to give him a lien on the land to be expressed in the deed, and deed, while not expressing existence of lien, recited that cash payment had been made by son, and letters subsequently received by son from both parents acknowledged indebtedness to him and gave assurances that he had under terms of deed been given a lien, it was held that son had an equitable lien, which he could enforce against the land after mother's death. Lee v. Lee's Adm'r, 30 Ky. L. R. 619, 99 SW 306.

41. In re Liberty Silk Co., 152 F 844. A secret lien cannot be created in favor of brokers who purchase goods for a bankrupt to be used and consumed in his business. Id.

42. Goodnough Mercantile & Stock Co. v. Galloway, 156 F 504.

An owner of standing timber may, by a verbal agreement, create a lien on the logs and lumber to be manufactured therefrom. Goodnough Mercantile & Stock Co. v. Galloway, 156 F 504.

Recording not essential: In Oregon it is not essential to validity of a verbal agreement for a lien on personalty that it be recorded. Goodnough Mercantile & Stock Co. v. Galloway, 156 F 504.

43. Storm v. McGrover, 189 N. Y. 568, 82 NE 160. Such lien passes as personalty to lunatic's next of kin and not to his heirs. Id.

44. Poole v. Johnson, 31 Ky. L. R. 165, 101 SW 955.

45. So held where plaintiff paid mortgage on property of woman he married, who had a husband living, rendering marriage void. Brown v. Brown [Miss.] 43 S 178.

46. Russell v. Deutschman [Tex. Civ. App.] 18 Tex. Ct. Rep. 896, 100 SW 1164.

47. Armstrong v. Ashley, 204 U. S. 272, 51 Law. Ed. 482.

(§ 2) *C. Statutory liens.*[See 8 C. L. 757]—The thresher's lien laws of Minnesota [48] and South Dakota [49] have been held constitutional. It is essential to the validity of a statutory lien that it be perfected in the manner prescribed by statute.[50] A statutory lien which attaches to the claim rather than to the claimant is assignable.[51]

Construction.[See 8 C. L. 757]—Lien laws being in derogation of the common law are to be strictly construed,[52] and he who claims a lien must show that there was a contract by the terms of which he is entitled to the lien he claims.[53] One is not entitled to a lien, under a statute creating a lien in favor of laborers, for their labor upon the property of their employers, unless the labor he contracted to perform and did perform was mainly physical.[54] The question whether the mental or the physical element preponderates is to be determined by the contract of employment,[55] and where such contract vests in parol, the facts and circumstances as to the duties actually performed may be considered in determining what was the real contract.[56] Where a statutory lien attaches, and what notice thereof, if any, is required to be given, is generally to be determined from the purpose and terms of the statute.[57]

§ 3. *Rank and priorities of liens.*[See 8 C. L. 758]—The property of a bankrupt passes to his trustee or assignee in bankruptcy subject to liens thereon.[58] Under the national bankrupt act lienholders who are entitled to priority under the laws of the state or of the United States are entitled to priority in the distribution of the bankrupt's general estate.[59] Generally, labor claims are entitled to priority over other liens against the estate of a bankrupt.[60] An equitable lien upon land has

48. Rev. Laws 1905, § 3546, not obnoxious to either state or Federal constitution. Phelan v. Terry [Minn.] 112 NW 872.

49. Rev. Code Civ. Proc. §§ 737, 738, not unconstitutional. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843.

50. In re Franklin, 151 F 642. Until so perfected it cannot be enforced against property of a bankrupt. Id. Lien not filed within time required by state law. Id. Ky. St. 1903, § 2494, making recording of claim essential to attachment of lien, has no application to lien given by § 2487 to persons furnishing materials or supplies for carrying on business of manufacturing company. In re Bennett [C. C. A.] 153 F 673.

51. Lien created by Ky. St. 1903, § 2487, in favor of persons furnishing materials and supplies for carrying on manufacturing business. In re Bennett [C. C. A.] 153 F 673.

52, 53. Howell v. Atkinson [Ga. App.] 59 SE 316.

54. Howell v. Atkinson [Ga. App.] 59 SE 316. A bartender whose duties are mainly manual is a laborer within meaning of Civ. Code 1895, § 2792 (Civ. Code 1882, § 1974), although as part of his duties he is required to keep books. Bluthenthal v. Bennefield, 127 Ga. 444, 56 SE 517. Primarily a clerk in a mercantile establishment is not a "laborer" within this statute, though proper discharge of his duties may include performance of some amount of manual labor. Howell v. Atkinson [Ga. App.] 59 SE 316. Evidence held insufficient to prove that clerk was a laborer within meaning of statute. Id.

55, 56. Howell v. Atkinson [Ga. App.] 59 SE 316.

57. Thresher's lien given by Rev. Code Civ. Proc. § 737, is paramount from date of threshing and precludes subsequent purchasers having no other notice than statute imports, provided lien is filed within ten days from time threshing is completed. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843. An elevator company having actual knowledge that grain of an embarrassed debtor had been recently threshed by some one is charged with knowledge of statute giving thresher a lien superior to certain mortgages to pay which it applied all proceeds of such grain delivered at its elevator. Id.

58. Jungbecker v. Huber [Tex. Civ. App.] 18 Tex. Ct. Rep. 975, 101 SW 552. A lien attaches to property in hands of an assignee in bankruptcy if it existed against property in hands of bankrupt and is superior to claims of general creditors. Goodnough Mercantile & Stock Co. v. Galloway, 156 F 504. An equitable lien on personalty acquired in good faith more than four months prior to the bankruptcy of which the bankrupt's creditors had notice, though not recorded, takes precedence of the rights of such creditors. Id.

59. Act July 1, 1898, c. 541, § 64b (5), 30 Stat. 563 (U. S. Comp. St. 1901, p. 3448). In re Bennett [C. C. A.] 153 F 673. The incipient lien created by Ky. St. 1903, § 2487, in favor of persons furnishing materials and supplies to a manufacturing corporation, comes within the purview of this act, and upon bankruptcy of the company such lienholders are entitled to priority over general creditors. Id. And if the lienholder assigns his lien prior to the company's bankruptcy, the assignee is entitled to such priority. Id.

60. In re Erie Lumber Co., 150 F 817. Under the bankrupt act wages due for labor performed for a corporation within three months before its bankruptcy, and also under the receivership, have priority over other liens, except liens for taxes. Id.

priority over an attachment thereof.[61] A claim based on a recorded contract of sale reserving title in the claimant cannot be defeated by a lien subsequently arising.[62]

§ 4. *Waiver, extinguishment, discharge, and revival.*See 8 C. L. 759—An attachment of property constitutes an abandonment of an equitable lien thereon.[63] A lien may be waived by parol,[64] or by conduct of the lienholder inconsistent with the existence of the lien.[65] To constitute a waiver the acts or omissions made the basis thereof must be relied upon and serve as an inducement to the doing of something which would otherwise not have been done.[66] A lienholder may by his conduct be estopped from asserting his lien.[67]

§ 5. *Enforcement and protection of liens.*See 8 C. L. 760—A lienholder may in a proper case sue for the conversion of the property,[68] even though he was out of possession at the time of the conversion,[69] or he may sue to recover possession from one who wrongfully withholds it,[70] but an action for the conversion of property upon which plaintiff claims a statutory lien cannot be maintained if all preliminary requirements essential to the existence of the lien have not been complied with.[71] A demand is not an essential prerequisite to a suit for conversion where it is evident that it would be wholly ineffectual.[72]

*Statutory proceedings to enforce or foreclose.*See 8 C. L. 761—Before a statutory lien can be foreclosed, all preliminary statutory requirements must be complied with.[73] Where a lien is claimed for the amount due for labor, part of which is lienable and part not lienable and there is no proof produced so that one can be separated from the other with reasonable certainty, the entire claim must be denied.[74] Many matters relating to statutory proceedings to enforce liens necessarily depend upon the construction of particular statutes.[75]

61. City Nat. Bk. v. Crahan [Iowa] 112 NW 793.

62. Cannot be defeated by lien for necessary supplies furnished sawmill under Civ. Code 1895, § 2809. Tift v. Moultrie Lumber Co., 1 Ga. App. 608, 57 SE 1053.

63. City Nat. Bk. v. Crahan [Iowa] 112 NW 793.

64, 65. Van Gordon v. Goldamer [N. D.] 113 NW 609.

66. That one having a thresher's lien on grain made no objection to its removal by purchaser from premises upon which it was threshed does not constitute waiver of lien if purchaser was not misled thereby. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843.

67. Frankfort & C. R. Co. v. State Nat. Bk., 31 Ky. L. R. 323, 102 SW 243. Upon sale of property of a railroad company, company guaranteed that its current indebtedness did not exceed its current assets. A bank was a stockholder in company, held a lien on part of its property, and though its cashier was a party to negotiations for the sale. It was held that bank, its failure to bring forward its lien claim having misled purchaser, was estopped from enforcing its lien. Id.

68. May sue purchaser who denies his right. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843.

69. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843.

70. Where statute gives lienholder right of possession for purpose of foreclosure. Phelan v. Terry [Minn.] 112 NW 872. One who has perfected a thresher's lien under Rev. Laws 1905, §§ 3546, 3547, may maintain claim and delivery to recover possession of grain covered thereby. Id.

71. Fact that bond required to be filed by Rev. Pol. Code, § 3145, before use of steam threshing machine, is signed by "William Hahn," while lien for threshing was filed in name of W. J. Hahn, where the names are of the same person, will not invalidate the lien and is no defense to action for conversion of grain threshed. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 483.

72. Suit for conversion of grain by one having thresher's lien thereon. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843.

73. Alleged defects in lien statement required by Rev. Laws 1905, § 3547, relating to thresher's liens, held not fatal to its validity. Phelan v. Terry [Minn.] 112 NW 872.

74. McGeorge v. Stanton-De Long Lumber Co., 131 Wis. 7, 110 NW 788.

75. Under St. 1898, §§ 2967, 2969, subd. 3, the **issuance of a general execution on a judgment to enforce a lien on specific real property** does not release the specific lien decreed by the judgment. Schultz v. Schultz [Wis.] 113 NW 445. Under Civ. Code, § 2876, where the **holder of a special lien is compelled to satisfy a prior lien** for his own protection, he may enforce payment of the amount as a part of the claim for which his own lien exists. Windt v. Covert [Cal.] 93 P 67. And so long as the right to foreclose his own lien exists, the right to recover the amount paid to satisfy the prior lien will not be barred by limitations. Id. Facts held to constitute a special lien within meaning of statute. Civ. Code, §§ 2875, 2923. Id. What constitutes compulsion of special lienholder to satisfy prior lien within meaning of statute. Id. Word "satisfy" as used in statute defined. Id.

Equitable remedies and procedure. See 8 C. L. 761—It is of course essential that all necessary parties should be brought in in a suit to foreclose a lien.[76] A judgment foreclosing a lien cannot be rendered if the plaintiff's petition contains no prayer therefor.[77] The burden is upon the plaintiff in a foreclosure suit to establish his case as laid.[78] The findings of the court must be sustained by the evidence.[79] The fact that proceedings to enforce liens against property subject to a prior mortgage are not prosecuted to final judgment will not, where the property is sold under foreclosure proceedings, defeat the lienholders' priority over a subsequent attachment creditor in the surplus remaining after satisfaction of the mortgage.[80]

LIFE ESTATES, REVERSIONS AND REMAINDERS.[81]

LIFE INSURANCE; LIGHT AND AIR, see latest topical index.

LIMITATION OF ACTIONS.

§ 1. The Statutes; Validity and Application Generally, 635.
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The scope of this topic is noted below.[82]

§ 1. *The statutes; validity and application generally.* See 8 C. L. 768—Statutes of limitation are statutes of repose operating to bar the right of action and not to transfer any right.[83] They go to the remedy, not to the cause of action, and do not extinguish the debt.[84] They proceed upon the presumption that claims are

76. After a lienor has parted with his interest in the property, he is not a necessary party to a foreclosure suit against his vendee, where no personal judgment is sought. Slaughter v. Dallas [Tex. Civ. App.] 18 Tex. Ct. Rep. 689, 103 SW 218. This rule was not changed by Rev. St. 1895, art. 1340. Id. In action to enforce equitable lien against property in hands of a trustee in bankruptcy, neither bankrupt nor person from whom he purchased property were necessary parties. Goodnough Mercantile & Stock Co. v. Galloway, 156 F 504.

77. Prayer for general relief insufficient. Russell v. Deutschman [Tex. Civ. App.] 18 Tex. Ct. Rep. 896, 100 SW 1164. Prayer that if plaintiff has not prayed for the specific relief to which in equity and good conscience he is entitled he be granted "such relief as the nature of his case demands, and which may be required, to the end that he receive all the proper and needful protection in his property rights and the benefits which in law or equity he should receive, from which he has, by the unlawful acts of the defendants, been excluded," is not sufficient basis for judgment foreclosing lien. Id.

78. Howell v. Atkinson [Ga. App.] 59 SE 316. When a clerk seeks to foreclose a lien as a laborer, he assumes burden of proving that by reason of nature of his employment he can properly be classed as a laborer. Id.

79. Evidence held to sustain finding that parents advancing money to child for purchase of land did not reserve any lien for their advances. Clapp v. Ervay [Wash.] 89 P 883.

80. Maguire v. Spaulding, 194 Mass. 601, 80 NE 587.

81. See 8 C. L. 762. The matter comprehended in this title will hereafter be treated in the topic Real Property.

82. It includes all matters relating to the operation of general statutes of limitation. **It excludes** special limitations imposed on particular actions (see Death by Wrongful Act, 9 C. L. 932, and like topics) and on proceedings which do not fall within the designation "actions" (see Estates of Decedents, 9 C. L. 1181; Bankruptcy, 9 C. L. 369; Appeal and Review, 9 C. L. 133, and like topics). It likewise excludes the doctrine of laches (see Equity, 9 C. L. 1123).

83. Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 SE 216.

84. Foot v. Burr [Colo.] 92 P 236; Holmquist v. Gilbert [Colo.] 92 P 232.

extinguished when they are not litigated in the proper forum within the period prescribed, and they take away all solid ground of complaint, as they rest on the negligence of the party suing.[85] The plea of limitations, based on one statute, will not admit the defense of another statute,[86] nor will exceptions in a general statute be applied to a special statute of limitations.[87] An amendment, however, limiting actions for injury or death, affects all actions previously accrued and not barred,[88] but a repeal of the statute will not affect pending actions,[89] and a statute not designed to create an exclusive remedy will not be held to work a bar.[90] A statutory provision that no action shall be brought unless notice thereof shall be given defendants is a statute of limitations and applies to both domestic and foreign corporations.[91] As it is actions that are barred by the statute, and not defenses to such actions,[92] the nature of the cause of action, and not its form, determines its application.[93] The rule that courts of equity will apply statutes of limitation, barring suits that are barred at law, does not obtain where the party was ignorant of the necessity of action and the rights of third parties not prejudiced,[94] nor where action was barred in a court of law not originally having jurisdiction but subsequently acquiring it.[95] Statutes of limitations are not applicable to causes of which courts of equity alone take cognizance,[96] such as actions for specific performance,[97] and the limitations prescribed for actions of tort will not be applied to actions founded on contract,[98] nor will the statute apply to a proceeding to revoke a physician's license,[99] nor does the general statute apply to proceedings to revive dormant judgments,[1] nor do the statutes applicable to actions against officers upon a liability by doing acts in official capacity and by virtue of office apply to actions against such officers for money had and received for official services upon untrue statements,[2] nor will the statute be applied so as to give it a retroactive effect.[3] But the rule that limitations do not affect defenses properly applicable to plaintiff's cause of action has no application to cross actions,[4] and they are applicable where one grantee seeks to hold another as trustee of the legal title,[5] but courts of equity in applying the statute of limitations to trust estates

85. Patterson v. Safe Deposit & Trust Co. [C. C. A.] 148 F 787.

86. The twenty year statute having been pleaded, a statute adopting the common law of England cannot be relied on. Connell v. Clifford [Cal.] 88 P 850.

87. Lewis v. Pawnee Bill's Wild West Co. [Del.] 66 A 471.

88. Old law limited action to two years. Amendment limited them to one year. Limitation reduced to one year from time amendment went into effect. Crothers v. Edison Elec. Co., 149 F 606.

89. Lehigh Valley R. Co. v. Comar [C. C. A.] 151 F 559.

90. Vt. St. 2810, relates to further hearing in probate court and not to the time within which ward may sue to set aside decree allowing guardian's final account. Scoville v. Brock, 79 Vt. 449, 65 A 577.

91. Rev. St. 4222, subd. 5. Arp v. Allis Chalmers Co., 130 Wis. 454, 110 NW 386.

92. State v. Tanner [Wash.] 88 P 321.

93. Action for damages for permanent trespass to land is barred in three years, notwithstanding injunction is sought as an alternation. Williams v. Southern Pac. R. Co., 150 Cal. 624, 89 P 599.

94. Action for accounting of rents and profits to set aside deed and for damages. Facts show plaintiff's mental condition such as not to understand necessity for action during the running of the statutes of limitation. Nichols v. Nichols, 79 Conn. 644, 66 A 161.

95. Action by ward against guardian for accounting. Stevenson v. Markley [N. J. Eq.] 66 A 185.

96. Suit to establish resulting trust. Patrick v. Stark [W. Va.] 59 SE 606.

97. Poston v. Ingraham, 76 S. C. 167, 56 SE 780.

98. Action against carrier for wrongful ejection of passenger controlled by § 5064 and not by § 5065, Kirby's Dig. St. Louis, etc., R. Co. v. Mynott [Ark.] 102 SW 380.

99. State Medical Examining Board v. Stewart [Wash.] 89 P 475.

1. Moline Milburn & Stoddart Co. v. Van Boskirk [Neb.] 111 NW 605.

2. Action by sheriff against county for fees. Counterclaim for money paid sheriff on false and fraudulent fee bills not governed by the three year limitation contained in Rev. Laws 1905, § 4077. Megaarden v. Hennepin County Com'rs, 102 Minn. 134, 112 NW 899.

3. Young v. McNeill [S. C.] 59 SE 986. Beale's Heirs v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 917, 99 SW 1045.

4. Smith v. Fairbanks, Morse & Co. [Tex.] 18 Tex. Ct. Rep. 636, 102 SW 908.

5. Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 SE 518.

will look to the facts and circumstances and construe the case outside of the bar as dictated by equity and good conscience.[6] A foreclosure proceeding by a trustee, however, not being an action, is not affected by the statute.[7] In the several states different periods for different actions are prescribed, as, for instance, actions on judgments by confession,[8] actions for an accounting for personal property,[9] actions for revision of and for mistake,[10] actions on stockholder's liability,[11] actions to recover money deposited as margins,[12] and in Texas the three year limitation is applied when title to land is involved, and neither title nor color of title is shown.[13]

The statutes do not run against the state See 8 C. L. 770 or the United States as to any claim for relief in a purely governmental matter,[14] but if it is clear from a statute that limitation shall run against the state, it will do so.[15] The statute does not run against a municipality in its governmental capacity,[16] hence, it will not run against the right of a city, town, or village to maintain action to recover title or possession to a road, street, alley, or other public grounds.[17]

Limitation is governed by the law of the forum. See 8 C. L. 770—The general rule is that the lex loci contractus must govern as to the validity, interpretation, and construction of the contract, but the remedy to enforce it, or to recover damages for its breach, must be pursued according to the law of the forum,[18] hence, in actions on contracts,[19] in the absence of statutory exceptions,[20] the limitation of action on an insurance policy is governed by the laws of the state where suit is instituted.[21] But an exception has been made where the difference between the two statutes are minor ones, not affecting their common purpose or the domestic policy of either of the two states,[22] and also in case of special statutory rights of action wherein the limitation imposed is deemed an essential part of the cause of action.[23]

The defense of the statute may be waived [24] by a failure to assert it.[25]

§ 2. *Classes of actions and the respective periods.* See 8 C. L. 771—The character of the liability, whether contractual or penal, will determine what period applies.[26] To illustrate, actions for injuries to personal property,[27] or trespass on land, as by

6. Huntington Nat. Bk. v. Huntington Distilling Co., 152 F 240.

7. Mills' Ann. St. § 2900, limiting certain actions to six years, has no application to deeds of trust. Holmquist v. Gilbert [Colo.] 92 P 232; Foot v. Burr [Colo.] 92 P 236; Brereton v. Benedict [Colo.] 92 P 238.

8. Limited to twenty years, Code 3447. Gilman v. Heltman [Iowa] 113 NW 932.

9. Limited to five years. McCord v. McCord [Iowa] 113 NW 552.

10. Limited to five years, Code Civ. Proc. § 318. Union Ice Co. v. Doyle [Cal. App.] 92 P 112.

11. Limited to three years, Code Civ. Proc. § 359. O'Neill v. Quarnstrom [Cal. App.] 92 P 391.

12. Limited to six years. Randolph v. Walker [S. C.] 59 SE 856.

13. Beale's Heirs v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 917, 99 SW 1045.

14. Proceeding to enforce judgment after ten years. United States v. Noojin, 155 F 677.

15. Laws 1905, c. 1, p. 3, applicable to action by state against railroad company for accounting as to license fees. State v. Chicago, etc., R. Co. [Wis.] 112 NW 515.

16. Quinn v. Baage [Iowa] 114 NW 205.

17. City of Lincoln v. McLaughlin [Neb.] 112 NW 363.

18. Galliher v. State Mut. Life Ins. Co. [Ala.] 43 S 833; Klages v. Kohl, 127 Ill. App. 70; Mahoney v. State Ins. Co., 133 Iowa, 570, 110 NW 1041; Bruner v. Martin [Kan.] 93 P 165; Gross v. Watts, 206 Mo. 373, 104 SW 30; Le Bar v. New York, etc., R. Co. [Pa.] 67 A 413. Action for personal injuries removed to Federal court. Lehigh Valley R. Co. v. Comar [C. C. A.] 151 F 559.

19. Union Stock Yards Nat. Bk. v. Maika [Wyo.] 92 P 619.

20. Nickel v. Vogel [Kan.] 92 P 1105.

21. Galliher v. State Mut. Life Ins. Co. [Ala.] 43 S 833.

22. Action in New Jersey for injury in Minnesota. In former state such action is limited to one year, in the latter to two years. Action brought after one and before two years. Keep v. National Tube Co., 154 F 121.

23. Swisher v. Atchison, etc., R. Co. [Kan.] 90 P 812. Exception held not to extend to suit to enforce statutory liability of stockholders. Ramsden v. Knowles [C. C. A.] 151 F 721, afg. 151 F 718.

24. See 8 C. L. 771. Foot v. Burr [Colo.] 92 P 236; Brereton v. Benedict [Colo.] 92 P 238.

25. Itasca County Com'rs v. Miller [Minn.] 112 NW 276.

26. Action to recover of officer deposits received by insolvent bank, held liability penal and barred in two years. Klages v. Kohl, 127 Ill. App. 70.

27. Action for damages done vessel in col-

cutting timber,[28] or by the erection of switch tracks and embankment,[29] or to recover value of land taken and damages to adjacent land by a railroad,[30] for pollution of water,[31] obstructing flow of surface water,[32] and for flooding lands.[33] Different periods are prescribed for actions on written contract,[34] sealed or unsealed,[35] such as promissory notes,[36] covenants,[37] suits for the enforcement of mortgages,[38] to recover on contractor's bond to the government[39] for the delivery of goods sold,[40] on written contracts containing express agreements to pay,[41] or in installments;[42] and the statute is not affected because, to make out the case, performance by plaintiff and breach by defendant had to be shown.[43] In like manner different periods are usually prescribed for actions on judgments,[44] or to vacate judgments for fraud,[45] to actions for contribution to party-wall,[46] to actions for accounting,[47] actions of trespass to

lision limited to six years. Dailey v. Kiernan [N. J. Law] 67 A 1027. An action for common-law liability for negligently killing cattle is barred in four years, and an action for liability created by Rev. St. § 3324, is barred in six years, and where the petition in such a case states facts sufficient to constitute a cause of action under the common law for negligent management of the train and consequent killing of said cattle, but does not clearly state facts sufficient to constitute a cause of action for liability created by said statute, the demurrer should be overruled. Roice v. Cleveland, etc., R. Co., 5 Ohio N. P. (N. S.) 7.

28. Limited to two years. Kirby v. Hayden [Tex. Civ. App.] 99 SW 746.

29. Houston, etc., R. Co. v. Barr [Tex. Civ. App.] 17 Tex. Ct. Rep. 705, 99 SW 437.

30. Limited to ten years. Civ. Code, art. 3544. McCutchen v. Texas & P. R. Co., 118 La. 436, 43 S 42.

31. Action for polluting water by sewage is one of case, not trespass, and the six year period applies. Gen. St. §§ 1111, 1115. Platt Bros. v. Waterbury [Conn.] 67 A 508.

32. Limited by statute to ten years. Thiessen v. Claussen [Iowa] 112 NW 545.

33. For injuries caused by the flooding of land with water from sewers, which has washed away bridges and soil, damages can be recovered for a period of four years only preceding the bringing of the action. City of Norwalk v. Blatz, 9 Ohio C. C. (N. S.) 417.

34. In action against defendant on written contract signed by her to recover purchase money due plaintiff for land, the ten, and not the five year period governs. Bennett v. Palmer, 128 Ill. App. 626. But the five year period governs an action in case to recover damages sustained through fraud of the defendant at time of breach, the action being based on the fraudulent act. Bates v. Bates Mach. Co., 230 Ill. 619, 82 NE 911. Motion based on account rendered, action limited to five years. Code, § 2920. Lurty's Curator v. Lurty [Va.] 59 SE 405. Action to recover premiums on insurance policy limited to four years. Fidelity & Casualty Co. v. Callahan [Tex. Civ. App.] 19 Tex. Ct. Rep. 864, 104 SW 1073. Where the debtor under an account stated affixed thereto a declaration in writing that the amount shown was due from him, and this was signed by him and accepted in writing by the creditor, the paper constitutes in law a promise in writing to pay the claim, although no promise to pay is specifically made, or, if not a promise in writing, such a paper is at least an agreement in writing within the meaning of § 4980, and the bar of the statute to an action thereon arises not in six years but fifteen years from the date thereof. Deering v. Miller, 9 Ohio C. C. (N. S.) 392.

35. Limited to ten years. Rev. St. 1899, §§ 4271, 4272 (Ann. St. 1906, pp. 2345, 2347). Gross v. Watts, 206 Mo. 373, 104 SW 30.

36. Limited to six years, which period is not affected by the fact that the note was secured by mortgage. McKenzie v. Matthews [Ala.] 44 S 958. To action on a note signed in presence of an attesting witness, the six year period does not apply. Murray v. Quint, 102 Me. 145, 66 A 313.

37. Limited to twenty years in Georgia (Kytle v. Kytle, 128 Ga. 387, 57 SE 748), and three years in Colorado (Hayden v. Patterson [Colo.] 88 P 437).

38. Fixed by St. 1898, §§ 4222, 4220, at six and twenty years respectively. Hughes v. Thomas, 131 Wis. 315, 111 NW 474.

39. Action on contractor's bond for material furnished, in California, limited to two years, the period for action on account. United States v. Axman, 152 F 816.

40. Limited to five years. Patten v. Iroquois Furnace Co., 124 Ill. App. 1.

41. Limited to ten years. Curtis v. Sexton, 201 Mo. 217, 100 SW 17.

42. Agreement to pay for land one-half of crops yearly. Action for half of crops of 1903 and 1904 not barred by action within four years from Jan. 1, 1903. Johnson v. Johnson, 31 Utah, 408, 88 P 230.

43. Curtis v. Sexton, 201 Mo. 217, 100 SW 17.

44. Fixed at ten years from rendition, whether foreign or domestic, and without reference to the residence of the judgment debtor. Gaines v. Grunewald, 102 Minn. 245, 113 NW 450. Action limited to twenty years, unless proof shows it unpaid. Haynes v. Blanchard, 194 Mass. 244, 80 NE 504. Limited to six years where rendered by a court without a seal or clerk, unless docketed in circuit court, when the period is ten years. Lewis v. Adamski, 131 Wis. 311, 111 NW 495. By statute limited to twelve years. Brooks v. Preston [Md.] 68 A 294.

45. Limited to three years. Code Civ. Proc. § 338, subd. 4. People v. San Joaquin Valley Agricultural Ass'n [Cal.] 91 P 740.

46. Limited to five years by Code, § 5447. Pier v. Salot, 134 Iowa, 357, 111 NW 989.

47. Limited to four years by statute. Code Civ. Proc. § 343. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P 39.

try title,[48] to correct acknowledgments,[49] to reform [50] or cancel instruments,[51] to enforce stockholder's liability [52] or to redeem corporate stock,[53] to reduce street assessments,[54] action against municipality for injury by change of grade,[55] to recover compensation of street railway company by municipality,[56] to actions for conspiracy to injure by libel or slander,[57] action to compel issuance of paid up life policy,[58] actions for fraud,[59] to set aside deeds for fraud,[60] to set aside sales for want of consideration,[61] and to actions on claims of which inadequacy of price is the predicate,[62] to actions for damages for embezzlement,[63] probate of will,[64] of trover [65] and conversion,[66] to enforce liabilities created by statute,[67] when no other time is fixed by the statute creating the liability,[68] to enforce collection of license fees,[69] and to recover penalties.[70]

§ 3. *Accrual of cause of action and beginning of period.* See 8 C. L. 775—The statute does not begin to run till cause of action accrues,[71] that is when the party owning it is entitled to begin and prosecute an action thereon and no earlier,[72] whenever such a breach of duty or contract has occurred, or such a wrong has been sustained, as will then give a right to bring and sustain a suit,[73] as where on maturity of the debt and failure to pay,[74] on demand, when such demand is necessary,[75] but

48. Limited to two years. Sanborn v. Crowdus Bros. [Tex. Civ. App.] 17 Tex. Ct. Rep. 739, 99 SW 444.

49. Limited to four years, notwithstanding nonresidence. Veeder v. Gilmer [Tex. Civ. App.] 19 Tex. Ct. Rep. 957, 105 SW 331.

50. Limited to ten years. Stark v. Zehnder, 204 Mo. 442, 102 SW 992.

51. Limited to four years in Texas. Mexican Nat. Coal, Timber & Iron Co. v. Frank, 154 F 217.

52. Limited to six years. Ramsden v. Knowles, 151 F 718; Id. [C. C. A.] 151 F 721.

53. Suit by pledgor to redeem corporate stock from a transfer of pledge is limited to ten years after accrual of action in a case where a limitation is not specially prescribed. Treadwell v. Clark [N. Y.] 82 NE 505.

54. Rev. St. § 4982, limiting to four years the time for bringing certain actions, does not apply to an action for the reduction of a street assessment in excess of benefits. Gault v. Columbus, 10 Ohio C. C. (N. S.) 263.

55. Limited to two years, under Ballinger's Ann. Codes & St. § 4805. Denney v. Everett [Wash.] 89 P 934.

56. Action by city to recover of street railway company compensation for location of tracks limited to six years. Asbury Park, etc., R. Co. v. Township Committee of Neptune Tp. [N. J. Eq.] 67 A 790.

57. An action for conspiracy to injure one by libel or slander and an action for libel or slander are not so identical in character as to bring them both into one category under the statute of limitations, and where the conspiracy forms the gist of the action and the libel or slander is merely incidental to the accomplishment of that purpose, the action is not barred by the statute applying to libel or slander. Zurhorst v. Kroll, 10 Ohio C. C. (N. S.) 228.

58. Limited to ten years after expiration of six months after default. Collman v. U. S. Equitable Life Assur. Soc., 133 Iowa, 177, 110 NW 444.

59. Limited to ten years when constructive. Chorrmann v. Bachmann, 104 NYS 151.

60. Limited to ten years from time fraud discovered, or, with reasonable diligence should have been discovered. Gordon v. Anderson [Miss.] 44 S 67.

61. Limited to four or ten years, depending on the circumstances. Rudolf v. Costa, 119 La. 781, 44 S 477.

62. Limited to four years. Fontenette v. Kling, 118 La. 152, 42 S 756.

63. Limited to three years by Gen. Laws, c. 285, § 33. Williams v. Smith [R. I.] 68 A 306.

64. Limited to ten years. Mullins v. Fidelity & Deposit Co., 30 Ky. L. R. 1077, 100 SW 256.

65. Limited to six years by Rev. St. 1898, § 4222. Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389.

66. Limited to three years by statute. Code Civ. Proc. § 338, subd. 3. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P 39.

67. Limited to five years. Ann. St. 1906, p. 2349. City of Moberly v. Hassett [Mo. App.] 100 SW 115.

68. Limited to five years, Ky. St. 1903, § 2515, applied in action to enforce lien for street improvements. Waggoner v. Frankfort Councilmen, 30 Ky. L. R. 847, 99 SW 918.

69. Action by state to enforce collection of railroad license fees limited to six years. State v. Chicago, etc. R. Co. [Wis.] 112 NW 515.

70. To recover penalty for refusal by street railway company to give transfer limited to three years. Munro v. Brooklyn Heights R. Co., 105 NYS 325.

71. Action by remainderman against life tenant and trustee to ascertain rights in the trust property did not accrue till death of life tenant. Putnam v. Lincoln Deposit Co., 118 App. Div. 468, 104 NYS 4; Indianapolis St. R. Co. v. Fearnaught [Ind. App.] 82 NE 102.

72. In re Hanlin's Estate [Wis.] 113 NW 411.

73. Aachen & Munich Fire Ins. Co. v. Morton [C. C. A.] 156 F 654.

74. Spesard v. Spesard, 75 Kan. 87, 88 P 576. Where mortgage stipulates that it shall become enforcible on failure to pay taxes, the statute begins to run from such failure. Id.

not until the courts have jurisdiction to adjudicate between the parties upon such cause and bind them by decision.[76] To say that a "cause of action arose," means that it "accrued." The terms are synonymous.[77] Where a condition precedent to a right of action exists, the cause of action does not accrue until the condition is performed,[78] and, where parties are entitled to a reasonable time to perform, a cause of action for failure to do so does not accrue until the lapse of such reasonable time.[79] Hence, on a contract for the sale of logs which stipulates for their measurement after delivery, action does not accrue until after the lapse of a reasonable time after such delivery.[80] The right to sue for a personal tort accrues on commission of the tort,[81] hence, the right to sue for malicious prosecution accrues when the prosecution is terminated.[82] Right to sue for breach of contract,[83] or covenant accrues with the breach,[84] except that breach of a covenant of seizure accrues when covenantee suffers actual loss,[85] and breach of an implied warranty of fitness of machinery accrues on its installation, without reference to plaintiff's knowledge, and irrespective of the date of subsequent consequential damage.[86] If there be several contracts to furnish material for government work, the statute begins to run when work on any one is finished, though the preliminary contract only contemplated one contract for the entire work.[87] Right of action on judgment accrues at the time of its entry,[88] but to enforce a liability over, based on judgment, on the affirmance of the judgment.[89] Actions to annul a donation accrues on the death of the donor,[90] and to sue for services, when such services are due.[91] To redeem stock action accrues when plaintiff knows of defendant's wrongful possession,[92] and to recover a railroad license fee by the state the right accrues when the last instalment thereof is due.[93] The statute does not begin to run against a ward from the time he acquires the right to call for an accounting,[94] nor is it started against the bailor's right to recover property

75. Where grantee of land agreed to convey on demand, the statute did not begin to run until demand and refusal. Cromwell v. Norton, 193 Mass. 291, 79 NE 433.

76. Judgment in 1898 in Missouri. Removal of defendant to Illinois in 1901. Claim filed in latter state, 1905, after defendant's death in 1902. Not barred by statute limiting actions on foreign judgments to five years. Davis v. Estate of William Pohlman, 128 Ill. App. 206.

77. Bruner v. Martin [Kan.] 93 P 165.

78. Ott v. Boring, 131 Wis. 472, 110 NW 824, 111 NW 833.

79. Deed to railroad company in 1889 of land, in consideration of the company's building a depot thereon. Action to cancel deed not barred in 1905. Louisville, etc., R. Co. v. Baskett, 31 Ky. L. R. 1035, 104 SW 695.

80. Contract for sale of logs to be measured after delivery. Logs escaped before measurement and not recovered. Delivery Dec. 30, 1902, and action Jan. 3, 1905, not barred under two year limitation. Southern Pine Lumber Co. v. Cameron [Tex. Civ. App.] 18 Tex. Ct. Rep. 1, 101 SW 488.

81. Action to hold bank liable for money paid to receiver, such payment being a participation in a breach of trust by such receiver. American Nat. Bk. v. Fidelity & Deposit Co. [Ga.] 58 SE 867. Action for injuries received by street car. Indianapolis St. R. Co. v. Fearnaught [Ind. App.] 82 NE 102.

82. Hackler v. Miller [Neb.] 114 NW 274.

83. Agreement to pay mortgage within two years. Action accrued on failure to pay. Clinton v. Clinton's Estate, 148 Mich. 496, 14 Det. Leg. N. 204, 111 NW 1087.

84. Action to recover damages for breach of covenants in a deed to land. Hayden v. Patterson [Colo.] 88 P 437.

85. Deed to plaintiff with covenants of seizure, July 1, 1892, surrender to paramount title, Mar. 17, 1903. Action within five years from latter date not barred. Jones v. Haseltine, 124 Mo. App. 674, 102 SW 40.

86. Action on purchase-money note and cross bill setting up breach of warranty. Smith v. Fairbanks, Morse & Co. [Tex.] 18 Tex. Ct. Rep. 636, 102 SW 908, afg. 17 Tex. Ct. Rep. 542 99 SW 705.

87. Sanger v. U. S., 40 Ct. Cl. 47.

88. Justice's judgment transferred to district court and entered. Miller v. Rosebrook [Iowa] 113 NW 771.

89. Agreement to railroad company to keep in repair certain way of travel and save city harmless. Because of defects in way, city suffered judgment for damages for injuries and sued company to recover amount of judgment. City of Seattle v. Northern Pac. R. Co. [Wash.] 92 P 411.

90. Jones v. Jones, 119 La. 677, 44 S 429.

91. O'Connell v. Storey [Tex. Civ. App.] 20 Tex. Ct. Rep. 223, 105 SW 1174.

92. Action by pledgor to redeem stock from the transferee of pledgee. Treadwell v. Clark [N. Y.] 82 NE 505.

93. State v. Chicago, etc., R. Co. [Wis.] 112 NW 515

94. Stevenson v. Markley [N. J. Eq.] 66 A. 185.

gratuitously bailed until demand and refusal to return, or the bailee, with the knowledge of the bailor, claims the property as his own,[95] but action against bank officials to recover deposits received by them after insolvency accrues on the failure of the bank.[96] Against a surety action accrues at the same time it does against the principal,[97] and, to recover interest due on municipal bonds, when the interest matures,[98] so, too, the right to have a senior grantee declared a trustee of a junior accrues on registration of the senior grant.[99] The statute begins to run on an account stated at the date of it,[1] on a material account on the date of the last item proved on either side,[2] or, where the balance is stated, the statute begins to run as to the transactions included in the account up to that time,[3] but the right to surcharge a settlement does not accrue till the settlement is confirmed.[4] Right to sue for money had and received accrues at the time of its reception by defendant,[5] or, if it be received under an executory contract, when the contract is broken,[6] but right to recover money borrowed, where no time is set for payment, accrues immediately,[7] and action on an agreement to pay balance remaining after the proceeds of a sale are credited does not accrue till such balance is ascertained.[8] Limitations begin to run against a note on the day that it is due,[9] and, if payable on demand, they begin immediately,[10] but where a note is made payable after actual demand, made prior to a particular event, the statute does not begin to run until such actual demand made as provided.[11] A sale under a mortgage securing a note will not have the effect to hasten the accrual of action on the note.[12] Right of action to recover realty accrues at the date of the conveyance,[13] or the issuing of the patent,[14] and answer puts the statute in operation,[15] nor does the fact that the land sued for was woodland and not in actual possession affect the statute.[16] The trustor's right to redeem accrues when the trustee takes possession,[17] to quiet title when the adverse claim attaches,[18] to contribution to a party-wall whenever it is made use of as such,[19] and to recover dower by the heirs

95. Replevin to recover property loaned. Woods v. Latta, 35 Mont. 9, 88 P 402.

96. Action brought in 1903 to recover deposits accepted by insolvent bank in 1897 barred by two years' limitation. Klages v. Kohl, 127 Ill. App. 70.

97. McGovern v. Rectanus [Ky.] 105 SW 965

98. Schoenhoeft v. Kearny County Com'rs [Kan.] 92 P 1097.

99. Frazier v. Eastern Band of Cherokee Indians [N. C.] 59 SE 1005. Action for damages to realty. Plaintiff derived title through grantee from state, grant issuing 1855, entry 1853, registered 1856. Defendant derived title from grantee of same grantor, grant issuing 1857, entry 1853, registered 1858. On claim by defendant that plaintiff be declared trustee for his benefit, held right to do so accrued on registry of plaintiff's grant in 1856 and was barred. Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 SE 518.

1. Visher v. Wilbur [Cal. App.] 90 P 1065.

2. McArthur v. McCoy [S. D.] 112 NW 155.

3. Figge v. Bergenthal, 130 Wis. 594, 109 NW 581, 110 NW 798.

4. Action to surcharge tax collector's settlement. Green County v. Howard [Ky.] 105 SW 897.

5. Whittle v. Whittle [Cal. App.] 91 P 170.

6. Agreement to convey land, part of consideration paid, conveyance never executed. Payment made 1887, conveyance refused 1888. Tomlinson v. Bennett [N. C.] 59 SE 37.

7. Sturdivant v. McCorley [Ark.] 103 SW 732.

8. Robertson v. Warren [Tex. Civ. App.] 18 Tex. Ct. Rep. 621, 100 SW 805.

9. Hall v. Jameson [Cal.] 91 P 518; Bush v. Brandecker, 123 Mo. App. 470, 100 SW 48.

10. Church v. Stevens, 107 NYS 310.

11. Neale v. Morrow, 150 Cal. 414, 88 P 815.

12. Note due in three years, mortgage giving creditor power of sale on default of interest. Default and sale one year before note payable. On claim that statute began to run on note when sale made, held suit Jan. 3, 1902, within the statute giving two years to sue from accrual of right. Hall v. Jameson [Cal.] 91 P 518.

13. Absolute devise of land to trustee which he conveyed. Action by party claiming by dissent. Korsstrom v. Barnes, 156 F 280.

14. Right to recover lands from a settler under the United States homestead laws accrues when the patent issues. Northern Pac. R. Co. v. Slaght, 205 U. S. 122, 51 Law. Ed. 738, afd. on review, 205 U. S. 134, 51 Law. Ed. 742.

15. Webb v. Borden [N. C.] 58 SE 1083.

16. At the time defendant's grantor conveyed to him, she was admitted to be seized and possessed of the land. Gordon v. Anderson [Miss.] 44 S 67.

17. Bernhardt v. Hagamon, 144 N. C. 526, 57 SE 222.

18. Lyons v. Carr [Neb.] 110 NW 705; First Nat. Bk. v. Pilger [Neb.] 110 NW 704.

19. Pier v. Solot, 134 Iowa, 357, 111 NW 989.

of the dowress at the death of such dowress,[20] but to restrain the operation of a railway the cause of action accrues only when the road is completed and operations begin.[21] Action for permanent trespass,[22] or nuisance accrues at the time of such trespass or nuisance,[23] and the fact that plaintiff has failed to discover the character and cause of the injury cannot change the rule,[24] hence, action for damages to land taken for writs accrues when the land has been entered for that purpose,[25] for damages resulting from a nuisance in the erection and operation of a water-tank by a railroad company on its erection and operation,[26] for the taking of a right of way, on the taking, and construction of the road,[27] and for damages for pollution of a stream and incident deposits on land at the time of the injury.[28] But where an act, not of itself a nuisance, becomes so only at intervals, the cause of action arises on receipt of each injury,[29] hence, action for damages to latteral support accrues at the time the injury is done and not at the doing of the act from which the injury resulted,[30] and for damages resulting from the negligent construction of a levee on the occurrence of the damage.[31] The statute does not run against the right to abate a continuing nuisance.[32]

As between stockholder, corporation, and creditor.[See 8 C. L. 778]—Right of action against a corporation for the refusal to issue new stock to a shareholder accrues on such refusal,[33] and the right of a creditor to recover a purchaser of its property accrues on the day of the purchase,[34] but the right of creditors to sue in equity to enforce an equitable lien against corporate property does not accrue until judgment at law and return of nulla bona.[35] Action accrues on a stockholder's liability for his proportion of corporate debt when it is created,[36] on his liability on debenture bond at the dissolution of the corporation, whether the debt is matured or not,[37] and the statute does not begin to run in his favor for an assessment decreed against him until such decree is rendered and receiver appointed,[38] nor against enforcement of his liability by a creditor till rendition of judgment and return of nulla bona.[39]

Mistake and fraud.[See 8 C. L. 779]—Actions for relief on the ground of mistake do

20. Dixon v. Harris [Ky.] 105 SW 451.

21. Muller v. Manhattan R. Co., 53 Misc. 133, 102 NYS 454; Goggin v. Manhattan R. Co., 54 Misc. 472, 104 NYS 548.

22. Action in Mar. 1904, against a railroad company for constructing road on plaintiff's land Jan. 1, 1900, barred by the three years' statute. Williams v. Southern Pac. R. Co., 150 Cal. 624, 89 P 599.

23. Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 SE 216.

24. Action for damages for permanent nuisance barred in five years. Virginia Hot Springs Co. v. McCray, 106 Va. 461, 56 SE 216.

25. Under Rev. Laws, c. 48, § 13, the award is payable on entry for purpose of constructing the street. Averill v. Boston, 193 Mass. 488, 80 NE 583.

26. Texas, etc., R. Co. v. Edrington [Tex.] 18 Tex. Ct. Rep. 175, 101 SW 441.

27. Cobb v. Wrightsville & T. R. Co. [Ga.] 58 SE 862.

28. Action by landowner against coal and iron company for polluting stream and depositing on land coal dust, ore-washings and muck, resulting in loss of crops, held entitled to damages caused within a year from commencement of suit. Alabama Consol. Coal & Iron Co. v. Vines [Ala.] 44 S 377.

29. Action to recover damages of railroad company for injury to land caused by improper construction of roadbed and embankment. St. Louis, etc., R. Co. v. Hoshall [Ark.] 102 SW 207; International, etc., R. Co. v. Kyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 940, 101 SW 272; Gulf, etc., R. Co. v. Caldwell [Tex. Civ. App.] 18 Tex. Ct. Rep. 539, 102 SW 461.

30. Simon v. Nance [Tex. Civ. App.] 17 Tex. Ct. Rep. 956, 100 SW 1038.

31. Barnett v. St. Francis Levee Dist., 125 Mo. App. 61, 102 SW 583.

32. Wright v. Ulrich [Colo.] 91 P 43.

33. Action against stockholder on note given for stock. Counterclaim that corporation had refused to issue him new stock to which he was entitled. Action, June, 1906. Original stock sold, July, 1899. Counterclaim barred. Woodworth v. Carroll [Minn.] 112 NW 1054.

34. Clevenger v. Galloway [Tex. Civ. App.] 19 Tex. Ct. Rep. 858, 104 SW 914.

35. Williams v. Commercial Nat. Bk. [Or.] 91 P 443

36. O'Neill v. Quarnstrom [Cal. App.] 92 P 391.

37. Ramsden v. Knowles, 151 F 718; Id. [C. C. A.] 151 F 721.

38. Goss v. Carter [C. C. A.] 156 F 746.

39. Judgment against corporation Dec. 7, 1900, execution returned nulla bona Jan. 2, 1901. Action for receiver Oct. 6, 1903, held not barred. Henley v. Myers [Kan.] 93 P 168.

not accrue until the mistake is discovered,[40] hence, action for shortage in land, caused by mistake, accrues only when the shortage is discovered, or should have been discovered, by the exercise of ordinary diligence,[41] but the right to have a mutual mistake in a deed corrected accrues when such mistake is made.[42] Whether the mistake was discovered within the statutory period is a question of fact,[43] and a party will not be heard to allege mistake not discoverable by ordinary diligence if the facts were plainly shown by the court records.[44] In some jurisdictions fraud in no instance postpones the running of the statute, save the specified exceptions in the statute,[45] while in others action may be brought at any time within the statutory period after discovery of the fraud,[46, 47] but actual knowledge of the fraud is not necessary,[48] yet notice imparted by the records will not constitute constructive discovery of fraud where for special reasons, the aggrieved party ought not to be found.[49] Where relief is sought, however, on the ground of fraud, some reason why the discovery was not sooner made must be given [50] and ignorance and diligence must be shown.[51] Hence, in an action to recover money paid through fraud or mistake, the plaintiff must show the payment was induced by such fraud or mistake, and that he had failed to discover it after due diligence before the statute had run.[52] Fraudulent concealment of a cause of action from the party entitled thereto, to prevent the running of the statute, must be something of an affirmative character,[53] and the claim that the fraud was concealed is rendered valueless by the showing that the means of discovering it were open to the party at the time he claims to have been affected thereby.[54] The statute begins to run in favor of a third person, to whom has been fraudulently diverted partnership funds, immediately upon the diversion, if the injured partner knew of it,[55] and action for damages sustained through fraud accrues on perpetration of the fraud.[56] Statutes

40. West v. Fry, 134 Iowa, 675, 112 NW 184. Suit to set aside decree of distribution. Bacon v. Bacon, 150 Cal. 477, 89 P 317.

41. Peacock v. Barnes, 142 N. C. 215, 55 SE 99.

42 Action to enforce lien and reform contract. Stark v. Zehnder, 204 Mo. 442, 102 SW 992.

43. Agreement in 1892 between father and son by which latter, on doing certain acts, was to have certain insurance money otherwise going to his sister. Receipt in full to son by sister of all demands due her, at which time trust was terminated, and evidence that she was present and consented to the conditional disposition of the money, held sufficient to show she knew the facts of the case. Marston v. Kuhland [Cal.] 90 P 108.

44. Action to surcharge tax collector's accounts. Green County v. Howard [Ky.] 105 SW 897.

45. Action by state against railroad for accounting and discovery of license fees, and subd. 7, § 4222, St. 1898, applied. State v. Chicago, etc., R. Co. [Wis.] 112 NW 515.

46, 47. Anderson v. Fry, 116 App. Div. 740, 102 NYS 112. Action for decree declaring defendant trustee for benefit of plaintiff of certain realty which it was alleged defendant obtained title to by fraud. Delmoe v. Long, 35 Mont. 139, 88 P 778. Action by joint tenants to set aside partition sale in suit brought by cotenant, and to charge purchaser as trustee because of fraud of said cotenant and purchaser, controlled by three and not ten year statute. Tuttle v. Tuttle [N. C.] 59 SE 1008.

48. Deed to defraud creditors recorded on Feb. 8, 1897. Action to subject property conveyed to satisfaction of judgment obtained in 1894 brought Nov. 14, 1903. Held recorded and notice of the fraud, and action barred by five year period. Piekenbrock v Knoer [Iowa] 114 NW 200.

49. Husband, trustee for wife, purchases property with her money and takes title in himself, she being led to believe that the property was hers solely and that he had no interest in it. Hinze v. Hinze [Kan.] 90 P 762.

50. Action to set aside judgment for fraud alleged to lie in the failure of defendants to plead certain facts which would have constituted a good defense. People v. San Joaquin Valley Agricultural Ass'n [Cal.] 91 P 740.

51. Clement v. Clement [Tex. Civ. App.] 99 SW 138. Deed recorded on day executed and twenty years thereafter suit to set aside for fraud. No effort to show ignorance of fraud or that it was not discovered, or that there was any diligence exercised. Gordon v. Anderson [Miss.] 44 S 67.

52. Stanford v. Finks [Tex. Civ. App.] 17 Tex. Ct. Rep. 477, 99 SW 449.

53. Something must be said or done with the purpose to conceal and has that effect. Mere silence is not a concealment within the statute. Fortune v. English, 226 Ill. 262, 80 NE 781, afg. 128 Ill. App. 537.

54. Stanford v. Finks [Tex. Civ. App.] 17 Tex. Ct. Rep. 477, 99 SW 449.

55. Stone v. Baldwin, 127 Ill. App. 563.

56. Action by vendee against vendor for false and fraudulent representations of title. Burling v. Allvord's Estate [Neb.] 110 NW 683.

limiting the time for relief on the grounds of fraud do not apply to actions to have the foreclosure of a trust deed set aside for fraud,[57] and though the action for a fraud may be barred within a limited time after the right accrues, the defense of fraud is never barred.[58]

§ 4. *Time tolled and computation of the period.* See 8 C. L. 779—The day on which a cause of action accrues,[59] or the time during which an obstruction continues, should not be computed in the limitation period.[60]

§ 5. *What is commencement of action. A. In general.* See 8 C. L. 780—Not only must petition be filed, but there must be a bona fide intention that process shall at once be served,[61] hence, merely filing a will and ordering a subpoena issued for subscribing witnesses is not such commencing of action as to suspend the statute,[62] nor where action begun and proceedings had in a court without jurisdiction,[63] nor will an execution on a judgment against a party deceased suspend the statute,[64] nor a scire facias sued out not followed by fiat within the statutory period,[65] but judgment, without steps to enforce it,[66] or service of citations, with copies of petition, though the citations be without seal,[67] or a citation improperly addressed,[68] or filing claim within the statutory period, though it be not immediately acted upon and no express orders of continuance, suspends the statute.[69]

(§ 5) *B. Amendment of pleading.* See 8 C. L. 781—The time to which the statute of limitations runs is the filing of the original complaint,[70] hence, an amendment, properly allowed, relates back to the filing of the original so as to prevent the bar of the statute.[71] An amendment setting up substantially a new cause of action will not,[72] while one which does not do so will be allowed.[73] To illustrate: Where the orig-

57. Barlow v. Hitzler [Colo.] 90 P 90.

58. Mandamus to compel payment of city warrants issued in satisfaction of judgment obtained by fraud and collusion. State v. Tanner [Wash.] 88 P 321.

59. Nebola v. Minnesota Iron Co., 102 Minn. 89, 112 NW 880.

60 Huntington Nat. Bk. v. Huntington Distilling Co., 152 F 240.

61. Action for conversion committed in 1903. Petition filed Dec. 27, 1904. No citation issued and served till Sept. 1906, after rule for costs against plaintiff. Held barred by two year statute. Faires v. Loessin [Tex. Civ. App.] 18 Tex. Ct. Rep. 654, 102 SW 924.

62. Mullins v. Fidelity & Deposit Co., 30 Ky. L. R. 1077, 100 SW 256.

63. Mullins v. Fidelity & Deposit Co., 30 Ky. L. R. 1077, 100 SW 256. Suit on Mar. 20, 1896, to set aside foreclosure of trust deed, and finding of fact by court, death of complainant, and bill of revivor by administrator, Dec. 11, 1899. Barlow v. Hitzler [Colo.] 90 P 90.

64. Judgment 1885, and execution in 1888, returned nulla bona, defendant died 1902, and execution in 1903. No revivor of judgment. Peoples Bk. of Kentucky's Assignee v. Barbour, 30 Ky. L. R. 712, 99 SW 608.

65. Scire facias and fiat June 11, 1887. Second scire facias without fiat, May 13, 1899. Auditor's bill filed Dec. 15, 1903, barred by twelve year' statute. Collins v. McBlair, 29 App. D. C. 354.

66. Proceeding to enforce judgment in ejectment, and petition for injunction, on the ground that right to possession barred, denied. Fulton v. Mathers, 75 Kan. 770, 90 P 256.

67. King v. Guynes, 118 La. 344, 42 S 959; Adams v. Guynes, 118 La. 348, 42 S 960.

68. Action against town of Lafayette citation addressed to and served on the mayor of such town. Gueble v. Lafayette, 118 La. 494, 43 S 63.

69. Notes barred Jan. 8, 1903. Guarantor died Aug. 12, 1902. Claim filed Mar. 16, 1903, allowed Mar. 17, 1903 and allowance set aside June 1, 1903, on motion. Appeal dismissed, and procedendo to probate court. Claim allowed Oct. 26, 1904. De Clerque v. Campbell, 125 Ill. App. 357.

70. Calloway v. Oro Min. Co. [Cal. App.] 89 P 1070.

71. Atlanta, etc., R. Co. v. Smith, 1 Ga. 162, 58 SE 106.

72. An amendment changing an action on express contract to one on quantum meruit sets up a new cause of action. Meinshausen v. A. Gettelman Brew. Co. [Wis.] 113 NW 408. Original declaration alleged negligence in failure of master to maintain rest or guide attached to rolls in safe condition. Amendment set out spanner or handle defective, change of rolls while revolving, failure to instruct as to risks, and failure to inspect. Mahoney v. Park Steel Co., 217 Pa. 20, 66 A 90.

73. In action for negligent killing, declaration set out as cause of action the death caused by wrongful act or omission. The new facts stated related to the time and fact of death as alleged in original complaint. Indianapolis St. R. Co. v. Fearnaught [Ind. App.] 82 NE 102. Original action brought against husband and wife on joint and several obligation. An amendment alleging contract made with wife alone did not change cause of action. Calloway v. Oro Min. Co [Cal. App.] 89 P 1070.

nal petition did not state a cause of action, an amendment curing this defect,[74] or changing the cause of action from one implied contract to one on express contract,[75] or introducing different parties[76] will not be allowed. But an amendment which changes an action brought against a person in a representative capacity to an action against the same person as an individual does not bring in a new party,[77] nor is a new cause of action set up where it is apparent that the matters complained of in the amendment and the original are the same,[78] but merely amplified[79] or elaborated,[80] or only amount to a restatement, in a different form of the original cause of action,[81] nor is it a statement of a new cause of action where the pleader's misconception of the facts is corrected,[82] as where it cures a defective description in the original,[83] or more particularly specifies damages,[84] or merely charges the acts complained of in varying form to suit different phases of the evidence,[85] or adds the allegation that defendant promised to pay,[86] or corrects clerical errors.[87] An amendment does not suspend the statute as to matters in the original petition not denied,[88] nor can it affect the running of the statute in favor of new parties brought in by it.[89] An amendment filed pending suit is not barred.[90]

(§ 5) *C. Nonsuit and dismissal.*[See 8 C. L. 782]—A second suit may be brought

74. Action to foreclose subcontractor's lien, original petition failing to allege notice of filing lien was served on owner. After action barred, amendment setting out such notice disallowed. Powers v. Badger Lumber Co., 75 Kan. 687, 90 P 254.

75. Booth v. Houston Packing Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 861, 105 SW 46.

76. Original declaration by widow for death of husband. Amendment, making personal representative plaintiff. LeBar v. New York, etc., R. Co. [Pa.] 67 A 413.

77. Suit against trustee for personal injuries on property under his control as such. Amendment procured against him individually. Boyd v. U. S. Mortgage & Trust Co. [N. Y.] 79 NE 999.

78. Action for personal injuries. Mobile Light & R. Co. v. Bell [Ala.] 45 S 56.

79. In action for personal injuries, the original declaration, which was defective, in that it failed to show defendant was responsible for employment of plaintiff, or responsible for the action of the foreman, and that it failed to connect the defendant with the negligence, may be amended by curing these defects, basing action on same injury, in the same place and under same circumstances as set out in the original complaint. Johnson v. American Smelting & Refining Co. [Neb.] 114 NW 144.

80. That an amendment in a sequestration suit is much more elaborate than the original does not set out a new cause of action, if the same property, on the same grounds, is sought to be recovered. Parlin & Orendorff Co. v. Glover [Tex. Civ. App.] 17 Tex. Ct. Rep. 589, 99 SW 592.

81. Action for death of servant through negligence. Amendment held merely to amplify the statements of original declaration. Swift v. Gaylord, 229 Ill. 330, 82 NE 299, afg. 126 Ill. App. 281; Lake Shore, etc., R. Co. v. Enright, 227 Ill. 403, 81 NE 374.

82. Action for personal injuries, original and amended petitions, stated cause of action to be the same, except that in the amendment it was stated that the accident occurred from the train's running in on the switch and sidetrack with unusual force, whereas original alleged it ran on switch and collided with another train. Texas, etc., R. Co. v. Clippenger [Tex. App.] 20 Tex. Ct. Rep. 53, 106 SW 155.

83. In action for personal injuries plaintiff alleged injury occurred Mar. 3, 1903, and that injuries were "personal." Amendment changing date of injury to Mar. 23, and alleging injuries permanent, and claiming damages for mental pain and medical expense, properly allowed. Southern R. Co. v. Cunningham [Ala.] 44 S 658.

84. Action to recover cemetery lot. Original complaint demanded damages merely. Amendment stated the damages at $400. Anderson v. Acheson, 132 Iowa, 744, 110 NW 335.

85. Action for damages for personal injury caused by negligence. Wise Terminal Co. v. McCormick [Va.] 58 SE 584.

86. Action for conversion of property. Original petition failing to allege a promise implied to pay, an amendment making this additional or supplementary allegation was allowable. Hitson v. Hurt [Tex. Civ. App.] 18 Tex. Ct. Rep. 279, 101 SW 292.

87. Original petition declared on 410 pounds oats, $45.20. Amendment set up 2,410 pounds oats, $45.20. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 338, 99 SW 128

88. Original set up claim to 260 feet from east to west and 168 feet from north to south adjoining the Malone acre. Amendment set up claim to 100 feet square in southeast corner of Malone acre. Defendants disclaimed any right to land claimed in original, but claimed the 100 feet square. Amendment stopped running of statute as to 100 square feet only. Hutchinson v. Chandler [Tex. Civ. App.] 19 Tex. Ct. Rep. 630, 104 SW 434.

89. Actions against incorporated company consolidated and amended petition making individual members parties as to new parties the amendment did not relate back. Nunn v. Louisville, 31 Ky. L. R. 1293, 105 SW 119.

90. To a declaration filed within the time allowed to sue, in 1902, an amendment made in 1905. Woodstock Iron Works v. Kline [Ala.] 43 S 362.

within one year after dismissal of the first,[91] but the statutory period within which to renew action after dismissal cannot be extended by repeated dismissals,[92] nor will the petition in a former suit on the same subject-matter be admitted to show that such suit was brought and prosecuted in good faith.[93] As to unnecessary or improper parties, a dismissal does not effect a discontinuance in the sense that a new cause of action is created.[94] Reversal, after action begun in due time extends the period for bringing a new action for one year,[95] but this rule, when the time limit has expired pending action, applies only where there has been a reversal without remand.[96] Statutes giving additional time to sue after arrest or reversal of judgment do not apply to suits in equity.[97]

§ 6. *Postponement, interruption, and revival. A. General rules.*—See 8 C. L. 783—No reason based upon apparent inconvenience or hardship will justify suspending the statute on other grounds than those mentioned therein.[98] The running of the statute cannot be suspended by agreement,[99] nor by the confidence the party seeking to avoid it has in the integrity and veracity of the adverse party,[1] nor by the debtor's possession of the evidence of debt,[2] nor by redemption of mortgaged premises,[3] nor a conveyance of mortgaged property,[4] nor by delay in taking action,[5] nor does the rule "contra non valentem agere" apply where the courts have been open at all times to bring suit,[6] nor does the fact that the security is sealed prevent the statute running against the obligation secured.[7] In Kentucky, the thirty year statute bars all claims, without regard to disability, where there was a right of action in the claimant.[8] A suspension of the right of action works a corresponding suspension of the statute of limitations,[9] and if made before the former period of limi-

91. Action for personal injuries sustained July 8, 1902, instituted July 6, 1903, and summons executed July 19, 1903, dismissed on motion of defendant Oct. 29, 1903. Second suit Dec. 21, 1903, with execution of summons Feb. 2, 1904, in time. La Follette Coal, Iron & R. Co. v. Minton, 117 Tenn. 415, 101 SW 178; Harris v. Quincy, etc., R. Co., 124 Mo. App. 45, 101 SW 601. Hurd's Rev. St. 1903, p. 1208, par. 25. Wiehe v. Atkins, 126 Ill. App. 1.

92. Statute provides that where suit brought in time the same may be dismissed after it is barred and new action brought within one year thereafter. Suit brought in 1897, bar to which was one year, dismissed in 1899. New action in 1900, which was dismissed in 1904. Another action in 1905 held barred. Denton v. Atchison [Kan.] 90 P 764.

93. McAllen v. Alonzo [Tex. Civ. App.] 19 Tex. Ct. Rep. 443, 102 SW 475.

94. Patten v. Iroquois Furnace Co., 124 Ill. App. 1.

95. Action on bond, period for bringing which limited to six months. Kansas City Hydraulic Press Brick Co. v. National Surety Co. 149 F 507.

96. Hutter v. Paige Iron Works, 127 Ill. App. 177.

97. Wood-Dickerson Supply Co. v. Cocciola [Ala.] 45 S 192.

98. Action begun in D. C. two years after accrual of right. No trial for seven years. Defendant died resident of Maryland and action abated. After action barred, suit begun against executor in Maryland. Relief from bar of the statute denied. Patterson v. Safe Deposit & Trust Co. [C. C. A.] 148 F 787.

99. Property owners agreed to postpone collection of damages for property taken for streets till balance due after set-off of benefits determined. Failure of city to accept by doing what was to be done as a consideration for the promise. Averill v. Boston, 193 Mass. 468, 80 NE 583. Hence, the running of the statute is not affected in favor of stockholders by agreement between corporation and creditors to postpone its liability to action. O'Neill v. Quarnstrom [Cal. App.] 92 P 391.

1. Stanford v. Finks [Tex. Civ. App.] 17 Tex. Ct. Rep. 477, 99 SW 449.

2. Manders v. Irwin, 118 La. 1048, 43 S 698.

3. Mortgage to become enforcible on failure of mortgagee to pay taxes. Failure to pay and tax sale. Redemption by mortgagee. Suit to enforce mortgage after five years from mortgagee's failure to pay taxes barred. Spesard v. Spesard, 75 Kan. 87, 88 P 576.

4. Conveyance by mortgagor, reciting the lien of the mortgage, but which was not assumed by grantee, nor was any part of the purchase money retained. Wallber v. Caldwell [Neb.] 112 NW 584.

5. Glazier v. Heneyhuss [Okl.] 91 P 872.

6. Manders v. Irwin, 118 La. 1048, 43 S 698.

7. Simple promissory notes secured by mortgage are barred in six years, notwithstanding the mortgage. McKenzie v. Mathews [Ala.] 44 S 958.

8. Dixon v. Harris [Ky.] 105 SW 451.

9. Where wife bequeathed to husband for life interest on notes which she held against him, held that he was not entitled to possession and control of notes themselves, but that they were to be held by her executor uncollected until his death, and hence running of limitations was suspended for that period. In re Church's Estate [Vt.] 67 A 549.

tations expires, a valid extension may be created by amendment to the statute.[10] So, too, the statute is suspended in favor of the remainderman during the life of the life tenant,[11] in favor of a junior lienor, who has paid off a senior lien during the life of such junior lien,[12] and where the cause of action accrues when there is no one in existence entitled to sue, suit may be brought in double the time otherwise provided.[13] An action is not commenced so as to suspend the statute unless complaint is filed and summons served, or attempted to be served, within the statutory period;[14] it must have been instituted in good faith in a court having jurisdiction,[15] and if begun and afterwards dismissed, the statute is not affected,[16] nor will an appeal interrupt the running of the statute as to persons not parties to the case appealed,[17] but the effect of the action is not interfered with by the subsequent operation of the statute on the matter in controversy.[18]

(§ 6) *B. Trusts.*[See 8 C. L. 784]—The statute does not run in favor of a trustee until the beneficiary has the power to sue,[19] and as implied trusts are within the operation of the statute of limitations,[20] it does not begin to run in favor of a trustee of such implied, continuing, or express trust until it is determined or repudiated,[21] or until demand and refusal,[22] or until he holds the trust subject hostile to the rights of the cestui que trusts,[23] and knowledge brought home to them of such repudiation or violation of the trust on his part.[24] Merely taking a deed to himself does not imply a denial by the trustee of the claim of the cestui que trust.[25] The statute begins to run in favor of a trustee ex malificio of a constructive trust from the discovery of the fraud,[26] and has been held a complete bar after twenty years from removal of disability.[27] The statute does not run in favor of a guardian until confidential relations have ceased.[28]

(§ 6) *C. Insanity and death.*[See 8 C. L. 785]—Where an injury results in insanity, the insanity occurring on the same day, the two events are simultaneous and the dis-

10. Weldon v. Rogers [Cal.] 90 P 1062.

11. Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984.

12. Windt v. Covert [Cal.] 93 P 67.

13. Action of trover limited to six years. Conversion of property, after owner's death, in March and Oct., 1897, and before appointment of representative, which was made in 1904. Action not barred. Palmer v. O'Rourke, 130 Wis. 507, 110 NW 389.

14. Action on contract. Complaint filed and summons served 6 years and 10 months after cause of action matured. Held barred by the six years' statute. Dutro v. Ladd [Or.] 91 P 459.

15. Mullins v. Fidelity & Deposit Co., 30 Ky. L. R. 1077, 100 SW 256.

16. Foster v. New York Cent., etc., R. Co., 118 App. Div. 143, 103 NYS 531.

17. Action against principal and pending appeal, right to sue sureties barred. In action against sureties, held that such appeal did not suspend the statute as to them. McGovern v. Rectanus [Ky.] 105 SW 965.

18. Action to enforce judgment begun in time. Judgment barred pendente lite and amendment to answer setting up the statute disallowed. Ahlering's Ex'rs v. Haven, 31 Ky. L. R. 421, 102 SW 845.

19. Suit by wife to have certain deeds declared to be held in trust by husband. During time husband held possession he had the right to do so under the common law, and the wife had no power to sue until his death. Smith v. Smith, 201 Mo. 533, 100 SW 579.

20. Action to recover title to mining claim alleged to be held under an implied trust. Barred by five year statute. Ames v. Howes [Idaho] 93 P 35.

21. Thornton v. Jackson [Ga.] 59 SE 905; Hanson v. Hanson [Neb.] 111 NW 368; Pearce v. Dyess [Tex. Civ. App.] 17 Tex. Ct. Rep. 922, 101 SW 549. Trust terminated in 1897. Action founded on such relation, not brought within four years thereafter, barred. Marston v. Kuhland [Cal.] 90 P 188.

22. Action by son against father, trustee, for accounting. Dillon v. Cross [Cal. App.] 91 P 439.

23. Conveyance to trustee for convenience, and evidence showing he had at no time claimed title adversely to cestui que trusts. Morrison v. Blake, 33 Pa. Super. Ct. 290.

24. Action for accounting against agent. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P 39.

25. Partners in farming purchased tract of land, contract for which ran in name of one, on whose death action brought by survivor for partition. Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014.

26. Hanson v. Hanson [Neb.] 111 NW 368.

27. Heinisch v. Pennington [N. J. Eq.] 68 A 233.

28. Stevenson v. Markley [N. J. Eq.] 66 A 185. Confidential relations held not shown to have ceased from the fact that guardian and ward met but once after final settlement and no communication, it appearing ward was ignorant of his rights and did not suspect guardian was liable for losses. Scoville v. Brock, 79 Vt. 449, 65 A 577.

ability suspends the statute.[29] Death, however, removes the disability of insanity.[30] Death suspends the statute, as a rule,[31] but whether, and to what extent, it suspends it depends on the terms of the statute.[32] Generally, it is extended one year after the appointment of a representation.[33] Death of the debtor suspends the statute for the period provided in such cases,[34] and the statute does not begin to run again until the appointment of an administrator,[35] but the statute once started against a judgment creditor is not suspended by his death.[36]

(§ 6) *D. Infancy and coverture.* See 8 C. L. 785—Infancy suspends the statute[37] during minority,[38] but such suspension is governed by the law in force when the cause of action accrued.[39] If, however, the statute begins to run against the ancestor, it will not be interrupted by her death and the supervening infancy of her heirs.[40] After coming of age an infant may sue on one cause of action, though during his minority action had been brought by his next friend for another cause.[41] Coverture suspends the statute,[42] but the death of the husband removes the disability,[43] nor can such disability be tacked to that of infancy.[44]

(§ 6) *E. Absence and nonresidence.* See 8 C. L. 786—Absence from the state suspends the statute,[45] when so provided only,[46] but a statute suspending actions against nonresidents only applies to cases falling within its terms.[47] Absence of mortgagor from the state will not suspend the statute in favor of his grantee, who purchased subsequent to the mortgage, though he may not have held the title during the entire statutory period,[48] nor will it suspend the limitation governing actions for personal injuries.[49] A person departing from the state cannot have reckoned in his favor clandestine or fraudulently contrived visits to his former residence for the purpose of ascertaining the time of absence, but otherwise if he returns openly, though the plaintiff does not learn of his presence.[50]

29. Injury and insanity occurred Jan. 12, 1899. Disability continued till Sept. 25, 1906. Action brought Jan. 25, 1907, within the six year limitation. Nelola v. Minnesota Iron Co., 102 Minn. 89, 112 NW 880.

30. Wood v. Wood [Iowa] 113 NW 492.

31. McAllen v. Alonzo [Tex. Civ. App.] 19 Tex. Ct. Rep. 443, 102 SW 475.

32. Morse v. Hayes [Mich.] 14 Det. Leg. N. 785, 114 NW 397.

33. De Clerque v. Campbell, 125 Ill. App. 357.

34. Right of action accrued Jan. 1, 1900, debtor died Nov. 3, 1904. Action Mar. 23, 1905, not barred by five year statute. McGill v. Hughes [Ark.] 105 SW 255.

35. Griesel v. Jones, 123 Mo. App. 45, 99 SW 769. Ward came of age in 1883, died in 1885, before accounting by guardian. Guardian died in 1905. Administrator for ward appointed in 1906 and suit brought. Held not barred. Stevenson v. Markley [N. J. Eq.] 66 A 185.

36. Judgment Mar. 30, 1892. Death of debtor 1894. Sci. fa. Nov. 8, 1905. Barred by twelve year statute. Brooks v. Preston [Md.] 68 A 294.

37. Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984. Cause of action accrued Dec. 30, 1878, at which time infant 18 years of age. Action begun Feb. 21, 1899. Held brought within the twenty years allowed after disability removed. Muller v. Manhattan R. Co., 53 Misc. 133, 102 NYS 454.

38. Cobb v. Wrightsville & T. R Co. [Ga.] 58 SE 862.

39. Cause of action arose while plaintiff was an infant. Action after infant became of age. Action barred by the statute in force when it accrued. Glover v. Floyd, 76 S. C. 292, 57 SE 25.

40. Action to quiet title. Lyons v. Carr [Neb.] 110 NW 705.

41. Action by next friend. Additional counts before period of limitation expired. Libby, McNeil & Libby v. Kearney, 124 Ill. App. 339.

42. Beale's Heirs v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 917, 99 SW 1045; Veeder v. Gilmer [Tex. Civ. App.] 19 Tex. Ct. Rep. 957, 105 SW 331.

43. Action for land accrued in 1887 while plaintiff, an infant 17 years of age, married while infant, husband dying in 1897. Suit brought in 1904 barred by Ky. St. 1903, § 2505. Dukes v. Davis, 30 Ky. L. R. 1348, 101 SW 390; Hinkle v. Lovelace, 204 Mo. 208, 102 SW 1015.

44. Priddy v. Boice, 201 Mo. 309, 99 SW 1055.

45. State v. Allen, 124 Mo. App. 465, 103 SW 1090.

46. The statute of 1869 provided that all causes of action accruing before June 1, 1865, should be sued before Jan. 1, 1870. Note due in 1863 not sued on was barred Jan. 1, 1870, notwithstanding defendant's absence from state. Weaver v. Davis [Ga. App.] 58 SE 786.

47. Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 SE 518.

48. Boyer v. Price [Wash.] 88 P 1106.

49. Injury 1902, and removal of defendant from state. Action 1904. Held barred by the one year period. Lewis v. Pawnee Bill's Wild West Co. [Del.] 66 A 471.

50. Stewart v. Stewart [Cal.] 92 P 87.

(§ 6) *F. A new promise to pay or acknowledgment of the obligation.*[See 8 C. L. 780]—The acknowledgment, to take the case out of the statute, is only a matter of evidence,[51] and a recognition of the debt and an admission that the party is the debtor is all that is necessary,[52] but to have this effect it must be express,[53] or, if there be no express promise, there must be a deliberate, voluntary act of the debtor or his agent evidencing an intention on his part to acknowledge the existence of the debt.[54] It must be clear and direct with reference to the indebtedness admitted;[55] it must be an unqualified,[56] unconditional promise,[57] or admission of an existing debt from which the law will imply a promise.[58] In some jurisdictions the acknowledgment may be made orally,[59] but the rule that a subsequent promise removes the bar of the statute does not apply to actions ex delicto,[60] nor to a judgment debt.[61] For an acknowledgment to have the force of a new promise, it must be made to one in privity of contract,[62] to the creditor, or some one acting for him,[63] by an agent acting under a power of attorney,[64] the payee, who has transferred the note,[65] or, a husband may extend the time without the wife's consent,[66] but the approval of an account by one not having authority to direct its payment will be ineffective.[67] It has been held that a city warrant,[68] confession of judgment,[69] and balances of account, stated each year and carried forward as a part of the next year's account, with the knowledge and consent of the parties, were new promises.[70] A clear acknowledgment of the debt in a letter by the debtor,[71] recognizing the continuance of the obligation, is sufficient.[72] The debt is sufficiently acknowledged in an instrument reciting that the note is thereby renewed,[73] by recitals in a deed [74] or mortgage that the prop-

51. Willis v. Wileman, 53 Misc. 462, 102 NYS 1004.

52. A letter stating that debtor was anxious and willing to pay when in his power, that he had nothing then he could call his own, that debtor had been a good friend to him and he was willing to show his appreciation, that though the debt was outlawed, an honest debt was never out of date, is a sufficient acknowledgment. Willis v. Wileman, 53 Misc. 462, 102 NYS 1004.

53. In a letter to creditor the sentences, "I have a chance to sell 26 2-3 acres of land you have the mortgage on. I would like to know, if I pay you $500, if you will release the mortgage on the 26 3-4 acres," insufficient. Rogers v. Robson, 147 Mich. 656, 14 Det. Leg. N. 61, 111 NW 193.

54. Brooklyn Bk. v. Barnaby, 107 NYS. 584.

55. Where three notes for same amount had been made on same day, securing same debt, one of which had been assigned, an acknowledgement of the first does not affect the statute as to the second note. Finn v. Seegmiller, 134 Iowa, 15, 111 NW 314.

56. Reed v. Interstate Oil Co. [Colo.] 92 P 911.

57. The statement, "I will pay it (the note) as soon as I can," or, "as soon as I am able," held conditional. Barker v. Heath [N. H.] 67 A 222.

58. Visher v. Wilbur [Cal. App.] 91 P 412. The written statement that, "'if the estate has any valid claim against me I will pay it, if I ever get money to do so," is insufficient. Visher v. Wilbur [Cal. App.] 90 P 1065.

59. Reed v. Interstate Oil Co. [Colo.] 92 P 911.

60. Action of assumpsit to recover money obtained by fraud. Basis of action, tort, barred in two years. Nelson v. Petterson, 229 Ill. 240, 82 NE 229.

61. Action to revive judgment by sci. fa. Brooks v. Preston [Md.] 68 A 294.

62. Letters written by an alleged debtor of an estate to one who had no interest therein except as heir to whatever estate deceased left, and who was not an agent of deceased, but who, after letters written, became administrator, are insufficient. Visher v. Wilbur [Cal. App.] 90 P 1065.

63. In a deed of the mortgaged property by the mortgagor to a third party, a recital that it is "subject to a mortgage of $225 made to the Farmers' Trust Co.," is insufficient. Wallber v. Caldwell [Neb.] 112 NW 584.

64, 65. Moore v. Gould [Cal.] 91 P 616.

66. Mortgage of homestead by husband and wife. Subsequent agreement by husband and mortgagee alone. Omlie v. O'Toole [N. D.] 112 NW 677.

67. Sheahan v. Chicago, 226 Ill. 115, 80 NE 754.

68. Abrahams v. Omaha [Neb.] 114 NW 161.

69. Judgment confessed before the bar of the statute. Gilman v. Heitman [Iowa] 113 NW 932.

70. Brown & Manzanares Co. v. Guise [N. M.] 91 P 716.

71. Debtor wrote to creditor: "In conveying this property to you, it is my purpose to effect the payment of some $6,000 due you." After sale "any balance remaining due you I agree to pay." Held sufficient. Robertson v. Warren [Tex. Civ. App.] 18 Tex. Ct. Rep. 621, 100 SW 805.

72. In action for partnership accounting, letters of defendant that plaintiff was entitled to an accounting held sufficient. Doncourt v. Denton, 105 NYS 906.

73. Instrument, made by attorney in fact of the debtor, designating the mortgage and

erty is subject to a deed of trust,[75] or prior mortgage between the same parties,[76] or that mortgagor promises to pay certain notes.[77] A new note and mortgage given to a party who pays the old debt,[78] or a note to a creditor by account, is sufficient,[79] the giving of a new note by the corporation does not operate to extend the time on a stockholder's liability,[80] and this rule is not affected by payment by a surety, accommodation maker, or indorser,[81] nor will an itemized claim for expenditures, filed against an estate, be considered an acknowledgment of indebtedness to the estate.[82]

(§ 6) *G. A partial payment.*See 8 C. L. 787—Payment suspends the statute,[83] if an actual payment,[84] and it must be shown to have been made at the time it purports to have been,[85] by the debtor in person or for him by his authority, or for him and in his name without authority, and subsequently ratified by him,[86] but this rule does not apply where the proceeding is in rem to enforce a mortgage.[87] A payment that will suspend the statute must have been intended by the debtor as a payment upon that particular debt,[88] hence, a payment made with the intent to thereby discharge the whole debt will not interrupt the running of the statute,[89] nor will unauthorized credits on account,[90] nor can the creditor apply an undirected payment so as to suspend the bar of the statute,[91] nor will an application of proceeds of deed of trust sale [92] by the trustee and to the payment of the note, even though directed to do so in the deed, revive the debt,[93] but an application by creditors of proceeds of collateral to payment of note will do so.[94] Payment of interest will suspend the statute,[95] and where interest payments are made on a note, the statute begins to run from

note and reciting that they are renewed and extended, sufficient. Moore v. Gould [Cal.] 91 P 616.

74. Deed, in which recited that grantor had theretofore executed a lien upon the property conveyed to secure an indebtedness, that such indebtedness was largely unpaid, that grantor had agreed to convey creditor's property "hereby conveyed" and that "this shall in nowise affect the lien," which "shall remain unimpaired as security," held sufficient. Stewart v. Forman [Miss.] 43 S 67.

75. Purchase, subject to deed of trust, mortgage of the premise subject to same encumbrance, and subsequent sale, and not mentioning deed of trust. Held, on proceeding to enforce deed, that last grantee took with notice of his grantor's recitals in mortgage. Medina v. Phelps [Colo.] 88 P 848.

76. David v. Fauble, 9 Ohio C. C. (N. S.) 263.

77. Moore v. Gould [Cal.] 91 P. 616.

78. Note and mortgage executed to bank and debt paid off by third person, at request of debtor, to whom executed new note and mortgage. Davies v. Pugh [Ark.] 99 SW 78.

79. United States v. Axman, 152 F 816.

80. Action to enforce stockholder's liability for proportion of debt of corporation. O'Neill v. Quarnstrom [Cal. App.] 92 P 391.

81. O'Neill v. Quarnstrom [Cal. App.] 92 P 391.

82. Visher v. Wilbur [Cal. App.] 90 P 1065; Id. [Cal. App.] 91 P 412.

83. Action for money had and received and payment on account within statutory period held to repel the bar. Purdy v. Deprez [Colo.] 88 P 972.

84. Endorsement on note of a certain sum as part payment, when, in fact, there had been no payment or other consideration for the indorsement, is insufficient. Rogers v. Robson, 147 Mich. 656, 14 Let. Leg. N 61, 111 NW 193.

85. Crow v. Crow, 124 Mo. App. 120, 100 SW 1123.

86. Woodcock v. Putnam, 101 Minn. 1, 111 NW 639.

87. Payment by parties having equity of redemption. McLaughlin v. Senne [Neb.] 111 NW 377.

88. Gilman v. Cochran [Or.] 90 P 1001.

89. Cashmar-King Supply Co. v. Dowd [N. C.] 59 SE 685.

90. Collections from debtor and applied, without authority, by creditor on account of debtor, held not to make the account mutual. Cashmar-King Co. v. Dowd [N. C.] 59 SE 685.

91. Creditor owned two notes of debtor, who made undirected payment. One note being barred, creditors applied payment to it. Held such application did not suspend statute. McBride v. Noble [Colo.] 90 P 1037; Gilman v. Cochran [Or.] 90 P. 1001.

92. Note and deed of trust, judgment of foreclosure and application of process of sale to payment of note by order of court. Held not voluntary payment by debtor. Union Stock Yards Nat. Bk. v. Maika [Wyo.] 92 P 619.

93. Note and deed of trust to secure same, executed in 1887, sale under deed, Dec., 1902, and application of proceeds to part payment of note, which was due Oct. 1, 1892. Dec., 1902, action on note for balance. Held application of payment by trustee not voluntary payment by maker and action barred. Holmquist v. Gilbert [Colo.] 92 P 232.

94. Note given and stock assigned as collateral. Dividends collected by payee and applied as payments on note. Held voluntary payments. Bosler v. McShane [Neb.] 113 NW 998.

95. Courtner v. Etheredge [Ala.] 43 S 368; Hughes v. Thomas, 131 Wis. 315, 111 NW 474.

the last credit.[96] Payment or other act which suspends the statute as to the debt will suspend it as to the security,[97] but will not affect it after it has been barred.[98] Payment by either of two joint obligors,[99] with the knowledge, consent, and ratification of the other, arrests the running of the statute as to both,[1] and payment made by an agent will do so,[2] but payment by a joint promisor in a mortgage will not.[3]

§ 7. *Operation and effect of bar. A. Bar of debt as affecting security.* See 8 C. L. 788—The general rule is, the bar of the debt does not affect the security,[4] but, by statute in some states, it is provided that when the debt is barred the security is also barred,[5] in the absence of some valid acknowledgment suspending the statute,[6] yet a pledge may maintain action on the pledge though the principal obligation be barred.[7]

(§ 7) *B. Against whom available.* See 8 C. L. 780—The statute is available against all parties in privity.[8] It is available against a cestui que trust, though she be a married woman,[9] against cotrustees,[10] and it operates against a railroad company concerning its right of way;[11] but it does not run against a vendee in possession,[12] nor against the state to defeat a forfeiture of nonentry for taxation and nonpayment of taxes or the transfer of the subject forfeited.[13]

(§ 7) *C. To whom available.* See 8 C. L. 789—The statute of limitations is only available to the parties to whose use it inures or their privies,[14] and though the privilege be personal, the rule is not to be limited to a narrow and literal construction,[15] hence, the real party in interest may interpose it.[16] It is available to a party out of possession,[17] to a mortgagor or his grantee against the holder of the mortgage in an action to quiet title,[18] and where a mortgage is barred, its exception from the covenants of a warranty deed does not estop the grantee from pleading the statute.[19]

96. Action to foreclose mortgages securing notes on which interest payments were made annually. Gillilan v. Fletcher [Neb.] 114 NW 161.

97. Omlie v. O'Toole [N. D.] 112 NW 677.

98. Action on note, credits entered after action barred. Manders v. Irwin, 118 La. 1048, 43 S 698.

99. Scott v. Christenson [Or.] 89 P 376. Payment made by one joint debtor at request and in presence of the other. In re Hallenbeck, 104 NYS 568.

1. Joint note and payments by one joint debtor. Claim allowed, although more than ten years had elapsed since maturity. Adams v. Douglas, 128 Ill. App. 319.

2. Payment made by agent, cashier, under express authority contained in collateral note. Brooklyn Bk. v. Barnaby, 107 NYS 584.

3. Clinton v. Clinton's Estate, 148 Mich. 496, 111 NW 1087.

4. Sturdivant v. McCorley [Ark.] 103 SW 732. Action to foreclose mortgage securing notes barred by statute. Gross v. Watts, 206 Mo. 373, 104 SW 30. Note secured by deed of trust, debt may be realized by foreclosure. Foot v. Burr [Cal.] 92 P 236; Brereton v. Benedict [Colo.] 92 P 238. Action to enforce deed of trust securing note barred by statute. Emmons v. Hawk [W. Va.] 59 SE 519.

5. Puckhaber v. Henry [Cal.] 93 P 114.

6. Action to enforce deed of trust securing barred note upheld, it appearing from the facts that a suspension of the statute was intended by the grantee of the debtor, he having acknowledged the validity of the deed, of which his vendee, who set up the statute, had notice. Medina v. Phelps [Colo.] 88 P 848.

7. Action to enforce policy of insurance by pledgee. Puckhaber v. Henry [Cal.] 93 P 114.

8. Action by parties subrogated to the rights of parties against whom the statute had run. American Nat. Bk. v. Fidelity & Deposit Co. [Ga.] 58 SE 867.

9. The statute, having run against the trustee, bars the cestui also. Pope v. Patterson [S. C.] 58 SE 945.

10. Under statute, trustees hold as joint tenants, hence, where one trustee is barred his co-trustee is also. Webb v. Borden [N. C.] 58 SE 1083.

11. Action of ejectment by railroad company to recover right of way. Louisville, etc., R. Co. v. Smith, 31 Ky. L. R. 1, 101 SW 317.

12. Action to obtain conveyance of realty. Howard v. Creech, 31 Ky. L. R. 201, 101 SW 974.

13. Lewis v. Yates [W. Va.] 59 SE 1073.

14. Funk v. Kempton, 123 Ill. App. 100.

15. Pendley v. Powers [Ga.] 58 SE 653.

16. City of Moberly v. Hassett [Mo. App.] 106 SW 115.

17. Action to enforce lien and reform contract. Lien given by husband in possession of the land. Plea set up by wife coming into the cause by petition, and claiming land. Stark v. Zehnder, 204 Mo. 442, 102 SW 992.

18. Action to quiet title, and affirmative allegations in answer, asserting valid title and lien upon property superior to plaintiff's. Foot v. Burr [Colo.] 92 P 236.

19. Mortgage assigned before maturity. After right to foreclose barred, mortgagee conveyed property with exception of mortgage. Held purchaser not bound by exceptions. Boyer v. Price [Wash.] 88 P 1106.

But the statute is not available to a mortgagor seeking to quiet title against the mortgagee,[20] and an action to foreclose mortgage, the defendant, claiming under a tax deed, cannot set up the statute against such action.[21] The plea is not available to a party guilty of such conduct as makes it inequitable for him to take advantage of it,[22] nor can a nonresident invoke the benefit of it,[23] nor a party in whose behalf an action is instituted;[24] and where partnership transactions cover a long term of years, and the matters in dispute yet undetermined, neither party should have the benefit of it.[25]

§ 8. *Pleading and evidence.*See 8 C. L. 789—The statute of limitations being an affirmative defense, plaintiff need not show in his complaint that his action is not barred;[26] but where fraud is the basis of the action and a longer time has elapsed than the law permits within which to bring action, the complaint must allege that the fraud was not discovered within that time.[27] A defective complaint may, however, be cured by general verdict.[28] When the statute is interposed, a new promise may be set up by amendment to the petition,[29] or plaintiff may assert by replication facts avoiding the bar pleaded;[30] but a replication which seeks to prevent the operation of the statute must be clear and positive in its statements.[31] In North Carolina, a written reply to the plea need not be put in, but is always deemed to have been made as upon a direct denial or avoidance, as the nature of the case may require.[32] The statute cannot be set up by demurrer,[33] or motion to dismiss,[34] unless it is apparent from the petition that the action is barred;[35] but in some jurisdictions the statute cannot be set up by demurrer, though it appear from averments of the petition that the action is barred.[36] In Wisconsin, however, the defense may be set up by demurrer,[37] and a demurrer is proper where an estate is sought to be declared insolvent,[38] but in jurisdictions where the statute may be interposed by demurrer in actions on contract, it cannot be so set up in actions to enforce deeds of trust.[39] It being an affirmative defense,[40] in the nature of a special privilege,[41] must be pleaded [42] specially, even in actions to recover a penalty.[43] The plea, however, must be based on an available statute,[44] and after the case is closed and no evidence offered to sustain it, an amendment setting it up will be disallowed.[45] It does not

20. Action by mortgagor against mortgagee to quiet title, on the naked ground that the right of mortgagee to foreclose was barred. Gibson v. Johnson, 73 Kan. 261, 84 P 982.

21. Bare v. Ford, 74 Kan. 593, 87 P 731.

22. Tomlinson v. Bennett [N. C.] 59 SE 37.

23. Action to recover land, party setting up statute a nonresident, but paid taxes and had tenant on land. Beal's Heirs v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 917, 99 SW 1045.

24. Michigan Trust Co. v. Frymark [Neb.] 107 NW 760.

25. Hanson v. Hanson [Neb.] 111 NW 368.

26. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196; Willis v. Wileman, 53 Misc. 462, 102 NYS 1004; Church v. Stevens, 107 NYS 310.

27. Smith v. Linder, 77 S. C. 535, 58 SE 610.

28. Complaint on note alleged that "defendant had not paid the note or any part thereof, except $2, paid on account thereof, on the 2nd Jan., 1899," which was within the statute. No demurrer. Held cured by general verdict. Scott v. Christenson [Or.] 89 P 376.

29. Pendley v. Powers [Ga.] 58 SE 653.

30. Tuttle v. Tuttle [N. C.] 59 SE 1008.

31. Patterson v. Safe Deposit & Trust Co. [C. C. A.] 148 F 787.

32. Oldham v. Rieger [N. C.] 58 SE 1091.

33. Punta Gorda Bk. v. State Bk., 52 Fla. 399, 42 S 846; Green County v. Howard [Ky.] 105 SW 897.

34. Oldham v. Rieger [N. C.] 58 SE 1091.

35. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196; Thornton v. Jackson [Ga.] 59 SE 905; Itasca County Com'rs v. Miller [Minn.] 112 NW 276; Betz v. Wilson, 17 Okl. 383, 87 P 844; Union Stock Yards Nat. Bk. v. Maika [Wyo.] 92 P 619.

36. Yager's Adm'r v. Bank of Kentucky, 30 Ky. L. R. 1287, 100 SW 848.

37. Action of quo warranto. State v. Norcross [Wis.] 112 NW 40.

38. O'Daniel v. Gaynor [Ala.] 43 S 205.

39. Emmons v. Hawk [W. Va.] 59 SE 519.

40. Church v. Stevens, 107 NYS 310.

41. Connell v. Clifford [Colo.] 88 P 850.

42. Tutwiler Coal, Coke & Iron Co. v. Wheeler [Ala.] 43 S 15; Gray v. Grand Trunk W. R. Co. [C. C. A.] 156 F 736; Doherty v. Lynett, 155 F 681.

43. Western Union Tel. Co. v. State [Ark.] 101 SW 748.

44. In action of trespass to try title, it was held that the five year statute could not be pleaded because there was no recorded deed. Hammond v. Hammond [Tex. Civ. App.] 15 Tex. Ct. Rep. 835, 94 SW 1067.

45. Hinkle v. Smith, 127 Ga. 437, 56 SE 464.

admit allegations made to take the case out of the statute.[46] The plea may be set up by answer,[47] especially in jurisdictions where the replication has been abolished.[48] But as the plea does not go to the merits, and though it must be received with strictness, it need not be set out in the words of the statute, a statement of such facts as may be necessary to form the defense being all that is required,[49] nor is the same strictness of pleading required in equity as at law.[50] Therefore, anything in an answer which will apprise plaintiff that defendant relies on the statute is sufficient, if such facts are stated as are necessary to show the statute is applicable.[51] An answer merely stating that the suit is barred because not commenced in time,[52] or which distinctly alleges that the action is barred by provisions of a specified section of the code,[53] or which alleges facts that constitute a bar and indicate with reasonable certainty that it is relied on, is sufficient.[54] A defendant in order to take advantage of the statute need not deny the complaint, but may admit all its allegations, and plead the cause of action did not accrue within the statutory period,[55] and the fact that the pleader set up two periods of limitation will not preclude him from the defense of the longer one if it applies to the facts of the case.[56] Where one statute is pleaded another cannot be relied on.[57]

Whether an action is barred is matter of proof, and the pleading alone will not furnish grounds for dismissal.[58] Any competent evidence is admissible which will show or tend to show that the debt is barred.[59] Evidence to prove payment though not positive is admissible,[60] and an indorsement of payment made on the note by the payee is also admissible, he having testified that such payment was made by an obligor,[61] but the note, with the indorsements thereon, standing alone, are not.[62] Parol evidence is competent to establish a new promise,[63] and if the record fails to show the fact, such evidence is admissible to prove the new action is identical with that in which the plantiff was formerly nonsuited.[64] The burden of establishing the defense is on the party setting it up,[65] unless proof is shown by the adverse party.[66] If the complaint shows the bar of the statute, and the answer sets it up, the burden is on plaintiff to show that it has been suspended,[67] and where the note sued on is apparently barred to effect a recovery, facts must be proved that will take it out of the operation of the statute.[68] When a credit on a note is denied by the payor, the burden is on the holder to prove it.[69] The burden is upon defendant to show knowledge

46. Manders v. Irwin, 118 La. 1048, 43 S 698.

47. Itasca County Com'rs v. Miller [Minn.] 112 NW 276; Willis v. Wileman, 53 Misc. 462, 102 NYS 1004; Moore v. Persson [S. D.] 111 NW 633.

48. Pendley v. Powers [Ga.] 58 SE 653.

49. Brooks v. Preston [Md.] 68 A 294.

50. Huntington Nat. Bk. v. Huntington Distilling Co., 152 F 240.

51. An answer pleading that if there be or was any such a claim it is barred and cannot be collected is sufficient. Huntington Nat. Bk. v. Huntington Distilling Co., 152 F 240.

52. Holland v. Grote, 107 NYS 667.

53. Marshutz v. Seltzor [Cal. App.] 89 P 877.

54. An allegation that "more than 10 years have elapsed between the entering of said judgment and the commencement of this action" is sufficient. J. C. Lewis Co. v. Adamski, 131 Wis. 311, 111 NW 495.

55. Action on note. First affirmative defense after admitting execution of note and its nonpayment, set up damages. Second affirmative defense set up the statute of limitations. Gilman v. Cochran [Or.] 90 P 1001.

56. The third paragraph of the answer set up the six, and the fourth paragraph set up the ten-year period. J. C. Lewis Co. v. Adamski, 131 Wis. 311, 111 NW 495.

57. Connell v. Clifford [Colo.] 88 P 850.

58. Church v. Stevens, 107 NYS 310.

59. Visher v. Wilbur [Cal. App.] 91 P 412.

60. In action on joint obligation of M. and N., plaintiff testified that M. or N., but he thought N., had made the payment. Held competent. Scott v. Christenson [Or.] 89 P 376.

61. Scott v. Christenson [Or.] 89 P 376.

62, 63. Sartor v. Wells [Colo.] 89 P 797.

64. Wiehe v. Atkins, 126 Ill. App. 1.

65. Schell v. Weaver, 225 Ill. 159, 80 NE 95, afg. 128 Ill. App. 106; Moffett v. Farwell, Jr., 123 Ill. App. 528.

66. Schell v. Weaver, 128 Ill. App. 106; McAllen v. Alonzo [Tex. Civ. App.] 19 Tex. Ct. Rep. 443, 102 SW 475.

67. Church v. Stevens, 107 NYS 310.

68. Hall v. Jennings [Tex. Civ. App.] 19 Tex. Ct. Rep. 602, 104 SW 489.

69. Owsley v. Boles' Adm'r, 30 Ky. L. R. 1016, 99 SW 1157.

of the fraud in plaintiff, or that he knew of such facts, which, if pursued with reasonable diligence, would have led to such knowledge.[70] Where the evidence of the new promise is conflicting, the question of its sufficiency is with the trial court.[71]

LIMITED PARTNERSHIP; LIQUIDATED DAMAGES, see latest topical index.

LIS PENDENS.

General Rule, 654.
Statutory Lis Pendens, 655.
Property Within the Rule, 656.
Continuity of Lis Pendens, 656.

General rule.[See 8 C. L. 791]—Except in proceedings in rem, a suit is not pending until the court has acquired jurisdiction of both person and subject-matter.[72] A purchaser of property after commencement[73] of, and pending, litigation in which it is involved, takes subject to the event of the action,[74] and is as fully bound thereby as the parties thereto.[75] The rule is applicable to a sale at foreclosure of a pre-existing mortgage when the mortgage creditor was party to the suit,[76] but a purchaser at mortgage foreclosure is not affected by a judgment in an ejectment suit commenced after institution of the foreclosure proceedings,[77] and assignees of a mortgage executed before suit was commenced will be protected though the transfers were made pending the suit.[78] The doctrine cannot be invoked to sustain a judgment resulting from mistake,[79] nor does it apply to independent titles not derived from parties to the action of their privies,[80] but all persons entering upon land after commencement of an action to recover it are presumed to have entered under defendant therein.[81] Third persons cannot be charged with notice of a new and independent cause of action set up by supplemental pleadings after they purchased,[82] but failure of the clerk of court to properly index amended declarations in ejectment covering additional property does not excuse failure of a searcher to examine the files.[83] Common-law lis pendens applies only to actions in rem,[84] and a suit against nonresidents by sub-

70. Action to set aside deed for fraud. Smith v. Linder, 77 S. C. 535, 58 SE 610.

71. Sartor v. Wells [Colo.] 89 P 797.

72. Suit for wrongful death brought by widow under state statute held distinct, for purposes of limitations, from suit by her as administratrix under Federal statute. Hall v. Louisville & N. R. Co., 157 F 464.

73. Suit begun by constructive service is commenced when proceedings for publication, under Kirby's Dig. §§ 6055, 6056, are complied with, so that purchaser after warning order for publication has issued but before publication is complete is a pendente lite purchaser. Boynton v. Chicago Mill & Lumber Co. [Ark.] 105 SW 77.

74. Kennedy v. Afdal, 229 Ill. 295, 82 NE 291. Purchasers pending suit to establish liens on land. Neff v. Elder [Ark.] 105 SW 260; Hall v. Manns, 30 Ky. L. R. 1121, 100 SW 222. Purchaser pending suit questioning validity of a deed. Scharff v. McGaugh, 205 Mo. 344, 103 SW 550. Purchaser from defendant in suit to quiet title to water rights in which court had acquired jurisdiction of person and subject-matter. Rickey Land & Cattle Co. v. Miller [C. C. A.] 152 F 11. Decree in partnership accounting adjudging that one partner had no interest in realty held binding on another partner having notice of pendency of action, so that he took nothing by conveyance from first named partner. Simmons v. Rowe [Cal. App.] 89 P 621. Railroad company purchasing property and rights of another company pending appeal in suit by latter to condemn land for right of way, and proceeding to use the land condemned, held bound by judgment on appeal increasing award, and personally liable though not party to appeal. Missouri, etc., R. Co. v. Murphy, 75 Kan. 707, 90 P 290. One who purchases a widow's interest in lands subsequent to a decree of sale free from her interest to which she has consented acquires no rights affecting the power of the court to order a conveyance pursuant to the decree. Kennedy v. Afdal, 229 Ill. 295, 82 NE 291.

75. Boynton v. Chicago Mill & Lumber Co. [Ark.] 105 SW 77.

76. Scovel v. Levy's Heirs, 118 La. 982, 43 S 642.

77. Bannard v. Duncan [Neb.] 112 NW 353.

78. Neff v. Elder [Ark.] 105 SW 260.

79. Pendente lite assignee of mortgage not bound by judgment decreeing sale of land to satisfy another judgment where such decree was made through mistaken belief of mortgagee's counsel that mortgage had been paid by mortgagor. Shive v. Merritt, 31 Ky. L. R. 978, 104 SW 368.

80. Harrod v. Burke [Kan.] 92 P 1128.

81. Presumed that sheriff under writ of possession removed one in privity with a party. Harrod v. Burke [Kan.] 92 P 1128.

82. Hulen v. Chilcoat [Neb.] 113 NW 122.

83. Armstrong v. Ashley, 204 U. S. 272, 51 Law. Ed. 482.

84. Not where defendant conveyed his

stituted process can be invoked as lis pendens only by parties whose property has been seized.[85] Pendency of a suit to establish a will devising lands forming part of an estate administered as intestate does not affect one who buys from the heirs without knowledge of the suit.[86]

Statutory lis pendens.[See 8 C. L. 702]—The object of a lis pendens notice is to warn persons and put them on their guard in their dealings regarding the subject-matter of a pending action,[87] hence, such notice is not necessary in proceedings which in themselves attain the same object.[88] Statutes generally authorize the filing of lis pendens in suits affecting the title to real estate,[89] and unless the statutory notice is filed, innocent purchasers will be protected.[90] A statute binding the holders of unrecorded conveyances executed prior to filing of notice of lis pendens is valid [91] and will be enforced,[92] but lis pendens will not cut off or affect the rights of one whose interest in the property was known when notice was filed.[93] In Kentucky the filing if a lis pendens notice is essential to the creation of a lien by execution good as against subsequent purchasers.[94] In New York summons must be served within sixty days after filing of the notice of lis pendens,[95] and plaintiff is not entitled to file successive notices so as to have the benefit of notice indefinitely without service of summons.[96] Notice of lis pendens in a creditors' suit is inoperative to impound property for the payment of debts which have not yet become liens either general or

premises before judgment requiring him to remove obstructions projecting from buildings into street. Ackerman v. True, 105 NYS 12.

85. W. K. Henderson Iron Works & Supply Co. v. Howard, 119 La. 555, 44 S 296.

86. Catholic University of America v. Boyd, 227 Ill. 281, 81 NE 863.

87. First Nat. Bk. v. Farmers' & Merchants' Nat. Bk. [Ind. App.] 82 NE 1013.

88. Under Burns' Ann. St. 1901, §§ 327, 328, 333, 934, issuance of attachment to sheriff of county in which suit is pending is constructive notice thereof and a subsequent mortgagee takes subject to attachment lien. First Nat. Bk. v. Farmers' & Merchants' Nat. Bk. [Ind. App.] 82 NE 1013.

89. A statute authorizing filing of notice in such actions applies to proceedings to condemn land for a railroad right of way. Ballinger's Ann. Codes & St. § 4887. Portland, etc., R. Co. v. Ladd [Wash.] 91 P 573. Section 5637, relating to eminent domain, does not require service of notice on incumbrances and purchasers after commencement of proceedings. Id. Where one conveyed his land pending an action by him for damages due to erection of an elevated railroad in front of his premises, purchaser agreeing to allow vendor to recover the damages and binding himself to release to railroad company his right to compensation on settlement of suit, an action by vendor, after settlement, to compel vendee to execute the release as agreed was within Code Civ. Proc. § 1670, providing for filing of notice of lis pendens in actions to recover a judgment affecting title to real estate. Schomacker v. Michaels, 189 N. Y. 61, 81 NE 555, rvg. 117 App. Div. 125, 102 NYS 334. One may not by lis pendens tie up property which he refuses to accept in a suit to recover a deposit and other expenses wherein he does not show inadequacy of legal remedy Krainin v. Coffey, 53 Misc. 6, 103 NYS 976. Plaintiff not entitled to any equitable lien. Krainin v. Coffey, 119 App. Div. 516, 104 NYS 174. Complaint in suit for commissions for purchase of realty held to show only a claim against a decedent's estate and not a lien on the land. Behrens v. Sturges, 121 App. Div. 746, 106 NYS 501. A lis pendens in a suit for enforcement of tenement house act brought against one not the owner of the premises and without filing of complaint is not an incumbrance justifying refusal to accept title from owner. Woodenbury v. Spier, 122 App. Div. 396, 106 NYS 817.

90. Failure to file suit to establish lien for purchase price appearing of record to have been paid. Begley v. Combs [Ky.] 106 SW 246.

91. Amendment to Code Civ. Proc. § 85, made in 1887. Munger v. Beard [Neb.] 113 NW 214. Statute did not intend to make such persons parties. Id. Sheasley v. Keens, 48 Neb. 57, 66 NW 1010 disapproved and overruled in part. Id.

92. One who withholds conveyance of realty from record until after commencement of action against grantor to quiet title by person ignorant of existence of deed is purchaser pendente lite and bound by judgment. Caldwell v. Bigger [Kan.] 90 P 1095. Defendant whose contract to purchase land had not been delivered before commencement of action against his vendor and filing of lis pendens held a purchaser pendente lite within St. 1898, § 3187, providing that purchasers and incumbrancers whose papers are not recorded or filed shall be deemed subsequent purchasers and incumbrancers and bound by the proceedings in the action. Siedschlag v. Griffin [Wis.] 112 NW 18.

93. Munger v. Beard [Neb.] 113 NW 214.

94. Ky. St. 1903, § 2358a. Tippenhauer's Ex'x v. Newport Rolling Mill Co. [Ky.] 105 SW 440.

95. On faillure to serve within such time notice may be canceled. Lipschutz v. Horton, 104 NYS 850.

96. Cancellation of original notice determined rights of parties. Lipschutz v. Horton, 104 NYS 850.

specific.[97] A suit to enforce a judgment against real property in Porto Rico on the ground that the debtor is owner, though title appears of record in another, is within the scope of the local mortgage law requiring the giving of cautionary notice,[98] and such law is applicable in suits in equity as well as in actions at law.[99]

Property within the rule. See 8 C. L. 793

Continuity of lis pendens. See 8 C. L. 793—A notice will not be canceled on motion on the mere ground that the suit cannot be successfully maintained, especially where plaintiff's contention is plausible.[1] Unreasonable delay in proceeding with the action is ground for cancellation,[2] the question of what constitutes unreasonable delay often depending upon the circumstances of each case.[3] An improper discharge of record of a lis pendens and lien before taking a bond, as required by order of court, is remediable by motion to restore and not by appeal.[4]

Literary Property; Livery Stable Keepers; Live Stock Insurance; Lloyd's; Loan and Trust Companies; Loans; Local Improvements and Assessments; Local Option; Logs and Logging; Lost Instruments; Lost Property, see latest topical index.

LOTTERIES.

What constitutes. See 8 C. L. 795—A lottery is a scheme for the distribution of property by chance among persons who have paid or agreed to pay a valuable consideration for the chance.[5]

Recovery back of losses. See 8 C. L. 795—An agent active in procuring a person to enter a lottery may be held personally liable with his principal for the return of the money paid.[6]

Offenses and prosecution. See 8 C. L. 795

MAIMING; MAYHEM.[7]

At common law the offense consisted in depriving a man of a member affecting his ability in physical combat,[7a] but statutes in most states have extended the offense so as to include disfigurement of the person.[8] Under such statutes the disfigurement must be visible to a casual observer as distinguished from a wounding which merely mars the member,[9] but the question as to whether the injury is of the necessary char-

97. That plaintiff's original petition alleged the existence of an unmatured note did not affect one who bought before setting up of cause of action thereon by supplemental bill. Hulen v. Chilcoat [Neb.] 113 NW 122.

98. Mortgage Law, art. 42. Romeu v. Todd, 206 U. S. 358, 51 Law. Ed. 1093.

99. Person dealing with record owner protected in absence of such notice. Romeu v. Todd, 206 U. S. 358, 51 Law. Ed. 1093.

1. Suit by vendor to protect rights to damages for operation of railroad, as per agreement with vendee, suit for which damages he had commenced before conveyance. Schomacker v. Michaels, 189 N. Y. 61, 81 NE 555.

2. Service of summons on other defendants in suit for specific performance held no bar to appellant's right to have notice canceled where she was not served in time and service on her after making of affidavit for her motion to cancel the lis pendens, and before notice of motion was served, held not to authorize denial of motion as matter of discretion. Steinmetz v. Kindred, 105 NYS 676.

3. Delay of five years in prosecuting claim of city for taxes held not to dissolve lis pendens. Seibert v. Louisville, 30 Ky. L. R. 1317, 101 SW 325.

4. Danella v. Paradise, 52 Misc. 662, 102 NYS 807.

5. "Guessing contest" as to total popular vote for president of United States at subsequent election, reward to be paid two persons coming nearest to same in consideration of subscription to certain publication, held a lottery. Waite v. Press Pub. Ass'n [C. C. A.] 155 F 58. Contract providing for return of sum of 50 per cent of amount invested, in addition to such amount, defending upon the writing up of new contracts and the lapse of old ones and consequent forfeiture of money paid thereon, held a lottery. Fidelity Funding Co. v. Vaughn, 18 Okl. 13, 90 P 34.

6. Fidelity Funding Co. v. Vaughn, 18 Okl. 13, 90 P 34.

7. See 8 C. L. 796.

7a. See **Clark and Marshall on Crimes, p. 297.**

8. Under Code 1896, § 5095, one maliciously depriving another of an ear is guilty of mayhem. Green v. State [Ala.] 44 S 194.

9. Green v. State [Ala.] 44 S 194.

acter is ordinarily for the jury.[10] Evil intent is a necessary element of the offense.[11] Self-defense is available in defense of the act providing the resistance is proportionate to the injury offered,[12] but instructions thereon must include all necessary elements.[13]

To constitute an attempt to commit mayhem there must be a guilty intent,[14] together with the apparent adequate means of carrying it out.[15]

MALICE; MALICIOUS ABUSE OF PROCESS, see latest topical index.

MALICIOUS MISCHIEF.[16]

Malicious intent, real or constructive, toward the owner of the property injured, is a necessary element of the offense,[16a] hence, ownership of the property in defendant,[17] or an honest though mistaken belief of ownership,[18] is a good defense. The value of the property destroyed is immaterial.[19] The abatement of a nuisance does not constitute malicious destruction of property.[20] Under the Texas statute making it unlawful to willfully deface any public building, an indictment for mutilating a church building must aver that the church was a public building and then and there devoted to a public use.[21] Evidence of the time, place, and circumstances of the act is relevant to disprove malice,[22] but parol evidence is inadmissible to show ownership of the land upon which the property destroyed was situated.[23] Instructions must submit all issues presented by the evidence[24] and contain all elements essential to conviction.[25]

MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

§ 1. Nature and Elements of the Wrong, 657.
A. Malicious Prosecution, 657.
B. Abuse of Process, 658.
§ 2. Responsibility of Defendant for the Prosecution or Suit and His Participation Therein, 658.
§ 3. The Prosecution of the Plaintiff, 658.
§ 4. Termination of Prosecution in Plaintiff's Favor, 658.
§ 5. Want of Reasonable and Probable Cause, 659.
§ 6. Malice, 659.
§ 7. Advice of Private Counsel, Prosecuting Attorney, or Magistrate, 660.
§ 8. Damages, 660.
§ 9. General Matters of Pleading and Practice, 660.

The scope of this topic is noted below.[26]

§ 1. *Nature and elements of the wrong. A. Malicious prosecution.* See 8 C. L.

10. Biting off small portion of an ear. Green v. State [Ala.] 44 S 194.

11. Maliciously as used in Code 1896, § 5095, held not synonymous with malice aforethought. Green v. State [Ala.] 44 S 194.

12. Green v. State [Ala.] 44 S 194.

13. Instructions held properly refused. Green v. State [Ala.] 44 S 194.

14. Dahlberg v. People, 225 Ill. 485, 80 NE 310.

15. Evidence held insufficient to justify conviction of attempt to commit mayhem. Dahlberg v. People, 225 Ill. 485, 80 NE 310.

16. See 8 C. L. 796.

16a. Commonwealth v. Shaffer, 32 Pa. Super. Ct. 375.

17. Upon filing and approval of bond in condemnation proceeding, the title vests in the instigator of the proceedings, and its servants cannot thereafter be convicted of offense of maliciously injuring property condemned on prosecution by former owner. Commonwealth v. Shaffer, 32 Pa. Super. Ct. 375.

18. Commonwealth v. Shaffer, 32 Pa. Super. Ct. 375.

19. Mutilation of a trespass notice held to warrant conviction though land was not registered in "the registry for posting lands," as required by Act. Aug. 15, 1903 (Acts 1903 p. 44). Moody v. State, 127 Ga. 821, 56 SE 993.

20. Instruction that no one may destroy private property as a nuisance unless declared to be such by competent authority held prejudicial. State v. Patton [Kan.] 92 P 588.

21. Burkhalter v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 884, 104 SW 901.

22. Destruction of gutter constituting obstruction of private roadway. McClurg v. Sate [Ga. App.] 58 SE 1064.

23. McClurg v. State [Ga. App.] 58 SE 1064.

24. Held error to refuse to instruct jury that defendant had a right to protect his crop from intrusion by domesticated birds which he was charged with maliciously killing. Swinger v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 124, 102 SW 114.

25. Charge on principles held erroneous for failure to state that destruction must have been malicious. Swinger v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 124, 102 SW 114.

26. It excludes false imprisonment (9 C. L. 1351) and liability independent of malice for

[797]—The elements necessary to sustain an action are prosecution, investigation by defendant, malice, want of probable cause, and termination in favor of the now plaintiff.[27, 28] It has been held in some states that malice and want of probable cause must coexist,[29] though it is usually said that malice is inferred from want of probable cause.[30] As in other torts, damage resulting to the plaintiff is essential to the right of action.[31] There is a difference between malicious prosecution and false imprisonment.[32]

(§ 1) *B. Abuse of process.*[See 8 C. L. 798]—It is abuse of process to institute criminal proceedings to remedy a civil wrong,[33, 34] or to bring unfounded civil proceedings with malicious intent,[35] and an analogous right of action exists for the malicious commencement of proceedings in private tribunals.[36] Where an alleged process is void on its face, no action will lie.[37]

§ 2. *Responsibility of defendant for the prosecution or suit and his participation therein.*[See 8 C. L. 799]—Defendant's connection with the prosecution need not be directly proven but may be inferred from reasonable circumstances.[38] One is responsible for the institution of a prosecution by his conferedate,[39] or by his agent if the institution was within the scope of the agent's authority,[40] or was subsequently ratified.[41] A creditor is liable for an arrest in a suit maliciously instituted.[42]

§ 3. *The prosecution of the plaintiff.*[See 8 C. L. 799]—The now plaintiff must have been prosecuted.[43]

§ 4. *Termination of prosecution in plaintiff's favor.*[See 8 C. L. 800]—The prosecution must have terminated [44] in favor of the accused,[45] conviction being usually deemed conclusive as to probable cause, though some courts regard it as prima facie

wrongful levy of attachment (see Attachment, 9 C. L. 282), execution (see Executions, 9 C. L. 1328) and the like, as well as the award of damages on dissolution of injunction (see Injunction, 10 C. L. 246).

This article supplements (in connection with those in 8 C. L. 797 and 6 C. L. 490), **an exhaustive special article** in 4 C. L. 470.

27, 28. Sasse v. Rogers [Ind. App.] 81 NE 590. "Among other things" that the prosecution was without probable cause and that it ended in plaintiff's favor. McGuirk v. O'Halloran, 149 F 909.

29. Van Meter v. Bass [Colo.] 90 P 637; National Life & Acc. Ins. Co. v. Gibson, 31 Ky. L. R. 101, 101 SW 895; Pinson v. Campbell, 124 Mo. App. 260, 101 SW 621.

30. See post, § 6.

31. Sanders v. Davis [Ala.] 44 S 979; Berkowich v. Kommel, 107 NYS 119.

32. Points of difference distinguished. Schultz v. Greenwood Cemetery [N. Y.] 83 NE 41. Count which avers merely that arrest was made on verbal charge to a police officer held false imprisonment and not malicious prosecution. Sanders v. Davis [Ala.] 44 S 979.

33, 34. Abuse of criminal process to get rid of troublesome tenant. White v. Apsley Rubber Co., 194 Mass. 97, 80 NE 500. Extorting money under threat of criminal prosecution. Marlatte v. Weickgenant, 147 Mich. 266, 13 Det. Leg. N. 1091, 110 NW 1061.

35. One who sues out a malicious order for garnishment is liable in damages. Lightfoot v. Murphy [Tex. Civ. App.] 19 Tex. Ct. Rep. 661, 104 SW 511.

36. Charges filed in lodges. Moon v. Flack [N. H.] 65 A 829.

37. Gray v. Joiner, 127 Ga. 544, 56 SE 752.

38. Aiding and abetting prosecution. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78.

39. Mere confederation to prosecute where probable cause is shown is not conspiracy to maliciously prosecute. Moon v. Flack [N. H.] 65 A 829.

40. Within scope of authority for corporation's bookkeeper who had charge of corporation's property to institute proceedings to compel surrender of tenancy. White v. Apsley Rubber Co., 194 Mass. 97, 80 NE 500. Where expenses of detective were paid by corporation, held corporation liable for prosecution by him. Smith v. N. Y. Anti-Saloon League, 121 App. Div. 600, 106 NYS 251. Where proprietor leaves business to be operated by a manager and manager affirms prosecution by a credit clerk, held proprietor liable for malicious prosecution. Staton v. Mason, 104 NYS 155. That one acted as adjuster of insurer after fire loss is not proof of agency of insurer prior to fire. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78.

41. Knowledge of general manager and president held to bind corporation. White v. Apsley Rubber Co., 194 Mass. 97, 80 NE 500.

42. Ex parte Morton [Mass.] 81 NE 869.

43. Warrant issued and withdrawn before arrest held no cause of action. Mitchell v. Donanski [R. I.] 65 A 611.

44. Warrant sworn out and never served held no cause of action. Mitchell v. Donanski [R. I.] 65 A 611. Proof of discharge by a magistrate for insufficiency of evidence or because prosecution was withdrawn held sufficient. Sasse v. Rogers [Ind. App.] 81 NE 590.

45. Defendant's want of probable cause does not excuse plaintiff from proof of acquittal. McGuirk v. O'Halloran, 149 F 909.

only,[46] and that the fine imposed was subsequently remitted does not show want of probable cause.[47] Arrest and release on prosecutor's motion is sometimes sufficient to support an action,[48] although generally mere arrest and final discharge are not sufficient.[49]

§ 5. *Want of reasonable and probable cause.*[See 8 C. L. 800]—By probable cause is meant a reasonable ground for suspicion, supported by circumstances sufficiently strong within themselves to warrant a cautious man in the belief that accused is guilty of the crime charged.[50] Probable cause for the prosecution is a complete bar to liability.[51] Good faith is an element of the defense of probable cause, and where facts existed showing probable cause, but defendent prosecuted not on these grounds but solely for an illegitimate purpose, probable cause will not excuse him.[52] Proof of the commission of the offense charged is usually deemed a good defense and is prima facie evidence of probable excuse,[53] though guilt or innocence is not strictly in issue, the question being solely "was there probable cause to believe him guilty."[54] In like manner lack of probable cause may be inferred from uncontroverted proof of innocence.[55] Conviction in court raises a presumption of probable cause[56] where there has been no unfairness, fraud, conspiracy, subornation, or other improper acts or methods during trial.[57] Often a holding or binding over by a magistrate after examination will raise a prima facie presumption of probable cause.[58] The test of defendant's liability is his belief in the existence of probable cause based on reasonable grounds,[59] and the question is to be determined as of the time of instituting the prosecution.[60] Probable cause may exist independently of the advice of counsel,[61] but advice of counsel is usually taken as fairly conclusive.[62] Where a public board orders its executive officer to enforce a law, the officer is held to have probable cause to prosecute offenders under the law.[63]

§ 6. *Malice.*[See 8 C. L. 801]—Malice is generally inferred where there is absence

46, 47. Miller v. Runkle [Iowa] 114 NW 611.

48. Criminal prosecution dropped when tenant vacated house after arrest for destroying property. White v. Apsley Rubber Co., 194 Mass. 97, 80 NE 500.

49. Burden remains on plaintiff to show no probable cause and malice. Simmons v. Gardner [Wash.] 89 P 887.

50. Whipple v. Gorsuch [Ark.] 101 SW 735; Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78; Pinson v. Campbell, 124 Mo. App. 260, 101 SW 621.

51. Whipple v. Gorsuch [Ark.] 101 SW 735; Hudson v. Truman [Neb.] 112 NW 325.

52. Vorhes v. Buckwald [Iowa] 112 NW 1105.

53. Defendant may prove probable cause by showing conviction although conviction subsequently reversed and plaintiff acquitted. McGuirk v. O'Halloran, 149 F 909. Where suit arises on alleged wrongful attachment, held proof of sustaining of attachment by courts is probable cause. Bell v. Thompson, 31 Ky. L. R. 473, 102 SW 830. Actual guilt is a complete defense under doctrine of probable cause. Whipple v. Gorsuch [Ark.] 101 SW 735.

54. Cramer v. Barmon [Mo. App.] 103 SW 1086.

55. Smith v. N. Y. Anti-Saloon League, 121 App. Div. 600, 106 NYS 251. Evidence of arrest by defendant, a private citizen, and subsequent acquittal for want of evidence held to show want of probable cause. Bernstein v. Walsh, 32 Pa. Super. Ct. 392.

56. Presumption may be overcome by evidence that conviction secured by defendant's perjury. McGuirk v. O'Halloran, 149 F 909.

57. Staton v. Mason, 104 NYS 155. Overcome by evidence of fraud and other improper means. Putnam v. Stalker [Or.] 91 P 363.

58. Prima facie presumption subject to overthrow by showing binding over as result of fraud or other improper means. Putnam v. Stalker [Or.] 91 P 363. Where defendant is held by magistrate, held prima facie evidence of probable cause. Schultz v. Greenwood Cemetery [N. Y.] 83 NE 41.

59. Defendant acquitted of arson but circumstantial evidence shown to connect him with fire, held nonsuit proper. Boyd v. Kerr, 216 Pa. 259, 65 A 674; Hudson v. Truman [Neb.] 112 NW 325. Where it was shown that defendant believed honestly that an action was well founded held no liability. Berkowitch v. Kommel, 107 NYS 119; Whipple v. Gorsuch [Ark.] 101 SW 735.

60. Hantman v. Hedden, 31 Pa. Super. Ct. 564.

61. Instruction that defense rested solely on counsel's advice held erroneous. Sasse v. Rogers [Ind. App.] 81 NE 590.

62. Evidence of probable cause held sufficient. Simmons v. Gardner [Wash.] 89 P 887. See § 7 post.

63. County superintendent of health ordered to vaccinate all persons in district. Held had probable couse to prosecute plaintiff who refused to be vaccinated. Morgan v. Stewart, 144 N. C. 424, 57 SE 149.

of probable cause,[64] or from a finding of reckless and grossly negligent prosecution.[65] Invalidity of complaint or deficit in judgment or proceedings on criminal trial are no bar to recovery where malice is shown and there was no probable cause.[66] The burden of proof in showing malice is on the plaintiff.[67] Following advice of officer of the law negatives idea of malice.[68]

§ 7. *Advice of private counsel, prosecuting attorney, or magistrate.*[See 8 C. L. 802] In some states it is a complete defense apart from malice and question of probable cause,[69] but generally advice of counsel alone cannot make out a complete defense.[70] Acting in good faith upon the mistaken opinion of counsel will not subject the prosecutor to liability to the person prosecuted,[71] The advice of counsel must be sought before the prosecution is begun.[72] Concealment of any facts will vitiate the otherwise good defense.[73] The question of whether defendant stated all his known facts and acted in good faith on the advice is for the jury.[74] Advice of counsel is not necessary to establish probable cause.[75] Where a reputable attorney is consulted and advice given in good faith is acted on in good faith, it is not necessary to show an investigation such as might be made by a prudent man ordinarily.[76]

§ 8. *Damages.*[See 8 C. L. 803]—Punitive damages can be recovered where actual malice is shown [77] and actual damage has resulted.[78] Damage to mind or body and general humiliation,[79] loss of time in defending criminal action and costs of defense, may be considered.[80]

§ 9. *General matters of pleading and practice.*[See 8 C. L. 804]—An action for malicious prosecution growing out of suing out of a writ of attachment cannot be joined with an action for breach of indemnity bond.[81] The statute of limitations will not

64, 65. Smith v. New York Anti-Saloon League, 121 App. Div. 600, 106 NYS 251.

66. Hackler v. Miller [Neb.] 114 NW 274.

67. Healey v. Aspinwall [Mass.] 81 NE 256; Schultz v. Greenwood Cemetery [N. Y.] 83 NE 41.

68. Radcliffe v. Hollyfield, 216 Pa. 367, 65 A 789. There can be no malice where one in good faith consults an officer of the law and is advised that information should be sworn out, where all known facts are related to the officer. Pinson v. Campbell, 124 Mo. App. 260, 101 SW 621; Radcliffe v. Hollyfield, 216 Pa. 367, 65 A 789.

69. Slater v. Walter, 148 Mich. 650, 14 Det. Leg. N. 314, 112 NW 682; Fleckinger v. Taffee, 149 Mich. 678, 14 Det. Leg. N. 545, 113 NW 311. Where one goes before a competent attorney and obtains his advice about a prosecution and then acts in good faith upon the advice, it is a good defense. National Life & Acc. Ins. Co. v. Gibson, 31 Ky. L. R. 101, 101 SW 895.

70. Murphy v. Eidlitz, 105 NYS 674. Advice of counsel is good defense only when sought in good faith and based upon complete statement of all facts within prosecutor's knowledge. Idea of malice is negatived. Radcliffe v. Hollyfield, 216 Pa. 367, 65 A 789; Van Meter v. Bass [Colo.] 90 P 637. Not liable as having acted without probable cause though more facts might have been learned by diligent inquiry. Putnam v. Stalker [Or.] 91 P 363.

71. Van Meter v. Bass [Colo.] 90 P 637.

72. Advice sought one week after prosecution. Murphy v. Eidlitz, 105 NYS 674.

73. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78.

74. Healey v. Aspinwall [Mass.] 81 NE 256; Phiscator v. Rice, 147 Mich. 411, 13 Det. Leg. N. 1095, 110 NW 1095.

75. Sasse v. Rogers [Ind. App.] 81 NE 590.

76. King v. Apple River Power Co., 131 Wis. 575, 111 NW 668.

77. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. In estimating exemplary damages, wealth of defendant can be considered. Id. The wealth of defendant may be shown for the purpose of estimating exemplary damages. Evidence of capitalization held competent to show wealth. Id.

78. Where no actual damages are recoverable because of the institution of a suit, no exemplary damages can be recovered although malice is shown. Lightfoot v. Murphy [Tex. Civ. App.] 19 Tex. Ct. Rep. 661, 104 SW 511.

79. Not shown. Held $500 was excessive. Sasse v. Rogers [Ind. App.] 81 NE 590. Evidence of a person as to appearance of plaintiff to show his mental worry held not proof of mental anguish. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Evidence of person that defendant seemed displeased after arrest held inadmissible. Fleckinger v. Taffee, 149 Mich. 678, 14 Det. Leg. N. 545, 113 NW 311. Evidence of size of plaintiff's family held admissible. Id.

80. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. The measure of damages for wrongful garnishment and detention of funds is the interest on the sum detained during detention. Lightfoot v. Murphy [Tex. Civ. App.] 19 Tex. Ct. Rep. 661, 104 SW 511. Proof of plaintiff's loss of time in defending criminal charge of prior earnings and expenses of defense held admissible. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Verdict of $12,500 damages held not excessive. Id.

81. Civ. Code Prac. § 83. Bell v. Thompson, 31 Ky. L. R. 473, 102 SW 830.

begin to run until the criminal case is dismissed or prosecution is otherwise determined.[82] The complaint must allege a judicial proceeding, prosecution at instigation of defendant, no probable cause for same, malice terminating in plaintiff's favor, and damages.[83]

Issues.—A general denial puts in issue allegations of want of probable cause and malice and under it defendant can show anything which tends to disprove malice a lack of probable cause.[84]

Burden of proof.[See 8 C. L. 805]—The burden of showing lack of probable cause [85] and malice is on the plaintiff.[86]

Admissibility of evidence.[See 8 C. L. 806]—Any evidence tending to show the motive of the prosecution is admissible,[87] as are all facts tending to show defendant's connection with the prosecution,[88] and the existence or want of probable cause.[89] Evidence of plaintiff's character is not in issue and incompetent as testimony to prove probable cause except where same is known to or should be known by person bringing action.[90]

Questions of law and fact.—It is the province of a jury to determine any conflict of testimony,[91] as where facts are in dispute in a question of probable cause,[92] in which case the court should instruct fully on what constitutes probable cause,[93] but a

82. Hackler v. Miller [Neb.] 114 NW 274.

83. Sanders v. Davis [Ala.] 44 S 979.

84. Hackler v. Miller [Neb.] 114 NW 274.

85. Emory v. Eggan, 75 Kan. 82, 88 P 740; Healey v. Aspinwall [Mass.] 81 NE 256.

86. Where arrest and discharge is conceded. Healey v. Aspinwall [Mass.] 81 NE 256; Schultz v. Greenwood Cemetery [N. Y.] 83 NE 41; Simmons v. Gardner [Wash.] 89 P 887.

87. Evidence that criminal prosecution was begun to shield against civil liability held admissible on the issue of probable cause. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78.

88. Where board of underwriters had offered reward for conviction of fire bug and witness allowed to testify of connection of insurer of burned property, with underwriters relative to existence and object of board, held incompetent but not prejudicial. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Circulars given to agent for defendant company by general agent who was agent's superior, for guidance of agent, held properly introduced in evidence though unsigned by defendant corporation or its officers. Providence Sav. Life Assur. Soc. v. Johnson, 30 Ky. L. R. 1031, 99 SW 1159. Evidence of reward offered by board of underwriters without showing connection of defendants with underwriters in arson case held incompetent. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78.

89. Held competent for plaintiff in rebuttal, where defense is guilt not probable cause, to show in arson case, that he was at home until after fire alarm had called him to scene of fire. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Evidence of clerk of fifteen years' experience that goods insured for only $6,000 were worth $12,000 held admissible to show diligence of defendant in procuring evidence before beginning action against plaintiff. Id. Evidence of advice by counsel a week after prosecution held inadmissible. Murphy v. Eidlitz, 105 NYS 674. Where offer to drop prosecution on payment of money due on mortgage is offered in evidence to rebut evidence to show good faith in bringing prosecution, held error to refuse to allow the testimony. Potter v. Sims [Iowa] 111 NW 29. Where charge of selling mortgaged property is made, offer of plaintiff to show permission for sale from mortgagee held admissible. Id. Where charge is selling mortgaged property and defendant testified that he did not sell, and defendant then shows a trade of horse mortgaged for another held exclusion of rebuttal, evidence of plaintiff that he had never traded horse held error. Id. Where district attorney had been told by witnesses that plaintiff was at place of fire before fire bell gave alarm, held incompetent for plaintiff's witness to testify that he was at his home until after fire bell rang, to show lack of diligence in procuring evidence of guilt. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Questions and replies made in actions on policies for insurance before fire held admissible in suit involving prosecution for arson to show interest of insurers in continuance of prosecution, but verdicts and judgments in such actions were incompetent. Id.

90. Evidence incompetent. Emory v. Eggan, 75 Kan. 82, 88 P 740. **Contra.** Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Information of previous bad reputation given to a prosecuting officer, held he could not testify to same from mere hearsay. Id. Testimony of bad reputation based on business dealings with plaintiff held inadmissible. Id.

91. Question of whether or not defendant had probable cause to think an assault had been committed, or all facts told to advisor or acted in good faith on advice. Healey v. Aspinwall [Mass.] 81 NE 256; Phiscator v. Rice, 147 Mich. 411, 13 Det. Leg. N. 1095, 110 NW 1095.

92. Sasse v. Rogers [Ind. App.] 81 NE 590; Marlatte v. Weickgenant, 147 Mich. 226, 13 Det. Leg. N. 1091, 110 NW 1061; Pinson v. Campbell, 124 Mo. App. 260, 101 SW 621; Boyd v. Kerr, 216 Pa. 259, 65 A 674.

93. General charge not sufficient. Slater v. Walter, 148 Mich. 650, 14 Det. Leg. N. 314, 112 NW 682.

question of probable cause being shown under admitted state of facts is for a court to determine upon.[94] Issues of fact regarding communications to attorneys are for the jury,[95] but where it appears that all facts were given to the attorney, it is for the court to determine.[96] The jury has the sole right to determine who was instigator or procurer of prosecution.[97] Peremptory instructions are improper and erroneous where there is any evidence on the point instructed.[98]

Instructions.[See 8 C. L. 808]—It is the court's duty to state in hypothetical form the material facts which the evidence tended to establish and give the jury positive instructions as to whether upon the state of facts assumed there was probable cause and if there was conflicting evidence to charge the law regarding conflicting testimony.[99] Instructions should not be misleading.[1]

Special findings [See 8 C. L. 810] should accord with general verdict.[2, 3]

MANDAMUS.

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§ 1. *Nature and office of remedy in general.*[See 8 C. L. 810]—The writ of mandamus was originally a prerogative writ which the court of king's bench was wont to

94. Richardson v. Powers [Ariz.] 89 P 542; Whipple v. Gorsuch [Ark.] 101 SW 725; Sasse v. Rogers [Ind. App.] 81 NE 590; Boyd v. Kerr, 216 Pa. 259, 65 A 674; King v. Apple River Power Co., 131 Wis. 575, 111 NW 668.

95. Held error to refuse instruction that where defendant not knowing law in good faith gave all known facts to prosecuting attorney and on his advice swore out a warrant, that recovery could not be had. Slater v. Walter, 148 Mich. 650, 14 Det. Leg. N. 314, 112 NW 682. Where question of whether all facts were given to prosecuting officer is in dispute, it is a question for the jury to determine. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78.

96. Simmons v. Gardner [Wash.] 89 P 887.

97. Smith v. N. Y. Anti-Saloon League, 121 App. Div. 600, 106 NYS 251.

98. Provident Sav. Life Assur. Soc. v. Johnson, 30 Ky. L. R. 1031, 99 SW 1159.

99. Where issue was whether plaintiff had right as tenant to cut grass on land of wife, instruction which assumed that plaintiff was a tenant of his wife and had right to cut grass is erroneous. Sasse v. Rogers [Ind. App.] 81 NE 590. An instruction that the jury should find for plaintiff if they believed the defendant caused prosecution to be instituted maliciously and without probable cause held not inconsistent with instruction setting out * * * that probable cause in the minds of agents of defendants in procuring a libel does not mean that they knew publication was false, but if they had reasonable grounds to believe that publication was false they should find for defendant. Provident Sav. Life Assur. Soc. v. Johnson, 30 Ky. L. R. 1031, 99 SW 1159.

1. Charge leading jury to believe that test of plaintiff's right to recover was his guilt or innocence is reversible error, though court stated law correctly in other parts of charge. Radcliffe v. Hollyfield, 216 Pa. 367, 65 A 789. Instruction as to kinds of notice and that if ill will prompted prosecution that the jury might infer malice held proper. Carp v. Queen Ins. Co., 203 Mo. 295, 101 SW 78. Instruction that if defendants aided in prosecution with malice plaintiff could recover, held proper. Id.

2, 3. Jury found general verdict for plaintiff but answered one of special questions to the effect that defendant had stated fully the facts to an attorney, who knowing all facts advised suit, and suit was then begun in good faith upon advice, and one juror upon being polled repudiated this statement, held error. Emory v. Eggan, 75 Kan. 82, 88 P 740. Where jury found conflicting special findings, i. e., that defendant acted upon advice of counsel given in good faith with probable cause to believe guilt of plaintiff, but did not use means an ordinarily prudent and careful man would use to ascertain all facts, held that defendant would nevertheless be absolved from liability. King v. Apple River Power Co., 131 Wis. 575, 111 NW 668.

issue to any part of the realm for the prevention of disorder from failure of justice or defect of police.[4] In modern practice it is not regarded as a prerogative writ running in the name of the sovereign, but as ordinary process of court available to any private citizen to protect a private right when it is an appropriate remedy.[5] It is in no sense an equitable proceeding, but is a common law remedy to compel performance of a legal duty.[6] It may not be used to establish rights or to determine legal controversies, but solely to compel the performance of clear legal duties.[7] The writ is discretionary and will not be awarded in all cases, even when a prima facie right to relief is shown, but regard will be had to the exigency which calls for exercise of such discretion, the nature and extent of the wrong or injury which would follow a refusal of the writ, and other facts which have a bearing on the particular case,[8] and it will not issue where it will work an injustice,[9, 10] or operate harshly,[11] or produce confusion and disorder,[12] or where it will not promote substantial justice;[13] but courts

4. Hamlin v. Higgins [Me.] 67 A 625.

5. Use of name of state is mere surplusage. State v. Cain [S. C.] 58 SE 937. It still preserves some of its prerogative features in England, but in many of the states it is a writ of right. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429.

6. State v. Jackson, 168 Ind. 384, 81 NE 62. Improper to entitle petition as in equity. Ford v. Manchester [Iowa] 113 NW 846.

7. Will not compel payment of money by county treasurer except after compliance with requirements of Laws 1892, p. 1158, c. 603, §§ 11, 13, and Laws 1904, p. 1467, c. 620, § 2. People v. Monroe County Treasurer, 105 NYS 576.

8. Bashore v. Tulare County Super. Ct. [Cal.] 91 P 801; Smith v. Hodgson [Ga.] 59 SE 272; Edwards Mfg. Co. v. Farrington, 102 Me. 140, 66 A 309; New York Mortgage Co. v. Secretary of State [Mich.] 14 Det. Leg. N. 672, 114 NW 82; In re Freeman [N. J. Law] 68 A 222; People v. Giroux Consol. Mines Co., 107 NYS 188; People v. National Park Bk., 107 NYS 369; State v. Holmes [N. D.] 114 NW 367. Whether mandamus be called a prerogative writ, a writ of right, or an ordinary action at law, the authorities agree that the courts have a discretion whether they will issue or refuse the writ even when a prima facie case is shown. State v. Boonville Bridge Co., 206 Mo. 74, 103 SW 1052. A mere abstract right, unattended by any substantial benefit of the relator, will not be enforced by mandamus. Where assessors refused to consider a petition for abatement of a tax, mandamus will not lie to compel action by them so that an appeal might be taken where it appears that no list was furnished the assessors as required by law, and it did not appear that it could not be furnished, which was the only excuse allowed by statute, for a decision could not lawfully be found favorable to the petitioner. Edwards Mfg. Co. v. Farrington, 102 Me. 140, 66 A 309. Where a bridge was originally intended to be used both for railroad and public travel but had never in the thirty years of its existence been opened to public travel, the court will refuse in its discretion to issue a mandate to compel the railroad to open it for public travel. State v. Boonville Bridge Co., 206 Mo. 74, 103 SW 1052. Where a citizen asks a writ to compel the clerk of a court to permit an inspection of ex parte affidavits filed in a suit to disbar an attorney, and it appears that the affidavits were filed twenty-one years before and that the court to which they were presented did not deem them sufficient to authorize a rule to show cause in the matter, and that the attorney in question was not at any time called upon to respond to the same, and that from the circumstances developed by the application no good was likely to be accomplished by allowing the writ, and that the petitioner was actuated rather by the zeal of the partisan than by a desire solely to promote the public weal, the application was denied. In re Freeman [N. J. Law] 68 A 222. Will be refused to compel county officials to honor warrants drawn by county road commissioners, where it is determined that they are not officers de jure and proceedings are pending to try their title to office, and great confusion might result if such mandamus issued. Wayne County Road Com'rs v. Wayne County Auditors, 148 Mich. 225, 111 NW 901.

9, 10. Where relator agreed to pay costs if a continuance were granted, but later refused so to do, mandamus will not lie to compel the setting down of the case for trial. Bashore v. Superior Ct. [Cal.] 91 P 801. The writ will not issue to promote a wrong. State v. Bigler [Ind.] 82 NE 464.

11. Bashore v. Superior Ct. [Cal.] 91 P 801. Where by granting the writ the court would in effect decide questions of importance between persons not parties to the proceeding upon whom its enforcement would entail hardships, the court in its discretion may refuse a mandamus. Smith v. Hodgson [Ga.] 59 SE 272.

12. Bashore v. Superior Ct. [Cal.] 91 P 801. Secretary of state upheld in refusing to grant articles of incorporation to "National Liberty League" when there already existed a corporation "National Liberty Legion." People v. Rose, 225 Ill. 496, 80 NE 293. To overrule order of civil service commission made to promote good behavior. McKenna v. Chicago, 127 Ill. App. 118.

13. Bashore v. Superior Ct. [Cal.] 91 P 801. Discretion of judge in ordering payment of certain expenses caused by relator in other proceedings was not abused. Wooster v. Calhoun Circuit Judge [Mich.] 14 Det. Leg. N. 746, 114 NW 232. Will not compel secretary of state to grant permission to a foreign corporation to do business in the state where its purpose is to sell worthless bonds and mortgages. New York Mortgage Co. v. Sec-

should not exercise their discretion to refuse a writ of mandamus simply because some hardship or embarrassment may ensue.[14] To warrant the issuance of a writ of mandamus, the petitioner must first show a legal right to have the act done;[15] second, it must appear that the act which is to be enforced by the mandate is that which is the plain legal duty of the respondent to perform without discretion either to do or refuse;[16] third, that the writ must be availing as a remedy,[17] and the petitioner must

retary of State [Mich.] 14 Det. Leg. N. 672, 114 NW 82. Will not compel compliance with the strict letter of a statute in disregard of its spirit. State v. Bigler [Ind.] 82 NE 464.

14. State v. Melton [W. Va.] 57 SE 729.

15. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213; People v. Rose, 225 Ill. 496, 80 NE 293; State v. McIntosh, 205 Mo. 589, 103 SW 1078; Putnam Foundry & Mach. Co. v. Harrington Town Council [R. I.] 67 A 733; Harrison v. People, 124 Ill. App. 519; City of Chicago v. O'Hare, 124 Ill. App. 290. Relator must have a clear legal right to the thing demanded. State v. Jackson, 168 Ind. 384, 81 NE 62. Mandamus to compel the issue of a dentist's license. State v. McIntosh, 205 Mo. 616, 103 SW 1071. Under Mill's Ann. St. § 480, providing that corporate stock shall be transferable as personalty as provided by the by-laws, a complaint in mandamus to compel a corporation to transfer stock to petitioner, which fails to allege that he complied with the by-laws of the corporation as to the transfer of stock, is bad. Butterfly-Terrible Gold Min. Co. v. Brind [Colo.] 91 P 1101. Petition for mandamus to compel a board of medicine to issue a license to relator to practice medicine denied because relator failed to prove a diploma as required by statute. Arwine v. Medical Examiners [Cal.] 91 P 319. Tenement house commissioner has no authority to pay salaries. People v. Butler, 105 NYS 631. Petition failed to allege that relator who sought reinstatement was a veteran fireman and therefore discharged without right. People v. Cassidy, 118 App. Div. 693, 103 NYS 671. Will not compel a city council to refer the plan and petition of a telephone company to the board of public works where there is no such duty imposed by law on the council. State v. Milwaukee [Wis.] 113 NW 40. Where it appears that provisions of the law on which the relator relies have not been complied with. State v. Eaton [Neb.] 110 NW 709. Where a city has appropriated money to be paid to the treasurer of a citizen's committee on celebrations, the treasurer cannot compel the controller to sign a warrant for the money until he has presented bills from which it may be ascertained if expenditures are lawful. Stegmaier v. Goeringer [Pa.] 67 A 782. Will not compel a board of registration in dentistry to issue a certificate to one who has not submitted to an examination before it as required by the state. Rosenkrans v. State Board of Registration in Dentistry [R. I.] 67 A 367. Mandamus will not issue to enforce the provisions of an act of doubtful validity. Id. Where a right to mandamus is granted by statute, the provision of the statute must be complied with. Section 114 of the election laws provides that, if any certificate of any election district shows that certain ballots were objected to, mandamus may upon the application of any candidate at such election in the district issue to the board of canvassers to determine whether any rejected ballot should be counted. Held that mandamus would not issue on an application which failed to state the particular election district in which the certified original return shows that certain of the ballots counted were objected to. In re Ordway, 118 App. Div. 386, 103 NYS 360. An act providing that every city having underground sewers shall create a board of plumbers to consist of a member of the board of health, city engineer, etc., cannot be made to apply by mandamus to a city where charter does not provide for such officers. Caven v. Coleman [Tex.] 18 Tex. Ct. Rep. 24, 101 SW 199.

16. Putnam Foundry & Mach. Co. v. Harrington Town Council [R. I.] 67 A 733. Mandamus does not lie to compel the executive committee of the democratic party to reconvene, after having declared its nominee, and disregard certain returns, and make another canvass. State v. Brown [Miss.] 44 S 769. It must be the imperative duty of the respondent to perform the act required. State v. Jackson, 168 Ind. 384, 81 NE 62. Lies only to a fee performance of an act which the law specially enjoined as a duty, etc. Fox v. Workman [Cal. App.] 92 P 742. See further cases under this topic § 2, Duties and Rights Enforceable by Mandamus.

17. Smith v. Hodgson [Ga.] 59 SE 272; Putnam Foundry & Mach. Co. v. Harrington Town Council [R. I.] 67 A 733. To entitle a party to the writ, it must appear that the relief asked for can be enforced by the writ. State v. Hammel [Wis.] 114 NW 97; State v. Melton [W. Va.] 57 SE 729. The writ will not issue if it is too late to be available as a remedy to enforce the right alleged to have been violated. Will not issue to revoke a license which has expired. State v. Hammel [Wis.] 114 NW 97. Mandamus will not lie to compel the revocation of a void liquor license since the granting of the writ would be fruitless in effect. Id. Mandamus will not aid in an attempted promotion of a civil service clerk, where his promotion at the time it was attempted was blocked by another having priority, although later such party was no longer eligible. Mandamus restricted to relief at time right is claimed to have arisen and not by subsequent happenings. In re Dryer, 52 Misc. 612, 102 NYS 922. Writ will not issue to compel payment by the tenement house commissioner of salaries for he has no authority so to do. People v. Butler, 105 NYS 631. Where a respondent has complied with the rule nisi, it would serve no useful purpose to make a writ of mandamus peremptory. Petition to compel a judge to set a case down for trial. State v. Reid, 119 La. 390, 44 S 137. Where the relief sought by mandamus would be fruitless and unavailing, the writ should be denied and proceedings dismissed. Howell v. State [Fla.] 45 S 453. Court would not compel a party, judicially known to be no longer a justice of

have no other plain, speedy, and adequate remedy.[18] In some states, however, the power to issue writs of mandamus has been enlarged to include supervisory control,[19] but even where the jurisdiction of courts has been thus enlarged, it will be granted only in special emergency cases and to prevent impending present injury, and cannot be used in place of appeal.[20] The relator must come into court with clean hands.[21] A demand and refusal is usually necessary to put respondent in default, but the law never demands a vain thing, and, where conduct is equivalent to a refusal to act, it is not necessary to go through the useless formality of demanding performance. Anything showing that the defendant does not intend to perform his duty is sufficient to warrant mandamus.[22] Courts as a general rule will not declare an act unconstitutional in an application for mandamus,[23] but there are exceptions to this rule for which, however, it would be difficult to formulate a general rule.[24]

Other adequate remedy.[See 8 C. L. 813]—Mandamus is an extraordinary writ and not to be resorted to where the purpose sought to be accomplished by it can otherwise reasonably be accomplished,[25] as by appeal [26] or a specific remedy provided by statute.[27]

the peace, to proceed with the trial of a case as justice. First Nat. Bk. v. Rowland [Tex. Civ. App.] 18 Tex. Ct. Rep. 85, 99 SW 1043.

18. Putnam Foundry & Mach. Co. v. Harrington Town Council [R. I.] 67 A 733. See infra. Other Adequate Remedy.

19. Louisiana Constitution, Art. 94. Murat v. New Orleans, 119 La. 505, 44 S 279.

20. Petition to compel a judge to issue an injunction where the same has been refused on hearing did not present a case of this kind. Murat v. New Orleans, 119 La. 505; Manion v. Public School Directors, 119 La. 879, 44 S 515.

21. State v. Bigler [Ind.] 82 NE 464; State v. Milton [W. Va.] 57 SE 729. Where one is willfully violating the law, he cannot complain of the refusal to issue him a license. State v. McIntosh, 205 Mo. 616, 103 SW 1071. Unlawful conduct appeals to the court in the exercise of its discretion. State v. McIntosh, 205 Mo. 589, 103 SW 1078.

22. In mandamus to compel a common carrier to ship goods at rates fixed by railroad commissioners, where the carrier averred that it declined to put into effect the commissioner's order, actual tender of goods for shipment was not required and a denial of tender did not raise a defensive issue of fact. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429.

23, 24. State v. McIntosh, 205 Mo. 589, 103 SW 1078.

25. McHenry v. State [Miss.] 44 S 831. Where any other adequate kind of relief is available, a remedy by mandamus will not be given. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213; Couch v. State [Ind.] 82 NE 457; Malone v. New York, etc., R. Co. [Mass.] 83 NE 408; Peninsular Club of Grand Rapids v. Perkins [Mich.] 14 Det. Leg. N. 790, 114 NW 396. Mandamus does not supersede legal remedies but rather supplies the want of a legal remedy. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213. Petition to compel a city to pay a judgment held to show the absence of another adequate remedy at law. City of Antonio v. Rutledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756. Petition to compel clerk of court to issue a fieri facias dismissed. State v. Thompson, 118 Tenn. 571, 102 SW 349.

26. People v. Murray, 53 Misc. 364, 104 NYS 740. Where appeal lies from a default, mandamus will not issue to compel a judge to hear a motion to remove default. State v. Langan [Nev.] 91 P 737. Mandamus will not lie to compel a trustee of a school township to erect a school house until after appeal to the higher school authorities. Nelson v. State [Ind.] 81 NE 486. In a petition to compel the restoration of a police officer removed after hearing before the police board, his failure to avail of his legal remedy of moving for a new trial is fatal to his application for mandamus. State v. Police Dept. Com'rs., 119 La. 515, 44 S 283. Under Code, § 2774, authorizing a school board to provide for transportation of children in certain cases where there will be a saving of expense, etc., the remedy of a parent on a board's refusal to make such arrangement is by appeal to the county superintendent and not by mandamus to require the board to provide transportation, since the matter involves the exercise of discretion on the part of the board. Queeny v. Higgins [Iowa] 114 NW 51. Mandamus will not lie to reinstate a member or a chapter of a benefit organization where the applicant has not first exhausted his right of appeal to the appellate body within the organization. Grant v. Ancient Order of Foresters [N. J. Law] 66 A 902. Mandamus to compel the issue of injunction. Manion v. Public School Directors for Parish of Orleans, 119 La. 879, 44 S 515.

27. No mandamus where another adequate remedy. A contractor who has performed his contract for paving pursuant to Acts 1893, p. 196, c. 112, as amended, authorizing the paving of highways, has an adequate remedy to obtain payment of the contract price and he cannot by mandamus coerce the commissioners to receive the road and to direct the auditor to draw a warrant to pay therefor. Jackson County Com'rs v. Branaman [Ind.] 82 NE 65. Mandamus does not lie to prevent an illegal expenditure of public money for the petitioners have a remedy under R. L. c. 25, § 100. Where the statute provides for a method for striking names illegally registered from the registration books, mandamus will not lie. Spitler v. Guy [Va.] 58 SE 769.

A writ of mandamus ought not to be used to perform the office of certiorari.[28] The pendency of another proceeding involving the same question will, as a general rule, preclude the issuance of a mandamus [29] unless it will be ineffective [30] or the other tribunal is without jurisdiction.[31] The existence of a temporary injunction granted in a suit by a third party against the railroad commission and the respondent in a different forum, temporarily restraining the commission from putting into effect similar rates prescribed in other circulars, is no bar to a petitioner in another case from prosecuting his remedy for mandamus.[32] The fact that the legality of certain assessments of taxes by the borough is under review by certiorari proceedings is no defense on an application for mandamus to compel the borough to pay over the state and county taxes.[33] If, however, the other remedy is not as adequate, mandamus will lie.[34] Mandamus is not the usual proceeding for the enforcement of a claim or payment of a salary and it is only where upon both the facts and the law it clearly appears that there can be no defense that the court exercises its discretionary powers by compelling payment in this way.[35] Under the Georgia code a private person having a special interest may enforce the performance of a public duty by a corporation, and it is not necessary before such remedy can be availed of that such person has no adequate remedy at law.[36]

Loss of remedy by limitations, laches, delay, estoppel, etc. See 8 C. L. 815—Laches may defeat the remedy by mandamus.[37] Delay may be excused by special circumstances

28. Reversal of the determination of a common council for jurisdictional error. Hartwig v. Watertown [Wis.] 112 NW 21.

29. Mandamus to restore a police officer. A prior proceeding had been duly instituted before the board and was still pending. State v. Metropolitan Police Com'rs [Ind.] 83 NE 83. Does not lie where another action is pending for the same cause. By statute in California. Code of Civ. Proc. §§ 430, 433. Goytino v. McAleer [Cal. App.] 88 P 991. Where mandamus has been denied and an appeal is pending in one county, a petition cannot be brought in another county on the ground that there is a possibility that the personnel of the respondent may change. Id. Where plaintiff made application to purchase certain state lands under the statute providing therefor and she was later credited with full payment but subsequently other persons claimed portions of the land and filed protests and the conflicting claims were referred to the superior court, mandamus does not lie pending such proceedings to compel the issue of a patent to the plaintiff, for all questions can be properly and finally determined in the superior court proceedings. Blakeley v. Kingsbury [Cal. App.] 93 P 129.

30, 31. State v. Metropolitan Police Com'rs [Ind.] 83 NE 83.

32. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429.

33. Trewin v. Shurts [N. J. Law] 65 A 984.

34. Mandamus is the proper method for compelling the reinstatement of a scholar dismissed from school for, although there is a remedy by appeal, it is not sufficiently speedy in a case of this sort. Vermillion v. State [Neb.] 110 NW 736.

35. People v. Butler, 105 NYS 631. Mandamus does not lie to compel the payment of an unliquidated, unadjudicated claim that is disputed. Mandamus to restore to office and to recover emoluments. Howell v. State [Fla.] 45 S 453. Mandamus against tax collector for commissions on collection of back taxes held to be the only remedy. Bailey v. Aransas County [Tex. Civ. App.] 18 Tex. Ct. Rep. 664, 102 SW 1159. Where one's claim against a municipality has been allowed and nothing remains to be done to enable him to obtain his pay but to issue to him the proper warrant on the municipal treasury, he may proceed by mandamus to compel its issuance, notwithstanding he may also proceed by action. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

36. Duty of common carrier to obey regulations of the railroad commissioners may be enforced by a shipper. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429; Priddy v. Hayes, 204 Mo. 358, 102 SW 976.

37. Failure to apply promptly for reinstatement to office. Ramsay v. Lantry, 107 NYS 828. Application for mandamus to compel reinstatement to office if not brought for over a year would not be granted because of delay. People v. Butler, 54 Misc. 18, 103 NYS 583. Discharged patrolman barred by laches after ten months. People v. Chicago, 127 Ill. App. 118. It has been held in New York that four months is the statutory period within which mandamus can be brought by analogy to certiorari proceedings. People v. Ahearn, 104 NYS 860. Mandamus for reinstatement ten months after discharge. It was no excuse that relator had been informed by lay friends that he had no legal remedy. People v. New York Board of Health, 56 Misc. 26, 106 NYS 923. Petition for mandamus to compel the issue of a land patent was not filed for fifteen years after relator's interest accrued, and until more than five years after the longest period allowed by the statute of limitations for suits in the state. Munson v. Terrell [Tex.] 20 Tex. Ct. Rep. 146, 105 SW 1114. Where relator, a citizen of Missouri, had practiced dentistry for twelve years prior to Ann. St. 1906, p. 4002, regulating such practice, but had never complied with the

where no harm has come thereby to the respondent.[38] No lapse of time protects a company from the consequences of a refusal to transfer shares of stock on their books where the ownership is of no concern to it.[39] Laches need not be pleaded to be available as a defense.[40] The proceeding in mandamus is not a civil action, and therefore the statute of limitations does not apply.[41] Mandamus may be refused in the discretion of the court where it is inefficacious, or where the conduct of the applicant in the nature of a waiver or estoppel makes it inequitable or unjust on his part to exact strict and full compliance with the law.[42]

§ 2. *Duties and rights enforcible by mandamus. A. Judicial procedure and process.*[See 8 C. L. 816]—The writ of mandamus does not lie from a superior court to an inferior court to control its judicial acts,[43] or their exercise of judicial discretion,[44]

prior laws as to a license, he was barred by laches from maintaining mandamus to compel the state board to examine and license him as qualified under the last act. State v. McIntosh, 205 Mo. 589, 103 SW 1078. Where a dentist applied for a license to practice but refused to appear for examination as required for a period of eight years, and until the law requiring examination was repealed, she was guilty of such laches as precluded her right to mandamus to compel the issue of a license. State v. McIntosh, 205 Mo. 616, 103 SW 1071. While the doctrine of estoppel or laches is not applicable to the state and its rights are not waived by inaction, yet delay may be considered by the court in the exercise of its discretion on the question of issuing mandamus. Failure of the state for a period of thirty years to require that a bridge originally intended for both railroad and public travel, but used only by a railroad for that period, should be open to public travel. State v. Boonville Bridge Co., 206 Mo. 74, 103 SW 1052.

38. Nevada Nat. Bk. v. Kern County Sup'rs [Cal. App.] 91 P 122. Failure to bring mandamus owing to a mistake in the remedy due to conflicting decisions is not laches preventing the issuing of the writ. Certiorari brought to compel reinstatement to office relying on a decision which was later overruled and mandamus held to be the proper remedy. People v. Butler, 54 Misc. 18, 103 NYS 583. No laches in mandamus to compel a tax levy where various proceedings without result have been carried on up to the time of bringing mandamus without result. Duke v. Turner, 204 U. S. 623, 51 Law. Ed. 652. Laches will not bar the right of one who upon retirement from office is entitled to a pension to compel the payment of the same by mandamus. Upon retirement from the fire department a person had his pension fixed at a less sum than he was entitled to. About two years later he brought mandamus to compel payment of proper amount. Ramsay v. Lantry, 107 NYS 828.

39. Barker v. Montana Gold, Silver, Platinum & Tellurium Min. Co., 35 Mont. 351, 89 P 66.

40. Munson v. Terrell [Tex.] 20 Tex. Ct. Rep. 146, 105 SW 1114.

41. Duke v. Turner, 204 U. S. 623, 51 Law. Ed. 652.

42. State v. Melton [W. Va.] 57 SE 729.

43. Will not compel appointment of receiver by lower court. Harding v. Garber [Okl.] 93 P 539. Mandamus will not lie to compel dismissal of an injunction issued by an inferiour court where proceedings were all proper. Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204, 13 Det. Leg. N. 1015, 110 NW 622. The Kansas City court of appeals, within the limits of its constitutional authority, has the same authority to hear and determine questions over which it may have jurisdiction as any other court in the state, and such determination even though erroneous cannot be reviewed by the supreme court by mandamus. State v. Broaddus, 207 Mo. 107, 105 SW 629. It is not the function of mandamus to reverse the orders of inferior courts or tribunals acting within their jurisdiction. Under the statute of Idaho, mandamus cannot be used to correct any order of a court in passing upon a motion to strike out portions of a pleading if the court is acting within its jurisdiction. Connolly v. Woods [Idaho] 92 P 573.

44. Rankin v. Fletcher [Ark.] 104 SW 933; O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951; Harding v. Garber [Okl.] 93 P 539. Discretion of secretary of interior in confirming adoption into Indian tribes and alloting lands. United States v. Hitchcock, 205 U. S. 80, 51 Law. Ed. 718. Refusal of Federal circuit court to remand a case to the state court which could be fully determined at the circuit court. In re Pollitz, 206 U. S. 323, 51 Law. Ed. 1081. Irregular and unjust proceedings which are within the jurisdiction of the court and hence not void are not to be controlled by mandamus. Cohnen v. Moore [Tex.] 19 Tex. Ct. Rep. 742, 104 SW 1053. Mandamus will not be granted to compel a judge to grant an appeal from an order where such order would not work irreparable injury under the circumstances. Mandamus to compel a judge to grant a suspensive appeal where he had granted an order permitting the dissolution of a preliminary injunction on bond. Lewis v. Sandell, 118 La. 852, 43 S 526. The determination of a motion to redocket a case which has been discontinued is a judicial determination and upon an adverse decision the judge cannot be compelled to redocket. McBride v. Hon [Ark.] 102 SW 389. A party to a suit for divorce, removed from one county to another, by an order regular on its face, is not entitled to a writ to compel the judge of the court of the latter county to vacate an order for alimony for want of jurisdiction, and thereby in effect obtain a vacation of the order of removal which the court of the latter county had refused to vacate and which was not sought to be reviewed in a direct proceeding. Bradfield v. St. Clair Circuit Judge, 148 Mich. 366,

unless there appears to be an abuse thereof.[45] Mandamus does not lie to correct judicial error but a writ of error must be used or an appeal taken.[46] Some acts of a court are ministerial and not judicial and if the duty is imperative, specific, and definite, mandamus will lie to compel performance.[47] Mandamus will be used to control an inferior court where it is the duty of the inferior court to act within its jurisdiction,[48] or if having jurisdiction, the court refuses to retain it where there was a

14 Det. Leg. N. 180, 111 NW 1043. The superintending control of the appellate court over inferior courts will not be extended to determine whether a circuit judge should do what he has refused to do where the error claimed to have been committed is reviewable on appeal from the order entered in the matter or from a final determination of the matter or proceeding in which it was made, and the refusal does not deny a clear statutory right but involves the determination of questions of law or fact, or both, of such difficulty that a judge might reasonably, proceeding considerately, commit judicial error. Mandamus to compel change of venue. State v. Circuit Court for Rock County [Wis.] 114 NW 455. In mandamus proceedings to review the action of a judge in appointing administrators for an estate, his conclusion on the evidence as to their qualifications will not be reviewed. McMeekin v. Saginaw Probate Judge [Mich.] 14 Det. Leg. N. 723, 114 NW 241. Mandamus to vacate a decree allowing solicitor's fees. Trial judge made a return that he decided the matter from his knowledge of the history of the case and the services rendered therein. Shenware v. Weber [Mich.] 113 NW 595. A mandate will never issue to control the judgment or discretion of an inferior tribunal in a matter over which it has full jurisdiction. Jurisdiction of police board over discharge of police officer. State v. Metropolitan Police Com'rs [Ind.] 83 NE 83.

45. Wooster v. Calhoun Circuit Judge [Mich.] 14 Det. Leg. N. 746, 114 NW 232. The large discretion of a trial judge in the matter of dissolving injunctions on bond will not be controlled so as to require him to grant a suspensive appeal from such order unless it appears that such discretion has been abused and irreparable injury will result. Union Saw Mill Co. v. Arkansas, etc., R. Co., 119 La. 970, 44 S 803.

46. Rankin v. Fletcher [Ark.] 104 SW 933; Citizens' Nat. Bk. v. Burdette, 61 W. Va. 636, 57 SE 53. Mandamus will not lie to correct the errors of inferior tribunals by annulling what they have done erroneously. State v. Broaddus, 207 Mo. 107, 105 SW 629. Cannot be used to perform the office of an appeal or writ of error. In re Pollitz, 206 U. S. 323, 51 Law. Ed. 1081.

47. Entry of record judgment after case is closed. Citizens' Nat. Bk. v. Burdette, 61 W. Va. 636, 57 SE 53. Will control only ministerial and not judicial or quasi judicial duties. State v. Langan [Ala.] 43 S 187. Where a plaintiff has not recovered judgment, he cannot maintain mandamus against the clerk of court to pay to him money paid into court by a garnishee. State v. Fitzhenry [Wash.] 92 P 898. By statute in Indiana a writ of mandamus may be issued to any inferior tribunal, corporation board, or person, to compel the performance of an act which the law specially enjoins or a duty resulting from an office, trust, or station. Burns' Ann. St. 1901, § 1182. State v. Jackson, 168 Ind. 384, 81 NE 62. By code in Iowa, where discretion is vested in an inferior tribunal or person, mandamus may be awarded to compel action but not to control the discretion. Does not lie to require establishment of highway by board of supervisors under §§ 1501, 1512, of the code. Perry v. Clarke County Sup'rs, 133 Iowa, 281, 110 NW 591. Where statutes provide for binding awards by arbitration and a valid award is rendered, it is the ministerial duty of the clerk of court to enter judgment in accordance with the award and such duty will be enforced by mandamus. Bishop v. Valley Falls Mfg. Co. [S. C.] 58 SE 939. Where a statute plainly imposes the duty upon a judge to make publication of the declaration of the result of an election, he may be compelled so to do by mandamus. Thorne v. Moore [Tex] 19 Tex. Ct. Rep. 985, 105 SW 985. The clerk of a district court may be compelled by mandamus to file an information presented by the prosecuting attorney. No speedy and adequate remedy at law. State v. Quarles [Idaho] 89 P 636. Where an order has been made for judgment, the clerk upon refusal or neglect to enter it may be compelled to do so by mandamus. Oliver v. Kootenai County [Idaho] 90 P 107. Motion for leave to petition for mandamus to compel a court of civil appeals to certify a question to the supreme court under the statute, making it the duty of the court of civil appeals to certify questions on which there are conflicting opinions among the courts of civil appeal, will be overruled where upon examination no conflict is shown. Texas & P. R. Co. v. Conner [Tex.] 100 SW 367. Mandamus lies to compel a justice of the peace to approve an appeal bond duly executed. Justice refused to approve because sureties did not sign in his presence, but the courts had held this was not essential and mandamus issued to compel approval. State v. Kloke [Neb.] 110 NW 687. The appropriate remedy to secure the reversal of an order quashing an information is by writ of mandamus. Objection to insufficient assignment of perjury in an information should be raised by exception and is not ground for quashing the information. Hoffman v. Allegan Circuit Judge [Mich.] 14 Det. Leg. N. 610, 113 NW 584. Mandamus is the appropriate remedy by which to review the contention that the court erred in refusing to stay execution pending final decision by the appellate court. Execution for costs. Luther v. Wolcott [Mich.] 14 Det. Leg. N. 817, 114 NW 673.

48. Facts showed jurisdiction in the court by proper service and no mandamus would lie. State v. Rock County Circuit Ct. [Wis.] 113 NW 722. In case a court refuses to act in matters over which it has jurisdiction, it may be compelled so to do. Connolly v. Woods [Idaho] 92 P 573. The only case in

clear duty so to do,[49] or where the court goes beyond its jurisdiction,[50] but only where all other remedies are inadequate,[51] for it is well settled that the remedial writs will not be issued if the applicant has complete remedy by appeal.[52] Where the court complies with the rule nisi, it would serve no useful purpose to make a writ of mandamus peremptory,[53] nor will the writ be granted in any case where it would be of no effect.[54]

which the circuit court of appeals can have power to interfere by mandamus with the action of the circuit court is where the question involved relates to its jurisdiction as a tribunal of original jurisdiction. Dowagiac Mfg. Co. v. McSherry Mfg. Co. [C. C. A.] 155 F 524. Will compel action where court refuses to take jurisdiction. In re Pollitz, 206 U. S. 323, 51 Law. Ed. 1081. If a county judge from whose decision there is no appeal refuses to order an election, when the statutory requirements are complied with he may be compelled by mandamus to act. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951. Where a court refuses or delays to act, mandamus is the appropriate remedy to set the machinery of the court in motion. State v. Broaddus, 207 Mo. 107, 105 SW 629. Will compel a county trustee to take jurisdiction of and hear a proceeding by a state revenue agent for the reassessment of property of a railway company where such trustee erroneously refused to hear such proceeding for alleged lack of jurisdiction. State v. Taylor [Tenn.] 04 SW 242. To compel court to hear application for leave to sue under Hurd's Rev. St. 1905, c. 33, § 5, where the refusal was due to failure to comply with invalid rule of the court. People v. Chytraus, 228 Ill 194, 81 NE 844.

49. People v. Murray, 53 Misc. 364, 104 NYS 740. Under the local option election laws, a county judge cannot be required by mandamus to name a certain day for the county election, but when he has fixed the day for the county election he may be required by a mandatory injunction to fix the same day for the city election if he should refuse to do so. O'Neal v. Minary, 30 Ky. L. R. 888, 101 SW 951. If a circuit court upon a proper application refuses to prescribe the method and direct the service of a scire facias, or if after sufficient service of it the court quashes the service and declines to take jurisdiction and decide the issues it presents, the remedy of the party aggrieved is a writ of mandamus and not a writ of error. Collin County Nat. Bk. v. Hughes [C. C. A.] 152 F 414. If a judge of an inferior court passes upon part of the issues in a cause but absolutely refuses to pass upon others, there is ground for a writ of mandamus. Court did not refuse to recognize the claims of certain heirs in an estate, hence there could be no mandamus. Landry v. Bellanger, 119 La. 466, 44 S 266.

50. Dowagiac Mfg Co. v. McSherry Mfg Co. [C. C. A.] 155 F 524; People v. Murray, 53 Misc. 364, 104 NYS 740; State v. Rock County Circuit Ct. [Wis.] 113 NW 722. Will compel court not to act where on the face of the record absolutely no jurisdiction has attached. In re Pollitz, 206 U. S. 323, 51 Law. Ed. 1081.

51. State v. Rock County Circuit Ct. [Wis.] 113 NW 722. Where there is no other remedy. Wandelohr v. Rainey [Tex.] 18 Tex. Ct. Rep. 14, 100 SW 1155.

52. Petition to require a judge to recognize the applicant's claims as heirs to an estate. The return showed that the judge had considered and passed upon their claims, hence there was a remedy by appeal if the decision was wrong and mandamus would not lie. Landry v. Bellanger, 119 La. 466, 44 S 266. Where appeal lies from a default, mandamus will not issue to compel a judge to hear a motion to remove a default. State v. Langan [Nev.] 91 P 737. Mandamus will not compel the issue of an injunction where there is the right of appeal. Manion & Co. v. Public School Directors for Parish of Orleans, 119 La. 879, 44 S 515. Mandamus will not lie to compel vacation of a decree as the proper remedy is by appeal. Vacate a decree so far as it allows a solicitor's fee. Shenevare v. Weber [Mich.] 113 NW 595. Will not grant mandamus to compel the signing of a bill of exceptions where it would require the court to determine that the trial court had erred in its rulings for a writ of error removing the cause to the supreme court, as review affords an adequate remedy. Morgan v. Perkins [Mich.] 14 Det. Leg. N. 612, 113 NW 583. Where the declaration of a suit did not state the residence of the parties and plaintiff refused to amend as suggested by the court, and the defendant's objection to jurisdiction was sustained, mandamus will not lie as such a ruling may be reviewed by securing an order therefor. Reynolds v. Mecosta Circuit Judge, 148 Mich. 470, 14 Det. Leg. N. 206, 111 NW 1038. The appellate court will not review an interlocutory motion on mandamus when the court does not refuse to proceed with the case if there is another adequate remedy, although it may be resorted to sometimes if it does so refuse. Where defendant in an action for breach of covenant in a deed brings suit in equity to reform the description and an injunction is issued restraining plaintiff from proceeding until further order from the court of chancery, but plaintiff has the action noticed for trial, and the judge of the circuit court refuses to vacate such order, mandamus will not lie to compel the vacation. Geddis v. Donovan [Mich.] 14 Det. Leg. N. 878, 114 NW 874. An erroneous judgment for costs can be reviewed by writ of error only and not by mandamus. Luther v. Wolcott [Mich.] 14 Det. Leg. N. 817, 114 NW 673. Mandamus does not lie against a court to require the dismissal of a pending action because of an error in form. Mandamus will not lie to compel allowance of a motion to dismiss a bill for an injunction because bill is multifarious. Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204, 110 NW 622. Mandamus will lie to compel a board of school directors to cancel their selection of a school house site only when they act without authority or jurisdiction. Where by statute they have authority to act, the only remedy is by appeal. Doubet v. Clearfield Independent Dist. Directors [Iowa] 111 NW 326.

53. Petition to compel a judge to set a case

Mandamus lies to compel the signing of bills of exceptions [55] or other papers necessary for appeal.[56] Under the provisions of par. 5 of rule 28 of the supreme court of Idaho, an application for a writ of mandamus against a court or judge must contain the name of the real party in interest so that he may be served with notice and come in and defend.[57] Mandamus may compel a judge to act or to enter a mandate commanded by a higher court.[58] In mandamus to compel a judge to set down cases for trial, his response that they will be heard as soon as prior cases are disposed of will be assumed to be made in good faith and the proceedings continued.[59] Mandamus is not the remedy to annul a judgment on the ground of conspiracy and fraud.[60] Mandamus will not lie to compel the vacation of an order restraining the collection of an execution issued on an invalid judgment,[61] nor will it lie to compel the issuance of an execution on an invalid default judgment.[62]

The writ of supervisory control.[See 8 C. L. 819]—The supreme court of Louisiana will compel a district judge to fix a date for trial of cases under its supervisory power in exceptional cases, when in its judgment it is necessary to bring about an effective remedial administration of justice,[63] and may review a judgment by writ of mandamus even though the case is appealable,[64] but it is too late where the case has been appealed.[65] Upon mandamus proceedings the court will decline to set aside the judgment of the lower court refusing to punish for contempt of an injunction where the facts do not show contempt.[66] The writ of supervisory control will not be issued where there is a right of appeal or where nonjurisdictional action is intimated but no order has been made.[67]

down for trial. State v. Reid, 119 La. 390, 44 S 137.

54. Mandamus does not lie to compel a trial judge to grant a supersedeas bond which the statute provides shall operate to stay proceeding upon an order appealed from, where the order merely denied to parties a right to intervene and defend, since no further action can be taken by the trial judge in enforcing the order and there is nothing to supersede. Hindman v. Great Western Coal Development & Min. Co. [Wash.] 89 P 894.

55. Mandamus lies to compel a judge to sign a bill of exceptions which he has erroneously refused to sign. Priddy v. Hayes, 204 Mo. 358, 102 SW 976. Mandamus will not issue to compel a judge to sign a bill of exceptions complaining of rulings in a case which was not within the jurisdiction of the court, when such want of jurisdiction appears from the application for the writ. Unconstitutionality of an act under which an election was held was determined in the superior court, which had only jurisdiction to ascertain the true results of the election. Harris v. Sheffield, 128 Ga. 299, 57 SE 305. The supreme court of Alabama will not compel a circuit court to treat as a bill of exceptions a paper which had been stricken from the record of the probate court prior to an appeal, as each court must make out its own record and certify the same. Ex parte Walker [Ala.] 43 S 130. Mandamus to a court to settle a bill of exceptions to be used on appeal from an order of court will not issue where the proposed bill is not presented in time. Shipman v. Unangst, 150 Cal. 425, 88 P 1090.

56. Where a judge erroneously refuses to file a statement of facts for use on appeal as required by law, the aggrieved party has a remedy by mandamus to compel him to do so. Middlehurst v. Collins-Gunther Co. [Tex.] 17 Tex. Ct. Rep. 771, 99 SW 1025; Id. [Tex. Civ. App.] 18 Tex. Ct. Rep. 402, 99 SW 1027.

57. Connolly v. Woods [Idaho] 92 P 573.

58. McBride v. Hon [Ark.] 102 SW 389.

59. Commonwealth v. Perry, 31 Ky. L. R. 716, 103 SW 287.

60. State v. Police Department Com'rs, 119 La. 515, 44 S 283. Mandamus does not lie to declare a judgment a nullity for fraud by rule. Judgment creditor of a husband sought to set aside a prior judgment in favor of the wife. Richardson v. Moore, 119 La. 149, 43 S 988.

61. Ex parte Dean [Ala.] 45 S 152.

62. Judgment made without intervention of a jury to fix the amount thereof. State v. Thompson, 118 Tenn. 571, 102 SW 349.

63. State v. Reid, 119 La. 884, 44 S 689. Where there is undue delay in the determination of a recused case, brought under the intrusion into office law, and especially a case in which the public is interested, mandamus will lie to compel the judge ad hoc to set it down for a day certain and if necessary summon a special jury and proceed with the trial until it terminates in a verdict, judgment or mistrial. State v. Reid [La.] 45 S 103.

64. Will compel a judge to mandamus a district attorney to bring an intrusion into office suit where the term of office of the officer sought to be proceeded against will run out before relief could be had by means of appeal. State v. Parsons, 119 La. 955, 44 S 795.

65. State v. Parsons, 119 La. 955, 44 S 795.

66. Perrin v. Crescent City Stockyard & Slaughterhouse Co., 119 La. 873, 44 S 513.

67. Where a district court sitting as a court of probate expressed an opinion that the executor of an estate must account for profits

(§ 2) *B. Administrative and legislative functions of public officers.*[See 8 C. L. 819]—Mandamus may issue to compel administrative officers to discharge purely ministerial duties,[68] but it will not compel them to act in a particular manner where they

derived from the purchase of stocks, the executor could not get out a writ of supervisory control even assuming that the court had no jurisdiction to determine the title to the stock, as the executor may appeal, and further it is to be assumed that the court will act legally and no order has been made as yet. State v. District Court of First Judicial Dist., 35 Mont. 364, 90 P 161.

68. Hertel v. Boismenue, 229 Ill. 474, 82 NE 298. Mandamus lies to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. Meyer v. San Francisco, 150 Cal. 131, 88 P 722; City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756. A writ of mandamus lies to the officer, board, or other organ of a corporation whose legal duty it is to perform the required act. Mandamus against members of a board of education which was a corporation to allow a boy to attend school. People v. Hendrickson, 54 Misc. 337, 104 NYS 122.

Duties held ministerial and enforcible: To compel civil service commission to hold a promotional examination. People v. Errant, 229 Ill. 56, 82 NE 271. Mandamus will lie to compel the fire commissioner to fix a proper pension for a retired fireman under the provisions of statute. Greater N. Y. Charter Laws 1901, p. 330, ch. 466, § 790. Ramsay v. Hayes, 187 N. Y. 367, 80 NE 193. May compel land commissioner to issue land patent where he has refused so to do because of error in papers filed with him. Patton v. Terrell [Tex.] 20 Tex. Ct. Rep. 147, 105 SW 1115 Will require common council to pass a resolution requiring bars, etc, to give an unobstructed view of their premises on Sundays where the duty so to do is made mandatory by the statute. Lay v. Hoboken Common Council [N. J. Law] 67 A 1024. Compel the payment of a pension to a fireman by the fire commissioner as required by law. Ramsay v. Lantry, 107 NYS 828. Where a statute provides that in case of the closing of a street a property owner may have proceedings instituted to ascertain the compensation to which he is entitled, mandamus will lie to compel the institution of such proceedings and it is no defense that the damages are small. People v. Delaney, 105 NYS 746. A ministerial officer who has a specific fund in his hands may be compelled by mandamus to make lawful distribution of the fund. Putnam Foundry & Mach. Co. v. Harrington Town Council [R. I.] 67 A 733. Mandamus may lie to compel a county treasurer to accept payment of delinquent interest by the assignee of a certificate of sale of school lands, although the treasurer may believe that another party has better title. Beatty v. Smith, 75 Kan. 803, 90 P 272. Mandamus lies to compel the surveyor general to communicate with the land office, as required by statute, where a request is made for a location. Alberger v. Kingsbury [Cal. App.] 91 P 674. Will compel comptroller to issue warrants upon the treasurer where required so to do by law. Receiver may mandamus comptroller to honor a requisition on the treasurer for funds available to him by statute despite the pendency of an appeal of an intervening claimant. Hart v. Stephens [Tex.] 100 SW 135. Mandamus lies to compel a court stenographer to deliver a transcript of evidence upon payment or tender of the statutory fees. Stenographer refused to furnish evidence until a bill he had against relator was paid. Lyle v. Sherman, 147 Mich. 424, 13 Det. Leg. N. 1067, 110 NW 932. Lies to compel a state treasurer to exchange a certificate of stock for a coupon bond as authorized by the express provisions of Laws 1892, pp. 24, 25, §§ 1, 2. Ehrlich v. Jennings [S. C.] 58 SE 922. Mandamus will lie against highway commissioners to compel the removal of obstructions built at the end of a highway which extends to the shore of a bay at highwater mark. Bath houses built above high water across the end of a highway leading to the shore. People v. Hawxhurst, 107 NYS 746.

Issue and revocation of licenses: The fact that a municipal ordinance regulating the height of sky signs is unreasonable and void does not justify the erection of any height of sky sign without a permit, but the party may apply for a permit asking that the superintendent of buildings determine whether or not the proposed sky sign is properly constructed and may enforce performance of the duty by mandamus. City of New York v. Gude Co., 107 NYS 414. Will lie to compel mayor to issue saloon license where applicant has complied with all laws and ordinances. Harrison v. People, 125 Ill. App. 178. Municipality cannot be compelled to grant license to pawnbroker where former license was properly revoked. Harrison v. People, 121 Ill. App. 189. Will not lie to review mayor's discretion in revoking saloon license. Harrison v. People, 124 Ill. App. 519. Lies to compel restoration of license revoked without authority. United States v. Macfarland, 28 App. D. C. 552. Where the statute requires action without discretion by a board where certain facts exist, such action may be compelled by mandamus. License to practice medicine may be compelled by mandamus where the law provides that the state board of health shall issue it where the applicant has matriculated prior to a certain date, has a diploma, and pays a fee. State v. Adcock, 206 Mo. 550, 105 SW 270. Where one is recognized as the proper assignee of a license, he may compel by mandamus the issuance to him of a similar license to that held by his assignor. Assignee of a license to a market stall could compel the comptroller to issue a license similar to that of his assignors and not restricted by additional prohibitions. People v. Metz, 107 NYS 970. May compel issue of a license to hold races by state racing commission. N. Y. laws regulating racing. People v. State Racing Commission, 105 NYS 528. Issuance of a permit to use stalls in the West Washington market. People v. Metz, 107 NYS 970. Relator is entitled to compel by mandamus the issuance of a license to sell cigarettes where he has complied with the statute requiring such license. People v. Busse, 231 Ill. 251, 83 NE 175.

are vested with a discretion in respect thereto,[69] in the absence of evidence of abuse of such discretion,[70] though it may be invoked to compel officers to act so as to ex-

Duties relating to assessment and levy of taxes: Mandamus lies to compel a borough collector to pay to the county collector the state and county taxes "out of the first money collected," as required by statute, for there is no other adequate remedy. Trewin v. Shurts [N. J. Law] 65 A 984. A peremptory mandamus will issue for the payment of state and county taxes by a borough where it has collected sufficient money for borough, county, and state purposes to pay such state and county taxes. Id. Mandamus against a city council to require it to apportion taxes among the proper subdivisions of real estate as provided for by statute. Morris & Cummings Dredging Co. v. Bayonne [N. J. Law] 67 A 20. Mandamus is the proper remedy to compel supervisors to make an assessment and levy under the statute providing for irrigation assessments, though the petitioner's demand was represented by a judgment against the district rendered in an action on the district bonds. Nevada Nat. Bk. v. Kern County Sup'rs [Cal. App.] 91 P 122. In respect to matters over which an assessor has no discretionary power and is governed by the law, mandamus lies to compel proper action in the name of the state at the instance of the tax commissioner. Assessments so made as to be a fraud upon the state. Dillon v. Bare, 60 W. Va. 483, 56 SE 390. State may compel a county tax collector to levy and assess taxes. Territory v. Gaines [Ariz.] 93 P 281.

69. Not lie to compel exercise of a discretionary power. People v. State Racing Commission [N. Y.] 82 NE 723. Jurisdiction of police board over discharge of police officer. State v. Metropolitan Police Com'rs [Ind.] 83 NE 83. Mandamus will not lie to compel public prosecutor to sign and file petition for leave to file information in nature of quo warranto. People v. Healy, 230 Ill. 280, 82 NE 599. Court will not by mandamus usurp the functions of officers. Will not compel the appointment of court attendants where the statute provides that the board of city magistrates shall appoint such court attendants upon the assent of the board of estimate and apportionment as may be necessary. People v. McClellan, 52 Misc. 609, 102 NYS 946. Certiorari is the proper remedy to review an assessment by the board of assessors. People v. Keefe, 104 NYS 154. A town council constitutes the legislative branch of the town government and as long as it acts within the statutory authority given it, its acts are not subject to judicial investigation. The refusal of the council to reconstruct a bridge which was washed away cannot be reviewed. Clay City v. Roberts, 30 Ky. L. R. 820, 90 SW 651. Where statute provides that veterans of equal qualifications with other applicants shall receive preference, the court cannot compel selection of a veteran as the council has to exercise its discretion in determining his qualifications. Ross v. Sioux City City Council [Iowa] 113 NW 474. Cannot control discretion of city authorities in absence of fraud, corruption, or arbitrary action. Mandamus will not lie to compel a city council to extend water and light for the benefit of one taxed for such purposes, and the exercise of that discretion will not be controlled in the absence of fraud, corruption or arbitrary action. Moore v. Harrodsburg City Council [Ky.] 105 SW 926. The expediency of providing for and constructing sewers by a municipality is left to the judgment of the local authorities. State v. Phillips [Wis.] 114 NW 802. Mandamus will not compel the acceptance of surety company bonds by the trustees of a village in lieu of those required by a provision of a statute where another provision makes such acceptance permissive. Hicks v. Perry Village Trustees [Mich.] 14 Det. Leg. N. 812, 114 NW 682. The veto power of a mayor is beyond the control of courts by mandamus or otherwise. Rudolph v. Hutchinson [Wis.] 114 NW 453. A state's attorney is possessed of discretion in issuing a quo warranto in a matter not involving any private right, but, if an individual has a private right and the only remedy is quo warranto, mandamus will lie to compel its issuance by the state's attorney. People v. Healy, 231 Ill. 629, 83 NE 453. Discretion of county commissioners as to repair of bridges will not be controlled. State v. Switzer [Neb.] 112 NW 297.

Issue of licenses: No mandate to compel police commissioners to issue a license to run a pool room. Goytino v. McAleer [Cal. App.] 88 P 991. Issue of a license to operate a theatre and sell wines. State v. Langan [Ala.] 43 S 187. License to sell milk refused by health commissioner because relator was selling unclean milk. People v. Gilman, 103 NYS 954. Mandamus cannot be used to compel action of officers in a different manner than that provided by law on the ground that the law is unconstitutional, where without the law the relator has no rights at all. Mandamus to compel the issue of a license to practice dentistry. State v. McIntosh, 205 Mo. 589, 103 SW 1078. Insurance commissioner in issuing a license to do business in the state acts judicially. Cole v. State [Miss.] 45 S 11. Wherever the duty, the performance of which is sought to be enforced, rests upon the ascertainment of facts or the existence of conditions by the officer against whom it is prayed, his judgment or discretion being invoked, the writ is not available to the petitioner. Issuance of licenses. State v. Langan [Ala.] 43 S 187. Will not compel state racing commission to grant a license where it is within the exercise of their judgment when a proper case for a license is made out. People v. State Racing Commission, 103 NYS 955.

70. Moore v. Harrodsburg City Council [Ky.] 105 SW 926. Will compel action where there has been abuse of discretion. State v. Adcock, 206 Mo. 550, 105 SW 270. Standing of any college of pharmacy to be examined by the pharmaceutical board before granting a license to a graduate. State v. Matthews, 77 S. C. 357, 57 SE 1099. Will not compel attorney general to grant leave to bring suit unless grave abuse of discretion. Lamb v. Webb [Cal.] 91 P 102. Where the powers of a board of health are administrative merely, their action is not subject to review, but if arbitrary, tyrannical, and unreasonable, or based upon false information, the relator may have a remedy through mandamus to

ercise their judgment or discretion in the premises.[71] There must be a clear legal right to compel official action.[72] A demand having been made and action refused,[73] mandamus will not lie to compel a general course of official conduct.[74] Under the laws of Texas mandamus lies against any officer of the state government except the governor.[75] Mandamus will not lie to compel the effacement of records which an officer is required to keep upon the ground that they are erroneous.[76]

Duties relating to allowance and payment of claims against municipalities. See 8 C. L. 821—Where a claim is duly established, mandamus will lie to compel the payment of the same,[77] despite the fact that an action at law may also be brought,[78] and

right the wrong he has suffered. Revocation of a license to sell milk. People v. New York Health Dept., 189 N. Y. 187, 82 NE 187. But this should be done by a petition for an alternative writ rather than a peremptory writ. Id. Fraudulent assessment. Dillon v. Bare, 60 W. Va. 483, 56 SE 390. Refusal to grant a license to have races held arbitrary. People v. State Racing Commission [N. Y.] 82 NE 723.

71. Dillon v. Bare, 60 W. Va. 483, 56 SE 390. An officer having discretionary power as to how he shall act may be compelled to act but the court which compels him to do so will not prescribe in its order how he shall act. If an assessor refuses to assess property within his jurisdiction he may be compelled to assess but the court will not determine the value at which he will assess. Id.

72. Smith v. Hodgson [Ga.] 59 SE 272. Mandamus cannot compel a public officer to do an act which it is not his official duty to perform. County treasurer has no authority to pay out any sum received from county authorities arising from the hire of convicts to judgments in favor of officers of court for insolvent costs. Sapp v. De Lacy, 127 Ga. 659, 56 SE 754. Must show clear legal right. Evidence did not clearly show that land claimed as swamp land under land acts was such. Olds v. State Land Office Com'r [Mich.] 14 Det. Leg. N. 451, 112 NW 952. Mandamus will issue only where it appears that there is some officer in being having the power and whose duty it is to perform the act commanded by the court. State v. Green, 131 Wis. 324, 111 NW 519. A duty arising out of a statute must not be merely permissive or discretionary but the statute must require the act to be done or it will not be enforced by mandamus. The trustee of a school township cannot be compelled by mandate to furnish a conveyance to and from school. State v. Jackson, 168 Ind. 384, 81 NE 62; Nelson v. State, 168 Ind. 491, 81 NE 486. Cannot compel an act by official prohibited by statute. Cannot compel the issue of warrants by county supervisor where the county treasurer shows no funds, for such act is forbidden by statute. State v. Goodwin [S. C.] 59 SE 35. Cannot compel an act not within the official duty or power of a board. Where the legislature has not seen fit to empower the county board of commissioners to lay taxes, mandamus cannot be issued to compel them to do so. Id. In mandamus by a militia company to compel the adjutant general to certify as correct and the governor to approve the payrolls, the petition should be dismissed as to the governor since he could only approve after the pay rolls were certified. Haley v. Cochran, 31 Ky. L. R. 505, 102 SW 852.

73. Must show an existing duty and a failure to perform the same on demand. Meyer v. San Francisco, 150 Cal. 131, 88 P 722. No mandamus until officer refuses a proper order. Mandamus does not lie to compel payment by a county treasurer of money deposited in court and held by him until he has refused to pay an order of the court. Higgins v. Keyes [Cal. App.] 90 P 972. Courts will not exert their power by mandamus against public officers to compel action in favor of an individual in a matter which has not been clearly and unequivocally demanded of such officer. Location in streets by telephone company. State v. Milwaukee [Wis.] 113 NW 40.

74. State v. Henderson, 117 La. 209, 41 S 496.

75. May compel by mandamus the issue of a patent by the land commissioner in a proper case. Munson v. Terrell [Tex.] 20 Tex. Ct. Rep. 146, 105 SW 1114.

76. Proceedings of a city council. Hartwig v. Watertown [Wis.] 112 NW 21.

77. May compel payment of money by a public officer under a contract. Contract for construction of a county bridge. Work completed. Assessments paid. Payment refused on the ground of irregularity in the letting of the contract of which no complaint had been previously made. Joliet Bridge & Iron Co. v. Freeman County Drain Com'r, 149 Mich. 274, 14 Det. Leg. N. 359, 112 NW 928. Where a judgment creditor is entitled to payment from the taxes under the city charter, he may have mandamus to compel payment despite the fact that he had been tendered a warrant on the back tax fund and refused the same, where it appears that he would have to wait a long time for money to be paid on such a warrant. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756. Where a municipal corporation is empowered and directed by its charter to pay off a judgment rendered against it, it has no discretion in the exercise of the power, and so long as it is in its power to obey the law, the duty will be enforced by mandamus. Id. Where a county building committee has been appointed by the chosen freeholders of any county as provided for by statute, and such committee has incurred obligations for lands or buildings, it is lawful to raise the necessary funds to cover such expense by bonds as provided for by statute and in default a mandamus will issue so directing. Christie v. Bergen County Chosen Freeholders [N. J. Law] 66 A 1073.

78. Where nothing remains to be done but issue the warrant. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

to compel the levy of a tax for such purpose [79] where it appears that there are not sufficient funds.[80] It is the appropriate remedy to compel a comptroller to sign a warrant for funds to pay a claim against a city where it appears that the funds are sufficient.[81] Before an officer can be required to pay out public money, those who demand it must show a clear provision of the law which entitles them to receive it,[82] also that a demand for payment has been made and refused.[83] Allegations of a petition held sufficient to support alternative writ in an action to recover damages against a city.[84]

Duties of election officers. See 8 C. L. 822—Mandamus will issue to compel election officials to act [85] and to discharge purely ministerial duties,[88] provided the duty be

79. Under Hurd's Rev. St. 1905, p. 565, c. 34, § 34, to compel county board to reconvene and include payment of claims reduced to judgment in the purposes of tax levy. Coles County Sup'rs v. People, 226 Ill. 576, 80 NE 1066. Compel levy and assessment by county commissioners to pay warrants issued in payment of a ditch construction which had been abandoned or to proceed to condemn land necessary for the completion of the ditch and thus levy the assessment as provided for by statute. State v. Lewis County [Wash.] 88 P 760. The fact that condemnation proceedings and the construction of a ditch have not been completed is no defense to mandamus to compel the levying of an assessment to pay warrants issued several years before in payment of construction. Id. Under the charter of a city prohibiting the issue of execution on a judgment against it and exempting all its property from forced sale but binding it to pay judgments and giving it the power to raise money therefor, mandamus lies to compel payment. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep 457, 102 SW 756. The fact that the council of a city has discretion to transfer the excess of funds over current expenses to any of the special funds does not show that mandamus may not issue to compel the city to levy a tax to create a fund from which a judgment may be paid. Id. Under the charter of the city of Antonio providing for the raising of money for the payment of judgments, a petition to compel the city to raise money by taxation, alleging that it had a surplus or unexhausted taxing power which if exercised would raise money sufficient to pay the judgment and that it refused to provide payment for two years after the date of rendition of the judgment and still refused, entitles the plaintiff to mandamus requiring payment of the judgment. Id. Where a judgment creditor of a city seeking to compel the city to pay the judgment alleges that it is the duty of the city to provide payment in levying taxes for the fiscal year, it was not necessary to allege wherein it became the duty of the city to provide for the payment of the judgment. Id. A petition for payment of a judgment out of a certain fund is subject to the exception that it does not allege it did not appear that the fund would not be exhausted by obligations of the city pending or not established. Id. The levy of a special tax by the council of the city of San Antonio under the charter, empowering it to levy for enumerated special purposes, is not within the discretion of the city and mandamus will lie to compel it to levy such tax to pay a judgment. Id. May compel the trustees to levy and collect a tax to pay a judgment against them obtained on a note which was uncollectible because it created an indebtedness in excess of revenue. School Dist. No. 10 Trustees v. Miller [Ky.] 105 SW 457.

80. The petition should allege that there are not sufficient funds from the present levy. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex. Civ. App.] 107 SW 157.

81. Small v. Cheboygan Circuit Judge [Mich.] 14 Det. Leg. N. 597, 113 NW 370. Mandamus lies to compel drainage commissioners to issue warrants to pay for the construction of a ditch contracted for by the commissioners under the authority of Sess. Laws 1895, p. 277, c. 115, § 8. State v. Drainage Dist. No. 1 Com'rs [Wash.] 90 P 660. Where one's claim against a municipality has been allowed and nothing remains to be done to enable him to obtain his pay but to issue to him the proper warrant on the municipal treasury, he may proceed by mandamus to compel its issuance, notwithstanding he may also proceed by action. Wunderlich v. Kalkofen [Wis.] 113 NW 1091. Where a judgment against a board of school trustees has been obtained, establishing a claim, a writ of mandamus will issue to compel the necessary official action to provide for its payment. Whitaker & Ray Co. v. Roberts, 155 F 882.

82. Brunson v. Caskie, 127 Ga. 501, 56 SE 621. On application for mandamus to compel the issue of a county warrant to pay a judgment, the court may go behind the judgment to ascertain if the liability of the county be such as it may legally levy a tax to discharge it. Judgment against a county in a suit for injuries due to a defective road. No liability on part of counties for defective roads and no tax could be levied to pay for injuries due to such. Id. A county auditor may defend mandamus to compel him to issue a warrant to a county officer on the ground that the act under which the officer was appointed and claims compensation is void. State v. Blumberg [Wash.] 89 P 708.

83. In a proceeding to compel a tax levy to pay a debt, a petition which does not specifically allege that the city council has been requested to levy a tax to pay off the relator's debt and that it failed and refused so to do is insufficient. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex. Civ. App.] 107 SW 157.

84. State v. Bechtner [Wis.] 113 NW 42.

85. Mandamus will lie to compel a canvassing board to perform duties made mandatory upon it by opening the sealed envelopes containing the ballots cast at a primary election and determining the controversy which has arisen with reference to the result of such

clear.[87] When, however, election officials have acted and declared the result, mandamus does not lie to compel them to declare some other result which may be more just,[88] for that is the exclusive province of the officials subject only to review by quo warranto,[89] unless such officials have acted wrongfully.[90] The writ will lie to prevent the counting of a defective ballot.[91]

Enforcement of right to public office.[See 8 C. L. 823]—A writ of mandamus cannot be rightfully invoked to settle a doubtful claim to an office,[92] or to have the title thereto adjudicated as between adverse claimants,[93] but where the relator is shown to hold a prima facie and uncontested title to an office a writ of mandate may be issued to put him in possession.[94] One who has been unlawfully deprived of office

election. State v. Felton, 6 Ohio N. P. (N. S.) 286. Mandamus lies to compel an election board of canvassers to do its duty. Metz v. Maddox, 189 N. Y. 460, 82 NE 507. Rev. Laws of Mass., c. 11, § 421, being the general election law giving the courts jurisdiction to enforce the provisions of the chapter, confers jurisdiction on the supreme judicial court to issue a writ of mandamus in a proper case. Brewster v. Sherman [Mass.] 80 NE 821. Mandamus will lie to compel a board of election canvassers to make a recount. Dickinson v. Cheboygan County Canvassers, 148 Mich. 513, 14 Det. Leg. N. 196, 111 NW 1075. A board of canvassers may be compelled to reconvene to make a canvass of returns where they adjourned without completing their work. Lehman v. Pettingell [Colo.] 89 P 48. Where a city council has by charter a supervisory power and refuses to order an election in the face of a sufficient petition, mandamus will lie to compel it to act. Good v. San Diego Common Council [Cal. App.] 90 P 44. Failure to make up and sign a statement of the result of a primary election as required by § 15, P L. 1903, p. 617. Freeman v. Metuchen Registry & Election Board [N. J. Law] 67 A 713. Where the election law provides that only official ballots shall be deposited in ballot boxes except in certain cases and provides that unofficial ballots shall be made into a package and returned by the inspectors and the inspectors count such unofficial ballots and place them in the ballot box with the official ballots, they may be compelled by mandamus to reject and return the unofficial ballots. People v. Beam, 117 App. Div. 374, 103 NYS 818.

86. Compel officers charged with the conduct of elections to perform the specific duties imposed upon them by law. State v. Parish Democratic Committee [La.] 45 S 526. Will compel the board of supervisors to meet and declare the result of an election as required by law. McHenry v. State [Miss.] 44 S 831. The duties of the board of election canvassers where but one set of returns is made are purely ministerial and they may be compelled to act by mandamus. Lehman v. Pettingell [Colo.] 89 P 48.

87. Where § 114 of the election laws provided that if any certificate of any district showed that certain ballots were objected to, mandamus may upon application of any candidate in the district issue to the board of canvassers to determine whether any rejected ballot should be counted. Held that mandamus would not issue on an application which failed to state the particular election district in which the certified original return shows that certain of the ballots counted were objected to. In re Ordway, 118 App. Div. 386, 103 NYS 36.

88. When a board of canvassers has acted, declared the result, and adjourned, mandamus will not lie to compel them to reconvene and declare some other result which may be a more just one. Dickinson v. Cheboygan County Canvassers, 148 Mich. 513, 14 Det. Leg. N. 196, 111 NW 1075.

89. Will not compel an election board to certify the result by specifying any particular number of votes cast for one or another party, which is the exclusive province of the board subject only to review by quo warranto. Metz v. Maddox, 189 N. Y. 460, 82 NE 507.

90. Where election inspectors wrongfully counted unofficial ballots, they could be compelled by mandamus to reconvene and reject such ballots and rectify the result of the elections, leaving the persons then appearing to be elected to asesrt their rights to their respective offices in some other proceeding. People v. Beam, 117 App. Div. 374, 103 NYS 818.

91. Action against board of registrars of voters and the town clerk to refrain from counting a ballot marked with a diagonal line instead of a cross. Brewster v. Sherman [Mass.] 80 NE 821.

92. Couch v. State [Ind.] 82 NE 457.

93. Couch v. State [Ind.] 82 NE 457. Where a party who was disqualified by statute from holding office received the most votes at an election for councilman and was declared elected by the board of aldermen, another claimant could not compel the mayor to recognize him as holder of the office by mandamus even though it further appeared that the first party did not lay any claim to the office. Hoy v. State, 168 Ind. 506, 81 NE 509.

94. Couch v. State [Ind.] 82 NE 457. While title to office cannot be tried by mandamus, yet if the facts are undisputed which determine the right of a person to be given a certificate of election or to be recognized as the duly elected officer, mandamus proceedings are proper to compel the giving of such certificate. Where the rector of a church is by law the judge of the qualification of voters for officers, and at an election receives votes for the relator and declares him elected but later declares he was not a qualified voter and declares the person receiving the next number of votes elected, mandamus will lie to recognize the relator as elected for there can be no question that he was, since the rector was the sole judge of qualifications and declared him elected. In re Williams, 107 NYS 1105.

may be restored by peremptory writ of mandamus,[95] as where one has been dismissed contrary to civil service regulations,[96] but he must be remitted to his suit at law to recover any arrears of salary to which he may be found justly entitled.[97] Title to office cannot be determined by mandamus where there is another specific remedy prescribed or where there is another plain, speedy, and adequate remedy at law.[98] This rule, however, is one only of procedure and not jurisdictional so the fact that title to office is incidentally involved does not interfere with mandamus proceedings.[99] Mandamus is the proper remedy to require an officer who has been ousted of his authority to turn over property belonging to the public and devoted to the use of the public to the new officer,[1] despite the fact that an appeal is pending.[2]

(§ 2) *C. Quasi public and private duties.*[See 8 C. L. 824]—While mandamus will not issue to enforce a private contractual right,[3] it may be invoked to compel

95. Mandamus is the proper remedy for the restoration of a police officer who has been dismissed without a trial before the police commissioner to which he is entitled. Elder v. Bingham, 118 App. Div. 25, 103 NYS 617. Mandamus to compel reinstatement to office because of insufficient time within which to meet charges allowed by statute denied where two days notice of hearing was given and charges were not complicated and no complaint of lack of time was made at the time of hearing. People v. Butler, 54 Misc. 18, 103 NYS 583.

96. Dismissal of a police officer contrary to the civil service regulations. Lattime v. Hunt [Mass.] 81 NE 1001. A clerk appointed under Greater New York Charter, § 1571, authorizing coroners to appoint clerks, etc., is not a public officer, and hence, when dismissed in violation of the civil service laws, mandamus is his remedy. People v. Cahill, 188 N. Y. 489, 81 NE 453. May compel the municipal civil service commission to certify the relator's name upon the municipal pay roll under Laws 1899, p. 807, c. 370, § 19, where he has been properly appointed to a position, although he did not perform services appropriate to the title of the position assigned him. People v. McWilliams, 56 Misc. 296, 106 NYS 459. Civil service rules held complied with and mandamus to reinstate a building inspector refused. People v. Butler, 107 NYS 833. Mandamus will lie to review the classification of a civil service commission. May compel the municipal civil service commission of the city of Buffalo to exempt the position of registrar in the bureau of water from the competitive class, its action in so classifying it not being judicial. People v. Wheeler, 56 Misc. 289, 106 NYS 450.

97. Lattime v. Hunt [Mass.] 81 NE 1001.

98. McKannay v. Horton [Cal.] 91 P 598.

99. Mandamus to compel payment of a mayor's secretary's salary involved question of title to office of mayor. McKannay v. Horton [Cal.] 91 P 598.

Note: That mandamus is not the proper action in which to try the title to an office is generally conceded, but the courts differ in their application of and limitations upon the principle. As a rule, even where there is a clear legal right, it will be denied if questions between pesons not parties to the proceedings must be decided. United States v. Gen'l Land Office, 72 U. S. (5 Wall.) 563; Keeler v. Deo, 117 Mich. 1. In the principal case service was made upon Schmitz, and the judgment of the court could not operate as an estoppel on either of the claimants to the office of mayor, but the practical effect was to finally decide the title between them. And, although mandamus has always been held proper when brought by a de facto and de jure officer to obtain possession of books or records, it has been denied when the result would be to oust a de facto officer. Keeler v. Deo, 117 Mich. 1. Or the question of title was directly and unavoidably in controversy (State v. Williams, 25 Minn. 340), or the court would have to go behind a certificate of election (State v. Johnson, 35 Fla. 2, 31 L. R. A. 357). But the lack of title must be clear, and quo warranto is necessary to try the title of a de facto officer. Lawrence v. Hanley, 84 Mich. 399, 404; State v. Atlantic City, 52 N. J. Law, 332, 8 L. R. A. 697. Nor can an officer try his title by bringing mandamus to compel the payment of his salary, even though the rival claimant be a party to the suit, for the latter has the right to insist that the proper action be used. People v. Board of Police Com'rs of Yonkers, 174 N. Y. 450, 95 Am. St. Rep. 596; State v. John, 81 Mo. 13. On the other hand the writ has been allowed where there was no other claimant or occupant (State v. Daggett, 28 Wash. 1; State v. Hewitt, 3 S. Dak. 187, 44 Am. St. Rep. 780, 16 L. R. A. 413; Metsker v. Nealey, 41 Kan. 122, 13 Am. St. Rep. 269); or there was merely a pretended retention of the office (People v. Kilduff, 15 Ill. 492, 60 Am. Dec. 769). It has also issued to compel the recognition of an officer until the title could be properly determined. In re Delgado, 140 U. S. 586; Keough v. Aldermen, 156 Mass. 403. Where other remedies involved delay or were inadequate, the writ has been held proper to try the title to office in several states. Morton v. Broderick, 118 Cal. 474; Harwood v. Marshall, 9 Md. 81; State v. Jaynes, 19 Neb. 161. Virginia and Wisconsin appear to have been even more liberal. Sinclair v. Young, 100 Va. 284; State v. Oates, 86 Wis. 634, 39 Am. St. Rep. 912.—From 6 Mich. L. R. 351.

1. A county board of education which has been succeeded by a city board of education may be compelled to deliver to the new board all records, books, papers, bonds, inventories, bills, vouchers, contracts, etc. State v. Green, 131 Wis. 324, 111 NW 519.

2. County treasurer. State v. Lawrence [Kan.] 92 P 1131.

3. Mandamus does not lie to compel the completion of a contract. Putnam Foundry & Mach. Co. v. Harrington Town Council

performance of a public duty imposed by contract [4] or law.[5] Mandamus is the appropriate remedy to effect the restoration of a member of a private corporation who has been irregularly removed from membership,[6] to compel a common carrier to perform its duties as a public service corporation,[7] to compel the inspection of public records [8] or the inspection of corporate books by a stockholder [9] or creditor, where such right is given by statute,[10] but if it appears that the application is not made in good faith for the protection of the stockholder or the corporation but for some ulterior motive, the writ will be denied.[11] Mandamus will also lie to compel the reinstatement of a scholar improperly dismissed from school,[12] and where a statute

[R. I.] 67 A 733. Mandamus will not lie to compel issuance of certificate of stock where the by-laws of corporation relating to transfer of stock have not been complied with. Shirley Farmers' Grain & Coal Co. v. Douglass, 130 Ill. App. 285. Will not lie to compel telephone company to obey ordinance requiring reports of business and payment of gross earnings tax. City of Chicago v. Chicago Tel. Co., 230 Ill. 157. 82 NE 607.

4. There being no other speedy and adequate remedy, the right to salary as secretary of the mayor of a city may be determined by mandamus. Secretary to the mayor of San Francisco where there were two claimants. McKannay v. Horton [Cal.] 91 P 598. When a public franchise which involves the performance of a certain service is granted and accepted, the party accepting such franchise can by mandamus be compelled to perform such service. Compel a street railway to carry certain classes of persons free as provided in the franchise. Oklahoma City v. Oklahoma R. Co. [Okl.] 93 P 48. Mandamus will lie to enforce performance by a traction company of duties in respect to public highways occupied by it pursuant to the terms of the municipal ordinances under which such occupation is enjoyed. Borough of Pleasantville v. Atlantic City & Suburban Trac. Co. [N. J. Law] 68 A. 60.

5. A railroad company which has laid tracks in a street may be compelled by mandamus to restore the street to its former condition as provided by law. State v. Wabash R. Co., 206 Mo. 251, 103 SW 1137.

6. Expelled without a hearing. Venezia v. Italian Mut. Benev. Soc. of Perth Amboy [N. J. Law] 65 A 898. Mandamus is the proper remedy to compel reinstatement in a church society by a member summarily deposed without cause and without hearing. Hughes v. North Clinton Baptist Church [N. J. Law] 67 A 66. Mandamus will lie to restore one who has been improperly expelled to membership in a society whose object is not solely religious but is to provide a fund for the payment of benefits and to generally help members in distress. People v. Erste Ulaszkoweer Kranken Unterstutzungs Verein, 56 Misc. 304, 106 NYS 922.

7. Connolly v. Woods [Idaho] 92 P 573. The duty of providing a reasonably safe and sufficient roadbed and equipment and operating and maintaining the property in a reasonably safe manner, and so as to give efficient and adequate service, may be enforced upon a common carrier by mandamus. Whether such duties are imposed by statute charter or raised by implication of law. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213; Id., 53 Fla. 689, 44 S 223. The duty to construct cattle guards and crossings by a railroad company may in a proper case be enforced by mandamus. But not where there is serious dispute between the parties whether the crossings and cattle guards are necessary. State v. Colorado, etc., R. Co. [La.] 44 S 905.

8. But when the only right of the petitioner is his interest as one of the public, he ought to show that the issue of the writ would conduce to the benefit of the general public and that he himself is actuated by proper motives. In re Freeman [N. J. Law] 68 A 222.

9. State v. Lazarus [Mo. App.] 105 SW 780; Hub Const. Co. v. New England Breeder's Club [N. H.] 67 A 574; Hodgens v. United Copper Co. [N. J. Law] 67 A 756; People v. National Park Bk., 107 NYS 369. A stockholder has the right to compel an examination by him of the books of the corporation if done in good faith to prevent mismanagement, and the issuance of the writ will not have any bad effect on the corporation (Varney v. Baker, 194 Mass. 239, 80 NE 524), and such right to examination includes the right to have the assistance of an expert and to make transcripts from the books for subsequent use (Id.). Foreign corporation. Nettles v. McConnell [Ala.] 43 S 838.

10. Hub Const. Co. v. New England Breeder's Club [N. H.] 67 A 574.

11. A small number of shares in a banking corporation acquired for the express purpose of getting a list of stockholders for purposes not disclosed. People v. National Park Bk., 107 NYS 369. Stockholder cannot inspect books for private gain. State v. Lazarus [Mo. App.] 105 SW 780. The right of a stockholder to inspect books will be so controlled as to safeguard the company from revealing its secret process in the manufacture of its product where the stockholder is the active manager of a competitor. Id. Cannot inspect books for improper purpose. Nettles v. McConnell [Ala.] 43 S 838. Stockholder a broker and wanted a list of other stockholders for purpose of sending circulars of other propositions. People v. Giroux Consol. Mines Co., 107 NYS 188. Because of a possibility that the stockholder may abuse his privilege is no reason for withholding the writ of mandamus. State v. Lazarus [Mo. App.] 105 SW 780. One holding stock in different corporations which are competitors is entitled to inspect the books of any provided his purposes are reasonable and just. Id. Courts have jurisdiction to compel the inspection of books of a foreign corporation which are within the state. The writ goes against the custodian of the books. Id.

requires the annual election of officers of corporations, any stockholder may compel by mandamus the calling of a meeting for such purpose if no meeting has been held.[13] Under the California constitution, persons to whose use water has been dedicated by a quasi public corporation engaged in supplying water, no matter for what purpose, may compel the continuance of the supply by mandamus by whosoever may be in control of the corporation.[14] Mandamus will not lie to compel a voluntary organization to comply with its by-laws.[15]

§ 3. *Jurisdiction and venue.*See 8 C. L. 825—Jurisdiction is a matter of substance and not of mere form and cannot be supplied by stating facts and demanding relief.[18] The supreme court of errors of Connecticut,[17] the supreme court of Michigan,[18] and the supreme court of North Dakota, except in special cases,[19] is without power to issue a writ of mandamus in the exercise of its original jurisdiction. Under the Texas constitution the district court and judges thereof may issue mandamus in all cases where courts of law or equity under settled rules would have the power to issue them.[20] Judges may issue mandamus in vacation under the Texas constitution.[21] The superior court of Arizona has original jurisdiction in mandamus throughout the state.[22] The probate court of Oklahoma has no jurisdiction to issue writs of mandamus.[23]

*Federal courts.*See 8 C. L. 825—The circuit courts of the United States have no power to issue writs of mandamus as an original and independent proceeding,[24] but only when ancillary to a jurisdiction already acquired.[25] Mandamus will not be

12. Vermillion v. State [Neb.] 110 NW 736.

13. Sylvania, etc., R. Co. v. Hoge [Ga.] 59 SE 806.

14. City of South Pasadena v. Pasadena Land & Water Co. [Cal.] 93 P 490. Right to receive water was appurtenant to the land and a private right. Orcutt v. Pasadena Land & Water Co. [Cal.] 93 P 497.

15. Will not lie to compel board of trade to reinstate suspended member who has complied with by-laws providing for reinstatement. People v. Chicago Board of Trade, 125 Ill. App. 20.

16. Whitaker & Ray Co. v. Roberts, 155 F 882.

17. The supreme court of errors of Connecticut is without power to issue a writ of mandamus in the exercise of its original jurisdiction neither custom nor statute conferring such authority. In re Ansonia Water Co. [Conn.] 68 A 378.

18. Application for mandamus to compel a court stenographer to deliver a transcript of evidence should be made originally in the circuit court and not to the supreme court. Lyle v. Sherman, 147 Mich. 424, 13 Det. Leg. N. 1067, 110 NW 932.

19. A writ of mandamus will not be issued by the supreme court of North Dakota in the exercise of its original jurisdiction (except in aid of its appellate jurisdiction or in the exercise of its supervisory control over inferior courts) unless the facts disclose a case publici juris affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people and leave to file an application for such a writ would ordinarily be made by the attorney general. State v. Holmes [N. D.] 114 NW 367.

20. Texas constitution, art. 5, § 8, empowering the district court and the judges thereof to issue writs of mandamus and certain other writs, is a grant of distinct jurisdiction not depending on other provisions defining classes of cases or amounts in controversy over which jurisdiction is also given, and gives the substantive power to issue the writs named in all cases where courts of law or equity under settled rules would have the power to issue them whether they be necessary to enforce some jurisdiction given by the other provisions or not. Thorne v. Moore [Tex.] 19 Tex. Ct. Rep. 985, 105 SW 985.

21. Thorne v. Moore [Tex.] 19 Tex. Ct. Rep. 985, 105 SW 985. Under Texas procedure the power given to the district court and the judges thereof to issue writs of mandamus cannot be construed as giving the judges in vacation power to issue alternative writs only, for such a writ has no real place in the procedure. Id. Notwithstanding the right granted to trial by jury, the district court of Texas and the judges thereof may grant mandamus during vacation unless it is conceded that the respondent is entitled to a jury trial. Id.

22. And is not limited to the county wherein the respondent officer may have his office. Territory v. Gaines [Ariz.] 93 P 281.

23. Starkweather v. Kemp, 18 Okl. 28, 88 P 1045.

24. Will not lie to compel a clerk of a county to keep open for record and to record a duly executed instrument. Burnham v. Fields, 157 F 246. Federal courts have no original jurisdiction to issue writs of mandamus, and they can only be issued after judgment and in aid of its enforcement and execution. Meyer v. San Francisco, 150 Cal. 131, 88 P 722. Circuit courts of the United States have no power to issue writs of mandamus to state courts and officers except in aid of a jurisdiction already acquired. Whitaker & Ray Co. v. Roberts, 155 F 882.

25. Burnham v. Fields, 157 F 246; Whitaker & Ray Co. v. Roberts, 155 F 882.

issued when the action of the circuit court is within its jurisdiction, but will be when it is not up to or goes beyond its jurisdiction and there is no other adequate remedy.[26]

§ 4. *Parties. A. Parties plaintiff.* See 8 C. L. 825—As to the right of a citizen to compel a public right unless he has a private interest the courts are divided, the rule in some jurisdictions being that no action can be maintained in such a case,[27] but in others it is held that when a question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result.[28] A single interested party may sue without joining all the others.[29] A petition brought in the name of the state at the relation of the individual members of a highway commission and described as constituting such board is proper language to make the said board the relator.[30] Mandamus proceedings to compel election canvassers to count returns need not be in the name of the state but by the parties interested.[31] Two candidates vitally interested in an election to two different offices may join in an action to compel a proper canvass to be made under the Colorado code.[32] The party prosecuting a petition for a mandamus must be designated as plaintiff and the adverse party the defendant under § 4955, Rev. St. 1887, of Idaho.[33] A territory which receives part of the county taxes is beneficially interested in such taxes to an extent sufficient to give it a right to bring mandamus for their collection, under the statute requiring a beneficial interest in the plaintiff.[34] Parties having a joint interest may petition jointly for a writ of mandamus.[35]

(§ 4) *B. Parties defendant.* See 6 C. L. 626—The party charged with the duty sought to be enforced is the proper party defendant.[36] All persons interested should be made defendants.[37] In mandamus proceedings against a board of officers representing the body politic, the general rule is that the proceedings should be against the board and not the individual members, though they may be joined but not as necessary parties.[38] Where in mandamus to compel a city council to issue a liquor

26. Dowagiac Mfg. Co. v. McSherry Mfg. Co. [C. C. A.] 155 F 524. Circuit court of appeals has no power to interfere by mandamus with the action of a circuit court of the United States where the question involved relates to its jurisdiction as a circuit court of the United States Id.

27. Brewster v. Sherman [Mass.] 80 NE 821.

28. Brewster v. Sherman [Mass.] 80 NE 821. Citizens and taxpayers are proper parties to maintain mandamus to compel the performance of a duty owed to the public. Compel railroad company to restore a street to its former condition after laying track. State v. Wabash R. Co., 206 Mo. 251, 103 SW 1137.

29. Where by charter municipal officials must submit to an election upon petition of a certain per cent of the electors expressing disapproval, one of the petitioners may maintain an action for mandamus to compel the calling of an election. Good v. San Diego Common Council [Cal. App.] 90 P 44.

30. State v. Marion County Com'rs [Ind.] 82 NE 482.

31. Lehman v. Pettingell [Colo.] 89 P 48.

32. A candidate for sheriff and a candidate for county treasurer. Lehman v. Pettingell [Colo.] 89 P 48.

33. Connolly v. Woods [Idaho] 92 P 573.

34. Territory v. Gaines [Ariz.] 93 P 281.

35. Where a county contracts to pay B. 10 per cent of moneys collected on back taxes, and the commissioner's court orders the county tax collector to make such payments to B., the interest of B. and the county is such as to authorize them to join in a petition to compel the collector to comply with such order. Bailey v. Aransas County [Tex. Civ. App.] 18 Tex. Ct. Rep. 664, 102 SW 1159.

36. Hertel v. Boismenue, 229 Ill. 474, 82 NE 298. Where county superintendent of schools is charged with duty of approving county treasurer's bond, former treasurer is not necessary party. Id. One appointed to fill vacancy is not necessary party where civil service commission is required by law to hold promotional examination. People v. Errant, 229 Ill. 56, 82 NE 271.

37. Mandamus will not lie to compel the issue of an execution on a default judgment where the defendant in the original action was not made a party. State v. Thompson, 118 Tenn. 571, 102 SW 349.

38. By statute in California, mandamus must be brought against a board of trustees of a city to compel the disincorporation of a city, and not against the members of such board individually. Taylor v. Burks [Cal. App.] 91 P. 814. In mandamus proceedings

license there was collusion between the plaintiff and defendant, which agreed not to interpose any defense, taxpayers and voters of the municipality might intervene and defend.[39] Where mandamus is brought against a city council to compel the performance of a duty and before hearing the life of the council expires and a new council takes its place, the mandamus goes against the new council.[40] A claim for title to office should be brought against the adverse claimants and not against the municipality.[41]

§ 5. *Pleading and procedure in general.*[See 8 C. L. 286]—The procedure relating to the issue of mandamus is regulated by statute in many states.[42] Where mandamus is the sole relief sought, it is ordinarily classed as a special proceeding but still remains triable at law.[43] Service of an alternative writ can be made under the code of New York on a board of education by service upon a majority of the members or its presiding officer.[44] By code in California the ordinary rules in civil actions are applicable to pleadings in mandamus except in respect to matters otherwise provided.[45] An ad interim injunction granted by a Federal court on a bill filed subsequently to a petition for mandamus to which litigation in the Federal court the petitioner is not a party, affords no sufficient reason for staying the mandamus proceeding or denying the issue of a mandamus absolute.[46]

§ 6. *Petition or affidavit.*[See 8 C. L. 827]—In mandamus the object of the petition or complaint is to secure the granting of the alternative writ or rule to show cause,[47] and when that has been issued the complaint is functus officio and the alternative writ becomes the initial pleading in the cause.[48] An application for the writ should not be granted unless the petition shows every fact necessary to entitle the relator to the relief sought,[49] but a petition is sufficient if it give the facts necessary for serving as a basis for mandamus and it need not go into detail.[50] The facts on which relator's right is based and not mere conclusions of law in respect thereto should be alleged.[51] A clerical error in a petition for mandamus may be corrected on motion.[52] The giving of notice of a petition for mandamus is discretionary.[53] In an original proceeding for mandamus to compel the clerk of a district court to file an

against a city it is not necessary to make such officers parties as have the duty and power to perform the act required of the city. In mandamus to compel the city to provide for the payment of a judgment, it is not necessary to make the aldermen and members of the city council parties. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756.

39. Conlee v. Clay City, 31 Ky. L. R. 533, 102 SW 862.

40. Morris & Cummings Dredging Co. v. Bayonne [N. J. Law] 67 A 20.

41. Couch v. State [Ind.] 82 NE 457.

42. Maine Rev. St., c. 104 §§ 17, 18, construed. Hamlin v. Higgins [Me.] 67 A 625.

43. Ford v. Manchester [Iowa] 113 NW 846.

44. People v. Hendrickson, 54 Misc. 337, 104 NYS 122.

45. Taylor v. Burks [Cal. App.] 91 P 814.

46. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429.

47. Chipman v. Forward [Colo.] 92 P 913. The New York code contemplates the issuance of a writ of mandamus, whether peremptory or alternative only, upon affidavits or other, written proofs showing a proper case therefor. People v. Ahearn, 104 NYS 860. An action to procure the issuance of a writ is not begun until a motion and affidavit or a petition verified positively is filed in the district court. A notice that application will be made at a certain time before any papers are filed does not confer jurisdiction to issue a peremptory writ in a case where notice must be given. State v. Harrington [Neb.] 110 NW 1016.

48. Where the defendant answered the complaint after issue of the writ and plaintiff demurred whereupon judgment was entered for plaintiff, defendant's appeal will be dismissed, for the alternative writ was not attached by answer, demurrer, or motion. Chipman v. Forward [Colo.] 92 P 913.

49. Munson v. Terrell [Tex.] 20 Tex. Ct. Rep. 146, 105 SW 1114.

50. Arkansas Southern R. Co. v. Wilson, 118 La. 395, 42 S 976. Contract for collection of back taxes. Bailey v. Aransas County [Tex. Civ. App.] 18 Tex. Ct. Rep. 664, 102 SW 1159.

51. Meyer v. Decatur, 125 Ill. App. 556. An allegation that petitioner was "duly appointed" to the office to which he seeks reinstatement is a mere conclusion of law. Meehan v. Flaherty, 103 NYS 1058.

52. In a petition to compel the attorney general to certify as correct the pay rolls of a company of militia called into service, the fact that several names were duplicated is an error to be corrected on motion. Haley v. Cochran, 31 Ky. L. R. 505, 102 SW 852.

53. Hamlin v. Higgins [Me.] 67 A 625.

information presented by the prosecuting attorney, the state is the party interested and the prosecuting attorney represents the state and may verify the complaint.[54] Where a statute requires that an affidavit be sworn to by the parties or by their attorney if they are absentees, it does not require that where all the relators are absentees except one, who is, however, merely a nominal party, the affidavit must be made by that party in person.[55] Where in mandamus to compel supervisors to make an assessment for irrigation under Laws 1897, p. 267, c. 189, § 39, it appeared that all the land was situated in one county, the petition was not insufficient because it failed to state that the office of the board of directors was situated in the county where the proceedings were brought.[56] Under the Kentucky statute regulating mandamus, a petition need not be filed ten days before the beginning of a term but may be filed during or out of term time and stands for hearing ten days after service, if the court in which the proceeding is pending is then in session.[57]

§ 7. *Alternative writ.*[See 8 C. L. 828]—It is usually necessary both at common law and by statute that an alternative writ issue in the first instance,[58] except where there is no room for controversy as to the right.[59] Such a writ recites the allegations upon which it was issued and the respondent is required to do certain acts therein described or make return why he should not do them.[60] The allegations in the alternative writ are clearly amendable within the discretion of the court,[61] at least if no new ground is introduced or if the amendment does not authorize a more stringent command in the peremptory writ.[62] All irregularities as to an alternative writ are waived by submitting the case for final decision on the merits.[63] The mandatory part of a writ should conform to the allegations of the writ and should not in general require more to be done than is justified by such allegations.[64] The mandatory clause of the writ should state with definiteness the particular duty required to be performed.[65] An alternative writ need not bear the seal of the court or be signed by

54. State v. Quarles [Idaho] 89 P 636.

55. Arkansas Southern R. Co. v. Wilson, 118 La. 395, 42 S 976.

56. Nevada Nat. Bk. v. Kern County Sup'rs [Cal. App.] 91 P 122.

57. McChesney v. Hager, 31 Ky. L. R. 1038, 104 S. W. 714.

58. State v. Harrington [Neb.] 110 NW 1016. At common law application was made to the court, containing allegations of facts requiring the issuance of the writ. If these allegations satisfied the court of the need of the writ, there was issued with or without notice a precept called an alternative writ of mandamus. Hamlin v. Higgins [Me.] 67 A 625. Where on motion for a peremptory writ issues of fact are presented by the opposing affidavits, the peremptory writ cannot be granted, but an alternative writ may be had instead. Mandamus to compel restoration to membership in a society. People v. Erste Ulaszkoweer Kranken Unterstutzung Verein, 56 Miss. 304, 106 NYS 922. Where the allegations of a complaint are denied by the respondent, it is error to grant a peremptory writ, but an alternative writ should be issued. Statute provided for a rebate of liquor license fee if there had been no prior convictions for violation of the liquor laws upon surrender of license before it expired. In mandamus to compel payment of the rebate, where the commissioner denied that relator had not been convicted, the burden was on the relator to prove compliance with all conditions precedent. People v. Clement, 117 App. Div. 539, 102 NYS 779.

59. Only where there is no room for controversy as to the right, and where from the nature of the facts set forth in the affidavit the court can take judicial notice that a valid excuse is impossible, that a writ may issue without notice. Mandamus to compel the delivery of cars to transport freight cannot be issued without notice. State v. Harrington [Neb.] 110 NW 1016.

60. The alternative writ is neither an original writ nor a final writ of execution. It is practically a rule to show cause issued by a justice in vacation. Hamlin v Higgins [Me.] 67 A 625.

61. After return by respondents, petitioners were allowed to amend their writ to coincide with facts stated in the return. Hamlin v. Higgins [Me.] 67 A 625. An alternative writ may be amended. State v. Atlantic Line R. Co., 53 Fla. 650, 44 S 213; Id., 53 Fla. 689, 44 S 223.

62. Hamlin v. Higgins [Me.] 67 A 625. An independent allegation of an important fact is in effect the institution of a new proceeding. People v. Ahearn, 104 NYS 860.

63. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

64. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213.

65. Writ issued to enforce performance by a common carrier of its duty to the public. State v. Atlantic Coast Line R. Co., 53 Fla. 689, 44 S 223. The range of action required of the respondent by an alternative writ should be clearly and explicitly set forth in the mandate of the writ, and should not be left to indiscriminate outside ascertain-

the clerk, the signature of the justice himself being sufficient authentication.[66] Where the duty sought to be enforced is a general one and its nature is such that some discretion in the performance of it is vested in the respondent and the character of the duty and the particulars of the breach as alleged in the writ are peculiarly within the knowledge of the respondent, a general allegation of the duty to the public with statements as to the violation of the duty by nonperformance or otherwise, in terms sufficient to enable the court to specifically enforce compliance with the mandate, will be sufficient on motion to quash the writ.[67] Allegations of alternative writ which are relevant and not otherwise improper will not be stricken out on motion.[68] The alternative writ has no real place in mandamus procedure in some states; all that need precede a peremptory writ is notice sufficient to give opportunity for a hearing.[69] If the respondent performs the acts required by the alternative writ, its purpose is answered. If he does not he may move to quash for want of sufficient allegations or other imperfections,[70] or he may make return upon it of facts relied upon to excuse his nonperformance.[71]

§ 8. *Demurrer to petition or writ; answer or return; subsequent pleadings.* See 8 C. L. 828—It is no longer proper practice to address a demurrer to a writ of mandamus; it should be addressed to the petition, which is the real pleading and declaration of the relator. A defect in the writ should be reached by motion to quash, and if the opportunity for filing a motion to quash has been allowed to pass, the defect cannot be reached hy a demurrer, even though addressed as in this case to both the petition and the writ.[72] The respondent may plead in its return and rely upon facts which occurred since the issuance of the writ.[73] In Massachusetts the statute has been construed to permit a demurrer to a petition for mandamus.[74] A demurrer to a petition admits the truth of its averments.[75] Substantive matter pleaded going to the sound discretion of the court exercised in issuing a peremptory writ of mandamus is not demurrable.[76] A demurrer will not lie to an alternative writ of mandamus and the petition therefor on the ground that the judge was without jurisdiction to order the writ while sitting at chambers and in another county of the same judicial district and subdivision.[77] A demurrer is properly sustained to a separate statement of defense in the return to an alternative writ, no new matter being contained in it, but all that it embraces being embraced in the issues raised by the denials.[78] When matters of inducement stated in an alternative writ are replied to, they should be either admitted, denied, or confessed and avoided.[79] At common law the respondent cannot plead a general denial but must plead specially by a distinct traverse of the allegations of the writ,[80] or by way of confession and avoidance.[81] An answer in mandamus is sufficient if it clearly responds to and denies the asser-

ment outside the writ. Howell v. State [Fla.] 45 S 453.

66. Hamlin v. Higgins [Me.] 67 A 625.

67. State v. Atlantic Coast Line R. Co., 53 Fla. 689, 44 S 223.

68. The taking of testimony thereunder will be in the discretion of the court. State v. Atlantic Coast Line R. Co., 53 Fla. 689, 44 S 223.

69. Thorne v. Moore [Tex.] 19 Tex. Ct. Rep. 985, 105 SW 985.

70, 71. Hamlin v. Higgins [Me.] 67 A 625.

72. State v. Defiance County Com'rs, 5 Ohio N. P. (N. S.) 225.

73. Mandamus to restore police officer. Supplemental answer that, since the issuance of the alternative writ, the relator had been given a hearing and found guilty. State v. Metropolitan Police Com'rs [Ind.] 83 NE 83.

74. Rev. Law, c. 192, § 5, upon the return of the order of notice, the person who is required to appear shall file an answer showing cause why the writ should not issue. Finlay v. Boston [Mass.] 82 NE 5.

75. People v. Healy, 231 Ill. 629, 83 NE 453.

76. State v. McIntosh, 205 Mo. 589, 103 SW 1078.

77. State v. Defiance County Com'rs, 5 Ohio N. P. (N. S.) 225.

78. People v. New Rochelle Water Co., 104 NYS 92.

79. Immaterial, irrelevant, or argumentative matter should not be included in an answer to an alternative writ. State v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 S 230.

80, 81. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756.

tions of the petition.[82] If the answer to an alternative writ is wholly insufficient as a pleading, a demurrer will lie,[83] and if it is wholly irrelevant and impedes a fair trial of the cause, it may be stricken on motion,[84] or any irrelevant, immaterial, or otherwise improper matter stated in the answer may be stricken on motion,[85] but when the answer contains positive denials and other averments that are responsive, a motion to strike the entire answer will not be granted.[86] Where no affidavits are presented on behalf of the respondent, the material allegations of the petition are assumed to be true,[87] and every fact pleaded by the plaintiff not specially traversed by the respondent is taken as admitted.[88] An evasive return is properly regarded as conceding the facts alleged and only raising a question of law as to whether the facts entitled to relief.[89] The plea must be as broad as the alternative writ unless it be expressly stated to be a partial defense.[90] On an application for a peremptory writ, the replying affidavits must be taken as true,[91] but averments of the answering affidavit on information and belief do not put in issue the allegations of the relator's petition,[92] and mere indefinite conclusions in answering affidavits are insufficient to raise an issue to defeat a peremptory writ.[93] Mandamus may issue on a prima facie case by the relator despite proof denying the same by the respondent and the question of fact may properly and conclusively be determined upon the traverse to the return to an alternative writ.[94] A motion to make a mandamus absolute necessarily involves a determination that the averments in the answer either afford or do not afford a sufficient reason in opposition to the issuance of the writ, and the question whether or not the answer was sufficient is open despite the fact that it was not attacked by way of motion to strike out or demur in the court below.[95] In mandamus to compel the reinstatement of a patrolman discharged after hearing on charges of neglect of duty, relator is not entitled to have the return made more definite by having set out how, when, and where he neglected his duty, and also a copy of the proceedings set out for uncertainty in the removal proceedings cannot be attached in collateral mandamus.[96] Where on a writ of error after the quashing of an alternative writ the relator in the mandamus proceedings disclaims any intention of having the writ cover matter included within its terms, upon which issues are made by the respondents, the order quashing the writ will be affirmed, but the cause will be remanded with leave to amend the writ.[97] Where a petition of a turnpike company for mandamus to compel the auditor to certify to the clerk of a county court the taxes due from a railroad company on its property in petitioner's taxing district did not make allegations required by statute, an answer alleging no knowledge of the facts which should have been alleged in the petition is sufficient.[98] Under Rev. St. 1901, par. 1367, providing that where the defendant has answered and the plaintiff amends no further answer is necessary, the original answer extending to the amendments, a

82. "Respondents deny the allegations and each of them contained in 16th paragraph," held sufficient without repeating words of allegation. People v. Chicago Board of Trade, 125 Ill. App. 20. See 224 Ill. 370, 79 NE 611.

83, 84, 85, 86. State v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 S 230.

87. People v. Metz, 107 NYS 970.

88. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756.

89. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

90. People v. New Rochelle Water Co, 104 NYS 92.

91. Hammond v. General Committee of Republican Party, 56 Misc. 302, 106 NYS 589.

92. Elder v. Bingham, 118 App. Div. 25, 103 NYS 617.

93. Mandamus to compel the issue of a license. People v. State Racing Commission [N. Y.] 82 NE 723.

94. Hughes v. North Clinton Baptist Church [N. J. Law] 67 A 66.

95. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429.

96. State v. Metropolitan Police Com'rs [Ind.] 83 NE 83.

97. State v. Dampier, 53 Fla. 508, 43 S 422.

98. Chesapeake, etc., R. Co. v. Vanceburg & Stout's Lane Turnpike Road Co., 31 Ky. L. R. 1163, 104 SW 951.

demurrer to the application for mandamus extends to subsequent amendments, no other answer or return having been made by the respondent.[99]

§ 9. *Trial, hearing, and judgment. A. Trial and hearing.* See 8 C. L. 829—A petition for mandamus is one which ought in many cases to be summarily heard and disposed of if the petitioner is to have what he is entitled to.[1] Under the Washington code mandamus is held to be a judicial investigation, the object of which is the determination of civil rights, the same as in any ordinary proceeding, not only the determination of rights but their determination in such a way as to culminate in an effective judgment.[2] Though the circuit court has jurisdiction in mandamus proceedings, it must try such a proceeding according to its inherent nature as an extraordinary remedy limited in its scope.[3] The relator has the burden of proving the allegations of his complaint.[4] In mandamus proceedings to compel obedience to an order of the board of railroad commissioners, the order of the board is prima facie reasonable and the burden is on the defendant to prove its unreasonableness.[5] Where a petition is properly brought by the attorney general, it is immaterial who prosecutes the same.[6] Immaterial allegations may be waived dispensing with the necessity of their proof.[7] Under Code 1896, § 2827, requiring appeals from final judgments to be taken within thirty days after judgment, an appeal taken Jan. 24, 1907, from a judgment rendered Nov. 21, 1906, was too late.[8] Where the answer to mandamus proceedings states that the act required to be performed will be done as soon as possible, the proceedings may be continued to await such performance.[9] Where the petition alleges the facts essential to the issue of a writ and the answer denies the allegations, the case being submitted on the pleadings for judgment, the petition is properly dismissed,[10] and under Washington Code Civ. Proc. § 1091, affirmative allegations of a sworn answer not controverted by either pleading or proof are sufficient to support a judgment though no evidence is introduced under them.[11]

Jury. See 8 C. L. 830—By statute in some states, if the answer makes an issue of fact, the issue thus made shall be tried by a jury.[12]

Damages. See 8 C. L. 830

Abatement and dismissal. See 8 C. L. 831—A petition will be dismissed where the pleadings disclose questions of fact which the court cannot determine.[13] Where the right is restored pending proceedings, an alternative writ issued has no substantial

99. Leatherwood v. Hill [Ariz.] 89 P 521.

1. Finlay v. Boston [Mass.] 82 NE 5.

2. State v. Drainage Dist. No. 1 Com'rs [Wash.] 90 P 660.

3. McHenry v. State [Miss.] 44 S 831.

4. Petition to reinstate a scholar dismissed from school. It was error to refuse to dismiss if relator refused to produce evidence and to require respondents to proceed with their evidence. Vermillion v. State [Neb.] 110 NW 736. Where a private relator seeks mandamus to compel action by a public officer, the burden is on him to show any prerequisite condition necessary to compel such action and that after making a necessary demand performance was refused. Stegmaier v. Goeringer [Pa.] 67 A 782. The burden is on the petitioner to prove such material allegations on behalf of his claim as are denied by the answer. Petition by a doctor to compel a medical board to grant him a license to practice. Arwine v. California Medical Examiners [Cal.] 91 P 319.

5. State v. Missouri P. R. Co. [Kan.] 92 P 606.

6, 7. Hamlin v. Higgins [Me.] 67 A 625.

8. Central Trust Co. of New York v. Greene [Ala.] 44 S 540.

9. Mandamus to compel a judge to set cases down for trial. Response that they will be heard in due course. Commonwealth v. Berry, 31 Ky. L. R. 716, 103 SW 287.

10. Petition for mandamus to compel a city council to issue a liquor license. Conlee v. Clay City, 31 Ky. L. R. 533, 102 SW 862.

11. Fox v. Workman [Cal. App.] 92 P 742.

12. Sylvania & G. R. Co. v. Hoge [Ga.] 59 SE 806. Where an issue is raised by the return of the material allegations of the complaint, the case should be submitted to a jury, or, if there is nothing to submit, a verdict should be directed under the New York code. Judge not entitled to make a final order dismissing the proceeding. People v. Italian Ass'n St. Bartholomew Eoliana of Mutual Aid, 107 NYS 1101.

13. Oldham v. Terrell [Tex.] 104 SW 1040.

office to perform and may be quashed.[14] Any defect in substance in the writ may be taken advantage of at any time before the peremptory mandamus is awarded.[15]

(§ 9) *B. Judgment.*[See 6 C. L. 513]

Scope of relief.[See 8 C. L. 831]—A judgment in a proceeding to compel respondent to act should not unnecessarily prescribe the manner of performance.[16] Relief may be granted to the petitioner without providing for other interested parties.[17] Both mandamus and injunction may be granted in one action where no objection is made to the petition praying therefor as multifarious.[18]

Costs.[See 8 C. L. 831]—Where the controversy has arisen because of negligence on the part of the relator in creating a condition which seemed to warrant the action of the respondent, the costs should be adjudged against the relator.[19] Costs accruing in the supreme court of Georgia in an application against a judicial officer are taxable against the applicant.[20] Costs go against the persons committing the wrong.[21] A mandamus proceeding is regarded as an action respecting the right to costs.[22] If pending appeal the right sought to be enforced expires, the appellant is entitled to reversal of judgment if the lower court improperly denied the petition, and a direction that he recover his costs.[23]

§ 10. *Peremptory writ.*[See 8 C. L. 831]—Where after return the facts are undisputed and the relator's right is clear, a peremptory writ should issue in accordance with the prayer of the petition,[24] but if issues of fact are presented by the opposing affidavits, the peremptory writ cannot be granted but an alternative writ may be had instead.[25] Where the mandatory part of a writ taken with its allegations is not so definite and specific that its performance can be readily enforced, a peremptory writ will not be issued.[26] Where after a petition for a mandamus has been presented the respondents do the act sought to be enforced thereby, the relator is not entitled to a peremptory writ.[27]

14. Hartwig v. Watertown [Wis.] 112 NW 21.

15. Court properly refused to issue a peremptory writ after a verdict for the relator by a jury of a question of fact on the ground that the petition did not show any right in the relator for relief. People v. Cassidy, 118 App. Div. 693, 103 NYS 671.

16. A railroad company has a proper discretion in the performance of its duty to the public, even when done in good faith under the command of judicial process, and the court will not specify the kind and number of materials to be used in carrying out a mandate compelling the performance of its duty to properly equip and maintain its property. State v. Atlantic Coast Line R. Co., 53 Fla. 689, 44 S 223.

17. In mandamus by a judgment creditor of an irrigation district to compel the supervisors to make an assessment and levy as required by statute, it was not erroneous to grant the writ without making provision for other creditors. Nevada Nat. Bk. v. Kern County Sup'rs [Cal. App.] 91 P 122.

18. In an action to enjoin defendants from cutting off plaintiff's water supply and to compel them to furnish water to certain other premises belonging to plaintiff, where the facts are sufficient to justify relief by injunction as to one lot, and by mandamus as to the other, and the proper parties are before the court, and the demurrer to the complaint is upon the ground of no cause of action stated, and hence does not state the objection that there is a misjoinder of causes, the superior court has jurisdiction to give relief by injunction and mandamus. Fellows v. Los Angeles [Cal.] 90 P 137.

19. Because of relator's negligence in filing a deed with an erroneous date, the respondent land commissioner refused to issue a patent. Patton v. Terrell [Tex.] 20 Tex. Ct. Rep. 147, 105 SW 1115.

20. Harris v. Sheffield, 128 Ga. 299, 57 SE 305.

21. In mandamus to compel the payment of a claim against a city by the supervisors, costs run against the supervisors personally. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

22. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

23. State v. Hammel [Wis.] 114 NW 97.

24. Elder v. Bingham, 118 App. Div. 25, 103 NYS 617.

25. Mandamus to compel restoration to membership in a society. People v. Erste Ulaszkoweer Kranken Unterstutzungs Verein, 56 Misc. 304, 106 NYS 922.

26. Compelling a railroad to do acts in connection with the operation and equipment of its road. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213. Where the court will not enforce the mandate of the alternative writ as it is framed, a peremptory writ will not issue thereon, since the writ must be enforced as a whole if at all. Id.

27. This does not avail, however, in a case seeking to compel the holding of a meeting,

§ 11. *Performance.*[See 8 C. L. 831]—The court cannot punish for contempt where it is impossible to carry out the order of the court and the inability of the respondent is not due to any design or purpose on his part.[28] A peremptory writ issued against an officer in his official capacity after his resignation is not binding on his successor where such successor was not a party and is not named in the writ.[29] Where in mandamus proceedings to compel a society to hold a meeting a void meeting is held before issue of the peremptory writ, the relators may attack such meeting as not constituting a defense in the proceedings and are not driven to a direct attack upon the meeting.[30]

§ 12. *Review.*[See 8 C. L. 832]—Where in mandamus all facts are conceded, an exception that the order and judgment was not supported by the law or the evidence should be construed to mean that the final result was not warranted by the conceded facts.[31] The assumption by a trial court that mandamus is a proper remedy is equivalent to so deciding, thus presenting the question of the propriety of the remedy for review.[32]

MANDATE; MARINE INSURANCE; MARITIME LIENS; MARKET REPORTS; MARKETS; MARKS, see latest topical index.

MARRIAGE.

§ 1. Nature of Marriage; Capacity of Parties; Fraud and Duress, 686.
§ 2. Essentials of a Contract of Marriage, 687. A Common-Law Marriage, 687. Evidence of Marriage, 687. Competency of Witnesses, 687.
§ 3. Validity and Effect, 688.
§ 4. Proceedings for Annulment, 689.
§ 5. Criminal Offenses and Penalties, 690.

Slave marriages,[33] the rights and liabilities resulting from marriage,[34] and the crime of bigamy,[35] are excluded.

§ 1. *Nature of marriage; capacity of parties; fraud and duress.*[See 8 C. L. 833] Statutory restrictions on remarriage of divorced persons have no extra-territorial effect,[36] but annul a marriage in violation thereof within the jurisdiction where they are operative.[37] The presumption of death from continued absence[38] is strengthened by the presumption in favor of the validity of a remarriage by the remaining spouse,[39] and such a marriage is valid as to all but the absent spouse.[40] Interracial marriages are prohibited in some states.[41]

and a meeting is held but without proper authority. State v. Rombotis [La.] 45 S 43.

28. Writ against the secretary of a company to produce books. Secretary had resigned prior to issue of peremptory writ, but not for purpose of evading the order of court. Egilbert v. Shasta County Super. Ct. [Cal. App.] 91 P 748.

29. Mandate against secretary of a corporation who resigned prior to its issue. His successor not guilty of contempt in failing to carry out its order. Bauter v. Shasta County Super. Ct. [Cal. App.] 91 P 749.

30. State v. Rombotis [La.] 45 S 43.

31. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

32. Dickinson v. Cheboygan County Canvassers, 148 Mich. 513, 14 Det. Leg. N. 196, 111 NW 1075.

33. See Slaves, 8 C. L. 1945.

34. See Husband and Wife, 10 C. L. 1.

35. See Bigamy, 9 C. L. 392.

36. Husband divorced in New York and decree forbade remarriage. Held remarriage in District of Columbia was valid. Dimpfel v. Wilson [Md.] 68 A 561.

37. Remarriage of one divorced for adultery. Succession of Gabisso, 119 La. 704, 44 S 438.

38. See Death and Survivorship, 9 C. L. 925.

39. Murchison v. Green, 128 Ga. 339, 57 SE 709.

40. In re Del Genovese's Will, 107 NYS 1033.

Note: The decision in the principal case follows the New York decisions as found in Cropsey v. McKinney, 30 Barb. [N. Y.] 47; White v. Lowe, 1 Redf. Sur. [N. Y.] 376; Jones v. Zoller, 29 Hun [N. Y.] 551; Gall v. Gall, 114 N. Y. 109, 21 NE 106. In these cases the court held that marriages of this nature are valid until nullified by the decree of a competent tribunal. However, Spicer v. Spicer, 16 Abb. Prac. [N. S.; N. Y.] 112, held that a woman whose husband absents himself for the space of five years, without being known to her to be living during that time, is incapable of contracting marriage,

§ 2. *Essentials of a contract of marriage.*[See 8 C. L. 833]

A Common-law marriage [See 8 C. L. 834] is a mutual agreement of competent parties [42] to be husband and wife in presenti with present assumption of the relation.[43] While a cohibition meretricious in its inception is presumed to so continue, slight evidence will overcome the presumption,[44] and in Arkansas the question is regarded as one of fact without presumption either way.[45] The relation created by a common-law marriage is the same as that created by ceremonial marriage.[46]

Evidence of marriage.[See 8 C. L. 834]—Though it is said that the burden is on one asserting marriage to prove it,[47] marriage is presumed from cohabitation and repute.[48] Ceremonial marriage may be proved by the record [49] or by the testimony of any person who knows the facts,[50] or by proof of cohabitation and repute.[51] A common-law marriage may be and ordinarily is established by cohabitation and repute,[52] and to be sufficient these must be matrimonial in their character.[53]

Competency of witnesses.[See 8 C. L. 835]

notwithstanding the statute. The principal case decided that Spicer v. Spicer, 16 Abb. Prac. [N. S.; N. Y.] 112, was contrary to the meaning of the statute. Similar holdings to those of the New York courts are found in Estate of Harrington, 140 Cal. 244, 73 P 1000, 98 Am. St. Rep. 51; Charles v. Charles, 41 Minn. 201. A few courts seem to have gone even further and have pronounced the marriage valid, nothing being said about the right of the first husband or wife to annul the subsequent marriage. See Strode v. Strode, 66 Ky. 227, 96 Am. Dec. 211; Inhabitants of Hiram v. Pierce, 45 Me. 367, 71 Am. Dec. 555; Woods v. Woods' Adm'rs, 2 Bay [S. C.] 476. The old common-law rule that marriages of this nature are void is still applied in some of the states. This common-law rule is well expressed in the opinion in Martin's Heirs v. Martin, 22 Ala. 86, in these words: "Though a man marries never so often, he can have but one lawful wife living. So long as she is living, and the marriage bond remains in full force, all his subsequent marriages whether meretricious or founded in mistake and at the time supposed to be lawful are utterly null and void." Some states which have statutes similar to those of New York have held marriages of this nature void. See Glass v. Glass, 114 Mass. 563; Pain v. Pain, 37 Mo. App. 110; Webster v. Webster, 58 N. H. 3; Thomas v. Thomas, 124 Pa. 646, 23 Wkly. Notes Cas. 410, 17 A 182; In re Clark's Estate, 173 Pa. 451, 34 A 68. The cases of Webster v. Webster, 58 N. H. 3, and Thomas v. Thomas, 124 Pa. 646, 23 Wkly. Notes Cas. 410, 17 A 182, hold that although the marriage is void, the person marrying is exempt from criminal liability.—From 6 Mich. L. R. 513.

41. Between octoroons and whites. Succession of Gabisso, 119 La. 704, 44 S 438.

42 If within marriageable age Jackson v. Banister [Tex. Civ. App.] 19 Tex. Ct. Rep. 795, 105 SW 66.

43. If parties are capable of contracting and cohabitation follows, though there is no solemnization. Klipfel's Estate v. Klipfel [Colo.] 92 P 26. Where there were no words de praesenti to indicate a marriage contract and nothing but notorious and open cohabitation, held no valid, common-law marriage. State v. Kennedy, 207 Mo. 528, 106 SW 57. Where parties do not presently agree to take each other and promise to have ceremony performed is put off from time to time for years, held not a valid, common-law marriage. Judson v. Judson, 147 Mich. 518, 111 NW 78.

Marriage according to tribal custom. Porter v. U. S. [Ind. T.] 104 SW 855; Ortley v. Ross [Neb.] 110 NW 982.

44. Persons between whom an immoral relation exists may legally contract a marriage between them. Foss v. Brown [Mich.] 14 Det. Leg. N. 865, 114 NW 873. Decedent had wife in insane asylum, then married another woman, who not knowing of former marriage in good faith cohabited with him and lived in every way with him as husband and wife until his death. Held that she became common-law wife on death of insane wife. In re Well's Estate, 108 NYS 164. Where there is illicit intercourse and after an impediment is removed the parties show evidence of intention to live together as husband and wife and continue relations under new status, though without a ceremony, it is a common-law marriage. Mick v. Mart [N. J. Eq.] 65 A 851. Where after removal of the impediment to marriage the cohabitation with two persons continued, both will be presumed meretricious. Klipfel's Estate v. Klipfel [Colo.] 92 P 26.

45. Darling v. Dent [Ark.] 100 SW 747.

46. Homestead Laws. Steves v. Smith [Tex. Civ. App.] 107 SW 141.

47. Lynch v. Knoop, 118 La. 611, 43 S 252.

48. See post this section. See, also, § 1, ante, as to presumption as to cohabitation meretricious in its inception, and § 3, post, as to presumption, as to validity of marriage.

49. Copy not admissible unless properly certified. Smallwood v. Kimball [Ga.] 58 SE 640.

50. Proof of witnesses to the ceremony that the marriage actually took place is sufficient to establish marriage. Exact language used need not be provided. Resnick v. Resnick, 126 Ill. App. 132. Possibility of record evidence does not exclude parol. Sellers v. Page, 127 Ga. 633, 56 SE 1011.

51. Baker v. Gibson [Ky.] 106 SW 253; Merrell v. Moore [Tex. Civ. App.] 104 SW 514; Potter v. Potter [Wash.] 88 P 625. Where parties had held each other out as husband and wife, the presumption is that they were married. Foster v. Berrier [Colo.] 89 P 787.

§ 3. *Validity and effect.* See 8 C. L. 836—Every presumption favors the legality of a marriage,[54] and the presumption is strengthened by cohabitation and birth of issue.[55] Positive evidence, however, of a former marriage overcomes any presumption of its invalidity arising from subsequent marriage.[56] A marriage valid when made continues so though the law under which it was so is superseded.[57] A marriage void when made [58] may become valid by ratification after impediment is removed.[59]

52, 53. Klipfel's Estate v. Klipfel [Colo.] 92 P 26.

54. Foster v. Berrier [Colo.] 89 P 787; Murchison v. Green, 128 Ga. 339, 57 SE 709; Sparks v. Ross [N. J. Eq.] 65 A 977; Potter v. Potter [Wash.] 88 P 625.

55. Murchison v. Green, 128 Ga. 339, 57 SE 709; McDonald v. White [Wash.] 89 P 891. Where there was fifteen years cohabitation with birth of nine children and couple lived as husband and wife till day of husband's death, held that the evidence of prior marriage was not powerful enough to invalidate marriage. Sparks v. Ross [N. J. Eq.] 65 A 977.

56. Resnick v. Resnick, 126 Ill. App. 132.

57. Marriages made by Indians under tribal customs which were valid while tribal relations existed will be held valid after statute laws take effect making Indians citizens of the U. S. Ortley v. Ross [Neb.] 110 NW 982.

58. Between parties, one of whom has a spouse living. Brown v. Brown [Miss.] 43 S 178; Stein v. Dunne, 103 NYS 894.

59. At time of ceremony wife had husband living. This fact known to both parties. Plaintiff on learning of former husband's divorce said "Before God, you are my wife." Held ratification and annulment refused. Mick v. Mart [N. J. Eq.] 65 A 851. Where couple legally married in England, separated, and husband came to America, then both remarried, English woman dying in 1901 and the man in America in 1904, and from 1901 to 1904 the American wife was generally recognized as the wife of the man, held a presumption would lie that either a divorce had been secured before marriage to the American wife or that the marriage to the American wife was created after death of first wife. In re Thewlis Estate, 217 Pa. 307, 66 A 519. Couple married after woman had left another man with whom she had lived. After death of first man she remarried formally her husband. Held, at least after death of first man, couple were husband and wife. Husband had widower's interest. Geiger v. Ryan, 108 NYS 13. Marriage relations continuing after death of first husband. Bechtel v. Barton, 147 Mich. 318, 13 Det. Leg. N. 1047, 110 NW 935. The defendant's wife obtained a decree of divorce from him, but before the decree became absolute he married another woman. The parties involved in this latter marriage separated, but subsequently cohabited after the divorce obtained by the first wife was made absolute. On indictment charging defendant with polygamy, held that the invalidity of such second marriage was not cured by the subsequent cohabitation of defendant and his second wife after such decree became absolute. Commonwealth v. Stevens [Mass.] 82 NE 33.

Note: The question whether a marriage, void because of an existing marriage, can be made valid by cohabitation after the removal of the impediment is decided in the following cases: Williams v. State, 44 Ala. 24, where the court held that cohabitation, though evidence of marriage, cannot make a void marriage valid. The Illinois court, in Cartwright v. McGown, 121 Ill. 338, held that cohabitation after the removal of the impediment will not alone change the marriage from being meretricious. Similar holdings are found in Summerlin v. Livingston, 15 La. Ann. 519; Thompson v. Thompson, 114 Mass. 566; Voorhees v. Voorhees, 46 N. J. Eq. 411, 19 Am. St. Rep. 404; Pettit v. Pettit, 105 App. Div. 312, 93 NYS 1001; Collins v. Collins, 80 N. Y. 1; Hunt's Appeal, 86 Pa. 294.

On the other hand the following cases are opposed to the doctrine laid down in the principal case: Stein v. Stein, 66 Ill. App. 526; Blanchard v. Lambert, 43 Iowa, 228, 22 Am. Rep. 245; Donnelly v. Donnelly, 8 B. Mon. [Ky.] 113; Turner v. Turner, 189 Mass. 373, 75 NE 612, 109 Am. St. Rep. 643; State v. Worthington, 23 Minn. 528; Chamberlain v. Chamberlain, 68 N. J. Eq. 414, 62 A 680; Fenton v. Reed, 4 Johns. [N. Y.] 52; Rose v. Clark, 8 Paige [N. Y.] 574; Taylor v. Taylor, 25 Misc. Rep. [N. Y.] 566, 55 NYS 1052; The Breadalbane Case, L. R. 1 H. L. Sc. 182; De Thoren v. Attorney General, L. R. 1 App. Cas. 686. Taylor v. Taylor, 25 Misc. [N. Y.] 566, 25 NYS 1052, decided that a marriage entered into by a woman whose former husband was absent for five successive years, and who was not known to be living, is voidable and is made valid by the continued cohabitation of the parties after the former husband's death. The court in Chamberlain v. Chamberlain, 68 N. J. Eq. 414, 62 A 680; followed the holdings of The Breadalbane Case, L. R. 1 H. L. Sc. 182; and De Thoren v. Attorney General, L. R. 1 App. Cas. 686. The case was distinguished from Voorhees v. Voorhees, 46 N. J. Eq. 411, decided by the same court fifteen years before, in that the marriage was contracted in good faith, the parties having reason to believe that the wife's former husband was dead, while in Voorhees v. Voorhees the marriage was meretricious, and the court held that cohabitation after the decree of divorce did not make the marriage valid, as the decree put the parties back in their matrimonial relations just where they were when the decree was pronounced. Turner v. Turner, 189 Mass. 373, 75 NE 612, 109 Am. St. Rep. 643, came within the provisions of the statute, and on that account the marriage was declared valid. The common-law rule that marriages, voidable because of the lack of age of one or both of the parties, are made valid if the parties continue to cohabit after reaching the proper age is followed by Smith v. Smith, 84 Ga. 440, 11 SE 496, 8 L. R. A. 362; Koonce v. Wallace, 52 N. C. 194; Holtz v. Dick, 42 Ohio St. 23, 51 Am. Rep. 791. The common law placed slaves in the same category as infants, as neither had the capacity to contract a valid

As a general rule a marriage valid where made is valid elsewhere,[60] but this is subject to exceptions.[61] The plea of prescription cannot be invoked to make valid an invalid marriage.[62]

§ 4. *Proceedings for annulment.* See 8 C. L. 837—Divorce suits and annulment suits are distinct proceedings,[63] though so closely related that a statute dealing with both has been held not to embrace two subjects.[64] Where statute provided against remarriage of certain divorced persons it was held that remarriage against terms of the statute were a ground of divorce not for nullity.[65] A marriage may be annulled for physical incapacity,[66] or fraud [67] or duress,[68] if the complaining party was without fault.[69] The time within which a suit may be brought for annulment on statutory grounds is generally fixed by statute.[70] A lunatic may sue by his next friend for annulment of his marriage made while mentally unsound.[71] It is not necessary to allege that at the time of marriage complainant knew that defendant had a husband

marriage. Practically all the cases agree that a marriage between slaves is rendered valid by their cohabitation after emancipation. The more recent cases which hold the marriage valid are Lewis v. King, 180 Ill. 259, 54 NE 330; State v. Melton, 120 N. C. 591, 26 SE 933; Ross v. Ross, 34 La. Ann. 860; Dowd v. Hurley, 78 Ky. 260. However, a contrary holding is found in Brown v. Beckett, 6 D. C. 253.

Where the marriage is invalid because one of the parties was insane at the time of its celebration, the general rule is that the marriage may be ratified by the cohabitation of the parties during lucid intervals. See Prine v. Prine, 36 Fla. 676, 18 S 781, 34 L. R. A. 87; Gross v. Gross, 96 Mo. App. 486, 70 SW 393; Cole v. Cole, 37 Tenn. [5 Sneed] 57, 70 Am. Dec. 275. A contrary decision is reached, however, in Sims v. Sims, 121 N. C. 297, 28 SE 407, 61 Am. St. Rep. 665. Where the marriage is void because of fraud or other cause of fear, Hampstead v. Plaistow, 49 N. H. 84, holds that a voluntary cohabitation, after the fraud is known, and after the force or cause of fear is removed, will not cure the defect.—From 6 Mich. L. R. 247.

60. Kirby's Dig. § 5177. Darling v. Dent [Ark.] 100 SW 747. Marriage in Virginia, where contracted, was invalid for lack of license, also invalid in Maryland where moved to. Held, however, valid in New Jersey where subsequently lived and where in every way held each other out as husband and wife just as if words of contract of marriage in praesenti had actually been used in New Jersey. Travers v. Reinhardt, 205 U. S. 423, 51 Law. Ed. 865.

61. As where a citizen of one state goes to another and there contracts a marriage prohibited by the law of his domicile. Succession of Gabisso, 119 La. 704, 44 S 438. Where the divorce in Massachusetts made it invalid to remarry within a certain time and woman went to Georgia and remarried, held remarriage even where otherwise would be valid in Georgia was invalid there because of unremoved Massachusetts disability. Commonwealth v. Stevens [Mass.] 82 NE 33. But where parties are actually domiciled in a state where marriage is valid at time of marriage and where they later return to state where woman was divorced and prohibited from remarriage within certain time, it is a valid marriage. State v. Fenn [Wash.] 92 P 417. Where a judgment for divorce in a foreign state was invalid because one of the parties was a resident of another state, a marriage in the foreign state after such judgment is invalid in South Carolina if the party marrying was a native of South Carolina. State v. Westmoreland, 76 S. C. 145, 56 SE 673. Where marriage was incestuous, bigamous, contrary to natural or positive law. State v. Fenn [Wash.] 92 P 417.

62. Succession of Gabisso, 119 La. 704, 44 S 438.

63. Annulment suit not within proviso in Rev. Laws 1905, § 4160. Waller v. Waller, 102 Minn. 405, 113 NW 1013.

64. Piper v. Piper [Wash.] 91 P 189.

65. Dimpfel v. Wilson [Md.] 68 A 561.

66. Must be want of potentia copulandi, not merely incapacity for procreation. Schroter v. Schroter, 56 Misc. 69, 106 NYS 22.

67. The circumstances of the marriage must show a fraudulent advantage taken of complainant. Trimpe v. Trimpe [N. J. Eq.] 65 A 744. Woman went through actual ceremony before priest with man impersonating plaintiff, and actual certificate of marriage filed by officiating priest with board of vital statistics. Held proper to annul certificate. Randazzo v. Roppolo, 105 NYS 481. To justify annulment of marriage, fraudulent misrepresentations must be of something essential to the relation. Fraudulent representation as to epileps yheld insufficient. Lyon v. Lyon, 230 Ill. 366, 82 NE 850. Intimated that barrenness known and concealed might be fraud. Schroter v. Schroter, 56 Misc. 69, 106 NYS 22.

68. Man arrested charged with seduction, and with officer went to clerk and took out a license. Marriage ceremony then performed. Held marriage forced on husband by threats and fear of imprisonment. Merrell v. Moore [Tex. Civ. App.] 104 SW 514.

69. The right of a husband to annul a marriage with a woman pregnant at the time of marriage, but with whom he has previous intercourse, is barred by the husband's previous misconduct. Trimpe v. Trimpe [N. J. Eq.] 65 A 744.

70. Civ. Code, §§ 61, 82, 83, may sue any time during existence of void marriage. Stierlen v. Stierlen [Cal. App.] 92 P 329.

71. Mere weakness of mind not sufficient. Must establish incompetency by preponderance of evidence showing he was mentally incapable of understanding the marriage re-

living, where the annulment is based on a prior marriage of the woman.[72] On the expiration of the period fixed by statute, the court must make final an interlocutory judgment of annulment.[73]

§ 5. *Criminal offenses and penalties.*[74]—While the issuing of a license for the marriage of a minor female without the consent of her parents is in some states a crime or subjects the officer to a penalty [75] the clerk cannot be held in civil liability to the father of a minor girl for loss of her services because of her marriage under such license.[76] Under the statutes of Ohio, it is required that an applicant for a marriage license state under oath the number of times he has been previously married, and a false statement with reference thereto, given under oath, warrants a conviction for perjury.[77]

MARRIAGE SETTLEMENTS, see latest topical index.

MARSHALING ASSETS AND SECURITIES.

The doctrine See 8 C. L. 838 of marshaling assets requires a creditor having recourse to two funds to one of which only other creditors can resort to first exhaust the fund in which his interest is exclusive.[78] It is administered only as between creditors and not at the suit of the debtor,[79] and will not be so applied as to injure third persons with equities equal to or greater than that of the creditor invoking the rule.[80] So, also, the court may direct payment to the paramount creditor from the common fund and provide for subrogation for its replenishment.[81] The right of a junior mortgagee to invoke the doctrine cannot be defeated by secret agreement between the senior mortgagee and the debtor.[82] Where by reason of intervening liens superior to his own a junior mortgagee can have no interest in other property covered by a general senior mortgage, he is not entitled to have the value of such other property

lation. Schneider v. Rabb [Tex. Civ. App.] 18 Tex. Ct. Rep. 962, 100 SW 163.

72. Husband sued wife to annul on ground that she had husband living when she married complainant. Harned v. Harned [N. J. Eq.] 67 A 180.

73. Interlocutory judgment was opened on condition and defendant did not comply with condition. Bernzott v. Bernzott, 107 NYS 424.

74. See 8 C. L. 838. Bigamy (see 9 C. L. 392), and offenses against the marital relation (see Husband and Wife, 10 C. L. 1, and topics there referred to), are excluded.

75. License issued for marriage of a worthless girl of 16 without consent of father and without inquiry of father, who was well known to register and who could have been reached by phone, application made by man unknown to register and no oath was taken by applicant. Held failure to exercise reasonable inquiry. Laney v. Mackey, 144 N. C. 630, 57 SE 386.

76. Clerk issued license to girl just over fourteen years while statute forbade issuance under eighteen years. Girl at fourteen capable of contracting common-law marriage. Held at marriage girl went from jurisdiction of father and he could not recover for her services. Jackson v. Banister [Tex. Civ. App.] 19 Tex. Ct. Rep. 795, 105 SW 66.

77. Rev. St. § 6390. Field v. State, 9 Ohio C. C. (N. S.) 245.

78. Assignee of rents entitled to landlord's lien on mortgaged cattle held entitled to enforce judgment for rent against proceeds of cattle only in case other property was insufficient. Groos v. Chittim [Tex. Civ. App.] 18 Tex. Ct. Rep. 906, 100 SW 1006. A creditor who holds collateral must credit his claim with their value before sharing ratably in dividends declared by a receiver. Kretschmar v. First Nat. Bk. [Miss.] 43 S 474. Where there was no proof of value of property covered by defendant's mortgage and not by plaintiffs, nor as to how much of such property defendant had seized, plaintiff could not require defendant to resort to such property first. Cassell v. Deisher [Colo.] 89 P 773.

79. Not applicable where tenant insisted that landlord enforce his lien against particular property. Citizens' Sav. Bk. of Olin v. Woods, 134 Iowa, 232, 111 NW 929.

80. Beneficiaries of a homestead have such equity in the estate as to be within protection of this limitation. Mulherin v. Porter, 1 Ga. App. 153, 58 SE 60.

81. Where a creditor claimed priority of payment from fund in court of notes held by him, which notes were a lien on property not in court, it was competent for court to direct payment of his claim from court fund on his transferring notes to its receiver to be sold for benefit of such fund (Mansur v. Dupree [C. C. A.] 150 F 329), and this did not operate as discharge of notes or lien but purchaser took rights of original holder (Id.).

82. That former should first resort to common security. Anthes v. Schroeder [Neb.] 112 NW 593.

yet unsold added to the fund for distribution.[83] Equity will not entertain jurisdiction of a suit by a solvent individual to marshal his assets and establish claims for or against the estate.[84]

Partnership assets. See 6 C. L. 520

Inverse order of alienation. See 8 C. L. 839

MARSHALING ESTATE, see latest topical index.

MASTER AND SERVANT.

§ 1. The Relation; Statutory Regulations 691. Termination of the Relation, 691. Actions for Wrongful Discharge, 694. Labor Laws, 695.

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§ 1. *The relation; statutory regulations.* See 8 C. L. 840—The relation of master and servant rests upon contract, express or implied, and its existence is to be determined, in general, by reference to the principles applicable to other contracts and to the facts of each particular case.[85] Whether the relation created is that of master and servant or employer and independent contractor depends upon the terms of the contract, the test being the degree of control exercised by one over the other in the performance of the particular service or work contracted for.[86] The distinction between the relation of principal and agent and that of master and servant is to be found in the nature of the service to be performed and the manner of its performance.[87] The contract of employment is governed by the general rules applicable to other contracts,[88] such as mutuality of obligation.[89]

Termination of the relation. See 8 C. L. 841—Whether a hiring is for a certain period,[90] or may be terminated at any time,[91] depends upon the terms of the con-

83. Willets v. Metcalf, 216 Pa. 445, 65 A 794.

84. Martin v. Brown [Ga.] 59 SE 302.

85. Where one wrote to another offering him employment for a certain term and such other in pursuance thereof went to work, the contract was not lacking in mutuality. Schultz v. Simmons Fur Co. [Wash.] 90 P 917. The relation of master and servant is created by contract and imposes reciprocal rights and duties. Louisville, etc., R. Co. v. Pendleton's Adm'r, 31 Ky. L. R. 1025, 104 SW 382. A contract by which one is employed to weigh, mark, and deliver all cotton bought by the employer during the season need not be in writing. Sadler & Lusk Trading Co. v. Logan [Ark.] 104 SW 205. A letter written by the manager of an employe after the terms of the employment had been agreed upon held not to alter the contract. Fitzpatrick Square Bale Ginning Co. v. McLaney [Ala.] 44 S 1023. A contract employing a physician at a certain place "until the timber was cut out" and reciting that the master would be there about two years expresses a contingency and is not within the statute of frauds. Texarkana Lumber Co. v. Lennard [Tex. Civ. App.] 19 Tex. Ct. Rep. 683, 104 SW 506.

86. See Independent Contractors, 8 C. L. 176. Also post, § 4.

87. Merritt v. Huber [Iowa] 114 NW 627.

88. See Contracts, 9 C. L. 654.

89. Contract held not void for want of mutuality. Butterick Pub. Co. v. Whitcomb, 225 Ill. 605, 80 NE 247.

90. A contract of employment at a stated salary for the first six months and a certain other sum for the second six months held not a contract for a year. Stein v. Kooperstein, 52 Misc. 481, 102 NYS 578. Where employer

tract. Where service continues without change after expiration of a term, there is an implied hiring for another term of the same length.[92] A general or indefinite hiring is prima facie a hiring at will [93] and is terminable at any time by either party.[94] An agreement to pay a certain salary monthly is held by some courts to be a contract for a month,[95] by others, such a hiring is held to be a hiring at will.[96]

An employer's right to cancel a contract for employment must be based on an act of the employe either in derogation of his duties or because of something outside the contract which affects his performance thereof.[97] That other persons desired services to be performed by another is not ground for an employe's discharge,[98] nor does the fact that the employe's services are no longer required justify his discharge before the end of his term.[99] A discharge or termination of the contract for causes specified in the contract is of course justifiable, if the right to terminate is exercised in good faith.[1] Where services to be rendered under a contract are personal, involv-

wrote to employe that his salary had been increased to a certain figure per month, and employe continued to work, he accepted the new contract and thereafter was employed by the month. Schott v. La Compagnie Generale Trans-Atlantique, 52 Misc. 236, 102 NYS 901. Contract construed as a hiring for one year which read, "I will work for you the first year for one thousand dollars, give my undivided time and attention to the advancement and best interest of the enterprise, after that time, * * * I will leave it to you to say what I am worth to the business. This contemplates continuous and perpetual service." Seago v. White [Tex. Civ. App.] 18 Tex. Ct. Rep. 183, 100 SW 1015. Where a contract for employment for a year terminated and eight days later the employe demanded a contract for another year and stated that he would quit at once unless he got it and the master said, "You are all right, go ahead." Held a contract for a year. Embry v. Hargadine, McKittrick Dry Goods Co. [Mo. App.] 105 SW 777. Where contract of employment as originally made provided for termination by either upon thirty days' notice but it was renewed for one year from a certain date, a term of a year was created and a discharge during the year was not justifiable. Daniel v. Manhattan Life Ins. Co., 116 App. Div. 780, 102 NYS 27.

91. Contract of employment, with appendix, held one instrument, which provided that it could be terminated at any time by either party. Killen v. Citizens' Life Ins. Co., 30 Ky. L. R. 881, 99 SW 943. Contract with sales agent allowing employer to terminate it on four months' written notice in case he desired to consolidate with other manufacturers held valid. Fuller v. Downing, 104 NYS 991.

92. Where contract of employment has been extended from year to year, payment of salary after lapse of extended period tends to establish fact of renewal for a further year. Fish v. Marzluff, 128 Ill. App. 549. The beginning of a new year's service without change of compensation at the end of a period of one year's service is a new hiring for a year on the former terms. Appleton Water Works Co. v. Appleton [Wis.] 113 NW 44.

93. Where a contract for hiring is general or indefinite in its terms, it is prima facie a hiring at will and the servant has the burden to prove hiring for a definite term. Frank v. Manhattan Maternity & Dispensary, 107 NYS 404.

94. A contract for permanent employment continues indefinitely and is terminable by either party at any time. Bentley v. Smith [Ga. App.] 59 SE 720. On expiration of two year contract, where service continues without any agreement, the term is indefinite and may be terminated by either party at any time. Schott v. La Compagnie Generale Trans-Atlantique, 52 Misc. 236, 102 NYS 901.

95. The fact that wages are payable monthly shows a hiring for that period, in the absence of a showing to the contrary. Cronemillar v. Duluth-Superior Mill. Co. [Wis.] 114 NW 432. See, also, 8 C. L. 841, n. 70.

96. A verbal contract between owner of a vessel and marine engineer for employment at a stated sum per month, no term being specified, is a hiring at will and not by the month, and, in the absence of established usage to the contrary, either party may terminate it at any time without notice. The Pokanoket [C. C. A.] 156 F 241. A contract for a certain sum per month, nothing being said about the period of service, is an indefinite hiring and the master may discharge at any time. Frank v. Manhattan Maternity & Dispensary, 107 NYS 404.

97. Because persons not connected with the contract nor responsible under it express an adverse opinion on the character of the employe is not sufficient. Porter v. Murphy [Ind. T.] 104 SW 658. Attorney employed by an Indian nation held wrongfully discharged. Id.

98. One who employed a person to weigh, mark, and deliver cotton could not breach such contract on the ground that sellers demanded that another weigher weigh the cotton. Sadler-Lusk Trading Co. v. Logan [Ark.] 104 SW 205.

99. Where a corporation contracted to employ an agent for five years, reserving no right to discharge him, it is liable for breach of the contract where it discharged him at the end of one year solely because his services were no longer required. Chipman v. Turner, Day & Woolworth Mfg. Co. [Ky.] 106 SW 852.

1. Under a contract employing one as foreman "so long a time up to five years as he satisfactorily performs his duties," he may be discharged whenever his employer becomes in good faith dissatisfied with his services and the discharge is not unlawful because the master gives a wrong reason if he has a good reason. Corgan v. George F.

ing fitness, integrity, and confidence, all that is required of the employe in exercising his option to discharge is that he act in good faith and not arbitrarily.[2] Acts committed before existence of the relation,[3] or done at his request,[4] or which have been condoned by the master,[5] are not grounds for the servant's discharge. Where an employe has bargained all of his time to his employer, he has no right to appropriate any of it to his own use without his employer's consent,[6] but a temporary absence from the employment at a time when work has been suspended, so that no injury results to the employer, will not in all cases justify discharge of the employe.[7] The question must in each case be determined by the contract, the nature of the business, and the interests of the employer.[8] Insubordination and incompetency authorize a discharge when shown.[9] A charge of incompetency is not sustained by showing acts of third persons not under the servant's control.[10] A servant's incompetency is not waived by the master retaining him an unreasonable time after discovery of such fact.[11] Whether a regulation adopted by a corporation for government of its employes is void for unreasonableness is a question of law and not of fact.[12] A resignation tendered and accepted terminates the contract of employment [13] and precludes an action for wrongful discharge.[14] Where according to the terms of a contract the employment is terminable at any time, a refusal to let the employe begin work is a breach of the contract.[15] Whether a discharge was justified may be a question for the jury.[16] It depends largely upon the facts of the particular case.[17] No particular

Lee Coal Co. [Pa.] 67 A 655. Where contract reserved to employer right to terminate contract upon giving four months' written notice, in case he desired to consolidate with other manufacturers, employer was bound to use good faith in terminating the contract. Fuller v. Downing, 104 NYS 991. Evidence of an attempt of the employer to effect a consolidation was admissible on the issue of good faith, in action for breach. Id. Where contract provided that plaintiff was to render satisfactory services in her specialties twice a day for a week, and she was discharged in good faith after the first day because her services were not satisfactory to defendant nor the public, she could not recover for the entire week. Parker v. Hyde & Behman Amusement Co., 53 Misc. 549, 103 NYS 731.

2. Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229, 113 NW 575.

3. Delivery to a competitor of master's list of agencies before servant is employed does not justify discharge. Butterick Pub. Co. v. Whitcomb, 225 Ill. 605, 80 NE 247.

4. In an action for wrongful discharge, an instruction that, if the servant was prevented from devoting his entire time and skill to the work by assuming other work at the master's request, he was not absolved from carrying out his contract, was properly refused. Sexton v. Richardson [Cal. App.] 92 P 395.

5. Sharp v. McBride [La.] 45 S 41; Fitzpatrick Square Bale Ginning Co. v. McLaney [Ala.] 44 S 1023. Instruction approved. Id. Retention of servant for one year after knowledge of fact that before his employment commenced he delivered a copy of master's list of agencies to a competitor waives right to discharge on that ground. Butterick Pub. Co. v. Whitcomb, 225 Ill. 605, 80 NE 247. Breach of contract by an employe in quitting without giving the sixty days' notice, as required, is waived where the employer agrees to treat it as canceled as of the date the employe quits. Bailey v. Bourn Rubber Co. [R. I.] 67 A 427.

6, 7, 8. Vidalia Compress & Power Co. v. Mathews, 1 Ga. App. 56, 57 SE 902.

9. Evidence insufficient to show insubordination and incompetency authorizing discharge. Sharp v. McBride [La.] 45 S 41.

10. Action for wrongful discharge. United Oil & Refining Co. v. Grey [Tex. Civ. App.] 18 Tex. Ct. Rep. 670, 102 SW 934.

11. United Oil & Refining Co. v. Grey [Tex. Civ. App.] 18 Tex. Ct. Rep. 670, 102 SW 934.

12. Servant discharged for refusal to obey regulation brought action for wrongful discharge. Walker v. John Hancock Mut. Life Ins. Co. [N. J. Law] 68 A 113.

13. New York Life Ins. Co. v. Thomas [Tex. Civ. App.] 19 Tex. Ct. Rep. 576, 103 SW 423. Where both parties continued under the contract after resignation had been demanded at some future time, until the resignation was tendered and accepted there was no discharge. Id.

14. A voluntary resignation tendered after threatened discharge, if such resignation was not made, precludes an action for wrongful discharge. New York Life Ins. Co. v. Thomas [Tex. Civ. App.] 19 Tex. Ct. Rep. 576, 103 SW 423.

15. Cronemillar v. Duluth Superior Mill. Co. [Wis.] 114 NW 432.

16. Whether discharge of manager of Mexican property was justified. Ware v. Guatemalan & Mexican Mahogany & Expert Co., 104 NYS 520. Instructions on right of discharged employe to recover held not objectionable as taking from the jury the question whether he was wrongfully discharged. Brown v. Crown Gold Mill. Co., 150 Cal. 376, 89 P 86.

17. Where one contracted to work another's farm and furnish a man at his own expense, the fact that he falsely stated the amount he was required to pay his hired man would not justify his employer in discharging him. Wood v. Ravenscroft [Iowa] 112 NW 640. In an action for wrongful discharge where the defense set up was that the

form is required for a notice of termination so long as the intention to terminate and to give such notice is evident.[18]

Actions for wrongful discharge.[See 8 C. L. 843]—The usual rules of pleading apply.[19] Plaintiff must show a contract of employment [20] and a wrongful discharge.[21] A servant who quits the service voluntarily has no right of action for breach of the contract.[22] A voluntary resignation by the servant may be shown by the employer under a general denial.[23] The discharge being shown, the master must show a reasonable cause therefor.[24] In an action for damages for breach of a contract of employment, plaintiff is prima facie damaged to the extent of the amount agreed to be paid [25] for the time up to the commencement of the action.[26] Indemnity [27] or expenses [28] are recoverable when shown to have been agreed upon in case of discharge, and special damages may be recovered [29] when alleged and proved.[30] While it is

employe failed to give his entire attention to the business, proof that after the discharge the employer engaged the agent of a competitor, who served both, was admissible. Fitzpatrick Square Bale Ginning Co. v. McLaney [Ala.] 44 S 1023.

18. Letter held sufficient notice of termination of contract of employment according to its terms. Fuller v. Downing, 104 NYS 991. Where one was employed as nurse to an invalid, and shortly afterward the employer moved to a distant state, leaving the servant in possession of his place, and after several months the servant sent in a bill for nursing and caretaking, and the master replied through an attorney to leave the place, held sufficient notice to terminate the employment and there could be no recovery for subsequent services. Kershner v. Henderson [Wash.] 93 P 323.

19. Declaration in action for wrongful discharge, setting up terms of contract of employment, fulfillment by plaintiff, and breach by defendant, held not demurrable. Jackson Bros. & Watts Co. v. Gillespie, 127 Ga. 358, 56 SE 409. Complaint in action for wrongful discharge of plaintiff's assignor held sufficiently definite and certain to state a cause of action. Abrahams v. Finkelstein, 53 Misc. 314, 103 NYS 89.

20. In an action for breach of contract of employment to weigh, mark, and deliver cotton, evidence sufficient to show that such contract was made. Sadler-Lusk Trading Co. v. Logan [Ark.] 104 SW 205. In an action for wrongful discharge, evidence held to show that plaintiff was employed by defendant and not by defendant's subcontractor. Smith v. Ohler, 31 Ky. L. R. 1275, 104 SW 995.

21. Evidence sufficient to show that an employe was wrongfully discharged. Daspit v. D. H. Holmes Co. [La.] 44 S 993. In an action to recover salary on an alleged wrongful discharge, evidence sufficient to sustain a verdict for plaintiff. Kelly & Jones Co. v. Moore, 128 Ga. 683, 58 SE 181. Whether hiring was for a year held a question for the jury in an action for wrongful discharge. Schultz v. Simmons Fur Co. [Wash.] 90 P 917. Where a merchant employs a salesman for a year at a fixed salary and during the year refuses to continue the contract unless it is changed to a percentage basis, it amounts to a breach of the contract entitling the servant to damages. Americus Grocery Co. v. Roney [Ga.] 58 SE 462. Evidence sufficient to show such breach. Id.

22. Testimony that a servant told his foreman that he felt bad and wanted to go home and the foreman told him, "you don't need to come tomorrow; they are going to move," whereupon the servant left and did not return, shows not a discharge but that the servant left voluntarily. Fenster v. Bass, 107 NYS 872. Voluntary resignation bars action for wrongful discharge. New York Life Ins. Co. v. Thomas [Tex. Civ. App.] 19 Tex. Ct. Rep. 576, 103 SW 423. Evidence held to show plaintiff was not discharged but left voluntarily. Abelson v. Goldstone, 103 NYS 777.

23. New York Life Ins. Co. v. Thomas [Tex. Civ. App.] 19 Tex. Ct. Rep. 576, 103 SW 423.

24. In an action for damages by a servant against the master for discharging him before his time of service has expired, it is the duty of the master to aver and prove that the discharge of the servant was for reasonable cause, and a charge of the court "that the burden of proof rests upon the servant to show that the discharge was without any just cause therefor" is error. Baird v. Burton Tel. Co., 10 Ohio C. C. (N. S.) 163.

25. Graff v. Blumberg, 53 Misc. 296, 103 NYS 184. For wrongful discharge an overseer of a plantation can recover stipulated salary for a year, he having been employed for a year. Sharp v. McBride [La.] 45 S 41. Where an employe is wrongfully discharged, he may recover salary unpaid if he was unable to obtain other employment. Keane v. Liebler, 107 NYS 102.

26. If action for breach of contract for a year is brought before the end of the year, damages up to the time of the breach only may be recovered. Stein v. Kooperstein, 52 Misc. 481, 102 NYS 578.

27. Where employer's rules provided for an indemnity of one month's pay, to a discharged employe, such indemnity as well as salary for the current month could be recovered. Schott v. La Compagnie Generale Trans-Atlantique, 52 Misc. 236, 102 NYS 901.

28. In action for wrongful discharge, recovery for board paid by plaintiff was erroneous where it did not appear that it was a part of the expense agreed to be paid by defendant, nor that sum paid was reasonable. Seago v. White [Tex. Civ. App.] 18 Tex. Ct. Rep. 183, 100 SW 1015.

29. For wrongful discharge the master is liable for such damages as the servant sustains. Texarkana Lumber Co. v. Lennard [Tex. Civ. App.] 19 Tex. Ct. Rep. 683, 104 SW 506.

30. In an action for breach of contract, recovery may not be had under an allegation

plaintiff's duty to use reasonable diligence to procure other employment of the same kind,[31] he may maintain his action whether or not he obtained other employment.[32] The burden of showing failure to use due diligence to procure other employment is upon defendant.[33] Plaintiff need not, as a part of his case, show that other employment was sought and could not be obtained,[34] nor the amount of his earnings.[35] To defeat plaintiff's claim entirely, defendant must show that he could have obtained other employment for the same compensation for the balance of the term.[36]

Remedies of master for breach by servant. See 8 C. L. 845

Labor laws See 8 C. L. 845 which violate the right to contract are invalid.[37] Statutes prohibiting employment of minors in certain occupations are a valid exercise of the police power.[38] The title of a statute must be sufficiently comprehensive.[39] In Colorado it is held that since the power to regulate hours of labor cannot be delegated by the legislature to coordinate branches of the government,[40] an eight-hour law applied to a particular business is invalid unless the legislature has declared such business injurious to health of employes.[41] The question of right to discharge in such case is one of law.[42]

§ 2. *The right of the master in services of the employe, and right of employe*

that but for the contract the plaintiff could have obtained other employment, where there was no evidence that at the time the contract was made there was any request for employment with other parties. Stovall v. Gardner [Tex. Civ. App.] 18 Tex. Ct. Rep. 387, 103 SW 405.

31. Graff v. Blumberg, 53 Misc. 296, 103 NYS 184. Discharged servant is only bound to use reasonable diligence to procure other employment. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867. Where teacher, hired for a term from June to May, was discharged in January, he was properly allowed to show that teachers were employed in May or June in order to show why he could not obtain a better position than he did secure, since it was his duty to secure other employment. Peacock v. Coltrane [Tex. Civ. App.] 17 Tex. Ct. Rep. 609, 99 SW 107.

32. The recovery, however, may be reduced by proof that he did or could have procured other employment. Fitzpatrick Square Bale Ginning Co. v. McLaney [Ala.] 44 S 1023. The fact that after a servant was discharged he did a few days' work for his masters' subcontractor only shows an effort to get other work and does not preclude his action for damages. Smith v. Ohler, 31 Ky. L. R. 1275, 104 SW 995.

33. Graff v. Blumberg, 53 Misc. 296, 103 NYS 184. The burden of showing that plaintiff could have reduced his damages by securing other employment is on defendant. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867. That discharged employe could have lessened his damages by procuring other employment is a matter of defense, hence, where employer introduced no evidence on the subject, it was proper to instruct the jury to deduct from the damages the amount admitted to have been earned by employe. Peacock v. Coltrane [Tex. Civ. App.] 17 Tex. Ct. Rep. 609, 99 SW 107.

34. Graff v. Blumberg, 53 Misc. 296, 103 NYS 184. A complaint for wrongful discharge setting forth the contract, the discharge, and the servant's readiness to fulfill it, is sufficient without alleging failure to obtain other work. Fitzpatrick Square Bale Ginning Co. v. McLaney [Ala.] 44 S 1023. An employe wrongfully discharged who sues to recover wages for unexpired term need not allege and prove that in the interim he was unable to porcure other employment. Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229, 113 NW 575.

35. In action for damages for wrongful discharge, plaintiff need not allege that he endeavored to find other work, and the amount of his earnings. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867.

36. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867.

37. Laws 1903, p. 439, c. 184, prohibiting employment of females, regardless of age, in factories, between 9 o'clock p. m. and 6 o'clock a. m., is an infringement of constitutional right to contract. People v. Williams, 189 N. Y. 131, 81 NE 778.

38. Act June 2, 1891 (P. L. 176), prohibiting employment of children under fifteen years of age to oil machinery in coal mine, is valid exercise of police power. Lenahan v. Pittston Coal Min. Co. [Pa.] 67 A 642.

39. Title of Sess. Laws 1903, p. 309, relative to hours of employment of women and children, held too narrow. Burcher v. People [Colo.] 93 P 14.

40. Under Const. art. 5, § 25a, requiring the legislature to provide for an eight-hour day in certain industries, the legislature must regulate the hours of labor and cannot delegate the power to either of the coordinate departments of the government. Burcher v. People [Colo.] 93 P 14.

41. Sess. Laws 1903, p. 310, prohibiting employment of women for more than eight hours per day in any factory, etc., and which fails to declare that laundry business is injurious to health, is void as to such business. Burcher v. People [Colo.] 93 P 14.

42. Butterick Pub. Co. v. Whitcomb, 225 Ill. 605, 80 NE 247.

to compensation; trade secrets; medical treatment; assignments of wages; statutory regulations; liens.[See 8 C. L. 846]—The right to compensation must rest upon contract, express [43] or implied.[44] Where there is an express contract, the amount of compensation depends upon its terms;[45] if the contract is implied, the reasonable value of services rendered may be recovered.[46] The presumption is that services similar to those contracted for are paid for by regular wages or salary, and one seeking to recover extra compensation must prove an express agreement therefor.[47] But an employe in a particular service has a right to compensation for services rendered on request outside the sphere of his employment, although there is no express agreement to pay therefor.[48] An agreement for a bonus is not enforcible if without a considera-

43. Evidence insufficient to show that defendant ever employed plaintiff or that plaintiff rendered him any service. Brightman v. Dring [R. I.] 67 A 449. Evidence sufficient to show a contract for hiring in an action for wages. Bogard v. Bartruff [Wash.] 92 P 778. Where contract of employment was evidenced by a writing signed by the employer as trustee, but the servant did not know whom the employer represented, the employer was held personally liable. Whalen v. Ruegamer, 108 NYS 38. Contract with architect to assist him in preparing plans for building held too indefinite and vague to be enforcible. Bluemner v. Garvin, 104 NYS 1009. Decedent proposed to claimant to pay him $15 a week and expenses to assist in establishing a business and to give him a one-fourth interest when decedent could draw $10,000. Held, claimant having accepted the proposition, and received $15 per week, and then $17.31 per week, he accepted the entire proposition and was entitled to one-fourth interest when business had grown as agreed. Ott v. Boring, 131 Wis. 472, 110 NW 824, 111 NW 833. An offer of employment at a certain sum per year may be accepted by overt acts showing acquiescence, express acceptance by words is not necessary. Smith v. Williams, 123 Mo. App. 479, 100 SW 55. Under a contract to pay a salesman an additional sum if his sales were satisfactory, it lay with the master to determine whether sales were satisfactory. Alford v. Cook, 107 NYS 710.

44. In an action to recover for services under an alleged contract, evidence held to show that no definite price had been fixed for the work, and that there was no agreement as to the value of the services. Bentley v. Smith [Ga. App.] 59 SE 720.

45. Contract providing for a per cent of net profits as compensation construed. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335. Contract with salesman construed as entitling salesman to $50 per week, the commission agreed upon to be adjusted at close of term of service. Wallach v. Slater, 103 NYS 225. Where oral contract for more than a year was voluntarily performed by both parties, and thereafter renewed for a year, the contract as renewed, though originally unenforcible, fixed the rate of compensation as well as the term of service. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335. Whether servant was entitled to commissions on sales in excess of amount admitted by the master in his answer held for the jury. Meyers v. Weber, 107 NYS 632. On conflicting evidence as to whether salary sued for was due the plaintiff or was held as liquidated damages for breach of contract, it was held error for the court to receive other evidence and direct verdict for plaintiff. Raims v. Penza, 107 NYS 25. Where a servant was employed by a director and manager of a company at a fixed salary but accepted reduced pay under protest, there was no such acquiescence as to work an abrogation of the contract. Kelly v. Jersey City Water Supply Co. [N. J. Err. & App.] 67 A 108. Where salesman's contract provided that he was to receive 50 per cent of the gross profits on his sales, and bear 50 per cent losses on his sales, he was liable for the losses as agreed, regardless of whether customers were insolvent. Meyers-Bridges Co. v. Badeau [Miss.] 43 S 609. In an action for commissions, the construction of the contract held for the court, and the amount of sales, and the amount of commissions paid, held for jury. Peyser v. Western Dry Goods Co. [Wash.] 92 P 886. Corporate resolution to compensate a manager for the first year at a certain salary, the second year at an increase, and "for the present year," which had already terminated, at a further increase, should be construed only for payment of past services, and, where the servant continued in the service after the resolution was passed, there was no presumption that the salary provided for the third year applied. Bell v. Piper Tobacco Warehouse Co., 205 Mo. 475, 103 SW 1014.

46. Where architect agreed to give a reasonable and fair share of commission to another for preparing acceptable plans, the latter could recover upon a quantum meruit, though the contract was not definite enough to sustain an action for damages for its breach. Bluemner v. Garvin, 104 NYS 1009.

47. Evidence insufficient to show agreement to pay domestic servant for extra services to defendant's invalid wife. Jerome v. Wood [Colo.] 88 P 1067. Evidence insufficient to show that a servant who sued for overtime had worked such overtime. Friedman v. Fertel, 107 NYS 832. Evidence sufficient to sustain finding that defendant's agent had authority to contract to pay for overtime. Bidwell v. Grand Trunk Western R. Co., 148 Mich. 524, 14 Det. Leg. N. 279, 112 NW 122. Laborer in street department of city acted at times as foreman at his own request, but received only pay of a laborer, receipting therefor without objection, except that he stated that he ought to have more. Held, he waived any right to greater compensation than he received. Farrell v. Buffalo, 118 App. Div. 597, 103 NYS 340.

48. Brown v. Crown Gold Min. Co., 150 Cal. 376, 89 P 86.

tion.[49] Expenses are recoverable when there is an agreement, express or implied, to pay them.[50] An agreement that the servant shall forfeit sums retained from wages, if he quits without the master's consent, is enforcible.[51] Some cases hold that an employe who quits or is discharged for cause cannot recover for services already performed,[52] others, that he may recover the proportionate part of the stipulated compensation for services actually rendered or their reasonable value not exceeding the stipulated sum.[53] Where a servant is to be compensated for his services by a percentage of the results of his labor, no title or ownership passes to him until the production of the product is complete.[54] An action for wages cannot be maintained before they are due.[55] An employe discharged without cause during the term of his employment may treat the contract as rescinded, and sue on a quantum meruit as if the special contract had never been made, whether the contract is valid or invalid.[56] Where the allegations of a complaint warrant a recovery upon a quantum meruit, an allegation of an express promise to pay may be regarded as surplusage.[57] But where a plaintiff has elected to sue upon a quantum meruit, he cannot recover upon a promise to pay a fixed sum.[58] Holdings as to pleadings,[59] burden of proof,[60]

49. Contract provided for payment of not less than a certain sum the first year, not less than a certain greater sum the next, etc., plaintiff requested to be released and employer said he would lose nothing by staying and would be given a bonus at the end of his term. Held, agreement for bonus was without consideration and bonus not recoverable. Price v. Press Pub. Co., 117 App. Div. 854, 103 NYS 296.

50. Where a servant's work included daily trips to another city and required him to be there at noon, and it appeared that the employer had paid for lunches of other servants who got them where they pleased, and that he was under obligations to provide them lunches, held the employe was entitled to recover the reasonable cost of the lunches. Taylor v. St. Clair, 79 Vt. 536, 65 A 655.

51. Where a servant is employed at so much per week under a contract that $2 per week should be retained as a guaranty that he would not leave during the busy season, where he left without the master's consent in the middle of the week during the busy season, he forfeited the amount retained and his wages due. Fenster v. Bass, 107 NYS 872.

52. See cases cited in Peacock v. Coltrane [Tex. Civ. App.] 17 Tex. Ct. Rep. 609, 99 SW 107. A contract by which an actor is employed for a certain number of weeks at a weekly salary is separable only to the extent that payments are to be made weekly, and where he quits or is discharged during the week, he cannot recover the entire or proportionate part of the week's salary, his action being for breach of contract. Keane v. Liebler, 107 NYS 102.

53. Instruction, so far as it went, held correct, embodying above rule. Peacock v. Coltrane [Tex. Civ. App.] 17 Tex. Ct. Rep. 609, 99 SW 107. Willful assault on plaintiff by defendant held to justify plaintiff in leaving defendant's service, and to recover for services performed, though contract was for entire term. Langguth v. Burmeister, 101 Minn. 14, 111 NW 653. Where plaintiff agreed to work an entire year for a percentage of gross receipts for a year, and worked only two months and a half, he was entitled to recover only the average percentage for the year. Kendall v. Chapel, 147 Mich. 709, 14 Det. Leg. N. 58, 111 NW 339. An employe who contracted to cut and remove trees from land and deliver the same at a specified place abandoned the contract after cutting the trees. Held he was entitled to recover for work done. Buckwalter v. Bradley, 31 Ky. L. R. 1177, 104 SW 970.

54. Where servant was to receive one-fourth of crop for compensation, no title or ownership passes until crop is matured. Baltimore & O. S. R. Co. v. Stewart, 128 Ill. App. 270.

55. Action for wages, before they were due, dismissed without prejudice. Dixon v. Bunnell, 52 Misc. 560, 102 NYS 775.

56. Brown v. Crown Gold Min. Co., 150 Cal. 376, 89 P 86.

57. Where a complaint alleges performance of certain services, their reasonable value and that they were rendered at the special instance and request of defendants warrants recovery upon a quantum meruit, and an allegation of an express promise to pay may be disregarded as surplusage. Brown v. Crown Gold Mill. Co., 150 Cal. 376, 89 P 86.

58. Plaintiff having amended and elected to sue upon a quantum meruit could not thereafter recover upon an express or implied contract fixing the value of the services. Schrader v. Fraenckel, 117 App. Div. 97, 102 NYS 335.

59. In an action for damages for breach of contract of employment by nonpayment, it is necessary to allege nonpayment. Babcock v. Anson, 106 NYS 642. Complaint held sufficient. Id. In an action on a contract for services rendered, where the defense was nonperformance and counterclaim for damages in consequence thereof, the question was whether the employe neglected his duties, and, if he did, the cause of such neglect was immaterial. Old Settlers' Inv. Co. v. Marshall Vinegar, Pickle & Soap Co. [Iowa] 113 NW 326.

60. In an action by an employe for a balance due, the introduction of a check "in full for services" did not cast on the employe the burden to prove that he had not misappropriated funds as alleged by defendant, but

sufficiency,[61] and admissibility [62] of evidence, in action to recover compensation, are given in the notes.

Trade secrets and inventions. See 8 C. L. 848—An employe impliedly contracts not to disclose trade secrets, knowledge of which is obtained by him during his work.[63] Where there is an express contract on the subject, its terms control as to the matter covered by it.[64] Former employes may be enjoined from using or disclosing valuable trade secrets learned in the course of their employment,[65] and may be compelled to account for profits acquired under a contract secured by means of information obtained from the employer.[66] One who induces the servant of another to break his contract and enter his employment may be enjoined from using secret processes, learned by the employe while in the service of the other, and from continuing the servant in his employ, and the employe may be enjoined from disclosing such processes.[67] A manu-

it was for the master to prove that such allegation was true. Demeules v. Jewel Tea Co. [Minn.] 114 NW 733.

61. In an action for services rendered as nurse and caretaker of property on conflicting evidence as to the servant's right to possession of the property, the question was for the jury. Kershner v. Henderson [Wash.] 93 P 323.

62. Where in an action for salary the only question was whether compensation for services sued on was included in salary paid him for other work, an extended examination into the servant's method of performing his work, representation respecting his ability, etc., was properly excluded. Fox v. Bialy [Mich.] 14 Det. Leg. N. 837, 114 NW 871. In action for compensation for superintending putting in plant, defendant claimed it was antiquated and unnecessarily expensive. Held, plaintiff could show the plant was a good one, etc. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F 241. In an action for overtime, it was held error to refuse to allow the master to prove that the servant had failed to work full time during days for which he had been paid full wages. Keysaw v. Datterweich Brew. Co., 105 NYS 562. Where in action to recover for overtime it was alleged that plaintiff worked under a contract, between the master and a labor union, fixing the rate of wages, it could be shown by parol that the master recognized the fact that plaintiff was working under the terms of such contract. Id. Where one sued for compensation as superintendent, monthly statements of receipts and expenditures sent by him to the company, a summary of which contained a claim for salary, are admissible to show claim for salary, that services were performed, and that the company had knowledge of them. Pearce v. Greek Boys' Min. Co. [Wash.] 92 P 773. Proper to refuse to allow the defendant company to show that its board of trustees had no knowledge of such monthly statements. Id. In an action by a salesman to recover compensation under a contract for commissions on net sales, evidence of salaries and other expenses of the business is not admissible on the question of net sales. Norman v. Loomis-Manning Filter Co., 108 NYS 261. Extracts from the employer's books to show sales were admissible where they were furnished the salesman at his request. Id. In an action to recover under a contract to pay additional sum if sales were satisfactory, letters written by the employer containing words of praise, if competent to show satisfaction, are at most ordinary messages calculated to stimulate the servant. Alford v. Cook, 107 NYS 710.

63. This is so though the employer is required to disclose such processes to the patentee under whose license the process is used. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695.

64. A contract between a manufacturer and employe for a certain term, binding him not to disclose knowledge of processes of steel making that might have then been, or which might, during the term of his agreement, be used in the works of his employer, held only to bind him to hold inviolate secrets used in the works of his employer. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695. The invalidity of the provisions of such contract binding him not to disclose processes known to him before entering into the employment did not invalidate the covenant to hold inviolate the employer's secret processes. Id. A contract by a manufacturer who used a manufacturing process, under license from the patentee, not to divulge any information during the life of the patent, held to protect the patentee against disclosures, but not to include discoveries made by experiments of the employer. Id.

65. Former employes of corporation enjoined from disclosing and using trade secret learned while in employ of corporation. Vulcan Detinning Co. v. American Can Co. [N. J. Err. & App.] 67 A 339. Employe of competitor may be enjoined from disclosing to competitor secrets learned while in plaintiff's employ. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695. Injunction restraining perpetually all use of information obtained by defendant while employed by plaintiff's predecessor, and all information which could only so have been obtained, held too broad. International Register Co. v. Recording Fare Register Co. [C. C. A.] 151 F 199.

66. Where a contract was obtained for defendants by means of information obtained by one of them while an employe of plaintiff's predecessor, whose good-will and business plaintiff purchased, defendants were accountable to plaintiff for profits obtained thereby. International Register Co. v. Recording Fare Register Co. [C. C. A.] 151 F 199.

67, 68. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695.

facturer seeking such relief must show that he possesses valuable trade secrets, but is not bound to disclose them to his competitor whom he seeks to enjoin from using them.[68] Where there is a special service of inventing under a special employment to invent for a consideration, the employer becomes the owner of the servant's invention,[69] And the same result follows where, in a contract of general employment of inventive skill, there is an express agreement that the employer is to be the owner of any invention or improvement.[70] But to warrant a decree of specific performance, such a contract must be clearly and unequivocally proven, and its terms as to subject-matter, consideration and all essentials, must be specific and unambiguous.[71]

*Medical treatment.*See 8 C. L. 848—A physician cannot recover from the master for services to an employe in the absence of some agreement to which the master is a party.[72]

*Assignments of wages.*See 8 C. L. 848

*Statutory regulations.*See 8 C. L. 848—Regulations relating specifically to liability,[73] to safety appliances,[74] to liability for negligence of fellow-servants,[75] and to assumption of risk,[76] are treated in subsequent actions of this article. Decisions under the statutes of Arkansas,[77] Massachusetts,[78] and Washington,[79] regulating the

69, 70. Portland Iron Works v. Willett [Or.] 89 P 421.

71. Portland Iron Works v. Willett [Or.] 89 P 421. Contract made by correspondence construed and held that defendant agreed to take out patents upon improvements on behalf of plaintiff and assign them to plaintiff as a part of his employment in designing improvements on machines made by plaintiff. Id. Evidence held also to show that inventions were made during term of employment. Id.

72. Where a physician has been called generally to attend employes and has been paid by the employer, he may assume, on being called in the usual way, that the person injured is an employe, but on being notified that he is not, the physician cannot recover for services thereafter rendered. Burton v. Fletcher Mfg. Co. [R. I.] 67 A 366. Where an employer retained a portion of wages of his servant for medical services, and employes contracted with a physician for medical treatment and directed the master to pay their hospital dues to him, which the master refused to do and notified the employes that the dues would be paid to certain hospital and that any employe not consenting to such payment would be discharged, held, the physician employed by the servants had no cause of action against the master, though the master's acts were malicious Banks v. Eastern R. & Lumber Co. [Wash.] 90 P 1048. Where the manager of a corporation directed an employe to call a doctor to attend an injured employe, and placed such injured employe under his care, and knew of his continued care of him, there was an employment of such doctor for his entire attendance. Freeman v. Junge Baking Co., 126 Mo. App. 124, 103 SW 565.

73. See post, § 3A.

74. See post, § 3B.

75. See post, § 3E.

76. See post, § 3F.

77. Act 1905, p. 538, provides that wages of employe, discharged by corporation, shall be due when discharged, and makes corporation liable to penalty, if wages be not paid within seven days. Corporation held not liable to penalty, where discharged employe presented time check, was told to call in afternoon, and failed to return or leave any instructions as to payment. Wisconsin & Arkansas Lumber Co. v. Reaves [Ark.] 102 SW 206. Where employe was given time for each month, and presented only one, corporation was not liable for penalty as to the other. Id. Under Kirby's Dig. § 6699, prescribing a penalty for failure to pay discharged employes, it must appear that wages were due, and the mere fact that the employer retained a portion of wages which it claimed it had a right to do under the contract is insufficient to authorize recovery of the penalty. Stewart & Alexander Lumber Co. v. Weaver [Ark.] 104 SW 152. Under Kirby's Dig. § 6649, imposing a penalty for failure to pay a discharged employe within seven days, where a foreman, at the time he discharged men, told them that he himself had been discharged, it was error to instruct that as long as the foreman was transacting business for the company he was presumed to be in the employment of the company. St. Louis, etc., R. Co. v. Broomfield [Ark.] 104 SW 133. Under Kirby's Dig. § 6649, imposing a penalty for failure to pay a laborer within seven days after discharge, where a discharged employe agreed that wages might be paid at the next regular pay day, the statutory penalty could not be recovered. Id. Under Acts 1905, p. 798, providing for consolidation of actions, actions by members of a section crew, discharged at the same time by the same foreman, to recover wages and penalties under Kirby's Dig. § 6649, were properly consolidated. Id.

78. Rev. Laws, c. 106, § 62, amended by St. 1902, c. 450, providing that employes shall be paid weekly, and where an employe is discharged or leaves the employment, he shall be paid in full the following regular pay day, does not prohibit a contract by which an employe agrees to forfeit wages due if he quits without giving ten days' notice. Ferry v. Kinsley Iron & Mach. Co. [Mass.] 51 NE 305.

79. Check given an employe held a negotiable instrument and not in violation of

time and manner of paying employes, are given in the notes. The Vermont act of 1906 is held valid.[80] The Indiana act of 1901 is held invalid.[81] A statute requiring operators of mines to supply wash rooms for miners in their employ is unconstitutional.[82] The Federal eight-hour day law is valid,[83] and a contractor violating the same is liable, though he acts under a mistake of law as to what constitutes an extraordinary emergency.[84] The act applies only to laborers [85] engaged on public works of the United States.[86]

Liens.—The subject of liens for labor is elsewhere fully discussed.[87] Holdings under the Georgia act, which is different from the usual mechanics' liens statutes are given in the note.[88]

§ 3. *Master's liability for injuries to servants. A. Nature and extent in general.*[See 8 C. L. 849]—The master is not an insurer of the safety of his servants; the law imposes only the duty of ordinary or reasonable care for their safety,[89] that is, that

Laws 1905, p. 219, making it unlawful to pay wages in any other manner than in cash or by check negotiable and redeemable at its face value. State v. Chehalis Furniture & Mfg. Co. [Wash.] 92 P 277. A check given a workman "Pay to order," etc., "on —— 15, 1907, is not a violation of Laws 1905, p. 219, requiring payment of wages in full on discharge of an employe or when he quits work, where it does not appear that the laborer had quit or was discharged. Id.

80. Act Dec. 10, 1906, p. 114, No. 117, requiring mining, manufacturing, etc., or railroad companies to pay its employes weekly in lawful money, is not a violation of due process clause of the constitution whose charter is subject to amendment, alteration, or repeal. Lawrence v. Rutland R. Co. [Vt.] 67 A 1091. Nor is such statute void as to a railroad company, though not including all corporations. Id. Nor is it subject to the objection that it cannot operate alike on all within its provisions because it includes foreign corporations as to which the legislature is without power to amend charters, since such corporations are amenable to the laws of the state. Id. Nor is it void as a restriction on the right of employes to contract with their employer. Id. Nor is it a violation of a bill of rights provision as to equality of rights to acquire and possess property. Id.

81. Burns' Ann. St. 1901, §§ 7056, 7057, requiring corporations to pay employes at least once a month, is unconstitutional as imposing on corporations a burden not imposed on individuals. Toledo, etc., R. Co. v. Long [Ind.] 82 NE 757.

82. Starne v. People, 222 Ill. 189, 78 NE 61.

83. Act Aug. 1, 1892. Ellis v. U. S., 206 U. S. 246, 51 Law. Ed. 1047.

84. Delay in receiving materials held not to create such an emergency. Ellis v. U. S., 206 U. S. 246, 51 Law. Ed. 1047.

85. Employes on tugs and dredges used in dredging a channel held not laborers. Ellis v. U. S., 206 U. S. 246, 51 Law. Ed. 1047.

86 Dredging of channel in Boston harbor held not such a work. Ellis v. U. S., 206 U. S. 246, 51 Law. Ed. 1047.

87 See Mechanics' Liens, 8 C L. 954.

88. Primarily a clerk in a mercantile establishment is not a "laborer" who has a lien, within Civ. Code, §§ 1882, 1974, though the discharge of his duties includes performance of manual labor. Howell v. Atkinson [Ga. App.] 59 SE 316. A clerk asserting such lien has the burden to prove that the nature of his work was such that he can properly be classed as a laborer. Id. The nature of the labor and whether the mental element preponderates is to be determined by the contract. Where the contract of employment of a clerk contemplates that his services shall consist mainly of the use of intellectual faculties, he is not a laborer. Id. Evidence insufficient to show that a clerk was a laborer. Id. A bartender whose duties are mainly manual, and who is also required to keep books, is a laborer, within the meaning of the law, creating a lien in favor of laborers for their labor upon the property of their employers. Bluthenthal v. Bennefield, 127 Ga. 444, 56 SE 517.

89. Coughlan v. Philadelphia, etc., R. Co. [Del.] 67 A 148; Swiercy v. Illinois Steel Co., 231 Ill. 456, 83 NE 168; Spencer v. Bruner, 126 Mo. App. 94, 103 SW 578. In a proceeding by a servant against a mine owner, under the common law, it is incumbent upon the plaintiff to prove lack of ordinary care. Kellyville Coal Co. v. Moreland, 121 Ill. App. 410. Only required to provide facilities in the manner generally accepted in other similar factories. Grace v. Globe Stove & Range Co. [Ind. App.] 82 NE 99. Error to refuse to charge that master is not an insurer of safety, where bricklayer was injured by object falling from upper part of building. Wood v. Burke, 121 App. Div. 542, 106 NYS 204. Electric illuminating company is not an insurer of safety of an electrician in its employ. Guest v. Edison Illuminating Co. [Mich.] 14 Det. Leg. N. 712, 114 NW 226. The duty to furnish safe appliances and keep them in repair does not make the master an insurer of the safety of his servants. Southern R. Co. v. Carr [C. C. A.] 153 F 106. Instruction approved as requiring ordinary care for safety of employes in mine. Daniel Boone Coal Co. v. Sisk, 30 Ky. L. R. 957, 99 SW 977. It is the master's duty to use reasonable care to provide reasonably safe appliances and place of work, so that employes can, with the exercise of ordinary care, do their work without being exposed to dangers not incidental to their work. St. Louis, etc., R. Co. v. Inman [Ark.] 99 SW 832. Instruction that master owes duty to provide reasonably safe place, etc., improper; he is only required to exercise ordinary care to provide reasonably safe place, etc. Fearon

degree of care which reasonably prudent and cautious persons exercise under similar conditions.[90] Thus, a master is not liable for injuries which could not reasonably have been foreseen and guarded against.[91] The degree of care required of the master in a particular instance depends upon the nature and character of the business or employment,[92] the character of the agencies employed by the master with and about

v. Mullins, 35 Mont. 232, 88 P 794. Master is only under duty of using ordinary care to supply reasonably safe appliances, etc., instruction held erroneous, but not prejudicially so, when construed in connection with other instructions. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577. Employer is only under duty to furnish reasonably safe place and tools; instruction that he must furnish "safe" place and tools held reversible error. Powell v. American Sheet & Tin Plate Co., 216 Pa. 618, 65 A 1113. Where injury was caused by defect in roadway used by employe in hauling lumber, instruction held not objectionable as imposing on master absolute duty of keeping way reasonably safe. Cameron v. Realmuto [Tex. Civ. App.] 100 SW 194. Mine operators owe employes the duty of ordinary care to furnish a reasonably safe place; instruction making master responsible, if place was unsafe, held erroneous. Big Hill Coal Co. v. Abney's Adm'r, 30 Ky. L. R. 1304, 101 SW 394. It is error to charge that, before a servant can recover for injuries, the jury must believe that the master was guilty of gross negligence. Owensboro Wagon Co. v. Boling [Ky.] 107 SW 264.

Wisconsin rule: It is held in Wisconsin that it is the absolute duty of the master to furnish a reasonably safe place of work; instruction that master must use ordinary care to provide such place held erroneous. Parker v. Fairbanks-Morse Mfg. Co., 130 Wis. 525, 110 NW 409.

90. Instruction that it was master's duty to use that degree of care and prudence ordinarily exercised by the great mass of men under similar circumstances in providing place and appliances, and preventing injuries, approved. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 NW 443. In guarding machinery under the factory act, an employer must use that degree of care which reasonably prudent and cautious persons exercise under similar circumstances and conditions. Noren v. Larson Lumber Co. [Wash.] 89 P 563. It is the duty of a railroad company employing men to remove a wreck to use such precautions as a reasonable and prudent man would take for his own safety under the same conditions. St. Louis, etc., R. Co. v. Inman [Ark.] 99 SW 832. To render a master liable for injuries caused by the condition of his premises, it must appear that the servant did not appreciate the risk incident to the condition, that the master did, and that an ordinarily prudent man would not permit it to exist, and that the master did not warn the servant. Bennet v. Concord Woodworking Co. [N. H.] 68 A 460. Where foreman of gang engaged in excavation examined roof, and was advised that it would be safe to move a column, and did so in the honest belief that it would be safe, he was not negligent, though a rock fell from the roof killing one of the men. Bertolami v. United Engineering & Cont. Co., 105 NYS 90. Where a railroad employe was injured while boarding a train in full view of the engineer, it was proper to charge that, if the engineer saw him and pulled the throttle just as the servant was about to board the train, and a reasonably prudent man would not have done so, the company was liable. Daniel v. Atlantic Coast Line R. Co. [N. C.] 58 SE 601.

91. A servant cannot recover where an injury is wholly due to accident. Brown v. Adams Co. [La.] 44 S 1005. The master is not liable if the injury is the result of an accident. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. Held not an accident where employe was injured by defective circular saw. Id. Evidence held insufficient to go to jury, where trackman, with cap over ears, was struck by train, the proof showing that usual signals were given and all possible means used to avoid accident. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 NW 446. No liability where employe stood or sat so close to passing engine that he was scalded by steam and hot water, not shown to have been discharged in any excessive amount. Valvo v. New York, etc., R. Co., 105 NYS 105. No negligence of company shown where employe was killed in an attempt to cross a track directly in front of a car. Kupec v. Interborough Rapid Transit Co., 104 NYS 924. Employe giving signals to engineer of train operating in connection with steam shovel was struck by a root which fell from shovel, after being raised by it. Accident held unavoidable and master not liable. Havlin v. Oliver, 30 Ky. L. R. 1192, 100 SW 835. Master not liable for poisoning of employe engaged in sorting broken vanilla beans, when that danger was not necessarily incident to the work and it did not appear that the master knew, or ought to have known, of such danger. McDonald v. Triest, 103 NYS 1041. If tool which fell from hand car, causing its derailment, was properly loaded, the derailment was an accident and plaintiff could not recover for injuries received. McEwen v. Central of Georgia R. Co., 127 Ga. 246, 56 SE 289. If it was not a part of a car inspector's duty to be under a car while inspecting it, it was not negligence for switching foreman to order car moved while inspection was in progress, but if the foreman had reason to believe that the inspector was under the car, and ordered it moved without giving notice, the company was liable. St. Louis, etc., R. Co. v. Dupree [Ark.] 105 SW 878.

92. The degree of care employed by the master must be proportionate to the dangerous character of the work or the instrumentalities employed therein. Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369; Goddard v. Enzler, 123 Ill. App. 108. Ordinary care as applied to the duty of a railroad to furnish reasonably safe appliances may require a very high degree of care in accordance with the circumstances.

which the employes are required to work,[93] and upon all the exigencies and circumstances of the particular case.[94] It follows that the question whether due care has been exercised by the master, or by those who stand in his place, in a given instance is usually a question of fact to be solved by the jury.[95]

Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910. Flagman at crossing was also required to place and take away certain switch lamps. Held, where he was struck by a train while so engaged, train employes owed him no duties to look out for him, since it was his duty to watch out for trains. Conniff v. Louisville, etc., R. Co., 30 Ky. L. R. 982, 99 SW 1154. Where a master carries on his business in a manner unnecessarily dangerous to his workmen, it is his duty to take correspondingly proper precautions for the safety of his workmen. Roff v. Summit Lumber Co., 119 La. 571, 44 S 302. Owner of private logging road is not held to same degree of care in its construction and operation as is required of ordinary railroads. Eastern & Western Lumber Co. v. Rayley [C. C. A.] 157 F 532.

93. Electric light company must use utmost degree of care to make place and appliances reasonably safe. Horne v. Consolidated R. L. & P. Co., 144 N. C. 375, 57 SE 19.

94. Where brakeman was injured while uncoupling engine from defective car, negligence could not be imputed to the master because of the fact that the car was attached to a freight train on which he was braking for the purpose of taking it to the shop for repairs. Southern R. Co. v. Elliott [Ind.] 82 NE 1051. In absence of statute limiting speed rate of trains in rural districts, no rate of speed is per se negligence. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 NW 446.

Employment of minors: Even in the absence of statutes prohibiting employment of children of tender years, a master owes to such children a higher degree of care than to adults. Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 SE 998. A master who employs a child of tender years in a dangerous occupation owes the child not only the duty of warning him of dangers but of taking such precautions against the child's forgetfulness of warnings, incapacity to appreciate danger, and other childish tendencies, as will reasonably insure his safety. Id. Correspondingly proportionate care must be taken when a youth is employed. Parrenin v. Crescent City Stockyard & Slaughterhouse Co. [La.] 44 S 990. An employer of children about machinery is bound to know that they will exercise only the degree of care as is usual among children of their age and is bound to use due care to protect them from dangers incident to the situation. Chambers v. Woodbury Mfg. Co. [Md.] 68 A 290. The age, capacity, intelligence, and experience of a minor servant are to be considered in determining whether the master has exercised due care for the safety of such servant. Daniels v. Johnston [Colo.] 89 P 811. Proof that a boy under sixteen years of age was put to work about a dangerous machine is evidence of negligence. Schmidt v. Printing Business of Edwin C. Bruen, 56 Misc. 130, 106 NYS 443. In an action based on negligence in employing a child under sixteen years of age about a dangerous machine, want of knowledge that the boy was under sixteen, and honest belief that he was over that age, may be shown to rebut the presumption of negligence arising from the mere fact of employment. Id. A servant eighteen years old who has had seven month's experience, and two month's special training in her particular line of work is not an inexperienced child so as to impose on her master any exceptional degree of care. Vinson v. Willingham Cotton Mills [Ga. App.] 58 SE 413. Where a boy sixteen years old had been employed in a packing department for several months and knew that contact with broken glass was dangerous, held his age was not material in the sense that the master must not expose young and inexperienced servants to injury. Freebourn v. Chamberlain Medicine Co. [Iowa] 113 NW 918.

95. Held for jury: Held that whether master was negligent in permitting car to become so loaded as to cause injury to a servant who was ordered to help move it presented a question for the jury. Ferguson & Lange Foundry Co. v. Schillo, 129 Ill. App. 212. Whether escape of molten metal from furnace was due to negligence of master held question for jury. Illinois Steel Co. v. Saylor, 129 Ill. App. 73. Whether explosion caused by escape of molten lead and its contact with water was caused by master's negligence properly submitted to jury. Illinois Steel Co. v. Saylor, 226 Ill. 283, 80 NE 783. Whether an engineer was negligent in signalling the approach of his engine. Louisville, etc., Co. v. Young [Ala.] 45 S 238. Falling of mine roof. Birmingham Min. & Cont. Co. v. Skelton [Ala.] 43 S 110. Whether switchman and other railway employes were negligent in sending a car down upon deceased. Roquemore v. Albany, etc., R. Co., 127 Ga. 330, 56 SE 424. Young negro brakeman on work train thrown off car, and run over by train. Oliver v. Calbert, 30 Ky. L. R. 1316, 101 SW 314. Question of master's negligence where explosion of gas occurred in a mine. McHenry Coal Co. v. Render, 31 Ky. L. R. 1274, 104 SW 996. Whether employe was injured because of negligence of superintendent. Lammi v. Milford Pink Granite Quarries [Mass.] 82 NE 26. Question of negligence where motorman was injured in a collision. Edge v. Southwest Missouri Elec. R. Co., 206 Mo. 471, 104 SW 90. Whether transposition of electric wires controlling the current which operated an elevator was negligence, where a servant operating such elevator was injured thereby. Fiesel v. New York Edison Co., 108 NYS 130. Whether master was negligent in employing child under sixteen years of age for certain duties. Schmidt v. Printing Business of Edwin C. Bruen, 56 Misc. 130, 106 NYS 443. Whether failure to stop an engine for the purpose of adjusting a belt which had become out of order was negligence held for the jury, where such stopping would have caused injury to the plant and product. Guilmartin v. Solway Process Co., 189 N. Y. 490, 82 NE

The common-law duties of the master to use ordinary care to provide a reasonably safe place of work, reasonably safe tools and appliances,[96] and a sufficient number of reasonably competent servants to do the required work,[97] to provide suitable methods of work, and to make, promulgate, and enforce reasonable rules and regulations,[98] and to warn and instruct servants,[99] are more fully discussed and illustrated in the succeeding paragraphs. These duties are personal to the master and cannot be delegated so as to relieve him from liability for their nonperformance.[1]

The right to recover for injuries is governed by the law of the place where the injury occurred,[2] but where a servant sues in one state for injuries sustained in another, and neither avers nor proves the laws of the latter state, he submits himself to the law of the state in which he brings his action and his rights will be determined thereby.[3]

Statutory liability. See 8 C. L. 853—Statutes relating particularly to the master's duties with reference to the place of work, tools and appliances,[4] and fellow-servant statutes,[5] are discussed in succeeding paragraphs. Decisions under statutes relating to the employment of miners are given in the note.[6] The imposition of a statutory

725. Whether master was negligent in placing electric light pole too near an iron awning so as to endanger employe engaged in trimming lamps. Horne v. Consolidated R. L. & P. Co., 144 N. C. 375, 57 SE 19. Servant injured by timber knocked from derrick, in quarry. Laubach v. Coplay Cement Mfg. Co., 217 Pa. 361, 66 A 566. Where section foreman was killed by a collision of his hand car with a freight train. Bussey v. Charleston, etc., R. Co. [S. C.] 58 SE 1015. Question of negligence where brakeman was thrown from logging train by violent jerk. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399. Question of negligence where locomotive fireman was killed by colliding with some obstruction near the track. Missouri, etc., R. Co., of Texas v. Carter [Tex. Civ. App.] 19 Tex. Ct. Rep. 691, 104 SW 910. Operation of a canting gear by which a log was rolled against the hand of an employe without warning. Ball v. Peterman Mfg. Co. [Wash.] 92 P 425.

96. See post, § 3B.

97. See post, § 3E.

98. See post, § 3C.

99. See post, § 3D.

1. Under Burns' Ann. St. 1901, §§ 7472, 7479, requiring mine operators to take certain measures for safety of men, such duty cannot be delegated. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Defendant operated and controlled a side track, a car from which broke through a wall of the shop injuring plaintiff. Held the fact that a contractor was moving the car did not relieve defendant, as moving cars was one of its charter powers and its duty to use the care in doing so could not be delegated. Cambiln v. Philadelphia, etc., R. Co. [Pa.] 66 A 977. The duty of the employer to exercise reasonable care and skill in furnishing safe machinery and appliances and keep them in repair is not ended by selecting a competent person to do the work. Kane v. Babcock & Wilcox Co. [N. J. Err. & App.] 67 A 1014. The duty of furnishing suitable machines and appliances and keeping them in repair cannot be delegated to an employe. Id.

2. A servant cannot recover in one state for injuries sustained in another unless he has a cause of action in the state where the injury occurred. Watford v. Alabama & Florida Lumber Co. [Ala.] 44 S 567.

3. Watford v. Alabama & Florida Lumber Co. [Ala.] 44 S 567.

4. See post, § 3D.

5. See post, § 3E.

6. **Iowa:** Laundry employe removing muslin cloths from rollers on ironing machine and putting on new ones is engaged in cleaning machinery, within Code Supp. 1902, § 4999b, providing that no female under eighteen years of age shall be directed to clean machinery while in motion. Bromberg v. Evans Laundry Co., 134 Iowa, 38, 111 NW 417.

Illinois: The child labor act of June 9, 1897, held not repealed by act of May 15, 1903. Jefferson Theatre Program Co. v. Crejczyk, 125 Ill. App. 1. Fact that minor concealed his age does not bar right of recovery under the child labor act. Swift v. Rennard, 128 Ill. App. 181.

Michigan: Whether Pub. Acts 1901, p. 157 Act No. 113, § 3, was violated by employing boy of fourteen to run an electric freight elevator, the statute prohibiting employment of persons under sixteen in any manufacturing establishment at any employment endangering life or limb, held for jury. Braasch v. Michigan Stove Co., 147 Mich. 676, 14 Det. Leg. N. 18, 111 NW 197.

New York: Employment of a child between fourteen and sixteen years of age without obtaining a certificate of a health officer, as required by Laws 1897, c. 415, may be considered on the issue of negligence of employer. Kenyon v. William P. Sanford Mfg. Co., 103 NYS 1053. Under Laws 1897, p. 447, prohibiting employment of children under sixteen years of age unless a health certificate is filed with the employer, the mere failure to file a certificate which was obtained was not evidence of negligence. Schmidt v. Printing Business of Edwin C. Bruen, 56 Misc. 130, 106 NYS 443. Laws 1897, pp. 477, 494, prohibiting the employment of children under fourteen, does not apply where a boy is over fourteen years of age. Fortune v. Hall, 106 NYS 787.

North Carolina: The employment of a

duty is not usually held to abrogate the common law.[7] An action for damages may be based upon a violation of a statutory duty though such duty was not imposed by the common law, and though the statute provides no penalty or remedy.[8] After much disagreement among the lower Federal courts,[9] the Federal Employer's Liability Act of 1906 has been held invalid by the supreme court of the United States.[10] Willful violation[11] of the Illinois statute renders the master liable, but only for such injuries as proximately result therefrom.[12]

The relation of master and servant must exist. See 8 C. L. 854—To warrant a recovery for injuries caused by an alleged breach of a master's duties, it must appear that the person injured was at the time the defendant's servant[13] and was engaged in

child under twelve in a tobacco factory in violation of Laws 1903, p. 819, c. 473, held to be negligence per se. Leathers v. Blackwell's Durham Tobacco Co., 144 N. C. 330, 57 SE 11.

7. Laws 1902, p. 1748, c. 600, giving an employe a right of action for injury caused by defect in places or appliances, due to negligence of the employer or his agent entrusted with the duty of seeing that they are in proper condition, does not abrogate the common law but gives a right of action additional to those theretofore existing. Kleps v. Bristol Mfg. Co., 189 NY 516, 81 NE 765.

8. Code 1896, § 2917, requiring stretchers and medicines and bandages to be kept in mines. Wolf v. Smith [Ala.] 42 S 824.

9. Act June 11, 1906, 34 Stat. 232, c. 3073, is not within power of congress. Howard v. Illinois Cent. R. Co., 148 F 997. The act makes common carriers liable for injuries to employes for negligence of the company as to appliances, road, etc., and also for negligence of other employes. It is held not a regulation of interstate commerce but an attempt to apply its provisions to all commerce. Id. Act held constitutional. Kelley v. Great Northern R. Co., 152 F 211; Snead v. Central of Georgia R. Co., 151 F 608. Statute construed as not retroactive and as laying down comparative negligence rule, held valid. Plummer v. Northern Pac. R. Co., 152 F 206. The statute was held not to apply to causes of action existing at the time of its adoption. Hall v. Chicago, etc., R. Co., 149 F 564. It was held that if the company was an interstate carrier an employe injured on an intrastate train was entitled to the benefits of the act. Id. Plaintiff, injured by unboxed saw in defendant's car shops, held not to have assumed the risk, in view of § 3 of the act, though the danger was obvious. Malloy v. Northern Pac. R. Co., 151 F 1019.

10. Howard v. Illinois Cent. R. Co., 28 S. Ct. 141.

11. "Willful" violation of statute requiring mine owners to observe suitable precautions for the safety of the miners held to mean any conscious violation, regardless of operator's intent. Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586, 81 NE 691. Held that any conscious violation of the statute (H. R. S. 1905, c. 93, § 33), providing for liability of mine owners, is willful within the meaning of the statute, regardless. Id. Any conscious failure to perform a duty imposed by the statute as willful. Springfield Coal Min. Co. v. Gedutis, 127 Ill. App. 327.

12. See post, this section.

13. An employe while going a short distance from his place of work for the purpose of getting a drink of water as was customary for employes to do is a servant while doing so. Woodward Iron Co. v. Curl [Ala.] 44 S 969. Where child 13 years old was killed at a crusher in a kaolin plant, evidence held insufficient to show that she was a servant of the owner of the plant. Taylor v. American Clay Co. [Ga. App.] 59 SE 829. Plaintiff had been frequently hired by a foreman to do work for defendant, being paid part of the time by the foreman and part of the time being on the company's pay roll. Held he was an employe of the company which had thus ratified the foreman's employment of him. Illinois Cent. R. Co. v. Timmons, 30 Ky. L. R. 1155, 100 SW 337. The lessor of a railroad is not liable to servant of the lessee for injuries resulting from negligent operation of the road, but is liable for an injury resulting from negligent omission to perform a duty owed the public. Illinois Cent. R. Co. v. Sheegog's Adm'r, 31 Ky. L. R. 691, 103 SW 232. The duty to furnish a safe place is an implied obligation of the contract between master and servant. A servant of a lessee railroad company cannot recover from the lessor for injuries sustained because of failure to light the yard. Travis v. Kansas City, etc., R. Co., 119 La. 489, 44 S 274. Whether one injured while cleaning a machine was at the time in the employ of defendant held for jury. Heffernan v. Fall River Iron Works Co. [Mass.] 83 NE 5. Superintendent of knitting mill held an employe entitled to benefit of employer's liability act. Aken v. Barnet & Aufsesser Knitting Co., 118 App. Div. 463, 103 NYS 1078. Owner of building held not liable for injury to employe of independent contractor who was struck by a brick which fell through an opening in a floor above. Wertje v. Silverman, 52 Misc. 567, 102 NYS 783. Where receiver was conducting business of railroad and lumber company, whether servant was employe of railroad or lumber company held for jury. Britt v. Carolina Northern R. Co., 144 N. C. 242, 56 SE 910. The violation by an electric light company of an ordinance and also a general law relative to the location of its poles and wires and the use of insulation creates no liability because of the death from contact with one of its wires of a lineman employed by a telephone company, who in accordance with established custom had climbed one of the poles of the lighting company for the purpose of adjusting telephone wires. Borck v. Cincinnati Gas & Elec. Co., 5 Ohio N. P. (N. S.) 526. Where a boy about 8 was in a cotton mill helping his sister, and the section boss sent him to oil some rollers, he became an employe while so.

performing, in a reasonable and proper manner,[14] duties within the scope of his employment.[15] In other words, it must appear that defendant owed the duties of á

engaged, so that the master was liable if he was sent into an unsafe place and was injured. Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626. Evidence held to warrant submission to jury of question whether boy of 11 was at time of injury employed by chief dispatcher of railroad as a call boy, so as to be an employe of defendant. Chicago, etc., R. Co. v. Connors [Tex. Civ. App.] 18 Tex. Ct. Rep. 283, 101 SW 480. It is no defense to an action for injuries that the servant procured his employment by falsely stating that he had never had any litigation with a railroad company. Such fact is insufficient to terminate the relation at the time of the injury. Galveston, etc., R. Co. v. Harris [Tex. Civ. App.] 107 SW 108. Where a railroad company employs one as a manager of its outfit of cars, requiring him to furnish a cook, and permitted the cook to go with the outfit, the relation of master and servant existed between the company and such cook requiring the exercise of ordinary care to prevent injury to her. Pugmire v. Oregon Short Line R. Co. [Utah] 92 P 762. Whether student locomotive fireman is a servant depends on the circumstances of the case. Norfolk & W. R. Co. v. Bondurant's Adm'r [Va.] 59 SE 1091. Evidence sufficient to show that an individual was not an independent contractor and that the employer was liable to a workman injured because of his negligence. Johnson v. Great Northern Lumber Co. [Wash.] 93 P 516. Where plaintiff was at work in defendant's factory, under supervision of defendant's foreman, and furnished with tools, etc., by defendant, the relation of master and servant existed between them, though plaintiff's assistants were paid out of plaintiff's earnings. Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694.

14. An employe riding on the pilot of an engine where he had no right to be may not recover where his injury was caused by the act of an engineer, who did not know of his whereabouts, suddenly starting the engine. St. Louis, etc., R. Co. v. Conway, 156 F 234. Where a servant was rightfully in the yards, the fact that he was at the time sitting down and not actively engaged in his duties did not release the company. Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149. The company owed him the duty to exercise ordinary care. Id.

15. A complaint showing that an employe was at his master's mining plant at his master's instance and request sufficiently shows that he occupies such relation as entitles him to the exercise of due care. Woodward Iron Co. v. Curl [Ala.] 44 S 969. Miner left his own place of work and went to another part of the mine on a private errand and was there injured. Held no right of recovery. Pioneer Min. & Mfg. Co. v. Talley [Ala.] 43 S 800. Evidence sufficient to show that boy, employed as cash boy in store, was regularly sent to warehouse to assist in moving goods with an elevator and trucks so that his employer was liable for injuries inflicted while so engaged. Jenson v. Will & Finck Co., 150 Cal. 398, 89 P 113. A car inspector who voluntarily and without authority undertakes to assist in switching ceases temporarily to occupy the relation of servant. Louisville, etc., R. Co. v. Pendleton's Adm'r, 31 Ky. L. R. 1025, 104 SW 382. The mere fact that the agent in charge of the yards saw him go to do such work does not create an implication that the relation of master and servant continued during such time. Id. Where a miner employed to drive an entry in a mine was injured while assisting in propping a dangerous portion of the roof, which precaution was immediately necessary, he was acting within the scope of his employment. Ballou v. Potter [Ky.] 106 SW 1178. A servant is entitled to protection when in the discharge of duties incidentally arising under his employment. Rochelle v. White Castle Lumber & Shingle Co. [La.] 45 S 449. Employe injured because of defect in an elevator held to have been engaged in the course of his employment at the time of the accident. Yarbrough v. Swift, 119 La. 344, 44 S 121. Employe in saw and planing mill was injured while operating for his own purposes a machine which did not constitute a part of the machinery of the mill but was under control and subject to use of a third person, who got power from the mill. Held mill company not liable. Gross v. Fischer Lumber & Mfg. Co., 119 La. 201, 43 S 1006. Where a servant was killed by a shock from an electric wire when he went into a basement to get a rat from the bleaching vat, held a question for the jury whether he was a volunteer or acted pursuant to a direct order of his superior. Saures v. Stevens Mfg. Co. [Mass.] 82 NE 694. Where a servant was sent to a cellar and was killed by an electric shock from a defective lamp which he was using, whether he was using the light in line of his duty and whether his duty took him in the vicinity of the light held for the jury. Id. Plaintiff was defendant's tool house foreman and was also required to assist in clearing away wrecks. After a wreck he was told to return to headquarters in the caboose of a freight train, and while doing so was injured in a rear end collision. Held plaintiff was a servant, not a passenger, and defendant owed him only the duty of ordinary care. St. Clair v. St. Louis, etc., R. Co., 122 Mo. App. 519, 99 SW 775. Where an employe of a railway company, while off duty but in compliance with an order to report at a certain place as soon as possible, walks along the tracks of the company as a matter of convenience and for the purpose of saving time, he is not within the course of his employment while on said tracks, and the engineer of an approaching train is not bound to keep a lookout for him. Byrket v. Lake Shore & M. S. R. Co., 10 Ohio C. C. (N. S.) 73. Whether a laborer was acting within the scope of his employment at the time he was killed by discharging of a steam boiler held for the jury. Zoesch v. Flambeau Paper Co. [Wis.] 114 NW 485. A special finding by the jury to the effect that the plaintiff was under the control of a foreman who is named does not entitle the defendant to a judgment on the ground that the accident happened in a different department, where the testimony shows that at the time of the accident the plaintiff's duties had taken him into another department and under the control for the

master to the person injured at the time of the injury.[16] Usually, it is held that these duties continue while the employe is on the premises preparing for his work or to leave it.[17] Where a minor knowingly misrepresents his age and is accepted by a railroad company as a student fireman, though the rules of the company forbid acceptance of minors for train service, he is a trespasser, or at most a bare licensee, and not a servant.[18]

Where the relation is that of general employer and independent contractor,[19]

time being of the foreman of that department. Jno. Kauffman Brew. Co. v. Betz, 8 Ohio C. C. (N. S.) 64. Evidence sufficient to warrant finding that factory employe was in his assigned place of work when injured, and was not guilty of contributory negligence in going to a place where he was not authorized to be. Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694. Where a servant employed to gauge oil in tanks was found dead in one of the tanks, whether he was in the discharge of his duties at the time of the injury held for the jury. Yellow Pine Oil Co. v. Noble [Tex.] 19 Tex. Ct. Rep. 841, 105 SW 318. Where an engineer was killed by being crushed between supporting columns of a round house and cab of an engine, and it appeared that it was his duty to operate all engines, evidence held to show that at the time he was in performance of a duty of his employment. Texas, etc., R. Co. v. Johnson, [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773.

16. Where a servant of a railroad company employed to operate a pumping station procured the voluntary assistance of his brother, who was killed during the performance of such work held that, in the absence of proof of an emergency or necessity for his brother's assistance, the relation of master and servant did not exist, and the company was not liable. Grisson v. Atlanta, etc., R. [Ala.] 44 S 661. Where trainmen violated a rule by entering a single track without orders or ascertaining whether trains due on such track had arrived, it was held not the duty of the operator to call their attention to facts disclosed by the train register. Cogbill v. Louisville, etc., R. Co. [Ala.] 44 S 683. Where an employe was on the railroad track not in the discharge of any duty, and at a place where his presence was not to be anticipated, no duty was owed him until his presence was discovered. Cincinnati, etc., R. Co. v. Reynolds' Adm'r, 31 Ky. L. R. 529, 102 SW 888. Where servant was injured by fall of the trap door of an elevator, evidence held insufficient to show that the master had control of the building or appliance which would make it chargeable with negligence in respect thereto. Bradford v. Bankers Bros. Co., 107 NYS 450. Where outfit cars of a railroad company were stationed on a side track, employes who occupied such cars could assume that the company would exercise ordinary care to prevent switch engines from running into them. Pugmire v. Oregon Short Line R. Co. [Utah] 92 P 762. Where a telephone foreman said that some one must tie an electric light wire to an insulator and no one was near except decedent, who understood the words to be directed to him, the foreman's acquiescence in his action in obeying was equivalent to prior command. Cumberland Tel. & T. Co. v. Graves' Adm'r, 31 Ky. L. R. 972, 104 SW 356. No affirmative duty to exercise due care is owed to a **volunteer** in the absence of knowledge that he is in peril. A volunteer is one who introduces one into matters which do not concern him or who undertakes to do something he is not bound to do. Kelly v. Tyra [Minn.] 114 NW 750. The mate of a miner who set off his blast according to custom, where the other had left before quitting time, and blasting was done as miners were leaving, held not a mere volunteer. McHenry Coal Co. v. Render, 31 Ky. L. R. 1274, 104 SW 996.

17. A servant entering the master's premises to begin work or leaving them at close of work is not, while using ways and means provided, a licensee but is there by invitation of the master. Feneff v. Boston, etc., R. Co. [Mass.] 82 NE 705. Relation continues until employe leaves place of work or has a reasonable opportunity to leave. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Plaintiff quit work on account of sickness, but on way out of mine was stopped and questioned by superintendent, and during this time was injured. Held relation still existed. Id.

18. Railroad not liable for his injury in a collision in absence of willful or wanton injury. Norfolk, etc., R. Co. v. Bondurant's Adm'r [Va.] 59 SE 109.

19. It is not essential that one who engages a contractor to produce a given result should reserve or should interfere and take complete control over all features of work to render him liable as master. Kansas City, etc., R. Co. v. Loosley [Kan.] 90 P 990. But the fact that he possesses limited or partial control will not entail such liability, if the contractor is still left free to exercise his own will generally respecting the means and methods of accomplishing the result. Id. When one contracts to do and deliver certain specific work, which is not unlawful, and the manner of the doing of which, including employment, payment, and control of the labor used, is left entirely to him, he is an independent contractor. Robideaux v. Hebert, 118 La. 1089, 43 S 887. Person hired by sawmill company to haul and pile lumber at a certain price per 1,000 feet, he to employ men to be paid by company out of funds due the contractor, the company reserving the right to discharge objectionable men, held not such an independent contractor as to relieve the employer for liability for injuries to an employe caused by a defect in the roadway used in hauling lumber. Cameron v. Realmuto [Tex. Civ. App.] 100 SW 194. Whether one injured was defendant's servant or the servant of an independent contractor held for the jury. Meyers v. Syndicate Heat & P. Co. [Wash.] 91 P 549. One who operates a lathmill under contract from the owner by which he is to receive 75 cents per 1,000 lath pro-

the general employer does not owe the duties of a master to the contractor [20] nor to the servants of the contractor,[21] even though he pays such employes in order to protect himself against liens.[22] The general employer may, however, assume the duties of master to the contractor's servants.[23]

The rule that the negligence must have been the proximate cause of the injury applies equally to liability for violation of statute,[24] but neglect of a statutory duty need not be the sole cause of accident.[25]

The master's negligence must have been the proximate cause [26] *of the servant's injuries.*[27]—What was the proximate cause of an injury is ordinarily a question of

duced, and employ men who are to be paid by the owner out of such 75 cents per M., the balance to the contractor, is not an independent contractor but an agent, and the relation of master and servant exists as to the contractor's servants. Barclay v. Puget Sound Lumber Co. [Wash.] 93 P 430. Where a manufacturing company employed a man to unload cars and he employed his own helpers, he is not an independent contractor as to an employe of the company who is injured by a defective structure which it was the company's duty to repair. Foster v. National Steel Co., 216 Pa. 279, 65 A 618.

20. Where one was employed to drive an entry in a mine at a certain price per yard, work measured every two weeks, and the finished portion turned over to the owner, such owner was not bound to timber that part of the entry still unfinished and make the same safe, but was only required to furnish timbers to the employe on demand. Mammoth Vein Coal Co. v. Bublis [Ark.] 104 SW 210. Defendant told plaintiff to take a scaffold belonging to defendant, and to go ahead with a job of whitewashing which plaintiff had agreed to do for a certain sum. Held plaintiff was an independent contractor and could not recover from defendant for injuries. Finkelstein v. Balkin, 103 NYS 99.

21. A general employer is not liable for injuries to employes of an independent contractor. Good v. Johnson, 38 Colo. 440, 88 P 439. One who employs an independent contractor to do certain work is not liable for acts or omissions of the contractor in the execution of the contract resulting in injury to employes engaged therein. Robideaux v. Hebert, 118 La. 1089, 43 S 887. Where an employer turns over to an independent contractor, for use in execution of the contract, a machine in good order and safe condition, he is not liable to an employe for injuries caused by a negligent use of the machine by the independent contractor. Id. Where one corporation contracted with another to do all its work of repair and rebuilding and assumed all risks incident thereto, the major corporation was not liable for injury to a servant of the subordinate one resulting from its negligence. Munroe v. Ley, 156 F 468. One who contracts with a boss painter for the painting of his house and does not direct or control the employes is not liable for injuries to one resulting from failure of an ornament upon the cornice to sustain his weight. Metzinger v. New Orleans Board of Trade [La.] 44 S 1007.

22. Good v. Johnson, 38 Colo. 440, 88 P 439.

23. If an employer assumes the relation of master to the servants of one whom he has engaged to produce a given result, the duties imposed by law upon such relation attach. Kansas City, etc., R. Co. v. Loosley [Kan.] 90 P 990.

24. Lack of ventilation causing lights in mine to go out held not the proximate cause of injury to driver caused by the consequent backing up of his mule. Rosan v. Big Muddy Coal & Iron Co., 128 Ill. App. 128. Held that failure to ventilate mining rooms pursuant to statute is not the proximate cause of injury to servant caused by fall of the ceiling. Pittenger & Davis Min. & Mfg. Co. v. Gettleman, 126 Ill. App. 549. Recovery cannot be had under the miner's act unless the injury is such as proximately follows a violation thereof. Rosan v. Big Muddy Coal & Iron Co., 128 Ill. App. 128. Failure to sufficiently light shaft held to be the proximate cause of injury to miner. Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586, 81 NE 691.

25. Mine owner liable for accumulation of coal gas though another cause contributed. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708.

26. For discussion of general doctrine of proximate cause, see negligence, 8 C. L. 1090.

27. See 8 C. L. 857. Where an employe is killed because of negligence of an engineer following contributory negligence of deceased, it must appear that the negligence of the engineer was the proximate cause. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238. Negligence alleged must have been direct and immediate, efficient cause of injury. Creola Lumber Co. v. Mills [Ala.] 42 S 1019. Known incompetency of servant must have been a proximate cause of injury to charge master. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822. Rev. St. Fla. 1892, § 2345, providing that recovery from a railroad company shall not be had where the injury is caused by contributory negligence, but if the complainant and company are both at fault recovery may be had while practically eliminating contributory negligence, does not permit recovery unless the negligence of the company was the proximate cause of the injury. Bootman v. Seaboard Air Line R. [C. C. A.] 152 F 686. An injury which could not have been foreseen or reasonably anticipated as the natural and probable result of an act of negligence is not actionable because it is not the proximate cause, but either the remote cause, or no cause at all, of the damage. Kreigh v. Westinghouse, Church, Kerr & Co. [C. C. A.] 152 F 120. A master is not liable if a defective appliance was not the proximate cause of an injury. Ataka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. A violation of law which does not contribute to the injury complained of but is only a condition will not make defendant liable. Farrell v. B. F.

fact to be determined by the jury, except in those few cases where the facts are undisputed and are such that only one reasonable conclusion can be drawn therefrom.[28] Negligence of the master will be held the proximate cause of an injury if the master, in the exercise of ordinary care, ought reasonably to have foreseen that injury might result therefrom;[29] it is not necessary that the particular injury which occurred

Sturtevant Co., 194 Mass. 431, 80 NE 469. Failure of telephone company to furnish rubber gloves to employe cannot be set up as negligence where the proximate cause of the injury was negligence of fellow servant. Hartenstine v. United Tel. & T. Co. [Pa.] 67 A 989. Where employe walked into open elevator shaft which was well lighted, he could not recover on account of failure to have device to give notice that it was in motion in violation of Pub. Laws, p. 43, c. 973. Leaby v. U. S. Cotton Co. [R. I.] 66 A 572. Where failure to equip cars with air brakes was not the proximate cause of an injury, it cannot be assigned as negligence. Lyon v. Charleston, etc., R. Co., 77 S. C. 328, 58 SE 12. Where injury was caused by hooks in a ladder carried by plaintiff catching in machinery, an instruction that if the injury was due to a bobbin rolling under plaintiff's foot, causing ladder to catch, it was immaterial that ladder was tilted up, was proper. Redmond v. Sherman Cotton Mills [Tex. Civ. App.] 17 Tex. Ct. Rep. 983, 100 SW 186. Plaintiff was injured by section car being precipitated upon him while it was being removed from the track. Held proximate cause of injury was sudden and unusual act of foreman in lifting car from track, and slippery condition of ground was a mere condition. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427. Evidence insufficient to show any negligence on the part of the master where a servant on a ladder was seized with dizziness, and to steady himself rested his foot on cog wheels which crushed them. Leffler v. Anheuser-Busch Brew. Ass'n [Mo. App.] 106 SW 105.

28. Proximate cause held a question for the jury: The question of proximate cause is for the jury where the evidence does not show what it is as a matter of law. Fogarty v. Southern Pac. R. Co. [Cal.] 91 P 650. Where car repairer was injured while working beneath a car, in consequence of the car being struck by another. Id. Held that question whether order of foreman to stop train after having ordered servant to uncouple cars thereon was the proximate cause of servant's injury was for the jury. East St. Louis Connecting R. Co. v. Meeker, 229 Ill. 98, 82 NE 202. Whether defective condition of the track resulting in derailment and death of engineer was the cause of his death. Illinois Cent. R. Co. v. Skeegog's Adm'r, 31 Ky. L. R. 691, 103 SW 323. Whether brakeman was injured by piece of coal falling from the tender. Louisville, etc., R. Co. v. Clark [Ky.] 106 SW 1184. Where railroad employe was run down by a train, whether failure to give signals was the proximate cause of his death. Wilson v. Virginia-Carolina Chemical Co. [S. C.] 58 SE 1019. Girder, being raised by four men, one of them a foreman, turned because bar used by foreman slipped and plaintiff was injured. Held it could not be said as a matter of law that the slipping of the foreman's hold was act of fellow-servant, rather than his selection of an unsafe method of doing the work, with not enough men. Bakamp v. Chicago, etc., R. Co., 123 Mo. App. 270, 100 SW 689. Where locomotive engineer was killed by derailment of his train, testimony that slush and water would come up on the ties when trains ran over the track was sufficient to go to the jury on the question whether the yielding condition of the track was the proximate cause. Jones v. Wilcox [S. C.] 60 SE 231. Whether the placing of an empty round top horse car in the middle of a train of loaded cars instead of back next to the caboose, as required by rule of the company, was the proximate cause of death of a brakeman who fell off such car at night while performing his duty. Freeland v. North Carolina R. Co. [N. C.] 59 SE 990. Where a brakeman was injured by a derailment, whether the accident was caused by a defective bolster which had been weakened by absence of burrs from the ends of truss rods. Henson v. Lehigh Valley R. Co., 106 NYS 602. Whether death of employe in a stone yard was caused by negligence in causing the stone to be moved by a derrick. Powers v. Miller, 107 NYS 960. Whether negligence in using defective engine was proximate cause of collision and death. Stone v. Union Pac. R. Co. [Utah] 89 P 715. Whether negligence of master in failing to warn was proximate cause of injury to section man. Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 SW 142. Whether want of repair of a guard on a machine was the proximate cause of an injury. Fergeson v. Robinson Mfg. Co. [Wash.] 93 P 428. Whether negligent failure to furnish suitable appliances was the proximate cause of the injury. Shaw v. Highland Park Mfg. Co. [N. C.] 59 SE 676. Where plaintiff was injured while assisting in carrying a rail, evidence held not to warrant assumption that negligence of fellow-servants caused the injury and not negligence of a foreman in not having a sufficient number of men. Galveston, etc., R. Co. v. Bann [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413.

29. To warrant a finding that a negligent act or omission, not amounting to a wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of such act or omission and that it ought to have been foreseen in the light of attending circumstances. Bryant v. Beebe & Runyan Furniture Co. [Neb.] 110 NW 690. Where the master gives his servant an order in the ordinary course of his employment, though the act is dangerous, the master is not liable if he could not have been expected to anticipate the injury. Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 NE 168. Where foreman directed an employe to draw a coupling pin from the drawhead of a car in motion, evidence held insufficient to show that such manner of doing the act was negligent or hazardous, or that a reasonably prudent man would have anticipated the accident. Bromley v. Hudson Lumber Co. [Mo. App.] 104 SW 1134. If an accident which should have been foreseen occurs and an un-

ought to have been foreseen,[30] provided it was the natural and probable consequence of the master's negligence.[31] If an injury would not have resulted but for negligence of the master, he is not relieved from responsibility by the fact that an independent cause, for which he is not responsible,[32] such as negligence of a fellow-servant,[33] or of a third person, or other agency, concurred in producing the injury.[34] These principles are further illustrated by holdings grouped in the notes.[35]

usual strain is put on other machinery and an injury results, the master is liable because the machine should have been made strong enough to withstand the strain, but if the first accident could not have been anticipated, there is no liability. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555.

30. If an act is one which a person in the exercise of ordinary care could have anticipated as likely to result in injury, then he is liable for any injury actually resulting therefrom, though he could not have anticipated the precise injury which occurred. Stone v. Union Pac. R. Co. [Utah] 89 P 715. Where an injury to a switchman resulted from the act of the foreman and might have been foreseen by the exercise of ordinary care, the switchman could recover without proving that the foreman should have foreseen the particular injury. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Where defect in machinery is liable to cause some injury, the fact that the particular accident which did result was not reasonably to be anticipated will not relieve the master. Industrial Lumber Co. v. Bivens [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831.

31. Whether the knocking loose of a carriage fastener by a fellow-servant falling against it was the natural result to be anticipated from failure to provide a suitable fastener held for the jury. Trickey v. Clark [Or.] 93 P 457.

32. Where it is a statutory duty to guard a saw, the master cannot escape liability on the ground that the employe was negligent in raising his foot so that his heel touched an unguarded saw. Johnson v. Far West Lumber Co. [Wash.] 92 P 274. An employe injured by coming in contact with machinery which should have been guarded as required by Burns' Ann. St. 1901, § 7087I, may recover though he was injured by reason of his foot slipping, where the injury would not have occurred if the machinery had been guarded. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981.

33. See post, § 3E.

34. If injury was caused by defendant's foreman, concurring negligence of third person would be no defense. Conroy v. G. W. & F. Smith Iron Co., 194 Mass. 468, 80 NE 488. Railroad company liable where its negligence in furnishing defective chain to hold lumber concurred with negligence of employe of lumber company to which duty of loading car had been delegated. Britt v. Carolina Northern R. Co., 144 N. C. 242, 56 SE 910. Where defective couplers was proximate cause of injury to brakeman, the fact that his foot slipped on a tie at the time (risk of which was assumed) would not relieve master from liability International, etc., R. Co. v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 90, 99 SW 856. Where employe was injured while operating saw which was not guarded as required by statute, a finding that failure to guard saw was proximate cause of injury was warranted though other causes contributed. Tucker & Dorsey Mfg. Co. v. Staley [Ind. App.] 80 NE 975.

35. Negligence of master, or one representing him, held proximate cause of injury: Proximate cause of injury held failure to guard belting, as required by Comp. Laws, § 5349. Swick v. Aetna Portland Cement Co., 147 Mich. 454, 111 NW 110. Evidence sufficient to show that defect in a circular saw causing it to have a lateral motion was the proximate cause of an injury. Herrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. Defect in track held the proximate cause of injury to a miner struck by a car while attempting to move another which had stopped because of such defect. Moore v. Royal Lead & Zinc Co., 125 Mo. App. 393, 102 SW 616. This defect is held not too remote a cause. Id. Employment of boy under 12 in violation of statute held proximate cause of his injury by machine he was operating, as a matter of law. Leathers v. Blackwell's Durham Tobacco Co., 144 N. C. 330, 57 SE 11. Evidence sufficient to warrant finding that injury to person hauling express matter on a truck, caused by falling of parcels off the truck, was caused by a defect in the platform or floor as alleged. Wells, Fargo & Co. v. Boyle [Tex.] 18 Tex. Ct. Rep. 437, 102 SW 107. Where barrel fell from joist on plaintiff, when another servant was ordered to get another barrel, there was no negligence of a fellow-servant as a cause of the injury to plaintiff. G. A. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 18 Tex. Ct. Rep. 416, 99 SW 715 Evidence sufficient to show that death of miner was caused by falling of "nigger head" from roof of mine owing to insufficient timbering. Pachko v. Wilkeson Coal & Coke Co. [Wash.] 90 P 436. Where laborer was killed while discharging a steam boiler, evidence held to show that the cause of his death was from the flow stopping and the sudden removal of the obstruction by his opening the valve. Zoesch v. Flambeau Paper Co. [Wis.] 114 NW 485.

Proximate cause of injury held not to be master's negligence: Held that the giving of a signal by a foreman to lower a column under which servant was standing, which was not obeyed, was not the proximate cause of servant's injury. Simpson v. Hansell-Elcock Foundry Co., 229 Ill. 554, 82 NE 388. Evidence held insufficient to show that defect in hand car was the proximate cause of servant's injury. Jacksonville, etc., R. Co. v. Stewart, 125 Ill. App. 516. Held that master's failure to properly insulate a heavily charged wire was not the proximate cause of the injury resulting in lineman's death. Central Union Tel. Co. v. Gibbons, 125 Ill. App. 532. Failure to cross-cut as required by statute held to give no cause of action for injuries caused by explosion of keg of powder. Carterville & Herrin Coal Co. v. Moake,

Contractual exemption from liability. See 8 C. L. 861—The validity of a release from liability is to be determined by reference to the law of the place where the contract of service is to be performed.[36] Contracts relieving employers from liability for negligence are usually held void as against public policy,[37] but agreements to look to benefits from a relief fund in lieu of damages are usually enforced.[38] Thus, a pro-

128 Ill. App. 133. Evidence held insufficient to show that the allowing of switch to remain open was due to the negligence of defendant. Chicago, etc., R. Co. v. Sammis, 127 Ill. App. 288. Evidence insufficient to show negligence of master as cause of brakeman slipping and getting foot caught under car wheels. Creola Lumber Co. v. Mills [Ala.] 42 S 1019. Where an engineer operating a mine cage was instantly warned by the shock of the wreck of the cage and stopped it as soon as possible, failure of the mine owner to keep an electric signal by which the cagee could communicate with the engineer was not contributory to the injury. Elkton Consol. Min. & Mill. Co. v. Sullivan [Colo.] 92 P 679. Defendant held not negligent where superintendent of brickwork on building was knocked off by a swinging bucket just as he stepped upon the roof. Kreigh v. Westinghouse, Church, Kerr & Co. [C. C. A.] 152 F 120. Mining company held not liable where miner was crushed by a descending cage which he signaled for, no negligence on the part of the company being shown. Southwestern Development Co. v. Boyd [Ind. T.] 104 SW 1174. Where a servant was struck by a truck placed so close to a railroad track that it was hit by a passing train, the act of a fellow-servant in leaving the truck so close to the track, and not the omission of the master to employ an extra man on the engine to watch out for such obstacles, was held the cause. Haskell & Barker Co. v. Prezezdziankowski [Ind.] 83 NE 626. Where cause of brakeman's injury was his stumbling, the company was not liable. Louisville, etc., R. Co. v. Cox's Adm'r, 31 Ky. L. R. 1214, 104 SW 956. Where an employe was injured while driving through a shed driveway by striking his head on the top of the driveway, evidence held insufficient to show that negligence of the master in permitting ice to be on the driveway was the proximate cause of the injury. Carroll v. Boston Coal Co. [Mass.] 81 NE 296. Where car was on time, and running 5 or 6 miles an hour at time of collision, negligence of car company in ordering motorman to observe a certain schedule was not proximate cause of collision. McGahan v. St. Louis Transit Co., 201 Mo. 500, 100 SW 601. Where employe in car factory was caught between cars and killed as he was going through a space between them, and provision had been made for warnings during switching operations, held injury was due to negligence of employe himself or of a fellow-servant. Jurkiewicz v. American Car & Foundry Co., 147 Mich. 622, 14 Det. Leg. N. 11, 111 NW 183. Evidence insufficient to show that negligent act of a conductor in ordering a brakeman to go on top of a train on a stormy night for the purpose of stopping it was the proximate cause of his injury. Shaw v. Chicago, etc., R. Co. [Minn.] 114 NW 85. Evidence insufficient to show negligence of the conductor in caring for the man after his injury. Id. Where employes were hauling trucks down an incline, with such short distances between that the one ahead could not escape in case his truck stopped, their conduct, and not the defective condition of a truck, was held the proximate cause of a collision. Bryant v. Beebe & Runyan Furniture Co. [Neb.] 110 NW 690. Where a mill employe is injured without negligence as to the construction or repair of machinery, the injury is attributable to accident or contributory negligence. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79. Evidence sufficient to show that a carpenter was injured because he did work in a method adopted by himself instead of in a safe method prescribed by the master. Quick v. Millfort Mill Co. [S. C.] 59 SE 365. Where railroad carpenter was injured while unloading lumber from a box car by lumber falling on him due to the method in which he unloaded it, evidence held insufficient to show negligence on the part of the company. Texas, etc., R. Co. v. Flowers [Tex. Civ. App.] 19 Tex. Ct. Rep. 765, 104 SW 1070. Where a fireman was killed by an engine running off an open switch which the master had left unlocked, but was not shown to have left it open, leaving the switch unlocked was not the proximate cause of the accident. Edgar v. Rio Grande Western R. Co. [Utah] 90 P 745.

36. Where at time release of liability for injuries was executed in Utah it was known that services were to be performed in Wyoming and plaintiff's intestate was injured in Wyoming, the contract was a Wyoming one and void under Wyo. Const. art. 10, § 4, and art. 19, § 1. Stone v. Union Pac. R. Co. [Utah] 89 P 715.

37. Release given by employe of express company who was also employed by railroad company to express company, releasing employers from liability for all acts of negligence resulting in injury or death during his employment, held void as to railroad company as against public policy. Stone v. Union Pac. R. Co. [Utah] 89 P 715. A master cannot contract in advance against liability for injuries due to his negligence. Pugmire v. Oregon Short Line R. Co. [Utah] 92 P 762. Under Burns' Ann. St. 1901, § 7083, making railroad corporations liable for injuries to employes sustained by negligence of certain employes, and § 7087, that contracts relieving railroads from liability imposed by statute shall be void, a promise by an employe to assume the risks of his employment is void. Pittsburg, etc., R. Co. v. Ross [Ind.] 80 NE 845.

38. Where a railroad employe was a member of the benefit department of the railroad, one of the rules of which was that an acceptance of benefits should be a defense to an action for injuries or death, decedent's widow, as administratrix, was entitled to the benefits, or to pursue her remedy for his death, and an acceptance of one remedy was an election which precluded resort to the other. Gipe v. Pittsburg, etc., R. Co. [Ind. App.] 82 NE 471.

vision in a contract for indemnity from a benefit fund, requiring as a condition precedent to receiving any benefits the execution of a release of all claims for damages by persons injured by the death of the employe, was held valid and enforcible,[39] though the contract also provided that all employes assumed the risk of injuries.[40] Under a contract with the relief department of a railroad that the receipt of benefits from that department shall bar all actions for damages for death of the member, a beneficiary cannot maintain an action for damages after receiving benefits[41] but the receipt of benefits by the beneficiary alone will not bar an action by her as administratrix for the benefit of her minor children.[42] A provision in such a contract that benefits otherwise payable shall be forfeited if any action for damages be brought is not enforcible.[43]

(§ 3) *B. Tools, machinery, appliances, and places for work.*[See 8 C. L. 802]—It is the duty of the master to use ordinary care[44] to furnish machinery, tools and appliances which are reasonably sale and suitable[45] for the purposes for which they are

39, 40. Frank v. Newport Min. Co., 148 Mich. 637, 14 Det. Leg. N. 289, 112 NW 504.

41, 42. Chicago, etc., R. Co. v. Healy [Neb.] 111 NW 598.

43. Widow sued for damages for death of husband but was defeated. Held she was entitled to payment of benefits. Chicago, etc., R. Co. v. Healy [Neb.] 111 NW 598.

44. Reasonable care must be exercised in furnishing and keeping in repair structures and appliances to be used by the servant. Combs v. Roundtree Const. Co., 205 Mo. 367, 104 SW 77. The master is not under absolute duty to furnish safe appliances but only to exercise reasonable care. Vilter Mfg. Co. v. Kent [Tex. Civ. App.] 19 Tex Ct. Rep. 955, 105 SW 525. The master must use ordinary care in selecting and keeping appliances in repair. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Ordinary care is such as a person of ordinary prudence would exercise under the circumstances. Id. Where locomotive fireman was injured by explosion of a water glass the master is not liable, there being a difference of opinion as to best method of protecting water glasses, and in its best judgment the master chose the one in use. El Paso, etc., R. Co. v. Foth [Tex.] 19 Tex. Ct. Rep. 835, 105 SW 322. The master is required to use ordinary care to furnish reasonably safe tools and appliances. Vanderpool v. Partridge [Neb.] 112 NW 318; Sparks v. River & Harbor Imp. Co. [N. J. Err. & App.] 67 A 600; St. Louis, etc., R. Co. v. Kern [Tex. Civ. App.] 18 Tex. Ct. Rep. 42, 100 SW 971. Instruction that it was master's duty to furnish safe appliances is erroneous as it is his duty to exercise only ordinary care to furnish safe appliances. Leary v. Anaconda Copper Min. Co. [Mont.] 92 P 477. Where plaintiff consented and continued to use a machine after a bolt had dropped out of it ten or twenty times, the master's duty was limited to the exercise of reasonable care in discovering when the bolt was out, and in seeing that it was replaced. Laughlin v. Brassil [N. Y.] 79 NE 854. The master does not insure that the appliances furnished are safe (Orr v. Waterson, 228 Ill. 138, 81 NE 825), but is required to use reasonable care in selecting and providing them (Id.). Instruction that it is the master's duty to supply reasonably safe machinery and appliances held erroneous. Id.

45. Coughlin v. Philadelphia, etc., R. Co. [Del.] 67 A 148; Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369; Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986. Though an employer is not an insurer of the safety of appliances, it is his duty to furnish appliances which are reasonably safe. Evidence held to show negligence in furnishing an unsafe appliance. Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99. Evidence that a swinging circular saw was guarded as such saws usually are did not release the master in the absence of proof that such method rendered the saw reasonably safe. Roy Lumber Co. v. Donnelly, 31 Ky. L. R. 601, 103 SW 255. While the master is not an insurer, he must furnish a reasonably safe place and reasonably safe appliances. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Employer engaged in operating steam saw mill owes employes duty of ordinary care to provide suitable and reasonably safe machinery and instrumentalities. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F 680. Reasonable care to provide and maintain reasonably safe freight elevator extends to safety appliances forming a part of the elevator. National Biscuit Co. v. Wilson [Ind. App.] 80 NE 33. A complaint alleging injuries caused by fall of an elevator because of negligence in using a defective rope and in failing to provide a safety device, and that injured servant had no notice of such defective condition, states a cause of action at common law. Reliance Mfg. Co. v. Langley [Ind. App.] 82 NE 114. It is duty of master to use ordinary care to furnish reasonably safe appliances and to use ordinary care to maintain them in that condition. Kentucky & Indiana Bridge & R. Co. v. Moran [Ind.] 80 NE 536. It is the duty of the master to guard dangerous machinery if it can be done with reasonable expense without interfering with the conduct of the business. Westman v. Wind River Lumber Co. [Or.] 91 P 478. Master will not be allowed to experiment at risk of servant. If he uses appliances not in general use, he assumes the risk of their not being reasonably safe. Johnson v. Griffith-Sprague Stevedoring Co. [Wash.] 88 P 193. The master's duty is not performed by furnishing an appliance such as is in general and ordinary use, if it is obviously dangerous, that is obviously

intended to be used.[46] Instrumentalities of the kind ordinarily used by those engaged in the same business are reasonably safe within the meaning of this rule,[47] which does not require the latest, safest, or best obtainable to be provided.[48] Whether

dangerous to the ordinarily careful employer charged with the duty of exercising due care for the safety of his employes. Instruction criticized as not properly presenting law. Yazdewski v. Barker, 131 Wis. 494, 111 NW 689.

46. It is the master's duty to use reasonable care to furnish appliances which are reasonably safe for the purpose for which they were intended. Chenoweth v. Sutherland [Mo. App.] 107 SW 6. Tools and appliances are sufficient which are reasonably safe and adapted to intended purposes. Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369. No negligence where appliances furnished were suitable for purposes for which they were intended. Conroy v. Morrill & Whiton Const. Co., 194 Mass. 476, 80 NE 489. A master may adopt such reasonably safe appliances as he deems best suited for the work in hand. Quick v. Millfort Mill Co. [S. C.] 59 SE 365. A railroad company is required to exercise ordinary care in furnishing machinery equal to that in general use and reasonably adapted to the uses to which it is put. Central of Georgia R. Co. v. Ray [Ga.] 58 SE 844. Where machine as furnished was unsafe and master put on an appliance to make it less dangerous, it was the duty of the master to see that it was properly adjusted. Giacomini v. Pacific Lumber Co. [Cal. App.] 89 P 1059. It is the duty of a railroad company, with respect both to the original construction and subsequent maintenance of a semaphore to exercise due care to have such a permanent adjustment of it, that, when the lantern is kept in suitable working order and properly set, it will display the correct signal to the engineer of an approaching train. Tillson v. Maine Cent. R. Co., 102 Me. 463, 67 A 407. Evidence sufficient to show performance of this duty. Id. Miner injured by ore car in which he was riding coming in contact with ore chute, which had been used for eighteen years without accident, and was placed close to where car passed to avoid dropping ore on men below. Held no negligence shown, car being intended for ore and not for men. Burns v. Old Sterling Iron & Min. Co., 188 N. Y. 175, 80 NE 927. Master held not negligent in not supplying means for stopping knives of pulp shredding machine while pulp is being taken away, where approach from beneath is not anticipated. McGrath v. Fibre Conduit Co., 106 NYS 777. Where master had reason to know that servants used bumpers on cars for making couplings, it is his duty to keep them in repair, though they were constructed for another purpose. Donk Bros. Coal & Coke Co. v. Retzloff, 229 Ill. 194, 82 NE 214.

47. It is sufficient if the machinery is of a kind in general use and reasonably safe for persons who operate it with ordinary care. Vinson v. Willingham Cotton Mills Co. [Ga. App.] 58 SE 413. Failure to guard machinery held not negligence where there was no evidence that it was customary to guard machines of that kind. Walters v. Wolverine Portland Cement Co., 148 Mich. 315, 14 Det. Leg. N. 222, 112 NW 113. Duty is discharged by providing machinery and appliances which are in common use and are reasonably fit for the purposes to which they are to be applied. Sparks v. River & Harbor Imp. Co. [N. J. Err, & App.] 67 A 600. An employer who uses machinery in common use is not liable for an injury caused thereby which might have been prevented by the use of different machinery. Employe injured while placing a belt on a moving pulley by his clothes catching on the bolts projecting from the sides of the pulley Warner v. Armond [Or.] 90 P 1113. Stub pilot of engine in universal use and approved by experience of a number of roads held reasonably safe within the rule. Jones v. Yazoo, etc., R. Co. [Miss.] 43 S 813. Evidence held not to show negligence in use of lever jack instead of screw jack in raising locomotive. Meyers v. Ruddock, Orleans Cypress Co., 118 La. 805, 43 S 448. No negligence shown where mangle which caused injury was new, of approved make, in good order, and properly placed. Lambert v. Troy Laundry Co., 118 La. 48, 42 S 642. Master held not negligent in using standard machine for shredding wood for pulp, fully equipped and in good working order. McGrath v. Fibre Conduit Co., 106 NYS 777. Where a joinder was as well protected as similar machines generally are, the master was held not negligent in failing to screen the machine. Brown v. J. A. Adams & Sons Co. [La.] 44 S 1005. Duty of master is performed where he purchases an apparatus in common use from a reputable and experienced manufacturer and makes a test when required. Bauman v. Cowdin [N. J. Law] 66 A 914. Whether immediate test is required in such case depends upon circumstances and terms of contract of purchase. Id. The master is not liable when an accident happens to the servant on the first occasion when apparatus is used if the method of use is the same as would be used to make a test. Id.

48. Vinson v. Willingham Cotton Mills Co. [Ga. App.] 58 SE 413; Louisville, etc., R. Co. v. Wilson, 30 Ky. L. R. 734, 99 SW 634. The ordinary care which a master is bound to use with respect to the safety of appliances provided for his workmen requires the application of no more than ordinary tests, and does not require the employment of experts or the application of the highest tests as to the adequacy or safety of such appliances. Speller v. Moerlein Brew. Co., 5 Ohio N. P. (N. S.) 561. Stub switch being reasonably safe, he is not negligent in failing to supply a split-switch. Smith v. Chicago Junction R. Co., 127 Ill. App. 89. Where a master furnished ice tongs which were efficient to the extent of their capacity and not calculated to deceive those using them, the master is not liable where an employe was struck by tongs, which slipped off a piece of ice, even though they were not the latest pattern nor the best adapted to the use. Wheaton v. Wagner Lake Ice & Coal Co. [Mich.] 14 Det. Leg. N. 842. 114 NW 853.

due care in this respect has been exercised in a given case is ordinarily a question of fact.[49]

49. Question of negligence held one for jury: Held that question whether defendant was negligent in furnishing an insufficiently hardened concrete slab which broke and caused plaintiff to fall was properly submitted to jury William Grace Co. v. Larson, 227 Ill. 101, 81 NE 44, afg. 129 Ill. App. 290. Question whether master was guilty of negligence in permitting hand rail of engine used by switchman in mounting to be placed so close to boiler head as to make it impossible for him to grab it held properly submitted to jury. Chicago, etc., R. Co. v. Marinan, 124 Ill. App. 272. Whether, in furnishing defective machine used to wind wire upon spools, master was guilty of negligence held question for jury. Western Elec. Co. v. Prochaska, 129 Ill. App. 589. Whether handle on hand car broke because of insufficiency for purpose or because of latent defect unknown to master. Southern R. Co. v. McGowan [Ala.] 43 S 378. Where an employe was killed by the explosion of a boiler, held for the jury whether the explosion was caused by crystallization, of which weakness the master should have known. Ultima Thule, etc., R. Co. v. Calhoun [Ark.] 103 SW 726. Whether breaking of belt was due to age and defectiveness or from other causes. Northern P. R. Co. v. Wendel [C. C. A.] 156 F 336. Saw mill employe was pushed against saw by log carriage. Held proof that carriage mechanism was out of repair so that carriage would creep was sufficient to make the question of negligence one for the jury. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F 680. Whether derrick was properly braced to withstand strain incident to its use was for jury. George B. Swift Co. v. Gaylord, 229 Ill. 330, 82 NE 299, afg. 126 Ill. App. 281. Where plug flew out of crown sheet of locomotive on inside of fire box. Burton v. Texas & P R. Co. [C. C. A.] 149 F 388. Question of negligence in management of steel converter which exploded and killed employe. Koshinski v. Illinois Steel Co., 231 Ill. 198, 83 NE 149. Question of negligence in making and maintaining a contrivance for keeping windows open. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Whether failure to provide a dough mixer with a guard was negligence. Sutton v. Des Moines Bakery Co. [Iowa] 112 NW 836. Whether planing machine was unsafe by reason of absence of guards. Louisville, etc., R. Co. v. Wilson, 30 Ky. L. R. 734, 99 SW 634. Employe came in contact with cutting chain on electric coal mining machine. Ford v. Providence Coal Co., 30 Ky. L. R. 698, 99 SW 609. Where servant was injured by breaking of a chain holding a pulley, whether a reasonably safe appliance was furnished. Louisville, etc., R. Co. v. Melton [Ky.] 105 SW 366. Question of negligence where servant was injured by breaking of an alleged insufficient iron hook used in raising a grounded vessel. Louisville & E. Packet Co. v. Hazzard [Ky. App.] 107 SW 270. Switchman fell from switch engine to which he had gone to get materials to make repairs on another. Wolfe v. Minneapolis, etc., R. Co., 100 Minn. 306, 111 NW 5. Where employe was injured by a drop hammer falling on his hand, evidence as to the sufficiency of a part of the apparatus by which the hammer was operated held for the jury. Rittel v. E. E. Souther Iron Co. [Mo. App.] 105 SW 662. Whether an injury was due to defective rope and the master's failure to inspect it. Chenoweth v. Sutherland [Mo. App.] 107 SW 6. Where servant's leg was drawn into elevator for elevating grain, evidence of master's negligence in not taking precautions to prevent such accident. Lynch v. American Linseed Co., 107 NYS 458. Where cable on bucket in mine shaft broke dropping the bucket, whether cable was defective. Owen v. Retsof Min. Co., 104 NYS 37. Whether appliance used to unload car was defective. Britt v. Carolina N. R. Co., 144 N. C. 242, 56 SE 910. Whether belt shifter in a cotton mill was a safety appliance and in proper repair, and if not whether its defective condition was or should have been known to the mill owner, held for jury. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79. Whether reasonable care was exercised in providing a safe fastening for a lever. Trickey v. Clark [Or.] 93 P 457. Bucket used to hoist ore from hold of vessel broke dropping ore on plaintiff. McGeehan v. Hughes, 217 Pa. 121, 66 A 238. Water glass on locomotive exploded, putting out fireman's eye. Shield used was not a wire screen but strips one-half inch apart. Whether master was negligent in using such appliances. El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 18 Tex. Ct. Rep. 610, 100 SW 171. Brakeman stepped on spike projecting from top of freight car. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 18 Tex. Ct. Rep. 345, 99 SW 577. It cannot be said as a matter of law that a master is not liable for injuries resulting from obvious defects in the simplest appliances furnished by him. St. Louis S. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783. Where brakeman was injured by breaking of a wooden wood rack when he attempted to board a moving car, whether the company was negligent in not keeping the wood rack reasonably safe. Sturgeon v. Tacoma Eastern R. Co. [Wash.] 93 P 526. Evidence sufficient to make out a prima facia case of negligence where the master furnished a defective appliance to work with. La Bee v. Sultan Logging Co. [Wash.] 91 P 560. Whether gearing in saw mill was properly guarded. Noren v. Larson Lumber Co. [Wash.] 89 P. 563. Whether appliances and place were reasonably safe held for the jury where laborer was killed in discharging a steam boiler. Zaesch v. Flambeau Paper Co. [Wis.] 114 NW 485. Whether negligence to allow set screw in revolving shaft on machine to remain in position, where it caught employe's hair. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 NW 443

Master held not negligent: Dumb waiter never having been equipped with device to prevent its starting unexpectedly, and it not being usual or customary to so equip dumb waiters, employe could not recover for injury caused by one starting unexpectedly. New Galt House Co. v. Chapman, 30 Ky. L. R. 692, 99 SW 632. Where an employe was

injured by a revolving shaft which had no coupling or set screw, held the master was not negligent in the construction and operation of the machinery. Hertel v. Safety Folding Bed Co., 149 Mich. 223, 14 Det. Leg. N. 413, 112 NW 712. Where motorman was injured by explosion of a controller on a car, expert evidence held insufficient to show that the explosion was caused by defective condition of the controller and want of inspection. Beebe v. St. Louis Transit Co., 206 Mo. 419, 103 SW 1019. Evidence insufficient to show that drill, held by plaintiff and struck by another, and a burr of which chipped off, was defective. Kellogg v. New York Edison Co., 105 NYS 398. Master held not negligent in failing to furnish glass vessel instead of a can to an expert chemist where he was never requested to and the chemist was injured by an explosion caused by particles of phosphorus remaining in the can after previous use. Gozzett v. Plaut, 121 App. Div. 513, 106 NYS 161. Evidence insufficient to show stamping machine was in dangerous condition. Frangipane v. Metal Stamping Co., 103 NYS 109. Where one was injured by fall of certain plates caused by the alleged defective hook on a crane, evidence held insufficient to show that such hook was defective. Famularo v. Oil Well Supply Co., 105 NYS 1063. The mere fact that a saw and boards being run through it twisted and jumped does not show negligence in the absence of proof of what caused such twisting and jumping. Carron v. Standard Refrigerator Co., 106 NYS 723. Where sudden stopping of car was alleged to be due to defect in slot rail, held evidence insufficient to show negligence as charged. McCann v. Interurban St. R. Co., 117 App. Div. 188, 102 NYS 296. Evidence insufficient to show defect in elevator where plaintiff was injured as he stepped out. Fouquet v. New York Cent. etc., R. Co., 53 Misc. 121, 103 NYS 1105. Where servant was killed by accidental tipping of ladle containing molten metal, evidence held insufficient to support a finding of negligence on the part of the master in providing a defective hook by which the ladle was attached to the crane. Wren v. Kennedy Valve Mfg. Co., 106 NYS 710. A claim that a brake chain was inadequate has no basis, where the testimony discloses that the parting of the chain and resulting accident was due to a latent defect, such as the imperfect welding of one of the links, and not to the lightness of the iron from which the chain was made. Speller v. Moerlein Brew. Co., 5 Ohio N. P. (N. S.) 561. Where switchman was thrown from a train by a jerk caused by inability of the conductor to uncouple cars at the proper moment, the fact that there was a broken link in the coupling pin chain so that the lever would not raise the pin was not of itself negligence of the master. Norman v. Southern R. Co. [Tenn.] 104 SW 1088. Evidence insufficient to show defects in machinery where servant's hand was caught in cotton gin. Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470.

Master held negligent: Evidence held sufficient to warrant finding of negligence where employe was injured by defective jack used to raise rails. Dalhoff Const. Co. v. Luntzel [Ark.] 100 SW 743. Evidence sufficient to show negligence in furnishing defective machinery. Brunger v. Pioneer Roll Paper Co. [Cal. App.] 92 P 1043. Gross negligence to furnish steel bar to tamp down powder in a rock in blasting. Pitts v. Wells, 31 Ky. L. R. 208, 101 SW 1192. Master held negligent in knowingly allowing shay engine to be operated without guards over the cogs, and in permitting it to be operated with the leaky tank. Roff v. Summit Lumber Co., 119 La. 571, 44 S 302. Evidence sufficient to show the master liable for not furnishing proper appliances to youthful employe. Parrentin v. Crescent City Stockyard & Slaughterhouse Co. [La.] 44 S 990. Evidence sufficient to show that an appliance was defective. Muscerelli v. Hodge Fence & Lumber Co. [La.] 45 S 268. Where servant lost an eye because of breaking of a defective belt, the master was held liable. Rochelle v. White Castle Lumber & Shingle Co. [La.] 45 S 449. Evidence held to show negligence in failure to furnish proper appliances. Bradley v. Shreveport Trac. Co., 119 La. 336, 44 S 119. Chain which broke under a load which a chain of that size would sustain if in proper condition held defective. Cushing v. G. W. & F. Smith Iron Co., 194 Mass. 310, 80 NE 596. Negligence to fail to keep opening in edger safely guarded. Johnson v. Atwood Lumber Co. [Minn.] 112 NW 262. Railway company negligent in requiring roundhouse employe to work with defective engine. Barschow v. Lake Shore, etc., R. Co., 147 Mich. 226, 13 Det. Leg. N. 1060, 110 NW 1057. Where servant was injured by breaking of rotten rope suspending scaffold on which he worked, evidence sufficient to show negligence in not providing safe instrumentalities with which to work. Duchene v. Lefebvre-Deslauriers Roofing & Cornice Co. [Minn.] 112 NW 865. Evidence sufficient to show negligence in failing to provide proper ladders or hand holds in a planing mill. Lee v. Wild Rice Lumber Co., 102 Minn. 74, 112 NW 887. Evidence held to support finding that engine with defective boiler was furnished to engineer and fireman and that explosion was result of defendant's negligence, Strand v. Great Northern R. Co., 101 Minn. 85, 111 NW 958. Evidence sufficient to show that servant engaged in removing lath stock from conveyor of saw mill was injured by reason of defect in conveyor chain. Dobsloff v. Nichols-Chisolm Lumber Co. [Minn.] 112 NW 218. Evidence sufficient to show that a circular saw which caused an injury was out of repair. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. That lid of a blow off tank used for the purpose of blowing off boilers had never been tested to determine its soundness and ability to stand pressure held sufficient to warrant a finding of negligence. Morton v. William Barr Dry Goods Co., 126 Mo. App. 377, 103 SW 588. Defect in a belt shifter held the proximate cause of an injury to a servant whose arm was caught in a frame, which could have been stopped if the shifter had been in proper working order. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79. Where a servant was drawn into the leg of an elevator, evidence that certain devices could have been easily provided which would have been considerable protection is sufficient to sustain a finding of negligence. Lynch v. American Linseed Co., 107 NYS 458. Where motorman was injured by the bumper of another car overriding and crushing the vestibule of his car, evidence held to show negligence in

The master, having provided reasonably safe and suitable machines and appliances, is not liable for injuries resulting from their negligent use by an employe,[50] or from failure to use appliances provided,[51] or from their use for a purpose for which they were not intended,[52] or from the selection by an employe or a third person of such as are defective, others, reasonably safe, having been provided,[53] unless reasonable care was used by the person selecting the appliance.[54] The liability of the master in supplying a vicious animal for the use of his servants is governed by the same rules as those applying to the use of dangerous machinery and appliances.[55]

furnishing cars with bumpers constructed of different heights. Durkee v. Hudson Valley R. Co., 106 NYS 735. Evidence sufficient to show negligence where a servant was injured while oiling a brick machine. Perrotta v. Richmond Brick Co., 108 NYS 10. Evidence sufficient to show negligence of master in providing a defective machine. Stine v. S. Morgan Smith Co. [Pa.] 67 A 990. Breaking of tongue of wagon held due to defendant's negligence, and not to servant's act. Gorman v. Hand Brew. Co. [R. I.] 66 A 209. Evidence sufficient to show negligence in furnishing a defective pinch bar. St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783. Evidence held to show negligence where brakeman was injured while attempting to set a defective brake. Gulf, etc., R. Co. v. Griggs [Tex.] 19 Tex. Ct. Rep. 855, 105 SW 486. Where servant was killed by fall of the door of a box car, evidence held to show that the fall was due to defective condition of the fastening of which the company had notice. Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149. Engine held defective which leaked steam and obscured track. Stone v. Union Pac. R Co. [Utah] 89 P 715. Evidence held to show that an injury was partially the result of a defect in a log deck and not solely the result of a fellow-servant's negligence in operating the kicker. Olson v. Humbird Lumber Co. [Wash.] 92 P 897. Held negligence for railroad company to allow whistle on engine to remain out of repair so that rules requiring blowing of whistle could not be complied with as a result of which a collision occurred. Crow v. Northern Pac. R. Co. [Wash.] 88 P 1022. Appliances for carrying steel plates on board vessel held not reasonably safe, where evidence showed they had dropped plates on other occasions before the one in question. Johnson v. Griffith-Sprague Stevedoring Co. [Wash.] 88 P 193. Evidence sufficient to show negligence where a servant was injured while operating a defective head splitting machine. Gelo v. Pfister & Vogel Leather Co. [Wis.] 113 NW 69.

50. Where the master supplies reasonably safe appliances and place of work, and makes regulations for their use, he is not liable for an improper or negligent use of them by servants. Jurkiewicz v. American Car & Foundry Co., 147 Mich. 622, 14 Det. Leg. N. 11, 111 NW 183. Master is not liable for negligence of co-employes in a mere detail of the work, nor need he guard against transitory perils arising in the course of the work, nor for negligent handling of an appliance by an employe. Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 NE. 529. Where experienced servant was furnished with wire to sew a belt, master was not liable where wire broke when servant pulled it, the end striking him in the eye. Damjanovic v. Herring-Hall-Marvin Safe Co., 103 NYS 932.

51. Where a steam shovel employe was injured by falling of an overhanging ledge, and the master had furnished a competent foreman and suitable appliances with which to work if the injury was due to failure of the foreman to make use of appliances at hand to break away the ledge, the negligence was that of a fellow-servant. Russell v. Lehigh Valley R. Co., 188 N. Y. 344, 81 NE 122.

52. Where mine was equipped with system of ladders, well lighted, and kept in good order, commonly used by miners in going to and from the mine, though a few employes used an ore car, which boss had told one miner not to use, court should have found that ore car was not intended as passenger conveyance. Burns v. Old Sterling Iron & Min. Co., 188 N. Y. 175, 80 NE 927.

53. A master is not liable where a servant is injured by an appliance which he prepares and selects himself. Quick v. Millfort Mill Co. [S. C.] 59 SE 365. Master not liable where he furnished suitable appliances and one not his servant selected one not suitable for the particular work being done. Conroy v. Morrill & Whiton Const. Co., 194 Mass. 476, 80 NE 489. The rule that the duty to furnish safe appliances cannot be delegated does not apply where the appliance requires selection and construction and the master has furnished proper implements and materials therefor. Hoveland v. National Blower Works [Wis.] 114 NW 795. Where suitable appliances are furnished and at hand for use but the servant takes a defective and insufficient one, he cannot recover. Hartenstine v. United Tel. & T. Co. [Pa.] 67 A 989. Evidence insufficient to show negligence where an employe was injured because of a defective ladder which he himself selected from several which were not defective. Smith v. Green Fuel Economizer Co., 108 NYS 45. Where plaintiff, doing stone cutting, objected to tools furnished by master and procured some for himself, the master was not liable for an injury resulting from a defect in the tool. Denver, etc., R. Co. v. Sporleder [Colo.] 89 P 55.

54. If fellow-servant used reasonable care in selecting a chain, but selected one which was unsafe and broke, the master would be liable though other safe chains were available, since the fellow-servant would not in such case be negligent. Cushing v. G. W. & F. Smith Iron Co., 194 Mass. 310, 80 NE 596.

55. Held that master's liability depends upon animal's vicious character rather than its propensity to injure mankind. Manu-

As to foreign cars a railroad company is absolved from liability because of defects therein if ordinary care is exercised in their inspection, and such defects as are found are remedied or the servants notified of their condition.[56]

Temporary appliances; scaffolds.[See 8 C. L. 886]—In respect to temporary appliances, such as scaffolds, built and used by the employes in the ordinary course of their duties, the master fully performs his duty by supplying a sufficient quantity of suitable material,[57] and he is not liable for injuries caused by negligent construction or a failure to use the suitable materials provided,[58] but if the master undertakes to furnish a completed structure he owes the servant the same degree of care with respect to its safety as with respect to other appliances.[59]

In New York a statute requires a person who procures certain work to be done to provide a scaffold, or similar contrivance needed for such work, which is safe.[60]

Places for work.[See 8 C. L. 887]—It is the duty of the master to use ordinary care to provide a place of work which is reasonably safe,[61] considering the nature of the

facturers Fuel Co. v. White, 228 Ill. 187, 81 NE 841, afg. 130 Ill. App. 29, 60.

56. Chicago & A. R. Co. v. Neves, 130 Ill. App. 340.

57. See 8 C. L. 866, n. 40.

58. Where a servant was directed to select lumber for a scaffold from old secondhand material, much of which was rotten, evidence held insufficient to affirmatively show that the master had furnished suitable material. Hoveland v. National Blower Work [Wis.] 114 NW 795. Master not liable for dangers arising during the construction of a building, where the constant charges are created by the progress of the work. McCain Co. v. Kingsley, 126 Ill. App. 165. Not liable for act of fellow-servant in placing large column of steel upon an insufficient surface, so that it rolled upon plaintiff and caused injuries complained of. Id.

59. A scaffold made necessary in course of construction is an appliance as to which the master is bound to use ordinary care to make the same safe. Hoveland v. National Blower Works [Wis.] 114 NW 795. Where scaffold fell with plaintiff while he was using it in the ordinary way, and in the exercise of due care, held negligence shown. Parker v. Fairbanks-Morse Mfg. Co., 130 Wis. 525, 110 NW 409. Evidence held to warrant recovery where scaffold fell injuring plaintiff. Ingram v. Covington, etc., R. Co., 30 Ky. L. R. 713, 99 SW 666. Plaintiff not negligent in failing to inspect scaffold which had been built for his use in his absence. Id.

60. **Construction of New York statute:** Labor Law, § 18, makes an employer liable for unsafe scaffolds, etc., though erected by fellow-servants of one injured. Held the act does not create a new cause of action but makes competent evidence which was previously incompetent to show negligence. Haggblad v. Brooklyn Heights R. Co., 117 App. Div. 838, 102 NYS 1039. Fall of a hoist (appliance under Labor Law, § 18), while being properly used for intended purpose, held evidence that it was unsafe. Id. Plank laid across two wooden horses, used by workmen in putting casing into window frame inside building, held not a scaffold within the meaning of Labor Law, § 18. Williams v. First Nat. Bk., 118 App. Div. 555, 102 NYS 1031. The duty to furnish a safe scaffold, imposed by Laws 1897, p. 467, cannot be delegated. Anderson v. Milliken Bros., 108 NYS 61. Whether method of placing and securing planks on braces across an elevator bin was safe held for the jury under Laws 1897, p. 467, requiring the master to furnish a safe scaffold. Id. Where servants were directed by a foreman to use planks placed across braces to stand on while fixing an elevator bin of great depth, but were not instructed how to place them nor furnished ropes to fasten them, held the master was liable for failure to furnish a safe scaffold as required by Laws 1897, p. 467. Id. Subcontractor for work of wrecking building sold materials to a third person, who was to remove them. An employe of the subcontractor was injured by the fall of a plank put up by subcontractor, but abandoned by him six days before, when third person assumed control. Held subcontractor not liable under Labor Law, §§ 18, 19. Priolo v. Southard, 103 NYS 593. Where laborers were spreading concrete on a wooden box or floor, which was to be removed when concrete hardened, the box was a contrivance within Labor Law, § 18, and the breaking of the box while employes were on it was prima facie proof of negligence. Michael v. Standard Concrete Steel Co., 105 NYS 131.

61. Coughlin v. Philadelphia, etc., R. Co. [Del.] 67 A 148; Postal Tel. Cable Co. v. Likes, 124 Ill. App. 459, afd. 225 Ill. 249, 80 NE 136; Mead v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821; Louisville, etc., R. Co. v. Pendleton's Adm'r, 31 Ky. L. R. 1025, 104 SW 382; Muscarelli v. Hodge Fence & Lumber Co. [La.] 45 S 268; Pagan v. Southern R. Co. [S. C.] 59 SE 32. Instruction on care required of master with reference to caving in of trench approved. Smith v. Kansas City, 125 Mo. App. 150, 101 SW 1118. Employer owes employe duty of furnishing reasonably safe place of work. Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694. Masters owe their servants the duty of providing them a reasonably safe place in which to work and of maintaining it in a reasonably safe condition. The servant may rely on its performance. King Mfg. Co. v. Walton, 1 Ga. App. 403, 58 SE 115. The fact that the servant fully appreciates the dangers incident to his employment does not relieve the master of his duty to furnish a safe place. Lynch v. American Linseed Co., 107 NYS 458. A master must provide a rea-

business and the character of the work [62] and the intended uses and purposes of the place provided.[63] Whether due care has been exercised by the master in this respect

sonably safe place and exercise ordinary care to keep it in a reasonably safe condition. Haskell & Barker Co. v. Prezezdziankowski [Ind.] 83 NE 626. Where mill employe was injured because of unsafe condition of a platform on which he was required to work, it was proper to charge that the master was required to furnish a safe place, or use ordinary care to make it so, and if he did not and a servant was injured while exercising ordinary care for his own safety, the master was liable. Anderson v. Mammoth Min. Co. [Utah] 93 P 190. Instruction that it is his duty to furnish a reasonably safe place held erroneous. Swift v. O'Brien, 127 Ill. App. 26.

62. Master owes duty to provide a reasonably safe place and keep it in a reasonably safe condition, having regard to the circumstances of the case. Hardy v. Sulphur Min. Co. [N. J. Law] 67 A 177.

63. An employer who maintains a contrivance for keeping windows open must exercise a high degree of care to see that it is the best plan and due diligence in carrying it out, so that employes passing along the building may not be injured by its falling. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. An employer of children who orders them to a certain place during a temporary suspension of work is bound to see that such place is reasonably safe. Chambers v. Woodbury Mfg. Co. [Md.] 68 A 290. Evidence sufficient to show that one was employed to do certain work with authority to hire an assistant, rendering the master liable for failure to furnish a safe place for such assistant. Meyers v. Syndicate Heat & P. Co. [Wash.] 91 P 549. The rule of maritime law that a vessel is not liable in rem for an injury to a seaman through negligence of the master or owner does not apply where a longshoreman employed by the owner of a vessel to work thereon is given an unsafe place to work. The Buffalo [C. C. A.] 154 F 815. A master is not required to so arrange the place where a servant works as to protect him from the consequences of a casualty for which the master is not responsible. Quick v. Millfort Mill Co. [S. C.] 59 SE 365.

Application of rule to roadbed, right of way, and premises of railroad companies: Failure to block frogs held not actionable negligence. Wabash R. Co. v. Kithcart [C. C. A.] 149 F 108. Where eaves of a house had projected slightly over a railroad track for 15 years, were permanent in character, and not liable to become impaired by use, the railroad company was not negligent in permitting them to remain in such condition. Southern R. Co. v. Carr [C. C. A.] 153 F 106. Where a railroad employe was required to be in the terminal yard and go to and from the same, it was the master's duty to keep them reasonably safe. Bookman v. Seaboard Air Line Ry. [C. C. A.] 152 F 686. Evidence sufficient to show negligence in maintaining a defective telltale before a low bridge. Whitehead v. Wisconsin Cent. R. Co. [Minn.] 114 NW 254. Evidence sufficient to show negligence where a railroad company removed a guy wire from a pole standing in the yard and permitted it to lean over the track, causing injury to a brakeman. Bradley v. Central Vermont R. Co. [Mass.] 82 NE 44. Where a train dispatcher issued a train order to an engineer to assume the right of way and as a result thereof a collision occurred and the fireman was killed, the company through the dispatcher was negligent in the performance of a nondelegable duty to provide a safe way for operation of trains. McCarthy v. Pennsylvania R. Co., 189 N. Y. 170, 81 NE 770. Evidence sufficient to show negligence where an engineer was killed by a derailment at a point where the track was being relaid and was unsafe. Crissman v. Erie R. Co., 107 NYS 827. Where cars were run in both directions over a single track while repairs were being made, it was the company's duty to keep employes informed of a change in the running time of cars so that collisions could be avoided. Baldwin v. Schenectady R. Co., 118 App. Div. 441, 103 NYS 514. Railway company must furnish reasonably safe side tracks for use by its employes in switching. Cincinnati, etc., R. Co. v. Zachary's Adm'r [Ky.] 106 SW 842. Torpedo placed on track to warn train of another ahead is not an obstruction, the placing of which constitutes negligence as to a section hand injured by its explosion. Mize v. Louisville, etc., R. Co. [Ky.] 105 SW 908. Verdict for plaintiff sustained where switchman was thrown off engine and killed owing to condition of track. McDaniel v. Atlantic Coast Line R. Co., 76 S. C. 189, 56 SE 956. Negligence may be inferred where a yard employe watching a train was run over by a switch engine which had no watchman, gave no warning, and was running at a high rate of speed. Free v. Southern R. [S. C.] 58 SE 952. Where servant was told to ride on a car loaded with telephone poles, and jumped from it when they fell, evidence held sufficient to warrant recovery if car was negligently loaded or track rough and uneven. Lodwick Lumber Co. v. Mounce [Tex. Civ. App.] 18 Tex. Ct. Rep. 516, 102 SW 142. Railroad company owes employes duty to exercise ordinary care to see that track is in reasonably safe condition. Chicago, etc., R. Co. v. Birk [Tex. Civ. App.] 18 Tex. Ct. Rep. 72, 99 SW 753. Where brakeman was injured by falling from a train, evidence held to show that the fall was caused by sudden lurch of the train due to a defect in the track. Galveston, etc., R. Co. v. Wallis [Tex. Civ. App.] 104 SW 418. Where engineer was injured by collision with a preceding train, evidence held to show negligence. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 825, 104 SW 397. Evidence showing a suspension of wire cables across a railroad track so low as to obstruct passage of a train and actually obstructing the track a short time before the injury is sufficient to raise an issue of negligence where a servant is injured because thereof. Newhouse v. Kanawha, etc., R. Co. [W. Va.] 59 SE 1071. A reasonably safe place in case of railroads includes the entire track over which a servant is re-

is usually a question of fact.[64] The "place of work" within the meaning of the rule

quired to pass in the discharge of his duties. Id.

Question of due care for jury: Whether railway company negligent in maintaining open culvert into which brakeman stepped and was injured. Ross v. Great Northern R. Co., 101 Minn. 122, 111 NW 951. Whether a railroad company had exercised ordinary care in providing a safe roadbed, or whether the derailment was caused by extraordinary rainfalls, held under the evidence a question of fact. Ferguson v. Central R. Co. [N. J. Err. & App.] 67 A 602. Where railroad employe was injured by stumbling over material between rails of a track while coupling cars, question of negligence in failing to keep the track free from debris. Gillespie v. Grand Trunk R. Co. [Mich.] 14 Det. Leg. N. 645, 113 NW 1116. Where engineer was killed by a derailment, testimony as to the question of negligence in maintaining the track in an unsafe condition held for the jury. Jones v. Wilcox [S. C.] 60 SE 231. Where engineer was killed by a derailment caused by a defective rail, question of negligence held for jury. Hach v. St. Louis, etc., R. Co. [Mo.] 106 SW 525. Whether defective rail causing derailment and death of engineer was negligence. Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707. Question of negligence in backing an engine over track without a switchman on the footboard to keep lookout held for jury, where the track was used only in a limited way by trains and might be used at any time by employes. Galveston, etc., R. Co. v. Wafer [Tex. Civ. App.] 20 Tex. Ct. Rep. 831, 106 SW 897.

64. Question held for jury: Where there was evidence that switch in mine was defective, and affirmative charge on that issue was properly denied. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Whether master furnished a youthful employe a reasonably safe place to work. Owensboro Brick & Sewer Pipe Co. v. Glenn [Ky.] 106 SW 1195. Leaving an electric lamp in a defective condition in the basement where a servant was sent. Saures v. Stevens Mfg. Co. [Mass.] 82 NE 694. Master's negligence in failing to provide a safe place to work in for an employe unloading cars and to provide safe appliances with which to work. Baltimore, etc., R. Co. v. Belinski [Md.] 67 A 249. Where steel worker of long experience was injured by the end of a steel beam slipping from a block on which it had originally been securely placed but which became displaced as the work progressed. Olcott v. Passaic Steel Co., 106 NYS 566. Where defendant left a stump in a road and its driver got his leg caught between stump and brake beam of wagon. Bradley v. South, etc., R. Co., 144 N. C. 555, 57 SE 222. Evidence held sufficient to show master's negligence in causing servants to dig a trench alongside of a brick wall so as to cause it to cave in. Grace & Hyde Co. v. Strong, 127 Ill. App. 336. Whether master was negligent in permitting elevator cables to be used after they had become defective and whether the defect had been sufficiently apparent to require repair held a question for jury. Diamond Glue Co. v. Wietzyehowski, 227 Ill. 338, 81 NE 392, afg. 125 Ill. App. 277. Evidence showing death of car repairer was caused by the pushing of other cars against one which he was repairing held sufficient to justify submission of question of master's negligence to jury. Elgin, etc., R. Co. v. Herath, 230 Ill. 109, 82 NE 610, afg. 129 Ill. App. 416. Question of master's negligence held properly submitted to jury where it appears that on account of the slippery condition of the floor servant slipped and his hand was caught in a machine and injured. Acme Harvester Co. v. Chittick, 230 Ill. 558, 82 NE 647. Where plaintiff was injured because lights in place of employment were put out before his exit therefrom, causing him to fall down an elevator shaft, the question of master's negligence was for the jury. McLean v. Dow, 125 Ill. App. 174. Railroad company held liable for running its train without warning into a number of camp cars in which its section crew was living and thereby injuring its servant. Illinois Cent. R. Co. v. Panebiango, 227 Ill. 170, 81 NE 53, afg. 129 Ill. App. 1. Whether master was negligent in permitting hole to remain near tracks in switch-yard held a question for the jury. Illinois Cent. R. Co. v. Heath, 129 Ill. App. 143. Employe killed by coming in contact with electric wire in building. Raker v. Toledo, etc., R. Co., 10 Ohio C. C. (N. S.) 297. Question of master's negligence in not furnishing safe place to work. Beil v. Bonneville Portland Cement Co. [Pa.] 67 A 804. On an issue of failure to furnish a safe place where it is not admitted that the servant assumed the duty of adjusting proper appliances furnished, and the evidence admits of an inference that he did not, the question is for the jury. Green v. Catawba Power Co. [S. C.] 58 SE 147. Evidence of failure to furnish safe place where plaintiff was put to work in mills without warning, and was hurt by cogs which were covered by dust, etc., on a dark afternoon, no light being furnished. Worthy v. Jonesville Oil Mill, 77 S. C. 69, 57 SE 634. Question of safe place where it was rendered dangerous to employes by the projection of a set screw from a revolving shaft. Chopin v. Combined Locks Paper Co. [Wis.] 114 NW 95.

Held negligence not shown: Where an employe was injured while cleaning out a hydraulic gas main, evidence that it had been cleaned four times each year for eleven years tends to show that it was properly constructed so far as suitableness for cleaning was concerned. Tilley v. Rockingham County L. & P. Co. [N. H.] 67 A 946. Evidence insufficient to go to the jury on the question of a safe place where a servant was injured by escape of steam from a blow off cock on a locomotive. Kelley v. American Locomotive Co., 105 NYS 583. Evidence insufficient to show negligence where a servant slipped on an oily floor around the machine where she was working and her hair was caught in the machine. Schalk v. Commercial Twine Co., 107 NYS 525. Employe injured in fire in factory. Arnold v. National Starch Co., 105 NYS 420. Evidence insufficient to show that a factory operator failed to provide a safe place and proper appliances. Loughran v. Jordan L. Mott Iron Works, 107 NYS 434.

Evidence held to show negligence: Evi-

being discussed means not only the place, where servants are directed or expected to perform their labors,[65] but also such portions of the master's premises as are used by employes for necessary purposes of their own, with the consent or acquiescence of the master.[66] The rule does not extend to a place not owned or controlled by the

dence sufficient to warrant recovery where a boy sixteen years old was injured by explosion caused by cone containing molten metal coming in contact with water, where, though he knew the effect of such contact, he did not know there was water on the floor where he was working and it was so dark that he could not see it. Northport Smelting & Refining Co. v. Twitchell [C. C. A.] 156 F 643. The duty to furnish a safe place is not discharged where a master left an excavation on his premises in a dangerous place and condition where he knew the servant would probably be engaged at night in the performance of his duties and failed to warn him. King Mfg. Co. v. Wellon, 1 Ga. App. 403, 58 SE 115. Evidence sufficient to show negligence where a street car conductor collided with a telegraph pole while standing on the running board of his car collecting fares. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE. 986. Evidence sufficient to show negligence where miner was injured while throwing a switch. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. A street car employe may recover where he was struck by a pole in dangerous proximity to the track, unless he had notice of it or it was patent to a reasonably prudent person. Finley v. Louisville R. Co., 31 Ky. L. R. 740, 103 SW 343. That a mine was not properly ventilated, that the air was bad, and an explosion of gas occurred, is evidence of negligence. McHenry Coal Co. v. Render, 31 Ky. L. R. 1274, 104 SW 996. Dangerous condition of a car door which fell on a station agent as he was passing in discharge of his duties held sufficient evidence of negligence. Louisville, etc., R. Co. v. Simrall's Adm'r, 31 Ky. L. R. 1269, 104 SW 1011. Held negligence to direct a servant to tie an electric light wire to an improper insulator where danger might have been averted by having the current turned off. Cumberland Tel. & T. Co. v. Graves' Adm'x, 31 Ky. L. R. 972, 104 SW 356. Master held negligent where a hole was dug and left uncovered near where a servant had to go in the performance of his duties. Republic Iron & Steel Co. v. Walsh [Ky.] 105 SW 974. Placing a heavy gate in such position that a slight touch would cause it to fall and injure an employe working near is negligence. Webster v. Stewart Iron Works Co., 31 Ky. L. R. 1045, 104 SW 708. It is negligence to so place a bell, which is a signal by which to start machinery which might result disastrously to an employe, in such position that it might be rung by accident. Owensboro Brick & Sewer Pipe Co. v. Glenn [Ky.] 106 SW 1195. Where a day crew repairing premises left them in an unsafe condition and a night engineer while acting in the line of his duty fell into a hole and was injured. Roundy v. United Box, Board & Paper Co. [Me.] 68 A 535. Where plank, customarily used by plaintiff to stand on in adjusting a belt on pulleys, slipped, causing his injury, evidence sufficient to show negligence in not providing reasonably safe place. Samuelson v. Hennepin Paper Co. [Minn.] 112 NW 537. Evidence sufficient to show negligence in construction of corduroy road over which a servant was required to haul logs. Goss v. Goss, 102 Minn. 346, 113 NW 690. Evidence sufficient to show negligence in failing to support roof of mine where miner was killed by caving in of the roof. Rogers v. Rundell [Mo. App.] 106 SW 1096. Master liable where part of chute used to slide goods from one floor to another was insecure and fell upon plaintiff. Ambellan v. Barcalo Mfg. Co., 118 App. Div. 547, 102 NYS 993. Evidence held to show negligence in failing to provide a safe place where an employe was injured by falling from an unprotected runway suspended in the air. Morrissey v. Dwyer, 105 NYS 821. Evidence sufficient to show that one unloading cars was not provided with a safe place to work in. Foster v. National Steel Co., 216 Pa. 279, 65 A 618. Evidence that a master provided a platform 6 feet wide, 14 feet long, and 18 feet above the surface, without railing of any character, and employe fell therefrom because it was wet and slippery, justified a finding that the master was negligent. Aiken v. Rhodhiss Mfg. Co. [N. C.] 59 SE 696. Miner injured by piece of ore falling on him. Evidence sufficient to show negligence of master. Minton v. La Follette Coal, Iron & R. Co., 117 Tenn. 415, 101 SW 178. Held negligence to set a servant to work on top of an improperly piled stock of sacks of flour. Commerce Mill. & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916. A safe place is not furnished where set screws projecting from revolving shaft were dangerous to employes in the discharge of their duties. Chopin v. Combined Locks Paper Co. [Wis.] 114 NW 95.

65. The word "place" means the premises where the work is performed, and does not comprehend negligent acts of fellow-servants rendering the place unsafe. Haskell & Barker Co. v. Prezezdziankowski [Ind.] 83 NE 626. Company liable where foreman directed plaintiff to go to his work across a roundhouse roof, from which boards had been removed, and the covering replaced, the plaintiff having gone through. Wilson v. Kansas City So. R. Co., 122 Mo. App. 667, 99 SW 465. Mine operator should see that timbers are properly set and kept in proper condition, and for this purpose a competent mining boss should be employed. Brunson v. Southwestern Development Co. [Ind. T.] 104 SW 593. It is negligence to fail to keep reasonably safe a place where an employe is ready to commence work when called upon. Texas, etc., R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. Duty to furnish a safe place cannot be extended to cog wheels three or four feet above the floor so as to render the master liable where a servant on a ladder became dizzy and stepped on the wheels to steady himself. Leffler v. Anheuser-Busch Brew. Ass'n [Mo. App.] 106 SW 105.

66. Where railroad employes had for sev-

master,[67] but it does extend to a place used by the master in his business though owned by another.[68] The duty of the master with reference to the place of work is personal and nondelegable so far as his responsibility is concerned.[69]

The rule that it is the master's duty to use ordinary care to provide a reasonably safe place does not apply where the very nature of the work itself renders it dangerous,[70] as where a dangerous place is being made safe,[71] nor where the danger is transitory or temporary and arises during the progress of the work,[72] nor where the

eral years crossed the tracks in going to and from their work, of which fact the company had notice, and went through, under, or between cars blocking the tracks, it was negligence to fail to provide precaution against accident from moving cars. Beck v. Southern R. Co. [N. C.] 59 SE 1015. A corporation, permitting its servants for a number of years habitually to use a building on the premises as a place to deposit their dinner pails while at work and in which to eat their dinner, owes such servants the duty not to injure them by its negligence while they are using the building in the customary manner, and if a servant is injured while eating his dinner there, through the want of ordinary care on the part of the corporation, it is liable, although the building is used for other purposes and although the servant would not have been injured had he remained at his usual place of work. Carnegie Steel Co. v. Rowan, 10 Ohio C. C. (N. S.) 329. Instruction that master owes duty of keeping way of access and departure as well as place of work reasonably safe approved in case where employe was injured in passageway while going from work. Nelson v. R. J. Reynolds Tobacco Co., 144 N. C. 418, 57 SE 127.

67. City held not liable to an employe for injuries received on stairway of pumping station where it was found that city did not own or control the stairway and that it was not on a public street nor a part of the city's premises. Johnstin v. McKeesport, 216 Pa. 633, 65 A 1114.

68. Where one railroad uses the tracks of another, it is liable to its servant for injuries sustained because of a negligently constructed overhead bridge. King v. Seaboard Air Line R., 1 Ga. App. 88, 58 SE 252. Where miner was injured by fall of materials from roof of an entry, which was his only means of access to his place of work, the master was estopped to deny liability on the ground that it had not accepted and did not control the entry. Garard v. Manufacturers Coal & Coke Co., 207 Mo. 242, 105 SW 767. The fact that the master is not the owner of the place of employment does not render him any the less liable for injuries to servant because of defects therein. Illinois Cent. R. Co. v. Fitzpatrick, 125 Ill. App. 247.

69. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510; Gillespie v. Grand Trunk R. Co. [Mich.] 14 Det. Leg. N. 645, 113 NW 1116. Duty to furnish a safe place cannot be delegated to a servant. Combs v. Rountree Const. Co., 205 Mo. 367, 104 SW 77. The duty to furnish a safe place and so plan the work as not to expose servants to unnecessary danger cannot be delegated. Schminkey v. Sinclair [Iowa] 114 NW 612. The duty to furnish a safe place, which as to a brakeman includes a safe track, cannot be delegated to sectionmen. Missouri, etc., R. Co. v. Wise [Tex. Civ. App.] 106 SW 465. Where an employe is killed by explosion of a blowoff tank, the master may not escape liability on the ground that he purchased the tank from a reputable manufacturer and employed competent workmen to install it. Morton v. William Barr Dry Goods Co., 126 Mo. App. 377, 103 SW 588.

70. Doctrine of duty to provide reasonably safe place not applicable where plaintiff was employed to remove broken stone from a trench after blasts had been fired by other employes. Citrone v. O'Rourke Engineering Const. Co., 188 N. Y. 339, 80 NE 1092. Where work consisted in drilling rock in a deep cut, where earth and rocks were liable to fall down from above, the rule as to safe place did not apply since the place was necessarily unsafe. Clifton v. Chesapeake, etc., R. Co., 31 Ky. L. R. 431, 102 SW 247. Evidence insufficient to show negligence where servant was killed by falling of a rock in an excavation where he was working. King v. Ford, 121 App. Div. 404, 106 NYS 50. The rule requiring the master to furnish a safe place and appliances does not apply where the place becomes dangerous in the progress of the work either necessarily or from the manner in which the work is done. Omaha Packing Co. v. Sanduski [C. C. A.] 155 F 897; Chicago & Marion Coal Co. v. Reese, 126 Ill. App. 567. The doctrine of safe place does not apply where servant is employed for the purpose of wrecking a building. William Grace Co. v. Kane, 129 Ill. App. 247.

71. Master not liable for failing to provide safe place of work where employe was injured by falling rock while engaged in clearing away landslide from track. Maloney v. Florence, etc., R. Co. [Colo.] 89 P 649. The rule that the master must furnish a safe place and appliances does not apply where servants are employed to make a dangerous place safe or in constantly changing the character of the place as work progresses. Norman v. Southern R. Co. [Tenn.] 104 SW 1088.

72. The obligation to furnish a safe place does not extend to all passing risks that may arise from short lived causes. Haskell & Barker Co. v. Prezezdziankowski [Ind.] 83 NE 626. Where a longshoreman was injured by falling of a box which had been negligently left in a dangerous position, the negligence was in a detail of the work rendering the place unsafe and the master was not liable. Williams v. Citizens' Steamboat Co., 106 NYS 975. Place where employes operating a steam shovel changed from day to day. Russell v. Lehigh Valley R. Co., 188 N. Y. 344, 81 NE 122. The master is relieved from the duty of furnishing a safe place, where the character of the serv-

injured servant was engaged at the time in making the place of work,[73] nor where the conditions are constantly changing and the safety of the servant must depend upon the exercise of due care by himself.[74] In these cases the dangers are incidental to the work and are assumed risks.[75] There can be no recovery for failure of the master to maintain the place of work in a reasonably safe condition where that duty devolved on the injured employe, or when the place was made unsafe by negligence of a fellow-servant.[76]

Inspection, repairs, knowledge of defects. See s C. L. 871—The master's duty is not fully performed by providing reasonably safe tools and appliances and a reasonably safe place of work; he must use ordinary care to maintain them in such condition[77] and the duty of maintenance necessarily includes that of reasonable inspection[78]

ant's work constantly produces changes which may or may not be more or less hazardous (Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 NE 839), but this rule does not apply to a servant taking no part in producing such condition (Id.). Held not to apply to servant loading coal in a mine entry injured by negligent development of a cross-cut. Id.

73. Master not liable for not furnishing safe place where men were engaged in excavating tunnel. Bertolami v. United Engineering & Cont. Co., 105 NYS 90. Mining company held not negligent where miner was injured by fall of rock in a room he had himself tunneled and braced in workmanlike manner, where the room had been regularly inspected. Brunson v. Southwestern Development Co. [Ind. T.] 104 SW 593.

74. The duty of caring for the safety of the place or appliances where, as the work progresses, the character of the place or appliances changes, is the duty of the servants and not of the master. Westinghouse, Church, Kerr & Co. v. Callaghan, 155 F 397; Kreigh v. Westinghouse, Church, Kerr & Co. [C. C. A.] 152 F 120. If the place is not inherently dangerous or will not necessarily or probably become so in the orderly execution of the work, no special provision of the master can be executed, but by attention to details the servant must guard the place against insecurity. Haskell & Barker Co. v. Prezezdziankowski [Ind.] 83 NE 626.

75. Where a stairway used by servants was also used in conveying meat from one part of the building to another, and there were drippings from the trucks which in cold weather froze, and a servant who had been in the place three years while passing over the platform at night slipped and was injured, held his injury was due to a risk known to and assumed by him. Omaha Packing Co. v. Sanduski [C. C. A.] 155 F 897.

76. Where servants themselves in the course of their work put up a burlap screen to protect plaintiff from chips thrown by another engaged in chiseling, and the screen came down and plaintiff was putting it up again at another's direction when struck by a chip, held master not liable. Alles v. Illinois Cent. R. Co. [Iowa] 112 NW 226. Master was not negligent in not furnishing a safe place where an employe fell down an elevator shaft because the place was not lighted, where the master furnished complete equipment for lighting and entrusted the turning on and off of lights to a competent fellow-servant. Miller v. Centralia Pulp & Water Power Co. [Wis.] 113 NW 954. Where a safe place and appliances are furnished, the details of the work may be committed to fellow-servants. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. A master who has furnished a safe place cannot be held liable where it is made unsafe by negligence of a fellow-servant. Haskell & Barker Co. v. Prezezdziankowski [Ind.] 83 NE 626. Act of fellow-servant in placing a truck so near the railroad track that it was struck by a passing train. Id. Where a safe place and proper appliances are provided, there can be no recovery where the place was made unsafe by neglect of a fellow-servant to properly operate the appliances. Tilley v. Rockingham County L. & P. Co. [N. H.] 67 A 946. It is the duty of the master to construct and provide, but the duty of the servant to so use, the place of work and appliances that they do not become dangerous by negligent use or operation. Kreigh v. Westinghouse, Church, Kerr & Co. [C. C. A.] 152 F 120.

77. The duty to furnish safe appliances is a continuing one. It is not sufficient for the master to see that they are safe at one time. Roff v. Summit Lumber Co., 119 La. 571, 44 S 302. Act of street railway company in permitting step on its work car to remain off when it knew the car would be used is negligence. Flynn v. Connecticut Valley St. R. Co. [Mass.] 82 NE 1085. Where switches in tracks in mine were supposed to work automatically, but were so frequently obstructed as to require the services of a man to keep them clear, failure to provide a workman for that purpose was negligence. Central Coal & Iron Co. v. Walker, 30 Ky. L. R. 621, 99 SW 309. Where a mill operator had attached frames to a cotton mill shifter, it was his duty by reasonable construction and frequent inspection to keep the shifters in proper working order. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79.

78. The master is under duty to inspect appliances used by the servant. Southern States Portland Cement Co. v. Helms [Ga. App.] 58 SE 524. Master's duty is not fully performed by furnishing reasonably safe belts and belt lacings for machine; he must also provide for adequate inspection to see that they do not become unsafe. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A 4. Where printing press operator was injured by automatic starting of the press, held master was liable in failing to inspect the press and discover defective condition. Mulvaney v. Peck [Mass.] 81 NE 874.

and repair.[79] Whether due care in this respect has been used in a given instance is ordinarily a question of fact[80] to be determined by reference to the nature of the work, the character of the place and appliances, and the use to which they are put.[81] The duty of maintenance and inspection is personal and nondelegable.[82]

The rule relieving the master from liability for injuries caused by inadequate appliances selected by the servant does not apply where the cause of the injury was the act of the foreman in ordering a servant into a dangerous place without inspecting the appliances. McGuire v. Waterloo & Cedar Falls Union Mill Co. [Iowa] 113 NW 850. A telephone company must inspect its poles and lines to keep them safe for employes. Combs v. Delaware & Atlantic Tel. & T. Co. [Pa.] 67 A 751. Evidence sufficient to show negligence where lineman was killed because of defectively insulated wire. Id. An instruction that it was sufficient if the master used all tests usually applied by similar railroad companies in testing boilers is properly modified by substituting "usually applied by prudent railroad companies." Ultima Thule, etc., R. Co. v. Calhoun [Ark.] 103 SW 726. Where brakeman was injured by breaking of a defective brake chain or bolt, evidence that the bolt was worn nearly through and was so weakened that it would not withstand the turning of the wheel, and that such defect should have been ascertained by proper inspection, shows negligence. Galveston, etc., R. Co. v. Harris [Tex. Civ. App.] 107 SW 108. It is no defense to an action for death of an engineer caused by derailment that such derailment was caused by wreckers, if the company was negligent in inspecting the track. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910

79. The duty to furnish a safe place is a continuing one to be performed by inspection and repair. Gillespie v. Grand Trunk R. Co. [Mich.] 14 Det. Leg. N. 645, 113 NW 1116. The master must provide suitable appliances and see that they are kept in proper repair. Pagan v. Southern R. Co. [S. C.] 59 SE 32. Master has duty to use due care to keep appliances and machinery in repair. International Mercantile Marine Co. v. Fleming [C. C. A.] 151 F 203. Railroad company which fails to use ordinary care to discover and repair a defect on pilot of its engines is liable to brakeman injured as result thereof. Missouri, etc., R. Co. v. Wise [Tex. Civ. App.] 106 SW 465. Appliances must be kept in a safe condition by inspection, repair, and replacement. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 SW 1057.

80. Question of negligence in inspecting the track where engineer was killed by derailment at a curve alleged to have been caused by wreckers. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910. Whether a vice principal negligently performed the duty of inspecting a mine for gas. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694. Whether injury due to defective hatch cover was chargeable to owner's foreman because of failure to inspect and repair. International Mercantile Marine Co. v. Fleming [C. C. A.] 151 F 203. Error to instruct for defendant at close of plaintiff's case where action was for death of brakeman caused by defective grab iron on car; question of inspection should have gone to jury. Davis v. Chicago, etc., R. Co. [C. C. A.] 151 F 1008. Where vapor of ammonia escaped from a pipe and caused death of employe, evidence sufficient to show that duty to inspect the pipe rested upon master. Kaess v. Tivoli Brew. Co., 149 Mich. 371, 111 NW 106. Whether master negligent held for jury. Id. Whether inspection of chain was made, and whether failure to discover a weak link in it was negligence, held for jury. Morena v. Winston, 194 Mass. 378, 80 NE 473. Where an injury resulted from an abnormal condition of premises, the risk from which was appreciated by neither master nor servant, whether the master should have appreciated it and whether the servant was at fault in not doing so held for the jury. Bennett v. Concord Woodworking Co. [N. H.] 68 A 460. Whether it appeared that duty of inspection and repair did not rest upon plaintiff and that master had a better opportunity to make such inspection and repairs, and the want of repair and unsafe condition was shown, and was unknown to servant who was not accustomed to the machinery, as master knew, a nonsuit was improper. Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P 624. In determining whether railroad company was negligent in failing to discover a defect in piston rod of an engine, jury were properly allowed to consider the practices of other companies as to inspection, and whether a system of inspection would have disclosed defect. Cederberg v. Minneapolis, etc., R. Co., 101 Minn. 100, 111 NW 953. Question of negligence in failing to inspect a chain before ordering a servant into a place where he would be injured if it broke held for the jury. McGuire v. Waterloo & Cedar Falls Union Mill Co. [Iowa] 113 NW 850. Whether guard on machine was defective and out of repair, and the question of negligence in allowing it to remain out of repair. Tergeson v. Robinson Mfg. Co. [Wash.] 93 P 428.

81. The duty to exercise reasonable care in discovering defects in machinery and appliances may or may not involve the duty of inspection. Fulton v. Grieb Rubber Co. [N. J. Err. & App.] 68 A 116. Where piston rod of engine broke inside the cross head, injuring plaintiff, held railroad company was not, as a matter of law, negligent in its inspection; evidence held to warrant finding that it was not negligent. Cederberg v. Minneapolis, etc., R. Co., 101 Minn. 100, 111 NW 953. Inspection of elevator and appliances held insufficient. Yarbrough v. Swift, 119 La. 344, 44 S 121. Where an engineer was present when engine was installed by a reputable firm, made inspection, and assisted in inspectors made by official inspector, and if inspections were not thorough it was the duty of the engineer to give notice of such fact. He was killed by explosion of elbow of the mud pipe in the boiler. Held the duty to inspect was complied with. Vincent v. Clements [Mich.] 14 Det. Leg. N. 805, 114 NW

A railway company owes to its employes the duty to make a reasonable inspection of foreign cars handled by it and to make repairs or warn employes of defects if any are discovered,[83] and is entitled to a reasonable time for such inspection.[84] A company not engaged in transportation is not bound to inspect cars received by it to be unloaded.[85]

A master is not liable for injuries resulting from defects of which he had no notice,[86] or whether in the exercise of ordinary care he should have had notice thereof,[87] and which ordinary care and a reasonable inspection would not have disclosed,[88] but

330. Proof that smokestack fell while being raised, injuring plaintiff, the fall being caused by the straightening of a hook used in the block and tackle, and that no test of the appliance was made except by striking the stack with the hands as it was being raised, warranted finding that due care had not been used. El Paso Foundry & Mach. Co. v. De Guereque [Tex. Civ. App.] 19 Tex. Ct. Rep. 405, 101 SW 814. Where it appeared that an elevator, the fall of which caused an injury, was regularly inspected by engineer in control of it, and three weeks before a city inspector had inspected it, evidence insufficient to show negligence in this respect. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 SW 1057.

82. Making it the duty of a servant to inspect belts and lacings and change them when necessary and providing materials necessary does not fully discharge master's duty; the representative of the master must perform his full duty in the matter. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A 4. A railroad company must inspect cars, and cannot escape liability by delegating such duty. Fogarty v. Southern R. Co. [Cal.] 91 P 650. Where chain broke owing to defective weld in a link, master would be liable though chain as originally provided was safe and though the defective weld was made by a servant, it being a nondelegable duty to maintain appliances. Cushing v. G. W. & F. Smith Iron Co., 194 Mass. 310, 80 NE 596. A railroad company cannot evade liability by imposing on its servants the duty of inspection where it does not afford a reasonable opportunity for the discharge of such duty. Sturgeon v. Tacoma Eastern R. Co. [Wash.] 93 P 526. The duty of inspection may be performed by servants for whose negligence the master will be liable. Lucas v. Southern R. Co., 1 Ga. App. 810, 57 SE 1041.

83. The duty of inspection of cars by railroad companies extends to foreign cars handled as well as their own cars. Handhold on foreign car gave way owing to rottenness of wood. Missouri, etc., R. Co. v. Harris [Tex. Civ. App.] 18 Tex. Ct. Rep. 190, 101 SW 506. Where a railroad company receives a foreign car to be handled in its switch yard, it must use reasonable care to inspect it to see if it is in a safe condition, and if not to notify employes who must handle it. New York, etc., R. Co. v. Hamlin [Ind.] 83 NE 343; Id. [Ind.] 79 NE 1040. A railroad company owes to its servants the duty of ordinary care to provide reasonably safe cars, and this duty extends to cars of a connecting carrier. Lucas v. Southern R. Co., 1 Ga. App. 810, 57 SE 1041. Where brakeman was required to couple foreign cars on tracks of another company, the employer owed him the duty of reasonable care to inspect and see if the cars were reasonably safe and to warn him if they were not. Texas, etc., R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 SW 1070. Railway company owes brakemen duty of ordinary care to furnish reasonably safe cars and to inspect cars, but as to foreign cars it is not liable for original defects therein, nor for defects not discoverable by reasonable inspection and unknown to the company. Gulf, etc., R. Co. v. Sliger [Tex. Civ. App.] 17 Tex. Ct. Rep. 953, 100 SW 957.

84. In the case of cars of a connecting carrier, a railway company has a reasonable time to make an inspection and ascertain whether they are reasonably safe. Lucas v. Southern R. Co., 1 Ga. App. 810, 57 SE 1041.

85. Where a company not engaged in transportation receives cars of other companies on its siding to be unloaded, it owes its employes no duty to inspect. Haskell & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626; Chicago Hardware Co. v. Mathews, 124 Ill. App. 89; Chicago & E. I. R. Co. v. Henderson, 126 Ill. App. 530.

86. Krooss v. Lehmaier, 107 NYS 218.

87. Master held not liable for injury received from embossing press where circumstances were such as would not put him upon inquiry. Chicago Hardware Co. v. Mathews, 124 Ill. App. 89. Instruction as to the liability of the master growing out of notice of the defect held proper. Illinois Cent. R. Co. v. Heath, 228 Ill. 312, 81 NE 1022. Master is not liable for injuries received by a car inspector in the course of his duties caused by defects unknown to the master, though he would be liable if he knowingly sent such inspector into a place of danger without warning. Lucas v. Southern R. Co., 1 Ga. App. 810, 57 SE 1041. Where the cause of injury was the condition of the master's instrumentalities, it was held the servant could recover only upon a showing that the master knew of the condition and the servant did not. Ray v. Hodge [N. H.] 66 A 123.

88. Where a conductor of a train was injured while descending on the end of one of the cars of a moving train because one of the rounds of the ladder gave way, and it appeared that inspectors had been provided to examine the cars at the place where the conductor took his train, held no negligence shown. Cryder v. Chicago, etc., R. Co. [C. C. A.] 152 F 417. The failure of the master to discover and remove latent defects which the exercise of ordinary care would not discover in the place, articles, or machinery, is not negligence since such discovery falls beyond the limits of ordinary care. Id. Recovery may not be had for injury resulting from an abnormal condition of the premises where the risk was not appreciated by either master or servant, unless the master should have

he is chargeable with notice of defects which ordinary care on his part would have disclosed,[89] and in such case absence of actual notice will not relieve him from liability.[90] Knowledge of dangers possessed by a vice-principal is knowledge of the master.[91]

appreciated it and the servant was not at fault in not doing so. Bennett v. Concord Woodworking Co. [N. H.] 68 A 460. If the occurrence resulting in the injury was beyond the reasonable probable consequences of ordinary occurrences that reasonably prudent men would have foreseen, the master is not liable because of omission to make inspection which extraordinary provision alone would have dictated. Fulton v. Grieb Rubber Co. [N. J. Err. & App.] 68 A 116. No duty to inspect an electric wire carrying only 110 volts to see if it was insulated. The wire was blown against a machine at which a servant was working and the current transmitted to the machine on which a servant's hand was resting, and as a result his hand caught in the rolls of the machine. Id. A master not being an insurer of the servant's safety, he is not liable for defects in a car which has been inspected, unless the use of ordinary care would have disclosed the defects. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. There is a want of reasonable care in furnishing a defective appliance only when the master knew or ought to have known that the appliance was not reasonably safe for use. Rogers v. Roe [N. J. Err. & App.] 66 A 408. Where the cause of the injury is a condition of the master's instrumentalities produced by ordinary wear or negligence of fellow-servants, the servant must show that the master knew or ought to have known and that he did not and could not have known of the defect. Evidence insufficient to show negligence of master where servant fell and broke her arm because of oil spilled on the floor. Klineintie v. Nashua Mfg. Co. [N. H.] 67 A 573. Employer held not liable for injuries caused by passageway in building being blocked unless he knew, or in the exercise of reasonable care ought to have known, of the obstruction. Nelson v. R. J. Reynolds Tobacco Co., 144 N. C. 418, 57 SE 127. Master held not liable where servant stepped into a hole in the floor, it not appearing that the master knew of the hole, and no presumption of negligence arises from failure to inspect during two or three hours the danger existed. Acme Box Co. v. Gregory [Tenn.] 105 SW 350.

89. Where examination by master would have disclosed dangerous character of place of work, failure to make it or making an insufficient examination is negligence. Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 NE 239. If defects in a rope used in loading a vessel were such as should have been discovered by ordinary inspection, the master was negligent where an employe was injured by breaking of the rope. Suderman v. Woodruff [Tex. Civ. App.] 19 Tex. Ct. Rep. 778, 105 SW 217. The master is liable if the defect could have been discovered by reasonable inspection. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Where blasting was a daily occurrence in a mine, the law imputes knowledge to the operator that such blasting would tend to loosen overhead material which would be dangerous to miners. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Where condition of the premises were under the control of the employer's superintendent, he was chargeable with conditions within his observation of which he might have known with the exercise of reasonable care. Larrimi v. Mifford Pink Granite Quarries [Mass.] 82 NE 26. Master is liable for injuries caused by defects which a reasonable inspection of the place of work would have disclosed. Oolitic Stone Co. v. Ridge [Ind. App.] 80 NE 441. Notice to person in general charge of business of defects in machinery is notice to master. Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369. Where coupling broke and after accident an old crack was found where the break occurred, it was held that the evidence warranted a finding that there existed a defect in the coupling which a reasonably careful inspection would have disclosed. St. Louis, etc., R. Co. v. Wells [Ark.] 101 SW 738. Notice of dangers characteristic to a machine may be presumed to have reached the master where the danger is generally known to those who work or have worked with the machine, and is of such a nature as is likely to be talked about. Fleming v. Northern Tissue Paper Mill [Wis.] 114 NW 841. While one of several instances in which a machine repeated its operation not attributable to any apparent defect would not be sufficient to charge the master with notice of the defect, occurrences commencing at the inception of its use and continuing several years may be sufficient. Id. Whether unexpected and abnormally dangerous movements of a machine had been of sufficient frequency to constitute sufficient evidence of notice to the master is ordinarily a question of fact. Id. A master is presumed to have knowledge of structural defects in machinery or appliances furnished by him. Stine v. S. Morgan Smith Co. [Pa.] 67 A 990. The master is liable where a servant is injured while acting in accordance with directions of the master regarding the work, provided the servant was in the exercise of due care, and the injury was caused by a defect of which the master knew or ought to have known. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839. Evidence held sufficient to show notice to master of defect in electric wires on its premises. Goddard v. Enzler, 123 Ill. App. 108. Evidence held sufficient to justify finding that master had knowledge that the trench in which plaintiff was working was unsafe. Dalton v. Ogden Gas Co., 126 Ill. App. 502. Evidence held to show notice to master of defect in machine used to wind wire upon spools. Western Elec. Co. v. Prochaska, 129 Ill. App. 589. Evidence held sufficient to show knowledge in the master of the dangerous propensity of animal furnished servant and of servant's ignorance thereof. Manufacturers' Fuel Co. v. White, 228 Ill. 187, 81 NE 841.

90. It is immaterial whether the master knew of existing defects if he might have

Ordinarily, the servant is under no duty to make an inspection of the place or appliances,[92] but may rely on the assumption that the master has performed his duty with respect thereto,[93] but this is not the rule with respect to simple and common tools used by the servant in the ordinary discharge of his duties,[94] nor does the rule apply where the servant injured was one on whom the duty of inspection rested.[95] No recovery can usually be had for an injury resulting from a defect or condition discoverable by the injured employe by the use of ordinary care in the course of his usual duties,[96] or which was actually known to him and of which he failed to complain or give notice,[97] but the servant is not bound to give notice of defects known to the master.[98]

Statutes. See 8 C. L. 876—Holdings under particular statutes relating to the master's duty with reference to appliances and places of work are given in the note.[99]

known of them by the exercise of ordinary care. Stephens v. Elliott [Mont.] 92 P 45. Actual knowledge by the master of a defect in the place of work is not essential; it is enough to fix liability if under all the circumstances he ought to have known of it. King v. Griffiths & Sprague Stevedoring Co. [Wash.] 88 P 759. The mere fact that a foreman was not aware of a defect which caused an injury will not relieve the master from liability for failure to exercise due care to keep appliances reasonably safe. Industrial Lumber Co. v. Bivens [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831.

91. Knowledge of foreman, directing and superintending stringing of telephone wires, that several of the wires are heavily charged and uninsulated, is knowledge of the master. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136, afg. 124 Ill. App. 459.

92. A servant is not required to inspect appliances for concealed dangers. Southern States Portland Cement Co. v. Helms [Ga. App.] 58 SE 524. Common laborer need not inspect tools and appliances which he is required to use. Nortonville Coal Co. v. Brooks, 30 Ky. L. R. 671, 99 SW 357. Where a master places in the hands of a servant for immediate use an instrument which he knows is in a dangerous condition, and the servant is likely to and does use it, without examination, and is injured, the master is liable. Gulf, etc., R. Co. v. Griggs [Tex.] 19 Tex. Ct. Rep. 855, 105 SW 486. Where it is not in line of his duty, an employe is not required to inspect his place of work for defects and dangers. Finley v. Louisville R. Co., 31 Ky. L. R. 740, 103 SW 343.

93. A servant may assume that a master has performed his duty. Not required to examine and see if a heavy gate left standing near his place of work is likely to fall. Webster v. Stewart Iron Works Co., 31 Ky. L. R. 1045, 104 SW 708. Where rules of a railroad company require that in case of danger to company's property employes unite to protect it, a brakeman who is ordered to stop a car from which danger by impending collision with a pile driver may be fairly anticipated may assume that the car is provided with ordinary and proper appliances for safety of employes. St. Louis, etc., R. Co. v. Morris [Kan.] 93 P 153. Where machinery was subject to two defects, an employe may recover if he was ignorant of either. Thompson v. Planters Compress Co. [Tex. Civ. App.] 106 SW 420.

94. Master held not required to inspect machinist's hammer. Meyer v. Ladewig, 130 Wis. 566, 110 NW 419. The rule making the master responsible for the selection of safe and suitable appliances does not apply to a simple tool like a ladder, the safety of which the employe may readily determine. Smith v. Green Fuel Economizer Co., 108 NYS 45. The master is not liable for injuries caused by defects in simple tools known to him and readily observable by the servant. Applied to defective chisel. Vanderpool v. Partridge [Neb.] 112 NW 318.

95. A servant whose duty it is to inspect appliances cannot recover for injuries caused by defects therein discoverable by the exercise of reasonable care in the performance of his duty. Servant could not recover because of defective grab iron car which it was his duty to inspect and to which he failed to apply the usual tests. Browder v. Southern R. Co. [Va.] 57 SE 572. Employe acting as mine boss, having supervision over tools and implements which it was his duty to inspect, could not recover for injuries caused by a defect in such tools. Nortonville Coal Co. v. Brooks, 30 Ky. L. R. 671, 99 SW 357.

96. To charge a servant with appreciation of dangers from known conditions, it need only be shown that he knew or ought to have known that injury might result; it need not appear that he ought to have anticipated the exact injury which in fact resulted. Roy v. Hodge [N. H.] 66 A 123.

97. See post, § 3F. Assumption of Risk. An employe injured by falling of pane of glass when he closed a window cannot recover where he had closed the window daily for some time, the pane had been broken for several weeks, and he had not notified the employer, and it not appearing that the employer had notice of the fact. Rockstrow v. Astoria Marble Co., 105 NYS 501.

98. Servant assumes only incidental risks; is not bound to give notice of defects known to master. Southern R. Co. v. McGowan [Ala.] 43 S 318. Servant need not notify master of defect of which master already has knowledge, whether or not servant knows that master has such knowledge. Id.

99. Federal safety appliance act: A complaint for injuries to a switchman due to a broken coupling pin chain, which does not allege that the defective car was being used in interstate traffic, does not charge a violation of safety appliance act, 27 Stat. 531. Norman v. Southern R. Co. [Tenn.] 104 SW 1088. Where a switchman was injured be-

cause of a defect in coupling pin chain and it appeared that the defect was one that could be repaired in the yards, and if it had been discovered before the car was detached from the train it would have been likewise handled, held not a violation of safety appliance act, 27 State. 531. Id. The burden is on the railroad company to bring itself within the exception as to four wheeled cars in the automatic coupler act. Schlemmer v. Buffalo, etc., R. Co., 205 U. S. 1, 51 Law. Ed. 681. A "shovel car" is a car within the automatic coupler act. Id.

Alabama: The Alabama statute requiring materials for the relief of injured miners to be kept in store at mines is held valid. Code 1896, § 2917, is a valid exercise of police power (Wolf v. Smith [Ala.] 42 S 824), and a breach of it resulting in damage gives rise to a cause of action to the person injured (Id.). Placing of box car on side track does not constitute defect in "ways, works, or machinery." Southern R. Co. v. Shook [Ala.] 43 S 579.

Colorado: Sess. Laws 1897, p. 258, requiring railroad companies to block frogs and providing that failure to do so is prima facie evidence of negligence, makes such failure prima facie evidence of negligence, but confers no new right on the employe and does not affect the law of assumption of risk. Denver, etc., R. Co. v. Gannon [Colo.] 90 P 853.

Connecticut: Where a superintendent of construction directed a workman to attach a tackle to certain timber instead of using a gin pole, which was the usual and safe way of raising the machinery, and the workman was injured by the breaking of the timber, held the master was liable for failure to provide safe place and appliances required by Gen. St. 1902, § 4702. Swain v. O'Loughlin [Conn.] 67 A 480.

Georgia: Civ. Code 1895, §§ 2611, 2612, relative to the care required in furnishing machinery equal to that in general use and reasonably safe, are not the entire law in that respect but are to be construed in connection with the entire general law. Southern States Portland Cement Co. v. Helms [Ga. App.] 58 SE 524.

Illinois: Meat hasher held not steam machinery within § 11, Child Labor Act. Swift v. Rennard, 128 Ill. App. 181. A temporary scaffold is a part of the "ways, work, plant, tools, and machinery" of a corporation within the meaning of the "Employers' Liability Act" of Indiana. Cleveland, etc., R. Co. v. Austin, 127 Ill. App. 281.

Mining act: One injured by reason of master's failure to safeguard a shaft in process of construction cannot recover under the statute providing for the proper care in the maintenance of a mining shaft. Cox v. Mount Olive & Staunton Coal Co., 127 Ill. App. 24. A demand for props made in conformity with a custom in general use and of which the mine manager had knowledge is sufficient. Demand made on drivers held sufficient. Pana Coal Co. v. Becker, 130 Ill. App. 40. Where proof shows that demand for props could properly be made of persons other than mine manager, instruction which limited plaintiff's right to make demand to such as were made of the mine manager held not to prejudice defendant. Donk Bros. Coal & Coke Co. v. Lucis, 226 Ill. 23, 80 NE 560. The fact that sufficient props were delivered for the use of one miner does not satisfy a demand therefor by another miner located in a different room. Instruction held correctly modified. Id. Demand for props made of driver, under rule established by mine manager, is a demand upon manager under the statute. Id. A recovery cannot be had for failure to furnish mine prop upon demand where failure did not occasion but merely contributed to the injury. Instruction held erroneous. Pana Coal Co. v. Becker, 130 Ill. App. 40. Under statute, any reasonable and timely demand by the miner for timbers and props to be used in his working place must be complied with. H. R. S. 1905, c. 93, § 16. Operator cannot escape liability by furnishing such timbers as in his judgment are necessary. Springfield Coal Min. Co. v. Gedutis, 227 Ill. 9, 81 NE 9, afg. 127 Ill. App. 327. Demand for props is sufficient under the statute if made on assistant mine manager. Donk Bros. Coal & Coke Co. v. Lucas, 127 Ill. App. 61. Mine owners in maintaining sufficient light in the shafts under the statute must take into consideration the fact that smoke in the bottom thereof is a necessary result of operation therein and maintain the lights accordingly. Eldorado Coal & Coke Co. v. Swan, 227 Ill. 586, 81 NE 691. Whether master maintained a good and sufficient light at the bottom of a mining shaft held a question for the jury. H. R. S. 1905, c. 93, § 28. Id. Failure to procure inspection of mining appliances as required by statute renders master liable for injuries thereby resulting to employe. H. R. S. 1905, c. 93, § 34. Such failure held to be proximate cause of death of plaintiff's intestate. Spring Valley Coal Co. v. Greig, 226 Ill. 511, 80 NE 1042. A hoisting engine used to lift coal cars, though used outside the mine, comes within the provisions of the statute requiring all dangerous places to be properly placarded. Hurd's Rev. St. 1905, c. 93, § 34. Id., afg. 129 Ill. App. 386. The provisions of the mine and miners' act apply to mine property both above and below the surface of the earth. To surface engine operating surface dump cars. Spring Valley Coal Co. v. Greig, 129 Ill. App. 386.

Indiana: Burns' Ann. St. 1901, § 7087e, relative to elevators in factories, is not mandatory in so far as it provides for installing of safety devices, and the owner is not bound to install them unless required to do so by the factory inspector. Reliance Mfg. Co. v. Langley [Ind. App.] 82 NE 114. Error to charge that failure to provide such device is negligence. Id. Evidence sufficient to show negligence in failing to comply with Burns' Ann. St. 1901, §§ 7472, 7479, requiring inspection and removal of loose material from roof of mine. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Under Burns' Ann. St. 1901, §§ 7479, 7472, 7483, requiring mine operators to employ a competent boss and requiring that the boss make certain inspections daily for safety of men, held failure to comply with such statutes is negligence per se. Id. Burns' Ann. St. Ind. 1901, § 7087i, requiring certain named machines and appliances to be guarded, applies to any machinery alleged and proved to be of the same kind as that enumerated with respect to danger of operation and practicability of guarding. Inland Steel Co. v. Kachwinski [C. C. A.] 151 F 219. Where injury was caused by saw not guarded as required by

Burns' Ann. St. 1901, § 7087i, an instruction that statute requires guards to be placed over saws whenever practicable, and that a failure to guard a saw when it can be done practically is negligence, was held sufficiently favorable to defendant. Tucker & Dorsey Mfg. Co. v. Staley [Ind. App.] 80 NE 975. Where an employe caught his hand in a machine because it was not guarded, as required by Burns' Ann. St. 1901, § 7087l, the fact that he would not have been caught had his hand not slipped does not relieve the employer; that being an intervening cause which should have been foreseen. Crawford & McCrimmons Co. v. Gose [Ind. App.] 82 NE 984. Whether cog wheels in a machine could have been guarded, as required by Burns' Ann. St. 1901, § 7087l, is a question of fact. Id. A concern engaged in manufacturing engines, pumps, etc., is a manufacturing establishment within Burns' Ann. St. 1901, § 7087i, requiring manufacturing establishments to guard machinery. Id. A crane used to lift molten metal in a manufacturing establishment and operated by hand is a machine within Burns' Ann. St. 1901, § 7087l, requiring machinery to be guarded. Id. Conveyor consisting of a long cylindrical rotating rod to which flanges are attached is shafting within Burns' Ann. St. 1901, § 7087i, requiring shafting to be guarded. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981. Duty of manufacturer to guard dangerous machinery, imposed by Burns' Ann. St. 1901, § 7087i, is imperative, and failure to do so is negligence per se. Id. Emery wheel used to grind tools is not within Burns' Ann. St. 1901, § 7087i, providing that vats, pans, saws, etc., and "machinery of every description," shall be properly guarded. National Drill Co. v. Myers [Ind. App.] 81 NE 1103. Where a servant removed a guard from a machine which he was operating so that he could accomplish more work, he could not recover for injuries sustained owing to absence of the guard, under Burns' Ann. St. 1901, § 7087i, requiring the master to guard machinery. Cincinnati Seating Co. v. Neiry [Ind. App.] 81 NE 216. Failure to prevent the falling of a cover of a vat, when off the vat, is not a violation of Burns' Ann. St. 1901, § 7087l, requiring vats to be guarded, and liability for injuries caused by falling of the cover is controlled by common law. Bessler v. Laughlin, 168 Ind. 38, 79 NE 1033. Where a line shaft was operated in a factory eight feet above the floor in the usual and generally accepted manner, the owner was not required to further guard it. Grace v. Globe Stove & Range Co. [Ind. App.] 82 NE 99.

Illinois: There can be no recovery under Laws Ill. 1899, p. 303, for failure to properly fence landings of mine shaft, where employe heedlessly put his head and shoulders through the fence and was killed by a car. Springfield Coal Min. Co. v. Gordon [C. C. A.] 147 F 690.

Iowa: Code Supp. 1902, § 4999, providing that machinery of every description shall be guarded, imposes no higher duty than would otherwise exist. Sutton v. Des Moines Bakery Co. [Iowa] 112 NW 836.

Kansas: Violation of a statutory duty is negligence. Madison v. Clippinger, 74 Kan. 700, 88 P 260.

Massachusetts: Old planks in vat used by employe negligently, in covering the vat, held not a part of ways, works, and machinery. Lavelle v. Dunn-Green Leather Co., 194 Mass. 294, 80 NE 475. Liability of master for defects in ways, works and machinery, under employers' liability act, is same as at common law. McCafferty v. Lewanda's French Dyeing & Cleansing Co., 194 Mass. 412, 80 NE 460.

Michigan: Comp. Laws, § 5349, requires factory owners to safeguard gearing and belts regardless of discretion of factory inspector. Belt ten inches wide, on pulleys near floor, held a belt within the statute. Swick v. Aetna Portland Cement Co., 147 Mich. 454, 111 NW 110.

Missouri: Rev. St. 1899, § 6433, only requires machinery to be guarded when there is reasonabe ground for anticipating that injury will result if it is not guarded. Strode v. Columbia Box Co., 124 Mo. App. 511, 101 SW 1099. Failure to guard belt above and to one side of plaintiff, unconnected with machines on his floor, held not a violation of the statute. Id. Failure to guard certain cog wheels, near which no one went except to oil them, held not violation of statute, where person stepped into them owing to sudden starting of engine. Meifert v. New Union Sand Co., 124 Mo. App. 491, 101 SW 1103. Girl's hair caught on revolving shaft left unguarded, contrary to Rev. St. 1899, § 6433. Evidence sufficient to show shaft was in dangerous position. McGinnis v. R. M. Rigby Printing Co., 122 Mo. App. 227, 99 SW 4. Miner's statute, Ann. St. 1906, p. 4098, requires entries to be run parallel for ventilation purposes, p. 4099 requires shots prepared for extracting coal from the solid to be so placed as to do the work safely. Held, where two entries were allowed to converge and a shot placed in the dividing wall broke through and injured a miner, the statute was violated. Kirby v. Manufacturers Coal & Coke Co. [Mo. App.] 106 SW 1069. Where a miner was killed by a shot breaking through a wall between entries which the foreman had negligently permitted to converge, an action for his death was held based on negligent placing of a shot in such wall and not an attempt to recover for violation of miner's statute, Ann. St. 1906, p. 4099, requiring entries to be run parallel, etc. Id.

New York: The provisions of § 3 of "A general act relating to factories and work shops and the safety, health, and hours of operatives," (Gen. St. p. 2345, § 29), do not apply to shafting used in gathering natural ice. Griffith v. Mountain Ice Co. [N. J. Law] 65 A 853. Recovery sustained where knives which came up through table of planing machine were not guarded, though guard was practicable, and injury resulted therefrom. Neuweiler v. Central Brew. Co., 103 NYS 1136. Where a servant was injured by the falling of coal which had been frozen and a crust formed on top and the master's superintendent had been notified that the overhanging crust was dangerous and failed to look after it as he promised, the master was held liable under Laws 1902, p. 1748, c. 600, § 1. Sienbida v. Tonawanda Board & Paper Co., 105 NYS 513. Where a servant was injured by tie falling out of a bundle while unloading a vessel and it did not appear that the chain around the bundle did not tighten readily, evidence held insufficient to show that safe appliances were not furnished as

(§ 3) *C. Methods of work, rules and regulations.* See 8 C. L. 878—If a master provides or adopts a mode of work which is not reasonably safe [1] and an injury re-

required by Laws 1902, p. 1748. Wack v. Tobin, 107 NYS 659. Where a servant was injured by fall of a platform supported by an acid tower which the master was razing and the fall was the result of weakening of the tower, the master's liability could be predicated only on negligence in conduct of the work and not on failure to provide a safe place, under Laws 1902, p. 1748, the master not being bound to guard against defects incident to razing structures. Kelly v. Battle Island Raper Co., 106 NYS 736. Evidence sufficient to show negligence under Laws 1902, p. 1748, c. 600, where employe was injured by falling of coal. Sienbida v. Tonawanda Board & Paper Co., 105 NYS 513. A statutory obligation of the employer to the employe may be waived by the employe. Labor Law, § 81, requiring machines to be guarded, held waived where operator of mangle did not ask to have guard roller, which had been taken off, replaced, but voluntarily operated the machine without it. Travis v. Haan, 103 NYS 973.

Washington: Laws 1905, c. 84, requires machines to be so guarded as to prevent injuries which could reasonably have been foreseen and anticipated, and whether a particular injury ought to have been guarded against is ordinarily for the jury. Vosberg v. Michigan Lumber Co. [Wash.] 89 P 168. Under Laws 1905, c. 84, § 7, a certificate of inspection by the commissioner of labor is only prima facie evidence of compliance with the statute; burden is on plaintiff to show that machinery was not reasonably safe guarded. Id. Whether cap or shield over cogs and gearing was a reasonable safeguard, whether a guard could have been used which would have been practicable and would have prevented injury, held questions for the jury. Boyle v. Anderson & Middleton Lumber Co. [Wash.] 90 P 433. In action for injuries caused by failure to guard machine as required by Laws 1905, p. 164, c. 84, whether it was practicable to place an effective guard upon the machine in question held for the jury. Campbell v. Whellihan-Weidauer Co. [Wash.] 89 P 161. Whether set screw in revolving shaft in factory was so located so that it ought to have been guarded. Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694. Evidence sufficient to show negligence in failing to guard cutter heads of a grooving machine. Adams v. Peterman Mfg. Co. [Wash.] 92 P 339. Whether a master has exercised reasonable care in protecting dangerous machinery, as required by statute, is ordinarily a question of fact. Barclay v. Puget Sound Lumber Co. [Wash.] 93 P 430. Fall of "nigger-head" in coal mine held to be a "caving-in" within the meaning of the statute requiring the operator to furnish a sufficient supply of timbering to make the place of work reasonably safe. Pachko v. Wilkeson Coal & Coke Co. [Wash.] 90 P 436. A mill company cannot escape liability for failure to guard machinery on the ground that it furnished a guard and the servant failed to adjust it, it not appearing to have been his duty to adjust it. Johnson v. Far West Lumber Co. [Wash.] 92 P 274. In an action for injuries from a lathe trimmer, evidence that the saw could have been guarded by the use of a certain attachment is admissible in view of the factory act, irrespective of whether such attachment was in general use or generally known to mill men. Barclay v. Puget Sound Lumber Co. [Wash.] 93 P 430. A certificate issued by the commissioner of labor under Laws 1905, p. 166, providing for a certificate when the factory or mill conforms to statutory requirements, is only prima facie evidence that it does so comply. Noelle v. Hoquiam Lumber & Shingle Co. [Wash.] 92 P 372.

Wisconsin: Under St. 1898 § 1636j requiring employers to guard belting, gearing, etc., a shaft in which a set screw projected, so located that employes in discharge of duties were required to be near it, should have been guarded. Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694. Set screw by which a circular knife was attached to a revolving shaft held a part of the shafting, within St. 1898, § 1636j, providing that shafting, etc., so located as to be dangerous, must be guarded. Von De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 NW 443.

1. Under Burns' Ann. St. 1901, §§ 7472, 7479, requiring mine operators to take certain precautions for safety of men where it is impracticable to secure loose rocks, etc., overhead in working places, they must be removed. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Where an employe digging a trench was injured by caving in of the sides, it was no defense that the work was done in the usual manner and that it had never been found necessary to brace the walls of the trench, if in fact it was negligent to do it in that manner. City of Columbus v. Allen [Ind. App.] 81 NE 114. Evidence sufficient to show negligence in failure to take precautions to prevent collision of cars in mine. Coal Bluff Min. Co. v. Akers, 39 Ind. App. 617, 80 NE 545. Evidence sufficient to show negligence in planing work and that it added a new and extraordinary risk of which servant was not warned. Schminkey v. Sinclair [Iowa] 114 NW 612. Where an employe was injured while aiding in setting electric light poles, evidence sufficient to show negligence in failing to use cant hooks to prevent the pole from turning while being raised. City of Henderson v. Smith, 31 Ky. L. R. 860, 104 SW 277. It was gross negligence for engineer and conductor of a work train to permit it to stand on the main track on another train's time, though the engineer directed the brakeman to flag such other train. Louisville, etc., R. Co. v. Brown [Ky.] 106 SW 795. It is proper to charge that the proper way to turn a derrick was to block or stake it to prevent it from slipping, where it appeared that this was the proper method, and to also instruct that, if such precautions were not taken, a servant injured because of failure to do so could recover. Garaci v. Hill & O'Meara Const. Co., 124 Mo. App. 709, 102 SW 594. Evidence held to show that a servant riding a railroad velocipede was killed by an engine running backwards, and that the engineer and fireman knew of his peril in time to have avoided injury. Lynch

sults therefrom, he is liable.[2] Whether a method adopted or provided is reasonably safe depends upon the nature of the work and the danger to be apprehended,[3] and this question is usually one for the jury.[4] Failure to supply a sufficient number of employes to do a given piece of work with reasonable safety is negligence.[5]

It is the duty of the master to provide and enforce suitable rules and regulations governing the conduct of employes and the carrying on of the work where the nature of the business is such as to require such precautions.[6] The necessity for rules is

v. Chicago, etc., R. Co. [Mo.] 106 SW 68. Where an employer adopts a dangerous method of doing his work which involves risk greater than the nature of the work calls for, he should take correspondingly appropriate precautions to guard against increased dangers. Smith v. Rock Island, etc., R. Co., 119 La. 537, 44 S 290. Employe who directed others to throw a plank out of a car held negligent, the plank having struck plaintiff who was passing. Smith v. American Car & Foundry Co., 122 Mo. App. 610, 99 SW 790. No negligence shown where a servant was injured by an explosion while cleaning combustion chambers of a stationary engine in a method in general use, and which had been employed without accident for twenty years. Kremkoski v. Great Northern R. Co. [Minn.] 112 NW 1025. Evidence held to show negligence in operation of cars where switchman was run down by unattended cars. Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 156, 105 SW 1019.

2. Foreman of section crew and men were taking hand car off track. After two wheels were off foreman suddenly raised the other two off the track and the car went down the bank upon two men, injuring plaintiff. Held to support finding that foreman did not follow usual method and was negligent. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427.

3. Where an employe was injured while testing a steam cylinder by its explosion, evidence held to show that a safety valve was a safer method of letting off excessive steam than the method used, but that it was the known and approved method. Phillips v. Salem Iron Works [N. C.] 59 SE 660. Making a flying switch is not negligence per se as to the employes engaged in the operation. Allen v. Atlantic Coast Line R. Co. [N. C.] 58 SE 1081.

4. Whether foreman was negligent in ordering jack screws under coal mining machine to be loosened while machine was running, as a result of which it slipped. Ford v. Providence Coal Co., 30 Ky. L. R. 698, 99 SW 609. Whether there was negligence of master in failing to furnish enough men to raise girders with safety. Bokamp v. Chicago, etc., R. Co., 123 Mo. App. 270, 100 SW 689. Where an employe was injured by an explosion of a cylinder while it was being tested by steam, evidence held for the jury on the question whether a safety valve was a known and approved method in general use for letting off excessive steam. Phillips v. Salem Iron Works [N. C.] 59 SE 660. Question of negligence in directing servant to uncap a mould too soon which caused it to explode. Swierez v. Illinois Steel Co., 231 Ill. 456, 83 NE 168.

5. Failure of the master to furnish sufficient help and suitable appliances on request of an experienced workman whereby he was injured is negligence. Shaw v. Highland Park Mfg. Co. [N. C.] 59 SE 676. It is the duty of the master to provide a sufficient number of servants. Coughlin v. Philadelphia, etc., R. Co. [Del.] 67 A 148. Evidence sufficient to warrant finding that foreman was negligent in directing plaintiff to assist in carrying a rail without providing a sufficient number of men to do the work in safety; court could not assume contrary under the evidence. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413. He must employ a sufficient number of fellow-servants and exercise ordinary care to select competent ones. Pagan v. Southern R. Co. [S. C.] 59 SE 32. Where a master orders a servant to do a certain act, he is required to furnish him a competent assistant who will exercise ordinary care. Horton v. Seaboard Air Line R. [N. C.] 58 SE 993. Where a master has furnished a crew adequate to operate an engine, it is not negligence to fail to employ an extra man by way of extraordinary precaution to discover and give notice of danger. Haskell & Barker Co. v. Prezezdziankowski [Ind.] 83 NE 626.

6. It is negligence to fail to prescribe rules where one set of men are subject to danger from operations of another set. Gaska v. American Car & Foundry Co. [Mo. App.] 105 SW 3. Evidence of character, extent, and complexity of the master's business held admissible on the question of necessity for rules. Id. When the business of the master is connected with the operation of dangerous machinery and appliances, it is his duty to provide rules for the conduct of his servants in reference thereto. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839. This duty he may discharge by the promulgation of general rules or by authorizing a servant to give general directions in the nature of rules. Id. Where a business conducted by many employes, working independently, and in which the work of one becomes periodically dangerous to another, it is the duty of the master to provide reasonable precaution against such danger by rules and regulations. Polaski v. Pittsburgh Coal Dock Co. [Wis.] 114 NW 437. The rule requiring a master to make and carry out regulations to render work of his employes reasonably safe applies to operation of a stone quarry. Harper v. Iola Portland Cement Co. [Kan.] 93 P 179. It is the master's duty to promulgate reasonable rules, where the safety of one servant depends on the manner in which another does his work. Johnson v. Prince Line, 108 NYS 193. Where a servant was killed while tightening truss rods on a car by falling of a car, evidence held to show that no rules were prescribed for protection of the servant killed. Gaska v. American Car & Foundry Co. [Mo. App.] 105 SW 3.

ordinarily a question of fact,[7] but the issue should not be submitted to the jury without some suggestion as to the nature or contents of a rule which would be proper, under the circumstances.[8] A failure to promulgate particular rules will not constitute actionable negligence, unless it is made to appear that such rules would be practicable [9] and would, if adopted, have prevented the injury complained of,[10] or that the necessity for such rules ought reasonably to have been foreseen.[11] Rules and regulations should be made known to the employes [12] and should be enforced,[13] and the master may be held liable for injuries proximately resulting from a violation of or failure to enforce rules [14] in the absence of circumstances excusing such act or omission.[15] A rule may be abrogated by a customary violation of it, with the actual or constructive knowledge of the master,[16] or by the enforcement of other rules incon-

7. Whether failure to promulgate rules and regulations for movement of cars on coal docks was negligence. Polaski v. Pittsburgh Coal Dock Co. [Wis.] 114 NW 437. Whether defendant was negligent in failing to promulgate and enforce a rule requiring some one to go back and warn approaching trains so as to prevent a collision. Dayton v. Brooklyn Heights R. Co., 103 NYS 867.

8. Durkos v. Chelsea Jute Mills, 105 NYS 183.

9. Failure to have cars accurately spaced on single track held not to constitute negligence, uniform spacing of cars at all times being impracticable. McGahan v. St. Louis Transit Co., 201 Mo. 500, 100 SW 601.

10. Failure to prescribe rules and signals for the movement of two engines when coupled together is not negligence as to an employe where it did not appear that any necessity had ever arisen requiring such rules, and the employe when injured was in a place where he had no right to be and no right to rules for his protection. St. Louis, etc., R. Co. v. Conway [C. C. A.] 156 F 234. Where a servant was injured by escape of steam from the blow off cock on a locomotive, the master could not be held liable for failure to promulgate rules to prevent the servant from accidentally moving the lever which opened the cock. Kelley v. American Locomotive Co., 105 NYS 583. Evidence insufficient to show that reasonable rules had not been adopted for operation of trains, but that derailment was due to negligence of fireman and semaphore tender. Pearsall v. New York Cent., etc., R. Co., 189 N. Y. 474, 82 NE 752. Evidence held to show that failure to prescribe rules and regulations for movement of cars on a coal dock was the proximate cause of an employe being struck by a car. Polaski v. Pittsburgh Coal Dock Co. [Wis.] 114 NW 437.

11. Ship owner held not negligent in failing to promulgate a rule requiring an extra man to be present to take the place of one temporarily absent during the operation of a winch where no accident had ever before occurred from this cause, and such rule was not in force on other ships. Johnson v. Prince Line, 108 NYS 193. The master is required to make rules for the conduct of his business to guard against dangers which in the exercise of reasonable care he should have anticipated. Gaska v. American Car & Foundry Co. [Mo. App.] 105 SW 3. Evidence insufficient to show negligence in failing to promulgate a rule with reference to starting machinery. Wolfinger v. Brooklyn Heights R. Co., 105 NYS 610. Where motorman was killed in head-on collision, at a point where he could see the track several hundred feet ahead, the company was held not negligent in failing to warn him of the approach of the other car, or to provide a rule by which he could discover an approaching car. McGahan v. St. Louis Transit Co., 201 Mo. 500, 100 SW 601.

12. Where hostler failed to give signal required by rules before backing engine, company could not defend on ground that hostler did not know rule, since it was their duty to inform him of the rule. Northern Alabama R. Co. v. Key [Ala.] 43 S 794.

13. Railroad company operating construction line owes employes duty of promulgating rules and issuing orders for the running of trains and also to see that such rules and orders are enforced. Morrison v. San Pedro, etc., R. Co. [Utah] 88 P 998.

14. Where a rule of a railroad company requires that yard limits be defined by sign boards, failure to do so may under certain circumstances constitute negligence on the part of the company. Atlantic Coast Line R. Co. v. Mallard [Fla.] 44 S 366. Freight train conductor put out torpedoes as required by rule but did not stay with them, as rule required, and section foreman, on hand car following train, was injured by explosion of torpedo. Held he could recover. Murphy v. Galveston, etc., R. Co. [Tex.] 18 Tex. Ct. Rep. 220, 101 SW 439. Railway company held liable for death of conductor run down by switch engine which failed to display and use signals required by rules, company having allowed habitual violation of rules, and failed to provide means for their observance. Dobyns v. Yazoo, etc., R. Co., 119 La. 72, 43 S 934. Where switchman was struck by cars and killed in railway yards, evidence held to authorize finding that engineer was negligent in failing to observe and obey signals, as a result of which accident occurred. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 17 Tex. Ct. Rep. 685, 99 SW 200.

15. Under rules of a railroad company, it was the duty of the conductor of a wrecked train, the engine of which was running on a work order between the wreck and the station, to send out a flagman to stop regular trains, and nothing having occurred to affect the right of the dispatcher to rely on observance of this rule, he was not negligent in failing to give notice to a regular train of the work order under which the engine was running. Veit v. Ann Arbor R. Co. [Mich.] 14 Det. Leg. N. 716, 114 NW 233.

16. That for fifteen years yard employes had been in the custom of riding on engines

sistent with it.[17] Rules reasonably sufficient to protect employes, if observed, are sufficient,[18] regardless of what rules other employers promulgate under different conditions.[19] Ordinarily, employes are entitled to have rules made for the benefit of the public observed.[20] Holdings as to the construction and meaning of particular rules are given in the note.[21] The duty to prescribe rules cannot be delegated.[22]

(3) *D. Warning and instructing servant.* See 8 S. L. 880—It is the duty of the master to properly warn and instruct young and inexperienced employes [23] in regard

to and from their work warrants an inference that a rule that no one but firemen and others in the necessary discharge of their duties should be permitted to ride on engines had been abrogated. Feneff v. Boston, etc., R. Co. [Mass.] 82 NE 705. It may be shown that a rule has been abandoned by universal disregard of it with the master's acquiescence. Texas, etc., R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 SW 1070.

17. Where a railroad train master held a school for instruction of employes and train crews were there directed to take the local operator's word as to movement of trains, which direction had been in force for four years, it was sufficient to constitute a general custom superseding a rule that all such orders should be in writing. McCarthy v. Pennsylvania R. Co., 189 N. Y. 170, 81 NE 770.

18. On an issue as to failure to adopt rules, the question is not whether the rules are the safest that could be adopted but whether they are reasonably sufficient when observed to protect employes. Pearsall v. New York Cent., etc., R. Co., 189 N. Y. 474, 82 NE 752.

19. Negligence cannot be imputed to a railroad company because it fails to adopt the same rules and methods for operating its road that other companies have where it does not appear that conditions are the same. Pearsall v. New York Cent., etc., R. Co., 189 N. Y. 474, 82 NE 752.

20. Rule requiring hostlers to blow whistle and ring bell of locomotive before backing it held for benefit of employes as well as general public. Northern Alabama R. Co. v. Key [Ala.] 43 S 794.

21. A rule of a railroad company for safety of yard employes, "a blue flag by day and a blue light by night displayed at one or both ends of engine, car or train, indicates that workmen are under or about it." Held such rule required signals at both ends of a car when both ends were exposed to danger of collision. O'Neill v. Lehigh Valley R. Co. [N. J. Law] 67 A 1019. Where inspection of cars was confided to car inspectors, a rule that flying switches should not be made without testing brakes did not make switchmen agents for inspection of cars, and the company was not liable for an injury resulting from violation of such rule. Fogarty v. Southern Pac. Co. [Cal.] 91 P 650. Rules relative to the riding on engines construed in connection with yard master's authority, and held that he had power to order a brakeman to ride on an engine while going to and from his work. Feneff v. Boston, etc., R. Co. [Mass.] 82 NE 705. Conflicting expert testimony as to necessity of hand car crew to send a flagman ahead at curves does not raise an issue of fact as to the reasonableness of a rule requiring such action, but such issue is raised by evidence that he was required to go over the road at such intervals as made it impossible for him to stop at curves. Bussey v. Charleston, etc., R. Co. [S. C.] 58 SE 1015. Whether a car barn situated midway on an electric railway, where conductors are required to stop for orders from a train dispatcher, is a terminal station within the meaning of a rule of the company which gives a conductor control of the car in regard to starting, stopping, and general management of the car "between terminal stations," is a question for the jury under proper instructions from the court. Interurban R. & T. Co. v. Treuheit, 9 Ohio C. C. (N. S.) 77. A rule of the company which requires a conductor, upon receiving orders from the train dispatcher, to "verbally communicate them to the motorman before proceeding," will not be construed against a motorman who started his car upon receiving a "bell" signal from the conductor to start, inasmuch as he could have placed no more reliance upon a "verbal" order to proceed than upon a bell signal, if they both came from the same person. Id. A rule that a train should not be started until proper signals were given does not apply to sudden acceleration of the speed of a train already in motion. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399. Rule that when train stops or is delayed, under circumstances that it might be overtaken by another train, a flagman must be sent back, applies to stops at stations. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 825, 104 SW 397. A rule of a mine owner that miners who left his employ should not be permitted to enter its mine, made for the purpose of excluding members of a striking union, is reasonable, and the operator is not required to allow striking employes to go in after their tools. Conversion not maintainable. Sloss-Sheffield Steel & Iron Co. v. Pryor [Ala.] 44 S 649.

22. Gaska v. American Car & Foundry Co. [Mo. App.] 105 SW 3.

23. American Brake Shoe & Foundry Co. v. Toluszis, 125 Ill. App. 622. A young and inexperienced servant must be warned though the place and appliances are reasonably safe, if the service is dangerous and such that a youth would not appreciate it. Gains v. Johnson [Ky.] 105 SW 381. It is the master's duty to warn and instruct youthful and inexperienced servants of defects in appliances, whether latent or patent. Arkadelphia Lumber Co. v. Henderson [Ark.] 105 SW 882. It is the master's duty to warn a young and inexperienced employe of dangers though open and apparent. Magone v. Portland Mfg. Co. [Or.] 93 P 450. Where an inexperienced boy fifteen years of age is employed as an oiler in a saw mill, it is the master's duty to warn him of dangers incident to the employment, unless they are open and obvious to one of his age and experience. Westman

to dangers of their employment of which they have no knowledge or appreciation.[24] It is also his duty to warn or instruct his employes as to special or unusual risks arising during the course of the employment.[25] It is the duty of the master to

v. Wind River Lumber Co. [Or.] 91 P 478. Where a boy ten years of age is employed to assist in operating a corn cutter, his age and size is notice to the employe that he has not the capacity of a mature person for the work in question. Bolton v. Ovitt [Vt.] 67 A 881. If a minor is old enough to know and appreciate danger, and is willing to undertake the work, instructions need not be given; if he is young and inexperienced, the master owes him the duty of special instruction though he expresses a willingness to undertake it. Woodstock Iron Works v. Kline [Ala.] 43 S 362. A youth of tender years employed to operate a dangerous machine must be instructed as to how to operate it and warned of danger of carelessness, not only when he commences work but at other times if necessary. Chess & Wymond Co. v. Gohagan's Guardian [Ky.] 105 SW 890. Evidence sufficient to show negligence in failing to warn youth employed at a dangerous machine. Id. Where an infant is employed at hazardous work, the master must see that he comprehends dangers. It is not sufficient that he is merely informed. Beckwith Organ Co. v. Malone [Ky.] 106 SW 809. Master liable if he puts boy of tender age at work at dangerous machine or in dangerous place without warning. Shirley v. Abbeville Furniture Co., 76 S. C. 452, 57 SE 178. It is the duty of the master to give suitable instructions to an inexperienced youth employed about dangerous machinery. Evidence insufficient to show performance of this duty. Medis v. Bently, 216 Pa. 324, 65 A 758. Evidence sufficient to show negligence in permitting an inexperienced youth to go to work feeding an edging machine without proper instructions. Bodcaw Lumber Co. v. Ford [Ark.] 102 SW 896. Failure to give proper instructions held negligence where an inexperienced workman who placed his hands on a machine to steady it in doing so displaced a portion of a machine and lost his arm. McBailey v. Suberbielle [La.] 45 S 442. Where an unskilled servant is employed to perform dangerous work, it is the master's duty to warn and instruct him. Coughlin v. Philadelphia, etc., R. Co. [Del.] 67 A 148. Where a workman was injured in operating a dangerous machine with which he was not familiar, complaint held to state a cause of action in failing to warn or instruct him how to operate the machine. Brockmiller v. Industrial Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688.

24. Where rapidly revolving sprocket wheel presented a smooth appearance, though in fact full of prongs and dangerous to one coming in contact with it, the master was under duty to warn an inexperienced servant whose duties took him near it. Gains v. Johnson [Ky.] 105 SW 381. It is negligence to fail to warn and instruct a youth employed to operate a planing machine provided with top, bottom, and side heads, equipped with knives. Tergeson v. Robinson Mfg. Co. [Wash.] 93 P 428. Failure to warn boy of seventeen of danger of striking a drill in a hole from which a blast had not been removed, boy having had no experience in blasting, held negligence. Burrows v. Ozark White Lime Co. [Ark.] 101 SW 744. Inexperienced boy of about twelve was put to work moving goods with trucks and a freight elevator, and was injured by a truck moving while on the elevator. Held putting him to work at this dangerous work without warning or instruction was actionable negligence. Jenson v. Will & Finck Co., 150 Cal. 398, 89 P 113. Duty of master to inform inexperienced employe of danger from fumes of paint when working inside boiler and necessity of going outside every little while for air, and failure to so warn and instruct was negligence. Houston, etc., R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529. It is the duty of the employer of children to instruct them concerning the dangers of their employment which from their inexperience they may not appreciate. Chambers v. Woodbury Mfg. Co. [Md.] 68 A 290. There is a duty to instruct inexperienced servants as to dangers incident to their employment. Crown Cotton Mills v. McNally, 127 Ga. 404, 56 SE 452. Where a longshoreman assisting in loading a vessel from a scow was unfamiliar with the work and was not instructed or warned as to dangers incident to it, held the injury was due to failure of the employer to warn him and he was liable. The Buffalo [C. C. A.] 154 F 815. Evidence sufficient to warrant recovery by servant injured by a vicious horse of the vicious habits of which the master failed to give warning. Fleming v. Covington, 102 Minn. 403, 113 NW 1016. Evidence held sufficient to show negligence on the part of the master in failing to warn a servant of dangers incident to operating a defective machine. Bowen, Jewell & Co. v. Adams [Ga.] 59 SE 795. Civ. Code 1895, § 2611, expressly provides that a master is bound to warn a servant of the danger from use of a defective machine where such danger is not obvious. Id. Vice-principal not relieved of duty to warn an employe by fact that latter said he was experienced, where his acts showed that he was not. McCracken v. Lantry-Sharpe Cont. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 959, 101 SW 520. It is the master's duty to instruct an inexperienced servant in the operation of a cut off saw, and warn him of dangers incident to its use. Wikstrom v. Preston Mill. Co. [Wash.] 93 P 213. Where danger to a street car conductor from an electric light pole near the track was either not obvious or extraordinary, it was the duty of the company to warn him of the danger. Savage v. Rhode Island Co. [R. I.] 67 A 633. Master held liable for failure to warn servant where he knew of open elevator shaft and knew that the nature of servant's work was such as might cause him to stagger backward into it, though master did not own the premises on which work was done. Myreen v. Smith, 127 Ill. App. 426. Evidence considered and held insufficient to justify finding of jury that plaintiff was inexperienced as to the operation of a sausage machine. Libby, McNeill & Libby v. Kearney, 124 Ill. App. 339.

25. Where engineer and fireman saw a servant ahead on a velocipede and that he

inform servant of new and unusual dangers within the master's knowledge and of which the servant is ignorant,[26] and as to hidden or latent dangers, known, or which ought to be known, to the master,[27] and unknown to the servant.[28] Proper instruction should also be given an employe who is sent to perform services outside the regular scope of the duties for which he was employed.[29]

did not know of his danger, it was their duty to warn him and stop if necessary. Lynch v. Chicago, etc., R. Co. [Mo.] 106 SW 68. Where master did not know and had no reason to know that employe was working on a switch car when directed to move it, he is not liable. Crane Co. v. Hogan, 228 Ill. 338, 81 NE 1032.

26. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 NE 857. Negligence for yardmaster in directing making up of a train to fail to notify the switch crew that the train would be moved by a road engine. Edington v. St. Louis, etc., R. Co., 204 Mo. 61, 102 SW 491. Where a servant injured was one of a gang of trackmen and it appeared that it was customary for the boss to give warning of approach of trains, the injured person had a right to rely on such warning being given and it was negligence to fail to give it. Germanus v. Lehigh Valley R. Co. [N. J. Err. & App.] 61 A 79. Where custom to give a warning by the foreman is proved, it is embraced in a duty owed by the master and the master is liable for his failure to perform it. Id. Where railroad employe was run down by an engine, evidence held to show that no switchman was on the footboard ahead to keep lookout. Galveston, etc., R. Co. v. Wafer [Tex. Civ. App.] 20 Tex. Ct. Rep. 831, 106 SW 897. Railway company held negligent toward engineer of a fast train in permitting a preceding train to run partly on the time of the fast train without signals, and no warning given engineer of the fast train. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 825, 104 SW 397. Hostler of engine who backed it upon an employe without giving required signal negligent, whether he knew of decedent's presence or was charged with notice of his duties and presence there at the time. Northern Ala. R. v. Key [Ala.] 43 S 794. Locomotive fireman injured in collision. Evidence held to show engineer negligent in failing to apply brakes, and yardmaster negligent in failing to give notice to crew of plaintiff's train of presence of other train. Southern Indiana R. Co. v. Osborn, 39 Ind. App. 333, 78 N. E. 248, 79 NE 1067. Where superintendent in charge of cutting trees directed chopper to cut certain trees and himself cut a tree and failed to warn the chopper of its fall and he was struck, held failure to warn was negligence and the master was liable. Curtin v. Clear Lake Lumber Co. [Wash.] 91 P 956. Section foreman held negligent when he allowed men to put hand cars on the track to go to camp, knowing that a passenger train was overdue, and that curves and obstructions obscured the view of the track, and failed to warn the men of the train or to look out for trains. Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 SW 142. Negligence to send boy of sixteen into a dark bin of oats to correct a defect there without warning him, the work being strange to him. Meier v. Way, Johnson, Lee & Co. [Iowa] 111 NW 420. It is not only the duty of the master to furnish a safe place, but to warn the servant of any unusual or newly developed dangers which arise in the course of the employment which are likely to escape the servant's notice. Southern Cotton-Oil Co. v. Gladman, 1 Ga. App. 259, 58 SE 249. A master is responsible for injuries sustained by a servant, if by his orders he causes a servant to be exposed to a danger known to the master but unknown to the servant. Id. Where a saw mill employe was between two logs and the movement of one of them would be dangerous to him, it was the duty of the sawyer, acting as master in directing the machinery in motion, to warn the employe that the log was about to roll, and to give him reasonable time to get out of his dangerous position. Maloney v. Stetson & Post Mill Co. [Wash.] 90 P 1046. It is negligence for one in charge of repairing roof to fail to warn a servant of danger of falling through, where sheathing boards had been sawed off but not removed. Anderson v. Republic Iron & Steel Co. [Ky.] 107 SW 220.

27. Where a master has notice of a defect in a machine, he owes the duty to an inexperienced servant directed to work at such machine to warn him. Fleming v. Northern Tissue Paper Mill [Wis.] 114 NW 841. Notice to a prior superintendent of the master of a defect in a machine is notice to the master, though the superintendent did not occupy such position at the time of the accident. Id. The master is required to give warning of latent defects or hazards incident to the employment of which he has or should have knowledge and which the servant does not appreciate. Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 NE 168. It is the duty of the master to warn his servant of latent dangers which are known to the master. Master liable where lineman was injured by coming in contact with live wire of which master had knowledge and servant did not. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136.

28. The master must exercise ordinary care to notify servants of danger peculiar to his premises of which he has knowledge and they are ignorant. Bennett v. Concord Woodworking Co. [N. H.] 68 A 460.

29. Where a common laborer inexperienced as a quarryman without warning or instruction set to work to drill out an unexploded charge of dynamite by a subboss, and it appeared that unexploded charges should never be dealt with in that way, held the master was liable for the negligence of the boss. Peters v. George [C. C. A.] 154 F 634. Evidence sufficient to show negligence in calling an employe from his regular work as a common laborer and setting him to operate a machine without proper instructions. Boyd v. Taylor [Mass.] 81 NE 277. Evidence held to warrant finding that master owed servant duty of warning and instructing him, where he was employed as a common laborer and was set to work on iron

No instruction is required as to incidental risks assumed by the contract of employment,[30] nor as to transitory dangers,[31] nor as to obvious dangers[32] fully known to the employe,[33] or as well known to him as to his employer,[34] or which ought to have been known to him by reason of his experience and capacity,[35] or by the exercise

construction with the processes and appliances of which he was unacquainted. Reardon v. Byrne [Mass.] 80 NE 827. Employment as tailer at stave bolting machine includes employment as feeder while the feeder is temporarily absent, where it is the custom and it was once done in the presence of the foreman for the tailer to take the feeder's place when he is temporarily absent. Arkadelphia Lumber Co. v. Henderson [Ark.] 105 SW 882. Where youthful servant was injured because of failure of the master to warn him of defects in a machine, evidence held to show that he was occupied as feeder according to custom while the feeder was temporarily absent. Id.

30. Evidence insufficient to show negligence in failing to warn a servant engaged in the manufacture of explosives of the danger of the occupation. Rogers v. MacBeth, 108 NYS 74. Safe place being furnished master is under no duty to warn as to transitory dangers arising from acts of fellow-servants. Miller v. American Bridge Co., 216 Pa. 559, 65 A 1109. Where freight car equipped with a defective coupling pin chain was nevertheless one which the switchman was required in course of his duties to assist in distributing, the conductor was under no duty to warn him before attempting to uncouple the car. Norman v. Southern R. Co. [Tenn.] 104 SW 1088.

31. Where only thing the servant does not know is the precise time when danger will intervene. Norman v. Southern R. Co. [Tenn.] 104 SW 1088.

32. Sutton v. Des Moines Bakery Co. [Iowa] 112 NW 836; Mattsen v. Chicago, etc., R. Co. [Minn.] 114 NW 759; Bovi v. Hess, 107 NYS 1001; Vant v. Roelofs, 217 Pa. 535, 66 A 749. Danger resulting from a plate which employe was moving, if it was struck by a rapidly moving bucket in a shaft. White v. Owosso Sugar Co., 149 Mich. 473, 14 Det. Leg. N. 505, 112 NW 1125. Danger of coming in contact with moving machinery. Boyd v. Taylor [Mass.] 81 NE 277. Defendant under no duty to warn as to obvious danger from moving belt and rollers. Hicks v. Claremont Paper Co. [N. H.] 65 A 1075. Evidence insufficient to show negligence in failing to warn a servant working on a subway of an electric rail. Causullo v. Lenox Const. Co., 107 NYS 431. Where laundry employe's hand was caught in a mangle, evidence held insufficient to show negligence in failing to give warning of the condition of the machine or to instruct as to method of covering machine, or notify of dangers connected therewith. Richards v. Ogden Steam Laundry [Utah] 91 P 267. Master is under no duty to warn servants of dangers patent to ordinary intelligence. Held to be immaterial whether a laborer has ever shoveled gravel or not on the question of duty of master to explain danger of working in a gravel pit. Village of Montgomery v. Robertson, 229 Ill. 466, 82 NE 396. Master is under no duty to warn servant against dangers which are obvious. Held not liable for failing to warn servant of danger of placing his feet between rails while conveyer is in operation. Valentine v. Chicago City R. Co., 127 Ill. App. 436; Chicago City R. Co. v. Sangiacomo, 130 Ill. App. 589. Where employe 19 years old who was operating a machine got his fingers cut by a knife on the machine which was in plain view, held failure to warn him was not negligence. Knight v. Paducah Box & Basket Co., 31 Ky. L. R. 629, 102 SW 1185. Where experienced brakeman jumped from a moving train onto a pile of gravel and slipped under the train, held the danger of alighting on the gravel was obvious, and failure to warn him thereof was not negligence. Louisiana, etc., R. Co. v. Miles [Ark.] 103 SW 158.

33. Not negligence to fail to warn of known dangers. La Duke v. Hudson River Tel. Co., 108 NYS 189. Where a miner knew of a rule forbidding the carrying of tools in the arms while in the cage, the company was not liable because the cagee, who had no authority, failed to warn him of the danger of such action. Elkton Consol. Min. & Mill Co. v. Sullivan [Colo.] 92 P 679.

34. Where plaintiff objected to hammer furnished him for stone cutting and procured another for himself (being an experienced carpenter and builder), the master was under no duty to instruct and warn him as to the liability of the hammer to chip, since he ought to have known as much about that as the master. Denver, etc., R. Co. v. Sporleder [Colo.] 89 P 55.

35. Long experience in the work may take the place of instructions as to danger. Rule requiring instructions does not apply where servant had worked for two years in a saw mill and must have known of danger incident to running two or three boards through the saw at one time. Carron v. Standard Refrigerator Co., 106 NYS 723. The mere fact that an employe was not informed that one of the probable results of striking a mass of steel with a sledge hammer might cause chips to fly therefrom does not render the employer liable for injury so resulting. Sabere v. Atha [N. J. Law] 68 A 103. Where a coal miner was injured while blasting with dynamite, the appliances used being those in common use, and the servant had worked in mines for many years and knew the dangers, held master not liable as no breach of duty in failing to warn the servant. Wilson v. Atlantic Crushed Coke Co. [Pa.] 68 A 671. Where a servant becomes familiar with machinery and cognizant of dangers attendant upon its operation, he cannot recover for failure to instruct in regard thereto at the time he commenced work. Crown Cotton Mills v. McNally, 127 Ga. 404, 56 SE 452. No instruction or warning required where experienced man was told to cover a vat in a tannery, a simple piece of carpentry. Lavelle v. Dunn-Green Leather Co., 194 Mass. 294, 80 NE 475. A master is not negligent in failing to warn a minor employed as wheelbarrow boy of

of ordinary care.[36] It is not negligence to fail to give warning of a danger not reasonably to be apprehended.[37] Instructions to servant by a vice-principal absolve the master from that duty.[38] Whether warnings or instructions should have been given in a particular instance,[39] and whether warnings or instructions given were sufficient,[40] are usually questions of fact to be determined by reference to the character of the risk or danger in issue, and the age, capacity, and experience of the employe concerned.[41] The duty to properly warn and instruct cannot be delegated.[42]

danger from flying splinters. Brown v. J. A. Adams & Sons Co. [La.] 44 S 1005. Liability of explosion when lime and water are mixed is a matter of common knowledge, and hence it is not negligence to fail to warn and instruct boy of 19 engaged in mixing them. Bollington v. Louisville, etc., R. Co., 30 Ky. L. R. 1260, 100 SW 850.

36. Where laborers working on a railroad track were warned of approaching trains by the foreman when working in groups, but it was the custom when one was separated from the others for him to look to his own safety, held where one was working alone the master owed him no duty to give warning. Predodnick v. Lehigh Valley R. Co. [N. J. Err. & App.] 65 A 1047.

37. A master is not required to anticipate a servant's deviation from instructions and provide means for averting danger due to such deviation. Patterson v. North Carolina Lumber Co. [N. C.] 58 SE 437. Railroad company held not liable for failure to give warning of approach of train to a section hand in its employ stationed at a place where warning is not customarily given. Toledo, etc., R. Co. v. Cross, 127 Ill. App. 204.

38. Chicago Hardware Co. v. Matthews, 124 Ill. App. 89.

39. Whether master was negligent in failing to warn 17 year old servant of defects in stave bolting machine at which he worked. Arkadelphia Lumber Co. v. Henderson [Ark.] 105 SW 882. Whether foreman was negligent in not keeping lookout for obstructions on track and other cars, where two hand cars collided. Mastellar v. Great Northern R. Co., 100 Minn. 236, 110 NW 869. Question of negligence in failing to warn of dangers and in placing a young and inexperienced employe at work without proper instructions. Cox v. Capitol Box Co. [Wash.] 91 P 555. Question of negligence in failing to give warning to one injured by escape of steam from blow-off cock on a locomotive. Kelley v. American Locomotive Co., 105 NYS 583. Question of negligence in assigning inexperienced workmen to work of loading and manipulating ore cars on a gravity track without proper warning and instructions. Granrus v. Croxton Min. Co., 102 Minn. 325, 113 NW 693. Whether master was negligent in failing to warn or instruct. Heffernon v. Fall River Iron Works Co. [Mass.] 83 NE 5. Whether superintendent was negligent in failing to discover and warn a workman of danger from an approaching crane. Jordon v. New England Structural Co. [Mass.] 83 NE 332. Whether foreman of telephone company was negligent in failing to warn lineman of danger of removing a cross-arm from a pole, which was sprung because of the weight of a messenger wire upon it. Long v. Johnson County Tel. Co., 134 Iowa, 336, 111 NW 984. Whether boy of 14 should have been warned of danger of operating electric elevator. Braasch v. Michigan Stove Co., 147 Mich. 676, 14 Det. Leg. N. 18, 111 NW 197. In an action by a miner for injuries alleged to have resulted from negligence of the mine owner in failing to keep its mine in a safe condition or instruct the injured person who was inexperienced in respect to peculiar dangers, evidence of negligence held for jury. Cumberland Coal & Coke Co. v. Gray [C. C. A.] 152 F 939. Evidence as to negligence in failure to warn a servant as to danger of explosion of molten iron he was assisting in rolling held for jury. Ginty v. New Haven Iron & Steel Co. [C. C. A.] 152 F 979. Whether an engineer should give signal to warn brakeman of sudden jerk of the train, irrespective of rules of the company, held for jury. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399. Employe at work on gas tank was injured by reason of the raising of the tank. Whether it was raised by pumping air into it, and whether doing so without warning was negligence, held for jury. Bartlett v. Farrell [C. C. A.] 152 F 150.

40. Where unusual conditions exist, such as passing of noisy trains which may interfere with a servants hearing customary warnings or signals, it is a question for the jury whether customary warnings are sufficient. Germanus v. Lehigh Valley R. Co. [N. J. Err. & App.] 67 A 79. Whether master sufficiently warned youthful employe. Owensboro Brick & Sewer Pipe Co. v. Glenn [Ky.] 106 SW 1195. Whether youthful employe was sufficiently warned of dangers of a machine he was operating. Magone v. Portland Mfg. Co. [Or.] 93 P 450. Whether foreman was negligent in that he failed to properly warn decedent, struck by a car while at work. Jordan v. St. Louis Transit Co., 202 Mo. 418, 101 SW 11. On conflicting evidence as to whether warning and instruction had been given. Tergeson v. Robinson Mfg. Co. [Wash.] 93 P 428. Whether a master gave proper warning to a child employe. Chambers v. Woodbury Mfg. Co. [Md.] 68 A 290. Whether or not a warning to a workman not to touch the machinery or wires, which had been placed in the room in which he was working, should be regarded as a warning of extreme danger to himself from touching them, or merely a calling of his attention to the wires and machinery as something not to be disturbed. Baker v. Toledo, etc., R. Co., 10 Ohio C. C. (N. S.) 297. Notice and instruction to operator of mangle held sufficient. Lambert v. Troy Laundry Co., 118 La. 48, 42 S 642. Question whether an engineer killed in head on collision was given sufficient warning of presence on the track of another train. Southern R. Co. v. Scanlon's Adm'r [Ky.] 105 SW 152.

41. Warning need no be given of dangers

(3) *E. Fellow-servants.* See 8 C. L. 884 *Competency.*—The master is charged with the duty of ordinary care [43] to employ and retain in his service only such servants as are reasonably competent to perform the duties for which they are employed.[44] He is accordingly liable for injuries to a servant resulting proximately from the incompetency of a fellow-servant,[45] if he had actual or implied knowledge

of an employment which are so visible that a person of ordinary intelligence cannot fail to comprehend them. Magone v. Portland Mfg. Co. [Or.] 93 P 450. Warning and instruction need not be given as to common operations of every day life free from complexity and done in usual way. As to opening of wooden packing cases with hammer and hatchet, piece of steel flew off and hit boy servant 17 years of age in eye. Whalen v. Rosnosky [Mass.] 81 NE 282. A master may assume that the experience of a servant and his knowledge of natural forces are adequate for his protection from ordinary results of the operation of such forces incident to his employment. The master may act on this assumption until he has notice to the contrary. Sabere v. Aka [N. J. Law] 68 A 103.

42. Duty to give warning of danger is nondelegable. Roberts & Shafer Co. v. Jones [Ark.] 101 SW 165. The duty to warn and instruct an inexperienced youth cannot be delegated. Owensboro Wagon Co. v. Boling [Ky.] 107 SW 264. The duty to instruct as to abnormal and extraordinary dangers cannot be delegated. Industrial Lumber Co. v. Bivens [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831. The duty to give warning of latent dangers cannot be delegated. Schminkey v. Sinclair [Iowa] 114 NW 612. Master chargeable with negligent instructions given by foreman. Morena v. Winston, 194 Mass. 378, 80 NE 473. It being the master's duty to warn a servant that it is dangerous to attempt to stop cars with a pinch bar, it may not escape liability by delegating that duty to a fellow-servant of one injured. Gussart v. Greenleaf Stone Co. [Wis.] 114 NW 799. The duty to warn and instruct an employe who is set to perform dangerous work with which he is unfamiliar is the absolute duty of the master and he cannot relieve himself from liability for its nonperformance by delegating it to a fellow workman or subordinate. Peters v. George [C. C. A.] 154 F 634.

43. Transfer company owes duty to servant moving pianos to exercise ordinary care in selecting a helper. McIntosh v. Jones [Mont.] 93 P 557. It is the master's duty to use reasonable diligence in selecting competent fellow-servants. Cooney v. Commonwealth Ave. St. R. Co. [Mass.] 81 NE 905. A master does not warrant the competency of fellow-servants. To recover for an injury caused by such incompetency, a servant must show that the master failed to exercise ordinary care in selecting them. Woodward Iron Co. v. Curl [Ala.] 44 S 969. A master is not liable for injury resulting because of incompetency or inefficiency of a fellow-servant where he has exercised due care in selecting them. Jackson v. Southern R. Co., 77 S. C. 550, 58 SE 605.

44. The master must exercise due and reasonable care in the selection of his servants with reference to their fitness and competency (First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822), and must use the same degree of care in their retention (Id.). Where a fellow-servant, originally competent, becomes incompetent, and the master has notice of such incompetency, his liability is the same as if he had originally hired an incompetent servant. Cooney v. Commonwealth Ave. St. R. Co. [Mass.] 81 NE 905. Evidence sufficient to show negligence in retaining incompetent fellow-servant (engineer). Kundar v. Shenango Furnace Co., 102 Minn. 162, 112 NW 1012. Evidence sufficient to show that a foreman was incompetent and that the master knew it. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59. Evidence insufficient to show that a fellow-servant employed to spray coal cars was incompetent. Southwestern Development Co. v. Boyd [Ind. T.] 104 SW 1174. Whether master was negligent in putting inexperienced motorman in charge of car resulting in injury to the conductor held for jury. South Covington, etc., R. Co. v. Brown, 31 Ky. L. R. 1072, 104 SW 703.

45. Where through overwork and loss of sleep a mortorman failed to observe a rule requiring him to keep his car 100 feet behind preceding car, and he collided with it, injuring the motorman thereof, the company may not interpose such noncompliance as negligence of a fellow-servant. Ft. Wayne & Wabash Valley Trac. Co. v. Crosbie [Ind.] 81 NE 474. Evidence sufficient to show that injury was caused by incompetence of a fellow-servant for which the master was liable. Famularo v. Oil Well Supply Co., 105 NYS 1063. Evidence held to show that injury was due to lack of ordinary skill on part of a fellow-servant. Cooney v. Commonwealth Ave. St. R. Co. [Mass.] 81 NE 905. Master is liable for injuries resulting from negligence of vice-principal in his dual capacity as such and as fellow-servant. Order given by vice-principal placing servant in hazardous position followed by ministerial act causing injury renders master liable. Roebling Const. Co. v. Thompson, 229 Ill. 42, 82 NE 196, afg. 129 Ill. App. 20. Master is liable if the injury results from the concurrent negligence of a fellow employe and the master. Chicago, etc., R. Co. v. Neves, 130 Ill. App. 340. The fact that the negligence of a fellow-servant concurred with that of the master does not relieve the latter from liability. Overloading by fellow-servant of scaffolding negligently constructed by the master does not relieve the latter from liability. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65, afg. 128 Ill. App. 30. In order to render master liable for negligence concurrent with that of a fellow-servant, it must appear that the former's negligence amounted to an efficient cause of the injury. Chicago & A. R. Co. v. Bell, 130 Ill. App. 45.

of such incompetency,[46] and it was unknown to the servant injured.[47] Notice to a vice-principal is, of course, notice to the master.[48] Negligence such as unfits a person for service or such as renders it negligent in a master to retain him in his employ must be habitual rather than occasional, or of such a character as to render it imprudent to retain him.[49] A single exceptional act will not prove a servant incapable or negligent.[50]

Negligence of fellow-servants. See 8 C. L. 885—A master who used due care in the selection and retention of employes is not, at common law,[51] liable to servants for injuries resulting from the mere negligence of fellow-servants,[52] such negligence

46. To charge an employer with liability for injuries caused by the incompetency of a fellow-servant, it must appear that the master had actual or constructive notice of such incompetency. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822. A master who fails to exercise ordinary care in selecting employes, or after knowledge of their incompetency retains them, is liable to a fellow-servant for their negligence. Tucker v. American Car & Foundry Co. [Pa.] 67 A 616. Evidence sufficient to show that the master had notice of the incompetency of his foreman. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59. Where an overseer on a plantation got into a difficulty with a laborer and was shot, and sued the common master, alleging that such servant was a man of notoriously bad character, held the master was not liable as the overseer provoked the difficulty; the dangerous character of the servant was not known to the master and the shooting was beyond the scope of his employment. Queen v. Schwann, 119 La. 495, 44 S 276.

47. Whether a conductor injured because of negligence of incompetent motorman had knowledge of such incompetency. South Covington, etc., R. Co. v. Brown, 31 Ky. L. R. 1072, 104 SW 703

48. The knowledge of an assistant superintendent of a street railway charged with the duty of supervising cars that a motorman was incompetent, which knowledge was communicated to the superintendent, must be imputed to the company. Cooney v. Commonwealth Ave. St. R. Co. [Mass.] 81 NE 905.

49. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822.

50. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822. An act of casual neglect by a freight elevator boy is insufficient to show that the master was negligent in employing an incompetent fellow-servant. Rush v. Thos. D. Murphy Co. [Iowa] 112 NW 814.

51. See post, for statutory modification. The fellow-servant rule is enforced as part of the common law. Southern R. Co. v. Elliott [Ind.] 82 NE 1051. Whether recovery is barred by the fellow-servant doctrine must be determined by the law of the place where the injury occurred. Morrison v. San Pedro, etc., R. Co. [Utah] 88 P 998.

52. In the absence of statute the master is not liable for injuries caused by the negligence of a fellow-servant. McIntosh v. Jones [Mont.] 93 P 557. No recovery where injury was clearly caused by negligence of fellow-servant. Hartnett v. Owosso Sugar Co., 147 Mich. 650, 14 Det. Leg. N. 16, 111 NW 457; Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. There can be no recovery for injuries due to negligence of a fellow-servant, however gross. Louisville, etc., R. Co. v. Brown [Ky.] 106 SW 795. No recovery can be had for injury caused by negligence of a fellow-servant, in the absence of concurring negligence of the master. Haskell & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626. Except in the case of railroad companies, the master is not liable to one servant for an injury arising from the negligence or misconduct of other servants about the same business. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839. Fellow-servant rule applies to youth 17 years of age, of ordinary intelligence, injured while operating a dangerous machine. Wilder v. Miller, 128 Ga. 139, 57 SE 309. Where a brakeman was injured while assisting fellow-servants carry a rail by their stumbling over another rail, and it appeared that they were walking in an obviously dangerous place, held the negligence of fellow-servants was the cause of his injury. Gulf, etc., R. Co. v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 145, 103 SW 447. Injury resulting from negligence of a fellow-servant will not render master liable, though injured servant was a minor and his father had directed master not to employ him in machine shop, but only in paint shop. Wilder v. Miller, 128 Ga. 139, 57 SE 309. Master is not liable for injuries resulting from obedience of orders of a fellow-servant, without authority to give orders. Shirley v. Abbeville Furniture Co., 76 S. C. 452, 57 SE 178. Fall of stone in quarry caused by coemploye, no recovery. Perry-Matthews & Buskirk Stone Co. v. Fletcher, 168 Ind. 348, 80 NE 970. Master is not liable for negligence of fellow-servants of a night watchman in putting coal into the cellar in such manner that a piece fell and struck the watchman as he was making his rounds. Lapre v. Woronoco St. R. Co. [Mass.] 82 NE 9. Pumpman at bottom of mine shaft, and brakeman on cage, held fellow-servants; no recovery for death of pumpman caused by brakeman leaving his post before being relieved. Williams v. Verona Min. Co., 149 Mich. 45, 14 Det. Leg. N. 292, 112 NW 496. Engineer and servant employed to unload rails from construction train, being fellow-servants, there could be no recovery for engineer's negligence. De Santes v. New York, etc., R. Co., 103 NYS 849. A cause of action is not stated where the only negligence alleged is that of the foreman under whom plaintiff worked in directing the manner of using or handling machinery, which is not defective or unsafe if properly used. Kinnear Mfg. Co. v. Carlisle [C. C. A.] 152 F 933. Workman engaged

being an assumed risk.[53] Negligence of a fellow-servant will not, however, defeat a recovery, unless it was the sole cause of the injury.[54] If negligence of the master, concurred with negligence of a fellow-servant in producing the injury, and if the injury would not have resulted had the master exercised due care, he is liable.[55]

In Arkansas, an employer is held not liable to an employe for the act of a convict also employed by him.[56]

Determining of relation. Common-law rules. See 8 C. L. 887—What facts are essential to the existence of the fellow-servant relation between two or more em-

in railway excavation, injured by explosion, could not recover where explosion was due to negligence of a coemploye who was assisting him and who lighted the fuse. Vito v. West Chester, Kennett & Wilmington Elec. Co., 217 Pa. 398, 66 A 659. Where an employe of a transfer company was injured by negligence of a fellow-servant in negligently letting go a piano which was being moved down stairs, when only ability required was strength and ordinary intelligence which he possessed, the master is not liable. McIntosh v. Jones [Mont.] 93 P 557. Where one employed by the janitor of a school building to assist had his hands injured by liquid given him to clean water closets, held the negligence, if any, was that of a fellow-servant. Higbie v. New York Board of Education, 107 NYS 168. Employe engaged in clearing away debris from around pillar, which was being encased in brick, was struck by brick dropped by fellow employe, at work, on scaffold above, Held act of fellow-servant caused injury; no recovery. Willis v. Thompson-Starrett Co., 54 Misc. 238, 104 NYS 668. Where switchman was injured in collision between a switch engine and an engine on which he was riding, evidence held to show that the operator negligently gave the signal which caused the collision. Feneff v. Boston, etc., R. Co. [Mass.] 82 NE 705.

53. See post, Incidental Risks.

54. Fellow-servant's negligence held not sole cause of injury to eye of man hammering steel, held by the fellow-servant who told plaintiff to do this work, where steel was defective and system of repairs improper. Pennsylvania R. Co. v. Garcia [C. C. A.] 152 F 104. Where act of coemploye was not an independent cause of an injury, which would have resulted from master's negligence without such coemploye's act, the master was liable. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57.

55. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555; Big Hill Coal Co. v. Abney's Adm'r, 30 Ky. L. R. 1304, 101 SW 394; Hardy v. Sulphur Min. Co. [N. J. Law] 67 A 177; G. A. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 18 Tex. Ct. Rep. 416, 99 SW 715; Chicago, etc., R. Co. v. Birk [Tex. Civ. App.] 18 Tex. Ct. Rep. 72, 99 SW 753; Suderman v. Woodruff [Tex. Civ. App.] 19 Tex. Ct. Rep. 778, 105 SW 217; Missouri, etc., R. Co. v. Wise [Tex. Civ. App.] 106 SW 465; Stone v. Union Pac. R. Co. [Utah] 89 P 715. The United States courts do not recognize the rule that the master is liable where his negligence concurs with that of a fellow-servant. Chandler v. St. Louis, etc., R. Co. [Mo. App.] 106 SW 553. If the negligence of the master is the proximate cause, he is not exonerated because the negligence of a coemploye concurred. Haskel & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626. Concurring negligence of fellow-servants no defense if negligence of foreman was proximate cause of injury. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413. The master is liable for an injury which results from the concurring of his negligence with the negligence of a fellow-servant, where the injury would not have happened but for his negligence. Trickey v. Clark [Or.] 93 P 457. Where concurring negligence of master and servant produces injury, either or both are liable. Daniels v. Johnston [Colo.] 89 P 811. Railroad company failing to equip its cars with automatic couplers, as required by 27 Stat. 531, held liable for injuries to a switchman though such failure concurred with negligence of a fellow-servant. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Servant entitled to recover if negligence of master in failing to provide suitable materials for walkway concurred with negligence of another employe in producing injury. J. W. Bishop v. Dodson [C. C. A.] 152 F 128. Employer liable where injury resulted from failure to prop roof of entry in mine, and negligence of fellow-servant. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57. Where a conductor was killed by a derailment caused by a defective track, the fact that the engineer handled the train negligently does not relieve the company. Pittman v. Chicago, etc., R. Co., 231 Ill. 581, 83 NE 431. Where car despatcher ordered car out, knowing that only two had passed and that three should have passed, his negligence was efficient cause of death of motorman in collision, though conductor of car also disobeyed rules. Doe v. Boston, etc., R. Co. [Mass.] 80 NE 814. Where death was caused by explosion of dynamite loaded on car next caboose, which did not have air brakes, whether negligence of master in not furnishing proper car concurred with negligence of fellow-servant in loading and placing car held for jury. Kelly v. Delaware, etc., R. Co., 118 App. Div. 432, 103 NYS 1065.

56. In view of Kirby's Dig. § 5856, providing that control of convicts shall not pass from the state where a fellow-servant of a convict was injured through his negligence, the master is not liable because he did not have control of the convict. St. Louis, etc., R. Co. v. Boyles [Ark.] 103 SW 744. The fact that the injury occurred on Sunday when the convicts were allowed pay for work does not change the rule. Id.

ployes is a question of law; the existence of such facts in a particular case is a question for the jury.[57]

It is essential to the existence of the fellow-servant relation that the employes have a common master,[58] or at least be under one control.[59] It is commonly held that employes of a common master, working together in a common enterprise,[60] or

57. Whether foreman was fellow-servant or vice-principal held for jury under proper instructions. Sandusky Portland Cement Co. v. Rice [Ind. App.] 82 NE 1007. Whether a bystander who is called by a station agent to assist in rolling cars away from a fire is his fellow-servant held for jury. Jackson v. Southern R. Co., 77 S. C. 550, 58 SE 605. Whether servants in the employ of a common master are fellow-servants is generally a question of fact. Chicago, etc., R. Co. v. Reddick, 230 Ill. 105, 82 NE 598. If the evidence is such that reasonable minds would differ, the question of the relation should be submitted to the jury. Whether bridge tender and machinist employed to repair bridge are fellow-servants held a question for the jury. Gathman v. Chicago, 127 Ill. App. 150. Where the evidence is conflicting, the question is for the jury (Chicago, etc., R. Co. v. Strong, 129 Ill. App. 196), but where there is no controversy as to the facts and the conclusions to be drawn therefrom, it becomes a question of law (Id.). One having authority to direct and control the movements of those employed under him is in the exercise of such authority a vice-principal. Chicago, etc., R. Co. v. Reddick, 230 Ill. 105, 82 NE 598. The question as to whether the relation of fellow-servant exists becomes one of law only when there is no dispute as to the facts which clearly show the relationship within the rule. Illinois Terminal R. Co. v. Chapin, 128 Ill. App. 170. One vested with proper authority ordering cars to be moved onto a track with the knowledge that other cars were standing on such track, and thereby causing collision resulting in death of a servant, is as to such servant a vice-principal. Chicago, etc., R. Co. v. Reddick, 230 Ill. 105, 82 NE 598.

58. Servants of different masters are not deemed to be fellow-servants, though working together in a common employment; they must be under the direction and control of a common master. Engineer on one train and employed by one company held not fellow-servant of employes of another company engaged on another train. Baker v. Philadelphia & R. R. Co., 149 F 882. Persons employed by different masters are not ordinarily fellow-servants though engaged in common work. Servants in the employ of a general contractor and servant of a subcontractor are not fellow-servants unless they have submitted to his control and accepted him as their master. Kelly v. Tyra [Minn.] 114 NW 750. One employed to repair an elevator and another regular employe who requested him to do certain work held not fellow-servants. Fiesel v. New York Edison Co., 108 NYS 130. Longshoreman engaged in loading a vessel, employed by a master stevedore, who got steam power from defendant, held not fellow-servant of winch man who was employe of defendant, and whom master stevedore had no power to discharge. Standard Oil Co. v. Anderson [C. C. A.] 152 F 166. Person injured was a teamster for his father, who hauled steel plates for defendant as an independent contractor. Held that while he was superintending the loading of wagons he was not the fellow-servant of a servant of the defendant who operated a crane used in loading. Otis Steel Co. v. Wingle [C. C. A.] 152 F 914. A master is not relieved from liability under the fellow-servant rule where though the injury was the proximate result of the negligent act it occurred some time later, and after the injured person had ceased to be a servant. Smith v. Humphreyville [Tex. Civ. App.] 19 Tex. Ct. Rep. 936, 104 SW 495.

59. The relation of fellow-servant may exist between servants of different masters where the employes of one master have been loaned to the other and they are all under control of the latter. Pioneer Fire Proofing Co. v. Clifford, 125 Ill. App. 352.

60. A workman and a foreman while making repairs held fellow-servants, and no recovery could be had for negligence of foreman in failure to discover defects in machinery. Reed v. Moore [C. C. A.] 153 F 358. Gang foreman of mining crew is fellow-servant of miners whom he directs. United Zinc Companies v. Wright [C. C. A.] 156 F 571. Where a gang of men were employed in dismantling buildings and heavy machinery, held the laborers and their foreman were fellow-servants where the foreman by untying a guy rope caused injury to a workman. Westinghouse, Church, Kerr & Co. v. Callaghan [C. C. A.] 155 F 397. Issue being whether mill where plaintiff was injured was operated by defendant or third person as an independent contractor, held that defendant was plaintiff's employer and third person was a fellow employe. Giacomini v. Pacific Lumber Co. [Cal. App.] 89 P 1059. Where foreman, roadmaster, and other employes were all engaged in clearing away a landslide from the track, they were fellow-servants and negligence of foreman in inspecting the place and pronouncing it all right was an assumed risk. Maloney v. Florence, etc., R. Co. [Colo.] 89 P 649. Plaintiff, a helper on coal wagons, was walking along passageway in stable yard to get his dinner pail after day's work and after receiving pay. Held relation of master and servant still existed, and he could not recover for negligence of a driver fellow-servant in throwing out a bale of straw which struck him. Taylor v. George W. Bush & Sons Co. [Del.] 66 A 884. At common law servant and superintendent were fellow-servants. Jordon v. New England Structural Co. [Mass.] 83 NE 332. Coal trimmer, working in vessel, which was being loaded with coal, held fellow-servant of man engaged in wheeling coal on barrow and dumping it into hatch. Griffin v. Curran, 194 Mass. 359, 80 NE 509. Men engaged in constructing railroad tracks, who are taken to and from their work in a special car, are fellow-servants of the motorman of such car and the master is not liable for injury caused

performing duties tending to the accomplishment of the same general end or purpose,[61] are fellow-servants, though not at the time in question engaged in the same operation or on the same piece of work.[62]

by his negligence in colliding with a wagon. Kilduff v. Boston El. R Co. [Mass.] 81 NE 191. Foreman and sawmill employe while moving a car of slabs held fellow-servants barring recovery where the servant was injured by a slab falling on him. Younggren v. I. Stephenson Co. [Mich.] 14 Det. Leg. N. 783, 114 NW 341. A "working foreman," under Illinois law, is the fellow-servant of other employes while engaged as a common laborer. Bokamp v. Chicago & A. R. Co., 123 Mo. App. 270, 100 SW 689. Persons employed to do blasting in a trench held fellow-servants of plaintiff who was engaged in removing broken rock, for their negligence plaintiff could not recover against common employer. Citron v. O'Rourke Engineering Const. Co., 118 N. Y. 339, 80 NE 1092. Operator of lathe machine and blacksmith who tempered steel portions of the lathes are fellow-servants. Hohl v. Hewitt Motor Co., 106 NYS 881. Boss of repair train held not vice-principal as to employe engaged in unloading when giving signal to start. Peterson v. Philadelphia, etc., R. Co., 217 Pa. 401, 66 A 660. Term fellow-servants as applied in action for injuries to a switchman through negligence of another switchman and engineer implies that all were engaged in a common purpose. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Where one common day laborer called another to assist him in holding a chisel, they were fellow-servants. Vilter Mfg. Co. v. Kent [Tex. Civ. App.] 19 Tex. Ct. Rep. 955, 105 SW 525. Employes engaged in moving bales of cotton across a depot platform held fellow-servants engaged in same piece of work (Sayle's Rev. Civ. St. art. 4560h, and one on whom a bale was rolled by others could not recover. International, etc., R. Co. v. Still [Tex.] 18 Tex. Ct. Rep. 172, 101 SW 442. Crew of four men and a foreman used a scantling for a brake on a push car by direction of the foreman. While the scantling was being used by another employe it was jerked out of his hand, and fell in front of the car, derailing it. Held foreman was acting as plaintiff's fellow-servant. Owens v. San Pedro, etc., R. Co. [Utah] 89 P 825. Electrician in mill is fellow-servant of a workman injured because of negligence of the electrician in turning off the lights. Miller v. Centralia Pulp & Water Power Co. [Wis.] 113 NW 954.

61. Foreman of factory yard who let cars down a track against others, catching plaintiff's intestate between them, held fellow-servant of plaintiff's intestate who started between cars to go across yards. Schwind v. Floriston Pulp & Paper Co. [Cal. App.] 89 P 1066. All who enter into the employment of a common master to accomplish a common undertaking are prima facie fellow-servants, though their grades of service are different and some direct and supervise, while others perform the labor. Westinghouse, Church, Kerr & Co. v. Callaghan [C. C. A.] 155 F 397. Superintendent of street car barn held fellow-servant of night watchman in inspecting coal in coal bin. Lapre v. Woronoco St. R. Co. [Mass.] 82 NE 9. Foreman in the employ of an electric illuminating company having charge of electricians and wiremen and himself under orders of a superintendent is a fellow-servant of electricians. Guest v. Edison Illuminating Co. [Mich.] 14 Det. Leg. N. 712, 114 NW 226. An employe operating a machine with assistance of coemployes with incidental authority to supervise the work is a fellow-servant. Bovi v. Hess, 107 NYS 1001. Foreman of a gang trimming trees so as to admit stringing of electric wires held the fellow-servant of one injured because of his negligence in holding a limb which had been sawed off suspended. Lowery v. Huntington L. & P. Co., 105 NYS 852. Where a blower works company contracted to erect a blower in a sawmill, and the mill company directed some of its servants to assist, such servants were prima facie fellow-servants of the employes of the blower works company. Hoveland v. National Blower Works [Wis.] 114 NW 795. Servants of a common master, directly co-operating with each other in the same line of employment, which brings them into habitual association with each other, are fellow-servants. Gathman v. Chicago, 127 Ill. App. 150. Whether coal miners and driver hauling coal along mine entry are fellow-servants held a question for the jury. Jones & Adams Co. v. George, 125 Ill. App. 503. Where plaintiff was unable to escape from danger caused by caving of sides of gravel pit on account of wagon being situated so as to obstruct his escape, it was held that the negligence of the driver thereof was that of a fellow-servant. Village of Montgomery v. Robertson, 229 Ill. 466, 82 NE 396. Whether servant loading coal in a mine entry and those engaged in developing a cross cut therein are fellow-servants held a question for the jury. Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 NE 239.

62. All serving a common master working under the same control, deriving authority and compensation from the same source, and engaged in the same general business though in different grades or departments, are fellow-servants. Southern R. Co. v. Smith [Va.] 59 SE 372. Employes in a common employment, for the same general purpose, are fellow-servants though not engaged in the same department or grade of service. Fouquet v. New York Cent. etc., R. Co., 53 Misc. 121, 103 NYS 1105. Elevator operator in railway office building held fellow-servant of one employed in same building as draughtsman in survey department. Id. A shoveler in a phosphate mill and men working under a different foreman in another department of the mill held fellow-servants. Wilson v. Virginia-Carolina Chemical Co. [S. C.] 58 SE 1019. Employe of defendant held fellow-servant of another engaged in same kind of work under same foreman though usual labors for the day had ceased. Master not liable for act of one in turning hot water on the other. Baker v. Swift [Neb.] 110 NW 654. Where employe had ceased his labors but was still on the prem-

The rule most frequently applied is that it is not the rank of an employe, nor the authority he exercises over other employes, but the nature of the duty or service he is performing at the time which determines whether he was, at such time, a vice-principal or a fellow-servant.[63] The duty of the master to use ordinary care for the safety of his employes being personal and nondelegable,[64] any person charged with and engaged in the performance of any part of that duty is a vice-principal for whose negligence in the performance of such duty the master is liable.[65] Thus, persons charged with and engaged in the performance of the duty of the master to provide and maintain a reasonably safe place of work,[66] or reasonably safe appli-

ises washing himself and his tools, it was held the relation of master and servant still existed, and he could not recover for act of a fellow-servant. Id.

63. Dennis v. J. S. Schofield's Sons Co., 1 Ga. App. 489, 57 SE 925; Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65; Smith v. American Car & Foundry Co., 122 Mo. App. 610, 99 SW 790. The determination of whether one is a fellow-servant or vice-principal turns rather on the character of the act than on the relation of the employes to each other. Peters v. George [C. C. A.] 154 F 634. Test is not relative rank, but nature of act done by offending servant. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A 4. It is not the grade, or title, or position in the service which determines whether one is a fellow-servant or vice-principal, but the duty which the servant performs for the master and toward other servants. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839. Mere power of supervision will not make one a vice-principal. Id. It is the act itself that characterizes the performer as a vice-principal or a fellow-servant and not the title of the act or the fact that he performs superior duties. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369. The responsibility of the master is not determined by the difference in rank or by the fact that the negligent person was foreman in control, but upon the nature of the act complained of, whether it is an act of service or attempted performance of a nondelegable duty. Tilley v. Rockingham County L. & P. Co. [N. H.] 67 A 946. When one who is a vice-principal does the work of an ordinary laborer, his negligence while so engaged does not make the master liable. Miller v. American Bridge Co., 216 Pa. 559, 65 A 1109. The test as to whether a person is a fellow-servant or a vice-principal does not depend on the difference of grade, rank, or authority, but upon the character of the act performed. Pagan v. Southern R. Co. [S. C.] 59 SE 32. In the absence of statute, the test in determining whether a particular employe was a vice-principal or fellow-servant is whether he was at the time performing any of the positive, nondelegable duties of the master. Morrison v. San Pedro, etc., R. Co. [Utah] 88 P 998.

64. "Vice-principal" means a servant who represents the master in the discharge of his personal or absolute, nonassignable duties owed by him to his servants. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839.

65. A vice-principal is a servant who performs the nondelegable duties of the master. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65; Republic Iron & Steel Co. v. Lee, 126 Ill. App. 297. One designated by a vice-principal to perform duty delegated to the latter by the master is as to such duty a vice-principal. Cleveland, etc., R. Co. v. Austin, 127 Ill. App. 281. The nondelegable duty to provide a safe place to work and safe appliance or a safe method of doing the work is a duty of construction and provision and not of operation. Kinnear Mfg. Co. v. Carlisle [C. C. A.] 152 F 933. Where a master was under no obligation to convey the servant to his place of work, but such servant was permitted to ride in a conveyance furnished for skilled workman, such servant and the driver of the conveyance were not fellow-servants. Pigeon v. Lane [Conn.] 67 A 886. Among the master's nonassignable duties are providing reasonably safe appliances and place of work, inspection and repair, selection and retention of servants, establishment of proper rules and regulations, and instruction of servants. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839. Where an employer provided a contrivance for keeping windows open, whoever operated the contrivance acted for the master and was not a fellow-servant. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Where a foreman at the time of his act of negligence is acting in the master's stead and performing the master's duties, the master is liable. Sandusky Portland Cement Co. v. Rice [Ind. App.] 82 NE 1007. The rule that the fellow-servant rule does not apply when the negligent employe is charged with a duty the master is bound to fulfill applies to operation of a stone quarry. Harper v. Iola Portland Cement Co. [Kan.] 93 P 179. One entrusted with performance of an employer's personal duties is a vice-principal. Edge v. Southwest Mo. Elec. R. Co., 206 Mo. 471, 104 SW 90. A vice-principal is one to whom the master delegates a duty of his own, which is a direct, personal, and absolute obligation from which only performance will relieve him. Vants v. Roelofs, 217 Pa. 535, 66 A 749.

66. Where it was not part of the duty of a servant using a temporary flooring to lay it, negligence of employes who put it down was not attributable to him but to the master. Thompson-Starrett Co. v. Fitzgerald [C. C. A.] 149 F 721. Workman who constructed a brace for a servant to stand on while he worked acts for the master and is not fellow-servant. Combs v Rountree Const. Co., 205 Mo. 367, 104 SW 77. Under Miners' St., Ann. St. 1906, p. 4099, requiring shots to be placed by a fellow-servant of a miner, yet where entries were allowed to converge by the pit boss and a shot broke through, the negligence was that of the company. Kirby v. Manufacturers' Coal &

ances,[67] or to direct the mode of work,[68] or to warn [69] or properly instruct [70] em-

Coke Co. [Mo. App.] 106 SW 1069. Superintendent in charge of raising beams in a mill held the vice-principal and not the fellow-servant of a workman whom he directed to a dangerous place. McGuire v. Waterloo & Cedar Falls Union Mill Co. [Iowa] 113 NW 850. Where a workman was directed by the foreman to dig out holes and was injured by explosion of an unexploded charge of dynamite, held the foreman was a vice-principal charged with the duty of seeing that employes under him were provided with a safe place in which to work and the master was liable for his negligence. Carlson v. James Forrestal Co. [Minn.] 112 NW 626. Instructions approved. Id. Where a foreman of a gang moving iron plates ordered a workman to pass over the pile of plates, and while he was in the act of doing so the foreman raised a plate so that it slid from the pile and injured the workman, held the foreman acted as vice-principal. Dizonno v. Great Northern R. Co. [Minn.] 114 NW 736. A vice-principal who orders a workman into a dangerous place and then without warning negligently starts machinery by an act which under ordinary circumstances would be performed by him in the capacity of a fellow-servant must be held to have acted as vice-principal, as well in starting the machine as in ordering the workman into a dangerous place. Cody v. Longyear [Minn.] 114 NW 735. Railroad company which delegated duty of loading car to lumber company held liable for injury to its employe caused by negligence of employe of lumber company. Britt v. Carolina Northern R. Co., 144 N. C. 242, 56 SE 910. Roadmaster charged with duty of seeing that part of the road is kept in reasonably safe condition is not fellow-servant of locomotive fireman. Chicago, etc., R. Co. v. Birk [Tex. Civ. App.] 18 Tex. Ct. Rep. 72, 99 SW 753. Servants who stacked flour on top of which another was to work held not his fellow-servants (Commerce Mill. & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916), nor was the foreman who orderd him on top of the stack (Id.). Where head sawyer in mill neglected to use safety device to secure log carriage, as a result of which the carriage moved suddenly, injuring a setter whose place of work was on the carriage, the act of the head sawyer was held a breach of the master's duty to maintain the place of work in a reasonably safe condition. Eidner v. Three Lakes Lumber Co. [Wash.] 88 P 326. Duty of master to warn servant of unusual dangers of which former has or should have knowledge and the latter is ignorant held nondelegable. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 NE 857. Timbermen whose duty it is to keep roof of mine in safe condition are as to such duties vice-principals. Id., afg. 128 Ill. App. 249. Failure of vice-principal to obey instructions to remedy defect which rendered position of servant hazardous is the willful act of the operator. Wilmington & Springfield Coal Co. v. Sloan, 225 Ill. 467, 80 NE 265, afg. 127 Ill. App. 218. Where obstructions in a gangway were placed there by order of a vice-principal, who also ordered plaintiff to carry articles over the gangway, the fact that they were placed there through the agency of a fellow-servant is immaterial. Deering v. Barzak, 227 Ill. 71, 81 NE 1.

67. Where an employer is a corporation, it is liable for negligence of a subagent to whom it delegates the duty of furnishing suitable tools and appliances and keeping them in repair. Kane v. Babcock & Wilcox Co. [N. J. Err. & App.] 67 A 1014. Where chain furnished by master broke, owing to a weak link put in by one of his servants, master was liable for resulting injury both at common law and under Rev. Laws, c. 106, § 71, cl. 1. Morena v. Winston, 194 Mass. 378, 80 NE 473. Foreman in charge of erecting tackle, who orders the use of a discarded rope which breaks and injures a workman, is as to such work and as to such workman a vice-principal. Cal. Hirsch & Sons Iron & Rail Co. v. Coleman, 227 Ill. 149, 81 NE 21. Held that one who spliced horses for a scaffold was a vice-principal. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65. One whose duty it is to repair defect in appliances necessary to render work of servants safe is a vice-principal. Wilmington & S. Coal Co. v. Sloan, 225 Ill. 467, 80 NE 265.

68. A servant directing the movements of his other servants and controlling within the scope of his authority the manner in which the work is done is as to such control or direction a vice-principal, though he has no authority to employ or discharge. Chicago, etc., R. Co. v. Rathneau, 225 Ill. 278, 80 NE 119, afg. 124 Ill. App. 427. Question whether order given was within the authority of the vice-principal held one for jury. Marquette Cement Mfg. Co. v. Williams, 230 Ill. 26, 82 NE 424. One instructing a servant to stop a motor and repair it and assuring him that it will not be started while he is working at it is not, such order and assurance being within the scope of his authority, a fellow-servant. Id.

69. Foreman directed plaintiff to strike a drill held by foreman in a hole from which a blast had not been removed without warning him. The foreman, as to his duty to warn, was a vice-principal for whose failure to give due warning the master was liable Burrows v. Ozark White Lime Co [Ark.] 101 SW 744. The duty to give mine employes warning of an expected explosion is one which cannot be delegated so as to relieve the master from liability. Hendrickson v. U. S. Gypsun Co., 133 Iowa, 89, 110 NW 322. Act of foreman who knew a joint in a steam pipe had slipped and was liable to pull apart, in sending an employe there without warning, held negligence imputable to the master. Hardacre v. Sayles [R. I.] 66 A 298.

70. Where a servant was put to work with a machine chipping rivet heads, and the overseer directed him what rivets to work on and the foreman was present while he was working, held they were not his fellow-servants so as to relieve the master from their negligence in failing to instruct him as to how to do the work. Brockmiller v. Industrial Iron Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688. Person employed by proprietor of livery stable as manager and superintendent, and who employed the help, held a vice-principal, for whose negligence in failing to instruct an employe how to safely

ployes, or to inspect [71] and keep in repair,[72] have been held vice-principals, for whose failure to perform the duties entrusted to them, or for whose negligence in the performance of those duties, the master has been held responsible. On the other hand, when a master has fully performed his duties, he may properly entrust to the employes themselves the details of the work,[73] and if the act or omission complained of does not pertain to any duty of the master but is a mere detail of the work which it is the duty of employes to perform, it is the act or omission of a fellow-servant,[74] regardless of the rank or authority of the employe charged therewith.[75]

start an engine the proprietor was liable. Tivnan v. Keahon, 117 App. Div. 50, 101 NYS 1076.

71. A servant to whom is delegated the duty of inspecting a mine for gas is as to coworkers a vice-principal. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694. "Foreman" whose duty it was to inspect belts and belt lacings and change them when necessary held not fellow-servant of one using the machine though foreman also acted as ordinary laborer at times. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A 4. A mining boss employed to inspect safety of mine, as required by Burns' Ann. St. 1901, § 7479, is a vice-principal and not a fellow-servant. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. An employe of a railroad company whose duty it is to hang signal lights on a switch standard for the purpose of indicating that the switch is set in a particular manner must use reasonable care to observe the condition of the switch, and his failure to observe and report a defective switch is negligence for which the company is liable. Neitge v. Chicago, etc., R. Co. [Minn.] 114 NW 467. Evidence sufficient to show that a switch was in a defective condition and that an employe whose duty it was to report the same failed to do so. Id. Engineers employed to inspect and test appliances and supervise installation of the same are agents of the master, and for an injury resulting to a servant from their negligence in doing their work, the master is liable. Morton v. William Barr Dry Goods Co., 126 Mo. App. 377, 103 SW 588. Employes charged with the duty of keeping place and appliances safe and inspecting same are vice-principals. Missouri, etc., R. Co. v. Wise [Tex. Civ. App.] 106 SW 465. Roundhouse inspector charged with duty of inspecting pilots of engine or section men required to keep the track in safe condition are not fellow-servants of brakeman. Id.

72. Plaintiff was employed as assistant to engineer of stationary engine. It was engineer's duty to have repairs made when need of them was called to his attention. Plaintiff requested certain repairs which were not made and he was injured. Held engineer was vice-principal. Peterson v. Van Dusen, 101 Minn. 50, 111 NW 839. A machinist employed to repair an elevator cable was the representative of the master as to his duty to provide the elevator operator with a safe place and appliances. Haynie v. Hammond Packing Co., 126 Mo. App. 88, 103 SW 581.

73. Keeping switches closed and locked while not in use held a duty which could properly be delegated to an employe. Dixon v. Grand Trunk Western R. Co., 147 Mich. 667, 14 Det. Leg. N. 62, 111 NW 200. Jacking up end of a railroad car for purpose of repairing the trucks is not a part of the duty to furnish a safe place to work, but a duty of servants making repairs, and no recovery can be had from master for injury to a fellow-servant if the appliances furnished by the master were sufficient. Molt v. Illinois Cent. R. Co. [C. C. A.] 153 F 354. Where action was at common law for failure of foreman to give warning of an approaching train, it was held this was a mere detail of the work, and plaintiff could not recover. Curran v. Manhattan R. Co., 118 App. Div. 347, 103 NYS 351. Plaintiff was engaged in cutting away part of a bridge, and while doing so the rest of it fell, injuring him. The mode of doing the work, failing to support the part which fell, was held a mere detail of the work, and plaintiff and foreman and superintendent were held fellow-servants. Connolly v. Hall & Grant Const. Co. 117 App. Div. 387, 102 NYS 599. Where plaintiff consented and continued to use a machine after a bolt had dropped out 10 or 20 times, the master could use it without liability as to plaintiff, and the repairing of the machine by putting the bolt back became a mere detail of the work which could be done by fellow-servant. Loughlin v. Brassil [N. Y.] 79 NE 854. Fastening of shutter used to cover port hole of ship held a mere detail of work which could be delegated by master to servant, unless it required some special kind of fastening which could be safely entrusted to persons having occasion to use it. Rende v. New York & T S. S. Co., 187 N. Y. 382, 80 NE 206. The foreman in a gas plant whose duty it is to shut off gas from a main and air it before it is cleaned, where such act does not require any special skill, is the fellow-servant of a workman who goes into the main to clean it, and the master is not liable for his negligence in such respect. Tilley v. Rockingham County L. & P. Co. [N. H.] 67 A 946. Where a master employs competent servants for inspection and gives them reasonable facilities for working, he is not liable for negligent performance of such labor unless he knew of the defective inspection. Sage v. Baltimore, etc. R. Co. [Pa.] 67 A 985.

74. Act of a factory foreman in picking up a broken bottle and placing it in a corner where an employe, while working, stumbled over it and was injured, held the act of fellow-servant and the master was not liable. Freebourn v. Chamberlain Medicine Co. [Iowa] 113 NW 918. It is the duty of the master to furnish safe appliances but it is

But the authority conferred upon and exercised by employes is often applied as a test by which to determine whether they are vice-principals.[76] Thus, employes who are placed in the absolute control or management of an entire business, or of a distinct department of the business,[77] or who have charge of a particular piece of work with authority to control and direct the men engaged thereon,[78] are held to

the duty of the servant to operate them, and one to whom the duty of operating machinery is delegated is the fellow-servant of all engaged in carrying out the enterprise. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369. Where plaintiff was injured in course of operation of derrick, due to premature signal to engineer by foreman, held foreman was then engaged in a mere detail of the work and a fellow-servant of plaintiff. Berneche v. Hilliard [Minn.] 112 NW 392. Servant employed to strike a steel chisel with a hammer was injured by chip struck off in process of hammering. The defect alleged was deterioration of the chisel due to constant use. Held the duty of inspection and repair was incidental to use and the negligence was that of fellow-servants. Demato v. Hudson County Gas Co. [N. J. Err. & App.] 67 A 28. Where evidence showed that employes at work in subway tunnel were charged with duty of protecting themselves from injury, an injury caused by defect in place of work would be chargeable to fellow-servant but not to master. Ortolano v. Degnon Cont. Co., 104 NYS 1064.

75. One assisting in loading logs on a wagon, though called a manager, held a fellow-servant while engaged in so helping. Van Dyke v. Menlo Fruit Co. [Ga.] 59 SE 215.

76. A master who intrusts authority to control others is responsible for the manner of its exercise. Shaw v. Highland Park Mfg. Co. [N. C.] 59 SE 676. While the fact that a servant is known as a "superintendent," "foreman," or "overseer" does not alone show him to be a vice-principal, this fact, in connection with evidence as to the character of work done by him, and orders given by him, may be sufficient to take the question of his representative character to the jury. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839. Where one servant is placed in a position of subordination to and subject to the control of another servant of the common master and is injured without fault of his own in the performance of his duty and through the negligence of his superior, while acting in the common service, an action lies against the master. Bell v. Rocheford [Neb.] 110 NW 646.

77. A vice-principal is one placed in entire charge of a business, or a distinct branch of it, having not mere authority to superintend certain work or certain workmen, but who exercises control over the business or a particular branch of it, and where the employer does not exercise judgment or discretion of his own. Vants v. Roelofs, 217 Pa. 535, 66 A 749. A foreman who is intrusted with a paper cutting machine, its repair and care, and who knowing of its defective condition directs an ignorant and inexperienced workman to operate it, is a vice-principal and not a fellow-servant. Brunger v. Pioneer Roll Paper Co. [Cal. App.] 92 P 1043. One who employed servant, gave him and others directions about what to do, being in charge of elevator, and who ordered servant into a bin of oats to correct a defect therein, the servant being smothered to death by a fall of oats, was a vice-principal and not a fellow-servant of decedent. Meier v. Way, Johnson, Lee & Co. [Iowa] 111 NW 420. Shift boss in mine held vice-principal of miner. Laitinen v. Shenango Furnace Co. [Minn.] 114 NW 264. Car dispatcher who has control of motormen and conductors as well as operation of cars is not a fellow-servant of motormen and conductors. Edge v. Southwest Mo. Elec. R. Co., 206 Mo. 471, 104 SW 90. Dispatcher on interurban electric railroad is vice-principal of motorman and conductors. Id. The nature of the business alone can separate it into departments. Cannot be divided into departments by the testimony of servants. Westinghouse, Church, Kerr & Co. v. Callaghan [C. C. A.] 155 F 397. The fact that a foreman in charge of a single job worked with men under him, had power to hire, discharge, and direct their movements, did not make that single job a separate department of the master's business and make the foreman a vice-principal, but he remained a fellow-servant. Vilter Mfg. Co. v. Otte [C. C. A.] 157 F 230. Section boss in mill whose duty it was to oil rollers, and who had charge of employes in his section, held not the fellow-servant of an infant whom he sent to oil some rollers. Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626.

78. Foreman of contractor erecting building directed a carpenter to take a gang of men and move a derrick. Held carpenter was a foreman as to such work. Farrell v. B. F. Sturtevant Co., 194 Mass. 431, 80 NE 469. An employe whose duty it is to direct and control workmen under him is a vice-principal as to the work entrusted to him. Smith v. American Car & Foundry Co., 122 Mo. App. 610, 99 SW 790. Employe in railroad shop was ordered to assist a machinist in drilling a hole in a vise, and in so doing was subject to the machinist's directions. Held machinist was not his fellow-servant and plaintiff could recover for machinist's negligence in failing to secure the vice. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 913, 99 SW 738. Evidence that the defendant's foreman told the plaintiff to help A. whenever A. called upon him to do so is sufficient to establish the relation of vice-principal and subordinate between A. and the plaintiff. Gill v. Pittsburg, etc., R. Co., 10 Ohio C. C. (N. S.) 276. Plaintiff, laborer on roadbed, was injured while assisting foreman to put a charge of powder under a rock under the direction of a "walking boss." Foreman directed work of men under him, hired and discharged them, and "boss" had general supervision of foremen. Held foreman and boss were not plaintiff's fellow-servants. Pitts v. Wells, 31 Ky. L. R. 208, 101 SW 1192. Where employer places a foreman in charge of construction of a building, and in charge of men who must obey his orders, a negligent

represent the master. One who is thus made a representative of the master does not lose his representative character by engaging occasionally in work as an ordinary employe.[79] The negligence of an alleged vice-principal will not make the master liable unless such employe was acting at the time within the scope of his employment,[80] or was exercising authority in fact conferred upon him by the master.[81]

In some jurisdictions the test applied is the extent to which employes associate in the performance of their usual duties.[82] Thus, it is held that employes engaged in different departments of a business are not fellow-servants.[83]

Railway employes.[See 8 C. L. 892]—Holdings as the relation existing between railroad employes are given in the note.[84]

order by the foreman in obeying which a servant is injured renders the master liable. McCracken v. Lantry-Sharpe Cont. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 959, 101 SW 520.

79. A superintendent is not relieved from the duty to use due care for the safety of employes under him because he temporarily takes the place of an ordinary employe. Jordan v. New England Structural Co. [Mass.] 83 NE 332.

80. In action for injury alleged to have been caused by defendant's foreman, an instruction requiring jury to find that foreman was acting within the scope of his employment was proper. Conroy v. G. W. & F. Smith Iron Co., 194 Mass. 468, 80 NE 488. A foreman in employ of an electric illuminating company having charge of electricians and wiremen has no authority to bind the company by an agreement that he would watch the switch box and see that it was not closed, and the company was not liable for an injury resulting from his failure to do so. Guest v. Edison Illuminating Co. [Mich.] 14 Det. Leg. N. 712, 114 NW 226. Where a railroad bridge foreman while in pursuit of his own affairs and not engaged in any duty for the company went upon the track at night in a hand car and was killed by colliding with a special train, held he did not stand in the relation of servant at the time and the statute making railroad companies liable for negligence of fellow-servants had no application. Russell v. Oregon Short Line R. Co. [C. C. A.] 155 F 22. Where chief operator who was vice-principal for telephone company, for the purpose of maintaining discipline among operators, took hold of the chair of an operator and violently whirled it around, injuring the operator, the company was liable, the act being within scope of his authority. Compher v. Missouri & Kansas Tel. Co. [Mo. App.] 106 SW 536.

81. Mere assumption of duties of general direction and superintendence by a fellow-servant in the absence of express or implied authority does not constitute him a vice-principal. Safety Insulated Wire & Cable Co. v. Matthews [C. C. A.] 151 F 761. Servant who directed another to adjust belt held not authorized. Id. To bind a master for damage to his servant resulting from the order or direction of an employe, it must appear that the employe giving such order or direction had authority from the master to give it. McMillan v. Middle States Coal & Coke Co., 61 W. Va. 531, 57 SE 129. In West Virginia it is held that a mine boss appointed pursuant to the statute is not, merely from his position as such, the servant of the coal mine owner outside his duties prescribed by statute. Ann. Code 1906 § 410. Id. And such owner is not responsible for his orders to servants or his negligence resulting in injury to them. Id. Whether a section hand properly gave orders and had authority to do so to a workman directing him to a dangerous place held for the jury. Saures v. Stevens Mfg. Co. [Mass.] 82 NE 694.

82. Persons employed by the same master to accomplish one common object and so related in their labors as ordinarily to be exposed to injuries caused by each other's negligence are fellow-servants. In Indian Territory car repairer is fellow-servant of brakeman engaged in switching in yards where repairer worked. Snellen v. Kansas City So. R. Co. [Ark.] 102 SW 193.

83. Servant employed to fire steam shovel used in constructing road is not fellow-servant of employes engaged in operating trains. Oliver v. Roach, 31 Ky. L. R. 284, 102 SW 274.

84. Held vice-principal: Employes loading coal on the tender not fellow-servants of brakeman. Louisville, etc., R. Co. v. Clark [Ky.] 106 SW 1184. Engineer, conductor, and brakeman of a train which they negligently permitted to stand on the main track on another train's time are not fellow-servants of brakeman on such other train. Louisville, etc., R. Co. v. Brown [Ky.] 106 SW 795. Trainmaster in charge of train and crew ran train negligently and in violation of rules, and train collided with another, injuring engineer thereof. Held trainmaster was vice-principal and not fellow-servant of engineer. Morrison v. San Pedro, etc., R. Co. [Utah] 88 P 998. Flagman at crossing not fellow-servant of fireman. Ferguson v. Central R. Co. [N. J. Err. & App.] 67 A 602. Foreman of switching crew vice-principal when exercising authority to direct and control crew. Chicago, etc., R. Co. v. Strong, 228 Ill. 281, 81 NE 1011, afg. 129 Ill. App. 196.

Held fellow-servant. A switch tender and fireman. Tillson v. Maine Cent. R. Co., 102 Me. 463, 67 A 407. Crossing tender and yard man leaving switch unlocked. Dixon v. Grand Trunk Western R. Co., 147 Mich. 667, 14 Det. Leg. N. 62, 111 NW 200. Section hand and his foreman. Chandler v. St. Louis, etc., R. Co. [Mo. App.] 106 SW 553. Locomotive engineer and fireman. Pearsall v. New York Cent., etc., R. Co., 189 N. Y. 474, 82 NE 752. Servant who cleans cinders out of engines and hostler who runs engines from one part of the yard to another. Atchison, etc., R. Co. v. Dickens [Ind. T.] 103 SW 750. Sec-

Statutory modification of common law fellow-servant doctrine. See 8 C. L. 893 The operation of the common-law rule that there can be no recovery for negligence of a fellow-servant has been limited by statute in many states. In other states statutes supply the tests by which it may be determined whether an employe charged with negligence was a fellow-servant or vice-principal as to the injured employe. In the notes are grouped, by states, holdings as to the validity and application of such statutes.[85] Congress may, as between interstate carriers and such of its em-

tion foreman and locomotive engineer. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369. Engineer and switchman. Id. Brakeman and engineer. Southern R. Co. v. Elliott [Ind.] 82 NE 1051. Engineer and engine cleaner. Sage v. Baltimore, etc., R. Co. [Pa.] 67 A 985. Flagman and engineer. Lyon v. Charleston, etc., R. Co., 77 S. C. 328, 58 SE 12. Engineer and brakeman. Pagan v. Southern R. Co. [S. C.] 59 SE 32. Engineer and switchman. Crane Co. v. Hogan, 228 Ill. 338, 81 NE 1032. Fireman and engineers of different train crews. Illinois, etc., R. Co. v. Chapin, 128 Ill. App. 170. Brakemen of two train crews. Chicago, etc., R. Co. v. Henderson, 126 Ill. App. 530. Engine crew and common laborers who loaded cars with cinders, etc. Chicago, etc., R. Co. v. Kimmel, 123 Ill. App. 382.

Question held for jury: Foreman of switching crew ordering switchman to uncouple cars of moving train and then negligently ordering train stopped. East St. Louis Connecting R. Co. v. Meeker, 229 Ill. 98, 82 NE 202. Whether in giving signal to back switch engine foreman of crew was acting as vice-principal. Chicago, etc., R. Co. v. Strong, 228 Ill. 281, 81 NE 1011.

85. Alabama: Code 1896, § 1749, making a railroad company liable for injuries caused by negligence of any person in charge of any "signal, points," etc., covers cases of negligence of persons having charge of signals generally. Cogbill v. Louisville, etc., R. Co. [Ala.] 44 S 683. An employe who had nothing to do with the starting of cars in a mine and whose only duty was to sprag wheels of the cars did not have charge of cars within Code 1896, § 1749, making employer liable for negligence of a servant in control of cars. Woodward Iron Co. v. Curl [Ala.] 44 S 969. Blacksmith at a mine having no duty in connection with the railway at the mine is not within Code 1896, § 1749a. Id. One charged with duty of spragging wheels and retarding speed of cars at a mine and who had no one under his control is not a superintendent for whose negligence the master is liable. Id. Code 1896, § 1749, subd. 2, makes an employer liable for injuries resulting from negligence of one having any superintendence entrusted to him. Complaint held to show negligence of one acting as superintendent of logging train and not of mere engineer. Creola Lumber Co. v. Mills [Ala.] 42 S 1019. Under Code 1896, § 1749, subd. 5, making an employer liable for negligence of a person having charge or control of any signal, points, locomotive, engine, switch, car, or train upon a railway, or of any part of the track, plaintiff must allege and prove that he was at the time of the injury employed and engaged in and about the railway; it is not enough to allege employment in and about a plant of one who also owns a railway. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 S 1034. Certain counts held sufficient, and another insufficient within this rule. Id. Complaint under Code 1896, § 1749, subd. 2, alleging that death of servant was caused by negligence of person whose name was unknown in service of company, who had control and management of train, the moving of which caused the death complained of, etc., held not demurrable. Southern R. Co. v. Shook [Ala.] 43 S 579. A count alleging an injury resulting from obedience to an order of one exercising superintendence under Code 1896, § 1749, subd. 3, may allege that the person was a certain employe (as that he was an engineer, exercising superintendence). Creola Lumber Co. v. Mills [Ala.] 42 S 1019. But a count under this clause is insufficient if it does not allege that the order was negligently given and set out the order. Id. Where proof showed that train was started in response to signal from baggage master, not shown to have charge or superintendence over train, and that death resulted from so starting the train, a case was not made under Code 1896, § 1749, subd. 2. Southern R. Co. v. Shook [Ala.] 43 S 579. Allegation in count upon Code 1896, § 1749, subd. 5, that person was engaged in operating a train, held a sufficient allegation that he had charge or control of it. Creola Lumber Co. v. Mills [Ala.] 42 S 1019.

Arkansas: Car inspector and engine foreman in charge of switch engine not engaged for a common purpose but working in different departments are not fellow-servants within Kirby's Dig. §§ 6658-6660. St. Louis, etc., R. Co. v. Dupree [Ark.] 105 SW 878.

Georgia: Under the statutes of Georgia a servant of a railroad company does not assume risk of negligence of a fellow-servant. Atlanta, etc., R. v. McManus, 1 Ga. App. 302, 58 SE 258.

Illinois: A statute making mine owners liable for negligence of their managers and examiners is valid. Not unfair in classification. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed 708. Nor is it bad because it restricts such owners to a limited number of licensed persons in selecting such employes. Id. Fact that mine owner is compelled by statute to employ licensed manager does not relieve him from liability for such manager's acts. Kellyville Coal Co. v. Strine, 117 Ill. App. 115. Mining operator is liable for any willful neglect of his manager, though he is "certified." Donk Bros. Coal & Coke Co. v. Lucas, 127 Ill. App. 61.

Indiana: Under Burns' Ann. St. 1901, § 7083, making master liable where injury is caused by negligence of any person whose orders the servant is bound to obey, where the proximate cause of the injury is the act

of a fellow-servant of the negligence of the person injured, the master is not liable. Sandusky Portland Cement Co. v. Rice [Ind. App.] 81 NE 215. "Order or direction" as used in the statute means a special order or direction; an injury through negligence of a foreman under whose general directions plaintiff was working is not within the statute. Indianapolis St. R. Co. v. Kane [Ind.] 80 NE 841. Complaint held to show a special, as distinguished from a general, order, where it was alleged that plaintiff was ordered to do certain specified work at a certain spot. Id. Complaint held to state cause of action for injuries while conforming to order of conductor. Pittsburg, etc., R. Co. v. Ross [Ind.] 80 NE 845. Under Burns' Ann. St. 1901, § 7083, a liability may arise in favor of a conductor of a railroad train for negligence of the engineer, though the conductor is in some respects superior to the engineer. Pittsburg, etc., R. Co. v. Collins [Ind.] 80 NE 415. Switch targets are not "signals" within Burns' Ann. St. 1901, § 7083, making a railroad company liable for negligence of an employe having charge of any signal; such statute applies only to signals complete within themselves. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369. The Indiana statute is held unconstitutional as applied to other than railroad corporations. Bedford Quarries Co. v. Bough, 168 Ind. 671, 80 NE 529. Burns' Ann. St. 1901, § 7083, subd. 2, making railroads and other corporations liable for injuries caused by negligence of an employe, having power to give orders to others, held invalid as applied to other than railroad corporations as violative of 14th amendment to Federal constitution. Id.

Iowa: Code § 2071, imposing liability on railroad companies for negligence of fellow-servants, amended by acts 27th Gen. Assem. p. 33, held the provisions of the amendment were germane to the original act and covered by the title. McGuire v. Chicago, etc., R. Co., 131 Iowa 340, 108 NW 902.

Kansas: Laws Kan. 1874, p. 143, providing that a railroad company shall be liable to employes for injury caused by negligence of fellow-servant, while restricted to hazards peculiar to railroading, applies where a track repairer is injured by a collision while being taken from his place of work in a caboose. Iarussi v. Missouri P. R. Co., 155 F 654. Servant does not assume risk of negligence of fellow-employe under railway employer's liability act, Missouri, etc., R. Co. v. Green, 75 Kan. 504, 89 P 1042. Defendant held liable under railway employer's liability act where an employe was injured by fall of engine which was being repaired, due to negligent selection and adjustment of a block under it by another employe. Id.

Kentucky: Laws 1893, p. 294, imposing on railroads liability for injury to employes, applies to all persons operating railroads, whether corporate or natural, and does not impose on corporations burdens not imposed on individuals. Louisville, etc., R. Co. v. Melton [Ky.] 105 SW 366. Not void as to railroad carpenter on the ground that it does not apply to carpenters not in railroad service. Id.

Massachusetts: The fact that a foreman in charge of a gang of men works the same as the rest of the men does not necessarily exclude him from being one whose principal duty is that of superintendence, within Rev. Laws Mass., c. 106, for whose negligence resulting in injury to a servant the master is liable. New England Tel. & T. Co. v. Butler [C. C. A.] 156 F 321. Whether a workman directing removal of wires from poles was one whose principal duty was superintendence of the work within Rev. Laws Mass. c. 106, making master liable for his negligence, held for jury. Monroe v. Ley [C. C. A.] 156 F 468. Person exercising superintendence called on laborer to engage in iron work on building without instructing him. Master liable for resulting injuries under Rev. Laws, c. 106, § 71. Reardon v. Byrne [Mass.] 80 NE 827. Where foreman directed certain work to be done, and when plaintiff was engaged in it foreman took a hand, and as a result of his negligence plaintiff was injured, a finding that foreman's act was one of superintendence was proper. Coates v. Saley, 194 Mass. 386, 80 NE 464. Whether negligent, for jury. Id. Where coal trimmer was injured by a load of coal dumped upon him, evidence held insufficient to show an order by a person in charge to dump the coal. Griffin v. Curran, 194 Mass. 359, 80 NE 509. Whether car dispatcher was negligent in ordering car forward where collision, causing motorman's death resulted, held for jury. Doe v. Boston, etc., R. Co [Mass.] 80 NE 814.

Minnesota: The Minnesota statute applies only in the case of injuries resulting from hazards peculiar to the use and operation of railroads (Tay v. Willmar, etc., R. Co., 100 Minn. 131, 110 NW 433), and whether a particular hazard or danger is within the meaning of the statute as so construed may be a question of fact for the jury (Id.). Men engaged in breaking a rail, making repairs. Foreman dropped his end too soon and rail fell upon plaintiff. Whether statute applied held for jury. Id. Where a servant riding with a crew on a hand car was injured because the car was run too fast and in a spirit of fun, held that the men in overspeeding the car were engaged within the scope of their duty and the master was liable. Soderlund v. Chicago, etc., R. Co., 102 Minn. 240, 113 NW 449.

Missouri: Fellow-servant act of 1897 applies to electric railway 35 miles in length and passing through 12 or 15 towns. Edge v. Southwest Elec. R. Co., 206 Mo. 471, 104 SW 90.

Montana: Laws 1903, p. 156, § 1, providing that a railway corporation shall be liable for damages sustained by a servant because of the negligence of a fellow-servant, held "railway corporation" means all persons, individual and corporate, operating railroads and is not in violation of the "equal protection of the laws" clause of the Federal constitution. Lewis v. Northern P. R. Co. [Mont.] 92 P 469.

New York: Where a machinist employed to assist in cleaning sheaves and cables of elevators was told by the chief engineer to assist another, held he and such other were fellow-servants. The mere fact that the other was directed to stand guard and give directions did not make him a superintendent within Laws 1902, p. 1748. Falk v. Havemeyer, 108 NYS 140. Foreman of telephone line crew is not negligent within Laws 1902, p. 1748, in failing to warn a lineman, who is experienced and knows of the

danger, to ascertain before climbing a pole whether it is weak at the base and liable to fall when wires are removed. La Duke v. Hudson River Tel. Co., 108 NYS 189. An employe operating a machine with assistance of other employes with incidental power to supervise but without authority to superintend is not a superintendent within Laws 1902, p. 1748. Bovi v. Hess, 107 NYS 1001. Where a longshoreman was injured by the fall of a box negligently placed near the gangway of the boat under the direction of one who, when the superintendent was present, was a fellow-servant, held that in absence of proof that the superintendent was absent and that the one who gave the direction was a superintendent, the master was not liable under Laws 1902, p. 1748. Williams v. Citizens' Steamboat Co., 106 NYS 975. Where a servant and superintendent were adjusting a belt and the superintendent jerked it and caused the servant's arm to be caught in a revolving shaft, held his act was that of a fellow-servant and the master was not liable under Laws 1902, p. 1748, making the master liable for negligence of a superintendent. Kujava v. Irving, 106 NYS 837. Act of foreman directing a yard employe to go between cars at a time when cars were being kicked against the cars standing on the track held an act of superintendence within Laws 1902, p. 1748, for which the company was liable. Onesti v. Central New England R. Co., 121 App. Div. 554, 106 NYS 233. Machine shop boss held a superintendent within Laws 1902, p. 1748, while directing the work of lowering an iron flask by hand after the men had asked for a crane. Ozogar v. Pierce, Butler & Pierce Mfg. Co., 105 NYS 1087. Under Laws 1902, p. 1748, making master liable for negligence of a superintendent, such superintendent is not the alter ego of the master when he performs the work of a fellow-servant. Id. Where an injury was caused by the act of a superintendent in starting machinery, it was error to refuse to submit whether the act of the superintendent was in line of his duty rendering the employer liable under Laws 1902, p. 1748. Gallagher v. Newman, 190 N. Y. 444, 83 NE 480. Instruction held insufficient to submit such issue. Id. Laws 1902, p. 1748, makes an employer liable where injury is caused by negligence of his superintendent, but not where the negligent act is subject to performance by subordinate employes and includes no element of supervision. Id. Direction of a foreman who had power to stop machinery that it be stopped, or failure to so direct, while a defect is being repaired, was an act of superintendence within Laws 1902, p. 1748, making an employer liable for injuries caused by negligence of one exercising superintendence. Guilmartin v. Solway Process Co., 189 N. Y. 490, 82 NE 725. Under New York Employers' Liability Act, Laws 1902, § 1748, making the master liable for negligence of superintendent, the owner of a factory is liable for act of a foreman whose sole duty was to superintend the work, make out reports, and have charge of appliances. Castner Electrolytic Alkali Co. v. Davies [C. C. A.] 154 F 938. Laws 1902, p. 1748, makes an employer liable for injury caused by negligence of a superintendent, irrespective of the care taken to provide competent superintendents. Finnigan v. New York Cont. Co., 107 NYS 855. Plumber hired to fit and repair pipes in blacksmith shop, without power to hire or discharge helper, who was employed by master and told to follow directions of the plumber, held a fellow-servant of the helper and not a superintendent, hence master not liable for injuries to helper caused by selection of improper appliances by plumber. McConnell v. Morse Iron Works & Dry Dock Co. [N. Y.] 80 NE 190. Laws 1906, c. 657, p. 1682, making person in charge of employes or of signals, switches, engines, etc., vice-principals, is valid. Schradin v. New York Cent., etc., R. Co., 103 NYS 73. Employe in charge of work of cleaning ashes from engines, in absence of regular superintendent, and who had charge of and directed men under him, held a superintendent under Laws 1902, c. 600. Mikos v. New York Cent., etc., R. Co., 118 App. Div. 536, 102 NYS 995. Superintendent held negligent in directing engine to be moved while cleaner was at work under it. Id. Plaintiff cannot sue at common law and recover under the employer's liability act. Curran v. Manhattan R. Co., 118 App. Div. 347, 103 NYS 351. Where employe was injured while holding a drill which another struck, a chip flying off the bur of the drill, it was held not negligence for a superintendent to direct them to hurry, where there was no proof that he directed use of drill in question or knew that it was defective. Kellogg v. New York Edison Co., 105 NYS 398. Foreman of gang of men, in immediate charge of work being done, and the men engaged in it, directed that planks in a room be removed and not replaced. This was held an act of superintendence under Laws 1902, c. 600. Heffron v. Lackawanna Steel Co., 105 NYS 429. The act being within the scope of his authority, it was no defense that he violated instructions to him in giving the order. Id. Person who was acting superintendent of deliveries for coal company assisted a driver in closing tailboard of wagon, and allowed it to fall, injuring the driver. Held this was not an act of superintendence under the statute. Hope v. Scranton & Lehigh Coal Co., 105 NYS 372. Where blacksmith retempered part of a lathe after it had been reshaped, but did it improperly, so that it broke, injuring plaintiff, blacksmith represented the master under Laws 1902, c. 600, § 1, making master liable for negligence of one having care of machinery, etc. Hohl v. Hewitt Motor Co., 103 NYS 755.

North Carolina: Revisal 1905, § 2646, makes railroad company liable for negligence of employe resulting in injury to coemploye. Britt v. Carolina Northern R. Co., 144 N. C. 242, 56 SE 910. Whether a fellow-servant for whose negligence a master is liable under Revisal 1905, § 2646, was negligent in dropping the end of an engine rod held for the jury. Horton v. Seaboard Air Line R. Co. [N. C.] 58 SE 993. Where a servant repairing an engine was injured by a fellow-servant dropping an end of a rod which he was holding, the mere fact of dropping the rod held not conclusive of negligence. Id. Federal court will follow state decision that Rev. Laws N. C. 1905, § 2646, applies to a manufacturing corporation which owns and operates a spur track on its grounds as incidental to its main busi-

ployes as are engaged in interstate commerce, provide for liability for negligence of a fellow-servant,[86] but an act not limiting its operation to employes so engaged is beyond the Federal power.[87]

(§ 3) *F. Risks assumed by servant. Nature of defense.* See 8 C. L. 896—Assumption of risk is a matter of contract, express or implied; contributory negligence is a matter of conduct.[88] The defense of assumption of risk is not available where

ness. United States Leather Co. v. Howell [C. C. A.] 151 F 444.

Ohio: The fellow-servant act (87 Ohio Laws, p. 150), providing that negligence of a fellow-servant is no defense to the master as to injuries to railroad employes, is valid under the constitution of Ohio and the 14th amendment of the Federal constitution. Erie R. Co. v. Kane [C. C. A.] 155 F 118.

South Carolina: Under Const. 1895, art. 9, § 15, an engineer is a vice-principal and not a fellow-servant of his fireman. Pagan v. Southern R. Co. [S. C.] 59 SE 32. Prior to the adoption of constitution 1895, the fellow-servant rule was applicable to railroads. Id. Under Civ. Code Ga. 1895, § 2610, a railroad is liable where an employe is injured by negligence of a fellow-servant. Bussey v. Charleston, etc., R. Co. [S. C.] 58 SE 1015. The change in the fellow-servant law made by Constitution of 1895 applies only to railroad employes. Wilson v. Virginia-Carolina Chemical Co. [S. C.] 58 SE 1019.

Tennessee: Acts Tenn. 1903, p. 520, c. 237, requiring employment of mine foreman having certificate of competency and relieving the owner from liability for injuries resulting from his negligence, and penalizing failure to operate a mine for more than 30 days without such foreman, held that provision permitting operation for 30 days without foreman does not give an unlicensed foreman the standing of a lawful foreman during such period, though he is afterwards licensed. Cumberland Coal & Coke Co. v. Gray [C. C. A.] 152 F 939.

Texas: Servant of railroad corporation may recover for injuries caused by negligence of a fellow-servant. Lodwick Lumber Co. v. Mounce [Tex. Civ. App.] 18 Tex. Ct. Rep. 516, 102 SW 142. Evidence held to sustain a verdict for a servant injured on the ground that it was due to negligence of other servants. Texas, etc., R. Co. v. Middleton [Tex. Civ. App.] 19 Tex. Ct. Rep. 487, 103 SW 203. Employe unloading ties from box car held engaged in work connected with operation of the road, within Sayles' Ann. Civ. St. 1897, art. 4560f, making the railroad company liable for negligence of fellow-servant. St. Louis S. W. R. Co. v. Thornton [Tex. Civ. App.] 18 Tex. Ct. Rep. 888, 103 SW 437. Where employe was injured where his co-workmen, who were carrying a rail, fell, held that he was not engaged in railroad work within the statute making railroads liable for negligence of a fellow-servant. Gulf, etc., R. Co. v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 145, 103 SW 447. Engineer of switch engine while oiling and the fireman while filling the tank are engaged in operating the engine within Rev. St. 1895, art. 4560g, abolishing the fellow-servant rule under such circumstances. Texas, etc., R. Co. v. Walton [Tex. Civ. App.] 19 Tex. Ct. Rep. 651, 104 SW 415. Railroad company held liable for injuries to engineer occasioned by fireman opening a valve and permitting steam to escape, where such act was his duty when the engineer directed him to do it. Id. Railroad employe was injured while assisting in replacing a tram car on an ordinary railroad track, connecting defendant's main line with its creosoting plant. Held the fellow-servant statute applied, and defendant could not defeat recovery by proof that fellow-servant caused injury. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 843, 99 SW 743. Acts 25th Leg. approved June 18, 1897 (Laws 1897, p. 14, c. 6), so construed, is not unconstitutional. Id.

Virginia: Yard foreman who had no authority over yard engineer except to direct him where to move his engine, and who had no right of employment or discharge, is a fellow-servant and not a vice-principal within Const. § 162, abolishing doctrine of fellow-servants as to certain railroad employes. Southern R. Co. v. Smith [Va.] 59 SE 372. Yard foreman in the discharge of whose duties it was necessary and customary for him to ride on a yard engine is an employe "engaged in service requiring his presence" on an engine, within Const. § 162, abolishing fellow-servant doctrine as to railroad employes. Id.

Wisconsin: Injury caused by negligent act of foreman of section crew in causing hand car to roll upon plaintiff while it was being taken from track held to have arisen from a risk or hazard peculiar to the operation of a railroad, within Rev. St. 1898, § 816, as amended by Laws 1903, c. 448. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427. Instruction to find railroad company liable for death of brakeman, if another employe gave signal to back cars, while he was between them, as a result of which he was killed. Hayes v. Chicago, etc., R. Co., 131 Wis. 399, 111 NW 471.

86. Howard v. Illinois Cent. R. Co., 28 S. Ct. 141.

87. Act July 11, 1906, held invalid as a whole. Howard v. Illinois Cent. R. Co., 28 S. Ct. 141.

88. The doctrine of assumed risk depends upon an implied contract between the parties. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 NE 1062. Contributory negligence is a matter of conduct. Id. The defense of assumed risk rests on the fact that the servant voluntarily exposed himself to danger. Southern P. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. "Assumed risks" means dangers incident to the work or due to conditions within the knowledge of the servant. The conscious negligence of a servant in doing or omitting to do an act is not "assumed risk." Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149.

a person injured was not at the time acting as an employe.[89] The assumption of a particular risk will not defeat recovery for injuries caused by another risk which was not assumed.[90]

It is usually held that the defense of assumption of risk is not available where the negligence charged is a violation of a positive statutory duty,[91] and some statutes expressly exclude the defense.[92] Under some statutes, however, the defense is available.[93]

89. Plaintiff, extra brakeman, was struck by engine while using customary route across tracks to employes' club house, maintained by road, to be on hand in case he was wanted on a train during the night. Held he was not an employe at the time. Best v. New York Cent., etc., R. Co., 117 App. Div. 739, 102 NYS 957. Hence he did not assume the risk. Id.

90. Where plaintiff was injured by reason of defects in engine or pilot and in turntable, the fact that he knew and assumed risk of injury from defect in turntable would not bar recovery. Barschow v. Lake Shore, etc., R. Co., 147 Mich. 226, 13 Det. Leg. N. 1060, 110 NW 1057. Track layer in coal mine, whose duty it was to lay and keep in repair tracks, but not to keep them clear of obstructions, did not assume risk of an obstruction in a switch preventing its automatic working while he was temporarily engaged as a car driver. Central Coal & Iron Co. v. Walker, 30 Ky. L. R. 621, 99 SW 309. Though a servant cannot recover for an injury to his eye by being struck by a rivet thrown from pulley belt which broke on the theory that the belt was defective, where it appeared that he knew of the defect and assumed the risk, he can recover on the theory that the breaking was caused by a pulley negligently permitted to remain in a defective condition, of which defect he did not know. Poindexter v. Receivers of Kirby Lumber Co. [Tex.] 107 SW 42.

91. Assumption of risk is not available as a defense in an action based on a violation of the Indiana factory act. Inland Steel Co. v. Kachwinski [C. C. A.] 151 F 219. The doctrine of assumption of risk does not apply where the negligence complained of consists in the violation of an imperative statute. Burn's Ann. St. 1901, § 7087i, requiring dangerous machinery to be guarded. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981. Under Burns' Ann. St. 1901, §§ 7472, 7479 it is the duty of a mining boss to see that all loose overhead material is removed before miners are permitted to work in mine, and a miner injured because of nonperformance of this duty did not assume the risk incident to his working place because the condition of the place was constantly changing. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Doctrine of assumed risk not applicable under Burns' Ann. St. 1901, § 7083, subd. 4, where railroad employe was injured because of negligence of fellow-servant. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Railroad employe does not assume risk of injury resulting from disobedience of city ordinance by fellow-servant. Id. An action for negligence of a person authorized to, and giving, a special order, under Burns' Ann. St. 1901, § 7083, subd. 2, cannot be defeated by a plea of assumption of risk. Indianapolis St. R. Co. v. Kane [Ind.] 80 NE 841; Pittsburgh, etc., R. Co. v. Ross [Ind.] 80 NE 845. Assumption of risk is not available as a defense in an action by an employe for injuries sustained because of failure of the master to guard machinery as required by Laws 1903, p. 540, c. 356. Western Furniture & Mfg. Co. v. Bloom [Kan.] 90 P 821. Risk arising from failure to guard belt, as required by Comp. Laws, § 5349, not assumed. Swick v. Aetna Portland Cement Co., 147 Mich. 454, 111 NW 110. Employe does not assume risk arising from failure to guard revolving shaft, under Rev. St. 1899, § 6433, requiring such shafts to be guarded and § 6450, making violation of the statute a misdemeanor. McGinnis v. Rigby Print. Co., 122 Mo. App. 227, 99 SW 4. Under Laws 1902, p. 1750, risks which result from failure of the master to provide reasonably safe appliances are not assumed. Perrotta v. Richmond Brick Co., 108 NYS 10. Risk of injury because of a defective scaffold not assumed under Laws 1897, p. 467, requiring master to furnish a safe scaffold. Anderson v. Milliken Bros., 108 NYS 61. Where a master is required by statute to guard machinery, risk of injury from working near an unguarded machine is not assumed. Johnson v. Far West Lumber Co. [Wash.] 92 P 274. Where a person is killed or injured by reason of the employer failing to comply with a statutory requirement, the defense of assumption of risk cannot be invoked. So held where death was caused by falling of "nigger-head" in coal mine owing to insufficient supply of timber to protect place of work. Pacnko v. Wilkeson Coal & Coke Co. [Wash.] 90 P 436.

92. Risk to employe coupling cars from raising his head too high is so incident to the occupation as to fall within the provision of the automatic coupler act against assumption of risk. Schlemmer v. Buffalo R. & P. R. Co., 205 U. S. 1, 51 Law. Ed. 681. Federal safety appliance act, 27 Stat. 531, abolishes defense of assumed risk if available. Southern P. R. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Act Cong. July 1, 1902, c. 1356, requiring mine operators to guard against injuries by dust, bad air, explosives, etc., precludes the operator from setting up contributory negligence or assumption of risk for an injury resulting from noncompliance. Bolen, Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. Where switchman in Arizona was injured while switching cars not equipped with automatic couplers, as required by 27 Stat. 531, the injuries, though caused by negligence of a fellow-servant, were from a risk not assumed, as Rev. St. Ariz. 1901, § 2767, modifies such rule as to incompetency of fellow-servants. Southern P. R. Co. v.

Dangers incidental to business.[See 8 C. L. 898]—The servant assumes the risks ordinarily incident to the employment in which he engages,[94] and this is so where the employment is necessarily dangerous.[95] Ordinary risks are such as arise from the permanent, open, visible conditions of the master's business,[96] and which are

Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Under Revisal 1905, § 2646, denying defense of assumption of risks, where injury is due to defective machinery, nonsuit is properly denied where injury was due to a defective hand car. Boney v. Atlantic, etc., R. Co. [N. C.] 58 SE 1082. Gen. Laws 1905, c. 163, provides that in actions against railroad companies the plea of assumed risk, where the ground thereof is knowledge or means of knowledge of the defect by the servant, shall not be available where the servant had an opportunity to inform the master and did so within a reasonable time, or where a person of ordinary care would have continued in the service with knowledge of the defect, in which case notice to the master shall not be necessary, is held not unconstitutional as impairing contract obligations, nor as disturbing vested rights, nor as discriminating in favor of interurban electric railways. El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 18 Tex. Ct. Rep. 610, 100 SW 171.

93. Failure to guard machinery as required by statute does not relieve the servant of his voluntary assumption of risk. Sutton v. Des Moines Bakery Co. [Iowa] 112 NW 836. Notwithstanding Kirby's Dig. § 5352, requiring mine operators to keep on hand a supply of timbers for props, where an experienced miner consents to work without a supply of timbers, and though he has demanded timbers, he assumes the risk of so doing. Patterson Coal Co. v. Poe [Ark.] 99 SW 538.

94. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65; Mize v. Louisville, etc., R. Co. [Ky.] 105 SW 908. Incident and open and obvious risks are assumed. Bowring v. Wilmington Malleable Iron Co., 5 Pen. (Del.) 594, 66 A 369; Coughlin v. Philadelphia, etc., R. Co. [Del.] 67 A 148; Strong v. Rutland R. Co., 121 App. Div. 391, 106 NYS 85; James v. Cranford, 108 NYS 142. In Missouri the only risks assumed are those incident to the employment. Garaci v. Hill-O'Meara Const. Co., 124 Mo. App. 709, 102 SW 594. A servant assumes risks which he knows are incident to the premises where he works. Bennett v. Concord Woodworking Co. [N. H.] 68 A 460. Risks reasonably and fairly incident are assumed. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986. All dangers incident to the employment are assumed, whether known or unknown. Id. It is an employe's duty to inform himself of the ordinary risks of his employment, and if he fails to do so he will nevertheless be held to have assumed them. Choctaw, etc., R. Co. v. Thompson [Ark.] 100 SW 83.

95. A servant who consented to work in a place which exposes him to known danger assumes the risks. Westman v. Wind River Lumber Co. [Or.] 91 P 478. Lineman assumed risk of coming in contact with high potential electric current while making repairs, when he knew that the current was not usually turned off while repairs were made. Zentner v. Oshkosh Gas Light Co. [Wis.] 112 NW 449.

96. Danger to brakeman in boarding and dismounting from train in motion assumed. Creola Lumber Co. v. Mills [Ala.] 42 S 1019. Servant assumes ordinary risk attendant upon leaving place of work. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Experienced brakeman entering employ of railway company, one of whose duties is to switch cars, has an opportunity to observe whether frogs are blocked or unblocked, and unblocked frogs are an obvious risk which he will be held to have assumed. Choctaw, etc., R. Co. v. Thompson [Ark.] 100 SW 83. Drillman in a mine, where it was usual custom to move drills up stopes by hand, assumes risk of injury from manner of doing work not relieved of such assumption by complaining to foreman. United Zinc Companies v. Wright [C. C. A.] 156 F 571. Where one was employed to assist a foreman in a factory to repair machinery, held he assumed the risk of injury from one defect in an elevator while he was assisting in repairing another defect. Reed v. Moore [C. C. A.] 153 F 358. Risks incident to tripping in loading logs on a wagon at a place where grass and weeds are dense, as well as risks incident to the use of rough round skids, are assumed. Van Dyke v. Menlo Fruit Co. [Ga.] 59 SE 215. An employe whose duty it is to inspect cars assumes the risk of dangers unknown to the master and which it is the servant's duty to discover and remedy. Lucas v. Southern R. Co., 1 Ga. App. 810, 57 SE 1041. The ordinary rule of nonliability for injury resulting from voluntary use of a defective tool held to apply where a servant lost an eye by being struck by a sliver of steel from a "set" or "snap" used to receive blows in riveting. Gillaspie v. United Iron Works Co. [Kan.] 90 P 760. Risks incident to insecure premises or insufficient tools may be assumed. Avery v. Lung [Ky.] 106 SW 865. Employes working about shops and using heavy machinery and objects assume incident risks. Id. An employe held to have assumed the risk of a ladder slipping and falling where it was placed too far from the wall it leaned against, it having been in use when plaintiff entered the employ. McDonald v. Lovell [Mass.] 82 NE 955. Risk of injury from stumbling over material falling on the railroad track from locomotive and cars. Gillespie v. Grand Trunk R. Co. [Mich.] 14 Det. Leg. N. 645, 113 NW 1116. Pumpman in mine who had worked some time and knew that shift boss was the inspector, assumed the risk of the system of inspection used. Williams v. Verona Min. Co., 149 Mich. 45, 14 Det. Leg. N. 292, 112 NW 496. Servant at work in trench, dug in cinders, sand, etc., assumed all risk incidental to his work which ordinary care on the master's part would not obviate. Smith v. Kansas City, 125 Mo. App. 150, 101 SW 1118. Where a switchman in uncoupling cars accidentally and without negligence fell and was injured, the injury could

presumed to be known to and undertaken by the servant when he enters into the employment.[97] The occasional negligence of fellow-servants is an assumed risk within the meaning of this rule,[98] but not the risk arising from a servant's incompetency.[99] Negligence of the master,[1] or of one who is, by virtue of statute or common law, a vice-principal,[2] is not an assumed risk. Unusual or extraordinary risks, unknown to the servant,[3] or which are encountered, under direction of the master,

be attributed only to the ordinary risks of the employment. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Switchman injured while working in yards held to have assumed the risk. Hager v. Terminal R. Ass'n, 207 Mo. 302, 105 SW 744. Employe clearing debris from pillar assumed risk of injury from brick falling from scaffold above on which men were engaged in encasing the pillar in brick. Willis v. Thompson-Starrett Co., 54 Misc. 238, 104 NYS 668. Danger of becoming entangled in cog wheels in a mill is incident. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79. Employe on repair train assumes risk of getting on and off at irregular stops where there are no stations or facilities. Peterson v. Philadelphia, etc., R. Co., 217 Pa. 401, 66 A 660. Flagman held to have assumed risks incident to uncoupling cars. Lyon v. Charleston, etc., R. Co., 77 S. C. 328, 58 SE 12. Risk of sudden jerk of train due to defective coupling pin chain held to have been assumed by switchman. Norman v. Southern R. Co. [Tenn.] 104 SW 1088. Plaintiff was injured while assisting in putting a hand car on the track, using unnecessary force to avoid lifting. Held, if this was customary method and plaintiff knew it was, he assumed the risk. St. Louis S. W. R. Co v. Brisco [Tex. Civ. App.] 18 Tex. Ct. Rep. 171, 100 SW 989. Risks due to defects in a rope used in loading a vessel which could not have been discovered by ordinary inspection are assumed. Suderman v. Woodruff [Tex. Civ. App.] 19 Tex. Ct. Rep. 778, 105 SW 217. Employe in charge of gin stand held to have assumed risk of his hands getting caught in saws. Thompson v. Planter's Compress Co. [Tex. Civ. App.] 106 SW 470. Express messenger, as to his employer, assumes risks incident to travel on railway trains. Robinson v. St. Johnsbury, etc., R. Co. [Vt.] 66 A 814. Held that driver in mine assumed the risk of tail chain loosening and catching on some object, thus stopping car suddenly while it was going down a steep grade. Lumaghi Coal Co. v. Bartlett, 128 Ill. App. 275. Danger from heavily charged uninsulated feed wires hanging below telephone wires in violation of custom of hanging them above held not one of the ordinary risks. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136.

97. A servant tacitly agrees to assume the risks ordinarily incident to the service, which are not limited to those ordinarily incident to his work, which an ordinarily prudent person of his experience would have discovered. Instruction limiting risks assumed to those incident to his work is erroneous. Leary v. Anaconda Copper Min. Co. [Mont.] 92 P 477. A miner engaged in making an unsafe place secure is in general required to look to his own safety. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. One who enters such an employment is presumed to have been made aware of the dangerous character of the work, both from the means adopted to avoid injury, and, in the case at bar, from years of experience in such work, and the dangers incident thereto must be held to have been assumed as risks of the occupation. Frank v. The Herancourt Brew. Co., 5 Ohio N. P. (N. S.) 281.

98. Haskell & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626; Shirley v. Abbeville Furniture Co., 76 S. C. 452, 57 SE 178; Pagan v. Southern R. Co. [S. C.] 59 SE 32; Westinghouse, Church, Kerr & Co. v. Callaghan [C. C. A.] 155 F 397. A servant working in an excavation made by fellow-servants assumed the risk of rocks falling as a result of their negligence in failing to properly clear the rocks from the side of the excavation. King v. Ford, 121 App. Div. 404, 106 NYS 50. A servant assumes the risk of negligence of his superior fellow-servant in the direction of men and work the same as he assumes the risk of negligence of the fellow-servant at his side. Westinghouse, Church, Kerr & Co. v. Callaghan [C. C. A.] 155 F 397.

99. Risk of injury arising from incompetency of fellow-servant of whose incapacity he has no notice is not assumed. Baldwin v. American Writing Paper Co. [Mass.] 82 NE 1.

1. See, also, post, Reliance on Care of Master. Negligence of the master is not an assumed risk. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808; Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 NE 1062; Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 SW 142; Grimm v. Omaha Elec. L. & P. Co. [Neb.] 112 NW 620. Railroad employe has right to assume that his master will obey all laws and rules relative to the giving of signals, etc. Chicago & N. R. Co. v. Thomson, 128 Ill. App. 594. The rule that servant assumes the ordinary risks of his employment presupposes that the master has performed the duties the law imposes upon him. Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 NE 239; Elgin, J. & E. R. Co. v. Meyers, 129 Ill. App. 12.

2. Risk caused by negligence of the superintendent of the master is not assumed. Lammi v. Milford Pink Granite Quarries [Mass.] 82 NE 26. Though switchman assumed risk of open frog while going between cars to uncouple them, he did not assume risk of negligence of engineer in failing to observe signals in movement of cars. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 17 Tex. Ct. Rep. 685, 99 SW 200.

3. Employe who went to adjust an appliance upon another machine in order to render it less dangerous held not to have assumed risk of injury while so doing, not being familiar with it, and not having been warned. Giacomini v. Pac. Lumber Co. [Cal. App.] 89 P. 1059. Brakeman, climbing a car, was struck by target of

outside the service which the servant was hired to perform,[4] and which ordinary care in the performance of his duties would not disclose,[5] are not assumed. Risks arising from latent defects, not discoverable by the use of ordinary care on the part of the master and unknown to him, are assumed, though no knowledge of the defect or appreciation of the danger by the servant is shown, such risks being classed as incidental.[6] Unavoidable accidents are assumed risks.[7]

Known or obvious dangers.[See 8 C. L. 901]—Risks which are actually known to the servant,[8] or which are so obvious[9] that a person of the same age, capacity, and

switch which had been recently moved and of the position of which he had not been warned. Held he did not assume the risk. Boston & M. R. Co. v. Gokey [C. C. A.] 149 F 42; Schminkey v. T. M. Sinclair & Co. [Iowa] 114 NW 612. An employe wheeling a wheelbarrow along a narrow runway suspended in the air does not assume risk incident to an effort to free his barrow which caught on an obstruction on the runway. Morrisey v. Dwyer, 105 NYS 821. An engineer with authority to direct a fireman when to open a valve to empty the boiler does not assume risk of his doing so without directions. Texas, etc., R. Co. v. Walton [Tex. Civ. App.] 19 Tex. Ct. Rep. 651, 104 SW 415. Brakeman on logging train held not to have assumed the risk of violent jerking of train. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399. Extraordinary risks are not assumed unless known or plainly obvious. Place v. Grand Trunk R. Co. [Vt.] 67 A 545. A defective rail which existed independent of a change of the gauge of the road is not a risk which is assumed by an engineer unless he has knowledge of such defect. Shattuck's Adm'r v. Central Vt. R. Co., 79 Vt. 469, 65 A 529. Risk incident to holding a hood over defective machine is extraordinary and is not assumed unless the employe has capacity to know the risk and how to avoid it, or unless it was plainly observable. Bolton v. Ovitt [Vt.] 67 A 881. Danger to telephone lineman from electric light wires near a pole on which he worked was an extraordinary risk not assumed unless he knew of them and appreciated the danger, or unless the same was obvious. Drown v. New England Tel. & T. Co. [Vt.] 66 A 801. Whether danger was obvious held for jury. Id. The risk by a conductor of a train of injury by derailment because of unsoundness of ties. Dunbar v. Central Vt. R. Co. [Vt.] 65 A 528.

4. Plaintiff did not assume risk of stepping on roof from which boards had been removed, and the fact concealed by replacing a covering where he was directed to cross the roof and was not warned as to its condition. Wilson v. Kansas City So. R. Co., 122 Mo. App. 667, 99 SW 465. Risks encountered outside of the line of work which the servant is employed to perform, under the employer's orders, are not assumed. Oolitic Stone Co. v. Ridge [Ind. App.] 80 NE 441. Under Laws 1902, p. 1750, providing that an employe is presumed to have assented to risks incident to his employment and no others, an engineer called by a person in charge of his master's brick yard to work outside his employment does not assume risks incident to such outside employment. Perrotta v. Richmond Brick Co., 108 NYS 10.

5. Employe did not assume risk arising from weak link in chain which could only have been discovered by careful inspection. Morena v. Winston, 194 Mass. 378, 80 NE 473.

6. The servant assumes the risk of latent defects in the place, articles, and machinery with which he works, which ordinary care on the part of the master fails to discover and remove. Cryder v. Chicago, etc., R. Co. [C. C. A.] 152 F 417. An employe whose duty is to roll heavy engine wheels from one part of the factory to another over a way not protected from the elements assumes the risk incident to the roughness of the path which is not apparent because of fresh fall of snow. Rumely Co. v. Myer [Ind. App.] 82 NE 97. A servant assumes the risks from latent defects in appliances which the master is not made aware of through the exercise of reasonable care, and where the master furnishes the appliances in general use as the best protection against known danger, it cannot be said that he was negligent in not providing against a hidden danger of which he knew nothing. Frank v. Herancourt Brew. Co., 5 Ohio N. P. (N. S.) 281. Whether lineman assumed dangers created by heavily charged uninsulated wires, of which he had no knowledge, is for jury. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136. A servant assumes such risks as reasonable care on the part of the master will not obviate. Illinois Steel Co. v. Saylor, 129 Ill. App. 73. Servant must be held to assume those risks arising from dangers which cannot be obviated by any reasonable care of the master. Where injury to servant while using a derrick was not caused by any defect therein, he cannot recover from the master. Illinois Steel Co. v. McConnell, 126 Ill. App. 354.

7. Unavoidable accidents which the exercise of ordinary care would not have prevented are assumed risks. Havlin v. Oliver, 30 Ky. L. R. 1192, 100 SW 835.

8. Cannot recover if he voluntarily remains in his service in the face of known or obvious dangers. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65. A minor servant assumes the risk of all dangers incident to the work or business in which he is engaged that are known to and fully appreciated by him. Laverty v. Hambrick, 61 W. Va. 687, 57 SE 240. Locomotive fireman assumes ordinary risks and those of which he has knowledge; risk arising from defective track assumed if known. Chicago, etc., R. Co. v. Birk [Tex. Civ. App.] 18 Tex. Ct. Rep. 72, 99 SW 753. Plaintiff was injured while assisting in putting a hand car on the

track, unnecessary force being used in order to avoid lifting the car. Held, he assumed risk of method used, if it was customary to his knowledge. St. Louis S. W. R. Co. v. Brisco [Tex.] 17 Tex. Ct. Rep. 774, 99 SW 1020. Dangers known or of which the servant is charged with notice are assumed. Corrigan v. West Division S. S. Co. [Wis.] 113 NW 441. Incident risks and extraordinary hazards of which the servant has knowledge are assumed. Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 NE 168. Incident and known risks are assumed. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. A servant who knows of the absence of safeguards and goes to work assumes the risk. Id. Servant who had been using a scraper for two hours, and knew that a latch on it occasionally failed to catch, assumed the risk. International & G. N. R. Co. v. Hall [Tex. Civ. App.] 19 Tex. Ct. Rep. 500, 102 SW 740. Servant whose eye was injured by a rivet thrown from a belt by breaking thereof, who had mended that belt and others, and knew of the liability of the belt to break and throw brads or hooks, held to have assumed the risk. Receivers of Kirby Lumber Co. v. Poindexter [Tex. Civ. App.] 19 Tex. Ct. Rep. 513, 103 SW 439. Miner, notwithstanding objection to mining in a particular manner because of his knowledge that it is more dangerous than another method, assumes the risk if he proceeds to work. Kirby v. Hillside Coal Co. [Ky.] 106 SW 278. Voluntary continuance of service after knowledge of the dangerous character of defects in machinery precludes recovery by servant. Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 81 NE 862. Cannot recover for injuries caused by defects in saw and appliances which were known to him. Elgin J. & E. R. Co. v. Myers, 226 Ill. 358, 80 NE 897, rvg. 129 Ill. App. 12. He assumes the risk arising from any defect of which he had knowledge. Illinois Cent. R. Co. v. Fitzpatrick, 227 Ill. 478, 81 NE 529. Servant held to assume risk arising from defect in floor of which he had knowledge. Riley v. American Steel & Wire Co., 129 Ill. App. 123.

9. Valentine v. Chicago City R. Co., 127 Ill. App. 436; Christiansen v. William Graver Tank Works, 126 Ill. App. 86, afd. 223 Ill. 142, 79 NE 97. Employe, who without a light went into a dark bin connected with a chute, and while attempting to start coal down the chute a portion on which he was standing gave way and carried him into the chute, held to have assumed the risk. Kentucky & Ind. Bridge & R. Co. v. Melvin, 31 Ky. L. R. 959, 104 SW 334. Risks which are apparent and obvious are assumed. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Where one moving a heavy truck was injured by a board leaning against a post falling on him and the situation of the board was obvious and known to him and danger could have been avoided, he assumed the risk. Avery v. Lung [Ky.] 106 SW 865. Servant working in a cinder pit assumes risk because of absence of barriers across the track at the pit. Atchison, etc., R. Co. v. Dickens [Ind. T.] 103 SW 750. Risks assumed are those which are obvious, of which he has been informed, or of which he ought to have known. Bryant v. Great Northern Paper Co. [Me.] 68 A 379. Danger arising from the use of an insufficient number of tackles in hoisting an iron plate held obvious. American Bridge Co. v. Bialk, 129 Ill. App. 202. Plaintiff held to have assumed obvious risk of running machine in shoe factory and using defective material. Loynes v. Loring B. Hall Co., 194 Mass. 221, 80 NE 472. Servant working at a derrick which he knew to be defective and dangerous held to have assumed the risk. Raven v. Seattle Elec. Co. [Wash.] 92 P 451. Evidence sufficient to show that a laundry employe assumed risks of her hands being caught in a mangle. Richards v. Ogden Steam Laundry [Utah] 91 P 267. If a servant voluntarily accepts a situation with full notice of incompetency of fellow-servants, without complaint or promise on the part of the master to change, he assumes the risk. Kansas City, etc., R. Co. v. Loosley [Kan.] 90 P 990. Painter painting an elevated railroad structure, who knew the danger of touching the iron swab used by him to the third rail, assumes risk. James v. Cranford, 108 NYS 142. Dangers incident to operating push car in railroad yards. Mattsen v. Chicago, etc., R. Co. [Minn.] 114 NW 759. Where an employe was carrying a heavy weight while other employes stood by and could have aided if necessary, and he momentarily lost control of the plate and was injured, held he assumed the risk due to failure to provide more men to lift the plate. White v. Owosso Sugar Co., 149 Mich. 473, 14 Det. Leg. N. 505, 112 NW 1125. A man 23 years of age, of high intelligence, and familiar with machinery, held to have assumed risk of getting caught in unguarded machinery in a bakery. Sutton v. Des Moines Bakery Co. [Iowa] 112 NW 836. Employe eighteen years of age held to have assumed the risk of danger from a revolving shaft on which there was no coupling or set screw. Hertel v. Safety Folding Bed Co., 149 Mich. 223, 14 Det. Leg. N. 413, 112 NW 712. Workman at foot of incline, who knows that other men are loosening the earth above so that it will slide down, assumes the risk of being caught by sliding earth. O'Neil v. Great Northern R. Co. [Minn.] 112 NW 625. Street car conductor assumes risk of danger from trolley pole setting near the track, where he has been on the run several months and knew that the ends of the ties near the pole were rotten and that cars swayed toward it. Kath v. East St. Louis & S. R. Co., 232 Ill. 126, 83 NE 533. Where a servant working around dangerous machinery knows and appreciates the danger as well as the foreman, he assumes the risk. Sandusky Portland Cement Co. v. Rice [Ind. App.] 82 NE 1007. A hazard is open and apparent which can be discovered by the exercise of ordinary care. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986. All open and known risks are assumed whether incident or not. Id. Held to assume risk of injury caused by getting finger caught between die and counterpart of embossing press. Chicago Hardware Co. v. Matthews, 124 Ill. App. 89. The fact that a safer method could have been employed does not affect master's liability; where servant fully appreciated the danger of the method employed. William Grace Co. v. Kane, 129 Ill. App. 247. Servant employed for the purpose of removing wreckage of a collapsed building familiar with the danger incident thereto assumes it. Id. Yard brakeman assumes only obvious or known risks. Feneff v. Boston & M. R. R. [Mass.] 82 NE 705. Where an electric light pole had stood in rail-

road yards for over three years and a brakeman had been in the employ of the company for years and had been accustomed to pass it regularly on his train, held he assumed the risk of the pole in its permanent condition. Bradley v. Central Vt. R. Co. [Mass.]82 NE 44. A night watchman assumes the risk of coal being put in bins, near which he makes his rounds, in such manner and quantities that a piece may fall on him as he is passing. Lapre v. Woronoco St. R. Co. [Mass.] 82 NE 9. Employe injured by striking his head on piece of board permitted to hang in shed driveway held to have assumed risk therefrom, where it was there when he entered the employment sixteen months before. Carroll v. Boston Coal Co. [Mass.] 81 NE 296. Experienced servant who has been in the place for years held to have assumed risk of danger from set screw on a revolving shaft, where the set screw had been there for years and could be seen when the shaft was at rest. Mutter v. Lawrence Mfg. Co. [Mass.] 81 NE 263. An employe repairing the track of a trolley road in a mine, who knows the trolley wire is low and who has once been shocked by coming in contact with it, assumes the risk of injury from it. Burke v. Union Coal & Coke Co. [C. C. A.] 157 F 178. Risks and dangers known of and appreciated are assumed. Id. Defect in machinery and unsafe condition of floor known to the servant held to have been assumed by him. Short v. Cherokee Mfg. Co. [Ga. App.] 59 SE 1115. Employe who had worked several days in quarry and knew how device used to carry rock worked, and how it was defective, assumed the risk of a stone being dropped. Day v. Houston & T. C. R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 302, 101 SW 1044. Miner assumes risk of roof falling, if he knew of the danger or ought to have known it in the exercise of ordinary care. Big Hill Coal Co. v. Abney's Adm'r, 30 Ky. L. R. 1304, 101 SW 394. Plaintiff held to have assumed risk of injury from defects well known to him. Lee v. Dobson, 217 Pa. 349, 66 A 557. Plaintiff injured while guiding the tongue of a heavy wagon over a defective alley held to have assumed the risk. Lindsman Box & Veneer Co. v. Thompson, 127 Ill. App. 134. Risk from obvious defects or dangers are assumed. Sparks v. River & Harbor Imp. Co. [N. J. Err. & App.] 67 A 600. Obvious risks are assumed. One working on a railroad track assumes risk of injury from passing trains. Precodnick v. Lehigh Valley R. Co. [N. J. Err. & App.] 65 A 1047. Where eaves of a house had projected over a railroad track for fifteen years, and a brakeman knew of them and knew that there was room for one standing on a car to pass under them, but he approached the place with his back turned and was struck by the eaves and knocked off, held he assumed the risk. Southern R. Co. v. Carr [C. C. A.] 153 F 106. Employe assumed risk of injury from moving an obvious belt and rollers. Hicks v. Claremont Paper Co. [N. H.] 65 A 1075. Where an employe working on a building placed his hand on the track of a traveling crane, held he could not recover as the risk of injury from such appliance was an obvious one. Ball v. Ransome Concrete Mach. Co. [N. J. Err. & App.] 68 A 104. Employe, tightening bolts in a tube mill with a wrench, was injured by the slipping of the wrench which caused his arm to go into another mill in motion, as he knew. Held, he assumed the risk. Walters v. Wolverine Portland Cement Co., 148 Mich. 315, 14 Det. Leg. N. 222, 112 NW 113; Bowring v. Wilmington Malleable Iron Co., 5 Pen. (Del.) 594, 66 A 369. Where servant was injured by slipping on refuse, sawdust, etc., on the floor, and getting his hand into the gearing, it was held he could not recover on account of the condition of the floor, since he had observed it and had made no complaint. Boyle v. Anderson & Middleton Lumber Co. [Wash.] 90 P 433. Held that plaintiff in opening air cocks in vat was not doing work outside the scope of his employment with dangers of which he was unfamiliar. Swick v. Aetna Portland Cement Co., 147 Mich. 454, 111 NW 110. Employe engaged in drilling rock in a deep cut assumed the risk of rock falling on him, when the danger was obvious and known to him, and was a matter of comment among all the men. Clifton v. Chesapeake & O. R. Co., 31 Ky. L. R. 431, 102 SW 247. Employe held to have assumed risk of stepping into hole in floor where cylinder was placed in well lighted room. McCafferty v. Lewando's French Dyeing & Cleansing Co. [Mass.] 80 NE 460. Intelligent adult employe held to have assumed risk of putting belt on moving pulley while standing on a ladder. Monte v. Wausau Paper Mills Co. [Wis.] 111 NW 1114. Inspector of cars having knowledge of dangers to be encountered, at least equal opportunity with the master, assumes the risk. Lucas v. Southern R. Co., 1 Ga. App. 810, 57 SE 1041. Inspector injured by cotton falling from car through defective door which he was trying to fix assumed the risk. Id. Employe cannot recover for injury caused by obvious danger, there being no negligence of master as to appliances or place of work. Toler v. Swan-Day Lumber Co., 30 Ky. L. R. 810, 99 SW 625. Evidence held to demand finding that servant operating machine knew and appreciated the danger of putting his hand into the cylinder thereof when the opening was concealed and that he assumed the risk. Crown Cotton Mills v. McNally, 127 Ga. 404, 56 SE 452. Servant injured while attempting to repair temporary roof with knowledge of its character held to assume the risk arising from parts of it being loose and causing him to fall through. Latrobe S. & C. Co. v. Regan, 130 Ill. App. 440. Whether servant assumed the risk in removing debris from a building which was being torn down, held, in view of his age and the circumstances, to be question for jury. American Car & Foundry Co. v. Hill, 128 Ill. App. 176. Servant held to have assumed the risk incident to repairing leaking flues in an engine of which he was fireman. St. Clair, etc., R. Co. v. Henckell, 127 Ill. App. 54. Servant held to assume risk created by condition of floor of warehouse in which he was working and the manner of piling boxes which fell on him. McCormick Harvesting Mach. Co. v. Gabris, 130 Ill. App. 624. Held to have assumed risk of injury by reason of the fact that freight elevator used by him had no gate at the shaft opening. Western Union Tel. Co. v. Gilleran, 126 Ill. App. 429. The servant is held to assume the risk arising from defects in simple and ordinary tools. Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 81 NE 862. Danger from heavily charged and uninsulated feed wires hanging below telephone wires in violation of custom held not an obvious or apparent

experience, exercising due care, would have known of them,[10] are also assumed by a servant who continues in the employment with such actual or implied knowledge of the danger.[11] But mere knowledge of a defective condition will not alone charge the servant with the assumption of a risk; it must also appear that he knew and appreciated the danger arising from the defect.[12] Dangers which are as well known

danger. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136.

10. Dangers which the servant should discover by the exercise of ordinary care are assumed. Hardy v. Sulphur Min. Co. [N. J. Law] 67 A 177. Experienced railroad man who knew of defects in turntable held to have assumed risk due to its stopping suddenly. Currie v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 686, 106 SW 1149. The rule that a servant of mature years and ordinary intelligence and experience will be presumed to know and comprehend obvious dangers does not apply where the circumstances require a contrary inference. Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. Perils incident, obvious, or which may be discovered by exercise of ordinary diligence, are assumed. Rumely Co. v. Myer [Ind. App.] 82 NE 97. An employe cannot be heard to say that he did not appreciate risk or danger, where defects were obvious and danger would be apparent to an ordinarily prudent man. Burke v. Union Coal & Coke Co. [C. C. A.] 157 F 178. Risk of injuries caused by defects which are obvious to a person of ordinary intelligence. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65, afg. 128 Ill. App. 30.

11. Risk due to exposed condition of a hole in the floor assumed by continuing work. Acme Box Co. v. Gregory [Tenn.] 105 SW 350. Master not liable where servant continues to use machinery with knowledge of defects. Bowring v. Wilmington Malleable Iron Co., 5 Pen. (Del.) 594, 66 A 369. If a servant knows of the incompetency of a fellow-servant, or has equal means of knowledge with the master, and continues in the service without objection, he assumes the risk. First Nat. Bk. of Montgomery v. Chandler, 144 Ala. 286, 39 S 822. Employe assumed risk of continuing to use defective chisel with knowledge of the defect. Vanderpool v. Partridge [Neb.] 112 NW 318. Servant held to have assumed risk of burr on drill chipping off when it was struck, where he used it voluntarily, and had used drills enough to know the danger. Kellogg v. New York Edison Co., 105 NYS 398. A servant who continues in an employment with knowledge of danger assumes the risk unless he is induced to remain by a promise by the master to immediately repair the defective condition. Jones v. Burnham, 217 Pa. 286, 66 A 523. Where servant used ladder in ordinary employment, he assumed risk of its slipping because of the iron points upon it becoming dull. Sheridan v. Gorham Mfg. Co. [R. I.] 66 A 576. Risks which arise from defects which are obvious and which arise by failure to furnish a safe place and appliances are assumed by entering and continuing in the service. Burke v. Union Coal & Coke Co. [C. C. A.] 157 F 178. Obvious hazards are assumed where the employe continues the employment without promise to repair, though they are the result of the master's negligence. Kath v. East St. Louis & S. R. Co., 232 Ill. 126, 83 NE 533. An experienced servant who knows that a certain number of men are necessary to perform the work in which he is engaged, who goes to work with full knowledge of the limited number of men at hand and the risk, cannot recover for an injury resulting from failure of the master to furnish a sufficient number of men. Cincinnati Gas & Elec. Co. v. Johnston, 76 Ohio St. 119, 81 NE 155. Brakeman injured by reason of defective coupling lever on caboose had been in company's employ a year, and had frequently used the appliance in the same condition as at time of injury. Held, he assumed the risk. Trinity & B. V. R. Co. v. Perdue [Tex. Civ. App.] 18 Tex. Ct. Rep. 245, 101 SW 485. Plaintiff, a carpenter, when employed, was told he might be called on to do other work besides carpentering, and was set to work cutting stone. Held, by continuing in the service, he assumed the known risk of his tools chipping off. Denver & R. G. R. Co. v. Sporleder [Colo.] 89 P 55. A servant who continues his work without objection after notice of the dangerous character of the machine which he is operating assumes the risk. Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. If machinery is dangerous because of a defect known to the servant, who with such knowledge voluntarily operates the machine, he will not be entitled to recover for injury received merely because master did not use the most improved machinery. Wilder v. Miller, 128 Ga. 139, 57 SE 309. By entering upon and continuing in service in an unsafe place, the dangers of which are known and fully appreciated by him, a servant waives the performance by the master of the duty imposed upon him by law in respect to the place of work. Laverty v. Hambrick, 61 W. Va. 687, 57 SE 240. Instruction that servant assumes only such risks of which he has actual knowledge held erroneous. Jones & Adams Co. v. George, 227 Ill. 64, 81 NE 4.

12. An infant employe will not be held to have assumed a risk, unless it appears not only that he knew of the defect, but also that he appreciated the danger and was able to weigh the liability of injury. Missouri, K. & T. R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 843, 99 SW 743. Actual or constructive appreciation of danger as well as knowledge of condition or defect is necessary. Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. To defeat the recovery by defense of assumption of risk, the master must show that the servant knew of the danger and appreciated the risk the increased danger exposed him to. National Steel Co. v. Hore [C. C. A.] 155 F 62. To charge an employe with the assumption of a risk, it is not enough that the condition of the works and machinery should be open to observation; it must appear that he knew the risk, or ought to have known it, in the exercise of reasonable care. West Pratt Coal Co. v. Andrews [Ala.] 43 S 348. Knowledge of a condition will not alone charge the servant

to the servant as to the master, or which the servant has equal opportunity with the master to observe, are assumed.[13] Risks which are unknown to the servant, and which due care on his part would not have disclosed, and which are not incidental to the employment, are not assumed.[14] Whether a particular risk was known or

with the risk unless there is also an appreciation of the danger. Rogers v. Roe [N. J. Err. & App.] 66 A 408. On the question of whether a servant assumed risk of falling from a platform not provided with railings or banisters, the fact of his youth held admissible. Aiken v. Rhodhiss Mfg. Co. [N. C.] 59 SE 696. Servant must know or have means of knowing that the defect renders the appliance unsafe. George B. Swift Co. v. Gaylord, 229 Ill. 330, 82 NE 299. The servant must appreciate both the risk and the danger arising therefrom. Chicago, etc., R. Co. v. Rathneau, 124 Ill. App. 427. Brakeman held not to assume the risk arising from hole in the right of way of which had no knowledge. Illinois Cent. R. Co. v. Heath, 228 Ill. 312, 81 NE 1022. Held that servant removing molten metal from a converter in obedience to an order did not assume the risk arising from the escape of ore of which he had no knowledge and which became ignited by coming into contact with the metal. American Brake Shoe & Foundry Co. v. Hank, 129 Ill. App. 188. Rule that where servant has equal opportunities with the master discovering dangers does not apply where defects were latent and known to the master. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136. Servant does not assume risk incident to wrecking a building where, when he is ordered to remove debris therefrom, he has no knowledge of the nature of the work being done therein. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784.

13. George B. Swift Co. v. Gaylord, 229 Ill. 330, 82 NE 299; Elgin, J. & E. R. Co. v. Myers, 226 Ill. 358, 80 NE 897, rvg. 129 Ill. App. 12. Knowledge of defect implies knowledge of dangers arising therefrom. Elgin, J. & E. R. Co. v. Myers, 226 Ill. 358, 80 NE 897, rvg. 129 Ill. App. 12.

14. Servant injured by box car door falling on him held not to have assumed the risk. Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149. Inexperienced servant loading and manipulating ore cars on gravity track without proper instructions held not to have assumed risk. Granrus v. Croxton Min. Co., 102 Minn. 325, 113 NW 693. Risk of danger from defective electric lamp in basement not assumed by servant whose duties did not take him there but where he was sent on one occasion when he was injured. Saures v. Stevens Mfg. Co. [Mass.] 82 NE 694. Complaint alleging that master negligently permitted a barge's gunwale along which servant was required to walk to remain defective, that plaintiff did not know of such defect, having entered the employment the day before he was injured, does not show assumption of the risk. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. Sup.] 81 NE 492. Where workman lost an eye by reason of chips flying from steel because of defective punch and die, held the servant did not assume the risk of danger of chips flying because of the defect, since it was not observable. American Smelting & Refining Co. v. McGee [C. C. A.] 157 F 69. Danger from the breaking of a belt is not assumed, though servant knew that it had been used some time and spliced, where it did not appear that the servant knew how long a belt should last or that the splicing weakened it. Northern Pac. R. Co. v. Wendel [C. C. A.] 156 F 336. A servant in operating a machine by standing at its side instead of behind it, where he should stand, does not assume the risk of breaking of a belt where there was no obvious danger in the position taken while the position behind the machine was obviously dangerous from other causes. Id. Risk of injury from a defective machine is not assumed if the danger is not so obvious as to be apparent to a person exercising ordinary care. Bowen, Jewell & Co. v. Adams, 129 Ga. 688, 59 SE 795. Evidence insufficient to show assumption of risk by brakeman injured while setting defective brake. Gulf, etc., R. Co. v. Griggs [Tex. Civ. App.] 18 Tex. Ct. Rep. 251, 101 SW 473. Employe unloading car on sidetrack did not assume risk of sudden and violent jolt by other cars being switched, though he knew that switching operations were in progress on the track. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 954, 101 SW 453. Risk of injury from defect in chain conveyor of sawmill not assumed when defect was unknown to servant. Dobsloff v. Nichols-Chisolm Lumber Co. [Minn.] 112 NW 218. Operator of lathe did not assume risk arising from faulty tempering of part of lathe which was not observable, he having applied the usual test. Hohl v. Hewitt Motor Co., 103 NYS 755. Risks not obvious and which cannot be known by exercise of ordinary care are not assumed. Sparks v. River & Harbor Imp. Co. [N. J. Err. & App.] 67 A 600. Servant who knew that a joint in a steam pipe leaked, but not that it had slipped and was liable to pull apart, did not assume risk of latter danger. Hardacre v. Sayles [R. I.] 66 A 298. Servant injured by breaking of elevator cable held not to have assumed risk by reason of the fact that he had inspected part of the machinery with another employe, it not appearing that he had seen the cable, and it not being his duty to inspect. Brusseau v. Lower Brick Co., 133 Iowa, 245, 110 NW 577. Plaintiff did not assume risk of riding to roundhouse on engine he knew nothing about and had never seen before. Barschow v. Lake Shore, etc., R. Co., 147 Mich. 226, 13 Det. Leg. N. 1060, 110 NW 1057. Employe held not to have assumed risk arising from use of defective appliances selected by fellow-servants, to replace tram car on track, where he did not know they were defective. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 843, 99 SW 743. Employe, injured while assisting others in carrying a rail, held not to have assumed risk of working with an insufficient number of men, when he was inexperienced, and was ordered to do the work on pain of discharge. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413.

ought to have been known to the servant, within the meaning of these rules, is ordinarily a question of fact [15] to be determined by reference to the age, capacity,

15. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65. Want of knowledge may be inferred from circumstances. George B. Swift Co. v. Gaylord, 229 Ill. 330, 82 NE 299. Held to present question for jury whether defect in scaffolding was patent. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65, afg. 128 Ill. App. 30. Evidence held to present for jury question whether servant assumed the risk in using defective machine with which to wind wire upon spools. Western Elec. Co. v. Prochaska, 129 Ill. App. 589. Whether danger to employe unloading ties from a box car was incident or obvious. St. Louis S. R. Co. v. Thornton [Tex. Civ. App.] 18 Tex. Ct. Rep. 888, 103 SW 437. Whether telephone employe, who was directed to tie an electric light wire to an insulator, assumed the risk. Cumberland Tel. & T. Co. v. Graves' Adm'x, 31 Ky. L. R. 972, 104 SW 356. Where servant was killed by giving way of an iron rod by which he held while crossing isle of a building where there was no floor, whether the danger was so patent that he should have known of it held for the jury. Wood's Adm'x v. Daviess County Distilling Co., 31 Ky. L. R. 511, 102 SW 813. Whether risks incident to operation of a rip saw were assumed. Cox v. Capitol Box Co. [Wash.] 91 P 555. Whether dangers were open and obvious held for jury, where inexperienced sawmill employe was injured while performing duties of an oiler. Westman v. Wind River Lumber Co. [Or.] 91 P 478. A notice to a brakeman that there were obstructions dangerously near the track that he was required to look out for held not to show as a matter of law that he assumed risk of being crushed between a car and a platform, where he had gone in line of his duty. Hemmingsen v. Chicago, etc., R. Co. [Wis.] 114 NW 785. Whether servant assumed risk in taking hold of an incandescent light charged with a deadly current. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 114 NW 769. Whether miner assumed risk of being given a defective fuse by shift boss. Laitinen v. Shenango Furnace Co. [Minn.] 114 NW 264. Whether a workman in a quarry assumed risk of insufficient appliance. Kjosnes v. Gray, 102 Minn. 410, 113 NW 1009. Question whether switchman assumed risk in attempting to mount engine by grabbing handrail placed so close to boiler that it was impossible to take hold, properly submitted to jury. Chicago & N. R. Co. v. Marinan, 124 Ill. App. 272. Question of assumed risk where machine operator was injured. Clark v. Chicago, etc. R. Co., 231 Ill. 548, 83 NE 286. Where it appears that examination by two experienced miners did not disclose unsafe character of place of work, the question of assumption of risk is properly submitted to the jury. Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 NE 239. Held that question whether plaintiff knew or should have known of defect in derrick, in that it was not properly guyed and ballasted, was for jury. Grace & Hyde Co. v. Sanborn, 225 Ill. 138, 80 NE 88, afg. 124 Ill. App. 472. Questions of assumed risk, where lineman was killed by taking hold of electric light bulb which he knew was out of order. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 112 NW 620. Question whether risk of danger due to absence of step from work car was assumed by street car employe. Flynn v. Connecticut Valley St. R. Co. [Mass.] 82 NE 1085. Whether risk was obvious and assumed. Heffernan v. Fall River Iron Works Co. [Mass.] 83 NE 5. Where an employe was injured while adjusting a belt which was out of order, and engine was not stopped, held a question for the jury whether the work was not inherently dangerous and involved liability of accident of some kind. Guilmartin v. Solvay Process Co., 189 N. Y. 490, 82 NE 725. Evidence held sufficient to justify finding that servant had neither knowledge of the unsafe condition of trench in which he was working nor an equal opportunity to ascertain its condition. Dalton v. Ogden Gas Co., 126 Ill. App. 502. Employers' liability act (Laws 1902, p. 1748), expressly provides that the question of assumption of risk by continuance in the employment with notice of the risk is one of fact. Guilmartin v. Solvay Process Co., 189 N. Y. 490, 82 NE 725. Whether conductor assumed risk of incompetency of motorman. Cooney v. Com. Ave. St. R. Co. [Mass.] 81 NE 905. Where an apprentice was killed by an explosion of a steam pipe and it did not appear that he had any mechanical knowledge, whether he realized the peril of his situation held for the jury. Baldwin v. American Writing Paper Co. [Mass.] 82 NE 1. Question of assumption of risk of falling in of walls of trench servant was digging held for jury. City of Columbus v. Allen [Ind. App.] 81 NE 114. Where one was injured by derailment of a logging engine on a private logging road, after he had accepted employment for the day with knowledge of the character of the road and knew that it would be subjected to unusual strain on that day, held, whether he assumed the risk from which injury resulted was for the jury. Eastern & Western Lumber Co. v. Hayley [C. C. A.] 157 F 532. A workman injured by the blowing out of a water block from a blast furnace held not chargeable as a matter of law with having assumed the risk. National Steel Co. v. Hore [C. C. A.] 155 F 62. Brakeman had foot crushed while between cars trying to adjust coupler. He did not assume risk as a matter of law, it not appearing conclusively that he knew or ought to have known that the coupler was defective. Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 SW 1070. Where inexperienced employe was set to work on planing machine not equipped with guards, he not knowing that it could be guarded, whether he assumed the risk was for the jury. Louisville & A. R. Co. v. Wilson, 30 Ky. L. R. 734, 99 SW 634. Whether servant assumed risk in working near an open elevator shaft of which he was ignorant, held a question for jury. Myreen v. Smith, 127 Ill. App. 426. Whether danger of getting hand caught in planing machine was obvious to boy of nineteen, held for jury. Smith v. F. Wesel Mfg. Co., 117 App. Div. 834, 102 NYS 959. Whether servant assumed risk arising from defective step in ladder on side of dump car, held a question for the jury. Peoria & Pekin Terminal R. Co. v. Schantz, 130 Ill.

intelligence, and experience of the employe,[16] and the facts and circumstances of the case. The question of assumed risk becomes one of law only when the evidence and the inferences to be drawn therefrom are such as to preclude any difference of reasonable minds.[17] The fact that a servant is inexperienced does not relieve him from the assumption of obvious risks.[18]

Reliance on care of master.[See 8 C. L. 907]—In the absence of knowledge to the contrary, the servant has a right to rely on the assumption that the master has properly performed the various duties imposed on him by law[19] and need not make

App. 141. Under Code Supp. 1902, § 4999b, prohibiting employment of females under eighteen years of age to clean moving machinery, a female under that age is presumptively incapable of appreciating the risk of cleaning a moving machine; whether employer had overcome this presumption held for jury. Bromberg v. Evans Laundry Co., 134 Iowa, 38, 111 NW 417. Miner injured by piece of ore falling on him. Minton v. La Follette Coal, Iron & R. Co., 117 Tenn. 415, 101 SW 178. Whether locomotive fireman was lacking in ordinary care in remaining upon the locomotive with knowledge that the water glass was defectively guarded, so that assumption of risk could be set up under Gen. Laws 1905, c. 163, held for jury. El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 18 Tex. Ct. Rep. 610, 100 SW 171. Servant injured by fall of mine roof. Birmingham Min. & Cont. Co. v. Skelton [Ala.] 43 S 110. Whether servant knew and assumed risk of danger of handle on hand car breaking. Southern R. Co. v. McGowan [Ala.] 43 S 378.

16. Assumption of risks by a youth is commensurate with his age and experience. Magone v. Portland Mfg. Co. [Or.] 93 P 450. If a minor employe knows of the special dangers attending his work and appreciates the risk, he assumes it. Jenson v. Will & Finck Co., 150 Cal. 398, 89 P 113. Where a lad ten years old was injured, the jury could consider his appearance on the witness stand in determining his experience on an issue of assumed risk. Bolton v. Ovitt [Vt.] 67 A 881. The tender age of an employe and consequent lack of experience is sufficient to carry the question of assumption of risk to the jury. Id. Instruction that plaintiff, a boy of fifteen, injured by knives in a hopper which he was cleaning out, was chargeable with knowledge of such dangers as one of ordinary common sense for one of his years ought to have known in the exercise of ordinary care, held proper. Horn v. La Crosse Box Co., 131 Wis. 384, 111 NW 522. A child of tender years is not expected to exercise the same caution and judgment as an adult, and whether such child appreciates and assumes the risk of a particular injury is for the jury, unless the evidence is conclusive. Jenson v. Will & Finck Co., 150 Cal. 398, 89 P 113. Evidence held insufficient to show that boy twelve and one-half years old appreciated danger connected with moving goods with trucks and elevator so that he did not, as a matter of law, assume the risk of injury by a truck moving while on the elevator. Id. Boy of sixteen, smothered in dark oat bin, where he was ordered to go by his superior, did not assume risk as matter of law. Meier v. Way, Johnson, Lee & Co. [Iowa] 111 NW 420. Children assume only such obvious dangers as they are capable of appreciating. Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 SE 998. Whether boy appreciated risk of trying to put belt on pulley held for jury. Shirley v. Abbeville Furniture Co., 76 S. C. 452, 57 SE 178. Minor sent by fellow-servant to do work outside the scope of his employment assumed the risk, if of such age as to appreciate the danger. Id. Child of thirteen employed to drive a team on a farm does not assume risk arising from wild and vicious nature of team. Bellamy v. Whitsell, 123 Mo. App. 610, 100 SW 514. Where girl of fourteen was injured in entering freight elevator under direction of head of department of store where she worked, it was proper to submit to jury the question whether she knew and appreciated the danger, considering her age, experience, and intelligence. Daniels v. Johnston [Colo.] 89 P 811.

17. Libby v. Kearney, 124 Ill. App. 339; Grace & Hyde Co. v. Sanborn, 124 Ill. App. 472, afd. 225 Ill. 138, 80 NE 88. Where conditions creating danger were known to servant, there is no question for jury. Smith v. Chicago Junction R. Co., 127 Ill. App. 89.

18. Temporary employment of inexperienced servant to operate a stamping machine does not render master liable for injuries sustained by getting his hands caught in the die, where that danger was apparent. American Brake Shoe & Foundry Co. v. Toluszis, 125 Ill. App. 622. Question whether servant, understanding little English, and inexperienced, assumed the risk of ore falling from a scoop as it was being loaded onto a ship held for jury. Illinois Steel Co. v. Strong, 129 Ill. App. 581.

19. Servant could assume that handle on hand car was reasonably safe unless he had knowledge to the contrary. Southern R. Co. v. McGowan [Ala.] 43 S 378. Employe at work on trestle had right to assume that it was reasonably safe for running of cars. West Prate Coal Co. v. Andrews [Ala.] 43 S 348. Employe hired to do repair work on railroad has a right to assume that master will not negligently or maliciously create unusual or unexpected dangers; hence, an instruction that employe assumes incidental dangers, but cannot rely "wholly" on his employer making the place of work safe is erroneous. Indianapolis St. R. Co. v. Kane [Ind.] 80 NE 841. Employe killed by stone which fell on him because of break in chain, who was acting under foreman's directions, and in reliance on warnings being given, held not to have assumed risk as matter of law. Morena v. Winston, 194 Mass. 378, 80 NE 473. Evidence insufficient to show plaintiff assumed risk of tamping powder in a rock with a steel bar under direction of two superiors. Pitts v. Wells, 31 Ky. L. R. 208, 101 SW 1192. Employe killed by stone which fell owing to break in chain was acting

an independent inspection or examination of his appliances or place of work.[20] In other words, negligence of the master, or of his representatives, is not one of the ordinary risks which a servant assumes,[21] ordinary or incidental risks being only

under foreman's instructions, and had a right to suppose that stones would not be swung over him without warning. Held, no contributory negligence shown. Morena v. Winston, 194 Mass. 378, 80 NE 473. Longshoreman, injured by plank which fell from upper hatch while at work below, held not to have assumed the risk as a matter of law, where he was working under foreman's orders and had no authority to disturb the upper hatch. King v. Griffiths & Sprague Stevedoring Co. [Wash.] 88 P 759. When ordered to work in a designated place, unless the danger is obvious, a servant may assume that it is reasonably safe. Myreen v. Smith, 127 Ill. App. 426.

20. Servant is not bound to make examination for hidden defects. Nelson v. Petterson, 229 Ill. 240, 82 NE 229; Cavanaugh v. Witte Gas & Gasoline Engine Co., 123 Ill. App. 571; George B. Swift Co. v. Gaylord, 229 Ill. 330, 82 NE 299. Servant is not required to examine the braces of a derrick and calculate whether they are sufficiently strong. George B. Swift Co. v. Gaylord, 126 Ill. App. 281. Servant is not bound to make a careful inspection of the place where he is to work. Myreen v. Smith, 127 Ill. App. 426. Railway employe is not himself bound to inspect track. Chicago, etc., R. Co. v. Birk [Tex. Civ. App.] 18 Tex. Ct. Rep. 72, 99 SW 753. Tracklayer and repairer, temporarily engaged in driving car, held not negligent in failing to inspect track for obstruction as he had a right to assume that track was clear. Central Coal & Iron Co. v. Walker, 30 Ky. L. R. 621, 99 SW 309. An employe does not assume a risk by reason of failure to discover a defect by an examination which he did not make and could not, under circumstances, have been reasonably expected to make. Monangahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 NE 1062. Employe did not as matter of law assume risk of using scaffold (which fell) without inspecting it. Parker v. Fairbanks-Morse Mfg. Co., 130 Wis. 525, 110 NW 409. Plaintiff was injured by the fall of a barrel from a joist above the floor of the room where she was working. Held she did not assume the risk, being under no duty to inspect to see if the barrel was securely fastened. G. A. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 99 SW 715.

21. Dangers incidental to mining are assumed, but not those increased dangers arising from negligence of employer. Birmingham Min. & Cont. Co. v. Skelton [Ala.] 43 S 110. An employe in assuming ordinary risks by entering an employment does not assume an independent risk produced by the negligence of the master. Atlanta, etc., R. Co. v. McManus, 1 Ga. App. 302, 58 SE 258. Lineman removing wires from poles held not to have assumed risk of pole falling because of having rotted off. Munroe v. Ley [C. C. A.] 156 F 468. The assumption of ordinary risks even of a dangerous employment does not carry with it the assumption of unknown, intervening, extraordinary hazards occasioned by the master's negligence. Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 SE 249. A rule that employes assume all risks is immaterial where the negligence alleged is disobedience of a city ordinance, as a company has no power to relieve itself by contract from the effect of such disobedience. Chicago, etc., R. Co. v. Lawrence [Ind.] 82 NE 768. In such case, a rule that the company desired its employes not to incur risks from which they could not protect themselves properly excluded. Id. Negligence of master in failing to provide a safe place and appliances not assumed. Brents v. Louisville & N. R. Co., 31 Ky. L. R. 1216, 104 SW 961. Risks due to master's negligence, which are not so obvious that their presence should be known, not assumed. Cumberland Tel. & T. Co. v. Graves' Adm'x, 31 Ky. L. R. 972, 104 SW 356. The willful violation of the duty of an employer to furnish safe appliances and the results which flow from such failure are not ordinarily incident risks which are assumed. Roff v. Summit Lumber Co., 119 La. 571, 44 S 302. Where an electric light pole had stood for years in a railroad yard, a brakeman who knew of its position did not assume danger produced by removing a guy wire and permitting it to lean over the track. Bradley v. Central Vermont R. Co. [Mass.] 82 NE 44. Servant held not to assume risk of injury due to defects in corduroy road over which he hauled logs. Goss v. Goss, 102 Minn. 346, 113 NW 690. Brakeman held not to have assumed risk due to defective telltale before a low bridge, though he knew of the location of the bridge and voluntarily changed the customary method of inspecting the train. Whitehead v. Wisconsin Cent. R. Co. [Minn.] 114 NW 254. Workman in planing mill held not to have assumed risk of breaking of a brace which was used in ascending the wall of the building for the purpose of adjusting a belt tightener. Lee v. Wild Rice Lumber Co., 102 Minn. 74, 112 NW 887. Risk of master's negligence is not assumed. Kirby v. Manufacturers' Coal & Coke Co. [Mo. App.] 106 SW 1069. Where negligence of the master is the producing cause of the injury, the assumption of the risk by the servant cannot be an issue in the case. Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 SW 142. Servant employed to deliver cases of beer held not to have assumed risk due to breaking of a defective case. Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99. Risks incident to employer's negligence in furnishing defective machinery are not assumed. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. An engineer does not assume risk of negligence in failing to keep roadbed in repair. Hoch v. St. Louis, etc., R. Co. [Mo.] 106 SW 525. Instruction approved. Id. Evidence held to warrant finding that servant did not assume risk of death while cleaning out ashes under boiler, where he had never done the work before, and defendant was negligent in not warning him or supplying proper tools. Naughton v. Laclede Gaslight Co., 123 Mo. App. 192, 100 SW 1104. Defects in scaffolds, forms, and temporary structures,

those which due care on the part of the master would not have obviated.[22] But this rule is usually limited in its application to breaches of the master's duty unknown to the servant.[23] If a neglect of duty by the master is known to the servant,[24] and he continues the employment without complaint, he assumes the risk of so doing, notwithstanding the want of due care by the master, unless he was justified in believing that he could continue with safety by the exercise of due care,[25] the danger not being so obvious and imminent that an ordinarily prudent person would not have encountered it.[26]

not intended to become part of the completed building, are not defects of the structure due to its unfinished state. Bell v. Rocheford [Neb.] 113 NW 157. Workman in cotton mill held not to have assumed risk of defective belt shifter which became defective after he entered upon the employment. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79. Switchman held not to have assumed risk incident to running cars down a siding at night unattended and without signal lights. Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 156, 105 SW 1019. Plaintiff hauling lumber held not to have assumed risk arising from breaking of plank in roadway, though he knew that such accidents occasionally occured. Cameron v. Realmuto [Tex. Civ. App.] 100 SW 194. Inexperienced workman did not assume risk of working on stack of flour improperly piled. Commerce Milling & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916. Brakeman jerked from train because of defect in roadbed held not to have assumed the risk. Galveston, etc., R. Co. v. Wallis [Tex. Civ. App.] 104 SW 418. Workman on coal dock held not to have assumed risk of cars being set in motion without notice or warning, where it was customary for gripman or others to give such notice. Polaski v. Pittsburg Coal Dock Co. [Wis.] 114 NW 437.

22. Assumption of risk cannot be availed of, unless the master has taken reasonable precautions for employe's safety. Strong v. Rutland R. Co., 121 App. Div. 391, 106 NYS 85. Dangers known to the master, which can be avoided by him in the exercise of ordinary care, are not assumed. Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 NE 168. Rule that employe does not assume risk from dangers against which the master has expressly undertaken to protect him applies to operation of stone quarry. Harper v. Iola Portland Cement Co. [Kan.] 93 P 179.

23. Risk of defective appliances assumed, if known and the master is not informed. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Where servant was killed by giving way of an iron rod which was patently defective, a recovery may be had, unless he knew or should have known of the defect. Wood's Adm'x v. Daviess County Distilling Co., 31 Ky. L. R. 511, 102 SW 813. In Missouri in order that a servant assume the risk of defective machinery, it must appear that he knew the defect and appreciated the danger. Garaci v. Hill-O'Meara Const. Co., 124 Mo. App. 709. 102 SW 594. Incidental risks do not include augmented risks arising from negligence of the master, unless the employe knows or is charged with knowledge of the increased danger. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 17 Tex. Ct. Rep. 685, 99 SW 200. Switchman held not to have assumed risk of customary negligence and violence in coupling cars unless he knew of such custom and appreciated the danger and risk. Galveston, etc., R. Co. v. Stoy [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 99 SW 135. The rule that an employe does not assume risks created by the master's negligence, and of which he does not know, applies to an engineer or other train employe. Texas, etc., R. Co. v. Middleton [Tex. Civ. App.] 19 Tex. Ct. Rep. 487, 103 SW 203.

24. Where an employe based his right to recover on defective machinery, it was proper to charge that he could not recover, if he knew at the time that the machinery was defective and dangerous. Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470. Section hand who was thrown from hand car because it was overloaded by fellow-servants, and it was shown to be customary to so overload cars, and the man knew it when he entered the employment, held to have assumed the risk. Chandler v. St. Louis, etc., R. Co. [Mo. App.] 106 SW 553. Where work is hazardous, the fact that an employe is directed to do it in the most dangerous way cannot be complained of by him if he knew of the dangers incident to such method. Kirby v. Hillside Coal Co. [Ky.] 106 SW 278.

25. Where a servant in obedience to the requirements of his master incurs the risk of machinery or appliances, which though dangerous are not of such character that they may not be safely used by the exercise of reasonable skill, he does not as a matter of law assume the risk of the master's negligence. Sapp v. Christie Bros. [Neb.] 113 NW 189.

26. Though employe at work in trench knew the danger of its caving in, he did not assume the risk unless the danger was imminent or such that an ordinarily prudent person would not have encountered it. Smith v. Kansas City, 125 Mo. App. 150, 101 SW 1118. Employe did not assume risk of riding on defective car unless the danger was so glaring as to threaten immediate injury, or such that a person of ordinary prudence would not have used it. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. The mere fact that a servant knows of some danger in the place of employment will not defeat his right to recover, unless such knowledge discloses imminent and immediate danger which a reasonably prudent person knows could not be avoided. Garaci v. Hill-O'Meara Const. Co., 124 Mo. App. 709. 102 SW 594.

The servant may also assume that work will be done in the customary manner and that rules will not be violated.[27]

Reliance on orders or assurances of safety.[See 8 C. L. 909]—A servant may rely to a reasonable extent upon the superior knowledge of the master or a superior, and may assume that he will not be exposed to unusual or unnecessary danger.[28] Hence, he does not assume the risk of executing an order of a superior,[29] or of continuing his work after an assurance of safety by a superior,[30] unless the danger is known and appreciated by the servant,[31] or is obvious and imminent and such that an ordinarily prudent person would not have encountered it under the circumstances.[32]

Reliance on promise to repair, after complaint.[See 8 C. L. 911]—Promise of master to remedy defects creates an implied agreement that servant shall not for a reasonable time thereafter be held to have assumed the risk,[33] unless the appreciated dan-

27. Plaintiff did not as matter of law assume risk of act of foreman of section crew in suddenly lifting car from track, causing it to be precipitated upon plaintiff, the act of the foreman being contrary to the usual custom. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427. Employe killed by engine, backed upon him without warning while he was performing his duty, had right to assume that engine would not be moved without the signal required by the rules. Northern Alabama R. Co. v. Key [Ala.] 43 S 794. No duty to signal hostler to stop when engine was not moving. Id. Freight conductor assumed only ordinary risks attendant upon waiting for his train in the yards; he did not assume risk arising from violation of rules of company as to signals upon and by switch engines, but had a right to assume that those rules would be observed. Dobyns v. Yazoo, etc., R. Co., 119 La. 72, 43 S 934.

28. Employe assisting in raising heavy girder with clinch bars held not to have assumed as a matter of law risk of girder turning owing to improper method of handling it, and lack of men, where he was acting under foreman's orders, and none of the men anticipated such accident. Bokamp v. Chicago & A. R. Co., 123 Mo. App. 270, 100 SW 689.

29. Employe was ordered to assist machinist in drilling a hole in a vise, and was told by the machinist to hold it with his hands. He was ignorant of the proper manner of securing the vise. He did not assume the risk of injury. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 913, 99 SW 738. An employe may assume that a foreman will not direct him to do anything that would endanger his life. Cumberland Tel. & T. Co. v. Graves' Adm'x, 31 Ky. L. R. 972, 104 SW 356. If brakeman stated he would ride cars down an incline, and foreman told him to get on at the double brakes and hold the cars, this would constitute an order. Woodstock Iron Works v. Kline [Ala.] 43 S 362.

30. Where servant called attention of his foreman to defect in machine and was assured that there was no danger, and in reliance on such assurance returned to work and was injured in a peculiar manner not to be expected, held he did not assume the risk. Industrial Lumber Co. v. Bivins [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831. Plaintiff was assured by defendant's foreman that there was no one at work on an upper floor of the building in which he was working, and was later injured by a brick dropped by an employe from above. Master held liable. Graham v. Van Hauten, 53 Misc. 641, 103 NYS 111. Where a foreman was accustomed to giving certain directions to persons running a car, and he told other employe he would direct them to stop the car, the workman on the track was entitled to rely on the promise and did not assume risk of car striking him. Utah Consol. Min. Co. v. Paxton [C. C. A.] 150 F 114. Where a servant complains of a dangerous appliance and the master commands him to proceed and assures him that it is safe, the servant is relieved from his former assumption of the risk. Bush v. West Yellow Pine Co., 2 Ga. App. 295, 58 SE 539.

31. Servant held to have assumed risk involved in loading rails in a certain way, where he had full knowledge, notwithstanding that foreman expressed opinion on complaint that method used was all right. Galland v. Great Northern R. Co., 101 Minn. 540, 111 NW 1133. Mule driver in a mine, injured by the mule taking fright at a certain object, held to have assumed the risk, the mule having taken fright at the same object shortly before and the driver having been induced to return to work upon assurance that it would not occur again. Milby & Dow Coal & Min. Co. v. Balia [Ind. T.] 104 SW 860.

32. One employed to load cars, and not to mine, was told by foreman to go to work in a certain entry and was assured that the roof was safe. Held, he did not assume the risk of the roof falling upon him unless the danger was so imminent that a person of ordinary prudence would not have undertaken it. Central Coal & Iron Co. v. Thompson, 31 Ky. L. R. 276, 102 SW 272. Where a servant continues employment with knowledge that an appliance is unsafe, but after command of his master and assurance that it is safe, the question of assumption of the risk is for the jury. Bush v. West Yellow Pine Co., 2 Ga. App. 295, 58 SE 529.

33. Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 81 NE 862. Where the servant has complained of a defective condition, and the master or his representative has promised to make it safe by proper repairs, the servant may continue in the employment without assuming the risk. Utah Consol. Min. Co. v. Paxton [C. C. A.] 150 F 114. Where a servant had repeatedly reported a defective handcar to his superior,

ger is so imminent that a man of ordinary prudence would refuse to encounter it.[34] The complaint to master must be based on apprehension of injury [35] and must be made with intent to quit work unless defect is repaired,[36] and the continuance of service must be in reliance upon promise to repair,[37] but it is not necessary that such intention be declared in terms,[38] and whether it was made with such intent is a question of fact.[39] It must also appear that the promise made, or assurance given, indicated that some change would be made for the better.[40] A promise to substitute another appliance for one which is already reasonably safe is not within the rule [41] nor to a promise of the master to remove the servant to a safer place of employment,[42] nor where the appliance toward which the promise is directed is a simple implement with which the servant is entirely familiar.[43] To bring a case within the operation of this rule, it must appear that a promise to repair was in fact made.[44] What is a reasonable time depends upon the circumstances of each case

who had promised to furnish another, there was no assumption of risk. Boney v. Atlantic, etc., R. Co. [N. C.] 58 SE 1082. Where employer complained to company that chain used in loading logs on car was defective, and was promised that it would be repaired, and he remained in the service relying on the promise, he did not assume the risk. Britt v. Carolina N. R. Co., 144 N. C. 242, 56 SE 910. Servant complained that machine was dangerous, and master told him to continue work and machine would be repaired in two days. Two hours later plaintiff was injured. Held, master assumed the risk. Altman v. Schwab Mfg. Co., 54 Misc. 243, 104 NYS 349. Where servant complained of an appliance, and his foreman promised to give him something better and requested him to work until the substitute could be made, the master is liable for all injuries resulting from the servant's careful use of such appliance during a reasonable period. Shea v. Seattle Lumber Co. [Wash.] 91 P 623.

34. Utah Consol. Min. Co. v. Paxton [C. C. A.] 150 F 114. Where employe complained of defect in log carriage and obtained a promise to repair it, he did not assume the risk of injury therefrom for a time reasonably sufficient for the repairing of it, unless the danger was so imminent and obvious that no person of ordinary prudence would encounter it. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F 680. Where employe, 14 years old, notified his employer of a defective appliance and the master promised to repair, risk of injury was not assumed if an ordinary youth of his age and experience would have continued under the circumstances. Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535.

35. Complaint held made on account of apprehension of danger. Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 81 NE 862. Held that question whether complaint was made with reference to threatened danger, or so that servant would be able to do better, was properly submitted to the jury. Western Elec. Co. v. Prochaska, 129 Ill. App. 589.

36. Burden is on servant to show that complaint was so made. Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 81 NE 862.

37. Evidence held to show reliance on promise to repair. Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 81 NE 862. Evidence considered and held insufficient to justify finding of jury that plaintiff continued in service on the strength of a promise to repair. Libby v. Kearney, 124 Ill. App. 339. Where servant's continuance in the service with knowledge of a dangerous pile of edgings was not induced by a promise by his employer to remove it, he could not recover for injuries received on that ground. Roy v. Hodge [N. H.] 66 A 123. Where tool used by servant was defective, and he complained and received a promise that it would be repaired, and whether he remained in reliance on the promise was disputed, an instruction should have been submitted on the question whether he remained in the service in reliance on such promise. St. Louis S. W. R. Co. v. Kern [Tex. Civ. App.] 18 Tex. Ct. Rep. 42, 100 SW 971. As to how far a street car employe was justified in relying on promise of master to repair a defective appliance, held for jury. Flynn v. Connecticut Valley St. R. Co. [Mass.] 82 NE 1085.

38, 39. Morden Frog & Crossing Works v. Fries, 228 Ill. 246, 81 NE 862.

40. Where plaintiff complained of material he was using, and foreman said it was borrowed stock and that other stock would be procured but did not say it would be different from that being used, servant was not thereby relieved of the risk. Laynes v. Loring B. Hall Co., 194 Mass. 221, 80 NE 472.

41. Railroad not liable for death caused by stub pilot on engine, though it had promised to substitute a pilot of different type. Jones v. Yazoo, etc., R. Co. [Miss.] 43 S 813.

42. Instruction held erroneous. United States Sugar Refinery v. Welcher, 123 Ill. App. 374.

43. Riley v. American Steel & Wire Co., 129 Ill. App. 123.

44. Servant who knew that a belt on a planing machine he was working with was defective and who had complained, but there was no promise to repair, held to have assumed the risk. Gainer v. Southern R. Co. [Ala.] 44 S 652. If upon complaint to the master that the conditions of the work are unsafe he refuses to better them, and the servant understanding them continues the work, he assumes the risk. Kansas City, etc., R. Co. v. Loosley [Kan.] 90 P 990.

and the time required for repairs.[45] Servant has an equal right to rely upon a second promise to repair.[46] The rule under discussion applies to dangers arising from incompetence of fellow-servants whom the master has promised to replace with competent employes.[47] A promise to repair does not relieve the servant from the duty of exercising ordinary care for his own safety nor deprive the master of the defense of contributory negligence.[48]

Risks created by servant.[See 8 C. L. 913]—A servant who unnecessarily adopts a dangerous method of doing work,[49] or who voluntarily and for purposes of his own undertakes work outside the scope of his own duties,[50] assumes the risk of injury

45. One day held a reasonable time where repair of defect required the placing of new tips in a power engine and defendant did not have them on hand at the time. Czajkowski v. Robinson, 124 Ill. App. 97; Utah Consol. Min. Co. v. Paxton [C. C. A.] 150 F 114. Where a master promises to repair a defective appliance, risk due to such defect is not assumed for a reasonable time after the promise. Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535. Employe had no right to expect repairs on log carriage in sawmill would be made in two or three days, where they required an overhauling of the whole mill machinery. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F 680. Where workman on die cutter complained to foreman that it was out of order, and foreman told him to go back to work and it would be repaired, and within half an hour thereafter he was injured, held question of negligence was for the jury. Fox v. Kinnear Pressed Radiator Co. [N. J. Err. & App.] 67 A 1011. Whether two days was an unreasonable time to work with an unsafe appliance after a safe one had been promised held for the jury. Shea v. Seattle Lumber Co. [Wash.] 91 P 623. Does not apply to runway consisting of planks laid on beam. Dauchy Iron Works v. Nevin, 130 Ill. App. 475.

46. Czajkowski v. Robinson, 124 Ill. App. 97.

47. Williams v. Kimberly & Clark Co., 131 Wis. 303, 111 NW 481. Where complaint alleged an injury as the result of negligence of a fellow workman, and that plaintiff had "entreated" employer to discharge the negligent man and employ a competent one ten days before the injury, and the employer promised to do so, whereupon plaintiff remained, held complaint did not show on its face that plaintiff remained an unreasonable length of time. Id.

48. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F 680.

49. Where two safe ways are provided for doing work and an employe chooses a third method which is dangerous, he assumes the risk. Perry v Michigan Alkali Co. [Mich.] 14 Det. Leg. N. 747, 114 NW 315. An experienced brakeman who unnecessarily assumes a dangerous position on the pilot of an engine not equipped with footboard or handholds assumes the risk of injury. St. Louis, etc., R. Co. v. Conway [C. C. A.] 156 F 234. An employe may not take risks, and in case of ill results following to him charge them to the employer. Such conduct constitutes an assumption of risk barring recovery. McConnell v. Alpha Portland Cement Co. [N. J. Err. & App.] 67 A 346. Employe stumbled over bolt on machine he was using and fell into elevator shaft. He knew position of bolt and failed to use a guard for the shaft, which he could have used. No recovery. Taylor v. Penn Steel Castings & Mach. Co., 217 Pa. 269, 66 A 353. Where employe attempted unnecessarily to cross a room containing a dangerous vat in the dark, being familiar with conditions there, he assumed the risk of walking into the vat. Krug v. American Sugar Refining Co., 104 NYS 1072. Where a miner violated a rule of the company against carrying loose tools in his arms while in the cage, and was injured as a result thereof, he assumed the risk. Elkton Consol. Min. & Mill. Co. v. Sullivan [Colo.] 92 P 679. Held that question whether servant assumed risk in attempting to make coupling of moving car under orders of master was for the jury. East St. Louis Connecting R. Co. v. Meeker, 229 Ill. 98, 82 NE 202. Servant cannot recover where in employing hazardous method of working he disobeys instructions. Dauchy Iron Works v. Nevin, 130 Ill. App. 475. In voluntarily placing himself in a position where it is difficult to hold a footing, servant assumes the risk of injury resulting therefrom. Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 81 NE 411, rvg. 126 Ill. App. 297.

50. Where an apprentice, learning trade of a millwright was injured while accompanying an assistant millwright, whether he voluntarily left the work he was engaged in and accompanied the millwright held for jury. Baldwin v. American Writing Paper Co. [Mass.] 82 NE 1. A servant who goes outside his duties without orders or authority assumes the risk. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Servant who went outside his duties and attempted to fix a scraper with which he was working assumed the risk. International, etc., R. Co. v. Hall [Tex. Civ. App.] 19 Tex. Ct. Rep. 500, 102 SW 740. Where a millhand employed to straighten boards leaves his work without order from the master, and as a favor to another servant attempts to operate a machine, he assumes the risk. Patterson v. North Carolina Lumber Co. [N. C.] 58 SE 437. Where a servant of one master has an interest in the work in any proper capacity, and at the request or with the consent of another's servants undertakes to assist in the work, he does so at his own risk. Kelly v. Tyra [Minn.] 114 NW 750. Where employe in mine left his own place of work and went to another part of the mine on a private errand and was there injured, he assumed the risk. Pioneer Min. & Mfg. Co. v. Talley [Ala.] 43 S 800.

arising therefrom. Servant assumes any risk arising from his failure to obey orders.[51] A specific order to do an act in the usual and customary manner does not relieve the servant from the rule of assumed risk.[52]

(§ 3) *G. Contributory negligence. Nature of defense.*[See 8 C. L. 913]—Contributory negligence is a want of ordinary care on the part of the servant injured, which, concurring and combining with negligence of the master, produced the injury as a proximate cause[53] without which the injury would not have occurred.[54] When found to exist it bars a recovery in most jurisdictions.[55] The defense of contributory negligence is usually available, though the action is based on a violation of a statutory duty of the master.[56]

51. Servant who in disobedience of orders climbs a semaphore pole without notifying operator cannot recover for injuries resulting from fall caused by operator turning arm thereof. Illinois Cent. R. Co. v. Braden, 128 Ill. App. 265.

52. Linderman Box & Veneer Co. v. Thompson, 127 Ill. App. 134.

53. Contributory negligence defeats recovery, though not sole proximate cause. Nashville, etc., R. v. Hayes, 117 Tenn. 680, 99 SW 362. It is a question of contributory negligence, and not of assumption of risk, where peril of a servant is increased by the master's negligence and the servant with knowledge of such negligence continues in the performance of his duty. Rogers v. Rundell [Mo. App.] 106 SW 1096. The defense of contributory negligence rests on an omission of duty on the part of the servant, and is available if it proximately caused the injury, though the master was also negligent. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Where act of brakeman in boarding car at the time, in the manner, and under the circumstances, was negligence, and this negligence was a proximate cause of or contributed to produce his injury, he could not recover. Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 18 Tex. Ct. Rep. 951, 100 SW 990. Where bucket dropped into mine by reason of breaking of defective cable, deceased was not guilty of contributory negligence by reason of his failure to give signal that there was an obstruction in the shaft. Owen v. Retsof Min. Co., 104 NYS 37. Contributory negligence on part of motorman injured in collision not shown, where his headlight went out and he put on a red light without informing his conductor, where it did not appear that the conductor could have done anything. Baldwin v. Schenectady R. Co., 118 App. Div. 441, 103 NYS 514. Riding on a car backwards instead of forwards would not constitute negligence if increased danger was unknown to plaintiff and was caused by defendant's negligence. Southern R. Co. v. McGowan [Ala.] 43 S 378.

54. An instruction that contributory negligence would not bar recovery, unless without it the master's negligence could not have caused the injury, was not erroneous. Northern Pac. R. Co. v. Wendel [C. C. A.] 156 F 336.

55. Contributory negligence defeats recovery. Instruction approved. Pittsburg, etc., R. Co. v. Collins, 168 Ind. 467, 80 NE 415. If the servant's negligence, whether it consist of a negligent act or an omission to do an act, is the proximate cause of his injury, he may not recover. Elmgren v. Chicago, etc., R. Co., 102 Minn. 41, 112 NW 1067. A servant while working with dangerous machinery is bound to exercise due diligence and if he does not he cannot recover, though the master may also be negligent. Vinson v. Willingham Cotton Mills, 2 Ga. App. 53, 58 SE 413. Contributory negligence which proximately causes an injury is a bar to recovery, no matter how negligent the master may have been. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. If an engineer ran his engine at 50 or 60 miles per hour around a curve where it left the track, and such speed proximately contributed to the derailment, he cannot recover. Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707.

56. Contributory negligence will bar a recovery under Factory Act, (Laws 1903, p. 540, c. 356), where action is based on failure to guard rip saw. Madison v. Clippinger, 74 Kan. 700, 88 P 260. Where brakeman with knowledge that automatic coupler on a foreign car was out of order went between the cars and negligently placed his hand between the deadwood before slack was taken up, his negligence in failing to guard against a known defect was the cause of the injury and he could not recover under Rev. Laws, c. 111, prohibiting the hauling of cars not equipped with automatic couplers. Dumphy v. New York, etc., R. Co. [Mass.] 82 NE 675. That the employer permitted cog wheels to remain unguarded in violation of Comp. Laws, 1897, § 5349, did not deprive him of the defense of contributory negligence. Schulte v. Pfaudler Co. [Mich.] 14 Det. Leg. N. 641, 113 NW 1120. Contributory negligence is defense to action based on failure of master to guard belt as required by Comp. Laws, § 5349. Swick v. Aetna Portland Cement Co., 147 Mich. 454, 111 NW 110. Though the employment of a boy under 16 years of age at employment dangerous to life is negligence under Pub. Acts. 1901, p. 157, No. 113, yet where such boy apparently above that age stuck his hand into the revolving knives of a machine, when he could have easily ascertained that the machine was in motion, his contributory negligence bars recovery. Beghold v. Auto Body Co., 149 Mich. 14, 14 Det. Leg. N. 381, 112 NW 691. Where servant was sent to repair rotten chain on water spout and negligently pulled on the chain, which broke, injuring him, he could not recover for a defect in an appliance, or in the way, under Revisal 1905, § 2646. Mathis v. Atlantic Coast Line R. Co., 144 N. C. 162, 56 SE 864. Where a boy over 14 years of age was injured because of his own negligence,

Degree of care required of servant. See 8 C. L. 914—Only ordinary care is required,[57] that is, such care as ordinarily prudent persons would exercise under the same circumstances.[58] Whether that degree of care was exercised in a particular

there could be no recovery because of failure of the master to obtain a certificate that he was physically able to perform the work as required by Laws 1897, p. 494. Fortune v. Hall, 106 NYS 787. Defense of contributory negligence is available in action under Factory Act of 1905. Bundy v. Union Iron Works [Wash.] 89 P 545.

Contra: Where a boy under 15 years of age is injured while employed to oil machinery in a coal mine prohibited by Act June 2, 1891, the employer cannot set up contributory negligence as a defense. Lenahan v. Pittston Coal Min. Co. [Pa.] 67 A 642. Where act of mine owner, causing injury, was willful under the statute, the contributory negligence of the servant is unavailing as a defense. Kellyville Coal Co. v. Strine, 117 Ill. App. 115.

57. Employes are under the duty of exercising ordinary care for their own safety. Bryant v. Beebe & Runyan Furniture Co. [Neb.] 110 NW 690. Contract requiring employe to examine appliances, etc., before using them held to require only ordinary care; failure to discover defect in engine pilot not negligence. Barschow v. Lake Shore, etc., R. Co., 147 Mich. 226, 13 Det. Leg. N. 1063, 110 NW 1057. Whether employe in car which was being unloaded was guilty of contributory negligence in remaining there during switching on the track, being injured by other cars striking his, depended on whether he exercised ordinary care under the circumstances. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 954, 101 SW 453. Orders to motorman to make certain running time do not relieve him from the duty of ordinary care in running his car. McGahan v. St. Louis Transit Co., 201 Mo. 500, 100 SW 601. Instruction that a servant could not recover if he did anything which contributed "in any way to his injury" was erroneous as requiring more than the exercise of ordinary care. Gage v. Springston Lumber Co. [Wash.] 91 P 558. Where street car conductor collided with a pole while standing on the running board of his car collecting fares, an instruction permitting recovery, if he did not know or by the exercise of reasonable diligence could not discover the dangerous proximity of the pole to the track, was proper. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 936.

58. A servant is not required to exercise the best judgment possible but only the degree of care to be expected of persons of reasonable prudence engaged in the same occupation. Perrotta v. Richmond Brick Co., 108 NYS 10. Instruction that brakeman, crushed between car, could not be held guilty of contributory negligence, if he went about his work as the great mass of men act under the same circumstances, approved. Hayes v. Chicago, etc., R. Co., 131 Wis. 399, 111 NW 471. The standard of care required of a servant is that which a reasonably cautious person would exercise under the same circumstances. Bryant v. Great Northern Paper Co. [Me.] 68 A 379. Where an ordinarily prudent person would not have continued to use a machine known by him to be defective and as to which he had objected, a servant so doing is guilty of negligence, especially if he increases the risk by his method of using it. St. Louis, etc., R. Co. v. Kern [Tex. Civ. App.] 18 Tex. Ct. Rep. 42, 100 SW 971. Where a servant with knowledge of the dangerous character of a machine continues to work at it, under circumstances such that no person of ordinary prudence would continue, he is guilty of contributory negligence. Mead v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. The "look and listen" rule is not strictly applicable where a railroad employe is injured in the discharge of his duties. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021. The motorman of an electric car is guilty of contributory negligence if, by the exercise of ordinary care and prudence, he ought to have discovered the presence of another car on the same track in time to have avoided the collision in which he was injured. Interurban R. & T. Co. v. Treuheit, 9 Ohio C. C. (N. S.) 77.

Plaintiff held guilty of contributory negligence: Experienced miner held negligent in continuing work after the master's failure to promptly furnish timbers to brace the mine as work progressed. Mammoth Vein Coal Co. v. Bublis [Ark.] 104 SW 210. Evidence sufficient to show contributory negligence where a miner was injured by falling of a stamp. O'Neill v. Thomas Day Co. [Cal.] 92 P 856. One who took hold of a live electric wire in the face of repeated warnings held negligent. Kennedy v. Scovill Mfg. Co., 79 Conn. 722, 65 A 131. Evidence held to show that an injury was the result of contributory negligence. Vinson v. Willingham Cotton Mills, 2 Ga. App. 53, 58 SE 413. Servant injured by obvious danger held guilty of contributory negligence. Sutton v. Des Moines Bakery Co. [Iowa] 112 NW 836. Evidence sufficient to show contributory negligence. Muscarelli v. Hodge Fence & Lumber Co. [La.] 45 S 268. Two employes engaged in a fight and fell on a track and were killed by train. No recovery for death. Rogers' Adm'r v. Covington & Cincinnati El. R. Transfer & Bridge Co., 31 Ky. L. R. 374, 102 SW 336. Section hand running a hand car over the track held negligent where he was injured by explosion of a torpedo placed on the rail to warn trains of another ahead, he knowing of the use of torpedoes and that the track ahead was obstructed. Mize v. Louisville, etc., R. Co. [Ky.] 105 SW 908. Evidence held to show contributory negligence where section hand was injured by falling from hand car. Louisville, etc., R. Co. v. Guest's Adm'r [Ky.] 106 SW 817. Where an engineer was injured by explosion of steam oven, evidence sufficient to show facts inconsistent with due care on his part. Cummings v. Masters & Wardens of Grand Lodge of Masons [Mass.] 81 NE 189. Where a brakeman went between cars after the train had come to a stop on a grade before slack had been taken up and without signalling the engineer or conductor, held he was guilty of contributory negligence as a matter of law. Dumphy v. New York, etc., R. Co. [Mass.] 82 NE 675. Flagman, whose

duty it was to discover and give warning of approach of trains, held negligent where he was struck and killed by a train. Zulke v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 971, 110 NW 493. Boy of 15, employed three months on power printing press, held negligent in getting too close to press to pick up paper which had fallen. Van Wyck v. Dickinson, 148 Mich. 418, 14 Det. Leg. N. 198, 111 NW 1033. Where a fireman on a locomotive failed to call the engineer's attention to danger signals on the line ahead, he was held guilty of negligence and could not recover for injuries sustained by derailment of the train. Elmgren v. Chicago, etc., R. Co., 102 Minn. 41, 112 NW 1067. Switchman held guilty of contributory negligence in permitting an engine to come so close to a switch that he did not have time to turn the switch before the engine struck his hand. Eliot v. Kansas City, etc., R. Co., 204 Mo. 1, 102 SW 532. Where trackman sweeping snow from a switch was killed by an engine running three miles an hour backing down onto him, held he was negligent as a matter of law. Cahill v. Chicago, etc., R. Co., 205 Mo. 393, 103 SW 532. Plaintiff operating iron drill got glove caught in set screw which was in plain sight and the danger apparent. Held guilty of contributory negligence. Pohlmann v. American Car & Foundry Co., 123 Mo. App. 219, 100 SW 544. Experienced miner who was head man in drill work and was handling a drill at the time of an explosion held negligent. Thornberry v. Old Judge Min. Co., 126 Mo. App. 660, 105 SW 659. Servant twenty-three years old, who attempts to clean rolls of leather pressing machine at which he works while such rolls are in motion, is negligent. Bennett v. Busch [N. J. Law] 67 A 188. Employe removing shredded pulp from pulp machine held guilty of contributory negligence as a matter of law. McGrath v. Fibre Conduit Co., 106 NYS 777. Where a boy fourteen years of age got his fingers caught in a sausage machine after he had been sufficiently warned and instructed, he was held guilty of contributory negligence as a matter of law. Fortune v. Hall, 106 NYS 787. Where an employe fell from a scaffold not shown to be defective but where the fall was due to a misstep, and it appeared that the servant was intoxicated, held, the employe failed to prove cause of action. Shea v. Hodden Const. Co., 107 NYS 54. Evidence held to show that an employe who got his hand caught in cog wheels of a machine was negligent. Loughran v. Jordan L. Mott Iron Works, 122 App. Div. 595, 107 NYS 434. Evidence sufficient to show contributory negligence where a miner in charge of coal cars in a mine was caught between a car and the wall of the mine. Kuhns v. H. C. Frick Coke Co., 216 Pa. 385, 65 A 796. Evidence sufficient to show contributory negligence of a foreman who was injured by reason of not paying attention to the work and permitting the machine he was working with to become out of order. Wisniawaki v. Carbon Steel Co., 216 Pa. 486, 65 A 935. Street car conductor killed held guilty of contributory negligence. Savage v. Rhode Island Co. [R. I.] 67 A 633. Evidence held to show contributory negligence where employe's hand was caught in gin saws. Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470.

Plaintiff held not guilty of contributory negligence: Servant not at fault for leaving mine by "haulage way" which was customarily used. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Evidence held to show that a lineman was not charged with knowledge that wires with which he came in contact were charged. Reeve v. Colusa Gas & Elec. Co. [Cal.] 92 P 89. Evidence insufficient where a servant was injured by defective machinery. Brunger v. Pioneer Roll Paper Co. [Cal. App.] 92 P 1043. Where a switchman was injured while riding on the rear of the tender of a road engine while it was backing along a Y before daylight, he was not negligent in turning and looking backward to see if his foreman was on the front end of the engine, the crew having been assured that the Y was clear. Brantner v. Chicago, etc., R. Co. [Iowa] 112 NW 790. Evidence sufficient to show that he was not negligent. Id. Employe operating unguarded saw (required by statute to be guarded) need only exercise reasonable care under the circumstances. Evidence held not to show contributory negligence. Tucker & Dorsey Mfg. Co. v. Staley [Ind. App.] 80 NE 975. Miner was not negligent in failing to tap roof of mine to ascertain whether it was loose, where its unsafe condition was not obvious. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Evidence sufficient to show that a switchman, killed by being caught between an engine and car on a spur, was free from contributory negligence. Chicago, etc., R. Co. v. Lawrence [Ind. App.] 82 NE 768. Where switchman was killed by being caught between engine and cars kicked onto the spur track evidence held insufficient on an issue of contributory negligence to show what the switchman meant when he said "she will clear." Id. Evidence insufficient to show that a miner was negligent in going outside his duties or violating rules. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Where engine which was being repaired fell upon plaintiff by reason of negligent selection and adjustment of block under it, held, plaintiff was not guilty of contributory negligence. Missouri, etc., R. Co. v. Green, 75 Kan. 504, 89 P 1042. Evidence insufficient to require a charge on contributory negligence, where an employe was struck by a swinging circular saw. Roy Lumber Co. v. Donnelly, 31 Ky. L. R. 601, 103 SW 255. Workman in planing mill injured by breaking of defective brace held not guilty of negligence. Lee v. Wild Rice Lumber Co., 102 Minn. 74, 112 NW 887. Inexperienced laborer loading and manipulating ore cars on a gravity track held not guilty of contributory negligence. Granrus v. Croxton Min. Co., 102 Minn. 325, 113 NW 693. Not contributory negligence to continue to operate defective circular saw with knowledge of the defect. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. Employe held not negligent in continuing to work with a defective circular saw after discovering the defect. Id. Brakeman held not negligent in sitting on a brake which was a new patent and which fell down and threw him under the wheels. Southern R. Co. v. Isom [Miss.] 45 S 424. Evidence sufficient to sustain a finding against contributory negligence where a servant was injured while riding on a defective hand car. Boney v. Atlantic, etc., R. Co. [N. C.] 58 SE 1082. Evidence sufficient to show that an employe was not negligent where she was injured

instance is ordinarily a question of fact for the jury,[59] to be determined with refer-

while attempting to tie a band on a spindle of a cotton mill. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79. Evidence insufficient to show contributory negligence where employe while wheeling a wheelbarrow along a narrow suspended runway, fell. Morrissey v. Dwyer, 105 NYS 821. Where an employe transporting material in a wheelbarrow along a runway was followed by others so that he could not return, he was not negligent in using another runway provided for the purpose. Id. Evidence insufficient to show contributory negligence where a servant was drawn into the leg of a grain elevator. Lynch v. American Linseed Co., 122 App. Div. 428, 107 NYS 458. Brakeman on logging train held not negligent in riding on car load of logs where there was no other place to ride. Ragley Lumber Co. v. Parks [Tex. Civ. App.] 18 Tex. Ct. Rep. 869, 103 SW 424. Inexperienced servant held not negligent in working on top of improperly piled stack of sacks of flour. Commerce Mill. & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916. Contributory negligence not shown where switchman was killed by cars kicked down the track at night, unattended and without signal lights, it not appearing that he knew of or could have discovered the approach of the cars. Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 156, 105 SW 1019. No contributory negligence shown where servant was injured by falling of box car door. Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149. Brakeman riding on bumpers in accordance with his custom and duty held not negligent where he was thrown off by sudden acceleration of the speed of the train. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399. Where an employe was kicked by a horse, evidence that he kicked the horse is not evidence of misconduct barring recovering for the injury sustained. Morgan v. Hendricks [Vt.] 67 A 702.

59. Contributory negligence held a question for the jury: It is not, as a matter of law, negligence under all circumstances for a brakeman to dismount from a moving train and mount the engine, though the act be unnecessary. Creola Lumber Co. v. Mills [Ala.] 42 S 1019. Injury caused by fall of mine roof. Birmingham Min. & Cont. Co. v. Skelton [Ala.] 43 S 110. Held that question whether plaintiff was negligent in failing to see defect in ladder was properly presented to the jury. Peoria, etc., R. Co. v. Schantz, 226 Ill. 506, 80 NE 1041. Whether servant was guilty of negligence in taking hold of a defectively insulated and heavily charged electric wire without knowledge of its being charged, held a question for the jury. Chicago Suburban Water & Light Co. v. Hyslop, 227 Ill. 308, 81 NE 379, afg. 129 Ill. App. 575. Held that question whether defect in elevator cables was sufficiently apparent that servant should have discovered it was properly submitted to jury. Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 NE 392. Held that question whether servant was guilty of negligence in attempting to uncouple cars while standing on coal car instead of stirrup was for the jury. East St. Louis, etc., R. Co. v. Meeker, 229 Ill. 98, 82 NE 202. Servant held not negligent for crawling under camp car provided for his use, where he had reason to believe that it would not be moved without warning. Illinois Cent. R. Co. v. Panebiango, 227 Ill. 170, 81 NE 53, afg. 129 Ill. App. 1. Whether servant was negligent in attempting to couple cars in one of two customary ways is for the jury. Donk Bros. Coal & Coke Co. v. Retzloff, 229 Ill. 194, 82 NE 214. Where switchman in uncoupling cars is caught between a projection therefrom and a post, the question of contributory negligence is for the jury, it being the first time he worked in the vicinity of place in question. Illinois Cent. R. Co. v. Fitzpatrick, 125 Ill. App. 247, afd. 227 Ill. 478, 81 NE 529. Whether plaintiff was guilty of negligence in working in a trench, pursuant to order of master, with the knowledge that quicksand was running into it, held a question for the jury. Dalton v. Ogden Gas Co., 126 Ill. App. 502. Whether switchman was guilty of negligence in failing to see slack and ice on the ground beside of track, thus rendering his work dangerous, held a question for the jury. Swift v. O'Brien, 127 Ill. App. 26. Held to present a question for jury whether car repairer was guilty of contributory negligence in failing to see approaching engine while pumping hand car on master's tracks. O'Donnell v. Chicago & A. R. Co., 127 Ill. App. 432. Evidence insufficient to show contributory negligence, as matter of law, where plaintiff was injured by defective jack. Dalhoff Const. Co. v. Luntzel [Ark.] 100 SW 743. Whether brakeman was negligent in going between cars to couple them, when he might have avoided injury by crossing track and using lever on other side of car, held for jury. Choctaw, etc., R. Co. v. Thompson [Ark.] 100 SW 83. An experienced lineman held not negligent, as a matter of law, in working near wires he did not know were charged, without inquiry. Reeve v. Colusa Gas & Elec. Co. [Cal.] 92 P 89. Where plaintiff had hand crushed while trying to couple cars by hand, coupling device being defective, as he discovered on attempting to use it as cars came together. Baltimore, etc., R. Co. v. Davis [C. C. A.] 149 F 191. Whether conductor killed in rear end collision was guilty of contributory negligence in failing to instruct brakeman under him as to duties with reference to giving warning to following trains held for jury. New York Cent., etc., R. Co. v. McGrath [C. C. A.] 151 F 436. On conflicting evidence as to contributory negligence, the question is for the jury. Northern Pac. R. Co. v. Wendel [C. C. A.] 156 F. 336. Plaintiff, driver in mine, injured in collision; whether he was negligent in not leaving his car to look for the other. Coal Bluff Min. Co. v. Akers, 39 Ind. App. 617, 80 NE 545 That an employe continues to work about machinery not guarded as required by Burns' Ann. St. 1901, § 7087, does not charge him with contributory negligence, and whether he used ordinary care was a question of fact. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981. Where an employe's hand was caught in cog wheels not guarded as required by Burns' Ann. St. 1901, § 7087, proof that the employe's foot had slipped does not show, as a matter of law, that he was guilty of contributory

negligence. Crawford & McCrimmons Co. v. Gose [Ind. App.] 82 NE 984. Where an employe is subjected to constant danger by failure of the master to guard machinery as required by Burns' Ann. St. 1901, § 7087, the question of his contributory negligence is for the jury. Id. Where street car conductor collided with pole near the track while standing on the running board of his car collecting fares, contributory negligence held for jury. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986. Question held for jury where trainman while coupling cars omitted to look and listen for approach of a car he thought securely braked. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021; Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Where servant was injured while throwing a switch. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Where a switchman was injured by a collision between a switch engine and road engine, it was proper to charge to determine what precaution ordinary care required plaintiff to exercise under the circumstances and the light of his experience. Brantner v. Chicago, etc., R. Co. [Iowa] 112 NW 790. Question of contributory negligence where machine operator was injured. Clark v. Chicago, etc., R. Co., 231 Ill. 548, 83 NE 286. A track repairer who omits to look and listen for approaching trains is not necessarily guilty of contributory negligence. Missouri Pac. R. Co. v. Bentley [Kan.] 93 P 150. Question of contributory negligence where a servant, after objection to the sufficiency of appliances proceeded with the work when the master insisted that haste was necessary. Pullman Co. v. Gellar [Ky.] 107 SW 271. Question where servant fell through a roof where sheathing boards had been sawed off but not removed. Anderson v. Republic Iron & Steel Co. [Ky.] 107 SW 220. Where servant was injured by giving way of defective iron rod to which he held while crossing the isle of a building which had no floor. Wood's Adm'x v. Daviess County Distilling Co., 31 Ky. L. R. 511, 102 SW 813. Where servant was injured by caving in of sand bank. Spinks v. Turley, 31 Ky. L. R. 676, 103 SW 321. Contributory negligence held for jury where employe operating meat chopper in sausage factory got caught in the machine. Boyd v. Taylor [Mass.] 81 NE 277. Contributory negligence of quarry employe. Lammi v. Milford Pink Granite Quarries [Mass.] 82 NE 26. Brakeman who was struck by a pole leaning over the track, its position being caused by negligent removal of a guy wire, held not guilty of contributory negligence as a matter of law. Bradley v. Central Vermont R. Co. [Mass.] 82 NE 44. Where servant was killed by reason of defect in an electric lamp which he held in the ordinary way. Saures v. Stevens Mfg. Co. [Mass.] 82 NE 694. Where street railway employe was injured while alighting from a car, because there was no step thereon, question of negligence in attempting to alight from a moving car. Flynn v. Connecticut Valley St. R. Co. [Mass.] 82 NE 1085. Where servant was injured while cleaning a machine. Hefferman v. Fall River Iron Works Co. [Mass.] 83 NE 5. Motorman's negligence for jury, where he was killed in collision. Doe v. Boston, etc., R. Co. [Mass.] 80 NE 814. Plaintiff injured while riding on low pilot of engine, according to custom and instructions. Barschow v. Lake Shore, etc., R. Co., 147 Mich. 226, 13 Det. Leg. N. 1060, 110 NW 1057. Where switchman in coupling cars was injured by falling over debris on the track, the question of his negligence in going in front of a moving car is for the jury. Gillespie v. Grand Trunk R. Co. [Mich.] 14 Det. Leg. N. 645, 113 NW 1116. Plaintiff unloading sawdust into hopper, danger from which he had been told to avoid, stepped into a hole in a conveyor, of the existence of which he was ignorant, having just gone to work at night. Held, not negligent as matter of law. Boman v. Mashek Chemical & Iron Co., 147 Mich. 178, 13 Det. Leg. N. 996, 110 NW 518. Where workman in a quarry was injured because of an insufficient appliance. Kjosnes v. Gray, 102 Minn. 410, 113 NW 1009. Whether miner was negligent in using a defective fuse. Laitinen v. Shenango Furnace Co. [Minn.] 114 NW 264. Plaintiff was thrown from hand car which foreman suddenly checked by applying brakes without warning when a train appeared. Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 SW 142. Section hand run down by train while sweeping snow from frog. Johnson v. St. Joseph Terminal R. Co., 203 Mo. 381, 101 SW 641. Employe at work in trench being dug through cinders, sand, and other loose materials, held not negligent, as a matter of law, in picking bricks out of the wall to prevent their falling upon workmen. Smith v. Kansas City, 125 Mo. App. 150, 101 SW 1118. Girl's hair caught on unguarded revolving shaft. McGinnis v. R. M. Rigby Print. Co., 122 Mo. App. 227, 99 SW 4. Question where motorman jumped to avoid injury in collision with another car. Edge v. Southwest Missouri Elec. R. Co., 206 Mo. 471, 104 SW 90. Evidence held insufficient to show, as a matter of law, that one killed by an engine while riding a railroad velocipide was negligent. Lynch v. Chicago, etc., R. Co. [Mo.] 106 SW 68. Question where miner was killed. Kirby v. Manufacturers' Coal & Coke Co. [Mo. App.] 106 SW 1069. Where miner was injured by fall of roof of entry. Garard v. Manufacturers' Coal & Coke Co., 207 Mo. 242, 105 SW 767. Unless a danger at the place of employment is so glaring as to threaten immediate injury, the question of contributory negligence is for the jury. Garcia v. Hill-O'Meara Const. Co., 124 Mo. App. 709, 102 SW 594. Where switchman was injured while uncoupling cars. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Whether a brakeman had used a dangerous method of making a coupling when a safe one was apparent, held for jury. Edington v. St. Louis, etc., R. Co., 204 Mo. 61, 102 SW 491. Whether switchman in uncoupling cars had the choice of two ways, one safe and the other dangerous, held for jury. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Where lineman was killed by picking up live wire. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 112 NW 620. Whether servant was negligent in taking hold of an incandescent light charged with a deadly current. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 114 NW 769. Where a servant is killed, the question whether he was negligent, and such negligence was the proximate cause of the accident, is for the jury. Christensen v. Floriston Pulp & Paper Co. [Nev.] 92 P 210. Whether employe was negligent in using buzz saw after knowing that it wabbled. Reich v. Ironclad Mfg. Co., 104 NYS 1069. Contributory negligence of engineer injured by derailment of his train by

ence to all the facts and circumstances of the case,[60] including the age, experience, and capacity of the servant.[61] Mere knowledge of a defective condition will not

misplaced switch. Pearsall v. New York Cent. etc., R. Co., 189 N. Y. 474, 82 NE 752. Whether yard employe was negligent in going between cars when other cars were being kicked against them. Onesti v. Central New England R. Co., 121 App. Div. 554, 106 NYS 233. Question of contributory negligence of brakeman. Henson v. Lehigh Valley R. Co., 106 NYS 602. Workman not warned that planks had been removed from the floor of an adjoining room, where his work required him to go, held not negligent as a matter of law, in attempting to cross it at night. Heffron v. Lackawanna Steel Co., 105 NYS 429. Where railroad employes had been accustomed for several years to pass through, under, or beneath cars blocking the tracks on their way to and from work, an employe held not negligent as a matter of law in passing between cars. Beck v. Southern R. Co. [N. C.] 59 SE 1015. Where brakeman was injured. Allen v. Atlantic Coast Line R. Co. [N. C.] 58 SE 1081. Where railroad employe was injured while boarding a train in full view of the engineer, evidence insufficient to show contributory negligence as a matter of law. Daniel v. Atlantic Coast Line R. Co. [N. C.] 58 SE 601. Question where minor servant put his hand under knives of a machine which was not in motion. Magone v. Portland Mfg. Co. [Or.] 93 P 450. Where an employe's work requires haste and his entire energy, he is not conclusively presumed to have a particular danger constantly in mind, and the degree of care and attention may depend on circumstances. Id. Servant's contributory negligence held for jury. Beil v. Booneville Portland Cement Co. [Pa.] 67 A 804. Whether engineer killed by derallment of his train was negligent in running at a speed higher then that prescribed by rules of the company, held for the jury. Jones v. Wilcox [S. C.] 60 SE 231. Miner injured by piece of ore falling on him. Minton v. La Follette Coal, Iron & R. Co., 117 Tenn. 415, 101 SW 178. Whether switchman was negligent in going between cars to uncouple them. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 17 Tex. Ct. Rep. 685, 99 SW 200. Whether brakeman negligent in attempting to couple cars, couplers being defective. International, etc., R. Co. v. Elder [Tex. Civ. App.] 18 Tex. Ct. Rep. 90, 99 SW 856. Whether injured conductor was negligent in directing a flying switch to be made, and in not being at the brake of a car at the time of the attempt to make such switch, held for jury. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176. Servant riding on car loaded with telephone poles jumped, when they fell, to avoid injury. Lodwick Lumber Co. v. Mounce [Tex. Civ. App.] 18 Tex. Ct. Rep. 516, 102 SW 142. Employe, killed by paint fumes while at work inside boiler, held not guilty of contributory negligence as a matter of law, when he did not know of the danger, and necessity of going out for air, and these facts were not obvious. Houston, etc., R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529. Where switchman was run down by an engine. Galveston, etc., R. Co. v. Wafer [Tex. Civ. App.] 20 Tex. Ct. Rep. 831, 106 SW 897. Whether switchman uncoupling cars equipped with defective automatic coupler, in violation of 27 Stat., 531, was guilty of contributory negligence. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. In placing his arm between buffers. Id. Whether an engineer killed by derallment was negligent in running his train too fast. Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707; Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. Question where employe operating trip machine in sawmill was injured. Industrial Lumber Co. v. Bivens [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831. Where employe was injured while unloading ties from a box car. St. Louis S. W. R. Co. v. Thornton [Tex. Civ. App.] 18 Tex. Ct. Rep. 888, 103 SW 437. Questions of contributory negligence and assumed risk held for jury, where railroad employe was injured by collision between switch engine and cars, while he was descending from the cars Place v. Grand Trunk R. Co. [Vt.] 67 A 545. Question where employe was injured while operating defective machine. Ferguson v. Robinson Mfg. Co. [Wash.] 93 P 428; Sturgeon v. Tacoma Eastern R. Co. [Wash.] 93 P 526. Question of contributory negligence in handling a rip saw. Cox v. Capitol Box Co. [Wash.] 91 P 555. Whether servant was negligent in obeying an order of his master. Withiam v. Tenino Stone Quarry [Wash.] 92 P 900. In action for death of brakeman, crushed between cars, evidence held to warrant finding that cars were not moving when he went between them, and the question of his contributory negligence held for the jury. Hayes v. Chicago, etc., Co., 131 Wis. 399, 111 NW 471. Where employe was caught on set screw projecting from a revolving shaft. Chopin v. Combined Locks Paper Co [Wis.] 114 NW 95. A servant held not guilty of contributory negligence, as a matter of law, where he was caught on a set screw projecting from a revolving shaft. Id. Where laborer was fatally injured while discharging a steam boiler. Zoesch v. Flambeau Paper Co. [Wis.] 114 NW 485. Where brakeman was crushed between platform and moving car, the question of his negligence in attempting to stand in such place while the car was passing. Hemmingsen v. Chicago, etc., R. Co. [Wis.] 114 NW 785. Where servant fell from a defective scaffold. Hoveland v. National Blower Works [Wis.] 114 NW 795. Whether a servant was negligent in attempting to stop a railroad car moving by gravity by use of a pinch bar. Gussart v. Greenleaf Stone Co. [Wis.] 114 NW 799.

60. Servant must use care proportionate to known danger. Lambert v. Troy Laundry Co., 118 La. 48, 42 S 642.

61. In determining whether danger of working with a defective appliance was so obvious that an injury was due to contributory negligence, the age and experience of the servant are to be considered. Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535. A minor is required to exercise the degree of care and caution required of one of his age and experience. Mayone v. Portland Mfg. Co. [Or.] 93 P 450. In South Carolina it is held that an infant be-

charge a servant with contributory negligence, as a matter of law.[62] His conduct may be excusable if it is due to a momentary forgetfulness,[63] or to the engrossing character of his work,[64] or to a zealous, rather than careless, performance of his duties.[65]

Choice of methods. See 8 C. L. 920—Needless exposure to a known danger is negligence;[66] hence, a voluntary choice of an obviously dangerous way of doing work, when a reasonably safe way is available,[67] is negligence.[68]

tween the ages of seven and fourteen is prima facie incapable of contributory negligence. Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626. Where boy of eleven fell over a ladder between two tracks and under a freight train, a requested instruction placing upon him the duty of exercising ordinary care under the circumstances, such care as a boy of his years should exercise under the circumstances, should have been given. Chicago, etc., R. Co. v. Connors [Tex. Civ. App.] 18 Tex. Ct. Rep. 283, 101 SW 480. Where girl of fifteen was caught by the hair by a set screw on a revolving shaft, an instruction was proper that she was required to exercise the degree of care which girls of her age ordinarily exercised under the same circumstances. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 NW 443. Boy of fifteen, injured by knives in hopper which he was cleaning, required to exercise ordinary care considering his age, etc. Horn v. La Crosse Box Co., 131 Wis. 384, 111 NW 522. In determining whether brakeman was negligent, his age, intelligence, and experience as a brakeman should be considered. Hayes v. Chicago, etc., R. Co., 131 Wis. 399, 111 NW 471. Whether an employe is guilty of contributory negligence resulting in his injury by machinery depends on his experience and knowledge of incident risks. Stephens v. Elliott [Mont.] 92 P 45. Children under fourteen years of age are held only to the exercise of that degree of care and diligence which their mental and physicial capacity fits them for exercising. Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 SE 998. It is negligence for one so afflicted as to make it extra hazardous for him to engage in certain work to undertake it without notifying his employer. Instructions on this subject held sufficient. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep 793, 99 SW 413. Ignorant laborer called by foreman to hammer a piece of steel, a splinter from which struck and put out his eye, held not guilty of contributory negligence, not being aware of any danger. Pennsylvania R. Co. v. Garcia [C. C. A.] 152 F 104.

62. Locomotive fireman not guilty of contributory negligence as a matter of law because he knew of defect in guard of water glass. El Paso, etc., R. Co. v. Foth [Tex. Civ. App.] 18 Tex. Ct. Rep. 610, 100 SW 171. A servant's opportunity to know of an obscure defect is not conclusive of his negligence in not knowing of it. Instruction approved. American Smelting & Refining Co. v. McGee [C. C. A.] 157 F 69.

63. Longshoreman noticed plank projecting over hatch while working in another place, but forgot about it, and was later injured by its fall while working under it. Held not guilty of negligence as a matter of law. King v. Griffiths & Sprague Stevedoring Co. [Wash.] 88 P 759.

64. Recovery may be had by a servant for an injury caused by a dangerous instrumentality negligently maintained, though the servant knew of its existence, where he did not exercise his knowledge because of the engrossing character of his work. This is so, though Code § 2612 requires that he must not know of such danger. King v. Seaboard Air Line R. Co., 1 Ga. App. 88, 58 SE 252.

65. The law is not quick to condemn acts of a servant as negligent when they result from a zealous rather than from a careless performance of his duty. King Mfg. Co. v. Walton, 1 Ga. App. 403, 58 SE 115.

66. Servant working on a roof with knowledge of its dangerous condition is negligent in stepping on a loosely laid sheet of iron without first ascertaining whether it will bear his weight. Latrobe Steel & Coupler Co. v. Regan, 130 Ill. App. 440. To walk into an open well lighted elevator shaft is negligence per se. Leahy v. U. S. Cotton Co. [R. I.] 66 A 572. It is contributory negligence not to see a latent danger. Muscarelli v. Hodge Fence & Lumber Co. [La.] 45 S 268. Where a servant went to attach a wrench to a dead shaft but instead attached it to a moving one, and by looking or inquiring could easily have ascertained which shaft was at rest, held he was guilty of contributory negligence as a matter of law. Hamel v. Burgess Sulphite Fibre Co. [N. H.] 68 A 191. Evidence sufficient to show contributory negligence where one, who had worked about a machine for 3 months, without necessity placed his arm so close to cog wheels that it was caught. Schulte v. Pfaudler [Mich.] 14 Det. Leg. N. 641, 113 NW 1120. Where one was killed by stepping through a hole in a floor, evidence sufficient to show that he knew of the hole, and could not recover. Ford v. Heffernan Engine Works [Wash.] 93 P 417. A railroad employe who voluntarily and unnecessarily takes an exposed position on a train, where the risk is so obviously great that a prudent man would not incur it, is guilty of contributory negligence. State v. Western Maryland R. Co. [Md.] 65 A 635. Motorman, injured in collision on foggy morning, held negligent in running car onto single track. Barry v. Boston El. R. Co., 194 Mass. 265, 80 NE 225. Plaintiff held negligent in allowing hand to remain too long in dangerous place under block. Meyers v. Ruddock Orleans Cypress Co., 118 La. 805, 43 S 448. Foreman of switching crew slipped from footboard of engine at night. Board was icy and sloped downward, but he had worked with it before, and at time in question need not have used it. Held, he was guilty of contributory negligence. Williams v. Choctaw, etc., R. Co. [C. C. A.] 149 F 104. Employe in saw mill held negligent in coming in contact with saw, location of which he knew, there being no defect in machinery or place of work. Toler v. Swan-

Day Lumber Co., 30 Ky. L. R. 810, 99 SW 625. Employe who unnecessarily puts himself on a railroad track in a dangerous position cannot recover for injuries received. Caffi v. New York Cent., etc., R. Co., 52 Misc. 570, 102 NYS 633. Plaintiff who knew that only a rope netting protected a hatch, and who walked into it, falling into the hold of a vessel, could not recover. Northwestern S. S. Co. v. Griggs [C. C. A.] 146 F 472. Decedent guilty of contributory negligence as a matter of law where he stood directly in front of saw, in position unnecessarily dangerous, knowing that log carriage was defective and might move down upon him, which it did causing him to be killed by the saw. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F 680. Painter on vessel held guilty of contributory negligence as a matter of law, where he fell into an uncovered hatch while passing through a dark compartment, not having availed himself of lights. Jones v. Moran Bros. Co. [Wash.] 88 P 626. Hand car was derailed by a tool falling from it on the track. Held, if tool was improperly loaded, plaintiff knew it, and could not recover. McEwen v. Central of Georgia R. Co., 127 Ga. 246, 56 SE 289. Failure of track inspector to keep any lookout for trains as he walked the track held contributory negligence, where he was struck by a train and killed. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 NW 446. Where experienced employe went through open porthole of ship without investigating fastenings, and shutter fell on him, and he could have fastened it so that it would not have fallen, he was guilty of contributory negligence. Rende v. New York & T. S. S. Co., 187 N. Y. 382, 80 NE 206. If a servant voluntarily choose to assume the risk of appreciated danger, the question of what a prudent man would have done upon the master's declination to remedy the defect is immaterial. Kansas City, etc., R. Co. v. Loosley [Kan.] 90 P 990. Whether servant used reasonable care in selecting method of coupling car held question for jury. Illinois Cent. R. Co. v. Heath, 129 Ill. App. 143. Servant cannot recover for injuries received in consequence of having voluntarily placed himself in an obviously dangerous position. Injury received by servant in catching his foot between the shaft and the moving elevator held the result of his own negligence. Western Union Tel. Co. v. Gilleran, 126 Ill. App. 429. Servant cannot recover for injuries caused by defective scaffolding erected by himself. Swift v. Halslip, 126 Ill. App. 560.

67. Servant is not negligent in choosing a method of work unless a less dangerous way is apparent or known to him. Southern R. Co. v. McGowan [Ala.] 43 S 378. Where a servant was injured while using a stick kept near an edger in a mill for the purpose of cleaning away refuse, he cannot be held negligent in using the stick, which was an unsafe appliance, instead of procuring a larger one where it does not appear that a larger one was suitable or could have been used. Shea v. Seattle Lumber Co. [Wash.] 91 P 623.

68. Master not liable for injuries to man 23 years of age, working at a machine for pressing leather, who attempts to clean rollers while they are in motion. Best v. Williamsport Staple Co. [Pa.] 67 A 205. Plaintiff guilty of contributory negligence where he adopted a dangerous method of doing certain work and was injured, a safe method, which he had already used, being open to him. Bundy v. Union Iron Works [Wash.] 89 P 545. Where plaintiff's intestate was caught and killed while going between cars when he might have gone around the train by walking a car's length, he was held negligent. Schwind v. Floriston Pulp & Paper Co. [Cal. App.] 89 P 1066. Railroad track employe, who stood in middle of track in a cloud of smoke and was struck by a train, could not recover, a safe place being open to him. Cannon v. New York, etc., R. Co., 194 Mass. 177, 80 NE 450. Where employe was told to cover an old vat, a simple piece of carpenter work, and negligently used old rotten planks to support new ones, and fell into the vat in consequence, he could not recover for his injuries. Lavelle v. Dunn-Green Leather Co., 194 Mass. 294, 80 NE 475. Where experienced brakeman attempted to open automatic coupler, while running in front of moving car, instead of stopping it, his own negligence was the proximate cause of injury, he being caught by a nail on a car and thrown to the track. New York, etc., R. Co. v. Hamlin [Ind.] 79 NE 1040. Where employe in machine shop chose dangerous route to water closet, there being a safe way, and was struck by timber from plaining mill, he was guilty of contributory negligence, though the way chosen by him was more convenient than the safe way. Douglas v. Southern Pac. Co. [Cal.] 90 P 538. Evidence held to show knowledge by servant of safe way to water closet, where he was injured by going in a dangerous way. Id. He at least had notice that there was a safe way, and was negligent in not inquiring for it, if he did not in fact know of it. Id. Where employe could have crossed track by a safe path provided by the company, but chose to attempt to cross directly in front of a car, he was guilty of contributory negligence. Kupec v. Interborough Rapid Transit Co., 104 NYS 924. Where plaintiff attempted to clean joining machine while in motion, though he could have stopped it, he could not recover for injuries received. Mulholland v. Ideal Mfg. Co., 149 Mich. 126, 14 Det. Leg. N. 295, 112 NW 483. Car repairer guilty of negligence where he attempted to repair a car not on the repair track, without orders or permission, and without displaying customary blue flag of warning. Snellen v. Kansas City S. R. Co. [Ark.] 102 SW 193. Where an electric car ran through a flock of chickens and conductor looked outside door and was struck by a pole and killed when he might with safety have looked back through the empty car, there can be no recovery. Kath v. East St. Louis, etc., R. Co., 232 Ill. 126, 83 NE 533. Where servant of one razing a building was injured by fall of a fire escape on which plaintiff was leaving the building, evidence sufficient to show that the fire escape was not the only method furnished for leaving the building. Gulliano v. F. W. Seagrist, Jr., Co., 107 NYS 577. Where a switchman attempted to make a coupling to a defective car in a dangerous manner when safe methods were at hand, held his contributory negligence and not the defective car was the proximate cause of his injury. New York, etc., R. Co. v. Hamlin [Ind.] 83 NE 343

Reliance on master's care.[See 8 C. L. 922]—A servant is not negligent in relying, to a reasonable extent, on the assumption that the master has performed or will perform his duties with respect to his employes,[69] unless he has actual or implied knowledge to the contrary.[70] He may also reasonably rely on an assurance of safety

Where a servant sacrificed his life to save that of a fellow workman and the servants had been supplied with appliances which would have averted the accident, the failure to use them was negligence. Walker v. Shreveport Gas, Elec. L. & P. Co. [La.] 44 S 925. Where a workman voluntarily selected a dangerous method of attaching the belt which operated his machine to the line shaft, held his negligence in so doing was the cause of his injury and he could not recover. Grace v. Globe Stove & Range Co. [Ind. App.] 82 NE 99. Where an employe selected a warped ladder from a number which were not defective, he could not recover for injuries sustained because of such defect. Smith v. Green Fuel Economizer Co. of Matteawan, 108 NYS 45. Switchman jerked from top of train by sudden jerk caused by his signalling the engineer to stop, unmistaken belief that foreman of the train crew had had time to uncouple, held negligent, it appearing that he could have safely waited before giving the signal. Louisville, etc., R. Co. v. Cox [Ky.] 105 SW 165. Section hand walking along railroad tracks with knowledge of the unusual danger attending at that particular point in view of circumstances existing held guilty of negligence. Chicago, etc., R. Co. v. Thomson, 128 Ill. App. 594. Switchman held guilty of negligence in attempting to board switching train going at a rapid rate of speed when the circumstances did not require him to do so. Murphy v. Chicago & A. R. Co., 127 Ill. App. 446. Car repairer working on a car standing on a right of way without placing a signal showing his presence therein or otherwise giving notice is guilty of negligence. Elgin, etc., R. Co. v. Herath, 230 Ill. 109, 82 NE 610. Servant who walks backward, when approaching a runway consisting of one plank across two beams, and making misstep falls is guilty of negligence. Dauchy Iron Works v. Nevin, 130 Ill. App. 475. Servant held guilty of negligence in following a dangerous route to get to his train, when a safe one was available. Shannon v. Chicago & A. R. Co., 125 Ill. App. 537.

69. Servant may assume that place provided for him by master is reasonably safe. Schillinger & Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65; Illinois Cent. R. Co. v. Fitzpatrick, 125 Ill. App. 247. May assume that master in developing cross cut in mine will examine it for danger before permitting him to go to work. Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 NE 239. Ordinary care does not impose upon a servant the duty of inspection. Anderson v. Republic Iron & Steel Co. [Ky.] 107 SW 220. A brakeman who has nothing to do with loading coal on the tender may assume that it has been properly done. Louisville, etc., R. Co. v. Clark [Ky.] 106 SW 1184. It is not incumbent on a servant to inspect an appliance furnished him for immediate use. St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783. Servant given a pinch bar to work with may assume that the master had discharged his duty in furnishing him a safe one, and was under no duty to inspect it to see whether it was safe. Id. A servant may assume that the master has done his duty in providing a safe structure on which to stand while he works. Combs v. Rountree Const. Co., 205 Mo. 367, 104 SW 77. Switchman who has signalled engineer not to move cars while he is between them is not negligent in assuming that his signal will be obeyed. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Employe not negligent as a matter of law in using a scaffold without inspecting it. Parker v. Fairbanks-Morse Mfg. Co., 130 Wis. 525, 110 NW 409. Servant held not negligent in going into room, where oils were kept, with an open light, since he had a right to assume that room was in proper condition and that he could use the appliances furnished him with safety. Bardsley v. Gill [Pa.] 66 A 1112. Servant had right to assume trestle safe; no duty to inspect. West Pratt Coal Co. v. Andrews [Ala.] 43 S 348. A servant may rely on the master's performance of his duty to furnish a safe place, and to give warning of new and unusual dangers which arise, until such time as he discovers or should discover them. Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 SE 249. Servant had right to assume engine reasonably safe and was under no duty to inspect. Jones v. Pioneer Min. & Mfg. Co. [Ala.] 42 S 998. Plaintiff held not negligent where barrel fell from a joist above the floor where she was working, she being under no duty to inspect. G. A. Duerler Mfg. Co. v. Eichhorn [Tex. Civ. App.] 18 Tex. Ct. Rep. 416, 99 SW 715. A trainman may assume that the employer has provided a reasonably safe place in which to work and is not bound to know from passing observation that objects along the line of road are in dangerous proximity to the track. Indianapolis Trac. & Terminal Co. v. Holtsclaw [Ind. App.] 82 NE 986. Servant held not charged with knowledge of sufficiency of an appliance nor the duty to inspect it before going into a place where he would be injured if it broke, and he was not negligent in failing to inspect it. McGuire v. Waterloo & Cedar Falls Union Mill Co. [Iowa] 113 NW 850. Instruction that plaintiff had right to assume that roadway used by him was reasonably safe, in connection with issue of contributory negligence, approved. Cameron v. Realmuto [Tex. Civ. App.] 100 SW 194. Servant, suddenly called to assist in raising a heavy girder with clinch bars, was not guilty of contributory negligence as a matter of law, where the girder turned, injuring him since he had a right to assume the reasonable safety of the method used. Bokamp v. Chicago, etc., R. Co., 123 Mo. App. 270, 100 SW 689. Employe at work in trench, in presence of and under direct supervision of foreman, need not inspect for danger, but may rely on the foreman's superior knowledge. Smith v. Kansas City, 125 Mo. App. 150, 101 SW 1118.

70. A railroad employe working on the

by a superior,[71] and may assume that execution of an order given by a superior will not expose him to any unusual danger,[72] unless he has knowledge of the danger

track cannot rely on warning being given him of the approach of trains, where he had been working alone for some time about 350 feet from the foreman and rest of the gang. Blute v. New York, etc., R. Co. [Mass.] 81 NE 188.

71. Evidence held to show that a servant injured while using an unsafe appliance after promise to repair was not negligent. Shea v. Seattle Lumber Co. [Wash.] 91 P 623. Where plaintiff was told to do a simple piece of carpentry in his own way, and proceeded on his own responsibility, and foreman, without inspection, said it was all right, plaintiff had no right to rely on this as an assurance of safety. Lavelle v. Dunn-Green Leather Co., 194 Mass. 294, 80 NE 475. Where an iron worker with no knowledge of wooden work or experience in ascertaining the strength of timbers was directed by the master's superintendent to make fast to a certain timber a tackle for raising trusses instead of using a gin pole which was the usual and safe method, and the timber broke and he was injured, held the servant was not negligent, the superintendent having assured him that the timber was strong enough. Swain v. O'Loughlin [Conn.] 67 A 480. Superintendent assured servant that certain appliances were safe, and servant relied on the assurance. Held, whether he was at fault was for jury, though it was his duty to inspect and make repairs, where supplies could be purchased by him only through the superintendent. Keys v. Winnsboro Granite Co., 76 S. C. 284, 56 SE 949. Where minor servant in obedience to orders changes his method of doing work from a safe to a dangerous one, the question of his negligence is for the jury. Jefferson Theater Program Co. v. Crejezyk, 125 Ill. App. 1. Where servant complained of the condition of saving board used in working on a smoke stack and was told that it was safe, the question whether he is guilty of negligence is for the jury. Springfield Boiler & Mfg. Co. v. Parks, 123 Ill. App. 503. See 222 Ill. 355, 78 NE 809. Whether servant in obeying order chose that one of two methods which, with assurance given, was the safer, was guilty of negligence, is for the jury. Marquette Cement Mfg. Co. v. Williams, 230 Ill. 26, 82 NE 424. Defendant held liable for ordering switchman to cross over moving cars and uncouple them, and then stopping train before he reached a place of safety. East St. Louis Connecting R. Co. v. Meeker, 229 Ill. 98, 82 NE 202. Assurance of safety by master does not relieve servant if the danger is obvious. Elgin, etc., R. Co. v. Myers, 226 Ill. 358, 80 NE 897. An assurance of safety by a superior should not be confounded with a mere opinion as to the danger involved. Statement by foreman that the absence of a tooth from a saw cuts no figure held a mere expression of opinion. Id. Where the character of the work at which servants are employed is constantly changing the conditions surrounding it, an assurance of safety by the master has reference only to the condition thereof at the time the assurance was made. Held to apply to the condition of a gravel pit. Village of Montgomery v. Robertson, 229 Ill. 466, 82 NE 396. A general direction to a servant to perform work with which he is familiar leaving him the choice of the manner in which it is to be done does not relieve him of the doctrine of assumed risk. Chicago & A. R. Co. v. Landroth, 123 Ill. App. 666. When acting under command of the master, servant does not assume the risk, but may be guilty of contributory negligence, if the danger is such that an ordinarily prudent man will not encounter it. Dalton v. Ogden Gas Co., 126 Ill. App. 502. Order jokingly given does not justify servant in taking an unnecessary risk. "Dare" by foreman of switching crew does not justify switchman's attempt to board it when going at a rapid rate of speed. Murphy v. Chicago & A. R. Co., 127 Ill. App. 446. The command to release the servant from the assumption of a risk incident to carrying it out must emanate from the master or one standing in that relation. Command by a servant who has no authority to direct the manner in which the work is done does not relieve. American Bridge Co. v. Bialk, 129 Ill. App. 202. Defect in roof of mine entry was reported, and employer attempted to fix it and assured servant it was safe. Held, servant had right to rely reasonably on such assurance and his going back to work, and failure to inspect it thereafter, was not negligence as a matter of law. Pioneer Min. & Mfg. Co. v. Smith [Ala.] 43 S 661.

72. If a danger is not so imminent that injury must almost necessarily result from obedience of a master's orders, it is not negligence to obey. Withiam v. Fenino Stone Quarry [Wash.] 92 P 900. Inexperienced employe held not guilty of contributory negligence as a matter of law where he threw a bucket of water on coals in a furnace, where he acted under an order from his foreman. Malone v. American Smelting & Refining Co. [Neb.] 110 NW 572. Boy of sixteen, killed by fall of oats when in a bin where he was ordered by his superior, held not negligent as matter of law. Meier v. Way, Johnson, Lee & Co. [Iowa] 111 NW 420. An employe obeying orders of his employer's superintendent may rely on his experience and authority. Lammi v. Milford Pink Granite Quarries [Mass.] 82 NE 26. Where boards had been removed from a roof and the fact concealed by the replacing of a covering, employe was not negligent in stepping on it, under directions of his foreman. Wilson v. Kansas City S. R. Co., 122 Mo. App. 667, 99 SW 465. Where a telephone lineman while on the cross arm of a pole holding wires was ordered by the foreman to let the wires come and when he let slack they came in contact with charged wire and he received a shock causing his injury, there was evidence that he could not see the charged wire and did not know their position. Held, whether he had knowledge of the danger or was justified in relying on orders of the foreman were questions for the jury. New England Tel. & T. Co. v. Butler [C. C. A.] 156 F 321. Where an ordinary workman was ordered by his foreman to tend cupola and was not instructed as to

involved, and such known danger is one which an ordinarily prudent person would not have encountered under the circumstances.[73] Similarly, the servant may rely to a reasonable extent on the assumption that work will be done in the customary manner,[74] and in accordance with the master's rules.[75]

Disobedience of orders and violation of rules.[See 8 C. L. 824]—Failure of the employe to observe and obey reasonable orders, instructions and rules, is usually held to constitute negligence,[76] which will bar recovery for injuries proximately caused

the work with which he was not familiar, and he objected but finally obeyed, the question of master's liability was for the jury. Zearfoss v. Norway Iron & Steel Co. [Pa.] 67 A 867. Where a servant is injured while obeying general directions of the master given through a servant, he must show that the directions or order came from the master and the servant was authorized to give it. Moore v. Dublin Cotton Mills, 127 Ga. 609, 56 SE 839. A servant who is injured while responding to a request or order from another to assist in doing a certain part of the master's work is without recourse against the master, unless it appear that the one who made the request or gave the order was, in so doing, acting under the authority of the master or some one standing in his place. J. B. Foote Foundry Co. v. Young, 9 Ohio C. C. (N. S.) 100.

73. Obeying orders is not negligence unless danger is so glaring that a prudent person would not have obeyed. St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783. The direct and immediate command of a master will not justify a servant in exposing himself to obvious and known danger. Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 SE 249. Where a master orders a servant into a situation of danger, and in obeying the command the servant is injured, he will not be charged with contributory negligence or assumption of risk, unless the danger was so apparent that no prudent man would have encountered it. St. Louis, etc., R. Co. v. Morris [Kan.] 93 P 153. Whether danger was so great that a prudent man would not have encountered it held for the jury. Id.

74. Switchman riding from his work on a passenger engine held not guilty of contributory negligence in assuming that a switch engine would not attempt to take the right of way, he knowing that switch engines had least rights of any. Feneff v. Boston & M. R. Co. [Mass.] 82 NE 703. Workman on coal dock directed to cross in front of a stationary car held not negligent as a matter of law, where the car started without notice or warning, and he had never known a car to be moved without warning being given. Polaski v. Pittsburgh Coal Dock Co. [Wis.] 114 NW 437. Plaintiff was in act of prying timbers apart, when his foreman started the horse hitched to them, and plaintiff was injured. Held not guilty of contributory negligence, since such act of foreman was not to be expected. Coates v. Soley, 194 Mass. 386, 80 NE 464. Plaintiff, injured when hand car was being taken off track, held not negligent in getting in front of it, where injury was caused by foreman's act of suddenly lifting car off, contrary to usual custom. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427. Custom of railroad company to warn employes on tracks in the yards by bells, whistles, etc., held to relieve employes in large measure from strict rule of self protection. Contributory negligence of one struck by switch engine, without warning, held for jury. Floan v. Chicago, etc., R. Co., 101 Minn. 113, 111 NW 957. A yard brakeman of a railroad company, in the pursuance of his duty in the making up of a train in the yards of the company, it being desired to reverse the location of the cars on the track and it being necessary in so doing to pass between the cars to couple them up, has a right to expect that the cars will not be moved without a warning to him from the conductor, where it has been the habit or custom of the conductor to keep track of the trainmen assisting him. Lake Shore & M. S. R. Co. v. Botefuhr, 10 Ohio C. C. (N. S.) 281.

75. An employe of a railroad has a right to go about his business obeying ordinances and rules established for the safety of all, on the assumption that others will do likewise, and it is only on the particular occasion that he knows or should know of the negligent conduct of others that he is required to exercise reasonable care to avoid injury. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021. A railway conductor is not guilty of contributory negligence in relying upon the engineer to obey stop signals, which was partially the cause of his injury. Pittman v. Chicago, etc., R. Co., 231 Ill. 581, 83 NE 431. Where a rule of the company required repair men to post a blue flag as a protecting signal, and it appeared that the foreman on the work instructed a servant that it was the duty of the first man who went to work to post the flag, and it appeared that a workman had gone to work before plaintiff, held he was not negligent in assuming that the flag had been posted. Anderson v. Great Northern R. Co., 102 Minn. 355, 113 NW 913. Boy seventeen years old working in a sawmill under express direction of a sawyer held not guilty of contributory negligence, where while blocking a log the sawyer without warning started the canting gear, and the boy's hand was crushed. Ball v. Peterman Mfg. Co. [Wash.] 92 P 425.

76. Disobedience of **orders** is contributory negligence. Zoesch v. Flambeau Paper Co. [Wis.] 114 NW 485. Where an employe was instructed to ask his superior concerning anything he did not understand, and attempted to tie a belt while a shaft was in motion without asking advice of his superior, he did not exercise ordinary care. O'Brien v. Hargraves Mills [Mass.] 82 NE 677. Where a carpenter was injured by the breaking of a timber which he was using as a pry, he is guilty of contributory negligence if such danger would not have arisen if he had done the work in the manner he was directed to do it in. Quick v. Millfort

thereby.[77] A violation of a rule is not usually held to be negligence per se;[78] the question must be determined with reference to other circumstances of the case as well.[79] Violation of a rule is not held negligence where it appears that the rule

Mill. Co. [S. C.] 59 SE 365. Where train crew were ordered to pass another train on a specified siding, but on seeing a locomotive on such siding took it for granted that it was the locomotive of the other train and ran by and collided with the other train just beyond the siding. Hayes v. New York, etc., R. Co., 105 NYS 592. Where brakeman had been told to look out for and report obstructions on or near the track, but failed to discover a chute near the track in time to avoid being struck by it, he was guilty of contributory negligence. Nashville, etc., R. Co. v. Hayes, 117 Tenn. 680, 99 SW 362. Disobedience of unambiguous and reasonable **rules** to which the servant has assented and with which he is familiar is contributory negligence. Elmgren v. Chicago, etc., R. Co., 102 Minn. 41, 112 NW 1067. It is negligence to disobey rules. Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535. Violation of rule promulgated for servant's safety is contributory negligence. St. Louis, etc., R. Co. v. Dupree [Ark.] 105 SW 878. Recovery may not be had for an injury sustained while violating a rule. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Disobedience of rules is negligence, though the servant is ordered outside the course of his duties by one without authority. Id. Rule as to throwing switch while cables were running in a mine held reasonable, and it was the duty of servants to obey it. Id. A servant must exercise reasonable care to ascertain what rules are in force before entering upon a dangerous duty. Id. Where a mining company forbade brushing of gas, a miner who swung his coat to brush out gas, should there be any, could not recover where he brushed gas against a fire causing an explosion. Central Coal & Coke Co. v. Wilson [Ark.] 104 SW 174. Contributory negligence for car inspector to go under a car without notifying operator of switch engine that he is going to do so. St. Louis, etc., R. Co. v. Dupree [Ark.] 105 SW 878. Locomotive engineer held negligent in violating a rule of the company in proceeding with his train before ascertaining whether trains due to arrive from the opposite direction had registered. Cogbill v. Louisville, etc., R. Co. [Ala.] 44 S 683. Where miner, who had been employed for a number of years in the mine and knew the rule that employes should not go into the shaft while loaded cars were being operated, followed a loaded car into the shaft and was killed by the car coming down when it became detached from the cable (Butteris v. Mifflin & Linden Min. Co. [Wis.] 113 NW 642), the fact that the return of the car had been long delayed did not justify plaintiff in disobeying the rule (Id.). Where a fireman on a locomotive observed absence of signals and disregarded rules of the company to stop in such cases, and did not say anything to the engineer, held he was guilty of contributory negligence and was not relieved by the fact that an unauthorized signal was given nor by the fact that it was also the duty of the engineer to see the signal. Missouri, etc., R. Co. v. Collier [C. C. A.] 157 F 347. A railroad company may make reasonable rules for the government of employes in the operation of trains, and an act of one employe in disregarding such rules cannot justify another employe, in disregarding an established rule and relieve him from charge of contributory negligence in so doing. Id. Rules requiring railroad engineers to keep careful watch for signals and stop if they are not clearly displayed or understood, and that he "must know" on approaching a switch that it is in proper condition, precludes recovery of an engineer who takes chances on its being in proper condition, or knowing that it is not, takes chances on crossing safely. St. Louis, etc., R. Co. v. Dewees [C. C. A.] 153 F 56.

77. Instruction that, if employe disobeyed instructions in going upon an oil tank alone and did what an ordinarily prudent person would not have done, and if his negligence in so doing proximately contributed to his injury, he could not recover, approved. Yellow Pine Oil Co. v. Noble [Tex.] 17 Tex. Ct. Rep. 777, 99 SW 1024. Failure to observe a particular warning or instruction to do certain work in a certain way will not bar recovery for injuries received by master's negligence from a source as to which the warning or instruction had no application. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A 4.

78. Violation of rules is not per se negligence. Texas, etc., R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 SW 1070; Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441.

Contra: Where the duties of the servant are particularly specified in unambiguous rules, to which he has assented by entering into and continuing in the employment, his nonobservance or disobedience of such rules is negligence as a matter of law. St. Louis, etc., R. Co. v. Dewees [C. C. A.] 153 F 56. Rule requiring car repairers to see that blue flag is displayed by day and blue light by night at each end of the car on which they work is reasonable and is binding on an employe who at the time of his employment understands and agrees to be bound by it. New York, etc., R. Co. v. Ropp, 76 Ohio St. 449, 81 NE 748. Failure to obey such rule is not excused by presence or consent of a servant superior in rank to the servant who agreed to obey the rule, when such servant is not authorized by the master to change it. Id.

79. Violation of rule against flying switches held not negligence per se, unless it was an act which no ordinarily careful person would do. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176. Brakeman went between cars of another road to adjust coupler, which was defective, and had his foot crushed. A rule forbade brakemen going between cars, but it was not observed by employes. Held, he was not guilty of contributory negligence as a matter of law. Texas, etc., R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 SW 1070.

had ben abrogated,[80] or that the servant did not know of it,[81] or was acting under a special order inconsistent with such rule.[82]

Emergencies.[See 8 C. L. 925]—A servant suddenly confronted with an emergency, or with an unexpected danger, is not required to act with some deliberation and foresight that might properly be expected of him under ordinary circumstances.[83]

Discovery of servant's peril; intervening negligence.[See 8 C. L. 928]—Negligence of the servant will not defeat recovery if negligence of the master intervenes as the sole proximate cause of his injury.[84] But the master is relieved from liability if due care was used to avoid injury to a servant after discovery of his danger.[85]

80. A section master who was killed by collision of train with his handcar held not negligent in disobeying a rule requiring that flagmen be sent ahead, such rule having been abrogated. Bussey v. Charleston, etc., R. Co. [S. C.] 58 SE 1015. The fact that a train is being run under special telegraphic orders and under a general rule of the company of which the engineer had notice he was required only to run steadily and uniformly and as closely to time as safety permits, held such special orders did not abrogate standing rules that engineers approaching switches must know that they are in proper position. St. Louis, etc., R. Co. v. Dewees [C. C. A.] 153 F 56. Evidence of habitual violation of rules, which violation is acquiesced in by the master is admissible to repel inference of contributory negligence. St. Louis, etc., R. Co. v. Dupree [Ark.] 105 SW 878.

81. An employe is not bound by a rule requiring employes to examine appliances to see whether they are in good working order, where such rule is not brought to his knowledge. Adams v. Gulf, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 507, 105 SW 526. Where a brakeman had no knowledge of a rule forbidding him to leave his position on top of the train, and his duties required him to and it was customary for brakeman to ride in the engine, he was not negligent as a matter of law in leaving his position on top of the train. Strong v. Rutland R. Co., 121 App. Div. 391, 106 NYS 85. Where rules of railroad required enginemen to read orders to firemen, who were required to keep them in mind and remind enginemen if necessary, fireman killed in collision due to disobedience of orders by engineer and conductor could not be held guilty of contributory negligence, unless it was shown that he knew of the orders, he being an inferior servant subject to the orders of the engineer. Sinclair's Adm'r v. Illinois Cent. R. Co., 30 Ky. L. R. 1040, 100 SW 236.

82. Where conductor in charge of movement of train gave brakeman a special order in conflict with general rules of company for moving trains, obedience of order was not contributory negligence. Crow v. Northern Pac. R. Co. [Wash.] 88 P 1022. Where boy of twelve and one-half was ordered to use an elevator to move goods, and persons superior to him saw him using it, he was not guilty of negligence by reason of disobedience of warning signs on the elevator. Jenson v. Will & Fink Co., 150 Cal. 398, 89 P 113.

83. Where plaintiff in emergency attempted to get out of way of cars in mine, but did not go to safest place, "dog-holes," held not negligence, owing to his sudden, extreme peril. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Whether an employe, killed by being struck by a loaded car while he was standing on the railroad track, had been placed in such a sudden emergency by failure to give signals as to excuse him in trying to escape on an unsafe side of the track, held for the jury. Wilson v. Virginia-Carolina Chemical Co. [S. C.] 58 SE 1019. Where brakeman only discovered that coupler was defective when cars were close together, and went between the cars instead of crossing the track to use a lever on the other side of one of the cars, he could be found negligent only if danger was so obvious that no ordinarily careful person would have done as he did. Choctaw, etc., R. Co. v. Thompson [Ark.] 100 SW 83. A switchman held not negligent while acting in an emergency in jumping from the footboard of the tender to the station platform instead of applying emergency air-brakes by means within his reach. Brantner v. Chicago, etc., R. Co. [Iowa] 112 NW 790. An experienced lineman given a general order to assist in transferring a transformer from one pole to another, and was informed that haste was necessary, held not negligent in exceeding his instructions and proceeding at once to the top of the pole where he was injured by contact with a live wire. Reeve v. Colusa Gas & Elec. Co. [Cal.] 92 P 89. The rule of law that one who is placed in a situation of danger without his fault is not to be held to the exercise of the same care and circumspection that prudent persons would exercise when no danger is present does not apply to a motorman injured in a collision, who testified that "the instant I saw the other car approaching I threw the current off and applied my brakes, the only thing I could have done." Interurban R. & T. Co. v. Treuheit, 9 Ohio C. C. (N. S.) 77. Where sparks of molten lead struck servant in the back, he is not guilty of negligence in turning and facing them, thus causing the loss of an eye. Illinois Steel Co. v. Ziemkowski, 123 Ill. App. 285.

84. Where a servant was guilty of contributory negligence in going in front of a moving train, yet it was the duty of the engineer to use all known appliances to stop the engine, and good faith and honest intent to do so is insufficient. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238. Section hand was run down while sweeping snow from frog, and it appeared that train operatives could have seen him and avoided the accident, but made no effort to do so. Held, "humanitarian" doctrine applied, and recovery notwithstanding contributory neg-

(§ 3) *H. Actions.* 1. *In general.*[See 8 C. L. 926]—Only questions peculiar to actions to recover for personal injuries to servants are here treated. The general principles which control procedure in actions of this nature are elsewhere discussed.[86]

Conditions precedent; notice.[See 6 C. L. 587]—Notice of the injury is not a condition precedent to the maintenance of an action at common law,[87] and such notice need be given only when required by the statute [88] upon which the action is based.[89] When required, the notice given should conform to statutory requirements.[90] A de-

ligence was warranted. Johnson v. St. Joseph T. R. Co., 203 Mo. 381, 101 SW 641. Though a servant at the time he is injured may be performing a duty so dangerous as to involve an element of rashness, yet if his rash conduct is not the proximate or natural cause of his injury, but it is due to an independent act of negligence on the part of the master, the mere fact of his being engaged in the rash conduct mentioned will not preclude recovery. Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 SE 249. Where brakeman was injured, evidence as to "last clear chance" held for the jury. Allen v. Atlantic Coast Line R. Co. [N. C.] 58 SE 1081. An act of a servant within the scope of his employment entirely harmless except in connection with certain physical conditions caused by antecedent negligence of the master of which the servant was ignorant will not, as a matter of law, defeat his right to recover though it may have contributed to his injury. King Mfg. Co. v. Walton, 1 Ga. App. 403, 58 SE 115. Where railroad trackman was killed while sweeping snow from a switch, by an engine backing onto him and it appeared that it was customary for the trackmen to precede engines from the roadhouse, evidence held to show that the presence of the deceased should have been known to servants in charge of the engine. Cahill v. Chicago, etc., R. Co., 205 Mo. 393, 103 SW 532.

85. Engineer had right to assume plaintiff would get off the track after giving warning whistle. Brown v. Southern R. Co., 144 N. C. 634, 57 SE 397. No negligence shown where it appeared that after trackman was discovered on the track engineer gave danger signal, applied brakes, and reversed engine. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 NW 446.

86. See Damages, 9 C. L. 869; Evidence, 9 C. L. 1228; Pleading, 8 C. L. 1355; Instructions, 10 C. L. 296, and like subjects.

87. A notice of a claim under a statute, made a condition precedent to suit, need not be given in order to maintain a common-law action. Notice under Laws 1903, c. 393, not necessary. St. Louis, etc., R. Co. v. Little, 75 Kan. 716, 90 P 447.

88. The statute requiring notice of injuries by defects in streets does not apply to an injury to an employe of the municipality while engaged in the performance of his duties. Gen. Laws 1897, c. 248. Pesek v. New Prague, 97 Minn. 171, 106 NW 305. Laws Kan. 1903, p. 599, amending Laws 1874, p. 143, making a railroad company liable for negligence of a fellow-servant, provided notice be given within ninety days on behalf of the injured person, does not apply in case of death where action is by the administrator. Iarusel v. Missouri Pac. R. Co., 155 F 654. Even if such provision is applicable to an action for death, it will not be held to apply where an employe was killed fifty-three days after the act was passed but sixty-five days before it went into effect. Id.

89. No notice of a claim for damages is necessary in a common-law action, or to gain the benefit of Laws 1906, c. 657, making certain railroad employes vice-principals. Schradin v. New York Cent., etc., R. Co., 103 NYS 73. Under Laws 1902, p. 1750, providing that no notice is necessary if the defect or negligence was known to the employer prior to the accident, where a scaffold was known to be dangerous and a servant was killed because of such defect, no notice was necessary. Anderson v. Milliken Bros., 108 NYS 61. Notice of the time, place and cause of injury is a condition precedent to the maintenance of an action under the New York Employer's Liability Act. Notice that employe fell through an opening insufficient to designate place where plant consisted of several buildings. Heffron v. Lackawanna Steel Co., 105 NYS 429. Notice of claim is condition precedent to maintenance of action under Laws 1902, c. 600. Hope v. Scranton & Lehigh Coal Co., 105 NYS 372. Pleadings held not to show service of notice prior to commencement of suit. Id.

90. A notice, to constitute the basis for an action under the New York employer's liability act, must fairly apprise the employer that the claim is made under the statute and point out the negligence from which the injury arose. Notice held insufficient. Ortolano v. Degnon Cont. Co., 104 NYS 1064. Where the notice of injury required by Laws 1902, p. 1748, is insufficient under the act, no cause of action is stated. Finnigan v. New York Cont. Co., 107 NYS 855. Under New York Employer's Liability Act, Laws 1900, p. 1748, requiring notice to be given of "time, place, and cause of injury," notice that a servant was killed on a certain date by explosion of hot water tank held sufficient. Castner Electrolytic Alkali Co. v. Davies [C. C. A.] 154 F 938. A notice of injury to an employe stating that the employer was negligent in failing to furnish a safe place, proper appliances, and competent fellow-servants, is insufficient within Laws 1902, p. 1749, requiring notice of "time, place, and cause" of injury and the negligent act relied on. Barry v. Derby Desk Co., 106 NYS 575. Notice of injury stating that it was caused by negligence of employer in failing to furnish a safe place and appliances is insufficient, under Laws, 1902, p. 1748, requiring notice of "time, place, and cause" of injury. Finnigan v. New York Contracting Co., 107 NYS 855. A notice of injury by a letter reciting injury through negligence of foreman and requesting a life position is

fect in the notice as to a matter as to which there is no dispute is not fatal.[91] An objection to the sufficiency of the notice must be seasonably urged [92] and must definitely indicate the defect relied upon.[93]

(§ 3H) 2. *Parties.* See 8 C. L. 927—Joint action against master and his servant may be maintained when based upon the negligent or other act of the servant for which the master is liable,[94] though the master's liability is imposed by statute, and that of the servant rests upon the common law.[95] Persons jointly negligent may be joined as defendants.[96]

(§ 3H) 3. *Pleading and issues. The complaint or petition* See 8 C. L. 927 must show the existence of the relation of master and servant,[97] that plaintiff was acting within the scope of his employment when injured,[98] and the existence and breach of some duty owed by the master to the servant at the time of the injury.[99] A mere allegation of duty is insufficient; facts showing a duty to exist must be

insufficient under Laws 1902, p. 1748. Bovi v. Hess, 107 NYS 1001.

Wisconsin: Under Rev. St. 1898, § 4222, subd. 5, and Laws 1899, c. 307, where original action was brought, and complaint served within one year after injury, and plaintiff was granted leave to amend but did not do so, and action was dismissed, and thereafter another action was brought for same cause but on different grounds of negligence, held sufficient notice was given. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809. Under Rev. St. 1898, § 4222, requiring a notice of a claim for damages, the notice need not in terms state that plaintiff claims that defendant caused such injury; service of the notice on defendant is sufficient to apprise him of this fact. Hardt v. Chicago, etc., R. Co., 130 Wis. 512, 110 NW 427. Though notice did not in terms state that hand car was precipitated upon plaintiff by defendant's negligence, it was held sufficient, under Rev. St. 1898, § 4222, where defendant was otherwise fully informed and could not have been misled. Id.

91. Failure to designate place not fatal where there was no controversy regarding it. Heffron v. Lackawanna Steel Co., 105 NYS 429.

92. Objection at close of evidence that negligence relied on was not stated specifically too late where parties tried the case on a certain theory without previous objection. Heffron v. Lackawanna Steel Co., 105 NYS 429.

93. Objection that notice did not show particular negligence resulting in injury held too indefinite. Heffron v. Lackawanna Steel Co., 105 NYS 429.

94. Mayberry v. Northern Pac. R. Co., 100 Minn. 79, 110 NW 356. A railway corporation can be jointly sued with three of its servants when it is sought to make the corporation liable only by reason of negligent acts of the servants in the operation of a train under their management and control, and where injury was caused by joint negligence of the employes. Southern R. Co. v. Miller, 1 Ga. App. 616, 57 SE 1090.

95. As where master's liability rests upon fellow-servant statute. Mayberry v. Northern Pac. R. Co., 100 Minn. 79, 110 NW 356. A train dispatcher whose negligence caused injury to a fellow-servant is liable as a joint tort feasor with the railroad, though his negligence is the negligence of the company under Burns' Ann. St. 1901, § 7083. Louisville & N. R. Co. v. Gollihur [Ind. App.] 82 NE 492.

96. Where yard brakeman's injury was the result of the concurrent negligence of two companies, they were jointly and severally liable though there was no concurrent action. Feneff v. Boston & M. R. Co. [Mass.] 82 NE 705.

97. Complaint alleging that plaintiff was at time of injury in defendant's employ as a domestic, under his directions and in performance of her duty as such, held to allege sufficiently the existence of the relation of master and servant. Fearon v. Mullins, 35 Mont. 232, 88 P 794. Complaint for injury to a mine employe by being struck by a tram-car while crossing the track, which does not allege the relationship of master and servant, does not show that any duty except to refrain from willful injury was owed the plaintiff. Woodward Iron Co. v. Curl [Ala.] 44 S 969.

98. A general allegation that plaintiff was injured while working in the scope of his employment is unnecessary if facts showing that he was so employed are alleged. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784.

99. Complaint for injuries to a mine employe by being struck by a tram car while crossing the track held bad because not showing that the employe was there in line of his duties. Woodward Iron Co. v. Curl [Ala.] 44 S 969. Where engineer was killed by running into an open switch, allegations of negligence in permitting the disks on the switch stand to become covered with snow, obliterating the colors, held insufficient to show that the colors were the only means by which it could be determined whether the switch was open. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369. An allegation that a master failed to provide servants of reasonable skill, which was the proximate cause of an injury, is not an allegation that the employe was at the time engaged in any duty imposed upon him. Woodward Iron Co. v. Curl [Ala.] 44 S 969. An allegation that a servant was injured while in the employ of the master is not an allegation that he was in the discharge of any duty imposed on him at the time. Id. Petition for damages for injury caused by foreman negligently turning on blast of furnace held demurrable because not showing a duty resting upon the foreman, acting for master, to give warning. Dennis v. Scho-

alleged.[1] Allegations of negligence must be sufficiently certain and specific to inform the defendant of the nature of plaintiff's claim,[2] but a general allegation of

field's Sons Co., 1 Ga. App. 489, 57 SE 925. A complaint for injuries sustained by falling from an unrailed platform, alleging that the platform was "constructed," etc., and that the master had negligently left it without banisters, did not authorize an inference that the platform was uncompleted at the time of the injury. Aiken v. Rhodhess Mfg. Co. [N. C.] 59 SE 696. The declaration must allege the duty of the master and its breach. Declaration held insufficient. Gibson Co. v. Hoideczka, 129 Ill. App. 325. An allegation that the master was "bound to place a competent person to assist plaintiff with said log," but without showing any failure of such duty or injury resulting from such failure, is insufficient. Van Dyke v. Menlo Fruit Co., 129 Ga. 532, 59 SE 215. Complaint for injuries sustained by a servant while coupling cars held not to state a cause of action for negligence on the part of the company. Zipperer v. Seaboard Air Line R. Co., 129 Ga. 387, 58 SE 872. A petition alleging that a machine was not reasonably safe is not demurrable because not also alleging that it was not equal to the kind in general use. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524. Requisites of complaint for injuries, caused by negligence of a locomotive engineer after contributory negligence on the part of the engiher, stated. Louisville & N. R. Co. v. Young [Ala.] 45 S 238. The declaration must allege a duty upon the master and its breach. Complaint held sufficient as showing master's failure to see that servant was not subjected to unknown hazards not obvious to him, though not showing that servant was exposed to perils to which a youth of his age should not have been exposed. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784. Complaint for death of an employe of an electric company, alleging that while decedent was repairing a wire the engineer negligently turned on the current, but not alleging that the company failed to exercise due care in selecting an engineer, or machinery, held not to state a cause of action. Williams v. Northern Texas Trac. Co. [Tex. Civ. App.] 107 SW 125. Declaration in action by servant against master and another held sufficient to sustain verdict against the master only where individual negligence of the master is charged in addition to charge of joint negligence. Postal Telegraph Cable Co. v. Likes, 225 Ill. 249, 80 NE 136. Complaint alleging injury because of master's negligence in placing servant at work in place which he knew to be dangerous, of which fact servant was ignorant, held to state cause of action. Grace & Hyde Co. v. Strong, 224 Ill. 630, 79 NE 967.

1. The petition or complaint should set out issuable facts showing negligence on the part of the master causing the injuries. Quinn v. Allen, 1 Ga. App. 807, 57 SE 957. Facts from which the law will imply the existence of an underlying duty must be alleged. Chicago & E. R. Co. v. Lain [Ind.] 83 NE 632. Complaint for injuries caused by a switch being left open that it was the railroad company's duty to keep the switch safe without alleging facts showing such duty is bad. Chicago, I. & L. R. Co. v. Barker [Ind.] 83 NE 369. Where an engineer was killed by running into an open switch, complaint alleging negligence in permitting the switch to become obstructed held insufficient to state facts showing duty violated or negligence. Id. Complaint alleging violation of certain well known customs but not alleging what the customs were held insufficient. Chicago, etc., R. Co. v. Cobler, 39 Ind. App. 506, 80 NE 162. Complaint alleging violation of city ordinance, but not alleging substance of ordinance, insufficient. Id. Complaint alleging violation of rules, without showing substance of rules, held insufficient. Id. Where a brakeman was injured while coupling an engine to a defective car, allegation held defective for failure to directly aver that the engine backed against the car when plaintiff was engaged in coupling. Southern R. Co. v. Elliott [Ind.] 82 NE 1051. Other allegations held also fatally defective for want of such direct averment. Id.

2. A complaint should set forth the facts upon which the cause of action is based "plainly, fully and distinctly," and with such certainty that they may be understood. Certainty required as to allegations by a servant injured by defective appliance discussed. Cedartown Cotton & Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289. Held insufficient. Id. Complaint that while a street car was standing across a railroad track one of defendant's servants negligently ran an engine against it, causing the injury, held to sufficiently allege negligence. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Where switchman was injured because of a defective foreign car brought into railroad yards, complaint held to state sufficient facts. New York, etc., R. Co. v. Hamlin [Ind.] 83 NE 343. Where injuries were alleged to have been caused by defects in a car, an allegation that the bearings of the car over the truck did not slide or follow the turn of the car, but were rigid, causing the car to be derailed, was sufficient to apprise defendant of the issue to be met. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. Complaint alleging negligence resulting in collision in mine, causing injuries, held not objectionable. Coal Bluff Min. Co. v. Akers, 39 Ind. App. 617, 80 NE 545. Defect in handle of hand car sufficiently alleged. Southern R. Co. v. McGowan [Ala.] 43 S 378. Complaint alleging negligence in failing to furnish a safe place, in failing to repair a machine, and in failing to instruct as to how to operate the machine, held sufficiently definite. Niemciek v. McCormick Lumber Co. [Wash.] 90 P 658. Complaint for injuries to a kitchen employe by fall of glass from a defective skylight over the kitchen held sufficient. Shaw v. Feltman, 121 App. Div. 597, 106 NYS 1043. Petition held to state cause of action for negligence of master in requiring work of carrying a rail to be done with an insufficient number of men. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413. Complaint for death of a mule driver in a mine held sufficiently defi-

negligence is usually held sufficient as against a demurrer,[3] if the facts alleged disclose a legal duty and a violation thereof. Evidence should not be pleaded.[4] Knowledge by the master, actual or constructive, of the defective or dangerous condition alleged to have caused the injury must be made to appear.[5] It must appear from the pleading that the negligence or wrongful act alleged was the proximate cause of the injury.[6] A complaint is demurrable if it shows on its face, conclusively

nite and certain to be understood by the jury and court. Blackwood Coal & Coke Co. v. James [Va.] 60 SE 90. Complaint in action for injuries caused by derailment held sufficient to allege negligence in failing to inspect the track though the wreck was caused by wreckers. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910. Complaint for injuries due to failure to provide safe place and appliances held sufficiently specific. Gains & Co. v. Johnson [Ky.] 105 SW 381. Complaint for injuries, though slightly repetitious, held sufficient. Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. Complaint for injuries to a conductor because of incompetency of a motorman held sufficient. South Covington, etc., R. Co. v. Brown, 31 Ky. L. R. 1072, 104 SW 703. A complaint for injuries by explosion of an iron casting held sufficiently definite though not alleging what particular liquid was in the cavity which caused the explosion. Lumpkin v. Reiser Mach. Shops [La.] 45 S 518. Petition held insufficient to allege defectiveness of coupling device on cars. Wabash R. Co. v. Kithcart [C. C. A.] 149 F 108. Complaint for injury to a servant held insufficient for uncertainty. Jarrell v. American Pipe Bending Mach. Co., 2 Ga. App. 764, 59 SE 186.

3. In an action for injuries, legal results from facts alleged may be pleaded in general terms. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524. The plaintiff need not set forth evidence. Cedartown Cotton & Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289. Complaint for injuries to servant held good against demurrer. Seaboard Air Line R. Co. v. Bostock, 1 Ga. App. 189, 58 SE 136. Declaration alleging injuries caused by explosion of cistern due to its negligent and faulty construction held not demurrable. Atlanta Ice & Coal Co. v. Barnes, 1 Ga. App. 802, 57 SE 955. Complaint alleging injury as result of a projecting nail in a car catching plaintiff as he was coupling cars, negligence alleged being unsafe place and appliances, and negligent inspection or repair or warning, held to state cause of action as against demurrer for want of facts. New York, etc., R. Co. v. Hamlin [Ind.] 79 NE 1040.

4. Allegation that order was given by foreman is sufficient without showing his authority to give it. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784.

5. It may be alleged in general terms that the master knew or should have known of defects in appliances. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524. Complaint based on defect in brake rod held defective because not alleging knowledge of defect by master for a period long enough for repairs. Kentucky & Indiana Bridge & R. Co. v. Moran [Ind.] 80 NE 536. Complaint in action for injuries sustained by domestic falling through a hole in a porch floor held not to show that master knew of its dangerous condition, or failed to use due care, or that negligence on his part was the cause of the injuries. Fearon v. Mullins, 35 Mont. 232, 88 P 794. In action by parents for death of minor son, a complaint alleging negligence of defendant in that he furnished their son an unsafe, wild, fractious, and runaway team to work with, held sufficient without alleging knowledge by the master of these unsafe qualities of the team. Bellamy v. Whitsell, 123 Mo. App. 610, 100 SW 514. In action for injuries caused by defects in work car, petition alleging defects, and that defendant negligently furnished the car for use in such defective condition, held not demurrable for want of express allegation that defects were known to defendant. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. Complaint in action for injuries caused by breaking of handle of hand car held not defective by reason of failure to allege knowledge of defects and negligence of the master, as the cause thereof. Southern R. Co. v. McGowan [Ala.] 43 S 378. Allegation that the master knew or by reasonable care and inspection should have known of defective appliance held sufficient to raise the issue of inspection. Galveston, etc., R. Co. v. Harris [Tex. Civ. App.] 107 SW 108.

6. It is not enough that facts or conditions are stated from which an injury might have resulted; plaintiff's pleadings must show a causal connection between the facts and conditions alleged and the injury actually received. Gahagan v. New Orleans, G. N. R. Co., 119 La. 26, 43 S 900. Complaint held not demurrable on ground of failing to show causal connection between failure to give signals and injuries by train. Louisville & N. R. Co. v. Dobson [Ala.] 43 S 138. Complaint held to sufficiently allege causal connection between cause alleged and injury. Wolf v. Smith [Ala.] 42 S 824. Complaint alleging unsafe place held demurrable because not showing alleged defect to have been cause of injury. Southern R. Co. v. Shook [Ala.] 43 S 579. Where complaint alleged that slab of stone was not properly supported and fell on plaintiff's intestate and that said defect was cause of death, causal connection was sufficiently shown as against demurrer. Perry, Matthews, Buskirk Stone Co. v. Fletcher, 168 Ind. 348, 80 NE 970. Complaint held to sufficiently allege failure to exercise due care in selection of fellow-servants (Woodward Iron Co. v. Curl [Ala.] 44 S 969), and that such failure was the proximate cause of the injury (Id.). Where engineer was killed by running into an open switch, allegations of negligence in failing to furnish the cab with double windows, and that windows were frosty, held insufficient to show that such failure was the proximate cause of the injury. Chicago, I. & L. R. Co. v. Barker [Ind.] 83 NE 369. Count alleging

and as a matter of law, that the servant assumed the risk [7] or was guilty of contributory negligence,[8] or that the act of a fellow-servant caused the injury.[9] There is a conflict of authority as to whether the complaint must show affirmatively that the injury was not due to the act or negligence of a fellow-servant,[10] and that plaintiff was in the exercise of due care [11] and did not assume the risk.[12] An allegation by plaintiff that he had no knowledge of the defect alleged negatives constructive as well as actual knowledge,[13] and is sufficient to show nonassumption of risk.[14] In an action based on the common-law liability of the master for incompetency of a fellow-servant, facts bringing the case within a fellow-servant statute need not be alleged.[15] Complaint based on incompetency of fellow-servant need not negative knowledge by plaintiff of such incompetency, this being matter of defense.[16] A demurrer for want of facts is properly overruled if the complaint is good either at common law or under an employer's liability act.[17] The usual rules of pleading apply as to the statement of different causes of action,[18] and the curing of defects by verdict.[19]

failure to properly instruct employe but failing to show that such failure occasioned the injury held bad. Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 NE 392. Where a servant had his fingers cut off by a shaper, an allegation that the injury was caused by the negligent failure of defendant to provide proper guards for the machine sufficiently alleges that absence of guards was the proximate cause of the injury. United States Furniture Co. v. Taschner [Ind. App.] 81 NE 736.

7. Complaint alleging that a servant relying on his master's promise to prop the entry of a mine, in reliance on such promise, continued to work for a reasonable time, and within a reasonable time was injured, sufficiently alleges that the servant continued only a reasonable time. Ballou v. Potter [Ky.] 106 SW 1178.

8. Complaint for injury to servant by falling into a hole left unguarded near his place of work held to show that he was exercising due care at the time of his injury. Republic Iron & Steel Co. v. Walsh [Ky.] 105 SW 974.

9. Petition demurrable which showed negligence of fellow-servant as proximate cause of injury. Wilder v. Miller, 128 Ga. 139, 57 SE 309. Complaint held demurrable because showing that injury was caused solely by negligence of a fellow-servant. Turner v. Seville Gin & Warehouse Co., 127 Ga. 555, 56 SE 739. Where the complaint shows that injuries resulted from the negligence of other servants, it is necessary to allege facts showing that they were not fellow-servants. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65.

10. Complaint alleging that foreman in charge of work ordered a guy rope detached, knowing that a pole would fall, held defective for not alleging that foreman was vice-principal and not a fellow-servant of plaintiff. Roberts & Shafer Co. v. Jones [Ark.] 101 SW 165. Complaint need not show that injury was not due to negligence of a fellow-servant. Shaw v. Feltman, 121 App. Div. 597, 106 NYS 1043.

11. Complaint must show the exercise of due care by the servant. Quinn v. Allen, 1 Ga. App. 807, 57 SE 957. Where more than one ground of negligence is relied upon, plaintiff must allege freedom from fault with reference to each. Central of Georgia R. Co. v. Ruff, 127 Ga. 200, 56 SE 290. Plaintiff must show by the allegations of his complaint that he was free from fault, while it is not essential that he should use the term "free from fault," he must allege facts sufficient to show the same. Id.

12. Lack of knowledge of a defect in an appliance must be alleged and proved. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524. The complaint need not show that the injury was the result of a risk not assumed. Shaw v. Feltman, 121 App. Div. 597, 106 NYS 1043. It should show that the servant did not know, and had not equal means of knowing, and could not by the exercise of ordinary care have known of the condition or defect or negligence set up as the ground of recovery. Quinn v. Allen, 1 Ga. App. 807, 57 SE 957. Where defect in car coupler was relied upon, plaintiff should have alleged want of knowledge thereof; a mere allegation that he had not had an opportunity to examine the apparatus was not enough. Central of Georgia R. Co. v. Ruff, 127 Ga. 200, 56 SE 290. Complaint held insufficient in not showing that the risk incident to operating the engine without double windows was not assumed. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369.

13. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 NE 1062. An allegation in a complaint by a street car conductor, injured by colliding with a telephone pole near the track, that he had no knowledge of the dangerous proximity of the pole to the track, implies that the peril could not have been discovered by the exercise of ordinary care and is sufficient on demurrer. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986.

14. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 NE 1062.

15, 16. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822.

17. Oolitic Stone Co. v. Ridge [Ind. App.] 80 NE 441.

18. Count alleging negligence of superintendent in allowing handle on car to become defective and negligence in permitting plaintiff to use it in defective condition held not

Pleading statutory causes of action.[See 8 C. L. 930]—Where a party relies for recovery upon a special statute creating a liability where none existed before, he must set forth in ordinary and concise language a statement of facts showing a right to recover under such statute.[20] Decisions as to pleadings in actions based on various statutes are given in the note.[21]

objectionable as setting up two separate causes of action. Southern R. Co. v. McGowan [Ala.] 43 S 378.

19. A complaint defective for failure to allege that the servant did not know of the danger is cured by the verdict where the question was submitted on the proof received without objection. City of Henderson v. Smith. 31 Ky. L. R. 860, 104 SW 277. Defect in complaint in failing to sufficiently allege that plaintiff continued to work only a reasonable time after promise to repair is cured by a verdict where the question was litigated and submitted to the jury. Ballou v. Potter [Ky.] 106 SW 1178. Failure to allege master's knowledge of danger held cured by verdict. Postal Telegraph Cable Co. v. Likes, 225 Ill. 249, 80 NE 136.

20. Kelly v. Northern Pac. R. Co., 35 Mont. 243, 88 P 1009. A complaint in order to show a statutory liability must clearly allege a violation of a statutory duty. Reliance Mfg. Co. v. Langley [Ind. App.] 82 NE 114.

21. Alabama: In action based on Code 1896, § 1749, subd. 1 (defect in ways, works, or machinery, a count alleging that a trestle in use at a particular place was defective and fell was held not demurrable for failure to specify the particular part of the ways, works, or machinery claimed to be defective. West Pratt Coal Co. v. Andrews [Ala.] 43 S 348. Complaint held not to show a defect in a "timber buggy," part of "ways, works, and machinery," but only a negligent use thereof. Woodward Iron Co. v. Johnson [Ala.] 43 S 186. Complaint for injury because of negligence of fellow-servant in allowing a car to run down upon him held insufficient under Code 1896, § 1749, because not alleging that the injured person was employed in or about the railway or was discharging any duty in connection therewith. Woodward Iron Co. v. Curl [Ala.] 44 S 969.

Indiana: Complaint based on Burns' Ann. St. 1901, § 7087i, requiring machinery to be guarded, must show that it would be practicable to guard it without rendering it useless. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981. Complaint held sufficient. Id. An employe suing for injuries sustained while operating an emery wheel because of failure of the master to provide exhaust fans to carry off the dust, as required by Burns' Ann. St. 1901, § 7087i, must allege and prove that it could be provided with exhaust fans without rendering it useless. National Drill Co. v. Myers [Ind. App.] 81 NE 1103. A complaint under Burns' Ann. St. 1901, § 7087i, requiring saws, etc., and machinery to be guarded, shows a case within the statute where it alleges that bits similar to teeth of a circular saw were used on the machine and were used in cutting wood as saws were used, except that they were placed so as to revolve horizontally. United States Furniture Co. v. Taschner [Ind. App.] 81 NE 736. Complaint held not to state cause of action for injury by being drawn into rollers of printing press, under Burns' Ann. St. 1901, § 7087i, requiring machinery to be guarded, because it did not show that machine was one which ought to have been guarded. Bemis Indianapolis Bag Co. v. Krentler, 167 Ind. 653, 79 NE 974. Complaint alleging that cover of vat fell on plaintiff, causing him to fall into a vat, which was unguarded, held to state a cause of action under Burns' Ann. St. 1901, § 7087i, requiring vats to be guarded, as against objection that it showed fall of cover to be proximate cause of injury. Bessler v. Laughlin, 168 Ind. 36, 79 NE 1033. A complaint under Burns' Ann. St., 1901, § 7083, must state specifically all facts necessary to show a cause of action under the statute. Chicago & E. R. Co. v. Lain [Ind.] 83 NE 632. Complaint for injury to railroad employe injured by passing locomotive held demurrable. Id. Complaint alleging injuries to street railway employe and averring that plaintiff was injured by negligence of a third person in defendant's service, to whose order plaintiff was bound to conform at time of injury and was conforming, that such person had authority to give orders which it was plaintiff's duty to obey, and that he did give an order in conforming to which plaintiff was injured, states a cause of action under Burns' Ann. St. 1901, § 7083, subd. 2. Indianapolis St. R. Co. v. Kane [Ind.] 80 NE 841. Complaint alleging that engineer in charge of a locomotive negligently ran it into one of defendant's passenger cars, held sufficient statement of cause of action under Burns' Ann. St. 1901, § 7083, subd. 4, as against a demurrer for want of facts. Chicago, etc., R. Co. v. Cobler, 39 Ind. App. 506, 80 NE 162. Complaint for injuries to switchman caused by negligence of coemploye in charge of train held to state cause of action under Burns' Ann. St. 1901, § 7083, subd. 4. Pittsburgh, etc., R. Co. v. Ross [Ind.] 80 NE 845. Allegations that day was cold, dark, and hazy, and air filled with flying frost, etc., held insufficient to charge that the day was "dark and foggy," under Burns' Ann. St. 1901, § 5173a, requiring switch lamps to be lighted on such days. Chicago, I. & L. R. Co. v. Barker [Ind.] 83 NE 369. In pleading a cause of action for injuries sustained by reason of failure to comply with statutory regulations, a substantial negation of compliance with the statute is all that is required. In pleading failure to comply with Burns' Ann. St. 1901, §§ 7472, 7483, requiring loose materials on roof of mine to be secured, assumption of risk and contributory negligence need not be negatived. Antioch Coal Co. v. Rockey [Ind.] 82 NE 76. Complaint by miner injured by fall of loose materials from roof of room where he was working, charging failure of mining boss to make inspection, as required by Burns' Ann. St. 1901, §§ 7472, 7479, held not to show that place was constantly changing and became dangerous as work progressed. Id.

Iowa: Complaint alleging that employer was negligent in allowing female under 18

Defenses; the answer.[See 8 C. L. 931]—There seems to be a conflict of authority as to whether the defenses of negligence of a fellow-servant,[22] contributory negligence,[23] and assumed risk,[24] must be specially pleaded.[25] A plea of contributory negligence or assumption of risk is defective which does not set out the act or acts which contributed to the injury as a proximate cause or constituted assumption of risk,[26] but a defective plea will be taken as good if it gives notice of the defense tendered, unless the adverse party moves to make it move definite and certain.[27]

Issues, proof, and variance.[See 8 C. L. 932]—Negligence must be proved as alleged.[28] There can be no recovery for negligence other than that alleged,[29] and

to clean machinery in motion held to state cause of action under Code Supp. 1902, § 4999b, prohibiting such act though statute was not mentioned. Bromberg v. Evans Laundry Co., 134 Iowa, 38, 111 NW 417.

Michigan: A violation of the statute prohibiting employment of persons under a certain age must be pleaded as negligence, or it cannot be the basis for a recovery. Van Wyck v. Dickinson, 148 Mich. 418, 14 Det. Leg. N. 198, 111 NW 1033.

Montana: Complaint alleging that "defendant company so carelessly and negligently managed, operated and ran said string of cars" held not sufficient to admit proof of negligence, of defendant's engineer, under Laws 1903, p. 156, making railroad company liable for negligence of engineer (in absence of contributory negligence), and Laws 1905, p. 1, making company liable for negligence of any employe connected with operation of road. Kelly v. Northern Pac. R. Co., 35 Mont. 243, 88 P 1009.

New York: Complaint alleging that plaintiff was directed by defendant to enter an elevator of defendant, that elevator was defective in certain respects, that it fell, injuring plaintiff, and that due notice of the time, place, and cause of the injury was given within 120 days, as provided by employer's liability act (Laws 1902, c. 600), held to state cause of action under statute for negligence of superintendent. Harris v. Baltimore Mach. & El. Works, 188 N. Y. 141, 80 NE 1028.

22. The defense of negligence of a fellow-servant cannot be proved unless pleaded. Reeve v. Colusa Gas & Elec. Co. [Cal.] 92 P 89. The defense that a servant's injuries were caused by negligence of a fellow-servant may be proved under a general denial and need not be specially pleaded. Big Hill Coal Co. v. Abney's Adm'r, 30 Ky. L. R. 1304, 101 SW 394.

23. Contributory negligence is a matter of defense provable under a general denial. Pittsburgh, etc., R. Co. v. Collins, 168 Ind. 467, 80 NE 415.

24. The defense of assumed risk may be set up in an amended answer without changing the issue raised by a general denial. Smith v. Rock Island A. & L. R. Co., 119 La. 537, 44 S 290. Complaint alleged that deceased did not appreciate danger of work at which he was injured and was not warned, and answer was general denial. Held assumption of risk was raised and instruction thereon was proper. Shirley v. Abbeville Furniture Co., 76 S. C. 452, 57 SE 178.

25. See, also, 8 C. L. 932, for authorities and distinctions.

26. Wings v. Inman Mills, 76 S. C. 550, 57 SE 525. A plea of contributory negligence is insufficient without alleging facts constituting negligence. Allegation that plaintiff "negligently attempted," etc., held a mere conclusion. Creole Lumber Co. v. Mills [Ala.] 42 S 1019. A plea of contributory negligence, alleging that the person injured knew or ought, with the exercise of reasonable care, to have known, of the danger, is insufficient. Jones v. Pioneer Min. & Mfg. Co. [Ala.] 42 S 998. Plea of assumption of risk held bad because not alleging knowledge of risk and danger as well as of defects. Southern R. Co. v. McGowan [Ala.] 43 S 378.

27. Wings v. Inman Mills, 76 S. C. 550, 57 SE 525.

28. The defects alleged must be proved. Southern R. Co. v. McGowan [Ala.] 43 S 378. Nonsuit proper where plaintiff failed entirely to prove allegations that he was sent to dangerous place and that careless and incompetent servants were employed. Holly v. Virginia-Carolina Chem. Co., 128 Ga. 352, 57 SE 482. Where complaint alleged appliance was defective or weak owing to negligence of defendant or person charged with duty of maintaining it in safe condition, proof of failure to servant charged with such duty to discover and remedy the defect was sufficient. Birmingham Rolling Mill Co. v. Myers [Ala.] 43 S 492. Variance immaterial where petition alleged that plaintiff was directed to prop a roof in a certain entry when the roof fell, and proof showed he was not in the room but was preparing to prop the roof. Central Coal & Iron Co. v. Thompson, 31 Ky. L. R. 276, 102 SW 272. Where petition alleged negligence in selecting a block and adjusting it under engine being raised by hydraulic ram, and that foreman selected the block, proof that the block was selected by the one who adjusted it did not make a fatal variance. Missouri, etc., R. Co. v. Green, 75 Kan. 504, 89 P 1042. Proof that a servant was injured by stones falling from a temporary pile in a quarry will not support an allegation that he was injured by reason of defects in ways, works, and machinery. Bonin v. Ballard [Mass.] 82 NE 702. There is a fatal variance between allegations that one was a stranger and entitled to the exercise of due care on the part of defendant's servants, and proof that his right to recover depended on his status as a servant. Woodward Iron Co. v. Curl [Ala.] 44 S 969. Under a complaint alleging negligence in directing a servant to feed a piece of lumber into a planer which it was insufficient to plane because of a defective belt, proof that it was too heavy and that the machine was never intended to dress lumber of that size constitutes a fatal variance. Gainer v. Southern R. Co. [Ala.] 44 S 652. A complaint for injuries to a motorman in a collision with another car may be amended to

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proof of negligence not alleged is inadmissible.[30] Where several acts of negligence are alleged, recovery is justified on proof of one or more.[31]

(§ 3H) 4. *Evidence, burden of proof, presumptions.* See 8 C. L. 932—The burden is upon the plaintiff to prove negligence of the master [32] as alleged,[33] and that

allege that the motorman jumped when he saw a collision was inevitable. Edge v. Southwest Missouri Elec. R. Co., 206 Mo. 471, 104 SW 90. In an action for injuries received because of a defective machine, there is no variance between allegations that a wheel driving belting "was out of plumb and wobbly," and proof that the surface of the wheel was not true to the axle which had gotten out of the true center of the wheel, and that its operation was irregular and unsteady. Receivers of Kirby Lumber Co. v. Poindexter [Tex. Civ. App.] 19 Tex. Ct. Rep. 513, 103 SW 439.

29. Where a servant alleges a specific ground of negligence, he may not recover on proof of another and different act. De La Mar v. Herdeley [C. C. A.] 157 F 547. Where a servant fell on an unguarded machine and merely alleged negligence in leaving the pool of oil on the platform by which he was caused to fall, he could not rely on violation of Laws 1897, p. 461, c. 415, in failing to guard the machine. Martin v. Walker & Williams Mfg. Co., 106 NYS 708. Where only ground of negligence asserted was retention of incompetent employe with notice of his incompetency, other claims of negligence may not be considered in determining whether an incompetent fellow-servant was retained. Trend v. Detroit United R. Co., 149 Mich. 338, 14 Det. Leg. N. 429, 112 NW 977. Declaration alleging improper construction of machine is not sustained by proof of defective condition. Latrobe Steel & Coupler Co. v. Shlones, 129 Ill. App. 215. Allegation that roof swayed down and caught car passing thereunder, and proof that timbers of roof swayed down and car caught thereon, held not to present a variance. Jones & Adams Co. v. George, 227 Ill. 64, 81 NE 4. Declaration charging that plaintiff was unaware of the fact that wire was charged with electricity is sufficient to carry proof of custom of master to notify servants when current is turned on. Chicago Suburban Water & Light Co. v. Hyslop, 227 Ill. 308, 81 NE 379, afg. 129 Ill. App. 575. Allegation that servant demanded repair of defects and proof that he was unaware of them presents a variance. Grace Co. v. Larson, 227 Ill. 161, 81 NE 44. Declaration alleging that servant was injured while uncoupling cars and proof that he was injured after uncoupling and while attempting to close the knuckle of the coupler does not present a variance. Illinois Cent. R. Co. v. Heaht, 228 Ill. 312, 81 NE 1022. Allegation that defendant in the exercise of ordinary care should have known of employe's presence in car at time of moving it held not sustained by evidence by improper order given by foreman. Crane Co. v. Hogan, 228 Ill. 338, 81 NE 1032. Where declaration alleges several duties of the master and their breach, proof of any one of them will sustain recovery. Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 NE 136. Where negligence of master otherwise appears, failure to prove an allegation of ownership of place of work in a joint tort feasor is immaterial. Id.

30. Under a complaint alleging that the master by its agent offered to convey the servant to his place of work and he was injured by the negligence of the driver, he could prove that the relation existing at the time of the injury was that of licensee and licensor instead of master and servant. Pigeon v. Lane [Conn.] 67 A 886. Where issues made were that an engineer was killed by neglignce in running his train into a train standing in the yards, it was held error to refuse to allow the company to prove such allegation because the yard limits were not marked as required by rule of the company. Atlantic Coast Line R. Co. v. Mallard [Fla.] 44 S 366. A complaint charging negligence in furnishing a defective appliance, a further allegation of negligence in failure to furnish a safe place was a deduction from specific acts of negligence charged and did not widen scope of inquiry so as to authorize evidence of negligence not covered by the specific allegations. La Bee v. Sultan Logging Co. [Wash.] 91 P 560. A complaint alleging that knives of a die cutter were defective did not limit proof to defect in blades but included defect in safety clutch which held the knives in place. Fox. v. Kinnear Pressed Radiator Co. [N. J. Err. & App.] 67 A 1011.

31. Ft. Wayne & Wabash Valley Trac. Co. v. Crosbie [Ind.] 81 NE 474. It is sufficient to introduce testimony from which a single ground of negligence on the part of the master may be found. Cooney v. Com. Ave. St. R. Co. [Mass.] 81 NE 905.

32. Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369; Vinson v. Willingham Cotton Mills, 2 Ga. App. 53, 58 SE 413; Dalton v. Ogden Gas Co., 126 Ill. App. 502; Harte v. Fraser, 130 Ill. App. 494; Pearsall v. New York Cent., etc., R. Co., 189 N. Y. 474, 82 NE 752. It is presumed that the master has furnished safe appliances, and if it be shown that they were defective it is presumed that the servant had notice of such fact. Elliot v. Kansas City, etc., R. Co., 204 Mo. 1, 102 SW 532. The mere fact that a switchman was injured in the act of throwing a switch lever does not overcome the presumption that safe appliances had been furnished. Id. Instruction in effect that defendant must show by preponderance of evidence that plaintiff was not injured as claimed by him held erroneous. Gulf, etc., R. Co. v. Newson [Tex. Civ. App.] 18 Tex. Ct. Rep. 158, 102 SW 450. Instruction that burden is on plaintiff to make a case by the "fair" preponderance of the evidence approved. Parker v. Fairbanks Morse Mfg. Co., 130 Wis. 525, 110 NW 409. Burden on plaintiff to prove defendant negligent as to inspection of engine. Cederberg v. Minneapolis, etc., R. Co., 101 Minn. 100, 111 NW 953. Plaintiff must prove defect as cause of injury, and also that it was known to defendant for a time long enough to have enabled him to make necessary repairs, or

that it should have been known. Carnegie Steel Co. v. Byers [C. C. A.] 149 F 667. Where **brakeman was killed by a derailment**, his administrator, to prove negligence, was entitled to urge every inference the jury might legitimately draw from the facts proved. Hinson v. Lehigh Valley R. Co., 106 NYS 602. In action for **death of an employe**, a charge that plaintiff must establish negligence on the part of the master, and that intestate was not negligent, and that liability could not be based on sympathy, was proper. Pearce v. Quincy Min. Co., 149 Mich. 112, 14 Det. Leg. N. 367, 112 NW 739. Where a servant was **injured by explosion of a steam pipe**, he has the burden to show that a fellow-servant through whose negligence in starting the engine the explosion occurred was orderd by the foreman to start it. Baldwin v. American Writing Paper Co. [Mass.] 82 NE 1. Where employe sues for injuries alleged to have been **caused by negligence of a third person**, he must show that such person represented the master and exercised superintendence. Reardon v. Byrne [Mass.] 80 NE 827.

Drakeman, struck by obstruction near track while switching, must prove the existence of the obstruction and also that the company had notice of it or was charged with notice. Nashville, etc., R. Co. v. Hayes, 117 Tenn. 680, 99 SW 362. Where **motorman was injured by explosion of a controller** on his car, he had the burden to prove that the controller was defective and that the defect should have been discovered by the exercise of ordinary care. Beebe v. St. Louis Transit Co., 206 Mo. 419, 103 SW 1019. Where **failure to warn** is negligence relied upon, plaintiff has burden of proving that danger was special and not obvious so that warning was required. No such proof where injury was caused by moving rollers, danger from which was obvious. Hicks v. Claremont Paper Co. [N. H.] 65 A 1075. Where injury is caused by alleged **defective appliances**, the servant has the burden to show that the master was negligent either in furnishing defective appliances or did not exercise ordinary care in keeping them in repair. Southern R. Co. v. Carr [C. C. A.] 153 F 106. Where a defect in an appliance is such as to injure an employe who operates it in a careful manner, the employer was negligent as a matter of law and the burden was on him to show that he had performed his duty, and inspected as often as ordinary care required. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. Where it is satisfactorily shown that a machine is defective and dangerous, which fact was known to the master, a servant injured is not required to show technically wherein the defect existed. Brunger v. Pioneer Roll Paper Co. [Cal. App.] 92 P 1043.

Evidence sufficient: In an action for injuries to a servant, evidence held to sustain a verdict for him. King Mfg. Co. v. Walton, 1 Ga. App. 403, 58 SE 115. Circumstantial evidence held sufficient to show that engine helper was killed by hostler negligently moving the engine, though the direct testimony of the hostler was to the contrary. Atchison, etc., R. Co. v. Colliati, 75 Kan. 56, 88 P 534. Where hook of block and tackle used to raise a smoke stack straightened out under the mere weight of the stack, the occurrence was prima facie proof of negligence, and burden was on defendant to show due care in selection and test of hook. El Paso Foundry & Mach. Co. v. De Guereque [Tex. Civ. App.] 19 Tex. Ct. Rep. 405, 101 SW 814. Where switchman was killed in performance of his duties, evidence held sufficient to show negligence on the part of the company. Macon, D. & S. R. Co. v. Joyner, 129 Ga. 683, 59 SE 902. Where employe was injured by refrigerator falling on him while being loaded, evidence held sufficient to show negligence of another employe who was not plaintiff's fellow-servant. Union Pac. R. Co. v. Shovall [Colo.] 89 P 764. Where brakeman was killed in a collision, evidence held to show negligence. Ragley Lumber Co. v. Parks [Tex. Civ. App.] 18 Tex. Ct. Rep. 869, 103 SW 424. Evidence sufficient to show that the railroad company through its engineer was negligent, where a brakeman was knocked off the top of a train by the jamming of cars. Louisville & N. R. Co. v. Barrickman, 31 Ky. L. R. 883, 104 SW 273. Where brakeman directed to assist in taking cars from a siding while between two cars standing six or eight feet apart was killed by the sudden shoving of the cars together without signal, held the railroad company was negligent. Louisville & N. R. Co. v. Herndon's Adm'r, 31 Ky. L. R. 1059, 104 SW 732. A prima facie case is established by proof that a brakeman was injured while setting a brake because a defective brake chain or bolt broke. Galveston, etc., R. Co. v. Harris [Tex. Civ. App.] 107 SW 108. Where the uncontradicted testimony of one witness was to the effect that warning of danger had been given and there was nothing to discredit the testimony, the jury were not warranted in finding that no warning was given. Savage v. Rhode Island Co. [R. I.] 67 A 633. Evidence sufficient to show that the injury resulted from a piece of iron flying into the servant's eye from a rivet on which he was working. Brockmiller v. Industrial Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688.

Evidence insufficient where a servant was injured by falling of a stone which had been hoisted under the servant's direction. McCarthy v. Norcross Bros. Co., 106 NYS 578. To show negligence where one employed in a railroad cinder pit was injured. Atchison, etc., R. Co. v. Dickens [Ind. T.] 103 SW 750. To go to the jury on the question of negligence in the manner of loading an iron column in the course of which a chain broke. Shutter v. McClintic-Marshall Const. Co., 106 NYS 706. To show that a brakeman's death was due to any negligence on the part of the company. Louisville & A. R. Co. v. Cox's Adm'r, 31 Ky. L. R. 1214, 104 SW 956. To show negligence in view of the presumption that due care was exercised in providing safe appliances. Henson v. Lehigh Valley R. Co., 106 NYS 602. To show that the master was negligent where quarry employe was struck by part of a derrick. Brodie v. Rockport Granite Co. [Mass.] 83 NE 321. To show negligence on the part of the company where a brakeman was injured while attempting to uncouple cars. Lyon v. Charleston & W. C. R. Co., 77 S. C. 328, 58 SE 12. To show negligence on part of a switching crew where a section hand was injured while working in the yard. Norfolk & W. R. Co. v. Belcher's Adm'x [Va.] 58 SE 579. To show negligence of acting foreman as cause of death of employe assisting in moving gin

such negligence was the proximate cause of the injury.[34] To recover on the ground

pole. Farrell v. B. F. Sturtevant Co., 194 Mass. 431, 80 NE 469. To show injury to employe of construction train, who was jerked off, due to company's negligence. Cunningham v. Pennsylvania R. Co., 217 Pa. 97, 66 A 236. To establish claim of negligence in leaving cars unsecured on "hill" side track so that they ran down upon a "lead" track, subsequently causing a collision. Quinn v. Minneapolis & St. Louis R. Co., 100 Minn. 244, 110 NW 872. To show negligence in action for death of brakeman in railroad yards. Pittard's Adm'r v. Southern R. Co. [Va.] 57 SE 561. To show negligence where servant laying pipe was injured while at the bottom of a ditch by the slipping of a rope held by other employes. King v. Iowa Cent. R. Co. [Iowa] 114 NW 177. Evidence that the injury was caused by a latent defect in the place or appliances is insufficient. Cryder v. Chicago, etc., R. Co. [C. C. A.] 152 F 417. Where brakeman was injured in a collision, evidence insufficient to show negligence on the part of the engineer or conductor. Hall v. Louisville, etc., R. Co., 31 Ky. L. R. 853, 104 SW 275. Evidence insufficient to show negligence for which the company was liable. Id. Where brakeman was injured during switching operations, evidence held insufficient to show negligence on the part of the conductor. Chesapeake & N. R. Co. v. Anderson's Adm'r, 31 Ky. L. R. 665, 103 SW 311. Where miner was killed by wreck of a cage in which he was being elevated, evidence held insufficient to authorize a finding that the wreck was caused by a jog negligently permitted to exist in the guides along which the shoes attached to the cage ran. Elkton Consol. Min. & Mill. Co. v. Sullivan [Colo.] 92 P 679. Employe in subway tunnel was injured by fall of some substance which cut his hand. Cause of the fall or source of the material not shown. Held insufficient to establish cause of action under statute or common law. Ortolano v. Degnon Cont. Co., 104 NYS 1064. Evidence that an employe was injured while fixing a defective latch on a scraper is insufficient to show negligence. International, etc., R. Co. v. Hall [Tex. Civ. App.] 19 Tex. Ct. Rep. 500, 102 SW 740. In action for injuries alleged to have been caused by premature blast in quarry, evidence held insufficient to show that fuse was defective to knowledge of master. Langhorn v. Nelson, 30 Ky. L. R. 482, 99 SW 223. Where brakeman was struck by a chute near the track while engaged in switching, but the evidence did not show by whom the chute was placed there nor when it was put there, nor how long it had been there, negligence of the company was not shown. Nashville, etc., R. Co. v. Hayes, 117 Tenn. 680, 99 SW 362. Circumstantial evidence that a switchman was killed by derailment of car due to defective track cannot stand against overwhelming testimony that he fell and was dragged 40 to 60 feet before the car was derailed. Cincinnati, etc., R. Co. v. Zachary's Adm'r [Ky.] 106 SW 842. Where section hand was injured in a yard, evidence held to show that employes in charge of a switching train were not negligent in not keeping lookout. Norfolk & W. R. Co. v. Belcher's Adm'x [Va.] 58 SE 579. Proof that a railroad employe was killed during the operation of trains does not make out a prima facie case. Atlanta, etc., R. Co. v. McManus, 1 Ga. App. 302, 58 SE 258. It must appear that the company was negligent, that the employe was free from negligence, but where death is caused in operation of a train, either one of these elements may be supplied by proof of the injury being so received. Id. Plaintiff's testimony that the injury might have been due to negligence of a fellow-servant and defendant's testimony that it was due to contributory negligence will not sustain a recovery. Bonin v. Ballard [Mass.] 82 NE 702. Where servant was struck by a truck placed so near the railroad track that it was hit by a passing car, the master cannot be held liable where it was not shown when or by whom the truck was placed there. Haskell & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626. Where railroad employe was injured, evidence of negligence of the railroad company held insufficient to go to the jury. Gibbons v. Lehigh Valley R. Co., 106 NYS 543. Evidence that an employe removing materials from a building was struck by a piece of wood belonging to his employer, which fell on him, held insufficient to connect the employer with the accident. Wurthlee v. Concrete Steel & Tile Const. Co., 107 NYS 101.

33. The particular negligence alleged must be proved. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555; Meyers v. Ruddock Orleans Cypress Co., 118 La. 805, 43 S 448; Bromley v. Hudson Lumber Co. [Mo. App.] 104 SW 1134. One or more of the specific acts of negligence alleged must be proved. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Where a complaint for services set up a valid implied contract, evidence that plaintiff during part of his term of service held a public office and used part of the master's building as his office was not admissible where such defense was not pleaded. Bell v. Peper Tobacco Warehouse Co. [Mo.] 103 SW 1014. Where negligence alleged was defective turntable, recovery could not be had on proof that it was too small. Currie v. Missouri, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 686, 106 SW 1149. Under a complaint alleging negligence in failing to provide a reasonably safe place and appliances, recovery cannot be had on proof of failure to warn. W. A. Gains & Co. v. Johnson [Ky.] 105 SW 381.

34. Plaintiff has burden of showing that defendant's negligence was direct and immediate, efficient cause of injury. Creola Lumber Co. v. Mills [Ala.] 42 S 1019; Coughlin v. Philadelphia, etc., R. Co. [Del.] 67 A 148. Where a section man fell from a hand car and the inference that the fall was due to his negligently losing hold of the lever is stronger than that it was due to defect in the car, he cannot recover. Louisville & N. R. Co. v. Guest's Adm'r [Ky.] 106 SW 817. Where an explosion of dynamite by which a miner was injured might have resulted from causes for which the master was not liable, recovery cannot be had. Thornberry v. Old Judge Min. Co., 126 Mo. App. 660, 105 SW 659. Where servant was killed, the plaintiff has the burden to show with reasonable distinctness how he met his death. Schell v. Chicago & N. W. R. Co. [Wis.] 113 NW 657. Evidence insufficient to show that it was caused by any act for which the master was re-

of incompetency of a fellow-servant, plaintiff must show that his injury resulted from some act or omission of said servant,[35] that said servant was incompetent to perform the duties assigned to him,[36] and that the fact of the incompetency of said servant was known to the master or ought to have been known, in the exercise of ordinary care.[37] It is generally held that mere proof of the occurrence of an accident does not alone raise a presumption of negligence on the part of the master,[38]

sponsible. Id. Where a servant was injured by falling of a plank, but there was no evidence as to what caused it to fall, the servant is not entitled to recover. McGowan v. Nelson [Mont.] 92 P 40. Where a railroad employe was killed because of negligence of an engineer after his own negligence, the plaintiff has the burden to prove that the engine could have been stopped by the exercise of ordinary care after the danger was discovered. Louisville & N. R. Co. v. Young [Ala.] 45 S 238. In an action by an employe for damages for the loss of his eyesight from the use of wood alcohol in the varnish supplied to him for the purpose of varnishing the interior of large casks used in the brewery of his employers, it is necessary that the proof show that the fumes of wood alcohol would have the effect of destroying eyesight in the manner alleged, and such proof must be of such a clear and positive character that a basis will be provided which will justify the jury in drawing the inference that the injury was due to the cause alleged. Frank v. Herancourt Brew. Co., 5 Ohio N. P. (N. S.) 381.

35. In order to recover on ground of incompetency of a fellow-servant specific acts of incompetency, and that the master knew of such incompetency, must be proven. McDermott v. Daniell, 106 NYS 496.

36. An employe injured because of alleged incompetency of fellow-servant must prove incompetency, and retention of such servant by the master with notice of his incompetency and that the injury was occasioned by such incompetency. Cooney v. Commonwealth Ave. St. R. Co. [Mass.] 81 NE 905.

37. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822. A conductor seeking to recover for injury sustained because of alleged incompetency of a motorman must prove such incompetency, the master's knowledge of it and his own ignorance of it. South Covington & C. St. R. Co. v. Brown, 31 Ky. L. R. 1072, 104 SW 703. Where elevator operator was injured by fall of the elevator and there was evidence that the fall might have been due to brake shoe becoming greasy, held insufficient to render the doctrine res ipsa loquitur applicable. Haynie v Hammond Packing Co., 126 Mo. App. 88, 103 SW 581.

38. The mere fact that the accident resulting in the injury happened raises no presumption of negligence on the part of the master. Omaha Packing Co. v. Sanduski [C. C. A.] 155 F 897. Generally, negligence will not be imputed from the circumstance of injury alone due to defective appliances, but some affirmative act of commission or omission must be proved. Newhouse v. Kanawha, etc., R. Co. [W. Va.] 59 SE 1071.

Res ipsa loquitur doctrine held inapplicable: Where there is no evidence that ways and appliances are in an unsafe condition or that there was such a state of affairs as required warning or instruction. Bonin v. Ballard [Mass.] 82 NE 702. Where a servant was injured by a plank which fell from the upper floor of a building, there being no evidence as to what caused it to fall. McGowan v. Nelson [Mont.] 92 P 40. Where an employe in a fire cracker factory was injured by an explosion while operating a machine, and it appeared that the machine had been running nicely all day as well as for three weeks and had never been out of order, held not to authorize an inference that the explosion occurred because of a defect in the machine, the doctrine "res ipsa loquitur" not being applicable. Thompson v. National Fireworks Co. [Mass.] 81 NE 256. Where brakeman was thrown to the ground while attempting to set a hand brake, which turned suddenly, and cars and equipment were later burned, so that no proof of any defect was available, held mere proof of the accident did not raise a presumption of negligence. Hamilton v. Kansas City So. R. Co., 123 Mo. App. 619, 100 SW 671. Where piston rod of engine broke within the crosshead, causing injury complained of, doctrine of res ipsa loquitur did not apply, since use of ordinary care in inspection would not have disclosed a defect in the piston rod. Cederberg v. Minneapolis, etc., R. Co., 101 Minn. 100, 111 NW 953. Not applicable where a miner was crushed by a descending cage. Southwestern Development Co. v. Boyd [Ind. T.] 104 SW 1174. Where a brakeman was injured while setting a brake by a defective brake chain or bolt. Galveston, etc., R. Co. v. Harris [Tex. Civ. App.] 107 SW 108. Where injuries result from complicated machinery, and is inapplicable where motorman was injured by explosion of controller on a car. Beehe v. St. Louis Transit Co., 206 Mo. 419, 103 SW 1019. Where elevated cog wheels were started when an employe while on a ladder was seized with dizziness and placed his foot on the cogwheels to steady himself. Leffler v. Anheuser Busch Brew. Ass'n [Mo. App.] 106 SW 105. Where a servant was injured by the falling of a fire escape on which he attempted to leave a building being razed, where such fire escape was not the only method furnished for leaving the building. Guiliano v. Seagrist, Jr., Co., 107 NYS 377. Where an injury resulted from the fall of an elevator, which was sufficient to carry the load then upon it, but was caused by the breaking of a large cog wheel which would not result from mere use or wear. National Biscuit Co. v. Wilson [Ind.] 82 NE 916. Employe on ship tried to go through port-hole and shutter fell on him. The shutter might have been fastened, or if not, its fall was to be anticipated. Held its fall was not presumptive evidence of negligence. Rende v. New York & T. S. S. Co., 187 N. Y. 382, 80 NE 206. **The fact that an employe is killed** while in the discharge of his duties does not raise a presumption of negligence on the part of the master. Elkton Consol. Min. & Mill. Co. v. Sullivan [Colo.]

and that the doctrine res ipso loquitur does not apply as between master and servant.[39] Negligence may, as in other cases, be inferred from the fact of injury, taken in connection with other surrounding facts and circumstances[40] from which failure of the master to exercise due care may be fairly inferred, and this rule is sometimes stated as an application of the rule res ipso loquitur.[41] Where an injury may have

92 P 679. No presumption of negligence arises from mere fact that a railroad employe has been killed. Jones v. Atlantic, etc., R. Co., 144 N. C. 79, 56 SE 556. No presumption of negligence raised where servant went down a ladder in a mine shaft to fix a caught bucket and was later found dead at the bottom of the shaft, the ladder being in good condition. Leonard v. Miami Min. Co. [C. C. A.] 148 F 827. Fact of injury by **sudden raising of elevator** held not to raise presumption of negligence. Carnegie Steel Co. v. Byers [C. C. A.] 149 F 667. Negligence of railroad company not inferable from mere fact that **coupling between engine and tender broke,** it must be proved by plaintiff. St. Louis & S. F. R. Co. v. Wells [Ark.] 101 SW 738. Fact that **car started and injured conductor** while he was adjusting trolley held no evidence of negligence, when the cause was left wholly to conjecture. Curtin v. Boston El. R. Co., 194 Mass. 260, 80 NE 522. Where a **car repairer was injured while repairing trucks** which had been jacked up by other employes and rested upon the jacks, there was no presumption of negligence arising from the accident, in the absence of proof of negligence or what caused the car to fall. Moit v. Illinois Cent. R. Co. [C. C. A.] 153 F 354.

39. The doctrine res ipsa loquitur is inapplicable in personal injury actions by a servant against the master. Reasons why rule is applicable in actions by passenger, and not in actions by servant, discussed. Hamilton v. Kansas City So. R. Co., 123 Mo. App. 619, 100 SW 671. In such action there must be affirmative proof of negligence of the master. Id. The doctrine of res ipsa loquitur has no application as between owner of elevator and servant operating it. Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 NE 392.

40. Proof of the occurrence of an accident in some cases furnishes such affirmative proof of negligence. Hamilton v. Kansas City So. R. Co., 123 Mo. App. 619, 100 SW 671. It should be applied only when reason therefor obtains, and in case of injury to a servant it applies only where facts are not susceptible of direct and positive proof by living witnesses. Held not to apply where injury was caused by fall of an elevator and it did not appear that knowledge of the facts was peculiarly within knowledge of the master. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 SW 1057.

41. The maxim res ipsa loquitur applies where the accident could not have happened unless through some negligence of defendant. Maxim applicable where trestle which had been built three years collapsed, injuring plaintiff who was pushing cars thereon. Ristau v. Frank Coe Co., 104 NYS 1059. When injury occurs to employe by reason of crossing of primary and secondary wires on master's premises. Goddard v. Enzler, 123 Ill. App. 108. See 222 Ill. 462, 78 NE 805. The rule res ipsa loquitur applies with equal force and effect as between master and servant where reason for its application exists. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 SW 1057. The doctrine applies if it appears from the facts and circumstances that the accident would not have happened had reasonable care been exercised. Robinson v. Consolidated Gas Co., 106 NYS 1088. The rule res ipsa loquitur is limited to cases where the accident is one which according to common experience does not usually occur except from some fault of the master or imperfection in appliance. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 SW 1057. Under Laws Kan. 1874, p. 143 a railroad company is liable for injury to a servant caused by negligence of a fellow-servant, and at common law for negligence of a vice-principal. The rule res ipsa loquitur applies where an employe is injured in a collision and negligence is presumed. Iarussi v. Missouri Pac. Co., 155 F 654. It is held in Arkansas that when an employe of a railroad company is injured by reason of a defect in the machinery or track of the company, the fact of injury does not raise a presumption of negligence. St. Louis, etc., R. Co. v. Standifer [Ark.] 99 SW 81. But where an employe is killed by a train, while on the track in performance of duties, the fact of such death is prima facie evidence of negligence owing to statutory provisions. Kirby's Dig. § 6607, requires lookout by train employes; § 6773 makes railroads liable for damages caused by running of trains. Id. Where means and instrumentalities employed by the master are peculiarly within his own knowledge and under his control and he can better explain the accident than the servant injured. Klebe v. Parker Distilling Co., 207 Mo. 480, 105 SW 1057. Where an employe is injured and the negligence complained of existed independently of his or a fellow-servant's acts, a presumption arises that the company was negligent. King v. Seaboard Air Line R., 1 Ga. App. 88, 58 SE 252. Buffer iron used to stop buckets which ran along iron rail of trench machine, slipped off the bolt on which it was hung, because the split key which held it slipped out and fell on plaintiff. Fall of buffer was itself held evidence of negligence. Sullivan v. Rowe, 194 Mass. 500, 80 NE 459. Where a **longshoreman was injured by fall of a box** leaned against the side of a gangway of a boat, the fall of the box raised a presumption that it had been insecurely fastened. Williams v. Citizens' Steamboat Co., 106 NYS 975. Where a **brakeman was injured by a derailment** of a car in the middle of a train while slowly passing over a curve which was of reasonably safe construction, it might be presumed that the curve was not the sole cause of the derailment. Henson v. Lehigh Valley R. Co., 106 NYS 602. In Georgia **where an employe is shown to be without fault** on his part, a presumption of negligence on the part of the employer arises. Bussey v. Charleston & W. C. R. Co. [S. C.] 58 SE 1015.

resulted from any one of several causes, the burden is upon plaintiff to show that it in fact resulted from a cause for which the master is responsible,[42] if the real cause of injury is left a matter of conjecture, there can be no recovery.[43]

It is usually held that contributory negligence is an affirmative defense which must be alleged and proved by the defendant,[44] though some courts hold that the plaintiff must prove that the person injured or killed was in the exercise of due care,[45] and did not assume the risk.[46] The presumption arising from the instinct of self-preservation is sufficient in the absence of any other evidence to sustain the burden of proof in the first instance that an employe, killed while in the performance of his duties, was at the time in the exercise of due care,[47] but such presump-

Failure of safety clutch on freight elevator to work in an emergency, resulting in injury, held to raise presumption of negligence, National Biscuit Co. v. Wilson [Ind. App.] 80 NE 33. Where employe was returning from work in the caboose of a freight train and was injured in a rear-end collision, **the fact of the collision** was prima facie proof of negligence. St. Clair v. St. Louis, etc., R. Co., 122 Mo. App. 519, 99 SW 775.

Where tongue of wagon became detached, causing a runaway and death of driver, and it appeared the wagon was under control of defendant and was repaired and kept in its shops and under its direction, the fact of such accident raised a prima facie case of negligence. Gorman v. Hand Brew. Co. [R. I.] 66 A 209. Doctrine held to apply where servant was injured by the collapse of a temporary platform or shed built over machinery to support workman. Ferrick v. Eidlitz, 108 NYS 28.

42. Where an assistant engineer was injured by explosion of a steam oven and there was no evidence of any defect in the oven, and there was more probability that the accident happened because of plaintiff's negligence than from any neglect of the master or manufacturer, he was not entitled to invoke the doctrine of res ipsa loquitur. Cummings v. Masters and Wardens of Masons Grand Lodge [Mass.] 81 NE 189. Where an injury was caused by a derailment and there were two or more possible causes for one or more of which the master was liable, the plaintiff must prove that the injury was the result of one or more of such causes. Henson v. Lehigh Valley R. Co., 106 NYS 602.

43. Where evidence leaves it uncertain as to whether the master or some unknown person was responsible for the negligent act causing the injury, no recovery can be had. Edgar v. Rio Grande Western R. Co. [Utah] 90 P 745.

44. The master has the burden to prove contributory negligence. Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369; Crawford & McCrimmon Co. v. Gose [Ind. App.] 82 NE 984; Edington v. St. Louis, etc., R. Co., 204 Mo. 61, 102 SW 491. Burden of showing contributory negligence is on defendant unless plaintiff's evidence affirmatively shows it. Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 SW 1070. Burden on defendant to show contributory negligence, but all the evidence in the issue must be considered. Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 18 Tex. Ct. Rep. 951, 100 SW 990. Preponderance of all the evidence, regardless of its source, to show contributory negligence requires verdict for defendant. Pittsburgh, etc., R. Co. v. Collins, 168 Ind. 467, 80 NE 415. Master has the burden to prove assumption of risk and contributory negligence. Cumberland Tel. & T. Co. v. Graves' Adm'x, 31 Ky. L. R. 972, 104 SW 356; Stephens v. Elliott [Mont.] 92 P 45; Industrial Lumber Co. v. Bivens [Tex. Civ. App.] 20 Tex. Ct. Rep. 117, 105 SW 831. Where a car repairer working beneath a car was injured by the car being struck by another car having a defective brake, and which was placed on the track by a flying switch, such switches being forbidden by rule unless necessary to obviate great delay, held that if the company relied on violation of the rule, it should prove that the work could have been done without great delay and that five or ten minutes might constitute great delay. Fogarty v. Southern Pac. Co. [Cal.] 91 P 650.

45. Dalton v. Ogden Gas Co., 126 Ill. App. 502. Lineman injured while working on a defective pole has the burden of proving freedom from contributory negligence. La Duke v. Hudson River Tel. Co., 108 NYS 189. Evidence insufficient. Id. Where servant was killed by being run over by a car, the plaintiff had the burden to show that at the time he was in the exercise of due care. Lizotte v. New York Cent., etc., R. Co. [Mass.] 83 NE 362. Evidence insufficient. Id. Where a servant was caught in an unguarded machine, the fact that statute required the machine to be guarded did not relieve him from the burden to show freedom from contributory negligence. Sutton v. Des Moines Bakery Co. [Iowa] 112 NW 836.

46. Dalton v. Ogden Gas Co., 126 Ill. App. 502; George B. Swift Co. v. Gaylord, 229 Ill. 330, 82 NE 299.

47. Presumption is that servant, killed in performance of duties, was exercising due care. Meier v. Way, Johnson, Lee & Co. [Iowa] 111 NW 420. Where servant was killed presumption was that he continued at work from time he was last seen until he was injured. Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. Where servant was killed by a car which was suddenly sent down a track upon him, the presumption was that he was free from fault. Whether presumption was overcome held for jury. Roquemore v. Albany & N. R. Co., 127 Ga. 330, 56 SE 424. Where injury results in death, the law presumes that decedent was in the exercise of due care this presumption arising out of the fact of instinct of self-preservation and avoidance of injury.

tion has no weight where testimony of eye witnesses disclose the circumstances of the accident.[48] By some courts it is held that the burden is on the defendant to prove that the employe knew or ought to have known of the danger, and that assumption of risk is an affirmative defense.[49] By others it is held that the plaintiff must show want of actual or implied knowledge of the defect which caused the injury.[50]

Admissibility in general. See 8 C. L. 937—The evidence introduced must conform to the allegations of the pleadings.[51] Holdings as to the relevancy of evidence on the issues of negligence of the master,[52] contributory negligence of the employe,[53]

Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P 624.

48. Savage v. Rhode Island Co. [R. I.] 67 A 633. Where in action for death of motorman of street car in collision it appeared that he could see the track for a distance of 700 feet ahead at a certain point, and that the collision occurred 150 feet from that point, the presumption of due care on the part of the motorman was overcome. McGahan v. St. Louis Transit Co., 201 Mo. 500, 100 SW 601.

49. The master has the burden to prove assumption of risk. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57; Grimm v. Omaha Elec. L. & P. Co. [Neb.] 114 NW 769; Strong v. Rutland R. Co., 121 App. Div. 391, 106 NYS 85. Assumption of risk not conclusively established where brakeman was injured by giving way of roadbed embankment which he was under no duty to inspect. Strong v. Rutland R. Co., 121 App. Div. 391, 106 NYS 85.

50. A servant has the burden of proving nonassumption of a risk. Bolton v. Ovitt [Vt.] 67 A 881. A conductor who is injured by derailment of a train because of unsound ties has the burden to show that he did not know the danger. Dunbar v. Central Vermont R. Co., 79 Vt. 474, 65 A 528. Where an employe was repairing a reservoir with a walk in it which fell, he must prove that he did not know that the walk was unsafe and that the defect was not apparent. Hatch v. Reynolds' Estate [Vt.] 67 A 816.

51. Where negligence alleged was improperly guarded swinging saw and no defect in the saw was complained of, evidence as to the reputation of the factory which made the saw is not admissible. Roy Lumber Co. v. Donnelly, 31 Ky. L. R. 601, 103 SW 255. Evidence that it was the custom for the tailer of a stave bolting machine to take the place of a feeder temporarily absent held admissible though not pleaded, where it was set up as a defense that the servant was so acting at the time of his injury without authority. Arkadelphia Lumber Co. v. Henderson [Ark.] 105 SW 882. Under allegations of complaint in action for death of employe in ash pit, evidence held admissible as to depth of ashes in pit to show that place of work was dangerous. Naughton v. Laclede Gaslight Co., 123 Mo. App. 192, 100 SW 1104. But proof by expert that it was not proper management to allow ashes to accumulate under boiler was inadmissible. no such ground of negligence being alleged. Id. Where complaint alleged general lack of repair of elevator, want of proper inspection, and also failure to provide safety devices, evidence of lack of repair of saftey devices, and not that none was provided, was admissible. National Biscuit Co. v. Wilson [Ind. App.] 80 NE 33. Where servant was killed by falling of roof of mine and complaint alleged negligence in removing certain pillars, but not that pillars were too far apart, evidence of the latter fact was inadmissible. Big Hill Coal Co. v. Abney's Adm'r, 30 Ky. L. R. 1304, 101 SW 394. Where complaint alleged that steam feed and log carriage were defective because not subject to proper and effective control, any evidence to show such lack of control was held admissible though it was also alleged that exhaust pipe was too small. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809. Where the only negligence charged is that of the conductor of the train in the operation whereof the plaintiff's intestate was injured, it may be competent to show defects in the cars of such train in explanation of the movements of the train and the conduct of the parties, though no recovery could be based upon such defects. Lake Shore, etc., R. v. Botefuhr, 10 Ohio C. C. (N. S.) 281. Where brakeman was injured, proof that brakes on a car failed to work at the time of the injury is not evidence that they were defective. Southern R. Co. v. Carr [C. C. A.] 153 F 106.

52. **Held admissible:** In an action for injuries by slipping on certain oil alleged to have been negligently left on a platform sustaining a machine, the rolls of which were unguarded, in violation of Laws 1897, p. 461, evidence that the rolls of similar machines in defendant's factory and other factories were not guarded held not admissible. Martin v. Walker & Williams Mfg. Co., 106 NYS 708. Proof of fact that machine operates improperly is sufficient, without proof of the particular defect which caused it. National Enameling & Stamping Co. v. Kinder, 126 Ill. App. 642. Where oiler in sawmill was injured because of alleged slipping of plank on a platform constructed for his use, and the master's theory was that he was not in performance of his duties at the time but was handling a loose conveyer belt which became entangled in a shaft, the servant was entitled to show on rebuttal that the edges of the belt were frayed and likely to get caught in the shaft without human aid. Westman v. Wind River Lumber Co. [Or.] 91 P 478. Where an employe of a sausage factory got his arm caught in the machine, the exclusion of evidence that it was customary in other sausage factories to employ only experienced persons, or to warn and instruct inexperienced ones in operation of similar

machines, was within discretion of the court. Boyd v. Taylor [Mass.] 81 NE 277. Where an employe was injured by breaking of a belt, it was held admissible to show that knives of the machine operated by the belt were dull and the gauge inaccurate as affecting the strain on the belt. Northern Pac. R. Co. v. Wendel [C. C. A.] 156 F 336. An injured servant held entitled to testify as to how he would have used certain appliances if he had been supplied with them. Shaw v. Highland Park Mfg. Co. [N. C.] 59 SE 676. Failure to give statutory signals at a crossing may be considered in determining an issue of negligence where a section foreman was killed by his hand car colliding with a freight train. Bussey v. Charleston, etc., R. Co. [S. C.] 58 SE 1015. Where an injury resulted from a lever on a log carriage becoming unfastened, statements by the master's agent while constructing the mill that the fastening was defective are admissible as showing notice of such defect. Trickey v. Clark [Or.] 93 P 457. In action for injuries received by servant in repairing motor, order given him by vice-principal to repair all motors that became in such condition be shown, though given in connection with another motor. Marquette Cement Mfg. Co. v. Williams, 230 Ill, 26, 82 NE 424. Where master's negligence is based on the fact that he required undue haste of a minor employe, evidence as to the character of the appliances as causing delay is admissible. Jefferson Theatre Program Co. v. Crejezyk, 125 Ill. App. 1. Where foreman directed a carpenter to move a derrick, and, in course of work, a servant was killed, in the action for his death, testimony of the foreman as to the carpenter's relation to deceased, giving of orders, etc., was admissible. Farrell v. B. F. Sturtevant Co., 194 Mass. 431, 80 NE 469. On issue whether conductor was guilty of negligence in directing a flying switch to be made, evidence that it was usual and customary to make flying switches upon the track in question was admissible, though a rule prohibited such switches except when necessary to save time. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 18 Tex. Ct. Rep. 582, 100 SW 176. Where employe is injured by fall of roof of mine entry, and must show negligence in manner of use of props, he may show another practicable and safe way of propping the roof. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57. Testimony of engineer who had driven engine that it leaked steam so badly that track was obscured held not objectionable as opinion evidence. Stone v. Union Pac. R. Co. [Utah] 89 P 715. Fact that other wood was available for handle of hand car which broke could be shown as a circumstance tending to show negligence. Southern R. Co. v. McGowan [Ala.] 43 S 378. In action for death caused by cars striking deceased, proof that engine carried no light was admissible to show one of the details, though not alleged as negligence. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 S 1034. Where the fact of employment is denied and it is set up that plaintiff was injured by an apparatus owned and operated by a third person, it was error to refuse evidence that plaintiff was not in defendant's employ and was injured by an apparatus owned and operated by another. Smith v. New Orleans G. N. R. Co., 119 La. 975, 44 S 805. Where parts of roof fell, plaintiff could show poor condition of other parts similarly situated. Lamb v. Philadelphia & R. R. Co., 217 Pa. 564, 66 A 762. Portion of roof of roundhouse fell injuring plaintiff. Held error to refuse to allow him to testify that he had never seen any one inspecting it for two years prior, and that he had seen parts of the roof fall before. Id. In action for injuries caused by employe's hair being caught by set screw on revolving shaft of machine, held proper for jury to consider, with other evidence, the fact that a bar had been removed from the machine, the purpose of it, and of removing it. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 N W 443. Photographs of scene of railway wreck held admissible. Louisville & N. R. Co. v. Brown [Ky.] 106 SW 795. Answer of a railroad company admitting employment of person killed and that it was his duty to ride a velocipede over the track, and alleging that while riding he failed to keep a proper lookout, is competent as an admission that decedent was killed while riding his velocipede. Lynch v. Chicago & A. R. Co. [Mo.] 106 SW 68. On an issue as to negligence in failing to guard cutter heads of a grooving machine, discussions between the master's foreman and a deputy factory inspector as to necessity of such guards are incompetent. Adams v. Peterman Mfg. Co. [Wash.] 92 P 339. Where negligence alleged was the stacking of sacks of flour in a manner in which they were liable to fall, evidence as to a safe method of stacking held admissible. Commerce Mill. & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916. Miner injured by an explosion could state that flame which burned him "seemed to come right up the slope." Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. Testimony that shortly before a servant was injured at an edging machine the foreman was told that someone would be killed at it and that he replied if any one was it would be a negro, etc., held admissible to show notice of defect. Bodcaw Lumber Co. v. Ford [Ark.] 102 SW 896. Statements made by servant at time of injury by a defective appliance held **res gestae.** St. Louis S. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783. Where a laborer was fatally injured while discharging a steam boiler, his declaration while being carried out of the boiler room, "The thing stopped running and I opened it up a little and the whole thing blowed out on me," was res gestae. Zoesch v. Flambeau Paper Co. [Wis.] 114 NW 485.

Held inadmissible: Testimony of an employe on the same work who was not shown to have ever seen the injured servant, that he had never heard warning given to him of danger, was without probative force. Causuelo v. Lenox Const. Co. 107 NYS 431. Where a workman on a scaffold was injured by breaking of the scaffold which was caused by the cornice falling on it, evidence that another wall of the building was improperly constructed. Kupfersmith v. Hopper, 106 NYS 797. Where a street car conductor collided with a pole while standing on the running board of his car, rejection of question whether the pole was nearer the track than the side of the bridge was proper.

Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986. Where a railroad employe attempted to board a train in full view of the engineer who opened the throttle and caused the train to start suddenly and the employe was thrown beneath the wheels, it was immaterial whether the employe was attempting to board the train in accordance with an established custom of employes. Daniel v. Atlantic Coast Line R. Co. [N. C.] 58 SE 601. Where a servant was injured by a lathe trimmer and there is no evidence that saws used in the trimmer were larger than necessary, or less safe than smaller saws, evidence that the master tried smaller saws is immaterial. Barclay v. Puget Sound Lumber Co. [Wash.] 93 P 430. Proof that after an injury to plaintiff caused by turning of a girder, which was being raised by four men with clinch bars, it was afterwards safely raised by three men with a rope and jack, was inadmissible tending to show an admission that first method was unsafe. Bokamp v. Chicago & A. R. Co., 123 Mo. App. 270, 100 SW 689. Where it appeared that a brick was dropped by a negligent fellow-servant working on a scaffold above plaintiff, evidence that the scaffold was improperly constructed. Willis v. Thompson-Starrett Co., 54 Misc. 238, 104 NYS 668. Where injury was caused by revolving shaft, not guarded as required by Rev. St. 1899, § 6433, whether factory inspector had inspected plant was irrelevant. McGinnis v. R. M. Rigby Print. Co., 122 Mo. App. 227, 99 SW 4. Where a street car conductor was killed by coming in contact with an electric light pole near the track, evidence of the speed of the car which was subject to the control of the conductor was not evidence of negligence of the company. Savage v. Rhode Island Co. [R. I.] 67 A 633. Evidence as to appliances in general use in unloading ore from vessels inadmissible without further proof that appliances used were unusual and unsafe. McGeehan v. Hughes, 217 Pa. 121, 66 A 238. Where employe on a ladder was seized with dizziness and placed his foot on cogwheels to steady himself and it was drawn into the cogs, evidence as to a defect in the machine to which the cogs were attached. Leffler v. Anheuser Busch Brew. Ass'n [Mo. App.] 106 SW 105. Where an employe on a ladder was seized with dizziness and to steady himself rested his foot on cog wheels, his testimony that the wheels might have been moving at the time cannot be taken as evidence on which to base an inference of negligence. Id. Where action is based on failure to furnish props, evidence that plaintiff borrowed props from another miner is inadmissible. Pana Coal Co. v. Becker, 130 Ill. App. 40. Where brakeman was thrown from train by sudden jerking thereof, evidence as to a rule requiring whistle to be blown when rounding curves was irrelevant. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399. Where engineer was killed by derailment at a curve, testimony that a witness had heard of wrecks at such curve was hearsay. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910. Where engineer was killed by derailment at a curve, evidence that while trackmen were working sufficiently at the curve to keep it in repair other parts of the track would become defective. Id.

53. Held admissible: Where a workman is killed by striking his head against an electric wire, while doing work required and necessary for the completion of the building on which he is employed, statements made by him to other workmen as to whether there was danger in working in such a place are admissible for the sole purpose of showing the state of mind of the deceased touching the safety of working there, as bearing upon the question of contributory negligence. Raker v. Toledo, etc., R. Co., 10 Ohio C. C. (N. S.) 297. Where in action for injuries received by plaintiff while riding backwards on a handcar, the existence of a rule forbidding riding in that manner was disputed, proof that others had ridden in that manner was admissible. Southern R. Co. v. McGowan [Ala.] 43 S 378. Evidence that it was the custom of a railway conductor to give warning to the trainmen, assisting him in the making up of a train in the yards, is admissible upon the question whether, knowing the custom, the conductor exercised ordinary care, and also upon the question of whether the deceased, being aware of the custom and habit of the conductor, was guilty of contributory negligence. Lake Shore, etc., R. Co. v. Botefuhr, 10 Ohio, C. C. (N. S.) 281. Where a miner was injured by a timber which was being hoisted falling back into the mine because of an alleged defective chute, evidence that it was the general custom for the man giving the signals to stand clear. Leary v. Anaconda Copper Min. Co. [Mont.] 92 P 477. Where engineer was killed by derailment and the company set up excessive speed, the engineer's watch which stopped at time of the accident was admissible to show average speed between the last station and place of derailment, though it did not show the speed at the time. Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707. On issue whether section foreman whose push car was struck by a train was negligent in not sending flagmen out, proof that he had only four men was admissible, as it was necessary to retain enough to load the car. International, etc., R. Co. v. McVey [Tex. Civ. App.] 18 Tex. Ct. Rep. 218, 102 SW 172. Whether the conduct of an employe is negligence under all the circumstances, barring recovery, is distinct from the proximate cause of the injury, and the fact that his hand was caught in a machine not guarded, as required by Burns' Ann. St. 1901, § 7087l, is proper for consideration on the question of contributory negligence. Crawford & McCrimmon Co. v. Gose [Ind. App.] 82 NE 984.

Held inadmissible: On an issue as to the due care of a servant whose duties were to keep clean a system of switches, evidence that he discharged his duties carefully was properly excluded, the issue not being as to his duties and character but whether he exercised due care under the circumstances. Lizotte v. New York Cent., etc., R. Co. [Mass.] 83 NE 362. Proof that plaintiff is a prudent and cautious man is inadmissible to show that he was exercising due care at the time of his injury. St. Louis, etc., R. Co. v. Inman [Ark.] 99 SW 832. Where a boy 9 or 10 years of age was injured, evidence that

and assumption of risk,[54] are given in the notes. Evidence that similar accidents had previously occurred is admissible,[55] if they occurred under the same conditions.[56] Proof of repairs or precautions taken to prevent other accidents, subsequent to the injury, is usually excluded.[57] Proof on conditions surrounding the place of

he had grown a good deal during the 18 months since the accident is inadmissible. Bolton v. Ovitt [Vt.] 67 A 881. Where in an action for death of an engineer killed by derailment the company set up that he was running at excessive speed, it was not admissible to show that he had been previously disciplined for running at high speed. Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707.

54. Knowledge of a defect may be considered either in establishing assumption of risk or contributory negligence. Bush v. West Yellow Pine Co., 2 Ga. App. 295, 58 SE 529. Where employe was killed by engine while at work in cinder pit, it was proper for defendant to show that deceased had been cautioned, that engine gave signals known to deceased, and to show custom and duty of deceased in the premises. Louisville & N. R. Co. v. Anderson [Ala.] 43 S 566. On the question whether or not servant assumed the risk, evidence is admissible to show that he was acting under command of the master, though it was not alleged. Dalton v. Ogden Gas Co., 126 Ill. App. 502. Where brakeman was injured while riding on engine pilot, in performance of his duties, proof of a custom of employes of riding on the pilot was admissible without proof that the company knew of the custom. Atchison, etc., R. Co. v. Sowers [Tex. Civ. App.] 17 Tex. Ct. Rep. 613, 99 SW 190. Where employe was killed by gas while working on oil tank, and there was evidence that he was inexperienced as to the danger from inhaling fumes from the oil, evidence that an inexperienced man would not realize the danger was admissible. Yellow Pine Oil Co. v. Noble [Tex. Civ. App.] 101 SW 276.

Inadmissible: Where a conductor was injured by a derailment caused by unsoundness of ties, evidence that a large percentage of derailments could not be accounted for nor guarded against was not admissible to show that derailments were ordinary risks which were assumed. Dunbar v. Central Vermont R. Co., 79 Vt. 474, 65 A 528. On issue whether a hole in the floor was in the same condition when plaintiff was employed as when (on same day) she stepped into it and was injured, the fact that it had previously been covered was immaterial. McCafferty v. Lewando's French Dyeing & Cleaning Co., 194 Mass. 412, 80 NE 460. Testimony of the wife of an employe who was injured that she did not know he was working at a certain place does not lay foundation for an inference that he had never worked there before and hence did not know of the defect. Hatch v. Reynold's Estate [Vt.] 67 A 816.

55. Where girl's hair was caught while she was at work by a revolving shaft, proof of another similar accident to another employe at the same place was admissible to show that the shaft, unguarded, was dangerous. McGinnis v. R. M. Rigby Print. Co., 122 Mo. App. 227, 99 SW 4. That a witness was injured at the same time as plaintiff may be shown, but not that defendant had settled with witness. Missouri, etc., R. Co. v. Smith [Tex. Civ. App.] 17 Tex. Ct. Rep. 954, 101 SW 453. Where street car conductor was hit by a pole standing in dangerous proximity to the track, evidence of similar accidents was admissible to show that poles were too near the track. Finley v. Louisville R. Co., 31 Ky. L. R. 740, 103 SW 343. In action for injuries caused by cogs, proof that another employe who formerly worked on the machine that he had nearly been similarly injured several times and had reported the fact to the foreman was admissible. Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. In action for injuries to boy operating machine, proof that other boys about the same age had been injured by the same kind of machine was admissible to show the dangerous character of the machine and the master's knowledge thereof. Leathers v. Blackwell-Durham Tobacco Co., 144 N. C. 330, 57 SE 11. Proof of other similar derailments at same switch within two months previous held competent to show notice of defect. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Where an employe was kicked by a horse, and it was alleged that the horse was in the habit of kicking and that this habit was known to the master, evidence of previous acts of viciousness is admissible. Morgan v. Hendricks [Vt.] 67 A 702.

56. Evidence of a prior similar accident inadmissible without a showing that condition of machine which caused injury was same as at time of injury complained of. Laughlin v. Brassil [N. Y.] 79 NE 854.

57. Where a servant was injured by insufficient platform and runway, evidence as to subsequent precautions to prevent similar accidents was not admissible. Burns v. Crow, 107 NYS 944. Where servant was injured by tipping of ladle of molten metal alleged to have been due to a defective bail, evidence that after the accident the bail was repaired could not be considered on the question of negligence at the time. Wren v. Kennedy Valve Mfg. Co., 106 NYS 710. It is not admissible to show that the machine was repaired after the injury. Bodcaw Lumber Co. v. Ford [Ark.] 102 SW 896. Where a servant was injured by falling from an unrailed platform, evidence of changes made in the platform after the injury held inadmissible. Aiken v. Rhodhiss Mfg. Co. [N. C.] 59 SE 696. Where one was injured because of an alleged defective machine, evidence as to its being out of repair and of its repair shortly after the accident held admissible. Brunger v. Pioneer Roll Paper Co. [Cal. App.] 92 P 1043. Held error to admit evidence of precautions to guard a machine after it had caused an injury. Worthy v. Jonesville Oil Mill, 77 S. C. 69, 57 SE 634. Evidence that after the accident the master repaired his machinery or building or adopted a different method of conducting his business is inadmissible to

injury must be confined closely to the time of the accident.[58] Where negligence alleged is failure to guard a machine, evidence that such machines are usually guarded may be admissible.[59] Proof of the usual manner of conducting business is admissible.[60] Want of care in the selection or retention of servants may be shown by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency [61] that the master, in the exercise of due care, must have had them brought to his notice.[62] But

prove his negligence at the time of the accident. Camp Bird v. Larson [C. C. A.] 152 F 160. Where a master is charged with negligence in failing to guard machinery, evidence as to his future intentions relative to such guards is inadmissible. Adams v. Peterman Mfg. Co. [Wash.] 92 P 339. Evidence of repairs to machine after an accident held inadmissible. Laughlin v. Brassil [N. Y.] 79 NE 854.

58. Where miner was injured by fall of rock from roof of mine, evidence as to the condition of the mine, at other times than that at which the accident occurred is not admissible. Arras v. Standard Plaster Co., 105 NYS 440. Evidence of condition of log carriage at time of trial inadmissible, its condition having been changed but evidence of its condition at a time when it was the same as at time of injury admissible. Odegard. v North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809. Where a conductor was injured by derailment of his train caused by unsound ties, the condition of the roadbed 18 months after the accident was not admissible where it was not the same as at the time of the accident. Dunbar v. Central Vermont R. Co., 79 Vt. 474, 65 A 528. Proof that master had used due care for 15 years previously in inspecting belts and belt lacings held not proof that he had used due care at time in question. Gilmore v. American Tube & Stamping Co., 79 Conn. 498, 66 A 4.

Held admissible: Where an injury was caused by alleged defective machinery, the condition of the machinery a reasonable time before and after the injury may be shown, but it is admissible only in so far as it tends to show defective condition at the time. Brunger v. Pioneer Roll Paper Co. [Cal. App.] 92 P 1043. Where a servant was injured because of an alleged defective belt shifter, evidence as to the condition of the appliance after the injury held inadmissible. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79. Where injuries were caused by wobbling buzz saw, evidence of another employe that the saw was out of repair and wobbly three weeks before, when he left, was admissible, when it appeared also that no change in its condition had occurred. Reich v. Ironclad Mfg. Co., 104 NYS 1069. Defective machinery being alleged as cause of injury, proof of its condition before and after the time of injury was admissible to show its condition at the time, and proof of its prior condition was also admissible to show knowledge of the condition by the master. Union Pac. R. Co. v. Edmondson [Neb.] 110 NW 650. Condition of bolt which allowed bucket to fall, immediately after accident, admissible. Sullivan v. Rowe, 194 Mass. 500, 80 NE 459. Proof that at a time other than that of the accident in question steam escaping from the engine alleged to be defective so obscured the track that the engineer had to go out on the pilot to see the track, held not objectionable as proof of an experiment rendering proof of similarity of conditions necessary. Stone v. Union Pac. R. Co. [Utah] 89 P 715. Where engine running backward ran over a servant on a railroad velocipede, it was not reversible error to admit testimony that no one was riding on the rear of the engine when it reached the station beyond the accident. Lynch v. Chicago & A. R. Co. [Mo.] 106 SW 68. Where motorman was injured in a collision, photographs of the scene of the accident, taken the day after, were admissible. Edge v. Southwest Missouri Elec. R. Co., 206 Mo. 471, 104 SW 90. Where street car conductor was killed by colliding with a trolley pole, and evidence of measurements of distance of the pole from the track was taken some time after the accident was introduced, evidence that the pole had been moved before the measurements were taken was also admissible. Kath v. East St. Louis & Suburban R. Co., 232 Ill. 126, 83 NE 533. When action is based on failure to furnish props and timbers demanded by miner, testimony as to what cross bars were in the room immediately after the accident is admissible. Springfield Coal Min. Co. v. Gedutis, 227 Ill. 9, 81 NE 9.

59. Where an injury occurred because of an unboxed gear in a cotton mill, evidence that at one other mill the wheels of such gears were boxed is inadmissible to show that it was usual to box such gears. Sibbert v. Scotland Cotton Mills [N. C.] 59 SE 79.

60. Where the charge is that appliance used was unsafe, it is proper to ask witness whether such appliance was ever used during his experience. Chicago, etc., R. Co. v. Rathneau, 225 Ill. 278, 80 NE 119, afg. 124 Ill. App. 427. As bearing on question of plaintiff's negligence in passing through entry of a mine where charge of dynamite has been set, the customary hours for shooting may be shown. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 NE 857, afg. 128 Ill. App. 249.

61. On an issue as to competency of a fellow-servant, single instances of incompetency are not admissible but his general reputation as being deficient in skill is admissible. Cooney v. Commonwealth Ave. St. R. Co. [Mass.] 81 NE 905. Where notorious incompetence of a foreman was alleged as negligence, it was error to exclude evidence of such notorious incompetence. Bromley v. Hudson Lumber Co. [Mo. App.] 104 SW 1134.

62. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822. Where ground of negligence asserted was retention of incompetent motorman, books of company containing records of conductors and motormen, includ-

such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of.[63] Proof that employer carried indemnity insurance is inadmissible.[64]

Expert and opinion evidence See 8 C. L. 940 is admissible relative to matters requiring special skill and knowledge,[65] but not on ultimate issues where the facts can be made intelligible to the jury.[66]

Questions of law and fact. See 8 C. L. 940—Unless the evidence is conclusive or the facts undisputed and such that only one reasonable conclusion can be drawn therefrom, the issues of negligence of the master,[67] contributory negligence of the serv-

ing the motorman in question, are admissible to show notice to the company. Trend v. Detroit United R. Co., 149 Mich. 338, 14 Det. Leg. N. 429, 112 NW 977. Where negligent act complained of was the employment of an incompetent foreman, evidence that he had performed other duties unskillfully, and the general disposition with which he performed his duties, was admissible. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59.

63. First Nat. Bk. v. Chandler, 144 Ala. 286, 39 S 822. Where plaintiff sued for injuries caused by negligence of engineer in moving an engine, contrary to his promise, while plaintiff was engaged in cleaning it out, evidence that plaintiff was later discharged as incompetent was irrelevant. Chesapeake & O. R. Co. v. Satterfield, 30 Ky. L. R. 1168, 100 SW 844.

64. Steve v. Bonners Ferry Lumber Co. [Idaho] 92 P 363; Virginia-Carolina Chemical Co. v. Knight, 106 Va. 674, 56 SE 725.

65. On the usual method of protecting miners from the dangers of falling rock. Spencer v. Bruner, 126 Mo. App. 94, 103 SW 578. Expert testimony inadmissible that decayed board in a negligently constructed scaffolding could not carry a specified weight. Schillinger Bros. Co. v. Smith, 225 Ill. 74, 80 NE 65. On the question as to how many nails should be put into a cleat to make it safe to stand on. Combs v. Rountree Const. Co., 205 Mo. 367, 104 SW 77. On question whether die was properly set and whether a certain splinter came from it. Hocking v. Windsor Spring Co., 131 Wis. 532, 111 NW 685. Whether latches on switch on track on main slope of mine were safe. Southern Coal & Coke Co. v. Swinney [Ala.] 42 S 808. Where switchman was injured by collision between engine and cars alleged to have been caused by a defective switch, an expert could testify as to effect on train if it ran over a split switch having the point of the rail bent away from its fellow. Place v. Grand Trunk R. Co. [Vt.] 67 A 545. Where it was alleged that log carriage was defective because not readily controllable, evidence by experts showing its working, its make, etc., admissible. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809. Where injuries were caused by unguarded, revolving shaft, testimony of experienced millwright that it was practicable to guard shaft was competent. McGinnis v. R. M. Rigby Printing Co., 122 Mo. App. 227, 99 SW 4. Opinion as to safety and reliability of telltales in use by defendant as compared with those in use by other railroads is incompetent for the reason that the jury were entitled to make their own deductions as to whether it was negligence to maintain the particular type used. Whitehead v. Wisconsin Cent. R. Co. [Minn.] 114 NW 254. Where a switchman was injured by a collision between a switch and road engine, evidence of experiment made with a different headlight than that on the engine at the time of the collision as to how far he could have seen along the track was inconclusive. Brantner v. Chicago, etc., R. Co. [Iowa] 112 NW 790. Question asked mining expert, "what effect would the leaving out of a collar brace have on the strength of timbering a drift," is competent. Rogers v. Rundall [Mo. App.] 106 SW 1096. Witness who had had long experience with various oils held qualified to testify that room where oils were kept was not properly ventilated and to state what precautions should have been taken for employe's safety. Bardsley v. Gill [Pa.] 66 A 1112.

66. Expert testimony is not admissible to show whether a hammer and hatchet are proper tools with which to take off a box cover. Whalen v. Rosnosky [Mass.] 81 NE 282. Where an injury resulted from a lever being defectively fastened, the opinion of expert millmen as to the safety of the fastening was not competent where the construction of the device was fully explained. Frickey v. Clark [Or.] 93 P 457. Where the whole function of a brake equipment is to regulate speed of a car which runs slowly and at a uniform rate down a slight grade for a few hundred feet only, expert testimony as to railway freight train standards is inapplicable and its admission would be erroneous. Speller v. Moerlein Brew. Co., 5 Ohio N. P. (N. S.) 561. Opinion evidence inadmissible on safety of snatch block which caused rope to break and on question where employe engaged in hoisting lumber could have stood with safety to himself. Virginia-Carolina Chem. Co. v. Knight, 106 Va. 674, 56 SE 725.

67. A peremptory charge should not be given for defendant in an action for injuries to a youthful and inexperienced employe where it appears that he had not been warned nor instructed. Owensboro Wagon Co. v. Boling [Ky.] 107 SW 264. On conflicting evidence as to whether the master was negligent, it is error to direct a verdict for the servant. Crothers v. Philadelphia Elec. Co. [Pa.] 67 A 206. The question of negligence of the master is for the jury unless, assuming all evidence for the employe to be true and adding thereto inferences to be drawn, the jury would be warranted in finding for the employe. Chambers v. Woodbury Mfg. Co. [Md.] 68 A 290. Where a verdict for plaintiff would be pure speculation, it cannot be sustained, but where several conclusions would be reason-

able but the most probable cause of injury, as shown by evidence, is the charge of negligence against defendant, a verdict would be sustained and a nonsuit is improper. Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P 624. Where there is room for different conclusions on the question of the master's negligence, the case should be submitted to the jury. Crawford & McCrimmon Co. v. Gose [Ind. App.] 82 NE 984. Conductor killed while adjusting trolley on car. Whether he was negligent and whether car was started by negligence of motorman. Curtin v. Boston El. R. Co., 194 Mass. 260, 80 NE 522. Where servant was killed by explosion of water tank, held the evidence as to the cause of the explosion presented a question for the jury. Castner Electrolytic Alkali Co. v. Davis [C. C. A.] 154 F 938. Where servant was injured while operating a grooving machine and there was evidence that the accident would not have happened if certain efficient and practicable guards had been used, whether such testimony was credible and whether the guards were practicable were for the jury. Adams v. Peterman Mfg. Co. [Wash.] 92 P 339. Where employe was regularly engaged in replacing a belt on a pulley, and was caught on a bolt projecting from the pulley, and there was evidence that pulleys could be made without projecting bolts and were usually so made, a refusal of a nonsuit was proper. Warner v. DeArmond [Or.] 89 P 373. Where there is evidence from which incompetency of plaintiff's fellow-servants may be inferred, and that plaintiff did not have equal opportunity with the master to know of this fact and it is doubtful whether the work was such as to require strength or skill and whether negligence or incompetency caused the injuries, the case should go to the jury. Corcoran v. Merchants' & Miners' Transp. Co., 1 Ga. App. 741, 57 SE 962. Whether boy injured while operating machine was under twelve, the age allowed by statute. Leathers v. Blackwell's Durham Tobacco Co., 144 N. C. 330, 57 SE 11. Where injuries were alleged to have been received by reason of defective machinery and failure to give instructions, whether machine was defective, or was properly guarded, and whether proper instructions were given, were held for jury. Kenyon v. Sanford Mfg. Co., 103 NYS 1053. Case for jury where employe jumped from burning building, defendants having failed to comply with notice to put on a fire escape as required by ordinance, violation of which was prima facie negligence. Sembler v. Cowperthwait, 53 Misc. 28, 103 NYS 979. Whether employer acquiesced in use of freight elevator by employes. Aken v. Barnet & Aufsesser Knitting Co., 118 App. Div. 463, 103 NYS 1078. Whether there was negligence in allowing elevator belt to get out of order. Id. Whether master or superintendent was negligent, where rock fell in tunnel being excavated, should have gone to jury. Bertolami v. United Engineering & Cont. Co., 105 NYS 90. Whether negligence of defendant existed where servant fell from freight car and whether plaintiff was injured as claimed. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 100 SW 1175. In action for injuries to rider on log carriage in sawmill, whether carriage was defective because not readily controllable, whether engineer was incompetent to the knowledge of the master, held for jury. Odegard v. North Wisconsin Lumber Co., 130 Wis. 659, 110 NW 809.

Questions of negligence and contributory negligence held for jury where cook on outfit cars was injured by switch engine running into such cars on a siding. Pugmire v. Oregon Short Line R. Co. [Utah] 92 P 762. Where brakeman, riding on steps of engine, according to custom, was injured by truck, left close to edge of platform by station agent, who had received a slight injury, and had gone to the station, leaving the truck, held, negligence and contributory negligence for jury. Koepsel v. Minneapolis, etc., R. Co., 100 Minn. 202, 110 NW 974. Negligence and contributory negligence for jury where shoveler on track was run into by engine. Brown v. Southern R. Co., 144 N. C. 634, 57 SE 397. Negligence and contributory negligence for jury where laborer wheeling materials in building stepped on loose plank which tipped up, causing him to fall. Thompson-Starrett Co. v. Fitzgerald [C. C. A.] 149 F 721. Where opposite conclusions may be drawn from the evidence as to master's negligence in furnishing tools and appliances, or whether the injury was the result of an obvious danger or want of ordinary care on part of the servant, the question is for the jury. Sparks v. River & Harbor Improvement Co. [N. J. Err. & App.] 67 A 600. The questions of negligence of the master and contributory negligence of the servant are for the jury where opposing inferences may be drawn from the evidence. Place v. Grand Trunk R. Co. [Vt.] 67 A 545. Whether company was negligent, or plaintiff guilty of contributory negligence where injury resulted from hostler moving engine while plaintiff was under it. McCoy v. New York Cent., etc., R. Co., 103 NYS 1083. Bricks in a wall gave way when plaintiff stepped on them in course of laying a wall on the bricks. Held, whether laying of bricks was unusual and negligent, whether place was unsafe, and whether plaintiff was guilty of contributory negligence, were all questions for the jury. Meehan v. Hogan, 54 Misc. 241, 104 NYS 417. Plaintiff's arm broken in attempt to throw a belt by hand. Held, defendant's negligence, plaintiff's contributory negligence, and whether he assumed the risk, were issues for the jury. Hahn v. Plymouth El. Co., 101 Minn. 58, 111 NW 841. Whether defendant or plaintiff was negligent and whether plaintiff assumed the risk held for jury, where plaintiff was injured while cleaning out ashes from under boiler. Naughton v. Laclede Gaslight Co., 123 Mo. App. 192, 100 SW 1104. Questions of negligence, contributory negligence, and assumed risk, held for jury where a servant was injured on account of a defective ladder furnished by the master. Adams v. Gulf, etc., R. Co. [Tex.] 18 Tex. Ct. Rep. 624, 102 SW 906. Questions of negligence of engineer for whose negligence the company was liable, and of the contributory negligence of a fireman who crawled under the engine to clean the ash pan and was injured by a movement of the engine, and the evidence was conflicting as to whether the engineer caused the engine to move. Chicago, etc., R. Co. v. Heil [C. C. A.] 154 F 626. Employe was injured by coming in contact with cogs of machine used to convey hot steel bars, his duty being to push the steel

ant,[68] assumption of risk,[69] and proximate cause,[70] are for the jury. But where evidence is conclusive, such questions become questions of law.[71] Whether the relation of fellow-servant exists is a mixed question of law and fact.[72]

(§ 3H) 5. *Instructions.*[See 8 C. L. 941]—Only a few illustrative holdings are here given, the general rules governing instructions being fully treated elsewhere.[73] Instructions should be confined to the issues raised by the pleadings and evidence.[74]

along with a hook, and his hook having slipped. Negligence of master for jury. Mead v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. Contributory negligence and assumption of risk also for jury. Id.

68. Under the New York employers' liability act, the questions of contributory negligence and assumption of risk must be submitted to the jury. Laws 1902, c. 600. Travis v. Haan, 103 NYS 973. Under Rev. Laws N. C. 1905, § 483, providing that contributory negligence must be pleaded and proved by defendant, the trial judge cannot direct a verdict on that ground but must submit the question to the jury. United States Leather Co. v. Howell [C. C. A.] 151 F 444. Questions of assumed risk and contributory negligence are questions of law only when reasonable minds could not reach different conclusions from the established facts. Clark v. Chicago, etc., R. Co., 231 Ill. 548, 83 NE 286. Under Laws 1902, c. 600, § 3, questions of contributory negligence and assumption of risk were for jury, where employe was injured by elevator, which was out of order. Aken v. Barnet & Aufsesser Knitting Co., 118 App. Div. 463, 103 NYS 1078. Whether brakeman was negligent or assumed the risk in going between cars to use defective couplers, instead of crossing track to other side to use lever. Choctaw, etc., R. Co. v. Thompson [Ark.] 100 SW 83. On conflicting evidence the master is not entitled to direction of a verdict on the ground that the servant stepped into a passageway into which material was being thrown when it was too dark to see him. Schminkey v. Sinclair & Co. [Iowa] 114 NW 612. Man employed as common laborer was put to work on iron work of building, with which he was not acquainted and was not instructed. Held, whether he used due care or assumed the risk was for jury. Reardon v. Byrne [Mass.] 80 NE 827. Where girls' hair was caught on set screw of revolving shaft, whether she was negligent or assumed the risk. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 NW 443. Plank on which plaintiff was standing to adjust belt slipped and plaintiff was caught in belt. Whether he was negligent or assumed the risk. Samuelson v. Hennepin Paper Co. [Minn.] 112 NW 537. Questions of contributory negligence and assumption of risk are for the jury where evidence is not conclusive. Missouri, etc., R. Co. v. Carter [Tex. Civ. App.] 19 Tex. Ct. Rep. 691, 104 SW 910.

69. Plaintiff held not to have assumed risk, or been negligent, as matter of law, in using edger after guard had been shattered. Johnson v. Atwood Lumber Co. [Minn.] 112 NW 262. Whether risk was assumed or whether servant was guilty of contributory negligence. Perrotta v. Richmond Brick Co., 108 NYS 10. Whether servant went into mine under orders from superintendent. Burns v. Old Sterling Iron & Min. Co., 188 N. Y. 175, 80 NE 927. Assumption of risk and contributory negligence for jury where employe was caught on set screw on revolving shaft in factory. Walker v. Simmons Mfg. Co., 131 Wis. 542, 111 NW 694. While pile of logs fell upon plaintiff, it was held for jury to determine whether plaintiff assumed the risk or was negligent, whether employer was negligent, and whether an independent contractor had charge of piling the logs. Caron v. Powers-Simpson Co., 100 Minn. 341, 111 NW 152. Only risks assumed by servant as matter of law, under Laws 1902, c. 600, § 3, are those incidental to work after safe place has been furnished, whether other risks are assumed is a question for the jury. Ortolano v. Degnon Cont. Co., 104 NYS 1064.

70. Whether die produced at trial was the one, a splinter from which caused plaintiff's injury. Hocking v. Windsor Spring Co., 131 Wis. 532, 111 NW 685.

71. It is proper to instruct a verdict for defendant where the evidence conclusively establishes the defense of assumption of risk. Burke v. Union Coal & Coke Co. [C. C. A.] 157 F 178. The case should be withdrawn from the jury only when there is no material conflict in the evidence, and where it is such that only one reasonable conclusion can be drawn therefrom. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 17 Tex. Ct. Rep. 685, 99 SW 200. If a verdict is against the weight of the evidence, it is the duty of the court to set it aside. Finding that employe did not know and assume risk of using drill which was burred so that chips flew off when it was struck, held against the weight of the evidence. Kellogg v. New York Edison Co., 105 NYS 398. Questions of contributory negligence and assumed risk are for the court where the facts and inferences to be drawn therefrom are admitted. Kath v. East St. Louis & S. R. Co., 232 Ill. 126, 83 NE 533.

72. Whether person who directed employes to throw a plank out of a car was the fellow-servant of plaintiff, who was struck by the plank as he was passing in performance of his duties, held a mixed question of law and fact. Smith v. American Car & Foundry Co., 122 Mo. App. 610, 99 SW 790. Liability of master for jury where there was evidence that person who gave order in obeying which servant was injured was placed in control of men and work by master. McCracken v. Lantry-Sharpe Cont. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 959, 101 SW 520.

73. See Instructions, 10 C. L. 296.

74. Where operator of drilling machine was shown to have had several years' experience, it was error to submit the issue of his inexperience to the jury, in an action by him for injuries. Chicago, etc., R. Co. v. Denton [Tex. Civ. App.] 18 Tex. Ct. Rep.

All acts of negligence relied on and having support in the evidence,[75] and all de-

277, 101 SW 452. Where there was evidence that some skill was required in carrying a rail across a ditch, an instruction that no skill was involved other than that supposed to be possessed by any ordinary laborer was properly refused. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413. Error to submit an issue as to which there is no evidence. Jordan v. St. Louis Transit Co., 202 Mo. 418, 101 SW 11. Where failure of master to employ a helper was not the cause of the injury, it was held proper to refuse an instruction predicated upon such failure. Commerce Milling & Grain Co. v. Gowan [Tex. Civ. App.] 19 Tex. Ct. Rep. 687, 104 SW 916. Where an injury occurred in turning and not in operating a derrick, an instruction based on the theory of operating the derrick properly refused. Garaci v. Hill & O'Meara Const. Co., 124 Mo. App. 709, 102 SW 594. Where a trainman was killed while coupling cars, it was proper to refuse an instruction relative to the custom of coupling cars under such circumstances, which did not hypothesize decedent's knowledge of such custom. Nevers Lumber Co. v. Fields [Ala.] 44 S 81. Where there was no evidence that an injury was due to failure to adjust machinery, an instruction on such theory was properly refused. Brunger v. Pioneer Roll Paper Co. [Cal. App.] 92 P 1043. It is error to refuse a charge withdrawing an issue of negligence as to which there is no evidence. Tergeson v. Robinson Mfg. Co. [Wash.] 93 P 428. Such error held not cured by other instructions. Id. In action for death of a switchman, instruction that plaintiff could not recover if in response to decedent's signal the engineer stopped his engine in the manner approved as proper by a person skilled in the business, properly refused as presenting an abstract question as to what persons skilled in the business generally do, instead of the question as to the duty of a person under the special circumstances. Houston & T. C. R. Co. v. Oram [Tex. Civ. App.] 107 SW 74. In an action for compensation under a contract providing for 5 per cent. commission on sales, $75 per month to be drawn against commissioners, an instruction allowing $75 per month in addition to commission was erroneous. Peyser v. Western Dry Goods Co. [Wash.] 92 P 886. Not cured by another instruction. Id. Where miner was injured by fall on materials from roof of entry, instruction held inapplicable to the evidence. Garard v. Manufacturer's Coal & Coke Co., 207 Mo. 242, 105 SW 767. Where in an action on a contract for services the testimony of the parties coincided as to the terms of the contract, it was error to charge that the jury must find that the contract constituting the contract was had, but also that by it both parties intended to enter into a contract. Embry v. Hargardine, McKittrick Dry Goods Co. [Mo. App.] 105 SW 777. Where a servant was injured by falling of a piece of tile, instructions held erroneous as not within the issues. Finnegan v. Robinson Co., 108 NYS 135.

Held proper: In action for injuries to street railway employe due to absence of a step from the work car, instructions held to properly submit the issues. Flynn v. Connecticut Valley St. R. Co. [Mass.] 82 NE 1085. Instruction on duty of inspecting cars held to properly submit issues. Missouri, etc., R. Co. v. Harris [Tex. Civ. App.] 18 Tex. Ct. Rep. 190, 101 SW 506. Instruction warranting recovery if car and bearings were found to be defective held to conform to negligence charged in the petition. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. Where miner was injured by timber falling back into mine chute as it was being hoisted, instruction **held erroneous as imposing too great a burden on the master.** Leary v. Anaconda Copper Min. Co. [Mont.] 92 P 477. Instruction that if servants were co-operating in the business on hand they were fellow-servants, held properly refused as not based on the evidence. Marquette Cement Mfg. Co. v. Williams, 230 Ill. 26, 82 NE 424. Where evidence shows that servants were occasionally in the relation of fellow-servants, but not in the transaction in issue, instruction is properly refused as misleading, though properly stating the rule of law as to fellow-servants. Id. Instruction as to ordinary risks held properly refused where it appeared that injury resulted from failure of master to notify servant that electric current had been turned on. Chicago Suburban Water & Light Co. v. Hyslop, 227 Ill. 308, 81 NE 379, afg. 129 Ill. App. 575. Instruction telling jury to consider whether work required of minor "might be dangerous" held misleading as Child Labor Act forbids employment of minors at work that is dangerous. Swift & Co. v. Rennard, 128 Ill. App. 181. Where issues do not embrace fellow-servant doctrine, instructions with reference thereto are properly refused. Postal Tel. Cable v. Likes, 225 Ill. 249, 80 NE 136.

75. Brakeman killed during attempt to "kick" cars on a sidetrack. Evidence held to require instruction that if foreman gave a signal to stop under certain circumstances it would be negligence for which plaintiff could recover. Smith v. International, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 583, 99 SW 564. An instruction that before a servant could recover he most prove that the defective appliance was the direct cause of the injury was error, such defect being a contributing cause. Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99. Where a car repairer was injured, instructions making the master liable for negligence of a switchman in failing to discover a defect in the car held erroneous, the switchman not being a vice-principal for such purpose. Fogarty v. Southern Pac. Co. [Cal.] 91 P 650. Instruction that knowledge of one or two negligent acts of a foreman was not knowledge of his incompetency properly refused, since it included only negligent acts, excluding acts due to incompetency. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59. Where the question whether the person whose negligence caused an injury to a servant was a servant of the master or of an independent contractor was for the jury, it was error to instruct on the master's liability for an injury resulting from his neg-

fenses sustained by proof,[76] should be submitted. Thus, the defendant is entitled to proper instructions on contributory negligence[77] and assumed risk.[78] They should

ligence concurring with the negligence of a servant of an independent contractor to be applied, either if it was found that such person was a fellow-servant of the person injured or the servant of an independent contractor. Atchison, etc., R. Co. v. Dickens [Ind. T.] 103 SW 750.

Instructions held proper: Where switchman was injured while uncoupling cars, instruction held to properly submit the question of negligence of his foreman. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. An instruction to find for the master if he "used ordinary care" in selecting appliances is equivalent to a charge to find for him "unless he failed to use ordinary care." Suderman v. Woodruff [Tex. Civ. App.] 19 Tex. Ct. Rep. 778, 105 SW 217. In an action for injuries to a miner, instruction held not erroneous as imposing on a master an absolute duty instead, requiring only reasonable care to keep an entry safe. Garard v. Manufacturer's Coal & Coke Co., 207 Mo. 242, 105 SW 767. A charge to find for the servant if the master failed to securely fasten a chisel because of the insecurity of which the injury occurred, providing such failure was negilgence, should have required a finding of failure to exercise ordinary care in fastening the chisel. Wilter Mfg. Co. v. Kent [Tex. Civ. App.] 19 Tex. Ct. Rep. 955, 105 SW 525. Where engineer was killed by derailment, instruction held not to require the company to furnish rails in a reasonably safe condition, where it was bound only to exercise reasonable care to that end. Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707. Charge that if plaintiff was not guilty of contributory negligence and did not assume the risk the verdict must be for him held not objectionable. Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 18 Tex. Ct. Rep. 951, 100 SW 990. Where mine shoveler was injured by falling rocks, instruction on negligence of fellow-servant was held authorized by evidence that it was duty of miners to go into such places and pick down loose rocks and see that they are safe. Nelson v. Boston & M. Consol. Copper & Silver Min. Co., 35 Mont. 223, 88 P 785.

76. Testimony of mine shoveler that he went into a place where blasts had been shot off without inquiring whether customary inspection had been made held to warrant instruction on contributory negligence, though not pleaded. Nelson v. Boston & M. Consol. Copper & Silver Min. Co., 35 Mont. 223, 88 P 785. Instruction as to knowledge of defects and assumption of risk approved. Hersberger v. Pacific Lumber Co. [Cal. App.] 88 P 587. In an action for injuries to a switchman while uncoupling cars equipped with an automatic coupler, the question of negligence in failing to comply with safety appliance act, 27 Stat. 531, was for the jury, and an instruction was held erroneous as withdrawing it from them. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Held error to refuse instructions on the doctrine of fellow-servants where that question presents an important issue. Pioneer Fire-Proofing Co. v. Clifford, 125 Ill. App. 352. Instruction as to liability of master for acts of vice-principal held not misleading as indicating liability of master for acts other than those done in the capacity of vice-principal. Chicago, etc., R. Co. v. Ratheau, 225 Ill. 278, 80 NE 119.

77. Instruction of contributory negligence approved. Hersberger v. Pacific Lumber Co. [Cal. App.] 88 P 587. Specific acts of contributory negligence relied upon should be submitted upon request, though contributory negligence was submitted in general terms. Western Coal & Min. Co. v. Burns [Ark.] 104 SW 535. Where there was some testimony that plaintiff purposely put his foot under car wheels, a requested instruction that if he did so he could not recover should have been given. Missouri, etc., R. Co. v. Mason [Tex. Civ. App.] 17 Tex. Ct. Rep. 417, 99 SW 186. Instruction on contributory negligence and assumption of risk held not erroneous. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413. Where a railroad employe was injured because of negligence of an engineer after his own contributory negligence, it was proper to charge that unless the engineer knew of his danger and failed to exercise ordinary care he could not recover. Louisville & N. R. Co. v. Young [Ala.] 45 S 238. Instruction **held erroneous** as requiring that the servant's act must have been the sole as distinguished from a contributing cause to his injury in order to prevent recovery. Heightman v. Sammons [Mo. App.] 107 SW 31. Instruction held not misleading as telling jury that servant may recover though injury was caused by his own negligence. Superior Coal & Min. Co. v. Kaiser, 229 Ill. 29, 82 NE 239.

78. Held proper: Instruction as to assumption of risk by a youthful servant after promise to repair a defective appliance held not misleading. Western Coal & Mining Co. v. Burns [Ark.] 104 SW 535. Instruction that employe did not assume risk unless he knew or ought to have known the danger held not erroneous as making the employe the standard, instead of a person of ordinary intelligence, where evidence did not show that he was not of ordinary intelligence. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413. Instructions held to sufficiently present the questions of assumption of risk. Clark v. Johnson County Tel. Co. [Iowa] 114 NW 554. Where instructions fully covering the questions of contributory negligence, instructions, warning, etc., were given, held not error to fail to charge relative to servant's duty to inquire if he did not understand the orders. Gelo v. Pfister & Vogel Leather Co. [Wis.] 113 NW 69. Instruction on assumed risk held not to eliminate the requirement that the employe must prove that he did not assume it. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Instruction that servant does not assume danger which may be brought about by negligence of the master, if "in the discharge of his duty" he must have known of the danger instead of "in the exercise of ordinary care" he must have known of it. Galveston, etc., R. Co. v.

clearly and specifically present the issues raised,[79] and should not be argumenta-

Harris [Tex. Civ. App.] 107 SW 108. A charge submitting assumed risk using "ordinarily prudent person" is sufficient under a statute providing that the defense is not available where a person "of ordinary care" would have continued the service with knowledge of the defect. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. An instruction submitting the issue of assumed risk in language synonymous with a statute on the subject is sufficient. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. Instruction is not erroneous for not embracing doctrine of assumed risk where that doctrine is fully covered by instructions given. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 NE 136.

79. Approved: In an action under Laws 1893, p. 294, making railroad companies liable for injuries caused by unsafe appliances, etc., instructions held to conform to the statute. Louisville, etc., R. Co. v. Melton [Ky.] 105 SW 366. Instructions as to burden of proof held to properly submit the issues. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Where a conductor was killed by derailment of train, an instruction directing verdict but failing to hypothesize his notice of the defective track was not error where the evidence showed that he did not have such notice nor equal means with the company of ascertaining it. Pittman v. Chicago, etc., R. Co., 231 Ill. 581, 83 NE 431. Instruction that action was based on Burns' Ann. St. 1901, § 7083, and which recites the substance of the statute, is not erroneous when applicable. Pittsburgh, etc., R. Co. v. Ross [Ind.] 80 NE 845. Where rules of a railroad company in evidence go no further than to impose upon employes such duties and obligations as are imposed upon them by law, and such rules of law in so far as they bear upon the issues are correctly set forth in the charge of the court, the failure of the court to mention such rules of the company specifically, or to state that such rules also impose the duties and obligations arising under the law, is not prejudicial error. Lake Shore & M. S. R. Co. v. Botefuhr, 10 Ohio C. C. (N. S.) 281.

Held not misleading: Instructions as to what incompetency of a foreman may consist of held correct and not misleading. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59. Where conductor was killed by derailment caused by a defective track, an instruction stating that the track was out of repair long enough for the company or its agents to have known of the fact was not defective because it did not appear what agent was required to keep the track in repair. Pittman v. Chicago, etc., R. Co., 231 Ill. 581, 83 NE 431. Instructions as to assumed risks and burden of proof construed as a whole held not misleading. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Where conductor was injured because of alleged incompetency of motorman, instructions held not misleading as informing the jury that the conductor was to be considered as a passenger requiring the company to exercise the highest degree of diligence. Coony v. Commonwealth Ave. St. R. Co. [Mass.] 81 NE 905. A charge that the law requires of an employe the exercise of ordinary diligence to prevent injury to himself is not ground for new trial where it is further charged that he could not recover unless he was free from fault. Macon, etc., R. Co. v. Joyner, 129 Ga. 683, 59 SE 902. Instructions held not misleading in action for injuries sustained because of defective cotton gin. Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470. Where plaintiff, brakeman, claimed he was injured by hand hold giving way, and his getting his foot under the car, and defendant claimed that brakeman purposely loosened the hand hold or put his foot under the wheels, held instruction that plaintiff could not recover if he purposely loosened the grab iron and put his foot under the wheels was not erroneous as requiring both acts by plaintiff to be found. Missouri, etc., R. Co. v. Mason [Tex. Civ. App.] 17 Tex. Ct. Rep. 417, 99 SW 186. Instruction on contributory negligence held not misleading as excluding failure to perform an obligation incumbent on the servant. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773.

Held misleading: Instruction that if a servant could have stepped into a position of safety but needlessly remained in a position of greater hazard, and such conduct contributed to the injury and caused it, he could not recover, was erroneous as misleading the jury to believe that his rights would not be barred unless his negligence was the sole cause of the injury. Leary v. Anaconda Copper Min. Co. [Mont.] 92 P 477. Where a minor servant was injured, an instruction that plaintiff could not recover if he disobeyed instructions was erroneous for failure to require the jury, in determining what constituted reasonable instructions, to consider all circumstances in the case, particularly the servant's youth and inexperience. Gage v. Springston Lumber Co. [Wash.] 91 P 558. Instruction held erroneous as stating a fact and not fully stating the law. Hersberger v. Pacific Lumber Co. [Cal. App.] 88 P 587. Instructions held erroneous as confusing assumption of risks incident to the employment and specific assumption by continuing in the employment with notice and failure of the master to repair. Clark v. Johnson County Tel. Co. [Iowa] 114 NW 554. An instruction which leaves the impression upon the jury that the defense of contributory negligence must fail unless established by defendant's own testimony, is erroneous. Missouri Pac. R. Co. v. Bentley [Kan.] 93 P 150. An instruction confusing assumed risk and contributory negligence is harmless where the facts preclude recovery on either ground. Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470. Instruction held erroneous as leading the jury to believe that a risk not assumed was assumed. Brents v. Louisville, etc., R. Co., 31 Ky. L. R. 1216, 104 SW 961. Where an employe was kicked by a horse, a requested charge relative to his knowledge of the vicious character of the horse held too broad. Morgan v. Hindricks [Vt.] 67 A 702. Use of term "all reasonable precautions" in connection with term "ordi-

tive[80] nor inconsistent.[81] They should not assume the existence of controverted facts,[82] nor intimate an opinion of the court.[83] Material facts or issues should not be ignored,[84] nor should undue prominence be given to particular facts.[85] Technical terms should be defined.[86] Verbal inaccuracies are generally held harmless.[87]

nary care" held not to render instruction misleading. Deering v. Barzak, 227 Ill. 71, 81 NE 1.

80. Instruction in an action by a miner for injuries caused by an explosion of gas in the mine held not argumentative. Western Coal & Min. Co. v. Buchanan [Ark.] 102 SW 694.

81. In an action for injuries to a miner caused by fall of materials from roof of an entry, instructions held not conflicting. Garard v. Manufacturers' Coal & Coke Co., 207 Mo. 242, 105 SW 767. In action for injuries to brakeman thrown from engine because of a defect in the track, instructions held not inconsistent. Missouri, etc., R. Co. v. Wise [Tex. Civ. App.] 106 SW 465.

82. Held not to assume that a servant was not negligent. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. Not erroneous as permitting an inference that a risk was not assumed in the absence of evidence that it was not. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Instruction in an action for injuries to a switchman while uncoupling cars. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Instruction held not objectionable as assuming facts in dispute. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 100 SW 1175.

Erroneous as assuming a controverted fact. Horton v. Seaboard Air Line R. Co. [N. C.] 58 SE 993. Where employe was injured by breaking of a ladder which he was descending. Adams v. Gulf, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 507, 105 SW 526. Erroneous as assuming negligence in failing to inspect track. Thompson v. Galveston, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 756, 106 SW 910.

83. Instruction in action for injuries to switchman because of alleged negligence in leaving refuse, cinders, etc., on the track, properly refused as intimating an opinion of the court. Houston, etc., R. Co. v. Grych [Tex. Civ. App.] 18 Tex. Ct. Rep. 856, 103 SW 703. Where evidence as to whether act of a switchman in going between cars was the proximate cause of his injury was conflicting, it was error to instruct that it was. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Instruction held not erroneous as declaring that a master was negligent in maintaining a circle saw in a defective condition. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637.

84. Held to violate the rule: Instruction on contributory negligence properly refused which failed to require negligence to be proximate cause of injury. Hersberger v. Pacific Lumber Co. [Cal. App.] 88 P 587. Instruction which fails to state law with reference to servant's knowledge of dangers is erroneous where that is a material issue. Swift & Co. v. O'Brien, 127 Ill. App. 26. Instruction held erroneous as ignoring the issues of assumed risk and contributory negligence. Chicago, etc., R. Co. v. Walker, 127 Ill. App. 212. Harte v. Fraser, 130 Ill. App. 494. Instruction upon subject of fellow-servants presenting only partial view of the facts upon which the question is to be determined is properly refused. Roebling Const. Co. v. Thompson, 129 Ill. App. 20. Instruction on discovery of defects by master erroneous because omitting reference to duty to originally furnish reasonably safe appliances. Birmingham Rolling Mill. Co. v. Myers [Ala.] 43 S 492. Erroneous as eliminating question of master's negligence. Swiercz v. Illinois Steel Co., 231 Ill. 456, 83 NE 168. Instruction on contributory negligence in a servant remaining at work after discovery of danger held erroneous as leaving out of consideration the question as to whether or not he might have considered that he could proceed safely. Rogers v. Rundell [Mo. App.] 106 SW 1096. Properly refused as ignoring evidence that an appliance was defective. Zeis v. St. Louis Brew. Ass'n, 205 Mo. 638, 104 SW 99. Where one employed to deliver cases of beer was injured by breaking of a case which allowed bottles to drop and break and glass to fly in his eye, an instruction ignoring the duty to furnish a safe box was erroneous. Id. Held erroneous as ignoring the fact that a servant injured by a defective appliance must have known of the defect. St. Louis S. W. R. Co. v. Schuler [Tex. Civ. App.] 19 Tex. Ct. Rep. 478, 102 SW 783. Where a circular saw which caused an injury was defective, it was held error to modify an instruction in such manner as to nullify the theory that the employer furnished a reasonably safe appliance. Harrod v. Hammond Packing Co., 125 Mo. App. 357, 102 SW 637. Instruction on contributory negligence held erroneous because failing to hypothesize causal connection between negligence and injury. Birmingham Rolling Mill Co. v. Myers [Ala.] 43 S 492. Where a servant was injured by the starting of a fly wheel while he was standing near the wheel pit in accordance with his duty, and he did not know the wheel was about to be started and could not be seen by the engineer, it was error to instruct that it was the master's duty to furnish a safe place in which to work and to warn him, but ignoring the question whether he was known to be in a place of danger. Fisher v. Crosby Mfg. Co. [Conn.] 67 A 943.

Instructions not objectionable as ignoring issues of negligence of plaintiff and his fellow-servants. Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413. Instruction held not improper as ignoring the question of assumption of risk. Chicago & N. R. Co. v. Marinan, 124 Ill. App. 272.

85. Instruction in action for injuries to a youthful employe that ordinary care as applied to such employe means such as might be reasonably looked for in a youth of his age, experience, and intelligence, "but no more," properly stated the rule and quoted words did not unduly emphasize the fact of infancy. Chess & Wymond Co. v. Gohagan's Guardian [Ky.] 105 SW 890.

86. Where switchman was injured by collision caused by alleged defective switch,

(§ 3H) 6. *Verdicts and findings.*[See 8 C. L. 944]—A verdict must respond to the pleadings.[88] Where a master and a servant are jointly sued, a verdict for the servant will not release the master where a violation of a statutory duty is charged.[89] Findings must be consistent with themselves [90] and with the general verdict.[91]

§ 4. *Liability for injuries to third persons. A. In general.*[See 8 C. L. 944]—The master is liable for the acts of his servant within the general scope of his employment while engaged in the business of the master,[92] though the servant exceeds his

held error to refuse to define proximate cause where the collision might have been caused by one of several incidents. Place v. Grand Trunk R. Co. [Vt.] 67 A 545. Where a minor servant was injured, instruction that if both master and servant were negligent, and that if the servant's negligence contributed proximately to the injury he could not recover, was erroneous for failure to define the standard of care which would constitute negligence on the part of the plaintiff. Gage v. Springston Lumber Co. [Wash.] 91 P 558. Instruction that in determining whether a servant had exempted his master from liability, because of contributory negligence or assumption of risk, the circumstances and exigencies of the position should be considered, was bad for failure to explain difference between contributory negligence and assumed risk. Southern R. Co. v. Carr [C. C. A.] 153 F 106.

87. Instruction that employe will be held to have known whatever a person of ordinary prudence "could" have learned held not erroneous because of use of word "could." Nelson v. Boston & M. Consol. Copper & Silver Min. Co., 35 Mont. 223, 88 P 785.

88. A verdict for an employe injured is not sustainable on a theory not alleged. Grace v. Globe Stove & Range Co. [Ind. App.] 82 NE 99.

89. Where a mill company and its superintendent were sued for an injury caused by an unguarded saw, a verdict for the superintendent did not release the company, its duty to guard the saw being statutory. Johnson v. Far West Lumber Co. [Wash.] 92 P 214.

90. A finding that a machine is not dangerous is inconsistent with a finding that it is dangerous for a boy fourteen years old to work within the absence of evidence that he was not sui juris. Fortune v. Hall, 106 NYS 787. In action for injuries to switchman, answers to special interrogatories held not conflicting. New York, etc., R. Co. v. Hamlin [Ind.] 83 NE 343. Statements in special finding that a car was forced up grade and ran back down grade are mere recitals as to the grade of the track and not a direct finding that an employe knew that the track was not level. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

91. Facts shown by special findings held insufficient to overcome general verdict with its attendant presumptions. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

92. Corporation hired horse and buggy for use of superintendent. Livery stable keeper told superintendent that horse would run away if not hitched. Horse ran away between 12 and 1 o'clock while being fed by superintendent, who had failed to hitch the horse. Noon hour was at superintendent's own disposal. Held corporation was liable for superintendent's negligence, since it occurred in the course of performing his duties. Riordan v. Gas Consumers' Ass'n [Cal. App.] 88 P 809. One who sends his servants to cut trees above a certain size on another's land is nevertheless liable if they cut trees of a smaller size, where it does not appear that the cutting of the smaller one was necessary in cutting the large one. Avery v. White, 79 Conn. 705, 66 A 517. The master is liable for an injury caused by the negligence of his servant within the scope and course of his employment, although he neither directs nor is aware of it. Standard Oil Co. v. Parkinson [C. C. A.] 152 F 681. Where a street car conductor while collecting fares had an altercation with a passenger relative to change, and during such altercation drew a gun and shot and the shot killed a person in the street, the company is liable. Savannah Elec. Co. v. Wheeler, 128 Ga. 550, 58 SE 38. The driver of a beer wagon held acting within the scope of his employment in opening a cellar door to throw some kegs down and then following them, leaving the door open in such manner that a traveler fell into it. Central Consumers Co. v. Booher [Ky.] 107 SW 198. Inspector for street railway company was charged with duty of seeing and conversing with persons injured, and investigating cause of accident and extent of injury. Held, company was liable for an indignity to an injured woman passenger by seizing hold of her person rudely. South Covington, etc., R. Co. v. Cleveland, 30 Ky. L. R. 1072, 100 SW 283. Owner of passenger elevator cannot escape liability for negligent killing of a child who was permitted to ride on top of the elevator on the ground that the operator was not authorized to grant such permission. Davis' Adm'r v. Ohio Valley Banking & Trust Co. [Ky.] 106 SW 843. Master is liable for injuries resulting from negligent driving of his servant, irrespective of the question of his competency. Ewing & Sons v. Callahan [Ky.] 105 SW 387. The fact that an elevator operator is a boy does not relieve his master from liability for injuries resulting from his negligence, the master being held to the same degree of accountability as if he had been a careful and experienced man. Davis' Adm'r v. Ohio Valley Banking & Trust Co. [Ky.] 106 SW 843. Evidence that a teamster was eighteen years of age, had been in employ of defendant but a few months, was without prior experience in street driving and usually drove recklessly, held sufficient to show that he was not competent and his master should have known of such fact. Ewing & Sons v. Callahan [Ky.] 105 SW 387. The master is liable where one is injured by negligence of the servant in driving a horse and wagon, if at the time the servant was acting within

actual authority or violates express orders or instructions, or is guilty of a willful

the scope of his employment. Mattingly v. Montgomery [Md.] 68 A 205. A master is liable for injuries caused by his servant's carelessness while acting within the scope of his employment. Feneff v. Boston, etc., R. Co. [Mass.] 82 NE 705. Employe in charge of horse left it standing unattended and went into a pool room for purposes of his own and the horse ran away, causing damage complained of. Held, employer liable, failure of employe to perform his duty being the cause. Hayes v. Wilkins, 194 Mass. 223, 80 NE 449. Assault by bartender, resulting in death of person assaulted, held to have been made in the course of his employment and in performance of his duty to preserve order in the saloon; hence employer held liable. Merrill v. Coates, 101 Minn. 43, 111 NW 836. Where a licensee was injured by the negligence of a servant, the master was held liable. Kelly v. Tyra [Minn.] 114 NW 750. Person employed to drive automobile is presumptively acting for his employer and in the scope of his employment while so engaged, and proof that the machine was not on the direct route between his employer's house and the place where he was directed to go is not enough to overcome the presumption. Long v. Nute, 123 Mo. App. 204, 100 SW 511. The servants of the owner of a building under construction in hauling material into such building must exercise ordinary care to prevent injury to servants of the contractor. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 SW 675. Railway company liable for injuries to third person by discharge of pistol with which conductor struck a passenger whom he was ejecting, if his act toward passenger was not warranted. Coleman v. Yazoo, etc., R. Co. [Miss.] 43 S 473. A master is ordinarily liable for tortious act of servant, done in the course of his employment, in his master's service. Whether the act is so done depends upon particular circumstances. Doran v. Thomsen [N. J. Law] 66 A 897. The shipper of a turntable agreed to load the same onto defendant's car. While plaintiff, a servant of the shipper, was securing it in position on the car a servant of defendant negligently permitted an appliance on the derrick to become unhooked, and plaintiff was injured. Held the railroad company was liable. Urbanneck v. Pennsylvania R. Co. [N. J. Law] 65 A 897. Facts held to show that the employes of a corporation when committing the assault complained of were acting within the scope of their employment. Moore v. Camden, etc., R. Co. [N. J. Err. & App.] 65 A 1021. Act of credit clerk in instituting criminal prosecution against one who had removed furniture from the state held binding on defendant when authorized by manager, and when defendant's general counsel conducted criminal proceedings. Staton v. Mason, 104 NYS 155. Driver of defendants' team allowed boy to drive, contrary to his instructions, and a collision resulted in which plaintiff was injured. Held, defendants liable, the boy and driver being at the time engaged in their business. Bamberg v. International R. Co., 53 Misc. 403, 103 NYS 297. Evidence sufficient to show that an automobile belonging to a third person was injured because of the negligence of a servant while he was using the machine in his employer's business and acting within the scope of his employment. Hughes Sons Co. v. Bergen & Westside Automobile Co. [N. J. Law] 67 A 1018. Druggist liable for act of clerk in selling a solution containing 86 per cent. carbolic acid as a wash for a wound. Horst v. Walter, 53 Misc. 591, 103 NYS 750. The test of the master's liability is whether the negligent act of the servant was done in the prosecution of the work that the servant was employed to do. Hogle v. Franklin Mfg. Co., 105 NYS 1094. Evidence sufficient to support a finding that a third person was struck by a piece of iron thrown from defendant's factory by a servant acting within the scope of his employment. Hogle v. Franklin Mfg. Co., 105 NYS 1094. Painters were allowed to use elevator to stand on while painting upper part of shaft. They then went to bottom to paint and elevator boy lowered the elevator and killed one of them. Held, owner of building liable. Perry v. Payne, 217 Pa. 252, 66 A 553. A master is liable for the acts of his servant within the scope of his employment. Rochester v. Bull [S. C.] 58 SE 766. Where a superintendent of a cotton mill was intrusted with control of its policies and methods in preventing interference with its operatives, the company was liable to one who went upon the premises to entice away operatives and was tied and thrown into a pond under direction of the superintendent. Fields v. Lancaster Cotton Mills, 77 S. C. 546, 58 SE 608. Negligence of a switchman, who discovers a person too near the track, in failing to exercise due care to prevent injury to him is negligence of the company. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. An electric company is liable for negligence of its servants in leaving high voltage wires uninsulated. San Antonio Gas & Elec. Co. v. Badders [Tex. Civ. App.] 19 Tex. Ct. Rep. 507, 103 SW 229. Railway company held liable for act of watchman, whose duty it was to care for passenger cars of the company, in arresting a person on a charge of throwing sticks at a train, he being authorized to investigate the matter of throwing sticks at cars. Johnston v. Chicago, etc., R. Co., 130 Wis. 492, 110 NW 424. Evidence sufficient to show that a child 8 years of age was kicked from a street car by defendant's servant acting within the scope of his employment. Schultz v. La Crosse City R. Co. [Wis.] 113 NW 658. Evidence sufficient to show that the kick was the proximate cause of the injury. Id. Assault by servant while in the act of carrying out master's orders is made within the scope of his employment. Coal Belt Elec. R. Co. v. Young, 126 Ill. App. 651. Liable for act of servant in negligently removing plank used to cross elevator shaft and putting it back so that it rested only on one end of shaft. Variety Mfg. Co. v. Landaker, 129 Ill. App. 630. Railroad company held liable for failure of its employes to use reasonable diligence to protect property endangered by fire started by locomotive. Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106.

tort.[93] The master is not liable for unauthorized acts outside the scope of the servant's employment.[94] Thus, for an act of the servant in the prosecution of some private purpose of his own unconnected with the business of the master the latter is not liable,[95] although the servant may have been using instrumentalities furnished by the master.[96] The master may become liable by ratification of a previously unauthorized act.[97]

The doctrine of respondeat superior is, of course, inapplicable unless the relation of master and servant existed at the time between defendant and the person charged with wrongful act or omission.[98] The test by which to determine whether

93. A street railway corporation is liable for the torts of its servant committed within the scope of its business, whether by negligence or willfully. Savannah Elec. Co. v. Wheeler, 128 Ga. 550, 58 SE 38. A master is responsible for torts of a servant within the scope of his employment. Compher v. Missouri & Kansas Tel. Co. [Mo. App.] 106 SW 536. A master is liable for willful torts of his servant committed in the course of his employment. Killing dog. Columbus R. Co. v. Woolfolk, 128 Ga. 631, 58 SE 152.

94. Carrier is not liable for an arrest made by a special agent without authority. St. Louis, etc., R. Co. v. Wyatt [Ark.] 105 SW 72. Railroad company is not liable where a switchman who is off duty suddenly assaults a person who is about to become a passenger. Id. This is especially so where the assault was so sudden that it could not be anticipated and prevented. Id. Foreman of bridge crew threw a water cooler from a train and struck plaintiff walking beside the track. The cooler belonged to the foreman, and it was no part of his duty to provide such articles on cars on which he traveled. Held company not liable. St. Louis S. R. Co. v. Bryant [Ark.] 99 SW 693. Where a fire was set by the sub-boss of a railroad bridge crew while he was sleeping in a railroad boarding car while off duty, his act was not performed in the business of the company and it was not liable for results thereof. Southern R. Co. v. Power Fuel Co. [C. C. A.] 152 F 917. Where a railroad company sent a surgeon to a wreck to attend an injured person who thereafter died and the surgeon ordered the body sent to an undertaking establishment and there he and the undertaker, without the consent of relatives, mutilated the corpse, held the tort of the surgeon was not within the scope of the business for which he was employed and the railroad was not liable. Louisville, etc., R. Co. v. Blackmon [Ga. App.] 59 SE 341. A master is not responsible for the tortious or wrongful acts of his servant when such acts are not directly authorized by him nor done in the course or within the scope of the servant's employment. Younkin v. Rocheford [Neb.] 110 NW 632. Where sewing machine agents were working under a contract specifying their powers, the master was held not liable for a trespass committed by an agent in retaking a machine which they had not been directed to retake. Weinstein v. Singer Mfg. Co., 121 App. Div. 708, 106 NYS 517. Corporation is not liable for damages done to a house by shooting of men employed to take the place of strikers where shooting was directed from defendant's premises against a mob, was not authorized nor within the scpoe of employment of persons doing it. Shay v. American Iron & Steel Mfg. Co. [Pa.] 67 A 54. The master is liable for intentional acts of the servant only when they are within the apparent scope of the master's business. Blomsness v. Puget Sound Elec. R. [Wash.] 92 P 414.

95. Where an automobile became out of order and the owner left it with the driver to repair and bring in, and the driver after repairing it took a stranger to ride who was injured because of the driver's negligence, held the master was not liable. Patterson v. Kates, 152 F 481. Plaintiff owned an automobile which he was about to deliver to defendant to sell on commission when defendant's servant asked that plaintiff's servant retain it over Sunday so that defendant's servant could show it to a buyer. Defendant's servant took the machine on a pleasure trip of his own and ran into a street car, destroying the machine. Held, defendant not liable. Evans v. Dyke Automobile Supply Co. [Mo. App.] 101 SW 1132.

96. Where a chauffeur without authority took his master's automobile from the garage and while using it on a personal errand of his own collided with a person, he was acting outside the scope of his master's business and the master was not liable. Jones v. Hoge [Wash.] 92 P 433.

97. Where a street railroad conductor instituted malicious prosecution against a passenger and subsequent thereto the manager of the company told the passenger that he could settle the matter if he would come and see him, such fact was evidence of ratification by the company of the act of the conductor. Conklin v. Consolidated R. Co. [Mass.] 82 NE 23.

98. Relation of master held to exist: The doctrine respondeat superior applies to one who stands in the relation of master to the wrongdoer. It is immaterial whether the servant has been appointed by the master directly or intermediately. Frerker v. Nicholson [Colo.] 92 P 224. A contractor working under a lot owner's direction in repairing a sidewalk is not an independent contractor so as to relieve the owner from liability for such contractor's negligence. Kampmann v. Rothwell [Tex. Civ. App.] 107 SW 120. Where an undertaking company employed a carriage and driver to convey people to a funeral and back the driver continued to be the servant of the original master and he and not the undertaker was liable. Frerker v. Nicholson [Colo.] 92 P 224. Evidence that a flagman at a crossing lowered gates for passage of trains of a company which used the tracks held sufficient to support a finding

the relation existed at the time may be the degree of control by defendant over the person charged,[99] or it may be the nature of the act and the business in the performance of which the servant was engaged.[1] Where a servant negilgently induces a stranger to assist him, and the stranger's negligence in doing the master's work results in injury to a third person, the master would be liable,[2] though not upon the theory that the person causing the injury was a servant, unless the employe inducing him to work had authority to employ him.[3] In any case negligence of such third person must be shown.[4] The owner of vehicle is not liable for an injury caused by negligent driving of a borrower, if it was not used at the time in the owner's business.[5]

The general employer is not in general liable for the acts or negligence of an independent contractor,[6] or acts of the servants of an independent contractor,[7] but

that the relation of master and servant existed between the flagman and the company. Record v. Pennsylvania R. Co. [N. J. Law] 67 A 1040. Where one hires persons and pays them and charges their services to another at an advanced rate, he is the employer and is liable for injury to a third person resulting from their negligence. Dorsey v. Redford [R. I.] 67 A 367. Evidence sufficient to show that a policeman at the time of committing an assault was acting as the servant of the owner of a skating rink and not as a policeman. Hirst v. Fitchburg, etc., R. Co. [Mass.] 82 NE 10. Evidence sufficient to authorize a finding that a gate tender at a crossing was the servant and agent of a railroad company and not of an independent contractor, though there was some evidence of an arrangement between defendant and other roads and that such other road paid and hired the tender. Boucher v. New York, etc., R. Co. [Mass.] 82 NE 15. Where employes of a railroad company moving cars on the track of a lumber company are under the control of the railroad company, it is liable for their negligence. Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194, 14 Det. Leg. N. 415, 112 NW 915. Servants of a union depot company are servants of a railroad company, while the former are operating switches, and the railroad company is liable for their negligence. Floody v. Great Northern R. Co., 102 Minn. 81, 112 NW 875. Switchman injured while riding out of depot. Id.

Relation of master held not to exist: Where a mail agent was assaulted by car cleaner, evidence that such agent was not in favor with railroad officials is insufficient to connect the company with the assault. Douglas v. Carr [Vt.] 67 A 1089. Word "servant" in Civ. Code 1895, § 3817, refers only to domestic servants. Paterson v. Sams, 2 Ga. App. 755, 59 SE 18. Where the owner of an automobile permits another to use it, the latter does not become his servant or agent so as to charge the owner with his negligence. Lewis v. Amorous [Ga. App.] 59 SE 338. Where a policeman was not appointed as railway policeman under Rev. Laws, c. 108, nor under St. 1906, p. 501, making such corporations liable for the acts of such policemen, the company was not liable for an assault committed by the policeman. Hirst v. Fitchburg, etc., R. Co. [Mass.] 82 NE 10. Chauffeur of automobile held not the servant of an express company who hired the automobile from another who employed the chauffeur, where the machine was run into a third person while the chauffeur was on his way to lunch or to the place of his employer. Bohan v. Metropolitan Exp. Co., 107 NYS 530. Relation of master and servant held not to exist between parent and child where the child took the parent's automobile without his consent and while engaged on a mission of his own collided with a third person. Maher v. Benedict, 108 NYS 228.

99. The test of one's liability for the negligence of his servant is his right to command and control his servant in the performance of the causal act or omission at the time of performance or neglect. Standard Oil Co. v. Parkinson [C. C. A.] 152 F 681.

1. Where employes of one person are engaged in performance of acts for another, which acts the latter is under duty to perform, the relation of servant is sustained to such a one whose duty it is to perform such work if he has control of the execution thereof. Where freight agent agreed to look after loading of a race horse, the servants of the shipper while acting under orders of the agent were servants of the railroad company, and where the horse was injured because of the negligence of the agent the company was liable. Indiana Union Trac. Co. v. Benadum [Ind. App.] 83 NE 261.

2, 3. Thyssen v. Davenport Ice & Cold Storage Co., 134 Iowa, 749, 112 NW 177.

4. No negligence in swinging ice pick, and striking plaintiff when plaintiff's presence was unknown. Thyssen v. Davenport Ice & Cold Storage Co., 134 Iowa, 749, 112 NW 177.

5. Doran v. Thomsen [N. J. Law] 66 A 897.

6. McHarge v. M. M. Newcomer & Co., 117 Tenn. 595, 100 SW 700. Contractors employed by railroad company held independent contractors and not servants in the execution of certain work. Louisville, etc., R. Co. v. Cheatham, 118 Tenn. 160, 100 SW 902. A company called for bids for construction of a road and accepted a bid of its former foreman which provided for payment of laborers by company's check. A third person as foreman of the company visited the scene of work and made suggestions but did not control any workmen. Held the contractor was an independent one for whose negligence the company was not liable. Houghton v. Loma Prieta Lumber Co. [Cal.] 93 P 377. Where liability depends on negligence, the independent contractor and

under exceptions to this general rule, the employer is liable for the acts of negligence of the contractor and his servants where the act contracted to be done is wrong or tortious in itself,[8] when the work contracted for is intrinsically dangerous, and the performance will probably result in injury to third persons or the public,[9] where the thing to be done or the manner of its execution involves a duty to the public incumbent on the proprietor or employer,[10] where the injury is the direct and necessary consequence of the work to be done [11] and where the employer or proprietor interferes with the contractor in the performance of the work.[12]

Damages.[See 8 C. L. 947]—A master is liable for actual damages caused by the wanton act of his servant,[13] but not for exemplary damages unless the act was authorized or ratified.[14]

Liability of servant; liability of master and servant.[See 8 C. L. 947]—There is a conflict as to the joint liability of master and servant, where the servant alone was guilty of negligence or wrongdoing.[15]

not his master is liable. Where one was injured by blasting out of a stump by an independent contractor who was constructing a road through a sparsely settled community. Houghton v. Loma Prieta Lumber Co, [Cal.] 93 P 82. Contractor not liable for negligence of a subcontractor. Bell v. New York, 114 App. Div. 22, 99 NYS 684. Owner of land is not liable for the acts of an independent contractor in excavating, where contractor is fit and competent person. Schulhofer v. Mulhare, 50 Misc. 658, 99 NYS 489. Where county road directors gave a contract to another to rebuild and repair a part of a road, the contractor to furnish all materials, men, etc., the county directors were not liable for an injury to a third person caused by the servants of the contractor while blasting rock for the road. Symons v. Allegany County Road Directors [Md.] 65 A 1067. A trained nurse performing her usual duties and exercising the skill required in her profession does not come within the definition of a servant, but rather is one who renders personal services in pursuit of an independent calling and the employer is not liable for her acts. Parkes v. Seasongood, 152 F 583. Owner of building held not liable to third person for injury caused by an appliance used by an independent contractor in doing work on the building. Goldstein v. Wolkenberg, 54 Misc. 545, 104 NYS 736. Occupants of store contracted with awning manufacturers to put their awning in shape, agreeing to pay a reasonable price, the manufacturers to do the work in their own way. They were held independent contractors. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700.

7. One doing the stone work on a building under a contract providing that it should be done according to plans and specifications, reserving to the owner only the right to see that it conformed to plans, is an independent contractor for the negligence of whose servants the owner is not liable. Johnson v. Helbing [Cal. App.] 92 P 360. The fact that the owner was doing the woodwork on the building did not affect the independence of the stone contractor. Id.

8. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700.

9. Doctrine applied where plaintiff was injured by fall of roll when contractor was putting up awning on defendant's store. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700. Where an independent contractor was constructing a road through a sparsely settled district, it was error to apply the doctrine that, though the work was done by an independent contractor, the master was liable on the theory that blasting was intrinsically dangerous. Houghton v. Loma Prieta Lumber Co. [Cal.] 93 P 82.

10. Duty of store proprietors, defendants, to public violated where contractor putting up awning on store front allowed a roller to fall upon and injure plaintiff, a pedestrian, on the sidewalk. McHarge v. M. M. Newcomer & Co., 117 Tenn. 595, 100 SW 700. Electric sign company lowered a sign in front of a theater, under employment and direction of theater company, and allowed sign to fall, injuring pedestrian. Theater company not relieved by fact that sign company was independent contractor. Loch v. Columbia Theater Co., 197 Mo. 328, 94 SW 847. Where independent contractor made an excavation on depot grounds and failed to guard or light it at night, and a prospective passenger fell into it, the railroad company and independent contractors were both liable. Louisville, etc., R. Co. v. Cheatham, 118 Tenn. 160, 100 SW 902. The running of frequent trains over a crowded street crossing is a business fraught with danger to travelers and a railroad company may not delegate the operation of gates to an independent contractor and escape liability for negligence of the gate tender. Boucher v. New York, etc., R. Co. [Mass.] 82 NE 15.

11, 12. McHarge v. Newcomer & Co., 117 Tenn. 595, 100 SW 700.

13. Stewart v. Cary Lumber Co. [N. C.] 59 SE 545.

14. Unnecessary blowing of locomotive engineer for purpose of frightening a team. Stewart v. Cary Lumber Co. [N. C.] 59 SE 545. The master is not liable in exemplary damages for the malicious act of his servant unless he authorized or ratified the act. Samieloff v. New York, etc., R. Co., 107 NYS 774. Where assault by servant was wanton and with reckless disregard of plaintiff's rights, punitive damages may be recovered. Coal Belt Elec. R. Co. v. Young, 126 Ill. App. 651.

15. Section boss and railroad company can

(§ 4) *B. Procedure.*See 8 C. L. 948—The complaint must show the existence of the relation of master and servant,[16] and that the act or negligence charged [17] was within the scope of the servant's employment [18] and was the proximate cause of the injury alleged,[19] and the burden is upon plaintiff to establish these facts.[20] A charge

be sued jointly when the sole ground of liability of the railroad company is the act of the section boss alone. Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 SE 462. The section boss is personally liable for injury resulting from his negligence and the railroad company is liable for the misfeasance of its agent. Id. An action cannot be maintained jointly against master and servant for a negligent act of the latter if, in the particular case, the master's liability for such act arises solely from the relationship between them, under the doctrine of respondeat superior. French v. Central Const. Co., 76 Ohio St. 509, 81 NE 751.

16. A complaint for injuries alleging that two certain persons were employes of or contractors for defendant does not necessarily mean that they were independent contractors for whose negligence defendant was liable. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 S 627.

17. Complaint in justice court that servants of defendant fired a brush heap near plaintiff's land and left burning, and caused property of plaintiff to be burned, shows negligence. Patterson v. Sams, 2 Ga. App. 755, 59 SE 18. Complaint for injuries to person near the track struck by a piece of ice negligently kicked off the rear platform of a caboose held sufficient. Maysville, etc., R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016.

18. Complaint that defendant by his agents "while in line of their employment" recklessly did a certain act held to sufficiently show that the act of the servant was the act of the master. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 S 627. In action for injuries to child struck by street car, complaint held to show that acts of motorman causing the injury were within the scope of his employment. Wahl v. St. Louis Transit Co., 203 Mo. 261, 101 SW 1. Complaint alleging that brakeman threw a piece of ice from a train and struck plaintiff, also a brakeman, held, insufficient to show that brakeman was at the time of throwing the ice acting within the scope of his duties. Galveston, etc., R. Co. v. Henefy [Tex. Civ. App.] 18 Tex. Ct. Rep. 407, 99 SW 884. Allegations that a street car company knowingly placed in charge of its cars a conductor of knowingly bad character who was drunk and armed, and that he shot a passenger while collecting fares, held not demurrable. Savannah Elec. Co. v. Wheeler, 128 Ga. 550, 58 SE 38.

19. Defendant directed his son, a boy of 9, reckless and physically incapable of managing a horse, to carry a message on horseback, and rode over plaintiff. Held defendant's negligence was proximate cause of plaintiff's injuries. Broadstreet v. Hall, 168 Ind. 192, 80 NE 145. Complaint held to show defendant's negligence and not acts of horse to be proximate cause of injuries. Id.

20. Person injured has the burden to prove that servant by whose negligence he was injured was acting within the scope of his employment. Hogle v. Franklin Mfg. Co., 105 NYS 1094. Where a child standing in the street was injured by being struck by an insulator which was let fall by a lineman from a telegraph pole, he was only required to show that it fell because of the lineman's negligence, and was not required to show the exact way in which it fell. McNichols v. New England Tel. & T. Co. [Mass.] 81 NE 889. Where one was injured by the alleged negligence of a driver of a team, and the alleged owner refused to admit that he owned the team, the injured person had the burden to prove that the team was being used in his service at the time of the injury. Sibley v. Nason [Mass.] 81 NE 887. Complaint alleging that defendant ran into plaintiff with his automobile on Sept. 3, 1904, is good, though servant was driving and defendant was not in it, and accident occurred on 2nd or 4th. Shepard v. Wood, 116 App. Div. 861, 102 NYS 306. Where servants of a mill company in loading steel plates on the wagon driven by a servant of a third person negligently operated the crane and permitted the plates to hit the driver, held to show actionable negligence on part of defendant's servants. Otis Steel Co. v. Wingle [C. C. A.] 152 F 914. Where a third person was struck by a vehicle driven by the servant of another, evidence held to show that the servant was negligent. Mattingly v. Montgomery [Md.] 68 A 205. Where one was injured at a railroad crossing by a horse and wagon driven by the servant of another, the master is liable if the injured person was in the exercise of ordinary care and the servant, though not negligent in getting into a dangerous place, did not use reasonable care to avoid injury to the third person while getting out of danger. Id. Where a third person was injured at a railroad crossing by a team and vehicle driven by the servant of another, the master was liable if the servant could have foreseen danger to such third person at the time he went onto the crossing, though beckoned by the flagman. Id. No case against defendant where person was struck by a brick from an elevator, where only employe of defendant engaged on the work was an engineer, who ran the engine which raised and lowered elevator subject to a contractor's orders, and no negligence on part of engineer was shown. Laurence v. Stanley Hod El. Co., 105 NYS 360. Evidence sufficient to warrant finding that defendant's servant was negligent in directing plaintiff to drive into a cellar way which was unsafe. Power v. Beattie, 194 Mass. 170, 80 NE 606. Evidence held insufficient to show the master liable. Bessemer Coal Iron & Land Co. v. Doak [Ala.] 44 S 627. Where a third person was injured by discharge of a revolver kept in a telegraph office, which discharge was caused by the falling of the revolver from its shelf, and it appeared that the company did not direct that the revolver be kept and did not know that it was kept in the office, the evidence did not show that it was

of negligence against the master is sustained by proof of negligence of a servant,[21] but a charge of a wanton or willful act is not sustained without proof of actual participation in or ratification of the willful act of the servant.[22] The questions of negligence,[23] whether the relation of master and servant existed,[24] and whether the servant was acting within the scope of his employment at the time,[25] are for the jury, unless the facts are undisputed and admit of but one reasonable conclusion. Holdings as to the admissibility of evidence are given in the note.[26]

§ 5. *Civil liability for interference with relation by third person.* See 8 C. L. 949 "Boycotting" of business by organized labor to compel unionizing of business and submission to rules of union will be enjoined.[27] An employer's liability insurance

jointly negligent. Western Union Tel. Co. v. Olsson [Colo.] 90 P 841. Where a third person was injured by the discharge of a revolver which fell from a shelf in a telegraph office, it was error to refuse to charge that the jury must find that the company knew of the presence of the revolver on the premises or had given instructions that it be kept there in order to render it liable. Id. A third person who is injured by being struck in the street by a wagon driven by the servant of another has the burden to prove that the driver was negligent and that his negligence caused the injury. Geiselman v. Schmidt [Md.] 68 A 202. One suing for injuries caused by automobile must show that driver or person in charge was defendant's servant and that he was acting within the scope of his employment. Lotz v. Hanlon, 217 Pa. 339, 66 A 525.

But one who seeks to evade liability for injury to third persons on the ground that the person causing the injury was an independent contractor has the burden to prove such fact. Kampmann v. Rothwell [Tex. Civ. App.] 107 SW 120.

21. Birmingham R. L. & P. Co. v. Randle [Ala.] 43 S 355. Under a complaint charging negligence of a master, recovery may be had on proof of negligence of the servant. Bessemer Coal Iron & Land Co. v. Doak [Ala.] 44 S 627. Complaint held sufficient. Id.

22. Birmingham R. L. & P. Co. v. Randle [Ala.] 43 S 355. Allegations of injury to a person leaving a car held insufficient to show a wanton or willful act of the servant in causing the injury. Birmingham R. L. & P. Co. v. Brown [Ala.] 43 S 342.

23. Where a child standing in the street was struck by an insulator let fall by a lineman, who was at work on a telegraph pole, the question of the lineman's negligence was held for the jury. McNicholas v. New England Tel. & T. Co. [Mass.] 81 NE 889. Questions of negligence and contributory negligence held for jury where third person was struck in street by wagon driven by servant of another. Geiselman v. Schmidt [Md.] 68 A 202. Whether brakeman was negligent in frightening a youth who was riding on a ladder on a freight car, causing him to jump, held for the jury. Texas, etc., R. Co. v. Buch [Tex.] 19 Tex. Ct. Rep. 991, 105 SW 987. Question of negligence where servants of a contractor were injured by falling timbers, which fall was caused by acts of servants of the owner of the building. Feddeck v. St. Louis Car Co., 125 Mo. App. 24, 102 SW 675.

24. Where a pedestrian was struck by a vehicle, the question of whether the driver was a servant of the person sued held for the jury. Geiselman v. Schmidt [Md.] 68 A 202. Where one who had the keys of oil storage tanks and used a team and vehicle belonging to the company sold oil to customers of the company and in neighboring towns, selected his own route, etc., and was paid one cent per gallon for sales made, and an injury to a third person was caused while he was driving the vehicle, held, whether he was a servant or independent contractor was for the jury. Standard Oil Co. v. Parkinson [C. C. A.] 152 F 681.

25. Whether negro was ejected from restaurant by waiters out of personal ill will, or in the cause of their employment, in order to protect a lady customer from insult and annoyance, held a question for the jury. Chase v. Knabel [Wash.] 90 P 642.

26. That defendant was owner of a team at the time a third person was injured by negligence of the driver is evidence that it was being used in his service at the time of the injury. Sibley v. Nason [Mass.] 81 NE 887. Where one was injured by negligence of the driver of a team, a report signed by the alleged owner in which he stated that he owned the team was admissible as an admission though the purpose of the report was not disclosed. Id. Where a third person was injured because of the alleged negligence of a servant, admissions made by the servant as to the cause of the injury while fulfilling instructions of the master are within the scope of his employment and binding on the master. McNicholas v. New England Tel. & T. Co. [Mass.] 81 NE 889. Where one was injured by defendant's automobile operated by defendant's chauffeur, but defendant claimed that at the time the chauffeur was acting against his express commands, his failure to assert this claim at the time summons was served could not be considered as proof that the chauffeur had authority. McEnroe v. Taylor, 107 NYS 565. Where one was struck by a vehicle, evidence that the horse and wagon which ran into him was owned by defendant, is evidence from which the jury may conclude that the driver was defendant's servant. Geiselman v. Schmidt [Md.] 68 A 202.

27. George Jonas Glass Co. v. Glass Bottle Blowers' Ass'n [N. J. Eq.] 66 A 953. A labor organization seeking to compel a manufacturer to unionize his plant is not such a competitor in the labor market as to justify it in enticing employes away or inducing or compelling them to leave their employment, the law upholds honest competition but not a malicious attempt to in-

company, which has procured the discharge of an employe who has sued the insured employer for an injury is liable to such employe.[28] Under the Georgia statute prohibiting the employment of a person already under contract with another to perform services,[29] an action for damages arises at once, upon violation of the statute,[30] in which damages equal to double the amount of wages contracted for may be recovered.[31] The relation of employer and employe may exist, a contract having been entered into, though services have not commenced.[32] An advance of money by the employer to the employe is a partial performance of an oral contract within the meaning of the statute.[33] In Arkansas, one who entices away a laborer under contract is liable to a penalty.[34]

§ 6. *Crimes and penalties.* See 8 C. L. 950—An employer is liable for the violation of an ordinance, which is a police regulation, by his employe, though he did not consent thereto, and though the employe violated instructions.[35] Holdings under the Georgia [36] and Alabama [37] statutes, making it an offense to procure an advance-

jure another's business. Id. A combination or agreement to maintain a system of picketing to prevent an employer from obtaining labor in order to compel recognition of the union, and for no other purpose, will be enjoined. Id.

28. Gibson v. Fidelity & Casualty Co., 232 Ill. 49, 83 NE 539. Evidence sufficient to show that defendant procured such discharge. Id.

29. Acts 1901, p. 63, and Acts 1903, p. 91. McBride v. O'Neal, 128 Ga. 473, 57 SE 789.

30. McBride v. O'Neal, 128 Ga. 473, 57 SE 789. The employment of a person during the life of a contract with another gives rise to an action for damages under the statute. Chambless v. Melton, 127 Ga. 414, 56 SE 414.

31. The damages are a sum not less than double the amount of salary or wages for the term of the contract. McBride v. O'Neal, 128 Ga. 473, 57 SE 789. Instruction to award sum sued for proper where that sum was lowest allowed by statute. Chambless v. Melton, 127 Ga. 414, 56 SE 414.

32. Contract made on Dec. 24, in force at once, though no service was to be performed until Jan. 1. McBride v. O'Neal, 128 Ga. 473, 57 SE 789.

33. Not necessary that employe should have commenced to work under Laws, 1903, p. 91. McBride v. O'Neal, 128 Ga. 473, 57 SE 789.

34. Evidence held insufficient to sustain a verdict for plaintiff in an action under Kirby's Dig. § 5030, prescribing a penalty for interfering with or enticing away a laborer under contract with another, etc. Sturdivant v. Tollette [Ark.] 105 SW 1037.

35. Firing blast within city without covering the blast. City of Spokane v. Patterson [Wash.] 89 P 402.

36. Construction of statute in general: Laws 1903, p. 90, was not intended as a remedy for breach of contract or for collection of debts, but to prescribe a penalty for fraud. Rickerson v. State [Ga. App.] 60 SE 114. The act is not intended as a means of collecting a debt or enforcing performance of a contract but to punish fraud. Heywood v. State, 1 Ga. App. 530, 57 SE 1025; Mulkey v. State, 1 Ga. App. 521, 57 SE 1022. Act cannot be construed as one to compel payment of debts or performance of contracts. Young v. State [Ga. App.] 60 SE 117; Patterson v. State, 1 Ga. App. 782, 58 SE 284. Prosecution under Acts 1903, p. 90, will not lie for injury to any one except the hirer. Patterson v. State, 1 Ga. App. 782, 58 SE 284.

Elements of offense: There is no offense if the element of fraudulent intent is lacking No intent to defraud where one working a farm on shares stays for several months, when a dispute arose as to the performance of the work and he abandons the contract. Rickerson v. State [Ga. App.] 60 SE 114. To constitute an offense under Acts 1903, p. 90, there must be an intent to defraud at the time the advance is secured, and the court should so instruct the jury. Mulkey v. State, 1 Ga. App. 521, 57 SE 1022; Heywood v. State, 1 Ga. App. 530, 57 SE 1025. If the employe works for such a time that it is unreasonable to suppose that he intended to procure the advancement by fraud, he cannot be convicted though he fails to fully perform or to repay the money loaned. Mulkey v. State, 1 Ga. App. 521, 57 SE 1022. Conviction under such act cannot be sustained by evidence that on a comparison of accounts with a hirer a servant is indebted to him for an unpaid balance. Patterson v. State, 1 Ga. App. 782, 58 SE 284. To sustain a conviction, intent to defraud must be shown to exist with reference to the particular advancement. Id. To authorize conviction under Laws 1903, p. 90, the evidence must show intent to defraud and loss on part of person alleged to have been swindled. Fuller v. State, 2 Ga. App. 696, 59 SE 1. An essential element of the offense is loss and damages to the hirer by breach of the contract. Young v. State [Ga. App.] 60 SE 117. The word "advance" in Laws 1903, p. 90, means payment of money to a contract laborer which has not been earned. Fuller v. State, 2 Ga. App. 696, 59 SE 1. The fact of indebtedness is wholly insufficient upon which to base a conviction for violation of Acts 1903, p. 90. Barnes v. State [Ga. App.] 59 SE 937. For the repayment of money advanced on a contract for labor to be effectual as a defense, the advancement must be repaid on or before the first day of the term of service contracted for. Id.

Accusation: An indictment for violation of Laws 1903, p. 90, which fails to allege a contract of employment, states no cause of action. Mason v. Terrell [Ga. App.] 60 SE

ment on a contract for services with intent to defraud, under the South Carolina statute making it a crime for a farm laborer to refuse to carry out his contract after procuring an advance,[38] under the Texas act prohibiting payment in tickets or checks redeemable in goods,[39] under the Washington factory act,[40] under statutes of Ohio prohibiting employment of children,[41] and requiring heating devices to be supplied for motormen,[42] and under the Federal eight hour law,[43] are given in the notes.

4. Acts, 1903. p. 90, creates two distinct offenses, and one charged with a violation thereof must be charged so definitely that he can know with which offense he is charged. Patterson v. State, 1 Ga. App. 782, 58 SE 284. An indictment which fails to charge that the failure to perform labor or repay advances was without good and sufficient cause is fatally defective. Mason v. Terrell [Ga. App.] 60 SE 4.

Proof: Though the facts recited by the statute when shown, make a prima facie case, yet guilt must be shown beyond a reasonable doubt before conviction can be sustained. Mulkey v. State, 1 Ga. App. 521, 57 SE 1022. Evidence sufficient to sustain a conviction in prosecution for violating a labor contract. Mosely v. State, 2 Ga. App. 189, 58 SE 298. In a prosecution for violation of Laws 1903, p. 90, on proof of facts raising a presumption of guilt, the accused has the burden to rebut the same. Barnes v. State [Ga. App.] 59 SE 937. Presumption of fraudulent intent arising under Acts 1903, p. 90, is not rebutted by repayment of advances unless such payment is made before date for commencement of work. Harwell v. State, 2 Ga. App. 613, 38 SE 1111. If it appears that accused was a miner and failure to perform services under the contract was due to parental interference, the presumption of fraudulent intent is rebutted. Id. Testimony that a payment was an advance is not competent, it being for the jury to say whether it was an advance or partial payment for labor done. Fuller v. State, 2 Ga. App. 696, 59 SE 1.

Instructions: On trial for violation of Acts 1903, p. 91, by specific acts set forth in the indictment, the judge did not err in including the whole of such statute in his charge, though the general words with which the act concludes did not embrace the case on trial, especially when it is contended that the defendant is not guilty except in the manner alleged. Perry v. State, 1 Ga. App. 542, 58 SE 60.

37. Where a superintendent of a gang on a public road exceeded his authority in contracting for a servant's services for 11 months in advance, the servant could not be guilty of obtaining advances with intent to defraud under Cr. Code 1896, § 4730. Johnson v. State [Ala.] 45 S 230.

38. Cr. Code 1902, § 357, making it a crime for a farm laborer to refuse to carry out a contract of labor after he has received advances, is unconstitutional as providing imprisonment for debt. Ex parte Holman [S. C.] 60 SE 19. This is so though the act does not provide for imprisonment for debt under civil process. Id. Such suit is also void as in violation of the constitutional provision prohibiting peonage and involuntary servitude. Id. It is also void because not bearing alike on landiord and laborer, the laborer alone being subject to imprisonment. Id. Such law is aiso void in that a laborer who receives advances and refuses to perform the contract is subject to indictment, and no provision is made to save himself by repayment, while one who receives advances and abandons the contract is not within the statute. Id. Cr. S. C. 1902, § 357, making it an offense for any farm laborer working for a share of the crop who has received advancements to fail to perform the services required of him under the contract, held an attempt to secure compulsory service in payment of a debt and void. Ex parte Drayton, 153 F 986.

39. Acts 29th Leg. p. 372, c. 152, making it an offense to pay a laborer in tickets or checks, redeemable in goods, is void as depriving a citizen of property, privileges, etc., without due process. Jordan v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 247, 103 SW 633.

40. An operator of a factory under the Washington factory act is not liable to a criminal prosecution for failure to pay a fee for a certificate of inspection and to post a copy, where the inspection is not made at the request of the operator or an employe. Laws 1905, p. 164, c. 84, construed. State v. Erickson [Wash.] 88 P 840.

41. Sections 6986-8, providing that no boy under sixteen years of age and no girl under eighteen years of age shall be employed at any work at nighttime later than 7 o'clock in the evening or earlier than 6 o'clock in the morning, is not an unreasonable exercise of the police power of the state and is constitutional. State v. Rodefer, 5 Ohio N. P. (N. S.) 337.

42. The act of February 9, 1906, (98 O. L. 5), amendatory of §§ 3443-3, creates a new offense, viz., failure to provide a heating device for motormen without prescribing any penalty for such offense. It is therefore inoperative and void. State v. Schoepf, 5 Ohio N. P. (N. S.) 161. In an indictment under §§ 3443-3 and 3443-4, which charges that it was the duty of the accused to carry out the provisions of said sections, it is not necessary to aver how or by whose authority such duty was imposed. Id.

43. Under 27 Stat. 340, prohibiting more than eight hours of work on public works, the offense consists in requiring or permitting more than eight hours, and not in the employe working more hours. Hence offense may be committed on Ohio side of state line, though most of the work is done on the Kentucky side. United States v.

MASTERS AND COMMISSIONERS.

§ 1. Office, Eligibility, Appointment, and Compensation, 812.
§ 2. Powers and Duties in General and Subjects of Reference, 812.
§ 3. Proceedings on Reference and Hearing by Master, 813.
§ 4. Report of Master, Exceptions and Objections, 813.
§ 5. Powers of Court and Proceedings on Review, 813.
§ 6. Re-reference, 814.

The scope of this topic is noted below.[44]

§ 1. *Office, eligibility, appointment, and compensation.*[See 8 C. L. 951]—Irregularity in appointing a master before return of process is waived by appearance and participation at the hearing without objection.[45] A master is entitled to fair remuneration for time necessarily and properly spent.[46] When a general rule of court provides for a stated compensation, and services are performed thereunder, a master or register cannot be deprived of such compensation by special order.[47] Before allowance can be made statutory provisions requiring the filing of a sworn statement of the number of days of service must be complied with.[48] A master appointed to make a sale at foreclosure is liable in trespass for seizing property not embraced in the decree.[49]

§ 2. *Powers and duties in general and subjects of reference.*[See 8 C. L. 952]—The master is a ministerial officer and the exercise of judicial power cannot be delegated to him.[50] Reference should be made only in case of an equitable nature,[51] such as cases involving accounts and the like,[52] but upon overruling of a motion to transfer a cause from an equity to a law calendar, a reference is properly made though notice of appeal is given.[53] The smallness of a claim is ground for refusal of reference to a master to ascertain the amount.[54] The court may refer the case to a master without first hearing the evidence and declaring the rights of the parties.[55]

Sheridan-Kirk Cont. Co., 149 F 809. Burden of showing existence of an extraordinary emergency as a defense to a prosecution for working men more than eight hours a day is on the contractor. Id. An extraordinary emergency in connection with building of dam across Ohio river cannot be a continuing emergency extending through the life of a contract, nor an emergency growing out of scarcity of labor, nor a flood and repairing of repairs thereafter; must be sudden, unforeseen, requiring immediate action, and when occasion is over, emergency ceases as a privilege. Id. A construction placed on eight hour law by government engineers for some years could not be pleaded as a defense after notice had been given by the department that such construction was no longer followed. Id.

44. It includes all matters relating to masters in chancery and court commissioners. Analogous matter may be found in titles, Reference, 8 C. L. 1702; Restoring Instruments and Records (examiners of titles under burnt record acts), 8 C. L. 1742; Notice and Record of Title (referees under Torrens Act), 8 C. L. 1169, and Partition, 8 C. L. 1246. See, also, Arbitration and Award, 9 C. L. 236, and Depositions, 9 C. L. 964. For referees in bankruptcy and proceedings before them, see Bankruptcy, 9 C. L. 343.

45. McCune v. McCune, 31 Pa. Super. Ct. 248.

46. Charge by master for one and one-half days examining pleadings, the same time examining testimony, three days preparing findings, and half day hearing objections, is too much when material part of report was very brief and questions involved very simple. Gottschalk v. Noyes, 225 Ill. 94, 80 NE 72.

47. In re Du Pont [Del.] 68 A 399. Rev. Code 1852, as amended in 1893, p. 919, c. 125, § 45, held to authorize promulgation of general rule fixing amounts due registers in chancery "for filing and proving recording and indexing and copy of trustees' accounts." Id.

48. Co-Operative Mfg. Produce & Home Co. v. Rusche, 30 Ky. L. R. 790, 99 SW 677.

49. Or owner may pursue any other appropriate remedy provided court's possession is not interfered with by other courts. Perry v. Tacoma Mill Co. [C. C. A.] 152 F 115. For liability of court officers in general, see Attachment, 9 C. L. 282; Clerks of Court, 9 C. L. 572; Executions, 9 C. L. 1328; Judicial Sales, 10 C. L. 507; Receivers, 8 C. L. 1679; Sheriffs and Constables, 8 C. L. 1897, etc.

50. Pearce v. Martin, 130 Ill. App. 24.

51. Suit to forfeit interest in realty held equitable. Independent Steam Fire Engine Co. v. Richland Lodge No. 39, A. F. M., 73 S. C. 533, 53 SE 993.

52. Gottschalk v. Noyes, 225 Ill. 94, 80 NE 72, afg. 128 Ill. App. 565. Where a lengthy and complicated accounting is involved, the matter must be referred to a master. Counsel cannot by stipulation or otherwise impose duties of master on appellate court. Garlick v. Mutual Loan & Bldg. Ass'n, 129 Ill. App. 402.

53. Independent Steam Fire Engine Co. v. Richland Lodge, No. 39, A. F. M., 73 S. C. 533, 53 SE 993.

54. Damages amounting to only a few

§ 3. *Proceedings on reference and hearing by master.*[See 8 C. L. 952]—While a master may consider depositions taken by virtue of a dedimus protestatem in connection with the evidence produced before him,[56] he cannot hear cases and decide issues upon evidence taken before another master.[57] A witness who is apprehensive of injury to his personal or property rights may refuse to answer a question propounded and stand on such refusal until the question has been determined by the court.[58]

§ 4. *Report of master, exceptions and objections.*[See 8 C. L. 953]—A master being purely a ministerial officer may, after expiration of his term, certify to the testimony taken before him,[59] but may not reach his conclusions and report them after that time. He is not required on request of a party to report evidence beyond what is necessary to a determination of the questions of law raised.[60] In a case involving a claim of credits wherein the evidence is conflicting, a report should show that such claims were passed upon and which claims were allowed and which disallowed.[61] A commissioner may authorize any person to write his report at his dictation, it not being essential that it be in his own handwriting.[62] A statute requiring auditors to reduce the evidence to writing does not require reduction to narrative form.[63] A waiver of retention of a commissioner's report in his office for the usual period for exceptions implies consent to its filing without notice of its completion.[64] A report filed after the time limited by order of the court is not a nullity,[65] but the delay is merely an irregularity which is waived by failure to make timely objection.[66] Exceptions must be specific,[67] and matters not raised thereby will not be considered.[68] Exceptions involving consideration of evidence must show the evidence necessary to decision thereon or at least contain a reference thereto.[69] Failure of a proponent to press a motion to compel a witness to answer a question, refused before the master and certified to the court, waives the right to an answer.[70]

§ 5. *Powers of court and proceedings on review.*[See 8 C. L. 953]—Except in involved matters of account, the master's conclusions of fact are only prima facie or advisory.[71] The presiding judge in reaching his decision may draw from the facts

dollars. Giragosian v. Chutjian, 194 Mass. 504, 80 NE 647.

55. Where rights of parties not involved in obscurity or doubts. Gottschalk v. Noyes, 128 Ill. App. 565, afg. 225 Ill. 94, 80 NE 72.

56. Coel v. Glos, 232 Ill. 142, 83 NE 529.

57. Parties entitled to have master hear witnesses testify. Coel v. Glos, 232 Ill. 142, 83 NE 529.

58. Dr. Peter H. Fahrney & Sons Co. v. Ruminer [C. C. A.] 153 F 735.

59. Coel v. Glos, 232 Ill. 142, 83 NE 529.

60. Young v. Winkley, 191 Mass. 570, 78 NE 377.

61. Commissioner's report in mechanic's lien case. O'Neil v. Taylor, 59 W. Va. 370, 53 SE 471.

62. O'Neil v. Taylor, 59 W. Va. 370, 53 SE 471.

63. Questions and answers as transcribed from stenographic report sufficient. Linder v. Whitehead, 125 Ga. 115, 53 SE 588.

64. O'Neil v. Taylor, 59 W. Va. 370, 53 SE 471.

65. Donalson v. Fain, 127 Ga. 682, 56 SE 1023, distinguishing Peary v. McDonald, 119 Ga. 865, 47 SE 203.

66. Objection must be made by exception or motion within twenty days from filing. Donalson v. Fain, 127 Ga. 682, 56 SE 1023.

67. Sanford v. Embry [C. C. A.] 151 F 977. Exceptions of mortgagor to auditor's account of amount due mortgagee, that account was not stated in accordance with certain decisions, or in accordance with conditions of mortgage, held too general and vague. O'Sullivan v. Traders' & Mechanics' Permanent Sav. Ass'n [Md.] 68 A 349.

68. Exceptions to certain findings of master appointed merely to assess damages held not to sufficiently raise question of construction of contract to convey land. Rosenberg v. Heffernan [Mass.] 83 NE 316. Court will not review finding of master unless it has been duly excepted to. Mere recital in decree that exceptions were overruled does not supply their absence from records. Boylan v. Cameron, 126 Ill. App. 432. Exceptions to this rule is where master correctly states the facts but draws incorrect legal conclusion therefrom. Id.

69. Exceptions not drawn in compliance with rule in First State Bank v. Avera, 123 Ga. 598, 51 SE 665, properly disallowed. Linder v. Whitehead, 125 Ga. 115, 53 SE 588.

70. Dr. Peter H. Fahoney & Sons Co. v. Ruminer [C. C. A.] 153 F 735.

71. Pearce v. Martin, 130 Ill. App. 24. The master's finding on facts is merely advisory. White v. Lifrierl, 124 Ill. App. 641. The master's finding on the facts is prima facie only. Id.

reported such inferences of fact as they warrant and which he deems material.[72] Testimony made incompetent by statute should be disregarded.[73] Examination of a master as to what took place before him is not a violation of the rule against the taking of oral testimony in open court on the hearing of a case which has been referred.[74] It is presumed that a commissioner attended to his duties and that the evidence was taken in his presence.[75] Greater weight will be given to a master's findings when the reference is by consent of the parties than when made by the court without such consent,[76] and where the decree of appointment does not require the master to report the evidence, his findings of fact are generally deemed final on appeal.[77] Where the subsequent action of one of the parties has left all the facts confessed, it is proper for the court to set aside the reference to the master and his report.[78]

§ 6. *Re-reference.* See 8 C. L. 954—Where a master whose term has expired certifies the evidence as former master, the court may in its discretion hear the case in open court upon the evidence so taken and thus dispense with a re-reference,[79] and it is not error to refuse to recommit for failure to take steps which were waived.[80] An order recommitting a report to a master for more specific findings, and requiring a statement of or reference to all the evidence, is sufficiently complied with by making a supplemental report reciting that a copy of testimony therewith submitted contains all the evidence from which the facts were found.[81]

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Liens in general,[82] and matters relating to the interpretation and performance of building contracts,[83] are elsewhere treated.

§ 1. *Nature of lien and right to it in general.* See 8 C. L. 954—Mechanics' lien laws are usually held constitutional,[84] but such laws cannot impair a constitution-

72. Kennedy v. Welch [Mass.] 83 NE 11.
73. Patrick v. Kirkland, 53 Fla. 768, 43 S 969.
74. Coel v. Glos, 232 Ill. 142, 83 NE 529.
75. Evidence insufficient to show that portion of the evidence was taken in absence of commissioner. O'Neil v. Taylor, 59 W. Va. 370, 53 SE 471.
76. Consent directing master to report conclusions of fact and law. Sandford v. Embry [C. C. A.] 151 F 977.
77. Hodgkins v. Bowser [Mass.] 80 NE 796. See, also, Appeal and Review, 9 C. L. 108.
78. Pierce v. Coryn, 126 Ill. App. 244.
79. Coel v. Glos, 232 Ill. 142, 83 NE 529.
80. Motion not based on desire to introduce further evidence or make further defense, but on ground that auditor had not taken oath at proper time, where court had heard evidence on question of mutual waiver of oath before hearing and overruled motion. McConnell v. Stubbs, 124 Ga. 1038, 53 SE 698.
81. Phelps v. Root, 78 Vt. 493, 63 A 941.
82. See Liens, 10 C. L. 632.
83. See Building and Construction Contracts, 9 C. L. 424.
84. Code Civ. Proc., §§ 1183, 1184, does not take property without due process of law

ally given right of homestead,[85] nor discriminate between classes of persons on whom the constitution confers the right of lien.[86] Where the constitution gives a lien right, mere failure to comply with certain statutory regulations regarding the same is not fatal as between the parties,[87] though it is otherwise as to third persons,[88] and where the right is given by statute every prescribed step must be followed.[89] Some courts hold that mechanics' lien laws should be liberally construed in favor of the claimant,[90] while others say that they should be strictly construed.[91] Mechanics' liens are governed by the law in force when the contract was made.[92]

§ 2. *Services, materials, and claims for which liens may be had.* See 8 C. L. 955—As a general rule a lien may be had for services or materials furnished or delivered on the premises under contract with the owner or his authorized agent.[93] Lien is ordinarily allowed only for "labor" done,[94] or materials furnished and used [95] in and about the construction [96] or repair [97] of a building or other structure.

§ 3. *Properties and estates therein which may be subjected to the lien.* See 8 C. L. 957—Though the lien against land may be waived and the lien asserted against the building alone,[98] a mechanics' lien is ordinarily given against the land on which the building improved or erected stands,[99] and all the appurtenances thereto,[1] and a lien cannot be imposed on a building unless in connection with some estate or inter-

or interfere with right to contract. Stinson Mill Co. v. Nolan [Cal. App.] 91 P 262. Ch. 101, p. 129, Laws 1901, affecting government lands, is constitutional. Powers Elevator Co. v. Pottner [N. D.] 113 NW 703.

85. Volker-Scowcroft Lumber Co. v. Vance [Utah] 88 P 896.

86. Where constitution gives liens to mechanics, materialmen, and laborers, the legislature cannot pass a law giving preference to one furnishing labor. Stinson v. Nolan [Cal. App.] 91 P 262. Code Civ. Proc. § 1194, unconstitutional, gives prior lien to laborer over materialman. Miltimore v. Nofziger Bros. Lumber Co., 150 Cal. 790, 90 P 114.

87. Blakeney v. Nalle & Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 56, 101 SW 875.

88. Kinsey v. Spurlin [Tex. Civ. App.] 18 Tex. Ct. Rep. 379, 102 SW 122.

89. Wees v. Elbon, 61 W. Va. 380, 56 SE 611.

90. McNab & Harlin Mfg. Co. v. Paterson Bldg. Co. [N. J. Err. & App.] 67 A 103; Kerwin v. Post, 104 NYS 1005; Salzer Lumber Co. v. Claflin [N. D.] 113 NW 1036; Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565.

91. Boylan v. Cameron, 126 Ill. App. 432; Williamson v. Shank [Ind. App.] 83 NE 641.

92. Treloar v. Hamilton, 225 Ill. 102, 80 NE 75; McNicholas v. Tinsler, 127 Ill. App. 381.

93. See post, § 4.

94. "Mercantile clerk" not a "laborer." Howell v. Atkinson [Ga. App.] 59 SE 316.

95. Acts 1883, p. 297, c. 220, § 3, as amended by Acts 1901, p. 215, c. 98, § 1. Explosives used in grading railroad tunnel and material for erection of culverts, bridges, and other railroad improvements, though not actually used in the improvements, are lienable. Luttrell & Co. v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565. Gasoline, gasoline torches, coal oil used in lighting railway tunnel in course of construction, packing mattocks, cotton waste, electric light supplies, carts, tools, shovels, spades, smith's tools, wagons, plows, scrapers, machines, machinery, derricks, crabs, cables, and, repairs for all these, are not lienable. Id. Tableware and commissary supplies furnished to subcontractor and materials furnished to workmen as part payment for services are not lienable. Id. Materials furnished railroad subcontractors for shanties for shelter of workment on tract adjoining railway right of way held not lienable. Id.

96. Plaintiff employed to pump oil out of well and also as watchman, held he could recover for pumping but not for services as watchman. Donalson v. Orchard Crude Oil Co. [Cal. App.] 92 P 1046. The lien is only for materials actually used in the construction of the building for which the materials were furnished. Central Lumber Co. v. Braddock Land & Granite Co. [Ark.] 105 SW 583.

97. Repairs to a lock and expressage thereon were subject for a lien. Nancolas v. Hitaffer [Iowa] 112 NW 382.

98. See post, § 8.

99. A joint lien may be taken on a dwelling with all its appurtenant outbuildings. Stephens v. Duffy [Ind. App.] 81 NE 1154.

1. Mechanics' lien extends to the ground covered by the building and to so much other ground immediately adjacent as may be necessary for ordinary and useful purpose of the building. Code Pub. Gen. Laws, art. 63, § 4, where 1,293 acre tract was covered with several buildings, each with its own parcel with fences between. Held whole tract not subject to lien. Filston Farm Co. v. Henderson [Md.] 67 A 228. The ground may be, subsequent to filing of lien, surveyed by order of court to determine proper boundaries for lien. Code Pub. Laws, art. 63, § 7. Id. Intended use is the criterion by which unity of adjacent structures in mechanic's lien cases is determined in order to comply with the statutory provisions regarding notice in which the building for which the account was made is described. An addition to dwelling extending over and resting on a barber shop roof, but with access only through dwelling, held properly described as part of dwelling. Petrosinelli v. Pisani [R. I.] 68 A 368.

est in land on which it is erected.[2] Where several buildings are on contiguous lots, a joint lien may be had [3] in the absence of contrary provision in the statute.[4] The entire tract or so much as shall be necessary to satisfy the lien may be sold in foreclosure of mechanics' liens.[5] The proceeding is ordinarily in rem and gives rise to no personal liability,[6] the statutes making the contractor agent of the owner and extending his authority so that he can bind the latter in personam.[7] The lien will generally attach to a leasehold estate,[8] if the building is erected under authority in lease,[9] but this applies only where the labor and materials are expended on something affixed to the realty.[10] The lien will not attach to an interest acquired in lands by a lessee under an ordinary oil and gas lease, though oil or gas is discovered,[11] or to the personal property of the lessee left upon the land.[12] The lien will attach to a building on land to which person contracting for the erection has no legal title.[13] The rights against the freehold are not affected by the fact that the owner has a reversionary right with no pecuniary interest in it.[14] Improvements made with owner's knowledge are held as made by him and liens will accrue.[15] Government land is generally exempt from mechanics' liens, but not land leased for term of years from the government.[16] Homestead rights being founded upon public policy, it is usually held unconstitutional for a legislature to allow a mechanics' lien to extend to sale of the homestead for its satisfaction.[17] Where a vendee and vendor co-operate to make improvements, the interests of each are bound for the payment of liens for labor and materials.[18] Where a mortgage holder has foreclosed and is practically in possession as against the owner, the mortgage holder is the real party in interest.[19]

2. Where plaintiff furnished material to a contractor who built house whose occupant was a tenant at will and put in possession to build house, held lien would attach. Williamson v. Shank [Ind. App.] 83 NE 641.

3. Where work done by taking tin gutters from house and putting on barn, held not objectionable to place lien on both buildings. Stephens v. Duffy [Ind. App.] 81 NE 1154. Where buildings are on contiguous lots and are built under one general contract, held whole tract liable to lien. Central Lumber Co. v. Braddock Land & Granite [Ark.] 105 SW 583.

4. Some statutes provide for separate liens on each house for work done there, where lots are not contiguous though all work was done under one general contract. Rev. St. 1899, § 4227. Work done on various houses on lots not contiguous. Aimee Realty Co. v. Haller [Mo. App.] 106 SW 588.

5. Section 2, Ch. 116, p. 230, Laws 1905. Where whole tract sale is prayed for and defendant fails to object to it, the whole tract and not a part will be sold. Lee v. Kimball [Wash.] 88 P 1121.

6. Held error to enter judgment against owner personally on subcontractor's lien. Builders' Supply Depot v. O'Connor,' 150 Cal. 265, 88 P 982, and see post, § 10D.

7. Act Feb. 7, 1889; Sess. Laws 1899, p. 147. Valley Lumber & Mfg. Co. v. Nickerson [Idaho] 93 P 24.

8. Code Civ. Proc. § 619 (Wilson's Rev. & Ann. St. 1903, § 4817). Although tenant had right to remove his building, fixtures, and machinery. Jarrell v. Block [Okl.] 92 P 167. Rights of lessee may be sold to satisfy lien of materialman. Crutcher v. Block [Okl.] 91 P 895.

9. Crutcher v. Block [Okl.] 91 P 895. Covenant in a lease obligating lessee to keep premises in repair is no implied consent to make improvements. Aetna Elevator Co. v. Deeves, 107 NYS 63. Where owner of hotel leased it on condition that lessee remodel it into a theater and at end of lease term improvements were to remain part of the building and at all times building was to be used only as a theater, held that work done by workmen or materialmen was done under contract with lessor, and liens would accrue against lessor's estate. Rev. St. 1899, § 4203 (Ann. St. 1906, p. 2277). Curtin Clark Hardware Co. v. Churchill, 126 Mo. App. 462, 104 SW 476.

10. Rev. St. 1899, § 4206 (Ann. St. 1906, p. 2289). No lien on hoisting engine put in under lease for coal mining purposes where right of removal is in lessee, as engine not part of realty. Ottumwa Iron Works v. Muir, 126 Mo. App. 582, 105 SW 29.

11. Subcontractor who drilled wells, held he had no lien rights. Phillips v. Springfield Crude Oil Co. [Kan.] 92 P 1119.

12. Eastern Ohio Oil Co. v. McEvoy, 75 Kan. 515, 89 P 1048.

13. Comp. Laws 10,712. Bauer v. Long, 147 Mich. 351, 13 Det. Leg. N. 1018, 110 NW 1059.

14. Curtin-Clark Hardware Co. v. Churchill, 126 Mo. App. 462, 104 SW 476.

15. Unless notice of disclaimer as provided by statute is properly given. Pacific Lumber Co. v. Wilson [Cal. App.] 92 P 654.

16. Crutcher v. Block [Okl.] 91 P 895. One leasing Federal school land from leasing board is subject to lien rights. They, however, must be subject to paramount interest of the Federal government, lessor, or holder of a fee. Block v. Pearson [Okl.] 91 P 714.

17. Volker-Scowcroft Lumber Co. v. Vance [Utah] 88 P 896.

18. Guiou v. Ryckman [Neb.] 110 NW 759.

19. McEwan v. Union Bank & Trust Co., 35 Mont. 470, 90 P 359.

§ 4. *The contract supporting the lien and the privity of the landowner therein. A. In general.* See 8 C. L. 958—The work must have been done under a contract with the owner [20] or his authorized agent.[21] A lien will not usually lie for extras,[22] in the absence of a new agreement.[23] Consent of the owner to the making of an improvement by a third person will not bind the land.[24] If husband and wife are tenants by the entirety, the contract should be signed by both.[25] In Illinois the contract must fix the time of completion of the work.[26] If the time fixed for completion in the original contract is within the statute, a subcontract not fixing the time for completion will nevertheless support a lien.[27] Where the statute provides that contracts must be in writing and an oral agreement is made, a subsequent identical agreement in writing will still give laborers and materialmen a lien as in the oral contract.[28] Where there is no fraud in executing the contract, though minor errors were committed, a lien will still lie.[29] A surety company on a bond against liens made by a contractor may assert any lien the contractor had.[30] Where a surety completes the contract, his privity to the original contract is not lost by the cancellation of such contract for failure of his principal to promptly complete it.[31]

Payments and offsets. See 8 C. L. 960—Where owner completes work after contractor abandons it and payments had been made to contractor on account, lien claims must be so reduced that the amount of their liens constitute such a proportion of the amount of their claims as the contract bears to the actual cost.[32] The owner may offset any damages he may have sustained, caused by contractor's failure to have building completed in time, if damages are such as were contemplated at time contract was made,[33] and this will extend even to an offset against claims of a subcontractor.[34] Sometimes an allowance is made the owner as an offset on defective work.[35]

20. Evidence held to show that contract was completed by one in his capacity as surety and not under a new contract with third persons. Maneely v. New York, 105 NYS 976.

21. Receiver who had no authority to purchase materials, held contractor selling to him secured no lien. Tenth Nat. Bank v. Smith Const. Co. [Pa.] 67 A 874. Materials sold under contract with husband of owner, held lien would lie. Block v. Pearson [Okl.] 91 P 714.

22. Gier v. Daiber, 148 Mich. 190, 14 Det. Leg. N. 183, 111 NW 773.

23. Where building collapsed and owner agreed to pay for additional materials to rebuild, held owner was liable. Nancolas v. Hitaffer [Iowa] 112 NW 382.

24. Not within St. 1898, § 3314. Clark v. North, 131 Wis. 599, 111 NW 681.

25. Comp. Laws § 10,711. McMillan v. Schneider, 147 Mich. 258, 13 Det. Leg. N. 1054, 110 NW 961; Bauer v. Long, 147 Mich. 351, 13 Det. Leg. N. 1018, 110 NW 1059.

26. Contract providing for completion within three years is valid under § 6 of the Lien Act, as the test will be construed as taking place within the three years. Merritt v. Crane Co., 126 Ill. App. 337.

27. Presumption is that subcontractor must complete work before time fixed in original contract. Merritt v. Crane Co., 126 Ill. App. 337.

28. Code Civ. Proc. § 1183. Stimson Mill Co. v. Nolan [Cal. App.] 91 P 262.

29. Gier v. Daiber, 148 Mich. 190, 14 Det. Leg. N. 183, 111 NW 773.

30. Prescott Nat. Bk. v. Head [Ariz.] 90 P 328.

31. Maneely v. New York, 105 NYS 976.

32. Kotcher v. Perrin, 149 Mich. 690, 14 Det. Leg. N. 593, 113 NW 284.

33. Offset of damages for delay in completion. Spears v. DuRant, 76 S. C. 19, 56 SE 652.

34. Code Civ. Proc. § 1184. Can secure damages for delay in completion. Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P 982.

Note: An owner paid subcontractors who were entitled to, but did not, file liens. An action was brought by another subcontractor to enforce his lien. Held, the owner was entitled to the same credit as if the liens of the paid subcontractors had been filed. Fossett v. R. I. Lumber & Mfg. Co. [Kan.] 92 P 833.

The Kansas statute, giving a lien directly on the property, is based upon the principle underlying the so-called Pennsylvania system of protecting mechanics and materialmen (Hunter v. Truckee Lodge, 14 Nev. 24, 41), but it borrows from the so-called New York system the rule that the aggregate of liens is limited in amount to the principal contract price (Hotel Co. v. Hardware Co., 56 Kan. 448; Gibson v. Lenane, 94 N. Y. 183; Montonya v. Reilly, 184 Ill. 183). Thus, while not going to the extent of the New York system in limiting further the fund available for subcontractors' claims to that part of the contract price unpaid to the contractor when the claims are filed (Van Clief v. Van Vechten,

(§ 4) *B. Contracts by vendors, purchasers, lessors, and lessees.* See 8 C. L. 961—The vendor in an executory contract of sale is an "owner." [36] Where vendee holds under lease on crop payment plan, it is held a lien will accrue,[37] and the fact that the vendor terminates the contract when lien is about to be enforced does not affect the lienholders' rights.[38]

(§ 4) *C. Subcontractors and materialmen.* See 8 C. L. 961—A subcontractor is an undercontractor who takes under the original contract and is to do his duty under terms of original contract.[39] The right of a subcontractor to a lien is statutory extending in some states even to persons acting under the subcontractor,[40] while other statutes do not extend it beyond the subcontractor.[41] This lien holds even where principal contractor has no lien.[42] Rights of enforcement are usually the same for subcontractors as for contractors.[43] The subcontractor, after notice to owner of his rights, has a lien on all money due and subsequently to become due contractor after the time of the service of the notice.[44] The lien of a subcontractor does not extend to damages for loss of profits resulting from refusal to allow contract to be fulfilled.[45] The contractor is not bound to pay liens incurred by a subcontractor until a court has passed upon them.[46] With knowledge of its terms a subcontractor is bound by the contract made between owner and contractor regarding liens,[47] but a settlement made with a contractor does not generally affect the lien rights of the subcontractor.[48] The contractor cannot be held to pay more than a contract calls for,[49] nor can the owner.[50] In some states statutes give materialmen rights which contractors do not possess.[51] In these cases the statute usually treats the transaction as a purchase from the ma-

130 N. Y. 571; Gibson v. Wheeler, 110 Cal. 243), the contract price in toto is established as such a fund (Clough v. McDonald, 18 Kan. 114). If the cost exceeds the contract price, the subcontractors take their pro rata share and the owner is entitled to a credit of that amount where he has paid in full the claim of a subcontractor who has filed a lien. Chicago Lumber Co. v. Allen, 52 Kan. 795; Smalley v. Gearing, 121 Mich. 190. But the filing of the lien is merely a remedy for the enforcement of a right already vested in the lienor (Nixon v. Cydon Lodge, 56 Kan. 298; Central Trust Co. v. Richmond, etc., R. Co., 68 F 90, 41 L. R. A. 458), and the argument that when this claim has been satisfied without resort to the remedy no credit should be given the owner, on the supposition that the remedy might not have been invoked and the claim thereby lost, seems "palpably unjust" and to rest on truly "technical grounds." And see Dunlop v. Kennedy [Cal.] 34 P 92; Central Trust Co. v. Richmond, etc., R. Co., 68 F 90, 41 L. R. A. 458.—From 8 Columbia L. R. 235.

35. Gier v. Daiber, 148 Mich. 190, 14 Det. Leg. N. 183, 111 NW 773.

36. Schnauber v. Ahr, 53 Misc. 299, 103 NYS 195. Vendor under executory contract of sale giving permission for erection by vendee of permanent buildings after default of vendee, lien will lie against buildings. Schnaufer v. Ahr, 53 Misc. 299, 103 NYS 195.

37, 38. Salzer Lumber Co. v. Claflin [N. D.] 113 NW 1036.

39. One who does work and furnishes goods not in original contract but under direction of contractor is not a subcontractor but a materialman. People v. Campfield [Mich.] 14 Det. Leg. N. 825, 114 NW 659.

40. Subcontractor's employe. Burns' Ann. St. § 7255. Stephens v. Duffy [Ind. App.] 81 NE 1154. One having contract from subcontractor. Burns' Ann. St. 1901, § 7255. Stephens v. Duffy [Ind. App.] 83 NE 268.

41. Vandenberg v. P. T. Walton Lumber Co. [Okl.] 92 P 149.

42. St. 1898, § 3315. Principal contractor lost lien by having no money due and for violating of terms of the contract. Taylor v. Dall Lead & Zinc Co., 131 Wis. 348, 111 NW 490.

43. Shannon's Code § 5310. Except that subcontractors not being creditors of owner cannot enforce liens by judgment and execution. Warner v. Yates, 118 Tenn. 548, 102 SW 92.

44. Owner responsible to subcontractor if he pays contractor after notice. Merritt v. Crane Co., 126 Ill. App. 337.

45. Where owner paid into court sum actually due for actual work of subcontractor. O'Reilly v. Mahoney, 108 NYS 53.

46. The contractor must furnish the court with all possible information. Vandenberg v. P. T. Walton Lumber Co. [Okl.] 92 Pa. 149.

47. Where contract called for holding owner harmless from liens. George B. Swift Co. v. Dolle, 39 Ind. App. 653, 80 NE 678.

48. Owner paid contractor before part of materials furnished by subcontractor was delivered. Held, did not invalidate subcontractor's lien. Home Brew. Co. v. Johnson [Ind. App.] 83 NE 358.

49. Vandenberg v. P. T. Walton Lumber Co. [Okl.] 92 P 149.

50. Philip Carey Mfg. Co. v. Viaduct Place, 1 Ga. App. 707, 58 SE 274.

51. Code Civ. Proc. § 1184. As where contractor gets no lien for failure to properly file contract. Hubbard v. Lee [Cal. App.] 92 P 744.

terialman by the owner on the latter's order.[52] A materialman furnishing materials to a subcontractor who has no contractual relation with the owner is not entitled to a lien.[53] The materialman's right to a lien is not lost by knowledge that materials are not as required by specifications.[54] Where materialman furnishes material to a contractor knowing that contractor alone was liable and had no consent from the owner, the owner cannot be held and no lien accrues.[55, 56] The materialman can only get a lien where the owner has money due to the contractor.[57]

§ 5. *Acts and proceedings necessary to acquire lien. A. Notice and demand, statement to acquire lien.* See 8 C. L. 961—Under most statutes [58] timely notice of the claim of lien [59] is essential.[60] The notice must set forth that labor or materials claimed for were used in the owner's building,[61] the amount due and that payment has been demanded of the contractor and refused,[62] and in general must give the exact description of the property upon which the lien is to be placed.[63] The question

52. The presumption obtains only to the end that the premises may be subjected to lien for payment. Hubbard v. Lee [Cal. App.] 92 P 744. No defense that entire contract price be paid or part due pro-rated among claimants against contractor. Merced Lumber Co. v. Bruschi [Cal.] 92 P 844.

53. Cambridge Tile Mfg. Co. v. Germania Bk., 128 Ga. 178, 57 SE 311.

54. Howe v. Schmidt [Cal.] 90 P 1056.

55, 56. Evidence that contractor agreed to erect building for specific sum and materialman knew it. McMaster v. Douhit [Neb.] 110 NW 574.

57. But the owner cannot set off a reasonable compensation for using his own teams and labor to complete work. Tuck v. Moss Mfg. Co., 127 Ga. 729, 56 SE 1001; Mulliken v. Harrison, 53 Fla. 255, 44 S 426. One furnishing materials to subcontractor is not entitled to a lien unless there is money due to the subcontractor. Maneely v. New York, 105 NYS 976.

58. McNab & Harlin Mfg. Co. v. Paterson Bldg. Co. [N. J. Err. & App.] 67 A 103. Rev. St. 1892 § 1743 (§ 2211, Gen. St. Fla. 1906). Mulliken v. Harrison, 53 Fla. 255, 44 S 426.

59. Material furnished before a receiver appointed but notice not given to owner until six months after appointment, held not proper notice to supoprt a lien. Tenth Nat. Bk. v. Smith Const. Co. [Pa.] 67 A 874. Evidence that materialman had furnished no material for thirty days, and for twenty days house had been occupied by owner and meanwhile material had been returned and materialman knew of these facts, he cannot extend time to file lien by claiming he sent forty cents' worth of material to owner for contractor, said material being unnecessary and not used in house. Valley Lumber & Mfg. Co. v. Nickerson [Idaho] 93 P 24.

60. P. L. 1898, p. 538, § 3. Sufficient notice to mention, by one who installs bars and levers for window in building to say he has a lien "for labor and materials." McNab & Harlin Mfg. Co. v. Paterson Bldg. Co. [N. J. Err. & App.] 67 A 103. Failure to serve requisite notice or to register it as required by law forfeits lien rights. Shreveport Nat. Bk. v. Maples, 119 La. 41, 43 S 905. Forfeiture follows failure to file lien within limitation. Ninety days' limitation. Warner v. Yates, 118 Tenn. 548, 102 SW 92. Where the constitution itself gives a lien, mere failure to comply with some statutory provision does not forfeit lien rights. Blakeney v. Nalle [Tex. Civ. App.] 18 Tex. Ct. Rep. 56, 101 SW 875. Statutory notice not properly complied with. Held, no suit to enforce lien maintainable. Abbott v. Easton, 106 NYS 970. Ky. St. 1903, § 2468. Provide that statement must show amount due with all just setoffs. Held, statement that did not show full amount of original bill nor credits thereon, but set out claim for balance due, was substantial compliance with statute. Dobson v. Thurman, 30 Ky. L. R. 1331, 101 SW 310. Affidavit stated that material was furnished to improve premises and person named as owner was informed that lumber and material were to be furnished by affiant to contractor for the work. Also alleged that sum due was over all legal setoffs. List of items attached was headed by affiant's name as creditors of the contractor. Held sufficient. Kleinert v. Knoop, 147 Mich. 387, 13 Det. Leg. N. 1039, 110 NW 941. Also provides that statement must be verified. Held, where materialman signed statement before notary, lien not lost because notary forgot to write out and sign jurat. Id.

61. "This is to notify you that I have sold to [The contractor] for your building * * * material to the amount of," etc., held sufficient notice of lien to owner because it avers that material was used in the building. Vitelli v. May, 104 NYS 1082. Statement that labor performed and materials furnished were in moving of a building and placing on premises hereinafter named and the agreed price $3,460, held not sufficient. Norton & Gorman Cont. Co. v. Unique Const. Co., 121 App. Div. 585, 106 NYS 372.

62. P. L. 1898, p. 538, § 3. McNab & Harlin Mfg. Co. v. Patterson Bldg. Co. [N. J. Err. & App.] 67 A 103. Where total amount due could easily be obtained by addition from statements in notice, held sufficient notice. Hurley v. Tucker, 53 Misc. 464, 105 NYS 162.

63. Held sufficient to give description of property sufficient to identify it. Stephens v. Duffy [Ind. App.] 83 NE 268. Where notice gave location of lots on street and corner with diagram showing 25-foot lot, and in suit to foreclose it was made fifty feet and the judgment said fifty feet, held erroneous and insufficient description in notice.

of sufficiency of the description is one for the jury, being a question of fact.[64] The name of the owner of the premises is generally required.[65] Under most statutes the written agreement to do the work must be set forth in the claim filed.[66] Several instruments may be construed together.[67] In some states the terms of the contract, the time given, and the other conditions of the contract, must be fully stated.[68] Where contract for a specified sum for work is filed with the lien statement and it is complete in itself, no further statement of account need be filed.[69] Under the Louisiana Code, mere statement of amount charged with payments and credits is not sufficient.[70] Claims in their nature separate cannot be joined in a mechanic's lien notice,[71] and the parties acquire no rights to liens by joining them in a notice.[72] A claimant cannot bind any estate or interest other than the one named,[73] but where the lien is discharged for want of proper name, it is proper to amend name or begin new action.[74] The California statute making a deferred payment solely available in exoneration of material claims is not available to the owner unless its provisions have been strictly complied with.[75] Notice to the owner intercepts only the amount due or to become due at the time of the service of notice to the contractor, and the owner's liability is only in this sum.[76] Where the law requires filing of notice, failure to do so, though notice has been served on owner, is insufficient to establish a lien.[77] Where materials are furnished at various times to one building but one notice is necessary.[78] The notice being defective can be remedied by amendment,[79] in the discretion of the court,[80] which may also amend so as to remedy error in name of party.[81] Where no

Sprickerhoff v. Gordon, 105 NYS 586. If affidavit for a mechanics' lien contains sufficient description so that any one familiar with the locality can identify it, held sufficient. Guiou v. Ryckman [Neb.] 110 NW 759. Where notice described premises as a barn located at No. — P. street in borough of Manhattan, and also on lots on F. st. ditto, held sufficient description in notice. Hurley v. Tucker, 53 Misc. 464, 105 NYS 162. Sufficient if interested person is enabled to recognize and locate property with reasonable certainty; thus, where correct number of lot and erroneous number of block but correct street number is given it is sufficient. Doyle v. Wagner, 100 Minn. 380, 111 NW 275. Inaccuracy of description will not defeat lien if otherwise all right. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P 1077; McNab & Harlin Mfg. Co. v. Patterson Bldg. Co. [N. J. Err. & App.] 67 A 103. Where property is partially described by meets and bounds, held sufficient description as between owner and lien claimant. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P 1077.

64. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P 1077.

65. Alternate name of owner sufficient. Abelman v. Myer, 106 NYS 978.

66. Act June 4, 1901 (P. L. 431), where verbal contract was superseded by a written contract for plastering. Westmoreland Guarantee Bldg. & Loan Ass'n v. Connor, 216 Pa. 543, 65 A 1089.

67. Where contractor under contract to erect building gave materialman an order on the owner and executed an assignment purporting to transfer to the materialman sum due from the owner for materials furnished.

The materialman served on owner the order and assignment and notice, stating that the sum was due from the contractor but did not state "for labor and materials furnished." Held two instruments construed together were valid notice and created a lien. McNab & Harlin Mfg. Co. v. Patterson Bldg. Co. [N. J. Err. & App.] 67 A 103.

68. "Outside work on house and painting of inside blinds, $190," held insufficient to give lien. Porteous Decorative Co. v. Fee [Nev.] 91 P 135.

69. Guiou v. Ryckman [Neb.] 110 NW 759.

70. Civ. Code, art. 3272. Shreveport Nat. Bk. v. Maples, 119 La. 41, 43 S 905.

71, 72. Lowden v. Sorg, 129 Ill. App. 261.

73. J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co. [N. J. Err. & App.] 68 A 215. By asking lien against house only, claim against land is lost. Salter v. Goldberg [Ala.] 43 S 571.

74. J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co. [N. J. Err. & App.] 68 A 215.

75. Code Civ. Proc. §§ 1183, 1184. Failure to reduce contract to writing and file it before work was commenced deprives owner of benefit of statute. Stinson Mill Co. v. Nolan [Cal. App.] 91 P 262. Failure to defer last payment thirty-five days after completion deprives owner of benefit of statute. Id.

76. Hubbard v. Lee [Cal. App.] 92 P 744.

77. After notice served but before legally filed property was deeded by owner to another, held lien not attached to property. Shreveport Nat. Bk. v. Maples, 119 La. 41, 43 S 905.

78. Unless continuity of furnishing is broken so that a presumption of separate sales will arise. Taylor v. Doll Lead & Zinc Co., 131 Wis. 348, 111 NW 490.

79. Misdescription of property. Stephens v. Duffy [Ind. App.] 81 NE 1154.

80, 81. Alberti v. Moore [Okl.] 93 P 543.

objection is made to defects in a notice it is held waived.[82, 83] Under the Florida statute the notice of a materialman to owner, of furnishing of materials to contractor if in proper form, creates personal liability in the owner for the amount due to contractor at the time notice is served.[84] This liability is in addition to granting of a lien on the property.[85]

(§ 5) *B. Filing and recording claim, and statement thereof.* See 8 C. L. 964—Some states simply require a filing of a statement of a lien. This statement usually contains a just and true statement of the amount due, less credits, and should as a rule be verified.[86] It is usually required that the statement be filed in the public records within a certain time after the last item was furnished.[87] Failure to file as required by law, despite service of notice, works a forfeiture of lien.[88] The statement must be filed within the statutory period.[89] The time when the statute begins to run varies in different states but is usually the time of the completion of the work.[90] Under some statutes the year to enforce a lien does not begin to run until the date of the furnishing of the last item of labor and material furnished *in fact*.[91] The owner may be estopped to assert delay in filing the statement.[92] The lien statement must be detailed.[93] An unintentional mistake as to the correct amount due will not necessarily defeat the lien.[94] The materialman's lien is not complete until there is

82, 83. Luttrell v. Knoxville R. Co. [Tenn.] 105 SW 565.

84. Chap. 5173, p. 78, Acts 1903 (§§ 2193 et seq. G. S. 1906). McDonald v. Erwin, 53 Fla. 1079, 43 S 872.

85. McDonald v. Erwin, 53 Fla. 1079, 43 S 872.

86. Neuman v. Grant [Mont.] 92 P 43.

87. Where statute provides time for filing and claimant files and gives dates of service as required, he is estopped and cannot fix later date of services, thus extending time for claiming a lien. Canton Roll & Mach. Co. v. Rolling Mill of America, 155 F 321.

88. Shreveport Nat. Bk. v. Maples, 119 La. 41, 43 S 905.

89. Where contract fixing certain date for completion gives the architect power to extend time for certain reasons, statutory period runs from the date of the final certificate of artchitect. Bloomington Hotel Co. v. Garthwait, 227 Ill. 613, 81 NE 714, rvg. 130 Ill. App. 418. The right to a lien is barred by failure to file required statement within required time. Stone v. Juvinall, 125 Ill. App. 562. The claim for a lien must be filed within the statutory period. McNicholas v. Tinsler, 127 Ill. App. 381. Where contract made last payment due on issuance of architect's final certificate, the statutory period begins with the date of said certificate. Shields v. Sorg, 129 Ill. App. 266.

90. Where delays are owner's fault, statute does not begin to run until completion of the work after delays. Whitcomb v. Roll [Ind. App.] 81 NE 106. Laws 1899, p. 271, c. 118, § 9, gives lien two months from time of completion. Lichty v. Houston Lumber Co. [Colo.] 88 P 846. Where contract is for delivery "f. o. b. cars" and statement that men were to come later at owner's option to put up contracted goods, but this right was never exercised, held delivery f. o. b. cars was time when statute began to operate. McEwen v. Union Bk. & Trust Co., 35 Mont. 470, 90 P 359. Contract for decorating store did not fix time to complete work. Job finished May 6. June 20, owner objected to work and contractor made suggested changes. He filed lien within sixty days after completion of changes. Held, notice filed in proper season. Id. Where furnace was being repaired and all work done but supplying water pan, which had to be sent away for, held statute did not begin to run until pan was finally delivered to furnace owner. Home Brew. Co. v. Johnson [Ind. App.] 83 NE 358. Where testimony showed contract for two coats of paint on houses and painting porches, which was denied by contractor at first, held time to file lien began to run after second coat on porches had been put on. Rockwell v. Light [Cal. App.] 99 P 649. Where owner accepted building from general contractor who had completed his contract, the statute did not start running as against one who had furnished material to the contractor where at time of such acceptance the building was not entirely completed because certain grates, mantels, and tiling later placed therein by another contractor, were missing. Lichty v. Houston Lumber Co. [Colo.] 88 P 846.

91. Although that time need not be stated in the affidavit for lien. Doyle v. Wagner, 100 Minn. 380, 111 NW 275. All lumber under contract was furnished and some extras. Held one contract and period of sixty day limitation to file lien began to operate at end of furnishing of last lumber under contract or for extras. Taylor v. Dall Lead & Zinc Co., 131 Wis. 348, 111 NW 490.

92. Where owner leads the materialman to believe that building is not completed and the materialman delays filing lien because of owner's statements, the owner is bound by his statements in subsequent foreclosure of lien suit. Hubbard v. Lee [Cal. App.] 92 P 744.

93. Must give each item of labor or material showing nature and kind of work done and the kind and amount of material, together with the respective dates at which the labor was performed or material furnished. Shields v. Sorg, 129 Ill. App. 266.

94. Unintentional failure to make certain

a judgment fixing the amount,[95] and where there is no priority between owner and materialman to obtain a lien, a judgment against the contractor must be obtained first.[96]

§ 6. *Amount of lien and priority thereof.* See 8 C. L. 965—The owner can only be held liable for the amount due under the contract,[97] or as to a subcontractor, only as to the amount due the contractor at the time of notice,[98] but where the contract price is sufficient, the persons furnishing materials and labor in constructing a building are entitled to be paid in full.[99] The statute creating a lien in favor of a materialman does not create a debt against the owner but appropriates only what is due from money in owner's hands sufficient to satisfy materialman's claim, the owner being liable only as he would be liable to the contractor.[1] Where the liens exceed the contract price, each lienholder is entitled to his proportionate share only of the contract price and amounts paid by the owner to laborers or materialmen is considered as unsatisfied liens.[2] In some states a specific agreement with a subcontractor to pay contractor's bill by owner is given preference over other subcontractors who file notice of lien after agreement is made.[3] Where a materialman's lien exists, the owner having a reserve fund held from contractor's money cannot pay from this fund claims without liens until lienholder is first satisfied.[4] Interest is allowable upon the sum due under a mechanics' lien.[5] Interest is allowable upon the sum due under a subcontractor's lien.[6] Some statutes give lienholders priority over mortgageholders,[7] in which cases there must be some notice to the mortgagee.[8] The burden of proving such notice is on the lien claimant.[9] An assignment for the benefit of creditors does not take priority over a lien properly filed within statutory time.[10] Where the contractor has no lien because of failure of wife to sign husband's contract,

credits did not defeat. Treloar v. Hamilton, 225 Ill. 1021, 80 NE 75.

95. Mere filing of suit after legal notice filed not alone sufficient. Philip Carey Mfg Co. v. Viaduct Place, 1 Ga. App. 707, 58 SE 274.

96. Philip Carey Mfg. Co. v. Viaduct Place, 1 Ga. App. 707, 58 SE 274.

97. When notice is served on owner by a subcontractor, he can be held only in the amount due or to become due at that time. Hubbard v. Lee [Cal. App.] 92 P 744.

98. Laws 1907, p. 516, c. 418, § 4. Gribben v. Hoare, 54 Misc. 245, 104 NYS 445. Where the owner has paid the contractor in full and subcontractors acquire liens, the owner may recover as damage all losses and costs against the contractor. Vandenberg v. P. T. Walton Lumber Co. [Okl.] 92 P 149. Often he is allowed to recover for loss of rents for noncompletion under time specified in contract. Alberti v. Moore [Okl.] 93 P 543. Where owner waived right to complete a building within specified time, is estopped from claiming for loss of rent for noncompletion. Kotcher v. Perrin, 149 Mich. 690, 14 Det. Leg. N. 593, 113 NW 284.

99. Central Lumber Co. v. Braddock Land & Granite Co. [Ark.] 105 SW 583.

1. Operates same as a writ of garnishment. Lonergan v. San Antonio Loan & Trust Co. [Tex.] 19 Tex. Ct. Rep. 732, 104 SW 1061.

2. Central Lumber Co. v. Braddock Land & Granite Co. [Ark.] 105 SW 583.

3. L. made a contarct with a contractor to rebuild a building. Two of subcontractors had special agreements with L. to receive payment for the work they did. But the contractors also bought from other dealers who had no such agreement. The contractors abandoned the contract and the subccntractors without agreement then served notice of lien on L. and L. answered saying he had only enough on hand due to contractors to pay parties with whom he had specific agreement to pay. Held not liable to those who served notice of lien. Lake v. Brannin [Miss.] 44 S 65.

4. Nancolas v. Hitaffer [Iowa] 112 NW 382.

5. Lien Act 1895, §§ 1 and 22. Sorg v. Crandall, 129 Ill. App. 255. The fact that lien will be enforced against another than the one contracting does not preclude the allowance of interest. Id.

6. Lien Act 1895, §§ 19 and 22. Merritt v. Crane Co., 126 Ill. App. 337.

7. Ky. St. 1903, § 2463. Where lien is filed before mortgage is of record, where lien holder failed to file as required, held not prior to mortgage in absence of proof that mortgagee had notice of work done. Id. Scheas v. Boston & Paris, 31 Ky. L. R. 157, 101 SW 942.

8. Mere proof that mortgagee had knowledge that work was being done on mortgaged premises did not constitute notice of existence of a mechanics' lien. Scheas v. Boston & Paris, 31 Ky. L. R. 157, 101 SW 142.

9. Scheas v. Boston & Paris, 31 Ky. L. R. 157, 101 SW 942.

10. Debtor gave trust mortgage for benefit of creditors. Then without accepting rights under mortgage one creditor filed lien, within statutory period to do so. Held trust mortgage was really an assignment for the benefit of creditors and receiver took

and after another creditor had garnisheed money due under contract, held lien would not attach because wife signed contract to give contractor preference.[11] Where work is done in independent jobs and pay is had for same about once a month, and after mortgagee took possession under foreclosure, the mortgagee took subject only to lien for work done for 90 days prior to date of lien filing.[12] In New York fees may be paid before funds due to contractor are applied on liens.[13] In Wisconsin the purchaser under mechanics' lien sale took priority over mortgagee who purchased at prior mortgage foreclosure sale all rights of mortgagor and wife, and such lien sale purchaser acquired mortgagee's interest including mortgagor's wife's right of dower.[14] In some states assignments of moneys due can be made by contractors. The effect of the assignment on subsequent liens is usually fixed by statute.[15] Discharge from bankruptcy before judgment for mechanics' lien takes priority over the lien.[16]

§ 7. *Assignment and transfer of lien.* See 8 C. L. 966—As a general rule a lien is assignable. Usually courts require the lien to be perfected before it can be validly assigned.[17]

§ 8. *Waiver, loss, or forfeiture of lien, or right to acquire it.* See 8 C. L. 966—A lien is of course lost by failure to comply with prescribed steps to perfect it.[18] The lienholder may waive his right to a lien by stipulation,[19] not only for himself but for subcontractors as well,[20] but one who sells goods on contract and retains title in himself until purchase price is paid does not waive his right to a lien.[21] A subcontractor can waive his lien by agreement.[22] A lien can be waived only by express covenant or a covenant resulting from clear implication.[23] An agreement to release claims of third parties for liens does not affect the right of a general contractor to enforce his own lien.[24] A contractor can lose his lien by an equitable estoppel.[25] A mechanic's

subject to lien. American Mortg. Co. v. Merrick Const. Co., 104 NYS 900.

11. McMillan v. Schneider, 147 Mich. 258, 13 Det. Leg. N. 1054, 110 NW 961.

12. Fitzpatrick v. Ernst, 102 Minn. 195, 113 NW 4.

13. Ottman v. Schenectady Co-Operative R. Co., 104 NYS 137.

14. Connecticut Mut. Life Ins. Co. v. Goldsmith, 131 Wis. 116, 111 NW 208.

15. Laws 1897, p. 521, c. 418, § 15. Must be properly filed and when not filed is inoperative against subsequent liens. Van Kannel Revolving Door Co. v. Sloane, 104 NYS 653. Subcontractor notified contractors by letter of subletting of work to third parties and authorized retention of certain sums to pay third parties, also for contractors to retain enough to protect themselves against claims arising through third persons. Defendants answered to third persons agreeing to pay them direct sums due. Held letters constituted an equitable assignment. Id. But the letters were only a promise to retain the amounts they might earn and not an absolute promise to pay third party subcontractors (Id.), and the letters did not operate as a payment of sums due under original contract so as to defeat subsequent liens (Id.).

16. Philip Carey Mfg. Co. v. Viaduct Place, 1 Ga. App. 707, 58 SE 274.

17. An assignment before lien, properly filed as required by statute, carries with it no right of lien. Fleming v. Greener [Ind. App.] 83 NE 354.

18. See ante, § 5.

19. Where architect with right to enforce mechanics' lien against corporation signed contract with corporation, bondholder, and contractor, whereby contractor agreed to assume claim and architect and contractor agreed to release liens, held architect could not thereafter enforce lien. Wyss-Thalman v. Beaver Valley Brew. Co., 216 Pa. 435, 65 A 811.

20. Where one of several tenants in common contracted with others to improve joint property, he waived, in good faith, his rights to lien. Held also waiver as to subcontractors. Westmoreland Guar. Bldg. & Loan Ass'n v. Connor, 216 Pa. 543, 65 A 1089. Where subcontractor had notice of contract against liens with owner. Swift v. Dolle, 39 Ind. App. 653, 80 NE 678. Where materials are sold either on the personal credit of the owner or contractor, it raises a question of fact as to the waiver of the lien. Scott Mfg. Co. v. Morgan, 217 Pa. 367, 66 A 566. A covenant in a contract to give a **release** from liens bars the **filing** of a lien. Wyss v. Beaver Valley Brew. Co., 216 Pa. 443, 65 A 814.

21. Elwood State Bk. v. Mock [Ind. App.] 82 NE 1003.

22. Promise of payment by owner is sufficient consideration to support it. Harness v. McKee-Brown Lumber Co., 17 Okl. 624 89 P 1020.

23. Language supporting implication must be so plain that a mechanic can understand without securing professional legal interpretation. Concord Apartment House v. O'Brien, 128 Ill. App. 437.

24. Concord Apartment House Co. v. O'Brien, 128 Ill. App. 437.

25. Where in proceeding to enforce lien the contractor is a party and admits right of claimant to money due from owner on

lien right, although having its inception in a supposed contract with the owner, cannot be impaired by an agreement in the contract between owner and lessee wherein the lessee agrees to do all work of improvements and protect estate of the owner from liens.[26] Acceptance of security for maturing payments does not affect right to enforce balance unsecured.[27]

§ 9. *Discharge and satisfaction.*[See 8 C. L. 967]—A lien may be discharged by court upon filing a bond or undertaking,[28] and where so discharged the lienholder may sue on the bond after recovering judgment establishing the validity of his claim.[29] The sureties are not liable unless the lien is fully established.[30] The sureties should be made parties defendant in lien foreclosure.[31] Where sum is deposited with clerk of court in compliance with statute, a complete discharge of lien is made when no suit to foreclose is made or order to continue lien is made within one year after lien was filed.[32] The lien is discharged when year is up.[33] Some states make discharge of a mechanics' lien on payment obligatory.[34]

§ 10. *Remedies and procedure to enforce lien. A. Remedies.*[See 8 C. L. 968]—The remedy given by the lien statute is additional and cumulative of other remedies both against persons and property.[35] Bringing of lien proceedings by a conditional seller of materials is not such an election as precludes him from retaking title.[36] That claimant had formerly attempted to subject the interest of another person for the same debt is no defense.[37]

Jurisdiction and venue.[See 8 C. L. 968]—Suits to restrain a sale under judgment foreclosing mechanics' lien are properly brought in the county where levy is made and one of the defendants live.[38] In some states a justice court can enforce a mechanics' lien.[39] In New York the municipal court of the city is empowered to enforce mechanics' liens only so far as they do not exceed in amount $500 over and above costs and disbursements, and the court may grant a personal judgment for such a lien when established or for a money judgment to be enforced by an execution authorizing sale of property to satisfy it.[40]

Time of bringing action.[See 8 C. L. 968]—A lien must be enforced within the time fixed by statute.[41] Suit must be brought within the statute of limitation or for-

contract, contractor is estopped from later demanding money. Where one makes false charges knowingly in a lien statement to improperly burden owner's property, held rights to lien lost. Nancolas v. Hitaffer [Iowa] 112 NW 382. Where owner claimed he could reconstruct building after collapse during construction with funds left and due contractor, held no estoppel of lien claimant for material furnished. Id.; Union Lumber Co. v. Simon, 150 Cal. 751, 89 P 1077. Where owner was notified and promised to pay on written order of principal contractor, who refused to give order, then subcontractor notified owner to this effect and then decided not to press claim. The request was made about time payment on contract was to be made to principal contractor. Held no waiver of rights by subcontractor and not estopped from asserting lien. Taylor v. Dall Lead & Zinc Co., 131 Wis. 348, 111 NW 490.

26. Curtin-Clark Hardware Co. v. Churchill, 126 Mo. App. 462, 104 SW 476.

27. Concord Apartment House Co. v. O'Brien, 128 Ill. App. 437.

28. Pierce, Butler & Pierce Mfg. Co. v. Wilson, 118 App. Div. 662, 103 NYS 678; Danella v. Paradise, 52 Misc. 662, 102 NYS 807.

29. Pierce, Butler & Pierce Mfg. Co. v. Wilson, 118 App. Div. 662, 103 NYS 678.

30. Casey v. Connors Bros. Const. Co., 53 Misc. 101, 103 NYS 1103.

31. Vitelli v. May, 104 NYS 1082.

32. Laws 1907, p. 523, c. 418, § 18. Deposit to be returned when lien discharged. In re Thirty-Fifth St. & Fifth Ave. Realty Co., 121 App. Div. 625, 106 NYS 390.

33. In er Thirty-Fifth St. & Fifth Ave. Realty Co., 121 App. Div. 625, 106 NYS 390.

34. Rev. Codes 1899, § 4799. Penalty provided for failure to do so. Sheets v. Prosser [N. D.] 112 NW 72.

35. Claim for a lien not impaired by taking a judgment at law upon the unpaid account. Sorg v. Crandall, 129 Ill. App. 255.

36. William W. Bierce v. Hutchins, 205 U. S. 340, 51 Law. Ed. 828.

37. J. C. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co. [N. J. Err. & App.] 68 A 215.

38. Kinsey v. Spurlin [Tex. Civ. App.] 18 Tex. Ct. Rep. 379, 102 SW 122.

39. So far as to attachment of the property, then papers are to be returned to circuit court for levy, etc. Warner v. Yates, 118 Tenn. 548, 102 SW 92.

40. Daxe v. Hajek, 107 NYS 601.

41. Boylan v. Cameron, 126 Ill. App. 432.

feiture of lien rights will follow.[42] Under the New York law commencement of foreclosure within one year is not alone sufficient.[43]

(§ 10) *B. Parties.*See 8 C. L. 969—The subcontractor is a necessary party to a suit involving materials furnished to subcontractor.[44] The contractor is a proper but not a necessary party to a lien foreclosure suit.[45] In cases where a subcontractor sues, the owner and the contractors should be made parties defendant.[46] Although a bond has been substituted for a fund, all liens should be made party defendants in suit to foreclose.[47] A person jointly responsible with the owner is a proper party defendant and a judgment may be rendered against him as well as the owner.[48] The contractor and the owner are usually sued together.[49]

(§ 10) *C. Pleading, practice and evidence.*See 8 C. L. 989—In an action to foreclose a lien where sureties finished work, sureties are proper party defendants and not owners.[50] One who furnishes materials to a subcontractor is not entitled to foreclose his lien therefor in a suit to which the subcontractor is not a party.[51]

*Pleading.*See 8 C. L. 969—Statutes usually prescribe methods by which issues are joined in mechanics' lien cases.[52] Pleadings must be along a definite theory and state each theory in a separate paragraph.[53] A bill in equity to enforce a mechanics' lien must allege every fact essential to the right to such lien with accuracy and clearness.[54] The property involved must be accurately described.[55] In Indiana the complaint must show for whose immediate use and benefit the materials were furnished.[56] In Washington the complaint is sufficient if it contains a cause of action for either the enforcement of a lien or for general delivery.[57] A subcontractor's complaint must show a sum due to the contractor.[58] Where it is sought to enforce a personal liability, there must be appropriate allegations.[59] Amendment [60] and supplemental pleading [61]

42. Warner v. Yates, 118 Tenn. 548, 102 SW 92.

43. Laws 1897, p. 522, c. 418, § 16. Must also file notice of pendency. In re Gabler, 107 NYS 542.

44. Failure to make him party is waived. Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565.

45. Maneely v. New York, 105 NYS 976.

46. Warner v. Yates, 118 Tenn. 548, 102 SW 92.

47. Maneely v. New York, 105 NYS 976.

48. Seary v. Wegenaar, 104 NYS 1055.

49. Philip Carey Mfg. Co. v. Viaduct Place, 1 Ga. App. 707, 58 SE 274.

50. Maneely v. New York, 105 NYS 976. Leave to make party defendants being unnecessary. Id.

51. Maneely v. New York, 105 NYS 976.

52. P. L. 431 (June 4, 1901), provides for joining of issues by suing out writ scire facias and provides for affidavit of defense. Held formal plea before jury sworn not necessary. Wyss-Thalman v. Beaver Valley Brew. Co., 216 Pa. 435, 65 A 811.

53. Williamson v. Shank [Ind. App.] 83 NE 641.

54. Where bill set forth that complainant furnished material to owner's contractor for use in the building, on the owner's land, that a written notice of claiming of lien had been served on owner of land, that the notice was in all respects legal and properly made out as to its contents, that the owner was indebted to the contractor on his contract that the debt was due when the notice was served, in a sum more than sufficient to pay complainant, that the contractor abandoned contract before completion, and that complainant's claim had not been paid. Held demurrer on ground that there was no privity between owner and complainant, and that it was not directly alleged that the owner was indebted to contractor at the time of the filing and after the receipt of the notice, should not be sustained. McDonald v. Erwin, 53 Fla. 1079, 43 S 872. Complaint good even if exact date is not stated as to furnishing last item. Stewart v. Simmons [Minn.] 112 NW 282. Mere allegation that complainant has filed and is entitled to such lien is not sufficient. Canton Roll & Mach. Co. v. Rolling Mill Co. of America, 155 F 321.

55. Description of house as owned by certain man and situated on a definitely described seven acres of land held sufficient. Salter v. Goldberg [Ala.] 43 S 571.

56. Where stated that materials were sold to S., engaged as builder, by defendants, of dwelling on certain lot, materials to be used in erecting said dwelling, held sufficient. Williamson v. Shank [Ind. App.] 83 NE 641.

57. Where complaint showed work performed under contract and the filing of proper lien, held sufficient as against a general demurrer. Lee v. Kimball [Wash.] 88 P 1121.

58. Gribben v. Hoare, 54 Misc. 245, 104 NYS 445.

59. Daxe v. Hajek, 107 NYS 601.

60. Where statutes provide for filing of amended complaint "by order of court," and after description found incorrect court gave leave to amend, new **notice** is filed after time of notice has expired. Held notice not

are usually allowed as in other cases. The notice and the complaint may be construed together to assist in making the complaint sufficient.[62] The proof must not be in variance with the allegations of a complaint.[63]

A counterclaim for damages for failure to complete contract in time may be set up.[64]

Evidence and burden of proof.[See 8 C. L. 970]—The lienor has the burden to show that there is a sum to which his lien may attach.[65] The burden to show compliance with statute in respect to steps to initiate a lien is on the plaintiff.[66] The burden to establish set-offs, payment, or recoupment are on the defendant.[67] Where lienholder's claim of delivery of goods and use in construction is disputed, the burden of proving nondelivery and nonuse is on the owner.[68] General rules of evidence apply as to showing of the nature and extent of the labor or materials,[69] that they entered into the building sought to be charged,[70] as to amount due and payments thereon,[71] and as to the taking of necessary steps to perfect the lien.[72]

Practice.[See 8 C. L. 970]—Statutes usually give the same procedure in enforcement

sufficient to give lien. Brown v. Trimble [Wash.] 93 P 317.

61. Code Civ. Proc. § 544. Van Kannel Revolving Door Co. v. Sloane, 107 NYS 507.

62. Stewart v. Simmons [Minn.] 112 NW 282.

63. Where allegations were for joint contract of defendants with materialman and proof was but single contract with one, held fatal variance. Cocciola v. Wood-Dickerson Supply Co. [Ala.] 44 S 541.

64. Spears v. DuRant, 76 S. C. 19, 56 SE 652.

65. Merritt v. Crane Co., 126 Ill. App. 337. The burden is upon the subcontractor to show an indebtedness existing between owner and contractor to which his lien will attach. Id. Where plea in defense is made by owner that building and land are not subject to debt, it imposes on the claimant the burden of establishing that as against the party pleading all requisites of lien act are complied with. Vreeland Bldg. Co. v. Knickerbocker Sugar Refining Co. [N. J. Err. & App.] 68 A 215.

66. Rev. St. 1899, § 4207 (Ann. St. 1906, p. 2290). The lien paper should be produced in evidence to show date of filing. Boland v. Webster, 126 Mo. App. 591, 105 SW 34. The burden of proving that lien statement was filed in proper season is upon plaintiff. Sess. Laws 1899, p. 261, c. 118. Foley v. Coon [Colo.] 93 P 13. Where statutes give lienholders prior rights to mortgagees in cases where notice to mortgagee is required, the burden of proving notice is on the lien claimant. Scheas v. Boston & Paris, 31 Ky. L. R. 157, 101 SW 942.

67. Salter v. Goldberg [Ala.] 43 S 571.

68. Central Lumber Co. v. Braddock Land & Granite Co. [Ark.] 105 SW 583.

69. Verified account filed to secure mechanic's lien is not evidence of delivery of material. Searle & Chapin Lumber Co. v. Jones [Neb.] 114 NW 783. Memorandum of yardman in lumber yard is not competent in evidence to show delivery of goods to contractor or at building to which it was furnished, where teamster was lumber firm's own employe when he delivered goods. Valley Lumber & Mfg. Co. v. Nickerson [Idaho] 93 P 24. Allegation that work was performed, and materials furnished of specified value and kind on premises of defendant, is sufficient. Kerwin v. Post, 104 NYS 1005.

70. Evidence not sufficient to hold owner where failure to absolutely show that goods were ordered and actually used in building. Battle Creek Lumber Co. v. Poland [Mich.] 14 Det. Leg. N. 866, 114 NW 671. Where materials ordered by contractor were delivered at building being erected and it was built of same materials as those delivered, held prima facie evidence that building was built of these materials. Central Lumber Co. v. Braddock Land & Granite Co. [Ark.] 105 SW 583. There must be some evidence at least that the goods were furnished and used as claimed in the lien. Crane Co. v. Farnandis [Wash.] 90 P 1134. Where statutes allow a lien on "machinery," etc., in a "mill," etc., mere allegation and proof that machinery sold was to be placed or used in mill is not sufficient without further proof that machinery was intended for and was actually used in the mill in such manner as to become part of the realty. Id.

71. In suit against owner of building to enforce subcontractor's lien, held evidence of payments made by owner to other subcontractors within sixty days within which they could file liens but did not is admissible. Fossett v. Rock Island Lumber & Mfg. Co. [Kan.] 92 P 833.

72. It is not necessary for records to show every step in the perfecting of a lien, but there must be evidence of same before judgment or lien will be defeated. Wees v. Elbon, 61 W. Va. 380, 56 SE 611. Where owner had not filed a copy of his contract so that date of the completion of building could be ascertained, held that statements made to materialman as to date of completion were proper evidence and admissible to show date of completion and to show that owner was estopped from denying that the lien was not filed within the statutory period. Hubbard v. Lee [Cal. App.] 92 P 744. Question of time to file notice, evidence held not filed in proper time where, after house was finished, forty cents' worth of unnecessary and unused material sent to house. Valley Lumber & Mfg. Co. v. Nickerson [Idaho] 93 P 24. Code Civ. Proc., § 4. Evidence admissible to determine sufficiency of description. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P 1077.

to contractors and subcontractors.[73] An action to foreclose a mechanics' lien is an action in equity.[74] Where no special provision is made as to practice in enforcement of a mechanics' lien, the common law is followed as nearly as possible.[75] Some statutes provide for separate suits of enforcement on each piece of work done on a single contract.[76] Several actions on liens against the same property may be consolidated.[77] The method of appeal in mechanics' lien cases is usually established by statute.[78] The powers of a court to compel payments into court are not very broad in lien matters.[79] In enforcing alien, attachment is not usually necessary.[80]

Questions of law and fact.[See 8 C. L. 971]—The jury has the sole power to determine questions of fact.[81]

(§ 10) *D. Judgments, costs, and attorneys' fees.*[See 8 C. L. 971]—The judgment must be complete in itself and not dependent on other record recitals,[82] and must contain an accurate description of the property involved.[83] Under some statutes a decree may be entered both for a lien against the land and for a personal liability against the owner.[84] Where in an action both to recover a money judgment and enforce a mechanics' lien, if the lien fails the other relief may be granted in the absence of fraud.[85] Where the statute gives power to a court to adjust equities among all parties, it does not give power to court to award judgment on legal claims of subsequent contractor's surety or claims against sureties of original contractor.[86]

Costs and attorneys' fees.[See 8 C. L. 972]—The statutes provide for costs and attorney's fees; usually the sum paid for filing and recording the lien, and a reasonable attorneys' fee.[87] Allowance of costs is in the discretion of the court.[88] In some states it is held that provisions for allowance of a fixed sum for attorney's fees is unconstitutional.[89] Where fees are agreed upon in advance of lower court trial, the reviewing court will not interfere.[90]

73. Right of attachment. Warner v. Yates, 118 Tenn. 548, 102 SW 92.

74. Trial in court should be had of main issue before reference to referee is made O'Brien v. New York Butchers' Dressed Meat Co., 54 Misc. 297, 105 NYS 950.

75. Warner v. Yates, 118 Tenn. 548, 102 SW 92.

76. Rev. St. 1899, § 4227. Aimee Realty Co. v. Haller [Mo. App.] 106 SW 588.

77. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P 1077.

78. In Pennsylvania because the statute provides that procedure in lien cases shall be according to the common law, and the circuit court has only common-law powers, appeals from that court in lien cases must be by writ of error instead of by certiorari. Five-Mile Beach Lumber Co. v. Friday [N. J. Law] 66 A 901.

79. Where subcontractor's complaint had been dismissed and he appealed only as against the contractor, and after time to appeal against owner expired the latter paid amount due to contractor, the court after reversal as to contractor had no right to order him to pay into court an amount to satisfy the plaintiff's claim, where right to the money and the existence of lien are in dispute. Van Kannell Revolving Door Co. v. Sloane, 107 NYS 504.

80. Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565.

81. Whether there was a waiver of lien where it was a question of sale on credit of contractor or owner held question of fact for jury. Scott Mfg. Co. v. Morgan, 217 Pa. 367, 66 A 566. Where items of material sold four months preceding filing of lien are relied on to validate the claim for materials furnished before that date, it must appear that the items sold within the period are so connected as to constitute one debt and this was a question of fact for the jury. Bell v. Mecum [N. J. Err. App.] 68 A 149. Whether or not description is sufficient. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P 1077.

82. Where complaint stated property description correctly but judgment did not, held judgment insufficient. Salter v. Goldberg [Ala.] 43 S 571.

83. Property described as "beginning at the S. E. one-quarter" without indicating at which part of S. E. one-quarter to begin, is uncertain and unsufficient. Salter v. Goldberg [Ala.] 43 S 571.

84. Ch. 5143, p. 78, Acts 1903 (§ 2213, Gen. St. 1906). McDonald v. Erwin, 53 Fla. 1079, 43 S 872. Code Civ. Proc. § 3399. Seary v. Wegenaar, 104 NYS 1055.

85. Becker v. California Super. Ct. [Cal.] 90 P 689.

86. Maneely v. New York, 105 NYS 976.

87. Fifty dollars attorney's fees in a foreclosure held not an improper amount. Lee v. Kimball [Wash.] 88 P 1121. Code Civ. Proc. § 1863, not authorized to allow for preparation or verification of lienor nor for abstract of title to property covered by lien. Neuman v. Grant [Mont.] 92 P 43.

88. Referee in proceedings to enforce lien may award costs before applying proceeds due contractor to liens. Ottman v. Schenectady Co-operative Realty Co., 104 NYS 137.

89. Under Code Civ. Proc. As discrimination in favor of lien claimants. Merced

§ 11. *Indemnification against liens.*[See 8 C. L. 972]—A surety on a builder's bond against liens is not estopped from asserting any lien the contractor may have had.[91] A court may dismiss a lis pendens and discharge a mechanics' lien of record upon the filing of an undertaking,[92] or it may be discharged where bond is filed as allowed by statute [93] and where so discharged the lienholder can sue on the bond after judgment establishing his lien claim,[94] and this failing the lienholder can always sue to restore the lien.[95] The undertaking only holds good during the period provided for beginning action.[96] After discharge of lien by filing bond, and suit is brought to establish lien, sureties on the bond should be made party defendant.[97] Action on the bond cannot be begun until after entry of judgment in mechanics' lien action.[98] Service of notice of justification of sureties on undertaking to release lien must be personal.[99]

MEDICINE AND SURGERY.

§ 1. Public Regulation of the Business of Treating Disease, 828.
§ 2. Malpractice, 831.
§ 3. Recovery of Compensation, 832.
§ 4. Negligent Homicide by Physician, 833.
§ 5. Regulation of the Keeping and Sale of Drugs and Medicines, 833.
§ 6. Tort Liability of Druggists, 834.

§ 1. *Public regulation of the business of treating disease.*[See 8 C. L. 972]—Regulations of the business of treating disease are usually held constitutional where they are properly enacted.[1] They must not deny or unreasonably limit the right to practice such professions,[2] but may impose all reasonable regulations.[3] The classes of persons from whom license may be required rests largely in the legislative discretion.[4] Qualifications for practice and the manner in which they shall be evidenced may be prescribed.[5] It is customary and not an improper discrimination to exempt persons

Lumber Co. v. Bruschi [Cal.] 92 P 844. No allowance should be made for attorney's fees. Donaldson v. Orchard Crude Oil Co. [Cal. App.] 92 P 1046. Allowance is erroneous. Stimson Mill Co. v. Nolan [Cal. App.] 91 P 262. Code Civ. Proc. § 1195, providing for compensation for attorneys and costs in cases of lien claimant who establishes his lien, held unconstitutional as violating Federal constitution guaranteeing to all equal protection of the law. Builders' Supply Depot v. O'Connor, 150 Cal. 265, 88 P 982. Code Civ. Proc. § 1195. Also violates state constitution regarding uniformity of laws and prohibiting special laws as well as for violating the guaranty of rights of protecting, acquiring, and holding property. Id. Costs may be allowed, however. Id.

90. One hundred and fifty dollars agreed upon between parties on eve of trial in lower court. Housekeeper v. Livingstone [Wash.] 93 P 217.

91. Prescott Nat. Bk. v. Head [Ariz.] 90 P 328.

92. Danella v. Paradise, 53 Misc. 662, 102 NYS 807.

93. Mechanics' Lien Laws 1897, p. 23, c. 418, § 18, subd. 4. Pierce, Butler & Pierce Mfg. Co. v. Wilson, 118 App. Div. 662, 103 NYS 678.

94. Pierce, Butler & Pierce Mfg. Co. v. Wilson, 118 App. Div. 662, 103 NYS 678. The bond sureties do not become liable until the lien is fully established. Casey v. Connors Bros. Const. Co., 53 Misc. 101, 103 NYS 1103.

95. Danella v. Paradise, 53 Misc. 662, 102 NYS 807.

96. New York, ninety days. Clonin v. Lippe, 121 App. Div. 466, 106 NYS 58.

97. Vitelli v. May, 104 NYS 1082.

98. Dearing v. Boss, 55 Misc. 58, 106 NYS 219.

99. Boland v. Sokolski, 106 NYS 766.

1. Act May 18, 1893 (P. L. 94), not defective as to title. Commonwealth v. Clymer, 217 Pa. 302, 66 A 560.

2. Laws 1907, ch. 346, p. 483, regulating practice of pharmacy, does not limit the right to those who apply within ten days after its enactment. Minnesota State Pharmaceutical Ass'n v. State Board of Pharmacy [Minn.] 114 NW 245.

3. The practice of dentistry is not such a vested right as precludes the exercise of the police power of the state to enforce regulation. State v. McIntosh, 205 Mo. 616, 103 SW 1071; Id., 205 Mo. 589, 103 SW 1078.

4. Classification sustained. Watson v. State [Md.] 66 A 635. License may be required for practice of midwifry. Commonwealth v. Porn [Mass.] 82 NE 31.

5. It is not an abuse of legislative power to pass a law regulating qualifications of schools upon whose diplomas physicians may practice. Arwine v. Medical Ex'rs [Cal.] 91 P 319. One not having a diploma nor license in any state has no right to question constitutionality of law (Id.), nor is he entitled to an examination by a state board (Id.). Laws 1905, p. 214, § 8527 (Ann. St. 1906, p. 4002), does not impair rights of citizens of different states because it required having diploma from reputable college. State v. McIntosh, 205 Mo. 589, 103 SW 1078. License obtained on diplomas from reputable colleges. Acts March 21, 1903, p. 241 (Ann. St. 1906, §§ 8518-19). State v. Adcock, 206 Mo. 550, 105 SW 270.

in practice at the time of the passage of the act,[6] in which case certain formalities are usually required of those exempted.[7] Many states allow practitioners under license in other states to practise on showing license from the other state,[8] but only under strict regulations,[9] a license giving no extra territorial rights.[10] The power of regulation may be delegated to municipalities.[11] The state cannot charter a corporation to practice medicine but it may charter a corporation which contracts for treatment of disease by competent and licensed physicians.[12] The prescription [13] and sale [14] of intoxicants and dangerous drugs under the guise of medical treatment may be prohibited. In some states the license is in the nature of an occupation tax.[15] Where statutes provide for licenses without stating what they should contain, a receipt for payment of the occupation tax is a "license." [16] Mandamus will not lie to compel a state board of dental examiners to issue a certificate until it is shown that the applicant for the writ was entitled to the certificate,[17] nor will the allowance of an examination be compelled except on like conditions,[18] but where a state board is required to issue a license to a physician upon his complying with certain acts, and he does

May require both diploma and examination. 3 Ballinger's Ann. Codes and St., § 3025 (Pierce's Code, § 4467), sustained. State v. Dental Examiners [Wash.] 93 P 515. Some states require not only satisfaction as to qualifications to practice, but a diploma or license and an examination. St. 1901, p. 56, c. 51. Arwine v. Board of Medical Examiners [Cal.] 91 P 319.

6. Code 1904, art. 43, § 83. Where law allowed all physicians practicing where bill passed were exempted, held constitutional as not violating constitutional provision for equal protection of laws. Watson v. State [Md.] 66 A 635.

7. Revisal 1905, § 4468. Certificate must be made in accordance with law and properly filed with secretary of state. State v. Hicks, 143 N. C. 689, 57 SE 441. Section 1-4, Dental Law of 1899. All engaged in practice of dentistry in state at time law went into effect are entitled to registry and certificate on filing affidavit. Sherburne v. Dental Examiners [Idaho] 88 P 762. Mere filing of affidavit is not sufficient where filer was not in practice at time in state. Id. Certificate must not be filed with party other than one named in law. Id. Must register as required by law and file proper certificate or copy of diploma or certain affidavits. State v. McIntosh, 205 Mo. 616, 103 SW 1071. Time of filing not of essence of requirement but directory. Dentist filing after specified time was entitled to certificate and practice. Id.

8. St. 1901, pp. 57, 59, c. 51, § 5, 6. The license must be issued under requirements as high as those of California. Arwine v. Medical Examiners [Cal.] 91 P 319.

9. The state board need not recognize license from another state until the petition shows that his license was issued under as high a set of qualifications as those imposed by California. Arwine v. Medical Examiners [Cal.] 91 P 319.

10. The mere fact that a man is admitted to practice in one state does not allow him to practice in another. Must have a license to practice in New York in addition. People v. Somme, 104 NYS 946.

11. Code, §§ 700 and 2581, not in conflict. City of Fairfield v. Shallenberger [Iowa] 113 NW 459. Municipal license tax of $50 yearly not unreasonable is not in violation of personal rights of citizens nor unequal taxation. Id.

12. Even though practicing physician was owner of 98 per cent of stock (of hernia cure institute). State v. Lewin [Mo. App.] 106 SW 581.

13. Rev. St. 1899, § 3050 (Ann. St. 1901, p. 1750) forbids prescribing intoxicating liquors for nonmedical purposes. State v. Davis, 126 Mo. App. 235, 102 SW 1103. Insufficient to show that person was not sick. Must show physician knew of this fact in order to convict. Weatherford v. State [Tex. Cr. App.] 102 SW 1146. Where physician was also a druggist and as such sold cocaine and afterward made out a prescription to cure case where law allowed sale on a prescription, held violation of law. State v. Willis [Mo. App.] 106 SW 584.

14. See post, § 5, and see Intoxicating Liquors, 10 C. L. 417.

15. Acts 25th Leg. (1897) p. 49, c. 18, subd. 13. License and tax on traveling medical specialists. Fouts v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 109, 101 SW 223. Rev. St. 1895, art. 5049, subd. 3. Traveling medical salesmen except those selling purely wholesale for a wholesale drug house. Needham v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 294, 103 SW 857.

16. Pen. Code, 1895, art. 112. Licensing doctors and surgeons. Fouts v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 109, 101 SW 223.

17. Refusal to appear before board and prove herself holder of exemption certificate. State v. McIntosh, 205 Mo. 616, 103 SW 1071. Where applicant failed to take the required examination, though applicant claimed registration law was unconstitutional. Rosenkrans v. State Board of Registration in Dentistry [R. I.] 67 A 367. Where board exercised discretion in investigating reputability of college and found same unsatisfactory. State v. Mathews, 77 S. C. 357, 57 SE 1099. For laches where had practiced for 12 years without complying with law, which would have allowed him to practice without examination. State v. McIntosh, 205 Mo. 589, 103 SW 1078.

18. Where applicant failed to make clear his right to an examination. State v. McIntosh, 205 Mo. 589, 103 SW 1078.

comply, the board can be compelled by mandamus to issue the license,[19] and the exercise of the board's discretion may be reviewed.[20] The state board may inquire into right of a petitioner for registry or certificate to practice.[21]

Revocation of license of professional status. See 8 C. L. 974—Suits to revoke a license are suits in equity and hence the trial by jury is not an essential right of the defendant.[22] The district court in Oklahoma has exclusive jurisdiction to determine whether or not a physician's license to practice was obtained by fraud.[23] The territory or state is generally not only a proper but a necessary party to a suit to annul a license.[24] The statute of limitations does not apply to cases of suits by boards to revoke license of a physician.[25]

Expulsion from society. See 8 C. L. 975

Prosecution for violation of regulative acts. See 8 C. L. 975—What constitutes the practice of medicine within licensing statutes is usually defined by the statute.[26] The prescribing of medicine is usually within such statutes,[27] but whether treatment without drugs is included depends on the language of the statute.[28] Whether or not there has been a public "practice" of medicine is usually for the jury to determine.[29] It is a separate offense in some states to append the title "M. D." to one's name without authority from some medical degree.[30] Expert testimony is admissible to show nature of duties to determine whether person is acting as a medical practitioner.[31] It is no defense to show a registration after the date prescribed by a law to regulate and license physicians.[32] The indictment must contain only necessary allegations to conform to the law under which it is drawn.[33] The rules as to sufficiency of the com-

19. Acts March 21, 1903, p. 241 (Ann. St. 1906, §§ 8518-9) provides any student presenting diploma properly made out and a specified fee is entitled to certificate from state health board to practice. State v. Adcock, 206 Mo. 550, 105 SW 270.

20. The duties of the board are administrative or ministerial but not judicial. State v. Adcock, 206 Mo. 550, 105 SW 270.

21. This investigation is more jurisdictional than to ascertain qualifications and requires no peculiar or professional knowledge. Sherburne v. Dental Examiners [Idaho] 88 P 762.

22. Gulley v. Ter. [Okl.] 91 P 1037.

23. The court can by proper proceeding revoke the license on showing of fraud. Gulley v. Ter. [Okl.] 91 P 1037.

24. Gulley v. Ter. [Okl.] 91 P 1037.

25. Suit may be begun at any time and after any lapse of time following an offense by physician. State Medical Examining Board v. Stewart [Wash.] 89 P 475.

26. Rev. Code 1852, as amended by Laws 1893, p. 58, c. 7, requires every one who prescribes remedies for the cure of bodily disease to have license, unless treatment is accompanied by direction as to use of drugs, medicines, or remedies. State v. Lawson [Del.] 65 A 593. Where no medicines or drugs were used but man by sign and card held himself out as a doctor with office hours, talked with patients, gave them prescribed directions for diet, care and treatment by rubbing, and professing to cure all diseases simply by diet and massage, held practicing of medicine. People v. Allcutt, 117 App. Div. 546, 20 Crim. R. 560, 102 NYS 678.

27. Kirby's Dig. § 5243, provides that a person "practices" when he repeatedly prescribes for the use of any person of any medicine for cure or relief of bodily disease. Foo Lun v. State [Ark.] 106 SW 946. Mere single instance of a treatment is not practicing." Id. Proof that medicine was prescribed to the sick is sufficient to show practice. State v. Bresee [Iowa] 114 NW 45. Where defendant is charged with recommending a medicine for a fee, defense of "domestic medicine" administered is unavailing. Id. "Shall prescribe for a fee for like use, any drug or medicine," except "the administration of domestic medicines." State v. Huff, 75 Kan. 585, 90 P 279. Relief supplies which are "food" as well as "medicines" are still "medicines" so far as the word is legally used. State v. Bresee [Iowa] 114 NW 45.

28. Under the Deleware statutes a **hypnotist and massage healer** need not take out a license. State v. Lawson [Del.] 65 A 593. Whether a **midwife** is a medical practitioner is debatable. Expert testimony is admissible to show nature of work of midwife Commonwealth v. Porn [Mass.] 81 NE 305. **Trained nurse practicing obstetrics** with instruments and prescriptions without license is guilty of violating medical practitioner's license law. Commonwealth v. Porn [Mass.] 82 NE 31.

29. State v. Bresee [Iowa] 114 NW 45.

30. People v. Somme, 104 NYS 946.

31. Midwife. Commonwealth v. Porn [Mass.] 81 NE 305.

32. Physician registered in September, when law provided he would have to be registered by previous March. Commonwealth v. Densten, 217 Pa. 423, 66 A 653.

33. Where medical license law provided that notices of provisions of law must be sent to any one practicing without a license and indictment failed to allege sending of notice, held sufficient indictment. Watson

plaint follow the usual and general rules of practice.[34] The burden of showing exemption from operation of a registry law is on the defendant.[35] That defendant had no license may be proved by the testimony of a clerk that no such license appeared on the records of the medical council.[36] The court can only define words of the indictment to a jury where they are technical and easily misunderstood, all other ordinary language being left for the jurymen themselves to define.[37]

§ 2. *Malpractice.*See 8 C. L. 977—A physician must use that care and skill which is exercised generally by physicians of ordinary care and skill in similar communities,[38] or the "same general neighborhood."[39] The question of what is negligence is determined by the facts in each case[40] and is ordinarily for the jury.[41]

*Negligence by nurses.*See 8 C. L. 977

*Damages.*See 8 C. L. 978—The measure of damages for injuries sustained by a patient as a result of unskillful or negligent treatment by a physician is a reasonable compensation for the bodily pain and mental suffering endured, and the permanent impairment of ability to earn money, which are the natural and proximate result of such treatment.[42]

*Malpractice by nonmedical practitioners.*See 8 C. L. 978

*Remedies and procedure.*See 8 C. L. 978—The complaint in a malpractice suit should contain a general statement of the facts in the case.[43] The result of the treat-

v. State [Md.] 66 A 635. Where certain dentists were exempted from registry, an indictment charging violation of registry law without an allegation that defendant was not one who had been exempted from registry is sufficient. Revisal 1905, §§ 4468-4470. State v. Hicks, 143 N. C. 689, 57 SE 441.

34. An allegation that defendant prescribed and recommended for a fee drugs and medicines for the cure and relief of bodily infirmity and disease of another person is supported by evidence showing that defendant administered outward treatment for cancer to a patient who agreed to pay defendant $50 down and $50 when cured, the liniment prescribed being mentioned as a remedy for the cancer. State v. Huff, 75 Kan. 585, 90 P 279.

35. State v. Hicks, 143 N. C. 689, 57 SE 441.

36. Such proof was deemed admissible in the discretion of the trial court, the original records being beyond the county. Commonwealth v. Clymer, 217 Pa. 302, 66 A 560.

37. State v. Bresee [Iowa] 114 NW 45.

38. Requirement of "his best skill and ability" erroneous. Dorris v. Warford, 30 Ky. L. R. 963, 100 SW 312. The physician cannot be held to account for negligence where he made an honest mistake in a case where there was reasonable doubt as to existing conditions. This is an exception to ordinary rule that failure in the exercise of best judgment is not excuse for negligent act. Staloch v. Holm, 100 Minn. 276, 111 NW 264. Where surgeon advised amputation saying there was but slight chance for recovery without amputation and patient took it and the recovery was bad, held no negligence. Nelfert v. Hasley, 149 Mich. 232, 14 Det. Leg. N. 425, 112 NW 705. A practitioner is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the average of the members of the profession. Verdict of malpractice held not justified where patient died of pneumonia, there being no evidence that lack of care and skill actually brought about death. Red Cross Medical Service Co. v. Green, 126 Ill. App. 214.

39. Difference between "same neighborhood" and "same general neighborhood," the latter being a much broader term. Testimony of surgeon as to usual treatment under requirements of good surgery, but not as practiced in same general neighborhood, held admissible where no mention of neighborhood was made. Sheldon v. Wright [Vt.] 67 A 807.

40. Mortification in broken arm set in and amputation followed. Mortification may have resulted from use of water and cloths by patient but this fact itself held not to relieve doctor who knew thereof, and who knowing of infection should have used reasonable care and skill to treat infection. Baute v. Haynes, 31 Ky. L. R. 876, 104 SW 272. Where physician failed to perform a primary operation for shock. Staloch v. Holm, 100 Minn. 276, 111 NW 264. Question of whether or not operation should have been performed should be based on conditions at time of operation and not subsequent conditions. Id. Physician prescribed 2 per cent solution of corosive sublimate as wash for ulceration of eyes. Failed to state to use two drops in quantity of water and patient lost sight of both eyes. Held negligence and $1,500 vedict upheld. Thompson v. Martin [Mo. App.] 106 SW 535.

41. Where plaintiff claimed innoculation of syphilis by contact with instruments in course of dental treatment. Bates v. Dr. King Co., 191 Mass. 585, 77 NE 1154. Where jury found that negligence was present causing patient's blindness, a verdict of $1,500 did not necessarily, by its smallness, show jury was actuated by sympathy. Thompson v. Martin [Mo. App.] 106 SW 535.

42. Dorris v. Warford, 30 Ky. L. R. 963, 100 SW 312.

43. Allegation that all directions of physician were followed in caring for wound after operation for tumor is sufficient, it being

ment in itself is not conclusive proof of negligence.[44] A physician is not ordinarily negligent in relying upon the purity of standard remedies compounded by reputable pharmacists,[45] the burden of showing malpractice in general being upon the plaintiff.[46] Where it appears that patient departed from the physician's instructions, the burden is upon the former to show that it did not result in the injury complained of.[47] Not only expert and defendant's own testimony is admissible, but all relevant evidence on question of defendant's treatment.[48] There is no presumption in the nature of evidence that a physician had and exercised requisite care and skill,[49] or in any way did his duty in treating the case.[50] The plaintiff may prove the ill will of the physician defendant toward him as well as acts of intent to injure plaintiff.[51] The jury may examine the injury in a private room.[52] The patient who sues a physician for malpractice waives the law making privileged the information of patient to physician,[53] but this extends only so far as it relates to the ailment in question and its treatment as disclosed in the action. The same holds true as to consulting physicians but not to a new physician called in to give subsequent treatment.[54] In malpractice suits, evidence of a second phycisian, who was called in after first physician was dismissed, that the second physician abandoned the case on being told that first physician had not been paid, is inadmissible.[55] Where there is evidence of malpractice, it is improper to instruct that defendant employed ordinary and recognized treatment as this is a controverted fact.[56]

§ 3. *Recovery of compensation.* See 8 C. L. 979—In the absence of express contract, a physician may charge the ordinary and reasonable sum usually charged by physicians of like standing in that locality,[57] or, as it is sometimes said, the reasonable value of the services rendered.[58] The professional standing of the physician in the community is an element to be considered.[59] An implied contract of hire for medical services cannot be based upon custom in general,[60] but a surgeon called to attend a man in an emergency has a quasi contract with patient for his treatment

unnecessary to minutely describe treatment. Blackburn's Adm'r v. Curd [Ky.] 106 SW 1186.

44. Instruction to that effect proper. Sheldon v. Wright [Vt.] 67 A 807. Death of patient immediately following an operation is not prima facie evidence of physician's negligence. Staloch v. Holm, 100 Minn. 276, 111 NW 264.

45. Ball v. Skinner, 134 Iowa, 298, 111 NW 1022.

46. Sheldon v. Wright [Vt.] 67 A 807.

47. Held error to instruct that defendant must show that injury did so result. McIlwain v. Gaebe, 128 Ill. App. 209.

48. Sheldon v. Wright [Vt.] 67 A 807. Evidence that treatment of limb was same as used by defendant for 339 cases before was properly refused. Id. Evidence of complaints made regarding injured limb made to a daughter is admissible. Id. Evidence of brother that he furnished cash to go to another city for another operation held improper. Id. X-ray pictures permissible in evidence. Id. Evidence that plaintiff could not use alleged injured limb as formerly held properly admitted. Id. Evidence that defendant was paid by plaintiff's employes a yearly salary to care for employes held admissible. Id.

49, 50. Sheldon v. Wright [Vt.] 67 A 807.

51. In an action for malpractice in treatment of plaintiff's wrist, it was held improper to admit evidence of subsequent acts of incivility to show defendant's ill will or intent to injure plaintiff. Willard v. Norcross, 79 Vt. 546, 65 A 755. Where manifestations of ill will did not appear for five month's after alleged injury through malpractice. Id.

52. Door but slightly open and people in court room could scarcely see in, held proper. Sheldon v. Wright [Vt.] 67 A 807.

53, 54. Hartley v. Calbreath [Mo. App.] 100 SW 570.

55. Short v. Frink [Cal.] 90 P 200.

56. Hartley v. Calbreath [Mo. App.] 106 SW 570. Unnecessary to allege that no other physician was obtainable where it was shown that patient had only himself and his family to attend him after his physician refused longer to care for him. Id.

57. Proof of what was charged another person for similar services is not admissible. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006.

58. In the absence of contract charges must be reasonable. Evidence held to sustain charges. Chicago, etc., R. Co. v. Westgate, 129 Ill. App. 146.

59. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006. In estimating his services the physician may show his skill and learning. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

60. Where attempt was made to show it was customary and usual to hire such services performed at lying-in homes, held evidence of custom properly barred. Molt v. Hoover [Ind. App.] 81 NE 221.

and can recover reasonable compensation.[61] As in other cases, one cannot be bound by the agreement of an agent acting outside the scope of his authority,[62] but where it was the custom for an employer to call a physician to attend an employe and to have him finish treatment of his injuries, the physician has the right to believe that he, on being called in the usual way, was giving service to an employe, and that as usual the employer would pay for medical services so rendered.[63] In some states medical services rendered to prisoners even where statute empowers the employment cannot be paid for on a claim against the county filed by physician.[64] The question of outcome of treatment does not enter into question of services unless the patient has a direct agreement to that effect,[65] but malpractice can be set up to defeat a claim for services.[66] In some states it is required that a physician suing for balance due for professional services must prove his right to practice.[67] Whether the contract sued on was made,[68] and the reasonableness of a charge,[69] are for the jury. Evidence of wealth and ability of defendant to pay is admissible on the issue of whether physician thought defendant could pay for services,[70] but this evidence is not admissible in measuring value of physician's services.[71] An instruction as to what a jury should consider in fixing amount of compensation without first instructing them to find for plaintiff on the main issue before considering the quantum meruit, is erroneous.[72] Interest may be allowed on physician's bills on balance due for services.[73]

§ 4. *Negligent homicide by physician.* See 4 C. L. 639

§ 5. *Regulation of the keeping and sale of drugs and medicines.* See 8 C. L. 960

—In the exercise of the police power, pharmacists may be licensed.[74] The practice of pharmacy is not such a vested right that the state under its police power cannot regulate it,[75] and an occupation tax may be imposed on itinerant vendors.[76] Compliance with the statute in force gives no such vested right as to preclude proper amendments.[77] An exemption of wholesalers does not invalidate a license law.[78] License fees are usually held not a tax upon the business but an occupation tax for support of ma-

61. Where bystander called doctor to attend injured man in the street, doctor operating to save man's life, held could recover reasonable compensation for services. Cotnam v. Wisdom [Ark.] 104 SW 164.

62. Manager held to have authority to employ physician for injured employe. Freeman v. Judge Baking Co., 126 Mo. App. 124, 103 SW 565.

63. But not after notice that patient was not an employe and that employer was not responsible. Burton v. Fletcher Mfg. Co. [R. I.] 67 A 366.

64. Rev. St. 1899, § 8134 (Ann. St. 1906, p. 3853). Claim must be paid by sheriff, a jailer, who may then recover from the county as on other claims in criminal cases. Miller v. Douglas County, 204 Mo. 194, 102 SW 996.

65. Where attempt was made to reduce value of services by making physician prove that operation was successful, held improper. Cotnam v. Wisdom [Ark.] 104 SW 164.

66. Comp. Laws, § 10426. Vandenberg v. Slagh [Mich.] 14 Det. Leg. N. 706, 114 NW 72.

67. But where witnesses testify that claimant is a city physician, the burden is on defendant to show that physician has no right to practice. Leggat v. Gerrick, 35 Mont. 91, 88 P 788.

68. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

69. Marshall v. Bahnsen, 1 Ga. App. 485, 57 SE 1006. Fee of $12,666 awarded by jury. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

70. Where physician claimed father who was wealthy had agreed to pay for services rendered to sick son. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

71. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571. Where patient became unconscious in accident and physician operated to save his life. Cotnam v. Wisdom [Ark.] 104 SW 164. Nor is evidence tending to show that patient was a bachelor and his estate would go to nephews and nieces. Id.

72. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

73. Leggat v. Gerrick, 35 Mont. 91, 88 P 788.

74. Rev. Laws 1905, §§ 2327-2341, are proper exercise of the police power. State v. Hovorka, 100 Minn. 249, 110 NW 870.

75. State v. Hovorka, 100 Minn. 249, 110 NW 870. Laws 1907, c. 346, p. 483, does not limit the right to registration to those applying within 10 days after its passage and is not unreasonable. Minnesota State Pharmaceutical Ass'n v. State Board of Pharmacy [Minn.] 114 NW 245.

76. Rev. St. 1895, act. 5049, subd. 3. Needham v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 294. 103 SW 857.

77. Rev. Laws 1905, §§ 2327-41, providing for license for druggists. State v. Hovorka, 100 Minn. 249, 110 NW 870.

78. Rev. St. 1895, art. 5049, subd. 3. Needham v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 294, 103 SW 857.

chinery of regulation of sale of goods.[79] In Washington liquors may be sold on prescription by a druggist without a license.[80] Some states like that of New York, provide certain drugs can be sold only by licensed druggist, while others can sell other drugs.[81] Sale by unlicensed employe under supervision of licensed pharmacist is sometimes permitted.[82]

§ 6. *Tort liability of druggists.*See 8 C. L. 980—A druggist is held to a high degree of care in the sale of drugs,[83] and is liable for the negligence of his clerk.[84] The purchaser has a right to presume he is receiving a proper and harmless drug,[85] and the burden is on the druggist to show error was caused by pure mistake and during exercise of due care,[86] but the druggist is not responsible for injuries to third parties from sales of poisons to customer.[87] A complaint against a druggist is sufficient if it alleges that act was negligent without reciting facts and circumstances of the alleged negligence.[88] The jury in the case of a suit against a druggist for damages for giving patient wrong drug can assess damages only on a basis of testimony relevant to the issue of damages and not on all the facts of the case.[89]

MERCANTILE AGENCIES.[90]

MERGER IN JUDGMENT; MERGER OF CONTRACTS; MERGER OF ESTATES, see latest topical index.

MILITARY AND NAVAL LAW.

§ 1. Military and Naval Organization, Maintenance and Enlistment, 834.
A. Regular Army and Navy and Marine Corps, 834.
B. Militia, 836.
§ 2. Orders, Regulations, and Discipline; Promotion and Discharge, 837.
§ 3. Military and Naval Tribunals, 837.
§ 4. Civil Status, Rights and Liabilities of the Military and Navy and of Military and Naval Reservations, 838.
§ 5. Martial Law, 838.
§ 6. Soldiers' Homes and Indigent Soldiers, 838.

The scope of this topic is noted below.[91]

§ 1. *Military and naval organization, maintenance, and enlistment. A. Regular army and navy and marine corps.*See 8 C. L. 981

*Pay and subsistence.*See 8 C. L. 982—The Federal statute makes it a criminal offense to knowingly purchase or receive in pledge clothing or other public property from a soldier not having the right to sell or pledge the same,[92] but there is a con-

79. State v. Hovorka, 100 Minn. 249, 110 NW 870.

80. Laws 1887-8, p. 125, c. 72, § 6 (Ballinger's Ann. Code & St., § 2937). City of Seattle v. Foster [Wash.] 91 P 642. Not repealed by Laws 1899, p. 222, c. 121, § 15, requiring pharmacist to enter sales of liquor for medicinal purposes only in a book. Id.

81. Pharmacy Laws 1900, p. 1482, c. 667, § 200. State Board of Pharmacy v. Matthews, 52 Misc. 492, 102 NYS 507. Tincture of arnica, iodine, and spirits of camphor, which should be carefully dispensed and cannot be promiscuously sold by any one. Id.

82. Sale of uncompounded poisons in put up bottles and labeled, made by unlicensed clerk when licensed man was across street, held improper under Pharmacy Laws 1900, c. 667, p. 1482, § 200. State Board of Pharmacy v. Matthews, 52 Misc. 492, 102 NYS 507.

83. Acetanilide sold for phosphate of soda. Knoefel v. Atkins [Ind. App.] 81 NE 600.

84. Where 86 per cent solution of carbolic acid was given by druggist's clerk to customer for a wound wash without label or instructions, held to be negligence and recovery for injuries sustained was proper. Horst v. Walter, 53 Misc. 591, 103 NYS 750.

85. Horst v. Walter, 53 Misc. 591, 103 NYS 750.

86. Knoefel v. Atkins [Ind. App.] 81 NE 600.

87. Where poison sold to minor who injured another minor with it, held no liability on druggist to third party. McKibbin v. Bax [Neb.] 113 NW 158.

88, 89. Knoefel v. Atkins [Ind. App.] 81 NE 600.

90. No cases have been found for this subject since the last article. See 2 C. L. 890.

91. It includes all matters relating to the organization and government of the armed forces. It excludes matters relating to pensions (see Pensions, 8 C. L. 1343), bounties (see Bounties, 9 C. L. 406), War (see War, 8 C. L. 2257), international law (see International Law, 10 C. L. 415), and public contracts (see Public Contracts, 8 C. L. 1473).

92. Word "knowingly" in Rev. St. § 5438, applies only to question whether person pur-

flict as to whether a civilian is liable for receiving in pledge military clothing issued to and paid for by the soldier out of his clothing allowance.[93]

A volunteer officer who was allowed two months' extra pay for service outside the United States, under act of January 12, 1899, on muster out and discharge, is not entitled to the one month's extra pay authorized by that act for service within the United States.[94] An officer ordered to a command which would have devolved upon him by seniority without any order by reason of the absence of his superior is not entitled to additional pay.[95] Refusal of a certificate of honorable discharge to a volunteer officer as of the date when his regiment was mustered out, on the mistaken ground that he had already been dishonorably discharged, is not an active retention of such officer in the service so as to entitle him to pay after that date.[96] Civil war soldiers relieved of the charge of desertion by act of congress were not given pay, bounty, or allowances while they were absent.[97]

The navy personnel act provides for the same pay to officers of the navy as that allowed for officers of corresponding rank in the army.[98] While the object of the act was to equalize army and navy pay, it did not operate to reduce the pay of officers in service at the time of its enactment.[99] The formalities of one's entry into service are immaterial on the question of right to pay for services actually performed and accepted.[1] A passed assistant surgeon in the navy with rank of lieutenant is entitled to the pay of a captain in the army of the mounted class.[2] A naval officer appointed for temporary service during the Spanish War, on receiving his extra pay after return home and discharge, is entitled to sea pay, not waiting orders pay.[3] An officer assigned to duty on personal staff of a rear admiral as flag lieutenant is "an aid" and as such entitled to extra pay.[4] Longevity pay of a naval officer is computed on the yearly pay of the grade or rank of the officer entitled thereto.[5] A retired naval officer ordered to active duty is not entitled to longevity pay.[6] A subordinate who without authority is suspended or dismissed from service by another subordinate,[7] but restored by superior authority and furloughed without pay, is entitled to compensation

chasing or receiving the property in pledge knew or under the circumstances should have known that vendor or pledgor was a soldier. United States v. Koplik, 155 F 919. To warrant conviction under § 5438, it must be proven beyond reasonable doubt that defendant purchased or received in pledge from a soldier the property described in the indictment with knowledge that seller or pledgor was a soldier in service of United States and that property was military property such as government issues, but it is not necessary to prove that soldiers had no right to sell or pledge (United States v. Smith, 156 F 859), and jury may in proper case give effect to statute making possession of such property by civilian presumptive evidence that same was disposed of contrary to law (Id.).

93. Though the sale by a soldier of military clothing issued to him during his term is an offense against the military law (United States v. Michael, 153 F 609), such clothing becomes the individual property of the soldier so that a civilian is not criminally liable for receiving it in pledge (Id.). That property pledged by soldier was clothing which he had paid for out of his clothes' allowance is no defense. United States v. Koplik, 155 F 919.

94. United States v. Brown, 206 U. S. 240, 51 Law. Ed. 1046.

95. Is not exercising "under assignment in orders issued by competent authority" a command above that pertaining to his grade. United States v. Mitchell, 205 U. S. 161, 51 Law. Ed. 752.

96. United States v. Brown, 206 U. S. 240, 51 Law. Ed. 1046.

97. McClure v. U. S., 42 Ct. Cl. 262.

98. It is corresponding "rank," not "duties," which is the basis of pay (Stevens v. U. S., 41 Ct. Cl. 455), and a naval officer must ascertain from Rev. St. § 1466, what officer in the army corresponds with himself in rank (Id.). Accordingly, naval paymasters or assistants are not entitled to mounted pay. Id.

99. Held, following Terry's Case, 39 Ct. Cl. 353, that the act did not by implication repeal Rev. St. § 1556, fixing pay of rear admiral. Cromwell v. U. S., 42 Ct. Cl. 432.

1. Stilling v. U. S., 41 Ct. Cl. 61.

2. United States v. Farenholt, 206 U. S. 226, 51 Law. Ed. 1036.

3. Where he was detached and ordered home and then discharged. United States v. Hite, 204 U. S. 343, 51 Law. Ed. 514.

4. United States v. Miller, 28 S. Ct. 199.

5. Not on amount as increased by extra pay as aid to rear admiral. United States v. Miller, 28 S. Ct. 199.

6. Faust v. U. S., 42 Ct. Cl. 94.

7. A quartermaster cannot dismiss or suspend a pilot for alleged dereliction of duty. Stilling v. U. S., 41 Ct. Cl. 61.

from the time of the unauthorized suspension until the time of furlough,[8] though not thereafter and before actual restoration to duty. A naval officer detailed for shore duty beyond seas prior to the passage of the act of March 2, 1901, was not entitled to increased pay until he entered upon his new duties.[9] That act provides that service under such detail shall be counted from date of departure from the United States to date of return thereto.[10] One is not performing shore duty beyond seas while in a hospital not rendering service.[11] The basis for computation of the 10 per cent increase for shore duty beyond seas is "pay proper as fixed by law for time of peace."[12] An officer of the revenue cutter service, who at his own request was assigned to duties abroad in connection with the Louisiana Purchase Exposition, is not entitled to increased pay as an officer serving beyond the limits of the United States, his services not being of a military character.[13] Though the appointing power is in the executive department, congress may provide for retirement of an officer with a rank and pay higher or lower than that which belongs to the office.[14] A midshipman serving as an undergraduate in the naval academy was an officer in the navy within the personnel act allowing officers who served during the Civil War to retire with the rank and three-fourths the pay of the next higher grade,[15] and it is not essential that he should have been actually ordered into active service during the war.[16] Where employes of the navy department are required to serve on Saturday afternoons, they are not entitled to more than regular pay.[17]

*Traveling expenses and mileage.*See 8 C. L. 983—Officers traveling under orders are entitled to mileage.[18] Constructive travel is that which is paid for though there was no actual travel.[19]

*Compensation for lost equipment.*See 8 C. L. 983

*Relief from unauthorized disbursements or other loss.*See 8 C. L. 983—The statute providing relief to disbursing officers from liability for loss or capture of funds or papers applies to cases arising in time of peace as well as in time of war,[20] but claimant's negligence bars relief.[21] Excessive payments made by a disbursing officer in good faith may be allowed him in certain cases where the government has received the benefits therefrom.[22]

*Quarters and commutation therefor.*See 8 C. L. 983—An owner may recover for the use and occupation of private property by the United States for military purposes where the country had been reduced by subjection before the taking.[23]

(§ 1) *B. Militia.*See 8 C. L. 983—The provision of the Kentucy statute requir-

8. Stilling v. U. S., 41 Ct. Cl. 61.

9. Farenholt v. U. S., 42 Ct. Cl. 114.

10. Officer on shore duty in St. Petersburg entitled to 10 per cent. increase until return to United States under orders to proceed for shore duty at Washington. McCully v. U. S., 42 Ct. Cl. 275.

11. Farenholt v. U. S., 42 Ct. Cl. 114.

12. "Pay proper" includes increase granted for longevity service as well as that provided by Rev. St. § 1261. McCully v. U. S., 42 Ct. Cl. 275.

13. Visiting machinery houses in Europe. Corden v. U. S., 42 Ct. Cl. 185.

14, 15, 16. Moser v. U. S., 42 Ct. Cl. 86.

17. Navy regulations, art. 1600, par. 5, providing for extra pay for work on Sundays and legal holidays, does not apply, notwithstanding § 1389, Act March 3, 1901, making Saturday afternoons legal holidays "for all purposes." Adams v. U. S., 42 Ct. Cl. 191.

18. No defense that it was intended officer should accompany a draft of men, order not having been sent him in time. O. D. Duncan v. U. S., 40 Ct. Cl. 235.

19. Where one actually traveled he could not be deprived of mileage on the ground of constructive travel on train chartered by United States. Duncan v. U. S., 40 Ct. Cl. 235.

20. Penrose v. U. S., 42 Ct. Cl. 29.

21. Officer not inquiring into character of clerk who had previously served under his father, and allowed him to have combination of safe without making any effort to change it, held responsible for loss due to clerks abstracting funds. Penrose v. U. S., 42 Ct. Cl. 29. That clerk contemporaneously deposited money in the treasury with object of making good his father's account did not entitle claimant to credit for such deposit. Id.

22. Expenditures for work and repair of transports. Jones v. U. S., 41 Ct. Cl. 493.

23. Philippine Sugar Estates Development Co. v. U. S., 40 Ct. Cl. 33.

ing persons who desire to organize a company in any county to obtain from the county judge a certificate of character, etc., is directory only,[24] and if the governor approves the application without the certificate, the company may be lawfully enrolled.[25] The cost of maintenance and care of armory buildings erected at county expense is borne by the county and not by the county jailer.[26] A legislative resolution authorizing the bringing of suit against the state for supplies furnished the militia contemplates a judgment against the state payable out of its general funds,[27] and hence a defense that the military fund was consumed when the contract was made is not available. An adjutant general may be compelled by mandamus to certify as correct the pay rolls of a company.[28]

§ 2. *Orders, regulations, and discipline; promotion and discharge.*See 8 C. L. 983—A military order of the president as commander in chief, to be enforced in a foreign country under our military control, does not take effect until received and promulgated in that country.[29]

§ 3. *Military and naval tribunals.*See 8 C. L. 984—An officer of the regular army though temporarily attached to a volunteer command is not eligible as a member of a court martial to try a volunteer officer.[30] The evidence adduced before a court of inquiry is surrounded by all the solemnities of evidence taken in a court of record or before a court martial.[31] A naval officer, charges against whom have been investigated by a court of inquiry, is not entitled to further trial by court martial as a matter of right.[32] The statutory provision that the proceedings of courts of inquiry shall be evidence before a court martial only when oral evidence cannot be obtained does not go to the jurisdiction of the court martial [33] but is merely a procedure regulation securing rights to accused which he may waive.[34] One acquitted by a military court of competent jurisdiction cannot be tried in a civil court for the same offense.[35] Under the army regulations, a sentence imposed upon a "soldier" for an offense committed while he was either undergoing or awaiting a prior sentence commences to run at the expiration of the first sentence.[36] Officers having authority to convene a general court martial may remit or investigate but not commute the sentence of such court.[37] Rulings and practices of the war department, though not binding on the judiciary, will not be overthrown except for cogent reasons,[38] and civil courts may not set aside or review the proceedings or sentences of courts martial legally constituted and having jurisdiction of the offense charged.[39]

24. Ky. St. 1903, § 2661. Haley v. Cochran, 31 Ky. L. R. 505, 102 SW 852.

25. Haley v. Cochran, 31 Ky. L. R. 505, 102 SW 852.

26. Statutes construed. Fiscal Ct. of Jefferson County v. Pflanz, 31 Ky. L. R. 1242, 104 SW 1002.

27. M. C. Lilly Co. v. Com., 29 Ky. L. R. 589, 93 SW 1039.

28. Duplication of names on pay roll could be corrected on motion in trial court. Haley v. Cochran, 31 Ky. L. R. 505, 102 SW 852. Petition properly dismissed as to governor, he being able only to approve the pay rolls after certification by adjutant general. Id. Contentions that plaintiff's services were unauthorized because certain persons were not lawful governor and adjutant general of Kentucky, and that members of state guard were at place of service without authority and in defiance of law, held answered by Sweeny v. Com., 118 Ky. 912, 82 SW 639. Id.

29. Order changing existing tariff regulations for Philippine Islands. Ho Tung v. U. S., 42 Ct. Cl. 213.

30. United States v. Brown, 206 U. S. 240, 51 Law. Ed. 1046.

31. Accused could agree that such evidence be admitted before court martial. Mullan v. U. S., 42 Ct. Cl. 157.

32, 33. Mullan v. U. S., 42 Ct. Cl. 157.

34. Where secretary of navy granted request of naval officer for court martial after adverse finding of court of inquiry, on condition that record of said court be accepted as evidence in the case, and this was agreed to by officer. Mullen v. U. S., 42 Ct. Cl. 157. Action of secretary was not duress. Id.

35. Acquittal of homicide as defined by Pen. Code P. I. art. 404, precluded subsequent trial in civil court of those islands. Grafton v. U. S., 206 U. S. 333, 51 Law. Ed. 1084.

36. "Soldiers" applies to officers as well as privates. Kirkman v. McClaughry, 152 F 255.

37. This does not apply to the president. Mullan v. U. S., 42 Ct. Cl. 157.

38. Kirkman v. McClaughry, 152 F 255.

39. Mullan v. U. S., 42 Ct. Cl. 157. Civil tribunals cannot disregard judgments of

§ 4. *Civil status, rights and liabilities of the military and navy, and of military and naval reservations.*See 8 C. L. 984—The Louisiana statute exempts members of the militia from the jurisdiction of the civil courts only when in active service on order of the governor.[40] While an enlisted soldier in time of peace may be subjected to arrest and punishment for violation of a municipal ordinance, the same as a civilian,[41] yet, where any punishment is sought to be inflicted which will interfere with the performance of his duties towards the government, the utmost good faith will be required of the civil authorities,[42] and any unfair discrimination or cruel or unusual punishment may be inquired into by the Federal courts.[43] Whether an act charged as a crime against a prisoner held in custody by a state was committed in the performance of his duty as a soldier of the United States may be inquired into by a Federal court or judge on habeas corpus,[44] and if such is the case the prisoner will be discharged for want of jurisdiction in the state court.[45] That an army officer accepts a small sum of money from the civil government to be used in the performance of military functions does not make him criminally liable as a civil officer.[46]

§ 5. *Martial law.*See 8 C. L. 985—During the Philippine insurrection, civil law was superseded by military law until the civil law and the treaty with Spain could be put in force.[47] The power of a military commander is subject only to restrictions imposed by the consent of civilized nations,[48] and he may impose and collect import duties to cover expenses of the military government.

§ 6. *Soldiers' homes and indigent soldiers.*See 8 C. L. 985

MILITIA, see latest topical index.

general courts martial against accused officers or soldiers for mere errors or for reason not going to jurisdiction of the military courts, even if civil court, if it had first taken case, might have tried accused for same offense or even for one of higher grade arising from same facts. Grafton v. U. S., 206 U. S. 333, 51 Law. Ed. 1084. General court martial has jurisdiction, under 62d article of war, as of a crime not capital, to try a soldier for a homicide punishable under Pen. Code P. I. art. 404, by imprisonment. Id.

40. Not when in service merely in sense of being members in good standing. State v. Josephson [La.] 45 S 381.

41, 42. Ex parte Schlaffer, 154 F 921.

43. Sixty days' imprisonment for violation of city ordinance not injuring person or property held unwarranted. Ex parte Schlaffer, 154 F 921.

Note: This decision is sound in refusing to adopt the doctrine of Ex parte Bright, 1 Utah, 145, which exempts a soldier from liability for violating a municipal ordinance. The general principle is settled that in time of peace the civil law is supreme, and that a soldier, unless acting under lawful authority, is amenable to the ordinary civil courts as any other citizens (Tytle v. Military Law 153; Steiner's Case [1854] 6 Op. Attys. Gen. 413; U. S. v. Clark, 31 F 710), in the absence of clear and direct language of congress (Coleman v. Tennessee, 97 U. S. 509, 514, 24 Law. Ed. 1118). It is no defense that imprisonment will interfere with his military duties. Ex parte McRoberts, 16 Iowa, 600. The statute requiring commanding officers to deliver up soldiers guilty of crimes against person or property, Rev. Stat. U. S. § 1342, was intended solely as an aid to the civil authorities (Coleman v. Tennessee, 97 U. S. 509, 514, 24 Law. Ed. 1118 and contrary to the opinion in Ex parte Bright, 1 Utah, 145, obviously implies no exemption from liability for other offenses. The decision implies that the minimum sentence must be imposed on soldiers, else it is wholly void, which is unsupportable on principle or authority, or that the sentence was unusually severe, and for this cause a sentence cannot be reviewed. Cummins v. People, 42 Mich. 142.—From 8 Columbia L. R. 52.

44. United States v. Lipsett, 156 F 65.

45. United States v. Lipsett, 156 F 65. Guard accidentally killing woman while shooting at fleeing prisoner held to have acted in supposed performane of his duty as soldier and not subject to trial in state court. Id.

46. Officer accepting money from government of Philippine Islands to be used in preparation and display of exhibit at Louisiana Exposition held not liable under P. I. Code, punishing falsification of documents by public officials. Carrington v. U. S., 28 S. Ct. 203.

47. Warner, Barnes & Co. v. U. S., 40 Ct. Cl. 1.

48. Warner, Barnes & Co. v. U. S., 40 Ct. Cl. 1.

Note: This case has been reversed in so far as it upholds the imposition of the tariffs in question after the ratification of the treaty with Spain. See Warner, Barnes & Co. v. U. S., 197 U. S. 419, 49 Law. Ed. 816.

MILLS.[49]

MINES AND MINERALS.

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The scope of this topic is noted below.[50]

§ 1. *General common-law principles. A. Public ownership.*[See 8 C. L. 985]

(§ 1) *B. Private ownership; rights of freehold tenants of less than fee.*[See 8 C. L. 985]—The right to remove coal to the injury of the surface will not be presumed from the mere fact of ownership of the coal.[51] Adjoining land cannot be made servient to mining operations as a mere matter of convenience.[52] An underlying mineral estate may be lost by adverse possession.[53]

§ 2. *Acquisition of mining rights in public lands. A. What lands may be located.*[See 8 C. L. 986]—Only unappropriated government lands are subject to location under the Federal mining laws, but lands once located may become subject to relocation when the former location is forfeited or abandoned.[54] Only a valid location, moreover, renders the land appropriated so as to prevent location by others.[55]

(§ 2) *B. Who may locate.*[See 8 C. L. 987]—Under the Federal statutes certain employes of the government are prohibited from locating, purchasing, or acquiring public lands, including mining claims.[56]

§ 3. *Mode of locating and acquiring patent. A. Making and perfecting location.*[See 8 C. L. 987]—A discovery is the first essential to the location of a mining claim.[57] The discovery may precede the location, but in the absense of retention of possession

49. No case have been found for this subject since the last article. See 6 C. L. 643.

50. **It includes** the principles of law applicable to the acquisition and ownership of mines and minerals, including natural gas, and estates therein. It also includes the principles applicable peculiarly to the operation of mines. It includes remedies and procedure only so far as they apply peculiarly to mines and minerals. **It excludes** the general principles of liability for negligence (see Negligence, 8 C. L. 1090), and the principles arising out of the relation of master and servant (see Master and Servant, 10 C. L. 691). It also excludes taxation of mines and minerals, see Taxes, 8 C. L. 2058.

51. Tischen v. Pennsylvania Coal Co. [Pa.] 66 A 988.

52. Where it was not necessary to operation of plaster quarry that refuse therefrom be dumped upon adjoining lands. White v. Lansing, 103 NYS 1040.

53. Alleged mineral estate untouched for more than twenty-five years cannot be asserted against adverse possession for that time. Redmond v. Cass, 226 Ill. 120, 80 NE 708.

54. See post, § 3B, Maintaining Location, and § 3C, Relocation.

55. See post, § 3D, subd. Adverse Claims.

56. Deputy United States mineral surveyor, appointed under U. S. Rev. St. § 2334, is not an officer, clerk or employe in the general land office within § 452, prohibiting such officers, etc., from purchasing, etc., public lands, and hence such a surveyor is not precluded by such statute from locating mining claim under c. 1, tit. 23, § 2207. Hand v. Cook [Nev.] 92 P 8, discussing the question at length.

57. The question as to whether there was a discovery of a lode or vein on the claim is for the jury in an action by a vendee to recover back the purchase price. Whitney v. Haskell, 216 Pa. 622, 66 A 101.

Oil claim must be supported by discovery. New England & Coaling Oil Co. v. Congdon [Cal.] 92 P 180.

it is absolutely essential either before or after location.[58] After discovery the location must be perfected in the manner prescribed by the statutes,[59] including the requirements as to markings on the ground,[60] posting of notice,[61] and the filing of certificates or statements of location.[62] Additional requirements not in conflict with the Federal laws may be imposed by local regulations.[63] A claim overlapping another by reason of the corners being partly upon the latter is good pro tanto the part outside of the overlap,[64] and so also a claim including more than allowed by statute is good pro tanto,[65] and the lines may be corrected so as to come within the statutory limit.[66]

(§ 3) *B. Maintaining location; forfeiture, loss, or abandonment.*[See 8 C. L. 990] —As against everyone except the government, one in actual possession of public land is entitled to hold it apart from the sufficiency of his mineral location,[67] but where the possession is not retained, a claim to a mineral location can be sustained only as such.[68] In order to hold a mining claim, the locator must do the work thereon required by statute.[69]

58. New England & Coaling Oil Co. v. Congdon [Cal.] 92 P 180.

59. Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424], must be followed in locating claim to asphaltum in vein or lodes. Webb v. American Asphaltum Min. Co. [C. C. A.] 157 F 203. Words "other valuable deposits," as used in Rev. St. § 2320, includes nonmetalliferous, as well as metalliferous, deposits. Id.

Asphaltum in veins or lode cannot be located by placer claim under Rev. St. § 2329. Webb v. American Asphaltum Min. Co. [C. C. A.] 157 F 203. A vein or lode is mineral bearing rock or other earthy matter in place in a fissure in rock, so that its boundaries may be distinctly defined by rocky walls in place. Id. Asphaltum in veins or lodes cannot be located under 29 Stat. § 26 [U. S. Comp. St. 1901, p. 1434], relating to entry of petroleum lands. Id. Laws relating to location of placer claims applies to **oil claims.** Wolfskill v. Smith [Cal. App.] 89 P 1001. 29 Stat. 526 [U. S. Comp. St. 1901, p. 1434]. New England & Coaling Oil Co. v. Congdon [Cal.] 92 P 180.

60. Under requirement of Rev. St. § 2324, that markings on the ground must be such as can be "readily traced," no particular kind of markings are necessary, and their sufficiency under the statute is a question of fact. Charlton v. Kelly [C. C. A.] 156 F 433.

61. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275.

62. Comp. Laws, §§ 210, 232, require location certificate to be recorded with district recorder as well as with county recorder, where there is a mining district and the place of business of the district recorder is publicly known. Ford v. Campbell [Nev.] 92 P 206. Phrase "necessary to hold claims," as used in Comp. Laws, § 231, providing that certificates of location and of labor and improvements "necessary to hold claims," need not be **verified,** etc., held to refer solely to "labor and inprovements" (Id.), but not necessary to the validity of the location [Comp. Laws, §§ 210, 216, 231] (Id.).

Description of a location as being about a certain distance from a town is not a description with reference to a natural object or permanent monument, within Comp. Laws, § 210, relating to certificate of location to be recorded. Ford v. Campbell [Nev.] 92 P 206. Under Sess. Laws 1901, p. 56, § 1, an additional or **amendatory statement** of location relates back to date of original location, in absence of intervention of conflicting rights. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P 302, afg., on rehearing, 90 P 177. Where it is clear that an amended, declaratory statement refers to the same location as the original statement, a variance as to the name is immaterial. Id. No record of claim is required **under Federal laws.** Ford v. Campbell [Nev.] 92 P 206.

63. Requirements imposed by Montana Pol. Code, §§ 3611, 3612, as to making of quartz lode location, held valid. Butte Consol. Min. Co. v. Barker [Mont.] 90 P 177, afg., on rehearing, 35 Mont. 327, 89 P 302. Comp Laws, § 2286, requiring posting of location notice in some conspicuous place on the location, is not inconsistent with the Federal mining law. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275. Acceptance by government of location proceedings had before the statute of 1866, and the issue of a patent thereon, is **evidence** that such proceedings were in accordance with the rules and customs of the local mining district. Lawson v. U. S. Min. Co., 28 S. Ct. 15.

64. McElligott v. Krogh [Cal.] 90 P 823. Fact that portion of claim upon which notice is posted may, by mistake, overlap or conflict with a pre-existing claim, does not invalidate the location, such location being valid as to the part not overlapping or in conflict. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275.

65. See U. S. Rev. St. § 2320 [U. S. Comp. St. 1901, p. 1424], limiting claim to 300 feet on each side of middle of vein. McElligott v. Krogh [Cal.] 90 P 823.

66. Corrected line may include both original and corrected corners, where such line nowhere exceeds 300 feet from center of vein, etc., as limited by U. S. Rev. St. § 2320. McElligott v. Krogh [Cal.] 90 P 823. Corrected line need not be straight line between corrected corner and one not corrected. Id.

67. New England & Coaling Oil Co. v. Congdon [Cal.] 92 P 180.

68. New England & Coaling Oil Co. v. Congdon [Cal.] 92 P 180. See ante, this sec-

A forfeiture See 8 C. L. 891 can be established only by clear and convincing proof of the default constituting the ground thereof.[70] One cannot claim a forfeiture against his co-owner for failure to contribute where no work had been done.[71] There seems to be some conflict as to whether a forfeiture will be declared for noncompliance with certain local mining regulations.[72]

An abandonment may occur by relinquishment of the possession, where the mining location has not been perfected.[73] The posting of a so-called notice of abandonment does not necessarily constitute an abandonment.[74] An abandonment leaves the lands unoccupied the same as before the attempted location,[75] and all improvements revert to the government.[76]

(§ 3) *C. Relocation.* See 8 C. L. 892—An adverse relocation may be made upon an abandoned claim,[77] or upon a forfeited claim.[78] Indeed, such a relocation can be

tion, subsection A. Making and Perfecting Location.

69. Under the evidence the expense of employing a keeper held proper to be considered as part assessment work required by Federal statutes. Kinsley v. New Vulture Min. Co. [Ariz.] 90 P 438. Upon an issue as to forfeiture for failure to do assessment work, work upon contiguous claims which was intended to and did tend to develop all of such claims may be considered in determining whether the proper amount of work was done upon any one of such claims. There must, however, be a sufficient basis for appointment of such work between the several claims. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275. Cross cut 132 feet below surface and accessible only by shaft upon another claim held not equivalent to location shaft or crosscut within Pol. Code, § 3611. Locator **cannot extend time** for doing required work on his location by posting a new discovery notice or altering old one. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P 302, afd., on rehearing, 90 P 177; Ingemarson v. Coffey [Colo.] 92 P 908.

70. Forfeiture for failure to do annual work. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275.

71. Ex parte proceedings under Rev. St. § 2326, by one co-owner against the other for forfeiture under § 2326, for failure to contribute to assessment work, are invalid and ineffective where no such work has been done. Delmore v. Long, 35 Mont. 139, 88 P 778.

72. NOTE. Effect of failure to comply with local regulations as to notice of location: The supreme court of California held that its decision in the present case upon this question was concluded by the ruling made upon the first appeal, which decision continued to be the law of the case. Upon the first appeal (Emerson v. McWhirter, 133 Cal. 510, 65 P 1036) it was held that the failure to comply with the mining rules in this respect would not work a forfeiture of title, inasmuch as there was nothing in the rules which made noncompliance a cause of forfeiture, that, unless the rule so provided, the failure to comply with its requirements would not work a forfeiture. The court cited other California cases to the same point and cases from the supreme court of Arizona (Rush v. French, 1 Ariz. 99, 25 P 816; Johnson v. McLaughlin, 1 Ariz. 493, 4 P 130), also the decision of Judge Sawyer in Jupiter Min. Co. v. Bodie Consol. Min. Co., 7 Sawy. 96, 11 F 666. There seems to be a conflict in state decisions upon this subject. The supreme court of Montana differs with the supreme court of California. King v. Edwards, 1 Mont. 235-241. As does also the supreme court of Nevada. Mallett v. Uncle Sam Gold & S. Min. Co., 1 Nev. 188, 90 Am. Dec. 484. Lindley, in his work on mines, seems to prefer the California rule as a "safe and conservative rule of decision, tending to the permanency and security of mining titles." 1 Lindley, Mines [2nd Ed.] § 274. But in view of the facts of this case we do not deem it necessary to decide whether a forfeiture will arise simply from a violation of this mining regulation.—See Yosemite Gold Min. & M. Co. v. Emerson, 28 S. Ct. 196.

73. Oil claim held abandoned. New England & Coaling Oil Co. v. Congdon [Cal.] 92 P 180.

74. No abandonment of location where locator, upon discovery that location work done was on a prior claim, posted notice of abandonment of the work and also a so-called relocation notice, specifying that such notice was for purpose of better describing the locus of the claim, and first notice was not removed from location. Monument. Ford v. Campbell [Nev.] 92 P 206.

75. Wolfskill v. Smith [Cal. App.] 89 P 1001.

76. Artesian wells drilled while drilling for oil. Wolfskill v. Smith [Cal. App.] 89 P 1001.

77. New England & Coaling Oil Co. v. Congdon [Cal.] 92 P 180. As to what constitutes abandonment, see ante, § 3B, subd. Abandonment.

78. Where there was no claim that work required by statute was done by a prior locator within sixty days after discovery, as required by the statute, an instruction that relocator was entitled to recover if he had complied with the statute, and the prior locator had not done the work within sixty days prior to the subsequent location, was not erroneous in that it eliminated the possibility of the prior locator having done the work in the required time. Ingemarson v. Coffey [Colo.] 92 P 908. Provision of Rev. St. § 2332 [U. S. Comp. St. 1901, p. 1433], providing that one who has held and worked claim for period prescribed by local statute of limitations shall be sufficient, in absence of adverse claim to establish a right to a patent, means, when construed in connection with other provisions, merely that possession

made only upon the abandonment or forfeiture of prior valid location,[79] and only after the abandonment or forfeiture is complete,[80] but where the first location is not perfected so as to segregate the claim, a relocation, so-called, may be made without regard to the former attempted location.[81] As in the case of original locations, a relocation must be perfected by compliance with the statutory requirements, including those relating to notice [82] and work.[83] Notwithstanding the provisions for forfeiture for failure to do the annual assessment work, a claimant who has a valid claim may, after such failure, relocate his claim to the exclusion of an adverse claimant who located while the senior location was subsistent.[84]

(§ 3) *D. Proceedings to obtain patents; adverse claims.*[See 8 C. L. 992]—Priority to the right to a single, broad vein vested in the discoverer is not determined by the dates of the entries or patents,[85] and priority of discovery may be shown by evidence other than the entries and patents.[86]

Suits to determine adverse claims.[See 8 C. L. 993]—Ordinary form of action may be employed so far as applicable,[87] and the verdict may be in form according to the form of action employed.[88] The declaration or complaint must show that the suit is founded upon an adverse claim,[89] and must allege the proper filing of the adverse claim,[90] and must sufficiently describe the area in controversy so as to sustain the

for statutory period is equivalent to valid location. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275. Such possession does not relieve possessor from necessity of doing the annual assessment work required by Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], and upon failure to do such work in any one year the land is subject to relocation, though the original locator may have occupied land for more than the statutory period preceding such relocation. Id.

79. Hence, in ejectment by relocator against original locator, the plaintiff cannot contest the validity of the original location. Zerres v. Vanina [C. C. A.] 150 F 564.

80. Relocation of claim segregated by posting of notice and markings on ground is invalid until after failure to do assessment work by original locator. Nash v. McNamara [Nev.] 93 P 405.

81. Where notice was posted, but claim was not marked within specified time, relocation could be made prior to expiration of such time. Nash v. McNamara [Nev.] 93 P 405. Where senior location was not perfected, a junior locator could recover claim and damages from senior locator for period allowed junior locator to perfect his location, though upon his failure to perfect such location the claim would be subject to location by others. Id. A relocator who attempts to locate, with full knowledge of a prior attempted location, and who loses his right upon the prior locator's failure to do assessment work, cannot sustain his relocation on the ground that the prior locator did not comply with local regulations as to **notice.** Yosemite Gold Min. & Mill. Co. v. Emerson, 28 S. Ct. 196.

82. Under Rev. St. 1901, § 3241, a relocation notice is not void, but only voidable, for failure to state whether the relocation is located as abandoned property, though statute uses word "void," and such notice may be amended, where conflicting rights have not intervened. Kinney v. Lundy [Ariz.] 89 P 496.

83. Relocator is required to seek a new discovery shaft, etc., same as on new claim, or to do certain work on the old shaft, etc. Mills' Ann. St. §§ 3152, 3155, 3162, requiring discovery shaft to be sunk, etc., within sixty days after discovery, held not complied with. Ingemarson v. Coffey [Colo.] 92 P 908.

84. See Comp. Laws, §§ 208, 209, as amended by St. 1901, p. 97, c. 93, § 2, and U. S. Rev. St. §§ 2319, 2322, 2324, 2326. Nash v. McNamara [Nev.] 93 P 405; Yosemite Gold Min. & Mill. Co. v. Emerson, 28 S. Ct. 196 Decision of highest court of a state that the evidence was conflicting, and hence that decision of lower court that original locators had resumed assessment work on their claim before an adverse location, as they were allowed to do by U. S. Rev. St. § 2324, did not present a **Federal question** so as to give supreme court of United States jurisdiction to review such decision. Id.

85, 86. Lawson v. U. S. Min. Co., 28 S. Ct. 15.

87. In adverse suits under Rev. St. § 2326 [U. S. Comp. St. 1901, § 1430], an ordinary declaration in ejectment is sufficient to present all questions between applicant for patent and adverse claimant. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275. In such suit rules governing ordinary action of ejectment are modified by Comp. Laws, § 2290, providing that mere prior possession shall not constitute basis for recovery, and by Act. Cong. March 3, 1881, c. 140, 21 Stat. 505 [U. S. Comp. St. 1901, p. 1431], requiring defendant, as well as plaintiff, to recover on strength of own title. Id.

88. Verdict of "guilty" held sufficient in ejectment by adverse claimant. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275.

89. Declaration in ejectment must contain allegations sufficient to apprise court that suit is on an adverse claim, so as to enable court to apply the statutory modifications of the rules applicable to ordinary ejectment. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275. Complaint held sufficient as complaint in ejectment based on adverse claim. Id.

90. Must allege filing within sixty days,

judgment which must also describe such area.[91] Such suits are in the nature of suits in equity, and hence the parties are not entitled to a trial by jury,[92] and in a proper case an injunction may issue in such a suit.[93] Suit in a state court to quiet title, based upon an adverse claim filed with the Federal government, is governed by the state laws.[94]

The burden is upon each claimant to establish his own claim.[95] Where the complaint alleges plaintiffs' ownership in general terms, the defendant may prove, under a general denial, anything which will defeat the plaintiff's title,[96] but where the only issue is whether a locater has forfeited his location, evidence of his location is immaterial.[97] So, also, in a suit to quiet title, proceedings in the Federal land office are immaterial unless they tend to show title or right of possession in one of the parties.[98] A declaratory statement is not admissible until steps required prior to such statement have been proved.[99] When an original declaratory statement is defective in failing to describe a discovery shaft, it is nevertheless admissible in evidence in connection with an amendatory declaration.[1]

Where the limitation is prescribed by a Federal statute, a state statute defining when actions shall be deemed to have been commenced does not apply.[2]

The general rules as to instructions apply.[3, 4]

in proceedings under Rev. St. § 2326 [U. S. Comp. St. 1901, § 1430]. Thornton v. Kaufman, 35 Mont. 181, 88 P 796.

91. Under Rev. St. U. S. § 2326 [U. S. Comp. St. 1901, p. 1430], the judgment must designate the part, if any, of the area in controversy that might belong to each of the adverse claimants and the complaint must definitely describe such area in order to sustain the judgment. Smith v. Imperial Copper Co. [Ariz.] 89 P 510.

92. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P 302, afd., on rehearing, 90 P 177.

93. Injunction pendente lite to prevent interference with discovery work. Safford v. Flemming [Idaho] 89 P 827. Injunction granted though allegations of complaint and affidavit are denied by defendants. Id. Liberal practice is indulged in granting injunctions in such cases. Id. Under Rev. St. Utah, § 3511, giving anyone the right to sue an adverse claimant to determine right to real property, a Federal court in Utah has jurisdiction of suit by claimant in possession under a patent from United States to quiet title to lode claim, and for injunction. Lawson v. U. S. Min. Co., 28 S. Ct. 15. Actual **possession** of mineral in place is not essential to such a suit. Combs v. Virginia Iron, Coal & Coke Co. [Ky.] 106 SW 815.

94. Bernard v. Parmelee [Cal. App.] 92 P 658.

95. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275. Where, therefore, owner has failed to make and file proof of labor required by Comp. Laws, § 2315, such owner is not entitled to invoke rule that a forfeiture can be established only by convincing proof. Id.

96. May attack plaintiff's title deeds. Holmes v. Salamanca Gold. Min. & Mill. Co. [Cal. App.] 91 P 160. May prove forfeiture under Rev. St. U. S. § 2324 [U. S. Comp. St. 1901, p. 1429], for failure to perform yearly assessment work. Id.

97. Upton v. Santa Rita Min. Co. [N. M.] 89 P 275.

98. Bernard v. Parmelee [Cal. App.] 92 P 658.

99. Admission of such statement before proof of such steps held not prejudicial error, where such steps were proved thereafter. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P 302, afd. on rehearing, 90 P 177.

1. To show attempt to comply with location laws and to identify land. Butte Consol. Min. Co. v. Barker, 35 Mont. 327, 89 P 302, afd. on rehearing, 90 P 177.

2. Under U. S. Rev. St. § 2326 [U. S. Comp. St. 1901, p. 1430], requiring suit on adverse claim to be commenced within thirty days after filing of adverse claim, the time of commencement is not controlled by Law Nev. 1861, c. 12, § 20, but by Code Civ. Proc. § 22, providing that actions shall be commenced by filing of complaint and issuance of summons. Harris v. Helena Gold. Min. Co. [Nev.] 92 P 1. Under Code Civ. Proc. § 22, appearance and filing of general demurrer after expiration of such thirty days constitutes waiver of summons. Id.

3, 4. Failure of instruction to state that only unappropriated United States lands were subject to location held not error where such statement was made in another instruction. Ingemarson v. Coffey [Colo.] 92 P 908. Phrase that if locator "complied with all requirements of the law," held sufficiently definite in view of other instructions. Id. Where one, acting for himself and another as tenants in common, applied for a patent, which he thereafter secured in his own name by fraudulent representations that he was sole owner of the claim, he held such patent in trust for his cotenant as to the latter's interest. Delmoe v. Long, 35 Mont. 139, 88 P 778. Suit to enforce such trust is subject to limitations prescribed by Code Civ. Proc. § 524, subd. 4, relating to fraud and mistake, and not by § 518, relating to proceedings for relief not otherwise provided for. Id. Complainant held not barred by laches from enforcing trust. Id. Representations of decedent as to ownership by

§ 4. *Ownership or estate obtained by claim, location, and patent; apex and extralateral rights.*[See 8 C. L. 994]

Apex and extralateral rights.[See 8 C. L. 995]—No extralateral rights exist in favor of a location outside of which the apex of a vein is located.[5] Where the apex, in its width, is partly within several locations, the senior location takes the entire width of the vein on its dip.[6] Seniority of location in such case is not conclusively established by seniority of entry and patent,[7] and in the absence of any record of adverse suits, there is no presumption that in the issue of such patent the subterranean rights of the parties were considered.[8]

Boundary lines and monuments [See 8 C. L. 996] may be proved by parol where they have become uncertain.[9]

§ 5. *Right to mine on private land thrown open to the public.*[See 8 C. L. 997]

§ 6. *Private conveyances or grants of mineral rights in land.*[See 8 C. L. 997]—A grant of mineral lands is sufficient if the land can be identified,[10] and in such case the name of the claim is immaterial,[11] and the grantor is presumed to have intended to convey the best title he had.[12] Mineral rights may be sold separately and apart from the land itself,[13] as may also minerals in place,[14] while, on the other hand, a grant of the surface may include the minerals underneath the same.[15] The grantee of minerals in place takes a fee simple estate,[16] and such a grant works a severance,[17] and thereafter mere possession of the surface does not carry with it or extend to the possession of the mineral,[18] and the owner of the legal title to such mineral need not exercise any acts of ownership over it to perfect or retain his title as against the owner or possessor of the surface.[19] Such a sale and severance of estate carries with it the right to remove or use so much of the containing strata, above and

co-owner held admissible to show concealment of decedent's fraud in securing patent in own name, and as being admissions against interest within Code Civ. Proc. §§ 3125, 3146, subd. 4. Id.

5. McElligott v. Krogh [Cal.] 90 P 823.

6, 7, 8. Lawson v. U. S. Min. Co., 28 S. Ct. 15.

9. Collins v. McKay [Mont.] 92 P 295.

10. Collins v. McKay [Mont.] 92 P 295. Evidence held sufficient to identify property. Id. Declarations of plaintiff's intestate, the grantor, subsequently to the conveyance, with reference to the location of the property, held admissible against plaintiff. Id.

11. Collins v. McKay [Mont.] 92 P 295.

12. See Civ. Code, § 1511. Collins v. McKay [Mont.] 92 P 295. Grantor cannot attack his own conveyance on the ground that it was invalid as to strangers. Id.

13. Conveyance held to convey no title to land but only an interest in oil and gas produced. Carter v. Estep, 30 Ky. L. R. 1144, 100 SW 308. Deed to "all mining right, property, possession, claim and demand whatsoever, and every part and parcel thereof," held to include grantor's **extra lateral rights.** Riley v. North Star Min. Co. [Cal.] 93 P 194.

14. Moore v. Indiana Camp Coal Co., 75 Ohio St. 493, 80 NE 6. A grant of a small portion of a tract of land, with the privilege of undermining another portion of such tract so far as not to injure the surface of the latter, constitutes a grant of the coal under the latter portion, and by prescribing the mode of removal withholds right to open the surface of such portion for purpose of removing coal. Higgins v. Round Bottom Coal & Coke Co. [W. Va.] 59 SE 1064.

The word "minerals" is not confined to metallic substances, etc. Includes salt, coal, clay, stone, etc. Held to include "shale." McCombs v. Stephenson [Ala.] 44 S 867.

Expert testimony held admissible as to meaning of word "minerals" and as to whether "shale" was a "mineral" within meaning of such word as used in conveyance. McCombs v. Stephenson [Ala.] 44 S 867.

15. Contract between claimant and adverse claimant setting controversy and agreeing to convey part of the land to adverse claimant held not confined to surface. Riley v. North Star Min. Co. [Cal.] 93 P 194.

16. Location of separate estate in mineral, with right to remove the same, whether by deed, grant, lease, reservation, or exception, unless expressly restricted, confers upon owner of mineral a fee simple estate which terminates when the mine is exhausted. Moore v. Indiana Camp Coal Co., 73 Ohio St. 493, 80 NE 6.

17. Coal. In re Murray's Estate, 216 Pa. 270, 65 A 675. Conveyance of undivided half interest in coal after having previously conveyed other undivided half interest to another. Gordon v. Park, 202 Mo. 236, 100 SW 621. Lessor's widow is entitled to **dower** therein, though it is not taken out in the life time of the lessor. In re Murray's Estate, 216 Pa. 270, 65 A 675.

18. Adverse possession as to coal in place. Gordon v. Park, 202 Mo. 236, 100 SW 621.

19. Gordon v. Park, 202 Mo. 236, 100 SW 621.

below, as may be reasonably required for the proper mining of the mineral,[20] and, in the absence of restrictions to the contrary, the space left by the removal of the mineral and strata belongs to the owner of the mineral until the mine has been exhausted.[21] Rights under a contract of sale of coal in place in consideration of royalties on coal mined may be lost by failure to mine such coal.[22] A grant of a lode claim includes a placer claim within the bounds of the former and owned by the grantor.[23] Privileges granted cannot be extended by interpretation,[24] but a conveyance of coal in place must be construed in the light of the conditions and circumstances existing at the time of its execution,[25] and where the deed is ambiguous, resort may be had to the meaning of the terms used at such time,[26] but parol evidence is admissible to show that certain terms, as used, had a special meaning and were so understood by the parties.[27] An action to recover for the royalty due upon a sale of coal in place is a personal action and must be brought in the name of the personal representative, and not in the name of the heirs at law, although the estate is otherwise fully settled up.[28] Only the actual loss can be recovered upon a penal bond given in connection with a conveyance of mineral rights.[29]

Rights as between surface and subterranean owners. See 8 C. L. 1001—A lessee of mineral rights cannot use portions of the surface excepted for the lessor's use for special purposes,[30] and may be liable to the owner of the surface for injuries thereto caused by the operations of the lessee,[31] and the failure of the surface owner to exact a statutory security from the owner of the minerals does not relieve the latter from liability,[32] but mere knowledge on the part of a lessor that the lessees of the upper level are working their level in a manner dangerous to the lower level will not render the lessor liable to a resulting injury to the lessee of the lower level.[33] A lessee of the lower level cannot invoke as against the lessor guaranties given to the latter by the lessee of the higher level,[34] nor is a reservation in a conveyance by one having no title to coal of the right to remove it, without liability for injury to the surface, available to the real owner, the latter being a stranger to the former's conveyance.[35] The

20. Moore v. Indiana Camp Coal Co., 75 Ohio St. 493, 80 NE 6.

21. Mine owner may use such space as he sees fit, including right to have mineral and drain water through such space from other mines, provided the surface be not injured. Moore v. Indiana Camp Coal Co., 75 Ohio. St. 493, 80 NE 6.

22. Failure for twenty years. Brown v. Wilmore Coal Co. [C. C. A.] 153 F 143.

23. Collins v. McKay [Mont.] 92 P 295.

24. Right to sink shaft on grantor's land to ventilate mines on adjoining lands, held not given by grant of coal, with privilege of ventilation in mining same, and right to transport the coal from the other mines through passages and entries made in the mining of the coal granted. Cubbage v. Pittsburg Coal Co., 216 Pa. 411, 65 A 797.

25. Hoysradt v. Delaware, etc., R Co., 151 F 321.

26. Where it appeared that person who wrote deed was skilled in use of such terms. Hoysradt v. Delaware, etc., R. Co., 151 F 321. "Coal bed" as used in deed executed in 1823, held not to include all coal under the land, but a quarry worked by "stripping." Id. Meaning of similar terms in contemporaneous conveyances will be considered. Id.

27. Provision in contract of sale of coal in place for royalties on all "merchantable coal" mined. Hutson Coal Co. v. Hughes, 9 Ohio C. C. (N. S.) 121.

28. Hutson Coal Co. v. Hughes, 9 Ohio C. C. (N. S.) 121.

29. Bond for certain sum agreed to be paid from net earnings in addition to purchase price and to secure the performance of certain conditions looking to the realization of such earnings held for a penalty. Blewett v. Hoyt, 118 App. Div. 227, 103 NYS 451.

30. Portion excepted for burial purposes. Montgomery v. Economy Fuel Co., 61 W. Va. 620, 57 SE 137.

31. Lessor held liable to owner for injury to surface from operation of coal vein by lessee, where lessor knew surface had been endangered, but took no steps to prevent the injury and received royalties on all coal taken out. Campbell v. Louisville Coal Min. Co. [Colo.] 89 P 767.

32. Mills' Ann. St. §§ 3139, 3159, 3620, authorizing surface owner to require bond from owner of minerals. Campbell v. Louisville Coal Min. Co. [Colo.] 89 P 767.

33. It must appear that lessor made lease of upper level after leasing lower level and that situation was such that, to knowledge of lessor, material injury would necessarily follow to lower level. Peterson v. Bullion-Beck & Champion Min. Co. [Utah] 91 P 1095.

34. Peterson v. Bullion-Beck & Champion Min. Co. [Utah] 91 P 1095.

35. Tischler v. Pennsylvania Coal Co. [Pa.] 66 A 988.

right of the surface owner to support may be released.[36] The right of action for injury to the surface by removal of support accrues when the support is so weakened that it may fall.[37]

§ 7. *Leases.* See 8 C. L. 1001

Essentials and validity. See 8 C. L. 1001—Some consideration or covenant on the part of the lessee is essential, otherwise the purported lease will constitute a mere option.[38]

Estate or interest created. See 8 C. L. 1002—The word lease, as applicable to certain minerals, has a well defined and more or less technical meaning.[39] Leases of undivided interests to different lessees constitute them colessees each of the undivided interest covered by his lease.[40] A parol license to mine is revocable at will and conveys no title to ores not mined and reduced to possession,[41] and nothing is added to such estate by expenditures under such license.[42] Change of the basis of rental from cash to royalty does not enlarge the leasehold estate.[43] A mining lease passes no title to the mineral in place,[44] though grants of minerals in place are sometimes treated as leases and have more or less in common therewith.[45] The title acquired at a judicial sale is ordinarily limited by the terms of the sale.[46]

Interpretation and effect in general. See 8 C. L. 1002—The scope of a lease depends, as in the case of other conveyances, upon the intent of the parties as manifested by the instrument by which the lease is evidenced,[47] and such an instrument will be given a reasonable interpretation.[48] There is an implied covenant for good title and peaceable and quiet possession in a lease for years for oil and gas,[49] and such covenant extends not only to the right to explore for oil and gas, but to the amount stipulated for, when produced.[50] Questions as to the interpretation of provisions as to diligence of the lessee in regard to operations, and as to forfeitures for failure to

36. Lease held to give right to remove all coal under land, regardless of effect on surface. Miles v. Pennsylvania Coal Co., 217 Pa. 449, 66 A. 764.

37. Tischler v. Pennsylvania Coal Co. [Pa.] 66 A. 988.

38. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S. 481. See post, this section, subsection, Forfeiture, Rescission, Cancellation, and Abandonment.

39. Allegation in suit to quiet title that complainant was fee simple owner of the lands, subject to a "gas and oil lease," held not indefinite in use of such term, the meaning thereof being well understood. Erie Crawford Oil Co. v. Meeks [Ind. App.] 81 NE 518.

40. Where a widow held an undivided one-half interest in oil and gas lands, the other half interest belonging to her children, and part of such lands being occupied by them as a homestead, a lease by her alone conveyed her interest and a subsequent lease by the children conveyed their interest and the respective lessess held each an undivided one-half interest, with right to take possession and to drill for oil, but neither was entitled to the exclusion of the other. Compton v. Peoples' Gas Co., 75 Kan. 572, 89 P. 1039.

41, 42. McCullagh v. Rains, 75 Kan. 458, 89 P. 1041.

43. Hence where lease is of homestead, such change need not be in writing or consented to by lessor's wife. Wilson v. People's Gas Co., 75 Kan. 499, 89 P. 897.

44. Oil and gas contract held merely a mining lease. Toothman v. Courtney [W. Va.] 58 SE 915.

45. See ante, § 6, Private Conveyances or Grants of Mineral Rights in Land.

46. While it is true that in the old field the word "lease," when referring to a lease in operation, means the whole plant, that is, the lease in its technical sense, together with the equipment and appurtenances in use in its operation, the title obtained by the purchase of such a lease at a judicial sale would ordinarily be limited to the terms of the decree of sale. Niece v. Percy, 9 Ohio C. C. (N. S.) 233.

47. Exclusive right to bore for and to produce oil on the premises held not to apply, in matter of production, to wells already on the premises. Doddridge County Oil & Gas Co. v. Smith, 154 F. 970. Lease of veins of coal, with provision that certain amount of coal of certain size might be mined and removed, gave lessee right to only such amount of such size. Hollenback Coal Co. v. Lehigh & Wilkes-Barre Coal Co. [Pa.] 67 A. 987.

48. A provision that the lease shall continue until all the product is taken out does not require the lessee to continue operations after the limit has been reached beyond which such product cannot be taken out at reasonable expense or with profit. Wilson v. Big Joe Block Coal Co., 134 Iowa, 594, 112 NW 89.

49, 50. Kilcoyne v. Southern Oil Co., 61 W. Va. 538, 56 SE 888.

operate or to pay rentals, usually arise in connection with a claim of forfeiture or an asserted right to cancel, and are treated in such connection.[51]

Rights, duties, and liabilities of the parties.[See 8 C. L. 1004]—A lease of the right to enter land, and to explore and operate, and to procure the subject-matter of the lease, creates only an incorporeal hereditament a license to explore for such matter and to remove it if found,[52] and the lessee has no right in or to any specific portion of the mass or strata until such portion has been severed.[53] Where a lease provides for the drilling of a certain number of wells, a certain amount of land to be apportioned to each well drilled, the lessee has the right, in the absence of specific directions or [54] specifications on the subject, to designate the portions to be reserved for the wells drilled. The lessee is not liable for failure to allow to the lessor's assignee a personal privilege reserved to the lessor, where the lessee has no notice of the assignment.[55] A subsequent lessee may be estopped to assert the invalidity of the prior lease.[56] The rights, and duties, and liabilities of the parties in connection with the lessee's failure to begin or continue operations or to pay rentals is treated elsewhere,[57] as is also the mutual rights and liabilities of surface and subterranean owners.[58]

Rents and royalties.[See 8 C. L. 1008]—Royalty means the share of the profit reserved by the lessor, and is in the nature of rent,[59] and hence an advancement of royalty, pursuant to the lease, cannot be applied exclusively, if at all, to the lessee's liability for excess of royalties earned over and above a stipulated minimum royalty.[60] Minimum royalties may be recovered as rent.[61] The lessee is sometimes expressly relieved from the payment of minimum royalties where operations are suspended by certain matters,[62] and in such case the lessee's liability for such royalties is not merely de-

51. See ante, this section, subdivision Forfeiture, Rescission, Cancellation and Abandonment.

52. Kansas Natural Gas Co. v. Neosho County Com'rs, 76 Kan. 335, 89 P 750.

53. Hence, Laws 1897, p. 456, c. 244, relating to taxation of separately owned minerals, has no application until such severance. Kansas Natural Gas Co. v. Neosho County Com'rs, 75 Kan. 335, 89 P 750.

54. When only two active wells of the seven wells contemplated were drilled, the lessor had no right to arbitrarily set off certain land for such wells, and to claim absolute title to rest. Pittsburg v. Pamage [Ind. App.] 82 NE 410. Lessor, or his assignee, should make demand upon lessee or those claiming under him, to make such reservation, and upon their default apply to court to make it. Id. Purchaser from receiver of lessee's assignee held entitled to notice or demand to make reservation, as to wells drilled, notwithstanding that he purchased with notice of suit to enforce reservation made by lessor's assignee. Id.

55. Where oil lessee had no notice of assignment of leasor's reserved privilege of employing a pumper to be paid for by the lessee, the latter was not liable for refusal to employ the assignee, and failure of petition to allege such notice was a fatal defect. Stanton v. Ohio Oil Co. [Ind. App.] 83 NE 521.

56. A subsequent lessee, who takes with notice of the first lease and that valuable improvements have been made thereunder, and that the lessor has accepted benefits thereof, cannot question the validity thereof, on ground that it lacks mutuality or that it has been revoked by the second lease. Compton v. People's Gas. Co., 75 Kan. 572, 89 P 1039.

57. See post, this section, subdivision, Forfeiture, Rescission, Cancellation and Abandonment.

58. See ante, § 6, Private Conveyances or Grants of Mineral Rights in Land.

59, 60. Kissick v. Bolton, 134 Iowa, 650, 112 NW 95.

61. Procedure is same as in action for ordinary rent. Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 SE 258. Such royalties are recoverable in assumpsit under an indebitatus count or under a special count on the contract. Id. As to lessor, such lease is an executed contract, and is admissible as evidence under a common count to prove amount he is entitled to recover. Id. No entry is essential as condition to right to recover such royalties. Id. Evidence to sustain demand for royalties as rent, not admissible under declaration containing no counts other than indebitatus for goods, etc., sold and delivered, work and labor, money lent, advanced, etc., money had and received, and an account stated, where there is no evidence of account stated. Id.

62. Matters, "over which lessee has no control," held equivalent to matters "for which the lessee is not to blame," or "without the fault of the lessee," and relate only to the personal or immediate control of the lessee. Robinson v. Kistler [W. Va.] 59 SE 505. Failure or refusal of railroad company

ferred, but ceases for the time being to exist.[63] Such a provision, however, cannot be invoked where operation and production are not in fact prevented.[64] Royalties payable only upon certain contingencies may depend not only upon the happening of such contingencies, but upon the continuation thereof.[65] Acceptance of royalties upon a certain basis may preclude the lessor from claiming royalties on any other bases.[66] In the absence of any provision on the subject, royalties are payable on the premises.[67] Rents payable in advance constitute a suspensive condition or a condition precedent to the creation or continuation of the lease.[68] A provision for the application of royalties to improvements is not rendered nugatory by a contract between the lessee and a third party, whereby the former is, for a valuable consideration, reimbursed for his expenditures in such regard.[69] The rights of one who has entered into a joint lease with another owner, whereby the royalties from their respective properties are thrown into hotchpot, are incident to and dependent upon his ownership of his portion of the property lease.[70] Forfeiture for nonpayment of rents and royalties is treated elsewhere.[71]

Forfeiture, rescission, cancellation and abandonment. See 8 C. L. 1010—Where the lease expressly provides for the payment of a minimum royalty, regardless of whether any mineral is mined or not,[72] a provision for forfeiture for failure to develop the property or to pay such royalties does not give the lessee the right to terminate the lease by his own default.[73] Some of the so-called gas and oil leases, however, are really mere options, revocable at the will of the holder, but not of the grantor,[74] while other so-called leases are unenforceable, and hence revocable, for want of mutuality.[75] It is held that where the contract has been violated by not doing what was covenanted to be done within the time stipulated, a putting in default

to supply sufficient cars held within such provision. Id. A provision relieving the lessee from liability for minimum royalties if he were prevented from taking out the product by matters he could not avoid, included impossibility of working mine with profit on account of unexpected and unforeseen difficulties. Wilson v. Big Joe Block Coal Co., 134 Iowa, 594, 112 NW 89.

63. Where it was provided that liability was to be "suspended." Robinson v. Kistler [W. Va.] 59 SE 505.

64. Breaker destroyed by fire, but coal was mined and shipped the same as before. Everhart v. Lehigh Valley Coal Co. [Pa.] 67 A. 618.

65. Under provision that, if gas was found in marketable quantities, a certain yearly rent should be paid, lessee held liable for such rent only so long as the wells produce gas in marketable quantities. Roberts v. Ft. Wayne Gas Co. [Ind. App.] 82 NE 558.

66. Where lease was susceptible to two constructions, and royalties were accepted for a number of years under one of such constructions. McKeever v. Westmoreland Coal Co. [Pa.] 68 A. 670.

67. Drake v. Pennsylvania Coal Co., 217 Pa. 446, 66 A 660.

68. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 481.

69. When the lessor was obligated to allow deductions from royalties, until one-half the cost of a branch road to be constructed by the lessee was paid, such liability was not extinguished by an agreement between lessee and railroad company, whereby the latter reimbursed former for costs of branch road in consideration of latter shipping certain quantity of coal over former's road. Alabama Mineral Land Co. v. Blocton-Cahaba Coal Co. [Ala.] 43 S 831.

70. Hence, on sale of his property under execution, he loses all interest in the hotchpot. Coolbaugh v. Lehigh & Wilkes-Barre Coal Co. [Pa.] 67 A 615.

71. See post, this section, subdivison Forfeiture, Rescission, Cancellation and Abandonment.

72. Provision for minimum royalties held to constitute absolute undertaking to pay such royalties as rent. Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 SE 258.

73. Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 SE 258.

74. Held option and not lease. Pittsburg Vitrified Paving & Bldg. Brick Co. v. Bailey [Kan.] 90 P 803. Such options are not invalid for want of mutuality. Id. The amount paid at the execution of the contract, and the rental thereafter paid, is sufficient consideration to support contract in entirety, including privilege of extending time for drilling by paying price therefor. Id.

75. A lease containing no covenants on the part of the lessee, and imposing no obligations upon him except the payment of royalties, is a mere option based upon no consideration and may be withdrawn at any time before money has been expended by the lessee. Collins v. Smith [Ala.] 43 S 838; Collins v. Abel [Ala.] 44 S 109; O'Neil v. Risinger [Kan.] 93 P 340; Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 481.

is not a prerequisite to a suit to rescind,[76] such putting in default being necessary only to the recovery of future damages,[77] and that where an oil and gas lessee breaks his contract to begin operations within a certain time, the lessor may thereafter refuse to allow him to perform, and in case of suit by the lessee the lessor may plead such breach by way of exception.[78] But the general rule is that, while equity may cancel a mining lease at the lessor's instance for failure of the lessee to operate,[79] a lease will be cancelled or declared forfeited only after notice [80] and the expiration of a reasonable time in which to perform.[81] The usual remedy of an oil and gas lessor against the lessee for defaults is by an action for damages and not by way of forfeiture,[82] forfeitures being abhorred by equity.[83] The lessor will be held to a strict exercise of a right of forfeiture,[84] and such right, though expressly reserved, is not usually self executing,[85] and must be exercised by some positive act.[86] Where, however, an oil and gas contract is alternative in requiring operations to begin within a certain time or the payment of a certain sum in advance, it becomes single upon failure to make such payment, and the only useful offer that can thereafter be made is to commence operations,[87] and where the lease provides that it shall be void for failure to perform conditions as to operations, the lessor may after a reasonable time, terminate the lease.[88] An alternate provision for the payment of rents or minimum royalties in the event of failure to perform conditions as to operation does not give the lessee an absolute option to extend the lease by mere payment of such rents or royalties,[89] and even acceptance of such rents or royalties

76, 77, 78. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 481.

79. Coal lease cancelled for two years default in operation. Starn v. Huffman [W. Va.] 59 SE 179. Principles upon which such cancellation will be allowed, stated and discussed. Id.

80. A reasonable demand is necessary as a condition precedent to cancellation. Flanagan v. Marsh [Ky.] 105 SW 424.

Sufficiency of notice: Notice to terminate mining license held sufficient, though it terminated with the expression "I desire the contract to be at an end." Gearhart v. Gwinn, 32 Pa. Super. Ct. 567. Notice that lease "will not be extended beyond May 20th, or delay in operations on said premises be delayed beyond such period, nor will a money consideration be accepted for further extension or delay in operations," held ambiguous and insufficient. Campbell v. Rock Oil Co. [C. C. A.] 151 F 191.

Evidence of notice: Written notice not admissible to show that it was given, where receipt thereof is denied. Gearhart v. Gwinn, 32 Pa. Super. Ct. 567. Expenditures necessarily incident to a license are immaterial on an issue of notice to terminate and abandon. Id. Whether notice was received, held for jury. Id.

Demand on joint lessee held sufficient when other lessee was nonresident of state. Flanagan v. Marsh [Ky.] 105 SW 424.

81. What constitutes reasonable time is usually for jury. Erie Crawford Oil Co. v. Meeks [Ind. App.] 81 NE 518. What constitutes reasonable time, after notice in which to determine whether products can be found, is question for jury. Campbell v. Rock Oil Co. [C. C. A.] 151 F 191. Seven months held reasonable time within which to comply with terms of lease by drilling oil well, time having already been extended for six months. Puritan Oil Co. v. Myers, 39 Ind. App. 695, 80 NE 851.

82. Failure to develop and protect wells against loss of product by drainage. Doddridge County Oil & Gas Co. v. Smith, 154 F 970.

83, 84. In re Murray's Estate, 216 Pa. 270, 65 A 675.

85. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 481; Drake v. Pennsylvania Coal Co., 216 Pa. 446, 66 A 660; In re Murray's Estate, 216 Pa. 270, 65 A 675.

86. In re Murray's Estate, 216 Pa. 270, 65 A 675. Notice of election to claim the forfeiture must be given. Drake v. Pennsylvania Coal Co., 217 Pa. 446, 66 A 660. As to sufficiency of notice, see ante, this section and subdivision.

87. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 481.

88. Where two parties leased their separate oil lands to same party, both leases, however, to be operated together, and it was stipulated that well should be drilled, etc., on land of one before on that of other, but lessee drilled on land of latter and not at all on that of former, the lease not performed was subject to forfeiture, according to terms thereof. Kimball Oil Co. v. Keeton, 31 Ky. L. R. 146, 101 SW 887.

89. Provision for minimum royalty held not to nullify provision for forfeiture for failure to operate for one year. Chauvenet v. Person, 217 Pa. 464, 66 A 855. Under lease reserving royalties for five years and providing that, if no well was completed within — years, the lease should be void unless a certain semi-annual rent was paid, lessee held to have exclusive option for only one year, and that he was bound to begin operations within a reasonable time, and could not hold exclusive right to explore, etc., for

does not necessarily operate as such an extension.[90] A fortiori may cancellation be had when such rental is not paid.[91] A stipulation for forfeiture for breach of conditions is not a mere covenant, but a condition subsequent upon which the estate of the lessee may be divested,[92] and the lessor may reserve an absolute right of forfeiture for breach of conditions as to due diligence in operation,[93] and in such case the lessee's inability to operate the mine is immaterial.[94] No notice, except as provided in the lease, is necessary to sustain a peaceable re-entry after forfeiture,[95] and an option is forfeited if not exercised within the time prescribed [96] without any claim of forfeiture.[97] A forfeiture will not be declared for a default caused by the bad faith of the lessor,[98] nor for nonpayment of royalties until after demand therefor at the proper place and a refusal of payment.[99] What constitutes performance depends, of course, upon the terms of the lease,[1] and such terms may be novated by subsequent agreements.[2] A commutative contract to exploit for oil and gas is broken by not beginning operations within the term specified, or offering to do so within reasonable time thereafter.[3] An assignee of a lease is not affected by the lessee's forfeiture of a collateral option.[4] Stipulations as to an amicable suit to declare a forfeiture do not apply where an ordinary suit is resorted to instead of the amicable suit.[5] Mining properties which have become a part of the realty are forfeited

oil and gas for five years merely upon payment of the stipulated rental. Erie Crawford Oil Co. v. Meeks [Ind. App.] 81 NE 518.

90. Where the intention of the lease is that all the mineral shall be removed by the lessee, acceptance of a minimum royalty will not waive a forfeiture for failure to operate the mine. Chauvenet v. Person, 217 Pa. 464, 66 A 855. Where the primary consideration is the payment of royalties, a lease for a special term may be cancelled for failure of the lessee to commence or carry out operations within the specified time, notwithstanding the payment of the rental provided for in the event of the lessee's default. Flanagan v. Marsh [Ky.] 105 SW 424.

91. Flanagan v. Marsh [Ky.] 105 SW 424.

92. Condition as to leaving sufficient pillars to support roof of mine. Geer v. Boston Little Circle Zinc Co., 126 Mo. App. 173, 103 SW 151.

93. Expert testimony as to what was due diligence in operation of mine held not admissible where lessor had reserved right to terminate whenever in his opinion the lessee failed to use due diligence, etc. Gearhart v. Gwinn, 32 Pa. Super. Ct. 567.

94. Gearhart v. Gwinn, 32 Pa. Super. Ct. 567.

95. Geer v. Boston Little Circle Zinc Co., 126 Mo. App. 173, 103 SW 151. Rev. St. 1899, §§ 4107, 4108 [Ann. St. 1906, pp. 2233, 2234], relating to notice of re-entry upon forfeiture of leases for less than two years, and § 4109, relating to tenancies from year to year, held not applicable to ten years' lease. Id.

96. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 481.

97. An oil and gas lease containing no covenants on the part of the lessee is a naked option and terminates upon the failure of the lessee to comply with the terms of the lease, without any claim of forfeiture on the part of the lessor. O'Neill v. Risinger [Kan.] 93 P 340.

98. Where lessor made contractor stop work of drilling upon the latter's failure to comply with an unfounded claim upon the lessee. Doddridge County Oil & Gas Co. v. Smith, 154 F 970. Where the lessor, as an inducement to the lease, represents that he has on the land certain appliances which can be used in drilling the well, and thereafter allows the lessee to use such appliances, the lessor cannot, without notice, take such appliances away from the lessee and then declare a forfeiture for failure to complete the well within the specified time, such failure being due to the loss of the use of the appliances. Id.

99. Drake v. Pennsylvania Coal Co., 217 Pa. 446, 66 A 660.

1. Oil lease, when construed in light of subsequent agreement endorsed thereon, held to contemplate termination on failure to produce oil within five years, and not extended beyond such term by mere commencement of well within such term. Meyers v. Carnahan, 61 W. Va. 414, 57 SE 134.

2. Subsequent agreement held to have novated original lease, so that lessee could not rely on provisions of latter as to when lease was to terminate. Myers v. Carnahan, 61 W. Va. 414, 57 SE 134. Evidence held to sustain lessor's claim for penalties for not drilling wells within specified time. Dailey v. Heller [Ind. App.] 81 NE 219. Lease held to provide penalty to be accepted in lieu of forfeiture for failure to drill well, and an additonal penalty for every well thereafter not drilled as stipulated. Id.

3. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 793, 44 S 481; Lobdell v. Chicago, 227 Ill. 218, 81 NE 354.

4. Lessee of oil and gas land, with option to purchase completed wells, machinery, etc., assigned lease but not option. Doddridge County Oil & Gas Co. v. Smith, 154 F 970.

5. Stipulation that amicable action of ejectment might be brought upon thirty day's notice, etc., held not applicable to ordinary action of ejectment. Drake v. Pennsylvania Coal Co., 217 Pa. 446, 66 A 600.

when the lease is forfeited,[6] and cannot thereafter be removed, even though there is a stipulation in the lease for the removal of all properties at any time.[7]

A lessee may lose his rights by abandonment,[8] and may, of course, surrender the lease when so authorized thereby.[9]

Reinstatement. See 8 C. L. 1012—A renewal may be implied by the continued working of the mine after expiration of the term.[10]

§ 8. *Working contracts.* See 8 C. L. 1012—Drilling contracts will be construed according to their ordinary and commonly understood meaning in the absence of any reason for a contrary construction,[11] and substantial compliance with provisions as to reports of strata drilled through is all that is required.[12] Stipulations as to drilling a well do not include matters relating to its permanent preservation.[13]

§ 9. *Mining partnerships and corporations.* See 8 C. L. 1013—Whether there was a partnership is ordinarily a question of fact.[14] A "grub-stake" contract does not constitute a partnership where it goes no further than furnishing of supplies.[15] Joint working or operation of a mine by joint owner creates a mining partnership without any agreement to that effect,[16] and the same is true of two or more holding interests in a lease of mining property [17] but where, by statute, actual participation in the work is essential to constitute persons mining partners,[18] cotenancy alone will not constitute the cotenants parfners,[19] though such a partnership may exist between two or more cotenants without the joinder of other cotenants.[20] The scope of the partnership agreement is a matter of construction.[21] Where on partner transfers the partnership claims to a corporation, the other party may obtain a decree against him personally without joining the corporation.[22] Whether a mining corporation may be organized under a general statute is a question of construction.[23]

6. Casing, drive pipe, and other material attached to oil well. Perry v. Acme Oil Co. [Ind. App.] 80 NE 174.

7. Properties which have become part of land cease to belong to lessee after forfeiture, and hence the stipulation for removal does not apply to them. Perry v. Acme Oil Co. [Ind. App.] 80 NE 174.

8. That no work was done for four years held evidence of abandonment. Gearhart v. Gwinn, 32 Pa. Super. Ct. 567. Coal and mineral leases held abandoned by failure to work for twenty years. Brown v. Wilmore Coal Co. [C. C. A.] 153 F 143.

9. A question whether anything had been done in the way of surrendering mine and mining properties called for mere conclusion. Wilson v. Big Joe Block Coal Co., 134 Iowa, 594, 112 NW 89.

10. Were mine was operated after expiration of lease providing for renewal, and evidence as to renewal was in conflict, the question was for the jury. Wallace v. Dorris [Pa.] 67 A 858. Lessee held estopped to deny renewal of release providing for renewal, when after expiration he operated the mine until it was exhausted, and could not assert liabilty of lessor for certain improvements conditioned on failure to renew. Id.

11. Contract whereby second party agreed to drill for oil or gas, and to go to Mississippi lime rock, unless good quantity of oil or gas is struck, or otherwise at the option of the first party, and to do work in good and workmanlike manner, and first party agreed to pay one dollar per foot for such work, held to obligate first party to pay such price when Mississippi lime rock was reached, provided work was good and workmanlike. Collier v. Manger, 75 Kan. 550, 89 P 1011. Contract held not to give oil company right to seize driller's machinery and to continue boring therewith after certain depth had been reached without finding oil, but to contemplate that if further boring were done it was to be done by the driller himself, without charge for use of his machinery. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453.

12. Where there was no evidence of incorrect reports, it was not error to instruct that substantially correct reports were sufficient. Runyan v. Punxsutawney Drilling & Cont. Co., 31 Ky. L. R. 588, 102 SW 854. "Indeed, a substantially correct report would be a fair compliance with the contract." Id.

13. Stipulation that an oil well shall be drilled in a good and workmanlike manner did not include placing therein a packer and tubing and removing salt water therefrom. Collier v. Manger, 75 Kan. 550, 89 P 1011.

14. Evidence held to show partnership between plaintiff and defendant, so as to entitle former to accounting. Costello v. Scott [Nev.] 93 P 1.

15. Costello v. Scott [Nev.] 93 P 1.

16, 17. Kirchner v. Smith, 61 W. Va. 434, 58 SE 614.

18. Rev. St. 1887, §§ 3300-3309. Madar v. Norman [Idaho] 92 P 572.

19, 20. Madar v. Norman [Idaho] 92 P 572.

21. Contract for location and operation of mining claim held to cover lease of claim and operation thereof. Costello v. Scott [Nev.] 93 P 1.

22. Decree for accounting and establishing plaintiff's interest in the claim, but not

§ 10. *Public mining regulations.*[See 8 C. L. 1013]—The term mineral, as used in statutes, is not confined to metalliferous ores,[24] nor is the term mines confined to subterraneous excavations or workings.[25] Regulatory statutes [26] must conform to the usual constitutional limitations [27]

§ 11. *Statutory liens and charges.*[See 8 C. L. 1014]—A watchman on an idle oil claim is not entitled, as such, to a laborer's lien.[28] Under some of the statutes an owner who has leased his mines may protect himself against liens by recording the lease.[29] The lessees of a mine by whom plaintiff was employed, are necessary parties to a suit to establish a laborer's lien against the mine.[30] A proceeding to enforce a laborer's lien against a mine involves title to land and is beyond the jurisdiction of a justice of the peace.[31]

§ 12. *Mining torts.*[See 8 C. L. 1016]—One has the right to drill for oil on his own land, though he thereby drains wells on the lands of another,[32] and a lessee of adjoining lands may do the same thing,[33] but such right cannot be exercised by a lessee for the collusive purpose of draining wells on other lands leased by him.[34] In West Virginia the sinking of an oil or gas well by a tenant in common is a waste,[35] and where such tenant is allowed to sink such an well on the land he must account to his cotenants for their proportionate shares.[36] The measure of damages for mining the coal of another under a bona fide claim or right is the value of the coal in place, or after removal less the expense of removal,[37] but where a trespasser confuses with

adjudicating any right to stock in the corporation. Costello v. Scott [Nev.] 93 P 1.

23. Corporation organized to supply natural gas to public may be organized under Gen. St. 1901, § 1249. Compton v. People's Gas Co., 75 Kan. 572, 89 P 1039.

24. Gypsum is a mineral within the meaning of the word mineral as used in statutes relating to mines. Nephi Plaster & Mfg. Co. v. Juab County [Utah] 93 P 53.

25. Naphi Plaster & Mfg. Co. v. Juab County [Utah] 93 P 53.

26. Under Rev. St. 1899, § 2572, making it a misdemeanor for any miner, etc., to "intentionally" injure any shaft, etc., the word "intentionally" imports merely knowledge of the nature of the act. Koppala v. State [Wyo.] 89 P 576. Information under Rev. St. 1899, § 2572, for doing certain acts endangering life of any person, etc., need not specify names of persons in mine whose lives were endangered. Id. Mine foreman whose duties were confined to the underground portion of the colliery, which constituted the mine proper, held not the superintendent of the colliery within Act June 2, 1891 (P. L. 176), art. 14, p. 196, requiring such superintendent to give notice to mine inspector in certain cases, including when pillars are to be removed or robbed, or when safety seems to be affected by squeeze or crush. Corgan v. George F. Lee Coal Co. [Pa.] 67 A 655.

27. Sess Laws 1890-91, p. 345, c. 80, § 7, Rev. St. 1899, § 2572, making it a misdemeanor for any miner, workman, etc., to intentionally injure any shaft, etc., held not unconstitutional as embracing more than one **subject-matter** or containing matter not covered by **title.** Koppala v. State [Wyo.] 89 P 576. Rev. St. 1899, § 2570 et seq., providing for inspector of coal mines, prescribing his duties, etc., held not unwarranted **delegation of legislative** power. Id.

28. Under Code Civ. Proc. § 1183. Donaldson v. Orchard Crude Oil Co. [Cal. App.] 92 P 1046. Watchman on idle oil claim held entitled to laborer's lien under Code Civ. Proc. § 1183, for pumping oil for use in boiler, though not entitled to lien for services as watchman. Id.

29. Under B. & C. Comp. § 5668, relieving owner from laborers' and materialmen's lien, where lease is recorded in county "mining records," a book in which county clerk recorded mining leases, etc., held "mining records." Slover v. Bailey [Or.] 90 P 665.

30. Hoye Coal Co. v. Colvin [Ark.] 104 SW 207. Service on nonresident lessee may be constructive, no personal judgment being sought. Id.

31. Circuit court acquires no jurisdiction by appeal from justice. Hoye Coal Co. v. Colvin [Ark.] 104 SW 207.

32, 33, 34. Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 A 801.

35. Hence such tenant not entitled to such well as an improvement. Dangerfield v. Caldwell [C. C. A.] 151 F 554.

36. Cotenant liable only for net receipts where he was allowed to proceed with such well, etc., by his cotenants. Dangerfield v. Caldwell [C. C. A.] 151 F 554.

37. Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 30 Ky. L. R. 1308, 101 SW 319.

Note: "It remains to determine upon what basis the value of this coal shall be fixed. The plaintiff insists that it is entitled to the value of the coal after it was removed from the mine which would be about $2.50 a ton. The circuit court allowed the defendant credit for what it cost it to get out the coal and then charged it for what it got for it, thus leaving a balance of 44c. per ton. Neither party being satisfied with the judgment of the court, both are complaining on the appeal before us. Where the trespass is wilfull, and not the result of an honest

gas from his own wells gas taken from another's property, and pending litigation takes no steps to facilitate an accounting, every presumption will be indulged against him on such accounting.[38] The servitude of lower lands to drainage from upper lands does not extend to waste oil and salt water from oil operations on such upper land.[39]

§ 13. *Remedies and procedure peculiar to mining rights.* See 8 C. L. 1016—A mining licensee has no legal remedy for injuries to the possession, he having no possessory rights.[40] Mineral in place is not susceptible of partition.[41]

MINISTERS OF STATE; MINUTES; MISJOINDER, see latest topical index.

MISTAKE AND ACCIDENT.

§ 1. Definition; Elements, 853.
§ 2. Effect of Mistake and Relief Against, 854.
§ 3. Procedure to Obtain Relief or Make Defense, 854.

The scope of this topic is noted below.[42]

§ 1. *Definition; elements.* See 8 C. L. 1029—Mistake generally consists of unconscious or inadvertent failure of parties to a written instrument to express the real agreement.[43] Where unmixed with fraud it must be mutual,[44] but not so where in-

mistake, the rule claimed by the plaintiffs applied. But the entire current of the latter authorities is against applying it in cases like that before us. In 20 Am. & Eng. Enc. of Law, 792, the rule is thus stated: 'It is the prevailing rule that in an action for unlawfully working a mine and extracting coal or ore therefrom, if the taking was not a wilfull trespass, but was the result of an honest mistake as to the true ownership of the mine, the measure of damages is the value of the coal or ore as it was in the mine before it was disturbed. The rule is thus stated in 3 Sedgwick on Damages, § 935: 'Where coal, ore, or other valuable mineral is wrongfully, but in good faith, mined from the plaintiff's land, the measure of damages is generally and properly held to be the value of the coal or ore taken as it lay in the mine.' In Barringer & Adams on Mines, 691, after a similar statement of the rule, it is said: 'This valuation may also be expressed as the usual royalty paid for the right of mining.' See, also, Keys v. Coal Co., 58 Ohio St. 246, 50 NE 911, 65 Am. St. Rep. 754, 41 L. R. A. 681; Bailey v. Railroad Co., 3 S. D. 531, 54 NW 596, 19 L. R. A. 653; Woodenware Co. v. U. S., 106 U. S. 432, 27 Law. Ed. 230; Benson Mining Co. v. Alta Mining Co., 145 U. S. 428, 36 Law. Ed. 762."—From Sandy River Cannel Coal Co. v. White House Cannel Coal Co., 30 Ky. L. R. 1308, 101 SW 319.

38. Great So. Gas & Oil Co. v. Logan Natural Gas & Fuel Co. [C. C. A.] 155 F. 114.

39. McFarlain v. Jennings-Heywood Oil Syndicate, 118 La. 537, 43 S 155. Syndicate owning such waste products, which were drained first to syndicate's claim, whence it escaped to the lower premises, held liable. Id.

40. Continental Zinc Co. v. Amsden, Leonard & Co., 125 Mo. App. 512, 102 SW 1087.

41. Coal, oil, gas, salt water, etc. Robertson Consol. Land Co. v. Paull [W. Va.] 59 SE 1085. Oil and gas lands are not readily susceptible to partition in kind. Partition in kind denied. Dangerfield v. Caldwell [C. C. A.] 151 F 554. In West Virginia the sinking of such a well without the consent of cotenants is a waste, and hence under Code 1906, § 3390, it cannot be set off on partition to party who sunk it as an improvement. Id.

42. It includes the constituents of mistake, its general effect on contracts, and the manner and sufficiency of proof. **It excludes** the remedies by way of cancellation (see Cancellation of Instruments, 9 C. L. 454), or reformation (see Reformation of Instruments, 8 C. L. 1708). The implied obligation to repay money paid under mistake is also excluded (see Implied Contracts, 10 C. L. 26). The related topic of Fraud and Undue Influence, 9 C. L. 1475, should also be consulted.

43. Evidence held to show that by mistake wrong kind of mortgage clause had been inserted in insurance policy so as to warrant reformation. Gardner v. Continental Insurance Co., 31 Ky. L. R. 89, 101 SW 908. To sustain finding that land had not been omitted from a mortgage by mistake. Northwestern Mut. Life Ins. Co. v. Murphy [Minn.] 114 NW 360. To sustain finding of no mistake in deed conveying property for both church and school purposes. Trustees A. M. E. Church v. Waller, 31 Ky. L. R. 408, 102 SW 338.

44. Cox v. Beard, 75 Kan. 369, 89 P 671. Evidence insufficient to show mutual mistake in deed reserving right of way. Graham v. Carnegie Steel Co., 217 Pa. 34, 66 A 103. Wife who quitclaimed land to which she held a certificate of sale for alimony held not entitled to relief on ground that she believed title stood in name of herself and husband, where mistake was hers only and there was no fraud on part of purchaser. Thompson v. E. I. Dupont Co., 100 Minn. 367, 111 NW 302. In suit to reform a contract, evidence insufficient to show mu-

duced by fraud.[45] It must affect the substance of the contract and not a mere incident or inducement for entering into it.[46] The surrender of a contract in mutual ignorance of facts under which liabilities have already accrued is ground for relief.[47]

§ 2. *Effect of mistake and relief against.* See 8 C. L. 1021—Where on account of mistake or accident there is no meeting of the minds as to all the essential elements of a contract, there is no binding obligation.[48] Relief will not be granted for mistake induced by negligence or inattention.[49] Failure of an illiterate to have a contract read to him before signing will ordinarily estop him from avoiding it,[50] but if induced to sign by false representations, he is not bound to the party making such representations.[51] Mistake of law alone will not as a rule relieve one of the effect of his contract,[52] but if such mistake is occasioned by the fraud, or culpable negligence of another, equity will interpose its aid.[53] Mutual mistake is ground for rescission [54] or reformation,[55] and equity will also rescind, though not reform, a contract for unilateral mistake in certain cases.[56] It will not reform a mistaken description in a mere voluntary conveyance.[57] A mutual and innocent mistake as to legal rights cannot be the basis of estoppel as between the parties.[58]

§ 3. *Procedure to obtain relief or make defense.* See 8 C. L. 1021—The remedy for mistake is in equity and not at law,[59] but a contract signed by mistake being void, rescission is not necessary to defeat a claim thereon.[60] Failure to rescind promptly and compliance with the terms of a contract after discovery of mistake constitutes a

tual misake as to persons liable thereon. Smith v. Interior Warehouse Co. [Or.] 94 P 508.

45. Leading one to believe that omitted land was covered by deed. Cox v. Beard, 75 Kan. 369, 89 P 171. Vendor signing contract in ignorance of provision requiring acceptance as cash of contracts of sale defendants might make with others held entitled to cancellation where he gave receipts for such contracts, relying on defendant's statement that it was a mere formality and did not deprive him of cash. Stone v. Moody [Wash.] 91 P 644.

46. Error in addition of figures without special circumstance excusing it held insufficient to justify cancellation of contract of sale. Steinmeyer v. Schroeppel, 226 Ill. 9, 80 NE 564.

47. Where insured property had burned on day before cancellation of covering note. Traders' Ins. Co. v. Aachen & Munich Fire Ins. Co., 150 Cal. 370, 89 P 109.

48. Purtle v. Bell, 225 Ill. 523, 80 NE 350. Subject-matter of sale. Charles Holmes Mach. Co. v. Chalkley, 143 N. C. 181, 55 SE 524. Contract signed by mistake and without negligence is utterly void. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344. An agreement to establish a boundary line is not binding, where an erroneous line was agreed upon by mistake or accident, there being no dispute between the parties and the intent being merely to ascertain the true line. Purtle v. Bell, 225 Ill. 523, 80 NE 350. Deed set aside where grantor, ignorant of actual title, intended only to release dower or curtesy interest. Morgan v. Owens, 228 Ill. 598, 81 NE 1135.

49. Failure to read writing before signing. Reed v. Coughran [S. D.] 111 NW 559; Fulton v. Messenger, 61 W. Va. 477, 56 SE 830; Grieve v. Grieve [Wyo.] 89 P 569. In absence of fraud, party to contract cannot avoid it because of misunderstanding unless it appears that it was not due to his own negligence. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 SE 120.

50. Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67.

51. Held for jury whether plaintiff was negligent in signing contract granting telegraph right of way or was induced by fraudulent statements. Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67. See Fraud and Undue Influence, 9 C. L. 1475.

52. Tolley v. Poteet [W. Va.] 57 SW 811.

53. Fraudulent representations inducing execution of deed. Tolley v. Poteet [W. Va.] 57 SE 811.

54. Vendee entitled to rescind on ground of mutual mistake as to identity of land sold. Lee v. Laprade, 106 Va. 594, 56 SE 719. See Cancellation of Instruments, 9 C. L. 454.

55. See Reformation of Instruments, 8 C. L. 1708.

56. Wife who executed a quitclaim deed did not come within rule that equity may rescind, though it will not reform a contract for mistake of one party only, where a judgment which could not be collaterally attacked had vested title in husband and it did not appear that she was mistaken as to her interest. Thompson v. E. I. Dupont Co., 100 Minn. 367, 111 NW 302.

57. Finch v. Green, 225 Ill. 304, 80 NE 318.

58. Where defendants purchased an interest in land in which they and plaintiff believed plaintiff had only a life interest. Busby v. Busby [Iowa] 114 NW 559.

59. Mistake in computation of purchase price of business. Farquhar v. Farquhar, 194 Mass. 400, 80 NE 654.

60. Where old man without his glasses which had been broken signed order for goods believing he was simply to sell on commission. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344. In suit on a bond, held error to refuse to allow defendant who could not read English to answer questions tending to show that bond was not read to him, that he did not know contents, etc.

waiver.[61] Mistake must be proven by clear and satisfactory evidence.[62] Proof of mutual mistake will not sustain a bill for rescission of a contract on the ground of fraud.[63] Where an instrument is introduced merely as a matter of evidence, parol evidence is admissible to show a mistake therein without plea of fraud or mistake.[64] On a bill for specific performance of a written contract, defendant may by parol show that through mistake of both or either of the parties the writing does not express the real agreement,[65] or that the agreement itself was entered into through mistake as to its subject-matter or terms.[66]

MISTRIAL; MONEY COUNTS; MONEY LENT; MONEY PAID; MONEY RECEIVED; MONOPOLIES; MORTALITY TABLES, see latest topical index.

MORTGAGES.

§ 1. Nature and Elements of Mortgages, 855.
§ 2. General Requisites and Validity, 856.
§ 3. Absolute Deed, 858.
§ 4. Equitable Mortgages, 862.
§ 5. Nature and Incidents of Trust Deeds as Mortgages, 862.
§ 6. Construction and Effect of Mortgages in General, 862.
§ 7. Title and Rights of the Parties, 863.
§ 8. Lien and Priorities, 866.
§ 9. Assignments of Mortgage, 867.
§ 10. Transfer of Title of Mortgagor and Assumption of the Debt, 868.
§ 11. Transfer of Premises to Mortgagee and Merger, 868.
§ 12. Renewal, Payment, Release or Satisfaction, 869.
§ 13. Redemption, 871.
§ 14. Subrogation, 872.

Scope of topic.—This article is devoted to the mortgage as an instrument and the substantive rights arising therefrom. The procedure by which a mortgage is foreclosed,[67] the doctrine of notice and record of title,[68] the application of the statute of frauds,[69] the effect of a mortgage as an incumbrance,[70] and the purchase of land subject to a mortgage,[71] are elsewhere treated. Mortgage as used in this article means only those on land or an interest therein.[72]

§ 1. *Nature and elements of mortgages.*See 8 C. L. 1023—A mortgage is a conveyance as security[73] for the payment of a debt,[74] or the performance of an obligation.[75] The mere absence of a defeasance clause is not conclusive.[76]

Overseer of Poor of City of Elizabeth v. Mitchell [N. J. Law] 68 A 89.

61. Defense that employe was not aware of extent to which he had bound himself. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A 695.

62. Mistake in deed. Bower v. Bowser [Or.] 88 P 1104; Paterson v. Hannan [Ala.] 43 S 192. Mere preponderance not sufficient. Arkansas Mut. Fire Ins. Co. v. Witham [Ark.] 101 SW 721. Evidence not clearly against finding of no mistake in insurance policy. Id. In suit on benefit certificate, evidence insufficient to impeach a settlement pleaded by defendant for fraud or mistake. Steffen v. Supreme Assembly of the Defenders, 130 Wis. 485, 110 NW 401. Insufficient to show mistake in deed induced by defendant's fraud. Sellers, Bullard & Co. v. Grace [Ala.] 43 S 716. Insufficient to show mutual mistake in using "nine degrees" instead of "nine per cent" in deed reserving right of way. Graham v. Carnegie Steel Co., 217 Pa. 34, 66 A 103. Evidence held to show mistake as to land sold so as to entitle vendee to rescind. Lee v. Laprade, 106 Va. 594, 56 SE 719. Held to sustain finding of mistake in description in deed. Paterson v. Hannan [Ala.] 43 S 192.

63. Burk v. Johnson [C. C. A.] 146 F 209.

64. Especially where court struck allegations setting up written contract. Martin v. Ferguson, 31 Ky. L. R. 1095, 104 SW 698.

65. Evidence insufficient to show that writing conformed to agreement. Gottfried v. Bray [Mo.] 106 SW 639.

66. Gottfried v. Bray [Mo.] 106 SW 639.

67. See Foreclosure of Mortgages on Land, 9 C. L. 1378.

68. See Notice and Record of Title, 8 C. L. 1169.

69. See Frauds, Statute of, 9 C. L. 1494.

70. See Covenants for Title, 9 C. L. 845; Vendors and Purchasers, 8 C. L. 2216.

71. See Vendors and Purchasers, 8 C. L. 2216. See, also, post, § 10.

72. See Chattel Mortgages, 9 C. L. 560. Railroad mortgages, see Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004.

73. Written instrument accompanying deposit of title deeds held to create mortgage, it clearly showing that specific lands were intended to be pledged as security. In re Snyder [Iowa] 114 NW 615. Where owners of life estates and of remainder gave mortgage on entire premises to secure debt of life tenant, a conveyance by him to remainderman of life estate, providing that he should collect rents, and apply in order to cost of collection, repairs, taxes, and in-

§ 2. *General requisites and validity.*[See 8 C. L. 1023]—The relation of mortgagor and mortgagee being contractual,[77] the parties must have legal capacity to contract.[78] Fraud renders the mortgage voidable [79] unless the victim thereof is estopped by his acts from asserting the same,[80] the party asserting fraud having the burden of establishing it.[81]

Property subject of mortgage.—An equitable title,[82] after-acquired property [83] having a potential existence,[84] and land owned but in the possession of another,[85] may be mortgaged in some states, but not the right to redeem from the foreclosure of a prior mortgage.[86] The legal lien of a mortgage covering after-acquired property

surance, and then to debt. held a mortgage. Lebensburger v. Schofield [C. C. A.] 155 F 85. Where one advancing money to purchasers of realty takes title and gives bond to convey to purchasers upon payment of loan, held transaction amounts to a mortgage. Glidden v. Newport [N. H.] 66 A 117. Where owner of sawmill property contracted with mortgagee of personalty therein by which he purported to convey to latter all the property, who was to sell same, pay certain debts, and to turn over balance, held trust deed and not a mortgage. Brecht v. Law Union & Crown Ins. Co., 153 F 452. For general treatment of deed, absolute as a mortgage, see post, § 3.

74. Can be no mortgage without a debt, express or implied. Duell v. Leslie, 207 Mo. 658, 106 SW 489; Lemke v. Lemke [Neb.] 111 NW 138.

75. Deed conditioned for support of grantor will be treated as a mortgage, and upon default equity will grant relief by foreclosure. Abbott v. Sanders [Vt.] 66 A 1032. And in action to foreclose same, grantor need not offer to do equity where grantee persistently abused her for purpose of driving her from premises. Id.

76. Instrument must be considered a mortgage if, taken alone or in connection with surrounding facts, it appears to have been given as security. Wylly-Gabbett Co. v. Williams, 53 Fla. 872, 42 S 910.

77. Evidence offered to prove execution of mortgage not produced nor shown to have been recorded or otherwise accounted for held insufficient to show execution. Diamond v. Dennison, 102 Minn. 302, 113 NW 696.

78. Where mortgagor was of unsound mind "but was not entirely without understanding," and "she did not have sufficient mental capacity to understand the nature, purpose, and effect of the transaction," held that case is not within Civ. Code, § 38, providing that person "entirely without understanding" has no power to contract, but within § 39, giving right to rescind. Jacks v. Deering, 150 Cal. 272, 88 P 909

79. Evidence held to support finding that mortgage was fraudulent. Harrison's Estate, 31 Pa. Super. Ct. 485. Tampering with books containing account to secure which trust deed was given, held no ground for holding that trust deed was procured by fraud. Christian v. Green [Miss.] 45 S 425. Finding that defendant falsely represented purpose for which he desired plaintiff to give mortgage, and that defendant promised to discharge mortgage on doing of certain acts by mortgagor "without" intention of so doing, held insufficient fraud to avoid mortgage. McCusker v. Geiger [Mass.] 80 NE 648. Mortgage by sawmill company covering all its lands, machinery, live stock, timber carts, and a railroad used in connection with business, held not void as fraudulent because it empowered mortgagor to sell worn out machinery, etc., and replace with proceeds. Wylly-Gabbett Co. v. Williams, 53 Fla. 872, 42 S 910. In action to redeem from mortgage given in exchange of property, evidence of parol declarations of defendant are admissible to show fraud. McCusker v. Geiger [Mass.] 80 NE 648.

80. In action on note given for part of purchase price of land against maker and one who in a deed of trust had assumed payment, failure of latter to return deed held not to estop him from repudiating contract for fraud, no possession having been taken and notice of rescission having been given. Jockusch, Davison & Co. v. Lyon [Tex.] 18 Tex. Ct. Rep. 492, 102 SW 396.

81. Jobert v. Wagner, 147 Mich. 409, 13 Det. Leg. N. 1016, 110 NW 942. In action to enforce a judgment, in which third person intervenes, claiming to hold note and mortgage prior to plaintiff's attachment, plaintiff has burden of proving that such note and mortgage are fraudulent. Day v. Earlington Iron Works [Ky.] 107 SW 301. Fraud is not presumed, and in action to cancel trust deed for fraud, proof must be clear and convincing. Christian v. Green [Miss.] 45 S 425.

82. Silent partner had conveyed land to active partner "as a basis of credit" under bond for reconveyance at end of term. Clark v. Lyster [C. C. A.] 155 F 513.

83. People's Trust Co. v. Schenck, 121 App. Div. 604, 106 NYS 782. Laws 1892, p. 1824, c. 688 (Stock Corporation Law), § 2, held to authorize such mortgage by stock corporations to secure loans necessary to transact business or to exercise a franchise. United States Mortgage & Trust Co. v. Eastern Iron Co., 120 App. Div. 679, 105 NYS 291.

84. Where mortgage is given by mining corporation on all its property, including that which might be afterwards acquired, at time when mortgagor did not own fee to part of property dscribed but owned ore and minerals therein with right of removal and subsequently acquired fee, held that mortgage was valid and enforcible against one obtaining mechanics' lien with notice. United States Mortgage & Trust Co. v. Eastern Iron Co., 120 App. Div. 679, 105 NYS 291.

85. By express authority of Rev. Codes 1905, § 8734. State Finance Co. v. Halstenson [N. D.] 114 NW 724.

86. Francis v. Sheates [Ala.] 45 S 241.

does not attach to such property unless the mortgagee takes possession or enforces his equitable lien by action.[87]

Description.[See 8 C. L. 1024]—The mortgage must describe the debt [88] and property mortgaged [89] with sufficient particularity to identify the same, although parol evidence is admissible to identify the description and the land described.[90] Where a mortgage is given to indemnify a surety on a bond, misdescription of the bond does not invalidate the mortgage.[91]

Consideration.[See 8 C. L. 1024]—A mortgage must be supported by a consideration,[92] although the consideration need not move from the payee of the mortgage debt to the mortgagor.[93] A note and mortgage securing same,[94] especially if under seal,[95] raises a presumption of consideration, and attacking party has the burden of overcoming the same.[96] Where a consideration is partly legal and partly illegal, the mortgage will be sustained to the extent of the legal consideration if it is separable from the illegal.[97] Where the consideration is paid to another under the direction of the mortgagor, he cannot recover of the mortgagee.[98]

Execution.[See 8 C. L. 1025]—The joinder of the other spouse in a mortgage by a husband and wife,[99] especially if the property is occupied as a homestead,[1] is usually required. A mortgage on realty must be executed as a real estate mortgage [2] and be duly delivered,[3] recordation being presumptive evidence of delivery,[4] as is possession by the mortgagee or one standing in his place.[5] In many states a mortgage must be duly acknowledged and attested.[6] The fact that mistake justifies reformation of a

87. Medina Gas & Elec. L. Co. v. Buffalo Loan, Trust & Safe Deposit Co., 104 NYS 625.

88. Mortgage to secure future advances, which gives sufficient information as to extent and purposes of contract to enable interested persons by ordinary diligence to ascertain extent of incumbrance, protects advances made within its terms as against intervening purchasers and creditors, even though such mortgage does not limit amount of advances or require mortgagee to make same. Groos v. Chittin [Tex. Civ. App.] 100 SW 1006.

89. Description fixing three sides and amount of land mortgaged held sufficient. Walden v. Walden, 128 Ga. 126, 57 SE 323. Description "100 acres in southeast corner" of a given square tract containing 490 acres held sufficient, as parties will be presumed to have intended to mortgage 100 in form of a square. Payton v. McPhaul, 128 Ga. 510, 58 SE 50.

90. Walden v. Walden, 128 Ga. 126, 57 SE 323.

91. Parol testimony is admissible to identify bond. Emerson v. Knight [Ga.] 60 SE 255.

92. Where mortgagor had procured loan from bank, receiving only a part thereof in money, giving of certificate of deposit and subsequent payment thereon of balance held no consideration for second mortgage. First Nat. Bank v. Robinson, 188 N. Y. 45, 80 NE 567. Evidence held to sustain finding that consideration for mortgage was extension of time on indebtedness. Cambria Sav. Bank v. Lanier [Iowa] 112 NW 774. Bill to enjoin sale under trust deed to pay three notes aggregating $1,665 is not demurrable on ground of no equity where it shows that amount of notes in excess of $504 is without consideration (McDonald v. Kamper, 89 Miss. 221, 42 S 877), and a demurrer, "no equity on the face of the bill," does not raise point that tender of admittedly due amount was not made (Id.).

93. Loan by mortgagee to third person held sufficient. Thackaberry v. Johnson, 228 Ill. 149, 81 NE 828.

94. Moore v. Gould [Cal.] 91 P 616. Such presumption, which is evidence under Code Civ. Proc. § 2061, held to sustain finding of consideration as against undenied evidence of no consideration inherently improbable. Id.

95. And party attacking has burden of disproving. Quackenbush v. Mapes, 123 App. Div. 242, 107 NYS 1047.

96. Quackenbush v. Mapes, 54 Misc. 124, 105 NYS 654.

97. Lepper v. Conradt [Wyo.] 89 P 575.

98. Hayne v. Van Epps, 108 NYS 278.

99. See Husband and Wife, 10 C. L. 1.

1. See Homesteads, 9 C. L. 1629.

2. Building erected on land of another under oral agreement that on payment of agreed price land should be conveyed to builder becomes part of realty and mortgage on building to landowner is ineffectual as chattel or as real estate mortgage. Hanson v. Blake, 155 F 342.

3. Delivery by mortgagor of key to box containing mortgage to third person with directions to deliver mortgage to mortgagee held good delivery, though such party did not deliver mortgage until after mortgagor's death. Booker v. Booker, 104 NYS 21.

4. Preston v. Albee, 105 NYS 33.

5. Receiver. Preston v. Albee, 105 NYS 33.

6. Acknowledgment, void because notary taking same was general counsel and stockholder in mortgagee corporation, operates as an attestation to mortgagor's signature (Maddox v. Wood [Ala.] 43 S 968),

trust deed so as to convey a different price does not authorize reformation of the trustee's deed as to pass the intended piece which was not in fact sold.[7]

*Recordation.*See 8 C. L. 1026—A mortgage is good as between the parties though not recorded.[8]

§ 3. *Absolute deed.*See 8 C. L. 1026—An absolute deed intended by both parties [9] thereto as security only is a mortgage,[10] and in a court of equity such deed may be shown to be a mortgage [11] by parol evidence.[12] While the primary test in determining whether a deed absolute or conditional is in fact a mortgage is the continuance of the debt,[13] all the facts and circumstances surrounding the transaction may be con-

such party not being incompetent as a witness (Id.).

7. Harper v. Combs, 61 W. Va. 561, 56 SE 902.

8. Robertson v. Sebastian, 30 Ky. L. R. 883, 99 SW 933.

9. Smith v. Smith [Ala.] 45 S 168. Petition held insufficient to show intent on grantee's part. Id.

10. Linkemann v. Knepper, 226 Ill. 473, 80 NE 1009; Duell v. Leslie, 207 Mo. 658, 106 SW 489; Eldriedge v. Hoefer [Or.] 93 P 246. Intention of parties is controlling. Pelinski v. National Brew. Co., 124 Ill. App. 45. Under Rev. Civ. Code, § 2044, providing that every transfer of interest in property, other than a trust, as security for performance of another act, shall be deemed a mortgage, absolute deed to secure loan is a mortgage. Krug v. Kautz, [S. D.] 113 NW 623. Where deed was executed as security for a loan, fact that there was no collateral undertaking evidencing debt, and no covenant or personal obligation by grantor to pay, is not fatal to right to have deed declared a mortgage. Id. Act purporting to be a vente a remere but made for inadequate consideration and unaccompanied by delivery of possession will be treated as security only in absence of counter evidence. Leger v. Leger, 118 La. 322, 42 S 951. Where purchaser of land had it conveyed to trustee who conveyed it by deed absolute in form to one advancing purchase money as security therefor, held that deed was mortgage. Eldriedge v. Hoefer [Or.] 93 P 246. Where maker of note purchased land and had deed made to payee as additonal security, held that under Civ. Code, § 2924, payee was a mortgagee in equity. Windt v. Covert [Cal.] 93 P 67. Holding special lien within §§ 2875, 2876, and 2923, providing that one holding special lien and paying a superior lien for his protection has lien for amount paid. Id. Grantee has equitable mortgage and one purchasing lands at execution sale against mortgagor acquires equity of redemption only. Powell v. Crow, 204 Mo. 481, 102 SW 1024.

11. Smith v. Smith [Ala.] 45 S 168; Duell v. Leslie, 207 Mo. 658, 106 SW 489; Musick v. O'Brien [Tex. Civ. App.] 18 Tex. Ct. Rep. 532, 102 SW 458. Where absolute deed is accompanied by agreement permitting redemption, court is always inclined to treat same as mortgage. Sebree v. Thompson, 31 Ky. L. R. 1146, 104 SW 781. Equity will look at real intention. Jeffreys v. Charlton [N. J. Eq.] 65 A 711; Wagg v. Herbert [Okl.] 92 P 250. Where mortgage is released as to part of lands covered and other land is conveyed by deed to mortgagee, evidence is admissible in foreclosure suit to show whether such deed was absolute or a mortgage. Hilt v. Griffin [Kan.] 90 P 808. Demurrer to petition by grantee to have deed construed as mortgage, etc., held properly overruled. Hester v. Gairdner, 128 Ga. 531, 58 SE 165. Where mortgage given by husband and wife is released on part of premises and a deed by husband alone is made to mortgagee as to other lands, evidence to show that such deed is a mortgage is admissible against wife in foreclosure action where she asks that deed be declared absolute and that she be given credit on account thereof. Hilt v. Griffin [Kan.] 90 P 808.

12. Deed absolute in form may be shown by parol to be in fact a mortgage. Belinski v. National Brew. Co., 124 Ill. App. 45; Abrams v. Abrams, 74 Kan. 888, 88 P 70; Jennings v. Demmon, 194 Mass. 108, 80 NE 471; Wagg v. Herbert [Okl.] 92 P 250; Eldriedge v. Hoefer [Or.] 93 P 246. Especially where transaction was called a sale but absolute title was not to pass. Rester v. Powell [La.] 45 S 372. Hence amendment more directly alleging that sum to be paid to secure re-conveyance was a debt is not demurrable as tending to vary terms of absolute deed. Askew v. Thompson, 129 Ga. 325, 58 SE 854. Where deed names husband and wife as grantees, parol evidence is admissible to show that husband purchased same and that wife was made grantee therein merely to secure a loan to husband. Hubbard v. Cheney [Kan.] 91 P 793. Where writings consist simply of absolute deed with oral or written agreement to reconvey upon payment of stated sum, parol evidence is admissible to show real nature of transaction. Hall v. Jennings [Tex. Civ. App.] 19 Tex. Ct. Rep. 602, 104 SW 489. Although deed and defeasance contract are in writing, parol evidence is admissible to show real nature of transaction. Kinkead v. Peet [Iowa] 114 NW 616.

13. Francis v. Francis [S. C.] 58 SE 804. Deed will not be declared a mortgage unless relation of debtor and creditor exists. Smith v. Smith [Ala.] 45 S 168; Duell v. Leslie, 207 Mo. 658, 106 SW 489. Though grantee contemporaneously agreed to reconvey on being paid within certain period an amount equal to the debt. Rotan Grocery Co. v. Turner [Tex. Civ. App.] 18 Tex. Ct. Rep. 658, 102 SW 932. Allegations in petition to have deed declared a mortgage held not to show relation but rather to negative it. Smith v. Smith [Ala.] 45 S 168. Agreement to reconvey if grantor or his heirs should pay grantee $140, with interest at 7 per cent, with any amount grantor may be

sidered,[14] especially the inadequacy of the consideration for the deed.[15] Where grantor is fraudulently induced to sign a deed believing it to be a mortgage, it will be given the effect as a mortgage.[16] A deed intended as a mortgage at its inception cannot be made effective as a deed by a subsequent parol agreement,[17] nor can it be extended by a verbal contract to subsequent loans.[18] Where a deed is accompanied with an unambiguous agreement to reconvey on payment of a stated sum, parol evidence is not admissible to vary such sum.[19] A written agreement executed contemporaneously with the deed,[20] or subsequently, if supported by a consideration,[21] characterizing or affecting the transaction, must be considered with it. In the absence of statute [22] or an estoppel, a deed may be shown to be a mortgage as against third persons.[23] Where grantee conveys the property to a third person under the direction of the grantor, such person takes an absolute title.[24] A grantee may be estopped by his actions from asserting that deed was absolute.[25]

Mortgage or conditional sale. See 8 C. L. 1027—Whether an instrument is a deed as

indebted to grantee, etc., held to show that indebtedness continued. Francis v. Francis [S. C.] 58 SE 804. Fact that secured notes were marked "cancelled" and "paid" held of great importance in determining whether deed was intended as mortgage. Powell v. Crow, 204 Mo. 481, 102 SW 1024. Where one advanced part of purchase money for purchaser and took deed from vendor under agreement to convey to vendee upon payment of stated sum, deed will be declared a mortgage where it appears that such sum is the continuing debt. Blake v. Lowry [Tex. Civ. App.] 15 Tex. Ct. Rep. 728, 93 SW 521. Where plaintiff conveyed land to defendant under parol trust by which he was to hold for plaintiff's benefit and subject to his order, and under plaintiff's direction defendant deeds it to one holding mortgage on premises to secure indebtedness and save a foreclosure, creditor held a mortgagee still, although parol trust could not have been enforced against defendant. Lynch v. Ryan [Wis.] 112 NW 427.

14. Krug v. Kautz [S. D.] 113 NW 623.

15. Wagg v. Herbert [Okl.] 92 P 250. Value $10,000, consideration $3,000. Butsch v. Smith [Colo.] 90 P 61. Fact that real estate expert said that land deeded for consideration of $500 was worth $750 at time of conveyance if purchaser could be found, but that it was difficult to find purchasers, held not to show that $500 was not its fair value. Harris v. Hirsch, 121 App. Div. 767, 106 NYS 631. Evidence held to show that deed to defendant for $9,000, to be paid by assumption of first mortgage, discharge of second held by him, payment of taxes due, and $300 to plaintiff, was based upon a fair consideration and no advantage taken of plaintiff. Webster v. McDowell, 102 Minn. 445, 113 NW 1021. Where amount paid by vendee under deed giving vendor option to repurchase is practically entire value of property and no obligation rested on vendor to repurchase, held that deed was not intended as a mortgage. Jeffreys v. Charlton [N. J. Eq.] 65 A 711.

16. Evidence held to show that petitioners were fraudulently induced to sign deed believing it to be a mortgage. Guarantee Gold Bond, Loan & Sav. Co. v. Edwards [Ind. T.] 104 SW 624.

17. Ullman v. Devereux [Tex. Civ. App.] 18 Tex. Ct. Rep. 683, 102 SW 1163. And where sale is made in reliance on such agreement, no estoppel arises where the rights of the parties can be adjusted in money. Id.

18. Leger v. Leger, 118 La. 322, 42 S 951.

19. Blake v. Lowry [Tex. Civ. App.] 15 Tex. Ct. Rep. 728, 93 SW 521. But where there is nothing in written contract to show amount of debt, parol evidence held admissible to show that deed was given to secure existing indebtedness of amount stated as consideration for deed and for future advances. Hester v. Gairdner, 128 Ga. 531, 58 SE 165.

20. Smith v. Smith [Ala.] 45 S 168.

21. Agreement executed hour after absolute deed, providing that grantor should occupy premises for five years, at rent of —— dollars, pay taxes, insurance, etc., and at end of five years pay back purchase money and redeem, held effective to render entire transaction a mortgage, though independent agreement, since it is supported by consideration. Sebree v. Thompson, 31 Ky. L. R. 1146, 104 SW 781.

22. Under Rev. Codes 1905, § 6153, deed in form may be shown by parol evidence to be a mortgage as between parties and all others with knowledge. Omlie v. O'Toole [N. D.] 112 NW 677. But under § 6179, constructive notice from possession is insufficient. Gray v. O. W. Kerr Land Co. [N. D.] 113 NW 1034.

23. Where in ejectment between adjoining landowners adverse title to particular line is asserted by one defendant, while codefendant and apparent owner testifies he only claimed to line fixed by plaintiff, it may be shown that his deed is only a mortgage. Stumpe v. Kopp, 201 Mo. 412, 99 SW 1073.

24. Conveyance by grantee of defeasible deed to a third party by direction of the grantor conveys an absolute title. Deadman v. Yantis, 230 Ill. 243, 82 NE 592.

25. Where debtor deeded property by absolute deed to creditor and received exclusive agency for sale of same, to have all received above debt and interest, expression of grantee of willingness to fulfill contract to quitclaim to grantee of debtor held not to estop him from asserting that deed was absolute and not a mortgage. Harrah v. Smith [Neb.] 112 NW 337.

security or an absolute conveyance with option of repurchase is largely one of intention,[26] the former being favored in case of doubt.[27] The continuance of the relation of debtor and creditor,[28] and the inadequacy of the consideration,[29] are essential.

Rights of the parties.—Where a deed absolute is in fact a mortgage and the grantor has fully performed his obligations, he is entitled to a reconveyance,[30] and, if the grantee has conveyed or exchanged the land, the defrauded grantor may require him to account for the value of the land conveyed or received,[31] or the proceeds;[32] but the grantee is entitled to credit for money expended in protecting the property[33] and improvements made in good faith.[34] An accounting is usually allowed between the parties.[35] A refusal to recognize grantor's right of redemption does not render grantee liable for loss of a sale, unless a tender has been made of the debt.[36] In Iowa an absolute deed given as security passes title, and the right of redemption must be exercised within the period of limitations.[37]

The proceeding to establish a mortgage is equitable,[See 8 C. L. 1027] and hence petitioner must be willing to do equity[38] and must timely assert his rights.[39] Deed will not be given effect as a mortgage where injustice will result.[40] All persons, who will be affected by the granting of the relief sought, must be made parties.[41] The petition must allege all facts necessary to show that the deed was in fact intended as a

26. Where deed absolute is accompanied by agreement reciting that grantor was desirous of saving what he could, and that if either party had opportunity to sell for not less than a stated price sale should be made, and out of proceeds grantee should be paid amount expended by him, etc., and surplus be divided, held a conditional sale. Duell v. Leslie, 207 Mo. 658, 106 SW 489. Fact that collateral agreement accompanying deed and requiring reconveyance upon payment of specified sum does not bind grantor to pay such sum is not conclusive that transaction was conditional sale and not a mortgage. White v. Redenbough [Ind. App.] 82 NE 110. Where plaintiff executed deed excepting existing mortgages from covenants of warranty and took back a defeasance reciting that, as conveyance was made to pay a debt and save cost of foreclosure, grantor was to have exclusive right of sale, and upon payment of debt due and sale grantee was to deed to plaintiff or designated person, held a mortgage and not a conditional sale. Kinkead v. Peet [Iowa] 114 NW 616.

27. White v. Redenbaugh [Ind. App.] 82 NE 110; Smith v. Jenson [N. D.] 114 NW 306.

28. Duell v. Leslie, 207 Mo. 658, 106 SW 489; Hall v. Jennings [Tex. Civ. App.] 19 Tex. Ct. Rep. 602, 104 SW 489.

29. White v. Redenbaugh [Ind. App.] 82 NE 110. Deed of land assessed for taxation at $700 in payment of matured debt for $425, coupled with agreement to reconvey on payment of debt, with interest, taxes, and liens, held a mortgage and not a conditional sale. Id.

30. Gibbs v. Haughowout, 207 Mo. 384, 105 SW 1067.

31. Dybdal v. Fagerberg, 102 Minn. 130, 112 NW 1018. Liable for value of land at time of sale less debt. Ullman v. Devereux [Tex. Civ. App.] 18 Tex. Ct. Rep. 683, 102 SW 1163. Where grantee exchanged mortgaged land and $3,000 for land worth $5,600, defrauded mortgagor is entitled to judgment for $2,600. Dybdal v. Fagerberg, 102 Minn. 130, 112 NW 1018.

32. Veach v. Smith [Ky. App.] 107 SW 234; Leger v. Leger, 118 La. 322, 42 S 951.

33. Interest on prior mortgage and taxes. Omlie v. O'Toole [N. D.] 112 NW 677. Entitled to taxes paid where grantor retained possession. Leger v. Leger, 118 La. 322, 42 S 951.

34. In action to declare deed a mortgage and for accounting, evidence of mortgagee's belief that deed was absolute, and that collateral agreement had no other effect than to permit mortgagor to repurchase, was competent as bearing on right to recover for improvements. Ferguson v. Boyd [Ind.] 81 NE 71.

35. In action to have deed declared a mortgage and for accounting, complainant cannot claim credit for amount of note against defendant which was barred before mortgage debt was created (Wynn v. Fitzwater [Ala.] 44 S 97), and objection may be taken by demurrer (Id.).

36. Eldriedge v. Hoefer [Or.] 93 P 246.

37. Lindberg v. Thomas [Iowa] 114 NW 562.

38. It is sufficient if plaintiff express a willingness to redeem by paying such sum as court adjudges due without tender, especially where amount due is in dispute and accounting is asked. Smith v. Jensen [N. D.] 114 NW 306.

39. Sheffield v. Hurst, 31 Ky. L. R. 890, 104 SW 350.

40. Sheffield v. Hurst, 31 Ky. L. R. 890, 104 SW 350. Conveyance by complainant's husband's creditor under agreement for reconveyance upon payment of consideration and interest held conditional sale and not a mortgage, where latter would be void. Maxwell v. Herzfeld [Ala.] 42 S 987.

41. In action against administrator to have deed to intestate declared a mortgage, heirs of decedent are necessary parties (Wynn v. Fitzwater [Ala.] 44 S 97), and chancellor may ex mero motu notice such defect (Id.).

mortgage,[42] but it may be amended so long as a new cause of action is not asserted.[43] The general rules governing the admission of evidence [44] and cross-examination [45] obtain. An offer of the defendant to reconvey, upon being paid the amount he has in the land, need not be included in the decree unless accepted by the petitioner.[46]

The burden of proving an absolute deed to be in fact a mortgage rests on the party asserting the same,[47] and the evidence must be clear and convincing.[48]

42. Complaint held to allege a cause of action. Krug v. Kautz [S. D.] 113 NW 623.

43. Petition alleging agreement by defendant to reconvey, on payment of $500, held to clearly show that such sum was an indebtedness owed by petitioner to defendant, hence amendment specifically so stating does not state new cause of action. Askew v. Thompson, 129 Ga. 325, 58 SE 854.

44. Evidence held admissible: Fact that grantee was obliged to borrow entire consideration for deed and to obtain a surety to sign note for loan. Butsch v. Smith [Colo.] 90 P 61.

Declarations of party in possession characterizing possession. Hubbard v. Cheney [Kan.] 91 P 793. Declarations of defendant's intestate while in full and complete possession. Vannice v. Dungan [Ind. App.] 83 NE 250. Where land was deeded to husband and wife, letters written by husband about time of purchase to wife and sister are admissible to show that wife was named merely to secure her loan to her husband, although it is not clearly shown whether or when letters reached addressee. Hubbard v. Cheney [Kan.] 91 P 793.

Inadmissible: In suit to have deed executed by husband to wife declared a mortgage, entries in private diary of wife are inadmissible in favor of those claiming under her, she being dead. Wilson v. Terry [N. J. Err. & App.] 65 A 983.

45. Where consideration of deed was $3,000 and witness testifies that he was willing at time of execution of deed to loan $4,500 on premises, it is error to exclude question whether he did not intend to apply part of loan to unsatisfied judgment against owner, and as to offers for another undivided interest. Butsch v. Smith [Colo.] 90 P 61.

46. Webster v. McDowell, 102 Minn. 445, 113 NW 1021.

47. Powell v. Crow, 204 Mo. 481, 102 SW 1024; Lowry v. Carter [Tex. Civ. App.] 19 Tex. Ct. Rep. 482, 102 SW 930; Hill v. Viele, 128 Ill. App. 5; Belinski v. National Brew. Co., 124 Ill. App. 45.

48. Hill v. Viele, 128 Ill. App. 5; Harper v. T. N. Hays Co. [Ala.] 43 S 360; Deadman v. Yantis, 230 Ill. 243, 82 NE 592; Reich v. Cochran, 102 NYS 827; Smith v. Jensen [N. D.] 114 NW 306. That deed was intended to operate as mortgage must be established **beyond a reasonable doubt.** Butsch v. Smith [Colo.] 90 P 61. Equity will be slow to treat instrument in form as a conditional sale and so treated by parties for many years as a mortgage. Sheffield v. Hurst, 31 Ky. L. R. 890, 104 SW 350.

Evidence held sufficient to establish mortgage. Harper v. T. N. Hays Co. [Ala.] 43 S 360; Veach v. Smith [Ky.] 107 SW 234; Leach v. Grube, 147 Mich. 348, 13 Det. Leg. N. 1053, 110 NW 1076; Smith v. Jensen [N. D.] 114 NW 306; Hall v. Jennings [Tex. Civ. App.] 19 Tex. Ct. Rep. 602, 104 SW 489. Held question for jury. Hester v. Gairdner, 128 Ga. 531, 58 SE 165. Contract purporting to be a vente a remere held a mortgage where consideration was inadequate and no demand for possession was made by purchaser. Rester v. Powell [La.] 45 S 372. Where creditor and another gave deed for stated consideration reciting that grantee had rented property to grantors for certain rent, that if rent was not paid lease should terminate, etc., that if before stated time grantors tender grantee rents due and certain sum property would be reconveyed, together with other facts, held to show that deed was a mortgage. Barnett v. Williams, 31 Ky. L. R. 255, 101 SW 1191. Evidence held to show that deed of partner's interest was as security for grantee partner's advances in excess of share in prosecuting business and advance to effect a sale. Kramer v. Wilson [Or.] 90 P 183. That deed absolute given to secure grantee as surety on grantor's appearance bond and not to secure attorney fees also. Gibbs v. Haughowout, 207 Mo. 384, 105 SW 1067. Inadequacy of consideration, continuance of debt, and declarations of grantee, held to show that deed absolute was in fact a mortgage. Wynn v. Fitzwater [Ala.] 44 S 97

Evidence held insufficient. Cooper v. Stauber [Or.] 89 P 641; Rotan Grocery Co. v. Turner [Tex. Civ. App.] 18 Tex. Ct. Rep. 658, 102 SW 932. Deed with option to repurchase. Jennings v. Demmon, 194 Mass. 108, 80 NE 471; Hinchman v. Cook, 45 Wash. 490, 88 P 931. Claim being asserted after grantee's death. Osborne v. Osborne [Wash.] 89 P 881. All evidences of indebtedness were surrendered. Harrah v. Smith [Neb.] 112 NW 337. Deed given by son to father who paid off incumbrances and unsecured debts of son. Lemke v. Lemke [Neb.] 111 NW 138. Wife gave deed of her land to husband's creditor, the evidence of indebtedness, $450 in amount, was surrendered, and $150 paid to wife, creditor agreeing to reconvey for $600. Farrow v. Cotney [Ala.] 45 S 69. Recollections of witnesses as to conversations and admissions occurring 15 years before suit, tending to show that deed was intended as security, held not to render contrary finding against the evidence. Harris v. Hirsch, 106 NYS 631. Fact that grantee intended to give grantor any profit which might result from sale held not to justify finding that deed was intended as security only. Id. Evidence of negotiations held insufficient to show that deed was intended as security, consideration practically equalling value. Sahlin v. Gregson [Wash.] 90 P 592. Statement by grantee that when he got his money out of the real estate he would reconvey remainder held insufficient to characterize deed absolute as mortgage. Smith v. Smith [Ala.] 45 S 168.

§ 4. *Equitable mortgages.*See 8 C. L. 1029—An equitable mortgage is one recognized and enforcible in equity alone,[49] and usually arises where an instrument intended as a legal mortgage fails as such,[50] or where legal title passes to one as security only.[51] An equitable mortgage cannot be created in Iowa by a deposit of title deeds.[52]

§ 5. *Nature and incidents of trust deeds as mortgages.*See 8 C. L. 1029—A trust deed [53] vests the title in the trust for the purposes of the trust,[54] and such title is not affected by the running of the statute of limitations against the debt.[55] The trustee has no power to compromise the debt without the consent of the beneficiaries.[56] Where the trustee accepts the trust, he is bound by the stipulation for compensation therein.[57]

§ 6. *Construction and effect of mortgages in general.*See 8 C. L. 1030—The general rules of construction applicable to written instruments apply to mortgages.[58] Note and mortgage securing same when executed at the same time must be construed together,[59] especially where the latter refers to the former.[60] Recitals in a mortgage are conclusive as between the parties in California,[61] and where by agreement recitals in the trustee's deed are conclusive, such deed is admissible to show compliance

49. Deed absolute as mortgage, see ante, § 3. Execution and delivery of mortgage by one not the owner apparently conveyed at direction of actual owner creates an equitable mortgage in favor of grantee receiving it on representation that it constitutes a first lien on the land in question. Rhode v. Rohn, 127 Ill. App. 579.

50. Neither attested nor acknowledged. Courtner v. Etheredge [Ala.] 43 S 368. Written agreement entered into to make certain property security for past indebtedness and future advances, and upon which the parties have acted, held an equitable mortgage if insufficient as a legal one. Earle v. Sunnyside Land Co., 150 Cal. 214, 88 P 920. Instrument in form a chattel mortgage but clearly intended by parties as security on real property held an equitable mortgage (Standorf v. Shockley [N. D.] 111 NW 622), enforcible in equity without reformation (Id.).

51. Purchaser at foreclosure under agreement to purchase, pay debt, and hold title and to permit mortgagor to pay amount advanced, holds title as mortgagee to secure advances. Howe v. Courtney [Ky.] 107 SW 206.

52. In re Snyder [Iowa] 114 NW 615.

53. Instrument given as security held a trust deed in nature of a mortgage. Curtin v. Krohn [Cal. App.] 87 P 243.

54. Holmquist v. Gilbert [Colo.] 92 P 232.

55. Reformation will not thereafter be refused as a vain act. Travelli v. Bowman, 150 Cal. 587, 89 P 347.

56. Schroeder v. Wolf, 227 Ill. 133, 81 NE 13.

57. Loftis v. Duckworth [N. C.] 59 SE 689. Deed construed to entitle trustee to commission on amount of debt and not on amount of sale. Id. Commission of 5 per cent on debt of $568 held reasonable. Id.

58. Provision in mortgage that mortgagor shall pay recording fee does not require him to pay fee for recording in county where it is not necessary to record. Kinard v. Hill [Ala.] 45 S 60. Held that, under terms of trust deed, auctioneer's fee and counsel's fee were properly retained out of proceeds of sale. Continental Bldg. & Loan Ass'n v. Light [Cal. App.] 92 P 1034. Statement in mortgage that it is subject to prior one qualifies covenants of warranty, and gives notice that it covers only equity of redemption. Frye v. Hubbell [N. H.] 68 A 325. Mortgage provided for payment of $93,000 on June 27, 1907; both bond and mortgage declared that obligors should pay $7,000 on account of principal on 27th of June each year until principal was paid, beginning June 27, 1905. Held that clause respecting instalments did not extend time for paying principal. MacDonald v. Potter, 57 Misc. 206, 107 NYS 915. And where, after June 27, 1907, mortgagor sent check for $7,000, "being instalment of principal under terms of mortgage due June 27, 1907," held that, being instalment only, acceptance did not constitute an accord and satisfaction notwithstanding correspondence. Id. Stipulation that mortgagor shall repay all money that may be paid by mortgagee on account of any prior or outstanding incumbrance or title does not refer to cost of litigation in defending against unfounded suits (W. C. Belcher Land Mortgage Co. v. Norris [Tex. Civ. App.] 20 Tex. Ct. Rep. 382, 104 SW 1077), and parol evidence is inadmissible to show that parties so intended (Id.).

59. Provision in mortgage making principal due for nonpayment of interest is sufficient, though no such provision is contained in note. Trinity County Bk. v. Haas [Cal.] 91 P 385. Where note provides that nonpayment of interest shall render principal due and collectable, mortgage may be foreclosed though it contains no stipulation in respect thereto. San Gabriel Valley Bk. v. Lake View Town Co. [Cal. App.] 89 P 360.

60. Graham v. Fitts, 53 Fla. 1046, 43 S 512. Notes held sufficiently referred to make mortgage security for payment of attorney's fees. Armijo v. Henry [N. M.] 89 P 305.

61. Code Civ. Proc., § 1962, subd. 2. Recital of extended time of payment. Moore v. Gould [Cal.] 91 P 616.

with the prerequisites of a valid sale.[62] A mortgage and the note secured thereby cannot be varied by evidence of a contemporaneous parol agreement.[63]

Property and interests conveyed. See 6 C. L. 1031—A mortgage upon land covers all things appurtenant thereto,[64] including easements,[65] and a subsequently acquired easement necessary and essential to the enjoyment of the mortgaged property inures to the mortgagee.[66] The property covered by general descriptive words [67] or clauses [68] is largely dependent upon the intention of the parties. Where a railroad having power to condemn lays tracks with the consent of the landowner and without condemnation, a subsequent mortgage by him does not cover the tracks and road bed.[69]

Debt secured. See 6 C. L. 1032—The fact that a deposit with a trustee to pay off a prior charge upon the trust property is invested in some of the bonds secured by the deed of trust does not destroy the security of the deed as to those bonds.[70]

§ 7. *Title and rights of the parties.* See 6 C. L. 1032—Where a purchase money mortgage [71] is executed simultaneously with the deed, the superior title remains in the grantor. A mortgagor cannot deny his title as against his mortgagee,[72] and one purchasing an unexpired leasehold knowing that the tenant had claimed a fee and had mortgaged the same is also estopped to deny fee title.[73] Where a mortgage constitutes a mere lien upon the mortgaged property,[74] the legal title can be lost only by foreclosure.[75] By agreement [76] or by statute,[77] the mortgagee may be required to look

62. Continental Bldg. & Loan Ass'n v. Light [Cal. App.] 92 P 1034.

63. Where mortgage and note secured thereby call for payment of specific sum, parol evidence of contemporaneous agreement to discharge same by part payment in money and discharge of another mortgage is inadmissible. McCusker v. Geiger [Mass.] 80 NE 648.

64. Mortgage on land and stock of water company, stock being declared to be appurtenant to the land, conveys stock. San Gabriel Valley Bk. v. Lake View Town Co. [Cal. App.] 89 P 360.

65. Where mortgage, which covers three lots and building thereon which building extends onto adjoining strip, is foreclosed, purchaser gets no title to strip but has an easement thereon to extent of occupancy by building. Carrigg v. Mechanic's Sav. Bk. [Iowa] 111 NW 329. Assignee of rents of such strip cannot recover rents of purchaser for portion occupied. Id. One holding trust deed from mortgagor on adjoining lot has lien on strip subject to easement. Id.

66. Latta v. Catawba Elec. & Power Co. [N. C.] 59 SE 1028.

67. Mortgage given by beet sugar factory, which was to cover "all other machinery plant * * * which the company may hereafter acquire for the aforesaid purposes," held not to include, under term "plant," land 200 miles distant purchased to raise beets upon. Old Colony Trust Co. v. Standard Beet Sugar Co., 150 F 677.

68. Mortgage of all property thereafter to be acquired by railroad company in connection with its railroad, or necessary or convenient to its operation, use, and enjoyment, held to cover lands under water acquired in development of a shore resort maintained in connection with road. People's Trust Co. v. Schenck, 121 App. Div. 604, 106 NYS 782.

69. Nittany Valley R. Co. v. Empire Steel & Iron Co. [Pa.] 67 A 349.

70. Assignee of the bonds has all the rights of a bondholder subject to equities of other bondholders growing out of purpose of deposit, and may have trust foreclosed. Moses v. Philadelphia Mortgage & Trust Co. [Ala.] 42 S 868.

71. Where land was sold by deed purporting to have been made for cash consideration, and on same day purchaser executed note to seller secured by mortgage on the land, which mortgage was witnessed by same parties as witnessed deed, held that facts warranted inference that mortgage was given to secure part of purchase price. Flack v. Braman [Tex. Civ. App.] 18 Tex. Ct. Rep. 107, 101 SW 537.

72. Townsend v. Boyd, 217 Pa. 386, 66 A 1099. Especially where mortgage warrants title. Griffis v. First Nat. Bk., 168 Ind. 546, 81 NE 490.

73. Son purchasing through judgment lien foreclosure. Townsend v. Boyd, 217 Pa. 386, 66 A 1099.

74. Held a lien only. Gerhardt v. Ellis [Wis.] 114 NW 495.

75. Where deed is determined to be a mortgage, it is error for court to decree that defendant's title shall become perfect, unless plaintiff redeems within certain time. Smith v. Jensen [N. D.] 114 NW 306.

76. Provision in trust deed that creditor would look exclusively to proceeds and sales effected by grantor for payment of his debt, and which binds grantor to exercise reasonable diligence to make sales, is not binding after grantor has defaulted in exercising such diligence (Earle v. Sunnyside Land Co., 150 Cal. 214, 88 P 920), and where deed only limited grantor as to minimum price, he could not arbitrarily fix price so high as to render sales impossible. (Id.).

77. Where deed intended as security is unaccompanied by bond or other instrument, under B. & C. Comp. § 5339, providing that mortgage shall not be construed as implying covenant to pay sum secured, etc., grantee's only remedy is to look to land when deed is declared a mortgage. Kramer v. Wilson [Or.] 90 P 183.

exclusively to the mortgaged property for the payment of his debt, while in others the security must be first exhausted before suit can be maintained on the secured debt.[78] A stipulation to release part of the premises from the lien of the mortgage upon payment of a specified sum is not available after foreclosure proceedings have been commenced.[79] The rights of the parties is largely dependent upon the terms of the mortgage,[80] and a provision in a mortgage restricting the mortgagor to the sale of liquors manufactured by the mortgagee is valid,[81] as is a provision rendering entire debt due upon non-payment of interest, or maturing installments,[82] or taxes within a stated time.[83] A payee of a note has an interest in a mortgage given by the maker to a surety thereon, in which "mortgagor agrees to pay all sums," etc.[84] Where a judgment enforcing a mortgage is reversed after sale, parties procuring such decree are not liable in tort,[85] but the mortgagor may elect to allow the sale to stand and receive the purchase money or recover the property subject to a lien for taxes and expenditures by purchaser in caring for the property.[86]

Taxes.—In the absence of covenant,[87] a mortgagee who has a mere lien is under no duty to pay taxes,[88] and hence he may acquire title at tax sale.[89] In some states, a mortgagee paying[90] taxes to protect his mortgage has an additional lien for the amount so expended.[91]

Insurance.—Where the mortgagor agrees to insure for mortgagee's benefit, equity will give the latter a lien upon a policy effected in the former's name.[92] Mortgagee

78. Code Civ. Proc., Mont. 1895, § 1290, requiring that security be resorted to before suit on the note, does not, in case of note given in Montana secured on land in California, make foreclosure of security a prerequisite to action on note in Washington. Mantle v. Dabney [Wash.] 92 P 134.

79. Brown v. Cleveland Trust Co., 10 Ohio C. C. [N. S.] 430.

80. Plaintiff issued to defendant as trustee a consolidated mortgage providing that certain amount of bonds secured thereby should be reserved to retire outstanding first mortgage bonds and that retired bonds should be retained as additional security, and upon satisfaction of all of first mortgaged bonds any reserved consolidated bonds not used should be returned to plaintiff. Held that, where plaintiff discharged some first mortgaged bonds out of sinking fund, it could not demand consolidated bonds in exchange. Havana Elec. R. Co. v. Central Trust Co., 122 App. Div. 829, 107 NYS 680.

81. Held founded upon a valuable consideration, not against public policy as in restraint of trade, and may be enforced by injunction to prevent sale on premises of other brews than that of mortgagee. Cleveland & Sandusky Brew. Co. v. Demko, 9 Ohio C. C. [N. S.] 130. Fact that mortgage is given to secure performance of covenant to sell only mortgagee's beer on premises does not authorize injunction to restrain sale of other beer where it would not otherwise issue. Hardy v. Allegan Circuit Judge, 147 Mich. 594, 14 Det. Leg. N. 21, 111 NW 166.

82. Robson v. Beasley, 118 La. 738, 43 S 391. Equity will not permit mortgagee or his assignee to declare forfeiture for non-payment of interest at prescribed time, where mortgagor after reasonable effort and without fault on his part was unable to find mortgagee, and assignee had not given notice of assignment. Isaacs v. Baldwin, 105 NYS 38.

83. Mortgage provided that mortgagor should pay taxes within 40 days after same became due, and, upon default, mortgagee was authorized to pay same, in which case sum paid became an additional lien and payable forthwith. It also provided that, if taxes were not paid "when the same become payable," and remained unpaid for 30 days, mortgagee could declare mortgage due. Held that expression "when same become payable" had reference to time payable to mortgagee and not tax collector. Union Trust Co. v. Grant, 148 Mich. 501, 14 Det. Leg. N. 215, 111 NW 1039.

84. Griffis v. First Nat. Bk., 168 Ind. 546, 81 NE 490.

85. Liable only for amount received. Hess v. Deppen, 31 Ky. L. R. 15, 101 SW 362.

86. Hess v. Deppen, 31 Ky. L. R. 15, 101 SW 362.

87. Provision authorizing mortgagee to pay taxes upon mortgagor's failure so to do does not obligate him to pay the same. Jones v. Black, 18 Okl. 344, 88 P 1052.

88. Jones v. Black, 18 Okl. 344, 88 P 1052.

89. Jones v. Black, 18 Okl. 344, 88 P 1052. Action to cancel tax deed and for accounting, alleging that B. while holding mortgage on real estate of J. purchased same at tax sale, thereby defeating title of J. and destroying his right of redemption, held not to state cause of action. Id.

90. Where mortgagee purchased from others and bid in at tax sale certificates of tax sales, such acts amounted to payment of taxes. Hackett v. Van Dusen [Wis.] 111 NW 1097.

91. Where mortgagee pays taxes to protect his lien, he acquires no independent right of action against mortgagor, but must add such sum to secure debt and collect therewith. Stone v. Tilley [Tex.] 18 Tex. Ct. Rep. 97, 101 SW 201.

92. Hence, where policy is taken out payable to a prior trustee as his interest may appear, and debt is paid from proceeds of

may bind himself to insure for the benefit of the mortgagor.[93] In Maine, the mortgagee is given a lien on the insurance upon filing with company a statutory notice,[94] but such lien must be enforced within sixty days, unless the mortgagor consents in writing that the insurance be paid to him.[95]

Possession, rents and profits.—A mortgagee in rightful [96] possession [97] may ordinarily retain possession until the debt is paid,[98] although he may be divested by the appointment of a receiver where it appears that he is irresponsible, is committing waste, or that the rents and profits will be lost.[99] Without forfeiting his right of possession as mortgagee, he may initiate an adverse claim.[1] Where mortgagee obtains possession under an unauthorized promise of his agent to pay a stipulated sum for the equity, he will be given option of paying such sum or of an accounting and sale, unless mortgagor shall redeem.[2]

A mortgagor in possession is entitled to the rents and profits accruing,[3] unless the mortgage provides to the contrary.[4] A mortgagee in possession is entitled to rents and profits collected by a receiver illegally appointed.[5] In an accounting, the mortgagor is entitled to credit for the fair rental value of the occupancy by the mortgagee.[6] Where mortgage gives a lien upon the rents and profits as well as the realty upon default in payment of maturing installment, mortgagee is entitled, in Kentucky, to a receiver for collection of such rents and profits, though realty is sufficient at the time to secure the debt.[7]

sale of land, second trustee, for whose benefit grantor agreed to effect insurance but failed, because entitled thereto in equity. Fitts v. A. P. Messick Grocery Co., 144 N. C. 463, 57 SE 164.

93. Mortgagor placed annual insurance on property and assigned policy to mortgagee, who thereafter, for his own advantage, agreed to place insurance and to collect premium from mortgagor. Held that agreement was not without consideration (Boyce v. Union Dime Permanent Loan Ass'n [Pa.] 67 A 766), and where property was destroyed but description in policy was insufficient to cover it, mortgagor may recover of mortgagee in assumpsit (Id.).

94. Under Rev. St. c. 49, § 54, giving mortgagee lien upon insurance on mortgaged premises, where "he files with the secretary of the insurance company a written notice briefly describing his mortgage, the estate conveyed thereby, and sum remaining unpaid thereon," notice merely stating that he is a mortgagee is insufficient. Knowlton v. Black, 102 Me. 503, 67 A 563.

95. Rev. St. c. 49, § 55. Knowlton v. Black, 102 Me. 503, 67 A 563.

96. Evidence held to show that mortgagee was in possession by tacit if not express agreement of mortgagor. Cory v. Santa Ynez Land & Imp. Co. [Cal.] 91 P 647.

97. Held that mortgagee's possession through tenant was such as to constitute him a mortgagee in possession. Lambert v. Howard [Or.] 90 P 150. Inclosure by mortgagee of mortgaged premises, with other lands belonging to him, does not cease to be evidence of possession on mortgagee selling and giving vendee possession of small tract of his land within inclosure. Cory v. Santa Ynez Land & Imp. Co. [Cal.] 91 P 647. Right to maintain trespass against mortgagee in rightful possession is not gained by mortgagor entering mortgagee's inclosure, including other lands, pitching tent on mortgaged premises and commencing to cut posts, he being warned that he was trespassing and thereafter being forcibly removed. Id.

98. Francis v. Francis [S. C.] 58 SE 804. Though foreclosure be barred by limitations. Cory v. Santa Ynez Land & Imp. Co. [Cal.] 91 P 647. Notwithstanding B. & C. Comp., § 336, providing that mortgagee cannot recover possession of premises without foreclosure, if mortgagee acquires possession after condition broken with mortgagor's consent, he may hold same until debt is paid. Lambert v. Howard [Or.] 90 P 150.

99. Harding v. Garber [Okl.] 93 P 539.

1. Had land assessed to him independent of mortgage. Cory v. Santa Ynez Land & Imp. Co. [Cal.] 91 P 647.

2. Mortgagor is not entitled to lien for promised sum. Leach v. Gube, 147 Mich. 348, 13 Det. Leg. N. 1053, 110 NW 1076.

3. White v. Redenbaugh [Ind. App.] 82 NE 110. Where entitled to possession at time rents accrue, he and his assigns are entitled to same. Groos v. Chittim [Tex. Civ. App.] 18 Tex. Ct. Rep. 906, 100 SW 1006.

4. Ruprecht v. Henrici, 127 Ill. App. 350. Provision in mortgage, following one giving mortgagee right to a receiver of rents and profits upon default that "the said rents and profits are hereby, in the event of any default * * * assigned to the holder of the mortgage," operates merely as a pledge of rents to which pledgee becomes entitled only when he asserts his right in some legal form, as by appointment of receiver, etc. In re Banner, 149 F 936.

5. Ruprecht v. Muhlke, 225 Ill. 188, 80 NE 106.

6. Especially where agreement stipulates therefor. Ketchum v. Bell [N. J. Err. & App.] 67 A 30.

7. Handman v. Volk, 30 Ky. L. R. 818, 99 SW 660.

Rights and liabilities of mortgagor's sureties.—A wife joining in a mortgage on the homestead to secure the husband's debt is not a surety.[8] A surety who joins with his principal in a mortgage covering property of both may insist that principal's property be first exhausted.[9] A guarantor [10] or indorser [11] of a note secured by a mortgage may be sued on his obligation before the mortgage security has been exhausted.

§ 8. *Lien and priorities.*[See 8 C. L. 1035]—In the absence of express release, the liens of a trust deed continue until payment of the debt.[12] Except as affected by the recording acts,[13] priority of execution usually determines the rank of liens upon the same property,[14] and where they are simultaneously executed, delivered, and recorded, the intention of the parties controls.[15] By agreement a mortgage inferior at law may be given priority.[16] A renewal mortgage is usually accorded the rank of the original.[17] A second mortgagee is bound by the terms of the first mortgage in so far as the same is valid.[18] A vendor's lien [19] is superior to a subsequent mortgage accepted with knowledge that a part of the purchase price remains unpaid.[20] A lien upon an undivided interest does not shift to another distinct, undivided interest of the mortgagor upon a sale of the former interest under a prior lien.[21] The giving of a second trust deed upon the same property to the same person, but securing a different debt, does not affect the first.[22] The life interest of a husband in the lands of his deceased wife is subject to a lien executed prior to her death upon the land.[23] The lien given

8. So as to be entitled to notice of extension of time. Omile v. O'Toole [N. D.] 112 NW 677.

9. Grantee of surety may assert right as against trustee in bankruptcy of principal attempting to apply proceeds of principal's property to payment of creditors generally and to collect secured debt out of his property. White v. Rovall, 105 NYS 624.

10, 11. Kinsel v. Ballou [Cal.] 91 P 620.

12. Schroeder v. Wolf, 127 Ill. App. 506.

13. Lien of mortgage executed Oct. 8, 1894, due Dec. 15, 1895, and recorded Oct. 29, 1894, held to expire in 1900 as to third persons, no memorandum of payments being indorsed on record. McCloy v. Robertson [Ark.] 102 SW 386. Priority as dependent upon recordation, see Notice and Record of Title, 8 C. L. 1169.

14. Lease existing at time of execution of mortgage is superior (Gross v. Chittim [Tex. Civ. App.] 100 SW 1006), but one subsequently given is inferior, especially if lessee has notice (Id.). Mortgage executed prior to levy of attachment is superior thereto. Day v. Earlington Iron Works [Ky.] 107 SW 301. Where their respective dates appear of record in case question of priority may be determined from record. Id. Where trust deed on personalty and timber is void as to former and second trust deed and on same property recites "that part of above property is subject to a prior trust deed," upon foreclosure of latter mortgagee must account to first mortgagee for value of timber, and judgment against grantor in favor of such first mortgage should be only for balance. Fullerton v. McBride [Miss.] 43 S 684.

15. Evidence held to show that one for commissions was intended to be inferior. State Finance Co. v. Halstenson [N. D.] 114 NW 724. Foreclosure of mortgage, simultaneously recorded with another, by advertisement establishes nothing as to priority. Id.

16. Holders of notes secured by trust deed may, without consent of maker, postpone lien thereof to an otherwise subsequent lien. Jackson v. Grosser, 121 Ill. App. 363. Exception of prior mortgage from covenant against incumbrances alone does not make it subject to such prior mortgage, held by one of mortgagors. Martin v. Smith, 102 Me. 27, 65 A 257. Provision for releasing lots in case of sale, proceeds to be held in lieu thereof, or to be applied to erection of buildings on remainder, held not to give priority to mechanics' lien growing out of construction of buildings with other funds, no lots having been sold. Old Colony Trust Co. v. Standard Beet Sugar Co., 150 F 677.

17. Where prior mortgage debt is compromised and mortgage discharged, but a new one executed to secure balance, held that latter is superior to second mortgage, being intended as a renewal. Western Loan & Sav. Co. v. Kendrick State Bank [Idaho] 90 P 112.

18. Where mortgage was given to secure advances to be made, interest to run on whole sum from date mortgagee, as against second mortgagee, is entitled to interest on full amount until mortgagor went into bankruptcy and thereafter on amount actually advanced. Tripp v. Babcock [Mass.] 80 NE 593.

19. Mere recital in bond that it is balance of purchase price of particular tract does not create any equity in land itself so as to take preference over trust deed, especially where rest of price was secured by trust deed, showing that land was not to be responsible for bond. Carpenter v. Duke, 144 N. C. 291, 56 SE 938.

20. Bennett v. Murphy, 108 NYS 231.

21. Distinct and different interest subsequently acquired by grantor. Watts v. Newberry [Va.] 57 SE 657.

22. Christian v. Green [Miss.] 45 S 425.

23. Husband's interest should be first sold. Buckley's Assignee v. Stevenson, 30 Ky. L. R. 952, 99 SW 961.

for nonpayment of an internal revenue tax is superior to a mortgage executed after a demand for payment,[24] but is inferior to one existing at the time the lien attached.[25] A construction loan mortgagee owes no duty to second mortgagee to see that the money is applied to improvements.[26] Where prior mortgagee forecloses both as to realty and personalty and bids enough for each to satisfy his debt, one holding a second mortgage on the realty acquires priority thereto where the prior mortgagee disposes of the personalty.[27] As between equitable mortgages, the one having the greater equity is usually given priority.[28] A mortgage on after-acquired property attaches as soon as the property is acquired and is superior to a lien of a subsequent judgment against the mortgagor.[29] Purchase-money mortgages are payable out of proceeds of a sale of the property in bankruptcy.[30] In California a junior mortgagee compelled [31] to satisfy [32] a superior lien for his own protection may add the amount so expended to his secured debt,[33] but the mortgagor is not personally liable therefor.[34] Where the owner of mortgaged land conveys the same with a covenant for quiet enjoyment, he cannot insist that the holder of the mortgage who also holds a mortgage given by the grantee applies the proceeds of a foreclosure sale to his mortgage first.[35]

§ 9. *Assignments of mortgage.*[See 8 C. L. 1636]—An assignment of a debt carries with it the mortgage securing the same,[36] though the assignment is not registered,[37] leaving the original mortgagee without an interest,[38] hence the production of the note duly endorsed raises a presumption of ownership of the mortgage.[39] A transfer of a

24. Lien given by Act July 13, 1866. Blacklock, Receiver v. U. S., 41 Ct. Cl. 89. May protect lien by payment or by redemption from sale. Id.

25. Tax sale held to convey only debtor's interest. Blacklock, Receiver v. U. S., 41 Ct. Cl. 89.

26. Tripp v. Babcock [Mass.] 80 NE 593.

27. Webster v. Ypsilanti Canning Co., 149 Mich. 489, 14 Det. Leg. N. 519, 113 NW 7.

28. S, owner of land, had D, a stranger, execute note payable to and indorsed by D secured by trust deed on S's land. This was recorded and note and trust deed were sold to R with representations by S that it was first lien. S thereafter sold to J notes payable to and indorsed by P, and trust deed executed to S as trustee, securing same, which had been executed while P owned land and had been paid and received by S after acquiring title. S represented that this was first lien. Neither R nor J examined records. Held that R and J had only equitable mortgages by way of estoppel, but because of R's negligence in not examining record, his lien was inferior. Rohde v. Rohn, 232 Ill. 180, 83 NE 465.

29. People's Trust Co. v. Schenck, 121 App. Div. 604, 106 NYS 782.

30. Mortgage given for money borrowed to pay purchase price of property mortgaged is in effect a purchase-money mortgage, and mortgagee is entitled to payment out of proceeds of sale of property by trustee in bankruptcy, notwithstanding a preference in a distinct transaction. In re Franklin, 151 F 642.

31. Mortgagee paying senior mortgage after foreclosure proceedings have been instituted is compelled to pay same for his protection within Civ. Code, § 2876. Windt v. Covert [Cal.] 93 P 67.

32. Word "satisfy" in Civ. Code, § 2876, means payment for discharge, and formal release of record is not essential. Windt v. Covert [Cal.] 93 P 67.

33. Civ. Code, § 2876. Windt v. Covert [Cal.] 93 P 67. Upon sale of premises proceeds should be applied to payment of amount so paid out first and then to discharge of mortgagee's claim. Id.

34. Civ. Code, § 2876, does not render mortgagor personally liable. Windt v. Covert [Cal.] 93 P 67.

35. Held that covenant obligated him to pay his mortgage before it became due. Durbin v. Shenners [Wis.] 113 NW 421.

36. Fish v. First Nat. Bk. [C. C. A.] 150 F 524. Trust deed. Emmons v. Hawk [W. Va.] 59 SE 519. Transfer of negotiable paper by proper indorsement. Milwaukee Trust Co. v. Van Valkenburgh [Wis.] 112 NW 1083. Indorsement of note, expressly including mortgage security. Id. Where vendor retains title to secure payment of negotiable purchase-money note, transfer of note carries an equitable right to charge land with payment of note. Aycock Bros. Lumber Co. v. First Nat. Bk. [Fla.] 45 S 501. Where note secured by mortgage is paid by conveyance of land to mortgagee, but is not surrendered or canceled, held that, upon assignment of such note and mortgage as security, assignee acquires right to enforce all securities which assignor has, since, under Revisal 1905, §§ 2214, 2215, assignor warranted that he knew of no fact which would render same invalid or worthless, and may recover unpaid balance of sale price of land to third person. Smith v. Godwin [N. C.] 58 SE 1089.

37. Assignee asserting rights against heirs of mortgagor. Morton v. Blades Lumber Co., 144 N. C. 31, 56 SE 551.

38. Not entitled to appear as party complainant in suit to correct title. Turpin v. Derickson [Md.] 66 A 276.

39. Milwaukee Trust Co. v. Van Valkenburgh [Wis.] 112 NW 1083.

part of the secured debt carries a proportionate share of the mortgage security.[40] An assignment omitting the name of the assignee but leaving a blank therefor is a nullity until filled,[41] but if the name is subsequently inserted with the authority of the assignor and the assignment is thereafter recorded, it is effective.[42] Since a mortgage is not a negotiable instrument, an assignee takes it subject to equities existing against it,[43] especially if he is not a bona fide holder.[44] A certified copy of the record of assignment is admissible to prove assignment.[45] Where an assignment is absolute in form but intended only as security, the assignee promising to repay any balance, an assignee of the balance may maintain a bill in equity to compel payment of the balance.[46]

§ 10. *Transfer of title of mortgagor and assumption of the debt.*See 8 C. L. 1037 —Where land is sold subject to a mortgage, the land remains chargeable therewith,[47] and it has been held that the grantee's liability to the grantor is coextensive with the debt and is not limited to the land.[48] Where the grantee assumes the debt, he is estopped from asserting its invalidity,[49] but where the deed merely excepts it from the covenants, he may assert the bar of limitations to a foreclosure proceeding.[50] The holder of one of several notes secured by a single mortgage cannot acquire a tax title to the land and destroy the lien of the other notes.[51] Assumption of mortgaged debt is not established as to others by the fact that grantee's executrix included it in the list of debts in petition to sell lands for payment of a tax.[52] The validity of an agreement, whereby grantee assumes the debt and the mortgagee releases the mortgagor, is tested by the laws of the state where executed.[53]

Where a grantee assumes a mortgage, he becomes the principal and the mortgagor a surety.[54]

§ 11. *Transfer of premises to mortgagee and merger.*See 8 C. L. 1038—A mortgagor may sell his equity of redemption to the mortgagee, but the transaction must be fair, honest, and without fraud,[55] and in case of fraud equity will declare the deed a mortgage,[56] unless the grantee is guilty of laches.[57] Intention largely determines

40. Mortgagee holds mortgage in trust to extent of such interest (Snyder v. Parmalee [Vt.] 68 A 649), and where he cancels title in such manner that it cannot be reinstated, he becomes personally liable (Id.), though cancellation was not fraudulent (Id.).

41. Assignee cannot foreclose by advertisement. Casserly v. Morrow, 101 Minn. 16, 111 NW 654.

42. Casserly v. Morrow, 101 Minn. 16, 111 NW 654.

43. Rohde v. Rohn, 127 Ill. App. 579; Voorhees v. Nixon [N. J. Eq.] 66 A 192.

44. Lack of consideration asserted against assignee who acquired mortgage after maturity and without consideration. Gantt v. Gantt, 76 S. C. 163, 56 SE 676. Rights as dependent upon bona fides, see Notice and Record of Title, 8 C. L. 1169.

45. Davenport v. Davenport [Vt.] 68 A 49.

46. Apollo Trust Co. v. Safe Deposit & Title Guaranty Co., 31 Pa. Super. Ct. 524.

47. Western Loan & Sav. Co. v. Kendrick State Bk. [Idaho] 90 P 112. Negligence of mortgagee in allowing property to become wasted and delay in foreclosing where not requested to foreclose by mortgagor does not relieve latter. McCrery v. Nivin [Del.] 67 A 452.

48. Land sold "under and subject" to mortgage. In re May's Estate [Pa.] 67 A 120. Where, on foreclosure, vendor is compelled to pay a deficiency, he may recover amount thereof from vendee. Id. Act June 12th, 1878 (P. L. 205), does not affect liability of grantee to grantor, but applies only to relation of the grantee to mortgagee. Id. But where vendor and holder of mortgage by agreement do not bid against each other but former purchases for nominal sum, where property would otherwise sell for sufficient amount to pay debt, no recovery can be had. Id.

49. Sherman v. Goodwin [Ariz.] 89 P 517.

50. Boyer v. Price, 45 Wash. 667, 88 P 1106.

51. And especially where equity of redemption has been conveyed to him and he owes duty of paying taxes. Gilman v. Heitman [Iowa] 113 NW 932.

52, 53. McCrery v. Nivin [Del.] 67 A 452.

54. Hence, where grantee becomes bankrupt and property is sold free from liens, liens to attach to proceeds, creditor is entitled to allowance of full amount of debt, notwithstanding part payment by foreclosure on another mortgage on grantor's property, surplus being held in trust for grantor. In re Beaver Knitting Mills [C. C. A.] 154 F 320.

55. Wagg v. Herbert [Okl.] 92 P 250. Sale of property to mortgagee is to be scrutinized to see whether any undue advantage was taken of mortgagor, especially where he has manifested such a disposition. Id.

56. Wagg v. Herbert [Okl.] 92 P 250.

57. Delay of two years held to constitute laches under circumstances of case. Wagg v. Herbert [Okl.] 92 P 250.

whether a mortgage lien merges into the fee upon acquisition of the equity of redemption by the mortgagee,[58] but a merger will not be permitted where it would be inequitable.[59] Where mortgagee, owning the equity of redemption, sells the land without mentioning the mortgage, a merger is effected.[60] A mortgagee acquiring equity of redemption on execution sale obtains an indefeasible title.[61] Where mortgagee purchases at the foreclosure of an inferior lien on a part of the premises, he does not satisfy his mortgage as to the other part.[62]

§ 12. *Renewal, payment, release, or satisfaction.*[See 8 C. L. 1039]—In California a renewal of a mortgage must be in writing.[63]

Payment[64] of the secured debt usually discharges the mortgage[65] and revests title,[66] but it does not have such effect where the mortgage has been assigned as security to one advancing the money to pay the debt.[67] The parties may contract for payment in a particular manner.[68] Payment to an agent[69] authorized to receive the same[70] is good. Payment to the mortgagee without notice of assignment[71] is good

58. Pease v. Doane, 33 Pa. Super. Ct. 6. Where equity of redemption was conveyed to mortgagee at suggestion of junior lienor for sole purpose of saving expense of foreclosure, held no merger. Id. Where deed of equity of redemption to mortgagee provides that mortgage should not merge, "but should remain in force * * * for the purpose of protecting and perfecting the title of second party," there will be no merger so long as it is advantageous that there be none. Woodward v. McCollum [N. D.] 111 NW 623.

59. Neff v. Elder [Ark.] 105 SW 260. Where merger would be fraudulent. Rohde v. Rohn, 127 Ill. App. 579. Equitable mortgage takes precedence over statutory mortgage prior in time where former was received with understanding that it was first lien and latter was sold after a merger had been effected between it and the equity, no superior equities appearing in favor of statutory mortgage. Id. Where tenant who has mortgaged his leasehold is dispossessed for nonpayment of rent and mortgagee takes a lease for remainder of term from landlord, there was not a complete merger, since tenant could redeem under Code Civ. Proc. § 2256, any time within year by payment of rent, and hence mortgagee could foreclose. Chumar v. Melvin, 53 Misc. 460, 105 NYS 27.

60. Woodward v. McCollum [N. D.] 111 NW 623.

61. Francis v. Sheats [Ala.] 45 S 241.

62. Equitable Bldg. & Loan Ass'n v. Thomas, 216 Pa. 571, 65 A 1100.

63. Instrument reciting that debtor is desirous of extending loan, and declaring that mortgage, together with note and debt secured thereby, is renewed for specific period and signed by debtor, is a renewal within Civ. Code, § 2922, requiring renewal of mortgage to be in writing. Moore v. Gould [Cal.] 91 P 616.

64. Evidence held to show that debt had not been paid by including amount in new mortgage. York v. West, 147 Mich. 549, 14 Det. Leg. N. 3, 111 NW 164. Statement of no set-off, reciting amount then due, held to sustain finding that such amount is still due, there being no evidence of any payment and proof of alleged tender being insufficient. Wright v. Stone Harbor Imp. Co., 69 N. J. Eq. 837, 66 A 417. Where assignee in bankruptcy of husband sold land belonging to husband covered by mortgage given by husband and wife to bank to secure indebtedness of husband, which mortgage also covered property of wife and out of proceeds paid bank and took assignment, held payment of mortgage and it cannot be enforced against wife's property. White v. Rovall, 105 NYS 624.

65. Fish v. First Nat. Bk. [C. C. A.] 150 F 524. Where mortgagor conveyed mortgaged premises to mortgagee by warranty deed in payment of debt, mortgagee surrendering notes secured and thereafter paying taxes, etc., held that transaction terminated relation of mortgagor and mortgagee, notwithstanding agreement to reconvey upon payment of specific sum within stated time. Neeson v. Smith [Wash.] 92 P 131.

66. Under express provisions of Code 1896, § 1067. Denman v. Payne [Ala.] 44 S 635.

67. Warren v. Hayes [N. H.] 68 A 193. Where it was agreed between mortgagor, mortgagee, and bank that bank should take over and carry debt and mortgage was assigned to it, bank's payment of debt to mortgagee did not discharge same. Krugmeier v. Hackett [Wis.] 113 NW 1103.

68. Evidence held to sustain finding that, under contracts between complainants and defendants, and between defendant and a mining company, complainants were entitled to have a mortgage debt owing from them to defendant paid from proceeds of ore sold by defendant as sales agent for mining company and release of mortgage. Billings v. Shores [C. C. A.] 151 F 369.

69. Correspondence held to show that broker receiving payment and canceling note and deed of trust was agent of trustee. Fifth Congregational Church v. Bright, 28 App. D. C. 229.

70. Actual authority of a person, not owner or possessor of a note and mortgage, to receive payment is necessary to extinguish security. Bautz v. Adams, 131 Wis. 152, 111 NW 69. Such authority need not be in writing or established by direct evidence. Id. Evidence held to show authority. Id. Where secured note is payable at a broker's office and is in his possession, maker has right to assume that he has authority to receive payment (Fifth Congregational Church v. Bright, 28 App. D. C. 229), and where payment is made, note canceled, and trust deed released, debt and deed are discharged, though broker absconds with money (Id.). Where note secured by deed of trust was

as against an unrecorded assignment.[72] In Wisconsin a mortgagor is not protected by the recording acts in making payment to the recorder, but not the real owner, of a mortgage where such person does not have possession of the secured commercial paper or actual authority to receive payment.[73] Lapse of twenty years after maturity of mortgage without payments thereon raises a presumption of payment,[74] as does nonforeclosure for the same period from execution in Missouri.[75] A mortgagor may estop himself from asserting payment.[76] Where a mortgage is given on a surety's property, an assignment of the mortgage to the principal discharges the same.[77] Where the mortgagor has sold the land subject to the mortgage, he may take an assignment of the mortgage without discharging it.[78]

A tender to be effective must include interest to date,[79] and, while it does not discharge the lien in Arkansas, it prevents foreclosure so long as it is kept good.[80]

The taking of a judgment on the secured debt does not release the lien of the mortgage.[81] The termination of the interest mortgaged extinguishes the lien.[82] Where mortgagee, who has acquired the equity of redemption, conveys the land with full warranty against incumbrances, the mortgage is extinguished.[83] Procurement of a release from the last record assignee does not discharge the mortgage in Kansas as against an unrecorded assignment.[84] Whether a particular transaction amounts to a release depends on the intention of the releasor.[85] A fraudulent release does not protect one relying thereon where there is notice or ground for suspicion that it

transferred without notice to maker and without assignment of trust deed, and transferee permitted trustee to collect interest, etc., as agent, held that payment of note to trustee who defaulted was payment to holder of note as between parties, especially under Civ. Code, § 2442, declaring that where one of two innocent parties must suffer for act of third person, he whose negligence makes loss possible must bear same. McVay v. Bridgman [S. D.] 112 NW 1138. Fact that interest coupons bore indorsement to transferee when presented for payment held not notice of transfer of note, being transferable apart from note. Id.

71. Where mortgagor was officer of corporation and chargeable with notice of assignment, held corporation also was charged. Schumacher v. Wolf, 125 Ill. App. 81. Rule requiring notice to be given by equitable assignee does not require it to be given to strangers but only to mortgagor. Id. Recording of assignment of mortgage is not notice to mortgagor in New York, hence fact that bankrupt without actual notice schedules original mortgagee as creditor does not render discharge less effective. Mueller v. Goerlitz, 53 Misc. 53, 103 NYS 1037.

72. Laws 1899, p. 340, c. 168, incidentally touching upon general statute relating to bonds, notes, and bills, and amending it by implication in some particulars, is not within Const. art. 2, § 16, requiring new act to contain sections amended. First Nat. Bk. v. Pearce [Kan.] 92 P 53. It is also sufficient as to title. Id.

73. Bautz v. Adams, 31 Wis. 152, 111 NW 69.

74. Greenfield v. Mills, 123 App. Div. 43, 107 NYS 705.

75. Rev. St. 1899, § 4277 (Ann. St. 1906, p. 2353). Morgan v. Pott, 124 Mo. App. 371, 101 SW 717.

76. Defendant made written extension agreements after alleged payment. Held estopped against assignee purchasing on strength of agreements. Gemkow v. Link, 225 Ill. 21, 80 NE 47.

77. Husband and wife executed mortgage on her separate property to secure former's note. Scribner v. Malinowski, 148 Mich. 446, 14 Det. Leg. N. 245, 111 NW 1032.

78. Where husband and wife execute mortgage to secure former's note and husband quitclaims his interest to wife subject to mortgage and thereafter takes an assignment of mortgage with understanding that he could reassign to his assignor and have money returned, which he does, held that mortgage was not extinguished by assignment to husband, since he had right to purchase and compel land to pay. Scribner v. Malinowski, 148 Mich. 446, 14 Det. Leg. N. 245, 111 NW 1032.

79. Tidwell v. Wittmeier [Ala.] 43 S 782.

80. Strickland v. Clements [Ark.] 104 SW 175.

81. Gilman v. Heitman [Iowa] 113 NW 932.

82. Where widow, having only a dower interest, executes mortgage on land, such mortgage is extinguished by her death. And part of heirs of husband paying same have no lien on land on account thereof. Couch v. Sizemore [Ky.] 106 SW 801.

83. Irrespective of merger. Greenfield v. Mills, 123 App. Div. 43, 107 NYS 705.

84. Since repeal of Laws 1897, p. 345, c. 160, by Laws 1899, p. 340, c. 168. Especially where releasee had reason to believe that releasor was not owner of mortgage. Mayse v. Williams [Kan.] 91 P 795.

85. Taylor v. Godfrey [W. Va.] 59 SE 631. Cancellation of mortgage on record is only prima facie evidence of its discharge, and where made through mistake equity will relieve. Id. Negligence in cancelling mortgage of record may not prevent relief where other party will not be prejudiced. Id. Failure to read held not to bar cancellation. Id.

is fraudulent.[86] A satisfied trust deed does not again become a lien until it has passed to another party for a new consideration.[87]

While payment renders the power of sale in a mortgage inoperative as between the parties, a bona fide purchaser is protected unless satisfaction is recorded.[88] In Missouri a recorder must require the production and cancellation of the secured notes or an affidavit accounting for the same before entering satisfaction, and one injured by his failure so to do[89] may recover unless he himself is negligent.[90] Mortgagee cannot insist upon preparing the satisfaction piece in New York and charge therefor.[91] A marginal entry of discharge is sufficient in New Jersey.[92]

Penalties for failure to release.[See 8 C. L. 1040]—A mortgagee is not liable for refusal to enter record satisfaction[93] or execute a release,[94] unless the mortgagor has fully performed all his obligations. Fact that satisfied mortgage defectively described the property does not relieve the mortgagee from the duty of acknowledging satisfaction on request.[95] A petition to recover the penalty for failure of the mortgagee to acknowledge satisfaction of record or execute a release must allege all the statutory facts.[96]

§ 13. *Redemption.*[See 8 C. L. 1041]—The right to redeem from the mortgage is distinct from the right to redeem from foreclosure.[97] The right of a cotenant to redeem and the effect thereof is elsewhere treated.[98] A court of equity will not reform a foreclosed mortgage so as to include additional land without giving an opportunity to redeem.[99] While the mortgagor may release his equity of redemption,[1] it must be

86. Abraham Lincoln Bldg. & Homestead Ass'n v. Zuelk, 124 Ill. App. 109.

87. Lien of trust deed made, recorded, and canceled in one transaction and subsequently sold for new consideration held not to attach until date of subsequent sale. White v. Giovanna Lifrieri, 124 Ill. App. 641.

88. Garrett v. Crawford, 128 Ga. 519, 57 SE 792.

89. Fact that vendee had given notes secured by defective trust deed prior to such satisfaction does not relieve recorder where vendee refused to correct such defect until satisfaction. State v. Green, 124 Mo. App. 80, 100 SW 1115. Nor does vendee's presumptive knowledge of the law, coupled with actual knowledge that secured notes were not produced and canceled or accounted for by affidavit, relieve recorder on theory that vendee could not have been misled. Id.

90. Fact that vendee accompanied beneficiary of a deed of trust to office of recorder of deeds and remarked that they had come to satisfy the record held not such negligence as to preclude him from recovering of recorder for entering satisfaction without requiring production and cancellation of notes secured or an affidavit accounting therefor, as required by Rev. St. 1899, § 4358 (Ann. St. 1906, p. 2401). State v. Green, 124 Mo. App. 80, 100 SW 1115.

91. Under Civ. Proc. § 1261, upon presentation of satisfaction piece, after payment of mortgage debt, and payment of 25 cents, mortgagee must execute same, and he cannot insist upon preparing satisfaction piece himself and charge therefor. Krulder v. Hillman, 57 Misc. 209, 107 NYS 727.

92. Marginal entry of discharge as provided by 2 Gen. St. p. 2107, § 23, held sufficient though mortgage was recorded in full, § 25, providing for an acknowledged certificate, not being exclusive. Manchester Bldg. & Loan Ass'n v. Beardsley [N. J. Eq.] 66 A 1.

93. Failed to pay recording fee as provided. Kinard v. Hill [Ala.] 45 S 60.

94. Where payment of taxes are secured by mortgage, mortgagor cannot recover until same has been paid. Kingston v. Newell, 125 Mo. App. 389, 102 SW 604.

95. Though mortgage on city property gave lot number and addition but failed to give the block, mortgagor held liable for penalty under Ann. Code 1902, § 2451, for failure to acknowledge satisfaction on request. Pierce v. Kingston Lumber Co. [Miss.] 43 S 81.

96. Petition founded upon Rev. St. 1899, § 4363 (Ann. St. 1906, p. 2404), imposing penalty of 10 per cent. of amount of debt for failure of mortgagee to acknowledge satisfaction of record or execute a release, where mortgage debt has been paid in full together with fee for satisfaction, etc., failing to allege amount of debt, when paid, and amount tendered as a fee, is defective (Kingston v. Newell, 125 Mo. App. 389, 102 SW 604), and is not cured by answer or verdict (Id.).

97. See Foreclosure of Mortgages on Land, 9 C. L. 1378.

98. See Tenants in Common and Joint Tenants, 8 C. L. 2114.

99. Will direct another sale. Carrigg v. Mechanics' Sav. Bk. [Iowa] 111 NW 329.

1. Where a release of equity of redemption by subsequent deed is claimed, it must appear that release was voluntary, based upon a consideration, untainted by fraud, and that no advantage was taken of mortgagor's necessity. Lynch v. Ryan [Wis.] 111 NW 707. Evidence held to show that deed absolute conveying equity of redemption to mortgagee was intended to be a mortgage only. Id.

based upon a consideration [2] and be in writing.[3] The parties may extinguish such equity by their acts notwithstanding the statute of frauds.[4] Ordinarily the right to redeem continues until cut off by foreclosure proceedings,[5] but the right to resort to a court of equity to assert the same against a mortgagee in possession [6] may be lost by laches [7] or barred by limitations.[8] Where mortgagee refuses to recognize mortgagor's right to redeem, a tender is not necessary before bringing suit to redeem,[9] nor need petitioner offer in his petition to pay judgment, costs, and taxes, where he alleges upon information and belief that the rents and profits received by defendant and the value of timber converted exceeds the debt.[10] To redeem, mortgagor must pay the amount due with interest, less rents and profits received by the mortgagee,[11] but is not liable for compound interest.[12] Upon redemption from one wrongfully in possession, the court, in its discretion, may refuse credit for improvements.[13]

§ 14. *Subrogation.* See 8 C. L. 1042—Where property is conveyed under an agreement that grantee will mortgage same and pay off liens thereon, to reconvey to grantor upon payment by him, such grantee is subrogated to a mortgage given by him where he is held personally on his note.[14] A grantee of a mortgagee in possession, having notice of mortgagor's right to redeem, is subrogated to all the rights of the mortgagee.[15] Where a purchaser of a lot pays a mortgage prior to a vendor's lien of which he has no knowledge, he is subrogated to the mortgage as against the lien.[16] Where one of two mortgagors pays the mortgage to save the land owned as tenants in common, he is entitled to contribution from his comortgagor.[17] A statute of limitations for foreclosures has no application where owner pays off a mortgage in ignorance of a defect in his title and asserts the mortgage by way of subrogation.[18]

MOTOR VEHICLES, see latest topical index.

2. Mortgagor cannot gratuitously release his equity of redemption by agreement contemporaneous with the mortgage or subsequent thereto. Lynch v. Ryan [Wis.] 111 NW 707.

3. Grantor in deed absolute but in fact a mortgage stated that he had abandoned idea of redeeming. Sebree v. Thompson, 31 Ky. L. R. 1146, 104 SW 781.

4. Mortgage constructed from deed and writing to reconvey. Mortgagees given possession voluntarily. Parol abandonment by mortgagor. Debt equal to value of land. Disappearance until after years the value has greatly increased. Ferguson v. Boyd [Ind.] 81 NE 71.

5. St. §§ 3165, 3169, construed, and held that right of redemption continues until confirmation of sale. Gerhardt v. Ellis [Wis.] 114 NW 495. Act 1791 provided that no mortgagee should maintain possessory action for estate mortgaged, with proviso that it should not apply where mortgagor was out of possession. Held where mortgagees took possession after repeal of proviso, fact that mortgage was given before does not affect right, if any, of heirs of mortgagor to redeem. Francis v. Francis [S. C.] 58 SE 804.

6. Where foreclosure suit was prosecuted to judgment but no sale was had and thereafter mortgagee occupied premises as part of his adjoining farm, held that he was mortgagee in possession. Becker v. McCrea, 119 App. Div. 56, 103 NYS 963.

7. Caraway v. Sly, 122 Ill. App. 648. Right to redeem is lost where foreclosure is barred. Rule applied to suit to declare absolute deed mortgage and to redeem, right to foreclosure being barred under Hurd's St. c. 83, § 11. Id.

8. Deadman v. Yantis, 230 Ill. 243, 82 NE 592. Action to redeem from mortgage lien is barred in Nebraska by elapse of ten years from time possession is taken by mortgagee. Clark v. Hannafeldt [Neb.] 113 NW 135. Under Code Civ. Proc. § 379, providing that action to redeem may be maintained by mortgagor unless mortgagee in possession or those claiming under him have been in continuous adverse possession for twenty years, etc., held that word "adverse" requires only that mortgagee be in possession as such. Becker v. McCrea, 119 App. Div. 56, 103 NYS 963.

9. Eldriedge v. Hoefer [Or.] 93 P 246.

10. Gerhardt v. Ellis [Wis.] 114 NW 495.

11. Deed absolute intended as a mortgage. Eldriedge v. Hoefer [Or.] 93 P 246.

12. Defendant was charged with "annual rent" for use and occupation forcibly secured by him and credited with interest on securities he held. Such benefit of compound interest to plaintiff held error. Shelly v. Cody [N. Y.] 79 NE 994.

13. Defendant was assignee of one who had title under agreement to return it to plaintiff on payment of certain sums. Defendant had assumed the obligation of his grantor but forcibly ousted plaintiff. Shelly v. Cody [N. Y.] 79 NE 994.

14. And may foreclose same against one purchasing with notice from grantor. Koppang v. Steenerson, 100 Minn. 239, 111 NW 153.

15. Francis v. Francis [S. C.] 58 SE 804.

16. Neff v. Elder [Ark.] 105 SW 260.

17. Thompson v. Griggs, 31 Pa. Super. Ct. 608. See Tenants in Common and Joint Tenants, 8 C. L. 2114.

18. Kirby's Dig. § 5399, held inapplicable. Neff v. Elder [Ark.] 105 SW 260.

MOTIONS AND ORDERS.

§ 1. The Motion, 873. | § 2. The Order, 874.

The scope of this topic is noted below.[19]

§ 1. *The motion. Making, submitting, and filing.* See 8 C. L. 1043—Motions must be clear and definite both as to object and the grounds upon which they are based.[20] A motion touching matters apparent on the face of the pleadings need not be in writing.[21] Verification is not always necessary.[22] A motion to reinstate a case dismissed for want of prosecution is to be regarded as filed when actually presented to the court for action, though written entry of filing by the clerk is not made until later.[23]

Notice. See 8 C. L. 1043—Unless governed by statute or rule, the necessity for notice will depend upon the character of the motion.[24] A rule that where a motion is for irregularity the notice or order to show cause must specify the irregularity complained of does not apply to matters of substance.[25] Service of notice on one of several attorneys is sufficient under a statute providing for service on the adverse attorney.[26]

Hearing, rehearing, and relief. See 8 C. L. 1043—Though affidavits are ordinarily the only evidence received on motions, where doubtful and difficult questions of fact are involved, the court may, in the absence of statutory inhibition, require oral testimony or order a reference,[27] or deny the motion with leave to institute an independent suit,[28] no improper conditions being imposed.[29] Counter affidavits may be filed without notice.[30]

Renewals.[31]—An ex parte order denying a motion is not a bar to a formal motion on notice.[32] Where one justice has refused to confirm the appointment of a

19. It includes matters relating to motions and orders generally. It excludes the necessity and requisites of motions and orders in particular proceedings (see such topics as Attachment, 9 C. L. 282; Continuance and Postponement, 9 C. L. 649; New Trial and Arrest of Judgment, 8 C. L. 1153, and the like), motions and orders in equity (see Equity, 9 C. L. 1110), docketing and order of hearing (see Dockets, Calendars and Trial Lists, 9 C. L. 1008), affidavits and counter affidavits (see Affidavits, 9 C. L. 56, and topics dealing with particular proceedings), effect of ruling as an adjudication (see Former Adjudication, 9 C. L. 1422), and necessity of motion in trial court to raise questions for review (see Saving Questions for Review, 8 C. L. 1822).

20. Should clearly and definitely state grounds on which based (Jackson v. First State Bk. [S. D.] 113 NW 876), but if no objections are made they will be regarded as waived on appeal (Id.). Motion to strike "latter part" of answer to a question held too indefinite. Colorado Springs Elec. Co. v. Soper, 38 Colo. 141, 88 P 165. See Saving Questions for Review, 8 C. L. 1822.

21. As to sufficiency of affidavit to excuse failure to give appeal bond. Livingston v. King, 2 Ga. App. 178, 58 SE 395.

22. Written motion under Rev. St. 1901, par. 1551, to dismiss for failure of nonresident plaintiff to comply with order to give security for costs, need not be verified. Union Iron Works v. Vekol Min. & Mill. Co. [Ariz.] 89 P 539.

23. Strachan v. Wolf, 2 Ga. App. 254, 58 SE 492.

24. Defendant entitled to vacation of order allowing officer's expenses in keeping attached property where same was granted without notice. Beeman v. Cashin Mercantile Co. v. Sorenson [Wyo.] 89 P 745. Notice of motion for execution held not necessary. Bredfield v. Hannon [Cal.] 91 P 334.

25. Sufficiency of affidavits. Agnew v. Latham, 54 Misc. 61, 105 NYS 366.

26. Rev. St. 1901, par. 1484. Union Iron Works v. Vekol Min. & Mill. Co. [Ariz.] 89 P 539.

27. If court is not satisfied with evidence produced before it on motion to set aside a judgment, it may order a reference. Jones v. Haile Gold Min. Co. [S. C.] 60 SE 35.

28. Motion to set aside sale of bank's assets. Jackson v. First State Bk. [S. D.] 113 NW 876.

29. Error on denying motion of nonresident stockholders to set aside receiver's sale and have new receiver appointed to impose as condition to independent suit for such relief that moving parties deposit $500, receiver being entitled to only security for costs. Jackson v. First State Bk. [S. D.] 113 NW 876.

30. On defendant's motion to set aside order for execution on a judgment, held proper to permit plaintiff to file counter affidavit without previous notice or service on defendant. Bredfield v. Hannon [Cal.] 91 P 334.

31. See 8 C. L. 1044. Effect of order on motion as adjudication, see Former Adjudication, 9 C. L. 1422.

32. Order refusing, on ex parte application, to vacate order for examination before trial held ex parte though attorney for adverse party was notified of hearing. Grant v. Greene Consol. Copper Co., 118 App. Div. 853, 103 NYS 676.

trustee and appointed a receiver, another justice will not appoint a trustee on a new application on the same facts.[33]

§ 2. *The order.*See 8 C. L. 1044—A statute providing that the written order of the judge entered upon the minutes of the court shall be evidence of a given fact is sufficiently complied with by an order given verbally in open court and entered on the minutes.[34]

*Operation, effect, and conclusiveness.*See 8 C. L. 1045—As between the parties,[35] an order is conclusive as to all matters upon which the court might have been called to pass had the parties chosen to bring them forward.[36]

Enforcement.—During willful disobedience of an order one may be denied the right to affirmatively move in the action.[37]

Nunc pro tunc orders See 8 C. L. 1045 may be made and entered during term to make the record speak the truth.[38]

*Amendment and vacation.*See 8 C. L. 1045—Where on resettlement of an order appealed from the affidavits used by one party are recited therein, those of the other party should also be included.[39] Final orders cannot ordinarily be set aside after terms,[40] though certain orders and judgments resulting solely from the fault of misprision of the clerk may be,[41] and where a motion to vacate is filed at term, it may be determined at a subsequent term.[42] If an order is filed by mistake after filing of a previous order, the proper course is to move to vacate it and not for the justice to destroy one of the orders.[43] An order consented to by the parties cannot be reversed, set aside, or impeached except for fraud or mistake.[44]

*Review.*See 8 C. L. 1046—A judge may not review or vacate orders of another judge of co-ordinate powers,[45] but the order itself may authorize action by a succeeding judge.[46] Erroneous compliance with an order by the clerk is not ground for appeal from the order.[47] The fact that a motion is granted is verification of the grounds on which it was based,[48] otherwise where it is denied.

MULTIFARIOUSNESS; MULTIPLICITY; MUNICIPAL AIDS AND RELIEFS, see latest topical index.

33. Lee v. Bowling Green Sav. Bk., 55 Misc. 369, 106 NYS 568.

34. Order need be written by judge only when in chambers. Order appointing jury commissioners. State v. Marionneaux [La.] 45 S 389.

35. Plaintiffs in pending suits who were not parties to a proceeding wherein the court declared jury lists void are not precluded from questioning the order in the regular course of judicial procedure. Polk County v. Polk County Dist. Ct., 133 Iowa, 710, 110 NW 1054. Were not entitled to certiorari. Id.

36. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076. In the absence of exception or appeal, an order retaxing costs is conclusive as between movant and the officer in whose favor the costs were taxed. Sheibley v. Cooper [Neb.] 113 NW 626.

37. Order for counsel fee and allmony. Harney v. Harney, 110 App. Div. 20, 96 NYS 905.

38. Where clerk failed to enter order extending time for filing bill of exceptions. Gormley v. St. Louis Transit Co., 126 Mo. App. 405, 103 SW 1147.

39. Order denying revocation of letters testamentary. In re Washburn, 105 NYS 615.

40. Order granting motion for new trial. Greenberg v. People, 129 Ill. App. 566. In absence of fraud. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076.

41. Error in calendar and subsequent correction without notice resulting in dismissal of defendant's appeal. Jacob Aaron v. Jefferson Ice Co., 129 Ill. App. 570.

42. Motion to vacate order allowing expense of keeping attached property having been filed at term, court could determine same at following term. Beeman & Cashin Mercantile Co. v. Sorenson [Wyo.] 89 P 745.

43. Though he believed tacit consent was given to his act. Hill v. Muller, 57 Misc. 437, 107 NYS 1.

44. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076.

45. Motion at special term to vacate order of another justice settling interrogatories on ground that settlement was contrary to law and general rules of practice held unauthorized. Spurr v. Empire State Surety Co., 106 NYS 1009. See Appeal and Review, 9 C. L. 108.

46. Where order allowing amendment to pleading was granted to avoid interlocutory appeal and provided that trial judge could pass upon its legal effect, such judge could strike amendment as irrelevant. Keys v. Winnsboro Granite Co., 76 S. C. 284, 56 SE 949.

47. Discharge of liens before taking bond

MUNICIPAL BONDS.

§ 1. Power to Issue, 875.
§ 2. Conditions Precedent; Submission to Vote; Provision for Payment, 877.
§ 3. Execution, 879.
§ 4. Form and Requisites, 879.
§ 5. Issue and Sale, 879.
§ 6. Rights and Liabilities Arising Out of Illegal Issue, 879.
§ 7. Transfer, 880.
§ 8. Payment, 880.
§ 9. Scaling Overissue, 880.
§ 10. Enforcement of Improvement Bonds Against Abutters, 880.

"Municipal bonds" include all public bonds, but not warrants for the payment of public money.[46, 50]

§ 1. *Power to issue.* See 8 C. L. 1046—There must be express legislative authority to authorize the issue of negotiable bonds, and the power cannot be implied from the power to borrow money.[51] The power to issue bonds for certain purposes does not obligate a municipality to issue bonds for such purposes if the money can be otherwise raised.[52] The bonds must be issued by a legally organized municipality,[53] and the ordinance authorizing the issue must be passed in the manner prescribed by statute, and it is frequently provided that it cannot be passed at the same meeting at which it was introduced.[54] Acts requiring counties to issue bonds to pay their share of the cost of boundary roads are constitutional,[55] as are also acts exempting such bonds from taxation,[56] for they are instrumentalities of government and will not be taxable unless the law is clear to that effect.[57] Home rule cities may by amendments to their charters authorize the issue of bonds, provided there is nothing inconsistent with the Federal or state constitutions.[58] Municipalities may be authorized to issue bonds to provide for waterworks,[59] to widen and deepen rivers,[60] to improve roads,[61] to provide for costs of improvements made outside of their territorial limits and in

required by order discharging liens. Danella v. Paradise, 53 Misc. 662, 102 NYS 807.

48. Strachan v. Wolf, 2 Ga. App. 254, 58 SE 492.

49, 50. See Municipal Corporations, 8 C. L. 1056; Counties, 9 C. L. 837.

51. General law as to bonds not applicable to special charter city authorized to borrow but not to issue bonds. Reed v. Cedar Rapids [Iowa] 113 NW 773.

52. Where municipality may issue bonds to acquire land for park purposes, the failure to do so will not affect the rights of a landowner after condemnation, for the latter may be paid out of the general funds. Bohannan v. Stamford [Conn.] 67 A 372.

53. In organizing an irrigation district the county commissioners cannot take the decision of the petitioners on requests by property owners to exclude land as final. Ahern v. High Line Irr. Dist. Directors [Colo.] 89 P 963. Warrants issued by town of Blaine could not be legally funded by the City of Blaine, as the town had included more than the statutory area. State v. Blaine, 44 Wash. 218, 87 P 124.

54. Held that an adjourned meeting of the Seattle city council was a special meeting, and accordingly the bonds then authorized were valid. State v. Ross [Wash.] 89 P 158.

55. Not a deprivation of local self-government; the county is an involuntary corporation organized as a political subdivision of the state. State v. Marion County Com'rs [Ind.] 82 NE 482.

56. That it makes other municipal taxes heavier is no reason for not allowing the exemption. Buist v. Charleston City Council, 77 S. C. 260, 57 SE 862.

57. That taxation shall be uniform on all property does not require the taxing of public property or instrumentalities of government, and under such a provision the bonds of a municipal corporation are not taxable in the hands of a resident of the state. Penick v. Foster, 129 Ga. 217, 48 SE 773.

58. As for owning and operating an electric railway, though it is a business inconsistent with the customary functions of a municipality. Love v. Holmes [Miss.] 44 S 835.

59. Under the authority of the Longworth act (95 O. L. 318), the city council of the city of Cincinnati may, by ordinance, provide for the borrowing of money and the issue of bonds to be placed at the disposal of the board of trustees, commissioners of waterworks, for the completion of the waterworks of the city of Cincinnati, in accordance with the provisions of 92 O. L. 606, and the acts supplementary thereto, within the limitations prescribed by said Longworth act. City of Cincinnati v. Von Bargen, 6 Ohio N. P. (N. S.) 258.

60. City authorized to issue bonds to improve river and to pay for the same out of the general fund, which was to be reimbursed by local assessment to the amount of one-half of the bonds. People v. Buffalo, 57 Misc. 17, 107 NYS 281.

61. Counties may issue bonds to provide for graveling roads to an amount not exceeding the contract price and all expenses incurred. Amount of bonds not limited to contract price and expense incurred prior to letting of the contract, but subsequent expenses may be estimated and included. State v. Marion County Com'rs [Ind.] 82 NE 482.

another state,[62] or for any purpose for which they are authorized to incur an expense.[63] Where a municipality is authorized to issue bonds to pay part of the cost of specific improvements,[64] it cannot issue them to provide a fund from which to pay for future improvements.[65] It is disputed whether the power to issue is lost because officials announce an intention to use the proceeds for an illegal purpose.[66]

Refunding bonds.[See 8 C. L. 1047]—An act authorizing refunding bonds is not unconstitutional as an amendment to a charter or as special legislation.[67] Bonds issued to refund illegal bonds are illegal,[68] but county officials may issue refunding bonds for previous bonds, whose validity was uncertain but which have been compromised.[69]

Railroad aid bonds [See 8 C. L. 1048] may be issued subject to such conditions as the municipality see fit to impose.[70]

Limitation of indebtedness.[See 8 C. L. 1048]—The limit may be fixed by statute or constitution.[71] Cities operating under special charter may not be subject to the statutory limitations,[72] though the legislature may place additional limitations over what the charter imposes.[73] The limitation does not generally apply to indebtedness already incurred, or to refunding bonds,[74] as they do not increase the debt.[75] A limitation may be put on the amount to be issued in any one year.[76] In estimating the

62. City of St. Louis authorized to contract a debt to build a bridge for railway and general travel across the Mississippi, and to acquire approaches in Illinois, and could issue negotiable or coupon bonds therefor. Haeussler v. St. Louis, 205 Mo. 656, 103 SW 1034.

63. Issued to pay expense of purchasing electric lighting from private company for the streets. City of Redlands v. Brook [Cal.] 91 P 150.

64. Under Mun. Code 1902, § 53, bonds cannot be provided for by resolution or ordinance until after the passage of an ordinance providing for the improvement, but under Rev. St. § 2835, the statement in ordinance issuing bonds was a sufficient declaration of necessity of improvement. Heffner v. Toledo, 75 Ohio St. 413, 80 NE 8.

65. For such improvements that may from time to time be made. Heffner v. Toledo, 75 Ohio St. 413, 80 NE 8.

66. Injunction refused where officials were going to use proceeds of municipal electric bonds to supply electricity to inhabitants, as later there will be time enough to prevent misappropriation. State v. Clay Centre [Kan.] 91 P 91. City entered into a contract through its mayor to buy a waterworks system, and though the bonds were voted for a legal purpose, yet their issue would be restrained as it was the declared intention of the council to use their proceeds to fulfill this contract. Woodward v. Grangeville [Idaho] 92 P 840.

67. Whether a general law could have been made was a legislative question. Buist v. Charleston City Council, 77 S. C. 260, 57 SE 862.

68. But after the lapse of thirty-four years a taxpayer could not enjoin the payment of such bonds as being in excess of the debt limit, though the city might refuse to pay the same. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462. City of Blaine attempted to fund the warrants of its predecessor, the town of Blaine, a void municipality. State v. Blaine, 44 Wash. 218, 87 P 124.

69. Much litigation, and part of bonds had been held valid, part invalid, and part not adjudicated. These last were compromised and voters approved of an issue of refunding bonds to carry out the compromise. Hamilton County v. Montpelier Sav. Bk. & Trust Co. [C. C. A.] 157 F 19.

70. That county should be exonerated from a prior obligation to issue bonds was a condition precedent, but that road should be located in county was not, and breach of obligation would not defeat bonds in hands of bona fide holder. Quinlar v. Green County [C. C. A.] 157 F 33, afd. 205 U. S. 410, 51 Law. Ed. 860.

71. Laws 1906, p. 33, limiting debts of cities to 1 1-4 per cent. of actual value, does not apply to special charter cities which are only subject to the constitutional limitation of 5 per cent. Reed v. Cedar Rapids [Iowa] 113 NW 773.

72. Might amend charter provided no conflict with Federal or state constitution. Love v. Holmes [Miss.] 44 S 835.

73. Ten per cent limit not inconsistent with provisions of charter that board of aldermen could not create an indebtedness except when authorized to do so by an election. Wharton v. Greensboro [N. C.] 59 SE 1043.

74. Fact that refunding bonds were issued to fund subsisting legal obligations of county did not prevent the funding of all the indebtedness, though it then exceeded the constitutional limit. Hamilton County v. Montpelier Savings Bk. & Trust Co. [C. C. A.] 157 F 19.

75. Merely change its form and may diminish its budren by reducing the interest. Wharton v. Greensboro [N. C.] 59 SE 1043.

76. Bonds for payment of a municipality's portion of street and sewer improvements are governed entirely as to the amount of issue by the provisions of § 2835, Rev. St. et seq., and amendments thereto, and are subject to the limitations therein prescribed, and especially to the limitation for any one calendar year of one per cent of the valuation of taxable property within the corporation and on the tax duplicate, and this limitation refers to the amount of bonds issued and not to the amount becoming pay-

amount of indebtedness, the debt of another corporation covering the same territory,[77] debts contracted for local improvements to be paid by special assessments,[78] contracts for supplies payable out of funds on hand,[79] or bonds payable out of the revenue of the water system, do not constitute a part of the general indebtedness.[80] As to these last there is a conflict of authority, some jurisdictions holding that a contract for supplies payable out of a designated fund creates a debt,[81] and that consequently certificates issued for extensions to waterworks payable out of a water fund are part of the general indebtedness.[82] Contracts for electric lighting payable monthly,[83] or an ordinance authorizing officials to borrow money to buy supplies, both create debts.[84] Where the authorized issue exceeds the limitation, the part within the limit may be issued.[85] The provision cannot be evaded by issuing bonds in partial payment on a contract in excess of the limit.[86]

Curative acts. See 8 C. L. 1049—The legislature may validate what it could have authorized in advance, and such legislation is not void as being special legislation,[87] but bonds cannot be made subject to curative acts by merely antedating the same.[88]

§ 2. *Conditions precedent; submission to vote; provision for payment.* See 8 C. L. 1049—Sometimes it is required that the auditor shall make his certificate that there are funds before the bonds can be issued.[89] From the mere fact of the issuance of bonds a presumption arises that there has been a compliance with conditions precedent.[90] A provision that a railway should locate and spend money in a certain county was not a condition precedent.[91]

Assent of voters or taxpayers. See 8 C. L. 1050—The submission of the question of

able within any one calendar year. Smith v. Rockford, 9 Ohio C. C. (N. S.) 465.

77. In determining the debt limit of the City of Grand Forks, the debt of the independent school district of that name is not to be considered. Vallelly v. Grand Forks Park Com'rs [N. D.] 111 NW 615.

78. Except one-fifth of the cost of paving for which there is a general liability. Vallelly v. Grand Forks Park Com'rs [N. D.] 111 NW 615.

79. Contract for a pumping engine. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

80. Constitute part of the 5 per cent additional allowed for water, light, and sewer purposes, although city at time of issue had not reached the 5 per cent. limit of general indebtedness. Dean v. Walla Walla [Wash.] 92 P 895.

81. With concrete construction company to be paid out of water fund when collected. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

82. Water fund created by ordinance from proceeds of water rates and out of special taxes. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

83. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

84. Mayor and finance committee were to borrow money to buy a hook and ladder truck. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

85. Where the total amount of bonds authorized by council exceeds the 1 per cent. limitation, but the contracts entered into and partly executed on the faith of such issue will not require an amount in excess of that limitation, the issue, to the extent of the amount required to meet such contracts, so in part executed, will be upheld as binding on the municipality. Smith v. Rockford, 9 Ohio C. C. (N. S.) 465.

86. Attempted to vote bonds for $30,000 to apply on contract to purchase waterworks for $32,000, as that was the greatest amount that could be issued and no provision was made for the other $2,000. Woodward v. Grangeville [Idaho] 92 P 840.

87. May legalize bonds approved by voters which were issued under an act which had been repealed by implication. City of Redlands v. Brook [Cal.] 91 P 150.

88. Bonds not authorized nor issued until after the date on which the amendments to §§ 2835, 2835b, 2836, and 2837, went into effect, April 4, 1906, do not come within the curative provisions of § 2837 as then amended, notwithstanding the ordinance providing for such issue of bonds directed that they be dated back to April 1st of that year, and further declared that the indebtedness so provided for was an existing, valid, and binding obligation of the village. Smith v. Rockford, 9 Ohio C. C. (N. S.) 465.

89. Where a bond issue is required for the payment of the whole cost of a proposed sewer, no certificate is required from the auditor that sufficient funds are in the treasury and unappropriated to pay the cost thereof. Kohler Brick Co. v. Toledo, 10 Ohio C. C. (N. S.) 137.

90. County had voted to issue bonds to a railroad on condition it was exonerated from its obligation to issue bonds to another railroad. The bonds to the former were issued and those to the latter were never issued, and a bona fide purchaser was entitled to assume that the county had been exonerated. Quinlan v. Green County, 205 U. S. 410, 51 Law. Ed. 860, afg. 157 F 33.

91. Obligation on company, but its failure to perform would not invalidate bonds in hands of a bona fide holder. Quinlan v. Green County [C. C. A.] 157 F 33.

issuing bonds to the electors is not an unconstitutional delegation of power.[92] It is not technically an election and the legislature may submit the question to the taxpayers exclusively.[93] The legislature may require the assent of voters even as to bonds already authorized but not sold.[94] Where the scheme submitted to the voters is not the scheme provided by the ordinance, the vote will be ineffectual to authorize the issue,[95] even under terms less onerous than the vote authorized.[96] If the ballot substantially conforms to the statute, it is sufficient;[97] sometimes it is provided that there shall be separate ballot boxes.[98] The assent of a majority of voters is usually sufficient.[99]

*Notice of election.*See 8 C. L. 1051—It is sufficient if it states the time, place, and object of the election, and it is posted or published as required by statute.[1] A notice which sets out that the bonds are not to bear interest over a certain rate,[2] or that the time of maturity shall not exceed a certain limit,[3] or that it is not in the customary form, but clearly apprises the voter of the election and its purpose, is good.[4] If the ordinance or notice as published contains unnecessary or illegal conditions as to the bonds, it will be treated as surplusage.[5]

*Providing for payment of bonds.*See 8 C. L. 1051—The assessment need not be confirmed before bonds are issued.[6] Municipalities usually have express authority to levy a tax,[7] but even in its absence they have an implied power to provide for the payment of bonds,[8] except in some jurisdiction there is a fixed limit on the tax levy.[9] A

92. City council authorized to submit to voters whether city will avail itself of provisions of park law. Vallelly v. Grand Forks Park Com'rs [N. D.] 111 NW 615.

93. Notwithstanding constitutional specifications as to the qualifications of electors. Menton v. Cook, 147 Mich. 540, 111 NW 94.

94. Amended charter after bonds authorized and prohibited sale of bonds without an election. City of St. Petersburg v. English [Fla.] 45 S 483.

95. Ordinance created a fund for payment of bonds by diverting $175,000 per annum from revenues from water, subject to certain deductions. The proposition as submitted omitted the deductions. Aylmore v. Seattle [Wash.] 92 P 932.

96. Injury lies in the fact that the irregularities frighten away intending purchasers of the bonds, so that the city will suffer. Aylmore v. Seattle [Wash.] 92 P 932.

97. Ballot substantially stated the terms as to issue of bonds as the same were stated in the election notice, except that it failed to state the amount of the issue and court refused to restrain the issue. Calahan v. Handsaker, 133 Iowa, 622, 111 NW 22.

98. Statute providing that there "may" be separate boxes did not render election for sewer and water bonds void where there was only one box. Town of Lumberton v. Nuveen, 144 N. C. 303, 56 SE 940.

99. Under charter, may borrow money for any object in their discretion, as for a city hall. Reed v. Cedar Rapids [Iowa] 113 NW 773.

1. Statute required notice to be posted on each school house. Proof showed posted on seven of nine school houses and that copies were left with teachers of other two with directions to post, and it will be presumed that they posted the same. Calahan v. Handsaker, 133 Iowa, 622, 111 NW 22. First publication may be in same issue of newspaper as publishes the ordinance directing the calling of the election. State v. Clay Center [Kan.] 91 P 91.

2. Statute provided notice shall recite that the bonds shall bear interest at a rate not exceeding 6 per cent; notice merely recited that interest should not exceed 6 per cent. Town of Lumberton v. Nuveen, 144 N. C. 303, 56 SE 940.

3. Not to exceed thirty years, and redeemable at option of municipality after twenty years. Town of Lumberton v. Nuveen, 144 N. C. 303, 56 SE 940.

4. Sheriff took a copy of the order of court ordering the election and wrote at top "Official Notice," and signed it at the bottom. Troutman v. Hays, 31 Ky. L. R. 204, 101 SW 976.

5. Ordinance stated bonds were to be in the denomination of $1,250, when the statute limited the denomination to $1,000. After the election the council might fix the denomination at its discretion within the statutory limits. City of Santa Barbara v. Davis [Cal. App.] 92 P 308.

6. Issue of bonds and making of assessments may be simultaneous acts. People v. Buffalo, 57 Misc. 17, 107 NYS 281.

7. Bonds valid though taxation already levied by town was insufficient to pay interest and sinking fund charges. Town of Lumberton v. Nuveen, 144 N. C. 303, 56 SE 940.

8. But it is an unconstitutional delegation of power for legislature to authorize a board appointed by the council to levy taxes. Vallelly v. Grand Forks Park Com'rs [N. D.] 111 NW 615.

9. It will not be presumed that the fiscal court will issue bonds of county requiring a greater levy to pay interest, and consequently a proposed issue will not be enjoined. Troutman v. Hays, 31 Ky. L. R. 204, 101 SW 976.

levy after issuance of the bonds may be good though it was required to be made before issuance.[10]

§ 3. *Execution.* See 8 C. L. 1051

§ 4. *Form and requisites.* See 8 C. L. 1051—Municipal bonds when in proper form are negotiable instruments and are subject to the provisions of the negotiable instrument act.[11] So a coupon bond of a state is negotiable and a bona fide holder of a stolen one is entitled to enforce it against the state by mandamus.[12] The council may determine the denomination of the bond notwithstanding an attempted determination by the electors,[13] and may alter its determination before the bonds are issued.[14] Bonds issued for street or district improvements may be required to have the name of the street or district printed thereon.[15]

Validation proceedings. See 8 C. L. 1052—In some jurisdictions the officers of a municipality may bring special proceedings to test the validity of its organization and bond issue.[16] In such proceedings the court is directed to disregard errors not affecting the substantial rights of the parties,[17] and the burden is upon an intervener to prove the facts which he sets up.[18]

§ 5. *Issue and sale.* See 8 C. L. 1052—Bonds may be enforcible in the hands of a holder in due course, though the bonds were fraudulently issued.[19] A county may not contract to sell bonds which it is not yet authorized to issue.[20] The legislature may prohibit the sale of bonds which have been legally authorized.[21] A city may agree with purchaser as to the time the latter shall pay for the bonds.[22]

§ 6. *Rights and liabilities arising out of illegal issue.* See 8 C. L. 1052—The court will not enjoin a sale of bonds though sufficient taxes to pay interest cannot be legally levied,[23] but taxpayers may sue to rescind the sale of illegal bonds.[24] So a taxpayer may enjoin the payment of illegal bonds but this right may be lost by laches,[25] though

10. Where bonds were sold to realize funds for the purpose of building a school without a tax levy being provided to meet them, a subsequent levy to raise funds to meet the principal and interest of the bonds is valid. St. Louis, etc., R. Co. v. People, 225 Ill. 418, 80 NE 303.

11. Coupon bonds payable to bearer comply with all the requisites of a negotiable instrument as prescribed by the act. Borough of Montvale v. People's Bk. [N. J. Err. & App.] 67 A 67.

12. Bond was exchangeable for stock and had been so exchanged but not properly canceled, and had been stolen from state officials and put in circulation, and bona fide holder was entitled to mandamus against state treasurer to compel him to exchange it for stock. Ehrilch v. Jennings [S. C.] 58 SE 922.

13. Ordinance submitting question to voters fixed denomination at $1,250, which was over the statutory limit, but after election council could fix denomination at $625. City of Santa Barbara v. Davis [Cal. App.] 92 P 308.

14. Power not exhausted by first determination, and same may be repealed if it does not affect any contractual rights of the taxpayers. City of Santa Barbara v. Davis [Cal. App.] 92 P 308.

15. This requirement does not apply to bonds issued to pay the city's part of the cost of such local improvements. Heffner v. Toledo, 75 Ohio St. 413, 80 NE 8.

16. In such a proceeding the qualifications of signers of any petition will be investigated and reliance will not be placed on the decision of the county commissioners. Ahern v. High Line Irr. Dist. Directors [Colo.] 89 P 963.

17. But defects in the signing of the notice of meeting, or if the same is directed to the wrong board, will be fatal. Ahern v. High Line Irr. Dist. Directors [Colo.] 89 P 963.

18. Alleged that the record did not set out copy of ordinance calling election, notice of election, or tally sheets and lists of voters. Spencer v. Clarkesville, 129 Ga. 627, 59 SE 274.

19. Mayor pledged bonds left in his hands for his own debts. Borough of Montvale v. People's Bk. [N. J. Err. & App.] 67 A 67.

20. County will not be liable in damages for its breach. Robinson-Humphrey Co. v. Wilcox County, 129 Ga. 104, 58 SE 644.

21. In absence of any intervening rights of innocent third persons. Here amended charter by requiring submission to voters. City of St. Petersburg v. English [Fla.] 45 S 483.

22. Money not to be paid until actually needed in prosecution of contemplated work. Aylmore v. Seattle [Wash.] 92 P 932.

23. Though constitutional limitation on tax, there was nothing yet done to violate the constitution or to imperil the taxpayer. Troutman v. Hays, 31 Ky. L. R. 204, 101 SW 976.

24. And enjoin construction of sewer for which bonds were issued. Village of River Rouge v. Wayne Circuit Judge, 147 Mich. 204, 13 Det. Leg. N. 1015, 110 NW 622.

25. After thirty-four years could not enjoin payment on ground exceeded debt limit. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

in such case the municipality of its own initiative may have the right to refuse to pay the same.[26] An issue of bonds will not be enjoined because the officials announce their intention to use the proceeds for an illegal purpose,[27] but a contrary result was reached in Idaho.[28]

§ 7. *Transfer.*[See 8 C. L. 1053]—Municipal bonds are negotiable and subject to the negotiable instrument law and a holder in due course is entitled to enforce them,[29] but any holder takes subject to all statutory provisions and restrictions.[30]

Recitals.[See 8 C. L. 1053]—A recital that bonds were issued to refund the existing legal obligations of a county estops the county to deny their validity.[31] In the absence of recitals, the presumption as to the performance of conditions precedent arising from the mere fact of issuance is not conclusive,[32] but the absence of recitals does not deprive bonds of the character of negotiable instruments.[33]

Estoppel.[See 8 C. L. 1053]

§ 8. *Payment.*[See 8 C. L. 1054]—Where territory is detached from a municipality, the detached territory is still equitably liable for the bonds of the municipality.[34] A bond after being drawn becomes due and payable, the interest ceases to run, and if the interest is paid by mistake it may be set off in a suit on the bond.[35] The fact that a bond long after it was due was in possession of township officers justifies a finding that it was paid.[36] The statute of limitations begins to run against negotiable bonds and coupons from the dates of their respective maturities.[37]

Payment from special fund or tax.[See 8 C. L. 1055]

§ 9. *Scaling overissue.*[See 8 C. L. 713]

§ 10. *Enforcement of improvement bonds against abutters.*[See 8 C. L. 1056]—Where improvement bonds were issued in the name of the municipality the same may be sued though the bonds were payable only out of a special fund raised by assessment on abutters,[38] but no personal judgment can be obtained against the municipality.[39]

26. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

27. If there is any misappropriation there will be an adequate remedy. State v. Clay Center [Kan.] 91 P 91.

28. Council intended to use proceeds of legally voted water bonds to fulfill an illegal contract made by mayor for the purchase of a waterworks system. Woodward v. Grangeville [Idaho] 92 P 840.

29. Bonds regular on their face were accepted by a bank as collateral before maturity and for value without knowledge that the depositor was not in legal possession of them, and that they had been negotiated by the mayor without legal authority. Borough of Montvale v. People's Bk. [N. J. Err. & App.] 67 A 67. The fact that the mayor negotiated bonds signed by him was not sufficient to charge the bank with notice, as the mayor might have owned the same. Id.

30. That became due on the Feb. 1st succeedings its drawal, when interest ceased. Packard v. Mobile [Ala.] 43 S 963.

31. On ground that preceding bonds which had been compromised were illegal. Hamilton County v. Montpelier Sav. Bk. & Trust Co. [C. C. A.] 157 F 19.

32. County was authorized to issue bonds to a railroad when it was exonerated from its prior obligation to issue bonds to another railroad. Quinlan v. Green County, 205 U. S. 410, 51 Law. Ed. 860.

33. Ordinary presumptions that conditions precedent have been performed apply, though such presumptions are rebuttable. Quinlan v. Green County [C. C. A.] 157 F 33.

34. But such liability cannot be enforced by a creditor except on allegation and proof that there is not enough property remaining in the municipality to pay the debt. Manahan v. Adams County [Neb.] 110 NW 860.

35. Payment of coupons was illegally made by city, and holder cannot dispute right of setoff, and he not having presented the bond for payment, cannot claim interest. Packard v. Mobile [Ala.] 43 S 963.

36. Volunteer bounty bond issued in 1864, due in one year, was seen in possession of town officers in 1888, and in suit thereon brought in 1904 it was held to have been paid. Collier v. St. Charles Township, 147 Mich. 688, 14 Det. Leg. N. 30, 111 NW 340.

37. It is immaterial that the municipality had not at any time funds in its treasury with which to pay the same, the rule being different from what it was with respect to warrants. Schoenhoeft v. Kearny County Com'rs [Kan.] 92 P 1097.

38. But question of defenses arising from overissue cannot be decided if property owners are not made parties. Meyer v. San Francisco, 150 Cal. 131, 88 P 722.

39. Neither is there any liability to pay for interest after maturity. Meyer v. San Francisco, 150 Cal. 131, 88 P 722.

MUNICIPAL CORPORATIONS.

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Scope of article.—This article is designed to treat, as strictly as may be the law of municipalities as distinguished from that of streets and other public ways,[40] parks and public grounds,[41] bridges,[42] public utilities, works and improvements,[43] health and sanitation,[44] buildings and injuries therein and public regulations,[45] the local taxing power,[46] local and special assessments,[47] licenses and licensing,[48] the granting of franchises,[49] and the law of public officers generally.[50] The particular applications of the general law of municipalities to these several enumerated subjects should be sought in the titles cited. The body of laws relating to each of these largely involves powers and duties of counties, towns, and of the public generally, as well as powers of municipalities. All this has been brought together into titles relating to the subject-matter of such powers and duties.

§ 1. *Nature, attributes and elements.*[51]—The term municipal corporations as ordinarily applied includes all corporations created for the local exercise of delegated governmental functions.[52] They are auxiliaries, or the convenient instrumentalities, of the general government of the state for the purpose of municipal rule.[53] The powers of a municipality are wholly delegated,[54] but in the exercise of its powers so conferred, it is subject only to constitutional limitations.[55] Its functions are of two

40. See Highways and Streets, 9 C. L. 1588.
41. See Parks and Public Grounds, 8 C. L. 1233.
42. See Bridges, 9 C. L. 408.
43. See Public Works and Improvements, 8 C. L. 1506.
44. See Health, 9 C. L. 1586.
45. See Buildings and Building Restrictions, 9 C. L. 441.
46. See Taxes, 8 C. L. 2058.
47. See Public Works and Improvements, 8 C. L. 1506.
48. See Licenses, 8 C. L. 734.
49. See Franchises, 9 C. L. 1445.
50. See Officers and Public Employes, 8 C. L. 1191.
51. See 8 C. L. 1057. See, also, **Abbott, Mun. Corp. §§ 1-8.**
52. Penick v. Foster, 129 Ga. 217, 58 SE 773. A district legally created from a designated part of the state and organized to promote the convenience of the public at large is a municipal corporation. Acme Dairy Co. v. Astoria [Or.] 90 P 153. A school district held to be a corporation. Clarke v. School Dist. No. 16 [Ark.] 106 SW 677. A town school district, under the Vermont statute, is a corporate body by necessary implication, separate and distinct from the town, whether coterminous with it or not. North Troy Graded School Dist. v. Town of Troy [Vt.] 66 A 1033.
53. See 8 C. L. 1057, n. 23. Wharton v. Greensboro [N. C.] 59 SE 1043.
54. See post § 7.
55. See post, §§ 7, 9, 10.

classes, governmental and private, the distinction being chiefly important in determining liability for tort.[56]

§ 2. *Creation and corporate existence. A. Creation and organization.*[See 8 C. L. 1057]—The creation of municipal corporations by special act being prohibited by the constitutions of most states,[57] the usual mode of incorporation is for inhabitants of the locality desiring to incorporate to avail themselves of the provisions of a general law,[58] which laws ordinarily provide conditions precedent of population, area, or physical characteristics.[59] Acceptance thereof is usually signified by an election.[60] A petition for incorporation must be acted upon and the incorporation effected by the proper officials,[61] and a map accompanying such petition must comply with the statutory requisites.[62] In some states, incorporation may be by an order of the court in a special proceeding designed for the purpose,[63] founded on petition [64] of freeholders.[65] A general decree incorporating a borough overrules all objection made in any form to the application.[66] Rulings on questions of fact will not be disturbed on appeal except for abuse of discretion.[67] Corporate capacity may be created by implication.[68] An act incorporating a town never having been followed by an organization of the town as a municipal corporation, the legislature is not prevented by the California constitution from repealing such incorporation act and passing a new act for the incorporation of a city comprising the same territory.[69]

(§ 2) *B. Consolidation, succession and dissolution.*[70]—Consolidation of municipal corporations is permissible only by legislative authority, and special laws authorizing consolidation are as a rule prohibited by the several state constitutions.[71]

56. See post, § 14. See, also, 8 C. L. 1057.

57. See post, § 3.

58. In Nebraska, towns and villages are incorporated under the provisions of a general statute by resolution of the board of county commissioners, whose acts in that respect are ministerial. Commonwealth Real Estate Co. v. South Omaha [Neb.] 110 NW 1007.

59. Under the Nebraska statute, every village containing a population of 1,000 becomes a city of the second class without any action being taken on the part of the municipality. State v. Northup [Neb.] 113 NW 540. To change a village to a city of the second class under the Idaho statute, it is required that the village contain "more than one thousand inhabitants," and that not less than "three-fifths" of the "electors" of the village shall petiton for the change. Boyd v. Bickel, 13 Idaho, 191, 89 P 631.

60. See 8 C. L. 1057, n. 30.

61. If the county commissioners have power to act upon a petition for incorporation, the township trustees are without power, and when a portion of the territory included within the proposed corporation has theretofore been platted, its incorporation must be affected by the county commissioners under the provisions of R. S. § 1553, and action by township trustees in that behalf is without authority and void. Schorr v. Braun, 4 Ohio N. P. (N. S.) 561.

62. The map which accompanies a petition for the incorporation of a village, whether filed with the county commissioners or township trustees, complies with the requirements of the statute if it accurately exhibits the territory affected and the lines bounding and dividing the properties, therein, notwithstanding it does not show that the entire territory has been platted into lots. Schorr v. Braun, 4 Ohio N. P. (N. S.) 561.

63. See 8 C. L. 1057, n. 33. It is competent to require by statute a preliminary judicial ascertainment of facts, the existence of which is made a condition precedent to the creation of a public corporation. Barnes v. Miner [Neb.] 114 NW 146. There is no provision in the Georgia law for making objection to an order of the superior court directing the clerk to issue a certificate of incorporation as provided in Pol. Code 1895, § 687 (Mangham v. Mallony, 128 Ga. 430, 57 S. C. 688), neither is there any provision for review by the supreme court, by writ of error or otherwise, of the action of the lower court in granting such order (Id.).

64. In Pennsylvania, the application for incorporation of a borough need not state the number of freeholders in the proposed territory nor need it be verified. Mountville Borough, 31 Pa. Super. Ct. 18.

65. A remainderman is not a freeholder within the borough incorporation act. Mountville Borough, 31 Pa. Super. Ct. 18.

66. Request of landowner to be excluded need not be separately denied. Mill Creek Borough, 32 Pa. Super. Ct. 465.

67. Mill Creek Borough, 32 Pa. Super. Ct. 465.

68. Where the functions of a town school district are corporate in their nature and cannot be performed without corporate capacity, a necessary implication arises that the legislature intended to confer that capacity, that the districts might fulfill the purpose of their creation. North Troy Graded School Dist. v. Troy [Vt.] 66 A. 1033.

69. People v. Wilmington [Cal.] 91 P 524.

70. See 8 C. L. 1058. See, also, **Abbott, Mun. Corp. §§ 33, 34.**

71. Pennsylvania Act 1906 (P. L. 7), au-

It is usualy effected by a special election initiated and held in a manner similar to those for incorporation.[72] The power to divide or dissolve municipalities is likewise a legislative power,[73] to which is incident the power to prescribe the rule for the apportionment of debts.[74] Incident to the power to consolidate municipalities is the power to prescribe the rule for devolution of office.[75]

(§ 2) *C. Classes and classification.*[76]—Municipalities may be classified for purposes of legislation,[77] provided such classification is reasonable and based on real and substantial differences of population or situation.[78]

(§ 2) *D. Attack on corporate existence; quo warranto.*[79]—The validity of the organization and existence of a municipal corporation cannot be questioned except in a direct proceeding,[80] and at the instance of the state,[81] but the state may be estopped from attacking the organization and existence of a municipal corporation.[82]

§ 3. *The charter; adoption, amendment, repeal and abrogation.*[83]—Municipal charters and amendments thereto like all other legislative acts, are subject to constitutional limitations,[84] such as the prohibition placed upon the delegation of legislative functions,[85] the requirements of uniformity in taxation,[86] and those relating to

thorizing cities contiguous or in close proximity to consolidate, is not violative of art. 3, § 7 of the Const., forbidding special legislation, though at the time of its passage it could apply only to the cities of Pittsburg and Allegheny, it being general in form and substance. Pittsburg's Petition, 217 Pa. 227, 66 A 348.

72. The electors of the consolidated territory may determine the question of annexation of a smaller city to a larger one, instead of leaving the matter to the electors of the smaller city. Pennsylvania Act 1906 (P. L. 7), held not violative of the provision of the Federal Const. relating to due process of law. Pittsburg's Petition, 217 Pa. 227, 66 A. 348.

73. See 8 C. L. 1058, n. 38.

74. A village organized pursuant to Laws of 1885, p. 148, c. 145, is not, either before or after its separation from the township, liable to be taxed for indebtedness incurred on account of township roads and bridges. State v. Peltier [Minn.] 114 NW 90, following Bradish v. Lucken, 38 Minn. 186, 36 NW 454. Under Act 1894, No. 165, p. 144, abolishing the town of Barre, and forming from its territory the city of Barre and the new town of Barre, and providing for an enforcement against the city of Barre of all claims and causes of action then existing against the town of Barre, and their subsequent apportionment and adjustment between the city and the new town, the city is not liable for the support of a pauper who was not a resident of the city at the time the aid was required or furnished. East Montpelier v. Barre, 79 Vt. 542, 66 A 100.

75. Pennsylvania Const. art. 3, § 13, prohibiting the extension of the term of a public officer, is not violated by Act 1906 (P. L. 7), extending the term of councilmen in the city of Allegheny upon its consolidation with the city of Pittsburg. Pittsburg's Petition, 217 Pa. 227, 66 A 348.

76. See 8 C. L. 1058. See, also, **Abbott, Mun. Corp. § 94.**

77. Bumb v. Evansville, 116 Ind. 272, 80 NE 625. The acts of 1874 and 1889 [P. L. 230, 277], relating to the classification of cities and government of cities of the third class, repeal the local and special provisions relating to taxation contained in the acts of 1860 and 1868, conferring peculiar powers of taxation upon the city of Harrisburg. City of Harrisburg v. Harrisburg Gas Co. [Pa.] 67 A 904. The city of Harrisburg being a city of the third class, the real estate which under the act of 1868 is subject to be taxed for city purposes by it is only such as is taxable for county purposes. Id.

78. State v. Northup [Neb.] 113 NW 540. Classification according to population sustained. Bumb v. Evansville, 168 Ind. 272, 80 NE 625. California corporations classification act (St. 1883, p. 24, c. 17, §§ 2, 3), prescribing a general method for classification of cities according to the United States census, is not restricted in its application to cities and towns organized under the general law, but is applicable as well to those organized under freeholders' charters. Ex parte Johnson [Cal. App.] 93 P 199; Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

79. See 8 C. L. 1058. See, also, **Abbott, Mun. Corp. §§ 32, 34.**

80. State v. Several Parcels of Land [Neb.] 113 NW 810.

81. State v. Several Parcels of Land [Neb.] 113 NW 810. The existence and authority of a municipal corporation acting under color of law cannot be questioned in actions between private individuals nor between private individuals and the assumed corporation. Such question can be raised only by the state. Board of Education of Flatwoods Dist. v. Berry [W. Va.] 59 SE 169.

82. State precluded from attacking franchise of village which had been permitted to exercise the functions of a village de facto for a period of 20 years and had been recognized as an existing village by legislative enactment. State v. Village of Harris, 102 Minn. 340, 113 NW 887.

83. See 8 C. L. 1059. See, also, **Abbott Mun. Corp. §§ 22-31.**

84. Act amending charter of Macon held constitutional. Smith v. Macon, 129 Ga. 227, 58 SE 713.

85. See post, § 8A. The Denver charter provisions creating a board of public works

the subjects of titles and acts.[87] Special charters are now quite generally prohibited by the constitutions of the several states.[88] Where cities are governed by general act, amendments must be within the constitutional limitation as to special acts.[89] Statutory provisions with respect to the amendment of charters must be complied with.[90] By constitutional provision, in some states, the council is empowered to prescribe the manner of amending the city charter.[91] An amendment of a city charter supersedes all former provisions inconsistent therewith.[92] The Kentucky general law, adopted on the subject of charters of cities of the first class, in obedience to the constitutional mandate, repealed all special charters theretofore existing,[93] and, in New Jersey, it is held that a general law relating to municipalities repeals all inconsistent provisions in city charter,[94] but, unless otherwise expressly provided, the provisions of a "home rule charter," if subject to municipal regulation, supersede the general laws with reference to the same subject-mater.[95] As to such matters as the California constitution authorizes to be provided for in freeholders' charters, the provisions of the charter are supreme, superseding all laws inconsistent therewith, and being exempt from any control by any subsequent act of the legislature.[96] A municipal corporation created by the legislature does not cease to exist by the nonuser of its charter or a surrender of its franchise.[97] Judicial notice will be taken of a municipal charter.[98]

§ 4. *The territory.*[99]—The creation of a municipal corporation involves the fixing of its boundaries, the determination of which rests with the legislature in the absence of constitutional restrictions.[1] Where the authority has been delegated, a city may change the number and boundaries of the wards.[2]

is not violative of § 35, art. 5, of the state constitution prohibiting the delegation to a special commission of power to levy taxes or perform municipal function. City of Denver v. Iliff, 38 Colo. 357, 89 P 823.

86. City of Chicago v. Knobel, 232 Ill. 112, 83 NE 459.

87. Body of act amending charter of Macon held not to contain matter variant from the title thereof. Smith v. Macon, 129 Ga. 227, 58 SE 713.

88. The Nebraska constitution prohibits the legislature from passing any special act defining the boundaries of the city of South Omaha. Commonwealth Real Estate Co. v. South Omaha [Neb.] 110 NW 1007. Indiana act of 1893 (Acts 1893, p. 65, c. 59), denying a right to a change of venue from the police court in cities of the class to which Evansville belongs, is not a local or special law contravening § 22, art. 4, of the state constitution. Bumh v. Evansville, 168 Ind. 272, 80 NE 625. New Jersey act (P. L. 1892, p 119; Gen. St. p. 500, § 202), concerning the government of cities of the second class, is a special act regulating the internal affairs of cities, and is therefore unconstitutional. Seymour v. Orange [N. J. Err. & App.] 65 A 1033. Plaintiff not being a member of the council except as the Act of 1892 made him such, he cannot recover salary as president of the council or the per diem compensation given to members by the city charter. Id.

89. The legislative act amending the Denver charter and providing for a board of public works is not violative of § 25, art. 5, of the state constitution against special and local laws. City of Denver v. Iliff, 38 Colo. 357, 89 P 823.

90. Amendment of charter held binding, although the whole amendment was submitted to the electors and adopted as one amendment, and although it was not specially numbered. Coreil v. Welsh [La.] 45 S 438.

91. Under Oregon constitution, art. 11, § 2, as amended June 4, 1906, the common council of Astoria is empowered to provide by ordinance for the manner of amending the city charter. Acme Dairy Co. v. Astoria [Or.] 90 P 153.

92. Rudolph v. Hutchinson [Wis.] 114 NW 453.

93. Act of 1893 passed in obedience to mandate of constitution of 1891. Parsons v. Breed, 31 Ky. L. R. 1136, 104 SW 766.

94. General statutes passed in pursuance of article 5, § 7, par. 11, of the state constitution, will repeal all inconsistent provisions in charters, whether there are words of express repeal or not. Lewis v. Newark [N. J. Law] 65 A 1039. Act 1881 (P. L. 1881, p. 295) held to repeal provisions of charter of city of Newark relating to publication of ordinances. Id.

95. Turner v. Snyder [Minn.] 112 NW 868.

96. Under the amended constitution, the legislature has no power to provide a police court for a city maintaining such a court under valid provisions in that behalf in its freeholders' charter. Graham v. Fresno [Cal.] 91 P 147.

97. Charter subject to forfeiture only by legislature. Beale v. Pankey [Va.] 57 SE 661.

98. Frost v. State [Ala.] 45 S 203; City of Bessemer v. Carroll [Ala.] 45 S 419.

99. See 8 C. L. 1059. See, also, **Abbott, Mun. Corp. §§ 35-51, 55-65.**

1. The power to establish and change boundaries of a municipality is a legislative one, and must be exercised either directly or in the method prescribed in the constituent act or other statute upon the subject. Hemple v. Hastings [Neb.] 113 NW 187. The terri-

Annexations.[See 8 C. L. 1060]—Under the Georgia statute providing for an election to determine the question of annexation, all questions arising out of such election must be determined solely by the managers of the election in the manner prescribed in the act.[3] The territory incorporated into a village is usually required by statute to be contiguous.[4] The extent and manner of such annexation is a question of legislative discretion.[5] In some states, annexation may be by an order of court in a special proceeding designed for the purpose.[6] In Indiana jurisdiction of proceedings for the annexation of territory to the existing boundaries of cities is dependent upon the question whether the land proposed for annexation is platted or unplatted.[7] In proceedings to annex territory to a municipality, if the body exercising the power to annex has jurisdiction of the subject matter, its action cannot be collaterally attacked.[8] The levy of city taxes upon property outside its boundaries being illegal and void as to such property, their collection may be restrained by injunction.[9]

Severances.[See 8 C. L. 1060]—In some states courts are authorized by statute to disconnect territory from cities on petition of a majority of the owners of real estate therein,[10] and such provisions are not invalid as delegating power to the courts to legislate, when they merely require the court to judicially determine whether facts found by it entitle petitioners to relief for causes determined by the legislature.[11] Under the Illinois statute a petition seeking to disconnect territory from a city or village, must be presented by the owner or owners of the land sought to be discon-

tory embraced within the town of Roswell, Ga., as defined by the Acts of 1882-83 and 1853, lies exclusively within the limits of Cobb county. Town of Roswell v. Ezzard, 128 Ga. 43, 57 SE 114. Boundaries of the city of Baltimore discussed. Western Maryland Tidewater R. Co. v. Baltimore [Md.] 68 A 6.

2. Under § 2, art. 1, c. 14, Comp. St. 1903 (Cobbey's Ann. St. 1903, § 8601), the council of a city of the second class may change the number and boundaries of its wards, subject to the limitation therein contained, that it shall have not less than two nor more than six wards. Tattersal v. Nevels [Neb.] 110 NW 708.

3. Ivey v. Rome, 129 Ga. 286, 58 SE 852.

4. Neither two tracts cornering nor two tracts joined by a narrow strip merely to include them constitute contiguous territory under Hurd's R. S. 1905, c. 24, § 182. Wild v. People, 227 Ill. 556, 81 NE 707.

5. It does not in any manner depend on the will of a majority or any of the inhabitants living within the territory. Carrithers v. Shelbyville, 31 Ky. L. R. 1166, 104 SW 744. Act of 1907 extending the boundaries of and annexing new territory to the city of Memphis held not unconstitutional as to that provision. Malone v. Williams [Tenn.] 103 SW 798.

6. Kentucky statute providing for a protest to the court by the resident voters of the territory sought to be annexed is not violative of the 14th amendment to the U. S. Const. § 1, by reason of the fact that some of the landholders affected might be women or corporations. Carrithers v. Shelbyville, 31 Ky. L. R. 1166, 104 SW 744.

7. If the territory is contiguous and has been platted into town lots as prescribed by law, and the plat recorded, the city council has exclusive jurisdiction (Burn's Ann. St. 1901, § 3658), and it is only where the city desires to annex unplatted contiguous territory that the board of county commissioners has any jurisdiction. Burns' Ann. St. 1901, § 3659. Ernsperger v. Mishawaka, 168 Ind. 253, 80 NE 543. Whether the land is platted or unplatted, being a jurisdictional fact, must be both alleged and proved. Id. Where petition contains no averment that plats were recorded, the court will not presume that they were not recorded, and that the lands described as platted and contiguous were unrecorded, and therefore in a legal sense unplatted territory. Id. Petition describing territory sought to be annexed as platted and unplatted and contiguous held to show that board of commissioners had no jurisdiction of the subject-matter, even to the extent of the unplatted territory. Id.

8. Rule does not apply where there is no attempt to exercise such jurisdiction except the act of the county clerk in extending upon the tax list city taxed against property outside the city limits. Hemple v. Hastings [Neb.] 113 NW 187. The validity of annexation proceedings cannot be tested in a collateral proceeding by a private individual where the evidence shows acquiescence in the proceedings and payment of taxes levied by the corporation for several years. State v. Several Parcels of Land [Neb.] 113 NW 810.

9. Hemple v. Hastings [Neb.] 113 NW 187.

10. Where territory consists entirely of agricultural land which receives no appreciable benefit from being within the corporate limits, the court is justified in finding that equity and justice require its severance within the provisions of Rev. St. 1898, § 289. In re Fullmer [Utah] 92 P 768.

11. In proceedings under Rev. St. 1898, §§ 288, 289, court is confined in first instance to issues of truth of petition and justice of disconnection and cannot determine other issues without consent of parties. In re Fullmer [Utah] 92 P 768.

nected,[12] but the Oklahoma statute makes no provision for the location of a part of a townsite by the owner of the part sought to be vacated.[13] Agricultural lands will not be severed from an incorporated town where the effect would be to compress the territory embraced in the town into too narrow limits.[14] In a proceeding to sever agricultural lands from an unincorporated town, the fact that there is no immediate demand for the lands in question for business or residence purposes by the inhabitants of the town is not controlling, though it may properly be considered in ascertaining the merits of the application,[15] and in such proceedings it cannot be assumed as a ground for severance that the lands will be assessed for taxation at a higher figure in the town than would be the case if they were not within the town limits.[16] Where land has been illegally included within the corporate limits of a city, the courts have the power to grant relief by disconnecting it therefrom.[17]

Plats. See 8 C. L. 1060

§ 5. *Officers and employes.*[18]—This subject is fully treated in another topic.[19] But speaking generally, the state having power to create municipal corporations, it may designate the various municipal officers,[20] fix the number of officers,[21] and prescribe the qualifications of officers.[22] The Kentucky statute requires aldermen in cities of the fourth class to be residents of the ward from which they are chosen, not only at the time of their election, but during their terms of office,[23] and the tenure of office,[24] define the powers and duties,[25] and fix the compensation [26] of the incumbents.

12. Laws 1901, p. 96. A petition signed by the general manager of a railroad company, the lessee of the owner, no authority being shown in him to present or sign a petition on behalf of the owner, did not give the village board jurisdiction to disconnect the land. People v. Chicago, etc., R. Co., 231 Ill. 463, 83 NE 219. Action of board in disconnecting land on such petition is a nullity and may be attacked collaterally. Id.

13. Statute does not authorize one owner of a small portion of the plat of a town to have such part of the plat vacated upon his individual petition, there being other owners of lots in the plat not parties to the proceeding. Scott v. Noble, 18 Okl. 409, 89 P 1122.

14. Boundaries may extend beyond the platted territory and include more or less lands of an agricultural character. In re Town of Leroy [Iowa] 113 NW 347.

15. In re Town of Leroy [Iowa] 113 NW 347.

16. Court cannot assume that the assessors either side of the line will do otherwise than assess the property at its fair value in proportion to other like property similarly situated. In re Town of Leroy [Iowa] 113 NW 347.

17. Commonwealth Real Estate Co. v. South Omaha [Neb.] 110 NW 1007.

18. See 8 C. L. 1060. See, also, **Abbott, Mun. Corp. §§ 596-716.**

19. See Officers and Public Employes, 8 C. L. 1191.

20. Burns' Ann. St. 1901, § 3717 et seq., providing for a metropolitan police force in certain cities of the state is not unconstitutional because it places the burden of supporting the police system upon the municipality without giving it any control over the expenditures therefor Arnett v. State, 168 Ind. 180, 80 NE 153. Texas act 1897 (Laws 25th Leg. p. 236), not being applicable to the city of Marshall, it cannot be compelled to create a board of plumbers. Caven v. Coleman [Tex.] 18 Tex. Ct. Rep. 24, 101 SW 199. In sections 2410 and 2411, Revised Statutes of Ohio (1536-521 and 522, Bates' Annotated Statutes), the words "trustees" and "trustees or board" include the directors of public service in cities, as well as boards of trustees of public affairs in villages. Hutchins v. Cleveland, 9 Ohio C. C. (N. S.) 226.

21. It is competent for the Kentucky legislature to fix the number of policemen in cities of the second class by Laws 1906, p. 439, c. 123, amending Ky. St. 1903, § 3140. Ex parte City of Paducah, 31 Ky. L. R. 170, 101 SW 898.

22. Person held ineligible for election to mayoralty because of failure to pay poll tax. Frost v. State [Ala.] 45 S 203.

23. State v. Donworth [Mo. App.] 105 SW 1055.

24. See 8 C. L. 1060, n. 86.

25. The Kansas statute requires that the city shall specify the duties of the city attorney by ordinance. Under general ordinance all duties which naturally appertain to the office of city attorney will be held to be covered unless the language clearly indicates to the contrary. Johnson v. Winfield, 75 Kan. 832, 89 P 657. The general council of a city of the second class in Kentucky has power to create the omce of market master and to prescribe his duties and salary. Potter v. Bell, 30 Ky. L. R. 1314, 101 SW 297.

26. The Kansas statutes provide that the compensation of the city attorney of a city of the second class must be specified by ordinance. Johnson v. Winfield, 75 Kan. 832, 89 Pa. 657. City attorney cannot perform ordinary legal services and then claim extra compensation on theory of implied contract or estoppel. Id. Burns' Ann. St. 1901, § 3717 et seq., providing for a metropolitan police force in certain cities is not an unlawful attempt to delegate legislative power, in

The office may be filled by election [27] or appointment,[28] and in proper cases the duties may be performed by a deputy.[29] A city council having power under statute to create commissions and boards, possesses the incidental power to determine how its members shall be chosen.[30] While the unauthorized acts of official will not estop a municipal corporation,[31] yet it may ratify the unauthorized acts and contracts of its officers which are within the scope of the corporate powers,[32] and such ratification is equivalent to original authority.[33] However, acts beyond the scope of corporate power cannot be ratified and are absolutely void.[34] The acts of defacto officers of a city may be binding so far as the interests of the public and third persons are involved.[35] An officer judicially ousted for misconduct cannot be reinstated in the office by re-election,[36] and the giving of intoxicating liquors to a minor without the consent of the parent or guardian is in Kentucky a sufficient reason for dismissal,[37] and under the San Francisco charter an office becomes vacant when the occupant is convicted of a felony.[38] A council has power to abolish offices in police force created by it where such abolition is a bona fide effort to enhance the efficiency of the force.[39] Mandamus will not issue to compel municipal officer to perform a discretionary duty,[40] or where the party seeking the mandamus has failed to comply with a condition precedent.[41]

§ 6. *Municipal records and their custody and examination.*[42]

that, within maximum and minimum limits, it authorizes the governor to determine the salaries of the police commissioners, and also, within fixed limits, authorizes the latter to determine the compensation of the officers of the police force. Arnett v. State, 168 Ind. 180, 80 NE 153.

27. Kentucky St. 1903, §§ 3484, 3485, held to constitute a proper exercise of the legislature to authorize the division of cities of the fourth class into wards, and to provide for the election of councilmen from the respective wards. Moore v. Georgetown [Ky.] 105 SW 905.

28. Burns' Ann. St. Supp. 1905, § 3469, relating to cities of the fifth class confers power upon the city council to appoint a person to fill a vacancy in that body by the adoption of a resolution. State v. Wagner [Ind.] 82 NE 466. The appointive power given the mayor by the charter of Portland does not cover city employes, but only officers whose appointment is not otherwise provided for. MacDonald v. Lane [Or.] 90 P 181. Under the Idaho statute providing that upon failure of village treasurer to file his report within a certain time, the office shall be declared vacant and the council or board of trustees shall fill the same by appointment, the board of trustees must first find that the treasurer has failed to make such reports before they can declare such vacancy to exist to be filled by appointment. Village of Kendrick v. Nelson, 13 Idaho, 244, 89 P 755.

29. See 8 C. L. 1061, n. 91.

30. Commission charged with construction of public hall. Wheelock v. Lowell [Mass.] 81 NE 977.

31. City not estopped to deny validity of action of council in auditing marshal's salary. O'Dwyer v. Monett, 123 Mo. App. 184, 100 SW 670.

32. Act of mayor in appointing detectives ratified by board of aldermen so as to bind city. O'Dell v. Scranton, 126 Mo. App. 19, 103 SW 570. Unauthorized act of city council in instituting condemnation proceedings held to have been adopted by the city by resisting application for certiorari to review such proceedings. Sayre v. Orange [N. J. Law] 67 A 933.

33. Unauthorized acts of officers in making contract on behalf of city ratified by bringing suit upon such contract. City of Worcester v. Worcester & H. Consol. St. R. Co., 194 Mass. 228, 80 NE 232.

34. Appropriation of money to railroad to induce it to enter town. Town of Luxora v. Jonesboro Lake City & E. R. Co. [Ark.] 103 SW 605.

35. Councilmen not having been properly appointed. Overall v. Madisonville, 31 Ky. L. R. 278, 102 SW 278. Board of police commissioner created by the unconstitutional act of 1905 is a de facto board, and its action in discharging a member of the police, prior to a judicial declaration that the act is unconstitutional, is valid as to such officer and his reinstatement will not be compelled by mandamus. Lang v. Bayonne [N. J. Law] 68 A 90.

36. See 8 C. L. 1062, n. 97.

37. Chief of police removed. Thomas v. Thompson, 31 Ky. L. R. 524, 102 SW 849.

38. McKannay v. Horton [Cal.] 91 P 598.

39. Evidence held sufficient to justify repealing ordinance. McBride v. Bayonne [N. J. Law] 65 A 895.

40. Mandamus will not lie to compel the mayor to sign orders on the treasurer, such duty being discretionary under the Janesville city charter. Rudolph v. Hutchinson [Wis.] 114 NW 453.

41. Committee of private citizens held not entitled to mandamus to compel city controller to countersign a warrant on the city treasurer for money appropriated for a public celebration, no bills or vouchers having been persented showing for what purpose and how the money was expended. Stegmaier v. Goeringer [Pa.] 67 A 782.

42. See 6 C. L. 720. See, also, **Abbott, Mun. Corp. §§ 591-595.**

§ 7. *Authority and powers of municipality.*[43]—Municipalities being creatures of the state, with powers defined by the legislature of the state,[44] they possess and can exercise only such powers as are expressly granted,[45] those necessary or fairly implied in or incident to the powers expressly granted,[46] and those essential to the declared objects and purposes of the municipality, not simply convenient but indispensable.[47] Any fair or reasonable doubt concerning the existence of the power is resolved by the courts against the municipality.[48] The power to contract,[49] to legislate with reference to streets and sidewalks,[50] and subjects within the police power,[51] are hereinafter referred to. In addition to the foregoing, municipalities are almost universally invested with power to supply their inhabitants with water,[52] and the gas[53] and electric

43. See 8 C. L. 1062. See, also, **Abbott, Mun. Corp. §§ 108-114.**

44. See 8 C. L. 1062, n. 4.

45. Burkhardt v. Cincinnati, 6 Ohio N. P. (N. S.) 17. Neither Detroit City charter, § 169, nor Comp. Laws, § 3443, authorizes the city to own and lay street car tracks in streets to be leased and used by a private street railway corporation for hire, and such an undertaking is prohibited by the constitution. Bird v. Detroit Common Council [Mich.] 111 NW 860. Under clauses 16 and 17 of § 2 of General Borough Act of 1851 (P. L. 1851, 322), a borough may pass an ordinance providing that certain grounds may be used for purposes of interment, whilst certain other grounds may not be so used. Carpenter v. Borough of Yeadon, 151 F 879. Council is empowered to fix rules and regulations for the use of water by consumers, and such rules having been provided, it is the duty of the board of public service to apply them. Hutchins v. Cleveland, 4 Ohio N. P. (N. S.) 593.

46. Burkhardt v. Cincinnati, 6 Ohio N. P. (N. S.) 17. Power to borrow money for purpose of constructing a plant for disposition of sewage is implied from express statutory authority to construct sewers. Glucose Sugar Refining Co. v. Marshalltown, 153 F 620. A municipality having authority to maintain public streets may accept a voluntary grant of land for a street. Hathaway v. Milwaukee [Wis.] 111 NW 570. An express power to incur a bonded indebtedness impliedly authorizes a city to make provision for the payment of same. Vallelly v. Grand Forks Park Com'rs [N. D.] 111 NW 615. The power to manufacture paving brick is not included in the powers expressly granted to the city of Detroit, and it is neither fairly implied in, nor incident to, powers expressly granted. Attorney General v. Detroit Common Council [Mich.] 14 Det. Leg. N. 643, 113 NW 1107. Power expressly given to city to provide and supply water to its inhabitants gives power to acquire water supplies without the city for that purpose. City of South Pasadena Land & Water Co. [Cal.] 93 P 490. A power expressly granted to a city to make all needful provisions by contract for a supply of water for itself and its citizens implies authority to contract for rates at which water shall be supplied to its citizens for a definite period, and, of consequence, to suspend its charter power in respect to the regulation of rates during such fixed period. City of Bessemer v. Bessemer Water Works [Ala.] 44 S 663; United States v. Macfarland, 28 App. D. C. 552.

47. Municipal corporations cannot engage in the manufacture of articles necessary to their lawful enterprises where they are in common use and are to be had in the open market. Manufacture of brick for paving purposes. Attorney General v. Detroit Common Council [Mich.] 14 Det. Leg. N. 643, 113 NW 1107. The legislative department of a city may authorize the mayor to employ detectives for the purpose of apprehending violators of the municipal laws. O'Dell v. Scranton, 126 Mo. App. 19, 103 SW 570.

48. O'Dell v. Scranton, 126 Mo. App. 19, 103 SW 570. A municipality has no power to impose a per capita tax for the maintenance of its streets. Town of Farmerville v. Mathews [La.] 44 S 999. An ordinance establishing public scales and requiring certain commodities to be weighed thereon before sale has no application to purchases by a state institution located within the corporate limits, the city having no authority to interfere with such purchases. City of Fulton v. Sims [Mo. App.] 106 SW 1094. Under Kentucky constitution and statute, a city cannot grant a valid franchise for any time, whether for a term of years or less, unless such privilege be sold at public auction to the highest and best bidder. Frankfort Tel. Co. v. Frankfort Common Council, 30 Ky. L. R. 885, 100 SW 310. Since the recent amendment of the Ohio municipal code, a city has no power, express or implied, to pass an ordinance for the regulation of the emission of smoke within its limits, and declaring that smoke of a certain density shall be deemed a nuisance per se. Burkhardt v. Cincinnati, 6 Ohio N. P. (N. S.) 17. Ordinance permitting milch cows to run at large in certain months does not supersede the general law forbidding such animals from running at large at any time. Gates v. Crandall, 123 Mo. App. 414, 100 SW 51.

49. See post, § 12.

50. See post, § 10E.

51. See post, § 10.

52. City of South Pasadena v. Pasadena Land & Water Co. [Cal.] 93 P 490; Eau Claire Water Co. v. Eau Claire [Wis.] 112 NW 458. A city exercises its business or proprietary powers when it purchases waterworks or contracts for their construction or operation. Omaha Water Co. v. Omaha [C. C. A.] 156 F 922; Carlisle Gas & Water Co. v. Carlisle Borough [Pa.] 67 A 844. Under New Jersey Act 1888 (P. L. p. 366; Gen. St. p. 2210, § 405), a municipality has power to contract with a water company for a supply of water, and to include in the contract an option to acquire the entire plant of the company. Livermore v. Millville [N. J. Err. & App.] 67 A 605.

53. See 8 C. L. 1063, n. 13.

lighting,[54] either through the medium of a system owned and maintained by the municipality,[55] or by contract with third parties.[56] Cities are usually given power

54. Vossen v. St. Clair, 148 Mich. 686, 14 Det. Leg. N. 331, 112 NW 746; Lighthipe v. Orange [N. J. Law] 68 A 120; Muncy Elec. L. Heat & P. Co. v. People's Elec. L., Heat & P. Co. [Pa.] 67 A 956.

55. Todd v. Crete [Neb.] 113 NW 172; Carlisle Gas & Water Co. v. Carlisle Borough [Pa.] 67 A 844. Electric lighting plant. Overall v. Madisonville, 31 Ky. L. R. 278, 102 SW 278. Act of May 20, 1891 (P. L. 90), empowers boroughs to manufacture electricity for commercial purposes for the supply and use of their inhabitants. Muncy Elec. L., Heat & P. Co. v. People's Elec. L., Heat & P. Co. [Pa.] 67 A 956. A city owning and maintaining an electric light plant may, after discharging its duty to the public, sell its surplus electricity to private citizens for lighting. Crouch v. McKinney [Tex. Civ. App.] 104 SW 518. Under Kentucky St. 1903, § 3058, subd. 4, cities of the second class have power to provide and maintain a waterworks system. Commonwealth v. Covington [Ky.] 107 SW 231. A city may purchase an existing waterworks system constructed by private parties under authority from the city. Eau Claire Water Co. v. Eau Claire [Wis.] 112 NW 458.

NOTE. Valuation of property of public service company on acquisition by municipality: When the property of a public service company, is taken by a state or municipality under condemnation proceedings (Matter of Brooklyn, 143 N. Y. 596), or under contract leaving the purchase price to be subsesequently determined (Matter of Water Com'rs, 71 App. Div. [N. Y.] 544), the problem of ascertaining the fair and just compensation has proven to be most vexatious and one upon which the courts have shown no little divergence of opinion. Several theories, none of them exclusive, have been advanced: first, the original cost of the plant to the company (Montgomery County v. Schuylkill Bridge Co., 110 Pa. 64; West Chester, etc., Co. v. Chester County, 182 Pa. 40); second, the present cost of reproduction (Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 382; In re Water Com'rs, 99 Me. 371, 382); third, the capitalized value of its net income (Nat'l Water Works Co. v. Kansas City, 62 F 853); and fourth, the market value of its stock (Mifflin Bridge Co. v. Juniata County, 144 Pa. 365, 13 L. R. A. 431; Montgomery County v. Schulkill Bridge Co., 110 Pa. 64.) The first consideration—that of original cost—has received considerable attention from the courts. In order, however, for it to have any bearing upon present value, the extent of depreciation of the plant must be considered (Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L. R. A. 856); moreover, there must be assurance that there were no fraudulent transactions and that the money was legitimately and wisely spent in the construction (Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 382). In the few cases in which original cost is considered to be the controlling element, the value of the franchise is added. Montgomery County v. Schuylkill Bridge Co., 110 Pa. 64; Clarion Turnpike Co. v. Clarion County, 172 Pa. 243; West Chester, etc., Co. v. Chester County, 182 Pa. 40. The objection to this test is that it may force the state to pay for an antiquated plant an amount greatly exceeding the cost of a modern and more efficient system. The second test, cost of reproduction, has received less consideration from the courts, seemingly on account of its severity (see Matter of Water Com'rs, 176 N. Y. 239), and in some cases has been entirely rejected (Montgomery County v. Schuylkill Bridge Co., 110 Pa. 64; Metropolitan Trust Co. v. H. & T. C. R. Co., 90 F 683). Value is thus determined in the competitive business field, but this rule is less applicable to public service callings because the capital can generally be less easily diverted to other channels, and more especially because they are subject to regulation and supervision. Here, likewise, the franchise must be separately considered. See Nat'l Water Works Co. v. Kansas City, 62 F 853. The third and fourth tests are very similar and both superficial though sometimes considered. Mifflin Bridge Co. v. Juniata County, 144 Pa. 365. Under these tests value depends upon the income received, which is governed by the rates charged. But since the rates which may lawfully be charged may only be a fair return upon the value of the property, it is begging the question to say that value then depends upon rates. See Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 382. If the rates are assumed reasonable, the results reached by these methods will, of course, approximate the valuation upon which the rates are theoretically based. The fact that the plan is a "going concern" is universally conceded to be a proper subject for compensation. Edinburg, etc., Co. v. Edinburg, 71 L. T. Rep. 301; Gloucester, etc., Co. v. Gloucester, 179 Mass. 365, 383; Newburyport etc. Co. v. Newburyport, 168 Mass. 541. Good will might well be considered if competition exists, but not if the company has a monopoly, for its customers have no choice. Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L. R. A 856. For the most part, the courts have refused to confine themselves to any single test, but say that all must be taken into consideration. This amounts to a practical confession that they are helpless to formulate a rule to cover a difficult and intricate situation and is simply an attempt to reach an equitable result in each case. See Nat'l Water Works Co. v. Kansas City, 62 F 853; Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371, 382; Kennebec Water Dist. v. Waterville, 97 Me. 185, 60 L. R. A. 856. The question of valuation of the franchise is usually separately considered. That it is property (West River Bridge Co. v. Dix, 6 How. [U. S.] 507, 12 Law. Ed. 535), and may not be directly taken without compensation, is generally recognized (Monongahela Navigation Co. v. United States, 148 U. S. 312, 37 Law. Ed. 463; People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684, 2 L. R. A. 255), though the same result can be indirectly reached by granting other franchises so that the resulting competition would be

to establish and maintain public schools,[57] and provide a sewerage system.[58] It has been held, however, that a city cannot engage in a commercial enterprise, thereby entering into competition with private individuals.[59] A municipality has the incidental or implied right to alienate or dispose of its property of a private nature held for the emolument and advantage of the municipality, unless restricted by charter or statute.[60] A municipality has the power to grant a monopoly for transporting and utilizing dead animals which have not been slaughtered for food.[61] In some states cities are prohibited by constitutional provisions from giving money or property to or in aid of any individual, association, or corporation.[62] Power to grant an exclusive franchise must be expressly granted.[63] The powers of a municipal corporation are restricted in operation to the municipal limits,[64] and power once exercised is ex-

ruinous (Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 Law. Ed. 773; Syracuse Water Co. v. Syracuse, 116 N. Y. 167, 5 L. R. A. 546). In computing its value, consideration must be taken as to its character, whether it be exclusive or nonexclusive (Brunswick, etc., Water Dist. v. Maine Water Co., 99 Me. 371; Gloucester, etc., Co. v. Gloucester, 179 Mass. 365, 383); the length of time it is to run (Kennebec Water Dist. v. Waterville, 97 Me. 185; Sunderland Bridge Case, 122 Mass. 459, 466), and whether or not it be subject to forfeiture (see Kennebec Water Dist. v. Waterville, 97 Me. 185; Bridge Co. v. United States, 105 U. S. 470, 482, 26 Law. Ed. 1143). If but part of a franchise is condemned, compensation must be made to the extent to which it has been impaired. United States v. Gettysburg Elec. R. Co., 160 U. S. 668, 40 Law Ed. 576). Franchise valuation is generally measured with reference to rates which the company has charged, in order to compute what its revenue would probably have been Bridge Case, 122 Mass. 459, 466; Montgomery during the unexpired period. Sunderland County v. Schuylkill Bridge Co., 110 Pa. 64. In a recent English case, a municipality entered into a contract to purchase a street railway when it should be constructed. It was held that the price paid should be the value as a structure, including the element of a going concern, but excluding the franchise value. Mayor, etc., of Dudley v. Dudley, etc., R. Co., 97 L. T. Rep. 556. This result was reached upon the interpretation of the contract, but under the Tramways Act of 1870, similar results have been reached in the absence of contract. Stockton, etc., Water Board v. Kirkleatham Local Board, 69 L. T. Rep. 61; Edinburgh, etc., Co. v. Edinburg, 71 L. T. Rep. 301), though in estimating value for the purpose of taxation, the franchise has been considered (Pimlico, etc., Co. v. Assessment Committee, 29 L. T. Rep. 605; The King v. Lower Mitton, 9 B. & C. 810). This distinction is not illogical, for retaking without compensation would proceed on the ground that the franchise was granted gratuitously, taxation, on the ground of benefits received.—From 8 Columbia L. R. 217.

56. Appleton Water Works Co. v. Appleton [Wis.] 113 NW 44. Under the acts of 1851 and 1891 (P. L. 320, 90), a borough has the power to contract with a private corporation to supply it and its inhabitants with electric light and may grant to such corporation the exclusive right of placing poles and wires upon all streets and alleys in the borough for a specified time. Muncy Elec. L., Heat & P. Co. v. People's Elec. L., Heat & P. Co. [Pa.] 67 A 956. A borough having entered into a contract with the parties for the supply of its water, it cannot adopt any other method, or contract with any other party as long as the first party continues to supply water according to law. Carlisle Gas & Water Co. v. Carlisle Borough [Pa.] 67 A 844. Where a city cannot grant an exclusive franchise to a private corporation to furnish its inhabitants with lights, the granting of a franchise to a corporation does not prohibit the city from granting a similar right to some one else, nor of using it itself. Crouch v. McKinney [Tex. Civ. App.] 104 SW 518.

57. Malone v. Williams [Tenn.] 103 SW 798.

58. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115.

59. But a city may be empowered to own and operate an electric railway, though such business is inconsistent with the customary functions of a municipality. Love v. Holmes [Miss.] 44 S 835.

60. Held that right of borough to sell stock in a company organized to supply its inhabitants with water, for which it was authorized to subscribe, was not restricted by statute, ordinance, or contract (Carlisle Gas & Water Co. v. Carlisle Borough [Pa.] 67 A 844), and fact that the relation between borough and company was one of partnership was immaterial (Id.).

61. A demurrer to a petition for an injunction against interference with rights under such a grant will not lie where the petition alleges that carcasses which have become decayed, putrid, or offensive, are not transported or handled, and that such transportation and handling has at all times complied with the rules and regulations of the board of health. Stadler v. Cleveland, 4 Ohio N. P. (N. S.) 649.

62. Sale by city of water for which it has no use is not a gift to or in aid of the person to whom the sale is made. Simson v. Parker, 190 N. Y. 19, 82 NE 732. A city may remit unpaid water rates due by veteran volunteer firemen. Laws 1887, p. 902, c. 696, as amended by Laws 1906, p. 1056, c. 440, so exempting, held not in conflict with Const. art. 8, § 10, prohibiting city from giving money or property to or in aid of any individual, association, or corporation. People v. Metz, 120 App. Div. 565, 104 NYS 1115.

63. Water, Light & Gas Co. v. Hutchinson, 28 S. Ct. 135.

64. Town of Montezuma v. Law, 1 Ga. App. 579, 57 SE 1025.

hausted and may not be invoked again.[65] Power delegated to municipalities by the state may be resumed and the municipality deprived of the right to exercise it.[66]

Judicial control over exercise of powers.[See 8 C. L. 1063]—The acts of municipal officers in the exercise of administrative or legislative discretion [67] are not subject to judicial review,[68] but if the authority which a municipality assumes to exercise is granted in general terms, it seems to be universally conceded that the grant is subject to judicial construction; [80] and matters purely ministerial,[70] or wherein there has been an abuse of power,[71] or in case of collusion or fraud,[72] may be judicially controlled. The judicial control over the exercise of municipal powers will be exercised with great care and caution and only in a clear and strong case.[73]

§ 8. *Legislative functions of municipalities and their exercise. A. Nature and extent of legislative power.*[74]—Inasmuch as a municipal corporation is purely a creature of the state,[75] it has only such legislative power as has been granted to it.[76] In practice the legislative power is confined chiefly to the enactment of police regulations,[77] the functions of the legislative department in the initiation of public contracts and improvements,[78] and in the fiscal management of the municipality,[79] being

65. See 8 C. L. 1063, n. 19.

66. Act of 1874 deprived cities of powers for inspection of oil. City of Chicago v. Burke, 226 Ill. 191, 80 NE 720.

67. Where discretion is validly vested in a municipal board, a court will not interfere with its exercise. Goytino v. McAlees, 4 Cal. App. 655, 88 P 991. Ordinance vacating street. Enders v. Friday [Neb.] 111 NW 140. Court of equity has no power to enjoin the passage of an ordinance which involves the exercise of legislative discretion. Passage of ordinance repealing a prior ordinance granting a franchise to a street railroad company. Missouri, etc., R. Co. v. Olathe, 156 F 624. Action of council in dividing city into wards. Moore v. Georgetown [Ky.] 105 SW 905. The courts will not interfere with the legislative discretion of the city council in passing an ordinance unless the ordinance is unreasonable and oppressive (City of Belleville v. Pfingsten, 225 Ill. 293, 80 NE 266), or unless the city council appears to have acted in bad faith and not for the best interest of the public (City of Belleville v. Herzler, 225 Ill. 404, 80 NE 269).

68. Mere fact that legislative forms used to commit breach of trust in disposing of corporate property does not bring acts under rule. Perkins v. Reservoir Park Fishing & Boating Club, 130 Ill. App. 128. Action of council in refusing to rebuild bridge which had been washed away not subject to review by mandamus. Clay City v. Roberts, 30 Ky. L. R. 820, 99 SW 651. Passage of ordinance granting a franchise to a public service corporation involves legislative action only, and such action cannot be reviewed by a writ of certiorari. Tenny v. Columbia [Wash.] 92 P 895. Under Utah Laws 1899, c. 28, p. 45, the action of the mayor and council in removing the heads of the fire and police departments is not reviewable by any court. Skeen v. Browning [Utah] 89 P 642. City cannot be compelled by mandamus to extend water mains and electric light lines for benefit of one taxed for water and light purposes. Moore v. Harrodsburg City Council [Ky.] 105 SW 926.

69. See 8 C. L. 1064, n. 24.

70. Publication of ordinance being a ministerial act merely, may be enjoined. Minneapolis St. R. Co. v. Minneapolis, 155 F 989. Mandamus to compel council to apportion taxes. Morris & Cummings Dredging Co. v. Bayonne [N. J. Law] 67 A 20. Upon the proper assignment of a market permit, mandamus lies to compel the comptroller to issue a new permit giving assignee same privileges as were possessed by assignor. People v. Metz, 123 App. Div. 269, 107 NYS 970.

71. Resolution of board of water commissioners to purchase land at a price greatly in excess of its market value set aside as unreasonable and improvident, the power of eminent domain having been conferred to meet just such juncture. Mundy v. Perth Amboy Water Com'rs [N. J. Law] 66 A 896.

72. Moore v. Harodsburg City Council [Ky.] 105 SW 926. In a taxpayer's action to enjoin municipal authorities from carrying out contract for lighting streets on account of fraud and collusion in the bidding, held that the evidence failed to establish such fraud and collusion. Sawyer v. Pittsburg, 217 Pa. 17, 66 A 86. In Louisiana the courts will not interfere with police juries in the exercise of their power to provide court houses, in the absence of gross abuse of this power, oppression, or fraud. Murphy v. Police Jury St. Mary Parish, 118 La. 401, 42 S 979.

73. Clark v. Chicago, 229 Ill. 363, 82 NE 370.

74. See 8 C. L. 1064. See, also, **Abbott, Mun. Corp. §§ 109, 110; Id., §§ 496-567.**

75. See 8 C. L. 1064, n. 31.

76. The exercise by a city of a legislative function not delegated to it renders the ordinance void and ineffectual. The city of Milwaukee has no power to grant rights and privileges and to impose conditions upon telephone companies for the conduct of such a business in the city except such as it may lawfully impose in the exercise of its police powers. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

77. See post, § 10.

78. See post, § 12; also Public Contracts, 8 C. L. 1473, and Public Works and Improvements, 8 C. L. 1506.

79. See post, § 13.

largely of an administrative character. Since the legislative powers exercised by a municipality are derived from the state, it is a general rule that it cannot delegate them to any person or body;[80] neither may a municipality by contract, ordinance, or by-law, cede away, limit, or control its legislative or governmental powers, nor disable itself from performing its public duties.[81]

(§ 8) *B. Meetings, votes, rules, and procedure.*[82]—A municipal council is a continuous body though its members and officers may change from time to time.[83] It has power by ordinance to establish and adopt suitable rules for its government in matters of procedure,[84] and such rules when adopted will not be set aside unless directly or by necessary implication in conflict with some charter or statutory provision.[85] Meeting of councils must be held at the time and place fixed.[86] A quorum must be present.[87] The legislative body of a city may act by resolution or motion, unless the charter or statute from which it derives its powers requires it to act by ordinance.[88]

(§ 8) *C. Records and journals.*[89]—Where the proceedings of the council were not properly entered upon the record, parol evidence is admissible to show such proceedings.[90] The failure of the clerk to properly enter upon the record the proceedings of the council does not invalidate such proceedings.[91] Where a charter provision requiring ordinances to be recorded is directory merely, delay in recording an ordinance

80. People v. Clean St. Co., 225 Ill. 470, 80 NE 298. Ordinance authorizing three city officials to provide for the collection of litter and waste paper is void. Id. City council may not delegate to city marshal authority to grant permits for the construction of telephone lines in city streets. City of Texarkana v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 734, 106 SW 915. Ordinance providing that no frame building shall be erected, etc., without written permission from all persons owning permanent brick or stone structures within a radius of 60 feet of the proposed structure, is unconstitutional as a delegation of governmental power to private citizens. Tilford v. Belknap, 31 Ky. L. R. 662, 103 SW 289. Power in municipality to regulate wharves, and to charge and collect wharfage for their use, is a public or legislative power and incapable of delegation or surrender by the municipality. Oliver v. Burlington [N. J. Law] 67 A 43.

81. City council cannot tie the hands of a succeeding council by the adoption of an ordinance providing that no ordinance or by-law shall be amended except at a regular meeting, legislative bodies being independent of their predecessors. City of Mt. Sterling v. King, 31 Ky. L. R. 919, 104 SW 322. Lease by city granting exclusive use and control of its wharves set aside. Oliver v. Burlington [N. J. Law] 67 A 43.

82. See 8 C. L. 1064. See, also, **Abbott, Mun. Corp. §§ 496-567.**

83. Proceedings before one council may be continued against succeeding council. Mandamus to compel council to apportion taxes (Morris & Cummings Dredging Co. v. Bayonne [N. J. Law] 67 A 20), but a board of aldermen is not a continuous body for strictly legislative purposes, so that a newly organized board can take up an unfinished act of legislation of a preceding board and finally adopt it (Paterson & R. R. Co. v. Paterson, [N. J. Err. & App.] 68 A 76).

84. A council having adopted a manual of parliamentary law as its rules may abolish, modify, or waive the same. Wheelock v. Lowell [Mass.] 81 NE 977.

85. Courts will not review action of council in disciplining member for words spoken in debate. Butler v. Harrison, 124 Ill. App. 367.

86. State v. Ross [Wash.] 89 P 158. Under statute requiring meetings to be held within the corporate limits at such place as may be designated by ordinance, upon failure to adopt such ordinance members may assemble at some convenient and accessible place within the corporate limits. Wells v. Town of Mt. Olivet, 31 Ky. L. R. 576, 102 SW 1182. Where ordinance designating the time and place of meetings of the council was passed at the same time an ordinance annexing territory was passed, held that the former was not in compliance with the requirements of Ky. St. 1903, § 3696, providing that the council shall by ordinance designate the time and place at which its stated meetings are to be held. Town of La Grange v. Pryor [Ky.] 106 SW 235.

87. Kentucky statute providing that a majority of both the board of aldermen and the general council shall constitute a quorum for the transaction of business in joint session means a majority of the members taken as a whole, not a majority of each board considered separately. Davis v. Claus, 30 Ky. L. R. 1082, 100 SW 263.

88. Sections 5838 and 5846, Rev. St. Mo. 1899 (Ann. St. 1906, pp. 2951, 2955), do not require the passage of an ordinance to extend the time for the performance of a contract with the city, but its city council may grant such an extension by motion or resolution. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

89. See 8 C. L. 1065. See, also, **Abbott, Mun. Corp. §§ 496-567.**

90. Wheat v. Van Tine, 149 Mich. 314, 14 Det. Leg. N. 430, 112 NW 933.

91. Action of council authorizing excavation of street. Wheat v. Van Tine, 149 Mich. 314, 14 Det. Leg. N. 430, 112 NW 933.

does not affect its validity.[92] A mistake in the date of passage or the title of the chapter in which it is included does not invalidate an ordinance.[93]

(§ 8) *D. Titles and ordaining clauses.*[See 8 C. L. 1065]—While the constitutional provisions to the titles of statutes have no application to ordinances,[94] similar provisions are usually contained in the charter, and are given the same interpretation, viz., that all parts of an ordinance must be germane to the subject-matter,[95] that there must be but one subject [96] which must be expressed with reasonable certainty in the title.[97]

(§ 8) *E. Passage, adoption, amendment, and repeal of ordinances and resolutions.*[See 8 C. L. 1065]—Ordinances must be uniform and definite.[98] Statutory or charter directions as to procedure to be observed in the enactment of ordinances and resolutions must be followed.[99] It is not fatal to an ordinance that it recited that it was passed under an act which was afterward declared unconstitutional, when the council had power under a previous statute to enact the ordinance.[1] It is generally provided that an ordinance shall not be passed at the same meeting at which it was introduced.[2] A majority vote of the members elected,[3] or of those present at a council meeting is usually made sufficient,[4] the yeas and nays being taken when required.[5] A mayor has no power to veto the acts of the council done in the exercise of its execu-

92. Elliott v. Council of Newark [Del. Eq.] 68 A 400.

93. Chicago, etc., R. Co. v. Wilson, 225 Ill. 50, 80 NE 56. See 8 C. L. 1065.

94. Bowers v. Indianapolis [Ind.] 81 NE 1097.

95. See 8 C. L. 1065, n. 52.

96. No statute in Indiana limiting an ordinance to a single subject. Bowers v. Indianapolis [Ind.] 81 NE 1097. Kentucky constitution providing that no law enacted by the legislature shall relate to more than one subject, which shall be expressed in the title, does not embrace an ordinance adopted by a city council. Tuggles v. Com., 30 Ky. L. R. 1071, 100 SW 235. Ordinance providing for an issue of bonds to pay the city's part of the cost of thirty-two street and sewer improvements held not to be violative of the requirement of § 1694, Rev. St., providing that no by-law or ordinance shall contain more than one subject which shall be clearly expressed in its title. Heffner v. Toledo, 75 Ohio St. 413, 80 NE 8.

97. Heffnee v. Toledo, 75 Ohio St. 413, 80 NE 8. See 8 C. L. 1065.

98. Ordinance imposing a license tax on the keeping of dogs sustained. Ex parte Ackerman [Cal. App.] 91 P 429. Ordinance prohibiting the location and operation of a wood yard "within 150 feet of any inhabited portion of any resident district" held void for uncertainty and indefiniteness. City of St. Paul v. Schleh [Minn.] 112 NW 532.

99. Missouri statute requires the assent and approval of the mayor to the action of the council in adopting an ordinance. Mulligan v. Lexington, 126 Mo. App. 715, 105 SW 1104. Requirement that every ordinance and resolution passed by council shall be presented to the chief burgess for approval, held not to apply to a resolution awarding a contract, which was preceded by an ordinance or resolution regularly enacted authorizing the award of the contract. Kolb v. Tamaqua Borough [Pa.] 67 A 44. A resolution of a borough council providing for the purchase of lands tends to impose a pecuniary obligation on the borough, and must under § 27 of the borough act of 1897 (P. L. p. 296), be submitted to the mayor for his approval. Sturr v. Elmer [N. J. Law] 67 A 1059. Ordinance authorizing street improvements held not to have been drawn in accordance with the requirements of the law. Town of Rayne v. Harrel, 119 La. 652, 44 S 330. Ordinance held to have been regularly adopted at a special meeting, it having been read twice at the last previous stated meeting when it could have been fairly understood from the call for the special meeting that the passage of the ordinance was one of the purposes for which the special meeting was called. Elliott v. Newark Council [Del. Eq.] 68 A 400.

1. State v. Several Parcels of Land [Neb.] 113 NW 810.

2. State v. Ross [Wash.] 89 P 158.

3. O'Dwyer v. Monett, 123 Mo. App. 184, 100 SW 670. Hurd's Rev. St. 1905, of Illinois, c. 24, § 41, provides that the concurrence of a majority of all the members of the city council or village board elected, is necessary to the passage of an ordinance. Ordinance disconnecting territory from village, which received the votes of a majority of the members present, but not a majority of all the members elected, held not to have been legally adopted. People v. Rhodes, 231 Ill. 270, 83 NE 176. Evidence of such concurrence must be shown by the journal of the proceedings. It cannot be supplied by parol. Id. Village held not estopped from denying that such ordinance was legally adopted. Id.

4. See 8 C. L. 1066, n. 62.

5. Iowa Code, § 683, providing that on the passage or adoption of an ordinance the yeas and nays shall be taken and recorded, is mandatory, ordinance held not legally adopted. Cook v. Independence, 133 Iowa, 582, 110 NW 1029. Likewise the Nebraska statute. In re Ryan [Neb.] 112 NW 599. Hurd's Rev. St. 1905, c. 24, § 41, requires that the yeas and nays be taken on the passage of all ordinances. People v. Rhodes, 231 Ill. 270, 83 NE 176.

tive authority.[6] An ordinance may be repealed where such repeal does not affect the contractual rights of the city nor the rights of third parties or taxpayers.[7] An ordinance may be repealed by implication.[8] The city council cannot amend, suspend, or repeal an ordinance by mere resolution.[9]

Publication.[10]—Under the charter of cities of the first class in Kentucky, ordinances do not become effective until they are published.[11] Subject to the provisions of the statute, a council has authority to select the newspapers in which its ordinances and resolutions shall be published.[12] The setting out of the name of the presiding officer of the council is not an essential part of the publication of an ordinance.[13]

(§ 8) *F. Construction and operation of ordinances.*[See 8 C. L. 1066]—An ordinance void in part may be valid as to the remainder,[14] but where the valid and invalid portions of an ordinance are so mingled that a division cannot be made which will carry out the valid portions, the entire ordinance is void.[15] An ordinance is presumptively valid.[16] The motives of a municipal legislative body are not the subject of judicial inquiry,[17] the rule, however, being sometimes relaxed, particularly if fraud can be established.[18] An ordinance is void so far as it materially conflicts with the statute.[19] The facts being undisputed, the question whether an ordinance is void is a question of law for the court,[20] but the court will not hold an ordinance void as unreasonable which is not clearly unreasonable upon its face,[21] and an ordinance ex post facto or retrospective in its operation is invalid.[22] An ordinance is not void because its provisions are all covered by statutes.[23] A general ordinance, applicable to all territory within the corporate limits at the time of its passage, becomes effective in additional territory when the same is attached.[24] Under the St. Louis charter, a special ordinance in conflict with a prior general ordinance is invalid.[25]

Rules of interpretation.—Ordinances in derogation of the common-law must be

6. Burns' Ann. St. Supp. 1905, § 3476, relating to cities of the fifth class does not confer on the mayor power to veto a resolution appointing a person to fill a vacancy in the city council. State v. Wagner [Ind.] 82 NE 466.

7. City of Santa Barbara v. Davis [Cal. App.] 92 P 308.

8. An ordinance imposing a license tax on every kind of business authorized by law, no reference being made to the keeping of dogs, does not by implication repeal a prior ordinance imposing a license tax on the keeping of dogs. Ex parte Ackerman [Cal. App.] 91 P 429.

9. Resolution accepting $12.00 license fee invalid when ordinance requires $25.00. Bloomington & Normal R. Elec. & Heating Co. v. Bloomington, 123 Ill. App. 639.

10. See 8 C. L. 1066. As to what publication is requisite before an ordinance becomes operative in the city of Newark, see Lewis v. Newark [N. J. Law] 65 A 1039.

11. City of Louisville v. Roberts [Ky.] 105 SW 431.

12. Council of a village has such authority subject to provisions of § 1536-619. Davis v. Davis, 6 Ohio N. P. (N. S.) 281.

13. Clerical error in publication as to name of presiding officer held immaterial. Bumb v. Evansville, 168 Ind. 272, 80 NE 625.

14. Burkhardt v. Cincinnati, 6 Ohio N. P. (N. S.) 17. An ordinance valid in part will not be set aside in toto. North Jersey St. R. Co. v. Jersey City [N. J. Law] 67 A 1072.

15. Assessment ordinance for improvements where valid and invalid assessments were made in gross. Chicago Consol. Trac. Co. v. Village of Oak Park, 225 Ill. 9, 80 NE 42.

16. City of Belleville v. Pfingsten, 225 Ill. 293, 80 NE 266; Ringelstein v. Chicago, 128 Ill. App. 483; Cox v. Mignery [Mo. App.] 105 SW 675. Where an ordinance is adopted, which would be lawful if intended for one purpose, and unlawful if for another, the presumption is that the purpose was lawful, unless the contrary clearly appears. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

17. Especially where subject-matter of ordinance is plainly within authority expressly granted. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

18. See 8 C. L. 1067, n. 82.

19. Ordinance fixing compensation of official invalid where statute fixes different compensation. Burke v. Chicago, 127 Ill. App. 161.

20. City of Lebanon v. Zanditon, 75 Kan. 273, 89 P 10.

21. Ringelstein v. Chicago, 128 Ill. App. 483.

22. Ordinance imposing licenses on certain occupations held to be neither ex post facto nor retrospective. City of Louisville v. Roberts [Ky.] 105 SW 431.

23. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

24. Ordinance fixing maximum speed of street cars. Deneen v. Houghton County St. R. Co. [Mich.] 14 Det. Leg. N. 670, 113 NW 1126.

25. Special ordinance providing for street improvements. Asphalt & Granitoid Const. Co. v. Hauessler, 201 Mo. 400, 100 SW 14.

strictly construed.[26] To determine the meaning of an ordinance, the ordinance as a whole must be considered.[27] Where an ordinance is uncertain and open to two constructions, the court will adopt the construction which will uphold the validity.[28] In construing an ordinance, the substance of the ordinance, the purpose and intention of the council as they appear in the ordinance, rather than the language of any particular clause or phrase, will be considered.[29]

(§ 8) *G. Pleading and proving ordinances and proceedings.*See 8 C. L. 1667—In proceedings in a municipal court it is sufficient to refer in the pleadings to an ordinance by title, number and date of approval, without setting out the ordinance in full or in legal effect.[30] State courts cannot take judicial notice of municipal ordinances and regulations; these must be proved as other facts.[31] Whether an ordinance is in force is a question of law for the court,[32] but this fact may be presumed on appeal.[33] Where the validity of an ordinance depends upon its conformity to a statutory condition contained in a clause distinct from the penal provision for its violation, the burden to prove its validity rests upon the person claiming the benefit, as does the burden to show that it has become effective, in conformity to conditions.[34] A printed compilation of ordinances purporting to have been issued by authority of the village board is prima facie evidence of the legal passage and publication of an ordinance.[35]

(§ 8) *H. The remedy against invalid legislation.*[36]—While the courts are without power to review the exercise of legislative discretion,[37] certiorari will lie for total invalidity,[38] and only in case of irreparable injury,[39] or to avoid multiplicity of proceedings [40] is injunction available.[41]

26. Inhabitants of Houlton v. Titcomb, 102 Me. 272, 66 A 733.

27. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615; Gage v. Wilmette, 230 Ill. 428, 82 NE 656.

28. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

29. Chicago Cold Storage Warehouse Co. v. People, 127 Ill. App. 179.

30. Nichols v. Salem [Or.] 89 P 804.

31. Cordatos v. Chicago, 129 Ill. App. 471; Sachs v. Lyons, 53 Misc. 640, 103 NYS 149.

32. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 SW 142.

33. On appeal from a judgment of conviction for violation of an ordinance, in the absence of evidence to the contrary, the court will presume that the ordinance was in existence at the time of the trial and conviction. Nichols v. Salem [Or.] 89 P 804.

34. People v. Prison Keeper of Seventh Dist., 121 App. Div. 645, 106 NYS 314.

35. Hurd's Rev. St. 1905, § 65. Chicago & A. R. Co. v. Wilson, 225 Ill. 50, 80 NE 56, afg. 128 Ill. App. 88. Ordinance not proved by introduction of pamphlet not purporting to be published by authority of city council and where no certificate of city clerk is attached thereto. Illinois, Iowa & Minnesota R. Co. v. Minnihan, 129 Ill. App. 432.

36. See 8 C. L. 724. See, also, **Abbott, Mun. Corp. § 560.**

37. See ante, § 7. Judicial Control over Exercise of Powers.

38. Validity of ordinance granting to a new sewer company the right to take over the plant of an old company, and to lay its pipes beneath the surface of the streets, and fixing higher rental rates, may be questioned by certiorari. Fogg v. Ocean City [N. J. Law] 65 A 885. The prosecutor will not be denied the benefit of the writ by reason of his delay where the delay which intervened between time when he as a vigilant taxpayer ought to have known of the resolution sought be reviewed and time when he applied for his writ has resulted in no detriment to defendants (Sturr v. Elmer [N. J. Law] 67 A 1059), especially when it further clearly appears that the action of council should have been by ordinance instead of resolution (Id.), and that the resolution itself was not submitted to the mayor for approval as required by statute (Id.). Certiorari proper remedy for testing validity of motion adopted by a municipal body, although the action under review may affect, collaterally, the right to an office. Lewis v. Newark [N. J. Law] 65 A 1039. The New Jersey supreme court in reviewing ordinances and municipal proceedings requiring the investigation of facts derives its power from the constitutional jurisdiction of the court and not from the certiorari act. Lighthipe v. Orange [N. J. Law] 68 A 120.

39. Ordinance declaring that buildings used for storage of cotton seed are a nuisance and ordering owner to remove same before a specified date, and on owner's refusal giving town the right to remove such building, held void and its enforcement enjoined on ground that demolition of buildings would result in irreparable injury to owners. Town of Cuba v. Mississippi Cotton Oil Co. [Ala.] 43 S 706. Where threatened prosecutions for a violation of an ordinance are not impending or imminent, and there is no reasonable ground for believing that the city is about to commence prosecutions or cause arrests, the enforcement of such ordinance will not be enjoined. Princess Amusement Co. v. Metzger [Ind.] 82 NE 758.

40. See 8 C. L. 1067, n. 95.

41. Resolution enjoined which impaired a

§ 9. *Administrative functions, their scope and exercise.*[42]—The power of administrative officers is limited to the enforcement of existing laws and ordinances,[43] and the acts of municipal officers in the administration of public duties does not give rise to liability in tort on the part of the municipality.[44] The New Orleans board of liquidation of the city debt is not bound to select an interest paying bank as its agent, but may do so in its discretion.[45]

§ 10. *Police power and public regulations.*[46]—This section deals only with matters peculiar to municipal police power, general rules as to the extent and exercise of police power being treated in topics descriptive of the subjects thereof.[47]

(§ 10) *A. In general.* See 8 C. L. 1068—Power to make needful police regulations is a proper legislative delegation.[48] In the enactment of ordinances under this power, municipalities are accorded a large discretion, and such ordinances will not be declared void unless unjustly discriminative, oppressive, or unreasonable.[49] The re-

contract created by an ordinance granting a street railway company a franchise in perpetuity to lay tracks in the streets and to operate cars thereon. Des Moines City R. Co. v. Des Moines, 151 F 854. United States courts of equity may enjoin the enforcement of an ordinance which impairs the obligation of a contract in violation of the Federal constitution; ordinance repealing prior ordinance granting a franchise to a street railway company. Missouri & K. I. R. Co. v. Olathe, 156 F 624. An ordinance which has gone through all the steps of its enactment except that of publication is a completed ordinance so far as legislative action is concerned, and its publication may be enjoined upon proper showing. Minneapolis St. R. Co. v. Minneapolis, 155 F 989.

42. See 8 C. L. 1067. See, also, **Abbott, Mun. Corp. §§ 568-581.**

43. The authority of a board of public service being purely administrative, its powers are exhausted when it enforces existing laws and ordinances, and when a different regulation is provided by such board the regulation is void. Reese v. Cleveland, 5 Ohio N. P. (N. S.) 193.

44. City not liable in damages for loss of profits by city council's wrongful conduct in failing to award contract for improvements to the lowest responsible bidder. Molloy v. New Rochelle, 108 NYS 120.

45. City of New Orleans v. Board of Liquidation of City Debt, 118 La. 543, 43 S 157.

46. See 8 C. L. 1068. See, also, **Abbott, Mun. Corp. §§ 115-139.**

47. See Buildings and Building Restrictions, 9 C. L. 441; Exhibitions and Shows, 9 C. L. 1344; Health, 9 C. L. 1586; Intoxicating Liquors, 10 C. L. 417; Licenses, 10 C. L. 622, and like topics.

48. Tannenbaum v. Rehm [Ala.] 44 S 532. The fourteenth amendment to the U. S. Const. does not impair the police power of the states, and an ordinance, passed under legislative authority designed to protect the lives and health of the people by providing for the inspection of food products and authorizing the summary seizure and destruction of impure and dangerous articles of food, does not contravene such amendment. North American Cold Storage Co. v. City of Chicago, 151 F 120. Attempted delegation of power to city of Memphis to license and regulate ferries held void under Tennessee constitution. Malone v. Williams [Tenn.] 103 SW 798. The use of property so as to constitute a nuisance is within the control of the police power lodged by the legislature in the common council of Atlantic City. Atlantic City v. France [N. J. Law] 65 A 894. Ordinance prohibiting emission of dense smoke held valid. Id.

49. Ordinance relating to a subject within the corporate jurisdiction presumed reasonable unless contrary appears on the face of the ordinance itself or is established by proper evidence. Miller v. Birmingham [Ala.] 44 S 388. In South Carolina an ordinance will not be set aside for mere unreasonableness, but only for lack of power in municipality to pass it or for violation of some constitutional principle. Town of Brunson v. Youmans, 76 S. C. 128, 56 SE 651.

Reasonable regulation: Prohibiting on portion of street the sport of roller skating and not mere travel upon roller skates. Billington v. Miller [N. J. Law] 67 A 935. Ordinance making it the duty of the chief of the fire department to assign a fireman to all performances in any theatre, who shall be paid by the manager of the theatre. Such cost or expenses must be fair and reasonable. Tannenbaum v. Rehm [Ala.] 44 S 532. Under the power conferred by general borough act 1851 (P. L. 322, § 2, clauses 16, 17), an ordinance passed by a borough council prohibiting the establishment of any new cemetery within the borough or any burials except within the limits of existing cemeteries is valid and not unreasonable. Carpenter v. Borough of Yeadon, 151 F 879. Held that plaintiff's land was not an established cemetery at the time of the passage of the ordinance within the meaning of such ordinance, and that he was not entitled thereunder to use it for cemetery purposes. Id. Prohibiting keeping of hogs in a pen within the corporate limits and within 200 feet of a street or alley. Miller v. Syracuse, 168 Ind. 230, 80 NE 411. Ordinance imposing license fee on each brewery, distillery, depot, or agency established or maintained in the city, held not discriminative. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. An ordinance limiting the speed of trains on an interstate railway which carries the United States mail to ten miles an hour within the corporate limits is not void as imposing an unreasonable restriction upon interstate commerce and the speedy transportation of the mail. Peterson v. State [Neb.] 112 NW

striction as to reasonableness has no application on an ordinance passed pursuant to a specific power.[50] The reasonableness of an ordinance is a question of fact,[51] and the burden of proof is upon those who attack an ordinance to show its unreasonableness [52] and show the facts from which the unreasonableness appears.[53] An ordinance which is a police regulation and not a revenue measure is not an unlawful interference with interstate commerce, in violation of the United States constitution.[54] A city charter authorizing it to exercise police powers within its limits does not repeal or effect the general laws on the same subject or prevent a prosecution for the violation thereof within the city.[55] Different municipal departments consistently exercise concurrent jurisdiction over the same subject-matter.[56] A municipality cannot by contract debar itself from the exercise of its police power.[57]

(§ 10) *B. For public protection.*[See 8 C. L. 1069]—If power to legislate on the subject has been granted, a municipality may regulate or prohibit gaming and the keeping of gaming places or implements,[58] sale of intoxicants,[59] the conduct of bil-

306. Ordinance prohibiting the erection of any sign which shall extend over any sidewalk more than eighteen inches from the building line or inside the sidewalk held not unreasonable on its face or under the evidence. City of St. Louis v. St. Louis Theater Co., 202 Mo. 690, 100 SW 627. Ordinance requiring abutting owners within a certain time after a snow fall to cause the same to be removed from the sidewalks adjoining their property sustained. State v. McCrillis [R. I.] 66 A 301. Ordinance which prohibited not merely the emission of smoke, but the emission of dense smoke in Atlantic City, smoke containing soot, or other substance, and containing it in sufficient quantities to permit a deposit of such soot or other substance or any surface, held reasonable and valid. Atlantic City v. France [N. J. Law] 65 A 894.

Oppressive regulation: Ordinance prohibiting the keeping of domestic animals within a town in a certain manner without a permit from the mayor and council held void as placing unreasonable, arbitrary and oppressive power in the hands of the mayor and council. City of Hagerstown v. Baltimore & O. R. Co. [Md.] 68 A 490. Ordinance prohibiting the operation of steam engines, foundries, etc., without first obtaining the consent of the council, held invalid as failing to prescribe a uniform rule of action, and also as giving the council the right to grant or withhold the privilege arbitrarily. City Council of Montgomery v. West [Ala.] 42 S 1000. An ordinance regulating the running of trolley cars in Jersey City from terminals at the Pensylvania and Erie stations during the evening rush hours, not being at all unreasonable in its application to the Erie terminal, and not under all circumstances unreasonable in its application to the Pennsylvania terminal, held valid and enforceable except in particular cases where circumstances might render its operation unreasonable or oppressive. North Jersey St. R. Co. v. Jersey City [N. J. Law] 67 A 1072.

50. Where such power is not in conflict with a constitutional prohibition. City of Guercastle v. Thompson, 168 Ind. 493, 81 NE 497.

51. North Jersey St. R. Co. v. Jersey City [N. J. Law] 67 A 1072.

52. The court will not interfere unless it is clearly shown that the ordinance, either upon the face of its provisions, or by reason of its operation in the circumstances under which it is to take effect, is unreasonable or oppressive. North Jersey St. R. Co. v. Jersey City [N. J. Law] 67 A 1072.

53. City of St. Louis v. St. Louis Theatre Co., 202 Mo. 690, 100 SW 627.

54. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632.

55. Laws 1905, p. 327, making it an offense to permit a female under the age of twenty-one years to remain in or about a saloon. State v. Baker [Or.] 92 P 1076.

56. That Building Code, § 152, provides for installing perforated pipes in certain buildings of a certain character, and confess certain powers on the building department in reference to them, is not inconsistent with exercise of like jurisdiction by fire commissioners. Lantry v. Hoffman, 105 NYS 353.

57. Grant of right to erect poles does not prevent subsequent license tax. Coatesville Boro. v. Coatesville Elec. Light, Heat & Power Co., 32 Pa. Super. Ct. 513.

58. The charter of the city of Portland does not confer exclusive jurisdiction on the city to prevent gambling houses, and the keeping of a house for selling pools on horse racing is an offense under B. & C. Comp. § 1903, and the circuit court has jurisdiction in such case. State v. Ayers [Or.] 88 P 653. The Nebraska statutes governing cities of the second class do not confer power upon them to prohibit by ordinance the keeping of "card tables" for sale in a place of business, nor to make it unlawful to permit card playing under any and all circumstances "in any place of business or adjacent thereto." Ex parte Sapp [Neb.] 113 NW 261.

59. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. Under a "general welfare" clause in the charter, a city may legally pass an ordinance prohibiting the possession of intoxicating liquors kept for purposes of illegal sale. Sawyer v. Blakely, 2 Ga. App. 159, 58 SE 399. Ordinance prescribing boundaries of residence districts and prohibiting the sale of intoxicating liquors therein is a valid police regulation. Cohen v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 460, 101 SW 1052. Ordinance authorizing a committee to refuse a liquor license if in their opinion the location of the saloon would disturb the public peace or good order, and providing an ap-

liard and pool rooms,[60] use of fire arms,[61] provide against danger of fires in theatres,[62] regulate the erection of buildings and other structures [63] or the materials for the construction of same,[64] provide against their becoming a menace to life,[65] and forbid structures or practices causing danger of fire [66] or explosion,[67] forbid the leaving of horses unhitched or hitched in the streets except to the public hitching rack,[67a] and establish public scales for protection against false weights,[68] provided the regulation goes no further than is required by the reasonable necessities of the occasion.[69]

(§ 10) *C. Health and sanitation.*[70]—Anything which from its nature or surrounding is or is liable to become a menace to the public health is a proper subject of police regulation; thus, burial permits may be required, the keeping of hogs,[71] cattle,[72] or dogs,[73] regulated, and the keeping of livery stables supervised; [74] the sale of cigarettes,[75] and the location of and inspection of dairies, may be regulated,[76] the

peal to the mayor and alderman, held not invalid as admitting opportunity for the exercise of arbitrary discrimination. Cooke v. Loper [Ala.] 44 S 78. Ordinance prohibiting the sale of intoxicating liquors within a half mile of the corporate limits and providing for the enforcement thereof held void as in conflict with the state constitutional provision relating to the jurisdiction of city police courts over violations of municipal ordinances. Earle v. Latonia Agricultural Ass'n [Ky. App.] 106 SW 312. A city may pass an ordinance prohibiting minors from frequenting dramshops or securing liquors therein. City of Lewistown v. Fitch, 130 Ill. App. 170.

60. Ordinance authorizing police commissioners to regulate the granting of permits to run pool halls sustained. Goytino v. McAleer, 4 Cal. App. 655, 88 P 991.

61. See 8 C. L. 1069, n. 24.

62. Ordinance making it the duty of the chief of the fire department to assign a firemen to all performances in any theater who shall be paid by the manager of the theater is valid as being within the police power conferred by the charter of the city of Mobile. Act Feb. 6, 1897, §§ 20, 21 (acts 1896-97, p. 559). Tannenbaum v. Rehm [Ala.] 44 S 532.

63. City of New York v. Gude Co., 107 NYS 484; Fellows v. Charleston [W. Va.] 59 SE 623. Sky sign erected on roof of building for purpose of advertising held to be a "structure within meaning of Greater New York charter and ordinances." City of New York v. Wineburgh Adv. Co., 107 NYS 478.

64. Ordinance prohibiting erection of "frame buildings" not violated by erection of building entirely of timber except the outside of end and side walls and rafters, which are covered with corrugated iron. Olmstead v. People [Colo.] 91 P 1113.

65. May require buildings used for public purposes to be provided with fire escapes. Hotels and lodging houses. Adams v. Cumberland Inn Co., 117 Tenn. 470, 101 SW 428.

66. Ordinance forbidding the erection, etc., of a frame building without the written permission of all persons owning permanent brick or stone structures within a radius of sixty feet of the proposed structure is void for unreasonableness. Tilford v. Belknap, 31 Ky. L. R. 662, 103 SW 289. Ordinance prohibiting the rebuilding or repairing of wooden buildings within the fire limits when they shall have been damaged to the extent of fifty per cent of their value held invalid for failure to prescribe any method for ascertaining such damge. Ex parte Heidleberg [Tex. Cr. App.] 19 Tex. Ct. Rep. 229, 103 SW 395.

67. Municipal corporations may adopt ordinance forbidding blasting of rock within its limits unless such blasts be properly covered. City of Spokane v. Patterson [Wash.] 89 P 402. An ordinance regulating the construction of buildings which provides that it shall be unlawful to erect a gas tank or holder without the written consent of the owners of all the property within a radius of 1,000 feet from the site of such structure is, as to such proviso, unreasonable and void. State v. Withnell [Neb.] 110 NW 680.

67a. Wells v. Town of Mt. Olivet, 31 Ky. L. R. 576, 102 SW 1182.

68. Ordinance establishing public scales and requiring certain commodities to be weighed thereon before sale has no application where the commodity sold is weighed on the purchaser's own scales and with his approbation, it being intended to protect purchaser from false weights. City of Fulton v. Sims [Mo. App.] 106 SW 1094.

69. See 8 C. L. 1069, n. 29. While a city may destroy buildings maintained within fire limits in violation of ordinance, it is liable for needless damage. Wheeler v. Aberdeen [Wash.] 92 P 135.

70. See 8 C. L. 1069. Interments prohibited within certain limits. Laurel Hill Cemetery v. San Francisco [Cal.] 93 P 70. Under express delegated authority, a municipality may prohibit interments altogether within the municipal limits or permit them within whatever area the council may see proper to designate. Carpenter v. Borough of Yeadon, 151 F 879.

71. Ordinance prohibiting the keeping of hogs in a pen within the corporate limits and within 200 feet of a street or alley of the town sustained, although it does not formally declare such keeping of hogs to be a nuisance. Miller v. Syracuse, 168 Ind. 230, 80 NE 411. The condition of lots in town in which hogs are kept cannot be considered in determining whether the municipality had power to pass an ordinance prohibiting keeping of hogs therein. Town of Brunson v. Youmans, 76 S. C. 128, 56 SE 651.

72. Ordinance regulating keeping and feeding of cows is reasonable regulation.

73. Fincher v. Collum, 2 Ga. App. 740, 59 SE 22.

74. City of Billings v. Cook, 35 Mont. 95, 88 P 656.

75. Mandamus awarded to compel issuance

emission of dense smoke prohibited,[77] and impure and dangerous articles of food may be seized, condemned, and destroyed.[78] Where the quality of nuisance does not inhere in buildings, an ordinance declaring such buildings per se nuisances, without reference to the uses to which they are put or the manner in which they are maintained, is void.[79]

(§ 10) *D. Regulation and inspection of business.* See 8 C. L. 1070—Regulations restrictive of the conduct of business are justified only by considerations of public comfort, health, or safety.[80] A power usually conferred on municipalities is that of licensing occupations for the purpose of regulation;[81] but license fees must be reasonable, and not unjustly discriminating.[82] Revocation of permits to conduct a

of license to sell cigarettes manufactured only from pure tobacco and containing no substances deleterious to health. Illinois Laws 1907, p. 265. People v. Busse, 231 Ill. 251, 83 NE 175.

76. City of New Orleans v. Murat, 119 La. 1093, 44 S 898.

77. People v. Sturgis, 121 App. Div. 407, 106 NYS 61. An ordinance which prohibited not merely the emission of smoke, but the emission of dense smoke in Atlantic City, smoke containing soot or other substance and containing it in sufficient quantities to permit a deposit of such soot or other substance on any surface, held a valid enactment under the police power. Atlantic City v. France [N. J. Law] 65 A 894. Complaint charging violation of such ordinance held sufficient. Id. Under such ordinance the deposit of soot or other substance raises the presumption of an injury, and it is not required that the convictions find that such deposit was injurious to any person. Id. Ordinance making emission of dense smoke from any smokestack, etc., a public nuisance, not invalid because it excepts private residences. Bowers v. Indianapolis [Ind.] 81 NE 1097. In an action to recover penalty for violation of a smoke ordinance, evidence tending to show that the plant used for heating the building was of the most approved type, and that the owner had done all that human skill could devise to prevent smoke from escaping from the stack, is admissible in mitigation of the penalty. City of Chicago v. Knobel, 232 Ill. 112, 83 NE 459. Ordinance declaring the emission of dense smoke from any chimney, etc., within the corporate limits a public nuisance, irrespective of the particular locality, is valid. Bowers v. Indianapolis [Ind.] 81 NE 1897.

Contra: The failure of the legislature to include former § 1692f (1) in the recent amendment of the municipal code must be construed as withdrawing from municipal corporations the authority "to determine what shall be a nuisance and to abate the same," and in view thereof it must follow that § 2 of the ordinance passed by the city of Cincinnati, April 12, 1907, for the regulation of the emission of smoke within the limits of said city, and declaring that smoke of a certain density shall be deemed a nuisance per se, is ultra vires and void. Burkhardt v. Cincinnati, 6 Ohio N. P. (N.-S.) 17. Neither does the provision of § 1536-100, "to regulate and compel the consumption of smoke, and prevent injury and annoyance" therefrom, authorize the punishment of the offenses described in said ordinance. Such an ordinance would be penal in its nature and must be strictly construed in favor of those charged within its violation; and § 3 of said ordinance is therefore invalid. Id. Section 4 of said ordinance, providing for the creation of a smoke inspector's department consisting of inspectors and prescribing their duties and fixing their compensation and terms of office, is of itself, after the elimination of the clause providing for the prosecution of offenders, sufficient to constitute a valid ordinance. Id.

78. An ordinance passed under legislative authority providing for the inspection of food products kept or stored in any other than a private dwelling, and authorizing the summary seizure and destruction of any putrid, decayed, poisoned, and infected articles of food, is a valid police regulation which does not contravene the provisions of the fourteenth amendment of the U. S. Const., and any abuse of the power granted by it would not present a Federal question. North American Cold Storage Co. v. Chicago, 151 F 120.

79. Buildings used for storage of cotton seed while awaiting shipment. Town of Cuba v. Mississippi Cotton Oil Co. [Ala.] 43 S 706.

80. See 8 C. L. 1070, n. 39.

81. The subject of licenses is more fully treated in another topic. See Licenses, 10 C. L. 622. City of Louisville v. Roberts, [Ky.] 106 SW 1197; Parish of Calcasieu v. Avery, 119 La. 143, 43 S 986. Ordinance imposing license on breweries, distilleries, depots, or agencies. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. When there is no express power granted to a city to license or regulate the business of constructing artificial stone, asphalt, or other composite walks, it cannot be implied from the grant of authority to construct and repair walks of such material and in such manner as the mayor and council deem necessary. Gray v. Omaha [Neb.] 114 NW 600.

82. Ordinance requiring a license of $15 for each wagon peddling milk or butter held not unreasonable or discriminative. Miller v. Birmingham [Ala.] 44 S 388. A license fee of $1,000 imposed on breweries and their agents held not excessive. Schmidt v. Indianapolis, 168 Ind. 631, 80 NE 632. Ordinance of city of third class imposing license tax of $10.00 per day on transient merchants held reasonable and valid. City of Lebanon v. Zanditon, 75 Kan. 273, 89 P 10. Ordinance imposing an occupation tax of $100 for each six months or part thereof upon persons engaged in the business of selling at fire sale, auction sale, damaged or bankrupt stocks of goods, held not discriminatory in

special business must be by ordinance or regulation of the board of aldermen, custom being insufficient,[83] and such revocation must be after due notice and a hearing.[84] Various cases dealing with the subject of licenses are given in the notes.[85] A municipality may require the destruction of garbage though it has some commercial value,[86] and may commit the collection of garbage to an official contractor.[87]

(§ 10) *E. Control of streets and public places.*[See 8 C. L. 1070]—Paramount authority over municipal streets resides in the state, which may delegate such powers as it sees fit.[88] Under a delegated power to regulate the use of streets, a municipality may regulate the use of automobiles therein,[89] regulate the use of streets for the purpose of mere sport,[90] regulate railroad street crossings,[91] and limit the speed of railway trains,[92] require precaution in the operation of street cars,[93] limit the speed of teams,[94] and prevent the running at large of horned cattle,[95] or other animals,[96] or prohibit the leaving of horses standing in a public place without being fastened or guarded to prevent their running away.[97] No use of streets or public places inconsistent with the public easement therein can be authorized,[98] and the use of

favor of merchants selling the same goods without advertising them as such. City of Emporia v. Endelman, 75 Kan. 428, 89 P 685.

83. So held in revoking permits to carry on business of selling milk at retail on conviction of selling milk below standard fixed by Sanitary Code. People v. New York Health Dept., 117 App. Div. 856, 103 NYS 275.

84. The department of public health of a city cannot revoke a permit to carry on the business of selling milk at retail on conviction of selling milk below standard fixed by Sanitary Code, without hearing and notice. People v. New York Health Dept., 117 App. Div. 856, 103 NYS 275.

85. Ordinance prohibiting location and operation of woodyards in certain portions of city held void for uncertainty. City of St. Paul v. Schleh [Minn.] 112 NW 532.

Auctioneers: Ordinance prohibiting the sale of jewelry and watches held reasonable because of the opportunity for fraud connected therewith. State v. Bates [Minn.] 112 NW 67. And not invalid as discriminatory as against a certain business within a certain class. Id.

Construction of walks: Ordinance to license and regulate the business of constructing artificial stone, asphalt and other composite walks, held unreasonable and void. Gray v. Omaha [Neb.] 114 NW 600.

Hawkers and peddlers. Miller v. Birmingham [Ala.] 44 S 388.

Keepers of dogs. Ex parte Ackerman [Cal. App.] 91 P 429.

Meat shops: Ordinance forbidding meat shops to be kept open or the sale of meat therein after 9 o'clock in the forenoon on Sunday held not unconstitutional as class legislation. City of St. Louis v. De Lassus, 205 Mo. 578, 104 SW 12.

Ticket brokers and scalpers: Ordinance prohibiting sale of railroad tickets by any one other than a duly authorized agent of the company, held invalid for want of power to enact it. Ex parte Hughes [Tex. Cr. App.] 18 Tex. Ct. Rep. 742, 100 SW 160.

Soliciting customers for hotels, etc.: Ordinance prohibiting the soliciting of customers for hotels, etc., on a depot platform while passenger trains are stopping, sustained. Emerson v. McNeil [Ark.] 106 SW 479.

86. Nash v. District of Columbia, 28 App. D. C. 598.

87. Grease rendered from meat held not garbage. Nash v. District of Columbia, 28 App. D. C. 598.

88. See 8 C. L. 1070, n. 45.

89. People v. Prison Keeper of Seventh Dist. Magistrate's Ct., 121 App. Div. 645, 106 NYS 314; Id., 190 N. Y. 315, 83 NE 44; Id., 55 Misc. 611, 106 NYS 960.

90. As long as restrictions imposed upon it are reasonable for a public purpose, and not arbitrary, the courts ought not to interfere. Billington v. Miller [N. J. Law] 67 A 935. Ordinance prohibiting on portion of a street the sport of roller skating and not mere travel upon roller skates, held reasonable and valid. Id.

91. Ordinance requiring railway company to maintain electric lights where its tracks intersect streets, sustained. Pittsburgh, etc., R. Co. v. Hartford City [Ind.] 82 NE 787. Complaint against railroad company for violating such an ordinance held sufficient. Chicago, etc., R. Co. v. Salem [Ind.] 82 NE 913.

92. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030; Peterson v. State [Neb.] 112 NW 306.

93. Ordinance forbidding street cars to cross railroad tracks until conductor goes ahead and signals is valid. Indianapolis Trac. & T. Co. v. Formes [Ind. App.] 80 NE 872. Action for personal injury due to breach of ordinance fixing maximum speed of street cars, may be brought by the person injured. Deneen v. Houghton County St. R. Co. [Mich.] 14 Det. Leg. N. 670, 113 NW 1126.

94 See 8 C. L. 1071, n. 50.

95. See 8 C. L. 1071, n. 52. Chapman v. Mayfield, 31 Ky. L. R. 982, 104 SW 376; Coreil v. Welsh [La.] 45 S 438.

96. City may require payment of reasonable costs incurred in impounding such animals, and retain them until such costs are paid, though they be at large through no fault of the owner. Evans v. Holman, 202 Mo. 284, 100 SW 624.

97. Under an ordinance to such effect, an action cannot be maintained for being bitten by a horse allowed to pass unguarded along a public street. Putermann v. Simon [Mo. App.] 105 SW 1098.

98. See post, § 11. City has no right to grant to street vender a license to maintain a stand on a sidewalk and in the street. Galloso v. Sikeston, 124 Mo. App. 380, 101 SW

streets for any purpose except that for which they are commonly and necessarily used may be prohibited.[99] Though a council has power to enact regulations for the moving of buildings through the public streets,[1] that power should not be set in motion in each individual case by resolution.[2] A municipality has the right, and it is its duty, in the exercise of its police power, to supervise and control the introduction and maintenance upon and under the surface of the streets, of the various appliances which subserve the several urban uses to which the highways of a municipality may lawfully be subjected.[3] Among such uses may be enumerated the placing of telegraph and telephone lines,[4] lighting wires,[5] the planting, maintaining, and protection of shade trees,[6] and the operation of street[7] and steam railways.[8] While a municipality may, by ordinance, grant to individuals and corporations the privilege of occupying the streets and public ways for the uses specified,[9] such rights are at all times held in subordination to the superior rights of the public.[10] A city may not, however, take

715. Under Greater New York City Charter, the board of estimate and apportionment has no authority to grant to the owners of a department store the right to construct and operate a spur track in the street to connect its store with a street railway to be used exclusively for the transportation of its goods. Hatfield v. Straus, 189 N. Y. 208, 82 NE 172. Abutting owners suffering special damages by reason of such occupation of the street may maintain an action to restrain the same. Id. Erection of electric lighting plant by city in center of a public street is an improper use. McIlhinny v. Trenton, 148 Mich. 380, 14 Det. Leg. N. 190, 111 NW 1083.

99. Exhibition of stallions on public streets may be prohibited. State v. Iams [Neb.] 111 NW 604.

1. An ordinance requiring a street railway company to temporarily raise or remove its wires so as to allow a building to pass, provided the person desiring to remove such building first obtain a license from the city and give 24 hours' notice to the company, is a valid exercise of the police power relieving the party moving such building from any liability to the street railway company. Indiana R. Co. v. Calvert, 168 Ind. 321, 80 NE 961. This does not constitute a technical taking of property as the term is used under the law of eminent domain. Id.

2. Though a city is authorized by its charter to prohibit the use of its streets for the removal of buildings, yet it must do so by a reasonable ordinance only adopted and promulgated. Hinman v. Clarke, 105 NYS 725.

3. See 8 C. L. 1071, n. 57.

4. City of Plattsmouth v. Nebraska Tel. Co. [Neb.] 114 NW 588; State v. Milwaukee [Wis.] 113 NW 40; State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

5. See 8 C. L. 1071, n. 62.

6. Burns' Ann. St. 1901, §§ 3541, 4198. Teague v. Bloomington [Ind. App.] 81 NE 103. An abutting owner's right to plant and grow trees along the edge of a street in front of his property is subject only to the right of the city, or some one authorized by it, to remove or trim the same when they interfere with a proper use of the street. Telephone company not having been granted a franchise to conduct a telephone business in a city is liable to property owners for mutilation of such trees. Cartwright v. Liberty Tel. Co. 205 Mo. 126, 103 SW 982.

7. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457; Jeffers v. Annapolis [Md.] 68 A 361. Ordinance requiring steam railroad company to change the location of its tracks in a street held a reasonable regulation and promotive of the public welfare and safety. Atlantic, etc., R. Co. v. Cordele, 128 Ga. 293, 57 SE 493. The grant of the use of a street to a street railway company does not authorize the company to exclude the public from the street or to operate its railway in a manner to render the street unnecessarily dangerous. City held liable for injuries resulting from trolly pole being erected in middle of street. McKim v. Philadelphia, 217 Pa. 243, 66 A 340. Town authorities may grant franchise for building and operating street surface railway to two or more rival companies, if routes not same. People v. Bauer, 54 Misc. 28, 103 NYS 1081. In New York a municipality cannot grant to an individual a franchise to construct and operate a street surface railroad upon its streets. Village of Phoenix v. Gannon, 108 NYS 255. Ordinance regulating the running of cars during the evening "rush" hours. North Jersey St. R. Co. v. Jersey City [N. J Law] 67 A 1072. A municipality has power to adopt an ordinance requiring a license fee to be paid on street cars. Bloomington & Normal R., Elec. & Heating Co. v. Bloomington, 123 Ill. App. 639.

8. In Georgia a commercial steam railroad company cannot, without the sanction of the general assembly, lay a track longitudinally along the streets of a city, but this sanction may be given either in the charter of the city or of the railroad company. Legislative sanction not contained in charter of city of Athens. Athens Terminal Co. v. Athens Foundry & Mach. Works, 129 Ga. 393, 58 SE 891. Municipalities cannot regulate switching of cars in private railroad yards. Ordinance requiring light to be placed on rear of train does not apply in private switching yards. Smith v. Chicago Junction R. Co., 127 Ill. App. 89. Ordinance forbidding the allowance of steam to escape from locomotives in immediate proximity to street or railroad crossing is reasonable. Chicago, etc., R. Co. v. Steckman, 125 Ill. App. 299.

9. See 8 C. L. 1072 n. 66.

10. City of Plattsmouth v. Nebraska Tel. Co. [Neb.] 114 NW 588. Ordinances of New York City of 1833 and 1844, allowing property owners on Fifth Avenue to enclose a portion of the sidewalk for a court yard were

away any vested rights without notice and an opportunity to be heard.[11] By statutes in some jurisdictions, where streets are abandoned, the property, if not needed for public use, may be disposed of by the municipality, subject to the conditions and provisions of the statute authorizing.[11a]

(§ 10) *F. Definition of offenses and regulation of criminal procedure.*[12]—Incident to the power to make police regulations is the power to punish their breach,[13] and, in the exercise of such power, acts made penal by the state law may be punished,[14] but such ordinances are justifiable only by express legislative authority,[15] and the conditions upon which authority granted is exercisable must be strictly complied with.[16] Where the manner of enforcing municipal regulations is prescribed by statute, such method is exclusive.[17] In defining offenses,[18] or prescribing procedure,[19] a municipality cannot depart from the established meaning of words and the settled rules of procedure. The extent of punishment which may be imposed is usually regulated by the charter.[20] The usual constitutional guaranty of a trial by

void. City of New York v. Knickerbocker Trust Co., 52 Misc. 222, 102 NYS 900. Ordinance granting right to erect portico in front of building on avenue was void, although building department acquiesced in it. Id. The fact that municipality has permitted for a consideration the construction and use of an unlawful obstruction on a street does not deprive it of power to have it removed. Rothschild v. Chicago, 227 Ill. 205, 81 NE 407.

11. A private corporation having acquired a right in city streets and having made expenditures on the strength of the grant extended by the city, this right cannot be taken away in an arbitrary manner and without reasonable cause. City of Plattsmouth v. Nebraska Tel. Co. [Neb.] 114 NW 588.

11a. People v. Metz, 119 App. Div. 271, 104 NYS 649.

12. See 8 C. L. 1072. Procedure on summary trials, see Indictment and Prosecution, 10 C. L. 57.

13. See 8 C. L. 1072, n. 71. O'Hare v. Chicago, 125 Ill. App. 73; City of Seattle v. MacDonald [Wash.] 91 P 952. When a license tax is imposed by an ordinance upon merchants, penalties for the violation of the ordinance may be imposed, not only upon the merchants, but also upon all agents and employes of such merchants who transact the unlicensed business and want of knowledge that the tax had not been paid is no defense to such agent or employe. City of Emporia v. Becker [Kan.] 90 P 798.

14. See 8 C. L. 1072, n. 72. City of St. Louis v. De Lassus, 205 Mo. 578, 104 SW 12. But whenever the penalty in a city ordinance is in excess of or less than the penalty prescribed by the state law, the ordinance is invalid. Ex parte McHenry [Tex. Cr. App.] 19 Tex. Ct. Rep. 233, 103 SW 390. Ordinance making it unlawful to trespass upon railroad tracks, etc., held not violative of the constitutional provision that no municipal ordinance shall fix a penalty for a violation thereof at less than that imposed by statute for the same offense, as no statute described the offense mentioned in the ordinance (Tuggles v. Com., 30 Ky. L. R. 1071, 100 SW 235), nor is such provision applicable to an ordinance providing a penalty for peddling without license, such offense not being classed with crimes and misdemeanors involving moral turpitude (Commonwealth v. Merz, 30 Ky. L. R. 1170, 100 SW 333). Ordinance prohibiting playing at any game of chance for money or its equivalent. City of Seattle v. MacDonald [Wash.] 91 P 952. Ordinance prescribing the hindering, obstructing or opposing any officer in the lawful discharge of his official duty sustained, though the offense described is substantially in the terms of a state statute relating to offenses against public justice. Town of Oceana v. Cook [W. Va.] 60 SE 145. **Contra.** Bowers v. Indianapolis [Ind.] 81 NE 1097.

15. Ordinance providing that all acts punishable under state laws, etc., shall be punished as offenses against the town, expressly includes felonies of every grade, as well as misdemeanors, and is for this reason void under Code 1906, § 3410, limiting jurisdiction of municipalities to misdemeanors. Town of Oakland v. Miller [Miss.] 43 S 467.

16. Failure to erect signboards as prescribed by statute for motor vehicles exceeding speed limit was fatal to ordinance. People v. Prison Keeper of Seventh Dist. Magistrate's Ct., 121 App. Div. 645, 106 NYS 314.

17. Granted power to enforce license regulation by fine or imprisonment excludes power to enforce on revocation of license. United States v. Macfarland, 28 App. D. C. 552.

18. See 8 C. L. 1072, n. 74. The charter of the city of Salem gives the council power to declare what shall constitute vagrancy. Nichols v. Salem [Or.] 89 P 804.

19. See 8 C. L. 1072, n. 75. The charter of Atlantic City (P. L. 1902, p. 297, § 16), confers upon the common council the right to provide that the amount of the penalty for the violation of an ordinance, with certain limitations, shall be left to the discretion of the magistrate. Altantic City v. France [N. J. Law] 65 A 894. Smoke ordinance giving the magistrate discretion in fixing the penalty between the mimimum and maximum amount prescribed by the ordinance held valid. Id.

20. The charter of the city of Salem gives the council power to provide for the punishment of persons guilty of vagrancy. Nichols v. Salem [Or.] 89 P 804. Town held not to have power to fix a penalty for carrying on a business without procuring a license therefor, the state law making the carrying on of such business without license

jury does not apply to a violation of a municipal ordinance.[21] In a prosecution for the violation of an ordinance, which does not embrace any offense made criminal by the laws of the state, the same degree of proof is not required as in criminal prosecutions,[22] and in a proceeding to recover a fine imposed for a breach of the peace, the ordinance must be strictly construed.[23] Equity will not interfere to enjoin the prosecution of a violation of a city ordinance,[24] but the validity of an ordinance may be drawn in question by motion to quash the summons.[25] Equity will take jurisdiction to enjoin a threatened violation of a municipal ordinance when such violation contemplates an act which is a nuisance in law.[26]

§ 11. *Property and public places.*[27]—The law upon this subject is fully treated elsewhere,[28] only a few cases based on the peculiar status of municipalities being here treated. It is competent for the state when creating municipal governments to retain to itself some control over the state's property situated within the territory of the municipality.[29] It may exercise this control directly or through the medium of other selected and more suitable instrumentalities.[30] Unless otherwise provided, a municipality may acquire property in any lawful manner, as by gift,[31] and hold land or other property,[32] and may sell the public property [33] or devote it to any use consistent with its position as trustee for the benefit of its inhabitants,[34] but it cannot sanction a use inconsistent with the public use [35] or amounting to a public nuisance.[36] However, property, dedicated to public use, is not owned by the city, but held by it in

a misdemeanor and fixing the penalty therefor. Ex parte Sweetman [Cal. App.] 90 P 1069.

21. At least when such ordinance is not of itself also a violation of the criminal laws of the state. Miller v. Birmingham [Ala.] 44 S 388. An action to recover a penalty for the violation of an ordinance, being a civil suit and not a criminal proceeding, art. 2, § 9 of the state constitution, providing that the accused in all criminal prosecutions shall have a right to a trial by a jury of the county or district in which the offense is committed, has no application. City of Chicago v. Knobel, 232 Ill. 112, 83 NE 459.

22. Such prosecution, though in form a criminal prosecution, is in fact a civil proceeding to recover a penalty and clear and satisfactory proof of the commission of the offense is sufficient. Proof beyond a reasonable doubt is not required. Peterson v. State [Neb.] 112 NW 306.

23. Such proceeding being quasi criminal in its nature. State v. Dineen, 203 Mo. 628, 102 SW 480.

24. Georgia R. & Elec. Co. v. Oakland City, 129 Ga. 576, 59 SE 296; City of Bessemer v. Bessemer Waterworks [Ala.] 44 S 663.

Contra: Where property rights will be destroyed or their lawful enjoyment taken away by criminal proceedings under an invalid ordinance, equity has jurisdiction to enjoin them. Fellows v. Charleston [W. Va.] 59 SE 623.

25. See 8 C. L. 1073, n. 79.

26. Inhabitants of Houlton v. Titcomb [Me.] 66 A 733.

27. See 8 C. L. 1073. See, also, **Abbott, Mun. Corp. §§ 717-834.**

28. See Parks and Public Grounds, 8 C. L. 1233. See, also, Highways and Streets, 9 C. L. 1588.

29. See 8 C. L. 1073, n. 84.

30. In Louisiana the obligation to provide good and sufficient courthouses for their respective parishes is imposed by law upon the police juries. Murphy v. Police Jury, St. Mary Parish, 118 La. 401, 42 S 979.

31. Under Rev. Laws 1905, § 767, acceptance must be by resolution of the council adopted by a two-thirds majority of its members, expressing the terms of the gift in full. Jenkins v. Hanson [Minn.] 112 NW 216.

32. See 8 C. L. 1073, n. 86.

33. A city of the class to which the city of Lincoln belongs may sell property acquired at a tax sale without first obtaining the approval of the electors of the city. State v. Citizens' St. R. Co. [Neb.] 114 NW 429. Sale of school building by city to school district sustained. Read v. Smith [Ky.] 106 SW 1182. City of Baltimore has power to sell such of its water front wharf property as has never been subject to public use. City Charter, §§ 7, 13, pp. 272, 274. Baltimore City v. Rowe [Md.] 67 A 93. Where there are no restrictions in the grant, land acquired by gift may be disposed of by the city for the benefit of its citizens. Sale of land by city sustained. Jenkins v. Hanson [Minn.] 112 NW 216.

34. Under the Washington statute (Ballinger's Ann. Codes & St. § 739, subd. 3), a city has power to grant permission to construct a railroad over land which the city had already appropriated for a pole line for the transmission of electricity. State v. Superior Ct. [Wash.] 90 P. 663.

35. Under St. 1898, c. 40, § 893, a town has no power to authorize a private corporation for its private interest to lay a steam pipe across a lot which the town holds for the maintenance of its water and light plant. Lakeside Lumber Co. v. Jacobs [Wis.] 114 NW 446.

36. City may maintain ash-receiving station within city in disposing of ashes, household and street sweepings, and rubbish, if method adopted does not create nuisance. Saal v. South Brooklyn R. Co., 106 NYS 996.

trust to be administered for the use to which it was destined.[37] Property bought by a municipality for a public purpose is corporate property held in trust for all the citizens,[38] and the corporation is bound to administer such property exactly as if it were the representative of a private individual or a corporation.[39] A court of equity will enjoin a corporation from deeding corporate property collusively and fraudulently for less than its value.[40] And such a bill may be maintained by the taxpayers of the municipality where the thing to be done by the city council would affect them financially as taxpayers.[41] Though a city holds land in special trust for street purposes, it may be freed therefrom by statute.[42] A conveyance by the municipality may be ratified by the legislature.[43] Streets being held and controlled by a municipality for the use of the general public, it may not grant an exclusive use of them for private purposes.[44] The general power over streets, which is usually possessed by cities must be considered with reference to, and is limited by, the purposes and uses of public ways.[45] The statute of limitations as to adverse possession does not run against a municipal corporation in respect to public property,[46] nor is the doctrine of equitable estoppel applicable to municipalities in respect to such rights.[47] A court of equity may restrain the illegal use of a street where such use if permitted would constitute a purprestur or public nuisance.[48] A municipality may maintain an action of ejectment against a person unlawfully encroaching upon a public highway under its control.[49]

§ 12. *Contracts.*[50]—Contracts by public governmental bodies are fully treated in a separate article.[51] Practically the only questions arising upon such contracts which are peculiar to municipalities and proper to be treated here are those relating to unauthorized contracts and the implications and estoppels resulting therefrom. It results necessarily from the limited and delegated character of municipal authori-

37. Without action by the sovereign, it is hors de commerce, inalienable, not subject to change, even as to its use. Board of Liquidation of City Debt v. New Orleans, 118 La. 712, 43 S 307. At time of institution of suit the property in the city of New Orleans known as the "sugar shed" was a locus publicus, dedicated to public use and hors de commerce, and its status was not changed by an offer of the city to sell it if, having made the offer under the erroneous belief that it could legally do so by retaining the proceeds for public purposes, it subsequently on ascertaining its error, withdrew the property from sale. Id. Nothing done by the city up to institution of suit changed status of property or estopped city from receding from its intention to sell. Id.

38. Property bought to furnish adequate water supply. Perkins v. Reservoir Pk. Fishing & Boating Club, 130 Ill. App. 128.

39. Breach of trust in disposing of corporate property for grossly inadequate sum. Perkins v. Reservoir Pk. Fishing & Boating Club, 130 Ill. App. 128. A municipality cannot lease public property for a grossly inadequate sum. Id.

40. Disposal of corporate property furnishing water supply to members of city council. Perkins v. Reservoir Pk. Fishing & Boating Club, 130 Ill. App. 128.

41. Disposal of corporate property for grossly inadequate sum. Perkins v. Reservoir Pk. Fishing & Boating Club, 130 Ill. App. 128.

42. People v. Delaney 120 App. Div. 801, 105 NYS 746.

43. Conveyance of Pueblo lands by city of Monterey. City of Monterey v. Jacks, 203 U. S. 360, 51 Law. Ed. 220.

44. No power to grant to railroad the exclusive right to use a public street. Pittsburgh, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934.

45. Construction of ditch in street. Kern Island Irr. Co. v. Bakersfield [Cal.] 90 P 1052.

46. Streets and grounds dedicated for public use to city. Krause v. El Paso [Tex. Civ. App.] 19 Tex. Ct. Rep. 586, 101 SW 828. Action by city to recover possession of portion of a street covered by a dwelling. City of Lincoln v. McLaughlin [Neb.] 112 NW 363. **Contra.** Baltimore City v. Rowe [Md.] 67 A 93.

47. Rights to land dedicated for street purposes cannot be lost by the city under the principles of equitable estoppel. Krause v. El Paso [Tex. Civ. App.] 19 Tex. Ct. Rep. 586, 101 SW 828. City held not estopped from enforcing its right to possession of street. City of Lincoln v. McLaughlin [Neb.] 112 NW 363.

48. Injunction to prevent city from erecting electric light plant in center of public street. McIlhinny v. Trenton, 148 Mich 380, 14 Det. Leg. N. 190, 111 NW 1083. A wall constituting part of a stoop and entrance to a residence and extending into the street held to be a nuisance and its maintenance enjoined. City of New York v. Rice, 56 Misc. 360, 107 NYS 641.

49. Riverside Tp. v. Pennsylvania R. Co. [N. J. Err. & App.] 66 A 433.

50. See 8 C. L. 1074. See, also, **Abbott, Mun. Corp. §§ 246-299.**

51. See Public Contracts, 8 C. L. 1473.

ty that a municipality can contract only to the extent and in the manner expressly authorized,[52] and contracts for an unauthorized purpose [53] or not executed in the prescribed manner [54] are invalid.[55] Where benefits have been received under an invalid contract, it has been held, on principles of implied contract or estoppel,[56] that the municipality is liable, but on the other hand it has been held that neither implied contract [57] nor estoppel will arise.[58] A city may recover under an implied contract.[59]

52. Where the agents of a city are restricted by law as to the method of contracting, the city cannot be bound otherwise than by a compliance with the condition prescribed for the exercise of the power. Roemheld v. Chicago, 231 Ill. 467, 83 NE 291. Under Missouri statute a contract of a city of the third class for repairing a street can be exercised only by ordinance, or at least by legislative action of the mayor and council acting in conjunction. Mulligan v. Lexington, 126 Mo. App. 715, 105 SW 1104. Under the Tonawanda charter, § 19, tit. 20 (Laws 1905, p. 782, c. 357), a contract by the city to supply water to a corporation situated outside the city limits was properly executed by the board of public works and no authority from the common council was necessary for its execution. Simson v. Parker, 190 N. Y. 19, 82 NE 732. The act of May 12, 1886 (83 Ohio Laws, p. 146), superseded the act of Jan. 29, 1885 (82 Ohio Laws, p. 11), and gave to cities the grade and class to which Defiance then belonged such authority as was necessary to pass a valid ordinance contracting for a supply of water for fire and other public purposes without any submission of the question to the qualified voters of the city. City of Defiance v. McGonigale [C. C. A.] 150 F 689. The water and light board of the city of Waseca is clothed by the charter with the exclusive control and management of the water and light plant and is authorized to enter into contracts relating thereto for and on behalf of the city. American Elec. Co. v. Waseca, 102 Minn. 329, 113 NW 899. Under New Jersey Act of April 2, 1888 (P. L. p. 366; Gen. St. p. 2210, § 405), the city of Millville had power to contract with a water company for a supply of water and to include in contract an option to acquire the entire plant of the company. Livermore v. Millville [N. J. Err. & App.] 67 A 605. The option to acquire the plant by purchase at a price to be fixed by commissioners, two of whom are to be appointed by each party, fixes, in the statutory sense, the terms upon which the plant is to be acquired. Id. City has power to bind itself by a contract with railway company that the city shall do certain work, in which both the city and the company were interested, and that the company should pay a stipulated price therefor. City of Worcester v. Worcester & H. St. R. Co., 194 Mass. 228, 80 NE 232.

53. A thirty year contract between a city and a water company, the city having no authority to contract beyond twenty years, is valid at least for the lesser period, the contract being separable by years. City of Defiance v. McGonigale [C. C. A.] 150 F 689. Where a statute authorzies a city to sell only surplus water as such surplus might exist from time to time, a contract whereby a city obligated itself to furnish to a manufacturing corporation situated outside the city limits such water as the corporation might require during a prescribed period of years, exceeds the authority granted and is invalid. Simson v. Parker, 190 N. Y. 19, 82 NE 732. A contract of sale by a member of a town council to the town is contrary to public policy and void. Bay v. Davidson, 133 Iowa, 688, 111 NW 25. Failure of city to follow statutory procedure in making contract which it was authorized to make does not render such contract ultra vires, but only irregular and contractor or his assignee may maintain action against city to recover balance due upon such contract. Contract for grading street. Rogers v. Omaha [Neb.] 114 NW 33.

54. Where a statute prescribes a mode of contracting by which alone a city can bind itself, it cannot be made liable on an implied contract in conflict with the statute. Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44. Where a city attempts to contract for the use of a patented pavement without following the charter requirements covering the subect, the contract is void. Cawker v. Milwaukee [Wis.] 113 NW 417.

55. See 8 C. L. 1075, n. 5.

56. Acceptance of services of policeman by city creates an implied contract on its part to pay him a salary. City of San Antonio v. Beck [Tex. Civ. App.] 18 Tex. Ct. Rep. 953, 101 SW 263. If, in Ohio, a city avails itself of benefits given by a contract which it considers invalid, it is its duty to take steps in one season to have the question of invalidity litigated or it cannot resist paying for the benefits thus taken. City estopped to deny validity of ordinance contracting for supply of water for fire and other public purposes. City of Defiance v. McGonigale [C. C. A.] 150 F 689.

57. Municipality held not liable on contract for legal services made by trustees individually and not as an official body, though the corporation received the benefit of such services. District of Highlands v. Michie [Ky.] 107 SW 216. Performance of work or furnishing material for a city and its acceptance of the resulting benefits will not render it liable if the work was not authorized. Roemheld v. Chicago, 231 Ill. 467, 83 NE 291. City not liable because its employes used materials left by contractor who has abandoned contract with city. Douglas v. Lowell, 194 Mass. 268, 80 NE 510. New Jersey Act (P. L. 1892, p. 119; Gen. St. p. 500, § 2021), concerning the government of cities of the second class, being a special act regulating the internal affairs of cities, and therefore unconstitutional, no contract can be implied against the municipality to pay for services of a member of the common council, rendered solely on the faith of the act and in anticipation of such compensation as the act and subsequent legislation provided. Seymour v. Orange [N. J. Err. & App.] 65 A 1033.

58. Sale by member of council to town. Bay v. Davidson, 133 Iowa, 688, 111 NW 25.

59. Where a street railway company failed

Persons dealing with a municipal corporation are presumed to know the extent of its powers.[60] In the exercise of legislative powers a city council may make no grant or contract which will bind the municipality beyond its term of office, since they may not lawfully circumscribe the powers of their successors,[61] but in the exercise of business powers so called the municipality and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the city will be governed by the same rules which control an individual or private corporation under like circumstances.[62] A municipality acting through its legislative body has no power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority.[63] Power of municipality to contract with reference to certain subject-matters may be limited by statute,[64] and municipal officers are usually prohibited from being interested in contracts made on behalf of the city by boards of which they are members.[65]

§ 13. *Fiscal affairs and management.*[66]—Municipal bonds are treated in a separate topic,[67] and such questions as the consent of electors to an indebtedness, which arise usually with special reference to bonded indebtedness, will be found more fully treated there. As a safeguard against official improvidence, it is frequently provided by charter that no indebtedness shall be incurred unless provision for its payment be then made,[68] or unless there is sufficient money unappropriated to meet the proposed appropriation,[69] or until an appropriation has been made for unpaid liabilities,[70] or

to complete its contract with a city for the construction of a bridge, held that the city upon completing the work was entitled to recover the cost thereof from the railway company. North Braddock Borough v. Monongahela St. R. Co., 217 Pa. 27, 66 A 152.

60. Compensation for services beyond contractual powers not recoverable. Burns v. New York, 105 NYS 605.

61. See ante, § 8A.

62. A city in contracting for the lease of a boat landing exercises a merely private right, and its liability under the contract is determined as that of any citizen would be. Commercial Wharf Corp. v. Boston, 194 Mass. 460, 80 NE 645. Contract between city and water company for supply of water. Omaha Water Co. v. Omaha [C. C. A.] 156 F 922.

63. Contract giving up control of park. State v. Minneapolis Park Com'rs, 100 Minn. 150, 110 NW 1121.

64. Hours of labor constituting day's work. Burns v. New York, 105 NYS 605.

65. Sale by member of board of aldermen to city held to violate state Const. § 109. Noxubee County Hardware Co. v. Macon [Miss.] 43 S 304. The secretary of a city board of health is a city officer within the meaning of 2 Burns' Ann. St. 1901, § 3539, and cannot recover on a contract with the city to care for smallpox patients. City of Greenfield v. Black [Ind. App.] 82 NE 797. Evidence held not to establish the existence of such an emergency as to justify the employment of the secretary of the board of health in violation of the statute. Id. Where a member of a borough council was indirectly interested in furnishing property to the borough, resolutions providing for the purchase and payment therefor will be set aside as contrary to the policy and intent of the act March 22, 1901 (P. L. p. 393.) Sturr v. Elmer [N. J. Law] 67 A 1059.

66. See 8 C. L. 1076. See, also, **Abbott, Mun. Corp. §§ 410-495.**

67. See Municipal Bonds, 8 C. L. 1046.

68. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348. But where the city was not prohibited by the charter from paying for lands taken for park purposes out of its general funds, plaintiff may recover payment for her land taken for such purposes upon showing a vested right to such payment, notwithstanding the fact that no action was taken by the council toward the issue of bonds for the purpose of paying for land taken for park purposes as authorized by an amendment to the charter. Bohannan v. Stamford [Conn.] 67 A 372. It is provided by the Ohio municipal code that no debt shall be incurred by a municipal corporation for its ordinary expenses unless an appropriation to meet it has been made by the council and the city auditor or clerk has certified to the council that the money is in the treasury. In the absence of such certificate, the board of public service is without authority to employ a janitor for the city building, and a person so employed cannot recover from the city for his services. Pittinger v. Wellsville, 75 Ohio St. 508, 80 NE 182. Texas constitution providing that no debt shall be created unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and create a sinking fund of at least two per cent has no application to the salaries of the various municipal officers, which are payable out of the current revenue without a special fund being appropriated therefor. City of San Antonio v. Serna [Tex. Civ. App.] 18 Tex. Ct. Rep. 405, 99 SW 875. Under the charter of San Antonio the city is not exonerated from the payment of any debt for current expenses because no appropriation by ordinance had been made to cover it before the debt was incurred. City of San Antonio v. Tobin [Tex. Civ. App.] 18 Tex. Ct. Rep. 919, 101 SW 269.

69. Under the Milwaukee charter the comptroller has no right to refuse to countersign the report of a committee of the council

to an amount exceeding the current revenue,[71] and to the same end is a common provision that no extraordinary expense shall be incurred unless authorized by popular vote.[72] And in some instances statutes provide for the discharge of particular obligations by payment out of a prescribed fund,[73] and such modes of discharging an obligation by a municipality must be pursued, a failure to provide the prescribed fund being a condition precedent to suit.[74] Proceedings for an examination into fiscal affairs are sometimes provided.[75]

Funds and appropriations. See 8 C. L. 1076—Public funds can be devoted only to public purposes[78] and must be expended and accounted for according to law,[77] and money borrowed[78] or appropriated for a specific purpose cannot lawfully be used for

made on a resolution appropriating money where there is sufficient money unappropriated to meet such appropriation, and the comptroller may be compelled by mandamus to countersign such report. State v. Bechther [Wis.] 113 NW 42.

70. See 8 C. L. 1076, n. 19.

71. See 8 C. L. 1076, n. 20. Such revenues include collectible delinquent taxes, of previous years, and includes not only the levy actually made for any year, but such as could have been legally made. Overall v. Madisonville, 31 Ky. L. R. 278, 102 SW 278. Moneys to be derived during ensuing year from fines and license fees are too uncertain and indefinite to be considered in determining the amount of debt that may be incurred. Id. Kentucky Const., § 157, limiting municipal indebtedness to its current revenues unless two-thirds of its electors consent to a greater indebtedness, limits the power of the municipality only, and not the power of the general assembly in adjusting taxation. Covington & C. Bridge Co. v. Davidson, 31 Ky. L. R. 425, 102 SW 339.

72. Under Santa Barbara charter propositions to incur bonded indebtedness must be submitted to vote in accordance with the general election laws of the state. City of Santa Barbara v. Davis [Cal. App.] 92 P 308. North Carolina Const., art. 7, § 7, prohibits municipal corporations from contracting debts except for the necessary expenses thereof unless by a vote of a majority of the qualified voters. Wharton v. Greensboro [N. C.] 59 SE 1043.

73. Davidson v. White Plains, 105 NYS 803.

74. Under Laws 1896, p. 1013, c. 769, providing for payment of obligations incurred in connection with the construction and operation of city water supply plant from particular fund, disbursed by special department, such mode of discharge must be pursued, and city can only be sued for breach of duty to provide fund. Davidson v. White Plains, 105 NYS 803.

75. Under the New Jersey Act (P. L. 1879, as amended P. L. 1898, p. 155, c. 97), providing for a summary investigation of county and municipal affairs, when a judge of the supreme court has made an order for summary investigation upon a petition and affidavit conferring jurisdiction on him to make such order, he may be required to institute an inquiry as to the facts on which his act has been founded, at least to the extent of discovering whether he has been imposed upon. Borough of Park Ridge v. Reynolds [N. J. Err. & App.] 65 A 990. Where the municipality filed a subsequent petition for the vacation of such order and supported it by counter affidavits, yet did not apply for a rule to show cause or other proceedings to determine the contested facts, held that there was no error in dismissing the latter petition and refusing to vacate the order made upon the first petition. Id. The constitutionality of the above-recited act having been challenged in the supreme court upon a specific ground, held that that ground was ineffective to support the claim, and that the other objections on the ground of unconstitutionality would not be considered. Id. Greater New York charter, Laws 1901, pp. 31, 536, c. 466, §§ 54, 1534, and Laws 1897, p. 35, c. 378, § 119, provide for the examination of accounts of the departments and offices of the city of New York. In re Hertle, 120 App. Div. 717, 105 NYS 765. N. Y. Laws 1901, pp. 31, 632, c. 466, §§ 54, 1534, providing for investigations by board of aldermen and justice of supreme court, at instance of citizens, into administrative system of municipalty, does not affect authority of commissioners of accounts under § 119, p. 46. In re Hertle, 54 Misc. 354, 105 NYS 1022.

76. Simson v. Parker, 190 N. Y. 19, 82 NE 732. The erection of a public hall in which citizens may exercise their right of assembling and considering and discussing public affairs is a public purpose for which a city may legally expend money. Wheelock v. Lowell [Mass.] 81 NE 977. A person seeking to restrain a city from appropriating public money for the erection of a hall on the ground that it is intended to be used for private purposes has the burden of proving the same. Id. If the dominating motive for the erection of the hall is a strictly public use, an expenditure for it is legal, although incidentally it may be devoted occasionally to uses which are not public. Id. At common law and under the "general welfare clause" of the act of May 23, 1889 (P. L. 277), a city of the third class has power to make an appropriation for the commemoration of events of great public interest in such a manner as to promote the general welfare of the city and advance its trade, commerce, and manufactures. Stegmaier v. Goeringer [Pa.] 67 A 782.

77. Where an appropriation of public moneys was made to a committee of private citizens for a public celebration, held, the city controller could not be compelled to countersign a warrant on the city treasurer for the amount appropriated, no bills or vouchers having been presented showing for what purpose and how the moneys were expended. Stegmaier v. Goeringer [Pa.] 67 A 782.

78. Vossen v. St. Clair, 148 Mich. 686, 14 Det. Leg. N. 331, 112 NW 746.

any other purpose,[79] but where it is not specified that a fund given to a city shall be used for any particular purpose, the city may, in its discretion, use it for any lawful purpose.[80] In the absence of express prohibition, a city may by an order, instead of by an ordinance, bill, or resolution, appropriate public funds for a public use.[81] Under the present provisions of the San Francisco freeholders' charter, the officers of the municipality must retain the public money in their custody and cannot deposit in banks.[82] Equity will interfere at the suit of a taxpayer to restrain the misapplication of funds,[83] and a resident taxpayer of a municipality may maintain an action against its officers who have paid out its funds for an unlawful or unauthorized purpose to recover such funds for the benefit of the corporation where its proper law officer neglects and refuses to prosecute such action,[84] but in Massachusetts mandamus does not lie to prevent an illegal expenditure of public money.[85]

Liens to secure moneys due in municipality usually arise only in case of taxes [86] or assessments for improvements,[87] but are occasionally extended to water rates and the like.[88]

Warrants.[See 8 C. L. 1077]—Municipal warrants possess none of the qualities of commercial paper.[89] A warrant, issued by the proper city authorities in consideration of a valid indebtedness against it, is a written acknowledgement of such indebtedness and promise to pay it, and arrests the running of the statute of limitations.[90] Warrants issued in consideration of demands which are valid obligations of a city, payable out of its general funds, are not invalidated by a recital not contemplated by statute that they should be payable of special funds.[91] It is sometimes provided that no warrant shall be drawn upon the treasurer of a city unless there is an unexpended balance in the fund upon which the warrant is drawn,[92] and a judgment creditor of a city may refuse a warrant payable out of a fund not in existence.[93]

Limitation of indebtedness.[See 8 C. L. 1077]—Almost without exception, munici-

79. Wolff Chemical Co. v. Philadelphia, 217 Pa. 215, 66 A 344.

80. Firemen's Relief Ass'n v. Scranton, 217 Pa. 585, 66 A 1103.

81. Appropriations for erection of public hall. Wheelock v. Lowell [Mass.] 81 NE 977.

82. Rothschild v. Bantel [Cal.] 91 P 803.

83. A corporation which is a resident and a taxpayer may maintain a taxpayer's bill to restrain the misapplication of funds, though they were raised by a loan authorized by the electors of the city and not by the taxpayers. Wolff Chemical Co. v. Philadelphia, 217 Pa. 215, 66 A 344. Taxpayers seeking to restrain disbursement of public money under a void contract are not estopped because they did not begin their action until the completion of the work done under the contract. Cawker v. Milwaukee [Wis.] 113 NW 417. A bill by taxpayer will lie to enjoin municipal authorities from misappropriating municipal funds. Taxpayers are equitable owners of funds. Litz v. West Hammond, 230 Ill. 310, 82 NE 634. An authorized expenditure of municipal funds may be restrained though warrants have been issued. Under Hurd's Rev. St. 1905, c. 24, § 91, appropriations not provided for in the annual appropriation will be restrained. Id.

84. Cathers v. Moores [Neb.] 113 NW 119, rvg. former opinion [Neb.] 110 NW 689. But to entitle a taxpayer to maintain such action, it must appear that the municipality could have maintained the action in the first instance. Id. A taxpayer having full knowledge of the allowance of a claim by a municipality and not availing himself of an opportunity to appeal from such allowance is not entitled to maintain an equitable action to recover the money disbursed upon such allowance. Id.

85. Where ten or more taxable inhabitants unite, the only remedy is by petition to the supreme judicial court or the superior court, under Rev. Laws, c. 25, § 100. Finlay v. Boston [Mass.] 82 NE 5.

86. See Taxes, 8 C. L. 2058.

87. See Public Works and Improvements, 8 C. L. 1506.

88. Municipal liens have no priority over mortgages made prior to the act creating the lien. Haspel v. O'Brien, 32 Pa. Super. Ct. 147; Gibbons v. Cochran, 32 Pa. Super Ct. 185.

89. Hence the holder of such warrants, even when payable to bearer or order, stands in the shoes of the payee. Jack v. Wichita Nat. Bk., 17 Okl. 430, 89 P 219.

90. Abrahams v. Omaha [Neb.] 114 NW 161; Rogers v. Omaha [Neb.] 114 NW 833.

91. Out of a special fund which city is not authorized to create, or out of special fund which city may lawfully create, but the failure to create which is due solely to the fault or negligence of the city. Abrahams v. Omaha [Neb.] 114 NW 161.

92. O'Dell v. Scranton, 126 Mo. App. 19, 103 SW 570.

93. Warrant payable out of back taxes. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756.

palities are prohibited from incurring indebtedness above a certain sum usually fixed at a percentage of the assessed valuation.[94] But it is sometimes provided that the general limit may be extended for certain purposes.[95] The determination of what are debts depends on the wording of the particular limitation.[96]

§ 14. *Torts and crimes.*[97]—A municipal corporation exercises functions of two classes, private and governmental.[98] In respect to matters of the former class, it is liable for the negligent acts of its officers and employes in the due course of duty to the same extent as a private corporation.[99] In the exercise of its governmental functions, the municipality possesses the attributes of sovereignty and is not liable in tort in the absence of statute imposing such liability.[1] A city directing the depression of

94. Cunningham v. Cleveland [C. C. A.] 152 F 907; Reed v. Cedar Rapids [Iowa] 113 NW 773; Eau Claire Water Co. v. Eau Claire [Wis.] 112 NW 458. The general statutes of Minnesota limiting the indebtedness of municipal corporations to five per cent of the assessed valuation of taxable property do not apply to the city of Waseca, being superseded by the charter limiting the indebtedness to ten per cent of the assessed valuation. American Elec. Co. v. Waseca, 102 Minn. 329, 113 NW 899. A city operating under a special charter is not affected by Mississippi Ann. Code 1892, § 3014, limiting the amount of bonds a city may issue. Love v. Holmes [Miss.] 44 S 835. Taxpayers held precluded by laches from enjoining the city from paying an indebtedness created by the issuance of bonds in excess of the constitutional limit. Schnell v. Rock Island, 232 Ill. 89, 83 NE 462.

95. Under the Montana constitution and statutes a city can only avail itself of the privilege of the extension when the financial condition of the city requires a resort to it, and cannot arbitrarily declare a debt to be in the extended limit where the city is not indebted to the original limit. Butler v. Andrus, 35 Mont. 575, 90 P 785.

96. Held no part of city indebtedness: City bonds payable out of the revenue of the water system do not constitute a part of the general indebtedness of the city within the meaning of such limitation. Dean v. Walla Walla [Wash.] 92 P 895. City bonds issued for the purchase of waterworks and payable out of the general fund cannot be considered as a part of the indebtedness for general municipal purposes, but are a portion of the additional indebtedness allowed for water, light and sewer purposes. Id. Where a city purchased waterworks and agreed to pay therefor a certain sum secured by "revenues arising from water service to private consumers," such agreement did not create a debt against the city within the constitutional limitaton. State v. Neosho, 203 Mo. 40, 101 SW 99. Bonds issued to fund a floating debt contracted for necessary expenses of city government are not issued for a special purpose within the meaning of North Carolina Revisal 1905, § 2977, prohibiting a city from contracting any debt, etc., for any special purpose to an extent exceeding ten per cent of the assessed valuation of the property therein. Wharton v. Greensboro [N. C.] 59 SE 1043. Debts contracted for paving and sewer purposes are not to be computed in ascertaining whether the limit has been reached, since there is no general liability against city for such indebtedness except for a portion of the cost. Vallelly v. Grand Forks Park Com'rs [N. D.] 111 NW 615. Street improvements, a portion of the cost of which is to be defrayed by special assessment on abutting property, will not create an indebtedness within the meaning of such limitation. Corey v. Ft. Dodge, 133 Iowa, 666, 111 NW 6. Bonds issued by an independent school district are not to be computed as debts of the city in ascertaining whether the debt limit has been exceeded. Vallelly v. Grand Forks Park Com'rs [N. D.] 111 NW 615.

97. See 8 C. L. 1078. See, also, **Abbott, Mun. Corp. §§ 950-1066.**

98. Evans v. Kankakee, 231 Ill. 223, 83 NE 223; Wilcox v. Rochester, 190 N. Y. 137, 82 NE 1119; Gillmor v. Salt Lake City [Utah] 89 P 714.

99. Wilcox v. Rochester, 190 N. Y. 137, 82 NE 1119. The care of streets is a corporate and not a governmental function, and a city is liable to any one injured through its negligence in the performance of that duty. Injury to city employe while engaged in repairing street. Burke v. South Omaha [Neb.] 113 NW 241. A muncipality operating an electric light plant for commercial purposes is liable to the public the same as an individual for the negligence of employes. Todd v. Crete [Neb.] 113 NW 172. Fact that wire causing injury was not in use at time of accident constitutes no defense. Id. Where a city maintained a conduit not used in the distribution of water for pay, but which was a part of and necessary to the system of waterworks by which the city supplied the inhabitants with water for domestic use at fixed rates, held the city was liable for an accident occurring in the conduit to the same extent as a private owner would be. Brown v. Salt Lake City [Utah] 93 P 570. City liable for negligence of servants in removing dirt from its streets, though such removal may in a remote degree be referable to governmental regulation to promote the general health of the city. Young v. Metropolitan St. R. Co., 126 Mo. App. 1, 103 SW 135.

1. City of Dayton v. Glasser, 76 Ohio St. 471, 81 NE 991. The duty exercised by the city of Rochester under the general statutes relating to cities of the second class, of maintaining and caring for a police station, used in part as a jail for prisoners, and in part for the accommodation of its police force, is a governmental duty, and the city is not liable for the negligence of an employe in charge of an elevator therein. Wilcox v. Rochester, 190 N. Y. 137, 82 NE 1119. Municipality not liable for arrest made by police acting as governmental agency. Clay-

railroad tracks for the purpose of abolishing grade crossings acts in the performance of a duty imposed for the general welfare of its citizens and is not liable for injuries resulting therefrom.[2] Under this rule a municipality is not liable for negligence connected with the operation of its fire [3] and police departments,[4] nor the control of its parks,[5] nor is liability incurred by a city for failure to pass or enforce ordinances,[6] or for failure to furnish protection against mob violence,[7] for failure to adopt a plan for drainage of surface water.[8] Neither is a city liable for destruction of property by fire through failure to furnish adequate water supply.[9] With respect to facilities designed for the use and benefit of the public, the municipality is not liable for any matter growing out of the plan of the work,[10] but is liable for failure to keep such facilities in repair,[11] or for negligence in the actual execution or construction of its public works,[12] unless such matters are committed to an independent instrumentality.[13] Where a municipality engages in private business without authority, it is

man v. New York, 117 App. Div. 565, 102 NYS 661.

2. Liermann v. Milwaukee [Wis.] 113 NW 65. Searching a river for dead body is a public service not for benefit of city alone, and hence city is not liable for trespass upon and injury to property by its police officers and persons acting under their direction while engaged in such search. Gillmor v. Salt Lake City [Utah] 89 P 714. City not liable for destruction by its officers of building maintained within the fire limits in violation of an ordinance. Wheeler v. Aberdeen [Wash.] 92 P 135.

3. Furnishing water for fire protection is governmental function. Brown v. Salt Lake City [Utah] 93 P 570. Negligence of driver of team connected with fire department. Higgins v. Superior [Wis.] 114 NW 490. City not liable for negligence of its servants in allowing fire engines or fire cisterns to get out of repair, thereby causing loss of property. Terrell v. Louisville Water Co., 31 Ky. L. R. 1281, 105 SW 100. Child in fire engine house by invitation fell through unguarded opening in floor. Brown v. District of Columbia, 29 App. D. C. 273.

4. Gillmor v. Salt Lake City [Utah] 89 P 714. Municipality not liable for wrongful or negligent acts of its police officers or board of health in managing a calaboose and detaining therein persons afflicted with smallpox, resulting in the contraction of such disease by persons working or residing nearby. Evans v. Kankakee, 231 Ill. 223, 83 NE 223.

5. City not liable for injuries sustained by negligence of employes in operation of steam roller in park. Louisville Park Com'rs v. Prinz [Ky.] 105 SW 948.

6. Abatement of nuisance. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631.

7. Acts held not to have constituted a riot so as to impose a liability upon a municipality for the destruction of property by mob violence, under the New York General Municipal Law, Laws 1892, p. 1740, c. 685, § 21. Adamson v. New York, 188 N. Y. 255, 80 NE 937.

8. Campbell v. Vanceburg, 30 Ky. L. R. 1340, 101 SW 343.

9. See 8 C. L. 1078, n. 59.

10. City not liable for failure to select the best possible route or to adopt the best plan of construction in relocating a water main to permit the building of a rapid transit station if those selected were reasonably safe. Kelsey v. New York, 123 App. Div. 381, 107 NYS 1089.

11. Failure to keep bridge in repair. City of Cedartown v. Brooks, 2 Ga. App. 583, 59 SE 836. Where by extension of corporate limits, a public bridge owned and controlled by a county comes to be within the city, it becomes the duty of the city to keep the bridge in repair, and city is liable for injury caused by defect or want of repair of such bridge. Cavender v. Charleston [W. Va.] 59 SE 732. Surface water diverted from its natural flow through failure of city to keep in repair an artificial drainage system, constructed by it. City of McCook v. McAdams [Neb.] 114 NW 596. City not liable for failure to keep in repair a leader pipe from a building which discharges water into an areaway, whence it runs onto the sidewalk and freezes. Udkin v. New Haven [Conn.] 68 A 253. With respect to the care and maintenance of property which, although acquired for a definite public use, has not yet been improved for such purpose, and is used if at all, by mere sufferance, a municipality is held to the same rule of liability for alleged negligence as an individual owner would be, and is not liable for injuries to trespassers, bare licensees, etc., coming upon it without invitation, express or implied. Pier acquired by city for a public use to which it had not yet been devoted, and to which the public had not been invited. Birch v. New York, 190 N. Y. 397, 83 NE 51. Board of education having power to close school buildings when in a dangerous condition is liable for injuries to child by falling of plaster from ceiling of schoolroom. Wahrman v. New York Board of Education, 187 N. Y. 331, 80 NE 192.

12. Laying drainage pipes to carry off surface water. Mayrant v. Columbia, 77 S. C. 281, 57 SE 857. City liable where it negligently adopts a drainage plan or constructs insufficient drains, causing overflow of surface water. Campbell v. Vanceburg, 30 Ky. L. R. 1340, 101 SW 343. In action for injuries caused by defect in street arising from the cutting of a sewer ditch and refilling same after line was laid, complaint held to sufficiently aver negligence on part of city. City of Anniston v. Ivey [Ala.] 44 S 48. Negligence in blasting ditch for sewer. City of Cherryvale v. Studyvin [Kan.] 91 P 60.

13. School yard under jurisdiction of board of education. McCullough v. Philadelphia, 32 Pa. Super. Ct. 109.

not liable for injuries caused by its acts.[14] With respect to street lighting [15] and the construction and operation of sewer systems,[16] the cases are not in unison. A municipality in maintaining and repairing a highway acts as agent of the state, and is not responsible for injuries to persons or property [17] in the absence of a statute creating liability. It has been held that an abutting owner claiming to be injured must resort to an action at law.[18] Dangerous places in grounds or ways for public use must be guarded with reasonable prudence.[19] To charge a municipality with liability for the defective condition of any of its public places or facilities, it must have

14. Under Hurd's Rev. St. 1905, c. 24, § 1, a city has no power to maintain a hospital for revenue and is not liable for negligence in so doing. Tollefson v. Ottawa, 228 Ill. 134, 81 NE 823, afg. 129 Ill. App. 139. City furnishing electricity for both public and private use without authority to do so not liable for injuries arising from defective wires. Village of Palestine v. Siler, 225 Ill. 630, 89 NE 345, afg. 128 Ill. App. 309.

15. A city owes no duty to a licensee on private property to keep in a safe condition wires located thereon and connected with the city lighting plant. Policeman injured by coming in contact with improperly insulated wire while on the roof of a building in the nighttime for the purpose of detecting persons violating the law, but without owner's knowledge or consent. City of Greeneville v. Pitts [Tex.] 107 SW 50.

16. Liability imposed: Defective sewers, proving inadequate to carry off waters occasioned by ordinary storms. Karfiol v. New York, 119 App. Div. 70, 103 NYS 1036. Substituting for natural drainage a sewer insufficient to carry off ordinary rainfalls, thereby causing overflow onto abutting land. Fewell v. Meridian [Miss.] 43 S 438. Liability of city for polluting and diverting water from brook used for sewerage purposes. Stevens v. Worcester [Mass.] 81 NE 907. Where a drain laid by property owners in a public street under permission from city, empties into a natural stream, and thereafter, without express license from the city, is used as a sewer to discharge sewage into the stream to the injury of a lower riparian owner, the drain is a nuisance, and the city is liable for negligence in not abating it. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631. Accumulation of drift and other obstructive material caused by cross-pipe passing through manhole, thus preventing proper flow of surface water through outlet pipe. Fewell v. Meridian [Miss.] 43 S 438. And city liable, although cross pipe was constructed by plaintiff's grantor, where it assumed control over manhole and cross-pipe, and dealt with it as part of its drainage system. Id. City bound to use reasonable care to protect public against danger arising from negligent maintenance of culvert, although city did not construct it, where it used and maintained it as a part of its sewerage system. Vaccarini v. New York, 54 Misc. 600, 104 NYS 928. Nauseous gases escaping from defective sewer, preventing use of adjoining property. Murray v. Butte, 35 Mont. 161, 88 P 789.

Liability denied: Where the sole cause of damage was an overflow from an unusual flood, and there was no notice to the city of an alleged defective condition of a sewer, nor of any obstruction which city authorities could relieve or remove after notice, the city was not liable. Judas v. New York, 105 NYS 96.

17. Where a bridge is built by a city outside the corporate limits under legislative authority, the city is not liable for failure to keep such bridge in repair. Injuries to horse while passing over bridge. Town of Montezuma v. Law, 1 Ga. App. 579, 57 SE 1025. Abutting owner cannot recover for consequential damages resulting to property, due to establishment of grade, different from natural grade, or to change of established grade in absence of statute. In re Perry Ave. in City of New York, 118 App. Div. 874, 103 NYS 1069.

18. See 8 C. L. 1079, n. 70. Admissibility of evidence in action for damages to property caused by grading abutting sidewalk. Town of Eutaw v. Botnick [Ala.] 43 S 739. Cross-examination of witnesses. Id.

19. Municipality liable for permitting excavation along edge of sidewalk to remain unguarded. Muncy v. Bevier, 124 Mo. App. 10, 101 SW 157. City liable for permitting building materials to remain in street unguarded and unprotected. City of La Porte v. Henry [Ind. App.] 83 NE 655. Fact that city had passed an ordinance authorizing contractors to place such materials in the street does not absolve city from liability for allowing them to remain unguarded. Id. Whether city's negligence in allowing building material to remain in street unguarded caused plaintiff's injury, held, under the evidence, a question for the jury. Jones v. Ogden City [Utah] 89 P 1006. Liability for injuries sustained by traveler stumbling over top of manhole whose top was several inches above surface of sidewalk was a question for jury. Corr v. New York, 121 App. Div. 578, 106 NYS 280. City not liable for injuries sustained by child on a drawbridge not in itself dangerous and in the proper and lawful use of which no injury could have resulted. Widger v. Philadelphia, 217 Pa. 161, 66 A 249. In action against city for injuries sustained through its alleged negligence in permitting a body of water to collect in a street, complaint held demurrable, as showing that city's alleged negligence was not the proximate cause of plaintiff's injury. Crowley v. West End [Ala.] 43 S 359. On a charge that city failed to perform duty owed to plaintiff as a traveler on one of its streets, held that city was not liable for injuries sustained by reason of defective condition of a wagon scale constructed in the street but outside of the traveled portion. O'Neil v. New Haven [Conn.] 67 A 487. City held guilty of negligence in allowing a loose plank to remain for a week on an iron water pipe lying on the surface of the street. City of Grand Forks v. Allman [C. C. A.] 153 F 532.

had actual or constructive notice thereof,[20] the question of constructive notice being for the jury.[21] A municipal corporation is liable for the acts of its officers, servants, or agents, done within the scope of their authority.[22] A city is not liable for the acts of an independent contractor engaged in the construction of a public work [23] unless the work is intrinsically dangerous or liable to create a nuisance.[24] A municipality is not liable when the proximate cause of the injury was the intervening and wrongful act of a stranger,[25] and if it be held liable for damages sustained in consequence of the unsafe condition of its streets, there can be a recovery over by the municipality against the person by whose wrongful act or omission the street was rendered unsafe.[26]

§ 15. *Claims and demands.*[27]—Statutes usually require that notice be given to municipalities within a limited time of demands for injuries received by reason of defective streets, sidewalks, or otherwise.[28] The provisions of these statutes ordinarily do not extend to claims for injuries to realty,[29] but do apply to claims arising under contract.[30] These notices must be sufficient in point of form [31] and contents [32]

20. City of Grand Forks v. Allman [C. C. A.] 153 F 532; Fewell v. Meridian [Miss.] 43 S 438. Defect in sidewalk existing for several months held constructive notice. City of Natchez v. Lewis [Miss.] 43 S 471. City held not chargeable with constructive notice of hole in sidewalk which was covered by a board so as to be invisible. Yeager v. Burwick Borough [Pa.] 67 A 347. Notice to the mayor is notice to the city. Shinnick v. Marshalltown [Iowa] 114 NW 542. In action for injuries caused by defect in street arising from the cutting of a sewer ditch and refilling same after line was laid, complaint held to sufficiently aver notice, actual or constructive, to the city of the defect. City of Anniston v. Ivey [Ala.] 44 S 48.

21. City of Grand Forks v. Allman [C. C. A.] 153 F 532; Jones v. Ogden City [Utah] 89 P 1006. Rejected curbstones remaining in street after completion of work. Meyers v. Philadelphia, 217 Pa. 159, 66 A 251.

22. Healdsburg Elec. L. & P. Co. v. Healdsburg [Cal. App.] 90 P 955; Todd v. Crete [Neb.] 113 NW 172. The doctrine of respondeat superior applies to municipal corporations. Higbie v. New York Board of Education, 122 App. Div. 483, 107 NYS 168. A municipality is not liable for the tortious act of a public official where the relation of master and servant does not exist between them. Johnson v. Somerville [Mass.] 81 NE 268. City liable for injuries sustained by running into rope stretched across street by order of the mayor. Shinnick v. Marshalltown [Iowa] 114 NW 542.

23. Property owners engaged in work on a city street in front of their properties in obedience to the requirements of an ordinance are not independent contractors over whom the municipal authorities have no control. Meyers v. Philadelphia, 217 Pa. 159, 66 A 251. Where work of resetting curbing was performed by property owner under an ordinance, the city is liable for injuries caused by allowing rejected curbstones to remain in the street after completion of work if it had notice of such obstruction. Id.

24. See 8 C. L. 1080, n. 80. Obstruction of street by contractor incident to the repair of a sewer held to constitute a nuisance, and city held liable for injuries resulting therefrom. Warden v. New York, 108 NYS 305.

25. Child injured on drawbridge through act of stranger. Widger v. Philadelphia, 217 Pa. 161, 66 A 249.

26. Trap door in sidewalk allowed to remain in unsafe condition by abutting owner, resulting in injury to pedestrian. City of Seattle v. Puget Sound Imp. Co. [Wash.] 91 P 255.

27. See 8 C. L. 1080. See, also, **Abbott, Mun. Corp. §§ 484-495.**

28. See Highways and Streets, 9 C. L. 1588, for rulings under statutes relating wholly to streets. City of Grand Forks v. Allman [C. C. A.] 153 F 532. Provisions in Niagara Falls city charter providing that claims against a city shall be presented within thirty days is not a statute of limitations, but a condition precedent, and compliance with it must be alleged and proved. Winter v. Niagara Falls, 190 N. Y. 198, 82 NE 1101. Petition for mandamus held to show that petitioner had a cause of action against the city and that she had served the notice prescribed by St. 1898, § 1339. State v. Bechtner [Wis.] 113 NW 42. The Utah statute does not apply to actions to recover damage for negligently causing death, and it is not required that claims be presented in such cases. Brown v. Salt Lake City [Utah] 93 P 570.

29. See 8 C. L. 1081, n. 85.

30. And occasionally claims arising out of contract are required to be presented. The presentation of a claim to a city is not indispensable to the maintenance of an action upon it under § 5854, Rev. St. Mo. 1899. The only penalty for a failure to present it is disallowance by the city, and, if the claim is unliquidated, the loss of costs. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

31. Michigan Comp. Laws, § 2754, requires notice to be verified. Morlan v. Marcellus [Mich.] 14 Det. Leg. N. 667, 114 NW 236.

32. Where notice complies with charter provisions on the subject, it is not essential that it comply with the general law. Peterson v. Red Wing, 101 Minn. 62, 111 NW 840, following Grant v. Berrisford, 94 Minn. 45, 101 NW 940, 1133. Claim held to comply with requirements of Rev. Code N. D. 1899, § 2172. City of Grand Forks v. Allman [C. C. A.] 153 F 532. Not necessary that notice state that party giving same will claim damages (Wright v. Omaha [Neb.] 110 NW 754), nor

and presented to the proper officials [33] within the prescribed time,[34] but defects therein may be waived by the city,[35] and a substantial compliance with statute requiring notice is sufficient.[36] Notice by a wife may support an action by the husband.[37] In the absence of prohibitive enactments, claims against municipalities are the proper

the amount or kind of damages suffered (Id.). Description of place of injury is sufficient which reasonably notifies the authorities of the locality. Ellis v. Seattle [Wash.] 92 P 431. Notice held insufficient with respect to description of place of injury. Barribeau v. Detroit, 147 Mich. 119, 13 Det. Leg. N. 810, 110 NW 512.

33. City auditor held to be a proper officer under North Dakota statutes. City of Grand Forks v. Allman [C. C. A.] 153 F 532.

34. Under New York city charter, Laws 1901, p. 114, c. 466, § 261, and Laws 1886, p. 801, c. 572, notice of intention to sue for personal injuries must be presented to the corporation counsel within six months from the time the injuries were received. Notice held not to have been filed within the time limit. Bernreither v. New York, 107 NYS 1006. A claim which accrued before a city charter went into effect is not defeated because not presented within six months as required by the provisions of that charter. Crim v. San Francisco [Cal.] 92 P 640. Notice by filing claim within sixty days after happening of injury. City of Grand Forks v. Allman [C. C. A.] 153 F 532.

Note: The plaintiff was injured in a runaway caused by a steam roller. More than three years elapsed after the accident before a claim for damages was presented to the city. Its charter provides that claims for damages founded on negligence shall be presented to the council within thirty days or an action therefor shall be barred. The plaintiff was eighteen years old at the time of the injury. Held, that the statutory requirement was not a statute of limitations the running of which was suspended during infancy, that it was a condition precedent to the maintenance of the action the performance of which must be averred, and that visits from the mayor and an examination by the city attorney did not constitute a waiver on the part of the city (O'Brien and Vann, JJ., dissented). Winter v. Niagara Falls, 190 N. Y. 198, 82 NE 1101. Whatever may be the difference of opinion as to the common-law liability of a municipality in tort for the negligence of its servants, there is no doubt on the proposition that such liability can be imposed by statute. Similarly the proceedings which are to be followed in seeking a recovery can be controlled. In one respect such statutes have been strictly construed. Where they require that notice be given the city or any "claim," "claim or claims," "any demand or claim," or "upon any claim or demand," such words do not apply to actions ex delicto, and in general do not make notice a condition precedent to such actions. Cropper v. Mexico, 62 Mo. App. 385; City of Chadron v. Glover, 43 Neb. 732; Howell v. Buffalo, 15 N. Y. 512; Sherman v. Oneonta, 142 N. Y. 637; Shields v. Durham, 118 N. C. 450, 36 L. R. A. 293; Kelly v. Madison, 43 Wis. 638, 28 Am. Rep. 576. But the words "upon any claim or demand of whatsoever nature" include both contracts and torts. Van Frachen v. Ft. Howard, 88 Wis. 570. And it has been so held as to the word "claim" alone. Barrett v. Mobile, 129 Ala. 179, 87 Am. St. Rep. 54. In the principal case the charter in terms required the notice of claims for negligence. Legislative regulations of this character are controlling, and a compliance with them is a condition precedent to the bringing of the action. Barrett v. Mobile, 129 Ala. 179, 87 Am. St. Rep. 54; Hancock County v. Leggett, 115 Ind. 544; Hastings v. Foxworthy, 45 Neb. 676, 34 L. R. A. 321; Reed v. Madison, 83 Wis. 171, 17 L. R. A. 733; Hay v. Baraboo, 127 Wis. 1, 115 Am. St. Rep. 977, 3 L. R. A. (N. S.) 584. But a substantial compliance is all that is necessary when the party's injuries prevent (Walden v. City of Jamestown, 178 N. Y. 213), or where the authorities delay taking action upon a notice (Dundas v. Lansing, 75 Mich. 499, 13 Am. St. Rep. 457, 5 L. R. A. 143; Whitney v. Port Huron, 88 Mich. 268, 26 Am. St. Rep. 291). In the form of the notice, compliance need only be substantial. Langley v. Augusta, 118 Ga. 590, 98 Am. St. Rep. 133. It is difficult to see how the city could waive such a requirement. A city may be estopped in pais as to matter relating to real property and contracts. People v. Rock Island, 215 Ill. 488, 106 Am. St. Rep. 179; City of Mt. Vernon v. State, 71 Ohio St. 428, 104 Am. St. Rep. 783. And the failure of the plaintiff to give notice is waived by the failure of the city to plead the statute in defense, since it is in the nature of a statute of limitations. Borghart v. Cedar Rapids, 126 Iowa, 313, 68 L. R. A. 306; O'Connor v. Fond du Lac, 109 Wis. 253, 53 L. R. A. 831. But beyond this it would appear that the acts of its officers could not operate as a waiver of the statutory requirement, nor could they estop the city.—From 6 Mich. Law Rev. 430.

35. Defects as to verification and sufficiency of description of claimant's injury held to have been waived where council did not decline to consider the claim because not properly made out, but acted upon it. Bowman v. Ogden City [Utah] 93 P 561. Failure to verify notice as required by statute held to have been waived by city. Morlan v. Marcellus [Mich.] 14 Det. Leg. N. 667, 114 NW 236. City held not to have waived the right to insist that a claim had not been presented within the prescribed time. Winter v. Niagara Falls, 190 N. Y. 198, 82 NE 1101.

36. Where a statute required a verified statement of the nature of the claim, time, and place at which injury received to be filed with clerk six months after cause of action accrued, filing of a carbon copy of original statement, where latter produced at trial, was sufficient. Scheer v. Perry, 119 App. Div. 606, 103 NYS 1048.

37. Notice to city by wife conforming to the statutory requirements and informing the city that the injured party is a married woman whose husband may suffer consequential damage arising from her injury is sufficient to enable the husband to maintain an action therefor. Wright v. Omaha [Neb.] 110 NW 754.

subject of assignment.[38] Injunction lies at the instance of a taxpayer to prevent the payment of an illegal claim.[39] Charters sometimes provide that claims which have been rejected by the city or have not been presented within a prescribed time shall not be allowed except through the order of a court of competent jurisdiction.[40] An appeal may be taken from the action of a council in disallowing a claim for personal injuries.[41]

§ 16. *Actions by and against.*[42]—In the absence of statutory limitation, municipal corporations in exercising their general corporate power may sue and be sued.[43] A tax payer may, under a statute permitting him to sue to recover money due the municipality, apply to a court of equity for other and further relief.[44] The corporate name should be used.[45] The time within which actions for negligence against a city may be brought is regulated by statute,[46] and a statutory provision that no action for negligence is maintainable against a city unless begun within one year after the accrual of the right of action does not bar the right of action of a minor.[47] A city's right to enforce a tax lien may be lost by inexcusable laches.[48] The rule that the burden is upon the defendant to establish the defense that the loss was caused by the act of God has no application to an action against a city for negligence.[49] In the absence of statutory inhibition an execution may issue against a city, and while on the ground of public policy it cannot be levied on any of the general revenues of the city either before or after their collection, or upon any property real or personal reasonably

38. See 8 C. L. 1081, n. 92.

Contra: Assignment to bank of which mayor is stockholder and president of a claim of contractor against city for work which he has not performed for city and which must be inspected and accepted for city by a board of which the mayor is chairman held contrary to public policy and void both at common law and under the statute. People's Sav. Bank v. Big Rock Stone & Const. Co. [Ark.] 99 SW 836.

39. Injunction granted to restrain payment of salary claim of an offier who was not duly appointed. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600.

40. The charter of the city of Omaha which enacts that the mayor and council shall not allow such claims is a limitation upon the power and jurisdiction of the body itself, and a claim so situated is extinguished so far as the judicial powers of the mayor and council are concerned. Redell v. Omaha [Neb.] 113 NW 1054.

41. In case of such appeal to the circuit court the charter of the city of Appleton requires the execution of a bond for costs to be approved by the mayor and clerk, and a bond approved by the clerk alone gives the circuit court no jurisdiction. Sharp v. Appleton [Wis.] 113 NW 1090.

42. See 8 C. L. 1081. See, also, **Abbott, Mun. Corp. §§ 1107-1168.**

43. Clarke v. School Dist. No. 16 [Ark.] 106 SW 677; Davidson v. White Plains, 105 NYS 803. The water and light board of the city of Waseca is, under the provisions of the charter, clothed with the exclusive control and management of the water and light plant, and may sue and be sued on contracts relating thereto. American Elec. Co. v. Waseca, 102 Minn. 329, 113 NW 899. But unofficial citizens cannot maintain an action on the behalf and in the name of the city. Action by taxpayer suffering no particular injury to recover of city officials for their wrongful conversion and embezzlement of public moneys. Cathers v. Moores [Neb.] 110 NW 689. Under §§ 1, 27, Code 1896, personal representative may maintain action against municipality to recover for death resulting from an injury directly attributable to defect in street. City of Anniston v. Ivey [Ala.] 44 S 48. Under the North Dakota statute a fire company may recover from a city its proportionate share of the premiums received from fire policies issued on property in the city. Under Rev. Codes 1905, § 2968, plaintiff must show affirmatively that it had the management of at least one steam, hand, or fire engine, hook and ladder truck, or hose cart, during the time wherein it claims to be entitled to such premiums. Continental Hose Co. v. Fargo [N. D.] 114 NW 834.

44. Perkins v. Reservoir Park Fishing & Boating Club, 130 Ill. App. 128.

45. Town of East Rome v. Rome, 129 Ga. 290, 58 SE 854.

46. An action by a husband to recover for the loss of services of his wife resulting from an inury received by her through the negligence of the city's servants is an action for "an injury to the person" within the meaning of Laws 1902, p. 322, c. 406, and can only be commenced within two years next after the cause of action accrues. Mulvey v. Boston [Mass.] 83 NE 402.

47. Under Niagara City charter, § 53 (Laws 1892, p. 241, c. 143, as amended by Laws 1897, p. 1004, c. 739), requiring claims to be presented within thirty days, **service of notice** by infant within thirty days after injury does not necessarily require that suit be begun within a year thereafter. Winter v. Niagara Falls, 119 App. Div. 586, 104 NYS 39.

48. Seibert v. Louisville, 30 Ky. L. R. 1317, 101 SW 325.

49. City of McCook v. McAdams [Neb.] 110 NW 1005.

necessary for governmental purposes, still, if the city is possessed of any property held for pecuniary benefit, such property may be taken.[50] Mandamus lies to compel levy of taxes to satisfy judgment,[51] or to pay a warrant,[52] or to compel the payment by city officials only of money collected and held for the purpose of paying a judgment against the city.[53]

MUNICIPAL COURTS; MURDER; MUTUAL ACCOUNTS; MUTUAL INSURANCE, see latest topical index.

NAMES, SIGNATURES, AND SEALS.

§ 1. Names, 915.
§ 2. Signatures, 916.
§ 3. Seals, 917.

The scope of this topic is noted below.[1]

§ 1. *Names.* See 8 C. L. 1082—A middle name or initial is deemed no part of the name,[2] hence its omission, or the insertion of a wrong one, will not ordinarily create a misnomer,[3] but mistake in the first name [4] or a transposition of initials may be fatal, especially in special statutory proceedings.[5] Where a person is known by more than one name, proceedings may be instituted against him by either or the one by which he is generally known.[6] Wrong spelling or improper contraction of a name in a deed or other contract will not vitiate if identity of person is sufficiently shown.[7]

50. Property owned and held by a municipal corporation other than for governmental purposes may be levied upon for the payment of debts. Southern R. Co. v. Hartshorne [Ala.] 43 S 583. Where a municipality while indebted paid the purchase price of lands conveyed to a railroad, intending the same as a gift or donation, it is the same as if the municipality held and owned the land and for other than governmental purposes, and such voluntary conveyance being fraudulent as to existing creditors of the municipality, such creditors may maintain a creditor's bill under Code 1896, § 818. Id.

51. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756. A writ of mandamus requiring a city to levy taxes for municipal purposes up to the limit of its power to tax under the charter, and to apply the surplus remaining after paying current expenses chargeable thereon in payment of a judgment against it, is continuous in its operation and the order of the court may be modified from time to time to meet the exigencies of the case. Cunningham v. Cleveland [C. C. A.] 152 F 907. Held that the city of New Orleans could not be compelled by mandamus to levy an additional tax in order to make good its failure to turn over to the police board the police tax levied and collected by it. State v. New Orleans, 119 La. 624, 44 S 321.

52. Right to enforce by mandamus levy of tax to pay warrants lost by laches. Duke v. Turner, 204 U. S. 623, 51 Law. Ed. 652.

53. Montpelier Sav. Bank & Trust Co. v. Quinn, 149 Mich. 701, 14 Det. Leg. N. 551, 113 NW 308.

1. It excludes trade names (see Trade Marks and Trade Names, 8 C. L. 2137), use of name as incident to good will (see Good Will, 9 C. L. 1539), and while retaining a few general propositions as to business names, excludes generally corporate (see Corporations, 9 C. L. 736) and firm, (see Partnership, 8 C. L. 1268) names. The designation in indictments of the accused and the person injured is excluded (see Indictment and Prosecution, 10 C. L. 57), though some cases illustrating the rule of idem sonans are retained.

2. Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 NE 815; Houpt v. Dutton [Ind.] 83 NE 634. Rule disregarding middle initial or name grew out of former custom of having only one Christian name, and since the almost universal custom of having more than one such name, the rule has lost much of the reason on which it was based. Wicker v. Jenkins [Tex. Civ. App.] 108 SW 188.

3. J. "S." W. for J. "W." W. in appeal record. Houpt v. Dutton [Ind.] 82 NE 634. In condemnation, notice to J. "H." B., a nonresident, held sufficient though record owner was Joseph "F." B., nonresident, and there was a Jacob "H." B. in township. Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 NE 815. Designation of a defendant as Henry T. Brown in notice of publication may be fatal where his real name is Henry. P. P. Brown. Howard v. Brown, 197 Mo. 36, 95 SW 191. Dropping of middle initial does not require extrinsic proof of identity of person. State Finance Co. v. Halstenson [N. D.] 114 NW 724.

4. Designation of defendant as "Chase M." instead of "Chan M." in published notice held fatal. Schaller v. Marker [Iowa] 114 NW 43.

5. W. "B. F." W. for W. "F. B." W. insufficient in abstract of judgment recorded in another county. Wicker v. Jenkins [Tex. Civ. App.] 108 SW 188.

6. Appointment of committee for incompetent. Sporza v. German Sav. Bk., 104 NYS 260. One as well known by initials "C. H." as by name "Cyrille H." held properly indicted in name of initials. State v. Libby [Me.] 68 A 631.

7. Evidence held to sustain finding that defendant who sometimes signed her first name "Elizabeth" and sometimes "Lizzie"

While a letter of the alphabet is not a name, the initial letter of the Christian name is so commonly used that it is to be regarded as an abbreviation of the name of the person intended.[8] Mere identity of name will not after judgment authorize an appellate court to presume for the purpose of reversing the judgment that the officer who served the summons was a party to the suit.[9] The words "et al" cannot stand in place of names required by law to be stated in a subpoena or writ of error.[10] Whether words following the name of a party in a pleading are descriptio personis is to be determined from the averments of the pleading.[11]

Idem sonans.[See 8 C. L. 1082]—Absolute accuracy is not essential in the spelling of names in legal documents or proceedings.[12]

Business and corporate names.[13]—Letter and bill heads are not contemplated by a statute requiring corporations to print the word "incorporated" on advertising matter.[14] Violation of a criminal statute against doing business under a partnership name where no actual partner is represented will not bar recovery for goods sold.[15] The abbreviation "Co." is proper in the statement of corporate names.[16]

§ 2. *Signatures.*[See 8 C. L. 1083]—No particular form of signature is required provided it is adopted as the signature of the person intended.[17] A mark[18] or typewritten signature,[19] followed by initials,[20] and in some cases the initials of official

had affixed to a note her name in form of "Elizzie." Youngk v. Kein, 34 Pa. Super. Ct. 337. "Said Hulbert" in condition clause in bond held to show that "Hurlbut" previously mentioned as principal was intended. Hurlbut v. Gainor [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 SW 409. Deed from Henry W. signed "Harry" W. held sufficient, correct name being given in body. Woodward v. Mc Collum [N. D.] 111 NW 623. Deed sufficient though grantor signed Christian name merely by initials, where body of deed set forth full Christian and surname. Id. Deed in chain of title describing grantees as Chauncey C., Frank E., and Henry S. Woodworth, held sufficient to vest two-thirds interest in Chauncey C. Woodworth and Frank E. Woodworth. Id. Evidence sufficient to show that one Ackerland who gave a mortgage was owner of the land though title appeared to be in Ackenland. State Finance Co. v. Halstenson [N. D.] 114 NW 724. Where in action by an administrator for death of L. "Schuler" plea of settlement left no doubt that estate of L. "Schuler" was referred to, though name of deceased was given as L. "Schulern," release was properly admitted, identity of personal representative, intestate, and cause of action being shown. Loveman v. Birmingham R. L. & P. Co. [Ala.] 43 S 411.

8. Notice to J. B. sufficient to Joseph B. though there was a Jacob B. Illinois Cent. R. Co. v. Hasenwinkle, 232 Ill. 224, 83 NE 815.

9. Hayman v. Weil, 53 Fla. 127, 44 S 176.

10. But they may be used in indorsing the title of the cause on copy of subpoena in absence of statute or rule requiring indorsement of names thereon. Saddler v. Smith [Fla.] 45 S 718.

11. "Administrator," etc., held descriptio personis. Hanson v. Blake [W. Va.] 60 SE 589.

12. Order appointing guardian for incompetent naming person as "Jetta" held sufficient to authorize payment of money deposited in name of "Jetter." Sporza v. German Sav. Bk., 104 NYS 260.

Held idem sonans: "Ravier" for "Revear" in indictment. Howard v. State [Ala.] 44 S 95, "Gersman" and "Gersmann" in notice of entry of judgment. Gersman v. Levy, 108 NYS 1107. "Peter Peterson" for "Peder Pederson" in execution proceeding. Pederson v. Lease [Wash.] 93 P 439.

Not idem sonans: "Mara" and "Maria" are neither idem sonans nor the equivalents of each other. Berger v. Tracy [Iowa] 113 NW 465.

13. See 6 C. L. 740. See, also, Partnership 8 C. L. 1268; Corporations, 9 C. L. 736; Trade Marks and Trade Names, 8 C. L. 2137.

14. Commonwealth v. National Biscuit Co. [Ky.] 106 SW 799.

15. Pen. Code, § 363, against use of words "and company" or "& Co." Hopp v. McWhirter, 107 NYS 823.

16. "Co." is not variant from "Company" as part of a corporate name. Blue v. American Soda Fountain Co. [Ala.] 43 S 709.

17. Indorsement on note. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386. Misspelling of an official's name to a process will not invalidate it if the official authorized another to sign it in his presence or actually adopted the signature and acted upon it. Signature to tax execution. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

18. Code 1896, § 1, providing that "signature" or "subscription" includes mark when a person cannot write, his name being written near it and witnessed by a person who writes his own name as a witness, does not change the common law so as to invalidate instruments evidencing contracts not required by statute to be in writing though signed by mark without a witness. Penton v. Williams [Ala.] 43 S 211.

19. Typewritten signatures to attachment bond sufficient if adopted by party whose name was signed. Bridges v. First Nat. Bk. [Tex. Civ. App.] 20 Tex. Ct. Rep. 62, 105 SW 1018.

20. Signature of contract to sell land by vendor's agent held sufficient where firm name under which agent did business was

names,[21] may be sufficient. Suffixing a word of representation without more still leaves the name individual,[22] and words of agency may be overcome by evidence.[23] Absence of the name of any officer after the name of a corporation affixed as a signature will not always render the instrument invalid.[24]

§ 3. *Seals.* See 8 C. L. 1083—At common law deeds must be sealed,[25] but not notes or indorsements.[26] An agent without authority under seal cannot bind his principal by contract under seal,[27] nor can the principal ratify by act less solemn than a writing under seal.[28] A seal imports consideration,[29] but it is provided by statute in some states that it shall be only presumptive evidence.[30] Courts do not take judicial notice of the seals of private corporations nor do such seals prove themselves,[31] but where it is shown that an instrument was signed for the corporation by its proper officer, the presumption is that it was duly executed and this presumption includes the authenticity of the seal used in its execution.[32] Unless otherwise provided by charter or statute, a corporation may bind itself without the use of its corporate seal in all cases in which individuals can bind themselves without using a seal.[33]

NATIONAL BANKS; NATURAL GAS; NATURALIZATION, see latest topical index.

NAVIGABLE WATERS.

§ 1. What are Navigable, 918.
§ 2. Relative, Public and Private Rights, 918.
§ 3. Regulation and Control, 920.
§ 4. Remedies for Injuries Relating to, 921.

The rights of riparian owners,[34] the ownership of subaqueous lands,[35] consuming uses of water,[36] and matters relating to navigation[37] and wharfage,[38] are elsewhere treated.

typewritten and followed by his initials written by himself. Degginger v. Martin [Wash.] 92 P. 674.

21. The initals of the official name of an officer taking an acknowledgment are sufficient, especially where his seal is affixed. N. P. for Notary Public. Williams v. Lobban, 206 Mo. 399, 104 SW 58. Addition of letters "T. C." to signature to tax execution sufficiently showed that official issued it as tax collector. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

22. "Trustee" after name of person suing. Moll v. Chicago Sanitary Dist., 131 Ill. App. 155.

23. Evidence held to show that defendants were real parties in interest in contract for services and materials, though words "for S. Trustee" were added to signature of one of defendants Le Greci v. Solomon, 107 NYS 611.

24. Signature of name of plaintiff bank to attachment bond without addition of name of officer who signed held sufficient. Bridges v. First Nat. Bk. [Tex. Civ. App.] 20 Tex. Ct. Rep. 62, 105 SW 1018.

25. Where attesting clause of certified copy of deed declares that it is under seal of grantor and acknowledgment recites due execution, it is presumed original deed was sealed. Hubbard v. Swofford Bros. Dry Goods Co. [Mo.] 108 SW 15. Seal attached to deed executed by agent under power is seal of grantor though latter's name is not written but only name of agent as "attorney for" grantor. Id. Where certified copy of deed acknowledged before a mayor recites that it bears mayor's official seal, it is presumed that omission of "(L. S.)" from copy was a mistake. Id.

26. A seal is unnecessary to an indorsement on a note, whether it be that of a corporation or a private person. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386. A note under seal executed in the partnership name by one of the partners is the simple contract of the partnership, the seal being regarded as surplusage. Cowan, McClung & Co. v. Cunningham [N. C.] 59 SE 992.

27. Hayes v. Atlanta, 1 Ga. App. 25, 57 SE 1087.

28. Lease held to create mere tenancy at will. Hayes v. Atlanta, 1 Ga. App. 25, 57 SE 1087.

29. Trust deed. Thackaberry v. Johnson, 131 Ill. App. 463. Bond unimpeached for fraud, etc., held conclusive evidence of debt against administrator. Woody's Adm'r v. Schaaf, 106 Va. 799, 56 SE 807.

30. Comp. Laws, § 10185. Suit on bond to pay money into bridge fund. Danby Tp. v. Beebe, 147 Mich. 312, 110 NW 1066.

31, 32. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687.

33. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687. See Corporations, 9 C. L. 733.

34, 35. See Riparian Owners, 8 C. L. 1744.

36. See Waters and Water Supply, 8 C. L. 2262.

37. See Shipping and Water Traffic, 8 C. L. 1903.

38. See Wharves, 8 C. L. 2304.

§ 1. *What are navigable.*[See 8 C. L. 1084]—A navigable stream is one that is subject to public use as a highway for purposes of commerce and travel.[39] That one may catch fish,[40] or row or pull a boat,[41] or that the tide ebbs and flows,[42] does not necessarily determine navigability. "Navigable waters of the United States" includes all waters capable of sustaining or being used for interstate or foreign commerce,[43] and all waters under the admiralty and maritime jurisdiction of the United States.[44]

§ 2. *Relative, public and private rights.*[See 8 C. L. 1084]—The public have equal rights to the reasonable use of navigable waters,[45] and any unreasonable obstruction which prevents or hinders such use is a nuisance.[46] The right of navigation for pleasure or recreation is as sacred as the right to navigate for other purposes.[47] Public highways or bridges cannot be laid out across navigable waters without legislative authority,[48] and power in public service corporations to condemn property for canals and reservoirs may not be exercised when a particular enterprise would interfere with the navigation of the waters of the state unless such interference is expressly authorized by statute.[49] A drawbridge constructed and maintained according to proper authority is not an unlawful obstruction to navigation,[50] but its owner is liable for negligent injury to shipping resulting from failure to properly operate it.[51] Dams, embankments, and the like may be constructed to facilitate the use of floatable streams,[52] but not to the extent of retarding the flow of the water or sending it down in increased volume to the injury of riparian proprietors,[53] or at times when the streams would not be otherwise navigable,[54] and in the use of navigable waters the public may not trespass upon private property.[55] While the public cannot be excluded from the benefits of improvements of navigable waters by a riparian owner,[56] they have no right to navigate waters made navigable solely by private enterprise.[57]

39. Smart v. Aroostook Lumber Co. [Me.] 68 A 527. Capability of use for transportation is the criterion as to whether or not a stream is navigable and is a question of fact. Id. All streams of sufficient capacity in their natural condition to float boats, rafts, or logs, are deemed public highways and as such subject to public use. Id.

Held navigable: Presque Isle stream held navigable for thirty miles above a bridge precluding right to obstruct it with logs. Smart v. Aroostook Lumber Co. [Me.] 68 A 527. Rogue river is a navigable stream, and hence it is a public highway where all the people may go of common right, and prima facie they have a common right to fish. Hume v. Rogue River Packing Co. [Or.] 92 P 1065.

Not navigable: Drainage ditch constructed under private grant, from twelve to fifteen feet wide, some places less than two feet deep, and so filled with vegetation that light skiff cannot be rowed. Bolsa Land Co. v. Burdick [Cal.] 90 P 532. Evidence insufficient to show that Big Pass is or ever was navigable. Caddo Levee Dist. Com'rs v. Glassel [La.] 45 S 370. Stream in which in natural condition only small logs could be floated only at extreme high water and for only a few hours at a time held not navigable for floatage. Kamm v. Normand [Or.] 91 P 448. Evidence held to show such stream. Id.

40, 41, 42. Bolsa Land Co. v. Burdick [Cal.] 90 P 532.

43, 44. United States v. Banister Realty Co., 155 F 583.

45. Smart v. Aroostook Lumber Co. [Me.] 68 A 527. The reasonableness of use will depend upon the circumstances of each case. Id. Temporary obstructions within reasonable limits are not unlawful (Id.), but if unreasonable in extent or duration, they are unjustifiable (Id.). Mill company may not obstruct unreasonably with logs and lumber a navigable stream when there are riparian owners who have occasion to use such stream for floating boats and transporting goods to their cottages on the stream. Id.

46. Obstruction by logs. Smart v. Aroostook Lumber Co. [Me.] 68 A 527.

47. Smart v. Aroostook Lumber Co. [Me.] 68 A 527.

48. Road could not be laid out and bridge constructed across flats dry at low water. Chase v. Cochran, 102 Me. 431, 67 A 320.

49. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

50. Southern R. Co. v. Reeder [Ala.] 44 S 699.

51. Southern R. Co. v. Reeder [Ala.] 44 S 699. See Shipping and Water Traffic, 8 C. L. 1903.

52, 53, 54. Kamm v. Normand [Or.] 91 P 448.

55. Pub. Acts 1905, p. 279, No. 189, attempting to confer on private persons the right to boom and assort logs along the shores and secure booms at points along the shores, is invalid as authorizing entry on lands of others and interfering with dominion over their property without compensation. Garth Lumber & Shingle Co. v. Johnson [Mich.] 14 Det. Leg. N. 898, 115 NW 52. Acts not a necessary incident to such navigation as stream afforded. Id.

56. King v. Muller [N. J. Eq.] 67 A 380.

57. Where damming of outlet of lake

The rights of littoral owners in adjacent navigable waters depend on the local laws of the several states subject to the authority of the United States to protect navigation and make improvements.[58] An owner of upland abutting on the shore lands of a navigable lake, the shore lands belonging to the state, has no riparian or littoral rights in the waters of the lake.[59] Grants of exclusive rights in navigable waters will not be presumed,[60] and a private person can have no exclusive statutory right to bar the public from the exercise of common privileges.[61]

A patent cannot by implication convey title to soil under a navigable stream embraced within the limits of the grant so as to affect the status of the stream as a navigable waterway,[62] and even a grant of the bed of such stream leaves it subject to the public right of navigation and the control of congress.[63] But the state may convey into private ownership lands under water between high and low tide,[64] and may also so convey lands perpetually covered by tides subject to the paramount control of the general government,[65] and it is not required to preserve the navigability of waters because the public may desire to fish or hunt.[66]

Where the middle of the channel of a navigable river separates the jurisdictions of two states, both are presumed to have the free use of the whole for purposes of commerce.[67] The free navigation of the Mississippi river by citizens of the United States is guaranteed by treaty, Federal acts, and the state and Federal constitutions.[68]

Right of access. See 8 C. L. 1085—A riparian owner has the right of access to the navigable water and as incident thereto to do all things reasonably necessary to the enjoyment of such right.[69] Each shore owner should have a proportionate share of the deep water frontage,[70] and the line of deep water frontage should be adopted as a basis of apportionment where other rules cannot be equitably applied.[71] Silence or recognition will not preclude one from proving the true line of division of water frontage where it does not amount to estoppel.[72] A statute fixing the boundaries of a city as running with and bounding on a navigable river does not permanently fix the

flooded adjacent wooded depression which private company improved by removing trees and dredging. King v. Muller [N. J. Eq.] 67 A 380.

58. Western Pac. R. Co. v. Southern Pac. Co. [C. C. A.] 151 F 376. Under common law and colonial ordinance of 1641-47, littoral owners hold the fee between high and low water mark subject to public easement for navigation, free fishing, and fowling, but there is no public right to use the beach for bathing. Butler v. Attorney General [Mass.] 80 NE 688.

59. Could not complain that houseboat interfered with such rights. Van Siclen v. Muir [Wash.] 89 P 188.

60. Riparian owner held to have no exclusive right to fish salmon either under statute, deed, prescription, or custom. Hume v. Rogue River Packing Co. [Or.] 92 P. 1065.

61. Act Feb. 17, 1899, attempting to confer on riparian owners exclusive right of fishing for salmon in certain rivers, held violative of constitutional inhibition against grant of special privileges. Hume v. Rogue River Packing Co. [Or.] 92 P 1065.

62. Carver v. San Pedro, etc., R. Co., 151 F 334.

63. No act of executive department of United States can affect right of public to navigate nor power of congress to control. Carver v. San Pedro, etc., R. Co., 151 F 334.

64, 65. Bolsa Land Co. v. Burdick [Cal.] 90 P 532. See, also, Riparian Owners, 8 C. L. 1744.

66. Where alleged navigable waters were included in and wholly inclosed by land held by plaintiff under a patent, defendants could not hunt and fish thereon. Bolsa Land Co. v. Burdick [Cal.] 90 P 532. If a dam confining such waters was a purpresture, it could be abated only by state or national government. Id.

67. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

68. Whether current be in one state or another. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

69. Owner of upland under crown grant made in 1697, bounded by high water mark, has right to build a pier in order to gain access to navigable waters, though extending over lands under water, fee to which was granted by crown in 1666 to a town, pier not being a nuisance. Town of Brookhaven v. Smith, 188 N. Y. 74, 80 NE 665. Common law of jus privatum held inapplicable. Id.

70. Columbia Land Co. v. Van Dusen Inv. Co. [Or.] 91 P 469.

71. Where impracticable to make division according to rule where property is situated in a cove or to take current of stream as basis, stream being three or four miles wide and tide rising nine feet. Columbia Land Co. v. Van Dusen Inv. Co. [Or.] 91 P 469.

72. License or use of map recognizing due north line. Columbia Land Co. v. Van Dusen Inv. Co. [Or.] 91 P 469.

city limits so as to deprive the city of the water front when the water line recedes.[73] One may not reach navigable waters by passing over private property.[74]

Rights of wharfage and reclamation. See 8 C. L. 1086—By the English common law, no right to wharf out to navigable water attached to the ownership of shore lands,[75] but this doctrine has been modified or repudiated in many of the American states,[76] and the subject is also largely controlled by statute[77] or conveyance.[78] Littoral proprietors on a convex shore having appurtenant rights of wharfage may generally extend their wharves to lines on either side which are at right angles to the general contour of the shore.[79] One's rights as to the direction in which he may wharf out are not effected by the establishment of a harbor line and construction of a new channel where these are parallel with the shore.[80]

§ 3. *Regulation and control.* See 8 C. L. 1086—Congress has power to legislate with respect to the navigable waters of the United States.[81] This power does not rest exclusively either in its constitutional power to regulate interstate commerce or in its power to legislate on matters necessary to carry into execution the Federal judicial admiralty and maritime jurisdiction but may be sustained under either or both of such powers.[82] It cannot be impaired or restricted by the action of any agent or officer of the government,[83] and navigable waters within the limits of a state are subject to the same control by the Federal government as those extending through or reaching beyond those limits.[84] However, in the absence of the exercise of Federal control over navigable streams within the states, the states have full power over such waters within their jurisdiction,[85] and the Federal act requiring the consent of Federal authorities to the construction of public works in waters of the United States does not make Federal authority over waters entirely within the limits of a state exclusive,[86] but the right of private persons to erect structures in such waters is dependent upon

73. Rights of city similar to those of deed holders. Western Maryland Tidewater R. Co. v. Baltimore [Md.] 68 A 6.

74. Bolsa Land Co. v. Burdick [Cal.] 90 P 532.

75. Such right must be based on state legislation. Western Pac. R. Co. v. Southern Pac. Co. [C. C. A.] 151 F 376. Appellee's right under ordinance of town of Oakland to wharf on water front of town for term of years held not extended to perpetuity by confirmatory ordinance of August 27, 1853. Id.

76. Riparian owners have the right at common law to dock out to navigable water (Mobile Trans. Co. v. Mobile [Ala.] 44 S 976), whether tidal or not (Id.), subject to rights of navigation and public control (Id.).

77. B. & C. Comp. § 4042, providing that owner of land lying on navigable water within corporate limits of a city may construct a wharf and extend it below low water, gives to upland owner a preference, right, or license to occupy land under water for wharfage purposes, exercise of which becomes a vested right. Grant v. Oregon R. & Nav. Co. [Or.] 90 P 178. By Laws 1872, pp. 129, 130, and Laws 1874, pp. 76, 77, owner of upland was given preference right to purchase tide land from state and on such purchase, if not already vested in another, under B. & C. Comp. § 4042, he thereby acquired exclusive wharfage right to deep water, also right to all accretions to tide land and to fill up shoals or flats so long as navigation was not interfered with. Id.

78. Conveyance by metes and bounds held to show intention not to convey riparian rights, hence plaintiff was not entitled to deep water frontage. Grant v. Oregon, R. & Nav. Co. [Or.] 90 P 178.

79. Defendant could not be enjoined from so extending its wharf on the east, though plaintiff's wharf extended so far beyond a line drawn at right angles to the shore that if defendant's line were extended it would meet plaintiff's and close a public slip. Lane v. Smith Bros. [Conn.] 67 A 558. Where an avenue running southerly terminated on the shore, rights of parties were not affected by a deed held by plaintiff giving the western boundary of land below high water mark as such avenue, deed not stating that avenue ran in same direction below as above shore line. Id.

80. Lane v. Smith Bros. [Conn.] 67 A 558.

81. Navigable, interstate rivers come within the exclusive power of congress to regulate interstate commerce. State statute relating to process and filing of statement with secretary of state held invalid in so far as it affected interstate river traffic. Ryman Steamboat Line Co. v. Com., 30 Ky. L. R. 1276, 101 SW 403. See Commerce, 9 C. L. 583.

82. Acts relating to obstructions to navigation are within such power where such navigation comes within the provisions for regulation of interstate or foreign commerce or within the admiralty and maritime jurisdiction. United States v. Banister Realty Co., 155 F 583.

83. Grant of patent. Carver v. San Pedro, etc., R. Co., 151 F 334.

84, 85, 86. Minnesota Canal Power Co. v. Pratt [Minn.] 112 NW 395.

the joint consent of the state and Federal governments.[87] The use and control of waters within the geographical limits of the United States is not restrained by international comity,[88] but state courts cannot declare rights in conflict with treaties,[89] in the absence of Federal approval.[90] The Federal statute condemns to penalties vessels used in depositing refuse in navigable waters of the United States,[91] and makes it unlawful to anchor or tie up a vessel so as to obstruct the passage of other vessels.[92] A dumping scow is subject to penalty though her contents are dumped in violation of orders of her owner,[93] but the towing tug is not liable where the act was committed without the knowledge or consent of any one on board her.[94] Owners of wrecked or sunken vessels are required to mark them with a buoy or beacon and light [95] immediately.[96] Tugs negligently causing a wreck are not liable for failure to mark it where the owner of the wreck is at hand and can attend to the duty.[97]

§ 4. *Remedies for injuries relating to.* See 8 C. L. 1988—Obstruction in navigable waters or trespass thereon may be enjoined [98] at the instance of the state,[99] or of a private person suffering special injury,[1] and the public may be excluded by injunction from navigating on private waters.[2] Where a statute authorizes the damming of a navigable river but provides that the grantee of the right shall be liable for all resulting damages, such damages are recoverable regardless of negligence,[3] and one

87. Public service corporation not entitled to condemn land for canals and reservoirs for generation of electric power without first procuring Federal approval. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

88. Diversion of waters of Birch Lake drainage area which is tributary to Rainy River and other lakes forming boundary between United States and Canada. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

89. Diversion of waters forming boundary between United States and Canada would violate Webster-Ashburton Treaty. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

90. Act Cong. March 3, 1899, c. 425, reserving to United States control over navigable waters, does not affect or modify Webster-Ashburton Treaty. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395. If congress in manner provided by said act approves an enterprise, question of violation of treaty is no longer for the courts since treaty then is abrogated as municipal law. Id.

91. Act March 3, 1899, c. 425, §§ 13, 16, 30 Stat. 1152, U. S. Comp. St. 1901, pp. 3542, 3544, making vessels used in depositing refuse matter in navigable waters of the United States liable for pecuniary penalties is constitutional. The Scow No. 9, 152 F 548. To render a vessel liable it is not essential that any person or corporation should be previously convicted thereunder. Id.

92. Act March 3, 1899, c. 425, § 15, does not prevent the aiding of a vessel grounded or in difficulty, though a channel may be temporarily obstructed. The Waverley, 155 F 436. See Shipping and Water Traffic, 8 C. L. 1903.

93. Where scowman became unnecessarily alarmed at roughness of sea and dumped part of load within harbor limits. The Scow No. 9, 152 F 548.

94. Could not be said to have been "used or employed" in violation of Act March 3, 1899, c. 425, §§ 13, 16. The Scow No. 9, 152 F 548.

95. Act March 3, 1899, c. 425, § 15, places such duty upon the owner, and negligence of a wreckage company, his agent, must be imputed to him. The Anna M. Fahy [C. C. A.] 153 F 866.

96. Owner who could have had wreck marked within an hour held liable in damages for collision by passing vessel six hours later when there was still no mark. The Anna M. Fahy [C. C. A.] 153 F 866.

97. The Anna M. Fahy [C. C. A.] 153 F 866.

98. Bill by navigation company to compel railroad to remove road across navigable stream held good. Silver Creek Nav. & Imp. Co. v. Yazoo, etc., R. Co. [Miss.] 43 S 478.

99. Preliminary injunction granted in suit by United States for permanent injunction against closing of inlet connecting Bay of Far Rockaway on southern coast of Long Island with ocean, principal question being as to present navigability of said bay and there being danger that obstruction would change its character. United States v. Banister Realty Co., 155 F 583.

1. An obstruction to navigation may be enjoined by a private person who suffers special injury, whether such injury is different in kind from that of the public at large or only greater in degree. Carver v. San Pedro, etc., R. Co., 151 F 334. One having a summer residence on a stream forming the only access thereto held to suffer special injury entitling him to enjoin obstructions. Smart v. Aroostook Lumber Co. [Me.] 68 E 527. A suit to enjoin a trespass on navigable waters must be brought either by the state or by some person specially injured. Owner of upland abutting on shore land, title to which was in state, could not have houseboat removed as trespass on navigable waters. Van Sicien v. Muir [Wash.] 89 P 188.

2. Private chanel in otherwise non-navigable arm of lake. King v. Muller [N. J. Eq.] 67 A 380.

3. Act 1899 (23 St. at L. p. 207). Sutton v. Catawba Power, Co., 76 S. C. 320, 56 SE 966.

who suffers special injury need not prove negligence in order to recover damages, where a particular obstruction is in law a nuisance.[4] In a suit to enjoin the exclusion of an owner from the use of the shore as a means of access to a stream, it is sufficient to allege the wrong of exclusion without setting out the extent of complainant's improvements on the shore.[5]

NE EXEAT.[6]

NEGLIGENCE.

§ 1. Definitions, 922.
§ 2. Acts or Omissions Constituting Negligence, 923.
A. Personal Conduct in General, 923. Act of God and Unavoidable Accident, 925. Joint and Several Liability, 926.
B. Use of Property in General, 926. Dangerous Machinery and Substances, 927. Liability of Manufacturers, 928.
C. Use of Lands, Buildings and Other Structures, 930. Liability to Trespassers and Licensees, 931. Liability for Injuries to Children, 932.
§ 3. Proximate Cause, 934.
§ 4. Contributory Negligence, 938. Due Care by a Plaintiff, 939. Children, 942. Comparative Negligence, 943. Last Clear Chance Doctrine, 943. Imputed Negligence, 944.
§ 5. Actions, 945.

Scope of topic.—This topic is confined to the general principles of the law of negligence without reference to their specific application except in so far as such applications are not covered by other topics, or have been retained for the purpose of illustrating the general principles. Thus, liability for negligence as between master and servant,[7] liability of railroads [8] and street raliroads [9] for negligent injury to persons and property on their tracks, liability of carriers for injuries to passengers and freight,[10] and other matters of negligence involving rights and duties growing out of particular relations and subjects,[11] are elsewhere treated. The subject of damages for negligent injuries is also excluded.[12]

§ 1. *Definitions.*[See 8 C. L. 1090]—Negligence is an act of omission of which an ordinarily prudent person would not have been guilty under the same circumstances.[13]

Question for jury whether dam was proximate cause of injury to riparian owner. Id.

4. Hidden log injuring vessel. Drews v. Burton, 76 S. C. 362, 57 S. E. 176.

5. Mobile Transp. Co. v. Mobile [Ala.] 44 S 976.

6. No matter has been found for this subject since the last article. See 8 C. L. 1090.

7. See Master and Servant, 10 C. L. 691.

8. See Railroads, 8 C. L. 1590.

9. See Street Railways, 8 C. L. 2004.

10. See Carriers, 9 C. L. 466.

11. See Adjoining Owners, 9 C. L. 28; Agency, 9 C. L. 58; Animals, 9 C. L. 100; Bailment, 9 C. L. 323; Banking and Finance, 9 C. L. 324; Bridges, 9 C. L. 408; Building and Construction Contracts, 9 C. L. 424; Buildings and Building Restrictions, 9 C. L. 441; Carriers, 9 C. L. 466; Corporations, 9 C. L. 733; Counties, 9 C. L. 827; Death by Wrongful Act, 9 C. L. 926; Electricity, 9 C. L. 1062; Explosives and Inflammables, 9 C. L. 1345; Fences, 9 C. L. 1358; Fires, 9 C. L. 1361; Highways and Streets, 9 C. L. 1588; Independent Contractors, 10 C. L. 48; Inns, Restaurants, and Lodging Houses, 10 C. L. 285; Intoxicating Liquors, 10 C. L. 417; Landlord and tenant, 10 C. L. 571; Master and Servant, 10 C. L. 691; Medicine and Surgery, 10 C. L. 972; Municipal Corporations, 10 C. L. 881; Negotiable Instruments, 8 C. L. 1124; Nuisances, 8 C. L. 1180; Parks and Public Grounds, 8 C. L. 1233; Party Walls, 8 C. L. 1284; Pipe Lines and Subways. 8 C. L. 1354; Poisons, 8 C. L. 1440; Railroads, 8 C. L. 1590; Riparian Owners, 8 C. L. 1744; Sewers and Drains, 8 C. L. 1882; Shipping and Water Traffic. 8 C. L. 1903; Street Railways, 8 C. L. 2004; Warehousing and Deposits, 8 C. L. 2258; Waters and Water Supply, 8 C. L. 2262; Weapons, 8 C. L. 2302; Wharves, 8 C. L. 2302. See, also, Torts, 8 C. L. 2125.

12. See Damages, 9 C. L. 869.

13. Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940; Bertolami v. United Engineering & Cont. Co., 120 App. Div. 192, 105 NYS 90. Washington Mills v. Cox [C. C. A.] 157 F 634. "Negligence is the failure to do what a person of ordinary prudence would have done under the circumstances of the situation, or doing what such a person, under such circumstances, would not have done." Geiselman v. Schmidt [Md.] 68 A 202.

Distinguished from nuisance: While a barking dog may be a nuisance, it is not negligence to keep such a dog. Seegmueller v. Pahner, 9 Ohio C. C. (N. S.) 333. Notwithstanding a nuisance implies negligence, there is a clear distinction under the Ohio law between ordinary actions for injury to persons or property through negligence per se, and injury to persons or property caused by nuisance. City of Cincinnati v. Darby, 5 Ohio N. P. (N. S.) 216.

In other words it is a failure to exercise ordinary care,[14] which is such care as an ordinarily prudent person would exercise under the same circumstances.[15] Actionable negligence must be predicated upon failure to discharge a legal duty,[16] and the exercise of ordinary care on the part of the person injured,[17] and must proximately result in injury.[18] Since negligence is the contrary of ordinary care, and such care must necessarily depend upon the circumstances,[19] there are, strictly speaking, no degrees of negligence,[20] but this strictness of terminology is not always observed.[21] Gross negligence, if there be such a thing, as distinguished from negligence, depends upon the circumstances.[22]

Willfulness or wantonness. See 8 C. L. 1091—Knowledge or present consciousness that the act done or omitted will result in injury is essential to willfulness or wantonness,[23] and actual participation in the damnifying act is essential to liability for willful or wanton injury.[24]

§ 2. *Acts or omissions constituting negligence. A. Personal conduct in general.* See 8 C. L. 1092—The legal duty to exercise care does not necessarily depend upon contract,[25] but may arise therefrom,[26] or from custom,[27] or from statutory enact-

14. Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369. "It has been defined to be the failure to use or observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other suffers injury." Id.

15. Bowring v. Wilmington Malleable Iron Co., 5 Pen. [Del.] 594, 66 A 369; Reiss v. Wilmington City R. Co. [Del.] 67 A 153; Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555; Ewing v. Callahan [Ky.] 105 SW 387; Madigan v. Berlin St. R. Co. [N. H.] 67 A 404. "Ordinary" care held equivalent to "all ordinary and reasonable care and diligence," as used in Civ. Code 1895, § 2321, relating to railroads. Goodwyn v. Central of Georgia R. Co., 2 Ga. App. 470, 58 SE 688. The standard of care in the treatment of another's property is not the care exercised by one in regard to his own property. Brown Store Co. v. Chattahoochee Lumber Co., 1 Ga. App. 609, 57 SE 1043. Instruction that negligence is absence of care which men of ordinary "intelligence" would exercise, etc., held erroneous. Van Cleve v. St. Louis, etc., R. Co., 124 Mo. App. 224, 101 SW 632.

16. Birmingham, R. L. & P. Co. v. Jones [Ala.] 45 S 177; Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122; Chambers v. Woodbury Mfg. Co. [Md.] 68 A 290. Negligence is the violation of duty by an omission or a commission which creates a menace. Birch v. New York, 121 App. Div. 395, 106 NYS 104. It is only want of ordinary care and skill in respect to a person to whom one owes a duty or obligation in that respect that can be characterized as negligence. Pamler v. Byrd, 131 Ill. App. 495.

17. See post, § 4, Contributory Negligence.

18. Negligence becomes actionable when the menace created thereby becomes effective by causing injury to a blameless person. Birch v. New York, 121 App. Div. 395, 106 NYS 104. See post, § 3, Proximate Cause.

19. See post, § 2B, Personal Conduct in General.

20. Instruction held erroneous as recognizing degrees of negligence. City of Valparaiso v. Schwerdt [Ind. App.] 82 NE 923.

21. "Highest degree" of care, and "All possible" care required in use of electrical apparatus. Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626. "Gross negligence" recognized as failure even to exercise slight care, in consideration of instruction as to effect of contributory negligence as defense to action for wanton injury, such negligence being recognized by Civ. Code 1902, § 2139. Osteen v. Southern R. Co., 76 S. C. 368, 57 SE 196.

22. Gross negligence by bailee held merely a violation of duty which bailee owed to bailor under the particular circumstances. Chicago Hotel Co. v. Baumann, 131 Ill. App. 324.

23. Such consciousness will not be implied from mere knowledge of the elements of the dangerous situation of the other party and negligence or inadvertence with regard to such position. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Wantonness consists in consciousness on the part of the person charged therewith, from his knowledge of existing conditions, and that his conduct will probably result in injury, and yet, with reckless indifference or disregard of the natural or probable consequences, but without intention to inflict the injury, he does or fails to do the act which he should have done or omitted. Birmingham R. L. & Power Co. v. Landrum [Ala.] 45 S 198. Willful or wanton refusal to perform an obvious duty cannot be on surmise or suspicion or from the lack of perfect diligence or vigilance or even from the lack of ordinary care. Ussery v. Augusta-Aiken R. Co. [S. C.] 60 SE 527. "Kicking" cars across public crossing, without anyone in charge thereof or to give warning, held willful misconduct. Lacey v. Louisville & N. R. Co. [C. C. A.] 152 F 134.

24. Bessemer Coal, Iron & Land Co. v. Dook [Ala.] 44 S 627.

25. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 NE 636.

26. Railroad company from where car sand was being transferred to a scow owed duty of due care to wife of owner of scow and to every one rightfully on the scow. Ericksson v. Goodwin [C. C. A.] 154 F 351.

27. Failure to give customary warning before moving cars held negligence. Fitzpat-

ment,[28] or it may arise solely from the special circumstances of the particular case.[29] The occasion for the performance of the duty of care may arise from the negligence of another,[30] even though he be the person injured.[31] The measure or standard of care required in the performance of the duty of care is ordinary care,[32] which has already been defined in general terms,[33] and, ex vi termini, no universal rule can be formulated by which to determine what constitutes ordinary care in particular instances.[34] It necessarily depends upon the circumstances,[35] the relations,[36] age,[37] and condition [38] of the parties, knowledge or notice of the danger,[39] and probability of injury,[40] and these elements should be considered as of the time of accident, and

rick v. Michigan Cent. R. Co., 149 Mich. 194, 14 Det. Leg. N. 415, 112 NW 915.

28. Duty of persons in charge of factory to guard machinery. Laws 1897, p. 480, c. 415, § 81. Poole v. American Linseed Co., 119 App. Div. 136, 103 NYS 1047. Failure to perform a statutory duty imposed for the protection of the public is negligence, entitling one injured to a recovery, in absence of contributory negligence. Vanderveer v. Moran [Neb.] 112 NW 581.

One complaining of negligence by reason of the violation of a statutory duty **must be within class** for whose benefit the statute was enacted, as distinguished from the public benefit generally. Anderson v. Settergren, 100 Minn. 294, 111 NW 279. Failure of railroad to give statutory signals at crossing not available to one on track at another point. Georgia R. & Banking Co. v. Williams [Ga. App.] 59 SE 846. One in building on direction of architect, but without occupant's knowledge, for purpose of repairing hoistway covering, held not within Laws 1882, p. 134, c. 410, § 492, as amended by Laws 1892 c. 275, p. 566, § 28, requiring hoistways to be protected and guarded. Kenney v. Brooklyn Bridge Stores Co., 121 App. Div. 684, 106 NYS 421.

29. Whenever one is placed in such a position with regard to another that it is obvious that if former does not use due care his conduct will cause injury to the latter, the duty at once arises to exercise care commensurate with the situation to avoid such injury to such other person. Depue v. Flatau, 100 Minn. 299, 111 NW 1. Where plaintiff was taken sick while temporarily at defendant's house by invitation, and defendant, who had previously refused plaintiff's request to be allowed to spend the night at such house, took plaintiff out and placed him in his cutter, and started him on his journey home, seven miles away, and plaintiff, by reason of his sickness, fell from the cutter and nearly froze, defendant was liable if he knew and appreciated plaintiff's condition. Id.

30. Duty of telephone company to its linemen to remove danger incident to proximity of electric light wires to telephone poles. Drown v. New England Tel. & T. Co. [Vt.] 66 A 801.

31. See post, § 4, Contributory Negligence, subd. Last Clear Chance Doctrine.

32. Rimmer v. Wilson [Colo.] 93 P 1110. To the ordinary rule that the exercise of the defendant's **best judgment** is no defense to an action for negligence, a general exception is recognized with respect to cases involving matters of opinion and judgment only. Action against surgeon for performing operation while patient was in shocked condition. Staloch v. Holm, 100 Minn. 276, 111 NW 264.

33. See ante, § 1, Definitions.

34. Johnson v. Veneman, 75 Kan. 278, 89 P 677.

35. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. Apart from the situation and surrounding circumstances, no act or omission can be pronounced negligent. Geiselman v. Schmidt [Md.] 68 A 202.

36. See topics, cited ante under scope of topic, relating to particular relations such as carrier and passenger, innkeeper and guest, master and servant, etc.

37. Fact that person concerned was a child of tender years should be considered. Madigan v. Berlin St. R. Co. [N. H.] 67 A 404. One cannot assume that a child will exercise same care for own safety as adult. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624. Intelligence, experience, and capacity of minor servant must be considered on issue of master's negligence. Daniels v. Johnston [Colo.] 89 P 811. Manufacturer held to high degree of care in protecting child employe, even before enactment of labor law of 1906 prohibiting such employment, and under which mere employment itself is per se negligence. Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 SE 998.

38. Sickness or physical inferiority of person injured. Depue v. Flatau, 100 Minn. 299, 111 NW 1. Drunkenness of person injured. Rollestone v. Cassirer [Ga. App.] 59 SE 442.

39. Where team was frightened by carcass of horse on defendant's right of way. Louisville & N. R. Co. v. Armstrong [Ky.] 105 SW 473.

40. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. It is not the obviousness of the physical situation or condition that charges one with negligence but the obviousness of the dangers which such situation or situations produce. Rogers v. Roe [N. J. Err. & App.] 66 A 408. Liability of brick work contractor for injury to employe of ironwork contractor from falling of brick from scaffold upon plaintiff, who was looking for something below, held to depend upon whether defendant's servants knew or had reason to know that plaintiff was down below, it appearing that it was not customary for persons to be below the scaffold. Choyce v. Hopper, 120 App. Div. 177, 105 NYS 48. Failure to construct scaffold so that bricks would not fall therefrom held not negligence where it was not customary for persons to be under the scaffold. Id. Fact that gasoline never before exploded under such circumstances held not conclusive

not as they appear thereafter.[41] The courts often declare that certain acts do not constitute due care [42] or negligence,[43] or even that certain acts constitute negligence per se.[44] Such rulings, however, are not exceptions to the doctrine that negligence depends upon the circumstances, but are mere applications of the doctrine that under certain circumstances the question of negligence will be determined by the court.[45] A more distinctive doctrine and one less readily traceable to the doctrine as to when negligence is a question of law and when one of fact, is the doctrine that the violation of a statutory duty or one imposed by municipal ordinance is negligence per se,[46] and some of the courts limit this doctrine to the proposition that the violation of such a duty is evidence of negligence.[47] The fact that the act charged as negligence was in compliance with a statutory requirement is not conclusive of freedom from negligence.[48]

Act of God and unavoidable accident. See 8 C. L. 1093—It is negligence to fail to provide against such acts of God as may reasonably be anticipated,[49] and though the primary cause is a pure accident, one whose negligence concurs therewith as an efficient cause will nevertheless be liable.[50] A pure or unavoidable accident,[51] however, is not actionable as such.[52]

against finding of negligence in the particular case. Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170. Defendant held not liable for injury to boy from hot ashes placed on vacant lot adjacent to defendant's premises, in absence of evidence to show that such injury might have reasonably been anticipated. Meyer v. Benton [N. J. Err. & App.] 65 A 1023.

In Iowa "it is not true that to constitute negligence the act must be such as that persons of ordinary prudence would or should have apprehended or foreseen the accident." Cutter v. Des Moines [Iowa] 113 NW 1081.

41. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510.

42. A general custom is not per se ordinary care. Wiita v. Interstate Iron Co. [Minn.] 115 NW 169.

43. Negligence cannot be predicated upon failure to give warnings to one already having full notice. Smith v. Humphreyville [Tex. Civ. App.] 19 Tex. Ct. Rep. 936, 104 SW 495. Carrier and passenger. Woolsey v. Brooklyn Heights R. Co., 108 NYS 16. Master and servant. La Duke v. Hudson River Tel. Co., 108 NYS 189.

44. See Carriers, 9 C. L. 466; Railroads, 8 C. L. 1590; Street Railways, 8 C. L. 2004.

45. See post, § 5, subd. Questions of Fact.

46. Whoever is under a **statutory duty,** or a common-law duty, is liable, the same in each case, for injury to another from its neglect. The liability in such case grows out of the duty, and to say that such neglect is some evidence of negligence is meaningless, since it creates the liability. Poole v. American Linseed Co., 119 App. Div. 136, 103 NYS 1047. Violation by railroad of Rev. St. 1895, art. 4426, relating to keeping crossings in repair. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638. Violation of Acts 1899, p. 234, c. 142, § 9, Burns' Ann. St. 1901, § 7087i, requiring manufacturers to guard dangerous machinery. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981. Violation of Laws, 1903, p. 819, c. 473, prohibiting child labor in factories, etc. Leathers v. Blackwell, Durham Tobacco Co., 144 N. C. 330, 57 SE 11. Failure to blow whistle or sound bell on locomotive at least sixty rods from road crossing. Bowles v. Chesapeake & O. R. Co., 61 W. Va. 272, 57 SE 131. Railroad speed **ordinance.** Louisville & N. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723; Kunz v. Oregon R. Co. [Or.] 93 P 141.

47. City ordinance prescribing speed limit of trains at crossings may be considered in determining whether train was negligently run, but is not itself evidence of negligence. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22. Violation of a duty imposed by statute or ordinance is, as a general rule, evidence of negligence sufficient to sustain a verdict. Violation of New York City Building Code 1899, § 80, and Greater New York City charter, Laws 1897, p. 15, c. 378, § 41. Shields v. Pugh, 122 App. Div. 586, 107 NYS 604.

48. Where automobile driver attempted to turn a corner to left of vehicle in front of him, when it was apparent that if the vehicle should turn the corner a collision would occur, he may have been negligent, though the law required him to pass to the left. Mendleson v. Van Rensselaer, 118 App. Div. 516, 103 NYS 578.

49. Shift of wind while fire set by defendant was burning. Mahaffey v. J. L. Rumbarger Lumber Co., 61 W. Va. 571, 56 SE 893.

50. Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940. Negligence in allowing ditch to be stopped up concurring with unusual rain fall and causing overflow complained of. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589.

Note: "We think it may be said to be the general rule sustained by the great weight of authority, that 'where the primary cause of an injury is a pure accident, occasioned without fault of the injured party, if the negligent act of the defendant is a co-operating or culminating cause of the jury, or if the accident would not have resulted in the injury excepting for the negligent act, the negligence is the proximate cause of the injury, for which damages may be recovered.' Goe v. Northern Pac. R. Co., 30 Wash. 654, 71

Joint and several liability.[See 8 C. L. 1093]—Joint negligence gives rise to a joint and several liability.[53] In such case the negligent acts need not be concerted,[54] and it is not necessary that the negligence of the several parties should arise from the same or similar relations towards the persons injured.[55]

(§ 2) *B. Use of property in general.*[See 8 C. L. 1093]—A property owner must, in using his property, exercise due care not to injure others,[56] and one will be liable for negligence in employing inadequate or defective appliances or machinery,[57] or in furnishing defective appliances or machinery to another,[58] but mere ownership of property does not necessarily involve liability for injuries caused thereby.[59] The owner

P 182. This doctrine has been directly recognized and applied in this state. Lundeen v. Livingston El. Co., 17 Mont. 32, 41 P. 995; Cannon v. Lewis, 18 Mont. 402, 45 P 572. In Meisner v. City of Dillon, 29 Mont. 116, 74 P 130, the same rule is stated as follows: 'Where two causes contribute to an injury, one of which is directly traceable to the defendant's negligence, and for the other of which neither party is responsible, the defendant will be held liable, provided the injury would not have been sustained but for such negligence.' Counsel for appellant cite Elliott v. Allegheny Light Co., 204 Pa. 568, 54 A. 278, which seems to be somewhat in conflict with the rule just stated; but we do not see any reason for departing from the former holdings of this court."—From Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940.

51. Unavoidable accident is one which the reasonable foresight of neither the defendant nor the person injured could have foreseen or anticipated. Brunson v. Southwestern Development Co. [Ind. T.] 104 SW 593. "An accident is inevitable if the person by whom it occurs neither has, nor is legally bound to have, sufficient power to avoid it or prevent its injuring another. Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170.

52. Long v. Louisville & N. R. Co. [Ky.] 107 SW 203. Injury sustained in jumping from buggy when train passed crossing held due to plaintiff's unfounded fright, and hence no one was to blame, as horses did not run away or become frightened. Clinebell v. Chicago, etc., R. Co. [Neb.] 111 NW 577. Stumbling of horse and plaintiff's fall from carriage held pure accident, and hence city not liable. Elseeck v. Capwell [R. I.] 67 A 421. No question of unavoidable accident was involved where street car fender became detached and struck person about to board car. McDonnell v. Chicago City R. Co., 131 Ill. App. 227.

53. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009; Haskell & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626; Drown v. New England Tel. & T. Co. [Vt.] 66 A 801. Railroad employe killed in collision between engine and street car. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Injury from concurrent negligence of master and fellow-servant. Daniels v. Johnston [Colo.] 89 P 811. Where a voyage itself is negligent, all persons concerned therein are jointly and severally liable, but if the voyage is not negligent and the negligence causing the accident is in connection with the navigation of the vessel, only the persons thus negligent are liable. Multnomah County v. Willamette Towing Co. [Or.] 89 P 389. Where one was injured by explosion of stove polish while polishing range, both the manufacturer and the retailer who sold it without notice of its dangerous character were jointly and severally liable. Clement v. Crosby, 148 Mich. 293, 14 Det. Leg. N. 85, 111 NW 745.

54. Failure of telephone company to provide lineman a safe place to work, in that wire of electric lighting company was close to top of telephone pole, and negligence of lighting company in so placing its wires. Drown v. New England Tel. & T. Co. [Vt.] 66 A 801. Concert of action or common purpose **held necessary** to joint and several liability for whole injury from leakage of oil pipes owned by different persons, though such injury was caused by combined effect of manner in which pipes were laid. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934.

55. Action against telephone company and an electric lighting company by telephone lineman injured by electric light wire too near telephone pole. Drown v. New England Tel. & T. Co. [Vt.] 66 A 801.

56. Owner of boiler near highway must keep lookout for horses and use reasonable care not to frighten them with the whistle. Truex v. South Penn Oil Co. [W. Va.] 59 SE 517.

57. Derrick company held guilty of negligence in attempting to lift heavy engine piston by means of eye bolts which were not screwed clear in, so that a lateral strain proved too much for their strength. Morse Dry Dock & Repair Co. v. Merritt & Chapman Derrick & Wrecking Co., 157 F 274.

58. One furnishing machinery or appliances for certain purpose must use reasonable care to see that they are reasonably safe and suitable for such purpose. Railroad company that furnished cars to gravel company held liable to servant if latter injured by defective brake. Fassbinder v. Missouri Pac. R. Co., 126 Mo. App. 563, 104 SW 1154.

59. Owner of automobile not liable for injury caused by negligent driving of a borrower not at the time engaged in the owner's business. Doran v. Thomsen [N. J. Law] 66 A 897. The owner of an automobile is not liable for injury inflicted therewith by an inexperienced operator who took it from its garage, without the owner's knowledge or consent, where the operator was sui juris. Lewis v. Amorous [Ga. App.] 59 SE 338. Owner not liable for injury from lumber pile in charge and under control of schooner-man on wharf where it was unloaded. Lynch v. Knoop, 118 La. 611, 43 S 252. Under Laws 1897, p. 480, c. 415, § 81, imposing on **person in charge of a factory** the duty of properly guarding machinery, one who had furnished

of leased machinery is liable only for defects therein at the time the lessee takes possession.[60] The only duty owed to licensees is the duty of refraining from positive acts of negligence [61] or from reckless, wanton, or willful injury.[62]

Dangerous machinery and substances. See 8 C. L. 1094—In the use of intrinsically dangerous articles, the care required is commensurate with the dangerous character of the articles, the circumstances under which it is used, and the seriousness of the dangers to be anticipated,[63] and reasonable care may thus under certain circumstances and conditions be the same as the highest degree of care,[64] but this doctrine does not apply where the injury is caused by independent agencies, and not by the dangerous character of the articles in question.[65] One delivering an article which he knows or ought to have known to be dangerous is bound to give notice of the character of such article.[66]

and set up machinery and agreed with plaintiff's employer to maintain it for a certain purpose was liable as being in charge of the factory where the machinery was set up. Poole v. American Linseed Co., 119 App. Div. 136, 103 NYS 1047.

60. Not liable for defects subsequently arising, in absence of request to repairor. Haigh v. Edelmeyer & Morgan Hod El. Co., 123 App. Div. 376, 107 NYS 936. Breaking of headpiece of hod hoisting elevator held not evidence that it was defective when installed. Id. No inference of negligence could be drawn from fact that three years after the accident defendant was unable to produce the broken headpiece upon the trial. Id.

61. Servant, not engaged in master's business, riding by permission, on vehicle not intended for his use, held mere licensee. Pigen v. Lane [Conn.] 67 A 886.

62. Child who, without permission, climbed on wagon and was allowed to ride, held mere licensee. West v. Poor [Mass.] 81 NE 960.

63. Wiita v. Interstate Iron Co. [Minn.] 115 NW 169; Whittaker v. Stangvick, 100 Minn. 386, 111 NW 295. Operation of **railroad train** along track beside which footpath ran. Missouri, etc., R. Co. v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 133, 101 SW 464. Care of master in matter of supplying proper and nondefective fuses to be used in exploding **dynamite.** Wiita v. Interstate Iron Co [Minn.] 115 NW 169.

Electricity: Carroll v. Grande Ronde Elec. Co., 47 Or. 424, 84 P 389. Where defendant permitted wire charged with 23,500 volts of electricity to remain fastened to a picket fence near public highway for 20 hours. Id. Placing electric wires where children may possibly come in contact therewith is not negligence, unless the possibility amounts to a reasonable probability. Denver Consol. Elec. Co. v. Walters [Colo.] 89 p. 815. Held negligence for telephone company to leave loose wires dangling in street, whereby a person was killed by electric shock communicated through the wire from a trolley wire. Home Tel. Co. v. Fields [Ala.] 43 S 711. Negligence in insulation of electric wires may depend on location of wires. Denver Const. Elec. Co. v. Walters [Colo.] 89 p. 815. Setting out **fire** which spread to land of another. Steele v. Darner, 124 Mo. App. 338, 103 SW 582. Held negligence for construction company to allow **petroleum** residuum to escape into stream, causing injury to boats below point of escape. Brennan Const. Co. v. Cumberland, 29 App. D. C. 554.

Gasoline: Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170.

64. Wiita v. Interstate Iron Co. [Minn.] 115 NW 169. Highest degree of care must be exercised in use of electrical apparatus, and this is equivalent of all possible care. Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626.

65. Where defendant's sectionmen, acting beyond scope of authority, allowed child to ride on hand car from which he fell. Dougherty v. Chicago, etc., R. Co. [Iowa] 114 NW 902. Owner of elevator operated by his engineer held not liable for injury from falling of brick from hod being hoisted, when it appeared that others for whose acts he was not responsible were engaged in and about the work of using the elevator, and that the accident might have been due to the negligence of some one of them. Laurence v. Stanley Hod El. Co., 105 NYS 360.

66. Leavitt v. Fiberoid Co. [Mass.] 82 NE 682.

NOTE. Liability for Injuries Arising from the Use of Dangerous Substances Sold in the Open Market: The defendant, Rommeck, a retail hardware dealer, sold to the plaintiff a package of stove polish manufactured by defendant, Crosby & Co. When plaintiff attempted to use the polish, it exploded, injuring her. The declaration proceeded on the theory that there rested upon both defendants the positive duty of knowing that the polish was a dangerous substance, and that they should not manufacture and sell dangerous and inflammable substances. There was no averment that defendants had actual knowledge of the inflammable nature of the goods, nor was it averred in what manner they were negligent in not knowing their inflammable nature. Both defendants demurred, Rommeck's demurrer being sustained and that of Crosby & Co. being overruled. The supreme court in Clement v. Crosby & Co., 148 Mich. 293, 111 NW 745, affirmed the overruling of the corporation's demurrer, and in the present case the court affirms the judgment sustaining Rommeck's demurrer. Clement v. Rommeck, 149 Mich. 595, 14 Det. Leg. N. 543, 113 NW 286. The question which presents itself squarely for decision is whether a retail merchant who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which

Liability of manufacturers. See 8 C. L. 1095—Manufacturers of dangerous articles are liable for injuries caused by such articles where they are sold without notice of their dangerous character,[67] but a manufacturer is not generally liable for persons

it is apparently intended, is liable, in the absence of negligence, if it turn out that the article is not adapted to the use and causes injury. In Clement v. Crosby & Co., 148 Mich. 293, 111 NW 745, the court overruled the demurrer, but the declaration was so drawn that it was not necessary to decide whether or not actual knowledge of the dangerous properties must be shown to be in the manufacturer, to render it liable in the circumstances, and the court expressly said that they did not mean to determine the necessity of a scienter, although the allegation of deceitful and artful withholding of knowledge from the public necessarily implied a knowledge on the part of the defendant. The court cited the following cases to show that one who places upon the market a dangerous article may be chargeable for injuries done to third persons, but a reading of the cases discloses the fact that the defendants either knew of the dangerous qualities of the goods or else were guilty of negligence. Barney v. Burstenbinder, 7 Lans. [N. Y.] 210; Davis v. Guarnieu, 45 Ohio St. 470, 4 Am. St. Rep. 548; Hall v. Rankin, 87 Iowa, 261; Shubert v. J. R. Clark Co., 49 Minn. 331, 32 Am. St. Rep. 559; Carter v. Towne, 98 Mass. 567; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Elkins, Bly & Co. v. McKean, 79 Pa. 493.

There are cases, however, which upon principle would seem to indicate that knowledge by the manufacturer is not necessary to charge him with liability. In Randall v. Newsom, 2 Q. B. Div. 102, the court held that in the sale of a pole furnished by the defendant for plaintiff's carriage there was an implied warranty that the pole was free from latent as well as discoverable defects. In Carleton v. Lombard, 149 N. Y. 137, it was held that in a contract for the sale of a quantity of petroleum of a certain quality, the contract was not satisfied unless the oil was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been avoided or guarded against in the process of refinement, or in the selection of material by reasonable care and skill. See also Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 Law. Ed. 86; Rodgers v. Niles, 11 Ohio St. 48, 78 Am. Dec. 290. In the principal case the plaintiff relied on the decisions in Craft v. Parker, 96 Mich. 245, and Hoover v. Peters, 18 Mich. 51. These cases ruled that in the sale of articles of food by a dealer in such goods for domestic consumption, there is an implied warranty that the food is wholesome. See, also, Van Bracklin v. Fonda, 12 Johns [N. Y.] 468, 7 Am. Dec. 339. The contention was that an analogous principle ought to be applied in the case before the court, but the court refused to so rule, saying, "We are not aware that the rule of these cases has been extended to the sale of commodities like stove polish." The decision was based on the case of Brown v. Marshall, 47 Mich. 576, 41 Am. Rep. 728. The facts in the case were briefly these: Plaintiff sent her sister to defendant's drug store to purchase some salts and was waited upon by a clerk of the defendant. The clerk delivered what he said was the article called for, but in fact it was a poison. Plaintiff took a portion of it and immediately became ill. At the trial the court instructed that if the defendant's clerk sold and delivered to the plaintiff a poison instead of a harmless drug, and the plaintiff took it supposing it to be harmless, and was thereby injured, the defendant was liable for all damages so caused. The Supreme Court ordered a new trial, for the reason that the trial court erred in the above instruction, in that it did not include negligence as an element to be necessarily considered. The court distinguished the case from the leading case of Thomas v. Winchester, 6 Seld. [N. Y.] 397, saying that in that case the liability was expressly grounded upon actual negligence. The case presents a confusion of ideas regarding tort actions based no negligence of manufacturers or dealers, and actions upon implied warranties. The case of White v. Oakes, 88 Me. 367, 32 L. R. A. 592, seems to be in point with the principal case. The defendants, being dealers in furniture and not manufacturers, sold a folding bed to the plaintiff without any express warranty of any kind. The bed proved dangerous to persons using it, not from defective parts but from faulty design. By reason of the fault the bed collapsed, injuring plaintiff. The defendants had no knowledge of its danger. The mechanism of the bed could be observed by the plaintiff as well as by the defendant, but neither, unless skilled in mechanics, would have been likely to have discovered the danger. The court held there was no liability.—From 6 Mich. L. R. 245.

67. Clement v. Crosby, 148 Mich. 293, 14 Det. Leg. N. 85, 111 NW 745. The manufacturer of a thing inherently dangerous, or of a thing which, when applied to its intended use, becomes dangerous, is liable to anyone who, without fault on his part, sustains injury which is the natural and proximate result of the manufacturer's negligence. Keep v. National Tube Co., 154 F 121. Manufacturer of explosive stove polish held liable for injury to purchaser from explosion, though the purchaser purchased it from a retailer who had full knowledge of the character of the polish and sold it without warning. Clement v. Crosby, 148 Mich. 293, 14 Det. Leg. N. 85, 111 NW 745.

Note: "In Parry v. Smith, 4 C. P. Div. 325, the defendant, a gas fitter, was employed by the plaintiff's master to repair a gas meter upon his premises, and for the purpose of doing so took away the meter, and in lieu of it made a temporary connection by means of a flexible tube between the inlet pipe and the pipe communicating with the house. The plaintiff having gone, in the ordinary performance of his duty, with a light into the cellar where the meter had been, gas, which had escaped by reason of the insufficiency of the connecting tube, exploded and injured him. The jury found that the work had been negligently done, and that the injury to the plaintiff was the result of such negligence. It was held that the defendant was liable. In Bragdon v. Perkins-Campbell Co., 30 C. C. A. 567, 87 F 109, 66 L. R. A. 924, the Cir-

other than the buyer for negligence in the composition or construction of the article

cuit Court of Appeals of this circuit held that the defendant, who had manufactured and sold to the plaintiff's husband a side-saddle, was not liable for injury sustained by the plaintiff because of negligence or want of skill in the manufacture. But the court said:

There are cases which may seem to qualify the principle which we have discussed but which are quite consistent with it and which as is pointed out in Curtin v. Somerset, 140 Pa. 70, 21 A 244, have no application to such an one as that with which we are now concerned.. They decide that one who deals with a thing which is inherently very dangerous, involving 'death or great bodily harm to some person as the natural and almost inevitable consequence' of lack of care, owes to the public at large the duty of extreme caution. Such a case is Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455, which in England has been thought to go too far. * * * In our opinion Thomas v. Winchester was rightly decided; but that case, and the others which follow its lead, do not at all conflict with our present judgment. The article here in question is not, like a poisonous drug, which was the harmful agent in Thomas v. Winchester, inherently dangerous, but is, like the lamp in Longmedi v. Holliday, 6 Exch. 761, not in its nature hazardous.'

In Losee v. Clute, 51 N. Y. 494, 10 Am. Dec. 638, it appears that the defendants manufactured a boiler for the Saratoga Paper Company. The testimony tended to show that it was constructed improperly and of poor iron, and that the defendants knew at the time that it was to be used in the immediate vicinity of and adjacent to dwelling houses and stores in a village, so that in case of an explosion while in use it would be likely to be destructive to human life and adjacent property. The boiler exploded and damaged the adjacent property of the plaintiff. The Saratoga Paper Company tested the boiler to its satisfaction, accepted it, and used it for three months before the explosion. In the opinion of the court it was said:

'When the boiler was accepted, they (the defendants) ceased to have any further control of it or its management, and all responsibility for what was subsequently done with it devolved upon the company and those having charge of it.'

It was decided that the case came within the principle that 'at the most an architect or builder of a work is answerable only to his employes for any want of care or skill in the execution thereof, and he is not liable for accidents or injuries which may occur after the execution of the contract,' and that the defendants owed to the plaintiff no duty whatever at the time of the explosion 'either growing out of contract or imposed by law.'

But Dr. Thompson, in the first volume of his work on Negligence (section 825) considers Losee v. Clute, unsound in principle, and adds:

'Steam boilers are highly dangerous, even when properly constructed; but when defectively constructed nothing is more probable than that they will explode, and that the explosion will kill or injure innocent persons, and destroy adjacent property. The ignorant or unskillful construction of such a dangerous machine is a degree of negligence approaching the grade of crime; it should seem, to be given in such cases to any one who has sustained an injury which a due regard for the lives and property of others would have prevented.'

The same rule, after an illuminating discussion of the principle on which it rests, was established for the courts of New Jersey by Chief Justice Beasley, in Van Winkle v. American Steam Boiler Co., 52 N. J. Law, 240, 19 A 472. He said:

'In all cases in which any person undertakes the performance of an act, which, if not done with care and skill, will be highly dangerous to the persons or lives of one or more persons, known or unknown, the law, ipso facto, imposes as a public duty the obligation to exercise such care and skill. The law hedges round the lives and persons of men with much more care than it employs when guarding their property, so that, in this particular, it makes, in a way, every one his brother's keeper, and therefore it may well be doubted whether in any supposable case redress should be withheld from an innocent person who has sustained immediate damage by the neglect of another in doing an act, which, if carelessly done, threatens, in a high degree, one or more persons with death or great bodily harm. Such misfeasances, if they result fatally, are indictable crimes. Where they inflict particular damage upon individuals, they should, it is conceived, be actionable. There are many decisions that appear to rest on this basis. A typical case is that of Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.' The same principle was applied by the highest court of New Jersey to the case of Guinn v. Delaware & Atl. Tel. Co., 72 N. J. Law, 276, 62 A 112, 111 Am. St. Rep. 669, 3 L. R. A. [N. S.] 988, where a boy was killed by contact with a guy wire of the defendant company, which had become crossed with an electric light wire and charged with a deadly current of electricity; and by the Supreme Court of Minnesota, in Schubert v. J. R. Clark Co., 49 Minn. 331, 51 NW 1103, 32 Am. St. Rep. 559, 15 L. R. A. 818, where the defendant manufactured a step-ladder of cross-grained and decayed wood, which the plaintiff could not discover, for the reason that the defective material had been covered with paint.

In Huset v. Case Threshing Mach. Co., 57 C. C. A. 237, 120 F. 865, 61 L. R. A. 303, the Circuit Court of Appeals of the Eighth Circuit held a declaration to be good on demurrer in which it was averred that the defendant sold and delivered to the plaintiff's employer a threshing machine with knowledge of its dangerous defect; but, notwithstanding the averment as to the defendant's knowledge of the defect, it was said:

'It is a rational and fair deduction from the rules to which brief reference has been made that one who makes or sells a machine, a building, a tool, or an article of merchandise designed and fitted for a specific use, is liable to the person, who, in the natural course of events, uses it for the purpose for which it was made or sold, for an injury which is the natural and probable consequence of the negligence of the manufacturer or vender in its construction or sale.'"—From Keep v. National Tube Co., 154 F 121.

made and sold unless the article is imminently dangerous,[68] or the manufacturer has notice of the defects and knows that they render the article dangerous to one who has no such notice,[69] and where the purchaser knows the dangerous character of the article and the manufacturer has used the usual methods and precautions, the latter will not be liable.[70]

(§ 2) *C. Use of lands, buildings, and other structures.* See 8 C. L. 1095—Negligence cannot be predicated upon one's lawful and ordinary use of his own premises,[71] but one is bound to use his own property so as not to wrongfully injure that of others,[72] or persons on adjoining premises,[73] and the owner or occupier of lands must exercise due care to render his premises reasonably safe for persons thereon by invitation, either express or implied,[74] and is bound to notify such persons of secret or hidden dangers known to him but not known to them,[75] but the owner or occupant is not an insurer of the safety of such persons,[76] and his liability is only coextensive with the invitation.[77] The duty of the owner or occupant arises at the time of the invitation.[78] Ownership of the premises or structure is not essential to liability for injury thereon or thereby,[79] but either ownership or control is essential,[80] and the owner or

68. Berger v. Standard Oil Co., 31 Ky. L. R. 613, 103 SW 245.

69. Liability in such case is founded on deceit, and the scienter must be laid in order to support the charge of deceit. Berger v. Standard Oil Co., 31 Ky. L. R. 613, 103 SW 245.

70. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682.

71. Act of railroad company in piling freight up on its land near highway. Davis v. Pennsylvania R. Co. [Pa.] 67 A 777. Railroad company not liable for injury caused by horse being frightened by glare of sun on tin covering to piles of freight on defendant's land which had been thus piled and stored while depot was being repaired. Id. One may prosecute a lawful business on his own land so long as he does not thereby injure others rightfully using the **highway,** or interfere with the comfortable enjoyment of life or property of **adjoining owners.** Ft. Wayne Cooperage Co. v. Page [Ind. App.] 182 NE 83. Erection of **manufacturing plant close to highway** is not per se negligence. Id. One is **not insurer** against injury from use of his property. Long v. Louisville & N. R. Co. [Ky.] 107 SW 203.

72. Owner liable for invasion of premises of another by debris thrown by blasts, but only liable for injury from concussions where the blasting is negligently done. Bessemer Coal, Iron & Land Co. v. Dook [Ala.] 44 S 627.

73. Weitzmann v. A. L. Barber Asphalt Co., 190 N. Y. 452, 83 NE 477.

74. Mandeville Mills v. Dale, 2 Ga. App. 607, 58 SE 1060; Calvert v. Springfield Elec. L. & Power Co., 231 Ill. 290, 83 NE 184; Pauckner v. Wakem, 231 Ill. 276, 83 NE 202; Hyatt v. Murray [Minn.] 112 NW 881; Nolan v. Bridgeton & Millville Trac. Co. [N. J. Err. & App.] 65 A 992; Brown v. Salt Lake City [Utah] 93 P 570; Clark v. Fehlhaber, 106 Va. 803, 56 SE 817; Meyers v. Syndicate Heat & Power Co. [Wash.] 91 P 549. Duty of **ordinary care** held owed to boy riding on top of elevator with knowledge or consent of operator. Davis' Adm'r v. Ohio Valley Banking & Trust Co. [Ky.] 106 SW 843. One who throws his **premises open to the public** for the purpose of gain impliedly warrants that they are reasonably safe for the purposes for which they are designed. Bayley v. Curtis Bros. Lumber Co., 108 NYS 937. Customer injured by fall of bundle of steel rods while he was at defendant's desk paying for goods. Higgins v. Ruppert, 108 NYS 919. One owes duty of ordinary care to **servant of customer.** Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170.

Who are licenses by invitation: See post, this section and subsection, subdivision, **Liability to Trespassers and Licensees.**

Employe of surveyor general of logs who was sent upon defendant's premises at their request to scale logs being shipped, held not a mere licensee. Hyatt v. Murray [Minn.] 112 NW 881. Street railroad company held liable for death of **employe of contractor** injured by an electric shock while painting trolley wire poles. Smith v. Twin City Rapid Transit Co., 102 Minn. 4, 112 NW 1001. Employe of independent contractor injured by unguarded set screw on revolving shaft. Columbia Box & Lumber Co. v. Drown [C. C. A.] 156 F 459. See Independent Contractors, 10 C. L. 48.

75. Owner held liable for death of contractor who was killed while working on smoke stacks by reason of defects in roof around stacks. Calvert v. Springfield Elec. L. & P. Co., 123 Ill. 290, 83 NE 184.

76. Clark v. Fehlhaber, 106 Va. 830, 56 SE 817.

77. Nolan v. Bridgeton & Millville Trac. Co. [N. J. Err. & App.] 65 A 992. See post, this section and subsection, subdivision, Liability to Trespassers and Licensees.

78. Where one delivering sash to one who had just acquired a building and who was having it repaired fell down an open elevator shaft. Gardner v. Waterloo Cream Separator Co., 134 Iowa, 6, 111 NW 316.

79. Association giving street fair held liable for injury caused by defective construction and negligent operation of amusement devise owned and operated by amusement company. Hollis v. Kansas City Retail Merchants' Ass'n [Mo.] 103 SW 32.

Lessee of building roof with right to maintain signs thereon who had agreed to indemnify tenant of building from liability in connection with signs on the roof held liable

occupant is not liable where the acts of independent agencies for which he is not responsible intervene.[81] The liability of the owner or occupant must be predicated upon some notice or knowledge of the danger,[82] and notice may be implied from their publicity and duration,[83] but not from any one of such circumstances alone when they all coexist.[84] The advice of experts as to the safety of a structure is not conclusive of the question of negligence.[85]

Liability to trespassers and licensees.[See 8 C. L. 1696]—The duty to refrain from willful or wanton injury is the only obligation owed to trespassers[86] and bare licensees,[87] the courts usually making no distinction between trespassers and bare licensees in this regard.[88] As a general rule there is no duty to anticipate the presence of such persons,[89] unless the circumstances are such as to charge the owner or occupant with the probability of the presence of such persons,[90] and in this regard a distinction is sometimes recognized between trespassers and licensees.[91] After the

for injury to third party from fall of a sign from the roof. San Filippo v. American Bill Posting Co., 188 N. Y. 514, 81 NE 463.

80. Jackson v. Ross, 1 Ga. App. 192, 57 SE 913. Contractor for building of sidewalk for property owner held not liable for injury caused by dirt excavated and left in street, it not being his duty to remove it and not having control thereof. Evans v. Ellefson [Ark.] 100 SW 759. Evidence held insufficient to show that defendant was in charge of blasting which caused the injury. Bessemer's Coal, Iron & Land Co. v. Dook [Ala.] 44 S 627. Occupant of part of storeroom who was mere licensee as to use trap door in other part in order to reach goods stored in basement, held not liable to one who fell through the trap door. Stone v. Smith-Premier Typewriter Co. [Wash.] 93 P 209.

81. Owner of house not liable to one who fell in cellarway left open by another, whether the cellarway was in the street or on owner's premises, where it was not of itself a nuisance. Davis v. Bonaparte [Iowa] 114 NW 896. Where plaintiff, who was defendant's servant, was pushing a car along a track when the car struck a plank, which someone for whose acts defendant was not responsible had placed on the track, and rebounded and crushed plaintiff against a post, the fact that the plank was on the track could not be considered. Yunkes v. Latrobe Steel & Coupler Co., 131 Ill. App. 292.

82. Notice of defective passageway in which plaintiff was injured. Jackson v. Ross, 1 Ga. App. 192, 57 SE 913.

83. Obstructions in etreet. Jones v. Ogden City [Utah] 89 P 1006.

84. Jones v. Ogden City [Utah] 89 P 1006.

85. Where brick wall left by fire fell, question of negligence in allowing it to stand was for the jury, notwithstanding that owner may have relied on assurances of architect and city officials that it was safe. Orr v. Bradley, 126 Mo. App. 146, 103 SW 1149.

86. Southern R. Co. v. Stewart [Ala.] 45 S 51. It is not the duty of a property owner to guard an excavation on his premises against a wayfarer who may accidentally or otherwise meander thereon from the highway. Collins v. Decker, 120 App. Div. 645, 105 NYS 357.

87. Herzog v. Hemphill [Cal. App.] 93 P 899; Pamler v. Byrd, 131 Ill. App. 495. Licensee on elevator injured by negligent operation thereof. Crane Co. v. Sobkowicz, 131 Ill. App. 211. Licensee accepts risks incident to use of premises. Davis v. Bonaparte [Iowa] 114 NW 896. No active duty owed to bare licensee by railroad company to light or guard a retaining wall. Watson v. Manitou & Pikes Peak R. Co. [Colo.] 92 P 17. Owner held not liable to one who, while crossing his premises, fell into open ditch and was injured. Habina v. Twin City General Elec. Co. [Mich.] 14 Det. Leg. N. 605, 113 NW 586. Owner of building not liable where visitor went into room in which, to his knowledge, he had no business, and fell through a hole in the wall. Foard v. Rath, 33 Pa. Super. Ct. 182.

88. Pauckner v. Wakem, 231 Ill. 276, 83 NE 202; Davis v. Bonaparte [Iowa] 114 NW 896; Weitzmann v. A. L. Barber Asphalt Co., 190 N. Y. 452, 83 NE 477.

In Georgia: Owner or proprietor is not free from duty to a mere licensee, and must keep the premises free from mantraps, pitfalls, and things of like character. Rollestone v. Cassirer [Ga. App.] 59 SE 442. The exact duty of the proprietor depends upon the circumstances of each case. Id. Proprietor must warn licensee where he sees that he is about to come into contact with secret danger known to the proprietor. Id. Such duty to warn the licensee is more imperative where proprietor knows that licensee is drunk or suffering from other infirmity. Id. Heavy articles which are apparently in state of stable equilibrium or to be securely fastened, but which are not, may be classed with pitfalls, mantraps, etc. Id.

89. Trespasser on railroad tracks. Southern R. Co. v. Stewart [Ala.] 45 S 51; Duncan v. St. Louis, etc., R. Co [Ala.] 44 S 418. Trespassers on railroad track in city street, in absence of special circumstances giving notice of probability of presence of such trespassers. Birmingham R. L. & P. Co. v. Jones [Ala.] 45 S 177.

90. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P 402. Where persons were accustomed to walk on railroad track at certain place. Id. Railroad running through populous neighborhood where by custom and necessity the track must be frequently crossed. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418.

91. Owner owes no duty of anticipating presence of trespasser and after discovery of his presence is bound only to refrain from willfully or wantonly injuring him, whereas probability of licensee's presence must be

discovery of the presence of such persons, a positive duty not to willfully or wantonly injure them arises.[92] Persons on the private premises of another without invitation, either express or implied, are either trespassers or bare licensees.[93] In the absence, therefor, of an express invitation, the question as to whether one is a trespasser or licensee depends upon whether the circumstances are such as to give rise to an implied invitation.[94] An invitation to enter a public place of business will ordinarily be implied,[95] but it will not be implied when it would involve a violation of the law.[96] Mere permission, whether express or by acquiescence in a custom, creates only a bare license.[97] The benefit of an invitation may be lost by going outside the scope thereof,[98] but such is not necessarily or always the case,[99] nor does one necessarily become a bare licensee or trespasser by failure to pursue the safest road or way.[1] One is not bound by an invitation extended by a servant where the latter is acting beyond the scope of his authority.[2]

Liability for injuries to children. See 8 C. L. 1093—The age and capacity of a child may sometimes be considered in determining whether or not a child is a trespasser.[3] A property owner owes no duty to anticipate presence of trespassing children except under special circumstances,[4] and will not be held liable merely because the person

anticipated and some care is required by reason of such anticipation, and ordinary care must be used to avoid injuring him after his presence becomes known. Mandeville Mills v. Dale, 2 Ga. App. 607, 58 SE 1060.

92. Trespasses. Birmingham R., L. & P. Co. v. Jones [Ala.] 45 S 177. Engine started while drunken trespasser was alighting therefrom in compliance with command of engineer. Forest v. Georgia R. & Banking Co., 128 Ga. 77, 57 SE 98.

93. Davis v. Bonaparte [Iowa] 114 NW 896.

94. Girl looking for work who rode on freight elevator, without express invitation where there was stairway in plain view which she could have used, held bare licensee, though it appeared that other girls looking for work had ridden on such elevator. Crane v. Sobkowicz, 131 Ill. App. 211. Wife of one in charge of outfit cars who did cooking for men, and when presence on the cars for this purpose was acquiesced in by defendant company, held not bare licensee, though the husband's contract required him to do the cooking and the wife received no wages from the company. Pugmire v. Oregon Street Line R. Co. [Utah] 92 P 762. Child invited by defendant's employe, having authority, to visit his father in defendant's mill at any time, and who availed himself of such invitation with defendant's knowledge and consent held a licensee by invitation. Mandeville Mills v. Dale, 2 Ga. App. 607, 58 SE 1060.

95. Rollestone v. Cassirer [Ga. App.] 59 SE 442. One who lawfully enters a saloon is at least a licensee, though not intending to buy anything. Id.

96. No invitation from saloonkeeper to drunken man to enter saloon to buy drink will be presumed, since it is unlawful to sell liquor to a drunken person. Rollestone v. Cassirer [Ga. App.] 59 SE 442.

97. Permission by restaurant keeper of use of urinal not kept for guests. Herzog v. Hemphill [Cal. App.] 93 P 899. Where the owner's occupancy of premises is exclusive and patent, the mere fact that people are allowed to pass over it does not give them any other character than that of bare licensees. Habina v. Twin City General Elec. Co. [Mich.] 14 Det. Leg. N. 605, 113 NW 586. Where one has merely an easement of passage over a porch, he is at best a bare licensee as to any other use of such porch. Pamler v. Byrd, 131 Ill. App. 495.

98. Where visitor adopts unusual means of egress from building, he becomes a bare licensee. Foard v. Rath, 33 Pa. Super. Ct. 182. A servant may place himself in the position of a trespasser or mere volunteer by undertaking duties not assigned to him or beyond the scope of his employment. Louisville & N. R. Co. v. Pendleton's Adm'r, 31 Ky. L. R. 1025, 104 SW 382. Cemetery association not liable when person injured is not walking on highways provided to reach her lot. Mount Greenwood Cemetery Ass'n v. Hildebrand, 126 Ill. App. 399.

99. One going on premises to get goods stored there, injured while going, for other purposes, along a passage which had to be used to reach portion of goods, did not become bare licensee. Pauckner v. Wakem, 231 Ill. 276, 83 NE 202. Passenger does not become mere licensee merely because he goes beyond passenger cars in search of smoker. Clark v. American Exp. Co. [Mass.] 83 NE 365.

1. It may be a question of fact whether the road taken has, by accustomed use known to the visitor, become a way that persons using the premises are invited to use. Nolan v. Bridgeton & Millville Trac. Co. [N. J. Err. & App.] 65 A 992.

2. Invitation by restaurant keeper's servant to patron to use certain water closet, in attempting to reach which through a passage the patron was injured. Macartney v. Coldwell [R. I.] 68 A 719.

3. Whether child in a mill by invitation or acquiescence became a trespasser by placing his hand on dangerous machinery. Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626.

4. In absence of enticement or allurement. Birmingham R., L. & P. Co. v. Jones [Ala.] 45 S 177.

injured is a child,[5] but under the attractive nuisance doctrine, commonly called the turntable doctrine, the owner or occupant must exercise due care to protect children from their inexperience and youthful inclination to play with dangerous and attractive appliances and structures.[6] This doctrine does not apply to every case of injury

5. Owner of freight piled on wharf in proper manner held not liable for injury to child trespassing on the pile of freight. Lynch v. Knoop, 118 La. 611, 43 S 252.

6. Judgment for plaintiff in action for injury to child from explosion of drip tank wagon, with open vent hole, left in street affirmed by divided court. Iamurri v. Saginaw City Gas Co., 148 Mich. 27, 14 Det. Leg. N. 163, 111 NW 884. Applied where children had been in habit of stealing oil from defendant's open barrels in which it was kept on its lot and making fires with it, and on one of such occasions a child was burned. Peirce v. Lyden [C. C. A.] 157 F 552, citing Railroad Co. v. Stout, 17 Wall. [U. S.] 657, 21 Law. Ed. 745. Knowledge of such practice of the children imputed to defendant by its long continued duration and notorious character, and from knowledge of night watchman. Id. Held not within rule that landowner owes no duty of protection to those on his premises without invitation or permission, where corporation erected dangerous pumping machinery upon its own lots or close to a path across its lot which had been used for several years, and the machinery being unguarded a boy passing along the path in some way came in contact with such machinery and was killed. Henderson v. Continental Refining Co. [Pa.] 68 A 968. Where child was drowned in unguarded reservoir in field near highway and in which children were accustomed to resort for play. Franks v. Southern Cotton Oil Co. [S. C.] 58 SE 960. Pond remote from street or highway not attractive nuisance. Hanna v. Iowa Cent. R. Co., 129 Ill. App. 134.

NOTE. Attractive Nuisance. The turntable cases: The following are turntable cases in which the doctrine is applied: United States—Sioux City & Pac. R. R. Co. v. Stout, 17 Wall., 657.

Minnesota—Keffe v. Milwaukee & St. P. R. Co., 21 Minn. 207, 18 Am. Dec. 393; O'Malley, Admx. v. St. P., Minneapolis & Manitoba R. Co., 43 Minn. 289.

Nebraska—A. & N. R. R. Co. v. Bailey, Admx., 11 Neb. 332.

Missouri—Koons v. St. Louis & Iron Mountain R. R. Co., 65 Mo. 592; Nagel v. Missouri P. R. Co., 75 Mo. 653, 42 Am. Rep. 418.

Kansas—Kansas Central R. Co. v. Fitzsimmons, 22 Kan. 686; Union Pacific R. Co. v. Dunden, 37 Kan. 1.

Iowa—Edgington v. Burlington, C. R. & N. R. Co., 116 Iowa, 410.

California—Barrett v. Southern Pac. Co., 91 Cal. 296, 25 Am. St. Rep. 186.

Washington—Ilwaco R. & Nav. Co. v. Hedrick, Admx., 1 Wash. 446, 22 Am. St. Rep. 169.

Tennessee—Bates v. Railway Co., 90 Tenn. 36, 25 Am. St. Rep. 665. But railway company is not required to fasten the turntable any more securely than necessary to keep it securely in place.

Illinois—St. Louis, W. & T. H. R. R. Co. v. Bell, 81 Ill. 76. Reversed judgment on the sole ground that the company was not negligent in view of the isolated position of the turntable.

South Carolina—Bridger v. A. & S. R. R. Co., 25 S. C. 24.

Georgia—Ferguson v. Columbus & Rome R. Co., 75 Ga. 637.

Texas—Evanisch v. G. C. & S. F. R. Co., 57 Tex. 126, 44 Am. Rep. 586; G. C. & S. F. R. Co. v. McWhirter, 77 Tex. 356, 19 Am. St. Rep. 755; Ft. Worth & Denver City R. Co. v. Measles, 81 Tex. 474. To this should be added Union Pac. R. Co. v. McDonald, 152 U. S. 262, 38 Law. Ed. 434. This was not a turntable case, but a case in which a boy was injured in a slack pit of the railroad company. However, the doctrine of the turntable cases was re-examined and approved. In the following cases, in which the injuries were received at a turntable, the doctrine of the turntable cases is denied.

New Hampshire—Frost v. Eastern R. R. Co., 64 N. H. 220, 10 Am. St. Rep. 396.

Massachusetts—Daniels v. N. Y. & N. E. R. R. Co., 154 Mass. 349, 26 Am. St. Rep. 253, 13 L. R. A. 248.

New York—Walsh v. Fitchburg R. R. Co., 145 N. Y. 301, 45 Am. St. Rep. 615, 27 L. R. A. 724.

New Jersey—Turess v. N. Y., Susq. & West. R. Co., 61 N. J. Law, 314; Delaware, etc., R. Co. v. Reich, 61 N. J. Law, 635, 68 Am. St. Rep. 727.

Virginia—Walker v. Potomac, etc., R. Co., 105 Va. 226, 4 L. R. A. (N. S.) 80, 115 Am. St. Rep. 871.

In the following cases, where the injuries were not sustained at a turntable, the doctrine of the turntable cases is denied.

New Jersey—Friedman v. Snare & Triest Co., 71 N. J. Law, 605, 108 Am. St. Rep. 764.

Michigan—Ryan v. Towar, 128 Mich. 463, 92 Am. St. Rep. 481.

Rhode Island—Paolino v. McKendall, 24 R. I. 432, 96 Am. St. Rep. 736, 60 L. R. A. 133.

W. Virginia—Ritz v. Wheeling, 45 W. Va. 262, 43 L. R. A. 148; Uthermohler v. Bogg's Run Co., 50 W. Va. 457, 88 Am. St. Rep. 884.

In the following cases, in which children were injured, but not while playing with a turntable, liability is denied in courts that have adopted the turntable doctrine in cases where the injuries were received at a turntable.

Minnesota—Emerson v. Peteler, 35 Minn. 481, 59 Am. Rep. 337; Twist v. Railroad Co., 39 Minn. 164, 12 Am. St. Rep. 626; Haesley, Adm'r v. Railroad Co., 46 Minn. 233, 24 Am. St. Rep. 220; Dehanitz v. St. Paul, 73 Minn. 385; Ratte v. Dawson, 50 Minn. 450; Stendal v. Boyd, 67 Minn. 279; Stendal v. Boyd, 73 Minn. 53, 72 Am. St. Rep. 597, 42 L. R. A. 288; Erickson v. Great Northern R. Co., 82 Minn. 60, 83 Am. St. Rep. 410.

Georgia—Savannah, F. & W. R. Co. v. Beavers, 113 Ga. 398, 54 L. R. A. 314; O'Connor v. Brucker, 117 Ga. 451.

Nebraska—Richards, Adm'x v. Connell, 45 Neb. 467; City of Omaha v. Bowman, Adm'x, 52 Neb. 293, 66 Am. St. Rep. 506, 4 L. R. A. 531.

to children by machinery.[7] It is not applicable where an independent, responsible agency intervenes to bring the child into contact with the thing causing the injury,[8] or where such agency causes the accident by putting the appliance into operation,[9] or by use of the same.[10] The doctrine has been expressly repudiated in some jurisdictions.[11]

§ 3. *Proximate cause.* See 8 C. L. 1099—Negligence is not actionable unless it is the proximate cause of the injury complained of,[12] and this rule applies as well where the negligence charged is the violation of a duty created by statute or ordinance as in other cases,[13] though it is sometimes held that such violation is as a matter of law

California—Peters v. Bowman, 115 Cal. 345, 56 Am. St. Rep. 106.

Missouri—Overholt v. Vieths, 93 Mo. 422, 3 Am. St. Rep. 557; Barney v. Railroad Co., 126 Mo. 372; Witte v. Stifel, 126 Mo. 295, 47 Am. St. Rep. 668; Arnold v. City of St. Louis, 152 Mo. 173, 75 Am. St. Rep. 447, 48 L. R. A. 291.

Kansas—Railroad Co. v. Bockoven, Adm'r, 53 Kan. 279.

Texas—Dobbins v. M., K. & T. R. Co., 91 Texas, 60, 66 Am. St. Rep. 856.

Tennessee—Stone Co. v. Pugh, 115 Tenn. 688, 112 Am. St. Rep. 881, 4 L. R. A. (N. S.) 804.

Washington—Clark v. Northern Pac. R. Co., 29 Wash. 139, 59 L. R. A. 508; Curtis v. Tenino Stone Quarries, 37 Wash. 355; Harris v. Cowles, 38 Wash. 331, 107 Am. St. Rep. 847.—From Wheeling, etc., R. Co. v. Harvey [Ohio] 83 NE 66.

7. Owner of **sawmill** held not liable where child had been warned and place and machinery was not more than usually attractive. Isbell v. Hayward Lumber Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 780, 105 SW 211.

Held not applicable where boy fell from **foot log** across canal. Indianapolis Water Co. v. Harold [Ind.] 83 NE 993, citing Evansville, etc., R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; City of Indianapolis v. Emmelman, 108 Ind. 530, 9 NE 155, 58 Am. Rep. 65; Savannah, etc., R. Co. v. Beavers, 113 Ga. 398, 39 SE 82, 54 L. R. A. 314; Stendal v. Boyd, 73 Minn. 53, 75 NW 735, 72 Am. St. Rep. 597, 42 L. R. A. 288; Overholt v. Vieths, 93 Mo. 422, 6 SW 74, 3 Am. St. Rep. 557; Richards v. Connell, 45 Neb. 467, 63 NW 915; Omaha v. Bowman, 52 Neb. 293, 72 NW 316, 66 Am. St. Rep. 506, 40 L. R. A. 531; Peters v. Bowman, 115 Cal. 345, 47 P 113, 598, 56 Am. St. Rep. 106; Klix v. Nieman, 68 Wis. 271, 32 NW 223, 60 Am. Rep. 854; Gillespie v. McGowan, 100 Pa. 144, 45 Am. Rep. 365; Dobbins v. Missouri, etc., R. Co., 91 Tex. 60, 41 SW 62, 66 Am. St. Rep. 856, 38 L. R. A. 573; Moran v. Pullman Palace Car Co., 134 Mo. 641, 36 SW 659, 56 Am. St. Rep. 543, 33 L. R. A. 755; Cooper v. Overton, 102 Tenn. 211, 52 SW 183, 45 L. R. A. 591, 73 Am. St. Rep. 864; Ritz v. City of Wheeling, 45 W. Va. 262, 31 SE 993, 43 L. R. A. 148; Benson v. Baltimore Traction Co., 77 Md. 535, 26 Atl. 973, 39 Am. St. Rep. 436, 20 L. R. A. 714.

8. Where section men allowed child to ride on hand car from which he fell. Daugherty v. Chicago, etc., R. Co. [Iowa] 114 NW 902.

9. City held not negligent in maintaining cogwheels four or five feet above ground by which gates to bridge were operated, and on which a child was injurd by act of stranger in opening gates while child's hands were on the cogs. Widger v. Philadelphia, 217 Pa. 161, 66 A 249.

10. Where inexperienced person took defendant's automobile from garage without defendant's knowledge or consent and injured a minor while operating the machine. Lewis v. Amorous [Ga. App.] 59 SE 338.

11. In turntable case. Thompson v. Baltimore, etc., R. Co. [Pa.] 67 A 768; Wheeling, etc., R. Co. v. Harvey [Ohio] 83 NE 66. In case where child was drowned in unguarded reservoir. Id.

Note: "The doctrine of the so-called turntable cases have been disapproved in Walsh v. Railroad Co., 145 N. Y. 301, 39 NE 1068, 45 Am. St. Rep. 615, 27 L. R. A. 724; Walker's Adm'r v. Railroad Co., 105 Va. 226, 53 SE 113, 4 L. R. A. (N. S.) 80; Railroad Co. v. Reich, 61 N. J. Law, 635, 40 A 682, 68 Am. St. Rep. 727, 41 L. R. A. 831; Daniels v. Railroad Co., 154 Mass. 349, 28 NE 283, 26 Am. St. Rep. 253, 13 L. R. A. 248; Frost v. Railroad Co., 64 N. H. 220, 9 A 790, 10 Am. St. Rep. 396; Paolino v. McKendall, 24 R. I. 432, 53 A 268, 96 Am. St. Rep. 736, 60 L. R. A. 133; Ryan v. Towar, 128 Mich. 463, 87 NW 644, 92 Am. St. Rep. 481, 55 L. R. A. 310; Dobbins v. Railway Co., 91 Tex. 60, 41 SW 62, 66 Am. St. Rep. 856, 38 L. R. A. 573; Ritz v. Wheeling, 45 W. Va. 262, 31 SE 993, 43 L. R. A. 148; and in many other cases. The doctrine is a sweeping innovation on the settled common-law rule that a landowner is not liable for the condition of his premises to one who enters them without permission. We are of opinion that it is not sound in principle, and that it cannot be sustained."—From Thompson v. Baltimore etc., R. Co. [Pa.] 67 A 768.

12. Williams v. San Francisco, etc., R. Co. [Cal. App.] 93 P 122; Vinson v. Willingham Cotton Mills, 2 Ga. App. 53, 58 SE 413; Cincinnati, etc., R. Co. v. Zachary's Adm'r [Ky.] 106 SW 842; Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367; Akin v. Bradley Engineering & Mach. Co. [Wash.] 92 P 903; Kreigh v. Westinghouse, Church, Kerr & Co. [C. C. A.] 152 F 120; Washington Mills v. Cox [C. C. A.] 157 F 634.

13. Violation of **statutory duty.** Louisville & N. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723; Anderson v. Settergren, 100 Minn. 294, 111 NW 279; Clinebell v. Chicago, etc., R. Co. [Neb.] 111 NW 577; Rogers v. Rio Grande W. R. Co. [Utah] 90 P 1075. Violation of an ordinance is not necessary but may be the proximate cause of an injury received while engaged in such violation, and no recovery can be had by boy who was injured by vehicle as direct and proximate result of violation of city **ordinance** against playing ball in street. Jaehnig v. Ferguson [Mass.] 83 NE 868. Violation of the ordinance not

the proximate cause of a resulting injury.[14] The general rule usually applied is that a proximate cause[15] is one from which a result follows as a natural consequence.[16]

proximate cause of the injury where such violation is merely an accompanying factor but not the proximate cause. Id. Violation of speed ordinance. Kunz v. Oregon R. Co. [Or.] 93 P 141. Car could not have been stopped even if speed ordinance had not been violated. Foreman v. Norfolk, Portsmouth & Newport News Co., 106 Va. 770, 56 SE 805.

14. Violation of Laws 1903, p. 819, c. 473, prohibiting child labor in factories, held proximate cause of child injured while operating machine. Leathers v. Blackwell Durham Tobacco Co., 144 N. C. 330, 57 SE 11.

15. The courts will not indulge in refinement and subtleties as to causation that will defeat the claims of natural justice. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. "Principal" cause is not synonymous with "proximate" cause. Woolsey v. Brooklyn Heights R. Co., 108 NYS 16.

Note: "Proximate cause is defined to be 'that which in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred.' Shearman & Redfield on Negligence, § 26. But the sequence is not broken by reason of contributory or concurring causes. Thus there was liability when a wagon, leaving a ferry, fell back and injured the plaintiff's wagon; the ferry hands having failed to block it. Townsend v. Boston, 187 Mass. 283, 72 NE 991. When a car collided with a wagon, and the plaintiff, a passenger in the car, was injured by being thrown against its side, the fact that the wagon's negligence contributed did not relieve the railroad. Frank v. Metropolitan St. R. Co., 91 App. Div. 485, 86 NYS 1018. When a horse was frightened by the defendant's negligent emission of steam from its locomotive, the plaintiff got out and took the horse by the head, and was thrown down and injured. Held, that the escape of steam was the proximate cause. Hinchman v. Pere Marquette R. Co., 136 Mich. 341, 99 NW 277, 65 L. R. A. 553. When the plaintiff's team was frightened by defendant's negligence, and the plaintiff, in attempting to control his horse, broke a line, which was weak and insufficient for such an emergency, and which caused him to fall and break his leg, the original negligence was the proximate cause. Snyder v. Phila. Co., 54 W. Va. 149, 46 SE 366, 102 Am. St. Rep. 941, 63 L. R. A. 896. When a passenger was thrown from a street ar by a sudden jerk, and when on the ground was run over by a cart drawn by an unmanageable mule, the jerk was held to be the cause. Grier v. St. Louis Merchant, etc., 108 Mo. App. 565, 84 SW 158. When a wheel track about two feet from the edge of an unguarded embankment had in it a mud hole, into which the rider ran and was thrown over the embankment, the court refused to hold the mud hole, and not the unguarded embankment, was the cause. Hendry v. Town of North Hampton, 72 N. H. 351, 56 A 922, 101 Am. St. Rep. 681, 64 L. R. A. 70. A car was negligently permitted to collide with and puncture a tank containing naptha, from which several thousand gallons escaped, went into a catch-basin of a sewer, flowed through it and under a bridge, on which plaintiff was standing, when he was injured by an explosion of the naptha, caused by coming in contact with a lighted switch lamp. Held question for the jury whether breaking the tank was the proximate cause. Gudfelder v. Pittsburg, etc., R. Co., 207 Pa. 629, 57 A 70. There may be more than one proximate cause. Geary v. Metropolitan St. R. Co., 84 App. Div. 514, 82 NYS 1016. Reference may also be made to Lowery v. Manhattan El. R., 99 N. Y. 158, 1 NE 608, 52 Am. Rep. 12; Gueille v. Swan, 19 Johns. 381, 10 Am. Dec. 234; Gibney v. State, 137 N. Y. 1, 33 NE 142, 33 Am. St. Rep. 690, 19 L. R. A. 365. The concurring negligence of a third person is no defense if the accident would not have occurred except for the negligence of the defendant. Cone v. Delaware, etc., R. Co., 81 N. Y. 206, 37 Am. Rep. 491; Ellis v. N. Y., etc., R. Co., 95 N. Y. 546; Coppins v. N. Y., etc., R. Co., 122 N. Y. 557, 25 NE 915, 19 Am. St. Rep. 523; Hawley v. Gloversville, 4 App. Div. 343, 38 NYS 647; Ivory v. Town of Deer Park, 116 N. Y. 476, 22 NE 1080; Wood v. Town of Gilboa, 76 Hun, 175, 27 NYS 1115; Rider v. Syracuse R. T. Co., 171 N. Y. 155, 63 NE 836, 58 L. R. A. 125."—From Schell v. German Flats, 54 Misc. 445, 104 NYS 116.

"In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. City of Dixon v. Scott, 181 Ill. 116, 54 NE 897. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. Chicago & Alton Railroad Co. v. Pennell, 94 Ill. 448; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 32 NE 285, 18 L. R. A. 215; Chicago Hair & Bristle Co. v. Mueller, 203 Ill. 558, 68 NE 51. The rule as to what constitutes proximate cause was considered in the case of Atchison, Topeka & Santa Fe Railroad Co. v. Stanford, 12 Kan. 354, 15 Am. Rep. 362, and it was said: 'Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and, if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action.' In Milwaukee & St. Paul R. Co. v. Kellogg, 94 U. S. 469, 24 Law. Ed. 256, it is said: 'The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the

Without the intervention of any independent, efficient cause,[17] the result being such

wrong and the injury? * * * The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury.' It is true that in this case the voluntary act of the decedent intervened between the negligent act of the appellant in setting out the fire and the injury occasiond by the burning of decedent. But this act was one of the intervening causes which the appellant with reasonable diligence might have foreseen. It was a consequence of the wrongful act of appellant which it ought to have anticipated. It was not a new and independent cause intervening between the wrong and the injury, or disconnected from the primary cause and self-operating, but was itself the natural result of appellant's original negligence. The case of Seale v. Railway Co., 65 Tex. 274, 57 Am. Rep. 602, has been cited by appellant and fully sustains its position. That case holds that, whether the deceased was negligent or not in her attempt to put out the fire, it was this attempt, and not the original negligence of the defendant in starting the flame, that was the proximate cause of her death. This case was followed by the Missouri Court of Appeals in Logan v. Wabash R. Co., 96 Mo. App. 461, 70 SW 734. In the case of Chattanooga Light & Power Co. v. Hodges, 109 Tenn, 331, 70 SW 616, 97 Am. St. Rep. 844, 60 L. R. A. 459, the injury resulted from an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence.' The court, while reversing the judgment against the defendant, said: 'The rule has been extended so as to give the injured party redress where his effort to save property has been such as reasonably prudent men would have made under similar circumstances.' The cases which sustain the position of the appellant we think are wrong in principle and opposed to the weight of authority. One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages. It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant. Berg v. Great Northern R. Co., 70 Minn. 272, 73 NW 648, 68 Am. St. Rep. 524; Liming v. Illinois Central Railroad Co., 81 Iowa, 246, 47 NW 66; Glanz v. Chicago, etc., R. Co., 119 Iowa, 611, 93 NW 575; Wasmer v. Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Page v. Bucksport, 64 Me. 51, 18 Am. Rep. 239."—From Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 NE 362.

16. Bowers v. East Tennessee, etc., R. Co., 144 N. C. 684, 57 SE 453. Where the act complained of is not wrong in itself, it is essential to a recovery that the consequences resulted therefrom according to the ordinary course of events. Bradshaw v. Edgar County Nat. Bk., 130 Ill. App. 37.

17. Washington Mills v. Cox [C. C. A.] 157 F 634; Florida East Coast R. Co. v. Wade, 53 Fla. 620, 43 S 775; Smith v. Norfolk & S. R. Co. [N. C.] 58 SE 799.

Held intervening cause: Where plaintiff's horse fell in pool of water permitted by defendant to collect in highway, and plaintiff had to unhitch him, and while so doing was knocked down by the horse and had to stand in water to rehitch, whereby he caught cold. Crowley v. West End [Ala.] 43 S 359; San Antonio & A. P. R. Co. v. Trigo [Tex. Civ. App.] 18 Tex. Ct. Rep. 958, 101 SW 254. Where car which plaintiff was pushing along a track struck a plank, rebounded and crushed plaintiff against a post near the track, but which could be passed safely under ordinary circumstances, the situation of the post was not the proximate cause of the accident. Yerkes v. Latrobe Steel & Coupler Co., 131 Ill. App. 292. Proximate cause of injury to child from cogwheels by which a bridge gate was operated, held to be the act of a stranger in opening gate while child's hand was on the wheels. Widger v. Philadelphia, 217 Pa. 161, 66 A 249. Where someone kicked plaintiff while he was sitting near an open cellarway, and he fell into the same, the proximate cause of the fall was the assault and not the open cellarway. Miller v. Bahmmuller, 108 NYS 924.

Plaintiff's own acts of negligence may constitute the intervening cause. Washington Mills v. Cox [C. C. A.] 157 F 634. See post, § 4, Contributory Negligence. Involuntary act of plaintiff in placing hand on side of wagon being loaded by means of a crane and sand bucket, in order to avoid the wheels of the wagon which had started to move, held proximate cause of injury to plaintiff's hand when bucket was tripped, the swinging of the bucket and the tripping of the same being the remote cause. McGovern v. Degnon-McLean Cont. Co., 120 App. Div. 524, 105 NYS 408.

Held not intervening cause: The causal connection is not interrupted by the acts of independent agents where such acts are naturally included by the defendant's negligence and ought to have been anticipated, even though the intervening act be that of plaintiff himself. Rolleston v. Cassirer [Ga. App.] 59 SE 442. Ordinary wind which blew steam from defendant's mill across highway and frightened the plaintiff's horse was not an independent, intervening cause which defendant could not have foreseen. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Ignorance of child which led him to try to explode dynamite caps with old automobile battery back held not an intervening cause so as to relieve defendant from liability for leaving caps where child could get them. Akin v. Bradley Engineering & Mach. Co. [Wash.] 92 P 903. Where third party in assisting a woman to alight from a train took her child from her, and walked along the side of the train which had begun to move, in order to give the child to its mother when she alighted, and fell over obstructions on the platform, which was not lighted sufficiently, and dropped the child under the train, it was held that there was no inde-

that it ought to have been foreseen by the exercise of reasonable foresight,[18] and the causal connection rendering negligence actionable exists upon the concurrence of all of these elements,[19] and only upon such concurrence.[20] What the wrongdoer could

pendent, intervening cause between the injury and the negligence of the railroad company in failing to announce station, failing to light platform, allowing obstructions on platform, and moving train before passengers had had reasonable chance to alight. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P 207. Act of stranger in attempting to assist plaintiff to alight from train held not to interrupt the causal connection between her injury while so alighting and the defendant's negligence in failing to stop the train. Martin v. Southern R. Co., 77 S. C. 370, 58 SE 3. Sale of firearms to minor held proximate cause of injury by reason of the minor's careless shooting, notwithstanding the independent act of the minor. Anderson v. Settergren, 100 Minn. 294, 111 NW 279.

Proximate cause of injury from fall into open elevator shaft held negligence of defendant in not providing guard barrier around shaft or not giving warning of the danger, though the door through which plaintiff entered and near which the shaft was situated had been left unlocked by a third person. Gardner v. Waterloo Cream Separator Co., 134 Iowa, 6, 111 NW 316.

18. Williams v. San Francisco, etc., R. Co. [Cal. App.] 93 P 122; Florida East Coast R. Co. v. Wade, 53 Fla. 620, 43 S 775; Haskell & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626; Bowers v. East Tennessee, etc., R. Co., 144 N. C. 684, 57 SE 453; International & G. N. R. Co. v. Rieden [Tex. Civ. App.] 107 SY 661; Kreigh v. Westinghouse, Church, Kerr & Co. [C. C. A.] 152 F 120. Instruction held erroneous when it placed right to recover on whether the injury could have been foreseen, since the injurious, proximate, and natural consequences of a negligent act are always deemed to have been foreseen. El Paso S. W. R. Co. v. Barrett [Tex. Civ. App.] 19 Tex. Ct. Rep. 418, 101 SW 1025. Negligence of conductor in telling passenger that the next stop was her destination and that it would be reached in twenty minutes held not proximate cause of sickness caused by fright in getting off at next place at which train stopped, without being told that it was her destination and without knowledge of trainmen, and there being nothing to indicate that the place was a station. Florida East Coast R. Co. v. Wade, 53 Fla. 620, 43 S 775. Where one visiting defendant's wife knocked at cellar door instead of room in which the wife was, and upon receiving the invitation to "come in" in response to the knock, opened the door and fell down the cellar stairs. Clark v. Fehlhaber, 106 Va. 803, 56 SE 817. Might have been foreseen that horse might become frightened and back wagon over embankment at bridge approach negligently left unguarded. Wallace v. New Albion, 105 NYS 524.

Particular accident or injury need be such as might have been anticipated. Florida East Coast R. Co. v. Wade, 53 Fla. 620, 43 S 775; Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009; Schell v. German Flats, 54 Misc. 445, 104 NYS 116; Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149; Stone v. Union Pac. R. Co. [Utah] 89 P 715; Akin v. Bradley Engineering & Mach. Co. [Wash.] 92 P 903.

Element of reasonable foresight and that of natural consequence are not so far apart as is might seem, since ordinarily one ought to foresee what would naturally follow. Savannah Elec. Co. v. Wheeler, 128 Ga. 550, 58 SE 38.

In Iowa the rule is that, "If the accident follows as the result of the wrong or negligent act of another, that other is responsible, although no one would reasonably have apprehended such a disaster." Cutter v. Des Moines [Iowa] 113 NW 1081.

19. Injury to boats in boat house down stream from point where defendant allowed petroleum residuum to escape into stream. Brennan Const. Co. v. Cumberland, 29 App. D. C. 554. Plaintiff burned while putting out fire started by locomotive. Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 NE 362. Allowing drunken conductor to be in charge of passenger car held proximate cause of injury to person on street whom conductor accidentally shot while shooting at a passenger. Savannah Elec. Co. v. Wheeler, 128 Ga. 550, 58 SE 38. Where mule was frightened by negligent running of train at crossing and ran away and injured the driver, proximate cause was the negligent running of the train and not the running of the mule. Southern R. Co. v. Tankersley [Ga. App.] 60 SE 297. Negligence of telephone company in leaving loose wires hanging in tree held proximate cause of death of one who received electric shock from wire fence attached to the tree, the electric current having been conducted by the telephone wire from a trolley wire to the fence. Home Tel. Co. v. Fields [Ala.] 43 S 711. Negligence causing fright held proximate cause of injuries resulting from the fright. El Paso Elec. R. Co. v. Furber [Tex. Civ. App.] 18 Tex. Ct. Rep. 605, 100 SW 1041.

20. Condition of telephone line held not proximate cause of death of horse by lightning. Southwestern Tel. & T. Co. v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 365, 106 SW 426. Uncovered vat of boiling water into which servant was about to pour pail of lye when he received a jolt from fellow-servant, slipped on floor made slippery by use of soft soap by fellow-servants, and fell into vat. McTiernan v. American Woolen Co. [Mass.] 83 NE 673. Where fire, originating in building remote from lumber piles on defendant's right of way, was communicated to other buildings, and thence to the lumber piles, and thence to the plaintiff's building. Bowers v. East Tennessee, etc., R. Co., 144 N. C. 684, 57 SE 453. Held not proximate cause where regular entry to cotton ginnery was blocked by other wagons, and plaintiff went around by another way to the ginnery, and while passing a steam pipe the steam blew off, as it was wont to do at intervals, and plaintiff's mules were frightened, the gin owner having no reason to anticipate that plaintiff would drive by the steam pipe. Black v. Southern Cotton Oil Co. [S. C.] 60 SE 447. Allowing colts to run loose on highway held not proximate cause of injury to a colt while running along a barbed wire fence,

reasonably have foreseen is not decisive. If the consequences follow in unbroken sequence from the wrong to the injury without an efficient intervening cause, it is sufficient if the wrongdoer in the exercise of reasonable care could have foreseen that some injury might result.[21] The proximate cause is not necessarily the last cause in point of time [22] nor the sole cause [23] but in cases of joint or concurrent negligence, no liability attaches on account of negligence which is not a concurring, proximate cause.[24]

§ 4. *Contributory negligence.* See 8 C. L. 1101—The doctrine of assumed risk has no application where the relation of master and servant does not exist.[25] Contributory negligence is the negligence of the plaintiff or the person injured directly contributing to the injury as a concurring, proximate cause thereof.[26] Such negligence

endeavoring to escape from an enclosure into the street where the other colts were. Loiseau v. Arp [S. D.] 114 NW 701. Removal of rail guard at bridge approach held not proximate cause of injury by reason of backing of wagon over embankment, the absence of any guard at such place being the proximate cause. Wallace v. New Albion, 105 NYS 524. Where quarantine existed only as to pastures in which infected cattle had been or were then running, negligence in allowing escape of uninfected cattle held not proximate cause for quarantine against pasture into which they escaped. Reynolds v. Galveston, etc., R. Co. [Tex.] 18 Tex. Ct. Rep. 560, 102 SW 724. Owners of property adjoining bank cannot recover from bank for injuries inflicted on their premises by burglars in dynamiting the vaults of the bank on the ground that the bank was negligent in permitting its doors to remain open so that bank was easily entered by burglars. Bradshaw v. Edgar Co. Nat. Bk., 130 Ill. App. 37.

21. Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 NE 362.

22. Southern R. Co. v. Tankersley [Ga. App.] 60 SE 397. The mere question of priority in time is not determinative, the inquiry being directed to what was the efficient or responsible cause. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009.

23. Rollestone v. Cassirer [Ga. App.] 59 SE 442; Western Tube Co. v. Pederson, 128 Ill. App. 637; Miller v. Boston, etc., R. Co. [Mass.] 83 NE 990; Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624. The concurrence of other causes does not relieve the party guilty of the original wrong from liability. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57. Sequence is not destroyed by reason of contributory or concurring causes. Schell v. German Flats, 54 Misc. 445, 104 NYS 116. As where intervening act is set in motion or induced by the first negligent act, and the consequence is one that should have been foreseen. Dannenhower v. Western Union Tel. Co. [Pa.] 67 A 207. Causal connection between negligence of telegraph company in allowing wire to fall across electric light wire, and injury to one from the light wire, by fact that the injury was caused immediately by the light wire which was caused to sag or was pulled down by children by means of the telegraph wire. Id.

Rule stated: Where several causes proximately contribute to an injury, each being a sufficient cause without the operation of which the accident would not have happened, such accident may be attributed to any or all of the causes, but it cannot be attributed to a specific cause, unless without its operation the injury would not have happened. Madden v. Saylor Coal Co., 133 Iowa, 699, 111 NW 57. When one creates a dangerous condition of things which does not become effective until the negligence of a third person concurs therewith, in some manner which might reasonably have been anticipated, the original act of negligence will be treated as the proximate cause. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030.

24. That is unless the accident would not have occurred but for such concurring negligence. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624.

25. Independent Brew. Ass'n v. Schaller, 128 Ill. App. 533.

26. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555; Grass v. Ft. Wayne & W. Valley Trac. Co. [Ind. App.] 81 NE 514; Ewing v. Callahan [Ky.] 105 SW 387. Definition of contributory negligence as such negligence on the part of plaintiff that, but for the same, he would not have been injured, held erroneous as ignoring negligence of plaintiff which may have been a contributing, proximate cause. Leary v. Anaconda Copper Min. Co. [Mont.] 92 P 477.

Contributory negligence and assumed risk distinguished: Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149. No question of contributory negligence is involved when case turns on assumption of risk by servant. St. Louis, etc., R. Co. v. Mathis [Tex.] 107 SW 530. Contributory negligence is not same as assumption of risk, the latter being applicable, in most cases at least, only where the relation of master and servant exists. Gloucester Elec. Co. v. Dover [C. C. A.] 153 F 139; Poole v. American Linseed Co., 119 App. Div. 136, 103 NYS 1047.

Negligence as sole cause and as contributing cause distinguished: Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940.

Proximate cause: Negligence, in order to be contributory, must proximately contribute to the accident. Abney v. Indiana Union Trac. Co. [Ind. App.] 83 NE 387; Adams v. Gulf, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 507, 105 SW 525. The negligence of the person injured must be at least a concurring, proximate cause. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702. Held proximate cause where the injury would not have occurred except for such negligence. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555.

is generally an absolute defense,[27] but in some jurisdictions it is only a limited defense,[28] and it is no defense at all as against willful or wanton injury.[29] Contributory negligence does not operate by way of estoppel.[30]

A licensee must use due care for his own safety.[31]

Due care by a plaintiff. See 8 C. L. 1102—The conduct of the plaintiff or the person injured is measured by the general standard of care, that is ordinary care or such care as a reasonably prudent person would exercise under the same circumstances.[32] Such care is commensurate with the danger to be avoided,[33] the age, condition, and capacity of the person injured,[34] correlative with the duty owed by the other party,[35] and involves some knowledge or notice of the danger about to be faced.[36] But knowl-

27. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 NE 636; Volosko v. Interurban St. R. Co., 190 N. Y. 206, 82 NE 1090; Morrison v. Lee [N. D.] 113 NW 1025; Drown v. Northern Ohio Trac. Co., 76 Ohio St. 234, 81 NE 326; Bowen v. Pennsylvania R. Co. [Pa.] 68 A 963; Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367; Rogers v. Rio Grande W. R. Co. [Utah] 90 P 1075; St. Louis, etc., R. Co. v. Deveer [C. C. A.] 153 F 56. Doctrine of contributory **negligence of fellow-servant** has no application as against strangers. Nonn v. Chicago City R. Co., 232 Ill. 378, 83 NE 924. The doctrine that contributory negligence constitutes a complete defense is **not based upon a comparison of negligence** but upon considerations of public policy. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624. Instruction authorizing recovery if plaintiff was guilty of only slight negligence held prejudicial error. City of Valparaiso v. Schwerdt [Ind. App.] 82 NE 923.

28. See post, this section, subdivision, Comparative Negligence.

29. Lacey v. Louisville & N. R. Co. [C. C. A.] 152 F 134.

30. Plea of estoppel held improper when one attempted to drive by dead horse on defendant's right of way, though he knew horse was there, and his horses were frightened. Louisville & N. R. Co. v. Armstrong [Ky.] 105 SW 473.

31. Foard v. Rath, 33 Pa. Super. Ct. 182. Person walking on railroad track not relieved from duty of bare licensee because circumstances are such as to charge trainmen with duty of keeping reasonable lookout. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P 402.

32. Hall v. Northern Pac. R. Co. [N. D.] 111 NW 609; Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356; Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. Instruction held erroneous in that it was calculated to lead the jury to determine the question of contributory negligence with reference to what men of plaintiff's character would have done and with reference to his own situation, rather than the standard afforded by the man of ordinary prudence. Gloucester Elec. Co. v. Dover [C. C. A.] 153 F 139. One is not required to exercise the best judgment possible, but only to exercise such care as might be expected from a reasonably prudent person engaged in the same occupation. Perrotta v. Richmond Brick Co., 108 NYS 10. The standard by which due care is to be determined is the common knowledge and experience of men and not the scientific knowledge of experts. Morrison v. Lee [N. D.] 113 NW 1025.

33. Carroll v. Grande Ronde Elec. Co., 47 Or. 424, 84 P 389.

34. Davis' Adm'r v. Ohio Valley Banking & Trust Co. [Ky.] 106 SW 843. See post, this section, subsection, Children.

35. One is ordinarily entitled to rely upon the performance by others of their duties to him until he has notice, actual or constructive, to the contrary. As between master and servant. Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 SE 249. But the right to assume that others will not be negligent does not relieve one from the necessity of exercising due care for his own safety. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815. One rightfully in a building may assume that it is reasonably safe for his use, and is not bound to anticipate negligence on the part of the owner or occupant. Gardner v. Waterloo Cream Separator Co., 134 Iowa, 6, 111 NW 316. One working on elevator shaft had right to assume that elevator operator would obey instructions to look out for him. McDermott v. Straus, 108 NYS 5. Fact that steps were old and worn and broke with plaintiff, held not to charge plaintiff with negligence. Bayley v. Curtis Bros. Lumber Co., 108 NYS 937. Traveler may assume that **public bridge** is safe. Ridings v. Marion County [Or.] 91 P 22. Railroad employe working near cars may reasonably rely on a **custom** of notifying men working near cars before moving them, and jury might find him free from fault in such case in going about his work in reliance on such custom. Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194, 14 Det. N. 415, 112 NW 915. One crossing railroad may presume that **speed ordinance** will not be violated. Kunz v. Oregon R. Co. [Or.] 93 P 141. The right to assume that another will not violate a **statutory prohibition** does not absolve one from the duty of exercising due care for his own safety. Right to assume that street car would not exceed speed limit. Harris v. Lincoln Trac. Co. [Neb.] 111 NW 580.

Servant not necessarily guilty of walking, in dark, across room of building in course of construction, where he was working in such room. Heffron v. Lackawanna Steel Co., 105 NYS 429. One employed on outfit cars stationed on a certain track had right to assume that defendant would not allow them to be run into. Pugmire v. Oregon Short Line R. Co. [Utah] 92 P 762. Plaintiff had right to assume that defendant would exercise due care to prevent **fires,** while moving traction engine from plaintiff's place. Underwood v. A. W. Stevens Co., 149 Mich. 39, 14 Det. Leg. N. 296, 112 NW 487.

36. City of Americus v. Johnson, 2 Ga. App.

edge of the danger does not change the standard of care [37] and will not necessarily charge one with contributory negligence,[38] but knowledge or absence thereof should be considered,[39] and when one has knowledge of a danger he must exercise care proportionate to such known danger,[40] and there is no distinction between knowledge of the existence of a dangerous instrumentality and the recognition of the risk incident thereto.[41] Mere forgetfulness or abstraction of mind is not conclusive of negligence,[42] nor is the fact that a different course of conduct would have avoided the injury determinative of such question,[43] though it is held to constitute contributory negligence in some cases.[44] Contributory negligence may consist either of acts or omissions,[45] some of the most common phases of such negligence being failure to take proper precautions against a known danger,[46] failure to heed warnings,[47] re-

378, 58 SE 518; Purnell v. Whitford, Bartlett & Co. [R. I.] 67 A 421; Galveston, etc., R. Co. v. Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 156, 105 SW 1019; Wood v. St. Louis S. W. R. Co. [Tex. Civ. App.] 107 SW 563. An act harmless except in connection with physcial conditions created by the negligence of another, and of which the person so acting is ignorant, is not contributory negligence, though it contributes to the injury. King. Mfg. Co. v. Walton, 1 Ga. App. 403, 58 SE 115. Plaintiff not chargeable with negligence contributing to fire set by traction engine being moved from his place by defendant, unless he knew or had reason to believe that defendant would be negligent. Underwood v. A. W. Stevens Co., 149 Mich. 39, 14 Det. Leg. N. 296, 112 NW 487. When plaintiff had no knowledge of defect in spark arrester of threshing machine engine, and defendant had such knowledge. Gingrass v. Harvey [Wis.] 113 NW 1095. Employe injured by sliver of steel flying from sledge hammer with which another employe was striking chisel which plaintiff was holding. Missouri, etc., R. Co. v. Quinlan [Kan.] 93 P 632. Plaintiff's driver held not negligent in not warning farrier not to drive horse from thills without having means of holding him, where driver had no notice that such act would be done. Rimmer v. Wilson [Colo.] 93 P 1110. Telephone lineman injured while working on pole by electric light wire near the pole held not guilty of contributory negligence. Drown v. New England Tel. Co. [Vt.] 66 A 801. One who knew that a T joint in a steam pipe had been leaking for some years and had to be calked repeatedly, but who did not know that the pipe had slipped in the joint, was not guilty of contributory negligence in approaching the pipe to hang a drip pan thereon, when the joint pulled apart and an explosion occurred. Hardacre v. Sayles [R. I.] 66 A 298. Telephone company's failure to use waterproof material to protect the potheads of its cables did not preclude a recovery for injuries caused by overflow from defendant's washroom which wet the cable heads and ruined the cables. Chicago Tel. Co. v. Commercial Union Assur. Co., 131 Ill. App. 248.

The proper test as to knowledge of danger under such circumstances is not that possessed by plaintiff but that of persons of ordinary care and prudence when placed under like circumstances. Cincinnati, etc., R. Co. v. Burkhardt, 10 Ohio C. C. (N. S.) 543.

37. City of Americus v. Johnson, 2 Ga. App. 378, 58 SE 518.

38. Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 107 SW 625. Going through alley known to be dangerous instead of going another way. Harrell v. Macon, 1 Ga. App. 413, 58 SE 124.

39. Hynson v. St. Louis S. W. R. Co. [Tex. Civ. App.] 107 SW 625.

40. Bowman v. Ogden City [Utah] 93 P 561.

41. One who knew that another had been injured by a live wire held negligent in approaching it and pointing at it, regardless of whether he knew that the other person had not touched the wire. Carroll v. Grande Ronde Elec. Co., 47 Or. 424, 84 P 389. The mere fact of investigation by the injured party prior to the accident will not charge him with such knowledge of the danger which afterwards materialized in the accident complained of, the test in such case being whether the danger would have been discovered by a reasonably prudent person. Young v. Madison County [Iowa] 115 NW 23. Examination of bridge before attempting to take threshing machine and engine across it. Id.

42. Fact that pedestrian knew of defect or obstruction in sidewalk, was not thinking of it when injured held not sufficient to justify taking case from jury. Bowman v. Ogden City [Utah] 93 P 561.

43. St. Louis, etc., R. Co. v. Morris [Kan.] 93 P 163; Brown v. Nawm [Mass.] 80 NE 791. Where miner was injured by premature explosion of dynamite while he was acting according to the usual custom in making blasts, he was not, as matter of law, guilty of contributory negligence because he would not have been injured if he had acted otherwise. Wiita v. Interstate Iron Co. [Minn.] 115 NW 169. Bicycle rider thrown from bridge at point where there was no rail or guard was riding on cycle path, and would not have been injured if he had taken the main roadway, which was open and smooth. Schell v. German Flats, 54 Misc. 445, 104 NYS 116. Not contributory negligence to stand in front of a machine while oiling it, merely because the injury would not have occurred if the person doing the oiling had stood behind the machine. Perrotta v. Richmond Brick Co., 108 NYS 10. Going through alley known to be dangerous when there was another way, held not negligence per se. Harrell v. Macon, 1 Ga. App. 413, 58 SE 124.

44. Where servant chooses unsafe way of doing an act where there is a safe way, he is guilty of negligence. Kath v. East St. Louis & S. R. Co., 232 Ill. 126, 83 NE 533.

45. St. Louis & S. F. R. Co. v. Deveer [C. C. A.] 153 F 56.

46. Volosko v. Interurban St. R. Co., 190 N. Y. 206, 82 NE 1090; Purnell v. Whitford,

maining in a position known to have become dangerous,[48] or commission of obviously dangerous acts.[49] The fact that the injury received is greater than the plaintiff anticipated will not excuse his contributory negligence in not avoiding the risk.[50] Persons with physical disabilities are chargeable with the duty of exercising ordinary care, due consideration, however, being given to the fact of such disabilities.[51] Voluntary intoxication will not excuse one from exercising such care as may reasonably be expected of one while sober.[52] A bare licensee is bound to exercise such care as is proper, in view of the restricted duty of care owed to him by the proprietor of the premises.[53] Violation of statutory requirements is not necessarily contributory negligence,[54] nor is one necessarily guilty of contributory negligence in risking injury in order to save another from peril.[55] Errors of judgment in a position of danger do not constitute negligence,[56] and failure to choose safe course in a moment of peril caused by another's negligence is not necessarily negligence.[57]

Bartlett & Co. [R. I.] 67 A 421. Contractor engaged in constructing overhead runways for cranes held not liabls to painter, employed by subcontractor, who was injured while attempting to use as a support a rail which had been put in place but not fastened when could have discovered the condition of the rail. Dubrule v. Benjamin F. Smith Co. [R. I.] 68 A 544. Stranger cannot hold manufacturer for injury caused by defective composition of lubricationg oil, where by ordinary care he could have discovered that such oil was dangerously defective. Berger v. Standard Oil Co., 31 Ky. L. R. 613, 103 SW 245. Failure to look and listen before driving across street car track held negligence. Price v. Rhode Island Co. [R. I.] 66 A 200. See Street Railways, 8 C. L. 2004.

47. Warning notices will be construed with reference to the purposes for which they were posted. Notice on door, "Positively no Admittance, Keep Out," held not notice that one who might enter might be injured through negligence of owner by reason of the building not being safe for transaction of usual business. Gardner v. Waterloo Cream Separator Co., 134 Iowa, 6, 111 NW 316. One voluntarily assuming a manifestly dangerous position is guilty of negligence per se, whether he could have gotten a safer place or not, as where one stood on running board of summer car outside the lowered bar. Harding v. Philadelphia Rapid Transit Co., 217 Pa. 69, 66 A 151. To unnecessarily lean against railing known to be loose without previously examining it. Pamler v. Byrd, 131 Ill. App. 495.

48. Sitting on wheel guard rail of bridge while two teams were about to pass each other at that point. Snow v. Coe Brass Mfg. Co. [Conn.] 66 A 881.

49. It is negligence for a parent to send a child of tender years upon an errand which will expose him to danger which he has not capacity to appreciate or avoid. Sullenberger v. Chester Trac. Co., 33 Pa. Super. Ct. 12. Plaintiff was injured by explosion while pouring oil containing gasoline, which defendant had sold to him, upon a fire. Morrison v. Lee [N. D.] 113 NW 1025.

50. Johnston v. New Omaha Thompson-Houston Elec. Light Co. [Neb.] 113 NW 526.

51. Blind person. Keith v. Worcester, etc., R. Co. [Mass.] 82 NE 680.

52. Keeshan v. Elgin, A. & S. Trac. Co., 229 Ill. 533, 82 NE 360; Jefferson Theatre Program Co. v. Crejczyk, 125 Ill. App. 1. A circumstance to be considered. Kansas City So. R. Co. v. Davis [Ark.] 103 SW 603. The drunkenness of a person injured will not be considered in determining whether he was guilty of contributory negligence. Rollestone v. Cassirer [Ga. App.] 59 SE 442.

53. Patron of restaurant who, without inducement or allurement, attempted to reach water closet by means of unlighted steps and platform with which he was not familiar, held guilty of contributory negligence. Macartney v. Colwell [R. I.] 68 A 719. Driver of wagon held negligent in attempting to turn wagon, without looking at character of ground, in a private way in which he knew that perpendicular pipes sometimes projected several inches above ground, and hence could not recover for injury to horse whose foot was caught in one of such pipes which happened to be open. Bomberger v. American Iron & Steel Mfg. Co., 33 Pa. Super. Ct. 299.

54. Where driver of vehicle turned corner on left side of road when law required him to pass to right side, and was run into by automobile coming up from rear and turning corner on left side of road as required by the statute. Mendleson v. Van Rensselaer, 118 App. Div. 516, 103 NYS 578. Painter obstructing streets with scaffolding contrary to the provisions of an ordinance cannot recover for injury caused by a van colliding therewith. Knickerbocker Ice Co. v. Leyda, 128 Ill. App. 66. But where the obstruction was had with the consent of proper authorities obtained in compliance with such ordinance, the maintenance thereof is not a violation. Id.

55. Right of recovery in such case depends upon whether the person for whose sake the risk was taken could have recovered from defendant and whether the act of rescue was rash or not. Texas, etc. R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. In such case one must exercise reasonable care for his own safety. Miller v. Union R. Co. [N. Y.] 83 NE 583. One whose own negligence has exposed him to danger is not relieved from responsibility for such negligence by a subsequent attempt to save another. Id.

56. Deneen v. Houghton County St. R. Co. [Mich.] 14 Det. Leg. N. 670, 113 NW 1126. Persons in a perilous situation are not required to exercise that care and caution

Children.[See 8 C. L. 1104]—A child is required to exercise only such care as could be expected from one of its age, capacity, and experience.[58] Accordingly, children of certain ages are sometimes held to be absolutely incapable of contributory negligence.[59] Such presumption being sometimes indulged, by analogy to the doctrine of the criminal law, where the child has reached an age of more or less discretion,[60] and by the same analogy a prima facie presumption of incapacity is indulged as to children between certain ages,[61] and a presumption of capacity is indulged as to children above a certain age,[62] and where it appears that a minor has arrived at full discretion, the question as to his negligence is determined by the same rules as in the case of an adult.[63] As a general rule, however, the question of capacity is one of fact to be determined by the jury,[64] though in some cases children are held guilty of contributory

exercised ordinarily by a prudent person. Chicago & Alton R. Co. v. O'Leary, 126 Ill. App. 311.

57. Accident to automobile at railroad crossing. Sherwood v. New York, etc., R. Co., 120 App. Div. 639, 105 NYS 547. Not necessarily contributory negligence for one caught on railroad bridge to try to escape by running, when he could have gotten out on girder and been safe. St. Louis, etc., R. Co. v. Stamps [Ark.] 104 SW 1114. One who has placed another in a position of sudden peril cannot be heard to say that the latter did not adopt the most prudent course of action. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Rule that one who is placed in a situation of danger without his fault is not to be held to exercise of same care and circumspection that prudent persons would exercise when no danger is present **does not apply** to motorman injured in collision, who testified that "the instant I saw the other car approaching I threw the current off and applied my brakes—the only thing I could have done." Interurban R. & T. Co. v. Treuheit, 9 Ohio C. C. (N. S.) 77.

58. Chicago, etc., R. Co. v. Ramsey, 168 Ind. 390, 81 NE 79; Baltimore, etc., R. Co. v. Hickman [Ind. App.] 81 NE 1086; Smith v. North Jersey St. R. Co., 73 N. J. Law, 295, 67 A 753; Kostenbaum v. New York City R. Co., 120 App. Div. 160, 105 NYS 65; Magone v. Portland Mfg. Co. [Or.] 93 P 450; Gesas v. Oregon Short Line R. Co. [Utah] 93 P 274; Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626; Van Salvellergh v. Green Bay Trac. Co. [Wis.] 111 NW 1120. Child of tender years is chargeable with duty of care only with his mental and physical capacity. See Civ. Code 1895, § 2901. Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 SE 998. Where boy twelve years old was killed while crossing railroad on a wagon, defendant's counsel had the right to comment on evidence that driver tried to keep boy from riding on the wagon. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

59. Child sixteen months old. Birmingham R., L. & P. Co. v. Jones [Ala.] 45 S 177. Boy more than twelve presumed to comprehend and avoid dangers. Hanna v. Iowa Cent. R. Co., 129 Ill. App. 434. A child 13 years of age is guilty of contributory negligence if it does not exercise such care and caution as children of the same age, capacity, intelligence, and experience are capable of exercising under the same circumstances. Lake Erie & W. R. Co. v. Klinkrath, 227 Ill. 439, 81 NE 377, rvg. 130 Ill. App. 322. Evidence held to show contributory negligence. Reed v. Manierre, 124 Ill. App. 127. Child four years and four months old. De Amado v. Friedman [Ariz.] 89 P 588.

60. Child seven years old conclusively presumed to be incapable of appreciating and avoiding danger. Sullenberger v. Chester Trac. Co., 33 Pa. Super. Ct. 12.

61. Child between seven and fourteen. Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626; Birmingham R. L. & P. Co. v. Landrum [Ala.] 45 S 198.

62. Boy fourteen years old. Fortune v. Hall, 122 App. Div. 250, 106 NYS 787. Child over fourteen held to same standard of care as adult, but child under that age is charged with duty of care commensurate only with mental and physical capacity. Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 SE 998.

63. Allen v. Western Elec. Co., 131 Ill. App. 118. Boy fifteen years old injured by collision between his wagon and an engine at street crossing not held to standard applicable to persons of mature years. McNamara v. Chicago, etc., R. Co., 126 Mo. App. 152, 103 SW 1903.

64. A court would not be justified under any circumstances in imputing negligence to a child as a matter of law, since such question depends upon the circumstances and generally should be submitted to the jury Miller v. Cincinnati Trac. Co., 5 Ohio N. P. (N. S.) 489. Child five years and ten months old injured by street car at crossing. Hammond, etc., Elec. St. R. Co. v. Blockie [Ind. App.] 82 NE 541. Child six years old injured while attempting to cross street car track in front of car. Van Salvellergh v. Green Bay Trac. Co. [Wis.] 111 NW 1120. Girl six years old run over by loaded truck. Pittel v. Burkhard, 121 App. Div. 571, 106 NYS 245. Boy of seven years old injured by stepping in front of or against street car. Madigan v. Berlin St. R. Co. [N. H.] 67 A 404. Child eight years old injured while trespassing on pile of freight on a wharf. Lynch v. Knoop, 118 La. 611, 43 S 252. Child eight years old killed at railroad crossing. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624. Child eight years old injured while climbing between cars that obstructed crossing. Gesas v. Oregon Short Line R. Co. [Utah] 93 P 274. Child eight years old injured by street car. Smith v. North Jersey St. R. Co., 73 N. J. Law. 295, 67 A 753. Verdict for death of child ten years old who failed to stop, look, and listen at railroad crossing, sustained. Baltimore, etc., R. Co. v. Hickman [Ind. App.] 81 NE 1086. Boy eleven years

negligence as a matter of law.[65] Capacity to appreciate danger is not alone sufficient to charge a child with contributory negligence. He must also have sufficient discretion to avoid the danger.[66] The question of capacity is immaterial where the act of the child is the sole cause of its injury.[67] Where a child is held incapable of due care, his negligence is not chargeable to the person who injured him, but such person is merely barred of the defense of contributory negligence which might otherwise be available.[68]

Comparative negligence.[See 8 C. L. 1104]—In some few jurisdictions degrees of negligence are recognized, and the negligence of the parties will be compared,[69] but in most jurisdictions this doctrine has been repudiated.[70]

Last clear chance doctrine.[See 8 C. L. 1105]—The doctrine of last clear chance is merely a phase of the doctrine of proximate cause, in which the negligence last in point of time is held to be the proximate cause to the exclusion of all prior acts of negligence.[71] This doctrine applies only where the defendant's negligence is subsequent to that of the plaintiff,[72] or where the peril is not discovered until the injury

old held not guilty of contributory negligence in exploding dynamite caps with an electric battery. Akin v. Bradley Engineering & Mach. Co. [Wash.] 92 P 903. Whether boy of twelve years had sufficient intelligence to appreciate danger of crossing railroad on wagon at grade crossing. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22. Boy twelve years old killed while riding on top of elevator and attempting to get off through hole in shaft. Davis Adm'r v. Ohio Valley Banking & Trust Co. [Ky.] 106 SW 843. Boy thirteen years old riding bicycle and run over by horse. Ewing v. Callahan [Ky.] 105 SD 387. Girl fourteen years old injured by fall of door of freight elevator which she was entering under direction of superior, evidence as to her capacity being conflicting. Daniels v. Johnston [Colo.] 89 P 811. Girl fourteen years of age, seeing car she desired to take approaching 150 feet away and slowing down for crossing where a number of intending passengers stood waiting, attempted to cross track diagonally to join the group, when motorman who was behind time suddenly turned on current with the intention of running by the group without stopping, and girl in her fright as the car sprang forward stood motionless and was struck. Miller v. Cincinnati Trac. Co., 5 Ohio N. P. (N. S.) 489.

65. Ordinarily bright boy of twelve years, who lived in city where electricity was generally and constantly used, who took hold of live wire for purpose of receiving a shock and was injured. Johnston v. New Omaha Thomson-Houston Elec. Co. [Neb.] 113 NW 526. Boy eleven years old attempted to cross horse car track five or six feet in front of horses going three miles an hour. Bambace v. Interurban St. R. Co., 188 N. Y. 288, 80 NE 913.

66. Child between seven and fourteen going upon street railroad track without stopping, etc. Birmingham R., L. & P. Co. v. Landrum [Ala.] 45 S 198.

67. Where boy of seven years, playing tag in market shed, ran out and against fender of passing street car. Meloy v. Philadelphia Rapid Transit Co., 217 Pa. 189, 66 A 253.

68. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624.

69. If the plaintiff's conduct be negligent, it will not defeat the action unless it amounts to a failure to exercise ordinary care, and in other cases there is a comparison of the negligence of the respective parties and a corresponding diminution of the recovery. See Code 1895, § 3830. Rollestone v. Cassirer [Ga. App.] 59 SE 442.

70. The law will not attempt to apportion the blame or negligence to be attributed to each party. Bowring v. Wilmington Malleable Iron Co., 5 Pen. (Del.) 594, 66 A 369. See ante, this section, first subdivision.

71. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418; Louisville R. Co. v. Hutchcraft [Ky.] 105 SW 983; Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Collision between street car and vehicle. Zaloutuchin v. Metropolitan St. R. Co. [Mo. App.] 106 SW 548; White v. St. Louis & M. R. R. Co., 202 Mo. 539, 101 SW 14. Crossing accident. Tuscaloosa Belt R. Co. v. Fuller [Ala.] 45 S 156; Louisville & N. R. Co. v. Young [Ala.] 45 S 238; Zander v. St. Louis Transit Co., 206 Mo. 445, 103 SW 1006; Riley v. Northern Pac. R. Co. [Mont.] 93 P 948; Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972; Chunn v. City & Suburban R. of Washington, 28 S. Ct. 63. Where motorman might have, by due care, avoided the collision, notwithstanding plaintiff's negligence in driving across track. Doherty v. Des Moines City R. Co. [Iowa] 114 NW 183. Where motorman could by due care have seen one negligently on track at street crossing. Grass v. Ft. Wayne & W. V. Trac. Co. [Ind. App.] 81 NE 514. Where train could have been stopped after deceased was struck and his life could thus have been saved, if an exchange of signals between brakeman and engineer had been provided for so that brakeman, who saw the peril, could have communicated with the engineer. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P 402.

72. Does not apply where plaintiff's negligence continues and contributes to the injury concurrently with defendant's negligence. Drown v. Northern Ohio Trac. Co., 76 Ohio St. 234, 81 NE 326; Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101; Jansen v. Southern Pac. Co. [Cal. App.] 89 P 616. Doctrine not applicable by reason of deceased having been standing on hub of wagon wheel close to car track, when he stepped from the hub on to the track, and motorman did not see and could not have

has occurred,[73] or where both parties, upon discovering the peril, endeavor to prevent the accident.[74] Willful or conscious wrong is not essential to this doctrine.[75] This doctrine does not necessarily exclude contributory negligence as a defense,[76] but such negligence must be predicated upon some act or omission subsequent to or concurrent with the last negligent act of the other party,[77] and upon some knowledge or notice of the peril on the part of the person in peril.[78]

Imputed negligence.[See 8 C. L. 1105]—Where the doctrines of master and servant cannot be invoked, the negligence of the driver of a vehicle will not be imputed to mere passengers therein,[79] but one may be guilty of negligence in entrusting his safety to the driver of a vehicle.[80] In some jurisdictions it seems to be still unsettled as to whether the negligence of a parent will be imputed to a child in an action for the latter's benefit,[81] but in most jurisdictions it is well settled that such an imputation will not be indulged,[82] though the fact that the child was with its parent at the time of its injury may be considered as bearing upon the question of the defendant's negligence.[83] It is not necessarily negligence for a parent to allow a child to go upon the street unattended.[84] In any case the negligence of parents in allowing a child to go into the street unattended cannot be imputed to the child when it appears that the child exercised all the care that could have been required of an adult.[85] In determining whether parents were negligent, it is proper to consider their circumstances.[86]

The negligence of a bailee may be imputed to the bailor,[87] but this is evidently under the doctrine of respondeat superior.[88]

seen him do so. State v. Cumberland & W. Elec R. Co. [Md.] 68 A 197.

73. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408.

74. Doherty v. Des Moines City R. Co. [Iowa] 114 NW 183.

75. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418.

76, 77. Louisville & N. R. Co. v. Young [Ala.] 45 S 238.

78. Southern R. Co. v. Stewart [Ala.] 45 S 51.

79. Negligence of driver not imputed to his companion where former was not the agent of or controlled by the latter. Donnelly v. Chicago City R. Co., 131 Ill. App. 302; Eckels v. Muttschall, 230 Ill. 462, 82 NE 872. Negligence of the driver of a wagon will not be imputed to one who is a gratuitous passenger therein. Illinois S. R. Co. v. Hamill, 128 Ill. App. 152. The negligence of the husband in driving a vehicle is not imputable to his wife who is an occupant thereof. Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105. Automobile accident. Noakes v. New York Cent., etc., R. Co., 121 App. Div. 716, 106 NYS 522; Read v. New York Cent., etc., R. Co., 123 App. Div. 228, 107 NYS 1068; Nonn v. Chicago City R. Co., 232 Ill. 378, 83 NE 924; Zaloutuchin v. Metropolitan St. R. Co. [Mo. App.] 106 SW 548. Negligence of driver of automobile not imputable to mere passenger who had no control over machine or the driver. Ward v. Brooklyn Heights R. Co., 119 App. Div. 487, 104 NYS 95. Negligence of master not imputable to servant who was riding on truck with him when collision with defendant's car occurred. Doctoroff v. Metropolitan St. R. Co., 105 NYS 229. Negligence of driver of hook and ladder truck which collided with street car not imputable to passenger on truck who had no control over the driver. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 SW 621. Negligence of husband not imputable to wife where buggy driven by him and in which she was riding collided with locomotive. Southern R. Co. v. King, 128 Ga. 383, 57 SE 687.

A joint undertaking is held in some states to render the negligence of driver imputable to his companions. Louisville & N. R. Co. v. Armstrong [Ky.] 105 SW 473.

80. Boy injured while crossing railroad on wagon. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

81. Evidence held not to require determination of question. De Amado v. Friedman [Ariz.] 89 P 588.

82. Atchison, etc., R. Co. v. Calhoun, 18 Okl. 75, 89 P 207.

83. Atlantic Coast Line R. Co. v. Cresby, 53 Fla. 400, 43 S 318. Declaration of mother immediately after accident that it was her fault held admissible as part of res gestae. Id.

84. Action by child six years old for injury at railroad crossing. Serano v. New York Cent., etc., R. Co., 188 N. Y. 156, 80 NE 1025. Seven year old boy allowed to go around alone on streets near home or to visit a neighbor. Henderson v. Continental Refining Co. [Pa.] 68 A 968. Five year old boy allowed to go on business part of city unattended. Saxton v. Pittsburg R. Co. [Pa.] 68 A 1022.

85. Serano v. New York Cent., etc., R. Co., 188 N. Y. 156, 80 NE 1025.

86. Cornovoki v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51.

87. In action against railroad company for loss of goods by fire, the contributory negligence of bailee of such goods was imputed

§ 5. *Actions. Pleading. The petition or complaint.*[See 8 C. L. 1108]—The sufficiency of the facts alleged to constitute negligence may be tested by a general demurrer.[89] The declaration is sufficient if it apprises the defendant of what is intended to be charged,[90] and if the defendant cannot escape liability by admitting all the facts charged,[91] and a complaint is sufficient on demurrer for want of facts if it contains a sufficient allegation of a single act of negligence.[92] The facts may be stated according to their legal effect.[93] While, therefore, the act of negligence complained of must be alleged,[94] and in some jurisdictions the specific facts must be alleged,[95] as a general rule a general allegation of negligence, that is an allegation of the ultimate act of negligence, is sufficient.[96] The complaint or petition must show a duty of due care on the part of the defendant,[97] and a general allegation of duty is insufficient,[98] nor will such duty be implied from a general allegation of negligence in the ultimate act charged as causing the injury.[99] The declaration in an action brought under the "attractive nuisance" doctrine must show an actual or implied invitation to the person injured to enter upon the premises.[1] A general allegation of willfulness and wanton-

to plaintiff. Svea Ins. Co v. Vicksburg, etc., R. Co., 153 F 774.

88. See Agency, 9 C. L. 58; Bailment, 9 C. L. 323.

89. Harden v. Georgia R. Co.[Ga. App.] 59 SE 1122.

90. Complaint for injuries caused by horse being frightened on highway by steam from defendant's manufacturing plant held not subject to demurrer for want of facts. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Allegations as to duty of manufacturer of dangerous articles to know the character thereof and to give notice of such character held sufficient. Clement v. Crosby, 148 Mich. 293, 14 Det. Leg. N. 85, 111 NW 745. Allegation of manufacturer's knowledge and fraudulent concealment of dangerous character of his product held sufficient. Id. Description of property destroyed held sufficient. McVay v. Central California Inv. Co. [Cal. App.] 91 P 745. General allegation of ownership is allegation that plaintiffs were tenants in common. Id. An allegation that defendant "permitted" an act to be done imports knowledge of the damage threatened or of the facts from which the danger may be anticipated. Pittsburg, etc., R. Co. v. Richardson [Ind. App.] 82 NE 536.

91. On general demurrer. Richards v. O'Brien, 1 Ga. App. 107, 57 SE 907.

92. Grass v. Ft. Wayne & W. Valley Trac. Co. [Ind. App.] 81 NE 514.

93. Allegation that defendant dug ditch in city street with consent of city, and that it was left open, unlighted, and unguarded, held not to show that defendant was acting merely for the city. Lowe v. Miller, 31 Ky. L. R. 829, 104 SW 257.

94. Hall v. Northern Pac. R. Co. [N. D.] 111 NW 609.

95. Gibbons v. Lehigh Valley R. Co., 106 NYS 543. General allegations of negligence unaccompanied by the facts constituting such negligence are insufficient on a special demurrer. Harris v. Southern R. Co., 129 Ga. 388, 58 SE 873. Even where the law creates a **presumption of negligence from accident** itself, such presumption being a rule of evidence and not of pleading. Georgia R. & Banking Co. v. Williams [Ga. App.] 59 SE 846; Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122.

96. Pittsburg, etc., R. Co. v. Richardson [Ind. App.] 82 NE 536; Edwards' Adm'r v. Chesapeake & O. R. Co. [Ky.] 108 SW 303; Welch v. Fransioli [Wash.] 90 P 644. On demurrer for want of facts. Lake Erie & W. R. Co. v. Moore [Ind. App.] 81 NE 85. That decedent was killed by negligent management of elevator. Davis' Adm'r v. Ohio Valley Banking & Trust Co. [Ky.] 106 SW 843. One injured by an electirc wire need not allege that the wire was improperly insulated, or that the injury was caused by the escape of electricity. Drown v. New England Tel. & T. Co. [Vt.] 66 A 801. Conditions of travel at place where collision with street car occurred need not be alleged. Wilmington City R. Co. v. White [Del.] 66 A 1009. Charge of negligence predicated upon collision between engine and street car held sufficient. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Allegation that plaintiff's springs were injured by negligence of defendant's servants in pumping water from the land held sufficient. Louisville & N. R. Co. v. Higginbotham [Ala.] 44 S 872. Allegation that defendant negligently furnished car with defective brake, held equivalent to allegation that by exercise of ordinary care defendant could have discovered such defect. Fassbinder v. Missouri Pac. R. Co., 126 Mo. App. 563, 104 SW 1154. A charge that an act was done negligently is **not a bare legal conclusion** but a conclusion of fact, and may be so pleaded without any statement of the facts constituting the negligence. Lowe v. Miller, 31 Ky. L. R. 829, 104 SW 257.

97. Evansville, etc., R. Co. v. Yeager [Ind.] 83 NE 742.

98. Facts from which duty arose must be alleged. Chicago & E. R. Co. v. Lain [Ind.] 83 NE 632.

99. Evansville & T. H. R. Co. v. Yeager [Ind.] 83 NE 742.

1. In charging negligence due to **attractive nuisance,** the declaration must allege that the premises on which the dangerous device stood were unlnclosed, or that owner had allowed premises to be so used that they were at least temporarily devoted to a public use, or that the plaintiff had been in some way invited to be or was rightfully upon the premises. Demurrer sustained to declaration

ness is insufficient,[2] but it is not necessary to particularize in what the wantonness or willfulness consisted.[3] Wantonness and willfulness may be alleged in the alternative.[4] Insufficient allegations of wantonness may constitute sufficient allegation of simple negligence, thus letting in the defense of contributory negligence,[5] but such is not necessarily the result.[6] In an action for negligence based on the violation of a statute, the statute need not be pleaded.[7] Several distinct causes of action arising from separate and distinct acts of negligence need not be stated in separate paragraphs,[8] but when the injury and the damages are the same, common-law and statutory negligence may be alleged in a single count.[9] Local customs must be pleaded but not so as to general customs.[10] In some jurisdictions freedom from contributory negligence must be alleged,[11] while in others such an allegation is not necessary,[12] contributory negligence being a matter of affirmative defense,[13] but in either case a demurrer will lie to a complaint which shows contributory negligence on its face.[14] The plaintiff cannot recover upon the last clear chance doctrine unless his petition alleges such negligence as warrants the application of such doctrine.[15] A recovery may be had, however, under such doctrine on a count charging simple negligence.[16] It is not necessary to negative that plaintiff was a trespasser,[17] but in an action by a licensee the negligence charged must be such as will render the defendant liable, in view of the limited liability to licensees.[18] The declaration must establish the connection between the wrongful act and the injury,[19] and must connect all of the parties defendant with the negligence alleged.[20] It must allege that the defendant's negligence

failing to allege how plaintiff came upon premises. Grauslis v. Kellyville Coal Co., 127 Ill. App. 311.

2. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418.

3. Southern R. Co. v. Weatherlow [Ala.] 44 S 1019. Allegations that defendants wantonly, etc., exploded powder, etc., well knowing that said acts would probably result in injury to the plaintiff, and with reckless disregard of the consequences, held sufficient. Bessemer Coal, Iron & Land Co. v. Doak [Ala.] 44 S 627.

4. Southern R. Co. v. Weatherlow [Ala.] 44 S 1019.

5. Birmingham R., Light & Power Co. v. Jaffee [Ala.] 45 S 469. Allegations that the defendant or his servants were acting wantonly and recklessly, without allegation that injury was wantonly inflicted, or any allegation of consciousness of probable injury, etc. Id.

6. Allegation that injury was wantonly inflicted, without stating facts of which the wantonness consisted, held subject to demurrer, and defense of contributory negligence was not available. Birmingham R., L. & P. Co. v. Jaffee [Ala.] 45 S 469.

7. Leathers v. Blackwell Durham Tobacco Co., 144 N. C. 330, 57 SE 11.

8. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265.

9. White v. St. Louis, etc., R. Co., 202 Mo. 539, 101 SW 14. Held harmless to refuse to compel **election** where the statute was merely declaratory of common-law duty and the issue thereon was eliminated by instructions. Id.

10. Custom of street cars to permit funeral processions to pass unbroken held admissible though not pleaded. Wilmington City R. Co. v. White [Del.] 66 A 1009.

11. Cahill v. Illinois Cent. R. Co. [Iowa] 115 NW 216.

12. Acts 1899, p. 58, c. 41 (Burns' Ann. St. 1901, § 359a). Kokomo R. & L. Co. v. Studebaker [Ind. App.] 83 NE 260.

13. See post, this section, subdivision The Answer.

14. Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 SE 462; Southern R. Co. v. Miller [Ga. App.] 59 SE 1115; Harris v. Southern R. Co., 129 Ga. 388, 58 SE 873; Georgia R. & Banking Co. v. Williams [Ga. App.] 59 SE 846.

15. Drown v. Northern Ohio Trac. Co., 76 Ohio St. 234, 81 NE 326. Complaint involving doctrine of last clear chance held sufficient. Southern R. Co. v. Stewart [Ala.] 45 S 51.

16. Allegation of wilfullness or wantonness not necessary. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418.

17. Where plaintiff's wood on side of highway running through defendant's land was burned by a fire set by defendant. King v. Norcross [Mass.] 82 NE 17.

18. Allegation that accident was caused by negligent driving of defendant's servant of sleigh in which plaintiff was riding by mere permission held sufficient to permit proof of such negligence as would render defendant liable. Pigeon v. Lane [Conn.] 67 A 886.

19. Mere allegation that plaintiff was ejected from car and later fell off bridge while walking along track after ejectment insufficient. Keeshan v. Elgin, A. & S. Trac. Co., 229 Ill. 533, 82 NE 360. The plaintiff's proof is sufficient if he proves that the defendant was negligent in any of the ways charged in the declaration, and that such acts contributed to the injury. Baltimore, etc., R. Co. v. Stewart, 128 Ill. App. 270.

20. Complaint dismissed as to certain parties where the only allegation connecting such parties with the negligence was that they were doing the work, the defects in which caused the injury, under contract with an independent contractor with plaintiff's employer, it not appearing whether such

was the proximate cause of the injury complained of.[21] Insufficient description of the injury and the damages may be cured by amendment,[22] as may also failure to negative contributory negligence,[23] but failure of the petition to allege knowledge or notice on the part of the defendant is not cured by a traverse and a plea of contributory negligence.[24] Where the declaration charges common negligence of two defendants and the action is dismissed as to one defendant, the declaration is still good as to the other,[25] but the rule is otherwise where the declaration charges concurrent negligence.[26]

The answer. See 8 C. L. 1110—The plea of not guilty puts in issue the averments of the declaration.[27] An argumentative denial is sufficient on demurrer.[28] That the accident was caused by agencies for which defendant was not responsible may be shown under a general denial.[29] Contributory negligence must be pleaded,[30] unless it is shown by plaintiff's own case [31] or by his own evidence.[32] Such a plea must allege the acts constituting such negligence.[33] Such a plea involves an admission of defendant's negligence.[34]

The replication must answer the plea.[35] Allegations of mere conclusions are insufficient.[36]

Issues and proof. See 6 C. L. 1110—The allegations and the proof must correspond,[37] but it is only necessary that the accident be proved substantially as alleged.[38] Where negligence is alleged in general terms, any specific act of negligence may be

parties were agents or servants of the independent contractor or an independent subcontractor, there being a misjoinder if they were the latter. Richards v. O'Brien, 1 Ga. App. 107, 57 SE 907.

21. Lake Erie & W. R. Co. v. Moore [Ind. App.] 81 NE 85. Where neglect of mine owner to perform statutory duty and order of mine manager concurred to produce injury, recovery was not precluded because no recovery could be had under the declaration on account of such order. Wilmington Star Min. Co., 205 U. S. 60, 51 Law. Ed. 708. Demurrer is proper method of objecting to failure to state facts showing proximate cause. Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. It is sufficient to allege the facts from which the causal connection may be inferred without a formal charge as to causation. Hammond, etc., Elec. R. Co. v. Antonia [Ind. App.] 83 NE 766.

22. Atlantic Coast Line R. Co. v. O'Neill, 127 Ga. 685, 56 SE 986.

23. Such amendment does not state new cause of action. Cahill v. Illinois Cent. R. Co. [Iowa] 115 NW 216; Ridings v. Marion County [Or.] 91 P 22.

24. Louisville & N. R. Co. v. Armstrong [Ky.] 105 SW 473.

25, 26. Frank Parmelee Co. v. Wheelock, 127 Ill. App. 500.

27. Smith v. Devlin, 127 Ill. App. 492.

28. Teague v. Bloomington [Ind. App.] 81 NE 103.

29. Though answers filed set up other reasons for the accident. Multnomah County v. Willamette Towing Co. [Or.] 89 P 389. Sustaining of demurrer to answer setting up other agencies as cause of the accident held not conclusive of right to prove, under general denial, that one of such agencies caused the accident. Id.

30. Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940; Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972; Smith v. Ogden & N. W. R. Co. [Utah] 93 P 185. Rev. St. 1901, par. 1277, requires answer to state facts constituting ground of defense. De Amado v. Friedman [Ariz.] 89 P 588.

31. Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940.

32. Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940. Motion for nonsuit is proper in such case. Smith v. Ogden & N. W. R. Co. [Utah] 93 P 185; Brown v. Oregon R. & Nav. Co., 41 Wash. 688, 84 P 400.

33. Plea that plaintiff was guilty of negligence proximately contributing to his injury held insufficient on demurrer. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Answer which sets forth an act or omission of the plaintiff characterizes it as negligent, and alleges that it caused or contributed to the injury complained of sufficiently tenders the affirmative issue of contributory negligence. Lincoln Trac. Co. v. Brookover [Neb.] 111 NW 357.

34. Hence is inconsistent with a denial of negligence. Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940.

35. Replication to plea of contributory negligence held insufficient in that it failed to answer the plea. Southern R. Co. v. Hobbs [Ala.] 43 S 844.

36. Averment that such negligence did not proximately contribute to plaintiff's injury held insufficient as stating a mere conclusion. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Replications held sufficient under this rule. Id.

37. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S 318. Plaintiff is confined to the act of negligence alleged and the results thereof which caused the injury as alleged. Elkton Consol. Min. & Mill. Co. v. Sullivan [Colo.] 92 P 679.

38. Variance not fatal where petition alleged that plaintiff's mule was frightened and ran down the railroad track and plaintiff was thrown out, and it was proved that mule ran down along the side of track and plaintiff jumped out. Southern R. Co. v. Tankersley [Ga. App.] 60 SE 297.

proved,[39] and where several acts of negligence are alleged, a recovery may be had upon proof of any one which is sufficient to predicate liability upon,[40] but where specific acts are alleged other acts cannot be proved.[41] The right to rely on the doctrine of res ipsa loquitur is not lost by particularly alleging the cause of the accident.[42] Matters treated by the parties as being in issue will be so treated by the court.[43] Where the evidence fails to establish any causal connection between the negligence alleged in an amendment and the injury, the amendment cannot be considered,[44] and especially is this the case where the evidence also fails to establish the negligence alleged in such amendment.[45] A custom known to the person injured may be considered though not pleaded.[46]

Evidence. Admissibility. See 8 C. L. 1111—Any circumstance or fact may be proved which affects the question of the degree of care required in the particular instance,[47] and in an action against several defendants, each has the right to prove any facts which would relieve it from liability.[48] Evidence of a general custom is admissible as bearing on the relation of the parties[49] and on contributory negligence,[50] but evidence of particular custom is inadmissible.[51] Physical conditions at the time of the accident may be proved,[52] and so also conditions after the accident where they remain unchanged.[53] Evidence of changes after accident is not admissible to prove negligence,[54] but is admissible to show conditions at the time of the accident.[55] As a general rule evidence of other transactions is inadmissible,[56] but such evidence is admis-

39. Edwards' Adm'r v. Chesapeake & O. R. Co. [Ky.] 108 SW 303; Welch v. Fransioli [Wash.] 90 P 644.

40. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265; Spaulding v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1049; Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 18 Tex. Ct. Rep. 941, 101 SW 492.

41. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815; Edwards' Adm'r v. Chesapeake & O. R. Co. [Ky.] 108 SW 303; Todd v. Missouri Pac. R. Co., 126 Mo. App. 684, 105 SW 671; Tighe v. Atchison, etc., R. Co. [Mo. App.] 107 SW 1034; Gibbons v. Lehigh Valley R. Co., 106 NYS 543; Hall v. Northern Pac. R. Co. [N. D.] 111 NW 609. The specific acts of negligence charged must be proved to have proximately caused the accident. Wilmington Star Min. Co. v. Fulton, 205 U. S. 60, 51 Law. Ed. 708. Specific allegations control and limit a general allegation of negligence. Joseph v. Metropolitan St. R. Co. [Mo App.] 107 SW 1055. General allegation of **joint negligence** held controlled and nullified by subsequent allegations of specific acts of negligence. Ramsey v. Cedar Rapids & M. C. R. Co. [Iowa] 112 NW 798.

42. Lobb v. Seattle, etc., R. Co. [Wash.] 93 P 420; Walters v. Seattle, etc., R. Co. [Wash.] 93 P 419. **Contra.** Kennedy v. Metropolitan St. R. Co. [Mo. App.] 107 SW 16.

43. Where doctrine of last clear chance is treated by both parties as being in issue, it will be considered by the court as being in issue, though not raised by the plaintiff's reply. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948.

44, 45. Shields v. Georgia R. & Elec. Co., 1 Ga. App. 172, 57 SE 980.

46. Custom of street cars to permit funeral processions to pass without break. Wilmington City R. Co. v. White [Del.] 66 A 1009.

47. Location of electric wires may be proved on issue of negligence in insulation. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815.

48. That construction company was in charge of railway company's track at time when employe of construction company was killed in wreck caused by obstructions placed on track by the employes of a Cuba company, all three companies bring suit jointly. Draper v. Interborough Rapid Transit Co., 108 NYS 691.

49. Custom of carrying passengers on freight elevator is proper to be considered in determining negligence with reference to a passenger injured on such elevator. Gray v. Siegel-Cooper Co., 187 N. Y. 376, 80 NE 201.

50. Custom of workman to step out of way on giving signal to hoist timber. Leary v. Anaconda Copper Min. Co. [Mont.] 92 P 477. Custom of street cars to allow funeral procession to pass unbroken. Wilmington City R. Co. v. White [Del.] 66 A 1009.

51. How another railroad handled rails. Texas Cent. R. Co. v. Waldie [Tex. Civ. App.] 18 Tex. Ct. Rep. 60, 101 SW 517.

52. Photographs showing material conditions at the time of the accident, held admissible. Edge v. Southwest Mo. Elec. R. Co., 206 Mo. 471, 104 SW 90.

53. Where there was no claim that condition of elevator was changed after the accident. Gray v. Siegel-Cooper Co., 187 N. Y. 376, 80 NE 201.

54. Diamond Rubber Co. v. Harryman [Colo.] 92 P 922; Kath v. East St. Louis Sub. R. Co., 232 Ill. 126, 83 NE 533; Matteson v. New York Cent., etc., R. Co. [Pa.] 67 A 847. When, after employe was injured while attempting, with others, to lift girder with clinch bars, the girder was lifted with rope and jack. Bokamp v. Chicago & A. R. Co., 123 Mo. App. 270, 100 SW 689.

Where it is admitted for some other purpose its effect should be limited to such purpose by a proper instruction. Diamond Rubber Co. v. Harryman [Colo.] 92 P 922.

55. That pole against which car conductor struck as he leaned out of car had been

sible to show a dangerous custom,[57] or to show that the defendant recognized the existence of the danger which resulted in the accident,[58] or had notice thereof,[59] but such evidence is not admissible for any purpose unless the conditions are shown to be similar.[60] Evidence of other accidents is admissible to show knowledge of the defendant,[61] but not to show negligence or character of the thing which caused the accident,[62] nor is evidence that no similar accidents had ever occurred admissible.[63] Evidence of experiments is admissible in a proper case,[64] as is also expert testimony,[65] and demonstrative evidence.[66] Opinions of witnesses are not admissible.[67] A city ordinance in the nature of a police regulation is admissible in an action based on the violation of such ordinance for injury caused by such violation.[68] Evidence that the defendant was insured against liability on account of such accidents as the one constituting the basis of the suit is inadmissible.[69] The usual rules as to cross-examination of witnesses apply.[70]

moved after accident. Kath v. East St. Louis & S. R. Co., 232 Ill. 126, 83 NE 533.

56. Testimony that witness had previously told certain employes to place warning light on subway track when they put obstructions on it, as they had previously come near wrecking him, held inadmissible, in action by an employe for injuries caused by obstructions on track. Draper v. Interborough Rapid Transit So., 108 NYS 686.

57. Throwing mail sacks from train. Pittsburg, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934.

58. In considering whether it was negligence to fail to provide for inspection of water power of a mill at night with regard to effect on regularity of flow of water in river, the fact that inspection was provided for in the daytime may be considered. Desautelle v. Nasonville Woolen Co. [R. I.] 66 A 579.

59. Evidence of another employe that he had several times come near being injured while using same machine and that he had notified master. Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821.

60. That witness, with one horse, had driven the distance driven by defendant with two horses, one of which died, in less time than that in which defendant drove it. Welch v. Fransioli [Wash.] 90 P 644.

61. Knowledge of master as to dangerous character of machine operated by minor. Leathers v. Blackwell Durham Tobacco Co., 144 N. C. 330, 57 SE 11. Notice of defects in elevator. Glassman v. Surpless, 53 Misc. 586, 103 NYS 789. Where fire extinguisher fell from window and injured person in street below, evidence that it had previously been knocked from the window by person passing the window, and that proprietor of building knew of such occurrences, held admissible. Stan v. Kane [C. C. A.] 156 F 100.

62. That others had tripped over iron pipe projecting above curb. Diamond Rubber Co. v. Harryman [Colo.] 92 P 922. That barrels had at other times fallen from same window held inadmissible, though one of defendant's theories was that the injury was result of pure accident. Calcaterra v. Iovaldi, 123 Mo. App. 347, 100 SW 675. Negligence in construction and maintenance of sewer resulting in overflow of plaintiff's cellar could not be predicated upon evidence of overflows of other cellars in a territory through which defendant's sewer system extended but in which a different system of sewers prevailed. McKenzie v. New York, 119 App. Div. 60, 103 NYS 855.

63. Where servant was injured by breaking of ladder, testimony of another servant that no ladder had ever broken with him under similar circumstances held inadmissible. Adams v. Gulf, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 507, 105 SW 526.

64. Evidence that steam was escaping from engine to such extent that engineer had to go out on pilot to see track held not based on an experiment so as to require proof of similar conditions at that time and the time of the accident. Stone v. Union Pac. R. Co. [Utah] 89 P 715.

65. Admissible on issue of negligence in insulation of electric wires. Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815. As to explosive character of gasoline. Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170. Opinion of physician that the cause of death was inhalation of paint fumes while painting inside of tank held admissible. Houston, etc., R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529. Where, in action for death of horse alleged to have been caused by overdriving and mistreatment, the court clearly charged that defendant was not bound to exercise the care and skill of an expert horseman, or veterinary surgeon, there was no error in allowing such a surgeon to testify as to proper treatment for a sick horse, such evidence being admitted primarily on issue as to the condition of the horse and the cause of such condition. Welch v. Fransioli [Wash.] 90 P 644.

66. Fragments of bone taken from plaintiff's head held admissible to show force of concussion and extent of injuries. St. Louis & S. F. R. Co. v. Mathis [Tex.] 107 SW 530.

67. Whether candle light on outside of hatchway would have enabled one to see the hatchway held matter of opinion or conclusion. Doyle v. Eschen [Cal. App.] 89 P 836. Testimony that steam escaped from engine to such extent as to obscure track and the headlight **held not opinion** evidence. Stone v. Union Pac. R. Co. [Utah] 89 P 715.

68. Deneen v. Houghton St. R. Co. [Mich.] 14 Det. Leg. N. 670, 113 NW 1126.

69. Error in admission of such evidence cannot be cured by instruction to disregard. Capital Const. Co. v. Holtzman, 27 App. D. C. 125. Evidence that witness' employer had

Presumptions and burden of proof.[See 8 C. L. 1113]—The burden is on the plaintiff to establish negligence by a preponderance of the evidence,[71] and this burden does not shift even where the doctrine of res ipsa loquitur is applicable.[72] Negligence will not be presumed in the absence of evidence thereof,[73] or from the mere facts of the accident,[74] but it may be inferred from facts and circumstances which reasonably impute it,[75] and under the doctrine of res ipsa loquitur a prima facie presumption of negligence arises when the accident is such that in the ordinary course of affairs it would not have happened except for the defendant's negligence.[76] This doctrine is

insured defendant, if admissible at all, should be confined to bias of witness. Id.

70. Where defendant had testified that he could have seen everything in the building if he had looked, and that he saw no posts at corners of elevator shaft into which he fell, there was no prejudicial error in refusing to allow him to be asked on cross-examination whether he could have seen the elevator and whether he saw the posts. Gardner v. Waterloo Cream Separator Co., 134 Iowa, 6, 111 NW 316.

71. Southern R. Co. v. Stewart [Ala.] 45 S 51; Little v. American Tel. & T. Co. [Del.] 67 A 169; Siemonsma v. Chicago, etc., R. Co. [Iowa] 115 NW 230; Luecke v. Graham, 123 Mo. App. 212, 100 SW 505; Grenshaw v. Asheville & B. St. R. & Transp. Co., 144 N. C. 314, 56 SE 945. In determining **whether the burden has been sustained,** all the evidence in the case should be considered. Daggett v. North Jersey St. R. Co. [N. J. Err. & App.] 68 A 179. Enough to prove facts and circumstances from which jury might infer that fall of elevator was due to defects therein or to negligent operation. Glassman v. Surpless, 53 Misc. 586, 103 NYS 789.

72. See post, this section and subdivision.

73. Negligence will not be inferred from the plan on which a freight elevator was constructed, in absence of showing that it ought to have been constructed differently. Rush v. Thos. D. Murphy Co. [Iowa] 112 NW 814.

74. Jones v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 83, 105 SW 1007. Accident on freight elevator. Rush v. Thos. D. Murphy Co. [Iowa] 112 NW 814. Injury to servant while in discharge of duties. Elkton Consol. Min. & Mill. Co. v. Sullivan [Colo.] 92 P 679. Employe injured by fall of elevator caused by breaking of cog wheel which could not have resulted from mere use or wear. National Biscuit Co. v. Wilson [Ind.] 82 NE 916. Collision between vehicle caused by running away of horse attached to one of them. Luecke v. Graham, 123 Mo. App. 212, 100 SW 505. As between carrier and passenger, see Carriers, 9 C. L. 466.

Note: "When an employe is injured while operating a freight elevator, the mere happening of an accident raises no presumption, and cannot serve as proof of the master's negligence. Hill v. Iver-Johnson, etc., Co., 188 Mass. 75, 74 NE 303; Moran v. Racine Wagon Co., 74 Hun, 454, 26 NYS 852; Kirby v. Ranier, etc., Co., 28 Wash. 705, 69 P 378; Robinson v. Wright, etc.. Co., 94 Mich. 283, 53 NW 938; Davidson v. Davidson, 46 Minn. 117, 48 NW 560; Haynie v. Hammond Packing Co., 126 Mo. App. 88, 103 SW 581, 47 Am. St. Rep. 633, 27 L. R. A. 401; Rush v. Murphy [Iowa] 112 NW 814. The cases cited involving accidents from defective passenger elevators are but remotely in point upon the question here presented. The general principle upon which our conclusion rests is firmly established. In the case of Wabash, etc., R. Co. v. Locke, 112 Ind. 404, 14 NE 391, 2 Am. St. Rep. 193, this court through Mitchell, C. J., in discussing a master's liability to a servant, said. 'Where, however, an action is predicated upon an inquiry resulting from an act or omission which could only become tortious on account of the relations which the parties sustained to each other, and where the very substance of the wrong complained of itself was the failure to act with due foresight, then the right of action depends primarily upon so fixing the relation of the parties as to show the defendant's obligation and upon showing further that the harm and injury complained of was such as a reasonable man in defendant's place would have foreseen and provided against. In such a case it is not enough to show that an accident happened, and that death or injury resulted therefrom. Negligence is not to be presumed from the fact of an occurrence like that involved in the present case, the statement of which suggests its anomalous, exceptional and extraordinary character.' See, also, Cleveland, etc., R. Co. v. Ward, 147 Ind. 256, 259, 45 NE 325, 46 NE 462; Hoosier Stone Co. v. McCain, 133 Ind. 231, 237, 31 NE 956; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 221, 12 NE 380; Pittsburg, etc., R. Co. v. Adams, 105 Ind. 151, 163, 5 NE 187; Louisville, etc., R. Co. v. Orr, 84 Ind. 50, 55; Patton v. Texas, etc., R. Co., 179 U. S. 658, 663, 45 Law. Ed. 361; Northern Pac., etc., Co. v. Dixson, 71 C. C. A. 555, 139 F 737, 740; Chicago, etc., Co. v. O'Brien, 67 C. C. A. 421, 132 F 593, 596; Droney v. Doherty, 186 Mass. 205, 71 NE 547; Welsh v. Cornell, 168 N. Y. 508, 61 NE 891; Sacks v. Dolese, 137 Ill. 129; 27 NE 62; Redmond v. Delta Lumber Co., 96 Mich. 545, 55 NW 1004; Huff v. Austin, 46 Ohio St. 386, 21 NE 864, 15 Am. St. Rep. 613; Baldwin v. Railway Co., 68 Iowa 37, 25 NW 918; Kansas, etc., Co. v. Salmon, 11 Kan. 83; Duntley v. Inman, 42 Or. 334 70 P 529, 59 L. R. A. 785; Brymer v. Southern Pac. R. Co., 90 Cal. 496, 27 P 371; Minty v. Union Pac. R. Co., 2 Idaho, 471, 21 P 660; Louisville, etc., Co. v. Allen's Adm'r, 78 Ala. 494; Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 SE 329; Edgens v. Gaffney, 69 S. C. 529, 48 SE 538; Short v. New Orleans, etc., 69 Miss. 848, 13 S 826; Stewart v. Van Deventer, 138 N. C. 60, 50 SE 562; Moore Lime Co. v. Johnston's Adm'r, 103 Va. 84, 48 SE 557; Glasscock v. Swofford, etc., Co. [Mo. App.] 74 SW 1039."—From National Biscuit Co. v. Wilson [Ind.] 82 NE 916.

75. Napurana v. Young [N. J. Err. & App.] 65 A 1052.

76. Louisville Lighting Co. v. Owens [Ky.] 105 SW 435; Todd v. Missouri Pac. R. Co.,

most frequently invoked in cases involving the relation of carriers and passengers.[77] It does not apply where the surrounding circumstances leave room for a different presumption,[78] and the circumstances must, therefore, exclude the operation of all other causes or agencies than defendant's negligence.[79] It does not apply to cases involving complicated machinery,[80] or where the injury arises from conditions inherently dangerous,[81] or where the appliances in question were under the direct control of plaintiff.[82] The burden of proof on the whole case is not shifted, but the defendant merely has to meet the presumption arising from the circumstances,[83] but a presumption of negligence involving defective conditions retains its force until the defendant has proved affirmative acts of care.[84]

The plaintiff must also prove by a preponderance of the evidence that the negligence charged was the proximate cause of the injury.[85]

126 Mo. App. 684, 105 SW 671; McGowan v. Nelson [Mont.] 92 P 40; Cunningham v. Dady [N. Y.] 83 NE 689; Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626. Injury to person on street by **fall of awning.** McHarge v. Newcomer, 117 Tenn. 595, 100 SW 700.

Electrict lamp fell by reason of **breaking of rope.** Louisville Lighting Co. v. Owens [Ky.] 105 SW 435.

Overturning of railroad car. Minihan v. Boston El. R. Co. [Mass.] 83 NE 871.

Street car fender became detached and struck person about to board car. McDonnell v. Chicago City R. Co., 131 Ill. App. 227. Injury from **electric wire** is prima facie evidence that wire was not properly insulated and that escape of electricity caused the injury. Drown v. New England Tel. & T. Co. [Vt.] 66 A 801. Prima facie case of negligence made out where **car coupling** broke, precipitating the contents of the car into a scow which was about to receive the load from the car, regardless of whether the negligence consisted of the manner of handling the car or of a defective coupler. Eriksson v. Goodwin [C. C. A.] 154 F 351. Where **fire** extinguisher fell from window upon person in street below. Stair v. Kane [C. C. A.] 156 F 100. Fall of **elevator.** Glassman v. Surpless, 53 Misc. 586, 103 NYS 789; Lauder v. Currier, 3 Cal. App. 28, 84 P 217. An injury caused by **street car leaving track** and striking plaintiff's wagon is within the rule of res ipsa loquitur. Chicago Union Trac. Co. v. Giese, 229 Ill. 260, 82 NE 232. Where **structure** on which servant was working **collapsed** while being properly used for the purpose for which it was constructed. Ferrick v. Eidlitz, 108 NYS 28. Where **trap door** in floor of car flew up and injured passenger. Baum v. New York & Q. C. R. Co., 108 NYS 265. Where **bundle of steel rods fell** on plaintiff's foot while he was at defendant's desk paying for goods he had purchased in defendant's store. Higgins v. Ruppert, 108 NYS 919.

Note: "A presumption of negligence may arise from the nature of the act—as, for example, the fall of an elevator (Griffen v. Manice, 166 N. Y. 188, 59 NE 925, 82 Am. St. Rep. 630, 52 L. R. A. 922); that a cylinder burst and fell into the street (Goll v. Manhattan R. Co., 5 NYS 185, afd. 125 N. Y. 714, 26 NE 756); the fall into the street of a bolt from an elevated road (Volkmar v. Manhattan R. Co., 134 N. Y. 418, 31 NE 870, 30 Am. St. Rep. 678); the fall of a brick into the street from a house in course of construction (Guldseth v. Carlin, 19 App. Div. 588, 46 NYS 357); fall of boom of derrick (Reed v. McCord, 18 App. Div. 381, 46 NYS 407); fall of chisel from structure into street (Cahalin v. Cochran, 1 N. Y. St. Rep. 583); fall of live wire into street (Jones v. Union R. Co., 18 App. Div. 267, 46 NYS 321); shock from electricity (D'Arcy v. Westchester El. R. Co., 82 App. Div. 263, 81 NYS 952)."—From Glassman v. Surpless, 53 Misc. 586, 103 NYS 789.

77. See Carriers, 9 C. L. 466.

78. Did not apply where plank fell on plaintiff through manhole in floor above him where other employes were working. McGowan v. Nelson [Mont.] 92 P 40.

79. McGowan v. Nelson [Mont.] 92 P 40; Crane v. Miller, 108 NYS 1015. Must appear that the defendant or persons for whose actions he was responsible was in exclusive control of the thing causing the injury. Id. Not applicable where gas exploded in defendant's subway which was also used by gas company to carry pipes and pipes were not controlled by defendant. Robinson v. Empire City Subway Co., 53 Misc. 593, 103 NYS 717. Where it did not appear how gas which exploded in subway came to be therein, but that gas pipes not controlled by defendant were in the subway, and it did not appear who the person was who ignited the gas. Id.

80. Explosion of street car controller. Beebe v. St. Louis Transit Co., 206 Mo. 419, 103 SW 1019.

81. Removing heavy material from front of building close to sidewalk in crowded city, without protection to passersby, is inherently dangerous, no matter how skillfully done. Sherman House Hotel Co. v. Gallagher, 129 Ill. App. 557.

82. Held not applicable to an electric light furnished by defendant but under control of plaintiff. Independent Brew. Ass'n v. Schaller, 128 Ill. App. 533.

83. Cleveland, etc., R. Co. v. Hadley [Ind.] 82 NE 1025. The presumption raised by the doctrine res ipsa loquitur **may be rebutted** by other testimony. Schaller v. Independent Brew. Ass'n, 225 Ill. 492, 80 NE 334, afg. 128 Ill App. 533; Cunningham v. Dady [N. Y.] 83 NE 689. It is only necessary for defendant to meet the prima facie case made by the presumption of negligence. Cunningham v. Dady, 119 App. Div. 89, 103 NYS 852.

84. Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626.

85. Crenshaw v. Asheville & B. St. R. & Transp. Co., 144 N. C. 314, 56 SE 945.

Contributory negligence will not be presumed in the absence of evidence thereof,[86] but, on the contrary, freedom from such negligence will be presumed in the absence of any evidence on the subject,[87] or may be negatived by the circumstances.[88] While, therefore, in some jurisdictions the burden is on the plaintiff to establish freedom from such negligence,[89] and in others such burden depends upon the circumstances,[90] or the question is more or less unsettled,[91] in the great majority of the states such burden is on the defendant.[92] The specific acts of negligence must be shown,[93] but a preponderance of the evidence is all that is necessary,[94] and the plaintiff's evidence as well as that of the defendant must be considered.[95]

Questions of law and fact. See 8 C. L. 1116—The court furnishes the standard [96] and determines whether there is any evidence of negligence,[97] contributory negligence,[98] or proximate cause,[99] or defendant's connection with the accident,[1] but where there is

86. Galveston, etc., R. Co. v. Berry [Tex Civ. App.] 20 Tex. Ct. Rep. 156, 105 SW 1019. No presumption of negligence on part of deceased whose dismembered body was found along defendant's tracks in public highway. Merkl v. Jersey City, etc., R. Co. [N. J. Err. & App.] 68 A 74.

87. Rogers v. Rio Grande W. R. Co. [Utah] 90 P 1075. Injury resulting in death. Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 83 NE 640. The instinct of self-preservation and the disposition of men to avoid personal harm may, in the absence of evidence, raise a presumption that a person killed was in the exercise of due care. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 114 NW 769. Where the fact is not susceptible of direct proof, the presumption is that due care was exercised by a person for his own safety. Chicago Terminal Transfer R. Co. v. Reddick, 131 Ill App. 515. One killed by an accident is presumed to have been in the exercise of due care for his own safety. Meier v. Way, Johnson, Lee & Co. [Iowa] 111 NW 420. Even if burden were on plaintiff to show freedom from negligence, such freedom is presumed in absence of any evidence except the physical facts, as when injury resulted in death. Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P 624.

88. Baxter v. Auburn & S. Elec. R. Co., 190 N. Y. 439, 83 NE 469; La Duke v. Hudson River Tel. Co., 108 NYS 189.

89. Cahill v. Illinois Cent. R. Co. [Iowa] 115 NW 216. This rule is not changed by fact that plaintiff fails to allege his freedom from negligence and the issue is raised by defendant's answer. Id.

90. Where circumstances are such as that the plaintiff's conduct might reasonably be expected to enter into or contribute to the injury, the burden is on him to disprove such negligence. King v. Norcross [Mass.] 82 NE 17. Plaintiff need not disprove negligence on his own part where defendant's negligence amounts to a nuisance, as where he is negligent in regard to fires on his place. Id.

91. Seems that burden is on defendant in Idaho, though some of the cases support the contrary doctrine to a greater or less extent. Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho 637, 89 P 624, not deciding the point, but reviewing the cases and expressing an opinion that the burden is on the defendant.

92. Bryson v. Southern R. Co. [Ga. App.] 59 SE 1124; Underwood v. Metropolitan St. R. Co., 125 Mo. App. 490, 102 SW 1045; Birsch v. Citizens' Elec. Co. [Mont.] 93 P 940; Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356; Norman v. Bellingham [Wash.] 89 P 559. See Revisal 1905, § 483. Goforth v. Southern R. Co., 144 N. C. 569, 57 SE 209. Acts 1899, p. 58, c. 41. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265. Burns' Ann. St. 1901, § 359a, changed the rule formerly obtaining in Indiana, under which plaintiff had to prove due care on his part. Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 490. Where the law presumes prima facie that a child of a certain age is incapable of contributory negligence, the burden of proving otherwise is upon the defendant. Tucker v. Buffalo Cotton Mills [S. C.] 57 SE 626.

93. Gibbons v. Lehigh Valley R. Co., 106 NYS 543.

94. Instruction that defendant must prove contributory negligence to "satisfaction" of jury held misleading, as only a preponderance of evidence is necessary. Hutson v. Southern Cal. R. Co., 150 Cal. 701, 89 P 1093.

95. Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 83 NE 640; Missouri Pac. R. Co. v. Bentley [Kan.] 93 P 150; Carroll v. Grande Ronde Elec. Co., 47 Or. 424, 84 P 389; Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356.

96. Doyle v. Eschin [Cal. App.] 89 P 836.

97. Wilmington City R. Co. v. White [Del.] 66 A 1009. Demurrer to evidence. Kennedy v. Metropolitan St. R. Co. [Mo. App.] 107 SW 16. Direction of verdict proper where there is no evidence of negligence. Brunson v. Southwestern Development Co. [Ind. T.] 104 SW 593.

98. Issue of contributory negligence to pedestrian, by fall of brick from building being repaired, held not raised by mere fact that deceased had recently been employed in such work, thus suggesting a possibility that deceased's own negligence caused the defects which resulted in his death. Smith v. Humphreyville [Tex. Civ. App.] 19 Tex. Ct. Rep. 936, 104 SW 495.

99. Where, under the evidence, the probabilities are equally balanced as to whether the accident was caused by defendant's negligence or by some other cause, there is no question for the jury. Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P 624.

1. Defendant held not sufficiently connected by evidence with digging of trench in street in front of plaintiff's property, causing flooding of plaintiff's cellar. Brill v. New York Edison Co., 107 NYS 44. Where there was no evidence of defendant's ownership or control of the building in

any evidence, the questions of negligence,[2] contributory negligence,[3] and proximate

which defendant was injured by reason of a defective passageway. Jackson v. Ross, 1 Ga. App. 192, 57 SE 913.

2. Doyle v. Eschen [Cal. App.] 89 P 836; Wilmington City R. Co. v. White [Del.] 66 A 1009; Southern Cotton Oil Co v. Gladman, 1 Ga. App. 259, 58 SE 249; Western & A. R. Co. v. York, 128 Ga. 687, 58 SE 183; Johnson v. Veneman, 75 Kan. 278, 89 P 677; Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821; Chesapeake & Potomac Tel. Co. of Baltimore City v. Leysber [Md.] 68 A 619; Griselman v. Schmidt [Md.] 68 A 202; Baltimore, etc., R. Co. v. Trader [Md.] 68 A 12; Smith v. Twin City Rapid Transit Co., 102 Minn. 4, 112 NW 1001; Merkl v. Jersey City, etc., R. Co. [N. J. Err. & App.] 68 A 74; Goforth v. Southern R. Co., 144 N. C. 569, 57 SE 209; Sealey v. Southern R. Co. [C. C. A.] 151 F 736; Laclede Gaslight Co. v. Cottone [C. C. A.] 152 F 629.

Collision between wagon and engine at street crossing. McNamara v. Chicago, etc., R. Co., 126 Mo. App. 152, 103 SW 1093.

Street car collision. Edge v. Southwest Mo. Elec. R. Co., 206 Mo. 471, 104 SW 90. Collision between street car and vehicle. White v. St. Louis, etc., R. Co., 202 Mo. 539, 101 SW 14. Person run over by street car. San Antonio Trac. Co. v. Haines [Tex. Civ. App.] 18 Tex. Ct. Rep. 606, 100 SW 788. Injury caused by **sleigh** being **caught** in **switch of street car track.** Miller v. Boston, etc., R. Co. [Mass.] 83 NE 990. Finding of negligence where **barrel fell out of window** upon child, held sustained. Calcotura v. Iovaldi, 123 Mo. App. 347, 100 SW 675. Action by blacksmith for injury from **kick of horse** brought by defendant to be shod, issue being whether horse was vicious to knowledge of defendant who did not notify plaintiff. Adams v. Simpson, 31 Ky. L. R. 604, 103 SW 247.

In North Carolina under Rev. Laws N. C. 1905, § 483, court has no right to direct verdict on plea of contributory negligence. United States Leather Co. v. Howell [C. C. A.] 151 F 444.

Where the evidence is conflicting, question of negligence is for jury. Brunson v. Southwestern Development Co. [Ind. T.] 104 SW 593; Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P 624; Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510; La Follette Coal, Iron & R. Co. v. Minton, 117 Tenn. 415, 101 SW 178. Person injured. Missouri, etc., R. Co. v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 133, 101 SW 464. Pedestrian injured at railroad crossing. Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101. Whether defendant's servant was grossly negligent in dancing and whistling while holding rope attached to heave machine being loaded onto a car. Pearlstein v. New York, etc., R. Co. [Mass.] 83 NE 1040. Elevator passenger stepped into hole between elevator platform and the wall. Gray v. Siegel-Cooper Co., 187 N. Y. 376, 80 NE 201.

Where the inferences are disputable, question of negligence is for jury. Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972; Clark v. Chicago, etc., R. Co., 231 Ill. 548, 83 NE 286; Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986; Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510; Long v. Louisville & N. R. Co. [Ky.] 107 SW 203; Weston v. Pennsylvania R. Co. [N. J. Err. & App.] 65 A 1015; Wilson v. Atlantic Crushed Coke Co. [Pa.] 68 A 671; Jones v. Wilcox [S. C.] 60 SE 231; Pugmin v. Oregon Short L. R. Co. [Utah] 92 P 762. Held question of fact, as to what switchman could and should have done to avoid injury to one whom plaintiff's intestate was trying to save from approaching train when he was killed. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Defendant's **notice** of defects or dangers. Jones v. Ogden City [Utah] 89 P 1006. When steps which broke with plaintiff were old and worn, the question as to whether defendant was charged with notice of the defect held for the jury. Bayley v. Curtis Bros. Lumber Co., 108 NYS 937. Negligence of railroad company in furnishing **unsafe tools** for removal of old ties, etc., by its employers. Dalhoff Construction Co. v. Luntzel [Ark.] 100 SW 743. Evidence held sufficient to sustain verdict for injuries sustained by reason of plaintiff's **horse** being **frightened by automobile.** Horak v. Dougherty [Iowa] 114 NW 883. Employe of **independent contractor** injured by unguarded set screw in defendant's mill. Columbia Box & Lumber Co. v. Drown [C. C. A.] 156 F 459. Negligence of defendant's servants, who were loading logs on cars, in causing injury to **employe** of **surveyor general** engaged in scaling the logs, held for jury. Hyatt v. Murray [Minn.] 112 NW 881. Where **elevator** passenger killed by striking of his head against top of unguarded arch opening to elevator shaft, there being no gate to elevator car, and doors to arch opening being on outside thereof. Conaway v. Martin, 121 App. Div. 551, 106 NYS 194. Fall through open door in elevator shaft. Baker v. Best [Ky.] 107 SW 1192.

Adjoining owner held not guilty, as matter of law, of negligence in making repairs to water pipe after notice of defects. Fitzgerald v. Goldstein, 56 Misc. 677, 107 NYS 614. Finding that injury to child by **street car** at street crossings was caused by negligence of persons in charge car, held warranted by evidence. Hammond, etc., Elec. St. R. Co. v. Blockie [Ind. App.] 82 NE 541.

Collision between hook and ladder truck and street car. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 SW 621. Collision between street car and vehicle. Nonn v. Chicago City R. Co., 232 Ill. 378, 83 NE 924. Where bridge contractor failed to provide screens or other method to prevent **objects falling** on people below the bridge. Pennsylvania Steel Co. v. Jacobson [C. C. A.] 157 F 656. Where **brick wall,** left by fire, fell on plaintiff's house. Orr v. Bradley, 126 Mo. App. 146, 103 SW 1149. Of city in allowing **obstructions** to remain **in street** unguarded and without warnings. Jones v. Ogden City [Utah] 89 P 1006. Where **horse was frightened** by steam from cooperage plant near highway. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Where **drunken person killed** by heavy bar counter, which was in state of unstable equilibrium and unfastened, falling on him when he caught hold of it. Rollestone v. Cassirer [Ga. App.] 59 SE 442. Whether it was negligence for city to allow **hole in street** for seven months, and

two feet deep, two feet wide, and six feet long. Purcell v. Chicago, 231 Ill. 164, 83 NE 137. Where **passenger** went beyond most forward passenger car in his search for smoker, and was struck by express truck. Clark v. American Exp. Co. [Mass.] 83 NE 365. Injury to street car passenger while alighting. Maxwell v. Fresno City R. Co. [Cal. App.] 89 P 367. Whether visitor became a mere **licensee** by not using the safest road, or way, over the premises. Nolan v. Bridgeton & Millville Trac. Co. [N. J. Err. & App.] 65 A 992. Evidence held sufficient to take question to jury, as to whether defendant's engineer willfully started engine while plaintiff, a **trespasser,** was alighting therefrom. Forrest v. Georgia R. & Banking Co., 128 Ga. 77, 57 SE 98. Whether **injury to real estate** from leakage in city water main was caused by city's negligence, was for jury, where there was evidence that city had notice of leakage and that no repairs had been made for a long time. Herron v. Duquesne Borough, 34 Pa. Super. Ct. 231. Where defendant, though warned, took no precautions **to prevent ice from falling** from gutter pipe, except to put salt thereon, the question whether he was guilty of negligence is for the jury. Richardson v. Nelson, 221 Ill. 254, 77 NE 583. **Where credibility of witnesses** is involved, the question is for the jury. Whitehouse v. Edwards [C. C. A.] 152 F 72.

3. Wilmington City R. Co. v. White [Del.] 66 A 1009; Western & A. R. Co. v. York, 128 Ga. 687, 58 SE 183; Southern Cotton Oil Co. v. Gladman, 1 Ga. App. 259, 58 SE 249; Geiselman v. Schmidt [Md.] 68 A 202; Smith v. Twin City Rapid Transit Co., 102 Minn. 4, 112 NW 1001; La Follette Coal, Iron & R. Co. v. Minton, 117 Tenn. 415, 101 SW 178; Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149. Hack driver injured by obstruction in street. City of La Porte v. Henry [Ind. App.] 83 NE 655. Contributory negligence is an ultimate fact to be determined by the jury from all the evidence. Indianapolis St. R. Co. v. Demaree [Ind. App.] 80 NE 687. Demurrer, on ground that complaint showed contributory negligence, held properly overruled. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Servant injured while using machinery. Meade v. Ashland Steel Co., 30 Ky. L. R. 1164, 100 SW 821. Employe fell from hand car. Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 SW 142. Contributory negligence of servant in action against master. Perrotta v. Richmond Brick Co., 108 NYS 10. Injury to passenger from falling of car window sash. Cleveland, etc., R. Co. v. Hadley [Ind.] 82 NE 1025. Injury to person crossing street car track. Birmingham R., L. & P. Co. v. Landrum [Ala.] 45 S 198. Person run over by street car. San Antonio Trac. Co. v. Haines [Tex. Civ. App.] 18 Tex. Ct. Rep. 606, 100 SW 788. Driving on street car track where rest of road was rendered almost impassable by snow. Miller v. Boston, etc., St. R. Co. [Mass.] 83 NE 990. Where plaintiff was injured by defective brake on car he was moving. Fassbinder v. Missouri Pac. R. Co., 126 Mo. App. 563, 104 SW 1154. Collision between wagon and engine at street crossing. McNamara v. Chicago, etc., R. Co., 126 Mo. App. 152, 103 SW 1093. Whether child injured by vehicle had, at the time, abandoned game of ball which he was playing in street in **violation of city ordinance.** Jacknig v. Ferguson [Mass.] 83 NE 868.

Where evidence is conflicting, contributory negligence is for jury. Southern R. Co. v. Hobbs [Ala.] 43 S 844; Clark v. Chicago R. Co., 231 Ill. 548, 83 NE 286; Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356. Pedestrian injured at railroad crossing. Matteson v. Southern Pac. R. Co. [Cal. App.] 92 P 101. Elevator passenger stepped into hole between elevator platform and the wall. Gray v. Siegel-Cooper Co., 187 N. Y. 376, 80 NE 201; Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510; Grimm v. Omaha Elec. L. & P. Co. [Neb.] 112 NW 620; Daggett v. North Jersey St. R. Co. [N. J.] 68 A 179; Hall v. Northern Pac. R. Co. [N. D.] 111 NW 609; Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972; Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356; Jones v. Wilcox [S. C.] 60 SE 231; Pugmire v. Oregon Short Line R. Co. [Utah] 92 P 762; Laclede Gaslight Co. v. Cottone [C. C. A.] 152 F 629. Directed verdict held improper under the evidence. Brown v. Nawn [Mass.] 80 NE 791; Koerner v. St. Louis Car Co. [Mo.] 107 SW 481; Volosko v. Interurban St. R. Co., 190 N. Y. 206, 82 NE 1090. Nonsuit should not be granted on account of fact that **opening statement of counsel** for plaintiff indicted contributory negligence on plaintiff's part, unless such negligence is conclusively shown thereby. Kelly v. Bergen County Gas Co. [N. J. Err. & App.] 67 A 21. Whether employe on railroad was warranted in **relying on giving of statutory signals** of approach of train. Johnson v. St. Joseph Terminal R. Co., 203 Mo. 381, 101 SW 641. Workman, **painting inside of tank,** not guilty of contributory negligence, as matter of law, for not coming out of tank to get air, when he was not warned and the danger was not obvious. Houston, etc., R. Co. v. Rutland [Tex. Civ. App.] 18 Tex. Ct. Rep. 134, 101 SW 529. Railroad employe's foot mashed by falling of rail, while **removing railroad ties** and inserting new ones. Dalhoff Construction Co. v. Luntzel [Ark.] 100 SW 743. Alighting from street car while encumbered with bundles. Hammond, etc., Elec. R. Co. v. Antonia [Ind. App.] 83 NE 766. Injury to pedestrian from **defective sidewalk.** City of Valparaiso v. Schwerdt [Ind. App.] 82 NE 923; Mayhood v. New York, 119 App. Div. 100, 103 NYS 856. Pedestrian injured by defect in sidewalk of which he had notice. Bowman v. Ogden City [Utah] 93 P 561. Where person was injured on sidewalk not manifestly dangerous, and there was only this one sidewalk, and street was rough and unsuited for pedestrians. Chambers v. Braddock Borough, 34 Pa. Super. Ct. 407. Where one attempted to go through **alley, known to be dangerous,** at night, when there was another way around. Harrell v. Macon, 1 Ga. App. 413, 58 SE 124. Where **bicycle rider** ran into obstruction in street. Kokomo R. & Light Co. v. Studebaker [Ind. App.] 83 NE 260. Bicycle rider was thrown from bridge by collision with pedestrian on cycle path at point where there was no rail or guard, the rider not having turned out for the person ahead but merely signalled, and the main roadway across the bridge being smooth and safe. Schell v. Town of German Flats, 54 Misc. 445, 104 NYS 116. Whether plaintiff must have seen **defect in sledge hammer,** with which chisel he was holding was being struck. Missouri, etc., R. Co. v.

Suintan [Kan.] 93 P 632. Pedestrians killed **at railroad crossing.** Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 490. Accident at railroad crossing. Cleveland, etc., R. Co. [Ind. App.] 80 NE 985.

Collision between train and wagon **at** crossing. Hutson v. Southern California R. Co., 150 Cal. 701, 89 P 1093. Whether sixteen year old girl riding with stepfather who was driving was guilty of negligence contributing to her injury from collision between vehicle and street car. Zaloutuchin v. Metropolitan St. R. Co. [Mo. App.] 106 SW 548. Collision between defendant's street car and plaintiff's buggy, in crowded street. Scott v. San Bernardino Valley Trac. Co. [Cal.] 93 P 677. Fireman, riding on hook and ladder truck, injured by collision with street car. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 SW 621. Where motorman **jumped from car** when it was about to collide with another car. Edge v. Southwest Mo. Elec. R. Co., 206 Mo. 471, 104 SW 90. Plaintiff fell into **elevator shaft** while going along dark passage in defendant's warehouse. Pauckner v. Wakem, 231 Ill. 276, 83 NE 202. Where one delivering goods fell down open elevator shaft. Gardner v. Waterloo Cream Separator Co., 134 Iowa, 6, 111 NW 316. Street car **passenger** injured while alighting. Maxwell v. Fresno City R. Co. [Cal. App.] 89 P 367.

Employe killed by falling from runway while trying to extract his wheelbarrow from obstruction in which it was caught. Morrissey v. Dwyer, 105 NYS 821. Refusal of nonsuit, or to direct verdict, held proper, where there was evidence showing that brakeman **went between cars** when one of them was detached and all were standing still. Hayes v. Chicago, etc., R. Co., 131 Wis. 399, 111 NW 471. Where plaintiff's intestate was **working beneath bridge** under course of construction, and was struck by blocks falling from bridge, which would not have struck him if he had been working in other places which were available for his work. Pennsylvania Steel Co. v. Jacobsen [C. C. A.] 157 F 656.

Employe of independent contractor, installing sprinkler system in defendant's mill, injured by unguarded set screw in revolving shaft near which he was working and which would have been stopped upon request, as the danger of which could have been avoided by building a platform. Columbia Box & Lumber Co. v. Drown [C. C. A.] 156 F 459. In suit against city for damages caused by **backing of water from sewer** into plaintiff's cellar, defendant could not complain of submission of question of contributory negligence to jury, where it appeared that plaintiff had lawfully connected his premises with the sewer and that such connection had worked property for several years. Cairns v. Chester City, 34 Pa. Super. Ct. 51. Where **drunken person** was killed by heavy bar counter falling on him when he caught hold of it to steady himself after a stumble. Rollestone v. Cassirer & Co. [Ga. App.] 59 SE 442. Whether **blind man** who fell into hole in sidewalk while walking thereon, using his cane by running it along curb, was negligent in not discovering the hole with his cane. Chesapeake & Potomac Tel. Co. v. Lysher [Md.] 68 A 619. Customer fell through **trap door** in floor of store. Stone v. Smith-Premier Typewriter Co. [Wash.] 93 P 209. Where plaintiff was injured by reason **if his horse being frightened** by setam from defendant's cooperage plant near highway. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Where plaintiff's horse was frightened by an engine standing partly on crossing over which plaintiff was driving, his negligence in driving across in front of the engine was for the jury. Fay v. Minneapolis, etc., R. Co., 131 Wis. 639, 111 NW 683. When plaintiff fell down **uncovered hatchway** of vessel. Doyle v. Eschen [Cal. App.] 89 P 836. Woman, sixty years old, riding with boy in wagon, on road with which she was not familiar, held reins in absence of boy, horse started, she **attempted to drive** back to starting place, wheel dropped into depression in road, wagon overturned, and plaintiff was injured. City of Ft. Collins v. Yetter [Colo.] 89 P 777. Where plaintiff tried to drive between two wagons stuck in mud, and his wagon wheel went into hole concealed by water and he was thrown out. Purcell v. Chicago, 231 Ill. 164, 83 NE 137. Plaintiff injured while replacing glass insulator of **electric wire.** Denver Consol. Elec. Co. v. Walters [Colo.] 89 P 815. Where telephone lineman was injured by electric light wire too near telephone pole. Drown v. New England Tel. & T. Co. [Vt.] 66 A 801. One killed by electric shock held not guilty of contributory negligence, as a matter of law, in taking hold of an incandescent lamp charged with a deadly electric current. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 114 NW 769, afg. on rehearing, 112 NW 620, in the following language, " 'The instinct of self-preservation, and the disposition of men to avoid personal harm, reinforce an inference that a person killed or injured was in the exercise of ordinary care.' 16 Cyc. 1057, note 49; Baltimore, etc., R. Co. v. Landrigan, 191 U. S. 461, 48 Law. Ed. 262; K. C. L. R. Co v. Gallagher, 68 Kan. 424, 75 P 469, 64 L. R. A. 344; Hendrickson v. R. R. Co., 49 Minn. 245, 51 NW 1044, 32 Am. St. Rep. 540, 16 L. R. A. 261; N. P. R. R. Co. v. Spike, 57 C. C. A. 384, 121 F 45. In the case last cited Caldwell, Circuit Judge, said: 'The presumption arising from this natural instinct of self-preservation stands in the place of positive evidence, and is sufficient to warrant a recovery in the absence of countervailing testimony. * * * Nor is this presumption applied only when no one witnesses the accident. It has its application in all cases, and may be strong enough to overcome the testimony of an eyewitness * * * The principle has been repeatedly affirmed and applied by the Supreme Court of the United States. Another inquiry is: Upon whom is the burden of proving that Grimm assumed the risk of the accident which resulted in his death? We think the weight of authority is that the burden of sustaining this defense is upon the defendant. Dowd v. N. Y., etc., R. R. Co., 170 N. Y. 459, 63 NE 541; Calloway v. Agar Packing Co., 129 Iowa, 1, 104 NW 721; Arenschild v. Chicago, etc., R. R. Co., 128 Iowa, 677, 105 NW 200; Mace v. Boedker, 127 Iowa, 721, 104 NW 475; Nadau v. White River Lumber Co., 76 Wis. 120, 43 NW 1135, 20 Am. St. Rep. 29; R. R. Co. v. Ward, 90 Va. 687, 19 SE 849, 44 Am. St. Rep. 945, 24 L. R. A. 717; M. R. Co. v. Jones, 35 Tex. Civ. App. 584, 80 SW 852; McDonald v. Champion Iron Co., 140

cause [4] are ordinarily questions of fact for the jury. There is no question for the jury, however, where the probabilities are equally balanced as to the cause of the accident,[5] and where the facts are undisputed and the inferences are undisputable,[6] negligence,[7] contributory negligence,[8] and proximate cause [9] become question of law for the court. These rules apply, of course, to the particular phases of negligence,

Mich. 401, 103 NW 829; Judd v. Chesapeake, etc., R. R. Co., 18 Ky. L. R. 747, 37 SW 842; E. E. Jackson Lumber Co. v. Cunningham, 141 Ala. 206, 37 S 445."

4. Fogarty v. Southern Pac. Co. [Cal.] 91 P 650; United States Cement Co. v. Cooper [Ind. App.] 82 NE 981; Mack v. Chicago, etc., R. Co., 123 Mo. App. 531, 101 SW 142; Boucher v. Larochelle [N. H.] 68 A 870; Goforth v. Southern R. Co., 144 N. C. 569, 57 SE 209; Trickey v. Clark [Or.] 93 P 457; Jones v. Wilcox [S. C.] 60 SE 231; Chicago, etc., R. Co. v. Morris [Wyo.] 93 P 664. Whether defective brake on car, furnished by defendant to gravel company, was cause of injury to servant of latter. Fassbinder v. Missouri Pac. R. Co., 126 Mo. App. 563, 104 SW 1154. Where plaintiff slipped on piece of ice and her foot went into a hole in defendant's sidewalk and she was injured. Maywood v. New York, 119 App. Div. 100, 103 NYS 856. As to whether **negligence of foreman** was in capacity of fellow-servant or in failure to furnish safe place to work. Bokamp v. Chicago & A. R. Co., 123 Mo. App. 270, 100 SW 689.

5. McGowan v. Nelson [Mont.] 92 P 40. Court's duty to nonsuit where plaintiff's evidence is equally consistent with absence of negligence as with existence thereof. Hummer v. Lehigh Valley R. Co. [N. J. Err. & App.] 67 A 1061. As to proximate cause. Louisville & N. R. Co. v. Guest's Adm'r [Ky.] 106 SW 817. When the accident was due to several possible causes, but the circumstances point particularly to defendant's negligence as the specific cause, the case is for the jury. Adams v. Bunker Hill & Sullivan Min. Co., 12 Idaho, 637, 89 P 624.

6. The court may disregard testimony as physically impossible. Zalotuchin v. Metropolitan St. R. Co. [Mo. App.] 106 SW 548.

7. Rimmer v. Wilson [Colo.] 93 P 1110; Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986; Baltimore, etc., R. Co. v. Trader [Md.] 68 A 12; Merkle v. Jersey City, etc., R. Co. [N. J. Err. & App.] 68 A 74; Petersen v. Union Iron Works [Wash.] 93 P 1077; St. Louis, etc., R. Co. v. Dewees [C. C. A.] 153 F 56. Held no evidence of negligence in driving hired horse near railroad crossing when he was frightened, reared, fell, and was killed. Cumberland Tel. & T. Co. v. Tally, 30 Ky. L. R. 1328, 101 SW 307. Judgment for defendant non obstante veredicto sustained where it appeared that an employe on a vessel in course of construction slipped on a piece of enamel which had fallen on the deck, and in falling stuck his arm into a bucket of hot enamel about to be lowered through the hatch by an employe of defendant, an independent contractor, it not appearing who spilled the enamel or how long it had been spilt, or that the bucket of enamel was improperly where it was. Foster v. American Bitumastic Enamel Co., 217 Pa. 144, 66 A 331.

Defendant not harmed by submission of question of negligence to jury where evidence showed negligence as matter of law. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 112 NW 620.

Nonsuit held proper. Vinson v. Willingham Cotton Mills, 2 Ga. App. 53, 58 SE 413. Nonsuit in action against owner of wagon for injury to boy who was riding thereon and fell off, held proper. McGuire v. Barnes Safe & Lock Co., 216 Pa. 639, 65 A 1112.

Instruction for defendant held proper where child unexpectedly ran out of shed near car track and against fender of car. Meloy v. Philadelphia Rapid Transit Co., 217 Pa. 189, 66 A 253. Refusal of defendant's motion for **new trial** held error on ground that evidence strongly preponderated against claim that accident was caused by defendant's negligence. Di Stefano v. Rhode Island Co. [R. I.] 66 A 200. Where there was no proof that defendant knew or ought to have known of **defective** condition of **passageway** in which plaintiff was injured. Jackson v. Ross, 1 Ga. App. 192, 57 SE 913. Where evidence showed conclusively that certain matters could not have contributed to **collapse of a building,** it was error to refuse to instruct that negligence could not be predicated on such matters. Glasgow v. Jordan, 108 NYS 814. Owner of building in course of construction held not guilty of negligence causing fall of such building and injury to employe therein. Stubley v. Allison Realty Co., 108 NYS 759. No negligence shown from mere fact that plaintiff slipped on a **wet spot** of some kind **on floor** of defendant's department store, it not appearing what the nature or size of the spot, or who put it there or how long it had been there. Dudley v. Abraham, 122 App. Div. 480, 107 NYS 97. Electric light and power company held guilty of negligence as matter of law in stringing **high power wires** through branches of trees and within twenty-six inches of low power wires. Grimm v. Omaha Elec. L. & P. Co. [Neb.] 112 NW 620. Directed verdict for defendant held proper in action for injuries to horse and harness sustained in **collision** with street car. Olney v. Omaha, etc., R. Co. [Neb.] 111 NW 784. In action for death of one struck by **street car,** evidence held insufficient to sustain finding of defendant's negligence. Sobol v. Union R. Co. of New York, 122 App. Div. 817, 107 NYS 656.

8. Baxter v. Auburn & S. Elec. R. Co., 190 N. Y. 439, 83 NE 469; Chambers v. Braddock Borough, 34 Pa. Super. Ct. 407.

Nonsuit held proper. Vinson v. Willingham Cotton Mills, 2 Ga. App. 53, 58 SE 413; Volosko v. Interurban St. R. Co., 190 N. Y. 206, 82 NE 1090; Purnell v. Whitford, Bartlett & Co. [R. I.] 67 A 421. Error to refuse **peremptory instruction** where contributory negligence clearly appears. Drown v. Northern Ohio Trac. Co., 76 Ohio St. 234, 81 NE 326. In Indiana, under Burns' Ann. St. 1901, § 359a, making contributory negligence an affirmative defense and thus placing the burden of proof on defendant as to such issue, a peremptory instruction on such issue can be given only in favor of plaintiff. Indian-

contributory negligence, and proximate cause, such as negligence with regard to

apolis St. R. Co. v. Coyner, 39 Ind. App. 510, 80 NE 168. Held error to refuse **directed verdict** for defendant, where workman who was ignorant of working of a "picker" in a cotton mill thrust his hand into it in endeavoring to uncheck it without knowing, according to his own testimony, whether he would get hurt or not. Woolerington Mills v. Cox [C. C. A.] 157 F 634. Affirmative charge for defendant held proper where it appeared that accident was caused by **failure** of deceased **to heed warnings** and get off the track. Wade v. Louisville & N. R. Co. [Fla.] 45 S 472.

Attempting to make horses pass object at which they had been frightened only a little while before when they passed it first time. Louisville & N. R. Co. v. Armstrong [Ky.] 105 SW 473. Where one voluntarily and unnecessarily **tried to pass ditch** in public road. Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 SE 462. Where plaintiff **ran into side of street car** just after having run out of way of a mule frightened by the car. Crenshaw v. Asheville & B. St. R. & Transp. Co., 144 N. C. 314, 56 SE 945. Failure to use of senses of sight and hearing before **crossing street** car track. Doherty v. Des Moines City R. Co. [Iowa] 114 NW 183. Error to charge that it was not negligence per se to **drive** across street car track without looking and listening. Price v. Rhode Island Co. [R. I.] 66 A 200.

Inspector of work injured by defect within scope of his duty as inspector and which could have readily been seen. McClellan v. Gerrick [Wash] 93 P 1087. Hotel guest who had reached hotel by ascending steps over a retaining wall maintained by defendant railroad company went out of hotel after dark and **fell over wall.** Watson v. Manitou, etc., etc., R. Co. [Colo.] 92 P 17. Servant killed while **standing on bumper** and cable of train car on which he was forbidden to ride. Union Coal & Coke Co. v. Sundberg, 36 Colo. 8, 85 P 319. Where plaintiff left his barn door open towards **fire** on railroad right of way. Brown v. Oregon R. & Nav. Co., 41 Wash. 688, 84 P 400. Person twenty-four years old held guilty of negligence contributing to his death where, though he had been warned not to go near a fence on which an **electric wire** had fallen, placed his hand on the fence and pointed to the wire with his finger which came within eight inches of the wire, whereupon he received a shock which killed him. Carroll v. Grande Ronde Elec. Co., 47 Or. 424, 84 P 389.

Telephone lineman held guilty of negligence in climbing a pole which was leaning and cutting the wires, without first testing the pole by tests with which he was familiar, though he had seen another climb the pole a little while before when the wires had not been cut. La Duck v. Hudson River Tel. Co., 108 NYS 189. Renter of apartment who had been to the building before the accident, and who, in dark hall, mistook **cellar door** for apartment-door and fell, held guilty of contributory negligence. Van Ness v. Murphy, 56 Misc. 556, 107 NYS 99. Foreman held not negligent in **removing column supporting roof of tunnel** being constructed. Bertolami v. United Egnineering & Const. Co., 120 App. Div. 192, 105 NYS 90.

Pouring oil into stove known to contain fire. Morrison v. Lee [N. D.] 113 NW 1025. Directed verdict for defendant held proper where brakeman **injured while alighting** from car by being struck by telegraph pole close to track, where he was well acquainted with situation of pole and the danger therefrom. Bowen v. Pennsylvania R. Co. [Pa.] 68 A 963. Nonsuit held proper where servant was injured while cleaning rolls of leather pressing **machine** without stopping machine. Best v. Williamsport Staple Co. [Pa.] 67 A 205. Judgment for plaintiff reversed where it appeared that he was hurt while **sitting on wheel guard rail of bridge** when two of defendant's teams were about to pass each other at that point. Snow v. Coe Brass Mfg. Co. [Conn.] 66 A 881. Verdict for plaintiff set aside where it appeared that plaintiff's **horse left unhitched** and unattended in street in which electric cars with snow scrapers were running, became frightened and turned upon car track and was injured. Moulton v. Lewiston, etc., St. R. Co., 102 Me. 186, 66 A 388. Where only conclusion possible was that plaintiff **walked against** side of defendant's **wagon** while the driver was looking in front of his horses. Henson v. Arthur, 217 Pa. 156, 66 A 256. One who fell down **elevator shaft** held guilty of contributory negligence. Donohue v. Braaf, 122 App. Div. 552, 107 NYS 377. Plaintiff injured at **railroad crossing.** Missouri Pac. R. Co. v. Trahern [Kan.] 91 P 48. Evidence held not to show freedom of pedestrian from negligence contributing to **collision** with street car. Sobol v. Union R. Co., 122 App. Div. 817, 107 NYS 656. Plaintiff injured by collision between street car and wagon on hub of which he was standing held guilty of contributory negligence in not looking out for car. Volosko v. Interurban St. R. Co., 190 N. Y. 206, 82 NE 1090. Verdict for plaintiff set aside where it appeared that plaintiff's horse, which had been left in street unhitched, suddenly turned upon defendant's track just as a car was about to pass and was injured. Moulton v. Lewiston, etc., R. Co., 102 Me. 186, 66 A 388. Collision between plaintiff's team and defendant's street car held caused by negligence of plaintiff's driver. Unghero v. New York City R. Co., 107 NYS 610. Directed verdict for defendant held proper where plaintiff attempted to drive across street car track in front of rapidly approaching car. Harris v. Lincoln Trac. Co. [Neb.] 111 NW 580. Nonsuit held proper where plaintiff was injured by overturning of vehicle which he was driving caused by **depression in street** he could and should have seen. Smith v. Philadelphia, 217 Pa. 118, 66 A 142. Finding that injury was received while **attempting to save another** from being injured by street car held not sustained by evidence. Miller v. Union R. Co. [N. Y.] 83 NE 583.

9. Haskell & Barker Car Co. v. Prezezdziankowski [Ind.] 83 NE 626. Where mine shaft cage was wrecked below the 200 foot level while ascending, a defect in the guides of the cage at the 200 foot level could not have caused the accident. Elkton Consol. Min. & Mill. Co. v. Sullivan [Colo.] 92 P 679.

children,[10] act of God,[11] res ipsa loquitur,[12] sudden peril,[13] contributory negligence of children,[14] last clear chance,[15] and risking life to save another.[16] Admitted facts should not be submitted to the jury.[17]

Instructions. See 8 C. L. 1119—The matters most frequently involved in connection with instructions in negligence cases are, what constitutes negligence,[18] or contribu-

10. Child injured by vehicle while playing ball in street in violation of city ordinance. Jaehnig v. Ferguson [Mass.] 83 NE 868. Where child six years old was run over by a team being driven slowly, and driver had full opportunity to observe the child, the question of negligence was for the jury. Napurana v. Young [N. J. Err. & App.] 65 A 1052.

11. For jury to decide whether flooding of cellar from sewer was caused by unusual tides in river into which sewer emptied, where the flooding was traceable to this cause only at rare intervals, and sewer had worked several years without being affected by tides. Caerns v. Chester City, 34 Pa. Super. Ct. 51.

12. Whether presumption under the doctrine of res ipso loquitur has been rebutted is for the jury. See Code Civ. Proc. § 2061, subd. 2, giving jury right to decide when presumptions have been overcome. Lauder v. Currier, 3 Cal. App. 28, 84 P 217.

13. Question of how a prudent man would act in the face of concurrent and distracting dangers is for the jury. Weston v. Pennsylvania R. Co. [N. J. Err. & App.] 65 A 1015. For jury whether driver acted prudently after horse was frightened by train. Id.

14. See ante, § 4, subd. Children. Capacity of child of tender years to exercise care for own safety is for the jury. Beck v. Standard Cotton Mills, 1 Ga. App. 278, 57 SE 998. Boy employe, fourteen years old, whose fingers were caught in worm of sausage machine which he was operating, held guilty of contributary negligence as a matter of law. Fostune v. Hall, 122 App. Div. 250, 106 NYS 787. Sixteen year old boy injured by electric shock received from incandescent lamp cord held guilty of contributory negligence. Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626.

15. Case involving doctrine of last clear chance held for jury. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Whether motorman discovered plaintiff in time to prevent the accident and whether he used due care to prevent it, held for the jury. Birmingham R., L. & P. Co. v. Jones [Ala.] 45 S 177. Whether persons in charge of engine could have prevented the injury after discovery of the peril held for jury. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Whether engineer discovered plaintiff's peril in time to prevent the accident held for jury. Tuscaloosa Belt R. Co. v. Fuller [Ala.] 45 S 156. Evidence held insufficient to take case to jury on issue as to whether engineer discovered deceased on track in time to avoid injuring him. Southern R. Co. v. Stewart [Ala.] 45 S 51.

16. Whether attempt to rescue another was so rash as to preclude recovery under doctrine of contributory negligence. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Rep. 828, 104 SW 408.

17. Whether plaintiff knew of stock gap into which he fell. Missouri, etc., R. Co. v. Plunket [Tex. Civ. App.] 103 SW 663.

18. It is not the province of the court to tell the jury that certain facts constitute negligence. Conklin Const. Co. v. Walsh, 131 Ill. App. 609. Instruction which leads the jury to believe that the slightest want of care on the part of the defendant will warrant recovery is erroneous. Knickerbocker Ice Co. v. Leyda, 128 Ill. App. 66. Instruction that if deceased was killed by train running faster than speed limit, law presumed defendant was negligent, erroneous. Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105. What constitutes negligence must be predicated, not upon an assumption of certain facts called from the evidence, but must be gathered from all the evidence in the case pro and con. Conklin Const. Co. v. Walsh, 131 Ill. App. 609. Error in instruction as to purpose and effect of warning lights placed around hatchway held cured by subsequent instruction that defendant was not liable if the lights were placed as claimed by him. Doyle v. Eschen [Cal. App.] 89 P 836. Instruction that defendant had right to maintain the wall, which fell, on his property, and was not an insurer of its safety, "and" if jury found that in maintaing such wall he exercised such care, etc., he was not liable, held erroneous as tending to give impression that defendant was not an insurer of the safety of the wall though it was in fact unsafe, etc., if he exercised reasonable care, etc. Orr v. Bradley, 126 Mo. App. 146, 103 SW 1149. Injury from horse being frightened by whistle of locomotive at crossing. Instruction held not erroneous as charging what facts constituted negligence. Paris & G. N. R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Charge that failure to blow whistle after discovering person on track does not of itself constitute negligence held erroneous. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Charge in action for injuries to one crossing railroad that company was under no duty to blow whistle or keep train under control held, under the evidence, to invade province of jury. Id. Erroneous instruction on ordinary care held not prejudicial when taken with other instructions. Brown Store Co. v. Chattahoochee Lumber Co., 1 Ga. App. 609, 57 SE 1043.

Definition of ordinary care as such care as any prudent person exercises with respect to his own property, such care as every prudent person would exercise under the same or similar circumstances, held not prejudicially erroneous, though no negligence as to property was involved. City of Cedartown v. Brooks, 2 Ga. App. 583, 59 SE 836. In defining ordinary care the court should not make the individual jurors the standards of prudent men. City of Americus v. Johnson, 2 Ga. App. 378, 58 SE 518. Substantial accuracy is all that is required in giving definitions. Definition that ordinary care is that care which "a" prudent man would exercise held not misleading for failure to use "every" instead of "a." Goodwyn v. Central of Georgia

tory negligence,[19] burden of proof [20] as to negligence [21] and contributory negligence,[22] submission of issues [23] as to the relation of the parties,[24] negligence,[25] contributory

R. Co., 2 Ga. App. 470, 58 SE 688. Definition of ordinary care held substantially in accordance with that given by Code 1895, § 2898. City of Atlanta v. Harper, 129 Ga. 415, 59 SE 230. Use of expression what plaintiff "thought was proper and prudent" for her to do held not error when construed in connection with other parts of instruction. Martin v. Southern R. Co., 77 S. C. 370, 58 SE 3.

19. Court should not tell jury what facts constitute contributory negligence. Conklin Const. Co. v. Walsh, 131 Ill. App. 609. Instruction that certain facts constituted contributory negligence held properly refused. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Instruction stating what constituted contributory negligence of pedestrian injured by tripping over wire in street held properly refused. Teague v. Bloomington [Ind. App.] 81 NE 103. Instruction referring to jury the question whether plaintiff was acting as an ordinarily prudent man might "or" would have acted held faulty, but not fatally defective, in the use of the alternative. Indianapolis Trac. & T. Co. v. Richey [Ind. App.] 80 NE 170. Held proper to predicate the effect of presence of sufficient light for plaintiff to see elevator shaft down which he fell, upon whether he exercised ordinary care. Parckner v. Wakem, 231 Ill. 276, 83 NE 202. Instruction that if carriage was moving in opposite direction to which plaintiff alleged it was moving no recovery might be had is improper. Eckels v. Muttschall, 230 Ill. 462, 82 NE 872. Instruction "that defendant's duty was to use ordinary care * * * and plaintiff can recover if injuries were caused by defendant's want of care" erroneous. Knickerbocker Ice Co. v. Leyda, 128 Ill. App. 66. Where the jury was instructed as to the effect of plaintiff's negligence, the failure to direct their attention to the fact of knowledge of plaintiff of defective conditions causing the injury is immaterial., City of Carlyle v. Cosgrove, 126 Ill. App. 627. Instruction that facts enumerated therein constitute negligence or contributory negligence are erroneous. Alton R. G. & E. Co. v. Webb, 119 Ill. App. 75, afd. 219 Ill. 563, 76 NE 687.

20. Charge requiring jury to be "convinced" instead of being "reasonably satisfied," held to impose too great a burden. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Charge requiring jury to be "satisfied" by preponderance of evidence held to impose too great a burden. Id.

21. Not error to refuse to instruct that burden of proving negligence is on plaintiff, where court instructs that jury must be satisfied from all the evidence in the case that defendant was negligent. Daggett v. North Jersey St. R. Co. [N. J. Err. & App.] 68 A 179. Instruction grouping facts authorizing a recovery and telling jury to find for plaintiff if it found such facts, and for the defendant if it did not find such facts to be true, did not place burden on defendant to negative such facts. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Instruction as a whole held not objectionable as placing the burden of proof on defendant to disprove negligence, though the expression "burden of proving" was used in connection with statement of defendant's duty of meeting the presumption of negligence under the doctrine of res ipso loquitur. Cleveland, etc., R. Co. v. Hadley [Ind.] 82 NE 1025. Instruction held not misleading as tending to lead jury to believe that burden of proof had shifted to defendant under doctrine of **res ipso loquitur.** Baum v. New York & I. C. R. Co., 108 NYS 265.

22. Charge on contributory negligence which did not place burden on defendant as to contributory negligence pleaded as defense held properly refused. Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. Instruction held erroneous as leaving question of burden of proof as to contributory negligence in doubt. Abney v. Indiana Union Trac. Co. [Ind. App.] 83 NE 387. Instructions as to presumptions as to exercise of due care by person injured held correct. Rogers v. Rio Grande W. R. Co. [Utah] 90 P 1075. Held error to instruct that burden of proving contributory negligence was on defendant where all the evidence on such issue was offered by plaintiff. Missouri, etc., R. Co. v. Plunkett [Tex. Civ. App.] 103 SW 663. Instruction that plaintiff was presumed to be free from contributory negligence and that defendant had burden of rebutting such presumption held not misleading as tending to lead jury to believe that only defendant's evidence could be considered on such issue. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Instruction intimating that contributory negligence could not be shown except by defendant's evidence held erroneous, but harmless in view of other instructions. Missouri Pac. R. Co. v. Bentley [Kan.] 93 P 150.

In Kentucky it is held improper to tell jury which side burden of proof is on, or to use expression "preponderance of evidence." Cincinati, etc., R. Co. v. Halcomb [Ky.] 105 SW 968.

23. Requested instruction held erroneous in not adverting to negligence, contributory negligence, proximate cause, or injury. Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367. Held to conform to pleadings in action for death of one who tried to save another from being struck by engine. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408.

24. Instruction as to weight of negative evidence held improper, where two witnesses testified positively that yardmaster beckoned plaintiff to come upon the car, and the yardmaster testified that he did not do so. Atlantic Coast Line R. Co. v. O'Neill, 127 Ga. 685, 56 SE 986.

25. Issue of negligence resulting in death of one trying to save another from being struck by an engine held properly submitted. Texas, etc., Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Instruction as whole held not misleading as to time and place, when and at which, plaintiff was required to exercise due care. Purcell v. Chicago, 231 Ill. 164, 83 NE 137. Charge held misleading and confusing. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Where it was manifest from plaintiff's evidence that he relied upon defendant to take the usual precautions in moving a traction engine past a

negligence,[26] and proximate cause,[27] failure to submit issues [28] or to give definitions,[29] failure to limit the effect of evidence admitted for a particular purpose.[30]

building, it was not error to instruct that plaintiff claimed to have assumed that defendant would place a spark arrester on the engine. Underwood v. A. W. Stevens Co., 149 Mich. 39, 14 Det. Leg. N. 296, 112 NW 487. Instruction in action against street railroad company and the owners of a coach for injuries sustained by passenger in coach in a collision, instruction held erroneous in failing to define and limit the liability of the street railroad company with reference to the separate acts of negligence charged against it, there being no sufficient allegations of joint negligence. Ramsey v. Cedar Rapids, etc., R. Co. [Iowa] 112 NW 798. Instruction as to railroad crossing bell being out of order held harmless though not supported by evidence, where it appeared that bell did not ring because it was disconnected. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Error to instruct on negligence as to place in house where electric wires were placed, where negligence charged was failure to properly insulate such wires. Denver Consol. Elec. Co. v. Walters, 39 Colo. 301, 89 P 815. Should be confined to acts of negligence pleaded. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699. In absence of request to state acts charged, defendant cannot complain of instruction **referring to acts charged in petition.** Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 18 Tex. Ct. Rep. 941, 101 SW 492. Instruction held erroneous in that it disregarded the doctrine of **res ipso loquitur,** the evidence being such as to render such doctrine applicable. McDonnell v. Chicago City R. Co., 131 Ill. App. 227. Instruction held misleading in that it involved doctrine of **unavoidable accident** when such doctrine was not applicable under the evidence. Id. General charge submitting question as to whether under all the evidence defendant was guilty of negligence held properly refused where some of acts charged would, if proved, have been **negligence as a matter of law.** Galveston, H. & H. R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct Rep. 544, 103 SW 699.

Where two or more acts are charged, though conjunctively, any one of which may be shown to have been the proximate cause of the injury, evidence tending to prove any one of such acts will authorize its submission to jury, but where it is apparent that one of such acts, disconnected, could not have been proximate cause, its submission is error. San Antonio, etc., R. Co. v. Trigo [Tex. Civ. App.] 18 Tex. Ct. Rep. 958, 101 SW 254. Defendant not harmed by submission of several charges of negligence, only one of which was proved, where his liability was conditioned by the court upon a finding of all of such charges against him. Gibler v. Quincy, etc., R. Co. [Mo. App.] 107 SW 1021.

26. Held misleading. Conklin Const. Co. v. Walsh, 131 Ill. App. 609. Instruction referring to "circumstances in life" of parents in connection with question of their negligence having contributed to death of child held harmless, if erroneous, in view of fact that evidence of such circumstances was confined to the work and duties of the parents at time of accident without reference to their financial condition. Cornooski v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51. Failure to give detailed instruction on knowledge as element of contributory negligence held not error in absence of request therefor. Waters-Pierce Oil Co. v. Snell [Tex. Civ. App.] 20 Tex. Ct. Rep. 190, 106 SW 170. Instruction that if deceased was exercising "ordinary for his safety," etc., held not misleading in that it omitted word "care" after word "ordinary." Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. Use of terms if plaintiff "voluntarily" or "unnecessarily" did certain things, etc., held not error in absence of special request for submission of converse of such expression. Runnels v. Pecos & N. T. R. Co. [Tex. Civ. App.] 107 SW 647. Instruction that contributory negligence is some "act of negligence," etc., held not misleading as exclusive of negligent omissions, etc. Texas & P. R. Co. v. Johnson [Tex. Civ. App.] 20 Tex. Ct. Rep. 410, 106 SW 773. Instruction held erroneous in leaving out element of proximate cause. Adams v. Gulf, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 507, 105 SW 526. Held erroneous as on weight of evidence, and because of assumption of fact as to which there was no evidence. Id. Instruction as to effect of headlight of engine on persons approaching crossing held improper in absence of evidence to sustain it. Rogers v. Rio Grande W. R. Co. [Utah] 90 P 1075. Instruction that contributory negligence precluded a recovery unless the act of defendant was wanton or willful held not supported by evidence of wantonness or willfullness, but was harmless to plaintiff. Jansen v. Southern Pac. Co. [Cal. App.] 89 P 616. Instruction held to have sufficiently presented to jury the issue as to whether brakeman was negligent in going between cars equipped with air and safety appliances. Hayes v. Chicago, etc., R. Co., 131 Wis. 399, 111 NW 471. Issue of contributory negligence in driving up to crossing where horse was frightened held properly submitted. Paris & G. N. R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Instruction on contributory negligence held misleading as giving undue prominence to an undecisive point. Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626. Instruction that gross negligence is absence of slight care, and that no recovery could be had if deceased did not exercise slight care, and such negligence contributed to the injury, and the reading of Civ. Code 1902, § 2139, providing that railroad company shall be liable in manner therein provided, unless it be shown that in addition to mere contributory negligence the person injured was at time of collision guilty of gross or willfull negligence, etc., held a sufficient presentation of doctrine that gross or willfull contributory negligence is a defense in an action based on the liability contemplated by the statute. Osteen v. Southern R. Co., 76 S. C. 368, 57 SE 196. Instruction held erroneous in that it ignored evidence that warning lights had been placed near obstructions on track which caused wreck in which an employe of a construction company was injured.

Verdicts and findings.[See 8 C. L. 1123]—It is improper to submit a special interrogatory as to what an ordinarily prudent man would have done under the circum-

Draper v. Interborough Rapid Transit Co., 108 NYS 686. Error in ignoring evidence that warning lights had been placed near obstructions on track which caused wreck in which employe of construction company was injured, held not cured by subsequent instructions. Id. Substantial conformity between instructions and pleadings as to position of one whom deceased sought to rescue from approaching train held sufficient, the real issue being the peril of the stranger. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. It is error to charge a jury with reference to the doctrine of the **last chance** where there is no allegation in the petition which would warrant an application to the rule of "last chance." Cincinnati Trac. Co. v. Kroger, 10 Ohio C. C. (N. S.) 64. Instruction on last clear chance held not on weight of evidence. Houston & T. C. R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Instruction as to last clear chance held correct. White v. St. Louis, etc., R. Co., 202 Mo. 539, 101 SW 14. Where acts of plaintiff alleged to constitute contributory negligence continued up to very moment of the accident, an instruction was not erroneous because it failed to state that plaintiff's negligence, in order to preclude a recovery, must have proximately caused or contributed to the injury. Jansen v. Southern Pac. Co. [Cal. App.] 89 P 616. Instruction as to doctrine of last clear chance held erroneous as not within the issues. Doherty v. Des Moines City R. Co. [Iowa] 114 183. Giving of such instruction held not harmless, since jury might have been led to believe that they could disregard plaintiff's negligence. Id. Instruction that one's duty to exercise care to avoid the consequences of another's negligence does not arise until the danger is impending or the circumstances are such that an ordinarily prudent man would have reason to apprehend its existence, held justified by the facts. Western & A. R. Co. v. York, 128 Ga. 687, 58 SE 183. Where instruction was requested that there could be no recovery if both plaintiff and defendant were guilty of negligence contributing to the injury, it was held erroneous but harmless to modify such instruction by adding "providing * * * plaintiff was guilty of a want of ordinary care." Pauckner v. Wakem, 231 Ill. 276, 83 NE 202. Instruction that one was not necessarily guilty of contributory negligence in **risking injury to save another** held erroneous in failing to advert to necessity of exercise of reasonable care for own safety. Miller v. Union R. Co. [N. Y.] 83 NE 583. Instruction refused as to negligence in **entrusting safety to driver** of vehicle, held covered by one given. Miller v. Boston & N. St. R. Co. [Mass.] 83 NE 990.

27. Not necessary to use the term proximate cause. Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51. Instruction held sufficient in connection with other instructions. Id. No error to submit evidence under general allegation, though there were specific allegations, where there was no request for a limiting instruction. Joseph v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1055. Where evidence showed that only intervening cause was one naturally following from result of defendant's negligence, an instruction failing to advert to doctrine of intervening cause was not erroneous. Cincinnati, H. & D. R. Co. v. Acrea [Ind. App.] 82 NE 1009. Instructions in regard to effect of **act of God** in form of unusual rainfall held properly refused. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589.

28 Failure to hypothesize right to recover upon absence of contributory negligence held harmless in view of other instructions. Underwood v. Metropolitan St. R. Co., 125 Mo. App. 490, 102 SW 1045. Instruction held erroneous as excluding doctrine of last clear chance. Zander v. St. Louis Transit Co., 206 Mo. 445, 103 SW 1006. Not error to refuse to instruct on contributory negligence where there was no evidence thereof. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Failure to instruct not error when no instruction was requested. Zalotuchin v. Metropolitan St. R. Co. [Mo. App.] 106 SW 548. Refusal to instruct on contributory negligence not error where same was not pleaded. Id. Instruction on contributory negligence held properly refused where such issue had already been properly submitted. Houston, etc., R. Co. v. McHale [Tex. Civ. App.] 20 Tex. Ct. Rep. 161, 105 SW 1149. Where case turns entirely on doctrine of last clear chance or discovered peril, it is not error to fail to submit issue of contributory negligence. Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Where instructions given negatived the right to recover on mere ground of minority of plaintiff and sufficiently covered the question of contributory negligence as dependent on plaintiff's capacity, refusal of instructions making no reference to such capacity was harmless to defendant. Daniels v. Johnston, 39 Colo. 177, 89 P 811. Evidence held to require instruction as to negligence with relation to fires to be predicated on **causal connection** doctrine of proximate cause. McVay v. Central Cal. Inv. Co. [Cal. App.] 91 P 745.

29. Terms not used in the court's instructions need not be defined. Galveston, etc., R. Co. v. Alberti [Tex. Civ. App.] 19 Tex. Ct. Rep. 544, 103 SW 699. Not error to fail to define negligence in instruction on negligence. O'Leary v. Kansas City [Mo. App.] 106 SW 94. Instruction as to right to recover for joint and separate negligence of owners of coach in which plaintiff was riding and owners of street car with which coach collided, held erroneous in not defining what would constitute joint and separate **negligence.** Ramsey v. Cedar Rapids & M. C. R. Co. [Iowa] 112 NW 798.

30. Where evidence is admissible for a single purpose only, the court should by instruction limit it to such purpose. Evidence of location of electric wires admitted on issue of negligence in insulation. Denver Consol. Elec. Co. v. Walters, 39 Colo. 301, 89 P 815.

stances.[31] While special findings and the general verdict are in conflict, the former must control.[32]

NEGOTIABLE INSTRUMENTS.

§ 1. Elements and Indicia, 962.
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§ 4. Liability and Discharge of Primary Parties, 969. Material Alteration, 969. Defenses Between Original Parties, 969.
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§ 14. Remedies and Procedure, 987. Limitations, 988. Parties, 988. Pleading, 988. Evidence, 992. Presumptions and Burden of Proof, 994. Province of Court and Jury, 996. Instructions, 997. Verdict, Findings, and Judgment, 998. Indemnifying Maker of Lost Instrument, 998.

The scope of this topic is noted below.[33]

§ 1. *Elements and indicia.* See 8 C. L. 1124—A negotiable instrument is an unconditional written promise or order to pay a certain person or his order or to bearer a certain sum of money at a certain time or on demand or at sight.[34] An order or

31. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83.

32. **Negligence:** Special finding that defendant was operating his mill in usual manner when defendant's horse was frightened by steam held not in conflict with general verdict for plaintiff. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Special finding which does not cover all the circumstances bearing on **contributory negligence** cannot overcome a general verdict for the plaintiff. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981. Where it was alleged that child was too young to "appreciate" danger, a special finding that child was 5 years and 10 months old and of average intelligence was not irreconcilable with a general verdict for plaintiff. Hammond, etc., R. Co. v. Blocker [Ind. App.] 82 NE 541. Where in answer to special interrogatory the jury found that plaintiff had no time to get out of his buggy after horse became frightened, a special interrogatory as to whether an ordinarily prudent man would have gotten out was properly refused. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Where burden of showing contributory negligence is on defendant, a general finding for plaintiff negatives contributory negligence. Grass v. Ft. Wayne & W. V. Trac. Co. [Ind. App.] 81 NE 514. Special findings as to contributory negligence in action for injury caused by horse being frightened by steam from defendant's cooperage plant near highway held not in irreconcilable conflict with general verdict for plaintiff. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83.

33. It treats of the law of negotiable instruments as a special class of contracts, and only incidentally discusses cases when general principals of contracts are applied. For a full discussion of the general law of contracts, see Contracts, 9 C L. 654. The law relating to reality of consent is excluded except so far as it concerns the rights of bona fide purchasers (see Fraud and Undue Influence, 9 C. L. 1475; Duress, 9 C. L. 1016; Mistake and Accident, 10 C. L. 853). Rights and powers peculiar to notes of corporations (see Corporations, 9 C. L. 733) and firms (see Partnership 8 C. L. 1261) are elsewhere treated, as are the powers and liabilities of agents with respect to the making and receipt of negotiable paper (see Agency, 9 C. L. 58). The law of banking is the subject of a separate article (see Banking and Finance, 9 C. L. 327).

34. **A promissory note** under the law merchant is an absolute promise in writing, signed but not sealed, to pay a certain specified sum at a time therein limited, or on demand, or at sight, to a person therein named or designated, or to his order, or to the bearer. Harris v. Pate [Ind. T.] 104 SW 812. Instrument held a promissory note within this definition. Id. Note in which payor for value received unconditionally promises to pay payee or order a fixed sum of money at a fixed date is a promissory note within purview of Rev. St. c. 83, § 89 (Murray v. Quint, 102 Me. 145, 66 A 313), and addition of a statement of the consideration, and of a stipulation that goods for which note was given shall remain property of vendor until payment of note, do not affect character of note as a promissory note within statute (Id.).

Bill of exchange: An order drawn by one person on another to pay to drawer's order a specific sum of money and to charge it to his account is a bill of exchange. Woodall v. Peoples' Nat. Bk. [Ala.] 45 S 194. Instrument held to be a foreign bill of exchange under Neg. Inst. Law, Laws 1897, p. 745, c. 612, §§ 210, 213, as amended. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.

Check: Under the Negotiable Instrument Law a check is a bill of exchange drawn on a bank payable on demand. Wisner v. First

Nat. Bk. [Pa.] 68 A 955. It is an essential element of a check that it shall be for a sum certain, payable unconditionally. Fidelity & Deposit Co. v. National Bk. of Commerce [Tex. Civ. App.] 106 SW 782. Where time of payment of an order drawn on a bank is uncertain, and amount bank may become liable for not definitely fixed, and its liability for any amount conditioned upon happening of certain contingencies, the instrument is not a check. Id.

A coupon bond of a state is a negotiable instrument, and state issuing it incurs same responsibilities which attach to individuals or corporations in like cases. Ehrlich v. Jennings [S. C.] 58 SE 922. Under Neg. Inst. Law (Laws 1897, p. 722, c. 612), § 20, an instrument to be negotiable must contain an unconditional promise or order to pay a sum certain in money. Hibbs v. Brown, 190 N. Y. 167, 82 NE 1108.

Note: At common law a joint stock association is a partnership. Griffith v. Paget, L. R. 6 Ch. Div. 511; Townsend v. Gowey [N. Y.] 19 Wend. 424. As in a simple partnership (Haskins v. D'Este, 133 Mass. 356), the contracts of the association are the contracts of its members (Tappan v. Bailey, [Mass.] 4 Metc. 529; McGreary v. Chandler, 58 Me. 537. **Contra.** Walker v. Wait, 50 Vt. 668), upon which they are primarily liable (Keasley v. Codd, 2 C. & P. 408; Skinner v. Dayton [N. Y.] 19 Johns, 513, 10 Am. Dec. 286). It is not inconsistent with the general nature of the partnership that the death of a member does not work a dissolution (McNeish v. Hulless Oat Co., 57 Vt. 316), or that its shares are transferable (Edwards v. Warren, etc., Works, 168 Mass. 564, 38 L. R. A. 791). Whether statutes adding further corporate features have created a new juridical person depends upon the nature of the legislation. If the statutory features are inconsistent with the conception of a partnership, the legislature is assumed to have created an artificial entity or quasi corporation. Such is the limited company of England and some of the states. In re Reese, etc., Co. (1867) 36 L. J. Ch. 618, 623; Oak Ridge Co. v. Rogers, 108 Pa. 147; Staver, etc., Co. v. Blake, 111 Mich. 282, 38 L. R. A. 798. For jurisdictional purposes on the ground of diverse citizenship, it fails to qualify as a corporation (Great Southern Hotel Co. v. Jones, 177 U. S. 449, 44 Law. Ed. 842), but the supreme court shows a reluctance to extend the privilege of a corporation rather than a refusal to recognize the artificial person, and the association may sue in its own name when jurisdiction is invoked on other grounds (Sanitas Co. v. Force Co., 124 F 302). On the other hand, if the statutory provisions are procedural, intended only to afford a convenient remedy, the fundamental nature of the association remains unchanged. Gott v. Dinsmore, 111 Mass. 45. The New York associations seem to fall within this category. People v. Coleman, 133 N. Y. 279, 16 L. R. A. 183; Chapman v. Barney, 129 U. S. 677, 32 Law. Ed. 800. While for some purposes the association or its officer has been considered a corporation, as in the adjustment of claims between the association and shareholders (Westcott v. Fargo, 61 N. Y. 542, 19 Am. Rep. 300); Service of process in a foreign state (State v. Adams Exp. Co., 66 Minn. 271, 38 L. R. A. 225), or for taxation (People v. Wemple, 117 N. Y. 136, 6 L. R. A. 30; Matter of Jones, 172 N. Y. 575), the important distinction has not been obliterated that the contracts and debts of the association are the original contracts and debts of the shareholders as partners (People v. Coleman, 133 N. Y. 279, 13 L. R. A. 183, Snyder v. Lindsey [N. Y.] 92 Hun, 432; United Press v. Abell Co. [N. Y.] 87 App. Div. 344). This view of the New York association is taken by the Massachusetts courts. Taft v. Ward, 106 Mass. 518; contra Edgworth v. Wood, 58 N. J. Law, 463. Since the Code, Code Civ. Proc., §§ 1919-1924, authorizes only such suits against the officer as would be enforcible against the shareholders (McCabe v. Goodfellow, 133 N. Y. 89), and permits suits against the members in the first instance (Schwartz v. Wechler [N. Y.] 2 Misc. 67), it would be difficult to define a shareholder's liability, if the association is to be considered an artificial person. It is not in the nature of a suretyship nor of course is it statutory. This difficulty was ignored by the majority in the recent case of Hibbs v. Brown [N. Y.] 82 NE 1109. The question at issue was the negotiability of a bond of the Adams Express Co. containing a stipulation that "no shareholder shall be liable as partner or otherwise in respect to this bond," under the rule that a negotiable instrument must pledge the general credit of the maker. Four justices took the view —a view undoubtedly in accord with commercial conceptions, but, it is submitted, a departure from the present legal conceptions—that the bonds are the obligations of an artificial person distinct from the shareholder, whose liabilities are secondary. Adopting this conception, the negotiability of the bonds logically follows. The case of Heflin, etc., Co. v. Hilton, 124 Ala. 365, cited for the proposition that the note of a corporation not enforcible against stockholders is non-negotiable (7 Cyc. 578), does not support that proposition, nor is the proposition sound upon principle. The rule that the instrument must pledge the general credit of the maker (Munger v. Shannon, 61 N. Y. 251) is the converse of the rule that the promise must be not to pay out of a particular fund. If, therefore, a maker pledges all his funds without limitation, this rule is satisfied. The test is the resources of the debtor, not the resources upon which the creditor may call. The exemption of a superadded credit of a third party as that of a general surety for the debts of the maker, or the secondary liability of the stockholders of a corporation to third parties, would not be a restriction upon the general credit of the maker. The fact that the general credit of a partnership is the credit of its members is not inconsistent with this rule, for, though the partnership may not draw upon the partners to the full extent of their resources, the contracts of the partnership are the contracts of the partners and, therefore, must pledge their individual credit. If, therefore, a joint stock association contracts as a quasi corporate entity, a limitation upon the shareholders' liability does not destroy the negotiability of its paper; if it contracts as a partnership, the limitation is fatal. See Hess v. Werts, 4 Serg. & R. [Pa.] 356. The minority, rejecting the entity theory, preserve the negotiability of the bonds by declaring the stipu-

promise to pay out of a particular fund is not unconditional,[35] but such a promise, though not negotiable, is a valid obligation.[36] Negotiability is not affected by the fact that a note is secured.[37] An instrument otherwise negotiable is rendered non-negotiable by an express provision therein to that effect.[38] The fact that a negotiable instrument is held by school trustees does not affect its negotiability.[39]

*The time of payment.*See 8 C. L. 1125—Whether the time of payment is certain is to be determined from an interpretation of the terms of the contract.[40] The fact that the day of maturity may never arrive renders an instrument ineffective as a negotiable note,[41] but it does not without evidence aliunde render it illegal as a contract to pay money.[42] It is an essential element of a check that it shall be payable instantly on demand.[43]

*The amount.*See 8 C. L. 1125—The negotiability of a note is not affected by the words "with exchange" where it is drawn and payable at the same place,[44] but the words "with collection" render it non-negotiable,[45] as does a provision for a reasonable attorney's fee.[46]

Words of negotiability are essential [47] unless dispensed with by statute.[48]

§ 2. *Form, interpretation, and effect.*See 8 C. L. 1125—Proper execution is essential to the validity of a negotiable instrument. Its payment can be enforced only

lation void. On grounds of public policy, a limitation on the liability of partners has been generally looked upon with disfavor (Imperial Co. v. Jewett, 169 N. Y. 143; Hess v. Werts, 4 Serg. & R. [Pa.] 356), but recognized if third parties choose to contract on such terms and an enforcible right remains (Bank of Topeka v. Eaton, 100 F 8), Since the Code provides no remedy not enforcible against the shareholders, supra, and the stipulation gives the shareholders immunity from suit, the position of the minority which gives effect to the primary intention to make a binding contract seems sound, and it is more logical to base this position, as Werner, J., did, upon the ground that the stipulation was repugnant to the general tenor of the bond, than upon the broad ground of public policy.—From 8 Columbia L. R. 215.

35. Hibbs v. Brown, 190 N. Y. 167, 82 NE 1108. A note containing stipulation on back that payee agrees to look to mortgage security for payment is not negotiable. Allison v. Hollembeak [Iowa] 114 NW 1059. Where a bond of a joint stock association pledges general credit of association, a clause therein exempting members from personal liability does not make the bond payable out of a particular fund. Hibbs v. Brown, 190 N. Y. 167, 82 NE 1108.

36. A note is not invalidated by an agreement that the debt which it is given to secure shall be paid out of a particular fund. Keller v. Cohen, 217 Pa. 522, 66 A 862.

37. Naef v. Potter, 127 Ill. App. 106, afd. 226 Ill. 628, 80 NE 1084; Beckstrom v. Krone, 125 Ill. App. 376.

38. A bill of lading upon which is stamped the words "not negotiable, unless delivery is to be made to the consignee or order," is exempt from Gen. St. 1894, § 7649, making bills of lading negotiable. Barnum Grain Co. v. Great Northern R. Co., 102 Minn. 147, 112 NW 1030.

39. Scott v. Goode, 128 Ill. App. 26; First State Bk. of Chester v. Noser, 128 Ill. App. 157.

40. Provision in deed of trust securing bonds held only to relate to procedure under trust indenture itself for purpose of enforcing payment of coupons, and not to permit postponement of time of payment thereof upon authority of certain proportion of bondholders and thus preclude negotiability. Hibbs v. Brown, 190 N. Y. 167, 82 NE 1108. A note containing stipulation whereby sureties, guarantors, indorsers, and makers waive notice of granting of any extension of time for payment and waive right of defense on ground that extension has been made without such notice, is not a negotiable note under Neg. Inst. Laws (Sess. Laws. 1903, p. 380). Union Stockyards Nat. Bk. v. Bolan [Idaho] 93 P 508. "Sixty days' demand" certain. Beckstrom v. Krone, 125 Ill. App. 376.

41. Promise to pay $500 "on the day after my nomination for county clerk in the year 1900." Federal Nat. Bk. v. Cross Creek & Pittsburg Coal [Pa.] 68 A 1018; Harris v. Firth [N. J. Law] 68 A 1064.

42. Harris v. Firth [N. J. Law] 68 A 1064.

43. Fidelity & Deposit Co. v. National Bk. of Commerce [Tex. Civ. App.] 106 SW 782.

44. 45. Buck v. Harris, 125 Mo. App. 365, 102 SW 640.

46. German American Bk. v. Martin [Mo. App.] 107 SW 1108.

47. Promissory note must contain such words in order to entitle transferee to rights accorded by law to bona fide purchasers of negotiable paper. Barrow v. Blasingame, 1 Ga. App. 358, 57 SE 926. Under the Negotiable Instrument Law. Acts 1899. p. 139, c. 94, a note not payable to either order or bearer is not negotiable. Gilley v. Harrell, 118 Tenn. 115, 101 SW 424. This law by necessary implication repealed Shannon's Code, § 3506. Id.

48. Rev. St. c. 98, §§ 3 and 4, makes such words unnecessary. Beckstrom v. Krone, 125 Ill. App. 376. Sections 3 and 4, ch. 98, dispensing with necessity of words of negotiability, held not repealed by Act 1895. Id.

when executed by or under the authority of the person sought to be charged,[49] or when executed without his authority but subsequently ratified by him.[50] To bind a corporation the instrument must be executed by its authorized agent, and for a purpose within the scope of his agency.[51] Other essentials to the validity of a negotiable instrument are a legal delivery[52] and a consideration[53] which must be both sufficient[54] and legal.[55] Under the negotiable instruments law a date is not essential to the validity

49. In action against administrator, evidence held insufficient to show execution of duebill by deceased. Richards v. McLain, 118 La. 424, 43 S 38.

50. Mere silence of one whose name is purported to be signed to a note, after receiving notice of protest thereof, does not amount to ratification. Ritchie County Bk. Bee [W. Va.] 59 SE 181.

51. Presumption that president of business corporation is authorized to execute negotiable instruments in name of corporation arises only when such instruments are apparently made for corporate purposes in ordinary course of corporate business. Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 SE 92. If a corporation allows its president and general manager in large measure to control its business transactions, it will be liable on a note executed by them in name of corporation, unless it affirmatively shows that they acted without authority, and this notwithstanding Ballinger's Ann. Codes & St. § 4255, providing that powers of corporation shall be exercised by board of trustees. McKinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P 495. Where a note is signed by the president of a corporation and the corporation has received benefit of proceeds, and there was a course of dealing justifying its acceptance, it is a valid legal obligation of the corporation though not countersigned by treasurer as required by by-laws. Bigelow Co. v. Automatic Gas Producer Co., 56 Misc. 389, 107 NYS 894. A note of a corporation issued by its secretary to secure a personal loan to himself, if not authorized or ratified by corporation, is ultra vires and void. El Dorado Imp. Co. v. Citizens' Bk. [Ark.] 107 SW 676.

52. A promissory note has no legal inception or valid existence until it has been delivered. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303. Delivery is, normally, to be in accordance with the purpose and intent of the parties, but this is subject to exceptions, of which one obtains when the departure from such intent is one of mode only. Id. A check delivered on Sunday is invalid and of no legal effect. Gordon v. Levine [Mass.] 83 NE 861. The controlling question in determining the delivery of a note is the intention of the parties. Barber v. McHenry County Hedge Fence Co., 129 Ill. App. 45.

53. No consideration for note. Reynolds v. Nevin, 1 Ga. App. 269, 57 SE 918; McGlinn's Estate v. Gallagher [Ind. App.] 83 NE 252; Garman v. Gumbiner, 32 Pa. Super. Ct. 181. The consideration of a negotiable instrument is open to inquiry. Holmes v. Horn, 120 Ill. App. 359.

54. Consideration held sufficient: A preexisting debt is sufficient consideration for a note under Neg. Inst. Law (Laws 1897, p. 727, c. 612, § 51). Bigelow Co. v. Automatic Gas Producer Co., 56 Misc. 389, 107 NYS 894. Extension of time on existing note is a sufficient consideration for a new note given to be held as collateral for existing note. Goll v. Fehr, 131 Wis. 141, 111 NW 235. Upon exchange of commercial paper, each instrument forms a sufficient consideration for the other. Matlock v. Scheuerman [Or.] 93 P 823. A benefit conferred by a third party or a detriment suffered by payee of note at instance of maker is a sufficient consideration for note, though maker receives no personal benefit by reason of execution and delivery. Doxy v. Exchange Bk. [Okl.] 92 P 150. An agreement not to bring proceedings to wind up a corporation is a sufficient consideration to support notes given by corporation. Beebe v. Wells [C. C. A.] 153 F 133. Where two parties enter into agreement concerning sum of money due from one to other, note given for amount agreed upon is not void for failure of consideration, in whole or in part, where there was no fraud or mistake, and each party had same means of ascertaining validity of amount claimed by payee in note. Armijo v. Henry [N. M.] 89 P 305. Where plaintiff having a labor claim against a corporation in good faith filed a lien against its property and was about to sue for its foreclosure when corporation compromised claim by giving notes for part of amount, compromise was sufficient consideration for notes though lien may have been invalid. Baines v. Coos Bay, R. & E. R. & Nav. Co. [Or.] 89 P 371. Note given in settlement of a suit pending in court against maker is supported by sufficient consideration, whether suit was instituted upon a valid claim or not. Glenn v. Zenovitch, 128 Ga. 596, 58 SE 26. Where defendant gave two checks which were not collected owing to failure of bank on which they were drawn, on one of which he received cash and for the other received credit for part and paid a valid obligation with balance, a note subsequently given by him in place of checks covering same amount was not without consideration. Crawford County State Bk. v. Stegemann [Iowa] 114 NW 549. Duebill held supported by sufficient consideration under Civ. Code, §§ 2160, 2161. Parnell v. Davenport [Mont.] 93 P 939. Insufficient evidence of lack of consideration did not warrant submitting case to jury. Warmcastle v. Castner, 34 Pa. Super. Ct. 464.

Consideration held insufficient: Neither release from liability on a void note nor discontinuance of a suit thereon is sufficient consideration for a new note. Kennedy v. Welch [Mass.] 83 NE 11.

55. Where note payable to a construction company is executed in consideration of benefits arising to maker by reason of construction of railroad between places named by a time stated, without naming any railroad company as an interested party, the

of a note.[56] A note made payable to the order of the maker when indorsed and delivered to the indorsee becomes a valid note.[57] The original parties to a negotiable instrument can annex any lawful condition to its payment at the time it is given.[58] Unless it is otherwise provided by statute,[59] a note is not rendered invalid by a provision for reasonable attorney's fees.[60] Such a provision is enforcible as part of the debt,[61] provided statutory requirements made a prerequisite to its enforcement have been complied with.[62] The death of the maker insolvent will not destroy the right to recover such fees as against the administrator.[63] The limit of recovery is the fee contracted to be paid,[64] or, in the absence of contract, the reasonable value of services rendered.[65] A provision that if interest is not paid when due the payee may declare the entire debt due is valid,[66] as is provision in a note payable in instalments that the whole amount shall become due upon failure in payment of one instalment.[67] Under some statutes it is essential to the validity of a negotiable instrument given for a patented article that it should show that fact on its face.[68] The

consideration is not illegal as against public policy. Sparks v. Oklahoma Const. Co. [Okl.] 91 P 839. B. was convicted of misdemeanor and fined $40. He agreed with A. that, if A. would pay his fine and clothe and feed him, he would work for him for 10 months. A. paid fine and $10 for clothing. C. proposed to A. that he would take his contract with B. and pay him amount of money which he had advanced to B. if B. would consent to it. Both A. and B. agreed, and C. thereupon gave his note for amount of money which A. had paid out for B. and B. then worked for C. for eight months. Held note was supported by valid consideration. Dorsey v. Redwine, 1 Ga. App. 626, 57 SE 1073. Where purchase price for which a note is given includes transfer of a nontransferable liquor license for purpose of enabling vendees as part of the transaction to continue business of selling intoxicating liquors, and valuation placed upon license is inseparable from purchase price, the consideration is entire, and note being tainted with illegality is absolutely void. Kennedy v. Welch [Mass.] 83 NE 11. Under B. & C. Comp. § 1945, a check the consideration for which is a gambling debt is void as to all parties except holders in good faith without notice of illegality. Matlock v. Scheuerman [Or.] 93 P 823.

56. Laws 1897, p. 723, c. 612, § 25. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

57. Sherman v. Goodwin [Ariz.] 89 P 517.

58. Aden v. Doub [N. C.] 59 SE 162.

59. Under a statute in Georgia an obligation to pay attorney's fees is void except under the circumstances stated in the statute. Acts 1900, p. 53. Circumstances under which it was error to enter judgment relieving defendant from attorney's fees. Mount Vernon Bank v. Gibbs, 1 Ga. App. 662, 58 SE 269.

60. German-American Bk. v. Martin [Mo. App.] 107 SW 1108.

61. In re Edens Co., 151 F 940. Where the maker of a note providing for attorney's fees brings about conditions which in effect mature the note and require services of an attorney to collect it before the face date of its maturity, the attorney's fee is recoverable. Jungbecker v. Huber [Tex. Civ. App.] 18 Tex. Ct. Rep. 975, 101 SW 552.

62. Notice held a substantial compliance with provisions of Act of Dec. 12, 1900 (Acts 1900, p. 53), regulating manner of collecting atorney's fees. Stocking v. Moury, 128 Ga. 414, 57 SE 704.

63. Harris v. Powers, 129 Ga. 74, 58 SE 1038. Under circumstances of this case holders of note were not prevented from recovering attorney's fees thereon because suit was commenced on return day. Id.

64. Elmore v. Rugely [Tex. Civ. App.] 107 SW 151. Where notes were turned over to attorneys for collection and were twice presented to administrator and disallowed in toto, held that holders were entitled to recover attorney's fee stipulated for therein without proving affirmatively an agreement to pay attorneys said sum, reasonableness not having been questioned. Dashiell v. Moody [Tex. Civ. App.] 97 SW 843. An alleged parol agreement, limiting the stipulated attorney's fees provided for in a vote, does not deprive the creditor of his right to claim the entire stipulated amount. In re Edens Co., 151 F 940.

65. Rinker v. Laurer, 13 Idaho, 163, 88 P 1057; Elmore v. Rugely [Tex. Civ. App.] 107 SW 151. Where a note provides for "reasonable attorney's fees," the court should not direct a verdict for "10 per cent attorney's fees" in the absence of proof that such amount was reasonable. Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093.

66. Evidence of election to declare whole debt due. Harris v. Powers, 129 Ga. 74, 58 SE 1038.

67. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112. A provision that in case of default in payment at maturity of any one or more of a series of notes maturing monthly the entire series shall become due is valid. Stocking v. Moury, 128 Ga. 414, 57 SE 704. In such case if notes, maturity of which has been accelerated by default, provide for payment of 10 per cent attorneys' fees, same may be collected in manner provided by law. Id.

68. Kirby's (Ark.) Dig. §§ 513-516. Ozan Lumber Co. v. Union County Nat. Bk. of Liberty, Ind. 28 S. Ct. 89, overruling [C. C. A.] 145 F 344, which afd. 127 F 206. Such a statute is valid (Id.), and is not rendered unconstitutional as denying the equal protection of the laws by a provision exempting from its operation merchants and dealers

nature of a negotiable instrument is determined by the law of the place where it is drawn and negotiated.[69] The validity of a note is determined by the law of the country where it is executed and made payable.[70] The rights and obligations of the drawer of a bill of exchange are determined by the law of the place where he draws it.[71] The method of the payment of a draft and matters incident thereto are regulated by the law of the place of payment.[72] In construing negotiable instruments, effect will be given the intention of the parties according to the terms of the instrument,[73] and such intention, clearly expressed cannot be affected by the existence of a usage or custom.[74] Every part of the contract must, so far as possible, be given effect.[75] The court may supply omitted words where the intention of the parties is plainly apparent.[76] The written parts of the instrument control the printed parts.[77] Uncertainty in the language is to be interpreted most strongly against the party who caused the uncertainty to exist, the promisor being presumed to be such party.[78] The drawer of a foreign bill of exchange guaranties its acceptance and payment in the place on which it is drawn, and agrees, in default of payment, to reimburse the holder at the place where the contract was made.[79] The maker of a check guaranties that the bank on which it is drawn is solvent and that it will be paid on presentation.[80] A demand note is payable at the date of its delivery.[81] Where an order is

who sell patented things in the usual course of business (Id.).

69. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.

70. First Nat. Bk. v. Doeden [S. D.] 113 NW 81. Where a note providing for attorney's fees was made in another state, evidence of the lex loci contractus, regulating their recovery, must be adduced. Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093. Although a stipulation in a note for attorney's fees is valid in the state where the notes are executed and payable, it will not be enforced in a state where such a stipulation is void as an agreement for a penalty. Arden Lumber Co. v. Henderson Iron Works & Supply Co. [Ark.] 103 SW 185.

71. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.

72. Hammond, Snyder & Co. v. American Exp. Co. [Md.] 68 A 496. The law of the place of payment of a draft is presumed to be the same as that of the place where suit is brought in the absence of an allegation to the contrary. Id.

73. One dealing with a negotiable instrument has a right to act upon it as it appears upon the face of it. Citizens' Nat. Bk. v. Burch [N. C.] 59 SE 71. Where note provides that it shall bear **interest** at a certain rate per annum, payable semi-annually, until maturity, and thereafter at same rate per annum only, holder after maturity is entitled only to current interest and not to interest on interest. Odams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718. Where note provides that **if an instalment is not paid** within ten days after due **whole note shall become due** at option of holder, if holder does not exercise option to declare note due for nonpayment of instalments, interest on instalments can be recovered only from time of maturity of each. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386. Where a note provides that upon default in payment of any instalment of interest principal shall become immediately due and payable "at the option of the holder," holder has a reasonable time in which to determine whether he will exercise his option. Knisel v. Ballou [Cal.] 91 P 620. Provision in note held merely an **option** to maker **to make partial payments** on principal **in advance of maturity,** and not to limit their obligation to pay interest monthly or destroy holder's right to declare entire sum due upon default in payment of interest. Id. Provision in note for payment of **"reasonable expenses of collection, including attorneys' fees,"** has reference to services rendered in a direct effort to collect note and not to those rendered in a collateral proceeding. German-American Bk. v. Martin [Mo. App.] 107 SW 1108. Fact that a draft at sixty days' sight is drawn on a consignment of wheat, has the bill of lading attached, and contains the additional words "to be surrendered upon payment of this bill before maturity under discount on or before arrival of vessel," **does not change the date of maturity.** Hammond Snyder & Co. v. American Exp. Co. [Md.] 68 A 496.

74. Existence of a usage or custom cannot change date of maturity of a draft appearing on face thereof. Hammond Snyder & Co. v. American Exp. Co. [Md.] 68 A 496.

75. United States Nat. Bk. v. Waddingham [Cal. App.] 93 P 1046.

76. Court may supply words "per annum" after words "with interest at 8 per cent" appearing in note. Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093. Note dated March 25, 1904, and payable on "the 1st day of November," without specifying year, is, in absence of anything requiring contrary construction, to be construed as maturing on November 1st, 1904. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 SE 911.

77. Civ. Code, § 1651. United States Nat. Bk. v. Waddingham [Cal. App.] 93 P 1046.

78. Civ. Code § 1654. United States Nat. Bk. v. Waddingham [Cal. App.] 93 P 1046.

79. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.

80. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212.

81. Church v. Stevens, 56 Misc. 572, 107

payable on demand, interest should be allowed from the date of demand.[82] A note payable to order which omits to name payee may be enforced by any bona fide holder.[83] A note payable to the order of the agent of a corporation, both being specified by names, is in legal effect payable to the corporation.[84] At any time before its delivery a check is revocable,[85] and the debt represented by it subject to garnishment.[86] The effect of an agreement extending the time for payment of a note is to waive any past default in payment of principal and to postpone maturity until the date to which the extension is made.[87] Upon the exchange of commercial paper, each instrument is an independent obligation not dependent on the payment of the other.[88] One is bound by the contract which the law attaches to his signature, unless it was the understanding of all the parties that a different liability attached.[89] Where one acting in a representative capacity executes his personal note, he will be bound thereby, though it is executed in the interest of his principal.[90] A bill of exchange is not money nor legal[91] tender.

§ 3. *Anomalous signatures and indorsements.*[See 8 C. L. 1129]—At common law, a third person indorsing in blank, before or at the time of delivery, is liable as a surety,[92] or guarantor,[93] unless a different understanding is shown.[94] That a different understanding did exist may be shown by parol.[95] In West Virginia, the payee of a note may treat indorsees before delivery as joint makers, or as indorsers or guarantors at his election,[96] unless he agrees, before or on the delivery of the paper, to treat them in a particular one of those characters.[97] Under the negotiable instruments law,

NYS 310. In New York, as between the maker and holder, a note payable on demand is due forthwith. Hyman v. Doyle, 53 Misc. 597, 103 NYS 778. Where a note is payable on demand simply, with no qualifying provisions, the word "demand" is not treated as part of the contract but is used to show that the debt is due. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

82. Where an order is drawn for immediate payment out of a fund in drawee's hands, subject to such demand, the full amount of order is payable on demand and interest should be allowed from date of demand. Foley v. Hauston Co-Op. Mfg. Co. [Tex. Civ. App.] 202 Tex. Ct. Rep. 224, 106 SW 160.

83. Fretwell v. Carter [S. C.] 59 SE 639. Such holder is authorized to bill in name of his indorser as payee, which is done in substance and effect by alleging in action on note execution and delivery to indorser as payee. Id.

84. Civ. Code 1895, § 3037, par. 2. Young v. Murray [Ga. App.] 59 SE 717.

85. Watt-Harley-Holmes Hardware Co. v. Day, 1 Ga. App. 646, 57 SE 1033. Where debtor sends check by mail, title remains in sender until it is received by creditor, unless creditor instructs debtor to send it by mail in settlement of debt, in which case title vests in creditor when check is placed in mail according to instructions. Id.

86. Watt-Harley-Holmes Hardware Co. v. Day, 1 Ga. App. 646, 57 SE 1033.

87. Bell v. San Francisco Savings Union [Cal.] 94 P 225.

88. Matlock v. Scheuerman [Or.] 93 P 823.

89. Vanderford v. Farmers' & Mechanics' Nat. Bk. [Md.] 66 A 47. Rule applied where one signing as joint maker of note sought to show that he signed only as a surety. Id. Citizens' Nat. Bk. v. Burch [N. C.] 59 SE 71. Where when one signs a note it is the understanding of all the parties that he signs as surety only, his liability is that of surety, except as against persons who have acted on the faith of his apparent character of principal. Windhorst v. Bergendahl [S. D.] 111 NW 544. As against all other persons his true relation to the contract may be shown by parol. Id.

90. President of bank executing his personal note for money loaned bank is personally bound, though payee was informed at time it loaned money and took note that maker was acting only as agent. Willoughby v. Ball, 18 Okl. 535, 90 P 1017. Where a trustee executes a note purporting to bind him personally, but signed as trustee, he is personally liable thereon, and this rule is not changed by Civ. Code, § 2267. Hall v. Jameson [Cal.] 91 P 518.

91. United States Health & Acc. Ins. Co. v. Clark [Ind. App.] 83 NE 760.

92. Rockfield v. First Nat. Bk. [Ohio] 83 NE 392. Where director of corporation indorses, before delivery, notes given by corporation for a loan, upon promise of president that he will protect him against liability if he has no interest in loan, is only a surety. Crosby v. Woodbury, 37 Colo. 1, 89 P 34.

93. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

94. Rockfield v. First Nat. Bk. [Ohio] 83 NE 392.

95. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

96. Peters v. Nolan Coal Co., 61 W. Va. 392, 56 SE 735. The right of election is determined by contract made before or at time of making and delivery of paper, affected by subsequent dealings of payee with paper, and such right extends to renewals by same parties, unless a new contract is shown. Id.

97. Peters v. Nolan Coal Co., 61 W. Va. 392, 56 SE 735. Evidence of agreement held in-

one placing his signature upon an instrument, otherwise than as maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.[98] Thus, one indorsing a note in blank before or at the time of delivery is an indorser and cannot be held in any other capacity.[99] That the name of a third person, indorsed in blank on a note, appears first and above all other names indorsed thereon, is strong presumptive evidence that he indorsed before the others and before the note was delivered.[1]

§ 4. *Liability and discharge of primary parties.* See 8 C. L. 1130—A comaker of a joint note is personally liable to the payee for the full amount thereof.[2] One who signs his name to a blank note as maker and delivers is to another makes the latter his agent to fill it up in any manner not inconsistent with the character of the paper,[3] and an agreement between the signer and the person to whom the paper is delivered that it is to be filled up for a certain amount or in a particular way will not affect the payee who takes the paper without notice of the agreement.[4] An agreement that a note is to be paid in work is not binding so long as it is executory.[5] The maker of a note is liable for interest at the legal rate upon all unpaid annual instalments of interest from the date they become due until they are paid.[6] Where notes given in consideration of a void contract are transferred by the payee to innocent purchasers, the maker may recover the amount thereof from the payee.[7]

Material alteration. See 8 C. L. 1130—A material alteration[8] made by the holder after execution and delivery and without the consent of the maker[9] invalidates the instrument as between the original parties. Where the instrument appears to have been altered, it is for the court to determine whether it shall be admitted in evidence without evidence explaining the alterations,[10] and to the exercise of court's discretion in this matter no exception lies;[11] and where a witness has testified that when the instrument was signed it was in the same condition as when shown him on the witness stand, the court should permit it to be read.[12]

Defenses between the original parties. See 8 C. L. 1130—In a suit on a negotiable instrument, it is a good defense that the maker was a minor,[13] or was mentally incapa-

sufficient to overcome prima facie right of election by payee. Id.

98. Laws 1899, p. 235, c. 674, § 71. National Exch. Bk. v. Lubrano [R. I.] 68 A 944.

99. Rev. St. 1906, §§ 3171, 3173h, 3173i, 3173k, 3173q, 3174g, 3178a. Rockfield v. First Nat. Bk. [Ohio] 83 NE 392; Dollar Sav. Bk. Co. v. Barberton Pottery Co., 5 Ohio N. P. (N. S.) 73. Neg. Inst. Act, P. L. 1902, p. 594, §§ 63, 64. Gibbs v. Guaraglia [N. J. Law] 67 A 81; Wilson v. Hendee [N. J. Err. & App.] 66 A 413. Section 64 deals only with liability of an irregular indorser to payee and subsequent parties, and does not define rights and liabilities of several such indorsers as between themselves. Id. By individually indorsing a firm note before delivery, a partner adds to his liability as maker a several and distinct liability as indorser. National Exch. Bk. v. Lubrano [R. I.] 68 A 944. Under Neg. Inst. Act (Pub. Laws 1896-1900, c. 674) art. 1, § 3, and art. 6, § 71, one who signs his name on the back of a note, before delivery, for the accommodation of the maker, is an accommodation indorser and not a joint maker. Deahy v. Choquet [R. I.] 67 A 421.

1. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

2. Will A. Watkin Music Co. v. Basham [Tex. Civ. App.] 106 SW 734.

3. Stanley v. Davis [Ky.] 107 SW 773.

4. Stanley v. Davis [Ky.] 107 SW 773. In such case maker is bound although larger sum is inserted than he authorized, if payee received it for value without knowledge that agent had exceeded authority. Id.

5. First Nat. Bk. v. Alexander [Ala.] 44 S 866.

6. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413.

7. Notes given as a consideration for sale of patent right, where owner thereof failed to comply with provisions of statute relating to registration and sale of such rights. Nyhart v. Kubach [Kan.] 90 P 796.

8. A change in the place of payment of a note from a bank in one state to a bank in another state is a material alteration. Mitchell v. Reed's Ex'r [Ky.] 106 SW 833.

9. Evidence held to show that alteration was made by payee without knowledge or consent of makers. Mitchell v. Reed's Ex'r [Ky.] 106 SW 833.

10. Wood v. Skelley [Mass.] 81 NE 872. Code Civ. Prac. § 1982. Meyer v. Lovdal [Cal. App.] 92 P 322.

11, 12. Wood v. Skelley [Mass.] 81 NE 872.

13. Where a father conducted a business in name of his infant son and gave a note for goods furnished for such business purporting to be signed by father and son, but

ble of making a valid contract,[14] or that the instrument sued on was a forgery,[15] or that the consideration therefor has failed,[16] or was illegal.[17] Fraud is a defense if defendant, exercising ordinary prudence, was influenced thereby,[18] and was damaged as a result thereof.[19] What constitutes such fraud as will preclude recovery is to be determined by the circumstances of each particular case.[20] Misrepresentations as to the conditions and the extent of the liability under the instrument is no defense if it is in plain language and unambiguous in its terms, and there is no proof that the signer is unable to read.[21] Where one signs a note which is signed as maker by an agent of payee, he cannot set up such agent's misrepresentations as a defense.[22] It is a good defense that the instrument was procured by duress [23] or was given to com-

son's name was used in business without his knowledge or consent and he received no benefit from goods purchased and was not in possession thereof, minority is good defense to action on note against son. Memphis Coffin Co. v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 670, 106 SW 697.

14. If maker of note at time he executes it is capable of exercising thought, reflection, and judgment, knows what he is doing, and has sufficient memory and understanding to comprehend nature and character of transaction, he is capable of making note. Rogers v. Rogers [Del.] 66 A 374.

15. A forged note without negligence imputed to maker is not a binding contract, whether forgery was committed by alterations or substitution of forged contract for supposed genuine contract (Biddeford Nat. Bk. v. Hill. 102 Me. 346, 66 A 721), but one forged signature on a note does not necessarily avoid it in favor of those whose signatures are found to be genuine (Beem v. Farrell [Iowa] 113 NW 509). Such result is not dictated by Code Supp. 1902, § 3060a, 23. Id. But if a woman signs a note in faith of genuineness of preceding signatures, believing that she is assuming a joint liability with her husband and his brother, the fact that one of signatures is forged will relieve her from liability. Id. Where one is by fraud and deceit tricked into signing a note without intending to do so, the instrument is a forgery. Biddeford Nat. Bk. v. Hill, 102 Me. 346, 66 A 721.

16. See ante, § 2. Alexander County Nat. Bk. v. Foster, 124 Mo. App. 344, 101 SW 685. After a contract employing one as manager of a corporation for a year at a specified salary was rescinded, a member of the corporation gave him her note for the year's salary, he agreeing to hold himself ready to work for corporation at any time called for within the year. His services were not called for. Held that note was supported by a sufficient consideration, and full amount was recoverable without deduction of amount earned by payee, within year, from other sources. Russell Elec. Co. v. Bassett, 79 Conn. 709, 66 A 531. Where a note is given under an agreement that if a third person refuses to agree to contract between maker and payee note shall be surrendered, and third person refuses to agree to it, there is a failure of consideration. Dial v. McKay [Ala.] 43 S 218. Where an agreement has been made to take a policy of life insurance, tender of a policy substantially different from that ordered, unless accepted, will not furnish a consideration for a note, executed in advance, for premium policy which was to be taken under agreement. Empire Mut. Annuity & Life Ins. Co. v. Avery [Ga. App.] 59 SE 324.

17. See ante, § 2.

18. To successfully defend on ground of fraud, defendant must show that false representations of material facts were made to him, which he believed true, that they influenced his action, and that his reliance on them was an act of ordinary prudence. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050.

19. That a note was obtained by fraud is no defense if it was for amount of debt owed by maker and he was not damaged thereby. Bowen v. Waxelbaum, 2 Ga. App. 521, 58 SE 784.

20. Facts precluding recovery: It is a good defense in a suit on a note against maker that defendant had been induced to sign note by a misrepresentation of a material fact made wilfully to deceive him. Turner v. Ware, 2 Ga. App. 57, 58 SE 310. Where one was induced to execute a note by payee's promise, made without intention to keep it, that he would renew note, payee cannot recover costs or stipulated attorney's fee, but only principal, with interest to time to which the promised renewal was to extend. Beaumont Carriage Co. v. Price [Tex. Civ. App.] 19 Tex. Ct. Rep. 847, 104 SW 499.

Facts not precluding recovery: Evidence insufficient to show that note was fraudulent in its inception and was fraudulently put into circulation by payee. First Nat. Bk. v. Person, 101 Minn. 30, 111 NW 730. Written acknowledgment of indebtedness held not to be invalid on ground of simulation and fraud. Sere v. Darby [La.] 45 S 749. Evidence held insufficient to show that notes were procured by fraud. Vanzant v. Abbeville Bk., 2 Ga. App. 763, 59 SE 85. Evidence held not to show that defendant's signature to note was procured by fraud. Home Ins. Co. v. Winn, 125 Mo. App. 384, 102 SW 590. In action on note, evidence held to show that maker was not deceived by false representations. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050.

21. Guthrie & W. R. Co. v. Rhodes [Okl.] 91 P 1119.

22. Defendant is charged with notice that agent cannot act as such in the transaction. Keyser v. Hinkle [Mo. App.] 106 SW 98.

23. It is a good defense that the order sued on was obtained by duress and has been rescinded by drawer. Civ. Code, § 1566. Harlan v. Gladding, McBean & Co. [Cal. App.] 93 P 400. Where one gives a note under a threat of prosecution for a crime,

pound a felony,[24] or in payment of illegal fees.[25] A valid tender is a good defense against a claim for interest accruing after the date thereof.[26] Payment,[27] or part payment to the extent of the amount thereof,[28] is a good defense, if made to a person authorized to receive it,[29] but a separate payment by one of the makers of a joint and several note does not release him from his joint and several liability for the balance due.[30] As to whether the acceptance of a renewal note will discharge the maker's liability on the original note, the authorities are in conflict.[31] A voluntary release of one of two joint makers of a note will release the other,[32] unless there is an express provision to the contrary.[33] Res judicata is a good defense,[34] as is also a valid set-off or counterclaim.[35] Usury is a good defense to the extent of the usurious interest.[36]

he may plead duress, although guilty of the crime, if no injury resulted therefrom to the threatener. Thompson v. Hicks [Tex. Civ. App.] 17 Tex. Ct. Rep. 669, 100 SW 357. Facts held not to show duress in law. Bond v. Kidd, 1 Ga. App. 798, 57 SE 944.

24. W. T. Joyce Co. v. Rohan, 134 Iowa, 12, 111 NW 319. It is not essential to support such defense to show that crime alleged to have been compounded was in fact committed. Id.

25. Notes given an employment agency for an amount in excess of the fees such agency is authorized to charge, under Laws 1904, p. 1055, c. 432, § 5, are void. Hapgoods v. Barrett, 106 NYS 189.

26. Facts held to constitute a valid tender. German-American Bk. v. Martin [Mo. App.] 107 SW 1108. Agreement of payee to accept a certain sum in payment of balance due on note, and tender of that amount, is a good defense, although amount tendered was less than sum actually due. Hall v. Coats, 2 Ga. App. 202, 58 SE 365.

27. If cash and a check are received as payment of a note, the makers are discharged. Citizens' Nat. Bk. v. Harter [Wis.] 114 NW 793. Evidence warranting submission of question of satisfaction and payment to jury. Marengo Sav. Bk. v. Kent [Iowa] 112 NW 767. An agreement of bank to apply proceeds of defendant's sale notes upon notes due by defendant to bank, if not fully executed, will not, where defendant continues to issue checks which are duly honored by bank, constitute a satisfaction of payment of original notes, in absence of proof of agreement that checks should not be paid out of credit fund but should be treated as an overdraft. Id. A deposit in a bank of the amount of the balance due on a note, to be paid conditionally upon surrender of note is not an extinguishment of obligation under Civ. Code, § 1500. Righetti v. Righetti [Cal. App.] 90 P 50. Transaction held not to constitute payment of note. Hyatt v. Bell [Ark.] 103 SW 748.

28. Lindsay v. Dutton, 217 Pa. 148, 66 A 250.

29. Maloney Mercantile Co. v. Dublin Quarry Co. [Tex. Civ. App.] 107 SW 904. Sale and delivery of property to agent of corporation for his own private use, upon his agreement to place a credit for its value upon a note given by vendor to corporation, is not binding on corporation unless expressly authorized or subsequently ratified by it. Id.

30. Alston v. Orr [Tex. Civ. App.] 19 Tex. Ct. Rep. 892, 105 SW 234.

31. In West Virginia acceptance of renewal note is not payment of original without express agreement to that effect. Ritchie County Bk. v. Bee [W. Va.] 59 SE 181.

In Missouri, in absence of understanding that renewal note was accepted in discharge of liability on original note, it will be presumed that it was taken as a conditional payment only, and upon default in its payment plaintiff can treat it as collateral security and found a cause of action on original note. Keyser v. Hinkle [Mo. App.] 106 SW 98.

But in Kentucky when a renewal note is accepted in place of the original, although amount and parties are same, the original is extinguished, unless there are facts manifesting a contrary intention. Steger v. Jackson, 31 Ky. L. R. 434, 102 SW 329. But payee may enforce liens securing original. Id.

In Rhode Island it has been held that question whether transaction amounts to payment of note and creation of new indebtedness, or renewal of existing note, is to be determined by intention of parties. First Nat. Bk. v. Littlefield [R. I.] 67 A 594. Rule that surrender of maturing note marked "Paid" upon receipt of a check, the discounting of a new note, and crediting proceeds of discount to holder on books of bank, amounts to payment of maturing note, held applicable to facts of this case. Id.

32. Banking House of A. Castetter v. Rose [Neb.] 111 NW 590. But when action has been brought against both jointly and a successful defense made by one supported by evidence of both, and thereupon plaintiff voluntarily dismisses action against one successfully defending and judgment is entered against other, upon appeal by latter to district court action may proceed against him alone, and petition which alleges all facts above stated is not subject to demurrer for nonjoinder of defendants. Id.

33. An agreement to release one of joint makers, expressly stating that it does not release her co-obligor, is not a technical release and does not relieve such co-obligor from liability. Will A. Watkin Music Co. v. Basham [Tex. Civ. App.] 106 SW 734.

34. A judgment canceling notes is a good defense to an action on the notes by one who was not a party to the prior suit, but who never owned or possessed the notes or had any beneficial interest in them. Alexander County Nat. Bk. v. Foster, 124 Mo. App. 344, 101 SW 685.

35. Where it was understood between the parties that defendant should make a settlement and pay a commissionman for selling real estate, and pay taxes against such real estate, and render certain services for

A contemporaneous written agreement that notes shall be paid out of a particular fund is a good defense,[37] but a parol agreement at the time of the execution of the instrument, varying its terms, is no defense.[38] In an action on a note the maker cannot contest the plaintiff's title thereto further than is necessary to preclude his future liability thereon.[39] It is no defense that the payee had brought a former suit on the note and that it was discontinued without the maker's knowledge or consent.[40] A note given as security for a note of like amount executed by a third party is subject to defenses which existed against the note which it was given to secure.[41] Defenses may be waived [42] or defendant may be precluded by estoppel from setting them up.[43]

§ 5. *Liabilities and discharge of sureties, guarantors, and other anomalous parties.*[See 8 C. L. 1132]—A surety on a note is liable to a bona fide holder even though the signature of the maker is a forgery.[44] One who agrees to pay the debt of another due on a note is liable for the attorney's fee therein stipulated for.[45] To constitute a surety on an instrument a cosurety with another person signing it, there must have been a mutual understanding between the parties to that effect.[46] A surety may defend against the original payee on the ground of absence or failure of consideration.[47] An extension of the time of payment granted those primarily liable releases sureties and other anomalous parties who are secondarily liable,[48] unless there is a provision in

plaintiff, such claims are a valid offset or counterclaim in suit on notes of defendant owned by plaintiff, although defendant has given plaintiff no statement of the claim nor asked for credit on notes. Rinker v. Lauer, 13 Idaho, 163, 88 P 1057.

36. Bell v. San Francisco Sav. Union [Cal.] 94 P 225. Where notes for which a renewal note is given are usurious, usury is a defense to an action on the renewal note to the extent of the usurious interest. Crabtree's Adm'r v. Sisk, 31 Ky. L. R. 206, 101 SW 886. Under Civ. Code, § 1919, provision in note for interest on instalments of interest falling due before maturity at rate greater than is borne by principal is void in its entirety and not merely as to excess. Bell v. San Francisco Sav. Union [Cal.] 94 P 225. Such provision, however, does not render invalid a provision for interest on instalments of interest falling due after maturity at same rate as principal. Id. Note held not to be usurious. Armijo v. Henry [N. M.] 89 P 305.

37. Keller v. Cohen, 217 Pa. 522, 66 A 862.

38. That payee at time note was executed verbally promised to take less than face value in payment is no defense. Bowen v. Waxelbaum, 2 Ga. App. 521, 58 SE 784. But maker of a note given to a bank is not liable thereon where by a contemporaneous oral agreement subsequently put in writing he is expressly relieved from liability and whole transaction is a device to deceive bank examiner. National Bk. v. Shaw [Pa.] 67 A 875.

39. Boline v. Wilson, 75 Kan. 829, 89 P 678.

40. Lindsay v. Dutton, 217 Pa. 148, 66 A 250.

41. Note given as security for note given in purchase of machinery subject to defenses which existed in favor of purchaser by reason of breach of warranty contained in contract of purchase. Northwest Thresher Co. v. Hulburt [Minn.] 115 NW 159.

42. One who gives a note in renewal of another note, with knowledge of partial failure of consideration for original note, on false representations by payee, etc., waives such defense and cannot set it up to defeat a recovery on renewal note. Padgett v. Lewis [Fla.] 45 S 29. And if maker by exercise of ordinary diligence could have discovered such facts and failed to make inquiry before executing renewal note, he is as much bound as if he had actual knowledge thereof. Id. Where a note given in renewal and extension of a past due note contains a stipulation releasing and relinquishing claims arising out of purchase of machine for which first note was given, such renewal and extension constitutes sufficient consideration for such waiver. Sheffield v. International Harvesting Mach. Co. [Ga.] 59 SE 1113.

43. Where a corporation has received the consideration for a note executed in its name, it is estopped to defend on ground that it neither authorized nor ratified its execution. McKinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P 495. Where joint and several note is secured by chattel mortgage, and third party signs it after execution and delivery upon consideration that payee or holder will release or waive his mortgage security, which is done, when sued individually on note, he is estopped from claiming that he signed it without knowledge of original maker's fee. Doxy v. Exchange Bk. [Okl.] 92 P 150. Following sentence in letter signed by defendant: "I would like to have you hold the note until fall." When considered in connection with other facts, held not to estop defendant from denying execution of note in suit. Acme Food Co. v. Tousey, 148 Mich. 697, 14 Det. Leg. N. 298, 112 NW 484.

44. Fretwell v. Carter [S. C.] 59 SE 639.

45. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 SW 616.

46. Citizens' Nat. Bk. v. Burch [N. C.] 59 SE 71.

47. Menzel v. Primm [Cal. App.] 91 P 754. A consideration to the maker of a note is sufficient to bind a surety thereon. Smith v. Hightower [Ga. App.] 59 SE 593.

48. Under Negotiable Instruments Act (Pub. Laws 1896-1900, c. 674, art. 9, § 128,

the instrument to the contrary.[49] A release based on a valid consideration will discharge the liability of a surety.[50] A guarantor of a note is liable though a mortgage given by the maker to secure it has not been foreclosed.[51] Discharge in bankruptcy of the maker of a note does not affect the liability of a surety.[52] After a surety has been released from liability, a new promise to pay is not enforcible unless based on a new and sufficient consideration.[53]

§ 6. *Negotiation and transfer generally.* See 8 C. L. 1134—A promissory note may be transferred without indorsement.[54] It may be the subject of valid transfer and delivery by way of pledge or collateral security.[55] The title to a note indorsed in blank by the payee may thereafter pass by delivery to subsequent holders.[56] The title to a non-negotiable note can only pass by a written assignment.[57] A fraudulent assignment of a note is void.[58] The assignee of the payee of a note, where the payee's title was not defective, stands in the shoes of the latter.[59] A note in the hands of an assignee is only subject to such equities between the original parties as existed prior to notice of the assignment to the maker,[60] and if the maker after notice of the assignment expressly promises payment to the assignee, he is estopped from setting up equities existing prior to such notice.[61] The assignee of a note given for land cannot recover against the maker personally after cancellation of the deed for fraud.[62] Title to a negotiable instrument cannot be transferred by school trustees except in their corporate capacity.[63]

§ 7. *Acceptance.* See 8 C. L. 1134—A mere order for the payment of a part of a fund in the hands of the drawee is revocable by the drawer before acceptance.[64] A bank is not liable on a check until it accepts or certifies it.[65] Uncontrolled by statute, an acceptance of a bill of exchange or check may be implied from the conduct of the drawee.[66] Statement by bank that it will take advice and pay check if it can does not

subd. 6), an extension of time of payment or a postponement of right to enforce instrument discharges a person secondarily liable. Deahy v. Choquet [R. I.] 67 A 421. Promise, as long as certain monthly payments are made, not to press suit on note is a postponement of right to enforce instrument. Id. Extension of time of payment of note for one year at original rate of interest releases sureties. Windhorst v. Bergendahl [S. D.] 111 NW 544. Payment of interest to maturity a short time before due and delivery of new note for same amount payable one year later is competent evidence of extension for a consideration sufficient to discharge sureties. Id.

49. Provision in note held an agreement in advance that time for payment may be extended without discharging sureties, and not a limitation of their liability. Wolfboro Loan & Banking Co. v. Rollins [Mass.] 81 NE 204.

50. Where holder of note for valid consideration agreed to release surety from liability thereon and return to him collateral notes deposited as security, surety was absolved from liability and entitled to have collateral returned. Oxford Junction Sav. Bk. v. Cook [Iowa] 111 NW 805.

51. Kinsel v. Ballon [Cal.] 91 P 620.

52. Wolfboro Loan & Banking Co. v. Rollins [Mass.] 81 NE 204.

53. Extension of time of payment given to maker of original note is a sufficient consideration. Steger v. Jackson, 31 Ky. L. R. 434, 102 SW 329.

54. O'Connor v. Slatter [Wash.] 93 P 1078. Equitable title to a negotiable instrument may be passed by delivery to a third party with intention to pass title. Haines v. Thompson, 129 Ill. App. 436.

55. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303. Note may be pledged to secure liabilities arising in future. Brown v. James [Neb.] 114 NW 591. To ascertain what debts are secured resort must be had to contract of parties. Id.

56. Stiles v. Shedden, 2 Ga. App. 217, 58 SE 515.

57. Sunderland v. Cowan [Md.] 67 A 141.

58. Button v. Renfro [Ky.] 108 SW 239.

59. It is no defense to an action by such assignee that he is not a bona fide holder. Montrose Sav. Bk. v. Claussen [Iowa] 114 NW 547.

60, 61. Isaac Eberly Co. v. Gibson [Va.] 58 SE 591.

62. Wheeler v. Preston [Ky.] 107 SW 274.

63. Indorsement by their agents is void. Scott v. Goode, 128 Ill. App. 26.

64. Harlan v. Gladding, McBean & Co. [Cal. App.] 93 P 400. Where such order is revoked before acceptance, no action lies thereon against either drawer or drawee. Id.

65. In re Grive, 151 F 711. Under Gen. St. 1902, § 4359, a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with bank. Id.

66. Wisner v. First Nat. Bk. [Pa.] 68 A 955. From acts or conduct, indicating clearly an intention to honor bill. Id. From unreasonable detention of bill. Id.

constitute an acceptance.[67] Under negotiable instruments law, failure of drawee to return check presented for payment within twenty-four hours after delivery constitutes an acceptance.[68] One who accepts an order conditionally becomes liable thereon upon the performance of the condition.[69] While a writing obligating a drawee to honor a draft is to be strictly construed against the writer, the construction must not be strained or unreasonable.[70] Where the acceptor of a draft with a forged bill of lading attached pays the amount to a bank that has discounted it in good faith, it cannot on discovery of the forgery recover back the amount so paid.[71]

§ 8. *Indorsement.*[See 8 C. L. 1135]—One of the elements of a contract of indorsement is a promise that if the note is not paid upon due presentment, and the necessary proceedings upon its dishonor are taken, to pay the amount thereof to the holder.[72] Writing and signature are necessary to a formal indorsement,[73] but no particular form of signature is required, any form adopted as such being sufficient.[74] A seal is unnecessary, whether it be that of a private person or of a corporation.[75] An indorsement must have been made by the person sought to be charged as indorser or by his duly authorized agent.[76] In the case of a corporation, the indorsement must be made by an officer having authority.[77] Executors have no power to bind testator's estate by a contract of indorsement.[78] If several persons not partners are payees or indorsees, the instrument must be indorsed by all of them.[79] An instrument indorsed by one not having authority may be recovered by payee in an action of conversion, if the right has not been lost by long silence after discovery.[80] When one who has indorsed a note and parted with it again comes into possession bona fide, he may strike out his own and subsequent indorsements and sue the prior parties.[81] The

67. In re Grive, 151 F 711.

68. Sections 137, 185 (P. L. 213, 219; 3 Purd. Dig. [13th Ed.] pp. 3307, 3314). Wisner v. First Nat. Bk. [Pa.] 68 A 955. And this notwithstanding that by § 132 (P. L. 212) implied acceptances are abolished. Id. Protest of domestic checks being unnecessary under this law, delivery of check to notary public for protest within prescribed time does not affect question of acceptance. Id.

69. Conditions attached to acceptance held substantially performed. Foley v. Houston Co-Op Mfg. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 224, 106 SW 160.

70. Writing held not to obligate writer to honor any draft except one for price of stock shipped to it. Stough v. Healy, 75 Kan. 526, 89 P 898.

71. Varney v. Monroe Nat. Bk., 119 La. 943, 44 S 753.

72. Hopkins v. Merrill, 79 Conn. 626, 66 A 174. A writing on back of note by payee which guaranties payment of note at maturity and waives notice of nonpayment and demand is an indorsement in a commercial sense and makes person to whom it was transferred an indorsee under the law merchant. Mullen v. Jones, 102 Minn. 72, 112 NW 1048.

73. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386.

74. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386.

In case of corporation, corporate name sufficient without name of agent writing it. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386.

75. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386.

76. A mere special agent is not presumed to have authority to take, in his own name, and negotiate a promissory note for money due his principal. Nickleson v. Dial [Kan.] 93 P 606. Evidence insufficient to show that daughter had authority to indorse notes in mother's name. Fourteenth St. Bk. v. Gersten, 118 App. Div. 905, 103 NYS 11. Defendants held not to be agents of plaintiff and their act, therefore, in indorsing check not his act. O'Connell v. Marvin [Wash.] 91 P 254.

77. An indorsement made by an officer of a corporation without authority will not bind the corporation to any person charged with notice. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. Evidence held to show authority of vice-president of corporation to bind corporation by indorsement of note. Jones v. Evans [Cal. App.] 91 P 532. A treasurer of a corporation has no authority ex officio to indorse commercial paper in name of corporation. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29.

78. Packard v. Dunfee, 119 App. Div. 599, 104 NYS 140.

79. Kaufman v. State Sav. Bk. [Mich.] 14 Det. Leg. N. 867, 114 NW 863. But either one of the joint payees may authorize the other to indorse for him (Id.), and an assignment of his interest in the paper from one to the other carries with it such authority (Id.), but there is no presumption of law that one may indorse for the other (Id.).

80. Blum Jr's. Sons v. Whipple, 194 Mass. 253, 80 NE 501. Failure to notify defendant for two years after discovery where he suffered no loss from delay was held not to preclude recovery. Id.

81. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303.

indorsement of a note secured by a mortgage or pledge carries with it the security, enabling the holder to enforce it without a formal assignment.[82] Foreclosure of such a mortgage is not an essential prerequisite to the indorser's liability.[83] An indorsement made after the making and delivery of a note requires a new consideration to support it.[84]

Indorser's liability and discharge. See 8 C. L. 1136—An indorser after delivery to payee is bound only as a guarantor.[85] Under negotiable instruments law, as respects one another, indorsers are liable prima facie in the order in which they indorse, but evidence is admissible to show that as between themselves they have agreed otherwise.[86] Where an indorsement is conditional, performance of the condition is an essential prerequisite to indorser's liability.[87] A draft indorsed and delivered to be returned only on a condition specified is, in the absence of forfeiture under the condition, enforcible against the indorser.[88] In Kentucky, where a note is payable at an incorporated bank and indorsed to and discounted by the bank,[89] the indorser of a non-negotiable note is liable to the indorsee to the same extent as the indorser of a negotiable note.[90] The only distinction is as to action of indorsee to fasten liability after default by maker.[91] It is a good defense to an action against an indorser who received no consideration that he was induced to indorse by the holder's fraudulent representations.[92] Payment is a good defense to an action against an indorser.[93] That indorser was drunk at the time of indorsement is no defense if the payee had no knowledge of the fact.[94] An extension of the time of payment granted to the parties primarily liable will discharge the liability of an indorser,[95] unless there is an ex-

82. Milwaukee Trust Co. v. Van Valkenburgh [Wis.] 112 NW 1083. Transfer of note by indorsement, expressly including mortgage security and interest, constitutes a good written conveyance of mortgage and interest coupon owned by indorser and attached to note. Id. Transaction whereby bank holding demand note payable to it at its place of business and secured by pledge indorses note "without recourse" and delivers it, with pledged securities, to a third person for a consideration more than sufficient to pay note, is upon its face a sale of note and substitution of purchaser in place of bank as pledgee of securities. Smith v. Shippers' Oil Co. [La.] 45 S 533.

83. Kinsel v. Ballou [Cal.] 91 P 620.

84. Promise "to be easy" and not force into bankruptcy not consideration. Funk v. Hossack, 129 Ill. App. 421.

85. State v. Allen, 124 Mo. App. 465, 103 SW 1090. An indorser of a note guaranties the genuineness of the maker's signature. Fretwell v. Carter [S. C.] 59 SE 639.

86. Laws 1897, p. 734, c. 612, § 118. Haddock, Blanchard & Co. v. Haddock, 118 App. Div. 412, 103 NYS 584. Subd. 2, of § 114 of this law does not affect question of rights of indorsers between themselves. Id.

87. Where payee of notes secured by mortgage transferred notes and mortgage, indorsing notes as follows: "By agreement with recourse after all security has been exhausted," he was liable only for balance due after exhaustion of security, and until such exhaustion, no cause of action accrued against him. Smith v. Bradley [N. D.] 112 NW 1062.

88. O'Connell v. Marvin [Wash.] 91 P 254.

89. Ky. St. 1903, § 483. The note is placed on footing of a foreign bill of exchange and indorser's liability is not affected by indorsee's failure to pursue legal remedies against maker with due diligence. Swope v. Boone County Deposit Bk., 31 Ky. L. R. 48, 101 SW 334.

90. Luverne Bk. v. Sharpe [Ala.] 44 S 871. An indorsement of a non-negotiable note for value before maturity is in effect a guaranty of payment and indorser is liable though consideration failed as to maker. Id. Under Neg. Inst. Law. Code Supp. 1902, § 3060-a66 (29th Gen. Assem. p. 88, c. 130, § 66), indorser of non-negotiable note assumes obligation to indorsee or any subsequent holder to pay amount due as provided in instrument, according to its tenor, his liability being limited by stipulation limiting liability of maker. Allison v. Hollenbeak [Iowa] 114 NW 1059.

91. Luverne Bk. v. Sharpe [Ala.] 44 S 871. But though protest and notice are not essential, indorsee must, under Alabama statute, Code 1896, §§ 892, 893, and 894, subd. 5, show exercise of diligence required thereby to first collect from maker, or a waiver thereof, or excuse for not doing so. Id.

92. In action by payee of note indorser may defend on this ground without offering to rescind maker's contract or restore consideration received by maker. Roessle v. Lancaster, 119 App. Div. 368, 104 NYS 217.

93. But the receipt from an insolvent corporation of a preferential payment, contrary to the statute, of an indorsed note does not release the indorser. Perry v. Van Norden Trust Co., 118 App. Div. 288, 103 NYS 543.

94. Civ. Code 1895, § 3654. Abbeville Trading Co. v. Butler, Stevens & Co. [Ga. App.] 59 SE 450.

95. Mere payment of interest in advance does not conclusively determine that there has been an extension of time such as will discharge an indorser. Miners & Merchants

press reservation that the rights and remedies against the indorser shall not be affected thereby.[96]

§ 9. *Presentment and demand.* See 8 C. L. 1137—The holder of a check cannot recover from the drawer or indorser until he has presented it to the drawee bank and payment has been refused.[97] As a general rule, to constitute a valid demand, the person making it must have the instrument with him to produce, if called for.[98] It must be presented within a reasonable time after its delivery or negotiation.[99] In determining what is reasonable, due regard is to be had to the usages of business, and all the facts and circumstances of the particular case.[1] If the holder lives in the place where the bank is located, he may present the check during banking hours of the day following the day he received it,[2] and if that day falls on Sunday, he may present it during business hours on Monday.[3] If the instrument is required to be transmitted to another place, it must be presented with reasonable diligence after time taken in reaching such place.[4] The requirement of presentation within a reasonable time is coupled with the requirement, as to maker, that the check shall certainly be paid when presented.[5] What constitutes a "business day" within meaning of negotiable instruments law,[6] requiring presentment to be made "at a reasonable

Bk. v. Rogers, 123 Mo. App. 569, 100 SW 534. Acceptance of a renewal note discharges liability of indorser of original note. Allentown Nat. Bk. v. Clay Product Supply Co., 217 Pa. 128, 66 A 252. Where after rejecting renewal note indorsee upon demanding payment of original note attaches rejected note thereto, so that both can be restored to maker on payment, no acceptance of renewal note is shown. Id.

96. Miners & Merchants Bk. v. Rogers, 123 Mo. App. 569, 100 SW 534. Taking a renewal note in which is included the amount of two prior notes does not discharge an indorser of such notes, where it is agreed that new note shall not discharge prior notes or operate as an extension of time of payment so as to prevent assertion of right against indorsee. Id.

97. First Nat. Bk. v. McConnell [Minn.] 114 NW 1129. But this rule does not apply where check is lost. Id. Holder of check, lost without his fault, may recover thereon against drawer upon filing indemnity bond, as required by Rev. Laws 1905, § 4718. Id.

98. Citizens' Bk. v. First Nat. Bk. [Iowa] 113 NW 481.

99. Citizens' Bk. v. First Nat. Bk. [Iowa] 113 NW 481; Gordon v. Levine [Mass.] 83 NE 861; School Dist. No. 57 of Logan County v. Eager [Okl.] 91 P 947. Under Neg. Inst. Law (Laws 1899, p. 733, c. 356, § 1678-1), presentment for payment of a draft on a bank is sufficient, as regards liability of payee who puts it in circulation with his unqualified indorsement thereon, and all subsequent parties thereto so indorsing, if made within a reasonable time after last negotiation. Columbian Banking Co. v. Bowen [Wis.] 114 NW 451. Presentment held to have been made within a reasonable time under this statute. Id. The neglect of payee to present a check within a reasonable time will discharge the drawer. Gordon v. Levine [Mass.] 83 NE 861. If maker has, in bank, money sufficient to pay check and owner fails to present it within a reasonable time, during which time it would have been paid if presented, and bank fails between time of drawing and presentation thereof, drawer is discharged from liability to extent of injury he has sustained by reason of such failure. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212. But to hold payee liable in damages for not presenting check, it must appear either directly or from circumstances of transaction that he has accepted check from drawer, or is under same obligation to do so. Id.

1. Citizens' Bk. v. First Nat. Bk. [Iowa] 113 NW 481. Negligence cannot be predicated upon mere circumstances that check was forwarded by mail instead of by messenger, though latter might have been more expeditious course. Id. Evidence held not to show such delay in presentment of check as to constitute negligence. Id. Reasonableness of delay in presenting draft held for jury. West Branch State Bk. v. Haines [Iowa] 112 NW 552.

2, 3. School Dist. No. 57 of Logan County v. Eager [Okl.] 91 P 847.

4. R. H. Herron Co. v. Mowby [Cal. App.] 89 P. 872. Civ. Code, §§ 3213, 3255, does not abrogate this rule, but merely fixes a limit after which delay in presentment will exonerate the drawer and indorsers, unless delay be for one of reasons expressly provided by statute. Id. Where check is drawn upon bank located at place distant from place of its delivery to payee or indorser, presentment promptly made by mail through other banks, in ordinary and usual course pursued in such business, is made within reasonable time, within Code Supp. 1902, §§ 3060a 71, 3060a 186. Plover Sav. Bk. v. Moodie [Iowa] 113 NY 476.

5. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212. To hold payee liable for failure to present check in event of fallure of bank on which it is drawn, maker must have in bank, subject to payment thereof at any and all times after drawing check, either funds of his own subject to check or some positive agreement or understanding with bank, which will guarantee payment of check at such time as it may suit pleasure, convenience or interest of holder to present it. Id.

6. Laws 1899, p. 715, c. 356, § 1678-2.

hour on a business day," is to be determined by the general custom of the place of presentment.[7] Neglect of payee's agent, to whom he negotiates check, to present it within a reasonable time is chargeable to payee.[8] Presentation of a check may be excused by fraud,[9] or negligence [10] on the part of the maker. Sending a check by mail directly to the drawee bank does not constitute a proper presentment, in the absence of proof of usage or custom among banks to do so.[11] But such a presentment will not discharge an indorser who suffers no loss by reason thereof.[12] In New York, a demand is not essential to fix the liability of the maker on a note payable on demand at a place specified.[13] Where the indorser of a negotiable note is sought to be charged, it is necessary that there should be a presentment and demand upon the maker within the time prescribed by statute.[14] Failure to make such presentment and demand will discharge the indorser,[15] unless there is a sufficient excuse for not making it.[16] Presentment should be made at the place specified in the note.[17] A note not payable at any particular place should be presented at the residence or place of business of the maker or wherever he may be found, at the option of the presentor,[18] on the day of maturity,[19] and notice of dishonor must be given before the close of the succeeding day.[20] Notice of dishonor duly mailed is sufficient though never received by the indorser.[21] The law of the place of performance governs as to presentment.[22] The fact

7. Columbia Banking Co. v. Bowen [Wis.] 114 NW 451. As relates to presentment in a foreign jurisdiction, what constitutes reasonable hours on a business day is a matter of proof of which court cannot take judicial notice. Id.

8. Gordon v. Levine [Mass.] 83 NE 861.

9. If drawer has no effects in hands of drawee and there is no positive agreement to pay by drawee, making of check will be considered fraud on part of drawee and presentation will be excused. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212.

10. Where, by reason of the neglect of the maker to properly sign a check, its presentment is delayed until after the bank has failed, the loss will fall upon the maker. School Dist. No. 57 of Logan County v. Eager [Okl.] 91 P 847.

11. R. H. Herron Co. v. Mawby [Cal. App.] 89 P 872.

12. Citizens' Bk. v. First Nat. Bk. [Iowa] 113 NW 481.

13. Hyman v. Doyle, 53 Misc. 597, 103 NYS 778.

14. Wills v. Booth [Cal. App.] 91 P 759; A. B. Farquhar Co. v. Higham [N. D.] 112 NW 557; Rockfield v. First Nat. Bk. [Ohio] 83 NE 392; Vaughan v. Potter, 131 Ill. App. 334. Where a note provides that, upon default in payment of any installment of interest, principal shall become immediately due and payable "at the option of the holder," the principal becomes due only when holder exercises his option, and presentment made on that day is in time to charge indorser. Kinsel v. Ballou [Cal.] 91 P 620.

15. Bayless v. Harris, 124 Mo. App. 234, 101 SW 617.

16. Wills v. Booth [Cal. App.] 94 P 759. It is only where maker has no place of business or residence within state, or where it cannot be ascertained with reasonable diligence that presentment is excused. Id.

17. Where note on its face is made payable in a named city and maker adds to his signature a certain address therein, presentation at such address, in absence of any change of address and notice thereof to payee or holder, is sufficient, although maker was on that day absent from city. Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 SE 892.

18. Wills v. Booth [Cal. App.] 91 P 759. Placing notes in a bank and notifying the maker that they will be in the bank on the dates of their maturity does not constitute presentment, where the bank is not named in the notes as the place where they are payable. Bayless v. Harris, 124 Mo. App. 234, 101 SW 617.

19. Presentment for payment must be within business hours on the day of maturity. Vaughn v. Potter, 131 Ill. App. 334.

20. Notice of dishonor must be given on the day of dishonor or the succeeding day. Vaughn v. Potter, 131 Ill. App. 334.

21. Notice to last indorser mailed to first indorser for transmission is not good. Vaughan v. Potter, 131 Ill. App. 334.

22. Vaughn v. Potter, 131 Ill. App. 334.

Note: The contract of a drawer or indorser of a negotiable instrument, as distinguished from the contract of the acceptor or maker, being performable as the locus contractus, the liability of the drawer or indorser is generally measured by the law of the place where the instrument was drawn or indorsed. Story, Conf. of Laws, §§ 314, 315, and cases cited. A qualification is found in cases treating of conditions precedent to the liability of the drawer or indorser, formal acts associated with the place of payment, where the courts have recognized the requirements of business necessity. Logic would demand that questions of the necessity or sufficiency of any act upon which the liability under a contract is conditioned should be determined by the law of the place where the contract was made and is to be performed, while practical expediency requires that acts such as demand, protest, and notice, which in their nature are performable where the instrument is payable, should be controlled by the law of that place. A distinction appears to be made between the necessity of the act and the sufficiency of the act. By the weight of authority, neces-

that by oversight a note presented to an administrator is improperly described as to the signature does not make the presentation invalid.[23] A negotiable instrument indorsed after maturity is treated as one payable on demand, as regards the time for presentment and demand.[24] Demand of payment of a foreign bill of exchange must be made in accordance with the law of the place where it is drawn.[25] The certificate of a foreign notary is insufficient to establish presentment and notice of dishonor of a note.[26]

§ 10. *Protest and notice thereof.* See 8 C. L. 1138—In some states,[27] but not in others,[28] protest is, if not waived,[29] essential to fix the liability of an indorser. A foreign bill of exchange must be protested.[30] But, under the negotiable instruments law, if a bill does not appear on its face to be a foreign bill, protest is unnecessary.[31] Due notice of dishonor,[32] and of protest, where protest is necessary,[33] is essential to

sity of demand and protest, as a condition of holding the drawer or indorser, is determined by the law of the place where the instrument was drawn or indorsed. Thorp v. Craig, 10 Iowa, 461; Aymar v. Sheldon, 12 Wend. [N. Y.] 439, 27 Am. Dec. 137, Gay v. Rainey, 89 Ill. 221, 30 Am. Rep. 545. The necessity of suing the acceptor or maker in order to hold the drawer or indorser is similarly determined. Levy v. Cohen, 4 Ga. 1; Hunt v. Standard, 15 Ind. 33, 77 Am. Dec. 79. But the sufficiency of the demand and protest, including consideration of the time and manner, is determined by the law of the place where the instrument is payable (Donnegan v. Wood, 49 Ala. 242, 20 Am. Rep. 275; Sylvester v. Crohan, 138 N. Y. 494; Pierce v. Indseth, 106 U. S. 546, 27 Law. Ed. 254), together with the maturity of the instrument, involving the question of days of grace (Cribbs v. Adams, 13 Gray [Mass.] 597; Bowen v. Newell, 13 N. Y. 290, 64 Am. Dec. 550). No distinction is made, however, between the necessity and the sufficiency of notice, both being determined by the lex loci contractus, according to the greater authority (Huse v. Hamblin, 29 Iowa, 501, 4 Am. Rep. 244; Snow v. Perkins, 2 Mich. 238; Cook v. Litchfield, 9 N. Y. 279), although the practical objection to this rule, that it compelled the holder to know the law of the place where each indorsement was made in order to be secure in his rights against the respective indorsers, has induced the English courts to make the reasonableness of the notice a possible subject of inquiry (Hirchfeld v. Smith, L. R. 1 C. P. 340; Horne v. Rouquette, L. R. 3 Q. B. Div. 514). The current of authority indicated is opposed by a unique decision in New York where the court held that the contract of the drawer of a bill or check to pay upon non-acceptance or nonpayment by the drawee, was performable where the drawee resides (Hibernia Nat. Bk. v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518); it would follow that with respect to protest and notice th law of the place upon which the instrument was drawn would govern (Union Nat. Bank v. Chapmon, 169 N. Y. 538, 88 Am. St. Rep. 614, 57 L. R. A. 513). The court relied on Everett v. Vendryes, 19 N. Y. 436 and Lee v. Selleck, 33 N. Y. 615. The Everitt case held that the form of an indorsement of a bill of exchange drawn and indorsed in New Granada but payable in New York, and its sufficiency to transfer title to the indorsee for the purpose of bringing suit, were to be determined by the law of New York. The court admitted that if the action had been against the indorser the law of New Granada would have governed. It seems that the liability of the drawer was unquestioned and that the issue related to the right of one of two parties to sue, a question pertaining to the remedy and determinable by the lex fori. Foss v. Nulting, 14 Gray [Mass.] 484; Scudder v. Union Nat. Bk., 91 U. S. 406, 413, 23 Law. Ed. 245, 249. In the Lee case the question was whether the law of New York governed with respect to the necessity of suit against the maker as a condition of holding the indorser of a note indorsed in Illinois and sent through the mail to the indorsee in New York. The court assumed that the law of the place where the indorsement was made governed, but held that under the circumstances the indorsement was made in New York. Hibernian Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518, therefore, was without substantial support, and appears to be limited to its precise facts, as a recent decision settles the law of New York in accordance with the general rule. A foreign bill of exchange was indorsed by the drawer to bankers in New York who sent it to their agent in Vienna to collect. The agent failed to protest the bill or to give notice to the drawer on the refusal of the drawees to pay as required by the laws of New York. The court held that the drawers were discharged from liability though under the laws of Austria no protest was necessary. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.—From 8 Columbia L. R. 134.

23. Sears v. Howe [Conn.] 68 A 983.

24. Presentment and demand must be made within time prescribed by Civ. Code sec. 3135.

25. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.

26. Vaughn v. Potter, 131 Ill. App. 334.

27. Bank of Luverne v. Sharpe [Ala.] 44 S 871.

28. Vaughn v. Potter, 131 Ill. App. 334.

29. Bank of Luverne v. Sharpe [Ala.] 44 S S 871. See post, § 11.

30. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.

31. Wisner v. First Nat. Bk. [Pa.] 68 A 955.

32. Bank of Luverne v. Sharpe [Ala.] 44 S 871; Rockfield v. First Nat. Bk. [Ohio] 83 NE 392; Dollar Sav. Bk. Co. v. Barberton Pottery Co., 5 Ohio N. P. (N. S.) 73.

33. Bank of Luverne v. Sharpe [Ala.] 44 S 871; Siegel v. Dubinsky, 56 Misc. 681, 107 NYS 678.

render an indorser liable, if not waived.[34] Under negotiable instruments law, except as therein otherwise provided, the drawer of check, to whom notice of dishonor is not given, is discharged.[35] To constitute dishonor, there must be a demand and refusal of payment.[36] The time within which notice of dishonor and protest must be given is generally prescribed by statute.[37] Any notice of protest is sufficient which, by express terms or necessary implication, informs the indorser of the identity of the paper, and that upon presentment, when due, payment has been neglected or refused.[38] Mistakes and omissions in a notiee, which could not have misled or prejudiced an indorser, are not fatal.[39] Protest of a foreign bill must be made, and notice thereof given in accordance with law of the place where it is drawn.[40]

The certificate of protest is prima facie evidence of the facts therein recited,[41] but the presumption thereby raised may be rebutted.[42] A notarial seal renders a certificate of protest evidence in foreign countries,[43] and in absence of such seal, extraneous evidence must be given of the authority of the officer to take the protest.[44]

§ 11. *New promise after discharge and waiver of presentment and demand.* See 8 C. L. 1139—Demand, protest and notice may be waived,[45] and the indorsers of a note may waive legal diligence to enforce its collection.[46] A written waiver, without limitation, cannot be limited by parol evidence.[47] But such evidence is competent for the purpose of applying the language of the waiver to its subject-matter and showing the circumstances under which it was made.[48]

§ 12. *Accommodation paper.* See 8 C. L. 1140—An accommodation party is one who signs an instrument without any consideration moving to him personally.[49] Money advanced by the payee of a note to one for whose accommodation it is made is

34. Bank of Luverne v. Sharpe [Ala.] 44 S 871. See post, § 11.

35. Laws 1897, p. 739, c. 612, § 160. Ewald v. Faulhaber Stable Co., 105 NYS 114.

36. Fact that, upon inquiry as to whether check will be honored, cashier of payee bank replies that, if on presentment drawer has sufficient funds, payment will be made, but otherwise not, does not amount to presentation and dishonor, requiring immediate notice to be given indorser. Citiens' Bk. v. First Nat. Bk. [Iowa] 113 NW 481.

37. Under Civ. Code, § 3147, notice of dishonor, where given otherwise than by mail, must be given on the day of dishonor or on the next business day thereafter. Kinsel v. Ballou [Cal.] 91 P 620. Under Neg. Inst. Law (Laws 1897, p. 741, c. 612, § 174), if service of notice of protest is made by mail, it must be deposited in post-office in time to reach indorser in usual course on day following, where parties reside in same city. Siegel v. Dubinsky, 56 Misc. 681, 107 NYS 678. Under Reg. Inst. Law (Laws 1897, p. 741, c. 612, §§ 174, 175, 178), a bank which a check is deposited by indorsee for collection has until day following dishonor to give notice, and indorsee has until day following such notice to give payee notice. Jurgens v. Wichmann, 108 NYS 881.

38. Derham v. Donahue [C. C. A.] 155 F 385.

39. Derham v. Donahue [C. C. A.] 155 F 385. It was held not fatal to a notice of protest of a certificate of deposit that there was a mistake in the date thereof, as well as in the recital of the date of the certificate, and that it omitted to recite this clause, which was in certificate "No interest after six months." Id.

40. Amsinck v. Rogers, 189 N. Y. 252, 82 NE 134.

41. Bayless v. Harris, 124 Mo. App. 234, 101 SW 617. Certificate, showing that instrument was duly presented, raises presumption that presentment was made at proper time. Columbia Banking Co. v. Bowen [Wis.] 114 NW 451.

42. The presumption of due diligence of service of notice of protest arising from certificate may be rebutted whether or not affidavit, under Code Civ. Prac. § 923, has been served. Siegel v. Dubinsky, 56 Misc. 681, 107 NYS 678.

43, 44. London & River Plate Bk. v. Carr, 54 Misc. 94, 105 NYS 679.

45. Bank of Luverne v. Sharpe [Ala.] 44 S 871. Subsequent to the indorsement, waiver may be by parol. Dewey v. Sibert [S. D.] 113 NW 721. This rule was not changed by Rev. Civ. Code, §§ 2191, 2221, 2226. Id. May be waived by a provision in note. Swope v. Boone County Deposit Bk., 31 Ky. L. R. 48, 101 SW 334. Held that alleged conversation, if it occurred at time claimed, amounted to a waiver. Deahy v. Choquet [R. I.] 67 A 421.

46. Waived by terms of note. Swope v. Boone County Deposit Bk., 31 Ky. L. R. 48, 101 SW 334.

47, 48. Toole v. Crafts [Mass.] 82 NE 22.

49. Where an officer of a corporation, without authority, filled out a note blank owned by corporation and signed by an accommodation maker, and then indorsed it in name of corporation to a firm of brokers of which he was a member, who indorsed it to plaintiff in consideration of an extension of time on an existing indebtedness, the note as regards corporation and maker was at best only accommodation paper. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29.

a sufficient consideration for the note.[50] A consideration to the maker of a note is sufficient to bind an accommodation indorser,[51] and a consideration passing from the original payee to the maker is not essential to the validity of accommodation paper.[52] One taking an accommodation note in payment of an antecedent debt may recover upon it, if its use was unrestricted.[53] The transferee of accommodation paper takes it discharged of all defenses that might have existed against the accommodated party,[54] and the fact that the holder of accommodation paper was aware of its character will not affect his right to a recovery.[55] An agent of a corporation has no implied authority to bind the corporation by an accommodation indorsement.[56] Prima facie, the status of accommodation parties is that which is shown by the instrument.[57] An accommodation indorser of a raised check is liable to the drawee bank that has paid it for the difference between the original and the altered amount.[58] Under the negotiable instruments law, an accommodation party is liable to a holder for value, who took the instrument with knowledge that it was accommodation paper.[59] An accommodation maker is not liable on the instrument to the person for whose accommodation it is made.[60] Mere ownership of note blanks, signed by an accommodation maker, does not constitute ownership of the notes as legal obligations.[61] One who holds an accommodation note, with the right to use it as collateral only, is not authorized to sell it.[62] Payment discharges an accommodation indorser.[63] At common law, an accommodation indorser is discharged by an extension of the time of payment of the instrument.[64] But, under the negotiable instruments law, an extension of time of payment of a note, without the consent of the accommodation maker, does not relieve him from liability thereon.[65] An accommodation indorser is discharged if notice of dishonor is not given him.[66] An accommodation indorser may require the creditor to account for the value of any collateral held for his protection and released or misapplied to his prejudice.[67]

§ 13. *The doctrine of bona fides.* See 8 C. L. 1141—Unless one is a bona fide holder

50. Willoughby v. Ball, 18 Okl. 535, 90 P 1017.

51. Smith v. Hightower [Ga. App.] 59 SE 593.

52. Naef v. Potter, 127 Ill. App. 106.

53. English v. Schlesinger, 105 NYS 989.

54. Though taken after maturity. Naef v. Potter, 226 Ill. 628, 80 NE 1084, afg. 127 Ill. App. 106.

55. Naef v. Potter, 226 Ill. 628, 80 NE 1084, afg. 127 Ill. App. 106.

56. Federal Nat. Bk. v. Cross Creek & Pittsburg Coal Co. [Pa.] 68 A 1018.

57. This applies as to their status, not only as to the holder for value, but inter sese. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303.

58. Smith v. State Bk., 54 Misc. 550, 104 NYS 750.

59. Laws 1897, p. 728, c. 612, § 55. English v. Schlesinger, 105 NYS 989. Under this statute, one who indorses a check that has been raised to enable the unidentified holder to cash it, upon being informed by cashier that check is good, is liable to bank thereon. Smith v. State Bk., 54 Misc. 550, 104 NYS 750.

60. The mere fact that plaintiff suggested to his debtor that he procure a party to make an accommodation note to enable him to meet his obligation to plaintiff does not make plaintiff the person for whose accommodation such note is made. English v. Schlesinger, 105 NYS 989.

61. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29.

62. In re Hopper-Morgan Co., 156 F 525. One purchasing from such a holder, with actual knowledge, acquires no title. Id. Nor does one who purchases in bad faith, which may be shown by a wilfull disregard of and refusal to learn facts, when available and at hand. Id.

63. Where accommodation indorser of note, upon its being protested for nonpayment, pays it, and receives note uncanceled, contract of indorsement is terminated. Packard v. Dunfee, 119 App. Div. 599, 104 NYS 140. If the note is thus paid and taken up by the executor of indorser and assigned by him together with a chattel mortgage securing it, assignee cannot recover against indorsee's estate on his indorsement. Id.

64. First Nat. Bk. v. Diehl [Pa.] 67 A 897. But an agreement by holder of a note with one of several joint accommodation indorsers that if latter would pay note within sixty days, time of payment on several other notes due by him would be extended, is not an extension of time to maker, and does not discharge other indorsers. Id.

65. Laws 1899, p. 18 (B. & C. Comp., §§ 4431, 4521, 4522, 4592. Cellers v. Meachem [Or.] 89 P 426.

66. Neg. Inst. Law (Pub. Laws 1896-1900, c. 674), art. 8, §§ 97, 111. Deahy v. Croquet [R. I.] 67 A 421.

67. Bank of Spartanburg v. Mahon [S. C.] 59 SE 31.

he is not entitled to the peculiar rights incidental to such holdership,[68] and it is always competent for one sued on a negotiable instrument, if he has a good defense, to show that the plaintiff is not a bona fide holder.[69]

*Who may be a holder.*See 8 C. L. 1141—A bona fide holder is one who takes the paper when it is complete and regular upon its face,[70] before maturity,[71] in the usual course of business,[72] and without notice of any defense thereto between the original parties,[73] and for value.[74] One cannot by having a note, for which he is to furnish the consideration, made payable to another and indorsed by that other to him become a bona fide holder.[75] The doctrine of bona fides does not apply to non-negotiable instruments,[76] nor does it apply where the transfer is otherwise than by indorsement,[77] unless the maker has notice thereof, either actual or constructive.[78]

*Once bona fide holdership always bona fide holdership.*See 8 C. L. 1141

*Notice and knowledge.*See 8 C. L. 1141—An indorsee before maturity and for value is not affected by any defenses or equities between the original parties of which he had no notice or knowledge[79] at the time of indorsement.[80] But if he takes the instrument with knowledge of an existing defense thereto, he cannot recover thereon.[81] As

68. Indorsee of foreign corporation, if not a bona fide holder, cannot enforce note received by corporation as consideration for contract which it was not authorized to make because of its failure to comply with law regulating foreign corporations. Neyens v. Worthington [Mich.] 14 Det. Leg. 794, 114 NW 404. In suit by holder of note, who has received same in dishonor, maker may set off, to extent of amount due on note, any sum due to him from payee which is in any way connected with debt sued on or transaction out of which it sprung. Civ. Code 1895, §§ 3750, 4944. Butler v. Mitchell, 128 Ga. 431, 57 SE 764. A note materially altered after delivery is void in hands of a subsequent purchaser with notice of alteration. Mitchell v. Reed's Ex'r [Ky.] 106 SW 833. If a bank which discounted drafts was not a holder for value and had on deposit to indorser's credit money sufficient to have paid drafts at any time after it learned that consideration for drafts had failed, it cannot recover from acceptor. Sherlin v. Peninsular Loan & Discount Co. [Tev. Civ. App.] 18 Tex. Ct. Rep. 704, 103 SW 232.

69. This right is not affected by Acts 1897, pp. 82, 83. Lee v. Hightower [Ga. App.] 59 SE 597.

70. Matlock v. Scheuerman [Or.] 93 P 823. The purchaser of a note, reciting collateral notes securing it, cannot purchase collateral without notice. Sill v. Pate, 230 Ill. 39, 82 NE 356.

71. Woodall v. Peoples Nat. Bk. of Leesburg, Va. [Ala.] 45 S 194; Oliver v. Miller [Ga.] 60 SE 254; First Nat. Bk. v. Busch, 102 Minn. 365, 113 NW 898; First Nat. Bk. v. McCullough [Or.] 93 P 366; Fretwell v. Carter [S. C.] 59 SE 639.

72. Woodall v. Peoples Nat. Bk. of Leesburg, Va. [Ala.] 45 S 194; Matlock v. Scheuerman [Or.] 93 P 823; Martin v. German American Nat. Bk. [Tex. Civ. App.] 19 Tex. Ct. Rep. 397, 102 SW 131.

73. Woodall v. Peoples Nat. Bk. of Leesburg, Va. [Ala.] 45 S 194; Oliver v. Miller [Ga.] 60 SE 254; Abmeyer v. First Nat. Bk. [Kan.] 92 P 1109; Security Bk. v. Petruschke [Minn.] 112 NW 1000; First Nat. Bk. v. Busch, 102 Minn. 365, 113 NW 898; Monett State Bk. v. Eubanks, 124 Mo. App. 949, 101 SW 687; First Nat. Bk. v. McCullough [Or.] 93 P 366; Fretwell v. Carter [S. C.] 59 SE 639; Martin v. German American Nat. Bk. [Tex. Civ. App.] 19 Tex. Ct. Rep. 397, 102 SW 131.

74. Woodall v. Peoples Nat. Bk. of Leesburg, Va. [Ala.] 45 S 194; Oliver v. Miller [Ga.] 60 SE 254; Abmeyer v. First Nat. Bk. [Kan.] 92 P 1109; First Nat. Bk. v. McCullough [Or.] 93 P 366; Matlock v. Scheuerman [Or.] 93 P 823; Fretwell v. Carter [S. C.] 59 SE 639; Martin v. German American Nat. Bk. [Tex. Civ. App.] 19 Tex. Ct. Rep. 397, 102 SW 131.

75. Empire Mut. Annuity & Life Ins. Co. v. Avery [Ga. App.] 59 SE 324.

76. Indorser of nonnegotiable note holds it subject to all defenses and equities that existed between maker and payee. Union Stockyards Nat. Bk. of South Omaha, Neb., v. Bolan [Idaho] 93 P 508; Gilley v. Harrell, 118 Tenn. 115, 101 SW 424. It is a good defense to an action by any holder of a nonnegotiable note that it was without consideration and procured from maker through fraud. Id.

77. First Nat. Bk. v. McCullough [Or.] 93 P 366. One to whom a negotiable instrument is delivered without indorsement takes it subject to any defense which might be interposed against it in the hands of the payee. Randall Co. v. Glendenning [Ok.] 92 P 158; First Nat. Bk. v. McCullough [Or.] 93 P 366.

78. Randall Co. v. Glendenning [Okl.] 92 P 158.

79. Failure of consideration. Lynds v. Van Valkenburgh [Kan.] 93 P 615. Agreement between other parties to instrument. Wilkes v. Pope [Ga. App.] 60 SE 823. One purchasing negotiable bonds for value before maturity, with notice of defenses against transferer, holds subject to those defenses. Hynes v. Illinois Trust & Sav. Bk., 126 Ill. App. 409.

80. Lynds v. Van Valkenburgh [Kan.] 93 P 615. Notice of an infirmity in a note after a bona fide sale thereof does not affect purchaser, unless he is so situated that he can protect maker without injury to himself. Youle v. Fosha [Kan.] 90 P 1090.

81. Knowledge of fraud or failure of consideration. Bank of Chillocothe v. Orms-

a general rule the notice which will invalidate an instrument in the hands of an indorsee is actual knowledge of the infirmity or defect or of such facts that his action in taking the paper amounts to bad faith,[82] and this rule has been embodied in the statutes of some of the states.[83] Mere inferences that might be drawn from the nature of the transaction are not sufficient.[84] Active inquiry is not essential to avert the imputation of bad faith.[85] Whether an indorsee was put on notice or inquiry must be determined in large measure by the facts peculiar to the particular case.[86] If a corporation is not authorized to issue negotiable paper under any circumstances, all holders of such paper issued by it are charged with notice of such lack of authority.[87] Proof that holder gave value for the instrument before maturity is insufficient in it-

dorff, 126 Mo. App. 654, 105 SW 664. One who takes a note for an existing indebtedness under circumstances that put him on inquiry as to an unauthorized indorsement by treasurer of payee corporation is not a bona fide holder as to such corporation. Pelton v. Spider Sawmill & Lumber Co. [Wis.] 112 NW 29. A note given for a stallion which does not have on its face the words required by Laws 1903, p. 723, c. 438, is void, and unenforcible in hands of one taking it with knowledge that it was given for a stallion. Quiggle v. Herman, 131 Wis. 379, 111 NW 479.

82. McKnight v. Parsons [Iowa] 113 NW 858; Aldrich v. Peckham [N. J. Err. & App.] 68 A 345.

But in Minnesota it has been held that one having possession of facts which would put a man of ordinary prudence upon inquiry is not a bona fide holder. Palmer v. McFarlane [Neb.] 111 NW 794.

83. B. & C. Comp. § 4458. Matlock v. Scheuerman [Or.] 93 P 823. Code Supp. 1902, § 3060-a56. McKnight v. Parsons [Iowa] 113 NW 858.

84. Johnson v. Buffalo Center State Bk., 134 Iowa, 731, 112 NW 165. Suspicious circumstances insufficient. Aldrich v. Peckham [N. J. Err. & App.] 68 A 345.

85. Matlock v. Scheuerman [Or.] 93 P 823.

86. Facts not putting indorsee on notice or inquiry: That payee at time of indorsing check informs indorsee that maker had asked him to wait a few days for presentation of check does not carry notice of any infirmity in contract. Matlock v. Scheuerman [Or.] 93 P 823. Brokers receiving negotiable bond from stranger and selling it in regular course of business are not charged with notice of or put an inquiry against outstanding rights of owner from whom it was stolen. Hills v. Brown, 190 N. Y. 167, 82 NE 1108. The fact that purchaser of note is an accommodation indorser thereon does not charge him with notice of an agreement between maker and payee in relation to note. Aldrich v. Peckham [N. J. Err. & App.] 68 A 345. Knowledge that a note was given in consideration of an executory agreement which has not been performed will not deprive indorsee of character of bona fide holder unless he also has notice of breach of agreement. McKnight v. Parsons [Iowa] 113 NW 858. Facts that certificate of deposit bears 8 per cent interest, and that bank transferred it instead of presenting it for payment, are insufficient to impute knowledge that it was not negotiated in regular course of business. Johnson v. Buffalo Center State Bk., 134 Iowa, 731, 112 NW 165. That bank discounting note is informed by payee, an insurance agent, that he had received note for a premium does not charge bank with notice of such facts as to require it to make further inquiry. Wallabout Bk. v. Peyton, 108 NYS 42. Evidence held to show that bank was holder without any notice of infirmity in instrument or any right of set-off in connection therewith. Allentown Nat. Bk. v. Clay Product Supply Co., 217 Pa. 128, 66 A 252. Bank held upon facts to be bona fide holder of draft and not guilty of negligence precluding recovery from indorser. Heim v. Neubert [Wash.] 94 P 104. Evidence held to show that bank was purchaser in good faith of note. Security Bk. v. Petruschke [Minn.] 112 NW 1000.

Facts putting indorsee on notice or inquiry: Where indorsees of note knew that person assuming to indorse it in name of payee corporation was its treasurer, and indorsed it solely for benefit of partnership of which he was a member, they were put on inquiry as to character of note and as to treasurer's authority. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. The purchaser of a note made in name of corporation by its president, in which he is named as payee, is put upon inquiry as to whether it was lawfully issued. Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 SE 92. The word "trustee" attached to payee's name is sufficient to put an assignee on inquiry as to terms and conditions under which trust was created. McLeod v. Despain [Or.] 90 P 492. Erasure of place of payment of note and interlineation of a different place, considered in connection with other facts, held to put bank purchasing note on notice of a material alteration. Mitchell v. Reed's Ex'r [Ky.] 106 SW 833. Where holder of note was before purchase notified by some of makers that they claimed credits, he is charged with such notice, though subsequently and before purchase he was informed by another maker who claimed no credits that matter had been adjusted. Bank of Chillicothe v. Arnsdorff, 126 Mo. App. 654, 105 SW 664. Evidence sufficient to sustain finding that plaintiff was put in possession of facts sufficient to put him on inquiry. Palmar v. McFarlane [Neb.] 111 NW 794.

87. Therefore such paper is void, not only in hands of original payee but in those of any subsequent holder (Stouffer v. Smith-Davis Hardware Co. [Ala.] 45 S 621), but if it is authorized to issue such paper for any purpose, an indorsee is not charged with knowledge of its want of authority to issue the particular instrument acquired by him (Id.).

self to prove good faith,[88] as is the mere denial by him of knowledge at notice of a breach of faith by payee.[89] Knowledge of one acting as agent of indorsee in negotiating the indorsement is not notice to indorsee.[90] A bank is not chargeable with knowledge of its president gained in another relation.[91]

Taking in due course of business.—See 8 C. L. 1143—As to what transactions are included in the usual course of business depends largely upon the circumstances of each particular case.[92] A bank which discounts negotiable paper for a depositor and credits the proceeds to his account is not a holder in due course,[93] unless the credit is absorbed by an antecedent indebtedness or exhausted by subsequent withdrawals.[94] In Oregon, where an instrument, payable on demand, is negotiated an unreasonable length of time after its issuance, the holder is not a holder in due course.[95] It is out of the usual course of business for a corporation to issue negotiable instruments to its officers.[96]

*Taking before maturity.*See 8 C. L. 1143—One who takes a note after maturity takes subject to any defense the maker may have against the payee.[97]

*Parting with value.*See 8 C. L. 1143—Value is any consideration sufficient to support a simple contract,[98] and need not be the face value of the instrument.[99] One who takes the instrument as collateral security for a debt created at the time is a holder for value,[1] and remains such under renewals thereafter made.[2] So one taking

88, 89. National Bk. of Barre v. Foley, 54 Misc. 126, 103 NYS 553.

90. Knowledge by such agent of failure of consideration does not charge indorsee with notice thereof. Harris v. Pate [Ind. T.] 104 SW 812.

91. A bank which discounts a note is not chargeable with knowledge which its president has of fraud in inception of note where he gained such knowledge in another relation, and neither participated in nor had knowledge of discount. McCalmont v. Lanning [C. C. A.] 154 F 353.

92. Generally speaking, commercial paper is received in usual course of business when indorsed and delivered under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it, and it is not so received if such a person would at once suspect the integrity of the paper itself or the credit and standing of party offering it. Matlock v. Scheuerman [Or.] 93 P 823.

In due course: A bank which receives a note from a debtor, indorsed by him, without notice of infirmity in instrument or any right of set-off in connection therewith, is a holder in due course. Allentown Nat. Bk. v. Clay Product Supply Co., 217 Pa. 128, 66 A 252. Evidence held to show plaintiffs holders of check in due course within Neg. Inst. Law (Laws 1897, p. 732, c. 612, §§ 91, 95, 96). Siegmaister v. Lispenard Realty Co., 107 NYS 158.

Not in due course: Where a note is signed in blank and given to another to fill in and deliver to payee, which is done, payee is not a holder in due course within meaning of Code Supp. 1902, § 3060a-52, and under § 3060a-14, if instrument is not filled in strictly in accordance with authority given, he cannot enforce it against makers. Vander Ploeg v. Van Zuuk [Iowa] 112 NW 807.

93. McKnight v. Parsons [Iowa] 113 NW 858; National Bk. of Barre v. Foley, 54 Misc. 126, 103 NYS 553.

94. McKnight v. Parsons [Iowa] 113 NW 858.

95. B. & C. Comp. § 4455. Under this statute a check negotiated at noon on day after its execution is not overdue so as to carry notice to indorsee of its illegality or previous dishonor. Matlock v. Scheuerman [Or.] 93 P 823.

96. Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 SE 92.

97. Lindsay v. Dutton, 217 Pa. 148, 66 A 250. Takes subject to rights which resulted from agreement of payee to accept a certain sum in full payment of note and tender to him of that amount. Hall v. Coats, 2 Ga. App. 202, 58 SE 365. Mere transfer without actual indorsement before maturity insufficient. Dazey v. Jeffers, 127 Ill. App. 307.

98. B. & C. Comp. § 4427. Matlock v. Scheuerman [Or.] 93 P 823. Exchange of checks. Id. Where plaintiff without knowledge of its infirmity received from payee defendant's check given for a gambling debt, giving his own check therefor, he was not bound to ascertain whether his check had been presented or paid at time he presented defendant's check for payment, nor was he required to stop payment on his check if at time of presentment he was a bona fide holder. Id. Indorsee who receives note as part of advance payment on contract obligating him to drill oil wells for indorser, and who expends large sums in preparation for work, is a purchaser for value. Youle v. Fosha [Kan.] 90 P 1090. Taken for consideration where bank credits payments withdrawn before bank has notice of equities. McCasland v. Southern Illinois Nat. Bk., 127 Ill. App. 37.

99. Rosenthal v. Freedman, 53 Misc. 595, 103 NYS 714. Transfer of a negotiable instrument at discount greater than legal rate of interest is not usurious, although transferrer may have indorsed it, and does not deprive transferee of protection of a bona fide purchase. Woodall v. Peoples Nat. Bk. of Leesburg, Va. [Ala.] 45 S 194.

1. Indorsee of note. Monett State Bk. v.

the instrument in payment of [3] or as collateral security for [4] a pre-existing debt is a holder for value, but one who merely gives a credit on an old account which does not discharge the debt to extend time of payment is not a holder for value.[5] A bank which discounts paper for a depositor and places the amount to his credit is not a holder for value,[6] but it becomes such a holder if it applies the proceeds of the discount to the payment of a debt due it from the depositor,[7] or if it assumes a legal obligation to another on the faith of the deposit,[8] or if before receiving notice of infirmity in the paper the deposit is withdrawn [9] or reduced by payment of checks drawn thereon to an amount less than the proceeds of the discount.[10] Brokers who through other brokers sell a negotiable bond for a client and pay to the latter the proceeds of sale are holders for value.[11] The holder of a renewal note who has not surrendered the original note is not a holder for value.[12] Where the first indorsee takes in good faith before maturity, subsequent indorsees after maturity take free of all defenses.[13]

Rights of a bona fide holder. See 8 C. L. 1144—A bona fide holder takes free from defenses and equities available between the original parties.[14] As to him it is no de-

Eubanks, 124 Mo. App. 499, 101 SW 687; Brown v. James [Neb.] 114 NW 591. Indorsee of accepted drafts. Stewart v. Givens [Mo. App.] 107 SW 422.

2. Stewart v. Givens [Mo. App.] 107 SW 422.

3. Harrell v. Nat. Bk., 128 Ga. 504, 57 SE 869; Woodworth v. Carroll [Minn.] 112 NW 1054. Creditor of maker of negotiable note payable in futuro to order of third person, who accepts that note, accompanied by collateral security and indorsed by payee in payment of pre-existing debt payable in praesenti, is a holder for a valuable consideration. Id.

4. Citizens' Bank v. Bank of Waddy's Receiver, 31 Ky. L. R. 365, 103 SW 249; First Nat. Bk. v. Busch, 102 Minn. 365, 113 NW 898; Fretwell v. Carter [S. C.] 59 SE 639. Accommodation note. Neg. Law (Laws 1897, p. 727, c. 612), § 51. In re Hopper-Morgan Co., 154 F 249. Rule applies though antecedent debt is in form of a contingent liability as indorser of discounted paper. First Nat. Bk. v. Busch, 102 Minn. 365, 113 NW 898.

5. National Bk. v. Foley, 54 Misc. 126, 103 NYS 553.

6. Montrose Sav. Bk. v. Clausen [Iowa] 114 NW 547; Sperlin v. Peninsular Loan & Discount Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 704, 103 SW 232.

7. Neg. Inst. Law (Laws 1897, p. 727, c. 612, § 54). Application to payment of note. Wallabout Bk. v. Peyton, 108 NYS 42. Where a bank, upon receiving from its debtor a note indorsed by him extended time of payment, applied proceeds as a credit to debtor's account, and relinquished bills of lading pledged as collateral, it was a holder for value. Allentown Nat. Bk. v. Clay Product Supply Co., 217 Pa. 128, 66 A 252.

8. Montrose Sav. Bk. v. Claussen [Iowa] 114 NW 547.

9. Security Bk. v. Petruschke [Minn.] 112 NW 1000; Sperlin v. Peninsular Loan & Discount Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 704, 103 SW 232.

10. Security Bk. v. Petruschke [Minn.] 112 NW 1000. But so long as no part of deposit is drawn out or balance of account exceeds amount of proceeds of discount, bank is not a purchaser for value. Union Nat. Bk. v. Windsor [Minn.] 112 NW 999. In Wisconsin it has been held that if between time of purchase of note and discovery by bank of defense thereon depositor withdraws more than sum placed to his credit on purchase of note, bank is a purchaser for value, though at date of discovery of defense deposit exceeds amount paid for note. Northfield Nat. Bk. v. Arndt [Wis.] 112 NW 451.

11. Hibbs v. Brown, 190 N. Y. 167, 82 NE 1108.

12. Such holder cannot recover against accommodation indorser. Gansevoort Bk. of City of New York v. Gilday, 53 Misc. 102, 104 NYS 271.

13. Hurst v. Pearce, 130 Ill. App. 251.

14. Woodall v. Peoples Nat. Bk. of Leesburg, Va. [Ala.] 45 S 194; Harrell v. National Bk., 128 Ga. 504, 57 SE 869; Oliver v. Miller [Ga.] 60 SE 254; Harris v. Pate [Ind. T.] 104 SW 812; Gumbel v. Ryan, 118 La. 606, 43 S 251; First Nat. Bk. v. Busch, 102 Minn. 365, 113 NW 898; Monett State Bk. v. Eubanks, 124 Mo. App. 499, 101 SW 687; Brown v. James [Neb.] 114 NW 591. If A. signs his name to a blank note and delivers it to B. designating payee to be filled in by B., A. will be bound to a bona fide holder although B. filled in as payee another than person designated. Wilkes v. Pope [Ga. App.] 60 SE 823. In an action on a certificate of deposit issued by defendant bank to its cashier as such and indorsed by him, it is not, under Neg. Inst. Act, § 42 (29th Gen. Assem. p. 85, c. 130; Code Supp. 1902, § 3060a42), competent as against plaintiff, a bona fide holder, to show that cashier was making use of his official title and authority in his individual interest. Johnson v. Buffalo Center State Bk., 134 Iowa, 731, 112 NW 165. Where note executed by P. to bank was pledged by cashier as collateral security for loan to bank, and upon its renewal cashier promised P. that he would return original note in a few days, instead of doing which he pledged renewal note for a loan by another party, it was held that P. was liable to both holders, but that each of them was bound to exhaust first other collateral before P. could be required to pay to both more than amount of original note with interest. Citizens' Bk. v. Bank of Waady's Receiver, 31 Ky. L. R. 365, 103 SW 249.

fense that the consideration failed [15] or was illegal,[16] nor is it a defense that the instrument was delivered on Sunday,[17] stolen,[18] procured by fraud,[19] transferred without authority,[20] or, in the case of a corporation, that its acceptance was unauthorized.[21] Where blanks negligently left in an instrument are fraudulently filled, the negligent party is liable to a bona fide holder.[22] A bona fide holder is not affected by any agreement or understanding between other parties to the paper.[23] In Wisconsin a bona fide holder may recover on a note for lightning rods though it does not contain upon its face the red ink declaration of consideration required.[24] In Kentucky a peddler's note, not indorsed "Peddler's note," is unenforcible in the hands of any subsequent holder.[25] In Georgia if the consideration of a note, expressed therein, is a patent or patent right, an indorsee takes subject to equities existing between the original parties.[26] Where some of the signatures to a joint and several note are forged, the signers whose signatures are genuine are liable to a bona fide holder.[27] A bona fide holder may recover from an indorser or surety even though the maker's signature is a forgery.[28] Where one guilty of negligence or laches is by fraud induced to sign a negotiable instrument without intending to do so, the instrument is unenforcible in the hands of a bona fide holder.[29] This rule has been em-

15. Note. Jones v. Evans [Cal. App.] 91 P 532. Note given by one for a debt which he did not owe. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779. Failure of consideration for acceptance of drafts. Stewart v. Givens [Mo. App.] 107 SW 422. Under Civ. Code 1895, § 3694, failure of consideration is no defense against a bona fide holder of acceptances. Bothwell v. Whitley Bros. [Ga. App.] 60 SE 371.

16. The bona fide holder of a check originally given for a gambling debt is not bound to sue the indorser rather than the maker. Matlock v. Scheuerman [Or.] 93 P 823.

17. Gordon v. Levine [Mass.] 83 NE 861.

18. The title of a bona fide holder of a negotiable instrument is good against an owner from whom it had been stolen. Ehrlich v. Jennings [S. C.] 58 SE 922. Where a state coupon bond has been surrendered and exchanged for stock under Laws 1892, p. 24, but not canceled as required, and is stolen and again put in circulation, a bona fide holder is entitled to have it exchanged for stock and his right is not affected by Const. art. 10, § 11. Id.

19. That execution and delivery of note were secured by fraud is no defense against a bona fide holder. First Nat. Bk. v. Busch, 102 Minn. 365, 113 NW 898. Fraud going only to consideration and not to execution of an instrument will not invalidate it in the hands of an innocent purchaser. Connolly v. Dammann, 232 Ill. 175, 83 NE 531.

20. Doctrine that agent disposing of property of principal without authority transfers no title as against principal does not apply to a negotiable instrument without restrictive indorsement in hands of bona fide purchaser. Perry v. Oerman [W. Va.] 60 SE 604.

21. If a corporation was authorized to accept drafts for any purpose, it cannot plead ultra vires in a suit by a bona fide holder, although the acceptance sued on was unauthorized, if the draft does not show on its face for what purpose it was issued. Stouffer v. Smith-Davis Hardware Co. [Ala.] 45 S 621.

22. National Exch. Bk. v. Lester, 119 App. Div. 786, 104 NYS 418. This rule is not changed by Neg. Inst. Law (Laws 1897, p. 745, c. 612, § 205). Id. Accommodation indorser liable to bona fide holder on raised note for full amount where through his negligence blanks are left enabling note to be raised. Id.

23. That one whose name appears as maker of note signed it as surety with understanding that another should sign as maker before delivery to payee, the latter having no notice of understanding, does not constitute defense as against bona fide holder. Wilkes v. Pope [Ga. App.] 60 SE 823.

24. Sanborn's Supp. §§ 1676-27, 1676-25, 1944, 1945, Laws 1903, p. 723, c. 438. Arnd v. Sjoblom, 131 Wis. 642, 111 NW 666.

25. Ky. St. 1903, § 4223. Lawson v. First Nat. Bk., 31 Ky. L. R. 318, 102 SW 324; McAfee v. Mercer Nat. Bk., 31 Ky. L. R. 863, 104 SW 287. This statute was not repealed by negotiable instruments statute, Acts 1904, p. 213, c. 102. Lawson v. First Nat. Bk., 31 Ky. L. R. 318, 102 SW 324. The maker of such a note is not estopped to defend on ground that it is not indorsed as required where transferee took note with knowledge of facts. Id. A note given for exclusive right to sell a patented article in a certain territory is a peddler's note. McAfee v. Mercer Nat. Bk., 31 Ky. L. R. 863, 104 SW 287. Evidence held to show that note in suit was a peddler's note within the statute. Id.

26. Act. 1897, p. 81. Lee v. Hightower [Ga. App.] 59 SE 597. The following statement in note "This note is given for patent right No. 771,015, patented Sept. 27, 1904," is a sufficient description to bring note within purview of statute. Id.

27. First Nat. Bk. v. Shaw, 149 Mich. 362, 112 NW 904. Fact that one of signatures to note is forged will not preclude recovery by innocent holder against other signers, where one of them committed the forgery and the other acquiesced therein. Beem v. Farrell [Iowa] 113 NW 509.

28. Fretwell v. Carter [S. C.] 59 SE 639.

29. Biddeford Nat. Bk. v. Hill, 102 Me. 346, 66 A 721; New Madrid Banking Co. v. Poplin

bodied in a statute in Minnesota [30] and Wisconsin.[31] In Kentucky a note which has not, under the statute, been placed on the footing of a bill of exchange is subject in the hands of a bona fide holder to a counterclaim or set-off.[32] A contemporaneous written agreement making the payment of a note conditional is a part of the note and the indorsee of both instruments takes the note subject to the condition.[33] In foreclosure proceedings in chancery by one to whom a note secured by a trust deed was assigned before maturity, the grantor may make any defense that he could have made against the original owner of the note and deed.[34] An innocent holder of drafts fraudulently put in circulation is only entitled to recover the amount he paid for them.[35] Estoppel may work against the assertion or rights by a holder.[36] In an action against the drawer of a check, lack of a consideration passing from plaintiff to the person to whom the check was originally given is no defense.[37] A bona fide holder of a note taken as collateral may collect it, and after applying the proceeds to the payment of his debt, hold the balance in trust for the indorser.[38]

Burden of proof. See 8 C. L. 1145—One in possession of a negotiable instrument properly indorsed is presumed, prima facie, to be a bona fide holder.[39] This rule has the sanction of statute in some states.[40] Accordingly, in an action by an indorsee, the burden is upon the defendant to prove that plaintiff is not a bona fide holder,[41] but if it is shown that the instrument had its inception in fraud,[42] that the considera-

[Mo. App.] 108 SW 115. But if the signer was guilty of negligence, the instrument is enforcible in hands of bona fide holder. Id. Evidence held to show negligence in maker of note. Id.

30. Laws 1883, p. 157, c. 114, § 1. First Nat. Bk. v. Doeden [S. D.] 113 NW 81.

31. Under Laws 1899, p. 707, c. 356, §§ 1676-25, where one of signatures to note executed by several persons was procured by fraudulently misrepresenting its character, if person so deceived could not have obtained knowledge of its character by use of ordinary care, instrument is void as to all makers and unenforcible in hands of bona fide holders. Aukland v. Arnold, 131 Wis. 64, 111 NW 212.

32. Any counterclaim or set-off maker might have asserted against payee before notice of assignment. Ky. St. 1903, §§ 483, 474. Union Bk. & Trust Co. v. Ford, 31 Ky. L. R. 8, 101 SW 347. But in absence of such counterclaim or set-off such holder is entitled to recover. Id.

33. Nottingham v. Ackiss [Va.] 57 SE 592.

34. Lauf v. Cahill, 231 Ill. 220, 83 NE 155.

35. Sperlin v. Peninsular Loan & Discount Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 704, 103 SW 232.

36. Facts held not to estop purchaser of note and mortgage securing it from asserting his rights thereunder. Hyatt v. Bell [Ark.] 103 SW 748.

37. Cleary v. De Beck Plate Glass Co., 54 Misc. 537, 104 NYS 831.

38. Martin v. German American Nat. Bk. [Tex. Civ. App.] 19 Tex. Ct. Rep. 397, 102 SW 131.

39. Harris v. Pate [Ind. T.] 104 SW 812; Engie v. Hyman, 54 Misc. 251, 104 NYS 390. The purchaser before maturity of a negotiable instrument is presumed to be a bona fide holder. In re Hopper-Morgan Co., 156 F 525. Production by holder of a negotiable instrument duly indorsed to him raises a presumption that it was acquired for value before due, with all the then incidents thereof, such as a mortgage securing same on coupons for future instalments of interest. Milwaukee Trust Co. v. Van Valkenburgh [Wis.] 112 NW 1083. The holder of a negotiable instrument indorsed in blank is presumed to be a bona fide holder. Botheil v. Whitley Bros. [Ga. App.] 60 SE 371. Where one acquires notes indorsed in blank by payee, before maturity, for valuable consideration in due course of business, it will be presumed that he took them without notice of any equities between the original parties. Gribbs Mach. Co. v. Roper, 77 S. C. 39, 57 SE 667. The presumption is that an indorsement was made in the regular course of business. Kerr v. Anderson [N. D.] 111 NW 614.

40. Neg. Inst. Law (Laws 1897, p. 733, c. 612, § 98). Engie v. Hyman, 54 Misc. 251, 104 NYS 390. Under Civ. Code, § 3104, the prima facie presumption is that notes were indorsed before maturity and for a valuable consideration. Jones v. Evans [Cal. App.] 91 P 532.

41. Indorsee who received note for value before maturity can be deprived of rights of innocent holder only by showing that he bought with actual notice of infirmity or was guilty of bad faith. Youle v. Fosha [Kan.] 90 P 1090. In an action by holder against maker of note, where under agreement of parties at time of trial defendant admits plaintiff's cause of action unless he can establish certain defenses, among others that plaintiff purchased note knowing that is was tainted with fraud, the burden is upon defendant to establish such defense. Cochran v. Priddy [Tex. Civ. App.] 107 SW 616. Evidence held not to sustain burden of showing that plaintiff purchased notes with knowledge that they were tainted with fraud. Id.

42. Meyer v. Lovdal [Cal. App.] 92 P 322; Finegan v. Green, 130 Ill. App. 445; Abmeyer v. First Nat. Bk. [Kan.] 92 P 1109. Where maker of note has shown that it was obtained from him by fraud, the holder must show under what circumstances and for what value he became such. In re Hopper-Morgan Co., 156

tion therefor was illegal,[43] or that, for any reason, the title of the person negotiating it was defective,[44] the burden shifts and the indorsee must show the bona fides of his holding. But evidence showing mere failure of consideration, total or partial, does not shift the burden of proof.[45] The burden of proving bona fide holdership is met by showing that the indorsee purchased for value in the usual course of business,[46] it being presumed therefrom that he took without notice of fraud or other infirmity, if there are no circumstances creating a contrary presumption.[47]

§ 14. *Remedies and procedure.*[See 8 C. L. 1146]—One holding commercial paper as a pledge or collateral security may bring either an action to enforce the principal debt or one to collect the pledged paper.[48] In Alabama separate drafts may be sued on in the same action.[49] Where the right of action depends upon the performance of conditions precedent, the conditions must be performed before the cause of action accrues.[50] Where property is pledged to secure the payment of a note, a foreclosure of the pledge is not an essential prerequisite to a suit upon the note.[51] Tender of the bond indemnity required by the New York statute, where a note is lost, is not a prerequisite to a right of action on the note.[52] Where suit is prematurely brought, the defect may be cured by filing an amended petition.[53] In Idaho an attachment may

F 525. If it is shown that the instrument was fraudulent in its inception and was fraudulently put into circulation, the burden shifts to the indorsee to show a bona fide holding. First Nat. Bk. v. Person, 101 Minn. 30, 111 NW 730. Evidence insufficient to shift burden. Id. Where to a plea that defendant was induced to sign acceptances by fraudulent representations, plaintiff replies that he was a bona fide purchaser, the burden is upon him to show that the paper was acquired before maturity and for value. Woodall v. Peoples Nat. Bk. [Ala.] 145 S 194. "Fraud in the procurement of the note" as used in Civ. Code 1895, § 3696, which declares that holder of note is presumed to be such bona fide and for value, but "such presumption is negatived by proof of any fraud in procurement of the note," means fraud of holder thereof and has no reference to fraud in contract out of which note arose, or fraud of an intervening indorser. Harrell v. National Bk., 128 Ga. 504, 57 SE 869.

43. It being admitted check was given in consideration of gambling debt, burden is with plaintiff to prove that he is a bona fide holder. Matlock v. Scheuerman [Or.] 93 P 823.

44. Neg. Inst Law (Laws 1897, p. 733, c. 612, § 98), Engle v. Hyman, 54 Misc. 251, 104 NYS 390. Gen. St. 1902, §§ 4222, 4229. Parsons v. Utica Cement Mfg. Co. [Conn.] 66 A 1024. The holder of a negotiable instrument is deemed prima facie to be a holder in due course unless the title of the person negotiating the instrument is shown to be defective. Kerr v. Anderson [N. D.] 111 NW 614. When this is shown the burden shifts to the holder to show that he took the instrument in due course. Id. Under Code Supp. 1902, §§ 3060-a55 3060-a59, the title of one who negotiates an instrument in breach of faith or under circumstances amounting to a fraud is defective, and burden is cast upon holder to show that he or some person through whom he claims acquired paper innocently. McKnight v. Parsons [Iowa] 113 NW 858. Where the payee negotiated note in bad faith, burden is on plaintiff, under Neg. Inst. Act (Laws 1897, p. 733, c. 612, § 98), to show that he or the person under whom he claims acquired title as a holder in due course. National Bk. v. Foley, 54 Misc. 126, 103 NYS 553.

45. Sheffield v. Johnson County Sav. Bk., 2 Ga. App. 221, 58 SE 386.

46. Meyer v. Lovdal [Cal. App.] 92 P 322. Evidence held to sustain burden cast upon indorsee. Id.

47. Meyer v. Lovdal [Cal. App.] 92 P 322. It is not incumbent upon indorsee to show beyond a reasonable doubt that he acted in good faith and without notice of any legal infirmities. Wood v. Skelley [Mass.] 81 NE 872. Where plaintiff has met the burden of showing that he is an innocent holder, and there are no circumstances raising a presumption that he knew the facts impeaching the validity of the instrument, it is proper to direct a verdict for him. Meyer v. Lovdal [Cal. App.] 92 P 322. Disputed evidence of cashier of bank that bank purchased note for value before maturity is not sufficient to enable court to say as matter of law that it was received in good faith. McKnight v. Parsons [Iowa] 113 NW 858.

48. Polliemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A. 303.

49. Code 1896, § 3292. Woodall v. People's Nat. Bk. [Ala.] 45 S 194.

50. Agreement indorsed on note given for land that lien on land should be released, construed, and held that release of lien was not a condition precedent to right of action upon note. Clark v. Fohl, 30 Ky. L. R. 1220, 100 SW 855.

51. Jones v. Evans [Cal. App.] 91 P 532.

52. Code, § 1917. Tender can properly be made at trial. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

53. Where suit is brought on order accepted conditionally before performance of condition, defect is cured by filing amended petition after performance of condition alleging compliance therewith. Foley v. Houston Co-op. Mfg. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 224, 106 SW 160.

issue against the property of an indorser of a note or guarantor of a bill of exchange when action is brought to enforce payment of the debt.[54]

Limitations.—Suit must be brought within the statutory period after the maturity of the paper,[55] unless the running of the statute is postponed.[56] A note is not rendered immune from prescription by fact of its having been accepted by way of investment.[57] Instruments acknowledging a debt evidenced by a note and renewing the note will take the case out of the operation of the statute.[58] Limitations on a demand note run only from the making of demand.[59]

*Parties.*See 8 C. L. 1147—An action may be maintained in the name of the payee of a note regardless of who is the owner of it,[60] and a payee in possession may sue although his uncanceled indorsement is on the instrument.[61] Under the law merchant the transferree of an unindorsed negotiable note must sue in the name of the payee,[62] but this rule has, in some states, been changed by statute.[63] The assignee of a nonnegotiable note can sue in his own name.[64] A holder who has no beneficial interest may sue.[65] Suit on a note indorsed in blank may be brought by any person.[66] In Iowa where a note is executed by one corporation to another and indorsed by the latter, the maker and indorser may be sued in the same action.[67] Where a partner is sued as individual indorser of the firm note, if he desires to bring in the maker he must move to have the partnership made a defendant.[68]

*Pleading.*See 8 C. L. 1147—A question not put in issue by the pleadings cannot be considered.[69]

54. Rev. St. 1887, § 4302. Armstrong v. Slick [Idaho] 93 P 775.

55. The six year limitation does not apply to action on promissory note signed in presence of an attesting witness. Rev. St. c. 83, § 89. Murray v. Quint, 102 Me. 145, 66 A 313. Against a demand note the statute begins to run immediately. Church v. Stevens, 56 Misc. 572, 107 NYS 310. Prescription on a demand note runs from date of note and not from demand. Darby v. Darby [La.] 45 S 747. In action on note, exercise of power of sale in mortgage given to secure it held not to accelerate the time of maturity of balance on debt remaining unpaid after application of proceeds of sale so as to start the running of the statute prior to date of maturity stated in note. Hall v. Jameson [Cal.] 91 P 518.

56. Where the time of payment is extended, the period of limitations will begin to run from the time to which it is extended. Dashiell v. Moody [Tex. Civ. App.] 97 SW 843. A mortgage given by payee of note to secure note which sets out note and recites that time of payment has been extended to a specified date, and promises to pay it according to its terms and conditions, contains a promise to pay note as extended and an action on note within statutory time after date specified is not barred. Moore v. Gould [Cal.] 91 P 616. Where under provisions of holder's will, accepted by the maker, notes are to be held uncollected during life of maker, running of statute is suspended until his death. In re Church's Estate [Vt.] 67 A 549. Agreement held not to suspend running of prescription against action on note. Darby v. Darby [La.] 45 S 747.

57. Darby v. Darby [La.] 45 S 747.

58. Moore v. Gould [Cal.] 91 P 616.

59. Neale v. Morrow, 150 Cal. 414, 88 P 815.

60. Wolfboro Loan & Banking Co. v. Rollins [Mass.] 81 NE 204. Suit may be brought in name of payee, a foreign corporation, though assignee of plaintiff's property has been appointed in foreign state, Id.

61. He is presumed to own it and his title cannot be inquired into, unless necessary for protection of defendant or to let in defense which he seeks to make. Carolina Locust Pin & Mica Co. v. Chattanooga Mach. Co., [Ga. App.] 60 SE 375.

62. First Nat. Bk. v. McCullough [Or.] 93 P 366.

63. Under B. & C. Comp. § 27, providing that every action shall be prosecuted in the same of the real party in interest, suit may be brought in name of transferee. First Nat Bk. v. McCullough [Or.] 93 P 366. Under Rev. St. 1895, art. 307, owner and holder of a negotiable note though not by indorsement or written transfer, may sue in his own name. Elmore v. Rugely [Tex. Civ. App.] 107 SW 151. Under practice act, possession of a note is sufficient to enable possessor to sue thereon in his own name without proving an actual indorsement. Dawson v. Wambles, 123 Mo. App. 340, 100 SW 547. One who acquires a note by a valid attachment and execution sale may, under B. & C. Comp. § 4453, sue thereon in his own name, whether sheriff's indorsement to him was regular or irregular. Fishburn v. Londershausen [Or.] 92 P 1060.

64. Sunderland v. Cowan [Md.] 67 A 141.

65. The holder of the naked legal title to a note may sue thereon, even though the money when collected belongs to another. Fisher Mach. Works v. Leavenworth Nat. Bk. [Kan.] 94 P 124. An unauthorized indorsement gives the indorsee power to collect by suit. Id.

66. Lyman v. Kline, 128 Ill. App. 497.

67. Code § 3465. Swartley v. Oak Leaf Creamery Co. [Iowa] 113 NW 496.

68. National Exch. Bk. v. Lubrano [R. I.] 68 A 944.

69. It must be assumed that renewal note

*The complaint.*See 8 C. L. 1147—The complaint need only state facts sufficient to make out a cause of action.[70] The execution and delivery of the instrument must be alleged,[71] and facts showing the jurisdiction of the court.[72] In an action on a note the date of the promise need not be stated,[73] but in an action by an indorsee an allegation of the time of the transfer to him is essential.[74] It is sufficient, however, if it appears from the declaration that the transfer was made before maturity and that the action is not barred by limitations.[75] In the case of a demand note, no allegation of demand is required.[76] In an action against an indorser, presentment must be alleged or a sufficient excuse for not making it.[77] Notice of dishonor or waiver thereof must be alleged in an action against an indorser,[78] or against the drawer of a check.[79] If attorney's fees are claimed, facts warranting the recovery thereof should be alleged.[80] The statute of limitations need not be anticipated by setting out payments or memorandum relied upon to take the case out of its operation.[81] A fact established by the suit itself need not be alleged.[82] To entitle plaintiff in the event that a defense to the instrument sued on is sustained to have submitted the issue as to defendant's liability for the sum due independent of his liability on the instrument, he must plead in the alternative that if such defense shall prevail he shall be entitled to

was accepted in discharge and satisfaction of original note if question is not directly put in issue by pleadings. Steger v. Jackson, 31 Ky. L. R. 434, 102 SW 329.

70. Church v. Stevens, 56 Misc. 572, 107 NYS 310. If answer sets up defense which, if true, would destroy that cause of action, plaintiff may meet it by proof in rebuttal or avoidance. Id. The declaration in an action on a note is sufficient if it sets out, generally and in substance, the nature and character of the agreement declared on. Pyle v. Gallagher [Del.] 67 A 197. Allegation that maker was indebted to payee and that note was for value received, a sufficient averment of consideration. McKinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P 495. In action upon foreign draft, declaration presents on its face a good cause of action where it avers that defendants directed payment to their order amount therein stated, indorsement to plaintiff with bills of lading attached, presentation, acceptance, dishonor, and notice thereof, and sale of grain covered by bill of lading and failure of proceeds to pay draft in full. Hammond, Snyder & Co. v. American Exp. Co. [Md.] 68 A 496. In an action on a note which provides that if maker shall pay on note at least one fourth of his interest in net profits of a certain business during the year note has to run the payee will renew it, an averment that defendant did not pay one fourth part, or any part of his interest, in such net profits to plaintiff, is sufficient without setting out amount of such profits, the dividends declared, or interest of defendant in net profits. Pyle v. Gallaher [Del.] 67 A 197. Allegations held a sufficient pleading of defendant's breach by nonpayment of contract to pay note at maturity. Dresser v. Mercantile Trust Co., 108 NYS 577.

71. Averment that corporation made and delivered note as its own act sufficient without averment that such acts were done by and through authorized agents of corporation. McKinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P 495.

72. Complaint not showing sufficient service of process by publication under B. & C. Comp. § 56, and, therefore, insufficient to show jurisdiction. Fishburn v. Londershausen [Or.] 92 P 1060.

73. Failure to give date not ground for dismissal of complaint. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

74. Hicks v. Hamilton [Ga. App.] 59 SE 331; McGehee v. Cooke, 105 NYS 60. Plaintiff may be required to state such date by motion to make definite and certain. Id.

75. Hicks v. Hamilton [Ga. App.] 59 SE 331.

76. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

77. Complaint in action against indorsers of note held insufficient in not showing sufficient presentment to maker or sufficient excuse for not making it. Wills v. Booth [Cal. App.] 91 P 759. Complaint in action against indorser alleging that presentment was made at place where maker had her residence and place of business at time of her death and that payment on her behalf was refused is not demurrable for uncertainty in not showing to whom demand was delivered. Kinsel v. Ballou [Cal.] 91 P 620.

78. Wisdom v. Bille [La.] 45 S 554. An allegation that note has been duly protested is not sufficient. Id.

79. Under Neg. Inst. Law (Laws 1897, p. 739, c. 612, § 160), complaint in action on check against drawer must allege that notice of dishonor was given drawer, and absence of such allegation renders it demurrable. Ewald v. Faulhaber Stable Co., 105 NYS 114.

80. Allegations held sufficient. Ellis v. National City Bk. [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 SW 437. Allegations held insufficient. Elmore v. Rugely [Tex. Civ. App.] 107 SW 151.

81. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

82. Where note provides for attorney's fee "if suit is brought on the same," it is not necessary to allege that suit has been brought. Adams v. Bartell [Tex. Civ. App.] 19 Tex. Ct. Rep. 503, 102 SW 779.

recover the amount defendant owes him.[83] In Alabama, where separate drafts are sued on in the same action, they may be described in the same count.[84] The complaint may be amended,[85] but no amendment can be granted which imparts into it a new cause of action.[86]

*The answer.*See 8 C. L. 1148—An issuable [87] defense must be set up and the grounds thereof plainly stated [88] without ambiguity or evasion.[89] The defenses of absence or failure of consideration,[90] fraud,[91] or duress,[92] when relied on, must be alleged with sufficient particularity. The plea of fraud must be verified.[93] Where the declaration alleges a contract to pay money absolutely, the general issue will put in issue the question whether the agreement was conditional.[94] Where the complaint in an action against an indorser alleges that notice of default had been given him, the answer must deny such notice.[95] In an action by an indorsee, if defendant would rely on infirmities in the instrument, he must allege facts showing that plaintiff is not a bona fide

83. Thompson v. Hicks [Tex. Civ. App.] 17 Tex. Ct. Rep. 669, 100 SW 357.

84. Code 1896, § 3292. Woodall v. Peoples' Nat. Bk. [Ala.] 45 S 194.

85. In action upon renewal note, unless accepted in absolute payment of original by express agreement, plaintiff may, upon the filing of plea of non est factum by defendant, accept such plea and so amend pleadings as to set up original note. Ritchie County Bk. v. Bee [W. Va.] 59 SE 181. But if plaintiff does not elect to so amend, appellate court will not reverse judgment joined upon issue on plea of non est factum and remand for new trial on amended pleadings to be filed. Id.

86. Amendment allowed in action on written order drawn against building loan and its acceptance by defendants held to violate this rule. Rockmore v. Kramer, 108 NYS 553.

87. Plea construed as a whole held to set up issuable defense that note sued on was embraced in composition of defendant's debts. Dicks v. Andrews, 129 Ga. 756, 59 SE 782. Plea held to set up issuable defense as to reasonableness of attorney's fees. Proctor v. Cooke, 129 Ga. 732, 59 SE 781; Thomas v. Siesel, 2 Ga. App. 663, 58 SE 1131. Where in an answer by paragraphs to a petition in suit on promissory notes defendant makes in answer to one of paragraphs a general denial of indebtedness, but nowhere sets up any legal defense, answer is properly stricken on demurrer. Id.

88. Plea held a sufficient plea of non est factum under Sayles' Am. Civ. St. 1897, art. 1265. Scott v. Menly [Tex. Civ. App.] 19 Tex. Ct. Rep. 865, 105 SW 55. In action against indorser, affidavit of defense held sufficiently precise, though not expressly denying that plaintiff was holder in due course of trade, in view of indefiniteness of statement of claim. Federal Nat. Bk. v. Cross Creek & Pillsbury Coal Co. [Pa.] 68 A 1018.

89. Plea of non est factum is subject to be stricken on demurrer which does not unequivocally deny that notes sued on are the act and deed of defendant. Thomas v. Siesel, 2 Ga. App. 663, 58 SE 1131.

90. Plea alleging that note is "without any valuable consideration, either moral or legal," involves only a reference to a "valuable" consideration and does not mean that note is without a "good" consideration. Dicks v. Andrews, 129 Ga. 756, 59 SE 782. Where only failure of consideration pleaded is that payee had not paid certain notes and discharged certain mortgages, judgment for plaintiff will not be denied for a failure of consideration in respect to any other matter. Lynds v. Van Valkenburgh [Kan.] 93 P 615. Where a total failure of consideration was relied upon to defeat recovery on note, pleas alleging that defendant was induced to purchase property for which note was given by plaintiff's warranty and false representations, but not containing other necessary allegations, held defective and subject to be stricken on general demurrer. Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093. The defense of failure of consideration may be made, in an action of assumpsit upon a note under the plea of non assumpsit. McClanahan v. Caul [W. Va.] 60 SE 382. In West Virginia such defense may be made either under plea of non assumpsit or a special plea under Code 1906, § 3891 (Code 1899, c. 126 § 5). Id. Affidavit of defendant that "whiskey to be delivered at once" was not delivered raises question of fact for jury. Kessler v. Connor, 32 Pa. Super. Ct. 145.

A special plea is necessary to raise the defense of failure of consideration. Barber v. McHenry County Hedge Fence Co., 129 Ill. App. 45.

91. Where defense to action by payee against indorser is fraudulent representations inducing indorsement, that representations were material is sufficiently stated by allegations that save for them defendant would not have indorsed. Roessle v. Lancaster, 119 App. Div. 368, 104 NYS 217. In such case answer need not specifically allege damages. Id. Demurrer to plea in action on notes on ground that facts alleged were insufficient to show fraud held properly sustained. Vangant v. Abbeville Bk., 2 Ga. App. 763, 59 SE 85. Plea of fraud held faulty in averment of facts showing fraud and therefore subject to demurrer. Stouffer v. Smith-Davis Hardware Co. [Ala.] 45 S 621.

92. Plea held not to allege facts sufficient to show that notes were procured by duress. Bond v. Kidd, 1 Ga. App. 798, 57 SE 944.

93. Plea of fraud in an action on a draft if not verified is subject to motion to strike. Stouffer v. Smith-Davis Hardware Co. [Ala.] 45 S 621.

94. Nottingham v. Ackiss [Va.] 57 SE 592.

95. Knisel v. Ballou [Cal.] 91 P 620.

holder.[96] If payment is relied on there must be a sufficient allegation thereof.[97] The statute of limitations must be pleaded,[98] as must the defense that plaintiff is not the real party in interest.[99] If a different contract from that which the law presumes from defendant's signature is relied on by special pleas in bar, it must be alleged that such was the understanding of all the parties.[1] A plea or answer is bad which attempts to vary the terms of the instrument by parol.[2] In an action on an instrument assigned after maturity, a defense that might have been pleaded against the assignor need not under negotiable instruments law, be alleged as a counterclaim but may be set up in the answer.[3] The answer must not set up inconsistent defenses.[4] Allegations constituting a part of the pleading of one special defense cannot be treated as allegations constituting another special defense which is not separately and specially pleaded.[5] In West Virginia, in an action of debt on a note if plaintiff files the statutory affidavit with his declaration, he is entitled to a judgment by default if defendant fails to file with his plea a counter affidavit.[6] An admission in the answer of the execution of the instrument curtails the scope of the general traverse by excluding therefrom the defense of non est factum.[7] The construction given by the answer to the instrument sued on must be considered in the light of the language of the instrument and the surrounding circumstances.[8] A defense may be waived by failure to plead it.[9] A plea which presents prima facie a good defense must be answered by replication.[10] Proper amendments may be made to the answer.[11]

96. Must allege that plaintiff took with notice of infirmities. Monett State Bk. v. Eubanks, 124 Mo. App. 499, 101 SW 687. Allegations of answer held to sufficiently charge that plaintiff had notice of infirmity in instrument when he purchased it, and hence was not a holder in due course, but took it subject to defense of which he thus had notice. Quiggle v. Herman, 131 Wis. 379, 111 NW 479.

97. A plea of payment which fails to allege when, how, and to whom payment was made, is properly stricken on demurrer. Thomas v. Siesel, 2 Ga. App. 663, 58 SE 1131. Special demurrer to plea of partial payments calling for dates of payments held under circumstances of case properly sustained. Swindell v. Bainbridge State Bk. [Ga. App.] 60 SE 13. Failure to pay at maturity raises a presumption of continuous nonpayment which defendant must meet by affirmative allegations. Dresser v. Mercantile Trust Co., 108 NYS 577.

98. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

99. Cleary v. DeBack Plate Glass Co., 54 Misc. 537, 104 NYS 831.

1. So held where one signing note as joint maker pleaded that he signed only as surety. Vanderford v. Farmers' & Mechanics' Nat. Bk. [Md.] 66 A 47.

2. Plea in action on notes held bad in this respect and demurrer properly sustained. Vanzant v. Bank of Abbeville, 2 Ga. App. 763, 59 SE 85. Pleas held to go to consideration of note and not to attempt to alter or vary its terms by parol. Dial v. McKay [Ala.] 43 S 218. An answer setting up as a counterclaim nonperformance of a contemporaneous oral agreement is bad if it does not allege that its omission from the writing was the result of fraud or mistake. Suit on note. Shell v. Asher, 31 Ky. L. R. 566, 102 SW 879.

3. Laws 1897, p. 732, c. 612, § 97. Breach of warranty. American Seeding Mach. Co. v. Slocum, 108 NYS 1042.

4. Where, in an action upon a guaranty indorsed on a note the answer admits an indorsement in blank but denies the guaranty and fraud in obtaining the blank, indorsement is then alleged as an affirmative defense, the defenses are not inconsistent, the latter defense being under the pleadings irrelevant. O'Connor v. Slatter [Wash.] 93 P 1078.

5. In action on note given for stock, allegations constituting a part of a continuous and apt recital of special defense of fraud cannot be treated as allegations constituting special defense that dividends were paid upon stock sufficient to discharge interest on note, which is not separately and specially pleaded. Commercial & Sav. Bk. v. Pott, 150 Cal. 358, 89 P 431.

6. Code 1899, c. 125, § 46 (Code 1906, § 3866. If plaintiff files affidavit with his declaration, clerk cannot receive issuable plea in bar at rules without required affidavit, and if he does and omits to enter judgment against defendant and no plea is filed by leave of court at first term, no plea can be filed thereafter, but plaintiff has right to have judgment accorded by court for his demand. Hansford v. Snyder [W. Va.] 59 SE 975.

7. Keyser v. Hinkle [Mo. App.] 106 SW 98.

8. Allegation that note was given as payment construed to mean that it was given as an evidence of indebtedness payable at maturity of note. Menzel v. Primm [Cal. App.] 91 P 754.

9. Where one sued as joint maker of a note makes no objection by demurrer or plea to form of suit, he cannot object to judgment against him on ground that he was only an indorser. Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 SE 56.

10. In an action by transferee against acceptor of bill of exchange, plea of fraudulent representations of payee inducing acceptance presents, prima facie, a good defense, and

Evidence.[See 8 C. L. 1149]—The evidence must be confined to the issues raised by the pleadings [12] and must support the allegations thereof.[13] In Minnesota a variance between the evidence and the pleadings is not fatal unless the adverse party was misled thereby in his preparation for trial.[14] Parol evidence is inadmissible to add to, take from, or vary the terms of a negotiable instrument, except where there has been an omission resulting from fraud or mistake,[15] but where a note is ambiguous on its face, extraneous evidence, either written or oral, is admissible to explain it.[16] Oral evidence is also admissible to show that defendant did not execute the instrument sued on and that no consideration passed to him,[17] or to explain that a note was exe-

puts on plaintiff, to reply that he is a bona fide holder. Woodall v. Peoples' Nat. Bk. [Ala.] 45 S 194.

11. An answer in a suit on a note alleging partial failure of consideration may be amended by adding thereto allegations of fraud. Bank of Chillicothe v. Ornsdorff, 126 Mo. App. 654, 105 SW 664.

12. Rockmore v. Kramer, 108 NYS 553.

No variance: Where claim against decedent's estate describing notes as signed by S. R. Co. and guaranteed by P., was correct as far as it went, the fact that notes produced also bore names of other indorsers was held not to be a variance. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224. In action by accommodation indorser of notes executed by defendant's intestate, evidence that one of notes though signed "C. H. Hall & Co." was decedent's individual note, and that in presenting copy to defendant as administrator was by oversight described as signed by intestate individually, where these facts appear in amended complaint, is admissible. Sears v. Howe [Conn.] 68 A 983.

Variance: Where petition alleges demand and notice of dishonor, evidence is not admissible to show waiver of necessity of demand and notice. Bayless v. Harris, 124 Mo. App. 234, 101 SW 617. Where issue raised by pleadings was whether note had been fully discharged by conveyance of property, evidence tending to show value of property, introduced to prove reasonableness of settlement, can be considered only so far as it relates to that subject, and cannot, in connection with evidence in rebuttal on same subject, be considered on subject whether there was any agreement that conveyance should operate as partial payment. McCauley v. Darrow [Mont.] 91 P 1059. Where cause of action was pleaded on a written order drawn against a building loan and its acceptance by defendant, complaint containing no allegation that building loan mortgagor by performance of his contract was entitled to receive any moneys under building loan agreement, evidence tending to establish cause of action both upon original oral promise to pay and upon equitable assignment of moneys due is inadmissible. Rockmore v. Kramer, 108 NYS 553.

Proof of loss admissible though loss not mentioned in petition: In an action on a note, a copy of which is set forth in petition, proof of loss of note and of its execution and contents may be received, although petition does not mention loss. Bare v. Ford, 74 Kan. 593, 87 P 731.

13. Where defendant in action on note pleaded that she was a married woman and that she signed under duress brought about by conduct of codefendant, her husband, evidence held insufficient to show either that defendants were married or that duress was brought about by codefendant. Claxton v. Lovett, 129 Ga. 300, 58 SE 830.

14. Rev. Laws 1905, § 4158. Kaufman v. Barbour [Minn.] 114 NW 738. Defendant not misled by variance between face of note and pleadings. Id.

15. Bowen v. Waxelbaum, 2 Ga. App. 521, 58 SE 784; Vanzant v. Abbeville Bk., 2 Ga. App. 763, 59 SE 85; Shell v. Asher, 31 Ky. L. R. 566, 102 SW 879. In the absence of fraud or mistake, oral evidence is not admissible to show that an indorsement "with recourse" was intended to be "without recourse." Knisel v. Ballou [Cal.] 91 P 620. Evidence of a parol agreement that indorser should be fully advised by indorsee as to conduct of maker regarding payment of instalments, and as affecting value of security, is not admissible to vary unqualified contract of indorsement. Hopkins v. Merrill, 79 Conn. 626, 66 A 174. Where note is given as subscription to railroad corporation to aid in construction of road, any representations made prior to or contemporaneous with execution of note are, under Rev. St. Okl. 1893, § 822, inadmissible to contradict, vary, or add to conditions plainly incorporated into and made part of note. Guthrie & W. R. Co. v. Rhodes [Okl.] 91 P 1119. Where a note is indorsed to a cashier of a bank by his name only without adding "cashier," parol evidence is inadmissible, under B. & C. § 4444, to show that bank was intended as indorsee. First Nat. Bk. v. McCullough [Or.] 93 P 366.

16. Dunbar Box & Lumber Co. v. Martin, 53 Misc. 312, 103 NYS 91. Note reading, "We promise to pay," with stamp of a corporation thereon and signature of president of corporation in space intended to hold an officer's signature, where payee had no account with president personally but only with corporation, is ambiguous, and a memorandum showing that payee regarded note as that of corporation is admissible. Id. Parol evidence is admissible in a court of law to show the intention of parties, when date of instrument is left ambiguous. Leffler Co. v. Dickerson, 1 Ga. App. 63, 57 SE 911.

17. Acme Food Co. v. Tousey, 148 Mich. 697, 14 Det. Leg. N. 298, 112 NW 484. Where defendant denied that he signed note contained in written contract or that any consideration passed to him, oral evidence was admissible as to what occurred when the contract was executed. Id.

cuted for the accommodation of another or to be held as collateral security.[18] An oral agreement between maker and payee of note, when fully executed, may change a stipulation as to interest.[19] Under the negotiable instrument law, parol evidence is admissible as between several indorsers to show that they agreed to become liable otherwise than in the order in which they indorsed.[20] A written agreement executed contemporaneously with a negotiable instrument annexing a condition to its payment is admissible in a suit on the instrument between the original parties.[21] A letter written by the maker of a note admitting receipt of consideration is admissible though never received by payee.[22] Entries in the books of the maker of a note, made after the note was executed, by one not appearing as a witness, are not admissible to show the invalidity of the note, unless the payee had knowledge of and assented to them.[23] If the instrument sued on has been lost, upon proper foundation being laid therefor secondary evidence of its contents is admissible.[24] The fact that certain receipts covered the same payments shown in statements of account will not render such receipts or statements inadmissible to prove payment.[25] Checks drawn by the maker of a note prior to the execution thereof are not admissible as evidence of payments on the note.[26] The usual rules as to relevancy and materiality,[27] admissions of parties to suit,[28] and opinion testimony, prevail.[29]

18. Willoughby v. Ball, 18 Okl. 535, 90 P 1017. But such evidence cannot be received to defeat recovery on note, where payee, on strength of execution and delivery thereof, and at request of maker, extended credit to third party. Id.

19. Agreement that if maker will withhold payment until certain proceedings against payee are settled no interest would be charged after maturity. Righetti v. Righetti [Cal. App.] 90 P 50.

20. P. L. 1902, p. 596, § 68. Wilson v. Hendee, [N. J. Err. & App.] 66 A 413.

21. Aden v. Doub [N. C.] 59 SE 162.

22. Austin v. Long, 1 Ga. App. 258, 57 SE 964.

23. Baines v. Coos Bay, etc., R. & Nav. Co. [Or.] 89 P 371.

24. It is largely within discretion of court to determine when sufficient foundation has been laid for introduction of such secondary evidence (Smith v. Hightower [Ga. App.] 59 SE 593), and where defendants admit that a copy sought to be introduced is a correct copy of the original instrument, no other foundation is necessary (Id.).

25. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413.

26. In re Roger's Estate, 217 Pa. 626, 66 A 854.

27. Evidence held competent and relevant on issue raised by plea of **non est factum.** Scott v. Menly [Tex. Civ. App.] 19 Tex. Ct. Rep. 865, 105 SW 55. In action on a lost note payable in instalments, where defense was non est factum, evidence of receipt of money by person to whom note was delivered held irrelevant. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112. Testimony held to have some slight tendency to **corroborate defendant's denial of execution** of instrument, and its admission, therefore, not erroneous. Ayrhart v. Wilhelmy [Iowa] 112 NW 782. In action on draft by assignee against acceptor's evidence, held irelevant upon question of failure of consideration. Johnson County Sav. Bk. v. Rapp [Wash.] 91 P 382. Copy of book account and notes and receipts bearing upon correctness thereof held admissible in action to recover **balance alleged due** on note. Vollmer Clearwater Co. v. Rogers, 13 Idaho, 564, 92 P 579. Evidence held admissible as tending to prove that note had been **materially altered** after payment and death of maker. Scott v. Menly [Tex. Civ. App.] 19 Tex Ct. Rep. 865, 105 SW 55. In action on draft by assignee against acceptors, evidence held admissible as tending **to show knowledge on part of assignee of character of paper.** Johnson County Sav. Bk. v. Rapp [Wash.] 91 P 382. In action by indorsee, evidence that instrument was given under duress and without consideration is admissible without evidence that plaintiff is a bona fide holder, it being competent and relevant as **affecting burden of proof to show plaintiff a bona fide holder.** Engle v. Hyman, 54 Misc. 251, 104 NYS 390. Where plaintiff seeks to defeat defense of payment by proof of defendant's inability to pay, evidence of other witnesses to prove defendant's **possession of sufficient money to make payment** is admissible. Dick v. Marvin, 188 N. Y. 426, 81 NE 162. Evidence held admissible to show **loss of note** sued on. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

In action on certificate of deposit issued by defendant bank to S. as cashier, and indorsed by him as cashier, it is competent, under Neg. Inst. Act, § 42 (29th Gen. Assem. p. 85, c. 130; Code Sup. 1902, § 3060a42), to show that S. was cashier of defendant bank and was acting in that capacity in transferring certificate. Johnson v. Buffalo Center State Bk., 134 Iowa, 731, 112 NW 165.

In action by bank on note discounted by it, where plaintiff's bookkeeper testifies that book produced was discount register and entry therein as to discount of note in suit was in his handwriting, and made with note before him in usual course of business, such entry is admissible. Wallabant Bk. v. Peyton, 108 NYS 42.

Evidence as to mental capacity of maker of note before or after time of execution is material only in aiding jury to determine his mental condition at time of execution.

Presumptions and burden of proof. See 8 C. L. 1149—The production of a check payable to the order of "Cash" constitutes prima facie evidence of ownership.[30] Where execution is denied, the burden is upon the plaintiff to prove it,[31] and this only applies in an action on a lost note.[32] The burden is upon the defendant to prove that the person executing the instrument was legally incompetent.[33] Where a note is executed by an illiterate man making his mark, if the execution is not denied and the maker executed and acknowledged a deed of trust to secure the note which is described in the deed, the presumption arises that he was acquainted with the contents of the note when he made his mark,[34] and this presumption cannot be overcome without evidence that imposition or fraud was practiced upon him.[35] The burden of proving that the instrument was procured by fraud is upon the defendant.[36] When forgery is pleaded as defense, the burden of proof is on plaintiff to show that maker signed the note.[37] There is a prima facie presumption that the signatures to a note were affixed in the order in which they appear.[38] A negotiable instrument prima facie imports consideration,[39] and the burden of proving a failure thereof is upon the defend-

Rogers v. Rogers [Del.] 66 A 374. Evidence held irrelevant to issue made by defense of **rescision for fraud,** of deed of trust in which defendant agreed to pay note. Jockusch, Davison & Co. v. Lyon [Tex.] 18 Tex. Ct. Rep. 492, 102 SW 396. In action by transferee of note, if there is no offer to introduce evidence to show notice to holder or reasonable ground for suspicion upon his part that purpose of payee in negotiating note was to **defraud creditors,** evidence that payee had expressed intention to transfer note in order to avoid payment of debts, is irrelevant and properly excluded. Oliver v. Miller [Ga.] 60 SE 254. A. and P. gave their joint notes for part of purchase price of stock and their individual notes for part. In action against P. on his individual note it was held that evidence to show that **vendor agreed to give a written guaranty to** A that he would never have to pay any part of principal of note given by him was inadmissible. Commercial & Sav. Bk. v. Pett, 150 Cal. 358, 89 P 431. Evidence that purchaser of check two months after purchase filed a petition in bankruptcy is immaterial and irrelevant upon issue of **bona fides in purchase.** Siegmeister v. Lespenard Realty Co., 107 NYS 158. In action by indorsee of note against maker, it is not error to exclude defendant's testimony as to what he did in reference to stopping payment, that he notified banks that note was fraudulent, and had notice published in daily papers with reference to manner in which it was procured, where it was **not shown that such steps came to plaintiff's notice,** or could reasonably be presumed to be known to them. Meyer v. Levdal [Cal. App.] 92 P 322.

28. Evidence held admissible to show an admission by defendant that note in suit was executed by him. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

29. In action against administrator on note executed by his intestate, evidence of physicians engaged in general practice who had attended intestate professionally, in reference to his mental capacity, is admissible. Ireland v. White, 102 Me. 233, 66 A 477. Where a witness has stated that note in suit was delivered to plaintiff for a specific purpose, it is not opinionative for him to state that such purpose has ended. Stiles v. Shedden, 2 Ga. App. 317, 58 SE 515.

30. Cleary v. De Beck Plate Glass Co., 54 Misc. 537, 104 NYS 831.

31. Plea of non est factum throws burden upon plaintiff. Memphis Coffin Co. v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 670, 106 SW 697. Where execution of acceptance sued on is denied, burden of proving such execution is upon plaintiff. Carrara Paint Agency Co. v. American Nat. Bk., 9 Ohio C. C. (N. S.) 150. To entitle plaintiff to recover on note on issue of non est factum, he must prove either that defendant signed note or that his name was signed thereto by a person duly authorized, or that, having knowledge of fact that his name was so signed and of all material facts, he subsequently ratified same. Ritchie County Bk. v. Bee [W. Va.] 59 SE 181. In action against several persons whose names are signed to a note, affidavit by one denying execution of note puts burden upon plaintiff to show execution of note before it can be offered in evidence. First Nat. Bk. v. Shaw, 149 Mich. 362, 112 NW 904.

32. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112. But requested charge that unless jury are satisfied by a preponderance of evidence that defendant signed note they must find for defendant requires too high a degree of proof. Id.

33. This he must do by a preponderance of evidence. Ireland v. White, 102 Me. 233, 66 A 477. Evidence held to sustain jury's finding that maker was of unsound mind at time she executed note. Id. Where it is shown that maker of note was mentally unsound before its execution, jury may presume that such unsoundness continued until time of execution, unless contrary is shown. Rogers v. Rogers [Del.] 66 A 374.

34, 35. Dawson v. Wombles, 123 Mo. App. 340, 100 SW 547.

36. But that it was so procured may be inferred from facts proved sufficient to warrant such inference. Rogers v. Rogers [Del.] 66 A 374.

37. Berkley v. Maurer, 34 Pa. Super. Ct. 363.

38. Beem v. Farrell [Iowa] 113 NW 509.

39. Moore v. Gould [Cal.] 91 P 616; Keating v. Morrissey [Cal. App.] 91 P 677; Mc-

ant.[40] In Georgia, where the defense to a note given for fertilizers is that the packages of fertilizers did not have tags attached as required by law, the burden is on defendant to prove that fact.[41] Where a note is payable on demand, demand is presumed to have been made at the time of its delivery.[42] Under the negotiable instruments law the burden of proof lies upon a party who alleges that cancellation of an instrument or signature was made unintentionally or under a mistake or without authority.[43] The burden is upon the defendant to prove payment,[44] tender,[45] or release.[46] In an action on a check if defendant alleges damages accruing from failure to present the check while the bank was solvent, the burden rests upon him to show that funds were on hand to meet it from the time of its execution until the bank failed.[47] Where one claims as the assignee of an instrument, the burden is upon him to prove the assignment.[48] In an action on notes executed by defendant to a corpora-

Kinley v. Mineral Hill Consol. Min. Co. [Wash.] 89 P 495. In a promissory note the seal imports consideration. Youngk v. Keim, 34 Pa. Super. Ct. 337. The burden of proving a consideration in action on note is upon the plaintiff and is shown prima facie by production of note in evidence. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex. Civ. App.] 107 SW 157. Under Rev. St. 1899, § 457 (Ann. St. 1906, p. 516), execution and delivery of a negotiable note imports that it was given for a valuable consideration. Dawson v. Wombles, 123 Mo. App. 340, 100 SW 547.

A note under seal imports a consideration. Rogers v. Rogers [Del.] 66 A 374; Smith v. Hightower [Ga. App.] 59 SE 593; Webb v. Simmons [Ga. App.] 60 SE 334. Imports consideration as to both makers and indorsers or sureties. Smith v. Hightower [Ga. App.] 59 SE 593. Where a note bears words **"value received,"** proof of signature of maker imports payment of a consideration. Harris v. Firth [N. J. Law] 68 A 1064. In a suit on such a note burden of rebutting consideration is upon maker. Evidence held insufficient for this purpose. In re Royer's Estate, 217 Pa. 626, 66 A 854. Where claim supported by uncontradicted evidence that note and mortgage securing it were given without consideration has in itself inherent elements of improbability, there is, in view of presumption of consideration arising from instrument itself, which is evidence under Code Civ. Proc. § 2061, a **conflict of evidence** sufficient to support finding of no consideration. Moore v. Gould [Col.] 91 P 616. Where in action on promissory note answer sets up a distinct **contract providing for conveyance of real estate as consideration** for note, and reply denies under oath execution and delivery of such contract, burden of proving execution and delivery is upon defendant, and failure of such proof precludes contract being received in evidence and failure of that ground of defense. Sparks v. Oklahoma Const. Co. [Okl.] 91 P 839.

40. Lynds v. Van Valkenburgh [Kan.] 93 P 615. Note under seal. Webb v. Simmons [Ga. App.] 60 SE 334. Where consideration for note is payment of certain notes and mortgages, and evidence shows they have been paid but not who paid them, the burden of showing failure of consideration is not met. Lynds v. Van Valkenburgh [Kan.] 93 P 615. If defendant shows that consideration was promise to do certain things in future, burden is still on him to show that promise was broken. Webb v. Simmons [Ga. App.] 60 SE 334.

41. Civ. Code 1895, § 516. Young v. Murray [Ga. App.] 59 SE 717.

42. Church v. Stevens, 56 Misc. 572, 107 NYS 310. A mere provision that the note bears interest does not change the rule. Id.

43. Neg. Inst. Law, § 123. This provision is not violative of Const. art. 2, § 17.

44. Evidence held not to sustain burden of showing payment. Lyngar v. Shafer, 125 Mo. App. 398, 102 SW 630. Failure to pay at maturity raises a presumption of continuous nonpayment which defendant must overcome. Dresser v. Mercantile Trust Co., 108 NYS 577. Where it is conceded that note sued on had not been paid before institution of suit, burden is upon defendant to prove payment subsequent thereto. Such burden was not sustained in this case. L. W. Blinn Lumber Co. v. McArthur, 150 Cal. 610, 89 P 436.

45. Where in an action on a note the defense was tender of payment on condition of a release of a prior note in lieu of which it is alleged note sued on was given, burden is upon defendant to show that it was so given. Stevens v. Taylor [Tex. Civ. App.] 19 Tex. Ct. Rep. 428, 102 SW 791.

46. Martin v. Monroe [Ga.] 60 SE 253. Mere introduction of writing relied upon as release does not shift burden upon plaintiff of proving paper a forgery. Id.

47. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212.

48. In action by assignee of note against maker, held that plaintiff's evidence proving signature of maker and indorsers, and execution and delivery to him of assignment, coupled with presumptions of law under Neg. Inst. Laws 1897, p. 719, c. 612, pp. 695, 730, 733, §§ 35, 75, 98, entitled him in absence of any evidence to contrary to a recovery. Colborn v. Arbecam, 54 Misc. 623, 104 NYS 986. The execution of the assignment of a note, in absence of a specific denial under oath of due execution by the person purporting to have executed it, is presumed to be according to its purport, and this though signature purports to be by one not a party to action. Milwaukee Trust Co. v. Van Valkenburgh [Wis.] 112 NW 1083. Production of a note and interest coupon, with proof of an assignment of former before it became due, prima facie establishes ownership of interest coupon, although it is detached from note. Id. In an action on the common counts by a personal representative based on notes alleged to have

tion and indorsed to plaintiff, plaintiff is not required to prove the indorser's corporate capacity.[49] In an action against an indorser of a note, the production of the instrument and proof of demand and notice of dishonor and protest makes out a prima facie case.[50] In the absence of evidence it will be presumed that an undated indorsement was made at the date of the note.[51] Where a negotiable instrument upon its face puts a purchaser upon inquiry as to its regularity, the burden is upon him to show its validity.[52] Where defendant admits plaintiff's right to recover unless it can be defeated upon affirmative grounds set up in the answer, the burden of proof is upon defendant.[53] Where a note provides for payment of attorney's fees, plaintiff must prove that the conditions upon which such fees are to be paid have been performed,[54] but if the condition of payment is that suit be instituted, the court will take judicial notice that it has been filed.[55]

Province of court and jury.—The construction of a negotiable instrument is for the court,[56] but all questions of fact, if the evidence is conflicting, must be submitted to the jury. Of this nature are the questions whether defendant executed the instrument in suit.[57] Whether one who signed a negotiable instrument without knowing it to be such was guilty of negligence or laches,[58] what amounts to such an unreasonable detention of a bill of exchange or check as to be considered an acceptance by implication,[59] whether the consideration was sufficient,[60] whether the debt has been paid,[61] whether presentment was made in reasonable time,[62] whether, where the suit is by an indorsee, the plaintiff is a bona fide holder,[63] what are reasonable attorney's

been transferred to his testatrix, burden is upon plaintiff to prove property in testatrix. Proof sufficient in this case. In re Church's Estate [Vt.] 67 A 549.

49. Even though complaint alleges indorser was a corporation. Jones v. Evans [Cal. App.] 91 P 532.

50. National Exch. Bk. v. Lubrano [R. I.] 68 A 944. The burden of proving a subsequent payment rests upon defendant. Id. Evidence held not to show giving of notice of protest in manner sufficient to charge indorser. Siegel v. Dubinsky, 56 Misc. 681, 107 NYS 678.

51. De Clerque v. Campbell, 231 Ill. 442, 83 NE 224.

52. Burden is upon holder of note made in name of corporation by its president in which he is named as payee to show that it is contract of corporation. Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 SE 92. In a suit against a corporation on a note taken by plaintiff for a pre-existing debt, under circumstances putting him on inquiry as to character of note and defendant's connection with it burden is upon him to show that defendant owned note and that indorsement of its name was authorized. Pelton v. Spider Lake Sawmill & Lumber Co. [Mo.] 112 NW 29.

53. Defendant admitted plaintiff's right to recover on notes unless it could be defeated on ground of payment. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413.

54. In an action on a note providing for payment of attorney's fees, if suit be instituted or it is placed in attorney's hands for collection, plaintiff must prove that note was not paid at maturity and what sum was paid or contracted to be paid for attorney's services. Elmore v. Rugely [Tex. Civ. App.] 107 SW 151.

55. Elmore v. Rugely [Tex. Civ. App.] 107 SW 151.

56. It is for court to determine whether note is a peddler's note within Ky. St. 1903, § 4223. McAfee v. Mercer Nat. Bk., 31 Ky. L. R. 863, 104 SW 287.

57. Memphis Coffin Co. v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 670, 106 SW 697.

58. Biddeford Nat. Bk. v. Hill, 102 Me. 346, 66 A 721; First Nat. Bk. v. Doeden [S. D.] 118 NW 81.

59. Wisner v. First Nat. Bk. [Pa.] 68 A 955.

60. Where evidence upon question of sufficiency of consideration is conflicting, jury must determine, and it is error for court to direct verdict. Gillis v. Paddock's Estate [Neb.] 109 NW 734.

61. Where defense to a note is payment by cash and a check, if there is evidence presenting a basis for an inference that they were received as payment, the question is one for the jury. Citizens' Nat. Bk. v. Horten [Wis.] 114 NW 793.

62. This question is not universally for the court, even where the facts are undisputed. Citizens' Bk. v. Nat. Bk. [Iowa] 113 NW 481.

63. Neyens v. Worthington [Mich.] 14 Det. Leg. N. 794, 114 NW 404. It is error to direct a verdict for plaintiff where there is competent evidence from which the jury might find he was not a bona fide holder. W. T. Joyce Co. v. Rohan, 134 Iowa, 12, 111 NW 319. Upon the evidence here question should have been submitted to jury whether payee of note given to compound a felony was acting as endorsee's agent in making criminal charge, and taking note. Id. Where evidence conflicting, question of good faith for jury. Montrose Sav. Bk. v. Clausen [Iowa] 114 NW 547. Whether a purchaser for a valuable consideration before maturity had notice of facts calculated to arouse suspicion as to the transaction in which paper originated is a question for the jury upon the evidence. Matlock v. Scheuerman [Or.] 93 P 823. Question of bad faith of indorsee in taking instrument, if evidence fairly tends to show it, is a question

fees,[64] and whether prior to suit for attorney's fees the required notice was given.[65] But if there is no conflict in the evidence there need be no submission to the jury.[66]

Instructions.—The instructions must be confined to the issues raised by the pleadings [67] and must be based upon and supported by the evidence.[68] An instruction must not be misleading,[69] but where an instruction considered as a whole is not misleading, an erroneous statement of law in a single paragraph,[70] or the fact that one paragraph deals with but a part of the proposition presented,[71] is not ground for reversal. It is error to refuse instructions presenting an issue made by the pleadings and evidence ont presented in the court's general charge.[72] An instruction is erroneous which casts upon plaintiff a burden of proof which the law does not require him to bear.[73]

of fact, especially where evidence of fraud is sufficient to put burden of showing good faith on holder. McKnight v. Parsons [Iowa] 113 NW 858. Where cashier of bank holding note testified in chief to purchase in good faith, but on cross-examination testifies to facts from which jury might find otherwise and there is evidence that payee's title was defective, question of good faith is for jury. Montrose Sav. Bk. v. Claussen [Iowa] 114 NW 547. Evidence held sufficient to go to jury on question whether assignee of accepted drafts was a bona fide holder. Johnson County Sav. Bk. v. Rapp [Wash.] 91 P 382.

64. Where note provides for reasonable attorney's fees. Proctor v. Crooker, 129 Ga. 732, 59 SE 781.

65. Bowen v. Waxelbaum, 2 Ga. App. 521, 58 SE 784.

66. Where the uncontradicted evidence shows that there is a total failure of consideration, it is not error to direct a verdict in favor of defendant. Reynolds v. Nevin, 1 Ga. App. 269, 57 SE 918. Where evidence that plaintiff is a bona fide holder is uncontradicted, question need not be submitted to jury (Johnson v. Buffalo Center State Bank, 134 Iowa, 731, 112 NW 165), but though plaintiff's testimony as to how he obtained the note in suit is uncontradicted, he being an interested witness, the question of his credibility is for the jury (Engle v. Hyman, 54 Misc. 251, 104 NYS 390).

67. Stiles v. Shelden, 2 Ga. App. 317, 58 SE 515. It is error to instruct as to effect of delivery of a note where no such issue is raised by pleadings. State v. Allen, 124 Mo. App. 465, 103 SW 1090. It is not error to refuse to instruct that plaintiff can recover upon strength of new promise by defendant where new promise is not declared upon in petition. Martin v. Monroe [Ga.] 60 SE 253. In an action on an acceptance of an order drawn by a contractor for the construction of a house on the owner in favor of a materialman, where the contractor was made a party by the defendant, a requested instruction as to liquidated damages under contract between defendant and contractor was properly refused. Foley v. Houston Co-Op. & Mfg. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 224, 106 SW 160.

68. Stiles v. Shedden, 2 Ga. App. 317, 58 SE 515. An instruction that jury may consider certain facts in determining whether defendant was negligent in signing note which he believed to be a different contract is erroneous, where there is no evidence of such facts. New Madrid Banking Co. v. Poplin [Mo. App.] 108 SW 115. Instruction submitting issue of agreement as to application of payments erroneous where not supported by evidence. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413. Instruction as to application of payments held erroneous in that it ignored issue raised by evidence of agreement as to application made subsequent to payments. Id. In an action on an acceptance of an order drawn by a contractor for construction of a house on owner in favor of a materialman, where acceptance was on condition that certain work should be completed, a requested instruction that there was no evidence that work had been completed so as to make acceptance binding was properly refused where work had been substantially performed and architect who was sole arbiter of question had approved the work and accepted building. Foley v. Houston Co-Op. Mfg. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 224, 106 SW 160. Requested instruction as to effect of alterations in note in suit held not supported by evidence. Wood v. Skelleg [Mass.] 81 NE 872. Instruction embodying statement that "a considerable part of plaintiff's business" was the handling of commercial paper held not supported by evidence. Id. Requested instruction as to waiver of demand of payment by indorser held not supported by evidence. Luxora Banking Co. v. Turner [Ark.] 105 SW 873.

69. In action on note where defense was forgery, instruction in reference to stamping held not to affirm validity of note with reference to signature and not to mislead jury in that respect. Beem v. Farrell [Iowa] 113 NW 509.

70. Erroneous statement in instruction as to what holder of note is required to prove in order to recover. Hawkins v. Young [Iowa] 114 NW 1041. Instructions construed together held to correctly instruct jury as to burden of proving payment. McCauley v. Darrow [Mont.] 91 P 1059.

71. Montrose Sav. Bk. v. Claussen [Iowa] 114 NW 547. That an instruction directs jury that plaintiff cannot recover unless he is a bona fide holder before maturity for value is not reversible error, if entire charge fairly advises jury that defect in payee's title must be shown to defeat recovery. Id.

72. So held in regard to instructions as to authority of agent of corporation to receive from maker of note due corporation property for his private use and credit same as partial payment on note. Maloney Mercantile Co. v. Dublin Quarry Co. [Tex. Civ. App.] 107 SW 904.

73. Instruction in action on a note requiring plaintiff to prove facts which the law

Verdict, findings, and judgment.—The verdict should be certain, but it is sufficient if it can be made certain by an inspection of the pleadings.[74] It must be sustained by evidence fairly and reasonably tending to support it,[75] and this rule is not dispensed with by a statute requiring the question of negligence in signing negotiable paper to be submitted to a jury.[76] Where there is a substantial conflict in the evidence the verdict will not be disturbed,[77] but a verdict which is clearly against the weight of the evidence will be set aside.[78] The findings of the court [79] and the judgment [80] must be supported by the evidence. Where a prima facie case is made out, motion for nonsuit is properly denied.[81] The action will not be dismissed on the merits where plaintiff's lacking proof is of a character that can be supplied on another trial, or where he might have tested the validity of a conjunctive denial of a negative pregnant in the answer.[82] Where defendant fails to prove any defense a demurrer to his evidence should be sustained and judgment rendered in favor of the holder.[83] Where it was unnecessary to bring suit on a note, the plaintiff should not be allowed an attorney's fee.[84] Judgment for defendant in an action upon a renewal note, not accepted in absolute payment of the original, is not a bar to an action by plaintiff on the original.[85]

Indemnifying maker of lost instrument. See 8 C. L. 1151

NEUTRALITY; NEW PROMISE, see latest topical index.

NEWSPAPERS.

This topic treats of only the designation and compensation of official newspapers, the necessity and sufficiency of publication of process [88] and other legal notices [87]

presumes from the execution and delivery of the note is erroneous. Dawson v. Wombles, 123 Mo. App. 340, 100 SW 547. Such an instruction is not cured by another instruction predicating plaintiff's right to recover on facts stated in general terms. Id.

74. Verdict in suit for balance due on note held not void for uncertainty as to amount. Smith v. Hightower [Ga. App.] 59 SE 593.

75. Evidence insufficient to justify finding that makers of note were not negligent in signing it upon supposition that it was receipt for goods purchased, and court justified in ordering judgment for holder notwithstanding verdict. Johnson County Sav. Bk. v. Hall, 102 Minn. 414, 113 NW 1011. Where the undisputed evidence shows that purchaser of note took it with notice of its invalidity, verdict in his favor will be set aside. Capital City Brick Co. v. Jackson, 2 Ga. App. 771, 59 SE 92. In an action against administrator on note alleged to have been executed by intestate, verdict that note was not intestate's act and deed held sustained by evidence. Collins v. Collins' Adm'r, 31 Ky. L. R. 563, 102 SW 867. Evidence held sufficient to sustain verdict. Vollmer Clearwater Co. v. Rogers, 13 Idaho, 564, 92 P 579.

76. Rev. Laws 1905, § 2747. Johnson County Sav. Bk. v. Hall, 102 Minn. 414, 113 NW 1011.

77. Vollmer Clearwater Co. v. Rogers, 13 Idaho, 564, 92 P 579.

78. Where all evidence showed that drill for which note was given was of some value, verdict of no cause of action was set aside. American Seeding Mach. Co. v. Slocum, 108 NYS 1042.

79. Evidence held to support finding that consideration for note had failed. Alexander County Nat. Bk. v. Foster, 124 Mo. App. 344, 101 SW 685. Evidence held to sustain finding that note in suit was given in lieu of a prior note. Stevens v. Taylor [Tex. Civ. App.] 19 Tex. Ct. Rep. 428, 102 SW 791. Evidence held to support finding that assignment of note was fraudulent. Button v. Ranfro [Ky.] 108 SW 239.

80. That a note sued on before a justice was produced, filed, and canceled by the judgment on the return day is sufficient, in absence of denial under oath of its execution, to base a judgment for plaintiff upon without other proof of its execution. O'Donnell v. Wade [Mich.] 14 Det. Leg. N. 873, 114 NW 871.

81. In action by widow of assignee of note and mortgage, introduction of assignment and of decree of distribution held to make out a prima facie case. L. W. Blinn Lumber Co. v. McArthur, 150 Cal. 610, 89 P 436.

82. Action on note. Colborn v. Arbecam, 54 Misc. 623, 104 NYS 986.

83. Action no note. Willoughby v. Ball, 18 Okl. 535, 90 P 1017.

84. Graham v. Light, 4 Cal. App. 400, 88 P 373.

85. Ritchie County Bk. v. Bee [W. Va.] 59 SE 181.

86. See Process, 8 C. L. 1449.

87. See such topics as Statutes, 8 C. L. 1976; Municipal Corporations (publication of ordinances), 10 C. L. 881; Public Contracts, 8 C. L. 1473.

being excluded, as are advertising contracts [88] and liability for improper publication.[89]

The designation See 8 C. L. 1151 must be made by the proper officer or board.[90] A newspaper may be "designated" though it was not formally selected for the particular year.[91] A "daily newspaper" implies one printed in the English language.[92] The mere selection by a county board of a newspaper to do printing does not constitute a contract binding upon the county or the newspaper,[93] but implies discretion, and includes power to reconsider and redesignate where the interests of the public require it and private rights are not directly impaired.[94]

The compensation. See 8 C. L. 1152—If no time is specified when compensation shall be fixed, the time of selection on the newspaper is intended.[95] Where a county court fixes compensation as required by statute, its decision is final and reviewable only by writ of review.[96] Compensation will not be allowed for publication in excess of the number of times required by statute.[97]

NEW TRIAL AND ARREST OF JUDGMENT.

§ 1. Nature of the Remedy by New Trial and Right to It in General, 999.
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A. In General, 1001.
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§ 3. Proceedings to Procure New Trial, 1008. Affidavits, 1012. Evidence in Support of Motion, 1012. Order Granting or Refusing New Trial, 1013.
§ 4. Proceedings at New Trial, 1013.
§ 5. Arrest of Judgment, 1013.
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B. Motions and Proceedings Thereon, 1014.
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The scope of this topic is noted below.[98]

§ 1. *Nature of the remedy by new trial and right to it in general.* See 8 C. L. 1153 A new trial is a re-examination in the same court of an issue of fact, after a verdict

88. See Contracts, 9 C. L. 654.

89. See Contempt, 9 C. L. 640; Libel and Slander, 10 C. L. 713.

99. Matter of printing and publishing delinquent taxes is under control of county treasurer and not county board. Woodward County Com'rs v. Smith, 18 Okl. 132, 89 P 1121. Council of a village has authority to select the newspapers in which its ordinances and resolutions shall be published, subject to the provisions of Rev. St. §§ 1536-619, and to direct where all other publications shall be made except in cases where the statutes expressly provide that the selection shall be made by some official. Davis v. Davis, 6 Ohio N. P. (N. S.) 281.

91. Where county commissioners contracted with a newspaper for publication of legal notices for a year, and for succeeding years recognized and dealt with it as official paper of county, such paper for purpose of publication of notice of tax sale was one "designated" by board of county commissioners. Continental Trust Co. v. Link [Neb.] 112 NW 352.

92. Publication in one German and one English paper held not publication in two daily newspapers. Bennett v. Baltimore [Md.] 68 A 14.

93. Parker v. Evening News Pub. Co. [Fla.] 45 S 309. Designation of newspaper with which county treasurer could contract. World Pub. Co. v. Douglas County [Neb.] 113 NW 539.

94. Parker v. Evening News Pub. Co. [Fla.] 45 S 309; World Pub. Co. v. Douglas County [Neb.] 113 NW 539. Allegations insufficient to show that newspaper first selected was misled and injured by redesignation. Parker v. Evening News Pub. Co. [Fla.] 45 S 309.

95. B. & C. Comp. §§ 2636-2638, Flagg v. Columbia County [Or.] 94 P 184. Where county board selected a newspaper without inquiring into circulation, as required by B. & C. Comp. §§ 2636-2638, and fixed compensation pursuant to publisher's offer, but thereafter rightfully rescinded its order and then selected same paper without fixing compensation, it must be presumed to have been satisfied with maximum statutory rate. Id.

96. Flagg v. Columbia County [Or.] 94 P 184.

97. Tax list published for three weeks where only one issue was required. Woodward County Com'rs v. Smith, 18 Okl. 132, 89 P 1121.

98. **It includes,** only, grant of new trial or arrest of judgment in the trial court in civil cases. **It excludes** new trial in criminal cases (see Indictment and Prosecution, 10 C. L. 176), the grant of new trials by reviewing

by a jury, report of a referee, or a decision by the court,[99] to be granted whenever it appears that substantial justice was not done.[1] The right exists only after an issue of fact has been tried.[2] The court may set aside its judgment overruling a motion for new trial and grant a subsequent one during the same term,[3] nor is the number of new trials limited by any invariable rule, though the presumption of the legality of the grant weakens upon each concurrent verdict.[4] In some cases, however, a party is limited by statute to two new trials.[5] Where the evidence develops facts which preclude a recovery by the movant,[6] or where the cause is such that the court may make a final order, a new trial will not be granted.[7] Ordinarily, the granting or withholding a new trial rests in the sound discretion of the trial court,[9] which is limited only by the rule that it must not arbitrarily be exercised but must rest on a reasonable foundation of fact,[9] but the court does not act within discretionary powers when it grants the motion solely because of alleged mistake of the jury in rendering its verdict.[10] In Georgia, by statute, in the granting or refusal of first new trials, the courts are vested with a sound legal discretion,[11] which is applied even where there have been two successive verdicts, one for each party, and a new trial in each instance,[12] but not when there have been two verdicts in favor of the same party and two new trials,[13] nor when the question presented is one purely of law.[14] In the exercise of their discretion, the courts may, as a condition to granting or refusing the new trial, require the payment of premium for extension of bond,[15] or the payment of costs,[16] or a modi-

courts (see Appeal and Review, 9 C. L. 108), the modification and vacation of judgments without resort to new trial (see Judgments, 10 C. L. 437, the erroneous or prejudicial character of particular ruling (see generally Harmless and Prejudicial Error, 9 C. L. 1563, and see the topic dealing with the subject on procedure to which the ruling relates), and the necessity and sufficiency of objections and exceptions (see Saving Questions for Review, 8 C. L. 1822).

99. People v. San Luis Obispo Bk. [Cal.] 92 P 481; Butts v. Anderson [Okl.] 91 P 906; Johnson v. Phenix Ins. Co. [Cal.] 92 P 182.

1. Fogel v. Interborough Rapid Transit Co., 53 Misc. 32, 103 NYS 977; Trower v. Roberts, 17 Okl. 641, 89 P 1113.

2. Case submitted to court on agreed statement of facts, the decision involving only question of law. Sheets v. Henderson [Kan.] 93 P 577. Whenever, under the pleadings, an issue of fact is presented to be decided by a preponderance of evidence, either at law, in equity, or in special proceedings, the right to move for new trial exists. People v. San Luis Obispo Bk. [Cal.] 92 P 481.

3. International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 17 Tex. Ct. Rep. 752, 18 Tex. Ct. Rep. 65, 100 SW 1000.

4. Second concurrent verdict set aside was held not to be abuse of discretion. Stewart v. Central of Georgia R. Co. [Ga. App.] 60 SE 1.

5. Civ. Code Prac. § 341, limits party to two new trials on ground verdict is not sustained by evidence. Champion Ice Mfg. & Cold Storage Co. v. Deisignore [Ky.] 105 SW 1181.

6. Action for damages for negligent death of party. Evidence conclusively showed that decedent's want of care contributed to his death. Butteris v. Mifflin & Linden Min. Co. [Wis.] 113 NW 642.

7. Wilson v. McCutchen Estate Claimant [Iowa] 114 NW 551.

8. Charlton v. Kelly [C. C. A.] 156 F 433; Owen v. Giles [C. C. A.] 157 F 825; Vannico v. Dungan [Ind. App.] 83 NE 250.

9. Ridge v. Johnson [Mo. App.] 107 SW 1103. The refusal of the court to grant a new trial is not the subject of an assignment of error, except for a gross abuse of discretion. McFadden v. McFadden, 32 Pa. Super. Ct. 534. It is not an abuse of discretion to grant new trial after a view of premises by jury, if, from such view, the jury could not have received much assistance therefrom. White v. Barling [Mont.] 93 P 348.

10. Butteris v. Mifflin & Linden Min. Co. [Wis.] 113 NW 642.

11. Bagley v. Shumate, 128 Ga. 78, 57 SE 99; Patman v. McCord, 1 Ga. App. 804, 57 SE 946. Judgment ordering new trial upheld, the verdict not demanded by the evidence. Jeffers v. Central of Georgia R. Co., 1 Ga. App. 331, 57 SE 923; Bailey v. Nooks, 1 Ga. App. 276, 57 SE 924.

12. Jordan v. Dooly, 129 Ga. 392, 58 SE 879.

13. If the evidence on the last trial, though conflicting, supports the second verdict, it should not be set aside. Scribner's Sons v. Mutual Bldg. Co., 1 Ga. App. 527, 58 SE 240.

14. Liquid Carbonic Acid Mfg. Co. v. Paulk & Julian [Ga. App.] 59 SE 1125.

15. New trial not asked for till time for taking writ of error expired. Wooster v. Calhoun Circuit Judge [Mich.] 14 Det. Leg. N. 746, 114 NW 232.

16. Action for damages for personal injuries, and given on honest opinion of experts that injury was permanent, which proved incorrect, and motion by defendant after several years. Fogel v. Interborough Rapid Transit Co., 53 Misc. 32, 103 NYS 977. New trial granted because, on the main point evidence was overwhelmingly in favor of defendant. Wilmerding v. Feldman, 54 Misc. 626, 104 NYS 776. Where verdict should have been for defendant, or for plaintiff in a sub-

fication of the verdict,[17] such as a reduction in amount;[18] but the judge may not by suggestion or order, cause the reduction of the verdict and make it a condition for the refusal of a new trial.[19] This right to new trial may be lost [20] or waived,[21] but a party is not estopped by accepting costs, and delay in moving to dismiss the motion.[22]

§ 2. *Grounds. A. In general.* See 8 C. L. 1155—New trial should not be granted for other grounds than those provided by statute.[23] They are not granted for error of law or procedure, unless it has worked material harm,[24] nor for failure of court to find on an immaterial issue,[25] nor for discrepancies in testimony not amounting to perjury,[26] nor because the litigants were married before judgment,[27] nor for inability to procure a transcript of oral evidence when adverse party offers to waive his advantage.[28] But unavoidable casualty and misfortune,[29] such as the abandonment of the suit by attorney, without notice,[30] the unavoidable absence of attorney [31] and client, may justify a new trial.[32] The motion may be granted, too, where it appears from the record that the verdict was influenced by passion and prejudice,[33] where a false or immaterial issue has been intruded in the case,[34] or for the disqualification of a juror,[35] but not when improperly drawn, if no objection made till after verdict.[36]

stantial sum, a new trial will not be conditioned upon plaintiff's payment of costs. Duffy v. New York, 105 NYS 68.

17. Smith v. Ellyson [Iowa] 115 NW 40; North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495, 14 Det. Leg. N. 509, 112 NW 1114; Goss v. Goss, 102 Minn. 346, 113 NW 690.

18. Evansville & Princeton Trac. Co. v. Broermann [Ind. App.] 80 NE 972; McGraw v. O'Neil, 123 Mo. App. 691, 101 SW 132. Where verdict is excessive, the court is amply justified in granting new trial unless substantial portion of it is remitted. McOwen v. Seattle Elec. Co. [Wash.] 93 P 518. Double judgment result of oversight, and error admitted. Costello v. Scott [Nev.] 93 P 1. Excessive verdict through mistake in the basis of calculation. Lewis v. Northern Pac. R. Co. [Mont.] 92 P 469.

19. Action for personal injuries. Verdict disapproved by judge as excessive, whereupon plaintiff wrote off amount suggested voluntarily. Seaboard Air Line R. Co. v. Randolph, 129 Ga. 796, 59 SE 1110.

20. A party may lose his right to new trial by proceeding jointly with a party not entitled thereto. Separate notices should be given if there is doubt as to the identity of relation or equality of right therein, though they be represented by the same attorney. Parnell v. Davenport [Mont.] 93 P 939.

21. Defendant, claiming nonsuit proper, may except directly to court's refusal to nonsuit. Rice v. Ware & Harper [Ga. App.] 60 SE 301. Right to new trial is not waived by application for judgment notwithstanding verdict. Sallden v. Little Falls, 102 Minn. 358, 113 NW 884.

22. Buffalo Land & Exploration Co. v. Strong, 101 Minn. 27, 111 NW 278.

23. That movant was unable to get a transcript of the evidence of the trial because of the death of the stenographer, not sufficient. Butts v. Anderson [Okl.] 91 P 906.

24. Reid v. Rhode Island Co. [R. I.] 67 A 328. A defendant who is not prejudiced is not entitled to a new trial. Gilmore v. Taylor [Ga. App.] 59 SE 325; Feldman v. Levy, 106 NYS 1092. Remarks of the court are not errors of law within the statute authorizing new trial on that ground. Hopkins v. Kitts [Mont.] 94 P 201. Refusing continuance no ground if discretion not abused. Schamper v. Ullrich, 131 Wis. 524, 111 NW 691. A new trial will not be granted to allow a party to introduce evidence on a matter as to which he has been concluded by a former adjudication. Hutchins v. Berry [N. H.] 66 A 1046.

25. Immaterial because barred. Puckhaber v. Henry [Cal.] 93 P 114.

26. Flock v. Kaufman, 107 NYS 752.

27. Graves v. Rivers [Ga. App.] 60 SE 274.

28. In re Winch's Estate [Neb.] 112 NW 293.

29. Admission in pleading, clearly an inadvertence due to error of counsel, resulting in judgment against truth and right of the matter. Shive v. Merritt, 31 Ky. L. R. 978, 104 SW 368.

30. Suit brought and abandoned by attorney, without fault on client's part, or notice to her. She lived remote from county seat and was unacquainted with court proceedings. Ray v. Arnett [Ky.] 106 SW 828.

Withdrawal of counsel is not ground for new trial where no motion for continuance was made and no exception of any kind preserved. Young v. Davidson, 129 Ill. App. 657.

31. Hornbuckle v. Luther [Tex. Civ. App.] 20 Tex. Ct. Rep. 80, 105 SW 995. But where an application for continuance is refused on this ground, new trial not granted. Hartford Fire Ins. Co. v. Hammond [Colo.] 92 P 686.

32. Party lived 138 miles from place of trial; knew no attorney at place of trial; started there with attorney in ample time, but delayed by trains; telegraphed court of fact. Trial set for 13th; arrived at 11 a. m. of that date after judgment. New trial. Hornbuckle v. Luther [Tex. Civ. App.] 20 Tex. Ct. Rep. 80, 105 SW 995. Absence of client not ground for new trial where trial gone into without any suggestion of such absence. Denmon v. Hillyer, 129 Ga. 698, 59 SE 806.

33. Aherns v. Fenton [Iowa] 115 NW 233.

34. Not proper to allow the jury to consider an issue not presented by pleadings or proof. King v. Knowles, 122 App. Div. 414, 106 NYS 760.

35. An employe of a party is not a competent juror, and failure to remove him is er-

(§ 2) *B. Misconduct of parties, counsel, or witnesses.*[See 8 C. L. 1156]—The question of granting new trial for improper conduct of litigants rests largely in the discretion of the trial judge [37] which is exercised as justice warrants,[38] nor need the court inquire whether the rights of the other party have been materially affected.[39] The misconduct may be cause for new trial though it occurred long before the trial,[40] nor can it be justified by showing that the other party has been guilty of like conduct.[41] Whether it has been waived depends on whether or not the misconduct was so flagrant as to make a vacation of the verdict a matter of public policy.[42] The granting of the motion for misconduct of counsel, also depends on whether or not such conduct was prejudicial.[43]

(§ 2) *C. Rulings and instructions at the trial.*[See 8 C. L. 1156]—The failure to adopt presumptions having judicial sanction,[44] or the submission to the jury of a question of law, is ground for new trial where a general verdict is returned.[45]

(§ 2) *D. Misconduct of or affecting jury.*[See 8 C. L. 1157]—It must appear that the misconduct complained of unduly [46] influenced the jury,[47] or might reasonably have done so.[48] Yet, conduct of a juror, which, standing alone, might be harmless,

ror. Atlantic Coast Line R. Co. v. Bunn, 2 Ga. App. 305, 58 SE 538. Employe of defendant, who was striker three years before, is disqualified. Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 SW 43. That a juror was disqualified is no ground for new trial, unless it is clear there was partiality and an unfair trial, even though the fact of disqualification was not known till after trial. Sansouver v. Glenlyon Dye Works [R. I.] 68 A 545.

36. Di Stefano v. Rhode Island Co. [R. I.] 66 A 200.

37. McGraw v. O'Neil, 123 Mo. App. 691, 101 SW 132.

38. That a party, through his own and friends' efforts, has sought by reprehensible methods to create a sentiment at the place of trial that will influence a verdict in his favor is misconduct warranting a new trial. Doyle v. Burns [Iowa] 114 NW 1. Giving jurors $5 apiece after verdict, and attempting to bribe an official having charge of the property in litigation, is such misconduct on the part of a successful litigant as will call for new trial. Merritt v. Bunting [Va.] 57 SE 567. But, because plaintiff, in a personal injury case, during defendant's argument, began weeping and was taken suddenly out of court (Connell v. Seattle, etc., R. Co. [Wash.] 92 P 377), or joining in general social conversation with the jury during recess is not (McGraw v. O'Neil, 123 Mo. App. 691, 101 SW 132).

39. Where misconduct of the prevailing party is shown, it is the duty of the court to set aside the verdict without inquiry whether the rights of the other party have been materially affected. Phares v. Krhut [Kan.] 91 P 52.

40. Prevailing party, being clerk of court, caused names placed in jury box illegally. Held ground for new trial. Phares v. Krhut [Kan.] 91 P 52.

41, 42. Doyle v. Burns [Iowa] 114 NW 1.

43. Misconduct of counsel prejudicial to the adverse party, objected to and no steps taken to remove its prejudicial effect, is ground for new trial. Winslow v. Smith [N. H.] 65 A 108. So, too, is misconduct which influenced the passions and prejudice of the jury. Fred Heim Brew. Co. v. Hamilton [Iowa] 114 NW 1039. But remarks of counsel for which the court has reproved him will not call for a new trial unless the court would itself be influenced by them. Kingsley v. Finch, Pruyn & Co., 54 Misc. 317, 105 NYS 968. Nor are statements by plaintiff's counsel that some of the witnesses were railroad men, that one had been discharged and hired over and that his client was in court by his advice, after consultation with physician, prejudicial. Stephenson v. Portland R. Co. [Me.] 68 A 453. A statement by the attorney of what the supreme court had decided in the case under investigation not ground for new trial where verdict is well supported by the evidence. City Elec. R. Co. v. Salmon, 1 Ga. App. 491, 57 SE 926. That counsel for plaintiff stated that the supreme court must have thought his client had a good case or it would not have sent it back is not such misconduct as will justify a new trial when both sides had frequently referred to the former trial and the court instructed the jury to disregard the statement. Brennan v. Seattle [Wash.] 90 P 434.

44. Presumption of notice from certain circumstances should be adopted in the absence of explanation. Cleveland, etc., R. Co. v. Moore [Ind.] 82 NE 52.

45. Beals v. Cleveland, etc., R. Co., 153 F 211.

46. City of Chicago v. Saldman, 225 Ill. 625, 80 NE 349, afg. 129 Ill. App. 282; Hoyt v. Hoyt [Iowa] 115 NW 222.

47. Gulf, etc., R. Co. v. Cook [Tex. Civ. App.] 102 SW 121. Casual remarks of juror during deliberations, not shown to have been heeded, that the judge was called to jury room and asked questions which he did not answer, or that some of the jurors played in a social game of cards with parties not jurors, no reference to the case having been made, are not sufficient. Ayrhart v. Wilhelmy [Iowa] 112 NW 782. Remarks made by one juror to the others after the verdict is arrived at is not misconduct. Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488.

48. That one of the litigants, before testifying, placed an order for a fine overcoat with a juror who was a tailor, sufficient.

may when taken in connection with other misconduct at the trial, be sufficient ground for new trial,[49] and it will be presumed prejudicial under some circumstances.[50] The court has discretionary power to grant new trial for misconduct,[51] which will be exercised as justice dictates, hence the motion will be granted where a juror has investigated on his own account,[52] unless the movant could not have been prejudiced thereby,[53] or for making up a compromise verdict,[54] which the movant must show,[55] or for intoxication;[56] but not for sending out for refreshments while deliberating,[57] or drinking socially and conversing with an outsider,[58] nor for making incorrect or untrue answers to special interrogatories,[59] nor for remarks made to them by outsiders when harmless,[60] or made so by caution from court.[61] However, if the verdict is vitiated, it is vitiated as a whole.[62]

(§ 2) *E. Irregularities or defects in verdict or findings.* See 8 C. L. 1157—That the verdict was received in the absence of counsel is no ground for new trial,[63] nor for receiving a general verdict although special interrogatories were put to the jury which it failed to respond to, such interrogatories being immaterial,[64] nor for an improper deduction from the verdict for plaintiff when defendant makes the motion,[65] but a verdict brought in after being sent back to reconsider a chance verdict is erroneous.[66] Where a special finding inconsistent with the verdict is complete and warrants judgment non obstante, it is error to grant a new trial instead.[67]

Akin v. Lake Superior Consol. Iron Mines [Minn.] 114 NW 654.

49. That the juror said to other jurors the parties had no right to a trial in that county, that they did not pay taxes there, and that defendant before the trial had created hostility for plaintiff and friendship for himself where the case was to be tried, are sufficient. Doyle v. Burns [Iowa] 114 NW 1.

50. In action for personal injuries by railroad company in use of its road, juror, without knowledge of parties or court, visited scene of accident, and examined the switch that caused accident, and other switches in the yard. Floody v. Great Northern R. Co., 102 Minn. 81, 112 NW 875.

51. Gulf, etc., R. Co. v. Blue [Tex. Civ. App.] 18 Tex. Ct. Rep. 377, 102 SW. 128. Where court had all the jurors before it, heard their testimony, the refusal to grant new trial will not be interfered with. Foley v. Northrup [Tex. Civ. App.] 19 Tex. Ct. Rep. 921, 105 SW 229.

52. If a juryman, on his own account, investigates a fact in issue and communicates the result to his fellows, it is misconduct calling for new trial. Hoskovec v. Omaha St. R. Co. [Neb.] 115 NW 312.

53. If a juror could not get any material evidence on visiting the premises under consideration, it is not such misconduct as to justify a new trial, especially when he and the other jurors were directed to disregard any information he received by such visit. Brennan v. Seattle [Wash.] 90 P 434.

54. Feldman v. Levy, 106 NYS 1092. In action for damages to real estate, that the jurors agreed to write on piece of paper the amount each was in favor of and divide the aggregate by 12, which resulted in the sum of a fraction less than $215, and that they agreed to make it $215, is not such misconduct as calls for new trial, the verdict not having been agreed upon till after the above result was ascertained. Gulf, etc., R. Co. v. Blue [Tex. Civ. App.] 18 Tex. Ct. Rep. 377, 102 SW 128.

55. Slips of paper found in the jury room, tending to prove a quotient verdict, but not shown to have been written on by the jury. Denial by juror that verdict was so found. Alleged appropriation of paper by counsel and denial. Insufficient evidence. Birmingham R., L. & P. Co. v. Turner [Ala.] 45 S 671.

56. If the intoxication of the juror was not known to movant before verdict and was such as to influence the finding, new trial granted. Alabama Lumber Co. v. Cross [Ala.] 44 S 563.

57. Long v. Davis [Iowa] 114 NW 197.

58. Affidavits showed jurors drank beer with agent of successful party, and one juror held private conversation with him. It was denied that agent was in employ of successful party and shown case was not discussed in conversation. Jurors men of good character and responsible business men. Court's discretion in refusing new trial not abused. St. Louis Belt & T. R. Co. v. Cartan Real Estate Co., 204 Mo. 565, 103 SW 519.

59. M. O'Connor Co. v. Gillaspy [Ind.] 83 NE 738.

60. Following remarks to jury by marshal held harmless: "What is the matter with you that you can't agree in this case? This is a very important case and this is the second time it has been tried. You ought to be able to come to some agreement some way. You had better call up the judge and get some more instructions." Charlton v. Kelly [C. C. A.] 156 F 433.

61. No misconduct exists when, although juror was approached and charged with being "fixed" to render a verdict for defendant, the juror reported the matter to court, who cautioned the jury on the subject and counsel expressed satisfaction with the whole jury. Boyle v. Virginia Lumber Co., 102 Minn. 508, 112 NW 1140.

62. Ahrens v. Fenton [Iowa] 115 NW 233.

63, 64. Reid v. Rhode Island Co. [R. I.] 67 A 328.

65. Tompkins v. Lamb, 121 App. Div. 366, 106 NYS 6.

66. Jury brought in chance verdict and court directed another deliberation, after

(§ 2) *F. Verdict or findings contrary to law or evidence.*[See 8 C. L. 1158]—The court may grant new trial when the verdict is the result of mistake,[68] passion, or prejudice,[69] contrary to law[70] or evidence,[71] or because against the weight of evidence,[72] within the court's discretion,[73] which is not interfered with unless abused,[74]

which same verdict, except that amount was changed. Harrington v. Butte, etc., R. Co. [Mont.] 93 P 640.

67. House v. Steffy [Iowa] 113 NW 321.

68. When the verdict is manifestly, from the pleading and evidence, the result of plain mistake in calculation against the movant, new trial granted. Gilmore v. Taylor [Ga. App.] 59 SE 325.

69. If the evidence of the defeated party is so excessively preponderating as to indicate that the verdict was the result of passion, prejudice, or mistake, new trial granted. Graham v. New York City R. Co., 54 Misc. 566, 104 NYS 869. Passion or prejudice must be apparent to warrant a new trial therefor. Lewis v. Northern Pac. R. Co. [Mont.] 92 P 469.

70. The record must affirmatively show that the verdict was contrary to law before it can be set aside. Scribner's Sons v. Mutual Bldg. Co., 1 Ga. App. 527, 58 SE 240. A verdict is contrary to law when it is clearly established by the evidence that the verdict returned is contrary to what the law directs under such state of facts. Chicago, etc., R. Co. v. Groves [Okl.] 93 P 755. Not granted on ground that verdict contrary to law when there is no conflicting testimony and the finding apparently proper. Meikliham v. Clarke [R. I.] 67 A 450. A verdict will not be held to be contrary to the law and evidence and without evidence to support it, if there was evidence in the case upon which the verdict could have been based. City of Lawrenceville v. Born, 128 Ga. 240, 57 SE 318. If the evidence is sufficient to support the verdict, it is not error to overrule the motion, the only ground alleged being that the verdict is contrary to law and evidence. Fender v. Valdosta Lumber Co., 128 Ga. 622, 58 SE 163; Giddens v. Giddens, 129 Ga. 246, 58 SE 708. Where the court fails to find on all material issues, the "decision is against the law." Brown v. Macey, 13 Idaho, 451, 90 P 339.

71. Moneagle v. Livingston [Ala.] 43 S 840; Leeds v. Cetenich [R. I.] 67 A 446. The parties are entitled to have the case tried and determined according to the issue, not upon some fancied theories of the court or jury. Action on contract and unwarranted computation of damages. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826. If a material issue is wholly unsupported by the evidence, new trial should be granted. Prinz v. Moses [Kan.] 91 P 785. Action for negligent killing. Plaintiff failed to prove death was due to the injuries received by reason of the negligence. McIntyre v. Interurban St. R. Co., 105 NYS 106. If the court believes the evidence is wholly insufficient, a new trial should not be denied because heavier damages may be cast on defendant. Rogers v. MacBeth, 108 NYS 74. If there is evidence to support the verdict, it is not error as matter of law to refuse new trial on the ground that verdict is contrary to evidence. Holder v. Prudential Ins. Co., 77 S. C. 299, 57 SE 853. If the verdict is not clearly and palpably unjust, it should not be set aside, if there is evidence to support it, because the court would have found otherwise. Lifshitz v. Schwartz, 107 NYS 579. The court's discretion is properly exercised in refusing to grant new trial on ground that verdict unsupported by evidence, if there is any credible evidence tending to support it. Salphart v. Reinig [Wis.] 115 NW 132. New trial not granted because verdict contrary to evidence if the credibility of the witness seems to have been doubted by the jury. It appeared on trial that there were discrepancies in the testimony and contradictions on circumstantial points. Foreman v. New York City R. Co., 54 Misc. 557, 104 NYS 932. If the court has strong reason to believe the jury has erred, capriciously or ignorantly, as to the credibility of testimony, new trial. Roe v. Doe [Ala.] 43 S 856. If the jury disregard evidence, new trial. If the evidence disregarded would have entitled movant to verdict, new trial will be granted. Slusher v. Pennington, 31 Ky. L. R. 950, 104 SW 354.

72. If the court believes that the evidence preponderates against the finding, it is his duty to grant a new trial. Weinstein v. Toledo, etc., R. Co. [Mo. App.] 106 SW 1125; James v. Oliver [Mo. App.] 107 SW 1012; White v. Barling [Mont.] 93 P 348. If the verdict is plainly against the evidence, it is the court's duty to grant new trial. Gould v. St. John, 207 Mo. 619, 106 SW 23; Kellogg v. New York Edison Co., 120 App. Div. 410, 105 NYS 398; Multnomah County v. Willamette Towing Co. [Or.] 89 P 389. If the evidence very strongly preponderates against the verdict, a new trial should be granted. Di Stefano v. Rhode Island Co. [R. I.] 66 A 200; St. Amand v. Manville Co. [R. I.] 67 A 368. Where reasonable men might differ as to the inferences to be drawn therefrom, a new trial will not be granted on the ground that the verdict is against the weight of evidence. New York Evening Journal Pub. Co. v. William F. Simpson Advertising Ag., 106 NYS 858; Brown v. Grossman, 108 NYS 653. To set aside the verdict because against the weight of evidence, it must appear that it was influenced by bias, passion, prejudice, corruption (Kingsley v. Finch, Pruyn & Co., 54 Misc. 317, 105 NYS 968), mistake or ignorance (Dambmann v. Metropolitan St. R. Co., 55 Misc. 60, 106 NYS 221), and the court must find the verdict plainly against the decided weight and preponderance of the evidence. "Decided" in the sense of "pronounced." Miller Supply Co. v. Crane, 61 W. Va. 658, 57 SE 268.

73. Reeves v. Douglas, 1 Ga. App. 24, 57 SE 901; Stephens v. Elliott [Mont.] 92 P 45; White v. Barling [Mont.] 93 P 348. To disturb verdict because against weight of evidence is exclusively within discretion of trial court. Corum v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1093.

74. Parsons v. Utica Cement Mfg. Co. [Conn.] 66 A 1024; Gould v. St. John, 207 Mo. 619, 106 SW 23. Within court's discretion to grant new trial because verdict against

but the court will not interfere where the case is close[75] and the evidence conflicting.[76] The court has this power also,[77] where the verdict is so plainly[78] or so grossly excessive that it ought not to be allowed to stand.[79] Granting new trial for this cause is also within the discretion of judge,[80] hence, though he disapprove the verdict for this reason, he is not obliged to grant a new trial,[81] nor will he merely because his finding would have been different,[82] nor will he if caused by mistake which may easily be harmonized with an honest and conscientious regard for duty,[83] and this power exists too where the verdict is inadequate.[84]

(§ 2) *G. Surprise, accident, or mistake.*[See 8 C. L. 1159]—New trial may be granted on the ground of perjury and mistake,[85] or surprise, in a proper case,[86] but

weight of evidence, and such discretion is not abused if there is substantial evidence against the verdict. Karnes v. Winn, 126 Mo. App. 712, 105 SW 1098.

75. Georgia R. & Banking Co. v. Lloyd, 129 Ga. 650, 59 SE 801.

76. Jordan v. Dooly, 129 Ga. 392, 58 SE 879; Early v. Rhode Island Co. [R. I.] 67 A 363; Steere v. Page [R. I.] 67 A 363; Kenyon v. Kenyon [R. I.] 67 A 431; Curry v. Rhode Island Co. [R. I.] 68 A 725. In a conflict of testimony, when the facts found by the jury will sustain the verdict, the court will not set it aside, although in their opinion the jury might, upon the evidence, have found otherwise. Bennett v. Busch [N. J. Law] 67 A 188. Controlling issue of fact fairly submitted, towit, whether payment made by plaintiff was penalty, forfeiture, or partial payment on purchase. Evidence to show payment on contract of sale which defendant had failed to carry out, as well as to show payment on different transaction in which defendant had complied with obligations. Motion refused. Wilcox v. Sergeant [Ga. App.] 60 SE 810. If the evidence is conflicting on a material issue, new trial will not be granted on the ground that the verdict is not supported by the evidence. Webster v. Armstrong [Iowa] 113 NW 549. If there is a substantial conflict in evidence as to the essential facts, the court's discretion in refusing a new trial should not be interfered with. Multnomah County v. Willamette Towing Co. [Or.] 89 P 389. No error of law assigned. Defendant's testimony authorized finding. Testimony of plaintiff well supported as to some issues, while defendant's evidence in conflict therewith unsupported. Refusal of new trial not erroneous. Smith v. Hembree [Ga. App.] 60 SE 126. Motion for new trial on ground that verdict was contrary to and without support from evidence held properly denied where evidence was conflicting. Cohankus Mfg. Co. v. Rogers' Guardian, 29 Ky. L. R. 747, 96 SW 437.

77. Boney v. Atlantic, etc., R. Co. [N. C.] 58 SE 1082.

78. Stephenson v. Portland R. Co. [Me.] 68 A 453; Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 SW 43; Reid v. Rhode Island Co. [R. I.] 67 A 328. Action of trespass to realty, or forcible entry and eviction. At time of suit no trespass, forcible entry or eviction from house. Trespass to adjoining lot resulted in nominal damages only, and no material interference with business, for all which verdict gave damages. New trial. Salmon v. M. E. Blasier Mfg. Co., 108 NYS 448.

79. Ahrens v. Fenton [Iowa] 115 NW 233. New trial not granted because verdict excessive on a mere preponderance of proof, unless it is so evident that the jury have erred as to convince of mistake, prejudice or partiality. Quinlan v. Welsh [N. J. Law] 66 A 950. Amount sued for $600 with interest from 1894 to 1901. Verdict for $1,031 excessive. Kytle v. Kytle, 128 Ga. 387, 57 SE 748. The highest estimate being $500, a verdict for $589 is excessive and new trial properly granted though plaintiff offered to remit the excess. Prosch v. Seattle [Wash.] 90 P 920. Verdict for $3,500 in personal injury case held not excessive. Injury about ribs and spine; very nervous since accident, and unable to follow any vocation. Connell v. Seattle, etc., R. Co. [Wash.] 92 P 377. In action for burning timber, verdict for $900 held not excessive, the proof being conflicting. Mobile & O. R. Co. v. Caldwell [Ky.] 106 SW 236. New trial not granted where excessive verdict reduced by remittitur to reasonable amount. Galveston, etc., R. Co. v. Wallis [Tex. Civ. App.] 104 SW 418. As a general rule, in tort actions, a new trial will not be granted on the ground of inadequate damages. Bolles v. Bloomington & Normal R. Elec. & Heating Co., 130 Ill. App. 263.

80. Morrell v. Lawrence, 203 Mo. 363, 101 SW 571.

81. Williams v. Tolbert, 76 S. C. 211, 56 SE 908.

82. Entzminger v. Seaboard Air Line R. [S. C.] 60 SE 441.

83. McGraw v. O'Neil, 123 Mo. App. 691, 101 SW 132.

84. Personal injuries, proving permanent, confined to bed and house two months; physician's bill $100. Verdict for $200. Tourtelotte v. Westchester Elec. R. Co., 120 App. Div. 417, 105 NYS 50. Action for severe personal injuries, causing intense suffering and confinement to bed for half the time. Verdict for $100 inadequate. Anglin v. Columbus, 128 Ga. 469, 57 SE 780.

85. If the court is satisfied that perjury and mistake was an important factor in producing the verdict, new trial. Ridge v. Johnson [Mo. App.] 107 SW 1103. Where judgment was obtained by perjury. Sargent Co. v. Baublis, 127 Ill. App. 631.

86. Surprise at the application of law to undisputed facts is no ground for a new trial. Hapgoods v. Lusch, 123 App. Div. 27, 107 NYS 334. Surprise cannot be relied on when movant's own evidence at trial shows he anticipated the evidence alleged as surprise. Geter v. Central Coal Co. [Ala.] 43 S 367. Where the evidence is competent under the general allegations, the defendant cannot set up surprise. Action for personal injuries alleging plaintiff was made sick and

the general rule is that a plaintiff is not entitled to a new trial on the ground of surprise at evidence given for the defendant.[87] To entitle movant to new trial for this cause he must have exercised proper diligence to avoid it,[88] as well as ask for continuance [89] or withdrawal of a juror,[90] and the court should be satisfied that a different result will be reached.[91]

(§ 2) *H. Newly-discovered evidence.*[See 8 C. L. 1160]—Application for new trials on ground of newly-discovered evidence are looked upon by the courts with distrust,[92] yet, where the ends of justice require it, new trials are allowed on this ground.[93] Such evidence is defined as the existence of material facts unknown to the moving party at the time of the trial and which reasonable diligence could not have discovered,[94] hence, known of some time before the finding is not newly-discovered within the meaning of the law.[95] There must be no doubt that the witness will testify as movant claims,[96] or as to the weight of the evidence.[97] The evidence must be legal,[98] must bear on the issue and sustain the plea;[99] it must be of such permanent and un-

disabled, and proof of tubercular condition resulting. Roenbeck v. Brooklyn Heights R. Co., 108 NYS 80. A party cannot claim to be surprised as to testimony when it was the same as on former trials or could have been elicited on cross-examination. Parkins v. Missouri Pac. R. Co. [Neb.] 113 NW 265. A party cannot successfully rely on surprise as to testimony of witness when it appears that the evidence is hearsay and the witness never sworn. Roberts v. First Nat. Bk., 149 Mich. 507, 14 Det. Leg. N. 507, 112 NW 1129. Plaintiff is not entitled to a new trial on the ground of surprise at evidence given by defendant where there is no objection made to its introduction nor any request for time (Manion v. Lake Erie, etc., R. Co. [Ind. App.] 80 NE 166), nor anything done by the adverse party to lead movant to assume no other witnesses would be called at the trial (Strand v. Great Northern R. Co., 101 Minn. 85, 111 NW 958). Surprise cannot be pleaded where the attorney did not know he could produce any evidence on the point, after making diligent efforts to do so before trial. James McCreery Realty Corp. v. Equitable Nat. Bk., 54 Misc. 508, 104 NYS 959. The failure of a witness, living without the jurisdiction, to attend, because of sickness in his family, is no ground for a new trial though he promised to be present. Atlantic, etc., R. Co. v. Johnson, 127 Ga. 392, 56 SE 482. The absence of a witness no ground for new trial, it appearing that his evidence would be cumulative, and that counsel went into trial with the knowledge that the witness would not appear. North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495, 14 Det. Leg. N. 509, 112 NW 1114. Movant failed to set out fully all he expected to prove by witness. Hartford Fire Ins. Co. v. Hammond [Colo.] 92 P 686.

87. Manion v. Lake Erie, etc., R. Co. [Ind. App.] 80 NE 166.

88. If it is apparent that movant was negligent in his search for evidence, the motion, on ground of surprise, will be denied. Hill v. Ellinghouse [Mont.] 93 P 345. Witness proposed to be called was one to whom party had sold the goods concerning which testimony desired. Oglebay v. Tippecanoe Loan & Trust Co. [Ind. App.] 82 NE 494. The accident or surprise relied on, and the diligence in attempting to obtain the evidence desired, must appear from the affidavit. Hall v. Jensen [Idaho] 93 P 962.

89. Geter v. Central Coal Co. [Ala.] 43 S 367.

90. Hapgoods v. Lusch, 123 App. Div. 27, 107 NYS 334; Roenbeck v. Brooklyn Heights R. Co., 108 NYS 80.

91. Rauer's Law & Collection Co. v. Bradbury, 3 Cal. App. 256, 84 P 1007; Hill v. Ellinghouse [Mont.] 93 P 345.

92. Hancock v. Beasley [N. M.] 91 P 735.

93. Action on note and credit of $350, claimed by defendant, not indorsed on note, but fragment of receipt showed the word "fifty." Court allowed credit of $50. Evidence relied on proved receipt was originally for $350. New trial allowed. Million v. Million's Ex'rs, 31 Ky. L. R. 1156, 104 SW 768. Action for merchandise delivered in bad condition. Question of whose agent expressman was who delivered goods. Plaintiff claimed expressman agent of defendant. Verdict for plaintiff. Evidence relied on was memorandum in handwriting of plaintiff showing statement of goods and where delivered. Diligence shown. New trial. Vandeventer Furniture Co. v. Warren Commission & Investment Co. [Mo. App.] 105 SW 653.

94. Fogel v. Interborough Rapid Transit Co., 53 Misc. 32, 103 NYS 977; El Paso S. W. R. Co. v. Barrett [Tex. Civ. App.] 19 Tex. Ct. Rep. 418, 101 SW 1025.

95. Evidence discovered Mar. 1, finding April 10. Burk v. Matthews Glass Co. [Ind. App.] 81 NE 88.

96. Clements v. Stapleton [Iowa] 113 NW 546.

97. Action on insurance policy and denial of payment of premium. Receipt discovered did not show premium paid. Hanson v. Aetna Life Ins. Co. [Neb.] 113 NW 114.

98. Action on insurance policy. Evidence relied on statements of deceased that premiums had not been paid. Hanson v. Aetna Life Ins. Co. [Neb.] 113 NW 114. Hearsay evidence not admissible on second trial. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 18 Tex. Ct. Rep. 248, 101 SW 541.

99. In re Doolittle's Estate [Cal.] 94 P 240; Button v. Button [Conn.] 67 A 478; Strong v. Moore, 75 Kan. 437, 89 P 895; Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 18 Tex. Ct. Rep. 248, 101 SW 541. The evidence must tend directly to establish or disprove some issue within the pleadings,

erring character as to preponderate greatly or have a decisive influence upon the evidence to be overturned by it,[1] so as to be likely to change the result[2] upon the crucial question decided by the jury.[3] It must not be contradictory or impeaching,[4] except under unusual circumstances,[5] nor must it be cumulative.[6] That the evidence is cumulative is not, however, an insuperable reason for refusing a new trial,[7] hence, the rule does not apply if it goes to the foundation of movant's defense and is of a decisive character,[8] and in some jurisdictions it is no ground for denying the motion.[9] Proper diligence on the part of movant must have been exercised,[10] especially

Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. Where the materiality of the new evidence is apparent, new trial will be granted. Rosenthal v. Bell Realty Co., 52 Misc. 265, 103 NYS 194. Action for damages for personal injuries. Evidence relied on indicated that origin of trouble antedated the accident. Geer v. Rhode Island Suburban R. Co. [R. I.] 67 A 449. Action for personal injuries. Evidence tended to show plaintiff not in condition claimed and jury took exaggerated view of severity of injuries. Thornton v. Rhode Island Suburban R. Co. [R. I.] 67 A 451. New trial not granted where the bearing of the evidence on the case would be slight. Action for damages from false representations in sale of land. Evidence relied on were statements made to movant after his purchase. Long v. Davis [Iowa] 114 NW 197. Not granted for newly-discovered evidence not bearing on the main issue but only affecting the credibility of witnesses. Heath v. Cook [R. I.] 68 A 427.

1. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 31 Ky. L. R. 931, 104 SW 320; Cahill v. Mullins 31 Ky. L. R. 72, 101 SW 336.

2. In re Winch's Estate [Neb.] 112 NW 293; Parkins v. Missouri Pac. R. Co. [Neb.] 113 NW 265; James McCreery Realty Corp. v. Equitable Nat. Bk., 54 Misc. 508, 104 NYS 959; Romaine v. Spring Valley, 120 App. Div. 502, 105 NYS 256; Flock v. Kaufman, 107 NYS 752; Lee v. Rhode Island Co. [R. I.] 66 A 835; Meikleham v. Clarke [R. I.] 67 A 450; McDonald v. Lawton Spinning Co. [R. I.] 67 A 451; Wilson's Ex'r v. Keckley [Va.] 59 SE 383. In a close case, if the evidence be affirmative and will assist in determining the controversy, new trial will be granted. McDonald v. Smith [Minn.] 112 NW 627. Levy on property as belonging to woman, claimed by daughter, found subject. Evidence relied on that while claimant was working for wages mother bought property and partly paid for it from daughter's wages. Does not require new trial. Denmond v. Hillyer, 129 Ga. 698, 59 SE 806. Where wife denies that she signed or knew of mortgage, new evidence that she knew of it is inconclusive. Columbian Bldg. & Loan Ass'n v. Leeds, 128 Ill. App. 195.

3. Ware v. Gautemalan & Mexican Mahogany & Export Co., 119 App. Div. 262, 104 NYS 520.

4. Hall v. Jensen [Idaho] 93 P 962; Hancock v. Beasley [N. M.] 91 P 735. Newly-discovered evidence is not a sufficient ground for granting a new trial, unless its effect would be such as to require a different verdict, and where the affidavits of witnesses who were not produced because the defendant had lost their names merely show that their testimony would merely tend to contradict that of the plaintiff, it is not an abuse of discretion on the part of the trial judge to refuse to grant a new trial. Cincinnati Trac. Co. v. Kelly, 5 Ohio N. P. (N. S.) 444.

5. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94.

6. Geter v. Central Coal Co. [Ala.] 43 S 367; Shaufelberger v. Mattix [Ark.] 107 SW 380; Bunn v. Hargraves [Ga. App.] 60 SE 223; Sparks v. Bedford [Ga. App.] 60 SE 809; Nehring v. Ricker, 126 Ill. App. 262; Louisville & N. R. Co. v. Ueltschi's Ex'rs, 31 Ky. L. R. 931, 104 SW 320; Mobile & O. R. Co. v. Caldwell [Ky.] 106 SW 236; North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495, 14 Det. Leg. N. 509, 112 NW 1114; Strand v. Great Northern R. Co., 101 Minn. 85, 111 NW 958; Whipple v. McCormick [R. I.] 68 A 428; Houston Lighting Power Co. v. Hooper [Tex. Civ. App.] 19 Tex. Ct. Rep. 410, 102 SW 133; St. Louis, etc., R. Co. v. Wiggins [Tex. Civ. App.] 107 SW 899. Evidence held clearly cumulative and not of so conclusive nature as to require interference with court's discretion. Few v. Webster [Minn.] 114 NW 647. Evidence relied on had reference solely to matters of alleged fact concerning which the witnesses had given testimony on the trial. Farrell v. Citizens' L. & R. Co. [Iowa] 114 NW 1063; Clark v. Van Vleck [Iowa] 112 NW 648. If the evidence relied on is of the same general character and directed to the same propositions as the evidence taken upon the trial, it is cumulative. Kataoka v. Hanselman, 150 Cal. 673, 89 P 1082; Metropolitan Ins. Co. v. Ford, 31 Ky. L. R. 513, 102 SW 876; Flint v. Illinois Cent. R. Co., 29 Ky. L. R. 1149, 97 SW 736; Louisville Bridge Co. v. Allen [Ky.] 107 SW 1191. Evidence which brings to light some new and independent truth of a different character, although it tried to prove the same proposition on ground of claim before insisted on, is not cumulative. In re McClellan's Estate [S. D.] 111 NW 540. Newly-discovered evidence contradicting a witness is not impeaching evidence. Hughes v. Rhode Island Co. [R. I.] 67 A 450. The rule that the new evidence must not be cumulative, but such as to probably change the result, and that movant must show diligence, applies when motion made in supreme court. Aden v. Doub [N. C.] 59 SE 162.

7. El Paso S. W. R. Co. v. Barrett [Tex. Civ. App.] 19 Tex. Ct. Rep. 418, 101 SW 1025.

8. Action for false arrest, defendant claimed it did not cause arrest. Evidence relied on shows that affiant and not defendant caused arrest. It satisfactorily appears there was no lack of diligence. Illinois Cent. R. Co. v. Wilson, 31 Ky. L. R. 789, 103 SW 364.

9. James McCreery Realty Corp. v. Equitable Nat. Bk., 54 Misc. 508, 104 NYS 959.

10. Murphy v. Meacham, 1 Ga. App. 155, 57 SE 1046; Columbian Bldg. & Loan Ass'n v. Leeds, 128 Ill. App. 195; Illinois Steel Co. v

where the case on the whole evidence, is a doubtful one at law,[11] but the greatest possible diligence is not required in all cases,[12] nor does the exercise of reasonable diligence require a party to anticipate the introduction of manufactured evidence.[13] In all cases, however, the granting of new trials on this ground rests largely,[14] or to some extent[15] in the discretion of the trial court,[16] and will not be interfered with except when manifestly abused.[17] The same rules that influence the granting or refusal of new trials for newly-discovered evidence control the courts while the new trial is asked for newly-obtained evidence.[18]

(§ 2) *I. As a matter of right in ejectment.*[See 8 C. L. 1162]—A party is not entitled to a new trial as of right in ejectment if any other cause of action is joined therewith and all prosecuted to final judgment,[19] nor does the right obtain where the claim is to vacant and unoccupied lands.[20]

§ 3. *Proceedings to procure new trial.*[See 8 C. L. 1182]—Any motion to set aside

Ferguson, 129 Ill. App. 396; Gay v. Mitchell [N. C.] 60 SE 426; Halbert v. Texas Tie & Lumber Preserving Co. [Tex. Civ. App.] 107 SW 592. Movant must state fully the facts disclosing diligence used. General statement not sufficient. Pronskevitch v. Chicago & A. R. Co., 232 Ill. 136, 83 NE 545; Shirk v. Township Bd. of Review of Monmouth [Iowa] 114 NW 884; Cahill v. Mullins, 31 Ky. L. R. 72, 101 SW 336; Burgess v. Grief, 31 Ky. L. R. 215, 101 SW 984; Whipple v. McCormick [R. I.] 68 A 428. Forgotten evidence is not new evidence diligently produced. Gregory v. Estate of Gregory, 129 Ill. App. 96. Case pending four years without effort to get evidence until last week is not diligence. City of Chicago, v. McNally, 227 Ill. 14, 81 NE 23, afg. 128 Ill. App. 375. Where witness' knowledge of case was known before trial and no effort made to produce him. Nehring v. Ricker, 126 Ill. App. 262. Affidavit should state that facts relied on were not within movant's knowledge or that of his counsel at time of trial and that he did not know and could not apprehend that witnesses might be material in his behalf. Hancock v. Beasley [N. M.] 91 P 735. Diligence not shown by general allegations of fact. Facts must be set forth with such particularity, definiteness, and clearness that the court may see on the face of the pleadings that proper diligence was used. Taylor's Estate v. Larter [Ind. App.] 82 NE 96. Affidavit that affiant made inquiry of all whom he had reason to suspect knew anything of the fact does not show diligence. Todd v. Crete [Neb.] 115 NW 307. An affidavit that the party, through various employes, tried to procure witness and used every proper means to do so, is insufficient as there are no definite statements of facts which the court can weigh on the question of diligence. Butler v. Rhode Island Co. [R. I.] 68 A 426. If facts known to witness could have been elicited on cross-examination, lack of diligence. Neal v. Whitlock [Tex. Civ. App.] 18 Tex. Ct. Rep. 105, 101 SW 284; Hill v. Union R. Co. [R. I.] 66 A 836. Where the witnesses are easily discoverable from court records, diligence is lacking. King v. Gilson, 206 Mo. 264, 104 SW 52. Where witness was used on the trial, the case must be a very strong one to justify a new trial. Marengo Sav. Bk. v. Kent [Iowa] 112 NW 767. Where the testimony is known, or should have been known before trial, due diligence cannot be claimed. Arnd v. Aylesworth [Iowa] 111 NW 407. Evidence relied on was that of son in behalf of father. They were continuously together before trial. Reynolds v. Hassam [Vt.] 68 A 645. If depositions were on file which would put the party on notice of the evidence desired, and no steps are taken to procure the testimony, a lack of diligence is shown. Chew v. Jackson [Tex. Civ. App.] 18 Tex. Ct. Rep. 678, 102 SW 427. A defendant who makes no effort at the trial to show a different version to that claimed by plaintiff, though having the means to do so, lacks diligence. Central of Georgia R. Co. v. Geopp [Ala.] 45 S 65. Attention called to matter by pleading and evidence. Trial concluded April 26 and verdict rendered May 6, within which time evidence could have been procured. Reasonable diligence negatived. Taliaferro v. Shepherd [Va.] 57 SE 585. Diligence does not appear when the evidence relied on is necessarily germane to the only issue in the case, and is such that its existence must have occurred to movant in its preparation. Also other witnesses could have been found before trial to prove same facts. Berger v. Standard Oil Co., 31 Ky. L. R. 613, 103 SW 245.

11. Roberts v. First Nat. Bk., 149 Mich. 507, 14 Det. Leg. N. 507, 112 NW 1129.

12. In re McClellan's Estate [S. D.] 111 NW 540.

13. Newly-discovered evidence relied on went to show receipt put in evidence was a forgery. Flock v. Kaufman, 107 NYS 752.

14. Lynch v. McGhan [Cal. App.] 93 P 1044.

15. Arkansas Mut. Fire Ins. Co. v. Stuckey [Ark.] 106 SW 203.

16. Rosenthal v. Bell Realty Co., 53 Misc. 265, 103 NYS 194. New trial properly refused when motion submitted on conflicting affidavits. Kataoka v. Hanselman, 150 Cal. 673, 89 P 1082; James McCreery Realty Corp. v. Equitable Nat. Bk., 123 App. Div. 358, 107 NYS 1080. The court, on such application, will consider the diligence employed, and whether the evidence is cumulative. Nugent v. Armour Packing Co. [Mo. App.] 106 SW 648; Louisville Bridge Co. v. Allen [Ky.] 107 SW 1191.

17. Breeden v. Martens [S. D.] 112 NW 960.

18. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 SE 983.

19. Action of ejectment, embracing action to redeem. Aetna Life Ins. Co. v. Stryker [Ind. App.] 83 NE 647.

20. Buffalo Land & Exploration Co. v. Strong, 101 Minn. 27, 111 NW 728.

a verdict for matters not appearing on the face of the record is, in effect, a motion for a new trial and subject to all the rules of law governing such motions.[21] The only question before the court is, shall a new trial be granted as requested or not.[22] If addressed to the discretion of the court it should be considered and not dismissed pro forma,[23] unless several join, in which case, if not good as to all, it should be denied,[24] but not where it has been acted upon on an objection that only one of the defendants was named in the caption.[25] The motion may be prosecuted pending an appeal;[26] its hearing may be accelerated under the provisions of the order providing for the hearing,[27] and a mandamus will lie to compel the court, in a proper case, to act upon it,[28] but equity has no jurisdiction to compel a new trial.[29] Jurisdiction to hear the motion is fixed by statute.[30] The proceedings, the validity of which may be governed by the preliminary rules and orders entered, and the absence of surprise on calling of motion,[31] are governed by statute, hence, while in some jurisdictions the motion may be in general terms,[32] generally, however, it should not,[33] but should

21. Georgia R. & Elec. Co. v. Hamer, 1 Ga. App. 673, 58 SE 54.

22. It is improper to decide that defendant is entitled to new trial and enter judgment on demurrer to evidence against plaintiff for costs, unless it appear that the deficient evidence cannot be supplied by plaintiff and on new trial he cannot make a prima facie case. Thomas v. Kansas City El. R. Co. [Kan.] 90 P 816. Jurisdiction of the court rendering judgment cannot be raised on motion for new trial. Eaid v. Connolly [Wash.] 94 P 188.

23. Motion to set aside verdict as against weight of evidence and excessive. Massuco v. Tomasi [Vt.] 67 A 551.

24. Harvey v. Harvey [Neb.] 106 NW 660.

25. Brandt v. Hall [Ind. App.] 82 NE 929.

26. If a party against whom judgment has been rendered discovers within the time allowed by the code any cause for opening the judgment by an action in the lower court, he will not be denied the right to do so because he is prosecuting an appeal from the judgment. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 31 Ky. L. R. 931, 104 SW 320.

27. Order provided for hearing in vacation at time and place as court should fix, after notice, if not then heard, ordered to stand continued to such time and place as counsel should agree on with court's approval, and on failure of counsel to agree, then at such time and place as judge may fix on his own motion or upon application of either party, both sides to have notice, and if not heard in vacation before next term, to stand on docket until heard the next term thereafter. Eady v. Atlantic Coast Line R. Co., 129 Ga. 363, 58 SE 895.

28. Bleakley v. Smart, 74 Kan. 476, 87 P 76.

29. Norwood v. Louisville & N. R. Co. [Ala.] 42 S 683.

30. In Nebraska the county court in term cases may grant new trials under § 602, Civil Code (Cobbey's Ann. St. 1903, § 1612). Oakdale Heat & Light Co. v. Seymour [Neb.] 114 NW 643. City court of New York has power to grant new trial for newly-discovered evidence after the case has gone to the United States court on appeal and affirmed. James McCreery Realty Corp. v. Equitable Nat. Bk., 54 Misc. 508, 104 NYS 959; Id., 123 App. Div. 358, 107 NYS 1080. The judge who tried the case and granted the extension of time may hear the motion, although the case was tried within another circuit and the motion heard after the expiration of the order assigning him to the circuit where the case was tried. Atlantic Coast Line R. Co. v. Mallard, 53 Fla. 515, 43 S 755. On the death of the judge before whom the motion is pending, it may be heard by another member of the court clothed with the same powers. Benson v. Hall [Mass.] 83 NE 1036. The motion cannot be acted on at a subsequent term unless the parties have agreed to a continuance of the motion. That the same judge held both terms does not affect the rule. Oak Hall Clothing Co. v. Bagley [N. C.] 60 SE 648. The court has no authority to grant a motion for new trial and set aside a judgment rendered at a former term of the court. Kruegel v. Bolanz [Tex. Civ. App.] 18 Tex. Ct. Rep. 886, 103 SW 435. In New Jersey either party may apply to the supreme court to set aside an award and grant a new trial without first having applied to the judge who made the reference. Harper Mach. Co. v. Sinclair [N. J. Law] 68 A 890.

31. On motion for new trial, rule nisi returnable during term, with directions that plaintiff be served three days before hearing. Parties were to have till hearing to file brief. No further action during term and motion stood continued to later term. After date in rule nisi, copy of rule and motion served on attorney who, at later date, on hearing, filed answer. Not contended there was surprise as to motion or hearing. Court properly approved brief of evidence and the grounds of motion. Jemison v. Polk [Ga.] 60 SE 174.

32. Practice under Rev. St. U. S. § 726 (U. S Comp. St. 1901, p. 584). Choctaw, O. & G. R. Co. v. Sarlls [Ind. T.] 104 SW 676.

33. King v. Gilson, 206 Mo. 264, 104 SW 52. Allegation of motion that "the verdict of the jury is contrary to and against both law and the evidence, and is unsupported thereby" too general. International, etc., R. Co. v. Vandeventer [Tex. Civ. App.] 107 SW 560. That "the verdict and judgment in this cause is contrary to law and the evidence, and wholly unsupported by the evidence in this case," too general. Houston, etc., R. Co. v. Kalitta [Tex. Civ. App.] 108 SW 175. That "the finding is contrary to law" is too general. Dietz v. Barnard [Ky.] 107 SW 766. Application stating that since the trial the movant has discovered new and important evidence material to the issue, which is not cumulative and was unknown to movant at

set out and specify the particular error and matter complained of [34] entitling the party to a new trial,[35] and where made on the ground of newly-discovered evidence, the petition should set forth the original case or make it a part of the pleadings.[36] When motion has been made in time, the court may permit additional ground to be filed before the motion is disposed of,[37] but no amendment will be allowed if new parties are introduced,[38] nor will a second petition be entertained which presents no new facts from those presented by a former petition overruled.[39] An omission to raise a ground for new trial is a waiver of it,[40] and it is not proper for the court to consider other grounds than those specified in the motion.[41] A motion is not necessary in all cases, since the court may grant a new trial on its own volition,[42] at the time judgment was rendered,[43] unless the appellate court has held it error to direct verdict,[44] but where made it must be done within the time limited by statute,[45] or some good reason given for failure to do so,[46] as the provision is mandatory;[47] and the party will be held to have waived the right[48] by failure to make his application within the statutory period;[49] and even the effect of statements by counsel may be to withdraw from the court's consideration all else in the motion save the matters argued.[50] The party who alleges a waiver, however, has the burden to show it by clear and satisfactory proof.[51] The time cannot be extended under the guise of a motion for reargument,[52] and, in some jurisdictions, not at all,[53] but where there is

time of the trial, is insufficient. King v. Gilson, 206 Mo. 264, 104 SW 52.

34. Chicago, etc., R. Co. v. Morris [Wyo.] 93 P 664. That the "verdict is contrary to the evidence" does not raise the question of excessive damages. Howard v. Beldenville Lumber Co. [Wis.] 114 NW 1114. The motion, if made on the ground that the verdict was contrary to law, should specify the errors of law on the respects in which the verdict is contrary to law. Moneagle v. Livingston [Ala.] 43 S 840. A motion should state what facts movant can prove, and show that a different result will be reached upon another trial. Kruegel v. Balanz [Tex. Civ. App.] 18 Tex. Ct. Rep. 886, 103 SW 435.

35. Application for new trial on the ground of newly-discovered evidence should show the evidence could not by reasonable diligence, have been discovered and produced at the trial. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 114 NW 606.

36. Flint v. Illinois Cent. R. Co., 29 Ky. L. R. 1149, 97 SW 736.

37. Statute requires motion to be made within three days after judgment. Motion made in time at trial term and undisposed of, additional grounds may be filed at subsequent term. Million v. Million's Ex'rs, 31 Ky. L. R. 1156, 104 SW 768.

38. Lunsford v. Sutton [Ga. App.] 59 SE 334.

39. State v. Bulecheck [Iowa] 114 NW 821.

40. Hensley v. Davidson Bros. Co. [Iowa] 112 NW 227.

41. In re McDonnell [Mass.] 83 NE 675.

42. Hensley v. Davidson Bros. Co. [Iowa] 112 NW 227.

43. Jones v. Marblehead Lime Co. [Mo. App.] 107 SW 420.

44. Where the appellate court has held it error to direct verdict for defendant, on the second trial the court cannot on its own motion, set aside a verdict for plaintiff on the same grounds as which the verdict was directed for defendant on the first trial. Hensley v. Davidson Bros. Co. [Iowa] 112 NW 227.

45. Thomas v. Kansas City El. R. Co. [Kan.] 90 P 816. The motion is a statutory proceeding and must be made within the time and in the manner provided. Vreeland v. Edens, 35 Mont. 413, 89 P 735. The statute includes all motions for new trial and amendments thereto. Scott v. Joffee, 125 Mo. App. 573, 102 SW 1038. Nonsuit April 25, and motion to set aside and grant new trial May 1, too late, under statute requiring such motions to be made within four days. Jones v. Marblehead Lime Co. [Mo. App.] 107 SW 420. On trial to the court a party aggrieved by rulings made during trial must file motion for a new trial within three days after findings and conclusions are made, irrespective of when judgment is rendered. Brubaker v. Brubaker, 74 Kan. 220, 86 P 455. Motion for new trial on the ground of newly-discovered evidence and perjury should not be denied because not made within five days after trial. Flock v. Kaufman, 107 NYS 752.

46. That counsel was sick no good reason, it appearing that he was able to give directions and was connected with the court house by telephone. Dixon v. Mutual Life Industrial Ass'n [Ga. App.] 60 SE 207.

47. Civ. Code of Prac. § 342, provides that the motion shall be made within three days after verdict or decision is rendered, unless unavoidably prevented. Seiler v. Gilley Bros. [Ky.] 108 SW 284.

48. Wilson v. McCutchen Estate Claimant [Iowa] 114 NW 551.

49. Thomas v. Kansas City El. R. Co. [Kan.] 90 P 816.

50. On hearing, court asked views of movant's counsel on points relied on, who replied, there was nothing sufficiently objectionable in the instructions, errors relied on in motion, and then called court's attention to verdict only. Held withdrawal of other grounds. Corum v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1093.

51. Nord v. Boston & M. Consol. Copper & Silver Min. Co., 33 Mont. 464, 84 P 1116.

52. Applebaum v. Bonagur, 56 Misc. 615, 107 NYS 635.

an extension, the time extended begins to run on the expiration of the regular statutory period.[54] If certain preliminary motions are required, such must be made,[55] nor need the motion be in writing,[56] but it must be made upon a case settled,[57] and notice, the filing and service of which is the initiation of the proceeding for a new trial,[58] must be made as designated by statute [59] and within the time limited thereby,[60] unless the judge extends the time,[61] or unless waived.[62] The notice that the statement would be presented in due time applies to either mode of presentation,[63] and is sufficient if it specify that the motion will be made for errors of law occurring at trial and excepted to.[64] The notice must be served on the adverse party,[65] or if an unauthorized acceptance of service is relied on, it must be shown that the act was ratified by the party.[66] After notice is properly served, however, the death of the party does not affect the jurisdiction to hear the motion,[67] nor does the fact that the clerk fails to endorse the notice as filed or that the fee is not paid affect it.[68] If a brief of evidence or statement is required,[69] they must comply with the statute as to contents [70] and time of filing,[71] unless there is a waiver,[72] or unless the time is ex-

53. Motion for new trial on grounds of newly-discovered evidence must be filed within four days after trial with no power in court to extend it. King v. Gilson, 206 Mo. 264, 104 SW 52.

54. Hill v. Ellinghouse [Mont.] 93 P 345.

55. In some jurisdictions a motion for new trial on the ground of entire lack of evidence does not lie until after motion for nonsuit or to direct a verdict. Entzminger v. Seaboard Air Line R. Co. [S. C.] 60 SE 441.

56. Moneagle v. Livingston [Ala.] 43 S 840.

57. Altmark v. Haimowitz, 105 NYS 205; Rhodes v. Union R. Co., 108 NYS 949. The court has power to pass on the motion for new trial on grounds of newly-discovered evidence upon the pleadings and affidavits, in the absence of a settled case, where no objection is made on argument of motion. Rosenthal v. Bell Realty Co., 53 Misc. 265, 103 NYS 194.

58. Bell v. San Francisco Sav. Union [Cal.] 94 P 225.

59. Service on a former stenographer, though the attorney making the service did not know of the severance of relationship, is not good. Nord v. Boston & M. Consol. Copper & Silver Min. Co., 33 Mont. 464, 84 P 1116.

60. Vreeland v. Edens, 35 Mont. 413, 89 P 735. Notice of intention to move for new trial must be filed within five days after verdict or notice of decision of court or referee. Everett v. Jones [Utah] 91 P 360.

61. The statute embraces special as well as general verdicts. Nerger v. Commercial Mut. Fire Ass'n [S. D.] 114 NW 689.

62. Procuring an extension of time to propose amendments does not waive service of statement to support motion. Nord v. Boston & M. Consol. Copper & Silver Min. Co., 33 Mont. 464, 84 P 1116. Assent to an extension of time within which to prepare a statement to support motion is not a waiver of service of notice. Vreeland v. Edens, 35 Mont. 413, 89 P 735. There must be some affirmative act pointed out in the statute as not necessary to be done until after the notice to constitute a waiver. Everett v. Jones [Utah] 91 P 360.

63. Such modes being by five days notice to adversary, or delivery to the clerk for the judge. Douglas v. Southern Pac. Co. [Cal.] 90 P 538.

64. Martin v. Southern Pac. Co., 159 Cal. 124, 88 P 701.

65. Every party whose interest in the subject-matter of the motion may be affected by the granting of the motion is an adverse party. Who is an adverse party is to be determined from the verdict rather than the judgment. Johnson v. Phenix Ins. Co. [Cal.] 92 P 182.

66. Acceptance of service by former clerk is not ratified by refusal to repudiate it or by securing an order granting time to propose amendments. Nord v. Boston & M. Consol. Copper & Silver Min. Co., 33 Mont. 464, 84 P 1116.

67. Bell & San Francisco Sav. Union [Cal.] 94 P 225.

68. Notice given to clerk April 24, 1905, after service of notice of decision on April 17, 1905. Clerk failed to mark filed till May 27, 1905. No fee demanded. Notice sufficient. Commercial Nat. Bk. v. Schlitz [Cal. App.] 91 P 750.

69. A brief of evidence is an indispensable statutory requisite to a valid motion for new trial. The rule obtains though the verdict be directed by the court and though the motion be based on grounds which do not require a consideration of the evidence. Georgia R. & Elec. Co. v. Hamer, 1 Ga. App. 673, 58 SE 54.

70. Leaving in immaterial questions and answers, and giving documentary evidence in full with no attempt to brief the same, is improper. Hirsch v. Dozier Lumber Co., 2 Ga. App. 520, 58 SE 786. A statement on motion for new trial is not made ineffectual because it incorporates a bill of exceptions. Martin v. Southern Pac. Co., 150 Cal. 124, 88 P 701. The court will presume that the evidence left out of a statement was unimportant and immaterial. Van Camp v. Emory, 13 Idaho, 202, 89 P 752.

71. The brief of evidence must be filed during the term at which the trial was had, unless an order of court is obtained relieving movant of such necessity. Pinnebad v. Pinnebad, 129 Ga. 267, 58 SE 879. The motion should be dismissed if movant fails to make out and tender a brief of evidence within the time prescribed by previous order. Dublin Hame Works v. Ross-Mehan Foundry Co., 128 Ga. 399, 57 SE 683. Unless the time is extended the statement must be presented within ten days. It may be presented on five days' notice to the adversary or delivered to

tended,[73] but the court is not bound to allow an amendment.[74] A motion made in time suspends the judgment.[75]

*Affidavits.*See 8 C. L. 1185—The application must be verified by affidavit [76] of the witness [77] and petitioner's attorney. The petition for new trial on the ground of after-discovered evidence must be supported by the affidavit of petitioner's attorney,[78] the sufficiency of which is determined by the nature of the case in which it is filed,[79] but failure to introduce affidavit will be excused when the witness is out of the jurisdiction and unwilling to make it.[80] Counter affidavits may also be filed on a motion, the grounds of which is newly-discovered evidence.[81] Where the statute does not require the motion to be supported by affidavit, it is not material that the jurat thereto is defective.[82]

*Evidence in support of motion.*See 8 C. L. 1185—The evidence need not be reintroduced,[83] but the court may consider the evidence in the original trial as well as the evidence presented to sustain the motion,[84] the facts as disclosed by the evidence,[85] and all the circumstances of the case,[86] even affidavits founded on hearsay in the absence of better evidence,[87] all of which, for the purpose of the motion, must be regarded as true.[88] The evidence may be sufficient though circumstantial.[89] The verdict may be supported [90] but not impeached, as a general rule, by the affidavit of jurors [91] or counsel.[92] When proper, however, it may be shown they considered and

the clerk for the judge. Douglas v. Southern Pac. Co. [Cal.] 90 P 538. The filing of a statement several months after its settlement does not vitiate it. Statement bears two dates of settlement, Oct. 7 1902, and Dec. 31, 1902, filed April 22, 1903. Van Camp v. Emery, 13 Idaho, 202, 89 P 752. Under an order continuing the motion indefinitely and giving movant leave to file his brief at the hearing, the court has jurisdiction to approve the brief filed at the next term after the order was passed. Eady v. Atlantic Coast Line R. Co., 129 Ga. 363, 58 SE 895.

72. An agreement, not in writing, to insert in one of the orders postponing the hearing that the motion might thereafter be perfected in any way is not a waiver of the right to object to the brief of evidence, no steps having been taken to insert such provision. Pinnebad v. Pinnebad, 129 Ga. 267, 58 SE 879.

73. Douglas v. Southern Pac. Co. [Cal.] 90 P 538. The court may extend the time for preparation of statement to support motion, notwithstanding the parties had agreed to an extension. Nord v. Boston & M. Consol. Copper & Silver Min. Co., 33 Mont. 464, 84 P 1116.

74. Affidavit by attorney that material matter had been left out of his original statement because of "press of business" was not sufficient to entitle him to amend. Freeman v. Brown [Cal. App.] 90 P 970.

75. Million v. Million's Ex'rs, 31 Ky. L. R. 1156, 104 SW 768.

76. Houston Lighting Power Co. v. Hooper [Tex. Civ. App.] 19 Tex. Ct. Rep. 410, 102 SW 133. In motion for new trial on ground of newly-discovered evidence, its truthfulness must be proved by affidavit. King v. Gilson, 206 Mo. 264, 104 SW 52.

77. On motion for new trial on ground of newly-discovered evidence, affidavit of litigant is not sufficient, no reason being given why witness did not make affidavit. Townsend v. Huntzinger [Ind. App.] 83 NE 619.

78. Reynolds v. Hassam [Vt.] 68 A 645.

79. Judgment rendered on service by publication. Petition to set aside, supported by affidavit that affiant "has read foregoing petition, knows its contents, and that the statements and allegations therein made are true to the best of his knowledge, information and belief," sufficient. Bracht v. Bracht [Tex. Civ. App.] 107 SW 895.

80. James McCreery Realty Corp. v. Equitable Nat. Bk. 54 Misc. 508, 104 NYS 959.

81. Wilson's Ex'r v. Keckley [Va.] 59 SE 383.

82. Ridge v. Johnson [Mo. App.] 107 SW 1103.

83. The presumption being that the evidence upon which the case was tried is in the breast of the court, it need not be reintroduced to support the motion. Moneagle v. Livingston [Ala.] 43 S 840.

84. Application made after term at which verdict and judgment rendered. Chicago, etc., R. Co. v. Mosher [Kan.] 92 P 554.

85. To determine whether verdict for exemplary damages is excessive. Ahrens v. Fenton [Iowa] 115 NW 233.

86. Will consider character of witness. James McCreery Realty Co. v. Equitable Nat. Bk., 54 Misc. 508, 104 NYS 959.

87. Witness nonresident and affidavit not obtainable. Soebel v. Boston El. R. Co., [Mass.] 83 NE 3.

88. Affidavits controverting the evidence relied on by movant should be disregarded on the hearing of the motion. In re McClellan's Estate [S. D.] 111 NW 540.

89. Evidence examined and held sufficient to show misconduct of party. Phares v. Krhut [Kan.] 91 P 52.

90. Birmingham R. L. & P. Co. v. Moore [Ala.] 42 S 1024; Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488.

91. Birmingham R. L. & P. Co. v. Moore [Ala.] 42 S 1024; Richards v. Sanderson, 39 Colo. 270, 89 P 769; Saackett v. Henderson County Sav. Bk. [Ky.] 100 SW 241; Butteris v. Mifflin & Linden Min. Co. [Wis.] 113 NW 642. Affidavit showing statements of fellow

gave weight to evidence not properly before them,[93] but the affidavit must be definite.[94]

Order granting or refusing new trial.[See 8 C. L. 1166]—The object of the statute in requiring trial courts to specify in the order the ground or grounds on which the new trial is granted is for the enlightenment of the losing party and the appellate court,[95] but it need not state which ground the motion is granted on, if any of them justified it,[96] nor is it vitiated because based on grounds devoid of merit,[97] for it will be presumed that it was made upon the exceptions,[98] but an order setting aside an erroneous finding and entering a new finding or decree is not an order granting a new trial.[99] A general judgment against joint tort feasors, if set aside at all, must be set aside as to both.[1] The effect of an order granting new trial is to leave the case where it was before,[2] but an order granting a new trial as to one count does not have the effect to disturb the verdict as to the counts of which no complaint has been made.[3] A court of purely statutory creation cannot vacate its order granting a new trial and reinstate the verdict.[4] While a motion for a new trial may be impliedly abandoned, the intent to do so must be plainly indicated.[5] A motion for new trial may be renewed where it has been withdrawn in order to move for judgment of ouster non obstante veredicto, which is afterwards set aside.[6]

§ 4. *Proceedings at new trial.*[See 8 C. L. 1166]—On a new trial the case is before the court for trial de novo,[7] and if the parties fail to introduce any additional evidence, after ample opportunity to do so, they cannot object that they have not had a new trial.[8]

§ 5. *Arrest of judgment. A. Nature and grounds.*[See 8 C. L. 1166]—The only questions reached by motion in arrest are those apparent on the face of the record,[9]

jurors outside the record of the case not competent. Hoyt v. Hoyt [Iowa] 115 NW 222. Affidavit of juror that he misconceived issue will not be received on motion for new trial. Winslow v. Smith [N. H.] 65 A 108. Affidavits by jurors as to what they considered in making up their verdict are not admissible. Clark v. Van Vleck [Iowa] 112 NW 648. Affidavit tended to show that because paper in evidence had not been sent to jury room they understood it was excluded from consideration. McMahon v. Iowa Ice Co [Iowa] 114 NW 203. Juror's affidavit set out that verdict was arrived at by gambling operation, by dividing the total sum of the amounts each juror determined to award by the number of jurors. Held not admissible. Galloway v. Massee [Wis.] 113 NW 1098.

92. The affidavit of counsel, alleging misconduct of the jury, not stating the source and time of his information, cannot be used to impeach the verdict. Pittsburg, etc., R. Co. v. Collins, 168 Ind. 467, 80 NE 415.

93. Brown Land Co. v. Lehman [Iowa] 112 NW 185.

94. Affidavit that juror heard conversation out of court between witnesses which influenced his verdict, without stating who the witnesses were or what was said, is insufficient. Goss v. Goss, 102 Minn. 346, 113 NW 690.

95. An order specifying that new trial is granted for "error in finding as to facts and law" is too general and vague. Ordelheide v. Berger Land Co. [Mo.] 106 SW 620.

96. Sharp v. Adom, 121 Mo. App. 565, 97 SW 225; Fink v. McCue, 123 Mo. App. 313, 100 SW 549; White v. Barling [Mont.] 93 P 348. "And the court being fully advised thereupon grants said motion for a new trial." Sufficient. Lynch v. McGhan [Cal. App.] 93 P 1044. An order granting a new trial which states that it is done on the ground that sympathy of the jury caused a failure of justice in effect states that the verdict was against the weight of evidence. Karnes v. Winn, 126 Mo. App. 712, 105 SW 1098.

97. Harrington v. Butte, etc., R. Co. [Mont.] 93 P 640.

98. Pase v. Woodside Heights Land Corp., 108 NYS 125.

99. Modern Woodmen of America v. Angle [Mo. App.] 104 SW 297.

1. Bamberg v. International R. Co., 105 NYS 621.

2. St. Francis Mill Co. v. Sugg, 206 Mo. 148, 104 SW 45; Multnomah County v. Willamette Towing Co. [Or.] 89 P 389.

3. Petition with several counts. Motion for new trial because verdict on one count inadequate. Gann v. Dearborn Mfg. Co. [Mo. App.] 107 SW 15.

4. The municipal court has only such powers as given by statute, expressly or by clear implication. Colwell v. New York, etc., R. Co., 108 NYS 540.

5. Held not abandoned by failure to agree and statement that it was made as a matter of mere form. Modern Woodmen of America v. Graber, 128 Ill. App. 585.

6. Goedecke v. People, 125 Ill. App. 645.

7. Riley v. Loma Vista Ranch Co. [Cal. App.] 89 P 849; Todd v. Bettingen, 102 Minn. 260, 113 NW 906.

8. On remand plaintiff submitted his case on the evidence of previous trial and defendant moved for nonsuit. Huber v. Mother Aurelia of St. Joseph's Hospital, 13 Idaho, 276, 89 P 942.

9. It will not reach facts disclosed by the

and the evidence cannot be looked to.[10] A motion in arrest will not lie because the counts are not all for the same cause of action,[11] nor because the original declaration gives no jurisdiction while the new counts amend into jurisdiction, if any is thereby conferred.[12]

(§ 5) *B. Motions and proceedings thereon.*See 8 C. L. 1167.

(§ 5) *C. Effect.*See 6 C. L. 812

NEXT FRIENDS; NEXT OF KIN, see latest topical index.

NON-NEGOTIABLE PAPER.[13]

The scope of this topic is noted below.[13a] The term "non-negotiable paper" comprehends those contracts for the payment of money which possess the form and other essentials of bills and notes but lack the characteristic of negotiability.[14]

The indorsee of non-negotiable paper holds it subject to all the equities, counterclaims, and defenses that existed between the original parties.[15]

The maker and assignor of a lost check, non-negotiable for lack of indorsement, is liable thereon to his assignee,[16] and a court of equity has jurisdiction to entertain a suit for the recovery of the amount due thereon.[17]

The assignee of nontransferable checks for merchandise cannot recover thereon from the maker on the common counts.[18]

NONRESIDENCE; NONSUIT, see latest topical index.

NOTARIES AND COMMISSIONERS OF DEEDS.[19]

The scope of this topic is noted below.[19a] A notary public, being a public officer whose compensation is fees for special services prescribed and authorized by law,[20] is within the statutory inhibition against government officers holding offices to which a certain annual salary attaches, from holding any other public office to which compensation attaches.[21] Under the statute, no notary is the legal successor of another and an appointment as notary commissions one for the full notarial term, regardless

evidence. Morgan v. Hendricks [Vt.] 67 A 702. A motion in arrest for defects in the verdict is tested by what appears on the face of the record, of which the verdict is a part. Hubbard v. Rutland R. Co. [Vt.] 68 A 647.

10. Hubbard v. Rutland R. Co. [Vt.] 68 A 647.

11. Massuco v. Tomasi [Vt.] 67 A 551.

12. Massuco v. Tomasi [Vt.] 67 A 551. Nor because the declaration was demurrable if it did not entirely fail to state a cause of action. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 NE 1049.

13. See 8 C. L. 1167.

13a. It includes only a few general holdings as to "commercial paper" which is not negotiable. The requisites of negotiability (see Negotiable Instruments, 10 C. L. 962), and the assignment of choses in action (see Assignments, 9 C. L. 262), are excluded.

14. Note containing stipulation whereby sureties, guarantors, indorsers and makers waive notice of extension, and right to defend on ground of extension without notice non-negotiable under Sess. Laws 1903, p. 380. Union Stockyards Nat. Bk. v. Bolan [Idaho] 93 P 508. Note not payable to either order or bearer non-negotiable under Acts 1899, p. 139, c. 94. Gilley v. Harrell, 118 Tenn. 115, 101 SW 424.

15. Union Stockyards Nat. Bk. v. Bolan [Idaho] 93 P 508. Failure of consideration and drunkenness at time of execution defenses. Gilley v. Harrell, 118 Tenn. 115, 101 SW 424.

16, 17. Moore v. Durnan, 69 N. J. Eq. 828, 65 A 463.

18. Maker not estopped from denying validity in hands of assignee because only reason given for declining to honor was that similar checks had been stolen and there was no proof that these particular checks had been stolen. Kanjutzky v. Tennessee Coal, Iron & R. Co. [Ala.] 45 S 676.

19. See 8 C. L. 1168.

19a. It includes only the office and its general powers, particular functions of notaries being excluded to such topics as Affidavits, 9 C. L. 56; Acknowledgments, 9 C. L. 22; Depositions, 9 C. L. 964; Negotiable Instruments, 10 C. L. 962 (protest), and the like.

20. Notary of District of Columbia is government officer within act of July 31st, 1894, prohibiting officers whose salary amounts to $2,500 per year from holding any other compensatory office. Pack v. U. S., 41 Ct. Cl. 414.

21. Under act July 31st, 1894, notary holding government position paying $2,500 per annum precluded from receiving fees for notarial services rendered government. Pack v. U. S., 41 Ct. Cl. 414.

of the fact that he may have been appointed to fill an alleged vacancy created by death of a notary,[22] since death created no vacancy but terminates the office held by the decedent.[23]

On grounds of public policy, partners and stockholders in corporations are disqualified to attest instruments taken in behalf of the partnership or corporation respectively or in which the partnership or corporation respectively has any pecuniary interest.[24] The oaths rendered by a notary de facto are valid and binding on the public although he has no valid title to the office and cannot recover the fees thereof.[25]

NOTES OF ISSUE; NOTICE, see latest topical index.

NOTICE AND RECORD OF TITLE.

§ 1. Bona Fide Purchaser and Doctrine of Notice, 1015. Requisites of a Bona Fide Purchaser, 1017. A Valuable Consideration, 1017. Good Faith, 1018. Notice or Knowledge, 1018.
§ 2. Statutory Records or Filings as Constructive Notice, 1022.
A. In General, 1022.
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C. Necessity and Effect of Recording, 1022.
D. Sufficiency, Operation, and Effect of Record, 1025.
E. Possession Under Chattel Mortgages; Refiling and Renewal, 1028.
F. Wills and Their Probate and Administrative Proceedings, 1028.
G. Recording Officers and Administration of the Acts, 1028.
H. Discharge of Record, 1029.
§ 3. Registration and Certification of Land Titles Under the Torrens System, 1092.

The scope of this topic is noted below.[26]

§ 1. *Bona fide purchaser and doctrine of notice.*[See 8 C. L. 1169]—It is a general rule of law that one who acquires an interest in property in good faith for value and without notice of any interests of other persons therein shall be protected against

22. Under § 791, Pol. Code, appointment of notary to take place of deceased notary, commissions for full notarial term and not to unexpired term of deceased only. People v. Edleman [Cal.] 92 P 846.

23. Pol. Code, § 1003a, providing for filling vacancies in office, inapplicable. People v. Edleman [Cal.] 92 P 846.

24. Stockholder disqualified to attest note evidencing conditional sale and reservation of title in payee corporation. Betts-Evans Trading Co. v. Bass, 2 Ga. App. 718, 59 SE 8.

25. Oaths administered by notary within statutory inhibition against government officials holding more than one office where compensation of one of them amounts to $2,500 per annum. Pack v. U. S., 41 Ct. Cl. 414.

26. **It includes** all matters relating to notice, actual or constructive, to purchasers or incumbrancers as to previous claims and equities. The operation of recording acts, the filing of chattel mortgages and conditional sales, and the registration of land titles under the Torrens system. **It excludes** the doctrine of lis pendens (see Lis Pendens, 10 C. L. 654), and the application of the rule of caveat emptor to judicial sale (see Judicial Sales, 10 C. L. 507.

27. **ILLUSTRATIONS. Innocent purchasers held to take free from:** Right of ancestor's creditors to subject land in hands of heirs. Cole v. Hall [Ark.] 107 SW 175. Agreement whereby vendor held land merely as security. White v. McSorley [Wash.] 91 P 243. Lien of existing chattel mortgage on dwelling house situate thereon. Bazelman Lumber Co. v. Hinton [Neb.] 112 NW 603. Equitable title. Williams v. Smith, 128 Ga. 306, 57 SE 801. Equities arising from vendor's **fraud** on original vendors. Prater v. Peters, 31 Ky. L. R. 1311, 105 SW 102. Equity of former owners of land who had been induced by fraud to convey. Warren v. Hayes [N. H.] 68 A 193. Fraud by which administrator had purchased through a go-between. Chaffe v. Minden Lumber Co., 118 La. 753, 43 S 397. Conveyance under duress. Royal v. Goss [Ala.] 45 S 231.

Prior illegal conveyance by trustees of a corporation. Blake v. Boye, 38 Colo. 55, 88 P 470; Noe v. Headley, 118 Mo. App. 722, 96 SW 309. Evidence held to sustain finding as to want of notice. Id. Evidence sufficient to show that defendant was bona fide purchaser of land and machinery and buildings thereon. North v. Coughran [Tex. Civ. App.] 108 SW 165. Purchaser from husband on his representation that he was single held protected from **wife's claim of homestead** land not being occupied by husband and wife. Steves v. Smith [Tex. Civ. App.] 107 SW 141. Purchaser without notice that property had been obtained from former owner by **undue influence** of one occupying a confidential relation held protected and mere knowledge of confidential relation held insufficient to support investigation of fairness of transaction by court of equity. Boddie v. Ward [Ala.] 44 S 105. Purchaser in reliance on record of assignment and satisfaction of mortgage held bona fide as against holder of second un-

the subsequent assertion of such interests.[27] A purchaser for value and without notice whose name is inserted in the deed to his grantor left blank as to grantee is as much a bona fide purchaser as if a new and direct conveyance had been executed by his grantor.[28] A purchaser for value from an executor under a power in the will who is without actual notice of a prior deed of gift takes titles as against the donee not in possession.[29] A mortgagee is a purchaser within a statute postponing in favor of bona fide purchasers liens of judgments on which execution is not levied within a prescribed time.[30]

The defense of bona fide purchaser is not available in the absence of statute, against the holder of the legal title,[31] and one who merely has possession of a deed but no title to the land for want of delivery cannot confer title on an innocent purchaser.[32] The doctrine of bona fide purchase will not protect a transferee for value, before maturity of a promissory note signed by one under disability of coverture.[33] In order that subsequent purchasers may acquire a greater interest under an ambiguous deed than passed as between the parties, they must show themselves to be innocent purchasers for value and without notice that the parties used the language in a sense other than its commonly accepted meaning.[34] Caveat emptor applies in judicial sales.[35] A defense of innocent purchaser must be set up by proper pleading.[36]

recorded assignment, though first assignee did not produce note and mortgage. Christenson v. Raggio [Wash.] 92 P 348. Purchaser of west half of quarter section of land containing more than the supposed 160 acres held innocent purchaser for value with relation to surplus as against subsequent purchaser of east half, there being nothing of record to put him on inquiry. Hootman v. Hootman, 133 Iowa, 632, 111 NW 60. Building erected by a tenant could not be subjected to **mechanic's lien** for materials sold him as against subsequent purchaser for value and without notice of tenant's claim to building. Denison Lumber Co. v. Milburn [Tex. Civ. App.] 107 SW 1161.

Restitution of realty sold at judicial sale cannot be compelled, after reversal of the judgment, from strangers to the record who were bona fide purchasers at the sale or who acquired bona fide collateral rights. Simms v. Tampa, 52 Fla. 641, 42 S 884. A **bona fide mortgagee** for value takes good title notwithstanding mortgagor's title is voidable as against creditors of his grantor, provided mortgage is duly recorded. Putnam v. Southworth [Mass.] 83 NE 887.

Held not bona fide purchasers: One purchasing for nominal consideration and in **reliance on invalidity of prior deed** held not a bona fide purchaser. Lufkin Land & Lumber Co. v. Beaumont Timber Co. [C. C. A.] 151 F 740; Interstate Inv. Co. v. Bailey, 29 Ky. L. R. 468, 93 SW 578. A **purchaser of mortgaged grain** is not protected as an innocent purchaser merely because the mortgagee permitted the mortgagor to sell and thresh the grain. Endreson v. Larson [Minn.] 112 NW 628. **Next friend of infant** complainants in proceeding resulting in sale of land held not a bona fide purchaser so as to render his title good on reversal of decree. Carroll v. Draughon [Ala.] 44 S 553. **Attorney for judgment creditor** who buys at execution sale is not an innocent purchaser. Woods v. Hayes [Ark.] 107 SW 387. **Assignee of note and mortgage** held not a bona fide holder, mortgage and assignments being without consideration and he having notice. Gantt v. Gantt, 76 S. C. 163, 56 SE 676. In foreclosure proceeding, mere agent of another creditor appointed to take title on redemption for benefit of mortgagor held not a bona fide purchaser, he having paid nothing and known of all the circumstances. Bigelow v. Sheehan [Mich.] 14 Det. Leg. N. 779, 114 NW 389. Law of innocent purchaser held not involved in garnishment proceeding. Elberton Grocery Co. v. First Nat. Bk. [Ga. App.] 59 SE 1129. Complaint stating that after docketing of a judgment against him and giving of a stay bond a defendant conveyed land to plaintiff's grantor, that plaintiff is holder of legal title, and praying injunction against execution sale under the judgment which was affirmed, held not demurrable for failure to state that plaintiff was bona fide purchaser, since judgment debtor had right to sell after stay, and if plaintiff was holder of legal title he was entitled to have cloud removed. Austin v. Union Paving & Cont. Co., 4 Cal. App. 610, 88 P 731.

28. Not effected by fraud in conveyance to grantor. Hall v. Kary, 133 Iowa, 465, 110 NW 930.

29. Culbreath v. Martin, 129 Ga. 280, 58 SE 832. Purchaser entitled to same rights as if purchase had been direct from testator in his lifetime. Id.

30. Code Civ. Proc. § 509. Glenn v. Glenn [Neb.] 112 NW 321.

31. Where a house while a chattel was wrongfully placed on other land with which it was sold, house owner could replevy against innocent purchaser. Eisenhauer v. Quinn [Mont.] 93 P 38.

32. Different from case where grantor had obtained title by fraud or was trustee. Burns v. Kennedy [Or.] 90 P 1102

33. That he had no knowledge of coverture is not protection. T. G. Northwall Co. v. Osgood [Neb.] 115 NW 308.

34. West v. Hermann [Tex. Civ. App.] 104 SW 428.

35. Sales by administrators or executors by order of court. Executor's grantee not bona

It is generally held that the burden of proving bona fide purchase is on the party who asserts it,[37] but proof that one paid value creates a presumption of want of notice to be overcome by the adversary,[38] and one who claims only an equity must show that the holder of the legal title was not a bona fide purchaser.[39] So, also, under a statute merely declaring that an unrecorded deed shall not take effect as against third persons, a junior grantee has not the burden of showing that he took without notice and for value.[40]

Requisites of bona fide purchaser.[See 8 C. L. 1170]

A valuable consideration[See 8 C. L. 1170] is essential,[41] but a consideration to be valuable need not be adequate in point of fact.[42] A pre-existing debt is not sufficient.[43]

fide purchaser though prior deed was unrecorded. Matson v. Johnson [Wash.] 93 P 324. See Judicial Sales, 10 C. L. 507.

36. Defense of innocent purchaser must be made either by answer or special plea. Grier v. Canada [Tenn.] 107 SW 970. In trespass to try title, defendant may prove under plea of not guilty that he was an innocent purchaser. North v. Coughran [Tex. Civ. App.] 108 SW 165.

37. Subsequent grantee to prevail over prior one must show that he was bona fide purchaser for value without notice. Lindley v. Blumberg [Cal. App.] 93 P 894; McAllen v. Alonzo [Tex. Civ. App.] 19 Tex. Ct Rep. 443, 102 SW 475; J. M. Guffey Petroleum Co. v. Hooks [Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690; Holland v. Ferris [Tex. Civ. App.] 107 SW 102. Under B. & C. Comp. § 302, making plaintiff in attachment a purchaser in good faith and for value on filing must prove that he acquired his lien in good of sheriff's certificate, an attaching creditor faith and without notice of outstanding equities. Jennings v. Lentz [Or.] 93 P 327.

38. Evidence insufficient to show notice to purchaser of outstanding equities. Williams v. Smith, 128 Ga. 306, 57 SE 801. One claiming to be a bona fide purchaser must prove purchase and payment, and burden is then on other party that before payment purchaser had notice. Nolen v. Farrow [Ala.] 45 S 183; Osceola Land Co. v. Chicago Mill & Lumber Co. [Ark.] 103 SW 609. The burden is upon the holder of an unrecorded deed to show that an execution plaintiff had notice of the deed when execution was levied. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456. Where in suit to foreclose mechanic's liens, preliminary statements for which had not been filed as required by statute, date and record of mortgage was set out in claimant's pleadings, burden was on them to show that mortgagee had actual notice of the liens, he having proven justness of claim. Scheas v. Boston & Paris, 31 Ky. L. R. 157, 101 SW 942.

39. Where plaintiff proved title by a regular and legal execution sale against one holding legal title. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 SW 4. Where plaintiff purchased the legal and apparently the only title to a tract of land and defendant's claim to half was a mere equity. Laffare v. Knight [Tex. Civ. App.] 17 Tex. Ct. Rep. 960, 101 SW 1034. Burden on plaintiffs claiming an equitable interest as heirs. Wallis, Landes & Co. v. Dehart [Tex. Civ. App.] 108 SW 180. Where plaintiff claimed under one who procured deed from defendants by fraud, burden is on defendants. J. S. Brown Hardware Co. v. Catrett [Tex. Civ. App.] 18 Tex. Ct. Rep. 167, 101 SW 559. Rule that holder of equitable title has burden of showing that purchaser of legal title had notice of his equity or did not pay value does not apply where one party claims through administration proceedings and the other under a subsequent deed from heirs of intestate. Holland v. Ferris [Tex. Civ. App.] 107 SW 102.

40. Purchase with notice or without value would be fraud and this must be shown by party asserting it. Act Dec. 20, 1836, § 40. Kimball v. Houston Oil Co. [Tex.] 17 Tex. Ct. Rep. 710, 99 SW 852.

41. Evidence insufficient to show that consideration for a mortgage was extension of time of payment of a note. Cambria Sav. Bk. v. Lanier [Iowa] 112 NW 774. Deeds held without consideration. Chandler v. Clark [Mich.] 115 NW 65. Junior purchasers will not prevail against unrecorded deeds unless they purchase for value. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456. Evidence insufficient to show payment of value by purchaser from heirs. Holland v. Ferris [Tex. Civ. App.] 107 SW 102.

42. Five dollars and natural love and affection sufficient to protect second grantee against unrecorded deed. Strong v. Whybark, 204 Mo. 341, 102 SW 968. One who had paid only $100 of $1,800 purchase price held not a purchaser for value. Rine v. Wagner [Iowa] 113 NW 471.

43. To protect grantee of homestead from attack for fraud of husband in inducing wife to join in conveyance. Scoggin v. Mason [Tex. Civ. App.] 19 Tex. Ct. Rep. 569, 103 SW 831. To give subsequent grantee priority. Holland v. Ferris [Tex. Civ. App.] 107 SW 102. One taking a crop as credit on pre-existing debt held not a bona fide purchaser. Beaumont Rice Mills v. Bridges [Tex. Civ. App.] 18 Tex. Ct. Rep. 116, 101 SW 511. Where plaintiff claimed under one who had procured a deed from defendant by fraud, defendant's burden to show that plaintiff was not a bona fide purchaser was prima facie discharged by showing that consideration was merely satisfaction of a judgment held by plaintiff against vendor. J. S. Brown Hardware Co. v. Catrett [Tex. Civ. App.] 18 Tex. Ct. Rep. 167, 101 SW 559. Defendant's prima facie case not rebutted by mere showing that abstract of judgment had been recorded and release of record was further consideration for conveyance to plaintiff, but it must be shown that debtor owned

Good faith.[See 6 C. L. 815]—Good faith is an honest intention not to take any unconscientious advantage of others, coupled with the absence of information which would render the transaction unconscientious.[44]

Notice or knowledge.[See 8 C. L. 1171]—One must not have had actual or constructive notice of outstanding equities,[45] though a purchaser with notice from a bona fide

land to which judgment lien had attached. Id.

44. Jennings v. Lentz [Or.] 93 P 327. Want of that caution and diligence which an honest man of ordinary prudence would ordinarily exercise in making a purchase constitutes want of good faith. Id. Where, under description said to be susceptible of double construction, purchaser at succession sale accepts a certain tract as being land described and sells same, his taking possession, either then or thereafter, of another tract as being the land described will be held to be in bad faith as against purchaser who has acquired latter tract by description admitting of but one construction. Railsback v. Leonard, 118 La. 916, 43 S 548.

45. Phelps v. Nazworthy, 226 Ill. 254, 80 NE 756. If one buys with notice of outstanding equities, he is not a bona fide purchaser though he had previously taken an option to buy without notice and for value. Storms v. Munday [Tex. Civ. App.] 18 Tex. Ct. Rep. 924, 101 SW 258. Evidence held to show that mortgagee had no actual notice of attachment proceedings. First Nat. Bk. v. Farmers' & Merchants' Nat. Bk. [Ind. App.] 82 NE 1013.

Held not bona fide: One who did not exercise option to buy or pay price before notice of unrecorded deed. Lindley v. Blumberg [Cal. App.] 93 P 894. Who bought knowing of agreement to sell to another but believing vendor had forfeited his rights. Booth v. Yenney [N. J. Eq.] 66 A 1092. Who accepted mortgage with notice that one of mortgagor's vendors had not been paid, and who subsequently brought foreclosure. Connolley's Ex'r v. Beckett [Ky.] 105 SW 446. Purchaser from an heir before the expiration of the time for appeal from a judgment holding a will invalid, where he had notice of the proceedings, though no steps had been taken looking to appeal. Rine v. Wagner [Iowa] 113 NW 471. Purchaser who took when prior lease was recorded and lessee was in possession. Walker v. Johnson, 53 Fla. 1076, 43 S 771. Purchasers with notice held to take subject to equitable right of third person to specific performance of contract to convey resulting from ratification of agent's ineffective deed. Kirkpatrick v. Pease, 202 Mo. 471, 101 SW 651. Where a grantee purchased in name of herself and minor children but surrendered her unrecorded deed to grantor and procured another deed to be executed to plaintiff, who had full knowledge of the facts, plaintiff was not a bona fide purchaser of interests of the minors. Salyer v. Johnson [Ky.] 107 SW 210. Where attachment creditor and subsequent purchaser knew the land had been conveyed to debtor's wife, she not having been made a party, her right to recover the land was not affected. Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921. Where one of several cotenants holds title in his own name, the purchaser had knowledge of the rights of the other cotenants. Donason v. Barbero, 230 Ill. 138, 82 NE 620. Evidence held to support finding that mortgagee had notice of prior mortgage. Cambria Sav. Bk. v. Lanier [Iowa] 112 NW 774. **Recitals** in a mortgage and deeds held sufficient to charge grantees with notice of extent of grantor's interest and that portions of the land had been previously conveyed to others. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456. Mortgagee could not assert priority over landlord's lien to which mortgage expressly referred. Bowles' Ex'r v. Jones, 29 Ky. L. R. 1022, 96 SW 1121. A grantee whose grantor's recorded deed contained a contract to convey to another, and whose agent had actual knowledge of such contract, held not an innocent purchaser. Houston Ice & Brew. Co. v. Henson [Tex. Civ. App.] 15 Tex. Ct. Rep. 455, 93 SW 713. Where a reservation in a deed was erased without grantor's knowledge, and a subgrantee had knowledge thereof, he was bound by the reservation. Waller v. Ward, 31 Ky. L. R. 40, 101 SW 341. One taking bill of sale disclaiming guaranty of title held to take chances as against mortgagee, where property had been sold at execution without authority. Boswell v. First Nat. Bk. [Wyo.] 93 P 661. One who takes a chattel mortgage, covenanting that property is unincumbered except by a certain prior mortgage described, has actual notice of prior mortgage and its conditions. Independent Brew. Co. v. Durston, 55 Misc. 498, 106 NYS 686. Purchaser from execution receiver held bound to notice that court making order of sale had no jurisdiction. Boswell v. First Nat. Bk. [Wyo.] 93 P 661. Defendant obtaining title under foreclosure proceeding adjudging that plaintiff was entitled to a water right could not plead abandonment of such right by plaintiff's grantor. Schmidt v. Olympia L. & P. Co. [Wash.] 90 P 212. Evidence held to show that grantee took with full knowledge that grantor had only a defeasible deed intended as security. Smith v. Jensen [N. D.] 114 NW 306. Chattel mortgagee held to have had notice of mortgagor's fraud on latter's vendor. William Bergenthal Co. v. Security State Bk., 102 Minn. 138, 112 NW 892. Where purchaser from attorneys who by improper conduct had obtained title to land belonging to plaintiff, their client, had notice of plaintiff's previous ownership, and that his grantors were plaintiff's attorneys, and that only title of attorneys was under execution against plaintiff's husband, he was not entirely innocent and should settle with plaintiff rather than with the attorneys. Bucher v. Hohl, 199 Mo. 320, 97 SW 922. Evidence sufficient to charge one loaning money on property with notice of interest of borrower's partner therein. Longley v. Sperry [N. J. Eq.] 66 A 1062. A wife who knows of the provision in a contract for the purchase of land by her husband that buildings erected shall be the property of the vendor until he is paid cannot, as against him, claim title to a building erected with her money. Edwards

purchaser succeeds to the latter's rights.[46] One who buys for value and without notice from a first purchaser is a bona fide purchaser though his vendor was charged with notice.[47] Registration or record,[48] or knowledge of facts sufficient to put an ordinarily prudent person on inquiry,[49] is equivalent to actual knowledge. Hence an intending purchaser who knows that a third person holds a contract adverse to his interests is charged with knowledge of its contents.[50] One who acquires an interest in land is bound to take notice of all facts disclosed by the direct chain of conveyances terminating with himself.[51] Possession is notice to the world of the title and

v. Lechleiter, 149 Cal. 677, 87 P 194. The doctrine of subordination of a legal estate acquired after and with notice of an earlier equity does not apply where there is no pre-existing equity in the vendor. Thompson v. E. I. Dupont Co., 100 Minn. 367, 111 NW 302. As where she had an equal opportunity with the vendors to know the extent of her interest in the land and vendees did not know of her misapprehension or conceal any knowledge with reference thereto. Id. Though equity will protect a vendor conveying in consideration that vendee shall establish a basin on the land, even as against the vendee's assigns who buy with notice. Dawson v. Western Maryland R. Co. [Md.] 68 A 301. Purchaser from vendor has no remedy where no easement was created in favor of land he bought. Id. Purchaser of land subject to water rights without knowledge of extent of such rights held not chargeable with notice of greater rights than described in deed conveying dominant estate. Schmidt v. Olympia L. & P. Co. [Wash.] 90 P 212. That one redeemed from judicial sale of a dominant estate specifying water rights as per deeds of that estate held not notice to purchaser of servient estate that redemption was intended to secure greater rights as per deeds conveying servient estate. Id. Evidence that a purchaser paid full value is, after the lapse of years and death of the parties, sufficient to authorize a finding that purchaser had no notice of defects in grantor's title. J. M. Guffey Petroleum Co. v. Hooks [Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690. Where grantor had previously conveyed a part of the premises by deed which was not recorded, and subsequent grantee paid a satisfactory price for entire tract, aforesaid rule was applicable though part not included in unrecorded deed was worth as much as subsequent grantee paid for the whole. Id.

Evidence insufficient to charge debtor with notice of ownership of note and mortgage at time he paid the debt and took release of mortgage. McVay v. Bridgman [S. D.] 112 NW 1138. To charge purchaser with notice that record release of trust deed was unauthorized. Vogel v. Troy, 232 Ill. 481, 83 NE 960. To charge partner selling out to copartner with notice of assignment of outstanding mortgage produced with seal torn off and note stamped paid. Longley v. Sperry [N. J. Eq.] 66 A 1062. That papers were thus presented before maturity held insufficient to excite suspicion that they had been stolen. Id. That quitclaim grantee had made third person party in foreclosure held not to show knowledge of claim of superior title. Baecht v. Hevesy, 115 App. Div. 509, 101 NYS 413.

46. Quitclaim grantee from bona fide purchaser acquires grantor's rights, regardless of his own knowledge of outstanding equities or price paid. Laffare v. Knight [Tex. Civ. App.] 17 Tex. Ct. Rep. 960, 101 SW 1034.

47. Coombs v. Aborn [R. I.] 68 A 817.

48. See post, § 2.

49. Knowledge of facts sufficient to excite inquiry is constructive notice of all that reasonable inquiry would have disclosed. Jennings v. Lentz [Or.] 93 P 327; Peterson v. Weist [Wash.] 93 P 519. One who has notice or knowledge of previous sale or of facts or circumstances sufficient to put reasonably prudent man on inquiry is not a purchaser in good faith. Froman v. Madden, 13 Idaho, 138, 88 P 894. Purchasers with knowledge of reservation of timber which had been sold to others held bound to make inquiry as to time for removal of timber, and could not rely on mere recital in their deeds. Peterson v. Weist [Wash.] 93 P 519. Instruction on hypothesis that chattel mortgagee had knowledge sufficient to put prudent man on inquiry of mortgagor's fraud held correct. William Bergenthal Co. v. Security State Bk., 102 Minn. 138, 112 NW 892. A vendee is chargeable with such knowledge as he might have obtained on inquiry where he knows facts which would lead a man of ordinary prudence to make such inquiry, and in such case matters of public record are constructive notice. Warner v. Hamill, 134 Iowa, 279, 111 NW 939. Presumption is that inquiry would have developed under what right or interest an agent held possession. Parker v. Gortatowsky, 127 Ga. 560, 56 SE 846. Prior purchaser to recover from subsequent one was required to show only that latter had notice of facts sufficient to put ordinarily prudent person on inquiry. Waddington v. Lane, 202 Mo. 387, 100 SW 1139. Grantee put on inquiry as against grantor's wife by recital in deed of consideration different from real consideration. Scoggin v. Mason [Tex. Civ. App.] 19 Tex. Ct. Rep. 569, 103 SW 831. Evidence held to show that purchasers from certain heirs were not purchasers in good faith and without notice of unrecorded deed to plaintiff's grantor. Mississippi River Logging Co. v. Blue Grass Land Co., 131 Wis. 10, 110 NW 796. To show facts sufficient to put purchaser on inquiry as to existence and extent of a building restriction so as to charge him, though agreement creating restriction was not recorded. Wahl v. Stoy [N. J. Eq.] 66 A 176.

50. Purchaser with knowledge that third person had received a written contract of sale held charged with knowledge of provision with reference to taxes. McAdow v. Wight [Mo. App.] 107 SW 421.

51. Transferee of lien notes bound to know that transaction out of which they arose was simulated for purpose of avoiding constitu-

rights of the person in possession,[52] but this doctrine has no application under statutes making conclusive absolute grants intended only as security, unless instruments of defeasance are recorded,[53] and it has been held that if the record shows absolute title in a grantor, possession by his grantor is not notice to the purchaser of a parol reservation in favor of the person in possession.[54] So, also, possession by a tenant is the landlord's possession,[55] and is not notice of rights claimed by the tenant independent of his lease.[56] Whether there is a sufficient possession to constitute constructive notice is a question of fact.[57] Visible user is also notice.[58] There is a conflict as to whether a quitclaim grantee is a bona fide purchaser.[59] A purchaser at judicial

tional inhibition against mortgaging homestead. Brooks v. Sanger Bros. [Tex.] 19 Tex. Ct. Rep. 782, 105 SW 37, rvg. [Tex. Civ. App.] 18 Tex. Ct. Rep. 49, 100 SW 798. Where a covenant not to use land for a particular purpose is not contained in a deed or indenture in the chain of title, subsequent purchasers are not bound thereby unless they have such knowledge or notice thereof as to imply that the burden was assumed as part of the consideration. Sjoblom v. Mark [Minn.] 114 NW 746.

52. Actual possession notice equal to record of deed. Merchants' & Farmers' State Bank v. Dawdy, 230 Ill. 199, 82 NE 606. Is notice of all rights legal or equitable. Garbutt v. Mayo, 128 Ga. 269, 57 SE 495. Held notice to subsequent purchasers. City Loan & Banking Co. v. Poole [Ala.] 43 S 13; Sproull v. Miles [Ark.] 102 SW 204; Bartlett v. Smith, 146 Mich. 188, 13 Det. Leg. N. 713, 109 NW 260; Chandler v. Clark [Mich.] 115 NW 65; Squires v. Kimball [Mo.] 106 SW 502; Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A 719; Hymen v. Gatta, 33 Pa. Super. Ct. 438; Frugia v. Trueheart [Tex. Civ. App.] 20 Tex. Ct. Rep. 535, 106 SW 736; Nuttall v. McVey [W. Va.] 60 SE 251. Immaterial that locus was a highway and possession was occupancy with steam railway. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A 719. Held notice to mortgagee. Martin v. Hill, 30 Ky. L. R. 1110, 100 SW 343 Purchaser of opera house held charged with notice of rights of lessees in possession by agent. Parker v. Gortatowsky, 127 Ga. 560, 56 SE 846. Possession is sufficient to put a purchaser from another on inquiry (Smith v. Owen [W. Va.] 59 SE 762), and such purchaser will be charged with all information such inquiry would have given if diligently pursued (Id.). Laws 1885, p. 233, c. 147, § 1 (Revisal 1905, § 980), excepting from its provision making invalid conveyances until registered, unregistered deeds executed prior to Dec. 1, 1885, where holder is in actual possession, excepts a bond for title executed before that date under which one is in possession, "unregistered deed" having same scope as "conveyance of land," etc., used in first part of section. McNeill v. Allen [N. C.] 59 SE 689. Civ. Code 1902, § 2457, providing that no possession of realty described in any writing required by law to be recorded shall be notice of such instrument and that actual notice must be of the instrument or its nature and purport, does not affect the rule that possession by a grantor in a deed intended as a mortgage is notice to a subsequent purchaser from the grantee (Manigault v. Dofton [S. C.] 59 SE 534), especially where deed to mortgagor was on record and purchaser had actual knowledge of extent of his grantor's rights (Id.).

53. Assignor of land contracts, though he was in possession, held not protected as against assignee's mortgagee without actual notice. Rev. Codes 1905, § 6179. Gray v. O. W. Kerr Land Co. [N. D.] 113 NW 1034.

54. Behrens v. Crawford [Ky.] 108 SW 288.

55. Evidence held to show that mortgagor was in possession by tenant when mortgage was given. Gray v. O. W. Kerr Land Co. [N. D.] 113 NW 1034.

56. Not notice that tenant claimed title to building erected during tenancy. Denison Lumber Co. v. Milburn [Tex. Civ. App.] 107 SW 1161. Is not constructive notice of tenant's interest as vendee in contracts which he has assigned to the landlord as security. Gray v. O. W. Kerr Land Co. [N. D.] 113 NW 1034.

57. Troike v. Cook County Sav. Bk., 127 Ill. App. 413.

58. Discoverable easement notice. Schmidt v. Brown, 226 Ill. 590, 80 NE 1071. Where purchaser knew that open passageway had been used by plaintiff for many years but failed to inquire concerning his rights, they were chargeable with notice thereof. Jones v. Jones, 31 Ky. L. R. 183, 101 SW 980. Purchaser of land with alleyway through center of a block with houses on each side and gates, held to take subject to burden imposed by vendor who platted block and conveyed lots with reference to alleyway. Myers v. Kenyon [Cal. App.] 93 P 888. Purchaser of land through which railroad was operated held charged with notice of width of right of way under company's charter, though company's deed of strip was not recorded. Southern R. Co. v. Howell [S. C.] 60 SE 677. To be constructive notice of existence of a servitude, there must be such connection between use and thing used as to suggest to a purchaser that one estate is servient to the other. Jobling v. Tuttle, 75 Kan. 351, 89 P 699. The servitude must be open and visible or the purchaser is not bound in absence of actual notice. Id. Knowledge of purchaser of mineral springs that guests of nearby hotel had for years enjoyed their use in common with public held not notice of special contract rights with reference thereto. Id.

59. That a deed is a quitclaim does not alone impute notice. Coombs v. Aborn [R. I.] 68 A 817. Quitclaim grantee for value and without notice protected as against prior unrecorded deed. Strong v. Whybark, 204 Mo. 341, 102 SW 968; Bannard v. Duncan [Neb.] 112 NW 353; Baecht v. Hevesy, 115 App. Div. 509, 101 NYS 413. Quitclaim grantee is not bona fide purchaser. O'Neal v. Prestwood [Ala.] 45 S 251. Not innocent as

sale is charged with notice of every fact appearing on the face of the proceedings affecting the title acquired.[60] Notice may also be imputed to one from certain representative relations in which he may stand.[61]

While notice of outstanding equities can be shown by circumstances, the circumstances must be of such character as to point with probative force to the existence of the equities.[62] A mere rumor that a title is bad, without more, is not sufficient to charge a purchaser with notice,[63] and if no knowledge of a claim is brought home to a purchaser he will not be affected by its assertion to strangers.[64] Actual or constructive notice of a deed which does not so describe the land as to enable one to identify it cannot affect the rights of a subsequent purchaser,[65] and notice of an invalid or worthless title cannot affect a title acquired for value.[66] There is no conclusive presumption that a letter which the law does not require to be sent is read by the one who receives it.[67]

One who takes without notice will be protected,[68] if he acts in good faith and pays value.[69]

against prior unrecorded deed. Woody v. Strong [Tex. Civ. App.] 18 Tex. Ct. Rep. 65, 100 SW 801.

60. Sale held not to include a certain lot. Board of Education of Flatwoods Dist. v. Berry [W. Va.] 59 SE 169. See, also, Judicial Sales, 10 C. L. 507.

61. Notice to mortgagee's agent of defect in title held notice to mortgagee. Connolley's Ex'r v. Beckett [Ky.] 105 SW 446. That an owner employed one to see if an increase in price of land could not be obtained and notified him thereafter to close the deal did not constitute him such agent as to effect owner with notice of fraud of owner's broker in taking title himself. Storms v. Mundy [Tex. Civ. App.] 18 Tex. Ct. Rep. 924, 101 SW 258. Rule that knowledge of agent which it would be unlawful for him, or which it is not his duty to, disclose to his principal, does not bind the latter, does not apply in the case of one who is the mutual agent of both parties to the transaction, as where a chattel mortgage is given by a vendee in fraud of the vendor through one who acted for both mortgagor and mortgagee. William Bergenthal Co. v. Security State Bk., 102 Minn. 138, 112 NW 892. Wife chargeable with notice of mortgage, knowledge of which was obtained by husband negotiating for purchase of land for her. Retherford v. Wright [Ind. App.] 83 NE 520. Purchaser of a dominant estate held chargeable with notice of unrecorded deed of which his attorney had knowledge, describing water rights as in deeds of servient estate. Schmidt v. Olympia L. & P. Co. [Wash.] 90 P 212.

62. Evidence insufficient. Wallis Landes & Co. v. Dehart [Tex. Civ. App.] 108 SW 180.

63. Williams v. Smith, 128 Ga. 306, 57 SE 801.

64. Lindley v. Blumberg [Cal. App.] 93 P 894.

65. Merritt v. Bunting [Va.] 57 SE 567.

66. Invalid tax title. Osmer v. Sheasley [Pa.] 68 A 965.

67. For jury whether plaintiff in ejectment had notice of unrecorded lease through letter received by him. Bova v. Norigian [R. I.] 67 A 326.

68 Easement of free use of mineral waters from lands of another could not be asserted against subsequent grantee without notice, nothing appearing of record. Jobling v. Tuttle, 75 Kan. 351, 89 P 699. The signing of a qualified consent to the construction of an elevated road in front of one's house which, when the road is built, is not complied with, and which is not recorded, will not be binding on a subsequent purchaser who takes title before the road is begun and who has no notice of the consent. Shaw v. New York El. R. Co. [N. Y.] 79 NE 984. Where defendants took title from surviving member of a community under deed purporting to convey the entire title without notice of equitable interest of heirs, defendants acquired entire title as against such heirs. Wallis Landes & Co. v. Dehart [Tex. Civ. App.] 108 SW 180. A grantee is not bound by a provision in a deed to another of contiguous land providing for a change in dividing lines where he had no notice thereof. Heflin v. Heflin [W. Va.] 59 SE 745. Evidence that purchaser had no notice or knowledge of any right asserted in the land by a mortgagee held sufficient to take question of innocent purchaser to jury. Hamilton v. Green [Tex. Civ. App.] 17 Tex. Ct. Rep. 951, 101 SW 280. Where agent fraudulently obtained title and leased to another, principal could recover only rent paid after notice of his rights. Storms v. Mundy [Tex. Civ. App.] 18 Tex. Ct. Rep. 924, 101 SW 258. Conversion would not lie by holder of unrecorded chattel mortgage and also of a landlord's lien against purchaser from mortgagor, in absence of proof that purchaser had notice of plaintiff's liens, or facts sufficient to arouse inquiry. Alabama Cotton Products Co. v. Myrick [Ala.] 44 S 587. Question of notice and authorization of sale by plaintiff held for jury. Id. Holder of chattel mortgage covering property to be subsequently purchased by the mortgagor could not in equity or law enforce mortgage as against purchaser from mortgagor of property traded for that owned by mortgagor when mortgage was made, purchaser being without notice or knowledge of mortgage. Spinney v. Meloon [N. H.] 68 A 410. Purchaser of standing timber held not protected as against innocent purchaser where trees were not branded as provided by Ky. St. 1903, § 1409, subsec. 14. Bowerman v. Taylor [Ky.] 106 SW 846. Mechanic's lien claimants held not entitled to priority over

§ 2. *Statutory records or filings as constructive notice. A. In general.* See 8 C. L. 1174

(§ 2) *B. Eligibility to record.* See 8 C. L. 1174—That its record may give constructive notice, an instrument must be properly executed and acknowledged,[70] and the record of instruments of a class not entitled to record is ineffective.[71]

(§ 2) *C. Necessity and effect of recording.* See 8 C. L. 1174—While the recording of a deed is presumptive evidence of its delivery [72] and also of its acceptance, these presumptions are rebuttable.[73]

As to such instruments as the law requires to be recorded or filed,[74] record or filing is essential for the protection of the holders against the claims of subsequent creditors or bona fide purchasers [75] whose deeds are first duly recorded,[76] but an un-

mortgagee where they failed to file preliminary statment showing furnishing of, or intention to furnish, materials and labor, as required by Ky. St. 1903, § 2463, in absence of proof of actual notice to mortgagee of furnishing of materials or performance of labor. Scheas v. Boston & Paris, 31 Ky. L. R. 157, 101 SW 942. Mortgagee's knowledge of building operations was not actual notice of existence of liens. Id.

69. See ante, this section.

70. Certificate that officer saw grantor sign held not acknowledgment entitling deed to record. Punchard v. Masterson [Tex.] 18 Tex. Ct. Rep. 101, 101 SW 204. Act Feb. 9, 1860 (Laws 1860, p. 75, c. 58) and act April 23, 1895 (Laws 1895, p. 157, c. 99), curing defects in record of certain deeds, applied only to instruments properly acknowledged. Id. Where chattel mortgages were regular on their faces and there was nothing to indicate that the notary who took acknowledgments was disqualified or interested, they were entitled to record and gave constructive notice. Boswell v. First Nat. Bk. [Wyo.] 93 P 661.

Held not constructive notice though recorded: Deed not properly acknowledged. Leavitt v. Thornton, 108 NYS 162. Deed to interest in Alaska mining claim neither properly witnessed nor acknowledged. Alaska Exploration Co. v. Northern Min. & Trading Co. [C. C. A.] 152 F 145. Chattel mortgage not properly witnessed or acknowledged. Pease v. Magill [N. D.] 115 NW 260. Chattel mortgage assignments not properly acknowledged. Longley v. Sperry [N. J. Eq.] 66 A 1062. Unsigned tax deed. Rainey v. Lamb Hardwood Lumber Co. [Miss.] 45 S 367. Contract for sale or option of coal in place not properly acknowledged or witnessed. South Penn Coal Co. v. Smith [W. Va.] 60 SE 593. Record of written instrument whether creating a lien or conveying or reserving title, is unauthorized and confers no notice where such instrument is attested by a stockholder in a corporation in whose interest it is executed. Betts-Evans Trading Co. v. Bass, 2 Ga. App. 718, 59 SE 8.

71. Held recordable: Agreement preserving land exclusively for residence purposes affects title to realty within St. 1898, § 2242. Boyden v. Roberts, 131 Wis. 659, 111 NW 701. Where a will insufficiently described land, affidavits clearly identifying the land are recordable and make title sufficient under Code, § 2957, providing for record of affidavits explaining any defect in chain of title. Hantz v. May [Iowa] 114 NW 1042. Attempted mortgage by one partner of share of partnership property held eligible to record. Clark v. Lyster [C. C. A.] 155 F 513. Record of a deed with a collateral contract of defeasance is notice to subsequent purchasers of the grantor's equity to a reconveyance. Francis v. Francis [S. C.] 58 SE 804.

Not recordable: Agreement by landowner with adjoining owner that he will abstain from selling liquor on his premises for a term of years, though executed on behalf of heirs, executors, and assigns. Sjoblom v. Mark [Minn.] 114 NW 746. Instrument allowing erection of mill to saw timber on payment of a sum per thousand feet to owner of the land. Tremaine v. Williams, 144 N. C. 104, 56 SE 694. Absolute bill of sale. Morin v. Newbury, 79 Conn. 338, 65 A 156. Registration of note for part of price of land but giving no interest therein did not give priority over later mortgage. Carpenter v. Duke, 144 N. C. 291, 56 SE 938. Statement showing drainage ditch and filed with county clerk under Ann. St. §§ 2264, 2265, which statute was unconstitutional. Blake v. Boye, 38 Colo. 55, 88 P 470.

72. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997.

73. Evidence held to show nondelivery though deed was recorded. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997.

74. Lease for five years with renewal covenant held within Rev. Laws, c. 127, § 4, providing for recording of leases for more than seven years. Leominster Gaslight Co. v. Hillery [Mass.] 83 NE 870. Record of assignment of mortgage is not required by Rev. St. § 4135, in order to give the mortgage priority over subsequent liens. Williams v. Queen City Homestead Co., 9 Ohio C. C. (N. S.) 136. The right of a community creditor to preference out of proceeds of community property being secured neither by technical privilege or mortgage, registry of the claim is not necessary to enable him to enforce it against third persons who have acquired rights in the property. Scovel v. Levy's Heirs, 118 La. 982, 43 S 642.

75. Act December 20, 1836 (1 Laws 1836, p. 156, § 40) providing that **unrecorded deeds** shall not take effect as against third persons applied to instruments executed after, as well as before, its passage. Kimball v. Houston Oil Co. [Tex.] 17 Tex. Ct. Rep. 710, 99 SW 852. Section 37, providing that holders of deeds should have some recorded before April 1, 1838, did not apply to instruments executed after passage of act, and grantee in

one such instrument did not have until April 1, 1838, to record as required by § 40. Id. The deed of a guardian, not recorded until after the ward has become of age and has given a deed to the same land, will not convey a good title against purchaser without notice. Phelps v. Nazworthy, 226 Ill. 254, 80 NE 756. Bona fide quitclaim grantee protected from prior unrecorded conveyance. Baecht v. Hevesy, 115 App. Div. 509, 101 NYS 413. Innocent purchaser protected where no deed transferring standing timber had been recorded. Bowerman v. Taylor [Ky.] 106 SW 846. A deed for lands executed by a mortgagor thereof in 1843, but not filed for record within six months of its exceution, nor until after decree and sale of such lands, in a suit to foreclose the mortgage wherein the mortgagor was the defendant, to bona fide purchaser without knowledge of such deed, is ineffective against the title so acquired at such judicial sale. Anderson v. United Realty Co., 9 Ohio C. C. (N. S.) 473. Rights of purchaser at such sale are superior to an unrecorded deed though he had knowledge of a prior deed, but before the judicial sale to him was consummated by deed grantee in such prior deed agreed for a valuable consideration not to stand upon the title thereby acquired, and to allow the title under the judicial sale to prevail. Id. Foreclosure purchaser of servient estate without notice of unrecorded deed held not chargeable with notice of greater water rights in dominant estate than fixed by prior deeds of latter estate. Schmidt v. Olympia L. & P. Co. [Wash.] 90 P 212. Prior unrecorded deeds are void as to creditors acquiring liens on the land by legal process unless the creditors have notice when their liens are acquired and the notice of an execution purchaser will not affect his title if the execution plaintiff was without notice when he acquired his execution lien. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456. Extension of expired recorded **option,** not recorded, being a contract to convey land, held void as against one relying on record, he having right to treat option as ended. Trogden v. Williams, 144 N. C. 192, 56 SE 865.

Trust instruments not recorded held invalid as against trustee in bankruptcy. Putnam v. Southworth [Mass.] 83 NE 887. Vendee from prior grantor and grantee held protected as against assignee of **vendor's lien notes,** transfer of which did not appear of record. Drumm Commission Co. v. Core [Tex. Civ. App.] 20 Tex. Ct. Rep. 111, 105 SW 843. Under Rev. Laws, c. 127, § 4, making invalid unrecorded conveyances except as against grantor and his heirs, and provisions of bankruptcy law, **mortgage** by wife, not recorded until after husband's bankruptcy, could be attacked by his trustee. Putnam v. Southworth [Mass.] 83 NE 887. Where a guardian wrongfully discharged of record a mortgage on his land given to his ward and thereafter mortgaged to others and finally sold to innocent purchasers without accounting to the ward, such purchasers would be protected against foreclosure of the ward's mortgage. Cummings v. Strobridge Land Syndicate, 150 Cal. 209, 88 P 901. Partner's lien for indebtedness of partnership to him held prior to **unrecorded chattel mortgage** on property transferred to him on formation of the partnership, he having no actual notice. Rankin v. Trickett, 75 Kan. 306, 89 P 698. Attachment lien takes priority over unrecorded chattel mortgage of which attaching creditor had no notice. Bowles' Ex'r v. Jones, 29 Ky. L. R. 1022, 96 SW 1121. Unrecorded chattel mortgage not enforcible as against creditors of corporation relying on ostensible ownership. Besten v. People's Messenger & Parcel Delivery Co's Assignee, 30 Ky. L. R. 787, 99 SW 631. Code 1896, § 1009, making inoperative conveyances of personalty not recorded, applies only to purchasers from the person who was owner when mortgage was executed, or some one holding under him, or having authority to sell. Couch v. Holmes [Ala.] 43 S 858. Hence, where wife of mortgagor without authority sold the chattel while mortgagor was in the penitentiary, purchaser was not protected though mortgage was not recorded. Id. Delivery of chattel mortgage to third person to be by him delivered to mortgagee at a future date if debt was not then paid held an absolute delivery and failure to file rendered same void as to creditors. Tooker v. Siegel-Cooper Co., 55 Misc. 68, 106 NYS 277. Allegation that chattel mortgage was "not filed pursuant to laws of state of New York" held sufficient allegation that neither mortgage nor copy was filed. Lesser v. Bradford Realty Co., 116 App. Div. 212, 101 NYS 571. Where record was clear when plaintiff filed chattel mortgage to secure advances, but later a prior mortgage was recorded, plaintiff could charge advances made after record of prior mortgage. Nolen v. Farrow [Ala.] 45 S 183. Under Rev. Codes N. D. 1899, § 4732, making void **unrecorded conditional sale contracts** as against "subsequent creditors without notice and purchasers and incumbrancers in good faith," failure to record does not invalidate as against purchaser's trustee in bankruptcy. In re Pierce [C. C. A.] 157 F 755. Failure to record conditional sale contract renders it voidable by attachment creditors, judgment creditors and bona fide purchasers only, in Minnesota. Dunlop v. Mercer [C. C. A.] 156 F 545. Where there were no such creditors or purchasers when petition in bankruptcy was filed, failure to record did not render contract voidable by trustee. Id. Purchaser in good faith of railroad equipment without notice of existence of conditional sale contract not filed in office of secretary of state, as required by Comp. Laws 1897, § 6336, takes title. Hogan v. Detroit United R., 148 Mich. 283, 14 Det. Leg. N. 87, 111 NW 765. A court of equity has nothing to do with questions of diligence or negligence and the balancing of equities where one party has and another has not complied with the registry laws for the preservation of liens. First Nat. Bk. v. Bedford [Ark.] 102 SW 683.

76. In suit for trespass, where a junior deed not properly recorded until after commission of injury complained of comes in conflict with a senior deed never properly recorded, junior deed takes priority only after it is lawfully filed for record, and with respect to trespass committed before junior deed is so filed, senior deed will prevail. Wadley Lumber Co. v. Lott [Ga.] 60 SE 836. Purchaser without notice or knowledge of prior unrecorded deed takes title where his deed is first recorded. Froman v. Madden, 13 Idaho, 138, 88 P 894; Strong v. Whybark, 204 Mo. 341, 102 SW 968. Unre-

filed or unrecorded instrument is valid as between the parties,[77] and as against prior creditors and persons who have notice thereof,[78] or who for any other reason are not bona fide purchasers.[79] A statute postponing an unrecorded deed to a subsequent recorded one from "the same vendor" is inapplicable where the junior deed is taken from the heirs or devisees of such vendor.[80] Of two unrecorded deeds the older prevails.[81] Excusable mistake may be ground for equitable intervention.[82] In some states, unless an instrument of defeasance is recorded, an absolute conveyance intended to be defeasible takes effect according to its terms except as against the grantee, his heirs or devisees, or persons with actual notice.[83] Failure to record a deed or mortgage does not constitute it an unlawful preference under the bankruptcy act.[84] Destruction of the record of title to land does not affect the status of the title but merely renders it more difficult of proof.[85] Under a statute which merely provides that, until recorded judgments affecting title to land shall not be admissible in evidence in support of any claim thereunder a subsequent purchaser will not be protected if a judgment divesting title is in fact recorded, though the record does not give notice that the grantor was a party thereto.[86] In Texas recorded instruments

corded grant of permission to use an alley held ineffective as against subsequent deed duly registered. Tise v. Whitaker Harvey Co., 144 N. C. 507, 57 SE 210.

77. Failure to record a deed does not affect the grantee's title except as to creditors and subsequent bona fide purchasers. Board of Improvement Dist. No. 5. v. Offenhauser [Ark.] 105 SW 265; Black v. Skinner Mfg. Co., 53 Fla. 1090, 43 S 919. The quantum of land carried by a deed purporting to convey an entire tract of which the grantor is then owner is not affected by the appearance or nonappearance of record of part of the land. Lang v. Osceola Consol. Min. Co., 145 Mich. 370, 13 Det. Leg. N. 474, 108 NW 678. Deed by attorney in fact pursuant to unrecorded power held valid as between grantor and persons claiming under grantee. Godsey v. Standifer, 31 Ky. L. R. 44, 101 SW 921. Unrecorded mortgage good as between devisee and mortgagee. Robertson v. Sebastian, 30 Ky. L. R. 883, 99 SW 933. Unfiled chattel mortgage good as between parties. Eastman v. Parkinson [Wis.] 113 NW 649. Unregistered assignment of mortgage held valid as against mortgagor's heirs. Morton v. Blades Lumber Co., 144 N. C. 31, 56 SE 551. A judgment may be a lien as between the parties although not properly indexed. Indexed as against Mrs. G. B. S. instead of K. L. S. State Sav. Bk. v. Shinn, 130 Iowa, 365, 106 NW 921.

78. Actual notice supplies absence of constructive notice. Gross v. Watts, 206 Mo. 373, 104 SW 30. Unrecorded chattel mortgage while not valid as to subsequent creditors generally is good as to creditors with notice and as to prior creditors. Swafford's Adm'r v. Asher, 31 Ky. L. R. 1338, 105 SW 164. In absence of fraud an unfiled chattel mortgage is valid as against **subsequent creditors** who acquire no lien on the property. Eastman v. Parkinson [Wis.] 113 NW 649. Junior purchasers acquire no title against prior unrecorded deeds of which they have notice. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456; Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921. Evidence held to show actual notice. Chandler v. Clark [Mich.] 115 NW 65. To show defendant's actual knowledge of a prior purchase by plaintiff. Waddington v. Lane, 202 Mo. 387, 100 SW 1139.

79. When title appears of record in one person, the record of a mortgage to him from another is not notice that the mortgagor is owner (Jennings v. Lentz [Or.] 93 P 327), and one purchasing from the mortgagor cannot rely on the statement of the record owner that he had conveyed to the mortgagor, though such is the case, as against the holder of an unrecorded deed from the mortgagor to a third person (Id.). Corporation purchasing property on which conditional sale lien existed, from a receiver who was also its general manager, held not a bona fide purchaser protected by North Carolina statute relative to recordation of conditional sale contracts. American Wood Working Mach. Co. v. Norment [C. C. A.] 157 F 801. Conveyance in trust for benefit of grantor does not constitute grantee a purchaser for value and record thereof will not affect title of real owner under prior unrecorded deed. Black v. Skinner Mfg. Co., 53 Fla. 1090, 43 S 919.

80. Statutes and prior decisions reviewed. Henderson v. Armstrong, 128 Ga. 804, 58 SE 624.

81. Williams v. Smith, 128 Ga. 306, 57 SE 801.

82. In suit to recover land, plaintiff could show that deed was not recorded because of excusable mistake in not sending fee to proper officer. Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921.

83. Vendee who assigned absolutely his contracts of purchase held not protected, as against assignee's mortgagee, though he was in possession. Gray v. O. W. Kerr Land Co. [N. D.] 113 NW 1034.

84. In re McIntosh [C. C. A.] 150 F 546.

85. Dixon v. Harris [Ky.] 105 SW 451.

86. Purchaser could not claim protection, as bona fide purchaser, under Rev. St. 1895, art. 4669, where judgment divested C. "Henderson" of all interest in the land though her real name was C. "Haines." Haines v. West [Tex.] 20 Tex. Ct. Rep. 153, 105 SW 1118. Not protected under art. 4640, which applies only to deeds. Id.

are admissible in evidence without proof of execution if filed with the papers of the case three days before trial.[87]

(§ 2) *D. Sufficiency, operation, and effect of record.*[See 8 C. L. 1175]—Statutory provisions relative to recording or filing must be at least substantially complied with,[88] and to this end the record must be made in the regular registry book [89] and in the proper county,[90] but mere inadvertent, clerical errors or omissions apparent on the record are not fatal,[91] and where the meaning is plain, abbreviations by ditto marks are permissible.[92] One who has duly deposited a valid recordable instrument with the proper officer for record will be protected notwithstanding failure of duty on the part of the officer,[93] but if a mortgage is in fact indexed or recorded, a purchaser may rely on the record as to the amount of the debt, notwithstanding the mistake is that of the registrar.[94] If an instrument is handed to the officer to be filed for record and then taken by him to the office and filed there, it will be considered as filed for record as required by law from the time of its actual deposit and filing in the office.[95] Recording of an unacknowledged chattel mortgage with an indorsement

87. Rev. St. 1895, art. 2312, is satisfied as to instruments which have been so on file for months, though temporarily withdrawn just before trial. Stark v. Harris [Tex. Civ. App.] 20 Tex. Ct. Rep. 665, 106 SW 887. While statute applies only to instruments on record prior to filing in the suit so that recording of instrument just before trial would add nothing to its admissibility (Id.), if it conveys other land situated in another county and had there been recorded, such registration, with the three day filing, makes it admissible without proof of execution in any county and as to any land conveyed by it (Id.).

88. Under Kirby's Dig. § 5407, in order that a chattel mortgage may become a lien as against strangers without being filed for record, the words "this instrument is to be filed but not recorded" must be indorsed upon it and signed by mortgagee or his agent, and it must then be filed with recorder. First Nat. Bk. v. Bedford [Ark.] 102 SW 683. Judgment against Alex. Simon entered in judgment docket but not indexed alphabetically therein held not a lien on lands of Simon Alexander as against subsequent purchaser. Citizens' Bank of Stanton v. Young [Neb.] 110 NW 1003. Where deed was properly authenticated so as to entitle it to registration under law in force at its execution and was duly recorded in 1849, its reregistration in 1894, after destruction of public records, was sufficient for all purposes of notice after that date. Rev. St. 1895, art. 4662. Frugia v. Trueheart [Tex. Civ. App.] 20 Tex. Ct. Rep. 535, 106 SW 736.

89. Irrigation contract held recordable not in book for deeds, grants, transfers, and mortgages, but in book for "such other writings as are required or permitted by law to be recorded," as provided by County Government Act, § 120, subd. 12. Stanislaus Water Co. v. Bachman [Cal.] 93 P 858. Record on minutes of court and not in regular registry book held not notice of outstanding equities in land. Williams v. Smith, 128 Ga. 306, 57 SE 801.

90. Evidence held to show residence of mortgagor in county where second mortgagee recorded his mortgage and not in county of record of first mortgage so as to postpone the latter. Reynolds v. Smith, 123 Mo. App. 229, 100 SW 535. Record of judgment and deeds in county where greater portion of land lay held notice of claim to portion in adjoining county. Haines v. West [Tex. Civ. App.] 18 Tex. Ct. Rep. 469, 102 SW 436. Under Rev. St. 1895, art. 783, a deed of land in a new county is, prior to the organization of the county properly recorded in the old county from which the new one was taken (Stark v. Harris [Tex. Civ. App.] 20 Tex. Ct. Rep. 665, 106 SW 887), and one attacking the registration must show that the organization was prior thereto (Id.). Act March 30, 1881, Gen. Laws 1881, p. 72, c. 67, and Rev. St. 1895, art. 4641, did not affect validity of prior registrations. Id. Where deed was duly recorded in another county, it was not necessary to again record in new one (Id.), and failure of county officers to include record of deed in transcript of record of old county to be filed in the new did not destroy efficiency of registration in old county as matter of notice (Id.).

91. Failure of officer to copy at end of record the names of grantor and wife held not fatal where probate and order of registration, which were copied, recited such names and they were also in body of deed. Smith v. Ayden Lumber Co., 144 N. C. 47, 56 SE 555.

92. Ditto marks for name of county as grantor in tax deed. Chase v. Maxcy [Wis.] 114 NW 832.

93. Oregon Short Line R. Co. v. Stalker [Idaho] 94 P 56; Smith v. Ayden Lumber Co., 144 N. C. 47, 56 SE 555. Where railroad desiring to obtain station grounds has done everything required by the law and the regulations of the interior department, its rights cannot be defeated through neglect of local officers to make proper notation, etc., required to be made on the plats and books. Oregon Short Line R. Co. v. Stalker [Idaho] 94 P 56. Chattel mortgage held in legal effect filed though officer fails in duty. Eastman v. Parkinson [Wis.] 113 NW 649.

94. Chattel mortgage indexed as for only $26.25 though securing eight notes, each for such amount. Burriss v. Owen, 76 S. C. 481, 57 SE 542. Purchaser bound to tender amount indexed. Id. On recovery of possession by mortgagee, purchaser may redeem by paying amount indexed and interest. Id.

95. J. M. Guffey Petroleum Co. v. Hooks

that the original instrument has been filed for record substantially complies with a statute requiring that the mortgage be either acknowledged and recorded on it or a copy thereof be filed with the recorder.[90] Curative acts are common.[97]

It is the duty of subsequent purchasers or incumbrancers to examine the records [98] except under special circumstances,[99] and whether one does so or not, he is affected with notice of every fact the knowledge of which might have been obtained from the record,[1] or to which the facts there appearing would have led him,[2] but a purchaser is not charged with notice of instruments outside his claim of title,[3] and

[Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690.

96. Rev. St. 1899, § 3404, Ann. St. 1906, p. 1936. Strop v. Hughes, 123 Mo. App. 547, 101 SW 146.

97. Gen Laws 1903, p. 305, to legalize defective registration of deeds filed before, or within 12 months after passage of the act, in so far as it attempts to legalize instruments recorded within two years from passage, is unconstitutional as to title. Carpenter v. Joiner [Ala.] 44 S 424. Act Feb. 9, 1860 (Laws 1860, p. 75, c. 58), and act April 23, 1895 (Laws 1895, p. 157, c. 99), curing defects in record of certain deeds applied only to instruments properly acknowledged. Punchard v. Masterson [Tex.] 18 Tex. Ct. Rep. 701, 101 SW 204.

98. Smith v. Owens [W. Va.] 59 SE 762. That a purchaser may be protected, it is not necessary that he personally inspect the record. Stewart v. Walker [Neb.] 113 NW 814. He may do it by agent or attorney as where he relies upon an abstract. Id.

99. Mortgagor selling out to comortgagor held relieved of duty to examine record where vendee produced note and mortgage canceled. Longley v. Sperry [N. J. Eq.] 66 A 1062.

1. Smith v. Owens [W. Va.] 59 SE 762. Record is constructive notice. Schroeder v. Wolf, 127 Ill. App. 506; Lindberg v. Thomas [Iowa] 114 NW 562. Grantees from tax foreclosure grantee held chargeable with notice **of recorded prior deed** from foreclosure grantee back to owner, though foreclosure proceedings were regular on their face. Bullock v. Wallace [Wash.] 92 P 675. Purchaser charged with notice of vendor's recorded deed containing contract to convey to another. Houston Ice & Brew. Co. v. Henson [Tex. Civ. App.] 15 Tex. Ct. Rep. 455, 93 SW 713. Record of deed of land owned by state, equitable title to which grantor afterwards obtained and which then vested in his grantee by operation of law, held notice to purchasers from grantor's heirs. Osceola Land Co. v. Chicago Mill & Lumber Co. [Ark.] 103 SW 609. Where plaintiff claimed through a deceased clerk of court the deed to whom defendant claimed was not properly indexed, evidence for defendant as to whether witness had found it on record held irrelevant and not admissible on theory of estoppel. Mitchell v. Cleveland, 76 S. C. 432, 57 SE 33. Record of **promise of sale** is notice to subsequent purchaser from promisor. Lehman v. Rice, 118 Ia. 975, 43 S 639.

Record of mortgage notice to purchaser at tax sale. Blacklock, Receiver v. U. S., 41 Ct. Cl. 89. As to incumbrances of record referred to in a contract of sale, the vendee is chargeable with notice of all that the record shows, and may rely upon the contract only to the extent that it contains express representations concerning the provisions of the incumbrances. Schnitzer v. Bernstein, 119 App. Div. 47, 103 NYS 860. Duly executed, acknowledged, and **recorded chattel mortgage** held notice to subsequent mortgagee equivalent to actual notice. Longley v. Sperry [N. J. Eq.] 66 A 1062. Recorded chattel mortgage held prior to subsequent ajister's lien. National Bk. of Commerce v. Jones, 18 Okl. 555, 91 P 191. Recording of **contract creating easement** in favor of realty binding on owners of irrigation ditch, and of all leases, deeds, or other contracts relating to ditch or land, they being contracts relating to real estate, constitutes under statute constructive notice to all of rights of parties. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290. Purchaser of property of canal company, having record notice of **irrigation contract,** held bound by its terms. Stanislaus Water Co. v. Bachman [Cal.] 93 P 858. One taking title from adopting parent held charged with notice that adopted child was legal heir, **instrument of adoption** being on record. J. M. Guffey Petroleum Co. v. Hooks [Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690.

2. As to whether land was included in previous grant to plaintiff wherein boundaries were confused but sufficient to lead to inquiry. Smith v. Owens [W. Va.] 59 SE 762. Abstract made before destruction of public records and recorded afterwards held not notice to a purchaser of the land of a deed from his grantor's ancestor to a third person, unless he would have learned of abstract and its contents by investigation of a prudent person acting in good faith. Frugia v. Trueheart [Tex. Civ. App.] 20 Tex. Ct. Rep. 535, 106 SW 736 That a deed may give notice under the registry law, it must so describe the land as to enable one to identify it. Merritt v. Bunting [Va.] 57 SE 567. Record of deed containing description sufficient to identify and convey the land held constructive notice to subsequent purchasers though false portions of description indicated that other land was conveyed, since a purchaser could not accept false portion and discard the true. West v. Houston Oil Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 286, 102 SW 927. Record of trust deed calling for 100 acres but describing land by metes and bounds held notice of rights in only land within description. Reid v. Rhodes, 106 Va. 701, 56 SE 722. Held for jury whether agister aiding in disposition of mortgaged cattle would have had notice of mortgage by its inspection or record aided by such inquiries as instrument or record would suggest. Rudolph v. National Live Stock Commission Co. [Kan.] 92 P 1103.

3. Gross v. Watts, 206 Mo. 373, 104 SW 30. Record of deeds of town property with

hence he is not ordinarily required to examine the title to property he does not buy.[4] The purchaser of a dominent estate may, however, be required to examine the record of the servient estate to ascertain the extent of the servitude,[5] and a grantee from one who had forged and recorded a deed to himself does not acquire title merely because the record shows title in the forger.[6] The record of a deed is not notice of subsequent transactions between the grantor and third persons.[7] Record of an absolute deed intended as a mortgage protects all the rights of the grantee though his instrument of defeasance is not recorded.[8] The record of a mortgage executed by one of two tenant's in common in his own name only and covering an entire crop is not constructive notice of the cotenant's consent thereto as against a subsequent mortgagee of the interest of the cotenant.[9] A mortgagor is not chargeable with notice of the record of an assignment of the mortgage.[10] The record of instruments which in themselves are inoperative,[11] or a record not designed for notice,[12] cannot serve as such or bind purchasers.

Subsequent purchasers and incumbrancers ordinarily have the right to rely upon the record,[13] and if a mistake exists by which a mortgagee's interest is not wholly disclosed, he rather than an innocent purchaser must suffer.[14]

"liquor clauses," not constructive notice of general scheme restricting rise of all town property so as to make purchaser liable to owners of other property. Judd v. Robinson [Colo.] 92 P 724.

4. While a purchaser has constructive knowledge of all facts which he would have learned by inspection of the premises and the public records, he is not bound to examine the title to property he does not buy. Smith v. Lockwood, 100 Minn. 221, 110 NW 980. Where landowner who has constructed a building mostly on one tract and partly on another sells second tract, while he is in possession of both, to purchaser without actual knowledge, vendee takes free from implied easement and is not bound to examine title to other tract to ascertain whether owner had mortgaged it. Id.

5. Circumstances held to charge purchaser with notice of foreclosure proceedings, shown by lis pendens, wherein extent of a water right was adjudged. Schmidt v. Olympia L. & P. Co. [Wash.] 90 P 212.

6. Gross v. Watts, 206 Mo. 373, 104 SW 30.

7. Purchaser from vendor after latter's prior absolute deed intended as a mortgage had been recorded held charged with notice of rights of record grantee though instrument of defeasance had not been recorded, but not with notice of intervening assignment by vendor of defeasance contract to secure a loan from a third person, which asssignment was not recorded. Lindberg v. Thomas [Iowa] 114 NW 562.

8. Lindberg v. Thomas [Iowa] 114 NW 562; Hamilton v. Green [Tex. Civ. App.] 17 Tex. Ct. Rep. 951, 101 SW 280.

9. Beaumont Rice Mills v. Bridges [Tex. Civ. App.] 18 Tex. Ct. Rep. 116, 101 SW 511.

10. Bankrupt not liable to one whose assignment without his knowledge had been recorded before discharge. Mueller v. Goerlitz, 53 Misc. 53, 103 NYS 1037.

11. Record of instrument relative to building restrictions which by its own terms shows it to be inoperative for each of proper proof of signatures, and therefore improperly recorded, held not to bind purchasers by terms of the instrument though instrument was thereafter duly acknowledged and recorded. Schefer v. Ball, 53 Misc. 448, 104 NYS 1028.

12. Record of a marriage license and return thereon is not constructive notice to a third person dealing with either spouse of his or her relation to the other, nor can either spouse be prejudiced by absence of such record. Steves v. Smith [Tex. Civ. App.] 107 SW 141.

13. Statements in a mortgage recorded by the mortgagee are his declarations to all subsequent purchasers (Stewart v. Walker [Neb.] 113 NW 814), and he is estopped as against a purchaser relying on the record to assert that his interest is greater or his lien more onerous than shown thereby (Id.). Mortgagee could not in suit against subsequent purchaser, with record notice only, show that notes secured matured at earlier date or bore higher rate of interest than specified in mortgage. Id. It is the policy of the law to require all matters affecting titles to be placed on record, and where an intending purchaser finds the record clear and has no notice of facts sufficient to put him on inquiry, he may presume that there is no adverse claim. Drumm Commission Co. v. Core [Tex. Civ. App.] 20 Tex. Ct. Rep. 111, 105 SW 843. A purchaser or mortgagee will be protected by the record of a discharge of a prior mortgage by the record owner after assignment (Bautz v. Adams, 131 Wis. 152, 111 NW 69), but the recording act will not protect a debtor or commercial paper secured by mortgage on his land in making payment to the record, but not the real owner of the security, the latter not having possession thereof nor actual authority to receive payment (Id). Evidence held to show actual authority. Id. Where a mortgagor fails to have satisfaction of mortgage recorded, purchaser at sale under power, relying on record, will be protected. Garrett v. Crawford, 128 Ga. 519, 57 SE 792. Mortgagee in good faith parting with money to husband in reliance on record held protected against equities of wife in the land. Bordelon v. Gumbel, 118 La. 645, 43 S 264. Where one took a clear warranty deed with only con-

(§ 2) *E. Possession under chattel mortgages; refiling and renewal.*[See 8 C. L. 1177]—In most jurisdictions unfiled or unrecorded chattel mortgages are void as against subsequent creditors and purchasers without notice unless the mortgagee takes possession,[15] and in some states the question of notice or knowledge is immaterial.[16] That the mortgagee takes possession will not protect him as against creditors unless the statute recognizes rights accruing therefrom.[17]

In the absence of statute, removal of the mortgaged chattel to another town, county, or state does not necessitate any new record of refiling,[18] but many statutes provide that unless within a stated period the mortgage is filed or recorded in the town or county to which the property is removed, or the mortgagee takes possession, the lien is lost except as between the parties.[19] Extensions must be filed in some jurisdictions.[20]

(§ 2) *F. Wills and their probate and administrative proceedings.*[See 8 C. L. 1177]—That the foreign probate of a will may be constructive notice to purchasers, the will and record of its probate must be recorded in the state where the property lies.[21]

(§ 2) *G. Recording officers and administration of the acts.*[See 8 C. L. 1178]—A recorder cannot be compelled to keep up indexes at his own expense.[22] If a recorder negligently satisfies a mortgage of record in violation of the statute, he is liable to the party injured [23] for all damage proximately resulting.[24]

structive notice of existence of a mortgage on the land and subsequently, when mortgage had been discharged of record, obtained a loan through the mortgagee who then declared that the title was good, and therewith paid the purchase price, mortgagee could not thereafter enforce mortgage on ground that by mistake he had caused it to be discharged of record. Messmore v. Maerz, 149 Mich. 331, 14 Det. Leg. N. 438, 112 NW 980.

14. Stewart v. Walker [Neb.] 113 NW 814.

15. Under Rev. St. 1899, § 3404, requiring chattels to be "delivered to and retained by" mortgagee where mortgage is not recorded, interpleader in attachment claiming under chattel mortgage not recorded must show such delivery and retention. Rice-Stix Dry Goods Co. v. Sally, 198 Mo. 682, 96 SW 1030. Actual delivery for jury. Id.

16. A chattel mortgage is not valid against any persons except the parties thereto unless mortgagee takes possession or mortgage is filed or recorded, as required by Rev. St. 1899, § 3404, Ann. St. 1906, p. 1936 (Saunders v. Ohlhausen [Mo. App.] 106 SW 541), whether third persons have actual knowledge or not (Id). Mere fact that lessor assisted tenant in saving crop did not show that tenant divested himself of possession. Id. A written sale of personalty to secure a debt, though not recorded, is valid as against third persons with notice, though possession remains in vendor (Henry Vogt Mach. Co. v. Bailey, 2 Ga. App. 204, 58 SE 314), but an oral such sale, possession not being transferred, is void as against creditors though these have notice (Id).

17. Statute without qualification making unfiled mortgage void as against bona fide creditors. Cornelius v. Boling, 18 Okl. 469, 90 P 874. Mortgagee could not hold property as against trustee in bankruptcy proceedings commenced before sale at foreclosure. Id.

18. Himmels v. Sentous [Cal.] 91 P 327. Removal of the chattel to another county without knowledge of the mortgagee. National Bk. of Commerce v. Jones, 18 Okl. 555, 91 P 191.

19. Lien subsists for period allowed for filing or taking possession. Himmels v. Sentous [Cal.] 91 P 327. Mortgagee's failure to record in new county under Civ. Code, § 2965, held not to bar conversion of hogs sold and slaughtered before expiration of the 30 days. Id. Failure to file or take possession within prescribed time renders mortgage void as against creditors though these acquire no process lien before mortgage is actually recorded and though they knew of mortgage. Hopper v. Keys [Cal.] 92 P 1017. Civ. Code, § 3431, providing that every contract of a debtor shall be valid against his creditors who have not acquired a lien on the property held immaterial. Id. Failure to record in new county as required by Code 1896, §§ 999, 1009, operates in favor of subpurchasers as well as purchasers. Williams v. Vining [Ala.] 43 S 744.

20. Under statutes of Arkansas put in force in Indian Territory, where a mortgage is filed but not recorded, it becomes void as against creditors and purchasers in good faith unless within 30 days from expiration of a year from filing an extension is filed, although a purchaser buys before expiration of the year. National Live Stock Commission Co. v. Taliaferro [Okl.] 93 P 983.

21. Under Hurd's Rev. St. 1905, p. 2050, §§ 9-10, deed of property by heirs receiving under regular intestate proceedings is valid against subsequently recorded will of which grantee had no notice. Catholic University of America v. Boyd, 227 Ill. 281, 81 NE 363.

22. Under § 1155, Rev. St. a recorder cannot be compelled to keep up general indexes of conveyances provided for by § 1154 and theretofore authorized and completed when commissioners of county refuse to pay therefor. State v. Wickham [Ohio] 82 NE 517.

23. That purchaser of land accompanied a mortgagee to office of recorder of deeds and remarked that they had come to satisfy the record was not such negligence as to pre-

Congressional and adopted territorial legislation constituted sufficient concurrent action on the part of the Federal and state governments to pass the records of the clerk or deputy clerk of the United States court in the Indian Territory as ex officio recorder at Muskogee, under the jurisdiction of the state of Oklahoma on its admission into the Union,[25] and vest their legal custody and right of possession in the proper elected and qualified register of deeds of Muskogee county,[26] but such officer could not by mandamus compel a state judge to surrender the records to him where respondent had received unauthorized possession thereof as an individual and not in his capacity as a state court.[27]

(§ 2) *H. Discharge of record.*—Mortgage records are often discharged by entry of a minute on the margin of the record.[28] Cancellation of a mortgage on the record is only prima facie evidence of its discharge,[29] and the owner may prove fraud, accident, or mistake. Failure to discharge of record a mortgage which has been paid does not keep it in force as against a subsequent mortgagee in good faith, notwithstanding a statute providing that chattel mortgages shall be valid until canceled of record.[30] Penalties are provided in some states for failure of a lienor to discharge the lien of record after payment.[31]

§ 3. *Registration and certification of land titles under the Torrens system.* See 8 C. L. 1178—The Torrens law is not unconstitutional[32] as depriving persons of property without due process or withholding from them the equal protection of law,[33] nor does it infringe constitutional provisions for the division of governmental powers.[34] Evidence showing title in the applicant is necessary to warrant awarding a decree for registration.[35] The examiner of title may not consider abstracts not

clude his recovery on recorder's bond for entering satisfaction without production of notes or affidavit of payment, as required by Rev. St. 1899, § 4358, Ann. St. 1906, p. 2401. State v. Green, 124 Mo. App. 80, 100 SW 1115. Doctrine that all are presumed to know the law did not apply. Id.

24. Loss to purchaser from foreclosure of mortgage insufficiently satisfied of record held to have resulted from recorder's negligence and not from that of purchaser where, though latter had already given a mortgage on other property, there was a mistake therein which he refused to have corrected until mortgage on property purchased should be satisfied. State v. Green, 124 Mo. App. 80, 100 SW 1115.

25, 26, 27. Eberle v. King [Okl.] 93 P 748.

28. A mortgage may be discharged under 2 Gen. St. p. 2107, § 23, providing for clerk's entry on margin of a registered mortgage of a minute of discharge, though § 25 provides that a mortgage registered or recorded shall be discharged by acknowledged and recorded certificate, latter method not being exclusive. Manchester Bldg. & Loan Ass'n v. Beardsley [N. J. Eq.] 66 A 1.

29. Release may be canceled in equity. Taylor v. Godfrey [W. Va.] 59 SE 631.

30. P. L. 1902, p. 489, § 8, Longley v. Sperry [N. J. Eq.] 66 A 1062.

31. Penalties cannot be recovered where debt has not been paid in full. Kingston v. Newell, 125 Mo. App. 389, 102 SW 604. Petition under Rev. St. 1899, § 4363 (Ann. St. 1906, p. 2404), for penalties for mortgagee's failure to enter satisfaction of mortgage, held insufficient for failing to state amount of debt secured, when debt was paid, and amount tendered as fee for entering satisfaction. Id. Complaint to recover penalty under Rev. Codes 1899, § 4799, for failure to discharge mechanic's lien of record, must indicate statute under which penalty is claimed and must state that expenses of discharge had been paid or provided for. Sheets v. Prosser [N. D.] 112 NW 72.

32. Title sufficiently comprehensive. Act March 17, 1897 (St. 1897, p. 138, c. 110). Robinson v. Kerrigan [Cal.] 90 P 129. Act April 11, 1903 (Sess. Laws 1903, p. 311, c. 139). People v. Crissman [Colo.] 92 P 949. Does not create a new county office not filled as required by constitution. Id. Is not special legislation. Robinson v. Kerrigan [Cal.] 90 P 129.

33. Act March 17, 1897 (St. 1897, p. 138, c. 110). Robinson v. Kerrigan [Cal.] 90 P 129. Act April 11, 1903 (Laws 1903, p. 311, c. 139), provides for due process. People v. Crissman [Colo.] 92 P 949.

34. Proceeding judicial, not administrative. Robinson v. Kerrigan [Cal.] 90 P 129. No objection that registrar is called on to determine legal effect of instruments creating trusts, liens, etc. (Id), or that his acts shall be under rules and instructions of district court (People v. Crissman [Colo.] 92 P 949).

35. Evidence insufficient without plat by which land may be identified appearing in record and where description in deed is insufficient to identify without plat. Glos v. Bragdon, 229 Ill. 223, 82 NE 224. Deeds describing lands as certain lots in certain subdivisions are insufficient where no plat of any subdivision is offered and there is no evidence that any such plat was ever made or that the lots or subdivision have any legal existence. Glos v. Grant Bldg., etc., Ass'n 229 Ill. 387, 82 NE 304. Abstracts offered in evidence under § 18, which had been adopted at an election held

introduced before him on the hearing or returned by him as part of the evidence.[36] The Massachusetts law provides that an application may be withdrawn at any time before final decree [37] upon terms to be determined by the court.[38] The filing of a withdrawal suspends all proceedings though the terms are not then decided on by the court.[39]

NOTICE OF CLAIM OR DEMAND; NOTICES, see latest topical index.

NOVATIO

Definition and elements. See 8 C. L. 1179—The requisites of a novation are a valid prior obligation to be displaced, consent of all parties to the substitution, a sufficient consideration, the extinction of the old obligation, and the creation of a valid new one.[40] To constitute a novation, the original indebtedness or obligation must be extinguished and there must be a mutual agreement between the parties to the old and new obligation, whereby the new obligation is substituted for the prior one.[41]

Novation between the same parties See 8 C. L. 1179 may result from the substitution of a new agreement between them.[42]

Novation may be by the substitution of a new party [43] and a mutual agreement between all of the parties that the old debt should become the obligation of the new debtor.[44]

Pleading and proof. See 8 C. L. 1180—Whether parties have manifested an intention to create a novation is a question of fact for the jury.[45] The burden of establishing novation is on the pleader.[46]

The effect of novation See 8 C. L. 1180 is to release the old debtor.[47]

illegal by the court, inadmissible. Messenger v. Messenger, 223 Ill. 282, 79 NE 27.

36. Glos v. Grant Bldg., etc., Ass'n, 239 Ill. 387, 82 NE 304.

37. "Final decree" in Rev. Laws, c. 128, § 36, refers to the ultimate decree in the proceeding which may be rendered after appeal and not necessarily to the confirmation of title by the land court in the first instance. McQuesten v. Attorney General [Mass.] 83 NE 1037.

38. Where withdrawal was filed after appeal, land court had no power to impose as terms requirement that applicant should waive exceptions on appeal or prosecute them to final determination. McQuesten v. Attorney General [Mass.] 83 NE 1037. Was not restricted to taxable costs but could require applicant to pay all of defendant's expenses. Id.

39. Order on pending appeal compelling applicant to waive or prosecute exceptions held void. McQuesten v. Attorney General [Mass.] 83 NE 1037.

40. Sufficient, where assignee of wages of bankrupt's employes takes note and duebill of bankrupt in exchange therefor. In re Fuller v. Bennett, 152 F 538. Executory agreement to transfer account from old to new party insufficient to extinguish old debt. Miles v. Bowers [Or.] 90 P 905.

41. Inman v. F. N. Burt Co., 108 NYS 210.

Sufficient, where assignee of wages of employes of bankrupt exchanges them for note and duebill of bankrupts. In re Fuller & Bennett, 152 F 538. Executory agreement to transfer account from old to new party. Miles v. Bowers [Or.] 90 P 905. Where new contract obviated defect in old, void under statute of frauds. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867.

42. Insufficient, where no agreement by plaintiff to release defendants and no release by plaintiff. Miles v. Bowers [Or.] 90 P 905.

43. See 8 C. L. 1179. Where creditor accepts note of third person and valuable security in payment of debt. Security Warehousing Co. v. American Exch. Nat. Bk., 118 App. Div. 350, 103 NYS 399. Agreement by creditor in consideration of part payment by retiring partner and promise by continuing partner to pay remainder to release retiring partner. Frye v. Phillips [Wash.] 89 P 559. Where assignee of shoe manufacturer, having contract to furnish defendant shoes, notified defendant by mail of assignment of contract and accounts of assignor and thereafter filled orders and received payments of account due assignor, sufficient to establish novation. Holloway v. White-Dunham Shoe Co. [C. C. A.] 151 F 216.

No substitution: In absence of agreement by third party to assume defendant's contract with plaintiff or agreement between former and defendant that former assume payment. Holloway v. White-Dunham Shoe Co. [C. C. A.] 151 F 216. Where mere executory agreement to transfer account from old to new party. Miles v. Bowers [Or.] 90 P 905. Where broker, acting for several customers, purchases goods from seller in lump, and seller for convenience agreed to ship lots to customers and draw direct on them therefor. H. Midwood's Sons Co. v. Alaska-Portland Packers' Ass'n [R. I.] 67 A 61.

44. Mere making new party principal debtor, insufficient. Miles v. Bowers [Or.] 90 P 905.

45. Under Rev. Civ. Code, § 1218, whether

NUISANCE.

§ 1. Distinction Between Private and Public Nuisance, 1031.
§ 2. What Constitutes a Nuisance, 1031.
§ 3. Right to Maintain; Defenses, 1035.
§ 4. Remedies Against Nuisances, 1036.
A. Abatement and Injunction, 1036.
B. Criminal Prosecution, 1038.
C. Action for Damages, 1039.
D. Rights of Private Persons in Respect to Public Nuisances, 1042.

§ 1. *Distinction between private and public nuisance.*[See 8 C. L. 1180]—A public nuisance is one that affects the public at large, while a private nuisance affects a limited number only.[48]

§ 2. *What constitutes a nuisance.*[See 8 C. L. 1180]—A public nuisance consists of an act or omission which annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons [49] or offends public decency.[50] Private nuisance is an act done unlawfully or tortiously to the hurt or annoyance of the person or property of another.[51] Anything physically discomfiting to persons of ordinary sensibility is a nuisance,[52] although it does not jeopardize health.[53] Each case must depend on its own facts for classification as a nuisance as a matter of law, or in fact.[54] The frequency of recurrence,[55] the character of the neighborhood,[56] and priority of occupancy therein,[57] are to be considered.

employe, employer, and third party entered into contract of novation, whereby employe released employer and accepted third person as creditor. Lemon v. Little [S. D.] 114 NW 1001.

46. Miles v. Bowers [Or.] 90 P 905.

47. In re Fuller & Bennett, 152 F 538. Security Warehousing Co. v. American Exch. Nat. Bk., 118 App. Div. 350, 103 NYS 399. Agreement to release in consideration of part payment by retiring partner and promise to pay remainder by continuing partner releases former. Frye v. Phillips [Wash.] 89 P 559.

48. Melker v. New York, 190 N. Y. 481, 83 NE 565.

49. Penn. Code, § 385. People v. Hoffman, 118 App. Div. 862, 103 NYS 1000. A public performance which is debasing in its character, debauching in its influence on public morals, and brutalizing in its effect on spectators, is a public nuisance. State v. Canty, 207 Mo. 439, 105 SW 1078. An offense against the public order, common good, and public decency and morals, or any public exhibition which tends to corrupt the morals, to disturb the peace or the general good order or welfare of society, is a public nuisance. Id.

50. Pen. Code, § 385. Keeping a house in which to practice vocation of an abortionist held to fall within statute. People v. Hoffman, 118 App. Div. 862, 103 NYS 1000.

51. One may not conduct his business nor harbor persons on his premises for so long a time as to create a nuisance. Hogle v. H. H. Franklin Mfg. Co., 105 NYS 1094. Throwing of bits of iron at the plaintiff from the defendant's factory by the defendant's workmen held to constitute a nuisance. Id.

52. Only downright discomfort is actionable and the nuisance must be such as is annoying to a person in a normal state of health. Froelicher v. Southern Marine Works, 118 La. 1077, 43 S 882.

53. Perrin v. Crescent City Stockyard & Slaughterhouse Co., 119 La. 83, 43 S 938.

54. If the natural tendency of the act complained of is to create danger and inflict injury, it may properly be found a nuisance as a matter of fact (Melker v. New York, 190 N. Y. 481, 83 NE 565), but if the act in its inherent nature is so hazardous as to make the danger extreme and serious injury so probable as to be almost a certainty, it should be held a nuisance as a matter of law (Id). Held a question of fact for the jury whether the discharge of fireworks in a public street was a nuisance in fact. Id. As a rule, whether the act constitutes a nuisance is a question of fact for the jury. H. S. Kerbaugh v. Caldwell [C. C. A.] 151 F 194; Bradbury Marble Co. v. Laclede Gas Light Co. [Mo. App.] 106 SW 594. Whether a certain use amounts to a nuisance depends upon the facts of each particular case. McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 81 NE 549. Whether a fence was a public nuisance within the terms of Revisal 1905, § 3784 (Code, § 2065), and the indictment thereunder, was a question for the jury. State v. Godwin [N. C.] 59 SE 132. Whether or not the operation of machinery by the defendant constituted a nuisance held a question for the jury. Ridpath v. Spokane Stamp Works [Wash.] 93 P 416. Whether an excavation in a street, made for a proper purpose and so not a nuisance per se, was one in fact by reason of being left open an unreasonable length of time, held a question for the jury. Garuetz v. Carroll [Iowa] 114 NW 57. The business of burning brick is a lawful one and whether or not it is a private nuisance depends upon the circumstances of each particular case. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

55. Whether the use is reasonable generally depends upon the location, nature of the use, character of the neighborhood, extent and frequency of the injury, and the effect on the enjoyment of life, health, property, and the like. McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 81 NE 549.

56. Storage of large quantities of dynamite near dwelling house. H. S. Kerbaugh v. Caldwell [C. C. A.] 151 F 194. The character of the locality enters largely into the question as to whether blasting is a nuisance or not. Houghton v. Loma Prieta Lumber Co. [Cal.] 93 P 82. Use of soft coal in a district

Illustrations.—The discharge of heated or impure air or air charged with offensive smells,[58] noxious gases, smoke and fumes,[59] collection of explosive or inflammable substances,[60] noise,[61] vibration,[62] keeping a gaming house,[63] sale of intox-

suitable for country houses. McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 81 NE 549.

57. This may not be of much importance in an action for damages but is of importance where an injunction is sought. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

58. Crematory and fertilizer plant. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A 387.

Fertilizer, rendering and **tallow plants.** Perrin v. Crescent City Stockyard & Slaughterhouse Co., 119 La. 83, 43 S 938. Use of **shrimp-shell powder or dust as a fertilizer.** Naccari v. Rappelet, 119 La. 272, 44 S 13.

City sewer: Declared to be a public nuisance. Platt Bros. v. Waterbury [Conn.] 67 A 508. An open sewer caused by turning a stream into a ditch near plaintiff's land. Desberger v. University Heights Realty & Development Co. [Mo. App.] 102 SW 1060.

Manure: Conditions changed at time of trial. Hale v. Jenkins, 55 Misc. 119, 106 NYS 282.

Slaughterhouse located withn 200 feet of a dwelling house and within 50 feet of barns of one engaged in raising fine stock enjoined as a prima facie nuisance. Steiner v. Hennon 5 Ohio N. P. (N. S.) 314. Operation of a slaughterhouse adjacent to dwelling house. Wright v. Ulrich [Colo.] 91 P 43.

Concealment of the body of a still born baby in a hotel closet. Parkes v. Seasongood, 152 F 583. Act done by trained nurse who was held not to be a servant and defendant not liable for act. Id. Evidence held to show that a **fish murket** as operated constituted a nuisance. Asia v. Pool [Wash.] 92 P 351.

Carpet-beating works held to be a nuisance. McQueen v. Phelan, 4 Cal. App. 695, 88 P 1099.

Discharging acids and waste from an oil well through a ditch, injuring crops and emitting unhealthy smells and odors. Exley v. Southern Cotton Oil Co., 151 F 101. While not nuisances per se, **livery stables** are of such an undesirable and hurtful character as to be properly kept at a proper distance from residences. Caskey v. Edwards [Mo. App.] 107 SW 37.

Held not to be nuisances: Slaughter house more than 600 feet away from barns housing fine stock held not to be a prima facie nuisance. Steiner v. Hennon, 5 Ohio N. P. (N. S.) 314. Evidence held insufficient to show that injury was caused by **stagnant water** allowed to accumulate by defendant. Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 18 Tex. Ct. Rep. 510, 102 SW 170 Court refused to enjoin erection of a **stable** 42 feet from the plaintiff's residence as it was not a nuisance per se and might never become one in fact. Hyden v. Terry [Ky.] 108 SW 241.

59. Use of **soft coal** where not necessary for running plant. McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 81 NE 549. Injunction restraining use of soft coal modified by granting the use of it upon proof of a charge of facts making its use proper. Id.

Sulphuric acid plant by reason of close proximity to a dwelling house. Holman v. Mineral Point Zinc Co. [Wis.] 115 NW 327.

Smoke nuisance. Bowers v. Indianapolis [Ind.] 81 NE 1097.

Odor and steam from machine shops held nuisance and ordered abated or shops closed. Froelicher v. Southern Marine Works, 118 La. 1077, 43 S 882.

Held not to be nuisances: Smoke and offensive odors occasioned by the proper use and conduct of a railway terminal are not actionable nuisances. Taylor v. Seaboard Air Line R. [N. C.] 59 SE 129. The manufacture of glazed brick, hollow ware, and sewer pipe is not a nuisance per se. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

Gas plant not a nuisance per se. Bradbury Marble Co. v. Laclede Gas Light Co. [Mo. App.] 106 SW 594.

60. Location of powder and dynamite magazines within 1,000 feet of a dwelling house found to constitute a nuisance by jury. H. S. Kerbaugh v. Caldwell [C. C. A.] 151 F 194.

61. Quartering a band of Greek laborers on work trains on a siding for weeks, who shot up the neighborhood and acted in a noisy, boisterous, and riotous way, held to be suffering and permitting a common nuisance on one's premises. Southern R. Co. v. Com., 31 Ky. L. R. 122, 101 SW 882. The fact that they were employes held immaterial. Id. Use of **railway water tank** giving rise to smoke and noise. Texas & Pac. R. Co. v. Edrington [Tex.] 18 Tex. Ct. Rep. 175, 101 SW 441. Operation of concrete mixer, **stone crusher,** etc. New York Continental Jewell Filtration Co. v. Wynkoop, 29 App. D. C. 594. Operation of **roller skating rink** in vicinity of church held nuisance in fact. First Methodist Episcopal Church v. Cape May Grain & Coal Co. [N. J. Err. & App.] 67 A 613.

Held not to be nuisances: Noise of factory held to be of a class incident to the neighborhood when the plaintiff voluntarily went into it and remained in it. Austin v. Converse [Pa.] 67 A 921. Evidence insufficient to justify injunction. Id. Usual and necessary noises occasioned by proper operation of a railway are not actionable nuisances. Taylor v. Seaboard Air Line R. [N. C.] 59 SE 129. A **barking dog** is not a nuisance per se and damages are not recoverable for an injury caused by the mere barking. Seegmueller v. Pahner, 9 Ohio C. C. (N. S.) 333. May be nuisance in fact; evidence held insufficient. Heylman v. District of Columbia, 27 App. D. C. 563.

62. Whether the operation of machinery on the ground floor of a building, the rest of which was used as a first class hotel was a nuisance, held a question for the jury. Ridpath v. Spokane Stamp Works [Wash.] 93 P 416. Noise and vibration of machinery ordered abated or shops closed. Froelicher v. Southern Marine Works, 118 La. 1077, 43 S 882.

63. Pool room where betting on horse races is indulged in is a nuisance per se at common law. Ehrlick v. Com., 31 Ky. L. R. 401, 102 SW 289; Huber v. Com., 31 Ky. L. R. 320, 102 SW 291.

icating liquors,[64] blasting,[65] obstructing or rendering unsafe a highway,[66] sidewalk,[67] street,[68] easements,[69] the obstruction,[70] diversion,[71] or pollution of a watercourse or spring,[72] keeping a house for the purpose of practicing the vocation of an abortion-

Slot machines. Mullen v. Mosley, 13 Idaho, 457, 90 P 986.

64. 1 Ballinger's Ann. Codes & St. § 3085, declares it a public nuisance to maintain a place where intoxicating liquors are on sale in contravention of the law. Town of Kirkland v. Ferry, 45 Wash. 663, 88 P 1123. The illegal sale of intoxicating liquors is a public nuisance. Lee County Dispensary Com'rs v. Hooper, 128 Ga. 99, 56 SE 997. Held not to be a public nuisance under common law or statute. Sopher v. State [Ind.] 81 NE 913, and see Intoxicating Liquors, 10 C. L. 417.

65. Blasting without reference to the particular locality in which it is carried on is not ipso facto a nuisance. Houghton v. Loma Prieta Lumber Co. [Cal.] 93 P 82

66. State v. Southern Indiana Gas Co. [Ind.] 81 NE 1149. To be a nuisance an object need not be actually in a highway. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. No nuisance where highway shown to be abandoned. Commonwealth v. Slagel, 33 Pa. Super. Ct. 514. A structure connecting an elevated station with a private store is a nuisance (City of Chicago v. Rothschild, 130 Ill. App. 542), and while the operation of a manufacturing plant in close proximity to the highway is not a nuisance per se (Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83), yet allowing a mill to emit great clouds of steam within eight feet of a public highway and six feet from the ground which passed over the highway, at the same time producing sounds calculated to frighten ordinarily gentle horses, may be found to be a nuisance (Id.). Habitually running trains through towns at an unsafe rate of speed without customary warning signals or precautions at crossings. Cincinnati, etc., R. Co. v. Com., 31 Ky. L. R. 1113, 104 SW 771. Indictment held sufficient to charge a public nuisance (Id.), but the evidence required an acquittal (Id.).

Tool chest of a city sewer contractor, habitually in the highway, held a nuisance. Warden v. New York, 108 NYS 305. Under Revisal 1905, § 3784 (Code, § 2065), a **fence** which obstructs a public highway and renders its use less convenient is an indictable nuisance. State v. Godwin [N. C.] 59 SE 132. A **stationary steam engine** in or upon a public highway. Smith v. Illinois Cent. R. Co., 31 Ky. L. R. 1323, 105 SW 96

67. Vault opened through instead of under a sidewalk and beyond the distance authorized held a nuisance per se. City of New York v. De Peyster, 120 App. Div. 762, 105 NYS 612.

Defective awning held a public nuisance and abutting owner held liable for injuries caused during its repair by an independent contractor. McHarge v. Newcomer, 117 Tenn. 595, 100 SW 700.

Structure of iron work and glass for access to basement. Levy v. Murray, 106 NYS 689. Greasy, slippery substance on sidewalk covered with straw, the result of defendant's business, which defendant had neglected to clean off for an unreasonable length of time. Brooks v. Atlanta, 1 Ga. App. 678, 57 SE 1081. Justification by business necessities for the creation of a temporary obstruction in the street does not extend in any event after the immediate necessity has passed and a reasonable time for its removal has elapsed. Id.

68. The exhibition of a stallion on the public streets of a city. State v. Iams [Neb.] 111 NW 604.

Unauthorized operation of a railroad on an alley and **entire obstruction** thereof is a public nuisance. Birmingham R., L. & P. Co. v. Moran [Ala.] 44 S 152. Maintenance of a **telephone pole** without permission in a **private alley** interfering with its use by abutting lessee. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358. The unauthorized erection of a **wall** by the city authorities for street improvement on the sidewalk and street in front of plaintiff's premises held a nuisance. Hyland v. President & Trustees of Village of Ossining, 57 Misc. 212, 107 NYS 225. A **wall** eight feet high forming part of the entrance to defendant's residence extending beyond the building line. City of New York v. Rice, 56 Misc. 360, 107 NYS 641. An **obstruction** in the street which absolutely prevents access to the plaintiff's land along the street although the obstruction is **not directly in front** of the land. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70. An encroachment beyond the building line of a street may be treated as a nuisance, and jurisdiction obtained over a nonresident owner of the property by serving him by publication, notwithstanding a decree in injunction, operates in personam. City of Columbus v. Philbrick, 5 Ohio N. P. (N. S.) 449.

Held not to be nuisances: An excavation in a street made for supplying heat to a library building and left open awaiting materials, held being made for a proper purpose, was not nuisance per se, nor one in fact unless left open for an unreasonable length of time. Garnetz v. Carroll [Iowa] 114 NW 57. The **discharge of fireworks** in a public street not a nuisance per se. A question of fact for the jury. Melker v. New York, 190 N Y. 481, 83 NE 565. A **cellarway** is not a nuisance per se. Davis v. Bonaparte [Iowa] 114 NW 896.

69. Obstruction of right of way reserved. Evidence insufficient. Hale v. Jenkins, 55 Misc. 119, 106 NYS 282.

70. The discharge of tailings and debris of mines into rivers, thereby filling up the beds causing the waters to overflow and carry debris with it and endangering bridges, held a nuisance. Sutter County v. Nicols [Cal.] 93 P 872. Intentional obstruction of a natural drain by railroad construction causing a stagnant pond which produced sickness. Georgia, etc., R. Co. v. Jernigan, 128 Ga. 501, 57 SE 791.

71. Diversion of a stream into a ditch so that the water would encroach on and eat away plaintiff's land is a nuisance. Desberger v. University Heights Realty & Development Co. [Mo. App.] 102 SW 1060. Allowing surface water to escape from one side of the track to the other side along a highway held not to be a nuisance. Townsend v. New York Cent., etc., R. Co., 56 Misc. 253, 106 NYS 381.

72. One who **pollutes a spring** by the burial of a dead animal on his premises is not liable

ist,[73] keeping a bawdy house,[74] erection of wooden building within the "Fire District," [75] an arena for bullfighting,[76] cattle running at large,[77] sale of unwholesome food, have been held to be nuisances.[78] A lawful business or erection properly operated is never a nuisance per se.[79] A municipality with power merely to prevent and abate nuisances has not authority to declare that a nuisance which is not one per se.[80] The power to define and abate nuisances dangerous to public health is legislative in its nature [81] and courts cannot interfere with its exercise except in cases of palpable abuse.[82]

unless, under the circumstances, a person of ordinary prudence should have anticipated the result. Long v. Louisville, etc., R. Co. [Ky.] 107 SW 203. It is a question for the jury. Id.

73. Is a public nuisance. People v. Hoffman, 118 App. Div. 862, 103 NYS 1000.

74. Is a nuisance and indictable as such at common law and is a misdemeanor by Gen. St. 1901, § 2243. State v. Coler, 75 Kan. 424, 89 P 693. Keeping of house of prostitution is a public nuisance. Tedeschi v. Berger [Ala.] 43 S 960.

75. In violation of ordinance declared to be a nuisance by Rev. St. c. 4, § 93, par. 8. Inhabitants of Houlton v. Titcomb, 102 Me. 272, 66 A 733. Permanently enjoined. Id.

76. An arena erected for the purpose of conducting a bull fight and in which one is actually carried on is a public and a common nuisance. State v. Canty, 207 Mo. 439, 105 SW 1078.

77. Coreil v. Welsh [La.] 45 S 438.

78. Milk not up to standard is a nuisance by nature. Kaiser v. Walsh, 4 Ohio N. P. (N. S.) 507.

79. Held not to be nuisances per se: A **theatre,** although subject in some measure to the municipal police power. City of Indianapolis v. Miller, 168 Ind. 285, 80 NE 626. The **transmission of electricity** at a high voltage over a right of way under authority of the law. Mull v. Indianapolis & C. Trac. Co. [Ind.] 81 NE 657.

Sulphuric acid plant. Holman v. Mineral Point Zinc Co. [Wis.] 115 NW 327. Operation of a **railway terminal.** Taylor v. Seaboard Air Line R. [N. C.] 59 SE 129.

Stable. Hyden v. Terry [Ky.] 108 SW 241; Caskey v. Edwards [Mo. App.] 107 SW 37.

Barking dog. Seegmueller v. Pahner, 9 Ohio C. C. (N. S.) 333.

Slaughterhouse. Steiner v. Hennon, 5 Ohio N. P. (N. S.) 314.

Gas plant. Bradbury Marble Co. v. Laclede Gas Light Co [Mo. App.] 106 SW 594.

Iron works. Froelicher v. Southern Marine Works, 118 La. 1077, 43 S 882.

Burial of the carcass of a dead animal on one's own land. Long v. Louisville, etc., R. Co. [Ky.] 107 SW 203.

The manufacture of glazed brick, hollow ware, and sewer pipe. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

Discharge of fireworks in the public streets. Melker v. New York, 190 N. Y. 481, 83 NE 565.

Cellarway. Davis v. Bonaparte [Iowa] 119 NW 896.

80. The decision of the board of street and water commissioners of Newark that street railway tracks are a nuisance is not conclusive and removal of the tracks will be enjoined until the question is passed on by the court. North Jersey St. R. Co. v. Newark Street & Water Com'rs [N. J. Eq.] 67 A 691. A thing is not a nuisance per se merely because an ordinance declares it to be. Inhabitants of Houlton v. Titcomb, 102 Me. 272, 66 A 733. Town held to have no power to declare by ordinance that buildings for the storage of cotton seed awaiting shipment are nuisances per se. Town of Cuba v. Mississippi Cotton Oil Co. [Ala.] 43 S 706. The fact that city refused permit to establish iron work held not to render the occupation carried on without the permit a nuisance if it was not so in fact. Froelicher v. Southern Marine Works, 118 La. 1077, 43 S 882. Burns' Ann. St. 1901, § 1709, Ann. St. Supp. 1905, § 1719, forbids cities to declare public nuisances what are not so per se. Bowers v. Indianapolis [Ind.] 81 NE 1097. The council of the city of Cincinnati having no power under existing law to declare smoke of the density described in said ordinance to be a nuisance per se, its attempt to declare such smoke to be a nuisance without any evidence as to its being so under the statutes or at common law is a usurpation by a legislative body of the functions which properly belong to the courts. Burkhardt v. Cincinnati, 6 Ohio N. P. (N. S.) 17. Act March 27, 1907, art. 3, § 3, giving certain city officers certain police powers and the president power to abate whatever in his opinion was a nuisance, and art. 3, § 1, subsec. 17, giving the municipal council power to prohibit pig pens, cow stables, dairies, etc., held unconstitutional. Malone v. Williams [Tenn.] 103 SW 798. A municipality has power to declare the maintenance of a structure on the highway a nuisance, though previous ordinance may have ratified its construction. City of Chicago v. Rothschild, 130 Ill. App. 542.

81. Const. art. 296, provides for the creation of boards of health, and Act No. 192, p. 437, of 1898, § 7, vests in them the power to define and abate nuisances dangerous to the public health. Naccari v. Rappelet, 119 La. 272, 44 S 13. Boards of health and police juries are vested with power as relates to public health and public nuisances and may pass ordinances which do not come in conflict with the jurisprudence of the country. Poonie v. Crescent City Stockyard & Slaughterhouse Co., 119 La. 873, 44 S 513. Held not so to conflict. Id. St. Louis City Charter, art. 12, § 3 [Ann. St. 1906, p. 4882], providing the trial of an alleged nuisance by the board of health, construed State v. St. Louis, 207 Mo. 354, 105 SW 748. Under Burns' Ann. St. Supp. 1905, § 3477, giving a city the power to declare what shall constitute a nuisance and prevent same and abate, a city may not abate the conduct of a theatre as a nuisance per se. City of Indianapolis v. Miller, 168 Ind. 285,

§ 3. *Right to maintain; defenses.* See 8 C. L. 1183—That the acts complained of necessarily result from the exercise of a franchise is generally held a defense.[83] Government authorization as a rule relieves from liability [84] for acts authorized thereby,[85] but license laws will not ordinarily be construed as allowing the licensing of a nuisance and municipalities have no power to permit by license or otherwise a private use of public ways in derogation of the public easement.[86] The possession of the power of eminent domain does not relieve one guilty of the maintenance of a nuisance from liability caused thereby to real property prior to an exercise of the right.[87] The right to maintain a private nuisance may be gained by prescription.[88] A license to commit a nuisance on leased land by a landlord not in possession or entitled to possession is no defense.[89] Reasonable necessity for a structure which causes a nuisance is no defense.[90] Questions of motive are immaterial.[91] Contributory negligence bars an action to recover damages.[92] The fact that other nuisances

80 NE 626. Ordinance forbidding alley entrances held unlawful. Id. The exhibition of a stallion on the public streets may be declared a nuisance by ordinance. State v. Iams [Neb.] 111 NW 604. Smoke nuisance ordinance held authorized under Burns' Ann. St. 1901, § 3794 (Ann. St. Supp. 1905, § 3477), giving cities power to declare nuisances (and by Burns' Ann. St. 1901, § 1709; Ann. St. Supp. 1905, § 1719), which were not so per se. Bowers v. City of Indianapolis [Ind.] 81 NE 1097. Ordinance held valid although it excepted private residences. Id. Town held to have had sufficient power delegated to it to adopt an ordinance for the impounding of cattle running at large as a nuisance, under its original and amended charter. Corell v. Walsh [La.] 45 S 438. Act. March 17, 1875 (Acts Sp. Sess. 1875, p 55, c. 43; Burns' Ann. St. 1901, § 7276 et seq.) and acts supplementary and amendatory thereto regulating sale of intoxicating liquors, held constitutional. Sopher v. State [Ind.] 81 NE 913.

82. Whether the use of fish refuse as a fertilizer is a nuisance is a question for the parish boards of health whose actions cannot be revised or reviewed by police juries or the courts. Naccari v. Rappelet, 119 La. 272, 44 S 13. The same respect should be given to the determination expressed by an ordinance as to a like conclusion expressed by a statute. Bowers v. Indianapolis [Ind.] 81 NE 1097.

83. Proper use and conduct of a passenger and freight terminal and the injuries and inconveniences arising to residents in neighborhood are not actionable nuisances. Taylor v. Seaboard Air Line R. [N. C.] 59 SE 129. Under Revisal 1905, § 2613, the running of trains and shifting of cars at the time of regular church service on Sunday at and near a terminal is not an actionable nuisance unless done in an unreasonable and improper way. Id.

84. Act Cong. March 1, 1893, c. 183, 27 Stat. 507 [U. S. Comp. St. 1901, p. 3553], providing for the appointment of the California debris commission and regulations for restraining debris from mines and the amount thereof and for permits for hydraulic mining, construed and held that it was not intended to exonerate the miner from injuries caused by debris or to limit the power of the state to protect private property. Sulter County v. Nicols [Cal.] 93 P 872.

85. Maintenance of curved street car rails authorized by statute cannot be required to be removed as a nuisance on the ground of illegal location. North Jersey St. R. Co. v. Newark Street & Water Com'rs [N. J. Eq.] 67 A 691.

86. Neither the municipal assembly nor the park commissioner may authorize on encroachments beyond the building line on streets wtihin 350 feet of a public park. New York v. Rice, 56 Misc. 360, 107 NYS 641. Laws 1901, p. 28, c. 466, providing that the board of aldermen should not have power to allow obstructions on sidewalk except temporary occupation during the erection of a building on adjoining lot, held not to authorize city contractors to leave a tool chest on the opposite side of the street from their work. Warden v. New York, 108 NYS 305. Permission to lay pipe line in streets held no defense if a nuisance was thereby created. Sun Co v Wyatt [Tex. Civ. App.] 107 SW 934. A city may not authorize a contractor to maintain a nuisance in the shape of an asphalt mixer for use in improving the streets. State v. St. Louis, 207 Mo. 354, 105 SW 748. Crematory and fertilizer plant. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A 387.

87. Platt Bros. & Co. v. Waterbury [Conn.] 67 A 508.

88. By adverse and exclusive enjoyment for the length of time prescribed by the statute of limitations for acquisition of title by adverse possession. Bradbury Marble Co. v. Laclede Gas Light Co. [Mo. App.] 106 SW 594. It is a question for the jury. Id

89. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358.

90. Need of water tank erected on right of way held no defense under Const. art. 1, § 17, providing that "no person's property shall * * * be damaged * * * for public use without adequate compensation being made, unless by the consent of such person." Texas & Pac. R. Co. v. Edrington [Tex.] 18 Tex. Ct. Rep. 175, 101 SW 441.

91. Whether use causing the nuisance resulted from wanton abuse, negligence, or unskillfulness, is immaterial. Exley v. Southern Cotton Oil Co., 151 F 101.

92. Held that if plaintiff was using his premises in usual manner in the light of all the surrounding circumstances he could not recover. Bradbury Marble Co. v. Laclede Gas Light Co. [Mo. App.] 106 SW 594. Instruction ignoring this question held erroneous. Id. Evidence held to warrant a finding of

exist in the locality which produce similar effects is no defense, if the nuisance complained of is of such a character and produces such results that standing alone it would be a nuisance.[93]

§ 4. *Remedies against nuisances. A. Abatement and injunction.* See 8 C. L. 1184 —A municipality may, in the exercise of its police power,[94] abate a public nuisance,[95] and one injured by a private nuisance may lawfully abate the same when the person guilty of maintaining it refuses to abate it.[96] The interest of the party menaced by a nuisance should govern in determining the degree of care and expense to be observed in protecting from injury objects constituting the nuisance during their removal by him.[97] A public nuisance may be abated by any individual annoyed or injured by it.[98] A town with power merely to prevent and remove nuisances has not authority summarily to abate as a nuisance that which it has declared to be such, but which is not a nuisance per se.[99] In some states a suit to enjoin a public nuisance may be brought by the solicitor general,[1] in others by the county attorney in the name of the state,[2] and in others in the name of the state at the relation of the attorney general.[3]

no contributory negligence. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83.

93. The fact that it is the principal though not the sole agent in producing the injury is sufficient. Perrin v. Crescent City Stockyard & Slaughterhouse Co., 119 La. 83, 43 S 938.

94. City is not liable, however, for failure to exercise the power or for the failure of its agents to enforce regulations prescribed in the exercise of the power. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631. The abatement of a public nuisance for the safety of the public health comes under the police power (Kaiser v. Walsh, 4 Ohio N. P. [N. S.] 507.), and a resolution of the board of health that milk not of a certain quality be seized and destroyed is not unconstitutional as requiring a taking without due process of law (Id.). Laws 1899, pp. 389, 390, §§ 4, 13 ("anti-gambling law"), authorizing seizure and destruction of gambling devices, held not unconstitutional as being a taking without due process of law and to be a proper exercise of the police power. Mullen v. Mosley, 13 Idaho, 457, 90 P 986. A city is not estopped by its contract for street improvement to exercise its police by abating a nuisance created by the contractor in connection with the work. State v. St. Louis, 207 Mo. 354, 105 SW 748. An order to abate under penalty of prosecution after a hearing by the board of health under authority given by the city charter and ordinances is not unconstitutional as depriving one of his property without due process or of any constitutional rights. Id. Act March 27, 1907, art. 3, § 3, empowering the officers of the city of Memphis to exercise certain police powers within given limits, and authorizing the president to abate whatever in his opinion was a nuisance, and art. 3, § 1, subsec. 17, empowering the municipal council by ordinance to prohibit pig pens, cow stables, and dairies within a given area, held unconstitutional being in violation of Const. arts. 1, § 8, and 11, § 8. Malone v. Williams, 118 Tenn. 390, 103 SW 798.

95. City is liable at common law and by statute for damages for its negligence in not abating a nuisance on land in its possession and under its control. City of Manchester v. Bristor, 76 Ohio St. 270, 81 NE 631. An injunction will not issue to restrain city officers from abating a public nuisance in accordance with the provisions of Civ. Code, § 3494. McQueen v. Phelan, 4 Cal. App. 695, 88 P 1099. The public authorities may abate a fence which obstructs a public highway and is an indictable nuisance. State v. Godwin [N. C.] 59 SE 132. In the exercise of the police power the legislature may authorize the abatement of nuisances by seizure of instruments and devices adopted and intended for the commission of nuisance and crime. Seizure of slot machines for gambling upheld. Mullen v. Mosley, 13 Idaho, 457, 90 P 986. Town may abate nuisance of cattle running at large through the streets and public places by impounding the animals. Corcil v. Walsh [La.] 45 S 438.

96. He must do no wanton or unnecessary damage in doing so, the right be given merely to prevent future injury. Pyott v. State [Ind.] 83 NE 737. Railroad with prescriptive right to conduct surface water through a ditch held to have the right to enter and remove a dam which obstructed the flow causing damage to the track. Id. At common law a private nuisance may be abated if no breach of the peace is committed. Cutting down a telephone pole which was a nuisance upheld. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358. Also held that landowner was not estopped to abate by having brought an injunction suit, after giving notice that he intended to abandon it and to abate the nuisance himself. Id.

97. Damage to cross arms and transformer on a telephone pole in cutting down the pole as a nuisance held not recoverable. Maryland Tel. & T. Co. v. Ruth, [Md.] 68 A 358.

98. State v. Godwin [N. C.] 59 SE 132.

99. Equity will enjoin the enforcement of the ordinance from which irreparable injury would result. Town of Cuba v. Mississippi Cotton Oil Co. [Ala.] 43 S 706.

1. Equity will enjoin a public nuisance at the instance of the state in a proceeding filed by the solicitor general. Dispensary Com'rs of Lee County v. Hooper, 128 Ga. 99, 56 SE 997.

2. State v. Coler, 75 Kan. 424, 89 P 693.

3. State v. Canty, 207 Mo. 439, 105 SW 1078.

A city may bring an equitable action to abate a public nuisance.[4] A municipality as representative of the equitable rights of the inhabitants may enjoin nuisances affecting matters of which the state has confided to it either control or regulation.[5] A court of equity at common law has jurisdiction to restrain nuisances.[6] Equity has jurisdiction to enjoin a violation of an ordinance which constitutes a public nuisance,[7] and in Maine specific jurisdiction is given by statute.[8] As in other cases an injunction will be granted only when there is no adequate remedy at law,[9] or in order to prevent a constantly recurring grievance,[10] or to prevent multiplicity of suits,[11] and where the right threatened thereby is clear and the fact is clearly established, that the proposed structure will infringe such right.[12] The remedy may be lost by estoppel [13] and must be sought promptly.[14] Injunction will lie to restrain the carrying on of a public nuisance although the act is indictable and punishable under the criminal law,[15] for no one has a right to commit an act which is both a nuisance and a crime in order to enjoy the right to a trial by jury.[16] The rule that property rights must be involved before injunctive relief will be granted has no application to a proceeding to abate a public nuisance.[17] Where during the trial of an action to abate a private nuisance the defendant conveys away the premises, judgment directing the abatement cannot be rendered [18] and the doctrine of lis pendens does not apply.[19]

4. Town of Kirkland v. Ferry, 45 Wash. 663, 88 P 1123. A city is not restricted to such remedy as exists by law in the form of an arbitrary abatement of a public nuisance but may resort to equity. City of New York v. Rice, 56 Misc. 360, 107 NYS 641. Erection of wall beyond building line. Id.

5. Threatened violation of ordinance forbidding wooden buildings within the limits of the "Fire District." Inhabitants of Houlton v. Titcomb, 102 Me. 272, 66 A 733.

6. Inhabitants of Houlton v. Titcomb, 102 Me. 272, 66 A 733.

7. Particularly where there is an obstruction or encroachment of a permanent nature in a public highway of long standing under a claim of right. City of New York v. De Peyster, 120 App. Div. 762, 105 NYS 612.

8. By Rev. St. c. 79, § 6, par. 5, in cases of nuisance and waste. Inhabitants of Houlton v. Titcomb, 102 Me. 272, 66 A 733.

9. Injury caused by set back of water by dam enjoined as legal remedy was inadequate. Royce v. Carpenter [Vt.] 66 A 888. The mischief must be irreparable in the sense that there is no adequate remedy at law. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345. Remedy at law for damages held adequate. Id.

10. Royce v. Carpenter [Vt.] 66 A 888.

11. Equity will enjoin a continuing nuisance occasioned by diverting a stream into a ditch so as to encroach on plaintiff's land for which suits could be brought daily. Desberger v. University Heights Realty & Development Co., 126 Mo. App. 206, 102 SW 1060. Where the injury is permanent, damages can be assessed in solido and an injunction will not lie to prevent a multiplicity of suits. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

12. The court refused to enjoin erection of a stable 42 feet from the plaintiff's house where it was self-evident that if properly kept it would not be a nuisance. Hyden v. Terry [Ky.] 108 SW 241.

13. Acquiescence and assistance in building a dam which proved to be a nuisance held not to create an estoppel where the party had no knowledge of what the effect of the dam would be. Royce v. Carpenter [Vt.] 66 A 888. Evidence insufficient to prove an estoppel. Levy v. Murray, 106 NYS 689.

14. Delay of ten and a half months held not to be laches. Royce v. Carpenter (Vt.) 66 A 888. Evidence insufficient to show laches in bringing action to abate. Desberger v. University Heights Realty & Development Co., 126 Mo. App. 206, 102 SW 1060. Delay did not amount to laches. Laird v. Atlantic Coast Sanitary Co. [N. J. Eq.] 67 A 387. Where a nuisance is a continuing one, the statute of limitations does not run and an action for its abatement will lie at any time during its existence. Wright v. Ulrich [Colo.] 91 P 43. No lapse of time will deprive the public of its right to have an encroachment on a highway, which does not extend to its full width and entirely cut off travel, removed. City of New York v. De Peyster, 120 App. Div. 762, 105 NYS 612.

15. Keeping a bawdy house will be enjoined although the act is made a misdemeanor by statute. State v. Coler, 75 Kan. 424, 89 P 693. Where special injury is threatened by a public nuisance, equity will enjoin it at the instance of a private individual. Caskey v. Edwards [Mo. App.] 107 SW 37. Proposed erection of stable in violation of an ordinance enjoined. Id. An act displayed before a public audience which is debasing in its character, debauching in its effect on public morals, and brutalizing in its effect on the spectators, is a public nuisance which equity will enjoin although act is also a crime. State v. Canty, 207 Mo. 439, 105 SW 1078. Equity has jurisdiction to abate a public nuisance, notwithstanding the fact that the offenders are amenable to the criminal law. Id. Use of arena for bull fights and managers holding bull fights therein enjoined. Id.

16, 17. State v. Canty, 207 Mo. 439, 105 SW 1078.

18. Only the owner can be compelled to abate. Ackerman v. True, 120 App. Div. 172, 105 NYS 12. In such cases the most practical remedy would seem to be to bring several

Injunction. See 8 C. L. 1185—An action to abate a nuisance and for relief by damages is not demurrable on the ground of multifariousness.[20] In Wisconsin a complaint in an action to abate a nuisance and for damages is not demurrable because on final hearing all the relief prayed for may not be granted.[21] The relative effect upon the parties of granting or refusing injunctive relief from a nuisance is a consideration affecting the exercise of the court's discretion.[22] In a suit to compel the removal from the sidewalk of so much of a building as encroaches thereon, the owner of the land as well as the lessee who erected the building is a necessary party.[23] The doctrine of res adjudicata applies to a nuisance existing at the date of the decision,[24] but it has no application to facts that have arisen since which have changed the conditions.[25] Where at the trial of an action to enjoin a nuisance it is found that the causes of complaint are removed, the bill must be dismissed but without costs.[26]

(§ 4) *B. Criminal prosecution.* See 8 C. L. 1187—The maintenance of a public nuisance was a crime at common law [27] and many specific nuisances are declared by statute and ordinance.[28] It is a good defense that the public nuisance is caused by

actions and recover damages until such time as a defendant is found who has the title and the judgment of abatement can operate. Id.

19. The doctrine only applies to actions in rem and not to trespass. Ackermann v. True, 120 App. Div. 172, 105 NYS 12. Hence a grantee is not bound by a judgment against the grantor nor compelled to carry out the decree. Id.

20. But several persons cannot maintain such an action successfully on the ground that it is a misjoinder of causes of action for damages. Burghen v. Erie R. Co., 108 NYS 311.

21. St. 1898, § 3181, provides that if the plaintiff prevails he shall have judgment for damages and costs and also for an abatement of the nuisance, unless the court shall certify that such abatement is unnecessary. Holman v. Mineral Point Zinc Co. [Wis.] 115 NW 327.

22. If the granting would entail much more injury upon the defendant than benefit to the plaintiff it should be refused. Downs v. Greer Beatty Clay Co., 9 Ohio C. C. (N. S.) 345.

23. City of Columbus v. Philbrick, 5 Ohio N. P. (N. S.) 449. The decree for the abatement of a nuisance of this character where the property owner is served by publication and the structure is erected by the lessee will be directed against the lessee and his sublessees who stand in the position of lis pendens purchasers. As to the owner the finding should be that he has no right or interest in that part of the building which extends over the true line of the street. Id.

24. It must entirely abate. Perrin v. Crescent City Stockyard & Slaughterhouse Co., 119 La. 873, 44 S 513.

25. Where to prevent the recurrence of the nuisance enjoined ordinances were passed regulating the industry complained of and the defendant again conducted his business in compliance therewith, it was held there was no ground for contempt proceedings. Perrin v. Crescent City Stockyard & Slaughterhouse Co., 119 La. 873, 44 S 513.

26. Hale v. Jenkins, 55 Misc. 119, 106 NYS 282.

27. Neither the sale of intoxicating liquors nor the keeping of orderly places for their sale was a public offense or nuisance at common law. Sopher v. State [Ind.] 81 NE 913. Pool room where betting on horse races is indulged in is a nuisance per se at common law. Ehrlick v. Com., 31 Ky. L. R. 401, 102 SW 289. At common law a bawdy house is indictable as a nuisance. State v. Coler, 75 Kan. 424, 89 P 693.

28. Erection of wooden buildings within the fire district in violation of ordinance by Rev. St. c. 4, § 93 par 8. Inhabitants of Houlton v. Titcomb, 102 Me. 272 66 A 733. 1 Ballinger's Ann. Codes & St. § 3085, makes it a public nuisance to maintain a place for the illegal sale of intoxicating liquors. Town of Kirkland v. Ferry, 45 Wash. 663, 88 P 1123. Keeping a bawdy house is a misdemeanor by Gen. St. 1901, § 2243. State v. Coler, 75 Kan. 424, 89 P 693. Under a municipal ordinance providing that no owner or occupant or other person having the management or control of any building or place shall allow a nuisance to exist therein, an owner of premises in possession of a tenant under a lease with no covenant as to the condition of the premises or as to repairs is not liable. People v. Kent [Mich.] 14 Det. Leg. N. 904, 114 NW 1012. Under Revsial 1905, § 3784 (Code, § 2065), a fence which obstructs a public highway and renders its use less convenient is a public nuisance. State v. Godwin [N. C.] 59 SE 132. Maintenance of building for any business which by occasioning noxious exhalations or noisome smells is injurious to individuals or the public. Acts 1905, p. 584, c. 169, § 535. Myers v. State [Ind.] 82 NE 763. Buildings erected contrary to ordinances provided for by Rev. St. c. 4, § 93, par. 8. Inhabitants of Houlton v. Titcomb, 102 Me. 272, 66 A 733. Smoke nuisance. Bowers v. Indianapolis [Ind.] 81 NE 1097. Penal Code, § 385. defining public nuisances, held to cover the offense of keeping a house for the purpose of practising the vocation of an abortionist. People v. Hoffman, 118 App. Div. 862, 103 NYS 1000. Exhibition of stallions on public streets. State v. Iams [Neb.] 111 NW 604. Obstruction of a highway. State v. Southern Indiana Gas Co. [Ind.] 81 NE 1149. Since Acts 1905, p. 709, c. 169, § 534 (Burns' Ann. St. Supp. 1905, § 2179), providing for punishments for maintaining public nuisances fails to define them as required by Burns' Ann. St. 1901, § 237, resort must be had to common law to

the acts of others over whom the defendant has no control.[29] An act authorized by the legislature which in the absence of such authority would constitute a public nuisance cannot be considered such unless the legislature exceeded its power.[30] Under a charge of maintaining a public or common nuisance, where the thing is a nuisance per se, it is no defense that there was no noise or disturbance or that the community was not disturbed by its presence.[31] A landlord may be held guilty of allowing a common nuisance to be operated on his premises, if he let it for the purpose or knew of the purpose or has control over the matter even after renting.[32] Two separate and distinct substantive offenses cannot be joined in one count in an indictment.[33] The complaint is sufficient if it substantially notes the elements of the offense.[34] A joint conviction of innocent and guilty parties for violation of an ordinance is not prejudicial to the latter.[35] In Kentucky after a verdict of guilty in a prosecution for maintaining a common nuisance, a judgment of abatement may enter which operates upon the person of the accused as well as upon the property.[36]

(§ 4) *C. Action for damages.*See 3 C. L. 1187—While one is liable only for damages proximately resulting from his acts,[37] where several persons acting independtly

determine if the act complained of was a public nuisance. Sopher v. State [Ind.] 81 NE 913. Act March 17, 1875 (Acts Sp. Sessions 1875, p. 55, c. 13; Burns' Ann. St. 1901, § 7276 et. seq.), regulating and licensing the sale of intoxicating liquors and later acts supplementary and amendatory thereto, held constitutional. Id. See, also, such topics as Betting and Gaming, 9 C. L. 388; Intoxicating Liquors, 10 C. L. 417.

29. Railroad not liable for nuisance caused by an embankment built by a third person for a coal switch connecting a mine with railroad, since by Const. § 216, "all railway, transfer, belt line and railway bridge companies shall allow the tracks of each other to unite, intersect or cross at any" reasonable or feasible point. Louisville, etc., R. Co. v. Com., 31 Ky. L. R. 65, 101 SW 382.

30. Sale and keeping places for the sale of intoxicating liquor. Sopher v. State [Ind.] 81 NE 913.

31. Pool room for betting on horse races. Ehrlick v. Com., 31 Ky. L. R. 401, 102 SW 289.

32. Evidence held to show knowledge and consent of landlord and sufficient to hold him even though there was no evidence against his lessee. Huber v. Com., 31 Ky. L. R. 320, 102 SW 291.

33. Acts 1905, p. 584, c. 169, § 535, forbidding the conduct of a business of such a character as to emit noisome smells injurious to health or comfort, and § 537, forbidding the placing of the carcass of any dead animal, spoiled meat, or putrid animal, are intended to cover distinctly different acts. Myers v. State [Ind.] 82 NE 763. Indictment held to charge an offense under § 535, but not under § 537, and hence was not bad for duplicity. Id.

34. Indictment held sufficient under acts 1905, p. 584, c. 169, § 535, forbidding businesses causing smells injurious to health. Meyers v. State [Ind.] 82 NE 763. Under the rules of criminal pleading, that where the statute defines the crime the indictment may use of the language of the statute, but where the statute defines the offense in general terms, particulars must be pleaded, the mere averment that the accused obstructed a public highway is insufficient under a statute forbidding in general terms the obstruction of a highway. State v. Southern Indiana Gas Co. [Ind.] 81 NE 1149. The highway should be named or identified to make the indictment sufficient. Id. A complaint otherwise sufficient to charge a public nuisance by the illegal sale of intoxicating liquors is not demurrable because it does not allege that the defendant was not a druggist, that being a matter of defense. Town of Kirkland v. Ferry, 45 Wash. 663, 88 P 1123. Complaint held sufficient. Ehrlick v. Com., 31 Ky. L. R. 401, 102 SW 289. Affidavit charging sale of intoxicating liquors and maintainance of a public nuisance held insufficient for failure to state that sale was unlawful or place conducted in disorderly or unlawful manner. Sopher v. State [Ind.] 81 NE 913.

35. Improper conviction of owners with tenants for allowing a nuisance to exist on their premises nonprejudical to tenants. Fine of latter held proper. People v. Kent [Mich.] 14 Det. Leg. N. 904, 114 NW 1012.

36. Ehrlick v. Com., 31 Ky. L. R. 401, 102 SW 289. Where before a motion for a judgment of abatement can be acted upon the defendant executes a supersedeas bond and supersedes the judgment of conviction, upon affirmance and discharge of the supersedeas the court should enter the judgment of abatement. Huber v. Com., 31 Ky. L. R. 320, 102 SW 291. Motion to abate pool room for sale of pools on horse races held properly granted. Respass v. Com., 31 Ky. L. R. 371, 102 SW 331; Id., 31 Ky. L. R. 443, 102 SW 800; Enright v. Com., 31 Ky. L. R. 442, 102 SW 799; Id., 31 Ky. L. R. 444, 102 SW 799.

37. Declaration alleging that defendant turned heated water into a conduit which carried it to an unprotected place adjoining the highway in which plaintiff fell held demurrable. Ellis v. Pennsylvania Iron Works [N. J. Law] 68 A 891. Damage held not to be so indirect as to preclude recovery. Bradbury Marble Co. v. Laclede Gas Light Co. [Mo. App.] 106 SW 594. Wind of not unusual or extraordinary velocity will not be a defense as an intervening cause where its effects could have been reasonably anticipated. Ft. Wayne Cooperage Co. v. Page [Ind.

create a nuisance, each is only liable for the results of his own wrong,[38] and although they may be jointly enjoined,[39] each must be sued separately for damages.[40] Several persons injured by a nuisance may not bring a bill praying both for abatement and relief by way of damages.[41] One may maintain an action at law for damages caused by a nuisance without seeking an abatement of the nuisance.[42] One who wrongfully creates and maintains a nuisance is liable for such damages as naturally flow therefrom [43] without notice of the effects or request to abate.[44] The rule is otherwise where the land is conveyed with a pre-existing nuisance thereon,[45] except where the nuisance consists in the violation of a statute.[46] A lessor is liable if he rents the premises for the express purpose of having conducted thereon a business which is a nuisance per se.[47] Successive actions may be brought for injury received from an intermittant [48] or a continuing nuisance,[49] and the statute of limitations begins to run upon the receipt of each injury.[50] While a city is liable in damages for maintaining a nuisance,[51] it is not liable for damages for failure to abate a nuisance rendering its streets unsafe to one not using the streets.[52] Limitations do not begin to run until the nuisance is established,[53] and are governed by statute.[54] In an action against a corporation for a nuisance, it is immaterial whether its property was ob-

App.] 82 NE 83. Accumulation of water of road held not to be proximate cause of injury. Crowley v. West End [Ala.] 43 S 359.

38. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934. Where a jury is impanelled to assess damages against one only of several independent wrongdoers, they should be instructed to find with a liberal hand if necessary, but as accurately as possible, the amount of damage done by that particular wrongdoer. City of Columbus v. Rohr, 10 Ohio C. C. (N. S.) 320.

39. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934.

40. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934. Where several persons unite in causing a nuisance by discharge of sewage and filth, they are not jointly liable for damages where there is no concert of action but each is liable only for his proportion of damages. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631. The liability of different persons contributing by independent action to the production of a nuisance, while joint in a suit to abate the nuisance, is not joint in an action at law for damages. City of Columbus v. Rohr, 10 Ohio C. C. (N. S.) 320.

41. Their actions for damages are separate and distinct and cannot be joined. Burghen v. Erie R. Co., 108 NYS 311.

42. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70.

43. Railroad held liable for sickness produced by a stagnant pond caused by intentional obstruction of a natural drain. Georgia, etc., R. Co. v. Jernigan, 128 Ga. 501, 57 SE 791. Where location of magazine for explosives was found to be a nuisance, defendant held liable for all the damages resulting therefrom. H. L. Kerbaugh v. Caldwell [C. C. A.] 151 F 194.

44. Exley v. Southern Cotton Oil Co., 151 F 101. Whether he did construct the nuisance or not is a question of fact. Choctaw, etc., R. Co. v. Rice [Ind. T.] 104 SW 819.

45. Notice to abate is required. Notice held not necessary, there being no allegation of any change of ownership. Exley v. Southern Cotton Oil Co., 151 F 101.

46. Destruction of a drain constructed under a state law, the act being in violation of Burns' Ann. St. 1901, § 5645, and § 5753, cl. 5. Kelsay v. Chicago, etc., R. Co. [Ind. App.] 81 NE 522.

47. Tedeschi v. Berger [Ala.] 43 S 960. Lessor held not liable for nuisance caused by pipe line maintained and operated by lessee. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934.

48. Where a railroad embankment is not a nuisance per se but becomes so only at intervals by diverting rain water, the cause of action arises on the receipt of each injury and successive actions may be brought. International, etc., R. Co. v. Kyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 940, 101 SW 272.

49. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196; Platt Bros. v. Waterbury [Conn.] 67 A 508.

50. Damages restricted to those suffered within two years before the filing of the suit. International, etc., R. Co. v. Kyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 940, 101 SW 272.

51. Discharge of sewage into a river so that it was deposited on riparian land. Platt Bros. v. Waterbury [Conn.] 67 A 508. Complaint averring that a railway company lowering its tracks with consent and under the direction of a city "unreasonably and unlawfully prevented and obstructed for a long space of time any traffic whatever" on certain highways held insufficient to charge the city with authorizing, or maintaining a nuisance. Liermann v. Milwaukee [Wis.] 113 NW 65.

52. Not liable to a workman injured in the collapse of a building. Stubley v. Allison Realty Co., 108 NYS 759.

53. Cause of action for nuisance caused by a railway water tank held not to arise until the tank was built and operated. Texas & Pac. R. Co. v. Edrington [Tex.] 18 Tex. Ct. Rep. 175, 101 SW 441.

54. The action for damages for a nuisance is founded on the common-law action of case and not of trespass, and hence is within Gen. St. 1902, § 1111, giving a six year' limitation, and not within § 1115. Platt Bros. v. Waterbury [Conn.] 67 A 508. Since one who maintains a continuing nuisance is liable to successive actions, the statute of limitations only bars recovery for what occurred prior to

tained by purchase or by eminent domain.[55] If a nuisance is proved, the law of negligence does not apply.[56] A public nuisance causes legal injury although the plaintiff fails to prove that he has suffered any specific damages.[57] In an action for damage caused by a nuisance, no specific allegation of breaking and entering vi et armis is necessary.[58] The unreasonableness of the use of a ditch need not be alleged in an action for nuisance where it can be deduced naturally from the facts alleged.[59] A complaint to be good against demurrer must exhibit enough facts in law to authorize affirmative relief and be sufficiently clear to enable a person of common understanding to know what is intended.[60] Where acts complained of are not nuisances per se, the complaint should set out wherein they are nuisances in fact.[61] Whether the location of a lawful business is proper or not under all the circumstances may be raised by answer.[62]

Damages. See 6 C. L. 1189—The measure of damages for the maintenance of a nuisance is the diminution in the value of the premises affected during the continuance of a nuisance.[63] Permanent damage to property by a continuing nuisance cannot be recovered.[64] Trustees cannot recover for the physical sufferings of their beneficiaries caused by a nuisance.[65] Where in action for damages caused by a nuisance the precise amount of damages is not ascertainable, the court or jury should make such award as under all the circumstances would seem to be just and equitable.[66] Where pending an action for abatement the defendant conveys the property and the plaintiff waives damages, and permanent damages instead of those suffered from year to year

the beginning of the time allowed for action. Donahue v. Stockton Gas Elec. Co. [Cal. App.] 92 P 196.

55. Taylor v. Seaboard Air Line R. Co. [N. C.] 59 SE 129.

56. Where the damage is the necessary consequence of or is incident to the defendant's business or the manner of its conduct, the law of nuisance and not of negligence applies. Hogle v. H. H. Franklin Mfg. Co., 105 NYS 1094. The question of negligence is immaterial in determining whether the cause is actionable. Exley v. Southern Cotton Oil Co., 151 F 101. In an action for the destruction of a drain in violation of Burns' Ann. St. §§ 5153, 5645, negligence or lack of contributory negligence need not be averred. Kelsay v. Chicago, etc., R. Co. [Ind. App.] 81 NE 522. Action charging injury to marble by discharge of discoloring ashes containing carbon, etc., held to be for maintaining a private nuisance and not based on negligence. Bradbury Marble Co. v. Laclede Gas Light Co. [Mo. App.] 106 SW 594. A nuisance does not rest upon the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with best of care. Melker v. New York, 190 N. Y. 481, 83 NE 565. If a structure is a nuisance per se, the owner may be held liable for damages irrespective of his contractor's negligence. Stubley v. Allison Realty Co., 108 NYS 759. Notwithstanding a nuisance implies negligence, there is a clear distinction under the Ohio law between ordinary actions for injury to persons or property through negligence per se and injury to persons or property caused by nuisance. City of Cincinnati v. Darby, 5 Ohio N. P. (N. S.) 216.

57. Platt Bros. v. Waterbury [Conn.] 67 A 508.

58. Exley v. Southern Cotton Oil Co., 151 F 101.

59. Whether the use be reasonable or unreasonable is a question of law. Exley v. Southern Cotton Oil Co., 151 F 101.

60. Burns' Ann. St. 1901, § 341. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Complaint held sufficient as against a general demurrer. (Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196), and as setting forth statements of time and other necessary facts (Id.).

61. Complaint failed to show operation of railway terminal was improper and illegal so as to constitute a nuisance in fact. Taylor v. Seaboard Air Line R. [N. C.] 59 SE 129.

62. Holman v. Mineral Point Zinc Co. [Wis.] 115 NW 327.

63. Pollution of a spring. Long v. Louisville, etc., R. Co. [Ky. App.] 107 SW 203. The measure of damages for the obstruction is limited to loss of profits expenses incurred, and injury resulting to the plaintiff from the obstruction. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70. A corporation cannot recover in addition to this for the value of the time of its officers which was lost defending the corporation from the defendant's attacks in consultation with attorneys and in preparation for trial. Id. The measure of damages for a nuisance by encroachment on the highway by an adjoining owner is the difference between the value of the plaintiff's property with the encroachment and without it. Ackerman v. True, 120 App. Div. 172, 105 NYS 12. The rule obtaining in elevated railway cases of taking into consideration the benefits caused to the plaintiff's property by the structure has no application to controversies of this kind. Id.

64. The acts may be enjoined and temporary damages recovered. Taylor v. Seaboard Air Line R. Co. [N. C.] 59 SE 129.

65. Taylor v. Seaboard Air Line R. Co. [N. C.] 59 SE 129. Finding that the plaintiff had suffered substantial damage held proper. Id.

66. Asia v. Pool [Wash.] 92 P 351.

are found, the court cannot modify the judgment by reversing the injunctions for abatement and awarding damages.[67] The right to damages for the maintenance of a private nuisance is given by statute in some states.[68] While the proof of the existence of a nuisance for which there is a general averment of damage nominal damages at least are recoverable,[69] yet, if special damages are alleged, they should be set out with such precision as to apprise the defendant of the items.[70] There can be no damages allowed for injuries not pleaded,[71] nor where there is no evidence from which to measure them.[72] Evidence of the amount and manner of the use prior to the time of injury,[73] and of the physical discomfort of the plaintiff and his family incident to the maintenance of the nuisance is admissible.[74]

(§ 4) *D. Rights of private persons in respect to public nuisances.* See 8 C. L. 1189 In order that a private person may maintain an action for relief against a public nuisance, he must sustain special injury therefrom different in kind from and in addition to that sustained by the general public.[75] The complaint must set forth the special injury.[76]

67. Ackerman v. True, 120 App. Div. 172, 105 NYS 12.

68. Civ. Code 1895 § 3858. Exley v. Southern Cotton Oil Co., 151 F 101.

69. Averment of special damage is unnecessary, the old common-law remedies by the writs of quod permitting posternere and of assize of nuisance being obsolete and superseded by an action on the case which does not require such an averment. Exley v. Southern Cotton Oil Co., 151 F 101. Under a general averment of damage the plaintiff may recover all damages that are the necessary and natural consequence of the nuisance. Id.

70. Exely v. Southern Cotton Oil Co., 151 F 101. Where each paragraph of a declaration was sufficient to state a cause of action a motion to make more specific was overruled. Kelsay v. Chicago, etc., R. Co. [Ind. App.] 84 NE 522.

71. Error to allow for sickness and death where there was no pleading seeking recovery therefor. Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 18 Tex. Ct. Rep. 510, 102 SW 170.

72. Held error to charge jury to find for any money spent for physician's services, where there was no proof of their value or that any sum was paid on contracted to be paid for them. Gulf, etc., R. Co. v. Craft [Tex. Civ. App.] 18 Tex. Ct. Rep. 510, 102 SW 170.

73. Magazines for explosives. H. S. Kerbaugh v. Caldwell [C. C. A.] 151 F 194.

74. Evidence of the abandonment of his house by the plaintiff held not irrelevant under the allegations in the petition. Southern R. Co. v. Hardenman, [Ga.] 58 SE 539.

75. Held specially damaged: Owner on alley on which railroad was operated without authority and which was wholly obstructed thereby held entitled to relief. Birmingham L. & P. Co. v. Moran [Ala.] 44 S 152; Illinois Cent. R. Co. v. Trustees of Schools, 228 Ill. App. 111. Special damage consisted of being deprived of spring water for family use. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872. Private citizen the entrance to whose premises was obstructed by a structure of iron work and glass used as a means of access to the basement. Levy v. Murray, 56 Misc. 354, 106 NYS 689. Obstruction of a private or public road or street will be enjoined at the instance of a private individual where a peculiar and special injury is caused thereby. Pent v. Trimboli, 61 W. Va. 509, 56 SE 881. Injury by obstruction to private easements in a street such as the right of ingress and egress to and from the lot by means of the adjacent street (Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330), whether the obstruction is immediately in front of the land or not (Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70), and whether only a portion of the street was capable of use and that part which would eventually be the sidewalk, is a special injury and will be enjoined (Id.). Injury to the right to receive light and air from the space occupied by the street (Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330), and to the right to have the street space open for signs or the display of goods to attract customers, is special and may be enjoined (Id.). A house of prostitution in adjoining house held to be a special injury. Tedescki v. Berger [Ala.] 43 S 960. Proposed erection of a stable 50 feet from plaintiff's residence in violation of ordinance held to threaten special injury and was enjoined. Caskey v. Edwards [Mo. App.] 107 SW 37. Where special injury is shown, the act will be enjoined whether the nuisance is one per se or one in fact. Id. Under Civ. Code §§ 33480, 3493, defining public nuisances and providing for suits by private individuals when specially damaged, not only a special injury must be shown but one different in kind and not simply in degree from that suffered by the general public. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196 Pollution of water and soil by leaking gas held to state special damage not suffered by the general public. Id.

Held not specially damaged: A city is not liable for damages caused by the loss of prospective customers who might have come down a street and stopped at plaintiff's store but for the obstruction of the street. Liermann v. Milwaukee [Wis.] 113 NW 65. Injunction refused as no special injury shown to result from use of streets for a street fair. Martin v. Hornor [Ark.] 103 SW 1134. Court refused to enjoin pendente lite the use of a street by a street railway signal tower. Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P 330.

76. Civ. Code § 3493 requires special injury

OATHS.[77]

OBSCENITY, see latest topical index.

OBSTRUCTING JUSTICE.[78]

In the absence of any evidence of an attempt to arrest, failure to comply with an officer's request that defendant go to court does not constitute the offense of obstructing an officer.[79] A citizen may resist an illegal arrest without a warrant,[80] and resistance to illegal arrest with any amount of force necessary to prevent arrest is not resisting an officer.[81] Ignorance that the person assaulted was an officer constitutes a defense.[82]

Information for obstructing an officer in the service of process should recite the process in order that the court may see if it was of a kind the officer had a right to execute.[83] An indictment under the statute punishing one for corruptly endeavoring to influence an officer of the court in the discharge of his duty is not defective because it did not charge that the court was in session, nor because the communication did not comment upon the merits of the case, nor because the act charged may be punishable as contempt of court.[84] The ordinary rules as to variance between the charging and reciting clauses,[85] verification,[86] and the elements of the offense necessary to be charged, apply to information for resisting an officer.[87]

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to appear. Complaint held sufficient under it. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70; Anderson v. Fry, 123 App. Div. 46, 107 NYS 916.

77. See 8 C. L. 1191. No cases have been found during the period covered for this topic, which includes only the form and sufficiency of oaths generally. See the related topics of Affidavits, 9 C. L. 56; Witnesses, 8 C. L. 2347; Jury, 10 C. L. 541; Perjury 8 C. L. 1344.

78. See 8 C. L. 1191.

79. Cooksey v. State [Ark.] 106 SW 674.

80, 81. Ryan v. Chicago, 124 Ill. App. 188.

82. Where defendant did not know that person assaulted was constable holding writ of execution against him. State v. Murphy [Del.] 66 A 335.

83. State v. Ostmann, 123 Mo. App. 114, 100 SW 696.

84. Under Rev. St. § 6907, letter to judges expressing hope that decision would be adverse to certain party on account of his alleged disgraceful conduct in office. State v. Johnson [Ohio] 83 NE 702.

85. Where charging clause speaks of process as execution and reciting clause shows it to have been fee bill for costs. State v. Ostmann, 123 Mo. App. 114, 100 SW 696.

86. Under Rev. St. 1899, § 2749 (Ann. St. 1906, p. 1603), failure to verify does not invalidate where affidavit filed with prosecuting attorney reciting offense was filed with the information. State v. Ostmann, 123 Mo. App. 114, 100 SW 696.

87. Failure of return of fee bill as shown by copy in information to show demand by officer obstructed does not invalidate. State v. Ostmann, 123 Mo. App. 114, 100 SW 696.

§ 9. Powers and Duties, 1060. Effect of Personal Interest, 1061. Acts of a De Facto Officer, 1061. Delegation of Powers, 1062. Mode of Official Action, 1062. Judicial Control or Review, 1062.
§ 10. Liabilities of Public Officers, 1063.
A. Civil Liability, 1063.
B. Criminal Liability, 1064.
§ 11. Liabilities of Public for Acts of Public Officers, 1064.
§ 12. Official Bonds and Liabilities Thereon, 1064.
§ 13. Compensation, 1066.

The scope of this topic is noted below.[88]

§ 1. *Definition and distinctions.* See 8 C. L. 1192—The essential element of a public office is that it embraces the performance by the incumbent of a public function delegated to him as a part of the sovereignty of the state.[89] An "officer" in the sense in which the word is used in the constitution of Ohio is an individual who takes the oath of office and becomes responsible to the public for his own official acts and those of his subordinates.[90] A county officer is one who performs functions only within the county.[91] The clerk of the district court of Oklahoma is an officer of the court.[92]

To constitute a de facto officer, there must be some appointment or election which might be supposed to be valid,[93] and an appointment to a municipal office in plain violation of charter provisions does not make the incumbent a de facto officer.[94] An officer elected to an office created by an unconstitutional statute is a de facto officer.[95]

Office and government contract distinguished.—An office is a public station or employment embracing the idea of tenure, duration, emolument, and duties, and is different from a government contract which is necessarily limited in its duration and specific in its object.[96]

Officer and employe distinguished. See 8 C. L. 1192—A public officer is one who is charged by law with duties involving an exercise of some part of the sovereign power, either great or small, in the performance of which the public is concerned and which are continuing and occasional or intermittent,[97] while an employe is one who merely

88. **It includes** all matters relating generally to officers and public employes. **It excludes** election to office (see Elections, 9 C. L. 1041) and matters peculiar to particular officers (see Counties, 9 C. L. 827; States, 8 C. L. 1970; Schools and Education, 8 C. L. 1851, and such topics as Clerks of Court, 9 C. L. 572; Coroners, 9 C. L. 733; Sheriffs and Constables, 8 C. L. 1897, and the like).

89. Palmer v. Zeigler, 76 Ohio St. 210, 81 NE 234.

90. Theobald v. State, 10 Ohio C. C. (N. S.) 175.

91. Director of a levee district created by Act Feb. 15, 1893, is not a county officer within Kirby's Dig. § 7984, requiring prosecuting attorneys to institute proceedings against persons usurping county office. State v. Higginbotham [Ark.] 106 SW 484.

92. Matney v. King [Okl.] 93 P 737.

93. Such an occupation of the office without dispute and with general acquiescence as would reasonably lead to the inference that such an authority existed, although not at the time known. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600. One assuming duties of road supervisor, by virtue of void election by fiscal court, and which were acquiesced in by court even after office had been declared vacant, is a de facto officer. Henry v. Com., 31 Ky. L. R. 760, 103 SW 371. Members of a board of excise commissioners, who are appointed by an unconstitutional method, do not become de facto officers by assuming to act as such, when it appears that there was a de jure board, which, during the same time, were holding official meetings, and claiming to be the only legal board. Dienstag v. Fagan [N. J. Law] 65 A 1011.

94. Under charter of city of Mt. Vernon, one appointed to the office of commissioner of public works by the mayor without consent of council. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600.

95. Lang v. Bayonne [N. J. Err. & App.] 68 A 90.

96. Attorney employed by chief of Muskogee nation under act of council thereof held not to be an incumbent of public office but an employe under contract. Porter v. Murphy [Ind. T.] 104 SW 658.

97. Positions held offices. Sanders v. Belue [S. C.] 58 SE 762. Chief grain inspector of state of Missouri appointed under Rev. St. 1899, is a state officer. State v. Knott, 207 Mo. 167, 105 SW 1040. Under charter of San Francisco, art. 5, c. 3, § 3. Pol. Code, § 865, assistant district attorney whose salary is fixed by supervisors held to be an officer entitled to compensation. Harrison v. Horton [Cal. App.] 90 P 716. Where a person appointed by the government and not by contract, who performs a continuing duty defined by the governmental rules, is a public officer. Thus, a superintendent for state school for the blind, elected by board of trustees of charitable institutions under au-

performs the duties required of him by persons employing him under an express contract or otherwise, though such persons be themselves public officers and though the employment be in or about a public work or business.[98]

§ 2. *Creation and change of offices.* See 8 C. L. 1194—If not prohibited by constitution,[99] the legislature may create or abolish offices,[1] prescribe their power and duties,[2] and may abolish, increase, or diminish the term, or change the manner of filling an office created by statute, and may declare it vacant or abolish the office by leaving it devoid of duties.[3] Where the legislature has power to prescribe the duties of an office, it may exercise the power without creating a new office.[4] Charter provisions are binding on municipal legislatures.[5] While an office may be abolished, yet the officer cannot be legislated out of office without an abolishment thereof.[6] A public office cannot be created and its powers, duties, and emoluments prescribed, by concurrent resolution.[7]

§ 3. *Eligibility and qualifications. A. In General.* See 8 C. L. 1194—The legislature may prescribe reasonable qualifications for public offices,[8] and in the absence of

thority of Act 1907, is a public officer. Lucas v. Futrall [Ark.] 106 SW 667.

98. Sanders v. Belue [S. C.] 58 SE 762.

Persons held not to be public officers: Clerk appointed by coroner under Greater New York charter, § 1571. People v. Cahill, 188 N. Y. 489, 81 NE 453. A public administrator. Wootton v. Smith [N. C.] 59 SE 649. Superintendent of a county infirmary. Zeigler v. Palmer, 10 Ohio C. C. (N. S.) 545. Deputy sheriff and court constable. State v. Shaffer, 6 Ohio N. P. (N. S.) 219. A grand juror is not a public officer within the meaning of the statute construing the term "public officers" to mean all officers of the state which have heretofore been commissioned by the governor. State v. Graham [S. C.] 60 SE 431. The position of bailiff or janitor and assistant clerk of the municipal court, as provided for by ordinance No. 15,328 of the City of Portland, is not an office but a clerical position within civil service regulations prescribed by city charter § 306. MacDonald v. Lane [Or.] 90 P 181. An employe of a union station terminal company to police its own property, who is paid by the employing company, and clothed with power to make arrests and subject to the control of the police department of the city, is not a member of the city police force within the meaning of a statute providing for the burial of an officer killed while in the discharge of his duty. Zipperer v. Savannah, 128 Ga. 135, 57 SE 311. Local executive committees of a political party are not public officers, even though certain duties are imposed upon them by c. 93, p. 510, Laws 1905, N. H., and they are required to conduct political campaigns. Attorney General v. Barry [N. H.] 68 A 192. Office of democratic board of committeemen of a city. Greenough v. Lacy [R. I.] 66 A 300.

99. So far as Act 1903 (Laws 1903, p. 248, c. 133) attempts to create office of county fruit inspector, it is in violation of Const. art. 11, § 6. State v. Blumberg [Wash.] 89 P 708. Under the constitution of 1868, the general assembly was without power to abolish the office of county treasurer either directly or indirectly, and local act approved Feb. 28, 1876 (Acts 1876, p. 325), consolidating offices of clerk of superior court and of treasurer of Dougherty county, held unconstitutional. Hall v. Tarver, 128 Ga. 410, 57 SE 720.

1. The office of chief engineer of the city of Louisville is created by Ky. St. 1903, § 2810. Parsons v. Breed, 31 Ky. L. R. 1136, 104 SW 766. Notwithstanding § 9, art. 19, of Const. 1874 of Arkansas, forbids the general assembly to create any permanent offices not provided for in constitution, the legislature has power under Const. art. 19, § 19, to make superintendent of Arkansas school for blind a public officer. Lucas v. Futrall [Ark.] 106 SW 667.

2. Under Ky. St. 1903, §§ 3038, 3049, 3058, subds. 7 and 26, the general council of city of the second class has power to create office of market master and to prescribe his duties and salary. Potter v. Bell, 30 Ky. L. R. 1314, 101 SW 297.

3. State v. Huegle [Iowa] 112 NW 234. Ky. St. 1903, § 2810, repeals special charter of Louisville creating and providing for the filling of office of principal engineer and his term. Parsons v. Breed, 31 Ky. L. R. 1136, 104 SW 766.

4. Act April 11, 1903 (Sess. Laws 1903, p. 316, c. 139, § 9), providing that county clerks and recorders of the several counties shall be registrars of titles does not create the office of registrar of titles, which is neither filled by appointment as required by Const. art. 4, § 6, nor by election or appointment as provided by art. 14, § 12. People v. Crissman [Colo.] 92 P 949.

5. The council of the city of Portland cannot create an office not provided for by the city charter. MacDonald v. Lane [Or.] 90 P 181.

6. Act March 27, 1907, art. 8, § 8, vacating and abolishing all offices existing under charter of city of Memphis, and providing other officers with substantially the same duties as those under charter did not have the effect of removing officers holding under the charter, and creating vacancies to be filled by appointment, since the offices are substantially the same. Malone v. Williams, 118 Tenn. 390, 103 SW 798.

7. First Nat. Bk. v. State [Neb.] 114 NW 772.

8. Laws 1901, p. 649, c. 449, requiring county supervisor of assessments to be an elector and householder of county not less than four

constitutional prohibition may alter or change the same,[9] and where it delegates the power of appointment, it may leave it to such appointing power to prescribe the qualifications for such office.[10] Mandamus will not lie to control the exercise of discretion on the part of a board upon which the duty to investigate and determine the qualifications of applicants to offices is cast.[11] The necessary qualifications for statutory office must exist either at the time of the election or at the time of entering upon the duties of the office, as the statutes may indicate or direct.[12] One holding an incompatible office is disqualified from holding another office,[13] and no officer of any corporation of Indiana having any contract with a city shall be eligible to any office in the city.[14] It is usually required that an applicant to be eligible to

years before date of his election, and to furnish bond to state signed by authorized surety company conditioned for faithful discharge of his duties, is not void. State v. Samuelson, 131 Wis. 499, 111 NW 712.

9. Where such qualifications have been fixed pursuant to its authority, electors cannot select one not possessing qualifications prescribed. State v. Huegle [Iowa] 112 NW 234.

10. Ex parte McManus [Cal.] 90 P 702. Under the "Veterans' Preference Law," it is the duty of the appointing power to determine whether or not an applicant for appointment has the qualifications required. Such determination, if made fairly and in good faith, is final. State v. Addison [Kan.] 92 P 581. If an applicant for appointment under such law possess the qualities essential to the prompt, efficient, and honest performance of the duties pertaining to the office for which application is made, he is entitled to appointment (Id.), and as between two such applicants, the appointing board may select without formal investigation as to their respective qualifications. Under Laws 1904, p. 8, c. 9, § 1, an investigation is only required as between one entitled and one not entitled to such preference. Kitterman v. Wapello County Sup'rs [Iowa] 115 NW 13. Under the statute of Iowa giving veterans a preference right to appointment to municipal positions over other persons of equal qualifications, the city council is vested with power to determine upon the qualification of the applicants. Such discretion will not be supervised or controlled when exercised in good faith under acts 30 Gen. Assem. c. 9. Robertson v. Alberson [Iowa] 114 NW 885; Boyer v. Creston [Iowa] 113 NW 474. In such case it is the duty of the council to investigate in good faith, fairly consider the qualifications of the respective candidates and honestly pass upon the issues presented. Robertson v. Alberson [Iowa] 114 NW 885.

11. Under Acts 30th Gen. Assem. p. 8, c. 9, a veteran applicant for a municipal office cannot by such remedy coerce the board to appoint him over nonveteran applicants of higher qualifications, but may compel it to determine whether his qualifications are equal to such other applicants. Ross v. Sioux City Council [Iowa] 113 NW 474.

12. Where the words used are "eligible to office" or equivalent, they mean eligibility at the time of entering upon the office and not at time of election. State v. Huegle [Iowa] 112 NW 234.

13. Under the Const. art. 14, § 7, no person holding any office under the United States shall hold any other office under the authority of the state. Wootton v. Smith [N. C.] 59 SE 649. The position of public administrator is not an office or place of trust within purview of the constitution but is a mere administrative agency. Id. Neither the position of deputy sheriff nor court constable is a public office as that term is known to the law, and the same person may hold both positions at the same time and lawfully receive the emoluments peculiar to each, provided he is not paid twice for the same service. State v. Shaffer, 6 Ohio N. P. (N. S.) 219. It has been held in Arkansas that a sheriff while holding such office may qualify as collector of revenue, and though such officer is suspended on indictment being filed against him, he is still sheriff and upon his failure to qualify to office of collector within certain time the governor may appoint a person to perform the duties of such officer who shall hold office till next general election. Remley v. Matthews [Ark.] 106 SW 482. Under Const. art. 4, § 18, and § 6, members of the legislature of Michigan providing for the state constitutional convention are ineligible as delegates to such convention. Fyfe v. ent County Clerk, 149 Mich. 349, 14 Det. Leg. N. 353, 112 NW 725. Comp. Laws, § 4317, which disqualifies a highway commissioner from serving as special drainage commissioner, is not applicable to road commissioners. Auditor General v. Bolt, 147 Mich. 283, 111 NW 74. Where, by authority of an ordinance, a quarantine physician holds office during the pleasure of the board of health, and his charges are regulated by them, such board cannot elect one of their own members to such office. Gaw v. Ashley [Mass.] 80 NE 790. Under Const. art. 14, § 7, one may hold both the position of justice of the peace and recorder of a city recorder's court. State v. Lord [N. C.] 59 SE 656.

14. St. 1905, § 46 (Acts 1905, p. 243, c. 129, 4 Burns' Ann. St. Supp. 1905, § 3770), such disqualification must exist at the time the term of office begins, and the right of the claimant thereto is not affected by the fact that at the time of his election he was ineligible, if such disqualification is removed before his term begins. Hoy v. State, 168 Ind. 506, 81 NE 509. The voters had a right to assume that he would remove such disqualification before he took office and it cannot be said that in voting for him they were guilty of willful obstinacy and misconduct so that their votes should be void. Id. Where a city councilman is so disqualified, the electors are not bound to take notice of such disqualification and the one opposing his title thereto must show that the electors actually had notice thereof. Id.

hold public positions must be a qualified voter [15] and a citizen.[10] The ineligibility of the incumbent to accept or hold an office does not give a minority candidate any claim to the office.[17] By statute in Iowa, the county superintendent must hold a first grade certificate or a state certificate or a lawful diploma.[18]

(§ 3) *B. Civil service.* See 8 C. L. 1195—Under the civil service laws, persons in office who attain a place on an eligible list have a prior right to transfer to those seeking original appointment.[19] Though the supreme court has the power to review the classification of the civil service commission, and if erroneous to direct a proper classification,[20] and though the civil service commission is not vested with arbitrary discretion in applying the provisions of the civil service act,[21] examinations will not be set aside for undue influence on the commissioners,[22] nor will the commission's discretion as to lists to be applied at examinations be interferred with or controlled by the courts.[23] Confidential positions are usually exempt from examination.[24] A police officer under the civil service rule may preserve his eligibility from year to year without further examination.[25] The commissioner of a tenement department may question the right of an employe to the privileges of an exempt fireman, regardless of a certificate which he offered in proof of such fact.[26] Making and swearing to false statements in an application is indictable.[27]

§ 4. *Choice or Employment. A. How chosen or employed.* See 8 C. L. 1196—Unless otherwise provided by constitution,[28] the legislature may provide for the appoint-

15. Respondent not having paid his taxes as provided by law, held that he was not a qualified voter and ineligible to office of mayor of Athens, under acts 1900-01, pp. 1037-1058. Frost v. State [Ala.] 45 S 203. Where officer must be resident voter of town, he is not disqualified by insufficient residence in precinct. Markiewicz v. People, 126 Ill. App. 203. Where the qualifications of a mayor and council of a municipality are not prescribed by statute, such officers are not ineligible for the sole reason that they paid their state and county taxes for a given year after Dec. 20th, but before execution for same had been issued without paying or tendering any interest on the taxes paid. McWilliams v. Jacobs, 128 Ga. 375, 57 SE 509.

16. Facts held not to constitute a change of residence of a successful contestant for office of county superintendent of schools, thus disqualifying him for such office. People v. Wilson [Cal. App.] 91 P 661. That one is not a qualified elector does not disqualify him to hold office of mayor of a town under a statute requiring bona fide citizenship for two years next preceding the election. State v. Matthews [Ala.] 45 S 307. In Oregon laborers who are not citizens of the United States are required to reside within the city one year previous to their employment. Under Portland city charter, §§ 163, 311, and B. and C. Comp. § 707. Landswick v. Lane [Or.] 90 P 490.

17. Hudson v. Conklin [Kan.] 93 P 585.

18. Under Acts 31, Gen. Assem. p. 87, c. 122, enacted April 5, 1906, taking effect Oct. 1, following expressly repealing Code, §§ 2735, 2737, one holding a two years' certificate issued Aug. 30, 1906, under § 2737, is not eligible to the office of county superintendent. State v. Huegle [Iowa] 112 NW 234.

19. City employe properly transferred from an exempt class to a competitive class, under Civil Service Law, Laws 1899, pp. 802, 805, c. 370, §§ 13, 15, and rule 26 of Buffalo civil service commission, though he did not stand highest on the eligible list. Peters v. Adam, 56 Misc. 29, 106 NYS 158. Position of chief clerk of bureau of engineering of city of Buffalo held to belong to exempt class and not in competitive class. Id.

20. Held that mandamus will issue to compel the municipal service commission of Buffalo city to exempt position of registrar in the bureau of water from the competitive class. People v. Wheeler, 56 Misc. 289, 106 NYS 450.

21. Where law provides for examination "where practicable," civil service commission cannot arbitrarily decide examination impracticable without a trial. People v. Errant, 229 Ill. 56, 82 NE 271.

22, 23. People v. Chicago, 131 Ill. App. 266.

24. Const. 1894, art. 5, § 9, Laws 1899, p. 795, c. 370, §§ 8, 12, construed. People v. Wheeler, 56 Misc. 289, 106 NYS 450. Duties and liabilities of office of registrar of hurean of water held to make it a confidential position. Id.

25. Facts held to show such preservation. Lattime v. Hunt [Mass.] 81 NE 1001.

26. Under Laws 1899, p. 809, c. 370, § 21, as amended by Laws 1904, p. 1694, c. 697, and Laws 1900, p. 1117, c. 449, commissioner may discharge employe upon his refusal to answer or to make explanation of charges against him. People v. Butler, 108 NYS 848.

27. United States v. Johnson, 26 App. D. C. 136.

28. A statute cannot impose upon members of the judicial department of a state powers of appointment which are assigned by the constitution to another department of government. State v. Brill, 100 Minn. 499, 111 NW 294, 639. Statutes 51 and 54, pp. 189, 192, Sp. Laws 1883, requiring judges of the district court, or a majority of them, to appoint members of the board of control of the county of Ramsey, held unconstitutional. Id. Where in accordance with § 6 of Acts 1905,

ment of statutory officers.[29] When it is the duty of the mayor to appoint an officer and he fails to do so, the council may select one,[30] but under a city charter providing that a commissioner of public works shall be appointed by the mayor with the consent of the council, the council has no power to make such appointment.[31] Though appointment to office is in its nature an executive act, it does not follow that the power to make appointments to city and town offices must be vested in the executive officer of such municipal corporation.[32] The office of mayor of New York City is a local office which must be filled by election or appointment from local officers.[33] Where by law an office is to be filled by election, it cannot be filled by appointment.[34] The question as to whether an officer has been rightfully appointed as provided for by statute cannot be determined in an action for his salary.[35] The certificate of the municipal civil service commission, that the persons named therein have been appointed or employed in pursuance of law, must appear upon the pay roll of each department of the city.[36]

(§ 4) *B. Filling vacancies and promotions.*[See 8 C. L. 1198]—The word "vacancy" has no technical meaning but must be understood with reference to the context in

p. 200, No. 146, three county road commissioners were appointed, two by county clerk and one by mayor of Detroit, such election was held void because not elected by people or appointed as required by Const. art. 4, § 49. Wayne County Road Com'rs v. Wayne County Auditors, 148 Mich. 255, 111 NW 901. The fact that county supervisors recognize such road commissioners as officers does not validate an appointment under an unconstitutional statute. Id.

29. The mayor of Newburyport has power to appoint police officers subject to confirmation or rejection by board of aldermen. Lattime v. Hunt [Mass.] 81 NE 1001. Section 155 of charter of city of Portland, providing for appointment of officers by mayor, does not apply to employes but to cases of officers not otherwise provided for at the time of the appointment. MacDonald v. Lane [Or.] 90 P 181. In Massachusetts the manager of a municipal lighting plant has the power of hiring and discharging the employes thereof. After adoption of St. 1891, p. 949, c. 370, as amended by St. 1893, p. 1355, c. 454, and St. 1905, c. 410, § 3, amending Rev. Laws, c. 34, § 20, by the city of Taunton, the mayor could not re-employ engineer discharged by the manager. Capron v. Taunton [Mass.] 81 NE 873. Provisions in 97 O. L. 111, and 98 O. L., requiring judges of court of common pleas to appoint four members of a court house commission, is not unconstitutional. State v. McKensie, 9 Ohio C. C. (N. S.) 105. The legislature of Kentucky may fix the number of policemen in cities of the second class by Laws 1906, p. 439, c. 123, amending Ky. St. 1903, § 3140. Ex parte City of Paducah, 31 Ky. L. R. 170, 101 SW 898. Acts 1868, p. 154, providing that board of trustees of state charitable institutions shall elect superintendent of state school for blind was repealed by Act 1907. Lucas v. Futrall [Ark.] 106 SW 667. Ky. St. 1903, § 3124, does not authorize the appointment of a market master by the board of public works. Potter v. Bell, 30 Ky. L. R. 1314, 101 SW 297. Under the charter of San Antonio, the power to appoint policemen and firemen is vested in the board of police and fire commissioners and not in the mayor and city council (City of San Antonio v. Beck [Tex. Civ. App.] 18 Tex. Ct. Rep. 953, 101 SW 263), and the city council has no power to refuse to accept services of chief of fire department duly appointed by police and fire commission, nor to endeavor to prevent performance of same, nor to pass on his appointment or otherwise (City of San Antonio v. Tobin [Tex. Civ. App.] 18 Tex. Ct. Rep. 919, 101 SW 269). St. 1901, P 641, c. 212, providing for state board of architecture, consisting of ten persons appointed by governor from two chapters of American Institute of Architects, or some similar institution or association of architects, is not invalid as providing an improper method of appointment. Ex parte McManus [Cal.] 90 P 702.

30. Comp. St. 1905, § 922. But this power of council does not exist where one who has been appointed by the mayor and confirmed by the council fails to qualify, there being an incumbent to hold over until his successor is elected and qualified. State v. Rosewater [Neb.] 113 NW 206.

31. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600.

32. Such power may be vested in city council. State v. Wagner [Ind.] 82 NE 466.

33. The legislature cannot have it filled in any other manner, and so long as the official term of the incumbent has not been reduced by legislation, he is entitled to hold office until he is ousted as the result of a judicial determination or removed for misconduct. Metz v. Maddox, 189 N. Y. 460, 82 NE 507.

34. Office of clerk of district court should be filled by election. Matney v. King [Okl.] 93 P 737.

35. Mill's Ann. St. § 2447, providing for appointment of superintendent of irrigation, construed. Montezuma County Com'rs v. Wheeler, 39 Colo. 207, 89 P 50.

36. Under civil service Laws 1899, p. 807, c. 370, § 19, where it appears from the official roster that a person whose name is presented by head of department was duly appointed to position assigned, it is duty of commission to attach its certificate and mandamus may issue to compel them to do so even though they believe such person did not perform services appropriate to title of position assigned him. People v. McWilliams, 56 Misc. 296, 106 NYS 459.

which it is found.[37] Appointment to fill a vacancy cannot be made until the vacancy actually exists.[38] One appointed to fill a vacancy holds until the appointment or election of his successor.[39] An office may become vacant upon the decision by a competent tribunal declaring the election to such office void,[40] or under the charter of San Francisco when the occupant is convicted of felony.[41] Acceptance of a resignation is necessary in order to relieve an officer of responsibility and to create a vacancy.[42] The power to fill vacancies is usually provided for by statute or constitution.[43] Where power is conferred upon a city council to fill vacancies but the manner in which such authority shall be exercised is not prescribed, vacancies may be filled by ballot, vive voce vote, or by the adoption of a motion or resolution declaring that the

37. State v. Herring [Mo.] 106 SW 984.

38. Under Port Jervis city charter, Laws 1907, p. 2114, c. 753, § 20, the death of a supervisor elect prior to January 1, 1908, did not create a vacancy, and a common council whose life ended on Dec. 31, 1907, had no power prior to that date to appoint a successor. Palmer v. Stubley, 108 NYS 500.

39. Under Rev. St. 1899, §§ 9267, 9247, the term of collector of revenue appointed by the governor in April, 1906, to fill a vacancy, would expire on first Monday in March, 1907, and his successor could not claim the office until that time. State v. Herring [Mo.] 106 SW 984. The words "for the balance of the unexpired term" indicate that the intention of the legislature was that at the time of filling a vacancy some part of the term must have expired. Palmer v. Stubley, 108 NYS 500. One appointed to fill a vacancy in the office of alderman of a city of the first class having more than 40,000 and less than 100,000 inhabitants holds only until the next regular municipal election. State v. Schroeder [Neb.] 113 NW 192. Under Const. art. 5, § 11, an officer appointed by governor of Missouri to fill a vacancy holds office until his successor has been elected or appointed and qualified. State v. Herring [Mo.] 106 SW 984.

40. Under Pol. Code, § 996, an office became vacant where court declared an election void on ground that the person elected, but failed to qualify and take possession of the office, was ineligible at time of the election. Campbell v. Santa Clara County Sup'rs [Cal. App.] 93 P 1061.

41. Office of mayor held to be vacant upon finding of verdict of guilty, and the board of supervisors upon judgment being certified to them declared office vacant though an appeal from such judgment has been perfected and certificate of probable cause granted. McKannary v. Horton [Cal.] 91 P 598.

42. One who has been elected to fill such vacancy before such acceptance cannot claim the office. State v. Kitsap County Super. Ct. [Wash.] 91 P 4.

43. Gen. Laws 1896, c. 187, § 1, and Pub. Laws 1901, p. 132, c. 809, § 24, providing for filling of vacancies occurring in office of railroad commissioners and board of agriculture when senate is not in session, by governor with consent of senate until next session thereof, does not authorize governor to fill such vacancies while senate is not in session. In re Railroad Commissioner [R. I.] 67 A 802. Pub. Laws 1901, p. 148, c. 809, §§ 62, 63, only gives senate power to act where governor has acted or neglected to act when his action is required by other sections of the chapter, and does not provide for a vacancy occurring while senate is in session. Id. Const. art. 7, § 5, authorizing governor to fill vacancies in offices not otherwise provided for by the constitution, applies to vacancies occurring in offices to which incumbents are elected by the people or by general assembly, and not to those which are filled by governor with advice and consent of senate, which occur while senate is in session. Id. Pub. Laws 1905, p. 211, c. 1248, § 1, providing for filling of vacancies occurring during a session of general assembly, etc., only provides for filling of vacancies by resignation and not those caused by death or some other cause. Id. The provisions of the general election law of Nebraska for filling vacancies in office apply to the office of alderman of the city of Lincoln, and no special provision of the act governing cities of this class, nor of the ordinances enacted thereunder, are inconsistent with Comp. St. 1905, c. 26, §§ 105, 107. State v. Schroeder [Neb.] 113 NW 192. Under Const. art. 7, § 50, requiring calling of special election by governor to fill vacancies in county offices for unexpired terms, and authorizing governor to fill such vacancy until the election, held under act Jan. 23, 1875, § 69, and Kirby's Dig. § 7991, a general appointment by governor to fill vacancy in office of county and probate judge without reference to time is valid, and constitutes appointee de jure officer for period of time for which governor had power to appoint. Cobb v. Hammock [Ark.] 102 SW 382. A congressman is not a district or state officer within meaning of Const. § 152, providing for appointments to fill unexpired terms of elective offices ending at the next succeeding annual election at which such offices are to be elected. Provence v. Lucas [Ky.] 107 SW 755. Const. art. 5, § 11, providing for filling of vacancies occurring in any office by the governor of Missouri, was intended to provide a method for filling vacancies when no other provision is made by law, and does not prevent the legislature from declaring how a vacancy shall be filled or term of person who shall fill it. State v. Herring [Mo.] 106 SW 984. Section 7028, Rev. St. 1899, of Missouri, authorizing appointment by governor to fill vacancy in office of collector of revenue, is constitutional. Id. Where on account of a void city election all the offices voted for were vacant, such vacancies were required by Ky. St. 1903, §§ 1526, 2791, 3758, 3932, to be filled by the governor, the judge of county court, mayor, and the judge of the city court. Scholl v. Bell, 31 Ky. L. R. 335, 102 SW 248.

person therein named be appointed,[44] and the mayor cannot veto a resolution making such appointment.[45] Under the statutes of Mississippi the election of a person to an office not qualified therefor is the same in effect as if there had been no election, and the failure of such person to qualify does not create a vacancy to be filled by a general election in certain instances.[46] Under the New York City charter, a policeman promoted from patrolman to roundsman for an act of heroism is not entitled on a civil service examination for further promotion to credit for such act.[47]

§ 5. *Right to office and remedies to enforce same. A. Indicia and evidence of right.*[See 8 C. L. 1199]—There is no such thing as title or property in a public office,[48] but one who has been elected to an office and who fails to qualify by filing the bond is the incumbent, although he never was in possession of nor performed any duty in connection with the office.[49]

(§ 5) *B. What remedy.*[See 8 C. L. 1199]—Quo warranto,[50] and not certiorari,[51] injunction,[52] or mandamus, is the proper remedy to try title to public office.[53] A writ of review will be granted to determine the right to an office, where an appeal will probably not be determined before the time for which the office is claimed would expire.[54] Injunction may be resorted to by the incumbent of a public office to protect his possession against interference by an adverse claimant until the latter establishes his title,[55] and he cannot be dispossessed by the exercise of the power of

44, 45. State v. Wagner [Ind.] 82 NE 466.

46. Code 1906, §§ 3435-6, construed. State v. Hays [Miss.] 45 S 728.

47. Laws 1901, p. 122, c. 466, § 288, construed. People v. Baker, 108 NYS 969.

48. City of Aurora v. Schoeberlein, 230 Ill. 496, 82 NE 860.

49. Campbell v. Santa Clara County Sup'rs [Cal. App.] 93 P 1061.

50. Beaumont v. Sampson [Cal. App.] 90 P 839; Couch v. State [Ind.] 82 NE 457; Hoy v. State [Ind.] 81 NE 509; Matney v. King [Okl.] 93 P 737; State v. Raisler [Wis.] 114 NW 118. In this form of action, the court tries the true merits of the controversy, namely, whether the incumbent has been legally elected, not merely the question whether he has been decided to be so elected. State v. Raisler [Wis.] 114 NW 118. To constitute a public office against the incumbent of which quo warranto will lie, it is essential that certain independent public duties, a part of the sovereignty of the state, should be appointed to it by law to be exercised by the incumbent by virtue of his election or appointment to the office thus created and defined and not as a mere employe subject to the direction and control of some one else. Superintendent of a county infirmary is not the holder of such a public office within the meaning of § 6760, Rev. St. of Ohio. Palmer v. Zeigler, 76 Ohio St. 210, 81 NE 234. Quo waranto will lie to oust from office one who bases his right thereto upon an unconstitutional statute. Hall v. Tarver, 128 Ga. 410, 57 SE 720. Quo warranto does not lie to inquire into the title of an office which is not a public one. Public administrator held not to be a public officer (Wootton v. Smith [N. C.] 59 SE 649), nor democratic ward committeeman of city (Greenough v. Lucey [R. I.] 66 A 300).

51. Beaumont v. Sampson [Cal. App.] 90 P 839. Under Code Civ. Proc. § 1068, the office of certiorari is not so much to determine the valid existence of the tribunal, board or officer, while acting in a judiciary capacity, as it is to determine whether the jurisdiction of such tribunal, etc., has been exceeded. Id.

52. Lucas v. Futrall [Ark.] 106 SW 667. Action by three members of a board of county commissioners claiming that the board consisted of only that number to restrain certain other persons who claimed it consisted of five members, and that they had been elected to fill certain vacancies. Lawson v. Hays, 39 Colo. 250, 89 P 968.

53. Couch v. State [Ind.] 82 NE 457. While the title to an office cannot be tried by mandamus procedings, yet if the facts are undisputed which determine the right of a person to be given a certificate of election or to be recognized as the duly elected officer, mandamus proceedings are proper to compel the giving of such certificate or due recognition of such election. Mandamus held proper to compel recognition of church warden. In re Williams, 57 Misc. 327, 107 NYS 1105. Held proper remedy to compel the judge of district court to recognize the person, holding the prima facie title to the office of clerk of such court as such officer. Matney v. King [Okl.] 93 P 737. To entitle relator to a peremptory writ of mandamus, he must show that the act to compel the performance of which the writ is invoked is one which the law specially enjoins on respondent as a duty resulting from an office. Eberle v. King [Okl.] 93 P 748. The prima facie right to possession of an office may be determined in such an action. Couch v. State [Ind.] 82 NE 457. Title to public office, based upon mistakes of fact or misconceptions of law, may impart a color of right which will bar the allowance of a mandamus. Palpable disregard of law renders the action whereby an office is seized merely colorable, and in a clear case will be brushed aside as affording no obstruction to the exercise of a plain legal duty. Matney v. King [Okl.] 93 P 737.

54. State v. Kitsap County Super. Ct. [Wash.] 91 P 4.

55. Superintendent of county infirmary held to be entitled to injunction to protect

removal and the appointment of a successor, but only by an intrusion into office suit,[56] In Arkansas where the title to an office is contested, the plaintiff may bring an action at law to recover the possession thereof from defendant.[57]

(§ 5) *C. Procedure and practice in particular remedies.* See 8 C. L. 1200—Procedure except as the same is affected by the fact that title to office is involved is elsewhere treated.[58] Original jurisdiction in quo warranto is sometimes conferred on appellate courts.[59] Quo warranto may be brought to try title to an office by one having a sufficient interest therein,[60] but not persons having no interest in an office differing from other members of the general public,[61] and one in possession of an office though he is a usurper, will not be removed at the suit of one who has no interest therein.[62] Relator must allege facts showing present right to possession of the office.[63] After the filing of an information in the nature of a quo warranto by the attorney general or prosecuting attorney, the latter officer may, under the statute of Missouri, discontinue the proceeding without the consent of relator.[64] Under statute regulating actions to try title to office, the requirements of the statute must be complied with.[65] The title to an office within the civil service laws cannot be tried in an action for salary.[66] Under the New York statute, in an action by the attorney general against a person unlawfully holding a public office, the party entitled thereto is not a necessary party,[67] but the opposing candidate is,[68] and judgment may be given

himself against an adverse claimant whose term has expired but who threatens and attempts to interfere with him in the discharge of his duties. Palmer v. Zeigler, 76 Ohio St. 210, 81 NE 234. Complaint to restrain defendant from disturbing plaintiff in discharge of his duties as superintendent of Arkansas school for blind, and cross complaint filed by defendant, held sufficient. Lucas v. Futrall [Ark.] 106 SW 667. In such action evidence held insufficient to show that plaintiff was in possession of office at commencement of action and therefore entitled to recover. Id. But it is not the proper remedy to restrain a poor house superintendent from interfering with his successor duly appointed by the county board of commissioners. In such case quo warranto is proper proceeding. Sanders v. Belue [S. C.] 58 SE 762.

56. Removal by governor of members of a parish school board from office and appointment of new board, held that members of old board were entitled to protect their possession of office by injunction. Jackson v. Powell, 119 La. 882, 44 S 689.

57. Under Kirby's Dig. §§ 7981, 7983, 7987, 7988. Suit in equity to restrain interference with plaintiff's possession is improper. Lucas v. Futrall [Ark.] 106 SW 667.

58. See Certiorari 9 C. L. 542; Injunction, 10 C. L. 246; Mandamus, 10 C. L. 662; Quo Warranto, 8 C. L. 1582.

59. Jurisdiction is not conferred upon supreme court by Gen. Laws 1896, c. 263, § 2, to try title to such office. Greenough v. Lucey [R. I.] 66 A 300.

60. A person in undisturbed possession of office of police judge of city of Chanute cannot maintain such action to oust judge of city court holding his office under provisions of act establishing that court, merely because such person suffers a loss of fees incident to the prosecutions of offenders against the city ordinances in the new court. Baughman v. Nation [Kan.] 92 P 548. A claimant receiving the next highest number of votes to an ineligible candidate has not such an interest, unless the votes cast for the ineligible candidate were made with full knowledge of his ineligibility, and to show his right to such writ the information or complaint must allege such fact. State v. Bell [Ind.] 82 NE 69. A taxpayer may maintain such action to try title to office of county supervisor of assessment created by Laws 1901, p. 649, c. 445. State v. Samuelson, 131 Wis. 499, 111 NW 712.

61. Such action must be brought by some one authorized to appear and represent the general public. Hudson v. Conklin [Kan.] 93 P 585.

62. Civ. Code Prac. §§ 483, 484, 487, construed. Hudson v. Conklin [Kan.] 93 P 585; Wilson v. Tye, 31 Ky. L. R. 491, 102 SW 856. The successful contestant to office of county superintendent of schools, though ineligible, will not be removed at the suit of the unsuccesful contestant. Wilson v. Tye, 31 Ky. L. R. 491, 102 SW 856.

63. The statement that relator was duly appointed is a conclusion of law rather than a statement of fact. Meehan v. Flaherty, 119 App. Div. 128, 103 NYS 1058. A complaint which shows that defendant has done none of the things mentioned in Statute 1898, § 3466, although it alleges that he intends so to do, is insufficient. State v. Raisler [Wis.] 114 NW 118.

64. Rev. St. 1899, construed. State v. Taylor [Mo.] 106 SW 1023.

65. Held under Code Civil Proc. § 1986, in an action by attorney general to try title of mayor of New York city to his office that it would be presumed that opposing candidate made no claim to office, nor any complaint to attorney general, where such action is brought upon motion of the latter without the relation of opposing candidate. People v. McClellan, 119 App. Div. 416, 104 NYS 447.

66. Deering v. New York, 107 NYS 934.

67. In such proceeding under Code Civ. Proc. § 1948, an allegation in the complaint setting forth the name of the person entitled

on the right of the party alleged to be entitled thereto.[69] The judge of the district court has not power to pass upon the title of claimants to the office of clerk of such court.[70] Where there is a dispute as to who are the regularly elected members of a local executive committee, when the question has been determined by the proper tribunal within the party, the court will enforce the rights of the regularly constituted committee.[71]

§ 6. *Induction into office.*[See 8 C. L. 1201]—It is generally required by statute or constitution that an officer before entering upon the duties of his office shall take an oath.[72] Oath of office should be filed within a reasonable [73] or specified time.[74]

§ 7. *Nature of tenure, and duration of term.*[See 8 C. L. 1201]—An officer who has been elected to a term of office which has a certain date of commencement is not entitled to the office before such date.[75] It is usually provided that an officer shall continue in office until his successor is elected or appointed and qualifies.[76] Where

to the office and facts showing his rights thereto does not make such person a necessary party. People v. McClellan, 54 Misc. 130, 105 NYS 844.

68. So held under N. Y. Code Civ. Proc. §§ 1948, 1949, where complaint alleged that according to vote cast opposing candidate and not defendant was entitled to office, so that a judgment declaring one elected must declare that the other was not. People v. McClellan, 119 App. Div. 416, 104 NYS 447.

69. Held that the term "party" as used in N. Y. Code Civ. Proc. § 1949, means a party to the action. People v. McClellan, 119 App. Div. 416, 104 NYS 447.

70. Where two persons claim title to such office and present their credentials to office of district judge, the latter should examine such credentials, but such examination does not constitute passing upon title to public office. Matney v. King [Okl.] 93 P 757.

71. Attorney General v. Barry [N. H.] 68 A 192.

72. It is not a compliance with Const. art. 160, prescribing oath of office for members of general assembly and all other officers, to take an oath faithfully and impartially to discharge duties of office according to a statute, omitting all reference to constitution and laws of United States and of the state. State v. McClendon, 118 La. 792, 43 S 417. A jury commissioner is an "officer" within the meaning of this section of constitution, and unless he takes the oath therein prescribed he is in effect forbidden to enter upon discharge of his duties even though he may have taken an oath to discharge those duties acording to Act No. 135, p. 216 of 1898, or some other statute. Id. Oath of office is not required under Michigan statutes providing for appointment and qualification of special drainage commissioners. Auditor General v. Bolt, 147 Mich. 283, 111 NW 74. Policemen, firemen, and United States mail carriers, are not officers contemplated or included by § 1, art. 15, of the constitution prescribing the oath to be taken by certain officers. Oklahoma City v. Oklahoma R. Co. [Okl.] 93 P 48.

73. Where upon a contest of an election held November 4, 1902, remittitur certifying the affirmance of judgment for contestant was filed April 4th, 1906, and his oath and bond on April 14th, held that he acted within a reasonable time. People v. Wilson [Cal. App.] 91 P 661.

74. Pol. Code, § 907, providing for time within which oath of office should be filed, does not apply where a contest is pending for an office. People v. Wilson [Cal. App.] 91 P 661.

75. State v. Herring [Mo.] 106 SW 984.

76. Const. § 3, art. 10, providing that no person shall be eligible to office of sheriff or county treasurer for more than four years in any period of six years is not applicable to 98 Ohio Laws 271, conforming terms of office of state and county offices to constitutional provisions of biennial elections. State v. Harris [Ohio] 83 NE 912. Upon failure of one to qualify who has been appointed as city engineer of a city of metropolitan clase by mayor, and confirmed by council, but who has not taken possession of office and entered upon discharge of his duties, the incumbent may qualify anew under § 17, c. 10, Comp. St. 1905. State v. Rosewater [Neb.] 113 NW 206. Under the constitution of Kentucky, where all offices voted for were vacant on account of a void election, each contestee is required to perform the duties of his office until the appointment and qualification of his successor. Scholl v. Bell, 31 Ky. L. R. 335, 102 SW 248. Under the Const. of Arkansas, a county treasurer was entitled to hold office until his successor was elected and qualified even though he was illegally elected to succeed himself. The governor cannot create a vacancy in such office and fill the same by appointment. Hill v. Goodwin [Ark.] 101 SW 752. Under the act of August 22, 1907, which amended act of 1897, creating the city court of Griffin, the judge and solicitor of that court continued to hold office until their successors were elected and qualified in accordance with the terms of act of 1907. Drake v. Beck, 129 Ga. 466, 59 SE 306. Upon the consolidation of the city of Allegheny with the city of Pittsburg, Act Feb. 7, 1906 (P. L. 12, § 10), which extends term of councilmen of former city, is not in violation of art. 3, § 13, as extending the term of a public officer. Pittsburg's Petition, 217 Pa. 227, 66 A 348. Act Feb. 15, 1905 (P. L. p. 14), changing time for election of officers of municipalities to general state elections, and extending terms of such offices, only applies to terms of county officers elected by the municipalities to represent them in county government, and as to these the statute extends term of office of incumbents until January first of ensuing year. Wright v. Campbell [N. J.

neither the constituton nor the statutes fix the term of office the appointee holds at the pleasure of the appointing power, though it attempts to fix a definite term,' but where a board is empowered by statute to appoint an officer, but fails to fix the term, such term is coextensive with the term of the board.[78] Where two school trustees are elected at the same time to fill a two and a three year term, such officers may agree as to which term each shall fill, where the statute provides no method for such determination.[79] By statute in Kentucky it is made an offense for any person to hold any office after his election thereto has been declared illegal by a court of competent jurisdiction.[80] Where a statute providing for the appointment of an officer makes no distinction between regular appointments and those to fill vacancies occurring during the term, an appointee to fill an unexpired term holds office for the full term from the date on which such term begins.[81] The constitution of Mississippi requires that officers be appointed for a definite period of time.[82] Under the regulations of the civil service commission, temporary appointments shall not continue for a longer period than one month.[83] An incumbent has no title to an office after the expiration of his term,[84] and at that time when a certificate of election has been issued to another who has qualified thereunder, he should surrender the office to his successor.[85] The delegation of power to appoint a subordinate officer, if the length of his term is not fixed, confers upon the appointing power authority to determine its duration.[86]

Err. & App.] 67 A 186. Act Feb. 15, 1905 (P. L. p. 14), changing time for election of officers in municipalities to state general election and extending term of office of incumbents during intervening time, does not apply to terms of county officers, except those elected by various municipalities to represent them in the county government, and as to this class the term of office of incumbents as extended until first day of ensuing January. Id. Such act does not change the date for the annual meeting for 1905 of the board of freeholders required by Gen. St. p. 410, to be held on second Wednesday of each May. Id.

77. The board of public works of city of first class created by Ky. St. 1903, § 2824, cannot appoint a chief engineer of a city for a fixed term, and is removable at pleasure of board. Parsons v. Breed, 31 Ky. L. R. 1136, 104 SW 766.

78. Const. art. 3, § 27, empowering board of county commissioners to appoint poor house superintendent. Sanders v. Belue [S. C.] 58 SE 762. The custom of a retiring county board of commissioners to elect a superintendent of the poor house for a period extending beyond their own term cannot change the rule of law. Id.

79. The fact that one received a larger number of votes does not entitle him to the longer term. Gilbert v. Lucas [Ky.] 107 SW 751. Failure of county superintendent to certify to election of trustee elected for three year term does not invalidate such election as being for such term. Id.

80. Road supervisor held not guilty of usurpation of office where though his election was not legal it had not been declared illegal by a court of competent jurisdiction. Eubank v. Com., 31 Ky. L. R. 746, 103 SW 368.

81. Under Sess. Acts 1879, p. 28, embodied in Rev. St. 1899, §§ 6539, 6541 (Ann. St. 1906, p 3272), considered in connection with act March 3, 1857, as amended by Act Nov. 14, 1857, an appointee to fill a vacancy in office of jury commissioner caused by death of incumbent holds office for four years from May 1st of year of his appointment. State v. Corcoran, 206 Mo. 1, 103 SW 1044. Such office is not an office within purview of Const. art. 9, § 14, limiting term of office of county, township, and municipal officers to four years. Id.

82. Policemen are officers within the meaning of Const. § 20, and an ordinance authorizing their appointment during good behavior is unconstitutional. Monette v. State [Miss.] 44 S 989.

83. Held under regulation 34 of municipal service rules promulgated July 11, 1899, under express provisions of Laws 1899, p. 795, c. 370, that plaintiff's appointment as investigator of complaints under regulation 34 of municipal civil service commission, in force 1898, was temporary and could be summarily discharged after one month from promulgation of rules. Deering v. New York, 107 NYS 934. The fact that the civil service commission failed to certify to an appointing officer an eligible list for a position does not make a temporary appointment permanent. Id.

84. Upon expiration of term of superintendent of county infirmary, no order of the board of directors for his removal is necessary, and therefore no cause need be assigned by said board for the termination of his term. Palmer v. Zeigler, 78 Ohio St. 210, 81 NE 234.

85. And should he then desire to contest the eligibility, election, or qualification of the person holding the certificate, he may do so by proceeding in the regular manner prescribed by law for determining contested claims to office. Couch v. State [Ind.] 82 NE 457.

86. Municipal ordinance authorizing appointment of clerk by water board construed. Robertson v. Coughlin [Mass.] 82 NE 678.

§ 8. *Resignation, abandonment, removal, and reinstatement. A. Resignation.* See 8 C. L. 1203—Acceptance is essential to the effectiveness of an express resignation.[87] Implied resignation may result from acceptance of another office,[88] or, under statute, by unexplained absence from duty.[89]

(§ 8) *B. Abandonment.* See 8 C. L. 1203

(§ 8) *C. Removal Power to remove.* See 8 C. L. 1203—The removal of an officer is not an exercise of judicial power.[90] The legislative power to provide for removal being plenary.[91] Power to remove one holding for a fixed term exists only by virtue of statute,[92] such power not being incidental to the chief executive[93] nor to the power of appointment,[94] but the power to suspend is.[95] Where the term of an appointive officer is not fixed by law, he may be removed at the pleasure of the appointing power.[96] In Massachusetts no person holding office in the classified serv-

87. State v. Kitsap County Super. Ct. [Wash.] 91 P 4.

88. Under Ky. St. 1903, §§ 3744, 3746, the acceptance by a city councilman of the office of member of county board of health thereby vacates the former office. Vickers v. Sory, 31 Ky. L. R. 277, 102 SW 272.

89. The unexplained absence without leave of any member of the police force of the city of New York for five days is equivalent to a resignation. Held under Greater New York charter, Laws 1901, p. 130, c. 466, § 303, such absence must be intentional and voluntary, and that a dismissal of a member absent on account of illness is unauthorized. Elder v. Bingham, 118 App. Div. 25, 103 NYS 617.

90. Even though involving judgment and discretion. City of Aurora v. Schoeberlein, 230 Ill. 496, 82 NE 860.

91. Public offices are created in the interests of the general public and no one has a constitutional right to remain in office for the full period of the term for which he was elected. Const. art. 3, § 20, not providing for removal of public officers except in case of state officers, the legislature has unlimited power to remove county and city offices, and may abolish the office altogether, notwithstanding the unexpired term of the incumbent. Eckerson v. Des Moines [Iowa] 115 NW 177. Under Const. art. 6, § 21, legislature had authority to pass Rev. St. 1898, § 4580, providing for removal proceedings at the instance of a private person, notwithstanding Const. art. 8, § 18, providing that prosecutions must be in name of state. Skeen v. Paine [Utah] 90 P 440.

92. Rev. St. 1898, § 4580, Utah, providing for removal of officers by district court, does not apply to heads of fire and police department of cities of over 12,000 inhabitants, this power being conferred by Laws 1899, c. 28, p. 45, upon mayor and city council whose action is conclusive. Skeen v. Browning [Utah] 89 P 642. The power conferred by charter of St. Cloud upon city council upon subject of removal of municipal officers for misconduct in office does not exclude power of state, through attorney general to remove for violation of Rev. Laws 1905, §§ 1561, 1562, the power of each being concurrent. State v. Robinson [Minn.] 112 NW 269. Nor is authority of attorney general taken away or superseded by provisions of § 1561 by which the county attorney of each county is required to prosecute violations of the statute. Id. Under § 1331, Greater New York charter, the tenement house commissioner may suspend an inspector pending determination of charges against him without pay. People v. Butler, 120 App. Div. 751, 105 NYS 631. Held that such removal related back and took effect as of the date of the suspension. Id. Under Springfield city charter (St. 1852, p. 54, c. 94), § 8, the absolute power is vested in mayor and aldermen to remove city marshal and his assistants without notice. Stebbins v. Springfield Police Commission [Mass.] 82 NE 42. And under authority of St. 1902, p. 94, c. 134, § 1, this power may be conferred upon a police commission chosen by the city council. Id. Under St. 1906, p. 256, c. 291, § 10, the police commission of the city of Boston may hear complaints against members of the police force, and after a finding of guilty discharge the member complained of without referring the complaint to the trial board. Welch v. O'Meara [Mass.] 81 NE 264. Hurd's Rev. St. 1903, p. 1728, ch. 122, § 8, amended by Hurd's Rev. St. 1903, p. 1728, ch. 122, § 16, is not in such conflict with Hurd's Rev. St. 1903, p. 381, ch. 24, § 12 (Civil Service Act), as to deprive board of education of power to remove employes. People v. Chicago, 227 Ill. 445, 81 NE 370; People v. Brenan, 125 Ill. App. 29. The removal of a village marshall by the board of trustes is not such an exercise of judicial power as to be repugnant to the provisions of § 2 of article 5 of the constitution. Evers v. Hudson [Mont.] 92 P 462.

93. The governor of New Mexico cannot remove an officer elected in accordance with a statute law of the territory. Such right is not embraced within the executive power vested in the governor. Territory v. Armijo [N. M.] 89 P 267.

94. People v. Healy, 231 Ill. 629, 83 NE 453.

95. The power to suspend without compensation is incidental with the power to appoint and discharge. Wertz v. U. S., 40 Ct. Cl. 397. Under the new municipal code of Ohio, the mayor may remove an officer or appointee in the police department, upon inquiry into the cause of suspension, by chief of police of such officer or appointee, but is without original jurisdiction to inquire into charges against such officer other than chief of police or appointee, and upon such an inquiry he is without authority to remove an officer or appointee. State v. Baldwin [Ohio] 83 NE 907.

96. Const. art. 3, § 27, providing for removal of officers, does not abrogate this rule. Sanders v. Belue [S. C.] 58 SE 762. In ab-

ice of the commonwealth or in any municipality can be arbitrarily removed during their term.[97] The deputy tenement house commissioner of New York City cannot delegate the power to suspend a tenement house inspector to the chief inspector.[98] The head of a municipal department cannot, at will, by assigning temporarily duties to a position created as an ordinary clerkship, transform it into a position which is excepted by statute from limitation upon the power to remove, and thus acquire the right to remove.[99]

What constitutes a removal.[See 8 C. L. 1204]—Under a statute conferring upon a board the power to fix salaries of certain officers and employes, a removal effected by reducing the salary of an officer of one grade to that of another is valid until set aside.[1] Where the power to remove at pleasure exists, the appointment of another person operates as a removal of the incumbent from the time he receives notice of the appointment,[2] but an order directing an officer to return home, payment to cease on such return, is not a discharge.[3]

Grounds of removal.[See 8 C. L. 1204]—"Removal for just cause" implies some misconduct upon the part of the officer or imputes to him some violation of the law,[4] and where an officer is subject to removal only for specified charges, such causes must exist before he can be removed.[5] In such case the order of removal must be based and founded upon some one or all of such causes and cannot be made for other causes.[6] Conflicting duties,[7] neglect of duty,[8] causes which tend to unfit one for

sence of legislation declaring contrary intention, the authority granted a municipal corporation to appoint a police officer, whose term is not fixed by law, carries with it the implied concurrent power to discharge him. Conwell v. Culdesac, 13 Idaho, 575, 92 P 535. One subordinate cannot dismiss another from public service without the sanction of the officer with power to appoint and dismiss. Stilling v. U. S., 41 Ct. Cl. 61.

97. St. 1904, p. 266, c. 314, does not apply to officers at expiration of their term. Robertson v. Coughlin [Mass.] 82 NE 678.

98. Suspension held to be by commissioner and not by chief inspector. O'Brien v. New York, 108 NYS 611.

99. Civil Service Law, § 21, Laws 1899, p. 809, c. 370, as amended by Laws 1900, p. 1694, c. 697, construed. People v. Cahill, 188 N. Y. 489, 81 NE 453.

1. Removal of veteran employed as a clerk of fifth grade in the classified service of New York City to the fourth grade of classified employes by the board of estimate and apportionment. Walters v. New York, 119 App. Div. 464, 105 NYS 950. In an action by such officer against the city to recover amount lost by reason of such reduction, the burden is upon him to show that he was entitled to position in fifth grade, that the removal had been set aside, and that he was reinstated (Id.), and he cannot establish his right to such position in the action against the city to recover this salary (Id.).

2. Sanders v. Belue [S. C.] 58 SE 762.

3. His status then was that of an officer waiting employment, and not entitled to his per diem compensation until employed. Wertz v. U. S., 40 Ct. Cl. 397. The secretary to mayor of San Francisco is removed whenever a new secretary is appointed and assumes the duties of the office. McKannay v. Horton [Cal.] 91 P 598.

4. Under such circumstances, it is necessary that the charge against him shall be based upon some refusal to obey or intention to violate the law prescribing his duties. Good v. San Diego Common Council [Cal. App.] 90 P 44. Into any contract by an infirmary board for the employment of a superintendent, there is written as one of its terms that he shall not be removed during the term of his employment except for cause. Zeigler v. Palmer, 10 Ohio C. C. (N. S.) 545.

5. Board of trustees of state charitable institutions had no power under Act 1907 to discharge superintendent of state school for blind and appoint another in his place at its next meeting after his election. Lucas v. Futrall [Ark.] 106 SW 667. Before village trustees can declare office of village treasurer vacant, and appoint a successor, they must first find that such officer has failed to make reports as required by § 64 of act approved Feb. 10, 1899 (Sess. Laws 1899, p. 201). Village of Kendrick v. Nelson, 13 Idaho, 244, 89 P 755.

6. Village of Kendrick v. Nelson, 13 Idaho, 244, 89 P 755.

7. Mayor may remove members of board or health who appoint one of its own members as quarantine physician when his duties as such are inconsistent with his membership on the board, and his reasons assigned for such removal "Misuse of authority and conduct prejudicial to the welfare of the public service." It was held to be sufficient cause and his action will not be reviewed by court (Gaw v. Ashley [Mass.] 80 NE 790), and the fact that a similar choice of a quarantine physician had sometimes been made in former years does not enable the court to say that the mayor's action was unauthorized (Id.).

8. Where the defense in an action to hear charges against police officer for failure to proceed against disorderly house was that he had orders to report such matters to police commissioner, and that in this case he had done so and had been ordered not to

office,[9] and conduct unbecoming an officer may constitute grounds for removal.[10] Whether charges are sufficient to support a removal cannot be raised after the hearing which resulted in the removal.[11] Ineligibility existing at the time of the appointment of a police officer is not a ground for removal under statute in New Jersey.[12]

Defenses.—An officer cannot set up as a defense to a removal proceeding a sham resignation effected for the purpose of escaping the effects of a violation of the law.[13] It is no defense to a proceeding under a statute to remove an officer for receiving illegal fees, that he made restitution thereof, after they had been declared illegal.[14]

Mode of proceeding.[See 8 C. L. 1206]—Statutory requirements for removal must be complied with,[15] and an application for reappointment for the following term does not constitute a waiver of an officer's right to resist removal otherwise than as provided by the statute.[16] Where a mode of removing officers is prescribed by the constitution, the legislature cannot authorize a removal in another mode.[17] The statutory remedy may not be exclusive.[18] Under a city charter providing for proceedings for removal of municipal officers upon petition of twenty-five per cent of electors, one of the electors may maintain mandamus to compel the calling of an election for that purpose.[19] A member of the police department of the city of San Francisco can be removed only after a trial before the police commissioners,[20] but the board of police commissioners of Niagara Falls City are vested with summary power to remove the chief of police or members of the force, without proceeding to a trial.[21]

proceed, evidence that he had reported on similar cases and obeyed orders received held improperly excluded. People v. Bingham, 121 App. Div. 593, 106 NYS 330. Evidence insufficient to sustain finding of police commissioner that relator was guilty of neglect of duty and disobedience of orders and rules of the police department. People v. McAdoo, 105 NYS 599.

9. Under Ky. St. 1903, § 3504, providing for removal of chief of police of a city, a good cause is a legal cause and not any cause which the council may think sufficient. Thomas v. Thompson, 31 Ky. L. R. 524, 102 SW 849. Proof that such officer gave in the city intoxicating liquor to a minor child without consent of parent or guardian is sufficient to show his unfitness to hold the office. Id. The action of city council in making such removal is beyond the control of a court of equity, where such officer is given reasonable notice specifying the offense. Id.

10. Held that removal of police officer was justifiable who, while on trial before deputy commissioner, spoke to him in an insolent manner and challenged him to remove him. People v. Bingham, 108 NYS 933. Evidence held insufficient to sustain a finding of the police commissioner that a police officer was guilty of conduct unbecoming an officer, so as to warrant his discharge. People v. Bingham, 123 App. Div. 286, 107 NYS 1055. Police officers may be removed for insubordination and breach of discipline. Communication by officer to board of associated engineers stating reasons why he had been transferred held not to warrant his removal. People v. Bingham, 189 N. Y. 104, 81 NE 776.

11. People v. Chicago, 127 Ill. App. 118.

12. P. L. 1899, p. 26, construed. Magner v. Yore [N. J. Law] 66 A 948.

13. City councilmen after receiving illegal fees to escape being removed, resigned and was immediately reappointed to fill the vacancy, held a sham resignation. Skeen v. Paine [Utah] 90 P 440.

14. Skeen v. Paine [Utah] 90 P 440.

15. Held that police officer legally appointed could not be removed without proceedings as required by St. 1906, p. 176, c. 210. Lattime v. Hunt [Mass.] 81 NE 1001.

16. Kitterman v. Wapello County Sup'rs [Iowa] 115 NW 13.

17. Rev. St. 1895, art. 3550, empowering district judges to suspend temporarily county judges for whose removal a petition has been presented to him, and to appoint some one to fill the temporary vacancy is not unconstitutional. Griner v. Thomas [Tex.] 19 Tex. Ct. Rep. 680, 104 SW 1058. Laws 1899, p. 809, c. 370, § 21, designating grounds and method of removal of veterans holding positions by appointment or employment is not in conflict with Const. art. 5, § 3, giving superintendent of public works certain powers of appointment and removal of which appointments Civil War veterans shall be given preference in appointment. Seeley v. Stevens, 190 N. Y. 158, 82 NE 1095.

18. The remedy provided by §§ 7445-7459, Rev. St. 1887 inclusively, for the removal of civil officers, is not an exclusive remedy, nor does it prohibit village trustees from removing appointive officers. Conwell v. Culdesac, 13 Idaho, 575, 92 P 535.

19. Good v. San Diego Common Council [Cal. App.] 90 P 44.

20. So far as concerns a member of the police department the charter of San Francisco, providing for such removal supersedes the provisions of Pen. Code, §§ 758-769. Dinan v. San Francisco Super. Ct. [Cal. App.] 91 P 806.

21. Laws 1904, p. 726, c. 300, § 274, construed. People v. Douglass, 105 NYS 517.

A police commissioner of the city of New York cannot dismiss a member of his force based upon proceedings had before his predecessor where the charges were pending at the time he entered office, and which, although tried, had not then passed to final judgment.[22] Under the municipal service rules providing for transfer of employes from one department to another, an employe cannot be deprived of his office or salary by refusal of the head of the new department to recognize the act of his predecessor.[23] By charter of the City of San Diego it is provided that in proceedings for the removal of municipal officers the petition shall contain a statement of the grounds upon which such removal is sought.[24] Officers elected or appointed for a definite term, during good behavior, subject to removal for specified causes,[25] and persons holding civil service positions,[26] cannot, except by statutory

22. Elder v. Bingham, 118 App. Div. 25, 103 NYS 617.

23. Where requirements of Municipal Service rule 14 have been complied with a draughtsman at a fixed salary in office of president of borough of Queens transferred to another department, will not thus be deprived of position and salary where he stands ready at all times to comply with terms of his contract. AHen v. New York, 120 App. Div. 539, 104 NYS 919. Upon the request of the appointing officer stating the facts with reference to a proposed transfer accompanied by the written consent of the appointing officer from whose jurisdiction the transfer is to be made, the commission will if the transfer be in accordance with law and the provisions of these rules, issue its certificate to that effect. Id.

24. Under Chapter 4, § 4, amending art. 1 of charter as approved by resolution of legislature Feb. 3, 1905, petition to common council demanding an election for removal of one of its members and election of his successor held sufficient. Good v. San Diego Common Council [Cal. App.] 90 P 44. It is the duty of the council to call an election where the petition bears proper number of names as shown by certificate of clerk. Id. Under statute requiring certificate of city clerk as to the result of his examination, held that his certificate that he had compared names on petition with great register and found it sufficient was a sufficient compliance with statute. Id. Under Greater New York charter § 1843 (Laws 1901, p. 636), notice to typewriter copyist of charges of incompetency, and an opportunity to appear held to allow a reasonable time. People v. Butler, 54 Misc. 18, 103 NYS 583.

25. The cause for removal must be determined after notice to officer and an opportunity to be heard. Porter v. Murphy [Ind. T.] 104 SW 658. Attorney employed by chief of Muskogee Nation under act of council thereof cannot be removed except after hearing. Id. Where there is no legal proof that a policeman was discharged without notice of charges, his dismissal is unlawful. People v. Bingham, 108 NYS 684. Under Act 1907, neither the board of trustees of state charitable institutions, nor the board of control, can discharge superintendent of state school for blind except for grounds specified, and after notice and hearing. Lucas v. Futrall [Ark.] 106 SW 667. Under a department requiring that notice of trial shall be served on defendant not less than 48 hours before trial, where a police officer was tried upon 44 1-2 hours' notice only, the action of the police commissioner before whom he was tried, in dismissing him, held to be illegal. People v. Bingham, 123 App. Div. 226, 107 NYS 1063. Chief grain inspector of state of Missouri appointed under Rev. St. 1899, § 7624, can only be removed after service of reasonable notice of charges, and a hearing although notice is not in terms required by statute. State v. Knott, 207 Mo. 167, 105 SW 1040.

26. Plaintiff, an honorably discharged veteran of the Civil War, cannot be removed from position of courthouse janitor without compliance with Laws 1904, p. 9, c. 9, § 2. Kitterman v. Sup'rs of Wapello County [Iowa] 115 NW 13. Statute providing for such removal is not unconstitutional. Id. Laws 1904, p. 8, c. 9, § 2, giving preference to honorably discharged veterans in employment, is a civil service law so far as it relates to removals. Id. The "Veteran Acts" civil service Laws 1899, pp. 808, 809, c. 370, §§ 20, 21, providing that honorably discharged sailors and soldiers in service of state shall only be removed after notice and hearing, apply only to subordinate positions, and a transfer tax appraiser for a county may be removed from office by state comptroller without notice or any stated charges of incompetency or misconduct. People v. Glynn, 56 Misc. 35, 106 NYS 956. Under Laws 1901, p. 636, c. 466, § 1543, held that a tenement house inspector was properly discharged and tenement house commissioner should not be compelled to reinstate him. People v. Butler, 122 App. Div. 790, 107 NYS 833. Under Civil Service Law § 21, Laws 1899, p. 809, c. 370, as amended by Laws 1904, p. 1694, c. 697, a coroner cannot remove, at any time, a clerk who has served a term as volunteer fireman, etc., and who under the statute may not be removed except for incompetence or misconduct shown after hearing upon due notice. People v. Cahill, 188 N. Y. 489, 81 NE 453. Held under Greater New York charter, Laws 1901, p. 636, c. 466, § 1543 and § 10, p. 7, as amended by Laws 1902, p. 1068, c. 436, that a reduction from $1,800 to $1,500 in salary of employe in classified service by board of estimate and appointment in 1902, for public reasons and not on personal grounds, was not a removal, but a reduction in grade which might be done without notice or hearing. Walters v. New York, 190 N. Y. 375, 83 NE 48. Under Laws 1901, p. 636, § 1543, a tenement house inspector who was neither a veteran nor an exempt fireman but who has been given an

authority,[27] or unless such rights have been waived, be removed without notice and a hearing.[28] But suspension from office without notice is not a deprivation of property without due process of law,[29] and one holding at the pleasure of the appointing power may be removed without notice and without cause.[30] A claim of exemption from removal must be promptly asserted.[31] It is proper for a police rule to provide that a patrolman shall be suspended, pending hearing of charges against him.[32]

Nature of Proceeding.[See 8 C. L. 1206]—The proceedings to oust an officer are not criminal.[33]

Appeal and review of proceeding.[See 8 C. L. 1208]—Where removal proceedings are of a judicial or quasi-judicial nature, they may be reviewed by certiorari.[34] A review must be seasonably pursued or it is lost.[35] The incumbency of a public office will not be changed by the decision of an intermediate court while an appeal is being prosecuted to a final hearing in the supreme court.[36] Where a person is given a special remedy by statute to review proceedings against him in case it results in his removal, or attempted removal, he is not entitled to an absolute writ of prohibition.[37] On certiorari to review removal of employe in tenement house department without a hearing, the question must be determined entirely on the return and the

opportunity to explain, may be removed upon a substantial charge without judicial hearing, or right to produce witnesses on his own behalf to testify as to reasons assigned for such removal. People v. Butler, 120 App. Div. 807, 105 NYS 606. Held that he had sufficient opportunity to make an explanation and that his removal was valid. Id. Under 1896, p. 535, c. 517, § 5, and St. 1904, p. 266, c. 314, § 2, a veteran civil service employe of city of Boston is entitled to a hearing before removal without application therefor. Ransom v. Boston [Mass.] 81 NE 998. Defendant's request that plaintiff was entitled to nominal damages only, if he had been guilty of such misconduct and neglect of duty as to make his removal inevitable in case he had been given a hearing, properly refused. Id. And where he is removed without such hearing and makes no effort to find further employment thereafter, he is only entitled to recover nominal damages for the time after which he should have known his services would no longer be accepted. Id.

27. Notice and hearing are unnecessary before suspension may be made under Rev. St. 1895, art. 3550, authorizing temporary suspension of county judges. Griner v. Thomas [Tex.] 19 Tex. Ct. Rep. 680, 104 SW 1058.

28. Rights provided for by § 21 of civil service law (Laws 1899, p. 809, c. 370, as amended by Laws 1902, p. 805, c. 270, held to be waived by veteran fireman in service of department of docks, where he was summoned before commissioner and given a hearing, his testimony reduced to writing, and was discharged upon cause stated, but did not assert such rights until three months later. People v. Bensel, 121 App. Div. 478, 106 NYS 110. The civil service commission need not call the accused before them when they pass upon the findings of the trial board. People v. Chicago, 127 Ill. App. 118.

29. Such property right in an office as the holder has is qualified by all pre-existing valid laws which provide for its suspension or termination, and hence the application of remedies so provided for does not unduly deprive him of any property. Griner v. Thomas [Tex.] 19 Tex. Ct. Rep. 680, 104 SW 1058.

30. The chief engineer of the city of Louisville is under the control of the board of public works and may be removed by it without notice and without cause. Parsons v. Breed, 31 Ky. L. R. 1136, 104 SW 766.

31. Where an employe in the public service becomes aware of the intention of his superior officer to take steps to remove him, it is his duty to make known to such superior that he claims to be a veteran, if he desires to avail himself of the statutory privilege reserved to such veterans, unless the status has already been brought to the knowledge of the superior officer. People v. President of Borough of Queens, 190 N. Y. 497, 83 NE 597. The certificate that a foreman in the department of highways of New York City was an exempt volunteer fireman, duly filed in the office of such department, is not sufficient notice to president of borough of his rights under Laws 1899, p. 809, c. 370, § 21, as amended by Laws 1904, p. 1694, c. 697, requiring that a hearing be given such employes before removal. Id.

32. State v. Logansport Metropolitan Police Com'rs [Ind.] 83 NE 83.

33. Statute of limitations does not constitute a defense. People v. Chicago, 127 Ill. App. 118. Where the proceeding under a statute for the removal of officers is civil and not criminal, the trial court may direct a verdict of guilty where the facts are undisputed. Rev. St. 1898, § 4580, construed. Skeen v. Paine [Utah] 90 P 440.

34. Civil service commission of Chicago quasi judicial board whose proceedings may be renewed by certiorari. People v. Powell, 127 Ill. App. 614.

35. Nine and one-half months unexplained is fatal. People v. Chicago, 127 Ill. App. 118.

36. Williams v. Buchanan [Ark.] 106 SW 202.

37. A veteran of class specified in Laws 1904, p. 1694, c. 697, who is given a remedy by certiorari under the statute, is not entitled to such writ. People v. Butler, 53 Misc. 366, 103 NYS 329.

allegations in the petition cannot be considered.[38] The courts have no corrective power with respect to the exercise of the discretion reposed by law in a civil service commission as a quasi-judicial body,[39] hence, where it has jurisdiction and proceeds according to law, the courts will not review its acts.[40]

Effect of illegal removal.—A veteran laborer employed by a city under the civil service, who has been illegally discharged or suspended is entitled to a recovery for damages.[41]

(§ 8) *D. Reinstatement.*[See 8 C. L. 1209]—Unless an officer has been guilty of unreasonable delay,[42] he is entitled to relief by mandamus, if illegally removed.[43] The only question determinable in such a proceeding is the prima facie right to possession.[44] A petition for mandamus to compel a borough president to reinstate a person excluded from the position of head of the bureau of highways must allege that such bureau was created by charter, or an official given power under the charter to create bureaus.[45] Mandamus will not lie to reinstate inspector of police to office, where he has neglected to apply for a new trial before board of police,[46] nor at the instance of relator holding prima facie title to the office of register of deeds to com-

38. If return is insufficient, the remedy of relator is to ask court to require a further return. People v. Butler, 108 NYS 848. The order of the board of railroad and warehouse commissioners removing chief grain inspector without complying with provisions of Rev. St. 1899, § 7662, is without jurisdiction and void, and is reviewable on certiorari. State v. Knott, 207 Mo. 167, 105 SW 1040.

39. Refusal of commission to grant new trial sought on grounds of new evidence will not be renewed. People v. Powell, 127 Ill. App. 614. The courts will not review an exercise of executive discretion or judgment in removing an officer. Removal of fire marshal by board of fire and police commissioners executive in its nature and no appeal will lie to the courts. Darst v. Kirk, 230 Ill. 521, 82 NE 862.

40. Feldman v. Chicago, 126 Ill. App. 186. The question of the jurisdiction of the trial board cannot be raised for the first time upon appeal. People v. Powell, 127 Ill. App. 614.

41. Facts held not to constitute an answer to defendant's liability. Ransom v. Boston [Mass.] 81 NE 998.

42. In New York, mandamus proceedings to reinstate one who has been removed from office must be brought in four months by analogy to certiorari proceedings. People v. Ahearn, 120 App. Div. 95, 104 NYS 860. Mandamus refused where veteran volunteer fireman, certified from civil service list for appointment as medicine clerk of department of health, did not make application therefor, until six months after dismissal by board of health, and the fact that he was advised by lay acquaintances that he was without legal remedy was no excuse. People v. New York Board of Health, 56 Misc. 26, 106 NYS 923. Delay in making application for mandamus to compel tenement house commissioner to restore typewriting copyist to her position, which was caused by conflicting decisions of court of appeals, resulting in a mistaken application for a writ of certiorari to review the removal, held not to constitute laches. People v. Butler, 54 Misc. 18, 103 NYS 583.

43. State v. Baldwin [Ohio] 83 NE 907; People v. Cahill, 186 N. Y. 489, 81 NE 453; Lattime v. Hunt [Mass.] 81 NE 1001. Where no trial is had before a police commissioner, dismissing a member of the force, the remedy of such member is not certiorari but mandamus. Elder v. Bingham, 118 App. Div. 25, 103 NYS 617. A veteran employed as a clerk of the fifth grade in the classified service of New York City, who claimed that he was unlawfully transferred by the board of estimate and apportionment, to the fourth grade of classified employes, by reduction of his salary, is entitled to writ of mandamus or certiorari as a matter of absolute right, to compel reinstatement to his former office, though he continued to perform the same duties as before such transfer. Walters v. New York, 119 App. Div. 464, 105 NYS 950. Where town officers wrongfully withhold possession of office from relator, the proceeding may issue against them individually, where the complaint alleges official relation of officers to the town and to office in question. Couch v. State [Ind.] 82 NE 457. Where codefendants co-operate with defendant in withholding possession from relator to which he was entitled, and codefendants could give efficacy to his official credentials, mandamus was rightfully issued against codefendants as well as against defendant. Id. Where a patrolman is legally discharged by the board of metropolitan police commissioners, which has jurisdiction thereof, mandamus will not issue to reinstate relator. State v. Logansport Metropolitan Police Com'rs [Ind.] 83 NE 83.

44. Questions as to time when incumbent's term ceased upon relator's election to trustee of ward, whether relator forfeited office, ipso facto, by removing from ward, or furnished ground upon which the board of trustees might properly declare a vacancy, cannot be decided. Couch v. State [Ind.] 82 NE 457.

45. Held that an allusion to certain extracts from the budget in the petition for the purpose of identification was no warrant for an insertion in the alternative writ that the board of aldermen duly ratified act of president in creating bureau. People v. Ahearn, 120 App. Div. 95, 104 NYS 860.

46. State v. New Orleans Com'rs of Police Dept., 119 La. 515, 44 S 283.

pel the judge of the district court to enter an order recognizing him as such.[47] Where an alternative writ of mandamus has been issued to restore a person to office from which he has been wrongfully suspended, if it appears that he has not suffered any substantial loss by such suspension, and that the period of suspension expired before the time for hearing the application for a peremptory writ, the court in its discretion may quash the alternative writ and enter judgment for dismissal with costs.[48] Where a person is restored by mandamus to a position in the public service from which he was unlawfully discharged, he is entitled to perform the same duties that he was discharging at the time of his discharge.[49]

§ 9. *Powers and duties.* See 8 C. L. 1209—Only such acts of officers are official as are done under some authority derived from the law or in pursuance of prescribed duties,[50] and a city officer must show that a power which he undertakes to exercise has been conferred by legislative grant.[51] It is presumed that an officer has done his duty,[52] and that the acts of officers are within their authority.[53] It will be presumed that a deputy clerk in whose name a jurat to an affidavit was made was a de jure officer.[54] Where a ministerial officer is not a party to nor has any interest in a proceeding, he is not estopped from disputing the verity of his own official act.[55] Powers and duties of officers and employes are generally prescribed by statute, constitution, and city charters,[56] and in the absence of constitutional restriction the

47. Eberle v. King [Okl.] 93 P 748.

48. Hartwig v. Watertown [Wis.] 112 NW 21.

49. People v. Stevenson, 108 NYS 860.

50. Authority given by board of selectmen to build bridge on premises of plaintiff held not an official act. Chase v. Cochran, 102 Me. 431, 67 A 320. The civil service commission may change the duties of an office, abolish an office, and require a new examination for promotion, if done in good faith. People v. Cook County, 127 Ill. App. 401.

51. People v. Healy, 231 Ill. 629, 83 NE 453. Statutes delegating powers to public officers are to be strictly construed. Diederich v. Rose, 228 Ill. 610, 81 NE 1140. A state treasurer may not retain state monies to reimburse himself for costs paid for state. He has no power to incur or pay any expense of his office beyond what had been provided for by appropriate acts. Whittemore v. People, 227 Ill. 453, 81 NE 427.

52. Hegan v. Louisville [Ky.] 107 SW 809.

53. Under an ordinance providing funds for a fire deparment and for such special officers as may be necessary for fire protection, "under the orders and appointment of the mayor," it will be presumed that the effect of the latter clause was intended to apply only to such special officers as might be appointed by mayor. City of San Antonio v. Tobin [Tex. Civ. App.] 18 Tex. Ct. Rep. 919, 101 SW 269.

54. Southern R. Co. v. Hundley [Ala.] 44 S 195.

55. Held that city engineer may testify that the date of the filing of plans and specifications for street improvements is incorrectly stated by his file marks thereon. Barber Asphalt Paving Co. v. O'Brien [Mo. App.] 107 SW 25.

56. Officers of municipal corporations organized under legislative authority are, in respect to all general laws having force and operating within their municipality, agents of the state, and may be charged with the performance of such duties in the enforcement of the same as the legislature may from time to time impose. State v. Robinson [Minn.] 112 NW 269. The term "prescribed by law" as used in Const. art. 5, § 6, describing duties of officers mentioned, means prescribed by some statute of the state and does not include matters required by common law. People v. Santa Clara Lumber Co., 55 Misc. 507, 106 NYS 624. The power and duties of the mayor of New York City in the appointment and supervision of commissioners of accounts, and the powers and duties of the commissioners to examine accounts and methods of various departments and officers of the city, are regulated by Greater New York Charter, Laws 1897, p. 35, c. 378, § 119; Laws 1873, p. 513, c. 335, amended by Laws 1882, p. 29, c. 410, § 110, and Laws 1884, p. 608, c. 516, and Laws 1897, p. 34. c. 378, § 115, subd. 3. In re Hertle, 120 App. Div. 717, 105 NYS 765. The right given the commissioners under Greater New York Charter, Laws 1897, p. 35, c. 378, § 119, to determine the extent of the examination, rests solely with the Commissioners, and they may pursue their investigation so long as the examination or the questions propounded to witnesses are relevant and pertinent to subject-matter of inquiry. Id. Examination of such accounts provided for by Greater New York Charter, Laws 1901, pp. 31, 536, c. 466, §§ 54, 1534, providing for investigations by a justice of the supreme court or by the board of aldermen, and by Greater New York Charter, Laws 1897, p. 35, c. 378, § 119, are separate and neither is exclusive of the other. Id. Under Rev. Laws 1905, §§ 1202-3, the county commissioners may contract for employment of such agents as may be necessary to oversee, superintend, and inspect work upon the highways of a county for which they have appropriated money. Armstrong v. St. Louis County Com'rs [Minn.] 114 NW 89. Pol. Code, §§ 4646, and 4350, providing that a county treasurer cannot pay jury certificates until issued by the clerk, signed and under seal, are mandatory. Ex parte Farrell [Mont.]

legislature may clothe an officer created by it with functions involving the exercise of powers which are executive, legislative, and judicial in character.[57] The limit of the power of a public officer is the statute conferring the power, and what further power is necessarily implied, in order to effectuate that which is expressly conferred,[58] and a statutory commission cannot by rule alter or enlarge the power conferred upon it by statute.[59] Officers cannot wholly disregard directory statutes, and they must be substantially complied with.[60]

Effect of personal interest.[See 6 C. L. 1210]—An officer or member of a corporation or public institution cannot make a contract in which he is personally interested with any corporation, municipality, or public institution of which he is a member.[61] Where no statute disqualifies a member of a board of town trustees from action in a levy and assessment for street improvements because of interest, his act is only voidable.[62]

Acts of a de facto officer.[See 6 C. L. 1211]—To justify his own acts, an officer must show himself to be an officer de jure,[63] but third persons whose interests are affected thereby need go no further than prove him to be an officer de facto,[64] and he is estopped to deny the validity of the law under which he has assumed to act.[65] One

92 P 785. Rev. St. 1901, par. 973, does not confer power upon a board of supervisors to compromise an action for collection of taxes. Territory v. Gaines [Ariz.] 93 P 281. The board of police of city of New Orleans has power to grant new trials. State v. New Orleans Police Com'rs, 119 La. 515, 44 S 283. Under Code, § 20, the determination of the secretary of the state of Iowa as to whether state printing and binding has been done in compliance with law is conclusive and cannot be collaterally attacked. State v. Young, 134 Iowa, 505, 110 NW 292. Under County Law, Laws 1892, p. 1756, c. 686, § 50, the county board of supervisors shall keep books of record of their proceedings, for public information and as a source of authentic evidence. Wallace v. Jones, 122 App. Div. 497, 107 NYS 288. Where the board of county supervisors has allowed a member compensation for unauthorized services, their action cannot be sustained on the ground that what the board had the power to authorize it could ratify after service was rendered, and that the audit of a bill for services actually rendered and expenses paid was equivalent to original authority. Id.

57. Eckerson v. Des Moines [Iowa] 115 NW 177.

58. But in the performance of ministerial duties expressly enjoined, when the mode of performance is prescribed, no further power is implied nor has the officer any discretion. Ex parte Farrell [Mont.] 92 P 785. A county attorney who is required by law and by order of county board to institute actions for benefit of county may bind county to pay the reasonable and necessary expenses incident thereto. Christner v. Hayes County [Neb.] 112 NW 347.

59. Where under civil service Laws 1899, p. 807, c. 370, § 19, the commission is required to certify the pay roll of one who has been duly appointed to the position assigned him even though he has not performed duties appropriate to the position, the board cannot by rule change the effect of the statute. People v. McWilliams, 56 Misc. 296, 106 NYS 459.

60. A strict and technical compliance is unnecessary. Evers v. Hudson [Mont.] 92 P 462.

61. Act March 31, 1860, § 66 (P. L. 400), construed and held that "any member of a corporation" had reference to corporation purchasing materials and supplies and of which the individual is a member, officer, or agent. Commonwealth v. Witman, 217 Pa. 411, 66 A 986. A councilman who is co-owner with his brother of a quarry may be convicted for violation of such statute where he assists in ratifying a contract with his brother to furnish stone to city from such quarry. Id. A contract by secretary of board of health with city to care for smallpox patients is in violation of act for incorporation of cities approved March 14, 1867 (Laws 1867, p. 53, c. 15, § 52; Burns' Ann. St. 1901, § 3539), where such an emergency does not exist that it would be manifestly unjust to delay action in order to comply with strict requirements of statute. City of Greenfield v. Black [Ind. App.] 82 NE 797.

62. Such objection is waived if not objected to if not raised until action to foreclose lien of assessment against property. Daly v. Gubbins [Ind.] 82 NE 659.

63. Gregory v. Woodbery, 53 Fla. 566, 43 S 504; Godbey v. Bluefield, 61 W. Va. 604, 57 SE 45. To be an officer de jure he must have been appointed and have qualified under the statute. Officer appointed and qualified under ordinance in conflict with statute is not de jure officer under statute. City of Chicago v. Burke, 226 Ill. 191, 80 NE 720, rvg. 127 Ill. App. 161. Officer appointed and qualified under ordinance in conflict with statute cannot claim to be de facto officer under statute. Id.

64. Godbey v. Bluefield, 61 W. Va. 604, 57 SE 45; Gregory v. Woodbery, 53 Fla. 566, 43 S 504. Where in a city entitled to six councilmen there were three vacancies, one of which was filled by the three remaining councilmen and the four filled another, held that such appointees having qualified and acted, were at least de facto officers if they were not properly appointed. Overall v. Madisonville, 31 Ky. L. R. 278, 102 SW 278.

65. Oil inspector appointed and qualified

elected to an office created by an unconstitutional statute is a de facto officer and his acts are valid until declared unconstitutional by the courts.[66]

Delegation of powers.—A public officer cannot delegate to others the performance of his official duties.[67]

Mode of official action.[See 8 C. L. 1212]—Individual members of a public board possessing deliberative functions have no authority to bind the body by individual action.[68] By statute in some states creating boards, it is provided what shall constitute a quorum to perform the duties of the office.[69] In Illinois it is the duty of the town clerk as clerk of the drainage commissioners to keep in a book a record of their proceedings and to enter therein all findings and orders of the commissioners on the subject of drainage,[70] and meetings of such commissioners for the levy of assessments should be held within the boundaries of the drainage district.[71] After notice to the commissioners and the clerk,[72] but after such notice, a majority of the commissioners may hold a legal meeting.[73]

Judicial control or review.[See 8 C. L. 1212]—Mandamus will issue to compel the performance of an act specially enjoined as a duty resulting from an office,[74] and the relator must have a clear legal right to have the act performed by the officer or board to whom the writ is directed,[75] but mandamus will not issue to compel the performance of an act within the discretion of the officer.[76] A county auditor will not be compelled to issue a warrant to a county officer who has been appointed under an unconstitutional statute.[77] Where the common council which is the auditing board of a city has passed upon a claim, it becomes res adjudicata, and a subsequent council has no power to review such judicial action.[78] A board of fire commission-

under void ordinance estopped to deny liability to city for fees collected under ordinance. City of Chicago v. Burke, 226 Ill. 191, 80 NE 720.

66. The act of a board of police commissioners created by the unconstitutional act of 1905, in discharging a police officer before such act was declared unconstitutional is valid and the courts will not compel his reinstatement by mandamus. Lang v. Bayonne [N. J. Err. & App.] 68 A 90.

67. Where an ordinance requires the city engineer to prepare specifications for street improvements, he need not perform the manual or clerical labor incident thereto but he is expected to apply his professional skill and judgment to the work. Barber Asphalt Paving Co. v. O'Brien [Mo. App.] 107 SW 25.

68. Where plaintiff was duly elected superintendent of state schools for blind by board of trustees of state charitable institutions, the action of several individual members thereof in directing defendant to continue to hold office until next meeting of board held not action of board. Lucas v. Futrall [Ark.] 106 SW 667.

69. The provisions of Act No. 135, p. 216, of 1898, providing for jury commission, contemplates notice to full number of members, and if there is a vacancy so that all such members cannot be notified, there can be no legal action taken by the commission. State v. McClendon, 118 La. 792, 43 S 417.

70. Held under Hurd's Rev. St. 1905, c. 42, § 76, that such record is the only lawful evidence of the action to which they refer, and it cannot be contradicted, added to, or supplemented by parol. People v. Carr, 231 Ill. 502, 83 NE 269.

71, 72, 73. People v. Carr, 231 Ill. 502, 83 NE 269.

74. Under Code Civ. Proc. § 1085, mandamus will not issue to compel county treasurer holding money deposited by party to suit to act until he has refused to obey order of court. Higgins v. Keyes [Cal. App.] 90 P 972.

75. Held to be no authority under Greater New York Charter to compel tenement house commissioner to audit and pay salary of a tenement house inspector. People v. Butler, 120 App. Div. 751, 105 NYS 631. Mandamus will issue upon the relation of the county attorney to compel the delivery of the money, books, and records of the office of county treasurer to the person adjudged to be elected, and where the title to such office has been determined by district court on proceedings in error from a contest court and the execution of such judgment is not stayed, such action may be maintained, although the defeated party in the contest is prosecuting proceedings in error in this court from such judgment. State v. Lawrence [Kan.] 92 P 1131.

76. Under charter of city of Janesville, the mayor's duty in signing orders drawn upon the treasurer will not be controlled by mandamus. Rudolph v. Hutchinson [Wis.] 114 NW 453.

77. State v. Blumberg [Wash.] 89 P 708.

78. An appointment by the mayor of city of Mt. Vernon in 1905, which is ineffective to charge liability on the city because not approved by council, cannot be made effective by action of a subsequent council in 1907 after term of appointee has expired. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600.

ers has no power to rescind the judicial determination of a former board.[79] A municipal body required to keep a history of its proceedings cannot properly be judicially compelled to efface any such history from its records upon the grounds that the proceedings were erroneous.[80] The rule that an action will not lie to enjoin state officers from doing acts required of them by state laws, although such acts when performed will constitute a breach of a contract entered into by the state, does not apply where state officers are proceeding under color of an unconstitutional law to violate a contract with an individual to his irreparable injury.[81]

§ 10. *Liabilities of public officers. A. Civil liability.*See 8 C. L. 1213—One who is merely de facto a judicial officer is not personally liable for the exercise of judicial functions, even though his acts be corrupt,[82] but one who affects or purports to act by virtue of authority appertaining to an office which does not in fact exist is personally liable for his acts.[83] A public officer is liable to a private individual for any injury he may sustain in consequence of the officer's neglect to properly perform a ministerial duty in which such individual has a special and direct interest,[84] and where such injury is the proximate result of the officer's neglect,[85] but a board of supervisors, in auditing claims against a county, exercise a judicial function, and if they act within their jurisdiction they cannot, in the absence of fraud and collusion, be held personally liable for their audits.[86] A public officer is not responsible for the acts of his subordinates properly employed by him if they are not in his private service, but are themselves servants of the government.[87] In an action for oppression in office, the question of probable cause is not involved though a showing of malice on part of defendant is necessary.[88] The amount of interest recoverable may depend on the circumstances.[89]

(§ 10) *B. Criminal liability.*See 8 C. L. 1215—Public officers are criminally liable for malfeasance and misfeasance in office.[90] The members of a fiscal court while

79. Where such board summarily disbands a fire company without notice or hearing upon recommendation of chief of city fire department, such proceeding may be reviewed by a subsequent board. Ultecht v. Allen, 53 Misc. 390, 103 NYS 384.

80. Hartwig v. Watertown [Wis.] 112 NW 21.

81. Baldwin Forging & Tool Co. v. Griffith, 5 Ohio N. P. (N. S.) 566.

82, 83. Varner v. Thompson [Ga. App.] 60 SE 216.

84. The injury must be the proximate result of the breach of duty complained of. Coleman v. Lytle [Tex. Civ. App.] 107 SW 562. Conduct and remark of vendee of land held not to be such negligence as would relieve recorder of deeds from liability for permitting release of deed of trust to be entered without compliance with Rev. St. 1899, § 4358 (Ann. St. 1906, p. 2401). State v. Green, 124 Mo. 80, 100 SW 1115. Where one executes deed of trust which contains error as to description of property, and discovering another deed of trust on property refuses to give a correct copy until such deed of trust is marked satisfied, held that liability of recorder for not entering satisfaction of such deed of trust according to law is not affected by execution of first deed prior to recorder's act. Id. The presumptive knowledge of purchaser of land of law relative to duties of such recorder as to entering satisfaction of mortgages will not relieve recorder from liability resulting to purchaser from the negligence of recorder. Id.

85. A tax collector held not liable to plaintiff for expense of setting aside judgments against her as a result of such officer's failure to credit her with taxes. Coleman v. Lytle [Tex. Civ. App.] 107 SW 562.

86. Before such board can be held responsible for an illegal and collusive audit of their bills under Taxpayer's Act, Laws 1881, p. 709, c. 531, as amended by Laws 1887, p. 885, c. 673, and Laws 1892, p. 620, c. 301, it is not enough that the claim is illegal, but the auditing must have been fraudulently concerted or done by collusion before they may be so held. Wallace v. Jones, 122 App. Div. 497, 107 NYS 288. Where such action is based upon the alleged collusion or fraudulent concert of the defendant's acting conjointly in auditing their illegal claims for compensation, judgment cannot be rendered against them severally for the money illegally received by each. Id.

87. A dog catcher selected by chief of police of Texarkana City is a public servant and such chief is not responsible for his misconduct in the performance of his duties. Casey v. Scott [Ark.] 101 SW 1152.

88. Miller v. Runkle [Iowa] 114 NW 611.

89. Defendant received money nearly 10 years before suit no attempt made at concealment, nor demand made on him till suit brought, nor delay caused by him. Interest allowed from date of suit. Whittemore v. People, 227 Ill. 453, 81 NE 427.

90. An indictmnet charging police commissioners holding office under Act of 1885 (Gen. St. p. 1551) with failure to inquire into neg-

acting in a judicial or quasi judicial capacity are not criminally liable for error of judgment where they act honestly and with good motives,[91] and under the statutes of Kentucky a member of such court upon conviction of malfeasance in office may appeal to the court of appeals.[92] The burden is upon the state to prove that a county official has committed an act contrary to law.[93] On prosecution for misappropriating public funds, evidence to show guilty knowledge is admissible.[94] Under an act of congress it is an offense for officers and employes of the United States to solicit or receive contributions for any political purpose from any of its officers, clerks, or employes, nor can any person solicit such contributions in any room or building occupied in the discharge of official duties by any officer or employe of the United States mentioned in the civil service act, or in any navy yard, fort, or arsenal.[95]

§ 11. *Liability of public for acts of public officers.*[See 8 C. L. 1217]—A state[96] or city, in the absence of special statute, will be held liable for the tortious acts of public officers,[97] and the approval of a claim against a city by an officer without authority to do so is ineffective,[98] but such an act may be confirmed and ratified by the city.[99]

§ 12. *Official bonds and liabilities thereon.*[See 8 C. L. 1218]—An official bond is one prescribed by public law,[1] its approval may be compelled,[2] and its validity is not affected by giving it to commissioners by their official title instead of to the county in its corporate name.[3] Statutes giving a remedy on the bond will be construed, if the words permit, so as to advance the remedy and cure the mischief,[4] hence, an officer and his bondsmen are liable upon breach or neglect of duty constituting a breach of his official bond,[5] or where he defrauds the government,[6] or misappropri-

lect and omission of police officers under their control to suppress houses of ill fame and gaming houses, and to discipline and punish such of the officers as were guilty of neglect of duty, is waived. State v. Castle [N. J. Law] 66 A 1059. And police commissioners may be jointly indicted for neglect of their duty as such. Id.

91. Held not criminally responsible for allowance of claim of de facto supervisor against county. Henry v. Com., 31 Ky. L. R. 760, 103 SW 371.

92. Under Const. § 227, and Ky. St. 1903, § 3748, enacted in pursuance of § 227, such officer is entitled to perform duties of his office during such appeal. Hazelbrigg v. Douglass, 31 Ky. L. R. 1121, 104 SW 755.

93. Purchase of evidence of indebtedness against county contrary to Pol. Code, § 1023, and Pen. Code, § 136. State v. Danzer, 35 Mont. 269, 88 P 952.

94. It may be shown that he returned a portion of the funds. Commonwealth v. Tilly, 33 Pa. Super. Ct. 35.

95. U. S. Comp. St. 1901, p. 1223. Letter sent to internal revenue employe at his office in a Federal building, soliciting campaign funds to be sent to chairman of republican state executive committee by mail, is not an offense under this act. United States v. Thayer, 154 F 508.

96. In an action for trespass against the warden of the state prison for cutting down timber on land adjoining penitentiary grounds, it is no defense that he was acting as officer of state. Elmore v. Fields [Ala.] 45 S 66.

97. So held in action against city for injury to property by police officers while engaged in dragging river for dead body. Gillmor v. Salt Lake City [Utah] 89 P 714.

98. Sheahan v. Chicago, 226 Ill. 115, 80 NE 754. Corporation counsel has no authority to direct payment for work done and committed by the charter to be done by the commissioner of public works and city is not bound by his approval of claim. Sheahan v. Chicago, 226 Ill. 115, 80 NE 754, afg. 127 Ill. App. 626.

99. Supplies purchased by fire marshal obligates city where city accepted and used same. City of Chicago v. Nicholson, 130 Ill. App. 466.

1. Under St. 1898, § 160, bond given to state by a bank which was authorized state depository charged with such duties as to constitute it a public office, held to be an official bond. State v. Pederson [Wis.] 114 NW 828.

2. Hertel v. Boismenue, 128 Ill. App. 322.

3. Monroe County v. Eilenberger, 34 Pa. Super. Ct. 22.

4. Monroe County v. Eilenberger, 34 Pa. Super. Ct. 28.

5. In an action by county commissioners against county treasurer and his bondsmen to secure money judgment, held that complaint stated cause of action based upon treasurer's failure to account for and to pay over full amount of taxes collected, that it did not state cause of action based upon failure of treasurer to collect all interest on county funds payable by bank designated as place for public deposits, that it stated a cause of action with respect to treasurer's failure to collect penalties or delinquent taxes on land. Itasca County Com'rs v. Miller [Minn.] 112 NW 276. Chapter 42, p. 156, Gen. Laws 1893, prescribing that no such action shall be commenced unless "recommended" within four years from date of filing new bond, or expiration of term of office, is inoperative because

ates public moneys, though he subsequently uses the money for the benefit of the government,[7] and the bond may stand for the protection of several municipal divisions of the county.[8] In an action by the United States on the bond of a disbursing agent, it is necessary to allege [9] and prove facts sufficient to show a breach of the contract and damage in consequence thereof.[10] Where such action is based upon a delinquency arising in his account after the execution of the renewal bond, the United States government may join in the same count an action upon the breach of the original and the renewal bonds.[11] Any person damaged through the misconduct of an officer may maintain an action upon his official bond.[12] Where after a county officer has given his official bond, his term of office is extended for a year by a statute changing the date of the election, the sureties on his official bond will not be held liable for any misconduct on his part occurring after the expiration of the time for which he was elected.[13] Where written notice is required to be given the surety upon default of an officer, such notice may be waived by the conduct of the surety.[14] Upon refusal of attorney, the state treasurer may maintain an action upon an official

incapable of rational construction. Id. Under St. 1898, § 881, providing for accounting of village treasurer, his failure to pay over money in his hands as treasurer to his successor though without demand, constitutes a breach of his bond. Village of Prentice v. Nelson [Wis.] 114 NW 830. Complaint in action on such bond held to sufficiently allege a demand as against general demurrer where there was no application for greater specification as to how, and by what person, such demand was made. Id. Where the gross amount of the sum deposited in a bank selected as a state depository is within the penalties and terms of the bond, the sureties on such bond are liable for such sum and this even though a larger sum was deposited by state treasurer than was prescribed by state board of depositors. State v. Pederson [Wis.] 114 NW 828. In absence of bad faith, a county treasurer is not liable on his official bond for depositing county funds in a legal depository in excess of depository bank's pro rata share of such funds, is provided by § 18, art. 3, c. 18, Comp. St. 1903, unless amount of deposit exceeds sum which might lawfully be deposited under provisions of § 20 of same chapter. Holt County v. Cronin [Neb.] 112 NW 561. Under § 18, art. 3, c. 18, Comp. St. 1903, providing for deposit of public moneys held by county treasurer, in absence of bad faith, the latter is not liable on his bond for depositing such funds in excess of depository bank's pro rata share, unless amount of such deposit exceeds sum which might lawfully be deposited under provisions of § 20 of same chapter. Id. Under St. 1903, § 3690, of Kentucky, the widow of a person killed by a town marshal while under arrest for a misdemeanor may maintain an action on the bond of such marshal and his sureties. Growbarger v. U. S. Fidelity & Guaranty Co., 31 Ky. L. R. 555, 102 SW 873. Under Ky. St. 1903, § 3752, the amount of plaintiff's recovery is not limited to the penalty of the bond. Id. While punitive damages may be recovered of the marshal, only compensatory damages may be recovered of surety on his official bond. Id. Under Sayles' Ann. St. 1897, art. 1462, the sureties on official bond of clerk of court are liable for a deposit in court, which was placed in the county treasurer's safe by the clerk from which it was stolen, regardless of care used by such clerk. Lanham v. Dies [Tex. Civ. App.] 17 Tex. Ct. Rep. 513, 98 SW 897.

6. Wrongful certificate by disbursing agent that certain work had been performed upon which government allowed payment. Ewing v. U. S. [Ariz.] 89 P 593.

7. United States government held entitled to judgment in action on bond of disbursing agent. Ewing v. U. S. [Ariz.] 89 P 593.

8. Commonwealth v. Maxwell, 34 Pa. Super. Ct. 631. Bond given by county treasurer, conditioned in strict accordance with § 33 of the Act of 1834, protects those municipal divisions of the county entitled to portions of liquor license fees received by him. Monroe County v. Eilenberger, 34 Pa. Super. Ct. 28.

9. Complaint held sufficient. Ewing v. U. S. [Ariz.] 89 P 593. Such facts may be shown by the books of the treasury department made legal evidence by Rev. St. U. S. § 886 (U. S. Comp. St. 1901, p. 640). Id.

10. Burden held to be on government to prove only that public funds had come into agent's hands and that he had failed to pay them over to the government. Ewing v. U. S. [Ariz.] 89 P 503. Instructions refused as not within the issues. Id.

11. Act Cong. March 2, 1895, c. 177, § 5, 28, Stat. 807. Ewing v. U. S. [Ariz.] 89 P 593.

12. Section 643 of Code of Civil Procedure refers only to bonds given under statutory authority. Cushing v. Lickert [Neb.] 112 NW 616. Action may be brought in the county's name to the use of a borough. Monroe County v. Eilenberger, 34 Pa. Super. Ct. 28.

13. And this is so notwithstanding the bond is conditioned for his good behavior during continuance in office "by virtue of said election", and constitution provides that "county officers shall hold their offices for term of two years and until their successor shall be qualified. Sparks v. Cherokee County Com'rs [Kan.] 91 P 89. An action upon the bond for such misconduct may be maintained against the principal. Id.

14. Notice by county sheriff to surety company of default of deputy held sufficient. United States Fidelity & Guaranty Co. v. Paxton [Ky.] 106 SW 841.

bond given by a bank selected as a state depositary.[15] Sureties on an official bond are presumed to know that the state is not estopped by acts of misfeasance on part of its officers, and that it does not contract with such sureties given to it that other public officers shall perform their public duties faithfully.[16] The bond of a county treasurer elected to serve a second term should be approved by the board of county commissioners when he has accounted or stands ready to account for monies collected by him during his first term.[17] A contract to apply the unearned fees of a public office to the payment of the joint debt of the promisor and the sureties on his official bond is against public policy and void.[18] In an action upon an official bond, a variance between the conditions relied upon in the declaration and in the bond is demurrable.[19] Prior to 1905, a citizen could not maintain an action upon the bond of a patrolman of the city of Omaha, there being no privity between the plaintiff and surety.[20] Where a county treasurer proceeds by notice and motion to recover of his predecessor money alleged to be due the county, the surety of such predecessor may enjoin such proceeding and the surety be permitted to make his defense in a court of equity.[21] Under the Virginia statute providing for settlement of accounts by the county treasurer with the board of supervisors, such settlement is only prima facie evidence of the balance in his hands at the date of settlement against a surety on his bond, conditioned upon the faithful discharge of his duties, but containing no contract of indemnity.[22] An action will not lie on an official bond to recover the statutory penalty for taking, charging, or demanding illegal or excessive fees.[23] In order to subject one to such penalty it must appear that he was an officer at the time of taking, charging, or demanding such fees,[24] and such action is barred if not brought within one year from the date of its accrual.[25]

§ 13. *Compensation.*[See 8 C. L. 1219]—A salary is a determined and stipulated sum to be paid for a fixed period.[26] It is incident to the title to the office and not to the exercise of its functions.[27] The compensation of public officers and employes is usually fixed by law,[28] and they are entitled for the performance of their official

15. St. 1898, §§ 131, 152, 163, 984, construed. State v. Pederson [Wis.] 114 NW 828.

16. State v. Pederson [Wis.] 114 NW 828.

17. Certain irregularities in disbursing funds in his hands during his first term held not to constitute valid objection to his proposed settlement or approval of his bond for second term. State v. Vinnedge [Neb.] 112 NW 858. County commissioners shall call such officer's attention to his failure to account for amount of interest due on taxes collected by him, if their refusal to settle with him is based on that ground, or pay the cost of legal proceedings brought to compel an approval of his bond if such objection is not disclosed before action brought to require acceptance and approval of his official bond for a second term of office to which he has been elected. Id.

18. Plaintiff in anticipation of becoming county treasurer agreed with defendants that in consideration of their becoming sureties on his official bond he would if elected, apply all fees and emoluments of office in excess of a certain amount to discharge certain obligations on which he and they were jointly liable, held to be void. Serrill v. Wilder [Ohio] 83 NE 486.

19. Declaration held demurrable. State v. Wilson [Md.] 68 A 609.

20. Cushing v. Lickert [Neb.] 112 NW 616.

21, 22. United States Fidelity & Guaranty Co. v. Jordan [Va.] 58 SE 567.

23. Sheibley v. Cooper [Neb.] 112 NW 363. Where such fees are claimed as a matter of right and are paid to a party after his term of office has expired voluntarily, and with full knowledge of the facts, they cannot be recovered. Id.

24. One whose term of office had expired when such fees were taken, charged, or demanded is not liable for the statutory penalty. Sheibley v. Cooper [Neb.] 112 NW 363.

25. Sheibley v. Cooper [Neb.] 112 NW 363.

26. Officers receiving their compensation under a fee system are not salaried officers and a change in the method of compensation from fees to a salary is not a change which "affects the salary of any officer during his existing term." Theobald v. State, 10 Ohio C. C. (N. S.) 175.

27. Pack v. U. S., 41 Ct. Cl. 414.

28. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600; Theobald v. State, 10 Ohio C. C. (N. S.) 175; Kerr v. Sun Co., 32 Pa. Super Ct. 239. In §§ 1296-29 (98 O. L. 96), which makes an allowance to sheriffs for "all expense of maintaining horses and vehicles necessary to the proper administration of the duties of his office," the word "maintaining" is used in its ordinary meaning, and only expenses incurred in supporting, sustaining, and supplying horses with the necessaries of life and in keeping them in good condition, can be allowed, and does not mean that a sheriff may purchase at county expense unnecessary horses

duties to such compensation only as is fixed for that office,[29] but not to any additional

and vehicles. State v. Mahoning County Com'rs, 10 Ohio C. C. (N. S.) 398. A county surveyor is entitled to payment at the rate of four dollars per day for all the days of service of his deputies, though he may not have been required to pay deputies at that rate, or for all their days of service. Spafford v. State, 10 Ohio C. C. (N. S.) 185. Under charter of City of Rochester, providing that corporation counsel shall receive to his own use costs collected from adverse party in actions in which city shall be successful, such counsel is entitled to taxable costs where city was successful in foreclosing tax liens, though the city became purchaser. Sutherland v. Rochester, 189 N. Y. 198, 82 NE 171. The salaries of the officers and employes of the City of San Antonio, as fixed by city council in March, 1903, was not changed by city charter providing that all ordinances of city "now in force, not contrary to the provisions" thereof, "shall continue in force until repealed." City of San Antonio v. Beck [Tex. Civ. App.] 18 Tex. Ct. Rep. 953, 101 SW 263. The word "debt" as used in charter of San Antonio, has no reference to salaries of officers and employes, provision for the appointment of which is made in the charter, and the pay of policemen and firemen is not a debt created by any officer of the city but is one that arises from their appointment in the legal way and the performance on their part of the duties and positions to which they had been appointed. Id. Under County Law, Laws 1892, p. 1750, c. 686, § 23, and § 10, p. 1745, providing for regular and special meetings of board of county supervisors and their compensation and mileage, the terms "annual meeting" and "special session" are synonymous, and "regular" or "special" session is to be measured by its actual duration, and each day of its duration is not a session within meaning of law so as to entitle board to mileage for each day's actual attendance at its meetings. Wallace v. Jones, 122 App. Div. 497, 107 NYS 288. Under County Laws, Laws 1892, p. 1750, c. 686, § 23, members of the county board of supervisors will not be allowed compensation for services pursuant to a general understanding that each shall look after the business in his own town and report from time to time to the board. Id. A county is not liable to the county treasurer for commissions upon a fund which he never handled but which was raised by private donation and deposited with ordinary, with the conditions imposed that the ordinary should personally disburse it in buying lot and in paying other expenses in erection of public buildings for county and that he should not pay it into county treasury. Worth County v. Sykes, 2 Ga. App. 175, 58 SE.380. The act of March 2, 1875 (acts 1875, p. 286), fixing the compensation of the treasurer of Houston County at $400, held constitutional at date of passage and was not repealed by constitution of 1877. Moore v. Houston County, 128 Ga. 187, 57 SE 236. Section 1396a, fixing salaries of police vlerks in first division and borough of Brooklyn at $2,500, and in borough of Queens and Richmond at $2,000, is not invalidated by unconstitutionality of Laws 1901, p. 595, c. 466, amending the original Greater New York Charter. Brennan v. New York, 122 App. Div. 477, 107 NYS 150. Provisions of amendment to special charter of Janesville, St. 1898, §§ 925-30, authorizing payment of salaries to mayor and aldermen in common with other officers of city, supersede all former portions of such charter inconsistent therewith. Rudolph v. Hutchinson [Wis.] 114 NW 453.

29. A solicitor appointed by county commissioners under act May 22, 1895, at a certain salary, cannot claim compensation for services rendered in proceedings to condemn toll bridges. Nelson v. Beaver County [Pa.] 68 A 832; Jacobs v. U. S., 41 Ct. Cl. 452. Because a taxpayer has knowledge that the mayor and aldermen have allowed a greater salary to the mayor than that allowed by law, he is not estopped from requiring such mayor to refund the excess. Drennen v. Griffin [Ala.] 43 S 785. Burns' Ann. St. 1894, § 6834, St. 1901, §§ 6521, and 6522, do not authorize a county auditor to tax and collect fees for procuring and dellvering lists of road taxes to township trustees. Jay County Com'rs v. Pike Civil Tp., 168 Ind. 535, 81 NE 489. Under Burns' Ann. St. 1901, §§ 6525, 6527, Salary Law 1891, p. 252, § 125, incorporated into act 1895, p. 355, as § 124, demand fees, collected by a county treasurer from delinquent taxpayers, and paid into the treasury fund of the county belong to the county and not the treasurer. Clinton County Com'rs v. Given [Ind.] 80 NE 965; Id. [Ind.] 82 NE 918; Sherill v. O'Brien, 188 N. Y. 185, 81 NE 124. Under 2 Starr & C. Ann. St. c. 53 § 36, providing that a town collector be allowed a commission on moneys collected by him up to $1,500 and excess to be paid into town treasury, an award to collector of commissions over that amount by unanimous resolution of town meeting is void. People v. Parker, 231 Ill. 478, 83 NE 282. By constitution in Nebraska providing that the governor cannot receive to his own use perquisites of office or other compensation other than his prescribed salary, held that providing governor with residence rent free held not a "perquisite or other compensation" within constitutional inhibition. State v. Sheldon [Neb.] 111 NW 372. Under Gen. St. 1901, §§ 949, 959, "consensus of councilmen" that city attorney should have extra compensation, or their statement that he "go ahead" and they would see that he got "just compensation," and resolution of mayor and council, is not sufficient to authorize payment of more than is provided for by ordinance. Johnson v. Winfield, 75 Kan. 832, 89 P 657. Under Const, § 106 Ky. St. 1903, § 1744, Act March 24, 1904 (Laws 1904, p. 263, c. 108), Ky. St. 1903, § 1749, subd. 1, and Ky. St. 1903, § 4346, a county fiscal court of Kentucky cannot allow a county surveyor a salary in lieu of fees provided by statute. Young v. Jefferson County, 30 Ky. L. R. 1209, 100 SW 335. Under Ky. St. 1903, § 1749, and Acts 1904, p. 298, c. 121, the circuit court clerk being allowed compensation for all service rendered the commonwealth in felony cases, witnesses for the commonwealth in such cases are not required to pay anything in order to obtain a certificate of their allowances unless the allowance exceeds $5.00. Pigman v. Slone [Ky.] 107 SW 230. It is the duty of a constable to apprehend and bring to justice all felons and disturbers and violaters

personal compensation,[30] nor to any increase allowed army officers in certain cases.[31] A messenger in the bureau of buildings in the city of New York, who is also commissioner of deeds, is entitled to recover for his official services as commissioner in taking affidavits made by other messengers, unless the services were performed with the understanding that they should be a part of his duty as a messenger in the department for which he received a salary.[32] An agreement by a public officer to serve for less than the compensation fixed by law is contrary to public policy and void,[33] but where an officer performs services outside of his official duties, not interferring therewith, he is entitled to compensation therefor,[34] unless the services are prohibited.[35] It is frequently provided that salaries of officers shall not be increased[36] or changed after his election or during his term of office,[37] and under such a constitutional provision the legislature may increase the duties incidental to an office without additional compensation therefor.[38] None but a de jure officer can successfully claim compensation for his official services,[39] and by the common law he may recover the fees of the office received by a de facto officer,[40] and a judgment in quo warranto declaring the right of the de jure officer to such office is conclusive in an action for the recovery of the fees.[41] The legislature may prescribe the number of hours which shall constitute a day's work for employes of a municipality and prohibit it from making contracts for services for a greater number of hours.[42] Officers and

of criminal laws of the state within his jurisdiction without other reward than is fixed by law. Somerset Bk. v. Edmund, 76 Ohio. St. 396, 81 NE 641. Under acts 1904, p. 298, c. 121, for swearing, entering attendance, and issuing attendance of witnesses, the circuit court clerk is entitled to a fee of 25 cents for each witness from the litigant, and for each order and certificate allowing any claim against county or state exceeding $5.00, a fee of 30 cents from claimant of certificate. Pigman v. Sione [Ky.] 107 SW 230.

30. Whittemore v. People, 227 Ill. 453, 81 NE 427.

31. Revenue-Cutter officer serving in Alaska waters not entitled to the 10 per cent increase allowed army officers, under Act of March 2, 1901 serving beyond limits of United States. Wiley v. U. S., 40 Ct. Cl. 406.

32. Morgan v. New York, 190 N. Y. 237, 82 NE 1089.

33. Abbott v. Hayes County [Neb.] 111 NW 780.

34. Slayton v. Rogers [Ky.] 107 SW 696.

35. Woodwell v. U. S., 41 Ct. Cl. 357.

36. Where salary of police judge of city of third class was increased by ordinance to greater sum than was allowed by Ky. St. 1903, § 3356, and by same ordinance he was given additional duties and compensation therefor, it was held that such officer was entitled to the increased salary even though his predecessor to draw for the extra services, such ordinance increasing the pay having been passed during his predecessor's term. Gorin v. Bowling Green, 30 Ky. L. R. 1160, 100 SW 833. Under Const. art. 3, § 5, held that salary of commissioner of public lands who had served for more than two years of his four year term, under appropriations fixing his salary at $2,000, could not be increased to $3,000. State v. Clausen [Wash.] 92 P 453. The salary of the present incumbent in office of judge of City of Griffin prior to the election provided for was not increased by act of 1907, but remained same as previously fixed by act of 1897. Drake v. Beck, 129 Ga. 466, 59 SE 306. Act of June 27, 1907, increasing salary of Wayne County auditors, being only for temporary purposes, is not invalid under § 20 of schedule appended to state constitution. Hudson v. Attorney General [Mich.] 14 Det. Leg. N. 605, 113 NW 595.

37. An order of fiscal court of a county fixing salary of county judge at a certain sum per annum beginning January, 1902, fixes his salary not only for term beginning on that date but for succeeding terms until changed by statute, which is not in conflict with Const. §§ 161, 325. McNew v. Nicholas County, 30 Ky. L. R. 1147, 100 SW 324.

38. Laws 1907, p. 352, c. 160, construed. State v. Pierce County Com'rs [Wash.] 93 P 920.

39. Eubank v. Montgomery County [Ky.] 105 SW 418. One cannot demand compensation for services which he renders merely as a de facto officer. Cobb v. Hammock [Ark.] 102 SW 382; Eubank v. Montgomery County [Ky.] 105 SW 418.

40. Sandoval v. Albright [N. M.] 93 P 717. In such action the reasonable expenses of incumbent in administering the office in good faith should be allowed him. Id.

41. The common law is in force in New Mexico except as modified by statute. Sandoval v. Albright [N. M.] 93 P 717.

42. One performing services beyond such prescribed time, is presumed to know extent of corporate power and cannot recover compensation therefor. Burns v. New York, 105 NYS 605. Under Labor Law, Laws 1897, p. 462, c. 415, § 3 as amended by Laws 1899, p. 1172, c. 567, an employe of a city cannot recover for services beyond eight hours per day. Id. A county surveyor performing services for the county does not come within the purview of §§ 4364-62a, Rev. St., fixing a day's work for mechanics and laborers at eight hours, and when on a calendar day he devotes more than that time to such services, he cannot charge the county for his excess time as hours of another day in addi-

employes are entitled to compensation for their services only for the time they hold office or for actual service,[43] and an officer cannot recover for time during which he was lawfully suspended,[44] but is entitled to full compensation for the time he serves notwithstanding his removal.[45] Township trustees cannot bind the township by paying unlawful claims,[46] and may recover such payments collected of the trustees.[47] The acceptance of the services of a municipal officer, by the controlling board creates an implied contract on the part of the city to pay him for his services,[48] but a city will not be held liable for the services of an officer which it neither accepts nor ratifies.[49] Power to fix the compensation of subordinate officers and employes is frequently conferred upon certain officers and official boards.[50] A city in making ap-

tion to his regular per diem. Spafford v. State, 10 Ohio C. C. (N. S.) 185.

43. Under Kirby's Dig. § 7468, a judge of a county and probate appointed to fill a vacancy, but who had only served a month and two days, cannot draw a salary for a whole quarter. Cobb v. Hammock [Ark.] 102 SW 882. The salary for the month of February should be computed on the basis of a thirty-day month. Jacobs v. U. S., 41 Ct. Cl. 452. A government officer is entitled to compensation, when employed by the day, for days actually or constructively employed, or when allowed to render services in the belief they are necessary and proper, or required to hold himself in readiness. Permission to make semi-weekly reports and requirement to furnish evidence of sufficiency and solvency of the sureties on his official bond entitles to compensation for days so employed. Wertz v. U. S., 40 Ct. Cl. 397. A county surveyor is not authorized to estimate and charge the county for the days of his service upon a given ditch or other improvement upon the basis of a certain number of days or hours per mile, but his charges must be based on the days of his actual service. Spafford v. State, 10 Ohio C. C. (N. S.) 185. Under Laws 1901, p. 242, c. 466, and § 536 p. 239, an employe in the department of street cleaning, in New York city, is not entitled to compensation during his absence without leave, though on account of an injury received in the service. Rogers v. New York, 120 App. Div. 513, 105 NYS 172. The salary of the commissioners appointed by the secretary of the interior to negotiate Indian treaties is not limited to the days on which they were actually engaged in the performance of their duties. The phrase "Actually Employed" as used in letter of instructions to commissioners should not be construed as equivalent to "Actively Employed." United States v. Hoyt, 158 F 162.

44. Under an ordinance of Bay City members providing that members of police force shall be paid such sums as recommended by police committee and approved by council, a police officer who was suspended but afterwards reinstated was not entitled to compensation during time of his suspension. Hawkins v. Bay City, 149 Mich. 268, 14 Det. Leg. N. 424, 112 NW 997. Under Laws 1901, p. 124, c. 466, §§ 292, 302. A police captain of the city of New York who is suspended without pay and tried on charges, convicted, and sentenced to a fine of 30 days' pay, is not entitled to compensation during the suspension. Halpin v. New York, 54 Misc. 128, 105 NYS 520. In an action by a veteran civil service employe of a city for his salary during a period in which he was suspended, he will not be held to have acquiesced in such suspension where he was justified in believing that he might soon be reemployed until he was formally discharged. The fact that plaintiff remonstrated against such suspension, and that during two winters of his service he was given continuous employment as the weather permitted, and that there was no regularity in time of his employment, justified plaintiff in such belief (Ransom v. Boston [Mass.] 81 NE 998), and a finding in a prior proceeding that plaintiff was illegally discharged and entitled to reinstatement by mandamus, constitutes an adjudication that plaintiff had not acquiesced in his discharge (Id.).

45. Mounted policeman of city having been appointed and served part of his term was removed, held that he was entitled to compensation until date of his removal. City of San Antonio v. Beck [Tex. Civ. App.] 18 Tex. Ct. Rep. 953, 101 SW 263.

46. Unlawful charge made by county auditor for procuring and delivering lists of road taxes to the trustee. Jay County Com'rs v. Pike Civil Tp., 168 Ind. 535, 81 NE 489.

47. The fact that board of county commissioners made no appropriation to pay an unlawful claim by the county auditor for procuring and delivering lists of road taxes to trustees is no defense to an action by township for recovery of said fees paid by the trustees. Jay County Com'rs v. Pike Civil Tp., 168 Ind. 535, 81 NE 489.

48. Acceptance by the police and fire commissioner of services of policemen. City of San Antonio v. Beck [Tex. Civ. App.] 18 Tex. Ct. Rep. 953, 101 SW 263.

49. Where a city attorney employs an assistant to assist in a suit on the city's behalf, the fact that the members of city council had individual knowledge of such services is not ratification thereof. City of Texarkana v. Friedell [Ark.] 102 SW 374.

50. It is the duty of the council of the city of San Antonio to provide for the salary of the chief of the fire department (City of San Antonio v. Tobin [Tex. Civ. App.] 18 Tex. Ct. Rep. 919, 101 SW 269), and in the absence of an ordinance providing therefor, the implication is that he should receive the same salary that had formerly been paid (Id.). Former and subsequent ordinances fixing such salaries are admissible to show what salary had been paid such officer. Id. Under Act 1903, p. 248, c. 133, and 1 Ballinger's Ann. Code and St. §§ 342, and 393, it is the duty of county commissioners to allow compensation to county fruit inspector and not that of the commissioner of horticulture. State

propriations to support a fire department cannot defeat the rights of the members to their salaries.[51] The right to an office must be shown to have been determined in favor of the plaintiff before he can sue for the incidental salary.[52] By statute contrary to the common-law rule, the successful contestant of an election cannot recover the salary paid to one holding the office pending the contest under a certificate of election.[53] The termination of a term of office implies the cessation of the salary of its occupant.[54] Under the charter of Portland, to entitle a person employed in the classified civil service to a warrant for his salary, he must show that he was appointed under the civil service rule,[55] and one who has not been regularly appointed according to the provisions of a city charter cannot recover for services while pretending to act as such.[56] Each county of an irrigation division, is liable for its pro rata share of the indebtedness to the superintendent of such division for his services.[57] The inspector of police of New York City, after reinstatement, is entitled to the salary attached to the position from the date of the order of reinstatement to the date on which he resumed his duties.[58] One who has been discharged from a position to which he was not entitled under the civil service laws cannot recover on quantum meruit for his services.[59] The allowance and payment of salaries of public officers fixed by law may be enforced by mandamus,[60] but does not issue except where upon both the facts and the law it clearly appears there cannot be a defense to the claim.[61] A member of the street cleaning department of the City of New York is not an incumbent of an office within the principle that his compensation is incident to and attached to it by law, irrespective of any service rendered to the city.[62] An employe may waive his right to higher compensation.[63] A

v. Blumberg [Wash.] 89 P 708. It is competent for the legislature to fix the salaries of county officers, leaving it to the county commissioners of the several counties to fix the sum to be paid to deputies, assistants, bookkeepers, clerks, and other employes. Theobald v. State, 10 Ohio C. C. (N. S.) 175. Under the constitution of Utah, the compensation of public employes which is not fixed by law must be approved by the board of examiners. The claim of a stenographer appointed by district judge under Laws 1899, pp. 111, 112, c. 72, §§ 1, 2, for mileage, being a claim for compensation fixed by contract, the state auditor will not be required under Rev. St. 1898, § 946, enacted pursuant to Const. art. 7, § 13, to draw a warrant for same until passed upon by such board. State v. Edwards [Utah] 93 P 720. Such board may in a proper case be subject to mandamus. Id.

51. And this is true even though it may have been intended to give the mayor the authority to disburse the money to a fire department appointed by him. City of San Antonio v. Tobin [Tex. Civ. App.] 18 Tex. Ct. Rep. 919, 101 SW 269.

52. The rule does not only exist when there has been an incumbent de facto, but may be invoked where plaintiff's salary has been reduced from a higher to a lower grade and he continues to perform the same services as an employe of the lower grade. Walters v. New York, 119 App. Div. 464, 105 NYS 950.

53. Under Pol. Code, § 936, as amended by Laws 1891, p. 28, c. 44, and Code Civ. Proc. § 807, such amount cannot be recovered either as compensation incident to the office, or as damages for the withholding of the office. Chubbuck v. Wilson [Cal.] 90 P 524.

54. Under Const. art. 20, § 30, providing for termination of all terms of offices in City of Denver upon consolidation of city and county, the city attorney was deprived of office and salary even though the term for which he was elected had not expired. Orahood v. Denver [Colo.] 91 P 1116.

55. City Charter, §§ 319, 309. MacDonald v. Lane [Or.] 90 P 181.

56. Held under charter of City of Mt. Vernon, providing for appointment of commissioner of public works, that mayor could not by an arbitrary appointment of such officer without consent of council obligate city for payment of his salary. Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600. And a taxpayer may bring an action to enjoin payment by board of aldermen of claim by such officer for his services. Id.

57. In an action by the superintendent against a county for such services, complaint alleging that such division embraced certain counties therein named is sufficient without alleging that such counties were all the counties in such division. Montezuma County Com'rs v. Wheeler, 39 Colo. 207, 89 P 50. Held in such action that superintendent was not entitled to interest on his claim. Id. Evidence held sufficient to establish liability of such county. Id.

58. Cross v. New York, 123 App. Div. 917, 107 NYS 942.

59. Deering v. New York, 107 NYS 934.

60. State v. Edwards [Utah] 93 P 720.

61. People v. Butler, 120 App. Div. 751, 105 NYS 631.

62. In an action by such employe to recover compensation during the time of his removal, such money as he has earned during the time in other employments may be deducted. Gutheil v. New York, 119 App. Div. 20, 103 NYS 972.

63. A laborer who from choice and without

police officer unjustly deprived of office must bring a suit at law to recover arrears of salary to which he is justly entitled.[64] The disbursing officer is required to account to the government for allowances made to officers in excess of their prescribed salary.[65] An act providing that the salaries of county officers shall be fixed under a rule based on population does not fail of uniform operation throughout the state.[66]

OFFICIAL BONDS; OPENING AND CLOSING; OPENING JUDGMENTS; OPINIONS OF COURT; OPTIONS; ORDER OF PROOF; ORDERS FOR PAYMENT; ORDERS OF COURT; ORDINANCES; OYSTERS AND CLAMS, see latest topical index.

PARDONS AND PAROLS.[67]

There can be a pardon only after conviction,[68] but the power to pardon exists after conviction and pending appeal.[69] The pardoning power granted to the governor by constitution is not exclusive;[70] amnesty laws in no way conflict with such provisions.[71] A statute prohibiting the court from fixing or limiting the duration of a sentence is constitutional.[72] A constitution empowering the governor to grant pardons, after convictions, for all "offenses," does not authorize him to release one imprisoned for failure to perform a civil obligation required by order of court.[73]

A pardon is a mere act of grace to which may be attached any condition not illegal, immoral, or impossible of performance,[74] and an acceptance of the pardon binds the prisoner to the conditions therein imposed.[75] A violation of a conditional pardon renders the same null and void and the convict liable to reimprisonment,[76] on determination of the fact of violation in the manner prescribed by the pardon itself,[77] or fixed by the pardoning power.[78] Detention of a prisoner reimprisoned on breach of parol beyond the expiration of the original sentence for the period which he has spent on parol is illegal where the parol is unauthorized by law.[79]

The effect of a pardon pending an appeal is to absolve the prisoner from all

appointment performs duties of foreman but continues to receive laborer's wages without complaint, except to say that he should have more, waives his right to salary of a foreman. Farrell v. Buffalo, 118 App. Div. 597, 103 NYS 340.

64. Lattime v. Hunt [Mass.] 81 NE 1001.

65. Allowance made to Indian commissioners in excess of salary prescribed by contract. United States v. Hoyt, 158 F 162.

66. Theobald v. State, 10 Ohio C. C. (N. S.) 175.

67. See 8 C. L. 1224.

68. Ex parte Campion [Neb.] 112 NW 585. The verdict of a jury is not such a conviction as is subject to pardon under the constitution. Id.

69. Cole v. State [Ark.] 106 SW 673.

70. State v. Bouman [N. C.] 59 SE 74.

71. State v. Bouman [N. C.] 59 SE 74. Where the statute provides that no person shall be excused from testifying in regard to a crime on the ground that his testimony might tend to incriminate him, and that he shall be fully pardoned of any crime concerning which he is required to testify, he is entitled to immunity from prosecution for such crime regardless of whether his testimony was incriminating or not. Id.

72. This is not an unlawful invasion of judicial or executive power. People v. Warden of City Prison, 105 NYS 551. The effect of such a statute is that the prisoners may be retained for the maximum period prescribed or released at the discretion of the prison authorities, it is not different in principle from a statute which requires the imposition of a maximum and minimum sentence. People v. Madden, 120 App. Div. 338, 105 NYS 554.

73. Ex parte Campion [Neb.] 112 NW 585. Bastardy is not a crime or an "offense" and the obligation imposed on conviction thereof is only civil. Id.

74, 75. Ex parte Houghton [Or.] 89 P 801.

76. Ex parte Houghton [Or.] 89 P 801; Spencer v. Kees [Wash.] 91 P 963.

77. Where the pardon provides upon its face that the governor may summarily determine whether its conditions have been violated and if he finds they have may revoke the pardon, such stipulation is valid and the convict is not entitled to a hearing on the question of breach of condition. Ex Parte Houghton [Or.] 89 P 801.

78. Where there are no provisions for determining where conditional pardons have been violated, the power to grant such a pardon carries with it power to determine when its conditions have been broken. Spencer v. Kees [Wash.] 91 P 963. However, it is not error to have and determine this question on an application of habeas corpus, and to place the burden of proof upon the state. Id. Sufficiency of evidence of violation of conditions. Id.

79. Scott v. Chichester [Va.] 60 SE 95.

fines and punishment but leaves in force the judgment for costs of both courts, which, however, may be collected by civil suit only.[80]

An application for a rehearing before a pardon board must set forth relator's case.[81] The discharge of a prisoner by the warden of the penitentiary and the restoration to citizenship by the certificate of the governor, are ministerial acts and, to be effective, must be in compliance with law.[82]

PARENT AND CHILD.

§ 1. Custody and Control of Child. 1072.
§ 2. Support and Necessaries, 1074.
§ 3. Services, Earnings and Injuries to Child, 1075.
§ 4. Property Rights and Dealings Between Parent and Child, 1078.
§ 5. Liability for Child's Torts, 1078.

The scope of this topic is noted below.[83]

§ 1. *Custody and control of child.* See 8 C. L. 1225—The parents,[84] the mother of an illegitimate child,[85] and, by statute, the adopter of a child by a deed of adoption, are the natural guardians,[86] the father if alive, the mother if he is dead, ordinarily having the primary right.[87] The death or disqualification of either parent devolves the guardianship upon the other.[88] This right of guardianship is not an absolute and uncontrollable one [89] but subject to judicial power in the interest of the happiness and well-being of the child.[90] Guardianship may be transferred to another by the consent of the parents if living in the manner provided by law.[91] It may be surrendered by voluntary abandonment of offspring,[92] and forfeited by such misconduct as renders them unfit guardians for the morals of the child.[93] In the latter case the general

80. Cole v. State [Ark.] 106 SW 673.

81. State v. Mehojovick, 119 La. 791, 44 S 481. It is not the mandatory duty of the board to set a day for hearing relator's witnesses upon filing of the application. Id.

82. Rev. St. § 7388-8. In re Application of Ballus, 8 Ohio C. C. (N. S.) 454.

83. **It includes** all rights of liabilities growing generally out of the relation. **It excludes** parentage by adoption (see Adoption of Children, 9 C. L. 34), rights and liabilities of parents of illegitimate children (see Bastards, 9 C. L. 383), presumptions of fraud and undue influence growing out of the relationship (see Fraud and Undue Influence, 9 C. L. 1475; Fraudulent Conveyances, 9 C. L. 1508), rights and liabilities of infants generally (see Infants, 10 C. L. 238), rights of inheritance (see Descent and Distribution, 9 C. L. 970), and rights in respect to testamentary disposition (see Wills, 8 C. L. 2305). **Custody** is treated slightly in this topic, but more fully in Infants, 10 C. L. 238, and as to procedure on habeas corpus to determine custody, the topic Habeas Corpus (and Replegiando), 9 C. L. 1559, should be consulted. Award of custody on grant of divorce is specifically treated in the topic Divorce, 9 C. L. 997.

84. Purinton v. Jamrock [Mass.] 80 NE 802. Section 5376, Cobbey's Ann. St. 1903. In re Wright [Neb.] 112 NW 311.

85. Mother of illegitimate child has all rights of other parents. Purinton v. Jamrock [Mass.] 80 NE 802. Entitled to custody of illegitimate child under Civil Code 1895, § 2509. Moore v. Dozier, 128 Ga. 90, 57 SE 110.

86. Rev. St. 1899, § 5248 (Ann. St. 1906, p. 2728), gives adopted child same rights for support and proper treatment as any child has by law. State v. Koonse, 123 Mo. App. 655, 101 SW 139.

87. Civil Code 1895, §§ 2502, 2503. Moore v. Dozier, 128 Ga. 90, 57 SE 110.

88. Under § 5376, Cobbey's Ann. St. 1903, where mother is dead, devolves on father. In re Wright [Neb.] 112 NW 311.

89. Parent's right is in nature of trust subject to duty to care for and protect child. Purinton v. Jamrock [Mass.] 80 NE 802.

90. Purinton v. Jamrock [Mass.] 80 NE 802. Parents have no inherent right of property in minor child of which they cannot be deprived without consent. Law secures their right only so long as they discharge their obligation. Id.

91. No consent where father ceased to assist in support of child after its removal to home of persons now claiming on their expressed desire to clothe and school for its company, they promising return of child when wanted. In re Wright [Neb.] 112 NW 311.

92. No abandonment where father contributed to support in accordance with his means, until taken into home of another agreeing to surrender when wanted. In re Wright [Neb.] 112 NW 311. Rev. Laws, c. 154, § 3, authorizing adoption of children without parent's consent, where suffered to be supported as paupers, constitutional. Purinton v. Jamrock [Mass.] 80 NE 802.

93. Where mother made no defense to action depriving her of custody on charges of neglect and vice. Purinton v. Jamrock [Mass.] 80 NE 802. Court will not remove infant who has been placed by parents with wet nurse of immoral character and put in possession of stranger who has no legal right, but is prompted alone by motives of humanity to ask for its possession, child

reputation of the place and persons dwelling where the child is being reared is admissible in evidence,[94] but opinion evidence as to the fitness of the parent to rear her child is inadmissible.[95] Except in extreme cases, poverty alone furnishes no reason for depriving a parent of her children,[96] and the fact of poverty cannot be proved by mere hearsay.[97] A reformation or change of circumstances may render it proper to restore children to parents' custody.[98]

In determining controversies over the possession of a child, the court is clothed with a sound discretion.[99] In the exercise of this discretion while the relation of parent and child should not be lightly disregarded,[1] the best interest of the child is the supreme consideration.[2] Where the child is possessed of sufficient judgment to express and manifest a desire to remain where it is, that fact should be considered by the court.[3]

In New Jersey where the custody of children is sought, the statute authorizes the filing of a petition for habeas corpus,[4] expressly permits the granting of the writ where advisable in the discretion of the court,[5] and also provides for modifications and changes in the court's orders from time to time where necessary.[6]

The law accords to parents a wide latitude in which to exercise discretion in the enforcement of family discipline.[7] The necessity of the punishment,[8] its extent and nature, are matters within their discretion,[9] so long as they act in good faith for the benefit of the child.[10] A parent guilty of excessive and unreasonable punishment of his child is punishable for assault under the statute.[11]

being so young that no neglect or disregard for child's best interest appears. Brown v. Robertson, 76 S. C. 151, 56 SE 786. By resort to life of vice or debauchery. In re Wright [Neb.] 112 NW 311. Civil Code 1895, § 2505, provides for taking into custody child under twelve years being reared under immoral, obscene, or indecent influences. Moore v. Dozier, 128 Ga. 90, 57 SE 110. Civil Code of 1895, § 2505, provided for committing children to a home where being reared under improper influences, not repealed by act of 1894, p. 93. Id.

94, 95. Moore v. Dozier, 128 Ga. 90, 57 SE 110.

96. No reason where mother though poor resides with and works for her father. Moore v. Dozier, 128 Ga. 90, 57 SE 110.

97. Reputation or hearsay as to parent's ability to rear children inadmissible. Moore v. Dozier, 128 Ga. 90, 57 SE 110.

98. Conversion to church and reformation from immoral ways. Moore v. Dozier, 128 Ga. 90, 57 SE 110.

99. Refused where mother unable to suitably support child and child preferred to remain where she was. Harrist v. Harrist [Ala.] 43 S 962. Presiding judge vested with broad discretion. Moore v. Dozier, 128 Ga. 90, 57 SE 110.

1. Where mother of illegitimate children alleging conversion and reformation seeks custody. Moore v. Dozier, 128 Ga. 90, 57 SE 110. His prayer should in ordinary cases be granted if he is reasonably suited and able to maintain and rear the child. Harrist v. Harrist [Ala.] 43 S 962. Evidence insufficient to show mother not proper person for children's custody. Francisco v. Francisco [N. J. Eq.] 67 A 687. Custody of child will be given to parent of high character, affection for child and ability to care for it, in preference to others in better pecuniary circumstances. Carter v. Botts [Kan.] 93 P 584.

2. Whether mother is immoral and improper person to rear children is for court. Moore v. Dozier, 128 Ga. 90, 57 SE 110. Where mother unable to suitably rear. Harrist v. Harrist [Ala.] 43 S 962. Welfare of child is primary though not always controlling consideration. Id.; Carter v. Botts [Kan.] 93 P 584.

3. Harrist v. Harrist [Ala.] 43 S 962. Desires of children of fourteen, eleven, and nine years, who were intelligent, should be heard. Francisco v. Francisco [N. J. Eq.] 67 A 687.

4. Act 1902, § 8, respecting minors. P. L. p. 263. Dixon v. Dixon [N. J. Eq.] 66 A 597.

5. Act 1902, § 12, respecting minors. Dixon v. Dixon [N. J. Eq.] 66 A 597.

6. Any order made is in nature of things temporary and open to modification. Dixon v. Dixon [N. J. Eq.] 66 A 597. Jurisdiction to modify not lost where wife removes from state where she is personally served. Id.

7, 8, 9. State v. Koonse, 123 Mo. App. 655, 101 SW 139.

10. State v. Koonse, 123 Mo. App. 655, 101 SW 139. Where punishment inflicted is so excessive and cruel as to show beyond reasonable doubt that parent was not acting in good faith for benefit of child, but to satisfy his own evil passion, he is no longer to be considered as judge administering law of household but as malefactor guilty of unlawful assault on helpless person intrusted to his care and protection. Id. Not bona fide for benefit of child where adopted father forces child to run barefooted over rocky road for four miles and whips with blacksnake. Id.

11. Prosecution for excessive punishment of adopted child properly brought under Rev. St. 1899, § 1850 (Ann. St. 1906, p. 1280),

The parent's religion is prima facie the infant's religion,[12] but the first and paramount duty is to consult the welfare of the child.[13]

§ 2. *Support and necessaries.*[See 8 C. L. 1229]—A parent is bound to provide for the support of his children,[14] including necessary medical and hospital attendance furnished at the instance of himself or his duly authorized agent.[15] A father cannot relieve himself of this obligation by agreeing with his wife for a separation and giving her custody of the child,[16] or by obtaining a divorce, leaving the wife the custody of child,[17] nor does the fact that the wife has removed from the state, taken the child with her,[18] obtained a divorce [19] and remarried, relieve him of liability.[20]

It is no defense to an action for failure to provide for its support that his child is an alien living in a foreign country,[21] or that no demand was made upon the parent for such support.[22]

Abandonment of a child either before [23] or after birth is generally punishable by statute,[24] where it can be shown that the child is in a destitute and dependent condition.[25] In such a case the instructions need not specifically call attention to the fact that the child is within the statutory age limit where no question as to the age has arisen.[26] It is no defense for prosecution for abandonment of a child [27] that the mother has deserted the father,[28] or been guilty of the greatest immorality or unwifely conduct,[29] but that others are providing for the child's support is a defense.[30]

The court having jurisdiction over the place where the parent resides when the failure to support occurs may take jurisdiction of the offense.[31] Since the duty to support runs to the children, they are proper parties plaintiff when within the statu-

and not under § 1857, which applies to master and apprentice. State v. Koonse, 123 Mo. App. 655, 101 SW 139.

12. Where nothing to put in balance against them, parent's wishes ordinarily decisive. Purinton v. Jamrock [Mass.] 80 NE 802. Policy of commonwealth is to secure to its wards right to be brought up, where reasonably practicable, in religion of parents. St. 1905, p. 411, c. 464, § 1. Id.

13. Where child had been four years in family suitable to educate and have custody of her, child's welfare held reason to refuse mother's demand as to religious teaching. Purinton v. Jamrock [Mass.] 80 NE 802.

14. Under § 5723 (Ballinger's Ann. Code and St.), may appoint and require father to compensate divorced mother as guardian of children. Claiborne v. Claiborne [Wash.] 91 P 763.

15. Where wife acted as agent and gave consent to removal to hospital and performance of operation. Howell v. Blesh [Okl.] 91 P 893. Where necessary medical services are rendered for child at instance of father and on his credit, no subsequent recovery can be had against estate of child acquired subsequent to rendering services, although father was insolvent. Gaston v. Thompson, 129 Ga. 754, 59 SE 799.

16, 17, 18. Maxwell v. Boyd, 123 Mo. App. 334, 100 SW 540.

19. Alvey v. Hartwig [Md.] 67 A 132; Maxwell v. Boyd, 123 Mo. App. 334, 100 SW 540. Divorce giving custody of child to wife does not divest son of right to sue for loss of care and support of father caused by his wrongful death. Sipple v. Laclede Gaslight Co., 125 Mo. App. 81, 102 SW 608.

20. Where father contracted to pay mother fixed annual sum for care of child. Maxwell v. Boyd, 123 Mo. App. 334, 100 SW 540.

21. Chapter 501, p. 679, St 1906, where father was domiciled in Massachusetts and child in Nova Scotia. Commonwealth v. Acker [Mass.] 83 NE 312.

22. Under §§ 3140-2 Rev. St. 1906, in prosecution for failure to support illegitimate child, instruction requiring demand erroneous. State v. Teal [Ohio] 83 NE 304.

23. Penal Code 1895, § 114. Moore v. State, 1 Ga. App. 502, 57 SE 1016. Although father never claimed, recognized, or acknowledged fatherhood, never lived with mother, contributed to her support, and brought suit for divorce before birth of child. Jackson v. State, 1 Ga. App. 723, 58 SE 272.

24. Person other than parents to whom child has been given for purpose of exposing and wholly abandoning is one to whom child has been "intrusted and confided" within meaning of Code, § 4766, prohibiting such acts. State v. Sparegrove, 134 Iowa, 599, 112 NW 83.

25. Evidence held sufficient to support finding of abandonment. Jackson v. State, 1 Ga. App. 723, 58 SE 272.

26. Where but one finding could have been made as to age and that adverse to appellant. State v. Sparegrove, 134 Iowa, 599, 112 NW 83.

27. Under Penal Code 1895, § 114. Moore v. State, 1 Ga. App. 502, 57 SE 1016.

28. Child not responsible for conduct of wife where mother refuses to let father provide home for her. Moore v. State, 1 Ga. App. 502, 57 SE 1016.

29. Moore v. State, 1 Ga. App. 502, 57 SE 1016.

30. Jackson v. State, 1 Ga. App. 723, 58 SE 272.

31. Massachusetts court will take jurisdiction where father resides in Massachusetts and child in Nova Scotia. Commonwealth v. Acker [Mass.] 83 NE 312.

tory provisions entitling them to such support.[32] Where such a statute provides for no procedure for its enforcement, it is enforcible by a suit in equity.[33] In such a suit the court has power to make preliminary orders requiring the parents to pay suit money, counsel fees, and maintenance pendente lite,[34] and the court may also reserve the power to alter the decree as the subsequent change in the circumstances of the parties may require.[35] Evidence that one in whose custody the child is, but who is not bound to support child, is able to do so, is immaterial in a suit against the father for abandonment.[36]

In Maryland, as to third persons and as between husband and wife, the father's responsibility to support his children is primary and the mother's secondary,[37] and the mother can compel the father to provide for his children to the relief of herself.[38]

The affection and sense of duty of a child towards an aged and dependent parent is a good consideration to support a contract making provision for her support.[39] Contracts between separating husband and wife for the support of the child will be sustained only when to the child's interest.[40]

§ 3. *Services, earnings, and injuries to child.* See 8 C. L. 1231—The parent's right to the services and earnings of a minor child [41] is founded upon the theory of compensation to him for the child's maintenance.[42] A father suing upon an implied contract for the value of his minor son's services cannot recover the gross value thereof when the defendant has supported the minor while in his employ, but only what the services were reasonably worth when employed and supported by the defendant.[43] Presumptively the right to the wages of a deceased child belongs to the father and not to the administrator,[44] and recovery by the administrator is no bar to recovery by the parent.[45] Failure to give the statutory notice of claim [46] or an express or an implied relinquishment of claim are defenses to the parent's right to recover for the services of the minor.[47] The fact that a father has relinquished his claims to the son's wages may be established by direct evidence or implied from the circumstances.[48]

32. Under § 206, Civil Code, in suit brought by adult blind child. Paxton v. Paxton, 150 Cal. 667, 89 P 1083.

33, 34, 35. Paxton v. Paxton, 150 Cal. 667, 89 P 1083.

36. Evidence that grandmother was able to support immaterial. Jackson v. State, 1 Ga. App. 723, 58 SE 272.

37. Fact that wife obtained divorce no defense where defendant was served by publication and decree was silent as to maintenance of children. Alvey v. Hartwig [Md.] 67 A 132.

38. Alvey v. Hartwig [Md.] 67 A 132.

39. Under Civil Code 1895, § 3658, contract by children to mutually pay for mother's support. Worth v. Daniel, 1 Ga. App. 15, 57 SE 898.

40. Not enforced where father intended to place child in home of aged father and mother in poor health. Carpenter v. Carpenter, 149 Mich. 138, 14 Det. Leg. N. 366, 112 NW 748. That portion of contract of separation which binds father to pay $50 annually to mother enforced, regardless of invalidity of contract of separation. Maxwell v. Boyd, 123 Mo. App. 334, 100 SW 540.

41. Woodward Iron Co. v. Curl [Ala.] 44 S 974; Doyle v. Carney, 190 N. Y. 386, 33 NE 37; Culberson v. Alabama Const. Co., 127 Ga. 599, 56 SE 765; Purinton v. Jamrock [Mass.] 80 NE 802. Where mother made definite contract of hiring of services of bastard. Sapp v. Parrish [Ga. App.] 59 SE 821. Mother entitled to earnings during minority. Tuite v. Tuite [N. J. Eq.] 66 A 1090. Father entitled to earnings of minor children. Jackson v. Citizens' Bk. & Trust Co., 53 Ala. 265, 44 S 516.

42. Doyle v. Carney, 190 N. Y. 386, 83 NE 37.

43. Charge that father is entitled to proceeds of labor reduced by the necessary expenses of maintenance not error. Culberson v. Alabama Const. Co., 127 Ga. 599, 56 SE 765.

44. Where father sues as administrator, he cannot amend complaint so as to sue individually, under § 723, code of civil procedure, as amendment brings in another party. Doyle v. Carney, 190 N. Y. 386, 83 NE 37.

45. Even where parent recovers as administrator. Doyle v. Carney, 190 N. Y. 386, 83 NE 37.

46. Domestic Relations Law, § 42. Doyle v. Carney, 190 N. Y. 386, 83 NE 37.

47. Doyle v. Carney, 190 N. Y. 386, 83 NE 37.

48. Instruction that father may relinquish the right to son's earnings by his conduct not erroneous. Jackson v. Citizens' Bk. & Trust Co., 53 Fla. 265, 44 S 516. Failure to forbid employment or demand payment for

The general rule is that parents may recover damages for any interference with their rights by a wrongdoer [49] and for wrongfully causing the death of the child.[50] One employing a minor child without the parent's consent, in a dangerous place or upon dangerous work, is liable to the parent for any injury suffered by the minor as a result of being placed at the work,[51] but consent of the parent to the employment of the minor at the particular work [52] or in violation of the law bars the right to recover [53] in the absence of notice of revocation of the consent.[54] Contributory negligence of the child [55] or parents,[56] or want of ordinary care, also bars the right to recover.[57] But, in order for the father's negligence to be a defense, it must be at least a concurring proximate cause.[58]

The right of the parent to maintain an action depends in every case upon the incurring of some direct pecuniary injury therefrom,[59] in consequence of loss of services [60] or expense necessarily consequent thereon,[61] and the recovery is limited to the actual loss of services resulting from the injury,[62] excluding, however, recovery for mental pain and suffering.[63]

But, on the other hand, a minor cannot sue his parent for a tort [64] unless he has been emancipated.[65]

The father holds the amount recovered for injuries to a minor child in trust for him.[66] While settlements of suits brought by a parent under the statute for injury

services, when father knows of employment, may constitute implied assent to child receiving own wages. Culberson v. Alabama Const. Co., 127 Ga. 599, 56 SE 765.

49. Purington v. Jamrock [Mass.] 80 NE 802.

50. Shannon's Code, § 4025-4028. St. Louis, etc., R. Co. v. Leazer [Tenn.] 107 SW 684.

51. Count alleging, only, that minor was employed without consent of father, insufficient in absence of averment of placing in danger, etc. Woodward Iron Co. v. Curl [Ala.] 44 S 974. Since it is not the mere employment that gives rise to the liability, a charge, that, if son was minor employed without father's consent, not necessary to find that father objected to employment because of dangerous character but might recover if minor was injured as proximate result of employment, erroneous. Id. Instruction failing to hypothesize that son was employed by defendant, and ignoring dangerous character of the work, erroneous. Id.

52. Fact that father visited son at work, although not consenting to original employment, and said nothing by way of objection, and received or let son receive wages, until after injury, shows consent. Louisville, etc., R. Co. v. Davis [Ky.] 105 SW 455. Written consent bars right to recover. Woodward Iron Co. v. Curl [Ala.] 44 S 974.

53. Father permitting child under ten to work in violation of Gen. Acts 1903, p. 68, child being injured at work. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702.

54. Mere letter to son that father wanted him to come with him and get better job without specifying any time, insufficient. Woodward Iron Co. v. Curl [Ala.] 44 S 974. Laying off one week, no such quitting employment as calls for new consent. Id.

55. Where infant, though told to keep off, climbed upon wagon crossing tracks and was killed by train demolishing wagon. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

56. Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 SW 109.

57. Contributory negligence, and want of ordinary care, bars. Vanderveer v. Moran [Neb.] 112 NW 581.

58. Not proximate cause for father to permit child to work at dangerous employment where defendant fails to instruct child as to danger. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702.

59. Sorrells v. Matthews, 129 Ga. 319, 58 SE 819. Cannot maintain action to recover damage for expulsion of children from school. Id.

60. Sorrells v. Matthews, 129 Ga. 319, 58 SE 819.

61. Civil Code 1895, § 3816, merely declaratory of common law. Sorrells v. Matthews, 129 Ga. 319, 58 SE 819. Father entitled to recover expenditures caused by injury to son, such as physician's bills, board, etc. Brinkman v. St. Landry Cotton Oil Co., 118 La. 835, 43 S 458.

62. St. Lous, etc., R. Co. v. Leazer [Tenn.] 107 SW 684. Entitled to recover only amounts necessarily and reasonably expended in treatment and care of child. Woodward Iron Co. v. Curl [Ala.] 44 S 974. Error to allow proof of father's railroad fare in going to son. Id. Damages, not amount of wages lost by father but value of services while nursing. Id. May recover only compensatory damages. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702; Brinkman v. St. Landry Cotton Oil Co., 118 La. 835, 43 S 458.

63. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702.

64. Taubert v. Taubert [Minn.] 114 NW 763. Disability of minor to maintain action for tort against parent arises from family relation. Id.

65. Taubert v. Taubert [Minn.] 114 NW 763.

66. Picciano v. Duluth, etc., R. Co., 102 Minn. 21, 112 NW 885.

to a minor child are not necessarily void, although not confirmed by the court,[67] the court will set aside a settlement of the claim and an order for dismissal entered without adequate knowledge or investigation of the facts, where there is a good cause therefor.[68] A release by the parents is no bar to a recovery by the child for injuries.[69] The bringing of suit for injury [70] or death of minor is generally governed by statute.[71] Where the statute reserves the right to sue to the legitimate father and mother,[72] the child must be legitimate or legitimated in the manner prescribed by statute in order for the parents to stand in judgment.[73] Under the employer's liability act, the father cannot recover for loss of services or expenses.[74] The statute giving the right only to the employe, his legal representatives, and in case of death to the widow or next of kin.[75] Failure to join mother in suit by father for death of child may be cured by amendment after trial and verdict,[76] even though the period of limitations has run against her right.[77] It is not necessary to aver in the complaint that the child was a member of the family,[78] but the fact that the employment was not with father's consent or knowledge must be pleaded.[79] A parent suing for a loss of services resulting from an injury to a minor child need only prove the fair value of the services,[80] and need not prove that he could or would have earned the same.[81] The defendant in such a suit may show recovery had by plaintiff in a former suit as the minor's next friend.[82]

Emancipation. See 8 C. L. 1232—Emancipation of a minor child entitles him thereafter to his own earnings.[83] To constitute an emancipation, there must be both a waiver of the minor's services [84] and a surrender of parental control over him.[85] Parental control over a minor son is lost by voluntary contract, releasing the right to a third person by consent to the adoption of the child by a third person, by failure

67. Suit brought under Rev. St. 1905, § 4060. Picciano v. Duluth, etc., R. Co., 102 Minn. 21, 112 NW 885.

68. Where father settles without consultation with or advice of counsel, against wishes of mother and child injured, and makes way with proceeds of settlement. Picciano v. Duluth, etc., R. Co., 102 Minn. 21, 112 NW 885.

69. For negligent injury at childbirth by physician. Kirk v. Middlebrook, 201 Mo. 245, 100 SW 450.

70. Under Shannon's Code, § 4503, suit to recover damages for loss of services of minor child can only be brought by father or, in case of his death or desertion of his family, by his mother, and no recovery can be had by administratrix. St. Louis, etc., R. Co. v. Leazer [Tenn.] 107 SW 684.

71. Suit for wrongful death will not lie under Shannon's Code, § 4503. St. Louis, etc., R. Co. v. Leazer [Tenn.] 107 SW 684. In suit to recover for injuries to deceased, and pecuniary value of life for next of kin, brought under §§ 4025-4028 by mother as administratrix, it is error to permit amendment introducing claim as mother for loss of services, under § 4503. Id.

72. Civil Code, § 198. Landry v. American Creosote Works, 119 La. 231, 43 S 1016.

73. Mere acknowledgment that child was offspring insufficient to legitimate, under Rev. Civil Code, § 220. Landry v. American Creosote Works, 119 La. 231, 43 S 1016.

74. Enlargement of rights, under Rev. Laws, c. 106, §§ 71-73, does not extend to father suing in own right. Jordan v. New England Structural Co. [Mass.] 83 NE 332.

75. Rev Laws 1906, c 106, §§ 71-73. Jordan v. New England Structural Co. [Mass.] 83 NE 332.

76. Act of April 26, 1855, P. L. 309. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

77. Where father sues alone, amendment including mother may be made, although period of limitation has run since bringing suit, but before amendment making her party. Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 SW 109.

78. Where statute gives father right to sue for injuries to minor child when member of family, law will presume in absence of proof to contrary that minor child is member of family. Woodward Iron Co. v. Curl [Ala.] 44 S 974.

79. In suit to recover for injuries to child under ten years old employed in violation of Gen. Acts 1903, p. 68 failure to deny employment with consent and knowledge of father fatal. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702.

80. Vanderveer v. Moran [Neb.] 112 NW 581.

81. Need not prove that he had contract for or could have actually secured employment. Vanderveer v. Moran [Neb.] 112 NW 581.

82. Reaves v. Anniston Knitting Mills [Ala.] 45 S 702.

83. Vanatta v. Carr, 229 Ill. 47, 82 NE 267.

84. Taubert v. Taubert [Minn.] 114 NW 763.

85. Mere waiver of wages of minor alone insufficient. Taubert v. Taubert [Minn.] 114 NW 763.

to provide necessaries for the child or abandonmnet of his family, by consent to the child's securing the proceeds of his own labor (revocable at any time), by cruel treatment of the child, and by consent to the marriage of the minor.[86] The fact of emancipation need not by proclaimed openly and notoriously [87] nor need the son cease to be a member of the family.[88] It may be proved by oral, written or circumstantial evidence or it may be implied.[89] After emancipation, the claim of the child for wages subsequently accruing can in no legal sense be said to be derived from, through, or under his father by assignment or otherwise.[90] In West Virginia, an agreement between a father and his infant child that the latter may have his earnings is irrevocable.[91]

§ 4. *Property rights and dealings between parent and child.* See 8 C. L. 1233—The relation of parent and child, where business relations are carried on between them, is the source of the very highest considerations of trust and confidence,[92] and where the child, dealing with his parent with regard to the latter's property, gains an advantage or obtains title to property without adequate or any consideration the transaction should be scanned with strictest scrutiny.[93] However, as there is no presumption of the invalidity of a voluntary gift,[94] the burden is not on the donee or grantee [95] but on parent to show undue influence,[96] unless there is evidence of undue influence or circumstances that give rise to a suspicion.[97] A deed from parent to child in consideration of love and affection,[98] or better support of the grantee as recited therein, is not invalid or fraudulent.[99] The fact that the children have an interest with the mother in a business descending from the father, and that they are employed by the mother therein after the father's death, gives rise to no presumption of partnership between them and the mother.[1]

§ 5. *Liability for child's torts.* See 8 C. L. 1233—One is not liable for the tort of an infant solely upon the ground that he is his father,[2] but liability arises from the

86. Civil Code 1895, § 2502. Culberson v. Alabama Const. Co., 127 Ga. 599, 56 SE 765. Marriage of minor son emancipates him. Vanatta v. Carr. 229 Ill. 47, 82 NE 267.

87, 88. Jackson v. Citizens' Bank & Trust Co., 53 Fla. 265, 44 S 516.

89. Emancipation held established by father testifying that he told minor's employer that he would not demand nor expect to receive pay for daughter's services. Weese v. Yokum [W. Va.] 59 SE 514. May be implied. Jackson v. Citizens' Bank. & Trust Co., 53 Fla. 265, 44 S 516.

90. Hence, father not incompetent under Code 1899, § 23, c. 130, to testify in child's behalf to show emancipation and right to wages Weese v. Yokum [W. Va.] 59 SE 514.

91. Weese v. Yokum [W. Va.] 59 SE 514.

92. Nobles v. Hutton [Cal. App.] 93 P 289.

93. Where son holding power of attorney and position as mother's agent secures title to property for no consideration. Becker v. Schwerdtle [Cal. App.] 92 P 398.

94. Assignment of note shortly before death where no confidential relation or evidence of undue influence. Vaughn v. Vaughn, 217 Pa. 496, 66 A 745. Mere fact conveyance is from parent to child does not render presumptively invalid. Becker v. Schwerdtle [Cal. App.] 92 P 398. No presumption as to deeds executed five years before death when free from all restraint. Dolberry v. Dolberry [Ala.] 44 S 1018. Where grantee was only heir except grandson and deed was made before officer at instance of grantor after the discussion with neighbors. Sanders v. Gurley [Ala.] 44 S 1022. Voluntary deed from mother to son, though stripping her of all her property, will not be set aside because honorable man would not have accepted it. Becker v. Schwerdtle [Cal. App.] 92 P 398.

95. Vaughn v. Vaughn, 217 Pa. 496, 66 A 745. Where conveyed to only child by mother enfeebled but of unclouded intellect. Becker v. Schwerdtle [Cal. App.] 92 P 398.

96. Parent presumed to be dominant party. Sanders v. Gurley [Ala.] 44 S 1022.

97. Vaughn v. Vaughn, 217 Pa. 496, 66 A 745. Burden on son, where mother is aged and mentally infirm though not altogether incompetent. Nobles v. Hutton [Cal. App.] 93 P 289. Where other children are excluded from parent's estate without apparent reason. Becker v. Schwerdtle [Cal. App.] 92 P 398.

98, 99. Becker v. Schwerdtle [Cal. App.] 92 P 398.

1. Where wife collected all money, paid all bills, employed help, purchased real estate with proceeds, stood all losses of business, after death of husband, and eldest child was only sixteen. Tuite v. Tuite [N. J. Eq.] 66 A 1090.

2. Where son negligently drove motor car. Maher v. Benedict, 108 NYS 228.

relationship of master and servant and it must be determined at the time whether the act was authorized by the master [3] in execution of his orders [4] or in the doing of his work.[5]

PARKS AND PUBLIC GROUNDS.

The scope of this topic is noted below.[6]

*Acquisition and creation.*See 8 C. L. 1233—The enlargement of municipal powers in recent years with reference to the acquiring of land for parks permits the direct purchase as well as the appropriation of land outside the city limits for that purpose.[7] As in other cases, the intent of the landowner to dedicate property for parks must be proved beyond a reasonable doubt.[8] In Nebraska the taking of property for park purposes may precede the payment of compensation.[9] Though a charter defers payment for property condemned until thirty days after completion of proceedings, the landowner's right to compensation vests on such completion,[10] and the city has no power to rescind its action and divest that right,[11] nor is the right to compensation affected by city's failure to issue bonds, there being no charter prohibition of payment from general fund,[12] and a charter amendment requiring approval of a majority, instead of a majority of those present, of the board of appropriation and apportionment in the case of condemnation for park purposes, does not exclude the mayor, as ex officio chairman, from voting in case of tie, all the members being present.[13] An act authorizing the acquisition of parks does not necessarily exclude such acquisition under another statute,[14] and a provision that the question of assuming indebtedness for park purposes shall be submitted to the voters does not require a vote on each parcel, when several widely separated parcels of land are included in one scheme of park improvement.[15]

*The public title.*See 8 C. L. 1234—A city taking land for park purposes acquires the same easements as a private purchaser.[16] A municipality has no power or right to tax its parks for special benefits.[17]

*Rights of individuals in or to parks.*See 8 C. L. 1234

*Adverse possession, abandonment, and diversion; actions.*See 8 C. L. 1234—Though mere nonuser is insufficient, when coupled with adverse possession for a prescriptive

3. Liability cannot be cast on father because he permitted son to drive motor car whenever he wished. Maher v. Benedict, 108 NYS 228.

4. Maher v. Benedict 108 NYS 228.

5. Father not liable for minor son's negligent driving motor car, engaged in business of his own, without knowledge or consent of his father. Maher v. Benedict, 108 NYS 228.

6. **It includes** only matters relating peculiarly to parks and similar public grounds. **It excludes** public ways (see Highways and Streets, 9 C. L. 1588), dedication (see Dedication, 9 C. L., 939), and condemnation (see Eminent Domain, 9 C. L. 1073) of land for public use, and rights in and disposal of the public domain (see Public Lands, 8 C. L. 1486).

This article supplements in connection with those in 8 C. L. 1223, and 6 C. L. 885, **an exhaustive special article** in 4 C. L. 876.

7. City of Cleveland v. Painter, 6 Ohio N. P. (N. S.) 129.

8. Evidence of dedication by filing of plats describing public square held sufficient. Canton Co. of Baltimore v. Baltimore [Md.] 67 A 274.

9. Const. art. 1 § 21. Ch. 12a, § 101b, Comp. St. 1897. State v. Several Parcels of Land [Neb.] 113 NW 248.

10. Stamford City Charter, 14 Sp. Laws, p. 857. Bohannon v. Stamford [Conn.] 67 A 372.

11. Bohannon v. Stamford [Conn.] 67 A 372.

12. Sp. Laws, p. 858, authorizing bonds. Bohannon v. Stamford [Conn.] 67 A 372.

13. 14 Sp. Laws p. 858. Bohannon v. Stamford [Conn.] 67 A 372.

14. St. 1889, p. 361, c 284, no bar to acquisition of park property under St. 1901, p. 27 c. 32 authorizing public improvements, and Oakland City Charter, Act 3, § 31, St. 1889, p. 524, authorizing city to acquire parks. City of Oakland v. Thompson [Cal.] 91 P 387.

15. St. 1901 p. 27, c. 32. City of Oakland v. Thompson [Cal.] 91 P 387.

16. City entitled to compensation for its easement on condemnation of servient lands. In re Jerome Avenue in City of New York, 120 App. Div. 297, 105 NYS 319.

17. Failure to assess park for a proportion of the special benefits derived from a public improvement works no fraud upon private property owner so assessed. State v. Several Parcels of Land [Neb.] 113 NW 248.

period, it may extinguish an easement for park purposes.[18] Objection to the condemnation of public park property for railway purposes cannot be raised by private parties whose interests are not affected.[19] Property originally acquired for park purposes may, it has been held, be lost by disuse and subsequent declaration that it is unnecessary for such purpose.[20]

Park bonds.[See 6 C. L. 866]—Authority to incur bonded indebtedness for park purposes implies authority to make provision for payment of the same.[21]

Government, control, and officers of parks.[See 8 C. L. 1235]—A board of park commissioners, having the power to sue and be sued, is a mere agency of the city and its liabilities are the same as would be the city's liabilities if no such board existed.[22] An act conferring upon a board the authority over parks previously exercised by the city council is valid, as is a further provision that the council may elect whether the law shall be locally operative.[23] Park commissioners have no authority to permit the maintenance of a nuisance within territory subject to their jurisdiction.[24] An unconstitutional provision for tenure of office in an act creating a park board will not invalidate the whole act, and term of office will be as if not declared.[25] By weight of authority, power to levy taxes for park purposes may be vested in an appointive board,[26] but some states hold that such authority can only be exercised by a body elected by the person whose property is to be taxed.[27]

Injuries in parks.[See 8 C. L. 1236]—By weight of authority the management and control of public parks, supported by taxation, is an exclusively public function and municipal or other corporations exercising it are not liable for torts of servants [28] or of licensees if the thing licensed is not dangerous per se.[29]

PARLIAMENTARY LAW.[30]

Formalities and procedure in the passage of ordinances [31] and statutes [32] are elsewhere treated. A record showing only the number of affirmative votes is not fatally defective if it appears that the vote was in fact unanimous.[33]

PAROL EVIDENCE, see latest topical index.

18. Canton Co. of Baltimore v. Baltimore [Md.] 67 A 274.

19. Private owner of property condemned in the same action sought to overthrow the proceedings on ground of illegal taking of park. New York Cent., etc., R. Co. v. Yonkers, 103 NYS 252.

20. Cincinnati, etc., R. Co. v. Cincinnati. 6 Ohio N. P. (N. S.) 325.

21. Vallelly v. Grand Forks Park Com'rs of Park Dist. [N. D.] 111 NW 615.

22. Louisville Park Com'rs v. Prinz [Ky.] 105 SW 948.

23. Ch. 143, p. 256, Laws 1905. Vallelly v. Grand Forks Park Com'rs of Park Dist. [N. D.] 111 NW 615.

24. Encroachment on porch line within 350 feet of parkway. City of New York v. Rice, 56 Misc. 360, 107 NYS 641.

25. Chap. 115, p. 166, Laws 1907, providing six year term, violates Const. art. 15, § 2. Wulf v. Kansas City [Kan.] 94 P 207.

26. Chap. 115, p. 166, Laws 1907, held constitutional to that extent. Wulf v. Kansas City [Kan.] 94 P 207.

27. Ch. 143, p. 256, Laws 1905, authorizing tax levy by park board appointed by city council held unconstitutional. Vallelly v. Grand Forks Park Com'rs of Park Dist. [N. D.] 111 NW 615.

28. Louisville Park Com'rs v. Prinz [Ky.] 105 SW 948.

29. Jury found that spot selected for discharge of fireworks was not dangerous to passers on adjacent street. De Agramonte v. Mt. Vernon, 108 NYS 236.

30. See 8 C. L. 1236.

31. See Municipal Corporations, 10 C. L. 881.

32. See Statutes, 8 C. L. 1976.

33. Where the record discloses that at the meeting of the city council at which there were proceedings with reference to a street improvement and the assessment therefor certain members of council were present just prior to the taking of the vote, and docs not disclose that any of the members left the room before voting, and it is definitely stated that the particular resolution and ordinance was passed by a certain number of votes being "yeas," and the number of "yeas" is the same as the number of members previously recorded as present, there is a substantial record of compliance with the statutory provisions requiring the vote of the council for street improvements to be by "yeas" and "nays," although the court does not approve of the form of the record. McMaken v. Hayes, 10 Ohio C. C. (N. S.) 38.

PARTIES.

§ 1. Definition and Classes, 1081.
§ 2. Who May or Must Sue, 1081.
§ 3. Who May or Must Be Sued, 1082.
§ 4. Designating and Describing Parties, 1084.
§ 5. Additional and Substituted Parties, 1084.
§ 6. Objections to Capacity and Defects of Parties, 1087.

Scope of topic.—This topic is devoted to a general treatment of parties to civil actions [34] at common law [35] and under the codes. It excludes parties to particular actions [36] and proceedings,[37] parties as dependent upon the subject-matter of the action,[38] the relief sought,[39] or the relations of the parties.[40] It also excludes parties to actions by or against particular persons,[41] and parties as affecting jurisdiction [42] and venue.[43]

§ 1. *Definition and classes.* See 6 C. L. 888

§ 2. *Who may or must sue.* See 8 C. L. 1236—The real party in interest is ordinarily the proper party to bring an action,[44] and some interest, either general or special, is absolutely essential.[45] A constituent or cestui que trust may sue, making his representative or trustee a party defendant, when the latter refuses after reasonable demand to commence a suit or take a proceeding which it is his duty to institute for the benefit of the former.[46] An action in the court of claims will not be

34. As to parties to criminal prosecutions, see Indictment and Prosecution, 10 C. L. 57.

35. As to parties in equity, see Equity, 9 C. L. 1110. As to parties in admiralty, see Admiralty, 9 C. L. 29.

36. See Specific Performance, 8 C. L. 1946; Replevin, 8 C. L. 1732; Prohibition Writ of, 8 C. L. 1467; Partition, 8 C. L. 1246; Mandamus, 8 C. L. 810; Injunction, 10 C. L. 246; Forcible Entry and Unlawful Detainer, 9 C. L. 1371; Ejectment, 9 C. L. 1026; Divorce, 9 C. L. 997; Deceit, 9 C. L. 935; Creditors' Suit, 9 C. L. 849. See such titles as Accounting, Action For, 9 C. L. 17.

37. See Appeal and Review, 9 C. L. 108; Arbitration and Award, 9 C. L. 236; Attachment, 9 C. L. 282; Bankruptcy, 9 C. L. 343; Certiorari, 9 C. L. 542; Extradition, 9 C. L. 1347; Garnishment, 9 C. L. 1525; Habeas Corpus (and Replegiando), 9 C. L. 1559; Insolvency, 10 C. L. 1294; Interpleader, 10 C. L. 415; Licenses, 10 C. L. 622; Paupers, 8 C. L. 1324; Scire Facias, 8 C. L. 1870; Supplementary Proceedings, 8 C. L. 2046.

38. See such titles as Copyrights, 9 C. L. 730; Death by Wrongful Act, 9 C. L. 926; Libel and Slander, 10 C. L. 609; Negligence, 10 C. L. 922; Railroads, 8 C. L. 1590; Subscriptions, 8 C. L. 2044; Torts, 8 C. L. 1178.

39. See such titles as Elections, 9 C. L. 1041; Eminent Domain, 9 C. L. 1073; Liens, 10 C. L. 632; Mechanics' Lien, 10 C. L. 814; Nuisance, 10 C. L. 1031; Patents, 10 C. L. 1127; Receivers, 8 C. L. 1679; Reformation of Instruments, 8 C. L. 1708; Cancellation of Instruments, 9 C. L. 454; Restoring Instruments and Records, 8 C. L. 1742, Wills, 8 C. L. 2305.

40. See such titles as Carriers, 9 C. L. 455; Contracts, 9 C. L. 654; Foreclosure of Mortgages on Land, 9 C. L. 1378; Chattel Mortgages, 9 C. L. 560; Guardianship, 9 C. L. 1551; Insurance, 10 C. L. 335; Landlord and Tenant, 10 C. L. 571; Master and Servant, 10 C. L. 691; Trusts, 8 C. L. 2169.

41. See such titles as Associations and Societies, 9 C. L. 274; Corporations, 9 C. L. 733; Counties, 9 C. L. 827; Estates of Decedents, 9 C. L. 1154; Foreign Corporations, 9 C. L. 1395; Fraternal Mutual Benefit Associations, 9 C. L. 1449; Guardians Ad Litem and Next Friends, 9 C. L. 1549; Guardianship, 9 C. L. 1551; Husband and Wife, 10 C. L. 1; Infants, 10 C. L. 238; Insane Persons, 10 C. L. 287; Joint Adventurers, 10 C. L. 460; Joint Stock Companies, 10 C. L. 462; Municipal Corporations, 10 C. L. 881; Partnership, 10 C. L. 1100; Receivers, 8 C. L. 1679; Religious Societies, 8 C. L. 1718; Street Railways, 8 C. L. 2004; Taxes, 8 C. L. 2058; Tenants in Common and Joint Tenants, 8 C. L. 2114; Trusts, 8 C. L. 2109; States, 8 C. L. 1970; United States, 8 C. L. 2207.

42. See Appearance, 9 C. L. 232; Jurisdiction, 8 C. L. 579; Judgments, 8 C. L. 530; Process, 8 C. L. 1449; Removal of Causes, 8 C. L. 1722.

43. See Venue and Place of Trial, 8 C. L. 2236.

44. Littleton v. Burgess [Wyo.] 91 P 832. Must be by real party in interest. Code Civ. Proc. § 367. Simpson v. Miller [Cal. App.] 94 P 252; Ingram v. Cincinnati, etc., R. Co. [Ky.] 107 SW 239. An action ex delictu must be brought by the real party in interest, that is the party who has received the damage. Action for deceit not maintainable by agent of party damaged. Farmer v. Lynch [R. I.] 67 A 449. Suit against theatre manager for services rendered as fireman pursuant to appointment by mayor under ordinance held properly brought by person so appointed. Tannenbaum v. Rehm [Ala.] 44 S 532. Where payments were to be made to plaintiffs at a certain bank and there applied to a specified indebtedness of plaintiff, the bank is not the real party in interest. Nickel v. Hodgens, 35 Mont. 563, 90 P 757.

45. One cannot sue to recover property in which he has no interest, either general or special. Clark v. Anderson [Me.] 68 A 633.

46. Brun v. Mann [C. C. A.] 151 F 145.

defeated by the absence of the plaintiff's assignee as a nominal plaintiff.[47] One acting in one capacity cannot sue himself in another capacity.[48]

*Joinder of parties plaintiff.*See 8 C. L. 1238—Only the real parties in interest need ordinarily be joined,[49] and identity of interest is usually the test as to the propriety of a joinder under the codes and statutes as well as at common law,[50] and as a general rule the plaintiff must be the only person interested in the cause of action, otherwise there is a nonjoinder of parties plaintiff,[51] but the equity rule under which one of many persons with a common interest may sue for all to avoid multiplicity [52] has been perpetuated by some of the codes.[53] In Louisiana the code makes no provision as to joinder of parties, and the common law prevails as to joinder of plaintiffs.[54] At common law all the obligees in a joint contract must unite in an action for its breach.[55] The plaintiff may sometimes assert rights in different capacities.[56]

§ 3. *Who may or must be sued.*See 8 C. L. 1239—A defendant must have either individual or corporate entity.[57]

*Joinder of parties defendant.*See 8 C. L. 1249—There is a distinction between necessary and proper parties, and this distinction is recognized by the statutes,[58] and the joinder if proper as distinguished from necessary parties defendent is at the plaintiff's option, and the defendant cannot complain of their nonjoinder.[59] Even the nonjoinder of necessary parties does not affect the jurisdiction of the court as to those who are made parties.[60] Parties whose interests will not be affected are not necessary parties,[61] and it is improper to join parties against whom no relief is

47. Federal Mfg. & Printing Co. v. U. S., 41 Ct. Cl. 318.

48. Medlin v. Simpson, 144 N. C. 397, 57 SE 24.

49. Where husband and wife gave money to son-in-law, on condition that it was to be returned on demand when they needed it, and that if they died without demanding it the son-in-law should have it absolutely, the wife could sue alone to recover such money after the husband's death. Weltsch v. Straub, 74 Kan. 292, 86 P 148. Parties whose interests will not be affected by the decision are not necessary parties, and hence an agent of real party in interest not necessary party when his interests will not be affected and no relief is asked against him. Golden Cross Min. & Mill. Co. v. Free Gold Min. Co. [C. C. A.] 154 F 441. State and county need not be joined in suit on undertaking given in suit to enjoin prosecuting attorney from enforcing criminal statute. Littleton v. Burgess [Wyo.] 91 P 832.

50. Under Code Civ. Proc. § 381, two or more persons claiming any estate or interest in land under a common source of title may unite in an action against one claiming an adverse title therein for purpose of determining such claim. Gillespie v. Gouley [Cal.] 93 P 856.

51. Moppar v. Wiltchik, 56 Misc. 676, 107 NYS 594.

52. See Equity, 9 C. L. 1110.

53. Code Civ. Proc. § 448. Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152, 103 NYS 822. Four or more constitute **"many"** persons under this rule. Id. Held proper under Civ. Code Proc. § 25, to allow some if many beneficiaries of will living in many states to sue for enforcement of provisions of will. Crane v. Crane [Ky.] 105 SW 370. Life tenant and remainderman held entitled to join in action for injury to property. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266.

54. According to which joinder is to a large extent within court's discretion, guided by aim to avoid multiplicity on one hand, and on other to avoid allowing defendants without a common interest to be joined, or when joinder would embarrass defendants in their defense or cause delays or complications. Gill v. Lake Charles, 119 La. 17, 43 S 897.

55. Promise to pay a sum of money to two persons. Sandusky v. West Fork Oil & Natural Gas Co. [W. Va.] 59 SE 1082.

56. The fact that the plaintiffs sue as trustees and also as members of a church and in behalf of other members thereof does not present a case of misjoinder, notwithstanding they are perhaps asserting rights in two capacities. Munsel v. Boyd, 10 Ohio C. C. (N. S.) 121.

57. Action not maintainable against unincorporated "Relief Department" of railroad company must be against members individually or against railroad company. Nelson v. Atlantic Coast Line R. Co. Relief Department [N. C.] 60 SE 724.

58. Under Rev. St. 1899, §§ 3480, 3487, necessary parties are those interested adversely to plaintiff, while those whose presence is required merely for a complete determination of the controversy are, as a rule, only proper parties. Field v. Leiter [Wyo.] 90 P 378.

59. Starn v. Huffman [W. Va.] 59 SE 179.

60. Bauman v. Kuhn, 108 NYS 773.

61. Page Belting Co. v. Prince [N. H.] 67 A 401. Mortgagee not necessary party to action against purchaser for failing to pay mortgage as agreed, thereby causing mortgagee to apply to mortgage debt property of vendor held by mortgagee as security. Hurwitz v. Gross [Cal. App.] 91 P 109. Failure to join intermediary in title between

sought.[62] Conversely all persons interested in the subject-matter and necessarily affected by the judgment are necessary.[63] In the code states the joinder of parties defendant depends, as under the old equity practice, upon the question of unity of interest [64] or joint liability.[65] Persons jointly and severally liable may be sued either jointly or severally,[66] but a joint liability is essential to a joint action.[67] These rules, however, have been considerably modified by the codes and statutes,[68] and in this regard the lex fori controls.[69] The necessity of election as to which of several defendants the action will be continued has also been considerably modified by statute,[70] and the question of joinder of defendants is rendered of less importance than formerly by the statutes providing for judgment against one or more of several defendants and for the determination of the ultimate rights of the parties.[71] The cases are not in harmony as to the effect of statutes authorizing a recovery against one or more of several joint defendants.[72] Where the plaintiff has a single cause of action against several defendants, his right to join them is not affected by the fact that they have

plaintiff and defendant in suit for specific performance of contract of sale held cured by finding that intermediary was not connected with contract and never acquired independent title. Atkins v. Atkins [Mass.] 80 NE 806.

62. Demurrer should have been sustained in favor of defendant against whom no relief was sought. Giddens v. Alexander, 127 Ga. 734, 56 SE 1014.

63. A judgment creditor having valid lien on mortgaged premises is a necessary party to suit to foreclose. Wehrheim v. Smith, 226 Ill. 346, 80 NE 908. In partition suits, all parties having an interest in the land must be made parties. Total lack of parties in failing to include children of deceased heir. Abernathie v. Rich, 229 Ill. 412, 82 NE 308. Where parties not joined will be materially affected by a decree, no further proceedings should be had until the omission be cured. Where grantors in deeds sought to be canceled were omitted. Id.

64. Joinder of two insurance companies in suit to set aside a single appraisal of loss made by appraisers appointed by insured and by both companies jointly, held proper. Mayer v. Home Ins. Co., 108 NYS 711.

65. Where independent acts of different persons combine to produce single injury. Mayer v. Home Ins. Co., 108 NYS 711. Where city owned school building destroyed by fire, and district school directors controlled and managed it, it was improper to join city and school director in suit for damages due to destruction of school. City of Galena v. Galena Water Co., 229 Ill. 128, 82 NE 421. Persons committing independent torts against the same property of plaintiff cannot be joined. White v. Whitcomb, 13 Idaho, 490, 90 P 1080.

66. Joint tort feasors. Clement v. Crosby, 148 Mich. 293, 14 Det. Leg. N. 85, 111 NW 745; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469. Declaration in action for conspiracy and trespass held to sufficiently declare against defendants as joint tort feasors. Handcock v. Massee & Felton Lumber Co., 127 Ga. 698, 56 SE 1021.

Insolvency of one of defendants does not affect the right to join him as a defendant in action for tort. Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469. Where the plaintiff elects to sue joint tort feasors jointly, he must allege and prove a joint participation in the tort by all the defendants. Diamond State Tel. Co. v. Blake [Md.] 66 A 631. The court cannot grant a severance where all the defendants are alleged to be liable. Id.

67. Master and servant not suable jointly for tort unless the tort is the joint or concurrent act of both. French v. Central Const. Co., 76 Ohio St. 509, 81 NE 751. Irrigation company and tenant held suable jointly for overflow. Blanton v. Kincheloe Irr. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 495, 102 SW 744. Where there is no concert of action, the defendants must be sued separately. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934. But see Negligence, 8 C. L. 1090; Torts, 8 C. L. 2125.

68. In Minnesota, an action may be maintained against one alone of several persons liable either ex contractu or ex delictu. Fryklund v. Great Northern R. Co., 101 Minn. 37, 111 NW 727. Code, § 3465, authorizing joint or several action against parties bound by contract either jointly, jointly and severally, or severally, includes corporations. Swartley v. Oak Leaf Creamery Co. [Iowa] 113 NW 496.

69. Fryklund v. Great Northern R. Co., 101 Minn. 37, 111 NW 727.

70. Under Rev. Code Civ. Proc. § 310, providing for determination of ultimate rights of parties and judgment against one or more of several defendants, no election was necessary in action against several defendants for conversion. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843.

71. Code Civ. Proc. § 578. Gillespie v. Gouley [Cal.] 93 P 856.

72. Code 1896, § 44, does not authorize a recovery against one where the evidence discloses a contract with one of the defendants instead of a joint contract as alleged. Redmond v. Louisville, etc., R. Co. [Ala.] 45 S 649. Plaintiff may sue one or more of joint promisors or may dismiss as to one and proceed as to another, even in the appellate court, and hence a variance, in that a joint promise is alleged and a sole or single promise by one alone of defendants is proved, is immaterial, and recovery may be had against such defendant alone. McDonald v. Cabiness [Tex.] 18 Tex. Ct. Rep. 562, 102 SW 721.

different defenses.[73] Necessary or proper parties may be joined as defendants when they cannot be joined as plaintiffs or refuse to so join.[74] Where it is alleged that a joint contractor is absent from the state and without the jurisdiction of the court, it is not necessary to make him a party in order to recover a personal judgment against the other parties.[75] The plaintiff may strike the name of a party defendant who prays no relief against any of the parties to the suit.[76] A misjoinder may arise out of the joinder of one individual in several representative capacities,[77] and one cannot be joined as a defendant in one capacity in a suit by him in another capacity.[78] The joinder of parties as affecting Federal jurisdiction is treated elsewhere.[79]

§ 4. *Designating and describing parties.*[See 8 C. L. 1242]—One designated as a party in one capacity is not therefore a party in another capacity.[80] In West Virginia, the defendant may be designated by a fictitious name with a statement that his real name is unknown.[81] Errors in description of parties may, under statutory provisions, be corrected by amendment[82] and as in other cases of amendment, the lex fori controls.[83]

§ 5. *Additional and substituted parties.*[See 8 C. L. 1242]—The question as to the bringing in of new parties in equity is treated elsewhere;[84] but many of the codes and statutes have preserved and extended to a greater or less degree the old equity rule that any party may be brought in who is necessary to a complete determination of the controversy,[85] and the common-law rule that additional defendants could not

73. Davis v. Rexford [N. C.] 59 SE 1002.

74. Executor or administrator in suit by co-executor or administrator. Monmouth Inv. Co. v. Means [C. C. A.] 151 F 159. Under Code Civ. Proc. § 448, providing that persons united in interest with the plaintiff must be made parties plaintiff unless their consent to such joinder cannot be obtained, the reason for such refusal being shown by the complaint, in which case they may be made parties defendant, a joinder of such persons cannot be sustained where the reason therefor does not appear. Baron v. Lakow, 121 App. Div. 544, 105 NYS 243.

75. Tally v. Ganabl [Cal.] 90 P 1049.

76. May strike name of such party as matter of right. Pearson v. Courson, 129 Ga. 556, 59 SE 907.

77. Merrill v. Suffa [Colo.] 93 P 1099.

78. Administrator of testator's widow joined as defendant in suit by him against executors of testator, he being one of such executors. Medlin v. Simpson, 144 N. C. 397, 57 SE 24. In such case he should be transferred to plaintiff's side of the case in both capacities. Id.

79. See Removal of Causes, 8 C. L. 1722; Courts, 9 C. L. 839.

80. Trustees as such not parties as executors or administrators of deceased defendant. Ball v. Ward [N. J. Eq.] 68 A 343.

81. Code 1899, c. 50, § 28; Code 1906, § 1979, relating to justices' courts. Coal & Coke Co. v. Taylor [W. Va.] 59 SE 941. Under this statute any description which designates the defendant may be used. "Italian number 37," held sufficient. Id.

82. Code, § 75. Solmonovich v. Denver Consol. Tramway Co., 39 Colo. 282, 89 P 57. Constituent corporation sued for injury inflicted by consolidated corporation. Amendment by consent held authorized under Code, § 75, process having been served on president of constituent corporation, who was also president of consolidated corporation, and defendant's attorney being attorney for latter and appearing therefor. Id. Under Code Civ. Proc. § 144, Comp. St. 1903, § 6715, amendment by changing name of plaintiff from company name of business, of which he was sole proprietor, to his individual name, held proper. Omaha Furniture & Carpet Co. v. Meyer [Neb.] 115 NW 310. Held proper to allow plaintiff to change capacity from administratrix to personal capacity as widow, in action for death of husband. See Civ. Code 1895, §§ 5105, 5106, 3361. Atlanta, etc., R. Co. v. Smith, 1 Ga. App. 162, 58 SE 106. Such an amendment does not change cause of action so as to let in plea of statute of limitations. Id.

83. Atlanta etc., R. Co. v. Smith, 1 Ga. App. 162, 58 SE 106.

84. See Equity, 9 C. L. 1110.

85. Civ. Code, § 16, provides that such parties shall be brought in. Day v. McPhee [Colo.] 93 P 570. Such rule cannot be invoked by a defendant on account of equities between him and another person, unless the plaintiff was in some way responsible for such equities, or by affirmative action destroyed them, or when the plaintiff's rights will not be affected or postponed thereby. Id. The equity rule, that all parties necessary to the rendering of complete justice must be brought in, has been retained by St. 1898, §§ 2604, 2610. Hagan v. McDermott [Wis.] 115 NW 138. A defect of parties under this rule is jurisdictional. Id. Code Civ. Proc. § 452, applies only to equitable actions. Gittleman v. Feitman, 122 App. Div. 385, 106 NYS 839. Plaintiff's right to bring in new parties under this rule is conditioned upon his having a good excuse for not making such persons parties in the first instance, but the action of trial court in accepting excuse sustained, where neither original defendant nor new party were prejudiced, and it was doubtful whether plaintiff could sue either alone, though excuse was

be brought in on the plaintiff's motion has been practically abrogated by statute in many of the states.[86] The authority to allow new parties to be brought in will not be exercised needlessly,[87] nor can such authority be invoked to inject into the case a new issue which alone renders such new parties necessary,[88] nor where the addition of such parties would cause a misjoinder of causes of action [89] or of parties,[90] or will amount to substitution of parties,[91] or will work an injustice.[92] The bringing in of new parties is sometimes made a matter of discretion for the court.[93] New parties must be brought in the manner provided by statute,[94] and a motion to bring in new parties must be made in proper time,[95] but as a general rule, the right to bring in new parties may be exercised at any time during the pendency of the action between

not satisfactory to appellate court. Haskell v. Moran, 118 App. Div. 810, 103 NYS 667. Under Code Civ. Proc. § 452, court must order of its own motion, if not otherwise required, necessary parties to be brought in. Quo warranto. People v. MacClellan, 119 App. Div. 416, 104 NYS 447. Error to deny plaintiff's motion to bring in copartner of defendant's husband, where it was alleged that property involved in litigation belonged to the partnership, and that it had been dealt with as partnership property in accordance with partnership agreement, and the right of such partner to proceeds of sale of such property was involved. McDonald v. McDonald, 120 App. Div. 367, 105 NYS 277. Where, pending a tax payer's action to prevent unlawful diversion of funds, such diversion is accomplished, the person receiving the same may be brought in by supplemental complaint. McNeil v. Suffolk County Sup'rs, 108 NYS 178.

86. Code Civ. Proc. § 723, allowing bringing in of parties defendant by way of amendment. Gittleman v. Feltman, 106 NYS 839. Code Civ. Proc. § 723, allowing bringing in of parties by a way of amendment, held not affected by rule, under § 452, that it is necessary to bring in new parties only, where a complete determination cannot be had without them, such latter section being merely a continuation of the old equity rule and not applicable to actions at law. Id. Authority, under Code Civ. Proc. § 723, to bring in additional defendant in common-law action, held not affected by § 452, authorizing determination of controversy as to parties before court without bringing in other parties, unless latter are necessary, etc., the latter section being confined to equity cases. Id. One jointly liable with the defendant on the contract sued on may be brought in by amendment, under Code Civ. Proc. § 728. Haskell v. Moran, 118 App. Div. 810, 103 NYS 667. **In New York,** the extent to which new parties may be added in actions of a legal as distinguished from an equitable nature, seems not entirely settled. See Id. reviewing the cases. Under Sayles' Ann. Civ. St. 1897, art. 1188, relating to amendment of pleadings, plaintiff may, by amendment, bring in new party defendant. Jolley v. Oliver [Tex. Civ. App.] 106 SW 1151.

87. Where it was sought to bring in plaintiff's assignors, who had parted with their whole interests, and it did not appear that the real party would be prejudiced by absence of nominal parties. Federal Mfg. & Printing Co. v. The U. S., 41 Ct. Cl. 318. The joinder of new parties, which before the institution of the original suit, had assigned all their interests in the contracts sued on, does not come within any rule of practice in the court of claims since the assignment of the contracts under which the claim is made destroys that privity of interest between assignors and assignee, which ought to appear. Id. Where there is no personal estate to be administered, plaintiff will, for mere form's sake, be put to expense and delay of having personal representative brought in. Dixon v. Roessler, 76 S. C. 415, 57 SE 203.

88. Bushe v. Wright, 118 App. Div. 320, 103 NYS 410.

89. Under Code Civ. Proc., § 723, authorizing bringing in of new parties by amendment, provided cause of action is not changed, one suing as personal representative cannot bring himself in as an individual plaintiff having a different cause of action. Doyle v. Carney, 190 N. Y. 386, 83 NE 37.

90. Rev. St. c. 84, § 11, relating to amendments. Clark v. Anderson [Me.] 68 A 633.

91. Rev. St. c. 84, § 11. Clark v. Anderson [Me.] 68 A 633.

92. Rev. St., c. 84, § 11, providing for addition of parties to writ, does not authorize the bringing in or substituting of parties plaintiff where injustice would thereby be caused to the defendant. Clark v. Anderson [Me.] 68 A 633.

93. Code Civ. Proc. 1902, § 139, provided that any person interested adversely to plaintiff or who is necessary to a complete determination of the questions involved "may" be made a party defendant. Murray Drug Co. v. Harris, 77 S. C. 410, 57 SE 1109.

94. New parties defendant can be brought in by plaintiff without defendant's consent only as provided by Code Civ. Proc., § 453, by supplemental summons. Robinson v. Thomas, 123 App. Div. 411, 107 NYS 1110. Proper way to cure the nonjoinder of plaintiffs is by amendment of the summons. Id.

95. Not error to refuse defendant's motion, made after case had been progressing for several years, and after announcement of ready for trial to bring in party, for defendant's benefit, who had been a party and who had recently been dismissed without exception. Sexton Rice & Irr. Co. v. Sexton [Tex. Civ. App.] 20 Tex. Ct. Rep. 697, 106 SW 728. Refusal of plaintiff's motion to have plaintiff's grantee, under whom defendant's claimed, brought in, after plaintiff had closed his evidence and defendant had introduced part of his, held within court's discretion. Johnson v. Conner [Wash.] 93 P 914.

the original parties.[96] An order, not excepted to, bringing in a new party and ordering the case to proceed in behalf of such party and of the original parties, is an adjudication that there were originally sufficient parties to authorize the amendment and that the party added is a proper party.[97] Under the common-law practice a variance as to the cause of action cannot be cured by bringing in new parties.[98] It is not incumbent upon the plaintiff to make parties in order to assist the defendant to perfect his equities, and if defendant needs such parties it is incumbent upon him to bring them in.[99]

*Intervention.*See 6 C. L. 1243—The right of intervention is governed by the general rules of equity.[1] Any person having such an interest in the subject-matter in litigation between others that he may gain or lose by the judgment therein may intervene and become a party.[2] The intervener need not be a necessary party,[3] but must show his interest in the action,[4] and where he fails to establish his claim, his petition will be dismissed.[5] An intervention comes too late after trial, especially if it adds new grounds.[6] An order of court granting leave to intervene is a determination that the intervener is interested in the subject-matter of the litigation,[7] and entitles the intervener to all the remedies available to the defendant in defeating the action.[8] Where the claim of the intervener to the subject-matter is adverse to both the plaintiff and the defendant but the only relief sought is that the plaintiff take nothing and that interveners recover costs, the intervener occupies the position of uniting with the defendant in resisting the plaintiff's claim.[9] The default of the defendant in such case does not preclude the intervener from obtaining relief.[10] Where an intervention has been allowed, the court cannot determine the issues of fact thereby tendered in the absence of the parties, without the notice required by law,[11] unless such notice is waived.[12] The intervener takes case as he finds it,[13] and his rights are not necessarily cut off because they would be barred by limitations if asserted in an independent action.[14] The plaintiff, however, may dismiss the action where the intervener seeks only to defeat his claim,[15] but otherwise the plaintiff cannot dismiss where the court has allowed the intervention,[16] and even the court after allowing the

96. Jolley v. Oliver [Tex. Civ. App.] 106 SW 1151. Right not affected by filing of **disclaimer** by original defendant where such disclaimer had not been disposed of. Id.

97. Grand Lodge Knights of Pythias v. Creswill, 128 Ga. 775, 58 SE 163.

98. Where action was brought by one only of several joint obligees, the other obligees could not be brought in by amendment. Sandusky v. West Fork Oil & Natural Gas Co. [W. Va.] 59 SE 1082.

99. Grace v. Means, 129 Ga. 638, 59 SE 811.

1. Day v. Bullen, 127 Ill. App. 155.

2. In manner provided by Rev. Laws, 1905, § 4140. Walker v. Sanders [Minn.] 114 NW 649. Under Rev. Laws, 1905, § 4140, where grantor sues to set aside for fraud, a pendente lite grantee of plaintiff may intervene and join with plaintiff in attack on former deed. Id.

3. Forster v. Raznik [Wash.] 91 P 252.

4. One claiming under power of attorney, which he did not produce, whose denials of plaintiff's rights were based on information without disclosing source thereof, and who did not state nature of the action, the complaint not being printed, and who did not show the right of the party for whom he claimed, held not entitled to be made party. Goff v. O'Rourke, 123 App. Div. 918, 107 NYS 1041.

5. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [Ind. T.] 104 SW 624.

6. Wenar v. Schwartz [La.] 44 S 902.

7. Townsend v. Driver [Cal. App.] 90 P 1071.

8. Code Civ. Proc., § 387. Townsend v. Driver [Cal. App.] 90 P 1071.

9, 10. Townsend v. Driver [Cal. App.] 90 P 1071.

11. Five days' notice required by Code Civ. Proc., § 594. Townsend v. Driver [Cal. App.] 90 P 1071.

12. Held no waiver. Townsend v. Driver [Cal. App.] 90 P 1071.

13. Intervener in mortgage foreclosure, seeking to establish prior lien, cannot, it seems, complain that plaintiff and defendant have treated mortgage debt as matured. Mahaska County v. Whitsel, 133 Iowa, 335, 110 NW 614.

14. Commencement of will contest within two years after probate inures to benefit of intervener, who intervenes after expiration of such period, the proceedings being in rem and the court having acquired jurisdiction of the res. Maurer v. Miller [Kan.] 93 P 596.

15, 16. Townsend v. Driver [Cal. App.] 90 P 1071.

intervention cannot dismiss the case except as authorized by statute.[17] Where judgment in favor of the plaintiff will not prejudically affect the intervener's rights, the plaintiff does not admit the allegations of the petition of intervention by failure to plead thereto.[18]

*Substitution.*See 8 C. L. 1244—Substitution is proper where the interests of a party have become vested in another,[19] as when, pendente lite, the whole beneficial interest in the cause of action is assigned or transferred.[20] So, also, a plaintiff, where it becomes necessary for the enforcement of his rights, may amend his petition by substituting the name of another person suing for the original plaintiff's use.[21] Prompt application is essential.[22] A minor suing by next friend may, upon coming of age, have himself substituted as plaintiff in his own right instead of through the next friend.[23] It is proper to allow a severance on death of one of several defendants in tort, so as to allow separate action against the executor of the deceased party.[24]

§ 6. *Objections to capacity and defects of parties.*See 8 C. L. 1245—Defects of parties may be raised by demurrer [25] or answer.[26] Such defects, however, may be waived,[27] and while the court may, of its own motion, recognize a jurisdictional defect of parties,[28] otherwise a complete waiver arises from failure to make proper objection,[29] as by demurrer or answer,[30] by demurrer when the defect appears on the

17. Except as authorized by Code Civ. Proc., § 581. Townsend v. Driver [Cal. App.] 90 P 1071.

18. Mansf. Dig. § 5072 (Ann. St. 1899, § 3277), providing that material allegations not denied are admitted, does not apply. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [Ind. T.] 104 SW 624.

19. Held proper on motion of corporation plaintiff to substitute as plaintiff the receivers of such corporation appointed pendente lite and to whom, as individuals, all the property and assets of the corporation had been adjudged. Gate City Cotton Mills v. Cherokee Mills, 128 Ga. 170, 57 SE 320.

Substitution on death of a party, see **Abatement and Revival,** 9 C. L. 1.

20. Walker v. Sanders [Minn.] 114 NW 649. Where plaintiff does not assign whole beneficial interest, the remedy of assignee is by intervention and not by substitution. Id.

21. Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. 88, 58 SE 316. The right, for protection of which such substitution is allowable, need not be such as is capable of direct enforcement by the original plaintiff either in law or in equity, provided it be substantial. Id. Upon such amendment, a cause of action must be shown in favor of the nominal party. Id.

22. Five years' delay held fatal. Moll v. Chicago Sanitary Dist., 228 Ill. 633, 81 NE 1147.

23. Mahoney v. Park Steel Co., 217 Pa. 20, 66 A 90.

24. Mulligan v. O'Brien, 119 App. Div. 355, 104 NYS 301.

25. Objection that adult children were joined with minor child in suit for death of father. See Civ. Code, 1895, § 3828. Western etc., R. Co. v. Harris 128 Ga. 394, 57 SE 722. Demurrer for want of facts does not raise capacity of plaintiff to sue. Valley Lumber & Mfg. Co. v. Nickerson, 13 Idaho, 682, 93 P 24.

26. Misjoinder not apparent on face of petition. Golden v. Moore, 126 Mo. App. 518, 104 SW 481. When the pleadings are oral and defect of parties cannot be reached by demurrer, such a defect appearing on the trial may be reached by amended answer. Moppar v. Wiltchik, 56 Misc. 676, 107 NYS 594.

27. Nonjoinder waived by consenting to order of reference. Dixon v. Roessler, 76 S. C. 415, 57 SE 203. Where defendant in action for tort did not object to joinder of codefendant. West Chicago Street R. Co. v. Muttschall, 131 Ill. App. 639. That plaintiff was neither a natural person, partnership, nor corporation, held waived by general demurrer on first trial, and plea on second trial after remand alleging that plaintiff was a corporation. Gate City Cotton Mills v. Cherokee Mills, 128 Ga. 170, 57 SE 320. Failure to make contractor party to suit against railroad to enforce lien of laborer employed by subcontractor held waived by year's delay in making objection. Jasper, etc., R. Co. v. Peek [Tex. Civ. App.] 18 Tex. Ct. Rep. 554, 102 SW 776.

28. Notwithstanding Rev. St. 1899, §§ 3535-3537, providing that defects of parties not raised by demurrer to answer are waived. Field v. Leiter [Wyo.] 90 P 378.

29. Field v. Leiter [Wyo.] 90 P 378. Objection for nonjoinder of defendants cannot be taken by motion for new trial. Hunt v. Doyal, 128 Ga. 416, 57 SE 489.

At common law a defect of parties constituting a variance as to the cause of action may be taken advantage of on the trial. Suit on joint contract by one only of two joint obligees. Sandusky v. West Fork Oil & Natural Gas Co. [W. Va.] 59 SE 1082. Where suit was on joint contract and evidence disclosed contract with one only of defendants. Redmond v. Louisville, etc., R Co. [Ala.] 45 S 649.

30. Lee v. Unkefer, 77 S. C. 460, 58 SE 343. Code Civ. Proc., § 499. Morton v. St. Patrick's Roman Catholic Church Soc., 105 NYS 1100. Rev. St. 1899, §§ 3535-3537. Field v. Leiter [Wyo.] 90 P 378. Code Civ. Proc., § 434. Salmon v. Ratjens [Cal.] 92 P 733. Rev. St. 1887, § 4178. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. Rev. St.

face of the complaint or petition,[31] or otherwise by answer.[32] Answering, after demurrer for defect of parties is overruled, waives the objection.[33] Objections for defects of parties must specifically point out the defects and name the proper parties.[34] Demurrer will not lie where parties properly joined originally, are rendered improper parties by a supplemental complaint based on matters occurring pendente lite.[35] Objections to misjoinder cannot be taken in answer to merits.[36] Defect of parties having been waived by failure to object by answer, it is not an abuse of discretion to deny leave to object thereto by amendment.[37] One may also be estopped to raise objections for defects of parties.[38] Where the real defendant, named in the pleadings, appears and answers and the real issues are tried between the proper parties, such defendant cannot complain of the joinder of other parties.[39] Error may be predicated upon nonjoinder of necessary parties,[40] but joinder of unnecessary parties is material only as affecting costs.[41] Where the defendant has filed a disclaimer, he cannot object to an order bringing in a new party defendant.[42]

1899, § 602 (Ann. St. 1906, p. 628). Bonsor v. Madison County, 204 Mo. 84, 102 SW 494.

Misjoinder of plaintiffs. Clark v. Boltz, 10 Ohio C. C. (N. S.) 1. That defendants were improperly made parties. Bonsor v. Madison County, 204 Mo. 84, 102 SW 494.

Nonjoinder is waived if not raised by demurrer or answer. Bauman v. Kuhn, 108 NYS 773. Objection in action for death that plaintiffs are not sole heirs of decedent. Salmon v. Ratjens [Cal.] 92 P 733.

Capacity of plaintiff. Maelzer v. Swan, 75 Kan. 496, 89 P 1037. Nonjoinder waived. Baker v. Lambert [Cal. App.] 91 P 340. Objection that plaintiff was not proper party to bring the suit. Maelzer v. Swan, 75 Kan. 496, 89 P 1037. Capacity of board of health of town to sue, except in name of town. Morton v. St. Patrick's Roman Catholic Church Soc., 105 NYS 1100. Capacity of foreign corporation to sue, as dependent upon compliance with statutes. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765.

31. People v. McClellan, 119 App. Div. 416, 104 NYS 447; Lee v. Unkefer, 77 S. C. 460, 58 SE 343; Littleton v. Burgess [Wyo.] 91 P 832. An objection for defect of parties cannot be taken by answer when it could have been taken by demurrer, under Rev. St. 1899, § 602, providing that such objection may be raised by answer when not apparent in face of petition. Hudson v. Wright, 204 Mo. 412, 103 SW 8.

Nonjoinder. Dixon v. Roessler, 76 S. C. 415, 57 SE 203.

Misjoinder. Golden v. Moore, 126 Mo. App. 518, 104 SW 481. Misjoinder of defendant's can be objected to only by demurrer. Allen-Fleming Co. v. Southern R. Co. [N. C.] 58 SE 793.

32. Lee v. Unkefer, 77 S. C. 460, 58 SE 343. Misjoinder not apparent on face of complaint, waived if not raised by answer. Code Civ. Proc., §§ 488, 498, 499. Wolverton v. Rogers, 123 App. Div. 45, 107 NYS 883. Where petition alleged that defendant informed petitioner that defendant and others, whose names petitioner did not know, were partners, the nonjoinder of such parties could be raised only by plea in abatement, giving names of such parties. Holman v. Vickery [Tex. Civ. App.] 20 Tex. Ct. Rep. 416, 106 SW 430.

33. Continental Zinc Co. v. Amsden, Leonard & Co., 125 Mo. App. 512, 102 SW 1087.

34. Whether defect is apparent on face of the complaint or is raised by answer. Darrow v. Chicago, etc., R. Co. [Ind.] 81 NE 1081.

Demurrer: General demurrer insufficient to raise question of nonjoinder of defendants. Hunt v. Doyal, 128 Ga. 416, 57 SE 489.

Demurrer for defect of parties goes, as a statutory ground, to the nonjoinder of parties plaintiff. Littleton v. Burgess [Wyo.] 91 P 832. Demurrer for want of authority or capacity to sue, taken to the whole complaint, is not available as to a separate cause of action set out therein and not specifically pointed out by demurrer, unless the demurrer is good as to the whole complaint. Demurrer for want of capacity to sue for self and others, under Code Civ. Proc., § 448, relating to suits involving interests common to "many." Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152, 103 NYS 822. Under Rev. St. 1887, § 4174, a demurrer for failure to state cause of action does not reach plaintiff's capacity to sue. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765.

35. Remedy in such case being by motion to dismiss as to such parties. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. In such cases, other parties cannot complain on the grounds of misjoinder, where no additional costs will be incurred by them. Id.

36. Diamond Rubber Co. v. Harryman [Colo.] 92 P 922.

37. Tingley v. Times Mirror Co. [Cal.] 89 P 1097.

38. Motion to dismiss based on amended answer, on ground that plaintiff had not duly qualified as administrator, should have been dismissed, where defendants had for two years stood upon their answer, admitting such qualifications and limitations had run against new action. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 NE 152. Amendment of answer so as to deny such qualification should have been refused as not in furtherance of justice. Id.

39. Where praecipe and declaration named as defendants the stockholders of the defendant corporation. Wilkinson v. Evans, 34 Pa. Super. Ct. 472.

40. **Defendant in default** cannot complain of nonjoinder of proper parties. Turpin v. Derickson [Md.] 66 A 276.

41. Ormond v. Connecticut Mut. Life Ins.

Objection for the purpose of saving questions as to parties for review is treated elsewhere.[43]

PARTITION.

§ 1. Nature, Right, and Propriety, 1089. The Right, and Parties Entitled, 1089. Statutory Sale for Partition, 1090. What May be Partitioned, 1090. Partition of Estates of Decedents, 1091.
§ 2. Jurisdiction and Venue, 1092.
§ 3. Procedure to Obtain Partition, 1092.
§ 4. Scope of Relief in Partition, 1095.
§ 5. Commissioners or Referees and Their Proceedings, 1096.
§ 6. Mode of Partition and Distribution of Property or Proceeds, 1097.
§ 7. Sale and Subsequent Proceedings, 1097.
§ 8. Appeal and Review; Vacation of Sale, 1098.
§ 9. Voluntary Partition, 1099.

§ 1. *Nature, right, and propriety.* See 8 C. L. 1246—The remedy is equitable in its nature, though generally provided for by statute.[44]

The right, and parties entitled. See 8 C. L. 1247—At common law, partition could be compelled only at a suit of a coparcener, either against a coparcener or one who had succeeded in the interest of a coparcener.[45] By St. 31 and 32, Henry VIII, the remedy was extended to joint tenants and tenants in common, whether of estates of inheritance or for life or years.[46] In this country the scope of the remedy is largely prescribed by statute,[47] but generally only joint tenants or tenants in common having a legal estate in the land can have partition,[48] and such procedure cannot be maintained apart from statute where there is no present right to possession,[49] nor can partition be compelled between a tenant in possession and mere remaindermen,[50] but tenants in common in possession having less than a fee simple estate may have partition.[51] In New York and Illinois, present right of possession is not required[52] but there must be present interest in the title.[53]

Partition may be had between the life tenant of an undivided part and the

Co. [N. C.] 58 SE 997. Only the defendant wrongfully joined can object to the misjoinder. Rensford v. Magnus [Ala.] 43 S. 853.

42. Jolley v. Oliver [Tex. Civ. App.] 106 SW 1151.

43. Saving Questions for Review, 8 C. L. 1822.

44. See infra, the Right and Parties Entitled. Field v. Leiter [Wyo.] 90 P 378.

45, 46. Field v. Leiter [Wyo.] 90 P 378.

47. The statutes do not enlarge upon the common law with respect to persons. Field v. Leiter [Wyo.] 90 P 378. Joint tenants and tenants in common may have partition. Plano Mfg. Co. v. Kindschi, 131 Wis. 590, 111 NW 680. By statute where lands are held in common, any one of the parties interested may present a petition for partition. Lester v. Kirtley [Ark.] 104 SW 213.

48. No action can be maintained where the facts do not show that the petitioner and respondent are owners in common. Herrick v. Glidden [Mass.] 83 NE 410. Where defendant claimed under a title paramount, in time and wholly distinct and hostile to that under which plaintiffs claimed, the court had no jurisdiction to decree partition. Preston v. Virginia Min. Co. [Va.] 57 SE 651.

49. Remainder only. Field v. Leiter [Wyo.] 90 P 378. The general rule, unless changed by statute, is that no persons can be made parties to a writ of partition or be affected by it but such as are entitled to the present possession of their share in severalty. Wicker v. Moore [Neb.] 113 NW 148. Remaindermen having no vested interest are not entitled to maintain partition during the continuance of the life estate. Green v. Head, 54 Misc. 454, 104 NYS 383. Partition between cotenants and tenants in common may be had by statute by any person who has an estate in possession but not by one who has only an estate in remainder or reversion. Plano Mfg. Co. v. Kindschi, 131 Wis. 590, 111 NW 680. A claimant whose interest is contingent and may never take effect cannot maintain partition. One of four children claiming under a devise of lands to such as survive a period of ten years cannot maintain partition against his codevisees. Wicker v. Moore [Neb.] 113 NW 148. Where plaintiffs have conveyed their right to realty to another during her widowhood, they can't maintain partition. Henderson v. Henderson [Iowa] 114 NW 178.

50. Field v. Leiter [Wyo.] 90 P 378, but contra, see 6 C. L. 898.

51. The statute of Wyoming requiring each tenant in common, coparceners or other interested person to be named as defendant does not prevent a partition between parties in possession as tenants in common though either or both hold less than a fee simple, where the property is capable of partition. Field v. Leiter [Wyo.] 90 P 378.

52. Wicker v. Moore [Neb.] 113 NW 148. Possession is not necessary in New York to the maintaining of an action of partition by one having an interest by ownership in fee in the property. Leidenthal v. Leidenthal, 105 NYS 807. Vested reversioners and remaindermen owning fee interests in land are entitled to partition. Deadman v. Yantis, 230 Ill. 243, 82 NE 592.

53. Glanz v. Miller, 230 Ill. 196, 82 NE 591.

owner in fee of the other part at the suit of either.[54] In the absence of statute, partition cannot be awarded in equity any more than at law of an estate in reversion or remainder.[55] Partition will not lie between cotenants in the absence of actual ouster or disseisin.[56] Partition of the life estate may be had between life tenants.[57] The right of partition may be waived or suspended for a limited period of time,[58] and equity will not award a partition at the suit of one in violation of his own agreement[59] or a condition or restriction imposed upon the estate by one from whom he claims.[60] It is the general rule, subject to exception that partition among cotenants must embrace the entire common estate and not parcel by parcel,[61] and, where the estate consists of several tracts, it is not necessary that there should be assigned to each cotenant a share in each parcel.[62] If defendants are in adverse possession of land claiming it against plaintiffs, partition will not lie but plaintiff's rights must first be adjudicated in ejectment.[63] The rights of the parties in an action for partition are determined by the order which finds them to be tenants in common, ascertains and adjudges the respective shares and orders a partition thereof.[64] Where one of the co-owners of land is a minor, a family meeting's approval or disapproval could not control the right of the others to partition.[65]

Statutory sale for partition. See 6 C. L. 1248—The statutes of nearly every state provide that in case a fair division of land cannot be made it shall be sold and the proceeds divided. Before sale can be had against objections, it must appear that the lands are so situated that partition thereof cannot be made and are of such description that it would be manifestly to the advantage of all interested that there be a sale instead of a partition.[66] The exercise of its discretion by the court in ordering land sold will not be disturbed except for an abuse thereof.[67]

What may be partitioned. See 6 C. L. 1246—A cemetery lot is not subject to partition.[68] Where the restrictions, under which one takes title, prohibit partition, it cannot be granted by the court.[69] The grantee of rights to oil and gas does not become a coparcener with the owner of the land and is not entitled to partition,[70] and such interest can only be partitioned by sale thereof and division of the proceeds among the parties entitled thereto.[71] A homestead, if occupied by survivor entitled to use, is not subject to partition,[72] but if the widow conveys away her interest, and the guardian of a minor child is not, as provided by statute, given a right to occupy by

54, 55. Field v. Leiter [Wyo.] 90 P 378.

56. Stern v. Telleck [Iowa] 111 NW 451.

57. Under the Wisconsin statute, a life tenant can only have partition of the life estate. Where reversioners are made parties defendant, their interests may not be sold nor partition of the whole estate in the land, including the fee in the reversioners. Plano Mfg. Co. v. Kindschi, 131 Wis. 590, 111 NW 680. A life tenant in a proper case would be entitled to a sale for partition. Life estate with power of disposal of one half of land, balance to be sold and proceeds divided. McKnight v. McKnight [Tenn.] 107 SW 682.

58. Contract that there should be no partition action brought under the statute for five years. Roberts v. Wallace, 100 Minn. 359, 111 NW 289.

59. Wicker v. Moore [Neb.] 113 NW 148. Where plaintiffs made an agreement that widow might enjoy land during widowhood, they cannot abrogate their agreement by an action for partition. Henderson v. Henderson [Iowa.] 114 NW 178.

60. Wicker v. Moore [Neb.] 113 NW 148.

61, 62. Ferguson v. Stringfellow [Tex. Civ. App.] 20 Tex. Ct. Rep. 718, 106 SW 762.

63. Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

64. Field v. Leiter [Wyo.] 90 P 378.

65. Carrollton Land & Imp. Co. v. Eureka Homestead Soc., 119 La. 692, 44 S 434.

66. McKnight v. McKnight [Tenn.] 107 SW 682.

67. Evidence showed a proper exercise of discretion in refusing to allot to one of the parties a part of the tract in specie. Cooper v. Trout, 31 Ky. L. R. 444, 102 SW 798.

68. Love v. Robinson [Pa.] 68 A 1033. Where a grantor reserved a certain lot for burial purposes out of land conveyed to a cemetery association, such lot was not a part of the estate subject to partition among the heirs. The graves of the dead cannot be partitioned among the heirs of one who owns a burial lot in a cemetery. Sharp v. Sharp, 148 Mich. 278, 14 Det. Leg. N. 72, 111 NW 767.

69. Love v. Robinson [Pa.] 68 A 1033.

70, 71. Robertson Consol. Land Co. v. Paull [W. Va.] 59 SE 1085.

72, 73. Williams v. Jones [Tex. Civ. App.] 20 Tex. Ct. Rep. 420, 106 SW 755.

the court, the homestead may be partitioned.[73] Where property is subject to lease to a lessee in possession, it cannot be partitioned as a general rule,[74] but, if partition should be granted, it must be subject to the rights of the lessee.[75] Co-owners of a water right have a legal right to have the water divided and their share assigned in severalty in the same manner as cotenants of real property, such partition being possible without injury to either party.[76]

Partition of estates of decedents. See 8 C. L. 1248—A bill for partition by heirs, alleging the death of the father intestate, his seisin of an individed interest in land and remainder in the defendant, locating and describing the land, making parties and praying for partition, is sufficient upon which to found a decree.[77] An executor as such cannot sue to partition real estate of the estate,[78] but where executors take real estate under a will to sell and pay legacies and are made the residuary legatees, and where the widow renounces under the will and elects to take her legal half of the estate, the executors became tenants in common with the widow and were entitled to sue for partition of the estate.[79] Where the will shows that the testator did not contemplate a division of the trust property, it will not be divided.[80] The heirs can legally proceed to partition before the settlement of the estate.[81] Partition cannot be had until expiration of the time for filing claims, unless it is shown that all debts are paid or secured,[82] and pendency of a partition does not prevent a sale by the administrator to pay debts.[83] Heirs may consent to the sale of particular properties therein or to a partial partition thereof.[84] Where dower has not been assigned, the widow is not a necessary party in an action by the children for partition of their father's estate.[85] Where a widow was devised certain property to hold until the children became of age and then to be divided, and the children died before reaching majority, the widow, when the children would have attained majority, is entitled to partition.[86] Where land has been set aside as a year's support to a widow and minor child, and the child marries and removes from the premises so set apart, she has no right to demand as tenant in common with her mother a partition of said lands.[87] Under Kentucky statutes where an arbitration agreement among heirs is repudiated by one of the infant parties on coming of age, resulting in depriving the plaintiff of his land, he may have his loss equalized by contribution between the distributees.[88] Under Missouri statutes, advancements made by an intestate to a son may be stated and adjudicated.[89] In South Carolina, if it appears that there are outstanding debts against the estate of one to whose interest the defendant succeeded as devisee, it is proper in the decree of sale to provide for payment of such debts.[90] The possession of parties claiming under a will is not adverse to the testator's other heirs preventing partition among them, for it must be sufficient if continued for certain time to ripen into perfect title under limitations.[91]

74, 75. Henderson v. Henderson [Iowa] 114 NW 178.

76. Roberts v. Claremont R. & L. Co. [N. H.] 66 A 485.

77. Richmond v. Richmond [W. Va.] 57 SE 736.

78, 79. Loughlin v. O'Reily [Miss.] 45 S 193.

80. Wicker v. Moore [Neb.] 113 NW 148.

81. Warren v. Warren [Mich.] 14 Det. Leg. N. 869, 114 NW 867.

82. Myers v. Myers, 9 Ohio C. C. (N. S.) 449.

83. On filing his certificate from the probate court in accordance with Rev. St. § 6173, in the court of common pleas where such partition suit is pending, the administrator is entitled to an immediate order of sale, the necessity for such sale not being contested, and, without filing such certificate, he may appear in said partition suit and, on his cross-petition, obtain such order of sale without waiting for the expiration of the year from the ancestor's death. Myers v. Myers, 9 Ohio C. C. (N. S.) 449.

84. Carrollton Land & Imp. Co. v. Eureka Homestead Soc., 119 La. 692, 44 S 434.

85. Francis v. Sandlin [Ala.] 43 S 829.

86. Roberts v. Herron [S. C.] 58 SE 968.

87. Bridges v. Barbree, 127 Ga. 679, 56 SE 1025.

88. Brownlee v. Bunnell, 31 Ky. L. R. 669, 103 SW 284.

89. Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

90. Green v. Cannady, 77 S. C. 193, 57 SE 832.

91. Shepperd v. Fisher, 206 Mo. 208, 103 SW 989.

§ 2. *Jurisdiction and venue.*See 8 C. L. 1248—The proceeding to compel partition at common law was by writ of partition,[92] but at an early period concurrent jurisdiction was entertained in equity to enforce partition where courts of law were incapable of granting relief, but only in cases of estates entitled to partition at law,[93] and the jurisdiction has been vested by statute in some states in courts of law, in others in courts of equity, and in others the remedy may be pursued in either law or equity.[94] The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to land under a will.[95] The circuit court of Missouri has jurisdiction of a suit involving a resulting trust and a partition, the subject-matter being an equitable partition.[96] A court of equity has jurisdiction to partition land under some circumstances, although defendant claims title to the entire tract.[97] Where, in injunction proceedings to prevent the removal of timber, it is discovered that both parties own jointly part of the timber, it is proper, although no partition was originally prayed, to allow while the case is pending an application for partition and to appoint partitioners [98] despite the fact that there was a remedy at law by partition.[99] The chancery court having jurisdiction to make partition of land, and a petition for partition of land of a decedent having been filed before the probate of his will, it is proper for that court to retain jurisdiction and adjudge the question of the validity and amount of a claim against decedent's estate and asserted to be a lien thereon.[1] The party applying for the partition had the right to have the suit instituted in the division of the district court whose judge had appointed the tutor of a minor co-owner despite the fact that the property was inherited by the minor from a grandmother and her succession was opened in another division of the court.[2] The district court has jurisdiction in an action of partition to construe a clause in a will determining the rights of the parties to land under a will.[3]

*Service of process.*See 8 C. L. 1249

*Venue.*See 6 C. L. 990

§ 3. *Procedure to obtain partition. Limitations.*See 8 C. L. 1249—The suit must be commenced within the period limited by law for the recovery of realty or the possession thereof.[4] Delay, however, in bringing an ordinary partition suit is no bar,[5] yet, where neglect and abandonment were shown the court is entitled in its discretion to deny recovery.[6]

*Parties.*See 8 C. L. 1249—Every person having an interest in the property is a necessary party,[7] and any one so interested is entitled to intervene.[8] A judgment

92, 93. Field v. Leiter [Wyo.] 90 P 378.

94. Field v. Leiter [Wyo.] 90 P 378. An action for partition is an equity case in South Carolina. Windham v. Howell [S. C.] 59 SE 852.

95. Fisher v. Fisher [Neb.] 113 NW 1004.

96. Padgett v. Smith, 206 Mo. 303, 103 SW 943.

97. Joint owner with the complainant or those under whom he claims title. Morgan v. Haley [Va.] 58 SE 564.

98, 99. Baxter v. Camp, 129 Ga. 460, 59 SE 283.

1. Lester v. Kirtley [Ark.] 104 SW 213.

2. Carrollton Land & Imp. Co. v. Eureka Homestead Soc., 119 La. 692, 44 S 434.

3. Fisher v. Fisher [Neb.] 113 NW 1004.

4. Where one joint tenant was for 35 years in open, notorious adverse possession of land owned in common, his cotenant is barred by the statutes of limitations from asserting his claim. Godsey v. Standifer, 31 Ky. L. R. 44, 101 SW 921. In a partition suit where plaintiff's interest was acquired at a foreclosure sale, the continued possession of the former owner for a period beyond the statute of limitations does not bar the plaintiff's right. Cali v. Dancy, 144 N. C. 494, 57 SE 220.

5. Land was conveyed to a husband and wife and at her death the husband conveyed the same to two of the sons which deed was recorded in 1891, in 1903 they made a conveyance and in 1904 the other heirs of the wife petitioned for partition and were not barred by laches. Stern v. Selleck [Iowa] 111 NW 451.

6. Warner v. Hamill, 134 Iowa 279, 111 NW 939.

7. As to who may or may not be necessary, see Field v. Leiter [Wyo.] 90 P 378.

Necessary parties: Purchaser from one cotenant of a specific part of the common property is a necessary party to a suit for partition between the original cotenants.

rendered without all the persons in interest being made parties is an absolute nullity,[9] but in the case of proper parties the action may proceed to judgment without them but will not be binding upon their interest.[10] In Wisconsin by statute every person having an interest in the premises may be made a party defendant.[11] Parties having no vested interest in the lands are not proper parties to be joined as plaintiffs or defendants.[12] A cotenant, who has not assented to a sale by the other cotenant of one of several lots owned in common is not bound to seek partition of that lot only with the purchaser, but may join him and the other cotenant in a suit to partition all of the lots.[13] The owners of some of the undivided interests in land are entitled to have their parts considered as one moiety and to unite in an application for a partition thereof.[14] Trustees and devisees under a will disposing of the testator's undivided interest in land may, pending a settlement of the estate, maintain a suit for partition against the owner of the other undivided interest where the executors under a statute having possession sufficient to maintain a suit for partition consent thereto.[15] Where two of the parties holding property in division with a minor file a petition for a partition, the minor occupies the position of a defendant though he be a coplaintiff in the petition and though his tutor expresses his consent to partition.[16] A defect of parties plaintiff or defendant is a ground of demurrer if the defect appears upon the face of the petition,[17] otherwise the objection may be taken by answer.[18]

Pleading and evidence. See 8 C. L. 1250—It is incumbent on a plaintiff unless suit is brought by one or more tenants in common of a vested remainder or reversion to allege and prove if denied that he and the defendant were in possession of the property as tenants in common at the time of the commencement of the suit.[19] Where the statute requires a particular description of premises sought to be divided and

Ferguson v. Stringfellow & Hume [Tex. Civ. App.] 20 Tex. Ct. Rep. 718, 106 SW 762. Where a testator appoints one of his sons as trustee to hold his property during the minority of his other sons in partition proceedings making all the sons parties but not the son a party as trustee, court had no jurisdiction to make an order for partition as affecting the interests of the minors. Parkhill v. Doggett [Iowa] 112 NW 189. Where a widow's dower has not been assigned, she is not a necessary party in an action by the children for partition of their father's estate. Francis v. Tandlin [Ala.] 43 S 829.

Parties held not necessary: One holding a future contingent remainder interest in land is not a necessary party. Legal title in trustee with power of disposal. Collins v. Crawford [Mo.] 103 SW 537. One claiming an undivided interest in lands under a conveyance executed by devisees thereof may, on the devisees becoming entitled to the possession and ownership of the estate on the death of a life beneficiary, maintain partition against the devisees without joining a lessee of the executor authorized to take charge of the estate during the beneficiary's life. Van Norden Trust Co. v. O'Donohue, 106 NYS 948.

8. The statutes as to divorce do not prevent a third party who is a joint owner in lands that might be in controversy between husband and wife in a suit for divorce to become a party by intervention to a proceeding therein looking towards the partition of such land. Weaver v. Manley [Tex. Civ. App.] 18 Tex. Ct. Rep. 200, 101 SW 848.

9. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889.

10. Field v. Leiter [Wyo.] 90 P 378. Where the wife of an intestate was not made a party defendant to partition proceedings and claiming title publicly forbade sale under the judgment, she has not lost her one third interest in the land. Gunter v. Fallaw [S. C.] 59 SE 70.

11. Interest in reversion. Plano Mfg. Co. v. Kindschi, 131 Wis. 590, 111 NW 680.

12. Parties having no vested interest in the remainder can not properly be joined as parties plaintiff. Green v. Head, 54 Misc. 454, 104 NYS 383; Collins v. Crawford [Mo.] 103 SW 537. An administrator is not a proper complainant in partition proceedings for he has no interest. Owings v. Owings, 150 Mich. 609, 14 Det. Leg. N. 787, 114 NW 393. Parties who will share in the proceeds of the sale of real estate after the death of a life tenant cannot maintain a bill for partition. McKnight v. McKnight [Tenn.] 107 SW 682.

13. Ferguson v. Stringfellow [Tex. Civ. App.] 20 Tex. Ct. Rep. 718, 106 SW 762.

14. Bowlsby v. Gregory [Iowa] 114 NW 1060.

15. Field v. Leiter [Wyo.] 90 P 378.

16. Carrollton Land & Imp. Co. v. Eureka Homestead Soc., 119 La. 692, 44 S 434.

17, 18. Field v. Leiter [Wyo.] 90 P 378.

19. Suit after divorce by wife against former husband for land purchased by them in common and now in possession of husband who claimed title. Frye v. Moffet [Or.] 93 P 353.

that the interest of parties shall appear a description by street and number only and failure to state the interest of any of the parties, is a fatal defect.[20] After judgment for partition, but before final judgment of distribution, the trial court may amend its records and judgments to conform to the facts.[21] Under the Wyoming code an action to compel partition is a civil action.[22] Where the defendant set up a right to possession under certain tax leases and plaintiff in reply denied their existence, plaintiff was entitled to show that the leases were void on their face.[23] The fact that plaintiff's title is being litigated between himself and a third party is no ground for a plea in abatement in an action for partition.[24] An answer alleging that one of the defendants paid a portion of the purchase money is without merit in the absence of an allegation that by such payment he acquired an interest in the land.[25] In a partition suit where the plaintiff claims an interest by purchase at a foreclosure sale, it is no defense to his claim of title that no notice of the sale was given the mortgagor where none was provided for and there is no evidence of fraud.[26] A defect of parties plaintiff or defendant is a ground of demurrer if the defect appears upon the face of the petition,[27] otherwise the objection may be taken by answer,[28] and if the objection is not raised by either demurrer or answer it is deemed waived unless it goes to the jurisdiction of the court.[29] Where defendants have been properly summoned in a partition suit, it is not necessary to notify them of an application for nunc pro tunc record entries after final judgment.[30] Under the Rev. Civil Code of Louisiana, no authorization by the judge on the advice of a family meeting is needed by the tutor of a minor in order to answer a suit for a partition brought against him.[31] On appeal evidence held sufficient to support a finding that defendant in a partnership accounting had surrendered all interest in the property which was to remain as a partnership asset subject to a mortgage thereon to defendant.[32] Where in injunction proceedings to prevent the removal of timber it is discovered that both parties jointly own part of the timber, it is proper although no partition was originally prayed for to allow, while the case is still pending, an application for partition and to appoint partitioner.[33]

Mode and time of trial. See 6 C. L. 002—When defendant's answer raises an issue of paramount title such as would defeat the plaintiff's action, the issue should be submitted to a jury,[34] but where there are no issues requiring a trial by jury, the court may refer all issues of law and fact to a master without consent.[35] Under the Florida statute whenever all parties to a bona fide partition are the owners in common, then all questions of the title should be settled by the chancellor.[36] In an action of partition where the defendant answers claiming title and waives a jury and participates in a trial of all the issues without objection, he will be held to have waived any right he may have had to have the first title determined.[37]

Costs and attorney's fees. See 8 C. L. 1252—Under the Kentucky Code, where commissioners report a fair and equal division of land, costs are correctly apportioned

20. Property described as "966 West Lake St." Tagert v. Fletcher, 232 Ill. 197, 83 NE 805.

21. Colller v. Catherine Lead Co. [Mo.] 106 SW 971.

22. Field v. Lelter [Wyo.] 90 P 378.

23. Obermeyer v. Behn, 108 NYS 289.

24. Schoonover v. Birnbaum, 150 Cal. 734, 89 P 1108.

25. Reeves v. Morgan, 30 Ky. L. R. 1158, 100 SW 836.

26. Call v. Dancy, 144 N. C. 494, 57 SE 220.

27, 28, 29. Field v. Lelter [Wyo.] 90 P 378.

30. Such entries are made only from written memoranda upon the records or files in the case. Colller v. Catherine Lead Co. [Mo.] 106 SW 971.

31. Carrollton Land & Imp. Co. v. Eureka Homestead Soc., 119 La. 692, 44 S 434.

32. Simmons v. Rowe, 4 Cal. App. 752, 89 P 621.

33. Baxter v. Camp, 129 Ga. 460, 59 SE 283.

34, 35. Windham v. Howell [S. C.] 59 SE 852.

36. No jury. Willlams v. Clyatt, 53 Fla. 987. 43 S 441.

37. Fisher v. Fisher [Neb.] 113 NW 1004.

equally between the parties.[38] Under Code Civ. Proc. § 1022 of New York providing for awarding of costs, it is error after a decision awarding costs to the plaintiff to amend by order the interlocutory judgment entered so as to award costs to the defendants.[39] Where a decree gives a widow certain realty as part of her share and orders the remainder sold, the proceeds to be brought into court for further orders as to distribution, the widow's share of costs and fees will be based on her whole share in the real estate and deducted from the amount still owing to her.[40] Where the validity of a mortgage is attacked and the issue is found in favor of the mortgagee, he is entitled to the proceeds of the partition sale after payment of necessary expenses of sale and taxes constituting a lien upon the property before the deduction of costs of suit.[41] Many states by statute provide that a reasonable attorney's fee may be taxed as costs [42] except for services rendered on contested issues against the interest of the defendants.[43] One who purchases the rights of other parties pending a partition suit was properly required to pay that part of the lawyer's fee which would have fallen on those bought out.[44] Where there is no substantial contest as to the rights and interests of the parties, fees of complainant's solicitors should not be apportioned among the parties and taxed as costs.[45]

§ 4. *Scope of relief in partition.*[See 8 C. L. 1251]—All questions of title of property sought to be partitioned may be litigated and decided in favor of the plaintiff although in the same action he obtains partition.[46] Where the evidence shows that partition in kind is impracticable, the court has power to decree a sale without issuing a writ for partition in kind.[47] Even where partition has been fully executed between coparceners, there is an implied warranty in favor of each against the others as long as the relation of privity exists among them which compels them to make good any loss by failure of title to the part assigned to him, and he may call for and obtain repartition.[48] A suit for partition under the Virginia Code cannot be made a

38. Mead v. Mead, 31 Ky. L. R. 70, 101 SW 330.

39. Smith v. Smith, 121 App. Div. 480, 106 NYS 137.

40. Piper v. Piper, 231 Ill. 75, 83 NE 100.

41. Goebbles v. Morrisey, 53 Misc. 421, 103 NYS 386.

42. Since it is the court's duty to pass upon charges of commissioners and approval must be had prior to their taxation, the failure of the plaintiff's attorney to call the courts attention to the fact that they are excessive does not constitute such negligence as deprived the attorney of the right to an allowance of fees for services rendered. Liles v. Liles [Mo. App.] 107 SW 1111. When an action had been commenced in partition, but afterwards the administrator of the common ancestor filed a cross-petition asking the sale of the real estate described to pay the ancestor's debts, and the property was sold on such cross-petition, no attorney fee can be allowed counsel for the plaintiffs under section 5778, Revised Statutes. Myers v. Myers, 5 Ohio N. P. (N. S.) 85. May allow as part of costs a reasonable attorney's fee under the Missouri statute. Padgett v. Smith, 206 Mo. 303, 103 SW 943.

43. Attorneys may receive a reasonable fee to be taxed as costs for services rendered other than on contested issues against the interest of the defendants. Liles v. Liles [Mo. App.] 107 SW 1111. In a contested action for partition and accounting between cotenants, it is error to tax one of the defendant cotenants with solicitor's fees to go to the complainant's solicitors. Bowles v. Wood [Miss.] 44 S 169. Complainant's solicitor's fees may not be taxed as costs where the defendants employed counsel and resisted partition in the manner reported by the commissioners, though they defaulted in the suit itself. Mulloy v. Mulloy, 231 Ill. 285, 83 NE 158.

44. Cooper v. Trout, 31 Ky. L. R. 444, 102 SW 798.

45. Where property was valuable and honest difference of opinion as to value. Jones v. Young 228 Ill. 374, 81 NE 1042, afg. 130 Ill. App. 616.

46. Land alleged to have been deeded to a minor daughter by decedent. Defendants claimed that grantee in the deeds was wife of decedent. The question whether the grantee named in the deeds was the daughter and if so whether there had been delivery and acceptance were proper subjects of inquiry Leidenthal v. Leidenthal, 105 NYS 807.

47. Green v. Cannady, 77 S. C. 193, 57 SE 832.

48. Where a deed was executed by a parcener who has made a verbal partition of land and who is in exclusive possession of a part thereof conveying a portion of the oil and gas therein and describing the land as owned by him and suit is brought by the grantee for partition of the oil produced by a well located on a portion of land other than that assigned to the grantor by the verbal partition under a claim of title thereto by virtue of such deed, such grantor may by reason of the implied warranty between coparceners defend and resist the demand for partition

substitute for an action of ejectment.[49] Where in partition proceedings one of the coparceners acquires a lien on the land allotted to the others in case of a failure of title to land allotted to him, a court of equity will enforce such lien.[50] An accounting of rents may be had.[51]

Operation and effect of decree. See 8 C. L. 1253—A decree of partition does not create new rights or estates but merely apportions and divides the pre-existing rights and estates.[52] A judgment of partition and order of sale is but an interlocutory judgment,[53] the order of distribution being the final judgment,[54] and so where a report of sale in a partition action was filed and the cause continued for distribution, the action is still pending.[55] Where there is a doubt as to whether or not a decree is final, the construction given it by the judge rendering it will be upheld.[56] A judgment rendered without all the persons in interest being made parties is an absolute nullity and any sale thereunder is void.[57] A standing final decree is binding as to all parties who had due notice.[58]

§ 5. *Commissioners or referees and their proceedings.* See 8 C. L. 1254—It is within the discretion of the court to appoint commissioners to value lands and improvements,[59] and under the Georgia Code a judge may appoint partitioners during vacation without a jury trial.[60] In chancery proceedings for partition, the court may follow the statutory method of appointing commissioners.[61] The report of commissioners will not be set aside unless for a mistake in quantity or a decided error in judgment.[62] The report of referees may be confirmed although it is merely a ma-

of the oil from such well. Stevenson v. Yoho [W. Va.] 59 SE 954.

49. Morgan v. Haley [Va.] 58 SE 564.

50. Eck v. Tate [Ala.] 44 S 384.

51. Donason v. Barbero, 230 Ill. 133, 82 NE 620.

52. Where a partition decree of riparian rights apportions waters without disposing of the underground waters, such waters essential for the preservation of surface streams undiminished cannot be diverted, but the surplus belongs to the riparian lands to be used in accordance with riparian rights, except that the partition cuts off from this right all lands except those tracts extending to some portion of the underground flow. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021.

53. The trial court has the right to correct errors in its record by amendments so as to make them conform to the facts. Collier v. Catherine Lead Co. [Mo.] 106 SW 971. The judgment in a suit for partition directing a division of the property, or a sale thereof, is not a final decree but merely an interlocutory order (Dangerfield v. Caldwell [C. C. A.] 151 F 554), and as such may be reopened without the formality of a bill of review but on mere petition or motion of the party aggrieved (Id.). A pendente lite decree is an equitable partition suit, appointing partitioners and directing the assignment of the interest of one of the heirs at law out of a particular lot only adjudicates that such heir's share is to be assigned from a particular lot. It is not until the share is actually allotted by the partitioners and their return made the judgment of the court that such heir becomes vested with a title in severalty to the land assigned. Haden v. Sims, 127 Ga. 717, 56 SE 989.

54. Collier v. Catherine Lead Co. [Mo.] 106 SW 971.

55. No notice need be given defendants of application for nunc pro tunc record entries. Collier v. Catherine Lead Co. [Mo.] 106 SW 971.

56. Baxter v. Camp, 129 Ga. 460, 59 SE 283.

57. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889.

58. They are bound as to all matters objected to or which might have been set up at that time. Barnes v. Henshaw, 226 Ill. 605, 80 NE 1076. And where not appealed from, all questions which might be decided on appeal become res judicata. Crowe v. Kennedy, 127 Ill. App. 189. Party estopped by adjudication from asserting non-existence of title involved and settled in partition proceedings. Deadman v. Yantis, 230 Ill. 243, 82 NE 592.

59. McCutchen v. McCutchen, 77 S. C. 129, 57 SE 678.

60. Baxter v. Camp, 129 Ga. 460, 59 SE 283.

61. Schulz v. Haase, 227 Ill. 156, 81 NE 50, afg. 129 Ill. App. 193.

62. Where commissioners appointed by agreement reported that they had made a fair and equal division, the affidavit of one of the parties supported by three other witnesses that the division was unequal as regarded the value was insufficient to overthrow that report. Mead v. Mead, 31 Ky. L. R. 70, 101 SW 330. Made on wrong principles or grossly unequal. Field v. Lelter [Wyo.] 90 P 378. Two out of five commissioners refused to sign a report insisting that the majority had agreed on a valuation. The fifth commissioner agreed at one time with the first two and later with the other two whereupon the last three signed a return without again going on the premises and without notice to the other two and without coming together. Held the confirmation of the report was not an abuse of discretion. Allen v. Allen, 76 S. C. 494, 57 SE 549. Evidence on partition by commissioners considered and held to show an approximately equal value in the shares. Mulloy v. Mulloy,

jority report.[63] A report of commissioners made without notice to defendants of the time when action was to be taken under the decree should not be accepted.[64] Omission in the report of facts concerning the character and situation of the premises where statute is silent respecting contents of report does not invalidate it.[65]

§ 6. *Mode of partition and distribution of property or proceeds.*[See 8 C. L. 1255] —The statutory sale for partition is generally not authorized unless the land cannot be equitably divided in kind.[66]

Distribution.[See 8 C. L. 1256]—Where the defendant has received a benefit from his use of the plaintiff's share [67] or has committed waste thereon, he is bound to account to the plaintiff for the same.[68] Payment by one of the remaindermen of the taxes imposed on the land during a life tenancy may be under such circumstances that the interest of the others may be charged with their proportion thereof on partition.[69] Distribution must be subject to all liens with which the land was charged,[70] and subject to all proper charges not waived or barred by laches.[71]

Owelty.[See 8 C. L. 868]

§ 7. *Sale and subsequent proceedings.*[See 8 C. L. 1257]—It is generally provided that a decree of sale and distribution of proceeds cannot be entered without there has been an averment and proof of facts showing that the lands cannot fairly be divided or equitably partitioned,[72] and it is the adjudication and not the sheriff's deed that conveys the ownership.[73] A certified copy of an order of sale not recorded is not invalid as the sheriff's authority to sell land, this making the sale void.[74] A judgment rendered without all the persons in interest being made parties is an absolute nullity and any sale thereunder is void.[75]

Notice.[See 8 C. L. 1257]

Terms of sale of minor's interests.[See 8 C. L. 1257]

Conduct of sale.[See 8 C. L. 1257]—The writ or commission directed by the court to the sheriff to sell certain property constitutes his sole guide.[76] A sheriff has no au-

231 Ill. 285, 83 NE 158. Evidence of amount of rent allowed by commissioner in partition proceedings between cotenants examined and allowance held excessive. Bowles v. Wood [Miss.] 44 S 169.

63. Bowlsby v. Gregory [Iowa] 114 NW 1060.

64. Robertson Consol. Land Co. v. Paull [W. Va.] 59 SE 1085.

65. Field v. Leiter [Wyo.] 90 P 378.

66. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889. See supra § 1, Statutory Sale for Partition.

67. Defendant received a benefit of $500 a year from his use of a part of the plaintiff's share in water rights. Roberts v. Claremont R. & L. Co. [N. H.] 66 A 485.

68. Under the law of West Virginia as found by the courts, the sinking of a gas or oil well on land by one tenant in common is a waste for which Code W. Va. 1899, c. 92, § 2, renders him liable in damages to his cotenants, and hence the sinking of such well does not give him any right or equity to have the same set off to him as an improvement made by him on a partition of the land. Dangerfield v. Caldwell [C. C. A.] 151 F 554.

69. Mateer v. Jones [Tex. Civ. App.] 19 Tex. Ct. Rep. 438, 102 SW 734.

70. Evidence held to show that lien against the premises had not been so paid as to allow distribution of receipts free from lien. Mathison v. Magnusson, 226 Ill. 368, 80 NE 885.

71. Where testator died in 1894, and his widow in 1900, and the executors did not offer the testator's will for probate until 1906, a suit for partition having been brought in the meantime and the will provided that the executors should provide for the widow's support, it was held that a claim by one of the executors asserted in the partition suit for support of the widow was barred by laches. Lester v. Kirtley [Ark.] 104 SW 213. Where in partition no issue was raised between defendants as to the interest of one previously conveyed to the others, and a pro confesso was taken, partition decreed, the land sold, and the sale confirmed, the decrees do not preclude defendants to whom their codefendant's interest was conveyed from asserting their title to the proceeds of that interest as against him or his garnishing creditor. Schuler v. Murphy [Miss.] 44 S 810.

72. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889.

73. Proces verbal. Chaffe v. Minden Lumber Co., 118 La. 753, 43 S 397.

74. Collier v. Catherine Lead Co. [Mo.] 106 SW 971.

75. Oneal v. Stimson, 61 W. Va. 551, 56 SE 889.

76. When ordered to sell in entirety he is without authority to divide the property and sell in halves. Doucet v. Fenelon [La.] 44 S 908.

thority to advertise property for sale before the commission to sell has been placed in his hands.[77] It is no ground for postponing a sale in partition brought by a trustee in bankruptcy in which it is found that he is the owner of an undivided half interest, that an appeal by the bankrupt is pending from the judgment for the trustee in an action against the bankrupt to recover such interest.[78]

*Confirmation of sale.*See 8 C. L. 1258—If the price realized was so low as to justify the court in concluding that a sale had not been fair to all parties concerned, confirmation as required by code would be refused and a resale ordered.[79] Where a judgment confirming a partition sale was collaterally attached in a suit for specific performance on the ground of lack of jurisdiction, it must be alleged that the absence of the jurisdictional fact affirmatively appeared from the record.[80]

*Rights and liabilities of purchasers or bidders.*See 8 C. L. 1258—Purchaser at a partition sale of an intestate's estate where the widow was not made a party to the partition acquires title to two-thirds of the tract and may maintain ejectment to oust the widow if she is in exclusive possession claiming the whole.[81] Where in partition proceedings one of the co-owners is a minor and the tutor and undertutor concur in opinion with the family meeting and the court approves and homologates the proceedings on petition of the tutor and orders a sale recommended by all parties, and the sale is made to a third person from which the tutor received the minor's share of the price, such purchaser is protected by the proceedings had.[82] Where a family meeting approved by the court reports that property is not divisible in kind, and a sale is had that question is closed as to the purchaser.[83] Where the wife of an intestate was not made a party defendant to partition proceedings and claiming title publicly forbade sale under the judgment, she has not lost her third interest in the land.[84]

*A misdescription.*See 6 C. L. 907—The intention of the parties and the direction of the court controls a misdescription in referees' deeds.[85] Where from all the circumstances of the case it is the evident intention to sell the entire real estate of the succession, the whole will be held to have been conveyed although the sheriff, in describing the land according to the maps of the government has omitted a part,[86] and sheriff's deed in Louisiana may be corrected even by parole.[87]

*The omission of property.*See 6 C. L. 907

*Land sold at a void sale.*See 8 C. L. 1259

§ 8. *Appeal and review; vacation of sale.*See 8 C. L. 1259—A partition decree fixing the rights and interests of the respective parties is final and appealable.[88] On an appeal from an order of sale entered after a final decree, the finding under the decree cannot be reviewed.[89] A decree will not be disturbed except for illegal or inequitable action on the part of lower court.[90] Where the defendant is present and without objection to the proceeding argues the case at the final hearing, he cannot successfully assign as error a failure to set the cause down for final hearing or failure to give notice of final hearing.[91] The fact that on actual partition of land some of

77. Cannot advertise and sell on the day commission is delivered. Doucet v. Fenelon [La.] 44 S 908.

78, 79. Schoonover v. Birnbaum, 150 Cal. 74, 89 P 1108.

80. Segal v. Reisert [Ky.] 107 SW 747.

81. Gunter v. Fallow [S. C.] 59 SE 70.

82, 83. Carrollton Land & Imp. Co. v. Eureka Homestead Soc., 119 La. 692, 44 S 434.

84. Gunter v. Fallow [S. C.] 59 SE 70.

85. Where in partition it was the desire of the parties and the direction of the court that fee to one half a road bed should be sold and conveyed with the lots abutting upon it, such fee passed under the referee's deeds though they described the land as bounded by the road. In re Jerome Avenue in City of New York, 120 App. Div. 297, 105 NYS 319.

86, 87. Chaffe v. Minden Lumber Co., 118 La. 753, 43 S 397.

88. Crowe v. Kennedy, 127 Ill. App. 189.

89. Piper v. Piper, 231 Ill. 75, 83 NE 100.

90. Hollenbeck v. Hollenbeck, 232 Ill. 384, 83 NE 926.

91. Williams v. Clyatt, 53 Fla. 987, 43 S 441.

the parties would be willing to pay cash for an exchange for some other tract is not ground for setting aside the partition or ordering an exchange.[92] Under California Code providing for appeals from interlocutory judgments within sixty days after the order is made and entered an appeal taken March 18, 1906, from a judgment entered on the minutes Dec. 23, 1905, and filed with the clerk Jan. 9, 1906, is too late.[93] A decree finding title and interest of parties and that partition be had in the proportion defined in it and leaving nothing to be done except for the commissioners appointed to divide the land if possible or if not to report the fact to the court for a decree of sale adjudicates the principles of the cause and is appealable.[94] A decree in partition settling all the rights of the parties except as to the mere matter of detail as to whether the property was susceptible of partition is a final and appealable decree.[95]

*Laches.*See 6 C. L. 911—Laches may bar the right to question irregularities in partition proceedings.[96]

*Vacation of sale.*See 8 C. L. 1260—Fraud in the conduct of a sale is sufficient reason for setting it aside,[97] but the fraud cannot affect one who buys from a fraudulent purchaser in good faith.[98] The remedy of tenants in common to set aside a partition sale on the ground of fraud and to charge the purchaser as trustee is by civil action against the cotenant and purchaser and not by motion in the partition suit, the purchaser not being a party thereto.[99] An application to set aside a partition sale held to contain sufficient allegations to render it an equitable petition, good as against a general demurrer, to set aside the sale for fraud.[1]

§ 9. *Voluntary partition.*See 8 C. L. 1260—Cotenants may partition property among themselves by mutual agreement.[2] An agreement in writing for a partition will have the same effect as an actual partition.[3] Parol partitions which have been executed by taking possession will be enforced in equity especially where acquiesced in for a considerable period.[4] The mutual agreement to partition is a sufficient consideration.[5] The parties may be required to execute conveyances to carry out the terms of a voluntary partition.[6] Where partition is made by mutual deeds between

92. Mulloy v. Mulloy, 231 Ill. 285, 83 NE 158.

93. Bloom v. Gordan, 150 Cal. 762, 90 P 115.

94. Richmond v. Richmond [W. Va.] 57 SE 736.

95. Interests of the parties found and ordered partition and appointed commissioners. Piper v. Piper, 231 Ill. 75, 83 NE 100.

96. Ten years delay fatal. Deadman v. Yantes, 230 Ill. 243, 82 NE 592. Laches of cotenant, short of adverse disseisin, to keep in possession or demand partition of land, does not bar his grantors' right of partition against cotenant in possession claiming absolute title by adverse disseisin. Donason v. Barbero, 230 Ill. 138, 82 NE 620.

97. A tenant in common suing to partition premises controlled by him as agent for the cotenants cannot on being appointed commissioner to sell purchase or procure them to be purchased for him and he cannot speculate for his own benefit or do any act detrimental to the interest of his cotenants. Tuttle v. Tuttle [N. C.] 59 SE 1008. In a suit by tenants in common to set aside a sale in a partition suit instituted by a cotenant and to charge the purchaser as a trustee on the ground of a fraudulent arrangement, it is sufficient to prove that he aided and abetted the cotenant in committing a fraud on the tenants in common. Id.

98. The fraud by which an administrator buys through a third party the property of the succession under his administration cannot affect a purchaser who without notice of the fraud buys in good faith from such third party or his vendee, and this though the vendee be the administrator himself. Chaffe v. Minden Lumber Co., 118 La. 753, 43 S 397.

99. Tuttle v. Tuttle [N. C.] 59 SE 1008.

1. Dykes v. Jones, 129 Ga. 99, 58 SE 645.

2. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709. Evidence held to show that the effect of an agreement was for a partition. Whitaker v. Farris [Tex. Civ. App.] 17 Tex. Ct. Rep. 1010, 101 SW 456.

3. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709.

4. Where a widow consented to a parol partition of the homestead by the children who took possession making valuable improvements, the children and their successors were estopped to repudiate the agreement. Ellis v. Campbell [Ark.] 106 SW 939. There may be a parol partition of lands if the division is followed by possession. Sires v. Melvin [Iowa] 113 NW 106.

5. But insufficient to support a division which would give widow fee simple instead of life estate. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709.

6. Where a voluntary agreement for par-

the cotenants, the deeds should be read and construed so as to carry into effect the true intent of the parties.[7] In a voluntary partition by deed one cotenant does not derive such title or interest from the other that either case be said to hold under the other.[8] Where defendants obtained title to an undivided half of certain land and took possession of the north half, making improvements thereon and it appeared that the difference in value was in favor of the south half, defendants would be entitled to have the north half set off to them in partition.[9] A conveyance by one tenant in common of a part of the common property is an election to take this as his share and is binding on all the cotenants if enough is left for their full share and they acquiesce in or ratify such partition.[10] An informal partition not binding on minors and married women but treated as a settlement for many years is effective evidence of the discharge of a resulting trust in favor of the heirs of one brother where the other upon death of the first brother took title to the land under a bond for a deed running to both.[11] Where a family who had inherited certain real estate agreed to an amicable partition, the heirs joining in quit-claim deeds to each other in which deeds the names of their husbands were inserted, the heirs took title by inheritance and the quit-claim deeds will be regarded as merely the means adopted to sever the tenancy in common.[12] Parties by agreement express or implied may bar themselves of a right to partition.[13]

PARTNERSHIP.

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tition is made by heirs and an award is made by parties selected to make the division fairly and justly, the chancellor will require the parties to carry the award into effect by executing conveyances. Bryson's Adm'r v. Biggs [Ky.] 104 SW 982.

7. Competent to show that only intention was partition and no other consideration passed. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709.

8. Each party transfers or releases his interest in all the land for exclusive fixed possession in a part. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709.

9. Baker v. Hamblen [Tex. Civ. App.] 107 SW 577.

10. Berryman v. Biddle [Tex. Civ. App.] 107 SW 922; Berryman v. McDonald [Tex. Civ. App.] 107 SW 944.

11. Scranton v. Campbell [Tex. Civ. App.] 17 Tex. Ct. Rep. 1014, 101 SW 285.

12. The insertion of names of the husbands of the heirs in quitclaim deeds executed on amicable partition did not invest the husbands with title to any part of the property, but was a mistake of the scrivener, the husbands holding an undivided one-half of the property in trust for their wives, which upon the death of the wives descends to their heirs. Under such circumstances the occupation of the property by the husband of one of the heirs during her lifetime was not adverse. Waterman v. Waterman, 10 Ohio C. C. (N. S.) 605.

13. Henderson v. Henderson [Iowa] 114 NW 178.

Incorporated [14] and unincorporated [15] associations not dependent on the personality of their members, as is the joint or common ownership of property.[16] Matters peculiar to partnerships of attorneys at law are treated in an appropriate topic.[17]

§ 1. *What constitutes. Definition and kinds.* See 8 C. L. 1261—Partnership is the relation which subsists between persons carrying on a business in common, with a view of profit.[18] Though resting in contract, it is in itself a status rather than a contract.[19] In Idaho a mining partnership is defined by statute.[20] United working of

14. See Corporations, 9 C. L. 733.

15. See Associations and Societies, 9 C. L. 374; Joint Stock Companies, 10 C. L. 462.

16. See Tenants in Common and Joint Tenants, 8 C. L. 2114.

17. See Attorneys and Counselors, 9 C. L. 315.

18. Manson v. Williams [C. C. A.] 153 F 525. Where several persons engage in a commercial enterprise under a firm name, each contributing his credit and services to business upon an agreement to divide net profits, a partnership exists. Hand Trading Co. v. Jones, 129 Ga. 853, 60 SE 154. A contract involving mutual consent of the parties, entered into between two or more persons for the purpose of carrying on a trade or business, with right to participate in profits thereof, constitutes a partnership, unless there are other facts and circumstances which show that some other relation exists. Bryant v. Fitzsimmons [Md.] 67 A 356.

19. See **Shumaker, Part. p. 3.**

NOTE. The Entity Theory of Partnership Under the Bankruptcy Act of 1898: It is now settled that when congress enacted in 1898 that "persons shall include partnerships," § 1 (19), and that "a partnership may be adjudicated a bankrupt," § 5a, it thereby made a partnership a legal entity. In re Meyer, 98 F 976; In re Mercur, 116 F 655, 658, afd. 122 F 384. Thus, a firm may be declared bankrupt though one member be a minor (In re Dunnigan, 95 F 428), or insane (In re Stein & Co., 127 F 547), and it has even been held that the partnership proceedings and the partners' proceedings are distinct cases, requiring payment of separate fees in each (In re Barden, 101 F 553; contra, In re Gay, 98 F 870). Acts of bankruptcy by the firm and by the individual partners are clearly distinguished (Hartman v. Peters & Co., 146 F 82),and the adjudication is made accordingly (In re Hale, 107 F 432). In at least one reported case, the issue of the firm's solvency was confined to partnership assets and partnership debts (In re McMurtrey & Smith, 142 F 853; Burdick, Part. [2d Ed.] 306). Merchants have always regarded the firm as something distinct from its members (Burdick, Part. [2d Ed.] 156), but the Federal judges, schooled in the common-law conception of a partnership as merely an aggregation of individuals (Id. 81), the doctrine recognized in the Banruptcy Act of 1867 by § 36, found it difficult, especially at first, to apply the entity theory to all circumstances. This led to the view that a partnership ought not to be adjudicated bankrupt apart from any of its members (In re Forbes, 128 F 137, 139), and to theories whereby at least one partner might also be declared bankrupt (Chemical Nat. Bk. v. Meyer, 92 F 896). Further to avoid the bankruptcy of merely the partnership entity, with all its difficulties (In re Carleton, 115 F 246, 249), the courts at this period held, in disregard of the entity theory, that a firm was insolvent only when its property, plus the individual property after the payment of individual debts, was less than its debts (In re Blair, 99 F 76). The reason given, that each individual partner as well as the firm was liable for partnership debts (Vaccaro v. Security Bk., 103 F 436), practically ignored the force of § 1 (15) and § 1 (19) of the Act, and the fact that a person is none the less insolvent if some one else is liable for his debts and able to pay them. Apparently, what underlay these decisions was the hidden fear lest a too strict application of the entity theory might result in merely distributing firm property among firm creditors, and then wiping the firm debts out of existence by a firm discharge (see In re Pincus, 147 F 621, 625), a conclusion clearly wrong but never called for by the entity theory under the statute. Accordingly, General Order VIII and Official Form No. 2 of the supreme court required the filing of individual schedules of the partners upon a voluntary petition in bankruptcy by a firm; this, however, is reconcilable with the entity theory on the ground that the schedules of the partners, like the examination of each of them by the creditors, are necessary for the proper administraton of the partnership estate. In the leading case of In re Meyer, 98 F 976, the circuit court of appeals for the second circuit, while deciding that proof of a partnership act of bankruptcy will not per se sustain the adjudication of an individual partner, first suggested the rule that an adjudication of the partnership entity nevertheless drew into the court of bankruptcy the administration of the estates of the individual partners, notwithstanding that there had been no individual adjudications. This dictum has been widely followed, especially in the eastern circuits. In re Stokes, 106 F 312. Recently, however, the circuit court of appeals for the eighth circuit, in a case wherein a partnership had made a general assignment and had been adjudged a bankrupt, without any of the partners being adjudicated, held that the partnership trustee could not take nor administer the property of an individual partner. In re Bertenshaw, 157 F 363. The court, while recognizing contrary dicta and decisions in other circuits, placed its decision upon a logical analysis of the act. An affirmance of this view by the supreme court, settling the law in the other circuits in accord, would be desirable.

There is no express provision of the statute allowing individual property to be taken by the trustee upon a firm bankruptcy. Sec. 5c does provide that "the court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the

a mine by several owners or several holders of leasehold interests creates a mining partnership.[21] A partnership may be formed for a single transaction.[22] It is for most legal purposes a distinct entity, separate in estate, in rights, and in obligations from the partners who compose it.[23] Its existence may be dependent on the performance of a condition.[24]

partners and of the administration of the partnership and individual property," but this ought to be read with §§ 2 (1) and 32 and General Order VI, and its purpose is apparently to have the cases of the partnership and all the partners administered for the sake of convenience in one district. Collier, Bank. (6th Ed.) 82. As to partners not adjudicated, the power of the court certainly ought to go no further than jurisdiction of their persons to compel compliance with § 7 (Duties of Bankrupts). The statute, although considering the firm an entity for bankruptcy purposes even after dissolution (§ 5a) nevertheless recognizes the common-law rule that the bankruptcy of a partner works for all other purposes a dissolution of the firm (Burdick, Part. [2d Ed.] 343), and provides for the trustee's receiving the bankrupt's interest in the firm after liquidation and accounting by the nonbankrupt partner or partners (§ 5h); but this does not by any implication give the trustee of the bankrupt partner the power to take the firm's property (In re Mercur, 122 F 384), nor that of the other partners (cf. Amsinck v. Bean, 22 Wall. [U. S.] 395). Similarly, there is no reason in allowing the property of a nonbankrupt partner to be taken upon an adjudication of the partnership entity.

On the other hand, wherever In re Meyer, 98 F 976, is followed, the distinction between acts of bankruptcy by the partnership and such acts by the partners, while still important upon the question of adjudication (Hartman v. Peters & Co., 146 F 82), becomes practically immaterial as to administration and discharge (Dickas v. Barnes, 140 F 849, 5 L. R. A. [N. S.] 654). Although both firm and individual property is thus taken and administered in the firm proceeding, the discharge, despite some dicta, seems never to have been granted to the firm only, but invariably to the individual partners. In re Farley, 115 F 359. Because of these decisions, and since in practice a firm is not likely to get into bankruptcy if any partner is solvent, it has become the most usual practice to adjudicate the firm and all the individual partners (In re Forbes, 128 F 137, 139; In re Grant Bros., 106 F 496, 498; Collier, Bank. [6th Ed.] 80), to marshal the assets of all and distribute them as provided by § 5f of the act, and then to discharge the individual partners from firm and individual debts (In re Meyers, 97 F 757; In re Gay, 98 F 870, 872).

Many of the difficulties of the subject may be removed if we adopt the theory that the partnership and the partners are distinct legal persons as regards adjudication and administration, but that a discharge (even from partnership debts), to be of any effect, can be granted only to the individual partners. As the application for a discharge is substantially a separate proceeding, this rule would be convenient in its workings and logical in its results. If one member of a firm commits an individual act of bankruptcy, the other members may liquidate (§ 5h), and firm creditors can be paid so far as possible in the liquidation proceedings. They may also prove their claims against the bankrupt (In re Bates, 100 F 263), although they cannot receive any dividend until after the individual creditors have been paid in full (§ 5f; In re Wilcox, 94 F 84; In re Janes, 133 F 912). The discharge is, according to the best authority, a valid bar to partnership and individual obligations. N. Y. Institution v. Crockett, 117 App. Div. [N. Y.] 269; 7 Columbia Law Review, 272. On the other hand, if the firm commits an act of bankruptcy, the partnership entity is adjudicated "a bankrupt" (§ 5a); the partnership creditors elect the trustee (§ 5b, for § 5h seems applicable only to the bankruptcy of a partner when the firm is not declared a bankrupt. In re Harris, 4 Am. B. R. 133; Collier, Bank, [6th Ed.], 87); the partnership assets are collected and the partnership debts are paid. The discharge of the partnership entity would be nullity (Chemical Nat. Bk. v. Meyer, 92 F 896, 899; In re Forbes, 128 F 137, 139, 140), for the partners, whether regarded as codebtors with their firm, or as quasi-sureties for its debts, would still be liable by virtue of § 16. The result would be much like the bankruptcy of a corporation whose stockholders are under a statutory liability for its debts. See § 4b. The net result of a partnership bankruptcy, then, would be an administration of its estate; the partners must then either pay off what remains of its indebtedness, or if unable to do so become voluntary bankrupts; or the partnership creditors, who are their individual creditors also, may cause them to be adjudicated involuntary bankrupts. Matter of Hee, 13 Am. B. R. 8.—From 8 Columbia L. R. 391.

20. To constitute mining partnership under Rev. St. 1887, §§ 3300, 3309, co-owners must actually engage in working mine or in business of operating it. Cotenancy of persons in mining claim does not in itself constitute them partners. Madar v. Norman, 13 Idaho, 585, 92 P 572. But partnership relation may be established among such co-owners as have actually engaged in the working or mining operation though all the tenants have not so engaged. Id.

21. Kirchner v. Smith, 61 W. Va. 434, 58 SE 614.

22. Partnership formed to buy and sell two pieces of land. Smallhouse v. Morris [Ky.] 107 SW 708.

23. In re Bertenshaw [C. C. A.] 157 F 363. This conception of a partnership is embodied in the bankruptcy law of July 1, 1898, c. 541 (30 Stat. 544; U. S. Comp. St. 1901, p. 3418), and under it a partnership may be adjudged bankrupt although the partners who compose it are not so adjudicated. Id; Manson v. Williams [C. C. A.] 153 F 525. But in State v. Krasher [Ind.] 83 NE 498, it is said that at least at common law a partnership, as such, "is not regarded as having any legal existence apart from the

*Essential elements.*See 8 C. L. 1262—The essential elements of a partnership are an agreement between the parties,[25] supported by a consideration,[26] to carry on some lawful business or adventure [27] in which they are to have a community of interest,[28] each to contribute property or services,[29] and each to share in the profits [30] and losses.[31] But a mere participation in profits and losses does not necessarily constitute a partnership between the parties so participating.[32] One who is only interested in profits as compensation for services rendered or money advanced is not a partner.[33] But participation in the profits raises a presumption of the existence of a partnership.[34]

*Intent as test.*See 8 C. L. 1264—Intention is controlling in determining whether a partnership exists.[35] The intention is to be determined by the contract itself and the surrounding circumstances.[36]

members composing it. In accordance with this rule, what is called the property of the firm is the property of the individual partners, and what are called the debts of the firm are the debts of the partners. * * * Notwithstanding the nonrecognition of the firm as a distinct legal entity, it is convenient, if not indispensable, for many purposes to personify the firm, and it is usual, whenever the collective rights and liabilities of the partners are the only thing that need be considered, to use the term 'firm' or 'partnership' as a symbol to designate the aggregate whole as distinguished from the individual partners. And it is merely a convenient mode of expression, which simplifies business operation and legal reasoning. Accordingly a firm is often spoken of as an entity, having its own property, creditors, and the like, but this is only in the sense just explained, and means nothing more than that the partners as such, have certain special rights and liabilities, which must be worked out through their partnership relation."

24. Evidence held to warrant finding that plaintiff never was full partner with defendant in firm, but that his membership depended upon his paying his full share of capital, and that defendant was mere depository of smaller sum paid him. Dusopole v. Manos, 194 Mass. 355, 80 NE 481.

25. Bryant v. Fitzsimmons [Md.] 67 A 356. A partnership is a relation between two or more competent persons resulting from a contract. Diamond Creek Consol. Gold & Silver Min. Co. v. Swope, 204 Mo. 48, 102 SW 561.

26. Where widow after death of husband continues his business in her own name, but assisted by her minor children, there is no consideration for an agreement of partnership betweeen widow and children. Tuite v. Tuite [N. J. Eq.] 66 A 1090.

27. Manson v. Williams [C. C. A.] 153 F 525.

28. To constitute a partnership there must be such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, and dispose of the whole property. Sain v. Rooney, 125 Mo. App. 176, 101 SW 1127. The agreement must be that the parties shall carry on the adventure for their common benefit. Manson v. Williams [C. C. A.] 153 F 525.

29. Manson v. Williams [C. C. A.] 153 F 525. Where there is a joint enterprise, with a provision for sharing the profits and losses, one person contributing the money, the other his experience and labor, and a firm name is used, the contract is one of partnership. Doncourt v. Denton, 105 NYS 906.

30. The right to share profits is an element of partnership. Manson v. Williams [C. C. A.] 153 F 525; Bryant v. Fitzsimmons [Md.] 67 A 356. An essential element of a partnership is an agreement of the parties to share the profits arising from some predetermined business engaged in for their common benefit. Miller v. Simpson [Va.] 59 SE 378. But it has been held that an agreement to share profits is not essential, that the right may flow out of the relationship existing between the parties. Manson v. Williams [C. C. A.] 153 F 525.

31. Community of liability for losses is an essential element of a partnership. Baldwin v. Patrick [Colo.] 91 P 828; Hays v. Colonial Trust Co., 217 Pa. 53, 66 A 143. Agreements held to lack this element. Baldwin v. Patrick [Colo.] 91 P 828; Hays v. Colonial Trust Co., 217 Pa. 53, 66 A 143. A mere promise to compensate another for his services in selling land by sharing with him the commission therefor, if no losses or expenses are contemplated or involved, is a contract of employment and not a partnership agreement. Sain v. Rooney, 125 Mo. App. 176, 101 SW 1127.

Contra: An agreement to share losses is not an essential element of partnership. Leeds v. Townsend, 228 Ill. 451, 81 NE 1069; Miller v. Simpson [Va.] 59 SE 378.

32. Diamond Creek Consol. Gold & Silver Min. Co. v. Swope, 204 Mo. 48, 102 SW 561. The mere participation by one in the proceeds of a transaction or business does not per se constitute him a partner therein. Nugent v. Armour Packing Co. [Mo. App.] 106 SW 648. A mere promise by A, owner of a quarry, to give B some portion of the profits, if any, that he may receive from a corporation on stone furnished it, does not make A and B partners. Id.

33. Larzelere v. Taber, 119 App. Div. 81, 103 NYS 970. An agreement that B is to build houses on his wife's land and T is to advance certain moneys and render legal services and receive his money back with interest and a share of profits, if any, does not create a partnership. Id.

34. Nugent v. Armour Packing Co. [Mo. App.] 106 SW 648. This presumption is not conclusive, but if not rebutted is sufficient to establish a partnership. Id.

35. Leeds v. Townsend, 228 Ill. 451, 81 NE 1069; Diamond Creek Consol. Gold & Silver

Concrete illustrations of the principles that have been stated will be found in the appended note.[37]

Who may become partners. See 8 C. L. 1265—That one is a member of a general partnership engaged in the real estate business does not preclude his entering into a particular partnership with a third person relating to a particular tract of land.[38]

Formalities of contract of partnership. See 8 C. L. 1265—Although there is some conflict of authority upon the question,[39] the weight thereof supports the rule that a

Min. Co. v. Swope, 204 Mo. 48, 102 SW 561; Nugent v. Armour Packing Co. [Mo. App.] 106 SW 648; Frankel v. Hillier [N. D.] 113 NW 1067. As between parties there can be no partnership unless one was intended. Miller, DuBrul & Peters Mfg. Co. v. Laidlaw-Dunn-Gordon Co., 4 Ohio N. P. (N. S.) 554.

36. Diamond Creek Consol. Gold & Silver Min. Co. v. Swope, 204 Mo. 48, 102 SW 561. Whether a partnership exists is to be determined by the terms of the agreement and the nature of the transaction rather than by what the parties call themselves. Sain v. Rooney, 125 Mo. App. 176, 101 SW 1127. Intention is to be determined not by particular expressions, but by the nature and effect of the whole contract. Nugent v. Armour Packing Co. [Mo. App.] 106 SW 648. Participation in the profits and losses of a going business or undertaking affords the usual test of the existence of an intention to form a partnership. Id. But an agreement for such participation is not conclusive but only prima facie proof of such intention, which may be rebutted by evidence of other facts and circumstances. Id.

37. **Partnership created:** An agreement by A and B that land shall be purchased on joint account and title taken by S and held for their joint benefit, and that each shall pay one-half purchase price and each own an undivided one-half interest, makes A and B partners in enterprise. Koyer v. Willmon, 150 Cal. 785, 90 P 135. Facts held to show an agreement for a partnership to deal in real estate. Langley v. Sanborn [Wis.] 114 NW 787. An agreement between S and M by which the latter is to care for and dispose of certain horses purchased by former and after turning over to S sufficient of proceeds to cover purchase price, parties to share equally in profits or losses, is a partnership agreement and horses are partnership property. Steckman v. Gault State Bk., 126 Mo. App. 644, 105 SW 674. Evidence held to show existence of a banking partnership. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598. Where the object of a joint mining venture is not only to search for and discover mines but also to work and develop them and conduct a general mining business, the agreement constitutes a partnership. Costello v. Scott [Nev.] 93 P 1. Letters interpreted and held to show that parties engaged in a partnership in praesenti for mining purposes. Id. Contract held to create a partnership and not merely the written evidence of the sale and purchase of a one-half interest in the profits of an established business. Miller v. Simpson [Va.] 59 SE 378. Facts held to show existence of a partnership in fact. Manson v. Williams [C. C. A.] 153 F 625. Contract held to constitute a partnership. Bryant v. Fitzsimmons [Md.] 67 A 356.

No partnership created: A voluntary association of business concerns, formed for the purpose of adopting a uniform basis of dealings between the members thereof and their employes and the investigation and adjustment of questions arising between them, is not a partnership. Webster v. Taplin, Rice & Co., 9 Ohio C. C. (N. S.) 587; Miller, DuBrul & Peters Mfg. Co. v. Laidlaw-Dunn-Gordon Co., 4 Ohio N. P. (N. S.) 554. A contract by which A agrees that if within ten years B shall sell certain lands for him he shall have half the profits in excess of the sum A paid for the lands and interest thereon at ten per cent, but that if at expiration of five years no sale has been made, contract shall terminate, and if at expiration of ten years enough has not been realized to pay purchase money and interest, B shall be allowed five per cent on sales made, is not a contract of partnership. Corbin v. Holmes [C. C. A.] 154 F 593. A, B and C leased land, A taking a half interest and B and C the other half. A treated her interest as a separate entity by causing her interest in improvements to be separately insured for her benefit. Held that leases did not constitute lessees a partnership. Kershaw v. Simpson [Wash.] 89 P 889. Where W and B made a contract to raise rice, W to furnish land, teams, tools, seed rice, and to pay for threshing, and B to furnish labor, shelter, and feed teams, make necessary repairs to tools, and furnish water for irrigation, gross proceeds to be equally divided, no partnership was created, but parties were merely joint owners of crop raised. Beaumont Rice Mills v. Bridges [Tex. Civ. App.] 18 Tex. Ct. Rep. 116, 101 SW 511. Facts held not to constitute a partnership between plaintiff and defendant for buying and selling cotton. Davidson v. Copeland, 77 S. C. 108, 57 SE 620. Evidence held to justify finding that there was no partnership between mother and son in fish and poultry business. Chlopeck v. Chlopeck [Wash.] 91 P 966. Evidence held not to show a partnership agreement between widow and minor children in deceased husband's business. Tuite v. Tuite [N. J. Eq.] 66 A 1090. Facts held not to establish a partnership in a mining enterprise. Diamond Creek Consol. Gold & Silver Min. Co. v. Swope, 204 Mo. 48, 102 SW 561. Evidence held insufficient to show existence of partnership. Howard v. Yates [Ky.] 107 SW 738.

38. Koyer v. Willmon, 150 Cal. 785, 90 P 135.

39. In Wisconsin it has been held that a promise to form a partnership to deal directly in real estate is void, under the statute of frauds, if not in writing. Langley v. Sanborn [Wis.] 114 NW 787.

partnership for the purchase and sale of land for speculation, the profits to be divided among the partners, is valid where verbally made,[40] and the existence of the partnership and the extent of the interest of the partners may be shown by parol.[41]

Stockholders in illegal or defective corporations.[See 8 C. L. 1265]—Incorporators will not be held liable as partners merely because the organization of the corporation is defective.[42] But to exempt them from such liability there must be at least a colorable compliance with the requirements of the charter or law under which they assume to act and a user of the rights claimed thereunder.[43] In the absence of fraud a creditor who has dealt with a de facto corporation in its corporate capacity is estopped to charge the stockholders as partners with the corporate debt.[44]

Evidence.[See 8 C. L. 1266]—Evidence of distinterested witnesses is admissible to prove that at the date of the contract sued on the defendants were not copartners.[45] A statement or admission by a partner of a fact concerning partnership transactions is admissible against all the partners.[46] But the mere declaration of a partner, whether written or spoken, is not admissible to prove the existence of a partnership.[47] But where there is independent prima facie proof of a partnership, the declarations of an alleged partner are admissible in corroboration.[48] That one held himself out as a partner cannot be shown by the declaration of a person who subsequently became his partner, made before the partnership was formed.[49] Where the admissions of a defendant who has filed a plea of no partnership are offered in evidence against him, they should be scanned with care.[50] The usual rules prevail as to the materiality of the evidence [51] and as to the admissibility of impeaching evidence.[52] The relation may be established by the testimony of the employes of the partnership.[53] Declarations or admissions of a partner are admissible to prove partnership.[54] Partnership acts may be proved to show the relation.[55]

Partnership is a mixed question of law and fact.[56]—If there is evidence thereof it is for the jury.[57]

Parnerships as to third persons.[See 8 C. L. 1267]—An estoppel may arise against one

40. Miller v. Ferguson [Va.] 57 SE 649. Partnership for the purpose of buying, holding, and selling lands may be formed by a parol agreement. Koyer v. Willmon, 150 Cal. 785, 90 P 135.

41. Miller v. Ferguson [Va.] 57 SE 649.

42, 43. Brooke v. Day, 129 Ga. 694, 59 SE 769.

44. Western Inv. Co. v. Davis [Ind. T.] 104 SW 573.

45. American Oilcloth Co. v. Alper, 104 NYS 446.

46. Declaration that he did a specific act, which act was clearly within actual or apparent scope of partnership business, is such a statement or admission and not a declaration as to his authority as an agent. Merrill v. O'Bryan [Wash.] 93 P 917.

47. Davidson v. Waxelbaum, 2 Ga. App. 432, 58 SE 687.

48. Davidson v. Waxelbaum, 2 Ga. App. 432, 58 SE 687. In an action against alleged partners in a firm which had succeeded to the rights of a bank, a resolution of board of directors of bank is admissible to show that one of defendants is a partner where such defendant voted upon resolution as a director and made no objection to its recitals. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598.

49. Declaration by L that G "was to become" his partner. James Reilly Repair & Supply Co. v. Gallagher, 108 NYS 655.

50. Mims v. Brook [Ga. App.] 59 SE 711.

51. Where a partnership agreement was admittedly oral, but a witness testified that it was put in writing but not signed, the writing is admissible as bearing upon the truth of such testimony. Michigan Shoe Co. v. Paul, 149 Mich. 695, 14 Det. Leg. N. 554, 113 NW 310. Where, as against a defendant filing a plea of no partnership, fact of partnership is otherwise prima facie established, bill heads of firm, used in business and containing his name as a partner, are admissible in evidence against him, especially where proof makes it probable that he knew his name was being so used. Mims v. Brook [Ga. App.] 59 SE 711.

52. Evidence held admissible to impeach testimony of a defendant that he was not a partner. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598.

53. Clark v. Hoffman, 128 Ill. App. 422.

54. Thomas v. Mosher, 128 Ill. App. 479.

55. Evidence that alleged firm sustained a loss and made claim therefor in a partnership capacity may be shown. Thomas v. Mosher, 128 Ill. App. 479.

56. See 8 C. L. 1267. Frankel v. Hillier [N. D.] 113 NW 1067.

57. So held where there was evidence of admissions of partnership by parties. Nevers Lumber Co. v. Fields [Ala.] 44 S 81. Evidence held insufficient to establish a partnership. Clark v. Hoffman, 128 Ill. App. 422.

to deny his liability as a partner, either by reason of admissions acted on,[58] by the parties holding themselves out as partners,[59] by the prior existence of a partnership of the dissolution of which proper notice was not given,[60] or by any other sufficient state of facts to create such an estoppel [61] if the party seeking to hold him was misled by the putative status and acted thereon.[62]

§ 2. *Firm name, trade mark, and good will.* See 8 C. L. 1268—When dissolution is caused by the death of a partner, the same general principles apply to the disposal of the good will as in other cases of dissolution where no agreement has been made concerning it.[63]

§ 3. *Firm capital and property. In general.* See 8 C. L. 1269—The effects of a partnership are vested, in solido, in the partnership, and not in the constitutent members in severalty.[64] Whether property belongs to a firm or to the members thereof individually is a question of intention.[65] The intention that realty shall become partnership property must be distinctly manifested.[66] Evidence to be admissible upon the question whether property belongs to a firm or to the members individually must be material.[67] The same formalities are required in the conveyance of partnership real estate as that of individuals.[68] An assignment by a partnership of all its profits and assets carries with it an indebtedness of a partner who has made an overdraft of profits.[69]

58. Mims v. Brook [Ga. App.] 59 SE 711. A declaration of one person that another is his partner is not admissible to charge latter unless made in his presence and hearing, or under such circumstances as make it reasonably certain that it was heard by him. Sax v. Doughty [N. J. Law] 68 A 912.

59. Where parties hold themselves out to the public as doing a particular business in a firm name, the law will imply a partnership agreement as to third persons, who contract with them in that name, whatever may be the real nature of their connection as between themselves. Michael Bros. Co. v. Davidson [Ga. App.] 60 SE 362. To render one liable for the contract of another on the ground that he was held out as his partner, it must appear that he consented to such holding out. Morback v. Young [Or.] 94 P 35. F conducted a mercantile business under name of "De Soto Supply Company" furnished all capital, purchased all goods, made all disbursements of money, and had exclusive control and management of business, and by agreement with him C furnished his own services as a clerk or salesman, and was to receive therefor one-sixth of net profits, and also furnished services of another clerk or salesman for whose services he was to receive another one-sixth of such profits, and whose wages he was to pay whether any profits were realized or not. Held that relatively to third persons F and C were partners. Callaway v. Waxelbaum Co., 128 Ga. 508, 57 SE 762. Evidence held sufficient to show that defendants held themselves out as partners. Gertner v. Merker, 104 NYS 873. Evidence held sufficient, prima facie, to show that defendant held himself out as a partner. James v. Sitomer, 108 NYS 115.

60, 61. Mims v. Brook [Ga. App.] 59 SE 711.

62. Mims v. Brook [Ga. App.] 59 SE 711. To charge one on ground that he held himself out as a partner, plaintiff must have contracted upon faith of such holding out. James Reilly Repair & Supply Co. v. Gallagher, 108 NYS 655; Morback v. Young [Or.] 94 P 35. No evidence to show that plaintiff so contracted. James Reilly Repair & Supply Co.v. Gallagher, 108 NYS 655.

63. In re Silkman, 105 NYS 872. It is to be accounted for as part of assets of decedent's estate, and to be considered in valuing his interest in a continuing partnership business. Id. The basis of its valuation should be the annual profits prior to decedent's death, arrived at by taking average annual profits for three years preceding decedent's death and calculating fifty per cent of the annual profits for two years. Id.

64. Blake v. Sargent, 152 F 263.

65. Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014. Whether and how far real property is partnership assets depends upon the intention or agreement of the parties. Clark v. Lyster [C. C. A.] 155 F 513. Evidence held to show that certain personal property was partnership property. Rankin v. Trickett, 75 Kan. 306, 89 P 698.

66. Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014. If realty is not purchased with partnership funds, the fact that it is used for partnership purposes will not convert it into partnership property if there is no agreement that it shall be so considered. Clark v. Lyster [C. C. A.] 155 F 513. Evidence held not to show conclusively that land was partnership property. Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014.

67. Where it is material on trial to determine whether personal property owned equally by two partners and used in partnership business is owned jointly as partnership property or individually as undivided moieties letter which is referred to in a written agreement to form a partnership as containing conditions and specifications on which business is to be conducted is material evidence. Rankin v. Trickett, 75 Kan. 306, 89 P 698.

68. Butts v. Cooper [Ala.] 44 S 616.

69. Where by articles of copartnership partner was entitled to draw a certain sum each month "on account of profits" and there were no profits, any sum withdrawn

How title is held.[See 8 C. L. 1269]—In relation to property which is the subject of the partnership agreement, each partner occupies the position of a trustee to the other.[70] The legal title to an interest in land created by a mechanic's lien vests, not in the partnership, but in its individual members, the partnership acquiring only an equitable interest.[71] Upon the dissolution of the partnership, no formal or written assignment is necessary to convey such equitable title from the partnership to the individual members.[72]

Partner's interest.[See 8 C. L. 1270]—A partner has a lien on the partnership assets for his portion thereof after payment of the firm debts.[73] A partner may dispose of his interest in the partnership property [74] subject to the rights, liabilities, and equities of the partnership.[75] But he cannot transfer an individual interest in any specific article belonging to the firm.[76] A transfer of the partner's interest merely entitles the transferee to receive such partner's share of what may remain after a settlement of the partnership affairs and the payment of the partnership debts.[77] What passes by an assignment of a partnership agreement must be determined by an interpretation of the language of the agreement.[78] A verbal agreement to purchase an interest in a partnership involving title to lands is invalid under the statute of frauds.[79]

§ 4. *Rights and liabilities as to third persons.*[See 8 C. L. 1270]—Partners are jointly [80] and severally liable, and payment by one partner of his part of the liability and his consequent release does not discharge the other partner.[81] The liability of partners is not to be determined by the extent or variety of the business affairs in which they are engaged.[82] Where a partner individually contracts for services to be performed for the firm, he is individually liable therefor.[83] A note made for the accommodation of a partnership by one not a partner and indorsed by the firm is a partnership debt.[84]

(§ 4) *A. Power of partner to bind firm. In general; contracts.*[See 8 C. L. 1270]—Of course no power vests in a partner to bind his copartner's until the formation of the partnership.[85] A partnership is bound by the acts and contracts of a partner who

by him was an overdraft of profits. Hoey v. Fechtenberg, 106 NYS 1090. Where, at time of transfer of assets of partnership to corporation, partner who had made an overdraft of profits entered on firm's books the sum withdrawn as a debt due from him to firm, he is estopped from asserting as against corporation that the money was withdrawn by him under claim of right. Id.

70. Koyer v. Willmon, 150 Cal. 785, 90 P 135. Where a partner purchases with his own money property that it was agreed should be purchased upon joint account of partners, he is a trustee for partnership. Id.

71. Soule v. Borelli [Conn.] 68 A 979.

72. The equitable title passes with the transfer of the debt secured. Soule v. Borelli [Conn.] 68 A 979.

73. Harlan v. Bennett, Robbins [Ky.] 106 SW 287.

74. Day v. Stafford [Mo. App.] 107 SW 433; Carlisle Gas & Water Co. v. Carlisle Borough [Pa.] 67 A 844.

75. Carlisle Gas & Water Co. v. Carlisle Borough [Pa.] 67 A 844.

76. Simmons v. Rowe, 4 Cal. App. 752, 89 P 621.

77. Simmons v. Rowe, 4 Cal. App. 752, 89 P 621; Day v. Stafford [Mo. App.] 107 SW 433. And this whether transfer is by voluntary act or by legal process. Simmons v. Rowe, 4 Cal. App. 752, 89 P 621. A sale of a partner's interest does not invest vendee with undivided interest in corpus of firm property owned by vendor. Day v. Stafford [Mo. App.] 107 SW 433.

78. Two assignments of a partnership agreement examined and held not to include a personal promise of one of the partners to pay a sum of money due from one partner to the other. Barnes v. Sim [Neb.] 114 NW 154.

79. Butts v. Cooper [Ala.] 44 S 616.

80. Kaplan v. Shapiro, 53 Misc 606, 103 NYS 922. Partnership debts are joint debts (Brandt v. Hall [Ind. App.] 82 NE 929), and contracts with partners are joint contracts (Id).

81. Code Civ. Proc. § 1942. Kaplan v. Shapiro, 53 Misc. 606, 103 NYS 922.

82. Where the purpose of the partnership is merely to buy and sell two pieces of land, the measure of the partner's liability within the scope of the partnership business is as great as if the partnership was continuous and covered a series of transactions. Smallhouse v. Morris [Ky.] 107 SW 708.

83. Perkins v. Peirce [Wash.] 93 P 525.

84. Such a note will sustain a partnership mortgage given for debts which include the note. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

85. A partner is not liable for debts contracted by his copartner prior to the formation of the partnership. James Reilly Repair & Supply Co. v. Gallagher, 108 NYS 655.

acts within the scope of his authority as such,[86] unless the transaction is tainted with fraud.[87] But the power of a partner over the property of the partnership is confined to the scope of the partnership business.[88] The scope of such business is to be determined from its nature and from the terms of the partnership agreement.[89] After a partnership has been dissolved by operation of law, it is without the scope of a new partnership to bind such partnership for payment of debts of the dissolved partnership.[90] If the authority and duties of each member of a trading partnership be expressly defined or limited, any act in excess of such limitations is not binding upon the firm [91] except as to third persons who without knowledge of the limitations rely upon the implied authority of the individual members.[92] Where a partnership agreement provides that a partner shall manage the business, he has authority to pledge the credit of the firm.[93] A partner may execute a chattel mortgage on partnership goods to secure a partnership debt.[94] Partners may confer upon a copartner by power of attorney authority to sign an instrument in their names.[95] Where such a power is a continuing one, revocation by act of the partners will not be presumed during the existence of the partnership.[96] In North Dakota a partner has no implied power to sell the good will of the partnership business.[97] A partnership is not liable for goods furnished a partner on his personal account.[98] Whether the act of a partner is within the scope of his authority is a question of fact.[99] Although a partner exceeded his authority in contracting in behalf of the firm, if the contract is not entire and indivisible it will be upheld so far as the authority extended.[1] In Michigan one partner cannot bind the firm to a liability in excess of $500.[2] A part-

86. Costello v. Scott [Nev.] 93 P. 1. One cannot avoid liability for the acts of his partner in the ordinary business of the firm on the ground that he did not know of such acts. Priddy v. MacKenzie, 205 Mo. 181, 103 SW 968.

87. Evidence held not to show fraud in transaction. Costello v. Scott [Nev.] 93 P 1.

88. Longley v. Sperry [N. J. Eq.] 66 A 1062. But so far as third persons who deal with a partner without notice are concerned, the copartners are bound if the transaction be such as the public may reasonably conclude is directly and necessarily embraced within the partnership business as being incident and appropriate to such business according to the course and usage of conducting it. Merrill v. O'Bryan [Wash.] 93 P. 917. Under Wilson's Rev. & Ann. St. 1903, a partnership obligation executed by one partner without knowledge or consent of other binds firm and each general partner if it is within reasonable conduct of partnership business. Shapek v. Oak Creek Valley Bk. [Okl.] 91 P. 1129.

89. Acts within scope of partnership business: Purchase of lumber for construction of warehouse at a terminal point is within scope of partnership business of a firm operating river steamers and handling freight. Merrill v. O'Bryan [Wash.] 93 P 917. Member of mining partnership held authorized to contract for location work upon certain claims and to transfer surface rights upon such claims in payment therefor. Costello v. Scott [Nev.] 93 P 1.

Acts not within scope of partnership business: A contract of suretyship, guaranty or accommodation indorsement is not within the legitimate business of an ordinary partnership. Durden v. Dekle [Ga. App.] 59 SE 315. Hence one partner has not power to bind partnership or other partners by any such contract without their consent. Id. Where partnership business is keeping a livery stable, a partner has no implied authority, without consent of his copartner, to mortgage the whole plant. Longley v. Sperry [N. J. Eq.] 66 A 1062. In such case the mortgagee is only entitled to the equitable interest which the mortgagor would have been entitled to after an accounting. Id.

90. Meinhard Schaul & Co. v. Folsom Bros. [Ga. App.] 59 SE 830.

91, 92. First Nat. Bk. of Brawerville v. Stadden [Minn.] 115 NW 198.

93. Thomas v. Hardsocg [Iowa] 115 NW 210. And our dealing with him is not effected by an oral change in the agreement of which he has no notice. Id.

94. Odom v. Clark [N. C.] 60 SE 513.

95. So held under Rev. St. 1899, § 2808, requiring chattel mortgages of partnership property to be signed by each partner. Boswell v. First Nat. Bk. [Wyo.] 92 P 624. Power to sign a chattel mortgage of partnership property to secure a firm indebtedness confers authority to include in indebtedness covered by mortgage a note made for accommodation of firm and endorsed by it. Id.

96. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

97. Rev. Codes 1905, § 5836. Kelly v. Pierce [N. D.] 112 NW 995.

98. Hanrahan v. Freeman, 35 Mont. 584, 90 P 793.

99. A finding of trial court upon this question if sustained by sufficient evidence will not be disturbed on appeal. Merrill v. O'Bryan [Wash.] 93 P 917.

1. Taylor v. Felder [Ga. App.] 59 SE 844.

2. Under Comp. Laws, § 6083, an agree-

ner will be bound by an act of his copartner in excess of his authority if he ratifies it.[3]

Partnership bills and notes.[See 8 C. L. 1271]—A partner may bind his copartners by the execution of a negotiable instrument where his authority extends to the execution of such instruments.[4] Members of trading partnerships have implied authority to pledge the credit of the firm by the issuance of negotiable instruments in furtherance of the partnership business.[5] But such authority is only an inference or presumption arising from the relationship of the parties, and is not conclusive.[6] To make an instrument executed by a partner binding on the firm, the partner must have been acting for the firm in executing it.[7] Where no firm name has been adopted, a note in the name of one of the partners will bind the firm if made for firm purposes, and such is the understanding of the parties.[8] An acceptance of a draft by a partner in the name of the firm will bind the partnership as against a bona fide holder, although such acceptance was not within the scope of the partnership authority conferred upon such partner and was without the knowledge or consent of his copartner.[9] A firm note executed by a partner without authority may become binding on his copartners by ratification.[10] A note under seal, executed by a partner in the firm name, is the simple contract of the firm.[11] Under the negotiable instruments law a partner who individually indorses a firm note is individually liable as an indorser.[12]

Notice to a partner is notice to the firm.[13]

Liability for torts and crimes.[See 8 C. L. 1272]—Where a partner's negligence in the

ment involving a liability of more than $500 is not binding upon a partnership unless reduced to writing and signed by at least two managers. Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 14 Det. Leg. N. 434, 112 NW 940.

3. Taylor v. Felder [Ga. App.] 59 SE 844, Durden v. Deple [Ga. App.] 59 SE 315. No fact sufficient to supply necessary elements of ratification appear in this case. Id. The mere fact that a partner was careless in omitting to know what use his copartner was making of the partnership funds is not sufficient to charge him with liability. Michigan Shoe Co. v. Paul, 149 Mich. 695, 14 Det. Leg. N. 54, 113 NW 310.

4. A note executed by a partner with due authority in payment for goods sold the firm is binding upon his copartners. Hand Trading Co. v. Janes, 129 Ga. 853, 60 SE, 154. Notes given and accepted as firm obligations and signed by a partner having authority to manage the business are binding upon the partnership. Thomas v. Hardsocg [Iowa] 115 NW 210. If a partner, having authority to bind partnership only for a certain sum, borrows money in excess of that sum and gives a note for it, note is binding on firm and other members to extent of authority partner had. Taylor v. Felder [Ga. App.] 59 SE 844.

5. First Nat. Bk. of Browerville v. Stadden [Minn.] 115 NW 198. Execution and delivery of vote as a renewal of firm obligation outstanding and due, upon which liability is admitted, is a transaction within scope of business of partnership. Shapek v. Oak Creek Valley Bk. [Okl.] 91 P 1129.

6. First Nat. Bk. of Browerville v. Stadden [Minn.] 115 NW 198. Where the authority of a member is expressly defined and does not include the right to pledge the credit of the firm, he cannot bind the firm by the issuance of negotiable paper. Id. Complaint in action upon bill of exchange issued by one member upon another of a trading partnership held to show issuance thereof was not within authority of partner issuing it. Id.

7. Evidence held to show that partner in signing notes and purchasing property was acting for firm, and therefore mortgage of partnership property to secure advances made to take up notes and pay for property purchased secured a partnership indebtedness, and not individual indebtedness of partner. Boswell v. First Nat. Bk. [Wyo.] 92 P. 624.

8. Dockery v. Faulkner [Tex. Civ. App.] 18 Tex. Ct. Rep. 939, 101 SW 501.

9. Boylston Nat. Bk. v. Kilbourn [N. H.] 68 A 335.

10. Though A was not directly authorized to sign B's name to notes executed by him for overdrafts on his, A's, acount, yet if A and B were partners and the overdrafts were used in the partnership business, and B knowing this ratified A's action in signing his name, he will be liable on the notes. Mathis v. Taylorsville Bk. [Ky.] 106 SW 1174. The mere fact that a partner did not deny his liability on being informed that his copartner had signed the firm name to a note is not of itself an adoption or ratification of the note, but may be considered in determining whether he authorized the giving of the note. Michigan Shoe Co. v. Paul, 149 Mich. 695, 14 Det. Leg. N. 554, 113 NW 310.

11. The seal is regarded as surplusage, Cowan, McClung & Co. v. Cunningham [N. C.] 59 SE 992.

12. National Exch. Bk. v. Lubrano [R. I.] 68 A 944.

13. See 8 C. L. 1271. Ferry v. Mattox, 2 Ga. App. 104, 58 SE 291.

performance of the business of the firm results in damage to one dealing with the firm, the other partners are liable therefor.[14] If a partner in conducting the business of a firm causes a libel to be published, the firm will be liable as well as the individual partner.[15] Where a partnership commits a breach of municipal ordinance, each partner is individually liable.[16]

(§ 4) *B. Effect of note given by partner for firm debt.*—A note given by a partner for a firm debt does not release his copartner unless the creditor agrees that it shall have that effect.[17]

(§ 4) *C. Commencement and termination of liability.*See 8 C. L. 1272

Work done before partnership contract became operative.—Parties to a partnership contract may become liable for work done for their benefit before the contract became operative.[18]

*Notice of dissolution and right of third parties dealing with firm after apparent dissolution.*See 8 C. L. 1272—To relieve a retiring partner from further liability as a partner, proper notice of dissolution must be given.[19] Dissolution must be made known to creditors and to the world.[20] Actual notice must be given to creditors.[21] As to others, notice by publication is sufficient.[22] The burden is upon the defendant to show that plaintiff received notice,[23] and this he must show by competent evidence.[24]

Creditor, after dissolution, taking partner's note.—After dissolution a partner's liability for a partnership indebtedness may be terminated by the creditor's taking from his copartner a note in renewal and extension of such indebtedness.[25]

14. Priddy v. Mackenzie, 205 Mo. 181, 103 SW 968. Negligence of one of firm of lawyers in examining title resulting in loss to client. Id.

15. Libelous letter asserting title by firm to ties in regard to which it was written and containing name of firm signed by member thereof. Burgess v. Patterson [Ky.] 106 SW 837.

16. City of Spokane v. Patterson [Wash.] 89 P. 402. Where firm conducting a quarrying business violates a municipal ordinance, a partner is liable though he did not as a partner participate in the act or assent thereto. Id.

17. Burdett v. Greer [W. Va.] 60 SE 497.

18. Though a partnership contract provides that it shall not become operative until one of parties thereto puts into business a certain sum, the partners will be liable for work done prior to that time if done for their benefit and by their direction and with understanding that it was at expense of partnership. Ehrardt v. Stevenson [Mo. App.] 106 SW 1118.

19. Mims v. Brook [Ga. App.] 59 SE 711. A partner is estopped as to new transactions with an old customer from showing that he had left the firm, unless the old customer had been given notice of his retirement. Akin v. Van Wirt, 108 NYS 327. Plaintiff who owed money to a firm of which defendant was a member agreed with firm that its employe who boarded with plaintiff should pay firm a part of each month's board bill, which should be applied on plaintiff's indebtedness as long as employe continued to board with plaintiff. Defendant withdrew from firm without notifying plaintiff, and new firm failed to apply payments on plaintiff's indebtedness. Held that defendant was not relieved from his contractual obligation. Dunham v. France [Mo. App.] 106 SW 1077.

20. Civ. Code 1895, § 2634. Mims v. Brook [Ga. App.] 59 SE 711. Word "creditors" as used in statute is not limited to persons who were creditors at time of dissolution, but extends to one who had previously sold goods and given credit to firm during its continuance. Id. Where plaintiff made its first sale to a partnership after receiving information from a commercial agency that defendant was a member of firm, agency having obtained such information from defendant, if defendant some months prior to sale notified agent of commercial agency that he had retired from firm, such notice was sufficient to relieve him from liability to plaintiff. Drewry-Hughes Co. v. McDougall [N. C.] 59 SE 73.

21, 22, 23. Mims v. Brook [Ga. App.] 59 SE. 711.

24. General reputation of the dissolution in a community where a person sought to be charged with notice resides, or in the business community to which the parties belong, is admissible as tending to show notice.. Mims v. Brook [Ga. App.] 59 SE 711. Evidence held admissible to prove notice of retirement of partner. Drewry-Hughes Co. v. McDougall [N. C.] 59 SE 73. Evidence tending to establish knowledge on part of plaintiff's bookkeeper of dissolution of partnership with whom plaintiff has been doing business is, in absence of proof that bookkeeper's authority to receive notice is greater than that usually possessed by those in that employment, inadmissible to show notice to plaintiff. Id.

25. But to have this effect, creditor must have had notice of dissolution, and note must have been taken without direction or

Discharge in bankruptcy.—The discharge of the partnership in bankruptcy proceedings where the partners are not adjudicated bankrupt does not discharge the partners from their liability for the partnership debts.[26]

Novation.[See 6 C. L. 927]—Where a partnership creditor agrees in consideration of the payment of a part of the debt by the retiring partner and the promise of the continuing partner to pay the remainder to release the retiring partner, there is a novation and the retiring partner is released.[27]

(§ 4) *D. Application of assets to liabilities.*[See 8 C. L. 1273]—Partnership property must be applied first to the payment of partnership debts.[28] Only the balance due each partner after settlement between them is subject to the satisfaction of individual debts.[29] Partners cannot claim exemptions out of partnership property as against partnership creditors.[30] Where all the creditors are on the same plane in the order in which assets are to be marshalled for distribution among them, any agreement favoring a few at the expense of the others will not be upheld unless made with the assent of all.[31] Partnership creditors may attach the firm property though one of the firm is a bankrupt.[32]

§ 5. *Rights of partners inter se. Duty to observe good faith.*[See 8 C. L. 1278]—Partners must observe the utmost good faith towards each other in all their transactions,[33] and one will not be permitted by the exercise of bad faith to acquire an unfair advantage over the other.[34] A sale by one partner to another of his partnership interest will be sustained only when it is made for a fair consideration and upon a full disclosure of all important information as to value.[35] Concealment of a material fact is sufficient to annul the compact.[36] In the case of such a sale if the parties have not equal means of information respecting the firm's indebtedness, the maxim caveat emptor will not apply.[37] Where the sale of a partner's interest is induced by the fraud of his copartners, he is entitled to a cancellation of the conveyance and to recover the profits which would have accrued to him if it had not been made.[38]

consent of partner. Mims v. Brook [Ga. App.] 59 SE 711.

26. In re Bertenshaw [C. C. A.] 157 F. 363.

27. Frye v. Phillips [Wash.] 89 P 559.

28. Noble v. Knobel Hoop Co. [Ark.] 107 SW 988; Blake v. Sargent, 152 F 263; Ferry v. Mattox, 2 Ga. App. 104, 58 SE 291. One partner cannot appropriate partnership property to the payment of his individual debts without the consent of the other partner, and it is immaterial in such case whether or not the creditor has knowledge that the property belongs to the partnership. Blake v. Sargent, 152 F 263. Under Kirby's Dig. §§ 344, 359, such property can only be levied upon in manner therein provided. Noble v. Knobel Hoop Co. [Ark.] 107 SW. 988. Such property cannot be attached for the individual debt of a partner, though such partner has admitted that he and the partnership are practically the same, where there is undisputed evidence that there is another partner. Id.

29. Parker v. Wells [Ark.] 105 SW 75.

30. Elkins v. Briscoe [Ky.] 105 SW 412. Although this rule applies to wife of an absconding partner, it does not preclude her from contesting claims of partnership creditors or defending an action brought by them in place of her husband, under Civ. Code Prac. § 34. Id.

31. Fried v. Danziger, 120 App. Div. 604, 105 NYS 44.

32. Pelzer Mfg. Co. v. Pitts, 76 S. C. 349, 57 SE 29.

33. Finn v. Young [Wash.] 89 P 400.

34. Where a partnership is organized to purchase certain land for purposes of speculation, a partner who avails himself of his copartner's plan, eliminates him as a possible competitor, and purchases the property, withholding from copartner the true facts, cannot exclude such partner from participation in profits. Miller v. Ferguson [Va.] 57 SE 649.

Declaration of intention by partner to use information concerning firm business in effort to obtain undue advantage of a copartner will be taken strongly against him when it appears that he has subsequently obtained such advantage and evidence is contradictory as to whether in doing so he suppressed the information or misrepresented material facts pertaining to subject-matter. Throne v. Brown [W. Va.] 60 SE 614.

35. Goldsmith v. Koopman [C. C. A.] 152 F. 173; Finn v. Young [Wash.] 89 P 400; Thorne v. Brown [W. Va.] 60 SE 614. Where a partner who is the manager of the business purchases the interest of his copartners, it is his duty to make a full disclosure of the condition of the business. Gilbert v. Anderson [N. J. Eq.] 66 A 926.

36. Finn v. Young [Wash.] 89 P 400.

37. Seal v. Halcomb [Tex. Civ. App.] 107 SW 916.

38. Goldsmith v. Koopman [C. C. A.] 152

Participation in management and share in profits and losses.—Each partner, in the absence of an agreement to the contrary, has the right to share in the management of the firm affairs and to participate in the profits.[39] The measure in which the profits and losses shall be shared by the partners respectively is to be determined by the terms of the partnership agreement.[40] But in the absence of any evidence showing a different intention, an equal distribution of profits and losses will be presumed to have been intended.[41] The fact that in some years a partner for the benefit of employes, orally waives his claim to the percentage of profits to which he is entitled does not preclude him from thereafter claiming that percentage.[42] One partner may give his time and attention to private affairs if the firm's business does not suffer thereby.[43] A surviving partner may in one action recover demands due him individually and as a surviving partner.[44] Unless done in bad faith, the withdrawal of partnership assets by one partner and the use thereof in the improvement of his wife's separate property gives the remaining partners no lien thereon.[45] In absence of a contract, partners are entitled to no salary from the partnership assets.[46]

Division of profits.—One of the ordinary incidents of an equal partnership is the division of profits at short intervals.[47]

§ 6. *Actions. A. By firm or partner.* See 8 C. L. 1274

Right of action.—Where a partnership is injured by a libel, each partner may maintain an action to recover the damage caused thereby to his interest.[48] A partner cannot maintain replevin against a third person to recover possession of partnership property.[49] But after insolvency of a partner and settlement of partnership affairs, the solvent partner may recover from a third person partnership funds received from the insolvent partner without consideration and with notice.[50]

Parties.—The common-law rule that a partnership cannot sue in the partnership name has been changed by statute in some states.[51] A statute so changing the

F. 173. Where a partner induced his copartner to sell his interest by falsely representing to him that price given was much less than half amount of price named in option on business given by partner to third party, and that such party would probably not take up option, copartner is entitled upon option being taken up to recover difference between amount he received and half sum named in option. Finn v. Young [Wash.] 89 P 400.

39. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849.

40. Partnership agreement between B & S held not to confer upon S an interest in contract made by B with third party, but only an interest in profits to be derived from carrying it out. Fox v. Fitzpatrick, 190 N. Y. 259, 82 NE 1103. Where partnership contract for handling sheep provides that one partner is to furnish the sheep and out of proceeds of sale thereof expenses are to be paid, and other partner is to give his time and attention to business and share in profits, latter is not liable for one-half losses. Johnston v. Steele [Tex. Civ. App.] 107 SW 631.

41. So held where one partner contributed only assets while other contributed only personal services. Manson v. Williams [C. C. A.] 153 F 525.

42. In re Silkman, 105 NYS 872.

43. Where attorney secured stock for services not connected with firm business, his copartners had no interest therein. Cragg v. Brown, 129 Ill. App. 597.

44. Blackstone v. Ragan, 125 Ill. App. 546.

45. Mere overdraft made in good faith gives remaining partners no lien. Stone v. Baldwin, 127 Ill. App. 563.

46. Employe on salary and profit sharing basis cannot be charged with such salaries. Street v. Thompson, 229 Ill. 613, 82 NE 367.

47. Oram v. Peirce [N. J. Err. & App.] 67 A 1053.

48. Tobin v. Alfred M. Best Co., 120 App. Div. 387, 105 NYS 294.

49. Steckman v. Gault State Bk., 126 Mo. App. 644, 105 SW 674.

50. Solvent partner may recover from wife of insolvent partner funds turned over to her by her husband where facts show that upon settlement latter was indebted to his partner more than amount sued for. Gloor v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 13, 105 SW 539. It is no defense to such action that wife has no homestead or other exempted property. Id.

51. Under Cobbey's Ann. St. 1903, § 1023, a partnership may sue in its partnership name. McJunkin v. Placek [Neb.] 114 NW 411. To authorize a partnership to maintain an action in the partnership name, the pleadings must show that it was formed for the purpose of carrying on trade or business, or for the purpose of holding property in the state. Id. Where a partnership sues in the ordinary name which it has assumed, there should be an allegation that it is a partnership "formed for the purpose of carrying on a trade or bus-

rule must be strictly construed.[52] In New York an action to recover partnership funds which a partner has wrongfully paid to his individual creditor must be brought in the name of the partnership.[53] Where upon the dissolution of a partnership a debt secured by mechanic's lien is transferred to the individual members, they may sue in their individual names to foreclose the lien.[54] Where pending action brought by partners one of them dies, the survivor may continue the cause in his own name without qualifying as administrator of the partnership estate.[55] A bill of intervention in the firm name is not so fatally defective as not to admit of amendment showing the individual names of the partners.[56]

Statutory prerequisites to suit.—Before suit is brought by a partnership, all requirements that are by statute made a prerequisite thereto must be complied with.[57]

Pleading.—In an action for the price of goods sold if it does not appear from the petition that plaintiff had a partner in the transaction, the issue of partnership is properly raised by the answer.[58] Where by statute the performance of certain prerequisites are essential to the right of partners to maintain an action, failure to perform is matter of defense and must be set up in the answer by way of abatement.[59] In proper cases the pleadings may be amended.[60]

Evidence.—The usual rules as to admissibility of evidence prevail.[61]

(§ 6) *B. Against firm or partner.* See 6 C. L. 1274

Venue.—A suit against partners on a firm obligation may be maintained in the county of the domicile of either,[62] and this rule is not changed by the fact that one of the partners has been discharged in bankruptcy.[63]

Service of process and attachment.—Service on a partner is good service on the

iness in this state." Wyler, Ackerland & Co. v. Louisville & N. R. Co., 6 Ohio N. P. (N. S.) 589.

52. McJunkin v. Placek [Neb.] 114 NW 411.

53. The bringing of such suit in name of partner is not authorized by Code Civ. Proc. § 448, though partner alleged to have misappropriated funds is joined as defendant, if no effort was made to obtain his consent to be joined as plaintiff. Baron v. Lakow, 121 App. Div. 544, 106 NYS 243.

54. Soule v. Borrelli [Conn.] 68 A 979.

55. But if he fails to qualify within prescribed time, administrator of deceased partner may displace him by qualifying as administrator of partnership estate. Meriwether v. Quincy, etc., R. Co. [Mo. App.] 107 SW 434. Unless it is shown that such administrator qualified, it will be presumed that the surviving partner's right and authority as such continued intact. Id.

56. Kleinert v. Knoop, 147 Mich. 387, 13 Det. Leg. N. 1039, 110 NW 941.

57. In Colorado a partnership doing business in the name of a company must, before it can sue to collect its debts, file an affidavit of copartnership. Sess. Laws 1897, pp. 248, 249, c. 65. Elgin Jewelry Co. v. Wilson [Colo.] 93 P 1107. In California partners doing business under a designation not showing the persons interested cannot sue upon contracts made under such designation until they have filed and published the statutory certificate of partnership. Meyer v. Lovdal [Cal. App.] 92 P 322. Acknowledgment of certificate need not be published, a statement showing that it was properly acknowledged being sufficient. Id. A firm name showing the surnames only of partners is not a fictitious name, nor a designation not showing names of partners within meaning of § 3901, Wilson's Statutes, which requires as prerequisite to suit on contract by partnership transacting business under fictitious name, or designation not showing names of partners, to file in district court and publish certificate stating names in full and places of residence of partners. Patterson v. Byers, 17 Okl. 633, 89 P 1114.

58. Nugent v. Armour Packing Co. [Mo.] 106 SW 648.

59. Requirement that partners doing business under designation not showing persons interested shall file and publish certificate stating names of partners. Civ. Code, §§ 2466, 2468. Nicholson v. Auburn Gold Min. & Mill. Co. [Cal. App.] 92 P 651. Such requirement sufficiently complied with, though publication not completed before commencement of action, if completed before interposition of plea in abatement. Id.

60. The name "Akerman & Akerman" in complaint connotes a partnership. An amendment alleging that it is a partnership is permissible, though not necessary. Dublin, etc., R. Co. v. Akerman, 2 Ga. App. 746, 59 SE 10.

61. Where plaintiff firm had dissolved and evidence of partners was conflicting as to existence of certain agreement alleged by defendant, evidence held admissible which tended to throw light on probability of statements of partners, respectively. Mitchem v. Allen, 128 Ga. 407, 57 SE 721.

62, 63. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598.

firm.[64] In Nebraska, where members of a partnership reside in another state, service of summons upon the firm cannot be made in a county where it has no usual place of doing business.[65] The summons may be amended in a proper case.[66] In Texas actual seizure is not essential in levying on the interest of a partner, it being sufficient to leave with his copartner notice of the levy.[67]

Parties.—Where a suit is brought on a partnership obligation, all the partners are proper parties.[68] A mere stranger cannot sue upon a contract made between partners.[69] Any member of a partnership may appear and defend a suit in the firm name,[70] and for that purpose may execute a statutory dissolving bond in the name of the partnership.[71] In an action against a partner individually as indorser of a firm note, if defendant desires to bring in the maker he must move to have the firm summoned in.[72]

Pleading.—Where it is sought to hold one liable as a partner by estoppel, the petition need not state the facts showing the estoppel. A direct allegation of partnership is sufficient.[73] Where a partnership has been dissolved by bankruptcy, a new promise to pay a creditor must be pleaded fully and in detail.[74]

Burden of proof.—In Georgia it is unnecessary to prove a partnership unless it be specifically denied on oath.[75] But in New York where the existence of the partnership is put in issue by a general denial, no recovery can be had against defendants jointly unless the proof shows such liability.[76] Less proof is requisite to establish a partnership in actions against alleged partners than is necessary in actions between the parties themselves.[77] Where a partner admits an original indebtedness and pleads an affirmative defense, the burden is upon him to prove it.[78]

Abatement.[See 8 C. L. 1275]—Where in a suit against a partnership only one partner is served and a plea of privilege is sustained as to him and he is dismissed from

64. Ferry v. Mattox, 2 Ga. App. 104, 58 SE 291. Under Code Civ. Proc. 1902, § 157, service on a partner gives court jurisdiction to render a judgment enforcible against partnership property and separate property of defendant served. Pierce v. Varn, Byrd & Co., 76 S. C. 359, 57 SE 184. In order that service of original process upon one member of a firm shall be as valid as if served upon each individual member thereof, so as to entitle plaintiff to proceed to judgment, and execution against them all, as provided in Gen. St. 1906, § 1404, such process must show upon its face to have been sued out against persons composing a mercantile or other firm. Hayman v. Weil, 53 Fla. 127, 44 S 176.

65. Code Civ. Proc. § 25. Stelling v. Peddicord [Neb.] 111 NW 793.

66. Where suit is brought against a partnership as a corporation upon proof of the partnership, the summons may be amended to conform therewith. Pierce v. Varn, Byrd & Co., 76 S. C. 359, 57 SE 184.

67. Rev. St. 1895, art. 2352. Seal v. Holcomb [Tex. Civ. App.] 107 SW 916.

68. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598. Statute declaring joint obligations to be joint and several does not apply to partnership. Hurd's Rev. St. c. 76, § 3. Fleming v. Ross, 125 Ill. App. 265. All the ostensible numbers of the copartnership must be joined. Id. In an action on an attachment bond given in a suit brought by a partnership, but executed by only three of the five partners, the other partners are proper parties defendant. State v. Allen, 124 Mo. App. 465, 103 SW 1090.

69. Where partnership agreement provides that partner upon electing to dissolve partnership may repay direct to third person money procured from latter by copartner and put in business, such stranger cannot, upon partners electing to dissolve, sue him for the money so furnished. Jarmulowsky v. Susskind, 53 Misc. 603, 103 NYS 763.

70. Taylor v. Felder [Ga. App.] 59 SE 328.

71. Taylor v. Felder [Ga. App.] 59 SE 328. But a judgment entered upon such bond binds only partnership assets and property of partner or partners by whom or through whose authority it was executed, and does not bind individual property of a nonresident partner who was not served in original action, who did not appear therein, and who took no part in execution of bond. Id.

72. Motion to have other partner brought in is improper in such case. National Exch. Bk. v. Lubrano [R. I.] 68 A 944.

73. Mims v. Brook [Ga. App.] 59 SE 711.

74. Petition held insufficient on general demurrer because it could not be assumed from its allegations that each member of former firm entered into new agreement to pay. Meinhard Schaul & Co. v. Folsom Bros. [Ga. App.] 59 SE 830.

75. Strickiln v. Crawley, 1 Ga. App. 139, 58 SE 215.

76. Schneider v. Fuchs, 107 NYS 33.

77. Frankel v. Hilller [N. D.] 113 NW 1067.

78. So held in action on account against firm where a partner interposed defense that she had paid plaintiff one-half of firm indebtedness under agreement that it would be accepted in full of all demands against her. Frye v. Phillips [Wash.] 93 P 668.

the suit, the court is without jurisdiction to render judgment against the firm.[79] It is not ground for abatement of a suit against a partnership that plaintiff had previously brought suit against a partner as an individual, upon the same account, which had been dismissed, although plaintiff failed to pay costs.[80]

Judgment.—In an action against a partnership, the fact that the judgment is against the firm alone does not render it void.[81] Where two are sued as partners, plaintiff may strike one and obtain a judgment against the remaining sole defendant provided the evidence shows a several liability upon his part.[82] In Alabama, where partners are sued both as individuals and as partners, judgment may be recovered against one and not against the other.[83] Where plaintiff has failed to prove a partnership, his motion at the close of the case to discontinue the action should be granted.[84] Judgment against a partnership binds not only the firm property, but, when it is exhausted, the individual assets of the partners served.[85] Recovery of judgment against one of several copartners discharges the others not used.[86]

(§ 6) *C. Between partners.* See 8 C. L. 1275—Where a partnership agreement is void under the statue of frauds, no action will lie for its breach.[87] The right of action which accrues to a partner for loss resulting from the fraud of his copartners is ex delicto, and the tort may be treated as several or joint, and the defendants have no right of contribution as between themselves.[88] Prior to an accounting and settlement, no action at law will lie between partners founded solely upon partnership dealing.[89] Suit can only be brought for the admitted balance shown by accounting.[90] But the rule is otherwise where the cause of action is distinct from the partnership accounts and does not involve their consideration or require their examination.[91] In a proper case, the defendant is entitled to have a third person made a party.[92] The complaint or petition must allege all facts essential to warrant a recovery.[93] In an

79. Ketelsen v. Pratt Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

80. Doody Co. v. Jeffcoat, 127 Ga. 301, 56 SE 421.

81. Ketelsen v. Pratt Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 956, 100 SW 1172.

82. Doody Co. v. Jeffcoat, 127 Ga. 301, 56 SE 421.

83. Code 1896, § 44. Nevers Lumber Co. v. Fields [Ala.] 44 S 81.

84. Schneider v. Fuchs, 107 NYS 33.

85. Ferry v. Mattox, 2 Ga. App. 104, 58 SE 291. Judgment need not be rendered against individual partners in order to bind individual assets. Id.

86. Notwithstanding they may be nonresidents of state. Fleming v. Ross, 125 Ill. App. 265.

87. Langley v. Sanborn [Wis.] 114 NW 787.

88. Goldsmith v. Koopman [C. C. A.] 152 F 173.

89. Downs v. Short [Del.] 66 A 365; Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014. A partner cannot sue his copartner at law to recover advances made to the firm in the absence of an agreement by the copartner to personally pay them. Reddington v. Franey, 131 Wis. 518, 111 NW 725. A partner cannot sue firm on a negotiable instrument given for amount due on a contract performed in part before he became a partner until there has been an accounting where he has sold property for firm, received proceeds, and not accounted for same. Rising v. Sebring, 104 NYS 486. Nor can one to whom he assigned the instrument without consideration bring such action prior to an accounting. Id. But where a partnership has merely to do with a single completed transaction, assumpsit by one partner against the other may be maintained to recover his share of the profits if the amount may be ascertained without an accounting. Crittenden v. Cobb, 156 F 535.

90. Downs v. Short [Del.] 66 A 365. Where partners agree on the terms of a settlement, an action at law may be maintained by a creditor partner to recover from the debtor partner the amount of the interest found due him. Day v. Stafford [Mo. App.] 107 SW 433. Such an action brought by a purchaser of a partner's interest will not be defeated by the fact that plaintiff's vendor owed a personal debt to the defendant. Id.

91. Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014. Thus an action will lie by a partner against heirs of copartner to establish his interest in land belonging to partnership. Id.

92. In an action by one partner against another to oust him from the management secured to him by the partnersip contract, if both partners have assigned their interests to a third person, defendant is entitled to have him made a party. Shubert v. Laughlin, 122 App. Div. 701, 107 NYS 708.

93. In an action in a justice court after dissolution and accounting for a balance alleged to be due, complaint held insufficient in that it could not be fairly inferred from its allegation that there was a settlement of accounts of partnership and an account stated showing balance due from defendant to plaintiff. Black v. Berg, 101 Minn. 9, 111 NW 386. In an action for breach of a part-

action for damages resulting from the misrepresentations of a selling partner, the usual rules as to measure of damages in actions founded on misrepresentation apply.[94] In an action for a breach of a partnership agreement, the burden is upon plaintiff to prove damages.[95] If plaintiff alleges that he was induced to purchase defendant's interest in the partnership by material misrepresentations as to the amount of the partnership indebtedness, the burden is upon him to prove such allegation.[96] A receiver will not be appointed unless grounds for his appointment are shown.[97] The statute of limitations is a defense to an action between partners.[98]

§ 7. *Dissolution, settlement, and accounting. A. Dissolution by operation of law.*[See 8 C. L. 1278]—A partnership is dissolved by a discharge in bankruptcy,[99] by the death of a partner,[1] or by the completion of the common enterprise for which the partnership was formed.[2]

(§ 7) *B. Dissolution by act of partners.*[See 8 C. L. 1277]—A partnership may be dissolved by mutual agreement.[3] A sale by a partner of his partnership interest operates as a dissolution of the partnership.[4] There is no cessation of the partnership relation during the temporary absence of a partner.[5] That a partner's mind is slightly weak will not preclude his making a settlement with his copartner.[6]

(§ 7) *C. Dissolution by order of court.*[See 8 C. L. 1277]—It is sufficient ground for dissolution that a partner applying therefor has been excluded from the management or a participation in the profits.[7] A contract of partnership will be rescinded at the suit of one who was induced to enter into it by false representations,[8] although thereby he suffered no pecuniary loss.[9]

(§ 7) *D. Effect of dissolution. I. In general.*[See 8 C. L. 1278]—After dissolution, if there are no outstanding debts, real estate held by the partnership "as a basis of credit" is to be regarded as the real estate of the partner who holds the equitable title.[10] All the partners are still bound after dissolution by a contract made during the partnership,[11] but the power of a partner to bind his copartners generally ceases upon the dissolution.[12]

nership agreement, plaintiff cannot recover for damages not alleged in his petition. Edwards v. Hale, 129 Ga. 302, 58 SE 817.

94. If the materiality of the misrepresentations consisted only in their tendency to enhance the value of the interest purchased, the measure of damages is the difference in value of such interest as represented and as it was in fact. Seal v. Holcomb [Tex. Civ. App.] 107 SW 916.

95. Edwards v. Hale, 129 Ga. 302, 58 SE 817.

96. Seal v. Holcomb [Tex. Civ. App.] 107 SW 916.

97. Where the purpose of an action is to continue the partnership but to oust defendant from the management secured to him by the partnership agreement and to make plaintiff manager, the appointment of a receiver pending the action is improper. Shubert v. Laughlin, 122 App. Div. 701, 107 NYS 708.

98. In an action by heirs of a deceased partner against surviving partner to recover money which he owes the firm on his private account and money collected on claims due the firm, the claim is one arising between partners, and the four year statute of limitations applies. Wylie v. Langhorne [Tex. Civ. App.] 18 Tex. Ct. Rep. 144, 101 SW 527.

99. Meinhard, Schaul & Co. v. Folsom Bros. [Ga. App.] 59 SE 830.

1. Haggerty v. Badkin [N. J. Eq.] 66 A 420; In re Coe, 157 F 308.

2. Such completion ipso facto dissolves the partnership. Goodfellow v. Kelsey [S. D.] 111 NW 555.

3. Correspondence held not to constitute a dissolution of mining partnership. Costello v. Scott [Nev.] 93 P 1.

4. Day v. Stafford [Mo. App.] 107 SW 433. The purchase by a partner of his copartner's interest dissolves the partnership. Butts v. Cooper [Ala.] 44 S 616. Where a partner purchases his copartner's interest for, and with money advanced by a third person, the old firm being thereby dissolved, the third person does not become a member thereof. Id.

5. Absent partner entitled to share in compensation for labor performed by copartner during his absence. Williams v. Pedersen [Wash.] 92 P 287.

6. Haight v. Haight [Cal.] 90 P 197.

7. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849.

8, 9. Jones v. Weir, 217 Pa. 321, 66 A 550.

10. He may mortgage it. Clark v. Lyster [C. C. A.] 155 F 513.

11. Burdett v. Greer [W. Va.] 60 SE 497.

12. As a general rule, after dissolution, a partner cannot bind his copartner by an admission of liability. Burdett v. Greer [W. Va.] 60 SE 497. A settlement made with

(§ 7D) 2. *As to surviving partner and estate of deceased partner.* See 8 C. L. 1278.—The surviving partner is exclusively entitled to the possession, management and control of the partnership properties and can be called to account only by the personal representative of his deceased partner,[13] unless special circumstances are shown that will justify the intervention of a court of equity to protect and enforce the rights of persons interested in the partnership assets.[14] In New Jersey it is held that the surviving partner holds the property in trust for the personal representatives of the deceased partner.[15] But in Indiana it has been held that the surviving

a partner, after dissolution finding a debt against firm, copartner not being present, does not bind latter, and is not admissible in evidence against him. Id. After dissolution by discharge in bankruptcy and confirmation of a composition with creditors, a partner cannot by a promise made to a condition bind his copartner. Meinhard, Schaul & Co. v. Folsom Bros. [Ga. App.] 59 SE 830. After dissolution with notice one partner cannot bind his copartner by the execution of a note in the firm name, in the absence of special authority to do so. Osborn v. Wood, 125 Mo. App. 250, 102 SW 580. Notice is a question of knowledge and is for the jury to pass upon. Id. Where a partner after dissolution of the partnership gives notes in the name of himself and his copartner relating to partnership affairs, the fact that suits are brought on one or more of such notes against the copartner and that he makes no appearance or allows them to go to judgment by default raises no presumption that he authorized his partner to sign his name to a note given for his individual indebtedness. Id.

13. Dickens v. Dickens [Ala.] 45 S 630. Where the partnership articles provide that the business shall be continued by the surviving partners, the firm assets vest in them as such. In re Coe, 157 F 308. As surviving partners they may petition or be petitioned against to put the firm into bankruptcy. Id.

14. Dickens v. Dickens [Ala.] 45 S 630. But in Louisiana neither the liquidator of a deceased partner's commercial business, nor the surviving partner, whether as liquidator or individually, nor the creditors of the firm, can be maintained in possession and use of succession and community property to prejudice of right of creditors, in general, of succession and community property of widow, of tutrix administering, and of tutrix as such, to demand that property be administered, in the succession of decedent, for benefit of all parties interested, and not in liquidation of his commercial business or for benefit of portion of creditors. Campbell v. Hart, 118 La. 871, 43 S 533.

15. Haggerty v. Badkin [N. J. Eq.] 66 A 420. Intestate being in negotiation with defendant in reference to a proposed partnership deposited with him $500 as his share of partnership capital and soon thereafter died. Defendant, while intestate was ill, deposited money in bank in his own name and after his death appropriated it to his personal use. It was held that this was a misappropriation of money held in a fiduciary capacity and that therefore the debt was exempted from discharge under subd. 4, § 17, Bankr. Act July 1, 1898, c. 541, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3428). Id.

NOTE. The rights of the heir of a deceased partner in firm realty: It is fundamental that no partner has title to any specific personalty, his interest therein being merely an equity to share in the final residual proceeds. Bank v. Carrollton R. R., 11 Wall [U. S.] 624, 20 Law. Ed. 82. The legal title to the firm realty, on the other hand, because of technical rules of seisin (Percifull v. Platt, 36 Ark. 456), must vest in some member (or members); but Equity treats the holder as trustee (Dupuy v. Leavenworth, 17 Cal. 263), without beneficial rights in any particular parcel (Meily v. Wood, 71 Pa. 488). In England an intention that all assets shall be turned into cash upon dissolution is presumed. Darby v. Darby, 3 Drew. 495. Accordingly, through the doctrine of conversion the realty when acquired is regarded in Equity as personalty, both as between the partners (Essex v. Essex, 20 Beav. 442), thereby excluding dower (In re Music Hall Block, 8 Ont. Rep. 225), and as between the real and personal representatives of a deceased partner (Attorney-General v. Hubbuck, 13 Q. B. Div. 275), unless a contrary intention appears (In re Wilson (1893) 2 Ch. 340 (semble); Parth. Act § 22). In America this presumption of intention is rejected (Shearer v. Shearer, 98 Mass. 107), and a specific division of the realty may be decreed (Molineaux v. Reynolds, 54 N. J. Eq. 559). The English result is here reached only under special circumstances: e. g., where there are express provisions for sale (Maddock v. Astbury, 32 N. J. Eq. 181), or when the sole partnership object is land speculation (Buckley v. Doig, 188 N. Y. 238). But except in such cases almost no American jurisdiction bars the heir altogether. His exact status, however, is involved in confusion. Much of this obscurity is due to needless use of the language of conversion. It is commonly stated that the realty is converted into personalty so far as necessary to satisfy firm creditors and to adjust advances by partners. Rovelsky v. Brown, 92 Ala. 522, 525, 25 Am. St. Rep. 83. But the realty is liable not because it is regarded as personalty, but because it is firm property. Parsons, Princ. Partn. [2d Ed.] § 114. The cases in group 2, post, might be explained simply on the theory of implied trusts. Shearer v. Shearer, 98 Mass. 107. Strictly, conversion can only concern those whose rights are affected by the legal nature of the property, i. e., a deceased partner's representatives and widow. Lindley, Partn. [7th Ed.] 383; see Woodward-Holmes Co. v. Nudd, 58 Minn. 236, 49 Am. St. Rep. 503, 27 L. R. A. 340. The numerous cases

establish clearly but two results, though without adequate development of the reasons; first, any surplus of realty in specie after adjustment of the firm obligations goes to the heir (Foster's Appeal, 74 Pa. 391, 15 Am. Rep. 553; Buchan v. Sumner, 2 Barb. Ch. [N. Y.] 165, 201), subject to dower (Lenow v. Fones, 48 Ark. 557); second, if the realty must be sold to meet firm obligations, Equity will compel the heir to convey whatever legal title vested in him (Burnside v. Merrick, 4 Metc. [Mass.] 537; Shanks v. Klein, 104 U. S. 18, 26 Law. Ed. 635). The precise nature of the heir's rights between the ancestor's death and the distribution point is left undetermined. Since a partner's share is strictly a right merely in the ultimate balance of the firm property, whatever its form (Clagett v. Kilbourne, 1 Black [U. S.] 346, 17 Law. Ed. 213), the moment determinative of the shares of living partners is the distribution point. Dissolution of the firm by the death of a member introduces the derivative, conflicting rights of either class of the decedent's representatives, and also a second controlling point of time, the instant of death. The English doctrine meets this situation logically, for at the partner's death the right ordinarily is a right to cash on final accounting, Lindley, Partn. [7th Ed.] 377, or if a contrary intention appears, a right in realty then owned. If the American doctrine differed from the English only in that the presumption of intention was reversed, it would be equally logical. Dicta to the effect that the surviving partner must exhaust the personalty in payment of debts before recourse to the realty. Stroud v. Stroud, Phil. L. R. [N. C.] 525, 526; Easton v. Courtwright, 84 Mo. 27, 39; Walling v. Burgess, 122 Ind. 299, 305, 7 L. R. A. 481, and decisions giving the heir the surplus proceeds of the necessary sale of indivisible realty. Walling v. Burgess, 122 Ind. 299, 305, 7 L. R. A. 481, seem to indicate that the heir's rights are in this country also fixed as of the date of the partner's death, though not ascertained until the distribution point. But the in specie rule, group 1, supra, is either non-committal, because enunciated where the realty was owned during the life of the firm. Haeberley's Appeal, 191 Pa. 239, or it determines the heir's rights, by the fortuitous condition of assets at the distribution point, as where personalty is exchanged for realty by the surviving partner during the winding-up process. Coolidge v. Burke, 69 Ark. 237. It is submitted that the measure of the heir's rights should be the land existing in specie at the time of the partner's death, or if sold, the proceeds remaining after payment of firm debts, plus the value of personalty which might properly have been used. This rule logically fixes the heir's rights as of the date of the ancestor's death, without necessarily negativing power in the surviving partner to sell the land, though the personal assets exceed liabilities. It might be argued that such power should exist in certain cases, as where a sale of realty would serve to swell the totality of assets, or an immediate liquidation of personalty would be ruinous, see Rossum v. Sinker, 12 Cent. L. J. 202, inasmuch as a partnership is primarily an association for profit. That the courts would go so far is doubtful, and it would seem that such sales should be at least on order of court. Support for the main rule suggested is found in dower cases. A widow has dower in the land left over in specie, supra, or if this be sold, to an equivalent in the surplus proceeds. Mowry v. Bradley, 11 R. I. 370. Though these cases are authoritative, they present a difficulty not found in the inheritance cases. The accepted doctrine of firm title, Burdick, Partn. [2d. Ed.] 98, 146, 148, precludes any conception of individual beneficial seisin like that of an ordinary land owner. But since the firm is not an entity, Burdick, Partn. [2d. Ed.] 81, it is evident that the beneficial seisin must rest in the partners in some individual capacity. Whatever the nature of this seisin, it is clearly not the orthodox seisin necessary to sustain dower, nor is it that of tenants in common, as often intimated. Dyer v. Clark, 5 Metc. [Mass.] 562, 577, 39 Am. Dec. 697; Pepper v. Smith, 24 Ill. App. 316. See Burdick, Partn. [2d. Ed.] 101, et seq. None of these difficulties is relieved by a recent decision in Arkansas. On A's death, his copartners, B and C, bought in the partnership plant at a sale ordered on their ex parte petition. Before the confirmation of the sale A's administrator acquiesced in the irregularity of such a purchase by surviving partners. Later A's heirs claimed that as a portion of the property was realty they should have been served. It was held that they were not parties in interest. French v. Vanatta [Ark.] 104 SW 141. This result would of course be reached in England (see cases supra). If the sale had been to a third party and the personalty had been insufficient to meet firm obligations, the decision would be sustained by the American cases generally. Under the rule earlier submitted the decisions on its actual facts is plainly wrong. As the heir's rights had attached at the time of A's death to the realty attempted to be sold by A's administrator, it follows that these rights could not be barred by any act of the personal representative. That such a sale, bona fide, leaves the distributees remediless except against the administrator, is settled. Kimball v. Lincoln, 99 Ill. 578, but there is no clear authority for the statement of a text-writer that the heir is similarly limited. Bates, Partn. § 924. In Valentine v. Wysor, 123 Ind. 47, 7 L. R. A. 788, the "heirs" were devisees and the will conferred power of sale, and in Steinberg v. Larkin, 58 Kan. 201, 37 L. R. A. 195, the heirs were parties to the sale proceedings. The reasoning in the principal case was clearly anomalous. The argument was that the sale itself worked the conversion into personalty, so that when the administrator acquiesced, he was competent to represent the whole estate. If the sale worked the conversion, it does not appear how the administrator's acquiescence could affect the heir as of the time of the order of sale, when some of the property was still realty. The confusion in the law of partnership realty may well have contributed to the adoption in the proposed American Partnership Act, § 1 Reports, Amer. Bar Ass'n, 1906, Pt. 2, 440, of the mercantile view of the firm as a legal entity. Under this theory the heir has no rights and the widow, no dower. Act, § 22.—From 8 Columbia L. R. 208.

partner is not a trustee in the usual sense of that term.[10] The duties of a surviving partner are to reduce the assets to money, and apply same, less expenses, on the partnership debts,[17] and to pay the surplus to the estate of decedent.[18] He may, before settlement, sell partnership property where the purposes of the partnership require it[19] but he cannot give it away.[20] A sale at the suit of surviving partners of partnership realty for the purpose of winding up the partnership converts such realty into personalty.[21] As between the lien and personal representative of a deceased partner, a conversion of partnership realty into personalty will be regarded as having been worked if such was the intent of the partners.[22] Where at all times after a dissolution caused by the death of a partner, the firm, the surviving partner and the estate of the deceased partner, were insolvent, the partnership creditors have no claim on the individual property of the partners.[23]

(§ 7D) 3. *As to continuing or liquidating partner. Retiring partner.* See 8 C. L. 1279—An agreement by a continuing partner to indemnify the retiring partner against liabilities, which include a suit for alleged false representation, is not illegal.[24] A partner who purchases his copartner's interest does not obtain the character of an innocent purchaser so as to escape liability on a firm indebtedness of which he had no knowledge.[25] The sale of a partner's interest to his copartner converts the partnership property into individual property,[26] and a covenant by the purchaser to pay the firm debts does not create a trust[27] or impose a lien on the property.[28] But where a partnership is insolvent, a dissolution and a transfer by one partner to the other of his interest for a nominal sum and the assumption by the purchaser of the partnership liabilities is not bona fide and is not binding upon the firm creditors.[29] Some of the peculiar provisions of contracts between continuing and retiring partners have been interpreted by the courts.[30] A retiring partner is entitled to an injunction restraining his copartner who has purchased his interest from using the firm name without complying with statutory requirements in relation thereto.[31] Where continuing partners require the retiring partner to leave in their hands a sum to

16. American Bonding Co. v. State [Ind. App.] 82 NE 548. A commingling of partnership funds with his individual funds is not a conversion. Id. A conversion arises when he fails at the proper time to honestly account for partnership funds to the proper persons or authority. Id.

17. American Bonding Co. v. State [Ind. App.] 82 NE 548. In payment of debts he may choose when and whom he will pay. Id. He can assign all the property for benefit of all the creditors. Id. Or prefer a creditor. Id. Or turn all the assets over to one creditor, if his debt equals the amount thereof, to exclusion of all other creditors. Id.

18. American Bonding Co. v. State [Ind. App.] 82 NE 548.

19. Jackson v. Gunton [Pa.] 67 A 467.

20. Jackson v. Gunton [Pa.] 67 A 467. Quitclaim deed held not an attempted conveyance of partnership interest, but only of individual interest of grantor. Id.

21. Therefore the heirs of the deceased partner are not necessary or proper parties to such a proceeding. French v. Vanatta [Ark.] 104 SW 141.

22. Buckley v. Doig, 118 N. Y. 238, 80 NE 913. Such intent may be shown by express agreement, or by facts and circumstances from which it may fairly be deduced. Id. Evidence authorizing finding that such intent existed. Id.

23. American Bonding Co. v. State [Ind. App.] 82 NE 548.

24. Price v. Parker [Mass.] 83 NE 323.

25. Dockery v. Faulkner [Tex. Civ. App.] 18 Tex. Ct. Rep. 939, 101 SW 501.

26. In re Hogg's Estate [Pa.] 68 A 1011.

27, 28. In re Hogg's Estate [Pa.] 68 A 1011.

29. Blake v. Sargent, 152 F 263. If firm assets thus acquired are used to pay an individual debt, the firm creditors may recover the same. Id.

30. Upon dissolution of a firm, one of partners purchased from other all his interest in real estate in which business had been carried on, and also his interest in all other partnership property except use of firm name, which it was agreed should be abandoned and not thereafter used by either party. Held, the good will of firm went to continuing partner, and with it exclusive right to all mail addressed to old firm. Pedretti v. Pedretti, 6 Ohio N. P. (N. S.) 113. Where agreement of dissolution and bond to insure its performance provides that partner taking over business shall discharge all "liabilities" of partnership, term "liabilities" includes claims arising ex delicto as well as claims arising ex contractu. Price v. Parker [Mass.] 83 NE 323.

31. Laws 1897, pp. 561, 562, c. 420, §§ 20, 21. Kram v. Shyev, 57 Misc. 112, 107 NYS 539.

meet a contingent liability of the firm and such liability becomes barred by limitations, the retiring partner is entitled to recover the amount so deposited with interest from the time the liability was barred.[32] Where a partner who upon dissolution took the firm assets and agreed to pay its debts uses such assets to pay his individual debt, the firm is subrogated to the rights of the creditor.[33]

(§ 7) *E. Accounting. Right to.*[See 8 C. L. 1280]—Upon dissolution of a partnership, a partner is entitled to an accounting,[34] as is also a purchaser of a partner's interest.[35] The amount of a partner's interest is immaterial in determining his right to an accounting.[36] It is a good defense to an action for an accounting that there has been a prior settlement,[37] or that the action is barred by the statute of limitations [38] or by laches.[39]

Procedure, pleading, and evidence.[See 8 C. L. 1281]—A party adjudged to account should file a verified account.[40] It is not essential that an allegation of partnership should give the details thereof.[41] It is improper to order a bill of particulars as to allegations of the complaint which are mere surplusage.[42] The burden of proving the existence of a partnership, where it is denied, is upon complainant.[43] The burden of showing what allowance should be made for a certain element of expense is upon the partner in charge of the bookkeeper and his books.[44] The course of dealing among the partners is controlling evidence of the status and interest of each in the absence of any other evidence.[45] A letter from defendant to plaintiff's attorney, written when no litigation was pending or threatened, admitting his willingness to account, is admissible to show the existence of an unsettled account between the parties.[46] A statement made by a partner to a commercial agency not adopted by his copartners is not admissible to prove the assets and liabilities of the partnership.[47]

Receivers.[See 8 C. L. 1282]—When a dissolution is intended or has already taken

32. Young v. Potter, 150 Mich. 375, 14 Det. Leg. N. 660, 114 NW 215.

33. Where assets are used to pay note secured by collateral, firm becomes entitled to possession of note and collateral. Pelzer Mfg. Co. v. Pitts, 76 S. C. 349, 57 SE 29.

34. Miller v. Simpson [Va.] 59 SE 378. A partner who has assigned his interest to his copartner as security for the latter's advances to the firm still has an interest in the surplus assets after payment of such advances, and is entitled to an accounting. Donnelly v. McArdle, 105 NYS 331. Evidence held to show that assignment was as security for such advances and not absolute. Id. Bill for an accounting held not demurrable for want of equity. Stevens v. Duckett [Va.] 57 SE 601. Bill by distributee of estate of deceased partner against surviving partner, who is also administrator of intestate's estate, for an accounting, held not without equity. Dickens v. Dickens [Ala.] 45 S 630. Answer held to admit facts entitling plaintiff to an accounting. Child v. O'Rourke, 106 NYS 884.

35. Such purchaser is entitled to demand an accounting, make settlement with the remaining partners, and receive the seller's share of the surplus. Day v. Stafford [Mo. App.] 107 SW 433.

36. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849.

37. It is incumbent upon defendant to prove such settlement. Doncourt v. Denton, 105 NYS 906. Evidence held insufficient to prove settlement. Id.

38. Defendant's admission of plaintiff's right to an accounting is sufficient to stop the running of the statute. Doncourt v. Denton, 105 NYS 906.

39. A claim for an accounting is not barred by laches where defendant voluntarily concedes plaintiff's right thereto. Doncourt v. Denton, 105 NYS 906.

40. Chancery rule 107. Kliger v. Rosenfeld, 120 App. Div. 396, 105 NYS 214. But failure to proceed in this mode is not ground for reversal upon defendant's appeal if he made no objection to the procedure in the lower court. Id. If this is not satisfactory to the other party, he should file his objections, specifying what is wrong and what surcharges he claims should be made. Id.

41. Allegation held sufficient. Rische v. Rische [Tex. Civ. App.] 19 Tex. Tex. Ct. Rep. 883, 101 SW 849.

42. So held of allegations that defendant wrongfully used partnership money and property without accounting for same, such allegations being immaterial, neither benefitting nor prejudicing either party, and provable under other allegations. Child v. O'Rourke, 106 NYS 884.

43. Butts v. Cooper [Ala.] 44 S 616.

44. Sanford v. Embry [C. C. A.] 151 F 977.

45. Evidence held to show that interest of deceased partner was only $30,000. Bainbridge v. Harris, 123 App. Div. 18, 107 NYS 471.

46. Such letter is not objectionable as a statement made in an effort to compromise a dispute. Doncourt v. Denton, 105 NYS 906.

47. Kliger v. Rosenfeld, 120 App. Div. 396, 105 NYS 214.

place, a receiver will be appointed if there is some breach of duty of a partner or of the contract of partnership.[48] To warrant the appointment, it need not appear conclusively that the plaintiff is entitled to recover.[49] But it must appear that the matters alleged will ultimately entitle complainant to a dissolution of the partnership.[50] The due existence of the partnership must be established as a prerequisite to the appointment.[51] But when this is shown a denial of its existence is not sufficient to prevent the appointment.[52] Upon an application for a receiver, the court will not pass upon the question of rights between the partners.[53] Upon the appointment of a receiver, an injunction follows as a matter of course.[54] Claims of third parties, if any, should be adjudicated and settled before the final discharge of the receiver.[55]

Credits and charges. See 8 C. L. 1282—The credits to which a partner is entitled and the charges to which he is liable upon an accounting are to be determined from the nature of the partnership agreement and a construction of its terms.[56] In the absence of an express agreement, or of such facts and circumstances as imply an

48. Jones v. Weir, 217 Pa. 321, 66 A 550. Contract induced by fraudulent representations of copartner. Id. Partnership composed of A and B held contract with company controlled by B to purchase from it land and pay for same with proceeds of sale thereof. B conspired with company to exclude A from interest in land and partnership. Held proper case for appointment of receiver to take charge of realty and partnership interests. Whipple v. Lee [Wash.] 89 P 712. A receiver will be appointed at suit of a partner who shows that he has been wrongfully excluded from participation in management of partnership property, though there is no evidence of insolvency of his copartner. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849. Rev. St. 1895, art. 1465, when construed in connection with art. 1492, does not change this rule. Id. The fact that the surviving partner has appropriated to his own use partnership assets is not ground for appointing a receiver if he will be entitled to a third of the assets, is solvent, and owns real estate sufficient to protect complainant against loss because of his misappropriation. Dickens v. Dickens [Ala.] 45 S 630. Nor in such case should a receiver be appointed merely upon the further allegation unsupported by evidence that complainant apprehends that it is the surviving partner's purpose to convert his personal assets into properties easily concealed from operation of court's processes, or to remove them without its jurisdiction. Id.

49, 50. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849.

51. It may be established either by admission of defendant or by other competent testimony. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849. Evidence held sufficient to show a partnership and other facts demanding appointment of receiver. Id.

52, 53. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849.

54. Jones v. Weir, 217 Pa. 321, 66 A 550.

55. Costello v. Scott [Nev.] 94 P 222.

56. Partnership agreement construed, and held that under its terms and circumstances of case where proceeds of stock of goods was insufficient, after payment of debts, to pay defendant what he had put in firm, he was entitled to whole of such proceeds. Greenwell v. Negley, 31 Ky. L. R. 144, 101 SW 961. Plaintiff and defendants undertook to sell lands located in two townships on commission. After selling part of lands in one township, they took the remaining lands therein themselves, the commissions being applied on purchase price. Subsequently defendants sold part of lands in second township and purchased what remained themselves. Held that plaintiff's refusal to take any of land in second township did not preclude his recovering his share of profits of sale of such land after deduction of his share of expenses and losses, if any. Goodfellow v. Kelsey [S. D.] 111 NW 555. After dissolution of partnership and adjustment of accounts, the partners entered into a new partnership in relation to different property, the agreement providing that money advanced by the partners should draw interest. It was held that this provision did not apply to a balance found to be due one partner upon the adjustment under the former partnership. Stiles v. Haight, 108 NYS 136. Where partnership contract provides that amounts in excess of money advanced by partners and interest thereon shall be credited to firm, a partner is chargeable with interest on money received by him in excess of amount advanced with interest. Id. A partnership contract for conducting an ice business provided that at end or on sooner determination of agreement one partner should be entitled to receive from others $1,600 for all his interest in iceheuses, tools, and property of firm. Held that interest referred to was partner's interest in fixed property on plant, and did not include ice or unsettled partnership accounts, and therefore, partner was liable to share losses and profits of business. Schuyler v. Cullen, 120 App. Div. 637, 105 NYS 544. Construction of peculiar terms of contract of partners engaged in business of packing and selling raisins, they being individually engaged in raising raisins, to determine the items of expense chargeable to one of them for packing, handling and selling his crop. Forsyth v. Butler [Cal.] 93 P 90.

agreement, a partner is not entitled to pay for his services.[57] But the course of dealing between partners may be such or the services rendered so extraordinary that the law will imply a contract to pay one partner for extra services.[58] Where plaintiff was induced by fraudulent misrepresentations to enter into the partnership, he is entitled to damages therefor.[59] A deceased partner's estate is chargeable with a sum which he for a valid consideration contracted to pay.[60] Where an insolvent surviving partner has applied private funds to the payment of partnership debts, he is entitled to credit therefor in accounting for assets in a suit on his bond.[61] In an action for an accounting after dissolution, a claim founded on errors occurring in the settlement of the partnership affairs, if outlawed, cannot be considered.[62]

*Interest.*See 6 C. L. 1283—There is no fixed rule in respect to interest. Its allowance depends upon the circumstances of each case.[63] If a partner by inadvertance draws from funds of firm more than his proper share, he is chargeable with interest on the overdraft from the time he drew it to the time of settlement.[64] Where the continuing partners use money of the retiring partners in the business, the latter is entitled to interest.[65]

Lien.—A partner's lien extends to all the partnership assets,[66] but it does not extend to the payment of the individual debts of one partner by the others.[67]

*Reference.*See 6 C. L. 1284—It is not error to refuse a reference where motion therefor is not made until after the chancellor has made a detailed statement of the account and transactions between the parties and reported his special findings therefrom.[68] The referee's report should find the character of the partnership assets,[69] and his findings must be supported by the evidence.[70]

Arbitration.—Where, pending suit for dissolution and accounting, partners submit their differences to arbitration, property used but not owned by the partner-

57. Peck v. Alexander [Colo.] 91 P 38; Caldwell v. Lang, 31 Ky. L. R. 237, 101 SW 972. No such agreement shown in this case. Caldwell v. Lang, 31 Ky. L. R. 237, 101 SW 972.

58. Williams v. Pedersen [Wash.] 92 P 287. But mere inequality of services is not alone ground for compensating the one doing the greater part of the work, in absence of an agreement express or implied. Id.

59. Where plaintiff was induced by fraudulent representations of defendant to purchase a half interest in his business, in action for accounting he can recover as general damages only difference between amount paid by him and true value of property at time of purchase, in absence of allegations or proof authorizing recovery of special damages. Peterson v. Barrow [Tex. Civ. App.] 19 Tex. Ct. Rep. 783, 105 SW 212.

60. Where a partner by a mistake due to his carelessness purchased machinery at a cost greater than that at which his copartners had informed him they could purchase it, and to settle consequent controversy promised to pay difference, his estate, upon distribution of partnership assets, will be chargeable therewith, though the machinery was worth what was paid. French v. Vanatta [Ark.] 104 SW 141.

61. American Bonding Co. v. State [Ind. App.] 82 NE 548.

62. Young v. Potter, 150 Mich. 375, 14 Det. Leg. N. 660, 114 NW 215.

63. Blum v. Mayer, 189 N. Y. 153, 81 NE 780.

64. Forsyth v. Butler [Cal.] 93 P 90.

65. Blum v. Mayer, 189 N. Y. 153, 81 NE 780. The amount upon which interest is recoverable is the sum found to be due upon dissolution of partnerships. Id. A partnership agreement provided that J was to receive interest upon all moneys contributed by him allowed to remain in the business. On day previous to termination of partnership by limitation a statement was entered on firm's books showing amount of J's interest. Such interest was transferred to his copartners, who formed a new firm. Held that J was entitled to interest on amount due him at time of dissolution, although same was increased by moneys paid new firm that belonged to J individually, and diminished by losses sustained and payments made for his benefit. Id.

66. French v. Vanatta [Ark.] 104 SW 141.

67. As to individual debts, one partner has no priority over other creditors of his copartner. French v. Vanatta [Ark.] 104 SW 141. Partners who as sureties on note of their copartner are forced to pay it have no lien on his interest in partnership though note was given for money borrowed to pay his share of partnership capital. Id.

68. East v. Key [Ark.] 106 SW 201.

69. Finding that assets are "unsold personal property, wagon scales, barn, two tanks, one coalhouse, one oilhouse," is a sufficient finding that buildings described are personal property. Stower v. Kamphefner [Cal. App.] 91 P 424.

70. Finding that there was no contract entitling a partner to receive compensation for services performed in partnership affairs held supported by evidence. Peck v. Alexander [Colo.] 91 P 38.

ship cannot be subjected to the arbitration.[71] An award of arbitrators upon a submission to settle partnership accounts, if the arbitrators do not exceed their jurisdiction, is not subject to review unless corruption found or like misconduct is shown.[72]

Findings and judgment or decree.—The court must find upon all material issues made by the pleadings.[73] The findings must not be conflicting.[74] All are to be considered together, and, if possible, reconciled, so as to prevent any conflict on material points.[75] They will be sustained unless clearly contrary to the weight of the evidence.[76] No personal decree should be rendered against individual partners until the assets have been converted into money.[77] The judgment must not be double.[78] It must be supported by the evidence.[79] A judgment finding the existence of a partnership and ordering a dissolution and settling the proportions of interest of the partners is a final judgment for the purposes of appeal,[80] though the right to make a supplemental decree is reserved by the court.[81] A final decree need not find in whom title to certain land vests where the report of the referee shows that such land is not a partnership asset.[82] Where both parties admit an error in the amount of the judgment, it is proper to deny a motion for a new trial on condition that plaintiff remit the excess.[83] The judgment is not binding upon a grantee of defendants who was not allowed to intervene.[84]

Apportionment of costs.[See 8 C. L. 1284]—Costs are discretionary both in the trial court[85] and on appeal.[88]

Opening and correcting settlement.[See 8 C. L. 1284]—Assumpsit will not lie to review and revise a partnership settlement.[87] In an action to reopen a settlement, the burden is upon the complainant to show error therein,[88] and this notwithstanding a provision in the settlement for the correction of errors.[89]

(§ 7) *F. Contribution and indemnity.*[See 8 C. L. 1284]

§ 8. *Limited partnerships.*[See 8 C. L. 1284]—The capital stock of a limited partnership association cannot be made fully paid and nonassessable by the mere declara-

71. Property purchased by wife of partner with her own money and used by partnership. Waismer v. Waismer, 15 Wyo. 420, 89 P 580. Land embraced in a partner's desert and homestead entrles made under Federal land laws. Id.

72. No misconduct shown warranting setting aside award. Ehrlich v. Pike, 53 Misc. 328, 104 NYS 818.

73. Durphy v. Pearsall [Cal. App.] 91 P 407. The plaintiff is entitled to a complete accounting if there is a prayer therefor in the complaint. Id. The reason for the rule demanding an accounting is that until all the partnership concerns are ascertained and adjusted it is impossible to know whether a particular partner be a debtor or a creditor of the firm. Id. The findings need not particularly describe real estate constituting part of the partnership assets. Stower v. Kamphefner [Cal. App.] 91 P 424.

74. A finding that property was transferred by partner to partnership solely for partnership purposes is not inconsistent with a finding that a consideration was given to grantor by other partner. Haight v. Haight [Cal.] 90 P 197. Finding of jury and additional finding of court on question whether deceased partner had owned property in his individual right purchased with partnership funds held not conflicting. Id.

75. Haight v. Halght [Cal.] 90 P 197. Finding that "there was no settlement" when considered in connection with other findings held to refer to complete settlement alleged in answer, and not to be inconsistent with finding of a partial settlement. Id.

76. East v. Key [Ark.] 106 SW 201. Special findings held not contrary to weight of evidence. Id.

77. Stower v. Kemphefner [Cal. App.] 91 P 424.

78. Judgment in suit for accounting of mining partnership held not to be double. Costello v. Scott [Nev.] 93 P 1.

79. Evidence held not to support judgment. Caldwell v. Long, 31 Ky. L. R. 237, 101 SW 972.

80. Costello v. Scott [Nev.] 94 P 222.

81. Judgment held final. Costello v. Scott [Nev.] 94 P 222.

82. Land upon which buildings belonging to firm were erected not included in report of referee which purported to cover all assets of firm. Stower v. Kamphefner [Cal. App.] 91 P 424.

83, 84. Costello v. Scott [Nev.] 93 P 1.

85. Forsyth v. Butler [Cal.] 93 P 90. The allowance of the fees of the receiver as costs in the proceeding is a matter in the legal discretion of the trial court. Costello v. Scott [Nev.] 94 P 222. But if an intention to impose such fees on one party is not definitely expressed, they should be borne by both parties equally. Id.

86. Forsyth v. Butler [Cal.] 93 P 90.

87. Pfeiffer v. Bauer, 122 Ill. App. 625.

88, 89. Sandford v. Embry [C. C. A.] 151 F 977.

tion of the original associates as to the value of the property of the association, made for the sole purpose of enabling them to sell at a nominal price stock represented to be fully paid.[90]

PARTY WALLS.[91]

This topic includes only rights between the parties, public regulation being elsewhere treated.[92]

A party wall ordinarily means a wall built partly on the land of one and partly on that of another for the common benefit of both in supporting timbers used in the construction of contiguous building.[93] A division wall may become a party wall by agreement, either actual or presumed even though such wall may have been built exclusively on the land of another.[94] By usage the words "party wall" and "partition wall" have come to mean a solid wall.[95] Generally party walls are erected under an agreement as to their use, and in many states are regulated by statute.[96] Although such statutes will be strictly construed,[97] they have repeatedly been held to be a constitutional exercise of the police power [98] and will be upheld unless plainly without substantial relation to the public interest and safety or a palpable invasion of rights secured by the fundamental law.[99] The statute may confer on adjoining property owners the right to enter upon and appropriate one another's property to an extent sufficient to erect a party wall.[1] The erection of a party wall by one party or his assignor and the subsequent use thereof by the other creates a legal liability in favor of the former against the latter,[2] even though there be no express or implied contract creating such liability,[3] and where an owner of a lot constructs a building so that the wall projects over on an adjoining lot, he cannot deny the adjoining owner the right to use it unless the projection does not prevent the free use of the adjoining property.[4] The value of the user in such cases is to be estimated as of the time when the user occurred, and not as that of the time when the wall was erected.[5] Where the covenants of a party wall agreement are binding on the heirs and assigns of the respective parties, they run with the land.[6] A party wall agreement signed

90. So held in action by trustee in bankruptcy of such association against members, to charge them with debts of association. Wood v. Sloman, 150 Mich. 177, 14 Det. Leg. N. 676, 114 NW 317.

91. See 8 C. L. 1284.

92. See Buildings and Building Restrictions, 9 C. L. 441.

93. Coggins v. Carey [Md.] 66 A 673.

94. Where land wall already erected, and right to build extension of wall was purchased, evidence held sufficient that it was intended as party wall. Coggins v. Carey [Md.] 66 A 673.

95. Injunction will lie to compel closing of opening. Coggins v. Carey [Md.] 66 A 673.

96. Spaulding v. Grundy, 31 Ky. L. R. 951, 104 SW 293.

97. Heron v. Houston, 217 Pa. 1, 66 A 108.

98. Act June 7, 1895, § 9 (P. L. 135), constitutional. Heron v. Houston, 217 Pa. 1, 66 A 108.

99. Evidence sufficient to show § 57, building regulations Dist. Col., reasonable in requiring party walls to be at least thirteen inches thick. United States v. Ashford, 29 App. D. C. 350.

1. Under Act June 7, 1895, § 9 (P. L. 135), conferring on municipalities power to regulate party walls, every lot owner has right to make party wall and may enter on adjoining lot for such purpose regardless of fact that adjoining owner has built wall exclusively on his own lot, either to or short distance from line. Heron v. Houston, 217 Pa. 1, 66 A 108. Covenant in deed that if building erected on adjoining lot extended over line onto lot conveyed by second deed wall should be held party wall, so that owner of building should not be compelled to take it down except at his pleasure, held not to prevent proceeding under Act June 7, 1905, whereby adjoining owner is proceeding to remove at his own expense. Heron v. Houston, 217 Pa. 4, 66 A 109.

2. Contract between owner and contractor showing extent of work to be done and terms of erection admissible. Watkins v. Glas [Cal. App.] 89 P 840.

3. Spaulding v. Grundy, 31 Ky. L. R. 951, 104 SW 293.

4. Fact that foot of wall extends six inches upon adjoining lot insufficient where projection does not prevent free use. Trulock v. Parse [Ark.] 103 SW 166.

5. Spaulding v. Grundy, 31 Ky. L. R. 951, 104 SW 293.

6. Where one party so covenants to pay one-half cost of wall erected by other, subsequent owner of said lot, wishing to use wall, must pay then owner of lot on which building first erected. Hoffman v. Dickson [Wash.] 92 P 272. Where adjacent owners agreed, one to build, and other to pay one-

half cost on using wall, held covenant running with land. Ferguson v. Worrall, 31 Ky. L. R. 219, 101 SW 966.

Note: This rule seems in accordance with what is now the judicial tendency. Southworth v. Perring, 71 Kan. 755, 114 Am. St. Rep. 527, 2 L. R. A. (N. S.) 87. The usual agreement provides that A shall build the wall and B shall have the right to use it upon payment of one-half the original cost; the agreement to bind the heirs and assigns of both parties. Normally the wall when built is owned by A and B in severalty, subject to cross easements. Sometimes, however, A is held to own the entire wall, half of which rests on B's land. Brown v. Pentz [N. Y.] 1 Abb. App. Dec. 227; National Life Ins. Co. v. Lee, 75 Minn. 157, 77 NW 794. Conceivably the parties might effect such a result to which the law of fixtures would present no obstacles (Brown v. McKee, 57 N. Y. 684, 2 City R. 320), but this is hardly a fair interpretation of their intention (Richardson v. Tobey, 121 Mass. 457, 23 Am. Rep. 283; Maine v. Cunston, 98 Mass. 317). Assuming, however, that B's contract is thus one for the purchase of land (Mickel v. York, 175 Ill. 62), the law of running covenants has evidently no application, and B's grantee is not liable on the covenant, since he has made no contract (Comstock v. Hitt, 37 Ill. 542). Even on the hypothesis that B had assigned the contract with his land, A or his grantee could acquire only the right to a specific performance of the contract by foreclosure of the assignee's equitable interest in the wall; a proceeding which would seem offensive to the rule against perpetuities. London, etc., R. Co. v. Gomm, L. R. 20 Ch. Div. 562. If A and his successors get title only until payment is made (Standish v. Lawrence, 111 Mass. 111; First Nat. Bk. v. Security Bk., 61 Minn. 25), the intention of the parties is probably to vest an absolute fee in A, with a contract for its purchase upon user, although in the decisions no conveyance of the wall appears. If A acquires merely a defeasible fee, his interest would pass upon user, without the need of a conveyance; but the agreement would not operate as a contract at all. B's grantee might be held on the ground of an implied promise to pay for the use he has made of another's property, but the recovery would be based on the value of the use, not on the cost of the wall. Whether A has title to the wall or not, the land of B may be held liable in the hands of purchasers with notice, even when the agreement is only parol, on the ground of equitable charge. (Keating v. Korfhage, 88 Mo. 524; Butt v. Lamaster, 30 Neb. 688, 27 Am. St. Rep. 428, 9 L. R. A. 637), or, more accurately, lien (Arnold v. Chamberlain, 14 Tex. Civ. App. 34), enforcible by A or his grantee even in jurisdictions where covenants for party walls do not run at law; but the parties must so have intended (Mott v. Oppenheimer, 135 N. Y. 312, 17 L. R. A. 409). The recovery is not upon the covenant but includes a decree establishing the lien, and if necessary providing for a sale of the land (Fresno Canal Co. v. Dunbar, 30 Cal. 530), a distinction sometimes overlooked (Garmire v. Willy, 36 Neb. 340). The occasional intimation that party wall covenants are restrictive in character (Sharp v. Chatham, 88 Mo. 498, 57 Am. Rep. 433), seems futile unless they touch and concern the land (West Virginia Transp. Co. v. Ohio, etc., Co., 22 W. Va. 600, 46 Am. Rep. 527; Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461, 6 L. R. A. 111). The basic reason for allowing the benefit of covenants to run, that the covenant favorably affects the land of the covenantee (Austerberry v. Oldham, L. R. 29 Ch. Div. 750, 776; Rogers v. Hosegood, L. R. 2 Ch. 388, 395), is lacking in the case of covenants for party walls. The performance of the covenant would be of no direct advantage to the land of A, nor would it affect its nature or quality or the mode of enjoying it (see Congleton v. Patison, 10 East, 130), nor would it enhance its value except upon the assumption that the covenant bound the assigns of both parties, the question at issue. There is no benefit incident to the land as there might be in the case of a covenant to pay taxes. Post v. Kearney, 2 N. Y. 394, 51 Am. Dec. 303. The contract seems purely collateral. Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; Gibson v. Holden, 115 Ill. 199, 56 Am. Rep. 146. That the benefit of these covenants does not run is not, however, conclusive as to the burden (Conduit v. Ross, 102 Ind. 166) save where the theory prevails that the only covenants which run with the land are those which create easements (Lincoln v. Burrage, 177 Mass. 378). Yet under the English requirements of privity, which are not satisfied by the grant of an incorporeal hereditament (Howard v. Bldg. Soc., 8 Q. B. Div. 403), the usual form of party wall agreement is clearly insufficient to allow the burden to run. In this country, also, where such a grant does constitute privity (Nye v. Hoyle, 120 N. Y. 196; 2 Columbia L. R. 554), it is submitted that the burden should be held personal to the covenantor. The agreement has been considered to imply a grant to A of an easement of way to enter B's lot and erect the wall (Conduit v. Ross, 102 Ind. 166), and of an easement of support of the wall by B's land (Roche v. Ulman, 104 Ill. 11; King v. Wight, 155 Mass. 444). But a covenant to pay a sum of money does not bear the slightest relation to either of these easements. See Morse v. Aldrich, 19 Pick. [Mass.] 449. The easement to enter and erect the wall arises at the time of the agreemnt, payment or nonpayment can have no effect upon its existence, mode of user, or value. Likewise the easement of support, once granted, cannot be divested or endangered by any act of B or his successors, nor does the covenant relate in any way to B's land. It has been suggested, however, that B also acquires an easement of support of the wall, for which the performance of his covenant operates as a recompense. Roche v. Ulman, 104 Ill. 11; King v. Wight, 155 Mass. 444. A covenant by the dominant as well as the servient tenant may bind his land (Midland R. Co. v. Fisher, 125 Ind. 19, 21 Am. St. Rep. 189, 8 L. R. A. 604; Carr v. Lowry, 27 Pa. 257), although no interest of the covenantee in the covenantor's land is protected; but it must concern the easement or the land in which the easement is granted (Wiggins Ferry Co. v. Ohio, etc., R. Co., 94 Ill. 83). The covenant by B has no reference to the land of A (Gibson v. Holden, 115 Ill. 199, 56 Am. St. Rep. 146), nor does it concern B's easement. At most it is a covenant to pay for an easement al-

only by the party sought to be charged is binding on such party,[7] but not in the absence of consideration for the right to use such wall.[8] The mere grant of a right to use a wall as the enclosure of a building will be interpreted to intend a building of such size as the wall will inclose, and not imply the right to enlarge the wall on the grantor's premises so as to employ it to enclose a large building.[9] The right to use a wall as a party wall may be acquired by prescription, and where so acquired the rights are to be measured by the use actually made and carry no right to place any further burden thereon.[10] One suing for contribution for erecting a party wall must plead and prove that he has erected the wall or caused it to be erected and that the defendant has made use of it without contributing his part of the cost of its erection.[11] It is no defense to an action for contribution for the cost of erecting a party wall that the party erecting the wall has not actually paid the cost thereof.[12] The right to sue for the use of a wall by an adjacent owner may be barred by limitation,[13] and, where there is no special limitation, the general statutory limitation for suits for unwritten contracts for injury to property applies.[14] The right of action in such cases accrues when the person sued first makes use of the wall as a party wall.[15] It is well settled that a mandatory injunction is the proper remedy for preventing an adjacent owner from opening or using windows through a party wall,[16] and is available though there is neither allegation nor proof that the other owner intends to use the wall.[17] Where the windows are already opened up, the injunction may be made broad enough to compel not only the closing of the opening but the making of the wall solid as it should be.[18] An injunction is also the proper remedy against attempted encroachment on an alleged party wall[19] and for using a party wall as to injure the rights of the adjacent owner.[20] The burden of showing an error in the appraisal agreed upon between the parties rests on the person setting it

ready acquired, or to be acquired. If the former, failure to perform it could not result in the destruction or impairment of the easement, as it might in the case of a covenant by a dominant owner to contribute to the cost of repairs to his easement, which has been held to run. Wooliscroft v. Norton, 15 Wis. 198; Mason v. Lane, 102 Ind. 364. If the latter, the burden could not run, as there would be no interest with which it might run until payment or user. Moreover such a construction should fall within the rule against perpetuities. Gray, Perp. [2d Ed.] § 314. Upon every theory, except that of equitable lien, applicable in but few cases, a construction of these covenants as personal, as in New York (Sebald v. Mulholland, 155 N. Y. 455), and impliedly in England (1 Columbia L. R. 257), is the sounder (4 Columbia L. R. 441).—From 8 Columbia L. R. 121.

7. Where signed only by party building wall. Trulock v. Parse [Ark.] 103 SW 166.

8. Agreement signed only by party building wall and requiring nothing of other party invalid for lack of consideration. Trulock v. Parse [Ark.] 103 SW 166.

9. Where lot owner about to erect building on lot conveyed adjacent owner use of wall for purpose of inserting ends of beams for specified depth and length and use of wall as enclosure for building. Miller v. Stuart [Md.] 68 A 273.

10. Right to use wall as support for joists, of one story building acquired by prescription, carries no right to increase height of wall. Bright v. Morgan [Pa.] 67 A 58.

11. Watkins v. Glas [Cal. App.] 89 P 840. Allegation of erection by plaintiff, appraisal of value by architect agreed upon by parties, notification to defendant of appraisement, use of wall by defendant and failure to pay therefor, sufficient. Id.

12. Watkins v. Glas [Cal. App.] 89 P 840. Unnecessary to allege actual payment of cost of erection or that party erecting has settled with builder for labor or materials. Id.

13. Right to recover for use of wall as party wall held barred by lapse of fourteen years. Pier v. Salot, 134 Iowa, 357, 111 NW 989.

14. Code, § 3447, prescribing five year period in which to bring action for injuries to property, held to apply to injuries due to use of wall by adjacent owner as party wall. Pier v. Salot, 134 Iowa, 357, 111 NW 989.

15. Fact that additional use as party wall was made after right to sue for original use was barred does not set statute running anew. Pier v. Salot, 134 Iowa, 357, 111 NW 989.

16, 17, 18. Coggins v. Carey [Md.] 66 A 673.

19. Where wall entirely on complainant's lot. Trulock v. Parse [Ark.] 103 SW 166.

20. Where roof of plaintiff's building was built against party wall so as to form gutter liable to become out of repair to injury of defendant, plaintiff may be required to keep same in repair and free from accumulation or other condition likely to cause injury. Pier v. Salot, 134 Iowa, 357, 111 NW 989.

up.[21] In New York where the agreement does not contemplate the present construction of a party wall, but authorizes its construction in the future, a covenant that the party, his heirs or assigns, using such a wall after its construction at the expense of the other party, shall be bound to pay a fixed sum for such use, creates a privity of estate and runs with the land;[22] but this rule does not apply where the agreement contemplates a present construction of the wall by the payee of the agreement who later disposes of all his interest in the property on which the wall is built.[23]

PASSENGERS, see latest topical index.

PATENTS.

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§ 1. *Necessity and kinds.*See 8 C. L. 1285—The patent laws being designed to stimulate invention give the patentee an exclusive right of manufacture and sale.[24] They charge the patentee with no duty to maintain free competition with other like articles that does not arise with respect to manufactures not protected by patent.[25] Independent of his letters patent, an inventor has by common law an exclusive property in his invention until by publication it becomes public property.[26] Mere omission of slight legal formalities in an application will not invalidate it.[27] The state statutes cannot interfere with the monopoly granted to a patentee and his assignees under the Federal laws,[28] yet patentees and their assignees are subject to the police power rights of the states, the state under such power having a right to decide what should be injurious to public welfare.[29] The state can prescribe regulations for registering the licensing of patents.[30] The state has the power to pass a general law prohibiting licensees and owners of patents from leasing patented machines by a contract prohibiting the lessee from obtaining from any other person similar machines to perform the same operation as that performed by the leased machines during term of the lease.[31]

21. Where parties agreed upon appraiser and defendant after setting up errors introduced no evidence in proof thereof. Watkins v. Glas [Cal. App.] 89 P 840.

22. Crawford v. Krollpfeiffer, 122 App Div. 848, 107 NYS 891.

23. Agreement that heirs, etc., of respective parties be bound thereby, that it be considered covenant running with land without conveying any part of fee of premises on which wall was erected, held to create mere easement in each other's favor, and that payee in agreement could not recover on covenant after conveyance by him of his lot and conveyance by other party of the other lot sought to be charged. Crawford v. Krollpfeiffer, 122 App. Div. 848, 107 NYS 891.

24. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. [C. C. A.] 154 F 358.

25. Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. [C. C. A.] 154 F 365.

26. Westcott Chuck Co. v. Oneida Nat. Chuck Co., 122 App. Div. 260, 106 NYS 1016.

27. Where affidavits laid venue as of one state and notary was of another, but patent office waived defects. Empire Cream Separator Co. v. Sears Roebuck Co., 157 F 238.

28. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. [C. C. A.] 154 F 358.

29. In re Opinion of the Justices [Mass.] 81 NE 142.

30. Territorial sale of exclusive rights come under this statute. Nyhart v. Kubach [Kan.] 90 P 796. Promissory notes given as consideration for exclusive territorial patent rights where registration of license granted was not complied with, held void between parties, but where they are in the hands of innocent third parties, the maker may sue and recover from the payee amount of notes and interest. Id.

31. Applies where two steps in a process are performed by two machines and

§ 2. *Patentability. Subjects of an invention.* See 8 C. L. 1288—The patent must involve actual invention.[82] A result is not patentable, but the means of producing

licensee of one forbids use of it with that of another patent for second step (In re opinion of the Justices [Mass.] 81 NE 142), and applies where lease provides that lessee must buy raw unpatented material to use in machine exclusively from lessor during term of lease (Id.).

32. ILLUSTRATIONS. Patents held to disclose inventions: Reissue No. 11,282 (orig. No. 445,235). American Sulphite Pulp Co. v. DeGrasse Paper Co. [C. C. A.] 157 F 660. Reissue No. 12,037 (orig. No. 589,168) claims 1 and 2. Kinetoscope camera. Edison v. American Mutascope & Biograph Co., [C. C. A.] 151 F 767. Reissue No. 12,263 (orig. No. 753,577), spinning machine thread guide. Houghton v. Whitine Machine Works [C. C. A.] 153 F 740. No. 30,478, grass cutting blade and No. 32,227, grass hook. H. S. Earle Mfg. Co. v. Clark & Parsons Co., 154 F 851. No. 37,649, bedspring. J. E. Tompkins Co. v. N Y. Woven Wire Mattress Co., 154 F 669. No. 436,916, claims 4 and 5 typewriter tabulator. Wagner Typewriter Co. v. Wykoff, Seamans & Benedict [C. C. A.] 151 F 685. Nos. 450,360 and 492,951, metal plate carriers. Aitken v. Nat. Tube Co., 157 F 691. No. 460,037, stocking. Shaw Stocking Co. v. Weierman, 154 F 67. No. 463,704 electric motor and dynamo. General Elect. Co. v. Bullock Elect. Mfg. Co. [C. C. A.] 152 F 427. No. 467,476, straw stacker. Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. [C. C. A.] 154 F 365. No. 476,230, hot air furnace. Kelsey Heating Co. v. Spear Stove & Heating Co., 155 F 976. No. 491,761 car seats. Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit R. Co., 152 F. 453. Nos. 511,559 and 511,560 and 401,520, motors. Diamond Meter Co. v. Westinghouse Elec. & Mfg Co. [C. C. A.] 152 F 704. No. 529,685, grass hook. Taussig v. North Wayne Tool Co., 154 F 856. No. 555,893, cream separator. Empire Cream Separator Co. v. Sears, Roebuck & Co., 157 F 238. No. 563,130, wall supports. Breuchand v. Mut. Life Ins. Co., 157 F 844. No. 578,576, fifth wheel for vehicle. Dayton Malleable Iron Co. v. Foster Waterbury & Co., 153 F 201. No. 580,281, improvement in typewriter escapement. Hillard v. Fisher Book Typewriter Co., 151 F 34. No. 582,481, core plates. Westinghouse Elec. & Mfg. Co. v. Prudential Ins. Co., 155 F 749. No. 587,308, net leader. Maunula v. Sunell, 155 F 535. No. 595,852, sectional steam boiler. Babcock & Wilcox Co. v. N. A. Dredging Co., 151 F 265. No. 603,841, blotter bath. Eureka Blotter Bath Co. v. Nicholas, 157 F 556. No. 605,947, neckties. Good Form Mfg. Co. v. White, 153 F 759. No. 618,428, candy machine. Electric Candy Mach. Co. v. Marris, 156 F 972. No. 619,567, casket face plate. National Casket Co. v. Stoltz, 153 F 765. No. 625,155, pipe coupling. Worcester County Gas Co. v. Dresser, [C. C. A.] 153 F 903. No. 626,900, heddle making machine claim 15. Gibbs Loom Harness & Reed Co. v. Howard Bros. Mfg. Co., 153 F 291. No. 638,941, dredger. Standard Sanitary Mfg. Co. v. J. L. Matt Co. Iron Works, 152 F 635. No. 640,197, pipe coupling. Western Tube Co. v. Rainer, 156 F 49. No. 641,092, rotary boiler tube cleaner. Liberty Mfg. Co. v. Am. Brew. Co., 155 F 900. No. 644,546, bowling alley pin setter. Brunswick-Balke-Collender Co. v. Backus Automatic Pin Setter Co., 153 F 288. No. 655,402, alloy for friction bearings. Ajax Metal Co. v. Brady Brass Co., 155 F 409. No. 675,577, locking device for pedestal tables. Tyden v. Ohio Table Co. [C. C. A.] 152 F 183. No. 687,499, phone transmitter. Kellogg Switchboard & Supply Co. v. International Tel. Mfg. Co., 158 F 104. No. 688,739, sound recorder. American Graphophone Co. v. Universal Talking Mach. Co. [C. C. A.] 151 F 595. No. 717,122, pressure governor. Davis & Roesch Temperature Controlling Co. v. Roesch [C. C. A.] 154 F 952. No. 740,982, electric car lighting. Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co., 153 F 193. No. 795,059, street flusher. St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co., 156 F 574. No. 831,188, phonographic tone regulator. R. Wurlitzer Co. v. Sheppy, 156 F 585.

Patents held void for lack of invention: Reissue No. 12,300 (orig. No. 742,540), refrigerator building. Wills v. Scranton Cold Storage & Warehouse Co. [C. C. A.] 153 F 181. No. 260,063, waterproof fabric. Streat v. Finch, 154 F 378. No. 423,998, brake shoe. American Brake Shoe & Foundry Co. v. Railway Materials Co. [C. C. A.] 152 F 700. Nos. 428,432, 614,587 and 727,233, concrete curbing. Steele Protected Concrete Co. v. Central Imp. & Const. Co., 155 F 279. No. 460,037, claim 2, stocking. Weierman v. Shaw Stocking Co. [C. C. A.] 157 F 928. No. 500,071, checking system in accounting. Hotel Security Checking Co. v. Lorraine Co., 155 F 298. No. 524,102, time recorder. Dey Time Register Co. v. Syracuse Time Recorder Co., 152 F 440. No. 526,913, pumping engine. Blake & Knowles Steam Pump Works v. Warren Steam Pump Co., 155 F 285. No. 527,242, process of expanding sheet metal. Expanded Metal Co. v. General Fireproofing Co., 157 F 564. No. 548,973, cable hoist. Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co. [C. C. A.] 154 F 372. No. 559,790, pool table pockets. Brunswick-Balke-Collender Co. v. H. Wagner & Adler Co., 155 F 120. No. 573, 107, field magnate poles. General Elec. Co. v. Bullock Elec. Mfg. Co. [C. C. A.] 152 F 185. No. 577,809 and reissue No. 11,778, being original No. 620,070, tufting machines. Buser v. Novelty Tufting Mach. Co. [C. C. A.] 151 F 478. No. 583,227, card records. Gunn v. Bridgeport Brass Co. [C. C. A.] 152 F 434. No. 626,900, heddle machine claims 4, 5, 6, 7, 8, 13 and 14. Howard Bros. Mfg. Co. v. Gibbs Loom Harness & Reed Co. [C. C. A.] 157 F 676. No. 630,037, overall buckle. Corser v. Sweet, 157 F 759. No. 640,816, potato harvesters. Ross v. Dowden Mfg. Co. [C. C. A.] 157 F 681. No. 645,026, locomotive engine lubricator. Nathan Mfg. Co. v. Delaware, etc., R. Co. [C. C. A.] 157 F 685. No. 668,960, storage apparatus and coal mover. Dodge Coal Storage Co. v. New York Cent. & H. R. R. Co. [C. C. A.] 160 F 738. No. 688,111, improvement on above. Id. No. 673,274, controllers for electric

the desired result is.[33] If a patentee shows a new result to be attained and means which are new and novel for attaining that result and the device indicated is operative, his patent is good even if in subsequently applying it he varies the means by substituting equivalents.[34] Devices used, though old, if performing each its original function, when so combined that by their co-operative action a greatly improved result is produced, become an invention and patentable.[35] A principle is not patentable, and while there may be a valid patent for means or methods of putting principles into operation so as to produce useful results, there cannot be for nature's means or methods.[36] Mere substitution of one material for another in a structure, while it does not constitute invention, is to be considered on that issue where it makes possible changes in other elements of a combination to produce improved operation.[37] Mere imperfection of operation where there is a novel device does not deprive the idea of patentability if all that is lacking to perfection is a mere change in the mechanical adjustment of parts.[38] Where patent is for mere function in a machine for the manufacture of an old product, it is void for lack of invention.[39] Where the idea of a machine is conceived and carried out and a machine made and could be used for the purposes intended, it is an invention, not an experiment.[40] Where a patent is not for a product, the result of a method or process, but for an article of special mechanical structure, the method of manufacture cannot enter into it as a patentable element.[41] In all patents, invention as distinguishable from mechanical skill is essential.[42] Mere improvement of form with no element of a pioneer invention does not allow a patent,[43] nor does the application of a somewhat new method to produce the same general result bestow a right to a pioneer invention,[44] nor does a new combination of old elements welded into an improvement allow more than a narrow range of equivalents,[45] but in cases of commercial success, where the new invention supplants and supersedes one in common, general, former use, for the same purpose, it is evidence of patentable invention, and in many cases persuasive evidence of a most valuable conception.[46] Mere splitting up of parts or multiplication of them, the functions remaining the same, gives no right to a patent.[47] Where there is in-

motors. Leonard v. Cutler-Hammer Mfg. Co., 156 F. 791. No. 689,906, toy torpedo. Potter v. Lake Shore Novelty Co. [C. C. A.] 155 F 278. No. 705,228, type block. Kuhn v. Lock Stub Check Co., 157 F 235. No. 714,290, electrical receptical. Fielding v. Crouse-Hinds Elec. Co. [C. C. A.] 154 F 377. No. 723,139, ornamental glass. Conroy v. Penn. Elec. & Mfg. Co., 155 F 421. No. 736,327, locking device for pedestal tables. Claim No. 1. Tyden v. Ohio Table Co. [C. C. A.] 152 F 183. No. 752,903, salt dredge. Hogan v. Westmoreland Specialty Co. [C. C. A.] 154 F. 66. No. 801,281, bottle stopper of sheet metal. Weissenthanner v. Dodge Metallic Cap Co., 156 F 365.

33, 34. Hilliard v. Fisher Book Typewriter Co., 151 F 34.

35. Barnes v. Lingo, 151 F 59; Blake & Knowles Steam Pump Works v. Warren Steam Pump Co., 155 F 285.

36. Sewage disposal by three systems, two were old and one was a process of nature, held void for prior act and lack of invention. Cameron Septic Tank Co. v. Village of Saratoga Springs, 151 F 242.

37. Houghton v. Whitin Mach. Works [C. C. A.] 153 F 740. Alloy mixture composite patentable. Ajax Metal Co. v. Brady Brass Co., 155 F 409. Where by new mixture of metals former imperfect results are remedied. Western Tube Co. v. Rainear, 156 F 49.

38. Brunswick-Balke-Collender Co. v. Backus Automatic Pin Setter Co., 153 F 288.

39. Conroy v. Penn. Electrical & Mfg. Co. 155 F 421.

40. Buser v. Novelty Tufting Mach. Co. [C. C. A.] 151 F 478.

41. Dodge Needle Co. v. Jones, 153 F 186.

42. No. 587,308, net leader. Maunula v. Sunell, 155 F 535.

43. Pelton Water Wheel Co. v. Abner Doble Co. [C. C. A.] 151 F 29.

44. Where new form of lining to machinery to assist heat merely resisted as well as old process did. Elevator Supply & Repair Co. v. Pederson, 151 F 497; American Sulphite Pulp Co. v. DeGrasse Paper Co., 151 F 47.

45. Dey Time Register Co. v. Syracuse Time Recorder Co., 152 F 440.

46. Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit R. Co., 152 F 453; St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co. [C. C. A.] 156 F 574.

47. Kelsey Heating Co. v. Spear Stove & Heating Co., 155 F 976; Western Tube Co. v. Rainear, 156 F 49.

ventive advance shown with patent office approval, patentability will be upheld.[48] Slavish copying of a complete set of features of a patent even to name gives clearly no patentability,[49] but where there is no invention at all to be found, extent of sales and use is immaterial to sustain patent.[50] It is when the term "process" is used to represent the means or method of producing a result that it is patentable, and it will include all methods or means not natures which are not effected by mechanism or mechanical combinations.[51] The relation between the mechanical and electrical arts is not so close that the adoption of a known mechanical device to a new use in an electric motor may not involve invention where the result is an improvement over prior constructions of great utility and success.[52] No patent right accrues where mere adoption of mechanical devices, of general knowledge and use, are made, the devices being simply transformed for one special purpose, the transformation requiring no more than engineering skill.[53] The fact that there existed a mechanical requirement for a machine to do a certain thing for a long time which was first supplied by the machine of a patent is high evidence of inventive application and genius.[54] An equivalent part is one which does not vary in any manner the idea of means, and, while it may perform new functions, it must perform all the functions of the element for which it was substituted.[55] The inventor himself may change or substitute equivalent parts at will if he does not change their functions.[56] If a substituted part or element not only performs the functions of the element for which it is substituted but introduces into the combination a new idea or a much more extended development of the idea of means, it is not an equivalent, but a patentable improvement.[57] It is unnecessary that each part coact upon another. It is sufficient that the desired end be simply attained to imply a combination.[58]

Novelty See 8 C. L. 1290 is essential to patent ability.[59] Mere use of a formula

48, 49. Kelsey Heating Co. v. James Spear Stove & Heating Co., 155 F 976.

50. Hotel Security Checking Co. v. Lorraine, 155 F 298.

51. Cameron Septic Tank Co. v. Saratoga Springs, 151 F 242. The rule which permits a less liberal construction of the claims of patents which are combinations or variaitons of previously known processes or contrivances than is required in the case of a pioneer patent relieves the wood paving contemplated in this case from the claim that it is an infringement of the Bevier patent; and the specifications are open and broad enough to admit competition from others than the owners of that patent Preuer v. Bardes, 6 Ohio N. P. (N. S.) 65. The specifications as to wood blocks to be used in the street improvement involved in this case are not an infringement of the Bevier patent, but refer to a different process for the preservation of wood, which is not new. State v. Miller, 10 Ohio C. C. (N. S.) 406.

52. General Elec. Co. v. Bullock Elec. Mfg. Co. [C. C. A.] 152 F 427.

53. Dodge Coal Storage Co. v. New York, etc., R. Co. [C. C. A.] 150 F 738.

54. Maunula v. Sunell, 155 F 535. In such case a wide range of equivalents is allowed by courts. Id.

55. Dey Time Register Co. v. Syracuse Time Recorder Co., 152 F 440.

56. Maunula v. Sunell, 155 F 535.

57. Dey Time Register Co. v. Syracuse Time Recorder Co., 152 F 440. Example of no equivalent use. Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit Co., 152 F 453.

58. Dayton Malleable Iron Co. v. Forster, 153 F 201.

59. Example of evidence and use necessary to show novelty. Ajax Metal Co. v. Brady Brass Co., 155 F 409.

Patents possessing novelty: No. 37,649, bedspring. James E. Tompkins Co. v. New York Woven Wire Mattress Co., 154 F 669. No. 578,576, fifth wheel for vehicle. Dayton Malleable Iron Co. v. Forster, 153 F 201, No. 655,402, alloy for bearings. Ajax Metal Co. v. Brady Brass Co., 155 F 409.

Patents void for lack of novelty: No. 460,037, stocking. Shaw Stocking Co. v. Weierman & Sarfert, 154 F 67. No. 483,646, mica sheets process. Mica Insulator Co. v. Commercial Mica Co., 157 F 90. No. 500,071, checking system for accounting. Hotel Security Checking Co. v. Lorraine Co., 155 F 298. No. 550,823, electric meters, claims 1 and 8. General Elec. Co. v. Latham, 155 F 293. No. 582,481, core plates. Westinghouse Elec. & Mfg. Co. v. Prudential Ins. Co., 155 F 749. No. 619,567, face plate for caskets. National Casket Co. v. Stolts [C. C. A.] 157 F 392. No. 641,092, rotary boiler tube cleaner. Liberty Mfg. Co. v. American Brew. Co., 155 F 900. No. 656,553, pneumatic track sander, claims 1, 2 and 8. American Locomotive Sander Co. v. Economy Locomotive Sander Co., 154 F 83. Nos. 768,591 and 768,592, switch rod. Ajax Forge Co. v. Morden Frog & Crossing Works, 156 F 594. No. 784,695, insulated paper tube lining. Marshall v. Pettingell-Andrews Co., 153 F 579. No. 801,281, sheet metal stopper.

somewhat changed from the one regularly employed in mixing ingredients for manufacture of certain lines of goods entitles the user to no patent, as the patent would be void for lack of novelty.[60]

Anticipation See 8 C. L. 1231 in a prior patent is fatal to the valididty of a patent.[61] Anticipation of device is not lost by abandonment of actual use of a device.[62] A model filed in the patent office is not an anticipation which will invalidate a subsequent patent to another; the word "model" must be understood to mean simply a pattern or representation, and not the actual device or machine of the invention.[63] A patent is not anticipated by prior patents in different acts which were not intended to accomplish, and did not in fact accomplish, the objects and purposes of the invention of the patent in suit. Prior patents which refer to features which take practical form in a later patent do not anticipate such later patent where it is the only one which solved the problem.[64] Anticipation is not made out where fact of prior existing device is shown, which might be easily changed to present patent form, and prior device was in common use, where it did not occur to anyone to make the change until it was suggested by the present machine.[65] Six years' delay after perfection of patent does not estop perfector from claiming priority over one subsequently issued

Weisenthanner v. Dodge Metallic Cap. Co., 156 F 365.

60. National Enameling & Stamping Co. v. New England Enameling Co. [C. C. A.] 151 F 19.

61. Inventions anticipated: Nos. 428,432, 614,587, and 727,233, concrete curbing. Steel Protected Concrete Co. v. Central Imp. & Cont. Co., 155 F 279. No. 450,592, typewriter tabulator, claim 9. American Writing Mach. Co. v. Wagner Typewriter Co. [C. C. A.] 151 F 576. No. 550,823, electric meters, claims 1 and 8. General Elec. Co. v. Latham, 155 F. 293. No. 559,910, dynamo armature. General Elec. Co. v. Bullock Elec. & Mfg. Co., 155 F 740. No. 577,809, and reissue No. 11,778 (original No. 620,070), tufting machine. Buser v. Novelty Tufting Mach. Co. [C. C. A.] 151 F 478. No. 587,633, fastner for stair carpets. Sloane v. Dobson [C. C. A.] 151 F 497. No. 589,342, claims 1, 2, and 3, acetyline burner. American Lava Co. v. Steward, 155 F 731. No. 689,906, toy torpedo. Potter v. Lake Shore Novelty Co. [C. C. A.] 155 F 278. Nos. 704,099 and 721,229, regulators for electric motors. Pieper v. Elec. Dental Mfg. Co., 156 F 672. No. 743,152, knitting machine needle. Dodge Needle Co. v. Jones, 153 F 186. No. 801,281, sheet metal stopper. Weisenthanner v. Dodge Metallic Cap. Co., 56 F 365.

Inventions not anticipated: No. 378,379, beer filter. German American Filter Co. v. Loew Filter Mfg. Co., 155 F 124. No. 460,037, stocking. Shaw Stocking Co. v. Weierman & Sarfert, 154 F 67. No. 463,704, electric motor and dynamo. General Elec. Co. v. Bullock Elec. Mfg. Co. [C. C. A.] 152 F 427. No. 469,809, electrical distribution system. Westinghouse Elec. Mfg. Co. v. Montgomery Elec. L. & P. Co. [C. C. A.] 153 F 890; Id. [C. C. A.] 156 F 582. No. 475,401, oil burner. Cleveland Foundry Co. v. American Stove Co., 157 F 562. No. 476,230, hot air furnace. Kelsey Heating Co. v. Spear Stove & Heating Co., 155 F 976. No. 504,401, dynamos armature. General Elec. Co. v. Bullock Elec. & Mfg. Co., 155 F 740. Nos. 511,559 and 511,560, motors. Diamond Meter Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 152 F 704. No. 526,913, pump engine. Blake & Knowles Steam Pump Works v. Warren Steam Pump Co., 155 F 285. No. 528,223, claims 1, 4, 5, 7 and 10, time recorder. International Time Recording Co. v. W. H. Bundy Recording Co., 152 F 717. No. 535,465, wash machines. Benbow-Brammer Mfg. Co. v. Wayne Mfg. Co., 157 F 559. No. 563,130, wall supports. Breuchaud v. Mutual Life Ins. Co., 157 F 844. No. 582,481, core plates. Westinghouse Elec. & Mfg. Co. v. Prudential Ins. Co., 155 F 749. Original No. 589,168 (reissue No. 12,037), kinetoscope camera. Edison v. American Mutoscope & Biograph Co. [C. C. A.] 151 F 767. No. 603,841, blotter bath. Eureka Blotter Bath Co. v. Nicholas, 157 F 556. No. 618.428, candy machine. Elec. Candy Mach. Co. v. Morris, 156 F 972. No. 625,155, pipe coupling. Worcester County Gas Co. v. Dresser [C. C. A.] 153 F 903. No. 626,900, heddle making machine, claim 15. Gibbs Loom Harness & Reed Co. v. Howard Bros. Mfg. Co., 153 F 291. No. 633,941, dredger. Standard Sanitary Mfg. Co. v. J. L. Mott Iron Works, 152 F 635. Nos. 638,540 and 29,777, hose supporter. Foster Hose Supporter Co. v. O'Brien, 153 F 535. No. 640,197. pipe coupling. Western Tube Co. v. Rainear, 156 F 49. No. 641,092, rotary boiler tube cleaner. Liberty Mfg. Co. v. American Brew. Co., 155 F 900. No. 655,402, alloy for bearings. Ajax Metal Co. v. Brady Brass Co., 155 F 409. No. 672,056, clutch for starting machinery. United Shoe Mach. Co. v. Greenman [C. C. A.] 153 F 283. No. 681,234, ore crushers. Quincey Min. Co. v. Krause [C. C. A.] 151 F 1012. No. 688,739, sound recorder. American Graphophone Co. v. Universal Talking Mach. Mfg. Co. [C. C. A.] 151 F 595. No. 795,059, street flusher. St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co. [C. C. A.] 156 F 574.

62. Machine used but discontinued after giving a practical demonstration of its working and forgotten, held anticipation. Buser v. Novelty Tufting Mach. Co. [C. C. A.] 151 F 478.

63. American Writing Mach. Co. v. Wagner Typewriter Co., 151 F 576.

64, 65. Electrical Candy Mach. Co. v. Morris, 156 F 972.

to another who had in the meantime conceived the same invention, but who took no steps to file application for a patent until after first perfector had filed and also introduced his invention to the public.[66]

Prior public use.[See 8 C. L. 1293]—Two years' prior use by the public is a bar to the right to a patent.[67] Prior knowledge and use which will anticipate a later patent is not to be made out by a chance combination made without appreciation of the principle upon which the patent is based.[68]

Abandonment.[See 8 C. L. 1294]—Where the idea of a machine has been conceived and carried into effect by the construction of the machine which is used or could be used for the purpose for which it was designed, it is no longer an experiment but a real invention, and subsequent abandonment of use does not render it an abandoned experiment nor lessen its effect as an anticipation which will invalidate a subsequent patent to another for substantially the same machine.[69]

§ 3. *Who may acquire patents.* [See 8 C. L. 1294]—When a claim covers a series of steps or a number of elements in a combination, the invention may well be joint, though some of the steps or some of the elements may have come as the thoughts of one,[70] but joint owners can only recover for damages and profits accruing after the partnership in the patent was formed in suits on infringements.[71]

§ 4. *Mode of obtaining and claiming patents.*[See 8 C. L. 1295]

Specification and description.[See 8 C. L. 1295]—Specifications may be used to explain an ambiguity in a claim, but not to expand or change the claim.[72] It is immaterial whether or not the means of accomplishing a result covered by a patent are illustrated therein, if they are sufficiently described in the specification.[73] Where the specification is so clear that any intelligent mechanic can follow it readily, it is sufficient.[74] If a specification, describing the invention, describes a device in fact entirely useless so far as contributing to the result is concerned, it does not restrict the claims to a combination including such device where it is not mentioned therein.[75] If in a specification the patentee in appropriate language described a real invention and properly sets forth a claim to the invention, he cannot be deprived of his invention because he erred in a reference to the prior act.[76] Peculiarities should be distinctly specified.[77] Any subsequent amendment of any consequence should be verified by the oath of the inventor.[78] The patentee must point out everything that cannot readily be discovered where the patent is on a process.[79]

The drawings.[See 8 C. L. 1296]

The cancellation of claim.[See 8 C. L. 1296]

Interference.[See 8 C. L. 1296]—On proper showing in interference cases, an injunction may be granted pending decision on merits.[80]

66. Kellogg Switchboard & Supply Co. v. International Tel. Mfg. Co., 158 F 104.

67. Dodge Needle Co. v. Jones, 153 F 186. No. 633,941, dredger. Standard Sanitary Mfg. Co. v. J. L. Mott Iron Works, 152 F 635. No. 795,059, street flusher. St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co. [C. C. A.] 156 F 574. Example of evidence and use necessary to show prior public use. Ajax Metal Co. v. Brady Brass Co., 155 F 409. No. 655,402, alloy for bearings. Id. No. 735,949, glass edge chipper. Conroy v. Penn. Electrical Mfg. Co., 155 F 421. No. 740,982, electric car lighting. Consolidated R. Co. v. Adams, 153 F 193.

68. Western Tube Co. v. Rainear, 156 F 49.

69. Buser v. Novelty Tufting Mach. Co. [C. C. A.] 151 F 479. Abandoned because product had no market, but was a successful invention nevertheless. United Shoe Mach. Co. v. Greenman [C. C. A.] 153 F 283.

70. Quincey Min. Co. v. Krause [C. C. A.] 151 F 1012.

71. Canda Bros. v. Michigan Malleable Iron Co. [C. C. A.] 152 F 178.

72. National Enameling & Stamping Co. v. New England Enameling Co. [C. C. A.] 151 F 19.

73. Hilliard v. Fisher Book Typewriter Co., 151 F 34.

74. Consolidated Rubber Tire Co. v. Firestone Fire & Rubber Co. [C. C. A.] 151 F 237.

75. Barnes v. Lingo, 151 F 59.

76. Babcock & Wilcox Co. v. North American Dredging Co., 151 F 265.

77, 78, 79. American Lava Co. v. Stewart [C. C. A.] 155 F 731.

80. Scott v. Laas [C. C. A.] 150 F 764.

*Appeal and review.*See 8 C. L. 1802

*Suit in equity to secure patent.*See 8 C. L. 1805—Federal statutes allow suits to compel issuance of patents.[81] This act was not limited by subsequent acts.[82] The government is treated as a party to all suits where the validity of a patent is in question.[83] A suit under Federal statutes to compel issuance of a patent is not revisory but an original suit in equity.[84] In such suits testimony taken before the patent office, although between the same parties, is inadmissible unless a foundation is laid for its introduction as secondary evidence.[85] In such suits, evidence is admissible that defendant's patent is void for anticipation, although no issue is made by the pleadings and although such evidence may defeat the action.[86]

§ 5. *Letters patent.*See 8 C. L. 1805

*Construction and limitation of claims.*See 8 C. L. 1805—The claim in a patent is the measure of the invention.[87] The patentee must claim in his patent the exact invention.[88] Where claims are so construable that intent can easily be read from them, they should be construed under the general rule that language in a patent should be construed to save rather than destroy it.[89] The omission of a patentee to point out or refer in his specifications or claims to a special feature which he subsequently maintains is the most important part of his invention, is very significant, and should be carefully scrutinized.[90] Specifications may be resorted to to explain an ambiguity in a claim, but cannot be used to change or expand it.[91] A patentee is entitled to every function his device will perform, though he was ignorant of it when he procured his patent,[92] but he secures no patent on the function, and the discovery of the new one in the patented device does not operate to enlarge or broaden the letter of his claim, which is the measure of his rights,[93] though they may be considered by a court.[94] In some cases courts hold failure to contemplate function or possibilities of any nature as persuasive evidence that it was not within the scope of the invention.[95] Where invention of a high order is indicated, the claims are entitled to a broad construction as limited by the prior act, and a liberal application of the doctrine of equivalents as covering a pioneer invention.[96] The claiming of a result is not invalidated by the fact that a specification may describe something which does not exist.[97] In construing improvement claims of a patent, consideration should be given to the character of the improvements introduced by the patentee and the change in the art attributable to them,[98] and the same is true of a patent which has had great commercial success and supplants or supercedes something of the same kind in for-

81. Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392].

82. U. S. Comp. St. 1901, p. 3391, relating to appeals to supreme court of D. C. Prindle v. Brown [C. C. A.] 155 F 531. Sufficiency of bill on appeal shown. Id.

83. To protect the public from having a monopoly granted to one not entitled to it. Richards v. Meissner, 155 F 135.

84, 85. Dover v. Greenwood, 154 F 854.

86. Richards v. Meissner, 155 F 135.

87. National Enameling & Stamping Co. v. New England Enameling Co. [C. C. A.] 151 F 19.

88. Claim of anything not in patent invalidates the patent. National Enameling & Stamping Co. v. New England Enameling Co. [C. C. A.] 151 F 19.

89. Maunula v. Sunell, 155 F 535; Electric Candy Mach. Co. v. Morris, 156 F 972. Use of reference letters in a claim cover all equivalent parts as well as those shown in a drawing. Id.; Kelsey Heating Co. v. James Spear Stove & Heating Co., 155 F 976.

90. Stirling v. Rust Boiler Co., 144 F 849.

91. National Enameling & Stamping Co. v. New England Enameling Co. [C. C. A.] 151 F 19.

92. General Elec. Co. v. Bullock Elec. Mfg. Co. [C. C. A.] 152 F 427.

93. Dunlap v. Willbrandt Surgical Mfg. Co. [C. C. A.] 151 F 223; Hardison v. Brinkman [C. C. A.] 155 F 962; Universal Brush Co. v. Sonn [C. C. A.] 154 F 665.

94. General Elec. Co. v. Bullock Elec. Mfg. Co. [C. C. A.] 152 F 427.

95. Where not necessarily inherent in the invention itself. Edison General Elec. Co. v. Crouse-Hinds Elec. Co. [C. C. A.] 152 F 437.

96. Hillard v. Fisher Book Typewriter Co., 151 F 34.

97. Barnes v. Lingo, 151 F 59.

98. Wagner Typewriter Co. v. Wyckoff [C. C. A.] 151 F 585.

mer general use.[99] If they change imperfection into completeness and thus produce a practical machine out of a raw experiment, however simple the change appears, the invention is entitled to liberal treatment by the courts.[1] Courts look with favor upon primary improvements which are novel and a manifest departure from the principles of prior structures and which are a final step in creating success out of failure.[2] A strict construction of the claims should not be resorted to if the result would be a limitation on the actual invention, unless it is required by the language of the claim.[3] Where patentee agreed to rejection of certain claims made for patent, and substituted new claims in patent office, the limited new claims can be interpreted in the light of all circumstances surrounding the issuance of the patent as shown by reference to rejected claims and the prior state of the act,[4] nor does it debar the inventor from a liberal construction of the claim as granted nor from the benefit of the doctrine of equivalents.[5] But some courts hold the inventor strictly to the final claims in such patents,[6] and where an inventor limits his claim by certain words and at the same time another patent is pending on a broader term for a similar device, the patentee in the first instance can only claim his limited rights.[7] In case, however, an inventor lays claim to a device in one form, and by interference suit he is compelled to change its form, he is estopped from asserting any rights to anything but his final device,[8] even where the winner of interference proceedings is found to have an invalid patent because of prior public use.[9] An inventor may specify and claim the subject-matter of what he believes himself to be the inventor of and can persist in his claims until the patent office rejects them, then the inventor can resist or acquiesce in the rejection and must choose the course to follow. If he acquiesces, the public is entitled to the bentfit of the limitations on his patent.[10] If there was no amendment narrowing a claim of a patent in respect to an essential feature of the invention disclosed therein, amendments made in reference to an incidental matter intended to perfect the claim or device impose no restriction on the rights of the patentee in respect to equivalents.[11]

Pioneer invention.[See 8 C. L. 1306]—A machine for making on a commercial scale more cheaply an article formerly made by hand is a pioneer invention, and a patent thereto is entitled to liberal construction.[12]

§ 6. *Duration of patent right. Surrender and reissues.*[See 8 C. L. 1307]—A patent is not exempted from the operation of Rev. St. § 4887 (U. S. Comp. St. 1901, p. 3382), making it expire with a prior foreign patent for the same invention because there may be a difference in detail between devices in the two patents, unless such difference affects the essence of the invention in a patentable sense.[13] Where American patent authorized taking out a British patent and did not repudiate the latter patent, the claim that the English patent did not affect American patent will not be

99. Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit Co., 152 F 453.
1, 2, 3. Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict [C. C. A.] 151 F 585.
4. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 151 F 601.
5. Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit R. Co., 152 F 453.
6. Dodge Needle Co. v. Jones, 153 F 186; St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co. [C. C. A.] 156 F 574. Where asquiescence was made as to lock of patentable novelty, the patent applicant must abide by it. Mica Insulator Co. v. Commercial Mica Co., 157 F 90; Good Form Mfg. Co. v. White, 153 F 759.
7. Ajax Forge Co. v. Morden Frog & Crossing Works, 156 F 594.
8, 9. Dodge Needle Co. v. Jones, 153 F 186.
10. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 151 F 601.
11. Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit R. Co., 152 F 453.
12. No. 618, 428, candy machine. Electric Candy Mach. Co. v. Morris, 156 F 972. Example of, no. 558,610, heating and ventilating. Powers Regulator Co. v. National Regulator Co., 152 F 984.
13. No. 448,894, electric meter expired with British patent for same invention. Thomson-Houston Elec. Co. v. McLean [C. C. A.] 153 F 883.

sustained.[14] The last international treaty in regard to patents did not effect the term of existing United States patents.[15]

§ 7. *Disclaimer and abandonment.* See 8 C. L. 1308—The burden of proving abandonment is on the person seeking to invalidate it.[16]

§ 8. *Titles in patent rights and license, conveyance, or transfer thereof. In general.* See 8 C. L. 1308

Patent rights as between employer and employe. See 8 C. L. 1309

Royalties. See 8 C. L. 1309—Where right to manufacture was based on agreement to pay royalties, no presumption arises that goods manufactured by defendants were subject to royalty.[17] The burden is on plaintiff to establish that goods manufactured were within scope of patent for which royalty should have been paid.[18] An agreement to terminate a contract for royalty unless minimum of stated royalties was paid, where this clause is acted upon by patent holder, does not deprive him of right to collect minimum royalty during time contract was in force.[19] An action for accounting and specific performance cannot be maintained by one to whom royalties are due because plaintiff does not know the amount due and defendants have failed to render statements, and a complaint alleging plaintiff's ignorance of amount due and demanding judgment for no definite sum is demurrable.[20] An agreement to pay royalty on a certain article made is not based upon the fact that there is a patent for it.[21]

Transfer. See 8 C. L. 1310—An assignment of a patent is sufficiently proved in a suit by the assignee for its infringement by the testimony of one of the subscribing witnesses unless there is special reason for more.[22] That an assignment was recorded, produced, and put in evidence by subsequent assignee in suit for infringement, is sufficient evidence of its delivery.[23] A corporation can assign its rights in a patent by the ordinary transfer.[24] Contracts of sale of patents are generally strictly construed.[25] An acknowledgment is not essential to the valididty of an assignment of rights in a patent if the genuineness of the assignor's signature can be proved.[26] Usually where a patent is assigned under contract which includes "improvement patents," any subsequent improvement patent obtained by one not patented will follow and become the property of the assignee.[27] Where a party is under contract to assign all future inventions to another, it is his duty to make full disclosures to such other of all inventions made and developed by him.[28] Where the assignor of an invention fraudulently assigns it to another, he is liable in an action for the sum re-

14. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. [C. C. A.] 155 F 842.

15. 32 St. 1936-39 as construed by 32 St. 1225, held not affected by Rev. St. § 4887, so as to extend time of expiration. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. [C. C. A.] 155 F 842.

16. Must prove clear intention of abandonment with dedication of patent to the general public. Hartford v. Hollander, 158 F 103.

17. Example of insufficient evidence to warrant allowance of royalties. Bennett v. Ironclad Mfg. Co., 105 NYS 593.

18. Bennett v. Ironclad Mfg. Co., 105 NYS 593.

19. Cummings v. Standard Harrow Co., 105 NYS 646.

20. Storr v. Central Bedding Co., 55 Misc. 398, 106 NYS 546.

21. Payor of royalty cannot set up invalidity. Strong v. Carver Cotton Gin Co. [Mass.] 83 NE 328.

22, 23. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 F 64.

24. Conveyance of all its property "including good will, patents, trade marks," etc., effective to pass title to patent then owned but not therein described. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 F 64.

25. Where description of patent wares transferred was for "rights in certain patents and no others," held rights were transferred only to specific kind and not also to a similar one, differing in the main but slightly. Ball & Socket Fastner Co. v. Patent Button Co., 152 F 187.

26. Clancy v. Troy Beltng & Supply Co., 152 F 188.

27. Brown v. Owen [C. C. A.] 158 F 98.

28. Bates v. Bates Mach. Co., 120 Ill. App. 563. Inventor agreeing to put all future patents into partnership business must assign all future inventions within the scope of the partnership business to the successor of the partnership succeeding with his consent. Id.

ceived by him for the invention wrongfully conveyed with interest from the date of the receipt thereof.[29]

Licenses.[See 8 C. L. 1311]—A parol license under a patent may be sustained and specifically enforced as between the parties,[30] but where the terms of a parol license are violated, the damaged party has a right to redress.[31] Where a machine is sold which can only be used in connection with another device, the sale carries with it an implied license to use the device.[32] Mere agreement among various licensees of patent to have each one join a pool to control prices and output is not a violation of the Sherman anti-trust act,[33] and a system of contracts between the owner of a patent and its licensees for a combine to hold up prices and avoid competition is valid.[34] The same is true where various patents are used in a pool under a similar arrangement.[35] License to manufacture a patented article does not deprive licensee of the right, also to manufacture unpatented articles of same nature.[36] A license once accepted after an opportunity to investigate patent for which it is given will not be rescinded when licensee sues in equity to rescind on the ground of fraud in any respect.[37]

§ 9. *Interference suits.*[See 6 C. L. 975]—Interference suits are provided for by statute.[38] Before a patent can take advantage of Rev. St. § 4916 [U. S. Comp. St. 1901, p. 3393], the original patent must be invalid for insufficient description or claims and the reissue must seek to cover the identical invention named.[39] A party to an interference proceeding in patent office who testified in his own behalf and then continued to postpone cross-examination beyond time for enforcement of his subpoena because time for closing testimony was past, and then refused to testify, can be compelled to do so on application by the circuit court who can enforce attendance in contempt proceedings.[40]

§ 10. *Infringement. A. What is.*[See 8 C. L. 1312]—One may imitate a perfected article of another already on the market where patents thereon have expired.[41] In-

29. Bates v. Bates Mach. Co., 120 Ill. App. 563.

30. Cook v. Sterling Elec. Co. [C. C. A.] 150 F 766.

31. Where license was given to use certain metal in making infringed device, and defendant broke agreement by using other metal, held no protection after breach. Clancy v. Troy Belting & Supply Co., 152 F 188.

32. Sale of electric engine which could not be used without a certain trolley switch, which was installed by purchaser, held no infringement as implied license went with sale. Thomson-Houston Elec. Co. v. Illinois Tel. Const. Co. [C. C. A.] 152 F 631.

33. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. [C. C. A.] 154 F 358. Patented articles unless released by patentee from the dominion of his monopoly are not articles of trade or commerce among the various states within meaning of Sherman act (26 St. 209 ch. 647, § 1 [U. S. Comp. St. 1901, p. 3200]) Id.

34. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. [C. C. A.] 154 F 358. Where royalties were paid back to patentee who fixed price of sale. Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. [C. C. A.] 154 F 365.

35. Nos. 467,476; 493,734; 517,475; 512,553; 514,266, pneumatic straw stackers. Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. [C. C. A.] 154 F 365.

36. Strong v. Carver Cotton Gin Co. [Mass.] 83 NE 328. Where license is for brass clamps, and licensee made them of steel of another patent, held proper and no violation. Clancy v. Troy Belting & Supply Co. [C. C. A.] 157 F 554; Cortelyou v. Johnson, 28 S. Ct. 105.

37. Landon v. Tucker [Mo. App.] 107 SW 1037.

38. Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3393-4].

39. General Chemical Works v. Blackmore, 156 F 968. Example patent void for interference, reissue no. 11, 995 (orig. no. 686,022), void as against No. 652,119, process for making sulphuric anhydride. Id.

40. Lobel v. Cossey [C. C. A.] 157 F 664.

41. Westcott Chuck Co. v. Oneida Nat. Chuck Co., 122 App. Div. 260, 106 NYS 1016.

ILLUSTRATIONS. Patents held infringed: Reissue No. 11,282 (orig. No. 445,235), wood-pulp digester. American Sulphite Pulp Co. v. De Grasse Paper Co. [C. C. A.] 157 F 660. Reissue No. 12,263 (orig. No. 753,577), thread guide for spinning machine, claims 1, 2, 3, & 4. Houghton v. Whittin Mach. Works [C. C. A.] 153 F 740. No. 30478, grass cutting blade and No. 32,227, grass hook. H. L. Earle Mfg. Co. v. Clark & Parsons Co., 154 F 851. No. 36,895, ladies underwear trimming. Friedberger-Aaron Mfg. Co. v. Chapin, 151 F 264. No. 37,649, bedspring. James E. Tompkins Co. v. New York Woven Wire Mattress Co., 154 F 669. No. 378,379, beer filter. German-American Filter Co. v. Loew Filter & Mfg. Co., 155 F 124. Nos. 381,968; 381,969; 382,280 and 382,281, electric motors. Westinghouse Elec. & Mfg. Co. v. National Elec. Co., 152 F 466. Nos. 388,366 and 632,-

527, stamp canceling machine (decision in 84 F 1014 and 61 F 284 followed). International Postal Supply Co. v. American Postal Mach. Co. [C. C. A.] 156 F 362. No. 433,686, claims 1 and 2, track sander. American Locomotive Sander Co. v. Economy Locomotive Sander Co., 154 F 79. No. 436,916, tabulator. Underwood Typewriter Co. v. Elliot-Fisher Co., 156 F 588. No. 442,631, store service ladder. Murray v. Orr & Lockett Hardware Co. [C. C. A.] 153 F 369. No. 446,230, grain drill. Deere & Webber Co. v. Dawagiac Mfg. Co., 153 F 177. Nos. 450,360 and 492,951, metal plate carriers. Aiken v. National Tube Co., 157 F 691. No. 452,268, typewriter tabulator. Underwood Typewriter Co. v. Graves Typewriter Co., 155 F 138. No. 460,037, stocking. Shaw Stocking Co. v. Weierman, 154 F 67. No. 463,704, electric motor and dynamo. General Elec. Co. v. Bullock Elec. Mfg. Co. [C. C. A.] 152 F 427. No. 469,809, electrical distribution system. Westinghouse Elec. Mfg. Co. v. Montgomery Elec. Light & Power Co. [C. C. A.] 153 F 890. No. 472,804, metal planers. Detrick & Harvey Mach. Co. v. American Foundry & Mach. Co., 156 F 777. No. 475,401, oil burner. Cleveland Foundry Co. v. American Stove Co., 157 F 662. No. 476,230, hot air furnace. Kelsey Heating Co. v. James Spear Stove & Heating Co., 155 F 976. No. 480,029, conveyor, not infringed by No. 829,911. Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co. [C. C. A.] 154 F 372. No. 480,515, hose clamp. Clancy v. Troy Belting & Supply Co., 152 F 188. No. 483,511, cash register. National Cash Register Co. v. Grobet [C. C. A.] 153 F 905. No. 497,482, electric light stations. Weston Electrical Instrument Co. v. Empire Electrical Instrument Co., 155 F 301. No. 499,411, and No. 572,561, and No. 634,220, electric signaling apparatus for elevators. Elevator Supply & Repair Co. v. Pederson, 151 F 497. No. 504,401, dynamo armature. General Elec. Co. v. Bullock Elec. & Mfg. Co., 155 F 740. Nos. 526,913 and 522,938, steam pump improvements Blake & Knowles Steam Pump Works v. Warren Steam Pump Co., 155 F 285. No. 527,361, claims 1, 2, 3, enameled metal ware. National Enameling & Stamping Co. v. New England Enameling Co. [C. C. A.] 153 F 184. No. 529,685, grass hook. Taussig v. North Wayne Tool Co., 154 F 856. No. 534,543, phonograh disk. Leeds & Catlin Co. v. Victor Talking Mach. Co. [C. C. A.] 154 F 58. No. 535,465, wash machines. Benbow-Brammer Mfg. Co. v. Wayne Mfg. Co., 157 F 559. No. 539,878. Lorain Steel Co. v. New York Switch & Crossing Co., 153 F 205. No. 554,675, rubber tire. Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co. [C. C. A.] 151 F 237. No. 555,893, cream separator. Empire Cream Separator Co. v. Sears, Roebuck & Co., 157 F 238. No. 558,610, heating and ventilating apparatus. Powers Regulator Co. v. National Regulator Co., 152 F 984. No. 563,130, wall support. Breuchaud v. Mutual Life Ins. Co., 157 F 844. No. 578,576, fifth wheel for vehicle. Dayton Malleable Iron Co. v. Forster, Waterbury & Co., 153 F 201. No. 580,281, improvement in typewriter escapement. Claims 30 to 35 and 37-38-41. Hillard v. Fisher Book Typewriter Co., 151 F 34. No. 582,481, core plates. Westinghouse Elec. & Mfg. Co. v. Prudential Ins. Co., 155 F 749. No. 587,308, net leader. Maunula v. Sunell, 155 F 635. No. 603,841, blotter bath. Eureka Blotter Bath Co. v. Nicholas, 157 F 556. No. 609,928, thill coupling. Eccles v. Bradley [C. C. A.] 158 F 98. No. 618,428, candy machine, claim 1. Electric Candy Mach. Co. v. Morris, 156 F 972. No. 619,567, casket face plate. National Casket Co. v. Stoltz, 153 F 765. No. 626,900, heddle making machine, claim 15. Gibbs Loom Harness & Reed Co. v. Howard Bros. Mfg. Co., 153 F 291. No. 626,900, heddle machine, claim 15. Howard Bros. Mfg. Co. v. Gibbs Loom Harness & Reed Co., 157 F 676. No. 625,125, pipe coupler. Worcester County Gas Co. v. Dresser [C. C. A.] 153 F 903. No. 633,941, dredger. Standard Sanitary Mfg. Co. v. J. L. Mott Iron Works, 152 F 635. No. 638,540, hose supporter, claim 1. Foster Hose Supporter Co. v. O'Brien, 153 F 585. No. 640,197, pipe covering. Western Tube Co. v. Rainear, 156 F 49. No. 644,646, bowling alley pin. Brunswick-Balke-Collender Co. v. Backus Automatic Pin Setter Co., 153 F 288. No. 655,402, alloy for bearings. Ajax Metal Co. v. Brady Brass Co., 155 F 409. No. 677,308, alternating current motor. General Elec. Co. v. Corliss, 154 F 671. No. 681,234, ore crushers. Quincey Min. Co. v. Krause [C. C. A.] 151 F 1012. No. 684,776 and 684,778, clothes dryer and drying machine. Barnes v. Lingo, 151 F 59. No. 688,739, sound record reproduction. American Graphophone Co. v. Universal Talking Mach. Co. [C. C. A.] 151 F 595. No. 687,499, phone transmitter. Kellogg Switchboard & Supply Co. v. International Tel. Mfg. Co., 158 F 104. No. 696,940, trousers hanger. Mackie-Lovejoy Mfg. Co. v. Cazier [C. C. A.] 157 F 88. No. 720,616, stud button. United States Fastener Co. v. Caesar. 154 F 671. No. 735,949, glass edge chipper. Conroy v. Penn. Electrical & Mfg. Co., 156 F 421. No. 743,152, knitting needle machine. Dodge Needle Co. v. Jones, 153 F 186. No. 767,303, telegraph transmitters. Martin v. Wall, 153 F 589. No. 771,963, bowling alley pin setter. Brunswick-Balke-Collender Co. v. Backus Automatic Pin Setter Co., 153 F 288. No. 795,059, street flusher. St. Louis Street Flushing Mach. Co. v. American Street Flushing Mach. Co. [C. C. A.] 156 F 574. No. 831,188, phonographic tone regulator. Rudolph Wurlitzer Co. v. Sheppy, 156 F 585.

Patents held not infringed: Reissue No. 11,282 (orig. No. 445,235), wood pulp digesters. American Sulphite Pulp Co. v. De Grasse Paper Co., 151 F 47. Reissue No. 12,037 (orig. No. 589,168), kinetoscopic camera. Edison v. American Mutoscope & Biograph Co. [C. C. A.] 151 F 767. Reissue No. 12,437 (orig. No. 695,508), frictional spring retarder for vehicles. Hartford v. Hollander, 158 F 103. No. 304,539, claim No. 1, electric conductor. National Conduit & Cable Co. v. John A Roebling's Sons Co. [C. C. A.] 158 F 99. No. 424,695, engine and electric switch device. Thomson-Houston Elec. Co. v. Illinois Tel. Const. Co. [C. C. A.] 152 F 631. No. 436,916, claims 4 and 5, typewriter tabulator. Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict [C. C. A.] 151 F 585. No. 439,684, sectional steam boiler, and No. 595,852, ditto. Babcock & Wilcox Co. v. North American Dredging Co., 151 F 265. No. 448,894, electric meter. Thomson-Houston Elec. Co. v. McLean [C. C. A.] 153 F 883. No. 450,592, typewriter tabulator. American Writing Mach. Co. v. Wagner Typewriter Co. [C. C. A.] 151 F 576. No. 452,268, tabulator on typewriter. Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict [C. C. A.] 151 F 585. No.

fringed articles made during life of a patent cannot be sold after patent expires.[42] Acquiescence in infringement may bar right to a preliminary injunction, but will not prevent granting of equitable relief.[43] Mere making of duplicate sets of contrivances under patent is not in itself an infringement.[44] Where by a new system somewhat similar results are produced unintentionally, there is no infringement[45] unless the functions of some parts of the machine are restricted so that it does not perform its entire work.[46] Where there is a patent for a combination and one element is removed and used with an entirely new combination, it is no infringement.[47]

463,03°, automatic switch. Cutler-Hammer Mfg. Co. v. Automatic Switch Co., 153 F 197. Nos. 454,115; 466,565; 558,956, and 523,314, wheel tires. Gormley & Jeffery Tire Co. v. Pennsylvania Rubber Co., 155 F 982. No. 466,-577, wheel tires. Boston Woven Hose & Rubber Co. v. Pennsylvania Rubber Co., 156 F 787. No. 470,691, screw cutting lathes. Hendey Mach. Co. v. Prentice Bros. Co., 155 F 133. No. 477,584, can heading machine. American Can Co. v. McGinnis, 156 F 784. No. 480,029, conveying apparatus. Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co. [C. C. A.] 154 F 372. No. 483,435, claim 2, atomizer. Dunlap v. Willbrandt Surgical Mfg. Co. [C. C. A.] 161 F 223. No 483,646, process for mica sheets. Mica Insulator Co. v. Commercial Mica Co., 157 F 90. No. 489,682, electric socket lamp. Edison General Elec. Co. v. Crouse-Hinds Elec. Co. [C. C. A.] 152 F 437. No. 509,334. Improvement in throttle valve. Consolidated Engine Stop Co. v. Landers, Frary & Clark, 151 F 775. No. 524,102, time recorder. Dey Time Register Co. v. Syracuse Time Recorder Co., 152 F 440. No. 526,947, steam boiler (Schleeper patent). Sterling Co. v. Rust Boiler Co., 144 F 849. No. 527,361, enameling process. National Enameling & Stamping Co. v. New England Enameling Co., 151 F 19. No. 527,361, claims 9, 10, 11 and 12. National Enameling & Stamping Co. v. New England Enameling Co. [C. C. A.] 163 F 184. No. 528,223, claims no. 5, 7, and 10. International Time Recording Co. v. Bundy Recording Co., 152 F 717. Nos. 533,-185 and 556,532, pool table pockets. Brunswick-Balke-Collender Co. v. H. Wagner & Adler Co., 155 F 120. No. 537,629, pneumatic tool. Chicago Pneumatic Tool Co. v. Cleveland Pneumatic Tool Co., 154 F 953. No. 542,-665, screw insulator press. Brookfield v. Elmer Glass Works [C. C. A.] 154 F 197. No. 548,623, duplicate sound records. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 151 F 601. No. 551,340, metal tubing machine. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 161 F 64. No. 558,969, paper bag machinery improvements. Continental Paper Bag Co. v. East Paper Bag Co. [C. C. A.] 150 F 741. No. 559,910, dynamo armature. General Elec. Co. v. Bullock Elec. & Mfg. Co., 155 F 740. Nos. 572,-679 and 601,408, knitting machine improvements. Cooper v. Otis Co., 156 F 665. No. 587,633, stair carpet fastener, claim No. 2. Sloane v. Dobson [C. C. A.] 151 F 497. Nos. 603,699 and 642,472, zithers. Menze v. Schmidt, 154 F 845. No. 605,947, necktie. Good Form Mfg. Co. v. White, 153 F 759. No. 620,895, claim 8, atomizer. Dunlap v. Willbrandt Surgical Mfg. Co. [C. C. A.] 151 F 223. No. 630,037, overall buckle. Corser v. Sweet, 167 F 759. No. 633,184, water wheel buckets. Pelton Water-Wheel Co. v. Abner Doble Co. [C. C. A.] 161 F 29. No. 634,423, disposal of sewage. Cameron Septic Tank Co. v. Saratoga Springs, 151 F 242. No. 640,456, adjustable switch rod, claims 1, 3 and 6. Ajax Forge Co. v. Morden Frog & Crossing Works, 156 F 591. No. 641,092, rotary boiler tube cleaner. Liberty Mfg. Co. v. American Brew. Co., 155 F 900. Nos. 650,318 and 686,691, automatic casings. Hardison v. Brinkman [C. C. A.] 156 F 962. No. 670,893, steam heating apparatus. Warren Webster & Co. v. National Vacuum Steam Heating Co. [C. C. A.] 157 F 920. No. 662,488, water boiler regulators. McAuley v. Chaplin-Fulton Mfg. Co., 217 Pa. 477, 66 A 750. No. 680,707, claims No. 1, 2, 3, 6 and 11 water tube steamboiler. Stirling Co. v. Rust Boiler Co., 144 F 842. No. 686,617, ball retainer. Star Ball Retainer Co. v. Strauss, 157 F 930. No. 688,739, phonographic records. American Graphophone Co. v. Leeds & Catlin Co., 155 F 427. No. 700,740, elevator valve. Plunger El. Co. v. Standard Plunger El. Co., 153 F 747. No. 717,014, brush making process. Universal Brush Co. v. Sonn [C. C. A.] 154 F 665. No. 717,122, pressure governor. Davis & Roesch Temperature Controlling Co. v. Roesch [C. C. A.] 154 F 952. No. 721,276, typographic numbering machine. Bates Mach. Co. v. Force [C. C. A.] 152 F 634. No. 727,-173, mask. Merrell-Soule Co. v. Star Co., 163 F 762. Nos. 731,667 and 735,949, glass edge chipper. Conroy v. Penn Electrical & Mfg. Co., 155 F 425. No. 736,327, locking device for pedestal tables. Tyden v. Ohio Table Co. [C. C. A.] 152 F 183. Nos. 768,591 and No. 768,592, switch rod. Ajax Forge Co. v. Morden Frog & Crossing Works, 156 F 591. No. 784,383, and No. 491,761, car seats. Heywood Bros. & Wakefield Co. v. Syracuse Rapid Transit R. Co., 162 F 453. No. 812,183, signal telegraph instrument. Bellows v. United Electrical Mfg. Co., 153 F 688.

42. Underwood Typewriter Co. v. Elliott-Fisher Co., 156 F 688.

43. Empire Cream Separator Co. v. Sears, Roebuck & Co., 157 F 238.

44. No. 688,739, phonograph record. American Graphophone Co. v. Leeds & Catlin, 155 F 427.

45. In water tube boiler drafts similar to other patents were unintentionally created, but by entirely different arrangement of circulation cycle, held no infringement. Stirling v. Rust Boiler Co., 144 F 842.

46. Where mechanism is substantially the same, but operative effect varies and the variance is not the result of the machine doing all its work that might be done, held may be an infringement. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 F 64. Possibilities under ordinary and proper use is the test to be applied. Id.

47. Ajax Forge Co. v. Morden Frog & Crossing Works, 156 F 591.

There is generally no infringement where the new patent is an improvement differing both in form and function.[48] Unless form is of the essence of the invention, any mere variation of form in a patented device while retaining the principle and mode of operation is an infringement,[49] but where parts of a machine are taken off and put onto another machine slightly different, but by the change recreated into the identical machine from which the part is taken, it becomes an infringement.[50] The test of an infringement of ordinary goods is "would the ordinary purchaser be easily deceived by a resemblance." [51] The mere fact that a patent has never been put into commercial use does not preclude the owner of the patent from maintaining a suit in equity to enjoin its infringement.[52] The general tendency of courts is to uphold rather than defeat patents especially where they have won an unchallenged supremacy in the world of business.[53] Changing parts around or transferring functions among parts without affecting a general principle or mode is an infringement.[54] Mere splitting up of parts or multiplication of them, the functions remaining the same, gives no defense for infringement.[55] Where three elements in a device performing separate functions are supplanted by one new device which performs work of all three the new device is not an equivalent of the three separate elements.[56] A patent for a specific improvement on a prior machine is not infringed by a machine which does not contain such improvement on the theory that an equivalent device is used.[57] The range of equivalents in case of a new combination of old elements is restricted to those elements which perform similar functions.[58]

Contributory infringement.[See 8 C. L. 1316]—A manufacturer of an article only adopted to be practically used in a patented device made and sold by another, who sells the same to owners of the patented device, for use therein is a contributory infringer of the patent.[59] As is one who having a license to use a machine with certain attachments places on the licensed machine a new attachment, and an injunction to restrain such acts will lie.[60]

(§ 10) *B. Defenses.*[See 8 C. L. 1317]—It is no defense in infringement proceedings to show that the infringing device was made in accordance with a later patent.[61] Notice of the alleged infringement must be given to infringer by patent holder before infringement suit can be begun.[62]

(§ 10) *C. Damages, profits and penalties.*[See 8 C. L. 1318]—A court has no power to award an arbitrary sum as profits or damages for an infringement not based upon

48. Pelton Water Wheel Co. v. Abner Doble Co. [C. C. A.] 151 F 29. Rubber tire improvement. Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co. [C. C. A.] 151 F 237. Where atomizer has three tubes into bottle, held not infringed by one with two tubes directly joined together. Dunlap v. Willbrandt Surgical Mfg. Co. [C. C. A.] 151 F 223.

49. Shelby Steel Tube Co. v. Delaware Seamless Tube Co., 151 F 64.

50. Cash registers (No. 78 & 79). National Cash Register Co. v. Grobet [C. C. A.] 153 F 905.

51. In ladies' trimming for underwear, sameness of effect and only change is in style of stitching, which might readily deceive the eye held an infringement. Friedberger-Aaron Co. v. Chapin, 151 F 264.

52. Continental Paper Bag Co. v. Eastern Paper Bag Co. [C. C. A.] 150 F 741.

53. Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co. [C. C. A.] 151 F 237; Electric Candy Mach. Co. v. Morris, 156 F 972.

54. Wagner Typewriter v. Wyckoff, Seamans & Benedict [C. C. A.] 151 F 585.

55. Kelsey Heating Co. v. Spear Stove & Heating Co., 155 F 976; Western Tube Co. v. Rainer, 156 F 49.

56. Lambert Hoisting Engine Co. v. Lidgerwood Mfg. Co. [C. C. A.] 154 F 372.

57. Wagner Typewriter Co. v. Wyckoff, Seamans & Benedict [C. C. A.] 151 F 585.

58. American Can Co. v. McGinnis, 156 F 784; Hardison v. Brinkman [C. C. A.] 156 F 962.

59. No. 534,543, disk for phonograph. Leeds & Catlin Co. v. Victor Talking Mach. Co. [C. C. A.] 154 F 58.

60. Perforated rolls for Aeolian piano. Aeolian Co. v. H. H. Juelg Co. [C. C. A.] 155 F 119.

61. Electric Candy Mach. Co. v. Morris, 156 F 972.

62. Lorain Steel Co. v. N. Y. Switch & Crossing Co., 153 F 205.

any finding made by the master on the accounting nor upon the evidence.[63] In some cases a court may, however, grant triple damages under the Federal statute.[64] A master appointed to hear evidence in an accounting, where evidence of both profits and damages are introduced, should file findings upon each kind of evidence separable.[65] In an accounting, royalty contracts with licensee where they were made in good faith and upon a uniform basis are admissible in evidence to allow a basis for the measure of damages even though the contracts were made during pendency of suit.[66] On an accounting of profits by an infringer where infringed machine was practically the same as are generally used it was proper to compare the cost of the machine with its nearest approach in the market.[67] The reasonableness of a fee in estimating the measure of damages may be based upon agreements with licensees.[68] Where there is no established market value or license fee, general evidence is admissible to show extent of damage and the utility and advantages of patent over old devices as a basis from which a jury may estimate loss.[69] Where joint owners sue to recover damages for infringement, the profits accruing before the joint ownership, while one partner was sole owner, cannot be recovered.[70] Interest can only be collected from date of obligation to pay damages and not from date license fee became payable.[71] In an accounting the infringer is not entitled to deduct from profits derived from the infringed patent for a fixed period of time any losses subsequently incurred in a separate transaction, but losses occurring at same time that profits were being made can be deducted.[72] In an accounting under the Federal statutes, the defendant's profits and complainant's damages are independent of each other and are governed by different principles, and one cannot be said to be the measure of the other, nor the allowance of one to preclude recovery on the other.[73] Where an infringement of one claim only of a patent is adjudged, the infringer cannot be held to account for profits arising from the sale of a part of the device which was not an element of such claim although it may have been an element of other claims.[74] The complainant in such case must show where the separation of profit exists, but before this rule is applicable the burden is on the defendant to show the existence of such extraneous elements and the probability that they affected the value of the machine. This is not done by showing that elements of the combination of plaintiff's patent and of the infringing machine were also elements of a prior patented combination and were therefore open to use by complainant as parts of his own combination and invention.[75]

(§ 10) *D. Remedies and procedure.*[See 8 C. L. 1318]—Power to declare a patent void after it is once granted lies only in the courts.[76] The use of a patented device under contract with the alleged inventor does not render the United States liable on an implied contract to one whose patent is thereby infringed his remedy being

63. Mast v. Superior Drill Co. [C. C. A.] 154 F 45.

64. Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395], where defendant deliberately infringed patent, prolonged litigation and transferred property to prevent execution levy on damage verdict. Weston Electrical Instrument Co. v. Empire Electrical Instrumental Co., 155 F 301.

65, 66, 67. Mast v. Superior Drill Co. [C. C. A.] 154 F 45.

68. Where had agreements of same price with dozen licensees. Diamond Stone Sawing Mach. Co. of New York v. Brown, 155 F 753.

69. McCune v. Baltimore & O. R. Co. [C. C. A.] 154 F 63.

70. Canda Bros. v. Michigan Malleable Iron Co. [C. C. A.] 152 F 178.

71. Diamond Stone Sawing Mach. Co. v. Brown, 155 F 753.

72. Canda Bros. v. Michigan Malleable Iron Co. [C. C. A.] 152 F 178.

73. Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395]. Beach v. Hatch, 153 F 763.

74, 75. Canda Bros. v. Michigan Malleable Iron Co. [C. C. A.] 152 F 178.

76. Patent office no power whatever. Mica Insulator Co. v. Commercial Mica Co., 157 F 90. But patent office acquiescence in subsequent proceedings may be considered and weighed by courts. **Id.**

against patentee.[77] Before infringement proceedings are begun, the alleged infringer must be notified by the patent holder.[78] The notice may be simply in marking on the patent.[79] The burden of proving such notice is on the complainant.[80] This proof must be made whether notice is denied specifically or not mentioned in the answer. The date must be proved to afford a basis for an accounting.[81] On default in a suit under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], to obtain a patent, application for which has been denied by the patent office, the claimant must prove his right to a patent including proof of patentability,[82] and though defendant is in default for want of pleading he is entitled to notice before final decree is entered.[83] After an accounting subsequent to a suit for infringement any new infringements should be set up by supplemental bill.[84] After a decree declaring an infringement by one device, it is improper for complainant to refer to the prior act to limit the scope of the invention to less than was found by the court on the original hearing.[85] Where defendant was privy to a prior suit brought by complainant, depositions in prior suit may be read in new suit if evidence of privity is clear.[86] A patent should be declared void on demurrer for lack of patentable invention apparent on its face only when question is free from doubt in exceptional cases.[87] Suit by patent owner against licensee to enjoin violation of terms of licensed use of patent is not one of specific performance of contract, but one to enjoin infringement, and is maintainable in a Federal court regardless of the validity of the contract.[88] Proceedings in a patent office, even when there is a direct issue, operate as estoppel in subsequent litigation only to a very limited extent, and can have no effect as estoppel even on a motion for a preliminary injunction as against one who was not a formal party thereto.[89] One of the patentees of a device who joined in an assignment of the patent is estopped to deny the validity of any of its claims when sued by the assignee for its infringment, and the estoppel extends to a corporation which he was instrumental in forming and in which he is a stockholder.[90] After a patent is declared valid by a court of equity and a master has made an accounting, the court will not permit complainant in a supplementary bill to bring in officers of the defendant to hold them as individuals on the same judgment.[91] In a suit under Federal statutes in interference upon its establishment, the court should investigate and decide any questions concerning the validity of either patent raised in the pleadings.[92] Where licensor of a patent notifies licensee of an assignment of license and that license must hereafter be paid to the assignee, plaintiff in execution against the licensor must show that the assignment of the royalties was in fraud of creditor's rights.[93]

Jurisdiction.[See 8 C. L. 1319]—Objection to jurisdiction is waived by filing a general demurrer or any other act of general appearance.[94] Where a number of suits are of like nature and could if joined be tried together, the court does not lose equity jurisdiction by the fact that in some of the cases there is also a remedy at law.[95]

77. Beach v. U. S., 41 Ct. Cl. 110.

78. Rev. St., § 4900 [U. S. Comp. St. 1901, p. 3388]. Lorain Steel Co. v. New York Switch & Crossing Co., 153 F 205.

79, 80, 81. Lorain Steel Co. v. New York Switch & Crossing Co., 153 F 205.

82, 83. Davis v. Garrett, 152 F 723.

84, 85. Murray v. Orr & Lockett Hardware Co. [C. C. A.] 153 F 369.

86. Evidence held insufficient to show privity. Rumford Chemical Works v. Hygienic Chemical Co. [C. C. A.] 154 F 65.

87. No. 752,903, salt dredge manifestly void on its face. Hogan v. Westmoreland Specialty Co. [C. C. A.] 154 F 66.

88. Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. [C. C. A.] 154 F 365.

89. Hildreth v. Curtis & Son Co., 157 F 394.

90. Mathews Gravity Carrier Co. v. Lister, 154 F 490.

91. The remedy there is in a plenary suit. H. C. Cook Co. v. Little River Mfg. Co., 156 F 676.

92. General Chemical Co. v. Blackmore, 156 F 968. See, also, Rev. St. § 4918 [U. S. Comp. St. 1901, p. 3393-4].

93. North Penn Iron Co. v. International Lithoid Co., 217 Pa. 538, 66 A 860.

94, 95, 96. Thomson-Houston Elec. Co. v. Electrose Mfg. Co., 155 F 543.

Where suit is brought under statutes for the recovery of profits, the jurisdiction at law is not lost by the statutory provision for a trial in equity where it can be held in a law court on other grounds.[96] Diversity of citizenship is not essential to jurisdiction of circuit courts of United States in patent cases.[97] Equity jurisdiction will extend to license contract infringements,[98] to establish jurisdiction the words "regular and established" in regard to defendant's place of business are not essential.[99] Where a corporation and an individual are jointly sued, it is unnecessary to allege that the individual is an inhabitant of the district or has an office there to obtain jurisdiction over him.[1] State courts can try cases involving more breach of license contract matters.[2] A state court of equity has jurisdiction to restrain one from ascertaining names of competitor's customers and wrongfully intimidating by threats of suit for infringements of a patent against customers if they bought and used competitor's goods.[3]

Parties. See 8 C. L. 1319

Questions of law and fact. See 8 C. L. 1319

Injunctions. See 8 C. L. 1320—Where an infringement is shown an injunction to restrain further infringement will lie.[4] An injunction pendente lite may issue if patentable invention appears on the face of the patent and the presumptions arising from the grant have been reinforced by the decisions of a competent court upholding the invention upon issues raised and fairly litigated.[5] On an appeal from an order so predicated, the only inquiry is whether the discretion of the court was improperly exercised under the circumstances.[6] An injunction will lie to prevent a licensee using any attachment to instrument licensed except one authorized.[7] In some jurisdictions preliminary injunctions are refused unless courts are convinced with reasonable certainty that complainant must succeed at final hearing,[8] and where such prima facie case is made out a court of equity may order a Federal marshal to take possession of the infringing goods in the hands of the alleged infringer and hold them until final decree is entered.[9] The granting of a preliminary restraining order ex parte is so perfunctory in character as to be of little weight when defendants appear and show cause against further continuance.[10] Preparations or threats to infringe a patent shown by affidavits ex parte only are not sufficient to warrant the granting of a preliminary injunction.[11] A Federal court of equity has power to enjoin either

97. Rev. St. § 711 [U. S. Comp. St. 1901, p. 577] gives exclusive jurisdiction to circuit courts. Thomson-Houston Elec. Co. v. Electrose Mfg. Co., 155 F 543.

98. Where patentee sold legal title on a royalty basis maintaining equitable title and legal title holder made similar goods under another patent alleged to be infringement of equity holder patent held court had jurisdiction. Leslie v. William Mann Co., 157 F 236. The circuit court of appeals has jurisdiction where citizens of same state had a patent matter litigated and decided in circuit court even where on appeal the question on one of the defenses went to the construction of a contract of license. Clancy v. Troy Belting Supply Co. [C. C. A.] 157 F 554.

99, 1. Thomson-Houston Elec. Co. v. Electrose Mfg. Co., 155 F 543.

2. Evidence held insufficient to show breach. Sullivan v. Compressed Air Renovator & Sweeper Mfg. Co., 131 Wis. 134, 111 NW 73.

3. Schwanbeck Bros. v. Backus, Jr., 148 Mich. 508, 14 Det. Leg. N. 200, 111 NW 1046.

4. Continental Paper Bag Co. v. Eastern Paper Bag Co. [C. C. A.] 150 F 741; Consolidated R. Elec. Lighting & Equipment Co. v. Adams & Westlake Co., 153 F 193.

5, 6. Scott v. Laas [C. C. A.] 150 F 764.

7. Different rolls on self-playing piano (Aeolian). Aeolian Co. v. Harry H. Juelg Co. [C. C. A.] 155 F 119.

8. (Second circuit.) Hall Signal Co. v. General R. Signal Co. [C. C. A.] 153 F 907. Example of doubt. Id. Evidence in doubt, sufficient to deny injunction. Marconi Wireless Tel. Co. v. American De Forest Wireless Tel. Co., 154 F 74; Richards v. Meissner, 158 F 109; Mathews Gravity Carrier Co. v. Lister, 154 F 490. In doubt. Sharp v. Bellinger, 155 F 139. Denied because if granted would cause serious loss to defendants. Johns-Pratt Co. v. Sachs Co., 155 F 129. Example of doubt removed, No. 773,234, vibrator. Lambert Snyder Co. v. American Vibrator Co., 154 F 492. Doubt removed, No. 452, 268, tabulator for typewriter. Underwood Typewriter Co. v. Graves Typewriter Co., 155 F 138.

9. Underwood Typewriter Co. v. Elliott-Fisher Co., 156 F 588.

10. Richards v. Meissner, 158 F 109.

11. American Graphophone Co. v. Leeds &

party to a suit before it from prosecuting other suits subsequently brought before it relating to the same subject-matter where it would be contrary to equity and good conscience although such suits may be in foreign jurisdictions.[12] Where a complainant is unsuccessful in an infringement suit and sues various customers of the successful defendant, a court of equity can assume jurisdiction to enjoin the further interference with defendant's customers.[13] On proper showing an injunction may issue in cases of interference pending a decision on the merits.[14] Courts usually are careful in granting temporary injunctions where claims in a patent are still unadjudicated and usually special circumstances must be shown. It is better practice to permit defendants to give security for any damages which might be awarded to plaintiff and where so furnished to refuse the injunction.[15] In fixing such bond the only basis the court can go on to establish the proper amount of the bond is to compute the amount of profits made by defendants from the alleged infringements,[16] also where general issues and merits are in issue in an infringement suit, an injunction will lie to prevent multiplicity of suits and further litigation in various parts of the country, but this does not affect suits begun before the action mentioned.[17] A decree adjudging the validity and infringement of a patent signed by the judge without reading or hearing evidence and on consent of parties, it is not such an adjudication as constitutes a proper foundation for the granting of a preliminary injunction in a suit against a different defendant.[18] In contempt proceedings subsequent to the granting of an injunction, the courts will consider the gravity of the alleged contempt.[19] An appeal from an order granting a preliminary injunction brings up for review the propriety of the action of the circuit court in granting the injunction only and the case will not be considered on its merits.[20]

Pleading. See 8 C. L. 1321—Answers must be full, unequivocal, and responsive to the bill.[21] Mere denial of rights to make machine in patent infringement suit and admission of having parts of alleged infringed machine on hand, with statement that defendant has ceased to sell the alleged infringed machine not supported by any clear proof, is not such a disclaimer as will deny right of injunction to complainant.[22] The complaint in a suit for infringement must allege that the article made under the patent in question was marked with notice of patent or that otherwise notice of the patent was given to defendant.[23] Where a patent is invalid on its face, a court may so declare it sua sponte, although the question is not raised by the pleadings and may dismiss a bill for its infringement.[24] Where a bill for infringement of a patent

Catlin Co., 155 F 427. The presumption in favor of the validity of a patent created by a decision of the circuit court of appeals sustaining it cannot be overcome by ex parte affidavits filed on a motion for a preliminary injunction in a subsequent case and relating to matters occurring several years before. Id.

12. Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 F 642.

13. The assumption by the defendant of his customers' suits does not deprive him of his right to such injunction. Kessler v. Eldred, 206 U. S. 285, 51 Law. Ed. 1065.

14. Scott v. Laas [C. C. A.] 150 F 764.

15. Karfiol v. Rothner, 151 F 777. Patent not long acquiesced in and not adjudicated. Hildreth v. Norton, 154 F 82; Earll v. Rochester, S. & E. R. Co., 157 F 241. A showing that two devices are not materially different after a patent has been declared valid by the circuit court of appeals will allow a temporary restraining order from the circuit court. Consolidated Rubber Tire Co. v. Diamond Rubber Co. of New York [C. C. A.] 157 F 677.

16. Karfiol v. Rothner, 151 F 779.

17. Commercial Acetylene Co. v. Avery Portable Lighting Co., 152 F 642.

18. Earll v. Rochester, etc., R. Co., 157 F 241.

19. Where not willful, but through substitution for patent of an article believed to be noninfringing, held only costs, damages, and disbursements to be paid as fines. In re De Forest Wireless Tel. Co., 154 F 81.

20. Consolidated Rubber Tire Co. v. Diamond Rubber Co. [C. C. A.] 157 F 677.

21. Must not be indefinite and evasive. Deere & Webber Co. v. Dowagiac Mfg. Co. [C. C. A.] 153 F 177.

22. Deere & Webber Co. v. Dowagiac Mfg. Co. [C. C. A.] 153 F 177.

23. Streat v. Finch, 154 F 378.

24. Wills v. Scranton Cold Storage & Warehouse Co. [C. C. A.] 153 F 181.

in which patentee and licensee are joint complainants, and the bill does not set up the instrument of license nor allege that it is recorded, and where the bill is challenged by demurrer, the instrument should be produced that the court may determine its legal effect.[25] A bill for infringement need not allege specifically that complainant was diligent where specific acts of infringement are alleged.[26] A bill for infringement is not demurrable because material facts are alleged on information and belief,[27] and where corporation and officers are charged with certain specific acts of infringement in a bill of complaint, it is not demurrable for multifariousness but alleges a sufficient case of joint infringement.[28]

*Evidence.*See 8 C. L. 1322—The burden of proving an infringement, actual existence, not mere possibility or probability, is on the complainant.[29] Where an existing process or device discloses what appears to be insuperable objections to practical operation, it is persuasive evidence of invention that an improver has the foresight and courage to break away from such disclosure and conceive some new method involving a different principle, but it is also evidence of invention if one by taking a step forward sees that what appeared to be barriers of progress are mere obstructions to side paths and byways and that the road to a practical invention lies straight ahead.[30] Where neither pleadings nor proof bring into record the prior act the court cannot take judicial notice of it on question of the validity of the patent except as to matters of general knowledge.[31] Where the question of invention is in doubt after usual negative tests, evidence of successful results where others had tried and failed especially where the results were both operatively and commercially successful will tend to strengthen the case of the new patentee.[32] Delay of unreasonable length in bringing a suit for infringement with knowledge of the infringement bars infringement suit for laches.[33]

*Prior decisions.*See 8 C. L. 1328

*Variance.*See 8 C. L. 1323

*Stay.*See 8 C. L. 1323

Accounting.[34]

*Saving questions for review.*See 8 C. L. 1324

*Costs.*See 8 C. L. 1324

*Judgment and decree.*See 8 C. L. 1324—A suit for infringement is not a proceeding in rem and a decree of the circuit court of appeals adjudging a patent void is binding only on the parties and does not affect the validity of a license contract subsequently made between the owner of the patent and others which is enforcible not only in the circuit where the decree was issued, but in every other circuit in the United States.[35] A final decree of a federal circuit court in favor of a defendant in a patent infringement suit entitles the defendant freely to sell the alleged infringed articles anywhere in the United States.[36] While pending an appeal from an interlocutory order granting a preliminary injunction, final decree is entered for complainant which is

25. Dyer v. Cryder, 153 F 767.

26, 27, 28. Thomson-Houston Elec. Co. v. Electrose Mfg. Co., 155 F 543.

29. Stirling Co. v. Rust Boiler Co., 144 F 849; American Sulphite Pulp Co. v. De Grasse Paper Co. [C. C. A.] 157 F 660.

30. American Graphophone Co. v. Universal Talking Mach. Mfg. Co. [C. C. A.] 151 F 595.

31. American Sulphite Pulp Co. v. De Grasse Paper Co. [C. C. A.] 157 F 660.

32. American Graphophone Co. v. Universal Talking Mach. Mfg. Co. [C. C. A.] 151 F 595.

33. Germer Stove Co. v. Twentieth Century Heating & Ventilating Co., 157 F 842.

34. See 8 C. L. 1323. See, also, "Damages, Profits and Penalties" ante 10 c. this subject. Example of findings of a master in accounting proceedings approved as to profits and damages recoverable. Mackie-Lovejoy Mfg. Co. v. Cazier [C. C. A.] 157 F 88.

35. Rubber Tire Wheel Co. v. Milwaukee Rubber Co. [C. C. A.] 154 F 358.

36. Defendant's rights are violated by continued litigation by defeated complainant. Kessler v. Eldred, 206 U. S. 285, 51 Law. Ed. 1065.

affirmed on appeal, the appeal from the order becomes a moot case and should be disposed of by a judgment that the order has been superseded.[37]

PAUPERS.

Definition and Status, 1145.
Settlement and Removal of Paupers, 1145.
Liability of Municipalities for Support and Aid, 1145.
Liability of Relatives, 1146.
Repayment by Indigent or Relatives, 1146.
Administration of Poor Laws; Officers and Districts, 1147.

Definition and status.[See 8 C. L. 1324]—Whether a person is in need of assistance is to be determined from his present condition.[38]

Settlement and removal of paupers.[See 8 C. L. 1325]—Settlement is regulated by statute,[39] and being ordinarily made to depend on domicile, the general rules thereof[40] apply, thus, intention on the part of the pauper to choose the place as a home is essential to a settlement.[41] Imprisonment will not interrupt the term necessary to gain a settlement,[42] nor will annexation of territory affect change of residence unless the person is then dwelling upon the land.[43] A widow though having a married daughter living elsewhere may acquire settlement as an "unmarried person not having a child."[44] Dependents derive their settlement from the head of the family[45] unless abandoned by him,[46] the matter of loss of settlement by the head of a family being some times regulated by statute.[47]

Liability of municipalities for support and aid[See 8 C. L. 1325] is statutory,[48] statutes generally charging the support of paupers on the town in which they are settled,[49] which town is ordinarily liable to any other which render aid to the pauper during his absence from the place of settlement,[50] unless such absence shall have

37. Howard Bros. Mfg. Co. v. Gibb Loom Harness & Reed Co. [C. C. A.] 157 F 676.

38. Regardless of the value of property held by him. Town of Ripton v. Brandon [Vt.] 67 A 541. In action by one town against another for aid furnished a pauper, evidence that he was to pay a note on real estate owned by him and his son as cotenants if he kept the place, otherwise the son was to have the property, held admissible. Id. Quadrennial appraisal of the taxable real estate held admissible in such action to show value of the property. Id.

39. Washington County v. Polk County [Iowa] 113 NW 833.

40. See Domicile, 9 C. L. 1010.

41. Mere presence is not sufficient. Inhabitants of Whately v. Hatfield [Mass.] 82 NE 48. Payment of rent in advance and residence for one year held to show settlement. Shrewsbury Township Poor Dist. v. Penn Township Poor Dist., 33 Pa. Super. Ct. 378.

42. Sentence to house of correction. Inhabitants of Whately v. Hatfield [Mass.] 82 NE 48.

43. Where a pauper resided in a town at the time of his removal to plaintiff city, changing the boundary after his removal so as to include his house within defendant city does not change his residence to the city. East Montpelier v. Barre, 79 Vt. 542, 66 A 100.

44. Act June 12, 1836. Turbett Township Overseers of the Poor v. Port Royal Borough Overseers of the Poor, 33 Pa. Super. Ct. 520.

45. The wife and legitimate children have the settlement of the husband and father. Rev. Laws, c. 80, § 1, cls. 1, 2. Inhabitants of Whately v. Hatfield [Mass.] 82 NE 48. Code, § 2224. Washington County v. Polk County [Iowa] 113 NW 833.

46. And hence, where an insane pauper is abandoned by her husband, who removes from the county, the county of their previous settlement cannot recover for her support as against the county in which the husband settled. Washington County v. Polk County [Iowa] 113 NW 833.

47. The person under whom a pauper derives his settlement must have gained his settlement within ten years preceding the last date of application for support in order to hold the town liable [Laws 1903, p. 100, c. 106, § 1; Laws 1897, p. 28, c. 31, § 1] (Town of Lancaster v. Coos County [N. H.] 68 A 867), and such settlement may be gained by a residence in the town and taxation of the poll for seven years and payment of all taxes legally assessed during such term [Pub. St. 1901, c. 83, § 1, cl. 9] (Id.). Evidence of such residence or payment of taxes more than ten years previous is immaterial. Id.

48. Rock County v. Holt County [Neb.] 111 NW 366.

49. The town wherein a person has his residence is liable for the support of his wife and legitimate children if paupers. Inhabitants of Whately v. Hatfield [Mass.] 82 NE 48. A county seeking to recover for support of a pauper whose husband had moved to another county must show that her residence had followed that of the husband. Evidence tending to rebut such showing is competent without being pleaded. Washington County v. Polk County [Iowa] 113 NW 833.

50. A county furnishing aid to a nonresident pauper may recover therefor from the

brought about a new settlement.[51] A town wherein a nonresident pauper is imprisoned for crime cannot, however, recover from the town of his settlement.[52] It is competent for the legislature to classify paupers accordingly as they have or have not a settlement and make different provision.[53] In Pennsylvania the quarter sessions has power to order the return of the pauper to his place of settlement.[54] In Minnesota the liability for support of paupers is on the county, which is liable even without the statutory notice[55] to any other municipality furnishing aid.[56] The determination by an overseer of the poor of a town, in which the person seeking relief is not a resident that he was in need of assistance is not a final adjudication as against the town of his residence.[57] The county is bound to support a bastard child whose parents neglect or are unable to support it,[58] and such a child once admitted to the almshouse must be supported until properly discharged.[59]

Liability of relatives See 8 C. L. 1327 to support pauper relations is statutory.[60] In Oregon a city may on order of the county court[61] recover from the relatives for support furnished a pauper,[62] but in New York a city may not recover from a decedent's estate for care in the poor house unless such care was fraudulently procured.[63]

Repayment by indigent or relatives. See 6 C. L. 986

county of his legal settlement. Cobbey's Am. St. 1903, §§ 9360, 9361, 9362. Rock County v. Holt County [Neb.] 111 NW 366. Including counties having township organization and which have not established a poor house. Id. U. S. §§ 3171, 3174. Town of Ripton v. Brandon [Vt.] 67 A 541. The town must look to the person assisted if he is able before applying to the town of his residence for reimbursement. Id. Recovery may be had if notice is given to the resident town, although he had property, where the assistance was given in good faith. Id. One becoming a pauper in a county other than that of his residence is chargeable as a pauper to the county in which he resides. Cobbey's Ann. St. 1903, § 9360. Rock County v. Holt County [Neb.] 111 NW 366. If a resident of a town moves to another part of the town where he is continuously supported until that part of the town is incorporated as a new municipality, the old town is still liable for his support. Peterson v. Emardville, 101 Minn. 24, 111 NW 652. Evidence held sufficient to show that the pauper had been continuously supported after his removal. Id.

51. A town is not liable for aid furnished a pauper by another town to which he has removed and settled in. Rev. Laws, c. 81, § 1. Inhabitants of Whately v. Hatfield [Mass.] 82 NE 48. In order to avoid liability for relief furnished a pauper, it must be shown that the pauper was a legal resident of the town seeking to recover for such relief. Evidence held sufficient to sustain a finding that the pauper was not a legal resident of the town. Town of Highland Grove v. Clay County Com'rs, 101 Minn. 11, 111 NW 651.

52. Under Pub. St. c. 223, §§ 53, 54, such expense shall be borne by the county where he was convicted under Pub. St. c. 203, § 20. Inhabitants of Whately v. Hatfield [Mass.] 82 NE 48. Nor is the town liable unless the pauper was convicted under Pub. St. c. 203, § 23, for stealing property of a value of less than $5, or under c. 207, § 29, for being a rogue, vagabond, etc. Id.

53. Pulaski Township Poor Dist. v. Lawrence County, 34 Pa. Super. Ct. 602.

54. Nicholson Township Poor Dist. v. Nicholson Borough Poor Dist., 33 Pa. Super. Ct. 358.

55. Service of the notice required by statute is not a condition precedent to recover for aid furnished a nonresident pauper. Laws 1903, p. 529, c. 298. Town of Highland Grove v. Clay County, 101 Minn. 11, 111 NW 651. The notice being for the purpose of giving the county authorities opportunity to remove him to the poor farm or otherwise care for him. Id.

56. A municipality furnishing medical attendance to a nonresident pauper is entitled to recover therefor from the county of his residence. Gen. St. 1894, § 7059. Village of Hewitt v. Com'rs of Hubbard County [Minn.] 114 NW 261. Evidence held to sustain a finding that the pauper did not have a legal settlement in defendant county. Id.

57. Such determination by the overseer will not preclude review of the act in an action by a town to recover for aid furnished a nonresident. Town of Ripton v. Brandon [Vt.] 67 A 541.

58. Code Cr. Proc. § 839. People v. Chamberlain, 106 NYS 149.

59. Laws 1896, c. 225, §§ 22, 56. People v. Chamberlain, 106 NYS 149. Where a child was admitted with its mother, who left, and the child was returned to her by the superintendent, he may be compelled to remove it again and retain it until properly discharged. Id.

60. There is no legal liability at common law for one relative to support another. Multnomah County v. Faling [Or.] 91 P 21.

61. An order from the county court is essential to render the delinquent relatives liable. Multnomah County v. Faling [Or.] 91 P 21.

62. B. & C. Comp. § 2654. Multnomah County v. Faling [Or.] 91 P 21.

63. Conduct of decedent held not fraudulent. In re Carroll's Estate, 55 Misc. 496, 106 NYS 681. It is presumed that the person told the truth regarding her property when asked. Id. A presumption that the city officers united in perpetrating the fraud on the city as to her condition will not lie where there is no evidence to that effect. Id.

Administration of poor laws; officers and districts. See 8 C. L. 1327—The superintendent of the poor house appointed by the board of county commissioners is a public officer,[64] but the board of managers for the relief and employment of the poor are not township officers.[65] The superintendent of the poor house may be removed at will.[66] The accounting of managers of the poor in the township of Germantown, Pennsylvania, is governed on the act of June 20, 1839,[67] and there is no appeal to the common pleas from their order settling accounts.[68] In Ohio the county commissioners are "the proper authorities" to order transferred to some other county fund where it is needed any surplus in the poor fund arising from Aiken law collections.[69] Under some circumstances matters relating to paupers may fall within the jurisdiction of officers charged with administration of health regulations.[70]

PAWNBROKERS AND SECONDHAND DEALERS.[71]

The scope of this topic is noted below.[72] Regulation of junk dealers by statute is a reasonable exercise of police power.[73] The year covered by a pawnbroker's license begins when the application for the license is made and the fee paid and runs until the corresponding day of the following year.[74] The transactions of pawnbrokers reported according to statute are not public records.[75] The Massachusetts license act regulates the occupation of pawnbroking,[76] and one may be engaged therein without having ever completed a contract in the course thereof, while one or more actual contracts are not conclusive as to the occupation.[77] A pawnbroker who becomes purchaser of a pledged article, at his own sale, must show that the sale was made according to law,[78] and with the utmost fair dealing and good faith.[79] Omission to report sale of pledged article as required by statute does not render sale void.[80] A pawnbroker who in good faith loans money to an unauthorized pledgor has no lien against the true owner.[81]

PAYMENT AND TENDER.

§ 1. Mode and Sufficiency of Payment or Tender, 1148. To and By Whom, 1148. Time and Place of Payment or Tender, 1149. Sufficiency of Payment or Tender, 1149. Medium; Checks, Notes, Drafts, Bills of Exchange, etc., 1151.

§ 2. Application of Payment, 1152.

§ 3. Effect of Payment or Tender, 1153.

§ 4. Payment or Tender as an Issue, 1154.

A. Pleading, 1154.

B. Evidence, 1155.

C. Limitations, 1157.

D. Questions of Law and Fact, 1158.

64. Act 1901 (23 St. at Large), p. 754; Civil Code 1902, §§ 785, 786. Sanders v. Belue [S. C.] 58 SE 762.

65. Hence Act Jan. 20, 1839 (P. L. 337), providing for their election, is not repealed or affected by Act March 10, 1875 (P. L. 6), providing when township officers shall be elected and when their term shall commence. Commonwealth v. Bowditch, 217 Pa. 527, 66 A 867.

66. Custom of a retiring board of county commissioners to appoint a superintendent of the poor house for a period extending beyond their term of office does not prevent the incoming board from at once replacing him. Sanders v. Belue [S. C.] 58 SE 762.

67. Act of March 31, 1809, repealed. Reeves' Appeal, 33 Pa. Super. Ct. 196.

68. Act May 1, 1861. Reeves' Appeal, 33 Pa. Super. Ct. 196.

69. Franklin County Infirmary Directors v. Franklin County Com'rs., 6 Ohio N. P. [N. S.] 347.

70. School board may bind district for cost of burying pauper dying of smallpox. Marlatt v. Aleppo Township School Dist., 34 Pa. Super. Ct. 323.

71. See 8 C. L. 1327.

72. It includes only the regulation of the occupation. **It excludes** the contract of pledge (se Pledges, 8 C. L. 1431), and the offence of receiving stolen property (see Receiving Stolen Goods, 8 C. L. 1696).

73. Statute required retention of articles purchased thirty days. Phillips v. State [Ohio] 82 NE 1064.

74. Kopelman v. Toledo, 9 Ohio C. C. (N. S.) 545.

75. Statute required account of articles pawned, to be inspected by police and rendered to licensing board. Round v. O'Meara [Mass.] 83 NE 412.

76. Commonwealth v. Schwartz [Mass.] 83 NE 326.

77. Evidence sufficient. Commonwealth v. Schwartz [Mass.] 83 NE 326. Employee of licensed junk dealer need not be licensed. State v. Rosenbaum [Conn.] 68 A 250.

78, 79. Uncle Sam's Loan Office v. Emery [Tex. Civ. App.] 107 SW 1155.

80. Statute provided that injured person might sue on pawnbroker's bond. Uncle Sam's Loan Office v. Emery [Tex. Civ. App.] 107 SW 1155.

81. Collateral Loan Co. v. Sallinger [Mass.] 80 NE 811.

Scope of articles.—This article does not include discharge by novation,[82] release,[83] or accord and satisfaction,[84] nor does it include payment into court,[85] nor matters peculiar to negotiable paper,[86] nor the recovery back of involuntary and mistaken payments.[87] Tender of payment only is included, tender of other performance being elsewhere treated.[88] Effect of tender to stop running of interest,[89] or to avoid the payment of costs if a greater sum be not recovered [90] are elsewhere treated.

§ 1. *Mode and sufficiency of payment or tender.*[91] *To and by whom.* See 8 C. L. 1328—Payment made under a justifiable belief that its receipt is authorized is valid,[92] but when made with notice of a lack of authority to receive, it is invalid,[93] and payment to an agent on a contract outside his authority to make is not absolute.[94] Payment made to an attorney employed to sue for the amount discharges the debt.[95] In an action on a note, the real party in interest and not the maker is the party entitled to recover.[96] An independent executrix of an estate, though a married woman, has power while the administration continues to accept payment on a note given to decedent,[97] but after administration has been closed, if the husband has an interest in the obligation, tender to the wife alone is not authorized.[98] Where payment of an indebtedness would work an injury to an estate the administrator should not compel it.[99] Payment of an obligation of another by a third party does not discharge it as between the original parties unless the payment is made and received with the intention that it shall do so,[1] and payment of a note without suing it is made at the payer's risk.[2] Tender or payment by a stranger may be made valid, however, if duly ratified by the debtor.[3] A payment by one joint obligee is a payment by all, each is the agent of the other.[4] Payment in escrow becomes absolute upon performance of

82. See Novation, 10 C. L. 1030.

83. See Releases, 8 C. L. 1714.

84. See Accord and Satisfaction, 9 C. L. 11.

85. See Payment into Court, 8 C. L. 1337.

86. See Negotiable Instruments, 10 C. L. 962.

87. See Implied Contracts, 10 C. L. 26.

88. See Contracts, 9 C. L. 654, and title dealing with particular contracts.

89. See Interest, 10 C. L. 408.

90. See Costs, 9 C. L. 812.

91. See 8 C. L. 1329. See, also, **Hammon, Cont. §§ 429, 433.**

92. Where the actual creditor might have corrected such belief. McVay v. Bridgman [S. D.] 112 NW 1138. As payment to one who negotiated loan though not the real creditor. Id. Tender of redemption money to one who thereafter purchases the land. John v. Anchor [Ala.] 45 S 218. Proper party. Id.

93. Payment to an assignor of a note. Schumacher v. Wolf, 125 Ill. App. 81. Payment to assignee of contract for goods furnished thereunder. Good v. Central Coal & Coke Co. [Ind. T.] 104 SW 613.

94. It amounts merely to an offer to pay. Brown v. Grady [Wyo.] 92 P 622.

95. A compromise by an attorney is valid only to the extent of the payment under it. Liquidators of Joseph David Co. v. Berthelot Bros., 118 La. 380, 42 S 971.

96. Wellborn v. Johnson, 118 La. 741, 43 S 392. Where the maker of a note for the benefit of another has been reimbursed, the latter only is entitled to recover for its unauthorized use by payee. Id.

97. Joinder of husband in release of liability unnecessary. Stevens v. Taylor [Tex. Civ. App.] 19 Tex. Ct. Rep. 428, 102 SW 791. The provisions of Pasch. Dig. Laws that an executrix who is a married woman must be joined by her husband in all matters pertaining to her representative capacity was not carried into the Revised Statutes. Id.

98. Community of right in the interest due on an obligation of which wife is devisee. Stevens v. Taylor [Tex. Civ. App.] 19 Tex. Ct. Rep. 428, 102 SW 791.

99. In re New Jersey Trust & Safe Deposit Co. [N. J. Eq.] 68 A 811. Where the collection of a debt due an estate would render impossible the performance of an agreement between all parties interested in the estate and the debtor which performance is of more benefit to the estate than is the collection of the debt. Id.

1. Payment of insurance does not relieve carrier from liability to shipper for loss of goods shipped under agreement subrogating carrier to rights of shipper against insurer. Bradley v. Lehigh Valley R. Co. [C. C. A.] 153 F 350. A note given by an agent in payment of an insurance policy, the acceptance of which was induced by the agent's misrepresentations, that by giving the note he bound the company, does not relieve the company of liability. Hartford Life Ins. Co. v. Sherman, 123 Ill. App. 202.

Contra: But under the Georgie code, a tender may be made by a friend of the party in interest as well as by the party himself. Arnold v. Empire Mutual Annuity & Life Ins. Co. [Ga. App.] 60 SE 470.

2. Schumacher v. Wolf, 125 Ill. App. 81.

3. Forderer v. Schmidt [C. C. A.] 154 F 475. Tender to avoid forfeiture. Id.

4. So a finding that one defendant has not paid is a finding that the debt still exists. Bell v. Adams, 150 Cal. 772, 90 P 118.

the stipulated condition,[5] but the payee may impliedly waive his right to a portion of the amount due him under the escrow agreement.[6] For an overpayment made a receiver by an administrator, the former is not accountable to the latter, when the obligation is due assigners of certain interests of the estate.[7]

Time and place of payment or tender.[See 8 C. L. 1330]—Payment must be seasonably made,[8] and so must presentment for payment,[9] but only reasonable diligence in making presentment is required.[10] When payment is to be made on demand, provisions inconsistent therewith may operate to extend the time.[11] Payment of a check relates back so far as extinguishment of the indebtedness is concerned, to the time it was given.[12] An express money order wherein no time of payment is stated is payable on demand.[13] When land is leased at a yearly rental but there is no provision as to when it shall be due, it is generally payable at the end of each rent year.[14] Though a mortgage provides that the principal shall become due on nonpayment of interest, the option to thereupon foreclose is lost if the mortgagee pays the interest before it is exercised,[15] or makes a valid tender of it.[16] When in a land contract the stipulations are mutual, an actual tender and demand by one party is ordinarily necessary to put the other in default.[17] This rule, however, does not apply where time of performance has been made the essence of the contract.[18]

Sufficiency of payment or tender.[See 8 C. L. 1330]—Payment is made by the debtor delivering to his creditor money, or some other valuable thing, for the purpose of extinguishing the debt which is received by the creditor for the same purpose.[19] A conditional delivery is not a payment,[20] unless it amounts to an executed agreement,[21]

5. Hunt v. Capital State Bk., 12 Idaho, 588, 87 P 1129.

6. Hunt v. Capital State Bk., 12 Idaho, 588, 87 P 1129. By acceptance of and refusal to refund purchase price of mining claim, plaintiff waived right to costs of procuring patent which was to be paid therewith. Id.

7. In re New Jersey Trust & Safe Deposit Co. [N. J. Eq.] 68 A 811.

8. In an action of replevin, a payment into court of the amount due on the goods made after filing the complaint, but before service of summons, is made in time. Andrews v. Hoeslich [Wash.] 91 P 772. Where the assignee of mortgaged chattels tenders the full amount due thereon on the day of sale but before the sale actually occurred, the tender is sufficient and need not be kept good thereafter where the jury is fully instructed as to the relations of the parties and the rights of the assignee. Thomas v. Seattle Brew. & Malting Co., [Wash.] 94 P 116.

9. Negligence in failing to present a bond for payment at the time stipulated, which bond contains a provision that after that time the bond should not draw interest, bars a right to recover interest after said time. Packard v. Mobile [Ala.] 43 S 963.

10. Where a note is payable in a certain city and the maker appends thereto his address in that city, presentation of the note at that address is sufficient in the absence of notice of any change, although the maker is absent from the city at the time of presentation. Hipp v. Fidelity Mut. Ins. Co., 128 Ga. 491, 57 SE 892.

11. Muir v. Greene [N. Y.] 83 NE 685. A bond for the payment of a certain sum on demand, and for such "moneys" as shall hereinafter be advanced, and which recites that the maker had requested the payee to extend the time of payment of a sum then due, operates to extend for a reasonable time, at least, the time of payment. Id.

12. Langridge v. Dauenhauer [La.] 45 S 387. Under the primary election law requiring candidates for office to pay assessments against them within a certain time, payment by a check given within the stated time, but not collected until thereafter, is good where the delay in collection is due to no fault of the drawer. Id.

13. Rosenberger v. Pacific Exp. Co. [Mo. App.] 107 SW 459. Refusal of a tender made on demand entitles defendant to costs of suit. Id.

14. Parker v. Gortatowsky, 129 Ga. 623, 59 SE 286.

Waiver: Acceptance of rent after it was due by the lessor in a contract of rental, containing an option to purchase, forfeitable upon nonpayment of rent when due, is not a waiver of the condition in regard to payment because of the dual nature of the contract. Brown v. Larry [Ala.] 44 S 841.

15. Trinity County Bk. v. Haas [Cal.] 91 P 385.

16. Trinity County Bank v. Haas [Cal.] 91 P 385. In such case deposit of the interest in a reputable bank, after tender was refused, is a legal payment under Civ. Code § 1500. Id. And under § 1504, tender without deposit bars the mortgagor from declaring the principal due. Id.

17. Kessler v. Pruitt [Idaho] 93 P 965. Payment of purchase price of land conditioned upon delivery of deed and abstract is not due until the abstract is delivered though the time set for payment has expired. Id.

18. Kessler v. Pruitt [Idaho] 93 P 965.

19. Persons v. Gardner, 122 App. Div. 167, 106 NYS 616.

20. Delivery of money to a judgment credi-

nor is a deposit in escrow,[22] and tender also must be unconditional.[23] The requirement of an express agreement that payment shall be made in certain species of coin may be impliedly waived.[24] Payment or tender otherwise insufficient may be made good by the laches of the creditor.[25] Purchase of a note by a third party does not operate as a payment of the debt so as to release collateral security.[26] A bona fide holder of a note is not bound by a transaction entered into without its knowledge, whereby the note is to be paid.[27] A tender at the place of payment of a note is sufficient although there was no one there authorized to receive the money tendered.[28] A tender must be made in good faith and coupled with an ability to perform,[29] but an offer to perform may be equivalent to an actual tender and production,[30] and knowledge that a tender will be refused renders it unnecessary to make it.[31] Tender must

tor, equal to the amount of the judgment, to be repaid in the event that an appeal from the judgment is decided in appellant's favor. Persons v. Gardner, 122 App. Div. 167, 106 NYS 616.

21. As an acceptance by a lien creditor of an insolvent of an amount less than his full claim on condition that he shall receive the balance if he establishes the lien which he fails to do. Rio Grande Southern R. Co. v. Colorado Fuel & Iron Co. [Colo.] 91 P 1114.

22. A deposit in a bank of the balance due on a note to be paid to the holder of the note upon the surrender of that and another note is not a deposit, within the meaning of Civ. Code § 1500, providing a debt is extinguished by a due offer of payment if the amount is immediately deposited in the name of the creditor in some bank of deposit. Righetti v. Righetti [Cal. App.] 90 P 50.

23. A check sent to a bank to be delivered to the creditor provided he gives a receipt in full of all his demands on the debtor is conditional and not a good tender. Towles v. Carpenter, Wright & Co. [W. Va.] 57 SE 365.

24. Where a note requires payment in gold, coin at a certain place, the payee cannot object that a tender of the amount due was not good because made by draft where the tender was not refused for that reason and where this requirement of the note has not been insisted on in the case of any previous payment. Hidden v. German Sav. & Loan Soc. [Wash.] 93 P 668.

25. Tipton v. Roberts [Wash.] 93 P 906. Where defendants sent plaintiff checks and receipted bills for repairs on a house amounting in the aggregate to the amount due as rent for the house, and such checks and bills were received and retained by plaintiff for nearly two months when they were returned and an action of ouster for nonpayment of rent was commenced, such delay in returning the checks and bills amounts to an acceptance, or at least affects a tender so as to prevent forfeiture for nonpayment of rent. Id.

26. Hyatt v. Bell [Ark.] 103 SW 748.

27. Acceptance by endorser of a deed in payment and agreement to cancel notes held by indorsee not binding on latter. Citizens' Sav. Bk. v. Marr [Mo. App.] 107 SW 1009.

Ratification of such a transaction will not be implied unless accompanied with a full knowledge of all the facts. Citizens' Sav. Bk. v. Marr [Mo. App.] 107 SW 1009.

28. When made in the coin stipulated in the obligation. Harmann v. Rose, 129 Ill. App. 337.

29. Doak v. Bruson [Cal.] 91 P 1001. Where a tender of a mortgage for purchase money is required, it is not necessary for the wife to execute such mortgage in order to make the tender valid, since she has no interest superior to the lien for the purchase money. Id. Taylor v. Mathews, 53 Fla. 776, 44 S 146.

30. Taylor v. Mathews, 53 Fla. 776, 44 S 146. A present readiness, willingness, and ability in good faith to perform the acts required of one by the agreement, provided the other party will concurrently do the things required of him by the contract, and notice by the former to the latter of such readiness, willingness, and ability, satisfies the requirements of a valid tender of purchase money as between vendee and vendor in a land contract. A tender strictly valid at law is not necessary. Id. Where, in an action to rescind a sale of land, the purchaser pleads that he does not know the amount due but offers to pay what the court may determine it to be there is a sufficient tender without paying the money into court, since he has offered to do equity. Moore v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 700, 103 SW 242. Under Civ. Code Proc. § 2074, but the offer must be in good faith (§ 1493), and accompanied by ability to perform (§ 1495), otherwise the offer, though dependant upon performance of a concurrent conditon by the other party (§ 1498), is ineffectual, regardless that such other party is unable and unwilling to perform. Doak v. Bruson [Cal.] 91 P 1001. A mortgagor who objects to the suffiiency of the amount offered in court can not afterwards object that the money was not paid where it proves sufficient. Strickland v. Clements [Ark.] 104 SW 175. An offer that a bank may retain from a check presented to be cashed, an amount due it out of the funds on which the check was drawn, those funds being sufficient, is a good tender. German-American Bk. v. Martin [Mo. App.] 107 SW 1108.

31. But one seeking to rescind a sale must make restoration on the trial. Packard v. Mobile [Ala.] 43 S 963. Refusal or waiver of a tender bars the right to costs, and a payment into court of the amount due, exclusive of costs, is good. Kindelberger v. Kunon, 122 App. Div. 158, 106 NYS 597. Refusal on the sole ground that tender is insufficient is an **estoppel** to the objection that it was made to the wrong person. Johns v. Anchors [Ala.] 45 S 218.

be kept good when equity requires it,[32] but in other cases it may be unnecessary.[33] A promise for a consideration may constitute a payment.[34] A valid tender may be kept good by a deposit in a bank of the amount due with instructions to pay unconditionally to the creditor.[35]

Medium; checks, notes, drafts, bills of exchange, etc. See 8 C. L. 1330—What may be received in payment of a debt is a matter of contract between the parties interested, with which, if made in good faith, courts will not interfere.[36] But a check is not payment until paid unless it is expressly agreed that, whether good or not, it shall have that effect.[37] In Massachusetts, however, exactly the contrary doctrine prevails,[38] but acceptance of a check implies an undertaking of due diligence in presenting for payment, and a failure in that regard is at the holder's risk,[39] and payment

32. Weil v. Lippman, 105 NYS 516. A party suing in equity for the cancellation of mortgage is bound to keep good a previous tender by bringing the money into court at the commencement of the action and allege that fact in the complaint. Id. In such a case the purchaser on foreclosure has a right to appeal from the decree and hence is not obliged to accept a tender since by so doing he would waive that right. Id. One who has lost his statutory right to redeem land sold on foreclosure, but obtains a decree extending the time, must keep good a tender of the amount due made within that time. Bunting v. Haskell [Cal.] 93 P 110. A refusal to pay within the time granted in an affirmance of the decree upon appeal waivers the right to redeem regardless of the previous tender. Id.

33. Rosenzweig v. Kalichman, 56 Misc. 345, 106 NYS 860. In an action by vendee in a land contract to compel specific performance, there seems to be no reason why a previous tender of the amount due need be kept good. Kerr v. Moore [Cal. App.] 92 P 107. Where vendee in possession has made such improvements as equitably entitle him to specific performance. Taylor v. Matthews 53 Fla. 776, 44 S 146. In an action to recover stock pledged as collateral and wrongfully sold by defendant. Furber v. National Metal Co., 118 App. Div. 263, 103 NYS 490. While, in an action on a composition agreement, a tender must be kept good to be available, yet where such an agreement is set up as a defense to a common-law action on the original obligation, and tender thereunder and its refusal is shown, such tender need not be kept good. Rosenzweig v. Kalichman, 56 Misc. 345, 106 NYS 860. Where the owner of property brought suit against his tenant to recover possession on the ground that the lease had terminated and refused to receive a tender of rent during the suit, it was not necessary to keep good the tender in order to prevent a termination of the lease for nonpayment of rent. Parker v. Gortatowsky, 129 Ga. 623, 59 SE 286. But since annual rental bears **interest** from the date when it is due, there must be a continuing tender to prevent interest from running. Id.

34. McGlinn's Estate v. Gallagher [Ind. App.] 83 NE 252. The surrender for a valuable consideration of a mortgage, coupled with a promise to surrender the note which it secured, when found, is an extinguishment of the debt, though the note is not found until after the creditor's death, and a new note has been given for the debt. Id.

35. Even though the certificate of deposit is in the name of the creditor and another jointly. Kerr v. Moore [Cal. App.] 92 P 107.

36. An agreement with member of a firm whereby an indebtedness to the firm is indorsed on notes held by its debtor against said member individually when the firm does not contest the member's right to make such an agreement. Brockman v. Ostdiek [Neb.] 113 NW 529.

37. Citizens' Bk. v. Kretschmar [Miss.] 44 S 930. And unless there is either precedent or contemporaneous debt. Matlock v. Scheuerman [Or.] 93 P 823. An unpresented check is not payment. Tholmann v. Lewis, 121 App. Div. 836, 106 NYS 1056. When dishonored, the original indebtedness continues to exist, and the creditor may recover therefor without resorting to the check. Citizens' Bk. v. Kretschmar [Miss.] 44 S 930. And even though the check is accepted as payment by the creditor who relies on the implied representation that it will be honored, if dishonored, the creditor will be relieved from his agreement though the debtor gave the check in good faith. Id. Where checks lost debtor remains liable both on checks and original indebtedness. First Nat. Bank v. McConnell [Minn.] 114 NW 1129. Where renewal notes are given in part payment of a judgment entered on the original notes, the payee has a lien on such judgment for their payment. Adair v. Decker, 34 Pa. Super. Ct. 153. Only evidence of payment and where bank operates a creamery and pays its patrons by checks drawn upon itself, such holders are general creditors. Emigh v. Earling [Wis.] 115 NW 128. Only conditional payment. R. H. Herron Co. v. Mawby [Cal. App.] 89 P 872.

Presumption against payment. Brughman v. Lowe [Ind. App.] 83 NE 255. But this presumption may be overcome by facts inconsistent therewith. Lester Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212. As where creditor instructs debtor to send a check by mail in settlement of a debt, the title to the check rests in the creditor when it is duly and properly mailed. Watt-Harley-Holmes Hardware Co. v. Day, 1 Ga. App. 646, 57 SE 1033.

38. Where the Massachussetts rule is not the law of the state of the creditor's place of business and where the notes were accepted, it is not applicable unless the contract sued upon was to be performed in Massachussetts. American Malting Co. v. Southern Brew. Co., 194 Mass. 89, 80 NE 526.

39. R. H. Herron Co. v. Mowby [Cal. App.]

by check bars garnishment of the debt unless or until the check is dishonored.[40] Where there is an exchange of commercial paper, each instrument is sufficient consideration for the other, and an independent obligation not conditional upon the payment of the other.[41] The certification of a check operates as a payment as between drawer and holder.[42] The giving of a debter's note does not pay the debt in the absence of agreement that it shall.[43] When a creditor is induced by misrepresentations to accept notes in payment of a debt, he may rescind such acceptance and the original debt thereupon revives.[44] The creditor may, however, estop himself from asserting nonpayment.[45] A check is not legal tender,[46] nor is a bill of exchange.[47]

§ 2. *Application of payment.*[See 8 C. L. 1331]—The creditor and debtor may agree upon the application of payments, where there is more than one debt to any particular item of indebtedness.[48] In the absence of such an agreement, the debtor is primarily entitled to apply the payment to such indebtedness as he chooses,[49] and, where payment is to an agent or trustee, he is not required to see that it is applied to the purpose of the payment.[50] If the debtor fails to omit application, it may be made by the creditor.[51] A creditor holding two notes, one an individual and one a joint note of

89 P 872. But this does not apply to one who merely holds a check pending further negotiations, but refuses to accept it as payment. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212. Check sent by mail must be accepted within a reasonable time on the conditions on which given. Dunn v. Whalen, 120 App. Div. 729, 105 NYS 588.

40. Watt-Harley-Holmes Hardware Co. v. Day, 1 Ga. App. 646, 57 SE 1033.

41. Matlock v. Scheuerman [Or.] 93 P 823.

42. Though accepted only as payment on account when given in full payment. Dunn v. Whalen, 120 App. Div. 729, 105 NYS 588.

43. Daniel v. Gordy [Ark.] 105 SW 256. In lieu of cash premiums due on insurance policy. Hipp v. Fidelity Mut. Ins. Co., 128 Ga. 491, 57 SE 892. Notes given in lieu of cash payment of premiums on insurance merely extend the time of paying in cash, and such notes after default are ineffective in preventing forfeiture. Hoar v. Union Mut. Life Ins. Co., 118 App. Div. 416, 103 NYS 1059. Note of debtor and third party only extends time of cash payment and evidence of indebtedness. Menzel v. Primm [Cal. App.] 91 P 754. Notes in payment of other notes secured by collateral do not release the security when the renewal notes are on their face also secured by collateral. Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 F 310. The execution of a renewal note is not a payment of the judgment obtained on the original note, but is only another evidence of the debt. Crenshaw v. Duff's Ex'r, 31 Ky. L. R. 773, 103 SW 287.

44. But the misrepresentations must actually deceive and induce the acceptance. American Malting Co. v. Southern Brew. Co., 194 Mass. 89, 80 NE 526.

45. American Malting Co. v. Southern Brew. Co., 194 Mass. 89, 80 NE 526. When insurance policy not to become operative until cash payment of initial premium, acceptance of a note and delivery of policy and receipt stating such premium to be settled by note, the policy therefrom took effect (Hipp v. Fidelity Mut. Life Ins. Co., 128 Ga. 491, 57 SE 892), and acceptance of note for overdue premiums waives right to forfeit policy (Arnold v. Empire Mut. Annuity & Life Ins. Co. [Ga. App.] 60 SE 470). Even upon nonpayment of note which itself provides for forfeiture when the policy is silent in that regard (Id.), such note operates as a cash payment, in absence of contrary provision in policy, when the insured is treated as a policy holder in good standing (Id.). The acceptance of a note in lieu of final cash payment due on land contract constitutes a good payment so as to conclude the transaction and entitle the brokers who sold the land to their commission, which was to be paid by agreement upon completion of sale and payment of purchase money. Rice v. Ware [Ga. App.] 60 SE 301.

46. In re Collyer, 108 NYS 600. Tendered for purchase price. Volk v. Olsen, 54 Misc. 227, 104 NYS 415.

47. Not good as a basis for revision of contract. United States Health & Acc. Ins. Co. v. Clark [Ind. App.] 83 NE 760. Though made in court, accompanied by consent to adjoin until honored. Id.

48. Maryland Jockey Club v. State [Md.] 68 A 613.

49. Cavanagh v. Marble [Conn.] 68 A 853. Such application need not be express. It is sufficient if his intention appears from the facts and circumstances connected with the payment. Id.

50. Rogers v. Leggett [N. C.] 58 SE 596.

51. Brown v. Larry [Ala.] 44 S 841; Maryland Jockey Club v. State [Md.] 68 A 613. Collateral assigned by a president to his company applied to other indebtedness than an accommodation note given for the president. Chestnut St. Trust & Sav. Fund Co. v. Hart, 217 Pa. 506, 66 A 870. To any lawful claim, but not to a spurious or pretended claim, nor to an immoral one, like a gambling debt, nor to usury. Anderson v. Griffith [Or.] 93 P 934. To any undisputed equitable claim within reasonable time. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413. Though debtor loses option to purchase by application to other debts than rent, and though amount paid was more than rent due. Brown v. Larry [Ala.] 44 S 841.

the same debtor, may apply to either note an undirected general payment,[52] but payment out of proceeds of property mortgaged must be applied to the debt secured thereby.[53] In the absence of direction or application by either party, the law applies the payment in accordance with well established and recognized rules.[54] In general, money paid into court by way of tender should be applied on the judgment recovered,[55] and payment into court is payment to plaintiff.[56] The question as to whether there was an application by the parties may be submitted to the jury.[57]

§ 3. *Effect of payment or tender.* See 6 C. L. 1333—A vendee under a land contract who pays the full purchase price and performs all the other conditions of the contract acquires thereby whatever title the vendor has, even in the absence of a deed.[58] For payments made by the mortgagor before the mortgagee acquired notice of a prior incumbrance, the purchaser will be protected pro tanto, to the extent of such payments.[59] Payment of the first premium on an insurance policy completes the contract.[60] The tender of a debt secured by mortgage does not release the lien of the mortgage, but there can be no foreclosure while the tender is kept alive.[61] To preserve the legal effect of a tender, it must be kept good.[62] Refusal of a valid tender bars the right to costs of a suit instituted thereafter for collection of the debt tendered,[63] and also stops interest.[64] In an action on a note, a payment into court of the amount due thereon simply eliminates any question as to plaintiff's right to re-

52. So where one is barred and the other not, application may be made to the former. McBride v. Noble [Colo.] 90 P 1037.

53. Not to another mortgage debt. Nolen v. Farrow [Ala.] 45 S 183. Purchase by lienor of an interest in the property secured extinguishes only that portion of the indebtedness which was a charge upon the interest purchased. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413.

54. Maryland Jockey Club v. State [Md.] 68 A 613. To that indebtedness for which the security is **most precarious.** Payments by a bank cashier will be applied to defalcations occurring outside the period covered by his bond, when unsecured. Fancher v. Kaneen, 5 Ohio N. P. (N. S.) 614. To the **oldest items** first. Brown v. Larry [Ala.] 44 S 841; Holloway v. White-Dunham Shoe Co. [C. C. A.] 151 F 216; Fisher v. Brown Hardware Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 575, 103 SW 655 In **order of maturity.** Belcher v. J. I. Case Threshing Mach Co. [Neb.] 111 NW 848. To **accomplish equity** among all parties interested, payments indorsed on interest will be applied to principal. Commonwealth v. Louisville & N. R. Co., 31 Ky. L. R. 819, 104 SW 267. Payments on an **interest** bearing note are applied first on the interest and balance on the principal, and interest is then computed on principal remaining; but if payment is less than the interest, the balance of the interest is not added to the principal, but the same principal draws interest until the payments exceed the interest, when the excess is again applied to the principal. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718. And where the debtor pays the principal sum, either before or pending suit, and the creditor still demands interest, the payment does not discharge the principal but is applied as a partial payment on the total sum then due. Commonwealth v. Louisville & N. R. Co., 31 Ky. L. R. 819, 104 SW 267. This note is not changed by Ky. St. 1903, § 2219, subsec. 3, which is merely declaratory of the common law. Id. Where a note bears semi-annual interest, payments of interest semi-annually after maturity will be applied on interest and not principal, the interest being not only accrued but due since the whole note is due. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718.

55, 56. Ahrens v. Fenton [Iowa] 115 NW 233.

57. Ontario Bk. v. Loomis, 189 N. Y. 578, 82 NE 436.

58. Grace v. Means, 129 Ga. 638, 59 SE 811. But in order to pass title, the full purchase price must be paid or a legal tender thereof made. Id.

Payment of taxes on land, cutting timber therefrom, and protecting it from trespassers, do not constitute possession, but are merely acts tending to show claim of ownership. Morgan v. Pott, 124 Mo. App. 371, 101 SW 717.

Promise to pay all reasonable expenses of collection covers only direct efforts, and does not extend to services in defending a collateral proceeding though such defense is against a claim which, if allowed, would exhaust the assets from which the note to be collected must be paid. German-American Bank v. Martin [Mo. App.] 107 SW 1108.

59. Nolen v. Farrow [Ala.] 45 S 183.

60. Arnold v. Empire Mut. Annuity & Life Ins. Co. [Ga. App.] 60 SE 470. Payment of the annual premium thereafter is a condition subsequent, the breach of which may or may not work a forfeiture of the policy. Id.

61. Strickland v. Clements [Ark.] 104 SW 175.

62. Kelly v. Keith [Ark.] 106 SW 1173. The mere fact that defendant has a receipt from the clerk of court and has promised to pay on demand does not make the tender good when money not actually paid into court. Id.

63. Anderson v. Griffith [Or.] 93 P 934.

64. Harmann v. Rose, 129 Ill. App. 337.

cover on the note, but leaves all other issues open.[65] Defendant is credited with whatever he pays into court, but if the amount is insufficient plaintiff recovers judgment for the full amount and costs.[66]

Recovery back of payment.—Payments, though voluntary, may be recovered if made under mistake of a material fact,[67] though otherwise if made under a mistake of law,[68] unless such payments were illegal.[69] But payments made in satisfaction of a *voidable* award cannot be recovered.[70] Rent due and voluntarily paid cannot be recovered,[71] nor can taxes paid by a stranger be recovered from the owner of the land.[72]

Necessity for tender.—Generally, tender of performance must be made by one party before he can maintain a suit for breach of conditions by the other.[73] A suit to redeem cannot be maintained without tender of the amount due,[74] but a formal tender is never required where it is disclosed that if it had been made it would have been fruitless.[75]

Payment is not excused by sickness [76] nor by the fact that another earnestly endeavored to make payment.[77]

Creditor may waive express conditions of payment by words or conduct.[78]

§ 4. *Payment or tender as an issue. A. Pleading.* See 8 C. L. 1338—A plea of tender, in general, admits plaintiff's right of recovery.[79] It must state the precise sum tendered and a refusal of the creditor to receive it, that defendant has been, and still is, ready and willing to pay the sum, and must aver that the money is brought into court, and it must be so brought, otherwise the plea and evidence under it is a nullity,[80] though an allegation of tender need not state the amount in dollars and cents.[81]

65. Aherns v. Fenton [Iowa] 115 NW 233. Does not preclude a counterclaim which may extinguish the debt sued upon, in which case the amount paid is returned to defendant. Id.

66. Ahrens v. Fenton [Iowa] 115 NW 233.

67. Collins v. Kelsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 955, 97 SW 122. Payment of a higher rate for electricity than that charged others. Armour Packing Co. v. Edison Elec. Illuminating Co., 115 App. Div. 51, 100 NYS 605.

68. In the absence of fraud. Armijo v. Henry [N. M.] 89 P 305.

69. In preference of creditors under § 48 of the stock corporation laws, p. 1838, c. 688, Laws of 1892. Wright v. Gansevoort Bk., 118 App. Div. 281, 103 NYS 548. But payment, after insolvency, of a secured debt, is not a preference. Id. That they were voluntarily made is no defense to a recovery. Packard v. Mobile [Ala.] 43 S 965.

70. Hegan v. Beckley [Ky.] 105 SW 969. Such payments are such a ratification of the award as to estop the party making them from thereafter questioning its validity. Id.

71. Where paid in summary proceedings, not based on nonpayment of rent, resulting in judgment of ouster. Dechenbach v. Rima [Or.] 93 P 464.

72. Neither at common law nor by statute. Mitchell v. Danielson, 38 Colo. 63, 89 P 823.

73. Where a contract for the sale of land for a sum payable in instalments is silent as to the time of delivering the deed, either the deed or so much of the land as equals in value the amount paid should be tendered before an action on a note given for one of the instalments can be maintained. Menzel v. Primm [Cal. App.] 91 P 754. Plaintiff cannot maintain an action for breach of a contract to purchase and remove buildings of defendants for a certain sum without proof of a tender of that sum. Volk v. Olsen, 54 Misc. 227, 104 NYS 415.

74. Longino v. Ball-Warren Commission Co. [Ark.] 106 SW 682. But when the amount is brought into court during pendency of suit, it prevents dismissal. Id.

75. Arnold v. Empire Mut. Annuity & Life Ins. Co. [Ga. App.] 60 SE 470; Starr v. Watkins [Neb.] 111 NW 363.

76. Insurance policy forfeited though payment of premiums thus prevented. Hipp v. Fidelity Mut. Ins. Co., 128 Ga. 491, 57 SE 892.

77. Hipp v. Fidelity Mut. Ins. Co., 128 Ga. 491, 57 SE 892.

78. By giving bill of sale of goods accompanied by words of the effect that the purchase price should go to cancel an existing debt, though condition of the sale at auction was the giving of an approved note for goods purchased. Cobb v. Holloway [Mo. App.] 108 SW 109. But acceptance of payments on a land contract after commencement of suit to compel specific performance and foreclose mortgage to secure payments is not a waiver of the right to maintain such suit. Gates v. Green [Cal.] 90 P 189.

79. Ahrens v. Fenton [Iowa] 115 NW 233. And even though it is not so made as to save defendant from liability for costs, it may be sufficient to authorize judgment against defendant for the amount tendered. Id.

80. Towles v. Carpenter, Wright & Co. [W. Va.] 57 SE 365. In such a case the filing of an affidavit that nothing was due above the amount tendered does not perfect such tender so that plaintiff must take judgment for that much of his claim and submit the balance as the only issue. The plaintiff

An averment of readiness and willingness to pay to parties not before the court is not good as a plea of tender,[82] and a plea of payment which fails to allege when, how, and to whom the payment was made is defective.[83] Matters not pleaded are unavailable,[84] but objections to a plea must be seasonably raised,[85] since generally, amendments thereto are within the discretion of the court.[86] Where the only issue is the amount due, the court should retain whatever is paid into court until judgment.[87]

(§ 4) *B. Evidence.*[88]—Where the evidence shows that a nurse made purchases for the patient at his request but is conflicting as to whether she paid for them out of certain checks given her by him, a verdict that she did so will be sustained.[89] Ordinarily, a receipt may be contradicted and explained by parol evidence,[90] and where it is indefinite as to the amount of payment it should be disregarded in determining that question.[91]

Presumptions. See 8 C. L. 1334.—There is a presumption that a check is not to have the effect of payment until paid, and this can be overcome only by clear proof to the contrary,[92] but it will not be presumed that money deposited in a bank to the credit of one of the parties to an award has not been accepted by him.[93] A note governed by the law merchant given for a pre-existing debt is only prima facie evidence of payment.[94] Whether this prima facie evidence has been rebutted is a question for the trial court.[95] It has been held to be overcome by the fact that acceptance of un-

is not bound under § 46, c. 125, Code 1899, to take judgment for part, though he may elect to do so. Id.

81. An averment of tender of the full amount of principal and interest due is sufficient. Askew v. Thompson, 129 Ga. 325, 58 SE 854.

82. Grace v. Means, 129 Ga. 638, 59 SE 811.

83. Properly stricken on demurrer. Thomas v. Siesel, 2 Ga. App. 663, 58 SE 1131.

84. Matters of counterclaim or set-off cannot be shown under the plea of payment (Thalmann v. Lewis, 121 App. Div. 836, 106 NYS 1056), nor, in action for the purchase price of goods, can damages for nondelivery (Id.), or other claims be offset against claims against the seller (Id.). Payment cannot be proved unless pleaded, under the provisions of Rev. St. 1895, art. 1266. Richey Grocery Co. v. Warnell [Tex. Civ. App.] 19 Tex. Ct. Rep. 543, 103 SW 419. A declaration which alleges that a new note was taken with the consent of defendants in place of an old note on which defendants were guarantors does not permit of the defense that defendants were discharged from liability on the old note, when discharge is not pleaded. Punta Gorda Bk. v. State Bk. of Ft. Meade, 52 Fla. 399, 42 S 846.

85. Where a case has once been tried upon the issue of payment and on appeal and reversal had, the plea of payment, even though most general, meets the requirement of Sayle's Civ. St. art. 1266, that "such payment be so plainly and particularly described in the plea as to give the plaintiff full notice of the character thereof." Brown v. Rash [Tex. Civ. App.] 18 Tex. Ct. Rep. 509, 101 SW 1041.

86. Amendment setting up payment and set-off though amendment forbidden by statute to be made after notice of trial. Huff v. Powell [Tex. Civ. App.] 107 SW 364.

87. This is the only issue where plaintiff pleads insufficiency of amount as provided by §§ 20, 21, of art. 75, Code Pub. Gen. Laws 1904. Palatine Ins. Co. v. O'Brien [Md.] 68 A 484.

88. See 8 C. L. 1334. A provision for interest in a note taken in lieu of a cash payment of a premium on a life insurance policy is some evidence that the note was a payment of the premium. Arnold v. Empire Mut. Annuity & Life Ins. Co. [Ga. App.] 60 SE 470. Testimony by a comaker with defendant on the note that plaintiff told him she had bought of defendant and that payment was to be made to her is no evidence that such note was transferred to plaintiff in payment of the note sued upon. Huff v. Powell [Tex. Civ. App.] 107 SW 364.

89. A charge in the form of a question as to whether the evidence clearly satisfies the jury that she so used the checks, and whether her present claim is consistent with that filed with the executor, held fair. Bleadingheiser v. Crumrine, 34 Pa. Super. Ct. 241.

90. When given to an insurance agent for his note given in payment of a policy, the acceptance of which was induced by false representations by the agent that he had authority to so bind the company. Hartford Life Ins. Co. v. Sherman, 123 Ill. App. 202.

91. Such as "Newton No. 818 (Date). Judgment received interest $18 (signed) 300," three hundred dollars being the amount of the judgment sued upon and eighteen dollars the interest thereon. Smith v. Summerhill, 31 Pa. Super. Ct. 235.

92. Citizens' Bk. v. Kretchmas [Miss.] 44 S 930. Presumption is not in favor of payment. Menzel v. Primm [Cal. App.] 91 P 754.

93. Hegan v. Beckley [Ky.] 105 SW 969.

94. Beach v. Huntsman [Ind. App.] 83 NE 1033. The same rule prevails where the debtor at the instance of the creditor executes the note to a third person. Id.

95. Beach v. Huntsman [Ind. App.] 83 NE 1033. And where the evidence in that regard is contradictory, it will not be weighed on appeal. Id.

secured notes, as such, would deprive a creditor of a collateral security or other substantial benefit.[96] Lapse of time may raise a presumption of payment.[97] In the absence of fraud or undue influence, a voluntary payment of money by a parent to his child will be presumed to be a gift.[98] The presumption arises in such cases, from circumstances which might be insufficient to raise it between strangers.[99] A new contract will not be presumed from the fact that payments due under an old were not made in accordance with its terms.[1]

Burden of proof. See 8 C. L. 1335—Payment is an affirmative defense and the burden of proving it by a clear preponderance of the evidence is upon him who alleges it,[2] and the same is true of tender,[3] but certain circumstances may raise a presumption of payment and cast the burden of proof upon the one denying it.[4] Plaintiff's possession of a note is prima facie evidence of its nonpayment.[5] In an action to recover money voluntarily paid, the burden of proving mistake, fraud, or like ground of recovery is upon the party alleging it.[6] To support a gift to a person standing in a confidential relation to the giver, the burden is upon the former to show in a clear and unequivocal manner that the donor understood the transaction and that it was his voluntary act.[7]

Sufficiency. See 8 C. L. 1336—A finding of the lower court that a mortgage has been paid will not be upheld where the testimony in support of such finding is given by parties in interest, and is improbable and inconsistent with testimony of other

96. Such as a mechanic's lien. Beach v. Huntsman [Ind. App.] 83 NE 1033.

97. Where from the final account of the guardian of a deceased lunatic, which was duly filed and approved, it appears that certain funds came into the guardian's hands more than twenty years before the commencement of suit for an accounting of said funds, it will be presumed that they were duly paid to those entitled thereto. Matthews v. Kelly, 70 N. J. Eq. 796, 67 A 1075. In the absence of proof of any payments on a mortgage during twenty years which it has been due, there is a presumption that it has been paid (Greenfield v. Mills, 123 App. Div. 43, 107 NYS 705), and so where a mortgage has not been foreclosed and more than twenty years have elapsed since its execution (Morgan v. Pott, 124 Mo. App 371, 101 SW 717). But in an action by judgment creditors to set aside as fraudulent a deed of the debtors, there is no presumption that the judgments, obtained four years before commencement of the action, have been paid, though the action has been pending for over twenty-five years. St. Francis Mill Co. v. Sugg, 206 Mo. 148, 104 SW 45.

98, 99. Jenning v. Rohde, 99 Minn. 335, 109 NW 597.

1. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718. Where a note provides for interest payable semi-annually until maturity and thereafter at the same rate annually, and the maker continues to pay interest semi-annually after maturity, the court will presume that such payments were made voluntarily for the convenience of the maker and not under a new contract. Id.

2. Delana v. Voss [Iowa] 114 NW 1076; Greenburg v. Sauls Bros. [Miss.] 45 S 569; Bossi's Estate v. Baehr [Wis.] 113 NW 433. Payment of renewal note given on condition that old note be surrendered. Stevens v. Taylor [Tex. Civ. App.] 19 Tex. Ct. Rep. 428, 102 SW 791. One claiming to be a bona fide purchaser of mortgaged chattels must make satisfactory proof of payment. The burden is then upon the mortgagee to show that claimant had actual or constructive notice of the mortgage, under Code 1896, § 1009 Nolen v. Farrow [Ala.] 45 S 183. Where sole defense is payment, defendants may open and close the evidence and argument. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413. That a check operated as payment. Citizens' Bank v. Kretchmas [Miss.] 44 S 930. Where the payee holds the check but declines to accept it as payment. Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212.

3. Volk v. Olsen, 54 Misc. 227, 104 NYS 415.

4. Where there is a presumption that decedent gave a deed in payment of services and not as a gift and but the barest scintilla of evidence in rebuttal, it is vital error to cast the burden of proof upon contestant. McNamara v. Michigan Trust Co., 148 Mich. 346, 14 Det. Leg. N. 250, 111 NW 1066. As where agent authorized to convey land executes deed in his own name instead of principal's but acknowledges payment in deed (Rogerson v. Leggett [N. C.] 58 SE 596), and the burden of showing that the drawer has sustained no loss from failure to present check for payment is on the holder (Lester-Whitney Shoe Co. v. Oliver Co., 1 Ga. App. 244, 58 SE 212).

5. McCauley v. Darrow [Mont.] 91 P 1059. An instruction as to what the verdict shall be if either payment or nonpayment is found by a preponderance of the evidence is not erroneous when qualified by an instruction that possession by plaintiff was prima facia evidence of nonpayment and that the burden of proof was on defendant. Id.

6. Collins v. Kelsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 955, 97 SW 122.

7. Jenning v. Rohde, 99 Minn. 335, 109 NW 597.

witnesses.[8] To establish tender, evidence of the amount must be definite and positive.[9]

Admissibility.[See 8 C. L. 1335]—Checks are admissible as evidence of payment.[10] In an action to recover payments, evidence that they were made as a gift is admissible under a general denial.[11] In an action on a note, testimony of the maker regarding statements of the deceased payee is inadmissible,[12] though other facts and circumstances showing the nature of plaintiff's transaction with decedent may be admissible.[13] Advancement of money by decedent to plaintiffs is no evidence of itself that it was in payment of services rendered.[14] In an action to recover money paid, statements by plaintiff against interest may be admissible as admissions,[15] and payment may be shown by circumstantial evidence.[16] Under a plea of payment, instruments competent to establish that fact are admissible,[17] though not themselves specifically pleaded,[18] and payment may be evidenced by more than one instrument.[19] Testimony showing a readiness to tender is no evidence that a tender was actually made and is inadmissible for such purpose.[20] Oral evidence that the amount tendered on a mortgage, was that agreed upon in a writing subsequent to the mortgage, it not being the full amount of the mortgage, is inadmissible.[21] Where tender is not the only question in issue, it is not conclusive of the others.[22]

(§ 4) *C. Limitations.*[See 6 C. L. 994]—While a creditor who holds more than one claim against a debtor, one of which is barred by the statute of limitations and the other not, may apply an undirected general payment to the barred debt, this does not prove that the debtor acknowledged that debt and hence does not raise the bar

8. York v. West, 147 Mich. 549, 14 Det. Leg. N. 3, 111 NW 164.

9. Where can identify but one of a number of bills he saw offered and does not know the total sum, he establishes no greater tender than the amount of the bill identified. Schuchman v. Hochstein, 104 NYS 374.

10. Checks given by decedent to claimant prior to date of note sued upon. Also checks of a later date payable to a third party. In re Royer's Estate, 217 Pa. 626, 66 A 854.

11. Jenning v. Rohde, 99 Minn. 335, 109 NW 597.

12. That interest was payable semi-annually where note provided for annual interest. Civ. Code Proc. § 606. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718.

13. Facts corroborating other evidence of payment as tending to show an arrangement between plaintiff and intestate whereby defendant's indebtedness was canceled. Cobb v. Holloway [Mo. App.] 108 SW 109. That defendant gave decedent's agent notes which they agreed to credit on his indebtedness is admissible when pleaded, not being prohibited by Sayle's Ann. Civ. St. 1897, art. 2302, since not relating to anything that occurred between defendant and decedent. Huff v. Powell [Tex. Civ. App.] 107 SW 364. In an action against an administrator to recover an overpayment on a note to deceased, a check signed by plaintiff and admitted to have been indorsed by deceased is admissible in evidence, as is also testimony of a third person as to who placed the paid stamp on the face of the check. Campbell v. Collins, 133 Iowa, 152, 110 NW 435.

14. In the absence of a showing that the money so advanced equalled the amount of the indebtedness. Atkinson v. Maris [Ind. App.] 81 NE 745.

15. Jenning v. Rohde, 99 Minn. 335, 109 NW 597.

16. That plaintiff entered decedent's place of business in possession of a certain sum and came out without it may be some evidence of payment of an indebtedness to decedent. Campbell v. Collins, 133 Iowa, 152, 110 NW 435. But proof of favors rendered, such as loaning money at less than ordinary rate, is no evidence of payment in the absence of any agreement to that effect. McGrew's Ex'r v. Congleton, 31 Ky. L. R. 609, 102 SW 1185.

17. Rio Grande & S. R. Co. v. Colorado Fuel & Iron Co. [Colo.] 91 P 1114. In an action to recover a balance due on a land contract, whereby the purchaser was to receive a deed of the land upon payment of the contract price, a deed of the land to him was properly received in evidence, as it tended to prove his performance of the contract. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 NW 820.

18. Rio Grande & S. R. Co. v. Colorado Fuel & Iron Co. [Colo.] 91 P 1114.

19. In an actlon on notes, the fact that certain receipts covered payments shown by certain statements rendered did not make such receipts and statements inadmissible in evidence. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413.

20. Cooley v. Bergstrom [Ga. App.] 60 SE 220.

21. The agreement not being produced and no relation between it and the mortgage being established. Wright v. Stone Harbor Imp. Co., 69 N. J. Eq. 837, 66 A 417.

22. Of the right of possession in replevin. McWhirter v. Penny [Ark.] 101 SW 742.

of the statute.[23] Where the confidential relation of principal and agent exists between debtor and creditor, the statute of limitations does not begin to run against the claim until the debtor's death.[24]

(§ 4) *D. Questions of law and fact.* See 8 C. L. 1336—Whether a note is payment of a debt, when connected with other instruments explanatory thereof, is a question of fact,[25] as is also the question as to whether or not there has been a waiver of a formal tender,[26] and, as such, they must be submitted to the jury.[27] But when the evidence clearly establishes a fact, such fact should be assumed by the court.[28]

PAYMENT INTO COURT.[29]

Money unconditionally deposited in court becomes the property of the one for whom it is paid.[30] The right thereto is admitted by a plea of tender and payment,[31] and the party to whom the fund belongs is entitled to an order allowing him to receive the same upon application therefor.[32] Money deposited in court cannot be withdrawn before final judgment,[33] and there is no final judgment pending an appeal.[34] Judgment for a greater amount than that paid into court may be had.[35] In such case the amount deposited must be paid plaintiff and credited upon the judgment.[36] But where the action is to recover the possession of property based on special ownership and not to recover a debt, judgment for a greater amount than the deposit in court does not call for a pro tanto application of the deposit on the judgment;[37] the amount deposited, less costs of suit, must be returned to defendant, and the fact that the court ordered the deposit to be made does not affect the party's right thereto.[38] One cannot be compelled to pay money into court where the right to it is a disputed fact,[39] nor can a party be required to pay money into court to take the place of a lien which has never been established.[40] Tender alone is sufficient in a bill for interpleader,[41] no one being authorized to receive a payment into court until the court has sustained the bill.[42] Payment into court will be regarded as following a valid tender where the testimony in regard to a tender having been made is conflicting.[43] Under statutory provisions that where a fund in litigation is admitted by

23. McBride v. Noble [Colo.] 90 P 1037. Following the English, Massachusetts and Maine doctrine. In Vermont and Missouri, however, such an application revives the debt. Id. See case cited in principal case,

24. McGrew's Ex'r v. Congleton, 31 Ky. L. R. 609, 102 SW 1185. This relation was established where claimants acted for twelve and one-half years as agents for decedent, decedent unqualifiedly recognized her liability for the services, and no settlement was demanded. Id.

25. Boyd v. Boyd, 34 Pa. Super. Ct. 405.

26, 27. Kindelberger v. Kunow, 122 App. Div. 158, 106 NYS 597.

28. Collins v. Kelsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 955, 97 SW 122.

29. See 8 C. L. 1337.

30. Dechenbach v. Rima [Or.] 93 P 464. In summary proceedings, rent due cannot be withdrawn though the action is based on expiration of the lease and not nonpayment of rent. Id.

31. Bieber v. Goldberg, 120 App. Div. 457, 104 NYS 1080.

32. Bieber v. Goldberg, 120 App. Div. 457, 104 NYS 1080. So, in a suit to foreclose a mortgage for nonpayment of instalments, complainant is entitled to withdraw them upon their payment into court following a valid tender, since the tender and payment defeat his right of foreclosure and renders the withdrawal unprejudicial to defendant. Id.

33, 34. Higgins v. Keyes [Cal. App.] 90 P 972.

35. Friedman v. Erste Kaiser Franz Joseph Unterstutzungs Verein, 104 NYS 908.

36. Sitley & Sons v. Morris [N. J. Eq.] 67 A 789; Friedman v. Erste Kaiser Franz Joseph Unterstutzungs Verein, 104 NYS 908; Levy v. Loew, 107 NYS 620.

37. Windsor v. Snider [Kan.] 90 P 820. Plaintiffs having recovered the property or a portion of it, cannot claim the money. Id.

38. Windsor v. Snider [Kan.] 90 P 820.

39. Van Kannel Revolving Door Co. v. Sloane, 122 App. Div. 610, 107 NYS 504.

40. Van Kannel Revolving Door Co. v. Sloane, 122 App. Div. 610, 107 NYS 504. Action to foreclose mechanic's lien by subcontractor against contractor, and owner dismissed on merits as against the latter before the order of payment. Id. A contractor cannot be compelled to pay into court money paid him by the owner until it is impressed with a trust for plaintiff's (subcontractor) benefit. Id.

41, 42. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662.

43. Bieber v. Goldberg, 120 App. Div. 457, 104 NYS 1080.

the pleadings to be held in trust the court may order it paid into its custody, the admission, to sustain the order, must be free from any claim on the fund by the pleader,[44] and the admission must relate to the state of facts as they exist at the time of granting the order.[45] Where all parties are before the court, the fund in litigation in its custody will be distributed according to the rights of the parties, though the application for distribution by one who failed to show an interest has been denied.[46] An order to pay money into court with interest calls for the legal rate, and the court cannot accept a lesser rate.[47] Payment into court by plaintiff must be made at commencement of suit and alleged in the complaint.[48] Deposit in a bank by the register of money paid into court, in violation of the court's order, amounts to a conversion,[49] the register becomes *eo instante* a debtor of the party to whom the fund belongs, and a cause of action at once arises against him and his surety.[50] It is the duty of the clerk to turn over money deposited in court to the county treasurer, who has no authority to pay it out except upon the court's order.[51]

PEDDLING.

§ 1. Definition, 1159.
§ 2. Statutory or Municipal Regulation, 1159.
§ 3. Who May Become Licensees, 1159.
§ 4. Offenses and Prosecution, 1159.

The scope of this topic is noted below.[52]

§ 1. *Definition.* See 8 C. L. 1338—When two parties, canvasser and collector, participate in one transaction, each is a seller of goods and within the ordinance against peddlers.[53]

§ 2. *Statutory or municipal regulation.* See 8 C. L. 1338—Statutes regarding peddlers will be declared unconstitutional on account of arbitrary discrimination,[54] but the legislature, in the exercise of police power, may constitutionally refuse licenses to aliens,[55] and a statute exempting salesmen selling drugs by wholesale is not violative of the constitution as class legislation.[56] A city council has no authority to enlarge the meaning of the word "peddler" beyond that intended by the legislature.[57]

§ 3. *Who may become licensees.* See 8 C. L. 996

§ 4. *Offenses and prosecution.* See 8 C. L. 1339—When goods are offered for sale,

44. Burke v. California Super. Ct. [Cal. App.] 93 P 1058. An admission that the fund is held in trust, coupled with a counterclaim for services, etc., is not sufficient. Id. Nor is the money which may be due on an accounting a subject of litigation within the meaning of such provisions. Id.

45. American Seeding Mach. Co. v. Commander, 77 S. C. 312, 57 SE 1108. So an admission made in a suit in which judgment was taken will not support such an order in an action to enforce the judgment. Id.

46. No further notice of hearing will be required. Sitley & Son v. Morris [N. J. Eq.] 67 A 789.

47. Lawrence v. Binninger, 121 App. Div. 701, 106 NYS 500.

48. Suit to cancel mortgage. Weil v. Lippman, 105 NYS 516.

49. Clisby v. Mastin [Ala.] 43 S 742. It creates the relation of debtor and creditor between the bank and depositor. Id.

50. Clisby v. Mastin [Ala.] 43 S 742. Such a deposit, though not in violation of any order of court, is prohibited by statute. Code 1896, § 4668. Id.

51. Higgins v. Keyes [Cal. App.] 90 P 972.

52. **It includes** the general regulation of the occupation. **It excludes** general rules as to licensing (see Licenses, 10 C. L. 622), and matters common to contracts of sale generally (see Sales, 8 C. L. 1751).

53. City of Muskegon v. Hanes, 149 Mich. 460, 14 Det. Leg. N. 489, 112 NW 1077. An offer to sell, and a going from house to house, constitute peddling. Construing ordinance. Id. Words "exposing for sale" in statute are satisfied when peddler has goods in receptacle and offers to exhibit. Commonwealth v. Hana [Mass.] 81 NE 149.

54. Discrimination on account of residence, amount of tax paid, age, etc. Commonwealth v. Hana [Mass.] 81 NE 149.

55. Commonwealth v. Hana [Mass.] 81 NE 149.

56. Needham v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 294, 103 SW 857.

57. Violation of ordinance. Fallis v. Gas City [Ind.] 82 NE 1056.

after shipment into state by foreign corporation, the transaction does not constitute interstate commerce.[58]

PEDIGREE, see latest topical index.

PENALTIES AND FORFEITURES.

§ 1. Definitions and Elements, 1160.
§ 2. Rights and Liabilities to Penalties and Forfeitures, and the Policy of the Law, 1160.
§ 3. Remedies and Procedure, 1161.

The scope of this topic is noted below.[59]

§ 1. *Definition and elements.*See 8 C. L. 1339—Whether a deposit is to be regarded as a penalty or liquidated damages depends upon the nature of the transaction and intent of parties.[60] If the sum deposited be disproportionate to any possible damage, it is to be treated as a penalty, and not as stipulated damages.[61] The word "forfeit" means to lose,[62] and involves a change of ownership.[63]

§ 2. *Rights and liabilities to penalties and forfeitures, and the policy of the law.*See 8 C. L. 1340—Equity will reluctantly enforce a forfeiture,[64] and will always relieve from a technical forfeiture [65] when no substantial injury has resulted.[66]

*Statutory penalties.*See 8 C. L. 1340—Penal statutes are to be strictly construed,[67] but not so as to defeat the intention of the act,[68] and actions for violation must be brought in good faith.[69] A statute imposing a minimum penalty only is not invalid.[70] Congress may enact that the sum mentioned as penalty in a bond be recoverable as liquidated damages.[71] An Arkansas statute provides for the maintenance of an action for penalty, though the penal statute be repealed,[72] and Texas provides for the same.[73]

*Relief from forfeitures.*See 8 C. L. 1341

58. City of Muskegon v. Hanes, 149 Mich. 460, 14 Det. Leg. N. 489, 112 NW 1077.

50. It excludes punishment for violation of criminal laws (see Criminal Law, 9 C. L. 851), and penalties provided by contract for failure to comply with their terms (see Building and Construction Contracts, 9 C. L. 424; Contracts, 9 C. L. 654; Public Contracts, 8 C. L. 1473, and see Damages, 9 C. L. 869, for a more extended treatment as to distinction between penalties and liquidated damages). Topics dealing with the subject matter as to which penalties are awarded should also be consulted (e. g. Betting and Gaming, 9 C. L. 388).

60. Harris v. Snyder, 105 NYS 502. Recourse may be had to prior negotiations and surrounding facts. United States v. Bethlehem Steel Co., 205 U. S. 105, 51 Law. Ed. 731.

61. Mining claims incapable of profits. Blewett v. Hoyt, 118 App. Div. 227, 103 NYS 451. Not disproportionate amount. United States v. Bethlehem Steel Co., 205 U. S. 105, 51 Law. Ed. 731.

62. Lien forfeited by statute. Sheets v. Prosser [N. D.] 112 NW 72. Defining forfeiture. Meyers v. State [Tex. Civ. App.] 105 SW 48.

63. Statute impounding animals, which will pass into ownership of town, involves forfeiture. Coreil v. Welsh [La.] 45 S 438.

64. Pheasant v. Hanna [W. Va.] 60 SE 618; Tetley v. McElmurry, 201 Mo. 382, 100 SW 37.

65, 66. Pheasant v. Hanna [W. Va.] 60 SE 618.

67. Section 85, c. 114, Hurd's R. S. 1905, held to be a penal statute. Atchison, etc., R. Co. v. People, 227 Ill. 270, 81 NE 342; State v. Ross [W. Va.] 57 SE 821; State v. Wisconsin Cent. R. Co. [Wis.] 113 NW 952. Plaintiff must show written application according to statute providing penalty for failure to supply consumers with gas. Shelley v. Westchester Lighting Co., 119 App. Div. 61, 103 NYS 951.

68. United States v. Louisville, etc., R. Co., 157 F 979; Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 621, 106 SW 918. Statute imposing penalty for nonpayment of wages. St. Louis, etc., R. Co. v. Broomfield [Ark.] 104 SW 133; Stewart & Alexander Lumber Co. v. Weaver [Ark.] 104 SW 152. Ordinance providing security for support of family, intended undertaking as indemnity, not penalty. Goetting v. Normoyle, 119 App. Div. 143, 103 NYS 881.

69. Passenger demanding transfer with sole object of recovering penalty for refusal cannot recover. Nicholson v. New York City R. Co., 118 App. Div. 858, 103 NYS 695.

70. Western Union Tel. Co. v. State [Ark.] 101 SW 748.

71. Bond of contractor for carrying mail. United States v. U. S. Fidelity & Guaranty Co., 151 F 534.

72. Western Union Tel. Co. v. State [Ark.] 101 SW 748.

73. Later act diminished penalties. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 621, 106 SW 918.

*Cumulative penalties.*See 8 C. L. 1341—Cumulative penalties cannot be recovered,[74] unless such is the clear intent of the legislature.[75]

§ 3. *Remedies and procedure.*See 8 C. L. 1342—A proceeding to collect a penalty is a civil suit,[76] and the institution of an action is a waiver of previous penalties.[77] Debt is the proper action for the recovery of statutory penalties,[78] and the state may maintain the action.[78] A penalty, imposed by statute, does not bar an action for damages for tort arising out of the violation.[80] The pleading is strictly construed.[81] Nothing is taken by implication.[82] An express averment that a statutory penalty is sought is necessary,[83] and the statute must be indicated,[84] but North Carolina holds this unnecessary if facts be set out bringing the case within the statute.[85] When a statute imposes a penalty, the plaintiff must prove the facts by a preponderance of evidence,[86] but it need not make out its case "beyond reasonable doubt," [87] though courts differ as to the latter rule.[88]

PENSIONS.[89]

A pension is an annuity from the government for past services.[90] Writ of mandamus to fix pension is not barred by laches because application was not promptly brought, the rule of promptness applicable to reinstatement in office having no application.[91]

PEONAGE; PERFORMANCE, see latest topical index.

74. Stevenson v. New York City R. Co., 54 Misc. 641, 104 NYS 866.

75. Several violations of statute regulating speed of trains. State v. Wisconsin Cent. R. Co. [Wis.] 113 NW 952; People v. Koster, 121 App. Div. 852, 106 NYS 793. Statute providing that seller of intoxicating liquors pay state, county, and city, town or village, each, $500, authorizes recovery of one penalty only. Town of Flora v. American Exp. Co. [Miss.] 45 S 149.

76. Suit for property for violation of city ordinance. McLain v. Chicago, 127 Ill. App. 489. A suit in the name of the state on a statutory bond is a suit for penalty. Myers v. State [Tex. Civ. App.] 105 SW 48; Hanger v. Com. [Va.] 60 SE 67. Offense "neither capital or infamous." United States v. Louisville, etc., R. Co., 157 F 979. Criminal statute of limitations does not apply. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 621, 106 SW 918. Proceedings "brought" by the auditor of state, under § 3818, Revised Statutes, to recover penalties from banks for failure to make semi-annual reports, must be prosecuted by civil action in the name of the state, and not in the individual name of the auditor of state. Guilbert v. Franklin Bk., 5 Ohio N. P. (N. S.) 209. Fine must be recovered by civil warrant. Wells v. Com. [Va.] 57 SE 588. The recovery of a penalty by civil instead of criminal proceedings is not a violation of § 20, art. IV, of the constitution, providing for indictments in prosecutions. Guilbert v. Franklin Bk., 5 Ohio N. P. (N. S.) 209.

77. Stevenson v. New York City R. Co., 54 Misc. 641, 104 NYS 866.

78. Words "offense," "guilty," "convicted," in statute do not change rule that civil action be maintained. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 621, 106 SW 918.

79. A vested right. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 621, 106 SW 918.

80. Passenger ejected after refusal of carrier to accept transfer as provided by statute. Charbonneau v. Nassau Elec. R. Co., 108 NYS 105.

81, 82. Frank A. Menne Factory v. Harback Bros. [Ark.] 107 SW 991.

83. Sheets v. Prosser [N. D.] 112 NW 72.

84. Statute modifying rule to set out full statute in the pleading. Sheets v. Prosser [N. D.] 112 NW 72.

85. Leathers v. Blackwell Durham Tobacco Co., 144 N. C. 330, 57 SE 11.

86. United States v. Central of Georgia R. Co., 157 F 893; Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 621, 106 SW 918. Burden of proof on U. S. United States v. Louisville, etc., R. Co., 157 F 979. Plaintiff held to strict proof. Engel v. New York City R. Co., 105 NYS 80.

87. United States v. Central of Georgia R. Co., 157 F 893; Kerin v. New York City R. Co., 53 Misc. 568, 103 NYS 769.

88. Guilt must be established to the exclusion of a reasonable doubt. United States v. Louisville, etc., R. Co., 157 F 979; Atchison, etc., R. Co. v. People, 227 Ill. 270, 81 NE 342.

89. See 8 C. L. 1343.

90. An act providing for disabled firemen held to grant pensions in violation of constitution, granting pensions for military and naval services only. Aetna Fire Ins. Co. v. Jones [S. C.] 59 SE 148.

91. Retired March 14, 1903, and commenced action Dec. 2, 1904. Ramsay v. Lantry, 123 App. Div. 71, 107 NYS 828.

PERJURY.

§ 1. Elements of the Offense, 1162. § 2. Prosecution and Punishment, 1163.

Matters common to other crimes are elsewhere treated.[92]

§ 1. *Elements of the offense.* See 8 C. L. 1344—Perjury is willful,[93] false swearing[94] before an officer or tribunal having jurisdiction[95] in respect to a matter material,[96] circumstantially[97] or otherwise to the issue, or which tends to credit[98] or discredit the witnesses in respect to the main fact in issue or on inquiry,[99] and upon an oath[1] duly administered by a competent officer on an occasion where an oath is required by law.[2] It does not require the participation of more than one person, and is scarcely susceptible of being committed jointly with others.[3] Knowledge by defendant of the materiality of his testimony is not essential,[4] nor do mere irregularities in the organization of the tribunal,[5] the administration of the oath,[6] or in the proceedings,[7] operate as a defense. Nor can a defendant proceeding to trial without objection rely upon the defective character of the information relative to which he gave false testimony to exculpate him,[8] and in the case of false swearing under naturalization statute, there need not have been any purpose of gain or instigation of malice.[9]

Perjury may be assigned upon the cross-examination of a witness only where the

92. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 10 C. L. 57.

93. Nurnberger v. U. S. [C. C. A.] 156 F 721.

94. Blevins v. State [Ark.] 107 SW 393; Schooler v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 403, 106 SW 359.

95. That grand jury indicting defendant for perjury had previously indicted him for bigamy, and both charges involved fact that defendant married certain woman on specified date, did not deprive court of jurisdiction to try perjury indictment. People v. Collins [Cal. App.] 92 P 513.

96. People v. Collins [Cal. App.] 92 P 513. **Held material:** Amount and title of property of surety of bail bond, under statute, §§ 572-3-5, Code Crim. Proc. People v. Davis, 122 App. Div. 569, 107 NYS 426. In prosecution for removing crops without paying rent, landlord's testimony that he did not assign rent or instruct defendant to pay assignee. State v. Harris [N. C.] 59 SE 115. All statements before grand jury which might properly influence decision. State v. Sargood [Vt.] 68 A 49. **Immaterial:** Where issue is, was defendant guilty of disorderly conduct on certain avenue, testimony that he was guilty at place not embraced in complaint. State v. Dineen, 203 Mo. 628, 102 SW 480.

97. People v. Collins [Cal. App.] 92 P 513; People v. Davis, 122 App. Div. 569, 107 NYS 426.

98. Value of property alleged to be owned, as giving credit to surety's statement of ownership of property valued at more than certain amount. People v. Davis, 122 App. Div. 569., 107 NYS 426.

99. People v. Collins [Cal. App.] 92 P 513.

1. Oath "to solemnly swear, * * * concerning penal laws of Texas, sufficient on which to predicate perjury, though touching violation of penal laws" might have been added to oath. Clay v. State [Tex. Cr. App.] 107 SW 1129.

2. Under the statute, false swearing in either the preliminary statement or in the depositions required by the stone and timber act constitutes the crime of perjury. Under Rev. St. § 5392 (U. S. Comp. St. 1901, p. 3653), regulations of land department requiring statements and depositions to be in certain form, valid. Van Gesner v. U. S. [C. C. A.] 153 F 46. As does a false statement under the statute requiring an applicant for a marriage license to state under oath the number of times he has been previously married. Field v. State, 9 Ohio C. C. (N. S.) 245.

3. Proper to try on separate information defendant complained against jointly with others. State v. Pratt [S. D.] 112 NW 152.

4. Statements before grand jury. State v. Sargood [Vt.] 68 A 49.

5. Defense that jury was irregularly sworn improper. Schooler v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 403, 106 SW 359.

6. Fact that indictment set forth only substance and not precise form of oath taken, immaterial. People v. Collins [Cal. App.] 92 P 513.

7. Or that false testimony before a justice of the peace was not reduced to writing, since these things are not elements of the crime. Clay v. State [Tex. Cr. App.] 107 SW 129.

8. State v. Roche [Iowa] 114 NW 1034. Where information for carrying concealed weapons omitted words "on his person," and accused on going to trial without objection gave false testimony. Id. False testimony under complaint invalid for alleging local option law to have been put into force illegally, sufficient where complaint not objected to. Kelley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 204, 103 SW 189.

9. Instruction that testimony must not only be false, but willfully and knowingly so, sufficient without adding that it must be corrupt and maliciously so under U. S. Comp. St. 1901, p. 3654, punishing one who commits perjury in naturalization proceedings. Holmgren v. U. S. [C. C. A.] 156 F 439.

testimony in chief is material and the cross-examination affects the credibility of the witness.[10]

Subornation of perjury.[See 8 C. L. 1345]—To constitute subornation of perjury, there must have been perjury committed by another at the procurement of the defendant.[11]

§ 2. *Prosecution and punishment.*[See 8 C. L. 1345]

Jurisdiction.—The district court has jurisdiction of violations of the national naturalization laws though committed in naturalization proceedings in a state court.[12]

Indictment.[See 8 C. L. 1345]—The ancient common law in exacting much particularization in the description of the offense of perjury and subornation of perjury has been greatly modified by statute.[13] Hence an indictment inartificially drawn and defective in matters of form cannot be questioned for such reasons after verdict,[14] and if one assignment is sufficient, an improper assignment will not be ground for quashing the indictment, and can only be taken advantage of by exception to the evidence introduced thereunder.[15] It is now only necessary that the indictment for both common law perjury and statutory false swearing so sufficiently inform the accused of the cause and nature of the charge that he may intelligently meet it, and, if convicted, successfully plead his conviction in a subsequent prosecution therefor.[16] The indictment therefore must set forth the substance of the controversy or matter in respect to which the offense was committed,[17] must show upon its face that the alleged false testimony was material to the issue,[18] must set forth the court or person before whom the false oath was taken,[19] the authority to administer it,[20] that the testimony was false[21] and willfully and[22] corruptly given.[23] But the indictment

10. Enough of the direct testimony must be admitted to show the materiality of the cross-examination. Wilkinson v. People, 226 Ill. 135, 80 NE 699.

11. Nurnberger v. U. S. [C. C. A.] 156 F 721. The indispensable elements are that false statement must have been willfully and corruptly made, and defendant must have procured making with knowledge that person swore falsely. Id.

12. Holmgren v. U. S. [C. C. A.] 156 F 439.

13. Sections 5396, 5397, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3655). Nurnberger v U. S. [C. C. A.] 156 F 721.

14. Averment that oath was made in support of certain application to enter certain land, subject to entry at said land office, sufficient after verdict as showing land was public land subject to homestead entry. Nurnberger v. U. S. [C. C. A.] 156 F 721.

15. Error to quash indictment containing two good assignments because third too general. Hoffman v. Allegan Circuit Judge, 150 Mich. 58, 14 Det. Leg. N. 610, 113 NW 584. Where but two of three statements alleged sufficiently traversed as to truthfulness, and court permitted jury to pass thereon only. State v. Roche [Iowa] 114 NW 1034.

16. Under Const. art. 10, indictment for perjury before grand jury which fails to specify subject-matter of investigation then being pursued, fatally defective. State v. Webber, 78 Vt. 463, 62 A 1078.

17. Commonwealth v. Combs, 30 Ky. L. R. 1300, 101 SW 312. Indictment giving title of case and setting out defendant's testimony with averment of materiality, sufficient. People v. Collins [Cal. App.] 92 P 513.

18. Mere averment of materiality insufficient. Wilkinson v. People, 226 Ill. 135, 80 NE 699. Should specifically show how and wherein testimony material. Askew v. State [Ga. App.] 59 SE 311. Good averment of materiality sufficient unless it affirmatively appears from other averments that matter alleged material was in fact immaterial. People v. Collins [Cal. App.] 92 P 513. Averment that testimony was material to action and trial and issues tendered in cause, and that in so testifying defendant testified to matter material to cause, action, and trial, sufficient. Id. Indictment alleging that material question was whether defendant charged for prescribing and giving drugs and medicine to persons under his treatment unobjectionable for failure to name persons and state particular times and places, etc. Collins v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 138, 101 SW 992. Indictment alleging false statements "necessary" for magistrate to know, sufficient. People v. Davis, 122 App. Div. 569, 107 NYS 426.

19. Pen. Code, § 966. People v. Collins [Cal. App.] 92 P 513.

20. Commonwealth v. Combs, 30 Ky. L. R. 1300, 101 SW 312. Pen. Code, § 966. People v. Collins [Cal. App.] 92 P 513. Allegation that "A being receiver (land office), having due and competent authority to administer," sufficient. Nurnberger v. U. S. [C. C. A.] 156 F 721. Fact that justice is authorized to conduct preliminary examination under Cr. Code Proc. § 71, subsec. 3, in certain instances, does not render indictment defective for failing to show authority in case in question, such facts being proper to be offered in evidence in trial. Commonwealth v. Combs, 30 Ky. L. R. 1300, 101 SW 312.

21. Commonwealth v. Combs, 30 Ky. L. R. 1300, 101 SW 312; Conant v. State [Tex. Cr.

need not set forth the pleadings, record, or proceedings with which the oath was connected, nor the commission or authority of the person or court before whom the perjury was committed.[24] And a direct averment of willfulness, where the facts alleged necessarily import willfulness,[25] or that accused was sworn where the indictment alleges that he committed perjury, is unnecessary.[26] So, also, in an indictment for perjury on prosecution for violation of local option law it is unnecessary to allege the method in which the law was put into force,[27] and in Texas an indictment need not show the materiality of the testimony although it is held better policy to do so.[28]

Subornation of perjury.[See 8 C. L. 1345]—To support an indictment for subornation of perjury in violation of the homestead laws, it is not essential that the affidavit should have been subscribed as well as sworn to before the land officer.[29]

Variance.[See 8 C. L. 1346]—The ordinary rules as to variance apply.[30] An information is not limited by a complaint as to the mode of charging the offense provided it is based on the same transaction.[31]

Admissibility of evidence.[See 8 C. L. 1347]—The materiality of false testimony is a mixed question of law and fact,[32] unless there is no dispute as to what was said upon

App.] 19 Tex. Ct. Rep. 283, 103 SW 897. In allegation that defendant paid "M," administrator, whereas in fact he did not, unnecessary to negative expressly that he paid "M" personally. Blevins v. State [Ark.] 107 SW 393. Failure of indictment alleging that defendant swore that he did not do certain things to allege that he did, fatal. Moore v. State [Miss.] 44 S 817.

22. Charge that testimony was feloniously, falsely, and corruptly given, necessarily implies willfully or intentionally given. Blevins v. State [Ark.] 107, SW 393. Complaint charging that defendant in chancery suit filed sworn answer, false in specified portions, and such answer was used to dissolve injunction, good though not alleging intent to so use. Hoffman v. Allegan Circuit Judge, 150 Mich. 58, 14 Det. Leg. N. 610, 113 NW 584.

23. Wilkinson v. People, 226 Ill. 135, 80 NE 699.

Indictment sufficient: Indictment under form provided in Laws 1889, p. 86, c. 83, setting out court, cause, alleged false statement, scienter, and charging that defendant did unlawfully commit perjury. State v. Harris [N. C.] 59 SE 115. Indictment alleging that accused testified that he had not engaged or seen others engage in certain game at specified time and place, that he had done so and well knew fact when he testified. Howell v. Commonwealth, 31 Ky. L. R. 983, 104 SW 685. Indictment that defendant falsely and knowingly testified that certain marriage ceremony was performed between himself and certain person at certain time and place and by certain minister, followed by negation thereof, and allegation of truth and facts, sufficient as against charge of negative pregnant, there being no allegation of substantive fact that marriage occurred but merely allegation that defendant falsely testified. People v. Collins [Cal. App.] 92 P 513. Indictment charging willful giving under oath in judicial proceeding of false testimony on material issue sufficient, under § 134, Cr. Code Prac. Commonweatlh v. Combs, 30 Ky. L. R. 1300, 101 SW 312.

24. Commonwealth v. Combs, 30 Ky. L. R. 1300, 101 SW 312. Indictment not bad for failing to set forth verbatim provisions of ordinances creating police court and authorizing appointment of clerk to administer oath where ordinances set forth by number and general tenor recited. State v. Dineen, 203 Mo. 628, 102 SW 480.

25. Indictment for subornation of perjury in violation Timber and Stone Act, U. S. Comp. St. 1901, p. 1545. Van Gesner v. U. S. [C. C. A.] 153 F 46. Word "feloniously" inessential to indictment under Laws 1889, p. 86, c. 83, establishing form for bill of indictment for perjury without using word, and providing that such form shall be sufficient. State v. Harris [N. C.] 59 SE 115.

26. Term perjury implies lawfully administered oath. State v. Webber, 78 Vt. 463, 62 A 1018. Indictment in form prescribed by Vt. St. 5417, form 49, not demurrable for failure to allege accused was lawfully sworn. Id; State v. Sargood [Vt.] 68 A 49.

27. Where indictment showed publication of order as required by law, and information showed publication otherwise. Kelley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 204, 103 SW 189.

28. McVicker v. State [Tex. Cr. App.] 107 SW 834.

29. Requirement of subscription in officer's presence merely evidential. Nurnberger v. U. S. [C. C. A.] 156 F 721.

30. Where several persons held for perjury on joint complaint, before magistrate, separate information as to one in circuit court does not make crime charged therein different offense from that charged in complaint, since § 27, Rev. Pen. Code, providing that all persons concerned in commission of crime are principals, is not applicable to perjury, since § 169, provides that one procuring another to commit perjury is guilty of subornation of perjury, a separate offense. State v. Pratt [S. D.] 112 NW 152.

31. No material variance where information identical with complaint, except that it alleged false answer, was made with intent to use same on hearing of motion to dissolve injunction. Hoffman v. Allegan Circuit Judge, 150 Mich. 58, 14 Det. Leg. N. 610, 113 NW 584.

32. Error to submit purely as question of fact. Wilkinson v. People, 226 Ill. 135, 80 NE 699.

a given issue in which case it is purely a question of law.[33] The ordinary rules as to relevancy, materiality,[34] and competency, apply.[35] The fact that the perjured witness was sworn may be proved by witnesses.[36] In subornation of perjury, evidence material to the question of motive or intention is admissible.[37]

Sufficiency of evidence.[See 8 C. L. 1347]—The rule that the determination of an issue of fact in a criminal case is conclusive in a subsequent criminal proceeding against the same person is inapplicable to perjury.[38] The proof should show how and wherein the testimony upon which the perjury is assigned was material.[39] It must also conform to the allegations of the indictment[40] and prove all the material averments thereof.[41] Proof that an oath was administered in the presence of the court by any officer authorized to do so is sufficient to sustain an allegation that the person was sworn by the court or in court.[42] To authorize a conviction for perjury, there must be two witnesses testifying to the falsity of the statement, or one witness with strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the party and the legal presumption of his innocence.[43]

33. State v. Dineen, 203 Mo. 628, 102 SW 480.

34. Evidence that intention of applicants was to convey lands to defendants contrary to sworn statements, admissible. Van Gesner v. U. S., 153 F 46. Where indictment charged perjury in giving testimony on trial for conspiracy to obtain money by false pretenses, error to admit entire record of suit. Wilkinson v. People, 226 Ill. 135, 80 NE 699. Statement to witness after examination before grand jury, showing falsity of previous statements upon which perjury charge was based, admissible. Clay v. State [Tex. Cr. App.] 107 SW 1129. Where defendant swore marriage ceremony never occurred, evidence that same was illegal inadmissible. People v. Collins [Cal. App.] 92 P 513.

35. Competent: Under indictment for subornation of perjury under Timber and Stone Act (U. S. Comp. St. 1901, p. 1545), proof that land was valuable, not for timber but for grazing purposes, although tending to show lands not enterable under act. Van Gesner v. U. S., 153 F 46. Tract book of land office to show that lands applied for under false oath were public lands subject to entry. Nurnberger v. U. S. [C. C. A.] 156 F 721. For register to explain meaning of abbreviations used in tract book. Id. Clerk's authenticated minutes and record of trial and proceedings in case where perjury was alleged to have been committed, to show jurisdiction of court and pendency of action. State v. Pratt [S. D.] 112 NW 152. Complaint at variance from information as to matters disregarded as surplusage. Kelley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 204, 103 SW 189.

36. Testimony of witness that defendant was sworn by justice and oath administered, admissible. Clay v. State [Tex. Cr. App.] 107 SW 1129.

37. Regulation of land office corroborating defendant's testimony as to his understanding of the law by showing such understanding was that of land department until after alleged offense, admissible. Nurnberger v. U. S. [C. C. A.] 156 F 721. Testimony of defendant that his agreement with alleged perjured applicants for land was that future conveyance to him was optional and not binding and dependent on other facts, relieving him of criminal intent. Id.

38. Conviction for poisoning colts not res judicata of defendant's perjury in denying he poisoned them, since conviction may be on evidence of single witness, while in perjury conviction cannot be so had. State v. Sargood [Vt.] 68 A 49.

39. Askew v. State [Ga. App.] 59 SE 311. Mere admission of testimony insufficient to show materiality. State v. Dineen, 203 Mo. 628, 102 SW 480. Mere fact that in prosecution for seduction defendant herein testified that he did not have certain conversation with defendant therein not necessarily material, though false. McVicker v. State [Tex. Cr. App.] 107 SW 834. Evidence insufficient to show materiality. Wilkinson v. People, 226 Ill. 135, 80 NE 699.

40. Where alleged that defendant testified that he paid M, and proof showed that he testified that he paid one claiming to be M, held variance. Blevins v. State [Ark.] 107 SW 393.

41. Where indictment is based on such facts, failure to require prosecution to show that defendant was present at time and place stated and committed acts charged erroneous. Howell v. Commonwealth, 31 Ky. L. R. 983, 104 SW 685. Mere improbability of testimony, without affirmative proof of falsity, insufficient. Blevins v. State [Ark.] 107 SW 393. Evidence sufficient to show false swearing to justification as surety on bail bond. People v. Davis, 122 App. Div. 569, 107 NYS 426. Evidence sufficient to sustain indictment. People v. Collins [Cal. App.] 92 P 513.

42. Where information alleges that defendant was sworn in court, and evidence shows that oath was administered by duly elected, qualified, and acting clerk in open court, in presence of judge, sufficient. State v. Pratt [S. D.] 112 NW 152.

43. State v. Pratt [S. D.] 112 NW 152. Two witnesses or one corroborated by circumstances. Parham v. State [Ga. App.] 60 SE 123. Under art. 786, Code Crim. Proc., two credible witnesses or one credible witness strongly corroborated. Conant v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 283, 103 SW 897. Must be acquitted unless two wit-

No legal rule can be laid down to measure the extent of the corroboration except that some corroboration must exist, the amount of which is in each particular case for the determination of the jury,[44] and where the jury finds that the corroboration is sufficient, and the trial judge is satisfied with their finding, the latter's discretion in refusing a new trial will not be interfered with unless manifestly abused.[45] An accomplice being a discredited witness, there must be at least one credible witness independent of the accomplice.[46] Motive is a material fact to be proved in statutory indictment for subornation of perjury.[47]

Instructions.[See 8 C. L. 1348]—The jury should be informed by the charge which assignments of false testimony are submitted to them as a basis for their verdict.[48] Instructions should not be misleading[49] and should not increase the burden of proof.[50] Instructions not warranted by the evidence,[51] and instructions amply covered by previous instructions, are properly refused.[52] It is proper for the court to select one or more assignments of perjury and inform jury of their materiality,[53] to instruct as to the meaning of terms employed where necessary,[54] and it is not error to instruct conversely.[55] An applicant for citizenship is not an accomplice in such a sense as to require the jury to be cautioned in respect to his testimony where it

nesses or one strongly corroborated testify against defendant. Howell v. Com., 31 Ky. L. R. 983, 104 SW 685. Sufficient where testimony of one witness tended directly to support and corroborate and that of another tended to support testimony of witness whose testimony traversed alleged false testimony of accused. Kelley v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 204, 103 SW 189. Insufficient where only one witness, whose incentive to testify to perjury was pardon from sentence in penitentiary and corroborative evidence inconclusive. State v. Pratt [S. D.] 112 NW 152.

44. Parham v. State [Ga. App.] 60 SE 123. Enough if corroborating circumstances, though slight, are sufficient to satisfy jury. Id.

45. Evidence held to warrant conviction on counts. Parham v. State [Ga. App.] 60 SE 123.

46. Charge that if jury finds witnesses' testimony true, and that he is accomplice, and his testimony shows or tends to show defendant guilty of perjury, they could not convict unless there was other testimony tending to show guilt, erroneous. Conant v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 283, 103 SW 897.

47. Evidence that defendants induced other persons to file on or purchase lands in same vicinity, which were subsequently conveyed to defendants in violation of oath in stone and timber act, admissible to show motive. Van Gesner v. U. S., 153 F 46.

48. Conant v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 283, 103 SW 897. Acts regarded and alleged material should be specifically pointed out. Id. Instruction that if jury found certain facts which court charged were material they should convict, but which failed to charge that defendant must have falsely testified thereto, erroneous. Id. Instruction ignoring question of materiality of issue upon which alleged false testimony was given, erroneous. Wilkinson v. People 226 Ill. 135, 80 NE 699.

49. Instruction to convict if any statement by affiants was falsely and intentionally sworn, when there was evidence tending to show that some recitals, as affiants understood land law, were inapplicable to their entries, and their swearing same was not therefore willful and corrupt, misleading. Nurnberger v. U. S. [C. C. A.] 156 F 721. Instruction for perjury on trial for carrying pistol unlawfully, using "or" instead of "and" in charge that defendant "did carry on or about his person," not misleading. Schooler v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 403, 106 SW 359.

50. Instruction to acquit, if offense upon which false testimony was predicated occurred at different time than alleged, not erroneous as requiring defendant to show offense occurred at other time. Clay v. State [Tex. Cr. App.] 107 SW 1129.

51. Proper to refuse instruction that where mariner comes to United States and though following business as mariner has intention of becoming citizen, abode in American vessels constitutes residence in United States in absence of evidence showing such facts. Holmgren v. U. S. [C. C. A.] 156 F 439. Defendant not prejudiced by instruction authorizing jury to consider records and proceedings in prior case in passing on question of deliberate and willful falsity of defendant's testimony and showing motive therefor. Collins v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 138, 101 SW 992.

52. Not error to fail to define "deliberately" where court charges that if false statement was made through inadvertence, under agitation or by mistake, defendant was not guilty. Clay v. State [Tex. Cr. App.] 107 SW 1129.

53. Conant v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 283, 103 SW 897.

54. Instruction that willfully meant done with evil intent or without reasonable grounds to believe act to be lawful, correct. Clay v. State [Tex. Cr. App.] 127 SW 1129.

55. Not error to charge conversely after charge of affirmative facts sufficient to convict. Clay v. State [Tex. Cr. App.] 107 SW 1129.

does not appear that the defendant gave the false testimony at the instigation of such applicant.[56]

PERPETUATION OF TESTIMONY, see latest topical index.

PERPETUITIES AND ACCUMULATIONS.

§ 1. The Rule Against Perpetuities and Accumulations; Its Nature and Applications, 1167.
§ 2. Computation of the Period and Remoteness of Particular Limitations, 1167.
§ 3. Operation and Effect, Complete and Partial Invalidity, 1171.

§ 1. *The rule against perpetuities and accumulations; its nature and applications.* See 8 C. L. 1348—Future estates must be so limited that in every possible contingency they must vest within the statutory period.[57] It is the postponement of the vesting that is prohibited and not merely the postponement of the possession,[58] and a limitation is not void if there are persons in being who can make absolute transfers.[59] Where trustees are given power to receive rents and profits pending their sale of realty, the power of alternation is not suspended by the fact that they may not act,[60] or that the interest of the beneficiaries is inalienable pending the trust. Under statutes providing that expectant estates shall be alienable in the same manner as estates in possession, a testamentary disposition of a reversion held under a deed is not invalid, though it suspends the absolute ownership of the property during two lives beyond that of the original life beneficiary.[61] The repeal of a statute of perpetuities after a testator's death does not affect the construction of his will with respect to the estates it purports to create.[62] Parties in interest cannot by agreement secure property to the heirs of living persons in evasion of the statute.[63]

§ 2. *Computation of the period and remoteness of particular limitations.* See 8 C. L. 1350—Whether a will violates the rule against perpetuities must be determined as of the date of the testator's death.[64] A will creating a power of appointment and

56. Evidence insufficient to show applicant accomplice. Holmgren v. U. S. [C. C. A.] 156 F 439.

57. Devise to executor to hold for 25 years from date of probate held void since probate which was condition precedent to vesting might be postponed for more than 21 years after death of testatrix. Johnson v. Preston, 226 Ill. 447, 80 NE 1001.

58. Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142.

Held valid: Bequest of stock to be delivered after seven years with provision that share of one should go to others should he die within the seven years held valid, stock vesting at death of testatrix. Orange County Trust Co. v. Morrison, 56 Misc. 88, 106 NYS 940. Discretionary power in trustees to hold for 25 years stock which at testator's death vested in residuary legatees. Lembeck v. Lembeck [N. J. Eq.] 68 A 337. Residue to two granddaughters, stated amounts to be paid to each on their arriving at different ages until age of 45, and provision for payments to survivor or to others in case both die. Hull v. Osborn [Mich.] 14 Det. Leg. N. 597, 113 NW 784. Provision that if any of descendants of a testator's child are minors at death of child, trustees should pay only income until they reach majority, did not prevent vesting of interest in them. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

59. Lease of land for any number of years does not violate statute against perpetuities since lessor and lessee may join in conveyance of fee and leasehold. In re Hubbell Trust [Iowa] 113 NW 512. Power in life beneficiary of testamentary trust to appoint either a life income or the corpus of the estate to her surviving husband does not violate the rule, though surviving husband may be born after testator's death. Ogden v. McLane [N. J. Eq.] 67 A 695.

60. Keyser v. Mead, 53 Misc. 114, 103 NYS 1091.

61. Real Prop. Law, Laws 1896, p. 567, c. 547, § 49. New York Life Ins. & Trust Co. v. Cary [N. Y.] 83 NE 598.

62. Cody v. Staples [Conn.] 67 A 1.

63. Gerard v. Beecher [Conn.] 68 A 438.

64. Will and codicil providing for creation of life trusts for benefit of widow and children when youngest child should become of age, but that before such division a sum should be invested for benefit of widow for life then to revert to the estate, not cured as to latter provision by fact that widow died during minority of youngest child. Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698. Validity of future estate depends on certainty of vesting within prescribed period and certainty must exist at time estate is created. Brown v. Columbia Finance & Trust Co., 30 Ky. L. R. 110, 97 SW 421.

a will attempting to exercise it will be read together in estimating the extent of a suspension,[65] but a trust deed and a will, not shown to be executed in furtherance of any scheme, has been considered separately.[66] A minority is deemed a part of a life and not a fixed period.[67] A limitation for a period not measured by lives,[68] or a suspension during the minority of a child born after testator's death,[69] is invalid. Particular estates are considered below.[70]

65. Where will limited trust estate on life of "longest liver" of two daughters, testamentary appointment by one of the daughters for another life held invalid. Farmers' Loan & Trust Co. v. Kip, 120 App. Div. 347, 104 NYS 1092.

66. Validity of testamentary disposition of trust property as part of residue held not affected by deed of trust. New York Life Ins. & Trust Co. v. Cary [N. Y.] 83 NE 598, rvg. 120 App. Div. 265, 105 NYS 125; Farmers' Loan & Trust Co. v. Bostwick, 120 App. Div. 271, 105 NYS 130, following New York Life Ins. & Trust Co. v. Cary, 120 App. Div. 265, 105 NYS 125.

67. One third of residue to each of three families of grandchildren, said shares "not to be paid to said children or any of them until the youngest of said three families of children becomes 21 years of age," held valid. Toher v. Crounse, 57 Misc. 252, 107 NYS 990. Trust held to continue during minority of youngest child living at testator's death and not of all children of the three families then living. Id.

68. Held void: Trust to sell within 5 years when $50,000 could be realized. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99. Direction to accumulate rents, etc., meanwhile held also invalid. Id. Where property was devised to children but will provided that executor was to hold it for five years, provision that if any devisee should die within the five years his share should go to his child or children. In re Phillips Estate, 56 Misc. 96, 107 NYS 388.

Held valid: Trust to hold land for 5 years for purpose of paying a son income monthly, and, in case he should die, property to go to others. Keenan v. Keenan, 122 App. Div. 435, 107 NYS 152.

69. Trust for grandchildren held not to let in after-born ones. Toher v. Crounse, 57 Misc. 252, 107 NYS 990.

70. Provisions held valid: Devise to wife and four children to be divided when youngest child should become 21, "until such time and during his minority," wife to have use of the property, did not suspend for period not measured by lives nor during existence of more than two lives. Jacoby v. Jacoby, 188 N. Y. 124, 80 NE 676. Direction to hold property in trust until youngest of several grandchildren should become 25 years old, they then to take in fee. Coston v. Coston, 118 App. Div. 1, 103 NYS 307. Testamentary provisions held at most to postpone vesting of estate for two lives. Hull v. Osborn [Mich.] 14 Det. Leg. N. 597, 113 NW 784. Where absolute ownership of stock to be distributed for benefit of wife and children was not suspended for more than two lives. Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403. Where trust fund was payable to grandchildren on death of daughter and youngest of grandchildren. Dexter v. Watson, 54 Misc. 484, 106 NYS 80. Direction for placing $50 at interest each year, in favor of each of two children until younger should be 20, held not unlawfully to suspend absolute power of alienation. In re Haines' Estate, 150 Cal. 640, 89 P 606. Limitations that devisees should reside on a farm, that it was never to be sold, that no stock to be pastured, etc., with provisions over, held to apply only while land was held by devisees and not to offend rule. Holt's Ex'r v. Deshon, 31 Ky. L. R. 744, 103 SW 281. Will construed to create life estate in wife and children with limitation over to grandchildren, and held valid. Ennen v. Air, 31 Ky. L. R. 1184, 104 SW 960. To daughter for life then to her two sons for life remainder in fee to son's children did not suspend beyond lives and 21 years and 10 months. Forsman v. Hofstetter [Ky.] 107 SW 796. Devise of real estate in trust during the life of testator's three daughters, then in being, the rents and profits to be divided equally among them, or in case of the death of either to her heirs, and upon the death of the survivor to be sold and the proceeds divided among testator's grandchildren, postpones the alienation thereof only during the lives of the daughters. Dwyer v. Cahill, 228 Ill. 617, 81 NE 1142. Powers of appointment of legal estate at termination of trust in case daughter died before reaching 21 without leaving will or issue. Keyes v. Northern Trust Co., 227 Ill. 354, 81 NE 384, afg. 130 Ill. App. 508. The vesting of a testamentary gift is not too remote where the event which makes it absolute must occur at or before the expiration of a life in being. Storrs v. Burgess [R. I.] 67 A 731. Income to wife and daughter, entire income to go to survivor, and provision that if wife survived she should have same for life with remainders over. Id. Provision for widow held not to extend a trust over three lives, but only to make a charge on the residue. People's Trust Co. v. Flynn, 188 N. Y. 385, 80 NE 1098. Gift to university contingent on death of son without issue, estate to be held by trustees as perpetual fund and income used for object named. In re Durand, 56 Misc. 235, 107 NYS 393. Provision that title of any devisee who might die within five years should be divested. In re Phillips' Estate, 56 Misc. 96, 107 NYS 388. Will held to create four **distinct trusts** each for one life, hence there was no violation. Bascom v. Weed, 53 Misc. 496, 105 NYS 459. Two separate trusts for benefit of two persons in being at death of testatrix held valid. Farmers' Loan & Trust Co. v. Shaw, 56 Misc. 201, 107 NYS 337.

Held void: A devise to the heirs of a living person unless it appears that these are his children violates the statute against perpetuities, since until the death of such person his heirs cannot be known, and they may be the issue of children unborn at testator's death. Grant v. Stimpson, 79 Conn.

Charitable gifts.[See 8 C. L. 1352]—Property may be given by will to a corporation to be formed after testator's death if the corporation is to be formed and the property vested in it within the lives of two persons in being when the will is executed.[71]

Accumulations of income.[See 8 C. L. 1352]—All accumulations of income are prohibited in New York except where they are for the benefit of minors and terminate with their minority,[72] and this prohibition applies to charitable gifts.[73] When no

617, 66 A 166. Remainder to lawful heirs of a daughter. Harmon v. Harmon [Conn.] 66 A. 771. Income to wife for life, then semi-annually to each of five sons or legal representatives of any who may have deceased, until death of all the sons, principal then to be equally divided among their issue per stirpes, held invalid as to gift over of both principal and income. Lepard v. Clapp [Conn.] 66 A 780. Devise to son, absolutely, on death of both wife and daughter, "or" in case he should die before that time to his legal heirs at law, held to give son a vested remainder in fee, limitation over in case of his not surviving mother and sister being void. Cody v. Staples [Conn.] 67 A 1. Provision in trust deed that trustee might pay income to children or descendants of a life tenant during remainder of their respective lives. Angell v. Angell [R. I.] 68 A 583. Life beneficiary's appointment to her children for life, remainder to their children. Brown v. Columbia Finance & Trust Co., 30 Ky. L. R. 110, 97 SW 421. To trustees during minority of four children, to be divided on all arriving of age. Whitefield v. Whitefield, 108 NYS 110. Trust to endure for minority of four children held void and not saved by a power of sale which did not terminate trust. Whitefield v. Crissman, 55 Misc. 468, 106 NYS 630. Income to be divided among sisters, a cousin, a niece, and father, and three years after death of these, estate to be distributed among nephews and nieces. Farmers' Loan & Trust Co. v. Cummings, 108 NYS 882. Income to children for twenty-five years, and to their children if they should have any. In re Fay's Estate [Cal. App.] 89 P 1065. Property to be held by trustees during lives of wife and children and for further period of thirty years if there should be lawful issue of any child in esse, etc. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184. To widow for life, remainder to son in trust for life of daughter, then to her bodily heirs for life, and in fee should they have issue, reversion to devisor on failure of issue. Shepperd v. Fisher, 206 Mo. 208, 103 SW 989. Trust provisions in favor of children and grandchildren. Bradford v. Blossom, 207 Mo. 177, 105 SW 289.

71. St. John v. Andrews Institute for Girls [N. Y.] 83 NE 981.

72. Prohibition of division of estate for five years without direction for payment of annuities or expenses held invalid. In re Phillips' Estate, 56 Misc. 96, 107 NYS 388. Direction that a portion of accumulations be held in trust during life of a child, remainder to his children, held void. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99. Provisions for payment of income, less certain sums, until beneficiary was 25, deducted sums to be added to principal and this then paid over less enough to produce a certain income for his life, held invalid in so far as accumulations were made part of fund to be held after majority. Cochrane v. Alexander, 56 Misc. 212, 107 NYS 587. Infant entitled to all accumulations on attaining majority. Id. A direction that no interest shall be collected on a mortgage during the life of the mortgagor does not call for an unlawful accumulation of interest. In re Harteau's Will, 53 Misc. 201, 104 NYS 586. **Implied accumulations** as well as express ones are within the statute. St. John v. Andrews Institute for Girls [N. Y.] 83 NE 981.

NOTE. "Sole benefit" in directions for accumulations under New York statutes: Under New York statutes all directions for the accumulation of the rents and profits of land or the income of personal property are void, unless such accumulation is directed to commence within the time limited for the suspension of the power of alienation or absolute ownership is for the benefit of one or more minors then in being, and is to terminate at or before the expiration of their minority. 1 Rev. St. 726, §§ 37, 38; Id. 773, § 3. See, also, Laws 1896, c. 547, § 51; Laws 1897, c. 417, § 4. A recent case, Cochrane v. Alexandre, 107 NYS 587, has confirmed the rule laid down by Pray v. Hegeman, 92 N. Y. 508, that the accumulation directed must be for the sole benefit of the infant beneficiary, and that, therefore a direction that the income only from the accumulated fund be paid to the infant after his majority and that at his death after majority the fund shall go to another is void. See 7 Columbia L. R. 403. The rule requires that the minor shall take the accumulations in enjoyment upon attaining his majority (Pray v. Hegeman, 92 N. Y. 516), but its effect upon a direction to accumulate for a minor, A, and to pay over the accumulated fund to him upon majority, but if he die during minority, then to pay over that fund to another, B, has not as yet been definitely settled. The court of appeals has dealt directly with the question only in a solitary dictum (Smith v. Parsons, 146 N. Y. 116, 120), although in Wood v. Mitcham, 92 N. Y. 375, where the question was not raised or noticed by the court, the result of the decision was to hold such a direction over valid. In the aforesaid dictum the court said that there was no legal objection to such a direction over to either a minor or an adult, provided the accumulations had not vested in A as paid in. The question then arises as to whether accumulations must vest as they accrue in order that a direction to accumulate may be valid. It is settled that A must be entitled to the next eventual estate in the realty (Manice v. Manice, 43 N. Y. 303; Pray v. Hegeman, 92 N. Y. 508; Reviser's Notes, 3 Rev. St. 578 [2nd Ed.]; and see Laws 1896, c. 547, § 52), and that this estate must be vested in him in order that the accumula-

tion may be said to be for his benefit (Manice v. Manice, 43 N. Y. 379, 380). Ordinarily the deed or will vests the estate, and the interposition of the minority is not a condition precedent. Id. The same rules appear now to apply to the corpus of personaly and with equal reason. 7 Columbia L. R. 73; Everitt v. Everitt, 29 N. Y. 39; Paterson v. Ellis, 11 Wend. [N. Y.] 259. But see Laws 1897, c. 417, § 5, where the words "entitled to the expectant estate" are omitted. If, then, the expectant estate must vest in the minor in order that the accumulations may be said to be for his benefit, it would seem a fortiori that the accumulations should vest as they accrue. In Manice v. Manice, 43 N. Y. 379, 380, it was laid down that accumulations must be for the sole benefit of the minor; that, therefore, the accumulations must vest; but that they could not vest if the expectant estate in the realty was contingent; and that, therefore, the estate in the realty must be vested. In this argument the court assumed as a premise that the accumulations must vest, and such seems to be the law. Draper v. Palmer, 27 N. Y. St. Rep. 510; Smith v. Parsons, 146 N. Y. 121; Smith v. Campbell, 75 Hun [N. Y.] 155, 161; Willets v. Titus, 14 Hun [N. Y.] 554; Gilman v. Healy, 1 Dem. [N. Y.] 404, 408; and see Matter of Lehman, 2 App. Div. [N. Y.] 531; and Laws 1896, c. 547, § 52; Laws 1897, c. 417, § 5, which assume vesting. Revisers' Notes, 3 Rev. St. [2nd Ed.] 578.

According to the dictum then, in Smith v. Parsons, 146 N. Y. 116, a direction over to B would be invalid, but the lower courts, in several instances, have intimated that vested accumulations might be divested upon the death of A during his minority. Willets v. Titus, 14 Hun [N. Y.] 554; Gilman v. Healy, 1 Dem. [N. Y.] 408; and see Bolton v. Jacks, 6 Robt. [N. Y.] 166, 230. In the case last cited the court reasoned that by the act of God it was impossible to comply with the provisions of the statute by giving the accumulations to the minor at majority and that therefore, if there were no provision in the will, the fund would have to revert back and the testator die intestate as to it; hence that there was no reason why the testator should not anticipate this result, treat the fund as part of his original estate, and devise it over to whom he chose. But this, of course, assumes that the accumulations did not vest as they accrued. It has also been stated that a devise over of the corpus, if the minor dies before majority, carries with it the accumulations (Gilman v. Healy, 1 Dem. [N. Y.] 408), but this is repudiated by Draper v. Palmer, 27 N. Y. St. Rep. 510. In Smith v. Campbell, 75 Hun [N. Y.] 158, 159; Smith v. Parsons, 146 N. Y. 120, it was stated that a gift over to B, an adult, would be void under the statute, but that a gift over to B, a minor, might not be. There should be no distinction between these two cases, for since A takes a vested interest in the accumulations, B, in either case, takes only a contingent interest, and the accumulation is not for his sole benefit. A distinction, however, must be made between the question whether a direction under the statute is good or bad, and the question whether the statute operates upon a given direction at all. The statute operates upon "all directions for the accumulation * * * for the benefit of one or more persons." Thus, if there is a direction to accumulate for A and pay the accumulated fund to him at his majority provided he is unmarried, the statute operates upon it although the gift is contingent, and the result is that the direction is void, for although the accumulation is for A's benefit, it is not for his sole benefit. See Pray v. Hegeman, 92 N. Y. 514. So in the case of a direction over to B the accumulation is equally for his benefit, and the statute operates upon it, whether B is a minor or an adult, and makes the direction bad. It seems, therefore, that every direction over is void under the statute. Smith v. Parsons, 146 N. Y. 116, and Draper v. Palmer, 27 N. Y. St. Rep. 510. See Chaplin, Susp. Pow. Allen, § 263 et seq. But compare Reeves, Real Prop. § 677, where a direction over is supported on the ground of the practical necessity of the case.

The remaining question then, is whether by reason of the void direction over the primary direction to accumulate for A is avoided. This depends upon the meaning of the words "sole benefit." If they mean the total possible legal benefit, it is evident that the primary direction would likewise be void, for the direction over involved a legal benefit to the contingent remainderman sufficient to make the statute operate upon it, thus subtracting from A's necessary total possible legal benefit. However, it would seem that the requirement of the words "sole benefit" and the apparent and reasonable meaning of the statute are satisfied if A has a vested interest both in the expectant estate and in the accumulations as they accrue, to become absolute in enjoyment in him upon his attaining his majority (Manice v. Manice, 43 N. Y. 303; Pray v. Hegeman, 92 N. Y. 508), and that the mere addition of a void condition subesquent should be insufficient to invalidate an otherwise valid primary direction. It is doubtful if any court would adopt the opposite construction. The clear object of the statute is to protect and benefit a living infant; the court likewise will strive to protect him, and hence to uphold the primary direction. Conceivably courts may continue to ignore the operation of the statute upon the direction over (Willets v. Titus, 14 Hun [N. Y.] 554; Bolton v. Jacks, 6 Rob. [N. Y.] 166; Gilman v. Healy, 1 Dem. [N. Y.] 404; Smith v. Campbell, 75 Hun [N. Y.] 155), on the ground that the object of the statute has been satisfied, or on the ground of the practical necessity of the case. However, if this be so, it is difficult to see how the statute could operate at all upon a primary direction giving a mere contingent interest to an infant, and yet the court in Manice v. Manice, 43 N. Y. 303, expressly stated that such a direction would be invalid under the statute. See Smith v. Parsons, 146 N. Y. 120. Unless both directions are held valid, it is submitted that the practical results of the view advanced here are the better, for if the other view be taken, i. e., that "sole benefit" means total possible legal benefit, both directions are invalidated, thus defeating the apparent object of the statute, the policy of the court as to infants, and the intent of the testator, for the infant will take the accumulations as they accrue, since he is the person pre-

valid direction is given for the accumulation of rents and profits pending a legal suspension of the power of alienation or ownership, such rents and profits belong to the persons presumptively entitled to the next eventual estate.[74] A direction for the payment of income is not rendered invalid because the income proves greater than the total of the sums directed to be paid,[75] but in such case the surplus will be paid to the persons entitled thereto under the statute.[76] On accumulation in the nature of a discretionary and temporary withholding of income as incidental to the general purpose of a trust is not within an inhibition against the permanent accumulation of income except during the minority of the beneficiary.[77]

§ 3. *Operation and effect, complete and partial invalidity.*[See 8 C. L. 1352]—Invalid provisions not inseparably connected with a general scheme may be rejected without affecting the valid ones.[78] Under the California code, a direction for accumulation for a longer term than during the minority of beneficiaries is void only as to the time beyond the minority.[79]

PERSONAL INJURIES; PERSONAL PROPERTY; PERSONS; PETITIONS, see latest topical index.

PETITORY ACTIONS.[80]

This topic treats of matters peculiar to petitory actions under the Louisiana code.

In a petitory action the only parties necessary are plaintiff claiming ownership and defendant in possession, though latter may bring in vendor or lessor.[81] A petition showing proceedings whereby petitioner's interest was divested, and alleging that such proceedings were nullities, presents a petitory action.[82]

PEWS; PHOTOGRAPHS; PHYSICAL EXAMINATION; PHYSICIANS AND SURGEONS; PILOTS, see latest topical index.

PIPE LINES AND SUBWAYS.[83]

The scope of this topic is noted below.[84]

An underground tunnel railroad largely beneath water and upon private prop-

sumptively entitled to the next eventual estate. 38 N. Y. Law Jour. No. 132; 7 Columbia L. R. 403.—From 8 Columbia L. R. 298.

73. Laws 1893, p. 1748, c. 701, as amended by Laws 1901, p. 751, c. 291, providing that gifts to charity "in other respects" valid shall not be held invalid by reason of indefiniteness of beneficiaries, does not as to such gifts abrogate the prohibitions against accumulations. St. John v. Andrews Institute for Girls [N. Y.] 83 NE 981.

74. Where property was given by will to a corporation to be formed as soon after testator's death as practicable, and to another only in a contingency which did not happen, corporation to be formed was, prior to formation, presumptively entitled to next eventual estate, but not being in esse it could not take income as it accrued, and hence income accruing between date of testator's death and formation of corporation passed as intestate property to next of kin. St. John v. Andrews Institute for Girls [N. Y.] 83 NE 981.

75. In re Harteau's Will, 53 Misc. 201, 104 NYS 586.

76. Where under will no person was entitled to "next eventual estate," surplus went as intestate property. In re Harteau's Will, 53 Misc. 201, 104 NYS 586.

77. Devise placing management of estate in hands of trustee with discretion as to disposal of accumulations and termination of trust did not infringe Act April 18, 1853 (P L. 503). In re Spring's Estate, 216 Pa. 529, 66 A 110.

78. Testator's scheme for conversion and distribution not upset by suspension of power of sale until a certain price could be obtained and provision for accumulations meanwhile. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99. Provision that if a child should die within five years his share should go to his children could be eliminated. In re Phillips' Estate, 56 Misc. 96, 107 NYS 388. Testator held not to intend to dispose of independent estates regardless of general plan. Sheppard v. Fisher, 206 Mo. 208, 103 SW 989. Provision for setting apart trust fund to widow held invalid in toto. Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698.

79. Direction for placing money at interest in favor of grandchildren until youngest should be 20. In re Haines' Estate, 150 Cal. 640, 89 P 606.

80. See 8 C. L. 1353.

81. Doucet v. Fenelon [La.] 41 S 908.

82. Brought at plaintiff's risk. Doucet v. Fenelon [La.] 44 S 908.

83. See 8 C. L. 1354.

84. It includes only matters peculiar to

erty is not a street railway under the statute.[85] The right to lay conduits in the public streets is generally dependent upon the character of the corporation, the statute of the state,[86] and the consent of the municipality [87] for which reasonable conditions may be imposed.[88] The right to remove conduits may be barred by laches.[89]

A borough may levy annual and mileage license taxes on the pipes of a natural gas company maintained in its streets [90] on the theory that it enables the municipality to discharge without cost to itself the duty of exercising proper surveilance over the company.[91] It is no defense to a recovery of such an annual stipulated sum that the payments have been diverted by the city to an illegal use,[92] or that the city has granted similar privileges to competing corporations.[93]

The power of locating the foundations and walls of a subway may be delegated by the city council to city officials [94] under suitable rules and regulations,[95] and the adoption of any plan for making subways, and securing the rights of the public, will not be interfered with unless the council has acted in bad faith.[96] A franchise conferring upon a private lessee the right to use a public subway for railroad purposes will be strictly construed against the lessee and held to confer only powers expressly

underground conveyance. It excludes subway companies as common carriers (see Carriers, 9 C. L. 466), or as employers of labor (see Master and Servant, 10 C. L. 691), and matters relating to the supplying of the public with gas (see Gas, 9 C. L. 1532), or water (see Waters and Water Supply, 8 C. L. 2262). The exercise of the right of eminent domain is also treated elsewhere (see Eminent Domain, 9 C. L. 1073).

85. Laws 1886, p. 919, c. 642, re-enacted in Laws 1890, pp. 1108, 1109, c. 565, §§ 91-3, relating to street surface railroads. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909.

86. Act May 8, 1889 (P. L. 136), providing for incorporation of companies supplying electricity authorizes change from pole and wires to conduits. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A 72. St. 1906, p. 743, c. 520, §3, construction of subways in Cambridge authorizes railroad commissioners to decide number of subway stations and gives mayor power to locate. Wardwell v. Railroad Com'rs [Mass.] 83 NE 869. Since Laws 1890, p. 1089, c. 565, § 16, embodied Tunnel Act 1880 (Laws 1880, p. 872, c. 582), and corrected unconstitutional features thereof as to corporations thereafter created, and Laws 1890, p. 1134, c. 565, § 181, provided that repeal of prior laws specified including act of 1880, should affect no right acquired prior to May 1, 1891, and § 16 was amended by Laws 1892, p. 1540, c. 702, and made retroactive so as to include corporations organized under Laws 1850, p. 211, c. 140, and amendatory and supplemental acts and to conform with act of 1880, ordinance adopted December 31, 1890, permitting construction of tunnel under New York city streets valid. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909.

87. Where statute authorizing change to conduits expressly ratified all privileges theretofore granted unnecessary to secure new consent to use streets for conduits instead of poles, under Act May 8, 1889 (P. L. 136). Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A 72. § 3550, Rev. St. 1906. City of Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 NE 440.

88. Payment of stipulated sum to compensate city for supervision of and keeping street in repair proper. City of Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 NE 440.

89. Barred where change from pole to conduit under Act May 8, 1889 (P. L. 136), unobjected to for more than six years. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A 72.

90. Kittanning Borough v. Consolidated Natural Gas Co. [Pa.] 68 A 728.

91. Kittanning Borough v. Consolidated Natural Gas Co. [Pa.] 68 A 728. Four thousand dollars annually not unreasonable for thirty miles of piping. City of Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 NE 440.

92. Where city illegally diverted payments to general revenue fund. City of Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 NE 440.

93. No defense that city granted rights to natural gas companies which destroyed profits, no exclusive franchise being granted. City of Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 NE 440.

94. Ordinance not invalid for delegating power to city engineer. People v. Grand Trunk Western R. Co., 232 Ill. 292, 83 NE 839.

95. Under rules governing department of water supply, gas and electricity, providing when application has been made to electrical subway company and space been assigned for conduits, consent of commissioner must be obtained before conductors are placed, subway company may not (In re Long Acre Elec. L. & P. Co., 188 N. Y. 361, 80 NE 1101) refuse application because consent of commissioner not first obtained (Id.).

96. Mere fact that engineers of experience think another plan better insufficient. People v. Grand Trunk & Western R. Co., 232 Ill. 292, 83 NE 839. Whether subway in street eighty feet wide under elevated railroad track shall be sixty-six feet wide, question solely for city authorities in absence of unreasonable or arbitrary action. Id.

granted.[97] So, also, a licensee of the right to construct a conduit takes it subject to the right of the municipality to construct other local improvements.[98] Hence since the right to use the streets for subways includes the right to use the space under the sidewalks.[99] A private wall extending under the sidewalk upon property acquired by a subway railroad may be removed where such space is a present or future necessity for the railroad.[1]

The rapid transit act confers upon the board of rapid transit commissioners all powers necessary to effectuate the speedy, proper, and adequate construction of subway,[2] and the city is a proper formal party to an application by the board to secure approval of a report of the commissioners authorizing a change of route of the subway.[3]

An owner of the fee of portions of certain public streets has the right to lay pipes in the bed of the street so long as they do not interfere with its use by the public and may make the necessary excavations in the street to enable him to effect his purpose.[4]

PLACE OF TRIAL; PLANK ROADS; PLATE GLASS INSURANCE, see latest topical index.

PLEADING.

§ 1. **Principles Common to All Pleadings, 1173.** Interpretation and Construction in General, 1182. Profert and Oyer, 1185. Exhibits, 1186. Bills of Particulars, 1186.
§ 2. **The Declaration, Count, Complaint, or Petition, 1189.** General Rules, 1189. Consolidation of Suits, 1192. Joinder of Causes of Action, 1192. Election, 1197. Splitting Causes of Action, 1197. Prayer, 1197.
§ 3. **The Plea or Answer, 1198.** General Principles, 1198. Denials and Traverses, 1201. Confession and Avoidance, 1202.
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§ 12. **Time and Order of Pleadings, 1240.**
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The scope of this topic is noted below.[5]

§ 1. *Principles common to all pleadings. General rules.* See 8 C. L. 1355—In code

97. Right to use public subway for railway held not to confer right to use ducts for transmission, electric currents for sale to third parties. City of New York v. Interborough Rapid Transit Co., 55 Misc. 138, 106 NYS 296.

98. Fact that license to construct steam conduit was prior in time and to public service corporation gives no rights superior to those of private owner building vault under municipal license, though construction thereof required licensee to take additional precautions for protection and maintenance of conduit. New York Steam Co. v. Foundation Co., 108 NYS 84.

99. Allegheny County Light Co. v. Booth, 216 Pa. 564, 66 A 72.

1. Where brick wall blocking passageway from building to subway extended into subway station. Potter v. Interborough Rapid Transit Co., 54 Misc. 423, 105 NYS 1071.

2. Under Rapid Transit Act (Laws 1891, p. 3, c. 4, amended by Laws 1894, p. 1880, c. 752, and Laws 1900, p. 1349, c. 616), board may issue permits to builders to use and open streets without action by municipality when constructing such subway itself but not where private corporation is constructing. Rapid Transit Subway Const. Co. v. Coler, 105 NYS 824.

3. In re Rapid Transit Com'rs, 119 App. Div. 196, 104 NYS 671.

4. City ordinance forbidding same invalid. Colegrove Water Co. v. Hollywood [Cal.] 90 P 1053.

5. This topic treats only of the general rules applicable to common-law and code pleading. For the sufficiency of pleadings in particular actions, reference should be had to the appropriate topics. Matters particularly applicable to equity pleading (see Equity, 9 C. L. 1110), and to affidavits of merits of claim or defense (see Affidavits of Merits of Claim or Defense, 9 C. L. 56), the necessity of verified pleadings and the sufficiency of the verification (see Verification, 8 C. L. 2255), and all questions in regard to set-off and counterclaim (see Set-off and Counterclaim, 8 C. L. 1875), have been excluded.

states the only proper pleadings are those designated by the code.[6] In code states it is not necessary that any particular name be given a pleading, but it is sufficient if it states facts constituting a cause of action or defense.[7] So, too, the allegations of the pleading, and not the name given to it by the pleader, determine its character.[8]

Where the court is of limited or special jurisdiction, facts bringing the cause within its jurisdiction must be alleged.[9] Except in local actions, facts justifying the venue need not be alleged.[10] Time[11] and place[12] should be alleged, if material. One seeking to avail himself of a statute must allege facts sufficient to bring himself within its provisions.[13] In pleading an ordinance, so much of its language must be stated as will enable the court to judge whether its provisions offer a ground for the action or defense in support of which the authority of the ordinance is invoked.[14] Foreign statutes must be pleaded if relied on.[15] In declaring on a written instrument, the pleader may set it out in full or according to its legal effect, but must do one or the other.[16] A general custom need not be pleaded, but a custom obtaining only in a particular district or neighborhood must be.[17] One is not ordinarily bound to negative defenses,[18] except such as are apparent on the face of his pleading.[19] The

6. Motion to serve an "amended and supplemental answer" will be denied, since no such pleading is recognized by the code, and relief can only be obtained by separate consecutive applications. Washington Life Ins. Co. v. Scott, 52 Misc. 639, 103 NYS 929.

7. Mastin v. Bartholomew [Colo.] 92 P 682. Failure to style petition in suit for injunction a "petition in equity" held not ground for dismissing it, since, under Civ. Code Prac. § 10, it could be transferred to proper docket during court when it convened. Owen County Burley Tobacco Society v. Brumback [Ky.] 107 SW 710.

8. If facts pleaded in answer are sufficient to authorize granting of affirmative relief, and affirmative relief is prayed for therein, court should treat answer as cross petition, regardless of what pleader may call it. Brown v. Massey [Okl.] 92 P 246. Answer in action to quiet title held to be so treated. Id.

9. See Jurisdiction, 10 C. L. 512.

10. Omission to lay action in county under videlicet held not to affect jurisdiction of court to try case, since place of trial is determined by statute. Massuco v. Tomasi [Vt.] 67 A 551.

11. The petition must allege a time when every material or traversable fact transpires. Mandeville Mills v. Dale, 2 Ga. App. 607, 58 SE 1060. Allegation of time of assignment of draft held sufficient. Hicks v. Hamilton [Ga. App.] 59 SE 331. Time when different items of repairs for which recovery was sought were made held to have been alleged with sufficient precision. Busby v. Marshall [Ga. App.] 60 SE 376.

12. Place in which any contract was made or act done need not be alleged unless when, from nature of the case, place is material or traversable. Code 1899, c. 125, § 32. Mankin v. Jones [W. Va.] 60 SE 248. Place held immaterial in action in assumpsit on contract, action being transitory. Id.

13. Employer's liability act. Chicago, etc., R. Co. v. Lain [Ind.] 83 NE 632.

14. Pleading ordinance merely by reference to its title held insufficient on demurrer. Reed v. Newark Fire Ins. Co. [N. J. Law] 65 A 1053.

15. Loyal Mystic Legion of America v. Brewer, 75 Kan. 729, 90 P 247. Common or statute law as to fellow-servants. Wabash R. Co. v. Hassett [Ind.] 83 NE 705.

16. Complaint is bad on demurrer where it appears therefrom that terms or conditions of contract sued on which may be material have been entirely omitted. Cross v. Home Ins. Co., 154 F 679.

17. Wilmington City R. Co. v. White [Del.] 66 A 1009.

18. Cedartown Cotton Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289. Plaintiff is not bound to anticipate, nor to notice and remove in his declaration, every possible answer, objection, or defense with which his adversary may oppose him. Hastings v. Speer, 34 Pa. Super. Ct. 478. In action against city for damages for injury received by pedestrian because of defective sidewalks, held not necessary for plaintiff to anticipate and negative defense of contributory negligence. City of Henderson v. Sizemore, 31 Ky. L. R. 1134, 104 SW 722. In action for negligent injury of servant, plaintiff need not plead that answer did not result from risk assumed, or that it was not due to negligence of fellow-servants. Shaw v. Feltman, 121 App. Div. 597, 106 NYS 1043. Complaint need not affirmatively show that action is not barred by limitations. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196. Plaintiff in action on note held not bound to anticipate plea of limitations by setting up in complaint payments or memorandum on which he intends to rely to take case out of operation of statute. Church v. Stevens, 56 Misc. 572, 107 NYS 310. Answer in action of ejectment alleged that plaintiff had previously been adjudged a bankrupt, and that before that time he had abandoned land in controversy as his homestead, and that any right of action he might have had was vested in his trustee in bankruptcy. Held not necessary for answer to allege that bankruptcy court had not adjudged land to plaintiff, but if it had done so that was matter for plaintiff to present in his reply. Martin v. Smith, 31 Ky. L. R. 882, 104 SW 310. Is not anticipating defense to state facts which bring plaintiff's case

strict rules of pleading do not apply on proceedings by motion for judgment under the Virginia statute.[20]

Material facts should be alleged by direct and issuable averment,[21] and not left to inference [22] or pleaded by way of recital.[23] Matters peculiarly within the knowledge of one of the parties must be stated by him.[24] Facts, not conclusions, must be pleaded.[25] Matters peculiarly within the knowledge of the opposite party

within exception to general rule. Cleveland, etc., R. Co. v. Moore [Ind.] 82 NE 52.

19. If facts alleged reasonably tend to establish some defense which would defeat action, enough additional facts must be set out to negative such defense. Cedartown Cotton Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289.

20. Stimmel v. Benthall [Va.] 60 SE 765.

21. Must be directly and positively averred. Studebaker v. Taylor [Ind.] 83 NE 747. In action against railroad company to recover damages for burning grass and timber on plaintiff's land, held that petition was not subject to special exception because, instead of alleging amount of diminished value of land, it alleged its value before and after the injury, leaving it to simple calculation to determine amount. Ft. Worth, etc., R. Co. v. Brown [Tex. Civ. App.] 17 Tex. Ct. Rep. 849, 101 SW 266.

22. Facts relied on should themselves be stated and not left to inference. Daniels v. Carney [Ala.] 42 S 452. Complaint in action by broker on contract to divide commissions held not to aver with sufficient clearness employment by plaintiff of defendant, and his acceptance and performance of service under such employment whereby commissions were earned and paid to him. Wefel v. Stillman [Ala.] 44 S 203. Petition in suit in equity to set aside judgment for fraud held insufficient for failure to set forth any acts constituting alleged fraud, it merely alleging facts from which remote inference thereof might arise. Dorman v. Hall, 124 Mo. App. 5, 101 SW 161. Allegation of value held insufficient. Cross v. Home Ins. Co., 154 F 679. As general rule, statement of a fact constituting a cause of action or defense cannot be obviated by statement of a fact which raises only prima facie presumption of fact relied on. Morrison v. Fletcher [Ky.] 108 SW 267. In action under statute to have conveyances set aside as fraudulent and to subject property to satisfaction of judgment after return of no property found, held that allegation that plaintiffs had an execution issued from clerk's office was not sufficient to dispense with necessity of alleging that said execution was issued upon a judgment recovered by them against judgment debtor. Id.

23. Mere recitals, especially those by way of argument, are not sufficient allegations of fact. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871. It avails nothing as against demurrer for want of facts to plead facts by way of recital. Chicago, etc., R. Co. v. Lain [Ind.] 83 NE 632. Answer in action for conversion of mortgaged sheep held fatally defective. Ilfeld v. Ziegler [Colo.] 91 P 825. Recital "that when the engine backed" held not equivalent to allegation that engine was backing at time of accident. Southern R. Co. v. Elliott [Ind.] 82 NE 1051. Allegation that on account of defective condition of cars, etc., they could not withstand force of shock of said engine being backed up against said car, etc., held not to take place of direct allegation that engine was backed up against car. Id. Recital of contents of written notice which complaint alleges was served is not equivalent to direct allegation that facts were as stated in said notice. Sheets v. Prosser [N. D.] 112 NW 72.

Allegations held to be recitals: Allegation as to defendant having succeeded to certain business. Brandt v. Hall [Ind. App.] 82 NE 929. That defendant knew day was dark and hazy and atmosphere filled with flying missiles, and that it was impossible for engineer to see along track more than short distance. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369. Allegations as to duty of foreman in action for personal injuries. Chicago, etc., R. Co. v. Lain [Ind.] 83 NE 632.

24. Rule is particularly applicable to agent called on to account for money of his principal in his hands, and he must set up what he has done with it, generality of allegation being necessarily allowed principal in such cases. Petition held sufficient. Hildreth v. Ayer & Lord Tie Co. [Ky.] 108 SW 255.

25. Material facts constituting ground of relief should be averred as they actually existed or took place, and not legal effect or aspect of those facts. Baird v. Western Union Tel. Co. [S. C.] 60 SE 695. Conclusion from facts recited must be tested by facts stated upon which it is based. Street v. Sederburg [Colo.] 92 P 29.

Averments held to be conclusions: Mere general averments of fraud, or fraudulent conduct of party, without facts constituting it. Smith v. Smith [Ala.] 45 S 168; Stouffer v. Smith-Davis Hardware Co. [Ala.] 45 S 621; Carroll v. Hutchinson, 2 Ga. App. 60, 58 SE 309; Studabaker v. Faylor [Ind.] 83 NE 747; Kranz v. Lewis, 115 App. Div. 106, 37 Civ. Proc. R. 368, 100 NYS 674; Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419; Quinn v. Valiquette [Vt.] 68 A 515; Herbst v. Land & Loan Co. [Wis.] 115 NW 119. As to limitations. Thornton v. Jackson, 129 Ga. 700, 59 SE 905. That cause of action is barred by limitations. Holland v. Grote, 56 Misc. 370, 107 NYS 667. Replication to plea of contributory negligence that certain facts did not proximately contribute to plaintiff's injury. Southern R. Co. v. Hobbs [Ala.] 43 S 844. That plaintiff was guilty of contributory negligence, which proximately contributed to injury complained of. Id. That by exercise of ordinary care defects in machine could not have been known to plaintiff. Cedartown Cotton Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289. In action for negligence, it is not sufficient to allege in general terms that it was defendant's duty to do certain things, but plaintiff must distinctly set forth facts

which he claims create duty violated. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369. Direct statement that it was duty of defendant to do or not to do certain act. Chicago & E. R. Co. v. Lain [Ind.] 83 NE 632. That by rules of defendant railroad company certain things were required to be done and certain duties were imposed, without pleading said rules in substance or in full. Wabash R. Co. v. Hassett [Ind.] 83 NE 705. That it was duty of engineer, flagman, and fireman to do certain things. Id. That it was duty of employe to do certain things. Indiana Union Trac. Co. v. Pring [Ind. App.] 83 NE 733. That jewelry delivered was of different kind from that which defendants had agreed to purchase, the same being of very little value, to wit, $10. McAllister-Coman Co. v. Matthews [Ala.] 43 S 747. Allegation in bill to restrain foreclosure of mortgage, etc., that no attorney's fee was due. Tidwell v. Wittmeier [Ala.] 43 S 782. That wrongs complained of in each count relate to same subject-matter. Gulf Yellow Pine Co. v. Urquhart [Ala.] 44 S 555. That defendant became and is owner of certain corporate stock. People's Home Sav. Bk. v. Stadtmuller, 160 Cal. 106, 88 P 280. That continued trespass "will ripen into a right and casement on plaintiff's property," and will "constitute and create an obstruction to the free and peaceable use" thereof. Bishop v. Owens [Cal. App.] 89 P 844. That plaintiff will be driven to a multiplicity of suits involving trivial amounts, etc., and that his property will suffer irreparable injury. Id. That fraud was not discovered until within two months before commencement of action, for purpose of bringing case within exception of statute of limitations. People v. San Joaquin Valley Agricultural Ass'n [Cal.] 91 P 740. Allegation by way of conclusion in answer that note was given as payment held not binding on court, it being plainly at variance with language of note itself, as well as with extrinsic circumstances surrounding its execution. Menzel v. Primm [Cal. App.] 91 P 754. Denial that plaintiff made any false representations, etc. Mastin v. Bartholomew [Colo.] 92 P 682. Allegation on information and belief in answer in action against executrix to recover legacy held to be construed as allegation of defendant's opinion as to legal effect of distribution in trust for purposes named in will. St. Mary's Hospital v. Perry [Cal.] 92 P 864. That will was contrary to laws of California as made and provided by certain named section of civil code. In re Lennon's Estate [Cal.] 92 P 870. That defendant "willfully, premeditatedly, and intentionally," refused and neglected to perform his duty in premises. Wyatt v. Arnot [Cal. App.] 94 P 86. In action of replevin, that plaintiff is entitled to immediate possession of property. Street v. Sederburg [Colo.] 92 P 29. That by virtue of mortgage plaintiff was owner and entitled to immediate possession of mortgaged property. Id. That refusal of carrier to transport articles offered for shipment on tender of rates prescribed by law is "arbitrary, illegal, and greatly to the injury and damage of petitioner, its property, and business. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429. That defendant broke contract. Hearn v. Gower, 1 Ga. App. 265, 57 SE 916. Allegation of indebtedness. Hicks v. Hamilton [Ga. App.] 59 SE 331. That court rendering judgment had no jurisdiction over defendant. Waterbury Nat. Bk. v. Reed, 231 Ill. 246, 83 NE 188. Allegations as to common law of foreign state in reference to fellow-servants. Wabash R. Co. v. Hassett [Ind.] 83 NE 705. That certain property was held in trust. Kelly v. Bell [Ind. App.] 83 NE 773. That defendant was fraternal beneficiary society, with head offices at certain place, with subordinate lodges. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452. Allegations of answer in action to remove cloud on title, caused by defendant claiming right to sell land under expired option, that there were defects in title which could have been settled at small expense by plaintiff, which he failed to do. Smith v. Howard [Ky.] 105 SW 411. Denial that bank "is the owner of the note sued on." Wheatly v. Hardin Nat. Bk. [Ky.] 106 SW 289. That raising of grade of sidewalk depreciated value of plaintiff's property. Nell v. Power [Ky.] 107 SW 694. In suit by stockholder to cancel certificate of corporate stock alleged to have been improperly issued, that plaintiff "has endeavored unsuccessfully by application to the company to secure relief and protection from the wrongs and against the danger mentioned in the petition." Vogeler v. Punch, 205 Mo. 558, 103 SW 1001. Allegations of complaint, in action on contract containing several stipulations which might or might not be construed as conditions which must be complied with before plaintiff could be put in default, that "all the conditions above mentioned were fulfilled or waived by the defendants," held insufficient, it being necessary to aver facts of performance and waiver without qualification and by averment of facts constituting them. Alden Speare's Sons Co. v. Casein Co., 53 Misc. 58, 103 NYS 1015. That relator was duly appointed to office of assistant deputy sheriff, in petition for mandamus. Meehan v. Flaherty, 119 App. Div. 128, 103 NYS 1058. That bank "wrongfully and negligently" paid amount of check. Peerrot v. Mt. Morris Bk., 120 App. Div. 247, 104 NYS 1045. That directors of defendant corporation had no power or authority to make alleged contract set forth in complaint. Vonnoh v. Sixty-Seventh St. Atelier Bldg., 105 NYS 155. That therefore said contract was illegal and could not be enforced. Id. That "under the terms" of certain instruments plaintiff "agreed" to insure defendant for certain purposes. Aetna Life Ins. Co. v. North Star Mines Co., 56 Misc. 164, 107 NYS 140. That plaintiff has adequate remedy at law. Holland v. Grote, 56 Misc. 370, 107 NYS 667. That certain sum remains due. Sparks v. Ducas, 108 NYS 546. That plaintiff "was forced to lose" certain properties. Dresser v. Mercantile Trust Co., 108 NYS 577. That plaintiff is without power to maintain this action. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 NE 152. That certain property was community property. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419. Allegations in counterclaims for breaches of guaranties. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871. That defendants were not liable to pay judgment, and that same could not be enforced against them. Cambers v. First Nat. Bk. [C. C. A.] 156 F 482. That the individual seals of town-

may be alleged on information and belief,[26] but not matters presumptively within the pleader's own knowledge.[27] As a general rule it is not permissible to plead in the alternative,[28] though it is sometimes allowed.[29]

Allegations should be definite and certain,[30] and direct rather than argumenta-

ship commissioners on bonds would have had no legal efficacy. Smythe v. Inhabitants of New Providence Tp., 153 F 213.

Averments held not to be conclusions: That plaintiff was without fault. Rome R. & L. Co. v. Keel [Ga. App.] 60 SE 468. Charge that act was done negligently is not conclusion of law, but conclusion of fact, and is sufficient without statement of facts constituting the negligence. Lowe v. Miller, 31 Ky. L. R. 829, 104 SW 257. That conductor "invited and encouraged" plaintiff to jump from moving train. Cooper v. Atlantic Coast Line R. Co. [S. C.] 59 SE 704. In action by trustee in bankruptcy to set aside mortgage as preference, allegation that bankrupt's estate was insolvent, and that there was not property enough to pay general creditors. Bowler v. First Nat. Bk. [S. D.] 113 NW 618. That on certain date "said contract was again renewed, ratified, and confirmed by defendant," in view of entire allegation. San Antonio Light & Pub. Co. v. Moore [Tex. Civ. App.] 19 Tex. Ct. Rep. 412, 101 SW 867. That defendant was duly qualified treasurer of village between certain dates, that his bond was duly approved, and that his successor was duly elected and qualified. Village of Prentice v. Nelson [Wis.] 114 NW 830. Plaintiff had insured defendant against liability on certain judgment to extent of $5,000. Defendant desiring to appeal, bonding company furnished appeal bond at plaintiff's request, and defendant agreed that if judgment was affirmed he would pay plaintiff any amount in excess of $5,000 which plaintiff was obliged to pay thereon. Plaintiff paid entire judgment after affirmance, and sued to recover excess. Held that averment that "plaintiff was obliged to and did pay upon said judgment" was sufficient allegation of affirmance of judgment. Travelers' Ins. Co. v. Hallaner, 131 Wis. 371, 111 NW 527.

26. For denials on information and belief, see § 3, post. Matters peculiarly within knowledge of defendants and as to which plaintiffs could learn only from statements made to them by others. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184.

27. Affirmative averments in answer of fraudulent representations by plaintiff and his agent as to goods sold held not put in issue by allegation that plaintiff had not and could not obtain sufficient knowledge upon which to base a belief, he being presumed to know what he himself and his agent said and did. Mastin v. Bartholomew [Colo.] 92 P 682.

28. Complaint in action for personal injuries, which showed on its face that plaintiff was guilty of contributory negligence so that there could be no recovery unless defendant's negligence was willful or wanton, held demurrable where it alleged that defendant either knew, or, in exercise of ordinary care, might have known, that plaintiff was in exposed position. Anderson v. Minneapolis, etc., R. Co. [Minn.] 114 NW 1123.

29. Plaintiff may plead in alternative where knows that defendant has been guilty in one or all of several ways, but not which and where defendant would be liable in either case, and plaintiff should not in such case, be required to elect in advance. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 815, 103 NYS 829. In action by insurance company against former president to recover damages sustained by defendant's unauthorized and unlawful appropriation of its funds, alternative allegation in complaint that defendant "made or authorized to be made, or knowingly or negligently permitted to be made," such payment, held permissible. Id.

30. Pleadings should be clear, definite, and certain. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871. Wrongs complained of must be alleged with definiteness and certainty to a common intent. Lipscomb v. Seaman [Ala.] 44 S 46. Petition should set forth facts upon which cause of action is based plainly, fully, and distinctly, and with such certainty that same may be understood by defendant, jury, and court. Cedartown Cotton Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289. Reasonable definiteness and certainty is all that is required, and factitious demands by special demurrer should not be encouraged. Busby v. Marshall [Ga. App.] 60 SE 376. In action by passenger against carrier for personal injuries, negligence may be averred in general terms. Birmingham R. L. & P. Co. v. Wright [Ala.] 44 S 1037. Where negligence is basis of recovery, declaration need not set out facts constituting it, but allegation of sufficient acts causing injury, coupled with averment that they were negligently done, is sufficient. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. In action for personal injuries under general allegation of damages, plaintiff may recover for all acts or omissions complained of without specifying them. Fritz v. Watertown [S. D.] 111 NW 630. Affirmative plea lacking in certainty, and showing no reason why defendant cannot make it more certain, should, when defects are specifically pointed out by demurrer, be stricken unless amended. Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. 88, 58 SE 316. In action for personal injuries, where allegations as to damages were indefinite, held that overruling of timely and appropriate special demurrers on that ground was reversible error, defendant having duly excepted, and plaintiff not having offered to amend. Cagle v. Shepard, 1 Ga. App. 192, 57 SE 946. Defendant held not entitled to complain that matters peculiarly within its own knowledge had not been alleged by plaintiff with sufficient certainty. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196. Petition for divorce must specify causes therefor with certainty to common intent. Hays v. Hays [Ind. App.] 82 NE 90. One suing on ambiguous contract who chooses to set it out in haec verba must put definite construction on it by averment. Linton v. Brownsville Land & Irrigation Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 475, 102 SW 433. In action for

damages for alienating affections of plaintiff's wife, held not error to deny motion to make complaint more definite and certain by showing sense in which word "seduce" was used, where plaintiff's counsel stated sense in which he intended to employ term, and defendant's counsel expressed himself as satisfied, and case was tried as though word was used in said sense. Ireland v. Ward [Or.] 93 P 932. In action for damages for personal injuries alleged to have been caused by defendant's negligence, held not error to overrule motion for compulsory amendment of declaration seeking to require plaintiff to separate acts of negligence complained of, and to state same specifically in separate and distinct counts, since plaintiff was confined to allegations of his declaration, particularly where order stated that plaintiff was so limited and that specific acts of negligence were properly set forth in one count. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S 318. Granting or denial of motion for compulsory amendment, based on Rev. St. 1892, § 1043, rests in sound judicial discretion of trial court, since said court must determine whether pleading is "so framed as to prejudice, or embarrass, or delay the fair trial of the action," and ruling will not be disturbed on appeal unless abuse is plainly made to appear. Id.

Allegations held sufficiently definite: Complaint in action for breach of contract. Hurwitz v. Gross [Cal. App.] 91 P 109. Complaint in action by widow to set aside deed to her husband alleged to have been procured through intimidation or undue influence, though particular acts constituting intimidation and influence were not alleged. Yordi v. Yordi [Cal. App.] 91 P 348. In action to abate nuisance and for damages, allegations of complaint as to time, special damages, etc. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196. Amendment of complaint in action for negligence held to have sufficiently met objections raised by special demurrer. Atlantic Coast Line R. Co. v. O'Neill, 127 Ga. 685, 56 SE 986. Petition in action for wrongful death. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524. Allegations as to plaintiff's injuries. Douglas, etc., R. Co. v. Swindle, 2 Ga. App. 550, 59 SE 600. Petition in action by tenant against landlord to recover for labor and material furnished and for improvments. Busby v. Marshall [Ga. App.] 60 SE 376. Paragraph alleging that plaintiff's earning capacity would increase. Rome R. & Light Co. v. Keel [Ga. App.] 60 SE 468. Allegations as to work for which compensation was claimed in complaint in action to foreclose lien for construction of canal. Nelson Bennett Co. v. Twin Falls Land & Water Co. Co. [Idaho] 93 P 789. Allegations of complaint as to manner of destruction and damage, in action under statute for damages for destroying public drain. Kelsay v. Chicago, etc., R. Co. [Ind. App.] 81 NE 522. Complaint in action to foreclose special assessment for street improvements. Daly v. Gubbins [Ind.] 82 NE 659. Complaint in action to recover for services. Huntington Fuel Co. v. McIlwaine [Ind. App.] 82 NE 1001. Overruling of motion to make complaint in action for personal injuries more definite and certain by stating point in defendant's mine where explosion occurred, and proximate cause of injury, held not prejudicial error. Bolen-Darnell Coal Co. v. Williams [Ind. T.] 104 SW 867. Averments of petition in action for alienation of husband's affections held sufficient to inform defendant of what he might expect at trial, and to enable him to make preparation therefor. White v. White [Kan.] 90 P 1087. Allegations as to defective condition of car. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. Petition in action against carrier for damages to household goods. Nairn v. Missouri, etc., R. Co., 126 Mo. App. 707, 106 SW 102. Complaint in action against trustee of insurance company for breach of duty. Mutual Life Ins. Co. v. Granniss, 118 App. Div. 830, 103 NYS 835. Complaint in action by insurance company to recover money lost to it through fraudulent acts of defendants. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 827, 103 NYS 837; Mutual Life Ins. Co. v. Raymond, 118 App. Div. 828, 103 NYS 839. Complaint in action by insurance company against former president and trustee to compel him to account for unauthorized expenditures. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 822, 103 NYS 840. Allegations as to appointment of plaintiff as trustee in bankruptcy held sufficiently definite to require answer. Bourton v. Wheeler, 118 App. Div. 426, 104 NYS 33. Allegations of waiver. Washington Life Ins. Co. v. Scott, 119 App. Div. 847, 104 NYS 898. Reply held to sufficiently allege parol lien or mortgage on after-acquired goods. J. F. White v. Carroll [N. C.] 59 SE 678. In action to recover damages for injuries received by passenger while attempting to get off moving train, allegation that conductor "invited and encouraged" plaintiff to jump from train. Cooper v. Atlantic Coast Line R. Co. [S. C.] 59 SE 704. Allegations of negligence. Robbins v. Baltimore, etc., R. Co. [W. Va.] 59 SE 512.

Allegations held not sufficiently definite: Plea of contributory negligence. Birmingham R. L. & P. Co. v. Lee [Ala.] 45 S 292. Where complaint claimed damages for shooting of plaintiff's dog; "and other wrongs done to said plaintiff by said defendant on or about" certain date, other wrongs not being specified, held that quoted averment was insufficient and bad on demurrer. Lipscomb v. Seaman [Ala.] 44 S 46. In action to recover realty, demurrer to complaint as ambiguous, unintelligible, and uncertain in describing property, etc., held properly sustained. Bothwell v. Denver Union Stockyard Co., 39 Colo. 221, 90 P 1127. Error, if any, in overruling demurrer for ambiguity and uncertainty, held harmless, it being manifest that defendants were not misled or injured by failure to allege facts with greater particularity. Yordi v. Yordi [Cal. App.] 91 P 348. Allegations as to breach of contract and resulting damages. Hearn v. Gower, 1 Ga. App. 265, 57 SE 916. Petition in action by servant against master for personal injuries occasioned by defective instrumentality. Cedartown Cotton Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289. Plea setting up redelivery. Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. 88, 58 SE 316. Complaint in action for damages for overflow of land resulting from construction of railroad embankment. Foreman v. Midland Valley R. Co. [Ind. T.] 104 SW 806. In action on bond containing reciprocal obligations

tive.[31] Less particularity is required in alleging matters of inducement.[32] Statutes in many states allow matters to be alleged generally which it would otherwise be necessary to particularize.[33] At law only the ultimate facts, as distinguished from matters of evidence, should be stated.[34] Negatives pregnant[35] and irrelevant,[36] in-

and duties, held insufficient to allege generally that plaintiff had performed all conditions imposed on him, but that petition should have set out with particularity the manner of performance. United States Fidelity & Guaranty Co. v. Trustees of Baptist church, 31 Ky. L. R. 520, 102 SW 325. Count charging conversion directed to be made more definite and certain with respect to time, and whether it was claimed that property was converted by single act or transaction. Mutual Life Ins. Co. v. Raymond, 118 App. Div. 828, 103 NYS 839. In action on note alleged to have been indorsed and assigned to plaintiff, held that plaintiff would be required to allege whether it was transferred to him before or after maturity. McGhee v. Cooke, 105 NYS 60. Where affirmative defense might apply to either of two agreements pleaded by plaintiff, held that plaintiff was entitled to have same made more definite and certain. Leibovitz v. Utopia Land Co., 107 NYS 135. Where date of instrument or fact upon which cause of action or defense is based is not given, pleading is indefinite in that respect, and a motion to make it definite will lie. Date of note sued on. Church v. Stevens, 56 Misc. 572, 107 NYS 310. In action involving right to possession of property belonging to religious corporation, held proper to order complaint to be amended so as to state with definiteness and certainty unlawful acts relied on as basis of claim for general damages. Epstin v. Berman [S. C.] 58 SE 1013. Order held not objectionable as requiring plaintiff to allege evidentiary matters or special damages not claimed. Id. Facts relied on to impeach validity of local option election should be set forth specifically and definitely. General allegations held properly stricken on exceptions. Oxley v. Allen [Tex. Civ. App.] 107 SW 945. Pleas of fraud. Payne v. Knickerbocker Trust Co. [C. C. A.] 153 F 176.

31. Certain allegations of answer to alternative writ of mandamus brought to compel railroad company to repair its track stricken as argumentative. State v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 S 230. Delivery of deed of release held argumentatively alleged. Dunlevy v. Fenton [Vt.] 68 A 651.

32. Inducement is statement of matter which is introductory to the principal subject of the declaration or plea, and which is necessary to explain or elucidate it. Armelio v. Whitman [Mo. App.] 106 SW 1113. Allegations as to contract in action for negligence. Id. May be stated according to its legal effect. Edwards v. National Window Glass Jobber's Ass'n [N. J. Law] 68 A 800. Statement of object of defendant's incorporation and stockholders' rights accruing thereform held not averment of matter of law but an averment of substance of corporate agreement. Id. Objection that averments with respect to objects of defendant's incorporation and rights of its stockholders were allegations of legal conclusions without averment of facts supporting them held untenable, such matters being recited merely by way of inducement. Id. Is not necessary, in stating executed considerations, to state them with same particularity required as to other matters, since averment of past consideration is considered to be matter of inducement and as such not in itself traversable. Allegations held sufficient. Id. Suit held, as to principal item, one for money had and received, averments regarding contract being mere matters of inducement not requiring particularity of averment which would have been necessary had action been on such contract. Pfeiffer v. Wilke [Tex. Civ. App.] 107 SW 361.

33. Acts and contracts may be stated according to their legal effect. Rules of court, § 144. Griswold v. Branford [Conn.] 68 A 987. Where facts showed tenancy from year to year resulting from conduct of parties under unenforcible parol lease, held that rent could be recovered under allegation of parol lease for year. Id. General averment of defendant's corporate capacity is sufficient under Code, § 3627. Krause v. Modern Woodmen, 133 Iowa, 199, 110 NW 452. Allegations as to appointment of trustee in bankruptcy held sufficient in view of Code Civ. Proc. § 532 that, in pleading a judgment, it is not necessary to state facts conferring jurisdiction, but judgment may be stated to have been duly given. Bouton v. Wheeler, 118 App. Div. 426, 104 NYS 33.

34. Pleading should not contain anything more than a statement of facts which party seeks to prove by evidence at trial. Washington Life Ins. Co. v. Scott, 119 App. Div. 847, 104 NYS 898. Material facts must be stated in complaint, and pleading omitting allegation of material fact and alleging only evidence of said fact is defective. Park v. Southern R. Co. [S. C.] 58 SE 931. In action by passenger against carrier for loss of baggage, allegation that plaintiff held check of carrier for said baggage held merely allegation of evidence going to show fact of delivery of baggage to carrier, and not to take place of allegation of delivery. Id. In action to determine rights of parties to use of waters of certain river, held that it was sufficient for plaintiff to plead ultimate facts as they existed at commencement of action, and was unnecessary, and would have been improper, to plead historical deraignment of its title and varying methods of its use. Wutchumna Water Co. v. Pogue [Cal.] 90 P 362. Evidence should not be pleaded. Weimer's Adm'r v. Smith, 30 Ky. L. R. 1311, 101 SW 327; City of Owensboro v. Yewell, 31 Ky. L. R. 858, 104 SW 284. In action by attorney to recover for services, striking from answer allegations as to fees charged by plaintiff for similar services previously rendered defendant held not prejudicial error, such allegations being purely evidential. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 SW 340. Material facts constituting ground of relief should be averred as they actually existed or took place, and not legal

consistent,[37] redundant,[38] equivocal and ambiguous,[39] and scandalous allegations,[40]

effect or aspect of those facts, and not mere evidence or probative facts by which their existence is established. Baird v. Western Union Tel. Co. [S. C.] 60 SE 695. Letter as pleaded held merely evidence. Quinn v. Valiquette [Vt.] 68 A 515.

35. Negative pregnant is such a form of negative expression as may imply or carry within it an affirmative. Lemke v. Lemke [Neb.] 111 NW 138. Denials held not negatives pregnant. Id. Where complaint alleged "that the defendant is a corporation owning and operating a line of railway running through S. county," held that allegation in answer denying that defendant "is a corporation owning and operating a line of railway running through S. county" was ambiguous and bad, both at common law and under the code. Chicago, etc., R. Co. v. State [Ark.] 106 SW 199. Where cross complaint alleged that defendant was and for long time had been "the owner and entitled to the exclusive use of all the waters" of certain lake, held that denial in answer that defendant was or had been "the owner and entitled to the exclusive use of all the waters" of the lake was not a good traverse, but was admission that defendant was entitled to substantially all the water. Duckworth v. Watsonville Water & Light Co., 150 Cal. 520, 89 P 338. Denial that loss of plaintiff by reason of destruction of property described in complaint, as therein alleged, was sum specified in complaint, held to raise no issue as to value of said property. McVay v. Central California Inv. Co. [Cal. App.] 91 P 745. Denial that plaintiff "made any false, untrue, and fraudulent statements and representations" to defendant held not to put allegations of answer in issue, it being in conjunctive instead of disjunctive. Mastin v. Bartholomew [Colo.] 92 P 682. Answer grouping several allegations of fact together and denying them conjunctively held not to place in issue any material fact contained in said group. Johnson v. Asher [Ky.] 105 SW 943. Where answer in action by vendee on contract for sale of land alleged that upon execution of title bond plaintiff "immediately entered into possession of said land, and every part thereof, which was then chiefly valuable for its timber, which he cut and removed," etc., held that averment of reply that plaintiff "denies that he upon making the trade with defendants immediately entered into the possession of the said tract of land and every part thereof; he denies that said land is chiefly valuable for its timber; denies that he cut and removed, said timber from said land, but says he cut a small portion of the same," was an evasion and not a sufficient traverse. Hatcher v. Fitzpatrick, 31 Ky. L. R. 120, 101 SW 933. Denial of any knowledge or information sufficient to form a belief as to each and every allegation in pleading held consistent with possession of knowledge or information sufficient to form belief of every allegation except one. Herbst v. Land & Loan Co. [Wis.] 115 NW 119. Denial that certain person promised to "immediately return" jewelry to claimant, etc. United States v. Larkin [C. C. A.] 153 F 113.

36. Rejoinders in action for personal injuries held not irrelevant. Code 1896, § 3286. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Plea in action by broker on contract to divide commissions held properly stricken. Wefel v. Stillman [Ala.] 44 S 203. Plea of estoppel containing also formal plea of general issue held improperly stricken. Id. Striking out allegations of complaint which were material to accounting to which plaintiff was entitled under facts alleged, and were proper, though not absolutely necessary, averments to lay foundation for such relief, held error. California Farm & Fruit Co. v. Schiappa-Pietra [Cal.] 91 P 593. Immaterial, irrelevant, or argumentative matter should not be included in answer to alternative writ of mandamus. State v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 S 230. Certain allegations of answer to alternative writ of mandamus brought to compel railroad company to repair its track held irrelevant and immaterial. Id. Certain allegations of petition in action by passenger against carrier for personal injuries held irrelevant and impertinent, and certain others not. Douglas, etc., R. Co. v. Swindle, 2 Ga. App. 550, 59 SE 600. Allegations of complaint in action for damages for overflow of land resulting from construction of railroad embankment held immaterial. Foreman v. Midland Valley R. Co. [Ind. T.] 104 SW 806. In action by shipper against carrier to recover damages for failure to furnish cars and for delay in transit, certain allegations held properly stricken and certain others improperly stricken. Meriweather v. Quincy, etc., R. Co. [Mo. App.] 107 SW 434. Certain parts of answer held properly stricken as irrelevant, and certain other parts containing good denials held improperly stricken. Ebling Brew. Co. v. Adler, 103 NYS 93. In suit for accounting under contract, held that allegations that plaintiffs were induced to enter into contract through false and fraudulent representations would be stricken on motion. Bradley v. Sweeney, 120 App. Div. 315, 105 NYS 296. In action against telegraph company for failure to transmit telegram correctly, certain allegations held irrelevant. Baird v. Western Union Tel. Co. [S. C.] 60 SE 695. In action on contract of guaranty indorsed on note, affirmative allegations of fraud not connected with contract in suit and not made basis for affirmative relief held to add nothing to previous denials and to be irrelevant. O'Connor v. Slatter [Wash.] 93 P 1078.

37. Surviving widow cannot in same action recover on contradictory allegations that realty did and did not belong to community. Bourdette v. Burke, 119 La. 478, 44 S 270. Action instituted on first theory held repelled by subsequent judicial admission that property belonged to husband's separate estate. Id. Allegation of sale by sample held inconsistent with former allegation showing sale by specific contract, and stricken out. W. H. Mullins Co. v. Freund Roofing Co., 5 Ohio N. P. (N. S.) 1.

38. Rejoinders in action for personal injuries held not unnecessarily prolix. Code 1896, § 3286. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Plea of estoppel held not unnecessarily prolix. Wefel v. Stillman [Ala.] 44 S

should be avoided, and sham [41] or frivolous [42] pleadings should not be interposed. Surplusage,[43] and allegations contradicting anything of which the court must take judicial notice,[44] will be disregarded.

Facts judicially noticed,[45] or which the law presumes,[46] and matters of evi-

203. Allegations of complaint in action for damages for overflow of land resulting from construction of railroad embankment held redundant. Foreman v. Midland Valley R. Co. [Ind. T.] 104 SW 806. In replevin by mortgagee of personalty against officer to recover mortgaged property seized by latter under writ of attachment in favor of creditor of mortgagor, held that, where answer contained general denial, subsequent narration of proceedings in attachment suit should have been stricken on motion. Beeler v. Perry [Mo. App.] 107 SW 1008. Refusal to strike it held harmless. Id. Certain parts of answer held properly stricken, and other parts improperly stricken. Ebling Brew. Co. v. Adler, 103 NYS 93. In action against telegraph company for failure to transmit telegram correctly, certain allegations held redundant. Baird v. Western Union Tel. Co. [S. C.] 60 S. E. 695.

39. United States v. Larkin [C. C. A.] 153 F 113. Error in overruling demurrer for ambiguity, uncertainty, or unintelligibility is not ground for reversal if it appears that demurring party was not misled by defect, and that cause was fairly tried upon its merits. Bank of Lemoore v. Fulgham [Cal.] 90 P 936.

40. Declaration alleging that defendant "by perjury, and by his evil influence on the judge and jury, procured a verdict against this plaintiff," and had judgment entered thereon, etc., held scandalous and properly stricken on motion. Ropes v. Stewart [Fla.] 45 S 31.

41. Answer in action to recover for goods sold and delivered, attempting to set up noncompliance by plaintiff with statute prescribing conditions under which foreign corporations might do business in state, held to have raised no real issue of fact, and hence to have been properly stricken as sham, it appearing by undisputed affidavits that plaintiff was not doing business in state and that contract was made outside of state, etc. Brown-Forman Co. v. Peterson, 101 Minn. 53, 111 NW 733. A denial can never be treated as sham, though it may be frivolous, word sham applying only to defenses. Rochkind v. Perlman, 108 NYS 224. Whether, under B. & C. Comp., § 76, pleading is sham, must be determined from pleading itself on the whole record. Pacific Mill Co. v. Inman, Poulsen & Co. [Or.] 90 P 1099. Where amended pleading is verified by affidavit, whether it is sham must be determined from whole record, and cannot be tried out on affidavit when making up the issues. Id.

42. Rejoinders in action for personal injuries held not frivolous. Code 1896, § 3286. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Denial is frivolous only when on its face it is not a denial, and defense only when on its face it is not a defense. Rochkind v. Perlman, 108 NYS 224.

43. In action for false imprisonment, allegations that defendant acted "unlawfully" and "without probable cause," if unnecessary. Neves v. Costa [Cal. App.] 89 P 860. Superfluous allegations as to contract of carriage in action ex delicto against carrier for injuries to passenger. Rushin v. Central of Georgia R. Co., 128 Ga. 726, 58 SE 357. Allegation as to extension of contract of guaranty to notes subsequently executed. Phoenix Mfg. Co. v. Bogardus, 231 Ill. 528, 83 NE 284. Unnecessary and irrelevant allegations in declaration. Henry v. Heldmaier, 129 Ill. App. 86. Statement of pleader's opinion as to legal effect of transaction. Ettinger v. Norton, 131 Ill. App. 521. Where all elements of contract are alleged in complaint in action for breach of warranty, averments characterizing defendant's conduct as fraudulent. Burgess v. Alcorn, 75 Kan. 735, 90 P 239. Allegation of duty in declaration, since, if particular facts recited raise the duty, allegation is unnecessary, and if they do not it will be unavailing. Millville Gaslight Co. v. Sweeten [N. J. Law] 68 A 1067. Where complaint stated cause of action for injunction to restrain trespass or waste, allegations attempting to state cause of action for treble damages under B. & C. Comp. § 348. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811. In action against joint stock company for wrongful death, names of shareholders who were made defendants. Wilkinson v. Evans, 34 Pa. Super. Ct. 472. In action for damages for injury to realty by lowering grade of street, allegation that defendants "combined and confederated in one common purpose, and unlawfully." Coyne v. Memphis, 118 Tenn. 651, 102 SW 355. Immaterial matter. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826.

44. Allegation of physical impossibility is wholly nugatory. Rome R. & L. Co. v. Keel [Ga. App.] 60 SE 468.

45. State statutes defining powers and duties of city council in cities, and giving power to abate nuisances and to make regulations for promotion of health, etc. North American Cold Storage Co. v. Chicago, 151 F 120. May be pleaded by way of legal conclusion. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524. Master's duty to furnish reasonably safe instrumentalities may be pleaded by way of legal conclusion. Cedartown Cotton & Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289.

46. Mansf. Dig. § 5062. Foreign corporation plaintiff need not allege compliance with statute requiring it to appoint resident agent. T. H. Rogers Lumber Co. v. McRea [Ind. T.] 104 SW 803. Court having taken notice of general law of state upon which such an ordinance as one pleaded might properly have been based will presume that it is based upon said authority. North American Cold Storage Co. v. Chicago, 151 F 120. Since possession of realty is presumed to be lawful until contrary appears, where possession is alleged, that it is lawful may be averred by way of conclusion. Woodruff v. Hughes, 2 Ga. App. 301, 58 SE 551.

dence,[47] need not be alleged, nor is it necessary to allege what or how the law requires things to be done.[48]

Pleadings must ordinarily be signed by counsel.[49]

Interpretation and construction in general.[See 8 C. L. 1364]—A pleading should be construed as a whole [50] and should be given a reasonable construction rather than a

47. Evidence need not be pleaded. Woodruff v. Hughes, 2 Ga. App. 361, 58 SE 551; Cedartown Cotton & Export Co. v. Miles, 2 Ga. App. 79, 58 SE 289; Sawyer v. Walker, 204 Mo. 133, 102 SW 544; Berry v. Jagoe [Tex. Civ. App.] 18 Tex. Ct. Rep. 81, 100 SW 815. Is error to sustain exception of no cause of action on ground that plaintiff has failed to allege that evidence relied on to support his case is in writing, even if it is necessary that it should be. Ruddock Orleans Cypress Co. v. DeLuppe, 119 La. 952, 44 S 794. Where answer, in addition to general denial, set out evidence on which defendants relied, held that denial of motion to strike from reply statement of evidence on which plaintiff relied was proper. Cobb v. Holloway [Mo. App.] 108 SW 109. In action on promissory note against an indorser thereof, allegations as to presentment for payment held not demurrable for uncertainty in that it failed to allege name of person to whom presentment was made. Kinsel v. Ballou [Cal.] 91 P 620. Executed compromise and settlement agreement held admissible under allegation of payment. Rio Grande Southern R. Co. v. Colorado Fuel & Iron Co. [Colo.] 91 P 1114. In action for injuries resulting from collision between coach and street car, held that evidence as to condition of travel at place where and time when accident occurred was admissible though not pleaded. Wilmington City R. Co. v. White [Del.] 66 A 1009. In action of trover defendant cannot, by special demurrer, compel plaintiff to disclose evidence by which he proposes to prove title. Bank of Sparta v. Butts, 1 Ga. App. 771, 57 SE 1061. Plea asking that suit against defendant be stayed pending determination of his petition for discharge in bankruptcy held sufficient without attaching certified copies of bankruptcy proceedings relied on. Hunter v. Lissner, 1 Ga. App. 1, 58 SE 54. Demurrer on ground that petition did not state distance plaintiff was from car when he signalled it to stop held not meritorious. Rome R. & L. Co. v. Keel [Ga. App.] 60 SE 468. In action to quiet title, held not necessary for cross complainant to set forth evidence by which he expected to prove his title. Bacon v. Rice [Idaho] 93 P 511. In action against railroad company for negligently burning plaintiff's orchard, held that defendant was not required to plead that its engines were screened as required by statute. Louisville, etc., R. Co. v. Beeler, 31 Ky. L. R. 750, 103 SW 300. In action to recover certain land, held that plaintiff was not required to allege that land sued for was not part of that excepted from patent under which he claimed, though burden was on him to show that fact at trial. Fuller v. Keesee, 31 Ky. L. R. 1099, 104 SW 700. Sustaining motion to make more definite and certain, which called for pleading of evidence, and dismissing action for failure to amend, held error, particularly when compliance with order of amendment was practically impossible. Walters v. Exeter [Neb.] 110 NW 631. The facts which are but the logical conclusion from other facts must be stated, but the facts from which they are inferred are but evidence which need not and should not be pleaded. Cooper v. Atlantic Coast Line R. Co. [S. C.] 59 SE 704. Where complaint in action against carrier by passenger injured while attempting to leave moving train alleged that conductor "invited and encouraged" plaintiff to jump, held that it was not necessary to allege words and gestures used, surrounding circumstances, etc. Id. In action on notes defendant claimed that he was entitled to credit not indorsed thereon. In supplemental petition plaintiffs alleged, for purpose of showing contrary, that defendant owed them other money on which credit claimed was applied. Held proper to refuse to require plaintiffs to state what other money was owing to them, matters set up in supplemental petition being merely matters of evidence which need not have been pleaded. Wood v. Limbaugh [Tex. Civ. App.] 20 Tex. Ct. Rep. 825, 106 SW 771.

48. Legal propositions can only be alleged as conclusions following statement of facts upon which alleged duty arises. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756. Allegation that under charter it became city's duty to provide for payment of judgment held sufficient. Id.

49. Where defendant at first term of court filed plea not signed by himself or his counsel, but which was not demurred to or objected to until next term, held that court did not err in then allowing plea to be signed, defect being one which could be cured by amendment. Currie v. Deaver, 1 Ga. App. 11, 57 SE 897. In action in county court defendant filed plea at first term. Subsequently case was transferred to city court of Sylvester under provisions of act creating that court. Held error to strike plea in latter court on ground that it was not signed by defendant's counsel, where, at time motion to strike was made, defendant's counsel moved to be allowed to sign it and case had not yet been marked in default. Gillis v. Atlantic Coast Line R. Co., 127 Ga. 678, 56 SE 1003. Fact that pleading is not signed does not affect its validity. Carr v. Calvert's Adm'r, 31 Ky. L. R. 303, 102 SW 282.

50. Answer. Milliken v. Thyson Commission Co., 202 Mo. 637, 100 SW 604. Theory of pleading must be determined by court from its general scope and tenor, and not from fragmentary statements and conclusions or detached parts. Oolitic Stone Co. v. Ridge [Ind.] 83 NE 246, rvg. [Ind. App.] 80 NE 441. In determining on motion to strike what force and effect should be given to certain allegations of answer, held that all the allegations thereof should be considered, various matters of defense not having been pleaded in separate counts. Teeple v. Hawkeye Gold Dredging Co. [Iowa.] 114 NW 906.

technical one,[51] but the court is not authorized to reconstruct a pleading, or to render, by transposition, that certain which the pleader has made uncertain.[52] Specific allegations control general ones.[53] That which is implied is of equal effect as though it had been expressed.[54] Mere clerical errors will be disregarded.[55] Answers to interrogatories propounded in a pleading are not a part thereof.[56] In some states, written instruments may be incorporated into the pleading by reference.[57] Formal recitals of an instrument incorporated in a pleading cannot supply essential averments not found in said pleading.[58] Pleadings in an action at law in the Federal courts should be construed as they would be in the courts of the state where the action is brought.[59]

At common law on general demurrer, everything in a pleading was taken most strongly against the pleader, and this rule still prevails in some states.[60] Under the codes, however, pleadings are generally to be liberally construed with a view to substantial justice between the parties,[61] and every reasonable intendment and presump-

51. Rees v. Storms [Minn.] 112 NW 419. In determining whether denial is negative pregnant, intention, when clear, must govern rather than technical rules. Lemke v. Lemke [Neb.] 111 NW 138.

52. Birmingham R., L. & P. Co. v. Wright [Ala.] 44 S 1037.

53. Dugas v. Hammond [Ga.] 60 SE 268. Petition in divorce case. Hays v. Hays [Ind. App.] 82 NE 90. Specific allegations of facts constituting negligence held to control general statement that plaintiff was injured through the carelessness and negligence of defendant. Southern R. Co. v. Elliott [Ind.] 82 NE 1051. General allegations of negligence should be regarded as explained and controlled by specific acts of negligence averred, in absence of clear indications in complaint that general allegations were intended to cover other acts than those specifically alleged. Goodwin v. Charleston & W. C. R., 76 S. C. 557, 57 SE 530.

54. Allegation that a decree is in full force and effect is equivalent to an allegation that it had not been performed and paid. Henry v. Heldmaier, 226 Ill. 152, 80 NE 705, afg. 129 Ill. App. 86.

55. Omission of word "plaintiff" between words "the" and "claims" in amended complaint held in view of summons and caption of complaint, a self-correcting clerical error. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

56. Are to be used as evidence (Code, § 3604) and are not to be considered in determining whether case should be transferred to equity docket. Van Norman v. Modern Brotherhood of America, 134 Iowa, 575, 111 NW 992.

57. Agreement referred to in complaint and made part thereof held as much part thereof as though fully set forth therein. Jones v. Gould, 108 NYS 31.

58. Street v. Sederburg [Colo.] 92 P 29.

59. As to whether general denial is qualified by admissions elsewhere in answer. School Dist. No. 11 v. Chapman [C. C. A.] 152 F 857.

60. Birmingham R., L. & P. Co. v. Wright [Ala.] 44 S 1037; Smith v. Smith [Ala.] 45 S 168; Reaves v. Anniston Knitting Mills [Ala.] 45 S 702; Padgett v. Lewis [Fla.] 45 S 29; People v. Grand Trunk Western R. Co., 232 Ill. 292, 83 NE 839; Wakefield v. Chicago, etc., R. Co., 31 Ky. L. R. 1108, 104 SW 778; Fishburn v. Londershausen [Or.] 92 P 1060. Petition in divorce case is to be liberally construed as to all matters of form, but ambiguous, doubtful, and defective statements of fact are to be construed most strictly against pleader. Hays v. Hays [Ind. App.] 82 NE 90. Where defendant denied allegation of indebtedness on account sued on, but at same time admitted all averments of petition necessary to constitute such indebtedness, held that admission, and not denial, must prevail. Bedingfield v. Bates Advertising Co., 2 Ga. App. 107, 58 SE 320. Any pleading, whether at law or in equity, is to be most strictly construed against pleader, and this principle applies with especial force to plea in nature of confession and avoidance. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761.

61. Burns' Ann. St. 1901, § 379. Radanbaugh v. Scanlan [Ind. App.] 82 NE 544. Revisal 1905, § 495. Blackmore v. Winders [N. C.] 56 SE 874. In action to foreclose mortgage, allegations of complaint as to plaintiff's acquisition of title to mortgage from the estate of a decedent held sufficient as against general demurrer, in view of Code Civ. Proc. § 475, providing that court must, in every stage of an action, disregard any defect of pleadings which does not affect substantial rights of parties. Wells Fargo & Co. v. McCarthy [Cal. App.] 90 P 203. Ownership of business and goods alleged to have been injured by defendant's acts held sufficiently alleged as against general demurrer, statement of facts indicating with reasonable certainty actual ownership being equivalent to allegation of the ultimate fact. Snyder v. Regan [Cal. App.] 89 P 852. Petition in action against railroad company for negligence held to state cause of action as against general demurrer. Atlantic Coast Line R. Co. v. O'Neill, 127 Ga. 685, 56 SE 986. In order to render complaint bad on demurrer, defect must be one substantially affecting rights of adverse party, defects of form only being disregarded as harmless. Burns' Ann. St. 1901, § 401. City of Huntington v. Stuver [Ind. App.] 83 NE 518. Complaint in action against city for injuries due to defective sidewalks held sufficient. Id. Allegation that property was damaged to extent of specified sum held sufficient as against demurrer. Reed v. Bernstein [Minn.] 114 NW 261. On motion to strike. J. F.

tion will be indulged in their favor,[62] though in some states this rule does not apply when they are attacked by special demurrer.[63] It has also been held not to apply to petitions for the granting of extraordinary writs.[64] As a general rule, both at common law and under the codes, pleadings will be liberally construed when first attacked at the trial [65] or after verdict and judgment.[66]

White Co. v. Carroll [N. C.] 59 SE 678. Where defendants demurred to complaint setting out lease on which action was based, thus raising question as one of law and not of fact, held that they must be bound by fair construction of terms of lease in fixing term granted. I. X. L. Furniture & Carpet Installment House v. Berets [Utah] 91 P 279.

62. Shaw v. Feltman, 121 App. Div. 597, 106 NYS 1043; Mutual Life Ins. Co. v. Hargus [Tex. Civ. App.] 18 Tex. Ct. Rep. 335, 99 SW 580. Matters of necessary inference from substantial facts are to be considered, though they may be imperfectly or defectively pleaded. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 NE 1043. But pleader is not entitled to have substantial or ultimate fact inferred from mere recital or conclusion in aid of pleading thus challenged. Id. Allegation that other personal property was converted by defendant held not to show ownership of any personalty by decedent. Id. Complaint is deemed to allege what may be implied from the allegations therein by reasonable and fair intendment. Ward v. Rogers, 51 Misc. 299, 100 NYS 1058. Where complaint in action by corporation to recover stock subscription alleged that plaintiff was domestic corporation, held that it would be presumed that plaintiff was legally and properly incorporated and that certificate of its incorporation contained information required by statute, though contents of certificate were not alleged and it was not made part of complaint. Avon Springs Sanitarium Co. v. Weed, 119 App. Div. 560, 104 NYS 58. No resort may be had to guesswork in order to determine what issues are. Dresser v. Mercantile Trust Co., 108 NYS 577. Complaint is deemed to state cause of action when requisite allegations can be fairly gathered from all its averments, though facts are imperfectly, informally, or argumentatively averred, and pleading is deficient in technical language. Heath Dry Gas Co. v. Hurd, 108 NYS 410. Complaint cannot be overthrown because of formal defects or unless it is wholly insufficient. Blackmore v. Winders, 144 N C. 212, 56 SE 874. Cause of action against tenant for rent held sufficiently alleged as against general demurrer, though improperly commingled with another cause of action. Id. In construing effect of instrument declared on, consideration alleged should be read into it. Richards v. Gee [Tex. Civ. App.] 107 SW 61. Declaration will be treated as alleging by implication every fact which can be implied from its averments by the most liberal intendments. Robbins v. Baltimore, etc., R. Co. [W. Va.] 59 SE 512. All facts reasonably inferable from those expressly alleged are to be regarded as sufficiently pleaded. White v. White [Wis.] 111 NW 1116. Are to be deemed set forth and as forming a part of the pleading. Travelers' Ins. Co. v. Hallaner, 131 Wis. 371, 111 NW 527. If language of pleading will reasonably admit of construction which will support it, that construction should be adopted instead of one which will condemn it. Id. Mere technical defects as regards insufficiency of statement give way to liberal rules for construction, where essential matters, not expressly alleged, are reasonably suggested to exist, and intended to have been included in language used. Milwaukee Trust Co. v. VanValkenburgh [Wis.] 112 NW 1083. Pleading is not open to objection for insufficiency if it will reasonably admit of construction which will sustain it in light of all facts stated expressly or by reasonable inference, reasonable doubts in that regard being resolved in favor of pleading. Id.

63. When attacked by special exceptions, allegations of pleading must be certain to a certain intent, principle that defects may be supplied by inference having no application in such case. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756.

64. Petition for application of any extraordinary writ, such as injunction, will be strictly construed. School Dist. No. 25, Brown County v. De Long [Neb.] 114 NW 934.

65. Every reasonable intendment will be made in its favor. Nairn v. Missouri etc., R. Co., 126 Mo. App. 707, 106 SW 102.

On motion to dismiss: Allegations must be liberally construed with view to substantial justice between parties. Code Civ. Proc. § 519. Leiman v. Rosenzweig, 103 NYS 83. Under allegation of complaint that in consideration of plaintiff "waiving" his rights to collect certain accounts due him and defendant "permitting" defendant to collect and retain same, defendant promised to pay him certain sum, held that contention that waiving and permitting referred to something to be done in future, and that there was no allegation of performance, was untenable, but that meaning was that waiving and permitting and promise to pay were simultaneous. Id. Every allegation of fact must be taken as admitted, and plaintiffs are entitled to every fair and reasonable presumption which may be justifiably implied therefrom. Locker v. American Tobacco Co., 121 App. Div. 443, 106 NYS 115. Complaint is sufficient if all allegations taken together state cause of action, though they are inartificially stated. Babcock v. Anson, 122 App. Div. 73, 106 NYS 642. Complaint in action to enjoin obstruction of right of way held to sufficiently describe lands to which way was appurtenant as against objection first made at trial. Palmer v. VanDeusen, 122 App. Div. 282, 106 NYS 707.

On motion for nonsuit because of alleged admission in pleading, such pleading should be liberally construed in favor of pleader. Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356.

Profert and oyer.[See 8 C. L. 1867]—Profert is not necessary where the instrument pleading is a public record, nor has the opposite party a right to crave oyer in such case.[67] Statutes in some states provide that it shall not be necessary to make profert of an instrument sued on, but that the opposite party shall be entitled to oyer in the same manner as if profert was made.[68] Instruments pleaded with profert must be recited on oyer in order to incorporate them in the pleading in which profert is made.[69] When so recited they stand the same as if incorporated in said pleadings.[70] As a general rule there cannot be oyer of the writ,[71] though there seems to be some conflict of authority in this regard.[72] In states where special demurrers have been

On objection to introduction of evidence: Allegations should be very liberally construed, and pleading sustained if it can be reasonably done. Missouri, etc., R. Co. v. Murphy, 75 Kan. 707, 90 P 290. Court will make every reasonable intendment in favor of petition which its allegations will justify. Smith v. Wabash R. Co. [Mo. App.] 107 SW 22. Such a course is not favored. Caskey v. Edwards [Mo. App.] 107 SW 37. Matters of form and irrelevant and redundant allegations will be disregarded, and pleading sustained if upon any view plaintiff is entitled to relief. Raymond v. Blancgrass [Mont.] 93 P 648. Objection should be overruled if upon well pleaded facts, which motion confesses, plaintiff is entitled to even nominal damages. Fritz v. Watertown [S. D.] 111 NW 630. Answer will be construed liberally, and will be held sufficient if its allegations would uphold a verdict rendered thereon. Johnson v. Sheridan Lumber Co. [Or.] 93 P 470. Answer held to inferentially allege that plaintiff had no knowledge of plaintiff's secret profit. Id. Same rule applies as where objection is made after verdict, and objection is properly overruled where there is defective statement of good cause of action. Bade v. Hibberd [Or.] 93 P 364.

66. See, also, § 11, post, Aider by Verdict. In absence of demurrer or objection to offered evidence, complaint that alleges essential fact only inferentially or as conclusion is good when first attacked on appeal. Dillon v. Cross [Cal. App.] 91 P 439. Complaint held to sufficiently allege trust as against attack first made on appeal. Id. In determining whether complaint contains averments sufficient to support judgment, every intendment is to be indulged in favor of the judgment, all doubts of construction to be resolved in support thereof, and construction of complaint which will uphold judgment is to be adopted, if it can be so construed. San Gabriel Valley Bk. v. Lake View Town Co., 4 Cal. App. 630, 89 P 360. Though objection that complaint fails to state cause of action may ordinarily be raised for first time on appeal, such objections are not favored, and such an objection will not be sustained where it is apparent that if attention had been called to defect previous to or at trial it could have been cured by amendment. Edward Mailey Co. v. Londoner [Colo.] 93 P 488. Will be supported by every reasonable intendment. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 NE 1049; Diamond Glue Co. v. Wietzychowski, 227 Ill. 338, 81 NE 392. As against objection first made on appeal, every presumption and intendment will be indulged in favor of declaration. Leigh v. National Hollow Brake Beam Co., 131 Ill. App. 106. Complaint in action on guardian's bond to recover money alleged to have been converted by him held sufficient against attack first made on appeal. United States Fidelity & Guaranty Co. v. State [Ind. App.] 81 NE 226. In action to enjoin levying of an execution, allegation of complaint as to ownership of property held sufficient in absence of direct attack thereon in district court. McQueeney v. Toomey [Mont.] 92 P 561. Complaint held to sufficiently allege consideration for defendant's promise to pay as against objection first made on appeal. Carlson v. Barker [Mont.] 93 P 646. Though petition to vacate judgment for fraud was defective in that it alleged that plaintiff had meritorious and valid cause of action in general terms only, held that general allegation was sufficient on attack for first time on appeal. Wagner v. Whitmore [Neb.] 113 NW 238. Where complaint is first challenged on appeal, all intendments will be indulged in favor of its sufficiency. Portland Iron Works v. Willett [Or.] 89 P 421. Complaint in suit for specific performance held sufficient. Id.

67. Tax collector's bond required to be recorded in office of clerk of circuit court held within rule. State v. Wilson [Md.] 68 A 609.

68. Under Code Pub. Gen. Laws, 1904, art. 75, § 24, subsec. 106, held that opposite party is entitled to oyer only in those cases in which profert was formerly necessary, and hence is not entitled to oyer of public record. State v. Wilson [Md.] 68 A 609.

69. Defendant in trespass quare clausum pleaded deeds with profert. Plaintiff craved oyer, and, having heard them read, demurred without reciting deeds. Held that deeds were not within scope of demurrer, and points depending on them would not be considered. Lee v. Follensby [Vt.] 67 A 197.

70. Lee v. Follensby [Vt.] 67 A 197. Tenor of instrument as it appears on oyer is considered as forming part of declaration. Earle v. Fidelity & Deposit Co. [N. J. Law] 68 A 1078. In action on bond upon oyer, it appeared that it contained conditions, performance of which by obligee was made precedent to right of recovery thereon, held that objection that declaration contained no allegation of performance of such condition could be raised by demurrer, though bond was not made part of declaration or referred to therein. Id.

71. Sipe v. Pennsylvania R. Co. [Pa.] 68 A 705.

72. Original writ not being part of record, except in judgments by default, it may be properly made so by resorting to oyer. Netter-Oppenheimer & Co. v. Elfant [W. Va.] 59 SE 892.

abolished, a pleading is not defective for craving oyer where oyer is not demandable,[73] and, where a demand for oyer is complied with, though oyer is not properly demandable, the instrument becomes a part of the record.[74]

*Exhibits.*See 8 C. L. 1367—By statute in some states when any pleading is founded on a written instrument, the original or a copy thereof must be filed with the pleading.[75]

As a general rule exhibits cannot be looked to in aid of a pleading,[76] though they may be against it.[77] There seems to be a conflict of authority as to the effect in this regard of statutes requiring the filing of written instruments sued on.[78]

*Bills of particulars.*See 8 C. L. 1368—A bill of particulars may ordinarily be demanded in all cases, when by reason of the generality of the claim or charge, the adverse party is unable to know with reasonable certainty what he is required to meet.[79] In an equity case the court has inherent power, in the exercise of a sound discretion, to order a bill, though there is no statutory provision on the subject.[80]

The purpose and effect of a bill of particulars is to amplify the pleading and to limit the issues.[81] A motion to require the furnishing of a bill is premature when

73. State v. Wilson [Md.] 68 A 609.

74. As in case of public record. State v. Wilson [Md.] 68 A 609.

75. In action on administrator's bond to recover for his failure to pay over money to those entitled thereto pursuant to order of probate court, held that said order was not foundation of action within meaning of Kirby's Dig. § 6128. Euper v. State [Ark.] 107 SW 179. In action at law exhibits are no part of pleadings unless action is founded on written instrument exhibited. Id. Burns' Ann. St. 1901, § 365. In action on insurance policy issued by another company, and subsequently assumed by defendant, held not necessary to make contract of reinsurance between the two insurers an exhibit, action not being founded upon it. Federal Life Ins. Co. v. Kerr [Ind. App.] 82 NE 943. Instrument not basis of action or defense, but only referred to as one among other facts material to pleading, need not be made exhibit or part of pleading. Vandalia R. Co. v. Fetters [Ind. App.] 82 NE 978 In action against railroad company under Burns' Ann. St. 1901, §§ 5323-5325, for cost of rebuilding right of way fence held that itemized statement of cost of so doing required by statute to be furnished to company was not foundation of action, and it was not necessary to make same part of complaint as exhibit or otherwise. Id.

76. Where pleader does not rely on short form of pleading authorized by Rev. St. 1899, § 3560, in action on an account, attaching of copy of account to petition as an exhibit does not supply necessary allegations, unless it is expressly made a part thereof. Sheridan County Com'rs v. Denebrink, 15 Wyo. 342, 89 P 7.

77. Where exhibits filed with petition showed that plaintiff had no cause of action against defendant, held that demurrer was properly sustained. Covington Gaslight Co. v. Covington, 31 Ky. L. R. 124, 101 SW 923.

78. Where paragraph of answer was addressed to complaint based on contract and bond sued on, and did not purport to set up any different contract between the parties, held that where allegations of answer were in conflict with terms of written contract, latter would control. Stamets v. Plano Mfg. Co., 40 Ind. App. 620, 82 NE 122; Id. [Ind. App.] 82 NE 923. Where allegations of petition are in conflict with writing filed therewith as constituting basis of action, exhibit must control. Kernan v. Carter, 31 Ky. L. R. 865, 104 SW 308. Allegation of petition as to consideration for transfer of property held not contradicted by deed filed as exhibit. Ingram v. Cincinnati, etc., R. Co. [Ky.] 107 SW 239.

79. When averments of the declaration are too general to give defendant reasonable information of the particular facts on which plaintiff relies as part of his general statement of his cause of action, specifications may be ordered on defendant's motion. Pool v. Bergman [Mass.] 83 NE 7.

80. In action to foreclose lien for construction of canal held not an abuse of discretion to refuse to order plaintiff to furnish bill of particulars as to work for which compensation was claimed. Nelson Bennett Co. v. Twin Falls Land & Water Co. [Idaho] 93 P 789.

81. Office is to amplify pleading, and to inform party with reasonable certainty of claim made by his adversary, in order to prevent surprise, and to enable him to intelligently meet issue upon trial. McIntosh v. Pullman Co., 53 Misc. 286, 103 NYS 223. To specify claim of party, and particularize issue. Waller v. Degnon Contracting Co., 120 App. Div. 389, 105 NYS 203. Purpose is to make definite that which is indefinite, and to facilitate prompt and orderly trial by confining issues within definite limits. Aub v. Hoffman, 120 App. Div. 50, 104 NYS 913. Is not its office to have complaint made more definite and certain or to compel disclosure of party's evidence. Kellogg v. Griffiths, 108 NYS 962. Theory of action contrary to bill furnished by plaintiff on defendant's demand cannot prevail. Dunne v. Robinson, 53 Misc. 545, 103 NYS 878. Object is to inform defendant of claim he is called upon to defend against and its effect is to limit proof to cause of action therein set forth. McKinnie v. Lane, 230 Ill. 544, 82 NE 878. Is amplification or more particular

made before issue joined unless the bill is shown to be necessary to enable the moving party to plead,[82] and an application for a bill to enable the applicant to plead will be denied if he may by any method plead without the aid of the particulars sought.[83] Though a demand for affirmative relief is not essential to authorize the court to require defendant to furnish a bill,[84] he should not be required to do so where the allegations of the answer are in effect a denial of those of the complaint.[85] It is no answer to an application for a bill that the party from whom it is demanded is an executor or administrator and hence has no personal knowledge of the facts.[86] An order directing the filing of a bill should not provide for the imposition of a penalty in case of disobedience, but if the bill is not filed the other party may then apply for an order preventing the giving of evidence as to the items in regard to which it was ordered.[87]

The bill should be as specific as the circumstances of the case will allow,[88] how far a party should be required to go in narrowing the statement of his case being largely discretionary with the court.[89] A party should not be required to disclose his evidence,[90] or to give information peculiarly or equally within the knowledge of the

specification of matter set forth in pleading. Weedon v. Weedon, 34 Pa. Super. Ct. 358.

82. Mutual Life Ins. Co. v. Granniss, 118 App. Div 830, 103 NYS 835; Bailey v Mayer, 56 Misc. 331, 107 NYS 624. Motion by defendant for bill of particulars on ground that it was necessary for his defense will be denied when made before answer is served, since it cannot be said that defense will be made until issue is raised. Standard Materials Co. v. Bowne, 118 App. Div. 91, 103 NYS 12. In action to recover balance due after foreclosure of chattel mortgage, where defendants counterclaimed for value of property belonging to them of which it was alleged plaintiff had taken possession, held that plaintiff's application for bill of particulars made before reply was premature, there being no showing in affidavits that bill was necessary to enable plaintiff to reply. Paul v. Nahl, 104 NYS 233.

83. In action to recover for personal injuries defendant's application for bill before issue joined denied, where he denied all knowledge concerning matters alleged in complaint, since he could put them in issue by denying any knowledge or information sufficient to form belief as to their truth. Bailey v. Mayer, 56 Misc. 331, 107 NYS 624. In action to recover advances alleged to have been made to agent in excess of commissions, held that defendant was not entitled to bill before issue joined, since he was presumed to know amount due plaintiff, and if not he could deny allegations on information and belief. United States Casualty Co. v. Jamieson, 122 App. Div. 608, 107 NYS 490. Bill will not be ordered to enable defendant to answer, where he is wholly ignorant of particulars of plaintiff's claim, since he may deny any knowledge or information sufficient to form belief as to allegations of complaint. Standard Materials Co. v. Bowne, 118 App. Div. 91, 103 NYS 12. Plaintiff's motion for further bill was denied on ground that his reply to defendant's counterclaim was not before court, and hence that such counterclaim stood admitted. Reply had in fact been served, but by inadvertence was not submitted to court. Was manifest that motion would otherwise have been granted. Held that leave to renew motion should have been granted. Foster v. Curtis, 105 NYS 362.

84. May be granted of defenses not involving counterclaim or demand for affirmative relief. Reader v. Haggin, 123 App. Div. 489, 107 NYS 963.

85. In action by creditor to set aside alleged fraudulent transfer of property to defendant, fact that defendants unnecessarily made part of their denial an affirmative allegation that they had property held not to justify court in requiring them to specify what property they had. Wilks v. Greacen, 120 App. Div. 311, 105 NYS 246.

86. Since office of bill is to amplify or limit pleadings and point out issues to be met at trial, and administrator does know upon what theory he seeks to recover. Action for wrongful death. Waller v. Degnon Contracting Co., 120 App. Div. 389, 105 NYS 203.

87. Foster v. Curtis, 121 App. Div. 689, 106 NYS 388.

88. While it need not state more than the party furnishing it is bound to prove under his pleading, it must be as specific as circumstances of case will allow, and should fairly appraise court and opposite party of nature of the claim or defense made, and nature of evidence. Weedon v. Weedon, 34 Pa. Super. Ct. 358.

89. In determining how far plaintiff should be required to go in narrowing statement of his case as to time or place, rights and interests of parties and difficulties and exigencies of preparation of plaintiff's case and defendant's defense should be considered, and such orders made as will promote justice. Pool v. Bergman [Mass.] 83 NE 7. In action for assault, time of which was not alleged in declaration, plaintiff filed specification alleging that assault occurred "on or about" certain date. Held error to strike out words "or about," though evidence at previous trial tended to show that assault occurred on date specified, remedy being by motion to require more definite specifications. Id.

90. Kellogg v. Griffiths, 108 NYS 962. Evidence to prove or disprove party's allegations. Wilks v. Greacen, 120 App. Div. 311, 105 NYS 246.

party seeking it.[91] In case the bill served is deemed defective or insufficient the remedy is ordinarily by motion for a further bill.[92] The bill may ordinarily be amended upon leave of court.[93] Ordinarily the bill is no part of the pleading and cannot supply necessary averments omitted therefrom.[94] Cases dealing with the right to bills in particular cases,[95] and the sufficiency of particular bills,[96] will be found in the notes.

91. In action to recover cost to electric company of caring for, repairing, and changing underground wires, etc., made necessary by reason of construction of subway, held that plaintiff would not be required to state which of the defendants, and which of their agents or employes did acts alleged, nor under what terms of what contracts it was claimed defendants were required to make repairs. New York Edison Co. v. McDonald, 54 Misc. 63, 104 NYS 606. In action by partner for dissolution of partnership and an accounting, where plaintiff alleged that defendant had applied funds of partnership to his own use in excess of his share, and in order to conceal that fact had never balanced partnership books, of which he had always had management, held error to require plaintiff to furnish bill of particulars of allegations of receipt of said moneys by defendant, each having presumptively as much knowledge of matters shown by books as other. Kellogg v. Griffiths, 108 NYS 962.

92. Where defendants served bill of particulars of counterclaim which they deemed compliance with order requiring it, held that if plaintiff claimed that bill was defective or insufficient he should have moved for further bill, and not having done so, he could not, for first time at trial, raise objection that it did not comply with order by invoking provision precluding giving of evidence as to counterclaim. Pollack v Wiener, 56 Misc. 434, 107 NYS 405. Motion under Code Civ. Proc. § 454, to require plaintiff to serve further account or bill of particulars held properly denied as made too late, where no objection to former bill was made for over five months, and not until moment of trial. Ames v. Bell [Cal. App.] 89 P 619.

93. McKinnee v. Lane, 230 Ill. 544, 82 NE 878. Where evidence as to certain services was received without objection, and there was no motion to strike it out, held that defendant could not contend on appeal that it was inadmissible because said services were not included in first bill of particulars, but only in amended one. Ames v. Bell [Cal. App.] 89 P 619. Amended bill served under order of court held to have superseded former one, so that it was not objectionable because it included services not charged for in former bills. Id.

94. In action of assumpsit. Sandusky v. West Fork Oil & Natural Gas Co. [W. Va.] 59 SE 1082. Cause of action or bill of particulars required by statute and rule of court to be filed with declaration is to appraise defendant of nature and extent of demand against him in order that he may plead with greater certainty, and ordinarily constitutes no part of declaration. Royal Phosphate Co. v. Van Ness, 53 Fla. 135, 43 S 916. Even if it may be made part of declaration by apt words, court is not authorized to so regard it, where it is not so made part of declaration and was not so treated by both parties, and it cannot, in such case, be resorted to or used on demurrer to supply essential allegations of fact omitted from declaration. Id.

95. Plaintiff held entitled to bill: Specifying names of securities claimed to have been purchased by defendant for him, amounte and times of purchase or sale, from or to whom bought or sold, etc. Foster v. Curtis, 105 NYS 362. In action for divorce, specifying times and places at which defendant charged plaintiff committed adultery. Weis v. Weis, 123 App. Div. 409, 107 NYS 1061. In action on notes pleaded in separate counts, where defendant denied each count separately, and alleged payment, held that plaintiff was entitled to bill stating with reasonable certainty time, place and amount of payments or when and how notes were otherwise satisfied or discharged in view of affidavit that he had no knowledge of any payments other than those admitted in complaint, etc., and letters of defendant admitting liability for greater part of debt. Coolidge v. Stoddard, 120 App. Div. 641, 105 NYS 544. In action to recover balance due on building contract and for extras, where defendant denied performance and counterclaimed for damages for failure of plaintiff to complete contract, held that plaintiff was entitled to bill, not for purpose of limiting defendant on issue as to performance, but as to damages alleged in counterclaim. Kelly v. St. Michael's Roman Catholic Church, 108 NYS 927.

Plaintiff held not entitled to bill: Concerning matter pleaded as partial defense and by way of mitigation of damages in action for slander. Reader v. Haggin, 123 App. Div. 489, 107 NYS 963.

Defendant held entitled to bill: In action for damages for loss of suit case from one of defendant's cars, showing particulars of items of special damages claimed. McIntosh v. Pullman Co., 53 Misc. 286, 103 NYS 223. In action by attorneys for lump sum for services, specifying suits or proceedings instituted by them, and details of services claimed to have been performed in each of them, and placing valuation on services rendered in each, and also enumerating services of general nature with such particularity as to indicate method of computing bill. Aub v. Hoffman, 120 App. Div. 50, 104 NYS 913. Defendant held entitled to further bill. Squires v. Kissam, 121 App. Div. 607, 106 NYS 373. In action for wrongful death of employe asphyxiated while working in tunnel specifying in what caisson decedent was working, in what manner defendant was negligent in management thereof, and in what respect it failed to provide proper and safe method of transmitting air, and to furnish reasonably safe place for prosecution of work. Waller v. Degnon Contracting Co., 120 App. Div. 389.

By statute in some states a party is not required to set forth in his pleading the items of an account therein alleged, but must in lieu thereof, and within a specified time after a written demand therefor, deliver to the opposite party, or file, a copy of said account, or be precluded from giving evidence thereof.[97]

§ 2. *The declaration, count, complaint, or petition. General rules.* See 8 C. L. 1372—A complaint preferred on behalf of the state in a civil action is usually termed an information.[97a] The declaration, petition, or complaint must aver all the facts necessary to show a cause of action against the defendant,[98] in ordinary and concise

105 NYS 203. In action for negligence for injuries to servant as to amount of damages, whether he was operating machine when injured, what he was directed to do, and in what respect machinery was defective. Kaplan v. Sher, 56 Misc. 432, 106 NYS 1094. In action for personal injuries, specifying injuries claimed to be permanent. Biehayn v. New York City R. Co., 108 NYS 66. Physical examination authorized by Code Civ. Proc. § 872, does not serve purpose of bill of particulars. Id. In action by servant for injuries caused by alleged negligence in blasting, specifying whether work of blasting was under personal charge of defendant at time of accident, or in charge of employe if latter, his name or description and his duties, of what negligence consisted, what rules should have been made, or what existing rule was disregarded. Dwyer v. Slattery, 118 App. Div. 345, 103 NYS 433. In action to recover cost to electric company of caring for, repairing, and changing underground wires, etc., made necessary by construction of subway, plaintiff required to specify dates on which alleged interference, etc., occurred. New York Edison Co. v. McDonald, 54 Misc. 63, 104 NYS 606. Also required to state whether wires, etc., were actually interfered with, or were about to be interfered with, complaint alleging that defendants had interfered with, or were about to interfere with them. Id. In action to compel specific performance of contract to convey land, where, in response to order, plaintiff furnished bill setting forth making of contracts in regard to said land which he alleged were partly written and partly oral, held that he should have been required to furnish copies of so much of said agreements as were in writing, defendant denying any knowledge thereof, and nothing being shown to contradict her in that regard, and it not being claimed that writings were signed by her personally. Fischel v. Fischel, 121 App. Div. 868, 106 NYS 815.

Defendant held not entitled to bill: As to sum allowed as credit memorandum. New York Edison Co. v. McDonald, 54 Misc. 63, 104 NYS 606. Where reliance is had solely upon an agreement of indebtedness arising from statement and settlement of accounts and promise to pay amount so ascertained, plaintiff will not be required to file certified copy of the account. Herbert v. Hellbut, 119 App. Div. 426, 104 NYS 699. In action by attorney to recover for services which all related to same subject, held error to require plaintiff to furnish bill placing value on each item of said services. Moore v. Scharnikow [Wash.] 94 P 117.

96. Bill in action for attorney's services held sufficient to notify defendant of nature of charge for services to decedent's estate and as attorney for guardian, and hence to authorize evidence as to nature and character of services performed under each heading. Ames v. Bell [Cal. App.] 89 P 619. In action against railroad company to recover damages resulting from fire alleged to have been set by locomotive, motion to make plaintiff's bill more definite and certain by setting out number of locomotive held properly overruled. Missouri, etc., R. Co. v. Traxon [Kan.] 92 P 580. In action by attorney for services, where employment is general to attend to particular case or matter of business, or to do specific work, account or bill of particulars filed with petition need not be any broader or fuller than contract. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 SW 340. Motion to make bill as to examination of abstracts, etc., more specific held properly overruled. Id.

97. Rev. St. 1887, § 4209. Nelson Bennett Co v. Twin Falls Land & Water Co. [Idaho] 93 P 789. Action to recover money alleged to have been given by plaintiff to her husband for safe keeping and to have been lost by him in gambling house maintained and operated by defendants, held not based upon an account alleged in the complaint within meaning of Mills' Ann. Code § 63. Lacey v. Bentley, 39 Colo. 499, 89 P 789.

97a. Action by attorney general to determine right to public office. People v. McClellan, 54 Misc. 130, 105 NYS 844.

98. Party seeking to enforce forfeiture must set forth every fact necessary to show that he is entitled to it, and his pleading will, in such case, be strictly construed and nothing taken by implication. Frank A. Menne Factory v. Harback Bros [Ark.] 107 SW 991. Count in assumpsit framed substantially as required at common law is sufficient compliance with provisions of code as to allegations of fact. Henry Inv. Co. v. Semonian [Colo.] 90 P 682. Demurrer on grounds of insufficiency and ambiguity held properly overruled. Id. Declaration in action at law should allege every fact essential to plaintiff's right of action. Royal Phosphate Co. v. Van Ness, 53 Fla. 135, 43 S 916. Complaint must clearly and distinctly allege every fact necessary to entitle him to relief sought. McKinnon v. Johnson [Fla.] 45 S 451. Plaintiff must allege sufficient acts of negligence as to injured party to withstand demurrer. Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122. Declaration taken as whole held to state cause of action for conversion of property. Ettinger v. Norton, 131 Ill. App. 521. Paragraph alleging that certain persons held property of certain person in trust, but not describing or indicating property so held nor alleging facts to establish trust, held insufficient under

language, in such manner as to enable a person of ordinary understanding to know what is intended.[99] The performance or happening of all conditions precedent to the right to sue, or an excuse for nonperformance, must be alleged.[1] Plaintiff need not allege matters of defense.[2] In some states a plaintiff who is not a resident of the county in which the action is commenced is required to state his residence and post office address in his petition.[3]

The complaint must proceed on a definite theory, on which plaintiff must recover, if at all.[4] The nature of the action,[5] whether it is in tort or on contract,[6]

Burns' Ann. St. 1901, § 341, requiring statement of facts constituting cause of action. Kelly v. Bell [Ind. App.] 83 NE 773. Must be sufficient to entitle plaintiff to relief asked without introduction of evidence to support it, if its allegations are not denied. Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. In action on contract, is proper for plaintiff to point out its various provisions, and to allege performance thereof by plaintiff's assignor in such respects as performance was required by him. Old Settlers' Inv. Co. v. Marshall Vinegar, Pickle & Soap Co. [Iowa] 113 NW 326. Where plaintiff relies on breach of covenant of lease, must set out covenant and allege its breach in accordance with legal requirements in such actions. Cassidy v. Richardson [N. H.] 66 A 641. Declaration held demurrable where it was impossible to ascertain therefrom the nature of the action or the ground upon which it proceeded, but it was wholly matter of conjecture as to what was relied on as ground of complaint. Id. Though complaint in justice's court may be oral, in action for statutory penalty it should at least inform defendant with what omission of duty he is charged, or under what statute penalty is claimed. Stone v. Atlantic Coast Line R. Co., 144 N. C. 220, 56 SE 932. Complaint stating good cause of action against defendants in representative capacity, in which capacity they were sued, for specific sum, separable from other amount demanded for which they were not so liable, held not subject to dismissal on demurrer on ground that it did not state cause of action against defendants in representative capacity. Scheibeler v. Albee, 144 App. Div. 146, 99 NYS 706. Where complainant is framed as in an equitable action purely, with no suggestion of a demand for relief at law, and right of action disclosed by facts pleaded does not justify equitable intervention, it will be held insufficient on demurrer. Cozzens v. American General Engineering Co., 56 Misc. 393, 106 NYS 548. In action to recover statutory penalty, must clearly indicate statute by virtue of which penalty is claimed. Sheets v. Prosser [N. D.] 112 NW 72. Whether complaint states cause of action must be determined before it can be determined whether causes are improperly joined. Chicago, etc., R. Co. v. Douglas County [Wis.] 114 NW 511.

99. Burns' Ann. St. 1901, § 341. Radenbaugh v. Scanlan [Ind. App.] 82 NE 544. Complaint in action to recover for services held sufficient. Huntington Fuel Co. v. McIlwaine [Ind. App.] 82 NE 1001. Complaint in action by coal miner to recover for personal injuries held, as a whole, sufficient compliance with Carter's Ann. St. 1899, § 3231. Bolen-Darnall Coal Co. v. Williams [Ind. T.] 104 SW 867. Object of declaration is to set forth facts constituting cause of action so that they may be understood by defendant, jury, and court. Robbins v. Baltimore, etc., R. Co. [W. Va.] 59 SE 512. A complaint to be good as against a demurrer for want of facts must exhibit enough facts in law to authorize affirmative relief, and though such facts may be awkwardly stated, if they are sufficiently clear to enable a person of common understanding to know what is intended, demurrer should be overruled. Burns' Ann. St. 1901, § 341. Fort Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 893. Complaint in action for damages for personal injuries sustained by being thrown from buggy in consequence of horse becoming frightened at noise and escaping steam from pipe connected with mill, held sufficient to fully appraise defendant of what pleader thereby intended. Id. Is not necessary to so model petition as to differentiate whether action is trespass or on the case, but every action is properly brought which sets forth plainly, fully, and distinctly plaintiff's cause of action. Civ. Code 1895, § 4960. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266.

1. Omission of averment is fatal on demurrer. Earle v. Fidelity & Deposit Co. [N. J.] 68 A 1078. In action on contract of insurance. Williams v. Fire Ass'n of Philadelphia, 119 App. Div. 573, 104 NYS 100. Complaint in action against city for damages for personal injuries held bad on demurrer for failure to allege compliance with statute requiring claim to be presented to council, or excuse for noncompliance. Winter v. Niagara Falls, 190 N. Y. 198, 82 NE 1101. Foreign corporation suing to recover for goods sold must allege compliance with Laws 1892, p. 1805, c. 687, § 15, requiring procurance of certificate from secretary of state, etc., or complaint is bad on demurrer. Wood v. Ball, 190 N. Y. 217, 83 NE 21, afg. 100 NYS 119. Foreign corporation must allege compliance with law entitling it to do business in state. Valley Lumber & Mfg. Co. v. Nickerson, 13 Idaho, 682, 93 P 24; Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765.

2. Cannot be required to do so by motion to make more specific. Vanderveer v. Moran [Neb.] 112 NW 581.

3. Failure to require compliance with Laws 1905, c. 327, held harmless where it appeared that defendant was familiar with such facts. White v. White [Kan.] 90 P 1087.

4. Cannot be made elastic so as to take form with varying views of counsel. Oolitic Stone Co. v. Ridge [Ind.] 83 NE 246, rvg. [Ind. App.] 80 NE 441. Complaint in action to foreclose materialman's lien held not to

or at law or in equity,[7] and whether the complaint states one or more causes of action,[8] are questions of construction.

violate rule. Williamson v. Shank [Ind. App.] 83 NE 641.

5. Nature of action is not to be determined by designation of pleader, but its character and classification depend upon intrinsic contents of petition, its recitals of fact, nature of wrong sought to be remedied, and quality of remedy invoked. Pennington v. Douglas, etc., R. Co. [Ga. App.] 60 SE 485. Facts set out in complaint, and not title of action, nor prayer for judgment, determine kind and character of cause of action alleged. Jones v. Gould, 108 NYS 31. As to whether action is against defendants personally or merely as managers of syndicate. Id. Theory of paragraph must be determined from leading allegations therein, and not from mere occasional averments. Kelley v. Bell [Ind. App.] 83 NE 773. Theory of paragraph held to set aside fraudulent conveyance of bonds and render them subject to judgment debt. Id. Complaint in action by passenger against carrier for personal injuries held to state cause of action in case. Birmingham R., L. & P. Co. v. Wright [Ala.] 44 S 1037. Complaint in action for breach of contract of agency held to have sought recovery for value of services actually rendered only, and not for prospective profits. Wilson v. Northwestern Nat. Life Ins. Co. [Minn.] 114 NW 251. Count held one upon quantum meruit and not upon stated account for an agreed sum, so that there was no error in admitting evidence on question of value of services. Rogers v. Mexico City Banking Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 853, 103 SW 461.

6. In doubtful cases every intendment is in favor of regarding action ex contractu. Randolph v. Walker [S. C.] 59 SE 856. Where given default may constitute both breach of contract and tort, and complaint contains apt allegations charging default in both respects, if it appears from whole complaint that contract is alleged chiefly or wholly by way of necessary inducement in order to show existence of a duty, and the emphasis is laid upon willful or wrongful disregard of said duty, intent is to charge tort, while if contract appears to be stated as basis of the action, and emphasis is laid upon default in carrying it out, intent is to charge mere breach of contract. Boehrer v. Juergens & Anderson Co. [Wis.] 113 NW 655.

Held to state cause of action on contract: Action by shipper against carrier for damages for failure to transport shipment. Jenkins v. Seaboard Air Line R. Co. [Ga. App.] 59 SE 1120. Complaint alleging deposit of money with defendant, his agreement to hold it at all times as agent of plaintiff subject to his order, and defendant's refusal to pay over said money, though it also alleged conversion. Randolph v. Walker [S. C.] 59 SE 856. Complaint alleging that defendant, for valuable consideration, undertook to present note to maker for payment, and in case of nonpayment to return it at certain time, but failed to return it, whereby sum due thereon was lost to plaintiff. W. H. Kiblinger Co. v. Sauk Bk., 131 Wis. 595, 111 NW 709.

Held to state cause of action in tort: Petition in action against carrier for injuries to passenger. Rushin v. Central of Georgia R. Co., 128 Ga. 726, 58 SE 357. For conversion. McIntyre v. Smathers, 118 App. Div. 776, 103 NYS 873. Complaint alleging that plaintiff placed with defendant a horse to sell for him, that defendant received certain sum therefor which he converted to his own use, and asking for recovery of said sum and for arrest and bail of defendant, held to be treated as election to sue in tort, where court in which action was brought would not have had jurisdiction of action on contract. White v. Eley [N. C.] 58 SE 437. Petition in so far as it sought to recover value of bull alleged to have been appropriated by defendant. Pfeiffer v. Wilke [Tex. Civ. App.] 107 SW 361. Petition in action for damages for destruction of house by defendants while engaged in raising it for purpose of building basement and foundation, allegations as to contract being mere matter of inducement. Armelio v. Whitman [Mo. App.] 106 SW 1113. Where original complaint counted in trespass to realty and additional one sought to recover damages for destruction of lien for wharfage charges on cotton, demurrer and motion to strike on ground of misjoinder in that original counts were ex delicto and additional one ex contractu were properly overruled. Williams v. Alabama Cotton Oil Co. [Ala.] 44 S 957.

7. Action against dormant corporations and officers thereof to recover on notes and to have judgment declared lien on corporate realty held one at law. Swartley v. Oak Leaf Creamery Co. [Iowa] 113 NW 496.

8. **Complaint held to state one cause of action:** Count in complaint in action for personal injuries alleged to have resulted from breaking of defective hand car handle. Southern R. Co. v. McGowan [Ala.] 43 S 378. For breach of contract to transmit telegram, averments of negligence in first count being merely descriptive of manner in which contract was broken. Western Union Tel. Co. v. Garthright [Ala.] 44 S 212. Complaint in action for damages for failure to perform contract to assume payment of chattel mortgages, though alleging two elements of damage. Hurwitz v. Gross [Cal. App.] 91 P 109. On contract of insurance. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93. In action on injunction bond conditioned for payment of judgment, collection of which was sought to be enjoined, and all costs and damages sustained by judgment creditor or his attorney in case injunction was dissolved, held that there was no misjoinder because declaration claimed costs awarded in favor of creditor and attorney jointly, and judgment and damages in which creditor alone was interested. New York Nat. Exch. Bk. v. Reed, 232 Ill. 123, 83 NE 548. Petition in action by passenger against carrier for personal injuries held to state same cause of action in both counts. Bussel v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 SW 613. Petition seeking recovery for several breaches of single contract of carriage. Haurigan v. Chicago, etc., R. Co. [Neb.] 113 NW 983. Counts of complaint in action by insurance

*Consolidation of suits.*See 8 C. L. 1374—The court ordinarily has discretionary power to consolidate two or more pending actions brought by the same plaintiff against the same defendant for cause of action which could be joined.[9]

*Joinder of causes of action.*See 8 C. L. 1375—The codes generally specify certain classes of causes of action which may be joined,[10] provided they are consistent[11] and

company against its former president held each to state but single cause of action to recover damages sustained by defendant's unauthorized and unlawful appropriation of plaintiff's funds. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 815, 103 NYS 829. To recover money lost to plaintiff insurance company through fraudulent acts of defendants acting in concert to execute preconceived conspiracy to obtain same wrongfully and without authority. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 827, 103 NYS 837. In action by insurance company against former president and trustee to compel him to account for unauthorized expenditures. Mutual Life Ins. Co. v. McCurdy, 118 App. Div. 822, 103 NYS 840. For breach of contract for publication of certain pictures, allegations as to extra damages not amounting to separate cause of action for tort. Dunn v. New York Herald Co., 119 App. Div. 477, 104 NYS 94. Complaint alleging sale of goods by plaintiff's assignor to certain company, loan to defendant of certain sum, and agreement by defendant to repay loan and also, as part of consideration of loan, to pay for said goods. Wood v. Duncan, 54 Misc. 628, 104 NYS 1035. Complaint in equitable action to restrain continuance of a nuisance, to creation of which acts of several defendants have contributed, is not multifarious because containing demand for damages already suffered. Burghen v. Erie R. Co., 108 NYS 311, rvg. 53 Misc. 457, 103 NYS 292. Complaint in action against express company for failure to deliver whiskey, mental anguish for which plaintiff claimed compensation being stated merely as an element of damages. Thompson v. Southern Exp. Co., 144 N. C. 389, 57 SE 18. Different branches of a contract are separate causes of action if sued on when occurring, but if no action is brought until after term of entire contract, different branches become one cause, and it is error to require plaintiff to separately state and number different branches as separate causes. Toledo Gas-Light & Coke Co. v. Toledo, 10 Ohio C. C. (N. S.) 490. To procure cancellation of corporate stock alleged to have been illegally issued and to prevent its abuse by holders. Brahm v. M. C. Gehl Co. [Wis.] 112 NW 1097. Fact that it did not state causes of action separately as required by St. 1898, § 2647, held significant of intention to plead but single cause. Id.

Complaint held to state two or more causes of action: One ex contractu for breach of contract to locate station on plaintiff's land and one ex delicto for damages due to manner of constructing railroad. Louisville, etc., R. Co. v. Hurt, 129 Ga. 234, 58 SE 706. Petition in action against carrier for damages for loss of goods shipped held to state two causes of action for breach of contract of carriage, and one in tort for breach of duty in reference to contract made by defendant for plaintiff with steamship company. Wolff v. Southern R. Co. [Ga.] 60 SE 569. Count in petition in action for death of servant, one under Rev. St. 1899, § 2864, and one under § 2865. Jordan v. St. Louis Transit Co., 202 Mo. 418, 101 SW 11. One at law against corporation to recover dividends and one in equity against directors to restrain them from consummation of conspiracy to increase stock in illegal manner to detriment of plaintiff. Searles v. Gebbie, 115 App. Div. 778, 101 NYS 199. To set aside unlawful transfers of bankrupt's property and to recover same for benefit of estate. Bonton v. Wheeler, 108 App. Div. 426, 104 NYS 33. One in equity for accounting and other at law for damages resulting from wrongful or negligent auditing of bills against plaintiff. Mutual Life Ins. Co. v. Gillette, 119 App. Div. 430, 104 NYS 683. One for breach of contract and one for unlawful possession and use of property. Hoag v. Lehigh Valley R. Co., 105 NYS 200. Complaint held to state two causes of action against two separate defendants based upon distinct acts of negligence, so that motion to separately etate and number should have been sustained. Hamnstrown v. New York Cont. Co., 122 App. Div. 43, 106 NYS 880, rvg. 52 Misc. 634, 102 NYS 835. In action for trespass and for injunction to prevent further trespass, where damage is substantial, and judgment therefor is demanded in complaint, it cannot be said that damage alleged is incidental only to the equity action. Duclos v. Kelley, 122 App. Div. 329, 106 NYS 1058. Complaint alleged conspiracy to destroy plaintiff's property and obtain possession thereof, and that pursuant thereto defendants wrongfully instituted criminal actions and civil actions for libel against him. Held that alleged conspiracy stated no cause of action, and overt acts pleaded as result of conspiracy constituted separate torts which could not be united in one complaint. Bird v. Post, 108 NYS 252. One for impairment of value of property by lowering grade of street and one for use and occupation of house by railway company for storage of tools. Coyne v. Memphis, 118 Tenn. 651, 102 SW 355. One against husband and one against husband and wife in action for slander. Kellar v. James [W. Va.] 59 SE 939.

9. For full discussion of this question, see Trial, 8 C. L. 2161.

10. Action of unlawful detainer being purely statutory, a demand for damages or rent cannot be joined in action for possession of premises, there being no statutory provision authorizing such joinder. MacKenzie v. Porter [Colo.] 91 P 916.

11. To be inconsistent, causes of action must be intrinsically and inherently discrepant, inharmonious, and logically incompatible with and contradictory to each other. Siefken v. Erie R. Co., 57 Misc. 222, 107 NYS 1060.

Causes held properly joined: For common law negligence and under Federal employers' liability act. Not inconsistent within mean-

affect all the parties to the action in the same character and capacity.[12] Among the

ing of Code Civ. Proc. § 484, because proof of absence of contributory negligence was essential to first and was not to second. Siefken v. Erie R. Co., 57 Misc. 222, 107 NYS 1060.

Causes held improperly joined: Causes of action based on rescission of contract because of false representations and on breach thereof, though growing out of same transaction. Code Civ. Proc. § 484, subd. 9. Kranz v. Lewis, 115 App. Div. 106, 37 Civ. Proc. R. 368, 100 NYS 674. For breach of contract and for unlawful possession and use of property, though growing out of same transaction. Code Civ. Proc. § 484. Hoag v. Lehigh Valley R. Co., 105 NYS 200. Causes of action in divorce and separation, though both may be joined in counterclaims under Code Civ. Proc. § 1770. Conrad v. Conrad, 56 Misc. 376, 107 NYS 655. County held not entitled to join with suit under B. & C. Comp. § 4946, to cancel lease of road for failure to comply with its provisions, a claim to avoid said lease because made without authority, or because not fully executed, said statute only providing for forfeiture on first named ground. Tillamook County v. Wilson River Road Co. [Or.] 89 P 958.

12. Held no misjoinder: Held proper for two plaintiffs with whom defendant's agent had made separate contracts for conveyance of land to join in suit for specific performance, where said contracts covered same land in part, so that seeming conflict could be determined and title cleared in one action. Carter v. Gray, 79 Ark. 273, 96 SW 377. Where plaintiff, claiming entire interest in property deeded to her and her husband, sued him and third person, who had purchased husband's interest at execution sale, to remove clouds from her title. Hudson v. Wright, 204 Mo. 412, 103 SW 8. In suit by guardian of insane person against executrix of former guardian and sureties on three several bonds given by said deceased guardian for money alleged to have been collected by latter and not accounted for. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

Causes held improperly joined: Count joining two distinct torts by different defendants held demurrable, no common purpose or motive being shown Hackney v. Perry [Ala.] 44 S 1029. Action by landlord against tenant to recover rent from termination of tenancy to commencement of suit to recover possession of leased premises with one against tenant and sureties on undertaking on appeal from judgment for possession to recover damages for withholding possession of premises pending said appeal. MacKenzie v. Porter [Colo.] 91 P 916. Petition for writ of mandamus by stockholder in eight corporations to compel respondent, who was secretary of each of said corporations, to allow him to inspect corporate books, etc., held bad. Mills' Ann. Code, § 70. Merrill v. Suffa [Colo.] 93 P 1099. Petition for equitable relief which embraces two claims by separate and distinct parties against separate and distinct parties, where there is no common right to be established, is multifarious. Civ. Code 1895, §§ 4938, 4936. White v. North Georgia Elec. Co., 128 Ga. 539, 58 SE 33. Petition for injunction and other relief held multifarious so that, appropriate objection having been taken thereto, it was error to grant injunction and to adjudge certain of defendants in contempt for violation of former injunction declared upon in the suit. Id. Where several parties have at diverse times, and without concert of action or collusion, gone upon land and each taken severally part thereof and erected improvements thereon, and one of said parties has individually and on his own account removed improvements placed thereon by himself, cause of action for such removal against such person cannot be joined with one against all such persons for restitution of entire premises, since same judgment cannot be rendered against all defendants. Rev. St. 1887, § 4169. White v. Whitcomb, 13 Idaho, 490, 90 P 1080. Cause of action against one party on lease with one on separate and distinct writing wherein another party guaranties that certain part of rent under said lease will be paid. Marshall v. Saline River Land & Mineral Co., 75 Kan. 445, 89 P 905. Petition in action in quo warranto averring cause of action against mayor, councilmen, and assessor of city to disorganize the municipality, and also one against county clerk and county treasurer to enjoin collection of tax levied on property of plaintiff in said city, held demurrable. Gen. St. 1905, § 4695. State v. Shufford [Kan.] 94 P 137. For maliciously suing out attachment without probable cause and for breach of indemnifying bond by defendant and his surety. Civ. Code Proc. § 83. Bell v. Thompson, 31 Ky. L. R. 473, 102 SW 830. Where different tenants occupy separate portions of premises claimed by plaintiff in ejectment, they should be separately sued. Hunter v. Wethington, 205 Mo. 284, 103 SW 543. Where husband and wife sued twenty-four defendants to quiet title to diverse tracts of land, and plaintiffs were not jointly interested in said several tracts, but each held title distinct from other in separate parcels, and it also appeared from petition that defendants did not in every instance claim interests adverse to plaintiffs in same tract. Gardner v. Robertson [Mo.] 106 SW 645. Action to foreclose mortgage with one to obtain money judgment on note not secured by the mortgage. McCague Sav. Bk. v. Croft [Neb.] 115 NW 315. Causes of action at law against corporation to recover dividends and in equity against directors to restrain them from carrying out conspiracy to increase stock in illegal manner. Searles v. Gebbie, 115 App. Div. 778, 101 NYS 199. Cause of action by shareholder to compel accounting by directors of corporation of their official acts and restoration to corporation of property wrongfully received by them, and one by shareholder to recover damages sustained by him personally by reason of wrongful acts of defendants. Brown v. Utopia Land Co., 118 App. Div. 364, 103 NYS 50. Complaint by several riparian owners to restrain obstruction of stream and to recover damages sustained by each by reason of such obstruction, each of defendants not being concerned in causes of others for damages. Burghen v. Erie R. Co., 108 NYS 311, rvg. 53 Misc. 457, 103 NYS 292. In action against

most common of these are causes of action upon claims arising out of the same transaction or transactions connected with the same subject of action,[13] causes of action on contract,[14] for injuries to real property,[15] and by or against a party in a fiduciary capacity arising by virtue of contract or operation of law.[16] In Iowa causes of action of whatever kind may be joined provided each may be prosecuted by the same kind of proceeding, and if held by the same party and against the same party in the same rights, and if suit on all may be brought and tried in the same county.[17] In Alabama causes of action in trespass and case may be joined if they relate to the same subject-matter.[18] In Louisiana it has been held that a petitory action, an action in jactitacity and railway company, cause of action for impairment of value of property by lowering grade of street, and one for use and occupation of house thereon by railway company for storage of tools. Coyne v. Memphis, 118 Tenn. 651, 102 SW 355. For personal injury to wife and for damages to husband as result of said injury. St. 1898, §§ 2680, 2345, 4985, construed. Brickner v. Kopmeier [Wis.] 113 NW 414.

13. Causes held properly joined: Declaration in suit by several plaintiffs against several defendants to cancel certain deeds and to quiet title, etc., held not multifarious, where under theory by which it was sought to recover all of the defendants were obliged to resort to enforcement of same security for whatever rights they might have, and that their several equities must be satisfied from common security. Ashley v. Cook, 128 Ga. 836, 58 SE 640. For unpaid rent due under lease of realty, and for damages occasioned by wrongful act of tenant in setting fire to building, thus violating covenant of lease to return premises at expiration of lease in as good condition as when received by him, both arising out of lease. Rev. Laws 1905, § 4154. Reed v. Bernstein [Minn.] 114 NW 261. Causes of action on tax bills for construction of sidewalk in front of two lots owned by defendants. Rev. St. 1899, § 593. City of Mexico v. Lakenan [Mo. App.] 108 SW 141. In action by trustee in bankruptcy, causes of action to set aside unlawful transfer of bankrupt's property and to recover same or its value for benefit of estate. Bouton v. Wheeler, 118 App. Div. 426, 104 NYS 33. Cause of action in equity for an accounting concerning disposition of fund over which defendant had disposition and control held improperly joined with one at law for damages claimed to have resulted from wrongful or negligent acts of defendant in improperly auditing bills against plaintiff payable out of its general funds. Mutual Life Ins. Co. v. Gillette, 119 App. Div. 430, 104 NYS 683. Cause of action for breach of logging contract with one in tort for conversion of property placed on defendant's land by plaintiff for purpose of carrying out said contract. Revisal 1905, § 469. Hawk v. Pine Lumber Co. [N. C.] 58 SE 603. Cause of action for equitable relief from forfeited mechanic's lien with one to recover penalty imposed by statute for failing to release said lien on demand. Rev. Codes 1899, § 5291. Sheets v. Prosser [N. D.] 112 NW 72. Against carrier for unreasonable delay in transporting goods, and for statutory penalty for such delay. McCullen v. Seaboard Air Line R. Co. [N. C.] 60 SE 506. Cause of action against defendants on debt assumed by them as partners, and one based on allegations in alternative that, if there was no partnership, defendants obtained property of plaintiff, the original debtor by fraud and false representations. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598. Petition in suit by sole heir of wife against defendant as sole legatee and devisee of husband, and as independent executor of his will, to recover value of certain personalty alleged to have been separate estate of wife, and to have been used by husband in improving community realty which had come into defendant's hands, and seeking to charge same on realty and to have community property partitioned, and including claim against defendant for value of community property alleged to have been converted by him and for rents, held not multifarious. Tison v. Gass [Tex. Civ. App.] 18 Tex. Ct. Rep. 298, 102 SW 751.

14. Count on contract and one on quantum meruit. Phillips v. Geiser Mfg. Co. [Mo. App.] 107 SW 471; Neuman v. Grant [Mont.] 92 P 43. Causes of action for work and labor and for goods sold. B. & C. Comp. § 94. Bade v. Hibberd [Or.] 93 P 364. It is not only permissible, but desirable, that all causes of action on different contracts between same parties that can be joined in same action should be joined, since, if separate actions thereon are pending in a court at same time, court may restrict costs under Vt. St. 1680. Massuco v. Tomasi [Vt.] 67 A 551.

15. For trespass and equitable cause of action for injunction to prevent further trespass. Duclos v. Kelley, 122 App. Div. 329, 106 NYS 1058.

16. Causes of action to set aside mortgage executed by bankrupt to defendant upon realty situated in state where action is brought, and to set aside conveyance by bankrupt to defendant of realty in another state, as preferences may be joined in suit by trustee in bankruptcy. Bowler v. First Nat. Bk. [S. D.] 113 NW 618.

17. Plaintiff sued dormant corporation on note and joined sole stockholder, who was in possession of corporate realty, praying that any judgment recovered should be made lien on land. No equitable relief was sought. Held no misjoinder of causes of action since issue raised as to stockholder was identical with that raised against company. Code, § 3545. Swartley v. Oak Leaf Creamery Co. [Iowa] 113 NW 496.

18. Code 1896, § 3293. Trespass and trover may be joined only when they relate to same subject-matter. Gulf Yellow Pine Co. v. Urquhart [Ala.] 44 S 555. Count in trover for conversion of logs and count in trespass quare clausum fregit for entry on

tion, and an action for damages for trespass, may not be cumulated in the same suit.[19] In states adhering to the common-law rules of pleading, causes of action for separate torts may be joined,[20] but not causes of action at law and in equity,[21] or which are inconsistent,[22] or on which the same judgment cannot be given.[23] The joinder of legal and equitable causes of action is ordinarily permissible under the codes.[24] Both at common law [25] and in some code states,[26] causes of action on tort and in contract cannot be joined. There is no misjoinder where one of two causes of action attempted to be stated is bad for want of facts.[27]

Several aspects of the same cause of action may ordinarily be pleaded in different counts, provided they are not inconsistent.[28] Duplicity should be avoided,[29] and

land and cutting trees from which logs were made held improperly joined. Id. Count for trespass quare clausum fregit for entering on certain lands and count in trover for certain pine trees held improperly joined. Gulf Yellow Pine Lumber Co. v. Monk [Ala.] 45 S 223. Counts for slander and counts for assault and battery cannot be joined. Vest v. Speakman [Ala.] 44 S 1017. Counts in trespass and case for pumping water from plaintiff's land and for filling up springs held to relate to same subject-matter. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

19. Bossier's Heirs v. Hollingsworth, 119 La. 500, 44 S 278.

20. For malicious prosecution and for slander. Slater v. Walter, 148 Mich. 650, 14 Det. Leg. N. 314, 112 NW 682. Fact that plaintiffs joined demands for which they were not entitled to recover with that upon which they did recover held no ground for new trial. Dickinson v. Pere Marquette R. Co., 148 Mich. 461, 14 Det. Leg. N. 252, 111 NW 1078. For two wrongful levies on same personalty. Smith v. White [W. Va.] 60 SE 404.

21. Cause of action to contest will under statute cannot be joined with one for specific performance, partition, and accounting which can be adjudicated only by exercise of general equity powers of court. Tagert v. Fletcher, 232 Ill. 197, 83 NE 805.

22. Held no misjoinder of counts in action in assumpsit where first alleged failure of consideration because mining claims sold plaintiff were never owned by defendant, and second alleged right to rescind for false representations. Whitney v. Haskell, 216 Pa. 622, 66 A 101.

23. Declaration against husband and wife charging utterance of slander by husband on one occasion, and by wife on another, pursuant to conspiracy previously formed to injure plaintiff's character, held demurrable. Kellar v. James [W. Va.] 59 SE 939. Demands of several former postmasters for unpaid salaries under Act of March 3, 1883, held improperly joined. Peysert v. U. S., 41 Ct. Cl. 311.

24. Complaint is not bad because it prays for both legal and equitable relief, as for injunction against maintenance of dam and for damages growing out of its erection. Bal. Ann. Codes & St. § 4793. Durga v. Lincoln Creek Lumber Co. [Wash.] 92 P 343.

25. Count alleging that defendant induced testator to take out policy of insurance and pay assessments, etc., by false and fraudulent representations, cannot be joined with common counts in assumpsit and for breaches of contract of insurance. Price v. Mutual Reserve Life Ins. Co. [Md.] 68 A 689.

26. Louisville, etc., R. Co. v. Hurt, 129 Ga. 234, 58 SE 706. For breach of contract and breach of duty as agent. Wolff v. Southern R. Co. [Ga.] 60 SE 669.

27. Is improper joinder only when there are two or more good causes of action pleaded which cannot be joined. White v. White [Wis.] 111 NW 1116. Demurrer for misjoinder will be overruled where of two pretended causes of action only one is in any event sufficiently stated. Id.

28. Whether or not duplicate statements of same cause of action will be allowed in same complaint rests in sound discretion of trial court, exercise of which will not be disturbed unless abused. Possell v. Smith, 39 Colo. 127, 88 P 1064. May be variety of counts in respect to same cause of action, provided privilege of so pleading is fairly and reasonably exercised. Wilmington City R. Co. v. White [Del.] 66 A 1009. Each theory must be embraced in a separate paragraph. Williamson v. Shank [Ind. App.] 83 NE 641. Complaint in action to foreclose materialman's lien held not to violate rule. Id. Where entire complaint stated cause of action in language and construction that one of ordinary intelligence would be able to understand, held that it was not fatally defective because single cause of action was stated in several separate paragraphs, and refusal to require its reformation in that regard was harmless. Bolen-Darnell Coal Co. v. Williams [Ind. T.] 104 SW 867. In suit for commissions, broker may join count on express contract with one for reasonable value of services. Berry v. Craig [Kan.] 91 P 913. Petition in action for personal injuries may charge two acts of negligence, provided they are not contradictory. Spaulding v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1049. Where same cause of action is stated differently in two counts, plaintiff is not required to elect on which he will rely. Russell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 SW 613. Court may, in its discretion, permit same cause of action to be stated in different ways in different counts in order to meet exigencies of case as presented by evidence, where allegations are not inconsistent and defendant is not misled. Neuman v. Grant [Mont.] 92 P 43. In action to recover damages for conversion of stock alleged to have been pledged as collateral security for loan, held not fatal objection to allowance of amendment to complaint, inserting alternative cause of action, alleging that half of

separate causes of action [30] and inconsistent allegations [31] should not be stated in a single count or paragraph. Each count or paragraph must be complete in itself.[32]

stock was delivered to defendant as security and half as bonus and that transaction was void, that complaint would state two apparently inconsistent statements of transaction on which cause of action rested, there being no discrepancy as to making of loan, giving of note therefor, and delivery of stock. Shirley v. Bernheim, 123 App. Div. 428, 107 NYS 946. When exact nature of plaintiff's legal right or defendant's liability under certain state of facts is doubtful, plaintiff may state same cause of action in different forms, and unless different allegations are so inconsistent that proof of one will disprove others, he should not be required to elect between them before trial. Norbeck & Nicholson Co. v. Pease [S. D.] 112 NW 1136. In action for drilling well, where plaintiff in one count pleaded performance of written contract subsequently modified by parol, and in another sought to recover on quantum meruit for same labor and material, held error to require him to elect between counts before trial. Id.

29. To constitute duplicity, it must appear that plaintiff relies upon more than one cause of action as ground of a single recovery, and it is not enough that it appears that he has more than one. Summers v. Geer [Or.] 93 P 133. Petition is not necessarily duplicitous because of some inconsequential or inapt expression which may not be strictly pertinent to case therein made, where it is plain that plaintiff does not rest his claim for recovery upon it. Rushin v. Central of Georgia R. Co., 128 Ga. 726, 58 SE 357.

Held duplicitous: Petition containing allegations appropriate to action to enforce liability against defendant under statute as last of connecting line of carriers of freight, and also allegations appropriate to action seeking to enforce against it a common law liability, and which are sufficient to set forth good cause of action on either theory. Central of Georgia R. Co. v. Banks, 128 Ga. 785, 58 SE 352. Petition seeking to enforce liability against railway company as carrier of freight under statute and containing allegations appropriate to action to enforce common-law liability. Atlanta, etc., R. Co. v. Broome [Ga. App.] 60 SE 355. Duplicity in declaration in action by passenger against carrier for personal injuries, which alleged negligent operation of car and employment of incompetent conductor, held harmless in view of instructions, though it might have been taken advantage of by special demurrer. Reid v. Rhode Island Co. [R. I.] 67 A 328.

Held not duplicitous: Petition in action against carrier for injuries to passenger. Rushin v. Central of Georgia R. Co., 128 Ga. 726, 58 SE 357. Declaration alleging bond and contract which it secures and the breach thereof is not double because it sets out a decree in chancery against the principal on the bond. Henry v. Heldmaier, 226 Ill. 152, 80 NE 705, afg. 129 Ill. App. 86. Complaint in action to recover as damages money obtained from plaintiff by conspiracy and fraud held not duplicitous because setting up contract as constituting part of means by which fraud was accomplished, it clearly appearing that recovery was sought for deceit alone. Summers v. Geer [Or.] 93 P 133. In action against purchaser of railroad property for damages for personal injuries received while road was in hands of receivers, declaration alleging as grounds of liability express assumption of liability by purchaser, and succession to betterments and improvements made by receivers, grounds being connected and stating or tending to state single cause of action. Gray v. Grand Trunk Western R. Co. [C. C. A.] 156 F 736.

30. Southern R. Co. v. McIntyre [Ala.] 44 S 624; Aetna Life Ins Co. v. Stryker [Ind. App.] 83 NE 657; Giacoma v. New York, etc., R. Co. [Mass.] 81 NE 899. Causes of action must be separately stated. St. 1898, § 2647. Brahm v. M. C. Gehl Co. [Wis.] 112 NW 1097. N. Y. Code Civ. Proc. § 483. Moore Bros. Glass Co. v. Drevet Mfg. Co., 154 F 737. Form of numbering paragraphs disapproved as leaving room for doubt and uncertainty as to whether it is intended to simply number paragraphs or to number causes of action. Toledo Gas-Light & Coke Co. v. Toledo, 10 Ohio C. C. (N. S.) 490 Plaintiff in action against railroad company for personal injuries cannot join in one count cause of action at common law for failure to furnish safe roadbed and machinery, and one arising from negligence of fellow-servants under Const. § 193, Yazoo, etc., R. Co. v. Wallace [Miss.] 43 S 469. Cause of action under Rev. St. 1899, § 2864, for death caused by negligence of servant operating defendant's means of transportation, cannot be joined in same count with one under §§ 2865, 2866, for death caused by negligence of defendant, though both may be joined in same petition. Casey v. St. Louis Transit Co., 205 Mo. 721, 103 SW 1146. Barring inconsistent and self-destructive averments, common-law and statutory negligence may be pleaded in same count so long as violated duties produce the one injury and one damage constituting subject-matter of the suit. White v. St Louis, etc., R. Co., 202 Mo. 539, 101 SW 14. In action against street railway for damages for death of person killed by collision between vehicle and car, held no such inconsistency as to require election. Id. Refusal to require election in personal injury action held harmless in any event, where theory of statutory negligence was eliminated by instructions. Id. Different and independent acts of negligence may be alleged in single paragraph. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265. Though nature of action is to be determined from general scope and character of pleading, and single paragraph should state but single cause of action, where more than one cause is stated in single paragraph, and upon trial facts as to all are submitted to jury, and from judgment it appears that full relief was granted, appellate court should not disregard allegations of fact constituting substantive cause of action merely because they are found in same paragraph with allegations authorizing different relief, par-

Election.[See 8 C. L. 1880]—An election is required whenever a pleader relies on two different, inconsistent conditions of fact.[33]

Splitting causes of action.[See 8 C. L. 1880]—One may not split his cause of action, but all damages arising from a single wrong or cause of action must be recovered in one suit.[34]

Prayer.[See 8 C. L. 1881]—As a general rule the fact that plaintiff asks for more or different relief than that to which he is entitled does not vitiate his pleading,[35] and

ticularly in suits in equity. Aetna Life Ins. Co. v. Stryker [Ind. App.] 83 NE 647. On construing pleadings in connection with judgment held that action to redeem land from foreclosuse sale was presented, considered, and determined as well as right to possession and to quiet title, so that defendants were not entitled to new trial as of right. Id.

31. Contradictory state of facts should not be set up in same paragraph. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369.

32. Under N. Y. Code Civ. Proc. § 483, each cause of action must contain facts sufficient to sustain it, irrespective of any averments in first cause of action. Moore Bros. Glass Co. v. Drevet Mfg. Co., 154 F 737. Count not purporting to exhibit annexed to previous count, and not referring thereto, cannot be aided thereby. Merrill v. Post Pub. Co. [Mass.] 83 NE 419. In passing on demurrer to one count, allegations in others cannot be considered unless incorporated therein. Farquhar v. Farquhar, 194 Mass. 400, 80 NE 654.

33. One cannot sue to enforce inconsistent rights in the same action, and where he attempts to do so he should, on a special demurrer on that ground being interposed, be compelled to elect between them. Venable v. Burton, 129 Ga. 537, 59 SE 253. Where each of two counts of declaration in action for negligence stated enough to embrace cause of action under statute or at common law according to what allegations were rejected as surplusage, held proper to require plaintiff to elect as to which cause of action he would regard as stated in each count. Giacoma v. New York etc., R. Co. [Mass.] 81 NE 899. Where one count of a declaration asks damages for conversion of oats and another for the conversion of the proceeds of the sale of the oats, plaintiff should not be required to elect. Hueni v. Freehill, 125 Ill. App. 345. In action in tort against chattel mortgages for injuring property of plaintiffs in removing mortgaged property from premises and taking property not covered by mortgage, held power to refuse to require plaintiff to elect between count in trover and count in trespass for forcible entry, since if plaintiffs proved that some of goods taken were theirs, and failed to prove that entry was unlawful, count in trover was necessary, though could recover for conversion of such goods under count in trespass if proved that entry was unlawful. Kennedy v. Hoyt [Mass.] 83 NE 862. Where same cause of action is stated differently in two counts, plaintiff is not required to elect on which he will rely. Bussell v. Quincy, etc., R. Co., 125 Mo. App. 441, 102 SW 613. Plaintiff held not required to elect between count on written contract as subsequently modified by parol and count on quantum meruit for same services and materials. Norbeck & Nicholson Co. v. Pease [S. D.] 112 NW 1136. In action against several defendants for joint conversion of grain, refusal to require plaintiff to elect upon which of alleged acts of conversion he would rely held not error, in view of Code Civ. Proc. § 310, authorizing judgment against one or more of several defendants and determination of their ultimate rights between themselves, and of fact that no prejudice was shown. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843. Complaint in action for damages for breach of contract of hiring contained count on theory that contract was renewed for period of three years as permitted by its terms and one on theory that it was renewed for one year. Plaintiff's evidence showed that he continued in defendant's employ after expiration of term fixed by original contract. Held that plaintiff should not have been compelled to elect between his causes of action until close of all the evidence, and it was error to require him to do so at close of his evidence, it being clear that he had good cause of action on second count in any event. Mendelson v. Bronner, 108 NYS 807. Election to rely on first count held none the less final because plaintiff attempted to reserve right to subsequent trial of issues raised by second count, and hence it was not error to permit plaintiff, after verdict, to amend by striking second count. Gorham v. New Haven, 79 Conn. 670, 66 A 505. Failure to require unqualified election held harmless in any event, in view of the verdict. Id. In action to recover damages for false representations in land deal, and also by failure of defendant to perform alleged oral contract in settlement of wrongs previously alleged, held not error to permit plaintiff to elect to proceed upon theory of contract of settlement. Schamper v. Ullrich, 131 Wis. 524, 111 NW 691.

34. See Former Adjudication, 9 C. L. 1422.

35. Prayer is not part of cause of action and does not determine the nature or extent of relief to which plaintiff is entitled, and petition which otherwise states cause of action is not demurrable because it seeks to recover more or different relief than that to which plaintiff is entitled. Updegraff v. Lucas [Kan.] 93 P 630. If facts stated entitle plaintiff to any relief, general demurrer will not lie though he is not entitled to relief demanded by prayer. Donovan v. McDevitt [Mont.] 92 P 49. Under Comp. Laws, § 2685, declaring that there shall be but one form of action, complaint will not be dismissed where it sets up cause of action good either at law or in equity, though he has asked for legal remedy when it should have been equitable, or equitable remedy

he will be granted such relief as the facts alleged and proved entitle him, regardless of that demanded.[36]

§ 3. *The plea or answer.*[See 8 C. L. 1381]—Matters relating to set-off and counterclaim,[37] affidavits of defense,[38] and the necessity of pleading under oath,[39] are treated in separate articles.

General principles.[See 8 C. L. 1381]—The codes generally provide that the answer shall consist of a concise statement of the facts constituting defendant's ground of defense,[40] or that it shall contain a denial of each allegation of the complaint and a statement of any new matter constituting a defense or counterclaim,[41] and permit defendant to set up as many defenses or counterclaims as he may have.[42] Whether the answer sets up more than one defense,[43] and whether it sets up an affirmative defense or merely denies the allegations of the complaint,[44] are questions of construction. The plea or answer must be responsive to the allegations of the complaint[45] and should not be evasive or ambiguous.[46] Except where permitted by the code,[47]

when it should have been legal. Kingston v. Walters [N. M.] 93 P 700.

36. For full discussion of this question, see Judgments, 10 C. L. 467.

37. See Set-off and Counterclaim, 8 C. L. 1875.

38. See Affidavits of Merits of Claim or Defense, 9 C. L. 56.

39. See Verification, 8 C. L. 2255.

40. Under Rev. St. 1901, par. 1277, defense of contributory negigence must be specially pleaded to be available, at least unless it appears from plaintiff's case. De Amado v. Friedman [Ariz.] 89 P 588.

41. Under Rev. St. 1899, § 604, held that, where defendant did not plead champerty, he could not show as defense that contract sued on was champertous. Kelerher v. Henderson, 203 Mo. 498, 101 SW 1083. In action to recover for extra work done under construction contract, where complaint showed that plaintiff did work in endeavor to carry out contract and alleged that plaintiff had no knowledge or reason to believe that work was different from that required by contract, held that defendant could not plead estoppel based on such knowledge, since it would neither be a denial or new matter constitutng a defense within meaning of Burns' Ann. St. 1901, § 350. Cleveland, etc., R. Co. v. Moore [Ind.] 82 NE 52.

42. Under Code Civ. Proc. §§ 94, 95, held that defendants might plead in answer cause of action at law for breach of warranty and one in equity for cancellation of notes sued on, where both arose out of transaction set forth in petition as foundation of plaintiff's claim. Minneapolis Threshing Mach. Co. v. Currey, 75 Kan. 365, 89 P 688.

43. Certain allegations held to have been intended only as recitals in aid of special defense of fraud, and not as presenting special defense of nonliability for interest. Commercial & Sav. Bk. v. Pott, 150 Cal. 358, 89 P 431. Answer, when properly construed, held to set up two separate and distinct defenses, viz., fraud in procuring order for goods, and notice by defendants to plaintiff, before goods were delivered to carrier for shipment, that they would not accept and pay for same, so that it was not error, on demurrer, to refuse to strike answer in its entirety, though plea of fraud was bad. Rounsaville v. Leonard Mfg. Co., 127 Ga. 735, 56 SE 1030. Answer in action on contract of guaranty indorsed on note held to set up but single defense, affirmative allegations of fraud not connected with contract in suit, and not made basis for affirmative relief, adding nothing to previous denials. O'Connor v. Slatter [Wash.] 93 P 1078.

44. Answer held not one of payment, but a denial of indebtedness alleged in complaint. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161.

45. Matter in plea not responsive to declaration properly stricken. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687.

46. Where plaintiff merely alleged generally that insured was member of defendant order in good standing at time of his death, and that policy was in full force and effect at such time, held that denial of such allegations in terms was sufficient to cast burden of proof on plaintiff. Supreme Lodge Knights of Pythias v. Crenshaw, 129 Ga. 195, 58 SE 628. Plea of non est factum which does not unequivocally deny that notes sued on are act and deed of defendant is subject to be stricken on demurrer. Thomas v. Siesel, 2 Ga. App. 663, 58 SE 1131. Plea of payment is properly stricken on demurrer where it fails to allege when, how, and to whom payment was made. Id.

47. Under Civ. Code 1895, § 5065, a party has right to file contradictory pleas. Wade v. Watson, 129 Ga. 614, 59 SE 294. Where defendant pleads general denial and in separate paragraphs matter in confession and avoidance, the admissions in the latter paragraphs are conclusive only as to matter contained in each paragraph respectively, and do not relieve plaintiff from necessity of proving material averments of complaint controverted by said denial. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 NE 854. Doctrine of election applies only to inconsistent causes of action and not to inconsistent defenses, which are expressly allowed by Code, § 3620. Bruner v. Brotherhood of American Yeomen [Iowa] 111 NW 977. Since P. L. 1903, p. 570, § 116, permits filing of inconsistent pleas, defendant may, to count in trespass, plead not guilty and also a justification, and plea of justification is not evidence to justify finding for plaintiff on plea of not guilty. Shallcross v. West Jersey, etc., R. Co. [N. J. Law] 67 A 931. In Nebraska general denial is treated

inconsistent defenses or pleas cannot be set up in the same answer.[48] There is a conflict of authority as to whether such a course is permissible under the code provision authorizing defendant to set up as many defenses as he may have,[49] and as to whether such provision authorizes the pleading of matter in abatement and in bar.[50] Even where the latter course is permitted, the same defense may not be pleaded in abatement and in bar, and where that is done the plea in abatement is a nullity.[51] Inconsistent defenses, when permitted, must be pleaded in separate paragraphs.[52] A plea to the merits is not to be deemed waived or withdrawn by subsequently filing a plea in abatement.[53]

as qualified by admissions elsewhere in answer. School Dist. No. 11 v. Chapman [C. C. A.] 152 F 887. In action on school bonds, where answer contained general denial, but elsewhere admitted genuinenness and execution of bonds, held that plaintiff was not required to prove those facts. Id. Facts alleged in petition to which defendant pleads a waiver, an estoppel, or matter to avoid, will be treated as admitted, though answer also contains general denial. Nason v. Nason [Neb.] 113 NW 139.

48. Separate and distinct defenses are consistent when both may be true, and are inconsistent only when proof of one necessarily disproves the others. Rees v. Storms [Minn.] 112 NW 419. Traverses and defenses in avoidance may go together where they are not inconsistent, test of consistency being whether proof of one will necessarily disprove other. Atterbury v. Hendricks [Mo. App.] 106 SW 111. Defenses may be deemed inconsistent only when they are so contradictory to each other that one of them must necessarily be false. Dutro v. Ladd [Or.] 91 P 459.

Held inconsistent: Plea of general issue and plea of nul tiel corporation. Keokuk & Hamilton Bridge Co. v. Wetzel, 228 Ill. 253, 81 NE 864. Where answer denies execution of writing, and in separate defense alleges that it was made for specific purpose, defenses are so inconsistent that both cannot stand, and affirmative allegation, being latest expression of pleader's intention, will prevail, and execution of instrument is thereby admitted. Johnson v. Sheridan Lumber Co. [Or.] 93 P 470.

Held not inconsistent: In ejectment, plea of not guilty and plea denying possession of premises sued for. Gill v. Graham [Fla.] 45 S 845. In action for slander, defendant may in one paragraph deny speaking the words charged, and in another allege that they are true, without being required to elect between them. Civ. Code Proc. § 113. Whittaker v. McQueen [Ky.] 108 SW 236. Defenses of want of and failure of consideration. Sere v. Darby, 118 La. 619, 43 S 255. In action by landlord to recover rent under written lease, general denial and plea by way of confesson and avoidance, setting up subsequent parol agreement, inconsistent with plantiff's right to recover. Rees v. Storms [Minn.] 112 NW 419. General denial and affirmative defenses of limitations and estoppel. Dee v. Nachbar, 207 Mo. 680, 106 SW 35. In action by brokers to recover commissions, beween general denial, allegations that contract of sale was actually made between owner and purchaser procured by plaintiffs, and special defense that plaintiffs accepted employment from each party to trade without defendant's knowledge or consent. Atterbury v. Hendricks [Mo. App.] 106 SW 111. In action to recover compensation for services, general denial and plea of limitations. Dutro v. Ladd [Or.] 91 P 459.

49. Under Code Civ. Proc. § 441, defendant may plead as many defenses as he may have though they are inconsistent with each other. Snipsic Co. v. Smith [Cal. App.] 93 P 1035. Where denials in first separate defense present perfect defense to cause of action, admissions in second separate defense cannot be regarded as destroying their effect. Id. B. & C. Comp. § 73, providing that answer may contain any new matter constituting defense, and § 74, providing that defendant may set up as many defenses as he may have, do not authorize joining of defenses clearly inconsistent. Dutro v. Ladd [Or.] 91 P 459.

50. **Florida:** Under Gen. St. 1906, §§ 1454, 1455, authorizing contradictory pleas, and authorizing defendant to plead as many matters of fact as he may deem necessary to his defense, may plead to merits or in bar and in abatement to venue without waiving latter plea. E. O. Painter Fertilizer Co. v. Du Pont [Fla.] 45 S 507. Presentation of pleas to merits or in bar along with plea, not denying jurisdiction over defendant's person, but in abatement to venue, because action was not begun in proper county, does not impliedly waive the plea in abatement, at least in absence of anything in record to indicate a waiver or abandonment of the plea duly filed. Id.

Missouri: Under Mo. Rev. St. 1899, §§ 596, 604, 605, held that everything constituting defense to an action, whether in abatement or to merits, must, unless defect appears on face of petition, be presented in answer, so that question of jurisdiction need not be raised by plea in abatement, and general denial puts all allegations of petition in issue whether they be matters in abatement or bar. Cole v. Carson [C. C. A.] 153 F 278. Under Federal conformity act, held that in action in Federal court in Missouri general denial put in issue allegations of diversity of citizenship, and plea in abatement was unnecessary. Id.

51. Rohloff v. Aid Ass'n for Lutherans, 130 Wis. 61, 109 NW 989.

52. Confession and avoidance and denial cannot be pleaded in the same paragraph. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 NE 854.

53. Rohloff v. Aid Ass'n. for Lutherane, 130 Wis. 61, 109 NW 989.

Each separate defense must be complete in itself,[54] except that matters alleged in other defenses may ordinarily be incorporated therein by reference.[55] Defendant may, however, in one paragraph, deny the allegations of all the paragraphs of plaintiff's pleading.[56] A plea or defense professing to answer the entire declaration, but which fails to do so, is bad.[57] Facts not alleged as a partial defense will be deemed to have been intended as a complete defense.[58] Separate defenses are sometimes required to be separately stated and numbered.[59]

Pleas must not be double.[60] Pleas reiterating and repeating defenses which have already been adjudged against the defendant should not be allowed to be filed, and should be stricken if filed without leave.[61] In states where the distinction between actions at law and suits in equity is preserved, pleas on equitable grounds to a common-law action, which set up only legal defenses, are bad.[62] A plea which merely tenders an issue of law is bad.[63]

Pleas in abatement are not favored and will be strictly construed and not aided in construction by any intendments.[64] With them correctness of form is a matter of substance, and any defect of form is fatal.[65] They should not only aver fully what is necessary to be answered, but should anticipate and exclude all such supposable matter as would, if alleged on the opposite side, defeat the plea.[66] Such a plea must ordinarily give defendant a better writ,[67] but this rule does not apply to a plea to the

54. Walsh v. Llspenard Realty Co., 55 Misc. 400, 106 NYS 570. Must contain all that is necessary to answer whole cause of action or that part of it which it purports to answer, and cannot be aided by resorting to other parts of answer to which it contains no reference in terms or by necessary implication. Outcault v. Bonheur, 120 App. Div. 168, 104 NYS 1099; Biedler v. Malcolm, 105 NYS 642.

55. Allegation in separate defenses that defendant "realleges all that he has hereinbefore alleged" held to incorporate into said defenses affirmative defenses theretofore alleged. Stemmerman v. Kelly, 122 App. Div. 669, 107 NYS 379.

56. Hicks v. Hamilton [Ga. App.] 59 SE 331.

57. Lee v. Follensby [Vt.] 67 A 197. Demurrer to plea in action for goods sold on ground that it did not answer certain count of complaint held properly overruled. McAllister-Coman Co. v. Matthews [Ala.] 43 S 747.

58. Where facts which, if stated as partial defense, would have been relevant and proper for that purpose, were not so stated, held that they would be deemed intended for complete defense and therefore demurrable for insufficiency. W. T. Hanson Co. v. Collier, 104 NYS 787. Separate defense not pleaded as partial defense or in mitigation of damages must be regarded as pleaded as complete defense. Thistle v. Jones, 123 App. Div. 40, 107 NYS 840.

59. Paragraph of answer held to state but single defense of limitations, so that order directing separate stating and numbering was improper. Ebling Brew. Co. v. Adler, 103 NYS 93. Where answer in suit to foreclose mortgage denied assignment of mortgage to plaintiff and also alleged new matter by way of defense, held that denial of motion to separately state and number was error. Code Civ. Proc. §§ 500, 507. Stern v. Marcuse, 119 App. Div. 478, 103 NYS 1026. Where defendant pleaded certain matter "for a distinct defense and as a counterclaim," but did not demand any affirmative relief, held that he should not have been required to separate paragraph into defense and counterclaim, it appearing that he intended to set up offset in diminution of plaintiff's recovery, and no duplicity being apparent. Leibovitz v. Utopia Land Co., 107 NYS 135.

60. Law refuses double pleading. United States v. Larkin [C. C. A.] 153 F 113. When the fact relied on as the gist of the defense is but the consequence of another fact, or when one of them is a necessary or proper inducement to the other, both may be pleaded without making plea double. Robinson v. St. Johnsbury, etc., R. Co. [Vt.] 66 A 814. Pleas setting forth accord and satisfaction and release under seal held not double, fact of satisfaction being matter of inducement only. Id. Plea of jurisdiction negativing every ground of jurisdiction enumerated in statute is not bad for duplicity, such a course being necessary to render such a plea sufficient. Deatrick's Adm'r v. State Life Ins. Co. [Va.] 59 SE 489.

61. Hooker v. Forrester, 53 Fla. 392, 43 S 241.

62. Pleas held property stricken. Carlsen v. Ziehme, 53 Fla. 235, 44 S 181.

63. Plea setting up no fact, but simply presenting defendant's construction of contract sued on, presents no defense. Daniel v. Siegel-Cooper Co. [Fla.] 44 S 949.

64, 65. Sutherlin v. Bloomer. [Or] 93 P 135.

66. Plea in abatement in action on liquor dealer's bond for damages for selling liquor to minor on ground of failure to join necessary party plaintiff held insufficient. Price v. Wakeham [Tex. Civ. App.] 107 SW 132.

67. Where action was brought in T. county against single defendant, and summons was directed to W. county and there served, plea in abatement to jurisdiction averring that defendant resided in W. county held not bad for failing to aver that cause of action did not arise in T. county. Netter-

jurisdiction showing a condition of facts under which no court of the state has jurisdiction.[68] Matter in abatement cannot be considered when pleaded in bar.[69] Matter in abatement concluding in bar must be regarded as pleaded in bar.[70] Pleas in abatement may ordinarily be determined though a party defendant has not yet been served.[71] The highest degree of certainty is required in pleas to the jurisdiction,[72] and they must negative every fact from which jurisdiction may be presumed.[73] Such a plea can derive no help from the writ or declaration unless referred to in such a way as to make it a part of the plea.[74] In Illinois an objection to the sufficiency of the service of summons on defendant corporation, when founded on extrinsic facts, may be taken by a plea to the jurisdiction in the nature of a plea in abatement, which need not be verified, nor give a better writ, nor conform in its commencement and conclusion to the rules applicable to pleas in abatement.[75]

In pleas puis darrein continuance, after the cause has been continued, great certainty is required, and it is not sufficient to say generally that after the last continuance such a thing happened, but the day of continuance must be alleged where the matter of defense arose.[76] Such a plea waives all former pleadings, and, if it is adjudged bad on demurrer, the judgment goes in chief, unless the court allows a repleader, on terms, which it may do.[77] It does not, however, admit the truthfulness of an affidavit for a capias ad respondendum.[78]

Denials and traverses.[79]—Argumentative denials are insufficient.[80] Denials on information and belief are generally permitted by the codes,[81] except as to matters presumptively within defendant's knowledge,[82] or matters of public record to which

Oppenheimer & Co. v. Elfant [W. Va.] 59 SE 892.

68. Rule that plea must show more proper or sufficient jurisdiction in some other court of state wherein application is brought. Deatrick's Adm'r v. State Life Ins. Co. [Va.] 59 SE 489.

69. That action was prematurely brought. Clayton v. Dinwoody [Utah] 93 P 723. Defense that plaintiff, a foreign corporation, had not appointed attorney on whom process could be served, as required by statute, held strictly matter in abatement and not open to consideration when pleaded in bar. Russia Cement Co. v. Whitmarsh [R. I.] 67 A 450.

70. Its character must be determined from its conclusion or prayer, and not from its subject-matter. Contract held pleaded in bar. Sutherlin v. Bloomer [Or.] 93 P 135.

71. Plea in abatement of another action pending held available to any party regardless of the others. Miller v. Drought [Tex. Civ. App.] 19 Tex. Ct. Rep. 416, 102 SW 145.

72. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 66 A 809.

73. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 66 A 809. Must negative every ground of jurisdiction enumerated in statute. Deatrick's Adm'r v. State Life Ins. Co. [Va.] 59 SE 489.

74. May, however, be noticed in support of the proceedings. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 66 A 809.

75. Plea held sufficient. Beck & Pauli Lithographing Co. v. Monarch Brew. Co., 131 Ill. App. 645.

76. Omission to state day of last continuance is fatal. Poland v. Davis [Me.] 68 A 456.

77. Repleader nunc pro tunc awarded on payment of costs since filing plea. Poland v. Davis [Me.] 68 A 456.

78. Van Norman v. Young, 228 Ill. 425, 81 NE 1060, afg. 129 Ill. App. 542.

79. See 8 C. L. 1383. See, also, § 14, post.

80. Inferential or argumentative denial in pleas to jurisdiction. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 66 A 809. Plea setting up in reply a different contract from one alleged is argumentative denial of what adverse party must prove to sustain his claim. Dunlevy v. Fenton [Vt.] 68 A 651.

81. Where defendant has no information as to facts alleged in complaint, he may put plaintiff to proof by denial of knowledge or information sufficient to form belief as to their truth. Code Civ. Proc. § 500. United States Casualty Co. v. Jamieson, 122 App. Div. 608, 107 NYS 490. In action for rent by plaintiffs who claimed to have purchased premises from defendant's lessor, held proper to deny sufficient knowledge to form belief as to purchase of premises by plaintiffs, or their ownership thereof. Connolly v. Schroeder, 121 App. Div. 634, 106 NYS 303. Denial on information and belief of allegation of institution and prosecution of summary proceedings held proper. Id.

82. Denial by defendant of indebtedness to plaintiff pleaded upon its want of information and belief held to raise no issue, since party must be held to know whether he is indebted to another. Brady v. Ranch Min. Co. [Cal. App.] 94 P 85. Where complaint alleged that defendant procured certain lands to be conveyed to himself in pursuance of agreement to hold them in trust, etc., held that allegation that defendant "has no knowledge or information sufficient to form a belief as to the truthfulness thereof, and therefore denies the same," was insufficient. Streator v. Streator [N. C.] 59 SE 112. Such a denial is frivolous where facts are presumptively within defendant's knowledge, or

he has access.[83] Where permitted, the prescribed form must be followed in all essential particulars.[84] A general denial should proceed rather than follow matters in confession and avoidance.[85]

*Confession and avoidance.*See 8 C. L. 1384—A plea of confession and avoidance must at least give color to the matter to which it is applied.[86] A pleading which attempts to confess and avoid, but does neither, is bad on demurrer.[87] A general denial may not be pleaded by iteration or otherwise in a separate defense which is a plea by confession and avoidance.[88] A specific allegation of the complaint may, however, be denied in a separate answer, either directly or by repeating a preceding paragraph of the answer, where such denial is necessary to make the separate defense complete.[89]

§ 4. *Replication or reply and subsequent pleadings.*See 8 C. L. 1384—The code provisions as to the necessity for a reply vary in the different jurisdictions. In some states no reply is necessary.[90] In others a reply is required only when the answer contains a counterclaim,[91] or new matter constituting a defense or counterclaim,[92] or new and affirmative matter,[93] or when the plaintiff wishes to set up matter by way

in case of intentional ignorance on his part when it is his duty to know or learn facts, and they are at hand and accessible, as in case of a public record. Rochkind v. Perlman, 108 NYS 224.

83. Denial of knowledge or information sufficient to form a belief that plaintiff purchased certain trees from a certain person and received from him deed, which was duly recorded, held insufficient under Civ. Code Prac. § 113, subsec. 7, since inspection of record would have informed him of facts. Johnson v. Asher [Ky.] 105 SW 943.

84. Denial of "any knowledge or information sufficient to form a belief as to the truth or falsity" of certain allegations of complaint held sufficient in form under Code. Scully v. Wolff, 56 Misc. 468, 107 NYS 181. Denials held insufficient in form under Code Civ. Proc. § 500. Rochkind v. Perlman, 108 NYS 224. Allegation that defendant "denies knowledge or information sufficient to form a belief as to the truth in any of the allegations" of certain paragraphs of complaint held bad, since it only denies knowledge or information in general. Jurgens v. Wichmann, 108 NYS 881.

85. Limitations. Sterling v. De Laune [Tex. Civ. App.] 20 Tex. Ct. Rep. 198, 105 SW 1169.

86. Must contain at least an implied admission that allegations to be avoided are true, and hence plea in effect denying existence of claim it opposes is defective. Dunlevy v. Fenton [Vt.] 68 A 651. Allegation of replication that plaintiff made release pleaded by defendant held insufficient to give color in view of allegations that it never became effective, contract as set forth being entirely inconsistent with existence of release as claimed by defendant. Id.

87. Sefton v. Mitchell, 120 Ill. App. 256.

88. Benjamin v. White, 105 NYS 991. Neither general nor special denial may be inserted in affirmative defense. Ontcault v. Bonheur, 120 App. Div. 168, 104 NYS 1099. Formal plea of general issue contained in plea of estoppel may be stricken as unnecessary where there is another plea of general issue. Wefel v. Stillman [Ala.] 44 S 203.

89. On motion to strike from paragraph setting up separate defense allegations repeating and incorporating therein previous denials, tests are whether matter so repeated is necessary to defense pleaded, and, if not, whether it is prejudicial to plaintiff. Benjamin v. White, 105 NYS 991. Motion to strike in action for rent granted in part and denied in part. Id.

90. New matter set up in answer deemed controverted under Code Civ. Proc. § 462. Newsom v. Woollacott [Cal. App.] 91 P 347. No replication is necessary even when answer consists of nothing but plea in avoidance, but every material fact in support of plea is deemed denied, and plaintiff may at trial meet such defense by evidence in rebuttal of that offered in its support, or proof of some fact in avoidance. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56.

91. Under Rev. Codes 1905, § 6878, allegation of new matter in answer, not relating to a counterclaim, is deemed controverted by adverse party as upon direct denial or avoidance as case may be, so that general denial of such matter in reply is surplusage, and leaves issues made by answer unchanged. Scott v. Northwestern Port Huron Co. [N. D.] 115 NW 192. New matter in answer deemed controverted as upon direct denial or avoidance as case may be. Revisal 1905, § 503. J. F. White Co. v. Carroll [N. C.] 59 SE 678. Filing of reply held not improper, though unnecessary, since defendant was not prejudiced thereby. Id.

92. In action on account for cattle sold, allegation that it was agreed when sale was made that defendant was to have two years in which to pay for them held to amount merely to denial of allegation that account was due and not to require reply. Schecter v. White [Colo.] 92 P 700.

93. In action by employe against railroad for personal injuries, held that allegations of answer were, in effect, only affirmative denial of facts stated in petition, so that no reply was necessary. Murphy v. Illinois Cent. R. Co., 31 Ky. L. R. 148, 101 SW 982. Where affirmative allegations of answer relate merely to matters already put in issue by allegations of complaint and denials in answer, no reply is necessary. Dueber v. Wolfe [Wash.] 92 P 455.

of confession and avoidance.[94] In others where the answer contains new matter by way of avoidance, the right to order a reply is discretionary with the court.[95] The reply must be responsive and defensive to the new matter pleaded in the answer.[96] It must not be inconsistent with the allegations of the complaint,[97] nor can it, as a general rule, be used as a ground for affirmative relief.[98] Denials on information and belief are permissible only when authorized by the code.[99]

In common-law states, a special replication or new assignment is necessary when it is desired to avoid the effect of new matter of defense set up in a plea.[1] The design of a special traverse as distinguished from a common traverse is to explain or qualify the denial.[2] When the denial under the absque hoc in a plea is sufficient, no issue of fact can be formed on the inducement.[3] A traverse upon a traverse is not ordinarily permissible.[4]

94. Under Code, § 576, in action on implied contract for services, where defendant pleaded that services were rendered as member of defendant's family, held that no reply was necessary. Webster v. Armstrong [Iowa] 113 NW 549.

95. Code, § 174. Kennedy v. Hill [S. C.] 60 SE 689.

96. Hallner v. Union Transfer Co. [Neb.] 112 NW 334. Demurrers to certain replications held properly overruled, as replications simply presented general issues to plea to which they were addressed. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Motion to strike allegations of reply as to conditions and circumstances under which contract sued on was made held properly overruled, they being addressed to allegations of ignorance and fraud in answer. Old Settlers' Inv. Co. v. Marshall Vinegar, Pickle & Soap Co. [Iowa] 113 NW 326.

97. Departure in pleading takes place when, in a subsequent pleading, party deserts ground taken in his last antecedent pleading, and resorts to another. Erickson v. McLennan [Wash.] 91 P 249. To set out part of cause of action in complaint and balance in reply is not a departure. Id. Reply in action on contract held not departure. Id. Allegations of reply held in nature of plea of matter in estoppel of defendant's plea of res judicata, and hence permissible under Civ. Code Prac. § 101. Dodd v. Pittsburg, etc., R. Co. [Ky.] 106 SW 787. Reply in action to recover personalty to which plaintiff claimed to be entitled under chattel mortgage held not inconsistent with complaint, it merely amplifying allegations of complaint as to title and right to possession alleged by showing how they were acquired. J. F. White Co. v. Carroll [N. C.] 59 SE 678. In suit to enjoin cutting of timber, defendant pleaded in justification certain contracts according to their legal effect. Held that pleading terms of said contracts in reply did not constitute departure. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811. Reply held departure. Halner v. Union Transfer Co. [Neb.] 112 NW 334. Where complaint in action to quiet title alleged that defendant had no estate, right, title, or interest whatever in premises or any part thereof, held that replication alleging that he had title, but that same was held in trust for plaintiff, and asking to have same canceled, but not conveyed to plaintiff, was such departure that no evidence should have been received in support of its allegations. Webber v. Wannemaker, 39 Colo. 425, 89 P 780.

98. Prayers for relief have no place in reply, but if plaintiff desires relief not already prayed for his remedy is by amendment of complaint. Watson v. Ruderman, 79 Conn. 687, 66 A 515. Under Code, § 174, authorizing court, in its discretion and on defendant's motion, to require reply where answer contains new matter by way of avoidance, allegations of reply can only be used for purpose of defense interposed by way of avoidance, and not as ground for affirmative relief. Kennedy v. Hill [S. C.] 60 SE 689. Refusal to strike reply held not ground for reversal where no prejudice was shown. Id.

99. Under Code Civ. Proc. § 720, as amended by Laws 1899, p. 142, and prior to enactment of Laws 1905, p. 8, c. 5, held that there was no provision authorizing denial in reply of any knowledge or information sufficient to form a belief as to truth of facts alleged in answer, and such a denial was ineffective to put affirmative allegations of answer in issue. McEwen v. Union Bk. & Trust Co., 35 Mont. 470, 90 P 359.

1. Where special pleas set up new matter in defense, joinder of issue thereon creates issue as to truth of such new matter, but does not furnish basis for avoiding its effect by other new matter. Atlantic Coast Line R. Co. v. Mallard [Fla.] 44 S 366. Gen. St. 1906, §§ 1447, 1453, do not do away with necessity for special replication or new assignment when it is desired to avoid effect of new matter of defense set up in plea. Id.

2. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

3. Replications merely denying matters of inducement in the pleas are bad on demurrer. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

4. Replications to pleas to information in nature of quo warranto to oust telephone company from use of streets which concluded with traverse, under the absque hoc, of traverse in pleas, held bad, traverse upon a traverse not being proper in such a case. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829. Only issuable matter in pleas being traverse under the absque hoc, proper manner of taking issue upon them was to join in traverse by reaffirming the usurpation. Id.

Additional pleadings.[See 8 C. L. 1386]—Rejoinders must be responsive to the replications to which they are addressed.[5]

§ 5. *Demurrer. General rules.*[See 8 C. L. 1386]—A demurrer reaches only such defects as are apparent on the face of a pleading,[6] and must be considered as directed against the pleading as it stands at the time the demurrer is interposed.[7]

A demurrer cannot go to the fragmentary part of a pleading, but must go to the whole of the count, plea, or defense to which it is addressed.[8] A demurrer for want of facts will be overruled if the complaint warrants the granting of any relief[9] or if

5. Rejoinder held properly stricken, where matter therein set up was irrelevant, and in no sense an answer to replication to which it was addressed. Code 1896, § 3286. Dalton v. Bunn [Ala.] 44 S 625.

6. As to what defects and defenses may be raised by demurrer, see § 10, post. Illinois, etc., R. Co. v. Minnihan, 129 Ill. App. 432; Jeffries v. Fraternal Bankers' Reserve Soc. [Iowa] 112 NW 786. Demurrer on ground of limitations can be sustained only when it affirmatively appears from complaint that plaintiff's cause of action is barred. Donahue v. Stockton Gas. & Elec. Co. [Cal. App.] 92 P 196. Defense of res adjudicata, founded on averments of facts not appearing in declaration or record of the case, cannot be made by demurrer. Fay v. Boston & W. St. R. Co. [Mass.] 82 NE 7. Complaint held not demurrable on ground that action was prematurely brought where there was nothing in complaint itself showing when it was brought. Belanewski v. Gallaher, 105 NYS 77. To sustain demurrer on ground that complaint fails to state facts sufficient to constitute cause of action, court cannot look to date of summons or verification to determine whether action was prematurely brought. Id. Extraneous or collateral facts stated in demurrer cannot be considered. Wood v. Kincaid, 144 N. C. 393, 57 SE 4. Submits to court legal effect of what appears on face of preceding record. Lee v. Follensby [Vt.] 67 A 197. Defendant in trespass quare clausum pleaded deeds with profert. Plaintiff craved oyer and having heard them read, demurred without reciting deeds. Held that deeds were not within scope of demurrer and points depending on their contents would not be considered. Id. Where bill in Federal court alleges that matter in dispute exceeds jurisdictional amount, and there is nothing in bill to contradict such allegation, demurrer for want of jurisdiction because requisite amount is not involved will be overruled, reasonableness of allegations as to amount not being open to consideration. North American Cold Storage Co. v. Chicago, 151 F 120.

7. Pleading demurred to cannot be subsequently modified on motion to strike and the demurrer then apply to the face of such modified pleading. Gooding v. Doyle [Wis.] 115 NW 114. Demurrer cannot be considered as directed against complaint as latter is amended by order of court at time of and as part of the order overruling the demurrer. City of Columbus v. Fountain Prairie [Wis.] 115 NW 111. Where demurrer to original petition was overruled, held that it could not be renewed at subsequent term after amendment. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93.

8. Separate demurrers to different parts of same defense for ambiguity, etc., held properly overruled. Elgin Jewelry Co. v. Wilson [Colo.] 93 P 1107. Demurrer to plea must be sustained or overruled as an entirety. Hooker v. Forrester, 53 Fla. 392, 43 S 241. Cannot reach simply a defective part of plea. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687. Cannot be addressed to fragmentary parts of pleading, or to certain portions of counts in a declaration. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. Cannot be addressed to part of defense. Gooding v. Doyle [Wis.] 115 NW 114.

9. Evansville & Princeton Trac. Co. v. Broermann [Ind. App.] 80 NE 972. In action on case for damages, declaration is not subject to demurrer if it makes case entitling plaintiff to any recovery whatever, though it be only for nominal damages, even if it claims other or greater damages than cause may legally entitle plaintiff to recover, proper way to test extent of recovery being by objections to testimony, instructions, or requiring declaration to be reformed under Rev. St. 1892, § 1043, when it is calculated to embarrass fair trial. Western Union Tel. Co. v. Milton, 53 Fla. 484, 43 S 495. Complaint showing that plaintiff is entitled to judgment for some amount is good on demurrer. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 NE 854 Rule that complaint must proceed upon some definite theory and must be good upon theory upon which it proceeds does not require that plaintiff must be entitled to all relief asked for, but if he is entitled to any of the relief asked for upon the theory of his case, complaint is sufficient to withstand demurrer or assignment of error for want of facts. Oolitic Stone Co. v. Ridge [Ind.] 83 NE 246, rvg. [Ind. App.] 80 NE 441. So-called demurrer, not challenging plaintiff's right to recover at all, but merely questioning his rights in so far as based on particular contract, held in effect a motion to strike certain clauses from petition, so that it should have been so treated. Frazer v. Andrews, 134 Iowa, 621, 112 NW 92. General demurrer raises question whether, under facts stated, plaintiff is entitled to relief demanded or any relief, and, if so, complaint is good as against such a demurrer. Donovan v. McDevitt [Mont.] 92 P 49. Complaint held good where it showed that plaintiff was entitled to money judgment, though not to equitable relief demanded. Id. Unless no cause of action is stated in complaint, dismissal for failure to state cause of action as to one item claimed will not be sustained. Babcock v. Anson, 106 NYS 642. Demurrer to complaint stating some cause of action held properly overruled, even if some of relief demanded was within proper province of court. Marien

it is good on any theory,[10] as will a demurrer addressed to a complaint,[11] answer, or plea,[12] as a whole, if any of the counts or defenses set up therein are good.

Form, requisites, and sufficiency.[See 3 C. L. 1337]—A frivolous demurrer is one which raises no serious issue of law.[13] A speaking demurrer is bad.[14] Where the

v. Evangelical Creed Congregation [Wis.] 113 NW 66.

10. Complaint is good as against general demurrer if it states cause of action either at law or in equity. Swan v. Talbot [Cal.] 94 P 238. Test as to whether petition can resist general demurrer is whether defendant could admit all that is alleged and escape liability. Douglas, etc., R. Co. v. Swindle, 2 Ga. App. 550, 59 SE 600. General demurrer to petition seeking equitable relief should be overruled if it contains good matter for equity to deal with. Dykes v. Jones, 129 Ga. 99, 58 SE 645. Where complaint states facts sufficient to constitute cause of action, mere fact that it is difficult to tell which of two theories is true one will not render it bad on demurrer for want of facts if same is so framed that either theory is consistent therewith. Oolitic Stone Co. v. Ridge [Ind.] 83 NE 246, rvg. [Ind. App.] 80 NE 441. Complaint will be upheld if states facts sufficient to constitute good cause of action of any kind whatsoever. Dresser v. Mercantile Trust Co., 108 NYS 577. Where complaint set up good cause of action in contract, held immaterial that plaintiff admitted orally that he intended to plead in tort. Id. Where averments of complaint are all consistent with the demand for damages without resort to equity to fix amount, it is not demurrable though equitable relief is also sought. Kelsey v. Walls, 55 Misc. 392, 106 NYS 575. Clear statement of facts upon which liability is predicated, followed by general prayer for relief, will, if facts show cause of action, be good as against general demurrer, even if suit is brought on wrong theory. Thompson v. Mills [Tex. Civ. App.] 18 Tex. Ct. Rep. 139, 101 SW 560. Demurrer to petition held properly overruled, though on facts pleaded plaintiff was entitled to damages for breach of contract, whereas he prayed for sum of money due and unpaid. Id.

11. Where contains one good count. McDougald v. Bass, 53 Fla. 142, 43 S 778; Alvey v. Hartwig [Md.] 67 A 132. If any part of it presents cause of action. Kampmann v. Rothwell [Tex. Civ. App.] 107 SW 120. Where matter in single count is divisible in its nature, demurrer should be confined to those parts which are defective, and, in such case, general demurrer to entire complaint will be overruled if either of said divisible parts states cause of action. Donahue v. Stockton Gas & Elec. Co. [Cal. App.] 92 P 196. Where demurrer is interposed to declaration, "and each of the four counts thereof," in passing thereon, entire declaration must be considered, and demurrer should be overruled if it contains one good count. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. In order that demurrer may raise question of sufficiency of single paragraph alone, it must be directed to that paragraph and not to complaint as a whole. Frederick v. Koons [Ind. App.] 81 NE 1155 Demurrer to whole complaint will not be available as to separate cause of action stated therein and not specifically pointed out in the demurrer unless it is good as to whole complaint. Code Civ. Proc. § 492. Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152, 103 NYS 822. Demurrer that plaintiff is not authorized or has not legal capacity to sue, or that no cause of action is stated, goes to complaint as whole. Id.

12. If one of separate defenses therein alleged is good. Snipsic Co. v. Smith [Cal. App.] 93 P 1035. Though allegations of fraud and mistake in answer were defective, held that defect could not be reached by general demurrer where other defenses were sufficiently alleged. In re Warner's Estate [Cal. App.] 92 P 191. Where answer contains denial of material allegations of complaint, and also affirmative allegations which do not constitute defense, latter must be reached by motion, and not by demurrer to whole answer. Edward Malley Co. v. Londoner [Colo.] 93 P 488. When plea is good in part and bad in part, proper remedy is motion to strike objectionable features, and not demurrer. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687. Is error to strike, on oral motion or general demurrer, an entire plea which, though defective in several paragraphs, contains one paragraph which properly presents a substantial issue. Hicks v. Hamilton [Ga. App.] 59 SE 331. While it is error to strike entire plea when any portion thereof is good, answer to petition filed in orderly and distinct paragraphs may be stricken on demurrer when denials are entirely inconsistent with admissions made in same connection. Bedingfield v. Bates Advertising Co., 2 Ga. App. 107, 58 SE 320. Where answer to cross complaint contained general denial, held that general demurrer to whole of said answer was properly overruled regardless of whether special defenses set up therein were good or not. Sherman v. Goodwin [Ariz.] 89 P 517.

13. Judgment overruling demurrer to complaint was affirmed. Answer was served, and thereafter supplemental complaint was served, to which defendant demurred. Held that motion by plaintiff for judgment on latter demurrer as frivolous, under Code Civ. Proc. § 537, could not be granted, supplemental complaint being purely and only supplemental, and not in itself stating cause of action, and issues raised by original complaint and answer not having been disposed of. People v. Westchester Trac. Co., 106 NYS 389.

14. Speaking demurrer is one that introduces some new fact or averment which is necessary to support the demurrer and which does not distinctly appear on face of pleading demurred to. Southern Exp. Co. v. Briggs, 1 Ga. App. 294, 57 SE 1066. Demurrer on ground of want of jurisdiction because suit was one for a tort with waiver of tort held properly stricken where there was nothing in statement of plaintiff's cause of action to indicate that it was suit for a conversion or tort. Id. Demurrer made to depend not upon what was alleged or revealed in pleading demurred to, but up-

statute prescribes the grounds of demurrer, no others are available.[15] The demurrer must clearly indicate the part of the pleading attacked.[16] In some states the precise defect relied on must be pointed out,[17] and only the grounds so specified may be considered.[18] In others this is true as to special demurrers,[19] but does not apply to general demurrers assailing substantial imperfections.[20]

A joint demurrer interposed by several parties will be overruled if the pleading attacked is good as to any of them,[21] but several demurrers test the sufficiency of the pleading as to each of the parties interposing them.[22]

on statement or recital of alleged rules and regulations of defendant society, which were embodied in demurrer itself, held bad. Jeffries v. Fraternal Bankers' Reserve Soc. [Iowa] 112 NW 786. Demurrer averring any fact not stated in pleading attacked. Wood v. Kincaid, 144 N. C. 393, 57 SE 4.

15. Demurrer to paragraph of answer on ground that same was not sufficient to constitute a sufficient cause of defense to plaintiff's cause of action held bad under Burns' Ann. St. 1901, § 349, providing that where facts stated in answer are not sufficient to constitute cause of defense plaintiff may demur to it under rules prescribed for demurrer to complaint, since it did not present any of the six causes of demurrer enumerated in Code. Oglebay v. Tippecanoe Loan & Trust Co. [Ind. App.] 82 NE 494. Defects for which demurrer will lie are only those named in Code Civ. Proc. § 680, and no others can be reached thereby. Donovan v. McDevitt [Mont.] 92 P 49. In action on note, cross complaint setting up facts showing that, as between defendants, those answering were entitled to demand that a codefendant pay said note, and praying that, if plaintiff obtained judgment, it should provide that execution should first issue against said codefendant, and that, if answering defendants were compelled to pay, they should be compelled to pay, held to demand affirmative relief against plaintiff within meaning of St. 1898, § 2656a, providing that party against whom affirmative relief is demanded in cross-complaint may demur thereto. First Nat. Bk. v. Frank, 131 Wis. 416, 111 NW 526. Under St. 1898, § 2658, giving plaintiff right to demur to answer of any defendant, or any separate defense pleaded therein, he may challenge the sufficiency of a cross complaint by demurrer regardless of § 2656a. Id.

16. Demurrer "to the defense and counterclaim consisting of new matter" held sufficiently explicit. Code Civ. Proc. § 494. Outcault v. Bonheur, 120 App. Div. 168, 104 NYS 1099.

17. Ground of demurrer held bad because general. Code 1896, § 3303. Francis v. Sandlin [Ala.] 43 S 829. Demurrer to complaint on ground that alleged negligence was not alleged to have been proximate "result" of plaintiff's injury held wanting in intelligent merit, and properly overruled. Birmingham R., L. & P. Co. v. Lee [Ala.] 45 S 292. Grounds of demurrer that several causes of action were improperly joined, and that complaint was ambiguous, unintelligible, and uncertain, disregarded for failing to specify grounds of objection. Mills' Ann. Code, § 51. Lacey v. Bentley, 39 Colo. 449, 89 P 789. Exception to petition in answer held, under rule 18 of district and county courts, to be regarded as general rather than special one. Pfeiffer v. Wilke [Tex. Civ. App.] 107 SW 361. Held that any defect or omission of averment in regard to actual damages sought to be recovered should have been specially indicated by an exception. Id. Demurrer on ground of defect of parties must designate parties improperly omitted. Federal Betterment Co. v. Blaes, 75 Kan. 69, 88 P 555. St. 1898, §§ 2649, 2651. White v. White [Wis.] 111 NW 1116; Wilcox v. Scanlon [Wis.] 113 NW 948.

18. Williams v. Alabama Cotton Oil Co. [Ala.] 44 S 957. Demurrer for want of facts does not raise question of legal capacity of foreign corporation to sue. Valley Lumber & Mfg. Co. v. Nickerson, 13 Idaho, 682, 93 P 24. Rev. St. 1887, § 4174. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. Exception to overruling of demurrer cannot avail where no grounds of demurrer were assigned. Code 1899, c. 125, § 29. Hanson v. Blake [W. Va.] 60 SE 589.

19. Must point out exact defect complained of. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524; Dykes v. Jones, 129 Ga. 99, 58 SE 645. Must point out exact defect complained of, and show wherein allegation is defective. Douglas, etc., R. Co. v. Swindle, 2 Ga. App. 550, 59 SE 600. Should specifically state what further allegations should have been made. Woodruff v. Hughes, 2 Ga. App. 361, 58 SE 551. Special demurrer on ground that petition as whole was too general, vague, uncertain, and indefinite, held itself too general and indefinite to raise any question for decision. Askew v. Thompson, 129 Ga. 325, 58 SE 854. Special demurrer held not to have reached objection that date when promise to pay for certain cotton delivered to defendant by mistake was made was not alleged or that, if it could be inferred that it made at time of delivery, limitations had run. Busby v. Marshall [Ga. App.] 60 SE 376. Demurrer questioning right of plaintiffs to sue and right of one of them to sue on contract pleaded held to raise question of misjoinder of parties. City of Galena v. Galena Water Co., 229 Ill. 128, 82 NE 421.

20. General demurrer enables party to assail substantial imperfections without particularizing any of them in demurrer. Douglas, etc., R. Co. v. Swindle, 2 Ga. App. 550, 59 SE 600. Fact that demurrer is addressed to certain paragraphs of petition instead of to petition as whole does not of itself make it a special demurrer. Demurrer held general. Id.

21. Caho v. Norfolk & S. R. Co. [N. C.] 60 SE 640.

22. Demurrer filed by each of several defendants, alleging that "the defendants and each of them separately demur" to the complaint, held several, and not joint. McCleary

Issues raised.[See 8 C. L. 1388]—A demurrer raises an issue of law [23] which must be determined upon the words actually employed in the pleading demurred to.[24] It admits the truth of all material allegations of fact which are well pleaded,[25] together with such inferences as may be reasonably drawn from them,[26] but does not admit conclusions of law [27] or facts pleaded by way of recital.[28]

As a general rule a demurrer, whenever and by whomsoever interposed, reaches back through the whole record, and condemns the first pleading defective in substance,[29] but this rule has been held not to apply to a demurrer to a counterclaim.[30]

v. Babcock [Ind.] 82 NE 453. Demurrer showing upon its face that each of the defendants for himself demurred separately and severally to each paragraph of complaint for reason that neither paragraph stated facts sufficient to constitute cause of action held sufficient in form to challenge sufficiency of each paragraph as to each of the defendants demurring. Southern R. Co. v. Elliott [Ind.] 82 NE 1051. Demurrer held to be treated as confined to one cause of action against two of defendants only, so that it was not error to sustain it where action was prematurely brought as to them, though complaint stated good cause of action against other defendant. Blackmore v. Winders, 144 N. C. 212, 56 SE 874.

23. Where plea in action against railroad for killing stock alleged that plaintiff's negligence proximately contributed to his damages, and set out facts relied on as constituting such negligence, held that sufficiency of such facts to constitute contributory negligence was on demurrer to plea, question of law for court. Southern R. Co. v. Dickens [Ala.] 45 S 215. Submits to court legal effect of what appears on face of preceding record. Lee v. Follensby [Vt.] 67 A 197.

24. Where contract on which counterclaim was based was not alleged otherwise than by reiteration of each and every allegation contained in certain paragraphs "of this amended complaint," and complaint was not an amended one, and paragraphs referred to did not set forth contract, held that demurrer to answer would be sustained with leave to amend on payment of costs, though defendant doubtless intended to refer to answer and not complaint. Aetna Life Ins. Co. v. North Star Mines Co., 55 Misc. 402, 106 NYS 545.

25. Smythe v. Inhabitants of New Providence Tp., 158 F 213; Atlantic Coast Line R. Co. v. Crosby, 63 Fla. 400, 43 S 318; Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761; Hays v. Hays [Ind. App.] 82 NE 90; Brown v. Gorman [Ind. T.] 104 SW 1165; Jeffries v. Fraternal Bankers' Reserve Soc. [Iowa] 112 NW 786; Martin v. Smith, 31 Ky. L. R. 882, 104 SW 310; Kevil v. Stunston, 31 Ky. L. R. 1000, 104 SW 348; Ingram v. Cincinnati, etc., R. Co. [Ky.] 107 SW 239; Ruddock Orleans Cypress Co. v. De Luppe, 119 La. 952, 44 S 794; Kingston v. Walters [N. M.] 93 P 700; Beresford v. Donaldson, 54 Misc. 138, 103 NYS 600; Climax Specialty Co. v. Seneca Button Co., 54 Misc. 152, 103 NYS 822; Avon Springs Sanitarium Co. v. Weed, 119 App. Div. 560, 104 NYS 58; People v. Luke, 122 App. Div. 64, 106 NYS 621; Shaw v. Feltman, 121 App. Div. 597, 106 NYS 1043; Wood v. Kincaid, 144 N. C. 393, 57 SE 4; Buchanan v. Wilburn [Tex. Civ. App.] 20 Tex. Ct. Rep. 113, 105 SW 841; Chicago, etc., R. Co. v. Douglas County [Wis.] 114 NW 511. Verified complaint in action by water company to restrain enforcement of rates fixed by county commissioners contained copies of orders fixing and refusing to modify said rates set out in haec verba. Demurrer to complaint was overruled and defendant elected to stand by it. Held that defendant could not complain that orders were not proven. Montezuma County Com'rs v. Montezuma Water & Land Co., 39 Colo. 166, 89 P 794.

26. Avon Springs Sanitarium Co. v. Weed, 119 App. Div. 560, 104 NYS 58.

27. As to what allegations are conclusions, see § 1, ante. People's Home Sav. Bk. v. Stadtmuller, 150 Cal. 106, 88 P 280; Aetna Life Ins. Co. v. North Star Min. Co., 107 NYS 140.

28. As to what allegations are recitals, see § 1, ante. Chicago, etc., R. Co. v. Barker [Ind.] 83 NE 369.

29. United States Fidelity & Guaranty Co. v. Paxton [Ky. App.] 106 SW 841. Opens up all previous pleadings, and judgment will be rendered against party who committed first error. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761. Bad replications are sufficient for a bad reply. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829. Where a general and special demurrer was interposed to all of several replications to two pleas, held that demurrer was properly sustained if there was one good plea and no good replication. Id. Where bill for injunction showed adequate remedy at law, held that it should have been dismissed on demurrer to answer. Lafayette v. Hood [Ind. T.] 104 SW 853. Demurrer will not lie to insufficient defense unless complaint states good cause of action. Peerrot v. Mt. Morris Bk., 120 App. Div. 247, 104 NYS 1045. That complaint does not state cause of action is complete answer to demurrer to defense, and complaint will be dismissed under such circumstances. Heath Dry Gas Co. v. Hurd, 108 NYS 410. Sufficiency of complaint considered on demurrer to answer. Holland v. Grote, 107 NYS 667. Demurrer to reply cannot be sustained where answer is defective in substance. Lewis v. Ryan, 55 Misc. 408, 106 NYS 646. Where upon demurrer to answer court dismisses a complaint as not stating cause of action, it will be reviewed on appeal as though demurrer had been to complaint, and allegations of answer, therefore, will not be taken as true. Nichols v. Riley, 118 App. Div. 404, 103 NYS 554. Demurrer reaches all pleadings, but has force of general demurrer only, as applied to pleadings prior to one demurred to and hence demurrer to replication reaches only substantial defects in plea, and not argumentativeness and duplicity. Dunlevy v. Fenton

In Louisiana peremptory exceptions founded on law do not go into the merits, and may be filed at any stage previous to definitive judgment,[31] and where a defendant files an exception of no cause of action after default, and also files an answer, the exception should not be considered as an answer admitting the facts alleged in the petition for the purposes of a trial on the merits.[32]

Hearing and decision on demurrer. See 8 C. L. 1390—Ordinarily the court should rule on a general demurrer before proceeding to trial on the merits,[33] or at least before passing on the merits.[34] A party to whose pleading a demurrer has been sustained should ordinarily be given an opportunity to amend.[35] After the signing of an order sustaining a demurrer to the entire declaration with no allowance of time to amend, it is too late to amend, though the order contains no formal words of dismissal.[36] The fact that a demurring party abides by his demurrer after it has been overruled does not preclude the amendment of the pleading to which it was directed.[37] Where plaintiff refuses to plead over after his demurrers to the answer are overruled, judgment is properly rendered for defendant if any one of the defenses demurred to is sufficient,[38] unless issues of fact remain to be tried.[39] As a general rule a party whose demurrer is overruled must withdraw the same before pleading

[Vt.] 68 A 651. Demurrer to part of answer held to entitle defendant to challenge validity of complaint. Moore Bros. Glass Co. v. Drevet Mfg. Co., 154 F 737.

30. Does not reach back to complaint, but sufficiency of countercaim is to be determined as an independent matter. Aetna Life Ins. Co. v. North Star Mines Co., 107 NYS 140.

31. Code Prac. arts. 345, 346. Bijou Co. v. Lehmann, 118 La. 956, 43 S 632.

32. So considered only when default is set aside and no other defense made. Bijou Co. v. Lehmann, 118 La. 956, 43 S 632.

33. Refusal to rule on general demurrer to petition before proceeding to hear evidence, after which it was overruled, held harmless though not commendable practice. Thompson v. Mills [Tex. Civ. App.] 18 Tex. Ct. Rep. 139, 101 SW 560.

34. An exception of no cause of action which has been referred to merits and which has not been waived by answer, but has been duly reserved, should be passed on before passing on merits, and regardless of what evidence may have been admitted, with or without objection, on the merits. Rogers v. Southern Fiber Co., 119 La. 714, 44 S 442.

35. Held error to dismiss complaint on sustaining demurrer thereto, but that plaintiff shoud have required and been given time to amend, or to have stood upon the complaint and appealed. Brown v. Gorman [Ind. T.] 104 SW 1165. Complaint should not be dismissed on merits on sustaining demurrer thereto where merits of controversy can only be determined by trial of facts involved and it is possible by amendment to allege state of facts showing legal liability, but plaintiff should be given an opportunity to amend. Brown v. Utopia Land Co., 118 App. Div. 364, 103 NYS 50. Where decree dismissing bill on sustaining of demurrer thereto was rendered in term time, and complainant did not offer to amend, he could not complain that he should have been given opportunity to amend. Ward v. Birmingham Waterworks Co. [Ala.] 44 S 570. Trial court should not be held in error for refusing to allow defendant further time to answer bill of complaint after two successive pleas have been held insufficient on demurrer when defendant is present and argues case on final hearing and does not ask for further time until judgment against him is announced, and even then makes no offer of a bona fide meritorious defense. Williams v. Clyatt, 53 Fla. 987, 43 S 441. Where town, summoned as codefendant by order of court, appeared and by demurrer raised practically same issue as that raised by demurrer of original defendant, held that plaintiff was not required to further amend complaint in order to obtain judgment on that issue which would bind town. Pinney v. Winsted, 79 Conn. 606, 66 A 337.

36. Wells v. John G. Butler's Builders' Supply Co., 128 Ga. 37, 57 SE 55. Where, in action by materialman against contractor, surety on his bond, and lot owner, seeking to obtain personal judgment against former and to foreclose materialman's lien on lot of latter, and general demurrer by lot owner was sustained with no time for amending, held that after order had been signed, and without any motion to open or revoke it, amendment could not be allowed so as to perfect petition for purpose of foreclosing lien. Id. In absence of motion to reopen judgment made at same term, held error to allow amendment at later term though filed at term when demurrer was sustained. Id.

37. Kistner v. Peters, 126 Ill. App. 615.

38. Where plaintiff refuses to plead over after his demurrers to the answer are overruled, judgment is properly rendered for defendant if any one of the defenses demurred to is sufficient. Beckerle v. Danbury [Conn.] 67 A 371.

39. Though demurrer to answer containing both denial of material allegations of complaint and affirmative allegations which were insufficient to constitute defense was properly overruled, held that it was error to render judgment against plaintiff for costs on his electing to stand by demurrer, since issues raised by denials remained to be tried. Edward Malley Co. v. Londoner [Colo.] 93 P 488.

further.[40] A judgment overruling a demurrer, while unreversed, is conclusive as to the legal sufficiency of the pleading demurred to,[41] and a pleading to which a demurrer has been sustained is out of the record.[42] The signing of an order sustaining a demurrer to the whole declaration interposed by one of several defendants puts an end to the case as to him.[43] A judgment on demurrer should be rendered only in favor of the parties interposing it even though the pleading is insufficient as to coparties not demurring.[44] Any error in sustaining a demurrer to a paragraph of the complaint [45] or to a plea or defense [46] is harmless where the facts therein alleged are provable under other allegations of the pleading. Overruling a demurrer to a bad paragraph is reversible error unless it appears that the facts set forth therein that are competent to go in evidence at all may be proved under some other sufficient paragraph, and that the verdict or finding is based on the latter paragraph and not on the defective one.[47]

§ 6. *Cross complaints and answers.* See 8 C. L. 1391—By statute in some states whenever a defendant seeks affirmative relief against any party affecting the property or transaction to which the action relates, he may, in addition to his answer, file a cross complaint demanding the same.[48] The sufficiency of a cross complaint is to

40. Where plaintiff's demurrer to separate defense is overruled, they cannot amend until they have withdrawn their demurrer. Nachod v. Hindley, 118 App. Div. 658, 103 NYS 801. Where plaintiff's demurrer to separate defense was overruled, and leave given them to amend, held that judgment should have given them leave to withdraw their demurrer. Id.

41. Judgment overruling demurrer to answer, unless excepted to and reversed, concludes plaintiff as to legal sufficiency of answer, and, if same goes to whole of plaintiff's demand and is duly supported by evidence, complete defense is established. Kiser Co. v. McLean-Everett & Co., 2 Ga. App. 360, 58 SE 489.

42. Where demurrer to the plea of statute of limitations is sustained and no leave is obtained to plead over, there is no issue of fact involving the statute of limitations. Gillmore v. Chicago, 224 Ill. 490, 79 NE 596, rvg. 125 Ill. App. 13. Where demurrer to plea has been sustained, defendant need offer no proof to sustain its allegations. F. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391.

43. Wells v. John G. Butler's Builders' Supply Co., 128 Ga. 37, 57 SE 55.

44. Where there are several defendants to equitable petition, and some of them file demurrers and others do not, petition should not be dismissed as to those not demurring, though there is no equity in petition as to any of defendants. Sapp v. Williamson, 128 Ga. 734, 58 SE 447.

45. Where facts stated therein were provable under another paragraph to which demurrer was overruled. National Cash Register Co. v. Price [Ind. App.] 83 NE 776. Subsequent dismissal of good paragraph by plaintiff held not to render ruling harmful. Sanders v. Crawford [Ind. App.] 83 NE 719.

46. When facts provable under general denial. Smith v. Davis [Ala.] 43 S 729; Idaho Placer Min. Co. v. Green [Idaho] 93 P 954; Stamets v. Piano Mfg. Co. [Ind. App.] 82 NE 923; Id., 40 Ind. App. 620, 82 NE 122. Where is another plea of same kind. Wefel v. Stillman [Ala.] 44 S 203; St. Louis, etc., R. Co. v. Douglas [Ala.] 44 S 677. Where defendant has benefit of all matters relied upon therein as a defense. Smith v. Davis [Ala.] 43 S 729. Union Fertilizer Co. v. Johnson [Ala.] 43 S 752. Defendant held not to have gotten benefit of plea to which demurrer was improperly sustained under certain other pleas which went further. Southern R. Co. v. Hundley [Ala.] 44 S 195.

47. Sullivan Mach. Co. v. Breeden [Ind. App.] 82 NE 107.

48. May file cross complaint demanding affirmative relief affecting property to which action relates. Rev. St. 1887, § 4188. Bacon v. Rice [Idaho] 93 P 511. In action to quiet title, where defendant relies upon title in himself, a cross complaint is unnecessary, but where he seeks to enforce an equitable title against plaintiff as holder of legal title, it is necessary. Id. Under St. 1898, § 2656a, relief sought by cross complaint must involve or in some manner affect the contract, transaction, or property which is subject-matter of the action, and it may be relief against a codefendant or defendants, or against a codefendant and the plaintiffs, or any part of the plaintiffs. First Nat. Bk. v. Frank, 131 Wis. 416, 111 NW 526. In action on note, cross complaint setting up facts showing that, as between defendants, answering defendants were entitled to demand that a codefendant pay said note, and that they be subrogated to plaintiff's right in case judgment could not be collected from him, held good as cross complaint. Id. In action by taxpayers to declare paving contract void and to enjoin payment for paving out of public funds, held proper to allow defendant contractor to interpose cross complaint against city and its officers, who were also defendants, praying that, in case special assessments for paving should be held invalid, city be required to make reassessment, such relief involving subject-matter of action, since balance attempted to be made chargeable against city or ward funds, which action was brought to conserve, might be substantially increased or diminished by reassessment. Cawker v. Milwaukee [Wis.] 113 NW 419.

be tested by the same rules of pleading as the complaint.[49] No answer to a cross complaint is necessary where it merely sets up matters provable under the answer.[50]

§ 7. *Amendments.* See 8 C. L. 1392—Amendments are, as a rule, freely granted in furtherance of justice,[51] the matter being largely committed to the discretion of the

49. In action to quiet title, cross complainant need not set forth evidence by which he expects to prove his title. Bacon v. Rice [Idaho] 93 P 511. Must state facts sufficient to entitle pleader to affirmative relief. Id.

50. In suit for injunction to restrain execution of writ of possession, where socalled "cross bill" of defendants only set up matters provable under their plea of not guilty. Taylor v. Ward [Tex. Civ. App.] 19 Tex. Ct. Rep. 441, 102 SW 465.

51. Only limitation on right of plaintiff in civil action at law to amend complaint at any time before final submission of cause to jury is that there must not be an entire change of parties nor substitution or introduction of an entirely new cause of action. Townes v. Dallas Mfg. Co. [Ala.] 45 S 696. Should be allowed if declaration has in it enough to amend by in respect to contents and nature of amendment offered. Boyce v. Day [Ga. App.] 59 SE 930. Court should be liberal in allowing amendments, where it appears that they are in good faith and that their allowance would serve the ends of justice. Rev. St. 1887 § 4229. Dunbar v. Griffiths [Idaho] 93 P 654. Statute allowing amendments should be liberally construed. Northwestern Mut. Life Ins. Co. v. Richardson, 130 Ill. App. 205. Circuit court may permit such amendments as will do substantial justice between parties. Toledo, etc., R. Co. v. Smith, 130 Ill. App. 11. Application for leave to amend should be granted unless something has taken place since service of original pleading which will work to prejudice of adverse party if amendment is allowed, or trial will be delayed by reason of it. Washington Life Ins. Co. v. Scott, 119 App. Div. 847, 104 NYS 898. Party ought to be permitted to put his pleadings in such shape as will enable him to raise and have determined at trial every question affecting his interest involved in subject-matter of the litigation. Code Civ. Proc. § 723. Id. Under Code § 194, only limitation on allowance of amendment before trial is that they must be in furtherance of justice. Kennedy v. Hill [S. C.] 60 SE 689. Exceptions to allowance overruled where defendant failed to satisfy court that they were not in furtherance of justice. Id. Power of court to allow amendments in furtherance of justice is very broad. Price v. Grzyll [Wis.] 114 NW 100. Rule that amendments should be liberally allowed in furtherance of justice changes to disadvantage of applicant on allowance of each new amendment. Scott v. Northwestern Port Huron Co. [N. D.] 115 NW 192. Refusal to allow amendment of second amended complaint after case had been called for trial and motion for judgment on pleadings had been made held not abuse of discretion. Id.

Amendment allowed: To answer in action to quiet title, so as to allege invalidity of certain tax deed under which plaintiff claimed. Webber v. Wannemaker, 39 Colo. 425, 89 P 780. To petition so as to add thereto name of plaintiff's counsel and allegation that account was due and unpaid and that defendants were partnership composed of named individuals. Austin v. M. Ferst's Sons, 2 Ga. App. 917, 58 SE 218. To petition, alleging liability of same defendants to same plaintiff for commissions growing out of same transaction and referring to same contract, but varying statement of some of stipulations of contract. Bunn v. Hargraves [Ga.] 60 SE 223. In action against carrier by passenger, amendment to petition claiming exemplary damages in which it was in effect alleged that act complained of amounted to willful misconduct, or that entire want of care which would raise presumption of conscious indifference to consequences. Southern R. Co. v. Jordan, 129 Ga. 665, 59 SE 802. To declaration alleging that contract, breach of which is wrong complained of, was made by defendant as agent, without more, by striking word "agent" therefrom, such contract being the individual undertaking of the maker. Hearn v. Gower, 1 Ga. App. 265, 57 SE 916. In action in justice's court by shipper against carrier for damages for failure to transport goods, amendments to summons amplifying statement of cause of action by setting out contract of carriage. Jenkins v. Seaboard Air Line R. Co. [Ga. App.] 59 SE 1120. Petition stating cause of action good as against general demurrer may be purged by amendment of general allegations which do not of themselves set forth different cause of action, but are inappropriate to real cause declared on. Central of Georgia R. Co. v. Inman, 129 Ga. 652, 59 SE 784. In action by landlord to recover rent under written lease, where defendant interposed general denial, held error to refuse to allow him to amend by alleging also, by way of confession and avoidance, subsequent oral agreement inconsistent with plaintiff's right to recover, and excluding evidence to that effect. Rees v. Storms [Minn.] 112 NW 419. In action against indorser of certificate of deposit, amendment of complaint at trial by inserting in copy of certificate set forth in pleading words "with interest at 3 per cent. per annum, no interest after 6 months," which had been omitted, held properly allowed under Minn. Gen. St. 1894, § 5262, variance being immaterial and not misleading. Derham v. Donohue [C. C. A.] 155 F 385. To complaint from which certain allegations had been stricken as irrelevant, so as to leave remaining allegations clear and connected. Bradley v. Sweeney, 120 App. Div. 315, 105 NYS 296. In action to foreclose mortgage, holders of mechanic's lien on premises defaulted. Held proper to amend complaint so as to allege foreclosure of prior mortgage, and existence of surplus after its payment, and to decree that plaintiffs have prior lien on said surplus without notice to holders of mechanic's lien of amendment, notwithstanding Code Civ. Proc. § 1207, providing that where there is no an-

trial court,[52] who may take into consideration the probable utility of the amend-

swer, judgment shall not be more favorable to plaintiff than that demanded in complaint, judgment rendered being proper under original complaint since, as to second mortgage, surplus took place of land. Hookey v. Greenstein, 119 App. Div. 209, 104 NYS 621. Refusal to allow amendment of answer held error. Washington Life Ins. Co. v. Scott, 119 App. Div. 847, 104 NYS 898. Where pleadings were oral so that defect of parties could not be taken advantage of by demurrer, held that defendant should have been allowed to amend answer at trial so as to set up that fact. Moppar v. Wiltchik, 56 Misc. 676, 107 NYS 594. Under Revisal 1905, § 1467, relating to amendments, etc., in justice's court, held that, where warrant and complaint in action in such court to recover statutory penalty merely alleged that amount claimed was "due by penalty," it was proper to allow warrant to be amended so as to show facts under which penalty was claimed to have accrued, and section of code under which it was claimed. Stone v. Atlantic Coast Line R. Co., 144 N. C. 220, 56 SE 932. Permitting a plaintiff who has sued in her individual capacity to substitute herself as executrix. Tucker v. Sherman, 9 Ohio C. C. (N. S.) 70. In action against county for damages for personal injuries sustained on defective bridge, amendment of complaint at trial so as to allege that plaintiff had no knowledge, it not having changed cause of action, and it not appearing that defendant was misled to his prejudice. B. & C. Comp. § 102. Ridings v. Marion County [Or.] 91 P 22. Fact that objection was made to admission of evidence as to said fact held not to have deprived cohr of right to allow amendment. Id.

Amendment disallowed: In suit by administrator to recover for wrongful death, where answer in terms admitted plaintiff's appointment and qualifications held that, on case being reached for trial more than two years after death of decedent, application to amend answer so as to deny plaintiff's appointment and qualification, for sole purpose of interposing bar of statute of limitations, should have been denied as not being in furtherance of justice. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 NE 152.

52. Northwestern Mut. Life Ins. Co. v. Richardson, 130 Ill. App. 205; Carey-Lombard Lumber Co. v. Daugherty, 125 Ill. App. 258. To rely. Gehlert v. Quinn, 35 Mont. 451. 90 P 168. Allowance not error unless deprives complaining party of some substantial right. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161. Application for leave to amend counterclaim is addressed to sound discretion of court, and denial will not be reviewed unless abuse of discretion is shown. Barngrover v. North, 35 Mont. 448, 90 P 162. Under Civ Code § 144, granting or refusing amendments rests in judicial discretion, abuse of which is subject to review. Minton v. Palmer [Neb.] 112 NW 610. Allowance of amendment on trial. Ruling will not be reversed except for manifest abuse. Ridings v. Marion County [Or.] 91 P 22. Court's action in allowing filing of amended reply after portions of original have been stricken out on motion will not be disturbed unless abuse of discretion is shown. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811. Fact that application was not supported by affidavit showing why amended reply should be allowed held not to show abuse of discretion in allowing it. Id. Discretion of trial court in granting amendments to answer should be exercised liberally, so as to secure to defendant his statutory right to assert as many defenses as he may have, and to bring about trial on merits. Rees v. Storms [Minn.] 112 NW 419. Kirby's Dig. § 6145, does not require court at all stages to permit introduction of new issues, but matter is to some extent discretionary when amendment does not change substantially the claim or defense, and court's action will not be disturbed unless abuse is shown. Bluff City Lumber Co. v. Hilson [Ark.] 107 SW 161.

Allowance held not an abuse of discretion: Of complaint so as to allege that the assault was "willful" and that plaintiff was "subjected to great humiliation, indignity and shame." Marbury Lumber Co. v. Wainwright [Ala.] 43 S 733. Of amended answer setting up special defenses other than those originally alleged, after denial of motion for nonsuit. Rose v. Doe, 4 Cal. App. 680, 89 P 135. Of complaint in action to recover damages to plaintiff's property resulting from construction of railroad, after jury was impaneled, so as to correct mistake in description of property, it not having changed cause of action, and no prejudice having been shown. Ft. Collins Development R. Co. v. France [Colo.] 92 P 953. Of petition in action to recover money alleged to have been fraudulently obtained and withheld by brokers who had negotiated sale of plaintiff's farm, so as to seek recovery of commissions paid defendants, right to which it was alleged had been forfeited by their misconduct. Deter v. Jackson [Kan.] 92 P 546. Of petition, after reversal of judgment for plaintiff in action to recover land, so as to allege that only part of land claimed was accretion instead of all of it as alleged in original petition, land claimed being same in both cases. Hollingsworth v. Barrett, 31 Ky. L. R. 428, 102 SW 330. Of answer, in action by passenger against carrier for personal injuries during trial, so as to deny that plaintiff attempted to board car. Howard v. Louisville R. Co. [Ky.] 105 SW 932. In suit in equity, where petition alleged that, through defendant's fraud, deed conveying certain land to plaintiff in exchange for certain other land did not convey all land agreed upon, and prayed damages for fraud, and for all proper relief, amendment adding prayer for reformation of the deed. Gregory v. Copeland [Ky.] 107 SW 768. To complaint at close of case, after all evidence was in, so as to increase amount of damages claimed, it appearing that defendant could not have been prejudiced or surprised, etc. Sohman v. Metropolitan St. R. Co., 56 Misc. 342, 106 NYS 1033. To answer before trial. Pacific Mill Co. v. Inman, Poulson & Co. [Or.] 90 P 1099. Of complaint, at trial, in action for injuries resulting from being run into

ment,[53] and the diligence exercised in presenting it,[54] and impose such terms as seem

by defendant's automobile, so as to allege that automobile was being driven by defendant's servants instead of by defendant, and by adding words "and negligently" to allegation that machine was run recklessly, wantonly, and willfully on and over plaintiff. Lampe v. Jacobsen [Wash.] 90 P 654. In action to recover rental due under lease, where defendant counterclaimed for failure to give him possession of dwelling house alleged to be upon leased lands, and reply alleged that there were two houses on leased premises, amendment of reply, when case was called for trial by striking said allegation and alleging that under lease defendants were given possession of house on lands of plaintiff other than those leased, in view of broad discretion given by St. 1898, § 2830, and fact that it appeared that original allegation was inserted by mistake. Kersten v. Weichman [Wis.] 114 NW 499. To petition in election contest so as to give names of alleged illegal voters. Widmayer v. Davis, 231 Ill. 42, 83 NE 87. Of complaint alleging an assault by a corporation and others, by inserting after name of corporation in body of complaint words "in all things acting by and through its servants, agents and employes." Marbury Lumber Co. v. Wainwright [Ala.] 43 S 733.

Refusal to allow held not an abuse of discretion: In action for conversion of grain on which plaintiff claimed thresher's lien, where answer was general denial of answer, at close of evidence, so as to allege waiver of lien, it not appearing that defendant who purchased grain relied on waiver at time he did so, or was in any manner misled thereby. Hahn v. Sleepy Eye Mill. Co. [S. D.] 112 NW 843. In suit to establish title and right of possession to certain land, refusal to allow defendant to file plea of innocent purchaser after all proof had been taken and case was about to be tried. Grier v. Canada [Tenn.] 107 SW 970. On second trial of action for personal injuries, amended answer, in which, for purpose of securing closing argument, defendant admitted that injuries, if any, were direct and natural consequences of its gross negligence and that plaintiff had been damaged, and offered to confess judgment for $300. Illinois Cent. R Co. v. Houchins, 31 Ky. L. R. 93, 101 SW 924. Refusal to allow plaintiff, after closing of his case and after defendant had requested peremptory instruction in its favor, which was subsequently given, to amend declaration by filing additional count alleging additional grounds of negligence. Allen v. Western Elec. Co., 131 Ill. App. 118. Of answer which was insufficient in that it denied on information and belief matters alleged to be within defendant's personal knowledge. Streator v. Streator [N. C.] 59 SE 112. Where answer to action for land denied possession in defendant, refusal at trial term, to enter disclaimer at plaintiff's instance, and to allow defendant to amend by withdrawing denial. Moore v. Moore, 126 Ga. 735, 55 SE 950. In action to recover possession of personalty from attaching officers, of answer at trial so as to attachment proceedings. Taylor v. Brown [Or.] 90 P 673. Of complaint in action for damages for breach of contract at trial, so as to plead repudiation by defendant. Longfellow v. Huffman [Or.] 90 P 907. Of answer in action to foreclose mortgage, so as to introduce new issue of payment or satisfaction near end of trial. Bare v. Ford, 74 Kan. 593, 87 P 731. Of declaration in action under statute for damages resulting from fire communicated by locomotive used in construction of street railway, so as to show that locomotive was used under license granted by town. Fay v. Boston, etc., R. Co. [Mass.] 82 NE 7. Refusal of leave to file additional pleas is not error where the issue thereby sought to be made has been raised by pleadings previously filed. Van Norman v. Young, 129 Ill. App. 542, afd. 228 Ill. 425, 81 NE 1060.

Refusal held abuse of discretion: Where application for leave to amend is made before trial, due diligence is shown and adverse party is not prejudiced thereby. Northwestern Mut. Life Ins. Co. v. Richardson, 130 Ill. App. 205. In action against city on award of arbitrators requiring it to repair certain street within specified time or to pay plaintiff certain additional sum as damages, complaint alleged that defendant had failed to make repairs within said time. Answer denied such allegation, and alleged affirmatively that repairs had been made within time specified. Held abuse of discretion to refuse to allow answer to be amended so as to allege that repairs had been made prior to signing of award, but after it had become known what award would be. City of Lexington v. Williamson [Ky.] 107 SW 717. To answer after case had been placed on short cause calendar, where amendment merely enlarged defense originally set up, and it did not appear that plaintiff was prejudiced by delay, and trial would not be delayed. Murtagh v. Kingsland Brick Co., 119 App. Div. 286, 104 NYS 515.

53. In suit to enjoin obstruction of ditch refusal to allow amendment of complaint so as to allege facts concerning old ditch held not error, where right to maintain ditch which was subject of suit could not be predicated on previously acquired right to use old one, so that proposed amendment showed no additional right in plaintiff. Kern Island Irrigating Co. v. Bakersfield [Cal.] 90 P 1052. Refusal to allow amendment of answer at trial will not be held erroneous where nature of proposed amendment and reasonable necessity therefor were not shown, nor any reason why earlier application had not been made. Federal Betterment Co. v. Reeves [Kan.] 93 P 627. In action to recover for services rendered by band, where defendant claimed that sum admitted to have been paid plaintiff was part of agreed compensation, and plaintiff claimed, and court found, that it was paid for another purpose, held that refusal to allow amendment of answer so as to set up counterclaim for said sum for money had and received was proper, since it would not have altered situation. Friedman v. Erste Kaiser Franz Joseph Unterstutzungs Verein, 104 NYS 908. Refusal to allow amendment striking out denial in reply held not error where such denial did not change issue. Scott v. Northwestern Port Huron Co. [N.

D.] 115 NW 192. Under Rev. St. § 954, allowance of amendments is discretionary, and such discretion should be exercised with great liberality in furtherance of justice, but amendment should not be allowed where it will prejudice substantial right of other party, or where it seems superfluous. Federal Mfg. & Printing Co. v. U. S., 41 Ct. Cl. 318. In action by assignee of contract against government, amended petition adding names of assignors as parties for use and benefit of claimant, filed after limitations had apparently run against them, stricken from files. Id.

54. Application for leave to amend must be made within a reasonable time after the necessity therefor has been discovered. Carey-Lombard Lumber Co. v. Daugherty, 125 Ill. App. 258. Court held to have abused discretion by ordering amended answer to be stricken without allowing defendant to make showing as to why he had not previously filed it, and his reasons for delay. Dunbar v. Griffiths [Idaho] 93 P 654. Delay held not to prevent granting of plaintiff's motion to amend, where such action would not necessarily delay trial, or require production of any different evidence. Shirley v. Bernheim, 123 App. Div. 428, 107 NYS 946.

Refusal to allow amendment held not abuse of discretion: In action on verified account, rejecting additional pleas proposed to be filed during progress of trial setting up an indebtedness of plaintiff to defendant and praying that it be deducted from plaintiff's demand. Murphy v. St. Louis Coffin Co. [Ala.] 43 S 212. To answer in action to recover on account for lumber sold and delivered, attacking quality of lumber furnished for first time, when it was not tendered until close of trial. Bluff City Lumber Co. v. Hilson [Ark.] 107 SW 161. After jury was impaneled to refuse to allow defendant to file amended answer containing pleas in abatement alleging failure of plaintiff to join her husband as party, and her want of legal capacity to sue, he having been allowed to file amended answer without them, and said defenses having been waived by failure to interpose them earlier, no excuse for such failure having been shown. Civ. Code Proc. § 473. Tingley v. Times Mirror Co. [Cal.] 89 P 1097. In action to foreclose mortgage of answer at trial setting up an agreement showing complete novation as to note secured by mortgage, where action had been pending for 5 years, and effect of allowance would have been to defeat plaintiff's claim if amendment was supported by evidence, and court was justified in treating it as application to amend in order to plead statute of limitations. Wells, Fargo & Co. v. McCarthy [Cal. App.] 90 P 203. To answer on day set for trial, where allowance would have worked further continuance, no showing was made why application was not made earlier, and it appeared that defendant knew facts sought to be set up when previous application for continuance was made. Manha v. Union Fertilizer Co. [Cal.] 91 P 393. In action for wrongful death in which complaint proceeded on theory that plaintiffs were decedent's only heirs, refusal to permit defendant at trial to so amend answer as to authorize inquiry as to existence of other heirs, no prejudice being shown and there being no showing why objection had not been made earlier. Salmon v. Rathjens [Cal.] 92 P 733. Of answer after case had been referred, where defendant made no showing why application had not been made earlier, or why amendment was necessary. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161. In action in replevin to recover property conditionally sold, where defendant alleged breach of contract by plaintiff, refusal to allow plaintiff, after evidence had been introduced, to amend so as to allege waiver. American Soda Fountain Co. v. Dean Drug Co [Iowa] 111 NW 534. Rulings on motion to strike equitable division of answer held not to have excused delay on theory that plaintiff could not have known until motions to direct verdict what said rulings were intended to include. Id. Of answer so as to substantially change issues after plaintiff had rested, no reason being made to appear why amendment could not have been filed sooner. Vorhes v. Buchwald [Iowa] 112 NW 1105. Of answer after conclusion of all the evidence, where defendant failed to ask leave to amend when he discovered necessity for doing so on ruling out of evidence. Cincinnati, etc., R. Co. v. Crabtree, 30 Ky. L R. 1000, 100 SW 318. To answer, offered after proof had been taken and case was ready for submission, where it was not made to appear therein that matters therein relied on were not known to defendants when original answer was filed. Weimer's Adm'r v. Smith, 30 Ky. L. R. 1311, 101 SW 327. In action to enjoin obstruction of plaintiff's passway, amended answer offered after case had been prepared and submitted, alleging that one of defendants had acquired title to land on both sides of passway, and that, in case decision should be adverse to them, plaintiff should be required to erect and maintain gates, since its allowance would have necessitated opening and continuing case, and statute makes ample provision for establishment of gates. Boyd v. Morris [Ky.] 106 SW 867. In action based on alleged contract with defendant's deceased husband, where original answer denied such agreement, and amended answer pleaded counterclaim, and proof was taken on issues raised by both answers, refusal to allow filing of second amended answer admitting contract and alleging its termination by agreement between herself and plaintiff, over 3 years having elapsed since filing of first answer, and no reason being offered for delay in setting up such defense. Howe v. Courtney [Ky.] 107 SW 206. Amended answer which set up no new defense except insolvency of one of defendants and an agreement to postpone trial of case until determination of another case, in view of length of time that case had been pending. Martin v. Martin [Ky.] 107 SW 771. Of answer at close of trial so as to set up settlement, no excuse being offered for failure to set it up in original answer. Hall v. Skahen [Minn.] 112 NW 865. Of answer on trial of reserved question before court, there being no showing excusing failure to bring in proposed defenses at first opportunity, or failure to bring them in by proper amendment before referee. Brillion Lumber Co. v. Barnard, 131 Wis. 284, 111 NW 483.

just.[55] Amendments may, on proper leave granted,[56] or in some states as a matter of right,[57] be made before trial,[58] at the trial [59] under proper restrictions against sur-

55. Under Code Civ. Proc. § 473, court held to have had authority to impose such terms as were just on allowing plaintiff to amend complaint at trial so as to raise new issue. Williams v. Myer, 150 Cal. 714, 89 P 972. Showing as to necessity of continuance, etc., held sufficient to justify imposition of terms. Id. Held proper to require payment by plaintiff of fees paid by defendant for per diem of jurors impaneled and sworn, expenses incurred by him in obtaining attendance of witnesses, and $100 as compensation for expenses incurred by him in employment of attorneys and his own expenses in attending trial. Id. Held error to require payment to clerk of court per diem and mileage paid by and due from county to jurors summoned for the trial. Id. Where court imposed both proper and improper charges, held not necessary for plaintiff to offer to pay amounts properly assessed in order to avail himself of the error on appeal. Id. Imposition of unjust terms held error though court could have denied motion for leave to amend unconditionally. Id. Imposing unjust terms held prejudicial error. Id. Amendment after it had been determined on appeal that plaintiff was not entitled to recover under allegations of complaint held to so change nature of answer that it would be allowed only on payment of taxable costs and disbursements in appellate division and court of appeals. House v. Carr, 52 Misc. 648, 103 NYS 929. Amendment to complaint so as to set up usury in action for conversion of stock alleged to have been pledged as collateral security for loan evidenced by note granted on condition that plaintiff pay costs of action to date of order, costs of motion, and stipulate that if judgment was rendered in favor of plaintiff there should be deducted from damages recovered the amount of plaintiff's note with interest. Shirley v. Bernheim, 123 App. Div. 428, 107 NYS 946. Held that plaintiff's motion during trial for leave to withdraw juror and amend complaint should, under circumstances, have been granted only upon payment of taxable costs and disbursements to date. Box Board & Lining Co. v. John H. Wiemers, Inc., 108 NYS 662. Amendment of complaint so as to cover defects pointed out on reversal of judgment for plaintiff allowed on condition that plaintiff pay all costs and disbursements of action antecedent to granting of application for leave to amend and $10 costs of application. Rosenberg v. Feiering, 108 NYS 941. Question of terms held to affect substantial right and to be subject to review. Id.

56. Pleadings cannot be amended unless leave to do so is obtained. Carey Lombard Lumber Co. v. Daugherty, 125 Ill. App. 258. Where objections to introduction of any evidence are sustained on ground that petition does not state facts sufficient to constitute cause of action, plaintiff is not entitled as matter of right to time in which to amend petition. Minton v. Palmer [Neb.] 112 NW 610. In view of Code Civ. Proc. § 481, providing that complaint must contain demand for judgment to which plaintiff supposes himself entitled, prayer for relief is part of complaint, though not part of cause of action, and motion to correct it is motion to amend complaint. McVey v. Security Mut. Life Ins. Co., 118 App. Div. 466, 103 NYS 1056. Defendant held not entitled to file "trial amendment" without leave of court, for purpose of setting up new matter supplementary to that contained in answer then on file, so that it was proper for court to disregard it in presenting issues to jury. Rev. St. 1895, art. 1262, and district court rule 27 construed. Hoffman v. Lemm [Tex. Civ. App.] 20 Tex. Ct. Rep. 431, 106 SW 712. Amendments sought to be made out of rule should be allowed only in furtherance of justice, they being not matter of right, but allowable only in discretion of court. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 NE 152. Failure to pass order allowing amendment to petition held immaterial where judge in order overruling demurrer stated that the demurrer was overruled after amendment allowed, proposed amendment being clearly stated in writing, fully entitled in the cause, and signed by counsel, and only omission was signature of judge. Austin v. M. Ferst's Sons, 2 Ga. App. 91, 58 SE 318. When paper containing such an amendment has been entered upon minutes and minutes approved and signed by judge, writing is fully identified, and amendment authorized. Id. Court, in absence of defendant's counsel, set aside order refusing to allow amended answer, offered after close of testimony, to be filed, allowed it to be filed and entered order controverting it of record. Court was not conscious of absence of counsel. Held harmless where amendment did not change issues, and there was nothing alleged therein that could not have been proved under original answer. Aetna Life Ins. Co. v. Howell [Ky.] 107 SW 294.

57. Under Code Civ. Proc. § 472, an amended answer cannot be filed as of course after demurrer to original answer has been disposed of, or after time within which plaintiff might have demurred, but did not, has expired. Manha v. Union Fertilizer Co. [Cal.] 91 P 393. Right of plaintiff to amend as of course is extended only up to time when the answer of defendant is filed, or if a demurrer is interposed by defendant, only while the issue of law raised thereby is undetermined, and if defendant answers without demurring, or if his demurrer to the complaint is overruled, plaintiff's right to amend as of course is gone. Tingley v. Times Mirror Co. [Cal.] 89 P 1097. Defendant's right to amend as of course under said section can be exercised only during time that a demurrer to the answer, if interposed by plaintiff, is undetermined, or if no demurrer is interposed, during the time within which such demurrer might have been interposed. Id. Rev. St. 1887, § 4228, construed and held that defendant is not entitled to amend as of course after expiration of time for filing demurrer to answer, where no such demurrer is filed. Dunbar v. Griffiths [Idaho] 93 P 654. Fact that original answer is served by mail does not

prise,[60] at the conclusion of the trial to conform the pleadings to the proof,[61] and, in

double time within which amended answer may be served Code Civ. Proc. §§ 542, 798. Seckel v. Tangemann, 53 Misc. 268, 38 Civ. Proc. R. 447, 103 NYS 77. A defendant who has served original answer by mail has right to amend same once as of course within 40 days, if not done for purpose of delay, or to deprive plaintiff of a term of the court. Langer v. Swasey, 54 Misc. 301, 103 NYS. 1086. Where default in pleading was opened and order opening it was complied with and answer served heid that defendant was in same position in regard to subsequent litigation as if no default had occurred, and hence had right to amend said answer within 20 days after service thereof. O'Reilly v. Skelly, 56 Misc. 122, 106 NYS 1082. If defendant takes full time allowed him to amend, he does so at peril of all regular proceedings which may be taken against him before he amends. Langer v. Swasey, 54 Misc. 301, 103 NYS 1086. Fact that a party may serve amended pleading and thus change issues raised in action does not preclude adverse party from noticing case for trial upon issues thus raised but, so long as right to amend exists, notice of trial is liable to be defeated and rendered unavailing by service of amended pleading. Id. Since under express provisions of Code Civ. Proc. § 542, right to amend as of course is not to prejudice proceedings already had, held that where plaintiff noticed case for trial and defendant's default was regularly noted on his failure to appear, default was not affected by subsequent service of amended answer, though it was served before expiration of time within which defendant had right to amend as of course. Id. In municipal court is mandatory to allow pleading to be amended at any time, if substantial justice will thereby be promoted, even though entire cause of action is thereby changed. Universal Cutter Co. v. Emden, 107 NYS 669. In action to recover installments of purchase price of machine, refusal to allow amendment of answer at trial so as to set up breach of warranty held error. Id.

58. In action on note held proper to allow plaintiff to amend after answer so as to allege that original note rather than copy was attached to complaint as an exhibit. Bradley v. Pinney [Kan.] 93 P 585. In action by assignor of claim for medical services held that under Code Civ. Proc. § 723, motion to amend complaint so as change name of person from whom plaintiff derived title should have been granted, no change in claim being made thereby. Thompson v. Young, 53 Misc. 250, 103 NYS 200. In action to recover damages for conversion of stock alleged to have been pledged to defendant to secure loan, held that motion made shortly before case was reached for trial to allow plaintiff to amend by inserting second and alternative cause of action alleging that half of stock was delivered to defendant as security and half as bonus, and that this transaction was usurious and void, should have been allowed upon terms. Shirley v. Bernheim, 123 App. Div. 428, 107 NYS 946. Defendants held entitled to withdraw or amend their disclaimer, where, though it had been called to attention of trial court, no judgment had been rendered thereon, and case had not been disposed of. Jolley v. Oliver [Tex. Civ. App.] 106 SW 1151.

59. Upon objection to evidence as not within issues, held that court might have allowed amendment rendering it admissible, upon such terms as would have been just. Bryant Lumber Co. v. Clifton [Ark.] 108 SW 216. On motion to dismiss complaint held that court, if satisfied that complaint was defective, should have allowed amendment on such terms as it deemed equitable, it being clear that defendant was not misled. Babcock v. Anson, 122 App. Div. 73, 106 NYS 642. Though statute expressly forbids amendment of pleadings after announcement of ready for trial, court in its discretion has right to permit such an amendment when same is necessary for attainment of justice and would not work hardship, injury, or surprise to other party, and would not operate as postponement or continuance of case. Huff v. Powell [Tex. Civ. App.] 107 SW 364. Refusal to allow trial amendment to answer after close of evidence held not ground for reversal. Id. Federal court held to have discretionary power to permit bill of particulars in action of ejectment to be amended at trial. Lamar v. Spalding [C. C. A.] 154 F 27. Where there was no proper plea of set-off, held that denial of defendant's motion for leave to file statement of his demands in set-off, after plaintiff had closed his case, was proper. Battey v. Warner [R. I.] 67 A 63.

60. Material amendments made pending trial may entitle opposite party to continuance if motion for that purpose is duly presented. Sparks Imp. Co. v. Jones [Ga. App.] 60 SE 810. Overruling motion held not an abuse of discretion. Id. Refusal to allow continuance on ground of surprise upon allowance of amendment to petition held not abuse of discretion, where it was not shown how defendant was surprised, or that he was less prepared to go on than he would otherwise have been. Civ. Code 1895, § 5128. Craddock v. Kelly, 129 Ga. 818, 60 SE 193. Refusal of continuance on ground of surprise held not error. Edge v. Southwest Missouri Elec. R. Co., 206 Mo. 471, 104 SW 90. Refusal of continuance on allowance of amendment of complaint held not abuse of discretion, defendant having made no showing that he could not safely go on with trial. Lampe v. Jacobsen [Wash.] 90 P 654. Where defendants had disclaimer on file, held that they could not object to filing amended petition bringing in new parties on eve of trial on ground of surprise. Jolley v. Oliver [Tex. Civ. App.[106 SW 1151.

61. The court may allow amendment of declaration after the motion for new trial, if the defendant is not prejudiced thereby. Chicago, etc., R. Co. v. Henderson, 126 Ill. App. 530. Court may allow amendment at any time before final judgment. Rev. Laws, c. 173, § 48. Quinby v. Jay [Mass.] 82 NE 1084.

Amendments allowed: Complaint considered amended after judgment to conform to evidence admitted without objection. Bynum v. Brady [Ark.] 100 SW 66. Where

plaintiff sued on contracts to recover commissions due him for several years, but evidence received without objection was sufficient to show an account stated for one of said years, held that court properly treated complaint as amended so as to declare on account for that year. Wrought Iron Range Co. v. Young [Ark.] 107 SW 674. Allowing amendment of complaint after case had been submitted, but before judgment was entered, held within discretion of court, under Code Civ. Proc. § 473, and that discretion was not abused, amendment not having introduced substantially new issue and defendant's rights not having been prejudiced. Yordi v. Yordi [Cal. App.] 91 P 348. Allowance of amendment of complaint, after submission of case to trial judge without argument, to conform to facts which judge stated he regarded as proven, held not abuse of discretion conferred by Code Civ. Proc. § 473. Doherty v. California Nav. & Imp. Co. [Cal. App.] 91 P 419. Allowing defendant to amend answer so as to allege plaintiff's bankruptcy in bar of action, after both parties had rested but before cause was submitted, held not abuse of discretion. Simpson v. Miller [Cal. App.] 94 P 252. Allowance of amendment to complaint, in action for injuries to servant, after close of evidence held proper, it not having changed issues, or misled or prejudiced defendant. Burns' Ann. St. 1901, §§ 345-397. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Where answer in action on three notes alleged failure of consideration and asked that notes be canceled, held that amendment of answer after close of evidence by averment that six other notes were given with those mentioned in petition for same purpose and as part of same transaction, and praying that they be canceled also, was permissible under Code Civ. Proc. § 139, and was properly allowed. Minneapolis Threshing Mach. Co. v. Currey, 75 Kan. 365, 89 P 688. Where original answer set up counterclaim, held error, after evidence had been taken by deposition to refuse to allow defendants to amend to conform to proof so as to allege that plaintiff had promised to pay sum counterclaimed for, since its filing could in no way have prejudiced plaintiff. Morrison v. Payton, 31 Ky. L. R. 992, 104 SW 685. Where petition in action to recover damages for death of person killed by one of defendants trains alleged that before train reached station, agent was notified that decedent was on track helplessly intoxicated 75 yards ahead of train, held that amendment to conform to proof that decedent was 200, 300 or 400 yards up track did not change cause of action, and should have been allowed under Civ. Code § 134. Glinn's Adm'r v. Louisville, etc., R. Co. [Ky.] 105 SW 437. In action on contract whereby certain land was to be purchased and profits growing out of sale of timber thereon divided, refusal to allow amendment of petition as to terms of agreement so as to conform to proof held error. Vaught v. Hogue [Ky.] 107 SW 757. Allowance of amendment to answer after trial held harmless where case was tried upon merits without regard to insufficiency of answer. Quimby v. Jay [Mass.] 82 NE 1084. Where petition in action for conversion of personalty was fatally defective for failure to allege plaintiff's possession or right to possession at time of conversion, held proper, after judgment for plaintiff and while case was pending on motions for new trial and in arrest of judgment, to allow amendment thereof in that regard. Golden v. Moore, 126 Mo. App. 518, 104 SW 481. In action for assault and battery held proper, after evidence was in, to allow plaintiff to amend by striking out word "stamping" in allegation accusing defendant of stamping plaintiff and inserting word "kicking" in lieu thereof. Rev. St. 1899,. § 657. Baxter v. Magill [Mo. App.], 105 SW 679. Held proper to allow amendment of answer at close of testimony, amendment being in furtherance of justice, and no prejudice from delay having been shown. Code § 144. Blondel v. Bolander [Neb.] 114 NW 574. Where complaint alleged contract of hiring, performance by plaintiff, refusal to perform by defendant, and that defendant was indebted to plaintiff in certain sum, held that court had power under Code Civ. Proc. § 273, as in furtherance of justice, to allow amendment to conform to proof that plaintiff was informed by defendant that no further work woud be required of him, but that his salary would continue to be paid until expiration of contract, and should have done so, no surprise being shown and evidence having been received without objection. Cullen v. Battle Island Paper Co., 108 NYS 921. In action to foreclose deed given as security for debt allowance of amendment of complaint by adding few items of taxes and interest paid, and more fully describing debt secured, etc., held not abuse of discretion, it having worked no substantial change in the claim. Omlie v. O'Toole [N. D.] 112 NW 677. In action on policy of insurance, where case had been tried in part on theory that there had been waiver of condition of poicy as to prepayment of premiums, held not error after verdict to permit amendment of petition setting up such waiver. Preferred Masonic Mut. Acc. Ass'n v. Harrington, 10 Ohio C. C. (N. S.) 134. Defect in declaration in trespass consisting of omission of words "vi et armis" may be cured by amendment at any stage of case. Gautieri v. Romano [R. I.] 66 A 652. In view of Rev. Code Civ. Proc. §§ 146, 147, 150, held that, in action to rescind contract and recover consideration paid, allowance of amendment so as to demand some relief on ground of mutual mistake was proper, it not operating to change plaintiff's claim. Wolfinger v. Thomas [S. D.] 115 NW 100. In action for personal injuries held proper to allow amendment of complaint at close of evidence so as to specify particular amount of general damages demanded, where case was tried as though such damages had been alleged, and proof thereof was received without objection. Lobb v. Seattle, etc., R. Co. [Wash.] 93 P 420. Where evidence to sustain demand for rent was erroneously admitted under common counts, held not error to permit amendment of declaration, after submission of case, but before any finding was made or judgment rendered, so as to state cause of action on written contract, defendant having waived right to continuance. Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 SE 258. Where modification of contract was not orig-

some cases, in the appellate court,[62] or after remand therefrom.[63] The right to add

inally pleaded as defense, but evidence thereof was received without objection, held that allowance of amendment setting it up after verdict for defendant based thereon was not an abuse of discretion. Bowe v. Gage [Wis.] 112 NW 469. In suit in equity to cancel certificate of tax sale of realty held not abuse of discretion to allow amendment of complaint, to conform to facts proved without objection, so as to allege possession and other facts necessary to entitle plaintiff to relief under St. 1898, § 3186, providing for actions to quiet title, suit not being thereby changed from one in equity to one at law. Durbin v. Knox [Wis.] 112 NW 1094. Where plaintiff set out cause of action for commissions earned by him under contract and cause of action for damages for breach of contract, and erroneously included item which was part of commissions in second count, and he was held to be entitled to recover on first count but not on second, held not an abuse of discretion to allow plaintiff, after verdict to amend by transferring said item to first cause of action. Greene v. Freund [C. C. A.] 150 F 721.

Amendments disallowed: Where original petition in action for personal injuries was drawn and case tried, on theory that relation of master and servant existed between defendant and third person, whom defendant's servant had induced to assist him, so that defendant was liable for such person's negligence, held that plaintiff was not entitled to amend after directed verdict so as to allege that servant was not proper person to do work and was guilty of negligence in permitting third person to assist him, which negligence was proximate cause of plaintiff's injury. Thyssen v. Davenport Ice & Cold Storage Co., 134 Iowa, 749, 112 NW 177. Where plaintiff sued for actual and exemplary damages for trespass in permitting cattle to go upon his land, and case was tried and submitted to jury on that theory, held that after verdict he could not, by amendment, waive tort and sue on implied contract for use and occupation. Cole v. Thompson, 134 Iowa, 685, 112 NW 178.

62. In action on account stated amendment of complaint so as to strike certain allegations as to credits claimed by defendants allowed under Code Civ. Proc. § 94. Brown & Manzanares Co. v. Guise [N. M.] 91 P 716. Pleadings cannot be amended to conform to proof on appeal, where facts have been proven over objection and exception of party against whom evidence is offered. Bjorkegren v. Kirk, 53 Misc. 560, 103 NYS 994. Where proper objections on ground of variance were made at trial, and no amendment was asked for, held that complaint could not be amended after trial to conform to proof. Epstein v. Cohen, 56 Misc. 579, 107 NYS 148. Pleadings in action commenced before justice may be amended after appeal to district court for purpose of correcting clerical error, there being no change in the issue. Kofold v. Lincoln Implement & Transfer Co. [Neb.] 114 NW 937. Amendment changing date of termination of lease held properly allowed. Id. Where claim against decedent's estate for services included enough to suggest that it was based on agreement of some sort, and that right thereunder was not barred by limitations, held not abuse of discretion for circuit court, on appeal from its allowance, to allow amendment showing an agreement by decedent to pay for said services, defect being indefiniteness. Longwell v. Mierow, 130 Wis. 208, 109 NW 943.

63. Amendments allowed: After reversal of judgment overruling demurrer to equitable petition, held that, when remittitur was returned to trial court, and before it was made judgment of that court, amendment to petition could be offered, provided it was proper one, and there was enough to amend by. Eagle & Phenix Mills v. Muscogee Mfg. Co., 129 Ga. 712, 59 SE 804. On reversal of order of interpleader on ground, among others, that sum admitted to be due by interpleader and directed to be paid into court was slightly smaller than that claimed by one of the claimants, held that after remand interpleader might amend to cover discrepancy if it found that it had erred in amount tendered. Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, 101 SW 662. Where in action for wrongful death under Rev. St. 1899, § 2864, petition was defective in failing to demand penalty specified in said section, but in substituting measure of damages of their own plaintiffs relied on decision of court of appeals, held that on reversal of judgment in their favor they would be granted new trial with leave to amend. Casey v. St. Louis Transit Co., 205 Mo. 721, 103 SW 1146. Refusal to allow amendment adding count to recover reasonable value of services rendered under agreement held error though original complaint contained quantum meruit count, and recovery could not be had on both, amendment embracing items for services and damages not included in original, prevention of recovery under both being matter to be taken care of at trial. Bluemner v. Garvin, 108 NYS 791. In action against vendor of realty to compel specific performance of contract of sale, judgment for plaintiff was reversed on ground that plaintiffs failed to show that they took objection to title, on which alone judgment was rendered for them, and, if they did, that it was not charged as ground of complaint. Held that application to amend complaint so as to cover defects pointed out in judgment of reversal was properly allowed under circumstances as in furtherance of justice. Rosenberg v. Feiering, 108 NYS 941. Plaintiff may amend after reversal of judgment on his appeal. Revisal 1905, § 507. McCulloch v. North Carolina R. Co. [N. C.] 59 SE 882. Under Court & Prac. Act 1905, § 261, declaration may, in discretion of superior court, be amended after that court has sustained substantial demurrer thereto, and after supreme court has overruled an exception to such ruling and remanded case for further proceedings. Hebert v. Handy [R. I.] 67 A 325. Where declaration stated cause of action against defendant personally, and proof showed one against estate of a decedent of which he was administrator, held that on reversal of judgment for plaintiff he would be allowed to amend so as to cure variance. Hanson v. Blake [W. Va.] 60 SE 589.

or eliminate, or substitute parties depends upon the statutes of the various states.[64] The amendment may be one of substance or form,[65] but amendments changing the cause of action or introducing new issues are not ordinarily permitted, particularly after the running of limitations.[66]

Amendments disallowed: Liberality in allowing amendments is greatest in earliest stages of case, decreases as it progresses, and changes to a strictness ordinarily amounting to a prohibition after matters litigated have received the normally final sanction of an adjudication by trial court, affirmed on appeal. Todd v. Bettingen, 102 Minn. 260, 113 NW 906. Affirmance of trial court's order for judgment ordinarily amounts to direction not to proceed to determination, as in case of reversal on appeal, but to enter judgment affirmed, and in such case amendments to pleadings involving new trial should not be allowed, except possibly in extraordinary cases, and then only when proposed amendment sets forth, clearly and distinctly, a basis for relief which has not before been presented for judicial determination. Id. Allowance of amendments after affirmance held error, case not being shown to have been within any possible exception to general rule. Id. Where plaintiff alleged and testified to agreement whereby defendant was to pay him a fair share of sum received for services, held that, after reversal of judgment for plaintiff on ground that contract was too indefinite to be enforced, it was error to allow plaintiff to amend so as to allege agreement to pay him half of said sum. Bluemner v. Garvin, 108 NYS 791.

64. In action for diversion of water held error, in view of Prac. Act. §§ 68, 71, to strike amended complaint which omitted part of plaintiffs and allegations on their behalf relating to damages, which it had previously been held on demurrer could not be joined, no new cause of action being set up. Smith v. Wells Estate Co. [Nev.] 91 P 315. Under Sayles' Ann. Civ. St. 1897, art. 1188, plaintiff held to have right by amended original petition to bring in new defendant at any time while cause was pending between plaintiff and original defendants. Jolley v. Oliver [Tex. Civ. App.] 106 SW 1151. Though ordinarily new and distinct parties cannot be added by amendment, plaintiff, when it becomes necessary for purpose of enforcing his rights, may amend petition by substituting name of another person suing for his use. Civ. Code 1895, § 5105. Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. 88, 58 SE 316. Right for protection of which such amendment is allowable need not be such a right as is capable of direct enforcement by original plaintiff, either in law or in equity, provided it be substantial. Id. Upon such an amendment being made, cause of action must be shown to exist in favor of the nominal party. Id. Amendment changing action for death by wrongful act from one by widow as administratrix for her benefit as widow to one in her individual name as widow held not to substitute new party as plaintiff, and to have been properly allowed. Atlanta, etc., R. Co. v. Smith, 1 Ga. App. 162, 58 SE 106. Suit brought by attorney general held substantially suit of state, and that upon special demurrer raising point that it was brought in name of attorney general instead of in name of state, defect could be cured by amendment. Hart v. Atlanta Terminal Co., 128 Ga. 754, 58 SE 452. Motion to allow amendment of complaint by changing name of garnishee in attachment proceeding held properly denied, since it amounted to application to bring in new garnishee who had not been served with process. Czyston v. St. Stanislaus Parish, 131 Ill. App. 161. If original plaintiff could not sustain action, Code Civ. Proc. § 723 does not authorize amendment adding name of person who was, as to original cause of action, a stranger in eye of law. Doyle v. Carney, 190 N. Y. 386, 83 NE 37, rvg. 115 App. Div. 921, 101 NYS 1119. In action by plaintiff as administrator of his minor daughter for services rendered by latter, held error to allow amendment to conform to proof so as to make father plaintiff in his individual capacity on theory that minor's earnings belonged to him, since it brought in another party having different cause of action. Id. Where action for wrongful death was brought by widow, held that amendment adding her name as executrix, offered after running of limitations, was properly disallowed. LeBar v. New York, etc., R. Co. [Pa.] 67 A 413. Declaration in action at law on joint contract cannot be amended by adding new party plaintiff. Sandusky v. West Fork Oil & Natural Gas Co. [W. Va.] 59 SE 1082.

65. An amendment should not be discriminated against merely because it involves or sets up usury, if it appears that party seeking to plead it does not seek to gain unfair or inequitable advantage over his adversary. Shirley v. Bernheim, 123 App. Div. 428, 107 NYS 946. In the Federal courts, where the record of the case, up to the time of the motion, shows jurisdiction in the particular court, but there is a defect in the allegations of the pleadings with relation to the setting forth of the grounds of that particular jurisdiction, amendment will be allowed on motion. Thompson v. Automatic Fire Protection Co., 151 F 945. Complaint granted leave to amend before trial so as to allege that amount involved exceeded $2,000, in view of uncontradicted allegations to that effect in moving affidavits. Id.

66. Power to allow amendment after trial to conform to proof does not permit importation into complaint of what is in effect a new cause of action. City of New York v. Knickerbocker Trust Co., 121 App. Div. 740, 106 NYS 506, modifying, 52 Misc. 222, 102 NYS 900. Test for determining whether amendment sets up new cause of action is whether facts therein alleged show substantially a different wrong in same transaction originally alleged. Jenkins v. Seaboard Air Line R. Co. [Ga. App.] 59 SE 1120. Test whether amendment sets up new cause of action is whether same evidence would support either, and would allegations of each be subject to same defense. Booth v. Houston

Packing Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 861, 105 SW 46. New cause of action is not set up by amendment where same substantial facts are pleaded merely in different form, so that recovery on either pleading would bar recovery on other. Alabama Consol. Coal & Iron Co. v. Heald [Ala.] 45 S 686. Change does not refer to form of remedy but to general identity of the transaction, and when it remains same amendment does not substantially change cause of action. Snider v. Windsor [Kan.] 93 P 600. Amendment to declaration in action to recover for wrongful death changing relation in which plaintiff sued from that of her individual capacity as widow to that of her representative character as administratrix held permissible under both Fla. Gen. St. 1906, § 1432, and Rev. St. U. S. § 954, though changing cause of action, provided limitations had not run. Hall v. Louisville & N. R. Co., 157 F 464.

Amendments held to set up new or different cause of action: Where all counts of original complaint were in trespass to realty, counts subsequently filed gravamen of which was destruction of alleged lien for wharfage charges on cotton. Williams v. Alabama Cotton Oil Co. [Ala.] 44 S 957. Additional count claiming damages for maintaining nuisance on public street to damage of plaintiff as abutting property owner held departure from original complaint and properly stricken. Id. In action on administrator's bond for refusal to pay over funds in accordance with order of probate court, amendment setting up order of distribution made by probate court after commencement of action. Ferguson v. Carr [Ark.] 107 SW 1177. Where original complaint sought to recover proceeds of land on theory that defendant's testator had conveyed same to him by deed in escrow to take effect on testator's death and had subsequently sold same to innocent purchaser, amendment so as to allege agreement by testator to devise land to plaintiff. Simpson v. Miller [Cal. App.] 94 P 252. Amendment, in action against city, showing that accident occurred on different street than that alleged in original declaration. Gillmore v. Chicago, 224 Ill. 490, 79 NE 596, afg. 125 Ill. App. 13. Where petition by subcontractor for mechanics' lien alleged that contractor had completed building and that owner had accepted it without paying petitioner, amended petition alleging that contractor abandoned work before its completion and that value of the work done was greater than petitioner's claim. Carey Lombard Lumber Co. v. Daugherty, 125 Ill. App. 258. In action on open account, amendment to complaint setting up judgment recovered by plaintiff in another state on same cause of action after institution of suit. Mansf. Dig. § 5080. Cassidy v. Saline County Bk. [Ind. T.] 104 SW 829. In suit against township to recover for goods sold held that plaintiff, after motion to direct verdict on ground that defendant was not legal entity had been made, could not amend so as to substitute as defendant's board of trustees of township and individual trustees, and ask court to take cognizance of action in equity, and to award writ of mandamus to compel trustees to make payment. Austin Western Co. v. Weaver Tp. [Iowa] 114 NW 189. In action by buyer of corporate stock for false representations inducing him to make purchase, where original declaration alleged that false representations were that full amount of capital had been paid in, that defendants owned stock, and that earnings yielded net annual profit of certain per cent on stock, amendment alleging false representation as to earnings of certain institution conducted by corporation. Van Cleve v. Radford, 149 Mich. 106, 14 Det. Leg. N. 376, 112 NW 754. Where original petition in action for damages for destruction of plaintiff's fences by fire stated cause of action at common law, gravamen of which was negligence of defendant's servants in setting fire to grass on defendant's right of way, held error, after close of evidence, to allow amendment to conform to proof received over objection, alleging that fire was set by sparks from locomotives, in which event defendant would be liable without regard to negligence. Riley v. St. Louis, etc., R. Co., 124 Mo. App. 278, 101 SW 156. In action to remove so much of defendant's steps and areaway as extended beyond stoop line established by city ordinance, held error to allow amendment of complaint after trial so as to include among structures complained of and sought to be removed portico and columns within stoop line, since it amounted to pleading new cause of action which defendant was entitled to answer, and on issues raised by which he was entitled to be heard. City of New York v. Knickerbocker Trust Co., 121 App. Div. 740, 106 NYS 506; modifying 52 Misc. 222, 102 NYS 900. Where complaint attempted to plead cause of action on written order drawn against building loan and its acceptance by defendants, amendment so as to allege original oral promise to pay to conform to proof introduced over objection. Rockmore v. Kramer, 108 NYS 553. Amendment setting up cause of action accruing to third person and alleging assignment thereof to plaintiff before commencement of action, instead of cause of action accruing directly to plaintiff. Woodward v. Northern Pac. R. Co. [N. D.] 111 NW 627. Amendment to statement of claim in action for personal injuries alleging defect in different machine than that referred to in original statement, and, for first time, failure to inspect, and failure to instruct employe as to dangers incident to his employment. Mahoney v. Park Steel Co., 217 Pa. 20, 66 A 90. Where action for wrongful death of plaintiff's son was originally brought by her as his administratrix under Shannon's Code, § 4025, amendment whereby she sought, as decedent's mother, to recover, under § 4503, for loss of his services. St. Louis, etc., R. Co. v. Leazer [Tenn.] 107 SW 684. Where original petition declared on implied contract to ship cattle, amended petition seeking to charge defendant on express contract. Booth v. Houston Packing Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 861, 105 SW 46.

Amendments held not to set up new or different cause of action: Striking out word "assaulted," and inserting in lieu thereof, words, "committed an assault and battery." Marbury Lumber Co. v. Wainwright [Ala.] 43 S 733. Where original count charged trespass on plaintiff's land in construction of railroad, amendment seeking to recover damages for interfering with travel to and

from plaintiff's land by erection of embankment on street near his land it not being alleged that plaintiff was in possession of street. Southern R. Co. v. McIntyre [Ala.] 44 S 624. Where original complaint in action against railroad alleged that mare and colt were killed by defendant's negligence, amendment alleging that mare was killed and colt killed or injured. St. Louis, etc., R. Co. v. Douglas [Ala.] 44 S 677. Where original count alleged crippling of cow by railroad company so as to diminsh her value, amendment alleging that cow died from injuries received, and eliminating allegations as diminution in value. Southern R. Co. v. Dickens [Ala.] 45 S 215. In action for wrongful death of employe, where original count was for negligent death of intestate, whether under statute or common law, and alleged that death was caused by defendant's negligence in failing to provide safe place for him to work, held that additional count alleging that it resulted from obeying orders which it was intestate's duty to obey under Code 1896, § 1749, subd. 3, was not departure, conceding that first count stated cause of action at common law and second one under statute. Alabama Consol. Coal & Iron Co. v. Heald [Ala.] 45 S 686. In action by employe for personal injuries counts added to complaint by amendment held to relate back to original. Townes v. Dallas Mfg. Co. [Ala.] 45 S 696. In action of ejectment amendment of complaint so as to set up different claim of title from that originally stated, title being one acquired before action was commenced. Gannon v. Moore [Ark.] 104 SW 139. In action on building contractor's bond by materialman, where original complaint counted on material furnished under, and breach of, contract generally as measure of defendant's liability, amendment alleging changes and alterations made in conformity to contract. People's Lumber Co. v. Gillard [Cal. App.] 90 P 556. Amendment setting up foreign statutes in amplification and aid of rights claimed in original pleading. Missouri State Life Ins. Co. v. Lovelace [Ga. App.] 58 SE 93. Where action for death by wrongful act was brought by widow, suing as administratrix, for benefit of herself as widow, amendment striking descriptive word "administratrix" from declaration and leaving suit to proceed in individual name of widow, held properly allowed. Civ. Code 1895, §§ 5105, 5106, 3361. Atlanta, etc., R. Co. v. Smith, 1 Ga. App. 162, 58 SE 106. Where original petition in action against railroad company for personal injuries resulting from defective floor in station alleged that plaintiff visited station for purpose of transacting business with defendant, amendment alleging that defendant permitted express company to transact business in station, that same person was agent of both companies, and that she went to building for purpose of transacting business with agent of express company. Central of Georgia R. Co. v. Hunter, 128 Ga. 600, 58 SE 154. Amendment of petition so as to allege that matters set up in answer had been adjudicated in former case, it not setting up any cause of action at all. Kelly & Jones Co. v. Moore, 128 Ga. 683, 58 SE 181. Amendment to petition which merely varies the acts of negligence, but does not complain of any different wrong or injury from that set forth in original petition. King v. Seaboard Air Line R. Co., 1 Ga. App. 88, 58 SE 252. Amendment to petition which merely amplifies or varies acts of negligence from which it is alleged that injury for which recovery is sought resulted. Southern States Portland Cement Co. v. Helms, 2 Ga. App. 308, 58 SE 524. In suit to redeem land conveyed by deed absolute in form, but which it was alleged was given as security for an indebtedness, amendment merely explaining how said indebtedness arose. Askew v. Thompson, 129 Ga. 825, 58 SE 854. Where original petition stated cause of action for loss of cotton by fire negligently set out by defendant's evidence, amendment which merely more accurately and definitely described cotton, and enumerated various acts of defendant alleged to have caused loss. Central of Georgia R. Co. v. Inman, 129 Ga. 652, 59 SE 784. Amendment merely setting forth act of negligence additional to those originally pleaded as being concurring and contributing cause of injury for which damages are asked. Bowen, Jewell & Co. v. Adams, 129 Ga. 688, 59 SE 795. In action to recover damages from defendant for using more than specified amount of water from stream for power, and to restrain such use in future, amendment setting up plaintiff's title to water, etc. Eagle & Phenix Mills v. Muscogee Mfg. Co., 129 Ga. 712, 59 SE 804. In proceeding to enforce landlord's lien held that amendment changing allegation that plaintiff furnished defendant "the use of" a horse to allegation that she furnished the horse should have been allowed. Boyce v. Day [Ga. App.] 59 SE 930. Amendment to summons in justice's court in action by shipper against carrier for damages for failure to transport goods, which merely set forth same alleged wrong more definitely. Jenkins v. Seaboard Air Line R. Co. [Ga. App.] 59 SE 1120. Where petition against several defendants contained appropriate and sufficient allegations to constitute complaint for land, and allegations appropriate for equitable relief, amendments alleging reason for not suing sooner, striking all defendants except to and electing to proceed against them for recovery of land and mesne profits only, and by adding special prayer for recovery of land. Craddock v. Kelly, 129 Ga. 818, 60 SE 193. In action by passenger against carrier for personal injuries alleged to have resulted from sudden jerk of street car, amendment to petition alleging overcrowding of car and failure to furnish plaintiff with seat as distinct act of negligence. Lyndon v. Georgia R. & Elec. Co. [Ga. App.] 60 SE 278. Where original complaint alleged facts constituting common-law action in trespass for removing timber, etc., from plaintiff's lands, amendment charging substantially same cause of action, but claiming treble damages under statute. Eklund v. B. R. Lewis Lumber Co., 13 Idaho, 581, 92 P 532. Amendment correcting the names of the next of kin in action for death by wrongful act. Grace & Hyde Co. v. Strong, 224 Ill. 630, 79 NE 967, afg. 127 Ill. App. 336. Where allegations of declarations by by implication show existence of subject-matter of suit, amendment expressly stating existence thereof. St. Louis Merchants' Bridge Terminal R. Ass'n v. Schultz, 226 Ill. 409, 80 SE 879, afg. 126 Ill. App. 552. Where original declaration alleged that gangway was ren-

Ordinarily pleas in abatement are not amendable,[67] but this rule does not apply to pleas in abatement to the jurisdiction of the court of the person.[68] Pleas amounting merely to the general issue are not amendable.[69]

Amendments which are insufficient in substance,[70] or which do not cure the de-

dered unsafe by reason of obstructions placed therein by order of defendant's foreman, amendment alleging that it was done with the knowledge of the foreman. Deering v. Barzak, 227 Ill. 71, 81 NE 1. Where first complaint failed to allege a duty of due care on part of defendant, amendment supplying the omission. Lake Shore, etc., R. Co. v. Enright, 227 Ill. 403, 81 NE 374, afg. 129 Ill. App. 223. Where one of grounds alleged in petition to contest election was that illegal votes had been cast, amendment stating names of alleged illegal voters. Refusal to strike it because filed after period prescribed for instituting contest held not error. Widmayer v. Davis, 231 Ill. 42, 83 NE 87. Amended declaration merely restating and amplifying causes of action set up in original. Swift v. Gaylord, 126 Ill. App. 281. Amended count in slander. Millar v. Solitt, 131 Ill. App. 196. Amended petition in action for damages for assault and battery filed after evidence had been adduced. Waltz v. Etnier [Iowa] 115 NW 209. In action for damages for personal injuries, though failure to allege plaintiff's freedom from contributory negligence renders petition demurrable, amendment supplying such omission. Cahill v. Illinois Cent. R. Co. [Iowa] 115 NW 216. Amendment of complaint so as to allege that original rather than copy of note sued on was attached as an exhibit, held not commencement of new action. Bradley v. Pinney [Kan.] 93 P 585. Where original petition alleged execution of certain notes by defendants and chattel mortgages to secure their payment, and a default, and prayed for judgment for amount due on notes and sale of mortgaged property, amended petition setting up cause of action in replevin for same property. Snider v. Windsor [Kan.] 93 P 600. Amendment held properly allowed. Id. In action by servant against master for personal injuries, where original answer was general denial, held that amended answer alleging assumption of risk, and that accident was due to negligence of fellow-servant did not change issue, and was not inconsistent with original, or calculated to take plaintiff by surprise. Smith v. Rock Island, etc., R. Co., 119 La. 537, 44 S 290. Where original petition in action against street railway company for personal injuries alleged that rate of speed of car was thirty miles an hour, amended petition stating that it was in excess of twenty miles an hour. Carey v. Metropolitan St. R. Co., 125 Mo. App. 188, 101 SW 1123. Amended petition in action to recover commissions earned in sale of farm. Sain v. Rooney, 125 Mo. App. 176, 101 SW 1127. In action against street railway company for injury to motorman, offered amendment after close of plaintiff's evidence changing allegation that he was injured by collision of cars to allegation that he was injured by jumping from car when he saw that his position was perilous. Edge v. Southwest Missouri Elec. R. Co., 206 Mo. 471, 104 SW 90. In action for damages for personal injuries amended petition differing from original only in that it connected defendant with negligence alleged to have produced injury, in which respect original was defective. Johnson v. American Smelting & Refining Co. [Neb.] 114 NW 144. Amendment in action against carrier for personal injuries to passenger sustained while alighting from car changing allegation that there was no stop of the car at all to one that there was insufficient stop. Schmelzer v. Chester Trac. Co. [Pa.] 66 A 1005. In action for personal injuries resulting from collision between car and carriage, amended count merely showing difference in description of plaintiff's position and direction in which her carriage was proceeding. Butler v. Rhode Island Co. [R. I.] 68 A 425. In action to recover commissions for procuring purchaser for land, amendment merely amplifying original petition. Mayes v. Magill [Tex. Civ. App.] 107 SW 363. Where plaintiffs originally sued as individuals, amended petition in which they sued as firm. Id. Amended petition in action for conversion held to set up substantially same cause of action as original, save that it contained additional or supplementary allegation that defendant promised to pay for property that both petitions charged he had converted about certain date, and not to have amounted to abandonment of original, and substitution of entirely new and distinct cause of action subject to statute of limitations. Hitson v. Hurt [Tex. Civ. App.] 18 Tex. Ct. Rep. 279, 101 SW 292. In action for personal injuries, amendment of complaint so as to allege that plaintiff was detained from business ninety days instead of thirty days. Jones v. Ogden City [Utah] 89 P 1006. Refusal to allow it held error. Id.

67. Hurd's Rev. St. 1905, c. 7, § 11. Spencer v. Aetna Indemnity Co, 231 Ill. 82, 83 NE 102.

68. Is not strictly plea in abatement, but meritorious plea necessary to protection of substantial right granted by statute. Spencer v. Aetna Indemnity Co., 231 Ill. 82, 83 NE 102.

69. In action on notes providing for reasonable attorney's fees, plaintiff alleged that defendant was indebted to him in sum of 10 per cent of principal and interest as attorney's fees. Defendant denied said allegation. Held error to refuse to allow defendant to amend on ground that his plea was only plea of general issue which could not be amended, since meaning of such denial could not be less than that 10 per cent was unreasonable fee. Proctor v. Crooker, 129 Ga. 732, 59 SE 781.

70. Leave to amend after demurrer sustained held properly denied where bill as amended would have been insufficient to justify relief prayed. Reed v. New York Nat. Exch. Bk., 131 Ill. App. 434. In action against city to recover damages resulting from change of grade of street, refusal to allow filing of amended answer pleading

fect sought to be remedied,[71] or which have been previously disallowed,[72] or which do not differ substantially from allegations previously held insufficient,[73] or which would require the adjudication of issues affecting persons not parties to the action,[74] or which are inconsistent with stipulations previously entered into,[75] and trial amendments inconsistent with the evidence previously introduced by the party offering them,[76] are ordinarily not permissible. The right to amend does not, however, depend upon whether the amended pleading is wholly invulnerable to demurrer or motion,[77] nor is the allowance of an amendment an adjudication of its sufficiency so as to preclude a demurrer or motion to test its substance or form.[78]

In order to allow an amendment the court must, of course, have acquired and retained jurisdiction of the cause.[79] Statutes in some states make the existence of

nature of improvement at length, and pleading alleged benefits as counterclaim, held proper, city not being entitled to recover on such a counterclaim, and allegations as to nature of improvements being merely matter of evidence provable without being pleaded. City of Owensboro v. Yewell, 31 Ky. L. R. 858, 104 SW 284. Refusal to allow filing of amended answer alleging fraudulent representations as to certain agreement held proper, where it contained no allegation of a specific fraudulent act upon which any one relied so that proof of actionable fraud would not have been admissible thereunder. Haag v. Burns [S. D.] 115 NW 104. Where on sustaining demurrers to complaint, court refused leave to amend on sole ground that complaint would not state cause of action if amendments were allowed, held that, on appeal from judgment for defendant on sustaining of said demurrers, proposed amendments would be regarded as incorporated in complaint for purpose of determining its sufficiency. Campbell-Kawaunanakoa v. Campbell [Cal.] 92 P 184.

71. In action for assault and battery where defendant filed plea of justification alleging that he committed assault in defending his son from attack by plaintiff, refusal to allow amendment thereof by inserting, after description of said attack, words "thus using unnecessary force in repelling any assault made upon him by the said son of this defendant" held proper, since amendment did not meet objections raised by demurrer to plea, and would not have made it sufficient. Morris v. McClellan [Ala.] 45 S 641. Amendment setting out more legal conclusions and which would not have cured defects in petition, held properly rejected. Thornton v. Jackson, 129 Ga. 700, 59 SE 905. Demurrer having been sustained, and it appearing upon tender of amended petition that initial defect is not susceptible of amendment, leave to file will be refused and cause dismissed. Code §§ 5116, 5320. Harris v. Cincinnati, etc., R. Co., 5 Ohio N. P. (N. S.) 173.

72. Order of special term of city court denying leave to amend answer, which was in full force at time of trial, held binding on trial court so that motion to amend in same particular to make pleading conform to proof was properly denied. P. H. & F. M. Roots Co. v. New York Foundry Co., 54 Misc. 635, 104 NYS 785.

73. After several successive sets of pleas have been held bad on demurrer, and defendant files still other pleas in which he reiterates and repeats substantially same defense, judgment is properly entered upon the demurrer thereto. Hooker v. Forrester, 53 Fla. 392, 43 S 241.

74. Amendment to petition held properly disallowed where it appeared that adjudication of issues raised thereby would affect parties at interest who were not parties to the action. Hamilton v. Cargile, 127 Ga. 762, 56 SE 1022.

75. Amendments to answer in action to recover damages for breach of contract of agency held not inconsistent with stipulation limiting issues, and to have been properly allowed. Wilson v. Northwestern Nat. Life Ins. Co. [Minn.] 114 NW 251.

76. Trial amendment setting up cause of action accruing to third person and alleging assignment thereof to plaintiff before commencement of action held properly disallowed where proof already introduced showed that assignment was not in fact made until after commencement of action. Woodward v. Northern Pac. R. Co. [N. D.] 111 NW 627.

77. If amended pleading sets up new defense, or former one more completely, or remedies any other defect, it is sufficient, and whether it does will be determined by an inspection of the pleadings. Pacific Mill Co. v. Inman Poulson & Co. [Or.] 90 P 1099. Fact that amendment offered is unduly prolix, or contains allegations of mere evidence, or irrelevant or redundant matter, is no ground for refusing to allow it or striking it from files if it contains any new issuable averments, but remedy is by motion to prune it to proper proportions. Bruner v. Brotherhood of American Yeomen [Iowa] 111 NW 977.

78. Is subject to such tests thereafter, the same as an original pleading. Pacific Mill Co. v. Inman, Poulson & Co. [Or.] 90 P 1099.

79. Since county court, in action to recover money, acquired jurisdiction by summons if defendant in fact resided in county, held that it had power to allow complaint to be amended so as to allege that fact. Henneke v. Schmidt, 121 App. Div. 516, 106 NYS 138. While court has jurisdiction of case, order allowing amendment of complaint by substituting new plaintiff, is not void for want of jurisdiction, even if erroneous. Sears v. Dunbar [Or.] 91 P 145. Jurisdiction of court not terminated by sustaining demurrer to complaint on ground that plaintiff did not have legal capacity to sue. Id.

enough to amend by a condition precedent to the allowance of an amendment.[80] Proposed amendments should ordinarily be presented in writing,[81] it being necessary in some states to attach copies thereof to the moving papers in case the amendment is made on motion.[82] An affidavit that allegations sought to be added by amendment were not omitted from the original pleading for purposes of delay,[83] or excusing the failure or negligence necessitating the amendment,[84] is sometimes required. Leave to amend is of no effect until the amendment is actually made.[85] The amendment should not be made on the face of the original pleading, but on a separate piece of paper,[86] or in the form of an entirely new pleading.[87] In some states a copy of the amended pleading must be served on the opposite party if it in any way changes or adds to the traversable allegations of the original, or aids the cause of action or defense.[88]

An amended pleading supersedes the original,[89] and relates back to the time of

80. Petition showing a plaintiff and defendant, and setting out sufficient to indicate and specify some particular fact or transaction as a cause of action, is enough to amend by. Civ. Code 1895, § 5098. Eagle & Phenix Mills v. Muscogee Mfg. Co., 129 Ga. 712, 59 SE 804. Where petition sufficiently indicated design of pleader to show that plaintiff claimed that it and defendant both held factory sites under conveyances from common grantor, that there was duty on part of defendant to take not more than specified amount of water or water power from stream, and that it was violating said duty to defendant's damage, held that there was enough to amend by. Id. Summons in justice's court held sufficient. Jenkins v. Seaboard Air Line R. Co. [Ga. App.] 59 SE 1120. Since municipal corporation can sue and be sued only in corporate name set forth in its charter, suit not brought in such name is mere nullity, and petition is insufficient to support amendment of any character whatever. Town of East Rome v. Rome, 129 Ga. 290, 58 SE 854.

81. Better practice. Evans Marble Co. v. McDonald [Ala.] 45 S 213.

82. Washington Life Ins. Co. v. Scott, 52 Misc. 639, 103 NYS 929.

83. Where amendment to answer, filed after time for answering has expired, sets up new facts of which notice was not given in original answer, affidavit attached to proffered amendment must state that such facts were not omitted from original answer for purpose of delay. Columbus Show Case Co. v. Brinson, 128 Ga. 487, 57 SE 871. Amendment to plea, which is not purely precatory in character, but avers new matter of defense, notice of which was not given in original answer, is properly disallowed when defendant fails to so swear in affidavit. Gross v. Whitely, 128 Ga. 79, 57 SE 94.

84. Where amendment to answer simply enlarged defense originally set up, held that affidavit of officer of defendant corporation on motion for leave to amend was unnecessary. Murtagh v. Kingsland Brick Co., 119 App. Div. 286, 104 NYS 515.

85. Until amendment is actually filed. Roth v. Burnham, 126 Ill. App. 222. Is not equivalent to amendment. Henion v. Vavrik, 126 Ill. App. 292; Pooler v. Southwick, 126 Ill. App. 264. Filing of amendment is ineffective after leave to amend has been vacated. Carey-Lombard Lumber Co. v. Daugherty, 125 Ill. App. 258.

86. Should not be interlined in original, or be made by erasures and corrections therein. Chicago & A. R. Co. v. Johnson, 128 Ill. App. 20.

87. Reproduction of original declaration with new count added, entitled "amended declaration," and so designated and treated in order of court filing it, held to be regarded as an amended declaration and not new and independent one. Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 SE 258.

88. Plaintiff held entitled on second trial to benefit of amendment made at first trial to conform complaint to proof as to date when contract sued on became effective, though no formal order allowing amendment was filed and amended complaint was never served, there being no request that such service be ordered. Stannard v. Reid, 118 App. Div. 304, 103 NYS 521. Where plaintiff sought merely to correct prayer of complaint so as to demand equitable relief instead of money judgment and did not seek to change cause of action in any way, sole purpose being to remove case from law to equity calendar, and motion papers and notice of motion stated fully exact language of proposed prayer, held that it was not necessary for him to serve copy of proposed amended complaint. McVey v. Security Mut. Life Ins. Co., 118 App. Div. 466, 103 NYS 1056.

89. Filing amended pleading is abandonment of original. Swift v. Gaylord, 126 Ill. App. 281. Filing of amended petition operates as a withdrawal or abandonment of original petition, and no issue growing out of latter or based upon it can properly be submitted to jury. Ingwerson v. Chicago, etc., R. Co., 205 Mo. 328, 103 SW 1143. Where a complete amended petition is filed, it supersedes the original and allegations of latter are no longer absolutely binding upon plaintiff, though they may be competent evidence against him. Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014. Where amended petition does not refer to or adopt any part of original one, latter is superseded and is no part of record, and, though it may be introduced in evidence, its contents cannot be considered at the trial, either as part of record or as admissions of plaintiff, unless so introduced in evidence. Lane

filing the latter,[90] except in so far as it introduces a new cause of action, or brings in new parties.[91] The effect of the original pleading as an admission in such case is treated in a subsequent section.[92] The opposite party may ordinarily plead de novo in case of a material amendment,[93] or he may allow his original pleading to stand.[94]

§ 8. *Supplemental pleadings.*[See 8 C. L. 1405]—The codes generally provide that, upon the application of either party, the court may permit him to file a supplemental complaint, answer, or reply alleging material facts which have occurred since the filing of his former pleading, or of which he was ignorant at that time.[95] When an

v. Choctaw, etc., R. Co. [Okl.] 91 P 883. Part removed by amendment drops out of case. Kersten v. Weichman [Wis.] 114 NW 499. Error, if any, in not sustaining motion made at second term to dismiss action on account for failure to furnish bill of particulars in accordance with superior court rule 11 (Civ. Code 1895, § 5642), held cured by amendment attaching bill of particulars which court required to be made at subsequent term. Souders v. Carolina Portland Cement Co. [Ga. App.] 59 SE 467. Error in overruling demurrer may be rendered harmless by amendment sufficient to cure objection. Pacific Selling Co. v. Albright-Prior Co. [Ga. App.] 59 SE 468. Consideration of intermediate amendments and so much of judgment as related to them held to have been rendered unnecessary by their elimination from petition by third amendment. Central of Georgia R. Co. v. Inman, 129 Ga. 652, 59 SE 784. Demurrer to petition, seeking to charge carrier of goods with both common-law and statutory liability, on ground of duplicity held properly overruled where plaintiff by amendment elected to proceed upon common-law liability. Atlanta, etc., R. Co. v. Broome [Ga. App.] 60 SE 355. Amendments to petition in suit for land held to have cured any possible error in refusing to dismiss petition. Craddock v. Kelly, 129 Ga. 818, 60 SE 193. In action for assault amended petition, not attacked by motion or otherwise, held to have supplied any defect in original in not asking for actual damages. Waltz v. Etnier [Iowa] 115 NW 209.

90. For effect of running of limitations in the meantime, see Limitation of Actions, 10 C. L. 635. Townes v. Dallas Mfg. Co. [Ala.] 45 S 696. Amendment changing action for death by wrongful act from one by widow as administratrix for her benefit as widow to one in her individual name as widow held to relate back to beginning of action. Atlanta, etc., R. Co. v. Smith, 1 Ga. App. 162, 58 SE 106. Plaintiff has right to file amended petition setting up good cause of action after demurrer to original petition has been sustained, though limitations have run in the meantime, provided amended petition does not seek to recover upon new and independent cause of action, and it is error to strike such an amendment from files. Johnson v. American Smelting & Refining Co. [Neb.] 114 NW 144.

91. Where petition fails to state cause of action, an amendment which asserts cause of action barred by limitations does not relate back to first petition so as to deprive defendant of defense of the statute. Powers v. Badger Lumber Co., 75 Kan. 687, 90 P 254. As where petition to foreclose subcontractor's lien failed to allege service of notice of filing of lien on owner, and amendment alleging such service was made more than a year after filing of lien. Id. Amendment to declaration in action to recover for wrongful death changing relation in which plaintiff sued from that of her individual capacity as widow to that of her representative capacity as administratrix, held change of cause of action from one under state statute to one under Federal employers' liability act and in effect bringing of new suit, so that amendment could not relate back to commencement of action so as to avoid bar of limitations which had run since commencement of action. Hall v. Louisville & N. R. Co., 157 F 464.

92. See § 14, post.

93. Where pleading is amended by adding immaterial matter, right does not exist. Race v. Isaacson, 124 Ill. App. 196. Where pleading is amended after commencement of jury trial, right of adverse party to plead thereto, time within which it may be done, and whether such privilege be general or limited to merits, are questions for trial court in its discretion, considering circumstances of case and conditions of parties at the time. Kansas Torpedo Co. v. Erie Petroleum Co., 75 Kan. 530, 89 P 913. Refusal to allow defendant to file plea in abatement held not abuse of discretion under circumstances, amendment not having materially changed attitude of parties. Id. Where defendant was allowed to file amended answer at trial, held not an abuse of discretion to allow plaintiff to file reply thereto. Metropolitan Life Ins. Co. v. Thomas [Ky.] 106 SW 1175.

94. Where defendants, after amendment of complaint, served no new answers, held that original answers would stand as answers to amended complaint. White v. Smith [Wis.] 114 NW 106.

95. Office of supplemental complaint is to bring to notice of court and opposite party things occurring after commencement of the action which do or may affect rights asserted and relief asked in original action. California Farm & Fruit Co. v. Schiappa-Pietra [Cal.] 91 P 593. Though complaint and supplemental complaint were both incorporated in single document styled an "amended and supplemental complaint," and supplemental complaint was distinguished only by being contained in separate, but consecutively numbered paragraphs, held that they were to be regarded as separate pleadings. Id. Order striking out certain allegations of "amended and supplemental" complaint held not res adjudicata of right to serve supplemental complaint containing substantially same allegations, such allegations having no place in amended complaint, but being appropriate only to a supplemental pleading. Trust Co. of New York v. Uni-

action is reviewed against the personal representatives of a deceased defendant, it is neither necessary nor proper to restate in a supplemental complaint the cause of action.[96] Motions for leave to file supplemental pleadings are addressed to the discretion of the court,[97] who may ordinarily impose such terms as may be just.[98] Where the application is timely,[99] leave should not be withheld, unless it be shown that the object of the application is to obtain delay or it is otherwise made in bad faith,[1] or unless the proposed pleading is manifestly frivolous [2] or does not present a doubtful question.[3] Plaintiff cannot by such a pleading set up a new cause of action.[4] In some states the motion for leave to file such a pleading must be accompanied by an affidavit,[5] and the proposed pleading must be attached to the moving papers.[6] The

versal Talking Mach. Co., 120 App. Div. 392, 105 NYS 217. Facts which have come into existence since filing of original answer should be set up by supplemental answer on leave granted. Silver v. Waterman, 122 App. Div. 373, 106 NYS 899. In action by subcontractor, to foreclose mechanic's lien, held that, under Code Civ. Proc. § 544, it was error to refuse to allow defendant contractor to file supplemental answer, setting up that action had been tried, and resulted in judgment dismissing complaint as to owner, plaintiff's failure to appeal therefrom, and subsequent payment by owner to contractor of latter's claim. Van Kannel Revolving Door Co. v. Sloane, 122 App. Div. 613, 107 NYS 507. Complaint in action by taxpayer to enjoin county board of supervisors from auditing or allowing payment of certain claims was dismissed, and claims were audited and paid, and such sum was thereafter levied and assessed against towns in said county and paid. Judgment was then entered in favor of defendant, which was reversed on appeal, and new trial ordered. Plaintiff then moved that treasurer making payments and persons to whom they were made be brought in as parties defendant, that supplemental summons issue and be served on them, and for leave to serve supplemental complaint, seeking among other things to recover money. Held that motion should have been granted, complaint not setting up new cause of action. McNeil v. Suffolk County Sup'rs, 108 NYS 178. Matters in response to defendant's plea in reconvention are properly incorporated in a supplemental petition. Burleson v. Tinnin [Tex. Civ. App.] 100 SW 350.

96. Since former pleadings still stand, and action proceeds upon issues made by them. Mulligan v. O'Brien, 119 App. Div. 355, 104 NYS 301, afg. 53 Misc. 4, 102 NYS 911.

97. Refusal to allow filing of supplemental answer setting up compromise of suit for same cause of action in Federal court as bar to action in state court held error as based on erroneous view of the law. Wieters v. Gideon, 76 S. C. 458, 57 SE 193. Held not abuse of discretion to allow purchasers at master's sale, on rule to show cause why they should not be required to comply with their bids, to allege by supplemental pleading birth of remaindermen after order of sale who were not made parties to proceeding. Bernard v. Bernard [S. C.] 60 SE 700. Practice Act, § 23, does not give defendant absolute right to interpose further defenses after he has once pleaded. Wilson v. Wilson, 125 Ill. App. 385. It is not error to refuse leave to file additional pleadings after cause is set where no good cause is shown. Id.

98. Motion for leave to serve supplemental answer setting up release of plaintiff's claim granted upon payment of costs up to time of application. Rosenbaum v. Breslauer, 54 Misc. 76, 104 NYS 506.

99. Application for leave to serve supplemental answer granted. Jones v. Gould, 56 Misc. 328, 107 NYS 661. Delay held not such as to require denial of leave to file supplemental answer setting up release of plaintiff's claim, where case, though "ready," had not been reached, and it did not appear that plaintiff had been prejudiced. Rosenbaum v. Breslauer, 54 Misc. 76, 104 NYS 506.

1. Application for leave to serve supplemental answer granted. Jones v. Gould, 56 Misc. 328, 107 NYS 661.

2. Application for leave to serve supplemental answer granted. Jones v. Gould, 56 Misc. 328, 107 NYS 661.

3. Where supplemental answer cannot be a bar, it will be disallowed, but when there is some doubt as to question, application should be allowed and question determined at trial. Jones v. Gould, 56 Misc. 328, 107 NYS 661. Application for leave to serve supplemental answer alleging that since institution of action judgment had been entered in favor of plaintiff and against defendant in another action subsequently instituted in same court between same parties on same alleged transaction and praying for same relief, which was unreversed and unmodified, and bar to action, granted. Id. Granting of leave to serve, supplemental complaint on short affidavit that action was "for the forfeiture of the defendant's franchise to operate a trolley system" in certain village held error, there being no such action known as that described, and original complaint not having been read on motion. People v. Westchester Trac. Co., 108 NYS 59.

4. New cause of action arising after institution of original suit cannot be set up by supplemental complaint. Mansf. Dig. § 5084. Cassidy v. Saline County Bk. [Ind. T.] 104 SW 829.

5. Affidavit in support of motion for leave to serve supplemental answer setting up release of plaintiff's claim held sufficient, though made by attorney, where it contained only allegations concerning condition of pleadings, and stated that in preparation for trial he learned of release, and that it was in his possession. Rosenbaum v. Breslauer, 54 Misc. 76, 104 NYS 506.

6. Washington Life Ins. Co. v. Scott, 52

court does not determine whether the fact pleaded is available upon a reading of the opposing affidavits,[7] nor does leave to file such a pleading in any way determine the rights of the parties.[8] The sufficiency of the complaint with respect to the proper joinder of all parties originally included is to be determined by reference to the facts existing and disclosed by the complaint at the commencement of the action, regardless of those disclosed by a supplemental complaint.[9]

§ 9. *Motions upon the pleadings.*[See 8 C. L. 1406]—Interlocutory motions may be used to simplify pleadings for the purpose of attacking them on demurrer.[10]

Statutes in some states authorize the striking of any pleading so framed as to prejudice or embarrass or delay the fair trial of the action.[11] Pleadings may not be stricken for want of sufficient evidence to support them.[12] Statutes providing for the striking of the complaint as a punishment for plaintiff's refusal to testify have been held to be valid,[13] though a different rule seems to prevail as to striking the answer on a similar refusal by defendant.[14] The distinction between a motion to strike and a demurrer should be observed, and one cannot be used interchangeably for the other.[15] On a motion to strike, the court is ordinarily confined to the grounds

Misc. 639, 103 NYS 929. Application granted though order to show cause prayed for order permitting service of answer "substantially in the form of" that annexed to moving papers, where moving affidavit alleged that exhibit sq annexed was copy of proposed answer which it was desired to serve. Jones v. Gould, 56 Misc. 328, 107 NYS 661.

7. Silver v. Waterman, 122 App. Div. 373, 106 NYS 899. In action to restrain unfair competition in manufacture and sale of certain article, held that application for leave to file supplemental answer setting up granting of patent to defendants in connection with article manufactured by them was properly granted, though plea could not establish complete defense if allegations of complaint were proven, and though it might not be material, since it was possible that some of acts of unfair competition alleged might be justified by invention, and hence it could not be said that pleading was manifestly bad or frivolous. Id.

8. Answer. Silver v. Waterman, 122 App. Div. 373, 106 NYS 899.

9. Hence, where certain parties are originally properly joined as defendants, complaint is not made demurrable for misjoinder or as failing to state cause of action as to them by filing of supplemental complaint showing that they have disposed of their interest since commencement of action. California Farm & Fruit Co. v. Schiappa-Pietra [Cal.] 91 P 593.

10. W. H. Mullins Co. v. Freund Roofing Co., 5 Ohio N. P. (N. S.) 1.

11. If answer to alternative writ of mandamus is wholly irrelevant or improper and impedes fair trial of cause, it may be stricken out on motion, and any irrelevant, immaterial, or otherwise improper matters therein may be stricken on motion. Gen. St. 1906, § 1433. State v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 S 230. Answer to alternative writ of mandamus brought to compel railroad company to repair its rack held to contain denials and other averments responsive to material allegations of writ, so that motion to strike entire answer was not well taken. Id. Plea in abatement to venue, filed with pleas to merits, does not prejudice, embarass, or delay fair trial, and when interposed in good faith should not be stricken. E. O. Painter Fertilizer Co. v. Du Pont [Fla.] 45 S 507.

12. Motion to strike declaration or counts thereof, good on demurrer, for want of evidence to support them, is not proper practice. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826.

13. Complaint may not be stricken out under Code Civ. Proc. § 1991 for refusal to answer proper questions propounded, to plaintiff on taking of his deposition before a notary until after he has been adjudged to be in contempt. O'Neill v. Thomas Day Co. [Cal.] 92 P 856.

14. Code Civ. Proc. § 1991 is invalid in so far as it authorizes striking of answer. O'Neill v. Thomas Day Co. [Cal.] 92 P 856. Striking out answer as punishment for contempt in failing to appear before referee for examination held violation of U. S. Const. amend. 14. Grant v. Greene, 105 NYS 641.

15. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S 318. Where demurrer is interposed to pleas when motion to strike would have been proper method of attack, but no such point is made below or in appellate court, and pleas are so faulty that court would have been justified in striking them of its own motion, sustaining demurrer will be held to be harmless. Hooker v. Forrester, 53 Fla. 392, 43 S 241. Motion to strike out is not designed to perform office of demurrer, nor is it a favored motion, and, since overruling of it has no effect other than to leave an irrelevant pleading in record, error cannot be predicated on action of the court in overruling such a motion. Hart v. Scott, 168 Ind. 530, 81 NE 481. Motion to strike out answer as irrelevant is not concurrent with right to demur for insufficiency or right to question sufficiency of pleading at trial. Hanson v. Collier, 104 NYS 787. Whether allegations of answer in libel suit were sufficient to constitute a justification held not open to determination on motion to strike as irrelevant. Id.

specified.[16] Matters of defense in no way appearing from the complaint will not be considered.[17] Sustaining a motion to strike a plea is harmless where the facts therein alleged are provable under a plea of the general issue.[18]

The petition alone, and not the evidence, must be looked to in determining its sufficiency on motion in arrest of judgment.[19] Motions to make more definite and certain are addressed to the discretion of the court.[20] All grounds of objection should be stated in a single motion.[21] In New York such a motion will not be denied because the moving papers contain an affidavit of merits.[22] Motions to make more definite and certain and for a bill of particulars are improperly joined.[23] An order requiring a pleading to be made more definite and certain should ordinarily provide for the striking out of the allegations attacked, rather than the whole pleading, in case of disobedience.[24]

A joint objection by two parties to the introduction of evidence because of the insufficiency of a pleading is properly overruled if it is good as to one of them.[25]

In some states, motions to require plaintiff to elect between counts must be in writing [26] and must be accompanied by written specifications of the grounds thereof.[27]

Leave to file amended and supplemental complaints may only be obtained by separate, consecutive, applications.[28]

§ 10. *Right to object, and mode of asserting defenses and objections; whether by demurrer, motion, etc.—Want of jurisdiction* See 8 C. L. 1407 may be raised by demurrer if apparent on the face of the complaint,[29] but if not must be set up by answer.[30] The fact that plaintiff sues at law instead of in equity is no ground for dismissing the complaint on demurrer, but the case should be transferred to the proper court.[31] The objection that the complaint in a suit in equity shows that plaintiff has

16. Williams v. Alabama Cotton Oil Co. [Ala.] 44 S 957.

17. Fact that defendant was infant and hence had no opportunity to defend certain former action against plaintiff for loss for which defendant was responsible held matter of defense which in no way bore on sufficiency of complaint on motion to strike certain of its allegations, that fact not appearing from complaint. Reynolds v. Alderman, 103 NYS 863.

18. Hays v. Miller [Ala.] 43 S 818.

19. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44.

20. Order to make pleadings more definite and certain by amendment is largely discretionary, and court's action will not be disturbed unless clearly shown to have been prejudicial. Epstin v. Berman [S. C.] 58 SE 1013.

21. Where defendant files motion to make petition more definite and certain as to particulars which are named, he will not be permitted after amendment of petition to file second motion attacking irregularities which were known and might have been covered by original motion. State v. Schott, 6 Ohio N. P. (N. S.) 270.

22. McGehee v. Cooke, 105 NYS 60.

23. Motions to make complaint more definite and certain, or, in the alternative, for bill of particulars, since one may only be made before and the other ordinarily only after pleading. Mutual Life Ins. Co. v. Granniss, 118 App. Div. 830, 103 NYS 835.

24. Where, if such allegations were stricken from complaint, it would still have stated cause of action. Harrington v. Stillman, 120 App. Div. 659, 105 NYS 75.

25. Joint objection by two defendants to introduction of any evidence on ground that complaint did not state facts sufficient to constitute cause of action. Rogers v. Gladiator Gold Min. & Mill. Co. [S. D.] 113 NW 86.

26. Rev. St. 1899, §§ 599, 603, 612, 613, 619, 640, 641. White v. St. Louis, etc., R. Co., 202 Mo. 539, 101 SW 14. Where written motion was overruled, held that, in order to renew it at trial, it should have been refiled, and, where counsel merely suggested ore tenus that he desired to renew it, court's action in overruling it could not be reviewed because it could not get into bill of exceptions. Id.

27. Under Rev. St. 1899, § 640, defendant is precluded from urging in support of motion to require plaintiff to elect between counts any ground not included in written specifications. White v. St. Louis, etc., R. Co., 202 Mo. 539, 101 SW 14.

28. Motion for leave to serve "amended and supplemental answer" denied, no such pleading being recognized by code. Washington Life Ins. Co. v. Scott, 52 Misc. 639, 103 NYS 929.

29. Legum v. Blank [Md.] 65 A 1071.

30. Where the declaration shows on its face proper matter for the jurisdiction of the court, no exception for want of jurisdiction can be taken except by plea in abatement. Code 1899, c. 125, § 16. Mankin v. Jones [W. Va.] 60 SE 248.

31. Kirby's Dig. § 5991. Newman v. Mountain Park Land Co. [Ark.] 107 SW 391.

an adequate remedy at law cannot be raised by an objection to the introduction of any evidence.[32]

Objection to parties See 8 C. L. 1407 for want of capacity to sue, or for misjoinder or nonjoinder, may be raised by demurrer on that ground if apparent on the face of the complaint, or by plea or answer if not,[33] but does not amount to a failure to state a cause of action.[34]

Misjoinder of causes of action See 8 C. L. 1408 is ordinarily ground of demurrer if apparent on the face of the complaint [35] and not for motion to strike.[36] On objection that two causes of action are improperly joined, plaintiff may dismiss as to one and proceed to trial upon the other.[37] If the objection is as to the manner of statement only, the remedy is ordinarily by motion to separate,[38] or to strike,[39] or to require an election.[40]

Irrelevant, See 8 C. L. 1409 redundant, or immaterial matter is ordinarily reached by motion to strike,[41] and not by general demurrer.[42]

32. Shannon v. Dorsinski [Wis.] 114 NW 129.

33. See Partles, 10 C. L. 1081.

34. Want of capacity to sue must be raised by special demurrer or answer and is not reached by general demurrer. Civ. Code Prac. § 92. Louisville, etc., R. Co. v. Herndon's Adm'r, 31 Ky. L. R. 1059, 104 SW 732.

35. Kellar v. James [W. Va.] 59 SE 939. Mills' Ann. Code, § 50. Merrill v. Suffa [Colo.] 93 P 1099. Can only be taken by demurrer if it appears on face of complaint. Diamond Rubber Co. v. Harryman [Colo.] 92 P 922. Can be raised only by demurrer. Prac. Book, p. 50, § 170. Gorham v. New Haven, 79 Conn. 670, 66 A 505. Where several causes of action are improperly joined, demurrer on that ground should be sustained and plaintiff be given leave to amend. White v. Whitcomb, 13 Idaho, 490, 90 P 1080. May be reached by demurrer where two causes are distinctly and completely pleaded. Mutual Life Ins. Co. v. Gillette, 119 App. Div. 430, 104 NYS 683.

36. Objection that complaint improperly joins cause of action at law on bond and one in equity to foreclose mortgage given to secure it, cannot be raised by motion to strike as irrelevant, but should be taken by demurrer or at trial by proper motion or objection to evidence. City Real Estate Co. v. King, 122 App. Div. 556, 107 NYS 535.

37. McCague Sav. Bk. v. Craft [Neb.] 115 NW 315.

38. Commingling in one statement of what should have been separate statements of same cause of action must be taken advantage of by motion. Possell v. Smith, 39 Colo. 127, 88 P 1064. Demand to separately state and number defense is propery subject of motion to make more definite and certain, and separate stating and numbering cannot be ordered on motion to strike irrelevant and redundant matter. Ebling Brew. Co. v. Adler, 103 NYS 93.

39. Objection that causes of action are not separately stated must be raised by motion to strike, under B. & C. Comp. § 106, made at proper time, and cannot be raised during admission of testimony. Bade v. Hibberd [Or.] 93 P 364. Where complaint in action against city and railway company presented cause of action for impairment of value of property by lowering street, and one for use and occupation of house thereon by railway company for storage of tools, held that court properly struck latter and directed issues raised thereby to be tried in separate action or before separate jury. Coyne v. Memphis, 118 Tenn. 651, 102 SW 355

40. Where two causes of action, which might have properly been united in same petition if stated in separate counts, are improperly blended in one count, remedy is by motion to require plaintiff to elect one and to strike out other. Jordan v. St. Louis Transit Co., 202 Mo. 418, 101 SW 11.

41. Irrelevant and frivolous pleas. Wefel v. Stillman [Ala.] 44 S 203. Immaterial, redundant, or superfluous matter. Frazer v. Andrews, 134 Iowa, 621, 112 NW 92. Striking out of allegations of answer which in no event could be made groundwork of a defense held proper. Teeple v. Hawkeye Gold Dredging Co. [Iowa] 114 NW 906. Immaterial matter. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826. Motion to strike portion of complaint seeking to recover improper element of damages held proper method of attack. Gregory v. Woodbery, 53 Fla. 566, 43 S 504. If an answer so palpably irrelevant that it is manifest that it could not be so amended as to make facts therein stated in anywise germane to the controversy, it may be rejected on motion. Hart v. Scott, 168 Ind. 530, 81 NE 481. Where plea of estoppel contained no matter out of which an estoppel could arise, held that objection that it was immaterial was sufficient to sustain ruling striking allegations on motion. Busby v. Busby [Iowa] 114 NW 559. Defendant held not entitled to object to particular ground assigned where he did not take leave to amend. Id. Separate answer which is subject to demurrer cannot be stricken out in its entirety as irrelevant or redundant under Code Civ. Proc. § 545. W. T. Hanson Co. v. Collier, 104 NYS 787. Though motions to strike irrelevant allegations are not regarded with same degree of favor in suits in equity as in actions at law, irrelevant allegations will be stricken in suits in equity where they are something more than allegations of inducement or evidence, and are not germane to the issue, but present new issue, or tend to confuse real issue. Bradley v. Sweeney, 120 App. Div. 315, 105 NYS 296.

Scandalous matter will be stricken on motion.[43]

Frivolous pleadings.—Statutes in some states provide that judgment may be entered on frivolous pleadings on motion.[44]

Formal defects See 8 C. L. 1400 can ordinarily be reached only by motion to require their correction [45] or to strike,[46] and not by objection to evidence,[47] motion for a directed verdict,[48] or demurrer,[49] except where special demurrers are authorized.[50]

Where a petition still states a cause of action against the defendant after the striking out of the redundant and improper matter, the court has no power to dismiss the action without prejudice in the absence of any pleading traversing the averments left in the petition. Klink v. Toledo R. & L. Co., 10 Ohio C. C. (N. S.) 49.

42. Where complaint makes out good cause of action for recovery of any damage at all, but combines in addition thereto claim for nonrecoverable damages, proper way to rid it of latter claim is by motion to strike, objection to evidence, or special instruction to jury, and not by demurrer. Western Union Tel. Co. v. Westmoreland [Ala.] 43 S 790; Western Union Tel. Co. v. Garthright [Ala.] 44 S 212. If complaint makes out recoverable right, but contains claim for nonrecoverable damages. Hays v. Miller [Ala.] 43 S 818. Where complaint states cause of action, general demurrer will not lie, but objection that it contains redundant or immaterial matter must be raised by motion to strike. Foreman v. Midland Valley R. Co. [Ind. T.] 104 SW 806. Demurrer may not be employed to rid single cause of action or defense of irrelevant, redundant, or improper matter. Sparks v. Smeltzer [Kan.] 93 P 338. Demurrer does not reach defect of irrelevancy and redundancy, but objection must be taken by motion. Gooding v. Doyle [Wis.] 115 NW 114.

43. Where scandalous matter has been inserted in answer solely to insult plaintiff, and not to protect defendant, plaintiff is not required to admit same by demurrer, but such answer, though alleged as separate defense, may be stricken. W. T. Hanson Co. v. Collier, 104 NYS 787.

44. As to what is a frivolous pleading, see § 1, ante. Judgment may be had on a denial or defense on motion only when it is frivolous on its face. Rochkland v. Perlman, 108 NYS 224. Denial of any knowledge or information sufficient to form belief is frivolous where facts are presumptively within defendant's knowledge, or in case of intentional ignorance on defendant's part when it is his duty to know or learn facts, and they are at hand and accessible, as in case of public record. Id. Motion for judgment may be made only on a frivolous answer, remedy for sham defense being motion to strike it out. Id. In action to foreclose mortgage executed by husband alone, answer of wife setting up her inchoate right of dower as defense held frivolous within meaning of Code Civ. Proc. § 537, and stricken out. Anderson v. McNeely, 120 App. Div. 676, 105 NYS 278. Motion for judgment on pleading as frivolous will be overruled if it requires argument to show that it is frivolous. Consolidated Rubber Tire Co. v. Vehicle Equipment Co., 121 App. Div. 764, 106 NYS 599. Answer setting up confirmation of composition with creditors in bankruptcy held not to be overruled as frivolous, though bankruptcy court had given plaintiff permission to prosecute action on its claim against bankrupt to judgment, it not being perfectly clear, in view of all the facts, that indebtedness on which action was based had not been discharged. Id. Motion for judgment on ground that demurrer to complaint is frivolous will not be granted where legal question raised by demurrer is doubtful. People v. McClellan, 53 Misc. 469, 105 NYS 223. Demurrer on ground of nonjoinder of necessary party held not so palpably bad as to justify its being treated as frivolous, it being unnecessary to consider on such a motion whether demurrer was or was not well pleaded. Id.

45. Where in setting forth second cause of action plaintiff alleged "the entire contents of folio 1" of complaint, and from folioing it was uncertain how much was included, held that remedy was by motion, and not by demurrer or dismissal at trial. Babcock v. Anson, 122 App. Div. 73, 106 NYS 642.

46. Where plea in abatement was not amendable but amended plea was filed, held that court should have granted motion to strike it instead of disposing of it on demurrer. Spencer v. Aetna Indemnity Co., 231 Ill. 82, 83 NE 102. Denial of motion to strike held no ground for reversal where court held plea had no demurrer. Id. Where aditional counts have been filed without leave of court a motion to strike out should be made. American Brake Shoe & Foundry Co. v. Hank, 129 Ill. App. 188. Where paragraph was good before new matter was added by amendment, held that motion to strike amendatory matter was properly overruled, since it did not make paragraph bad whether it was surplusage or necessary to admission of proof, and was harmless. Alerding v. Allison [Ind.] 83 NE 1006, afg. 82 NE 934.

47. Fact that statement of defense of fraud in answer was insufficient as matter of pleading held no reason for excluding evidence of its truth. Low v. Low [Mass.] 83 NE 406.

48. Verdict should not be directed because of defect in petition curable by amendment, plaintiff being entitled to have objection raised in such manner that he may cure it if possible. Cahill v. Illinois Cent. R. Co. [Iowa] 115 NW 216.

49. General demurrer reaches only substantial defects, and not defects of form such as argumentativeness and duplicity. Dunlevy v. Fenton [Vt.] 68 A 651. Not formal defects. Blackmore v. Winders, 144 N. C. 212, 56 SE 874. Not structural defects. Douglas, etc., R. Co. v. Swindle, 2 Ga. App. 550, 59 SE 600. Duplicity must be objected to by motion to strike out, and not by general demurrer. Smythe v. New Providence Tp., 158 F 213. Defect in form in that com-

Uncertainty See 8 C. L. 1410 is ground for a motion to make more definite and certain,[51] but not for objection to evidence,[52] or motion to strike,[53] or dismissal of the

plaint does not fully and clearly state terms of contract sued on cannot be reached by demurrer to substance, but should be remedied by motion to make more definite and certain, or by demurrer to form where permissible. Revisal 1905, § 496. Wood v. Kincaid, 144 N. C. 393, 57 SE 4. Omission of word "county" in petition in action on liquor dealer's bond held mere clerical error which could not be availed of by general demurrer. White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 SW 160. Objection that plaintiff is not entitled to money judgment because there is no prayer therefor in complaint cannot be reached by general demurrer, notwithstanding Code Civ. Proc. § 1003. Donovan v. McDevitt [Mont.] 92 P 49. General demurrer to amended complaint does not raise objection that it introduces new cause of action accruing since commencement of action. Ferguson v. Carr [Ark.] 107 SW 1177. Objection that defense is improperly incorporated in the several separate defenses should be raised by motion to strike, and is not reached by demurrer to said defenses as insufficient in law. Stemmerman v. Kelly, 122 App. Div. 669, 107 NYS 379. Fact that special plea tenders issue covered by plea of not guilty is ground for striking it, but does not render it demurrable. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S. 318. Sustaining demurrer held harmless. Id. Demurrer to paragraph of answer held properly overruled, it being good as an argumentative denial. Teague v. Bloomington [Ind. App.] 81 NE 103. Argumentative plea is good on general demurrer. De Long v. Spring Lake Beach Imp. Co. [N. J. Law] 66 A 591.

50. Defects of form can be reached only by special demurrer. Hicks v. Hamilton [Ga. App.] 59 SE 331; People v. Munroe, 227 Ill. 604, 81 NE 704; Central of Georgia R. Co. v. Banks & Fortson, 128 Ga. 785, 58 SE 352. Objection that counts of declaration in action of replevin refer to another count for description of property, instead of being complete in themselves. McDonough v. Reilly, 131 Ill. App. 553. Pleading should not be stricken for prolixity except in extreme and palpable cases, but, in cases of doubt, better practice is to proceed by special demurrer so that matter may be corrected by amendment. Wefel v. Stillman [Ala.] 44 S 203. Where complaint states all facts essential to recovery, but states them imperfecty, demurrer, to be effectual, must be special, and directed to the very defect apparent. Union Ice Co. v. Doyle [Cal. App.] 92 P 112. Complaint is good against general demurrer though essential facts are alleged only by way of conclusions. Wyatt v. Arnot [Cal. App.] 94 P 86. Petition in action for breach of contract of sale held not subject to general demurrer, though possibly subject to special demurrer, so that it was error to dismiss it. Carolina Portland Cement Co. v. Columbia Imp. Co. [Ga. App.] 60 SE 279. Interrogatories attached to a pleading which are irrelevant or not pertinent to the issue should be reached by demurrer. W. H. Mullins Co. v. Freund Roofing Co., 5 Ohio N. P. (N. S.) 1.

51. Avon Springs Sanitarium Co. v. Weed, 119 App. Div. 560, 104 NYS 58; Gillikin v. Lake Drummond Canal & Water Co. [N. C.] 60 SE 654. In action to recover sum claimed for work and labor performed, and money advanced, held that, if there was anything uncertain about method of stating itemized account filed by paintiff as basis of action, defendant should have objected to it on that ground, and moved to have it made more definite and certain. Deal v. Beck [Ark.] 103 SW 736. In action by servant against master for personal injuries, held that defect in complaint in failing to sufficiently allege that defendant's foreman, whose negligence was claimed to have caused injury, was vice-principal and not fellow servant should have been met by motion to make more definite and certain. Roberts & Shafer Co. v. Jones [Ark.] 101 SW 165. In action against city for injuries due to defective sidewalk, held that defendant's remedy to obtain more particular information as to where accident occurred was by motion to make complaint more definite and certain. City of Huntington v. Stuver [Ind. App.] 83 NE 518. Not every indefinite or uncertain allegation may be made subject of motion to make more definite and certain, but only such as are so indefinite and uncertain that precise meaning or application thereof is uncertain. Code Civ. Proc. § 546. Harrington v. Stillman, 120 App. Div. 659, 105 NYS 75. In action for negligently operating automobile so as to cause horse to run away, allegations that defendant operated automobile negligently by not giving proper or adequate signals, and by running at dangerous rate of speed, held not subject to motion to make more definite and certain, defendant's remedy, if entited to details, being by motion for bill of particulars. Id. Allegations that defendant was guilty of negligence in not obeying rules and regulations, etc., held subject to motion to make more definite and certain. Id. Order directing amendment of complaint so as to make allegations as to damages for breach of contract more definite held error, since court would, without amplification or amendment have no difficulty in applying correct rule of damages. Friedman v. Denousky, 122 App. Div. 258, 106 NYS 780. Controlling consideration in deciding whether complaint should be made more definite and certain is whether it contains plain and concise statement of facts constituting cause of action as required by Code Civ. Proc. §§ 481, 546. Mutual Life Ins. Co. v. Granniss, 118 App. Div. 830, 103 NYS 835. Court may require allegations with respect to charge to be made definite, but neither particulars nor circumstances of time or place should be required. Id. Remedy by motion to make complaint more definite and certain is prescribed to enable party before pleading to ascertain charge made against him with sufficient definiteness to enable him to properly plead. Id. B. & C. Comp. § 86, providing that, where allegations of a pleading are so indefinite and uncertain that precise nature of charge or defense is not apparent, court may require it to be made more defi-

complaint at the trial,[54] or demurrer,[55] except when demurrer on that ground is authorized by the code.[56] A party seeking a more particular statement of his oppo-

nite by amendment, applies only where pleading contains defective or vague statement of good cause of action or defense, and is designed for cure of such defects as appear on face of pleading itself, and it is not province of court on motion to make more definite and certain to require pleader to state evidence upon which he relies, or to amend his pleading for purpose of enabling his adversary to demur. Multnomah County v. Wilamette Towing Co. [Or.] 89 P 389. Denial of motion to make second amended answer more definite and certain by inserting averments alleged to have been vital portion of former answers and to have been omitted to keep last answer from being demurrable held proper. Id. Where complaint in action for breach of executory contract to purchase goods would have supported recovery on any of three theories as to measure of damages, held that defendant could compel election by motion to make definite and certain or for bill of particulars. Isaacs v. Terry & Tench Co., 56 Misc. 586, 107 NYS 136.

52. Objection cannot serve purpose of motion to make more definite and certain. Fritz v. Watertown [S. D.] 111 NW 630.

53. Plea which states substantial defense and is merely deficient in certainty or particularity may not be stricken on motion at trial term. Bailey & Carney Buggy Co. v. Guthrie, 1 Ga. App. 350, 58 SE 103.

54. Remedy is by motion, under Code Civ. Proc. § 546, to make definite and certain. Palmer v. Van Deusen, 122 App. Div. 282, 106 NYS 707.

55. General demurrer does not reach uncertainty. Yordi v. Yordi [Cal. App.] 91 P 348; Union Ice Co. v. Doyle [Cal. App.] 92 P 112; Moore v. First Nat. Bk., 38 Colo. 336, 88 P 385. Ambiguity or uncertainty cannot be considered on general demurrer, but must be corrected by special demurrer or motion to strike or make certain, latter method being peculiarly applicable to fragmentary statements material to, but not stating sufficiently, one cause of action, found in pleading stating another cause of action. Neves v. Costa [Cal. App.] 89 P 860. Where complaint in action for wrongful death was indefinite as to whether plaintiff sued in representative or individual capacity, held that defect was not reached by general demurrer, but could only be taken advantage of by motion. De Amado v. Friedman [Ariz.] 89 P 588. Complaint in action for false imprisonment held good as against general demurrer, notwithstanding ambiguity and uncertainty. Neves v. Costa [Cal. App.] 89 P 860. Complaint in action to recover penalty for violation of town ordinance relating to intoxicating liquors held not obnoxious to demurrer, though it would have been to motion. Weiss-Chapman Drug Co. v. People, 39 Colo. 374, 89 P 778. Complaint containing general allegation of negligence is sufficient to withstand demurrer for want of facts. Lake Erie, etc., R. Co. v. Moore [Ind. App.] 81 NE 85. In action for damages to realty and crops by diversion of water from ditch, held that objection that description of premises was indefinite should have been raised by motion rather than by demurrer. Evansville & Princeton Trac. Co. v. Broermann [Ind. App.] 80 NE 972. Where complaint states cause of action, general demurrer will not lie because of indefiniteness, but remedy is by motion. Foreman v. Midland Valley R. Co. [Ind. T.] 104 SW 806. In action on fire insurance policy, held that averment in answer in general terms that defendant had assented to assignment of policy was sufficient on demurrer, defendant's remedy, if it desired particular facts of transaction, being by motion. Home Ins. Co. v. Myers [Ky.] 107 SW 719. Where only effect of alternative allegations is to render pleading indefinite or uncertain, remedy is by motion and not by general demurrer. Anderson v. Minneapolis, etc., R. Co. [Minn.] 114 NW 1123. In action to quiet title, when petition sets forth adverse interest in general terms, but without special or particular description, it is not for that reason obnoxious to general demurrer, but remedy of defendant is by motion. State v. Alter [Neb.] 114 NW 293. Defect in complaint for want of definiteness and certainty must be reached by motion, and is not properly raised by demurrer. Wilcox v. Scanlon [Wis.] 113 NW 948. Mere uncertainty as to details cannot be reached by demurrer for insufficiency where the substance of a charge fairly appears, but remedy is by motion. White v. White [Wis.] 111 NW 1116. Mere ambiguities which may be solved by construction are judicially remediable only by motion, and not by demurrer for want of facts. Milwaukee Trust Co. v. Van Valkenburgh [Wis.] 112 NW 1083. Demand held sufficiently alleged as against general demurrer in absence of motion to make more specific. Village of Prentice v. Nelson [Wis.] 114 NW 830. Where ultimate fact essential to cause of action is brought into existence by a series of detail acts and events, is proper to plead latter according to their legal effect, and, when so pleaded, complaint is not bad on demurrer, but is, at most, subject to motion to make more specific upon showing that it is material to understanding of controversy that some or all of specific acts, conduct, or events, be set out. Id.

56. In action to recover money lost at gambling by plaintiff's servant, held that objections that complaint did not sufficiently describe money lost, and that there was no proper or sufficient allegation of damage, were such as might have been raised by special demurrer, and hence did not affect sufficiency of complaint on general demurrer. Ramirez v. Main [Ariz.] 89 P 508. Ambiguity in complaint cannot be taken advantage of on appeal from default judgment based thereon, but only by demurrer. San Gabriel Valley Bk. v. Lake View Town Co., 4 Cal. App. 630, 89 P 360. In action to recover purchase price of stock on ground of fraud, held that fraud, and not precise amount of damage, was essential thing, and that if defendant desired more explicit statement as to amount of pecuniary loss he should have presented objection by means of demurrer for uncertainty. Spreckles v. Gorrill [Cal.] 92 P 1011. Objections for uncer-

nent's claim for the purpose of narrowing the issues at the trial, or to prevent surprise, should apply for a bill of particulars.[57]

Inconsistency or departures See 8 C. L. 1411 in pleading are ordinarily reached by motion [58] or demurrer.[59]

Failure to state a cause of action or defense See 8 C. L. 1411 may be reached by demurrer,[60] objection to the introduction of any evidence,[61] motion to dismiss,[62] mo-

tainty may be raised by demurrer. Bothwell v. Denver Union Stockyard Co., 39 Colo. 221, 90 P 1127. Objection that facts are stated hypothetically or by way of recital may be taken advantage of by general demurrer. Ilfeld v. Ziegler [Colo.] 91 P 825. Lack of fulness or explicitness in allegations of declaration should be reached by demurrer, and not by motion to strike. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S 318. Ambiguous and evasive answer to suit on note may be stricken on demurrer. Thomas v. Siesel, 2 Ga. App. 663, 58 SE 1131. Where petition is ambiguous as to whether action is ex contractu or ex delicto, remedy is by demurrer. Jenkins v. Seaboard Air Line R. Co. [Ga. App.] 59 SE 1120. Where defendant desires complaint made more definite and certain, should specially demur. Carlson v. Barker [Mont.] 93 P 646.

57. In such case, should not be allowed to obtain amended pleading on motion to make more definite and certain on theory that precise meaning or application of allegation is uncertain. Harrington v. Stillman, 120 App. Div. 659, 105 NYS 75. Where distinction exists, should be observed though result of either application would be same. Id.

58. If several defenses are inconsistent, remedy is by motion to strike or to require election, and not by motion for judgment on pleadings. Dee v. Nachbar, 207 Mo. 680, 106 SW 35. If new matter in reply is departure from case made in petition, it should be stricken on motion or objection, or disregarded. Hallmer v. Union Transfer Co. [Neb.] 112 NW 334. Where denials in plea raised issues of fact requiring evidence on part of plaintiff before he was entitled to recover, held error to strike plea on general demurrer because of any inconsistent or apparently inconsistent allegations therein. Wade v. Watson, 129 Ga. 614, 59 SE 294. Objection that cause of action stated in cross petition is not germane to that stated in original petition should be raised by motion to strike or to dismiss. Novak v. Novak [Iowa] 115 NW 1.

59. Objection to inconsistency of two counts in narr. must be taken advantage of by demurrer, and will not be inquired into on error. Whitney v. Haskell, 216 Pa. 622, 66 A 101.

60. In view of statute of amendments and abolition of general demurrers, when pleading, though not unnecessarily prolix or frivolous or irrelevant, is supposed to be substantially defective, as where facts alleged do not constitute cause of action or defense, objection must be taken by demurrer, and not by motion to strike. Wefel v. Stillman [Ala.] 44 S 203. If complaint in action for personal injuries was defective in failing to show proximate cause of injury, held that remedy was by demurrer, and not by motion to make more definite and certain. Bolen-Darnell Coal Co. v. Williams [Ind. T.] 104 SW 867. Where facts are alleged in petition in alternative, and under either alternative defendant is not liable, general demurrer should be sustained. Wakefield v. Chicago, etc., R. Co., 31 Ky. L. R. 1108, 104 SW 778. Where complaint alleges in alternative two statements of fact, one of which would be legally sufficient to constitute cause of action and other not, they neutralize each other, and demurrer will lie, as where complaint in action for personal injuries, showing on its face that plaintiff was guilty of contributory negligence so that there could be no recovery unless defendant's negligence was willful or wanton, alleged that defendant either knew, or, in exercise of ordinary care, might have known, that plaintiff was in dangerous and exposed position. Anderson v. Minneapolis, etc., R. Co. [Minn.] 114 NW 1123. Demurrer to petition should be sustained where it neither states cause of action in equity nor at law. Kimmell v. Powers [Okl.] 91 P 687. General demurrer reaches objection that it appears on face of petition that contract sued on is void under statute of frauds. Miller v. Drought [Tex. Civ. App.] 19 Tex. Ct. Rep. 416, 102 SW 145. Plea setting up matter contradicting written instrument which would have to be established by parol evidence de hors, record is bad on demurrer. Griffing Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687. If answer to alternative writ of mandamus is responsive to allegations of writ, but is wholly insufficient as a pleading, demurrer will lie. State v. Atlantic Coast Line R. Co., 53 Fla. 711, 44 S 230. Where petition sets forth cause of action in orderly paragraphs, and plea and answer thereto set up no ground of defense, court may at any stage of trial, give cause such direction as will disregard plea. Bedingfield v. Bates Advertising Co., 2 Ga. App. 107, 58 SE 320. Cause of action being purely equitable in its nature, insufficiency of defense that plaintiff has adequate remedy at law may be raised by demurrer. Holland v. Grote, 56 Misc. 370, 107 NYS 667. If from allegations of complaint it appears that defense of limitations is insufficient as a matter of necessity, demurrer to defense will lie, mere statement of defense being no more than averment of legal conclusion. Id.

61. Where petition in action by subcontractor to foreclose mechanic's lien failed to allege service of notice of filing of lien on owner, held that objection to introduction of any evidence should have been sustained, though petition was amended in that regard after running of limitations. Powers v. Badger Lumber Co., 75 Kan. 687, 90 P 254. Where petition fails to state cause of action, objection to introduction of any evidence thereunder should be sustained. Willoughby

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tion to strike,[63] or motion for judgment, notwithstanding the verdict.[64] The objection that a counterclaim is not pleadable in the action must be taken by demurrer, or, if not apparent on the face of the answer, by reply.[65] Defects in a plea to the jurisdiction may be reached by general demurrer.[66]

Matters of defense[67] must ordinarily be raised by plea or answer,[68] unless apparent on the face of the complaint, when demurrer will lie.[69] Defenses not raised by answer or demurrer are deemed waived.[70]

§ 11. *Waiver of objections and cure of defects.* See 8 C. L. 1413—Objections to pleadings must as a rule be made[71] and brought to a hearing[72] at the earliest oppor-

v. Ball, 18 Okl. 535, 90 P 1017. Objection to introduction of evidence should be sustained and action dismissed if it appears that defect in complaint is one of substance which cannot be cured by amendment or evidence. O'Day v. Ambaum [Wash.] 92 P 421. Failure to demur to plea which sets up no valid defense in law does not preclude plaintiff from moving to exclude evidence offered in its support. Halliday v. Bank of Stewart County, 128 Ga. 639, 58 SE 169.

62. Oral motion to dismiss plaintiff's case because petition does not state cause of action may be made at any stage before verdict. Capps v. Edwards [Ga.] 60 SE 455. On oral motion to dismiss because petition does not state cause of action, question is not whether any particular allegation has been defectively pleaded, but whether petition in its entirety sets out cause of action. Id. Petition in action for damages for breach of contractor to sell stock held sufficient. Id.

63. Plea or answer which sets up no legal or equitable defense and is bad in substance may be stricken on motion at trial term. Bailey & Carney Buggy Co. v. Guthrie, 1 Ga. App. 350, 58 SE 103.

64. Motion for judgment notwithstanding verdict because of defect in petition may only be sustained when evidence heard, issues submitted to jury, and verdict, do not cure defect. City of Henderson v. Smith, 31 Ky. L. R. 860, 104 SW 277.

65. St. 1898, §§ 2658, 2660. Randal v. Link [Wis.] 114 NW 498.

66. All defects in plea to jurisdiction may be reached by general demurrer. United States v. U. S. Fidelity & Guaranty Co. [Vt.] 66 A 809.

67. See 8 C. L. 1412. See, also, topics dealing with particular defenses, as Former Adjudication, 9 C. L. 1422; Limitation of Actions, etc., 10 C. L. 635.

68. Defendant can raise point that plaintiff has recommenced action previously dismissed without paying costs of former suit only by a timely plea in abatement. Sparks Imp. Co. v. Jones [Ga. App.] 60 SE 810. Objection that corporation defendant was not sued in its true corporate name should be raised by answer or affidavit in nature of plea in abatement, setting forth misnomer and disclosing defendant's true name. University of Louisville v. Hammock [Ky.] 106 SW 219.

69. See, also, § 5a, ante. In action by taxpayers to compel mayor of city to return to treasury salary received by him in excess of amount fixed by certain statute, held that defenses that statute was unconstitutional, that no demand had been made on mayor to return excess, that it was not averred that payment was made to him under mistake of fact, or that he had committed or participated in any fraud, and that it appeared that payment was made under mistake of law, should have been set up by demurrer and not by plea. Drennen v. Griffin [Ala.] 43 S 785. Ruling upon question of negligence may be invoked by general demurrer. Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122. General demurrer to petition in action for negligence should be sustained where it appears from allegations thereof that injuries were result of failure to exercise due care to avoid consequences of alleged negligence of defendant. Louisville, etc., R. Co. v. Edmondson, 128 Ga. 478, 57 SE 877. Demurrer to answer held properly sustained where it attempted to set up defense which defendant was estopped from averring or proving. Moran v. Bank of Forsyth, 129 Ga. 599, 59 SE 281. Defense of laches may be raised by general demurrer to complaint where laches is apparent on its face. Elliott v. Clark [Cal. App.] 89 P 455. Complaint in action to establish trust and for accounting held demurrable. Id.

70. Where a defendant sued as joint maker of note, on back of which his name appeared, did not, by demurrer or plea, object to form of suit, or allege that he was other than joint maker, held that he could not object on appeal that suit did not describe him as indorser, and that judgment was not entered against him as such. Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 SE 56. Objection that plaintiff, a foreign corporation, has not complied with statutes relating to such corporations. Valley Lumber & Mfg. Co. v. Nickerson, 13 Idaho, 682, 93 P 24; Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. Where defendant failed to plead contract in abatement, held that he waived any right to rely on it for that purpose, and could not contend that under said contract decree against him was premature. Sutherlin v. Bloomer [Or.] 93 P 135. Defendant by consenting to appointment of receivers and admitting facts averred in bill held to have waived objection that complainant was not judgment creditor and hence had not exhausted its remedy at law. In re Reisenberg, 28 S. Ct. 219.

71. Objection to ambiguity of statement of damages in complaint held to come too late as an objection to an instruction where right to object by demurrer had been waived. Neves v. Costa [Cal. App.] 89 P 860. All exceptions to petitions and pleas must be taken at first term. Austin v. M. Ferats Sons, 2 Ga. App. 91, 58 SE 318. If petition is insufficient in law, or for any reason is not sufficiently full to enable defendant to plead

tunity, and, while entire failure to state a cause of action,[73] or want of jurisdiction of the subject-matter,[74] or the objection that the action is prematurely brought,[75] may be availed of at any time, other objections are waived by pleading responsively,[76]

thereto, defendant must make his objections at the first term, or he will be held to have waived any objection which can be cured by amendment. Id. Defendant cannot, by asking instruction that declaration should be disregarded because it failed to state cause of action, raise any question which could have been raised by demurrer. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 NE 784. Defendant having right to plea in abatement must avail himself of it at first opportunity and before or at time of pleading to merits and if he does not do so it will be waived. That action was prematurely brought. Clayton v. Dinwoodey [Utah] 93 P 723. Failure to object to admission of evidence held waiver of right to thereafter object that it was inadmissible under pleadings. Hubbard v. Rutland R. Co. [Vt.] 68 A. 647.

72. Demurrant will be deemed to have waived those grounds of objection to which he fails to direct court's attention. Indianapolis St. R. Co. v. Kane [Ind.] 81 NE 721.

73. May be made for first time on appeal. Leigh v. National Hollow Brake Beam Co., 131 Ill. App. 106; Cartwright v. Liberty Tel. Co., 205 Mo. 126, 103 SW 982. Though demurrer to petition was overruled below. Pardee v. Kuster, 15 Wyo. 368, 89 P 572, 91 P 836. Sufficiency of petition will be considered on appeal where there is motion in arrest of judgment on ground of its insufficiency, though defendant has waived demurrer on that ground by pleading to merits. Clippard v. St. Louis Transit Co., 202 Mo. 432, 101 SW 44. Assignment of error calling in question for first time on appeal sufficiency of complaint must reach entire complaint, since sufficiency of single paragraph can only be tested by demurrer. Indianapolis St. R. Co. v. Bolin [Ind. App.] 83 NE 754. Objection is not waived by failing to demur. Caskey v. Edwards [Mo. App.] 107 SW 37. Not by failure to raise it by demurrer or answer. Code Civ. Proc. § 499. Wood v. Ball, 190 N. Y. 217, 83 NE 21, afg. 100 NYS 119. Objection, apparent on face of complaint, that defendant township was not corporation nor legal entity, and hence that no judgment could properly be rendered against it, held not waived by failure to demur, but objection could still be raised by motion to direct verdict, or in any other proper manner. Code, § 3564. Austin Western Co. v. Weaver Tp. [Iowa] 114 NW 189. Objection that application to compel administrator to file final account failed to state facts sufficient to entitle petitioners to relief prayed for held not waived by answering over after overruling of demurrer. B. & C. Comp. § 72. In re Morrison's Estate, 48 Or. 612, 87 P 1043. Under Bal. Ann. Codes & St. § 4911, providing that objection that complaint does not state facts sufficient to constitute cause of action may be taken at any time, overruling demurrer on that ground does not preclude court from subsequently sustaining objection to evidence on same ground. O'Day v. Ambaum [Wash.] 92 P 421. Verdict will aid defective statement of good cause of action, but not failure to state cause of action. Leigh v. National Hollow Brake Beam Co., 131 Ill. App. 106; Lake Shore, etc., R. Co. v. Enright, 227 Ill. 403, 81 NE 374. Failure to state cause of action cannot be cured by answer, verdict, or judgment. Pardee v. Kuster, 15 Wyo. 368, 91 P 836. Special finding of facts on which conclusions of law were stated held not to take place of cross complaint demurred to for want of facts. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. Petition to recover statutory penalty for failure to satisfy deed of trust of record held not to state cause of action, so that defects were not cured by verdict. Kingston v. Newell, 125 Mo. App. 389, 102 SW 604. Demurrer for want of facts may be interposed at any time in hearing of cause and in any court. Bothwell v. Denver Union Stockyard Co., 39 Colo. 221, 90 P 1127.

74. May be raised at any stage of proceedings. 2 Bal. Ann. Codes & St. § 4911. West v. Martin [Wash.] 92 P 334. Objection held not waived by failure to take exception to overruling of demurrer on that ground, demurrer having been argued, answer expressly stating that defendants answered without waiving demurrer, and they having objected to introduction of evidence on same ground. Id.

75. Cannot be waived, and may be raised for first time on appeal. Blackmore v. Winders, 144 N. C. 212, 56 SE 874.

76. Where defendant did not plead limitations in code form, but plaintiff did not question sufficiency of plea, but took issue thereon, and it was clearly proved that cause of action was barred, held that defendant was entitled to affirmative charge, though issue was immaterial one. Sloss-Sheffield Steel & Iron Co. v. Vinzant [Ala.] 44 S 1015. In action by servant against master for personal injuries, held that though complaint, alleging that "defendant, through its foreman in charge of said work," had been negligent in certain particulars, was defective in failing to allege that foreman was vice-principal and not fellow-servant, defect was waived by answering to merits. Roberts & Shafer Co. v. Jones [Ark.] 101 SW 165. Defendants held estopped to object that duplicate statements of same cause of action were improperly commingled, where, without objection, they answered and put same in issue. Posseil v. Smith, 39 Colo. 127, 88 P 1064. After defendant pleaded general issue to amended declaration, he indorsed upon plea filed to original declaration that he elected to apply same to first three counts of amended declaration. Held at most an irregularity in filing of new and distinct plea, which was waived where plaintiff subsequently joined issue "upon each and every of the defendant's pleas filed herein." Holloway v. Gracy [Fla.] 44 S 1012. Omission of prayer for process in petition to set aside partition sale held waived by appearing and demurring generally. Dykes v. Jones, 129 Ga. 99, 58 SE 645. After pleading general issue and trial on the merits without objection, defendant can-

failure to object by motion,[77] or demurrer or answer,[78] going to trial on the merits,[79] or by suffering a default.[80] Omissions in a pleading supplied by allegations in

not complain of curable defects in declaration. Illinois Cent. R. Co. v. Panebiango, 129 Ill. App. 1. Objection that complaint is partly in trespass, partly in case, cannot be availed after pleading the general issue and after verdict. Chicago Consol. Trac. Co. v. Mahoney, 230 Ill. 562, 82 NE 868, afg. 131 Ill. App. 591. Objection that counts of declaration in replevin referred to another count for description of property, instead of being complete in themselves held too late after pleas to merits had been filed to them, particularly after verdict. McDonough v. Reilly, 131 Ill. App. 553. Motion to strike allegations of complaint as to various provisions of contract sued on and performance thereof by plaintiff's assignor held properly overruled in view of fact that defendant in his answer pleaded such provisions and admitted performance thereof. Old Settlers' Inv. Co. v. Marshall Vinegar, Pickle & Soap Co. [Iowa] 113 NW 326. Pleading to merits waives objection that plaintiff has blended in one count two causes of action which might properly have been united in one petition if stated in separate counts, and oral motion, made at beginning of trial, to require plaintiff to elect, comes too late. Jordan v. St. Louis Transit Co., 202 Mo. 418, 101 SW 11. Defendant's assertion of right to be sued in particular county is plea in abatement, whether presented by exception or otherwise, and hence is waived where not filed until after answer to merits. Wolf v. Willingham [Tex. Civ. App.] 107 SW 60. Where right to file plea in abatement has been waived by answering to merits, it cannot be regained by withdrawing or abandoning such answer to merits. Id.

77. Defendant who fails to attack by motion or demurrer petition stating facts sufficient to constitute cause of action for breach of warranty, and also containing averments that would justify recovery on ground of fraud cannot complain on appeal that case was tried as one based on contract. Burgess v. Alcorn, 75 Kan. 735, 90 P 239. Defendant held not entitled to complain on appeal that demurrer to answer should have been carried back to petition and sustained thereto where he did not make motion to that effect below, particularly where parties went to trial and litigated question claimed not to have been sufficiently alleged in petition. United States Fidelity & Guaranty Co. v. Paxton [Ky.] 106 SW 841. In suit by stockholder to cancel certificate of corporate stock alleged to have been improperly issued, held that defendant's failure to move to make more definite and certain an insufficient allegation, by way of conclusion, as to plaintiff's efforts to obtain relief within corporation, did not waive objection to want of particularity, primary duty of making pleading definite and certain being on party drawing it. Vogeler v. Punch, 205 Mo. 558, 103 SW 1001. Indefiniteness and uncertainty is waived by filing general demurrer. State v. Alter [Neb.] 114 NW 293. Where defendant failed to ask that complaint be made more definite and certain, held that he could not on appeal, complain that no cause of action was stated, if, under pleadings, any contract or agreement could be proven which was fairly within allegations made. Nichols v. Riley, 118 App. Div. 404, 103 NYS 554. Where complaint states cause of action, indefiniteness is waived by answering without moving to make more definite and certain or demurring. Revisal 1905, §§ 496, 498. Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469.

78. Any misjoinder in joining actions for recovery of realty and of ferryboat and appliances held waived, under Kirby's Dig. § 6082, by failure to object thereto. Lake v. Combs [Ark.] 104 SW 544. Objection that amendment to complaint introduced new cause of action accruing after commencement of action held waived where defendant merely demurred to amended complaint on ground that it did not state cause of action, and that plaintiffs did not have legal capacity to sue. Ferguson v. Carr [Ark.] 107 SW 1177. Clerical defects and inartificialities waived by failure to demur. Leigh v. National Hollow Brake Beam Co., 131 Ill. App. 106. Defendant held not entitled to object for first time on appeal that count of declaration was bad for duplicity where he did not demur but answered and went to trial on merits under declaration ambiguously setting forth two causes of action. Paine v. Kelley [Mass.] 83 NE 8. In action before justice of peace, under Rev. St. 1899, § 4573, to recover damages and penalty for cutting fence inclosing plaintiff's farm, held that failure of statement on which case was tried to allege that fence in question did not lead into defendant's inclosure was cured by failure to demur on that ground, defect being one which could be waived. Frederick v. Bruckner, 124 Mo. App. 31, 101 SW 619. Objection on ground of misjoinder of parties defendant or causes of action comes too late if made after answer where defect is apparent on face of petition. Rev. St. 1899, §§ 598, 602. Hudson v. Wright, 204 Mo. 412, 103 SW 8. Misjoinder of causes of action held waived by answering over and not attacking petition on that ground by demurrer or otherwise. Gardner v. Robertson [Mo.] 106 SW 645. Defendant failing to demur to insufficient reply as authorized by Code, § 176, cannot complain of court's refusal to strike it out. Kennedy v. Hill [S. C.] 60 SE 689. Where under code defendant may plead as many inconsistent defenses as he desires fact that plea of limitations appears in answer before general denial is mere defect of form not available to plaintiff unless taken advantage of by special exception. Sterling v. De Laune [Tex. Civ. App.] 20 Tex. Ct. Rep. 198, 105 SW 1169.

79. Any error in ruling on plea to the jurisdiction. Oakes v. Barbre, 127 Ill. App. 208. Objection that corporation defendant was sued under wrong name held not available on appeal where it did not object on that ground below, but made defense on merits. University of Louisville v. Hammock [Ky.] 106 SW 219. Defendants in suit to quiet title objected to introduction of evidence on ground that petition was insufficient because it contained no allegation of posses-

the pleadings of the adverse party are thereby cured.[81] After verdict, no defects

sion. After objection was overruled, issues raised by answer, which sought to have title established in defendants and any cloud thereon removed, were tried on merits. Held that objection that action should have been in ejectment was waived. Brown v. Baldwin [Wash.] 89 P 483. Though petition is bad for duplicity, if it is not attacked by special demurrer on that ground and parties go to trial and introduce evidence relative to issues raised by petition and answer, verdict for plaintiff will not be set aside as without evidence to support it if either cause of action is supported by any evidence. Central of Georgia R. Co. v. Banks, 128 Ga. 785, 58 SE 352. Objection that amended petition was defective in failing to offer to place defendant in statu quo held waived by answering and going to trial on merits. Smith v. Smith, 75 Kan. 847, 89 P 896. Failure to object to form of pleading waives error if any, in stating two causes of action in same complaint without separating them as required by code. Schultz v. Greenwood Cemetery, 190 N. Y. 276, 83 NE 41. Where parties go to trial on material issus raised by answer, though it should have been raised by petition, court is not justified in directing verdict for defendant if there is any evidence supporting it. Cahill v. Illinois Cent. R. Co. [Iowa] 115 NW 216. Defendant's plea of privilege to be sued in county of his residence held waived by answering and going to trial without urging plea or presenting it to court for action. Karner v. Ross [Tex. Civ. App.] 16 Tex. Ct. Rep. 737, 95 SW 46. Objection that counterclaim is not pleadable in the action is waived unless raised by demurrer or reply. St. 1898, §§ 2658, 2660. Randall v. Link [Wis.] 114 NW 498. Where testimony was introduced in support of affirmative defense alleged in answer and cross complaint, held that, if counterclaim thereby set up did not arise out of same transaction as that which was basis of suit, defect was cured. Reynolds v. Dickson [Wash.] 93 P 910. Though claims for damages set up in answer were defectively pleaded, held that where reply treated them as counterclaims and they were so regarded at trial, and they were not otherwise disposed of by trial court, they were issues made by pleadings, and court should have made findings on such issues. Louie Chung v. Stephenson [Or.] 89 P 386. Defendant held not entitled to object that reply was departure where it joined issue thereon and case was tried on theory that matter therein alleged was properly in issue. Dodd v. Pittsburg, etc., R. Co. [Ky.] 106 SW 787. Objections that replication is not answer to special plea and that it is bad for duplicity cannot be raised for first time on writ of error after trial on merits. Stimmel v. Bentall [Va.] 60 SE 765. Acceptance of immaterial issue raised by replication by going to trial without demurring thereto or asking judgment is a waiver thereof. Stitzel v. Franks, 126 Ill. App. 260; Chicago Consol. Trac. Co. v. Mahoney, 230 Ill. 562, 82 NE 868; Illinois Cent. R. Co. v. Panebiango, 129 Ill. App. 1.

Joinder of issue waived: Cannot be contended on appeal that it was error to dismiss petition after hearing because no answer was filed to amended petition where judgment was not objected to on that ground in lower court. Wright's Adm'r v. Wright [Ky.] 108 SW 266. Plaintiff held not entitled to object on error that no issue was joined on pleas where court and both parties dealt with case as though pleadings had been perfected, and evidence was introduced and case argued on that theory, he having sustained no injury. Deatrick's Adm'r v. State Life Ins. Co. [Va.] 59 SE 489. Failure to answer cross complaint held waived by going to trial without insisting on answer, to do so being an election to treat its allegations as being in issue, precluding contention that they should be taken as admitted. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 SW 606. By treating allegations of answer as denied and going to trial on issue thereby raised, plaintiff held to have waived necessity for reply. Schecter v. White [Colo.] 92 P 700. Filing of replication is waived by submitting cause for hearing on bill, answer, and exhibits. Harrigan v. County of Peoria, 128 Ill. App. 651. Decree will not be reversed for want of replication to answer where defendant has taken depositions as if there had been a replication. Code 1906, § 4035. Kirchner v. Smith, 61 W. Va. 434, 58 SE 614. Where case was tried without objection on theory that issue tendered by reply was in the case, held that defendant could not complain that reply, which was handed to judge during trial, was never in fact filed, or object to making of order that it be filed nunc pro tunc. Marengo Sav. Bk. v. Kent [Iowa] 112 NW 767.

80. See, also, Defaults, 9 C. L. 960. Allegation in form of conclusion of law is sufficient to support default judgment, such faults of pleading being cured by judgment, in absence of any demurrer. Kilillea v. Wilson [Cal. App.] 89 P 621. That defendants became indebted to plaintiff in certain sum. Id.

81. Essential averments omitted from complaint which are supplied by the answer. Omlie v. O'Toole [N. D.] 112 NW 677.

Defects held cured: Insufficiency of complaint held not ground for reversal where all issues which it was contended it should have tendered were set forth by answer, counterclaim, and cross complaint of defendant and issue was joined thereon by plaintiff's answer to the two latter pleadings. Donegan v. Houston [Cal. App.] 90 P 1073. In action on certificate of insurance issued by fraternal benefit association, held that if it were necessary to plaintiff's right of recovery to allege that defendant's officers had failed or refused to make assessment to pay plaintiff's benefit, and that assessment, if made, would have produced sufficient funds for that purpose, answer supplied omission by statement of facts equivalent to an admission that officers had not made such assessment. Loyal Mystic Legion v. Brewer, 75 Kan. 729, 90 P 247. Though unliquidated demand may be used as set-off only when plaintiff is nonresident of state, answer is not demurrable for failing to allege that plaintiff is nonresident where that fact appears from petition.

which might have been cured will avail,[82] and the appellate court may, if necessary,

Abernathy v. Myer-Bridges Coffee & Spice Co., 30 Ky. L. R. 1236, 100 SW 862, modifying 99 SW 942. Failure of complaint to allege refusal of plaintiff to accept and retain certain machine held cured by answer containing allegation to that effect. Scott v. Northwestern Port Huron Co. [N. D.] 115 NW 192. Defendants by expressly pleading statute held to have made it available for plaintiffs. Red River Nat. Bk. v. DeBerry [Tex. Civ. App.] 20 Tex. Ct. Rep. 385, 105 SW 998. Held that, if petition did not sufficiently identify defendant company, answer supplied omission. San Marcos Elec. L. & P. Co. v. Compton [Tex. Civ. App.] 107 SW 1151.

Defects not cured: In action for damages for injuries caused by defendant's negligence in leaving carcass of horse killed by one of its trains near public road crossing its track, at which horses driven by plaintiff became so frightened as to overturn wagon, held that failure of petition to allege that defendant knew of presence of carcass, or that it remained there unreasonable length of time, or long enough for defendant to have removed it, was not cured by answer containing only traverse and plea of contributory negligence. Louisville, etc., R. Co. v. Armstrong [Ky.] 105 SW 473. Failure of petition in action for divorce to allege that plaintiff had resided in state for statutory period held not cured by defendant's cross bill. Coulter v. Coulter, 124 Mo. App. 149, 100 SW 1134. Answer and cross bill held also not to have supplied defect in petition by showing that offenses complained of were committed within state, thus bringing case within statutory exception. Id. Answer held not to have supplied defects in petition in action to recover statutory penalty for failure to satisfy deed of trust of record. Kingston v. Newell, 125 Mo. App. 389, 102 SW 604.

82. General verdict cures a defective statement if issues joined necessarily required proof of the facts imperfectly alleged. Scott v. Christenson [Or.] 89 P 376. Where issues joined necessarily require proof of a fact omitted from declaration and proof thereof is given, omission will be cured by verdict. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246. Verdict will aid a defective statement of a cause of action, but not statement of a defective cause of action. Lake Shore, etc., R. Co. v. Enright, 227 Ill. 403, 81 NE 374. Defective statement of good cause of action, but not failure to state cause of action. Leigh v. National Hollow Brake Beam Co., 131 Ill. App. 106. Where no plea is filed to the declaration, it can, after judgment, be questioned only for matter of substance. Foster v. Oberreich, 230 Ill. 525, 82 NE 858. After verdict or judgment, objection that petition fails to state facts sufficient to constitute cause of action is tenable only when pleading fails to allege substance or foundation of good cause of action, fact that it is otherwise defective, informal, indefinite, or incomplete, being no longer material. In re First Nat. Bk. [C. C. A.] 152 F 64.

Defects held cured by verdict: In action to recover purchase price of stock on ground of fraud, held that lack of direct allegations in complaint that statements of defendant were untrue, and defective allegation of fraudulent intent, were defects which, in absence of special demurrer, were cured by findings of court, and which could not be taken advantage of for first time on appeal. Spreckels v. Gorrill [Cal.] 92 P 1011. Objection that duplicate statements of same cause of action are improperly commingled. Possell v. Smith, 39 Colo. 127, 88 P 1064. Complaint in action by passenger against carrier for wrongful eviction from car held sufficient after verdict and judgment though it did not state amount sought to be recovered on account of general damages sustained, no motion to require such specification having been made. Denver, etc., R. Co. v. Klaes [Colo.] 90 P 60. Defects of form. Starr & C. Ann. St. 1902, c. 7, § 6. Foster v. Oberreich, 230 Ill. 525, 82 NE 858. That material allegations are argumentatively pleaded. Inter-State Independent Tel. & T. Co. v. Liberty, 129 Ill. App. 114. In action for personal injuries, failure to show extent to which passage way is used by public so as to show degree of care required of defendant. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 NE 1049. Failure to allege due care on part of plaintiff. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246. Defect in declaration in that allegations of negligence are general. Chicago City R. Co. v. Shreve, 226 Ill. 530, 80 NE 1049. Objection that complaint is partly in trespass and partly in case. Chicago Consol. Trac. Co. v. Mahoney, 230 Ill. 562, 82 NE 868, afg. 131 Ill. App. 591. After judgment, complaint will be held sufficient if it exhibits facts enough to bar another action for same cause. Schmoll v. Schenck [Ind. App.] 82 NE 805. Complaint in action to enjoin collection of taxes held sufficient against attack first made on appeal. Id. Complaint held sufficient against objection first made by assignment of error that it did not state facts sufficient to constitute cause of action. Elwood State Bk. v. Mock [Ind. App.] 82 NE 1003. Complaint in action for work and services with bill of particulars held good as against assignment of error. Rossow v. Doebling [Ind. App.] 83 NE 248. Where an issue has in fact been submitted to jury, technical failure to raise such issue which might have been raised by proper pleading. Cahill v. Illinois Cent. R. Co. [Iowa] 115 NW 216. Plaintiff in action for personal injuries failed to allege freedom from contributory negligence, but defendant, instead of demurring, raised issue by answer. Held that plaintiff, by asking leave to amend before trial, did not elect to treat defect as fatal to his right to recovery. Id. Informalities in complaint may be cured and rendered harmless by special finding of facts and conclusions of law based thereon. Daly v. Grubbins [Ind.] 82 NE 659. Under Ann. St. 1899, § 3292, no objection may be taken after judgment to any pleading for want of, or defect in, verification. Poole v. Peoria Cordage Co., 6 Ind. T. 298, 97 SW 1015. Petition in action by employe for personal injuries held to sufficiently allege that injuries were inflicted by plaintiff's superiors in authority as against objection made after verdict, though superior authority might have been alleged with

regard amendments obviating such defects as having been made.[83] A verdict will not, however, cure failure to state a cause of action.[84]

more formality and certainty. Chesapeake, etc., R. Co. v. Satterfield, 30 Ky. L. R. 1168, 100 SW 844. In action for damages for breach of building contract in that house as built was defective, petition held to preclude idea that defects were not latent, and hence not to show waiver by acceptance, so that failure to describe them as latent, if a fault, was cured by verdict. Forbes v. Hunter, 31 Ky. L. R. 285, 102 SW 246. If petition in action by servant against master was defective in failing to allege that plaintiff did not know of danger incident to work in way in which it was attempted to be done, held that error was cured by verdict, where proof was heard on question, and it was submitted to jury without objections. City of Henderson v. Smith, 31 Ky. L. R. 860, 104 SW 277. Failure of complaint, in action against city for injuries to pedestrian resulting from defective sidewalk, to allege that crossing where plaintiff was injured was within city limits and being maintained by city, held cured by evidence, instructions and verdict. City of Henderson v. Sizemore, 31 Ky. L. R. 1134, 104 SW 722. In action for personal injuries, defect in petition in failing to allege that injuries were permanent held cured by evidence, instructions, and verdict. Maysville, etc., R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016. In action by servant against master for personal injuries, petition held to sufficiently allege that plaintiff was himself exercising due care, as against objection after verdict. Republic Iron & Steel Co. v. Walsh [Ky.] 105 SW 974. In action by servant for personal injuries, held that, if petition was defective in failing to allege that plaintiff only continued to work reasonable time after defendant's promise to prop entry to mine, defect was cured by verdict for plaintiff, question having been raised by evidence and submitted to jury, and it not being reasonable to presume verdict would have been rendered for plaintiff without such evidence. Ballou v. Potter [Ky.] 106 SW 1178. In action to have realty declared to be held in trust for plaintiff on theory that provisions to that effect were, through mistake, accident, and oversight, omitted from deeds conveying it, held that defects in petition in that allegations of mistake, accident, and oversight were too general and indefinite were cured by judgment, where no objection on that ground was made in trial court. Rev. St. 1899, § 672. Smith v. Smith, 201 Mo. 533, 100 SW 579. In action against railroad company for killing of stock alleged to have resulted from defendant's failure to maintain lawful fence, held that, though petition was demurrable for failure to allege that defendant had notice of defect in fence, allegation that fence for long time prior to accident was negligently and carelessly permitted by defendant to remain in unsafe condition was sufficient after verdict. Hax v. Quincy, etc., R. Co., 123 Mo. App. 172, 100 SW 693. Petition in action under statute against railroad company for damages alleged to have resulted from its failure to maintain lawful fence held sufficient after verdict and judgment, though probably open to attack by demurrer. Ayers v. St. Louis, etc., R. Co., 124 Mo. App. 422, 101 SW 689. Petition held sufficient to sustain judgment for damages for rape, though defendant would have been entitled to have it made more definite and certain had he made motion for that purpose. Linville v. Green, 125 Mo. App. 239, 102 SW 67. In action on attachment bond, allegation that property was by the sheriff "levied upon and seized as the property of the relator," though defective, held sufficient as allegation of plaintiff's ownership as against objection first made after judgment. State v. Cowell, 125 Mo. App. 348, 102 SW 573. Petition in action against railroad company for personal injuries held to sufficiently allege defendant's ownership of road and that persons whose alleged negligence caused injury were in its employ, as against attack after verdict. Rev. St. 1899, § 672. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Failure to allege in petition that alleged adverse possession was exclusive and made under claim of ownership and of court to so find in decree held immaterial after judgment where proof admitted without objection showed possession to have been of that character. Agnew v. Pawnee City [Neb.] 113 NW 236. Allegation of payment relied on to stop limitations pleaded by way of recital. Scott v. Christenson [Or.] 89 P 376. In action for damages for rendering difficult of identification certain logs on which plaintiff claimed lien, held that allegation of complaint as to filing of lien notice amounted at most to defective statement of facts, and hence was sufficient as against objection first raised on appeal. Fischer v. G. W. Cone Lumber Co. [Or.] 89 P 737. Though complaint in action of replevin was defective in that allegation that defendant wrongfully took property did not disclose that he took it from defendant, held that defect was aided by verdict, and, the proof disclosing that it was taken from plaintiff's possession, defendant was not entitled to directed verdict. Brown v. Lewis [Or.] 92 P 1058. Averment in petition in bankruptcy that alleged bankrupt was corporation engaged in business of manufacturing certain articles held demurrable and amendable before, and invulnerable after verdict. In re First Nat. Bk. [C. C. A.] 152 F 64.

83. Where evidence is taken by consent and without objection on issue not made by pleadings, pleadings will be treated on appeal as amended in respect thereto. Lindstrom v. Hope Lumber Co., 12 Idaho, 714, 88 P 92. In action on guardian's bond to recover money alleged to have been converted by him, objection that complaint failed to contain formal averment that amount remained unpaid held no ground for reversal when first raised on appeal, averment being formal one not necessary to be proved by plaintiff, and in respect to which complaint might have been amended after trial and before judgment so that it would be considered as amended in appellate court. United States Fidelity & Guaranty Co. v. State [Ind. App.] 81 NE 226. Variance between cross complaint alleging

In the absence of a statutory provision to the contrary,[85] pleading to the merits ordinarily waives a previous demurrer [86] or motion to require an election.[87] Pleading over [88] or amending [89] after ruling on demurrer ordinarily waives any error in

that husband and wife sold premises and finding that husband alone did so held immaterial, so that pleading would be considered on appeal as having been amended in that particular. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. If allegations of complaint were insufficient to justify instruction authorizing jury to consider plaintiff's loss of time resulting from his injuries, as element of damage, held that appellate court would consider complaint as amended to correspond with proof in that regard. Pittsburg, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934. Technical variance which might have been obviated by amendment of pleading to conform to proof will be regarded on appeal as having been so obviated. Oil Well Supply Co. v. Priddy [Ind. App.] 83 NE 623. If evidence had warranted amendment to petition, and amendment had been offered, held that on appeal from judgment for plaintiff case would have been treated as though amendment had been allowed. Weissenfels v. Cable [Mo.] 106 SW 1028. Where descriptions of lot in controversy in complaint, reply, and testimony were conflicting, but testimony describing it was received without objection, pleadings will be deemed amended to conform thereto. Thornely v. Andrews, 45 Wash. 413, 88 P 757. Judgment in equity case will not be reversed and new trial ordered for purpose of allowing plaintiff to amend complaint so as to allege facts found by trial court on sufficient evidence, but complaint will be regarded by supreme court as so amended. Brown v. Baldwin [Wash.] 89 P 483. In action of replevin, where, when question as to sufficiency of allegations as to ownership was raised, plaintiff asked leave to amend in this particular, which was refused on ground that complaint was sufficient, held that defendant was not misled as to true issues presented, and supreme court, if it thought necessary, could deem complaint amended to conform to proof. Hester v. Stine [Wash.] 90 P 594. Where complaint was not demurred to, held that, as against objection first made on appeal that it did not state cause of action, it would, if necessary, be considered amended so as to conform to proof. Brummett v. Gleason [Wash.] 92 P 266.

84. See ante, this section.

85. Under statute, defendant may at same time demur for want of facts and file answer without waiving demurrer. State v. Edwards [Utah] 93 P 720.

86. Under Mills' Ann. Code, § 52, providing that demurrers must be disposed of before any other pleading to same cause of action shall he filed, or they will be deemed waived, held that demurrer to defense was waived by filing replication and going to trial thereon. Plattner Implement Co. v. Bradley, Alderson & Co. [Colo.] 90 P 86. Plaintiff by noticing issue raised by pleadings for trial on merits held to have waived its demurrer previously interposed, and issues of law raised thereby, and its right to object to answer and cross complaint on ground of misjoinder of causes of action. Id. Demurrer to complaint is waived by filing answer before it has been acted on. State v. Johnson, 144 N. C. 257, 274, 56 SE 922.

87. Filing answer and going to trial on merits held abandonment of motion to require plaintiff to elect, previously overruled. White v. St. Louis, etc., R. Co., 202 Mo. 539, 101 SW 14.

88. Hepler v. People, 226 Ill. 275, 80 NE 759; Republic Iron & Steel Co. v. Lee, 126 Ill. App. 297; People v. Crowe, 130 Ill. App. 349. Objection that there was misjoinder of causes of action and parties held waived by answering to merits after overruling of demurrer on that ground, where such defects were apparent on face of complaint, though misjoinder was also pleaded in answer. Diamond Rubber Co. v. Harryman [Colo.] 92 P 922. Objections to form of complaint held waived by answering and going to trial after demurrer thereto was overruled. Golden Age No. 2 Min. & Mill. Co. v. Langridge, 39 Colo. 157, 88 P 1070. Demurrer on ground of misjoinder of causes of action held waived by answering over after it was overruled. Seerie v. Brewer [Colo.] 90 P 508. Defense of multifariousness held waived by answering over after demurrer to bill on that ground was overruled. Risser v. Patton, 232 Ill. 353, 83 NE 914. Error in overruling demurrer is waived by answering to merits. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 NW 820. After demurrer to petition, on ground that it did not sufficiently allege performance of condition precedent by plaintiff, was overruled, defendant filed answer setting out in detail particulars in which plaintiff had not complied with contract. Reply was filed and issue formed as to every material fact in controversy. Held that judgment for plaintiff would not be reversed because demurrer was erroneously overruled. United States Fidelity & Guaranty Co. v. Trustees of Baptist Church, 31 Ky. L. R. 520, 102 SW 325. Defendants, by pleading to complaint after court had sustained their demurrer thereto, without insisting upon judgment on demurrer, held to have waived the demurrer. Diven v. Burlington Sav. Bk. [Ind. App.] 82 NE 1020.

89. Party who submits to ruling on pleadings by filing amendment to meet objection waives right to except on ground that amendment was not necessary. Atlantic Coast Line R. Co. v. Hart Lumber Co., 2 Ga. App. 88, 58 SE 316. Amendment, voluntarily made, amplifying petition in action for slander, held to have cured any error committed in overruling demurrers to original petition except in certain particulars. Taylor v. Chambers, 2 Ga. App. 178, 58 SE 369. By obtaining leave to file and filing amended plea, defendant waives right to question correctness of ruling holding original plea insufficient. Spencer v. Aetna Indemnity Co., 231 Ill. 82, 83 NE 102. Error in sustaining demurrer is waived by filing amendment. Marshall Ice Co. v. La Plant

the ruling, and such an error may be waived by entering into a stipulation inconsistent with an intention to insist on it.[90] So, too, any error in striking a pleading [91] or in sustaining an objection to the introduction of any evidence in support of its allegations [92] is waived by acquiescing in the ruling. An objection to the allowance of an amendment is waived by accepting the benefits of conditions imposed [93] and an objection to the allowance of a trial amendment on the ground of surprise by proceeding with the trial without asking for an adjournment.[94] Going to trial without objection is a waiver of the right to plead de novo to an amended pleading.[95] Answering an amended pleading waives the effect of a previous ruling on a demurrer to the original,[96] but not the right to object that recovery can no longer be had on the original pleading.[97] A general appearance waives want of jurisdiction over the person.[98]

§ 12. *Time and order of pleadings.*[See 8 C. L. 1419]—Pleadings must ordinarily be filed within the time fixed by statute,[99] though the court may in its discretion, and for good cause shown, extend the time for pleading,[1] or allow a pleading to be filed out of time.[2] The time for filing may also be extended by stipulation of the parties.[3]

[Iowa] 111 NW 1016. Tendering amended petition and making application to file same held waiver of any error in sustaining demurrer to original petition. Garfield County Com'rs v. Beauchamp, 18 Okl. 1, 88 P 1124.

90. Errors, if any, in ruling on demurrers for misjoinder and failure of petition to state cause of action, held waived by entering into stipulation for taking of testimony as to issues joined and participation thereafter in taking of such testimony. Michael v. Security Ins. Co., 6 Ohio N. P. (N. S.) 401.

91. Where exception to order striking out pleading as irregular is entered on record in accordance with P. L. 1903, p. 569, § 110, defeated party waives error by filing new pleading. King v. Morris [N. J. Err. & App.] 68 A 162.

92. Where plaintiff asks leave to amend petition either by interlineation or by filing such other pleading as court may order, and complies without objection to order requiring him to file amended petition, he cannot thereafter complain of such ruling. Hackler v. Miller [Neb.] 114 NW 274. Where objection to introduction of any evidence is sustained on ground of defect in petition, and plaintiff obviates objection by filing amendment, he thereby waives exception to ruling. Id.

93. Objection to order allowing amendment of answer after verdict so as to change issues held waived by acceptance of costs, payment of which was imposed as condition of allowance. Price v. Grzyll [Wis.] 114 NW 100.

94. Allowance of amendment of complaint at trial changing action for work and materials furnished to one for damages for breach of contract to procure dismissal of certain tenement house violations and to pay expense incident thereto held no ground for reversal. Vucci v. Pellettieri, 103 NYS 104.

95. Race v. Isaacson, 124 Ill. App. 196.

96. Where plaintiff amends after demurrer to petition is sustained, defendant, by answering over, waives effect of previous ruling as to those portions of petition at least to which he pleads issuably. Marshall Ice Co. v. La Plant [Iowa] 111 NW 1016. Where, after demurrer to petition was sustained, plaintiffs amended, held that, by traversing allegations of petition as amended by answer, defendant elected to treat amendment as remedying defects, if any, on which ruling on demurrer was based, and to raise issues in another way, so that ruling on the demurrer could not be accepted as finally determining the law of the case. Id.

97. Answering amended petition and going to trial held not waiver of right to object that plaintiff could not, after amending, recover on cause of action stated in original petition. Ingwerson v. Chicago, etc., R. Co., 205 Mo. 328, 103 SW 1143.

98. See Appearance, 9 C. L. 232.

99. Pleas in abatement must be filed at first term. Sparks Imp. Co. v. Jones [Ga. App.] 60 SE 810. Under Sess. Laws 1899, c. 126, in court of Coffeyville, defendant must file written pleading on answer day named in summons or be in default, personal appearance on that day being insufficient to secure him any rights and unnecessary. Schockman v. Williams [Kan.] 91 P 64. Rev. St. 1898, §§ 2939, 2999, 3331-3333, 3179, construed, and held that service of demurrer on plaintiff's attorney on last day by leaving copy with his wife at his residence, he being absent in another county, was not equivalent to filing same with clerk, and where it was mailed to clerk on last day and not in time to reach him on that day, default judgment was properly entered. Cutler v. Haycock [Utah] 90 P 897.

1. Code Civ. Proc. § 783. Vague and general statement of plaintiff's counsel as to professional engagements, etc., held not to furnish basis for relieving plaintiff from consequences of long delay in serving complaint, particularly in view of laches in making motion. Martin v. McCurdy, 120 App. Div. 665, 105 NYS 474. On day when time for serving amended answer expired ex parte order was granted extending it for 20 days. Plaintiff thereafter served notice of motion to vacate said order, but amended answer was served within 20 days and before motion to vacate was granted. Held that motion to compel plaintiff to accept

§ 13. *Filing, service, and withdrawal.*See 8 C. L. 1420—Pleadings are generally required to be filed.[4] Where the judgment may determine the ultimate rights of two or more defendants as between themselves, a defendant desiring such determination is sometimes required to demand it in his answer, and to serve a copy of such answer on the attorney of each of the defendants to be affected thereby.[5]

Statutes in some states authorize the re-establishment of lost or destroyed pleadings by the court in which the action is pending.[6]

§ 14. *Issues made, proof and variance.*See 8 C. L. 1421—An issue of fact arises whenever an allegation of one party is denied or deemed denied by the other.[7] The denial of a conclusion of law raises no issue of fact.[8] Under the Maryland rule day acts, defendant's appearance and compliance with the statute gives him the benefit of all defenses.[9]

*The general issue and general denials.*See 8 C. L. 1421—A general denial or plea of the general issue puts in issue all the allegations to which it is directed,[10] and renders

service would be granted, order extending time remaining in full force until order vacating it was actually signed and entered. Levy v. New York Press Co., 107 NYS 541.

2. For matters relating to opening of defaults, see Defaults, 9 C. L. 960. Replication. Geffinger v. Klewer, 227 Ill. 598, 81 NE 712. Where in ejectment motion for leave to file rejoinders was not made until second trial was taken, and no reason was given for the delay, it was properly refused. Glos v. Swanson, 227 Ill. 179, 81 NE 386. Civ. Code Prac. § 367a, subsec. 3, authorizing court to permit filing of plea after time when it is due on filing of affidavit showing sufficient excuse for delay, held to give trial court power to pass on sufficiency of excuse, so that its discretion will not be interfered with so long as it is based on affidavit giving reasonable excuse, and appears to be honestly and not arbitrarily exercised. Weldon v. Finley, 31 Ky. L. R. 1050, 104 SW 701. Permitting answer to be filed held not error in view of excuse presented. Id. Held not abuse of discretion to overrule defendant's motion for judgment on counterclaim for want of reply, and to permit plaintiff to file one. Bernhardt v. Dutton [N. C.] 59 SE 651. Ordinarily motions for leave to answer under Code Civ. Proc. § 195 are addressed to discretion of court, and his ruling will not be interfered with unless there is abuse of discretion, or unless it was controlled by error of law. McSween v. Windham, 77 S. C. 223, 57 SE 847. Refusal to allow filing of answer reversed, where it was based on erroneous construction of agreement extending time in which to answer. Id. Refusal to allow defendant to file answer after parties had announced ready for trial held not error, where no attempt was made to show excuse for not having filed it before. Crawford v. Johnson [Tex. Civ. App.] 107 SW 553.

3. Stipulation construed and held not to require answer to be served by specified date, but that it was complied with where plaintiff's attorney was advised by that date of every defense intended to be set up. McSween v. Windham, 77 S. C. 223, 57 SE 847.

4. Striking out reply because it had not been marked "filed" and because no reply was necessary, held error where it had remained on file several terms without objection. J. F. White Co. v. Carroll [N. C.] 59 SE 678.

5. Code Civ. Proc. § 521. Is not entitled to judgment against codefendants or determination of controversy between him and them unless he demand it, even though he serves answer on them. Maneely v. New York, 119 App. Div. 376, 105 NYS 976.

6. Proceeding in pending suit to reestablish lost declaration and plea is controlled entirely by Gen. St. 1906, § 1996, and no writ of error will lie from interlocutory order re-establishing them. Florida Cent. R. Co. v. Bostwick, 53 Fla. 124, 44 S. 31.

7. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56. Denial of facts showing indebtedness puts same in issue, and requires plaintiff to prove same before he can recover judgment thereon. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161. Validity of transfer of claim held put in issue by pleadings. Cane v. Lieberman, 103 NYS 728.

8. Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 SE 429. In mandamus to compel issuance of license to conduct races, denials in answering affidavits that relator had complied with requirements of statute and was entitled to license, held denials of mere conclusions and too indefinite to raise issue to defeat a peremptory writ. People v. State Racing Commission, 190 N. Y. 31, 82 NE 723.

9. If defendant appears and complies with requirements of statute to avoid judgment by default, case then proceeds as an ordinary action ex contractu, and neither the cause of action nor affidavit of plaintiff controls the nature or character of proof he may offer. Legum v. Blank, 105 Md. 126, 65 A 1071.

10. Declaration alleged that defendant owned and operated carriage in which plaintiff was riding when injured, through negligence of driver thereof. Held that the plea of general issue put in issue the ownership and control of horses and relation of defendant to the driver. Smith v. Devlin, 127 Ill. App. 492. General denial puts in issue all essential averments of complaint, puts burden of proving them upon plaintiff, and admits evidence by defendant to controvert plaintiff's evidence, to disprove his allegations, and to prove other and inconsistent facts. Idaho Placer Min. Co. v. Green [Idaho] 93 P 954. General denial puts in

admissible all facts which directly tend to disprove any one or more averments of the complaint, or to show that plaintiff never had a cause of action.[11] In common-law

issue only such pleaded facts as are necessary for plaintiff to prove in order to recover on his cause of action. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

11. Is not necessary to affirmatively plead facts which tend only to contradict allegations of complaint, but all such facts may be shown under general denial. Sodini v. Gaber, 101 Minn. 155, 111 NW 962. Any fact which in effect admits cause of action set out in complaint, but attempts to avoid its force and effect, must be affirmatively pleaded, but evidence which merely controverts facts necessary to be proved by plaintiff to authorize recovery may be proved under general denial. Multnomah County v. Willamette Towing Co. [Or.] 89 P 389.

Facts provable under general denial: In action to recover possession of unpatented mining claims, where plaintiff alleged ownership in general terms, that deeds under which plaintiff claimed were bad, and that rights of original locator or his successors under whom plaintiff claimed had been forfeited for failure to do required assessment work. Holmes v. Salamanca Gold Min. & Mill Co., 5 Cal. App. 659, 91 P 160. In action for claim and delivery under specific denial, which, when complaint is verified, is under the statute the same as a general denial, defendant may prove his right to possession, or that he, as an officer, levied on property at suit of creditor of him from whom plaintiff obtained it in fraud of creditors, or his right to possession by virtue of a lien, or he may show title in stranger. Idaho Placer Min. Co. v. Green [Idaho] 93 P 954. In action of debt upon a judgment, plea of nul tiel record is equivalent to plea of the general issue. Forsyth v. Barnes, 131 Ill. App. 467. Coverture existing at time of entry of judgment and at time of making contract on which it was based held provable under plea of nul tiel record. Id. In action by employe for injuries, assumption of risk and that accident was due to negligence of fellow-servant. Smith v. Rock Island, etc., R. Co., 119 La. 537, 44 S 290. In action on express contract, that contract differed in terms from that pleaded, or that no contract was in fact made. Sorensen v. Townsend [Neb.] 109 NW 749. In action for damages for breach of building loan agreement, that materials used in construction of buildings were not purchased so that ownership thereof vested in contractors on delivery as required by contract, that buildings were not finished, and that certain materials, fixtures, and articles had been removed before payment was demanded. Adams v. Lawson, 188 N. Y. 460, 81 NE 315. In action for negligence, that acts upon which it is based were done by other persons for whose negligence defendant was not liable. Multnomah County v. Willamette Towing Co. [Or.] 89 P 389. In action of assumpsit on note, defense of failure of consideration may be made either under plea of non assumpsit, or special plea under Code 1899, c. 126, § 5. McClanahan v. Caul [W. Va.] 60 SE 382.

Evidence held admissible: In action to recover money alleged to have been loaned to defendants, proof that money was paid to them as gift. Jenning v. Rohde, 99 Minn. 335, 109 NW 597. In forcible entry and unlawful detainer proceedings for restitution of premises alleged to have been leased by plaintiff to defendant, held that evidence tending to show that relation of landlord and tenant did not exist was admissible under plea of not guilty, which was equivalent to general denial. Sodini v. Gaber, 101 Minn. 155, 111 NW 962. In action of replevin by mortgagee of personalty against constable to recover mortgaged property seized by latter under writ of attachment in action against mortgagor, evidence that mortgage was fraudulent. Beeler v. Perry [Mo. App.] 107 SW 1008. Certain evidence in action for conversion. Shelton Imp. Co. v. Parlor Furniture & Mattress Co. [Neb.] 112 NW 618. In action for malicious prosecution, any evidence tending to disprove allegations of malice and probable cause. Hackler v. Miller [Neb.] 114 NW 274.

Facts not provable under general denial: Justification in civil action for assault and battery. Morris v. McClellan [Ala.] 45 S 641. Where plaintiff in action on contract alleged generally, as permitted by Code § 56, that he had performed all conditions precedent held that defendant could not prove nonperformance under general denial, but was required to specially allege conditions of nonperformance of which he relied, and specially allege their performance. Penn Mut. Life Ins. Co. v Ornauer, 39 Colo. 498, 90 P 846. In action for services held that only questions presented by general denial pleaded to count based on quantum meruit were rendition of services and their reasonable value, it being necessary in order to defeat recovery on ground that services were rendered under express contract fixing amount to be paid, which had been executed by full payment, to specially plead such facts in bar. Shaw v. Pope [Conn.] 67 A 495. Non-joinder of a party defendant, unless the defect appears on face of pleading. Wilson v. Wilson, 125 Ill. App. 385. Under Code, § 3628, general allegation of corporate capacity cannot be put in issue by general denial or averment of different corporate capacity as a conclusion, but facts relied on must be specifically stated. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452. In action to foreclose a mortgage, payment, satisfaction, or settlement. Bare v. Ford, 74 Kan. 593, 87 P 731. Where answer in action for personal injuries was simply a traverse, held that defendant could not show that there would have been no permanent injury had plaintiff promptly consulted surgeon. Cincinnati, etc., R. Co. v. Crabtree, 30 Ky. L. R. 1000, 100 SW 318. In action to enforce tax bill, where defendants, in new matter alleged in answer as to why plaintiff was not real party in interest, averred that he had assigned bill before bringing suit, held that they could not, under general denial, contend that plaintiff had not previously acquired title to bill by assignment thereof to him from original contractor. Dickey v. Porter, 203 Mo. 1, 101 SW 586. In action on fire insurance policy, destruction of property by insured must be specially

states a plea of the general issue does not put in issue matters of inducement,[12] and the same has been held true of a general denial in some code states.[13] A special plea amounting to the general issue is bad.[14]

Special issues and special denials.[See 8 C. L. 1422]—As a general rule matters which lie in affirmative proof because of presumptions of law to the contrary, such as contributory negligence,[15] waiver,[16] estoppel,[17] payment,[18] fraud,[19] and the like, must be specially pleaded. Specific denials of indebtedness,[20] and of the execution of written instruments sued on,[21] are required by statutes in some states. Facts relied on

pleaded if relied on. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152. Under plea of general issue defendant cannot set up claim arising out of separate transaction which is proper subject of set-off. Sawyer v. Van Doren [N. J. Err. & App.] 66 A 396. Waiver of conversion in action for conversion, since release of cause of action or rescission of contract must be specially pleaded. Wood v. Proudman, 122 App. Div. 826, 107 NYS 757. Objections to legal capacity of plaintiff to sue must be distinctly pleaded. Rev. St. 1906, § 5063. Archdeacon v. Cincinnati Gas & Elec. Co., 76 Ohio St. 97, 81 NE 152. Justification in action for assault and battery. Price v. Grzyll [Wis.] 114 NW 100. In action for breach of marriage promise, rescission or abandonment of contract cannot. Salchert v. Reinig [Wis.] 115 NW 132. Where pleas of fraud were properly stricken as not sufficiently specific, and fraud was not again and more specifically pleaded, held proper to refuse to permit defendant to irregularly introduce such defense under plea of general issue by cross-examination of plaintiff's witness. Payne v. Knickerbocker Trust Co. [C. C. A.] 153 F 176.

12. Allegations that defendant is in possession and operation of a street car line is not put in issue by a plea of not guilty. Chicago Union Trac. Co. v. Jerka, 227 Ill. 95, 81 NE 7, afg. 126 Ill. App. 365. General issue admits allegation that defendant in personal injury suit is in possession and operation of street car line. Hill v. Chicago City R. Co., 126 Ill. App. 152. In action by passenger against carrier for personal injuries, plea of general issue held to admit allegation of declaration that defendant owned, operated, and controlled street car line in question. Chicago Union Trac. Co. v. Wirkus, 131 Ill. App. 485.

13. In action for injuries to minor brought by next friend, plea of general issue held an admission of character in which plaintiff sued, such as was set out in declaration. Birmingham R., L. & P. Co. v. Moore [Ala.] 43 S 841. General denial does not put in issue plaintiff's appointment as administrator. Gross v. Watts, 206 Mo. 373, 104 SW 30.

14. Plea setting up in reply a different contract from one alleged is bad since it is argumentative denial of what adverse party must prove to sustain his claim. Dunlevy v. Fenton, 80 Vt. 505, 68 A 651. Special plea tendering issue covered by plea of not guilty should be stricken out, either on motion of plaintiff or by court on its own motion, under Rev. St. 1892, § 1043, as tending to embarrass the trial. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S 318. Rejection of special plea held not error where defense therein alleged was provable under plea of not guilty. Smith v. White [W. Va.] 60 SE 404. In suit on notes providing for reasonable attorney's fees, plaintiff alleged that defendant was indebted to him in sum of 10 per cent of principal and interest as attorney's fees. Held error to strike plea denying such allegation on ground that it was only plea of general issue and afforded no issuable defense, since meaning of such denial could not be less than that 10 per cent was unreasonable fee, and effect of it was to raise issue for jury. Proctor v. Crooker, 129 Ga. 732, 59 SE 781.

15. See Negligence, 8 C. L. 1090.

16. See Election and Waiver, 9 C. L. 1037; Contracts, 9 C. L. 654.

17. See Estoppel, 9 C. L. 1217. Though as a general rule estoppel must be specially pleaded, it is not waived where party has no opportunity of pleading it. Held not waived. Cleveland, etc., R. Co. v. Moore [Ind.] 82 NE 52.

18. See Payment and Tender, 10 C. L. 1147.

19. See Fraud and Undue Influence, 9 C. L. 1475. Rule that writing cannot be attacked for fraud, mistake, or undue influence unless pleaded has no application where writing is not referred to or embraced in pleading of party relying on it, but appears for first time when introduced in evidence in case. Puff v. Puff, 31 Ky. L. R. 939, 104 SW 332. Printed statute of frauds of foreign state is inadmissible under plea of nonassumpsit, but only by way of special matter, after due notice, under Rule of Court No. 30, § 8. Callaway v. Prettyman, 218 Pa. 293, 67 A 418.

20. Under Civ. Code 1895, § 5050, general denial of indebtedness is prohibited. Hicks v. Hamilton [Ga. App.] 59 SE 331. Where, in action on notes, answer in paragraphs contains general denial of indebtedness, but nowhere sets up any legal defense, it is properly stricken on demurrer. Thoms v. Siesel, 2 Ga. App. 663, 58 SE 1131.

21. For necessity of denial under oath, see Verification, 8 C. L. 2255. Rev. Laws c. 173, § 86, providing that signature to written instrument which is declared on or set forth as a cause of action shall be taken as admitted unless party sought to be charged thereby files in court specific denial of genuineness thereof and demand that it be proved at trial, held to dispense with proof of signature in absence of specific denial only where it appears from declaration that cause of action arises out of written instrument executed by adverse party. Bryant v. Abington Sav. Bk. [Mass.] 81 NE 997. Where declaration in action involving ownership of savings bank deposits, alleged to have been assigned to plaintiff by decedent, and claimed by decedent's administrator, did not show that written assignments were relied

to controvert performance of conditions precedent are sometimes required to be specially stated.[22]

Proof and variance. See 8 C. L. 1423—Since a party must recover, if at all, on the cause of action set up in his pleadings, his allegations and proofs must substantially correspond.[23] Where the deficiency of the evidence is as to the entire scope of the

on, held that administrator could show that written assignments offered in evidence by plaintiff were forgeries, though he did not specifically deny signatures, oral assignment being valid. Id. In action of debt the plea non est factum puts in issue only the giving of the deed. Landt v. McCullough, 130 Ill. App. 515.

22. General denial of general allegation of performance of conditions precedent held not to have put them in issue under Code §§ 3626, 3628. Krause v. Modern Woodmen of America, 133 Iowa, 199, 110 NW 452.

23. Cannot sue on one cause of action and recover on another. Ingwerson v. Chicago, etc., R. Co., 205 Mo. 328, 103 SW 1143; Henry County v. Citizens' Bk. [Mo.] 106 SW 622. Plaintiff can recover only secundum allegata et probata. Abromovitz v. Markowitz, 108 NYS 1044. Must be allegations as well as proof, and they must correspond. Perry v. Hackney, 142 N. C. 368, 55 SE 289. Defendant cannot avail himself of any defense not set up in his pleadings. Millard v. Millard, 123 Ill. App. 264. Variance exists when evidence does not sustain pleadings upon which a recovery is sought or a defense rested. Illinois Cent. R. Co. v. Curry [Ky.] 106 SW 294. Defenses not pleaded should be ignored in submitting issues to jury though incidentally established by evidence. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94. Plaintiff having failed to prove cause of action alleged, proper objection having been made at trial and no amendment having been asked for, held that judgment in plaintiff's favor on cause of action not alleged could not be sustained on appeal. Epstein v. Cohen, 56 Misc. 579, 107 NYS 148. Where certain evidence offered by defendants was excluded on ground that neither counterclaim nor offset was pleaded, and that it was not admissible to establish defense of payment, and no motion was made to amend, or to withdraw juror, though question was presented in various forms and number of times, held that defendants would be held to have elected to stand upon their answer. Thalmann v. Lewis, 121 App. Div. 836, 106 NYS 1056. Where it appeared by plaintiff's evidence that contract declared on was not the true contract entered into by parties, held that court could either grant nonsuit or allow verdict to be entered for amount admitted by defendant to be due. Tuck v. Earle & Prew Exp. Co. [R. I.] 67 A 428.

No variance: As to name of plaintiff corporation. Blue v. American Soda Fountain Co. [Ala.] 43 S 709. Allegations of complaint as to an individual indebtedness may be supported by evidence of partnership indebtedness of firm of which defendant is member, where objection that there is defect of parties is not raised by demurrer or answer and hence is waived under Code Civ. Proc. § 434. Baker v. Lambert, 5 Cal. App. 708, 91 P 340. Between allegation that defendant negligently communicated fire to plaintiff's land from locomotive and proof that fire was communicated to plaintiff's land by reason of change in direction of wind. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250. In action for personal injuries, between allegations and proof as to how injury occurred, right to recovery not depending solely on act so pleaded. King Mfg. Co. v. Walton, 1 Ga. App. 403, 58 SE 115. In action against railroad for damages resulting from firing of timber by sparks, allegation that plaintiffs were owners of realty did not necessarily imply joint title, so that proof that one owned life estate in part of land and others remainder did not constitute variance. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266. Between allegations that plaintiff was injured while standing in car unloading freight into wagon, and proof that injury occurred while he had one foot on wagon. Louisville, etc., R. Co. v. Varner, 129 Ga. 844, 60 SE 162. Between declaration charges interference with natural water course, and proof that in some respects embankment constructed by defendant does not interfere with course of water. St. Louis Merchants' Bridge Terminal R. Ass'n v. Schultz, 226 Ill. 409, 80 NE 879. Between allegation that plaintiff's injury was caused by reason of fact that his car caught in timbers of roof which swayed down, and proof that timbers swayed down and coal on his car caught thereon. Jones & Adams Co. v. George, 227 Ill. 64, 81 NE 4. Between allegations and proof in action for personal injuries, general allegations being sufficiently broad to admit proof made. Orr v. Watersen, 128 Ill. App. 124. Under a general allegation of notice, any notice which would impose upon defendant the duty charged may be proved. City Water Co. v. Silverfarb, 128 Ill. App. 215. Between allegation that machine was defectively constructed and proof that it was permitted to become out of order. Latrobe Steel & Coupler Co. v. Shlones, 129 Ill. App. 215. Between allegation of deposit in bank and proof of implied deposit. First Nat. Bk. v. Pickens [Ind. T.] 104 SW 947. Between allegation that corporation made and executed its articles of incorporation "under oath" and proof that they were acknowledged, averment of execution under oath being immaterial, since statute contained no provision for execution under oath, and legal effect of articles conformed precisely to their description. Roy v. Bordas, 150 Mich. 242, 14 Det. Leg. N. 698, 114 NW 81. Where declaration purports to set out written instrument according to its substance and legal effect, it is ordinarily sufficient if instrument proved and one alleged correspond in all essential particulars. Id. In action involving rights of mortgagees of hops raised on leased land under cropping contract and rights of lessors between complaint alleging that tenant delivered crop to lessor as pledge to secure advances, and that latter hired laborers to care for and pick crop at tenant's request, and that

mortgagees directed lessor to pick and bale hops, and agreed to pay expenses thereof, and proof that lessor harvested crop with tenant's consent and was holding it accordingly. Abernethy v. Uhlman [Or.] 93 P 936. Between allegation that wheel driving belting "was out of plumb and wobbly," and proof that wheel was wooden one which had worn off on one side until it was oblong in shape. Receivers of Kirby Lumber Co. v. Poindexter [Tex. Civ. App.] 19 Tex. Ct. Rep. 513, 103 SW 439. Between allegation that defendants were to have building for rent of which note in suit was given until certain date, and proof that they were to have it until later date with privilege of year thereafter. McClanahan v. Caul [W. Va.] 60 SE 382.

Fatal variance: In order for there to be fatal variance, allegations and proof must differ in such manner as to mislead opposite party. Receivers of Kirby Lumber Co. v. Poindexter [Tex. Civ. App.] 19 Tex. Ct. Rep. 513, 103 SW 439. Between allegation of verbal contract and proof of a written one. Boylan v. Cameron, 126 Ill. App. 432. Where plaintiff pleads express written agreement cannot recover on proof of oral one. Leonard v. Leonard, 134 Iowa, 131, 111 NW 409. Where plaintiff sues on written contract, he cannot recover on one partly in writing and partly in parol, or on quantum meruit for work and labor or services. Koons v. St. Louis Car Co., 203 Mo. 227, 101 SW 49. Where plaintiff declared on special contract employing him as agent to sell property, held that he could not recover on implied contract arising from acceptance of his services. Bassford v. West, 124 Mo. App. 248, 101 SW 610. Between allegation that cow was killed on or about May 18, 1905, and proof that she was killed October 10, 1904. Central of Georgia R. Co. v. Simons [Ala.] 43 S 731. Between complaint counting on "a bond or bill single" and deed of trust offered in evidence. Union Fertilizer Co. v. Johnson [Ala.] 43 S 752. Where complaint alleged that plaintiff was jerked off car while standing on platform or steps of car preparatory to alighting, held that she could not recover on proof that jerk came after she had partially alighted or while she was actually getting off train. Southern R. Co. v. Hundley [Ala.] 44 S 195. Permitting plaintiff to recover on ground of negligence not alleged, without an amendment, held departure. Bryant Lumber Co. v. Clifton [Ark.] 108 SW 216. In action on note, where evidence admitted without objection showed new promise to pay same, refusal to instruct that plaintiff might recover on new promise held proper, it not having been declared upon. Martin v. Monroe [Ga.] 60 SE 253. Between allegation that servant knew of defect in machinery and continued working only because of master's promise to repair, and proof that servant was unaware of the defect. Republic Iron & Steel Co. v. Lee, 227 Ill. 246, 81 NE 411. Evidence of injury to building by vibration of passing trains is inadmissible under allegation that because thereof the school maintained in such building was disturbed and frequently suspended. Illinois Cent. R. Co. v. School Trustees, 128 Ill. App. 111. Between allegations and proof as to proximate cause of injury. Balkwill v. Becker, 131 Ill. App. 221. In action for injuries received by plaintiff's child from being hooked by vicious cow alleged to belong to defendant corporation, held that, without amending, plaintiff could not seek to hold another than said corporation liable as joint owner of cow. Stevens v. Mrs. E. D. Burguieres Planting Co. [La.] 45 S 601. Narr. held bad on demurrer because of variance between condition of bond sued on and condition as pleaded. State v. Wilson [Md.] 68 A 609. Under declaration on common counts in assumpsit which were limited by bill of particulars to counts for goods sold and services rendered by plaintiff to defendant, held that evidence that goods were sold and services rendered to defendant's deceased husband and that defendant subsequently promised to pay therefor if plaintiff would release husband's estate, was inadmissible. Hosken v. Carr, 147 Mich. 633, 14 Det. Leg. N. 5, 111 NW 201. Where declaration as limited by bill of particulars set up cause of action for services previously rendered defendant, held that proof of new and independent agreement whereby plaintiff was to be paid balance due him for said services previously rendered in addition to specified salary was inadmissible. Rhoades v. Malta Vita Pure Food Co., 149 Mich. 235, 14 Det. Leg. N. 434, 112 NW 940. Admission in evidence of portions of answer setting up transactions different from those alleged in petition held error. Milliken v. Thyson Commission Co., 202 Mo. 637, 100 SW 604. Where plaintiff's action was in nature of trespass on the case for negligent blasting resulting in injury to his crops, stock, etc., held that he could not recover for unlawful entry of defendant's servants on his property. Thurmond v. Ash Grove White Lime Ass'n, 125 Mo. App. 57, 102 SW 619. Where allegation of due performance of conditions precedent to right to sue on insurance policy is controverted, plaintiff cannot recover on proof of facts showing excuse for nonperformance. Code Civ. Proc. § 533. Williams v. Fire Ass'n, 119 App. Div. 573, 104 NYS 100. Plaintiff held not entitled to recover against defendant as member of an association, where complaint sought to charge him for materials and labor furnished to him individually. Brown v. Wolfe, 119 App. Div. 777, 104 NYS 573. One cannot declare on a pure trespass and a direct injury from the wrongful act and recover on proof of negligence. Gordon v. Ellenville, etc., R. Co., 119 App. Div. 797, 104 NYS 702. Where complaint set up ordinary contract of bailment of a horse, held that plaintiff could not recover on proof of express agreement to stand good for horse in case anything happened to it. Epstein v. Cohen, 56 Misc. 579, 107 NYS 148. Between complaint seeking to recover for goods sold and delivered and promise to answer for debt of another. Weisinger v. Brownstein, 107 NYS 644. Evidence of assignment of claim sued on to plaintiff by third person held inadmissible where pleadings were framed on theory that claim accrued to plaintiff. Woodward v. Northern Pac. R. Co. [N. D.] 111 NW 627. Between allegations and proof as to existence and payment of note, and decedent's promise to deliver same to plaintiff. Newmyer v. Davidson, 31 Pa. Super. Ct. 468. Between allegations of complaint and proof as to agreement between plaintiff and defendant. Lee v. Unkefer, 77 S. C. 460, 58 SE 343. Plaintiff suing to recover money loaned

pleading, and not merely to some particular part thereof, there is a failure of proof.[24] The parties may enlarge the issues by mutually trying out issues of fact not involved in the pleadings.[25]

held not entitled to recover on proof that money was delivered to defendant in payment for certain stock which defendant failed to deliver. Max Hahn Packing Co. v. Shaw [Tex. Civ. App.] 97 SW 712. Declaration counting as upon special contract of carriage between plaintiff and defendant held not supported by proof of contract between defendant and county court for plaintiff's benefit, nor by implied contract between carrier and passenger. Jenkins v. Chesapeake, etc., R. Co., 61 W. Va. 597, 57 SE 48. Where declaration stated contract with plaintiff alone and proof showed contract with, and promise to plaintiff and another person. Sandusky v. West Fork Oil & Natural Gas Co. [W. Va.] 59 SE 1082. Between declaration alleging cause of action on claim against defendant personally and proof of claim against estate of a decedent of which he was administrator. Hanson v. Blake [W. Va.] 60 SE 589.

Action by or against several jointly: In suit to foreclose materialman's lien, held fatal variance between allegation of joint contract between two defendants and contractor, and proof showing contract with one defendant only. Cocciola v. Wood-Dickerson Supply Co. [Ala.] 44 S 541. In action on case for value of cotton, held fatal variance where complaint averred contractual relation from which alleged duty to return cotton arose as to all defendants, and there was total failure of evidence showing any such relation between plaintiff and one of them. Hackney v. Perry [Ala.] 44 S 1029. where complaint alleges joint contract by both defendants, and proof shows contract with one of them only, there is fatal variance, notwithstanding Code 1896, § 44, providing that when suit is instituted against several defendants, plaintiff may recover against one or more. Redmond v. Louisville, etc., R. Co. [Ala.] 45 S 649. Where defendants are sued as joint tort feasors and plaintiff dismisses as to one of them, variance does not result. Frank Parmalee Co. v. Wheelock, 224 Ill. 194, 79 NE 652, afg. 127 Ill. App. 500. Plea of denial of joint liability puts upon plaintiff the burden of proving the joint liability. Clark v. Hoffman, 128 Ill. App. 422.

Particular facts descriptive of transaction: Where pleader specifies, he is held to proof of his specifications. Gruwell v. National Council of Knights & Ladies of Security [Mo. App.] 104 SW 884. In action on fraternal benefit certificate, where defendant pleaded in haec verba certain of its laws under which it claimed that certificate was forfeited, held that he could not rely on other laws not pleaded. Id. Where plaintiff alleged special damage, held that evidence should have been confined to such allegation. Illinois Cent. R. Co. v. Trustees of Schools, 128 Ill. App. 111. Where plaintiff himself specifies particular act or acts of negligence, he is confined in his proofs to them alone. Denver Consol. Elec. Co. v. Walters, 39 Colo. 301, 89 P 815; Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S 318; Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122; Allen v. Western Elec. Co., 131 Ill. App. 118. Where complaint in action for personal injuries alleged to have resulted from defendant's negligence specified defects in handle of hand car, existence of which was negligence complained of, held that plaintiff was bound to prove same with equal particularity. Southern R. Co. v. McGowan [Ala.] 43 S 378. Instruction pretermitting duty of plaintiff to prove more than one of defects averred and particularized held reversible error. Id. In action by passenger against carrier for personal injuries, instruction authorizing recovery for any negligent act of defendant causing accident, without reference to acts of negligence alleged in petition, held reversible error. Missouri, etc., R. Co. v. Redus [Tex. Civ. App.] 107 SW 63. Instructions authorizing recovery on different ground of negligence than that alleged in complaint held erroneous. Finnegan v. Andrew J. Robinson Co., 108 NYS 135. Where is charge of general negligence coupled with specific acts of negligence, complainant will be confined to the specific acts. Joseph v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1055. Where plaintiff specifies injuries, he will be held to such specifications in his proof and recovery. Partello v. Missouri Pac. R. Co. [Mo. App.] 107 SW 473.

24. No failure of proof within meaning of Ann. St. 1899, § 3282, Mansf. Dig. § 5077, where complaint alleged that plaintiff had deposited money with bank which latter had converted and refused to return, and proof showed that note deposited with bank by plaintiff as security had been paid to bank after loan secured thereby had been paid. since even if was wrongful appropriation of note plaintiff might waive tort, and sue in assumpsit for money had and received. First Nat. Bk. v. Pickens [Ind. T.] 104 SW 947. In action by shipper against carrier to recover damages for injuries to stock, plaintiff alleged that original contract of shipment was in parol, but that he signed written contract after stock was loaded, and proved that verbal contract had been entered into. Defendant relied on written contract and proved it. Held not a failure of proof within meaning of Civ. Code Prac. § 131. Illinois Cent. R. Co. v. Curry [Ky.] 106 SW 294. Variance, if any, between allegations and proof as to terms of contract sued on held not to amount to failure of proof. Vaught v. Hogue [Ky.] 107 SW 757. Rev. St. 1899, § 798, has no application where action is unproven in some particular only, but only where it is unproven in its entire scope and meaning. Carson v. Quinn [Mo. App.] 105 SW 1088. In action by tenant to recover for injuries received by reason of defective sidewalk, where petition alleged that defendant was owner of premises, but proof showed that he was agent of owner with exclusive management and control of premises, and was himself liable for plaintiff's injuries, held that there was not failure of proof, but only variance. Id. Where amended petition in action against carrier for damages for delay in transportation of cattle was based on breach of special contract of carriage, and such contract was not

Matters laid under a videlicet need not be proved as alleged.[26] A failure to prove all that is charged does not preclude a recovery provided a cause of action is made out.[27] Immaterial allegations [28] and matters pleaded by way of recital [29] need not be proved.

Immaterial variances will be wholly disregarded.[30] By statute in some states no

proved, held that there was failure of proof, and not merely a variance. Ingwerson v. Chicago, etc., R. Co., 205 Mo. 328, 103 SW 1143. Alleged variance held not to amount to failure of proof within meaning of Rev. St. 1899, § 3738. Chicago, etc., R. Co. v. Pollock [Wyo.] 93 P 847.

25. Evidence admitted without objection does not have effect of enlarging pleadings when admissible under them. Rogers v. Southern Fiber Co., 119 La. 714, 44 S 442. Litigant who has interposed exception of no cause of action, and only consented to file answer when forced to do so by court, and even then only with full reserve of the exception, cannot be presumed to have consented to such a change in petition as would make it show cause of action, and hence in such case pleading cannot be deemed changed by admission of evidence without objection. Id. Complaint contained charge of general negligence coupled with specific acts of negligence. Defendant did not object to evidence of general negligence, or ask that plaintiff be confined to negligence specified. Held that he could not object to instructions submitting question of general negligence as part of issue. Joseph v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1055. If evidence received and proceedings had, which it is claimed constitute waiver, are pertinent to any issue presented by pleadings, should be held, in absence of any other fact or circumstance clearly indicating the contrary, that evidence was received and proceedings had with respect to issue formally presented. Maneely v. New York, 119 App. Div. 376, 105 NYS 976. In action of assumpsit for goods sold and delivered, where defendant introduced evidence tending to show new agreement between parties after delivery of goods, and so conducted defense as to show that what was done under new agreement went only to question of defendant's liability under original contract, held that he could not complain that plaintiff was permitted to go into same matters in rebuttal, nor, after trial on merits and verdict and judgment against him, of departure from statement of claim. Hastings v. Speer, 34 Pa. Super. Ct. 478. Evidence incidentally brought out as bearing on an issue in case cannot operate to enlarge issues, though it incidentally tends to establish defense not pleaded. Smith v. Mutual Cash Guaranty Fire Ins. Co. [S. D.] 113 NW 94.

26. Specification that assault occurred "on or about" certain day held not to confine plaintiff to proof that it occurred on said day. Pool v. Bergman [Mass.] 83 NE 7. Plea of date under videlicet is not averment of an exact date, and it need not be exactly proved to establish allegation of pleading, nor does it estop pleader from proving near, but different date. "To-wit." City of St. Charles v. Stookey [C. C. A.] 154 F 772.

27. Plaintiff need not prove more than is necessary to his recovery, though more is alleged. Snyder v. Parmalee, 80 Vt. 496, 68 A 649. In action on tort it is sufficient if plaintiff proves such material allegations as are necessary to his cause of action; it is not necessary that all material allegations be proved. Chicago Union Trac. Co. v. Hampe, 130 Ill. App. 596. Where several distinct and independent acts of negligence are alleged, proof of any one of them is sufficient to sustain action. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265. In action for personal injuries where petition states two acts of negligence, which are not contradictory, only one of them need be proved, provided it is sufficient to sustain the case. Spaulding v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1049. A defendant who pleads two separate complete defenses is entitled to a verdict if he establishes one of them, though he wholly fails to establish other. Gilman v. Cochran [Or.] 90 P 1001. Though plaintiff alleged that two parties to contract made him a promise, held that he could recover against one on proof that he promised, though he failed to prove promise of other. McDonald v. Cabiness [Tex.] 18 Tex. Ct. Rep. 362, 102 SW 721, afg. 17 Tex. Ct. Rep. 518, 98 SW 943. In action against carrier for injuries to passenger, plaintiff held not to have waived right to rely upon presumption of negligence arising from happening of accident by pleading and undertaking to prove the particular cause thereof. Walters v. Seattle, etc., R. Co. [Wash.] 93 P 419; Lobb v. Seattle, etc., R. Co. [Wash.] 93 P 422.

28. Unnecessary allegations not essential to recovery. Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 464, 101 SW 1030. Averments which may be rejected without prejudice to the charge or claim need not be proved, and variance between pleadings and proof in that respect is unimportant. Chicago Union Trac. Co. v. Hampe, 130 Ill. App. 596. An averment which may be entirely expunged without affecting the right to recover. Mankin v. Jones [W. Va.] 60 SE 248. Where plaintiff needlessly introduces matters into his statement which do not lie at the foundation of his right of action, he is not bound to prove them. Hastings v. Speer, 34 Pa. Super. Ct. 478.

29. In action to recover money alleged to have been paid defendant as usurious interest, allegation that company from whom defendant obtained loan had sold and transferred assignment of wages given to secure it to defendant "who claimed to succeed to the business" of said company held mere recital which it was not necessary to prove. Brandt v. Hall [Ind. App.] 82 NE 929.

30. Will not authorize grant of new trial. Bales v. Griffin [Ga. App.] 59 SE 316. Slight unsubstantial variance will not work nonsuit. Rice v. Ware [Ga. App.] 60 SE 301.

Variance held immaterial: Between allegations and proof as to contract sued on.

variance is to be deemed material unless it has actually misled the other party to his prejudice in maintaining his action or defense upon the merits.[31]

A variance between the writ and the declaration cannot be taken advantage of by demurrer,[32] but the contrary is true as to a variance between the provisions of a

Newell v. National Advertising Co., 39 Colo. 295, 89 P 792. Rules of Court, § 149. Where facts showed tendency from year to year resulting from conduct of parties under unenforceable parol lease, held that rent could be recovered under allegation of parol lease for year. Griswold v. Branford [Conn.] 68 A 987. Between allegation that defendant through its negligence communicated fire to plaintiff's lands from locomotive, and proof that fire was set upon adjoining land of another and spread to plaintiff's land. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250. As to how injury complained of occurred. Southern R. Co. v. Tankersley [Ga. App.] 60 SE 297. In action by brokers to recover commissions for sale of land, between allegations and proof as to manner of consummating sale. Rice v. Ware [Ga. App.] 60 SE 301. Difference of one year in age of cow alleged to have been killed by defendant's negligence, particularly where action was in justice's court. Seaboard Air Line R. Co. v. Smith [Ga. App.] 60 SE 353. Where allegations were substantially proved though not proved in words alleged. Hills v. McMunn, 232 Ill. 488, 83 NE 963. Between allegation that defect causing injury existed on one coach, and proof that it existed on another, both on the same train. Chicago, etc., R. Co. v. Snedaker, 122 Ill. App. 262. In boundary suit, fact that certain survey was described in petition as No. 446, while proof showed that it was No. 436, held immaterial, court being justified in concluding that number stated in petition was clerical error. Battles v. Barnett [Tex. Civ. App.] 17 Tex. Ct. Rep. 827, 100 SW 817. Variance between liquor dealer's bond introduced in evidence and that declared on consisting in writing word "spirituous" as "spiritous." White v. Manning [Tex. Civ. App.] 18 Tex. Ct. Rep. 655, 102 SW 1160. In action in assumpsit on contract as to place where contract was made. Mankin v. Jones [W. Va.] 60 SE 248.

31. Rev. Code Civ. Proc. § 146. Wolfinger v. Thomas [S. D.] 115 NW 100. Gen. St. 1901, § 4567. Question must be raised at time and in manner which will permit amendment of pleading upon such terms as may be just, and adverse party must not only be misled to his prejudice, but that fact must be proved to satisfaction of trial court, and it must be shown in what respect he has been misled. Missouri, etc., R. Co. v. Green, 75 Kan. 504, 89 P 1042. Variance held not ground for reversal even if material, where defendant did not take advantage of it in manner provided by Rev. St. 1899, § 655. Carson v. Quinn [Mo. App.] 105 SW 1088. When it is alleged that party has been so misled, that fact must be proved to satisfaction of court, and it must also be shown in what respect he has been misled, whereupon court may order amendment upon such terms as are just, and where variance is immaterial court may direct fact to be found according to evidence, and order an immediate amendment without costs. Rev. St. 1899, §§ 3736, 3737. Chicago, etc., R. Co. v. Pollock [Wyo.] 93 P 847. Where amendment might have been allowed to correspond to facts proven, judgment will not be disturbed because no formal amendment was made. Id.

Variance held immaterial: Between complaint setting up cause of action for damages for breach of contract contained in lease from plaintiff to defendants and proof that contract was assigned, or agreed to be assigned by plaintiff to third person, who thereafter reassigned it to plaintiff. Code Civ. Proc. § 469. Pogue v. Ball, 4 Cal. App. 406, 88 P 376. Rule that negligence proven and found by jury must correspond with averments of petition is not to be construed in narrow technical sense, but with view of giving effect to Gen. St. 1905, § 5015, and verdict will not be set aside because some of language used is inappropriate, where is sufficient to appraise defendant of nature of negligence complained of, and it manifestly appears that defendant was not misled or prejudiced in maintaining defense on merits. Hutchinson Lumber & Planing Mill Co. v. Baker, 74 Kan. 120, 85 P 1016. In action to rescind contract of agency and to recover amount paid thereunder on ground that plaintiff was induced to sign same through fraudulent substitution, between complaint and proof as to fraud. National Cereal Co. v. Alexander, 75 Kan. 537, 89 P 923. Between allegation that contract sued on was made with defendant and proof that it was made with his agent, particularly when no objection was made below except possibly in general demurrer to evidence. Collier v. Monger, 75 Kan. 550, 89 P 1011. In action for negligence, between allegations and proof as to person who selected block, selection of which was charged as negligence. Missouri, etc., R. Co. v. Green, 75 Kan. 504, 89 P 1042. In action by shipper against carrier to recover damages for injuries to stock, plaintiff alleged that original contract of shipment was in parol, but that he signed written contract after stock was loaded, and proved that verbal contract had been entered into. Defendant relied on written contract, and proved it. Held not a variance within meaning of Civ. Code Proc. § 129. Illionis Cent. R. Co. v. Curry [Ky.] 106 SW 294. Omission of words "with interest at 3 per cent. per annum, no interest after 6 months," in pleading certificate of deposit. Minn. Gen. St. 1894, § 5262. Derham v. Donohue [C. C. A.] 155 F 385. In action against carrier for value of horses delivered to it for transportation, between allegation that horses were loaded upon cars of defendant by one of its employes, and proof that they were lost or escaped before they were so loaded. Chicago, etc., R. Co. v. Pollock [Wyo.] 93 P 847.

32. Fact that summons is in assumpsit and statement claims damages in trespass for injury to property. Sipe v. Pennsylvania R. Co. [Pa.] 68 A 705.

written instrument sued on and the pleading.[33] A variance is waived by failure to make timely objection on that ground in the trial court,[34] and any error in overruling a motion for nonsuit on the ground of variance and failure of proof, by proceeding with the trial.[35] Where there is some evidence tending to support the material allegations of the pleading, the question of variance will not be considered on appeal.[36]

Admissions in pleadings or by failure to plead. See 8 C. L. 1428—A party is bound by statements and admissions in his pleadings.[37] Allegations of a pleading which are admitted by the pleadings of the opposite party,[38] and matters well pleaded which

33. Variance between condition of bond sued on and allegations of declaration may be reached by general demurrer. State v. Wilson [Md.] 68 A 609.

34. Where objection was first made on appeal. Leigh v. National Hollow Brake Beam Co., 131 Ill. App. 106. Objection made after evidence complained of has been introduced comes too late. City of Chicago v. Bork, 227 Ill. 60, 81 NE 27. In action to recover damages resulting from fire alleged to have been set by defendant's locomotive on or about certain date, variance as to date of fire held not to preclude recovery, defendant not having objected to evidence, claimed surprise, showed that he was misled to his prejudice in preparation of his defense, requested postponement of trial, or objected to form of statement of time in declaration. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250. Objection that there was no plea of set-off under which evidence would be competent, held waived where there was no objection to evidence on that ground. Melton Hardware Co. v. Heidelberg [Miss.] 44 S 857.

35. Motion made at close of plaintiff's case. Newell v. National Advertising Co., 39 Colo. 295, 89 P 792.

36. Louisville, etc., R. Co. v. Varner, 129 Ga. 844, 60 SE 162.

37. By allegations of his petition. Pardee v. Kuster, 15 Wyo. 368, 91 P 836, 89 P 572. Party cannot prove facts specificially denied in his pleadings. Millard v. Millard, 123 Ill. App. 264. In action by employe for personal injuries, where from petition and sworn statement as to circumstances under which injuries were received, which had been previously furnished defendant and was attached to petition as an exhibit, it appeared that plaintiff was guilty of contributory negligence, held that petition was insufficient and would not sustain a recovery. Atchison, etc., R. Co. v. Schroll [Kan.] 92 P 596. In action to reform note given for part of purchase price of land, held that, where defendant did not apply under B. & C. Comp. § 533 for order permitting examination of contract of sale of said land before answering, he could not, in face of correct description of land contained in answer, and admission in reply of contract to purchase land so described, contend that description in written memorandum of sale was too indefinite for specific performance on theory that he had never had opportunity to inspect it before trial. Fagan v. Wiley [Or.] 90 P 910. Statement of claim held admissible for purpose of proving defense that plaintiff was real estate broker who had not taken out license. Sprague v. Reilly, 34 Pa. Super. Ct. 332.

Abandoned pleadings: After amendment, allegation in abandoned pleading may be used as evidence, but it is not conclusive. Miller v. Drought [Tex. Civ. App.] 19 Tex. Ct. Rep. 416, 102 SW 145. Allegations of original petition are no longer absolutely binding on plaintiff, though they may be competent evidence against him. Reemsnyder v. Reemsnyder, 76 Kan. 565, 89 P 1014. Though original answer is withdrawn by filing of amended answer by leave of court, it is admissible in evidence as an admission against interest. Johnson v. Sheridan Lumber Co. [Or.] 93 P 470. Admissions in original pleading are not, however, conclusive against pleader in such case, but should be construed in connection with the qualifying statements, if any, and it is for jury, and not for court, to determine from inspection of entire pleading the intent of party who interposed it. Id. After amendment original petition may be introduced in evidence, but contents cannot be considered at trial, either as part of record or as admissions of plaintiff, unless so introduced. Lane v. Choctaw, etc., R. Co. [Okl.] 91 P 883. Where pleading is amended, part removed by amendment drops out of case and cannot be regarded as admission of facts therein stated. Kersten v. Weichman [Wis.] 114 NW 499. Original answer, made without knowledge on part of defendant that original written contract sued on had been altered by plaintiff, held not admissible in evidence as an admission of allegations of petition, after filing of amended answer denying execution of contract as altered. Koons v. St. Louis Car Co., 203 Mo. 227, 101 SW 49.

Note: "The conceded rule is that superseded pleadings when thus used must always be formally offered in evidence at the proper time like other matters of evidence." —From Wigmore, Ev. § 1067.

38. No evidence may be received to contradict admission in pleading. Horn v. Martinho [Cal. App.] 94 P 79. Facts expressly admitted by answer need not be proved. Patrick v. Kirkland, 53 Fla. 768, 43 S 969. Admission by answer of a material fact in issue is conclusive upon the defendant. Murphy v. People, 129 Ill. App. 533. Where allegations of complaint are denied by answer and plaintiff is thereby put to his proof upon all issues, defendant cannot claim a credit allowed in complaint. Oneida Steel Pulley Co. v. New York Leather Belting Co., 120 App. Div. 625, 105 NYS 534. Admissions in answer do not go beyond the

averments of complaint. Lehman v. Gunn [Ala.] 45 S 620. Admission of justness of indebtedness evidenced by notes held not admission of indebtedness prior to dates of notes. Id. In suit to enjoin interference with laying of water pipes across streets, held that failure of complaint to allege that plaintiff owned fee to part of street did not render finding to that effect erroneous as not responsive to issues where answer alleged ownership of certain land by plaintiff's predecessor and facts from which it might be inferred that it was bounded by said street, thus raising presumption that adjoining proprietor owned to center of street, particularly where evidence of such ownership was not objected to. Colegrove Water Co. v. Hollywood, 151 Cal. 425, 90 P 1053. Admission of execution and genuineness of check alleged in answer to have been given in payment of demand sued on held not admission of accord and satisfaction or that check in any way related to transaction set forth in complaint, and as such allegations of answer were to be deemed controverted under Code Civ. Proc. § 462, defendant's motion for judgment on pleadings was properly denied. Newsom v. Woollacott, 5 Cal. App. 722, 91 P 347. Judgment for defendant held erroneous as not supported by pleadings, where answer admitted liability in specified amount. Horn v. Martinho [Cal. App.] 94 P 79. Plea held not subject to construction that it admitted sum to be due by defendant to plaintiff in excess of amount found by jury in latter's favor. Bailey & Carney Buggy Co. v. Guthrie, 1 Ga. App. 350, 58 SE 103. In action on certificate of insurance issued by fraternal benefit association, allegations of answer to effect that insured had been expelled from membership for failure to pay dues and assessments held equivalent to admission that defendant had not levied assessment to pay plaintiff's benefit and refused to do so. Loyal Mystic Legion of America v. Brewer, 75 Kan. 729, 90 P 247. Where all of defendants in action for trespass on land justified in joint answer, held that neither could complain that there was no evidence to connect him with trespass. Asher v. Helton, 31 Ky. L. R. 9, 101 SW 350. Plea of prescription admits debt except in so far as it is prescribed, but does not admit allegations put into petition for purpose of taking debt out of prescription. Manders v. Irwin, 118 La. 1048, 43 S 698. Contract between defendant railroad and government for carrying of mails held admitted by answer. Decker v. Chicago, etc., R. Co., 102 Minn. 99, 112 NW 901. Allowing isolated portions of answer to be read to jury as admissions held error where whole answer taken together showed that purpose was to deny, and not to admit, allegations of petition. Milliken v. Thyson Commission Co., 202 Mo. 637, 100 SW 604. Admissions of reply held not bar to plaintiff's recovery in action for damages for fraud and deceit. Sawyer v. Walker, 204 Mo. 133, 102 SW 544. Answer in personal injury action held tacit admission that defendant owned railroad and right of way where accident occurred. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Answer held not to admit that there was valid contract, but to merely refer to contract alleged in petition, which evidence showed to be invalid. Mulligan v. Lexington, 126 Mo. App. 715, 105 SW 1104. In action by brokers to recover commissions for sale of land, admissions in answer held to have eliminated every issue except special defense that plaintiffs accepted employment from both parties without defendant's knowledge or consent. Atterbury v. Hendricks, 127 Mo. App. 47, 106 SW 111. Admission to that effect in answer to supplemental complaint held to dispense with necessity for proof that claim against deceased defendant was presented to and disallowed by his administrator. Harrington v. Butte & Boston Min. Co., 35 Mont. 530, 90 P 748. Allegations of verified pleading, even if not conclusive against pleader, may be treated as admissions against party making them same as if made orally or in any document or proceeding. Talbot v. Laubheim, 188 N. Y. 421, 81 NE 163. Admissions are to be taken in connection with all allegations of pleading in which they are contained, and weight to be given admissions not in themselves conclusive against pleader is to be determined by court or jury same as other evidence offered at trial. Id. Where several defendants unite in answer, admissions therein are to be treated as admissions of each, and not confined to person actually verifying same. Id. Though admission in counterclaim is not conclusive as against general denial in answer, it may be considered with other evidence received at trial in determining issues in action. Id. Formal admissions in pleadings that mortgage was valid held binding on parties making them, so that judgment holding it void was based on matters not in issue and could not be upheld. Bradt v. McClenahan, 118 App. Div. 768, 103 NYS 884. Admission of answer that notice, service of which was condition precedent to suit under employers' liability act, was served on or about June 16, held not an admission that it was served prior to commencement of action, summons having been dated June 13, and served June 15. Hope v. Scranton & Lehigh Coal Co., 120 App. Div. 595, 105 NYS 372. In action against railroad company for negligent killing of cattle, defendant sought reversal for failure to grant nonsuit, claiming that, if strictly construed, reply contained implied admission of contributory negligence. Admission could not arise except by reference to affirmative allegations of answer. Held that, since one relying on technical defect is subject to technical rules, answer would be strictly construed, and when so construed did not allege contributory negligence, since cows therein referred to were not necessarily same as those mentioned in complaint, and hence defendant was not entitled to reversal after judgment against it. Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356. Defendant held not entitled to complain that judgment foreclosed mortgage lien though no mortgage was introduced in evidence, where he admitted existence of said lien in his answer. Dunlap v. Thrasher [Tex. Civ. App.] 107 SW 83. In suit to recover losses sustained through acts of plaintiffs' agents in which it was alleged defendant had participated, allegation of answer that plaintiffs had previously sued agents and recovered judgment for smaller sum, and that no other sum was

are not denied or avoided by the allegations of the opposite party,[39] are taken as established, and need not be proved. The pleadings in a case are not evidence of the facts pleaded.[40]

Judgment on the pleadings See 8 C. L. 1430 should be granted when they present such a case of conceded facts as entitles either party to relief,[41] but is improper where

due plaintiffs from agent, and that judgment was for same moneys as present suit, held not an admission of an indebtedness conclusive on defendant, he not having been party to former suit. Harris v. Chipman [C. C. A.] 156 F 929.

39. Allegations of complaint not controverted by answer must be taken to be true. English v. Ter. [Ariz.] 89 P 501; Oliver v. Calbert, 30 Ky. L. R. 1316, 101 SW 314; Nolan v. Garrison [Mich.] 115 NW 58; Reiss v. Pfeiffer, 117 App. Div. 880, 103 NYS 478. Plaintiff need not offer evidence to support allegations not put in issue by answer. Johnson v. Asher [Ky.] 105 SW 943. All material facts set out in a plea and not put in issue by replication are admitted. Hepler v. People, 226 Ill. 275, 80 NE 759. Matter pleaded as affirmative defense not denied by reply is admitted. Fisk v. Arnold [Ind. T.] 104 SW 824. Where complaint alleged that plaintiff had acquired timber in controversy by purchase from certain persons, the owners thereof, and answer denied that plaintiff had purchased it from said persons, held that when conveyance from such persons to plaintiff was proved there was no further controversy left as to plaintiff's ownership. Moore v. Chas. F. Luehrmann Hardwood Lumber Co. [Ark.] 102 SW 385. Defendant held not entitled to attack finding that certain notice was given where allegation to that effect in complaint was not denied by answer. Kinsel v. Ballou, 151 Cal. 754, 91 P 620. Where complaint alleged that defendant knew at time he made representation to plaintiff that it was false, denial that defendant made representation at all did not raise issue as to defendant's knowledge of falsity of representation, if made, and hence, if made, it was, under Code Civ. Proc. § 462, admitted by failure to deny in answer that it was made with knowledge of its falsity. Crandall v. Parks [Cal.] 93 P 1018. Proof upon subject of attorney's fees held unnecessary, defendant having, under Civ. Code 1895, § 4961, admitted prima facie case by failure to deny allegations of petition in that regard. Abbeville Trading Co. v. Butler, Stevens & Co. [Ga. App.] 59 SE 450. Failure of defendant in action to recover land to deny allegation that plaintiff claimed title under a deed and under abstract of title attached as an exhibit to petition held merely an admission that plaintiff had title alleged, which was insufficient to authorize her to maintain action because possession was not alleged, and not an admission of a prima facie title in her. Dugas v. Hammond [Ga.] 60 SE 268. Failure to deny allegation that defendant was operating line of stage coaches for carriage of passengers on certain street held admission that it was operating said line, but not that it was operating particular coach in which plaintiff was passenger when she was injured. Sturgis v. Fifth Ave. Coach Co., 120 App. Div. 658, 107 NYS 270. Where denial on information and belief was insufficient to raise issue, held that judgment on allegation so denied for want of an answer was proper. Streator v. Streator [N. C.] 59 SE 112. Though failure to deny allegations of complaint is admission thereof, and dispenses with proof, such an admission does not preclude plea of statute of limitations. Gilman v. Cochran [Or.] 90 P 1001. Common-law rule that every fact pleaded by plaintiff, not specially traversed by respondent is taken as admitted held to obtain in mandamus proceedings. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756. Held not necessary to prove formal averment that amount involved exceeded jurisdictional amount, where defendant did not plead to jurisdiction. Bitterman v. Louisville & N. R. Co., 28 S. Ct. 91.

Failure to plead: Allegations of replication held admitted where no rejoinder was made thereto. Leigh v. National Hollow Brake Beam Co., 131 Ill. App. 106. Where plaintiff's demurrer to defendant's cross bill was overruled, and plaintiff filed no additional pleading, held that plaintiff was left without defense to cross bill, and every material allegation therein was, for purposes of the case, to be taken as true. Code, § 3622. Warner v. Norwegian Cemetery Ass'n Trustees [Iowa] 112 NW 176. Failure to file reply admits new matter in answer. Martin v. Smith, 31 Ky. L. R. 882, 104 SW 310; Hall v. Mineral Development Co., 31 Ky. L. R. 863, 104 SW 284. Where, on overruling of demurrer to paragraph of answer, plaintiff declined to plead further, and other paragraphs of answer presented complete defense, and no reply was filed, held proper to dismiss petition absolutely. Martin v. Smith, 31 Ky. L. R. 882, 104 SW 310. Material allegations of new matter in answer not controverted by reply are to be taken as admitted. Rev. St. 1893, § 4006. Brown v. Massey [Okl.] 92 P 246.

Default of defendant admits allegations of complaint, so that it is unnecessary to prove them. Eklund v. B. R. Lewis Lumber Co., 13 Idaho, 581, 92 P 532.

40. Count in declaration upon which issue has been taken and respecting which no evidence is introduced held harmless to defendant upon merits of case, so that it was not error to deny motion to strike it or grant nonsuit as to it, plaintiff having abandoned it and jury having been instructed to disregard it. Wilmington City R. Co. v. White [Del.] 66 A 1009. Affirmative statements in a pleading made by a party in his own behalf have no probative value when in conflict with sworn testimony delivered at trial. Austin v. M. Ferst's Sons, 2 Ga. App. 91, 58 SE 318. Evidence that defendant admitted that account sued upon was correct held not rebutted by defendant's plea, though sworn to. Id.

41. Motion for judgment on pleadings can

there is any material issue of fact.[42] A motion therefor admits the truth of the allegations of the opposite party which are well pleaded.[43] In considering such a motion made when the case is called for trial, the court may consider the admissions and statements of counsel as to what he expects to prove and rely on at the trial.[44] The failure to offer proof by the party having the affirmative of the issue is no ground for entering judgment against him on the pleadings.[45] By statute in some states where, in an action for the recovery of money, the answer admits a part of plaintiff's claim, he may take judgment for the amount so admitted.[46]

PLEAS, see latest topical index.

be properly granted only where complaint is sufficient to warrant granting of relief sought and answer presents nothing, either by way of denial or new matter, to bar or defeat the action. St. Mary's Hospital v. Perry [Cal.] 92 P 864. Answer in action against executrix to recover legacy held to raise no material issue, so that judgment on pleadings was properly granted. Id. Motion cannot be sustained unless, under admitted facts, moving party is entitled to judgment without regard to what findings might be on facts upon which issue is joined. Perrin v. Smith, 39 Colo. 404, 89 P 648. Judgment held improperly rendered where practically all allegations of complaint and answer were denied. Id. Where petition in action by subcontractor to foreclose mechanic's lien failed to allege service of notice of filing of lien on owner, held that motion for judgment should have been sustained, though petition was amended in that regard after running of limitations. Powers v. Badger Lumber Co., 75 Kan. 687, 90 P 254. Defendant held not entitled to judgment because of plaintiff's failure to reply where answer and counterclaim were insufficient. Shell v. Asher, 31 Ky. L. R. 566, 102 SW 879. In action to quiet title, held that, in view of fact that none of affirmative allegations of answer by which it asserted title to lands were denied, defendant was entitled to judgment on pleadings alone. Hall v. Mineral Development Co., 31 Ky. L. R. 904, 104 SW 341. Where defendant by answer admits that more is due plaintiff than is claimed in complaint, subject to certain credits, and in reply plaintiff accepts amendment as to amount due and admits credits, he is entitled to judgment for amount admitted to be due. Allen v. Hodge [Ky.] 106 SW 255. Where defendant in answer pleaded facts warranting granting of affirmative relief, which he demanded, and plaintiff dismissed action by leave of court before filing reply, held that, on motion for judgment on ground that said allegations of answer were not denied, court should either have granted motion or ruled plaintiff to file reply. Brown v. Massey [Okl.] 92 P 246. Where, on overruling demurrer to separate defense, plaintiff was not given leave to withdraw demurrer, held that judgment on pleadings for defendant was proper. Thistle v. Jones, 123 App. Div. 40, 107 NYS 840. Where interlocutory judgment overruling demurrer to separate defense was reversed on appeal and demurrer sustained, held that final judgment for defendant on pleadings, on ground that no leave to withdraw demurrer was granted, fell with it. Id. Insufficiency of answer to state defense may be urged in opposition to motion for judgment on pleadings, either in trial court or on appeal, though no demurrer was filed. B. & C. Comp. 72. Sutherlin v. Bloomer [Or.] 93 P 135.

42. Is error to enter judgment on pleadings where issues of fact are raised by pleadings which require evidence to establish them before court can intelligently determine whether they are with plaintiff or defendant. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161. Where answer pleaded limitations and estoppel, held that plaintiff was not entitled to judgment though former plea was bad if latter was good, two not being inconsistent. Dee v. Nachbar, 207 Mo. 680, 106 SW 35. Entry of judgment held error where pleadings raised certain issues for trial, though insufficient to permit introduction of evidence as to others. Scott v. Northwestern Port Huron Co. [N. D.] 115 NW 192. Motion is properly denied where denial of allegations of complaint tenders material issue. Pacific Mill Co. v. Inman, Poulsen & Co. [Or.] 90 P 1099.

43. Party moving for judgment admits, for purposes of motion, truth of all allegations of his adversary and untruth of all his own allegations which have been denied by his adversary. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161. Where ground of judgment is that facts set forth in answer are insufficient to establish a plea in bar, on appeal allegations in answer must be treated as true. Settle v. Settle, 141 N. C. 553, 54 SE 445.

44. Scott v. Northwestern Port Huron Co. [N. D.] 115 NW 192.

45. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161.

46. Where defendant files counter affidavit under Code 1899, c. 125, § 46 (Code 1906, § 3866), that there is only a part of the demand due plaintiff, plaintiff is not bound to then take judgment as to that part and try as to balance of his demand, though he may do so, but he may try case as to all his demand. Towles v. Carpenter, Wright & Co. [W. Va.] 57 SE 365. Under Rev. St. 1898, § 2892, when answer admits part of plaintiff's claim, either expressly or by not denying it, court may, on motion, order defendant to satisfy that part of it and enforce said order as it enforces a judgment or provisional remedy. Mann v. Roberts, 126 Wis. 142, 105 NW 785. Where there was no tender before suit and answer admitted that defendant owed plaintiff certain sum, held that plaintiff was entitled to order for payment of said sum with interest from date when answer admitted it became due. Id.

PLEDGES.

§ 1. Definition and Nature, 1253.
§ 2. Right to Make, 1253.
§ 3. Property Subject to be Pledged, 1253.
§ 4. The Contract and Its Requisites, 1253.
§ 5. Rights, Duties, and Liabilities Under the Pledge, 1253.

Matters peculiar to the pledge of negotiable instruments[47] and to the rights of banks in respect to collateral security[48] are more fully treated elsewhere, and pledge by way of mortgage[49] is excluded, as is the regulation of the business of pawnbroking.[50] Validity of pledge incident to a gambling contract[51] and matters common to all contracts[52] are also treated in other topics.

§ 1. *Definition and nature.* See 8 C. L. 1431—A transaction will be declared a pledge when it is established that such was the intention of the parties.[53] The agreement, ascertained from the writings, must determine what debts are secured[54] and what was pledged therefor.[55] The relation of pledgor and pledgee arises when a broker purchases stock for a customer upon a margin.[56]

§ 2. *Right to make.* See 8 C. L. 1433—A person who takes property from an officer of a corporation as a pledge is not charged with notice of any infirmity of title.[57]

§ 3. *Property subject to be pledged.* See 8 C. L. 1065—A promissory note may be the subject of a valid transfer and delivery by way of pledge or collateral security.[58] A contract of pledge may cover future as well as present deliveries and operate upon future as well as present loans.[59]

§ 4. *The contract and its requisites.* See 8 C. L. 1433—The general law of pledges requires possession, and a valid pledge cannot exist without it.[60] Whether the property pledged was delivered to the pledgee must be determined from the circumstances of each case.[61]

§ 5. *Rights, duties, and liabilities under the pledge.* See 8 C. L. 1434—Pledgee need not insure notice to the public of the existence of a pledge, but reasonable care should be observed to negative ostensible ownership in the pledgor.[62] Notice to a purchaser of goods to remit to the pledgee is not notice of the existence of a pledge.[63] A pledgee

47. See Negotiable Instruments, 10 C. L. 962.

48. See Banking and Finance, 9 C. L. 327.

49. See Mortgages, 10 C. L. 855; Chattel Mortgages, 9 C. L. 560.

50. See Pawnbrokers and Secondhand Dealers, 10 C. L. 1147.

51. See Gambling Contracts, 9 C. L. 1522.

52. See Contracts, 9 C. L. 654. See, also, 8 C. L. 1431.

53. Money advanced on oral promise for future delivery of coal. Atchison, etc., R. Co. v. Hurley [C. C. A.] 153 F 503. Evidence that bill of sale was pledge. Puzis v. Temko, 33 Pa. Super. Ct. 526. Transfer of stock in form of sale construed as pledge, elements of sale being lacking. Keifer v. Myers, 5 Cal. App. 668, 91 P 163.

54. "Any other liability which may hereafter be contracted" does not include funds converted by pledgor. Brown v. James [Neb.] 114 NW 591. Property was turned over by the cashier, defendant in this case, to the president of the bank, as trustee, to secure to that extent his indebtedness to the bank by reason of his defalcations. This was done without designation as to what part of the indebtedness this credit should be applied. Held that in the absence of a designation as to the items upon which this credit should apply the law upon equitable principles will imply that the debtor intended that it should be used in payment of that part of his indebtedness which was the most precarious. Fancher v. Kaneen, 5 Ohio N. P. (N. S.) 614.

55. Notes deposited to be purchased. Hanover Nat. Bk. v. Suddath [C. C. A.] 153 F 1022.

56. Strickland v. Magoun, 119 App. Div. 113, 104 NYS 425.

57. Pledge of bonds by directors. Farmers' Loan & Trust Co. v. Madison Mfg. Co., 153 F 310.

58. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303.

59. Philadelphia Warehouse Co. v. Winchester, 156 F 600; Brown v. James [Neb.] 114 NW 591.

60. Goods in a "field warehouse," but no signs of ownership, not a valid pledge. Security Warehousing Co. v. Hand, 206 U. S. 415, 51 Law. Ed. 1117. Lease to pledgee of buildings, with pledgee's custodian in possession, is sufficient. Philadelphia Warehouse Co. v. Winchester, 156 F 600.

61. Kramer v. Haeger Storage Warehouse Co., 108 NYS 1.

62. Signs and placards upon "field storage," sufficient. Philadelphia Warehouse Co. v. Winchester, 156 F 600.

63. Thalmann v. Giles, 116 App. Div. 437, 101 NYS 980.

not relying on all of the pledged property is not liable for failure to record a chattel mortgage.[64] The pledgor is presumed to have waived nothing except what is specifically waived.[65] Where money is borrowed by one on collateral loaned him for that purpose, the pledgee becomes vested with the same rights as he would have had if the loan had been made by the owner of the collateral.[66] Pledgee of promissory note in good faith takes it free from any equities of which he had no notice.[67]

*Possession and custody.*See 8 C. L. 1434—The pledgor cannot recover possession of the pledged property without paying his debt, though barred by the statute of limitations.[68]

*Title to the property.*See 8 C. L. 1067—A pledge does not divest the pledgor of the general property in the thing pledged,[69] and the pledgor has title to the property subject to the pledgee's lien [70] in whosesoever hands he finds it.[71] An unauthorized pledge of stock may give the pledgee good title if he acts in good faith and the transaction is founded upon valuable consideration,[72] but a pledge by a bailee of goods, with intent to convert the proceeds, is void,[73] and the pledgee though acting in good faith acquires no title against the owner.[74] One in possession of personal property may recover for a tort though the legal title be in another as security for a debt.[75]

*Duty to realize on collaterals and prevent loss.*See 8 C. L. 1435—A pledgee holding choses in action, such as bonds, notes, or obligations of third parties, is bound to use reasonable care and diligence to make the collateral available.[76]

*Conversion by the pledgee.*See 8 C. L. 1435

*Redemption and surrender.*See 8 C. L. 1435

*Default, foreclosure, and sale.*See 8 C. L. 1436—A pledgee cannot sell the security save in satisfaction of the debt pledged,[77] and conditions precedent must be complied with,[78] but the sale is at the discretion of pledgee.[79] The pledgor is entitled to reasonable notice of the intention to sell the property [80] and he may recover any amount in excess of the debts received by the pledgee.[81] So, also, pledgee may sue pledgor for a balance due.[82] A pledgor ratifies the sale of pledged property by the pledgee unless he objects within a reasonable time.[83] The sale of pledged property by the pledgee, under a valid agreement, cannot be restrained by a court of bankruptcy.[84]

*Right of action on the debt.*See 8 C. L. 1438—A creditor holding a pledge of commercial paper may bring an action to enforce the principal debt or one to collect the pledged paper.[85]

64. Pledge of real estate and chattel mortgage. Buxton v. Alton-Dawson Mercantile Co., 18 Okl. 287, 90 P 19.

65. Waiver of "further notice." Smith v. Shippers' Oil Co. [La.] 45 S 533.

66. Naef v. Potter, 127 Ill. App. 106.

67. Is not bound by restrictions placed upon the use of accommodation paper unless he had notice thereof. Naef v. Potter, 127 Ill. App. 106.

68. Life insurance policy pledged. Puckhaber v. Henry [Cal.] 93 P 114.

69. Pledge of tax bill for a less sum. Dickey v. Porter, 203 Mo. 1, 101 SW 586. A pledge delivered to secure performance of conditions which cannot legally be performed may be recovered back by the pledgor. Burke v. Chicago, 127 Ill. App. 161.

70. Statute required action at law by real party in interest. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

71. Stolen stock. Treadwell v. Clark, 190 N. Y. 51, 82 NE 505.

72. Strickland v. Magoun, 119 App. Div. 113, 104 NYS 425.

73. Newton v. Cardwell's Blue Print & Supply Co. [Colo.] 92 P 914.

74. Replevin of mining instruments. Newton v. Cardwell's Blue Print & Supply Co. [Colo.] 92 P 914.

75. Emanuel County v. Thompson [Ga. App.] 59 SE 603.

76. Pledgee failed to sell corporate stock at par value at pledgor's request. National Exch. Bk. v. Kilpatrick, 204 Mo. 119, 102 SW 499.

77. Smith v. Shippers' Oil Co. [La.] 45 S 533.

78. Sale only on failure to provide additional security. Smith v. Shippers' Oil Co. [La.] 45 S 533.

79. Smith v. Godwin [N. C.] 58 SE 1089.

80. Smith v. Shippers' Oil Co. [La.] 45 S 533.

81. Fictitious sale for less than debt. McKee v. Smith [Pa.] 68 A 1026.

82. Dwight v. Senger, 32 Pa. Super. Ct. 371.

83. A year unreasonable. Violett v. Horbach, 119 App. Div. 373, 104 NYS 249.

84. In re Mayer [C. C. A.] 157 F 836.

85. Promissory note. Polhemus v. Pru-

Effect of insolvency and bankruptcy. See 8 C. L. 1438

Equities and defenses between one of the parties and third persons. See 8 C. L. 1438 The pledgee may enforce his lien though it appear that the property belongs to a third person,[86] and this right is a matter solely between the pledgee and pledgor.[87] A pledgee must allege and prove an existing indebtedness before he can collect on his collateral security.[88] The right of pledgor to sue to redeem accrues upon discovery of transfer by pledgee.[89] The pledgor may sue in equity where special grounds appear.[90] The pledgor of a promissory note may obtain judgment thereon and enforce same if pledgee makes no objection.[91] A person liable for the payment of a debt may pay the same and is then entitled to be subrogated to the creditor's rights in the pledge.[92] Where the holder of a note sells property pledged by an indorser, the indorser is entitled to the note as subrogee of the holder's rights.[93]

POINTING FIREARMS, see latest topical index.

POISONS.[94]

POLICEMEN; POLICE POWER; POLLUTION OF WATERS; POOR LAWS; POOR LITIGANTS; POSSE COMITATUS, see latest topical index.

POSSESSION, WRIT OF.

POSSESSORY WARRANT.[96]

This topic treats only of the possessory warrant under the Georgia practice.

Possessory warrant is the remedy to recover personal property taken by fraud, violence, seduction, or other like means inhibited by statute.[97] Manner of securing possession is the sole question of the action.[98] The warrant will lie where defendant's possession, though originally lawful, became subsequently unlawful.[99]

POSTAL LAW.

§ 1. The Federal Postal System and Its Administration, 1255.
§ 2. Use of Mails and Mail Matter, 1256.
§ 3. Postal Crimes and Offenses, 1257.

The scope of this topic is noted below.[1]

§ 1. *Federal postal system and its administration.* See 8 C. L. 1441—A mail carrier and the surety on his bond are liable to the government for money stolen by the

dential Realty Corp. [N. J. Err. & App.] 67 A 303. Indorser may proceed against pledgor without selling pledge. Jones v. Evans [Cal. App.] 91 P 532.

86. Pledgor an agent. Meyerholtz v. Paxton [Cal. App.] 94 P 78.

87. Purchasers cannot claim title to property held as collateral unless payment to pledgee is proved. Southern Pine Lumber Co. v. Ward, 28 S. Ct. 239.

88. Thalmann v. Giles, 116 App. Div. 437, 101 NYS 980.

89. Defense of statute of limitations. Treadwell v. Clark, 190 N. Y. 51, 82 NE 505.

90. Pledgee transferred to third person who received dividends. Treadwell v. Clark, 190 N. Y. 51, 82 NE 505.

91. Gilman v. Heitman [Iowa] 113 NW 932.

92. Polhemus v. Prudential Realty Corp [N. J. Err. & App.] 67 A 303.

93. Smith v. Shippers' Oil Co. [La.] 45 S 533.

94. No cases have been found during the period covered for this topic, which includes only regulation of sale of poisons and liability for negligence. As to homicide by poison, see Homicide, 9 C. L. 1636, and as to regulation of drug business, see Medicine and Surgery, 10 C. L. 828.

95. No cases have been found for this subject since the last article. See 8 C. L. 1441.

96. See 8 C. L. 1441.

97. Dennard v. Butler, 2 Ga. App. 198, 58 SE 297. May issue in favor of landlord where crop disposed of. Landrum v. Smith, 1 Ga. App. 215, 57 SE 913.

98. Possession secured by consent. Dennard v. Butler, 2 Ga. App. 198, 58 SE 297. Defendant wrongfully bought plaintiff's property. Monk v. Gay [Ga. App.] 59 SE 1117.

99. Stock impounded without giving statutory notice. Goodwill v. Peeples, 2 Ga. App. 673, 58 SE 1115.

1. It includes the postal system and its

former from registered letters.[2] And in a suit against the surety the government may recover the entire amount taken with interest, regardless of the fact that the postal regulations limit the liability of the government to twenty-five dollars.[3]

§ 2. *Use of the mails and mail matter.*See 8 C. L. 1442—The power of congress over the postal system is plenary, absolute, and exclusive, and embraces the regulation of the entire postal system of the country, including the right to designate what shall be carried, what excluded, and at what rates,[4] and this power may be delegated by it to the postmaster general.[5] The postmaster general has authority to intrust the determination of matters pertaining to the second class mailing privilege to an assistant postmaster general.[6] The actions of the assistant in such case are, however, merely those of a master or referee to hear proofs and report findings, it being the postmaster general alone who finally acts on the matter,[7] and it will be conclusively presumed that the postmaster general acted on the testimony submitted to him by the assistant as fully as if the hearing had been before him.[8] The courts have jurisdiction to re-examine the action of the postmaster general when he is either acting without authority of law, or in excess of the power granted to him by law, or has misconstrued the legal effect of the statute under which he is acting,[9] but findings of fact made by him are conclusive and will not be disturbed by the courts in the absence of fraud or mistake of law.[10] Second class mail privileges once granted to any publication may be suspended or annulled only after a hearing.[11]

Where mail is so addressed that it might have been intended for either of two parties, one of them cannot enjoin its delivery to the other.[12]

A fraud order may be issued only after a hearing,[13] and mail cannot be withheld from the addressee pending such hearing, at least for more than a limited time.[14]

The Federal and state courts have concurrent jurisdiction in controversies aris-

administration. **It excludes** matters of administration applicable to the public service generally (see Public Contracts, 8 C. L. 1473; Officers and Public Employes, 10 C. L. 1043), the presumption as to receipt of letters (see Evidence, 9 C. L. 1228, and the service of notices and pleadings by mail (see Pleading, 10 C. L. 1173; Motions and Orders, 10 C. L. 873; Negotiable Instruments, 10 C. L. 962).

2. United States v. American Surety Co., 155 F 941.

3. Government being bailee bound to restore property or stand responsible for full loss may recover full damages for conversion. United States v. American Surety Co., 155 F 941.

4, 5. Lewis Pub. Co. v. Wyman, 152 F 787.

6. Though statute only authorizes postmaster general to grant or revoke privileges, held that he had authority under Rev. St. § 161, authorizing head of each department to prescribe rules and regulations for distribution and performance of its business, to intrust determination of such matters to third assistant postmaster general, and fact that order revoking privilege was made by postmaster general after hearing before assistant was immaterial. Lewis Pub. Co. v. Wyman, 152 F 787.

7. Immaterial that hearing was before third assistant postmaster general instead of postmaster general, since action of former merely advisory to latter. Lewis Pub. Co. v. Wyman, 152 F 787.

8. Objection that evidence was heard by subordinate will not lie. Lewis Pub. Co. v. Wyman, 152 F 787.

9. Where bill charges revocation second class mail privilege contrary to law. Lewis Pub. Co. v. Wyman, 152 F 787.

10. His determination of number of bona fide subscribers which journal has, and hence number of copies it may send through mails under second class privilege. Lewis Pub. Co. v. Wyman, 152 F 787.

11. Act March 3, 1901, c. 851, 31 Stat. 1107. Lewis Pub. Co. v. Wyman, 152 F 787. To constitute hearing, publisher must be cited to show cause, and after appearing must be given opportunity to present his evidence and be informed what he is called upon to answer. Id. Order revoking privilege held to have been made without required hearing, and hence void. Id.

12. Central Trust Co. cannot enjoin delivery to Central Trust Co. of Illinois unless plainly addressed to former. Central Trust Co. v. Central Trust Co. [C. C. A.] 152 F 427.

13. Findings of postmaster general as to existence of scheme to defraud and use of mails for that purpose conclusive only if made after an investigation and hearing. Donnell Mfg. Co. v. Wyman, 156 F 415. Reasonable time only need be given party for hearing. Id.

14. Mail cannot be withheld six weeks without hearing or issuance of fraud order, even if it may be for limited time, or in case party prolongs case beyond reasonable time. Donnell Mfg. Co. v. Wyman, 156 F 415.

ing under the postal laws.[15] If such a cause is begun in a state court, it may, however, be removed to the Federal court if the jurisdictional amount is involved.[16]

§ 3. *Postal crimes and offenses.*[See 8 C. L. 1443]—An indictment under the statute prohibiting the use of the mails in furtherance of a lottery or gift enterprise must aver specifically or by necessary intendment the existence of such lottery or enterprise.[17]

Obscene matter.[See 8 C. L. 1443]—The mailing of obscene matter or information as to where the same may be obtained is made a criminal offense,[18] punishable by fine or imprisonment, or both.[19] As in other cases the indictment must sufficiently inform the accused of the nature and cause of the accusation against him [20] and must not charge the commission of more than one offense.[21] It must sufficiently identify the letter charged to have been mailed [22] and allege that it was deposited in the post-office for mailing and delivery,[23] but need not characterize it as indecent in addition to being lewd, obscene, and lascivious.[24] Time not being an element of the offense, it is sufficient if it appears that it was committed before the finding of the indictment and within the statute of limitations.[25] Whether the letter is too obscene to be spread upon the records is a question for the determination of the trial court.[26]

Use of mails to defraud.[See 8 C. L. 1443]—Any person who, having devised a fraudulent scheme or artifice, with intent to defraud,[27] to be effected by the use of the

15. Rev. St. § 629, subd. 4, does not confer exclusive jurisdiction on Federal courts. Lewis Pub. Co. v. Wyman, 152 F 200. State court held to have jurisdiction of suit to enjoin enforcement of order annulling second class mailing privilege. Id.

16. Suit to enjoin enforcement of order revoking second class mailing privilege held removable under Act March 3, 1887, c. 373, 24 Stat. 553, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 434, bill showing on its face that controversy was one under postal laws, and that value of matter in controversy exceeded $2,000. Lewis Pub. Co. v. Wyman, 152 F 200.

17. Rev. St. § 3894 (U. S. Comp. St. 1901, p. 2659). United States v. Irvine, 156 F 376. Indictment under Rev. St. § 3894 merely charging sending newspaper containing advertisement of lottery or gift enterprise and partial list prizes awarded, insufficient. Id.

18. Words "obscene, lewd and lascivious," as used in Rev. St. 3893, signify that form of immorality relating to sexual impurity, and have same meaning as is given them at common law in prosecutions for obscene libel. Hanson v. U. S. [C. C. A.] 157 F 749. Mailing pamphlets entitled "Sexual debility, cause and cure," "Syphilis and gonorrhea, origin, effect and cure," containing matter relevant to title, and "Guide to full pockets," intended to attract investment in stock of corporation selling medicines to relieve sexual disorders, held not nonmailable, though containing vulgar terms and coarse in expression. Id. Words "of an indecent character" qualify only the words "other publication," and include any publication, other than those specifically mentioned, which is similarly indecent that is, obscene, lewd, or lascivious. Rinker v. U. S. [C. C. A.] 151 F 755.

19. Rev. St. § 3893, as amended by Act Sept. 26, 1888, c. 1039, § 2, 25 Stat. 496, held not to violate Const. Amend. 8, forbidding excessive fines and cruel and unusual punishments. Rinker v. U. S. [C. C. A.] 151 F 755.

20. Indictment setting forth beginning and end of letter, and alleging that it was too indecent, etc., to be set out in full, held sufficient where defendant did not apply for bill of particulars. Rinker v. U. S. [C. C. A.] 151 F 755. Plain inference to be drawn from letter held that charged in indictment. Lee v. U. S., 156 F 948.

21. Charge of mailing letter informing where, how, of whom, and by what means articles intended to prevent conception and procure abortion might be obtained, not double. Lee v. U. S. [C. C. A.] 156 F 948.

22. Indictment setting forth beginning and end of letter, and alleging that it was too obscene to be set forth in full, held sufficient. Rinker v. U. S. [C. C. A.] 151 F 755.

23. Statement that defendant unlawfully and knowingly deposited letter stamped, addressed, and directed so as to be entitled to transmission, and such mailing was contrary to statute, held sufficient, it not being necessary to use language of statute. Rinker v. U. S. [C. C. A.] 151 F 755.

24. Under Rev. St. § 3893, forbidding mailing any "obscene, lewd, or lascivious letter, etc., or other publication of an indecent character," words "of indecent character" qualify words "other publication" only. Rinker v. U. S. [C. C. A.] 151 F 755.

25. Indictment charging that offense was committed "on or about" certain date held sufficient, particularly in view of Rev. St. § 1025. Rinker v. U. S. [C. C. A.] 151 F 755.

26. Admission of letter in evidence over objection that it did not appear that it was too obscene to be more fully set forth in indictment held not error, particularly as it was within discretion of trial court to say whether it was fit to be spread upon record or not. Rinker v. U. S. [C. C. A.] 151 F 755.

27. "Scheme or artifice" within Rev. St. § 5480 is forming plan or devising trick to defraud. United States v. Dexter, 154 F 890.

mail,[28] deposits or causes to be deposited any matter in the mail in furtherance thereof, or takes any such matter therefrom,[29] is guilty of a criminal offense. Each letter put in or taken out constitutes a separate offense.[30] Not more than three offenses committed within the same six calendar months may be charged in the same indictment,[31] but this provision does not prevent the consolidation for trial of indictments charging offenses not committed within the same six calendar months and aggregating more than three in number,[32] nor does it render bad an indictment joining three or more offenses not committed within the same six calendar months.[33] The indictment must fully and accurately describe an offense committed by the accused within the statute,[34] should be definite and certain,[35] and should not be double.[36] Time not being an essential element of the offense, it is sufficient if it is shown to have been committed within the statute of limitations and before the finding of the indictment.[37] While specific intent need not be proved where manifest from the nature of the scheme itself,[38] the evidence must connect the accused with the offense

Crime denounced by Rev. St. § 5480 is execution of scheme or artifice to defraud through mails. Gourdain v. U. S. [C. C. A.] 154 F 453.

Held fraudulent: Scheme by owner saloon to induce different persons to purchase half interest, misrepresenting value and fact license was revoked. Van Deusen v. U. S. [C. C. A.] 151 F 989. Issuance certificates by which holder paid one dollar monthly and on maturity was entitled to receive double amount paid, from fund created solely by payment into it of less than 75 per cent receipts, double payment being promised in 40 to 70 months. Walker v. U. S. [C. C. A.] 152 F 111. Sale of purported oil producing lands neither actually producing nor in oil producing territory, issuance of certificates purporting to give option to purchase interest in other similar tracts. Gourdain v. U. S. [C. C. A.] 154 F 453. Fraudulent representation of being land company, securing lists with authority to sell at one dollar per acre commission, real purpose being signature of contract to pay one dollar per acre for advertising land for sale. United States v. Dexter, 154 F 890. Advertising for agents at salary $1,800 with deposit of $1,000 as guarantee of ability to sell certain amount each month, where goods inferior in quality and too high priced to sell. Donnell Mfg. Co. v. Wyman, 156 F 415.

Not fraudulent: Commission merchant's circular substantially true though containing some exaggerations as to facilities for handling business, and though merchant failed to settle with some of patrons, held not scheme or artifice to defraud within Rev. St. § 5480. Faulkner v. U. S. [C. C. A.] 157 F 840.

28. By opening correspondence, communicating with persons intended to be defrauded by means of mail, or inducing them to open correspondence with him respecting scheme or artifice. United States v. Dexter, 154 F 890.

29. Must appear that in furtherance of scheme, he deposited or caused to be deposited matter in mail to be sent and delivered by post office department, or took or caused to be taken from mail matter connected with scheme. United States v. Dexter, 154 F 890. Thing forbidden not general use mails, but putting in or taking out letter furthering scheme. Francis v. U. S. [C. C. A.] 152 F 155.

30. Indictment for one offense no shield from indictment for another, although of like general kind. Francis v. U. S. [C. C. A.] 152 F 155.

31. Provision of Rev. St. 5480, limiting number of offenses chargeable in single indictment, relates only to mode of procedure, and not to offenses charged elsewhere in section. Walker v. U. S. [C. C. A.] 152 F 111. Indictment containing four counts not fatally defective in absence of demurrer or objection where court imposed single sentence. Id. Nolle may be entered against objectionable counts and trial had upon statutory number if indictment charges counts in excess thereof, as where it joins four offenses committed within same six calendar months. Id.

32. Consolidation authorized by § 1024, Rev. St. (U. S. Comp. St. 1901, p. 720). Booth v. U. S. [C. C. A.] 154 F 836.

33. Indictment charging offenses committed in April, September, and October. Hall v. U. S. [C. C. A.] 152 F 420. Offenses are separate and distinct and punishable as such. Where offenses not committed in same six calendar months are joined in single indictment. Id.

34. Averment of sale of purported oil producing lands neither actually producing nor in oil producing territory, and issuance of certificate purporting to give options for purchase interest in other tracts, full description of means of executing their purpose and effect, and intention to convert money derived to use of accused, sufficient. Gourdain v. U. S. [C. C. A.] 154 F 453.

35. Averment of intention to further scheme by paying small prizes to certain purchasers, and that manner of determining to whom paid was arbitrary and unknown, not uncertain or insufficient. Gourdain v. U. S. [C. C. A.] 154 F 453.

36. Averment that artifices were designed to give one understanding of scheme to one class and another to another class, deceiving both classes, not objectionable as double. Gourdain v. U. S. [C. C. A.] 154 F 453.

37. Sufficient if matter deposited in mails within three years next prior to indictment. United States v. Dexter, 154 F 890.

38. Walker v. U. S. [C. C. A.] 152 F 111.

charged by presence, acquiescence, or coincident circumstances.[39] Correspondence of the accused other than that pleaded and relied upon for conviction,[40] and evidence concerning offenses sufficiently similar in character and so related in time as to be material as to the fraudulent intent of defendant in the transactions charged,[41] is admissible. Where the evidence is conflicting, the question of intent to defraud is for the jury.[42]

Embezzlement and larceny from the mails. See 8 C. L. 1445—The secreting, destroying, or embezzling by any person employed in the postal service of any mail matter intended to be conveyed by mail and containing valuable inclosures is made a criminal offense.[43]

POSTPONEMENT, see latest topical index.

POWERS.

§ 1. Nature and Kinds, 1259.
§ 2. Creation, Construction, Validity, and Effect, 1259.
§ 3. Execution of Powers, 1260.

This topic treats only of powers of appointment, powers of attorney being elsewhere treated.[44]

§ 1. *Nature and kinds.* See 8 C. L. 1445—A power is an authority in one person to dispose of or limit an interest in lands belonging to another.[45] Powers of attorney to convey land are elsewhere treated.[46]

§ 2. *Creation, construction, validity, and effect.* See 8 C. L. 1445—Power to dispose of the fee may be given to life tenants.[47] In creating a power of appointment, a phrase that it may be exercised by writing in the nature of a last will and testament is apt where the donee has no other property to dispose of.[48] The instrument creating a power should be so construed as to give effect to all its provisions if possible.[49] A power in a deed of settlement will be construed according to the law of the place with reference to which it was made.[50] By statute in some states an absolute power of disposition given to the owner of a particular estate for life or years enlarges the estate into a fee only in favor of creditors and purchasers and leaves it subject to future estates if the power is not executed or the land sold in satisfaction of debts.[51]

39. Evidence of participation in scheme to defraud effected through express and telephone companies by accused and accessories, and subsequent use of mails by latter, insufficient in absence of evidence connecting accused with change to use of mails. Dalton v. U. S. [C. C. A.] 154 F 461.

40. United States v. Dexter, 154 F 890. Letter whose text shows nothing effective to further scheme admissible where written on stationery ordinarily used to further fraud and intended to be used in connection therewith. Walker v. U. S. [C. C. A.] 152 F 111.

41. Booth v. U. S. [C. C. A.] 154 F 836.

42. United States v. Conrad. 156 F 248.

43. Where inspector with permission of addressee opened and copied contents, placed marked money therein, and replaced it, held that it did not thereby cease to be mail matter intended to be conveyed by mail within meaning of Rev. St. § 5467. Ennis v. U. S. [C. C. A.] 154 F 842.

44. See Agency, 9 C. L. 58.

45. Testamentary power in widow to divide estate among children as she might see best held valid. In re McNelle's Estate, 217 Pa. 179, 66 A 328.

46. See Agency, 9 C. L. 58.

47. Will construed to confer a life estate on devisees with power to convey the fee for their support, they being sole judges of necessity therefor. Hosman v. Willett [Ky.] 107 SW 334. Deed of quitclaim held to pass fee. Id.

48. White v. Holly [Conn.] 68 A 997.

49. Where deed to husband, wife, and children provided that husband and wife, "excluding their childrens' rights," should have right to convey or exchange the land, they could convey title free from claim of children. Funkhouser v. Porter [Ky.] 107 SW 202.

50. Circumstances and recitals held to raise presumption that deeds of trust were drawn with reference to laws of Connecticut, making question of donee's last domicile immaterial. White v. Holly [Conn.] 68 A 997.

51. Code 1896, § 1046. Remaindermen not barred by petition of life tenant to probate court for sale of land for division and by sale thereunder, where widow did not act as executrix, and there was a defect of parties, and statute for execution of powers was not complied with. Rutledge v. Crampton [Ala.] 43 S 822.

That may not be done under a power of appointment which the donor himself could not have legally done.[52] Power in a trustee to sell with consent of another ceases with the latter's death, there being no provision for disposition of the corpus.[53] A power coupled with an interest passes to the survivors of several donees.[54] Where two devisees of a fee are donees of a power of sale for the benefit of themselves and a third, and by the latter's death his share vests in them, the power merges in the fee.[55]

§ 3. *Execution of powers.*[See 6 C. L. 1446]—The provisions of the power must be strictly observed.[56] A power to appoint a life estate in income of property held in trust will not authorize an appointment of a life estate in the corpus.[57] General authority in grantees to sell or exchange the property includes power to mortgage it,[58] but power in a devisee to sell for the support of herself and children does not.[59] Where two executors qualify, both must join in a deed made under a power in the will to sell land at private sale.[60] A power to appoint by instrument in the nature of a will prepared in the form required by the laws of a named state is legally executed in another state by a will valid under its laws and recognized by the laws of the state named.[61] The words "give, devise, and bequeath" are sufficient when used in connection with a previous statement of intention to exercise all power of disposition and appointment.[62] An intention to execute a power is shown by express reference to the property on which it was to be executed, especially where the donee has no other property.[63] A testamentary power to divide an estate is properly executed by a devise in trust to sell and distribute in a manner prescribed.[64] A direction by a testator, in execution of a general power, that the realty be sold and the proceeds distributed as indicated in the will, is not objectionable as failing to designate the persons who shall take,[65] nor as an attempted delegation of the execution to the executors. A general power of appointment may be exercised in favor of whomsoever the donee pleases, even in favor of himself.[66] A life beneficiary's appointment of the princi-

52. Power could not be so executed as to offend rule against perpetuities. Brown v. Columbia Finance & Trust Co., 30 Ky. L. R. 110, 97 SW 421.

53. Wells v. Brooklyn Union El. R. Co., 121 App. Div. 491, 106 NYS 77. Real Property Law, Laws 1896, p. 583, c. 547, § 154, making consent of survivor sufficient, did not apply where death occurred prior to its passage. Id.

54. Easy Payment Property Co. v. Vonderheide, 29 Ky. L. R. 782, 96 SW 449.

55. In re Rathyen, 115 App. Div. 644, 101 NYS 289.

56. Authority to appoint $4,000 to mother's family and balance to father's family not lawfully exercised by giving mother's family $4,500. In re Rogers' Estate, 218 Pa. 431, 67 A 762. Power in donee to dispose of realty by will to any of her children held not to confer authority to limit children to life estates with remainders to heirs of their bodies. Preston v. Preston [Ky.] 107 SW 723. Having so appointed children took fee. Id.

57. Where beneficiary by will disposed of trust property in connection with her own, intending to exercise her power to appoint a life estate in income to her surviving husband, and she gave husband a life estate in all the property, corpus of trust estate was not transferred to husband for life, but remained in trustees, husband receiving the income. Ogden v. McLane [N. J. Eq.] 67 A 695.

58. Foreclosure held to exclude rights of grantees' children. Funkhouser v. Porter [Ky.] 107 SW 202.

59. Dougherty v. Dougherty, 204 Mo. 228, 102 SW 1099.

60. Board of Education of Glynn County v. Day, 128 Ga. 156, 57 SE 359. Rule not altered by fact that one executor had moved away and had ceased to take part in administraton, he not having resigned or been removed. Id.

61. Statute recognizing foreign wills executed according to law of state where made. White v. Holly [Conn.] 68 A 997. Test not whether will was admissible to probate in Connecticut, but whether it was executed in manner required by its laws. Id.

62. White v. Holly [Conn.] 68 A 997.

63. Where testatrix directed that her real estate be sold. Papin v. Piednoir, 205 Mo. 521, 104 SW 63.

64. In re McNeile's Estate, 217 Pa. 179, 66 A 328.

65. Papin v. Piednoir, 205 Mo. 521, 104 SW 63.

66. Where husband conveyed in trust for sole use of wife for life remainder to children, but with provision that wife, during his life, could dispose of property as she might see fit, conveyance by her and her husband and reconveyance by grantee in fee simple to wife on same day held valid and effectual. Mandel v. Fidelity Trust Co. [Ky.] 107 SW 775.

pal of a trust estate by deed confers a vested remainder when the deed is executed,[67] and, by reconveyance from the appointee and conveyance of the life estate to himself, the beneficiary may terminate the trust and vest in himself the whole estate.[68] An appointment under one of two or more independent powers is not invalidated by the defective exercise of the others.[69] Equity cannot cure a defective appointment in favor of mere volunteers and without knowledge of donee's intentions as to the manner in which he would have executed the power legally.[70] A sale uncompleted by reason of death of an executor before conveyance may be completed by decree of court when all persons in interest are bound.[71]

POWERS OF ATTORNEY; PRAECIPE; PRAYERS; PRECATORY TRUSTS; PRELIMINARY EXAMINATION; PRELIMINARY SUITS; PRESCRIPTION; PRESUMPTIONS; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; PRIOR APPROPRIATION; PRIORITIES BETWEEN CREDITORS, see latest topical index.

PRISONS, JAILS, AND REFORMATORIES

§ 1. Nature and Classes, 1261.
§ 2. Custody, Discipline, Government, and Employment of Inmates, 1261.
§ 3. Administration and Fiscal Affairs, 1262.

The scope of this topic is noted below.[72]

§ 1. *Nature and classes.* See 4 C. L. 1087

§ 2. *Custody, discipline, government, and employment of inmates.* See 8 C. L. 1448

The uninhabitable condition of a place of confinement is not a ground upon which courts can order a prisoner's release upon habeas corpus.[73] The shortening of the term or change of place of imprisonment by the managers is a matter of prison discipline, and not of an exercise of judicial power.[74] There is no conflict between a statute conferring power upon the court sentencing a prisoner to prescribe what portion of the time he is sentenced for shall be spent in solitary confinement and a statute providing that wardens shall cause prisoners to be employed at useful labor, and the latter does not repeal the former.[75] In Nebraska it is the duty of the warden of the penitentiary, if a convict under sentence of death appears to be insane, to give notice thereof to the judge of the district court of the county in which the penitentiary is located,[76] and it is thereupon the duty of such judge to summon a jury to inquire into the facts;[77] and if the warden refuses to give such notice, it is the judge's duty, upon proper application, to investigate as to whether the warden is justified in so refusing.[78] In an action to enforce the provisions of a statute placing a limitation on the amount of prison labor which may be engaged at any one time in the manu-

67. Phillips v. Pike, 121 App. Div. 753, 106 NYS 486.

68. Laws 1893, c. 452, p. 939. Phillips v. Pike, 121 App. Div. 753, 106 NYS 486.

69. Will held to give life beneficiary independent powers with reference to disposition of income and corpus of trust estate (Ogden v. McLane [N. J. Eq.] 67 A 695), and appointment of income to surviving husband for life held not rendered invalid by attempted exercise of power to appoint disposition of corpus after husband's death (Id.).

70. Appointment of $4,500 to mother's family in attempted execution of power to give $4,000 to mother's family and the balance to father's family held incurable. In re Rogers' Estate, 218 Pa. 431, 67 A 762.

71. In re Walker, 149 Cal. 214, 85 P 310.

72. It includes only the management and discipline of prisons and the powers and duties of officers charged therewith. It excludes the extent of punishment for crime and in what institutions court may order commitment (see Criminal Law, 9 C. L. 851), status of convicts and validity and interpretation of convict labor contracts (see Convicts, 9 C. L. 729), pardon and parole of convicts (see Pardons and Paroles, 10 C. L. 1071), and peonage laws (see Slaves, 8 C. L. 1945).

73. Ex parte Ellis [Kan.] 91 P 81.

74. Indeterminate sentence law (P. L. 1901, pp. 234-236 held valid. Ex parte Marlow [N. J. Law] 68 A 171.

75. Laws of 1903, p. 273; Hurd's Rev. St. 1905, c. 38. People v. Hahn, 232 Ill. 416, 83 NE 937.

76. Section 6, c. 105, p. 504, Laws 1901. Barker v. State, 75 Neb. 289, 106 NW 450.

77, 78. Barker v. State, 75 Neb. 289, 106 NW 450.

facture of any one article or class of goods in the state, it is sufficient to aver that a specified number of men are engaged in making certain specified articles, where the articles are not designated in the alternative;[78] but such a statute is unconstitutional because of its unequal operation,[80] and, where it leaves the enforcement of such limitation to the discretion of a designated individual, it is also void because it fails to provide equal protection to all free laborers, and also because it is a delegation to the individual of legislative functions.[81]

Credits for good behavior. See 8 C. L. 1448

§ 3. *Administration and fiscal affairs.* See 8 C. L. 1449—In the absence of a showing to the contrary, it will be presumed fines, forfeitures, and money received from the hire of prisoners have been disbursed in the manner prescribed by law.[82] A county may be liable to a municipality in whose prison its convicts are kept.[83] A physician who, at the oral request of the jailor, furnishes medical aid to a prisoner, cannot recover therefor in a suit against the county where all county contracts are required to be in writing,[84] but such fees may properly be taxed against the county by the jailor.[85]

PRIVACY, RIGHT OF; PRIVATE INTERNATIONAL LAW; PRIVATE SCHOOLS; PRIVATE WAYS; PRIVILEGE; PRIVILEGED COMMUNICATIONS; PRIZE, see latest topical index.

PRIZE FIGHTING.[86]

PROBATE, see latest topical index.

PROCESS.

§ 1. Nature and Kinds, Form and Requisites, 1262.
§ 2. Issuance, 1263.
§ 3. Extraterritorial Effect or Validity, 1264.
§ 4. Actual Service, 1264.
A. Personal, 1264.
B. Substituted, 1269:
C: The Server, His Qualifications, and Protection, 1270.
§ 5. Constructive Service, 1270.
§ 6. Return and Proof of Service, 1272.
§ 7. Defects, Objections and Amendments, 1274.
§ 8. Privileges and Exemptions from Service, 1276.
§ 9. Abuse of Process, 1276.

The scope of this topic is noted below.[87]

§ 1. *Nature and kinds, form and requisites. Definition.* See 8 C. L. 1449

Designation of court and parties. See 8 C. L. 1450—The parties sued must be suffi-

79. Baldwin Forging & Tool Co. v. Griffith, 5 Ohio N. P. (N. S.) 511.

80. Section 7432-1, Ohio Rev. St. Baldwin Forging & Tool Co. v. Griffith, 5 Ohio N. P. (N. S.) 666.

81. Section 7432-2, Ohio Rev. St. Baldwin Forging & Tool Co. v. Griffith, 5 Ohio N. P. (N. S.) 566.

82. Jail fees. Randolph County v. Ellis [Ga.] 60 SE 458.

83. The liability of county commissioners for maintenance of prisoners, sentenced by the common pleas court to a city work house, is not essentially contractual, but is based rather on the mandatory requirements of § 1536-369, Rev. St. City of Cleveland v. Cuyahoga County Com'rs, 10 Ohio C. C. (N. S.) 277.

84. Under Ann. St. 1906, p. 1262, even though Ann. St. 1906, p. 3327, provides that one in good faith fulfilling a contract with the county may recover thereon, though in entering into it the county or its agents did not follow the form prescribed by law. Miller v. Douglas County, 204 Mo. 194, 102 SW 996.

85. Under Ann. St. 1906, p. 3853, which provides, that when a prisoner requires such attention the jailor may procure it and the costs thereof shall be taxed as other criminal costs. Miller v. Douglas County, 204 Mo. 194, 102 SW 996.

86. No cases have been found for this subject since the last article. See 4 C. L. 1070.

87. It treats generally of process and the service thereof, without reference to the kind or character of the proceeding in which the process is issued (see Appeal and Review, 9 C. L. 108; Certiorari, 9 C. L. 542; Habeas Corpus, etc., 9 C. L. 1559, and other similar titles. See, also, Attachment, 9 C. L. 282; Garnishment, 9 C. L. 1525; Divorce, 9 C. L. 997; Alimony, 9 C. L. 89; Eminent Domain, 9 C. L. 1073, and other appropriate titles), or the person upon whom the service is made (see Infants, 10 C. L. 238; Fraternal Mutual Benefit Associations, 9 C. L. 1449, and

ciently designated,[88] but a misnomer is not fatal where the real party is served and is not misled and the error is corrected by the court as authorized by law.[89] Amendment as to parties is treated in a subsequent section.[90] Process against a corporation must direct service upon the corporation, and not upon its agent.[91]

*Signing and sealing.*See 8 C. L. 1450—Lack of the attesting judge's official title does not render the process void.[92] No prejudice can arise from the signature of a writ by a de facto officer.[93]

Sealing is not a matter of substance but of form.[94]

*Indorsement.*See 8 C. L. 1450

*Direction and delivery.*See 8 C. L. 1080

*Stating nature of cause of action.*See 8 C. L. 1451

Penalties or consequences of nonappearance.[95]

The appearance day See 8 C. L. 1451 must be designated with sufficient certainty,[96] but does not necessarily contemplate appearance in person.[97]

*Return day.*See 8 C. L. 1451—The statement of the return day is sufficient if from the whole process it is apparent what day is intended.[98] Omission of the date in the copy served on the defendant is harmless where the return day is stated.[99]

*Alias, counterpart or supplemental process.*See 8 C. L. 1451

§ 2. *Issuance.*See 8 C. L. 1451—Where the duty of the clerk to issue a summons is purely ministerial,[1] he cannot demand a showing of jurisdictional facts as a condition to the issue of the summons,[2] especially where the court has not the absolute power to refuse jurisdiction.[3]

other appropriate topics. Service on corporations and upon nonresidents is retained. The necessity of process as a means of acquiring jurisdiction is excluded. See Appearance, 9 C. L. 232; Jurisdiction, 10 C. L. 512. Defective process and objection thereto are treated herein, but defects in and absence of process as grounds of attack on the judgment are treated elsewhere (see Judgments, 10 C. L. 467; Foreign Judgments, 9 C. L. 1405), as are also saving such questions for review (see Saving Questions for Review, 8 C. L. 1822), the review itself (see Appeal and Review, 9 C. L. 108), and waiver of defects by appearance (see Appearance, 9 C. L. 232).

88. Under statute requiring name of wife, when sued with husband, to be stated, a citation designating defendants as a certain person by name, "et uxor" or "and wife," is insufficient. Higgins v. Shepard [Tex. Civ. App.] 107 SW 79.

89. Summons against "Grant's Lick, Claryville & Butler Turnpike Co.," and returned as served on such company by service on president of "Claryville, Grant's Lick & Butler Turnpike Co." And was actually served on the president of the latter, such being the correct name of the defendant, and error was corrected under authority of Cr. Code Prac. § 125. Claryville, Grant's Lick & Butler Turnpike Co. v. Com. [Ky.] 107 SW 327.

90. See post, § 7, Defects, Objections, and Amendments.

91. Under Sayles' Rev. Civ. St. 1897, art. 1214, requiring process to direct service to be made upon "defendant." Mutual Life Ins. Co. v. Uecker [Tex. Civ. App.] 18 Tex. Ct. Rep. 167, 101 SW 872.

92. Sapp v. Parrish [Ga. App.] 59 SE 821.

93. Writ signed by woman as deputy clerk held not void, even if it were voidable. State v. Webster Parish Police Jury [La.] 45 S 47.

94. Under Revisal 1905, § 448, authorizing personal service in lieu of publication, sealing, if necessary, is matter of form. Vick v. Flournoy [N. C.] 60 SE 978.

95. See 6 C. L. 1080. See, also, Appearance, 9 C. L. 232.

96. Rev. St. 1887, § 4140, subd. 3, held sufficiently complied with as to statement of the time within which defendant was required to appear and answer. McKnight v. Grant, 13 Idaho, 629, 92 P 989.

97. In Kansas the answer day stated in the summons is the day for the filing of a written pleading or to become in default, no personal appearance otherwise being necessary or contemplated. Schockman v. Williams [Kan.] 91 P 64.

98. Writ tested on Aug. 1, and made returnable "on first Monday in August next," is not absolutely void, since, when read in the light of the law as to issuance and return of process, the error is self-correcting, and it appears that the first Monday in the month therein mentioned was intended. Town of Point Pleasant v. Greenlee [W. Va.] 60 SE 601.

99. Mayerson v. Cohen, 108 NYS 59.

1. Such is nature of case of district court under Municipal Court Act, § 27, Laws 1902, p. 1498, c. 580. In re North American Mercantile Agency Co., 109 NYS 165.

2. In re North American Mercantile Agency Co., 109 NYS 165.

Mandamus lies in case of such refusal. In re North American Mercantile Agency Co., 109 NYS 165.

3. Under Municipal Court Act, § 25, a district court must try an action where no objection is made by defendant and he does not

§ 3. *Extraterritorial effect or validity.* See 8 C. L. 1452—In the absence of statutory authority, the courts of a state cannot order service on a resident of process from a foreign court,[4] and even where there is such authority, it will not be exercised in contravention of the settled policies of the state or to the prejudice of the interests of its citizens.[5]

To justify the issuance of a summons to another county, and service on a defendant residing or found there, the action must be rightly brought and the persons sued must be properly joined as defendants [6] and the statutory requirements must be observed.[7] This subject is closely allied to that of venue, and the article on that subject should be consulted in connection herewith.[8]

§ 4. *Actual service. A. Personal. In general.* See 8 C. L. 1452—Service obtained by unlawful entry of defendant's dwelling house or any portion thereof is invalid,[9] but one cannot evade personal service by refusal to take the process from the officer, or by flight when he attempts to make the service.[10] Service in cases removed to Federal courts is treated elsewhere.[11]

Upon nonresidents or their agents. See 8 C. L. 1453—In the absence of trick or device enticing a nonresident into the state, he may be personally served while therein,[12] and such service will not be invalidated by the mere fact that the plaintiff anticipates such contingency and makes prior arrangements for such service.[13] Service on a nonresident cannot be made by service on his agent [14] or partner.[15]

Upon municipal corporations. See 6 C. L. 1084

Upon domestic corporations. See 8 C. L. 1453—To sustain service on corporation by service on its agent, the relation of principal and agent must be actual.[16] In the absence of statutory specification as to what particular agents may be served, the capacity of an agent to be served depends upon whether his position is such as to raise a presumption of notice by him to his company,[17] but the fact that the proper agent actually receives the process is not sufficient where service is not made upon him as

request removal to proper district. In re North American Mercantile Agency Co., 109 NYS 165.

4. In re Romero, 56 Misc. 319, 107 NYS 621.

5. Court could not order service of process from Mexican court in suit against New York corporation which had neither office, business, nor property in Mexico. In re Romero, 56 Misc. 319, 107 NYS 621.

6. Marshall v. Saline River Land & Mineral Co., 75 Kan. 445, 89 P 905.

7. Service of summons in action in justice's court cannot, under Code Civ. Proc. § 849, be made outside of the county without a certificate of county clerk attached showing that justice issuing summons was at date thereof an acting justice. Ferguson v. Basin Consol. Mines Co. [Cal.] 93 P 867. Under Revisal 1903, § 1448, process from a justice's court may issue, when properly certified, to sheriff of county in which process agent of foreign corporation resides, § 1447, relating to service in other counties where residents thereof are sued jointly with residents of the county where the suit is brought, having no application in such case. Allen-Fleming Co. v. Southern R. Co. [N. C.] 58 SE 793. Indorsement showing identity of cause of action held sufficient under Code 1896, § 3271, requiring summons issued to another county in suit against several defendants to be indorsed that all the summonses constitute one suit and are for one and the same cause of action. Drennen v. Jasper Inv. Co. [Ala.] 45 S 157.

8. See Venue and Place of Trial, 8 C. L. 2236.

9. Entry obtained through servants' quarters of house where defendant resided, under pretense of wish to see another than defendant, was not such an entry as authorized forcible access to dining room upstairs. Olson v. McConihe, 54 Misc. 408, 105 NYS 386.

10. Where director of corporation knew that process was about to be served on him as such and ran out of the room. Boggs v. Inter-American Min. & Smelting Co., 105 Md. 371, 66 A 259.

11. See Removal of Causes, 8 C. L. 1722.

12, 13. Case v. Smith, Lineaweaver & Co., 152 F 730.

14, 15. Lowrie v. Castle [Mass.] 83 NE 1118.

16. Doctrine of implied agency does not apply. Chicago, etc., R. Co. v. Suta, 123 Ill. App. 125.

17. Central of Georgia R. Co. v. Eichberg [Md.] 68 A 690. Under Revisal 1905, § 440, authorizing service on any local agent, and defining agent as anyone receiving or collecting money for the corporation, a caretaker, acting without recompense, who in a single instance sold oil out of corporation's tank and paid a watchman with the proceeds was not an agent. Kelly v. Lefaiver, 144 N. C. 4, 56 SE 510.

required by law.[18] One employed by a coporation only to sell goods on commission is not an agent in the sense that service of process on him will bind principal.[19] Officers interested cannot be served.[20] Domestic corporations having their place of business and works outside of the state may be classed as foreign or nonresident corporations.[21] Service by leaving a copy at the corporation's place of business is treated in a subsequent subsection of this section.[22]

Upon foreign corporations.[See 8 C. L. 1454]—A foreign corporation, by doing business in a state, impliedly assents to the laws of such state as to the mode of service upon foreign corporations,[23] but such implied assent does not extend to suits arising out of business transacted in other states.[24] Where, therefore, a foreign corporation is doing business in the state and service is made upon the proper agent, such service is equivalent to personal service on the corporation.[25] Both of these elements are essential to jurisdiction in personam.[26] A single act does not constitute doing business within this rule.[27] The corporation must be engaged in business to the extent that it may be said in legal parlance to be doing business therein.[28] A state may

18. State v. Myers, 126 Mo. App. 544, 104 SW 1146.

19. Temby v. William Brunt Pottery Co., 127 Ill. App. 441, afd. 229 Ill. 540, 82 NE 336.

20. Assignor of obligation sued on. Atwood v. Sault Ste. Marie L. Heat & P. Co., 148 Mich. 224, 14 Det. Leg. N. 71, 111 NW 747. Prima facie case of identity made by identity of names. Id.

21. Acts W. Va. 1905, c. 39, requiring foreign corporations and domestic corporations having their place of business and works outside of state to appoint state auditor as process agent does not deny equal protection of laws to latter class. St. Mary's Franco-American Petroleum Co. v. State of W. Va., 203 U. S. 183, 51 Law. Ed. 144.

22. See post, § 4B, Substituted.

23. Central of Georgia R. Co. v. Eichberg [Md.] 68 A 690.

24. Insurance company doing business in Pennsylvania without complying with Act Pa. June 20, 1883, does not impliedly assert that process in a suit on a policy executed in another state may be served on Pennsylvania insurance commissioner. Old Wayne Mut. Life Ass'n v. McDonough, 204 U. S. 8, 51 Law. Ed. 345.

25. Where president of foreign holding company and foreign mining company was same person, who had office in state and managed both corporations from such office, and mining company had money in hands of holding company in the state and also bank deposits in state, service on such president was service on mining company. Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 NE 191.

26. Jurisdiction of a foreign corporation which is not doing business in the state cannot be acquired by service upon an officer thereof temporarily in the state. Donovan v. Dixieland Amusement Co., 152 F 661. Must be doing business within state or otherwise be within court's jurisdiction. Knapp v. Wallace [Or.] 92 P 1054. The liability to service of process from a **Federal court** sitting in a state other than that of the residence of the corporation depends upon whether the corporation is doing business within the state. Green v. Chicago, etc., R. Co., 147 F 767.

27. Ladd Metals Co. v. American Min. Co., 152 F 1008. Presence of officer of foreign corporation in the state for purpose of discussing a proposed adjustment of single controversy is not doing business in the state. Wilkins v. Queen City Sav. Bk. & Trust Co., 154 F 173.

28. Ladd Metals Co. v. American Min. Co., 152 F 1008.

Held doing business: Nonresident railroad company held within Code Pub. Gen. Laws 1904, art. 23, §§ 409, 411, by reason of contract for joint business with domestic company, though none of the foreign companies carriage was to be done in the state. Central of Georgia R. Co. v. Eichberg [Md.] 68 A 690. Evidence held to show that president was doing business for his corporation in state at time of service. Plattner Implement Co. v. Bradley [Colo.] 90 P 86.

Held not doing business: Solicitation through agent of freight business by foreign railroad corporation which neither owned nor operated any road within state, such business to be conducted outside of state. Beyer v. Pennsylvania R. Co., 27 R. I. 583, 65 A 261. Solicitation by railroad company whose lines were entirely outside the state of business through a resident agent for whom it rented an office held not doing business in the state. Green v. Chicago, etc., R. Co., 205 U. S. 530, 51 Law. Ed. 916. Foreign transportation company for whom connecting local carrier sold tickets to be used outside the state held not doing business in the state. Allen v. Yellowstone Park Transp. Co., 154 F 504. Railroad company's solicitation of traffic through an agent in a county through which its line does not run held not doing business in such county, within Const. art. 12, § 232, and Code 1896, § 4207. Abraham Bros v. Southern R. Co. [Ala.] 42 S 837. The bare fact that a foreign railroad corporation which had not complied with Pa. Act. April 22, 1874 (P. L. 108), relative to filing of statement and appointment of agent as condition to right to do business in the state, leased lines of another foreign company which had complied with such requirements, and that the agent appointed by lessor acted for lessee, did not show that lessee was doing business in the state. Green

by statute designate the agents of a foreign corporation upon whom service may be made [29] though the corporation has not designated any person in the state upon whom service may be made [30] and though by other statutes or even by constitutional provision foreign corporations are themselves required to designate such an agent.[31] The validity of the service in such case depends upon whether the party served was in fact such an agent as was authorized by statute to be served.[32] Where service is authorized on certain specified officers or agents, or "other agent," etc., such other agent must belong to the same general class as those designated.[33] Where service is

v. Chicago, etc., R. Co., 147 F 767. Foreign insurance agent sent into state for special purpose of investigating plaintiff's claim held not transacting business within Rev. St. 1899, § 570, subd. 4, Ann. St. 1906, p. 597. Painter v. Colorado Springs & Cripple Creek Dist. R. Co., 127 Mo. App. 248, 104 SW 1139. Ownership by a foreign corporation of a majority of the stock in a domestic corporation which runs its own business as a separate and distinct entity does not constitute transaction of business in the state. Peterson v. Chicago, etc., R. Co., 205 U. S. 364, 51 Law. Ed. 841. Presence of an officer in the state in attendance upon the taking of depositions in a suit to which the corporation is a party is not doing business in the state. Ladd Metals Co. v. American Min. Co., 152 F 1008. Maintaining office in charge of salaried sales agent who took orders to be accepted and filled outside state held not doing business. Case v. Smith, 152 F 730.

Question of fact: Whether the corporation was doing business and had an agent in the county where process was served may be entirely a question of fact. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441.

Federal question is involved in determination of whether foreign corporation is doing business in state so that service may be had upon its agent. Wold v. J. B. Colt Co., 102 Minn. 386, 114 NW 243.

Note: A foreign railroad corporation owned the stock and controlled the policy of a domestic railroad corporation, and both corporations were parts of one railroad system. The foreign corporation sent its trains and crews over the tracks of the domestic corporation. The expense of management of such trains was borne by the domestic corporation while on its tracks. The domestic corporation owned only a small rolling stock and no passenger cars. Held, the foreign corporation was not "doing business" in the state where the domestic road was incorporated so as to be liable to service of process; (the Chief Justice and Mr. Justice Moody dissenting). Peterson v. Chicago, etc., R. Co., 205 U. S. 364, 51 Law. Ed. 841. This case, perhaps, goes a little farther than similar cases, which hold that having traffic arrangements in other states is not "doing business" there. Earle v. Chesapeake & O. R. Co., 127 F 237; Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 45 SE 300, 62 L. R. A. 178. See, also, Commonwealth v. Standard Oil Co., 101 Pa. 119, and United States v. American Bell Tel. Co., 29 F 17. On the general subject of service of process on foreign corporations, see exhaustive note to Eldred v. American Palace Car Co., 45 C. C. A. 3. Thompson, Commentaries on Corporations, Vol. 6, § 8034, discusses the relation between the parent corporation and a subcorporation, organized to exploit its business in another state. In such a case, courts have held that a relation of principal and agent exists and make the foreign corporation liable to process. Norton v. R. R. Co., 61 F 618; Van Dresser v. Navigation Co., 48 F 202. The supreme court in the principal case has undoubtedly overruled these last two cases and, also, Buie v. Chicago, etc., R. Co., 95 Tex. 51, 65 SW 27, 55 L. R. A. 861, which decides the relationship between the same two corporations is that of principal and agent. The principle which distinguishes a stockholder from the corporation itself clearly governs the principal case. See Cook, Corp. vol. 1, § 11; Humphreys v. McKissock, 140 U. S. 304, 35 Law. Ed. 473.—From 6 Mich. L. R. 259.

29. Code Civ. Proc. § 1780 held not in violation of fourteenth amendment to provision relating to due process of law. Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 NE 191. Mills' Ann. Code, § 38, subd. 9. Venner v. Denver Union Water Co. [Colo.] 90 P 623. Where corporation has no office or place of business in the state, service may be made upon an officer, agent or employe transacting the corporation's business in the state. Rev. St. 1899, § 570, subd. 4; Ann. St. 1906, p. 597. Painter v. Colorado Springs & Cripple Creek Dist. R. Co., 127 Mo. App. 248, 104 SW 1139.

30. Such is express provision of Code Civ. Proc. § 432, subd. 1. Grant v. Cananea Consol. Copper Co., 189 N. Y. 241, 82 NE 191.

31. Const. art. 15, § 10, and 1 Mills' Ann. St. Rev. Supp. § 499. Venner v. Denver Union Water Co. [Colo.] 90 P 623. Acts W. Va. 1905, c. 39, requiring appointment of state auditor as process agent and exacting annual fee of $10, does not deprive corporation of property without due process of law. St. Mary's Franco-American Petroleum Co. v. West Virginia, 203 U. S. 183, 51 Law. Ed. 144.

32. On motion to vacate judgment on ground that party served was not agent of defendant corporation, evidence held not to show that he was not such, and only evidence before court showed that he was such agent. People v. Tilden, 121 App. Div. 352, 106 NYS 247. Service on traveling salesman held insufficient where there was an agent in the state on whom service might have been made. W. T. Adams Mach. Co. v. Castleberry [Ark.] 106 SW 940. Service on secretary of local council of **foreign beneficiary society** held sufficient under the statute relating to service on corporations. Riddle v. Order of Pendo [Or.] 89 P 640.

33. Honerine Min. & Mill. Co. v. Tallerday Steel Pipe & Tank Co., 31 Utah, 326, 88 P 9.

authorized upon agents and officers generally, the test is whether the agent or officer is such as to reasonably insure notice to the corporation.[34] In the absence of statutory designation of the agent that may be served, he must be the agent representing the corporation in the business which it is doing in the state,[35] or such as will be deemed generally to represent the corporation in its corporate capacity and as such authorized to be served.[36] The agent must also be one in fact, and not merely by construction of law.[37] An officer or agent cannot be served where he is casually or temporarily in the state [38] unless it is so provided by statute,[39] or where he is enticed into the state for the purpose of service.[40] The mere tender of a resignation by an officer, not acted on and unknown to the plaintiff, will not invalidate service upon such officer after such tender,[41] and so also where the articles provide for a holding over until election of a successor, and no successor of the resigning officer has been elected.[42] The appointment of an officer as a receiver for the corporation will not prevent service on him as an officer.[43] Withdrawal from the state will not prevent service in suits arising out of business transacted in the state provided a proper agent or officer can be served.[44] A state may require foreign corporations to designate an agent upon whom service may be made in suits growing out of business transacted in the state [45] whether such suits be brought before or after the corporation ceases to do business in the state,[46] and a corporation, having assented to such provisions and

Under Rev. St. 1898, § 2948, as amended by Laws 1899, c. 51, p. 74, providing for service on certain designated officers or agents, "or other agent having management," etc., of the corporation's affairs "or control of any property of such corporation," one temporarily intrusted with collection of a corporation's bill against one in the state cannot be served, not being in any way within the class of officers or agents named. Id. Such service was invalid also under Laws 1905, c. 105, p. 126, amending the prior law. Id.

34. Service on "commercial" agent of railroad, who had office in state maintained by the railroad company, and who solicited freight and other business, but who had no authority to make contracts, sell tickets, or collect money, held sufficient to give jurisdiction to render judgment of legal efficacy at least in the state. Bell v. New Orleans, etc., R. Co., 2 Ga. App. 812, 59 SE 102.

35. Central of Georgia R. Co. v. Eichberg [Md.] 68 A 690. Under Iowa Code, §§ 3500, 3529, 3532, agent must be connected with business out of which the cause of action arose. McGuire v. Great Northern R. Co., 155 F 230. Where an officer of a foreign corporation is in the state in attendance on the business of the corporation as manager thereof, he may be served. Rudd v. McClean Arms & Ordnance Co., 54 Misc. 49, 105 NYS 387. Service on joint agent of domestic and foreign carriers engaged in joint traffic, though none of carriage of foreign carrier was in state, held service on foreign carrier within Code Pub. Gen. Laws 1904, art. 23, § 411, authorizing service on "agent" of foreign corporation, etc. Central of Georgia R. Co. v. Eichberg [Md.] 68 A 690. Domestic railroad company which sold tickets for a foreign connecting carrier to be used outside the state held not such agent of foreign carrier as might be served with process against it. Allen v. Yellowstone Park Transp. Co., 154 F 504.

Federal practice. McGuire v. Great Northern R. Co., 155 F 230; Ladd Metals Co. v. American Min. Co., 152 F 1008; Peterson v. Chicago, etc., R. Co., 205 U. S. 364, 51 Law. Ed. 841.

36. Ladd Metals Co. v. American Min. Co., 152 F 1008; McGuire v. Great Northern R. Co., 155 F 230.

37. He must be one having representative capacity and derivative authority in fact. Wold v. J. B. Colt Co., 102 Minn. 386, 114 NW 243.

38. Process of Federal court cannot be served on officer of foreign corporation casually within state where the corporation transacts no business in the state. Case v. Smith, 152 F 730. President held not casually in state at time of service on him. Plattner Implement Co. v. Bradley [Colo.] 90 P 86.

39. Under Mills' Ann. Code, § 38, subd. 9, providing for service on any agent found in the county of the venue, service might be had on officer temporarily in state though on business other than that of the corporation. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

40. President of defendant corporation held not enticed into state at time service was made upon him. Plattner Implement Co. v. Bradley [Colo.] 90 P 86.

41, 42, 43. Venner v. Denver Union Water Co [Colo.] 90 P 623.

44. Under Code Pub. Gen. Laws, art. 23, §§ 409-412, service may be made on resident director in suit arising out of business transacted by corporation in the state, though corporation has withdrawn from state at time of suit. Boggs v. Inter-American Min. & Smelting Co., 105 Md. 371, 66 A 259.

45. Hill v. Empire State-Idaho Min. & Developing Co., 156 F 797.

46. Hill v. Empire State-Idaho Min. & Developing Co., 156 F 797. Under Act Idaho, March 10, 1903 (Laws 1903, p. 49), providing that such notice and designation of agent

designated an agent, must respond to process served upon him in the mode prescribed by law,[47] and the designation of such agent is irrevocable as to persons acting in reliance theron,[48] and it is sometimes so provided by statute,[49] but limitations

shall run from time of filing until his successor is appointed or the resignation of such agent, etc., the capacity of the agent to receive service continues after withdrawal of corporation from the state and after the agent had ceased to have any relation to the corporation except with regard to service. Id.

47. Hill v. Empire State-Idaho Min. & Developing Co., 156 F 797.

48. Foreign insurance company could not revoke designation of North Carolina insurance commissioner as agent for service as against a resident assignee of a South Carolina policy holder, where the assignment was made prior to the insurance company's attempted revocation. Hunter v. Mutual Reserve Life Ins. Co., 118 App. Div. 94, 103 NYS 70, following, by analogy, Woodward v. Mutual Reserve Life Ins. Co., 178 N. Y. 485, 71 NE 10, 102 Am. St. Rep. 519, where the policy sued on was issued to a resident of North Carolina, and distinguishing Hunter v. Mutual Reserve Ins. Co., 184 N. Y. 136, 76 NE 1072, on the ground that in that case the assignment to the resident of North Carolina was after the revocation of the designation of the insurance commissioner as agent for service.

Note: The defendant company, a foreign corporation, had done business in Idaho and had while there lived up to the statutory requirement of appointing an agent upon whom service could be had. The statute required that the designation of the agent should run until his successor was appointed. The defendant company withdrew from the state and ceased doing business there, and the agent was no longer connected with the company. The plaintiff sues the company in tort for damages to his lands and served the former agent of defendant company. Held that the service was good. Hill v. Empire State-Idaho Min. & Developing Co., 156 F 797.

The general rule is that a foreign corporation must be doing business in the state before it is subject to process. It must be present through its agents, and the agent served must be representing it in its business there. St. Clair v. Cox, 106 U. S. 350, 27 Law. Ed. 222; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 Law. Ed. 1113; Peterson v. Chicago, etc., R. Co., 205 U. S. 364, 51 Law. Ed. 841. The court in the principal case reasons that a foreign corporation can agree as a condition to entering a state for business purposes that it will be liable to suit by a specified service as long as there shall exist any liability against it in that state, and this even though it ceases to do business there. It would seem that such an agreement should be express and should clearly contemplate such service so that the constitutional guaranty of "due process of law" will not be violated. The agreement has been held to exist when the statute specifically requires a stipulation to be filed by the foreign corporation that the agent's authority to receive service will not be revocable while any liability against the corporation remains outstanding throughout the state. These statutes apply to insurance companies most generally, and service is authorized on the insurance commissioner. Collier v. Mutual Res. Life Ass'n, 119 F 617; Home Benefit Society v. Muehl, 109 Ky. 479, 59 SW 520; Magoffin v. Mutual Res., etc., Ass'n, 87 Minn. 260, 91 NW 1115, 94 Am. St. Rep. 699; Ben Franklin Ins. Co. v. Gillett, 54 Md. 212; Woodward v. Mutual Res., etc., Ass'n, 178 N. Y. 485, 71 NE 10, 102 Am. St. Rep. 519; Biggs v. Mutual Res., etc., Ass'n, 128 N. C. 5, 37 SE 955; Green v. Life Ass'n, 105 Iowa, 628. The effect of the above cases is modified when we see that the United States supreme court has decided that an insurance company is doing business in a state even when it has ceased taking new policies and is merely collecting premiums. Insurance Co. v. Spratley, 172 U. S. 603, 43 Law. Ed. 569; Mutual Res., etc., Ass'n v. Phelps, 190 U. S. 147, 47 Law. Ed. 987. The defendant corporation in the principal case did not certainly expressly agree that service on its agent should be good after it had withdrawn from the state. The court interpreted the statute to mean that the authority of the agent should continue and consequently implied the agreement of the foreign corporation to such an arrangement. This resulted in a person receiving service for the defendant who had no connection with the corporation at the time. The principal case is supported by Groel v. United Elec. Co., 69 N. J. Eq. 397, 60 A 822; Germania Ins. Co. v. Ashby, 112 Ky. 303, 65 SW 611, 99 Am. St. Rep. 295; Davis v. Kansas & T. Coal Co., 129 F 149. Opposed to it are De Castro v. Compagnie Francaise, 76 F 425; Swann v. Mutual Res., etc., Ass'n, 100 F 922; Friedman v. Empire Life Ins. Co., 101 F 535; Forrest v. Bridge Co., 53 C. C. A. 577, 116 F 357; Cady v. Associated Colonies, 119 F 420; Eureka M. Co. v. California Ins. Co., 130 Cal. 153, 62 P 393. For general reference to this subject, see note to Abbeville Elec., etc., Co. v. Western Elec. Supply Co., 85 Am. St. Rep. 926; Note to Reeves v. Southern R. Co., 70 L. R. A. 535; Note to Eldred v. American Palace Car Co., 45 C. C. A. 3. As to service on foreign corporations, see 5 Mich. L. R. 280, 4 Mich. L. R. 219.—From 6 Mich. L. R. 506.

49. Resident of Virginia as assignee of resident of North Carolina of policy issued by New York insurance company stipulating that it was a New York contract, such contract being executed prior to Act 1893, p. 302, c. 2999, could not revoke Revisal 1905, § 4747, prohibiting revocation of designation of insurance commissioner as process agent so long as there is any liability outstanding in the state. Williams v. Mutual Reserve Fund Life Ass'n [N. C.] 58 SE 802. The rights of citizens of other states do not entitle them to claim the benefit of provisions as to designation of process agent and revocation of his authority enacted for benefit of the state's own citizens, and such provisions are not invalid discriminations against the former. Id. Prior to Act 1893, p. 302, c. 2999, § 8 (Revisal 1905, § 4808), a contract

upon the right to revoke the appointment of the statutory process agent do not affect the kinds of suits that may be instituted.[50] A subsequent statutory provision as to service does not necessarily repeal a former provision.[51] Provision is sometimes made for service in the nature of substituted service.[52] In some states foreign corporations are placed upon the same basis as domestic corporations for the purpose of service.[53] A process agent appointed by a foreign corporation pursuant to statutory requirement may accept service for the corporation.[54]

Upon foreign unincorporated associations. See 4 C. L. 1078

(§ 4) *B. Substituted.* See 8 C. L. 1456—Substituted service can be made only when and as authorized by statute.[55] Statutes authorizing substituted service will be strictly construed [56] and must be substantially complied with.[57] Statements of the statutory grounds upon information and belief must disclose the source of the information.[58] The test as to what constitutes one's family is whether the relation between him and the other persons of the household is of a permanent and domestic character, and not intended to be merely temporary.[59] Where service is made on several defendants residing in the same residence, a copy should be left for each.[60]

Provision is sometimes made for service in the nature of substituted service on corporations.[61] Such service is authorized where the contingency provided for by the statute exists at the time of the service.[62]

of insurance stipulating that it was a New York contract was not an obligation outstanding in North Carolina within Revisal 1905, § 4747. Id.

50. Provision of Shannon's Code, § 3292, subsec. 3, that appointment of insurance commissioner as process agent shall not be revoked while obligations are outstanding in state, does not preclude suit against foreign insurance company by a nonresident. Patton v. Continental Casualty Co. [Tenn.] 104 SW 305.

51. Service may be made as provided by Code, notwithstanding Ky. St. 1903, § 571, subsequently enacted. Cumberland Co. v. Lewis [Ky.] 108 SW 347.

52. See post, this section, subsection B, Substituted.

53. Civ. Code 1895, § 2693, subsec. 7, is broad enough to include foreign as well as domestic corporations. Bell v. New Orleans, etc., R. Co., 2 Ga. App. 812, 59 SE 102. Under Civ. Code 1902, § 1791, a foreign corporation which files with secretary of state a copy of its charter, etc., becomes a domestic corporation for purpose of service. Geraty v. Atlantic Coast Line R. Co. [S. C.] 60 SE 936.

54. Insurance commissioner appointed process agent pursuant to Shannon's Code, § 3292, subsec. 3. Patton v. Continental Casualty Co. [Tenn.] 104 SW 305.

55. Order for substituted service, under Code Civ. Proc. § 435, improper where it did not appear from papers that defendant was in state when order was granted, or was avoiding service, or that diligent effort had been made to obtain personal service. Nichols v. Emmett, 56 Misc. 321, 107 NYS 663. Substituted service under Municipal Court Act, Laws 1902, p. 1500, c. 580, § 32, held unauthorized where it appeared that defendant had neither residence nor place of business in city at or after time of issuance of original summons. Duryee v. Hunt, 56 Misc. 684, 107 NYS 734.

56. Gage v. Riverside Trust Co., 156 F 1002.

57. Rev. St. 1899, § 570; Ann. St. 1906, p. 597. Colter v. Luke [Mo. App.] 108 SW 608. Service "by delivering a true copy on Mrs. M. B., wife of the within named J. M. B." is not sufficient under provision authorizing service by leaving copy at usual place of abode with some member of family above fifteen years of age, and informing such person of the contents thereof. Barwick v. Rouse, 53 Fla. 643, 43 S 753.

58. That defendant was in the state when the order was issued. Nichols v. Emmett, 56 Misc. 321, 107 NYS 663.

59. Colter v. Luke [Mo. App.] 108 SW 608. "Family," as used in Rev. St. 1899, § 570, Ann. St. 1906, p. 597, means a collective body of persons who live in one house, under one head, a manager, including parents, children and servants, and, as the case may be, lodgers or boarders. Id. Evidence held to show that house where service was made was not defendant's usual place of abode. Waterman v. Bash, 46 Wash. 212, 89 P 556.

60. Service upon several minors by leaving one copy of the summons for all of them is insufficient. Colwell v. Culbertson, 126 Ill. App. 294.

61. Rev. St. 1899, § 995; Ann. St. 1906, p. 876, authorizing alternative service by leaving copy at "business office" with person in charge thereof, authorizes service on railroad company by leaving copy, etc., at place where train orders are transmitted, but not at switchman's "shanty." State v. Myers, 126 Mo. App. 544, 104 SW 1146. St. 1902, p. 269, c. 349, authorizing service on corporations in suits to enjoin them from doing business until payment of taxes by leaving copy at place of business, held **not unconstitutional** as being unreasonable. Scollard v. American Felt Co., 194 Mass. 127, 80 NE 233. Such statute was not repealed by St. 1903, pp. 443-455, c. 437, §§ 58-95. Id. Under Gen. St. 1901, § 4498, service on a **foreign corporation** doing business and having an office in the state may be made in an action in the county where such office is located by leav-

(§ 4) *C. The server, his qualifications and protection.*[See 8 C. L. 1457]

§ 5. *Constructive service. Service by publication.*[See 8 C. L. 1457]—Statutes authorizing service by publication are strictly construed,[63] and must therefore be strictly complied with,[64] and such compliance must affirmatively appear of record,[65] unaided by any presumptions.[66]

When proper.[See 8 C. L. 1458]—Constructive service is allowable only where it is expressly authorized by statute.[67] Such service is usually confined to cases where the court has jurisdiction of the res [68] and the parties sought to be served are nonresidents of the state.[69] There is some conflict as to the effect of an honest mistake as to the defendant's nonresidence.[70]

Procedure to authorize.[See 8 C. L. 1458]—The statutory provisions must be followed with exactness,[71] including those relating to the affidavit,[72] which must set out the cause of action [73] and all the essential statutory facts,[74] and in this respect

ing a copy at such office with the person in charge thereof, where it appears that at the time of such service the other officers and representatives designated by the statute are not found in the county. American Bonding Co. v. Dickey, 74 Kan. 791, 88 P 66. Service at corporation's office on mere salesman held invalid. Frankel v. Dover Mfg. Co., 104 NYS 459.

62. See Rev. St. 1899, §§ 995, 996; Ann. St. 1906, pp. 876, 878, authorizing service by leaving copy, etc., where president, etc., cannot be found, etc. Cornwall v. Star Bottling Co. [Mo. App.] 106 SW 591.

63. Gage v. Riverside Trust Co., 156 F 1002; Whitney v. Masemore, 75 Kan. 522, 89 P 914.

64. Morse v. U. S., 29 App. D. C. 433; Slattery v. Stevens, 125 Ill. App. 67; Czyston v. St. Stanislaus Parish, 131 Ill. App. 161; Schaller v. Marker [Iowa] 114 NW 43; Finn v. Howard [Kan.] 94 P 801.

65, 66. Cohen v. Portland Lodge, No. 142, B. P. O. E. [C. C. A.] 152 F 357.

67. Bisby v. Mould [Iowa] 115 NW 489.

68. In suit concerning title to shares in domestic corporation held by nonresident, latter may be served by publication. Sohege v. Singer Mfg. Co. [N. J. Eq.] 68 A 64. Under Code Civ. Proc. § 438, subd. 5, authorizing published service where defendant is sought to be excluded from an interest, etc., in real or personal property in the state, such service may be had upon nonresident beneficiaries of insurance policy in suit by testator's trustee to recover advancements made by testator for premiums to secure which the policy had been assigned to testator. Morgan v. Mutual Ben. Life Ins. Co., 189 N. Y. 447, 82 NE 438, afg. Id., 119 App. Div. 645, 104 NYS 185. Enforcement of laborer's lien. Hoye Coal Co. v. Colvin [Ark.] 104 SW 207. Prior to Laws 1903, p. 587, c. 384, published service was not allowable in action for specific performance of contract to convey realty. Horner v. Ellis, 75 Kan. 675, 90 P 275. Suit for specific performance of contract to convey land is not suit in rem where no property is attached. Lucas v. Patton [Tex. Civ. App.] 107 SW 1143. Suit by stockholder for receiver with authority to appear in state court and defend against judgment therein against the corporation and to obtain injunction against interference with corporation's property, and to secure accounting as to certain stock pledged for the indemnity of the corporation, held not local so as to warrant service on nonresidents by publication. Schultz v. Highland Gold Mines Co., 158 F 337.

69. Hoye Coal Co. v. Colvin [Ark.] 104 SW 207; Payne v. Anderson [Neb.] 114 NW 148.

70. Honest mistake as to defendant's nonresidence does not confer jurisdiction where defendant is actually a resident. Payne v. Anderson [Neb.] 114 NW 148, following Eayrs v. Nason, 54 Neb. 143, 74 NW 408, and German Nat. Bk. v. Kautter, 55 Neb. 103, 75 NW 566, 70 Am. St. Rep. 371, and disapproving Davies v. Vinson Land Co. [Kan.] 90 P 766. No jurisdiction acquired by service by publication on resident who might have been served. Wagner v. Lincoln County [Neb.] 114 NW 574, following Payne v. Anderson [Neb.] 114 NW 148.

71. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357.

72. Compliance with the statutory requirements as to the affidavit is jurisdictional. Cordray v. Cordray [Okl.] 91 P 781.

73. Affidavit in suit to quiet title held not so defective in statement of cause of action as to render judgment void. Finn v. Howard [Kan.] 94 P 801.

74. Anderson v. Anderson, 229 Ill. 538, 82 NE 311. **Residence** in another state may be alleged as a fact. McLaughlin v. McCann, 123 App. Div. 67, 107 NYS 762. Allegation that defendants are nonresidents and that service of summons cannot be made upon them within the state is an allegation of fact and not of a mere conclusion. Becker v. Linton [Neb.] 114 NW 928. An allegation of residence in the past is aided by the presumption of continuation of such residence. McLaughlin v. McCann, 123 App. Div. 762, 107 NYS 762. Upon an allegation that the defendant lives in another state, the distance of such state from the state of the forum will be considered in determining whether personal service could be made with due diligence. Id. Description of **unknown persons** merely by stating that they were heirs of decedent whose land was sought to be subjected held not compliance with Rev. St. 1899, § 580; Ann. St. 1906, p. 606, requiring complaint to describe interest of unknown persons and how derived in order to authorize publication against them. Davis v. Montgomery, 205 Mo. 271, 103 SW 979. An allegation of the affiant's conclusion as to the exercise of **due diligence** is unnecessary, the

the affidavit, while not a pleading, may be tested by the rules applicable thereto.[75] In certain cases the allegations may be upon information and belief.[76] The return of the sheriff not found, after diligent search, is prima facie evidence of the defendant's absence from that county wherein the sheriff exercised its authority,[77] and the affidavit of an attorney as to the substance of the record in this regard will be given the same weight.[78] Where the statute authorizes published service on several grounds in the alternative, the affidavit should not be in the alternative, but the plaintiff should select which ground he relies on,[79] and where the plaintiff does not know which of the grounds is true, he must resort to other means provided by law for obtaining the order of publication.[80]

How and when made. See 8 C. L. 1460—Where the statute is sufficiently comprehensive to include service on particular classes of parties, the provisions of statutes relating to personal service on such parties will not be considered.[81] A requirement of publication for a certain number of successive weeks does not require publication daily for such term, but only a weekly publication for such term,[82] but it is held that the full specified term must expire before the service is complete.[83] Where the statute provides that the service shall be complete at the expiration of the time prescribed

jurisdiction of the court to pass in such question being dependent upon allegation of facts having a probative tendency upon such issue. Evans v. Weinstein, 108 NYS 753. When affidavit shows that defendant is a nonresident and has been such for a long time, and that he is not in the state, this is a sufficient showing of diligence. McKnight v. Grant, 13 Idaho, 629, 92 P 989. In suit involving property of decedent, inquiry of executor as to whereabouts of defendants whose interests were derived from the will held due diligence. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357. An affidavit which fails to show inability to discover defendant's whereabouts is insufficient as the basis for service by publication. Anderson v. Anderson, 229 Ill. 538, 82 NE 311. Allegation that defendants were nonresidents of the state and were residents of Great Britain and had always been residents thereof, and that personal service on them could not be had, held sufficient. Sinnott v. Ennis, 105 NYS 218. Statement, in words of Code Civ. Proc. § 438, that plaintiff "will be unable, with due diligence, to make personal service," etc., held mere conclusion. McLaughlin v. McCann, 123 App. Div. 67, 107 NYS 762. Statement that plaintiff cannot ascertain after diligent inquiry where defendants reside held mere conclusion. Id. Affidavit stating inquiries of named persons, and that after due diligence and inquiry the defendant could not be found, held sufficient under Code Civ. Proc. § 412, though the specific results of the inquiries were not stated. Chapman v. Moore, 151 Cal. 509, 91 P 324. Allegation of inquiry of executor as to whereabouts of minor child of decedent, such inquiry resulting in the information that the child was in an orphan asylum in another state, held sufficient showing of diligence. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357. B. & C. Comp. Or. § 56 held complied with, as against collateral attack, by affidavit showing that defendant was foreign corporation with principal office in another state, that process against it was returned unexecuted, and that affiant had, without avail, made diligent inquiry of persons named as to whether it had any officer or agent in state who could be served. Ranch v. Werley, 152 F 509.

75. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357.

76. Nonresidence. Evans v. Weinstein, 108 NYS 753. Where there is a positive statement of the facts constituting due diligence and of the information received from others in a position to know of the presence or absence of the defendant, upon such information; if adopted by the affiant, may be predicated his allegation that the defendant is absent or nonresident. Information stated held accepted by use of expression "therefore" the defendant, etc. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357.

77, 78. Cohen v. Portland Lodge, No. 142, B. P. O. E. [C. C. A.] 152 F 357.

79. Under Kirby's Dig. § 6055, authorizing publication where defendant is a nonresident or conceals himself. Holloway v. Holloway [Ark.] 108 SW 837.

80. Kirby's Dig. § 6055 authorizes publication where return shows that defendant is a nonresident or conceals himself, and § 6056 authorizes court to make warning order upon requisite facts being shown by affidavit or other proof. Holloway v. Holloway [Ark.] 108 SW 837.

81. Minors. Cohen v. Portland Lodge No. 142, B. P. O. E. [C. C. A.] 152 F 357. B. & C. Comp. Or. § 57, requiring copy of summons and complaint, to be mailed to the "defendant," is complied with by mailing such copy to the corporation eo nomine, without reference to the methods of personal service on corporations by service on officers and agents. Ranch v. Werley, 152 F 509.

82. Acts 1905, p. 61, c. 48, § 4 (Burns' Ann. St. Sup. 1905, § 896). Southern Indiana R. Co. v. Indianapolis, etc., R. Co., 168 Ind. 360, 81 NE 65.

83. Where publication is required for three successive weeks, three weekly insertions covering only fifteen days are insufficient. Morse v. U. S., 29 App. D. C. 433.

for publication, the time, according to the usual rules of computation, will be computed by excluding the first day and including the last.[84] Where the notice is mailed to an address other than that set out in the affidavit, the court does not acquire jurisdiction.[85]

*Order of publication.*See 8 C. L. 1480—Compliance with the statutory requirements as to the published notice or order is jurisdictional,[86] but mere irregularities in an order for constructive service are not fatal.[87] The order of publication must be made by the proper court,[88] and, must sufficiently designate the defendants,[89] describe the res,[90] and state the time for appearance.[91]

Personal service in lieu of publication See 8 C. L. 1481 is sometimes authorized.[92]

§ 6. *Return and proof of service.*See 8 C. L. 1461—A summons once returned and filed with the papers in the case becomes a file of the court which cannot be withdrawn without permission of the court,[93] but the court may order it to be withdrawn and served on any defendant in the case.[94] A return of service by a private individual must show service as required by the statute.[95] Admission of service can be made only by one having capacity to be served.[96] A written admission of service must identify the process.[97]

*Official return.*See 8 C. L. 1461—The official return of service must show a legal service [98] upon the party sued,[99] and cannot be aided by reference to the statute under

84. Under B. & C. Comp. Or. §§ 56, 57, an order and published summons held sufficient where it stated the day of the first publication and required defendant to appear on or before the last day. Ranch v. Werley, 152 F 509.

85. Where affidavit shows defendant's last known residence to be 5559 State St., a notice mailed to 5857 State St. Is insufficient to confer jurisdiction. Anderson v. Anderson, 229 Ill. 538, 82 NE 311.

86. Cordray v. Cordray [Okl.] 91 P 781.

87. Clerical error in ordering "notice of object of action" to be served on defendant personally, instead of "copy of complaint," as required by Code Civ. Proc. § 440, held cured by amendment nunc pro tunc after foreclosure and sale, where a copy of the complaint was actually served. See Code Civ. Proc. §§ 419, 423, 438-440, 479. Mishkind-Feinberg Realty Co. v. Sidorsky, 189 N. Y. 402, 82 NE 448.

88. Neither § 13 nor § 21 of article 5 of the constitution prohibits the legislature from authorizing a probate judge to make an order for the publication of summons in a case pending in the district court involving a suit or controversy over which the probate court has no jurisdiction. McKnight v. Grant, 13 Idaho, 629, 92 P 989. Rev. St. 1887, § 4145, authorizing a probate or district court to make an order for the publication of summons upon a certain showing by affidavit, held not unconstitutional because it authorizes a probate judge to make an order for publication in a case not pending in his court. Id.

89. Wife not served in suit against her and husband by warning order referring to "defendant" husband by name, followed by "etc." Clark v. Raison, 31 Ky. L. R. 905, 104 SW 342. No jurisdiction acquired of unmarried woman named Florence D. Whitney by publication against "—— Whitney, and —— Whitney, his wife, whose names are unknown." Whitney v. Masemore, 75 Kan. 522, 89 P 914.

90. Property held sufficiently identified by reference to lot and block on recorded plat. Caldwell v. Bigger [Kan.] 90 P 1095.

91. Default judgment not supported by published notice to appear within certain time after certain day of month without stating the year. McLean v. Lester [Wash.] 93 P 208.

92. Under Revisal 1905, § 448, authorizing personal service on nonresidents outside of state in lieu of publication in actions in rem, such service may be made in suit to redeem land from mortgage and to enforce contract made in respect to such land. Vick v. Flournoy [N. C.] 60 SE 978.

93, 94. Ridenbaugh v. Sandlin [Idaho] 94 P 827.

95. Under Code 1899, c. 124, § 2; Code 1906, § 3798, a return by a private individual must show not only the manner and time but also the place of service. Lynch v. West [W. Va.] 60 SE 606.

96. Admission by superintendent of insurance of service on foreign corporation not sufficient in absence of allegation that it had office in New York City, which was essential to jurisdiction of municipal court (Laws 1902, p. 1488, c. 580, § 1, subd. 18), and there was no proof that defendant was an insurance company or that it had filed the written appointment provided for by Laws 1892, p. 1945, c. 690. McKeever v. Supreme Ct. I. O. F., 122 App. Div. 465, 106 NYS 1041.

97. McKeever v. Supreme Ct. I. O. F., 122 App. Div. 465, 106 NYS 1041.

98. "Member" of family held equivalent to "a person of" defendant's family within Rev. St. 1899, § 570; Ann. St. 1906, p. 597. Colter v. Luke [Mo. App.] 108 SW 608.

99. Designation of party as "within named defendant" sufficiently identifies him as the party sued. Barnes v. Colorado Springs, etc., R. Co. [Colo.] 94 P 570. Re-

which the service is made.[1] At common law, process for appearance must be returned at the same or the next term,[2] and this rule still prevails in some states.[3]

Return of service on corporations.[See 8 C. L. 1462]—A return of service on a corporation must show that the agent served was one upon whom service was authorized.[4] Where the corporation is a nonresident, the return must show that it was subject to service.[5]

Amendment of return.[See 8 C. L. 1462]—An amendment of an official return can be made only by the officer who made it or from his memoranda or facts proved to the court.[6] Return of service on a foreign corporation may be amended by inserting the title of the officer or agent served.[7] Amendment of proof of service by publication is treated in a subsequent subdivision of this section.[8]

Impeachment and contradiction of return.[See 8 C. L. 1488]—There is a strong presumption in favor of the return of an officer,[9] and, under the common-law rule, in the absence of fraud or mistake, an official return regular on its face, is conclusive upon the parties,[10] but in some of the states provision is made for the traverse of the return.[11] Such a traverse is a matter of abatement, and must be pleaded as

turn of service of process against several defendants, reciting service "by delivering to the within named defendant a true copy," etc., "on the dates and at the places hereinafter set forth," etc., naming each defendant, etc., held insufficient to show service on any of defendants. Mahan v. McManus [Tex. Civ. App.] 19 Tex. Ct. Rep. 490, 102 SW 789.

1. Wealaka Mercantile & Mfg. Co. v. Lumberman's Mut. Ins. Co. [Mo. App.] 106 SW 573.

2. Bowden v. T. A. Gillespie Co. [N. J. Law] 68 A 238.

3. Bowden v. T. A. Gillespie Co. [N. J. Law] 68 A 238. Where defendant was served before return day, but return was not made on such day, it was error to direct a return to be made and to require defendant to demur or plead, more than a term of court having intervened between issue of writ and makng of such order. Id.

Remedy in New Jersey for failure of officer to make return in proper time is by amercement of officer. Bowden v. T. A. Gillespie Co. [N. J. Law] 68 A 238.

4. Under Burns' Ann. St. 1901, § 318, authorizing service primarily on certain officers and secondarily on other officers and agents, a return which showed service merely on an "agent," without disclosing his name or that none of officers primarily subject could be found, was insufficient. Southern Indiana R. Co. v. Indianapolis, etc., R. Co., 168 Ind. 360, 81 NE 65. Such defect held not cured by § 319. Id. A return showing service on president or vice-president sufficiently shows that service was upon an agent. Venner v. Denver Union Water Co. [Colo.] 90 P 623. Under Rev. St. 1899, § 7992; Ann. St. 1906, p. 3801, authorizing service on foreign insurance company which has not complied with Rev. St. 1899, §§ 7963, 7961; Ann. St. 1906, pp. 3786, 3799, by service on adjuster, the return must show that the person served as adjuster was acting as such in the state. Wealaka Mercantile & Mfg. Co. v. Lumberman's Mut. Ins. Co. [Mo. App.] 106 SW 573. Must show that the circumstances were such as to authorize service on the officer or agent served. Knapp v. v. Wallace [Or.] 92 P 1054. Under Arizona statute service of process may be made upon the statutory agent without describing the class or kind of agent upon whom service was made. Turner v. Franklin [Ariz.] 85 P 1070.

5. In order to show compliance with Rev. St. Mo. 1899, § 570 (Ann. St. 1906, p. 597), the return must show that the corporation had an office or place of business in the state or was doing business therein. Allen v. Yellowstone Park Transp. Co., 154 F 504.

6. Ex-sheriff cannot amend return of service made by his former deputy. Knapp v. Wallace [Or.] 92 P 1054.

7. Cumberland Co. v. Lewis [Ky.] 108 SW 347.

8. See post, this section, subdivision Return of Constructive Service and Proof of Service by Publication.

9. Unangst v. Southwick [Neb.] 113 NW 989. Presumed, in absence of contrary showing, that **place** where service is recited as being made is within the officer's jurisdiction. Mahan v. McManus [Tex. Civ. App.] 19 Tex. Ct. Rep. 490, 102 SW 789.

10. See Ky. St. § 3760. Claryville, Grant's Lick & Butler Turnpike Co. v. Com. [Ky.] 107 SW 327. Sheriff's return that president or other chief officer could not be found in state, and that service was made by leaving copy, etc., could not be contradicted on motion to quash by affidavits showing that such officer could have been found. Cornwall v. Star Bottling Co. [Mo. App.] 106 SW 591.

11. Official return conclusive unless traversed. Mayerson v. Cohen, 108 NYS 59. Under municipal court act, Laws 1902, p. 1578, c. 580, § 311, judgment for plaintiff must be reversed where undisputed affidavits show that there was no service on defendants Swift v. Mutual Commission Co., 107 NYS 40. Uncontradicted affidavits filed by defendant on appeals and previously served on plaintiff's attorney, held to show that no service was made and in absence of affidavits in reply must be taken as true. Fosullo v. Bonjiorno, 105 NYS 155. On appeal, affidavit of defendant that he was not served held overcome by affidavit of process server and testimony of witness that he was with the server when the service was made, heard

such.[12] Where the return is made by a deputy-sheriff, both he and the sheriff are necessary parties to the traverse.[13] Denials of service must be direct [14] and something more than the mere conclusions of the affiant.[15] An official return is not even prima facie service of a notice, the service of which is not within the officer's official duties,[16] nor is an unofficial entry of service any evidence thereof.[17] The presumption of the correctness of an official return does not prevail in favor of a return of service by a private individual.[18] Collateral attack upon the return is treated elsewhere.[19]

Waiver of irregularities. See 8 C. L. 1463

Return on constructive service and proof of service by publication. See 8 C. L. 1463 The affidavit of constructive service must be made by the party designated by statute,[20] and must be in compliance with the statute.[21] Service by publication is not rendered defective by reason of the failure of the return to show in what particular mail box the notice was dropped.[22] Amendment of the proof is allowable,[23] but only when authorized by order of court and upon a sufficient showing of the facts.[24]

§ 7. *Defects, objections, and amendments. In general.* See 8 C. L. 1464—It is sometimes provided that service shall not be set aside where it is sufficient to inform the defendant of the suit, the plaintiff's name, and the court and time at which appearance is required.[25] The service of a summons should not be set aside because

him address defendant by name, and saw him hand defendant a copy. Halpern v. Sherman, 107 NYS 20. Affiavit of defendant, her husband, and real estate agent, that she had moved from residence where, according to affidavit of process server, the service was made, held to prevail over the affidavit of such server that process was served on her at such residence. Hogan v. Gault, 104 NYS 410. Evidence on appeal held to show fact of personal service. Sills v. Machson, 104 NYS 770. Judgment in municipal court of New York City cannot be vacated solely for purpose of traversing the return. Mann v. Meryash, 107 NYS 599. Prior to amendment of Laws 1902, p. 1562, c. 580, by Laws 1907, p. 554, c. 304, the municipal court of New York City could not vacate or set aside a judgment for nonservice of the summons, only remedy being by appeal, on which affidavits were submitted and served on plaintiff, who had right to controvert them. Id. No relief was allowable under Laws 1907, p. 554, c. 304, § 253, where defendant did not ask to have his default opened and the case set down for trial, and submitted no prepared answer or affidavit of merits, and did not even declare that he had any defense. Id. Under Municipal Court Act, § 311, affidavits filed in lower court, but not served on plaintiff, no notice being given him that they would be relied upon on appeal, could not prevail without giving plaintiff an opportunity to controvert them. Id.

12. Such a plea is dilatory and must be verified. Bell v. New Orleans, etc., R. Co., 2 Ga. App. 812, 59 SE 102. When the record shows a return prima facie valid, and the defendant discovers the existence of the return prior to the judgment, the objection for lack of service must be made by plea in abatement, accompanied by a traverse of the official return. Id.

13. Sheriff and his sureties being liable under Civ. Code 1905, §§ 4372, 4379, for defaults of deputies. Bell v. New Orleans, etc., R. Co., 2 Ga. App. 812, 59 SE 102.

14. That constable read summons to defendant in an inarticulate and unintelligible manner does not justify setting aside the service, being an argumentative denial. Allegretti v. Stubbert, 126 Ill. App. 171.

15. An allegation in an affidavit that the defendant was not served is merely a conclusion, and cannot prevail over an allegation of the specific facts by the process server. On appeal from municipal court of New York City. Mann v. Meryash, 107 NYS 599.

16. Notice to landowner to restore a fence certified by constable as served by him. Manuel v. Flynn, 5 Cal. App. 319, 90 P 463.

17. Justices of the peace not being required to make entries of service, such an entry is no evidence of mode of service. Ferguson v. Basin Consol. Mines [Cal.] 93 P 867.

18. Lynch v. West [W. Va.] 60 SE 606.

19. See Judgments, 10 C. L. 467.

20. Under Code, § 3536, the affidavit of publication must be made by the publisher, and cannot be made by the plaintiff. Empire Real Estate & Mortgage Co. v. Beechley, [Iowa] 114 NW 556.

21. Affidavit of mailing held to show that mailing was not done within time required by statute or the order of the court. Knapp v. Wallace [Or.] 92 P 1054.

22. Slattery v. Stevens, 125 Ill. App. 67.

23. Proof of publication may be amended on collateral attack upon the judgment, and it is not essential in such case to require the amendment to be filed nunc pro tunc, though it would, no doubt, be regular to do so. Ranch v. Werley, 152 F 509.

24. Amendment of affidavit of mailing. Knapp v. Wallace [Or.] 92 P 1054.

25. Burns' Ann. St. 1901, § 318. Southern Indiana R. Co. v. Indianapolis, etc., R. Co., 168 Ind. 360, 81 NE 65. Such provision cannot be invoked to aid return of service on corporation which did not show that the agent served was such as was authorized to be served by Burns' Ann. St. 1901, § 318. Id.

the copy served did not indicate that the seal had been placed on the original.[26] Failure to comply with the statutory prerequisites of published service is fatal to jurisdiction,[27] but not so as to mere irregularities.[28] A misnomer may be fatal, but is not necessarily so.[29] Failure to publish service for the required length of time is not ground for quashing the service.[30] Service will not be set aside upon the motion of one not a party to the action,[31] but a defendant may move to vacate an order of publication against codefendants who are proper and necessary parties.[32]

Alterations and amendments. See 8 C. L. 1464—An unauthorized change in a process by a stranger to the writ[33] does not affect its validity.[34] Process may be amended[35] as to the name of the court,[36] name and description of parties,[37] and title of attesting officer.[38] Bringing in new parties by amendment of process is considered elsewhere.[39]

When objections made. See 8 C. L. 1464—Objections for defects in process must be made in proper time.[40]

26. Sietman v. Goeckner, 127 Ill. App. 67.

27. Affidavit of publication made by plaintiff instead of by publisher as required by Code, § 3536. Empire Real Estate & Mortgage Co. v. Beechley [Iowa] 114 NW 556.

28. Omission of word "filed" in phrase requiring defendant to appear and answer the complaint "filed herein" held not fatal where copy of summons and complaint mailed to defendant contained such word in its proper place. McKnight v. Grant, 13 Idaho, 629, 92 P 989. Irregularities in the affidavit short of such as render it absolutely worthless may subject the judgment to reversal on appeal (Finn v. Howard [Kan.] 94 P 801) but if the material facts are inferentially, though imperfectly, stated, a judgment by default thereon will not be absolutely void (Id.). An affidavit for service by publication is not rendered invalid because it has a caption or because the persons named in the affidavit against whom the petition is filed, are referred to as "defendants," though under Code Civ. Proc. §§ 19, 78, the action does not commence until first publication and the affidavit must precede the publication, the contention that since there was no action pending the styling of the affidavit as if filed in a pending action prevented it from being such an affidavit as could constitute the basis of a prosecution for perjury, though finding some support among the English authorities and some of the American authorities, being too technical to be sustained. Becker v. Linton [Neb.] 114 NW 928.

29. Defendant "Cayce," sued as a member of C. & Co., was described as "Cracy." Notice was mailed to him as "Cracy" at street address of the firm, and returned opened and endorsed by C. & Co., as opened but not read. Hirsch v. Cammon, 56 Misc. 349, 106 NYS 814. Statement of defendant's name in published summons as "H. B. Knight" held not fatal where copy of summons and complaint mailed to defendant correctly stated his name as "H. B. McKnight." McKnight v. Grant, 13 Idaho, 629, 92 P 989. Designation of defendant in published notice as "Chase Marker," instead of "Chan Marker," held fatal misnomer. Schaller v. Marker [Iowa] 114 NW 43.

30. It only requires delay of hearing. Southern Indiana R. Co. v. Indianapolis, etc., R. Co., 168 Ind. 360, 81 NE 65.

31. Howell v. Atlantic Coast Line R. Co. [S. C.] 60 SE 1114.

32. Morgan v. Mutual Benefit Life Ins. Co., 189 N. Y. 447, 82 NE 438, afg. 119 App. Div. 645, 104 NYS 185.

33. Change without order of court, even in slightest way, after signature is forbidden by Code Civ. Proc. § 727. People v. Kuhne, 56 Misc. 30, 107 NYS 1020.

34. Change by relator's counsel held either within his implied powers to make writ conform to intent of justice who issued it, or wholly unauthorized and forbidden by Code Civ. Proc. § 727, in either of which cases its validity was not affected. People v. Kuhne, 56 Misc. 30, 107 NYS 1020.

35. Under Rev. St. 1887, § 3862, the court has control of its process, and may order a defective summons so amended as to conform to the requirements of the statute, and after amendment may order it withdrawn from the files and served. Ridenbaugh v. Sandlin [Idaho] 94 P 827.

36. Process from city court requiring appearance at superior court on date fixed by law for next term of city court held amendable by striking out reference to superior court and inserting proper reference to city court. Kelly v. Fudge, 2 Ga. App. 759, 59 SE 19.

37. Correction of summons by change of spelling of "Edmond" to "Edmund," the Christian name of defendant, held proper and allowable. Hirsch v. Camman, 56 Misc. 349, 106 NYS 814. Magistrate may permit corporate name under which defendant was sued to be changed to partnership name, to conform to proof. Pierce v. Varn, Byrd & Co., 76 S. C. 359, 57 SE 184. When summons showed that plaintiff was suing individually and alone, whereas complaint stated that he was suing in behalf of himself and all other stockholders of defendant corporation, on motion to strike the complaint the court, under authority of Code Civ. Proc. § 723, relating to amendment of process, reserved decision for five days in order to allow plaintiff time to move to amend. Wohlfarth v. National Export Ass'n, 56 Misc. 137, 107 NYS 540.

38. Process attested by judge held amendable by inserting his official title. Sapp v. Parrish [Ga. App.] 59 SE 821.

39. See Parties, 10 C. L. 1081.

40. Objection that writ was signed by

How objections made.[See 8 C. L. 1465]—Defects and irregularities in process and service thereof must be raised by special appearance and objections to jurisdiction,[41] but exemption from service may be raised by answer.[42] Where defects in the service appear on the face of the papers, objection on account thereof may be taken by motion to quash.[43] Defects not apparent on the face of the papers may be objected to by plea in abatement or rather a plea in the nature of a plea in abatement,[44] but such a plea need not conform to the rules applicable to pleas in abatement strictly so-called.[45] On a motion to vacate an order for substituted or published service, the court will inquire into the merits as exhibited by the bill to ascertain whether the case is one in which such service may be had.[46] Service of process in one action cannot be set aside in another action.[47]

Waiver of irregularities or lack of process.[See 8 C. L. 1465]—Irregularities which do not absolutely vitiate the process may be waived,[48] as may also even a total lack of process.[49]

§ 8. *Privileges and exemptions from service.*[See 8 C. L. 1467]—Parties to suits are exempt from service while going to, attending, or returning from court,[50] and such exemption will be allowed a reasonable latitude.[51] Exemption while attending court as witness under order of court exists independently of statute and is liberally construed.[52] Such exemption applies to a nonresident defendant[53] whether sued in his individual or a representative capacity.[54] The exemption applies also to witnesses summoned into the state by the Federal courts.[55] The rule in the Federal courts is that one attending court in another state, either as a witness or as a defendant, nominal or real, is exempt from service while in such attendance,[56] at least in the absence of statute clearly to the contrary.[57]

§ 9. *Abuse of process*[See 8 C. L. 1467] considered elsewhere.[58]

PRODUCTION OF DOCUMENTS, see latest topical index.

woman as deputy clerk should have been raised in limine. State v. Police Jury of Webster Parish [La.] 45 S 47.

41, 42. Stelling v. Peddicord [Neb.] 111 NW 793.

43. Electric Vehicle Co. v. Craig Toledo Motor Co., 157 F 316.

44. Beck & Pauli Lithographing Co. v. Monarch Brew. Co., 131 Ill. App. 645. Must be made by plea in abatement so as to afford the complainant an opportunity to cross-examine the witnesses. Electric Vehicle Co. v. Craig Toledo Motor Co., 157 F 316. Variance between "branch" summons to another county and the other summons must be objected to by a plea in abatement, and not by motion to strike the branch summons from the files. Drennen v. Jasper Inv. Co. [Ala.] 45 S 157.

45. Plea alleging merely that person served as secretary of corporation defendant was not such secretary at the time of such service, nor any other officer or agent, etc. held sufficient. Beck & Pauli Lithographing Co. v. Monarch Brew. Co., 131 Ill. App. 645.

46. Plaintiff's bill must make act a case within those enumerated by Fed. Judiciary Act Mch. 3, 1875, c. 137, 18 Stat. 472 (U. S. Comp. St. 1901, p. 513), in order to be entitled to an order for substituted service. Gage v. Riverside Trust Co., 156 F 1002.

47. Setting aside summons and vacation of proceedings in action instituted by one attorney could not be had in subsequent action upon same cause if action instituted by another attorney. Toma v. Foundation Co., 119 App. Div. 151, 104 NYS 263.

48. Sapp v. Parrish [Ga. App.] 59 SE 821.

49. See Appearance, 9 C. L. 232. Sapp v. Parrish [Ga. App.] 59 SE 821.

50. A suitor going to, attending, or returning from court, for the purpose of a case to which he is a party, is privileged from service of summons while so going, attending or returning, whether he be a resident or a nonresident. Barber v. Knowles [Ohio] 82 NE 1065. Nonresident privileged while attending court either as party or witness. Goldsmith v. Haskell, 120 App. Div. 403, 105 NYS 327. Defendant held a nonresident, and hence privileged while attending bankruptcy in state under order of court. Id.

51. Exemption in Ohio of suitor from service, whether resident or nonresident, does not require him to take most direct route in going to and returning from court, reasonable deviations and delays being allowable. Barber v. Knowles [Ohio] 82 NE 1065.

52, 53, 54. Sewanee Coal, Coke & Land Co. v. Williams [Tenn.] 107 SW 968.

55. Exemption under Shannon's Code, § 5616. Sewanee Coal, Coke & Land Co. v. Williams [Tenn.] 107 SW 968.

56. Skinner & Mounce Co. v. Waite, 155 F 828.

57. No such statute in Idaho. Skinner & Mounce Co. v. Waite, 155 F 828. Quaere, whether Federal courts would be bound by such a statute. Id.

58. See Malicious Prosecution and Abuse

PROFANITY AND BLASPHEMY.[59]

Use of indecent, obscene,[60] or threatening [61] words, and disorderly conduct,[62] are elsewhere treated.

There must be an invocation of divinity to constitute profane swearing.[63]

PROFERT; PROFITS A PRENDRE, see latest topical index.

PROHIBITION, WRIT OF.

§ 1. Nature, Function, and Occasion of Remedy, 1277.
§ 2. Practice and Procedure, 1279.

The determination as to whether jurisdiction exists [64] and prohibitive relief by other writs [65] are elsewhere treated.

§ 1. *Nature, function, and occasion of remedy.* See 8 C. L. 1467—The writ of prohibition is not a writ of right,[66] but an extraordinary legal remedy,[67] sometimes called the counterpart of the writ of mandate.[68] It will only issue to arrest the proceedings of a tribunal, corporation, board, or person, when such proceedings are without [69] or in excess of the jurisdiction of such tribunal, corporation, board, or person.[70]

of Process, 10 C. L. 657. See, also, Special Article, 4 C. L. 470.

59. See 8 C. L. 1467.

60. See Indecency, Lewdness and Obscenity, 10 C. L. 42.

61. See Threats, 6 C. L. 1697.

62. See Disorderly Conduct, 9 C. L. 995.

63. "Go to hell" not within Code 1906, 1295. Stafford v. State [Miss.] 44 S 801.

64. See Jurisdiction, 10 C. L. 512.

65. See Injunction, 10 C. L. 246; Mandamus, 10 C. L. 662

66. Zinn v. Barnes Dist. Ct. [N. D.] 114 NW 475.

67. Ex parte State [Ala.] 43 S 490; Crittenden v. Booneville [Miss.] 45 S 723.

68. § 1102, Code Civ. Proc. Beaulieu Vineyard v. Napa County Super. Ct. [Cal. App.] 91 P 1015. § 4994, Rev. St. 1887. Bragaw v. Gooding [Idaho] 94 P 438.

69. State v. Hinkle [Wash.] 91 P 640. Will only lie when court is proceeding without or in excess of jurisdiction. Bragaw v. Gooding [Idaho] 94 P 438; State v. Riley, 203 Mo. 175, 101 SW 567. St. § 7835. Zinn v. District Ct. of Barnes County [N. D.] 114 NW 475; Hindman v. Colvin, 46 Wash. 317, 89 P 894. §§ 1102, 1103, Code Civ. Proc. Murphy v. Bantel [Cal. App.] 91 P 805. Code Civ. Proc. § 1102. Beaulieu Vineyard v. Napa County Super. Ct. [Cal. App.] 91 P 1015. The only question is whether the justice had jurisdiction to entertain the application and has jurisdiction to make the order sought to be restrained People v. O'Gorman, 108 NYS 737. Right to maintain stands or falls on question of jurisdiction to render judgment. Lenham Mercantile Co. v. Herke, 105 NYS 472. § 479, Code Civ. Proc., provides for issuance writ to prevent inferior courts acting out of jurisdiction. Thomas v. Thompson, 31 Ky. L. R. 524, 102 SW 849.

Granted: To prevent petition of habeas corpus from being heard by court of another county than one committing prisoner. Ex parte State [Ala.] 43 S 490. To prevent court from trying accused for any offense but manslaughter where accused on trial for murder was convicted of manslaughter and new trial was ordered on appeal. Huntington v. San Francisco Super. Ct., 5 Cal. App. 288, 90 P 141. Where court takes jurisdiction of cause regardless of fact that appeal was not perfected as required by statute. Lane v. Kings County Super. Ct., 5 Cal. App. 762, 91 P 405. Under Rev. St. 1887, § 4994, to prevent hearing of appeal imperfectly perfected by not filing undertaking required by law. Gunderson v. District Ct. [Idaho] 94 P 166. To prevent one county court acting to prevent proceedings in slander case pending before court in another county. State v. Riley, 127 Mo. App. 469, 105 SW 696. To prevent one court from interfering with property in hands of receiver appointed by court of another county. State v. Reynolds [Mo.] 107 SW 487. To restrain proceedings for judicial recount of vote for mayor in cities of first class under alleged unconstitutional act, under §§ 2101, 2102, Code Civ. Proc. People v. Dayton, 120 App. Div. 814, 105 NYS 809. To prevent court from proceeding to try accused on second information charging same offense as one removed from jurisdiction of court by change of venue. Reefe v. District Ct. [Wyo.] 94 P 459.

Denied: Where justice of supreme court has jurisdiction under Laws 1897, p. 520, to revoke theatrical license. People v. O'Gorman, 108 NYS 737. Where court has been given jurisdiction by filing cross complaint. Dunbar v. Wallace [Ark.] 105 SW 257. To prevent trial by city council of chief of police with view to dismissal where offense was sufficient ground for dismissal. Thomas v. Thompson, 31 Ky. L. R. 524, 102 SW 849. To prevent justice of peace from proceeding to prevent obstruction of highway. Hughes v. Holbrook [Ky.] 108 SW 225. To prevent court of equity from giving relief by injunction against multiplicity of suits, under Rev. St. 1899, § 3631 (Ann. St. 1906, p. 2049). State v. Riley, 127 Mo. App. 469, 105 SW 696. To restrain court from enjoining pure food commissioner pending determination of legality of his acts. State v. District Ct. [N. D.] 115 NW 675. To restrain court commis-

The writ will lie only to restrain judicial and quasi judicial action,[71] and not to prevent acts of a legislative, ministerial,[72] administrative, or executive character, though performed by the judge or presiding officer of an inferior tribunal.[73] While the purpose of the writ is to relieve from pending,[74] not completed, action,[75] it cannot be used to prevent the institution of an action,[76] nor to prevent an inferior court from exercising jurisdiction in a particular case if it has jurisdiction in any case of that kind,[77] and prohibition after conviction under an alleged unlawful ordinance should be brought after sentence and not before.[78] It should not issue unless it is the only plain, speedy, and adequate remedy of the party making application therefor,[79] is necessary to attain the ends of right and justice,[80] and prevent injury or damages for which the party has no adequate or complete remedy in the usual course of law [81] by mandamus, habeas corpus,[82] injunction,[83] certiorari, or writ of error,[84] appeal,[85] or

sioner from hearing habeas corpus matter for custody of children. In re Potter [Wis.] 112 NW 1087. To prevent prosecution of suit in jurisdiction of another court. State v. Riley, 127 Mo. App. 469, 105 SW 696.

70. State v. Hinkle [Wash.] 91 P 640. Must appear inferior court is about to exceed jurisdiction. U. S. v. Barnard, 29 App. D. C. 431.

71. Court of Com'rs of Washington County v. State [Ala.] 44 S 465.

72. **Will not issue** to prevent commissioner of agriculture, a ministerial officer, from summoning and examining witnesses under oath to secure information in aid of legislation. In re Fenton, 109 NYS 321. To prevent erection of court house and jail at county seat by court county commissioners. Court of Com'rs of Washington County v. State [Ala.] 44 S 465. To prevent exercise of judgment and discretion by village authorities to grant street railway franchise. People v. Bauer, 54 Misc. 28, 103 NYS 1081.

73. Court Com'rs of Washington County v. State [Ala.] 44 S 465.

74. Will lie to prevent pending enforcement of void ordinance and repeated arrests and prosecutions rendering property and business valueless. Crittenden v. Booneville [Miss.] 45 S 723. Can only operate on pending suit. Darnell v. Vandine [W. Va.] 60 SE 996. Unavailable to prevent anticipated action on mandamus for granting appeal within authority of lower court. Gleason v. Wisdom [La.] 45 S 282.

75. Crittenden v. Booneville [Miss.] 45 S 723. Denied where proceedings complete except sentence. State v. Abrams, 119 La. 981, 44 S 807.

76. Denied to prevent carrying into execution threats of further prosecution. Darnell v. Vandine [W. Va.] 60 SE 996.

77. Unavailable where person is accused of selling liquor without a license within one mile of municipality. Darnell v. Vandine [W. Va.] 60 SE 996. Unavailable, since state may under some circumstances maintain action to prevent issuance certificate of purchase state land. Woodworth v. Marin County Super. Ct. [Cal.] 94 P 232.

78. State v. Abrams, 119 La. 981, 44 S 807.

79. **Granted** to prevent prosecution under alleged void ordinance where appeal would suspend business. Murphy v. Bantel [Cal. App.] 91 P 805; Crittenden v. Booneville [Miss.] 45 S 723; State v. Denton [Mo. App.] 107 SW 446. § 4962, Rev. St. 1887. Gunderson v. District Ct. [Idaho] 94 P 166.

80. **Available** under § 922, Code of 1906, to prevent closing pool room under void ordinance. Crittenden v. Booneville [Miss.] 45 S 723. To prevent payment into court of money where facts requisite to order for such payment do not appear. Burke v. Superior Ct. [Cal. App.] 93 P 1058. To prevent judicial recount of votes for mayor under alleged unconstitutional statute involving large expense to city. People v. Dayton, 120 App. Div. 814, 105 NYS 809. **Denied** where redress may be had in ordinary course of judicial proceeding. Crittenden v. Booneville [Miss.] 45 S 723.

81. Granted where poceeding would compel giving bail or going to jail and expense of defending proceeding in court which has lost jurisdiction by change of venue. Keefe v. District Ct. [Wyo.] 94 P 459.

82. Habeas corpus, not prohibition, lies to prevent procedure for violation of alleged void ordinance. State v. Hinkle [Wash.] 91 P 640.

83. Injunction, not prohibition, lies to prevent payment by municipal treasurer of bill approved by judge of superior court. Murphy v. Bantel [Cal. App.] 91 P 805.

84. **Certiorari, not prohibition, lies** to prevent court from confirming verdict assessing damages and benefit in proceeding to open and extend highway. U. S. v. Barnard, 29 App. D. C. 431. To prohibit issuance liquor license by city board. Hayes v. Oceanside Trustees [Cal. App.] 92 P 492. To correct erroneous rulings as to drawing, summoning, and empaneling grand jury. Zinn v. Barnes County Dist. Ct. [N. D.] 114 NW 475.

85. Ex parte State [Ala.] 43 S 490.

Appeal not prohibition lies to prevent further proceedings before justice where copy of summons served on defendant failed to state year in which returnable, reading "on the 18th day of July, 190." Lenham Mercantile Co. v. Herke, 105 NYS 472. Where summons never served or returned within three years of time proceedings commenced before justice of peace. Hubbard v. Justices' Court of San Jose Tp., 5 Cal. App. 90, 89 P 865. To restrain county judge from entering orders requiring auditor's agents to verify statements filed in proceeding against taxpayers omitting to list property for taxation. Commonwealth v. Peter [Ky.] 106 SW 306. To prevent trial after erroneous denial change

any other substantial remedy.[88] However, in some states, the writ will be granted when the court is without jurisdiction, regardless of the existence of other remedies.[87] The writ of prohibition sometimes issues to prevent conflicts with [88] and encroachments on the jurisdiction of other tribunals,[89] the incurring of useless costs,[90] and in exceptional instances to prevent a court from proceeding with a criminal or civil cause of action arising under an unconstitutional statute or a void city ordinance.[91]

§ 2. *Practice and procedure.*[See 8 C. L. 1471]—The applicant for the writ must show some interest which will be affected by the act sought to be prohibited.[92] His petition must clearly and affirmatively show that the inferior tribunal is about to proceed in a matter over which it has not jurisdiction.[93] While some states hold that no application for a writ of prohibition can be entertained until after a plea to the jurisdiction of the lower court has been urged and overruled,[94] in others the matter is discretionary with the supervising court.[95] On application for a writ of prohibi-

of venue, notwithstanding delay and expense. State v. Mason County Super. Ct. [Wash.] 91 P 639. To correct errors in granting change of venue. State v. Riley, 203 Mo. 175, 101 SW 567. Where change of venue is granted on alleged imperfect application under statute. Id. To prevent proceeding to trial after alleged erroneous refusal to dismiss. State v. King County Super. Ct. [Wash.] 94 P 472. To control action of court in vacating or modifying judgment. Weiborn v. Edwards, 31 Ky. L. R. 270, 102 SW 235. To set aside or reverse action state board of examiners in disallowing claim presented against state under § 18, art. 4, Constitution, and Sess. Laws, 1905, p. 366. Bragaw v. Gooding [Idaho] 94 P 438. To arrest proceedings by trial court on indictment found by grand jury irregularly drawn, summoned, and impaneled. Zinn v. Barnes County Dist. Ct. [N. D.] 114 NW 475. To restrain superior court from proceeding with trial on indictment alleged to have been found without evidence to show petitioner guilty of public offense. Brobeck v. California Super. Ct. [Cal.] 92 P 646. Where indictment states or attempts to state offense of which court has jurisdiction. Kitts v. Nevada County Super. Ct., 5 Cal. App. 462, 90 P 977. To review action of court in denying right to trial by jury in condemnation proceedings. Beaulieu Vineyard v. Napa County Super. Ct. [Cal. App.] 91 P 1015. Where purpose was to question whether facts justified condemnation of land. Reclamation Dist. No. 551 v. Sacramento County Super. Ct., 151 Cal. 263, 90 P 545. To correct error in refusing permission to intervene and defend in foreclosure proceeding. Hindman v. Colvin, 46 Wash. 317, 89 P 894. To question sufficiency of pleadings. State v. Riley, 127 Mo. App. 469, 105 SW 696. Cause action. Woodworth v. Marin County Super. Ct. [Cal.] 94 P 232. To determine constitutionality of act submitting question of detachment from county to voters. Herbert v. Superior Ct. [Cal.] 91 P 800. Where only question is authority of city to pass ordinance in absence of special authority. State v. Hinkle [Wash.] 91 P 640. To restrain arrest and prosecution for maintaining smoke stack in violation alleged void ordinance. State v. Shannon [Mo. App.] 108 SW 1097. To prevent prosecution under alleged void ordinance. State v. Hinkle [Wash.] 91 P 640. To question court's action in leaving value of tract sought to be condemned to jury, and reserved to itself after determination of jury question of necessity of tract to be condemned. Beaulieu Vineyard v. Napa County Super. Ct. [Cal. App.] 91 P 1015.

86. U. S. v. Barnard, 29 App. D. C. 431.

87. Enforcement judgment for costs unauthorized by statute prohibited, as when court rendering it has no jurisdiction of the cause on any other ground. Bice v. Boothsville Tel. Co. [W. Va.] 59 SE 501. Under art. 94, Const., even though the applicant in the end may have right to appeal. Ferridy v. Middlesex Banking Co., 118 La. 770, 43 S 403. Where writ of habeas corpus is attempted to be sued out before judge of another county than one committing prisoner. Ex parte State [Ala.] 43 S 490.

88. To prevent clash of jurisdiction, court may take matter and pass upon question involved, particularly if it does not abundantly appear that adequate remedy by appeal may be had. Ferriday v. Middlesex Banking Co., 118 La. 770, 43 S 403.

89. To prevent interference by one court with persons or property in custody of another. State v. Reynolds [Mo.] 107 SW 487.

90. Ferriday v. Middlesex Banking Co., 118 La. 770, 43 S 403.

91. State v. Shannon [Mo. App.] 108 SW 1097.

92. Railroad corporation, not taxpayer or resident of village, owning no property or vested rights therein, having no franchise or application therefor over proposed route of rival corporation, is not entitled to writ of prohibition preventing village granting franchise to rival corporation. People v. Bauer, 54 Misc. 28, 103 NYS 1081.

93. Petition based on presumption that appointees under order of court will disregard jurisdiction given them in premises, insufficient. Bowyer v. Green [W. Va.] 60 SE 492.

94. Mere notification of intention to apply for writ of prohibition insufficient. Gleason v. Wisdom [La.] 45 S 282.

95. State v. Riley, 127 Mo. App. 469, 105 SW 696. When lack of jurisdiction in lower court is apparent on face of proceedings, it is not fatal to application for prohibition that no plea to jurisdiction of lower court

tion, the verity of the recitals of finding and the judgment of trial court will be presumed.[96] While the procedure by demurrer to the petition is unusual and irregular in prohibition, yet where the parties acquiesce and no exceptions are presented the case will be considered as one arising on motion to discharge a rule in prohibition.[97] In New York statutes regulate the petition for the writ,[98] the title,[99] and the mode of questioning the sufficiency of the papers on which the writ is granted,[1] and in Idaho the title of the writ is governed by statute.[2]

PROMOTERS, see latest topical index.

PROPERTY.

§ 1. **Definition and Nature, 1280.** Realty or Personalty, 1280. Formulae, Information, Processes, Literary, and Like Mental Productions, 1281.
§ 2. **Creation, Possession, and Ownership, 1281.**
§ 3. **Estates in Personalty, 1282.** Life Estates, 1282. Reversions, 1282. Vested and Contingent Interests and Remainders, 1282. Interests Created in Individual Cases, 1283. Mutual Rights of Present and Future Tenants, 1283. Capital and Income, 1284.
§ 4. **Transfer, Loss, and Abandonment, 1285.**

Scope of title: This topic includes general principles pertinent to the nature of property and estates in personal property. Real property is elsewhere considered,[3] as are matters relating to contracts respecting personal property,[4] taxation,[5] and the doctrine of fixtures.[6]

§ 1. *Definition and nature.*[See 8 C. L. 1471]—"Property" embraces everything of exchangeable value, including money, things in action, and evidences of debt.[7]

Realty or personalty.[See 8 C. L. 1472]—Standing timber is realty, and its sale affects realty.[8] A mere right to plant and take oysters is not "real estate."[9] A ten year real estate lease is a chattel real.[10]

Corporate stock is personalty and passes as such on its owner's death.[11] Liquids drawn from trees are personalty from the moment of extraction.[12] As between them-

has been made without avail in that court. Id. Rule respecting application to inferior court to vacate unauthorized judgment before awarding writ of prohibition to prevent enforcement thereof is discretionary, and judgment of the circuit court on review in supreme court of appeals will not be reversed for failure of circuit court to require such application before awarding the writ. Bice v. Boothsville Tel. Co. [W. Va.] 59 SE 501.

96. Beaulieu Vineyard v. Napa County Super. Ct. [Cal. App.] 91 P 1015.

97. Bowyer v. Green [W. Va.] 60 SE 492.

98. Under § 2091, Code Civ. Proc., providing that prohibition may issue on affidavit or other written proof showing proper case therefor, unverified petition is insufficient. In re Fenton, 109 NYS 321.

99. Under Code Civ. Proc. § 1994, proceeding on application of private person against W. and G. officers should be entitled "The People of the State of New York on the relation of F. against W. and G. as such officers." In re Fenton, 109 NYS 321.

1. Objection to sufficiency of papers upon which writ is granted may be taken in return or presented by motion at special term of court before return day, under § 2097, Code Civ. Proc. People v. Bauer, 54 Misc. 28, 103 NYS 1081.

2. Title "In matter of application of B., state auditor, for writ of prohibition to G., etc.," erroneous under § 4955, Rev. St. 1887. Bragaw v. Gooding [Idaho] 94 P 439.

3. See Real Property, 8 C. L. 1676.

4. See Bailments, 9 C. L. 323; Chattel Mortgages, 9 C. L. 560; Sales, 8 C. L. 1751.

5. See Taxes, 8 C. L. 2058.

6. See Fixtures, 9 C. L. 1367.

7. Promissory note held attachable as property. Fishburn v. Londershausen [Or.] 92 P 1060. Under Rev. St. 1887, § 16, money is personal property. Sencerbox v. First Nat. Bk. [Idaho] 93 P 369.

8. Midyette v. Grubbs [N. C.] 58 SE 795. Title could be conveyed by statutory deed. Morgan v. Pott, 124 Mo. App. 371, 101 SW 717. Standing timber is realty, and owner who has conveyed it by deed is not revested with title by mere verbal declarations of grantee not amounting to estoppel. Warren v. Ash, 129 Ga. 329, 58 SE 858.

9. One who has only a right to plant and take oysters from a bay is not the owner of "real estate" and as such entitled to quiet title to such right. Catchot v. Zeigler [Miss.] 45 S 707.

10. Real Prop. Law N. Y. c. 547, § 23. Not proper subject of chattel mortgage. In re Fulton, 153 F 664.

11. Elkhorn Land & Imp. Co. v. Childers, 30 Ky. L. R. 1121, 100 SW 222.

12. Crude turpentine in boxes in trees in state to be dipped up held subject to replevin. Richbourg v. Rose, 53 Fla. 173, 44 S. 69.

selves parties may treat as personalty things which would otherwise be considered realty.[13]

Formulae, information, processes, literary, and like mental productions. See 8 C. L. 1472—Though an inventor of an unpatented secret formula has a qualified right in it to the extent that he may maintain the secrecy and prevent its disclosure or use by persons obtaining knowledge of it through fraud or breach of contract,[14] the formula is not property within the meaning of a provision prohibiting corporations from issuing stock except for labor or "property actually received."[15] An author has, at common law, a right of property in his manuscript, and before publication he is entitled to its exclusive use.[16] This rule applies though the contents are not wholly the product of his own brain,[17] but the right to the exclusive use or multiplication of copies ceases with publication.[18] Independent of letters patent, an inventor has an exclusive common-law property in his invention until by publication it becomes the property of the general public.[19]

§ 2. *Creation, possession, and ownership.* See 8 C. L. 1472—Subject to exceptions in the interest of justice, the title to tangible personalty is governed by the law of its situs.[20] The word "owner" has a wide application, but with respect to land it primarily means one who is seized of a freehold therein and who owes no service to another which limits his dominion.[21] Ownership of property may be shown by proof of possession and control [22] as well as by proof of signs displayed thereon.[23] Where the ownership of personalty is undisputed, slight evidence will suffice to establish it.[24]

13. Verbal chattel mortgage on growing crops. Odom v. Clark [N. C.] 60 SE 513. Hay "now cut or that shall be cut" becomes personalty in hands of purchaser. Allen v. Bryant, 4 Cal. App. 371, 88 P 294. Slag dumped from ore smelter or mill could be sold as personalty without actual severance. Manson v. Dayton [C. C. A.] 153 F 258.

14. O'Bear-Nester Glass Co. v. Antiexplo Co. [Tex.] 108 SW 967.

15. Const. art. 12, § 6. O'Bear-Nester Glass Co. v. Antiexplo Co. [Tex.] 108 SW 967.

16. Vernon Abstract Co. v. Waggoner Title Co. [Tex. Civ. App.] 107 SW 919.

17. As where material is gathered from public records and other sources and an abstract of title to lands is thus compiled. Vernon Abstract Co. v. Waggoner Title Co. [Tex. Civ. App.] 107 SW 919.

18. Vernon Abstract Co. v. Waggoner Title Co. [Tex. Civ. App.] 107 SW 919. Furnishing or offering to furnish abstracts to general public held publication depriving owner of exclusive right to multiply copies, though sale was to persons procuring abstracts for sole and special purpose of examining title to specific property. Id. The common-law right which an author or owner of a literary work has to prevent its publication can exist only so long as the work is kept private (State v. State Journal Co. [Neb.] 110 NW 763), if it is published without a compliance with the copyright act, the right is abandoned (Id.). Where supreme court reports had already been made public and had not been copyrighted, state had no cause of action against one who contracted with it to manufacture certain volumes thereof for manufacturing and selling such volumes on his own account. Id.

19. Westcott Chuck Co. v. Oneida Nat. Chuck Co., 122 App. Div. 260, 106 NYS 1016.

20. Title to personalty belonging to Iowa corporation, but stored in New Jersey, and not merely in transitu, should be determined by law of New Jersey as between residents of Iowa and residents of other states. Schmidt v. Perkins [N. J. Err. & App.] 67 A 77.

21. Mere tenant held not "owner" entitled under statute to object to granting of liquor license. American Woolen Co. v. North Smithfield Town Council [R. I.] 69 A 293.

22. North American Restaurant & Oyster House v. McElligott, 129 Ill. App. 498. If other evidence is introduced to control it, whole evidence is considered together. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412. Ownership of personalty may be established by acts of dominion as well as by direct testimony (City of La Porte v. Henry [Ind. App.] 83 NE 655), possession being prima facie proof of ownership (Id.; In re Diamond, 158 F 370; Hannis Distilling Co. v. Berkeley County Ct. [W. Va.] 59 SE 1051). The burden is on the person in possession to establish want of ownership where he seeks relief from the burdens of an owner. Hannis Distilling Co. v. Berkeley County Ct. [W. Va.] 59 SE 1051. Where liquor was in bonded warehouse in joint control of distiller and Federal storekeeper, evidence held insufficient to show want of ownership in distiller who sought to avoid taxation. Id.

23. Such proof makes a prima facie case in action for personal injuries against owner of the property. North American Restaurant and Oyster House v. McElligott, 129 Ill. App. 498.

24. City of La Porte v. Henry [Ind. App.] 83 NE 655.

Possession follows title to realty in the absence of any other possession adverse to it,[25] and the burden is on him who alleges the unlawful possession of land.[26]

§ 3. *Estates in personalty.*[27]—The rule in Shelley's case applies seemingly to personalty.[28]

Life estates.—Life estates may be created in personal property as well as in real estate,[29] but perishable personalty bequeathed for life vests absolutely.[30]

Reversions.—A reversion is beyond the control of the life tenant and not subject to inheritance tax on his death.[31]

Vested and contingent interests and remainders.—The principles of distinction between vested and contingent remainders apply to personalty as well as to realty.[32] When the time of division or payment is of the substance of the gift, it is contingent,[33] but it is vested when such time is mentioned only as a qualifying clause of payment or division.[34] A direction for future payment to or division among a class vests title in those who answer the description at the time of distribution,[35] but where interest is given pending enjoyment of the principal in possession, the principal vests in right immediately.[36] A legacy is vested rather than contingent when the intention is doubtful.[37] If land is devised with direction that in case of its sale by the devisee a portion of the proceeds shall go to another, death of the devisee without sale ex-

25. Holder of legal title may sue in trespass. Newman v. Mountain Park Land Co. [Ark.] 107 SW 391.

26. Langston v. Cothran [S. C.] 58 SE 956.

27. See Life Estates, Reversions and Remainders, 8 C. L. 762.

28. Vogt v. Vogt, 26 App. D. C. 46. Rule, though sometimes followed in cases of bequests, will not be allowed to defeat a plain intent. In re Dull's Estate, 217 Pa. 358, 66 A 567.

29. "Leases" of stock from children to father for life. State v. Washington County Probate Ct., 102 Minn. 268, 113 NW 888. Widow held entitled under will to income of personalty for life with right to use principal if needed. In re Trelease, 115 App. Div. 654, 100 NYS 1051.

30. Medlin v. Simpson, 144 N. C. 397, 57 SE 24. Where husband's will gave wife all estate, real and personal, for her life, she was entitled to possession of all the personalty and to consume it if she chose to do so. Simpson's Estate, 34 Pa. Super. Ct. 115.

31. Leases from children to father of stock previously transferred by him to them held to create life estate in father with reversion in children beyond father's control and not subject to inheritance tax on death of father. State v. Probate Ct. of Washington County, 102 Minn. 268, 113 NW 888.

32. Voorhees v. Singer [N. J. Eq.] 68 A 217. Interest to W. for life, principal on his death to his children, if any, if not to F. or her heirs, held to give F. a vested remainder In re Allison, 63 Misc. 222, 102 NYS 887, afd. 107 NYS 1119.

33. Crawford v. Engram [Ala.] 45 S 584. Where the only words of gift are in a direction to divide or pay at a future time, the gift is future and not vested. Olsen v. Youngerman [Iowa] 113 NW 938; Hess v. Zahn, 57 Misc. 515, 107 NYS 951.

34. Crawford v. Engram [Ala.] 45 S 584. A legacy will not be held contingent so as not to vest until the time for division or payment arrives where the gift is to legatees by name and the will as a whole shows a different intent. Id. Provision for sale of property after death of wife and division among named children gave vested interests to children. Id. If the purpose of a testator in fixing a future time for payment or division is personal to the legatee, the gift will not vest until the time appointed (Pearson v. Hanson, 230 Ill. 610, 82 NE 813), but if the postponement is merely for the convenience of the property or fund, it will vest immediately even though there is only a direction to pay or distribute in futuro (Id.). Trust property held vested and devisable though enjoyment of corpus was postponed. Id. A legacy is vested if futurity is annexed merely to the time of taking and not to the gift itself. Hall v. Ayer's Guardian [Ky.] 105 SW 911. Gift of money to daughter to be paid on her becoming 21 or marrying gave vested interest with only enjoyment postponed. Id. Two of three stock legacies to be held by trustees for seven years held to vest absolutely on death of testatrix, and the third to vest at that time subject to divestiture by death of legatee within the seven years. Orange County Trust Co. v. Morrison, 56 Misc. 88, 106 NYS 940.

35. Olsen v. Youngerman [Iowa] 113 NW 938; Bascom v. Weed, 53 Misc. 496, 105 NYS 459; In re Benner's Will [Wis.] 113 NW 663. Interest to one for life, then principal to heirs of testator's body then surviving, vested principal only on death of life beneficiary. In re Wilson, 53 Misc. 238, 104 NYS 480. Interest annually to two sons for life, after their death principal to go to their surviving children at age of 21, vested principal at termination of life estates in son's children then living, with right of possession postponed until they should become 21. In re Benner's Will [Wis.] 113 NW 663.

36. In re Benner's Will [Wis.] 113 NW 663.

37. Crawford v. Engram [Ala.] 45 S 584.

tinguishes the interest of the other person.[38] A contingent gift may be reached by creditors.[39] Whether one is entitled to only a portion of a remainder under a will must necessarily depend upon its terms.[40]

Interests created in individual cases.[41]—Where the income of personalty is bequeathed without remainder or contingency, it is a gift of the property itself [42] unless a contrary intent is shown.[43] Subsequent clauses will not cut down a gift given in clear terms unless an intention to that effect is shown with reasonable certainty.[44]

Mutual rights of present and future tenants.—A life tenant occupies the position of a quasi-trustee.[45] He is entitled to the interest on money and choses in action,[46] but the principal sum coming into his hands must be kept intact for the remainderman.[47] His personal representative is chargeable with the proceeds of sales of the property [48] and must turn over to the remainderman all personalty on hand.[49] In the case of money or its equivalent or property which must be converted into money, a life tenant under a will is entitled only to income therefrom, and not to possession unless a contrary intent is shown by the will,[50] and where one bequeaths to the maker of notes interest thereon for life, the maker is not entitled to possession and control of the notes themselves.[51] Where a trustee and life beneficiary commingle trust and individual funds, the burden is on them to show that expenditures for securities or improvements were made with money of the life beneficiary, and not with that of the estate.[52] The possession of a life tenant is subject to the right

38. Devisee not bound to sell. In re Walker's Estate [Pa.] 68 A 53.

39. Will construed to give a legacy on happening of three contingencies, and to "vest" legatee's interest on death of testator so that it passed to his trustee in bankruptcy. Watkins v. Bigelow, 93 Minn. 361, 101 NW 497.

40. Will construed to give a daughter only one-half of remainder of a fund bequeathed to widow for life, other half lapsing into residue. Leggett v. Stevens, 185 N. Y. 70, 77 NE 874.

41. All personalty to wife, but provision that whatever should remain at her death should go over, gave wife only the use for life with beneficial power of disposition and remainder over. Tuthill v. Davis, 121 App. Div. 290, 105 NYS 672. One-eighth of estate in trust for use of daughter passed to daughter's estate and not under residuary bequest. Twilley v. Toadvine [Md.] 66 A 1030. Direction to pay interest annually to two sons during their lives, and principal after their death to their surviving children at age of 21, gave survivor of the two sons all the interest for life. In re Benner's Will [Wis.] 113 NW 663. Will giving sisters $100 each held not to give survivor $200. Driggs v. Plunkett [Ky.] 105 SW 976.

42. Bequest to churches of moiety of dividends from mining stock vested entire estate in that moiety of stock of which dividends were bequeathed. Wilkinson v. Rosser's Ex'r, 31 Ky. L. R. 1262, 104 SW 1019. A bequest of the income from a trust fund without limit as to time or gift over carries the corpus itself. Where only condition was against widow's remarriage. Busby v. Busby [Iowa] 114 NW 559.

43. Interest on $2,000 for life; on death, principal to go to heirs. In re Dull's Estate, 217 Pa. 358, 66 A 567.

44. Legacies held not subject to condition that legatees be part of household at testatrix's death. Lowe v. Whitridge, 105 Md. 183, 65 A 926. Absolute gift to wife held not cut down by provision for disposition of remainder, if any, after her death. Farney v. Weirich, 52 Misc. 245, 103 NYS 38. Expression of desire that fund should be used as scholarship fund held not to qualify absolute gift. Farmers Loan & Trust Co. v. Shaw, 56 Misc. 201, 107 NYS 337. Absolute gift not sut down by subsequent doubtful clause. In re Pearce's Estate, 53 Misc. 215, 104 NYS 469.

45. Widow having right under will to income of personalty for life, and right to principal if needed, held trustee for residuary legatees. In re Trelease, 115 App. Div. 654, 100 NYS 1051.

46. Roush v. Hyre [W. Va.] 57 SE 368. See, also, post, Capital and Income.

47. Roush v. Hyre [W. Va.] 57 SE 368. Evidence held to show that payments to life beneficiaries were no part of corpus, relieving them of liability to account to remaindermen. Wilson v. Gordon [S. C.] 61 SE 85.

48. Roush v. Hyre [W. Va.] 57 SE 368. Proceeds of personalty after death of life beneficiary goes to remainderman. Wilson v. Gordon [S. C.] 61 SE 85.

49. Roush v. Hyre [W. Va.] 57 SE 368.

50. Will held to show intention to give life tenant possession, but not that she should encroach on principal. Scott v. Scott [Iowa] 114 NW 881.

51. They should be held by executor uncollected until maker's death, thus suspending limitations for that period. Church's Ex'r v. Church's Estate, 80 Vt. 228, 67 A 549.

52. Stocks held purchased, and improvements made with money belonging to estate. Putnam v. Lincoln Safe Deposit Co., 118 App. Div. 468, 104 NYS 4. Beneficiary held liable for amount of note given for shortage in trust fund. Id. Should not be charged with

of remaindermen to have the property in a state of security to be forthcoming upon the termination of the life estate.[53] Life tenants of animate and inanimate personalty are not accountable to the remaindermen for the death or unavoidable loss of the former or the ordinary wear of the latter.[54]

Capital and income.—Where one is entitled to income only after the amount of the fund has been ascertained, his estate is not entitled thereto where he dies before that time.[55] Where articles of partnership provide for a continuation of the firm for a certain period after death of a member, a deceased member's share of profits for such period will be treated as income.[56] Stock dividends representing profits, whether issued in cash, stock, or other property, belong to the life tenant of the stock,[57] but so-called dividends representing merely corporate capital go to the remaindermen.[58] Since dividends presumptively represent profits, the burden is on him who claims that they are capital.[59] Dividends go to the life tenants only so far as earned after the latter became such.[60] The privilege of a stockholder to subscribe for additional stock belongs to the remainderman.[61] As between life tenants and

amount received from sale of certain securities where other securities held to belong to estate were purchased therewith. Id.

53. Where executrix was decreed to turn over certificates to a legatee "to be held by him under the will," executrix was authorized to indorse thereon memoranda that they should be held under the terms of the will. De Loney v. Hull, 128 Ga. 778, 58 SE 349. Before personalty like mining stock is turned over to a life tenant, he should be required to execute a bond for forthcoming of the estate to remaindermen, or a trustee should be appointed to hold the property in accordance with the terms of the document creating the estate. Wilkinson v. Rosser's Ex'r, 31 Ky. L. R. 1262, 104 SW 1019. That husband's will exonerated wife from giving bond as executrix held insufficient to show testator's intention that no security should be exacted to secure her acts as trustee for remaindermen. Scott v. Scott [Iowa] 114 NW 881. Where money or its equivalent is bequeathed for life without direction as to security in favor of the remaindermen, the exaction of security is discretionary with the court and depends on a showing of liability of waste. Id. Held proper to require security where life tenant who was not kindly disposed toward remaindermen spent most of her time in another state and had made certain loans without personal investigation as to security. Id. Where executrix, also life tenant, failed to promptly account, and endangered estate by entrusting title to an unfit agent, court properly required her to secure remainderman though as executrix she was not required to give bond and though will gave her use of principal so far as in good faith she should deem it necessary for her support. Reed v. Reed [Conn.] 68 A 852.

54. Negroes lost as result of Civil War, mules dead, and machinery worn out. Wilson v. Gordon [S. C.] 61 SE 85.

55. Will creating trust construed to give children yearly proportional parts of fund to be ascertained by deduction of expenses, and widow's share from income, so that estate of child dying was not entitled to share of income accruing after last settlement and before death. Green v. Bissell, 79 Conn. 547, 65 A 1056. The representatives of one who was entitled to annual interest on a note for life are not entitled to interest for the year which was unexpired at the death of the life beneficiary. Rogers v. Osborne, 146 Mich. 613, 13 Det. Leg. N. 898, 109 NW 1123.

56. Passed to life beneficiary under will. In re Weaver's Estate, 53 Misc. 244, 104 NYS 475.

57. Kalbach v. Clark, 133 Iowa, 215, 110 NW 599. Dividend in cash out of accumulated surplus and undivided profits belongs to life tenant. Richmond v. Richmond, 108 NYS 298. That the value of stock is lessened by a dividend is immaterial in determining whether the dividend is income or capital, such question being determined by the origin of the dividend. Id. Earnings of a corporation properly payable in regular dividends belong to life tenants of its stock, and not to the remaindermen, though allowed to accumulate from year to year and finally paid out in the shape of scrip. Where obligations were issued equal to amount of income spent for realty and permanent improvements, and deed of trust provided that all dividends, whether in money or scrip, should go to life tenant. In re Robinson's Trust, 218 Pa. 481, 67 A 775. In Connecticut it is held that, while cash dividends are regarded as income passing to the life tenant (Green v. Bissell, 79 Conn. 547, 65 A 1056), stock dividends are capital inuring to the benefit of the remaindermen (Id.). Distribution pro rata among shareholders of shares in treasury of corporation held a cash dividend, though resolution designated same as stock dividend. Id.

58. Kalbach v. Clark, 133 Iowa, 215, 110 NW 599, giving the different rules. Additional stock held not to represent profits, but a mere change in form of ownership of corporate capital. Id.

59. Kalbach v. Clark, 133 Iowa, 215, 110 NW 599.

60. New stock paid for by dividend simultaneously declared held a dividend. Brown v. Brown [N. J. Eq.] 65 A 739.

61. Richmond v. Richmond, 108 NYS 298. Proceeds of sale of right of shareholders to subscribe to increased issue of stock became principal, and did not go to life tenants. Brown v. Brown [N. J. Eq.] 65 A 739.

remaindermen, assets distributed among stockholders by corporations in process of liquidation after dissolution are to be regarded as capital, and not income.[62]

Rights as against third persons.

§ 4. *Transfer, loss, and abandonment.* See 8 C. L. 1472, 1478—Transfer is usually by sale,[63] gift,[64] inheritance,[65] or will.[66] In the absence of statute or estoppel,[67] one cannot acquire title to personalty by purchase in good faith from one who has no title.[68]

A finder of property may hold it as against all persons except the owner.[69] The status of title to land is not affected by the distruction of the record thereof.[70]

Abandonment is the voluntary forsaking or giving up of property without concern as to who may subsequently take possession.[71] It consists of nonuser and intention.[72] Mining and similar rights or privileges may be lost by abandonment,[73] but equity will not divest title to land for mere laches short of the period of limitations, the same being unaccompanied by supervening equities.[74] One must act with reasonable diligence in the assertion of his rights to property not in his possession.[75] Hence statutes authorizing the distribution of the estates of absentees after the lapse of many years are generally upheld.[76]

Prosecuting Attorneys; Prostitution; Proxies; Publication; Public Buildings and Places, see latest topical index.

PUBLIC CONTRACTS.

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62. Curtis v. Osborne, 79 Conn. 555, 65 A 968.

63. See Sales, 8 C. L. 1751; Judicial Sales, 10 C. L. 507; Executions, 9 C. L. 1328.

64. See Gifts, 9 C. L. 1534.

65. See Descent and Distribution, 9 C. L. 970.

66. See Wills, 8 C. L. 2305.

67. By standing by in silence and allowing property to be sold to an innocent purchaser, one estops himself from afterwards asserting ownership. Where lessor knew that property was to be sold by lessee as junk, he was required to exercise his rights of ownership within a reasonable time, such time being for the jury. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412. That plaintiffs who had purchased cotton cloth left it in the possession of the selling agents in accordance with custom did not bar recovery from agent's innocent pledgee. Schwab v. Oatman, 56 Misc. 393, 106 NYS 741. See, also, Estoppel, 9 C. L. 1217.

68. Purchase from mere bailee. Heisley v. Economy Tool Mfg. Co., 33 Pa. Super. Ct. 218.

69. Notwithstanding demand for it by police officer. Ryan v. Chicago, 124 Ill. App. 188.

70. Dixon v. Harris [Ky.] 105 SW 451.

71. Wilmore Coal Co. v. Brown, 147 F 931. Custom of mineral water company of purchasing its own old bottles from bottle dealers who had obtained them from purchasers of water held to show abandonment thereof by company. Enno-Sander Mineral Water Co. v. Fishman, 127 Mo. App. 207, 104 SW 1156. Statement by one, whom plaintiff's manager had authorized to decide whether certain property was worth retaining or not, that he did not think it was of any value, held admissible on issue of abandonment. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412. Evidence held hearsay, and not sufficient to justify holding that one alleged to have written a letter had abandoned certain land. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 SW 606.

72. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112. Nonuser alone, at least short of the period of limitations, is not sufficient (Id.), but where continued for a considerable time and coupled with acts showing intention of owner not to repossess himself of thing relinquished, it may constitute abandonment (Id.). Evidence held to sustain finding of abandonment of priority of water rights. Id.

73. Failure to operate under mining leases. Wilmore Coal Co. v. Brown, 147 F 931.

74. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 SW 606.

75. Nelson v. Blinn [Mass.] 83 NE 889.

76. Statute authorizing distribution after 14 years. Nelson v. Blinn [Mass.] 83 NE 889. See Absentees, 9 C. L. 9.

This topic includes all questions relating to the making, validity, and performance of public contracts generally, excluding some matters peculiar to contracts of particular public corporations,[77] and excluding also matters common to private contracts [78] and those peculiar to contracts for public improvements.[79]

§ 1. *Power of government and authority of its officers to contract.*—See 8 C. L. 1473—Municipal corporations can make such contracts as they are expressly authorized to enter into,[80] such contracts as are essential to the declared objects and purposes of the corporation, not simply convenient but indispensable,[81] and such as are implied as incident to powers granted,[82] and no others.[83] A distinction is made as to the validity of corporate contracts between those that are ultra vires, as being beyond scope of corporate powers,[84] and those within corporate powers, though the power is irregularly exercised.[85] Both parties having acted upon a contract for a long time, the city may be estopped from asserting that the contract was ultra vires and void.[86] If the method of entering into the contract is prescribed by charter or statute, such method must be strictly complied with,[87] and the doctrine of implied contract does not ordinarily apply,[88] persons dealing with municipal corporations being bound to take notice of the limitations of their powers; [89] but acceptance of benefits has been

77. See Counties, 9 C. L. 827; Municipal Corporations, 10 C. L. 881; States, 8 C. L. 1970; United States, 8 C. L. 2207.

78. Contracts, 9 C. L. 654.

79. See Public Works and Improvements, 8 C. L. 1506.

80. Robinson-Humphrey Co. v. Wilcox County, 129 Ga. 104, 58 SE 644; Blackburn v. Delta County [Tex. Civ. App.] 20 Tex. Ct. Rep. 576, 107 SW 80; Brunnitt v. Ogden Waterworks Co. [Utah] 93 P 828. City acting under unlimited grant of state might make binding contract with waterworks company, fixing maximum rates for thirty years, and such contract beyond legislative or municipal alteration, in absence of suggestion of fraud. City of Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 Law. Ed. 1155.

81. Under Tonawanda Charter, § 19, tit. 20 (Laws 1905, p. 782, c. 357), a contract obligating the city to furnish water to a plant outside the city and making the city liable for damages for failure to furnish, is invalid, since the charter authorizes only a sale of surplus water as it may exist from time to time. Simson v. Parker, 190 N. Y. 19, 82 NE 732.

82. Though a resolution of intent to make a sewer, and the notice inviting proposals for bids, simply speaks of the construction of a sanitary sewer, a contract was authorized which provided that manholes and lampholes should be constructed in connection with the work and is a part thereof. Comstock v. Eagle Grove City, 133 Iowa, 589, 111 NW 51.

83. A city cannot, before acquiring a waterworks system, enter into a contract with an individual, whereby he shall have charge for an indefinite period of the additions which may be made to a waterworks plant of a private corporation after the city has acquired it. Witmer v. Jamestown, 109 NYS 269.

84. Bell v. Kirkland, 102 Minn. 213, 113 NW 271.

85. Bell v. Kirkland, 102 Minn. 213, 113 NW 271. Where a municipal corporation enters into a contract which, under the existing law, it was authorized to make, but where the procedure laid down by the statute was not followed, the contract is not ultra vires, but irregular, and enforcible at the instance of the contractor or his privies. Rogers v. Omaha [Neb.] 114 NW 833.

86. Preston v. West Beach Corp. [Mass.] 81 NE 253.

87. Rev. Pol. Code, § 1209, requiring a yea and nay vote to be taken and entry on board records, was substantially complied with. State v. Holt [Wis.] 111 NW 1106. Where a city attempts to contract for the use of a patented pavement without following the charter requirements covering the use of patended articles, the contract is void. Cawker v. Milwaukee [Wis.] 113 NW 417. Under a statute creating commissioners of roads and revenues and authorizing special as well as regular meetings, and providing that two members of the board shall constitute a quorum, two members may exercise corporate authority, either at special or regular meetings, in the matter of executing contracts for constructing bridges. Gaines v. Dyer, 128 Ga. 585, 58 SE 175. Act May 12, 1886 (83 Ohio Laws, p. 146), authorizing cities of fourth grade, second class, to contract for water supply for fire purposes, superseded prior legislation and renders inapplicable Act Jan. 29, 1885 (82 Ohio Laws, p. 11), requiring municipal contracts generally to be submitted to the qualified voters for ratification. City of Defiance v. McGonigale [C. C. A.] 150 F 689.

88. A municipal corporation is not liable on an implied contract in conflict with the statute prescribing a mode of contracting by which alone it can bind itself. Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44. A contractor was bound by the provisions of a city charter as to the manner of making improvements, and could not recover for services under an implied contract. City & County of Denver v. Hindry [Colo.] 90 P 1028.

89. Compensation for services beyond the contractual powers of a corporation is not

frequently held to raise an obligation to pay.[90] Compliance with a contract in excess of corporate powers does not, by estoppel and relation back, supply the power originally wanting.[91] Where no method is prescribed, contracts which fall within the ordinary powers of a city may be entered into without resolution or ordinance, and, in the absence of any statute requiring it, without writing.[92] Public officers [93] and boards [94] have only such power to contract on behalf of the public as is conferred upon them by law, and one contracting with them is bound to know the scope of their authority.[95] The public powers devolved by law or public charter upon the governing body of a municipality cannot be delegated to others.[96] As to matters within the business functions of municipalities, officers may bind the municipality beyond their terms of office [97] provided it does not exceed the time limitation fixed by statute.[98] A municipal corporation may ratify the unauthorized contracts of its agents if it had the

recoverable, as one dealing with a municipal corporation is presumed to know the extent of its contractual powers. Burns v. New York, 105 NYS 605. Under Labor Laws, Laws 1897, p. 462, c. 415, § 3, as amended by Laws 1899 p. 1172, c. 567, providing for an eight hour day, an employe of a municipal corporation cannot recover for services beyond eight hours per day. Id.

90. Where a sewer as constructed was complete and serviceable though not in strict conformity with the original plans and specifications, the city was estopped from denying its authority to make the contract and its liability to pay for the work. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86. A city having received the consideration and accepted the benefits of an agreement with another city could not complain that its council made the agreement in an illegal manner. City of Colorado Springs v. Colorado City [Colo.] 94 P 316.

91. A contract by the commissioners' court of a county with one who has theretofore purchased county land reducing the rate of interest on the purchase price being prohibited by the constitution, acceptance of the lower rate of interest will not by estoppel and relation back supply the power wanted in the first instance, and prevent recovery of interest according to the original contract. Blackburn v. Delta County [Tex. Civ. App.] 20 Tex. Ct. Rep. 576, 107 SW 80.

92. Continuation of contract by mutual consent after expiration of original contract. Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44. Motion passed and recorded sufficient. City of Taylorville v. Hogan, 130 Ill. App. 70.

93. In re Opinion of Justices [N. H.] 68 A 873. Directors of public works of a city may order extra work done which is clearly incidental to the general work and recommended by the engineer in charge. Jonathan Clark & Sons Co. v. Pittsburg [Pa.] 66 A 154. County judge may make contract exceeding appropriation by levying court. Kerwin v. Caldwell, 80 Ark. 280, 96 SW 1058. In inviting bids for a public building, the building commission are without authority to require bidders to include in the total amount of their bids an arbitrary sum which the commission reserves the right to expend at its discretion for particular items that are not of such a nature as to render competition at all admissible. But items of a necessarily noncompetitive character may be contracted for without this procedure, and it is competent for the commission to reserve such items for further lawful action. State v. McKenzie, 9 Ohio C. C. (N. S.) 105. Presumption that supervisors did their duty and that contract is valid. Good Roads Mach. Co. v. Union Tp., 34 Pa. Super. Ct. 538.

94. The statutory limitation on the authority of the board of public service to make contracts involving more than $500 without the action of the city council has reference to original contracts, and does not affect the power of the board to make such modifications as it deems necessary in contracts already properly entered into by council; and where a contract for the construction of a sewer has been entered into in due form by the city council, the board of public service has power to enter into a subsidiary agreement with the contractor to meet exigencies subsequently arising. Burke v. Cleveland, 6 Ohio N. P. (N. S.) 225. Acceptance by police and fire commission having control of police and fire departments, under San Antonio city charter, of the services of its appointee as a policeman, is an acceptance of the service by the city, creating an implied contract on its part to pay him a salary. City of San Antonio v. Beck [Tex. Civ. App.] 18 Tex. Ct. Rep. 953, 101 SW 263.

95. A contract signed by the mayor of a city is not a binding obligation of the city when the law does not authorize the mayor to make such a contract, and the contract was neither authorized nor ratified. Woodward v. Grangeville, 13 Idaho, 652, 92 P 840. County has no power to enter into contract with a person to search for and discover property omitted from taxation in former years. People v. Smith, 130 Ill. App. 407. Supervisors of township entered into a valid contract for purchase of engine, though order given in irregular manner. Geiser Mfg. Co. v. Frankford Tp., 34 Pa. Super. Ct. 146.

96. The power to locate sewers in cities of the third class, expressly vested in the council thereof by Rev. St. 1899, § 5847 (Ann. St. 1906, p. 2956), cannot be delegated to the city engineer. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86.

97, 98. Picket Pub. Co. v. Carbon County Com'rs [Mont.] 92 P 524.

power to make the contract in the first instance, but not otherwise,[99] as an ultra vires act is void and cannot be ratified,[1] though the city may be estopped from asserting the contract to be ultra vires where both parties have acquiesced in and acted upon the contract.[2] Where an ordinance is necessary to the validity of the contract, it is necessary for a valid ratification.[3] A city may contract in the exercise of a merely private right not involving a governmental function, and in such case its liability is determinable as that of any citizen by the contract effected.[4]

§ 2. *How initiated.* See 8 C. L. 1477—If so required the specifications in the published notice must be so framed as to secure fair competition on equal terms to all bidders,[5] and requirement of patented materials or appliances invalidates the contract if it tends to give one person a monopoly,[6] but not if it leave room for competition.[7] Statutory requirements as to advertising for bids,[8] the filing of a certificate of funds available,[9] as to getting an approval affixed to a contract,[10] or indorsement on contract by designated officer of his certificate of existence of fund to pay estimated expenses,[11] and other requirements, must be complied with,[12] although substantial compliance may be sufficient.[13] The advertisement for bids not being a legislative func-

99. Woodward v. Grangeville, 13 Idaho, 652, 92 P 840.

1. Bell v. Kirkland, 102 Minn. 213, 113 NW 271.

2. Preston v. West Beach Corp. [Mass.] 81 NE 253.

3. Mulligan v. Lexington, 126 Mo. App. 715, 105 SW 1104.

4. Commercial Wharf Corp. Co. v. Boston, 194 Mass. 460, 80 NE 645.

5. Saunders v. Iowa City, 134 Iowa, 132, 111 NW 529; Lacoste v. New Orleans, 119 La. 469, 44 S 267. A contract for bitulithic pavement was valid, although it was patented pavement, where an ordinance provided for bids for construction of a pavement out of either vitrified brick or bitulithic pavement. Campbell v. Southern Bitulithic Co. [Ky.] 106 SW 1189.

6. Under Kansas City Charter, art. 17, § 12, requiring contracts to be let to the lowest and best bidder, a provision by the board of public works that the brick of a certain company be used, and a stipulation in the contract to that effect, is void, and against public policy. Curtice v. Schmidt, 202 Mo. 703, 101 SW 61.

7. That a pavement was patented was no obstacle to fair competition when patentee filed with the city an agreement to let successful bidder have free use of patent on payment of a fixed and reasonable royalty. Lacoste v. New Orleans, 119 La. 469, 44 S 267.

8. Under city charter of San Bernardino, § 140, providing that no supplies, material, or other item of expenditure exceeding a certain amount shall be ordered or purchased, except after first advertising for sealed proposals, it was not necessary, in calling for proposals and bids for furnishing electric lights, that the council fix the absolute number of lights required, upon which number alone proposals were to be received. Cady v. San Bernardino [Cal.] 94 P 242.

9. Failure to file certificate of funds available renders a contract void, and it is therefore necessary in an action on a contract with township trustees that the petition allege that the clerk certified before the contract was entered into that the funds necessary to meet the liability imposed thereby were in the treasury. Broken Sword Stone Co. v. Trustees, 5 Ohio N. P. (N. S.) 573. The provisions of § 2834b, Rev. St., requiring that before any contract is entered into by township trustees the clerk shall file a certificate stating that there is in the treasury, and unappropriated, funds sufficient to meet the obligation proposed, is a general provision relating to townships, and applies to the letting of contracts in all townships of the state. Id.

10. Where approval of council is requisite, the same must be given before the authorized negotiations become a contract. Van Camp v. Huntington, 39 Ind. App. 28, 78 NE 1057.

11. New York City Charter, Laws 1901, c. 466, § 149, requiring indorsement by comptroller of certificate that there is a sufficient fund to pay estimated expense of executing contract. Beckwith v. New York, 121 App. Div. 462, 106 NYS 175.

12. Williams v. New York, 118 App. Div. 756, 104 NYS 14. A contract between county commissioners and one who undertakes to pike county highway is invalid where no record of the meeting of the commissioners was made and no auditor's certificate was filed or recorded as required by § 2834b, Rev. St. Such a contract cannot be enforced against the county, nor can an equitable accounting be granted for the labor and materials expended in improving the road. North v. Huron County Com'rs, 10 Ohio C. C. (N. S.) 462. Under Const. § 164, providing that before granting a franchise or privilege for a term of years a city shall first, after one advertisement, receive bids therefor publicly and award the same to the highest bidder, a city may not grant a valid franchise without such preliminary steps, even though the city does not bind itself to continue the franchise for more than a year. Frankfort Tel. Co. v. Frankfort Common Council, 30 Ky. L. R. 885, 100 SW 310.

13. Com'rs of Huntington County v. Pashong [Ind. App.] 83 NE 383; State v. Holt [Wis.] 111 NW 1106.

tion may be delegated to a committee of the city council.[14] The material to be used is sometimes required to be specified.[15] Under statutes requiring advertisements for bids, city need not readvertise for bids for completing the work, on abandonment of the contract by the contractor.[16]

§ 3. *How closed.* See 6 C. L. 1479—Where bids are called for, they must be responsive to the advertisement.[17] A bid may be withdrawn by the bidder prior to his notification of acceptance, although a resolution by the official board has been only adopted to notify.[18] Although under a rule requiring contracts to be let to the lowest responsible bidder the contract need not be let to the lowest bidder unless he is responsible[19] and furnishes proof thereof,[20] the lowest bidder if responsible must be awarded the contract.[21] but where the determining body is allowed to use its discretion in awarding the contract, they do not have to award it to the lowest bidder,[22] and, where their action is free from fraud, the exercise of their discretion cannot be controlled,[23] nor is the city liable in damages for failure to award the contract to the highest bidder, though the rejection was wrongful.[24] Despite a constitutional provision for an award to the highest and best bidder, with right of rejection reserved, an ordinance precluding consideration of the bid of a certain company having the only existing franchise is valid.[25] Where a matter is for the determination of a public board, a court will not interfere in the absence of a showing of fraud or abuse of discretion.[26]

§ 4. *Essential provisions in, and conditions pertaining to, public contracts.*

14. Cady v. San Bernardino [Cal.] 94 P 242; Saunders v. Iowa City, 134 Iowa, 132, 111 NW 529. That a city council in its resolution and advertisement for bids required the use of a certain patented pavement did not restrict competition. Saunders v. Iowa City, 134 Iowa, 132, 111 NW 529.

15. Curtice v. Schmidt, 202 Mo. 703, 101 SW 61.

16. City of Milbank v. Western Surety Co. [S. D.] 111 NW 561.

17. Where bids were invited for the paving of a street as one work bids for less than the whole work were not in response to the invitation and were properly disregarded. Stismon v. Hanley, 151 Cal. 379, 90 P 945.

18. Where, on receipt of bids, commissioners in joint session with a town board adopted a resolution to notify a bidder that his bid for the construction of a bridge had been accepted, but prior to taking of steps to notify, bidder telegraphed commission not to consider his bid, and in a letter claimed that he made an error in bid, and withdrew bid, there was no acceptance binding bidder who was entitled to return of deposit. Northeastern Const. Co. v. North Hempstead, 105 NYS 581.

19. Saunders v. Iowa City, 134 Iowa, 132, 111 NW 529; Curtice v. Schmidt, 202 Mo. 703, 101 SW 61; City of Milbank v. Western Surety Co. [S. D.] 111 NW 561.

20. Under a charter provision requiring bidders to satisfactorily prove their ability to perform the work, the council may refuse to award a paving contract to one who failed to make such proof, though it was the lowest bidder. Case v. Trenton [N. J. Law] 68 A 57.

21. Under Act May 23, 1874 (P. L. 230), providing that all work and materials required by the city shall be awarded lowest responsible bidder, municipal authorities cannot negotiate privately with successful bidder, whereby the terms of the competitive bids are so modified that successful bidder becomes in fact the lowest bidder. Louchheim v. Philadelphia, 218 Pa. 100, 66 A 1121.

22. Case v. Trenton [N. J. Law] 68 A 57.

23. A paving contract awarded to one not the lowest bidder will not be disturbed unless the municipal authorities have abused their discretion. Case v. Trenton [N. J. Law] 68 A 57.

24. Where the city reserved the right to reject bids, but wrongfully rejected the bid of one who was the lowest responsible bidder, qualified to do the work, yet the latter cannot maintain an action to recover from the city damages for loss of profits, due to the failure to award the contract to him. Molloy v. New Rochelle, 108 NYS 120.

25. To secure competition, a city passed an ordinance that in selling a franchise to string and maintain wires along the streets for distributing and selling electricity any bid made by a certain lighting company, having the only existing franchise, should not be considered, was valid, notwithstanding Const. Ky. § 164, providing that, before awarding franchise a municipality shall, after advertisement, publicly receive bids therefor and award it to the highest and best bidder, reserving the right to reject any and all bids. Stites v. Norton, 31 Ky. L. R. 263, 101 SW 1189.

26. Whether or not a machine is one that has been in successful operation for two years is a matter for determination by the board of public service along with other facts connected with the bidding, and in the absence of a showing of fraud or abuse of discretion on the part of the board a court will not interfere. Columbus v. Board of Public Service, 5 Ohio N. P. (N. S.) 462.

See 8 C. L. 1480—The contract must be authorized by a valid law or ordinance [27] and must conform thereto.[28] All statutory conditions must be complied with [29] as to the mode of exercising the power to contract,[30] the making of an estimate before,[31] as to the fund out of which the cost of improvements is to be paid,[32] or until an assessment has been made, confirmed, and delivered to proper official.[33] It is presumed that payment in the manner and on the terms authorized by law is contemplated.[34] It must, if so required, be in writing,[35] signed in the name of the city by the proper official.[36] Contracts must conform to the principles of public policy, hence a public official cannot contract with himself,[37] or with a partnership of which he is a member,[38] or of a corporation of which he is an officer.[39] Estoppel does not arise to ren-

27. A contract awarded by resolution in pursuance of a regularly adopted ordinance is valid without action by chief burgess. Kolb v. Tamaqua Borough, 218 Pa. 126, 67 A. 44. Where a contract of a city for repairing a street was invalid because not based on an ordinance, payment of a portion of the contract price under authority of a motion adopted by the council has no effect on the contract's validity (Mulligan v. Lexington, 126 Mo. App. 715, 105 SW 1104), and a written demand by the mayor, at the council's instigation, upon the contractor, to furnish the repairing material, has no binding effect upon the city (Id.). Burden of showing absence of valid ordinance authorizing on taxpayer suing to set aside municipal contract. Kolb v. Tamaqua Borough, 218 Pa. 126, 67 R 44.

28. State v. Holt [Wis.] 111 NW 1106. A county court house must be constructed and furnished by contract, according to the proceedings expressly prescribed by Burns' Ann. St. 1901, §§ 5589-5592, 5594q1. Com'rs of Huntington County v. Pashong [Ind. App.] 83 NE 383.

29. Where the specifications for paving contracts in effect made an agreement among bidders on the price of material, contravening Acts 1905, p. 281, c. 129, § 95, designed to prevent collusion and combination a proposed contract conforming thereto was unlawful. Seibert v. Indianapolis [Ind. App.] 81 NE 99.

30. People v. Buffalo, 57 Misc. 10, 107 NYS 689.

31. Failure of board of public works to make estimate of expense of public works before borrowing money to pay for same. Vossen v. St. Clair, 148 Mich. 686, 14 Det. Leg. N. 331, 112 NW 746.

32. Corey v. Ft. Dodge, 133 Iowa, 666, 111 NW 6. Where city contracts to make certain payments out of interest collections, it is liable therefor to the extent of the collections made. City of Chicago v. McGovern, 226 Ill. 403, 80 NE 895.

33. Under Buffalo City Charter, § 408, a contract involving over $25,000, for dredging, which was drawn, signed and acknowledged by the contractor on Sept. 27, 1906, on which day the contractor's bond was executed, was approved by corporation counsel on Sept. 28, by the comptroller on the 29, by the bureau of engineering on Oct. 9, 1906, immediately following which the work was prosecuted, though the contract was not signed by commissioner of public works until July 6, 1907, was premature where the assessment roll was not filed until Feb. 25, 1907, and confirmed July 2 following. People v. Buffalo, 57 Misc. 10, 107 NYS 689.

34. Corey v. Ft. Dodge, 133 Iowa, 666, 111 NW 6. Promise by city to pay over to contractor such interest as it may collect from property holders is not void where the money so received cannot be recovered back by the property holders. City of Chicago v. McGovern, 226 Ill. 403, 80 NE 895.

35. A municipality is not bound by a contract entered into by its board of public service under § 1536-679 unless it is in writing, and it follows that mandamus will not lie to compel the award of a contract which had been once accepted by the board, but before notice to the bidder the acceptance was rescinded and all bids rejected. State v. Columbus Public Service Board, 5 Ohio N. P. (N. S.) 446. Where a physician furnished medicines and medical attention to prisoners confined in a county jail on oral request of sheriff, jailer, or prosecuting attorney, he could not recover the value thereof from the county under either Rev. St. 1899, § 6759 (Ann. St. 1906, p. 1252), or § 1800 (Ann. St. 1906, p. 3327). Miller v. Douglas County, 204 Mo. 194, 102 SW 996. Invalidity of contract because of noncompliance with statute providing for reduction to writing is immaterial after contract is performed. United States v. Andrews, 28 S. Ct. 100.

36. A contract made by a board of public service is properly executed if signed by the president and clerk only, if such authentication is in accordance with the rules adopted by the board for the execution of contracts. Burke v. Cleveland, 6 Ohio N. P. (N. S.) 225.

37. A contract by a city with an alderman, ratified by a city council, is within Const. § 109, providing that no public officer shall be interested in a contract with a city authorized by law passed or order made by any board of which he is a member. Noxubee County Hardware Co. v. Macon [Miss.] 43 S 304. A contract of sale by a member of a town council to the town is contrary to public policy and void. Bay v. Davidson, 133 Iowa, 688, 111 NW 25.

38. A contract between a municipality and a partnership in which one of the members of its council is a partner is void. McCarthy v. Bloomington, 127 Ill. App. 215. Act March 31, 1860, § 66 (P. L. 400), prohibiting any member of a municipality from being interested in furnishing supplies to it, applies to a councilman interested as a co-owner of a quarry in furnishing stone for

der a city liable for benefits of a contract of sale by a member of the council to the city.[40] That a contractor was a town official prior to and subsequent to contracting with the town, but not at the time of contracting, does not invalidate the contract,[41] and a contract entered into by an outgoing board of officials is not necessarily contrary to good morals.[42] Agreements to suppress competition are illegal,[43] but bona fide agreements between partnerships for bidding [44] or bona fide arrangements between prospective bidders [45] are valid. In the absence of a contract, express or implied, there can be no recovery for extra work.[46] A provision in the contract against assignment is valid, and the assignee cannot recover on the contract.[47] Provisions for indemnifying the city against the improper conduct or negligence of the contractor and the retention of funds due on the contract until the settlement of claims are valid.[48] The government is not liable for delays caused by the failure of congress to make the necessary appropriations to prosecute the work.[49]

Bonds See 8 C. L. 1482 with sureties [50] executed before the officer or board having charge of the subject-matter of the contract [51] and in an amount sufficient to secure its faithful execution [52] are usually required. The bond ordinarily required on contracts for public improvements to protect against claims of materialmen and subcontractors is elsewhere treated.[52a] In some jurisdictions, security for payment by the contractor for labor performed and materials furnished is required.[53] A stipulation in a statutory bond executed by a bridge contractor, providing for reconstruction on removal from any cause except fire, embraces destruction by a flood.[54]

§ 5. *Interpretation and effect of public contracts; performance and discharge.* *A. Construction and interpretation.* See 8 C. L. 1482—The contract may be deduced from a series of letters.[55] A provision in a paving contract that the contractor shall keep up repairs for a specified time is a mere guaranty of good work, and does not amount

the use of a municipality. Commonwealth v. Witman, 217 Pa. 411, 66 A 986.

39. In suit to enjoin payment by a city for printing, evidence was sufficient to show that company with which it contracted was merely a device in an attempt to evade Ky. St. 1903, § 2768, making void contracts between a city and a corporation where a member of the council is an officer or employe of such corporation. Jacques v. Louisville [Ky.] 106 SW 308.

40. Boy v. Davidson, 133 Iowa, 688, 111 NW 25.

41. A contract for constructing a sidewalk was not invalid because the contractor was a town trustee until resigning just before the bidding, though he was afterwards reappointed, there being no evidence of bad faith in resigning. Harmison v. Prestonsburg [Ky.] 107 SW 337.

42. Contract made by outgoing board of county commissioners for county printing was not contra bonos mores, within Civ. Code, § 2240. Picket Pub. Co. v. Carbon County Com'rs [Mont.] 92 P 524.

43, 44. Virginia Bridge & Iron Co. v. Crafts, 2 Ga. App. 126, 58 SE 322.

45. An arrangement whereby a bid for the entire contract is put in, and the parties to the agreement are each to do a part of the work, the object not being to suppress competition, is valid. Virginia Bridge & Iron Co. v. Crafts, 2 Ga. App. 126, 58 SE 322.

46. Beattie v. McMullen [Conn.] 67 A 488.

47. United States v. Axman, 152 F 816. That a sewer contractor contracted with another, from whom he obtained a loan, to assign tax bills to be received for a public improvement, and the loanor employed an engineer to see that the work was done so as to sustain the validity of the tax bills, was not violative of the terms of the contract that it should not be transferred, assigned, or sublet. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

48. Sweeten v. Millville [N. J. Law] 66 A 923.

49. Deterioration in the machinery necessary to furnish the stone required by contract. Sanger & Moody v. U. S., 40 Ct. Cl. 47.

50. Van Buren County v. American Surety Co. [Iowa] 115 NW 24. Act of congress Aug. 13, 1894, c. 280, § 1, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), requires contractor for construction of public buildings, or prosecution and completion of public work, to execute penal bond with sufficient sureties, prior to beginning work. United States v. Axman, 152 F 816.

51. United States v. Axman, 152 F 816; Brown v. U. S. [C. C. A.] 152 F 964.

52. Brown v. U. S. [C. C. A.] 152 F 964.

52a. See Public Works and Improvements, 8 C. L. 1506.

53. Burr v. Massachusetts School for Feeble-Minded [Mass.] 83 NE 883.

54. Where a statutory bond was given to a county by a bridge contractor, stipulating that if the bridge was removed from any cause, fire excepted, within a specified time, the contractor should rebuild without cost to the county, he is bound to rebuild on its destruction by an unprecedented flood. Mitchell v. Hancock County [Miss.] 45 S 571.

55. United States v. Andrews, 28 S. Ct. 100.

to an abrogation of a governmental function.[56] A contract for the construction of a sewer, to be paid for by assessments, and which expressly exempts the city from liability, is not within a penal statute requiring a provision for forfeiture on permitting laborers to exceed eight hours work per day.[57] An express provision by congress as to the construction and effect to be given to bonds executed to the United States is controlling in the interpretation of the bond.[58] A provision in a contract limiting a city as to time to test smoke consumers is of the essence of the contract, and binding.[59] Where in a contract for public improvement the resolution of intention and proceedings intermediate to final award are based on specifications providing that all loss or damage be sustained by the contractor, bonds issued pursuant thereto, and assessments, are void.[60]

(§ 5) *B. Performance and discharge.*[See 8 C. L. 1482]—A release is presumed to be the final settlement of a contract unless otherwise stipulated.[61] A stipulation in a contract making an engineer, inspector, or other person the arbiter of the sufficiency of performance is valid,[62] as is a provision referring to them for settlement of matters of dispute,[63] and his action thereunder is final in the absence of fraud or such gross mistakes as implies bad faith.[64] The power of such person is exhausted by a final award.[65] Where a particular mode of discharge of a contract by a municipality is provided by statute, such mode must be first pursued, and the corporation is liable only for a breach of duty to provide the fund prescribed.[66] Violating a statute fixing the hours of labor on municipal contracts does not work a forfeiture of compensation for work done after the completion of the contract.[67] A municipality may complete a contract which has not been finished in accordance with the agreement and recover the cost of completing the unfinished work.[68] To constitute a waiver of incompleteness in the performance of a contract, acceptance is essential.[69] Use of materials different from those specified does not discharge the contract, although used without the consent or waiver of the surety on the bond of the contractor.[70] There may be recovery for extra work ordered by an authorized person[71] when the contract so

56. Contractor presumed to know that street pavement would be affected by abnormal amount of moisture, leaking gas mains, and like causes. MacFarland v. Barber Asphalt Paving Co., 29 App. D. C. 506.

57. Genilla v. Hanley [Cal. App.] 92 P 752. A contract for street paving is not invalidated by a provision for the contractor keeping the paving in repair for a certain time. City of Sedalia v. Smith, 206 Mo. 346, 104 SW 15.

58. United States v. U. S. Fidelity & Guaranty Co., 151 F 534.

59. Missouri Smoke Preventer Co. v. St. Louis, 205 Mo. 220, 103 SW 513.

60. It is a rule of property which the courts must follow. Joyce v. Newmark [Cal. App.] 93 P 1041.

61. United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206 U. S. 118, 51 Law. Ed. 983.

62. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

63. Jonathan Clark & Sons Co. v. Pittsburg [Pa.] 66 A 154.

64. Under a contract providing that disputes as to work or materials or pay for extra work should be referred to the directors of public works, whose decision should be final, the decision of such officers was conclusive in the absence of fraud, accident, or mistake. Jonathan Clark & Sons Co. v. Pittsburg [Pa.] 66 A 154. In the absence of fraud, the city was bound by the approval of the sidewalks committee and street commissioners where the price of work was paid to the contractor after their approval, as stipulated in the contract. City of Jamestown v. Arter, 55 Misc. 629, 106 NYS 1027.

65. Arbiter cannot subsequently modify, revoke, or annul his finding, or make new award on same issues. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

66. Davidson v. White Plains, 105 NYS 803.

67. So held under Laws 1897, p. 462, c. 415, § 3, as re-enacted by Laws 1906, p. 1394, c. 506. People v. Zimmerman, 109 NYS 396.

68, 69. North Braddock Borough v. Monongahela St. R. Co., 217 Pa. 27, 66 A 152.

70. Where a county did not consent to or have knowledge of the act of a bridge contractor in substituting lighter materials for those contracted for, and sued for damages resulting thereby, the contractor's surety could not claim that it was discharged because the bridges were erected of materials of a substantially different kind and character from those contracted for without the surety's consent or waiver. Van Buren County v. American Surety Co. [Iowa] 115 NW 24.

71. By engineer. Talbott v. Newcastle [Ind.] 81 NE 724.

provides [72] and the claim is properly presented.[73] Compensation for extra work may be governed by the rate fixed for work specified.[74] A contract may be modified by a later agreement,[75] but the original contract remains in force, except in so far as expressly modified or annulled,[76] but damages for increased cost resulting from authorized alterations are not recoverable.[77] Where statutes provide for the award of municipal contracts to the lowest responsible bidder, a city may provide in a contract for payment for extra work without advertisement.[78]

§ 6. *Remedies and procedure. A. By taxpayer.* See 8 C. L. 1484—A taxpayer may maintain a bill to restrain public officials from paying out public moneys upon a void contract,[79] to recover moneys so paid,[80] to enjoin the performance of a contract,[81] and may maintain, in his own name, injunction against entering into any illegal contract which may result in the creation of a public burden.[82] Taxpayers are not estopped because they did not commence their action until the completion of the work.[83] That the highest of several bidders was a subsidiary company of the successful bidder is not ground for injunction at the instance of a taxpayer in the absence of fraud.[84] A taxpayer may sue for injunction only when the performance of the contract will result in damage to him.[85] Conditions precedent to the enforcement of a subscription contract by a city having been complied with, a taxpayer cannot have the subscription declared void [86] or enjoin the payment of the subscription.[87] The right of a taxpayer to intervene and restrain the discontinuance of an action by another taxpayer to restrain a city in carrying out a contract is not absolute.[88] Illegalities and irregularities in a contract may in some instances be cured by statute, so as to validate the contract.[89] A contract having finally been entered into, a taxpayer

72. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835. The fact that one doing extra work has sustained loss is not grounds for recovery where the contract under which it is done does not include pay for same. Costa v. Cranford Tp. in Union County [N. J. Err. & App.] 68 A 160.

73. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835.

74. Compensation for extra work properly fixed at rate stated in bid and contract, independent of resolution adopted by town, and not accepted by bidder, fixing cost of extra work at such rate. Talbott v. Newcastle [Ind.] 81 NE 724.

75, 76. Sweetin v. Milville [N. J. Law] 66 A 923.

77. Where a contract for the construction of a city sewer provided that the engineer, with the written consent of the board, could make alterations in the work at any time before completion, and, if the alterations diminished the quantity of work to be done, they should not constitute a claim for damages or anticipated profits, and a change was made by the engineer with the consent of the board, whereby certain subdrains were dispensed with, damages for increased cost in constructing the remaining portion on account of the conditions resulting from the abandonment of the subdrains were not recoverable. City & County of Denver v. Hindry [Colo.] 90 P 1028.

78. Jonathan Clark & Sons Co. v. Pittsburg [Pa.] 66 A 154.

79. Cawker v. Milwaukee [Wis.] 113 NW 419.

80. Where a partnership has executed and performed a contract with a municipality of which one of its members is a councilman, a payor may for the benefit of the municipality recover the consideration paid to the partnership under the contract. McCarthy v. Bloomington, 127 Ill. App. 215.

81. Coyne v. Yonkers, 108 NYS 625.

82. Contract to be based on plans and specifications filed with the auditor could be enjoined by a taxpayer where the plans and specifications submitted by the board, for lack of detail and specificness, were practically worthless as a basis for competitive bidding, and the bidders were required to submit their bids, detailed specifications of the design, material to be used, construction and ornamentation of the furniture from information only to be obtained from the plans. Com'rs of Huntington County v. Pashong [Ind. App.] 83 NE 383.

83. Cawker v. Milwaukee [Wis.] 113 NW 419.

84. Hearsay was insufficient to establish fraud. Sawyer v. Pittsburg, 217 Pa. 17, 66 A 86.

85. Brummitt v. Ogden Waterworks Co. [Utah] 93 P 828.

86, 87. Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 SW 732.

88. A taxpayer having sued to enjoin the carrying out of a contract for public lighting, and the action having been pending for six years, one who had been a taxpayer for only a year was not allowed to intervene and restrain a discontinuance of the action. Coyne v. Yonkers, 109 NYS 625.

89. Illegalities and irregularities respecting matters and features of a contract that the legislature had power to dispense with in the first instance may, subsequent to the making of the contract, be ratified and

cannot object that the city failed to require a deposit by the successful bidder, as required by the city charter.[90] Where the making of a contract is discretionary with a board of aldermen, its execution will not be enjoined in the absence of an abuse of such discretion, of good faith, or a violation of some statute.[91] The burden is on a taxpayer, suing to set aside a municipal contract as illegal, to show the absence of a valid authorizing ordinance.[92]

(§ 6) *B. By bidder.*[See 8 C. L. 1485]—An action lies against a city for the improper refusal of an officer to execute a contract.[93] Mandamus lies to compel a state official to execute a contract authorized by statute, there being no discretion reposed in such official,[94] but it will not lie to compel a city council to complete the making of a contract.[95] A deposit forfeited by the highest bidder for failure to execute a contract is not recoverable.[96] A contract fraudulently obtained by a city may be rescinded by the contractor,[97] likewise if the contract was made under mutual mistake.[98] An action lies to enforce specific performance of a contract by a city to make a lease.[99] One who acquired no right to have a contract awarded to him cannot recover damages from the city for refusing to execute a contract with him.[1] The designation of a depository by the county commissioners is not a judicial but a ministerial function, to be exercised without discretion, except in the matter of bond, at the time the proposals are opened, by an immediate award to the highest bidder; and an aggrieved bidder is without remedy by way of proceedings in error to the award which the commissioners have seen fit to make, or to their refusal to make an award.[2]

(§ 6) *C. On the contract proper or on a quantum meruit.*[See 8 C. L. 1485]—There may be a recovery either on the contract, on an allegation of performance [3] by a contractor with a city, or on a quantum meruit,[4] if the contract has been substantially, although not completely performed, and the city has received and retained the benefits of performance.[5] There can be no recovery on an unauthorized contract.[6] In

validated by statute, and a bill by a taxpayer to enjoin the execution of the contract will be dismissed, though filed prior to the passage of the statute. Cranor v. Volusia County Com'rs [Fla.] 45 S 455.

90. The purpose of the requirement that a bidder awarded a contract should make a deposit to protect the city should he refuse to enter into the contract is at an end when the contract is finally entered into. Cody v. San Bernardino [Cal.] 94 P 242.

91. Campbell v. Southern Bitulithic Co. [Ky.] 106 SW 1189.

92. So held where plaintiffs claimed that a resolution awarding the contract had not been submitted to the chief burgess, as required by Act May 23, 1893 (P. L. 113). Kolb v. Tamaqua Borough, 218 Pa. 126, 67 A 44.

93. Beckwith v. New York, 121 App. Div. 462, 106 NYS 175.

94. House Roll 57, Laws 1907, p. 526, c. 193, providing for purchase of supply of statutes for states. State v. Junkin [Neb.] 115 NW 546.

95. A town council having recommended to the electors that they authorize the council to make certain improvements, and that plaintiff's bid of a certain sum be accepted, and the work awarded to it, and the financial town meeting, acting on the report, having passed a resolution appropriating such sum, to be spent under the supervision of the council, as recommended in the report, and the council subsequently rejected plaintiff's bid, mandamus would not lie to compel the council to complete the execution of the contract. Putnam Foundry & Mach. Co. v. Barrington Town Council [R. I.] 67 A 733.

96. On failure to execute a lease as agreed, the bidder or his assignee could not recover deposit. Phillips v. New York, 108 NYS 1059.

97, 98. Long v. Athol [Mass.] 82 NE 665.

99. Brown v. New York, 108 NYS 555.

1. Williams v. New York, 118 App. Div. 756, 104 NYS 14.

2. State v. Defiance County Com'rs, 5 Ohio N. P. (N. S.) 225.

3. City of St. Charles v. Stookey [C. C. A.] 154 F 772; Omaha Water Co. v. Omaha [C. C. A.] 156 F 922. Under the Indiana statute relating to the construction of roads, no judgment can be recovered by the contractor against the county for money due him under the contract, his remedy being mandamus to compel the county board to perform its statutory duties. Acts 1895, p. 146, c. 63. Jackson County Com'rs v. Branaman [Ind. App.] 79 NE 923.

4, 5. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

6. Under Laws 1896, p. 751, c. 626, a city is not liable to architects for compensation which commissioner of correction had agreed to pay them for preparing detailed plans and specifications and supervising work, where neither the commission nor the board of estimate and apportionment had not approved them. Withers v. New York, 123 App. Div. 283, 107 NYS 955. There

some jurisdictions a city having received the benefit of performance of an invalid contract is liable on a quantum meruit.[7] On failure of a city to pay instalments, a contractor may abandon the contract and recover the value of work performed thereunder.[8] A city cannot withdraw or change the contract after entering on performance and thereby affect the right of the contractor to recover.[9] Substantial compliance with a contract for construction of sewers entitles the contractor to the contract price upon due notification to the city to receive, although the city refuses to formally accept.[10] Estoppel or waiver does not arise to prevent a city from refusing payment on a contract where the work is not completed according to contract and the engineer in charge makes false and fraudulent estimates, although approved by the council, if ignorant of its fraudulent character.[11] On abandonment of the contract by the contractor, the city may complete the work and recover the difference in cost from the sureties of the contractor [12] or bond deposited.[13] Upon a failure to reject a device within the limit prescribed by the contract, a city is liable for the contract price thereof.[14] Assumpsit will not lie against a county to recover the price of fixtures placed in a county building to which the county has not acquired title.[15] The compensation recoverable by a contractor is determinable by the terms of the contract [16] or by a statute governing the amount of the compensation.[17] A city is liable only for the market price of articles sold and delivered.[18] Payment is recoverable for services performed in pursuance of a contract authorized by a statute declared valid, although subsequent to rendition of services the statute is declared unconstitutional and void.[19]

(6) *D. On the contractor's bond.* See 8 C. L. 1486—Liability to materialmen and subcontractors on bonds given for their benefit is elsewhere treated.[19a] On letting a contract not performed, the city as trustee for property owners taxed with the resulting loss and original contract price cannot sue on the bond.[20] In an action against a contractor and his sureties for breach of contract, it is necessary to allege

being no authority of law for a county to enter into an executory contract for the sale of bonds, the issuance of which is unauthorized, an action will not lie against city for damages for breach of undertaking. Robinson-Humphrey Co. v. Wilcox County, 129 Ga. 104, 58 SE 644.

7. A city availing itself of the benefit of a contract with a contractor by accepting the work done under it after knowledge of the violation by the contractor of Laws 1897, p. 462, c. 415, § 3, re-enacted by Laws 1906, p. 1394, c. 506, cannot refuse to pay the contractor pursuant to the contract. People v. Zimmerman, 109 NYS 396.

8. Peet v. East Grand Forks [Minn.] 112 NW 1003.

9. Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44. A contractor to whom a subcontractor has surrendered control after abandoning the contract may perform and recover against the city any loss or damage sustained thereby for which it is liable. Capital City Brick and Pipe Co. v. Des Moines [Iowa] 113 NW 835.

10. A sewer having been constructed in substantial compliance with the terms of the contract therefor the city on notification must receive it, and cannot refuse to pay therefor though arbitrarily refusing to formally accept. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86.

11. Peet v. East Grand Forks [Minn.] 112 NW 1005.

12. City of Milbank v. Western Surety Co. [S. D.] 111 NW 561.

13. MacFarland v. Barber Asphalt Paving Co., 29 App. D. C. 506.

14. Missouri Smoke Preventer Co. v. St. Louis, 205 Mo. 220, 103 SW 513.

15. Calhoun County v. Art Metal Const. Co. [Ala.] 44 S 876.

16. People v. Neff [N. Y.] 83 NE 970. Duty of subcontractor to protect himself by stipulation. Sand Filtration Corporation of America v. Cowardin, 29 App. D. C. 571.

17. A publication of a commissoiner's report in columns and with leaders and two or more justifications ie tabular work within the meaning of § 4366, and in the absence of a special contract the publisher is entitled to the price and a half rate therein prescribed. Knorr v. Darke County, 4 Ohio N. P. (N. S.) 35.

18. One selling a tripod to a city could recover only the market value, shown by what the city could have purchased it for in the market, at the time plaintiff made the purchase, in order to deliver the tripod to the city. Burke v. New York, 108 NYS 650.

19. Thomas v. State, 76 Ohio St. 341, 81 NE 437.

19a. See Public Works and Improvements, 10 C. L. 1307.

20. City of St. Louis v. G. H. Wright Cont. Co., 202 Mo. 451, 101 SW 6.

that the contract relied on is one of binding force and effect,[21] also to allege all of the prerequisites to a valid and complete contract.[22]

(§ 6) *E. Under lien laws.* See 4 C. L. 1105

PUBLIC LANDS.

§ 1. The Public Domain and Property Therein, 1296.
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The scope of this topic is noted below.[23]

§ 1. *The public domain and property therein.* See 8 C. L. 1487—Public lands are such lands as are subject to sale or other disposal under general laws.[24] They are not subject to taxation,[25] and the state may be estopped to deny the character of them and its title thereto.[26] The soil under tideless inland rivers does not belong to the government,[27] but the title to tide lands is in the state.[28]

§ 2. *Lands open for settlement and lands granted or reserved.* See 8 C. L. 1487—There is no presumption that lands are open to entry.[29] They are not until provision is made for issuing grants thereto,[30] and in disposing of them the legislature acts in subordination to the constitution.[31] A temporary withdrawal of lands from settlement is a reservation of them,[32] unless previously appropriated.[33] An agent reserving lands need not describe his acts in language of the statute,[34] and his judgment is conclusive.[35] Tide lands within two miles of certain cities are excluded from

21. There can be no recovery in an action against a contractor and his sureties for damages by reason of failure to complete a contract entered into with county commissioners where there is no averment that the contract relied on was one of binding force and effect. State v. Williams, 10 Ohio C. C. (N. S.) 530.

22. It is also necessary to aver compliance with § 799, Rev. St., by alleging endorsement of the contract by the prosecuting attorney and performance of all the other prerequisites to a complete and valid contract. These prerequisites are not for the benefit and protection of the sovereign power alone, but they are of the essence of the contract, which without them becomes null and void. State v. Williams, 10 Ohio C. C. (N. S.) 530.

23. It includes matters pertaining to the public domain both federal and states. **It excludes** lands held by the public for school purposes (Schools and Education, 8 C. L. 1851), location of mining claims (see Mines and Minerals, 10 C. L. 839), and lands held for public use (see Highways and Streets, 9 C. L. 1588; Parks and Public Grounds, 10 C. L. 1079.

24. Union Pac. R. Co. v. Harris [Kan.] 91 P 68. Lands reserved by competent authority, for any purpose or in any manner, although no exception is made, are not public lands. United States v. Grand Rapids, etc., R. Co., 154 F 131.

25. Stetson v. Grant, 102 Me. 222, 66 A 480.

26. Acceptance by the state of lands certified to it by the secretary of the interior as "swamp and overflow" is conclusive upon the state as to the character of such lands. Chauvin v. Louisiana Oyster Commission [La.] 46 S 38.

27. The United States has no title to islands in the St. Mary's river between the Michigan shore and the thread of the stream. United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F 25.

28. Sequin Bay Canning Co. v. Bugge [Wash.] 94 P 922.

29. Bowser v. Westcott [N. C.] 58 SE 748.

30. The land beneath waters of Ohio river, between thread of stream and low water mark, not subject to settlement, legislature having made no provision for issuing patents to same. Wars v. Hager, 31 Ky. L. R. 728, 103 SW 283.

31. Restraints of state constitution are binding upon legislature in disposing of public lands under authority granted to it by congress. Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490.

32. Withdrawal by secretary of the interior pending determination as to advisability of including same within forest reserve. Alberger v. Kingsbury [Cal. App.] 91 P 674.

33. Keenan v. Slaughter [Tex. Civ. App.] 108 SW 703.

34. Stetson v. Grant, 102 Me. 222, 66 A 480.

35. Where a land agent is made the

sale.[36] So are those used as town site and for trade purposes,[37] or those already granted,[38] or under lease,[39] or occupied by a settler[40] under a valid homestead entry,[41] and where forfeiture proceedings are void, there can be no resale,[42] but void certificates and applications cannot have the effect to close it to location.[43]

§ 3. *Mode of locating and acquiring title. A. Federal lands.* See 8 C. L. 1488. The land office may make such reasonable rules as it sees proper as to the disposition of public lands[44] which must be complied with.[45] A homestead right may be initiated by actual bona fide settlement on the land or by entry at the local land office,[46] but the applicant is not required to supervise the entries on the books of the registrar,[47] nor, at final hearing, can he be required to reiterate his purpose, bona fides and interest in acquiring the lands,[48] nor is it necessary that the survey should be made upon lines of sections and subdivisions,[49] but statement should not be filed during time for appeal.[50] The term "entries" is used wtih various meanings.[51] Title cannot be acquired by persons prohibited,[52] nor does it pass till patent issues,[53] or the land is selected.[54] It operates both as a judgment and conveyance,[56] and is prima facie evidence that no objection to its issuance existed.[58]

judge of the quality of land reserved by him, both the state and its grantees are bound by his judgment honestly exercised. Stetson v. Grant, 102 Me. 222, 66 A 480.

36. This applies to lands within such cities as well as to those outside and within two miles of city limits. Williams v. San Pedro [Cal.] 94 P 234.

37. White v. Whitcomb, 13 Idaho, 490, 90 P 1080.

38. Caldwell Land & Lumber Co. v. Coffey, 144 N. C. 560, 57 SE 344; Dew v. Pyke [N. C.] 59 SE 76. And this is true although the land may have been illegally purchased for scrip, instead of money. Smith v. Crandall, 118 La 1052, 43 S 699; Frelisen v. Crandell [La.] 45 S 558. Land granted to a state by the federal government is a segregation of it, and a subsequent sale of it by such government is void. Frederick v. Goodbee [La.] 45 S 606. An award of school lands segregates it so long as the award remains unforfeited. Bumpass v. McLendon [Tex. Civ. App.] 18 Tex. Rep. 267, 101 SW 491. Construction that grant does not except land reserved for Indian purposes cannot prevail against a correct legal interpretation. United States v. Grand Rapids, etc., R. Co., 154 F 131.

39. Ford v. Terrell [Tex.] 107 SW 40. The lease of lands takes them out of the market for the term of the lease. Patterson v. Knapp [Tex.] 18 Tex. Ct. Rep. 446, 102 SW 97.

40. Occupation by settler who had filed declaratory statement claiming right under pre-emption law. Union Pac. R. Co. v. Harris [Kan.] 91 P 68.

41. A valid homestead entry constitutes such an appropriation and withdrawal of the land as to segregate it from the public domain. Holt v. Classen [Okl.] 91 P 866; Enid & Anadarko R. Co. v. Kephart [Okl.] 91 P 1049.

42. Hickert v. Van Doren [Kan.] 92 P 593.

43. Kleinsorge v. Burgbacher [Cal. App.] 92 P 199.

44. Eastern Banking Co. v. Lovejoy [Neb.] 115 NW 857.

45. To perfect a right to additional homestead, the rules and regulations of the department must be complied with. Lamson v. Coffin, 102 Minn. 493, 114 NW 248.

46. Holt v. Classen [Okl.] 91 P 866.

47. When the applicant pays for the land and gets his receipt, it is all the law requires. The law presumes the registrar will do his duty. Le Marchel v. Teagarden, 152 F 662.

48. Construction of timber and stone act of June 3, 1878, § 3 (20 Stat. 89, c. 151, U. S. Comp. Stat. 1901, p. 1545): Williamson v. U. S., 28 S. Ct. 163.

49. Boundary of land reserved by treaty fixed by survey of adjoining lands, shown by plat returned, sufficient. United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F 25.

50. A declaratory statement filed during the time allowed for appeal from a decision of the commissioner gives applicant no right, under rule of land office which declares no application received or rights recognized as begun by application tendered for land entered until entry canceled in local office. Holt v. Murphy, 28 S. Ct. 212.

51. When applied to proceedings in the land office under the homestead law, it is used sometimes in the sense of preliminary entries, at other times in the sense of final entries, and, again, in the sense of the proceedings as a whole. Stearns v. U. S. [C. C. A.] 152 F 900.

52. Employes of land office cannot, directly or indirectly, become interested in purchase of public lands, and this prohibition extends to special agents of that department. Prosser v. Finn, 28 S. Ct. 225.

53. The land department, although finding that a party has the right to enter, may inquire further, before patent issues, and award the land to another having a better right. Love v. Flahive, 205 U. S. 195, 51 Law. Ed. 768. Entry and death of entryman before patent issues. Held, devisees took no interest. Walker v. Ehresman [Neb.] 113 NW 218.

54. Montana v. Rice, 204 U. S. 291, 51 Law. Ed. 490. No title passes under a grant of land by the federal government to a state until a selection is made and reported to the

Railroad grants. See 8 C. L. 1489—Filing profile map of the road in the land office is a condition precedent to obtaining right of way,[57] after which, and action thereon by the secretary of the interior, title is complete,[58] and cannot be defeated by failure of an officer to perform a clerical duty,[59] but when the right attaches depends upon the limits within which the land lies.[60]

Swamp land grants. See 8 C. L. 1490

Cancellation and forfeiture. See 8 C. L. 1491—On notice to the entryman,[61] but not his alienee,[62] by registered letter [63] within five years,[64] the government may sue to annul the grant,[65] but a judicial proceeding is not necessary when the forfeiture is by legislative act,[66] though the question of fact upon which the forfeiture depends may be enquired into and determined in such proceeding.[67] In a proper case,[68] such as fraud or mistake, the final certificate may be canceled,[69] and the patent also if erroneously issued,[70] unless to do so would be inequitable to third persons as well as grantee.[71] A sale of the homestead may be treated as a relinquishment of it [72] when it reverts to the government [73] free from any burdens,[74] but though the cancellation of an entry, from which no appeal is taken, extinguishes the right,[75] a judgment of forfeiture will not affect lands not therein included.[76]

Jurisdiction of land officers and courts. See 8 C. L. 1491—Courts have no jurisdiction in suits against the government respecting the disposition of its land in the absence of its consent,[77] hence the land office is the proper forum,[78] unless it has lost

secretary of the treasury as required by granting act. Koch v. Streuter, 232 Ill. 594, 83 NE 1072.

55. A patent to land of which the land department may dispose is both the judgment of that tribunal and a conveyance of the legal title. Le Marchel v. Teagarden, 152 F 662.

56. United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F 25.

57. Unless actual construction has begun. Act Mar. 3, 1875, 18 Stat. 482, c. 152; U. S. Comp. Stat. 1901 p. 1568. Minneapolis etc., R. Co. v. Doughty, 28 S. Ct. 291. Title to land within the primary limits of a railroad grant passes on filing the map and definite location of the line, and the acceptance and approval thereof by the secretary of the interior. United States v. Oregon, etc., R. Co., 152 F 473.

58. Oregon Short Line R. Co. v. Stalker [Idaho] 94 P 56.

59. Maps of railroad land filed in duplicate in local land office approved by secretary of interior, and returned to local office, which failed to make proper notations thereon of the location of station grounds, subject in controversy. Oregon Short Line R. Co. v. Stalker [Idaho] 94 P 56.

60. Within the primary limits, the right attaches upon definite location, while within the indemnity limits it does not attach until selection. Donohue v. St. Paul, etc., R. Co. [Minn.] 112 NW 413.

61. Eastern Banking Co. v. Lovejoy [Neb.] 115 NW 857.

62. Alienee is not entitled to notice until he gives notice to the local land office of his interest therein. Eastern Banking Co. v. Lovejoy [Neb.] 115 NW 857.

63. Eastern Banking Co. v. Lovejoy [Neb.] 115 NW 857.

64. Construction of statute of limitations of Mar. 3, 1891, c. 559, 26 Stat. 1093 (U. S. Comp. St. 1901, p. 1521). United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F 25.

65. Action to forfeit grants must be instituted by the Federal government. Warrior River Coal & Land Co. v. Alabama State Land Co. [Ala.] 45 S 53.

66. Grant of lands to railroad on conditions. Failure to perform such conditions operated ipso facto to forfeit the rights designated in the statute. Columbia Valley R. Co. v. Portland, etc., R. Co. [Wash.] 93 P 1067.

67. Columbia Valley R. Co. v. Portland, etc., R. Co. [Wash.] 93 P 1067.

68. Gourley v. Countryman, 18 Okl. 220, 90 P 427.

69. But after the patent has issued, the remedy is in the courts. Budd v. Gallier [Or.] 89 P 638.

70. There must be proper proof by the party entitled to the land. Le Marchel v. Teagarden, 152 F 662.

71. Lands granted to railroad company did not pass because same had been reserved. Grantee, acting in good faith, sold to good-faith purchasers. Grant cannot be canceled, nor minimum price of land recovered. United States v. Grand Rapids, etc., R. Co., 154 F 131.

72. Vendor's continuing in possession will not create a new right as against the party in whose favor he relinquished. Love v. Flahive, 206 U. S. 356, 51 Law. Ed. 1092.

73. Lands granted and abandoned by the grantee revert to the public domain. United States v. Oregon, etc., R. Co., 152 F 473; Donohue v. St. Paul, etc., R. Co. [Minn.] 112 NW 413.

74. Moore v. Linn [Okl.] 91 P 910.

75. Eastern Banking Co. v. Lovejoy [Neb.] 115 NW 857.

76. United States v. Southern Pac. R. Co., 152 F 303.

77. Suit to restrain secretary of interior from carrying out provisions of act respect-

jurisdiction,[79] and its decisions on questions of fact are conclusive [80] in the absence of fraud, imposition, or mistake,[81] and will not be disturbed by a court of equity;[82] but it is otherwise as to questions of law,[83] unless the question is as to the validity of homestead documents.[84]

(§ 3) *B. State lands.*[See 8 C. L. 1492]—Title to public lands cannot be acquired by adverse possession,[85] but application to purchase must be made to the state land board and must be filed with the clerk of the board,[86] and since an entry of land creates an inchoate equity which becomes a complete legal title on payment of the money and taking a grant,[87] every intending purchaser,[88] such as competitive bidders [89] or entrymen, must proceed pursuant to statute,[90] unless its provisions are waived.[91] There must be an actual occupancy for the statutory period,[92] but this will not be required in all cases,[93] nor need the purchaser be the original occupant.[94]

ing pine lands ceded by Indians in Minnesota, and to require him to execute trust and account, dismissed. Naganab v. Hitchcock, 202 U. S. 473, 50 Law. Ed. 1113.

78. Where the entryman's title is inchoate and another takes possession, he should apply to the land office for relief and for reinstatement. Eastern Banking Co. v. Lovejoy [Neb.] 115 NW 857.

79. The issuance of a patent to land in controversy, pending such controversy, deprives the department of jurisdiction If errors are committed, however, the parties may seek remedy in the courts. Brooks v. Garner [Okl.] 94 P 694.

80. Decision that it is mineral and not agricultural, conclusive. Cragie v. Roberts [Cal. App.] 92 P 97; Love v. Flahive, 205 U. S. 195, 51 Law. Ed. 768. In a suit between parties, the determination of the land office as to what did or did not pass under certain grants is conclusive. Barringer v. Davis [Iowa] 112 NW 208.

81. Old Dominion Copper Min. & Smelting Co. v. Haverly [Ariz.] 90 P 333; White v. Whitcomb, 13 Idaho, 490, 90 P 1080.

82. Gourley v. Countryman, 18 Okl. 220, 90 P 427.

83. Decisions of the land office on matters of law are not binding on the courts but will not be overruled unless clearly erroneous. Hand v. Cook [Nev.] 92 P 3. When there has been a manifest misapplication of the law to the facts, courts of equity will grant relief. United States v. Citizens' Trading Co. [Okl.] 93 P 448.

84. The decision of the land department as to the validity of documents evidencing the right to homestead is conclusive. Question as to right to additional homestead. Lamson v. Coffin, 102 Minn. 493, 114 NW 248.

85. Lands granted to state by Federal government for school purposes held not subject to loss to state by adverse possession. Murtaugh v. Chicago, etc., R. Co., 102 Minn. 52, 112 NW 860.

86. The governor and ex-officio land commissioner, therefore, is not liable to action for damages for defrauding would-be purchasers. Summers v. Geer [Or.] 93 P 133.

87. Fisher v. Owen, 144 N. C. 649, 57 SE 393.

88. Blakeley v. Kingsbury [Cal. App.] 93 P 129.

89. On day lands are opened for competitive bids, bidder must have filed application and obligations and made first payment. Rawls v. Terrell [Tex.] 19 Tex. Ct. Rep. 983, 105 SW 488.

90. Where land is resided on or cultivated by another, the party entering must give the occupier 30 days' previous notice in writing of his intention to enter. Entry made or grant obtained without such notice is void. Bell v. North American Coal & Coke Co. [C. C. A.] 155 F 712. The burden of proof is on the enterer to show that the land is unappropriated and open to entry. Bowser v. Westcott [N. C.] 58 SE 748.

91. Occupier agreeing to attorn to the entryman and hold possession for him until grant secured waives notice of entry. Bell v. North American Coal & Coke Co. [C. C. A.] 155 F 712.

92. Settler, before statutory period of residence, left land temporarily, and on return found another on it. He again left, agreeing with party in possession to leave matter to court. His failure to reside on the land worked a forfeiture of it. Overfelt v. Vinson [Tex. Civ. App.] 18 Tex. Ct. Rep. 996, 103 SW 1189. Failure to reside upon and improve the land forfeits the purchase. In such case the commissioner endorses on the obligation "land forfeited." Slaughter v. Terrell [Tex.] 18 Tex. Ct. Rep. 485, 102 SW 399.

93. Applicant settled within 700 or 800 varas of the land desired, believing she was on the land applied for, and, on discovering her mistake, moved on proper land. As against a subsequent locator, applying with notice of her claim, she had the better right to purchase. Morgan v. Armstrong [Tex. Civ. App.] 19 Tex. Ct. Rep. 424, 102 SW 1164. A purchaser of land additional to his private land need not make affidavit of settlement. Evans v. Terrell [Tex.] 19 Tex. Ct. Rep. 982, 105 SW 490.

94. Assignee of state lands takes the benefit of payments made by his assignor. Reininger v. Pannell [Tex. Civ. App.] 19 Tex. Ct. Rep. 378, 101 SW 816. A substituted purchaser stands as an original purchaser direct from the state, though the purchase be from one not an actual settler, if no adverse right intervenes. Id. Deed by settler, executed and delivered after purcaser filed affidavit of settlement, but by mistake dated prior to such affidavit and purchase canceled under law prohibiting

The entry [95] or application should describe the land with certainty.[96] It should not be premature,[97] and must show the right to purchase,[98] that applicant desires the land for his own use,[99] though a sale is contemplated when the certificate is secured,[1] and it must state the facts [2] as to possession and improvements.[3] It may be withdrawn, however,[4] and since it takes effect from the date of its filing in the clerk's office,[5] precedence will be given him who first files.[6] When rights are denied, mandamus will lie to enforce them,[7] but the petition must show that the land was on the market at the time of the attempted purchase,[8] nor must it raise a question of fact,[9] and the right to the remedy may be lost by laches,[10] but not barred by the statute of limitations.[11] Judgment in an entry proceeding should follow the statute and be within its terms.[12]

transfer before affidavit. On showing proper settlement and mistake in date of deed, reinstatement of sale ordered. Patton v. Terrell [Tex.] 20 Tex. Ct. Rep. 147, 105 SW 1115.

95. 640 acres, on waters of Texaway river, Transylvania county, beginning at northwest corner of Harriet Fisher homestead tract, and adjoining lands of J. S. Fisher and others, and running various courses for complement not sufficient. Fisher v. Owen, 144 N. C. 649, 57 SE 393.

96. Bieber v. Lambert [Cal.] 93 P 94. Application describing the land as 160 acres, the west quarter of the designated section, is sufficient, it appearing the state had only one quarter in that section. Lindsey v. Terrell [Tex.] 18 Tex. Ct. Rep. 321, 101 SW 1073. Application calling for "the south part of section 150, cert. 241, grantee, F. M. Gardner, 400 8-10 acres," may be understood to apply to that quantity of land anywhere in the south part of the survey. Morgan v. Armstrong [Tex. Civ. App.] 19 Tex. Ct. Rep. 424, 102 SW 1164.

97. An application made before forfeiture declared is premature. Adams v. Terrell [Tex.] 107 SW 537.

98. Application will not be held void, on a contest, because it merely states the fact of the right to purchase, where it appears applicant was unmarried woman and entitled to hold real estate in her own name. Henshall v. Marsh, 151 Cal. 289, 90 P 693.

99. An agreement by applicant to pay another for services rendered in the matter of application, though payment is to be made on the sale of the land, does not show applicant did not apply to purchase for his own use and benefit, nor does the fact that money was borrowed to be repaid on sale of the land, or secured by mortgage after certificate of purchase. Henshall v. Marsh, 151 Cal. 289, 90 P 693. The right to purchase is not lost by an agreement to sell, made after filing application. Bryan v. Graham, 5 Cal. App. 599, 91 P 114. That an applicant to purchase school lands proceeds in good faith will be presumed. Henshall v. Marsh, 151 Cal. 289, 90 P 693.

1. Henshall v. Marsh, 151 Cal. 289, 90 P 693.

2. A false statement defeats both the applicant and his assignee of any rights acquired thereunder. Kleinsorge v. Burgbacher [Cal. App.] 92 P 199.

3. If the applicant does not know the condition of the land as to possession and improvements, he is in no position to present application. State v. Ross [Wash.] 91 P 762.

4. Application filed, with cash payment, and former mislaid until land sold to another applicant, when applicant requested a return of cash payment. Hamilton v. Gouldy [Tex. Civ. App.] 19 Tex. Ct. Rep. 12, 103 SW 1117.

5. Fellers v. McFatter [Tex. Civ. App.] 19 Tex. Ct. Rep. 391, 101 SW 1065.

6. Fellers v. McFatter [Tex. Civ. App.] 19 Tex. Ct. Rep. 391, 101 SW 1065. Other things being equal, the party who is first in time has first right to purchase. Bieber v. Lambert [Cal.] 93 P 94.

7. Will lie to compel the issuance of a certificate of purchase. State v. Eaton [Neb.] 112 NW 592. Will lie to compel the surveyor general to receive and file application to purchase. Alberger v. Kingsbury [Cal. App.] 91 P 674. Will lie to compel the acceptance of purchase money. Beatty v. Smith, 75 Kan. 803, 90 P 272; Hickert v. Van Doren [Kan.] 92 P 593. But not to compel county commissioners to consent to appointment of appraisers. Nation v. Rundberg [Kan.] 94 P 257. Not to compel the issuance of patent to submerged lake bottom. Olds v. State Land Office Com'r, 150 Mich. 184, 14 Det. Leg. N. 451, 112 NW 952. On application for mandamus to compel commissioner to execute deed, it appeared there was collusion between purchaser and others at the bidding, and relief denied. State v. Ross [Wash.] 91 P 762. Mandamus refused where applicant for writ had filed contest against other claimants, and it did not appear clearly that it was the duty of the officer, under the circumstances, to prepare the patent. Blakeley v. Kingsbury [Cal. App.] 93 P 129. Appropriation to county of certain lands. Right to lands and right to selection assigned by county. Issuance of grant to assignee by land commissioner compelled. Robson v. State Land Office Com'r, 148 Mich. 12, 14 Det. Leg. N. 114, 111 NW 906.

8. Lands sold, abandoned, and purchase reinstated, are not on the market. Hamilton v. Terrell [Tex.] 107 SW 47.

9. Slaughter v. Terrell [Tex.] 18 Tex. Ct. Rep. 485, 102 SW 399.

10. The defense need not be pleaded, but the court will apply the rule of its own motion. Munson v. Terrell [Tex.] 20 Tex. Ct. Rep. 146, 105 SW 1114.

11. Robson v. State Land Office Com'r,

Grants and patents.[See 8 C. L. 1496]—The officers have no right to issue a patent pending contest,[13] but the making of an award is presumptive evidence that it was authorized and regular,[14] and whether made pending a lease may be shown by such lease.[15] A vague and indefinite grant is invalid, unless the identity of the premises can be ascertained by extrinsic evidence,[16] but alterations will not invalidate it,[17] nor will mistake in the name affect a certificate.[18] Until annulled in a proper action the patent is conclusive against the state and claimants under junior titles,[19] and the registration is not required to vest title.[20]

Rescissions, cancellations, forfeitures, and reversions.[See 8 C. L. 1497]—A patent cannot be revoked except upon proper judicial proceedings,[21] instituted in behalf of the state [22] within the statutory period,[23] nor does occupation of the land as a settler affect the rule,[24] but a void certificate is open to attack by one not in privity with the paramount source of title.[25] In a proceeding to forfeit for abandonment, the abandonment must be shown.[26] The cancellation restores the land to the state,[27] and the abandoning party may purchase the same land at competitive sale.[28] Jurisdiction to vacate plats of tide lands is vested in the board of state and land commissioners.[29]

Protest against an entry is not a civil action but a simple proceeding,[30] and cannot be terminated by submitting to nonsuit,[31] but may be withdrawn.[32] The contestant must begin his action within sixty days [33] or forfeit all rights,[34] but, if begun before the patent issues, is in time.[35] The court derives jurisdiction from the order of reference,[36] and the ordinary rules of pleading, practice, and evidence apply,[37]

148 Mich. 12, 14 Det. Leg. N. 114, 111 NW 906.

12. In re entry No. 49 of Williams [N. C.] 59 SE 698.

13. Blakeley v. Kingsbury [Cal. App.] 93 P 129.

14. Bumpass v. McLendon [Tex. Civ. App.] 18 Tex. Ct. Rep. 267, 101 SW 491.

15. Lease of the land admissible to show whether it was in force or canceled at the date of an award of the land. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 SW 614.

16. Grant not showing where land located, except that it is on a certain island, and embraced within certain courses and distances, which have no starting or ending point, too vague as notice of any rights claimed thereunder. Merritt v. Bunting [Va.] 57 SE 567.

17. Alteration in the surveyor's field notes will not invalidate a patent. Keenan v. Slaughter [Tex. Civ. App.] 108 SW 703.

18. A mistake in the middle initial of the vendee will not invalidate the certificate. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 SW 614.

19. Frellsen v. Crandell [La.] 45 S 558.

20. Dew v. Pyke [N. C.] 59 SE 76.

21. Smith v. Crandall, 118 La. 1052, 43 S 699.

22. Frellsen v. Crandell [La.] 45 S 558; Darby's Heirs v. Emmer [La.] 45 S 548. Neither the state nor any of its agents can attack a state patent, valid on its face, in a collateral proceeding. Chauvin v. Louisiana Oyster Commission [La.] 46 S 38. On cancellation of the deed, the property reverts to the state, and a private person having no interest is not a proper party. Powers v. Webster [Wash.] 91 P 569. A deed from the state to tide lands cannot be collaterally attacked. Grant v. Oregon R. & N. Co. [Or.] 90 P 178.

23. The limitation of one year within which to attack the title of a former purchaser does not apply where there has been a forfeiture and resale. Slaughter v. Terrell [Tex.] 18 Tex. Ct. Rep. 485, 102 SW 399; Campbell v. Enochs [Tex. Civ. App.] 107 SW 878.

24. Ewbank v. Mikel [Cal. App.] 91 P 672.

25. Action to quiet title by holder of void certificate of purchase of tide lands. Williams v. San Pedro [Cal.] 94 P 234.

26. If the fact of abandonment does not exist, no power exists to forfeit on that ground. Bumpass v. McLendon [Tex. Civ. App.] 18 Tex. Ct. Rep. 267, 101 SW 491.

27. Ford v. Terrell [Tex.] 107 SW 40.

28. Construction of Laws 1901, p. 294, c. 125. Cameron v. Terrell [Tex.] 107 SW 46.

29. Construction of Act of March 16, 1903, p. 238, c. 127. State v. Abraham [Wash.] 93 P 325.

30. Bowser v. Westcott [N. C.] 58 SE 748.

31, 32. In re Entry No. 49 of Williams [N. C.] 59 SE 698.

33. On an order of reference, the statute begins to run from the the making and entry of the order. Ewbank v. Mikel [Cal. App.] 91 P 672.

34. He has the right to file another application, and thus acquire a right. Ewbank v. Mikel [Cal. App.] 91 P 672.

35. Blakeley v. Kingsbury [Cal. App.] 93 P 129.

36. Kleinsorge v. Burgbacher [Cal. App.] 92 P 199; Blakeley v. Kingsbury [Cal. App.] 93 P 129.

37. Plaintiff must show the certificate is invalid, and the defendant may rely on proof made by plaintiff and facts admitted by the pleading. Bieber v. Lambert [Cal.] 93 P 94.

hence an alias notice may issue if the original was defective.[38] The protestant is not bound to make out a perfect chain of title.[39] The burden of proof is on the enterer or claimant,[40] but a subsequent settler need not show that defendant's nonresidence on the land was the result of mistake.[41] In such cases there is no appeal from the state board of land commissioners.[42, 43]

§ 4. *Interest and title of occupants, claimants, and patentees. A. Federal lands.* See 8 C. L. 1498—The patent is conclusive as to the extent of the right passing under the grant,[44] but does not pass lands not public at its date though they may afterwards become so.[45] What riparian rights go to a patentee, however, depends upon the general law of the state where the land is situated.[46] A substantial right accrues when payment is made and certificate or receipt received.[47] The party in actual possession has the right to hold the land against everyone but the United States,[48] and a homestead entryman has the right to the land and all improvements and crops thereon,[49] but an unsuccessful claimant is not entitled to hold the land until improvements made during the contest are paid for.[50] A contestant's preference right is superior to a trespasser's,[51] and one first entering after the cancellation of a prior entry has priority over another who attempted to enter prior to such cancellation.[52] On relinquishment of the entry, in the absence of superior intervening rights, the settler is entitled to the homestead entry.[53] Courts of equity will determine whether or not title shall be held as trustee,[54] and will decree as circumstances warrant.[55] Laches and waiver, however, defeat the right to charge patentees

38. The proceeding will not be dismissed for defective notice. Caldwell Land & Lumber Co. v. Coffey, 144 N. C. 560, 57 SE 344.

39. Caldwell Land & Lumber Co. v. Coffey, 144 N. C. 560, 57 SE 344.

40. He must show proper entry and that the lands are vacant and unappropriated. Walker v. Carpenter, 144 N. C. 674, 57 SE 461.

41. Morgan v. Armstrong [Tex. Civ. App.] 19 Tex. Ct. Rep. 424, 102 SW 1164.

42, 43. Pierson v. State Land Com'rs [Idaho] 93 P 775.

44. Barringer v. Davis [Iowa] 112 NW 208.

45. United States v. Grand Rapids, etc., R. Co., 154 F 131.

46. If land patented lie in state where English common law doctrine of riparian ownership prevails, the patentee, if land on natural water course, would have right to have water flow down to him without material diminution in quantity, but such right would not exist in arid western states where this doctrine has been modified so as to allow diversion in the interest of agriculture. City of Los Angeles v. Los Angeles Farming & Mill. Co. [Cal.] 93 P 869.

47. Budd v. Gallier [Or.] 89 P 638.

48. New England & Coalinga Oil Co. v. Congdon [Cal.] 92 P 180.

49. First entryman leased land to croppers who sowed and then relinquished back to the government; entry by second party entitled him to crops growing under lease with first entryman. Moore v. Linn [Okl.] 91 P 910.

50. Howe v. Parker, 18 Okl. 282, 90 P 15.

51. Settler on land covered by valid homestead entry acquires no right as a settler against a contestant who secures the cancellation of the first entry and is awarded the preference right to enter. Gourley v. Countryman, 18 Okl. 220, 90 P 427.

52. Holt v. Classen [Okl.] 91 P 866; Enid & A. R. Co. v. Kephart [Okl.] 91 P 1049.

53. Settler must be qualified and make application within 90 days. Gourley v. Countryman, 18 Okl. 220, 90 P 427.

54. By misconstruction of law, lots owned by private party were scheduled to party not entitled. Held, a case for equity jurisdiction. Leak v. Joslin [Okl.] 94 P 518.

55. Where patent has been erroneously issued, the court will declare the patentee a trustee for the party entitled and decree a conveyance. Gourley v. Countryman, 18 Okl. 220, 90 P 427. When patent issued to wrong party, courts will declare a constructive trust, divesting the wrongful holder of title and placing it in the one entitled. Brooks v. Garner [Okl.] 94 P 694; Prosser v. Finn, 28 S. Ct. 225. In 1888 W. & L. in possession of unsurveyed land. In 1891 L. located it as quartz claim, and in 1896, patent taken in name of B. as convenience. Subsequent conveyance to C. who knew all the facts. Agreement between W. & L. in 1888 by which L. retained possession on certain conditions. In suit by W. against L. & C., for W.'s interest, defense that contract of 1888 was for purpose of acquiring patent illegally held not maintainable, it appearing it was legally acquired. Waring v. Loomis [Wash.] 93 P 1088. The plaintiff having relinquished his claim, defendant who holds title will not be decreed a trustee for him. Love v. Flahive, 205 U. S. 195, 51 Law. Ed. 768. A party will not be held to hold as trustee for another on the ground that the patent was obtained by fraud and perjury. Cragie v. Roberts [Cal. App.] 92 P 97.

as trustees.[56] On entry by town authorities the title is held in trust,[57] and the interest of a town lot owner cannot be reduced by the surveyor or affected by the rules of the legislature.[58] The right to mortgage, sell, or lease depends on circumstances also.[59]

Railroad land grants.[See 8 C. L. 1500]—The extent of the interest granted is to be determined by the granting act,[60] and the mere selection of lands by the company confers on it no title, equitable or otherwise,[61] The price of land erroneously patented and sold to innocent parties by the company may be recovered by the government.[62]

Area acquired and boundaries.[See 8 C. L. 1500]—If a meander line substantially corresponds to a shore line of a body of water in fact meandered in the original survey, the grantee will take to the actual water line, although it is more than the plat represents.[63]

Adverse possession.[See 8 C. L. 1500]

(§ 4) *B. State lands.*[See 8 C. L. 1501]—The certificate is prima facie evidence of title,[64] but no interest or title passes under a void certificate,[65] nor under a deed to lands located before the execution of the deed.[66] Unless he hold as trustee for the rightful owner,[67] the party holding the older grant has the better title,[68] which cannot be defeated by error or mistake in the discription of the land.[69] Grantee may devise lands held under grant,[70] and the title descends to the heirs of the party who

56. Waiver filed before patent issued, and delay of several years to enforce preferential right. Holt v. Murphy, 28 S. Ct. 212.

57. Entry made under § 2387, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1457), the enterer holds in trust for the benefit of the occupants individually and collectively and the disposal of the lots is conducted under such regulations as the state wherein the same are located may make. White v. Whitcomb, 13 Idaho, 490, 90 P 1080; Scully v. Squire, 13 Idaho, 417, 90 P 573.

58. On entry of town authorities, the rights of the inhabitants accrue and cannot be defeated by rules of the territorial legislature or the acts of the surveyor. Scully v. Squire, 13 Idaho, 417, 90 P 573.

59. Homestead lands may be mortgaged before patent issues. Rogers v. Minneapolis Threshing Mach. Co. [Wash.] 92 P 774. The sale of the right initiated by settlement is an abandonment of the settlement as against an adverse claimant. Brooks v. Garner [Okl.] 94 P 694. Conveyance after patent pursuant to agreement made before its issuance sustained. Hartman v. Butterfield Lumber Co., 199 U. S. 335, 50 Law. Ed. 217. A party may dispose of the substantial title or interest accruing on paying purchase price and receiving certificate or receipt. Gourley v. Countryman, 18 Okl. 220, 90 P 427. A donation land claimant may sell and convey his claim after four years' residence and cultivation whether he has received patent or not. Sylvester v. State, 46 Wash. 585, 91 P 15. The full beneficial interest and ownership vests in the homesteader upon receipt for final entry, and a lease by him before the issuance of his patent is valid. Walker v. Johnson, 53 Fla. 1076, 43 S 771.

60. United States v. Southern Pac. R. Co., 152 F 314.

61. Donohue v. St. Paul, etc., R. Co. [Minn.] 112 NW 413. Rights acquired by settlement and improvement upon unsurveyed land, duly asserted, will be protected in their entirety, even though the lands claimed lie in different quarter sections and the improvements of the settler are confined to a single quarter section. Id. A railroad company appropriating a right of way over land covered by a homestead entry acquires no right in law or equity. Enid & A. R. Co. v. Kephart [Okl.] 91 P 1049.

62. Suit by United States under U. S. Comp. St. pp. 1595 and 1603, to recover from railroad company price of land erroneously patented and sold to third parties. Acts under which suit brought are valid, independent acts, passed for the protection of the property of the government. United States v. Southern Pac. R. Co., 157 F 96.

63. Whether the line is a meander line in fact or was run by fraud or mistake is for determination of land department, whose judgment is conclusive in a collateral proceeding. Barringer v. Davis [Iowa] 112 NW 208.

64. Bieber v. Lambert [Cal.] 93 P 94.

65. Certificate of purchase of state lands which had been excluded from sale. Williams v. San Pedro [Cal.] 94 P 234.

66. Land located thirty years prior to deed. Stetson v. Grant, 102 Me. 222, 66 A 480.

67. Where entry was so defective as not to give notice to one who subsequently enters he will not be adjudged to hold in trust for party making such defective entry. Fisher v. Owen, 144 N. C. 649, 57 SE 393. Where testator at time of making will was entitled to patent which issued to his heirs, they held same in trust for the devisees. Dean v. Jagoe [Tex. Civ. App.] 18 Tex. Ct. Rep. 676, 103 SW 195.

68. Dew v. Pyke [N. C.] 59 SE 76.

69. Foster v. Meyers, 117 La. 216, 41 S 551.

70. The rule is not affected by fact that grant inhibited sale of land. Dean v.

completed the period of occupancy.[71] A certificate and the land patented thereunder are also assets of a decedent's estate.[72] A claimant will be compensated for a failure of title unless he is excluded by the terms of the conveyance,[73] but the damages are limited to the purchase money and interest.[74] There can be no recovery for improvements unless put on the land in good faith,[75] nor has an intruding settler a right to remove such as constitute fixtures.[76] A purchaser of school land may create a valid lien thereon,[77] but not until the statutory period of occupancy has expired.[78] An alien takes such an interest as can only be divested by the state.[79]

Area acquired and boundaries. See 8 C. L. 1501—The purchaser of tide lands has the right of wharfage to deep water, and the right to all accretions,[80] and in arriving at the extent of the grant the mode of measurement is determined by the character of the surface to which it is to be applied.[81]

Adverse possession.—Entry by the elder patentee will stop the running of the statute of limitations in favor of the junior patentee.[82]

Adjudication of title by the courts. See 8 C. L. 1502—Statute conferring jurisdiction on the court of claims is constitutional.[83] A patent will be construed according to its language,[84] but not so as to pass lands occupied under a claim of title.[85] An abandoned survey cannot be set up against a subsequent patent,[86] but title may be established by any competent parol evidence,[87] and the burden is on plaintiff.[88]

§ 5. *Leases of public lands and rights thereunder.* See 8 C. L. 1502—The statute fixes the amount of land to be leased to any one person,[89] though the unauthorized

Jagoe [Tex. Civ. App.] 18 Tex. Ct. Rep. 676, 103 SW 196.

71. C. takes up homestead with wife who died before completion of three-year actual occupancy required by statute. C. married again and wife lived with him on land until completion of period. Title descended to heirs of last wife. Heirs of first wife, however, were entitled to contribution for improvements made by the community of the first marriage. Creamer v. Briscoe [Tex. Civ. App.] 107 SW 635.

72. Certificate after death of party entitled and patent issued not property of heirs, but subject to administration. Fields v. Burnett [Tex. Civ. App.] 108 SW 1048.

73. Construction Laws 1894, p. 574, c. 317, § 5. Wheeler v. State, 190 N. Y. 406, 83 NE 54.

74. Wheeler v. State, 190 N. Y. 406, 83 NE 54.

75. Improvements put on after application rejected and after suit cannot be recovered for. Fellers v. McFatter [Tex. Civ. App.] 19 Tex. Ct. Rep. 391, 101 SW 1065.

76. McCullers v. Johnson [Tex. Civ. App.] 19 Tex. Ct. Rep. 606, 104 SW 602.

77. Before the expiration of the three years' occupancy required by statute, a lien may be created on school land, enforcible after such occupancy had been completed. Bumpass v. McLendon [Tex. Civ. App.] 18 Tex. Ct. Rep. 267, 101 SW 491.

78. Bourn v. Robinson [Tex. Civ. App.] 107 SW 873.

79. Johnson v. Eversole Lumber Co., 144 N. C. 717, 57 SE 518.

80. Grant v. Oregon R. & Nav. Co. [Or.] 90 P 178.

81. If the distance to be ascertained is over the sea, it is determined in marine miles; if over the land, in statute miles. Lazell v. Boardman [Me.] 69 A 97.

82. Where junior patentee makes first entry within the interference and holds possession, if the elder enters within 15 years and takes possession, the statute is suspended against him. Such entry gains possession of the uninclosed lands. Where two patents interfere, and junior patentee first settles on the part of the interference with intention of taking possession, and elder patentee enters and improves part of interference, he is, by construction of law, possessed of whole tract. Goff v. Lowe, [Ky.] 107 SW 794.

83. Laws 1900, p. 1633, c. 767, conferring jurisdiction on the court of claims in matters of claims of purchasers of public lands, is not violation of Const. art. 3, § 19. Wheeler v. State, 190 N. Y. 406, 83 NE 54.

84. Patent recites issuance of land certificates and their assignment to certain persons, "executors of" party deceased, and grants to said persons, executors and their "heirs and assigns." Land passed to them as individuals, the term "heirs and assigns" being necessary to create an estate in fee. Sanborn v. Loud, 150 Mich. 154, 14 Det. Leg. N. 586, 113 NW 309.

85. In re Jerome Avenue in City of New York, 54 Misc. 345, 105 NYS 1009.

86. Fuller v. Keesee, 31 Ky. L. R. 1099, 104 SW 700.

87. Bumpass v. McLendon [Tex. Civ. App.] 18 Tex. Ct. Rep. 267, 101 SW 491.

88. Fellers v. McFatter [Tex. Civ. App.] 19 Tex. Ct. Rep. 391, 101 SW 1065. The burden is on plaintiff to show that the land sued for is not within the exceptions of the patent. Fuller v. Keesee, 31 Ky. L. R. 1099, 104 SW 700.

89. A lessee of the maximum amount of school lands is estopped from claiming that another lease is held for him. Noel v. Barrett, 18 Okl. 304, 90 P 12.

insertion of lands in the lease may be ratified by the state.[90] The lease may be denied for failure to pay rent,[91] but cannot be canceled before its termination and a new one issued, there being no such failure.[92] Inhibition against sale does not include leasing.[93] The lessee of tide lands may exercise ownership over what is on the leased premises,[94] and his assignee may enjoin a trespass thereon.[95] The right to renew or release is subject to sale and purchase.[96] The quantities in which the land may be purchased is fixed by statute,[97] which gives lessees and their assignees a preference right to purchase the leased premises [98] before the expiration of the lease [99] on notice of his intention to buy,[1] and showing that the right of the state under the lease has ended.[2] Purchase of the land by the lessee takes it out of the operation of the lease.[3]

§ 6. *Spanish and other grants antedating Federal authority.* See 8 C. L. 1503

§ 7. *Regulations and policing, and offenses pertaining to public lands. Cutting timber on public lands.* See 8 C. L. 1504—Other topics treat of conspiracy to violate the land laws,[4] and of perjury in applications for lands.[5] The law prescribing the terms upon which timber may be cut and removed will be construed so as to effectuate it,[6] hence where authority is given to cut on mineral lands they must be actually such,[7] and the intent with which the location was made may be determined by circumstances.[8] In jurisdictions where a permit for the removal of timber is necessary, it can only be removed during the life of the permit,[9] and if not then so removed it becomes the property of the state [10] when the party then removing is guilty of a conversion,[11] an action for which is not barred by the statutes applying to penalties or forfeitures.[12] Such permit may be extended once for the period of one year,[13] but

90. Land not subject to lease inserted therein by clerk not having power to do so. Rents paid by lessor and commissioner of land office and state treasurer treated lease as covering land inserted. McGill v. Sites [Tex. Civ. App.] 18 Tex. Ct. Rep. 63, 19 Tex. Ct. Rep. 695, 103 SW 695.

91. The statutory prohibition that no lease shall issue to original lessees until all arrears of rent are paid applies to the original lease, and not to subsequent ones, though some of the lessees may be the same. Rhea v. Terrell [Tex.] 18 Tex. Ct. Rep. 818, 103 SW 481.

92. McGill v. Sites [Tex. Civ. App.] 18 Tex. Ct. Rep. 63, 19 Tex. Ct. Rep. 695, 103 SW 695.

93. An inhibition of the sale of school lands does not include a lease thereof for mineral purposes. State v. Evans, 99 Minn. 220, 108 NW 958.

94. The lessee or his assignee is entitled to the claims that gather on leased tide lands. Sequin Bay Canning Co. v. Bugge [Wash.] 94 P 922.

95. The state, being no party to the trespass or to the immediate possession, need not be impleaded. Sequin Bay Canning Co. v. Bugge [Wash.] 94 P 922.

96. School lands in Oklahoma. Noel v. Barrett, 18 Okl. 304, 90 P 12.

97. The "surveys" referred to in the statute mean "sections," which are to be sold as a whole, and not in subdivisions, if no part of it has already been sold. Ford v. Terrell [Tex.] 107 SW 40.

98. The statute giving such right is not unconstitutional, and is not confined to assignees who were such when the statute was passed. Glasgow v. Terrell [Tex.] 18 Tex. Ct. Rep. 443, 102 SW 98; Patterson v. Knapp [Tex.] 103 SW 489.

99. Patterson v. Crenshaw [Tex. Civ. App.] 20 Tex. Ct. Rep. 91, 105 SW 996.

1. Statute requires 60 days' notice before expiration of lease. Assignment executed Aug. 1, 1907, acknowledged Aug 17, 1907, notice Aug. 20, 1907, lease to expire Sept. 18, 1907. Notice too late under the act of May 16, 1907, which took effect between the execution and acknowledgment of the assignment. Ross v. Terrell [Tex.] 20 Tex. Ct. Rep. 144, 105 SW 1116.

2. Patterson v. Knapp [Tex.] 103 SW 489.

3. The lease comes to an end without any cancellation, and the statutory regulation for cancellation of leases for nonpayment of rent has no application. Patterson v. Knapp [Tex.] 18 Tex. Ct. Rep. 446, 102 SW 97.

4. See Conspiracy, 9 C. L. 600.

5. See Perjury, 10 C. L. 1162.

6. State v. Rat Portage Co. [Minn.] 115 NW 162.

7. To justify the cutting of timber on public mineral lands, the lands must be actually, and not apparently, mineral. The mere appearance of mineral, the mere appearance of colors here and there, as in a placer claim, is not sufficient. Anderson v. U. S. [C. C. A.] 152 F 87.

8. The failure to do more than assessment work on a mining claim may be considered by the jury in determining whether the location was made as a blind to cover timber depreciations. Anderson v. U. S. [C. C. A.] 152 F 87.

9, 10, 11, 12. State v. Rat Portage Lumber Co. [Minn.] 115 NW 162.

13. State v. Shevlin-Carpenter Co., 102

the state is not estopped to deny the validity of an unauthorized extension,[14] nor to bring an action for the conversion of the timber.[15] That the trespasser had knowledge of the law does not of itself make the trespass willful.[16] The amount of damages recoverable depends on the terms of the statute [17] which has been held constitutional,[18] and both damages and penalties may be recovered in one action.[19] In the absence of a statute giving damages, however, none can be recovered.[20]

Crimes and offenses against public lands. See 8 C. L. 1505—The land department has jurisdiction to make rules for the disposition of public lands,[21] but criminal charges cannot be based on violations of them,[22] and statutes imposing penalties for this illegal purchase of public lands must be strictly construed.[23] Hence the statute relating to fraudulent entries contemplates active fraud,[24] but does not require pecuniary loss,[25] nor will the oath be willful and corrupt if wanting in essential criminal intent.[26] The indictment, however, need not charge that the lands were public lands, subject to homestead entry.[27] The secretary of the interior has the authority to make such rules and regulations as will insure the objects of the forest reserves,[28] and this authority cannot be affected by state policy.[29] Unless forbidden, the public have an implied license to graze stock on the public lands,[30] but this privilege cannot be monopolized by anyone.[31]

Fencing. See 8 C. L. 1505—Without the intent to inclose public lands, knowing them to be such, there can be no offense.[32] Color of title cannot be shown by a deed

Minn. 470, 113 NW 634; State v. Rat Portage Lumber Co. [Minn.] 115 NW 162.

14. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

15. State v. Rat Portage Lumber Co. [Minn.] 115 NW 162.

16. Parties who enter in good faith, under the belief that a permit has or will be extended, are not willful trespassers. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

17. The statute, as construed, authorizes the state to recover double or treble value of the timber taken, according to whether the trespass is casual or involuntary, or willful and unlawful. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

18. The statute fixing damages for trespass upon state timber to double and treble the value of the timber taken is not unconstitutional. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

19. Action for trespass in cutting trees, and for penalty under forest, fish and game law. People v. Bennett, 56 Misc. 160, 107 NYS 406.

20. Code Civ. Proc. 1867, 1868, giving treble damages for cutting trees, do not apply to trees on state lands. People v. Bennett, 56 Misc. 160, 107 NYS 406.

21. The land department has the power to make such reasonable rules and regulations not inconsistent with any valid law, as will give effect to the acts of congress providing for the disposition of public lands. Van Gesner v. U. S. [C. C. A.] 153 F 46. The term "jurisdiction," in connection with the secretary of the interior, is used in its legal sense. United States v. Keitel, 157 F 396.

22. Rules and regulations of the land office cannot be made the basis of crime where a statute does not distinctly make the charge in question a criminal offense. United States v. Keitel, 157 F 396.

23. Hand v. Cook [Nev.] 92 P 3.

24. Silence, in view of a misleading appearance, will have an active property, and be in effect an affirmative representation that the apparent facts are the real facts. United States v. Robbins, 157 F 999. To secure an entry by feigning to comply with the law, and then use it as a cover for obtaining or prolonging possession is a fraud. Stearns v. U. S. [C. C. A.] 152 F 900.

25. Any false trick or practice set in motion for the purpose of inducing the government officials, in executing the laws in cases where they must act upon statements made by the parties interested, to act in a way which would be unlawful if the real truth were known, is a fraud on the government. United States v. Lonabaugh, 158 F 314.

26. Prosecution for subornation of perjury in procuring homesteads. Nurnberger v. U. S. [C. C. A.] 156 F 721.

27. "Entries in the land offices" relate to lands, if nothing is said to the contrary, which are subject to disposition in some form under the public laws, and not to those which are set apart and used for some special public purposes. Stearns v. U. S. [C. C. A.] 152 F 900.

28. United States v. Shannon, 151 F 863.

29. The United States' right to forbid entry upon its forest reserves by cattle cannot be curtailed by the policy of the state in which the lands are located. United States v. Shannon, 151 F 863.

30, 31. Richards v. Sanderson, 39 Colo. 270, 89 P 769.

32, 33. Carroll v. U. S. [C. C. A.] 154 F 425.

for unsurveyed public lands from a railroad company to defendant.[33] A verdict of guilty may be found on one count and not guilty on another.[34]

PUBLIC POLICY, see latest topical index.

PUBLIC WORKS AND IMPROVEMENTS.

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§ 1. *Definitions and scope of title.*[See 8 C. L. 1506]—This topic treats generally of public works and improvements, including local improvements [35, 36] the powers and duties of municipalities with respect to public works and improvements, the procedure therefor and the costs thereof, including local assessments. The taking of property for public use,[37] the construction and operation of particular public works,[38] and matters peculiar to the powers and fiscal affairs of particular public bodies,[39] are treated elsewhere. While the manner of letting a contract for a public work and the validity of provisions peculiar to contracts of this kind are treated herein, matters pertaining to the making and validity of public contracts in general are excluded.[40] Liability for personal injuries resulting from negligence in the construction and maintenance of public works is also excluded.[41]

§ 2. *Power, duty and occasion to order or make improvements.*[See 8 C. L. 1506]

34. Indictment charged first, unlawful enclosure of certain public lands, second, unlawful maintenance and control of such enclosure and, third, the unlawful prevention and obstruction of free passage over said lands by means of fencing and enclosing. Verdict of not guilty on first and third counts, and not guilty on second, upheld. Carroll v. U. S. [C. C. A.] 154 F 425.

35, 36. Essential element of a local improvement is benefit to adjacent property as distinguished from property throughout the municipality. Water main held local improvement. Vreeland v. Tacoma [Wash.] 94 P 192.

37. See Eminent Domain, 9 C. L. 1073.

38. See such titles as Highways and Streets, 9 C. L. 1588; Sewers and Drains, 8 C. L. 1882; Waters and Water Supply, 8 C. L. 2262.

39. See Counties, 9 C. L. 827; Municipal Corporations, 8 C. L. 1056; Towns; Townships, 8 C. L. 2130; States, 8 C. L. 1970.

40. See Public Contracts, 8 C. L. 1473; Building and Construction Contracts. 9 C. L. 424.

41. See Negligence, 8 C. L. 1090; Municipal Corporations, 8 C L. 1056; Independent Contractors, 8 C. L. 176.

Subject to constitutional limitations,[42] the power of the state to construct public works and to make public improvements is inherent and, except to the extent that it has been delegated to municipalities, exclusive,[43] while the powers of municipalities in this regard are solely derivative,[44] and the legislative functions delegated to the municipal body in this regard cannot be delegated by it,[45] but the details of supervision and direction of the construction may be delegated,[46] and a slight deviation from the plans and specifications will not constitute usurpation of legislative authority by the officer in charge of such details, where the plans and specifications are substantially followed in all material respects.[47] The exercise of this power by a municipality involves more or less of discretion,[48] and where such power is limited only by a restriction as to the amount of municipal indebtedness, the determination of the duly authorized authorities as to the necessity of the work or improvement is exclusive.[49] A city's power to make such repairs and improvements is not curtailed by a statute requiring a public service corporation to do a portion of such work.[50]

§ 3. *Funds for improvements and provision for cost.* See 8 C. L. 1509—Some of the statutory limitations as to the funds for improvement and costs of the work are, that the funds must be provided for or appropriated before the indebtedness is in-

42. Act entitled "An act to provide for a commission for building court houses." passed April 18, 1904 (97 Ohio Laws, p. 111), as amended by act March 8, 1906 (98 Ohio Laws p. 53), held constitutional. Mackenzie v. State, 76 Ohio St. 369, 81 NE 638. Act April 3, 1903 (P. L. 136), amending act May 22, 1895, authorizing erection of soldiers' monuments in certain counties, held to give sufficient notice of erection of soldiers and sailors memorial halls in certain counties by its adoption of the title of the amended act as its own. Yoho v. Allegheny County, 218 Pa. 401, 67 A 648. Act April 18, 1904 (97 O. L. p. 111), amended by act March 8, 1906 (98 O. L. p. 53), held relating to construction of court houses entirely distinct and separate from Rev. St. §§ 794-799, relating to the same **subject-matter,** the result being that there are two separate and independent methods provided for the same matter, and the validity of the one is not dependent upon that of the other. Mackenzie v. State, 76 Ohio St. 369, 81 NE 638. Act March 17, 1897 (Sess. Laws 1897, p. 328, c. 112), as amended by act March 8, 1905, (Sess. Laws 1905, p. 300), authorizing various works and improvements by municipal corporations, being merely amendatory in character and intended to confer additional powers on such corporations held not invalid under Const. art. 2, § 19, providing that no bill shall embrace more than one subject. Aylmore v. Seattle [Wash.] 92 P 932. Classification of counties may be made according to population for the purpose of erection of public improvements. Act Apr. 3, 1903 (P. L. 136), authorizing erection of memorial halls in memory of soldiers and sailors in the war of rebellion, in counties of more than 500,000 and less than 1,000,000 inhabitants. Yoho v. Allegheny County, 218 Pa. 401, 67 A 648. Sewers. parks, waterworks, lighting plants, etc., are not works of **internal improvement** but relate to public health, safety, and welfare. Bird v. Detroit Common Council [Mich.] 111 NW 860. Construction of street railroad held work of internal improvement, within Const. art. 14, § 9, forbidding state, and municipality as subdivision thereof from engaging in internal improvements. Id. Construction of a public improvement upon the credit of the city does not constitute a violation of constitutional inhibitions against loan of credit, etc., where the city is to have absolute title to and complete control over such improvement. Haenssler v. St. Louis, 205 Mo. 656, 103 SW 1034.

43. A city cannot require its permission to be obtained as a condition to the right to do certain things authorized by statute to be done in the prosecution of a public work. Hudson & M. R. Co. v. Hoboken [N. J. Law] 68 A 60.

44. City of Detroit not authorized by its charter, § 169, nor by Comp. Laws, § 3443, authorizing city to pave, improve, keep in repair, etc., its streets, to construct, own, and lease to private corporations a street railroad. Bird v. Detroit Common Council [Mich.] 111 NW 860.

45. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86; Lisbon Ave. Land Co. v. Lake [Wis.] 113 NW 1099.

46, 47. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86.

48. The necessity of a sewer improvement is a question for council to determine in the exercise not only of the taxing power but also of the police power delegated to it by the code. This authority combines discretion. King v. Dayton, 6 Ohio N. P. (N. S.) 369. Where construction of public improvement involves, as it usually does, judicial discretion of local authorities, **mandamus** will not lie to compel such construction. State v. Phillips [Wis.] 114 NW 802.

49. Tipton v. Shelbyville [Ky.] 107 SW 810.

50. See Gen. Laws 1896, c. 72, authorizing cities to do such paving, etc., as it deems necessary, and Gen. Laws 1896, c. 187, § 18, requiring street railroad companies to pave, etc., certain parts of the street. Warren Bros. Co. v. Taylor [R. I.] 69 A 303.

curred,[51] submission to the vote of the people,[52] and limitations as to the amount to be expended.[53] Under a general authority to issue bonds, a city may issue bonds to raise funds for an authorized public improvement,[54] and the right to assess the owners with a part of the cost is not necessarily exclusive of the right to issue bonds for the remainder.[55]

§ 4. *Proceedings to authorize or validate making. A. In general.* See 8 C. L. 1511.

(§ 4) *B. By whom and how initiated.* See 8 C. L. 1512—Public works and improvements undertaken by municipalities are usually inaugurated either by ordinance enacted by the municipal body of its own motion or upon a petition required by statute.[56] In either case jurisdictional requirements must be strictly complied with, and failure to do so will render all subsequent acts and proceedings void,[57] but not so as to mere irregularities in matters of procedure.[58] The ordinance must, of course, be enacted by the requisite majority,[59] and in the manner prescribed by stat-

51. Tie vote for expenditure of funds, decided in favor of such expenditure by vote of mayor, held sufficient merely to authorize expenditure of funds on hand and not sufficient to create obligation to be met by taxation. Vossen v. St. Clair, 148 Mich. 686, 14 Det. Leg. N. 331, 112 NW 746. Under 1 Priv. Laws 1869, p. 364, § 13, giving **park commissioners** all powers of council as to parks, such board may incur expense for improvements without an appropriation therefor as required by city charter where such expenses are incurred by city council. Barber Asphalt Pav. Co. v. South Park Com'rs, 233 Ill. 362, 84 NE 243. Buffalo City charter, § 408, requiring levy of assessment and confirmation thereof before contracting for public improvements in excess of certain amount, does not apply to issue of bonds under Laws 1902, p. 1361, c. 568, §§ 1-3, as amended by Laws 1906, p. 1725, c. 665, and assessment to reimburse city for such **bond issue.** People v. Buffalo, 57 Misc. 17, 107 NYS 281. An appropriation therefor as required by city charter, where such expenses are incurred by city council. Barber Asphalt Paving Co. v. South Park Com'rs, 233 Ill. 362, 84 NE 243. If section 408 should be construed to apply to such bond issue, it was repealed by the law authorizing such issue. Id. Section 408 does not apply to assessment to pay bonds of city of Buffalo levied under Laws 1902, p. 1356, c. 566, but does apply to assessment under Laws 1906, p. 1439, c. 527, to pay for improvements therein specified. People, etc., R. Co. v. Buffalo, 57 Misc. 10, 107 NYS 689. The levy of an assessment is a **sufficient appropriation** to render the funds available for the construction of the improvement. McGilvey v. Lewiston, 13 Idaho, 338, 90 P 348.

Persons contracting with municipality for construction of street or sewer improvements are bound to use reasonable diligence and business caution to ascertain validity of proceedings and authority of council to enter into such contracts, and where gross disproportion is apparent between amount authorized to be so expended and amount legally applicable thereto in view of taxable valuation of property included within such municipality, such contracting parties cannot rely merely on clerk's certificate that requisite funds are in treasury and unappropriated for any other purpose. Smith v. Rockford, 9 Ohio C. C. (N. S.) 465.

52. Where city, under authority of Comp. Laws, § 3258, submitted to voters the question of raising funds to enlarge waterworks and electric lighting plant by installing larger boilers, and on being so authorized borrowed money for such purpose, it could not under authority of § 3265 use such money in connection with a contract to purchase electrical current. Vossen v. St. Clair, 148 Mich. 686, 14 Det. Leg. N. 331, 112 NW 746. Where municipality is required to submit to qualified voters the plan for raising revenues to meet the cost of an improvement, the entire plan must be submitted. Act March 17, 1897 (Sess. Laws 1897, p. 327, c. 112), as amended by Act March 11, 1905 (Sess. Laws 1905, p. 300, c. 159), held not complied with, and bond issue enjoined. Aylmore v. Seattle [Wash.] 92 P 932.

53. Under Kirby's Dig. § 5683, prohibiting single improvements in excess of 20 per cent of value of property in improvement district as shown by "last county assessment," changes in such assessment by board of equalization must be considered in determining such value. Board of Imp. v. Offenhauser [Ark.] 105 SW 265.

54. Haeussler v. St. Louis, 205 Mo. 656, 103 SW 1034.

55. Edwards House Co. v. Judson [Miss.] 45 S 14.

56. Where a special statute providing for a particular class of municipal improvements does not require any petition, the municipality may itself inaugurate the proceedings. Googin v. Lewiston [Me.] 68 A 694.

57. Leibole v. Traster [Ind. App.] 83 NE 781. Failure to follow mandatory requirements renders the ordinance void. Requirement of Ky. St. 1903, § 3100, of intervention of two weeks between passage of ordinance in the two branches of the municipal council. Thomas v. Woods [Ky.] 108 SW 878.

58. Leibole v. Traster [Ind. App.] 83 NE 781.

59. Improvement proceedings not rendered void because the improvement was voted for by unanimous vote of only eight members of council present, there being ten members in all, and charter requiring "unanimous vote." Bussing v. Mt. Vernon, 121 App. Div. 502, 106 NYS 195. Under Code, § 793, requiring three-fourths majority to pass resolution for improvement on council's own motion, a bare majority is sufficient to receive the resolution and fix the time for its

ute.[60] It must sufficiently describe the improvements therein proposed,[61] but where the ordinance definitely describes the property, irregularities in designation of the owners is not necessarily fatal.[62] Impractical exactness in specifications is not required.[63] The enabling statute may be incorporated into the resolution for the improvement by reference,[64] as may also plans and specifications on file.[65]

Where the proceedings are required to be instituted by petition of property holders the filing of a petition signed by the proper number of property holders is jurisdictional.[66] Such a petition must be supported by the legally sufficient

consideration and final adoption. Nixon v. Burlington [Iowa] 115 NW 239. Record of detailed statement of the vote upon streets of roll calls specially prepared for the purpose is sufficient, though such statement is not set on in the general record book, especially where it appears that all members of council were present and that all voted for the resolution. Id. Where it does not appear that the improvement was ordered by less than three-fourths vote, the resolution of necessity itself shows, as required by Code, § 811, that the improvement was on council's own motion. Bennett v. Emmetsburg [Iowa] 115 NW 582. Record that resolution was "carried 8 votes for" held not compliance with Code, § 811, requiring vote to be by "yeas and nays" and entered of record. Id. Clerk need not, under Code, § 811, rewrite names of councilmen in recording vote where the vote is unanimous and it appears that all members were present. Id.

60. Adjourned meeting held "subsequent meeting" regardless of time intervening, under St. 1901, p. 27, c. 32, § 2, requiring call for special election to determine whether improvement shall be made to be made at a meeting subsequent to the one at which the necessity of the improvement is determined. City of Redondo Beach v. Barkley, 151 Cal. 176, 90 P 452. Resolution of necessity of sewer not passed in accordance with Code, § 810, held invalid. Bennett v. Emmetsburg [Iowa] 115 NW 582. President of board of trustees of city of 6th class held, under St. 1883, p. 268, c. 49, §§ 858, 875 to be the "executive" of such city within St. 1901, p. 27, c. 32, § 2, requiring resolution of necessity and ordinance calling special election to be "approved by the executive." City of Redondo Beach v. Barkley, 151 Cal. 176, 90 P 452.

61. Ordinance describing hydrants, pipes, grades, etc., held sufficient. Gault v. Glen Elyn, 226 Ill. 520, 80 NE 1046. Ordinance describing manholes and catch basin covers held sufficient. Gage v. Wilmette, 230 Ill. 428, 82 NE 656. Ordinance held sufficiently certain as to the limits of the drainage district. Id. Ordinance held to sufficiently describe the drainage district. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615. Where the ordinance is ambiguous as to the number of catch basins to be constructed, objection to the assessment should be sustained. Id.; Gage v. Chicago, 227 Ill. 137, 81 NE 11, citing Gardner v. Chicago, 224 Ill. 254, 79 NE 624. Under Code 1892, § 3011, requiring improvements to be paid for by special ordinance to be described by resolution of mayor and board of aldermen, such description need not be contained in the resolution of necessity, if it is described by subsequent resolution. Edwards House Co. v. Jackson [Miss.] 45 S 14. The fact that ordinance does not provide in express terms for repaving streets torn up in excavating for sewers does not render it invalid if it does so by implication. Provision in ordinance that labor "be performed in a good and workmanlike manner, construed in connection with estimate, held to provide for repaving of streets torn up in excavating for sewers. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

62. Designated owners in partnership name without stating individual names. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

63. Where amount of masonry could not be determined with exactness until excavations were made, an estimate of such amount was sufficient. Dickey v. Porter, 203 Mo. 1, 101 SW 586. Fact that resolution of necessity of which notice was given contained no specification as to the substructure of the proposed pavement did not invalidate the resolution and contract calling for such substructure, though Code, § 810, required resolution to state nature of the pavement proposed and the method of construction, the office of notice being merely to apprise the public and persons interested of the general character of the proposed improvement, and offered opportunity for investigation and protest. Nixon v. Burlington [Iowa] 115 NW 239.

64. Edwards House Co. v. Jackson [Miss.] 45 S 14.

65. Gilsonite Const. Co. v. Arkansas McAlester Coal Co., 205 Mo. 49, 103 SW 93; Dickey v. Porter, 203 Mo. 1, 101 SW 586. Ordinance held sufficient as to description of improvement when taken in connection with the plans and specifications on file. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86. An ordinance of necessity referring to plans and specifications on file for a description of the improvement will not confer jurisdiction where such plans and specifications are not on file. Barber Asphalt Paving Co. v O'Brien [Mo. App.] 107 SW 25.

66. Construction of sidewalk under Laws 1901, p. 215, c. 167. State v. Bury [Minn.] 112 NW 534. Where the municipal charter provides that local improvements shall be made only on petition of the majority of the owners of property affected, an ordinance which ignores the wishes of such owners is invalid. A general expression in an improvement ordinance adopting the provisions of the Act 1872, art. 9, relating to incorporation of cities and villages, does not repeal the special charter of the city providing a different method of making the improvement. City of Olney v. Conour, 230 Ill. 15, 82 NE 347.

signatures [67] of the required number [68] of legally qualified signers.[69] The fact that some of the signatures were made under a misapprehension of the facts does not affect jurisdiction, where such fact does not appear on the face of the petition.[70] Petitioners cannot prevent further proceedings by withdrawal from the proceedings which they have inaugurated.[71] Where the entire proceedings prior to the directing of the improvement are at the risk of the petitioners, the municipality cannot recover costs from the sureties on petitioners' bond which has been declared invalid by reason of the invalidity of the statute under which it was given.[72] Where the record of the municipal body is required to show that the proceedings were initiated by petition, it is sufficient if such fact appear from the whole record.[73]

(§ 4) *C. Notice and hearing.*See 8 C. L. 1518—In the absence of statutory mandate, notice of a proposed public improvement is not necessary,[74] but where notice is required [75] it is imperative that it should be given.[76] The notice must specify the approximate location of the proposed improvement [77] and the property to be assessed,[78] and must be for the required length of time.[78] Due diligence must be ex-

67. Signature of married woman by her husband, but ratified by her, held sufficient. Board of Imp. v. Offenhauser [Ark.] 105 SW 265. Petition not conveyance of realty or agreement, under Kirby's Dig. § 753, requiring letters of attorney containing power to execute such conveyances and agreements to be acknowledged, recorded, etc. Id. Petition not within Kirby's Dig. § 3901, requiring wife to join in conveyance affecting husband's homestead. Id.

68. Foot frontage created by vacation of street must be considered in determining whether owners of majority of foot frontage have signed petition. S. D. Mercer Co. v. Omaha [Neb.] 112 NW 617. A requirement that the petition be signed by a certain number of freeholders "of the township or townships" in which the improvement or the lands benefited thereby may be situated, there need not be such number of freeholder petitioners from each township. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742. Majority in value is determined with reference to the value at last assessment preceding presentation of petition, without regard to improvements thereafter placed therein. Board of Imp. v. Offenhauser [Ark.] 105 SW 265.

69. One may be a competent petitioner, though not a competent juror, in condemnation proceedings. Female freeholder held competent to petition for drain under Comp. Laws, § 4319. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 42. Where the statute requires the petitioners to be **freeholders,** without qualification, they need not be resident freeholders. Id. Under Comp. Laws, § 8787, a tenant by entireties has an estate for life and is a "freeholder" within the drainage law, though his interest may be one in common with another. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676. Recorded deed to land is not essential to constitute one a "freeholder." Id. One holding title to city lots, with full power to improve them, was an abutting **"owner"** and authorized to petition for repavement of street under Omaha charter (Cobbey's Ann. St. 1903, § 7563), as it was prior to 1903. S. D. Mercer Co. v. Omaha [Neb.] 112 NW 617. Vendor under oral contract on condition of approval of title by vendee, no deed having been executed and possession not having been surrendered, held qualified to sign as owner. Board of Imp. v. Offenhauser [Ark.] 105 SW 265. Wife of owner of homestead held not entitled to sign as owner. Id.

70. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

71. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

72. Carroll County v. Cuthbertson [Iowa] 114 NW 17.

73. Need not appear in resolution for improvement itself nor in the record of its adoption. Hardwick v. Independence [Iowa] 114 NW 14.

74. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957. An abutting property owner is not entitled to written notice of the passage of an ordinance providing for the construction of a sewer. Kibler v. Newark, 4 Ohio N. P. (N. S.) 641.

75. Must be given under Muskegon City Charter. Local Acts 1901, p. 182, No. 344, tit. 11, § 4. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957.

76. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957; Hyland v. Ossining, 57 Misc. 212, 107 NYS 225. Under Laws 1897, p. 219, § 31, owners or agents of property affected by creation of improvement district have absolute right to be heard at time and place mentioned in resolution. Hensley v. Butte [Mont.] 92 P 34. Right to notice extends to **change of plans** originally accepted. Hyland v. Ossining, 57 Misc. 212, 107 NYS 225. The plans of the improvement cannot be materially changed without notice to the property owners, where notice is required in the first instance. Increase of length of sewer and decrease of area of sewer district held illegal. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957.

77. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957. Notice to a property owner within the district is sufficient to apprise him that his property is to be assessed, where the description embodied in the notice embraces the entire district in which his property is located. King v. Dayton, 6 Ohio N. P. (N. S.) 369.

78. Thayer Lumber Co v. Muskegon [Mich.]

ercised to ascertain who are the owners entitled to notice.[80] Notice to a wife is not notice to her husband,[81] nor is notice to one tenant in common notice to the other.[82]

(§ 4) *D. Protests and remonstrances.* See 8 C. L. 1517—It is sometimes provided that an improvement may be prevented by the protest of a certain number of property owners.[83] Remonstrances must be made in the manner prescribed by statute.[84]

(§ 4) *E. Estimates of cost.* See 8 C. L. 1517—Requirements as to estimates of cost are not necessarily jurisdictional.[85] An estimate is an approximation, which is something more than a mere statement of the maximum cost,[86] and should be itemized sufficiently to give the owners of property a general idea of what it is estimated each of the substantial component elements will cost,[87] but an impractical degree of particularity is not required.[88] The scope of the improvement to be made with the proceeds of municipal bonds is not limited by estimates and plans furnished merely for the information and assistance of the municipal board, there being no statutory or charter provision for such estimates and plans, and the submission of the proposal to bond the municipality being general and contemplating general improvements.[89] Where the officer charged with the duty of making the estimate testifies that he made the required estimate, an inquiry into the general custom of making estimates with reference to whether they were excessive or not will not be allowed in the absence of any averment of fraud,[90] nor, in such case, is it relevant to inquire into the details of the estimate.[91] Where the same kind of improvement is made in front of each lot, a separate estimate as to each lot is not necessary.[92]

115 NW 957. See post, § 9, Local Assessments.

79. Publication of notice for four successive days, one of which was Sunday, held sufficient under statute requiring four publications. Nixon v. Burlington [Iowa] 115 NW 239. Requirement of twenty days' notice held complied with by one publication twenty days prior to date of meeting or other action of which publication purports to give notice. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348.

80. Hyland v. Ossining, 57 Misc. 212, 107 NYS 225.

81, 82. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

83. Under Laws 1897, p. 219, § 31, if owners of more than one-half in area of all property to be assessed object to improvement, either orally or in writing, whether they assign reasons or not, the improvement cannot be made at that time. Hensley v. Butte [Mont.] 92 P 34.

84. Under Laws 1897, p. 219, § 31, the remonstrants must appear personally or by agent, it being insufficient merely to file remonstrance at clerk's office. Hensley v. Butte [Mont.] 92 P 34.

85. Under Local Improvement Act, §§ 57, 58 (Hurd's Rev. St. 1905, c. 24, §§ 563, 564), failure to make the required estimate of cost does not render the ordinance void but merely requires a new assessment. City of Chicago v. Clark, 233 Ill. 404, 84 NE 363.

86. City of Boonville v. Rogers, 125 Mo. App. 142, 101 SW 1120.

87. Where estimate includes cost of labor, material, etc., in paving a street and each item includes the cost of laying it in place, failure to itemize cost of grading does not invalidate estimate. Chicago, etc., R. Co. v. Chicago, 230 Ill. 9, 82 NE 399.

88. When from the nature of the work to be done in connection with a proposed improvement it is impossibe to estimate except approximately the expense likely to be incurred, a certificate by a clerk or auditor that there is in the treasury of the corporation and unappropriated "money sufficient to pay" for the improvement as proposed is an adequate compliance with the requirement of § 2702 that a certificate must issue to render valid contracts, agreements, or other obligations involving the expenditure of municipal or village funds. Village of Carthage v. Diekmeier, 10 Ohio C. C. (N. S.) 71. An estimate otherwise proper is not invalid because it includes "labor, material and other expenses attending the improvement." McChesney v. Chicago, 227 Ill. 450, 81 NE 435. The extent to which separate items must be stated in the estimate depends upon the nature of the improvement, and where in assessment for system of sewers the house and catch basin slants are included in the estimate, they need not be itemized. McChesney v. Chicago, 227 Ill. 215, 81 NE 410. Estimate is sufficient though labor and materials are not estimated in a separate item. Gage v. Wilmette, 230 Ill. 428, 82 NE 656. Estimate including an item for lawful expenses and cost of collecting the assessment does not cover any part of the salaries of the board of local improvements or the regular expenses of maintaining it. Id. Only the substantial component elements of the improvements need be set out as separate items. Y-junctions held included in estimate for catchbasins and sewer pipe connections. Village of Oak Park v. Galt, 231 Ill. 482, 83 NE 212.

89. Improvement of street not designated by estimates and plans held authorized. Clough v. Duffy [Cal.] 92 P 859.

90, 91. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

92. Sidewalk assessments. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

(§ 4) *F. Approval and acceptance of work.*[93]

(§ 4) *G. Curative legislation and ratification.*See 6 C. L. 1153—Proceedings for local improvements may be legalized by subsequent legislation,[94] the rule being that the legislature may cure by subsequent legislation defects consisting of acts or omissions which it could have declared immaterial in the first instance.[95] Where an improvement contract must be based upon an ordinance, so must a ratification thereof.[96]

§ 5. *Proposals, contracts and bonds. Advertisements, bids, and awarding of contract.*See 8 C. L. 1518—Failure to comply with statutory requirements as to notice to bidders is jurisdictional.[97] Bidding is not always necessary,[98] and unnecessary advertisement does not bind the authorities to the procedure applicable where advertisement is necessary.[99] The notice or call for bids must be given in the manner and for the time required by statute,[1] and must usually be made with reference to the plans and specifications of the work.[2] The specifications must be such as to leave room for free competition between the bidders,[3] and where this is not done the notice or advertisement will be invalid, as where patented or trade marked material is called for without any alternative,[4] but such is not the effect where such material is called

93. See 8 C. L. 518. See, also, post, § 5, subd. Performance, and subd. Allowance of Claims and Recovery by Contractor.

94. Constantine v. Albion, 148 Mich. 403, 14 Det. Leg. N. 231, 111 NW 1068.

95. Sudberry v. Graves [Ark.] 103 SW 728. Requirement that owners be given right to choose kind of pavements to be constructed. Haggart v. Kansas City [Kan.] 94 P 789.

96. Contract invalid because not based on ordinance as required by statute, not validated by payment of part of price of work pursuant to resolution of council. Mulligan v. Lexington, 126 Mo. App. 715, 105 SW 1104. Demands by mayor upon contractor for performance could not validate the contract. Id.

97. Failure to comply with Code, § 813, relating to notice for bids on sewer construction. Nixon v. Burlington [Iowa] 115 NW 239.

98. Under 1 Priv. Laws 1869, p. 364, § 13, giving board of park commissioners all authority of common council as to government of parks, such board may let a contract without advertisement and bidding, notwithstanding 1 Priv. Laws 1863, p. 4, and 1 Priv. Laws 1867, p. 772, giving board of public works power to let contracts for public improvements, and requiring such contracts to be let to lowest bidder, except that the council, upon the certificate of such board of public works, may let such contracts without advertisement. Barber Asphalt Pav. Co. v. South Park Com'rs, 233 Ill. 862, 84 NE 243.

99. Where the petition fails to disclose that the contract is one which the commissioners are required to award by public bidding, the fact that they did advertise in regular form for bids, with a reservation of the right to reject any or all, does not afford ground for compelling them to accept the lowest and best bid, or for complaint because an amendment was permitted to one of the bids after expiration of the time fixed for their filing, whereby better figures were obtained for the county. State v. Sandusky County Com'rs, 9 Ohio C. C. (N. S.) 210.

1. Publication for a certain number of consecutive days is not invalidated by the intervention of a Sunday on which there was no publication where the paper was not published on Sunday. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

2. Code, § 813, relating to notice to bidders on sewer construction, held not complied with as to specifications. Nixon v. Burlington [Iowa] 115 NW 239. Under special charter of Superior (Laws 1891, pp. 809, 828, c. 124, §§ 63, 127), the plan of the work must be adopted before advertisement for bids, and the bids invited with relation to such plan. Stocking v. Warren Bros. Co. [Wis.] 114 NW 789. Where a board of public service advertises for machinery that has been in successful commercial operation for at least two years, a machine which is of the general type and possesses the features of those which have stood the two years' test is **within specifications,** notwithstanding changes designed to render the machine more efficient have been made within the two years. Columbus v. Public Service, 5 Ohio N. P. (N. S.) 462. An official engineer charged with the duty of **preparing plans** and specifications may delegate the performance of the manual and clerical work, but not that portion of his duties requiring his professional skill. Certainly he cannot accept plans and specifications prepared by a bidder. Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25.

3. The court finds that the pure coal tar creosote oil required by the specifications may be obtained in the market, notwithstanding testimony of experts to the contrary, and bidders were therefore not shut out of the competition by reason of being unable to obtain oil of that character and quality. State v. Miller, 10 Ohio C. C. (N. S.) 406.

4. Where the material is controlled by a patent or other monopoly, alternative varieties of material should be specified in order to open the way for actual competition. State v. McKenzie, 9 Ohio C. C. (N. S.) 105. Under Gen. St. Kan. 1901, § 747, requiring paving contracts to be let to lowest bidder, etc., invitations to bidders which specified a brand of brick which were covered by trade mark, though there was other brick just as good and available held invalid. Kansas

City Hydraulic Press Brick Co. v. National Surety Co., 157 F 620.

Note: Questions as to what amounts to proper competition under statutory and charter provisions requiring that paving contracts be let to the lowest bidder have caused much difficulty where patented processes or proprietary materials have been involved. Such requirements are primarily for the protection and benefit of the taxpayer. His rights are paramount, while those of the contractor are subordinate. As a result it often appears that the decisions of the courts are more or less influenced by the consideration that a contract is being attacked by a taxpayer rather than a bidder of vice versa. Specifications or ordinances calling for a patented pavement or material and followed by the single bid of the parties controlling the patent brought the meaning of the words "lowest bidder" before the courts. A sharp conflict at once appeared in the two leading cases of Dean v. Charlton, 23 Wis. 590, 99 Am. Dec. 205, and Hobart v. Detroit, 17 Mich. 245. The facts in both were the same, but the Wisconsin court held such a contract void, while the Michigan court held it valid. From these cases grew the so-called Wisconsin Rule and Michigan Rule, each of which has its adherents. With changing statutes and circumstances, however, courts have receded from their original positions, have modified and distinguished, until it is difficult to state precisely upon which side of the controversy they stand. Still at times the conflict reappears as sharply as in the two leading opinions.

In the recent case of Stocking v. Warren Bros. Co. [Wis.] 114 NW 789, the question was involved. The specifications called for bids on four different kinds of paving. One of these was patented and controlled by the defendant company, which, as the sole bidder on that particular kind of pavement, submitted the lowest of all bids on the four kinds specified. Previously the defendant had offered to furnish all the necessary rights and material to any successful bidder at a fixed price. An action by taxpayers to enjoin the execution of the work was sustained on the ground that the statute required competition between bidders upon the same plan or process and was not satisfied by competition between different plans or processes. Timlin and Kerwin, JJ., dissented on the authority of Baltimore v. Flack, 104 Md. 107, 64 A 702. It may be taken as settled that, in the absence of statute, municipal corporations are not bound to let their contracts to the lowest bidder, nor are they precluded from contracting for patented materials or processes. The fact that such a contract tends to create a monopoly does not make it void as against public policy. Bunker v. Hutchinson, 74 Kan. 651, 87 P 884; Dillingham v. Spartanburgh, 75 S. C. 549, 56 SE 381, 117 Am. St. Rep. 917, 8 L. R. A. (N. S.) 412. Then, too, when the statute uses the words "lowest responsible bidder," there is a large measure of discretion left to the municipal authorities. Reuting v. Titusville, 175 Pa. 512. Even if "responsible" be omitted, the letting of a contract calls for the exercise of some discretion. The conflict is whether "lowest bidder" calls for competition, and, if so, what must be the nature of that competition. The following cases may be said to directly support the Wisconsin Rule: Nicholson Pav. Co. v. Painter, 35 Cal. 699; Fishburn v. Chicago, 171 Ill. 338, 63 Am. St. Rep. 236, 39 L. R. A. 482; Siegel v. Chicago, 223 Ill. 428, 79 NE 280; Monaghan v. Indianapolis, 37 Ind. App. 280; Fineran v. Paving Co., 116 Ky. 495; State v. Elizabeth, 35 N. J. Law, 351; Dolan v. New York, 4 Abb. Pr. [N. S., N. Y.] 397; People v. Van Nort, 65 Barb. [N. Y.] 331. Also Burgess v. Jefferson, 21 La. Ann. 143, in so far as burdens on abutting property owners are involved. The Michigan Rule is directly supported by Holmes v. Detroit, 120 Mich. 226, 77 Am. St. Rep. 587, 45 L. R. A. 121; Barber Pav. Co. v. Hunt, 100 Mo. 22, 18 Am. St. Rep. 530, 8 L. R. A. 110; Swift v. St. Louis, 180 Mo. 80; and, though not directly in the case or passed upon, is cited with approval in Rhodes v. Board of Public Works, 10 Colo. App. 99; Saunders v. Iowa City, 134 Iowa, 132, 111 NW 529; Yarnold v. Lawrence, 15 Kan. 126; Baltimore v. Flack, 104 Md. 107, 64 A 702; Newark v. Bonnell, 57 N. J. Law, 424, 51 Am. St. Rep. 609. The great difficulty is that many cases, often cited as being on one side or the other of the controversy, arose under changed circumstances or requirements which forced the courts to modify their earlier holdings.

Thus New York is claimed by the followers of both rules. The two early decisions above certainly supported the Wisconsin view. But in the case of In re Dugro, 50 N. Y. 513, a contract calling for "Nicolson" pavement was held valid, but on the ground that the statute gave the common council wide discretion. In the opinion it is said, "if, as alleged, there could be no competition for paving with the Nicolson pavement, the common council has nevertheless the power to cause the street to be paved with it, and it is simply a case not within the statute, although the words are broad enough to include it." A contract for the purchase of patented water meters was sustained on the same ground of discretion. Baird v. New York, 96 N. Y. 567, 47 Am. Rep. 75. Then a contract calling for paving with a patented brick which was on the market at a fixed price was held invalid. Smith v. Syracuse Imp. Co., 161 N. Y. 484. But in Knowles v. New York, 75 NYS 189, afd. without opinion in 74 App. Div. 632, the specification of a patented steel for a bridge was upheld, since the steel could be had on the market and the price was not fixed. Finally, in Rose v. New York, 85 App. Div. 461, it was held, under a charter calling for a "fair and reasonable opportunity for competition," that the municipality could not advertise for bids to pave with a patented article, although the patentee agreed to furnish the material to all bidders at a uniform price. New Jersey also is claimed under both rules. State v. Elizabeth, 35 N. J. Law, 351, followed Wisconsin. But there was a departure in Newark v. Bonnell, 57 N. J. Law, 424, 51 Am. St. Rep. 609, and in Ryan v. Patterson, 66 N. J. Law, 533, where it was held that specifications calling for "Trinidad Lake" asphaltum, "a proprietary article and a monopoly," were valid, since all the bidders could use it, taking the risk of obtaining it from the proprietor. In the latter case the city council had the right to reject any or all bids. Fi-

nally, in Bye v. Atlantic City, 73 N. J. Law, 402, it was held that bids could be called for upon special or patented material alone, provided anyone could obtain such material at a known fixed price before the bids were called for.

In other states the question has not been definitely passed upon. Colorado, while favoring the Michigan Rule, has only decided that where the abutting owners are given the right to choose a paving material they may properly petition for Trinidad Lake asphalt, there being no proof that it could not be purchased on the market. Rhodes v. Board, etc., 10 Colo. App. 99. Iowa also favors the Michigan Rule, but has gone no farther than to decide that such contracts are valid where the patentee will sell at a fixed price to the successful bidder. Saunders v. Iowa City, 134 Iowa, 132, 111 NW 529. The Kansas court, too, in Yarnold v. Lawrence, 15 Kan. 126, approved the Michigan case of Hobart v. Detroit, 17 Mich. 245. In State v. Shawnee County, 57 Kan. 267, a contract for a patented system of bridge construction was sustained, since all bidders might use it by payment of a fixed royalty. In Bunker v. Hutchinson, 74 Kan. 651, the statute did not require paving contracts to be let to the lowest bider, so the question was not decided. The Maryland court in the recent case of Baltimore v. Flack, 104 Md. 107, 64 A 702, cited the Michigan cases with approval, and as there were three bids under the patented process the court held that there was sufficient competition. In Baltimore v. Rayno, 68 Md. 569, the question was whether a patented process conformed to the contract requirements. In Pennsylvania it has been held that there must be specifications to bid on before there can be a lowest bidder (Mazet v. Pittsburgh, 137 Pa. 548), and that a city could contract to purchase patented flues for a fire engine built by the patentee (Silsby Mfg. Co. v. Allentown, 153 Pa. 319). Of the two Federal cases, one, Worthington v. Boston, 41 F 23, held that an exchange of patented pumping engines did not satisfy an ordinance calling for bids, and the other, Field v. Barber Pav. Co., 117 F 925, held a contract for Trinidad asphalt valid. The statute in the latter case did not require contracts to be let to the lowest bidder.

Where this Trinidad or Trinidad Lake asphalt has been called for by the specifications, the courts have fallen into a disagreement which does not follow the lines of the original conflict. Contracts made under such specifications were sustained in Newark v. Bonnell, 57 N. J. Law, 424, 51 Am. St. Rep. 609, and in Rhodes v. Board, etc., 10 Colo. App. 99, it appearing in both cases that there was nothing to show that all bidders could not purchase the asphalt. Such a contract was held invalid in Fishburn v. Chicago, 171 Ill. 338, 63 Am. St. Rep. 236, 39 L. R. A. 482, the court taking the position that while the council might determine that some proprietary material was best adapted to its use, yet the ordinance should be so framed as to make such material the standard of quality, not to require that it alone should be used. But by far the most serious conflict appears where the owner of the proprietary material or patented process offers its use to the bidders at a fixed price, or when it is on the market. Here, too, the lines of the original conflict are not followed. The New Jersey case of Newark v. Bonnell, 57 N. J. Law, 424, 51 Am. St. Rep. 609, goes so far as to hold that provided the bidders can take the risk of obtaining a proprietary material or gaining the owner's license to use it there is sufficient competition. Usually it is necessary to show that the article or commodity is on the market or has been offered to the bidders by the owners. Contracts under these circumstances have been sustained in the following cases. Perine, etc., Pav. Co. v. Quackenbush, 104 Cal. 684; Saunders v. Iowa City, 134 Iowa, 132, 111 NW 529; State v. Shawnee County, 57 Kan. 267; Baltimore v. Flack, 104 Md. 107, 64 A 702; Bye v. Atlantic City, 73 N. J. Law, 402; Knowles v. New York, 75 NYS 189; Hastings v. Columbus, 42 Ohio St. 585. To the contrary and with the principal case on this point are Siegel v. Chicago, 223 Ill. 428, 79 NE 280, on the ground that the proprietor can sell only to whom he pleases and so control the bids; Monaghan v. Indianapolis, 37 Ind. App. 280, because the owner reserved the right to sell only to a capable or competent contractor, the owner being the judge. Smith v. Syracuse Imp. Co., 161 N. Y. 484, the proprietor allowing only a fixed price at which he would sell; Rose v. New York, 85 App. Div. 461, where the charter required a "reasonable opportunity for competition;" and Allen v. Milwaukee, 128 Wis. 678, 116 Am. St, Rep. 54, 5 L. R. A. (N. S.) 680, because the patentee, in fact, not only sold the material, but was to do the bulk of the work, distinguishing Kilvington v. Superior, 83 Wis. 222, 18 L. R. A. 45.

The principal case holds that competition between different patented processes is not sufficient and that there must be a competitive bidding under the same process. In those cases which have held that bidding between patents is sufficient, it is significant that more than one bid was put in under the patented process. Attorney General v. Detroit, 26 Mich. 263, two bidders; Baltimore v. Flack, 104 Md. 107, three bidders; Newark v. Bonnell, 57 N. J. Law, 424, 51 Am. St. Rep. 609, two bidders. From the cases discussed it appears that on the original question, where the specifications call for a patented process or material, the weight of authority is with the Wisconsin Rule. Where Trinidad asphalt is specified, the authorities are not numerous, but the Illinois holding in Fishburn v. Chicago, 171 Ill. 338, 63 Am. St. Rep. 236, 39 L. R. A. 482, appeals to the reason. Where the article is on the market or can be purchased from the proprietor, the weight of authority is with the states following the Michigan Rule. California, New Jersey and New York have been won over. The object of the requirement that municipal contracts be let to the lowest bidder is to obtain competition and to escape the corrupt practices which follow favoritism. If the specification of a patented process destroys this competition, the proceedings should be held void. The legislature can remedy any inconvenience which may follow by such provisions as may seem just. The difficulty is well met in Attorney General v. Detroit, 26 Mich. 263, in which it is held that something must be left to the discretion of the council, and the law can lay down no

for in the alternative with other materials [5] or free competition is otherwise provided for.[6] A limited discretion may be reserved in regard to the materials to be used,[7] but not to such an extent as to leave any discretion as to the acceptance of the lowest bid, where such bid is requested by law to be accepted.[8] Where the kind of material is left to the discretion of the municipal authorities, the exercise of such discretion is conclusive in the absence of abuse.[9] In the absence of contrary provision, advertisements for bids must be in the English language and published in a newspaper printed in such language.[10] The council having once acquired jurisdiction does not lose it by an abortive attempt to secure satisfactory bids, and may either readvertise,[11] or, where the successful bidder does not execute the required contract, may award the contract to another bidder.[12] Statutory designation of cases in which readvertisement may be made is not necessarily exclusive.[13] Authority to have the work done either by a commission or to advertise for bids becomes single and nonelective after an election between the alternative methods authorized has been made.[14] The contract need not be awarded to the lowest bidder where he is otherwise disqualified.[15] Where there are several bona fide bids, the acceptance of one of them is not invalidated by the fact that there was also a sham bid.[16] An ordinance accepting

inflexible rule that will not work mischief, for each case must stand upon its own circumstances in determining whether there is in fact competition or not. The charter of New York city, which requires "a fair and reasonable opportunity for competition," seems to meet the situation. See 4 Mich. L. R. 78, and 5 Mich. L. R. 484, 485, 708.—From 6 Mich. L. R. 493.

5. Specification of materials manufactured by certain concerns is not improper when coupled with some such qualification as "or some other, etc., equally as good." Gilsonite Const. Co. v. Arkansas McAlester Coal Co. [Mo.] 103 SW 93. Patented material may be specified in the alternative with other material equally as good. Campbell v. Southern Bitulithic Co. [Ky.] 106 SW 1189.

6. Where owner of patent files agreement to allow successful bidder to use material on payment of fixed royalty. Lacoste v. New Orleans, 119 La. 469, 44 S 267. In such case, fact that owner does not have to pay such royalties does not change this rule, since his profit on the contract would begin only after deduction of his royalties. Id. A requirement that patented materials can be included in the specifications only under such circumstances as admit of reasonable competition, does not necessarily require the specifications in the several bids to be the same. Laws 1901, p. 642, c. 466, § 1554, relating to paving in Greater New York, does not so require. Warren Bros. Co. v. New York, 190 N. Y. 297, 83 NE 59. Proposals held to comply with requirement as to reasonable opportunity for competition. Id.

7. Specification of certain kind of brick, or other brick equally as good, to be approved by board of local improvements, held not to invalidate the ordinance providing for the improvement. Village of Oak Park v. Galt, 231 Ill. 365, 83 NE 209.

8. Before bids are invited for a public building, the commission having the matter in charge must make the specifications so definite and certain as to material as to leave no discretion with the commission in the acceptance of the lowest bid. State v. McKenzie, 9 Ohio C. C. (N. S.) 105. In inviting bids for a public building, the building commission are without authority to require bidders to include in the total amount of their bids an arbitrary sum which the commission reserves the right to expend at its discretion for particular items that are not of such a nature as to render competition at all admissible. But items of a necessarily noncompetitive character may be contracted for without this procedure, and it is competent for the commission to reserve such items for further lawful action. Id.

9. No abuse shown by mere fact of acceptance of bid specifying patented material. Campbell v. Southern Bitulithic Co. [Ky.] 106 SW 1189.

10. Publication in one German and one English newspaper held not publication in two newspapers within Baltimore City Charter, § 14 (Laws 1898, p. 274, c. 123). Bennett v. Baltimore [Md.] 68 A 14.

11, 12. City of Lexington v. Commercial Bk. [Mo. App.] 108 SW 1095.

13. Rev. St. 1899, § 5859 (Ann. St. 1906, p. 2967), as amended by Laws 1901, p. 95, held not exclusive of right to readvertise without new resolution of necessity where the bidder whose bid was accepted failed to execute the required contract. City of Lexington v. Commercial Bk. [Mo. App.] 108 SW 1095.

14. Authority of city council under Acts 1891, p. 323, c. 118, Burns' Ann. St. 1901, § 4291, to have the work done by street commissioner or to readvertise for bids, after rejection of former bids, did not authorize reconsideration of bid accepted, and acceptance of another bid put in at same time as one rejected, without readvertising. Zorn v. Warren-Scharf Asphalt Pav. Co. [Ind. App.] 81 NE 672.

15. Trenton charter requires bidders to prove their ability to do the work, and hence council properly rejected bid of one who did not furnish such proof. Case v. Trenton. [N. J. Law] 68 A 57.

16. Campbell v. Southern Bitulithic Co. [Ky.] 106 SW 1189.

a bid is a valid acceptance though the vote is not entered of record as required by a general ordinance.[17] It seems that mandamus is available to enforce the right of a bidder to the contract.[18]

Where the local authorities are required by statute to make yearly contracts for the construction of certain improvements, contracts for a greater or less time cannot be made,[19] and this limitation cannot be evaded by terminating a yearly contract made and the execution of a new contract.[20] A recital of the municipality's authority in the contract estopped the municipality from denying its authority to make the contract.[21] Fraud or mistake will violate the contract and entitle the defrauded party to rescind,[22] unless he has waived such right or is estopped to assert it,[23] or unless the parties cannot be placed in statu quo.[24]

Form of contract.[See 8 C. L. 1522]—The minds of the parties must meet as in the case of other kinds of contracts.[25] The municipality cannot urge as a defense to an action for breach of its contract that there was no formal contract other than the bid and its acceptance, where it has waived the execution of such contract.[26]

Particular contract provisions.[See 8 C. L. 1522]—Where the contract is complete and unambiguous, and clearly covers the whole subject-matter, the negotiations and bids leading up thereto are merged therein.[27] Repairs may be stipulated for,[28] but not to such an extent as to increase the burden of the property owners [29] where the authority to assess is limited to original construction.[30] Stipulation that damages arising from the nature of the work shall be borne by the contractor renders the contract and all other proceedings, including bonds and assessments, void.[31] This is a

17. City of Joplin v. Freeman, 125 Mo. App. 717, 103 SW 130.

18. It is not improbable that mandamus will lie to compel county commissioners to award a contract for a public improvement to the lowest and best bidder when the statute requires such action on their part and it appears by undisputed evidence or concession in pleadings that one of the bidders is the lowest and best and that the commissioners are fraudulently colluding for the award of the contract to another bidder. State v. Sandusky County Com'rs, 9 Ohio C. C. (N. S.) 210.

19. Whedon v. Lancaster County [Neb.] 114 NW 1102.

20. Whedon v. Lancaster County [Neb.] 114 NW 1102. Improvements must be commenced under the yearly contract in force at the time, though they cannot be completed before its expiration. Id.

Damage to taxpayers will be presumed where yearly contract is terminated before expiration and a less advantageous one made. Whedon v. Lancaster County [Neb.] 114 NW 1102.

21. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86.

22. Contractors entitled to rescind for fraud or mistake in estimates, etc., furnished them. Long v. Athol [Mass.] 82 NE 665.

23. Contractors held not estopped to rescind for false estimates, though they had access to the data from which a skilled draftsman could have discovered the mistake. Long v. Atbol [Mass.] 82 NE 665.

24. Held that upon rescission of contract for false estimates furnished by municipality it could be placed in statu quo by requiring it to pay merely the value of the work and material actually furnished, though the work done disclosed that the improvement contemplated was more difficult and expensive than previously contemplated, and hence that it could not again be let on such favorable terms. Long v. Athol [Mass.] 82 NE 665.

25. Instructions as to effect of mistake of council as to price in acceptance of bid held not inconsistent. Blassingame v. Laurens [S. C.] 61 SE 96. Requested instructions as to mistake in price held properly refused as misleading. Id.

26. Evidence held to show waiver. Blassingame v. Laurens [S. C.] 61 SE 96.

27. Fullerton v. Des Moines [Iowa] 115 NW 607.

28. Contractor held required to make only such repairs as were necessitated by defective material or workmanship. Owensboro City R. Co. v. Barber Asphalt Pav. Co. [Ky.] 107 SW 244. Tax bill held not vitiated by provision of ordinance and contract for repairs by contractor. City of Sedalia v. Smith, 206 Mo. 346, 104 SW 15.

29. Where the power to assess is limited to the original work, a guaranty requiring the contractor to make repairs other than those rendered necessary by defective material and workmanship imposes an additional and unlawful burden upon the property owners, unless it appears that the work will last for the period covered by the guaranty without needing repairs (Bradshaw v. Jamestown, 109 NYS 618), and the burden is on the municipality to bring the case within such exception (Id.).

30. See post, § 9A, **Power and Duty to Make.**

31. Joyce v. Newmark [Cal. App.] 93 P 1041. Stipulation guarantying city against liability for damages arising from nature

rule of property, and, having been declared by the court in former decisions, must be followed.[32] The price must be a bona fide one.[33] Whether certain items of the work are included in the price stipulated for is a matter of construction.[34] Extras mean something beyond and in addition to the requirements of the contract,[35] and allowance therefor depends upon the terms of the contract.[36] Where provision is made for extra work, except that the price is not fixed for such work, the price agreed upon for the principal work may be considered.[37] Some other provisions which have been construed are those relating to subletting,[38] supervision,[39] alterations,[40] time and conditions of payment,[41] and arbitration of disputes.[42] A more or less arbitrary right

of work on acts of contractor. Woollacott v. Meekin [Cal.] 91 P 612.

32. Joyce v. Newmark [Cal. App.] 93 P 1041.

33. A contract for the construction of a sewer for $60 per lineal foot is not shown to be fraudulent as to price by the fact that an expert, who did not take into account several elements of cost, estimated the work at $50 per foot. Burke v. Cleveland, 6 Ohio N. P. (N. S.) 225.

34. Price stipulated for paving street held to include concrete foundation, and not confined merely to sheet asphalt surface. Fullerton v. Des Moines [Iowa] 115 NW 607.

35. Concrete foundation necessary to bring street up to proper grade held not an extra where contract required contractor to bring street up to such grade and pave with asphalt. Fullerton v. Des Moines [Iowa] 115 NW 607. Under a provision for such extra compensation as is necessary to accomplish a certain purpose, the contractor can recover for only such extra work as is necessary to accomplish such purpose. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835.

36. A stipulation against liability for extras will be abrogated or limited pro tanto by a provision subsequently added that certain extras will be allowed. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835. Representation by city that it had investigated the site by borings, and that the nature of the excavation necessary was as represented, held a warranty, entitling contractor to compensation for extra work caused by the fact that the work was more difficult than as represented. Id.

37. Price per foot of main sewer, fixed by court as price of extensions and tributaries constructed as extras. Talbott v. New Castle [Ind.] 81 NE 724.

38. Assignment of special tax bills by the contractor to secure the payment of money borrowed by him to enable him to perform the contract is not within a provision against subletting. Dickey v. Porter, 203 Mo. 1, 101 SW 586. Employment of engineer by assignee to see that work was done in such manner as to sustain the tax did not render the assignment a subletting. Id.

39. Inasmuch as the court in which assessment is confirmed must determine whether improvement is constructed in accordance with the terms of the ordinance, the fact that it provides that the work shall be done under the supervision of the board of local improvements does not render it void. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615. It is not lodging too wide a discretion in a board and engineer in charge of a street improvement to reserve the right under the contract "to increase or decrease the quantities or to change the method of construction in any particular," or to provide for a right of inspection, at the contractor's expense, at the plant where the materials used in the improvement are prepared, or to permit the acceptance of a bid for a material which is more expensive than some other material which was offered. Preuer v. Bardes, 6 Ohio N. P. (N. S.) 65. Provisions for the superintendence of the work by an engineer do not constitute a delegation of the legislative authority of the municipal council. Gilsonite Const. Co. v. Arkansas McAlester Coal Co. [Mo.] 103 SW 93. Provisions for inspection give the right to require only that the work shall conform to the specifications, and inspector cannot require more expensive work and materials than called for by specifications. Beattie v. McMullen [Conn.] 67 A 488. Complaint held not demurrable as showing merely a requirement of conformity to specifications. Id. A stipulation that the work must be done under the direction of the municipal engineer does not authorize the engineer to enlarge the contract or change the plans and specifications, and hence the municipality is not liable to the contractor for the mistakes of its engineer in not following the plans and specifications, and contractor cannot, therefore, recover for extra work rendered neceesary by mistake of engineer in setting stakes, which mistake would not have occurred if plans had been followed, nor is the engineer liable in the absence of bad faith. Wilson v. St. Joseph, 125 Mo. App. 460, 102 SW 600.

40. A provision for alterations and release of damages on account thereof covers damages growing out of increase of cost of work caused by abandonment of other portions thereof. City & County of Denver v. Hindry [Colo.] 90 P 1028.

41. Stipulation for payment of instalments on certificate of engineer as to progress of work held not to require exact measurements by him, estimates being sufficient. Devlin v. New York, 108 NYS 739.

42. Where city engineer acted both as city's agent and as arbiter of all questions under the contract, notice by him to contractor to do certain work under penalty of having it done at his expense held notice in capacity of agent, and not an announcement of his decision as arbiter. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

of revocation may be reserved by the municipality,[43] and where it is stipulated that the municipality may forfeit the contract for nonperformance, it may, upon such a forfeiture, enter into a new contract with some other contractor.[44]

Performance of contract. See 8 C. L. 1524—In the absence of fraud, the municipality is bound by the approval and acceptance of the duly authorized officer or commission.[45] Likewise, it may be estopped by its acquiescence to complain of a variance from the plans.[46] Trivial variations will not defeat a recovery, especially where the work has been approved by the engineer in charge thereof.[47] Assessment of benefits in excess of the amount paid the contractor is an adjudication that the municipality has not been damaged by a variance from the contract as to the material used.[48] Where the time of performance is not definitely fixed,[49] the work must be completed in a reasonable time.[50] Where a money penalty is attached to failure to perform within the stipulated time, the tax bills are not necessarily invalidated by failure to perform within such time,[51] the question in such case being whether the performance was completed within a reasonable time,[52] and the rule is the same when it is provided not only that the work shall be completed but that it shall be commenced and completed within a certain time.[53] The contractor is bound by a stipulation that no extensions shall be allowed except upon the determination of certain officers.[54] On the other hand the municipality may waive such limit [55] or may be estopped to assert it.[56] Maintenance of the force originally prescribed by the engineer in charge will not relieve the contractor of the duty to complete the work within the time prescribed,[57] and provision is sometimes made in the contract for the employment of an additional force if necessary to complete the work within such time.[58] Where the engineer in charge acts in bad faith and in an unreasonable manner in requiring the work to be done under unfavorable circumstances, the contractor will not be concluded thereby.[59]

43. Reservation of right to revoke street repairing contract whenever council should become satisfied that work was unnecessarily delayed held to give right of revocation upon such contingency, without notice to contractor, and though the delay was caused by inability to procure materials. Miller v. Atlantic City [N. J. Law] 68 A 64.

44. City of Auburn v. State [Ind.] 83 NE 997.

45. City of Jamestown v. Arter, 55 Misc. 629, 106 NYS 1027.

Fraud is not shown by a variance from the contract as to material used where there is no evidence that such material was not suitable, but on the contrary there was evidence that it was suitable, and the work has been accepted and paid for by the duly constituted authorities. Id.

46. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86.

47. Ford v. Manchester [Iowa] 113 NW 846.

48. City of Jamestown v. Arter, 55 Misc. 629, 106 NYS 1027.

49. Requirement that work should be finished on certain date held indefinite when qualified by provision for forfeiture of certain sum for failure to complete it by such date. Paul v. Conqueror Trust Co., 125 Mo. App. 483, 102 SW 1070.

50. Paul v. Conqueror Trust Co., 125 Mo. App. 483, 102 SW 1070.

51. City of Sedalia v. Smith, 206 Mo. 346, 104 SW 15.

52. City of Sedalia v. Smith, 206 Mo. 346, 104 SW 15. Time held unreasonable. Gilsonite Const. Co. v. Arkansas McAlester Coal Co. [Mo.] 103 SW 93.

53. Though the money penalty expressly applies only to time of completion, it impliedly applies also to time of commencement. Merine v. Barber Asphalt Pav. Co., 125 Mo. App. 623, 103 SW 508.

54. Where no such extension was obtained on account of inability to obtain use of city street roller and on account of weather, such matters were no excuse for delay. Paul v. Conqueror Trust Co., 125 Mo. App. 483, 102 SW 1070.

55. Time limit for completion of state building held waived by acceptance of work and part payment, the delay, moreover, being contributed to by the fault of the state. J. J. Newman Lumber Co. v. Wemple, 56 Misc. 168, 107 NYS 318.

56. The contractor cannot be held responsible for delays occasioned by the municipality's failure to furnish materials which it contracted to furnish. J. J. Newman Lumber Co. v. Wemple, 56 Misc. 168, 107 NYS 318.

57. McIntyre v. U. S., 40 Ct. Cl. 366.

58. In such case the engineer in charge is not limited by a requirement that he must determine before the work begins the force necessary to complete it. McIntyre v. U. S., 40 Ct. Cl. 366.

59. McIntyre v. U. S., 40 Ct. Cl. 366. Inter-

Allowance of claims and recovery by contractor.[See 8 C. L. 1525]—The contractor cannot demand acceptance and payment until the work has been completed,[60] and a municipal board having complete charge of the improvement has implied power to determine when the work is completed,[61] the contractor's remedy for a refusal to accept being as provided by the statute.[62] In a proper case, mandamus is available.[63] The contractor cannot recover until all conditions and requirements have been performed,[64] including those imposed by the duly authorized engineer in charge,[65] and where compensation is payable only upon certificate of performance no recovery can be had without such certificate [66] unless its absence is due to the fraud or arbitrary or unreasonable conduct of the person whose duty it is to give it,[67] and the facts upon which such excuse is based must be pleaded and proved.[68] Where the contract is let as a whole, payment for a part only of the work cannot be enforced when the balance has not been done.[69] The discretion of the municipal authorities in allowing claims is not an arbitrary one,[70] and they have no power to allow claims clearly illegal and in excess of the terms of the contract.[71] In the absence of fraud or mistake, equity cannot reform the contract so as to allow compensation not provided for therein.[72] Failure of a contractor to present his claim for allowance as prescribed by statute will not bar an action thereon where such result is not within the penalty prescribed by the statute.[73] A provision that no allowance will be made for extras unless the same is presented to a certain board is valid [74] and in such case the claim must be presented to the board as such.[75]

vention by engineer in charge of levee work held justified by high water, etc. Id.

60. Board of Com'rs of Jackson County v. Branaman [Ind.] 82 NE 65. Under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63, authorizing improvement of highways and providing that whole amount of contract shall not be paid until the road has been received as completed by board of county commissioners, contractor cannot recover until road is completed (Id.), and such acts contemplate that board shall fix a time for determining question of completion at which any interested taxpayer may appear, and party aggrieved may appeal to circuit court (Id.).

61, 62. Board of Com'rs of Jackson County v. Branaman [Ind.] 82 NE 65.

63. Mandamus lies to compel officer charged with duty of issuing warrants in payment for work to perform such duty. State v. Com'rs of Drainage Dist. No. 1, Pacific County, 46 Wash. 474, 90 P 660. Action to recover on contract, coupled with demand for mandatory order in aid thereof, seeks legal and not equitable relief. Ford v. Manchester [Iowa] 113 NW 846. Mandamus to compel acceptance of the work and issue of a warrant for payment is not available where the contractor has another adequate remedy. Contract for road improvement under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 146, § 63. Board of Com'rs of Jackson County v. Branaman [Ind.] 82 NE 65. Under the Indiana statute relating to the construction of roads, no judgment can be recovered by the contractor against the county for money due him under the contract, his remedy being mandamus to compel the county board to perform its statutory duties. Acts 1895, p. 146, c. 63. Id.

64. Payment of claims. City & County of Denver v. Hindry [Colo.] 90 P 1028.

65. Erection of structures required by contract upon certain contingencies, and required by officer in charge. McIntyre v. U. S., 40 Ct. Cl. 366.

66. In absence of fraud or arbitrary or unreasonable conduct on part of engineer in charge, contractor could not recover installments without certificate of engineer, required by contract, as to progress of work. Devlin v. New York, 108 NYS 739.

67. Devlin v. New York, 108 NYS 739. Fraud or arbitrary or unreasonable conduct of engineer in refusing to give certificate of progress of work held for jury. Id. Held for jury even though difference between engineer's calculations and those addressed in favor of the contractor is slight. Id.

68. Devlin v. New York, 108 NYS 739.

69. City of Auburn v. State [Ind.] 83 NE 997.

70. Fullerton v. Des Moines [Iowa] 115 NW 607.

71. Fullerton v. Des Moines [Iowa] 115 NW 607. Cannot by construction change the terms of the contract and allow compensation not provided for thereby. Id.

72. Fullerton v. Des Moines [Iowa] 115 NW 607.

73. Under Rev. St. Mo. 1899, § 5854, presentation of claim to city is not prerequisite to action, only penalty being disallowed by city, and, if unliquidated, the loss of costs. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

74. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835.

Held question for jury whether proper presentation was made. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835.

75. Presentation to member in private of-

Where the contractor sublets the contract, but is subsequently compelled, by the inability of the subcontractor to complete the work, to resume it, he is the proper party to recover any loss or damage for which the city is liable under the contract.[76] A municipality cannot be held liable unless the mandatory provisions of the charter have been complied with, and contractors are bound to take notice of such provisions,[77] and hence the municipality cannot be held liable upon a quantum meruit where the contract is invalid.[78] A municipality is not necessarily liable to the contractor because the work is done under the supervision and control of and by contract with a commission appointed by it.[79] The usual rules as to varying the contract by parol evidence apply in actions on contracts for public improvements.[80]

Enjoining performance of illegal contract.[See 8 C. L. 1526]—Taxpayers who will be injured may sue to enjoin the performance of illegal contracts,[81] but a general taxpayer cannot sue to restrain the letting of a contract on the ground of the invalidity of the special assessment therefor,[82] nor are they entitled to have the acceptance of the work enjoined, since no injury accrues to them until payment for such work.[83] Payment of compensation in excess of that provided for by the contract may be enjoined.[84]

Bonds.[See 8 C. L. 1527]

§ 6. *Security to subcontractors, laborers and materialmen.*[See 8 C. L. 1528]—Such security may be provided for by the contract.[85] Where a subcontractor furnishes extras solely upon the credit of the contractor, the latter alone can be held liable therefor,[86] and reference in a subcontract to the principal contract as being a part of the subcontract with reference to specifications does not incorporate into the subcontract provisions of the principal contract relative to extra work.[87] Where the government provides in its contract for a limited liability to the original contractors, and the latter have given bond to pay for labor and materials furnished to them, and no provision is made by statute for the security of persons furnishing materials to subcontractors, the contractors are not liable for such labor or materials, and cannot

fice or on street held insufficient. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835.

76. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835.

77. City & County of Denver v. Hindry [Colo.] 90 P 1028.

78. Where the charter of a city provides the method of making improvements and payment therefor, the city cannot be held liable for a quantum meruit upon an implied contract. City & County of Denver v. Hindry [Colo.] 90 P 1028. Where a contractor enters into an agreement with county commissioners for the macadamizing of a county road, but the attempted contract is rendered invalid by reason of the omission of the auditor's certificates required by § 2834b, he cannot recover either the consideration named in the contract, or on a quantum meruit, or for the money, labor and material actually expended in faithfully carrying out the contract; and this is true notwithstanding he acted in good faith in the entire matter, and in reliance on the representations of the commissioners that they were fully empowered to make and enter into the proposed contract. North v. Huron County Com'rs, 6 Ohio N. P. (N. S.) 519.

79. Persons assessable and not county or township held liable for highway improvement under Acts 1893, p. 196, c. 112, as amended by Acts 1895, p. 143, c. 63. Board of Com'rs of Jackson County v. Branaman [Ind.] 82 NE 65.

80. Blassingame v. Laurens [S. C.] 61 SE 96.

81. Where assessments for paving were onerous, and in addition thereto they would have to bear their share of costs of paving, to be paid out of the general tax levy. Bennett v. Baltimore [Md.] 68 A 14.

82. General taxpayer has no right of action until an attempt is made to defray the expenses of the improvement from the general funds. Merritt v. Duluth [Minn.] 114 NW 758.

83. On motion to vacate injunction granted at instance of general taxpayers against payment of funds on illegal contract and restraining city from acceptance of the work, the court may and should modify the injunction by vacating the latter part, though no motion to modify is made. Cawker v. Milwaukee [Wis.] 113 NW 419.

84. Fullerton v. Des Moines [Iowa] 115 NW 607.

85. Provision for withholding payment until claims against contractor have been paid held valid. City & County of Denver v. Hindry [Colo.] 90 P 1028.

86, 87. Beattie v. McMullen [Conn.] 67 A 488.

maintain an action of interpleader against a subcontractor relative to the title to and disposition of the amount due by the subcontractor for labor or materials.[88]

Bond. See 8 C. L. 1528—The order in which the contract and the bond are executed is immaterial,[89] and the recital of the bond as to the date of the execution of the contract is conclusive upon the sureties.[90] So, also, the recital in the bond of the contract as valid and subsisting estops the sureties from asserting that it was ultra vires.[91] The remedy of the materialman against the sureties will not be defeated by mere irregularities in the making of the principal contract,[92] nor by a variance between the work and the specifications.[93] A materialman may be debarred of remedy on the contractor's bond by reason of his participation in matters rendering the contract void,[94] but knowledge of fraud or illegality in such contract must, in order to defeat the materialman's security under such bond, be such that, in furnishing the material, he can be regarded as an active agent in the promotion of such fraud or illegality.[95] In the absence of discrediting circumstances or anything to raise suspicions, it need not be proved that the various items went into the work,[96] it being sufficient in such case to show that the material was furnished in good faith for such work.[97] Sureties on a bond given by a partnership are not released from liability for claims of laborers and materialmen because other persons were associated with the firm as partners in carrying out the contract.[98] Limitations applicable to statutory bonds apply and run from the time the debt was contracted.[99] An officer cannot be held liable for failure to take a bond for the security of labor and materials claims, where the duty of taking such bond is not imposed on him but on the municipality.[1] The liability of municipalities in Michigan and Minnesota for losses sustained by reason of its failure to require the bond provided for by statute [2] is secondary and conditional upon the contractor's inability to pay.[3] The privilege of a contractor to be sued on his bond in a particular place may be waived.[4]

88. Mosier v. Kurchhoff, 51 Misc. 432, 101 NYS 643.

89. Bond to secure materialmen supplying material for construction of sewer under St. Paul city charter. Red Wing Sewer Pipe Co. v. Donnelly, 102 Minn. 192, 113 NW 1.

90. Red Wing Sewer Pipe Co. v. Donnelly, 102 Minn. 192, 113 NW 1.

91. Bell v. Kirkland, 102 Minn. 213, 113 NW 271.

92. Failure of municipality to obtain consent of property owners through whose property the sewer passed and the consent of the Federal authorities for the outlet on government land. Bell v. Kirkland, 102 Minn. 213, 113 NW 271.

93. Bond furnished government contractor by surety company pursuant to Act Aug. 13, 1894, c. 282, 28 Stat. 279 (U. S. Comp. St. 1901, p. 2315), is in effect two separate instruments, one to secure the government and one to secure subcontractors; and hence variation in work by government will not discharge obligation of surety company to subcontractors. United States v. California Bridge & Const. Co., 152 F 559.

94. A materialman who has procured specifications calling for a brand of material of which he holds the trade mark cannot maintain an action on the contractor's bond for balance due for such material, the contract being invalid by reason of the suppression of bidding as to materials, and the bond being infected by the invalidity of the contract. Kansas City Hydraulic Press B. Co. v. National Surety Co., 157 F 620.

95. National Surety Co. v. Wyandotte Coal & Lime Co. [Kan.] 92 P 1111.

96. National Surety Co. v. Wyandotte Coal & Lime Co. [Kan.] 92 P 1111; Red Wing Sewer Pipe Co. v. Donnelly, 102 Minn. 192, 113 NW 1.

97. National Surety Co. v. Wyandotte Coal & Lime Co. [Kan.] 92 P 1111.

98. City Trust, Safe Deposit & Surety Co. v. U. S. [C. C. A.] 147 F 155.

99. Action on bond given pursuant to requirement of Pierce's Code, § 6121 (Ballinger's Ann. Codes & St. § 5925), held barred when debt was contracted more than three years before suit. Johnson Service Co. v. Aetna Indemnity Co., 46 Wash. 434, 90 P 590.

1. Road commissioner letting contract for construction of bridge is not required to take bond to secure payment for labor and material. Duty to secure bond as required by Rev. St. 1899, §§ 6761, 6762 (Ann. St. 1906, p. 3328), rests on county court. State v. Miller, 123 Mo. App. 730, 101 SW 616.

2. Rev. Laws 1905, §§ 4535, 4536. Wilcox Lumber Co. v. School Dist. No. 268 of Otter Tail County [Minn.] 114 NW 262. Comp. Laws, §§ 10,743, 10,745. Michaels v. McRoy, 148 Mich. 577, 14 Det. Leg. N. 272, 112 NW 129.

3. Michaels v. McRoy, 148 Mich. 577, 14 Det. Leg. N. 272, 112 NW 129; Wilcox Lumber Co. v. School Dist. No. 268 [Minn.] 114 NW 262.

Liens.[See 8 C. L. 1530]—Liens for labor or material being purely statutory, their scope is necessarily a matter of statutory construction,[5] as is also the procedure for the enforcement of such liens.[6] Where the proceedings for the enforcement of such liens are purely in rem,[7] the court has no jurisdiction of a cross bill by the contractor for an accounting between him and the municipality.[8] The express consent of a state is not necessary to authorize foreclosure proceedings against it,[9] and it may be estopped to claim exemption from such a suit.[10]

§ 7. *Hours and conditions of labor.*[See 8 C. L. 1532]

§ 8. *Injury to property and compensation to owners. A. In general.*[See 8 C. L. 1532]—The measure of damages resulting from a public work or improvement is the difference in the value of the property before and after the work is done.[11] Where, therefore, taking all things into consideration, the value of the property has not decreased, the owner is not entitled to damages,[12] and one is estopped to complain of the effect of work done with his consent.[13] One presenting an itemized statement of damages and accepting payment therefor is prima facie presumed to have received full compensation.[14] The failure to award damages upon the taking of property for a public improvement is equivalent to an adjudication that the owner has suffered no damage, and is an estimate of damages.[15] Damages assessed after conveyance of the property belong to the grantee, though the conveyance is made after the appointment

Evidence held insufficient to show insolvency of contractor. Wilcox Lumber Co. v. School Dist. No. 268 [Minn.] 114 NW 262.

4. Any privilege which a surety company has, under Act Aug. 13, 1894, c. 282, § 5, 28 Stat. 280 (U. S. Comp. St. 1901, p. 2316), to be sued on a bond, which it has furnished for a government contractor, in the district where the bond was executed or else in the district where its principal office is, held waived by general appearance, filing affidavit of defense to merits, taking depositions, etc. United States v. California Bridge & Const. Co., 152 F 559.

5. Lien under Laws 1897, pp. 518, 520, 522, c. 418, §§ 9, 12, 17, is restricted to claims for labor and materials already performed or furnished at time of filing of lien. Goss v. Williams Engineering Co., 108 NYS 862.

6. Under lien law, §§ 6, 7, as amended by Laws 1907, c. 37, a defendant in a suit by another lienor who has filed the required **notice** need not himself file a notice of the pendency of the suit. J. J. Newman Lumber Co. v. Wemple, 107 NYS 318.

7. Such are proceedings provided by P. L. 1892, p. 369. United States Fidelity & Guaranty Co. v. Newark [N. J. Eq.] 66 A 904.

8. United States Fidelity & Guaranty Co. v. Newark [N. J. Eq.] 66 A 904.

9. Under Code Civ. Proc. §§ 3398, 3418, read in connection with the lien law, §§ 5, 12, 17, as amended by Laws 1902, c. 37, it is clear that it was intention of legislature that action might be maintained against state to foreclose lien for work and labor on state buildings prior to amendment of 1906 expressly authorizing such an action. J. J. Newman Lumber Co. v. Wemple, 107 NYS 318.

10. Where suit to foreclose lien for materials furnished for state building was instituted prior to Laws 1906, p. 548, c. 255, amending Code Civ. Proc. § 3400, and expressly providing that the state may be made a party to such a suit, and the attorney general, after such amendment, withdrew his objection formerly filed as to propriety of state being sued, the state was not in any position to contend that the suit was brought against it before such a suit against it was authorized. J. J. Newman Lumber Co. v. Wemple, 107 NYS 318.

11. Town of Eutaw v. Botnick [Ala.] 43 S 739.

12. Town of Eutaw v. Botnick [Ala.] 43 S 739. Question on cross-examination as to **rental value** before and after the improvement held admissible both to test plaintiff's correctness as to his statements of value and on issue of damage. Id.

General and special benefits are sometimes distinguished in this connection, but this distinction is not recognized in Alabama. See Town of Eutaw v. Botnick [Ala.] 43 S 739. When the owner, upon a petition to assess damages introduces **evidence** of a decrease in the value of his premises by reason of the public work or improvement, **cross-examination** as to other causes of such decrease was proper. Hyde v. Fall River [Mass.] 83 NE 323. Extent of such cross-examination being within the discretion of the court. Id. Where respondent's witnesses expressly excluded any damage from the collateral causes, refusal to allow cross-examination as to effect of such causes held within court's discretion, especially where petitioners had expressly disclaimed any damages caused thereby. Id.

13. Excavation in street to make grade. Wheat v. Van Tine, 149 Mich. 314, 14 Det. Leg. N. 430, 112 NW 933.

14. If he desires to rebut such presumption, he must show that both parties intended such settlement as only a part payment. City of Rawlins v. Jungquist [Wyo.] 94 P 464.

15. Taintor v. Cambridge [Mass.] 83 NE 1101.

of the commissioners.[16] Where an improvement is authorized by a municipal board prior to the acceptance of a municipal charter, but the petition and the appointment of the commissioners to ascertain damages are subsequent thereto, their duties and the duties of the municipality with reference to payment for the necessary lands are governed by the charter.[17] The right is sometimes given to set off damages against assessments,[18] and an exemption of property from assessment does not necessarily prevent the deduction of benefits from damages thereto.[19] The language of a notice given by the appraisers will be liberally construed to uphold their acts, especially in case of ambiguous phrases borrowed from the statute.[20] In an action against municipal officers for damages from an improvement alleged to have been unauthorized, parol evidence is admissible to show authorization by the council where the records are silent in regard thereto.[21]

(§ 8) *B. Establishment or change of grade of street.*[22]

§ 9. *Local assessments. A. Power and duty to make.* See 8 C. L. 1535—Local assessments are made to pay for local improvements,[23] and the levying of such assessments is an exercise of the taxing power, and not of the power of eminent domain.[24] Such power is entirely statutory,[25] and the scope of the statutory authority is therefore necessarily a matter of statutory construction,[26] as are also matters relating to the time of the assessment [27] and date of payment,[28] and the mode prescribed by stat-

16. Hull v. Phillips [Mo. App.] 107 SW 21. Attorney employed by grantor to secure allowance of damage had no **attorney's lien** as against grantee in conveyance before assessment where he did not notify grantee of his contract with grantor. See Laws 1901, p. 46, § 2 (Ann. St. 1906, § 4937-2). Id.

17. In re Jerome Ave. in New York, 120 App. Div. 201, 105 NYS 315.

18. Right under an ordinance to set off condemnation award and damages sustained to property against assessment held not waived by taking city warrants for such award and damages instead of entering satisfaction of the amount thereof on execution docket and filing certificate of such satisfaction with city treasurer, etc., as provided by the statute. State v. Seattle [Wash.] 94 P 656.

19. See New York City Charter, Laws 1897, p. 342, c. 378, § 970 (Rev. Charter Laws 1901, c. 466, p. 1184), relating to damages assessable, and Laws 1879, p. 397, c. 310, exempting cemeteries. In re Jerome Ave. in New York, 120 App. Div. 201, 105 NYS 315.

20. Use of phrase "actual damages done to all other property" held not fatal, though admitting of construction that appraisers were to assess damages to property other than that through which street was to pass. Kansas City v. Napiecek [Kan.] 92 P 827. Expression "to appraise and assess the actual value of the land proposed to be taken * * * and the actual damages done to all other property * * * and for the payment of such value and damages assess against said city, * * * the amount of benefit to the public generally, and the remainder of such damages caused by the opening of said street against the property or the benefit district," held not subject to objection, being borrowed from the statute, though it might be susceptible to the construction that the appraisers were to assess against the city both the value of the land taken and the damages to other property, but against the property specially benefited only the damages to other property than that appropriated. Id.

21. Wheat v. Van Tine, 149 Mich. 314, 14 Det. Leg. N. 430, 112 NW 933. Evidence of allowance of bills for such work, with knowledge of what they were for, held admissible. Id. Allowance of bills for work held sufficient ratification. Id.

22. See 8. C. L. 1533. See Highways and Streets, 9 C. L. 1588.

23. A local improvement is a public improvement which, being confined to a locality, enhances the value of adjacent property as distingulshed from benefits diffused by it throughout the municipality. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615. There is a conflict of authority as to whether street sprinkling is a local improvement for which special assessments may be made. Stevens v. Port Huron, 149 Mich. 586, 14 Det. Leg. N. 559, 113 NW 291, holding the affirmative of the question, and reviewing the cases pro and con.

24. New York, etc., R. Co. v. Hammond [Ind.] 83 NE 244.

25. Bennett v. Emmetsburg [Iowa] 115 NW 582.

26. St. 1906, p. 372, c. 393, relating to highways, held to apply to improvements ordered prior to June 27, 1902, and not completed until after passage of such act. Morse v. Charles [Mass.] 83 NE 891. Assessment of costs of sewer upon parties benefited, but whose properties did not abut on the sewer, held not authorized either under Act April 28, 1899 (P. L. 74), or Act May 16, 1891 (P. L. 71). Viewers appointed to assess costs, etc., resulting from change in course of a certain run, assessed costs, etc., of the main sewer upon parties benefited. Held assessment could not be sustained under Act April 28, 1899, relating to assessment of costs, etc., of change of runs upon parties benefited. Id.

27. St. 1906, p. 372, c. 393, does not require assessment of benefits of street improvement on same day, etc., when the improvement in

ute is of the essence of the power, which can be exercised legally only in the prescribed mode.[29] Authority to assess for construction does not include authority to assess for repair.[30] The duty to levy an assessment may be enforced by mandamus,[31] but the courts will hesitate to interfere with the discretion of the city council in prescribing the location, nature and character of a local improvement.[32] Under some of the statutes a demand upon the property owner is an essential prerequisite to the right to make an assessment.[33] A special assessment cannot be levied to defray the cost of an improvement which will be ineffectual without a further improvement.[34]

(§ 9) *B. Constitutional and statutory limitations.*[See 8 C. L. 1536]—Statutes relating to special assessments must conform to constitutional limitations,[35] but the failure of the legislature to properly denominate the burden imposed as a tax or assessment will not invalidate the statute if it can be sustained as an exercise of the taxing power.[36] Assessments for benefits are not subject, however, to the constitutional limitations relating to taxation in the ordinary sense,[37] such as the limitations relating to double taxation,[38] and the taking of property without compensation.[39] As-

question was begun, under prior statutes but not completed until after passage of such act. Morse v. Charles [Mass.] 83 NE 891.

28. Provision that no deduction shall be allowed for benefits received in common with other properties did not prevent assessments from being made payable prior to construction of the work. Nalle v. Austin [Tex. Civ. App.] 18 Tex. Ct. Rep. 54, 103 SW 825.

29. People v. Kingston Common Council, 189 N. Y. 66, 81 NE 557, rvg. 114 App. Div. 326, 99 NYS 657. See post, this section, subsection D, Procedure for Authorization. Statutes must be strictly followed. Bennett v. Emmettsburg [Iowa] 115 NW 582. Must be made by legislative action of council. Mulligan v. Lexington, 126 Mo. App. 715, 105 SW 1104.

30. Construction and repair distinguished. City of Covington v. Bullock, 31 Ky. L. R. 688, 103 SW 276.

31. At instance of holders of county warrants issued in payment for improvement. State v. Lewis County, 45 Wash. 423, 88 P 760. Fact that condemnation proceeding to acquire necessary property is pending is no defense to suit of holder of improvement warrants, but court should order such proceedings to be perfected and completed. Id.

32. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615. To justify a holding that an assessment for an improvement is unreasonable and oppressive, the evidence must be clear and convincing. Id.

33. Gen. Laws 1896, c. 72, § 31, relating to setting of curbstones. Bowers v. Narragansett Real Estate Co. [R. I.] 67 A 324.

34. Gault v. Glen Ellyn, 226 Ill. 520, 80 NE 1046.

35. P. L. 1895, p. 95, **held constitutional.** Simmons v. Millville [N. J. Law] 66 A 895. Denver city charter provisions respecting creation and appointment of board of public works held constitutional. Jackson v. Denver [Colo.] 92 P 690. Denver charter provisions creating board of public works with power to levy assessments, etc., held not in contravention of Const. art. 5, § 35, prohibiting delegation to commission power to levy taxes or perform municipal functions. City of Denver v. Iliff, 38 Colo. 357, 89 P 823. Denver charter provision creating board of public works held not in contravention of Const. art. 5, § 25, prohibiting special and local laws. Id. Under Const. art. 19, § 27, assessments must be based upon **consent of majority in value of property owners** adjoining affected locality. Craig v. Russellville Waterworks Imp. Dist. Board [Ark.] 105 SW 867. Such requirement is a limitation upon the power of the legislature in the nature of a guaranty of property rights, and hence the courts may inquire into the question whether the limitation has been disregarded. Id. Only way in which this limitation can be observed is by enactment of such a statute as Kirby's Dig. § 5667, whereby certain procedure is prescribed to obtain consent of majority in value, and a forum to determine whether such consent has been obtained. Id. The legislature cannot determine for itself whether such consent has been obtained. Id. Laws 1907, p. 389, c. 252, relating to paving, etc., and sewers in certain townships, held unconstitutional as an attempted **delegation of legislative powers** to individuals. Martin v. Holer [N. D.] 115 NW 256. **Not contrary to provision against special or local laws** where the statute applicable generally throughout the state, though application to particular localities in particular instances is made condition upon petition of property owners. St. Benedict's Abbey v. Marion County [Or.], 93 P 231.

36. In re Water Front in New York, 190 N. Y. 350, 83 NE 299.

37. Nalle v. Austin [Tex. Civ. App.] 18 Tex. Ct. Rep. 54, 103 SW 825.

38. An assessment does not constitute double taxation because bonds are also issued to pay for work. Edwards House Co. v. Jackson [Miss.] 45 S 14.

39. Edwards House Co. v. Jackson [Miss.] 45 S 14. An assessment for benefits, though collectible prior to the construction of the improvement, is not a taking without compensation, where the assessment is applicable, only to such improvement. Nalle

sessment statutes may be retroactive.[40] As a general rule the assessment must be based on benefits conferred,[41] but it is held that certain assessments may be made regardless of benefits.[42] Special assessments are not within limitations upon the amount of municipal indebtedness,[43] or as to submission of proposed indebtedness to the vote of the people.[44] The legislature may itself fix the sum to be raised [45] and prescribe the benefit district,[46] or both of such matters may be delegated to a local board or body,[47] the legislature being vested with a wide discretion in this regard.[48] General laws upon the subject of special assessments for local improvements may be superseded by municipal charters.[49]

Equality and uniformity.[See 8 C. L. 1536]—Assessments in proportion to benefits do not violate constitutional provisions relative to equality and uniformity of taxation,[50] and a reasonable classification of properties for the purpose of such assessments is permissible,[51] but descrimination between individuals cannot be made,[52] and the liability to and the amount of the tax cannot be left to pure accident having no just relation to the subject.[53] The fact that the entire municipality will be bene-

v. Austin [Tex. Civ. App.] 18 Tex. Ct. Rep. 54, 103 SW 825.

40. P. L. 1905, 22, relating to sewer assessments, held not invalid as to a town which had already paid for the improvement for which the assessment was made. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115.

41. St. Benedicts Abbey v. Marion County [Or.] 93 P 231. See post, this section and subsection, subdivision, Equality and Uniformity; post, this section, subsection C, Persons, Property and Districts Liable.

42. Backlying property not benefited held assessable for street improvements. Diven v. Burlington Sav. Bk. [Ind. App.] 82 NE 1020. Improvements made in the exercise of the police power may be assessed against abutting property regardless of benefits. Lisbon Ave. Land Co. v. Lake [Wis.] 113 NW 1099.

43. Limitation on municipal indebtedness. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348; Blackwell v. Coeur D'Alene, 13 Idaho, 357, 90 P 353.

44. Blackwell v. Coeur D'Alene, 13 Idaho, 357, 90 P 353; McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348, citing People v. Pacheco, 27 Cal. 218; Meyer v. San Francisco, 150 Cal. 131, 88 P 722; Little v. Portland, 26 Or. 235, 37 P 911; Atkinson v. Great Falls, 16 Mont. 372, 40 P 877; City of Litchfield v. Ballou, 114 U. S. 190, 29 Law. Ed. 132; Cooley, Const. Lim. [7th Ed.] 92; Davis v. Des Moines, 71 Iowa, 500, 32 NW 470; Corey v. Ft. Dodge, 133 Iowa, 666. 111 NW 6; Tuttle v. Polk, 92 Iowa, 433, 60 NW 733; City of Clinton v. Walliker, 98 Iowa, 655, 68 NW 431; Quill v. Indianapolis, 124 Ind. 292, 23 NE 788, 7 L. R. A. 681; 1 Dillon, Mun. Corp. 477; Winston v. Spokane, 12 Wash. 524, 41 P 888; Smith v. Seattle, 25 Wash. 300, 65 P 612; Goshen Highway Com'rs v. Jackson, 165 Ill. 17, 45 NE 1000; Kansas City v. Ward, 134 Mo. 172, 35 SW 600; 1 Abbott, Mun. Corp. § 340; 25 A. & E. Ency. 1233; State v. Moss, 44 Wash. 91, 86 P 1129; German American Sav. Bk. v. Spokane, 17 Wash. 315, 49 P 542, 38 L. R. A. 259; R. I. Mortg. & Trust Co. v. Spokane, 19 Wash. 616, 53 P 1104; Gray's Limitations of Taxing Power, § 2102; City of Valparaiso v. Gardner, 97 Ind. 1, 49 Am. Rep. 416; Swanson v. Ottumwa, 118 Iowa, 161, 91 NW 1049, 59 L. R. A. 620; Gedge v. Covington, 26 Ky. L. R. 273, 80 SW 1160; 2 Modern Law of Mun. Corp. (Smith) p. 879; 1 Abbott, Mun. Corp. p. 336; Borough of McKeesport v. Fidler, 147 Pa. 532, 23 A 799; Simonton, Mun. Bonds, § 135.

45, 46, 47, 48. St. Benedict's Abbey v. Marion County [Or.] 93 P 231.

49. Charter of City of Crookston, adopted July 31, 1906, superseded Gen. Laws 1895, p. 601, c. 235, and Gen. Laws 1899, p. 130, c. 128. Turner v. Snyder [Minn.] 112 NW 868.

50. Edwards House Co. v. City of Jackson [Miss.] 45 S 14; St. Benedict's Abbey v. Marion County [Or.] 93 P 231. Const. art. 9, § 1, relating to uniformity of location, does not apply to local assessments. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115. P. L. 1905, 22, relating to sewer assessments, held not in violation of bill of rights. Id. Not taxes within constitutional provisions requiring equality and uniformity. Heman Const. Co. v. Wabash R. Co., 206 Mo. 172, 104 SW 67.

51. The municipality may create local assessment districts and thus classify the properties to be assessed in separate groups. Hallett v. U. S. Security & Bond Co. [Colo.] 90 P 683; Blackwell v. Coeur D'Alene, 13 Idaho, 357, 90 P 353; McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348. P. L. 1905, 22, authorizing division of municipality into sewer districts and for alternative method of assessment, held not in violation of constitution. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115. Statute providing that municipality containing less than 100,000 inhabitants may include in assessment a sum not in excess of 6 per cent thereof for the cost of making and levying assessment and letting and executing contract is not unconstitutional as being an unreasonable classification of municipalities. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

52. Laws 1907, p. 389, c. 252, relating to paving, etc., and sewers in civil townships adjoining cities of not less than 6,000 inhabitants, held unconstitutional, because of discrimination between individuals. Morton v. Holes [N. D.] 115 NW 256.

53. Greater New York charter, Laws, 1901,

fited by a proposed improvement does not invalidate the assessment of those specially benefited thereby,[54] but the assessment must be equally and ratably apportioned among those benefited.[55] Under some circumstances the result reached under the front foot rule may be the same as that under the benefit rule,[56] and a statute authorizing a levy for street improvements according to front foot rule is not unconstitutional,[57] equal benefit being presumed from fact of assessment according to frontage.[58] Equality is not necessarily dependent upon an apportionment of benefits, however, and the legislature may provide other modes for fixing the amounts of the respective assessments.[59] The question as to the necessity of benefits as a basis for assessments is often considered from different points of view, with more or less actual or seeming conflict.[60]

Competitive bids.[See 8 C. L. 1538]—The work for which the assessment is levied is sometimes required to be let upon competitive bidding to the lowest bidders,[61] and such a requirement cannot be evaded by letting the work upon separate contracts.[62]

Due process of law.[See 8 C. L. 1538]—Notice and opportunity to be heard satisfy all the legal requirements necessary for the protection of private rights,[63] and an assessment on property benefited is not a deprivation of property without due process of law where the owner is given an opportunity to be heard [64] and failure to fix a definite time for hearing and production of witnesses does not constitute a violation of

p. 351, c. 466, § 822, providing that where a part of a water front proprietor's property is taken for water front improvements the difference between the entire premises and the value of the balance after the improvement shall be the measure of the compensation for the part taken, held violative of the 14th Amendment. In re Water Front in City of New York, 190 N. Y. 350, 83 NE 299.

54. Though a system of sewers installed will benefit the entire municipality, if it specially benefits the property assessed, it is a local improvement. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

55. Special assessments cannot be authorized by statute except in proportion to the benefits received. Stevens v. Port Huron, 149 Mich. 536, 14 Det. Leg. N. 559, 113 NW 291. Assessments must be based on benefits received. People v. Buffalo, 57 Misc. 17, 107 NYS 281. Sewer assessment held invalid as not in conformity with the benefit rule. Bennett v. Emmetsburg [Iowa] 115 NW 582. Exclusion of property benefited renders the assessment invalid as to property assessed. Simmons v. Millville [N. J. Law] 66 A 895. The mere fact that the assessment does not exceed the benefits does not validate it where the burden is not proportionately and ratably distributed. Early v. Ft. Dodge [Iowa] 113 NW 766. The fact that a parcel of land described in a special improvement ordinance is not specially assessed does not affect the validity of the assessment, provided such parcel is not specially benefited by the improvement. Ridenour v. Biddle, 10 Ohio C. C. (N. S.) 438.

56. Where it appeared that every foot of relator's properties had same advantage of and privilege for shipping and commercial purposes, and that benefits derived by use of city ship canal were identical and uniform, a front foot assessment to pay expense of canal was not improper. People v. Buffalo, 57 Misc. 10, 107 NYS 689.

57. Edwards House Co. v. Jackson [Miss.] 45 S 14.

58. Northern Pac. R. Co. v. Seattle, 46 Wash. 674, 91 P 244.

59. City of Perry v. Davis, 18 Okl. 427, 90 P 865.

60. See ante, this section and subsection. Post, this section, subsection C, Persons, Property and Districts Liable.

61. Under Laws 1900, p. 374, c. 168, § 151, requiring all work that is to be paid for by special assessments to be let to the lowest bidder, an assessment for costs of paving and sewers under Kingston City Charter, Laws 1896, p. 972, c. 747, § 147, was invalid where contract was not let upon competition bids. People v. Kingston Common Council, 189 N. Y. 66, 81 NE 557, rvg. 114 App. Div. 326, 99 NYS 657.

62. Where sidewalk to be constructed was continuous, and separate contracts, identical in terms, parties, etc., were made as to walk in front of each lot. People v. Lamon, 232 Ill. 587, 83 NE 1070.

63. New York, etc., R. Co. v. Hammond [Ind.] 83 NE 244. Sections 4483 and 4484, Rev. St., providing for the improvement of ditches in villages, is not unconstitutional because wanting in "due process" in not providing for a jury to assess compensation, for which provision is made in other sections of the same chapter; or in not limiting the power of taxation and assessment, inasmuch as the constitutional limitation applies to cities and villages and not to counties. McCaslin v. Perrysburg, 6 Ohio N. P. (N. S.) 48. Provision of P. L. 22, for assessment of benefits where sewers passed through private lands, held invalid, since the land is taken in such case by eminent domain, and the owner is entitled to have his damages assessed by jury. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115.

64. St. Benedict's Abbey v. Marion County [Or.] 93 P 231.

constitutional provisions as to due process of law where provision is made for notice and filing of objections.[65] It is even held that an assessment for benefits without a hearing is not a deprivation of property without due process of law,[66] and that notice to the property owner is not essential.[67] Failure to provide for a hearing is cured by provision for an appeal and a full hearing thereon.[68] The assessment being upon the property and not upon the owner, one acquiring property pending the work or after completion thereof, but before assessment, is not deprived of property without due process of law by the assessment.[69]

(§ 9) *C. Persons, property, and districts liable, and extent of liability.* See 8 C. L. 1539—Local assessments are primarily imposed upon the property and not the owner thereof,[70] and in some states cannot be made basis of a personal liability of the owner.[71] The separate ownership of lots forming a block must be considered, however, in levying the assessment, which must be upon the separate lots and not the block.[72] Ordinarily an assessment must be in accordance with the law in force when the proceedings therefor were begun.[73]

As a general rule the basis of local assessments is the benefit accruing from the improvement,[74] but this rule is far from being universal in its application, and property is sometimes assessed without regard to benefits,[75] or because of the fact that the owners have participated in rendering the improvement necessary,[76] or according to the foot frontage of the property abutting on the improvement.[77]

65. Opportunity to file written objections held due process of law. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

66. Naylor v. Harrisonville, 207 Mo. 341, 105 SW 1074.

67. The local improvement act of 1897 is not unconstitutional in that it fails to provide for notice to owner of property assessed. McChesney v. Chicago, 227 Ill. 450, 81 NE 435. Publication of ordinance creating improvement district, the notice for bids, and the ordinance levying the assessment. held sufficient. City of Perry v. Davis, 18 Okl. 427, 90 P 865. An opportunity to appear and be heard is not necessary where the legislature has fixed the mode of assessment in advance so that the amount of each assessment is determined solely by a mathematical calculation. Sewer assessment on each lot fixed in proportion which area of such lot bears to area of whole assessment district. Id.

68. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

69. Morse v. Charles [Mass.] 83 NE 891.

70, 71. Heman Const. Co. v. Wabash R. Co., 206 Mo. 172, 104 SW 67.

72. Where three lots held by different owners form a flat-iron or wedge-shaped plot, bounded on three sides by public streets, the assessments for improving the adjoining streets should be levied on each lot separately, although all three form a single parcel and are used at the time for a common purpose; and such assessments should be based on the shorter frontage of each lot. McMaken v. Hayes, 10 Ohio C. C. (N. S.) 38.

73. Monroe v. Cleveland, 9 Ohio C. C. (N. S.) 523.

74. See ante, this section, subsection B, Constitutional and Statutory Limitations. Provision that appraisers shall assess a part of cost against property within specified district which shall in their opinion be especially benefited thereby, in absence of provision for any other rule of apportionment, must be construed to mean that the total amount to be charged against such property shall be distributed in proportion to the actual benefit received by the several tracts respectively, as estimated by the appraisers. Kansas City v. Napiecek [Kan.] 92 P 827. In as much as payment of an assessment for a street improvement can be compelled only on the theory that benefit has resulted to the abutting property, neither the discretion lodged in the municipal authorities as to the plans and specifications to be adopted, nor an honest difference of opinion among engineers as to the drainage required to render a proposed improvement beneficial, is a sufficient basis upon which to rest a valid assessment, where the event has shown that because of a failure to provide proper drainage the improvement is without any benefit whatever to the abutting property. Breuer v. Cincinnati, 5 Ohio N. P. (N. S.) 49. Assessment without regard to benefits, in excess thereof, and not in accordance with present value of property, but with relation to speculative future value, held void. Spence v. Milwaukee [Wis.] 113 NW 38.

Evidence held to show that assessments exceeded benefits. Early v. Ft. Dodge [Iowa] 113 NW 766.

75. Backlying lots not benefited by street improvement held assessable under Barrett Law, Burns' Ann. St. 1901, §§ 4290-4298. Diven v. Burlington Sav. Bk. [Ind. App.] 82 NE 1020.

76. Where plaintiffs, by reason of artificial improvements on their own lands above, helped to make it necessary for the protection of the lands below that improvements be made in a ditch or watercourse, they should contribute toward payment thereof. Mason v. Fulton County Com'rs, 10 Ohio C. C. (N. S.) 201.

77. Under Newberg City Charter (Laws

Under the benefit rule, various elements must be considered in determining the extent of the benefit,[78] including the value of the property [70] and its foot frontage on the improvement,[80] an assessment according to such frontage being sometimes equivalent to an assessment in proportion to benefits,[81] and unless the contrary appears such an assessment will be sustained.[82] Increase of market value is not the sole test,[83] nor is liability to assessment for benefits dependent upon the location of the property,[84] nor upon the use which is made of the property,[85] nor upon benefits to others than the owners.[86] One is not exempt from an annual assessment merely because not assessed in former years,[87] nor is liability affected by the question of enforceability of the assessment.[88] Private improvement by the owner may exempt the property from assessment,[89] but such result does not necessarily follow.[90] A fee

1893, p. 305), §§ 65, 66, 82, 110, relating to improvement of streets. Oliver v. Newberg [Or.] 91 P 470. Under Laws 1890, p. 94, c. 37, art. 16 (Rev. Proc. § 1304), amending Comp. Laws, 1887, § 974, the assessment per front foot is same as under the law before amended, and is ascertained by dividing the total cost of the street improvement, including alley and street intersections, by the number of feet fronting or abutting upon the same. Brandhuber v. Pierre [S. D.] 113 NW 569.

78. Character and condition of the properties affected, their improvement, value, adaptibility for use in connection with the improvement, and all other items affecting the benefits actually received. People v. Buffalo, 57 Misc. 17, 107 NYS 287.

Evidence: Objection that witnesses, shown to be conversant with real estate values in the community, were not competent to testify as to benefits to railroad property from street improvements, goes rather to weight than to competency. New York, etc., R. Co. v. Hammond [Ind.] 83 NE 244.

79. In re Seattle [Wash.] 91 P 548. The benefit received is determined with relation to the value of the land without the improvement for which the assessment is made. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348.

80. Under Supp. Code 1902, § 792a, requiring assessments to be in proportion to benefits, the foot frontage of the property may be considered in determining benefits from sewer. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

81. Blackwell v. Coeur D'Alene, 13 Idaho, 357, 90 P 353.

82. Where statute required assessment according to benefits and to foot frontage. Blackwell v. Coeur D'Alene, 13 Idaho, 357, 90 P 353. An ordinance creating an improvement district and directing an assessment upon all abutting property according to frontage is a legislative determination that such property will be benefited, and in the absence of fraud or arbitrary action such determination is not reviewable by the courts. Northern Pac. R. Co. v. Seattle, 46 Wash. 674, 91 P 244. Where the amount of a sewer assessment does not exceed the special benefits to the land, the assessment is not rendered invalid because levied in terms by the abutting foot. Kibler v. Newark., 4 Ohio N. P. (N. S.) 641.

83. Churches, factories, and perhaps railroads, held benefited by sewer, in regard to their use if not their market value. Simmons v. Millville [N. J. Law] 66 A 895. Whether or not abutting property has been benefited by a street improvement is not to be determined alone by the market value of the property after the improvement has been made as compared with its value before, but the real question is whether there will be any potential benefits, and the determination thereof is within the discretion of council rather than of the courts. McMaken v. Hayes, 10 Ohio C. C. (N. S.) 38.

84. It is not always essential that a lot should abut upon the improvement in order to be benefited. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348. Under a general provision for assessment upon property benefited, it is not essential that the property assessed abut on the improvement, under Laws 1903, p. 223, c. 122, § 160, relating to streets. Kansas City v. Napiecek [Kan.] 92 P 827. Property adjoining the locality to be affected is any property adjoining or near the improvement which is physically affected or the value of which is commercially affected directly by the improvement to a degree in excess of the effect upon property in the municipality generally. Board of Imp. v. Offenhauser [Ark.] 105 SW 265. Under Comp. St. 1897, c. 12a, § 101b, special assessments may be levied to pay for property appropriated for boulevard purposes upon all property specially benefited, regardless of its location with relation to the improvement. State v. Several Parcels of Land [Neb.] 113 NW 248.

85. Railroad right of way held assessable for street improvement. Heman Const. Co. v. Wabash R. Co., 206 Mo. 172, 104 SW 67; Northern Pac. R. Co. v. Seattle, 46 Wash. 674, 91 P 244.

86. Where it is shown that existing payment has become useless and that improvement ordered will facilitate travel, the ordinance will not be declared void because business of objector's tenants will not be benefited by the pavement. Clark v. Chicago, 229 Ill. 363, 82 NE 370.

87. People v. Buffalo, 57 Misc. 10, 107 NYS 689.

88. Railroad right of way. Northern Pac. R. Co. v. Seattle, 46 Wash. 674, 91 P 244.

89. Where an upper proprietor has drained his lands without exceeding his legal rights, and no advantage results to him from a township ditch which he did not enjoy before it was constructed, he is not chargeable with any part of the assessment for the cost of such an improvement, and an injunction will lie against the collection of an assess-

simple title is not essential to liability for an assessment.[91] A municipality cannot grant special exemption in favor of particular property,[92] but such exemptions may be and are granted by statute.[93]

ment levied on his land. Pontificial College v. Kleeli, 5 Ohio N. P. (N. S.) 241.

90. Property not exempt from sewer assessment because it has private sewer discharging into river, especially in view of legislation for protection of rivers from pollution. Simmons v. Milleville [N. J. Law] 66 A 895. A property owner who is provided with a drain leading to a cess pool on his own property is not, on the ground that he is already provided with local drainage, exempt from assessment for a sewer laid in the street, having a proper outlet, and built in conformity with the requirements of the statute. Kibler v. Newark, 4 Ohio N. P. (N. S.) 641.

91. Railroad company assessable as owner of right of way. Northern Pac. R. Co. v. Seattle, 46 Wash. 674, 91 P 244.

Street railroad track and right of way held not within Ballinger's Ann. Codes & St. § 796, authorizing assessments upon "lots, blocks, tracts and parcels of land" benefited. City of Seattle v. Seattle Elec. Co. [Wash.] 94 P 194. Street railroad franchise to operate cars in street held not within Ky. St. 1903, §§ 3564, 3566, 3567, 3571, 3572, relating to assessment on lots and parts of lots abutting on the street to be improved. City of Maysville v. Maysville St. R. & Transfer Co. [Ky.] 108 SW 960.

NOTE. Special assessments on street railways: Under a statute providing for the levy of assessments for street improvements upon the "lots, blocks, tracts and parcels of land" specially benefited, commissioners of the city of Seattle assessed the "right of way and trackage" of the Seattle Elec. Co. Held (Root, J., dissenting) that the street car company had no interest in the street answering the description of "lots, blocks, tracts and parcels," since the fee was in the abutting owners and the company had a mere easement. City of Seattle v. Seattle Elec. Co. [Wash.] 94 P 194.

The question involved is not free from doubt. Various statutes, charters and ordinances, differing one from another, add to the uncertainty. Street railways have been Held (Root, J., dissenting) that the street following cases: North Beach R. Co.'s Appeal, 32 Cal. 500; New Haven v. Fair Haven, etc., Co., 38 Conn. 422, 9 Am. Dec. 399; Chicago v. Baer, 41 Ill. 306; Kuehner v. Freeport, 143 Ill. 92, 17 L. R. A. 774; Lightner v. Peoria, 150 Ill. 80; Shreveport v. Prescott, 51 La. Ann. 1895. On the other hand it has been held that they are not liable for such assessments, nor can they be made so. Boehme v. Monroe, 106 Mich. 401; People v. Gillon, 126 NY 147; New York v. Eighth Ave. R. Co.,7 App. Div. 84, 39 NYS 959; Davis v. Newark, 54 N. J. Law, 144; Philadelphia v. Philadelphia, etc., Co., 177 Pa. 379. As a general rule such companies may be required to pave between the tracks or for a reasonable distance outside of them, and they may be assessed when the city is forced to do the work. State, etc., v. Hoboken, 14 N. J. Law. 71; New York v. Second Ave. Co., 102 N. Y. 572, 55 Am. Rep. 839; Harrisburg v. Harrisburg Pass Co., 1 Pearson [Pa.] 298. By charter or contract this duty may be extended even to the extent of having to pave the whole street. Philadelphia v. Thirteenth etc., Co., 169 Pa. 269; Brick, etc., Co. v. Hull, 49 Mo. App. 433. When paving is done as required by the charter or a contract, it is in lieu of a special assessment. West Chicago R. Co. v. Chicago, 178 Ill. 339. Where the statutes only authorize assessments on "lands," "buildings," "houses," "lots," "blocks," or "parcels," the general rule relieves the street railway from any burden. This is especially true where the company does not own the fee in the street, but has only an easement. Koons v. Lucas, 52 Iowa, 177; State v. County Dist. Co., 31 Minn. 354; People v. Gillon, 126 NY 147; Oshkosh City R. Co. v. Winnebago County, 89 Wis. 435. Opposed to this view is the dictum in Storrie v. Houston Co., 92 Tex. 129, and the cases of New Haven v. Fair Haven, etc., Co., 38 Conn. 422, 9 Am. Rep. 399; Kuehner v. Freeport, 143 Ill. 92, 17 L. R. A. 774, where the statute used the word "property;" and Chicago v. Baer, 41 Ill. 306, where the word was "real estate." See the note to 46 L. R. A. 193. The principal case is of interest in view of the recent decisions in Northern P. R. Co. v. Seattle [Wash.] 91 P 244, where a steam railroad company was held liable on an assessment for improving a street along its right of way. For a discussion of the case and the conflict with regard to such railways, see 6 Mich. L. R. 153. The court distinguishes the two cases on the ground that in the former the right of way abutted on the street and was private property, while in the principal case it was no part of the street and was only an easement granted for a limited time.—From 6 Mich. L. R. 603.

92. Exemption in deed to city held invalid. Rackliffe v. Duncan [Mo. App.] 108 SW 1110.

93. The rule that **municipal property** held for public or governmental purposes cannot be sold under legal process for improvement assessments does not exempt property subject to an assessment liability at the time of its purchase by the municipality. City of Indianapolis v. City Bond Co. [Ind. App.] 84 NE 20.

Public parks belonging to city of metropolitan class are exempt from assessment for benefits from construction of boulevard. State v. Several Parcels of Land [Neb.] 113 NW 248. Exemption under Laws 1879, p. 397, c. 310, §§ 1, 2, of **lands used for cemetery purposes,** is not confined to that portion actually occupied by graves and used for purpose of interment. In re Perry Ave., New York, 118 App. Div. 874, 103 NYS 1069. Under Laws 1879, c. 310, p. 397, §§ 1, 2, exempting land used for cemeteries, and providing that whenever such land shall cease to be used for such purpose it shall be liable for any assessment, etc., which but for such

One cannot be assessed with a lump sum for separate improvements where he is not benefited by them all.[94] The costs of different improvements cannot, therefore, be lumped and a property owner assessed with a certain proportion thereof where the costs of the several improvements are required to be assessed against property owners upon different principles.[95] Where the law specifies the depth to which property is assessable on one side of a street, the local authorities must assess the property on the other side to an equal depth.[96] The action of the local authorities in including or excluding property from an assessment district is conclusive in the absence of fraud,[97] and, unless injustice is apparent in the assessment of the expense incurred in ditch improvement proceedings, a court of equity will not disturb the findings of the county commissioners.[98]

Only such items of expense may be included in an assessment as are considered, in legal contemplation, to be reasonably necessary and incident to the improvement.[99]

(§ 9) *D. Procedure for authorization, levy, and confirmation of assessments. Statutes, ordinances and jurisdiction of proceedings.* See 8 C. L. 1544—Assessment proceedings must be based on an existing statute.[1, 2, 3] The presumption in favor of assessment statutes cannot be invoked to deprive property owners of property rights.[4] An assessment ordinance must be in conformity with the appropriate statute,[5] and

exemption would have been imposed thereon, such land is liable to only such assessments as may be laid after the exemption has been removed. Id.

94. Assessment for grading of several streets, one of which relator's property did not abut upon. People v. Kingston Common Council, 189 N. Y. 66, 81 NE 557.

95. Under Kingston City charter, Laws 1896, p. 972, c. 747, § 147, certain part of costs of grading may be assessed against abutting property and certain part of costs of sewers may be assessed upon property benefited. People v. Kingston Common Council, 189 N. Y. 66, 81 NE 557, rvg. 114 App. Div. 326, 99 NYS 657.

96. When one side divided into blocks and other was not, and law required blocks to be assessed to one-half their depth, the property on side not divided into blocks should be assessed to depth of one-half blocks on other side. City of Louisville v. American Standard Asphalt Co., 31 Ky. L. R. 133, 102 SW 806. Where unplatted property abuts on a sewer or other improvement within a municipal corporation, a part of which will not be benefited by the improvement, it is within the power of council to limit the assessment as to such property to the extent of the benefits received by fixing the assessment in proportion to the depth of an ordinary platted lot. Kohler Brick Co. v. Toledo, 10 Ohio C. C. (N. S.) 137.

97. The conclusion of the superintendent of assessments as to property included in or excluded from an improvement district will not be interferred with in the absence of a showing of fraud. Clark v. Chicago, 229 Ill. 363, 82 NE 870. The action of the city council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake. Board of Imp. v. Offenhauser [Ark.] 105 SW 265.

98. Mason v. Fulton County Com'rs, 10 Ohio C. C. (N. S.) 201.

99. Assessment held void as including illegal items and as being grossly in excess of legal amount. Bennett v. Emmettsburg [Iowa] 115 NW 582. Service of engineer in preparation of maps, plans, etc., held proper item to be included in assessment. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348. A charge against an abutting owner in a paving assessment for removing the water boxes on the street, which were put in by the city, and not by a private person or corporation, is a legitimate item of expense. Acklin v. Parker, 10 Ohio C. C. (N. S.) 243. Village containing less than 100,000 inhabitants may include in assessment a sum not exceeding 6 per cent thereof for the cost of making and levying the assessment and letting and executing the contract. Gault v. Glen Ellyn, 226 Ill. 520, 80 NE 1046; Gage v. Wilmette, 230 Ill. 428, 82 NE 656; Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

1, 2, 3. P. L. 1895, p. 95, providing proceedings for sewer assessments, held not repealed by P. L. 1895, p. 298, Gen. St. p. 631, § 842, or by P. L. 1906, p. 414. Simmons v. Millville [N. J. Law] 66 A 895. The repeal of a statute relating to sewer improvements after proceedings for the construction of a sewer have been begun, but before the passage of the assessing ordinance, does not render the assessment invalid. Kibler v. Newark, 4 Ohio N. P. (N. S.) 641.

4. Right under Const. Art. 19, § 27, to object to assessments for local improvements and a hearing on question of whether majority in value of owners have consented. Craig v. Russellville Waterworks Imp. Dist. [Ark.] 105 SW 867.

5. In an improvement ordinance passed subsequent to March 25, 1904, provision was

must be passed in the manner provided by statute [6] and by the required majority.[7] The validity or invalidity of an ordinance providing for the improvement is immaterial where such proceedings are sustained by statute providing directly therefor.[8] A resolution for an improvement to be paid for by general taxation will not support a special assessment,[9] and where such a resolution is adopted, property owners have the right to assume that the method will not be changed.[10] The ordinance must describe the work,[11] but a change of the plans will not necessarily invalidate the assessment, nor is a variance in this regard necessarily fatal.[12] An assessment ordinance is not within a statutory provision relating to publication of ordinances of a general nature.[13] Such an ordinance may be published on Sunday.[14] To establish a mistake in the proceedings of a city council preliminary to the making of an improvement, the proof must be clear and satisfactory,[15] and to constitute an estoppel to make a reapportionment there must have been reliance on the ordinance as originally adopted.[16]

A property owner may attack the jurisdiction of the authorities to levy the assessment,[17] and may dispute the records of the municipal council and ministerial officers in this regard.[18] Where the ordinance prescribes a time limit for the com-

properly made for an assessment under § 1536-250, notwithstanding the adoption of the resolution of necessity was prior to that date. King v. Dayton, 6 Ohio N. P. (N. S.) 369.

6. Where the record discloses that at the meeting of the city council at which there were proceedings with reference to a street improvement and the assessment therefor, certain members of council were present just prior to the taking of the vote, and does not disclose that any of the members left the room before voting, and it is definitely stated that the particular resolution and ordinance was passed by a certain number of votes being "yeas," and the number of "yeas" ie the same as the number of members previously recorded as present, there is a substantial record of compliance with the statutory provisions requiring the vote of the council for street improvements to be by "yeas" and "nays," although the court does not approve of the form of the record. McMaken v. Hayes, 10 Ohio C. C. (N. S.) 38.

7. Requirement under Laws 1903, p. 63, § 8 (Ann. St. 1906, § 5747-8), of two-thirds majority to pass improvement and assessment ordinance, held mandatory, and ordinance not so passed was void. Cox v. Mignery [Mo. App.] 105 SW 675. Same **presumption** of validity is indulged in favor of municipal ordinance as in favor of acts of the legislature, and hence in the absence of any showing to the contrary an assessment ordinance will be presumed to have been passed by the requisite majority. Id.

Burden of proof to show contrary is on party attacking the ordinance. Cox v. Mignery [Mo. App.] 105 SW 675.

Evidence held to show that ordinance was passed by requisite majority. Cox v. Mignery [Mo. App.] 105 SW 675. Minute book and entries by clerk and testimony of clerk and members of council held admissible on iseue as to whether ordinance was passed by requisite majority. Id.

8. Hardwick v. Independence [Iowa] 114 NW 14.

9. Bennett v. Emmetsburg [Iowa] 115 NW 582.

10. Hence they are not estopped to object to special assessment thereafter levied by fact that they did not object to such resolution. Bennett v. Emmetsburg [Iowa] 115 NW 582.

11. Where the contract refers to the ordinance for description of the work, no assessment can be levied for work not described by the ordinance. Bennett v. Emetsburg [Iowa] 115 NW 582.

12. The fact that the first resolution in proceedings for assessment for a system of sewers does not describe and create a drainage district, while the ordinance does, does not present a variance. MacChesney v. Chicago, 227 Ill. 215, 81 NE 410. Slight changes in an adopted sewer plan will not invalidate the legislation or assessments where the sewer is not rendered less serviceable or valuable or more expensive, and is not affected thereby in any material manner. Kohler Brick Co. v. Toledo, 10 Ohio C. C. (N. S.) 137.

13. Not within Rev. St. § 1695. Kohler Brick Co. v. Toledo, 10 Ohio C. C. (N. S.) 137.

14. Hallett v. U. S. Security & Bond Co. [Colo.] 90 P 683.

15. Acklin v. Parker, 10 Ohio C. C. (N. S.) 243.

16. Council is not estopped from fixing a different proportion in an assessing ordinance, and thus laying a heavier burden on property owners, by reason of the fact that in the original resolution and ordinance declaring it necessary to improve the street they fixed the proportion they intended to assess upon the abutting property, where property owners have done nothing in reliance upon the declarations in such ordinance and resolution. Acklin v. Parker, 10 Ohio C. C. (N. S.) 243.

17, 18. Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25.

pletion of the work, time is thereby made of the essence of the proceedings, and jurisdiction to proceed may be lost by delay.[19] The filing of plans and specifications may likewise be jurisdictional,[20] as may also the giving of notice,[21] but since the legislature could in the first instance levy an assessment and apportion the same without notice, it may validate an assessment made by commissioners without the statutory notice by adoption of such assessment by way of reassessment.[22] A charter provision for notice is not rendered invalid by failure to specify the time and place for the hearing,[23] or to specify the tribunal,[24] nor is an ordinance invalid for failure to specify such time and place where it specifies the tribunal.[25] In proceedings by a city for improvements, the city, county and state in which the property affected is situated need not be specified.[26] A finding as to jurisdiction must be specific.[27]

Essential prerequisites to assessment. See 8 C. L. 1545—Statutory requirements must be strictly complied with.[28] The assessment must be made by the officers designated by law,[29] and cannot even by agreement be committed to others.[30] When the statute requires the assessment to be levied by a board or commission, no levy can be made without a legally constituted meeting.[31] An order appointing assessment commissioners must recite their statutory qualifications.[32] A valid assessment cannot be based on defective work.[33]

Defective or excessive assessments. See 8 C. L. 1545—Defects and irregularities not jurisdictional and which do not mislead the property owner will not invalidate the assessment,[34] and such irregularities are waived by appearance and objection to the

19. Where ordinance required work to be completed 90 days from execution of contract, and contract was not executed for eleven months after it was awarded, the tax bills were void, though the work was completed within 90 days from execution of contracts. City of Marshall v. Wisdom, 127 Mo. App. 640, 106 SW 1078.

20. Filing of plans and specifications by engineer charged by ordinance with duty of filing and making same held jurisdictional under Rev. St. 1899, § 5989 (Ann. St. 1906, p. 3024), and tax bills issued to contractor were void where plans prepared by him were accepted and filed. Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25. City engineer may testify that filing marks endorsed by him on plans and specifications are false as to date. Id.

21. Where notice is required, failure to give it is a jurisdictional defect. Sudberry v. Graves [Ark.] 103 SW 728; City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 SW 1091. Failure to give the required notice and to afford an opportunity to be heard before confirmation is fatal to jurisdiction. People v. Phinney, 231 Ill. 180, 83 NE 143. Notice **held sufficient** under Kirby's Dig. §§ 5677, 5678, 5679. Board of Imp. Dist. No. 5 v. Offenhauser [Ark.] 105 SW 265. Description of the property is sufficient if, from the notice, it may be said that the lot owners were advised that their property would be affected. Notice to "the property owners in west Denver sidewalk district No. 6," the district being described with reference to streets, held sufficient. Hallett v. U. S. Security & Bond Co. [Colo.] 90 P 683.

22. Sudberry v. Graves [Ark.] 103 SW 728.

23, 24, 25. Hallett v. U. S. Security & Bond Co. [Colo.] 90 P 683.

26. Kansas City v. Napiecek [Kan.] 92 P 827.

27. Finding in general terms that the court has jurisdiction, and that all notices and affidavits and all other formalities have been complied with, is not a finding of fact that the court has jurisdiction. People v. Phinney, 231 Ill. 180, 83 NE 143.

28. People v. Carr, 231 Ill. 502, 83 NE 269.

29. Smadbeck v. Mt. Vernon, 109 NYS 70.

30. Agreement between city and property owner for submission of question of benefits to arbitrators, their award to be amount to be paid by property owner, held ultra vires. Smadbeck v. Mt. Vernon, 109 NYS 70.

31. People v. Carr, 231 Ill. 502, 83 NE 269.

32. That they are discreet persons, residents, and freeholders of the borough." Batchelor v. Avon-by-the-Sea [N. J. Law] 68 A 124.

33. Bennett v. Emmetsburg [Iowa] 115 NW 582. Lot owners not bound to pay full amount where amount paid to city by contractor on account of defects went into the city's general fund. Id.

34. Notice of intention to levy sewer assessment did not contain word "west" in description of street, but plat and schedule filed ten days before resolution for sewer was adopted showed exact location of such street. Reed v. Cedar Rapids [Iowa] 111 NW 1013. Under St. 1906, p. 372, c. 393, § 5, where assessment for street improvement was less than one-third the land damages paid, and not more than the special benefits, the question as to whether the methods of construction were legal or illegal was immaterial. Morse v. Charles [Mass.] 83 NE 891. Under St. 1906, p. 372, c. 393, § 5, assessment for street improvements which was less than one-third of land damages paid by city, and not more than the special benefit, held valid, though commissions did not specify detail of costs. Id. An informality in an improvement assessment is not a suf-

levy on other grounds.[35] Where the excess is susceptible of mathematical calculation, it does not render the whole assessment invalid.[36] A property owner cannot take advantage of excessiveness until he has paid or tendered the valid amount.[37]

*Assessment roll or report.*See 8 C. L. 1545—The assessment roll must be made by the duly authorized officer [38] and must be proved as required by law.[39] It must definitely describe the property assessed.[40] The court has power to determine what changes shall be made therein and the manner in which they shall be made, and its order in that connection must be incorporated in the record.[41] It may, if justice requires, annul the entire assessment, but it cannot make an original assessment, nor can it require the officer who made the original roll to make a new one according to his discretion.[42] Changes in the assessment roll must be governed entirely by the order of the court, and are limited to the changes thereby required.[43]

*Confirmation of assessments.*See 8 C. L. 1546—Where the assessing board has granted a stay, it may confirm the assessment notwithstanding such stay, thereby revoking the same.[44] In order to be entitled to a continuance on account of absent witnesses, the party applying therefor must show reasonable diligence in preparing for trial and the reason of the absence of such witnesses.[45] Affidavits offered in support of a continuance cannot be considered on the hearing unless offered in evidence thereon.[46] The question of benefits is one of fact, to be determined from the evidence.[47] Objection that the improvement will injure an adjoining municipality can be raised only by such municipality.[48] Where the only issues are whether the objector's property was assessed beyond the benefits or for more than its proportionate share, the question whether the improvement should be made is immaterial.[49] Where the contents of the notice of the confirmation proceedings are prescribed by statute, other matters need not be included.[50] A variance between the assessment roll and

ficient ground for setting aside the whole assessment unless it is shown that prejudice has resulted to the plaintiff by reason of such informality. Ridenour v. Biddle, 10 Ohio C. C. (N. S.) 438.

35. That street in which sewer was to be laid was not sufficiently described in notice of intention to make the levy. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

36, 37. Hallett v. U. S. Security & Bond Co. [Colo.] 90 P 683.

38. Must be made by superintendent of special assessments by whom it is returned to the court, and thereafter no change can be made therein except upon order of the court. Chicago, etc., R. Co. v. Chicago, 230 Ill. 9, 82 NE 399.

39. Under Code, § 2366, assessment must be acknowledged and certified. Smadbeck v. Mt. Vernon, 109 NYS 70.

40. Description of property as "outlet 52" held insufficient where there was no authenticated plat or survey of such lot on record, and no deed to the alleged owner describing the lot in such terms. People v. Owens, 231 Ill. 311, 83 NE 198.

41. It is error for court to direct a change in the assessment roll without directing the manner in which it shall be done. Chicago, etc., R. Co. v. Chicago, 230 Ill. 9, 82 NE 399.

42. Chicago, etc., R. Co. v. Chicago, 230 Ill. 9, 82 NE 399.

43. Where assessment roll is referred back to superintendent with directions to recast it on the face thereof, he has no right to file a new roll. Chicago, etc., R. Co. v. Chicago, 230 Ill. 9, 82 NE 399.

44. Objection to confirmation of assessment for street improvement on the ground that a stay order has been granted until the sewer system was put in another street, and that such sewer system has not been put in, is properly overruled. McChesney v. Chicago, 227 Ill. 450, 81 NE 435.

45. Village of Franklin Park v. Franklin, 231 Ill. 380, 83 NE 214.

46. Statement of the court on refusing a continuance that the village would be required to admit that objector's witnesses, if present, would testify to the matters set out in the affidavits offered in support of the motion for the continuance, did not put such affidavits or their contents in evidence where they were not offered by the objector. Village of Franklin Park v. Franklin, 231 Ill. 380, 83 NE 214.

47. State v. Blue Earth County Dist. Ct., 102 Minn. 482, 113 NW 697. Stipulation of city attorney that allegation of objector's answer in compensation proceedings that improvement was no benefit, etc., was proven, held not an admission that the improvement was no benefit, but merely that evidence to that effect had been introduced. Id.

48. In proceedings to confirm assessment, the objection that the sewer system will contaminate the water supply of an adjoining municipality cannot be raised. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

49. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

50. Local Improvement Act, § 41 (Hurd's

the notice of the confirmation proceedings as to matters not required to be contained in the notice is immaterial.[51] An order of confirmation includes a finding that the property was in fact benefited,[52] but confirmation is not an adjudication of any indebtedness to the municipality.[53] Where the proceedings are regular and notice of hearing is given, confirmation of the assessment settles all questions which should have been raised on the hearing,[54] and irregularities not affecting the jurisdiction of the court are cured.[55] The parties cannot by stipulation entered into prior to confirmation confer jurisdiction upon the court to set aside the order of confirmation after it has lost jurisdiction of the case,[56] and equity will not, therfore, enforce such stipulations,[57]

(§ 9) *E. Reassessments and additional assessments.* See 8 C. L. 1548—Provision is generally made for reassessment where the original assessment is invalid or is vacated or set aside,[58] and defects in the improvement contract may thus be cured,[59] as may also failure to assess property liable to assessment [60] and formal defects in the assessment proceedings [61] and in a proper case the court in making such reassessment may adopt the original assessment.[62] Where an assessment is set aside by the courts, it is nullified, and a new assessment is not merely a different mode of collecting the former assessment, but is a distinct proceeding,[63] but may be based upon the original proceedings for the improvement.[64] A reassessment is not precluded by a judgment declaring the contract for improvement void for failure to comply with statutory requirements,[65] nor does delay occasioned by an injunction preclude the re-

Rev. St. 1905, c. 24, § 547), does not require notice to contain description of the property. City of Chicago v. Becker, 233 Ill. 189, 84 NE 242.

51. City of Chicago v. Becker, 233 Ill. 189, 84 NE 242.

52. State v. Blue Earth County Dist. Ct., 102 Minn. 482, 113 NW 697.

53. Nalle v. Austin [Tex. Civ. App.] 18 Tex. Ct. Rep. 54, 103 SW 825.

54. Engineer's estimate, price of work, nature of improvement, bid, amount of assessment, etc., for street improvement under Burns' Ann. St. 1901, § 4288. Daly v. Grubbins [Ind.] 82 NE 659.

55. Act 1897, § 66 (Hurd's Rev. St. 1905, c. 24. People v. Judson, 233 Ill. 280, 84 NE 233.

56. After term at which judgment of confirmation is rendered. Noonan v. Thompson, 231 Ill. 588, 83 NE 426.

57. Noonan v. Thompson, 231 Ill. 588, 83 NE 426.

58. Where the municipality elects under Local Improvement Act, § 75 (Hurd's Rev. St. 1905, c. 24, § 581), to proceed with work notwithstanding appeal from judgment of confirmation, the fact that the contract for the work is not let until after reversal of the order of confirmation does not show bad faith so as to preclude reassessment under Local Improvement Act, §§ 57, 58 (Hurd's Rev. St. 1905, c. 24, §§ 563, 564). City of Chicago v. Clark, 233 Ill. 404, 84 NE 363.

59. Such is effect of reassessment under charter of city of Mankato, and a judgment declaring the contract void for failure to comply with statutory requirements is rendered inoperative by a reassessment. State v. Blue Earth County Dist. Ct., 102 Minn. 482, 113 NW 697.

60. Where a street improvement assessment has been set aside after settlement has been made as to part of the lots and lands affected, a reassessment of the lots with respect to which there has been no settlement is not invalid because the lots covered by the settlement are omitted from the reassessment. Ridenour v. Biddle, 10 Ohio C. C. (N. S.) 438.

61. Under act approved March 23, 1881 (P. L. 194), court will make reassessment where assessment is invalid because of failure of order appointing assessment commissioners to recite their statutory qualifications. Batchelor v. Avon-by-the-Sea [N. J. Law] 68 A 124.

62. Where original assessment was correct upon legal principals, fair and just, but was invalid because order appointing commissioners did not recite their qualifications. Batchelor v. Avon-by-the-Sea [N. J. Law] 68 A 124.

63. Hence judgment setting aside former assessment is not res adjudicata of any question as to the essentials of a valid new assessment. See Local Improvement Act, §§ 57, 58 (Hurd's Rev. St. 1905, § 563, 564). City of Chicago v. Gage, 232 Ill. 169, 83 NE 663.

64. Under Local Improvement Act, § 57 (Hurd's Rev. St. 1905, c. 24, § 563), where an assessment is set aside and the new assessment is made before the improvement, the proceedings must be same as in case of original assessment; but under Local Improvement Act, § 58 (Hurd's Rev. St. 1905, c. 24, § 564, no estimate of probable cost or recommendation of the board of local improvements is necessary where the new assessment is for work already done under the prior ordinance which could not be enforced on account of defects therein. City of Chicago v. Gage, 232 Ill. 169, 83 NE 663.

65. Injunction did not issue against performance of contract until after completion

assessment as soon as the restraint of the injunction is removed.[66] An adjudication as to the former levy will not apply to subsequent levies unless plainly intended to do so.[67] Where the liability of the city is dependent upon the liability of the property benefited, the city is not liable for loss which may accrue by reason of a reapportionment of the property in the assessment district.[68]

Where an additional levy is authorized to meet a contingency, such levy cannot exceed the amount necessary to meet the contingency on which it is based.[69] Where the additional levy is dependent upon an official certificate of a contingency necessitating such levy, the certificate must state the facts showing such contingency.[70] Authority to levy an additional assessment to complete the work does not authorize such a levy after the completion of such work.[71]

(§ 9) *F. Maturity, obligation and lien of assessments.*[See 8 C. L. 1550]—Assessment liens as such are purely statutory,[72] but the lien of judgment making an assessment relates back to the beginning of the proceedings in which it is rendered, regardless of the validity of the statutory lien.[73] The legislature may provide for priority of the lien over liens and encumbrances existing prior in time to the inception of the statutory lien.[74] Whether such was the intent of the legislature is a matter of construction of statutes,[75] and assessment statutes being an exercise of the sovereign prerogative of taxation, any statutory construction seeking to ascertain the legislative intent must necessarily have special regard to the public necessity upon which the exercise of such power is based.[76] The scope and duration of the lien are matters of statutory construction,[77] and it is held that such lien is not divested by a tax sale of the property,[78] nor by condemnation of land to which it attaches until the title of the owner has been divested.[79] One paying assessment on lot of another is subrogated to lien of the municipality.[80] Questions as to the enforcement of liens are treated in a subsequent subsection of this section.[81]

of the work. State v. Blue Earth County Dist Ct., 102 Minn. 482, 113 NW 697.

66. State v. Blue Earth County Dist. Ct., 102 Minn. 482, 113 NW 697.

67. Haggart v. Kansas City [Kan.] 94 P 789.

68. City of Louisville v. American Standard Asphalt Co., 31 Ky. L. R. 133, 102 SW 806.

69, 70. People v. Peoria, etc., R. Co., 232 Ill. 540, 83 NE 1054.

71. Drainage Com'rs Dist. No. 2 v. Kinney, 233 Ill. 67, 84 NE 34.

72. Town of Rayne v. Harrel, 119 La. 652, 44 S 330. Act Feb. 3, 1824 (P. L. 18), was repealed but re-enacted by Act June 4, 1901, p. 365, and hence under latter act the municipality has prior lien for paving assessments. Haspel v. O'Brien, 218 Pa. 146, 67 A 123.

73. Judgment for assessment in condemnation proceedings for parkway. In re Spring Valley Park in Kansas City [Mo.] 106 SW 531.

74. Shaler v. McAleese [N. J. Eq.] 68 A 416.

75. Lien under Act March 24, 1897, § 58 (P. L. p. 46), as amended by Act March 30, 1900 (P. L. p. 42), street improvement assessments, being based upon benefits to the property, take priority over other encumbrances, regardless of priority in point of time. Shaler v. McAlleese [N. J. Eq.] 68 A 416. Under Act June 4, 1901, p. 365, municipal paving liens take priority over mortgages executed prior to the act, though such act in referring to the liens given priority uses the phrase "with which the said property may become charged," the act, however, being merely a re-enactment of Act Feb. 3, 1834 (P. L. 18). Haspel v. O'Brien, 218 Pa. 146, 67 A 123.

76. Shaler v. McAleese [N. J. Eq.] 68 A 416.

77. Under Gen. Laws 1896, c. 48, § 2, and c. 72, § 31, curbing assessments do not become an encumbrance on the property until included in the next tax assessment. Bowers v. Narragansett Real Estate Co. [R. I.] 67 A 521. Borough act, § 45 (P. L. 1897, p. 307), as amended by P. L. 1906, p. 87, where taken in connection with borough act 1897 (P. L. p. 316), § 67, providing for payment of assessments in yearly instalments, gives lien for two years after maturity of last instalment. Voorhees v. North Wildwood [N. J. Law] 68 A 175.

78. Assessment lien not divested by tax sale under Burns' Ann. St. 1901, § 8623, providing that purchaser at such sale takes absolute estate in fee simple. City of Indianapolis v. City Bond Co. [Ind. App.] 84 NE 20.

79. In re Spring Valley Park [Mo.] 106 SW 531. Upon the payment of the money into court, the lien of the assessment attaches thereto and may be enforced by the court. Id.

80. Owner cannot maintain suit to remove cloud created by such assessment until the lien therefor has been discharged. Mathews v. Wagner [Wash.] 94 P 759.

81. See post, subsection H, Enforcement.

(§ 9) *G. Payment and discharge.*[See 8 C. L. 1551]—The contractor cannot prior to the letting of the contract, make a valid agreement with a property owner to allow the latter a discount on his tax bill,[82] as such an agreement would show either fraud or corruption,[83] but the same considerations do not necessarily attach to a discount made after the completion of the work.[84]

(§ 9) *H. Enforcement and collection. Mode of collection.*[See 8 C. L. 1552]—An assessment lien may be enforced against the whole or a part of the abutting property,[85] and such lien may be enforced against the property of persons under legal disability in the manner prescribed by law.[86]

Warrant or tax report.[See 8 C. L. 1552]—A special tax bill must be properly signed by the duly authorized officer,[87] but, unless so required by the statute, it need not recite every step necessary to its validity,[88] and, where it is made prima facie evidence of the regularity of the assessment proceedings,[89] it need not recite notice to the property holders.[90] Such a bill is not invalidated in toto by the inclusion of unauthorized items,[91] and in a suit on the same the court may render judgment for the proper amount without interest.[92] The validity of a special tax bill issued for work conforming to the contract requirements is not affected by the failure of the proper officer to sign the report of completion.[93] A special tax bill is not invalid because the partner of the contractor to whom it is issued is a surety on the contractor's bonds.[94]

Character of action and parties.[See 8 C. L. 1552]—Special provision is usually made for the enforcement of local assessments,[95] but, in the absence of statute to the contrary,[96] the hearing of special assessment cases is conducted under the same rules as apply to other cases at law.

An assignee of special tax bills [97] may, as the real party in interest, sue thereon in his own name though he has pledged them to secure a debt, where there has been no default as to the debt.[98] Upon an application for an order of sale of property as-

82, 83. Kurtz v. Knapp, 127 Mo. App. 608, 106 SW 537.

84. Tax bills not invalidated by small discount allowed on large claim. Kurtz v. Knapp, 127 Mo. App. 608, 106 SW 537.

85. Barron v. Lexington [Ky.] 105 SW 395.

86. Insane person. See Civ. Code Proc. § 36. Barron v. Lexington [Ky.] 105 SW 395. Where grantee of part of property became guardian of grantor who was adjudged insane, the grantee could represent the grantor on question of sale of whole property under assessment lien, but not as to distribution of proceeds. Id. Where defendant becomes insane pending suit to enforce lien, the claim should be verified before proceeds of sale are withdrawn from court. Id. Need not appear that lunatic's interests require sale or that sale is absolutely necessary to pay the claim. Id.

87. Under Kansas City charter, art. 9, § 15, providing that special tax bills must be made out and signed by president of board of public works or in his name by some one duly authorized, etc., a tax bill was not void because made out and signed in president's name by another than the one designated for that purpose, the latter, however, signing his own name under that of president as having signed for and in name of president. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

88. Tax bill held not invalid under Kansas City charter, art. 9, § 10, because it failed to recite the total area of the lands subject to assessment or any general statement that the lands described in the bill were charged according to area of such tract. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

89. Rev. St. 1899, § 5863 (Ann. St. 1906, p. 2970). City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

90. Lack of notice required by the ordinance being matter of defense. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

91. City of Joplin v. Freeman, 125 Mo. App. 717, 103 SW 130; City of Boonville v. Rogers, 125 Mo. App. 142, 101 SW 1120.

92, 93. City of Joplin v. Freeman, 125 Mo. App. 717, 103 SW 130.

94. Kurtz v. Knapp, 127 Mo. App. 608, 106 SW 537.

95. Under St. Louis Scheme and Charter, art. 6, § 5 (Rev. St. 1899, p. 2509 [Ann. St. 1906, p. 2850]), special assessments can be collected only by actions on the special tax bills. City of St. Louis v. Brinkwirth, 204 Mo. 280, 102 SW 1091.

96. Village of Franklin Park v. Franklin, 228 Ill. 591, 81 NE 1132.

97. Evidence held to show assignment to plaintiff by original holder. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

98. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

sessed, owners of other property assessed may file objections and the cases be tried as one.[99]

Service of summons and warning order. See 8 C. L. 1553—A variance between the notice of application for judgment and the delinquent list may be fatal,[1] but is not necessarily so.[2]

Pleading and proof. See 8 C. L. 1553—Causes of action on tax bills for a single improvement against several pieces of property owned by the same persons may be joined in the same petition in separate counts.[3] The petition in a suit on a tax bill [4] need not allege that the work was done by virtue of an ordinance,[5] nor is it necessary to allege the separate items of cost, though the statute requires such an account to be kept.[6] The petition or complaint in a suit to foreclose an assessment lien [7] must definitely describe the property sought to be subjected,[8] but it need not state matters merged in the assessment and not reviewable in the foreclosure proceedings,[9] nor is it necessary to describe the extent of the improvement where there is no limitation as to such extent.[10] Where the allegations of such a petition are prescribed by statute, it is sufficient to follow the statute.[11] Failure to follow the language of the statute as to demand for payment is not ground for demurrer.[12] Under some of the statutes the petition is made prima facie evidence of the legality of the assessment,[13] and the burden is upon the attacking party to prove illegality.[14] Where the suit is upon special tax bills,[15] the issuance of such bills must be proved or the bills themselves introduced in evidence.[16] Records required by law to be kept are not only lawful evidence but the only evidence admissible.[17] The court is vested with a judicial discretion in the matter of withdrawal of evidence.[18]

99. People v. Phinney, 231 Ill. 180, 83 NE 143. Such objections need not be signed by the property owners. Id.

1. Fatal variance where title of delinquent list was "Second special assessment," and notice of application for judgment was "second instalment of special assessment." People v. Warren, 231 Ill. 518, 83 NE 271.

2. Variance between published notice and delinquent list as to recital of warrant in regard to interest held immaterial. People v. Smythe, 232 Ill. 242, 83 NE 821; Id., 232 Ill. 259, 83 NE 828, 232 Ill. 561, 83 NE 1061. On application for judgment and order of sale, a variance between published notice and delinquent list in that in former defendants were designated as "Smyth & Chew," and in the latter as "Smith & Chew," held not fatal. People v. Smythe, 232 Ill. 242, 83 NE 821; Id., 232 Ill. 259, 83 NE 828; City of Peoria v. Smith, 232 Ill. 561, 83 NE 1061.

3. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

4. Held sufficient on demurrer. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

5. City of Joplin v. Freeman, 125 Mo. App. 77, 103 SW 130.

6. Sidewalk tax bills. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

7. Complaint to foreclose lien of assessment for street improvement under Burns' Ann. St. 1901, § 4288, held sufficient. Daly v. Gubbins [Ind.] 82 NE 659.

8. Description held insufficient. Bell v. Johnson, 207 Mo. 281, 105 SW 1039.

9. Engineer's estimate, price of work, etc., of street improvement under Burns' Ann. St. 1901, § 4288. Daly v. Gubbins [Ind.] 82 NE 659.

10. Since under Burns' Ann. St. 1901, § 4288, the board of trustees of a town may, upon petition of certain proportion of abutters, provide for improvement of street for any distance, a petition to foreclose the assessment lien need not state the distance. Daly v. Gubbins [Ind.] 82 NE 659.

11. Petition held sufficient under Ky. St. 1903, § 8453, prescribing contents of petition to enforce lien. Nell v. Power [Ky.] 107 SW 694.

12. Foreclosure of lien for assessment for street improvement under Burns' Ann. St. 1901, § 4288. Daly v. Gubbins [Ind.] 82 NE 659.

13. In a tax foreclosure under what is commonly called the "Scavenger Act," the petition is made, by Cobbey's Ann. St. 1903, § 10,651, prima facie evidence of the legality of all the assessments set forth therein and of the several amounts levied on behalf of the state, county or city. State v. Several Parcels of Land [Neb.] 113 NW 248.

14. See Kirby's Dig. §§ 5691, 5692, providing that in suit to enforce assessments the plaintiff needs to allege only the fact of the assessment and the nonpayment thereof. Board of Imp. v. Offenhanser [Ark.] 105 SW 265. This rule applies to question whether petition for improvement was signed by requisite number of qualified petitioners. Id.

15. Petition held based on special tax bills. City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 SW 1091.

16. City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 SW 1091.

17. People v. Carr, 231 Ill. 502, 83 NE 269. On application for order for sale of property for supplemental assessment, the petition for the assessment, order therefor, judg-

*Defenses.*See 8 C. L. 1555—Harmless irregularities are not available as a defense,[19] and the same is true as to irregularities cured by the confirmation,[20] and as to irregularities in collateral proceedings, such as the election of municipal trustees,[21] but while the revenue law is liberal in allowing irregularities, informalities, or omissions not affecting the substantial justice of the tax to be corrected or supplied in proceedings to enforce the assessment,[22] the court cannot levy a tax where none has been levied by the proper officers.[23] Delay in the completion of the improvement is no defense.[24] In a suit on a special tax bill, the validity of the assessment may be inquired into so far as to determine whether it was levied according to law,[25] but lack of benefit cannot be shown as a defense to such a suit.[26] Where alternative methods of construction are authorized, the property owner is not concerned in the method adopted so long as his assessment is not thereby increased.[27] Set-offs allowed by statute [28] must be presented as required thereby.[29] Dismissal of proceedings under a new ordinance for the collection of unpaid balance of the cost of an improvement on the ground that proceedings under original assessment are still pending does not preclude municipality from again commencing such proceedings after final judgment is rendered in the proceedings under the original assessment.[30] A property owner who has not paid his portion of the original assessment cannot defend against an additional assessment to reach property not previously assessed on the ground that there is no unpaid balance of the costs of the work to authorize the improvement.[31]

Where special tax bills are not issued until the period of limitation upon the city's liability to issue the same has expired,[32] an action thereon against the property

ment confirming it, and return of delinquent list, held competent. People v. Phinney, 231 Ill. 180, 83 NE 143.

18. Discretion of court in matter of allowing withdrawal of evidence held properly exercised by refusal to allow collector to withdraw competent evidence after application for order of sale had been taken under advisement by the court. People v. Phinney, 231 Ill. 180, 83 NE 143.

19. Daly v. Gubbins [Ind.] 82 NE 659. Mere irregularities in the proceedings authorizing the improvement are not available. Id.

Description in appraisers' report of whole parcels of land, a part only of which was taken, held no defense against assessment where it appeared that damages were awarded for only the parts taken. State v. Several Parcels of Land [Neb.] 113 NW 248.

Variance between the ordinance and report of the appraisers as to description of property authorized to be taken and for which damages are allowable is immaterial where it is merely a different way of describing the same property. State v. Several Parcels of Land [Neb.] 113 NW 248.

20. Questions settled by the confirmation cannot be considered in the foreclosure proceedings. Daly v. Gubbins [Ind.] 82 NE 659.

What questions are settled has already been discussed. See ante this section, subdivision D, Confirmation of Assessments.

21. Failure to file statement of election of town trustees, as required by Burns' Ann. St. 1901, § 4331, is not available as defense in proceedings to foreclose lien of assessment for street improvements under § 4288, Daly v. Gubbins [Ind.] 82 NE 659. Answer held too indefinite to raise such defense. Id. Such defense was rendered without merit by Acts 1899, p. 90, c. 68, validating incorporation of town in question and the election of its trustees and other officers. Id.

22, 23. People v. Carr, 231 Ill. 502, 83 NE 269.

24. Cincinnati Bldg. & Deposit Co. v. Cincinnati, 10 Ohio C. C. (N. S.) 31.

25. City of St. Louis v. Brinckwirth, 204 Mo. 280, 102 SW 1091.

26. City of Mexico v. Lakenan [Mo. App.] 108 SW 141.

27. Edwards House Co. v. Jackson [Miss.] 45 S 14.

28. Set-offs allowed by Kirby's Dig. § 5689, do not include improvements constructed by owner but connected with another improvement district. Board of Imp. v. Offenhauser [Ark.] 105 SW 265.

29. Property owner held not to have pursued statutory method of securing set-off under Kirby's Dig. § 5689, of value of improvements already constructed by him. Board of Imp. v. Offenhauser [Ark.] 105 SW 265.

30. City of Chicago v. Baldwin, 227 Ill. 534, 81 NE 542.

31. People v. Judson, 233 Ill. 280, 84 NE 233.

32. Limitation is that prescribed by Rev. St. 1899, § 4273 (Ann. St. 1906, p. 2349), applicable to contracts, obligations, etc., and liabilities created by statute. City of Moberly v. Hassett, 127 Mo. App. 11, 106 SW 115.

owner is barred.[33] The limitation upon an action to enforce an assessment lien [34] is not affected by the maturity of all the instalments of the assessment by reason of default as to one.[35]

Waiver of and estoppel to urge defenses. See 8 C. L. 1559.—Objections must be made within the time specified by law,[36] and if a property owner fails to avail himself of the fair and reasonable opportunities afforded him to be heard, he cannot thereafter be heard to say that the assessment is unfair or unequal.[37] Property owners, therefore, should object at the time and place and in the manner provided by law, and not wait until the work has been done and they have received the benefit thereof,[38] but provisions rendering irregularities unavailable after completion of the work do not apply to matters jurisdictional and rendering the improvement ordinance void,[39] and such provisions are sometimes declared unconstitutional.[40] A provision for waiver by payment does not apply where the assessment is absolutely void.[41] Petitioners for an improvement are generally estopped to urge irregularities.[42] A waiver

33. He being the real party in interest. City of Moberly v. Hassett, 127 Mo. App. 11, 106 SW 115.

34. Laws 1895, p. 270, c. 114, prescribing limitations as to suits to enforce such liens, held not repealed by Laws 1903, p. 26, c. 24, amending Ballinger's Ann. Codes & St. § 4807 (Pierce's Code, § 1519). Mathews v. Wagner [Wash.] 94 P 759.

35. Limitation still runs from original date of maturity of last instalment. Gilsonite Const. Co. v. Arkansas McAlester Coal Co., 205 Mo. 49, 103 SW 93.

36. Blackwell v. Coeur D'Alene, 13 Idaho, 357, 90 P 353.

37. Board of Imp. v. Offenhauser [Ark.] 105 SW 265.

38. Edwards House Co. v. Jackson [Miss.] 45 S 14. Abutting owners who stand silently by and permit street improvements to be made, and pay several instalments of the assessment levied for payment therefor, are estopped to deny the validity and regularity of the assessment proceedings. Monroe v. Cleveland, 5 Ohio N. P. (N. S.) 220. Abutting owners, who knew of the defective construction of a street before the work was approved and the reserve fund paid to the contractors, are thereafter estopped from contesting the assessment on the ground of such faulty construction. Gault v. Columbus, 10 Ohio C. C. (N. S.) 263. Where county ditch is converted into a brick sewer, thereby changing it from an open ditch to a closed sewer to the benefit of the land through which it runs, one joint landowner, who has stood silently by and allowed his land to be benefited by the improvement without objection, cannot resist collection of the assessment on the ground of irregularity in the proceedings. Millikin v. Fearnside, 10 Ohio C. C. (N. S.) 259. Under Act 1897, § 66 (Hurd's Rev. St. 1905, c. 24), providing that confirmation is conclusive of errors not affecting jurisdiction, objection that there was no unpaid balance authorizing an additional assessment is waived by failure to raise it at the confirmation. People v. Judson, 233 Ill. 280, 84 NE 233. Where there is no statutory or constitutional provision disqualifying a town trustee on account of interest from acting in the matter of the levy, his acts in the premises are voidable only, and hence objection on account of such interest is waived if not raised at the proper time. Interest of trustee who participated in levy of assessment for street improvements under Burns' Ann. St. 1901, § 4288, not available as defense to proceedings to foreclose lien. Daly v. Gubbins [Ind.] 82 NE 659. One of five **joint owners** of a tract of land within a municipality, who has the actual control of the land may bind his cotenants to the proposed improvement of a county ditch running through the premises by signing a petition therefor. Millikin v. Fearnside, 10 Ohio C. C. (N. S.) 259.

39. Failure to allow two weeks to intervene between passage of ordinance in two branches of council as required by Ky. St. 1903, § 3100. Thomas v. Woods [Ky.] 108 SW 878.

40. Requirement of Kansas City charter, art. 9, § 23, that all objections to validity of tax bills shall be filed with board of public works within sixty days from date of issue of such bill, under penalty of waiver of such objections, held unconstitutional as a deprivation of property without due process of law. Gilsonite Const. Co. v. Arkansas McAlester Coal Co., 205 Mo. 49, 103 SW 93.

41. Hurd's St. 1905, p. 420, c. 24, § 572, providing that voluntary payment of any instalment of assessment constitutes consent to confirmation of assessment roll, does not apply where assessment is absolutely void by reason of failure to sufficiently identify the property. People v. Owens, 231 Ill. 311, 83 NE 198.

42. The provisions of the statutes as to proceedings which a municipality must take with reference to a proposed street improvement are for the benefit and protection of those against whose property it is sought to levy an assessment without their consent. Petitioners for the improvement waive their right to have the municipality proceed in accordance with the statutes, and will not be heard to complain because the estimated assessment, which the law requires shall be advertised for three weeks, was advertised for two weeks only. Johnson v. Cleveland, 6 Ohio N. P. (N. S.) 183. The rule that the rights of all parties to a street assessment, including the municipality, are to be determined by the law of contract, renders liable for a street assessment an abutting

of a particular ground of objection constitutes an estoppel to assert the unconstitutionality of the statute on such ground.[43]

As a general rule a general appearance cures all defects in the application for judgment,[44] including defects of notice.[45]

The judgment.[See 8 C. L. 1560]—The judgment must be in substantial conformity with the statutory form.[46] Where the proceedings are in rem, no personal judgment can be rendered.[47] Some of the statutes provide for interest on the judgment [48] and for penalties.[49] The applicability of particular provisions of general statutes is a matter of statutory construction.[50]

Sale and redemption.[See 8 C. L. 1561]—Proceedings for sale must conform strictly to the statutory requirements,[51] including those relating to the various notices that may be required,[52] place of sale,[53] and mode of sale.[54] Where the sale is held invalid,

owner who joined in a petition for the improvement of the street by grading, draining, curbing, and the laying of sidewalks, and who knew or should have known that the work was in progress but entered no protest thereto. Id. While a lot owner cannot escape payment for a street improvement made in accordance with a petition signed by him, even though the assessment exceeds the statutory limitation, he is entitled to have such an assessment added to any later assessment made within five years for the purpose of ascertaining whether the total exceeds thirty-five and one-third per cent of the value of the land after the improvement has been made, and if excess is found he is entitled to relief from the second assessment to that extent. Fifth Nat. Bk. v. Cincinnati, 10 Ohio C. C. (N. S.) 602. **Mortgagee** who has become owner by foreclosure is estopped from denying that property is not benefited to extent of assessment or that it is not valuable enough to stand the assessment, where mortgagor joined in the petition for improvement. Cincinnati Bldg. & Deposit Co. v. Cincinnati, 10 Ohio C. C. (N. S.) 31.

43. Where in proceedings to foreclose lien of assessment for street improvements, under Burns' Ann. St. 1901, § 4288, defendant was estopped to urge disqualification, on account of interest, of trustee who participated in levy, he was also estopped to assert that the statute was unconstitutional because it made no provision for supplying places of disqualified trustees. Daly v. Gubbins [Ind.] 82 NE 659.

44. People v. Warren, 231 Ill. 518, 83 NE 271.

45. Variance between title of delinquent list and that of notice of application for judgment held waived by general appearance and filing of general objections not confined to question of jurisdiction. People v. Warren, 231 Ill. 518, 83 NE 271.

46. Schedule filed with and referred to by judgment cannot supply failure of judgment to include the items required to be included by statute. See Local Improvement Act (Hurds' Rev. St. 1905, c. 24, § 573), § 67, and Revenue Act, § 191 (Hurds' Rev. St. 1905, c. 120). People v. Smythe, 232 Ill. 242, 83 NE 821; Id., 232 Ill. 259, 83 NE 828; City of Peoria v. Smith, 232 Ill. 561, 83 NE 1061.

47. Procedure under Ky. St. 1903, § 3706, on assessment warrant. Jackson v. McHargue [Ky.] 106 SW 871.

48. Under Kansas City charter, judgment on special tax bill bears interest at 10 per cent. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

49. Statutory penalty of 4 per cent should be computed upon the judgment exclusive of attorney's fees. English v. Ter. [Ariz.] 90 P 601.

50. Laws 1907, p. 456, Prac. Act, § 41, authorizing **submission by agreement of propositions of law** to court, does not apply to application for order of sale of property assessed, since such section applies only where parties are entitled to trial by jury. People v. Chicago, etc., R. Co., 231 Ill. 112, 83 NE 120. Seems that the revenue act, which is made a part of local improvement act, contemplates that the judgment and order of sale shall be spread of **record** in the "tax, judgment, sale, redemption, and forfeiture record." People v. Smythe, 232 Ill. 242, 83 NE 821; Id., 232 Ill. 259, 83 NE 828; City of Peoria v. Smith, 232 Ill. 561, 83 NE 1061.

51. Lantz v. Fishburn, 3 Cal. App. 662, 91 P 816. Sales for delinquent special assessments can be made only in the manner provided by the statute. Williams v. Eau Claire County [Wis.] 115 NW 140.

52. Notice of sale. Lantz v. Fishburn, 3 Cal. App. 662, 91 P 816. Notice to owner that purchaser will apply for deed and right to redemption will expire on certain day held invalid under Pol. Code, §§ 3775, 3776, prior to amendment of 1895, where the requirement as to notice that right of redemption would expire was omitted. Id. No valid sale where notice gave place of sale as "easterly door of the county court house," and it did not appear that any resolution of supervisors had been passed prescribing "the front door of the court house" as place of sale, as required by Pol. Code, § 3768, then in force. Id.

53. Sale must be made at the place prescribed by statute. Front door of court house, under Act Feb. 27, 1893, § 5 (St. 1893, p. 36, c. 21), making delinquent tax laws applicable to sale for assessment bonds. Lantz v. Fishburn, 3 Cal. App. 662, 91 P 816.

54. General tax sale certificate issued upon a general tax sale held invalid by reason of inclusion of special assessments which were required to be enforced by separate sale. Williams v. Eau Claire County [Wis.] 115 NW 140.

the purchaser may recover back his money under statutory provisions.[55] By sale of assessment certificates under judgment in its favor, a city contracts that the purchaser shall receive a lien capable of being matured into a valid title to the lands described,[56] or a return of the consideration paid, with interest, in case of redemption or of judicial determination in bona fide litigation that the certificates are invalid.[57] Where a sale to satisfy an assessment bond is void, a purchaser of the certificate of sale becomes the equitable owner of the bond [58] and may enforce full payment of the amount paid by him, regardless of the equities between the owners of different parts of the land,[59] the remedy of an owner of a part of such land being by payment of the whole amount and then enforcing contribution from the owner of the other part.[60]

Where the proceedings are in rem, the sale passes title as to all persons,[61] but one claiming under assessment sale must show compliance with the statute.[62] The court, having control of the proceeds of the sale, should apportion them among the parties entitled thereto.[63]

(§ 9) *I. Recovery back of assessments paid.*See 8 C. L. 1562—An action lies to recover from a municipality a special assessment rebate notwithstanding the fund created by the assessment has been depleted.[64]

(§ 9) *J. Remedies by injunction or other collateral attack, and grounds therefor.*See 8 C. L. 1562—Defects rendering the assessment absolutely void are available on collateral attack,[65] and injunction is the proper remedy,[66] as where there was a lack of jurisdiction of the assessment proceedings; [67] but the right to an injunction cannot be predicated upon irregularities, not jurisdictional, which have been waived by failure to urge them upon the hearing,[68] or by failure to take advantage of the remedies provided by law, such as an appeal,[69] nor can objections be urged which have been waived by appearance [70] and objection on other grounds.[71] In the absence of fraud, the remedies provided by statute for review of assessments are exclusive,

55. Purchaser at general tax sale held entitled to refund where sale was void because special assessments which required a separate sale were included. Williams v. Eau Claire County [Wis.] 115 NW 140.

56. Otis v. St. Paul, 102 Minn. 208, 113 NW 269.

57. Otis v. St. Paul, 102 Minn. 208, 113 NW 269.

Purchaser not estopped to seek refundment of price of certificate sold under second judgment by adjudication in suit to which he was party that former judgment was invalid, where in a subsequent suit the former judgment was held valid and the second judgment invalid. Otis v. St. Paul, 102 Minn. 208, 113 NW 269.

58, 59, 60. Ellis v. Witmer, 148 Cal. 528, 83 P 800.

61. Proceedings for sale of land for levee taxes. Updegraff v. Marked Tree Lumber Co. [Ark.] 103 SW 606.

62. Sale under St. 1893, p. 33, c. 21. Lantz v. Fishburn, 3 Cal. App. 662, 91 P 816.

63. Where owner sold part of property after assessment, and the whole property was thereafter sold under the assessment lien, the court, having control of the proceeds, had power to determine what portion of the tax should be paid by the vendor and what part by the vendee. Barron v. Lexington [Ky.] 105 SW 395.

64. Claimant is not required to proceed against officers of municipality whose improper acts depleted the fund. City of Chicago v. Paulsen, 125 Ill. App. 595; City of Chicago v. McCormick, 125 Ill. App. 650.

65. Failure to sufficiently identify the property on assessment roll. People v. Owens, 231 Ill. 311, 83 NE 198.

66. Spence v. Milwaukee [Wis.] 113 NW 38. To prevent multiplicity of suits, equity may enjoin the collection of an illegal special assessment. Drainage Com'rs Dist. No. 2 v. Kinney, 233 Ill. 67, 84 NE 34.

67. Vreeland v. Tacoma [Wash.] 94 P 192. Lack of notice of the proceedings to authorize the improvement. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

68. See Code, §§ 823, 824. Nixon v. Burlington [Iowa] 115 NW 239.

69. Failure to appeal waives objections available on appeal. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676. See Code, § 839, providing for appeal on all questions not waived on the hearing. Nixon v. Burlington [Iowa] 115 NW 239.

70. Appearance in response to notice waives defects in the service of notice. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

71. Where a property owner appears in response to notice and makes objection on certain grounds, he cannot obtain an injunction on other grounds which he might have raised but did not. That plaintiff's lands were not described in the petition for the drain, and that they could not therefore be included in the drainage district. Mackay v. Hancock County [Iowa] 114 NW 552.

and equity will not interfere.[72] Mere irregularities, not jurisdictional, do not constitute ground for equitable relief where they are declared harmless by statute,[73] and independently of statute such irregularities are not available to one who has not been injured thereby.[74] Where the question of validity of the assessment turns on the service of notice the objection is personal to each of the complainants.[75] In the absence of fraud, equity has no jurisdiction on the ground of excessiveness of the assessment,[76] and an assessment which has been confirmed cannot be attacked collaterally for irregularity or inaccuracy.[77] The property owner need not wait until the improvement has been completed or an actual levy of the tax has been made.[78] On the contrary, equity will not grant relief to one who has delayed asking therefor until he has received the benefit of the full or partial completion of the work.[79] Where, however, the assessment is absolutely void, failure to interfere while the work is in progress will not preclude equitable relief,[80] nor is resort to equity for relief from a void assessment precluded by failure to take advantage of opportunities provided by statute for objection to and review of the assessment,[81] as where there was a lack of jurisdiction of the assessment proceedings,[82] and, in the absence of any provision for review of the assessment proceedings, the aid of equity may be invoked on the ground of illegality in such proceedings.[83] Equitable relief is not barred by a statutory provision that no "action at law" shall be maintained for any damages, etc., arising from the improvement.[84] The decision of the duly authorized tribunal as to benefits is conclusive on the courts in any case admitting of a substantial doubt [85]

72. St. Benedict's Abbey v. Marion County [Or.] 93 P 231. Such is the rule regardless of statutory prohibitions. Jones v. Gable, 150 Mich. 30, 14 Det. Leg. N. 623, 113 NW 577. Owner must avail himself of the opportunities offered to appear and object in the special forum designated by law, otherwise he will not be heard to object in any other forum. Hallett v. U. S. Security & Bond Co. [Colo.] 90 P 683. Assessment of damages for land taken on basis that owners would retain title to improvements already thereon and remove them at their own expense held at most merely an erroneous award of damages, correctible on appeal, under Laws 1903, p. 225, c. 122, § 162, and hence unavailable in suit to enjoin assessment. Kansas City v. Napiecek [Kan.] 92 P 827. One failing to seek review of drain assessment under Pub. Acts 1899, p. 464, No. 272, by appeal or certiorari, is expressly precluded from thereafter questioning the validity of the drain proceedings either by action of law or suit in equity. Jones v. Gable, 150 Mich. 30, 14 Det. Leg. N. 623, 113 NW 577.

73. See Charter of Fond du Lac (Laws 1883, p. 424, c. 152, subc. 14, § 4), providing that no error, informality or defect in proceedings had before or in issuance of a special tax certificate shall impair its validity, etc. McMillan v. Fond du Lac County [Wis.] 114 NW 1119.

74. Irregularities without injury do not constitute ground for equitable relief. McMillan v. Fond du Lac County [Wis.] 114 NW 1119.

75, 76. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

77. Assessment for street improvement under Burns' Ann. St. 1901, § 4288. Daly v. Gubbins [Ind.] 82 NE 659.

78. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957.

79. Jones v Gable, 150 Mich. 30, 14 Det. Leg. N. 623, 113 NW 577. An owner who, though having full knowledge of the progress of the work, makes no protest until after the assessment, cannot thereafter have the collection of the assessment enjoined, even on constitutional grounds. Mackay v. Hancock County [Iowa] 114 NW 552. An abutting property owner whose property has been assessed for a street improvement in excess of the amount authorized by law, who voluntarily pays the first instalment before the contract for said improvement is let, who continues to pay all instalments as they fall due while he watches in silence the letting of the contract and completion of the work, and who accepts all the benefits flowing therefrom, is estopped from enjoining the collection of the excess instalments. Monroe v. Cleveland, 9 Ohio C. C. (N. S.) 523.

80. Where improvement ordinance was not passed by two-thirds majority as required by Laws 1903, p. 63, § 8 (Ann. St. 1906, § 5747-8). Cox v. Mignery, 126 Mo. App. 669, 105 SW 675.

81. Void assessment may be enjoined at instance of one who failed to appear and object as authorized by Milwaukee City Charter, p. 158, subc. 7, § 9, and who did not appeal as authorized by § 11. Spence v. Milwaukee [Wis.] 113 NW 38.

82. Nixon v. Burlington [Iowa] 115 NW 239.

83. No provision for such review under Muskegon city charter. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957.

84. Milwaukee City Charter, p. 158, subc. 7, § 12. Spence v. Milwaukee [Wis.] 113 NW 38.

85. Decision of legislature. Coates v. Nugent [Kan.] 92 P 597. An assessment for a sewer will be regarded as having been made

and the burden is on one seeking to enjoin the enforcement of an assessment on the ground of lack of benefit to show conclusively that no such benefit is possible;[86] but the collection of an assessment for a street improvement which has conferred no benefit whatever on the abutting property because of a mistake in the provision for drainage will be enjoined without seeking to inquire whether due to an abuse of corporate power or to gross negligence on the part of the corporation.[87] Where the proceedings have been legalized by subsequent legislation, equity will not interfere.[88] No tender is necessary as a condition precedent to the right to sue to set aside an absolutely void assessment.[89] Suit must be instituted within the time prescribed by law,[90] the legislature having power to limit the time within which suits to annul assessments must be brought.[91] General tax payers have no status to sue to restrain the collection of a special assessment, their remedy being by injunction to restrain the paying of public funds upon the contract.[92] Where the assessment is void, the municipality is not injured by a misjoinder of several lot owners as plaintiffs in a suit to set it aside.[93] Where the ordinance does not show its invalidity on its face, the burden of proving such invalidity is on the attacking party.[94] Equity will not enforce specific performance of stipulations between the property owner and counsel for the municipality where such stipulations are contrary to statute.[95]

(§ 9) *K. Appeal and other direct review.*[See 8 C. L. 1565]—The right of appeal is purely statutory[96] and is available only to those who have complied with the statutory requirements,[97] and the methods of review are such as are provided by statute,[98] and proceedings for review must be instituted and perfected within the time prescribed by the statute.[99] Where provision is made for notice and opportunity to be heard before confirmation of the assessment, an appeal is a matter of grace and may

with reference to benefits, as required by § 53 of the municipal code, when the proceedings with reference thereto are all regular and the property owner enters no complaint until he seeks to enjoin collection of the assessment and there is no showing of fraud or evidence that the assessment as laid unquestionably exceeds the special benefits to the property. Kibler v. Newark, 4 Ohio N. P. (N. S.) 641. Where the testimony is conflicting as to benefits, a court of equity will not disturb the apportionment of the assessment which has been made. Grove v. Delaware County Com'rs, 5 Ohio N. P. (N. S.) 521.

86. Coates v. Nugent [Kan.] 92 P 597.

87. Breuer v. Cincinnati, 5 Ohio N. P. (N. S.) 49.

88. Constantine v. Albion, 148 Mich. 403, 14 Det. Leg. N. 231, 111 NW 1068.

89. Woolacott v. Meekin, 151 Cal. 701, 91 P 612.

90. Blackwell v. Coeur D'Alene, 13 Idaho, 357, 90 P 352. Under Denver City Charter, art. 7, § 34, suit to annul the invalid assessment must be brought within thirty days after the passage of the assessing ordinance. Where no constitutional questions are involved, and if such questions are involved then within ninety days. Jackson v. Denver [Colo.] 92 P 690.

91. See Denver City Charter, art. 7, §§ 34, 90. Jackson v. Denver [Colo.] 92 P 690.

92. Cawker v. Milwaukee [Wis.] 113 NW 419.

93. Woolacott v. Meekin, 151 Cal. 701, 91 P 612.

94. That ordinance was not passed by requisite majority. Cox v. Mignery, 126 Mo. App. 669, 105 SW 675. One seeking to enjoin a street assessment on the ground that lots or lands which should have been assessed have been omitted should make it appear that the omitted lots or lands derived some benefits from the improvement and therefore should bear a share of the burden of the cost thereof, and that a proper assessment, including the omitted lots or lands, would probably reduce the assessment on his property of which he complains. Burr v. Parker, 10 Ohio C. C. (N. S.) 550.

95. Whether such stipulations are considered as agreements or orders of court. Noonan v. Thompson, 231 Ill. 588, 83 NE 426. Stipulation for withdrawal of warrant of sale issued upon valid confirmation after term of court at which judgment of confirmation was rendered. Id.

96. Renard v. Spokane [Wash.] 93 P 517.

97. Filing objections as required by Laws 1901, p. 240, c. 118, § 2. Renard v. Spokane [Wash.] 93 P 517.

98. Under Laws 1893, p. 156, c. 537, p. 404, amended by Lawe 1894, p. 1307, c. 567, and Laws 1905, p. 2116, c. 747, certiorari lies to review findings of grade commissioners as to damages. People v. Stillings, 108 NYS 903.

99. Under Village Law, Laws 1897, p. 404, c. 414, § 109, and Tax Law, Laws 1896, p. 882, c. 908, § 251, a petition for certiorari to review village assessment must be presented within fifteen days after the completion and filing of the assessment roll and the posting and publication of notice thereof. People v. Dimond, 122 App. Div. 459, 106 NYS 832.

be limited in such manner as the legislature may deem proper,[1] as may also the relief which may be granted.[2] The decision of the tribunal authorized by law to determine the question of benefits will not be disturbed when the assessment appears to be reasonably fair,[3] nor will a finding of the lower court as to the necessity of the assessment be reviewed where the evidence is conflicting.[4] Only such questions can be reviewed as are properly saved below.[5] Objections for defects in special tax bills must be made in the trial court in a suit thereon,[6] as must also defects in the proceedings for the improvement,[7] but on appeal from order for sale of property assessed, matters rendering the assessment absolutely void may be raised, notwithstanding entry of general appearance below.[8] A reversal will not be granted for harmless irregularities,[9] and the rule that error is presumed to be prejudicial does not apply to irregularities in apportioning improvement assessments, such cases being governed by the principle of liberal construction provided for by the statutes.[10] Where intermediate the final judgment for improvement assessment and the suing out of a writ of error proceedings for a supplemental assessment were instituted, they were

Under "act concerning townships," approved March 24, 1899 (P. L. p. 412), § 93, no certiorari will be allowed to set aside an ordinance or resolution for a public improvement in a township after thirty days shall have elapsed from the date of the adoption of such ordinance or resolution. Browning v. Pensauken [N. J. Law] 68 A 1063. Where objections are overruled at one term and final judgment rendered at a subsequent term, and the time within which to take bill of exceptions has not been extended, a bill of exceptions not taken until final judgment will be expunged. Village of Franklin Park v. Franklin, 228 Ill. 591, 81 NE 1132.

1. New York, etc., R. Co. v. Hammond [Ind.] 83 NE 244. Under charter of city of Hartford, making it the duty of the committee appointed to hear appeals as to assessments for street improvements to hear the appeal and reapportion the whole amount of damages and benefits if cause be found to alter the appraisal or assessment, it is the duty of such committee to determine questions of law as well as of fact. Appeal of Gray [Conn.] 67 A 891. Under Code, § 839, the amount as well as the validity of the assessment may be determined. Early v. Ft. Dodge [Iowa] 113 NW 766. Under Muskegon City Charter, Local Acts 1901, p. 182, No. 344, tit. 11, § 8, the board of review has no authority to review the proceedings leading up to the assessment, but only the assessment itself. Thayer Lumber Co. v. Muskegon [Mich.] 115 NW 957. Under Code Civ. Proc. § 2127, requiring relator to show a proper case for the issue of the writ. Objection that contract by city of Buffalo was entered into without compliance with City Charter, § 408, as to levy and confirmation of assessment prior to entering into contract, could not be considered where it was not raised by the petition. People v. Buffalo, 57 Misc. 10, 107 NYS 689.

2. Under Ky. St. 1903, § 2834, court may direct reapportionment of the property so as to do justice between all parties. City of Louisville v. American Standard Asphalt Co., 31 Ky. L. R. 133, 102 SW 806.

3. Decision of commissioners under Laws 1893, p. 96, c. 84, § 22. In re Harvard Avenue North [Wash.] 92 P 410. An ordinance creating an assessment district and levying an assessment according to frontage is a legislative determination that the property will be benefited, and with perhaps occasional exceptions involving fraudulent or arbitrary action, such determination is not reviewable by the courts. Northern Pac. R. Co. v. Seattle, 46 Wash. 674, 91 P 244. Where a final and conclusive character is given by statute to assessments when confirmed, an assessment showing upon its face full compliance with the law and which has been confirmed after notice and opportunity to be heard, but without objection, will not be disturbed upon certiorari except upon clear and cogent proof. Kirtland v. Parker, [N. J. Law] 68 A 913. Mere coincidence that assessments appear to be in proportion to frontage of property is not sufficient to overcome recital of commissioner's report that the assessments were in proportion to benefits. Id. Evidence as to excessiveness held conflicting, but assessment not so inequitable or unjust as to authorize court to set it aside. In re Seattle [Wash.] 91 P 548.

4. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

5. Under Laws 1901, p. 240, c. 118, § 2, written objections must be filed in order to save questions as to nonjurisdictional irregularities. Renard v. Spokane [Wash.] 93 P 517. Protest filed nearly two months prior to filing of assessment roll cannot be considered as objection to such roll. Id.

6. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

7. That ordinance did not sufficiently describe the improvement. Dickey v. Porter, 203 Mo. 1, 101 SW 586.

8. People v. Owens, 231 Ill. 311, 83 NE 198.

9. Allowance by appraisers of damages for land not described in the ordinance, providing what land should be taken, was harmless where trial court scaled assessments accordingly. State v. Several Parcels of Land [Neb.] 113 NW 248. A property owner cannot complain of the mode of assessment where he has not been assessed with more than his proportionate share nor in excess of benefits. In re Seattle [Wash.] 91 P 548.

10. Rev. St. § 2327 (1536-280). Ridenour v. Biddle, 10 Ohio C. C. (N. S.) 438.

improperly dismissed on the ground that proceedings as to objector's property were still pending.[11] Where the delinquent list is furnished to the county collector prior to an appeal from the judgment of sales, a second one need not be supplied after affirmance.[12]

PUIS DARREIN CONTINUANCE; PURCHASE-MONEY MORTGAGES; PURCHASERS FOR VALUE; QUARANTINE; QUASI CONTRACT, see latest topical index.

QUESTIONS OF LAW AND FACT.

Province of Court and Jury in General, 1346. | Particular Facts or Issues, 1347.

Scope of topic.—Only the general principles with a few illustrative applications are here treated. Whether particular facts or issues are questions of law or facts are treated in the topic to which they are germane.[13] The propriety of taking a case from the jury is elsewhere treated,[14] as is the revisory power of appellate courts over decisions of questions of fact.[15] The province of court and jury likewise is most frequently discussed in connection with the form and sufficiency of instructions.[16]

*Province of court and jury in general.*See 6 C. L. 1567—It is the province of the jury to decide issues of fact,[17] and of the court to decide questions of law.[18] Whether there is evidence legally sufficient is for the court,[19] but, there being such evidence, its sufficiency to establish the issue is for the jury.[20] The jury are the sole judges of the credibility of witnesses,[21] and the weight to be given the evidence.[22] While it is for the jury to determine conflicting evidence [23] and to draw conclusions from established facts where reasonable minds might differ in respect thereto,[24] the court

11. City of Chicago v. Baldwin, 227 Ill. 534, 81 NE 542.

12. Murphy v. People, 129 Ill. App. 533.

13. See such topics as Contracts, 9 C. L. 654; Carriers, 9 C. L. 466; Highways and Streets, 9 C. L. 1588; Master and Servant, 10 C. L. 691.

14. See Discontinuance, Dismissal and Nonsuit, 9 C. L. 982; Directing Verdict and Demurrer to Evidence, 9 C. L. 975.

15. See Appeal and Review, 9 C. L. 108.

16. See Instructions, 10 C. L. 296.

17. King Mfg. Co. v. Walton, 1 Ga. App. 403, 58 SE 115; Harrison v. Franklin, 126 Mo. App. 366, 103 SW 585. Whenever the evidence has reached a point where it must be weighed and conclusions deduced therefrom, the jury alone must make the deductions. Missouri, etc., R. Co. v. L. A. Watkins Merchandise Co. [Kan.] 92 P 1102.

18. Erie Crawford Oil Co. v. Meeks [Ind. App.] 81 NE 518; Outhouse v. Baird, 121 App. Div. 556, 106 NYS 246. See, also, Instructions, 10 C. L. 296.

19. Coles v. Boston, etc., R. Co. [N. H.] 68 A 868; Boswell v. First Nat. Bk. [Wyo.] 92 P 624. See, also, Directing Verdict and Demurrer to Evidence, 9 C. L. 975; Discontinuance, Dismissal and Nonsuit, 9 C. L. 982.

20. Georgia R. & Elec. Co. v. Harris, 1 Ga. App. 714, 57 SE 1076; Coles v. Boston, etc., R. Co. [N. H.] 68 A 868.

21. Zipperlen v. Southern Pac. Co. [Cal. App.] 93 P 1049; Rhodes v. Des Moines, etc., R. Co. [Iowa] 115 NW 503; Louisville, etc., R. Co. v. Mount, 31 Ky. L. R. 210, 101 SW 1182; Musselliam v. Cincinnati, etc., R. Co., 31 Ky. L. R. 908, 104 SW 337; Louisville Bridge Co. v. Allen [Ky.] 107 SW 1191; Pressinger v. Woodhull, 101 NYS 36; Dorsett v. Doubleday, Page & Co., 53 Misc. 598, 103 NYS 792; Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408; Walker v. Erwin [Tex. Civ. App.] 20 Tex. Ct. Rep. 209, 106 SW 164; Williams v. Burke [Tex. Civ. App.] 20 Tex. Ct. Rep. 816, 108 SW 160; Parkersburg Nat. Bk. v. Hannaman [W. Va.] 60 SE 242; Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

22. Paige v. Illinois Steel Co., 233 Ill. 313, 84 NE 239; Rhodes v. Des Moines, etc., R. Co. [Iowa] 115 NW 503; Louisville, etc., R. Co. v. Mount, 31 Ky. L. R. 210, 101 SW 1182; Champion Ice Mfg. & Cold Storage Co. v. Delsignore [Ky.] 105 SW 1181; Owensboro City R. Co. v. Allen [Ky.] 108 SW 357; Walker v. Erwin [Tex. Civ. App.] 20 Tex. Ct. Rep. 209, 106 SW 164; Curtin v. Clear Lake Lumber Co. [Wash.] 91 P 956; Parkersburg Nat. Bk. v. Hannaman [W. Va.] 60 SE 242; Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

23. Ong Chair Co. v. Cook [Ark.] 108 SW 203; Copriviza v. Rilovich, 4 Cal. App. 26, 87 P 398; Atlantic Coast Line R. Co. v. Miller, 53 Fla. 246, 44 S 247; Hester v. Gairdner, 128 Ga. 531, 58 SE 165; Forbes v. Hunter, 31 Ky. L. R. 285, 102 SW 246; Paine v. Kelley [Mass.] 83 NE 8; Schweyer v. Jones [Mich.] 115 NW 974; Hann v. Brettier, 107 NYS 78; Cantelou v. Trinity, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 457, 101 SW 1017; Hoffman v. Titlow [Wash.] 92 P 888; Gallaway v. Massee [Wis.] 113 NW 1098.

24. City of Valparaiso v. Schwerdt [Ind.

may decide an issue where the evidence is undisputed,[25] and will permit of but one reasonable inference.[26] The competency of witnesses is a preliminary question for the court.[27]

Particular facts or issues. See 8 C. L. 1563—It is the province of the court to determine the meaning,[28] legal effect,[29] and nature [30] of written instruments. Assumption of risk,[31] negligence and contributory negligence,[32] are essentially questions of fact for the jury, but where the act is negligent per se, as in violation of some statute or ordinance,[33] the matters may be for the court. Questions of knowledge,[34] intention,[35] certain questions of possession,[36] damages [37] and ownership,[38] are of fact and for the jury, but the defense of limitations,[39] unless depending on conflicting evidence as to a matter of fact,[40] is for a court.

QUIETING TITLE.

§ 1. Chancery and Statutory Remedies and Rights, 1348. Title and Possession, 1349. Defenses, 1351.
§ 2. What is a Cloud or Conflicting Claim, 1352.
§ 3. Procedure, 1352.

App.] 82 NE 923; Bennett v. Busch [N. J. Law] 67 A 188; McCarthy v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 69 A 170; Greenwood Grocery Co. v. Canadian County Mill El. Co., 77 S. C. 219, 57 SE 867; Red River Nat. Bk. v. De Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 385, 105 SW 998; Kersten v. Welchman [Wis.] 114 NW 499.

25. Jones v. St. Louis, etc., R. Co., 124 Mo. App. 246, 101 SW 615; Maher v. Benedict, 108 NYS 228; Smith v. Humphreyville [Tex. Civ. App.] 19 Tex. Ct. Rep. 936, 104 SW 495.

26. Sealey v. Southern R. Co. [C. C. A.] 151 F 736; Red River Nat. Bk. v. De Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 385, 105 SW 998; Walker v. Erwin [Tex. Civ. App.] 20 Tex. Ct. Rep. 209, 106 SW 164.

27. Parkersburg Nat. Bk. v. Hannaman [W. Va.] 60 SE 242.

28. Where there is clearly no ambiguity and where the relations between the parties must be determined. Veitch v. Jenkins [Va.] 57 SE 574. But where court instead allowed jury to construe instrument and where it appears a proper construction would have been adverse to the complaining party, it was harmless error. R. L. Moss Mfg. Co. v. Carolina Portland Cement Co., 1 Ga. App. 232, 57 SE 914. Where money was advanced to soliciting agent by insurance company under written agreement that it was to be paid back out of commissions and agent failed to earn commission. New York Life Ins. Co. v. Wolfson, 124 Mo. App. 286, 101 SW 162.

29. In an action to try title to land where title hinges on character of a deed and its acceptance and delivery, a directed verdict is proper only if ordinary minds could reach no other conclusion than that the instrument never became effective because not a deed, or if a deed because never delivered or accepted. Walker v. Erwin [Tex. Civ. App.] 20 Tex. Ct. Rep. 209, 106 SW 164. Whether a deed was delivered or not and accepted by grantees. Id.

30. Whether instrument was deed or bill of sale or mortgage where it was not ambiguous. Nelson v. Spence, 129 Ga. 35, 58 SE 697. Whether mill machinery was included in a mortgage and whether it was sold in accordance with power in a mortgage held erroneous instructions to jury. McIntyre v. Hairston [Ala.] 44 S 417. If submitted, should have been not mere naked questions of law without any guide but should have been hypothesized, if there was some parol evidence introduced to solve question. Id.

31. Clark v. Chicago, etc., R. Co., 231 Ill. 548, 83 NE 286. And see Master and Servant, 10 C. L. 691.

32. See Negligence, 10 C. L. 922, and topics dealing with actionable negligence, such as Carriers, 9 C. L. 466; Master and Servant, 10 C. L. 691.

33. Whether an ordinance is in force in a city or not is question of law for a court. Ghio v. Metropolitan St. R. Co., 125 Mo. App. 710, 103 SW 142.

34. As relating to assumption by shipper of liability over certain sum for carriage of freight safely by common carrier. Coles v. Boston, etc., R. Co. [N. H.] 68 A 868.

35. Where law does not from the act in question infer the intention. Carson v. Milwaukee Produce Co. [Wis.] 113 NW 393. Where question in action on a contract for purchase and sale of commodities was whether it was the intention of parties that commodities should be received or delivered. Id.

36. Where evidence makes an issue in suit to eject an intruder, as to the character of plaintiff's possession and the bona fides of defendant's entry. Smallwood v. Jones, 128 Ga. 41, 57 SE 99.

37. Where there was conflict as to damages for defects in building a house. Forbes v. Hunter, 31 Ky. L. R. 285, 102 SW 246.

38. Where deceased was killed by alleged negligence in letting live wire part and fall on deceased and there was evidence that electric plant had been sold by defendant, evidence of ownership held for jury. Gordon v. Ashley [N. Y.] 83 NE 686.

39. Whether statute of limitations was good defense where there was conflict of dates, held for jury. Moore v. Chas. F. Luehrmann Hardwood Lumber Co. [Ark.] 102 SW 385.

40. Hutcheson v. Chandler [Tex. Civ. App.] 19 Tex. Ct. Rep. 630, 104 SW 434.

The scope of this topic is noted below.[41]

§ 1. *Chancery and statutory remedies and rights. Nature and office.* See 8 C. L. 1570—Equity has inherent jurisdiction of suits to quiet title and to remove clouds.[42] Statutory actions for this purpose are generally regarded as equitable in character [43] and provisions authorizing them as merely enlarging the powers of courts of equity,[44] and as creating concurrent and not exclusive remedies.[45] As in other cases, equity will not assume jurisdiction where there is an adequate remedy at law [46] unless in exceptional cases to prevent fraud and injustice [47] or, in proper cases, to prevent a multiplicity of suits.[48] Independently of statute,[49] equity may in a proper case, en-

41. This topic treats of suits in equity to quiet title to realty and for the removal of clouds and statutory substitutes therefor. The cancellation of particular instruments which may be clouds on title (see Cancellation of Instruments, 9 C. L. 454), quieting title as an incident to statutory actions for the restoration of destroyed instruments (see Restoring Instruments and Records, 8 C. L. 1742), and adverse proceedings for the determination of conflicting interests in mining claims (see Mines and Minerals, 10 C. L. 839), have been excluded.

42. Well established ground for equitable relief. Acord v. Western Pocahontas Corporation, 156 F 989.

43. Carlson v. Current [Wash.] 93 P 315. Action held properly brought in equity. Jonesville Perpetual Bldg. & Loan Ass'n of Jonesville v. Beverly [Ky.] 107 SW 770.

44. St. 1898, § 3186, authorizing action to try title to real property, not restriction but enlargement of equity powers. Siedschlag v. Griffin [Wis.] 112 NW 18.

45. While Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), providing remedy to determine interests and quiet title, repealed by implication Rev. St. 1899, § 647 (Ann. St. 1906, p. 665), providing remedy in such cases, it did not oust jurisdiction of equity to remove clouds from titles, but statutory and chancery jurisdictions are concurrent. Hudson v. Wright, 204 Mo. 412, 103 SW 8.

46. Adams v. Johnson, 129 Ga. 611, 59 SE 269; Austin v. Minor [Va.] 57 SE 609; Swick v. Rease [W. Va.] 59 SE 510. Where defendant's intestate held right of possession for term, purchased at sale for delinquent taxes, which right was barred by limitations, complainant not required to sue at law, but might file bill to quiet title under Gen. St. p. 3486, and P. L. 1907, p. 57, c. 30. Beatty v. Lewis [N. J. Eq.] 68 A 95. Remedy at law inadequate where complainant is in possession. Mackey v. Maxin [W. Va.] 59 SE 742. Does not lie where ejectment will. Pollitzer v. Bunkemper, 76 S. C. 517, 57 SE 475. One selling land to another who has gone into possession but refuses to receive title on account of outstanding adverse claim cannot be compelled to bring ejectment under Act April 16, 1903 (P. L. 212; 2 Purd. (13 Ed.) 1304), right being limited to one in possession. Heppenstell v. Long, 217 Pa. 491, 66 A 991. Since plaintiff in forcible entry and detainer suit may remove same from justice's court to circuit court where title to land may be tested, statement in bill of pendency of such suit instituted by defendant against plaintiff, prosecution of which complainant seeks to enjoin until determination of title, held to have deprived bill of equity. Rosebrook v. Baker [Ala.] 44 S 198. Disposition in alleged last will and testament of property which testator may not own does not give superior court, in exercise of equity powers, jurisdiction to cancel alleged will as cloud on title of one averring ownership of property devised, or to enjoin its probate by nominated executor. Adams v. Johnson, 129 Ga. 611, 59 SE 269. Where complainant owned property in defendant's addition to town which he was unable to sell on account of vendor's lien on all lots in addition, and alleged that unless defendant be compelled to sell the property primarily liable and sufficient to pay lien his lots were liable to foreclosure, insufficient to compel sale to remove cloud in absence of showing imminent danger of foreclosure and loss. Lennig v. Harrisonburg Land & Imp. Co. [Va.] 59 SE 400. Where defendant submitted to court of equity and interposed equitable counterclaim for same relief, held that she could not, by objection to evidence, challenge jurisdiction of court on ground that plaintiffs were out of possession, and hence had adequate remedy at law. Siedschlag v. Griffin [Wis.] 112 NW 18.

47. Since cases of this kind are not strictissimi juris, but are addressed to the discretion of the court, which is to be governed by general principles as far as it can be, but which at the same time grants or withholds relief according to the particular case, when those rules furnish no certain measure of justice between the parties. Quinn v. Valiquette, 80 Vt. 434, 68 A 515. Refused where adequate remedy at law and no injury would result from delay or other cause not remediable at law. Id.

48. Will not lie to prevent multiplicity of suits where there is insufficient community of interest among defendants as to subject-matter, regardless of possible delay and great expense. Illinois Steel Co. v. Schroeder [Wis.] 113 NW 51. Insufficient community of interest where defendants claim title through entry and adverse possession of M and tack their alleged adverse possession to M's, though determination of M's adverse possession settles title of all defendants. Id.

49. Suit to enjoin threatened sale as school land of land occupied adversely for 50 years under purchase from state, but for which no patent had issued, held not to be regarded as one under Rev. St. 1899, § 650, no such proceeding being authorized by that section. Bonsor v. Madison County, 204 Mo. 84, 102 SW 494.

join a sale of land which would cast a cloud upon the legal title,[50] and a remedy by injunction under such circumstances is sometimes specifically provided for by statute in certain cases where there is no adequate remedy by an action for damages.[51] The jurisdiction of a Federal court to restrain the enforcement of a judgment of a state court is not effective to remove a cloud from the title to realty cast by reason of the judgment which would still remain notwithstanding the owner is not permitted to enforce it.[52] As a rule only title to realty may be quieted.[53] There is a conflict of authority as to whether the statutory action is one in personam or in rem.[54] It is sometimes considered an action for the recovery of the real property which is the subject-matter thereof.[55] The action being equitable, complainant must come into court with clean hands,[56] and may be required to do equity as a condition to relief.[57]

Title and possession.[See 8 C. L. 1572]—In the absence of a statutory provision to the contrary, both possession[58] and legal title[59] are ordinarily necessary to the main-

50. Bonsor v. Madison County, 204 Mo. 84, 102 SW 494.

51. See under Rev. St. 1899, § 3649 (Ann. St. 1906, p. 2055), where landowner whose land is about to be sold under execution issued against person having apparent though not real interest. Payne v. Daviess County Sav. Ass'n, 126 Mo. App. 593, 105 SW 15.

52. Schultz v. Highland Gold Mines Co., 158 F 337.

53. Right to plant and take oysters from bay in front of property is mere privilege or license and not real estate within meaning of Code 1906, § 550, and bill to remove cloud therefrom will not lie. Catchot v. Zeigler [Miss.] 45 S 707.

54. Action under Rev. St. 1899, § 650, is not one against the world as in a proceeding in rem, but to determine issues between adversary parties relating to their respective titles. Dixon v. Hunter, 204 Mo. 382, 102 SW 970. Is in personam. Lally v. New York Cent., etc., R. Co., 123 App. Div. 35, 107 NYS 868.

55. Townsend v. Driver, 5 Cal. App. 581, 90 P 1071.

56. Wife joining in deed with husband in fraud of his creditors not barred from right to claim dower as against creditors avoiding deed. Huntzicker v. Crocker [Wis.] 115 NW 340.

57. Where mortgage lien has been extinguished and mortgagor borrows money and agrees that mortgage shall stand as security, he cannot sue in equity to remove mortgage as cloud without first paying same. Krugmeier v. Hackett [Wis.] 113 NW 1103. Where lien forfeited for failure to foreclose within thirty days after demand by owner as provided by § 4797, Rev. Codes 1899, payment of debt not condition precedent. Sheets v. Prosser [N. D.] 112 NW 72. Payment or tender of just taxes not necessary before bringing action where assessment invalid through failure to describe land. State Finance Co. v. Halstenson [N. D.] 114 NW 724.

58. Hoyt v. Forrest, 56 Misc. 147, 106 NYS 1083; Pollitzer v. Beinkempen, 76 S. C. 517, 57 SE 475. Where one has legal title without possession, remedy is by ejectment. Austin v. Minor [Va.] 57 SE 609. That the defendant is in possession is complete defense. Ranch v. Werley, 152 F 509. Stipulation that premises are capable of physical possession and that defendant alone is collecting rents sufficient ground for dismissal under Code Civ. Proc. §§ 1638-42. Hoyt v. Forrest, 56 Misc. 147, 106 NYS 1083. Bill for partition with defendants in possession cannot be treated as bill to quiet title. Warren v. Warren [Mich.] 14 Det. Leg. N. 869, 114 NW 867. No right of action where lessee of mining claims under executed lease to commence at future date was in possession. Johnston v. Corson Gold Min. Co. [C. C. A.] 157 F 145. Under Gen. St. Kan. 1901, §§ 7961, 7966, providing that filing authenticated copy of will passes title, and § 3009, empowering foreign executor or administrator to sue and be sued, one directed by will to sell lands in Kansas in possession and who has recorded will has sufficient title and possession. Quinton v. Neville [C. C. A.] 152 F 879. Institution of action in ejectment in federal court in state in which ejectment may be maintained, although plaintiff is not out of possession, held not an admission by such plaintiff that he is not in possession so as to preclude him from maintaining suit in equity against the defendant to remove a cloud on his title to same lands. Acord v. Western Pocahontas Corp., 156 F 989. Possession subject to a public easement is sufficient. Proof of highway running across plaintiff's land not inconsistent with possession of entire tract. Glos v. Holmes, 228 Ill. 436, 81 NE 1064. Actual physical possession not necessary under Code Civ. Proc. §§ 1638-42. Hoyt v. Forrest, 56 Misc. 147, 106 NYS 1083; Heppenstall v. Leng, 217 Pa. 491, 66 A 991. Under Ky. St. 1903, § 11, constructive possession insufficient. Brown v. Ward [Ky.] 105 SW 964. Evidence sufficient to show possession. Alexander v. Hill [Ky.] 108 SW 225. Constructive possession insufficient. Mackey v. Maxin [W. Va.] 59 SE 742.

59. Valid and subsisting claim is complete defense. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709. A vendor who has given bond for deed, but who still holds legal title. Has legal title and interest to be protected in order to fulfill bond. Coel v. Glos, 232 Ill. 142, 83 NE 529. In equitable action against county, county sheriff, county court and judges thereof to enjoin selling land as school land and establish plaintiff's title

tenance of the action, unless removal of cloud from title is merely incidental to the primary relief sought, or the plaintiff has no remedy at law.[60] This rule has, however, been greatly modified by statute in many states. Thus in some states equitable title coupled with possession is requisite;[61] in others equitable title without possession is sufficient though the defendant be in possession,[62] and in still others the holding of legal title without possession is sufficient.[63] In some states the action cannot be maintained by the owner of an equitable title against the owner of a legal title.[64] Title and right to possession,[65] peaceable possession under claim of title,[66] or possession for a certain period under claim of title,[67] is sometimes required. By some statutes anyone having a lien or incumbrance on land is given the right to test the validity of any other lien, claim, or incumbrance.[68] In Michigan any person claiming legal or equitable title whether in possession or not may institute suit against any other person not in possession setting up claim in opposition to his title.[69] A tenant's possession is construed as that of his landlord,[70] the possession of an officer of a corporation that of the corporation,[71] and a life tenant's possession that of the remainderman.[72] A title by adverse possession will be quieted.[73]

thereto, petition alleging that plaintiffs have been in open, notorious, continuous and hostile possession for over fifty years, and that original occupant purchased from state, but received no patent therefor, and that sheriff of county was about to sell it under order of county court as school lands, sufficiently states cause of action, since under Rev. St. 1899, c. 122, art. 2 (Ann. St. 1906, pp. 3867-3874), county courts are made trustees to sell school lands, and Rev. St. 1899, § 9829 (Ann. St. 1906, p. 4507), gives the county court care and management of funds, though title remains in state. Bonsor v. Madison County, 204 Mo. 84, 102 SW 494. One having only equitable interest under contract providing same would be conveyed when directed, or authorizing sale under either mortgage thereon, cannot maintain bill to declare tax deed void and remove same as cloud. Tax Title Co. v. Denoon [Va.] 57 SE 586. Holder through patent from United States of legal title may maintain suit to quiet title and restrain removal of ore. Lawson v. U. S. Min. Co., 28 S. Ct. 15.

60. In such case, neither legal title nor possession is necessary. Swick v. Rease [W. Va.] 59 SE 510.

61. One having equitable title may maintain action as against a party having the record title. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709. Vendee under contract for deed, holding entire equitable title, has sufficient interest. Coel v. Glos, 232 Ill. 142, 83 NE 529. Variance immaterial where fee alleged and proof shows possession under equitable title only. Van Vranken v. Granite County, 35 Mont. 427, 90 P 164.

62. Where those in possession held under another than one holding tax title. Carlson v. Curren [Wash.] 93 P 315. Under Code 1877, § 255, where defendant director and officer of corporation has taken possession in own right under fully performed oral agreement. Consolidated Plaster Co. v. Wild [Colo.] 94 P 285. Where person in trust relation deeds land to another. Swick v. Rease [W. Va.] 59 SE 510.

63. Where plaintiff has title and sells to another now in possession who refuses to accept title by reason of defendant's adverse title. Heppenstall v. Leng, 217 Pa. 491, 66 A 991.

64. Defense consisting merely in denial of plaintiff's title and assertion of title in defendant not established by proof that plaintiff holds legal title and defendant equitable title. Robinson v. Muir, 151 Cal. 118, 90 P 521.

65. Right to possession presumed where admitted that plaintiff had legal title under commissioner's deed. Flood v. Templeton [Cal.] 92 P 78. In Washington a valid subsisting interest with a right to possession is sufficient. Under § 5500, Ballinger's Ann. Codes & St., holder of legal title with right to possession may sue. White v. McSorley [Wash.] 91 P 243; Warren v. Oregon & Washington Realty Co., 156 F 203.

66. Easement in public square acquired by dedication sufficient under Code 1896, §§ 809-813. Oates v. Headland [Ala.] 45 S 910. Disputed or scrambling possession is insufficient. Rosebrook v. Baker [Ala.] 44 S 198. Under Code 1896, § 809, administrator with will annexed in possession of land forming part of estate cannot sue, since legal title is in heirs. Nashville, etc., R. Co. v. Proctor [Ala.] 44 S 669.

67. One having no title, no right by adverse possession, and not in actual possession, cannot recover under § 1638. Code Civ. Proc., authorizing one in possession claiming title for period of one year to sue. Wiechers v. McCormick, 122 App. Div. 860, 107 NYS 835.

68. Inchoate right of dower sufficient incumbrance to sustain suit under St. 1898, § 3186. Huntzicker v. Crocker [Wis.] 115 NW 340. Holder of sheriff's certificate of sale on execution may maintain suit. Siedschlag v. Griffin [Wis.] 112 NW 18.

69. Under § 448, Comp. Laws, action does not lie against one using land for hitching posts, boat landing, leading horses to water, and grazing cattle. Tinker v. Piper, 149 Mich. 335, 14 Det. Leg. N. 439, 112 NW 913.

70. Hoyt v. Forrest, 56 Misc. 147, 106 NYS 1083.

71. Director and manager of corporation cannot acquire hostile possession of its

Plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of his adversary's.[74] In the Federal courts the suit may now be maintained without a prior adjudication of the legal title in an action at law.[75]

Defenses. See 8 C. L. 1575—The right to maintain the action may be lost by laches [76] and also by the operation of the statute of limitations.[77]

property so as to permit its maintenance of action, but his possession is that of the corporation. Consolidated Plaster Co. v. Wild [Colo.] 94 P 285.

72. Under §§ 57, 59, c. 73, Comp. St. 1903. Remainderman may bring suit during life of life tenant. Hobson v. Huxtable [Neb.] 112 NW 658. Operation of the statute of limitations is not postponed until the death of the life tenant, and hence delay of ten years until death of life tenant fatal to suit by remainderman. Id. In suit under Act June 10, 1893 (P. L. 415), § 2, it is not merely petitioner's possession which must be disputed and which he may defend, but the title by which it is held. Kimmel v. Shaffer [Pa.] 68 A 1017. Claim of petitioner to contingent right on death of person in possession, whom he claims is life tenant, is present dispute of title by which possession is held, and hence within the statute. Id.

73. Rice v. Kelly [Neb.] 115 NW 625. Possession for seven years under color of title sufficient. Van Etten v. Daugherty, 83 Ark. 534, 103 SW 737. One in actual possession for ten or fifteen years who had made improvements. Dickson v. Sentell, 83 Ark. 385, 104 SW 148.

74. Action not supported by void tax title. Mason v. Gates, 82 Ark. 294, 102 SW 190. Must establish validity of own title and invalidity of opponent's. Houston v. McKinney [Fla.] 45 S 480; Lennig v. Harrisonburg Land & Imp. Co. [Va.] 59 SE 400. Where plaintiff fails to prove his own title, cannot maintain action under Gen. St. 1902, § 4053, or complain of defects in defendant's title. Roberts v. Merwin [Conn.] 68 A 377. Plaintiff claiming under deed against one claiming through void sale under attachment directed against grantor's property shows sufficient right of relief. Empire Real Estate & Mortg. Co. v. Beechley [Iowa] 114 NW 556. Evidence that plaintiff parted with title conclusive against recovery by him. Brown v. Comonow [N. D.] 114 NW 758. Where plaintiff's grantor made no claim that conveyance to plaintiff was obtained by fraud, adverse claimant cannot successfully assert such claim, conveyance being otherwise sufficient to pass title. Obermeyer v. Behn, 108 NYS 289. Defendants held not precluded from questioning validity of certificate of purchase of tide lands from state under which plaintiff claimed, but which was void under Pol. Code, § 3488, though they did not bring themselves in privity with paramount source of title, and were not in possession. Williams v. San Pedro [Cal.] 94 P 234.

75. Lawson v. U. S. Min. Co., 28 S. Ct. 15.

76. Where father slept on rights during lifetime, children have no rights. Begley v. Dixon, 31 Ky. L. R. 196, 101 SW 963. Where it is alleged that plaintiff's husband and his grantee conspired to defraud plaintiff who was grantee of husband in prior deed, she may show ignorance of deed of trust which husband gave before deeding property to her, to explain her conduct in not preventing sale by paying indebtedness. Parks v. Worthington [Tex. Civ. App.] 19 Tex. Ct. Rep. 698, 104 SW 921. Laches will not be imputed to one in possession of land who resorts to court of equity to settle question of title as against adverse claimant out of possession, no matter how long the delay. Smith v. Owens [W. Va.] 59 SE 762. Where complainants claiming equitable title had been in peaceable possession until suit brought, such possession was notice of rights, and they were not chargeable with laches for delay in resorting to equity to establish legal title. Ogletree v. Rainer [Ala.] 44 S 565.

77. No limitation where, whether claim was by prescription requiring ten years, or by sheriff's deed requiring five, five years' time had not elapsed. Empire Real Estate & Mortg. Co. v. Beechley [Iowa] 114 NW 556. Under Code 1892, § 2731, person holding valid paper title not barred from suing to cancel alleged cloud held by one not in possession by owner's failure to sue within period he might have made entry or sued to recover land. Kennedy v. Sanders [Miss.] 43 S 913. Provisions of § 117, c. 23, Comp. St. 1907, apply to irregular administrative sales, but not to sales absolutely void, and action by heir to quiet title to homestead of ancestor may be brought at any time within ten years after right accrues or attainment of majority. Holmes v. Mason [Neb.] 114 NW 606. Where lands of resident of state are sold under decree rendered after service by publication, no appearance being made by him, action may be brought at any time within ten years from recording of deed. Payne v. Anderson [Neb.] 114 NW 148. Where defendant in action to quiet title claims as cotenant with plaintiff, and action proceeds to decree quieting title in cotenants plaintiff and defendant, and against other defendants, action will be deemed action to quiet title, and, if statute of limitations would run against such action by any defendant, such defendant will be barred. Hobson v. Huxtable [Neb.] 112 NW 658. Where certain city blocks laid off as public parks and used as such for 22 years, and conveyed to county under legislative act to be used for erecting county buildings, and so used for 29 years before plaintiff brought action, and 26 years after Federal patent, under which plaintiff claimed, had been issued, claim barred both by limitations and laches. Casserly v. Alameda County [Cal.] 94 P 765. Statute inapplicable to one in possession. Van Ellen v. Daugherty, 83 Ark. 534, 103 SW 737. Where the beneficial owner of lands has never been out of possession for over 50 years, statute is inapplicable to affect his interest. Combs v. Combs, 30 Ky. L. R. 873, 99 SW 919.

§ 2. *What is a cloud or conflicting claim.*See 8 C. L. 1575—A cloud is an apparent legal or equitable title or a claim of interest appearing in some legal form, but which is in fact unsound.[78] An instrument void on its face does not ordinarily constitute a cloud.[79]

§ 3. *Procedure.*See 8 C. L. 1576

*Process.*See 8 C. L. 1577—The subject of process is fully treated elsewhere.[80]

Parties.[81]—A municipality is the proper party to maintain a bill to settle the title of the general public in a public square.[82] All persons having a joint interest in all the property involved may join as plaintiffs.[83] Only persons claiming an interest

78. Any deed, devise, or other instrument, judgment, or decree not void on its face, which purports to convey any interest in or makes any charge upon land of true owner the invalidity of which requires proof by extrinsic evidence, or any pretended conveyance which, if left undisturbed, may ripen into perfect title. Acord v. Western Pocahontas Corp., 156 F 989.

Held to constitute cloud: Deed so inartificially drafted as to create possible doubt whether title under it was vested in corporation or in its president. St. Stephen's Evangelical Lutheran Church v. Pierce [Del.] 68 A 194. Contract for sale of land, recorded without consent of vendor, vendee not being entitled to specific performance. Sugar v. Froelich, 229 Ill. 347, 82 NE 414. Sheriff's deed void because no valid proof of publication of process, even though defendant might amend proof. Empire Real Estate & Mortg. Co. v. Beechley [Iowa] 114 NW 556. Where father furnished means whereby son redeemed land and eleven years thereafter son took deed in his own name and father conveyed part thereof to his daughter, daughter entitled to quiet title against son's deed. Combs v. Combs, 30 Ky. L. R. 873, 99 SW 919. Under Rev. St. 1899, § 3649 (Ann. St. 1906, p. 2055), when at time widow contracted debt on which defendant recovered judgment she owned fee, and after judgment executed quitclaim deed for nominal consideration, complainant claiming by adverse possession, sale on execution against widow would cloud title. Payne v. Daviess County Sav. Ass'n, 126 Mo. App. 593, 105 SW 15. Tax levied by city to pay water rents under canceled contract constiuttes cloud. Regan Land Co. v. Carthage [Mo. App.] 108 SW 589. Plaintiff, executing deed with space for grantee blank for security for debt, and space later filled in with mortgagee's name and recorded, and deed through which defendant claims was forged in grantee's name after latter's death, entitled to relief. Butler v. Paterson [Neb.] 113 NW 161. Though, where evidence dehors letters patent for land is required to show invalidity thereof patent can be avoided only by direct proceeding by state to review action of commissioners of land office, or by action in equity to vacate patent, yet an individual may bring an action to remove from her title cloud consisting of patent from state. Lally v. New York Cent., etc., R. Co., 123 App. Div. 35, 107 NYS 868. Code Civ. Proc. § 1957, empowering attorney general to bring action to vacate or annul letters patent granted by state, not prohibitive of such action. Id. The record of a mechanic's lien forfeited by failure to institute foreclosure proceedings after statutory demand, as required by Rev. Codes 1899, § 4797. Sheets v. Prosser [N. D.] 112 NW 72. Bill alleging that complainant is absolute owner, that defendants were in possession as tenants of complainant without right or title thereto, that they conspired to defraud complainant of lands, and executed deeds to one another purporting to convey title, and recorded same, states cause of action. Acord v. Western Pocahontas Corp., 156 F 989.

Held not to constitute cloud: Where plaintiff claimed lots according to recorded plats through tax title, and alleged that defendant's claim was cloud, since it was to lots occupying corresponding location, though differently numbered in unrecorded plat, but lots to which plaintiff had tax title had been listed, assessed, and forfeited to state according to original, unrecorded plat, plaintiff's tax title was to lots located as numbered in the original plat; hence defendant's claim to differently numbered lots, according to that plat was not cloud. Mason v. Gates, 82 Ark. 294, 102 SW 190. Sale of land under execution against stranger to record title, who is not in possession. Payne v. Daviess County Sav. Ass'n, 126 Mo. App. 593, 105 SW 15. To sustain a suit to remove a lien as a cloud, the bill must be against one who asserts an adverse title under the lien, the validity of which plaintiff denies. Lenning v. Harrisburg Land & Imp. Co. [Va.] 59 SE 400. Insufficient where validity of vendor's lien was admitted, holder thereof merely failing to foreclose. Id.

79. Tax deed void on its face because describing no land. Beardsley v. Hill [Ark.] 106 SW 1169. Tax deed conveying a vigintillionth part of tract. Petty v. Beers, 127 Ill. App. 593.

80. See Process, 10 C. L. 1262.

81. See 8 C. L. 1577. See, also, Parties, 10 C. L. 1081.

82. Code 1896, c. 13, §§ 809-813. Oates v. Headland [Ala.] 45 S 910.

83. Husband and wife claiming to own different tracts of land separately cannot join as plaintiffs in an action to quiet title of all the tracts. Gardner v. Robertson, 208 Mo. 605, 106 SW 645. Two or more parties claiming interest in land under common source of title, whether holding as tenants in common, joint tenants, copartners or in severalty, may unite in an action against any person claiming an adverse interest therein. Gillespie v. Gouley [Cal.] 93 P 856. Two sons claiming divided half under will seeking to remove fraudulent deed properly joined. Id.

in the property involved are necessary parties defendant.[84] All persons claiming interests adverse to plaintiff in the same property may ordinarily be joined as defendants.[85] A conveyance during the pendency of the action is sufficient to support a substitution of the grantees in place of the original plaintiff.[86]

Bill, complaint, or petition. See 8 C. L. 1577—The usual rules of pleading apply,[87] including those as to joinder of causes of action.[88] Whether the suit is one to quiet title is to be determined from a construction of the bill or complaint.[89] As a general rule, plaintiff must allege ownership [90] and that defendant claims some adverse interest.[91] Possession [92] and that there is no other suit pending in regard to the

84. The patentee is a necessary party defendant in an action to remove a cloud consisting of a patent issued by the state. Lally v. New York Cent., etc., R. Co., 123 App. Div. 35, 97 NYS 868. Grantors without warranty who have parted with all claim to the lands in question are not necessary or indispensable parties defendant. West Coast Lumber Co. v. Griffin [Fla.] 45 S 514. In action to quiet title to certain land which defendant's grantors had orally agreed to convey to plaintiff prior to their execution of deed to defendant, whether plaintiff had a partner immaterial where agreement made with plaintiff only and partner not necessary party. Crane v. Cheney [Kan.] 91 P 67.

85. All adverse claimants though there be no privity between them and plaintiffs. Carlson v. Curren [Wash.] 93 P 315. No misjoinder where deed was taken in husband and wife and wife claiming whole sued husband and one buying his interest at execution sale. Hudson v. Wright, 204 Mo. 412, 103 SW 8. Defendants who do not in every instance claim interests adverse to plaintiffs in the same tracts of land cannot be joined in an action to quiet title to all the tracts. Gardner v. Robertson, 208 Mo. 605, 106 SW 645.

86. Vietzen v. Otis, 46 Wash. 402, 90 P 264.

87. Pleadings should conform to pleadings under practice act in ordinary civil action so far as analogous. Spencer v. Merwin [Conn.] 68 A 370.

88. See 8 C. L. 1580. For full discussion of this question, see Equity, 9 C. L. 1110, and Pleading, 10 C. L. 1173.

89. Action held one to determine adverse claims to realty and not one to construe will. Savage v. Savage [Or.] 94 P 182. Bill to restrain enforcement of judgment held not sustainable as bill to remove cloud from title to realty where realty alleged to have been clouded is not described and does not proceed on the theory of the removal of an incumbrance. Schultz v. Highland Gold Mines Co., 158 F 337.

90. West Coast Lumber Co. v. Griffin [Fla.] 45 S 514; Yonker v. Hobart [N. D.] 115 NW 839. Allegation in ordinary and concise terms of ultimate fact that plaintiff is owner of some substantial named interest in real estate is sufficient. Savage v. Savage [Or.] 94 P 182. Should aver nature and extent of estate. Richards v. Moran [Iowa] 114 NW 1035. Must show with clearness, accuracy, and certainty the validity of complainant's title and invalidity of that of his opponent. Houston v. McKinney [Fla.] 45 S 480. Where firm dissolved by death of senior member and real estate sold by surviving partner to pay firm debts and deed executed by such partner and wife and deceased partner's widow as individuals only, complainants claiming equitable title to interest of heirs of deceased partner under such deed must allege and prove, in suit to compel conveyance of said interest that personal assets of firm insufficient to pay debts. (Ogletree v. Rainer [Ala.] 44 S 565), if in addition to allegation of ownership in fee facts which constitute title are also set out and such facts show title not to be in complainant, a demurrer to the bill will lie (West Coast Lumber Co. v. Griffin [Fla.] 45 S 514). Complaint averring plaintiff was fee owner subject to oil and gas lease sufficiently definite description of interest. Erle Crawford Oil Co. v. Meeks [Ind. App.] 81 NE 518. Allegation that plaintiff is owner in fee simple sufficient allegation of title. Shute v. Shute [S. C.] 60 SE 961. Ownership being ultimate fact, allegations setting out detailed facts showing ownership are allegations of evidentiary facts. West Coast Lumber Co. v. Griffin [Fla.] 45 S 514. Need not set out in detail the facts showing such ownership. Need not set out source of title. Rosebrook v. Baker [Ala.] 44 S 198; Savage v. Savage [Or.] 94 P 182. Adopted heir need not allege facts establishing adoption. Jones v. Leeds [Ind. App.] 83 NE 526.

91. Must aver that complainant's title is denied. Rosebrook v. Baker [Ala.] 44 S 198. Complaint held sufficient under Code, § 4224, it not being necessary to follow wording of statute. Richards v. Moran [Iowa] 114 NW 1035. While complaint need not be description of property that adversary claims, facts should be alleged showing that defendants are setting up claim of title or right hostile to plaintiff. Brown v. Ward [Ky.] 105 SW 964. Averment that defendants are setting up some claim to land and both together are setting up claim to whole of it insufficient under Ky. St. 1903, § 11. Id. Failure of petition to specifically describe adverse title or interest claimed by defendant held not to render it bad on general demurrer, proper method of attack being by motion to make more definite and certain. State v. Alter [Neb.] 114 NW 293. Averment that defendant claims adverse interest, without defining it, is sufficient to put him to a disclaimer, or to allegation and proof of estate or interest which he claims. Savage v. Savage [Or.] 94 P 182.

92. Must allege that plaintiff is in possession or that lands are wild and unoccupied. West Coast Lumber Co. v. Griffin [Fla.]

land [93] must be alleged if essential to the right of action. Plaintiff need not allege matters of defense.[94] Complainant may lawfully allege facts pertinent to the transaction out of which his claim for equitable relief may have arisen and which support a claim for such incidental orders as may be proper to render the equitable relief sought full and complete.[95] The Iowa statute requires notice to be given stating in general terms the cause of action, accurately describing the property, and stating in general terms the nature and extent of plaintiff's claim.[96] Under a plea of title based on specific facts, defendant may show a lien based on the same facts, and thereby defeat plaintiff's right to have his title quieted as against said lien.[97]

Answer, cross-complaint, and other pleadings.[See 8 C. L. 1579]—If defendant has no claim at all he should file a disclaimer.[98]

A cross complaint is ordinarily unnecessary where defendant relies upon title in himself.[99] It has, however, been held that defendant may file a cross complaint demanding affirmative relief for the purpose of compelling plaintiff to litigate the cloud on defendant's title raised by the commencement of the action.[1] It is also proper where he seeks affirmative relief to have title quieted in himself as against plaintiff.[2] The sufficiency of the cross complaint is to be determined by the same rules of pleading as the complaint.[3]

Evidence.[4]—The burden is ordinarily on plaintiff to show title.[5] Where defendant claims title and demands affirmative relief, however, he must establish such title in order to preclude recovery by plaintiff.[6] Cases dealing with the admissibility of

45 S 514. That he is in possession of or that it is not in possession of another. Savage v. Savage [Or.] 94 P 182. Averment of peaceable possession, actual or constructive, under claim of ownership, sufficient. Rosebrook v. Baker [Ala.] 44 S 198. Allegation that plaintiff was owner in fee held sufficient without specific allegation of possession, possession being presumed to follow legal title. Shute v. Shute [S. C.] 60 SE 961. Complaint alleging lot sold on execution for community debt was plaintiff's separate property, not subject to sale, sufficient though failing to allege possession or that land was unoccupied. Dueber v. Wolfe [Wash.] 92 P 455.

93. Code 1896, § 809. Corona Coal & Iron Co. v. Swindle [Ala.] 44 S 549. Must be averred that complainant's title is denied, and that no suit is pending to enforce or test validity of such title. Rosebrook v. Baker [Ala.] 44 S 198.

94. Bill in equity to cancel deed alleged void by reason of grantor's insanity and to remove cloud created by it contains equity though not offering to restore consideration, since payment of adequate consideration for land is defensive matter. Mitchell v. Baldwin [Ala.] 45 S 715.

95. Under Gen. St. 1902, § 4053, where defendant claimed under valid lease adverse to plaintiff's title, plaintiff claiming absolute ownership, plaintiff may allege lease obtained by undue influence and include prayer for cancellation of lease without which complete relief would not be given. Spencer v. Merwin [Conn.] 68 A 370.

96. Under Code, §§ 3514, 4224, notice stating plaintiff's claim to real estate, describing same, and that as owner he prays quieting title and general equitable relief, referring to petition in file, sufficient. Richards v. Moran [Iowa] 114 NW 1035.

97. Where defendant pleaded title under tax certificates which merely gave him lien. Bacon v. Rice [Idaho] 93 P 511.

98. State v. Alter [Neb.] 114 NW 293.

99. Bacon v. Rice [Idaho] 93 P 511. Is ordinarily unnecessary, and when unnecessary may be stricken on motion. Keller v. McGilliard, 5 Cal. App. 395, 90 P 483.

1. Keller v. McGilliard, 5 Cal. App. 395, 90 P 483.

2. Where holder tax deed and certificate desires quiet title in himself. Bacon v. Rice [Idaho] 93 P 511.

3. Need not plead muniments of title such as tax deeds and certificates. Bacon v. Rice [Idaho] 93 P 511. Need only allege how defendants acquired their title, and then state generally that defendants claim an interest in and to premises adverse to plaintiffs, and pray that respective interests be ascertained and decree entered adjudging rights of parties. Rev. St. 1899, § 650 (Ann. St. 1906, p. 667). Summet v. City Realty & Brokerage Co., 208 Mo. 501, 106 SW 614.

4. See 8 C. L. 1580. See, also, Evidence, 9 C. L. 1228.

5. Keller v. McGilliard, 5 Cal. App. 395, 90 P 483; Yonker v. Hobart [N. D.] 115 NW 839. Where the allegations of ownership and adverse possession are sufficiently denied, the burden is on the plaintiff to prove his title, either by record or adverse possession. McHargue v. Parks [Ky.] 104 SW 955.

6. Defendant conceding that he acquired title if at all through tax proceedings must establish tax title. Dixon v. Hunter, 204 Mo. 382, 102 SW 976. When the defendant's claim is purely equitable one, burden is upon him to show that it was superior to legal title of plaintiff by reason of fact that plaintiff had notice of equitable claim or did not pay valuable consideration. Laffare

particular evidence on the questions of title [7] and possession [8] will be found in the notes. The evidence showing superior title in the plaintiff must be clear and convincing.[9] To establish title to unoccupied lands, it is ordinarily necessary to trace it back to the sovereign power, but not where the parties stipulate that another conveyed the land to defendant's predecessor.[10]

Trial.[See 8 C. L. 1581]—In states where forms of action have been abolished, failure to plead or prove facts essential to a suit to quiet title is not ground for dismissal, and relief as in ejectment may be awarded.[11] In an action to determine adverse claims under the Oregon statute, the better practice is for the court to decline to determine the validity of defendant's claim, even if plaintiff has assumed to set it out in the complaint, until he has disclosed it by answer.[12]

In states where the chancellor is required to frame an issue at law as to the facts upon which the controverted title depends, to be passed upon by the law court, the party supporting the affirmative of the question to be tried should ordinarily be made plaintiff, unless the issue may otherwise be more conveniently raised.[13] In New Jersey it is immaterial whether the issue at law so formed be framed in the usual form of feigned issues or whether a simpler form be adopted.[14]

Jury trial.[15]—In Kentucky a party desiring the submission to the jury of legal issues must transfer the case to the ordinary docket, and on his failure to do so he cannot complain because the chancellor tried the issue.[16]

Findings, decree, or judgment.[See 8 C. L. 1581]—The judgment should ordinarily quiet and settle the title to the land in dispute and award such incidental relief as may be proper to make the main equitable relief granted full and complete,[17] such

v. Knight [Tex. Civ. App.] 17 Tex. Ct. Rep. 960, 101 SW 1034.

7. Where defendant claimed under deed, records in matter of grantor's estate showing grantor's death before execution of alleged instrument admissible. Nemo v. Farrington [Cal. App.] 94 P 874. Evidence that taxes on lot claimed by defendant as park had not been paid immaterial, since assessor could not accept same as park for city, plaintiff having shown failure to accept by city. Myers v. Oceanside [Cal. App.] 93 P 686. Where defendants introduced tax deed under which they claimed, judgment in former action by plaintiff against defendant in which title was adjudged in plaintiff admissible to show claim under tax deed adjudged against them. Nemo v. Farrington [Cal. App.] 94 P 874. Where decree of distribution in decedent's estate through which title is claimed referred to inventory and appraisement for purpose of description, such inventory competent for such purpose. Myers v. Oceanside [Cal. App.] 93 P 686. Evidence that plaintiff has disposed of all his title to another admissible. Brown v. Comonow [N. D.] 114 NW 728. Where original owner gave trust deed mortgage and subsequent warranty deed through which plaintiff's grantor holds, and subsequent to transfer grantor received trust deed by assignment and defendant claimed through judgment against grantor without notice of lis pendens, trust deed and various assignments inadmissible against plaintiff, who claimed no rights thereunder. Gilman v. Carpenter [S. D.] 115 NW 659. Where complainant claimed title under deed from grantor holding deed not embracing lands in controversy, old plat showing land belonged to him admissible in determining boundaries and title. Austin v. Minor [Va.] 57 SE 609.

8. Where plaintiff claims by adverse possession, evidence by defendant to establish her possession by common reputation, referring principally to discussions among her neighbors, incompetent. Cooper v. Blair [Or.] 92 P 1074.

9. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709.

10. Wiechers v. McCormick, 122 App. Div. 860, 107 NYS 835.

11. Failure of plaintiff to prove possession or that premises are vacant and unoccupied. Vletzen v. Otis, 46 Wash. 402, 90 P 264. Failure to allege possession. Brown v. Baldwin, 46 Wash. 106, 89 P 483.

12. Where complaint demurred to and demurrer sustained. Savage v. Savage [Or.] 94 P 182.

13. In suits to quiet title to unoccupied lands under Laws 1901 (P. L. 57). McGrath v. Norcross [N. J. Eq.] 67 A 942. Is better practice to make petitioner defendant in analogy to ejectment where defendant is not called on to disclose his title until he knows by whom and on what grounds it is attacked. Kimmel v. Shaffer [Pa.] 68 A 1017. Is not necessarily ground for reversal that this was not done. Id.

14. Laws 1901 (P. L. p. 57). McGrath v. Norcross [N. J. Eq.] 67 A 942.

15. See 8 C. L. 1581. See, also, Jury, 10 C. L. 541.

16. Jonesville Perpetual Bldg. & Loan Ass'n v. Beverley [Ky.] 107 SW 770.

17. Gen. St. 1902, § 4053. Spencer v. Merwin [Conn.] 68 A 370.

as injunction.[18] The relief to be granted is sometimes specified by statute.[19] It is generally held that the decree should not require a conveyance by the party against whom it is rendered,[20] though there is some conflict of authority in this regard.[21] In Kansas the holder of a tax title who institutes a suit to quiet his title against the original owner, if defeated, cannot in the same action have taxes paid by him adjudged a lien on the real estate, since the statute affords adequate relief.[22] In states where the suit lies against persons in possession, defendant is properly charged for use and occupation on a decree in favor of plaintiff.[23] The fact that plaintiff is not entitled to have title quieted does not necessarily entitle defendants to a decree quieting title in them.[24] Where title to land is revested absolutely in plaintiffs by a decree quieting title, defendant's rights are not affected by the fact that plaintiffs have not paid to a third person a sum which the decree makes a lien upon the land.[25] The judgment should definitely describe the land to which title is quieted.[26]

Costs.[27]—Statutes in some states authorize the taxing of an attorney's fee as part of the costs if before suing to quiet title plaintiff requests defendant to quitclaim his adverse interest, and he refuses to do so.[28] It is sometimes provided that, if plaintiff substantiates his title, defendant shall be adjudged to pay all costs unless he disclaims and gives a release.[29]

QUORUM, see latest topical index.

QUO WARRANTO.

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18. Proper to enjoin forcible entry and detainer. Rosebrook v. Baker [Ala.] 44 S 198. A general prayer is sufficient to support additional relief in the shape of an injunction where the facts alleged warrant it. City of Los Angeles v. Los Angeles Farming & Mill. Co. [Cal.] 93 P 869. Plaintiff in possession under claim of ownership entitled to injunction to protect his possession from injury and waste by defendant pending adjudication of title. Chancey v. Allison [Tex. Civ. App.] 107 SW 605. To prevent destruction of fence. Id.

19. Under Code 1896, § 812, decree that defendants have legal title and entitled to same sufficient. McDaniel v. Sloss Iron & Steel Co. [Ala.] 44 S 705. Where bill contains only statutory averments, relief cannot be granted on general principles of equity. Fowler v. Alabama Iron & Steel Co. [Ala.] 45 S 635. Relief under Code 1896, art. 13, c. 16, cannot be granted on ground of resulting trust in land. Id. Under § 650, Rev. St. 1899, cannot in addition to decreeing plaintiff's interest to be that of equitable mortgagee declare amount due thereon and order foreclosure. Powell v. Crow, 204 Mo. 481, 102 SW 1024.

20. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709.

21. Conveyance decreed from common-law heir of president of corporation, where deed intending corporation as grantee was so drawn as to be doubtful whether president or corporation was grantee. Where deed made "President of, etc.," grantee. St. Stephen's Evangelical Lutheran Church v. Pierce [Del.] 68 A 194.

22. Must resort to remedy provided by Gen. St. 1901, § 7681. Equitable Inv. Trust Co. v. Essex, 74 Kan. 240, 86 P 467.

23. Proper to allow rent for land cultivated where testimony clearly showed value of same. McMahon v. Yazoo Delta Lumber Co. [Miss.] 46 S 57.

24. Where defendants failed to show payment or tender of payment of indebtedness through foreclosure of which plaintiff claims. Brown v. Comonow [N. D.] 114 NW 728.

25. In suit to enforce decree. McKenzie v. Donnell, 208 Mo. 46, 106 SW 40.

26. Where dispute being as to boundary line and plaintiffs failing to plead and prove actual conflicts between claims of parties, decree granting title to whatever land was included in their description improper. Mason v. Long [Wash.] 94 P 646.

27. See 8 C. L. 1582. The general subject of costs is fully treated in the article Costs, 9 C. L. 812, only a few matters peculiarly applicable to this remedy being retained.

28. Where grantor in warranty deed after conveyance accepted quitclaim deed from another, grantee justified in demanding quitclaim of interest so acquired and, on refusal, to costs under Code, § 4226. Hurni v. Sioux City Stockyards Co. [Iowa] 114 NW 1074. Allowance held reasonable. Id.

29. St. 1898, § 3186. Where defendant disclaimed but gave no release, he is not within statutory exception. Durbin v. Knox [Wis.] 112 NW 1094.

This topic treats of the grounds for the writ and the proceedings thereon. Topics dealing with the subject-matters respecting which it is invoked should be consulted as to matters of substantive right.[30]

§ 1. *Nature, function, and occasion of the remedy.* See 8 C. L. 1532—Quo warranto is a civil action to redress a public wrong or enforce a public right.[31] It is strictly a prerogative writ,[32] and it will be issued only in exceptional cases [33] where no other adequate relief is available.[34] Under the common law it was employed exclusively as a prerogative remedy to punish usurpations of franchises and its use as a remedy for private citizens was unknown,[35] but now it is made the vehicle for the assertion of both private and public rights,[36] but not being a personal action,[37] the writ is even now never demandable as a matter of right by a private relator.[38] More specifically the writ or information in the nature of a writ of quo warranto is in the nature of a writ of right by the state against one who claims or usurps any office, franchise, or liberty, inquiring by what authority he supports his claim in order to determine his right.[39] Quo warranto is the proper remedy where any person usurps, intrudes into, or unlawfully holds any public office [40] to which a partition of the sovereignty of the country either legislative, executive, or judicial attaches, and is exercised for the benefit of the public, [41] and which is not merely the function or employment of a deputy or servant held at the will or pleasure of others.[42] It is also the proper method of challenging the existence of an office,[43] ousting an illegal officer,[44] or otherwise trying title to an elective office.[45] Quo warranto is the proper remedy to question the right of both public and private corporations to exercise corporate functions,[46] and, except as limited by statute, may be brought against a

30. See Corporations, 9 C. L. 733; Officers and Public Employes, 10 C. L. 1043.

31. St. 1898, § 3466. State v. Norcross [Wis.] 112 NW 40. May be said to be civil in nature, though still borrowing and using certain forms and punishments peculiar to criminal law. State v. Taylor, 208 Mo. 442, 106 SW 1023. Civil action to try civil right. State v. Matthews [Ala.] 45 S 307.

32, 33. State v. Nohle [N. D.] 112 NW 141.

34. Refused where statutory relief by injunction is provided to prevent interholding of stock in corporations under St. 1906, p. 846, c. 372. Malone v. New York, etc., R. Co. [Mass.] 83 NE 408.

35. People v. Healey, 230 Ill. 280, 82 NE 599.

36. People v. Healey, 230 Ill. 280, 82 NE 599. Allowed at instance of private relator to question right of officers of corporation to such offices. Commonwealth v. Straus, 32 Pa. Super. Ct. 389.

37. Service need not be made within state. Anderson v. Myers [N. J. Law] 67 A 1036.

38. State v. Burr [N. D.] 113 NW 705; Commonwealth v. Straus, 32 Pa. Super. Ct. 389; State v. Norcross [Wis.] 112 NW 40.

39. Greenough v. Lucey [R. I.] 66 A 300.

40. Code Civ. Proc. § 653, Gen. St. 1901, § 5149. Baughman v. Nation [Kan.] 92 P 548. Lies for usurping any public office, however created. Greenough v. Lucey [R. I.] 66 A 800. Proper method of determining disputed questions of title to public office. Matney v. King [Okl.] 93 P 737. Where number of members on township board constituting municipal corporation was increased before census authorizing such increase was legally promulgated, only quo warranto and not certiorari lies. Buck v. Douglass [N. J. Law] 65 A 848. To try right to hold office of supervisor of assessments. State v. Samuelson, 131 Wis. 499, 111 NW 712. To try title to office of superintendent of poor farm. Sanders v. Belue [S. C.] 58 SE 762. To determine right of clerk of penitentiary trustees to hold office over into term of new trustees. Yerger v. State [Miss.] 45 S 849.

41. Wootton v. Smith [N. C.] 59 SE 649. Clerk of board of trustees of penitentiary public officer under Code 1906, § 3598. Yerger v. State [Miss.] 45 S 849. Gen. Laws 1896, c. 263, § 1, amended by Court and Practice Act 1905, § 1160, providing that title to any office triable by quo warranto at common law may be questioned by petition in equity by supreme court, is not enlarged by § 2 of the Court and Practice Act so as to give authority to try title of democratic ward committeemen to office, since § 2 is limited by § 1160 of the same act. Greenough v. Lucey [R. I.] 66 A 300.

42. Greenough v. Lucey [R. I.] 66 A 300. Does not lie to oust public administrator, a merely administrative office. Wootton v. Smith [N. C.] 59 SE 649.

43. State v. Samuelson, 131 Wis. 499, 111 NW 712. Where respondent based right to exercise office of county treasurer on unconstitutional statute. Hall v. Tarver, 128 Ga. 410, 57 SE 720. To prevent trustees of alleged illegal municipal corporation from acting as such. Beaumont v. Samson, 5 Cal. App. 491, 90 P 839.

44. Magner v. Yore [N. J. Law] 66 A 948.

45. Action seeking to contest election and try defendant's title to office held to be action of quo warranto, regardless of suggestions in prayer attemping to invoke peculiar equitable remedies. State v. Raisler [Wis.] 114 NW 118.

46. To annul proceedings declaring terri-

corporation which has abused or misused its corporate franchise,[47] or has usurped a franchise not granted to it[48] with such injurious consequences to the public as to justify a forfeiture of its charter.[49] The remedy has also been extended to challenge intrusion into corporate office.[50]

Quo warranto is also the proper method of challenging the validity of a dramshop license,[51] the validity of a street railway charter,[52] to oust a telephone company from exercising a franchise attempted to be conferred upon it by an invalid ordinance,[53] and for presenting the question of law whether there was a right to determine the license, and the question of fact whether there was a breach of any condition of the ordinance,[54] and in Wisconsin it is the only statutory method of contesting an election.[55]

There are, however, cases of this sort in which quo warranto will not lie. Thus it cannot be brought to oust one holding an election certificate, since he is not a usurper,[56] nor can one appointed to a lawful office carrying with it by the words of the act creating it no constitutionally forbidden powers be ousted because subsequent legislation has conferred such powers upon him.[57] As a general rule, subject to some exceptions [58] it does not lie where the attorney general desires only a judgment restraining a corporation from exercising powers ultra vires,[59] and not being a writ of correction or review, it will not issue to review error of judgment by board of arbitrators settling controversies under state school laws.[60] Laches may bar one's right to quo warranto.[61]

tory to be duly incorporated as municipal corporation. Beaumont v. Samson, 5 Cal. App. 491, 90 P 839. To attack validity of incorporation of town. State v. Bellflower [Mo. App.] 108 SW 117. Legality of body constituting municipal corporation can only be attacked by quo warranto. Buck v. Douglass [N. J. Law] 65 A 848.

47. Malone v. New York, etc., R. Co. [Mass.] 83 NE 408.

48. Malone v. New York, etc., R. Co. [Mass.] 83 NE 408. Legislative acts granting right to maintain dam of specified height in stream under certain conditions as to navigation and rights of riparian owners held sufficiently in nature of franchise to come under St. 1898, § 3466, authorizing issuance of writ of quo warranto. State v. Norcross [Wis.] 112 NW 40.

49. Malone v. New York, etc., R. Co. [Mass.] 83 NE 408.

50. To question authority of respondents to office and privileges of trustees of cemetery association. Hankins v. Newell [N. J. Law] 66 A 929. Since § 8, Act April 29, 1874, P. L. 73, providing for setting aside invalid election of corporation officers, did not repeal act of June 14, 1836, providing for writ quo warranto to question not validity of election but right of officers to exercise office, it is error to require action to question title to corporate office to be brought under later act. Commonwealth v. Straus, 32 Pa. Super. Ct. 389. Appropriate remedy when question arises concerning exercise of office in corporation created by authority of law and having chief place of business within county under § 2, Act June 14, 1836, P. L. 631. Id.

51. Hurd's Rev. St. 1905, c. 112, § 1. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

52. Andel v. Duquesne St. R. Co. [Pa.] 69 A 278. Bill in equity to enjoin street railway from laying railroad tracks in city street under alleged invalid franchise purported to be granted held in effect to be quo warranto to challenge validity of charter. Thirteenth & Fifteenth St. Pass. R. Co. v. Broad St. Rapid Transit St. R. Co. [Pa.] 67 A 901.

53. St. 1898, § 3466. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

54. Proceeding to oust telephone company from streets. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

55. St. 1898, § 3466 et seq. State v. Raisler [Wis.] 114 NW 118.

56. Civil Code Prac. § 480. Scholl v. Bell, 31 Ky. L. R. 335, 102 SW 248.

57. Where constitutional powers given dairy and food commissioner by creative act have been changed so as to add to his duties some which are in violation of art. 3, § 27, Const., reserving right to measure and inspect merchandise, etc., to county or municipality. Commonwealth v. Warren, 217 Pa. 163, 66 A 322.

58. Under Rev. Laws, c. 192, §§ 6-11, when attorney general does not intervene, corporation may be perpetually excluded from exercising franchise privileges not conferred by law which it is found to have been exercising. Malone v. New York, etc., R. Co. [Mass.] 83 NE 408.

59. Malone v. New York, etc., R. Co. [Mass.] 83 NE 408. Will not lie in action to prevent defendant from holding stock and bonds and guarantying bonds and dividends of other corporations in violation of St. 1906, p. 511, c. 463, pt. 2, § 5. Id.

60. State v. Job, 205 Mo. 1, 103 SW 493.

61. Two years' delay in questioning validity of act, under which county officials claim

§ 2. *Jurisdiction.*[See 8 C. L. 1585]—The exercise by the supreme court of its original jurisdiction rests in its discretion,[62] and the general rule is that the supreme court will assume original jurisdiction at the relation of private parties only in cases which present some special reason or some special or peculiar emergency, or where the interests of the state at large are shown to be such as to render it apparent that the interests of justice require its exercise,[63] after weighing all the facts and the attitude of the attorney general with reference to the particular case under consideration where he refuses to bring or consent to the bringing of the action.[64] In such a case while the refusal of the attorney general to apply for the writ or consent to the application by a private relator may have great weight with the supreme court, it is not necessarily controlling.[65]

§ 3. *Parties and the right to prosecute.*[See 8 C. L. 1585]—Proceedings in the nature of quo warranto on the relation of a private citizen are controlled by statute,[66] and under the statute the plaintiff in the action must be the real party in interest [67] and must have an interest in the subject of the action and the relief sought.[68] The statute provides for trying title to office either on information filed by the prosecuting attorney [69] or any other person on his own relation whenever he claims an interest therein,[70] and does not attack the existence of the office [71] when the attorney general refuses to act,[72] or in Wisconsin the office usurped pertains to a county.[73] The inter-

to act, fatal. State v. Nohle [N. D.] 112 NW 141.

62. State v. Burr [N. D.] 113 NW 705; State v. Nohle [N. D.] 112 NW 141.

63. Refused at instance of private relator questioning right of county officials to act under alleged unconstitutional act creating comity where he shows no greater interest than other residents and property owners and failed to invoke jurisdiction of district court properly having jurisdiction in such cases. State v. Nohle [N. D.] 112 NW 141. Original jurisdiction assumed in case of illegally appointed judge threatening to assume jurisdiction over cases in which relator is interested. State v. Burr [N. D.] 113 NW 705.

64. State v. Burr [N. D.] 113 NW 705.

65. Not controlling where judge illegally appointed threatens to assume jurisdiction of cases in which his acts in consequence of his illegal appointment would be null and void. State v. Burr [N. D.] 113 NW 705. Fact that attorney general indorsed consent to invoking original jurisdiction does not change rule. State v. Nohle [N. D.] 112 NW 141.

66. State v. Job, 205 Mo. 1, 103 SW 493. Par. 1, § 2, Act June 14, 1836 (P. L. 623), applying to township officers and permitting quo warranto only by attorney general, does not affect board of managers of poor of township, not being township officers. Commonwealth v. Bowditch, 217 Pa. 527, 66 A 867.

67. Code Civ. Proc. §§ 26, 35, Gen. St. 1901, §§ 4454, 4463. Baughman v. Nation [Kan.] 92 P 548. In action in quo warranto in name of state to disorganize municipality for purpose of escaping payment of municipal taxes, state has no interest and is not proper party. State v. Shufford [Kan.] 94 P 137.

68. Insufficient where plaintiff's only interest aside from that of citizen and tax payer is that defendant holds separate and distinct office which results in diminishing fees of plaintiff's office. Baughman v. Nation [Kan.] 92 P 548.

69. Burns' Ann. St. 1901, § 1146. State v. Bell [Ind.] 82 NE 69.

70. State v. Bell [Ind.] 82 NE 69. Persons claiming illegal removal from school board have sufficient interest. People v. Healy, 231 Ill. 629, 83 NE 453. Duly elected managers of poor in township as members of board of managers have sufficient interest to sustain quo warranto to determine whether a claimant of right to sit with them as fellow managers has right to do so. Commonwealth v. Bowditch, 217 Pa. 527, 66 A 867. Private citizen claiming to have been rightfully elected senator of district, office now being occupied by respondent, has no such interest as entitles him to maintain writ quo warranto, senate being ultimate judge of election contests. Commonwealth v. Crow, 218 Pa. 234, 67 A 355.

71. Decker v. Daudt [N. J. Err. & App.] 67 A 375. Information which does not attack existence of office but only right to hold it, need not be brought on information filed by attorney general but may be filed on relation of private citizen in his own name. Id.

72. Fact that attorney general associated himself as counsel for defendant equivalent to refusal, though no demand on him was made under St. 1898, § 3466. State v. Samuelson, 131 Wis. 499, 111 NW 712. Where attorney general refuses to act. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

73. Office of supervisor of assessment of county is county office within statute 1898, § 3466, permitting private person to institute proceedings in his own name. State v. Samuelson, 131 Wis. 499, 111 NW 712.

74. Person receiving next highest number of votes cast for candidate at election has no such interest as entitles him to question right of person securing greater number of

est claimed by one seeking to try title to office by quo warranto must be shown to be such as will in the eye of the law give him a standing in court to maintain the action,[74] and one having no interest in an office held by defendant different from other members of the general public must have the maintenance of the action to some one authorized to appear for and represent the general public.[75] The attorney general only may attack the validity of the incorporation of a town,[76] or a street railway charter,[77] but in some cases a private person may be competent to question an alleged usurpation provided he has some interest in ending it.[78]

The statutory requirement as to parties must be followed.[79] If the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation to oust it from the use of the usurped power,[80] but where it is claimed that corporate powers are being usurped by a body which has no corporate existence, the action must be against the individuals who are usurping corporate rights.[81] The attorney general is a proper party to a suit to question title to office only when the office is a public office.[82] In Massachusets the statute does not limit the authority of the attorney general to proceed independently of action by the railroad commissioners in any case where the interests of the public seem to him to require it.[83]

Leave to file an information. See 8 C. L. 1586—A proceeding in the nature of quo warranto at the relation of a private citizen can only be filed by leave of court.[84] The petition for such leave to file an information in the nature of quo warranto must be verified,[85] and the affidavits accompanying the petition must be made by persons knowing the facts and must be full and positive.[86] In the absence of statutory requirement, no notice need be given the defendant of an application for leave to file an information.[87] It is also necessary in the absence of a statute conferring such authority that a private person secure the interposition of the proper state official before proceeding in his own name.[88] In such cases the proper practice is to pre-

votes for office even though he be ineligible. State v. Bell [Ind.] 82 NE 69.

75. Minority candidate has no such interest as entitles him to question eligibility of majority candidate. Hudson v. Conklin [Kan.] 93 P 585. Refused at instance of private relator who has no greater interest than other residents and property owners. State v. Nohle [N. D.] 112 NW 141.

76. State v. Bellflower [Mo. App.] 108 SW 117.

77. Andel v. Duquesne St. R. Co. [Pa.] 69 A 278. Private individual cannot maintain bill in nature of quo warranto to test street railway's right to use public street. Thirteenth & Fifteenth St. Pass. R. Co. v. Broad St. Rapid Transit St. R. Co. [Pa.] 67 A 901.

78. Taxpayer in district affected has sufficient interest to institute proceedings to question constitutionality of law establishing office of supervisor of county assessment, under St. 1898, § 3466. State v. Samuelson, 131 Wis. 499, 111 NW 712. Taxpayer has sufficient interest if exercise of powers and franchise sought to be questioned may involve city in a pecuniary way. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

79. Louisville, etc., R. Co. v. State [Ala.] 46 S 296. Under Code Civ. Proc. §§ 1948, 1949, authorizing attorney general to maintain action on own information against person who usurps a public office and provides that complaint may set forth name of person rightfully entitled to office and facts showing his right thereto, and judgment be rendered to person entitled to office, such person must be made a party. People v. McClellan, 119 App. Div. 416, 104 NYS 447, rvg. 54 Misc. 130, 105 NYS 844.

80. In case questioning existence of street railway corporation. State v. Lincoln St. R. Co. [Neb.] 114 NW 422.

81. State v. Lincoln St. R. Co. [Neb.] 114 NW 422.

82. Attorney general cannot maintain action to oust democratic ward committeemen. Greenough v. Lucey [R. I.] 66 A 300.

83. St. 1906, p. 485, c. 463, pt. 1, § 8. Malone v. New York, etc., R. Co. [Mass.] 83 NE 408.

84. In proceeding to invalidate proceedings consolidating school districts. State v. Job, 205 Mo. 1, 103 SW 493.

85. King v. Southern R. Co., 128 Ga. 285, 57 SE 507.

86. Affidavits as to unlawful usurpation of office in corporation held sufficient. People v. Healy, 230 Ill. 280, 82 NE 599.

87. McWilliams v. Jacobs, 128 Ga. 375, 57 SE 509.

88. Rev. St. 1899, § 4457 (Ann. St. 1906, p. 2442). State v. Taylor, 208 Mo. 442, 106 SW 1023. The statute requires private person to bring quo warranto in name of state in certain cases to obtain consent of attorney general. Under St. 1898, § 3466, applying to usurpation of county office, private person

sent to the attorney general or the state's attorney for his signature a petition addressed to the court for leave to file the information.[89] If the papers presented are in proper form and the evidence presented establishes a legal right in the petitioner, it is the duty of the attorney general or the state's attorney to affix his signature thereto.[90] If he refused to affix his name to the petition in a proper case, he can be compelled to do so by mandamus,[91] but where the proceedings are brought by the people and invoke no individual rights, the discretion of the state's attorney as to the institution of the proceedings is absolute.[92] The fact that the proper officer has exercised his discretion in permitting the bringing of quo warranto proceedings is evidenced by his signature to an information in due form and its exhibition to the court,[93] which signature need not be on oath or authenticated by jurat.[94] The state's attorney can be deprived of the right to exercise this discretion only by statute,[95] but after the information is exhibited, filed, and the proceeding commenced, the relator thenceforward shares with him the control and disposition of the litigation,[96] and the proceeding is thereafter in the control of the court.[97] The refusal of the attorney general to give his consent to the action will only be reviewed by the court in exceptional cases and within the discretion of the court.[98]

Process.—In Pennsylvania a statute providing for service of a copy of the information and the rule to plead,[99] and providing that service on nonresident defendant either personally or by mail is sufficient, is valid.[1]

§ 4. *The information or complaint.*[See 8 C. L. 1587]—This proceeding was originally commenced by the issuance of a writ against the respondents inquiring by what right they claim or usurp powers and franchises which can emanate only from sovereign authority.[2] The practice was later changed, and under statute the proceeding is commenced by the filing of an information in the nature of a writ of quo warranto.[3] Hence, except as changed by statute, pleadings in the nature of quo warranto should correspond to pleadings at common law where such a course will not prevent the formation of proper issues.[4] The office of an information in the

cannot bring action against jury commissioners under St. 1898, § 2533a, without first applying to attorney general. State v. Anson [Wis.] 112 NW 475. Statute confers power to determine whether quo warranto proceeding shall be instituted upon discretion of attorney general and prosecuting attorneys. State v. Taylor, 208 Mo. 442, 106 SW 1023. Words "shall exhibit" as used in Rev. St. 1899, § 4457 (Ann. St. 1906, p. 2442), are not mandatory so as to deprive officers of their discretion. Id. Will not be issued without consent of attorney general upon information of private party having no interest in question distinct from public to try the right of incumbent of public office to hold same. State v. McDonald [Minn.] 112 NW 728.

89. People v. Healey, 230 Ill. 280, 82 NE 599.

90. People v. Healey, 230 Ill. 280, 82 NE 599. Cannot cause parties to appear before him and hear them on proposition whether he should sign and file petition. Id. State's attorney has no arbitrary and uncontrolled discretion to file or refuse to file information in nature of quo warranto upon application of individual having personal right enforcible by that proceeding. People v. Healy, 231 Ill. 629, 83 NE 453.

91. People v. Healey, 230 Ill. 280, 82 NE 599; People v. Healy, 231 Ill. 629, 83 NE 453.

92. People v. Healey, 230 Ill. 280, 82 NE 599.

93, 94. State v. Taylor, 208 Mo. 442, 106 SW 1023.

95. Does not lose right by caprice or inattention or nonaction of attorney general. State v. Taylor, 208 Mo. 442, 106 SW 1023. Attorney general or prosecuting attorney cannot delegate authority by giving others right to use name. Id.

96. Attorney general cannot dismiss or discontinue without relator's consent. State v. Taylor, 208 Mo. 442, 106 SW 1023.

97. Where attorney improperly permits use of name by others without himself signing information, court alone can act. State v. Taylor, 208 Mo. 442, 106 SW 1023.

98. Right to institute proceedings to determine legality of county organization and right of respondents to office thereunder refused. State v. McDonald [Minn.] 112 NW 278.

99. Gen. St. p. 2634, § 6. Anderson v. Myers [N. J. Law] 67 A 1036.

1. Anderson v. Myers [N. J. Law] 67 A 1036.

2, 3. People v. Healey, 230 Ill. 280, 82 NE 599.

4. In proceeding to oust corporation from exercising its franchise. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829. Pleading not governed by rules of pleading

nature of quo warranto is simply to call upon the defendant in general terms to show by what warrant or charter the privilege claimed is held and exercised.[5] Hence, the allegations of usurpation may be of a general[6] and informal character,[7] the pleading being sufficient if establishing a prima facie charge.[8] However, in those states where the statutory system in respect to quo warranto has supplanted the common law, the statutory requirements as to procedure must be followed.[9] In such states the information or complaint is the first step in the pleadings,[10] and it must aver the act or omission complained of clearly and concisely,[11] and must contain the essential elements prescribed for the complaint by the statute.[12] While it is not objectionable to rely upon two or more grounds of usurpation in one information,[13] the usual rule permitting joinder only of such causes of action as affect all parties to the action applies,[14] nor should incompatible causes of action be joined in the complaint,[15] and each ground should be stated in a separate count or paragraph.[16]

stated in Code of Civil Procedure. State v. Missouri Pac. R. Co., 206 Mo. 28, 103 SW 936.

5. Not office to tender issue of fact. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829. Information in nature of quo warranto not of character of ordinary petition in law or equity, but official call on corporation or individual to show by what authority the particular franchise is assumed and exercised. State v. Missouri Pac. R. Co., 206 Mo. 28, 103 SW 936. Sufficient if information avers that operation of railroad was and is without authority of law. Louisville, etc., R. Co. v. State [Ala.] 45 S 296. Not incumbent on relator, in complaint to question right of foreign corporation to operate in Alabama, to allege that defendant was without charter power so to do and had not complied with Alabama foreign corporation laws. Id.

6. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230; People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829. Amendment striking from information details of usurpation of mayor's office does not affect sufficiency. Frost v. State [Ala.] 45 S 203.

7. Mere informality not ground for dismissal. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

8. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

9. Ch. 94, Code 1896. §§ 3417-3439. Louisville, etc., R. Co. v. State [Ala.] 45 S 296. Since statute provides that where action is brought by attorney general on relation or information of person having interest in the question, the complaint must allege and title show that action is brought on relation of that person. Code Civ. Proc. § 1986. People v. McClellan, 119 App. Div. 416, 104 NYS 447, rvg. 54 Misc. 130, 105 NYS 844. The court must presume where attorney general brought action in own name and motion without relation of opposing candidate that latter made no claim to office and preferred no complaint to attorney general. Id.

10. Information first step in pleading and not mere information to court. Code 1896, § 3428. Louisville, etc., R. Co. v. State [Ala.] 45 S 296.

11. Under § 3428, Code 1896, in action to oust alleged ineligible mayor. State v. Matthews [Ala.] 45 S 307. Information indefinite and uncertain as to what franchise defendant is usurping, of what defendant is to be ousted, so that defendant is not clearly informed of matter to be put in issue objectionable under Code 1896, § 3428. Louisville, etc., R. Co. v. State [Ala.] 45 S 296.

12. Under § 3466, St. 1898, actual occupation and exercise of office essential, and mere allegation of intent to occupy and exercise insufficient. State v. Raisler [Wis.] 114 NW 118. Charge that for two years succeeding 1900 A D has kept up a continually recurring public wrong, claiming the right to do so under the franchise which he holds and which he is exercising for that purpose, states sufficient cause of action for purpose of ousting him from exercising liberty or franchise wrongfully claimed under § 3466, St. 1898. State v. Norcross [Wis.] 112 NW 40. In complaint attacking validity of election and title to office predicated thereon, complaint failing to state number of votes cast for each candidate, names of alleged illegal voters which were canvassed for defendant, and in what illegality consisted, election district in which votes were cast, insufficient under § 3466, St. 1898, even though defendant be in occupation of the office. State v. Raisler [Wis.] 114 NW 118. Complaint that city granted and defendant now holds and exercises powers granted by city, that city had no power or authority to make grants, that defendant has no right to hold and exercise power granted, and that attorney general has refused to bring action, states sufficient cause of action. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

13. Louisville, etc., R. Co. v. State [Ala.] 45 S 296.

14. Improper under Code Civ. Proc. § 83, Gen. St. 1905, § 4965, to join county treasurer and county clerk alone interested in collecting taxes as defendants in action to disorganize municipality and to join other parties alone interested in disorganization of municipality as defendants in action to restrain collection of taxes. State v. Shufford [Kan.] 94 P 137.

15. Improper where state is party to join action to disorganize municipality to action for injunction restraining municipality from collecting taxes on property of relator in municipal limits. State v. Shufford [Kan.] 94 P 137.

16. Under Code 1896, § 3428, shifting from one ground to another in same count and stating several acts of usurpation in alterna-

In New York an action has been substituted for the ancient proceeding by writ, a complaint taking the place of the information.[17]

§ 5. *Answers and other pleadings and motions to quash and dismiss.* See 8 C. L. 1587—When the information is in general terms, tendering no issue of fact, it cannot be traversed,[18] but the defendant must answer by disclaimer or justification,[19] and in such a case a pleading establishing a prima facie answer is sufficient.[20] If the defendant justifies, the justification must state specifically the grounds of defense,[21] and must show not only that he once had the right to use and enjoy the license or privilege but that he still has it.[22] The plea, however, need not anticipate matter proper for replication,[23] and a traverse upon a traverse is not permissible.[24] The defendant is not limited to a single defense but numerous defenses may be set up if they are not inconsistent,[25] but defenses of a different character require different pleas.[26] A demurrer lies to a complaint which fails to comply with statutory requirements,[27] and admits the truth of all that is stated therein.[28]

New matter may be set up by replication showing that the rights claimed in the plea have termininated,[29] or are invalid or inapplicable,[30] and the ineligibility of one

tive or disjunctive, so that it is impossible to say which averment relied upon, objectionable. Louisville, etc., R. Co. v. State [Ala.] 45 S 296.

17. People v. McClellan, 119 App. Div. 416, 104 NYS 447.

18. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829; State v. Missouri Pac. R. Co., 206 Mo. 28, 103 SW 936.

19. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829; State v. Missouri Pac. R. Co., 206 Mo. 28, 103 SW 936.

20. Pleas showing prima facie right to license sought to be questioned sufficient. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230. Under Hurd's Rev. St. 1905, p. 1532, c. 100, pleas to information questioning validity of dramshop license need not state that they set forth all the ordinances in force governing the issuing of such licenses. Id. Pleas to information to test validity of dramshop license issued in certain portion of city setting out charter and ordinance provisions authorizing granting of dramshop licenses generally and defendant's compliance therewith is not fatally defective for failure to show compliance with provisions of regulations in that particular locality, the information not indicating conditions to be different there than elsewhere. Id. Plea failing to show legal removal of relator, under P. L. 1899, p. 26, or vacancy in office at time defendant was appointed, insufficient to show title to office in defendant. Magner v. Yore [N. J. Law] 66 A 948.

21. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

22. Continued existence of right essential to enjoyment of license or privilege claimed. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829. Plea setting out title and right and alleging that it was by virtue of that title and right that it exercised and enjoyed the license and privilege claimed, and following facts with absque hoc of general charge of information, sufficient. Id. Plea setting up granting of license to occupy streets on certain conditions, and failing to show performance of the conditions, bad. Id. Question whether foreign corporation may operate railroad in Alabama without express charter power to do so granted by Alabama legislature and original charter power to do act complained of, properly raised by answer where not raised by complaint. Louisville, etc., R. Co. v. State [Ala.] 45 S 296.

23. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

24. Replication to pleas to information in nature of quo warranto, to oust telephone company from exercising privilege of using city streets, concluding with traverse of traverse contained in pleas under absque hoc, bad. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

25. In proceeding to test validity of dramshop license. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

26. Plea in form of single plea in bar setting up title to office in defendant and praying that it be allowed and adjudged him cannot also be permitted to put title of relator in issue even though it may be competent to do so indirectly. Magner v. Yore [N. J. Law] 66 A 948. Where defendant, under P. L. 1903, p. 379, in his plea relied upon his own title to office and such plea was ineffective to sustain his title, he cannot afterwards seek to sustain plea as an attack upon the right of the relator to proceed in his own name without leave of court under P. L. 1903, p. 375. Id.

27. State v. Matthews [Ala.] 45 S 307; Louisville, etc., R. Co. v. State [Ala.] 45 S 296.

28. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

29. Where plea to information in nature of quo warranto to oust telephone company from use of streets alleges facts which would constitute a contract between the parties permitting the use of streets, etc., the people by way of replication may set up new matter showing that contract right had terminated. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829. Termination and forfeiture of license to use streets need not be set up by amending information but may be set up by reply. Id.

to hold office where his right to do so is questioned [31] may be so asserted. Replications setting out repeal of ordinance without showing any breach of its conditions or right to repeal it,[32] or setting up alleged implied conditions not contained in the reaffirming the usurpation.[34] The pleadings may be amended as pleadings in other reaffirming the usurpation.[34] The pleadings may be amended as pleadings in other civil cases,[35] except that in Missouri proceedings instituted ex officio by the attorney general without leave, being governed by the common law, permit of no amendment.[36] The statute of New Jersey provides that, in quo warranto proceedings to try defendant's title to an office, the defendant may also put the relator's title to the same office in issue.[37]

§ 6. *Trial and judgment.* See 8 C. L. 1588—The court will try the true merits of the controversy, namely, whether the incumbent has been legally elected, and not merely the question whether he has by the various other tribunals having to do with an election been decided to be so elected,[38] and the statute authorizes the court to adjudge the relator to be entitled to the office whose title is sought to be tried by the proceedings,[39] where the pleadings are properly framed for that purpose,[40] but the rights of persons not parties cannot be adjudicated.[41]

In an action of quo warranto against a public officer, the only judgment which can be entered against him is ouster.[42] In quo warranto proceedings based on unlawful usurpation of franchise privileges not granted in the original franchise, judgment under the statute may only be of ouster of the excess unlawfully usurped.[43] A judgment in quo warranto proceedings is self-executing.[44] The Iowa statute also makes refusal to obey orders of the court in quo warranto proceedings contempt,[45] and provides that obedience to such judgment may be coerced by attachment as for contempt.[46] A former judgment of dismissal in quo warranto proceedings is no bar to a new action by different parties.[47] An information in the nature of quo war-

30. Where plea to information questioning validity of dramshop license issued in particular portion of city sets out general charter and ordinance provisions, fact that such ordinances and provisions do not apply to particular locality in question should be set out by replication to plea. People v. Heidelberg Garden Co., 233 Ill. 290, 84 NE 230.

31. Frost v. State [Ala.] 45 S 203.

32. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

33. City cannot impose new and added conditions not contained in ordinance and forfeit license for failure to comply with them. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

34. Where only issuable matter in pleas was traverse under absque hoc. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

35. State v. Job, 205 Mo. 1, 103 SW 493. Rev. St. 1899, § 675 (Ann. St. 1906, p. 691). State v. Missouri Pac. R. Co., 206 Mo. 28, 103 SW 936.

36. State v. Job, 205 Mo. 1, 103 SW 493.

37. P. L. 1903, p. 379. Magner v. Yore [N. J. Law] 66 A 948. Single plea in bar setting up defendant's title to the office insufficient to put relator's title in issue. Id.

38. State v. Raisler [Wis.] 114 NW 118.

39. P. L. 1903, p. 379, § 12. Decker v. Daudt [N. J. Err. & App.] 67 A 375.

40. Information charging that relator was duly appointed officer for term expiring on certain date and that he duly qualified and exercised the rights and privileges of the office, sufficient. Decker v. Daudt [N. J. Err. & App.] 67 A 375.

41. Under § 1949, Code Civ. Proc., providing that judgment may be given on the right of the party alleged to be entitled to the office, the word "party" means party to the action. People v. McClellan, 119 App. Div. 416, 104 NYS 447.

42. Commonwealth v. Warren, 217 Pa. 163, 66 A 322. Judgment of ouster proper against one holding office under unconstitutional statute. Hall v. Tarver, 128 Ga. 410, 57 SE 720.

43. St. 1898, § 3463. State v. Norcross [Wis.] 112 NW 40. Judgment of forfeiture refused where grantees of franchise to construct dam, though having complied with all its conditions, have abused or misused conditions by usurping powers in excess of those granted. Id.

44. State v. Cahill, 131 Iowa, 286, 108 NW 453.

45. Under Code, § 4335, continuance in office as subcontractor after judgment finding them guilty of usurpation and granting ouster is contempt. State v. Cahill, 131 Iowa, 286, 108 NW 453.

46. Code, § 3954. State v. Cahill, 131 Iowa, 286, 108 NW 453.

47. Dismissal of action against trustees of town on ground that town was not party, no bar to subsequent action against town and trustees. State v. Bellflower [Mo. App.] 108 SW 117.

ranto filed against a corporation in its corporate name admits the existence of the corporation.[48]

§ 7. *New trial and review.* See 8 C. L. 1589—A writ of error lies from the refusal of a judge of the superior court to grant leave to file an information in the nature of a writ of quo warranto.[49]

RACING.[50]

The scope of this topic is noted below.[51]

While the New York state racing commission is vested with discretion as to the grant of license,[52] such discretion must not be exercised in an arbitrary or unreasonable manner.[53]

RAILROADS.

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48. State v. Lincoln St. R. Co. [Neb.] 114 NW 422.

49. Civil Code 1895, § 4881. King v. Southern R. Co., 128 Ga. 285, 57 SE 507.

50. See 8 C. L. 1589.

51. **It includes** only public regulation of horse racing. **It excludes** betting on races (see Betting and Gaming, 9 C. L. 388), and rights of the public at race tracks (see Exhibitions and Shows, 9 C. L. 1344).

52. People v. State Racing Commission, 190 N. Y. 31, 82 NE 723, overruling on this point 120 App. Div. 484, 105 NYS 528.

53. The commission's refusal to grant a license because the legal racing season had been divided among other tracks in the vicinity of New York and the Saratoga Racing Associations, and that to grant an applicant any dates upon which to hold its meetings would interfere with racing on those tracks, was arbitrary and unreasonable. People v. State Racing Commission, 190 N. Y. 31, 82 NE 723; Id., 120 App. Div, 484, 105 NYS 528, which rvd. 103 NYS 955.

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K. Actions for Injuries, 1426. Pleadings, 1426. Burden of Proof, 1428. Evidence, 1430. Instructions, 1433. Double Damages and Attorney's Fees, 1438.
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§ 13. Actions by and Against Railroad Companies, 1439.
§ 14. Offenses Relating to Railroads, 1439.

The rights and duties of railroads as common carriers,[54] their liability to employes,[55] and matters common to all corporations,[56] are elsewhere treated.

§ 1. *Definitions and general nature of railroads.*[See 8 C. L. 1590]—Technically a railroad is any way or road on which rails are laid for the transportation of freight or passengers,[57] without regard to length or ownership of rolling stock.[58] The term includes all public [59] switching tracks and approaches to bridges maintained by the company.[60] A distinction, however, is generally made between a commercial railroad and a street railway,[61] and in determining the class of a particular road, reference must be had to its charter [62] and the statute under which it was organized.[63] The fact that a railroad charges toll for the use of its property does not change the character thereof.[64]

§ 2. *Franchises, licenses, permits, and the like.*[See 8 C. L. 1591]

§ 3. *Route, location, termini, and stations.*[See 8 C. L. 1592]—The railroad first completing the location of its route [65] has priority, which will be protected from en-

54. See Carriers, 9 C. L. 466.

55. See Master and Servant, 10 C. L. 691.

56. See Corporations, 9 C. L. 733.

57. Mode of construction and chartered use, and not motive power, determines. McCleary v. Babcock [Ind.] 82 NE 453. Lumber company operating tramway for private use held subject to rules governing ordinary railway companies, and liable for wantonly and unnecessarily blowing whistle to frighten horse. Stewart v. Cary Lumber Co. [N. C.] 59 SE 545. Act May 12, 1869 (Laws 1869, p. 92, c. 44), was entitled an act to authorize aid in construction of "railroads" by counties and towns. Act March 9, 1903 (Acts 1903, p. 233, c. 134), provides that word "railroad" occurring in Act 1869, or in any act amendatory or supplemental thereof, shall include street railroads, etc. Held that Act of 1869 was not limited to steam railroads, and hence Act 1903 was not objectionable as not germane to title. McCleary v. Babcock [Ind.] 82 NE 453.

58. State v. Wiggins Ferry Co., 208 Mo. 622, 106 SW 1005. Ferry company operating tracks over which steam cars are drawn to and from ferry, same being used for storage, for loading and unloading, and for regular traffic and switching purposes, held operating railroad within Rev. St. 1899, c. 149, art. 8 (Ann. St. 1906, pp. 4293-4315), providing for assessment and taxation of railroads. Id.

59. In determining whether switch is a public one or merely a private spur track, question to be ascertained is not who uses it, but who has right to use it. Richards v. Ferguson Implement Co., 125 Mo. App. 428, 102 SW 606. Where railroad at plaintiff's request constructed switch along rear of his lots for his private use, and thereafter extended it so as to accommodate adjoining owners held that switch was private way, and plaintiff could charge rental for privilege of using same. Id.

60. Approach to bridge maintained by railroad company, directly and continually used in operation of its lines, is used for purpose of operating such railroad. State Board of Equalizatoin v. People, 229 Ill. 430, 82 NE 324.

61. A railroad corporation cannot perform functions of city railway. Gillette v. Aurora R. Co., 228 Ill. 261, 81 NE 1005. Railroads carrying general freight and passenger traffic between two towns are commercial railroads. City of Aurora v. Elgin & A. S. Trac. Co., 227 Ill. 485, 81 NE 544, rvg. 128 Ill. App. 77. The fact that railroad corporation is obliged to stop cars on street corners and is not permitted to carry freight does not make it any less a railroad. Gillette v. Aurora R. Co., 228 Ill. 261, 81 NE 1005. Road incorporated under general street railway laws, which laid its tracks in highways and streets, used electricity to propel cars, and stopped at all street crossings, etc., held street railway. Michigan Cent. R. Co. v. Hammond, etc., R. Co., [Ind. App.] 83 NE 650.

62. And not to relation it may have established between itself and city. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457. Shreveport Traction Company held commercial railroad, and not street railroad. Id. And declaration that it was resultant of a consolidation under Act 100 of 1898, providing for consolidation of street railroads, held not to change character of roads into street railroad. Id.

63. Statute controls statement in its charter. David Bradley Mfg. Co. v. Chicago, & Co. Trac. Co., 229 Ill. 170, 82 NE 210.

64. Charging of toll for use of approach to bridge held not to put it to a use for other than railroad purposes so as to take it from exemption from taxation. State Board of Equalization v. People, 229 Ill. 430, 82 NE 324.

65. Where survey was completed, money appropriated for purchase of right of way, and franchises and option contracts pro-

croachment by other roads provided it proceeds with reasonable diligence to construct the same.[66]

Stations.—While a railroad cannot by private contract impair its capacity to discharge its duty to the public,[67] a contract for the location of a station or side tracks at a particular place,[68] or to maintain same,[69] is not per se void,[70] and the party seeking to escape therefrom has the burden of establishing by satisfactory evidence that it is so in conflict with the duties owed to the public as to prevent a discharge thereof.[71] Such contracts where valid may be enforced in equity where the remedy at law is inadequate,[72] due regard always being had to the rights of the public.[73] Where reasonably necessary,[74] the legislature may require the location of a station at a particular place and enforce the same by a criminal prosecution.[75]

Alterations, changes, and discontinuances. See 6 C. L. 1593—Where a railroad, given power to locate its route between designated termini, has done so, such route cannot be changed without legislative authority,[76] and any private person suffering special injury may enjoin an unlawful removal[77] unless the right has been lost by laches.[78]

cured for eight of the nine miles of the line, held that location of route was complete (In re Milwaukee Light, Heat & Trac. Co. [Wis.] 112 NW 663), and it was immaterial that prior surveys by other parties were adopted (Id.) and that only option contracts were held (Id.).

66. Will not protect survey and location where nothing has been done for seven years and there is no purpose of constructing road in near future. Columbia Valley R. Co. v. Portland, etc., R. Co. [Wash.] 94 P 918.

67. Whether private contract obligation conflicts with duty owed to public cannot be arbitrarily determined by railroad. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

68. Allegations of negotiations and of acts of parties thereafter held to show contract to locate and maintain station at particular place in consideration of plaintiff's purchasing nearby property. Atlanta, etc., R. Co. v. Camp [Ga.] 60 SE 177. Where railroad accepts deed conveying right of way and uses land so conveyed, it is bound by the terms thereof though not signed by it. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

69. Contract "to maintain the spur track, depot and platform * * * during what is known as 'winter tourist season,' which consideration is binding upon the party of the second part, its successors and assigns," considered in light of surrounding circumstances, held to indicate intention to remain binding so long as conditions remained substantially same between parties and their privies. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

70. Enforcible so long as it does not interfere with superior rights of public. Atlanta, etc., R. Co. v. Camp [Ga.] 60 SE 177. While railroad is not bound by private contract which renders it incapable of performing its duties to public, yet where contract is not foreign to lawful purposes of corporation, but is fairly within its authorized powers and purposes, and not forbidden by statute, it is valid. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. Where owner of hotel conveyed land for right of way for main line, spur track, and depot, in consideration that railroad maintain spur track and depot near hotel, which would be peculiarly beneficial to his business, equity will enforce same unless it will directly, materially, and injuriously affect public rights. Id.

71. Atlanta, etc., R. Co. v. Camp [Ga.] 60 SE 177.

72. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

73. Where, in consideration of conveyance of land for main track, railroad agrees to maintain spur track, depot, etc., grantor cannot enjoin use of main line upon breach of contract to maintain spur, since rights of public control. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

74. While courts may review reasonableness and public necessity for special act requiring railroad to construct and maintain station at particular place, determination of legislature is conclusive unless its power has been arbitrarily exercised. Louisiana, etc., R. Co. v. State [Ark.] 106 SW 960. Special plea to indictment raising question of reasonableness and public necessity for requirement should be treated as preliminary question raising question of validity of statute. Id. Question for court, on all information it can obtain. Id. Evidence that existing stations are amply sufficient to serve the community and that station could be maintained only at a loss should have been received under special plea going to validity of statute as unreasonable. Id.

75. Act of 1905 (Laws 1905, p. 265), requiring railroad to maintain station at certain place, expressly providing that noncompliance shall subject it to indictment and fine, proceeding by indictment held proper. Louisiana, etc., R. Co. v. State [Ark.] 106 SW 960. Where indictment was returned against L. & A. "Railroad" company under act of 1905, requiring L. & A. "Railroad" company to maintain station at certain place, court properly ordered, under Kirby's Dig. § 2232, that proceedings be in name of L. & A. "Railway" company, it appearing that it was only line through the place. Id.

76. Atlantic, etc., R. Co. v. Kirkland, 129 Ga. 552, 59 SE 220.

77. Atlantic, etc., R. Co. v. Kirkland, 129 Ga. 552, 59 SE 220. Where petition stated facts constituting ground for injunction,

In the absence of charter limitations, contractual obligations, or statutory enactments, a railroad may discontinue a side track [79] upon reasonable notice,[80] but is liable for resulting injury where no notice is given.[81]

§ 4. *Rights of way and other lands, and the acquirement thereof.* See 8 C. L. 1594—The term "right of way" ordinarily means the entire strip condemned for railroad purposes.[82] While a right of way cannot be acquired by dedication,[83] it may be acquired by purchase.[84] Whether a railroad has a fee or only an easement depends upon the statute or deed under which the right of way is acquired,[85] and one having only an easement cannot excavate sand therefrom for sale.[86] The right to construct laterals depends upon the road's charter powers.[87]

Grants in highways and streets. See 8 C. L. 1595—The power to occupy highways and streets must be derived directly or indirectly from legislative grant,[88] and ordinarily the right to pass along or over a highway or street does not include the right to the exclusive use of any part thereof,[89] although it has been held to authorize the construction of a switch.[90] General power to construct a line carries the right to cross highways and streets.[91] A railroad cannot acquire right to the exclusive use of a street by any length of user.[92] Except in the exercise of the power of eminent do-

held error to strike out so much of answer specifically denying allegations of petitions. Id.

78. Held error to strike out defense of laches. Atlantic, etc., R. Co. v. Kirkland, 129 Ga. 552, 59 SE 220.

79. Durden v. Southern R. Co., 2 Ga. App. 66, 58 SE 299.

80. What is reasonable notice is question for jury, and in determining it rights of shippers and carrier must be considered. Durden v. Southern R. Co., 2 Ga. App. 66, 58 SE 299.

81. Shipper of wood held entitled to recover for loss to wood cut in bona fide anticipation of shipment, but not for wood standing, although he purchased because of shipping facilities. Durden v. Southern R. Co., 2 Ga. App. 66, 58 SE 299.

82. St. Louis, etc., R. Co. v. Wabash R. Co. [C. C. A.] 152 F 849. Decree that Colorado company should have joint use of the "right of way, tracks, switches, side tracks, turnouts, turntables of Wabash Railroad Company," etc., held to give right to joint use of entire strip and all the facilities thereon (Id.), but not facilities outside such strip as it then existed (Id.). Held that no change of conditions are shown to justify court of equity to refuse to enforce such decree. Id.

83. Where one street on dedicatory plat was marked "Railroad street," held that railroad did not acquire same for railroad purposes to exclusion of public. Pittsburg, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934.

84. See post, Private Grants.

85. Agreement for improvement of street, confirmed by Laws 1855, p. 854, c. 475, giving foot strip forever for tracks and turnouts, held to give perpetual easement for right of way, and not a fee. In re Long Island R. Co., 189 N. Y. 428, 82 NE 443. Under Railroad Incorporation Act, § 19, par. 2 (Hurd's Rev. St. 1905, c. 114, § 20, par. 2), conferring on railroads power to take voluntary grants of land for railroad purposes and to convey same when no longer required therefor, held that where, after commencement of condemnation, owner conveyed by absolute warranty deed and proceedings were dismissed, railroad acquired fee, notwithstanding Const. art. 2, § 13, providing that where land is taken without consent of owner fee shall remain in him. Spierling v. Ohl, 232 Ill. 581, 83 NE 1068.

86. Nashville, etc., R. v. Karthaus [Ala.] [Ala.] 43 S 791.

87. Power given by Acts 1826, c. 123, § 14, to Baltimore & Ohio R. Co. to construct laterals, is not limited to branches which will act as feeders to port of Baltimore, but includes connecting line to carry through freight around such city (Baltimore, etc., R. Co. v. Waters, 105 Md. 396, 66 A 685), and Act 1906, p. 838, c. 457, prohibiting construction of steam railroads within certain territory in so far as it applies to Baltimore & Ohio R. Co., is unconstitutional as impairing obligations of contract (Id.), interest of the public generally not justifying it as a police regulation (Id.).

88. Must be given in plain words or by necessary implication. Riley v. Pennsylvania R. Co., 32 Pa. Super. Ct. 579.

89. Taber v. New York, etc., R. Co. [R. I.] 67 A 9. Authority by legislature to railroad to widen, construct and use its old roadbed in city of Providence, and to extend it across certain streets, held to give no exclusive right. Id.

90. Beaver Borough v. Beaver Valley R. Co., 217 Pa. 280, 66 A 520.

91. Board of County Com'rs of Cuyahoga County v. Pennsylvania R. Co., 6 Ohio N. P. (N. S.) 141. Right granted by Act April 12, 1859 (P. L. 1860, 857), and Act March 14, 1865 (P. L. 444), to Plymouth & Wilkes-Barre Railroad & Bridge Co. to construct laterals, held to authorize its successor to construct same through streets without municipal consent of city subsequently incorporated within territory through which it was authorized to build. Northern Coal & Iron Co. v. Wilkes-Barre, 218 Pa. 269, 67 A 352.

92. Concurrent user. Pittsburg, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934.

main, the legislature in Ohio has no power to authorize the construction of an elevated road in the street.[93]

While in the absence of statute a municipality has no power to authorize the construction of a railroad in the street,[94] the right to so occupy has been made to depend in most states upon municipal consent,[95] by the proper authorities,[96] and the occupation must be within the consent given,[97] and all conditions complied with if not waived.[98] In Pennsylvania municipal consent is necessary to the elevation or depression of an existing track in a street.[99] Likewise the right to occupy [1] or cross [2] a highway is usually [3] made dependent upon the consent of the proper highway officials. A private person suffering special damages from an unlawful occupation of a street or highway may enjoin such occupation,[4] but he has the burden of showing such unlawful occupation.[5]

93. Louisville, etc., R. Co. v. Cincinnati, 76 Ohio St. 481, 81 NE 983.

94. Pittsburg etc., R. Co. v. Warrum [Ind. App.] 82 NE 934. Neither Rev. St. 1892, § 3283, Act May 3, 1904, § 1 (97 Ohio Laws, p. 546), nor Rev. St. 1906, §§ 3337-17a, 3337-17b, authorize municipality to grant right to occupy street with railroad structure. Louisville, etc., R. Co. v. Cincinnati, 76 Ohio St. 481, 81 NE 983. General grant to municipalities of the care, supervision and control of streets held not to authorize them to grant right of way therein. Id. Ordinance of council of Cincinnati passed Nov. 7, 1904, as amended Aug. 28, 1905, giving Louisville & N. R. Co. right to occupy and cross certain streets, held void. Id. Unconstitutionality of provision in Laws 1880, p. 872, c. 582, allowing substitution for consent of local authorities and abutting property owners, held not to invalidate remainder of act. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909. Statutes considered and held that ordinance adopted December, 31, 1890, permitting construction of tunnel under New York city streets, held valid. Id.

95. City of Aurora v. Elgin, A. & S. Trac. Co., 227 Ill. 485, 81 NE 544, rvg. 128 Ill. App. 77; Gillette v. Aurora R. Co., 228 Ill. 261, 81 NE 1005; City of Chester v. Baltimore, etc., R. Co., 217 Pa. 402, 66 A 654. Cannot do so by force of contract with city railway and without consent of municipality. City of Aurora v. Elgin & A. S. Trac. Co., 227 Ill. 485, 81 NE 544, rvg. 128 Ill. App. 77. Under New York railroad law, railroad company is not authorized to build trestle for tracks over public highway in city for obtaining access to coal pockets without consent of city. Delaware, etc., R. Co. v. Syracuse, 157 F 700. Ohio Act of Feb. 24, 1848, § 11, adopted in Pennsylvania by Act of April 11, 1849 (P. L. 754), held not to give Ohio & Pennsylvania R. Co. and its successors authority to occupy streets with municipal consent for depot purposes (Riley v. Pennsylvania R. Co., 32 Pa. Super. Ct. 579), and certainly not to extend depot into street in after years (Id.). Laws 1860, p. 16, c. 10, prohibiting laying of a railroad in any street in New York City except under authority and subject to restrictions hereafter granted, wherever the road shall commence and end, held not to affect right to construct railroad on Long Island and under East river. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909. Permits given by board of aldermen to New York & L. I. R. Co. to construct tunnel under land conveyed to city under Laws 1870, p. 390, c. 137, § 99, as amended, for docks, held not revocable after railroad had expended large sum of money on ground that dock department's permission had not been obtained. Id.

96. Consent in cities of second class can only be given by common council. Delaware, etc., R. Co. v. Syracuse, 157 F 700.

97. Resolution granting permission to company generally to construct and operate "switch or switches, track or tracks," across the street, held not to authorize trestle. Delaware, etc., R. Co. v. Syracuse, 157 F 700.

98. Default in completion within specified time. Manton v. South Shore Trac. Co., 104 NYS 612.

99. Railroad, under Act May 31, 1887 (P. L. 275), cannot elevate or depress its tracks within a city without latter's consent. City of Chester v. Baltimore, etc., R. Co., 217 Pa. 402, 66 A 654.

1. Under Rev. St. § 3283, must obtain consent of county commissioners or appropriate as provided therein. Board of County Com'rs of Cuyahoga County v. Pennsylvania R. Co., 6 Ohio N. P. (N. S.) 141.

2. Resort to § 3283 for authority to construct railroad crossing over public highway not within municipality is forbidden by provisions of §§ 3337-17j et seq, under rule that latter enactment upon same subject and embodying a restriction supersedes and repeals earlier act by implication. Agreement with county commissioners whereby it is attempted to confer authority for construction of such a crossing is therefor clearly illegal, and injunction against such construction will lie upon petition of abutting owner. Ritter v. Cleveland Short Line R. Co., 6 Ohio N. P. (N. S.) 161.

3. Comp. Laws 1897, § 6234, authorizing a railroad company to construct its "road" upon or across a highway, held not to authorize construction of tracks for yard purposes without consent of highway commissioners. Highway Com'r of Ecorse Tp. v. Wabash R. Co., 148 Mich. 436, 14 Det. Leg. N. 221, 111 NW 1090.

4. See Highways and Streets, 9 C. L. 1588.

5. Plaintiff, claiming that consent to laying of tracks in street should have been on condition that provisions of Railroad Law,

Right of eminent domain.[6]

Private grants. See 8 C. L. 1597—Many of the general rules governing the construction of contracts and deeds are applicable to private grants of right of way.[7] The description in the deed controls the survey as to the land conveyed thereby.[8] A contract to convey a right of way within a specified time gives no present right of entry.[9] A grant of right of way as subsidiary to mining rights does not authorize its use for general railroad purposes.[10]

Conditions and reservations in private grants. See 8 C. L. 1598—Agreements to construct private crossings,[11] depots,[12] etc., are frequently made the inducement or consideration for private grants. While conveyance in consideration of the establishment of a station does not create an estate upon condition, so that noncompliance will work a forfeiture,[13] the construction of the road or a commencement thereof over the land granted within a specified time is frequently made a ground of forfeiture.[14] Where grantor is in possession at time of forfeiture, nothing is necessary to revest title,[15] and re-entry in any event may be expressly excused.[16] Substantial compliance with the conditions of the grant is usually sufficient to prevent forfeiture,[17] but the fact that the construction force was concentrated on another part of the line as a result of some litigation does not relieve forfeiture for failure to complete within specified time.[18] Where land is conveyed in consideration of the establishment of a depot thereon, the company has a reasonable time within which to construct the same.[19] Where action is brought against one company for failure to locate depot as required by grant to another and for trespass committed by the latter,

Lads 1890, p. 1109, c. 565, § 92, be complied with, has burden of pointing out omitted provision. Manton v. South Shore Trac. Co., 104 NYS 612.

6. See 8 C. L. 1597. See, also, Eminent Domain, 9 C. L. 1073.

7. Where contract binds owner to convey right of way 50 feet wide on each side of the center line thereof as finally located at $100 per acre, parol evidence is admissible to show that center line was located at the time, of which parties had knowledge, and that strip thus conveyed included land previously conveyed, as bearing on question whether railroad was to pay $100 per acre for entire strip or only new land conveyed. Albert v. Tidewater R. Co. [Va.] 58 SE 575. Contract construed to require payment only for new land conveyed. Id.

8. Columbia Valley R. Co. v. Portland, etc., R. Co. [Wash.] 94 P 918.

9. Agreement to convey right of way within a specified time, with unrestricted right to enter, locate, and construct a railroad. Boring Lumber Co. v. Roots [Or.] 90 P 487.

10. Jackson v. Big Sandy, etc., R. Co. [W. Va.] 59 SE 749. Constitutional inhibition against taking of private property for public use without compensation gives equity jurisdiction to restrain such use (Id.), and equity, independent of constitutional inhibition against taking private property for public use without payment of compensation or giving of security therefor, may enjoin such use (Id.).

11. Evidence held to show parol agreement to construct private crossing made as inducement to execution of deed. Perkiomen R. Co. v. Bromer, 217 Pa. 263, 66 A 359.

12. Deed of land in consideration of establishment and maintenance of station thereon, and providing that it is to be used only in connection with railroad and its business, held to show intent that defendant should erect depot thereon and not merely use land for railroad purposes. Louisville, etc., R. Co. v. Baskett, 31 Ky. L. R. 1035, 104 SW 695.

13. Louisville, etc., R. Co. v. Baskett, 31 Ky. L. R. 1035, 104 SW 695.

14. Where land was conveyed as right of way with condition that it should revert if grantee should fail to "construct its line of road over the premises hereby granted" within five years, failure to commence construction on such land within five years forfeits grant. McDowell v. Blue Ridge, etc., R. Co., 144 N. C. 721, 57 SE 520.

15. McDowell v. Blue Ridge, etc., R. Co., 144 N. C. 721, 57 SE 520. If anything is necessary, notice to contractors of railroad not to enter is sufficient. Id.

16. Where private grant provided for forfeiture if road was not constructed over such land within five years, without obligation on grantor's part to re-enter, re-entry is unnecessary. McDowell v. Blue Ridge, etc., R. Co., 144 N. C. 721 57 SE 520.

17. Where deed of right of way provided for reversion on grantee's failure to construct road across the premises within a specified time, completion of about one-half of grading is not a substantial compliance with condition. Thomas v. Blue Ridge, etc., R. Co., 144 N. C. 729, 57 SE 523.

18. McDowell v. Blue Ridge, etc., R. Co., 144 N. C. 721, 57 SE 520.

19. Limitations for breach of agreement to establish depot do not commence to run until railroad has had a reasonable time to erect depot. Louisville, etc., R. Co. v. Baskett, 31 Ky. L. R. 1035, 104 SW 695.

petition must show such connection between the two companies as to render defendant liable for the acts of the contracting railroad.[20]

*Adverse possession.*See 8 C. L. 1599—A railroad may acquire a right of way by adverse possession, and where a cut or a fill is being used, the adverse possession extends to the top of the cut and to the base of the fill,[21] and, likewise, a way across its right of way may be acquired by prescription.[22] A railroad acquiring land for a right of way over which individuals exercise and claim a well defined way adverse to and by recognition of the owner takes with notice of their rights.[23]

Right to cross right of way of other roads.—While power to construct a line necessarily implies authority to cross other roads,[24] the right is frequently given by express legislative enactment.[25] The right is often controlled and regulated by private contract.[26]

*Abandonment of right of way.*See 8 C. L. 1599—Abandonment is largely a matter of intention [27] as gathered from all the surrounding circumstances.[28]

Establishment of highways over right of way.—A railroad may dedicate [29] a crossing for a highway, and, where once dedicated, it cannot recall the same.[30] Where a railroad has only an easement, it is not entitled to compensation for land taken in condemning a highway crossing.[31]

Actions.—In determining the location or extent of a right of way, the general

20. Petition in action for damages for failure to locate depot on petitioner's land as agreed in consideration of conveyance of right of way and for trespass held not to state cause of action against appellant, as it failed to connect it with company making contract so as to render it liable thereon or in tort for its trespass. Atlanta, etc., R. Co. v. Newman, 128 Ga. 281, 57 SE 514.

21. Louisville & N. R. Co. v. Elliston [Ky.] 108 SW 858.

22. Where railroad acquires land for right of way over which individuals claim way adverse to owner, and such way is continued for 20 years under claim of right against railroad company, held that they acquired prescriptive right of way, such way not interfering with use of railroad's right of way. Trustees of Cincinnati Southern R. Co. v. Slaughter, 31 Ky. L. R. 913, 104 SW 291.

23. Trustees of Cincinnati Southern R. Co. v. Slaughter, 31 Ky. 913, 104 SW 291.

24. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457.

25. Code 1902, § 1895, giving corporation organized under the article power to construct and operate a railroad, electric railway, turnpike, tramway, etc., and to cross any existing railroad or public road, but no power to condemn lands except for such crossings, held not violative of Const. art. 1, § 5, or 14th Amend. Fed. Const. as denying equal protection of laws, in that right of crossing is not mutual. D. W. Alderman & Sons Co. v. Wilson Lumber Co., 77 S. C. 165, 57 SE 756. Code 1902, § 1895, held to give power to condemn right of way for crossing over public or private existing railroads. Id.

26. Fact that contract between two railroads, whereby one agreed to move tracks of other to get trackage space, provided that former was to construct certain spur tracks for latter at its own expense, held not to imply that latter would not continue to maintain an existing spur track crossing former's tracks. Atlantic, etc., R. Co. v. Atlantic Coast Line R. Co., 129 Ga. 44, 58 SE 465.

27. Where one railroad wrongfully takes possession of right of way for spur track of another, and, pending litigation, latter constructs another spur track to meet the necessities of case, held there was no abandonment. Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 153 F 122.

28. Fact that railway company for more than fifty years has owned hundred foot right of way without using it except by single track in center thereof, does not justify assumption that unused portion has been abandoned, nor can abandonment be established by evidence that railway company has granted to a pipe line company the right to maintain a pipe line along right of way for period of five years, with right reserved to annul license at any time space may be needed for railroad purposes. Hawkins v. Buckeye Pipe Line Co., 6 Ohio N. P. (N. S.) 553.

29. Where, after street was platted and dedicated up to and on both sides of right of way, railroad opened street through right of way, built fences and guards conforming to sides of street, planked same, and public used it as a street, held a dedication. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650. And, in absence of limitations as to use, railroad cannot assert that public acquired easement of less extent than if it had been expressly dedicated. Id. Where railroad had dedicated street across right of way, it cannot object to any proper use thereof, whether it owns a fee or only an easement. Id.

30. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650.

31. Cincinnati, etc., R. Co. v. Connersville [Ind.] 83 NE 503.

rules as to admissibility of evidence,[32] and the proof required to establish the issue,[33] are applicable.

§ 5. *Aids and bonuses.* See 8 C. L. 1599—Public land grants to railroads [34] and municipal aid bonds [35] are elsewhere treated. Where a tax can be voted only in aid of "public improvements and railroads," a vote of aid to a corporation authorized to engage in private undertakings as well as railroad business is void unless limited in purpose.[36] In Louisiana the petition to the police jury to call an election to vote aid must be signed by the requisite number,[37] must state the amount of money to be raised and not the rate of the tax,[38] and the question of aid must be submitted singly and on its own merits.[39] Where an incorporated town appropriated money in violation of the constitution as an inducement to a railroad to enter acceptance of the benefit does not ratify the illegal appropriation [40] or estop the town from recovering back the money,[41] in an action at law.[42]

Subscriptions. See 8 C. L. 1600—A subscription contract must be construed with reference to the intent of the parties at the time.[43] All conditions [44] precedent [45] must be complied with, although substantial performance is sufficient.[46] The time of payment is usually regulated by the contract of subscription.[47]

32. In action by railroad, claiming right of way 200 feet wide through defendant's premises, to enjoin obstruction thereof, evidence that plaintiff permitted others to use right of way on opposite side of track held properly rejected, defendant's rights not being involved. Southern R. Co. v. Howell [S. C.] 60 SE 677. Letter written during boundary controversy by superintendent stating "it is my understanding that we own 50 feet on each side of track," held not a mere statement of opinion but an admission against interest. Id. Whether superintendent had authority to write letter regarding boundary of right of way held for jury. Id.

33. Finding that right of way extends 100 feet on each side of center of track held supported by evidence that charter provided for condemnation of such strip and that main line was located in 1858 in practically its present location, since it will be presumed that road acquired right authorized by charter. Atlantic, etc., R. Co. v. Newbern [N. C.] 60 SE 925.

34. See Public Lands, 10 C. L. 1296.

35. See Municipal Bonds, 10 C. L. 875.

36. Const. art. 270, and Act. No. 202, p. 483, of 1898. Tolson v. Police Jury of St. Tammany Parish, 119 La. 215, 43 S 1011.

37. Where sufficiency of petition is raised in election contest, burden is on police jury, and is not satisfied by proof of a committee having verified signatures and found a sufficient number. Signatures themselves must be produced or proved by competent evidence. Tolson v. Police Jury of St. Tammany Parish, 119 La. 215, 43 S 1011.

38. Act No. 202, p. 483, of 1898. Tolson v. Police Jury of St. Tammany Parish, 119 La. 215, 43 S 1011.

39. Error to so couple with school tax as to require both to be voted or rejected together. Tolson v. Police Jury of St. Tammany Parish, 119 La. 215, 43 S 1011.

40. Voted in violation of Const. art. 12, § 5. Town of Luxora v. Jonesboro, etc., R. Co. [Ark.] 103 SW 605.

41, 42. Town of Luxora v. Jonesboro, etc., R. Co. [Ark.] 103 SW 605.

43. St. Louis, etc., R. Co. v. Houck, 120 Mo. App. 634, 97 SW 963. Where business man subscribed on condition that road run through or into his town such contract must be construed with reference to town limits as it existed at time of contract (Id.), and court may consider subject-matter of agreement, its inducement, and circumstances under which it was made as well as its phraseology (Id.).

44. Application, ordinances, and recorded acceptance construed, and held that limitation upon bond issue was not made a condition of subscription. Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 SW 732. In subscription by city to stock of company, made under Acts 1887, p. 57, c. 3, there is no implied condition that subscription shall be void if entire stock is not subscribed. Id. Agreement by construction company to construct road and to receive therefor all of its authorized stock not otherwise subscribed for held in effect subscription for all of road's stock and hence prior subscription cannot be avoided for failure to obtain subscriptions to its entire stock. Id.

45. Subscription ordinance held not to make deposit of bonds to guaranty certain extensions and against foreclosure of road, location of principal shops in city, and deposit, on consolidation with other companies, of a majority of stock of consolidated company with trust company, conditions precedent. Sweeney v. Tennessee Cent. R. Co., 118 Tenn. 297, 100 SW 732. Bill to have subscription declared void and to enjoin payment, alleging failure of company to locate shops in city and to deposit certain certificates in fulfillment of conditions precedent, held demurrable for failure to allege that shops had been located elsewhere or that company had no purpose of locating in city, that it had refused to make deposit, and that city was about to pay without requiring such deposit. Id.

46. St. Louis, etc., R. Co. v. Houck, 120 Mo. App. 634, 97 SW 963. Agreement to construct line from certain point "through or into Bloomfield" to another point held com-

§ 6. *Taxes, fees, and license charges.*[See 8 C. L. 1800]—By charter contract, property used for railroad purposes [48] is frequently exempt from general taxation, and in most states a special method of assessment and valuation is prescribed by statute,[49] which is not violative of the constitutional requirement of uniformity.[50] The rule that a railroad cannot be taxed by a county to pay its subscription has no application to a franchise tax on an operating road.[51] A right of way within the corporate limits of city of St. Louis is subject to special assessments for improvements.[52]

§ 7. *Public control and regulation.*[See 8 C. L. 1601]—A state may regulate railroads,[53] and the extent of such regulation is a matter of legislative discretion, subject to the constitutional guaranties for the protection of property.[54] Regulatory statutes must conform with the consitutional requirement as to title.[55]

Control by railroad commissions.[See 8 C. L. 1601]—The statute creating the Kansas board of railroad commissioners is valid,[56] and is not unconstitutional as delegating legislative [57] or as conferring executive and judicial powers,[58] or as commingling the same,[59] or as providing for the taking of private property without due process of

plied with by construction of new line from first point and connecting with old line running through Bloomfield to other designated termini. Id.

47. Where subscription was made payable when railroad "shall have constructed and begun operation of road through certain town and when company "shall have caused" certain trust company "to execute in favor of undersigned a bond" conditioned that line should be maintained and operated for five years, held that operation must be begun in good faith and with intention to continue running trains for five years and operation designed to be temporary is insufficient. St. Louis, etc., R. Co. v. Houck, 120 Mo. App. 634, 97 SW 963. Held for jury whether operation was in good faith. Id. Where railroad used old depot within city limits while constructing new depot outside of city limits, evidence of endeavor to secure extension of city limits for purpose of building into it instead of inside original limits is admissible on issue of good faith. Id.

48. Stone quarry owned by railroad was used for some time solely for production of stone for road. Later one was given authority to locate crushing plant thereon and to sell crushed stone, but for some time quarry had been idle, except ice was allowed to be taken therefrom. Held that it was property used for railroad purposes and exempt from taxation under charter, Priv. Laws 1851, p. 72, § 22, there being no abandonment. People v. Illinois Cent. R. Co., 231 Ill. 151, 83 NE 132.

49. Under Revisal 1905, § 5290, authorizing the corporation commission to assess the "right of way and superstructures thereon," word superstructures includes all buildings situated on right of way. Atlantic, etc., R. Co. v. Newbern [N. C.] 60 SE 925. Rev. St. 1899, c. 12, §§ 9338, 9339, 9344, relating to assessment and taxation of railroad, construed with § 1163, held not restricted to railroads owned by railroad companies or railroad corporations, but includes all companies, corporations and individuals owning or operating railroads; hence short railroad operated in connection with ferry is assessable by state board of equalization and not by city assessor. State v. Wiggins Ferry Co., 208 Mo. 622, 106 SW 1005.

50. Revisal 1905, § 5290, providing for assessment of railroad property through commission, held not to impair uniformity. Atlantic, etc., R. Co. v. Newbern [N. C.] 60 SE 925.

51. Applies to tax on road bed and tangible property. Illinois Cent. R. Co. v. Grayson County, 30 Ky. L. R. 780, 99 SW 625.

52. Under St. Louis Amended City Charter, art. 6, § 14, providing that "all the property fronting on or adjoining an improvement shall be subject to a special assessment therefor," right of way within special assessment district held subject to assessment. Heman Const. Co. v. Wabash R. Co., 206 Mo. 172, 104 SW 67.

53. Efland v. Southern R. Co. [N. C.] 59 SE 355.

54. State v. Missouri Pac. R. Co. [Kan.] 92 P 606. Laws 1905, p. 500, c. 105, § 1, providing penalty for failure of railroad to construct sidetrack to elevator, etc., held not unconstitutional as special legislation as taking private property without just compensation, or as depriving citizen of property without due process of law. State v. Missouri Pac. R. Co. [Neb.] 115 NW 757. Railroad compelled by mandamus to construct sidetrack to elevator. Id.

55. Acts 1906, p. 413, c. 257, prohibiting Cumberland and Pennsylvania Railroad Company from permitting its tracks to connect with or be used by Baltimore and Ohio Railroad Company, etc., held violative of Const. art. 3, § 29, providing that every law shall have but one subject, which shall be expressed in title. State v. Cumberland, etc., R. Co., 105 Md. 478, 66 A 458.

56. Fact that constitution does not specifically provide for creation of board does not render act invalid, there being no prohibition. State v. Missouri Pac. R. Co. [Kan.] 92 P 606.

57. Laws 1901, p. 517, c. 286, and acts supplementary and amendatory thereof, being Laws 1903, p. 597, c. 391, and Laws 1905, p. 555, c. 340 creating board of railroad commissioners. State v. Missouri Pac. R. Co. [Kan.] 92 P 606.

58, 59. State v. Missouri Pac. R. Co. [Kan.] 92 P 606.

law.[60] Generally railroad commissioners have only such powers as are expressly or by necessary implication conferred by statute,[61] but where a matter lies within their jurisdiction, the courts will not ordinarily regulate the rights of litigants in respect thereto though they have the power.[62] In many states the findings [63] and the orders of the commission are prima facie correct and valid, and the burden is on the objector to show the contrary.[64] Failure of a railroad to bring affirmative action to test the reasonableness of an order within thirty days does not, under the Kansas statute, preclude the railroad from asserting unreasonableness as a defensive matter.[65] In a proceeding before the commission to determine the necessity of a connection between intersecting roads, questions relating to the taking of property and compensation are not involved.[66] Where an order is in the alternative, the invalidity of one alternative does not affect the other.[67]

§ 8. *Construction and maintenance.* See 6 C. L. 1602—A railroad is not liable for annoyances and inconveniences incidental to its construction work,[68] and may obstruct a highway for a time reasonably necessary to the proper prosecution thereof.[69] A railroad may make reasonable changes in its right of way to meet the growing needs of commerce,[70] providing it does not impose unreasonable additional burdens.[71] Where, however, after the completion of the road, improvements are made to the injury of adjoining property, recovery may be had therefor.[72] Where plain-

60. Since a hearing is provided. State v. Missouri Pac. R. Co. [Kan.] 92 P 606. Railroad appearing and participating in hearing cannot assert that order made therein is not due process of law. Id.

61. Code 1904, § 1294d, subsec. 57, held to authorize corporation commission to establish more than one connection between intersecting roads where reasonably necessary for interchange of traffic. Louisville, etc., R. Co. v. Interstate R. Co. [Va.] 57 SE 654.

62. State corporation commission has jurisdiction to establish rules governing traffic relations between intersecting roads, and hence court on appeal from order determining necessity of connection will not make order in respect thereto. Louisville, etc., R. Co. v. Interstate R. Co. [Va.] 57 SE 654.

63. Under Const § 156, cl. "f," finding of corporation commission that a connection between two intersecting roads is reasonably necessary is prima facie correct. Louisville, etc., R. Co. v. Interstate R. Co. [Va.] 57 SE 654.

64. Louisville, etc., R. Co. v. Interstate R. Co. [Va.] 57 SE 654. Mandamus proceedings to enforce order of commission. State v. Missouri Pac. R. Co. [Kan.] 92 P 606. Order compelling separate passenger service on Madison Branch of Missouri Pac. R. Co. held not unreasonable on its face. Id. Evidence held insufficient to show that it was unreasonable. Id. Evidence held to sustain finding that connection was necessary, it appearing that existing connection was hardly adequate to meet present requirements and that petitioner was about to open some extension lines. Louisville, etc., R. Co. v. Interstate R. Co. [Va.] 57 SE 654.

65. Provision of Laws 1905, p. 563, c. 340, § 11, making certain orders of the commissioners conclusive after 30 days, is a rule of evidence, and does not preclude assertion of defense in mandamus to compel obedience. State v. Missouri Pac. R. Co. [Kan.] 92 P 606.

66. Louisville, etc., R. Co. v. Interstate R. Co. [Va.] 57 SE 654.

67. Where order of commission orders defendant to furnish separate passenger train service or to adopt motor car service for passengers, fact that defendant has no charter power to adopt motor power does not invalidate rest of order. State v. Missouri Pac. R. Co. [Kan.] 92 P 606.

68. Not liable for annoyance and discomfiture caused by coal dust, noise, etc., produced by steam shovel and blacksmith shop in absence of showing of negligence. Canteiou v. Trinity, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 457, 101 SW 1017.

69. Indictment held demurrable for failure to allege that obstruction was maintained for unreasonable length of time. Commonwealth v. Morganfield, etc., R. Co., 30 Ky. L. R. 1274, 101 SW 304.

70. Townsend v. New York Cent., etc., R. Co., 56 Misc. 253, 106 NYS 381.

71. Establishment of platform for reception of freight held not an unreasonable, additional burden. Townsend v. New York Cent., etc., R. Co., 56 Misc. 253, 106 NYS 381. Fact that patrons use plaintiff's dock to reach same created no liability on companies' part, especially where plaintiff could prevent such use by a short fence. Id. Replacing of wooden sluiceway with an iron one held not to place an additional burden on property. Id. No cause of action exists for slight changes in grade of tracks, making approach over private crossing a trifle more difficult. Id.

72. Missouri, etc., R. Co. v. Perry [Tex. Civ. App.] 18 Tex. Ct. Rep. 687, 102 SW 1169. Petition held to state cause of action for injury to dwelling house in consequence of the erection and use of a turntable and water tank on right of way. Id. Where erection and maintenance of turntables and water tank constitute a nuisance, recovery

tiff's property has depreciated in value by reason of the erection of stockpens nearby, he may recover notwithstanding property generally, including his, has increased in value since the erection thereof.[73] One seeking to hold a city liable for damages caused by change of grade in a street by a railroad company must comply with all conditions precedent.[74] A railroad laying tracks in the street is usually required to restore the same to its former condition or to such state as not to unnecessarily impede travel.[75] Where, under an ordinance, a railroad repairs a bridge which a street railway was in duty bound to repair, the railroad is subrogated to the city's rights against the latter.[76]

Establishment and maintenance of depots. See 8 C. L. 1602—A railroad may exercise its own discretion as to the location of its depots, subject to the rights of the public and contractual limitations.[77] Impossibility of performance excuses a railroad's noncompliance with a penal statute requiring the construction of a depot within a specified time.[78] A railroad must exercise reasonable care to maintain its depot and grounds in a safe condition [79] for the use of those there by invitation,[80] and is liable for injuries proximately resulting from negligence.[81]

Private farm crossings. See 8 C. L. 1603—By statute in most states, railroads are required to maintain private crossings,[82] especially through agricultural districts,[83]

may be had for personal discomfort and annoyance without regard to care exercised. Id. In action for damages, caused by maintenance of water tank near homestead, fact that jury did not find for plaintiff on issue of personal annoyance did not necessarily prevent finding that property had depreciated in value. Texas, etc., R. Co. v. Edrington [Tex. Civ. App.] 102 SW 1171.

73. Gulf, etc., R. Co. v. Blue [Tex. Civ. App.] 18 Tex. Ct. Rep. 377, 102 SW 128. Where property was used for residence purposes, evidence of depreciation in value for such purpose is admissible. Id.

74. Laws 1883, p. 100, c. 113, as amended by Laws 1884, p. 342, c. 281 and Laws 1894, p. 330, c. 172, prescribing liability of city for damages to private persons resulting from change of grade construed with Railroad Law, Laws 1890, p. 1082, c. 565, providing for changing street crossings by railroads and held that where change of grade is made under latter act, action could not be maintained against city unless notice of claim be filed with railroad commissioners as provided by latter act. Melenbacker v. Salamanca, 188 N. Y. 370, 80 NE 1090.

75. Provision in Rev. St. 1899, § 1035 (Ann. St. 1906, p. 898), requiring railroad constructing its tracks in street to restore street to its former condition is not a mere condition subsequent and void if impossible of performance. Hence, where company constructed tracks without authority but was thereafter given authority to use street as provided by such statute, it must comply therewith or refrain from using street (State v. Wabash R. Co., 206 Mo. 251, 103 SW 1187), and taxpayers may maintain mandamus to compel performance (Id.).

76. Northern Cent. R. Co. v. United R. & Elec. Co., 105 Md. 345, 66 A 444.

77. See ante, § 3.

78. Held not liable under Act Feb. 2, 1907, (Acts 1907, p. 6), requiring it to build depot at certain place within 60 days from time act takes effect. State v. St. Louis, etc., R. Co. [Ark.] 108 SW 508.

79. Held not negligence to fail to maintain guard rail about station platform, platform being of usual and customary kind. Central of Georgia R. Co. v. Floyd [Ga. App.] 59 SE 826.

80. Where defendant permitted express company to do business in depot, and plaintiff, after finishing business with express company walked through waiting room out on to platform and was injured, held from positions of rooms and open doors there was implied invitation to so depart, and defendant owed duty to have platform in reasonably safe condition. Central of Georgia R. Co. v. Hunter, 128 Ga. 600, 58 SE 154.

81. In action for injuries caused by walking off platform in darkness, held that proximate cause of injury was plaintiff's negligence and not absence of light. Central of Georgia R. Co. v. Floyd [Ga. App.] 59 SE 826.

82. Words "farm crossings" in St. 1898, § 1810, requiring maintenance of farm crossings for use of occupants of adjoining lands, are descriptive of the kind of crossings, as distinguished from highway crossings and company must maintain same though adjoining land is not used for farm purposes. Manitowoc Clay Product Co. v. Manitowoc, etc., R. Co. [Wis.] 115 NW 390. Word "crossing" as used in Code 1906, § 4058, making it duty of railroad to maintain convenient and suitable crossings for plantation roads, means crossing over entire width of right of way. Illinois Cent. R. Co. v. McGowan [Miss.] 46 S 55. Code 1904, § 1294b2, requiring construction of private crossings, etc., applies equally to road in process of construction as to completed one. Adams v. Tidewater R. Co. [Va.] 60 SE 129.

83. Railroad fencing act (Hurd's Rev. St. 1905, p. 1577, c. 114, § 62) does not require railroads to build a crossing in unplatted portion of a city not used for agricultural purposes. Williams v. Chicago, etc., R. Co., 228 Ill. 593, 81 NE 1133.

where necessary.[84] The Ohio statute applies only where the land on the opposite side of the tracks was under a common ownership at the time of constructing the road,[85] while the Mississippi statute requires the maintenance of the "plantation road" only for the use of the adjoining plantation.[86] The kind and nature of the crossing required depends largely upon the statute.[87] No duty is owed to a tenant at sufferance to construct a private crossing.[88]

By contract a railroad may obligate itself to maintain a private crossing,[89] the nature and kind depending largely upon the terms thereof,[90] in the interpretation of which a practical construction will be given great weight.[91] Such contract may be considered in awarding damages for the right of way.[92] Although a crossing has been established pursuant to private contract, changes may be made where reasonably necessary to safe travel.[93] An owner of land on both sides of a right of way may construct a private crossing at his own expense where reasonably necessary and where it does not interfere with movement of trains.[94] Evidence that a railroad only acquired the right to construct an embankment with an open underground passage is not objectionable as establishing a parol easement.[95]

*Public crossings.*See 8 C. L. 1804—While it has been held that a grade crossing can only exist by state authority,[96] such right is frequently granted where it will not impede travel,[97] and where such crossing is authorized, the only duty owed is to main-

84. In proceeding under Code 1904, § 1294b2, for appointment of commission to determine necessity for private crossing, fact that written demand asked for eight ways, while notice for application for commission designated only two, held not to affect right to commission as to the two roads. Adams v. Tidewater R. Co. [Va.] 60 SE 129.

85. Rev. St. 1892, §§ 3327, 3328. Gratz v. Lake Erie, etc., R. Co., 76 Ohio St. 230, 81 NE 239.

86. Penalty cannot be recovered for failure to maintain in good condition, where it became out of repair by heavy driving by others than owner. Illinois Cent. R. Co. v. McGowan [Miss.] 46 S 55. Instructions on duty to keep plantation crossing in repair where defects were caused by teaming by others than plantation owner held conflicting. Id.

87. Sayles' Ann. Civ. St. 1897, art. 4427, held satisfied by any adequate opening through fence, and where road divides pasture, owner thereof is not entitled to opening and crossing with wing fences and cattle guard. Bean v. Jasper, etc., R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 386, 101 SW 874.

88. Marsh v. Rutland R. Co., 80 Vt. 397, 67 A 1098.

89. Evidence held sufficient to show prima facie an agreement for maintenance of open underground crossing, and closing of same enjoined. Stone v. Missouri Pac. R. Co., 75 Kan. 600, 90 P 251. Where as part of consideration for conveyance of land for right of way defendant agreed to construct underground crossing for grantor, defendant cannot escape liability by condemning another strip, especially where a part of purchased strip is used and condemnation is for purpose of avoiding obligation. Stafford v. Big Sandy R. Co. [Ky.] 105 SW 389.

90. Agreement to construct "open crossing" where right of way interesects a pasture held to mean an open crossing suitable for passage of stock. Hartshorn v. Chicago Great Western R. Co. [Iowa] 113 NW 840.

91. Where deed provided for "farm crossing" and the crossing established was used for many years to reach village company could not discontinue same on ground that it was not used as farm crossing. Kraeer v. Pennsylvania R. Co., 218 Pa. 569, 67 A 871.

92. Although report of condemnation commissioners, pleadings on appeal, verdict and judgment, are silent on subject, other evidence is admissible to show that damages were awarded on theory that existing underground farm crossing was to be maintained. Stone v. Missouri Pac. R. Co., 75 Kan. 600, 90 P 251.

93. Hartshorn v. Chicago Great Western R. Co. [Iowa] 113 NW 840. Where open private crossing established pursuant to contract interferes with safe transportation, but it is practical to establish it at other places, it will not be presumed that expense of such new crossing will be excessive, and railroad company must demand that owner select a place therefor before it can close existing crossing, in absence of great pressing need for such closing. Id.

94. Gratz v. Lake Erie, etc., R. Co., 76 Ohio St. 230, 81 NE 239.

95. Stone v. Missouri Pac. R. Co., 75 Kan. 600, 90 P 251.

96. Being in the nature of a nuisance. Cowles v. New York, etc., R. Co. [Conn.] 66 A 1020. Railroad Law (Laws 1897, p. 794, c. 754, § 60), provides that all surface railroads, "except additional switches and sidings," must be so constructed as to avoid grade crossings where practicable. Held that exception is in favor of railroads, and with their consent railroad commissions may regulate such switches and sidings. In re Terminal R. Co., 122 App. Div. 59, 106 NYS 655.

97. Additional track for use of freight trains to relieve main track held to con-

tain the same in as safe a condition as when established.[98] Overhead or underground crossings within cities are often required by ordinance,[99] and the courts will not interfere therewith in the absence of abuse.[1] A railroad erecting an embankment across a street must leave spaces therein [2] reasonably sufficient for the use of the public.[3] Railroads being subject to police power [4] are not entitled to compensation for the cost of maintaining newly condemned crossings in statutory safe condition.[5] A railroad must exercise ordinary care [6] in the construction of its crossings,[7] which duty it cannot delegate.[8] The duty owed in the construction and maintenance of crossings is prescribed by statute in many states,[9] and the acceptance of a franchise carries an assumption of all the duties and obligations imposed by exsiting statutes.[10] These statutes are usually applicable to crossings established after the construction of the road.[11] While the duty extends to the approaches,[12] it does not include bridges on right of way but not a part of the approach or roadbed.[13] A charter obligation to

duce to safety rather than to impede travel over crossing. City of Newark v. Central R Co. [N. J. Eq.] 67 A 1009. Additional tracks to facilitate access to freight yards held to impede travel. Id.

98. Not liable for dangers resulting solely from construction. Cowles v. New York, etc., R. Co. [Conn.] 66 A 1020.

99. Railroad track elevation ordinance and supplemental ordinance providing for construction of subways under tracks of certain railroads held not so uncertain as to location of subways as to be void (People v. Grand Trunk Western R. Co., 232 Ill. 292, 83 NE 839), nor because they delegate power of locating foundations and walls of subway to certain municipal officers. Id. Track elevation ordinance provided for construction of 66 foot subway under C. railroad companies' tracks in Union street. Second ordinance provided for construction of 60 foot subways in Union street. Held that latter ordinance modified first and successor to C. road was only required to build 60 foot subway. Id.

1. Adoption of any plan for elevation of railroad tracks and construction of subways thereunder is vested in first instance in city council, and, in absence of bad faith, courts will not interfere because another plan is better in opinion of engineers. People v. Grand Trunk Western R. Co., 232 Ill. 292, 83 NE 839. Fact that municipal authorities provided for 66 foot subway where 80 foot one might have been constructed held not to authorize judicial interference. Id.

2. Not sufficient that it leaves suitable passageways within reasonable distance from where embankment crosses street. Wickliffe v. Illinois Cent. R. Co. [Ky.] 108 SW 243.

3. Wickliffe v. Illinois Cent. R. Co. [Ky.] 108 SW 243.

4, 5. Cincinnati, etc., R. Co. v. Connersville [Ind.] 83 NE 503.

6. Whether walk across railroad track having a perpendicular drop of three or four inches is negligently constructed held question for jury. Illinois Cent. R. Co. v. Stewart, 130 Ill. App. 197. Negligence in maintenance of approaches held for jury. Illinois Southern R. Co. v. Hayer, 225 Ill. 613, 80 NE 316. Petition charging negligence in maintaining crossing, containing allegations that same was not planked as was custom in city, held not misleading in causing jury to believe that it was defendant's duty to keep in repair in that particular manner. St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736.

7. Road crossing, as referred to in Civ. Code 1895, § 2222, is a crossing by a railroad of a public highway, not only used but maintained as such by proper authorities. Atlantic Coast Line R. Co. v. Bunn, 2 Ga. App. 305, 58 SE 538.

8. Railroad company cannot justify negligent construction of crossing by showing that it was maintained pursuant to a municipal ordinance. Illinois Cent. R. Co. v. Stewart, 230 Ill. 204, 82 NE 590, afg. 130 Ill. App. 197.

9. Duty, under Rev. St. 1895, art. 4426, to keep crossing in repair, is absolute (St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638), and failure so to do is negligence per se (Id.). Neighborhood road held within Revisal 1905, § 2567, subd. 5, and § 2569, relating to maintenance of safe crossings over "highways" and "established roads and ways." Goforth v. Southern R. Co., 144 N. C. 569, 57 SE 209. In determining whether railroad kept crossing in repair as required by Rev. St. 1895, art. 4426, question of condition of highway at other places is immaterial. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638.

10. Cincinnati, etc., R. Co. v. Connersville [Ind.] 83 NE 503. Duty imposed by Burns' Ann. St. 1901, § 5153, to construct and keep in repair highway crossings, implies obligation to defray cost thereof. Id.

11. Burns' Ann. St. 1901, § 5153. Cincinnati, etc, R. Co. v. Connersville [Ind.] 83 NE 503.

12. "Crossing" as used in Rev. St. 1895, art. 4426, requiring railroads crossing highway to restore highway to former condition or to such state as not to unnecessarily impair its usefulness, and to keep such crossing in repair, held to include bridge in approach on right of way. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638.

13. Civ. Code 1892, §§ 1378, 2141, 2144, 2149, 2183, held not to require railroads to keep in repair highway bridges on right of way, but not on road bed, where not constructed or required by them. Feider v. Southern R. Co., 76 S. C. 554, 57 SE 524. Railroad company owes no duty to construct or keep in repair a road or bridge

construct and maintain good and sufficient crossings is a continuing obligation.[14] A railroad, however, is liable only for injuries resulting proximately [15] from its negligence [16] to one exercising due care for his own safety.[17]

Abolition and prevention of grade crossings. See 8 C. L. 1607—Jurisdiction has been conferred on the New Jersey court of chancery to compel railroads to adopt underground or overhead crossings,[18] in certain cases,[19] and a suit may be instituted therein without previous notice to the railroad to construct such crossings.[20] The bill need not allege that such crossing is practicable,[21] nor need it designate the mode

on its right of way unless rendered necessary by the construction of the railroad. County of Cass v. Chicago, etc., R. Co., 130 Ill. App. 346.

14. Provision in charter of Montclair Railway Co. that "It shall be the duty of the said company to construct and keep in repair good and sufficient bridges over or under the said railroad where any public or other road shall cross," etc., is a continuing one in effect and is not satisfied by constructing one sufficient at time of construction but which has become insufficient. City of Newark v. Erie R. Co. [N. J. Eq.] 68 A 413.

15. Where planking had been removed and mule slipped while passing, held for jury whether condition was proximate cause of injury. Goforth v. Southern R. Co., 144 N. C. 569, 57 SE 209.

16. Where it was not shown how long defect in crossing had existed or that defendant had knowledge of defect, held that there was no proof of negligence. Flanery v. St. Louis, etc., R. Co. [Mo. App.] 108 SW 575. Where frog or device used to permit tracks of one railroad to cross another was of standard pattern in general use in United States by like companies for a similar purpose, company is not liable for injury to horse from catching foot therein (Bobbink v. Erie R. Co. [N. J. Err. & App.] 69 A 204), and evidence of witness that he knows of a better device is inadmissible (Id.).

Evidence held insufficient to show decedent was delayed in crossing tracks by horse's foot catching in space between rail and planking. Chicago, etc., R. Co. v. Donaldson [C. C. A.] 157 F 821. To show that defendant negligently left a wider space than necessary between rail and planking. Connor v. New York, etc., R. Co. [R. I.] 68 A 481.

Evidence held to show negligence in permitting hole to exist in bridge at crossing. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638. That accident was caused by properly constructed frog and not by a defect. Piver v. Pennsylvania R. Co. [N. J. Err. & App.] 67 A 109.

Negligence held for jury where planking had been removed and mule slipped in crossing. Goforth v. Southern R. Co., 144 N. C. 569, 57 SE 209. In action for killing of team stalled on track at crossing in consequence of wheel of wagon going into ditch at side of bridge, evidence held to make question for jury as to faulty construction of bridge. Thompson v. Seaboard Air Line R. Co. [S. C.] 58 SE 1094. In action for injuries caused by stepping into hole in bridge at crossing, instruction that if bridge was of sufficient width on side of hole for passage of travelers on foot by using ordinary care, plaintiff cannot recover held properly refused, since under Rev. St. 1895, art. 4426, it was duty to keep it in reasonably safe condition and it was question for jury. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638.

17. One attempting to use crossing at night, knowing that there was hole in same, held not negligent as matter of law. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638. Held question for jury under evidence. Id. Fact that plaintiff knew that crossing was defective held not to make use thereof negligence per se. St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736. Evidence held to show plaintiff's freedom from negligence in stepping into hole in bridge at crossing in nighttime though he knew of such hole. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638.

18. Revised Act concerning railroads, approved April 14th, 1903 (P. L. p. 660), § 29, conferring on New Jersey court of chancery jurisdiction to compel railroads to construct overhead or underground crossings, held constitutional. City of Newark v. Erie R. Co. [N. J. Eq.] 68 A 413.

19. Court of chancery may compel railroad, whose road crosses street at grade and whose charters contain appropriate provisions, to elevate or depress their tracks or the highways crossing same (City of Newark v. Central R. Co. [N. J. Eq.] 67 A 1009), but company cannot be compelled to elevate or depress unless because of some peculiarity the crossing has become dangerous (Id.). Where road was only used by employes of two factories and change of grade would be very expensive, change will not be ordered. Id. P. L. 1903, p. 659, § 26, makes it duty of every railroad company to construct and keep in repair bridges and passages over, under, and across the railroad and right of way, where any road, street, etc., shall cross same. Section 27 declares that where any railroad shall cross any street, etc., it shall be either above or below grade. Held that they are not repugnant, § 27 applying to railroads to be built. Id.

20. Notice prescribed by § 29 of act relates only to proceeding by municipality to construct such crossing if railroad company refuses on notice so to do. City of Newark v. Erie R. Co. [N. J. Eq.] 68 A 413.

21. Bill brought under § 29 of revised act concerning railroads, approved April 14, 1903 (P. L. p. 600), to compel railroad to establish an underground or overhead crossing, is not defective for failing to allege that such crossing is practicable. City of

of crossing desired.[22] Likewise, the court of common pleas in Ohio may require such crossings [23] in certain cases.[24] In New York the railroad commission has been given jurisdiction in regard to public crossings.[25]

Crossings with other railroads, street railways, and canals. See 8 C. L. 1607—In many states an underground or overhead crossing is required if practicable,[26] and, if not, a grade crossing is permitted.[27] The determination of the mode and manner of crossing is frequently vested in the courts,[28] or the railroad commission,[29] notwithstanding a private contract,[30] and while in some states the cost thereof is equally apportioned,[31] in others it is imposed upon the road seeking the crossing,[32] unless the roads have otherwise agreed.[33] Where a grade crossing is effected, an interlock-

Newark v. Erie R. Co. [N. J. Eq.] 68 A 413.

22. City of Newark v. Erie R. Co. [N. J. Eq.] 68 A 413.

23. Whether crossing shall be at grade, above grade or below grade, is a matter entirely within jurisdiction of common pleas; and where railroad company has acquired right to cross by proper proceedings in probate court, privilege so granted is without any reference to character of crossing with reference to grade. City of Toledo v. Toledo, etc., R. Co., 9 Ohio C. C. (N. S.) 399.

24. Where proposed crossing is by spur track leading to manufacturing establishments, commercial houses, and certain docks, it falls within exception as to tracks for increasing "yard facilities at terminal or other points," and company has right under statute to cross at grade. City of Toledo v. Toledo, etc., R. Co., 9 Ohio C. C. (N. S.) 399. In action brought in common pleas to enjoin laying of crossing at grade under grant from probate court, it is error to exclude testimony offered by railroad company for purpose of showing that crossing in question falls within exception provided in 97 O. L. 546. Id.

25. Railroad Law, Laws 1897, p. 796, c. 754, § 62, gives to railroad commissioners jurisdiction to determine in what manner crossings shall be made to close a highway and divert the travel to another, and to change the grade thereof, subject only to review by the appellate court and the court of appeals. In re Terminal R. Co., 122 App. Div. 59, 106 NYS 655. Held, where crossings of parallel streets were dangerous, that commissioners had power and authority to close some of them and to divert traffic through viaducts, railroad offering to pay expense of construction of viaducts and damages to property owners. Id.

26. Phrase "if court shall find it practicable" as used in Acts 1903, p. 125, c. 59, § 5, providing that court may order overhead or underground crossing in such event, does not mean if it finds it "possible" but calls for exercise of discretion based upon all facts of case affecting question of practicability in ordinary sense. Pittsburgh, etc., R. Co. v. Indianapolis, C. & S. Trac. Co. [Ind.] 81 NE 487. Evidence as to cost and necessity therefor held to sustain finding against petitioner. Id.

27. Under § 116 of general corporation law (22 Del. Laws, p. 815, c. 394), one company may cross tracks of another at grade if overhead or underground crossing is not practicable. New Castle, etc., R. Co. v. Delaware R. Co. [Del.] 68 A 386.

28. Section 3333-1, R. S., providing for determination by courts of mode and manner whereby one railway shall cross tracks of another outside limits of municipality and apportionment of cost of construction and maintenance thereof, applies to all crossings whether at or above or below grade, where companies affected cannot agree between themselves as to mode or manner of divided expense of such crossings. Lima & Toledo Trac. Co. v. Toledo R. & T. Co., 11 Ohio C. C. (N. S.) 17. In proceeding to acquire right to cross tracks of another road at grade, held error to confine petitioner's right to lay single track. State v. Northern Pac. R. Co. [Wash.] 94 P 907.

29. Where objection is made to crossing of one railroad track by tracks of another, question as to whether such crossing can be made must be submitted to railroad and warehouse commissioners. Illinois Cent. R. Co. v. St. Louis, etc., R. Co., 125 Ill. App. 446.

30. Although railroad commission may install interlocking system at crossing of tracks without regard to private contract between roads, in apportioning expense thereof it cannot ignore private contract in respect thereto. Grand Trunk Western R. Co. v. Hunt [Ind. App.] 81 NE 524. Contract requiring one road to put in and maintain sufficient frogs and crossings so that other could "operate its road at that point with convenience and safety," etc., held not to contemplate interlocking switches and signals at distant points. Id.

31. Louisville, etc., R. Co. v. New Orleans Terminal Co. [La.] 45 S 962. Where crossing will be equally serviceable to both companies, expense connected therewith should be equaliy divided between them, notwithstanding crossing will be of no special benefit to old company. Lima & Toledo Trac. Co. v. Toledo R. & T. Co., 11 Ohio C. C. (N. S.) 17. Where railroad crosses tracks of another in public street in exercise of its right to use street, priority of occupation gives latter no equity to compel former to bear entire cost of appliance necessary for safety thereat. Louisville, etc., R. Co. v. New Orleans Terminal Co. [La.] 45 S 962.

32. Interlocking system. State v. Northern Pac. R. Co. [Wash.] 94 P 907. Decree allowing grade crossing should prescribe specific method of construction, appliances necessary, which, with attendance required for operation will be at charge of company making application. New Castle, etc., R. Co. v. Delaware R. Co. [Del.] 68 A 386.

33. Unrecorded agreement relative to cost of maintaining a common crossing held

ing system is sometimes required,[34] and in Indiana an order of the railroad commission in respect thereto may be reviewed by an appeal to the courts.[35] The petitioner must aver facts affirmatively showing that the order is unwarranted in law.[36] Where a crossing is effected in a street, the road crossed cannot complain of any acts which are incidental to a proper use of the street.[37]

Right on tracks of other companies.[See 6 C. L. 1607]

Private connections.—While the duty of constructing and maintaining a private connection is frequently regulated by private contract,[38] in some states railroads are bound to permit mill and mine owners to connect private sidings with their railroads.[39] Where a railroad puts down side tracks at the request of a lessee of coal mines under a lease which gave coal company the right to remove its mining appliance upon abandonment of the premises, the railroad may remove its tracks upon abandonment of the premises by the company.[40]

Cattle guards, fences, and stock gaps.[See 8 C. L. 1608]—While at common law railroads were not required to fence and construct cattle guards, they are required so to do by statute in most states,[41] which duty may be enforced by a mandatory injunction,[42] or by mandamus if the duty is clear and undisputed.[43] In some states a penalty is prescribed for failure to construct [44] or repair upon notice [45] by the adjacent

void as against third corporation purchasing without notice the property and franchises of debtor railroad. Louisville, etc., R. Co. v. New Orleans Terminal Co. [La.] 45 S 962.

34. Laws 1897, p. 238, c. 157, § 4, providing that where electric railroad crosses at grade tracks of another road it must interlock crossing to satisfaction of auditor, etc., held not applicable where it crosses within limits of street or highway. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650. In imposing upon railroad seeking to acquire right to cross tracks of another at grade the duty of installing and maintaining interlocking system, it is proper to require that such system should cover additional track contemplated by defendant if laid within reasonable time, but error to provide that it should cover any and all tracks which defendant might lay in future. State v. Northern Pac. R. Co. [Wash.] 94 P 907.

35. Railroad commission act (Acts 1905, p. 88, c. 53, § 6), authorizing company dissatisfied with "any order or regulation of said commission" respecting crossings to file petition in circuit or superior court of county, etc., held broad enough to include order installing interlocking system. Grand Trunk Western R. Co. v. Hunt [Ind. App.] 81 NE 524.

36. Grand Trunk Western R. Co. v. Hunt [Ind. App.] 81 NE 524.

37. Excavation of soil and of cutting of its rails by street car company in effecting a crossing held incidental. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650. Crossing of railroad tracks in street by tracks of another road occupying street is but exercise of right of public use of street and not an appropriation. Louisville, etc., R. Co. v. New Orleans Terminal Co. [La.] 45 S 962.

38. Contract for extension of branch line to defendant's mines provided that defendant should construct substructure and complainant lay track on "said branch railroad and to maintain and operate same." Held that duty rested on complainant to rebuild bridge washed out by freshet, notwithstanding substructure was to be property of defendant. Louisville, etc., R. Co. v. U. S. Iron Co., 118 Tenn. 194, 101 SW 414.

39. Pennsylvania railroads are bound to permit mill owners and mine owners to construct sidings on their own land and to connect same. Beech Creek R. Co. v. Atlanta Coal Min. Co. [C. C. A.] 158 F 36. Mandatory injunction will lie to compel such connection. Id. Act Pa. 5, 1832 (P. L. 501), and its supplements, provide an adverse proceeding to enable mine owners, etc., to lay out sidings over intervening private property to connect with railroad, and is not applicable where there is no intervening private property. Id.

40. Provided it does so without doing substantial injury to the freehold and before such abandonment takes place. Ambler v. Erie R. Co., 9 Ohio C. C. (N. S.) 81.

41. Railroad companies are required to construct cattle guard at points where their lines cross each other. Illinois Cent. R. Co. v. Davidson, 225 Ill. 618, 80 NE 250, afg. 125 Ill. App. 420.

42. Where company's continued failure to construct cattle guards where road enters and leaves fenced lands, as required by statute, constitutes a nuisance, mandatory injunction is proper (Atchison, etc., R. Co. v. Billings [Kan.] 93 P 590), and where petition alleges all the facts, it is immaterial that condition is not characterized as a nuisance (Id.).

43. Where right of way has been secured by expropriation, duty to install cattle guards and crossings is not contractual but arises from law (State v. Colorado Southern, etc., R. Co. [La.] 44 S 905), and may be enforced by mandamus where necessity therefor is admitted (Id.), but not where railroad disputes the necessity (Id.).

44. Under Kirby's Dig. §§ 6644, 6645, railroad is liable in penal sum for failure to construct cattle guards after each statutory

landowner,[46] while in others the abutting owner after statutory notice,[47] or a waiver thereof,[48] may erect the fence and recover for the necessary labor and materials furnished,[49] provided the adjoining lands are improved or inclosed.[50] The fact that a rebuilt fence is within the line of the old fence does not defeat recovery where the line was designated by a representative of the railroad.[51] The sufficiency of the complaint must be determined by the statute upon which it is based,[52] and in Indiana it must contain an itemized statement of materials and labor furnished.[53] Where the railroad fails to construct cattle guards, it is liable for the damage proximately resulting therefrom.[54]

Drainage and disposal of surface water. See 8 C. L. 1609—Where the railroad does not divert the natural flow of surface water, no liability attaches for damages done thereby,[55] but it becomes liable where it so interferes therewith as to create a nuisance.[56] Where a railroad has obstructed the natural flow by the construction of a ditch, it must exercise reasonable care to adapt such ditch to new conditions,[57] and to keep the same open and unclogged.[58] An unprecedented rain does not relieve a railroad for damages resulting therefrom where its own negligence concurs there-

notice by landowner. Chicago, etc., R. Co. v. Fitzhugh, 83 Ark. 481, 104 SW 175.

45. Though railroad has constructed cattle guard, it is not liable under Kirby's Dig. § 6644 for failure to repair unless notice is given. Chicago, etc., R. Co. v. Adams, 84 Ark. 14, 106 SW 200.

46. Under Kirby's Dig. § 6644, requiring every railroad on 10 days' notice from owner of land through which line passes to construct and keep in repair stock guards, notice by tenant is insufficient, though tenant may be authorized by owner to give notice in his name. Chicago, etc., R. Co. v. Adams, 84 Ark. 14, 106 SW 200.

47, 48. Pitman v. Louisville, etc., R. Co., 31 Ky. L. R. 988, 104 SW 693.

49. Under Burns' Ann. St. 1901, §§ 5324, 5325, abutting owner may, after statutory notice, build a new fence on finding materials of original fence are rotten and cast aside materials which might have been used in repairing original fence. Vandalia R. Co. v. Seltenright [Ind. App.] 82 NE 980.

50. By fence or natural barriers. Pitman v. Louisville, etc., R. Co., 31 Ky. L. R. 988, 104 SW 693. Under Burns' Ann. St. 1901, §§ 5323-5325, requiring a railroad to fence its right of way except where same runs over unimproved and uninclosed lands and to maintain same, and authorizing abutting owner after notice to repair, such owner may rebuild after notice though fence between his land and his neighbor's is out of repair. Vandalia R. Co. v. Fetters [Ind. App.] 82 NE 978.

51. Vandalia R. Co. v. Seltenright [Ind. App.] 82 NE 980.

52. Complaint alleging that defendant's fence had long been out of repair, etc., that plaintiff requested defendant to rebuild same, which it failed to do, that plaintiff made repairs and furnished defendant with itemized statement of cost thereof, which defendant refused to pay, held based on Burns' Ann. St. 1901, § 5325, hence need not negative exceptions in § 5323. Vandalia R. Co. v. Shadle [Ind. App.] 82 NE 999.

53. Complaint under Burns' Ann. St. 1901, §§ 5323-5325, alleging reasonable value of fence, followed by itemized statement of materials and labor employed, and that after completion an itemized statement was furnished, sufficiently embodies the itemized statement. Vandalia R. Co. v. Fetters [Ind. App.] 82 NE 978.

54. Verdict, in action for damages for failure to construct cattle guards, allowing for labor expended in guarding cattle, for loss of pasturage, and for diminished rental value of entire farm, held not to allow double damages under facts of case. Atchison, etc., R. Co. v. Billings [Kan.] 93 P 590. Where, in action for damage to crops by stock alleged to have entered over insufficient cattle guards, defendant answered that plaintiff's fence was defective in various places and that cattle entered there, defendant need prove that it was defective in but one place and cattle entered there. Kansas City, etc., R. Co. v. Mayfield [Tex. Civ. App.] 107 SW 940.

55. Not liable for failure to construct side ditches which would have diverted water to another point. Greenwood v. Southern R. Co., 144 N. C. 446, 57 SE 157.

56. Permitting of surface water from one side of track to escape to other alongside of highway held not to constitute an actionable nuisance. Townsend v. New York Cent., etc., R. Co., 56 Misc. 253, 106 NYS 381.

57. Created by change of grade. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589. Though ditch as originally constructed was sufficient to carry off water, yet if defendant increased flow by raising embankment and allowed ditch to become clogged, it is liable for injury proximately resulting therefrom. Id.

58. Evidence that culvert was permitted to become clogged with ice held to make case of negligence for jury. Strong v. Rutland R. Co., 121 App. Div. 391, 106 NYS 85. Instruction that defendant was not liable if it constructed ditch and culvert sufficient to carry off water to be reasonably anticipated held properly refused as ignoring negligence in permitting ditch and culvert to become clogged. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589.

with.[59] By statute in some states a railroad is required to construct sufficient culverts, etc., to carry off the water.[60] One acquiring adjacent property subsequent to an illegal change of grade may recover for temporary injuries resulting therefrom, as from diverted waters.[61]

Obstruction of watercourses. See 6 C. L. 1609—Where a railroad has a right to bridge a stream, it is liable only for negligence,[62] unless the flow is so obstructed as to necessarily result in injury.[63] A railroad is not liable for damages arising from the maintenance of an embankment constituting a nuisance in the absence of a notice to abate the same unless it was connected with the construction thereof.[64] Where an embankment is not of itself a nuisance but becomes so only at intervals by diverting water, distinct causes of action arise for each injury.[65]

§ 9. *Sales, leases, contracts, and consolidation. Sales.* See 8 C. L. 1610—While the Texas statute relating to the purchase of railroads at judicial sale contemplates purchasers capable of exercising the rights, powers, and duties of ownership,[66] a married woman may purchase where a suitable person takes title in his name and undertakes the responsibility of a purchaser,[67] and she and her husband have power to exchange her equitable interest for stock in a corporation duly organized to take over the road.[68] Where purchaser and associates[69] form a corporation under the Texas statute to take over and operate the purchased road, title vests therein upon filing of its charter[70] and is not affected by the fact that the corporation was organized to raise money upon bonds which failed of realization.[71] The duties of a purchaser are determined from the contract[72] and statutes relating to such transfers.[73]

59. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589. Evidence that culvert in ravine was sufficient to carry off natural flow but not in times of heavy rains held to show negligence. Strong v. Rutland R. Co., 121 App. Div. 391, 106 NYS 85.

60. Where in action for damages from overflow negligence alleged was that defendant constructed ditch along right of way too small to carry off water, that culvert at certain street crossing was not large enough for water from ditch to flow through and that defendant permitted ditch and culvert to become clogged, plaintiff cannot assert that defendant was negligent as matter of law in constructing roadbed without sufficient culverts, as required by statute. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589.

61. Downey Bros. Spoke & Bending Co. v. Pennsylvania R. Co. [Pa.] 67 A 916.

62. Braine v. Northern Cent. R. Co., 218 Pa. 43, 66 A 985. Held error to instruct that, though company had right to bridge, it would be liable for any injury caused by any change in natural flow of water. Id. Company negligently repairing bridge in such manner as to bank floating ice is liable for injury caused by giving way of same. Dutton v. Philadelphia, etc., R. Co., 32 Pa. Super. Ct. 630.

63. Where the construction of a railroad embankment caused the obstruction of a watercourse to plaintiff's injury, the fact that it was constructed in accordance with approved principles of engineering is no defense. Chicago, etc., R. Co. v. Carpenter, 125 Ill. App. 306.

64. Choctaw, etc., R. Co. v. Rice [Ind. T.] 104 SW 819.

65. International, etc., R. Co. v. Kyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 940, 101 SW 272. Court properly restricted recovery to losses occurring within last two years, period of limitations. Id.

66. Rev. St. 1895, art. 4549, providing that purchaser or purchasers of entire roadbed, track, franchise, and chartered right of a railroad on execution or judicial sale, etc., and their associates, may exercise all powers, franchises, etc, of sold out company. Texas Southern R. Co. v. Harle [Tex.] 20 Tex. Ct. Rep. 32, 105 SW 1107.

67, 68. Texas Southern R. Co. v. Harle [Tex.] 20 Tex. Ct. Rep. 32, 105 SW 1107.

69. Purchaser may have "associates," and they may be other than those making the purchase. Texas Southern R. Co. v. Harle [Tex.] 20 Tex. Ct. Rep. 32, 105 SW 1107.

70. Rev. St. 1895, art. 4550. Texas Southern R. Co. v. Harle [Tex.] 20 Tex. Ct. Rep. 32, 105 SW 1107.

71. Texas Southern R. Co. v. Harle [Tex.] 20 Tex. Ct. Rep. 32, 105 SW 1107.

72. Where defendant bought plaintiff's railroad under agreement that part payment should be made by assignment of one-half of subsidy notes to be secured, but upon it proving impracticable to make division, it was further agreed that defendant should collect same and pay plaintiff one-half of proceeds, less cost of collection, uncollected notes to be divided, held that defendant was only required to use reasonable diligence to collect and was not liable for uncollected notes remaining. Bentonville R. Co. v. Arkansas, etc., R. Co., 84 Ark. 623, 105 SW 84. Contract not specifying what costs are to be allowed, defendant held entitled to the usual and necessary fees. Id.

73. Provision in Rev. St. Ohio 1892, § 3300, that purchasing road shall be subject to all

Leases.[See 8 C. L. 1610]—The lessor[74] and the lessee[75] must possess corporate power to enter into a lease, and the particular lease must not be prohibited.[76] The rights of the parties rest in the terms of their lease.[77] Action by stockholders to recover rental must be timely brought.[78]

Duties and liabilities subsequent to sale or lease.[See 8 C. L. 1610]—While a railroad cannot by a lease relieve itself of the duties owed to the public,[79] it is not responsible

the "duties, obligations and restrictions" of former company, held not to include claim for breach of private contract to transport goods at specified rate (Rice v. Norfolk, etc., R. Co. [C. C. A.] 153 F 497), and purchaser is not liable where it did not agree to assume liability (Id.).

74. Pittsburg v. Castle Shannon Railroad Company, organized under general railroad act of April 4, 1868 (P. L. 62), with special powers conferred by subsequent acts, held to have power to lease to Pittsburg Railway Company. Kaufman v. Pittsburg, etc., R. Co., 217 Pa. 599, 66 A 1108. In absence of express legislative authority, one railroad company has no power to lease its road to another, and an attempted lease is void as against public policy. American Lumber Co. v. Tombigbee Valley R. Co. [Ala.] 45 S 911.

75. Pittsburg Railways Company, incorporated under special act May 25, 1871 (P. L. 1170), held to have power to lease. Kaufman v. Pittsburg, etc., R. Co., 217 Pa. 599, 66 A 1108.

76. General railroad acts April 23, 1861 (P. L. 410), and Feb. 17, 1870 (P. L. 31), requiring roads of lessor and lessee to connect, do not apply to roads possessing special power under act May 25 1871 (P. L. 1170), to lease. Kaufman v. Pittsburg, etc., R. Co., 217 Pa. 599, 66 A 1108.

77. Under lease in perpetuity providing that lessee should at its own cost repair, etc., pay all taxes and assessments upon the property and the business done, except income taxes of stockholders, held that lessee could not recover money spent in making improvements, expenses incident to issuing of new bonds, nor money paid as tax on franchise. Aetna Ins. Co. v. Albany, etc., R. Co., 156 F 132. Lease at annual rental of $490,000 to be paid by paying interest on certain bonds and dividends on stock at stated rate, with provision that if payments so required did not amount to $490,000 balance was to be paid to lessor, held to entitle lessor to benefit of saving made by refunding the bonded debt at lower rate of interest. Id. Where part of debt is paid from sinking fund, and money borrowed to pay remainder is subsequently paid, held that debt was paid from sinking fund within lease provision that after the loan "shall, by the operation of the sinking fund * * * be paid," the rental used to pay interest thereon shall be paid to lessor. Id. Where lessor covenanted that lessee should peaceably and quietly enjoy demised property without hindrance from any person claiming under lessor, a clause releasing lessor from any claim for damages by reason of any defect of title should not be extended to include expense of protecting title. Brooklyn Heights R. Co. v. Brooklyn R. Co., 109 NYS 31. Provision that lessee should pay expense of any action brought against lessor held not to include expense of asserting claim against lessee which was not sustained. Id. Provision held to include $1,500 counsel fee incurred in suit arising out of prior sale of property not demised (Id.), but not expense of ejectment suit based on tax sale, there being a covenant in lease for quiet enjoyment against persons claiming under lessor (Id.). Counsel fee of $12,000 for defending four suits brought by lessee held reasonable, although only one reached trial. Id. Lease provided that proceeds of certain land sales should be used for additions, improvements, etc., other than those necessary to preserve or secure efficiency in operation of railroad. Held that exception related to operation of company as a railroad rather than to administration of its affairs as a corporation, and hence cost of office building was payable therefrom. Id. Phrase "keeping up the organization," as used in lease stipulating that lessee should pay all reasonable expense necessary to keep up organization of lessor, held to mean lessor's current expenses as living corporation. Id. Where lessor was not engaged in business and had parted with control of all of its property, and was only required to maintain its corporate existence, held that salary of $3,600 per year to president, $500 to vice-president, $2,000 to secretary and treasurer, and expense of calling frequent executive meetings, were not "reasonable expense necessary to keep up the organization," total allowance of $4,500 being ample. Id. Where lessor brought suit against lessee to recover alleged necessary expense within provision, and lessee settled by paying claim in full, held that counsel fee therein was necessary expense within provision. Id. Where legal services were rendered without expectation of pay, compensation therefor is not a reasonable expense within provision. Id. Lessor has burden of proving that claim asserted was a reasonable expense. Id.

78. Delay by stockholders in bringing suit to recover rental due under lease, such delay being less than period of limitations, held not to constitute laches, the questions being complicated and directors of two companies being largely the same men. Aetna Ins. Co. v. Albany, etc., R. Co., 156 F 132.

79. Jackson v. Southern R. Co., 77 S. C. 550, 58 SE 605. Lessor railroad company is liable for injuries sustained by reason of negligence of lessee company while exercising the charters and privileges of the lessor. Wabash R. Co. v. Keeler, 127 Ill. App. 265. Under Const. § 203, railroad cannot by lease exempt itself from liability for torts of itself and lessee. Illinois Cent. R. Co. v. Sheegog's Adm'r, 31 Ky. L. R. 691, 103 SW 323. Lessor held liable for killing of stock by reason of defective fences and cattle guards, though

for a discharge of the duties owed by the lessee to particular individuals.[80] One injured by the operation of a leased road may sue either the lessor or the lessee,[81] and the pendency of an action in the Federal court against one does not bar an action against the other in a state court.[82]

*Contracts.*See 8 C. L. 1611—Generally a railroad cannot enter into any contract which will interfere with a discharge of its duties to the public [83] or which may tend to make it more careless in the performance of the same.[84] Many of the principles of general contract law as to authority of agents,[85] rescission,[86] etc., apply. Contracts will be given effect according to their terms.[87] The Alabama statute requiring the assent of the holders of a majority of the stock to a contract for the operation of the road by another company is for the benefit of the stockholders, and may be waived.[88] A railroad permitting a logging company to use its tracks is liable for the latter's negligence.[89] Where a contract about to be entered into is clearly detrimental to the interests of the minority stockholders, equity may grant relief.[90]

*Consolidation.*See 8 C. L. 1611—The right of railroads to consolidate [91] and the

road was being operated by receiver of lessee. Harris v. Quincy, etc., R. Co., 124 Mo. App. 45, 101 SW 601. Evidence of lease by defendant to another, and a lease from such road to plaintiff's employer, and also deed of the land on which switch was located to defendant, held to make question of defendant's ownership for jury. Brady v. Kansas City, etc., R. Co., 206 Mo. 509, 102 SW 978. Pleadings held to admit ownership. Id.

80. Duty owed to employe to light yard is one growing out of contract, and not a duty owed to public generally, hence lessor is not liable. Travis v. Kansas City, etc., R. Co., 119 La. 489, 44 S 274. Lessor is not liable to servants of lessee for negligence of lessee in handling of trains or in general management of road, but is liable for omission of duty owed to public, such as proper construction of road. Illinois Cent. R. Co. v. Sheegog's Adm'r, 31 Ky. L. R. 691, 103 SW 323.

81. Mayfield v. Atlanta & C. Air Line R. Co. [S. C.] 61 SE 106. Election to sue lessee in first instance does not bar suit against lessor where the first suit was not prosecuted to judgment. Id.

82. Mayfield v. Atlantic & C. Air Line R. Co. [S. C.] 61 SE 106.

83. Grant to a logging company of such extended right to use tracks as might exclude all other use is against public policy. American Lumber Co. v. Tombigbee Valley R. Co. [Ala.] 45 S 911.

84. Contract granting right to private party to build platform on right of way from which to load cars on condition that builder indemnify the railroad company for any damage or loss resulting therefrom is not against public policy. Southern R. Co. v. Blunt, 155 F 496.

85. Station agent has no implied authority to hire one to carry mail between station and post-office, hence to hold company liable therefor actual authority must be shown. Silver v. Missouri, etc., R. Co., 125 Mo. App. 402, 102 SW 621.

86. Where contractor making improvements leases certain dump cars and upon discovering that cars do not comply with warranty makes no attempt to rescind, but enters into contract whereby lessor releases some for lessee, held too late to rescind when sued for rental. Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co., 108 NYS 707.

87. Agreement to construct a railroad spur to a mine held unambiguous and to bind obligor to not only construct the grade and to place ties thereon, but to lay the rails. Ford v. Ingles Coal Co., 31 Ky. L. R. 382, 102 SW 332. Where side track is built on land of private party under agreement giving right to railroad company to remove on 60 days' notice, held that, after expiration of notice, contract was at end, and railroad acquiring private party's interest was not estopped from maintaining action for a connection. In re Ohio River Junction R. Co. [Pa.] 68 A 830.

88. Lack of assent as required by Code 1897, § 1170, cannot be raised by state in quo warranto to oust foreign corporation. Louisville, etc., R. Co. v. State [Ala.] 45 S 296.

89. St. Louis, etc., R. Co. v. Chappell, 83 Ark. 94, 102 SW 893.

90. Where W. road, having expended $1,700,000 in acquiring right of way, construction, etc., and having contracted for completion of remainder in consideration of issuance of bonds for $15,000,000 and stocks for $19,000,000, proposed to enter into contract whereby it transferred to another road between same termini all its property, including construction contract, latter to complete line, presumably by aid of construction contract, the roads to have joint use of road, etc., held that proposed contract was so detrimental to interests of minority stock holders as to authorize injunction pendente lite. Robinson v. New York, etc., R. Co., 108 NYS 91.

91. Under express provisions of Acts 1853, p. 105, c. 85 (Rev. St. 1881, § 3971), an Indiana railroad may consolidate with one organized in adjoining state (Smith v. Cleveland, etc., R. Co. [Ind.] 81 NE 501), and a railroad which is result of prior consolidation may consolidate with another thereunder (Id.). More than two roads may consolidate thereunder, although it speaks of "two" roads uniting. Id. Under Acts 1853, p. 107, c. 86 (Burns' Ann. St. 1901, §

manner of so doing [92] is largely regulated by statute, and a stockholder in a corporation authorized by law to consolidate holds subject to the right of the majority to exercise the power.[93] In the absence of restrictions, the resultant corporation possesses the powers, franchises, rights and obligations of the constituent companies.[94] The consolidation of two or more roads pursuant to the laws of different states creates a corporation which is a domestic corporation of each state whose laws were followed.[95]

§ 10. *Indebtedness, insolvency, liens, and securities.* See 8 C. L. 1612—The right of a creditor to the appointment of a receiver on the insolvency of a railroad is generally regulated by statute.[96]

Mechanics' and materialmen's liens. See 8 C. L. 1812—A lien exists only in favor of the persons designated [97] for materials [98] furnished and labor [99] performed within the terms of the statute. Ordinarily the materials must be actually used in the construction of the road,[1] but under the Tennessee statute it is sufficient if they are furnished in good faith to be so used.[2] An assignment of claims for labor and materials does not carry an unperfected lien in Indiana.[3]

Defects in the notice may be waived by failure to object thereto.[4] Equity has

5262), right of consolidation given thereby applies to roads organized after its enactment. Id. Burns' Ann. St. 1901, § 5215, providing that a railroad may not consolidate with another which may cross or intersect its line, does not apply where intersection is at terminal point. Id. Burns' Ann. St. Ind. 1894, § 5257, providing that "any railroad company * * * shall have power to intersect, join and unite its road with any other railroad," held to authorize consolidation of more than two roads at same time. Bonner v. Terre Haute, etc., R. Co. [C. C. A.] 151 F 985.

92. Burns' Ann. St. 1901, § 5252, providing that whenever two or more railroads unite under common name they shall, upon adoption, cause copy of resolutions of their directors to be recorded in recorders' offices of different counties through which road runs, does not apply to consolidation and merger of capital stock. Smith v. Cleveland, etc., R. Co. [Ind.] 81 NE 501.

93. Bonner v. Terre Haute, etc., R. Co. [C. C. A.] 151 F 985.

94. Power of eminent domain. Smith v. Cleveland, etc., R. Co. [Ind.] 81 NE 501. Under laws of Florida and consolidation agreement, held that property of extinct company held by absorbing company was subject to levy of execution based on judgment obtained against former after merger in suit pending at time of merger. Atlantic Coast Line R. Co. v. Cone, 53 Fla. 1017, 43 S 514.

95. Smith v. Cleveland, etc., R. Co. [Ind.] 81 NE 501.

96. Where purchaser agreed to pay any judgment which might be recovered in pending suit, and thereafter ceased to operate more than one-half of road, which was only 16 miles long, and allowed same to depreciate, both railroads being insolvent, held ground for appointment of receiver under Civ. Code Prac. § 298. Ingram v. Cincinnati, etc., R. Co. [Ky.] 107 SW 239.

97. One hiring horses and harnesses to contractors constructing road held not a subcontractor within Code Civ. Proc. § 1183, giving subcontractors a lien for labor, etc. Wood, Curtis & Co. v. El Dorado Lumber Co. [Cal.] 94 P 877. Persons clearing weeds, etc., off right of way by own labor and teams held laborers under Sayles' Ann. Civ. St. 1897, art. 3312, giving lien to laborers, though work was performed under subcontract at so much per mile. Missouri, etc., R. Co. v. Bryan [Tex. Civ. App.] 107 SW 572.

98. Under Acts 1891, p. 215, c. 98, explosives used in construction of tunnel are lienable materials (Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565), but not materials furnished for construction of shanties on lots adjacent to right of way for protection of workmen (Id.), gasoline, gasoline torches, coal oil used for lighting, packing, mattocks, cotton waste, electric light supplies, tools, machinery (Id.), nor tableware or commissary supplies (Id.). Groceries furnished subcontractor for boarding house for men while constructing road held not "supplies" furnished for construction of railroad for price of which seller is entitled to lien under Ky. St. 1903, § 2492. Carson v. Shelton [Ky.] 107 SW 793.

99. Labor performed in mowing grass, weeds, etc., from right of way, held work done in the operation and repair of a railroad within Sayles' Ann. Civ. St. 1897, art. 3312. Missouri, etc., R. Co. v. Bryan [Tex. Civ. App.] 107 SW 572. Also labor in taking down fence and replacing same to more readily cut grass and weeds (Id.) and mowing weeds from tie plant presumed to be on right of way (Id.).

1. Evidence held sufficient to show delivery of materials and use in construction of road. Barnes v. Colorado Springs, etc., R. Co. [Colo.] 94 P 570.

2. Under Acts 1891, p. 215, c. 98. Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565.

3. Unperfected lien under Burns' Ann. St. 1901, § 7265. Fleming v. Greener [Ind. App.] 83 NE 354.

4. Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565.

jurisdiction to enforce a lien without bringing the property into court.[5] While in an action to enforce a lien for an unliquidated account for materials furnished to a subcontractor such subcontractor is a proper party,[6] the defendant may waive the right to have him made a party.[7] Likewise in an action to enforce the lien of a laborer under a subcontractor, the contractor is a proper,[8] but not a necessary party.[9] Where the statute gives a lien on the entire road for materials used on any portion thereof, it is not necessary to show where the materials were used,[10] nor is it necessary to prove what portion of the materials was used by the subcontractor under the different contracts with the various contractors.[11]

Bonds and mortgages and priority of claims. See 8 C. L. 1613—Where bonds are convertible into preferred stock upon certain conditions, such conditions must be complied with.[12]

A mortgage on property "thereafter acquired for railroad purposes" does not cover property which cannot be so used,[13] and a mortgage upon the "income" covers only the net income after deducting current operating expenses.[14] A court of equity administering mortgaged property under a receivership in a foreclosure suit may prefer unpaid claims for current operating expenses [15] for a limited period before receivership to bonds secured by a prior mortgage.[16] Where property in the hands of a receiver and ordered sold under foreclosure is involved in a litigation which will affect the bidding, the court may postpone the sale [17] though the term at which the order was made has expired.[18] A trustee of an active trust may bring an action for the preservation of the property against the consent of the beneficiary and recover the cost thereof.[19]

5. Lien may be declared and enforced by equity without bringing property into court by attachment or otherwise, where it is specifically described in petition. Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565.

6. Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565.

7. Answering on merits without objecting held to waive right. Luttrell v. Knoxville, etc., R. Co. [Tenn.] 105 SW 565. Amended answer, denying that complainants have taken necessary steps to fix lien and that they have acquired a lien, held not to raise objection that complainants have not first established claim against subcontractor or that he has not been made party. Id.

8. So that railroad may obtain judgment which will protect it in settlement with contractor. Jasper, etc., R. Co. v. Peek [Tex. Civ. App.] 18 Tex. Ct. Rep. 554, 102 SW 776.

9. May establish case against railroad by showing that work was performed under subcontractor connected with contractor, though contractor is not a party. Jasper, etc., R. Co. v. Peek [Tex. Civ. App.] 18 Tex. Ct. Rep. 554, 102 SW 776.

10. Lien under Mills' Ann. St. Rev. Supp. § 2869. Barnes v. Colorado Springs, etc., R. Co. [Colo.] 94 P 570.

11. Where no attempt is made to hold principal contractor. Barnes v. Colorado Springs, etc., R. Co. [Colo.] 94 P 570.

12. Where convertible "within 10 days after any dividend shall have been declared and become payable on said preferred stock," tender 60 days after declared dividend has become payable is untimely. Carpenter v. Chicago, etc., R. Co., 119 App. Div. 169, 104 NYS 152 Where convertible upon tender of the bond and the "unmatured coupons," bondholder is not entitled to an exchange after all coupons have matured and been paid. Id.

13. Held not to cover an undivided interest subsequently acquired, since there was no purpose to which railroad could put such undivided interest. Chicago, etc., R. Co. v. Tice, 232 Ill. 232, 83 NE 818.

14. Rodger Ballast Car Co. v. Omaha, etc., R. Co. [C. C. A.] 154 F 629.

15. Preferential test is whether consideration of claim was or was not part of current expenses of the ordinary operation (Rodger Ballast Car Co. v. Omaha, etc., R. Co. [C. C. A.] 154 F 629), and if it was not a part of current expenses, fact that it conserved the property and increased security of mortgage, or that it was necessary to keep mortgagor a going concern, does not give it a preference (Id.). Claim for purchase of 32 ballast cars to meet unusual conditions held not a current operating expense. Id. Claims for purchase price or for rental of engines and cars held not entitled to preference. Id.

16. Usually a period for six months. Rodger Ballast Car Co. v. Omaha, etc., R. Co. [C. C. A.] 154 F 629.

17. United States & Mexican Trust Co. v. Young [Tex. Civ. App.] 18 Tex. Ct. Rep. 451, 101 SW. 1045.

18. Where, in action to establish validity of bonds, foreclose a mortgage and appoint a receiver, order is entered granting entire relief, held that by appointment of receiver court took possession of property and could modify order directing sale though term had expired. United States & Mexican Trust Co. v. Young [Tex. Civ. App.] 18 Tex. Ct. Rep. 451, 101 SW 1045.

19. Mortgage by lessee on earnings to secure bonds, construed with mortgage by les-

§ 11. *Duties and liabilities incident to operation of the road. A. Obligation to operate and statutory regulations.* See 8 C. L. 1614—When a state confers upon a railroad corporation the rights of a common carrier, the law imposes a duty to provide all facilities and to so operate the same as to reasonably meet the requirements of the service it has undertaken to render,[20] which duty may be enforced by the state [21] by mandamus where the acts to be performed are sufficiently definite [22] and there is no other adequate remedy.[23]

Among the more common regulations are those prohibiting the escape of steam,[24] designating the signals to be given,[25] regulating speed,[26] and requiring lookouts [27] within corporate limits.

Injuries to adjacent owners from smoke, noise, etc. See 8 C. L. 1614—By statute in some states, railroads are liable for permitting obnoxious grasses and weeds to grow on right of way and to spread therefrom.[28] An action for injury to property must be timely brought.[29]

Equipment of cars. See 8 C. L. 1615—Statutes and franchises frequently require passenger cars to be so equipped as to insure comfort and convenience.[30] The safety appliance act, being remedial, must be construed to effectuate the intent of congress.[31] Under this act all cars used in moving interstate commerce [32] must be

sor and lease, held to be more than naked or dry trust, and hence trustee was authorized to maintain suit against lessee as trustee for preservation of property, and lessee as bondholder is liable for proportional share of costs though action was without its consent. Louisville, etc., R. Co. v. Schmidt [Ky.] 107 SW 745.

20. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213. Whether property devoted to service is reasonably sufficient and is being operated in a reasonably safe and convenient manner may be determined by court when properly presented. Id.

21. State has inherent power. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213.

22. May be compelled by mandamus to put roadbed in reasonably safe condition. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213.

23. Chapter 4700, p. 76, Laws of Fla., relating to power of commissioners, etc., held to afford sufficient remedy for failure to provide sufficient cars and motive power. State v. Atlantic Coast Line R. Co., 53 Fla. 650, 44 S 213.

24. Ordinance forbidding allowance of steam to escape "when engine is in immediate proximity to any street or railroad crossing" held to apply also to streets running in a close proximity parallel with railroad. Chicago, etc., R. Co. v. Steckman, 125 Ill. App. 299.

25. Ky. St. 1903, § 786, held to confer on municipalities exclusive power to determine by ordinance what signals shall be given within corporate limits. Cincinnati, etc., R. Co. v. Com., 31 Ky. L. R. 1113, 104 SW 771.

26. See post, this section, subsec., Speed Regulations.

27. Shannon's Code Tenn. § 1574, subsec. 4, requiring company to keep some one on locomotive always on lookout ahead, etc., held not applicable where train had become uncoupled in depot grounds and was backing to recouple. Payne v. Illinois Cent. R. Co. [C. C. A.] 155 F 73.

28. Petition for recovery of damages under statute for permitting Johnson grass to grow on right of way and to spread to plaintiff's adjoining property held to state cause of action, and not to be wanting in particularity. Doeppenschmidt v. International, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 642, 102 SW 950.

29. Where original construction and use of spur track did no injury to plaintiff's premises 30 or 50 feet away, but thereafter spur is changed into main line and heavy traffic thereon causes vibrations which injure plaintiff, cause of action held not to have accrued until change was made. Schueller v. San Antonio, etc., R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 476, 102 SW 922.

30. Franchise requiring cars running through rural district to be so equipped as to insure comfort and convenience of passengers requires them to be provided with water tanks and toilet rooms. West Bloomfield Tp. v. Detroit United R. Co., 146 Mich. 198, 13 Det. Leg. N. 717, 109 N 258.

31. United States v. Central of Georgia R. Co., 157 F 893.

32. Where defectively equipped empty car is being hauled in interstate train, it must be shown that such car was used or intended to be used in moving interstate traffic. United States v. Illinois Cent. R. Co., 156 F 182. Car used in connection with engine used in interstate commerce comes within safety appliance act as amended. United States v. Chicago, etc., R. Co., 157 F 616. Act, as amended, applies to moving of car generally used in moving interstate traffic although it is empty at time of alleged offense. Id.; United States v. St. Louis, etc., R. Co., 154 F 516. Complaint, in action for personal injury to brakeman in making coupling, failing to allege that car having defective coupler was being used in moving interstate traffic, does not state cause of action under safety appliance act before amendment of 1893. Missouri Pac. R. Co. v. Brinkmeier [Kan.] 93 P 621.

equipped at both ends [33] with automatic couplers, but if so equipped the act does not require that such equipment be effectively operated,[34] and the railroad is liable only for common-law negligence in keeping the same in repair.[35] The act is applicable to a railroad engaged in interstate commerce [36] though it operates wholly within a state.[37] Knowledge of the defect is not an element of the offense,[38] and if diligence is a defense at all [39] it must be of the highest kind.[40] A car discovered to be defective must be repaired at the first opportunity.[41]

There seems to be a conflict of opinion as to whether an action to recover the penalty for a violation of the safety appliance act is one of debt [42] or a criminal proceeding,[43] and hence whether the violation must be established by a preponderance of the evidence or beyond a reasonable doubt.[44] The government must establish all the elements of the offense.[45] The burden rests upon the defendant to bring itself within the proviso excepting certain logging cars from its operation.[46]

Speed regulations.[See 8 C. L. 1616]—By statute [47] or otherwise, cities are frequently given the power to fix reasonable [48] speed limits, and the court will not interfere

33. United States v. Central of Georgia R. Co., 157 F 893.

34. United States v. Illinois Cent. R. Co., 156 F 182.

35. Missouri Pac. R. Co. v. Brinkmeier [Kan.] 93 P 621.

36. In determining when carrier is engaged in interstate commerce within act, language of interstate commerce act is not controlling. United States v. Colorado, etc., R. Co. [C. C. A.] 157 F 321. Hauling of empty car from one state to another for purpose of repair held engaging in interstate commerce within act. United States v. Chicago, etc., R. Co., 157 F 616.

37. United States v. Colorado, etc., R. Co. [C. C. A.] 157 F 321.

38. United States v. Southern Pac. Co., 154 F 897; United States v. Chicago, etc., R. Co., 156 F 180.

39. Violation of safety appliance act renders railroad company liable absolutely, and hence it need not be alleged or proven that defendant was negligent in failing to discover and repair. United States v. Atlantic Coast Line R. Co., 153 F 918. Where car becomes defective during trip, company does not become liable under act unless it fails to repair at first opportunity after actual discovery or after it would have been discovered by use of the utmost care of a highly prudent man. United States v. Illinois Cent. R. Co., 156 F 182.

40. Evidence held insufficient to show that proper inspection was made. United States v. Indiana Harbor R. Co., 157 F 565. Where defendant's car came into its yards loaded with interstate traffic, with one handhold missing, and was moved from there to other yards, and then for delivery to connecting carrier, two inspections being made in meantime without discovering defect, held that company failed to exercise care required by safety appliance act. United States v. Louisville, etc., R. Co., 156 F 193.

41. No defense that car was on way to repair shops, especially where it could have been repaired before starting. United States v. St. Louis, etc., R. Co., 154 F 576. Where defective coupler was capable of repair at any stage of journey without serious inconvenience or delay, carrier cannot delay repairs until car has been taken to terminal yards for unloading and then to repair shops. United States v. Southern Pac. Co., 154 F 897. Where it is practicable to repair coupler so as to make it comply with safety appliance act without taking it to repair shops, it is not defense for failure to make such repairs that car generally was so out of repair as to necessitate taking it to the shop. Id. Where defect was discovered at place in yards where it could not be fixed without blocking entire business of yards, and consignee's place of business was only four blocks distant and nearer than repair tracks, held not violation of act to take car to consignee's place and after unloading to repair track, it being most practical course. United States v. Louisville, etc., R. Co., 156 F 195.

42. Action to recover penalty for violations of safety appliance act of March 2, 1893 (27 Stat. 531, c. 196; U. S. Comp. St. 1901, p. 3174), is one of debt, and in such action in Federal court in North Carolina complaint need not allege a specific date in describing violations. United States v. Atlantic Coast Line R. Co., 153 F 918.

43. Held criminal action. United States v. Illinois Cent. R. Co., 156 F 182.

44. By preponderance of evidence. United States v. Central of Georgia R. Co., 157 F 893. Beyond reasonable doubt. United States v. Illinois Cent. R. Co., 156 F 182.

45. To recover penalty, plaintiff must prove beyond reasonable doubt (1) that car was used in hauling interstate traffic, (2) that when so used it was not equipped as required, and (3), if equipment became defective during transit, that defect had been discovered or by exercise of utmost care of highly prudent man it could have been discovered. United States v. Illinois Cent. R. Co., 156 F 182.

46. United States v. Atlantic Coast Line R. Co., 153 F 918.

47. Under Ky. St. 1903, § 3074, town of sixth class may require railroad to observe such reasonable precautions as to speed of its trains in approaching crossing or passing through its limits as may be needful for safety of public. Cincinnati, etc., R. Co. v. Com., 31 Ky. L. R. 1113, 104 SW 771.

48. Where no unreasonable extent of territory is included in city and there are public

therewith unless the unreasonableness of such ordinances or the want of necessity therefor clearly appears.[49] Such ordinances, however, must not unreasonably interfere with the speedy transportation of the mails.[50] A city may limit the speed of steam cars without limiting that of street cars.[51] An ordinance limiting the speed until gates and signal bells are erected and operated becomes inoperative upon the erection and operation of such gates and bells, and is not revived by a discontinuance thereof.[52] The violation of a speed ordinance is usually held negligence.[53]

Penal statutes regulating the speed of trains should be so construed as not to give cumulative penalties unless the legislative intent to the contrary is clear.[54] Where a speed ordinance does not embrace any offense made criminal under the laws of the state, a suit to recover a penalty for a violation thereof is a civil action.[55]

Obstructions at crossings.[See 8 C. L. 1616]

Stops at railroad crossings.[See 8 C. L. 1616]—In some states a railroad company, where no interlocking systems are maintained, must stop all trains and ascertain that there is no approaching train before crossing,[56] and is liable to any one[57] injured by a failure so to do.

Conveniences at depots.[See 8 C. L. 1617]—By statute in many states, railroads are required to keep waiting rooms at stations comfortably heated and supplied with drinking water[58] and to provide proper water closets.[59] While the Texas statute is valid in so far as it requires the railroads to keep water closets in a reasonably sanitary condition and lighted at night[60] it is unconstitutional so far as it relates to the construction of closets,[61] and hence no liability attaches for the construction of an unsuitable closet.[62]

An indictment for failure to provide statutory convenience must be certain[63]

streets and roads crossing railroad tracks in sparsely settled portion, city may reasonably limit speed. Kunz v. Oregon R. & Nav. Co. [Or.] 94 P 504.

49. Peterson v. State [Neb.] 112 NW 306.

50. Ordinance limiting speed of trains within city limits to 10 miles per hour held not void as unreasonably restricting speedy transportation of mail. Peterson v. State [Neb.] 112 NW 306.

51. Fact that latter are more readily controlled being sufficient ground for classification. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030.

52. Hecker v. Illinois Cent. R. Co., 231 Ill. 574, 83 NE 456.

53. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723.

54. State v. Wisconsin Cent. R. Co. [Wis.] 113 NW 952. St. 1898, §§ 1809, 1819, imposing penalty "for each and every" violation, held to authorize recovery of cumulative penalties. Id.

55. Proof beyond reasonable doubt is not required. Peterson v. State [Neb.] 112 NW 306.

56. Instruction on statutory duty of railroad company, where no interlocking fixtures are maintained, to stop before crossing tracks of another road and to ascertain that there is no approaching train, held not erroneous as requiring infallibility of those in charge of train. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009. Rev. St. 1895, art. 4507, requiring engines approaching place where two lines cross to stop, held applicable to crossings where switch engines are operated. El Paso, etc., R. Co. v. Murtle [Tex. Civ. App.] 108 SW 998.

57. Under Burns' Ann. St. 1901, § 2293, making it an offense for engineer to cross tracks of another road without stopping, etc., railroad violating same is liable for injury resulting from collision though it did not sustain relation of carrier and passenger to one injured. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009.

58. Acts 1903, p. 303, § 2, held not violative of Const. U. S. Amend. 14. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 625.

59. Acts 1903, p. 303, § 2, requiring railroads to maintain separate water closets for males and females and to properly designate same by lettering held not to violate U. S. Const. Amend. 14. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 623.

60. Acts 1905, p. 324, c. 133. Houston, etc., R. Co. v. State [Tex.] 107 SW 525, afg. [Tex. Civ. App.] 19 Tex. Ct. Rep. 673, 103 SW 449.

61. Act April 17, 1905 (Acts 1905, p. 324, c. 133). Houston, etc. R. Co. v. State [Tex.] 107 SW 525, afg. [Tex. Civ. App.] 19 Tex. Ct. Rep. 673, 103 SW 449; Southern Kansas R. Co. v. State [Tex.] 100 SW 1197. Held void as ex post facto and as a deprivation of property without due process of law (State v. Texas & N. O. R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 550, 103 SW 653), and also for uncertainty of terms requiring "suitable closets" within a "reasonable and convenient distance" (Id.).

62. Houston, etc., R. Co. v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 673, 103 SW 449.

63. Indictment, under Acts 1903, p. 303, § 2, for failure to keep waiting room properly heated and supplied with drinking water, but failing to designate whether it was waiting room for white or colored race,

and not duplicitous.[64] An action to recover a penalty, being in the nature of a civil action, the violation need not be proven beyond a reasonable doubt.[65]

(§ 11) *B. General rules of negligence and contributory negligence.*[See 8 C. L. 1617]—A railroad owning and operating another[66] the autonomy of which is preserved for convenience is liable for its negligence.[67] Where an injury results from the concurrent negligence of two roads, both are liable therefor.[68] While a master is not usually liable for acts of the servant wholly beyond the scope of his employment, a railroad is liable for the actual damages resulting from a want of and unnecessary blowing of the whistle,[69] but not for exemplary damages unless the act is authorized or ratified.[70] Ordinarily a railroad owes reasonable care to avoid injury to persons and animals.[71] As in tort cases generally, defendant's negligence must be the proximate cause of the injury,[72] and this is true although the negligence relied

separate rooms being required, held void for uncertainty. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 625. Indictment, under Acts 1903, p. 303, § 2, requiring railroads to provide separate closets for males and females and to properly letter same, charging that defendant failed to maintain two water closets and to designate same by proper lettering, is void for uncertainty, for if it failed to maintain such closets it could not fail to properly letter same. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 623.

64. Indictment under Acts 1903, p. 303, § 2, for failure to keep waiting room at station comfortably heated and supplied with drinking water held duplicitous. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 625. Indictment under Acts 1903, p. 303, § 2, for failure to provide separate closets for males and females and to properly letter same held to charge two offenses. State v. St. Louis, etc., R. Co. [Ark.] 103 SW 623.

65. Action under Acts 1905, p. 324, c. 133, for failure to maintain water closets in sanitary condition. Houston, etc., R. Co. v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 673, 103 SW 449. Where in action under Code 1906, § 2382, for failure to provide suitable water closets, evidence shows that a water closet is maintained, but fails to disclose conditions and circumstances from which its suitableness can be determined, judgment against defendant must be reversed. State v. Baltimore, etc., R. Co., 61 W. Va. 634, 57 SE 44. In action for penalty under Acts 1905, p. 324, c. 133, for failure to maintain water closets in sanitary condition, where evidence tended to show that inclosure about closets proper was frequently used for closet purposes, question of unsanitary condition held for jury. Houston, etc., R. Co. v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 673, 103 SW 449.

66. Where evidence makes prima facie case of such ownership and operation, railroad must show contrary case to escape. Hollins v. New Orleans, etc., R. Co., 119 La. 418, 44 S 159.

67. Hollins v. New Orleans, etc., R. Co., 119 La. 418, 44 S 159.

68. Collision. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009.

69. Stewart v. Cary Lumber Co. [N. C.] 59 SE 545. Action for negligently blowing whistle at street crossing. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428.

70. Stewart v. Cary Lumber Co. [N. C.] 59 SE 545.

71. For the duty owed in particular cases, see the following subsections of this section. Instruction as to degree of care required of railroad in operating its cars held proper. Scalan v. Chicago Union Trac. Co., 127 Ill. App. 406. Instruction as to duty of railroad in operating its cars, as to unusual and extraordinary duty held proper. Id. Where finding for plaintiff is authorized only on theory that deceased child was exercising degree of care to be expected of one of his age and discretion, it is not necessary to liability that defendant's action be willful or wanton. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624.

72. Southern R. Co. v. Hansbrough's Adm'r [Va.] 60 SE 58.

Held proximate cause: Failure to give warning of collision at crossing. Kelsall v. New York, etc., R. Co. [Mass.] 82 NE 674; Meyers v. Central R. Co. of New Jersey, 218 Pa. 305, 67 A 620. Negligent operation of train causing injury from runaway. Southern R. Co. v. Tankersley [Ga. App.] 60 SE 297. Failure to give warning before starting train, although horse took fright at noise. Atchison, etc., R. Co. v. Wilkie [Kan.] 90 P 775. Placing boy in perilous position on car, of his falling therefrom. Daugherty v. Chicago, etc., R. Co. [Iowa] 114 NW 902. Running of train at rate of 40 to 50 miles per hour over street crossing, of death of one struck thereat. Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 490. Where switchman saw peril of one on track in time to stop train and saw decedent's effort to save him, held that his failure to stop train was proximate cause of decedent's death. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Held that plaintiff's attempt to drive by after discovering that horse was frightened was not proximate cause of injury, instead of negligence in leaving car in street. Ft. Worth, etc., R. Co. v. Morris [Tex. Civ. App.] 18 Tex. Ct. Rep. 527, 101 SW 1038. Where defendant failed to stop before crossing tracks of another road, resulting in collision which partly demolished depot, causing panic which injured plaintiff, held that defendant's negligence was proximate cause of injury. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009. In action against

upon is the violation of a rule of the company [73] or the failure to discharge a statutory duty,[74] and notwithstanding a statute allowing recovery despite plaintiff's negligence, but diminishing the amount thereof.[75] Defendant's negligence, however, need not be the sole cause of the injury.[76] Except where the doctrine of comparative negligence obtains,[77] negligence on the part of plaintiff proximately contributing to the injury [78] will defeat recovery [79] unless defendant is guilty of willful or

railroad company and street car company by being struck by locomotive after jumping from one on parallel track to avoid collision with street car, answers to special interrogatories considered and held not to show that negligence of each defendant was not proximate cause of injury. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030.

Held for jury: Whether failure to erect sign board was cause of accident at crossing, night being dark. Texas, etc., R. Co. v. Tucker [Tex. Civ. App.] 28 Tex. Ct. Rep. 689, 106 SW 764. Where planking had been removed from crossing and mule slipped while crossing. Osteen v. Southern R. Co., 76 S. C. 368, 57 SE 196. Whether failure to ring bell and blow whistle was proximate cause of killing of cow. Texarkana, etc., R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167. In action for killing of team stalled at crossing in consequence of wheel going into ditch at side of bridge, whether proximate cause was faulty construction of bridge or negligent driving. Thompson v. Seaboard Air Line R. Co. [S. C.] 58 SE 1094. Where sleigh was overturned by dropping of reach and its striking rail, it is not error to refuse instruction that defect in planking was not proximate cause where there was evidence that planking was not maintained as required by law, and that if it had been in proper condition reach would have passed over it safely. Logan v. Lake Shore, etc., R. Co., 148 Mich. 603, 14 Det. Leg. N. 303, 112 NW 506. Where defendant blocked street for period longer than allowed by ordinance and pedestrian, after waiting for such period, attempted to pass through and was injured, held, under facts, that blocking of crossing was properly submitted as proximate cause. Chicago, etc., R. Co. v. Johnson [Tex.] 108 SW 964. Where negligence relied on was bumping of cars into car which plaintiff was unloading without warning, thereby causing him to fall against spike, instruction that if plaintiff would not have been injured but for spike, and that if defendant could not have anticipated any such injury to find for defendant, held properly refused. Missouri, etc., R. Co. of Texas v. Thomas [Tex. Civ. App.] 107 SW 868.

Held not proximate cause: Failure to provide cattle guards, of injury received by plaintiff in attempting to drive his cattle off right of way. Thompson v. Cleveland, etc., R. Co., 226 Ill. 542, 80 NE 1054. Killing of horse, of injury received from another horse taking fright thereat. Louisville, etc., R. Co. v. Armstrong [Ky.] 105 SW 473. Keeping of pile of clay alongside track is not proximate cause of injury to child playing thereon who was injured while running along such pile attempting to tag passing trains. Seymour v. Union Stock Yards & Transit Co., 125 Ill. App. 61. Neither failure to have air brakes (Bookman v. Seaboard Air Line R. Co. [C. C. A.] 152 F 686), negligent speed (St. Louis, etc., R. Co. v. Ferrell, 84 Ark. 270, 105 SW 263), nor failure to maintain lookout, where plaintiff stepped onto track immediately in front of train (Texas, etc., R. Co. v. Shivers [Tex. Civ. App.] 20 Tex. Ct. Rep. 818, 106 SW 894). Failure to give signals, where plaintiff saw train (St. Louis, etc., R. Co. v. Ferrell, 84 Ark. 270, 105 SW 263) or was deaf (Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885). Instruction that, decedent being deaf, no recovery can be had for failure to give signals, held erroneous, as signal might have been heard by others and decedent saved. Id. Where one stepping from engine to depot catches foot in switch and is struck by car, held error to submit as ground of negligence placing of switch in street, it appearing that street was not used and could not be used. Missouri, etc., R. Co. v. Scruggs [Tex. Civ. App.] 20 Tex. Ct. Rep. 722, 106 SW 778. Evidence considered and held that escape of steam from engine did not cause deceased's horses to become frightened and run away. Illinois Northern R. Co. v. Casey, 130 Ill. App. 481.

73. Allegation of petition held to show that proximate cause of injury was horse's taking fright at rapidly approaching train, and not absence of white light in violation of rules. Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 SE 374.

74. Statutory crossing signals. Rogers v. Rio Grande Western R. Co. [Utah] 90 P 1075. Instruction authorizing recovery if speed exceeded rate allowed by ordinance held erroneous as ignoring causal connection. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. As, also, instruction on failure to give signals. Id.

75. Rev. St. Fla. 1892, § 2345, held not to affect rule. Bookman v. Seaboard Air Line R. Co. [C. C. A.] 152 F 686.

76. May be proximate cause without being sole cause. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867.

77. Instruction on comparative negligence held not erroneous as not requiring defendant's negligence to exceed decedent's, especially where Civ. Code of 1895, §§ 2322, 3830, relating thereto, were read to jury. Wrightsvile, etc., R. Co. v. Gornto, 129 Ga. 204, 58 SE 769.

78. Where plaintiff's negligence is a concurrent proximate cause of injury, there can be no recovery. Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56. Although, notwithstanding decedent's negligence, train could have been stopped in time to avoid injury, after his peril was discovered, had it not been running at negligent speed, accident is still result of concurrent negligence. Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885. Instruction on

wanton negligence,[80] or after discovering [81] plaintiff's perilous position [82] defendant could by the means at hand,[83] in the exercise of ordinary care,[84] have avoided the in-

contributory negligence authorizing recovery unless injury to decedent was caused "by his own fault" held erroneous, since if decedent was only partially in fault and it contributed there could be no recovery, Southern R. Co. v. Hansbrough's Adm'x [Va.] 60 SE 58. In action for injury caused by horse taking fright at blowing of whistle at crossing, whether plaintiff's negligence in driving near to crossing if negligence, was proximate cause, held properly submitted to jury. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Where evidence shows that engineer saw plaintiff in time to stop train, observed that she was old, but assumed that she would stop before going onto track or crossing over before train reached her, held question for jury whether her negligence was proximate cause of injury. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. One attempting to drive horse by car negligently left in street, after seeing that she was frightened thereat, held not precluded from recovering on ground of voluntarily encountering a known danger, since it does not follow from fact that she was frightened that it would be dangerous to urge forward. Ft. Worth, etc., R. Co. v. Morris [Tex. Civ. App.] 18 Tex. Ct. Rep. 527, 101 SW 1038. Where employe on track is rendered unconscious by lightning, but train running over him was far enough away to have been stopped had a lookout been maintained, negligence in going onto track in first instance held not proximate cause of injury. Sawyer v. Roanoke R. & Lumber Co. [N. C.] 58 SE 598.

79. Louisville, etc., R. Co. v. McNary's Adm'r [Ky.] 108 SW 898; Rogers v. Rio Grande Western R. Co. [Utah] 90 P 1075. Complaint showing that plaintiff stood upon or so near tracks as to be struck by train while watching excavations held to show contributory negligence. Anderson v. Minneapolis, etc., R. Co. [Minn.] 114 NW 1123. One passing behind train without being able to see, because of smoke and steam, that another is following, held negligent. Smetanka v. New York Cent., etc., R. Co., 123 App. Div. 323, 107 NYS 973. In action for death of one guilty of contributory negligence, instruction that, unless engineer knew of peril or impending peril of decedent and failed to exercise due care, plaintiff could not recover, held proper. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238. Where evidence conclusively shows contributory negligence proximately contributing to injury, and there is entire absence of evidence to show that engineer discovered plaintiff's peril in time to avoid injury, directed verdict is proper. Kelly v. Gulf, etc., R. Co. [Tex. Civ. App.] 101 SW 1166. Where evidence shows that excessive speed and absence of headlight were not proximate cause of injury, but decedent's negligence in failing to leave track after warning, affirmative charge for defendant is proper. Wade v. Louisville, etc., R. Co. [Fla.] 45 S 472. Where child standing on crossing between main line and side track, crossing being blocked by cars, on discovering trains approaching on both tracks, attempted to escape by running up space between track to cross, held not negligent as matter of law. Central of Georgia R. Co. v. Motz [Ga.] 61 SE 1.

Held negligent: Where one is guilty of negligence in being too near track, and is not discovered in time by trainmen to avoid injury by use of ordinary care, there is no actionable negligence. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. In walking down steps and onto track without looking, notwithstanding train was in full view. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418.

80. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867; Russell v. Oregon Short Line R. Co. [C. C. A.] 155 F 22; Lacey v. Louisville, etc., R. Co. [C. C. A.] 152 F 134. Civ. Code 1902, § 2139, providing that railroad shall be liable for injuries at crossing caused by failure to give statutory signals unless party injured was grossly negligent, does not vary rule that contributory negligence is no defense to willful injury. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. "Willful negligence" rendering railroad liable notwithstanding plaintiff's negligence is failure to exercise ordinary care to prevent injury "after" discovering plaintiff's perilous position, hence allegation that, although trainmen knew, or in exercise of ordinary care would have known, of plaintiff's peril, they failed to check speed, etc., does not charge such negligence. Anderson v. Minneapolis, etc., R. Co. [Minn.] 114 NW 1123. Held that alternative allegation could not be treated as surplusage. Id. Evidence that conductor, knowing that plaintiff and her husband living in car on side track, but not knowing whether she was in, caused car to be kicked onto siding with such force as to bump violently into such car, held sufficient to submit issue of wantonness. Mobile, etc., R. Co. v. Smith [Ala.] 45 S 57. Whether making of flying switch over much used crossing without anyone in control is wanton or willful held for jury. Lacey v. Louisville, etc., R. Co. [C. C. A.] 152 F 134.

81. Jury may infer that employes saw person dangerously near track, notwithstanding denials, where there were no obstructions. Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Evidence that trainmen kept lookout that track was straight and view was unobstructed held to support finding that they saw plaintiff, notwithstanding their contrary testimony. Louisville, etc., R. Co. v. Bell [Ky.] 108 SW 335.

82. Instruction that if brakeman on moving car saw plaintiff on track in front of car in time to avoid injury, etc., held not objectionable as not requiring plaintiff to have been in place of danger before requiring ordinary care of brakeman. Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660.

83. Engineer discovering one in peril must use all appliances at hand to stop train, and good faith and honest intent

jury.[85] Railroads must exercise reasonable care to avoid injury after discovering another's peril,[86] but the doctrine being based upon the rule of sole proximate

does not excuse a failure so to do. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238.

84. Hovius v. Cincinnati, etc., R. Co. [Ky.] 107 SW 214; Texas Mexican R. Co. v. De Hernandez [Tex. Civ. App.] 108 SW 765. Negligence after discovering one in perilous position through own negligence consists of failure to promptly use every appliance at hand known to skilled engineers to avoid injury, and is dependent upon fact whether engine could have been sooner stopped. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238. Evidence of failure to blow whistle held sufficient to require submission of question of discovered peril. Texas, etc., R. Co. v. Tucker [Tex. Civ. App.] 20 Tex. Ct. Rep. 689, 106 SW 764. Where engineer discovered one on track immediately in front of train, negligence in sounding alarm instead of devoting whole effort to stopping train held for jury. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238. Engineer held not negligent in shouting warning instead of blowing danger whistle, cars being almost onto plaintiff. Jones v. Sibley, etc., R. Co. [La.] 46 S 61.

85. St. Louis, etc., R. Co. v. Cain, 84 Ark. 623, 104 SW 533; Zipperlen v. Southern Pac. Co. [Cal. App.] 93 P 1049; Jones v. Sibley, etc., R. Co. [La.] 46 S 61; Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Instruction on discovered peril and liability for killing of one attempting rescue held to properly submit issues. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Instruction on discovered peril held not erroneous as failing to require that peril should have been discovered in time to avoid injury, especially when considered with special instruction. Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Instruction on effect of contributory negligence held properly refused as ignoring defendant's duty to exercise reasonable care to avoid injuring deceased in position in which he placed himself. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948. After discovering peril, it is duty of operatives to use all means at hand, consistent with safety of persons on train, to avoid injury, and though court improperly submits only negligence in failing to stop train, jury may consider evidence of negligence in other respects. Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. In action to recover for death of one who was himself negligent, plaintiff must show that, after knowledge of decedent's peril, defendant failed to exercise due care to stop engine, and that such negligence was proximate cause of death. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238.

Evidence held to authorize submission of doctrine: Evidence that trainment saw plaintiff running on track with back toward train about 175 yards ahead and failed to sound warning. Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. Evidence that by exercise of ordinary care engineer could have seen decedent going upon track unaware of approaching train in time to avoid injury. Chesapeake, etc., R. Co. v. Wilson's Adm'r, 31 Ky. L. R. 500, 102 SW 810. Evidence that train was running at speed in excess of limit fixed by ordinance, that engineer saw plaintiff walking on track with head down and paying no heed to warning signals, but that no attempt was made to stop train until within 25 feet of plaintiff. Smith v. Wabash R. Co. [Mo. App.] 107 SW 22. Where one walking along space between was struck by cars coming from behind while stepping to side to avoid steam from passing engine on other track. Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94.

Held not to authorize submission: Evidence that after discovering that object on track was human being it was too late to stop train held not to raise issue of discovered peril. San Antonio, etc., R. Co. v. McMillan [Tex.] 18 Tex. Ct. Rep. 431, 102 SW 703. Where engineer kept constant lookout and applied emergency brakes, sanded the tracks and shut off steam upon discovering plaintiff's danger. Atchison, etc., R. Co. v. Baker [Ind. T.] 104 SW 1182. Decedent stepped onto track immediately in front of train. Edwards' Adm'r v. Chesapeake, etc., R. Co. [Ky.] 108 SW 303.

Evidence held to authorize recovery: For injury at crossing. Zipperlen v. Southern Pac. Co. [Cal. App.] 93 P 1049. One struck by train from behind while stepping from space between tracks to avoid steam from passing engine. Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Evidence held to authorize finding that operatives discovered plaintiff's peril in time to avoid injury, train running very slowly at time. Nacogdoches, etc., R. Co. v. Beene [Tex. Civ. App.] 20 Tex. Ct. Rep. 249, 106 SW 456. Negligence of switchman in failing to signal train to stop on discovering perilous position of one on track held negligence of company. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408.

Held for jury: Whether operatives of train saw one's perilous position in time to avoid injury by exercise of ordinary care. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Whether switchman discovered peril of one near track in time to stop train by signals held for jury under facts of case, notwithstanding presumption that one on track will leave in time to avoid injury. Id.

86. Petition alleging that defendant permitted large volumes of steam to escape, thereby frightening plaintiff's horse, causing it to back onto tracks, that trainmen saw perilous position of plaintiff, that they could easily have stopped in time to avoid injury, but failed to do so, etc., held not open to general demurrer for failure to allege that such escape of steam was unnecessary. Brunswick, etc., R. Co. v. Hoodenpyle, 129 Ga. 174, 58 SE 705. Where reasonable minds may differ as to whether railroad discharged full duty to one discovered in perilous position question is for

cause [87] does not authorize recovery where plaintiff's negligence contributes therewith.[88] While in most states defendant must have actual knowledge of plaintiff's peril,[89] in others it is sufficient if defendant in exercising the care owed to plaintiff would have discovered the same.[90] One in a position of peril is not bound to choose the course which ultimately will prove safest,[91] but an emergency will not excuse failure to exercise the care required under ordinary circumstance where plaintiff's own negligence aided in creating the same.[92] A child,[93] however, is only required to exercise the care ordinarily to be expected of one of his age and discretion.[94] While a railroad company is not ordinarily liable for the negligence of mail clerks, it may become liable where it permits them to continue a dangerous custom.[95] Negligence of a parent contributing to the injury of a child will bar a recovery for the parent's benefit,[96] and whether a parent is guilty of negligence is usually a question for the jury.[97]

(§ 11) *C. Injuries to passengers and freight.*[98]

(§ 11) *D. Injuries to employes.*[99]

(§ 11) *E. Injuries to licensees and trespassers. General rules.*[See 8 C. L. 1619]

As a general rule the only duty owed to trespassers [1] and bare licensees [2] is not to

jury. Norfolk, etc., R. Co. v. Dean's Adm'x [Va.] 59 SE 389.

87. Instruction on proximate cause held in effect to charge last clear chance doctrine, and correct. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644.

88. Contributory negligence to be a defense to a failure to exercise due care after discovering plaintiff's peril must be a negligent act or omission with a knowledge of the present and impending peril. Southern R. Co. v. Steward [Ala.] 45 S 51. Where pedestrian approaching railroad crossing attempts to cross without looking or listening, and by looking or listening approaching train would have been discovered, company is not liable though it failed to give signals. Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101.

89. Instruction on discovered peril held not objectionable as making defendant liable whether peril was discovered or not, though all possible means was used to avoid injury after discovery of peril, and without regard to proximate cause. Nacogdoches, etc., R. Co. v. Beene [Tex. Civ. App.] 20 Tex. Ct. Rep. 249, 106 SW 456.

90. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776; Riley v. Northern Pac. R. Co. [Mont.] 93 P 948. Need not have absolute knowledge. Smith v. Wabash R. Co. [Mo. App.] 107 SW 22. In action for death of one killed at crossing, question whether defendant, in exercise of ordinary care, might have discovered perilous position of deceased in time to have avoided injury, held question for jury. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948. Where licensee was knocked between rails by first car of long train, but was not killed until struck by fire box of engine, brakeman being unable to give stop signal to engineer, held that doctrine was applicable though engineer had no knowledge of decedent's perilous position, since, being bound to observe lookout, defendant was bound to provide for exchange of signals. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P 402. Where licensee was knocked between rails by first car of long backing train, but was not killed until engine struck him, evidence of distance in which train could have been stopped was admissible, though engineer had no actual knowledge of his position, where exercise of care owed would have disclosed same. Id.

91. Whether boy 16 years old exercised care ordinarily exercised by one of his age in remaining in automobile threatened with collision held for jury. Sherwood v. New York Cent., etc., R. Co., 120 App. Div. 639, 105 NYS 547.

92. Held inapplicable where plaintiff negligently approached crossing. Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56.

93. Instruction on contributory negligence held not to exact of plaintiff, sixteen years old, only the care of children. Cleveland, etc., R. Co. v. Wuest [Ind. App.] 83 NE 620. In action by child injured at crossing, plaintiff has burden of proving that he was non sui juris. Simkoff v. Lehigh Valley R. Co., 190 N. Y. 256, 83 NE 15.

94. Whether seven year-old child injured at crossing exercised decree of care to be expected of one of his age held for jury under facts and circumstances. Simkoff v. Lehigh Valley R. Co., 190 N. Y. 256, 83 NE 15.

95. Throwing mail pouch from moving train onto public street. Pittsburg, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934.

96. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246.

97. Where child who was allowed to play in yard near tracks was seen ten minutes before accident and search commenced before injury, question of contributory negligence of parents is for jury. Illinois Cent. R. Co. v. Warriner, 229 Ill. 91, 82 NE 246.

98. See Carriers, 9 C. L. 466.

99. See Master and Servant, 10 C. L. 691.

1. Held a trespasser: One going upon right of way to look for his cattle. Chicago, etc., R. Co. v. Bunch, 82 Ark. 522, 102 SW 369. Where, through defendant's failure to supply proper cattle guards plaintiff's cattle reached railroad's right of way, plaintiff in attempting to drive them therefrom is

willfully or wantonly injure them,[3] and hence no duty is owed to keep the premises safe,[4] to give warning of approaching trains,[5] or to maintain a lookout to discover their presence on the track.[6] Where, however, the road runs through a thickly populated locality or place where the presence of people on the track is to be anticipated, a higher care is required.[7] After discovering a trespasser, ordinary care must be exercised to avoid injury,[8] and a railroad is liable if his peril was, or by the exercise

implied licensee. Thompson v. Cleveland, etc., R. Co., 226 Ill. 542, 80 NE 1054.

Held not a trespasser: One on crossing generally used by public with consent of railroad company owning tracks is not trespasser. St. Louis Nat. Stock Yards v. Brennan, 126 Ill. App. 601. One using foot path across tracks constantly used by public. Minot v. Boston, etc., R. Co. [N. H.] 66 A 825. Plaintiff, in standing on railroad track while waiting for train to pass on parallel track at private crossing, made by company under contract with his grantor, an adjoining landowner. Hovius v. Cincinnati, etc., R. Co. [Ky.] 107 SW 214. Railroad having tracks in street has no rights therein superior to those of a pedestrian. Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026.

2. Party remaining at depot unreasonable time after leaving train or before train time is mere licensee. Illinois, etc., R. Co. v. McMillion, 129 Ill. App. 27. Where plaintiff was injured while walking along beaten path between railway tracks, which had been so used by a great number of people for many years, it is not error for trial judge to refuse to declare as matter of law that plaintiff was a trespasser, and to allow jury to determine whether or not railway company had waived prohibition against passing through its yard and had extended permission to public to use path as foot way, notwithstanding it was longitudinal use, and notwithstanding presence of warning signs as to danger and against trespassing. Harmon v. McGuire, 6 Ohio N. P. (N. S.) 597.

3. Illinois, etc., R. Co. v. McMillion, 129 Ill. App. 27. Trespasser. Grand Trunk R. Co. v. Flagg [C. C. A.] 156 F 359. Licensee. Deakin v. Illinois, etc., R. Co., 127 Ill. App. 258; Norfolk, etc., R. Co. v. Bondurant's Adm'r [Va.] 59 SE 1091. While only duty owed a trespasser is not to wantonly or willfully injure him, failure to exercise ordinary care after discovering his perilous position is usually so akin to wantonness or willfulness as to create liability. Charleston, etc., R. Co. v. Johnson, 1 Ga. App. 441, 57 SE 1064, exhaustively treating Georgia cases as to duty owed trespassers. While fundamental duty owed to infant trespasser is not different from that owed to an adult trespasser due consideration must be given to known indiscretions of childhood in determining whether particular course of action was wanton or willful. Charleston, etc., R. Co. v. Johnson, 1 Ga. App. 441, 57 SE 1064. Petition held to state cause of action for injury to trespassing child, jerked from car by sudden reversal of locomotive, engineer knowing of perilous position. Id.

4. As to a trespasser, no duty is owed to actively keep premises safe. Boy injured by being struck by projecting bar of turntable held not entitled to recover. Thompson v. Baltimore, etc., R. Co., 218 Pa. 444, 67 A 768. Where railroad erects turn-table on its own land, it owes no duty to take special precaution to protect children though it may tend to attract them. Id.

5. Thompson v. Cleveland, etc., R. Co., 226 Ill. 542, 80 NE 1054. No duty to employe or other person using its tracks merely as convenient path of travel to give notice by bell or whistle of an approaching train, or to run at particular rate of speed. Daniel A. Byrket v. Lake Shore, etc., R. Co., 10 Ohio C. C. (N. S.) 73.

6. Hence liable only for willful or wanton misconduct or for negligence after discovering his peril. Southern R. Co. v. Stewart [Ala.] 45 S 51. Owe no duty until they are discovered. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Fact that trespasser is near crossing is immaterial, and only duty owed is to use ordinary care after discovering peril. Adams' Adm'x v. Louisville, etc., R. Co., 31 Ky. L. R. 987, 104 SW 363. Instruction on discovered peril held not objectionable as imposing duty not required of law and requiring lookout to be maintained for trespassers. Nacogdoches, etc., R. Co. v. Beene [Tex. Civ. App.] 20 Tex. Ct. Rep. 249, 106 SW 456.

7. Held duty to keep lookout. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Operatives of train, approaching places where public is permitted to use tracks, must use ordinary care to keep a lookout to discover persons on track and to give such warnings as ordinarily prudent person would give upon discovering one on track. Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. Failure to give warning while running through town where people are likely to be upon tracks may render company liable to a trespasser. Rader's Adm'x v. Louisville, etc., R. Co., 31 Ky. L. R. 1105, 104 SW 774. Charge that railroad owed no duty to approach foot path at such speed as to be able to stop if person was discovered on path held to invade province of jury. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. As does an instruction that defendant owed no duty to blow whistle. Id.

8. Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122. Where railroad has knowledge of trespasser's presence on track or notice of his probable presence, rate of speed may be negligent as to him, and whether it is negligence is for jury. Rader's Adm'x v. Louisville, etc., R. Co., 31 Ky. L. R. 1105, 104 SW 774. Where uncontradicted evidence shows that trainmen did all that was possible to stop train after discovering trespassing child on track, directed verdict is proper. Harris v. Nashville, etc., R. Co, [Ala.] 44 S 962. Code 1896, § 3440, requiring engineers, upon perceiving an obstruction on track, to

of the care required in operating trains might have been, discovered in time to avoid injury.[9]

Employes of other roads and independent contractors.[See 8 C. L. 1622]—A railroad company must exercise reasonable care for the safety of employes of other roads rightfully on the premises,[10] and to servants of independent contractors working on the road,[11] and such persons must exercise due care for their own safety.[12] By statute in some states a train must be stopped before crossing the tracks of another road,[13] and a customary disregard of such duty does not relieve from liability for injuries resulting therefrom.[14] Rules of intersecting roads regulating the movement of their trains must be observed,[15] but in the absence thereof the train arriving first has precedence.[16] In Pennsylvania any person lawfully employed on or about the road of a railroad company of which company he is not an employe or passenger has the rights of an employe.[17]

use all means known to skillful engineers, "such as applying brakes and reversing engine," to stop their trains, requires doing of all things known to skillful engineers, and if train can be stopped sooner upon applying air brakes without reversing engineer must not reverse, as direction is suggestive only. Id.

9. Rader's Adm'x v. Louisville, etc., R. Co., 31 Ky. L. R. 1105, 104 SW 774. Where circumstances were sufficient to apprise engineer of a peril ahead which might involve life or limb and he failed to stop, mere fact that party injured was a trespasser does not preclude recovery. Chicago, etc., R Co. v. Pritchard, 168 Ind. 398, 81 NE 78.

10. Employe of railroad company who leaves his engine to cross right of way to get drink of water from tank maintained by such company is lawfully on such right of way as against defendant who has right to use right of way by permission of such railroad company. Lake Shore, etc., R. Co. v. Enright, 227 Ill. 403, 81 NE 374. Railroad company owes to employes of other roads operating on same track duty to notify them of any obstruction placed upon such tracks. Wabash R. Co. v. Keeler, 127 Ill. App. 265. Defendant held negligent in failing to prescribe proper rules and regulations for movement of trains in switch yard and in permitting train of such length to back around curve which obstructed view of engineer without sufficient brakemen to pass signals (Union R. Co. v. Tate [C. C. A.] 151 F 550), and being negligence of company as distinct from its servants, act of 1868, making servants of two roads fellow-servants under circumstances, is inapplicable (Id.). Held, under facts, a question for jury whether moving of switch was cause of rear trucks of car taking the switch. France v. New York Cent., etc., R. Co., 118 App. Div. 550, 102 NYS 991.

11. Employe of a switch and signal company installing switches and signals under contract between employer and railroad is not mere licensee, and company owes due care. Froelich v. Interborough Rapid Transit Co., 120 App. Div. 474, 104 NYS 910. Whether signals should be given at a sharp curve to warn men known to be working along tracks held for jury. Id. Evidence held insufficient to show that defendant's servants knew or had reason to know that anyone was working about work car on siding with which train collided. Prosser v. West Jersey, etc., R. Co. [N. J. Err. & App.] 68 A 58.

12. Operatives of train having right of way over crossing of another track may assume that train approaching on such other track will be operated with due care (El Paso, etc., R. Co. v. Polk [Tex. Civ. App.] 108 SW 761), and that rule giving their train precedence and the statute requiring it to stop will be observed (El Paso, etc., R. Co. v. Murtle [Tex. Civ. App.] 108 SW 998).

Held for jury: Whether employe on train which was negligently run into by defendant was negligent in remaining at post as long as he did. El Paso, etc., R. Co. v. Polk [Tex. Civ. App.] 108 SW 761. Negligence in jumping from engine to avoid collision which plaintiff thought was about to occur, but which in fact did not happen. Jennings v. Philadelphia, etc., R. Co., 29 App. D. C. 219. Negligence of plaintiff in failing to properly watch for danger signals after entering block on signal indicating that way wae clear. Id.

13. See ante, § 11a.

14. El Paso, etc., R. Co. v. Murtle [Tex. Civ. App.] 108 SW 998. Held not error to submit negligence in so doing, in action for injuries received in collision. El Paso, etc., R. Co. v. Polk [Tex. Civ. App.] 108 SW 761. Where defendant violated statute requiring it to stop train before crossing tracks of another road and crashed into train, held not error to withdraw rules of companies. El Paso, etc., R. Co. v. Murtle [Tex. Civ. App.] 108 SW 998.

15. Violation of rule governing operation of trains in block held negligence as matter of law. Jennings v. Philadelphia, etc., R. Co., 29 App. D. C. 219. Rule of railroad crossings providing that where trains are of same class one nearest crossing has precedence held to control movements of trains in yards propelled by switch engines. El Paso, etc., R. Co. v. Murtle [Tex. Civ. App.] 108 SW 998.

16. El Paso, etc., R. Co. v. Polk [Tex. Civ. App.] 108 SW 761.

17. Act Pa. April 4, 1868 (P. L. 58), held inapplicable where engineer on train of another company using defendant's tracks under contract and had right of way, since premises for time being was not that of defendant. Philadelphia, etc., R. Co. v. Baker [C. C. A.] 155 F 407. Held not applicable

*Persons at station.*See 8 C. L. 1623—While a trespasser [18] and a licensee [19] on the platform or about the station must take the premises as he finds them,[20] the company must exercise ordinary care [21] to keep in a safe condition its station and all parts of its grounds [22] to which patrons will naturally resort,[23] and to avoid injuring them.[24] Where a passenger train is stopped with tracks between it and the depot, the duty owed to [25] and by one having business with the same [26] is the same as if intervening space was a platform.[27] No liability, however, is incurred where the person injured is himself negligent.[28]

*Persons loading and unloading cars.*See 8 C. L. 1624—Persons engaged in loading or unloading cars are not trespassers or bare licensees,[29] and the company owes ordinary care [30] to furnish them reasonably safe cars [31] and to avoid injuring them,[32] but they must exercise due care for their own safety.[33]

to mail agent in car of company owning road injured by another company having use of track, but not rightfully there at particular time. Delaware & Hudson Co. v. Yarrington [C. C. A.] 152 F 396. Held to make railroad's liability to Pullman car conductor same as to employe, and no recovery can be had for injury due to servants in charge of train. Scott v. Pennsylvania Co., 151 F 931.

18. Where child accompanying passenger to station steps from platform onto side track to escape steam jokingly allowed to escape from engine, held that she was not a trespasser. Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660.

19. One entering on depot grounds to see a friend off is a licensee, and not a trespasser. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738.

20. Licensee. Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865. Trespasser. Watson v. Manitou, etc., R. Co. [Colo.] 92 P 17.

21. Instruction exacting highest practicable degree of care held erroneous. Louisville, etc., R. Co. v. Brown [Ky.] 107 SW 321. Where depot agent testified that he left truck in particular place, which was one of safety, but such truck ran down inclined station platform, and there was no evidence that any third person moved it from such place onto incline, held that question whether he so left it is for jury. Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865. In action for injuries received while on lawn adjacent to platform by being tripped over wires thereon, evidence held to sustain finding of negligence in maintaining wires, there being insufficient light. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738.

22. Does not extend to streets and sidewalks not under its control but abutting on its property, and as to them railroad owes same duty as abutting owners generally. Webster v. Chesapeake, etc., R. Co. [Ky.] 105 SW 945.

23. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738. What grounds are so near that public would naturally resort thereto is usually a question for jury. Id.

24. Where by long acquiescence railroad has licensed public to use its station platform for ordinary travel, it must conduct its business with ordinary care to avoid injury. Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865. Evidence that engineer jokingly blew steam from engine, causing plaintiff and other children to step from station platform onto side track to avoid same, and that brakeman on car making flying switch made no effort to stop car until within a few feet of plaintiff, held to support finding of negligence. Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660. Where conductor wrongfully strikes passenger whom he is ejecting with revolver, causing it to discharge and injuring bystander at station, held company is liable. Coleman v. Yazoo, etc., R. Co. [Miss.] 43 S 473.

25. Ordinary care at least is owed to boy sent to deliver package to passenger. Atchison, etc., R. Co. v. McElroy [Kan.] 91 P 785. Held negligence to run train over intervening track at high speed and without warning. Id.

26. Ordinary rule of "look and listen" does not apply. Atchison, etc., R. Co. v. McElroy [Kan.] 91 P 785.

27. Atchison, etc., R. Co. v. McElroy [Kan.] 91 P 785.

28. Passenger held not guilty of negligence in attempting to escape from depot partially demolished by collision, whereby she was injured. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009. Plaintiff held not negligent in stepping from platform onto adjacent grass plot to pass by truck on platform. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738.

29. Invited by commission firm to go to car to see some potatoes and thereafter assisted in unloading at their request. Missouri, etc., R. Co. v. Thomas [Tex. Civ. App.] 107 SW 868.

30. Missouri, etc., R. Co. v. Thomas [Tex. Civ. App.] 107 SW 868.

31. St. Louis, etc., R. Co. v. Fritts [Ark.] 108 SW 841. Railroad receiving a loaded car is under no obligation to inspect manner of loading to see if it is safe for unloading. Safety valve on oil car left open. Gulf, etc., R. Co. v. Wittnebert [Tex.] 108 SW 150, rvg. [Tex. Civ. App.] 19 Tex. Ct. Rep. 636, 104 SW 424. Where cars are reasonably safe and of kind in general use, they need not be discarded because newer and better ones have come into use. St. Louis, etc., R. Co. v. Fritts [Ark.] 108 SW 841.

32. Where rules of company require its employes to give warning to men in and about cars before moving same, and such warnings are customarily given, it is negligence to move a car without warning. Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194, 14 Det. Leg. N. 415, 112 NW 915. Where railroad in delivering cars on declining pri-

Children on or near tracks.[See 8 C. L. 1625]—A railroad company is not required to take extraordinary precautions for their safety [34] until their presence is discovered,[35] although due care must be exercised where children are likely to be on the track.[36] Ordinarily a company owes no duty to so fence its right of way as to exclude children therefrom.[37]

Adults walking on tracks.[See 8 C. L. 1626]—Ordinarily a company owes no duty to a trespasser [38] or bare licensee except to abstain from willfully or wantonly injuring him,[39] and hence owes no duty to him to run its train on time or at a particular

vate side track was accustomed to set brakes on each car so that front one could be run down to bottom as required, it is liable for injury to one relying on such custom where brakes are left unset. Kesterson v. Southern R. Co. [N. C.] 59 SE 871. Where one on car fastening fire engine knew that car was to be incorporated into train, held not "gross" negligence to back train against car for coupling without warning. Nauss v. Boston, etc., R. [Mass.] 81 NE 280. Where employes of railroad company engaged in moving cars on private track are under control of railroad company, company is liable for their negligence. Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194, 14 Det. Leg. N. 415, 112 NW 915.

33. Where plaintiff unscrewed cap from off discharge pipe of oil car, erroneously believing that discharge valve was closed, held not negligent as matter of law in attempting to replace cap to stop flow of oil. Gulf, etc., R. Co. v. Wittnebert [Tex. Civ. App.] 19 Tex. Ct. Rep. 636, 104 SW 424. One loading car held not negligent as matter of law in being on car, knowing that car was likely to be moved at any time, it being customary to give immediate warning before moving same. Fitzpatrick v. Michigan Cent. R. Co., 149 Mich. 194, 14 Det. Leg. N. 415, 112 NW 915. One injured by door becoming unhooked from track held guilty of negligence in lifting same, danger being obvious and he being familiar with similar doors. St. Louis, etc., R. Co. v. Fritts [Ark.] 108 SW 841. Where plaintiff slipped while unloading because of uneven position of wagon, caused by temporary trench at end of ties while construction work was in progress, held that injury was result of accident or contributory negligence. Wood v. St. Louis S. W. R. Co. [Tex. Civ. App.] 20 Tex Ct. Rep. 781, 107 SW 563.

34. Railroad company is under no obligation to construct barrier between pile of clay on its right of way and railroad track so as to protect children playing in the clay from injury by trains. Seymour v. Union Stock Yards & Transit Co., 125 Ill. App. 61. Railroad company is under no obligation to construct a safe pathway on pile of clay along its highway to protect children while playing thereon from injury in running along with passing trains. Id.

35. Trainmen seeing child approaching moving train must act promptly to prevent injury. International, etc., R. Co. v. Vallejo [Tex. Civ. App.] 108 SW 1187. Negligence in running down child 12 years old seen on track for distance of quarter of mile held under fact for jury. Rader's Adm'x v. Louisville, etc., R. Co., 31 Ky. L. R. 1105, 104 SW 774. In action for injury to child run over by train, evidence that trainmen saw him in close proximity to train, that train could be stopped almost instantly, held to make negligence for jury. International, etc., R. Co. v. Vallejo [Tex. Civ. App.] 108 SW 1187. Where engineer testified positively that child stepped onto track about 15 or 20 rods away and too close to stop train, which testimony was uncontradicted except by evidence merely raising inference that child had walked for some distance on track, no recovery can be had. Grand Trunk R. Co. v. Flagg [C. C. A.] 156 F 359.

36. Held negligence to back train through streets where children are known to congregate without lookout on rear. Hollins v. New Orleans, etc., R. Co., 119 La. 418, 44 S 159.

37. Act July 1, 1874 (Rev. St. 1874, c. 114, § 37), held not to require railroads to so fence right of way as to exclude children. Bischoff v. Illinois So. R. Co., 232 Ill. 446, 83 NE 948.

38. Passenger riding beyond his destination through no fault of company, and walking back along right of way, held a trespasser. Adams' Adm'x v. Louisville, etc., R. Co., 31 Ky. L. R. 937, 104 SW 363. Where one on crossing seeks to escape from perilous position between parallel tracks upon which trains are approaching by running up space, held that he did not become a trespasser. Central of Georgia R. Co. v. Motz [Ga.] 61 SE 1. One walking along track in violation of Railroad Law N. Y. § 53 (Laws 1892, p. 1394, c. 676), prohibiting persons not employes from walking upon or along railroad tracks except where same are laid across or along street or highway, etc., has only rights of trespasser, though company has acquiesced in use by public, and can recover only for gross negligence. Butler v. New York Cent., etc., R. Co. [C. C. A.] 152 F 976. Fact that persons walked upon trestle, however frequently, held not to render them the less trespassers. Adams v. St. Louis, etc., R. Co., 83 Ark. 300, 103 SW 725. Evidence that passengers in going to and from depot used track with knowledge and apparent acquiescence of company held to warrant finding that one so using track was not a trespasser, but on track by sufferance if not by invitation. Missouri, etc., R. Co. v. Bratton [Ark.] 108 SW 518.

39. Melton v. Chesapeake, etc., R. Co. [W. Va.] 61 SE 39. Temporary placing of coal gate of tender on top of coal held not such reckless and wanton disregard of life as to render company liable to trespasser on track injured by its rattling off. Thomas v. Cincinnati, etc., R. Co. [Ky.] 105 SW 379. As against bare licensee on track, company may run train in usual way without special precautions where circumstances do not give notice of his probable presence and he

speed,[40] nor does the company owe any duty to him to observe crossing [41] and station [42] regulations. While trainmen may assume, until the contrary appears,[43] that one walking on the track will leave the same in time to avoid injury,[44] and that one beside the track will not heedlessly place himself in danger,[45] after discovering his perilous position and that he is not going to extricate himself therefrom [46] they must exercise all reasonable means at hand to avoid injury.[47] Where, however, the train runs through a populous community where people are likely to be upon the tracks, a higher duty is owed,[48] and those operating trains must moderate the speed,

is not seen until too late. Delaware, etc., R. Co. v. Wilkins [C. C. A.] 153 F 845.

40. Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122.

41. Harden v. Georgia R. Co. [Ga. App.] 59 SE 1122. As to checking speed and ringing of bell. Georgia R. & Banking Co. v. Williams [Ga. App.] 60 SE 808; Id. [Ga. App.] 59 SE 846. Failure to give statutory signals held not negligence per se. Missouri, etc., R. Co. v. Saunders [Tex.] 20 Tex. Ct. Rep. 291, 106 SW 321.

42. Failure to stop at station for one-half minute as required by Code Pub. Gen. Laws, art. 23, § 266. Chesapeake Beach R. Co. v. Donahue [Md.] 68 A 507.

43. Trainmen cannot assume that one on track will leave in time to avoid danger where situation is such as to suggest to ordinarily prudent person that he is unaware of approaching train. Smith v. Wabash R. Co. [Mo. App.] 107 SW 22. Evidence held to warrant finding that brakeman was aware that plaintiff who with others was following officers in charge of prisoner was oblivious to danger. St. Louis, etc., R. Co. v. Cain, 84 Ark. 623, 104 SW 533.

44. Southern R. Co. v. Gullatt [Ala.] 43 S 577; Norfolk, etc., R. Co. v. Dean's Adm'x [Va.] 59 SE 389.

45. St. Louis, etc., R. Co. v. Cain, 84 Ark. 623, 104 SW 533. Need not slow down train, and not liable where he suddenly steps onto track just ahead of train. Bookman v. Seaboard Air Line R. Co. [C. C. A.] 152 F 686.

46. It is not necessary that engineer have actual knowledge that pedestrian on track is not going to get off before it becomes his duty to attempt to check train, it being sufficient if he knows that decedent is in place of peril and cannot or will not extricate himself in time. International, etc., R. Co. v. Munn [Tex. Civ. App.] 18 Tex. Ct. Rep. 548, 102 SW 442.

47. Texas, etc., R. Co. v. Patterson [Tex. Civ. App.] 18 Tex. Ct. Rep. 519, 102 SW 138; Norfolk, etc., R. Co. v. Dean's Adm'x [Va.] 59 SE 389. Instruction as to when it became duty of engineer to attempt to stop train to prevent injury to pedestrian held correct when considered with other instructions. International, etc., R. Co. v. Munn [Tex. Civ. App.] 18 Tex. Ct. Rep. 548, 102 SW 442. Where engineer discovers that attention of pedestrian on track cannot be attracted by warning signals, it becomes duty to use every means at hand consistent with safety of train to stop. Id.

Evidence held sufficient: To show that trainmen discharged full duty after discovering that decedent was not going to get off track. Norfolk, etc., R. Co. v. Dean's Adm'x [Va.] 59 SE 389. Evidence that decedent was walking along side of track, that signals were given, but that he threw himself or fell onto track too close to stop train, held to sustain finding of no negligence. Gonzales v. Galveston, etc., R. Co. [Tex. Civ. App.] 107 SW 896.

Evidence held for jury: Whether decedent was intoxicated, and whether trainmen saw that he was not going to get off track in safety, held for jury. Texas, etc., R. Co. v. Patterson [Tex. Civ. App.] 18 Tex. Ct. Rep. 519, 102 SW 138.

Evidence held insufficient: To show that trainmen discovered plaintiff in time to avoid injuring him. Chesapeake Beach R. Co. v. Donahue [Md.] 68 A 507. Evidence that train after giving several sharp warning blasts came to quick stop and decedent was found injured held insufficient to warrant finding that trainmen saw decedent in time to avoid injury. Chicago, etc., R. Co. v. Bunch [Ark.] 102 SW 369. Evidence that some one on engine shouted to plaintiff as engine was on top of him does not show that trainmen discovered him in time to avoid injury. Chesapeake Beach R. Co. v. Donahue [Md.] 68 A 507. Testimony of trainmen that everything was done that was possible to avoid injury after discovering that something was wrong with plaintiff and that he was not going to get off track held to warrant reversal of verdict for plaintiff. St. Louis, etc., R. Co. v. London, 82 Ark. 267, 102 SW 212.

48. Louisville, etc., R. Co. v. McNary's Adm'r [Ky.] 108 SW 898. Mere fact that decedent was killed at a private path does not relieve company where such path was in a town where presence of people on track was to be anticipated. Id. While through trainmen may not have known of path across track near depot, held bound to know that station was one of 400 or 500 people, that depot was approached by people walking along track, there being no other adequate way of reaching it, and hence that persons on track may be anticipated. Id. Where presence of persons on track is to be anticipated, held negligence to back train at night without warning light or signals. Oliver v. Roach, 31 Ky. L. R. 284, 102 SW 274. Because one walking along path beside track and knowing of defective condition of track did not in exercise of ordinary care know that it was dangerous, it does not follow that in exercise of ordinary care railroad would not know thereof, since ordinary care requires greater diligence on part of railroad than on part of such pedestrian. Missouri, etc., R. Co. v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 133, 101 SW 464.

give notice of approach, and maintain a lookout.[49] While a mere passive acquiescence by a railroad company of occasional use of its tracks as a pathway does not change its duty,[50] where it permits a general use of its tracks it must exercise commensurate care.[51]

One going upon or walking on the tracks of a railroad company must exercise due care for his own safety,[52] and the failure of the company to maintain a lookout

49. Louisville, etc., R. Co. v. McNary's Adm'r [Ky.] 108 SW 898. Must keep lookout and use ordinary care to avoid injuring persons thereon. Louisville, etc., R. Co. v. Hoskins' Adm'r [Ky.] 108 SW 305. Must observe a reasonable lookout to prevent injury when attention is not directed to other duties. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P 402. Failure to keep lookout cannot be inferred from failure to stop or to give signals where decedent and companions were in place of safety until decedent attempted to cross immediately in front of train. St. Louis, etc., R. Co. v. Ferrell, 84 Ark. 270, 105 SW 263. Where train passes through cut and emerges from a curve within a town where presence of persons on track is to be anticipated adequate notice of approach must be given and speed so regulated as to render lookout of avail. Louisville, etc., R. Co. v. McNary's Adm'r [Ky.] 108 SW 898. Signal of train's approach ordinarily sufficient to give notice to persons exercising ordinary care for own safety and in possession of their faculties. Id. Evidence that deceased child was run down on straight track, habitually used for foot passage, held to make question of negligence for jury. Louisville, etc., R. Co. v. Hoskins Adm'r [Ky.] 108 SW 305.

50. Chesapeake Beach R. Co. v. Donahue [Md.] 68 A 507. Signals or lights or watchmen are not required on backing trains for protection of one using track as foot path. Melton v. Chesapeake, etc., R. Co. [W. Va.] 61 SE 39.

51. Where public were allowed to use track for passageway to depot, which usage had prevailed for long time and was notorious, railroad owed duty of operating cars with due care for safety of persons using same, and such duty involved duty to anticipate presence of people at any time. International, etc., R. Co. v. Howell [Tex. Civ. App.] 20 Tex. Ct. Rep. 123, 105 SW 560. Where well defined footpath across track has been used for years by pedestrians with knowledge of railroad and without objection on its part, held that one using same was a licensee to whom railroad owed same duty as it owed to one using public crossing. Calwell v. Minneapolis, etc., R. Co. [Iowa] 115 NW 605. Existence of stakes along tracks used in proper construction and maintenance of road held not negligence. St. Louis, etc., R. Co. v. Ferrell, 84 Ark. 270, 105 SW 263.

52. Licensee on tracks must exercise reasonable care to avoid injury. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P 402.

Negligent per se: Walking on track, knowing that train was soon due, and without taking any precautions. Chesapeake Beach R. Co. v. Donahue [Md.] 68 A 507. One in full possession of his faculties, going upon track in full view of approaching train. Chicago, etc., R. Co. v. Bunch, 82 Ark. 522, 102 SW 369. Stepping off track to allow train to pass, but remaining so near as to be struck. Delaware, etc., R. Co. v. Wilkins [C. C. A.] 153 F 845.

Negligence for jury: Whether one on track by sufferance if not by invitation was negligent in failing to look and listen for train, where circumstances were such that he might not expect train at time. Missouri, etc., R. Co. v. Bratton [Ark.] 108 SW 518. Negligence in stepping in darkness from track to avoid approaching train onto parallel track in front of backing train without warning signals. Oliver v. Roach, 31 Ky. L. R. 284, 102 SW 274. Evidence that plaintiff in crossing from depot to freight house looked for train from station platform and again when he reached steps near track and saw no train, but walked about thirty feet and then stepped onto track without looking. Sealey v. Southern R. Co. [C. C. A.] 151 F 736. Where path along track was not obviously dangerous, negligence in pursuing same instead of another equally convenient route. Missouri, etc., R. Co. v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 133, 101 SW 464. Knowledge of defective condition of track, without knowledge that such condition makes travel on path along same dangerous, does not make traveler negligent in using path. Id.

Held negligent: Walking on trestle. Adams v. St. Louis, etc., R. Co., 83 Ark. 300, 103 SW 725. Where, after alighting from train, decedent left safe way of exit and stepped onto track in full view of approaching train, without taking any precaution. Legge v. New York, etc., R. Co. [Mass.] 83 NE 367. One walking along track to start diagonally across track in front of engine without looking. Byrnes v. New York, etc., R. Co. [Mass.] 81 NE 187. Attempting to cross immediately in front of known approaching train and stumbling over stake in so doing. St. Louis, etc., R. Co. v. Ferrell, 84 Ark. 270, 105 SW 263. Unnecessarily running down track, knowing that train was about due. Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. One walking down track held guilty of **gross negligence** in not perceiving cars approaching and in not heedings warnings. Jones v. Sibley, etc., R. Co. [La.] 46 S 61. Complaint showing that decedent was killed while stopping to tie shoe while walking along tracks held to show contributory negligence. Georgia R. & Banking Co. v. Williams [Ga. App.] 59 SE 846. One attempting to make use of casual opening between cars assumes all the hazard thereof, and, if injured, company will not be liable unless after seeing his danger it could have avoided injury. Southern R. Co. v. Mouchet [Ga. App.] 59

and to give signals does not excuse a failure so to do.[53] One crossing the tracks where the presence of persons on the track is to be anticipated may assume that due notice of approaching trains will be given.[54]

Persons standing, sitting, or lying on tracks.[See 8 C. L. 1829]—Unless the presence of persons on the track is to be anticipated,[55] railroad owes no duty to maintain a lookout for persons standing or lying on the track,[56] and liability attaches only upon failure to exercise due care after discovering the peril.[57] Trainmen discovering one standing on track owe no duty to stop the train until they discover that he cannot or will not leave the track.[58]

Persons in switch yards.[See 8 C. L. 1831]—Where the presence of persons in the yards is to be anticipated, due care must be exercised to avoid injury,[59] especially if a licensee,[60] but ordinarily no statutory duty to fence the yards exists.[61] A party in switch yards must exercise care commensurate with the increased dangers.[62]

SE 927. Evidence held insufficient to support verdict for plaintiff. Id.

53. Byrnes v. New York, etc., R. Co. [Mass.] 81 NE 187.

54. Louisville, etc., R. Co. v. McNary's Adm'r [Ky.] 108 SW 898.

55. Company operating log road is required to keep a lookout for persons on track, though it is in remote place and no one is likely to be on track except employes. Sawyer v. Roanoke R. & Lumber Co. [N. C.] 58 SE 598. Guard, whose duty it was after dark to walk ahead of train and warn travelers as it came into narrow street, held not negligent in walking on side of track which was mostly traveled and failing to discover plaintiff lying on other side with hand over rail. Johnson v. J. M. Guffey Petroleum Co. [Mass.] 83 NE 874. Fact that plaintiff was not discovered lying in darkness with his hand over rail held insufficient to show negligence where it appeared that a lookout was maintained. Id.

56. Hence no liability where everything was done that was possible to prevent injury after discovering that object on track was a man. Cincinnati, etc., R. Co. v. Reynold's Adm'r, 31 Ky. L. R. 529, 102 SW 888.

57. Where trainmen discover trespasser lying on track 80 or 90 yards ahead and there is nothing to show that train can be stopped in such distance, railroad is not, as matter of law, negligent in not stopping. Southern R. Co. v. Gullatt [Ala.] 43 S 577. Held not liable where, when trainmen discovered decedent on track, they did not recognize object as a human being and when they did so recognize it was too late to stop. San Antonio, etc., R. Co. v. McMillan [Tex.] 18 Tex. Ct. Rep. 431, 102 SW 103. In action for death of trespasser on track, evidence held to require submission of liability based upon negligence of agent notified of decedent's presence on track in state of helpless intoxication. Glinn's Adm'r v. Louisville, etc., R. Co. [Ky.] 105 SW 437. In action for death of trespasser where there was no evidence of speed of train, nor position of engineer, nor that train could have been stopped quicker, nor that engineer was looking forward at place where decedent could have been discovered in time to avoid injury, fact that track was straight and day bright held insufficient to warrant inference that engineer in fact discovered plaintiff in time to avoid injury. Southern R. Co. v. Stewart [Ala.] 45 S 51.

58. San Antonio, etc., R. Co. v. McMillan [Tex.] 18 Tex. Ct. Rep. 431, 102 SW 103. Finding that decedent was killed at crossing held contrary to evidence, it appearing that his body and legs were found some 75 yards therefrom and there being no blood at crossing. Melton v. Chesapeake, etc., R. Co. [W. Va.] 61 SE 39. Petition held to state cause of action for death of one while passing through opening left between cars by sudden closing thereof. Southern R. Co. v. Mouchet [Ga. App.] 59 SE 927.

59. Where evidence tended to show that light of lantern of one maintaining lookout on backing train only enabled him to see about 30 feet, in which distance train could not be stopped, negligence in maintaining sufficient lookouts held for jury. St. Louis, etc., R. Co. v. Graham, 83 Ark. 61, 102 SW 700.

60. One unloading cars in yards at invitation of company is a licensee and not a trespasser. Cincinnati, etc., R. Co. v. Rodes, 31 Ky. L. R. 430, 102 SW 321. Held negligent in prematurely starting train before licensee in yards could get to place of safety, thereby frightening his mules. Id.

61. Burtram v. Michigan Cent. R. Co., 148 Mich. 166, 14 Det. Leg. N. 71, 111 NW 749.

62. One stepping onto switch track in front of train approaching in full view held negligent. Teakle v. San Pedro, etc., R. Co. [Utah] 90 P 402.

Held negligent as matter of law in failing to look after entering upon system of tracks, knowing of dangerousness of situation. St. Louis, S. W. R. Co. v. Boyd [Tex. Civ. App.] 20 Tex. Ct. Rep. 21, 105 SW 519. In stepping in front of approaching car on switch track without looking or listening or taking other precaution. Texas, etc., R. Co. v. Shivers [Tex. Civ. App.] 20 Tex. Ct. Rep. 818, 106 SW 894. One killed on side track by backing of train to make coupling held guilty of such negligence as to preclude recovery if it was not case of suicide. Payne v. Illinois Cent. R. Co. [C. C. A.] 155 F 73. Instruction making it negligence as a matter of law to fail to stop, look, and listen, held properly refused. Missouri, etc., R. Co. v. Balliett [Tex. Civ. App.] 107 SW 906.

Persons on trains.[See 8 C. L. 1631]—While a railroad is liable to a trespasser [63] only for injuries willfully or wantonly inflicted [64] by its servants,[65] it owes reasonable care to a licensee [66] to avoid injury.[67] Where boys habitually catch onto cars, however, reasonable care must be exercised although company has attempted to break upon the practice.[68] In general, in absence of statute or ordinance, company may run its trains at such rate as it deems convenient,[69] but condition of track or other fact may limit such rule.[70] Trainmen cannot eject a trespasser in a dangerous place or in dangerous manner,[71] and company is liable if they do so provided they act within their authority.[72] After discovering one on train in a perilous position, company must exercise reasonable care to avoid injury.[73] Contributory negligence precludes recovery,[74] but a lower degree of care is required of immature children.[75]

63. Held a trespasser: One riding at invitation of brakeman who had no authority to give same. Johnson v. Great Northern R. Co. [Wash.] 94 P 895. Positive testimony of conductor of logging train that he had not accepted fare of plaintiff and had agreed to permit him to ride, under facts of case, held to show that he was trespasser. Parker v. Louisiana, etc., R. Co. [La.] 44 S 996. Where minor is upon train as a student fireman through misrepresentation that he was of age, he is a trespasser or at most a mere licensee. Norfolk, etc., R. Co. v. Bondurant's Adm'r [Va.] 59 SE 1091.

64. De Vane v. Atlantic, etc., R. Co. [Ga. App.] 60 SE 1079; Johnson v. Great Northern R. Co. [Wash.] 94 P 895. Trespasser attempting to board moving train cannot complain of signal cord being out of order, delaying stopping. Illinois Cent. R. Co. v. Cotter, 31 Ky. L. R. 679, 103 SW 279.

65. While fact that one on train wore a cap and uniform of the kind usually worn by employes is a circumstance to show that he was an employe, the law raises no conclusive presumption therefrom. De Vane v. Atlantic, etc., R. Co. [Ga. App.] 60 SE 1079.

66. One who, while in employ of contractor for feeding men engaged in construction work, rides in caboose with express or implied consent of company, held licensee, and not trespasser. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 20 Tex. Ct. Rep. 616, 107 SW 369.

67. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 20 Tex. Ct. Rep. 616, 107 SW 369; Johnson v. Great Northern R. Co. [Wash.] 94 P 895. Where evidence failed to show that trainmen knew of plaintiff's presence or that train was improperly handled, held insufficient to take case to jury. Id. Evidence in action for injury to licensee from falling from train held insufficient to show negligence, it not appearing what caused fall. Jones v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 83, 105 SW 1007.

68. Texas, etc., R. Co. v. Buch [Tex. Civ. App.] 19 Tex. Ct. Rep. 406, 102 SW 124.

69. Without being per se negligent in case derailment occurs and injures licensee on train. Chicago, etc., R. Co. v. O'Brien [C. C. A.] 153 F 511.

70. Negligence held for jury in running train at rate of 70 to 75 miles per hour down a grade ending at a six degree curve, resulting in derailment. Chicago, etc., R. Co. v. O'Brien [C. C. A.] 153 F 511.

71. Gates v. Quincy, etc., R. Co., 125 Mo. App. 334, 102 SW 50. Conductor in ejecting trespasser from moving train is not chargeable with knowledge of his crippled condition, though discoverable in the exercise of reasonable care. Doggett v. Chicago, etc., R. Co., 134 Iowa, 690, 112 NW 171. Where brakeman, authorized to eject trespassers, used such violent and threatening language as to cause boy of immature years to fall or jump from moving train, defendant is negligent as matter of law. Texas, etc., R. Co. v. Buch [Tex. Civ. App.] 19 Tex. Ct. Rep. 406, 102 SW 124. Evidence held to show that threatening words and actions of brakeman were proximate cause of his falling or jumping from moving train. Id. Fact that boy testified on cross-examination that he fell while trying to get onto car held not to preclude basing verdict on direct examination that while on ladder brakeman forced him off, there being corroborating evidence. Id. Evidence held insufficient to show that brakeman pushed trespasser from train. Parker v. Louisiana, etc., R. Co. [La.] 44 S 996. Evidence held to show that plaintiff was injured in jumping from train on which he was stealing ride, and not to support verdict based on theory that he had safely alighted and was injured by different train while at public passway. Louisville, etc., R. Co. v. Daniel, 31 Ky. L. R. 944, 104 SW 344.

72. Where rule expressly prohibiting brakemen from ejecting trespassers is habitually violated, held question for jury whether brakeman had authority to eject plaintiff. Texas, etc., R. Co. v. Buch [Tex. Civ. App.] 19 Tex. Ct. Rep. 406, 102 SW 124.

73. Where flagman after discovering plaintiff hanging to car of rapidly moving train pulled signal cord, went inside and got porter and after finding that they could not pull plaintiff onto car left him to try other means to stop train, signal cord failing to work, held there was no actionable negligence. Illinois Cent. R. Co. v. Cotter, 31 Ky. L. R. 679, 103 SW 279.

74. Complaint for injuries received by licensee in alighting from train held not to show contributory negligence. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 20 Tex. Ct. Rep. 616, 107 SW 369. In determining contributory negligence of trespasser in alighting from moving train upon order of conductor, his crippled condition may be considered. Doggett v. Chicago, etc., R. Co., 134 Iowa, 690, 112 NW 171.

75. Mere fact that trespasser alighting from moving train upon order of conductor was only 17 years old does not authorize in-

*Persons using hand cars or railroad tricycles.*See 8 C. L. 1633—A railroad company is liable to a trespasser [76] only for injuries willfully or wantonly inflicted,[77] and where section men without authority place a child on a hand car for a ride, company is not liable however grossly negligent they may be.[78] Parties using such means of transportation must exercise commensurate care.[79]

(§ 11) *F. Accidents to trains.*See 6 C. L. 1217—A railroad owes ordinary care to avoid injuring passengers of other roads at intersecting points.[80]

(§ 11) *G. Accidents at crossings.* 1. *Care required on the part of the company. General rules.*See 8 C. L. 1633—Although in approaching a public crossing [81] a railroad has a superior right of way over a traveler on the highway,[82] it must exercise a degree of care commensurate with the danger [83] and consistent with a practical operation of the road,[84] but it is not required that the means adopted shall

struction to consider his age and experience in determining contributory negligence. Doggett v. Chicago, etc., R. Co., 134 Iowa, 690, 112 NW 171.

76. One inducing employe to take him to next station on tricycle, contrary to orders, is a trespasser. Illinois Cent. R. Co. v. Tyson's Adm'x [Ky.] 108 SW 863. Boy riding on hand car on invitation of men in charge is a licensee or trespasser. Daugherty v. Chicago, etc., R. Co. [Iowa] 114 NW 902.

77. Act of men in charge of hand car in placing boy in perilous position thereon, from which he fell, held not such wanton or malicious conduct as to render company liable. Daugherty v. Chicago, etc., R. Co. [Iowa] 114 NW 902. Evidence of trainmen that train stopped 1,500 feet after brakes were applied and everything possible was done to stop train held to show that it could not be stopped in 100 or 200 feet as testified to by witness. Illinois Cent. R. Co. v. Tyson's Adm'x [Ky.] 108 SW 863. Where child is permitted to ride on hand car by section men and is injured through their of negligence, doctrine of turntable cases and dangerous agency is inapplicable. Daugherty v. Chicago, etc., R. Co. [Iowa] 114 NW 902.

78. Daugherty v. Chicago, etc., R. Co. [Iowa] 114 NW 902.

79. Negligence of decedent and companion on "speeder" in switch yards in failing to discover engine approaching from behind in dark held for jury, attention being directed toward discovering an expected passenger train from ahead. St. Louis S. W. R. Co. v. Graham, 83 Ark. 61, 102 SW 700. One familiar with operation of trains and knowing a special train was liable to run at any time held negligent as matter of law in going onto track with hand car at night without a light. Russell v. Oregon Short Line R. Co. [C. C. A.] 155 F 22.

80. Instruction on concurrent negligence in action for injury to passenger of one road by collision of trains at intersection of two roads held not erroneous as exacting highest degree of care towards one not a passenger. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009.

81. Evidence held to sustain finding that decedent was killed at crossing and not on right of way before reaching crossing. Bowles v. Chesapeake, etc., R. Co., 61 W. Va. 272, 57 SE 131. Constant reference to way as a highway during trial held an implied admission that way was highway within Rev. Laws, c. 111, §§ 188, 190, requiring bell to be rung or whistle to be blown. Giacoma v. New York, etc., R. Co. [Mass.] 81 NE 899. Where people living on cliff adjacent to tracks made a practice of crossing same midway between public crossings, fact that when company rebuilt fence openings were left for them held not to make pathway a public crossing, so as to require care exacted at such crossings. Smetanka v. New York Cent., etc., R. Co., 123 App. Div. 323, 107 NYS 973.

82. Kunz v. Oregon R. Co. [Or.] 93 P 141. Not required to stop to allow team to cross unless action of team or driver is so unusual as to advise trainmen that team is to be given right of way. Chicago, etc., R. Co. v. Sack, 129 Ill. App. 58.

83. Crane v. Pennsylvania R. Co., 218 Pa. 560, 67 A 877. Degree of care required at crossings depends upon the facts of each case, and is question for jury. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988. Greater precautions are required in crossing city streets than country highways. Schwanenfeldt v. Chicago, etc., R. Co. [Neb.] 115 NW 285. Where crossing is unusually dangerous, company must employ such means as are reasonably necessary to give effective protection. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988. Railroad on approaching crossing must have train under reasonable control, must maintain a reasonable lookout, and give timely notice of approach of trains. Southern R. Co. v. Winchester's Ex'x [Ky.] 105 SW 167. Held for jury whether heavy traffic and natural obstruction of view of track required that exceptional means other than statutory signals should have been provided. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988. Whether single whistle was adequate. Crane v. Pennsylvania R. Co., 218 Pa. 560, 67 A 877. Negligence in failing to ring bell. Id. While dangerous character of crossing may require care in addition to ordinary warnings, instruction that company must take "such precautions to warn travelers * * * that, notwithstanding obstructions, they * * * can avoid injury," etc., held erroneous as in effect making company an insurer. Weaver v. Columbus, etc., R. Co., 76 Ohio St. 164, 81 NE 180.

84. Railroad cannot be required to take precautions inconsistent with practical

prove effective.[85] A railroad is only liable for negligence,[86] and trainmen may assume that one approaching in apparent possession of his faculties will not heedlessly place himself in danger [87] unless they have so conducted themselves as to lead him to believe that the train will yield the right of way.[88] Ordinarily a railroad is not liable for injuries caused by horses taking fright at noise incident to the ordinary operation of the train,[89] but where they are peculiarly likely to endanger life and

operation of its road. Held not liable for injury inflicted by backing of train where ordinary precautions were taken to prevent accidents. Pittsburgh, etc., R. Co. v. Puszdrakiewicz, 129 Ill. App. 295.

85. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988.

86. Railroad is not liable for injuries caused by team taking fright at carcass of horse on right of way near crossing unless it knew, or by exercise of ordinary care could have known, of its presence in reasonable time to have enabled it to remove same. Louisville, etc., R. Co. v. Armstrong [Ky.] 105 SW 473. Where knowledge was not communicated to defendant until within hour before accident and was removed within two hours thereafter, removal was within reasonable time after notice. Id. Fact that two freight trains had passed held not sufficient to charge defendant with knowledge where it did not appear that carcass was wholly upon right of way, or that its situation was such as to make it apparent to trainmen that its proximity to crossing required its immediate removal, or that it was their duty to watch for dead stock. Id. Defendant held not liable if plaintiff's horse took fright and ran into train at crossing. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988. Evidence as to failure to exercise reasonable diligence to stop train on signal held not to make case for jury. Hummer v. Lehigh Valley R. Co. [N. J. Err. & App.] 67 A 1061. Where person in charge of train sees, or by exercise of ordinary care could see, that team on highway is unmanageable and running in direction of railroad crossing and situation is such as to apprise ordinarily prudent man of danger of collision, he must exercise reasonable care to avoid injury. Chesapeake, etc., R. Co. v. Pace [Ky.] 106 SW 1176.

Held negligent: In failing to stop train where child approaching track was discovered in time so to do. Duggan v. Boston, etc., R. Co. [N. H.] 66 A 829. In not stopping train after discovering runaway horse coming toward crossing. Denver, etc., R. Co. v. Mitchell [Colo.] 94 P 289. In failing to discover child approaching track and in using corresponding care. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624. Where engineer discovered plaintiff's perilous position in time to avoid injury and failed to do so. Tuscaloosa Belt R. Co. v. Fuller [Ala.] 45 S 156. Evidence held to warrant finding that engineer in exercise of due care could have discovered street car in time to avoid injury. Lindenbaum v. New York, etc., R. Co. [Mass.] 84 NE 129. Evidence held not to show affirmatively that company was not negligent in approaching crossing at which decedent was killed. Atlantic Coast Line R. Co. v. Miller, 53 Fla. 246, 44 S 247.

Negligence held for jury: Negligence in failing to stop train in time to avoid collision with runaway team. Chesapeake, etc., R. Co. v. Pace [Ky.] 106 SW 1176. Where there was evidence that engineer saw plaintiff's horse backing toward crossing when 25 or 30 yards away and that train could be stopped within 35 or 40 feet, held question for jury whether defendant was negligent in failing to stop. Tuscaloosa Belt R. Co. v. Fuller [Ala.] 45 S 156. General instruction as to what should be considered in determining defendant's negligence held not to charge that it was negligent to follow another train immediately. Barnum v. Grand Trunk Western R. Co., 148 Mich. 370, 14 Det. Leg. N. 237, 111 NW 1036.

87. Unless they know of a disability or his actions and appearance discloses one, or unless they see that such party will not or cannot keep out of way, and need not attempt to stop train. Atlantic Coast Line R. Co. v. Miller, 53 Fla. 246, 44 S 247. Though person near tracks gives no indication of knowledge of approaching train. Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101. Engineer may assume that person ten feet from track and apparently in possession of his faculties will hear whistle at distance of eighty yards. Cox's Adm'r v. Louisville, etc., R. Co., 31 Ky. L. R. 875, 104 SW 282. Where decedent did not come into view at greater distance than eighty yards, and engineer blew whistle while he was ten feet from track, not knowing that he was partially deaf, peremptory instruction for defendant held proper, it being too late to stop when danger became apparent. Id.

88. Horton v. Houston, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 870, 103 SW 467. Fact that engine colliding with street car was local switch yard engine with no definite destination and slowed up about eighty or 100 feet before reaching crossing may be considered in determining whether operatives had right to assume that street car would yield right of way. Id.

89. Williams v. Chicago, etc., R. Co. [Neb.] 111 NW 596. Unusual noises create no liability unless unnecessary. Brunswick, etc., R. Co. v. Hoodenpyle, 129 Ga. 174, 58 SE 705. Question held for jury whether whistle which frightened plaintiff's horse was of loud and unusual character. Paris, etc., R. Co. v. Calvin [Tex.] 20 Tex. Ct. Rep. 316, 106 SW 879. Fact that mule became frightened at usual and customary noises of operation and balked on crossing held not to relieve railroad where proximate cause of injury was failure to check speed and have control as required by statute. Charleston, etc., R. Co. v. Camp [Ga. App.] 59 SE 710.

can be temporarily suspended without material inconvenience, they must be stayed.[90] Cities have been empowered in some states [91] to require railroads to maintain lights at street crossings,[92] but such requirements must be definite [93] and reasonable.[94] Railroad has an equal right with the public to use the highway for purposes incidental to the operation of its road.[95] Company owes no legal duty to cut down trees upon its right of way obstructing view of the crossing.[96]

Railroad owes reasonable care at a private crossing [97] or a crossing used with its acquiescence.[98]

Lookout.—Trainmen must keep a lookout for persons on or near crossings,[99] and on seeing teams approaching must make no unnecessary noise calculated to frighten them.[1]

Duty to signal. See 8 C. L. 1835—Railroad must give adequate notice of approaching trains,[2] and, where the crossing is unusually dangerous, it must, in addition to

90. Williams v. Chicago, etc., R. Co. [Neb.] 111 NW 596. Held liable for suddenly starting without warning a locomotive standing near crossing while team was crossing. Id. Evidence held to sustain negligence in starting and operating engine, seeing plaintiff crossing ahead of engine, thereby frightening team. St. Louis S. W. R. Co. v. Moore [Tex. Civ. App.] 107 SW 658. Instruction predicating negligence in starting engine, sounding of whistle, escaping of steam, which caused team to run away, confining the noises to time plaintiff was in act of crossing track, held sustained by evidence. Id.

91. Burns' Ann. St. 1901, § 5173, held to authorize adoption of ordinance requiring railroad to maintain light at intersection of street and tracks. Pittsburg, etc., R. Co. v. Hartford City [Ind.] 82 NE 787. Term "kind of light" as used in Acts 1905, p. 219, c. 129, authorizing town trustees to require railroad companies to light street crossings, providing that they shall not be required to maintain any different kind of light than that maintained by the town, has reference to general class of lights, as electric, gas, etc., Chicago, etc., R. Co. v. Salem [Ind.] 82 NE 913.

92. Police regulation and not invalid as taking of property without just compensation or due process of law. Pittsburg, etc., R. Co. v. Hartford City [Ind.] 82 NE 787. Complaint charging violation of ordinance requiring railroad to light its crossings with 2,000 candle power electric light for thirty minutes before passing of train held sufficient in form. Chicago, etc., R. Co. v. Salem [Ind.] 82 NE 913.

93. Provision that lights shall be "of sufficient power to light entire crossing" does not render ordinance invalid for indefiniteness (Pittsburg, etc., R. Co. v. Hartford City [Ind.] 82 NE 787), nor is it invalid because of provision that such lights need not exceed power of city lights as making company look outside of the ordinance to determine whether it is being violated (Id.). Ordinance requiring railroad to maintain electric light of 2,000 candle power at every point where main track crosses street for thirty minutes prior to passage of trains during nonmoonlight nights held not void for uncertainty. Chicago, etc., R. Co. v. Salem [Ind.] 82 NE 913.

94. Held not invalid because it limits character of lights and requires them to be lighted five minutes before train passes. Pittsburg, etc., R. Co. v. Hartford City [Ind.] 82 NE 787. Where ordinance requiring company to maintain electric lights where its tracks intersect public streets does not fix the height thereof, it is not invalid as impairing efficiency of headlights, since they may be placed at a height so as not to interfere. Id.

95. Webster v. Chicago, etc., R. Co. [C. C. A.] 158 F 769. Held not liable for injuries caused by horse taking fright at hand car of section foreman removed from track to highway to allow train to pass. Id.

96. Cowles v. New York, etc., R. Co. [Conn.] 66 A 1020.

97. San Antonio, etc., R. Co. v. Mertink [Tex. Civ. App.] 18 Tex. Ct. Rep. 201, 102 SW 153.

98. Missouri, etc., R. Co. v. Hollam [Tex. Civ. App.] 107 SW 642. One using road under bridge commonly and habitually used by public with knowledge of railroad company is more than a licensee. Id. Evidence held to authorize submission of question whether road under bridge was commonly and habitually used by public with knowledge and acquiescence of railroad company. Id.

99. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776; Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624. Where plaintiff in exercise of due care attempted to cross but horse took fright and stood upon track and plaintiff was injured without fault on her part by reason of failure of defendant to keep lookout, recovery may be had. Zipperlen v. Southern Pac. Co. [Cal. App.] 93 P 1049. Held question for jury whether if trainmen had kept lookout as required they would have distinguished decedent's body from supposed piece of paper. Snowball v. Seaboard Air Line R. Co. [Ga.] 60 SE 189.

1. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Unnecessary blowing of whistle held negligence. Id.

2. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776. Instruction as to duty to give signals held erroneous. Kahl v. Chicago, etc., R. Co., 125

the usual signals, provide such signals as are reasonably necessary.[3] Signals must be given at such distance as to be effective.[4] The giving of crossing signals is regulated by statute in most states [5] and a failure to comply therewith [6] constitutes negligence,[7] but a recovery cannot be based thereon unless such negligence is the proximate cause of the injury.[8] Ordinarily the duty to give signals is owed only to one using the crossing,[9] although it has been held to apply to one using a crossing near to the one for which signal was given.[10] Railroad must give warning of approach to persons crossing at points other than crossings where danger is to be apprehended,[11] and it must exercise due care to give warning before starting an engine

Ill. App. 294. Where gates are not properly operated and train is run at high speed, failure to whistle may be considered in determining negligence, notwithstanding ordinance prohibiting whistling. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22. Fact that one trespassed on right of way to reach crossing does not deprive him of right to ordinary crossing warnings. Bowles v. Chesapeake, etc., R. Co., 61 W. Va. 272, 57 SE 131.

3. Southern R. Co. v. Winchester's Ex'x [Ky.] 105 SW 167. In action for death of pedestrian at unusually dangerous street crossing, held question for jury under evidence whether adequate notice of approaching train was given. Id.

4. Bickel v. Pennsylvania R. Co., 217 Pa. 456, 66 A 756. Whether whistle was sounded at proper distance considering obstructed view of track held for jury. Kunz v. Oregon R. & Nav. Co. [Or.] 94 P 504. To comply with Texas statute requiring whistle to be blown not less than eighty rods from crossing it must be sounded sufficiently near to give effective warning, but not less than eighty rods. Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. Negligence in sounding half mile from crossing held for jury. Id.

5. Side track crossing public highway held within statute relating to crossings. Bryson v. Southern R. Co. [Ga.] 59 SE 1124.

6. Under Rev. St. 1895, art. 4507, requiring whistle to be blown "at the distance of at least eighty rods" from crossing, instruction that whistle shall be blown at the distance of eighty rods, and that failure to give the signals when within 440 yards is negligence, held erroneous. Texas, etc., R. Co. v. Stoker [Tex. Civ. App.] 18 Tex. Ct. Rep. 998, 103 SW 1183. Statute requiring signals of approach of train is satisfied by either blowing of whistle or ringing of bell. Chicago, etc., R. Co. v. Sack, 129 Ill. App. 58. Instruction predicated on Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938), requiring railroads to ring bell or blow whistle, etc., on approaching crossing, held not to make defendant liable if it failed to ring bell and blow whistle. Midgett v. St. Louis, etc., R. Co., 124 Mo. App. 540, 102 SW 56. Evidence held sufficient to sustain finding that statutory signals were not given. Heise v. Chicago G. W. R. Co. [Iowa] 114 NW 180. Testimony of two witnesses near place of accident that they heard crash and a whistle thereafter, but not before, held to make case for jury as to whether whistle was blown before reaching crossing. Rogers v. West Jersey, etc., R. Co. [N. J. Err. & App.] 68 A 148. Where evidence shows that electric warning bell did not ring and is conflicting as to where and how many times whistle was blown, negligence held for jury. Cleveland R. Co. v. Schneider [Ind. App.] 80 NE 985.

7. As required by Code, § 2072. Heise v. Chicago G. W. R. Co. [Iowa] 114 NW 180. As required by Starr & C. Ann. St. Ill. 1896, c. 114, par. 74. Weinstein v. Toledo, etc., R. Co. [Mo. App.] 106 SW 1125. Under Texas statute requiring whistle to be sounded eighty rods from crossing. Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. Though company may have adopted other means of warning less effective than gates or flagmen. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988.

8. Where train fails to give statutory crossing signal and collision results, it will be presumed that noncompliance was the negligence which caused the accident. Drawdy v. Atlantic Coast Line R. Co. [S. C.] 58 SE 980. Where statutory signals are not given and person at crossing is injured, only defenses open are that injury was with consent of party injured, or by exercise of ordinary care he could have avoided injury, or, in mitigation of damages, that his negligence contributed to injury. Bryson v. Southern R. Co. [Ga.] 59 SE 1124. Fact that plaintiff saw train when two or three miles off held not to prevent him from basing action on failure to give crossing signals. Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. In action for injury to stock at crossing, instruction that failure to give signals as required by Code 1906, § 4045, was negligence, was proper, though evidence tends to show that persons in charge saw approaching train. Southern R. Co. v. Murray [Miss.] 44 S 785. If cattle killed at crossing would have escaped had statutory signals been given, held for the jury. Heise v. Chicago G. W. R. Co. [Iowa] 114 NW 180.

9. Held to apply to one temporarily standing on crossing. Central of Georgia R. Co. v. Motz [Ga.] 61 SE 1.

10. Where person crossing private crossing could hear signals required for public crossing and relied thereon, company is liable for failure to give same without regard to distance between crossings. Chesapeake, etc., R. Co. v. Wilson's Adm'r, 31 Ky. L. R. 500, 102 SW 810. Where cattle are killed at crossing, failure to give statutory signal at another crossing, 1,122 feet distant may be considered on issue of negligence. Heise v. Chicago G. W. R. Co. [Iowa] 114 NW 180.

11. Railroad company is required to use care commensurate with circumstances at

standing near a crossing over which one is driving.[12] In determining whether the signals were given, affirmative evidence is usually of greater weight than negative.[13]

Speed.[See 8 C. L. 1637]—While ordinarily a railroad may operate its trains at such speed as it may choose through rural districts[14] and owes no duty to slacken the same for ordinary crossings,[15] in running through cities[16] and over other crossings particularly dangerous[17] due care must be exercised for the safety of persons using the same, and the fact that a high speed will make it easier to ascend a grade beyond does not justify such speed as to unnecessarily endanger life.[18] The violation of a statute or ordinance regulating speed is usually negligence,[19] but must be the proximate cause of the injury to authorize recovery.[20]

Gates.[See 8 C. L. 1638]—The maintenance of gates at city crossings is frequently required by statute or ordinance,[21] but independent thereof the dangerous character of the crossing may make it the duty of the company to provide them[22] during particular hours of the day,[23] and where gates are erected they must be operated with

point where with its consent its tracks are crossed daily by a large number of people. St. Louis Nat. Stock Yards v. Brennan, 126 Ill. App. 601.

12. Held negligent to start without warning, thereby frightening horse. Atchison, etc., R. Co. v. Wilkie [Kan.] 90 P 775. Held question for jury whether trainmen were negligent in starting engine standing near crossing without warning, thereby frightening team crossing tracks. Williams v. Chicago, etc., R. Co. [Neb.] 113 NW 791.

13. Where witnesses testify that they were giving their attention to approaching train, that they could have heard whistle if it had been blown, and that they did not hear it, such evidence held sufficient to overcome positive testimony that it was blown. Schwarz v. Delaware, etc., R. Co., 218 Pa. 187, 67 A 213.

14. Instruction making excessive speed the basis of recovery rather than failure to give sufficient warning held erroneous. Schwartz v. Delaware, etc., R. Co., 218 Pa. 187, 67 A 213.

15. Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885. While failure to reduce speed on approaching crossing is not ordinarily negligence, held proper to submit issue to jury where it appeared that no bell was rung, that headlight was insufficient, and that there was no crossing sign board. Texas, etc., R. Co. v. Tucker [Tex. Civ. App.] 20 Tex. Ct. Rep. 689, 106 SW 764.

16. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776. Rapid running of trains over streets or crossings which will render unavailing signals that may be given is evidence of negligence. Cincinnati, etc., R. Co. v. Com., 31 Ky. L. R. 1113, 104 SW 771. Speed from 15 to 25 miles per hour around abrupt curve at much used city crossing at which no gate or watchman was maintained held sufficient to make case of negligence for jury. Serano v. New York Cent., etc., R. Co., 188 N. Y. 156, 80 NE 1025. Running of train at speed of 40 to 50 miles per hour over city street crossing in violation of speed ordinance held negligence. Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 490.

17. At exceptionally dangerous crossings, if company does not choose to have flagman or other safety device, and statutory signals are insufficient, it must regulate speed so as not to unnecessarily impair safety of persons using same. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988. Running of train at high speed over much used crossing at which there was no watchman or gates held negligence for jury. Davis v. Pennsylvania R. Co., 34 Pa. Super. Ct. 388. Approaching crossing at rate of 18 miles per hour held not negligence where view of track from highway was unobstructed. Giacoma v. New York, etc., R. Co. [Mass.] 81 NE 899.

18. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776.

19. Not negligence per se, but a fact to be considered. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22. Speed of 20 or 30 miles per hour across a public grade in city where lawful speed was six miles per hour, and where view of road from approaches was obstructed, held to authorize finding of negligence. Kunz v. Oregon R. Co. [Or.] 93 P 141. It is prima facie negligence to operate a train at a prohibited rate of speed. Atchison, etc., R. Co. v. People, 128 Ill. App. 38. Proof of ordinance regulating speed of train, its violation and resulting injury, with proof of ordinary care on the part of the plaintiff, establishes a prima facie case. Wabash R. Co. v. Kamradt, 109 Ill. App. 203.

20. Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105; Southern R. Co. v. Hansbough's Adm'r [Va.] 60 SE 58. Where plaintiff testified that he did not see train which collided with his wagon, he cannot be heard to claim that in crossing he relied on speed ordinance. Westerkamp v. Chicago, etc., R. Co. [Colo.] 92 P 687.

21. Statute requiring 60 days' notice to railroad company before requiring them to have a flagman at a railroad crossing has no application to an ordinance requiring it to maintain gates there. Chicago & A. R. Co. v. Averill, 127 Ill. App. 275.

22. Davis v. Pennsylvania R. Co., 34 Pa. Super. Ct. 388. Evidence that five electric car lines ran along streets which crossed nine tracks held to sustain finding that company owed duty of maintaining gates thereat, though it had not been ordered so to do under Rev. Laws, c. 111, § 192. Boucher v. New York, etc., R. Co. [Mass.] 82 NE 15.

23. Where gates are only operated until 8 o'clock in evening the inference, if any,

due care.[24] Where the gates are not otherwise sufficiently lighted,[25] the company may be required to place lights thereon.[26] Where gates are necessary, a company using the track is liable though the gates are maintained by the proprietory road [27] or by an independent contractor.[28] A lowered gate serves as a warning of the approach of as many trains as may be used on the several tracks.[29]

*Flagmen.*See 8 C. L. 1638—Where a crossing is located in a populous community and much used, it may become the duty of the railroad company to keep a flagman thereat,[30] though not required by statute [31] or other governmental regulation.[32] In Indiana a railroad operating [33] two or more tracks across a public highway for switching purposes, exclusively or regularly,[34] may be required by the county commissioners to maintain a flagman thereat,[35] but such order must be definite and certain.[36] Where one crossing tracks relies upon gateman's signal to proceed, such signal may be considered in determining defendant's negligence.[37]

*Switching and backing train.*See 8 C. L. 1638—A railroad in kicking cars,[38] back-

is that they were not necessary after such hour. Glacoma v. New York, etc., R. Co. [Mass.] 81 NE 899.

24. Held question for jury whether safety gates were negligently open. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

25. Railroad need not keep light on arm of gate extending over sidewalk where there is sufficient light to enable person in exercise of ordinary care to see gate. McDonald v. Covington & C. El. R., Transfer & Bridge Co. [Ky.] 107 SW 726. Evidence held to show as matter of law that there was sufficient light to have enabled plaintiff to see gate had she exercised ordinary care. Id.

26. Held question for jury. Record v. Pennsylvania R. Co. [N. J. Law] 67 A 1040.

27. Schulte v. Louisville, etc., R. Co. [Ky.] 108 SW 941. Where two roads jointly maintain gates, agreement between them does not affect rights of third person negligently injured. Record v. Pennsylvania R. Co. [N. J. Law] 67 A 1040. Evidence held to make question for jury whether gateman was not servant of both roads. Id.

28. Duty cannot be delegated. Boucher v. New York, etc., R. Co. [Mass.] 82 NE 15.

29. When crossing gates are lowered, they serve as a warning of the approach of as many trains as may be used on the several tracks. Pittsburg, etc., R. Co. v. Puszdrakiewicz, 129 Ill. App. 295.

30. Where evidence shows that crossing was in populous neighborhood and much used, charge predicting negligence on failure to maintain watchman is proper though evidence does not show duties of watchman. St. Louis S. W. R. Co. v. Moore [Tex. Civ. App.] 107 SW 658.

31. In absence of request under Rev. Laws, c. 111, §§ 191, 192, railroad is not derelict in any statutory duty in failing to maintain flagman or gates. Glacoma v. New York, etc., R. Co. [Mass.] 81 NE 899.

32. Though not ordered by commission. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988; Barnum v. Grand Trunk Western R. Co., 148 Mich. 370, 14 Det. Leg. N. 237, 111 NW 1036. Absence of ordinance requiring flagman at crossing is not conclusive of the question of necessity for one. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948.

33. Objection to complaint for recovery of penalty for failure to obey order of county commissioners to maintain watchman at crossing that it did not allege that defendant operated tracks on date of order is unavailable where order so recites and is made a part of complaint. Grand Trunk Western R. Co. v. State [Ind. App.] 82 NE 1017.

34. Since under Acts 1891, p. 364, c 150, § 1, county commissioners may require a watchman at crossing where tracks are used "exclusively or regularly" for switching, allegation in action for penalty that tracks were used "exclusively or regularly" is not objectionable as being in alternative. Grand Trunk Western R. Co. v. State [Ind. App.] 82 NE 1017. "Regularly," as used in Acts 1891, p. 364, c. 150, § 1, providing that railroads having more than two tracks across public highway and used for switching purposes "exclusively or regularly" shall maintain a watchman on order of county commissioners, etc., held to mean in conformity with established mode and as part of routine business done at that point, and does not mean that switching must be done at regular intervals. Id.

35. Evidence held to sustain verdict against railroad company for failure to comply with order of commissioners under Acts 1891, p. 364, c. 150, § 1, to maintain watchman at certain crossing. Grand Trunk Western R. Co. v. State [Ind. App.] 82 NE 1017.

36. Acts 1891, p. 364, c. 150, § 1, providing that railroads having more than two tracks across any public highway and used for switching purposes exclusively or regularly shall, upon order of county commissioners in which said railroad is located, place a flagman thereat at their expense, etc., held not void for uncertainty. Grand Trunk Western R. Co. v. State [Ind. App.] 82 NE 1017.

37. Evidence held to warrant conclusion that decedent was acting on gateman's invitation to cross when killed, hence instruction that it was wholly material as bearing on defendant's negligence whether gateman invited her to cross was properly refused. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 20 Tex. Ct. Rep. 740, 106 SW 705.

38. Evidence held to show negligence in kicking caboose standing over crossing so as to injure one passing behind same. Jonesboro, etc., R. Co. v. Moody, 82 Ark. 603, 103 SW 375.

ing trains,[39] or running switch engines [40] over a public crossing, must exercise due care for the safety of travelers.

Blocking crossings.—A railroad must not unduly occupy a public crossing,[41] and where it does so one attempting to cross over the cars is not a trespasser [42] but is entitled to reasonable care,[43] although he is not relieved from exercising due care for his own safety.[44] A brakeman has no implied authority to invite pedestrians to climb between cars blocking a street.[45]

(§ 11G) 2. *Contributory negligence. General rules.*[See 8 C. L. 1639]—One approaching a crossing must exercise such care as an ordinarily prudent person would exercise under the same or similar circumstances,[46] and a failure so to do will defeat recovery.[47] The unusually dangerous character of a particular crossing may,

39. Held negligence per se to back train over crossing on dark night without warning. Bowles v. Chesapeake, etc., R. Co., 61 W. Va. 272, 57 SE 131. Where in backing engine and tender over much used crossing engineer merely watched by looking through window instead of leaning out, and was unable to see within 50 feet of engine, held negligence. Houston, etc., R. Co. v. Kauffmann [Tex. Civ. App.] 18 Tex. Ct. Rep. 238, 101 SW 817. Evidence that defendant backed train over public crossing on dark night without warning signals or lights held to sustain finding of negligence. Gerringer v. North Carolina R. Co. [N. C.] 59 SE 152. Negligence in closely following train by engine running backwards, without lookout on tender, and over crossing without watchman or gates, held for jury. Barnum v. Grand Trunk Western R. Co., 148 Mich. 370, 14 Det. Leg. N. 237, 111 NW 1036. Evidence that one struck by backing train could see same, that brakeman shouted warning, that she hesitated and then attempted to go around moving train, that brakeman then tried to stop, held insufficient to show negligence in not sooner attempting to stop train. Matteson v. Southern Pac. R. Co. [Cal. App.] 92 P 101.

40. Negligence in not properly guarding crossing while passing of switch engine held for jury. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948.

41. Where horse was frightened by blowing off of steam by engine standing, and which had been standing, for 30 minutes and projecting into street, held that negligent leaving of engine in street was proximate cause of injury, and that escape of steam was but an incident. Fay v. Minneapolis, etc., R. Co., 131 Wis. 639, 111 NW 683.

42. Gesas v. Oregon Short Line R. Co. [Utah] 93 P 274. One attempting to climb between cars before same have blocked crossing unreasonably is a trespasser. Southern R. Co. v. Clark [Ky.] 105 SW 384. Civ. Code 1902, § 1375, providing that if any railroad company or its employe unnecessarily obstructs any public road, etc., it shall be liable for penalty, does not affect rule that company may become trespasser by unreasonably blocking highway by standing train, and one attempting to pass through or over cars is not a trespasser. Walker v. Southern R. Co., 77 S. C. 161, 57 SE 764.

43. Where train had obstructed crossing for over half hour and people were passing between and over cars, negligence in starting same without warning held for jury. Gesas v. Oregon Short Line R. Co. [Utah] 93 P 274. Evidence that train had blocked crossing for nearly an hour and that men were passing between cars held to warrant finding that trainmen in exercise of ordinary care ought to have anticipated that some one might be in act of crossing and that not to give warning before moving train would result in injury (Id.), and it was their duty to give warning before starting (Id.). Negligence did not depend upon knowledge that particular person injured was passing between cars. Id.

44. One attempting to climb at night between cars of train blocking crossing to which engine is attached held negligent as matter of law (Southern R. Co. v. Clark [Ky.] 105 SW 384), and cannot recover for injuries sustained by starting of train in absence of proof that trainmen knew of his presence (Id.).

45. Southern R. Co. v. Clark [Ky.] 105 SW 384.

46. Lowden v. Pennsylvania R. Co. [Ind. App.] 82 NE 941; Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776; Boyd v. St. Louis S. W. R. Co. [Tex.] 108 SW 813. Instruction as to care required of traveler upon railroad crossing held correct. Chicago, etc., R. Co. v. Louderback, 125 Ill. App. 323. Instruction assuming that only duty owed by decedent was to look and omitting duty to listen held erroneous. Southern R. Co. v. Hansbrough's Adm'r [Va.] 60 SE 58. Fact that train was late held not to excuse failure to observe usual precautions. Union Pac. R. Co. v. Entsminger [Kan.] 92 P 1095. Degree of care required of travelers to discover approach of train differs according to their familiarity with locality in which they are traveling. Kahl v. Chicago, etc., R. Co., 125 Ill. App. 294. One living two miles from railroad crossing held not chargeable with knowledge of time at which train usually crossed same or with its speed thereat, although it appears that train was on time and that he usually left home about same time. Kunz v. Oregon, etc., R. & Nav. Co. [Or.] 94 P 504. Traveler approaching crossing must exercise same vigilance to avoid injury as operatives of train must exercise to avoid injuring him. Lake Shore, etc., R. Co. v. Brown [Ind. App.] 84 NE 25. Railroad and a traveler at crossing owe reciprocal duty to keep careful lookout for danger, and degree of vigilance is in proportion to known danger. Southern R. Co. v. Hansbrough's Adm'r [Va.] 60 SE 58.

however, require commensurate care,[48] and in some states only "gross" [49] negligence will preclude recovery where the defendant violated a statutory duty.[50] Whether a person injured at a crossing exercised the proper degree of care for his safety is a question of fact [51] or law,[52] according to the particular circumstances of the case.

47. Negligence of company in approaching crossing does not relieve traveler of duty of exercising diligent care for his own safety. Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56. Violation of speed ordinance does not authorize recovery where plaintiff was negligent. Kunz v. Oregon R. Co. [Or.] 93 P 141. General verdict for plaintiff in action for personal injuries in collision at crossing is a finding in her favor on issue of contributory negligence Lowden v. Pennsylvania R. Co. [Ind. App.] 82 NE 941.

48. Southern R. Co. v. Winchester's Ex'x [Ky.] 105 SW 167. Obligation of traveler and company are reciprocal, and where circumstances demand additional care from company, same is demanded of traveler. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988. Fact that it is dark and cloudy and that smoke of passing train has settled down over crossing held not to excuse looking. Morrow v. North Carolina R. Co. [N. C.] 59 SE 158.

49. Where person knew train was approaching and had ample opportunity to observe its proximity, speed, and danger in attempting to cross ahead of it, but made the attempt, held to warrant nonsuit. Drawdy v. Atlantic Coast Line R. Co. [S. C.] 58 SE 980. Question whether one is guilty of gross negligence in attempting to pass between cars of train unreasonably blocking crossing, to get mail bag on other side, held for jury. Walker v. Southern R. Co., 77 S. C. 161, 57 SE 764.

50. Civ. Code 1902, § 2139. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. Under Code 1895, § 3830, plaintiff's negligence does not defeat recovery but diminishes amount thereof. Southern R. Co. v. Tankersley [Ga.] 60 SE 297.

51. Held for jury. Elgin, etc., R. Co. v. Lawlor, 229 Ill. 621, 82 NE 407; Lake Shore, etc., R. Co. v. Enright, 227 Ill. 403, 81 NE 374. Confusing situation. Chicago, etc., R. Co. v. O'Leary, 126 Ill. App. 311. View of track obstructed. Chicago, etc., R. Co. v. Louderback, 125 Ill. App. 323; Chicago, etc., R. Co. v. Wilson, 128 Ill. App. 88; Illinois S. R. Co. v. Hamill, 128 Ill. App. 152, afd. 226 Ill. 88, 80 NE 745. View obstructed and no signal given. Meyers v. Central R. Co., 218 Pa. 305, 67 A 620. Run down by switch engine. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948. Usual signals not given and no lookout maintained. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776. Where intestate had driven close to track before discovering approaching train, no signals having been given, whether he exercised ordinary care in attempting to cross instead of turning back. Id. Electric warning bell not sounding and evidence conflicting as to where and how many times whistle was blown. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Negligence of owner in directing servant to take cattle to pasture which necessitated crossing tracks, knowing that train had not passed, and of servant after discovering approaching train in first trying to hurry them across tracks and then trying to check them. Heise v. Chicago G. W. R. Co. [Iowa] 114 NW 180. Negligence in attempting to cross where decedent was almost on track when train was discovered about 750 feet away. Bickel v. Pennsylvania R. Co., 217 Pa. 456, 66 A 756. Negligence after being placed in perilous position by trains approaching on different tracks. Mosten v. Lake Shore, etc., R. Co., 218 Pa. 392, 67 A 740. Negligence in crossing side track behind train, which backed onto decedent. Minot v. Boston, etc., R. Co. [N. H.] 66 A 825.

Held negligence: In approaching crossing. Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56. Train in sight. Spencer v. New York Cent., etc., R. Co., 108 NYS 245. One who, knowing that a car may start at any moment, attempts to cross a track so near it that if it moved escape would be impossible. Chicago Terminal Transfer R. Co. v. Korando, 129 Ill. App. 620. Attempting to pass under cars temporarily standing on crossing and liable to be moved at any time. Jones v. Illinois Cent. R. Co., 31 Ky. L. R. 825, 104 SW 258. Attempted to cross in front of approaching train which she saw. Missouri Pac. R. Co. v. Trahern [Kan.] 91 P 48. Attempted to pass ahead of backing train in full view. Matteson v. Southern Pac. Co. [Cal. App.] 92 P 101. Drove onto track ahead of approaching train. Atlantic Coast Line R. Co. v. Miller, 53 Fla. 246, 44 S 247. Decedent in full possession of faculties, familiar with crossing, unobstructed view, train on time and lighted. Chicago, etc., R. Co. v. Donaldson [C. C. A.] 157 F 821. Where by use of faculties train could have been discovered, it will be presumed that decedent was negligent. Byrket v. Lake Shore, etc., R. Co., 10 Ohio C. C. (N. S.) 73; Southern R. Co. v. Hansbrough's Adm'r [Va.] 60 SE 58. Evidence that view of track was unobstructed for nearly a mile held to show that plaintiff did not look or that he ignored approaching train. Gehring v. Atlantic City R. Co. [N. J. Err. & App.] 68 A 61. Where traveler is warned, or by exercise of proper care would be warned, of approaching train, it is negligence to go upon track ahead of same. Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56. Stepping in front of train with full knowledge of approaching train (Harris v. Southern R. Co., 129 Ga. 388, 58 SE 873); complaint held to show that she so stepped (Id.).

Held not negligence: Heavy rain, umbrella up. Central of Georgia R. Co. v. North, 129 Ga. 106, 58 SE 647. To cross in front of standing locomotive where other teams were doing so, instead of going by another and longer route. Williams v. Chicago, etc., R. Co. [Neb.] 111 NW 596. Evidence held not to show contributory negligence in going on dark night onto track in front of backing engine giving no warning signals and having no lights. Gerringer v. North Carolina R.

One attempting to cross in face of warnings is usually held guilty of negligence.[53] A child is ordinarily held only to the degree of care to be expected of a child of similar age and discretion,[54] and, where a child exercises the care of an adult, negli-

Co. [N. C.] 59 SE 152. To make question of negligence for jury in going onto traeks in front of approaching train, there being a driving rain at time and decedent was holding umbrella towards train. Central of Georgia R. Co. v. North, 129 Ga. 106, 58 SE 647. Negligence of husband not being imputable to wife, evidence held to authorize recovery. Southern R. Co. v. King, 128 Ga. 383, 57 SE 687.

Facts to be considered: Fact that train was not on time. Wrightsville, etc., R. Co. v. Gornto, 129 Ga. 204, 58 SE 769. Proper speed of train may be considered in determining decedent's negligence in going onto track ahead of train running at a negligent speed. Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885. In action for injuries caused by team taking fright at carcass of horse on right of way near crossing, plaintiff's failure to report same to town authorities for removal held provable to establish assumed risk. Louisville, etc., R. Co. v. Armstrong [Ky.] 105 SW 473.

52. Nonsuit should not be ordered on ground of contributory negligence unless negligence of party injured is manifest. Kunz v. Oregon R. Co. [Or.] 93 P 141. Where surrounding circumstances are such that in exercise of due care one crossing tracks must have been able to avoid train, court may direct verdict. Allen v. Boston, etc., R. Co. [Mass.] 83 NE 863.

Negligence as matter of law: Struck by train approaching on straight track in broad daylight. Houston, etc., R. Co. v. Kauffman [Tex. Civ. App.] 18 Tex. Ct. Rep. 238, 101 SW 817. One possessing unimpaired faculties, in going onto crossing ahead of train approaching in full view. Lake Shore, etc., R. Co. v. Brown [Ind. App.] 84 NE 25. Unobstructed view of track for 200 feet, attempted to cross in face of approaching train and in disregard of warnings and signals. Chicago, etc., R. Co. v. Blake, 125 Ill. App. 336. Knew that train was due, view unobstructed except for a few scattered trees, notwithstanding he testified that he looked and did not see train. Westerkamp v. Chicago, etc., R. Co. [Colo.] 92 P 687. Where plaintiff, knowing that team was afraid of carcass of horse on right of way near crossing, attempted to compel them to pass by use of whip. Louisville, etc., R. Co. v. Armstrong [Ky.] 105 SW 473. Evidence that plaintiff's sight and hearing were unimpaired, that he had clear view of track for long distance, that headlight of engine was burning brightly and was seen by one crossing ahead of plaintiff. Atchison, etc., R. Co. v. Baker [Ind. T.] 104 SW 1182.

Not negligence as matter of law. Louisville, etc., R. Co. v. Molloy's Adm'x [Ky.] 107 SW 217. Driving automobile 12 to 15 miles per hour and colliding with iron trolley pole while trying to avoid closed gates (Record v. Pennsylvania R. Co. [N. J. Law] 67 A 1040), nor was act of turning car per se negligence (Id.). In going onto track, knowing that train was approaching about quarter of mile away, accident being caused by pony's foot becoming caught between railroad planking. Dunham v. Wabash R. Co., 126 Mo. App. 643, 105 SW 21. Attempting to cross in front of stationary engine projecting into street six or ten feet. Fay v. Minneapolis, etc., R. Co., 131 Wis. 639, 111 NW 683. In driving over crossing in front of standing engine, there being nothing to indicate that it was about to start. Atchison, etc., R. Co. v. Wilkie [Kan.] 90 P 775. Where plaintiff would have had time to clear crossing ahead of approaching train had not mule become frightened and balked on crossing, held not negligent as matter of law in attempting to cross. Charleston, etc., R. Co. v. Camp [Ga. App.] 59 SE 710. Plaintiff's testimony that after waiting for freight train to pass he looked and listened for approaching train, but could not see or hear it on account of darkness, smoke, noise of freight, etc., held to justify denial of nonsuit on ground of contributory negligence, Morrow v. North Carolina R. Co. [N. C.] 59 SE 158. Evidence held not to show as matter of law that decedent knew or ought to have known of approaching train. Louisville, etc., R. Co. v. Molloy's Adm'r [Ky.] 107 SW 217.

53. Cleveland, etc., R. Co. v. Huston, 125 Ill. App. 522. In disregard of lowered gates and other required warnings. Pittsburgh, etc., R. Co. v. Puszdrakiewicz, 129 Ill. App. 295. Held not negligence per se to attempt to cross while gates are down. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 20 Tex. Ct. Rep. 740, 106 SW 705. Invitation by flagman to cross after gates are lowered does not excuse disregard of lowered gates and other signals of the approach of trains. Pittsburg, etc., R. Co. v. Puszdrakiewicz, 129 Ill. App. 295. While fact that plaintiff heard automatic warning bell ringing when she went upon crossing may be considered with other evidence in determining her negligence, it does not of itself render her guilty of negligence, it appearing that she knew that bell was constantly rung by trains standing in yards. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988.

54. Boy 13 years old held of sufficient age to appreciate danger. Gehring v. Atlantic City R. Co. [N. J. Err. & App.] 68 A 61.

Held for jury: Negligence of child struck by train coming around abrupt curve, evidence being conflicting as to giving of signals. Serano v. New York Cent., etc., R. Co., 188 N. Y. 156, 80 NE 1025. Negligence of child eight years old in not seeing or avoiding approaching train, his attention being attracted by another train. Holmes v. Missouri Pac. R. Co., 207 Mo. 149, 105 SW 624. Negligence of twelve year-old boy in going onto crossing without stopping, looking and listening. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22. Where evidence tended to show that decedent looked when about fifteen yards from track and saw no train, and that train failed to give signals, contributory negligence in being on track. San Antonio, etc., R. Co. v. Mertink [Tex. Civ. App.] 18 Tex. Ct. Rep. 201, 102 SW 153. Neg-

gence of parents in permitting him to go alone is negatived.[55] The fact that plaintiff, knowing of the presence of a carcass of a horse on defendant's right of way and within town limits, did not report same to the town authorities, does not preclude recovery for an injury caused by his team becoming frightened thereat.[56]

Acts required of traveler. See 8 C. L. 1641—The care exacted of one approaching a crossing requires that he should use his faculties of sight and hearing to avoid injury,[57] but the failure to "stop, look and listen" is not usually negligence per se[58]

ligence of eight year old child in attempting to cross between cars of train which had obstructed street for over half hour. Gesas v. Oregon Short Line R. Co. [Utah] 93 P 274. Child nine years old held not negligent as matter of law in crossing ahead of train though she saw same approaching. Duggan v. Boston, etc., R. Co. [N. H.] 66 A 829. Testimony of switchman that switching was being done in front of plaintiff, eleven-year-old boy, as he entered onto right of way, held not to show conclusively that he was negligent in not discovering and avoiding car kicked across highway. Olson v. Minneapolis, etc., R. Co., 102 Minn. 395, 113 NW 1010.

55. Serano v. New York Cent., etc., R. Co., 188 N. Y. 156, 80 NE 1025.

56. Louisville, etc., R. Co. v. Armstrong [Ky.] 105 SW 473.

57. Illinois, etc., R. Co. v. McMillion, 129 Ill. App. 27; Gehring v. Atlantic City R. Co. [N. J. Err. & App.] 68 A 61; Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56. Instruction as to duty of plaintiff to look and listen before crossing railroad tracks held proper. Scanlan v. Chicago Union Trac. Co., 127 Ill. App. 406; Ravatt v. Cleveland, etc., R. Co., 128 Ill. App. 220; Cleveland, etc., R. Co. v. Wuest [Ind. App.] 83 NE 620. Rule that one approaching crossing must ordinarily look and listen applies to one riding in vehicle in charge of another. Noakes v. New York Cent. etc., R. Co., 121 App. Div. 716, 106 NYS 522. Instruction that, if plaintiff could have seen and heard train in time to have avoided it had he looked and listened, he cannot recover though he testified that he looked and listened and neither saw nor heard train, held erroneously refused. Atchison, etc., R. Co. v. Baker [Ind. T.] 104 SW 1182.

Negligence held for jury: Stopped, looked and listened three times, view much obstructed. Weston v. Pennsylvania R. Co. [N. J. Err. & App.] 65 A 1015. Negligence of girl sixteen years old, riding in rear seat of automobile in charge of a chauffeur operating under immediate direction of her father, in failing to look and listen. Noakes v. New York Cent., etc., R. Co., 121 App. Div. 716, 106 NYS 522. Instruction in effect holding plaintiff negligent as matter of law held properly refused. Id. Testimony of plaintiff that he looked and listened, but did not see or hear approaching train, the headlight being dim and no signals given, held to make question for jury, although evidence was highly incredible. Calwell v. Minneapolis, etc., R. Co. [Iowa] 115 NW 605.

Held negligent: Drove onto track without looking, view being clear. Stotler v. Chicago, etc., R. Co., 204 Mo. 619, 103 SW 1. Approached crossing on clear day, unobstructed view for several hundred feet, and knew that train was about due. Allen v. Boston, etc., R. Co. [Mass.] 83 NE 863. Familiar with location of railway tracks, attempted to cross without looking for approaching train, which might have been seen two thousand feet away. Cincinnati, etc., R. Co. v. Bokenkotter, 10 Ohio C. C. (N. S.) 448. One approaching crossing in closed wagon and observing headlight in fog, but believing it to be at station, crosses without further investigation and without urging horse off of walk. Hamblin v. New York, etc., R. Co., 195 Mass. 555, 81 NE 258. Evidence that decedent looked, and must have seen that heavy freight train was slowly approaching in full view, held to show negligence in colliding therewith. Gaffney v. New York Cent., etc., R. Co., 108 NYS 169. Evidence that boys approaching crossing in automobile were not looking for train held not so clear as to require reversal of verdict against defendant. Sherwood v. New York Cent., etc., R. Co., 120 App. Div. 639, 105 NYS 547. Man thirty-six years of age, seated in rear seat of automobile on side of approaching train, visible for 2,000 feet, held negligent, **as matter of law,** in not looking for train. Read v. New York Cent., etc., R. Co., 123 App. Div. 228, 107 NYS 1068. Where evidence is clear that had plaintiff taken proper precautions he could have seen train in time to stop, fact that he testified that he looked some distance from track and did not see approaching train held not to require submission of case to jury. Spencer v. New York Cent., etc., R. Co., 108 NYS 245. Where evidence shows that if one killed at crossing had looked and listened he would have discovered approaching train presumption of due care is destroyed (Rogers v. Rio Grande Western R. Co. [Utah] 90 P 1075), and it will be presumed that he did not look and listen or that he did not heed what he saw and heard (Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 490). Instruction held correct. Rogers v. Rio Grande Western R. Co. [Utah] 90 P 1075. Evidence that view of track was unobstructed at time of trial held not to show that it was in such condition at time of accident. Wamsley v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 490.

Held not negligent: Where hack driver halted his team before going onto system of tracks and saw no train and then looked in direction he was going for about fifteen seconds, when he was struck, held he was **not negligent as matter of law.** Boyd v. St. Louis S. W. R. Co. [Tex.] 108 SW 813.

58. Not negligence as matter of law. Bryson v. Southern R. Co. [Ga. App.] 59 SE 1124; Southern R. Co. v. Tankersley [Ga. App.] 60 SE 297; Elgin, etc., R. Co. v. Lawler, 229 Ill. 621, 82 NE 407; Chicago, etc., R. Co. v. Louderback, 125 Ill. App. 323; Cincinnati, etc., P. R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988 Instruction that it was decedent's

and may be excused by the peculiar circumstances of the case.[59] The rule requires that the duty be exercised at such point as to render it effective,[60] and is not satisfied by looking one way only.[61] A failure to stop, look and listen, however, will not defeat recovery unless it is the proximate cause of the injury.[62]

*Duty where view of track is obstructed.*See 8 C. L. 1643—Where the view of the tracks is obstructed, commensurate care must be exercised.[63]

*Parallel tracks.*See 6 C. L. 1643—While one unnecessarily waiting on one track for a train to pass on a parallel track is per se negligent,[64] it is generally a question for the jury whether one is negligent in not stopping and looking after passing the first track.[65]

*Right to rely on crossing signals, gates, flagmen, etc.*See 8 C. L. 1643—While one approaching a crossing may ordinarily assume that trains will be operated with due

duty to stop, look and listen held favorable to defendant. Chesapeake, etc., R. Co. v. Wilson's Adm'r, 31 Ky. L. R. 500, 102 SW 810.

59. Before failure to look and listen will constitute negligence, it must appear that there was nothing in the age, sex, or condition of plaintiff, or in surrounding circumstances, excusing the failure. Noakes v. New York Cent., etc., R. Co., 121 App. Div. 716, 106 NYS 522. Not negligence to fail to stop, look and listen if one is not in position to do so or where it would not avail anything. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867. Instruction as to liability where plaintiff's team became frightened before he came close enough to stop and look and ran onto track, and engineer, seeing such runaway, failed to use all reasonable means to avoid injury, approved. Southern R. Co. v. Hobbs [Ala.] 43 S 844.

60. Southern R. Co. v. Hansbrough's Adm'r [Va.] 60 SE 58. One approaching crossing must stop, look and listen immediately before crossing so as to preclude danger from approaching trains between time he stopped, looked and listened and attempted to cross. Central of Georgia R. Co. v. Barnett [Ala.] 44 S 392. Held question for jury whether decedent should have again stopped and looked before crossing. Meyer v. Chicago, etc., R. Co., 134 Iowa, 722, 112 NW 194. Where one stopped 125 steps from crossing and then drove onto it without again looking, there being nothing to prevent him from again stopping and looking, he cannot recover where train would have been seen had he so looked. Central of Georgia R. Co. v. Barnett [Ala.] 44 S 392. Where plaintiff driving cattle over crossing looked for train when about 400 feet from crossing, held negligence not to look again as he approached nearer. Union Pac. R. Co. v. Entsminger [Kan.] 92 P 1095. Where plaintiff stopped, looked and listened about twenty feet from track and could see for about 600 feet up track and rear end of wagon was struck, negligence held for jury. Howard v. Baltimore, etc., R. Co. [Pa.] 68 A 848.

61. Whether plaintiff was guilty of negligence in looking one way and not the other is a question for the jury. Ravatt v. Cleveland, etc., R. Co., 128 Ill. App. 220.

62. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867. Where defendant failed to prove beyond dispute that plaintiff's failure to stop, look and listen was proximate cause of accident, general affirmative charge is proper although plaintiff failed to excuse such failure. Id. If engine could not have been seen or heard, failure to stop, look and listen is not proximate cause of collision. Id. Fact that team became unmanageable, and hence plaintiff could not stop, look and listen, does not excuse where ordinarily prudent man would have stopped, looked and listened before reaching the point where team became frightened. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Where engine was approaching in dark without lights and in front of heavy train, held question for jury whether failure to look and listen was proximate cause of injury. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867.

63. Traveler approaching crossing must look and, if view is obstructed, listen, and if he fails without reasonable excuse he is negligent. Kunz v. Oregon R. Co. [Or.] 93 P 141. Where view was obstructed and many headlights confusing, one driving onto track ahead of approaching engine held not negligent as matter of law. Corrigan v. Pennsylvania R. Co., 218 Pa. 336, 67 A 619. Negligence of one approaching along alley, which did not admit of view of tracks until within seventeen feet thereof, in not stopping before reaching such point, and in not avoiding collision after discovering train, held for jury. Schwanenfeldt v. Chicago, etc., R. Co. [Neb.] 115 NW 285. Where view of tracks was obstructed, one colliding with train held not negligent as matter of law, although there was place near tracks where unobstructed view could have been obtained. Hutson v. Southern California R. Co., 150 Cal. 701, 89 P 1093.

64. Stopped street car on tracks. Casey v. Chicago, etc., R. Co. [C. C. A.] 157 F 66.

65. Failure of ten-year-old boy to stop and look when between two tracks held not negligence as matter of law. Baltimore, etc., R. Co. v. Hickman, 40 Ind. App. 315, 81 NE 1086. Negligence of ten-year-old child in not looking after crossing first track when view became clear held for jury where electric bell failed to ring. Id. Whether one having received signal of gateman to go ahead and having looked for trains before starting is negligent in not looking after getting onto first track held for jury. Union Pac. R. Co. v. Rosewater [C. C. A.] 157 F 168.

care [66] and that statutory regulations as to speed [67] and signals [68] will be observed, he is not excused from exercising due care for his own safety.[69] Likewise, open gates and signals of flagman to proceed do not as a matter of law excuse a traveler from exercising due care.[70]

(§ 11) *H. Injuries to persons on highways or private premises near tracks.* See 8 C. L. 1644—While a railroad must exercise reasonable care to avoid injuring one rightfully on a highway,[71] it is not liable for injuries caused by teams taking fright at the ordinary operation of its trains.[72] Where a traveler on the adjacent highway is seen in apparent danger, it becomes the duty of the railroad to exercise reasonable and practicable care to avoid injury.[73] A railroad in the public street has a right of way over travelers,[74] but where it maintains a platform thereon, the public may use the same.[75] Rules and regulations as to crossings are generally held inapplicable to persons on highways,[76] and a violation thereof in any event must be the proximate

66. Schwanenfeldt v. Chicago, etc., R. Co. [Neb.] 115 NW 285. Crossing track in front of standing locomotive. Williams v. Chicago, etc., R. Co. [Neb.] 111 NW 596. Fact that electric alarm bell did not ring may be considered in determining contributory negligence in going onto track. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. One approaching crossing has **no right to assume** that defendant will not in any way be negligent in operation of trains. Hutson v. Southern California R. Co., 150 Cal. 701, 89 P 1093.

67. Chicago, etc., R. Co. v. Wilson, 128 Ill. App. 88; Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105; Kunz v. Oregon R. & Nav. Co. [Or.] 94 P 504. In absence of notice to the contrary. Kunz v. Oregon R. Co. [Or.] 93 P 141. No right to assume that train is running at lawful rate of speed where by looking the contrary would be evident. Stotler v. Chicago, etc., R. Co., 204 Mo. 619, 103 SW 1. Decedent's negligence in attempting to cross after hearing whistle, he assuming that train was approaching at lawful rate of six miles per hour, held for jury under all the evidence. Kunz v. Oregon R. Co. [Or.] 93 P 141.

68. Chicago, etc., R. Co. v. Louderback, 125 Ill. App. 323; Chicago, etc., R. Co. v. O'Leary, 126 Ill. App. 311; Lake Shore, etc., R. Co. v. Enright, 227 Ill. 403, 81 NE 374; Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56.

69. Complaint considered and held not demurrable as showing that plaintiff relied solely on electric bell to give warning. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Reliance on giving of statutory signals does not justify approaching crossing at such speed as to be unable to stop before reaching crossing after reaching point where train can be seen or heard. Smith's Adm'r v. Norfolk, etc., R. Co. [Va.] 60 SE 56. Fact that crossing signals were not given held not as matter of law to excuse failure to listen. Morrow v. North Carolina R. Co. [N. C.] 59 SE 158.

70. Open gates. Schulte v. Louisville, etc., R. Co. [Ky.] 108 SW 941; Shafer v. Lehigh Valley R. Co. [N. J. Law] 66 A 1072. Signal of gateman. Union Pac. R. Co. v. Rosewater [C. C. A.] 157 F 168. Whether after opening of safety gates driver should stop, look and listen before going onto track held for jury. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22. Motorman held not negligent as a matter of law in failing to look for approaching trains where the gates were open. Louisville Bridge Co. v. Moroney [Ky.] 106 SW 870.

71. Pittsburgh, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934. Proof of custom of throwing mail pouches from moving train onto platform constantly used by public held to show actionable negligence. Id. Must show custom to throw off at place where it was liable to injure persons, though not necessarily at point where plaintiff was injured. Id. Where complaint, in action for injuries to person struck by mail pouch thrown from moving train, alleged that for more than two years it had been custom of railroad to permit mail bags to be thrown from moving trains and thereby subjecting persons to hazard of life, held that evidence of throwing of bags at other points than at particular spot where plaintiff was injured was admissible. Id. Held not negligent to blow whistle in regular operation of train where team was standing 105 yards away waiting to cross tracks. Berry v. Boston, etc., R. Co., 102 Me. 213, 66 A 386.

72. Owe no duty to check speed of trains so as not to frighten horses, and are not liable for injuries caused by horses taking fright at sight thereof or usual noises incident to running of train. Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 SE 374. Incidental noise. Whistenant v. Southern States Portland Cement Co., 2 Ga. App. 598, 59 SE 920. Damnum absque injuria. Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 SE 374. Petition held to state no actionable negligence. Id. Rule applies to private railroad. Whistenant v. Southern States Portland Cement Co., 2 Ga. App. 598, 59 SE 920.

73. Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 SE 374.

74, 75. Pittsburgh, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934.

76. One injured on road parallel with track cannot predicate negligence on failure to give crossing signals. Southern R. Co. v. Flynt, 2 Ga. App. 162, 58 SE 374. Not bound to give warning of approach of trains or to keep lookout for such travelers. Id.

cause of the injury to sustain a recovery.[77] Contributory negligence defeats recovery.[78]

(§ 11) *I. Injuries to animals on or near tracks. How far liability extends.* See 6 C. L. 1646—While it has been held that a railroad owes only the duty to abstain from willfully and wantonly injuring a trespassing animal,[79] and hence owes no duty to keep a lookout [80] or to maintain its roadbed in a safe condition,[81] the more general rule seems to be that it must exercise reasonable care to avoid injury [82] and is liable for negligence [83] proximately causing injury.[84] While trainmen must have due regard for the known habits of animals,[85] they may operate the train in the usual manner,[86] and ordinarily a high rate of speed is not of itself negligence.[87] After discovering an animal in peril, reasonable care must be exercised to avoid injury.[88] What constitutes actionable negligence is usually a question of fact for the jury.[89]

77. No recovery where plaintiff was injured by unnecessarily jumping from buggy, team not being frightened. Clinebell v. Chicago, etc., R. Co. [Neb.] 111 NW 577.

78. One walking along platform at safe distance from edge and struck by mail pouch thrown from moving train held not negligent though he knew of approaching train. Pittsburg, etc., R. Co. v. Warrum [Ind. App.] 82 NE 934.

79. Bateman v. Rutland R. Co., 54 Misc. 312, 105 NYS 970. Although cattle at large on open range and straying on unfenced right of way are not trespassers so as to render owner liable, they are not rightfully thereon so as to render railroad liable as insurer of their safety. Martin v. Chicago, etc., R. Co., 15 Wyo. 493, 89 P 1025.

80. No liability for killing dog on trestle without proof that trainmen saw plaintiff's signal or knew of dog's presence. Cook v. Southern R. Co. [S. C.] 59 SE 361.

81. Injured by defective cattle guard at point where one was not required. Gibson v. Louisville, etc., R. Co. [Ky.] 106 SW 838.

82. Robbins v. Baltimore, etc., R. Co. [W. Va.] 59 SE 512. Instruction requiring railroad to use all possible care to avoid injury to stock held erroneous. Atlantic Coast Line R. Co. v. White, 129 Ga. 668, 59 SE 898. Instruction making it absolute duty to keep lookout held erroneous. Houston, etc., R. Co. v. Van Ness [Tex. Civ. App.] 101 SW 265. Held that instruction as to care owed to avoid injury to stock was cured and rendered harmless by correction of court. Atlantic, etc., R. Co. v. Smith, 2 Ga. App. 294, 58 SE 542. Railroad must run its locomotive at night at such speed that it can be stopped by use of ordinary means and appliances within distance stock would be seen by aid of headlight. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723.

83. Negligence of company must be shown to render company liable. Denver, etc., R. Co. v. Coulter [Colo.] 92 P 906; Missouri, etc., R. Co. v. McCoy [Ind. T.] 104 SW 620; Gibson v. Iowa Cent. R. Co. [Iowa] 113 NW 927. Railroad is under common-law liability for injury to stock caused by taking fright at negligent operation of train. Earl v. St. Louis, etc., R. Co., 84 Ark. 507, 106 SW 675. Railroad is not liable for injury to stock taking fright by unnecessary blowing of whistle or escaping of steam unless trainmen are aware of presence of such stock and knew that injury was liable to result. Gibson v. Louisville, etc., R. Co. [Ky.] 106 SW 838. Where horse was killed at place where defendant was not required to fence, and hence liability was predicable on negligence only, it was error to refuse peremptory instruction for defendant where there was no proof of negligence. Texas Cent. R. Co. v. Randal [Tex. Civ. App.] 108 SW 505. After railroad has fenced its right of way, it is liable for injury to stock only for negligence proximately contributing to injury. Ft. Worth, etc., R. Co. v. Worsham [Tex. Civ. App.] 20 Tex. Ct. Rep. 89, 105 SW 853.

84. Instruction authorizing recovery if defendant negligently permitted fence to become out of repair, though stock entered through open gates, held erroneous. Ft. Worth, etc., R. Co. v. Worsham [Tex. Civ. App.] 20 Tex. Ct. Rep. 89, 105 SW 833.

85. Where it is apparent to person of reasonable prudence that animal is likely to be injured by running into train, operatives must exercise reasonable care to prevent injury. Rhinehart v. St. Louis, etc., R. Co. [Mo. App.] 108 SW 103.

86. License to leave team near station platform while transacting business with company held not to deprive company of right to operate trains in usual manner and to give necessary signals. Galveston, etc., R. Co. v. Graham [Tex. Civ. App.] 19 Tex. Ct. Rep. 395, 101 SW 846. Blowing of crossing whistle in usual manner and stock whistle in attempt to prevent colts from running onto track held not acts of negligence, though colts may have been frightened thereby. Southern R. Co. v. Puryear, 2 Ga. App. 75, 58 SE 306.

87. Miller v. Chicago, etc., R. Co. [S. D.] 111 NW 553; Gulf, etc., R. Co. v. Anson [Tex.] 19 Tex. Ct. Rep. 994, 105 SW 989.

88. Instruction on liability for failure to exercise reasonable care after discovering cattle on track held proper. Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972. Instruction, in action for killing of mare which, while running alongside of train, dashed into same, allowing recovery if operatives saw her in time to avoid injury, without regard to whether situation was such as to warn prudent person of danger, held erroneous. Rhinehart v. St. Louis, etc., R. Co. [Mo. App.] 108 SW 103. In action for killing of mare which, while running alongside of train, dashed into same, negligence in failing to stop train after discovering her presence held for jury. Id.

Defendant's negligence must be the proximate cause of the injury sued for.[90] The

89. Negligent instruction on hypothesis that engineer could not have sounded bell and whistle because engaged in stopping train held properly refused, correct rule with reference to due care having been given. Atlantic Coast Line R. Co. v. Waycross Elec. L. & P. Co., 1 Ga. App. 488, 57 SE 1017. Where circumstantial evidence is relied upon to show negligence in killing of stock, circumstances must negative every hypothesis save negligence. Gibson v. Iowa Cent. R. Co. [Iowa] 113 NW 927. Where cow had been standing on track for five minutes before she was struck by train, liability depends upon whether ordinary care required employes to keep lookout and whether, if one had been kept, she would have been discovered in time to have avoided injury. Texarkana, etc., R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167.

Evidence held for jury: Where conflicting as to whether it was foggy and as to distance of train from cattle when they were discovered, etc. Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972. Where animals were killed in cut and on straight track, negligence in failing to keep lookout or in failing to stop train after discovering animals. Cockburn v. St. Louis, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 965, 102 SW 740. Whether ordinary care required employes to keep lookout while backing train through part of town where cattle run at large (Texarkana, etc., R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167), and whether ordinary care required ringing of bell and blowing of whistle (Id.). Evidence that cow was killed in cut where track was straight for long distance. Haardt v. Central of Georgia R. Co. [Ala.] 44 S 547. Where train was being switched backward through part of town where cattle were allowed to run at large, held that jury could consider failure to ring bell in determining whether railroad had exercised ordinary care to prevent injury. Texarkana, etc., R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167.

Evidence held sufficient: To show negligence in running at reckless speed at place where stock was liable to be on track. Gulf, etc., R. Co. v. Anson [Tex. Civ. App.] 102 SW 136. To support finding that horse was thrown onto fence by train or was so frightened thereby that he jumped onto it. Meier v. Northern Pac. R. Co. [Or.] 93 P 691. Evidence that mule could have been seen as it came onto track about quarter mile ahead of train, that whistle was not sounded until within ten steps of mule, and that speed of train was increased until he was struck, having run for about 260 yards ahead of train, held to support finding of negligence. St.. Louis, etc., R. Co. v. Scott, 84 Ark. 623, 104 SW 1103. Bruised condition of mare found dead near tracks together with evidence of blood on track held sufficient to sustain finding that she was killed by collision with train. Dees v. St. Louis, etc., R. Co., 127 Mo. App. 353, 104 SW 485. Evidence of condition of horse found dead on right of way held to authorize finding that it was killed by train. Ft. Worth, etc., R. Co. v. Polson [Tex. Civ. App.] 20 Tex. Ct. Rep. 237, 106 SW 429.

Evidence held insufficient: Doctrine of **res ipsa loquitur** does not apply to mere killing of animal by train. Craft v. Peekskill L. & R. Co., 121 App. Div. 549, 106 NYS 232; Martin v. Chicago, etc., R. Co., 15 Wyo. 493, 89 P 1025. Mere proof that animal was found dead on track, place not being one specified in Code 1896, §§ 3440-3443, does not show negligence. Alabama, etc., R. Co. v. Franklin [Ala.] 44 S 373. Evidence that trains passed during night at high speed, that stock whistle was given, and that ponies were found dead near track next morning, held insufficient to show negligence. Gulf, etc., R. Co. v. Anson [Tex.] 19 Tex. Ct. Rep. 994, 105 SW 989. Fact that stock signal was blown does not show that stock was on track and hence that company negligently ran into them. Id. Negative testimony as to giving of signals as against positive testimony of trainmen in respect thereto, and that all possible effort was made to prevent injury, held insufficient evidence of negligence to go to jury. Missouri, etc., R. Co. v. McCoy [Ind. T.] 104 SW 620. Positive testimony of engineer that cow was standing about twenty or thirty feet from track until train was within 150 feet of her, when she suddenly rushed onto track, weakened only by inaccuracy as to distances, held not to authorize verdict for plaintiff. Kennedy v. Chicago, etc., R. Co. [Neb.] 114 NW 165. Evidence that team standing near track became frightened at usual operating signals and sprang in front of train too close to be stopped held not to show actionable negligence. Galveston, etc., R. Co. v. Graham [Tex. Civ. App.] 19 Tex. Ct. Rep. 395, 101 SW 846. Where undisputed testimony of engineer showed that he did everything possible to avoid injury after seeing mule approaching crossing, verdict for plaintiff is unsupported. Macon, etc., R. Co. v. Wood [Ga. App.] 59 SE 595. Fact that cow was killed at point where track was straight for a half a mile, and that there were no obstructions, held insufficient to show negligence. Denver, etc., R. Co. v. Coulter [Colo.] 92 P 906. In action for killing of horse which evidence tends to show ran into side of train, held that there was no proof of negligence. Texas Cent. R. Co. v. Randal [Tex. Civ. App.] 108 SW 505.

Not negligence: Blowing off of steam to frighten mare running on track ahead of train off track held proper, and not to render company liable for injury caused by her running into fence. St. Louis So. R. Co. v. Conger, 84 Ark. 421, 105 SW 1177. Where animal attempts to cross track a short distance ahead of train and too close to stop train, railroad is not liable. Hansberry v. Chicago, etc., R. Co. [Neb.] 112 NW 292.

90. Failure to give statutory crossing signals held not to render railroad liable for killing of trespassing animals twenty-five rods from crossing, in absence of showing that accident would have been avoided by giving of same. Miller v. Chicago, etc., R. Co. [S. D.] 111 NW 553. Failure of defendant to give proper crossing signals held not

existence [91] of "stock law" does not ordinarily preclude recovery.[92] Where cattle are shipped from a quarantine district, ordinary care must be exercised to prevent their escape outside of the district.[93]

Place of entry on right of way. See 8 C. L. 1851—The place of entry may be material on the question of liability under the fence laws,[94] and in Indiana a railroad is not liable for injury to stock entering at a private crossing [95] unless caused by its negligence.[96]

Duty to maintain fences. See 8 C. L. 1851—At common law a railroad owes no absolute duty to fence its tracks,[97] but in many states it is required [98] by statute [99] to fence its right of way [1] except in cities,[2] at depot grounds,[3] switch yards,[4] and pub-

proximate cause of injury to mare frightened from track into fence by blowing off of steam. St. Louis S. W. R. Co. v. Conger, 84 Ark. 421, 105 SW 1177. Evidence held to show that flesh wounds inflicted in December were not proximate cause of colt's death in April. Southern R. Co. v. Puryear, 2 Ga. App. 75, 58 SE 306.

91. Validity of stock law election may be inquired into in action for injuries to stock. Missouri, etc., R. Co. v. Tolbert [Tex. Civ. App.] 18 Tex. Ct. Rep. 454, 101 SW 1014.

92. Comp. Laws N. M. 1897, § 98. Porter v. El Paso S. W. R. Co. [Tex. Civ. App.] 107 SW 927. Existence of "stock law" does not change degree of duty owed to avoid injury to stock. Atlanta, etc., R. Co. v. Hudson, 2 Ga. App. 352, 58 SE 500. Fact that stock law election has been declared to be in force and is being observed does not affect absolute liability under Rev. St. 1895, art. 4528, for stock killed by trains upon unfenced tracks. Missouri, etc., R. Co. v. Tolbert [Tex.] 18 Tex. Ct. Rep. 94, 101 SW 206.

93. Reynolds v. Galveston, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 338, 99 SW 569. Where it appears that gate was not defective, that it was properly shut, and that cattle had never worked it loose, held that finding of negligence was unwarranted. Id.

94. Plea that failure to fence was not proximate cause held unavailable in action under statute for killing of mule where it appeared that mule entered at point where road was not fenced and was thereafter struck and killed. Cleveland, etc., R. Co. v. Miller, 40 Ind. App. 165, 81 NE 517.

95. Held entry at private crossing within Burns' Ann. St. 1901, § 5322, where stock first entered at point where company failed to maintain fence, but thereafter passed onto private land and again entered at private crossing. Chicago, etc., R. Co. v. Ramsey, 168 Ind. 390, 81 NE 79.

96. Since Burns' Ann. St. 1901, § 5322, exempting company from liability where entry is at private crossing in the absence of negligence, does not define negligence, it must be determined by rules of common law. Chicago, etc., R. Co. v. Ramsey, 168 Ind. 390, 81 NE 79. Where, on discovering cattle 400 feet distant, engineer gave usual warning signals, but findings are silent as to whether train could be stopped in such space, judgment for plaintiff must be reversed as court cannot say as matter of law that it could have been stopped. Id.

97. In absence of statute or contract, mere nonexistence of fence does not render railroad liable for injury to animals on track but negligence must be alleged and proven. Martin v. Chicago, etc., R. Co., 15 Wyo. 493, 89 P 1025. Where there is no statute requiring railroad to fence right of way, right to recover for killing of stock cannot be based upon insecurity of fence. Beasley v. New Orleans, etc., R. Co. [Miss.] 45 S 864. Complaint alleging that fence was defective, that defendant knowing thereof, did not repair, and that animal entering through it was killed by train, held not to state a cause of action. Martin v. Chicago, etc., R. Co., 15 Wyo. 493, 89 P 1025.

98. Duty to fence is absolute. Coe v. Northern Pac. R. Co., 101 Minn. 12, 111 NW 651. Act July 1, 1874 (Rev. St. 1874, c. 114, § 37), held to impose duty on railroads to fence tracks, and not merely an option to fence as therein provided or to assume liability as imposed. Bischoff v. Illinois So. R. Co., 232 Ill. 446, 83 NE 948.

99. Acts 29th Leg. (Laws 1905, p. 226, c. 117, fixing liability of railroads for killing of stock whether roads are fenced or unfenced, though appearing as amendment to stock law, held valid when applied to county which had adopted stock law prior to its enactment. Ft. Worth, etc., R. Co. v. Poison [Tex. Civ. App.] 20 Tex. Ct. Rep. 237, 106 SW 429.

1. Where track passes along highway, statute requires company to fence same; and where animals pass on track through want of fence and are injured, company is liable whether owner is an adjacent landowner or not. Brown v. Quincy, etc., R. Co., 127 Mo. App. 614, 106 SW 551. Duty of railroad under Ky. St. 1903, § 1790, to construct fence half distance of division line between right of way and land of adjoining landowner, when landowner has constructed fence for other half, is limited by §§ 1791, 1792, 1795, 1784, so that land must be improved or inclosed on other three sides, and notice in writing must be given. Parrish v. Louisville, etc., R. Co., 31 Ky. L. R. 1020, 104 SW 690. Petition for injury to stock based upon failure to fence held fatally defective for failure to allege that adjoining lands were improved or inclosed and that notice in writing had been given. Id.

2. Where land through which tracks pass is laid out into lots and blocks and right of way is crossed by various streets and alleys, company has no right to fence. Gibson v. Iowa Cent. R. Co. [Iowa] 113 NW 927. Where facts are undisputed, question whether railroad has right to maintain fence at particular place is for the court. Id.

lic crossings,[5] and absolute liability is frequently imposed by statute [6] for injury to stock entering upon the right of way at an unfenced point.[7] Natural barriers effective to turn stock frequently relieve the company of its statutory duty to fence.[8] Where a fence law is intended for the protection of stock as well as the abutting landowner,[9] a contract between the company and such owner relieving the former from its duty to fence does not affect the rights of another whose stock is injured.[10] Generally a railroad is only liable for common-law negligence in miantaining a fence,[11] although in come states a fence so out of repair as to be ineffective as a

3. Where there was about one and one-half miles of unfenced track from depot extending towards next station, and it appeared that it was three-quarters of a mile to head of switch running back toward station used for storing engines, etc., and about 150 yards further was a branch line forming head of a "Y," held question for jury whether such unfenced portion could be considered a part of depot grounds. Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356.

4. Where horses were killed by engine at point beyond station, coal chute, switches, and the tollhouse, held question for jury whether place was properly included in switch limits, thus relieving defendant of duty of fencing. Southern Kansas R. Co. v. West [Tex. Civ. App.] 102 SW 1174.

5. Colorado, etc., R. Co. v. Neville [Colo.] 92 P 956. Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), does not require railroads to fence public highways de facto or de jure. Sikes v. St. Louis, etc., R. Co., 127 Mo. App. 326, 105 SW 700. Notwithstanding Rev. St. 1899, § 9694 (Ann. St. 1906, p. 4421), providing that no lapse of time shall divest owner of land unless in addition to use of road by public for ten years, public money or labor has been spent thereon, purpose of such statute being to prevent prosecutions for obstructing same, railroad may regard road as public road and leave same unfenced though no money or labor had been spent thereon. Id. Where wagon road crossing had been open for many years and used by all who had occasion to pass that way, and was protected by wing fences, cattle guards, and the usual sign warning travelers, held public crossing which defendant was not required to fence. Smith v. St. Louis, etc., R. Co., 125 Mo. App. 15, 102 SW 593. Where road has become a public highway, railroad is not required to fence same to escape double liability imposed by Rev. St. 1899, § 1105 (Ann. St. p. 945), for killing of animals thereon. Berry v. St. Louis, etc., R. Co., 124 Mo. App. 436, 101 SW 714.

6. Code, § 2055. Mikesell v. Wabash R. Co., 134 Iowa, 736, 112 NW 201. In action under B. & C. Comp. §§ 5139, 5144, for killing of horse straying upon unfenced track, it is immaterial whether he was thrown onto fence or was frightened by train and jumped onto it. Meier v. Northern Pac. R. Co. [Or.] 93 P 691. In action under B. & C. Comp. §§ 5139, 5144, proof that defendant failed to fence its track and that stock was killed near such unfenced track by moving train establishes negligence. Id. Under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), making railroads liable for injury resulting from failure to maintain lawful fence where right of way passes through cultivated fields, company is liable though animal injured first escaped onto lands of another and thence entered onto railroad. Smith v. Chicago, etc., R. Co., 127 Mo. App. 160, 105 SW 10. Instruction as to prima facie case from killing held erroneous as not requiring finding that entry was at place required to be fenced. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723.

7. Evidence held to sustain finding that mare entered onto tracks through defective portion of defendant's fence. Mikesell v. Wabash R. Co., 134 Iowa, 736, 112 NW 201. Where horse strayed onto track through insufficient fence and thereafter, becoming frightened at hand car, ran onto bridge and was killed, held that railroad's failure to fence, in connection with the operation of hand car, was proximate cause, and rendered company liable under Code, § 2055. Id.

8. Whether pond three and one-half feet deep constitutes a fence within B. & C. Comp. § 4342, subd. 7, providing that all ponds "if equally secure against the trespass of any domestic animals," etc., shall be deemed a lawful fence, held question for jury (Meier v. Northern Pac. R. Co. [Or.] 93 P 691), as well as whether it is a fence within § 5140, declaring that complete natural defenses, such as walls and deep ditches, shall be deemed lawful fences (Id.).

9. Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), held intended for protection of live stock, as well as for benefit of land owner. Rinehart v. Kansas City Southern R. Co., 204 Mo. 269, 102 SW 958. Code 1896, § 3480, held to require cattle guards for protection of adjacent lands from trespassing animals, and not to prevent animals from going onto track. St. Louis, etc., R. Co. v. Douglas [Ala.] 44 S 677.

10. Rinehart v. Kansas City Southern R. Co., 204 Mo. 269, 102 SW 958. Only relieves where lawful fence is maintained by such contractee. Id.

11. Liability is governed by the ordinary rules of negligence. Coe v. Northern Pac. R. Co., 101 Minn. 12, 111 NW 651. Where fence has remained out of repair for several weeks though defective condition could have been discovered and remedied by exercise of reasonable care, defendant is liable. Ft. Worth, etc., R. Co. v. Hickox [Tex. Civ. App.] 18 Tex. Ct. Rep. 691, 103 SW 202. Evidence that gap in fence was made by section boss' son and was seen by section men held to show that defendant knew thereof. Smith v. Chicago, etc., R. Co., 127 Mo. App. 160, 105 SW 10. Proof of ownership of colt, that it passed through open gate onto track and was killed and that gate had been permitted to remain out of repair for

fence is regarded as no fence.[12] The Wyoming statute defining a lawful fence and making the company liable for injuries resulting from an illegal fence is applicable only to injuries from fence itself.[13] One seeking to recover under the statute must allege and prove all facts necessary to impose the liability.[14]

Gates.[See 8 C. L. 1653]—While in some states a railroad is absolutely liable for injury to stock entering through a defective gate,[15] the duty usually rests upon the adjacent owner to keep a gate maintained for his convenience in repair and closed.[16]

Cattle guards.[See 8 C. L. 1654]—Railroads are generally required to maintain efficient cattle guards at fence terminals,[17] and are frequently made absolutely liable[18] for injuries to stock passing over the same.[19] While the construction of a cattle guard dangerous to animals attempting to cross is not in itself negligence, it becomes such if of an inviting nature.[20] Where a cattle guard is located at the place required by law, no negligence can be predicated on the location.[21]

Contributory negligence of owner.[See 8 C. L. 1654]—Contributory negligence of owner of stock usually[22] defeats recovery,[23] but the existence of "stock law" does not

nearly a month, held to make prima facie case; hence demurrer was properly overruled notwithstanding contradictory evidence of company. Rinehart v. Kansas City S. R. Co., 204 Mo. 269, 102 SW 958. Evidence that some of posts were rotten and would not hold staples, and that section foreman had promised to rebuild, etc., held to make question of negligence for jury in failing to maintain sufficient fence. Church v. Chicago, etc., R. Co., 102 Minn. 295, 113 NW 886.

12. Rev. St. 1895, art. 4528, creating absolute liability, held applicable. Missouri, etc., R. Co. v. Tolbert [Tex.] 18 Tex. Ct. Rep. 94, 101 SW 206.

13. Rev. St. 1899, § 1973. Martin v. Chicago, etc., R. Co., 15 Wyo. 493, 89 P 1025.

14. To recover under 3 Mills' Ann. St. § 3712a (Laws 1902, p. 23, c. 1, § 3), for failure to fence, plaintiff must show that period allowed for construction had expired. Colorado, etc., R. Co. v. Neville [Colo.] 92 P 956; Denver, etc., R. Co. v. Kelso [Colo.] 90 P 65. Evidence that road was built in 1872, and that plaintiff had done business with "Rio Grande" for twenty-five years, held insufficient that defendant, the Denver & Rio Grande Railroad Company, had road open for use at time of passage of the act. Id. In action under statute for killing of stock, caused by failure to fence, omission must be alleged in some manner to sustain recovery, though action is before justice of the peace. St. Louis, etc., R. Co. v. Hoff [Kan.] 92 P 539. In action under B. & C. Comp. §§ 5139, 5144, making railroads liable for killing of stock on unfenced track, it is not necessary to allege or prove entry at particular place unless killing occurs at point where fence is not required. Meier v. Northern Pac. R. Co. [Or.] 93 P 691.

15. Action for injuries to horse entering onto right of way through defective gate held not an action for negligence, and instruction on absence of evidence of negligence properly refused. Brown v. Quincy, etc., R. Co., 127 Mo. App. 614, 106 SW 551.

16. Ft. Worth, etc., R. Co. v. Worsham [Tex. Civ. App.] 20 Tex. Ct. Rep. 89, 105 SW 853. Railroad held under no duty to keep gates constructed for convenience of adjoining owner, it exercising no control over same. International, etc., R. Co. v. Russell [Tex. Civ. App.] 20 Tex. Ct. Rep. 419, 106 SW 438. Though duty rested on railroad to keep gates closed, held not liable where securely fastened, but opened during night by third person. Id.

17. Under Ky. St. 1903, § 1793, railroad is not required to erect guards except at points where fence has been erected. Parrish v. Louisville, etc., R. Co., 31 Ky. L. R. 1020, 104 SW 690. Railroad held under no statutory duty to maintain cattle guards to prevent cattle from going onto track. St. Louis, etc., R. Co. v. Douglas [Ala.] 44 S 677.

18. To escape absolute liability under Acts 29th Leg. (Laws 1905, p. 226, c. 117), railroad must maintain sufficient cattle guards to turn stock, as well as fences. Ft. Worth, etc., R. Co. v. Polson [Tex. Civ. App.] 20 Tex. Ct. Rep. 237, 106 SW 429. Under Acts 1890, c. 565, § 32. Only common-law liability exists. Bateman v. Rutland R. Co., 54 Misc. 312, 105 NYS 970.

19. Where evidence is conflicting whether steer was killed on crossing or on track beyond defective cattle guard, refusal to direct verdict for defendant held correct. Smith v. St. Louis, etc., R. Co., 125 Mo. App. 15, 102 SW 593. Under Sayles' Ann. Civ. St. 1897, art. 4528, declaring railroad liable for stock killed or injured, except that if company fence its road it shall only be liable for negligence, it is duty to invoke exception not only to put in cattle guards at private crossing but to keep same in repair. Texas, etc., R. Co. v. Sproles [Tex. Civ. App.] 20 Tex. Ct. Rep. 27, 105 SW 521. Finding that insufficiency of cattle guard to turn stock was due to defendant's negligence in failing to keep in repair held to include finding that defendant had notice of defective condition. Id.

20. Carrollton Short Line R. Co. v. Lipsey [Ala.] 43 S 836. Whether particular guard is inviting to animals is generally a question for jury. Id.

21. Houston, etc., R. Co. v. White [Tex. Civ. App.] 108 SW 971.

22. That owner of dog knowingly permitted it to go upon track will not preclude recovery for its death, caused by company's

make it negligence, as matter of law, to permit stock to run at large.[24] Such negligence, however, must be the proximate cause of the injury.[25]

(§ 11) *J. Fires.*[See 8 C. L. 1655]—A railroad company must exercise reasonable care to prevent the communication of fires to adjacent property,[26] and is liable only for negligence.[27] Negligence is usually a question of fact for the jury.[28] A rail-

negligence. Central of Georgia R. Co. v. Martin [Ala.] 43 S 563.

23. Owner of cattle killed in collision with train cannot, in absence of proof of willful neglect, recover from the railroad company where it appears that cattle reached right of way because of his failure to keep gate closed. St. Louis, etc., R. Co. v. Fankboner, 128 Ill. App. 284. Where duty rests on railroad to keep fence in repair, it cannot predicate contributory negligence on failure of plaintiff to repair, especially where plaintiff had no control of adjoining premises. Ft. Worth, etc., R. Co. v. Hickox [Tex. Civ. App.] 18 Tex. Ct. Rep. 691, 103 SW 202.

Held for jury: Negligence in not driving cattle from main track first. Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356. Negligence in turning stock out to graze on unenclosed lands near railroad track. Id. Negligence in allowing cattle to run at large, buildings being a mile from track, and cattle not being in habit of going on track. Carr v. Minneapolis, etc., R. Co. [N. D.] 112 NW 972.

Held negligent: In leaving team unattended and untied near track, they having run away before. Galveston, etc., R. Co. v. Graham [Tex. Civ. App.] 19 Tex. Ct. Rep. 395, 101 SW 846. Where owner ordered company employes who were rebuilding fence on line of original to desist, claiming that line was wrong, which they did, held that he was guilty of contributory negligence in turning horse into pasture while in such condition, and cannot recover for horse injured by becoming entangled in wire. Baltimore, etc., R. Co. v. McIlyar, 77 Ohio St. 391, 83 NE 497.

Not negligent: In turning of mule into pasture, knowing of defective cattle guards. Texas, etc., R. Co. v. Sporles [Tex. Civ. App.] 20 Tex. Ct. Rep. 27, 105 SW 521. In action for killing of stock, plea that plaintiff was guilty of negligence in that, with knowledge of existing condition of cattle gap, he turned stock into lane leading by same, giving them opportunity to cross it, held to state no defense. St. Louis, etc., R. Co. v. Douglas [Ala.] 44 S 677.

24. Atlanta, etc., R. Co. v. Hudson, 2 Ga. App. 352, 58 SE 500.

25. Plaintiff's negligence in failing to maintain fence as required by contract held not proximate cause of killing of stock entering there, and negligently run down by train. Southern R. Co. v. Dickens [Ala.] 45 S 215

26. Instruction requiring company to exercise "the utmost care" held erroneous. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153. Railroad must exercise ordinary care corresponding to the risk. Toledo, etc., R. Co. v. Sullivan [Ind. App.] 83 NE 1024.

27. Railroad is not liable for fire communicated from its locomotive unless due to negligent use of a defective and insufficient spark arrester. Toledo, etc., R. Co. v. Sullivan [Ind. App.] 83 NE 1024. In order to recover for loss by fire because of improperly constructed engine or improper operation, plaintiff must show negligence. Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106. Allegations in effect charging negligence in placing "cook car" near building containing combustible materials held properly stricken, as such act in itself, without regard to construction thereof, etc., is not negligence. Talmadge v. Central of Georgia R. Co., 125 Ga. 400, 54 SE 128. Instruction, "If you do not find that defendant, through its officers or agents, caused the fire, then you should find for defendant," held not objectionable, when considered with other instructions, as making defendant liable, though it used reasonable care. Fireman's Fund Ins. Co. v. Northern Pac. R. Co., 46 Wash. 635, 91 P 13.

28. Under Comp. Laws, § 6295, providing that railroad shall not be liable for fire if it prove that it originated from an engine properly equipped and operated, negligence becomes question of law for court where uncontroverted evidence shows that appliances were such as law and good railroading require and properly managed. Dolph v. Lake Shore, etc., R. Co., 149 Mich. 278, 14 Det. Leg. N. 426, 112 NW 981. Undisputed evidence of proper equipment and management held to render question of negligence for court, notwithstanding trainmen failed to give in detail manner of operation. Clark v. Grand Trunk Western R. Co., 149 Mich. 400, 14 Det. Leg. N. 486, 112 NW 1121.

Evidence held sufficient: To warrant finding that fire was caused by negligent operation of engine or defective condition of spark arrester. Southern R. Co. v. McGeoughey, 31 Ky. L. R. 291, 102 SW 270. Evidence that in effort to pull derailed car back onto track engine emitted sparks and live coals, and that while falling fire was discovered on adjacent building, held to sustain finding for plaintiff. Missouri, etc., R. Co. v. Davis [Kan.] 90 P 1133.

Evidence held for jury: Evidence that engine emitting sparks was unnecessarily left standing for an hour near combustible material, etc., Devlin v. Charleston, etc., R. Co. [S. C.] 60 SE 1123. Evidence that engine passed, emitting sparks in unusual quantities and of unusual size, and that building near track was soon thereafter discovered to be on fire. Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S 631. In action for loss by fire, alleged to have been set by sparks from defendant's locomotive, evidence held to sufficiently show negligence to authorize refusal of nonsuit. Whitehurst v. Atlantic Coast Line R. Co. [N. C.] 60 SE 648.

Evidence held insufficient to show negligence: Evidence held not to support finding that engine was defective or improperly

road company must exercise reasonable care to keep its right of way [29] free from combustible material,[30] and, if it fails to do so, it is immaterial that it is not negligent in other respects.[31] In some states, company is absolutely liable for fires communicated by its locomotives.[32] Where trainmen, having knowledge [33] that a fire hose is laid across the track, unnecessarily run over and sever the same, the company is liable for the loss proximately caused thereby.[34] The duty of trainmen to leave the train and extinguish a fire negligently set by sparks is subject to the greater duty owed to the public.[35] The South Carolina statute making railroads liable for fires started by an act of their authorized agents does not apply where the agent is off duty.[36] Ordinarily a railroad cannot relieve itself for fires negligently started while burning fire guards by employing an independent contractor,[37] especially where it interferes with the work,[38] and in some states the liability is affected by statute.[39] Company's negligence must be the proximate cause of the loss.[40]

Duty as to equipment and operation of engines. See 3 C. L. 1656—Ordinary care must be exercised in equipping locomotives with proper appliance for the prevention of fire [41] and in keeping the same in repair; [42] it is usually sufficient, however, if the

handled, though warranting a finding that fire was set by spark from engine. Svea Ins. Co. v. Vicksburg, etc., R. Co., 153 F 774.

29. When track is in highway, duty extends to such portion thereof as may be properly regarded as its right of way. Smith v. Ogden, etc., R. Co. [Utah] 93 P 185. Instruction considered and held erroneous as relieving company from such duty. Id.

30. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044; Smith v. Ogden, etc., R. Co. [Utah] 93 P 185; Fireman's Fund Ins. Co. v. Northern Pac. R. Co., 46 Wash. 635, 91 P 13. Independently of statute, question whether railroad company is negligent in permitting combustible material to accumulate on right of way is for jury. Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 NE 362. Evidence held to authorize finding of negligence in permitting combustible material to accumulate along right of way. Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106. Evidence that defendant permitted tall grass to grow in right of way, that same was dry, and that fire was discovered shortly after passing of train, held to sustain verdict for plaintiff. Fireman's Fund Ins. Co. v. Northern Pac. R. Co., 46 Wash. 635, 91 P 13.

31. That its engine was properly equipped and operated. Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106; Fireman's Fund Ins. Co. v. Northern Pac. R. Co., 46 Wash. 635, 91 P 13. Where negligence charged is in permitting combustible material to accumulate along track and in permitting fire set by engine to spread, it is not necessary to show that engine was defective or negligently operated. Smith v. Central Vermont R. Co., 80 Vt. 208, 67 A 535.

32. Rev. Laws, c. 111, § 270, held not to apply to dummy engine used in construction of road. Fay v. Boston, etc., R. Co. [Mass.] 82 NE 7.

33. Railroad is not chargeable with negligence in not looking for and discovering fire hose laid across tracks. Dolph v. Lake Shore, etc., R. Co., 149 Mich. 278, 14 Det. Leg. N. 426, 112 NW 981. Evidence held sufficient to show that trainmen knew that hose was lying across track. Phenix Ins. Co. v. New York Cent., etc., R. Co., 122 App. Div. 113, 106 NYS 696.

34. Dolph v. Lake Shore, etc., R. Co., 149 Mich. 278, 14 Det. Leg. N. 426, 112 NW 981.

35. To operate trains with reasonable speed and on schedule time. Pittsburg, etc., R. Co. v. Brough, 168 Ind. 378, 81 NE 57.

36. Civ. Code S. C. 1902, § 2135, not applicable where sub-boss of bridge and trestle crew negligently sets fire while using sleeping car. Southern R. Co. v. Power Fuel Co. [C. C. A.] 152 F 917.

37. Being dangerous to adjoining property unless precautions were taken. St. Louis, etc., R. Co. v. Madden [Kan.] 93 P 586.

38. Mere giving of order on Saturday night to independent contractor to burn fire guard on Monday, on which day high wind caused fire to escape, held not such interference as to render railroad liable. St. Louis, etc., R. Co. v. Madden [Kan.] 93 P 586.

39. Held that work was performed as a part of operation of road, and company could not avoid liability placed upon it by Gen. St. 1901, § 5923, by employing independent contractor. St. Louis, etc., R. Co. v. Madden [Kan.] 93 P 586.

40. Where fire set by locomotive burned out from road and then parallel therewith until it jumped a river, held that negligence in starting fire was not proximate cause of loss beyond river, such premises not being next adjoining to premises on which fire originated. McDonough v. New York Cent., etc., R. Co., 108 NYS 270. Fact that change of wind drove fire onto plaintiff's premises held not such intervening agency as to relieve company from liability in negligently setting same in first instance. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250.

41. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044. Although testimony of defendant's employes as to proper equipment and maintenance of spark arrester is un-

engines are equipped with the most approved practical appliances in general use.[43] Locomotives must be operated with reasonable care.[44]

Contractual exemptions from liability.[See 8 C. L. 1657]—Exemption from liability may ordinarily be imposed as a condition upon the right to place property within the right of way,[45] but a contract by a warehouseman to save the railroad harmless does not affect the right of recovery of one depositing goods therein.[46]

Contributory negligence.[See 8 C. L. 1657]—While adjacent property owners may cultivate the same in the ordinary way, without taking extra precautions,[47] and owe no duty to keep their premises free from grass, weeds, etc.[48] They must exercise reasonable care to save their property after a fire has started.[49] and may recover for injuries received in so doing [50] independent of statute.[51]

contradicted, credibility of interested witnesses held sufficient to take issue to jury. Ross v. St. Louis S. W. R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 650, 103 SW 708. Evidence that sparks were blown 40 feet high coupled with testimony of fireman and engineer that no such thing could occur if spark arrester was in good condition, held to authorize jury to find that engine was not properly equipped, notwithstanding evidence tending to show proper equipment. Southern R. Co. v. Elliott, 129 Ga. 705, 59 SE 786. Verdict for plaintiff held against evidence where undisputed evidence showed engines were properly equipped with arresters in good order. Goodman v. Lehigh Valley R. Co. [N. J. Law] 68 A 63.

42. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044. Evidence of size and quantity of coals emitted, distance they were thrown, and the time they remained alive, held to sustain finding of defective spark arrester. Toledo, etc., R. Co. v. Sullivan [Ind. App.] 83 NE 1024. Charge that prima facie case made by proof of fire set by sparks could be rebutted by proof that engine was equipped with proper spark arrester and that engine was properly operated held erroneous as ignoring negligence in keeping arrester in good condition. Ross v. St. Louis S. W. R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 650, 103 SW 708. Instruction to find for defendant if they believed that engine was properly constructed and operated held erroneous as ignoring evidence warranting finding that it was in defective condition. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153.

43. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044; Toledo, etc., R. Co. v. Sullivan [Ind. App.] 83 NE 1024. Instruction requiring engines to be equipped "with the most modern and best known appliances" held too stringent. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044.

44. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044. Evidence as to emission of sparks and distance that fire was started held to support finding of negligence in operation of engine. Gulf, etc., R. Co. v. Blakeney-Stevens-Jackson Co. [Tex. Civ App.] 20 Tex. Ct. Rep. 1473, 106 SW 1140. Where evidence authorizes finding that fire was caused by sparks from engine, but it does not appear whether they resulted from defective spark arrester or from negligent operation, instruction that, although engine was equipped with sufficient spark arrester, defendant would be liable if fire was caused by negligent operation of engine, held proper. Southern R. Co. v. McGeoughey, 31 Ky. L. R. 291, 102 SW 270.

45. Where cotton is deposited on premises of railroad company under agreement that it remain on premises without company's consent and at sole risk of shipper until tendered and accepted for shipment, case falls within exception of Civ. Code 1902, § 2135, making every railroad liable for losses by fires set by locomotives, etc., unless property is on right of way unlawfully and without company's consent, contract not being against public policy. German-American Ins. Co. v. Southern R. Co., 77 S. C. 467, 58 SE 337.

46. Devlin v. Charleston, etc., R. Co. [S. C.] 60 SE 1123.

47. Walker v. Chicago, etc., R. Co. [Kan.] 90 P 772. Held not negligent in leaving dry corn stalks and grass in field as was custom. Id.

48. Contributory negligence cannot be predicated thereon. Louisville, etc., R. Co. v. Beeler, 31 Ky. L. R. 750, 103 SW 300.

49. Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 NE 362; Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106. Plaintiff held not liable for mere mistake of judgment as to best means of extinguishing fire. Alabama Great Southern R. Co v. Planters' Warehouse & Commission Co. [Ala.] 45 S 82. Owner of warehouse near railroad track is not required to keep fire hose therein to guard against fires communicated by engines. Id. Failure of employe in charge of property to exercise reasonable care to avert fire is negligence of owner. Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106. Evidence held not to show that plaintiff or his employes failed to exercise proper care. Id. Evidence that plaintiff and her son lived on same tract, but that each tended to their respective business, that he was 42 years old and had a family, that he saw fire start but did not stop to put it out as he was going to fire on own part of tract and to save his cattle, held insufficient to require instruction on negligence as agent of plaintiff. Mobile, etc., R. Co. v. Caldwell [Ky.] 106 SW 236. Evidence held to tend to show contributory negligence in placing cotton near switch tracks and in failing to have watchman present as usual. Svea Ins. Co. v. Vicksburg, etc., R. Co., 153 F 774. Evidence held not to show negligence in attempting to save hay instead of the

Pleading.[See 8 C. L. 1657]—The general rules of pleading relative to pleading facts [52] and evidentiary matter,[53] certainty,[54] and amendments,[55] apply. Plaintiff must plead all ultimate facts essential to recovery.[56] Contributory negligence must be specifically pleaded.[57]

Evidence, burden of proof, and presumptions.[See 8 C. L. 1657]—Plaintiff has the burden of proving ownership of the property destroyed [58] and defendant's negligence,[59] but proof that the fire was started by an engine [60] raises a presumption of

posts destroyed. Smith v. Ogden, etc., R. Co. [Utah] 93 P 185. In determining whether ordinary care was used by employes, fact that cook car was placed on track near warehouse containing combustible material may be considered. Talmadge v. Central of Georgia R. Co., 125 Ga. 400, 54 SE 128.

50. Railroad company is liable to one who in the exercise of due care is injured while attempting to put out fire which through defendant's negligence was communicated from its right of way to his premises. Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 NE 362. Defendant's negligence through which fire was communicated from its right of way to plaintiff's premises is the proximate cause of injuries to plaintiff resulting from his efforts in the exercise of due care to put it out. Id.

51. Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 NE 362.

52. Complaint charging negligence in construction of engine in failing to keep same in repair and in operating it held not demurrable for want of facts. Pittsburg, etc., R. Co. v. Brough, 168 Ind. 378, 81 NE 57. Allegation that injury was caused by sparks emitted by engine and "was caused by the carelessness and negligence of defendant's agents and servants" held to admit proof of negligence in operation of train. Southern R. Co. v. Herrington, 128 Ga. 438, 57 SE 694.

53. In action for negligently burning orchard, it is unnecessary for defendant to plead that engine was screened as required by statute, and plaintiff need not join issue. Louisville, etc., R. Co. v. Beeler, 31 Ky. L. R. 750, 103 SW 300.

54. Complaint alleging that plaintiff owned certain specifically named property, situated on plaintiff's premises, which was destroyed by fire communicated to certain bales of cotton by sparks from defendant's engine, through negligence of its servants, etc., held not demurrable on ground of uncertainty and indefiniteness. Alabama Great Southern R. Co. v. Planters' Warehouse Commission Co. [Ala.] 45 S 82.

55. Where original petition alleged that the "servants, agents, and employes did negligently set fire to brush," etc., thereby basing cause of action on common-law negligence, it is error after evidence is in to allow amendment based upon absolute statutory liability for fire set by locomotive. Riley v. St. Louis, etc., R. Co., 124 Mo. App. 278, 101 SW 155.

56. Complaint alleging that defendant, its agents or employes, negligently set fire to and destroyed specifically named property belonging to plaintiff and on plaintiff's premises in named town, held sufficient on demurrer. Alabama Great Southern R. Co. v. Planters' Warehouse & Commission Co. [Ala.] 45 S 82.

57. Smith v. Ogden, etc., R. Co. [Utah] 93 P 185.

58. Evidence held sufficient to show that orchard destroyed was on plaintiff's farm. St. Louis, etc., R. Co. v. Noland, 75 Kan. 691, 90 P. 273. Where plaintiff pleads ownership of property destroyed and evidence shows ownership in another and proof of assignment is rejected, nonsuit is proper. Woodward v. Northern Pac. R. Co. [N. D.] 111 NW 627.

59. Burden of showing that sparks smitted actually set fire is on plaintiff in first instance, and it is error to charge that it shifts back to plaintiff upon proof that engine was properly equipped and operated. Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S 631. Evidence that depot was constructed of combustible material, that it was very dry, that engine passed about 40 minutes before fire, and that other engines were seen to emit sparks, held good as against demurrer. Tapley v. St. Louis, etc., R. Co. [Mo. App.] 107 SW 470.

60. Not sufficient to show that it might have been so set. Clark v. Grand Trunk Western R. Co., 149 Mich. 400, 14 Det. Leg. N. 486, 112 NW 1121. Charge that plaintiff must prove by greater weight of evidence that fire originated from locomotive, etc., held to correctly state law. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636. That fire was started by sparks from engine may be established by circumstantial evidence Tapley v. St. Louis, etc., R. Co. [Mo. App.] 107 SW 470.

Evidence held to show that fire originated from engine. Greene v. Central of Georgia R. Co. [Ga.] 60 SE 861. Evidence that engine emitting sparks and coals of fire passed shortly before fire was discovered, and that fire originated in building remote from furnace, etc. Toledo, etc., R. Co. v. Sullivan [Ind. App.] 83 NE 1024. Evidence that train passed shortly before fire started, that wind was blowing from track toward barn, and that there was no other apparent cause. Gulf, etc., R. Co. v. Blakeney-Stevens-Jackson Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 1473, 106 SW 1140. Evidence that fire started on right of way shortly after passing of heavy freight train. St. Louis, etc., R. Co. v. Noland, 75 Kan. 691, 90 P 273. Evidence that engine passed just before fire, that it was emitting sparks, and that there was no other fire on premises. Southern R. Co. v. Elliott, 129 Ga. 705, 59 SE 786. Evidence that engine passed point where fire was discovered about two hours prior thereto and was emitting sparks.

negligence [61] as charged,[62] which casts the burden [63] upon the company to negative every fact which would authorize a finding of negligence.[64]

Admissibility of evidence. See 8 C. L. 1659—There must be no material variation between the allegations and the proof.[65] The general rules of evidence are applicable.[66]

Hawley v. Sumpter Valley R. Co. [Or.] 90 P 1106.

Held for jury: Where building near tracks was discovered to be on fire about 15 or 20 minutes after passing of train, there being evidence that engine was puffing hard. Clark v. Grand Trunk Western R. Co., 149 Mich. 400, 14 Det. Leg. N. 486, 112 NW 1121. Evidence that train passed about 10 minutes before starting of fire in dry cut grass adjacent to right of way. Louisville, etc., R. Co. v. Beeler, 31 Ky. L. R. 750, 103 SW 300. Evidence that train passed shortly before fire, that other engines had been seen to throw sparks farther than destroyed property and that there was no other known fire about building. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636.

61. By engine while in operation of road. Southern R. Co. v. Elliott, 129 Ga. 705, 59 SE 786. While communication of sparks to adjacent property by passing engine raises presumption of negligence, proof of emission of sparks in unusual quantity and size is only evidence of negligence. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153.

Under statutes: Under Gen. St. 1906, § 3148, making proof of damage by fire from locomotive prima facie evidence of negligence, instruction requiring plaintiff to show that fire was started from locomotive and that defendant was negligent held too favorable to defendant. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250. Presumption of negligence from fire under Civ. Code 1895, § 2321, does not arise where not occasioned "by the running of the locomotive or cars or other machinery" of company. Talmadge v. Central of Georgia R. Co., 125 Ga. 400, 54 SE 128. Presumption of negligence arising under Civ. Code 1895, § 2321, from proof that fire was started by locomotive, may be rebutted by plaintiff's evidence. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044. Under Code, §§ 2055, 2056, proof of loss by fire set by railroad raisee a presumption of negligence which amounts to substantive evidence, and does not operate merely to shift burden of proof. Stewart v. Iowa Cent. R. Co. [Iowa] 113 NW 764. Instruction held to be misleading in that jury might infer that only effect was to shift burden. Id.

Instruction "the burden is on plaintiffs * * * to establish facts entitling them to recover under this charge by a preponderance of the evidence" held not to place burden on them to show that spark arrester was insufficient, whereas it rested upon defendant to show its sufficiency after plaintiff proved that fire, etc., was started by sparks from engine, especially in view of other instructions. Womack v. International, etc., R. Co. [Tex. Civ. App.] 18 Tex. Rep. 635, 102 SW 936.

62. Where fire is shown to have been set out by operation of locomotive, presumption arises under Civ. Code 1895, § 2321, that defendant was negligent as charged. (Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044), and defendant must show that it exercised reasonable care and diligence in regard to the matters charged (Id.).

63. Where engine is shown to have emitted sparks in unusual quantity and size and fire resulted therefrom, burden is on defendant to clear itself of negligence. Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S 631; Steward v. Iowa Cent. R. Co. [Iowa] 113 NW 764; Gulf, etc., R. Co. v. Blakeney-Stevens-Jackson Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 473, 106 SW 1140. Where plaintiff's proof shows that fire was started by spark from engine, and defendant's tends to disprove negligence, burden is on plaintiff to make case of negligence. Id.

64. Gulf, etc., R. Co. v. Blakeney-Stevens-Jackson Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 1473, 106 SW 1140. May be overcome by proof that locomotive was equipped with best spark arrester, that it was in good order and repair, and that locomotive was being carefully managed by competent employes. Illinois, etc., R. Co. v. Bailey, 222 Ill. 480, 78 NE 833, afg. 127 Ill. App. 41; Gulf, etc., R. Co. v. Blakeney-Stevens-Jackson Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 1473, 106 SW 1140.

65. Where petition alleged that the "servants, agents, and employes did negligently set fire to brush," which spread to plaintiff's premises, etc., held error to admit evidence of fire set by sparks from engine. Riley v. St. Louis, etc., R. Co., 124 Mo. App. 278, 101 SW 156. Although the negligence charged was permitting of combustible material to accumulate along track, recovery cannot be had for fire started by some third person where it is alleged that it was started by passing engine. Smith v. Central Vermont R. Co., 80 Vt. 208, 67 A 535. Where plaintiff pleads ownership of property destroyed, he cannot prove ownership in another and assignment of cause of action. Woodward v. Northern Pac. R. Co. [N. D.] 111 NW 627. Held no fatal variance between allegation that locomotive set fire to plaintiff's premises and proof that fire was set to neighboring premises and spread therefrom to plaintiff's. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250. Where defendant made no objection to proof of date of fire differing from that alleged, and made no claim of surprise or prejudice, court properly refused to direct verdict on ground of variance. Id.

66. Plaintiff's testimony that "the whistle he knew as Captain Taylor's" was on engine that passed his premises the day his property was burned held not objectionable, when considered with his entire testimony, on ground of indefiniteness, as not necessarily relating to engine which passed just before the fire. Whitehurst v. Atlantic Coast Line R. Co. [N. C.] 60 SE 648.

Evidence of other fires: Is admissible to show how far sparks had carried to contra-

Instructions. See 8 C. L. 1680—While the instructions must accurately [67] submit the

dict expert testimony that they could not have fallen so far from tracks as to set fire to plaintiff's premises. Whitehurst v. Atlantic Coast Line R. Co. [N. C.] 60 SE 648. Evidence that train which set fire to plaintiff's property had also set fire to woods near by is admissible as tending to show defective condition of locomotive. Id. Evidence that immediately after defendant's south bound train passed witness saw smoke arising in his woods held sufficiently definite to identify train with one setting fire to plaintiff's property, where he testified that he saw smoke arising from plaintiff's premises just before seeing such smoke. Id. Evidence of other fires along right of way is inadmissible unless such fires are connected with operation of road. Hawley v. Sumpter Valley R. Co. [Or.] 90 P. 1106. Fact that fire was discovered shortly after passage of particular train held not to so identify locomotive causing fire as to render evidence of fires started by other locomotives at or about time of fire admissible as showing probability that fire was started by locomotive. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250.

Emission of sparks by same engine: Proof that engine emitted sparks of unusual and dangerous quantities is evidence of negligence in the construction, maintenance, or operation thereof. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153. Evidence that same engine emitted sparks on day of week immediately preceding burning of plaintiff's property is admissible. Whitehurst v. Atlantic Coast Line R. Co. [N. C.] 60 SE 648.

Emission of sparks by other engines: Evidence that other engines of defendant emitted sparks held admissible on issue of origin of fire. Tapley v. St. Louis, etc., R. Co. [Mo. App.] 107 SW 470. Evidence that three days after fire engine passed emitting sparks and setting a fire is admissible to show that fire was probably so started. Smith v. Central Vermont R. Co., 80 Vt. 208, 67 A 535. On question as to whether fire was caused by sparks thrown from one engine, evidence that another threw sparks **at a time remote** from fire is **inadmissible.** Illinois, etc., R. Co. v. Bailey, 127 Ill. App. 41. Evidence that witnesses had seen other engines throw sparks farther than distance between tracks and plaintiff's property held admissible to show that engine passing shortly before fire emitted sparks. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636. Witness may testify whether engine alleged to have set fire was emitting more sparks than other engines passing at about same time to prove that it was emitting sparks in unusual quantities. Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S 631. Not only may witness testify that engine alleged to have caused fire was emitting sparks of unusual size and in unusual quantities as compared with engines generally, but he may compare with other engines passing about same time. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153. Offer to point out "each engine" that passed on day of fire, not being offer to point out the offending one, does not invoke rule that where engine setting fire is identified, evidence of defective condition of other engines is inadmissible Smith v. Central Vermont R. Co., 80 Vt. 208, 67 A 535.

Subsequent conditions: Held not error to permit witness to testify that 14 months after fire he found embers and cinders at point where fire is supposed to have started, evidence to show that fire started there being circumstantial. Smith v. Central Vermont R. Co., 80 Vt. 208, 67 A 535. To show force and direction of wind and dryness of ground, witness may testify that three days after fire he found partly burned shingles from 600 feet to one-quarter of mile beyond burned building, though he did not know personally where they came from, it being otherwise shown that shingles were carried in that direction and that fire was in fact carried there. Id.

Corroborative and rebuttal evidence: In action for loss by fire from defective locomotive, witness may testify that while he and another witness who had given testimony of same nature were working on plaintiff's premises on day of fire latter stated that something like hot pebbles had fallen on his hands and burned him, and it is immaterial that statement was addressed to plaintiff. Whitehurst v. Atlantic Coast Line R. Co. [N. C.] 60 SE 648. In action for destruction of fence by fire, written agreement between plaintiff and another railroad, which evidence tended to show defendant succeeded, containing statements inconsistent with plaintiff's testimony as to ownership and location, held relevant and material. Southern R. Co. v. Dickens [Ala.] 44 S 402. Where defendant offers evidence of good quality of screens in use on engine, piece of partly burned coal found on snow about 41 feet from track is admissible though not directly shown to have come from engine, inference being that it did. Smith v. Central Vermont R. Co., 80 Vt. 208, 67 A 535.

Hypothetical questions: Where in action for loss by fire set by sparks from locomotive it is not impracticable to put facts before jury, it is error to permit hypothetical questions calling for opinion of witnesses as to degree of diligence which should have been exercised by plaintiff to save property. Smith v. Ogden, etc., R. Co. [Utah] 93 P. 185. Where evidence will justify finding that fire originated from engine, hypothetical questions showing that fire will not escape from engines properly equipped and operated are admissible. St. Louis, etc., R. Co. v. Noland, 75 Kan. 691, 90 P 273.

Documentary: Dispatcher's train sheets shown to have been kept in regular course of business held admissible to show movement of trains on night of fire. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636.

67. Where defendant denied that it was guilty of the negligence charged in the petition, charge stating that defendant denies that it is guilty of any negligence is inaccurate. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044.

issues raised by the pleadings and supported by the evidence,[68] they must not refer the jury to the pleadings for the same.[69] They must not assume liability,[70] invade the province of the jury,[71] be misleading,[72] or argumentative.[73]

Damages.[74]

(§ 11) *K. Actions for injuries.* See 8 C. L. 1661—Venue is usually regulated by statute.[75] The action must be instituted within the period of limitations.[76] One injured through the joint negligence of two roads may sue them jointly.[77]

Pleadings. See 8 C. L. 1661—While a complaint must show a duty and a violation thereof,[78] after the former is shown the latter may be alleged in general terms.[79]

68. Instruction on intervening independent agency held not supported by evidence. Smith v. Ogden, etc., R. Co. [Utah] 93 P. 185.

69. Instruction that if plaintiff was owner of barn, etc., mentioned in petition, and that, if such property was destroyed by fire from one of defendant's engines, defendant was liable without regard to question of negligence, held not erroneous as referring jury to pleadings for issue. Big River Lead Co. v. St. Louis, etc., R. Co., 123 Mo. App. 394, 101 SW 636.

70. Instruction that if jury believed from the evidence that plaintiff's property was destroyed by fire emitted from a negligently operated engine of defendant they must find for plaintiff held not objectionable as assuming that plaintiff should have a verdict. Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S 631.

71. Instruction that if jury "believe the evidence" that engine was not working steam then it could not throw sparks 30 to 35 feet as testified to by witness held to invade province of jury in omitting word "from" before words "the evidence." Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S 631. Where engineer testified that engine was not working steam, but there was evidence that engine was throwing sparks 30 to 35 feet, and that engine not working steam would not emit sparks, instruction that, if jury believe the evidence, the engine was not working steam, held invasion of province of jury. Id. Held error for court to say that fact that locomotive threw sparks of size of end of finger straight up for 35 feet was not evidence of negligence, especially where there was evidence that properly constructed and operated engine would not do so. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153. Instruction that there was no evidence of positive acts of negligence held erroneous, there being circumstantial evidence of positive acts of negligence in operation of locomotive. Id. Instruction tending to mislead jury into believing that railroad was required to have its locomotive equipped with spark arrester "of the latest approved pattern in general use" is erroneous. Albany, etc., R. Co. v. Wheeler [Ga.] 59 SE 1116.

72. Instruction as to risks assumed by one owning property along track held confusing and misleading. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 14 S 250. Instruction that if fire was discovered 30 minutes after passing of engine, etc., lapse of time would not raise presumption that fire could have arisen from sparks, held misleading in leading jury to conclude that fire of such dimensions could not have arisen in such time. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153. Charge on duty to keep right of way free from combustible material held not misleading in that jury might infer that defendant owed reasonable care to keep it absolutely clean. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266.

73. Held argumentative: Instruction on risks assumed by adjacent owner. Florida East Coast R. Co. v. Welch, 53 Fla. 145, 44 S 250. Instruction on duty owed in running locomotives through town where wooden buildings are situated near track. Sherrell v. Louisville, etc., R. Co. [Ala.] 44 S 153. Where witness testified that sparks were thrown from 30 to 35 feet high, instruction that, if he guessed at the distance, jury could look to his other testimony and manner of testifying, his demeanor, etc., in determining weight to be given to guess. Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S. 631.

74. See 8 C. L. 1661. See, also, Damages, 9 C. L. 869.

75. See Venue and Place of Trial, 8 C. L. 2236.

76. Provision of charter of Eastern & Amboy Railroad Co., to which defendant has succeeded, that action for personal injuries must be brought within one year, held not repealed by act of New Jersey 1881 (P. L. 1881, p. 257), limiting personal injury actions against railroads to two years. Lehigh Valley R. Co. v. Comar [C. C. A.] 151 F 559. Kirby's Dig. § 6776, providing that owner of stock killed by railroad train may recover damages, etc., applies only where stock is killed by collision, and not where it is frightened by train and injured, hence its limitation as to time for bringing action does not apply in latter case. Earl v. St. Louis, etc., R. Co., 84 Ark. 507, 106 SW 675.

77. Lindenbaum v. New York, etc., R. Co. [Mass.] 84 NE 129.

78. Allegation of negligence in operation of train implies a duty as well as a breach thereof. Robbins v. Baltimore, etc., R. Co. [W. Va.] 59 SE 512. Complaint simply charging that plaintiff boarded box car to set brake, that he was seen by defendant's servants when they were one-half mile away, that they made a flying switch, etc., held demurrable as not showing duty to exercise care towards plaintiff, since it does not negative that he might have left car. Evansville, etc., R. Co. v. Yeager [Ind.] 83 NE 742. Petition charging negligence in permitting carcass of horse to remain on right of way near crossing, thereby fright-

A presumptive rule of evidence does not relieve plaintiff from pleading specific acts of negligence.[80] Pleading must be definite [81] and charge defendant with the negligence [82] and show that such negligence was the proximate cause of the injury.[83] Evidentiary matter need not be pleaded,[84] and negligence may be predicated on speed in excess of an ordinance without pleading the ordinance [85] or alleging its validity.[86] Matters of res gestae may be pleaded.[87] "Discovered peril" [88] and "willful and wanton" negligence [89] must be specifically pleaded to warrant a recovery thereon. Where

ening plaintiff's team, but failing to allege that defendant knew thereof or that it had remained there an unreasonable length of time, held demurrable. Louisville, etc., R. Co. v. Armstrong [Ky.] 105 SW 473. Allegation that horse was killed by train held insufficient to charge knowledge, since trainment might not have known of collision or that horse was killed thereby. Id.

79. Complaint charging that defendant negligently failed to stop and listen before crossing tracks of another road, thereby resulting in collision, held sufficient without alleging that by exercise of reasonable care defendant could have ascertained that another train was approaching. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009. Allegation that engineer negligently and carelessly and without ringing bell or blowing whistle or giving plaintiff any warning ran engine against plaintiff held broad enough to embrace any negligence in operation of train, as failure to keep lookout and not limited to failure to give signal Louisville, etc., R. Co. v. Davis [Ky.] 106 SW 304, and hence not error to refuse instruction limiting recovery to negligence in failing to give signals (Id.). Allegations of negligence in failing to equip train with proper appliance to speedily stop same held sufficient without detail description of equipment. Central of Georgia R. Co. v. Brandenburg, 129 Ga. 115, 58 SE 658. Complaint held to sufficiently charge negligence in running down horse through careless operation of train. Robbins v. Baltimore, etc., R. Co. [W. Va.] 59 SE 512. Complaint held to state cause of action for negligently running into plaintiff at crossing. Southern R. Co. v. Hobbs [Ala.] 43 S 844. In action for killing of mule, allegation of negligence in general terms held insufficient. Southern R. Co. v. Pope, 129 Ga. 842, 60 SE 157. Petition for death of one run down while standing on narrow space between track by one of two trains approaching without signals, etc., held to charge negligence. Central of Georgia R. Co. v. Motz [Ga.] 61 SE 1. Petition held to sufficiently allege failure to restore street to former condition or to such state as not to unnecessarily impede travel. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638.

80. Civ. Code 1895, § 2321. Harden v. Georgia R. Co. [Ga.] 59 SE 1122; Georgia R. & Banking Co. v. Williams [Ga. App.] 59 SE 846.

81. Petition held subject to special demurrer as not showing by what right decedent was on tracks, and whether at public crossing or not, and whether he was walking, standing, or lying on tracks. Central of Georgia R. Co. v. Brandenburg, 129 Ga. 115, 58 SE 658.

82. Petition for recovery for injuries caused by being struck by ice kicked from passing train held to sufficiently charge defendants with negligence, acting through servant (Maysville, etc., R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016), and not objectionable as failing to charge that servant was acting within scope of his authority (Id.).

83. Complaint merely alleging that defendant approached crossing at negligent rate of speed, and that plaintiff was injured, held defective. Lake Erie, etc., R. Co. v. Moore [Ind. App.] 81 NE 85.

84. In action for injury to stock escaping from pasture through defective fence into adjoining field, and thence onto track through gap, held not essential to proof of defective condition of pasture fence that defect therein should have been alleged. Smith v. Chicago, etc., R. Co., 127 Mo. App. 160, 105 SW 10.

85. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723.

86. Need not allege that same is reasonable. Kunz v. Oregon R. & Nav. Co. [Or.] 94 P. 504.

87. Allegations of blocking of tracks held proper as res gestae, though not proximate cause of injury. Charleston, etc., R. Co. v. Camp [Ga. App.] 59 SE 710. Although animal was killed between blow post and crossing, and failure to give signals and check speed was not proximate cause of injury, allegations in respect thereto are proper as res gestae. Southern R. Co. v. Pope, 129 Ga. 842, 60 SE 157.

88. Pleading of facts sufficient to invoke doctrine of discovered peril is sufficient without specifically naming the rule. Smith v. Wabash R. Co. [Mo. App.] 107 SW 22. Petition alleging that trainmen saw while nearing crossing, or by exercise of due care could have seen perilous position of plaintiff in time to avoid injury, held to sufficiently allege discovery of peril. Texas Mexican R. Co. v. De Hernandez [Tex. Civ. App.] 108 SW 765. Complaint charging negligence after discovering decedent's perilous position held not demurrable as not showing that defendant saw plaintiff's peril in time to avoid injury, or as failing to show willful and wanton injury, it appearing that decedent was a trespasser. Southern R. Co. v. Stewart [Ala.] 45 S 51. Count predicating liability on negligence subsequent to decedent's negligence must allege facts showing knowledge on part of defendant of decedent's peril and that such subsequent negligence was proximate cause of injury. Louisville, etc., R. Co. v. Young [Ala.] 45 S 238.

89. Averment of reckless acts is insufficient and does not permit testimony of wanton and willful negligence. Illinois Northern R. Co. v. Casey, 130 Ill. App. 481. Com-

an action is based upon the violation of a statutory duty, sufficient facts must be pleaded to show the duty,[90] but ordinarily plaintiff need not negative exceptions and provisos of the statute.[91] As a general rule, freedom from contributory negligence need not be affirmatively shown,[92] but must be specifically averred in the answer [93] and admitted or denied by the reply.[94]

Burden of proof. See 6 C. L. 1661.—Except as to matters of which the courts will take judicial notice [95] or are admitted,[96] plaintiff has the burden of proving by a preponderance of the evidence [97] all facts essential to a recovery, including negligence,[98] proximate cause,[99] and ownership of property injured.[1] The burden of

plaint alleging that defendant's engineer, in utter disregard for safety of persons passing at that point, and without giving any signal, etc., willfully and wantonly propelled engine against plaintiff, held insufficient to charge willful and wanton negligence. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. In action for injuries caused by mule taking fright at train, petition held to fail to allege cause of action for willful and wanton wrong. Alabama Great Southern R. Co. v. Fulton [Ala.] 43 S 832.

90. Petition based upon Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring railroads to maintain lawful fences where right of way passes through cultivated fields, and making them liable for injury where they fail to do so, held sufficient. Smith v. Chicago, etc., R. Co., 127 Mo. App. 160, 105 SW 10. Allegation that defendant failed and neglected to erect and maintain good and lawful fences held sufficient without specifying in what particular fence was defective. Till v. St. Louis, etc., R. Co., 124 Mo. App. 281, 101 SW 624. Petition under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), substantially following statute and reciting every duty imposed and the elements of neglect, held sufficient though it did not particularize what constituted a lawful fence. Marlon v. St. Louis, etc., R. Co., 127 Mo. App. 129, 104 SW 1125. Where it is alleged that stock went on railroad, where it "passed through, along and adjoining inclosed and cultivated fields" inference is that such fields are inclosed by lawful fence. Smith v. Chicago, etc., R. Co., 127 Mo. App. 160, 105 SW 10.

91. In action under Burns' Ann. St. 1894, § 5313, for killing of mule which had entered on track at point where it was not fenced, complaint need not aver that place did not come within exception to statute requiring railroads to fence. Cleveland, etc., R. Co. v. Miller, 40 Ind. App. 165, 81 NE 517.

92. Hence too general allegations in respect thereto do not render complaint demurrable. Central of Georgia R. Co. v. Brandenburg, 129 Ga. 115, 58 SE 658.

93. Answer, in action for killing of cows, that defendant negligently herded "certain cows" along right of way, does not raise issue of contributory negligence in absence of identification of "certain cows" with those killed. Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356.

94. Where, in action for cattle killed, defendant alleged contributory negligence in that plaintiff drove cattle onto right of way, reply denying averments of answer, except that "certain cows of plaintiff, being then and there under immediate care, custody, and control of plaintiff," etc., held not to mean that they were under his care and control when they went onto right of way and track. Jackson v. Sumpter Valley R. Co. [Or.] 93 P 356. Pleas to contributory negligence alleging that plaintiff's team became unmanageable and ran upon track, etc., as excusing failure to stop, look and listen, held not demurrable. Southern R. Co. v. Hobbs [Ala.] 43 S 844.

95. Court of civil appeals will take judicial notice that cow catcher and cars extend beyond rails (San Antonio, etc., R. Co. v. Mertink [Tex. Civ. App.] 18 Tex. Ct. Rep. 201, 102 SW 153), and that rapidly moving train creates a vacuum in its path, drawing to it objects nearby, with a force proportionate to rapidity of movement (Id.). Court cannot take judicial notice that train going 20 or 25 miles an hour can be stopped within 80 or 90 yards. Southern R. Co. v. Gullatt [Ala.] 43 S 577.

96. Where, in action for killing of horse, it was stipulated that defendant owned and operated railroad at all times mentioned, plaintiff need not prove that train which caused injury was owned or operated by defendant. Meier v. Northern Pac. R. Co. [Or.] 93 P. 691.

97. Charges requiring jury to be "convinced" and to be satisfied by a "preponderance" of the evidence held to exact too high a degree of proof. Southern R. Co. v. Hobbs [Ala.] 43 S 844. To recover for injury to animal alleged to have been struck by train, plaintiff must prove by preponderance of evidence that it was actually struck, mere possibility that injury might have been so inflicted is insufficient. Beaumont, etc., R. Co. v. Langford [Tex. Civ. App.] 104 SW 920. Evidence that shortly before accident child was seen walking on parallel track a few feet from train and was found run over, with blood on truck of one car, held to sufficiently show circumstances of accident. International, etc., R. Co. v. Vallejo [Tex. Civ. App.] 108 SW 1187.

98. Hence failure to call conductor or engineer cannot be considered by jury in making out prima facie case. Southern R. Co. v. Stewart [Ala.] 45 S. 51. One injured by train while lying unconscious on track has burden of showing negligence. Johnson v. J. M. Guffey Petroleum Co. [Mass.] 83 NE 874. In action for death at crossing, motion for nonsuit held properly overruled. Wrightsville, etc., R. Co. v. Gornto, 129 Ga. 204, 58 SE 769. Evidence of several witnesses for defendant as to place and man-

proving contributory negligence usually rests upon the defendant,[2] though he may utilize plaintiff's evidence in so doing.[3] Where doctrine of discovered peril is relied upon, plaintiff has the burden of showing that defendant knew of the perilous position in time to avoid injury.[4] A prima facie [5] presumption of negligence as alleged [6] arises in some states from proof of injury by a train,[7] especially where de-

ner of accident as against that of plaintiff held insufficient to show negligence. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 107 SW 369. Where, in action for negligent killing of dog, evidence afforded inference of negligence, affirmative charge is properly denied. Mobile, etc., R. Co. v. Glover [Ala.] 43 S 719.

99. To require submission of case to jury, there must be substantive proof that negligence was proximate cause of injury. Mere conjecture is insufficient. Payne v. Illinois Cent. R. Co. [C. C. A.] 155 F 73. Evidence held to indicate deliberate suicide rather than accidental death due to negligence. Id.

1. In action for death of horse and damage to buggy and harness, evidence held to warrant inference that plaintiff owned property. Flanery v. St. Louis, etc., R. Co. [Mo. App.] 108 SW 575. Evidence held sufficient to identify mare killed and burned as plaintiff's, notwithstanding discrepancies in evidence as to color. St. Louis, etc., R. Co. v. Miller, 84 Ark. 495, 106 SW 484.

2. Boyd v. St. Louis S. R. Co. [Tex.] 108 SW 813. Acts 1899, p. 58, c. 41. Unless plaintiff's own evidence shows contributory negligence. Lawden v. Pennsylvania R. Co. [Ind. App.] 82 NE 941; Ft. Worth, etc., R. Co. v. Morris [Tex. Civ. App.] 18 Tex. Ct. Rep. 527, 101 SW 1038. In proving contributory negligence, defendant need not show a particular act which decedent failed to do or that he did a particular thing which a prudent person would not have done, but he may show facts and let the jury determine whether decedent exercised proper care. Southern R. Co. v. Hansbough's Adm'x [Va.] 60 SE 58.

3. Where all facts tending to show contributory negligence are offered by plaintiff, burden of proof is not on defendant. Missouri, etc., R. Co. v. Plunkett [Tex. Civ. App.] 103 SW 663. Where plaintiff's own evidence shows contributory negligence proximately contributing to injury, directed verdict is proper. Atchison, etc., R. Co. v. Baker [Ind. T.] 104 SW 1182. Instruction that one injured at crossing is presumed to have exercised due care, but that such presumption might be removed by evidence, the burden being on defendant to remove it, held not erroneous as conveying impression that rebuttal evidence must come exclusively from defendant's witnesses. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985.

4. Burden rests on one guilty of contributory negligence to show that defendant's employes saw his perilous position in time to avoid injury. Adams v. St. Louis, etc., R. Co., 83 Ark. 300, 103 SW 725. Instruction on discovered peril held not objectionable as placing burden on defendant to show that he did not discover peril and used all means to avoid injury. Nacogdoches, etc., R. Co. v. Beene [Tex. Civ. App.] 20 Tex. Ct. Rep. 249, 106 SW 456.

5. Instruction that proof of injury from running of train is prima facie evidence of negligence is proper, though presumption must yield to facts. Southern R. Co. v. Murray [Miss.] 44 S 785. Positive testimony of defendant offered in rebuttal of presumption of negligence arising from proof of killing of horse by train may be overcome by physical facts and circumstances. Atlanta, etc., R. Co. v. Clute [Ga. App.] 60 SE 277.

Presumption held overcome: Evidence that cattle were killed on curve at night by freight train coming down grade at lawful rate of speed held to overcome presumption of negligence from killing. Beasley v. New Orleans, etc., R. Co. [Miss.] 45 S 864. Mere presumption of negligence from killing of stock by train is rebutted by positive testimony of trainmen that stock was not and could not have been, discovered in time to avoid injury. Western, etc., R. Co. v. Clark, 2 Ga. App. 346, 58 SE 510. In action for killing of animals trespassing on right of way, presumption of negligence arising from proof of killing held overcome by evidence that engine and roadbed were in good condition and that trainmen were competent and did not see the animals. Miller v. Chicago, etc., R. Co. [S. D.] 111 NW 553.

Not overcome: Presumption of negligence arising under statute from killing of mule at crossing held not rebutted where it appears that track was straight, that it was bright night, that mule could be seen 200 yards, and that speed was not slackened or signals given. St. Louis, etc., R. Co. v. Thompson, 83 Ark. 631, 104 SW 223. Testimony of fireman that mules were struck in a bunch and that they went onto track about 30 or 50 feet ahead of train, opposed by evidence that they were not all killed at same point, held insufficient to overcome presumption of negligence. St. Louis, etc., R. Co. v. Minor [Ark.] 107 SW 171.

6. Civ. Code 1895, § 2321. Bryson v. Southern R. Co. [Ga.] 59 SE 1124.

7. St. Louis S. W. R. Co. v. Graham, 83 Ark. 61, 102 SW 700. Under Ky. St. 1903, § 809, injury to stock is prima facie negligence, and burden is on defendant to show due care. Troutwine v. Louisville, etc., R. Co. [Ky.] 105 SW 142. Proof that there had been no fence along portion of defendant's right of way for more than a year and that plaintiff's mare was injured by reason thereof, in connection with operation of road, makes prima facie case and casts burden on defendant to show erection of a good and sufficient fence. Mikesell v. Wabash R. Co., 134 Iowa, 736, 112 NW 201. After plaintiff has shown that stock was killed by locomotive or cars within city, under Code 1896, § 3443, burden rests on defendant to show compliance with § 3440, as

fendant fails in a statutory duty.[8] Where two roads are using the same track, there is no presumption from fact of injury that defendant's train caused the same,[9] but plaintiff must prove such fact.[10] In the absence of evidence,[11] there is a prima facie [12] presumption of due care.[13] The question of negligence [14] and of contributory negligence [15] is usually one of fact for the jury.

Evidence.[See 8 C. L. 1662]—While there must be no material variance between the allegations and the proof,[16] only the substance of the issues need be proven.[17] While

to whistling and ringing of bell. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. Where child is run over in daylight by backing train upon which there was no lookout and without knowledge of trainmen, it is for defendant to show that accident was caused by some other excusable cause than negligent failure to have lookout. Hollins v. New Orleans, etc., R. Co., 119 La. 418, 44 S 159. Where one standing on station platform six or eight feet from track is hit by some swinging object hanging from train, doctrine of **res ipsa loquitur** is applicable. Eaton v. New York Cent., etc., R. Co., 109 NYS 419. Instruction that if jury believe that defendant negligently ran its train against stock, etc., to find for plaintiff, but if they do not so believe to find for defendant, held erroneous as placing burden on plaintiff. Troutwine v. Louisville, etc., R. Co. [Ky.] 105 SW 142.

8. Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938), makes proof of injury at crossing and of failure to ring bell a prima facie case, and casts burden on defendant to prove that failure to ring bell was not the cause of injury (McNulty v. St. Louis, etc., R. Co., 203 Mo. 475, 101 SW 1082); hence instruction requiring plaintiff to prove "the facts in support of case" by a preponderance of the evidence is erroneous as casting on her burden of showing that failure to ring was cause of injury (Id.). Where one is injured at crossing and company has failed to give statutory signals, it has burden of proving gross negligence on part of plaintiff, under Rev. Laws, c. 111, § 268. Kelsall v. New York, etc., R. Co. [Mass.] 82 NE 674.

9. Fact that horse is found dead beside track raises no presumption that it was killed by licensee using road jointly with another. St. Louis, S. W. R. Co. v. Heintz, 82 Ark. 459, 102 SW 221.

10. Evidence in action against railroad, operating on tracks used jointly with another, held insufficient to show that defendant's train killed horse. St. Louis S. W. R. Co. v. Heintz, 82 Ark. 459, 102 SW 221.

11. Where facts and circumstances tend to show negligence on decedent's part, issue must be determined therefrom, and not from any presumption of due care. Southern R. Co. v. Hansbough's Adm'x [Va.] 60 SE 58.

12. Presumption that decedent stopped, looked and listened is not overcome by testimony of engineer that he did not see him stop where he was not in position to see. Schwartz v. Delaware, etc., R. Co., 218 Pa. 187, 67 A 213. Whether presumption has been rebutted is for jury unless contrary evidence is so clear as to require court to set aside finding of due care. Unger v. Philadelphia, etc., R. Co., 217 Pa. 106, 66 A. 235.

13. In absence of contrary evidence. Rogers v. Rio Grande Western R. Co. [Utah] 90 P 1075.

14. If there is any evidence of negligence in crossing in front of train, question is for jury, scintilla rule applying. Louisville, etc., R. Co. v. McNary's Adm'r [Ky.] 108 SW 898. Plaintiff's evidence as to bumping of stationary cars against deceased child and then in dragging him under cars held not so inconsistent with admitted physical facts and so contrary to reason as to require withdrawal of case from jury. Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026. Where no duty rested on defendant to keep lookout for plaintiff and undisputed evidence shows that trainmen did not see plaintiff until after his mule had become frightened, court erred in refusing to charge that there could be no recovery under count alleging that engineer unnecessarily permitted steam to escape thereby frightening plaintiff's mule, etc., Alabama Great Southern R. Co. v. Fulton [Ala.] 43 S 832.

15. **Held for jury:** Evidence being conflicting as to whether day was foggy and as to whether plaintiff stopped, looked and listened. Weinstein v. Toledo, etc., R. Co. [Mo. App.] 106 SW 1125. Whether plaintiff was guilty of "gross negligence" where some of witnesses were contradicted and evidence was of character to leave credibility for jury. Kelsall v. New York, etc., R. Co. [Mass.] 82 NE 674. Evidence being conflicting as to whether path along track was dangerous if track was in good condition, or whether path was dangerous because of defective condition of track, and whether plaintiff knew thereof. Missouri, etc., R. Co. v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 133, 101 SW 464.

16. **No variance:** Between allegations that plaintiff was on crossing and in act of crossing when mule became frightened at approaching train and ran down track and that wagon overturned and threw plaintiff out and proof that he was not quite onto crossing, that mule ran down beside the track, not on it, and that plaintiff jumped out. Southern R. Co. v. Tankersley [Ga. App.] 60 SE 297. Between allegation that plaintiff was "in a freight car" unloading freight into wagon at time of injury and proof that he was standing with one foot out upon wagon, engaged in removing a piece of machinery. Louisville, etc., R. Co. v. Varner, 129 Ga. 844, 60 SE 162.

Fatal variance: Where one is killed before reaching highway, there can be no recovery on count alleging that he was killed

ordinarily affirmative evidence is of greater weight than negative,[18] its weight is a matter for the jury.[19] Uncontradicted, positive evidence,[20] especially if of expert character,[21] cannot be disregarded.

The general rules as to the admissibility of evidence apply.[22]

on a highway crossing. Legge v. New York, etc., R. Co. [Mass.] 83 NE 367. Between allegation that escape of steam which frightened plaintiff's mule occurred as engine was approaching crossing and proof that engine had passed crossing and was returning, after being reversed, in direction of plaintiff. Alabama Great Southern R. Co. v. Fulton [Ala.] 43 S 832. Where petition alleges injury at public crossing, evidence of facts authorizing inference that defendant had impliedly licensed use of path along its track held properly rejected. Snowball v. Seaboard Air Line R. Co. [Ga.] 60 SE 189. Where only negligence charged was failure to ring bell and blow whistle, negligence in not taking extra precautions because of unusually dangerous character of crossing, cannot be submitted. Holmes v. Pennsylvania R. Co. [N. J. Err. & App.] 66 A 412. Where negligence charged was running into mare, but proof showed that mare ran into side of train, held error to refuse instruction that plaintiff could not recover if mare ran into side of train. Rhinehart v. St. Louis, etc., R. Co. [Mo.] 108 SW 103. Where failure to stop train after discovering decedent's peril is negligence alleged, recovery cannot be predicated on failure to give station signals. Edwards' Adm'r v. Chesapeake, etc., R. Co. [Ky.] 108 SW 303. Instruction seeking to defeat recovery on ground of negligence not covered by defendant's pleadings held properly refused. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S. 867.

17. Where, in action for killing of one attempting rescue of another, petition alleged that such other person was standing on track, but evidence showed that ne was standing between track and platform, equally as dangerous a position, instructions predicating right to recovery on such position held not erroneous as not conforming to petition. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408.

18. Greater weight should be given to testimony that signals were given than to evidence of parties that they did not hear them. Illinois S. R. Co. v. Hamill, 128 Ill. App. 152.

Positive and negative character of evidence considered and held: To show that signal was given. Missouri, etc., R. Co. v. McCoy [Ind. T.] 104 SW 620. Where evidence of defendant that signals were given was contradicted, fact that latter is of negative character held not, as matter of law, insufficient to overcome former. Winterbottom v. Philadelphia, etc., R. Co., 217 Pa. 574, 66 A 864. Where one witness testifies that bell was ringing and that headlight was burning, and another that he did not hear or see same, fact that latter evidence is of negative character held not to justify instruction that uncontradicted evidence shows that bell was ringing and that headlight was burning. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948.

19. Louisville, etc., R. Co. v. Molley's Adm'x [Ky.] 107 SW 217. Instruction that positive evidence that signals were given is of greater weight than mere negative testimony that they were not heard held properly refused. Cleveland, etc., R. Co. v. Wuest [Ind. App.] 83 NE 620.

20. Where trainmen testify that they did not see trespassing animals, such evidence cannot be disregarded in absence of contradictory facts. Miller v. Chicago, etc., R. Co. [S. D.] 111 NW 553.

21. Where expert testimony is uncontradicted that train can be stopped quicker by applying air brakes without reversing than by applying brakes and reversing, question is not one of such common knowledge as to justify disregarding expert evidence. Harris v. Nashville, etc., R. Co. [Ala.] 44 S 962.

22. That offered witnesses were boys 8 and 12 years old, who were between trains and climbing over cars, held not to show that means and opportunity of hearing bell ring were so lacking as to render testimony that they did not hear bell inadmissible. Gesas v. Oregon Short Line R. Co. [Utah] 93 P 274.

Res Gestae. Admissible: Statement made immediately upon regaining consciousness as to cause of accident. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Question of engineer to fireman "Why didn't you tell me to stop?" asked immediately after accident and in injured party's presence. Zipperlen v. Southern Pac. R. Co. [Cal. App.] 93 P 1049. Where flagman after running back to where plaintiff lay after falling from moving train stated that he could not stop train before plaintiff fell because signal cord was out of order. Illinois Cent. R. Co. v. Cotter, 31 Ky. L. R. 679, 103 SW 279.

Not admissible: Statement by engineer made half hour after accident and several miles from place of injury. International, etc., R. Co. v. Munn [Tex. Civ. App.] 18 Tex. Ct. Rep. 548, 102 SW 442.

Hearsay: Statement that about three minutes after accident some one in crowd stated that decedent was standing on track at time of accident held inadmissible as original evidence. International, etc., R. Co. v. Howell [Tex. Civ. App.] 19 Tex. Ct. Rep. 123, 105 SW 560.

Relevancy and Materiality. Admissible: Where failure to ring bell was fact to be considered in determining whether due care was exercised, witnesses held properly allowed to testify to facts tending to show that no bell was rung. Texarkana, etc., R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167. Although only negligence charged was in operation of train, plaintiff may show existence of crossing gates and that they were open as throwing light on

accident and as bearing on contributory negligence, although it was unusual to have gate-keeper there at such time. Rogers v. West Jersey, etc., R. Co. [N. J. Err. & App.] 68 A. 148. Where plaintiff was tripped by wires on lawn adjacent to platform, failure of railroad to properly light place is admissible on issue of negligence. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738. Where engineer jokingly caused steam to escape and plaintiff stepped from platform onto side track to avoid same, such fact may be considered in determining plaintiff's negligence. Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660. Evidence as to what kind of a whistle was blown at crossing held admissible in action for collision at crossing. Southern R. Co. v. Hobbs [Ala.] 43 S 844. Evidence to show at what points train could have been seen had plaintiff looked held admissible under either phase of testimony that team became frightened and unmanageable and ran onto track or that they were deliberately driven thereon. Id. Where plaintiff excuses his presence on crossing at time of collision on ground that team became frightened and unmanageable, question as to how far he was from track at time they began running held admissible as tending to show that he drove too close before they became frightened, as defendant contended. Id. In action for collision with train at crossing, question as to whether plaintiff heard any train whistle before leaving home held admissible as it might serve to identify train which struck plaintiff, several having passed about same time. Id. In action for death at crossing, evidence of path along railway from switch to crossing held admissible as explanatory of locality. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. In action for death of pedestrian struck by backing train, question whether witness saw any person on end of train with lantern is pertinent. Matteson v. Southern Pac. R. Co. [Cal. App.] 92 P 101.

Inadmissible: Where issue relates only to existence of lights on rear car, and witness testifies as to lights on that car, question whether he saw lights on other cars. Matteson v. Southern Pac. R. Co. [Cal. App.] 92 P 101. Rules of company having no application to issues raised. Wabasha R. Co. v. Keeler, 127 Ill. App. 265. Where it appears that plaintiff reached point of injury by traveling along defendant's right of way, presence or absence of gates at such points is immaterial. Chicago Terminal Trans. R. Co. v. Korando, 129 Ill. App. 620. Immaterial whether engine was brought back to place of injury. Southern R. Co. v. Hobbs [Ala.] 43 S 844. In action for injuries while in street in being struck with piece of ice kicked from passing train, questions as to plaintiff's habit of jumping onto passing trains, whether he had made up his mind to jump onto train, and whether he would have been injured had he remained where he was when engine passed. Maysville, etc., R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016. Where it was admitted that signals were not given on train approaching crossing and that decedent was familiar with crossing, evidence that signals could be heard at decedent's residence. Matteson v Southern Pac. R. Co. [Cal. App.] 92 P 101.

Conclusion of Witness. Admissible: Question whether mare was frightened by approach of defendant's hand car. Mikesell v. Wabash R. Co., 134 Iowa, 736, 112 NW 201. Statement by witness who had experimented with gate that by working it back and forth slat holding it shut would work out. Brown v. Quincy, etc., R. Co., 127 Mo. App. 614, 106 SW 551. Testimony that engine could be seen from road. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867.

Inadmissible: Where engineer and fireman admit that they do not remember whether crossing signals were given, not error to exclude testimony that they thought that they were given. Chesapeake, etc., R. Co. v. Wilson's Adm'r, 31 Ky. L. R. 500, 102 SW 810. In action for injury while unloading oil tank, evidence as to proper manner of unloading same, which was merely witness's conclusion as to what ordinary care required, held properly excluded. Gulf, etc., R. Co. v. Wittnebert [Tex. Civ. App.] 19 Tex. Ct Rep. 636, 104 SW 424. As was evidence as to what witness would have done and as to how an ordinarily prudent person would have acted. Id.

Prior Conditions, Accidents, Acts, etc. Admissible: Where knowledge of one killed while crossing tracks of movement of trains at such point is material, evidence of train's movements for four or five years held admissible where deceased was in position to observe same. Minot v. Boston, etc., R. Co. [N. H.] 66 A 825. Where plaintiff, while passing from platform to grass plat to avoid truck on platform, tripped over wires, evidence that at times there were four trucks on platform is admissible as bearing on negligence in maintaining wires, though there was only one truck thereon at time of injury. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738. Evidence that prior to accident another horse's foot had become caught between rail and planking held admissible on issue whether place was such as to admit of foot being caught. Dunham v. Wabash R. Co., 126 Mo. App. 643, 105 SW 21.

Inadmissible: In action for injuries caused by horse's foot catching frog, evidence of similar accidents. Bobbink v. Erie R. Co. [N. J. Err. & App.] 69 A 204. Evidence of failure to give warnings on prior occasions. Southern R. Co. v. Winchester's Ex'x [Ky.] 105 SW 167. In action for death at crossing, evidence that train was not running faster than trains usually run through town. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776.

Conditions at other places: Absence of gates at another crossing is immaterial. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

Subsequent conditions: In action for injuries to animal escaping through defective gate onto track, testimony of witness who examined gate soon after accident that slat holding same shut would work out by working gate back and forth held competent. Brown v. Quincy, etc., R. Co., 127 Mo. App. 614, 106 SW 551.

Customs and Habits. Admissible: Testimony of brakemen that if they discovered trespassers on train they put them off, and that it was custom of brakemen so to do,

Instructions. See 8 C. L. 1663—The court should give such instructions as to place all matters for the jury properly before them,[23] and should specifically [24] submit the issues raised by the pleadings [25] and supported by the evidence,[26] but none other.[27]

held admissible to show custom of brakemen to eject trespassers notwithstanding rule prohibiting such action. Texas, etc., R. Co. v. Buch [Tex. Civ. App.] 19 Tex. Ct. Rep. 406, 102 SW 124.

Inadmissible: In action for killing at crossing, evidence that deceased was by custom reckless in driving at crossings. Louisville, etc., R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776.

Rules of company: In action against railroad and a traction company for injuries received in collision between defendants' cars, held that rules of railroad for guidance of its servants under conditions similar to those at time of accident are admissible. St. Louis, etc., R. Co. v. Wiggins [Tex. Civ. App.] 107 SW 899. Evidence held to warrant finding that certain rules of defendant had not been verbally modified. Lindenbaum v. New York, etc., R. Co. [Mass.] 84 NE 129.

Experiments: Experiments made under substantially same conditions are admissible to show how far stock could have been seen by trainmen. Atlanta, etc., R. Co. v. Hudson, 2 Ga. App. 352, 58 SE 500.

Cross-examination: Where, in action for death at crossing, witness who had made experiments from switch engine testified that engine could be seen from road, it is proper on cross-examination to show that opportunity for observation was as good for engineer as for intestate. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867.

Impeachment: Where engineer testifies that he did not realize decedent's peril, but assumed that he would get off track in time to avoid injury, a statement by him that "the damn fool made me mad because he would not get off the track" held admissible to impeach his testimony that he did not realize decedent's peril. International, etc., R. Co. v. Munn [Tex. Civ. App.] 18 Tex. Ct. Rep. 548, 102 SW 442. Evidence of statement by engineer an hour after accident that he was sorry that he did not see plaintiff in time to avoid injury, although inadmissible as res gestae, held admissible to contradict his testimony that he did not make statement. Louisville, etc., R. Co. v. Davis [Ky.] 106 SW 304.

23. In action for injuries at defective crossing, under Rev. St. 1895, art. 4426, imposing absolute duty to keep same in repair, court need not instruct as to what would constitute a keeping in repair. St. Louis S. W. R. Co. v. Smith [Tex. Civ. App.] 107 SW 638. Where evidence showed acts of negligence occurring before train struck decedent and acts of negligence after he was under train, but recovery could not be had on former because of decedent's negligence, held error to refuse instruction that if decedent was negligent in going onto track no recovery could be had unless defendant failed to exercise diligence to avoid injuring him after learning of his perilous position. Gregg v. Northern Pac. R. Co. [Wash.] 94 P 911. Instruction in language of statute that it was duty of company when it built its road to restore highway to its former condition held not objectionable as requiring company to build approaches as wide as the highway, in absence of request for specific instructions. Logan v. Lake Shore, etc., R. Co., 148 Mich. 603, 14 Det. Leg. N. 303, 112 NW 506.

Construction of instructions: In action for cattle killed, instruction construed to submit negligence in maintaining fence, and not in operation of train. Ft. Worth, etc., R. Co. v. Worsham [Tex. Civ. App.] 20 Tex. Ct. Rep. 89, 105 SW 853. Instruction as to duty to keep watchman on cars about to be backed to warn people held not objectionable as requiring lookout for persons under or between cars. Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026.

24. Instruction should include all material facts that evidence tends to prove and leave to jury question whether such facts constitute negligence. Chicago, etc., R. Co. v. Sack, 129 Ill. App. 58.

Issues sufficiently submitted: Contributory negligence in absence of written request for more specific instructions. Wrightsville, etc., R. Co. v. Gornto, 129 Ga. 204, 58 SE 769. Plaintiff's negligence in attempting to pass between cars blocking street and negligence in manner of so doing, in absence of request that they be more distinctly separated. Chicago, etc., R. Co. v. Johnson [Tex.] 108 SW 964. Rebuttableness of presumption of negligence arising from injury by collision. Wrightsville, etc., R. Co. v. Gornto, 129 Ga. 204, 58 SE 769. Instruction on additional means of protection rendered necessary by dangerous condition of crossing held to fairly state law, although it would have been better to have not pointed out therein particular means to be employed. Cincinnati, etc., R. Co. v. Champ, 31 Ky. L. R. 1054, 104 SW 988.

Improperly refused: Instruction that, if at time he was struck, plaintiff was walking near side of moving train, and that a person of ordinary prudence would not have so walked, defendant was not liable. Missouri, etc., R. Co. v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 133, 101 SW 464.

25. Mere statement of general statutory duty to give crossing signals held not erroneous though issue was not specifically raised by pleadings. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. Submission of issue as to whether defendant kept proper lookout, although not raised by pleadings, held proper where responsive to evidence. Id.

Held raised: Duty of defendant to have watchman on tender of backing switching engine to give warnings to engineer. El Paso, etc., R. Co. v. Murtle [Tex.] 108 SW 998. In action for death of one attempting rescue of another on track, held that pleadings and evidence authorized submission of issue whether such third person was in peril from approaching train. Texas, etc., R. Co. v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 828, 104 SW 408. Although petition contained extravagant allegation

It is sufficient, however, if the instructions as a whole fairly submit the same,[28] and

of negligence, held that instruction submitting negligence irrespective of wantonness and recklessness was not erroneous as departing from petition. Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660. Motion to strike town ordinance prohibiting blocking of street for more than 10 minutes held proper where it is alleged that violation thereof in connection with other negligent acts caused homicide. Southern R. Co. v. Mouchet [Ga. App.] 59 SE 927.

26. Evidence held to authorize: Instruction on discovered peril. Chesapeake, etc., R. Co. v. Perkins, 31 Ky. L. R. 1350, 105 SW 148. Where evidence tended to show that defendant maintained flagman at crossing, that he failed to warn plaintiff, and that, relying thereon, plaintiff went onto crossing and was struck by engine, held error to refuse instruction submitting negligence in failing to give warning. Buchanan v. Missouri, etc., R. Co. [Tex. Civ. App.] 107 SW 552. In action by licensee for injuries while alighting from train, defendant held entitled to instructions presenting its theory of time, place and manner of accident, such theory being supported by practically all evidence except plaintiff's. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 107 SW 369. Evidence that cow killed was on way home to her calf, and hence less liable to turn from path on blowing of whistle or sounding of bell than stock generally, held sufficient to require requested instruction that prima facie case under Rev. St. 1899, § 1102 (Ann. St. 1906, p. 938), made by proof of injury at crossing and failure to give statutory signal, could be overcome by proof that failure to give signals did not cause injury. Midgett v. St. Louis, etc., R. Co., 124 Mo. App. 540, 102 SW 56.

27. Charge held not objectionable as stating as one of grounds of negligence defendant's failure to plank crossing. St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736.

Not supported by pleading or evidence: Willful negligence. Atchison, etc., R. Co. v. Baker [Ind. T.] 104 SW 1182. In action for injury at horse taking fright at blowing of whistle at crossing and running into train where defense is that it was not sounded until after crossing was passed, and there was no evidence that it was done in necessary operation of train, instruction that if it was blown maliciously and for purpose of frightening the horse defendant is not liable unless done in scope of employment and in necessary operation of train held inapplicable. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 S. W. 428.

Not raised by pleadings: Instruction on willful injury. Mobile, etc., R. Co. v. Glover [Ala.] 43 S 719. Where petition charged that while plaintiff was in act of alighting, with knowledge of conductor, defendant's agents caused train to start, held not to authorize charge predicating liability upon starting of train by conductor with knowledge that plaintiff was alighting. Gulf, etc., R. Co. v. Walters [Tex. Civ. App.] 107 SW 369.

Not supported by proof: Instruction on last clear chance. Southern R. Co. v. Hansbrough's Adm'x [Va.] 60 SE 58. Instruction as to racing of trains to reach crossing, evidence showing that train stopped, etc. El Paso, etc., R. Co. v. Murtle [Tex.] 108 SW 998. Instruction authorizing jury to consider dazzling effect of approaching headlight in determining issue of contributory negligence where there is no evidence that decedent saw same or was confused thereby, although there was general evidence of effect of such light. Rogers v. Rio Grande Western R. Co. [Utah] 90 P 1075. Instruction submitting question of negligence in causing mule to be driven upon right of way and left there to graze. St. Louis, etc., R. Co. v. Scott, 84 Ark. 623, 104 SW 1103. Instruction injecting issue whether cow entered onto track too close to train to avoid injury. Texarkana, etc., R. Co. v. Bell [Tex. Civ. App.] 19 Tex. Ct. Rep. 401, 101 SW 1167. Instruction that engineer had right to assume that one walking on tracks toward engine will get off, where there was no evidence that plaintiff was walking on tracks toward engine. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S. 418. Where there was nothing in surroundings inviting decedent to cross and to lull him into belief that he could safely cross, instruction on theory that decedent was without fault and was confronted with sudden danger which excused failure to exercise reasonable care. Southern R. Co. v. Hansbrough's Adm'x [Va.] 60 SE 58. Testimony of witness that he did not know whether he heard bell ring and of another living half block away that she did not hear same held insufficient to take issue to jury, there being positive evidence that bell was rung. Holmes v. Pennsylvania R. Co. [N. J. Err. & App.] 66 A. 412. Where proof showed that mare was injured by running into side of train, instruction allowing recovery if train ran into mare held erroneous. Rhinehart v. St. Louis, etc., R. Co. [Mo. App.] 108 SW 103. Where there is uncontradicted evidence that rule required section boss to have red light on his hand car, charge should assume such fact and not submit it to jury. Louisville, etc., R. Co. v. Crow [Ky.] 107 SW 807. Where, in action for injury at stock gap, plaintiff in his testimony practically admitted that he knew of location, held error to submit issue to jury. Missouri, etc., R. Co. v. Plunkett [Tex. Civ. App.] 103 SW 663.

28. Instructions as a whole held not to authorize recovery without regard to plaintiff's negligence. St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736. Instruction that if railroad employes operating engine and tender, by keeping such lookout as ordinary person would have kept, could have discovered plaintiff in time to have avoided injury by use of means at hand, etc., held charge on negligence in keeping lookout and not on discovered peril. Missouri, etc., R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745. Where evidence tends to prove contributory negligence, an instruction that law does not permit one to bring upon himself injury and recover damages therefor held not erro-

the court may refuse requested instructions covered by those given.[29] They should not invade the province of the jury,[30] single out facts [31] and give undue prominence to them,[32] be ambiguous,[33] argumentative,[34] misleading,[35] on the weight of the evi-

neous because prefacing a long series of instructions. Scanlan v. Chicago Union Trac. Co., 127 Ill. App. 406. In action for death of engineer killed in collision with engine of defendant, instructions as a whole held to properly submit decedent's negligence in operating his train at high speed. Philadelphia, etc., R. Co. v. Baker [C. C. A.] 155 F 407.

Particular instructions held good when construed with whole: Instruction if you find that crossing was "out of repair" held not objectionable as requiring it to be out of repair in respects alleged. St. Louis S. W. R. Co. v. Hawkins, [Tex. Civ. App.] 108 SW 736. Instruction directing verdict for plaintiff if speed in excess of limit prescribed by ordinance was direct cause of injury held not erroneous as omitting hypothesis of contributory negligence. Smith v. Wabash R. Co. [Mo. App.] 107 SW 22. Where evidence showed that engineer could not see crossing on account of boiler obstructing view, instruction that if engineer negligently failed to keep lookout, etc., held not erroneous in using word "negligently," when considered with another instruction exacting ordinary care to discover whether decedent was ignorant of approach of train. Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885.

29. Instructions held covered: As to nonliability for injuries caused by horse taking fright at ordinary noise incident to operation of train. Paris, etc., R. Co. v. Calvin [Tex.] 20 Tex. Ct. Rep. 316, 106 SW 879. As to duty and care of one crossing tracks. Cleveland, etc., R. Co. v. Wuest [Ind. App.] 83 NE 620. That boy approaching highway along railroad right of way, with intention of proceeding along such right of way, is a trespasser while on highway, if correct. Olson v. Minneapolis, etc., R. Co., 102 Minn. 395, 113 NW 1010.

30. Reversible error to charge "It has been argued by counsel that these are not safety gates, but rather death traps; why they should be there we are not just clear, because if they are a positive injury they ought to be taken down." Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

Held erroneous: Instruction that failure to blow whistle after discovering plaintiff's position was not negligence. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Instruction that plaintiff should have made a reasonable effort to stop her team at greatest possible distance from track where she could have looked and listened. Cleveland, etc., R. Co. v. Schneider [Ind. App.] 80 NE 985. Instruction that unless engineer, after discovering plaintiff's peril, did not in good faith exercise due diligence to prevent injury, to find for defendant. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Instruction that if jury find that codefendant dismissed from action paid a sum of money in consideration for failure to prosecute claim against it "then you should deduct such sum and render a verdict for only the remainder" held erroneous as in effect direct verdict. Chicago, etc., R. Co. v. Turck, 131 Ill. App. 128.

Held not erroneous: Charge that if defendant unnecessarily sounded whistle when it was reasonably apparent that it would frighten plaintiff's horse and cause same to run away, etc., defendant was liable, held not objectionable as charging what acts or omissions constitute negligence. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428. Instruction that presumption of due care is destroyed where it appears that if decedent had looked and listened he would have seen or heard train approaching does not invade province of jury, since it is still left for them to say whether presumption was overcome. Rogers v. Rio Grande Western R. Co. [Utah] 90 P 1075.

31. Instruction that if horse was found dead on right of way, and jury believe from its appearance or from signs on track that horse was killed by train, it will be presumed that defendant was negligent, held not erroneous as charge respecting matters of fact, plaintiff being bound to show that horse was killed by train to raise presumption, and evidence being all circumstantial. St. Louis, etc., R. Co. v. Ewing [Ark.] 107 SW 191.

32. Instruction on contributory negligence in crossing behind train on side track held to give undue prominence to evidence. Minot v. Boston, etc., R. Co. [N. H.] 66 A 825. Charge that failure of defendant to blow whistle after discovering plaintiff was not such negligence as authorized recovery held erroneous as giving undue prominence to a single feature of case. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. Instruction in action for injury received while attempting to pass between cars blocking street in violation of ordinance held not to give undue prominence to fact that cars were blocking street in violation of ordinance. Chicago, etc., R. Co. v. Johnson [Tex.] 108 SW 964. In action for killing of one at crossing, instruction that if decedent was deaf it was his duty to exercise great caution in use of his remaining senses held not erroneous as singling out facts or giving undue prominence to them. Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885.

33. Instruction which warrants inference that statute requires both ringing of bell and blowing of whistle is improper. Chicago, etc., R. Co. v. Sack, 129 Ill. App. 58.

34. Instruction on contributory negligence in crossing behind train on side track held argumentative. Minot v. Boston, etc., R. Co. [N. H.] 66 A. 825. Instruction that jury might consider fact that persons coming after decedent saw approaching engine, in determining whether reasonably prudent man would have seen same, held properly refused as being proper subject of comment in argument but not of instruction. Riley v. Northern Pac. R. Co. [Mont.] 93 P. 948.

35. Held misleading: Instruction on negligence, contributory negligence, and proximate cause. Southern R. Co. v. Hobbs

dence,[36] assume facts in issue,[37] or ignore material evidence,[38] grounds of recovery,[39]

[Ala.] 43 S 844. Instruction authorizing jury to assume that although there was no evidence of defect in switch, yet they might take such defect as existed into consideration in determining negligence in operating. Floody v. Great Northern R. Co., 102 Minn. 81, 112 NW 875. Where, in action for injury caused by truck running down inclined platform colliding with train, and then striking plaintiff, only negligence relied on was placing of truck in dangerous position, instruction requiring defendant to keep "vigilant lookout" to avoid injury held calculated to mislead jury in considering negligence of train crew. Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865. Where evidence shows what was done by engineer and that everything was done that was possible to stop train before striking mule, instruction that it is insufficient for railroad engineer to "simply guess" that he could not do anything to avoid collision. Central of Georgia R. Co. v. Thweatt [Ala.] 44 S 380. In action against railroad for injuries received in collision with street car, instruction specifically submitting question of negligence of employes of street car company in not stopping car and going ahead onto track to look held properly refused as it might have misled jury to believe that in mind of court such was proper method of observation. St. Louis, etc., R. Co. v. Wiggins [Tex. Civ. App.] 107 SW 893. Where evidence shows that by rising in his seat decedent would have clear view of track, instruction that he is presumed to have exercised due care is misleading in that jury might infer that there was no evidence of negligence and render verdict on presumption. Southern R. Co. v. Hansbrough's Adm'x [Va.] 60 SE 58. Instruction on contributory negligence in crossing behind train on side track held to divert attention from effect of decedent's knowledge of customary movements of such train. Minot v. Boston, etc., R. Co. [N. H.] 66 A 825.

Held not misleading: Beginning of instruction on contributory negligence with words "Now in this case I charge you," etc., held not misleading in that jury might infer that such negligence was only issue in case. Wrightsville, etc., R. Co. v. Gornto, 129 Ga. 204, 58 SE 759. Instruction on presumption of negligence from injury caused by running of train held not to mislead jury to believe that it could be rebutted only by evidence coming from defendant. Brunswick, etc., R. Co. v. Hoodenpyle, 129 Ga. 174, 58 SE 705. Instruction that all persons running railway trains must keep lookout for stock held not objectionable as requiring every member of train crew to keep lookout. St. Louis, etc., R. Co. v. Ewing [Ark.] 107 SW 191.

36. **Held on weight:** Where duty to stop, look and listen did not exist as matter of law under facts, instruction that ordinary care required decedent to stop, look and listen. International, etc., R. Co. v. Howell [Tex. Civ. App.] 19 Tex. Ct. Rep. 123, 105 SW 560. Instruction on what would create implied license to use passway held on weight of evidence because it negatived giving any effect to evidence of knowledge of use by station agents. Id. Instruction that evidence of signals being given is entitled to more weight than evidence of witnesses that they did not hear them and would have heard them if given. Chicago, etc., R. Co. v. Louderback, 125 Ill. App. 323.

Not on weight: Instruction on contributory negligence and discovered peril. Houston, etc., R. Co. v. Finn [Tex. Civ. App.] 107 SW 94. Charge requiring employes to exercise reasonable care to maintain lookout, etc. Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457. Instruction that if gates were up and if this indicated that no cars or engine were about to cross, etc., held not on weight of evidence as assuming that gates were up, and, being up, indicated that no cars or engines were about to cross. Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 20 Tex. Ct. Rep. 740, 106 SW 705.

37. **Erroneous:** Where ownership of stock is not conclusively shown by evidence, it is error to assume same in instructions. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. Instruction that failure to blow whistle after discovering plaintiff was not such negligence as authorized recovery, as assuming that it was only act of negligence on defendant's part. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418. As assuming that decedent's failure to stop, look and listen was proximate cause of injury. Central of Georgia R. Co. v. Hyatt [Ala.] 43 S 867. Instruction basing right of recovery on violation of speed ordinance, as assuming plaintiff's ownership of stock and that stock was struck by locomotive. Louisville, etc., R. Co. v. Christian Moerlein Brew. Co. [Ala.] 43 S 723. Should not assume that deceased was in exercise of ordinary care at time of accident causing his death. Chicago, etc., R. Co. v. Sack, 129 Ill. App. 58.

Not erroneous: As assuming that ordinary care required an actual lookout in approaching crossings when considered with other instructions. Texas Mexican R. Co. v. De Hernandez [Tex. Civ. App.] 108 SW 765. Where cars are being unloaded on defendant's unloading tracks, presumption is that they were shipped over defendant's line; hence instruction so assuming held not erroneous. Missouri, etc., R. Co. v. Thomas [Tex. Civ. App.] 107 SW 868. Where evidence clearly showed that use of every means at hand to stop train would have been consistent with safety of train, in exacting such use after discovering peril of one on crossing. Texas Mexican R. Co. v. De Hernandez [Tex. Civ. App.] 108 SW 765. Where undisputed evidence shows that crossing was much frequented, instruction as to duty predicated on crossing being a place where presence of person was to be anticipated. Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885. Where only evidence of warning to plaintiff unloading car was that it was given by switchman, instruction that if "a member of defendant's switching crew" gave due warning, etc., defendant is not liable, as limiting warning which might have been given to member of switching

or defenses.[40] Defenses should be submitted in the disjunctive rather than in the conjunctive,[41] and technical words and phrases should generally be defined.[42]

crew. Missouri, etc., R. Co. v. Thomas [Tex. Civ. App.] 107 SW 868. Instruction on discovered peril, as assuming plaintiff's peril and that trainmen discovered same in time to avoid injury. Nacogdoches, etc., R. Co. v. Beene [Tex. Civ. App.] 20 Tex. Ct. Rep. 249, 106 SW 456. Instruction beginning "if the jury believe from the evidence," and enumerating facts authorizing recovery. Jaffi v. Missouri Pac. R. Co., 205 Mo. 450, 103 SW 1026. Designating lawn on which injury occurred as "depot grounds," in questions for purpose of identifying the place, held not reversible error. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738.

38. Where evidence is clear that boy was told not to get onto wagon crossing tracks, instruction "we recollect no testimony" to warrant conclusion that he was forbidden is error. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22. Instruction that whether engineer used all means at hand to avoid injury after discovering decedent's peril "may be shown by circumstances, and same must be determined by the circumstances at the time," held not to direct jury to consider circumstantial evidence only. International, etc., R. Co. v. Munn [Tex. Civ. App.] 18 Tex. Ct. Rep. 548, 102 SW 442. Instruction in action for injury at crossing that sheds obstructing view of approaching train in no way affected plaintiff's case held erroneous as ignoring evidence that company was not responsible therefor, hence their presence increased care to be exercised by party injured (Southern R. Co. v. Hansbrough's Adm'x [Va.] 60 SE 58), and in conflict with instruction specifically stating that they increased care owed by decedent (Id.).

39. Instruction, in action for death of one killed at crossing between 2 and 4 o'clock a. m., that there was nothing in traffic conditions requiring operation of gates, etc., held erroneous as withdrawing question whether defendant exercised ordinary care in moving switch engine across street under all circumstances. Riley v. Northern Pac. R. Co. [Mont.] 93 P 948. Instruction on contributory negligence in assuming place of danger held improper as inapplicable to evidence and as ignoring defendant's duty to exercise reasonable care to protect deceased in such position. Id. Requested instruction as to nonliability for injuries caused by horse taking fright at ordinary noise incident to operation held to ignore fact that unusual and unnecessary blast may have been given and may have contributed. Paris, etc., R. Co. v. Calvin [Tex.] 20 Tex. Ct. Rep. 316, 106 SW 879. In action for injuries caused by overturning of sleigh at crossing, instruction that undisputed evidence showed that sleigh was not upset because of narrowness of roadway, and that width of roadway was of no importance, etc., held properly refused where, though not causing sleigh to overturn, narrowness may have caused injuries. Logan v. Lake Shore, etc., R. Co., 148 Mich. 603, 14 Det. Leg. N. 303, 112 NW 506.

40. Instructions as to care necessary to be exercised should embrace his approach to track as well as time of injury. Chicago, etc., R. Co. v. Sack, 129 Ill. App. 58. Instruction as to liability of defendant for injury caused by operating train at prohibited rate of speed which ignores defense that plaintiff was guilty of contributory negligence is erroneous. Cleveland, etc., R. Co. v. Dukeman, 130 Ill. App. 105. Instruction on duty of one in position of apparent peril held not to withdraw defense of intervening cause. Cincinnati, etc., R. Co. v. Acrea [Ind. App.] 82 NE 1009. Instruction that if plaintiff saw train approaching in time to avoid injury by ordinary care he cannot recover held objectionable as impliedly authorizing recovery if he did not see train regardless of whether he looked and listened. Atchison, etc., R. Co. v. Baker [Ind. T.] 104 SW 1182. Instruction that if engineer, after observing that plaintiff was about to go upon tracks, could have avoided accident by blowing whistle, and he failed to do so, and plaintiff as result of such failure went onto tracks in ignorance of danger, plaintiff can recover, held objectionable as ignoring plaintiff's duty to look and listen. Id. Instruction on burden of proof and contributory negligence held, in view of other instructions, not erroneous as withdrawing other defenses. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. Where undisputed evidence shows that cow went on tracks at crossing, instruction requiring jury to find that cow was killed at point not a public crossing or within switch limits of a station, incorporated town, or village, held not objectionable as allowing jury to find for plaintiff regardless of where she entered on track, where it also required finding that she entered right of way by reason of insufficient guards. Stepp v. St. Louis, etc., R. Co., 124 Mo. App. 644, 101 SW 1150. Charge that although deceased was negligent, yet if such negligence was not proximate cause of injury, but defendant's negligence was, plaintiff could recover, held not to charge that recovery could be had notwithstanding decedent's negligence proximately contributed. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644.

41. Instruction that if decedent failed to exercise ordinary care for his own safety, and defendant did not have reasonable ground to believe that he would not get off track to avoid injury, and defendant used reasonable care to avoid injury after it became manifest that decedent was not going to get off, defendant was not liable, held not erroneous as stating defenses in conjunctive instead of disjunctive, there being no request. Texas, etc., R. Co. v. Patterson [Tex. Civ. App.] 18 Tex. Ct. Rep. 519, 102 SW 138.

42. Instruction that pedestrian must exercise ordinary care in approaching crossing held erroneous as not defining duty owed. Southern R. Co. v. Winchester's Ex'x [Ky.] 105 SW 167. Instruction on discovered peril held not objectionable as not

Double damages and attorney's fees.[See 8 C. L. 1665]—Under the Missouri statute making railroads liable in double damages for injuries to stock entering right of way where it is required to fence or maintain cattle guards, it is the condition of the fence and guards at place of entry that determines the liability.[43]

§ 12. *Railroad corporations.*[See 8 C. L. 1665]—Many of the general principles of corporation law are applicable to railroads.[44] By statute in some states the charter [45] or certificate of incorporation [46] must definitely state the termini of the proposed road. In New York railroads must prove the public necessity for the proposed road and obtain from the railroad commissioners a certificate of public necessity and convenience.[47] The action of the commissioners may be reviewed by certiorari if the same is timely prosecuted.[48] In New York ten per cent of the capital stock must be paid in cash [49] at the time of filing of the certificate of incorporation. While a mere failure to exercise corporate powers is not a surrender thereof,[50] it is frequently provided that a failure to complete the road within a specified time shall work a forfeiture of the charter.[51] Though a railroad charter is a contract within the Federal constitution, its inviolability may be surrendered.[52]

defining "discovered peril" or in telling when it would arise. Nacogdoches, etc., R. Co. v. Beene [Tex. Civ. App.] 20 Tex. Ct. Rep. 249, 106 SW 456. Where instruction uses term "acting within the scope of his employment" in respect to ordinary brakeman, held not error to refuse to define same. Maysville, etc., R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016. Where undisputed evidence shows that fence maintained was not a lawful one, held not error for court not to instruct as to what constitutes a lawful fence. Till v. St. Louis, etc., R. Co., 124 Mo. App. 281, 101 SW 624.

43. Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945). Sowders v. St. Louis, etc., R. Co., 127 Mo. App. 119, 104 SW 1122. Evidence of boy that he saw cow enter over guard held to render presumption that animal entered right of way at point where killed inapplicable. Id. Where evidence shows that cow entered right of way over cattle guard admittedly insufficient, and there is no evidence of entry through a fence, failure to define a lawful fence is not error. Id.

44. See Corporations, 9 C. L. 733. To incorporate interurban railroad under St 1898, § 1863, it is not necessary that articles give termini or state towns through which it is to pass, but statement that purpose was to construct and operate street railways in named town and elsewhere in state, and to extend lines into or through any village or town, etc., held sufficient statement of business under § 1772. In re Milwaukee Light, Heat & Trac. Co. [Wis.] 112 NW 663.

45. Railroad company cannot, under Laws 1891, p. 184, be incorporated for purpose of building lines within city to connect with belt line adjoining such city. Gillette v. Aurora R. Co., 228 Ill. 261, 81 NE 1005.

46. Provision of Laws 1850, p. 211, c. 140, held satisfied by naming town or cities which are termini. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909.

47. Proof of granting of certificate of public necessity and convenience by commissioners and certificate itself establish compliance with all statutory requirements relating thereto. Erie, etc., R. Co. v. Brown, 57 Misc. 164, 107 NYS 983. Where proposed road, only 12 miles in length, would serve only a small locality and would probably not earn running expenses, finding of commissioners that it was necessary and convenient is erroneous. People v. Railroad Com'rs, 108 NYS 288.

48. Although railroad commissioners sign and date certificate of public convenience and necessity for road as required under Railroad Law, Laws 1890, c. 565, § 59, as amended, and give notice that they have determined to grant it, determination is not final so as to start period for suing out writ of certiorari where held as required until payment of tax required by statute. People v. Public Service Commission, 122 App. Div. 283, 106 NYS 968.

49. Where three directors and another give their demand note to trust company for 10 per cent of capital, one T delivering consents of property holders, maps, etc., as collateral, and at same time makers draw check for same amount to directors, who indorse to T, who in turn indorses to company in payment of note, it being understood that proceeds of note should be withdrawn only in payment thereof, held no cash payment of 10 per cent of capital as required by law. People v. Public Service. Commission, 122 App. Div. 283, 106 NYS 968.

50. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457.

51. Charter held not forfeited under Laws 1850, p. 211, c. 140, as amended, providing that corporate existence of railroad shall cease if it shall not within five years from filing of articles begin construction and expend 10 per cent of capital, or finish construction within ten years, where upwards of 10 per cent of capital was expended within five years, and time of completion has been extended. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909.

52. Under Const. 1875, art. 14, § 25, authorizing railroad companies holding inviolable charters to enjoy benefits of future legislation by "accepting" provisions of article making charter subject to amendment, no formal acceptance is necessary, and railroad accepting benefits of Code 1896,

Powers of corporations and authority of officers.[See 6 C. L. 1666]—Where a railroad by its charter is invested "with all the powers, rights, privileges and immunities granted to" another, the charter of the latter must be looked to in determining its powers.[53] Railroads incorporated under the general railroad incorporation act of Georgia must hold the regular election of officers annually, and a minority of stockholders in number and interest may elect on the day set,[54] but if no election is held, any stockholder may compel directors holding over to call a meeting for such purpose.[55]

§ 13. *Actions by and against railroad companies.*[See 6 C. L. 1666]—The venue of actions against railroad companies is usually regulated by statute,[56] as is the service of process.[57] In an action against a railroad for the negligence of a logging company using its tracks as a licensee, the latter is not a necessary party.[58]

§ 14. *Offenses relating to railroads.*[See 8 C. L. 1667]—In some states a corporation owning a railroad [59] and failing to equip its engines with proper warning devices is liable to a penalty, and a company running its train through a city at an unsafe speed without sufficient warning signals [60] may be guilty of a public nuisance.[61] The operation of trains on Sunday has been prohibited in some states,[62] but a train running on a bona fide, practical schedule does not violate the Georgia statute by completing its run on Sunday where unavoidably delayed,[63] the burden, however, resting upon the company to excuse the delay.[64] While the stealing of a ride is not a crime

§§ 1170, 1171, brings itself within such section. Louisville, etc., R. Co. v. State [Ala.] 45 S 296. Hence, though railroad was organized under charter granted before adoption of Const. 1875, art. 14, subjecting charters to amendment, thus exempting charter from amendment without its consent, company could enjoy benefits of Code 1896, §§ 1170, 1171, authorizing domestic railroads to contract for operation of their roads by foreign companies, by surrendering inviolable character of its charter as contemplated by §§ 3, 25 of art. 14 of Const. Id. And where stockholders held regular meetings for nearly 30 years after acceptance of benefits under Code 1896, §§ 1170, 1171, without objecting, sufficient acceptance of provisions by stockholders is shown. Id.

53. Southern R. Co. v. Howell [S. C.] 60 SE 677.

54, 55. Sylvania, etc., R. Co. v. Hoge, 129 Ga. 734, 59 SE 806.

56. See Venue and Place of Trial, 8 C. L. 2236. Where suit to foreclose a mortgage, brought against mortgaged railroad company and mechanic's lien claimants, is brought in county where railroad has franchises, and not in county where it has its principal place of business or where its land is situated, such court has exclusive jurisdiction of entire controversy, including right of lien claimants to enforce lien in county in which company has principal place of business. Prather Engineering Co. v. Genesee Circuit Judge, 149 Mich. 53, 14 Det. Leg. N. 374, 112 NW 502.

57. See Process, 10 C. L. 1262.

58. St. Louis, etc., R. Co. v. Chappell, 83 Ark. 94, 102 SW 893.

59. Corporation operating a railroad is corporation "owning" railroad within Kirby's Dig. § 6595, imposing penalty on corporation owning railroad for failing to equip locomotive with bells, whistles, etc. Chicago, etc., R. Co. v. State, 89 Ark. 409, 106 SW 199.

60. To find railroad company guilty of public nuisance in running trains through incorporated town at unsafe rate of speed without sufficient and necessary warning signals, evidence must show insufficient warnings as well as rapid speed. Cincinnati, etc., R. Co. v. Com., 31 Ky. L. R. 1113, 104 SW 771. Evidence held to require directed verdict for defendant. Id. Where evidence shows maintenance of watchman at crossing, it is proper as bearing on good faith, to show that he is maintained pursuant to requirement of commissioners, though they exceeded authority in making requirement. Id.

61. Indictment held to charge public nuisance. Cincinnati, etc., R. Co. v. Com., 31 Ky. L. R. 1113, 104 SW 771.

62. Legislature may prohibit running of trains on Sunday, and this has been done by Kirby's Dig. § 2030, making it unlawful to work on Sunday except to perform "customary household duties of daily necessity, comfort, or charity" (Barefield v. State [Ark.] 107 SW 393), and fact alone that certain labor is performed in connection with operation of train does not bring case within exception (Id.).

63. Pen. Code of 1895, § 420, subsec. 2, construed. Brand v. State [Ga. App.] 60 SE 339.

64. Brand v. State [Ga. App.] 60 SE 339. Good faith and honest endeavor to run on schedule time rather than exercise of ordinary care is test of criminal liability. Id. In determining what are unavoidable delays, belated train should not be considered as isolated train, but must be considered in relation to other trains, and as unit in complex whole. Id. Where delay was caused by other delayed trains, such other trains should be shown to have been unavoidably

in West Virginia,[65] it is made a misdemeanor in many states.[66] In Arkansas a railroad failing [67] to post the killing of stock is liable to a penalty. An indictment under the Iowa code for throwing rocks at a train need not name any person injured, or attempted to be injured,[68] or allege ownership of the train,[69] and, where a conspiracy is shown,[70] it need not be proven that defendant was the one who threw the stone.[71]

RAPE.

§ 1. Natue and Elements, 1440.
A. In General, 1440.
B. Female Under Age of Consent, 1441.
C. Attempts and Assaults With Intent to Commit Rape; and Forcible Detention, 1441.
§ 2. Indictment and Prosecution, 1442.
A. Indictment or Information, 1442.
B. Evidence, 1443.
1. Admissibility, 1443.
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C. Instructions, 1446.
D. Trial and Punishment, 1448. New Trial, 1448.

Matters applicable to crimes generally are elsewhere treated,[72] as are civil actions for damages.[73]

§ 1. *Nature and elements. A. In general.* See 8 C. L. 1667—Rape is unlawful carnal knowledge of a woman without her consent.[74] The essential elements are force,[75] actual, constructive or implied,[76] and the absence of consent by the female.[77] Pretermitting the question of consent, any unlawful force is sufficient [78] if reasonably adapted to the purpose to be accomplished,[79] but from the standpoint of the resistance required of the female, there must be force sufficient to overcome her utmost efforts.[80] Where the force used by the man is not actual but constructive, the true

delayed. Id. Not sufficient to show that schedule was capable of being carried out and usually was where it is admitted that there were frequent delays and no effort has been made to remedy evil. Id.

65. Held not to amount to malicous mischief under § 27, c. 145, Code 1906. Davis v. Chesapeake, etc., R. Co., 61 W. Va. 246, 56 SE 400.

66. Evidence that defendant was seen on top of box car and was arrested after jumping therefrom held sufficient to sustain conviction of riding on freight car without authority of conductor or permission of engineer, and with intention of being transported free. Gains v. State [Ala.] 43 S 137. In prosecution charging a person not an employe in discharge of his duties and without authority of the conductor or by permission of engineer with riding on top of freight car with intention of being transported free, burden of proving negative averments is not on state. Id.

67. Evidence that for more than month after killing plaintiff examined all sides of depot building for notice almost daily and failed to find same held sufficient to show failure to post. St. Louis, etc., R. Co. v. Ewing [Ark.] 107 SW 191.

68. State v. Leasman [Iowa] 114 NW 1032.

69. If necessary, allegation that train was on tracks of particular railroad is sufficient. State v. Leasman [Iowa] 114 NW 1032.

70. Where, immediately after rock struck train, accused and another were discovered near end of platform, one with rock in his hand as if in act of throwing and other standing near with his mouth to ear of one with stone, held sufficient evidence of conspiracy to warrant an argument on such theory. Lacy v. State [Ala.] 45 S 680.

71. Where there is evidence from which conspiracy to rock the train might be inferred, instruction basing conviction upon finding that defendant threw rock held properly refused. Lacy v. State [Ala.] 45 S 680.

72. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 10 C. L. 57.

73. See Assault and Battery, 9 C. L. 257.

74. Art. 633, Pen. Code 1895. Collins v. State [Tex. Cr. App.] 107 SW 852. Unlawful carnal knowledge of woman forcibly against her will. Section 2004, Burns' Ann. St. Supp. 1905. Rahke v. State, 168 Ind. 615, 81 NE 584. Section 4964, Rev. St. 1899. Ross v. State [Wyo.] 93 P 299.

75. Section 2004, Burns' Ann. St. Supp. 1905. Rahke v. State, 168 Ind. 615, 81 NE 584.

76. Rahke v. State, 168 Ind. 615, 81 NE 584.

77. Freeman v. State [Tex. Cr. App.] 107 SW 1127. Consent by the woman at any time during the assault condones it. Evidence insufficient to show consent. Lindville v. Green, 125 Mo. App. 289, 102 SW 67.

78. Force, as applicable to rape, is the same as that required in assault and battery. Collins v. State [Tex. Cr. App.] 107 SW 852.

79. Under art. 634, Pen. Code 1895, force insufficient where only act was catching hold of watch pinned to breast. Collins v. State [Tex. Cr. App.] 107 SW 852.

80. Must be sufficient to overcome all resistance female might make in absence of consent. Freeman v. State [Tex. Cr. App.] 107 SW 1127. Instruction that resistance must be bona fide and not mere pretense, that she need not resist with all violent means within her power or do more than her age, strength, and attendant circum-

inquiry is not the nature of the injury feared by the woman, nor the particular ground for the fear, but her actual mental condition as indicating her power to act voluntarily or give her consent.[81]

(§ 1) *B. Female under age of consent.* See 8 C. L. 1668—Carnal knowledge of females under a specified age is generally made rape by the statutes regardless of the consent of the female,[82] and regardless of the fact that the defendant believed the female to be over the age of consent,[83] the law conclusively presuming that a female under the statutory age is incapable of assenting.[84] Consent being immaterial in such cases, it follows that resistance by the female is unnecessary.[85]

(§ 1) *C. Attempts and assaults with intent to commit rape; and forcible detention.* See 8 C. L. 1888—To constitute an attempt to commit rape there must be an actual assault with intent to use whatever force is necessary to overcome resistance.[86]

The incapacity of a female under the age of consent to consent to sexual intercourse extends to and renders her incapable of assenting to an assault with intent to rape,[87] and the intent of defendant to use force [88] and physical resistance on her part are unnecessary.[89]

stances make reasonable, proper. Rahke v. State, 168 Ind. 615, 81 NE 584.

81. Instruction that defendant was not guilty if woman consented short of fear of death or great bodily harm, improper. State v. Grove, 61 W. Va. 697, 57 SE 296.

82. Robertson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 208, 102 SW 1130. Section 2004, Burns' Ann. St. Supp. 1905. Rahke v. State, 168 Ind. 615, 81 NE 584. Section 4964, Rev. St. 1899. Ross v. State [Wyo.] 93 P 299. Comp. Laws, § 11,489. People v. Chamblin, 149 Mich. 653, 14 Det. Leg. N. 528, 113 NW 27. Carnal knowledge of child under ten conclusively presumed rape, and of child under twelve and over ten presumptively so. Tuttle v. State, 83 Ark. 379, 104 SW 135. Carnal knowledge of female under age of consent unlawful and constitutes violent injury under Rev. St. 1897, § 4957. Ross v. State [Wyo.] 93 P 299.

83. Robertson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 208, 102 SW 1130. That prosecutrix stated that she was over age of consent, inadmissible. Renfroe v. State, 84 Ark. 16, 104 SW 542.

84. Baxter v. State [Neb.] 115 NW 534. Proper to charge that child under twelve cannot give legal consent under Act No. 115, p. 165, of 1896. State v. Mehojovich, 118 La. 1013, 43 S 660.

85. Instruction requiring resistance improper. Ross v. State [Wyo.] 93 P 299.

86. Insufficient: Mere solicitation. Woodson v. Com. [Va.] 59 SE 1097. Assault with intent to induce female to have sexual intercourse. Rahke v. State, 168 Ind. 615, 81 NE 584. Where after use of insufficient force defendant resorted to persuasions. Warren v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 254, 103 SW 888. Under Pen. Code 1895, art. 634, mere placing of hand on girl's leg where accused fled on discovery. Cotton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 912, 105 SW 185.

Sufficient: Where defendant struck prosecutrix and threw her to ground. Bowman v. Com., 31 Ky. L. R. 828, 104 SW 263. Assault with intent to have carnal knowledge forcibly, against her will, sufficient. Fields v. State, 2 Ga. App. 41, 58 SE 327.

87. Consent no bar to prosecution for assault with intent to rape. Ross v. State [Wyo.] 93 P 299. Comp. Laws, § 11,490. People v. Chamblin, 149 Mich. 653, 14 Det. Leg. N. 528, 113 NW 27. Under Rev. St. 1899, § 4964, punishing crime of rape, and §§ 4956-4958, punishing assault with intent to commit felony, assault with intent to rape is committed although female under age of consent consented. Ross v. State [Wyo.] 93 P 299.

Note: The rule is stated in Bishop on Statutory Crimes [3d Ed.] § 496 as follows: "While the common form of attempt to commit the ordinary rape is by assault with such intent, and on an indictment for rape there may be a conviction of assault if no technical rule prevents, in matter of principle and by the better judicial determination, there cannot be under the common-law rules an assault with intent to have the criminal carnal knowledge of a girl with her consent; because by the common-law rule violence consented to is not an assault, and the statute which makes her consent immaterial in defense of the carnal knowledge does not extend also to the assault." Of the American cases cited in the footnote as supporting that doctrine. Whitcher v. State, 2 Wash. 286, 26 P 268, has been overruled in State v. Hunter, 18 Wash. 670, 52 P 249; Hardin v. State, 39 Tex. Cr. Rep. 426, 46 SW 803, has been overruled in Croomes v. State, 40 Tex. Cr. Rep. 672, 51 SW 924, 53 SW 882; Stephens v. State, 107 Ind. 185, 8 NE 94, was overruled in Murphy v. State, 120 Ind. 115, 22 NE 106. This rule does not seem to have found much favor with the American courts, for so far as our research has enabled us to determine it is now followed by but two of those courts. Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; State v. Pickett, 11 Nev. 255, 21 Am. Dec. 754. The weight of authority is overwhelmingly the other way, and to the effect that such consent is unlawful and does not waive the assault. People v. McDonald, 9 Mich. 150, 152, 153; People v. Courier, 79 Mich. 366, 44 NW 571; Oliver v. State, 45 N. J. Law, 46; Commonwealth v. Roosnell, 143 Mass. 32, 8 NE 747; Territory v. Keyes, 5 Dak.

Forcible detention is a less offense than that of rape or attempt to commit rape.[90] It need not involve the use of any physical force such as either laying hold on, catching, or seizing, prosecutrix, or any covert act evincing a determination to carnally know the woman against her will, but is sufficient if she is detained against her will with the intent to have carnal knowledge of her or that she is caused to flee.[91]

§ 2. *Indictment and prosecution. A. Indictment or information.* See 6 C. L. 1669 The information should state the acts constituting the offense in ordinary and concise language and in such manner as to enable a person of common understanding to know what is intended.[92] Where the information is otherwise sufficient, words

244, 38 NW 440; State v. Dancy, 83 N. C. 608; Hays v. People, 1 Hill [N. Y.] 351; Brown v. State, 6 Baxt. [Tenn.] 422; Fizell v. State, 25 Wis. 364; People v. Lourintz, 114 Cal. 628, 46 P 613; People v. Vann, 129 Cal. 118, 61 P 776; State v. Wray, 109 Mo. 594, 19 SW 86; State v. Grossheim, 79 Iowa, 75, 44 NW 541; Polson v. State, 137 Ind. 519, 35 NE 907; Hanes v. State, 155 Ind. 112, 57 NE 704; Leibscher v. State, 69 Neb. 395, 95 NW 870; State v. Sargent, 32 Or. 110, 49 P 889; Farrell v. State, 54 N. J. Law, 416, 24 A 723; In re Lloyd, 51 Kan. 501, 33 P 307; Addison v. People, 193 Ill. 405, 62 NE 235; 2 Am. & Eng. Enc. Law [2d Ed.] 987, and page 361, vol. 1 of Supp., and cases cited in the footnotes. 1 McClain, Crim. Law, § 464. The difference in the holdings may, however, be accounted for in the fact that the cases in this country have turned upon the construction of the statutory definition of assault rather than upon the common-law definition of that offense. In construing a statute which contains new and different elements, the courts are not bound by that construction which obtained with reference to the common-law offense. The statutory changes were evidently meant to remedy some imperfections which were recognized to exist. The statute, by apt words, created and defined a new crime which is a substitute for the common-law offense, and the rules appertaining to the latter, except in so far as they are applicable, have to yield to the statutory rules of construction. In Croomes v. State, 40 Tex. Cr. Rep. 672, 51 SW 924, there was a conviction for an assault with intent to commit rape on the person of a female under 15 years of age, that being the statutory age of consent in that jurisdiction. The court say: "The Code provides that any unlawful violence upon the person of another, whatever be the manner or degree of violence, is an assault. There is no statute or construction of a statute on the question of assault saying that the consent of the injured party prevents the act from being an assault. If the act is unlawful, it is an assault. The mere fact that the party injured consents to it does not prevent it from being an assault."

It will be observed that the information charges the defendant with having perpetrated an assault with the felonious intent to "ravish and carnally know." The word "ravish" presupposes force, and was indispensable in the common-law indictment for rape, but does not occur in the definition of that crime given in our statute, and for that reason its use is not necessary in describing the offense. Tway v. State, 7 Wyo. 74, 50 P 188. There must be resistance and force used in overcoming such resistance in rape, where the female is over the age of consent, either under the common law or under the statute; and carnal knowledge of a female under the statutory age of consent, and also at the common law when such female is under the age of 10 years, is conclusively presumed to have been accompanied with force and against consent, and in an indictment or information therefor under and following the words of the statute, the word "ravish" is unnecessary and may be treated as surplusage. Bish. St. Cr. [3d Ed.] § 486. We are not, however, dealing with the completed offense of rape. The charge is of an assault with intent to commit a felony, and if the intent was to carnally know a female under the statutory age of consent, then such intent was felonious regardless of whether the accused contemplated resistance on her part or not. The word "ravish" as used in the information did not impose any greater burden upon the state than proving the elements of the offense as defined by the statute, and which are charged in the information, and it may therefore be treated as surplusage.—From Ross v. State [Wyo.] 93 P 299.

88. Where defendant accompanied child of eleven into water closet, placed his hand under her dress, held sufficient. Tuttle v. State, 83 Ark. 379, 104 SW 135.

89. Ross v. State [Wyo.] 93 P 299.

90. Section 1158, Ky. St. 1903. Copenhaver v. Com., 31 Ky. L. R. 1161, 104 SW 750.

91. Sufficient where defendant aroused her suspicion, caused her to withdraw into house, approached within three feet of her and caused her to flee house, and pursued her. Copenhaver v. Com., 31 Ky. L. R. 1161, 104 SW 750. Necessary to prove commission of acts indicating intent or desire to have sexual intercourse as cause of detention. Bowman v. Com., 31 Ky. L. R. 828, 104 SW 263. Sufficient where defendant called prosecutrix to halt, caught up with her, placed hand over her mouth and dragged her into alley. Norman v. Com., 31 Ky. L. R. 1283, 104 SW 1024. Sufficient where defendant called at prosecutrix's house, forced entrance, followed her, retreated on approach of sisters, and was caught while later attempting entrance. Gilson v. Com., 31 Ky. L. R. 945, 104 SW 351.

92. Sufficient: Under Pen. Code, § 220, charging that defendant unlawfully assaulted female with intent to ravish. People v. Collins, 5 Cal. App. 654, 91 P 158. Count charging assault with intent to commit rape, and count charging attempt to commit rape, held both to sufficiently charge assault with intent to rape. People v.

charging force may be disregarded as surplusage in an indictment for statutory rape.[93] An information charging a conspiracy to commit rape, and also the commission of such offense in pursuance thereof, is good,[94] and if the charge of conspiracy is unnecessary it may be eliminated as surplusage where what remains is sufficient to charge rape.[95] Slight errors in chirography may be disregarded.[96] The statutory intent must be charged.[97]

(§ 2) *B. Evidence.* 1. *Admissibility.* See 8 C. L. 1671—Evidence is admissible to show the physical condition of prosecutrix [98] and declarations of defendant before the alleged crime showing intent.[99] Acts and declarations of the family of prosecutrix are not admissible.[1] The appearance, condition, and demeanor of prosecutrix immediately after the assault are admissible as part of the res gestae.[2] Her reputation for virtue prior to the offense is always competent as bearing on the reasonableness of her story, the probability of consent,[3] and defendant's intent,[4] as is also defendant's reputation as to virtue and morality if he puts it in issue.[5] As affecting her credibility, prosecutrix's character both before and after the offense may be attacked,[6] but not by proof of specific acts of immorality.[7] Since prompt complaint is

Horchler, 231 Ill. 566, 83 NE 428. Information that accused attempted to commit violent injury upon female under age of consent, with ability and intent to rape, coupled with averment of felonious intent, sufficient under Rev. St. 1899, § 4957. Ross v. State [Wyo.] 93 P 299. Indictment charging that defendant did unlawfully make an assault with intent to rape prosecutrix by attempting to have carnal knowledge of said prosecutrix not insufficient in failing to charge assault on particular person. Myers v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 309, 103 SW 859.

93. Baxter v. State [Neb.] 115 NW 534. Conviction may be had under information charging rape with force committed with consent of child. Id. Word "ravish," in information for assault of child under age of consent, may be rejected as surplusage. Ross v. State [Wyo.] 93 P 299.

94. Conspiracy may be involved and included, not as substantive offense for which punishment is sought, but as ground or means by which some of parties charged may be convicted. State v. Grove, 61 W. Va. 697, 57 SE 296.

95. State v. Grove, 61 W. Va. 697, 57 SE 296.

96. Fact that indictment charged Dove Smith with committing offense, and that copy reading Dave Smith was served on Dave Smith, no ground for quashing indictment where the "a" though not plain could be read as "a". Smith v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 845, 106 SW 1161.

97. The word feloniously sufficiently charges criminal intent. Feloniously means done with a mind bent on doing that which is wrong, or with a guilty mind. State v. Connors [Mont.] 94 P 199. Charge that defendant assaulted with intent to have sexual intercourse willfully, feloniously, violently, and unlawfully, alleges intent to accomplish act by force. State v. Neil, 13 Idaho, 539, 90 P 860.

98. Testimony of attorney present when doctor examined private parts of prosecutrix as to their appearance. State v. Symens [Iowa] 115 NW 870. Testimony of physician as to pregnancy where no confidential relation exists. State v. Winnett [Wash.] 92 P 904. That prosecutrix's husband learned after marriage she was not virgin as reason for his questioning her. Smith v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 845, 106 SW 1161.

That prosecutrix had a venereal disease when rape is alleged to have occurred where it appears that she had disease shortly after and defendant never had it though it was contagious. People v. Fong Chung, 5 Cal. App. 587, 91 P 105.

99. Statement by defendant of intent to commit crime if opportunity presented. State v. Winnett [Wash.] 92 P 904.

1. Statements and complaints made by a member of prosecutrix's family to third persons as to commission of offense. State v. Fowler, 13 Idaho, 317, 89 P 757. That mother went to defendant's house with pistol crying and intending to kill him. Adams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 953, 105 SW 197.

2. State v. Neil, 13 Idaho, 539, 90 P 860. Conduct, statements, and exhibitions of feelings occurring months after offense and defendant's arrest inadmissible. Cowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 202, 102 SW 1128.

3. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003; People v. Ryno, 148 Mich. 137, 14 Det. Leg. N. 69, 111 NW 740; Freeman v. State [Tex. Cr. App.] 107 SW 1127.

4. Error to instruct that testimony of previous intercourse between parties and prosecutrix's reputation for virtue was admitted, not in justification, but on issues of credibility of witness, and as to whether it was necessary that she should be forced to the embraces of defendant. Freeman v. State [Tex. Cr. App.] 107 SW 1127.

5. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003.

6. **Admissible:** Evidence as to morality subsequent to offense where pregnant prosecutrix testified that she had not had intercourse since. State v. Blackburn [Iowa] 114 NW 531. That prosecutrix was threatened with prosecution for vagrancy unless she signed complaint to bring out motive and affect credibility. Under Code Civ. Proc.

an important test of the sincerity of the woman,[8] the state may show by the prosecutrix and other witnesses that she made complaint soon after the commission of the alleged act and show when, where, to whom, and under what circumstances she did so, and her appearance, demeanor, and physical condition at the time;[9] but the details of the conversation had and the name of the person accused by her may not be given by the witness.[10] However, though the particulars of the complaint are not admissible, enough may be given to show the nature of the complaint even though it involves to some extent the particulars thereof.[11] The detailed account as given by the prosecutrix to a third party is only admissible in cases where the defendant has attempted to impeach her, on the theory that it corroborates her,[12] or where defendant previously called out same facts.[13] While the general rule is that evidence of complaint is inadmissible as hearsay unless the prosecuting witness testifies,[14] the rule does not apply where the prosecuting witness is a child of too tender age to testify.[15] But in North Dakota, if the statement was made immediately following the commission of the crime, the particulars of the complaint may be proved as part of the state's case in chief the same as any facts which are a part of the res gestae.[16] Complaints by prosecutrix as to previous familiarities by defendant have been held admissible to disprove encouragement by her.[17] Since previous chastity [18] and consent are immaterial when the child is under the age of consent, the ordinary rules of evidence as to outcry, pursuit of offender, and complaint, as facts going to show consent, and previous reputation for chastity, are usually inapplicable,[19] though such evidence has been held admissible under peculiar circumstances.[20] Whether or not the appearance of the defendant should go to the jury as evidence of his age is in the dis-

§ 1847. People v. Mitchell, 5 Cal. App. 45, 89 P 853. Intercourse of child under age of consent with other Chinamen prior to alleged offense to repel inference that defendant conveyed disease to her and to show mistake of identity. People v. Fong Chung, 5 Cal. App. 587, 91 P 105.

7. Evidence of prosecutrix's alleged illicit intercourse with other young men not at time when child might have been conceived. State v. Blackburn [Iowa] 114 NW 531. Specific acts of adultery with others and evidence that on one occasion she exhibited to a male companion photograph of herself nude. State v. Arnold [N. C.] 60 SE 504.

8. Commonwealth v. Mtynarczyk, 34 Pa. Super. Ct. 256.

9. State v. Fowler, 13 Idaho, 317, 89 P 757.

Admissible: Complaint by child of eight to mother of pain in private parts and her physical condition. Adams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 953, 105 SW 197. That prosecutrix complained to mother that accused had sexual intercourse with her against her will. State v. Symens [Iowa] 115 NW 878. Complaint made few minutes after assault while still sobbing and trembling from effects. Younger v. State [Neb.] 114 NW 170. Complaint given less than half hour afterwards. State v. Neil, 13 Idaho, 539, 90 P 860. Complaint by five year old prosecutrix where offense was committed in latter part of January, shortly before and after February fifth. People v. Blanchino, 5 Cal. App. 633, 91 P 112.

Inadmissible: Complaint by child of eleven six weeks after leaving home after assault. People v. Gonzalez [Cal. App.] 91 P 1013.

10. State v. Fowler, 13 Idaho, 317, 89 P 757.

11. Statement by mother that daughter complained that defendant had sexual intercourse by force, against her will, admissible. State v. Symens [Iowa] 115 NW 878.

12. State v. Fowler, 13 Idaho, 317, 89 P 757; Cowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 202, 102 SW 1128. Where cross-examination of eight year old prosecutrix elicited facts tending to impeach and discredit. State v. Werner [N. D.] 112 NW 60.

13. Younger v. State [Neb.] 114 NW 170. Where cross-examination by defense has elicited part of them. State v. Werner [N. D.] 112 NW 60.

14. People v. Bianchino, 5 Cal. App. 633, 91 P 112.

15. Proper to allow evidence without testimony prosecutrix, five years old. People v. Bianchino, 5 Cal. App. 633, 91 P 112.

16. State v. Werner [N. D.] 112 NW 60.

17. Brown v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 555, 106 SW 368.

18. Renfroe v. State, 84 Ark. 16, 104 SW 542. Fact that others had intercourse with female under age of consent inadmissible. State v. Blackburn [Iowa] 114 NW 531. Refusal to give instruction as to previous chastity of prosecutrix under fifteen, proper. Harris v. State [Neb.] 114 NW 168. That penetration did not bruise or lacerate, that it was not painful, and in opinion of physician showed previous intercourse. State v. Bricker [Iowa] 112 NW 645.

19. State v. Nehojovich, 118 La. 1013, 43 S 660.

20. That child made no outcry and only authorities were permitted to see her after arrest. People v. Fong Chung, 5 Cal. App. 587, 91 P 105.

cretion of the trial judge, which should be exercised with due caution,[2] and when the appearance of the defendant is relied upon to sustain a material ingredient of the offense charged, as age, the defendant should be identified and his appearance, if relied on, put in evidence in the regular manner of offering other evidence.[22] Defendant is entitled to testify directly as to his intent.[23]

(§ 2B) *2. Weight and sufficiency.*[See 8 C. L. 1673]—Each of the essential elements, as the age of the defendant, where material,[24] penetration,[25] nonconsent,[26] force,[27] and previous chastity,[28] must be proved by the evidence.[29] And in presecution for assault with intent to commit rape, every fact necessary to constitute rape except penetration must be proved,[30] and in such case the evidence of the specific intent is particularly essential.[31] While the female assaulted is not an accomplice within the statute requiring corroboration of the testimony of accomplices,[32] the statute frequently requires that the prosecutrix be corroborated by such other evidence as tends to convict the defendant of the commission of the offense.[33] The corroboration need not be by direct evidence, but is sufficient if the facts and circumstances support her testimony and a reasonable inference of guilt.[34] In Georgia and

21. Where no evidence introduced as to defendant's age, and jury were instructed to judge age from appearance. Commonwealth v. Walker, 33 Pa. Super. Ct. 167.

22. Error to submit age of defendant to jury on his appearance without identification or calling jury's attention to his appearance as part of case. Commonwealth v. Walker, 33 Pa. Super. Ct. 167.

23. State v. Neil, 13 Idaho, 539, 90 P 860.

24. Under P. L. 128, Act of May 19, 1887, failure to prove age of defendant fatal. Commonwealth v. Walker, 33 Pa. Super. Ct. 167.

25. Sufficient where prosecutrix shown to have venereal disease and defendant shown to have been treated for such disease before consummation. Freeney v. State [Tex. Cr. App.] 102 SW 113.

26. Payment of money to prosecutrix after act insufficient to show consent. State v. Fowler, 13 Idaho, 317, 89 P 757. Sufficient to show consent where prosecutrix was raped three times on successive days while doing defendant's housework. Cowles v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 202, 102 SW 1128.

27. State v. Fowler, 13 Idaho, 317, 89 P 757.

28. Evidence of statement to prosecuting attorney in order to induce him to prefer charges against another that prosecutrix had had sexual intercourse with others, that she had been found in compromising position with man in locked room, that she had offered to testify that another than defendant had committed crime for consideration, tend to throw grave doubt on chastity. Burt v. State [Neb.] 112 NW 573.

29. Evidence sufficient. People v. Gonzales [Cal. App.] 91 P 1013; Johnson v. State, 128 Ga. 102, 57 SE 353; State v. Mehojovich, 118 La. 1013, 43 S 660. Where defendant spent night with deaf and dumb girl of seventeen under average intelligence. State v. Smith, 203 Mo. 695, 102 SW 526.

30. Must prove assault with intent to use such force as might be necessary to have carnal knowledge against her will and consent. State v. Neil, 13 Idaho, 539, 90 P 860.

Evidence sufficient. People v. Bowman [Cal. App.] 93 P 198; Linville v. Green, 125 Mo. App. 289, 102 SW 67; Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879. Where defendant found before four year old child in compromising position. Ross v. State [Wyo.] 93 P 299. Mere request to accompany to dressing room and catching watch pinned to prosecutrix's breast. Collins v. State [Tex. Cr. App.] 107 SW 852.

31. Rahke v. State, 168 Ind. 615, 81 NE 584. Acts, conduct, and manner of accused and prosecutrix, language used, time, place and circumstances, admissible. Bowman v. Com., 31 Ky. L. R. 828, 104 SW 263; Gibson v. Com., 31 Ky. L. R. 945, 104 SW 351.

Evidence sufficient. People v. Collins, 5 Cal. App. 654, 91 P 158; State v. Neil, 30 Idaho, 539, 90 P 860. Where gun was thrust in face of sleeping husband and wife and wife's person laid hold upon. People v. Bowman [Cal. App.] 93 P 198.

Insufficient: Mere placing of hand on calf of sleeping girl. Cotton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 912, 105 SW 185.

32. Fields v. State, 2 Ga. App. 41, 58 SE 327.

33. Under Laws 1907, p. 396, c. 170, that accused advised wife to induce prosecutrix to leave state and admissions of liberties with her person, though not referring to particular act charged, tended to convict of offense charged. State v. Jonas [Wash.] 92 P 899. Where child born 299 days after gestation, evidence of physicians that period could not be 299 days admissible to discredit. State v. Blackburn [Iowa] 114 NW 531.

34. Instruction that there must be evidence corroborating, erroneous. Younger v. State [Neb.] 114 NW 170.

Sufficient: Notwithstanding impeachment of prosecutrix by her own conduct where other circumstances tend to corroborate her. State v. Katon [Wash.] 91 P 250. What defendant said as to how to prevent conception. Smith v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 845, 106 SW 1161. Where witness wrote prosecutrix to meet defendant and herself and endeavored to persuade prosecutrix to leave city. State v. Katon [Wash.] 91 P 250. Where accused charged by prosecutrix in presence of others was silent, procured medicines to procure abortion, offered property to get settlement, showing that he

Mississippi the testimony of the prosecutrix alone is sufficient to authorize conviction for assault with intent to rape [35] unless there are numerous and serious contradictions therein,[36] but the rule is otherwise in the case of rape.[37] Whether there is any corroborating evidence is a question for the court,[38] but the weight and sufficiency of corroborating evidence is solely for the jury under ordinary circumstances.[39] The uncorroborated confession of the defendant is insufficient to establish the corpus delicti,[40] but where there are circumstances corroborating the confession, the corpus delicti may be thus established.[41] Concealment for any considerable time after an opportunity to complain justifies a strong, but not necessarily conclusive, inference against the truthfulness of prosecutrix's testimony, particularly so far as it relates to the grade of the crime.[42] Where direct evidence is amply available, indirect evidence of nonmarriage of prosecutrix and defendant is insufficient.[43] The burden of showing nonconsent is on the prosecution where female is under no legal disability to give consent.[44]

(§ 2) *C. Instructions.* See 8 C. L. 1674—The charge must embrace the law applicable to every phase of the case made by the evidence and every legitimate deduction to be drawn therefrom,[45] and a charge which as a whole guards against the

alone had opportunity for intercourse. Harris v. State [Neb.] 114 NW 168. Where witnesses testified to disheveiled and bloody condition shortly after assault, to seeing defendant in vicinity, and defendant was found dressed in clothes described by prosecutrix and others. Younger v. State [Neb.] 114 NW 170. Where accused was seen with prosecutrix at late hour of night, after which they entered darkened room. State v. McCausland [Iowa] 113 NW 852. Where prosecutrix had venereal disease short time after abuse by defendant. Lam Yee v. State [Wis.] 112 NW 425. Where defendant assisted in procuring abortion. Linville v. Green, 125 Mo. App. 289, 102 SW 67. Complaint and description of assailant. People v. Bianchino, 5 Cal. App. 633, 91 P 112; Younger v. State [Neb.] 114 NW 170; State v. Werner [N. D.] 112 NW 60.

Insufficient: Testimony of physician that prosecutrix had extended intercourse with someone. State v. Jonas [Wash.] 92 P 899. Fact that child was born prosecutrix. State v. Blackburn [Iowa]. 114 NW 531. Where defendant had objected to reputation as cause of prosecutrix's condition by saying "The first time was too long ago and the second time it would be impossible," and that prosecutrix told prosecuting attorney in connection with another case that she had had sexual intercourse with others. Burk v. State [Neb.] 112 NW 573.

35. Under Pen. Code, § 991, proper to refuse instruction that accused could not be convicted on testimony of witness alone, unless there were other corroboratory circumstances. Fields v. State, 2 Ga. App. 41, 58 SE 327; Parker v. State [Ga. App.] 59 SE 823.

36. Allen v. State [Miss.] 45 S 833.

37. In Georgia the Davis Case, 120 Ga. 435, 48 SE 180, requiring corroboration of prosecutrix, applies only to rape, and not assault with intent to rape. Scott v. State [Ga. App.] 60 SE 112.

38. Not error to refuse to instruct jury that there was no corroborating evidence. State v. Bricker [Iowa] 112 NW 645.

39. State v. Bricker [Iowa] 112 NW 645.

40. Austin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 493, 101 SW 1162.

41. Sufficient where defendant's confession corroborated by proof that he and prosecutrix slept together as man and wife, and prosecutrix was pregnant. Austin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 493, 101 SW 1162.

42. For jury where offense was committed in morning and no complaint made until evening to husband on return from work. Commonwealth v. Mtynarczyk, 34 Pa. Super. Ct. 256. Three months' delay accompanied by such conduct as showed that prosecution was held in abeyance until certain demands relative to land transaction were complied with. Id. Not conclusive where plaintiff of nineteen threatened with death if crime disclosed. Linville v. Green, 125 Mo. App. 289, 102 SW 67. Where prosecutrix made no outcry for fear father would whip her. Smith v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 845, 106 SW 1161.

43. Case of child eleven years old. People v. Gonzalez [Cal. App.] 91 P 1013.

44. Error to emphasize by instruction failure of defense to give evidence of consent. State v. Fowler, 13 Idaho, 317, 89 P 757.

45. Where jury might find assault made to recover ring from prosecutrix, error to fail to instruct to acquit defendant if jury so found. Freeman v. State [Tex. Cr. App.] 107 SW 1127. Instruction that if prosecutrix was under age of consent and not wife of defendant, and that if such intercourse took place any time within five years of filing this information defendant was guilty, not erroneous as allowing conviction for act occurring after date of alleged offense and before filing information, though prosecutrix might have become of age of consent within that time, and act might have taken place after becoming of such age and before filing information, or for any act occurring within five years, since words "such intercourse" are presumed to refer to offense charged; and where appeal is taken from judgment and evidence not brought up, evidence will

possibility of conviction of any crime barred by the statute of limitations is sufficient.[46] The instructions should be based upon the evidence.[47] The instructions should not single out, emphasize, or give undue prominence to particular parts of the evidence.[48] An instruction which assumes to state all the essential elements of an offense and omits one or more of them is erroneous,[49] and this omission is not corrected by an ample statement as to the omitted elements in another instruction where the two instructions when considered together are misleading.[50] But an instruction collating matters the jury might consider as bearing on corroboration is not necessarily defective.[51] Where the court fairly submitted the question of consent[52] and the necessity of corroboration, it may refuse requested instructions thereon;[53] nor is it necessary to instruct conversely on these points.[54] The court need not instruct as to the meaning of corroboration.[55] A charge that defendant might be found guilty of lesser offense if jury failed to find him guilty of rape is not erroneous as tending to impress jury that they should convict if possible.[56] Failure of the court to charge the jury that they may convict of the lesser offense may be error.[57]

be presumed to relate only to one offense. State v. Connors [Mont.] 94 P 199.

46. Fact that charge did not expressly state that crime must be found to have been committed within eighteen months preceding return of indictment harmless where indictment returned October 1906 and charge expressly instructed that offense must have been performed on or about June 3, 1906. State v. McCausland [Iowa] 113 NW 852.

47. Where, on trial for rape alleged to have been committed on certain date, state's evidence showed but one act of intercourse and testimony did not disclose finding another indictment charging offense on the next day, court did not err in charging jury to find defendant guilty if they believed offense to have been committed at any time within one year before presentment of indictment. Robertson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 208, 102 SW 1130. Where case was tried as assault with intent to rape and defendant was convicted thereof, instructions inapplicable to case telling jury what constituted attempt to commit a crime in absence of statute punishing such attempt, etc., not erroneous. People v. Horchler, 231 Ill. 566, 83 NE 428.

48. Proper to refuse instruction that if jury find existence of venereal disease in defendant material existence thereof must be proved to convict. State v. Mehojovich, 118 La. 1013, 43 S 660. Error to call attention of jury that no witness had testified to prosecutrix's consent. State v. Fowler, 13 Idaho, 317, 89 P 757. Error to instruct verdict if jury believed defendant pulled witness to ground, pushed her over and had intercourse with her, she resisting, etc., where acts mentioned were but few of those given in testimony. State v. Grove, 61 W. Va. 697, 57 SE 296.

49. Instruction omitting element of intent to use force necessary to overcome woman's will, erroneous. Rahke v. State, 168 Ind. 615, 81 NE 584. Instruction that attempt to carnally know female under age of consent whether with or without consent is attempt to do violent injury to her charges but one element of assault charged in information charging attempt to commit violent injury on female under age of consent with intent to know her, and is not objectionable as defining attempt to commit felony or offense unknown to law. Ross v. State [Wyo.] 93 P 299.

50. Where element of force was omitted. Rahke v. State, 168 Ind. 615, 81 NE 584.

51. State v. McCausland [Iowa] 113 NW 852.

52. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003. Instruction that if jury found defendant did not commit rape because prosecutrix consented, or if they believed such consent was not given until after assault with intent to commit rape defendant would be guilty, proper. State v. Symens [Iowa] 115 NW 878. Instruction as to consent properly refused when female is under age of consent. State v. Mehojovich, 118 La. 1013, 43 S 660.

53. Harris v. State [Neb.] 114 NW 168.

54. Lake v. Com., 31 Ky. L. R. 1232, 104 SW 1003

55. Corroboration word in ordinary use and generally understood. Austin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 493, 101 SW 1162.

56. State v. McCausland [Iowa] 113 NW 852.

57. Error where evidence shows that jury might more reasonably have convicted of lesser offense. State v. Blackburn [Iowa] 114 NW 531. An instruction that accused must entertain specific intent to rape, and that if he did not case should be tried on question of aggravated assault, properly submitted to jury question whether accused had some other intent. Washington v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 301, 103 SW 879.

Proper: Where assault might have been to recover ring or to secure consent. Freeman v. State [Tex. Cr. App.] 107 SW 1127. Where evidence if insufficient to support conviction for rape will support conviction on assault. State v. Arnold [N. C.] 60 SE 504. Failure to charge as to included offenses reversible error. People v. Ryno, 148 Mich. 137, 14 Det. Leg. N. 69, 111 NW 740. Where prosecutrix testified that she awoke to find hand on foot and man's head and

(§ 2) *D. Trial and punishment.*See 8 C. L. 1676—On a trial for rape, it is not error to permit the prosecuting attorney to state in opening the case that the knowledge of the prosecutrix, seventeen years of age, was limited and that she compared in information with a child between ten and eleven,[58] or to allow as interpreter the superintendent of the deaf and dumb asylum where prosecutrix was a pupil.[59] Considerable latitude should be allowed the defense in its cross-examination of the prosecutrix going to affect her credibility.[60] Though not the general rule, the courts sometimes review the punishment inflicted.[61]

New trial.—Where the fact of pregnancy was used by the state as a corroborative circumstance, and the lapse of time and nondelivery of the child has destroyed and dissipated its effect as a circumstance against defendant, such fact may be treated as newly discovered evidence warranting new trial.[62]

RATIFICATION, see latest topical index.

REAL ACTIONS.[63]

This topic includes only the most general rules, matters relating to particular real actions being treated under appropriate titles.[64]

Where the general issue is pleaded, plaintiff must show the title on which he relies,[65] and, being entitled to recover only on the strength of his own title, cannot recover because such plea does not enable defendant to show any title in himself.[66]

REAL COVENANTS; REAL ESTATE BROKERS, see latest topical index.

REAL PROPERTY.

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shoulders under mosquito bar over bed. Ballentine v. State [Tex. Cr. App.] 107 SW 546.

Improper: On mere testimony that prosecutrix said some one attempted to assault her. Canida v. State [Ga.] 60 SE 104. Where evidence showed higher offense or none. Holman v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 850, 106 SW 1165. Where no evidence of lesser offense. Ross v. State [Wyo.] 93 P 299. Where defendant in instruction as to first count of indictment charging rape ignored second count charging fornication and bastardy, and court also ignored second count, defendant having failed to include instruction thereon cannot assign court's failure as error. Commonwealth v. Walker, 33 Pa. Super. Ct. 167. Propriety of omitting held sustained by evidence. Canida v. State [Ga.] 60 SE 104.

58, 59. State v. Smith, 203 Mo. 695, 102 SW 526.

60. People v. Mitchell, 5 Cal. App. 45, 89 P 853.

61. Where prosecutrix was woman of ninety pounds and defendant went to house where she resided and remained until purpose was accomplished, a physician testifying that examination showed use of unusual force, death penalty not excessive. Brown v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 555, 106 SW 368. Where defendant plead guilty of assault with intent to rape and evidence shows mother bartered away virtue of child, and defendant had no connection with child, twenty years' imprisonment excessive, and ten years sufficient. State v. Young [Iowa] 113 NW 325. Ten years held excessive under circumstances for assault with intent to commit rape on prosecutrix twenty-eight years old, and reduced to two years. State v. Nell, 13 Idaho, 539, 90 P 860.

62. Where defendant was convicted of rape on testimony showing that he had slept with prosecutrix as husband, married her a month later, and that at time of trial, ten months and four days after offense, she was expecting momentarily to be confined, motion two weeks after conviction for new trial on ground that she had not yet been delivered of child should be granted. Austin v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 493, 101 SW 1162.

63. See 6 C. L. 1247.

64. See Ejectment, 9 C. L. 1026; Forcible Entry and Unlawful Detainer, 9 C. L. 1371; Trespass, 8 C. L. 2147, and the like.

65, 66. Brown v. Webber [Me.] 68 A 456.

C. Restraints, 1460.
§ 5. Rents and Charges, 1460.
§ 6. Mutual and Relative Rights and Remedies of Present and Future Tenants, 1460. Possession Is Not Adverse to Remaindermen, 1462. Improvements, Taxes, Incumbrances, Etc., 1463.
§ 7. Rights and Remedies Between Third Persons and Present and Future Tenants 1463.
§ 8. Proof of Title to Realty, 1464.
§ 9. Merger and Abandonment, 1464.

The scope of this topic is noted below.[67]

§ 1. *Definitions and nature of real property.*[See 8 C. L. 1877]—Real property is land and generally whatever is growing upon or affixed thereto.[68] A mere right to plant and take oysters is not "real estate" within the meaning of a statute authorizing the quieting of title.[69]

§ 2. *Present and future estates. A. In general.*[See 8 C. L. 1877]—What kinds of estates are created by the use of particular words in grants or devises is shown in a subsequent section.[70]

(§ 2) *B. Freeholds.*—A perpetual easement is a freehold.[71] The assignability of a freehold estate results from the nature of the estate and is not dependent upon independent permission from the grantor.[72]

(§ 2) *C. Estates in fee.*—Essential to a fee simple is the quality that it passes to the owner's heirs generally upon his death.[73] An estate in fee may be conveyed to commence in futuro without the creation of any intermediate estate.[74]

Entails.[See 8 C. L. 1678]—The word "body" or other words of procreation are necessary to the creation of an estate tail.[75] An estate to the grantee and his children not in esse creates an estate tail at common law and a fee conditional in South Carolina.[76]

Base or determinable fees.[77]—These are estates in fee which, though limited to heirs general, are subject to divestiture on the happening of some future contingent

67. This topic treats of the nature of real property, and the general rules applicable to the different estates therein except estates for years (see Landlord and Tenant, 10 C. L. 571). Buildings and Building Restrictions (9 C. L. 441); Homesteads (9 C. L. 1629); Trusts (8 C. L. 2169); Estates of Decedents (9 C. L. 1154); Descent and Distribution (9 C. L. 970); Dower (9 C. L. 1012); Curtesy (9 C. L. 857); Easements (9 C. L. 1017); Tenants in Common and Joint Tenants (8 C. L. 2114); Adjoining Owners (9 C. L. 28), and principles peculiar to specific kinds of realty (see Emblements and Natural Products, 9 C. L. 1072; Forestry and Timber, 9 C. L. 1408; Fixtures, 9 C. L. 1367; Mines and Minerals, 10 C. L. 839), or applicable to all kinds of property (see Property, 10 C. L. 1280), and estates in personal property (see Property, 10 C. L. 1280), are elsewhere discussed, as are also Perpetuities and Accumulations (see 10 C. L. 1167), conveyances (see Deeds of Conveyance, 9 C. L. 943; Vendors and Purchasers, 8 C. L. 2216; Powers, 10 C. L. 1258), liens on (see Mortgages, 10 C. L. 855; Mechanics' Liens, 10 C. L. 814), and actions affecting real property (see Trespass, 8 C. L. 2147; Ejectment, 9 C. L. 1026; Quieting Title, 10 C. L. 1347; Foreclosure of Mortgages on Land, 9 C. L. 1378; Judicial Sales, 10 C. L. 507). While proof of title is here included (post, § 8), matters relating to the public domain (see Public Lands, 10 C. L. 1296; Territories and Federal Possessions, 8 C. L. 2121), and notice and record of title (see Notice and Record of Title, 10 C. L. 1015), pertain to other topics.

68. State v. Wolf [Del.] 66 A 739.

69. Catchot v. Zeigler [Miss.] 45 S 707.

70. See post, § 3.

71. Funston v. Hoffman, 232 Ill. 360, 83 NE 917.

72. Interest of purchaser of school lands before acquisition of complete title is not a freehold. Bourn v. Robinson [Tex. Civ. App.] 107 SW 873.

73. And not to any particular heir or class of heirs, as is the case with interest of purchaser of school lands before he acquires title. Bourn v. Robinson [Tex. Civ. App.] 107 SW 873.

74. White v. Willard, 232 Ill. 464, 83 NE 954.

75. Such estate held not created by devise to grandsons with provision that should either die without children property should descend to survivor and his descendants. Simpson v. Adams [Ky.] 106 SW 819. Though the precise words, "heirs of the body," are not essential to the creation of an estate tail, the heirs must be limited to be procreated by, or begotten on, some body certain, either by express words or necessary implication. Conveyance to A and heirs of grantor and heirs of grantee, though grantor and grantee be husband and wife, creates no estate tail which by statute becomes a fee simple. Ackerman v. Ackerman, 34 Pa. Super. Ct. 162.

76. Deed from grantee and her grantor carried clear title. Dillard v. Yarboro, 77 S. C. 227, 57 SE 841. Held to create estate tail. Hayes v. Martz [Ind. App.] 84 NE 546.

77. See, also post, § 3.

event.[78] Unlike a life estate, a base fee may last forever and terminates only if the contingency happens.[79] A conveyance of standing timber creates a fee therein determinable on failure to remove within a reasonable time.[80]

(§ 2) *D. A life estate* See 8 C. L. 762 is a freehold limited to determine with the life or lives of particular persons or at an uncertain time which may be postponed for life.[81] Whether it was intended that there should be a life estate in the property itself without a trustee will depend largely upon the terms of the devise or grant.[82]

(§ 2) *E. Estates upon condition or limitation.*[83]—Conditions must be at least substantially performed.[84] Nonperformance of a condition which must be performed during the lifetime of a testator is not excused by devisee's ignorance of the condition.[85] In general, waiver of performance of a condition precedent to the vesting of a devise must be shown by the will itself.[86] Conditions subsequent are not favored.[87] An estate during widowhood is terminated by marriage.[88]

(§ 2) *F. Hereditaments.*—The right of an appropriator of water, for irrigation, to have it flow in the stream to the head of the ditch, is an incorporeal hereditament appurtenant to the ditch.[89]

(§ 2) *G. Future estates.* See 8 C. L. 1677—May be created in the alternative.[90] In New York an expectant estate is descendible, devisable and alienable in the same manner as an estate in possession.[91] The statute so providing does not prevent a testator from making an expectant estate subject to be defeated by the exercise of a

78. An estate to A and, should he die without leaving children, then to revert or go over, is a base or determinable fee defeasible on A's death without children. Klnard v. Hale, 128 Ga. 485, 57 SE 761. Will held to create a fee for benefit of certain daughters subject to divestiture upon their death without issue. Maynard v. Greer, 129 Ga. 709, 59 SE 798. Children held to take conditional fee subject to divestiture by death before widow and absolute in survivors after her death. In re Carney's Estate [Ind. App.] 84 NE 506.

79. Devise to "A, then to her heirs," but if no "heirs of her own" then to others, is a base fee. Ahlfield v. Curtis, 229 Ill. 139, 82 NE 276.

80. Warren v. Ash, 129 Ga. 329, 58 SE 858. See, also, Forestry and Timber, 9 C. L. 1408.

81. Robb v. New York & Cleveland Gas Coal Co., 216 Pa. 418, 65 A 938. Will construed to give life estate to daughters subject to annual charge in favor of grandchildren, with remainder to grandchildren. In re Haines' Estate, 150 Cal. 640, 89 P 606.

82. Gift of "use" of realty for life (Little v. Coleman [N. H.] 66 A 483) and of "income from all the rest" of the estate (Id.) held to create life estates in property itself, without trustee (Id.).

83. See, also, Deeds of Conveyance, 9 C. L. 943.

84. Will construed to create devise on condition precedent that devisee support testator, requiring substantial performance to vest title in the former. Fisher v. Fisher [Neb.] 113 NW 1004. Evidence insufficient to show substantial performance. Id. Maintenance of a mere technical school, excluding all religious instruction, held not to satisfy condition that government should continue a mission for cultivation of sound literature and solid science and teach no religion contrary to that theretofore inculcated by said mission, government knowing that mission was founded to convert Hawaiians to Christianity. Lowrey v. Ter. of Hawaii, 206 U. S. 206, 51 Law. Ed. 1026.

85. That heir knew not that he was required to support testator did not excuse where he was also given other property. Fisher v. Fisher [Neb.] 113 NW 1004.

86. Fisher v. Fisher [Neb.] 113 NW 1004.

87. Devise of property to church to be kept and used as a parsonage and nothing else held not to create an estate upon condition. Adams v. First Baptist Church of St. Charles, 148 Mich. 140, 14 Det. Leg. N. 111, 111 NW 757.

88. McCartney v. Moon, 6 Ohio N. P. (N. S.) 158.

89. Suit held in nature of one to quiet title to realty. Rickey Land & Cattle Co. v. Miller [C. C. A.] 152 F 11.

90. Provisions devising estate to wife for life, then to a son for life on condition that he pay certain sums to daughters, then to son's issue surviving him, and providing that on son's failure to accept the conditional life estate property should be divided in fee among testator's children, held valid. Real Prop. Law, Laws 1896, p. 566, c. 547, § 41. Green v. Head, 54 Misc. 454, 104 NYS 383. On death of conditional devisee during life of widow, remainder would vest in his children subject to performance of conditions, and if children were infants and election became necessary, court could elect for them. Id.

91. Real Prop. Law. p. 567, § 49. Owner of reversion could suspend absolute ownership for two lives beyond that of life beneficiary. New York Life Ins. & Trust Co. v. Cary [N. Y.] 83 NE 598.

power of sale in trustees which must be exercised before the owner of the expectant estate becomes vested with absolute title.[92]

A reversion. See 8 C. L. 763—A conveyance in trust to the grantor's use for life remainder to his heirs subject to testamentary disposition leaves no reversion to merge with the life estate.[93] A mere stranger may not question the method of forfeiture of the particular estate.[94]

A remainder See 8 C. L. 763 is vested in one when he or his heirs have the right to the immediate possession, whenever or however the preceding estate may determine.[95] It is contingent when limited to a dubious or uncertain person or on a dubious or uncertain event.[96] If there is a present right to have the estate the instant the prior estate shall determine, it will not be rendered contingent by uncertainty of enjoy-

92. Real Prop. Law 1896, p. 567, § 49. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

93. Grantor could not convey fee. Frank Fehr Brew. Co. v. Johnston, 30 Ky. L. R. 211, 97 SW 1107.

94. One claiming lumber sold on credit to tenant could not contend that there was no judgment of court or reconveyance to reversioner. Mosca Town Co. v. Wellington, 39 Colo. 326, 89 P 783.

95. Storrs v. Burgess [R. I.] 67 A 731. A vested remainder is one that is so limited to persons in being and ascertained that it is capable of taking effect in possession or enjoyment on a certain determination of a particular estate, without the concurrence of any collateral contingency. Voorhees v. Singer [N. J. Eq.] 68 A 217. Where there is no uncertainty in the capacity of a devisee to take, the devise is vested in him, though there may be uncertainty in the happening of the event on which the devise is conditional. Storrs v. Burgess [R. I.] 67 A 731. Estate to be divided equally, afted death or marriage of widow, between testator's children surviving him and issue of such as should have died, held vested at testator's death. Runyon v. Grubb, 119 App. Div. 17, 103 NYS 949. Interest on mortgages to W. for life, on his death principal to go to his children, if any, if none then to "F. or her heirs," held to give vested remainder to F. on testator's death which passed by her will, though she died before W. In re Allison 53 Misc. 222, 102 NYS 887, afd. 122 App. Div. 898, 107 NYS 1119. Entire property to wife "after disposing of enough to pay debts," then same "or so much thereof as shall remain unexpended" to four sons equally, held to create vested remainders. Jonas v. Weires, 134 Iowa, 47, 111 NW 453. Bequest of entire estate to wife during minority of youngest child, after which wife should have one-third for life, remaining two-thirds to be divided between his eleven children, held to create vested remainders in children subject to widow's estate for years and life estate in the one-third. Shafer v. Tereso, 133 Iowa, 342, 110 NW 846. Will held to create a vested remainder in children subject to divestiture as to any who might die childless. Toombs v. Spratlin, 127 Ga. 766, 57 SE 59. Devise of land to wife for life, and to a daughter the right to live thereon and enjoy the rents and profits thereof during the life of such wife, and the remainder over to the daughter and her children, gives the wife a life estate and the daughter a vested remainder. Deadman v. Yantis, 230 Ill. 243, 82 NE 592. Estate to widow for life or until remarriage, remainder to son and daughter in equal shares, gave latter a vested interest in remainder, alienable under laws of Minnesota. Perkins v. Gibbs [C. C. A.] 153 F 952.

96. Shafer v. Tereso, 133 Iowa, 342, 110 NW 846. Trust for use of named children for life, remainder to such of their children or descendants of deceased children as might be living at death of life tenants. Whallen v. Kellner, 31 Ky. L. R. 1285, 104 SW 1018. Direction for division on death or remarriage of widow, among testator's children then living, and other provisions, held to render children's remainders uncertain both as to person and quantity, and not subject to execution. Mattox v. Deadwyler [Ga.] 60 SE 1066. Bequest in trust for benefit of testator's wife for life, remainder to such children as survive her, or the share of any deceased child who did not to the issue of such deceased child, create a contingent remainder in the children. Brechbeller v. Wilson, 228 Ill. 502, 81 NE 1094. Where testator gave property to his children and provided that on death of last survivor it should be divided between "the children, the lawful heirs of my aforesaid children," gift to grandchildren was a contingent remainder which could not vest unless there were grandchildren living at time of death of last surviving child. Reilly v. Bristow, 105 Md. 326, 66 A 262. Will construed to create interests in testator's "own right heirs" contingent upon existence of "descendants" on death of life tenants. Boston Safe Deposit & Trust Co. v. Blanchard [Mass.] 81 NE 654. In trust for C, trustee having power to use principal if necessary for C's support, at C's death remainder to go to her children if living, gave latter only contingent remainders. Collins v. Crawford [Mo.] 103 SW 537. Devise of life estate to R, remainder to A or A's surviving issue, but if A died without issue then to C., B. and W. or their lawful issue, held to create only contingent remainders in A and B. Voorhees v. Singer [N. J. Eq.] 68 A 217. Where the persons who are to take under a will are uncertain, as where it depends on who shall survive a life tenant, remainder is not only contingent but nontransmissible. Cooper v. Cooper [S. C.] 58 SE 950. To S. for life, and "at his death to his children then alive," gave contingent remainders to children. Steele v. Poe [S. C.] 60 SE 951.

ment [97] or as to quantity or value.[98] A remainder to unborn children may be made to vest on birth of the first subject to opening to let in successive ones.[98a] A remainder subject to an estate for life vests in possession on death of the life tenant.[99] That there may be an acceleration of a remainder, the entire particular estate must terminate and not merely the interest of one of several persons.[1] The death of a life tenant before that of a testator under whose will he claims does not defeat the devise over.[2] A devise to one's wife with direction that so much as remains in her hands on her remarriage shall go to testator's children is valid,[2a] and by statute in some states a remainder will not fail for want of a particular estate.[3] Remainders are alienable [4] and, where vested, they may be partitioned or sold on execution.[5]

Executory interests.—An executory devise in an estate permitted at common law to be created by will to commence in the future, either with or without a preceding estate.[6] If an estate can take effect as a remainder, it will not be held to be an executory devise.[7] Where a fee is mounted upon a fee by way of executory devise, a conveyance by both takers extinguishes their contingent rights.[8]

Expectancies.—While the sale of a mere expectant interest by an heir is presumed fraudulent, it will be sustained if made for a fair price and with the ancestor's consent,[9] though the contrary is also held.[10] A court of equity in its ordinary jurisdiction cannot protect a mere expectancy.[11]

97. Shafer v. Tereso, 133 Iowa, 342, 110 NW 846; Voorhees v. Singer [N. J. Eq.] 68 A 217. Uncertainty of "right" to enjoyment of remainder as distinguished from uncertainty of enjoyment distinguishes vested from contingent remainders. Weil v. King, 31 Ky. L. R. 1010, 104 SW 380. Remainder to testator's heirs after termination of a life estate is vested. Id. Property to wife to divide between herself and two children equally when latter became of age gave vested remainders to children. Roberts v. Herron [S. C.] 58 SE 968.

98. Estate unaffected by provision that debts of remaindermen inter se should be adjusted before their shares should be turned over to them. Jonas v. Weeves, 134 Iowa, 47, 111 NW 453.

98a. To F, wife of G, so long as she remains his wife, and to children she might have by him, property to go to G's children on F's death or ceasing to be G's wife, held to create contingent remainder till birth of a child, then vested in that child and all others afterwards born to F and G opening to let in each successive child as it was born. Greenlaw v. Dillon [Tex. Civ. App.] 108 SW 705.

99. Where trustees did not exercise a power of sale as to share of a life tenant, her children became vested with title thereto on her death and entitled to partition from share of others. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

1. Election of widow who was life tenant to take dower did not cause acceleration where executor held particular estate to hold until death of widow for benefit of children. Toombs v. Spratlin, 127 Ga. 766, 57 SE 59.

2. Thompson v. Thornton [Mass.] 83 NE 880.

2a. Littler v. Dielmann [Tex. Civ. App.] 106 SW 1137.

3. Civ. Code, § 3099. Toombs v. Spratlin, 127 Ga. 766, 57 SE 59.

4. Conveyance by life tenant and children held to give clear title under rule permitting alienation of contingent remainders. Summet v. City Realty & Brokerage Co., 208 Mo. 501, 106 SW 614. That remaindermen received no part of loan did not affect validity of trust deed. Id. A contingent remainder is not an estate, but a right in property, and may be released. Ortmayer v. Elcock, 225 Ill. 242, 80 NE 339. Hurd's Rev. St. 1905, p. 465, c. 30, provides form of release of vested or contingent remainder to life tenant. Id.

5. Vested remainders are subject to the law of conveyance, partition and sale on execution. Deadman v. Yantis, 230 Ill. 243, 82 NE 592.

6. Income to wife and daughter, whole estate to vest in daughter should she attain twenty-five and survive mother, but if not half to be divided among certain grandchildren on death of wife, held to create executory devise continuing until death of daughter, on whose death grandchildren then living took vested interests subject to life interest of wife. Storrs v. Burgess [R. I.] 67 A 731. Gift to issue of daughter having no issue on death of testator held an executory devise, so that issue born after testator's death would take contingent remainder during daughter's life. Id.

7. Estate to A for life, then to issue, but in default of such to B. McCreary v. Coggeshall, 74 S. C. 42, 53 SE 978.

8. One having conveyed to other, latter could give clear title to a third. Sheppard v. Jones, 77 S. C. 274, 57 SE 844.

9. McAdams v. Bailey [Ind. App.] 80 NE 171. Sale of expectancy sustained where made in good faith and for sufficient consideration. Petts v. Harding, 133 Iowa 7, 109 NW 1074. Acts 1899, p. 132, c. 99, § 2, providing that children by former marriage shall be estopped by "conveyances in fee" during life of second and childless wife, includes mortgages with covenants of warranty. Griffis v. First Nat. Bk. [Ind. App.]

§ 3. *Estates created in particular cases and principles of classification.*[12]—Of primary importance is the intention of the parties, to be gathered from the particular language of the entire instrument creating the estate,[13] and this intention will

79 NE 230. Statute applicable though death of husband occurred prior to its enactment. Id.

10. Son's release to father of claim to latter's estate held void. Elliott v. Leslie, 30 Ky. L. R. 743, 99 SW 619. Contract held not violative of Code, art. 1887, as an attempt to dispose of an interest in the succession of living person. Rudolf v. Costa, 119 La. 781, 44 S 477.

11. Owner of executory devise held not entitled to enjoin owner of base fee from cutting timber, nor to taxes voluntarily paid, nor to certain condemnation money. Fifer v. Allen, 228 Ill. 507, 81 NE 1105.

12. See Wills, 8 C. L. 2305.

13. Fee simple estates: Devise to children with provision that if either should die childless its share should go to the survivors except as the law provides otherwise held to devise a fee simple estate in the first takers. Connor v. Gardner, 230 Ill. 258, 82 NE 640. Will held to show intention to give a house and lot without limitation, testator having described other land which was given for life only. Pauley v. Dils, 31 Ky. L. R. 1151, 104 SW 717. Estate to wife "to have, to hold, and to use" as she might wish, gave fee. Scott v. Scott [Ky.] 105 SW 896. Realty and personalty to niece "absolutely," and if niece should die without issue then to others, gave niece an absolute and not a defeasible fee. Pritchett v. Corder [Ky.] 105 SW 910. Will as a whole held to give children fee simple title despite useless provision that in case of their death property should go "to their children and not to any husbands or wives which their consorts may again have by remarriage." Williams v. Neal's Guardian [Ky.] 105 SW 951. Devise to wife, coupled with certain requests, held to give estate in fee, and not a mere life estate. Wood v. Wood [Ky.] 106 SW 226. Deed to one, "his heirs and assigns, forever," gave fee simple though habendum clause was to him "his children, forever," and it closed with reservation of lot, barn, etc., to grantors for life. Crews v. Glasscock [Ky.] 107 SW 237. Will construed to give nephew a life estate which ripened into a fee on his marriage after testatrix's death. Stimpson v. Murch [Mass.] 83 NE 1107. All property to "sister, on her death her heirs to have it," gave fee simple to sister. Harring v. Flowers [Miss.] 45 S 571. Under statute converting estates tail into fees, will "lending" land to grandson and his lawful heirs of the body forever held to give a fee simple. Sessoms v. Sessoms, 144 N. C. 121, 56 SE 687. Under the will of M his estate passed to his wife for life, then to his sisters in fee tail, and then to their issue in fee simple; or in the absence of issue of any sister, her share to pass to the surviving sisters or sister in fee simple. Harding v. Marsh, 9 Ohio C. C. (N. S.) 542. "My two daughters E and L to have the upper farm share and share alike, and if my daughter L dies without any living children her share to be paid back to all my grandchildren," held to give L a fee and not only a life estate. Throckmorton v. Thompson, 34 Pa. Super. Ct. 214. Where will provided that on termination of a life estate land should belong to testator's son "by same being valued by three disinterested men," and he should pay a daughter one-half of valuation in full of her share, son took entire title subject to charge for daughter's benefit, and daughter was not entitled to accounting for rents. Bowen v. True, 74 S. C. 486, 54 SE 1018. To A, B and C, and survivors and their heirs, and heirs of survivors, gave to C's grantee clear fee simple title where A had died without issue and B had conveyed all her interest in expectancy or otherwise to C. Sheppard v. Jones, 77 S. C. 274, 57 SE 844. Grant to a territory without the words of succession passed fee which went to state when territory merged therein. Sylvester v. State, 46 Wash. 585, 91 P 15. Devise of "all" property of testatrix, "of every kind," excludes idea that devise is subject to husband's courtesy. Balster v. Cadick, 29 App. D. C. 405.

Fees determinable: Will held to vest title in devisees and legatees on probate of will subject to divestature on his or her death during five year period for which property was to be managed by executor. In re Phillips' Estate, 56 Misc. 96, 107 NYS 388. Construed to create fees defeasible on devisee's death without children. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997. One-half to wife and her heirs for life, remainder to son if he survived her, and one-half to son and his heirs "during his natural life," then to wife if she survived, held to give widow and son each a freehold for life of one first dying, with cross determinable fees in remainder, the one to be enlarged to a fee simple in survivor. Tebow v. Dougherty, 205 Mo. 315, 103 SW 985. Will construed to create fee determinable on death of "each or all" of several daughters, respectively, without heirs, after testator's death. Harrell v. Hagan [N. C.] 60 SE 909.

Life estates: Entire estate to wife for her sole use and benefit, with provision for division among testator's heirs after death of wife. Lester v. Kirtley, 83 Ark. 554, 104 SW 213. Will providing for education of children, division among them on death of widow, setting apart an equal share to her if she should remarry, etc., held to create an estate during life of widow with title to be held by executors and direction that property be cultivated for support of family. Tooms v. Spratlin, 127 Ga. 766, 57 SE 59. Devise absolutely in fee simple to wife for life, same to go over on her death. Wallace v. Bozarth, 123 Ill. App. 624, afd. 223 Ill. 339, 79 NE 57. "Grant to A and her heirs, etc., during her natural lifetime, to have and hold unto said A, her heirs, etc., during her natural lifetime." Miller v. Mowers, 227 Ill. 392, 81 NE 420. Will and circumstances held to show intention to give wife a life estate in all of testator's property. Felkel v. O'Brien, 231 Ill. 329, 83 NE 170. Conveyance to grantee for life, at his death to descend to his body heirs, if any, or his nearest blood, held to create only a life estate, with contingent re-

not be defeated by the misuse of technical terms.[14] An estate devised in decisive

mainder to children surviving grantee. Clubb v. King, 30 Ky. L. R. 830, 99 SW 935. Will giving money in trust to be invested in land at daughter's request, and deeded to her and heirs of her body at her death if she had any, held to give daughter only a life estate, with remainder to children, free from interest in daughter's husband. Reeves v. Morgan, 30 Ky. L. R. 1158, 100 SW 836. To wife for life, then to children, to be equally divided "between all male and female of them and their offspring, they are only to have the use of it during their lifetime," passed property after widow's death to children for life, remainder to such of their offspring as would take by descent. Ennen v. Air, 31 Ky. L. R. 1184, 104 SW 960. Where money was given to a trustee to be invested, at daughter's request, in land to be deeded to her and "heirs of her body" at her death if she had any, daughter took life estate in land so bought, with remainder in fee to her children taking under the will. Reeves v. Morgan, 30 Ky. L. R. 1158, 100 SW 836. Estate to wife "during her natural life" after sale of sufficient to pay debts, "to own and do with as she pleases." Howard v. Cole, 30 Ky. L. R. 1027, 100 SW 225. To sister and niece all property to use or sell for their support, with gift over of what was left after their death, held to give life estate convertible into fee by conveyance. Hosman v. Willett [Ky.] 107 SW 334. To daughter for life, then to daughter's two sons for life, remainder in fee to son's children, gave only life estate to one of the sons though he acquired the interests of daughter and other son by conveyance. Forsman v. Hofstetter [Ky.] 107 SW 796. All property to wife for life except forced portion to father and mother. Succession of Verneuille [La.] 45 S 520. A cottage, etc., for "term of five years or longer." Dow v. Abbott [Mass.] 84 NE 96. Will directing widow in case she should marry to sell realty and divide proceeds between herself and sons construed to create in her a life estate, and not a determinable fee. Peck v. Griffis, 148 Mich. 682, 14 Det. Leg. N. 311, 112 NW 722. Antenuptial conveyance to grantor's affianced wife and heirs of her body by him begotten created estate tail in grantee, converted by statute into life estate in wife, with contingent remainders to "heirs of her body" on her death. Summet v. City Realty & Brokerage Co., 208 Mo. 501, 106 SW 614. "To daughter for her natural life, but if she has lawful heirs then it is at her own disposal 'at her decease,'" gave a life estate which did not become a fee simple on birth of issue. Early v. Coleman, 34 Pa. Super. Ct. 267. Rents and profits for life without power to sell or incumber, but with power to devise, gave life estate only. Schoyer v. Kay, 217 Pa. 32, 66 A 141. Devise to sons "in trust to make their living," and to their "children" after them, held to create only a life estate in sons, with remainder to children in fee. Emerick v. Emerick [Pa.] 68 A 183. To son for life, then to son's children living at his death, with devise to others should son die without leaving children, gave life estate only to son. McDaniel v. McDaniel [Pa.] 68 A 847. Limitation to "blood relations" held to apply to a certain lot, though separated by a period, so as to give only a life estate. O'Malley v. Loftus [Pa.] 69 A 819. Conveyance to grantee forever and at her death to children named to have and hold in warranty "unto said E and her heirs," carries a life estate. Windham v. Howell [S. C.] 59 SE 852. Deed providing that grantors should enjoy "free use, benefit and possession" for life "for residence or other purposes, free from will or wish" of grantees, held to reserve life estate in grantors, remainders in fee to grantees. McDonald v. Jarvis [W. Va.] 60 SE 990. Interest to two sons annually "during their lives" gave survivor entire interest until his death. In re Benner's Will [Wis.] 113 NW 663.

Life estates with power of disposition: Will held to give widow a life estate with power of disposal in fee. Greenwalt v. Keller, 75 Kan. 578, 90 P 233. Estate to wife "to do with as she may please during her life," with devise over if any should remain at her death, gave only right to dispose of so much as might be necessary for her support. Embry's Ex'x v. Embry's Devisees, 31 Ky. L. R. 295, 102 SW 239. Will held to show intention that widow have power to dispose of realty as well as personalty. Young v. Hillier [Me.] 67 A 571. Will construed to give widow life estate with power to sell so much of realty as was necessary for support. Champney v. Bradford [Mass.] 81 NE 993. Estate to widow to use and dispose of as she might think best for her interest and comfort, with remainder over held to create a life estate in widow with power to devise in fee if her welfare required it. American Baptist Publication Soc. v. Lufkin [Mass.] 83 NE 401. It not appearing that her will was intended to operate as an execution of the power, property went to remaindermen. Id. Balance to wife who was to be "real owner" with permission to use and live therefrom, she to have full ownership "same as I now have and have had," and expression of desire that whatever should remain should go to daughter who was to have power of disposition, held to give widow right to consume the realty with power to convey it though she did not acquire fee simple. Allen v. Hirlinger [Pa.] 67 A 907, rvg. 33 Pa. Super. Ct. 113.

Estates in common: Provision for children after death of wife held not to give children a joint tenancy with right of survivorship. Kellog v. Burnett [N. J. Eq.] 69 A 196. To wife "for herself and all her children" did not give fee to wife, but she and children took in common. Kyte v. Kyte [N. J. Eq.] 67 A 933.

Remainders: Will held to create life estate in wife with vested fee simple remainders to daughter and her children. Deadman v. Yantis, 230 Ill. 243, 82 NE 592. "Lineal descendants" of trust beneficiaries held to take corpus only after death of all the beneficiaries. Parrish v. Mills [Tex.] 20 Tex. Ct. Rep. 342, 106 SW 882.

14. Clause, after grant of fee, that estates to sons should only be "life estates," and that land should go over to survivors in case of death without issue, held not to destroy

terms will not be reduced by subsequent clauses not equally decisive;[15] and the converse is also true that where an estate less than a fee is given in clear terms it will not be enlarged by general language in a subsequent item unless such intent is plain.[16] After an absolute devise in fee, a devise over in case of death of first taker, or his death without issue, is generally held to refer to his death in the lifetime of the testator,[17] but not where a different intent is shown,[18] as where the estate is preceded by

determinable fee intended. Smoot v. Kirk, 31 Ky. L. R. 1081, 104 SW 715.

15. All property to wife, and provision that after her death "I will that all property belonging to her at that time" be equally divided among children, held to create fee in wife. Hume v. McHaffie, 40 Ind. App. 703, 81 NE 117. Legacies to persons living at testatrix's death held not subject to condition that legatees be part of household at that time. Lowe v. Whitridge, 105 Md. 183, 65 A 926. Estate to M and his heirs, subject to ten year trust and cerain legacies held not cut down by provision for conveyance to his devisees or children in case of his death before expiration of ten year term, same being merely a provision for vesting legal title free of charges. Matthern v. Rankin, 228 Ill. 318, 81 NE 1024. Bequest to a daughter, then to her heirs, held to vest a fee cut down by a clause that if she should die without heirs of her own the remainder shall go to other designated persons. Ahlfield v. Curtis, 229 Ill. 139, 82 NE 276. An estate in trust for ten years, remainder over to trustee, and upon his death to his legatees or issue, subject to the dower rights of his wife, gives to trustee an estate in fee simple, subject to the terms of the trust. Matthern v. Rankin, 228 Ill. 318, 81 NE 1024. Fee not diminished unless intention requires it. McCauley's Guardian v. Dale [Ky.] 108 SW 268. Fee not cut by provision in case of devisee's death leaving children and clause against disposition. Hayes v. Martz [Ind. App.] 84 NE 546. Gift to daughters of full proceeds of trust estate not cut down by provision for payment by trustees to beneficiaries of so much of interest as would provide for their comfort and necessities. Sevier v. Woodson, 205 Mo. 202, 104 SW 1. A plain devise of a vested interest will not be limited or conditioned by subsequent clauses unless the will as a whole requires it. Interests held vested though subsequent clause stated that children should have "no interest therein or right thereto" until youngest one should be twenty-one. Ross v. Ayrhart [Iowa] 115 NW 906. See, also, Property, 10 C. L. 1280. Will held to devise realty to wife in fee not cut down by provision that authorized sale should be for best interest of children and expression of desire that whatever should remain be divided among them. Bennett v. McLaughlin, 103 NYS 256. Will held to give wife all property absolutely except a small sum to be paid to others, and gift held not cut down by subsequent provision as to disposition of remainder, if any, after wife's death. Farney v. Weirich, 52 Misc. 245, 103 NYS 38. Expression of desire as to use to which money was to be put held not to qualify or reduce absolute gift. Farmers' Loan & Trust Co. v. Shaw, 56 Misc. 201, 107 NYS 337. Property to wife with power to sell as she might deem proper and for best interest of children. Bennett v. McLaughlin, 109 NYS 63. Expression of wish that if anything was left wife should divide it among children did not annex condition that if devisee did not dispose of property by deed it should go to children at her death. Id. Fee simple created by devise to one and heirs of his body held not reduced by limitation over on failure of such heirs, such limitation merely creating a conditional estate by way of executory devise. Sessoms v. Sessoms, 144 N. C. 121, 56 SE 687. A gift of a life estate followed by a division of all the residue of the estate held not to imply a cutting down of the life estate in a farm to a life estate of an undivided one-fifth. Hiratt v. Simpson, 5 Ohio N. P. (N. S.) 513. Fee simple not reduced by provision for contingency of death of devisees, the same referring to time of testator's death. Holmes v. Stanhope, 217 Pa. 63, 66 A 146. To wife, her heirs and assigns forever, "so long as she remains my widow," gave fee, she dying without having remarried. Scott v. Murray, 218 Pa. 186, 67 A 47. To husband for life, "investing him with power to rent or lease," sell "and distribute proceeds between two daughters," gave husband an estate for life, subsequent words not being sufficient to create a trust. Jennings v. Talbert, 77 S. C. 454, 58 SE 420. "To them and their heirs, share and share alike," "child or children of deceased child to represent and take parent's share," gave fee simple estates. Fishburne v. Sigwald [S. C.] 60 SE 1105. Wife and children held jointly entitled to income of trust property during wife's life, and on her failure to dispose of same by will it would pass to children and heirs of wife jointly. Smith v. White [Va.] 59 SE 480. Proviso in habendum of deed limiting fee simple conveyed by granting clause held void. Carllee v. Ellsberry, 82 Ark. 209, 101 SW 407. See Deeds of Conveyance, 9 C. L. 943.

16. Life estate not enlarged by provision that property should go to legatees and their heirs and not be subject to debts. Kimbrough v. Smith, 128 Ga. 690, 58 SE 23.

17. Devise over if children should die without issue living at time of their death. Neubert v. Colwell [Pa.] 68 A 673. Sons held to take vested interests upon surviving testatrix. Siegwarth's Estate, 33 Pa. Super. Ct. 622. Construction not contrary to Act July 9, 1897 (P. L. 213). Id. "In case of death of my wife the estate to be divided between the surviving children" referred to her death in testator's lifetime, and children took vested remainders at testator's death. Foley v. Hook [Ky.] 107 SW 1188. "If S or J should die," their shares to go over, gave fee to them on their surviving testatrix, and not only a life estate. Holmes v. Stanhope, 217 Pa. 63, 66 A 146. To wife for life, then to daughter, her heirs and assigns, but in case of her death without issue then over, gave

fee simple remainder to daughter on her surviving testator. Hannon v. Fliedner, 216 Pa. 470, 65 A 944.

NOTE. "Dying without issue" construed in devises of real property: At common law, a devise in fee, followed by the words "but if he die without issue," followed by a limitation over, raised an estate tail by implication (Brice v. Smith, 1 Willes Rep. 1), and the failure was construed as an indefinite failure of issue. Unless the limitation could take effect as a remainder, it was void for remoteness. Cadagon v. Ewart, 7 Adol. & E. 636; Bigge v. Bensley, 1 Bro. C. C. 187. This result was obviated by statutes which provided for a construction as a definite failure. Stat. 1 Vict. c. 26, § 295; Laws N. Y. 1896, c. 547, § 38. After the statutes the first legatee has a determinable fee, and the limitation over takes effect as an executory devise. But the phrase today has assumed a new character and a new meaning. Formerly it was a phrase of limitation used by the testator to guide the devolution of the estate after it might leave the hands of the first beneficiary. But the context of the will may have regard merely to the time of the testator's death, and so used the phrase is not one of limitation but a mere substitutionary devise, in case one of the legatees dies before the will takes effect; it is a provision against intestacy, and the testator provides for no further devolution than the first taker. If the devisee takes at all, he gets an absolute fee. The question is no longer one of definite or indefinite failure, but whether the words import a limitation engrafted on the estate already given, or whether the testator has in mind one of the many contingencies liable to cause a lapse and in describing it and providing a substitution has used words which happen to be identical with the stock phrase of limitation.

The development of this rule was comparatively late and was due to several causes. The chief of these was probably the influence of two early English cases which applied such a construction. Doe v. Sparrow, 13 East, 359, and Clayton v. Lowe, 5 Barn. & A. 636. These cases were plainly decided on their facts. In the former, the limitations in one clause were read over into a succeeding clause; the latter case involved incongruous provisions. These cases are far from establishing a fixed rule. Both were followed in Caldwell v. Skilton, 13 Pa. 152. The rule in Caldwell v. Skilton was recognized in Jessup v. Smuck, 16 Pa. 327; Karker's Appeal, 60 Pa. 141, and Fahrney v. Holsinger, 65 Pa. 388, and was solidified in the later Pennsylvania cases. Engel's Estate, 180 Pa. 215; Flick v. Forest Oil Co., 188 Pa. 317. Another cause of the development of the rule was the failure or refusal (Mickley's Appeal, 92 Pa. 514, 518; Hancock's Estate, 13 Phila. [Pa.] 283), to recognize the distinction in the English cases (Smith, Exec. Int. §§ 662, 665, 666) between real property and personal property in this connection. So, too, courts have confused English cases where there was an alternative limitation to the issue besides a limitation over in default. As in Fowler v. Duhme, 143 Ind. 248, where the court, besides relying upon Doe v. Sparrow, 13 East, 359, and Clayton v. Lowe, 5 Barn. & A. 636, cited Gee v. Manchester, 17 Q. B. 737. These English cases stand on a special ground. The devise is to the first legatee in fee; the limitation to the issue cannot raise an estate tail because if there are issue they all take, not merely the eldest son. The other limitation over is by way of executory devise, upon the happening of the contingency. But because of both limitations over, there is no contingency at all, for one of the events specified must of necessity happen, and thus it is impossible for the first taker to keep the whole estate. The possibility, however, of keeping the estate is a necessary element to make a limitation over operate by way of executory devise. While the alternative devises determine the first taker's estate in fee at his death, this may not necessarily give him a strict life estate. While the court itself could so cut down his fee, by rejecting the words of inheritance and thus give effect to the devise over as a remainder, it is loath to do so. It gives effect to all the words by treating the phrase as a substitutionary devise. Another element which has aided the growth of the rule has been the employment in the later American cases of the general principle that a devise in fee will not be cut down by subsequent provisions unless the latter are clear and certain. See Biddle's Estate, 28 Pa. 59. This is illustrated by the long line of New York cases dealing with the rule (Vanderzee v. Slingerland, 103 N. Y. 47), although the rule was not applied in Buell v. Southwick, 70 N. Y. 58, and in Nellis v. Nellis, 99 N. Y. 505. It may be noted, however, that two cases often cited are not in point. Moore v. Lyons, 25 Wend. [N. Y.] 119, involving a question of survivorship, and Livingston v. Greene, 52 N. Y. 118, a question of vesting of remainders. The New York courts are eager to seize upon slight expressions to defeat the rule and to give the words their "natural import." Benson v. Corbin, 145 N. Y. 351, 359; Washbon v. Cope, 144 N. Y. 287.

The recent case of Fifer v. Allen, 228 Ill. 507, 81 NE 1105 throws an interesting light upon the present status of the rule. The court recognized the rule, but held that the words should be construed in their "natural and primary" sense; and that therefore the contingency was referable to a death as well before as after that of the testator. If this is a sound way at arriving at the testator's intent, it strikes at the existence of the rule itself.—From 8 Columbia L. R. 37.

18. Rule that where estate is given with devise over in case of "death without issue" quoted words refer to death during testator's life does not apply where will shows testator referred to death either before or after his own. Fifer v. Allen, 228 Ill. 507, 81 NE 1105. To daughter, her heirs, etc., with devise over should she die without issue her surviving, held to create defeasible fee. Tyndall v. Fleming, 108 NYS 239. Words of survivorship will be construed according to their usual and common acceptation unless a different meaning is clearly intended (Dent v. Pickens, 61 W. Va. 488, 58 SE 1029), and will be referred to the event plainly intended to accomplish the purposes of the testator whether that event be before, at the time of, or after, testator's death (Id.). Will held to give a son a fee defeasible on his death without children or issue of children, with executory devise over in that

another one for life or years.[10] In some jurisdictions it is held that a provision in case of death "without issue" as distinguished from one merely in case of death refers to death at any time,[20] and under such holding a base or determinable fee usually results.[21] Where distribution is to be made in the future, words of survivorship will be construed as referring to the time of distribution, in the absence of a contrary intention.[22] While the law favors the early vesting of estates,[23] intention must con-

contingency. Id. To son for life, and in case of his death without issue and leaving widow surviving then estate to be divided, estate to go to his issue if he left any, referred to son's death after testator's. Chesterfield v. Hoskin [Wis.] 113 NW 647. "Dying without issue" held to refer to death before youngest child should be 23, so that estate vested absolutely at that time, in children then living. McCauley's Guardian v. Dale [Ky.] 108 SW 268.

19. In such case, general rule is that reference is made to death during period of intervening estate. In re Farmer's Loan & Trust Co., 189 N. Y. 202, 82 NE 181. Interest to S for life, principal at her death to C, with provision that in case of death of C "without leaving issue after the demise of said S then" to a grandniece, referred to death of C during life of life tenant. Id. To wife for life, then to son, but over should he die without heirs, meant death in wife's lifetime, and not later. Duzan v. Chappel [Ind. App.] 84 NE 775. Remainders to children, but should any die without issue his share to go to survivors, gave each child a fee defeasible on death without issue before death of life tenant. Riner v. Renfro, 31 Ky. L. R. 1178, 104 SW 951. To daughter for life, at her death to her two sons, or survivor of them, or their descendants, passed property on daughter's death to sons then living, absolutely. Simpson v. Adams [Ky.] 106 SW 819. Conveyance to children and reservation of life estate with provision that should any of children die without heirs of body land should revert to their survivors or representatives held not to create mere life estates or defeasible fees in children, contingency having reference only to children dying during grantor's life. Cosby v. Newby, 30 Ky. L. R. 1375, 101 SW 306.

20. Devise over in case of death of first taker refers to death in lifetime of testator, but where death is coupled with other contingent circumstances, such as death without issue or under age, it refers to death at any time. Fifer v. Allen, 228 Ill. 507, 81 NE 1105; Carpenter v. Sangamon Loan & Trust Co., 229 Ill. 486, 82 NE 418. Devise over to son if grandchildren should die without issue referred to death subsequent to that of testator as well as before. Fifer v. Allen, 228 Ill. 507, 81 NE 1105. Where there is no intervening estate and no period to which the words dying without issue can be reasonably referred, they are held to refer to death at any time, and usually create a defeasible fee. To grandsons, but should either die without children then to survivor and his descendants. Simpson v. Adams [Iowa] 106 SW 819. Under Act July 9, 1897, words "in default of issue" held to mean definite failure of issue so as to give daughter life estate only. Dilworth v. Schuylkill Imp. Land Co. [Pa.] 69 A 47.

21. To daughter, then to her "heirs," but if she should die leaving no "heirs of her own" then over, created base or determinable fee, and not fee simple on death of testator. Ahlfield v. Curtis, 229 Ill. 139, 82 NE 276. Death of devisees without husband or wife or children held referable to death before or after testatrix's death, giving a base or determinable fee. Carpenter v. Sangamon Loan & Trust Co., 229 Ill. 486, 82 NE 418. Another separate bequest of a ring held to show reference by testator to death of a devisee at any time, so that he acquired a base fee. Crocker v. Van Vlissingen, 230 Ill. 225, 82 NE 614. To two sons and survivor in case of death of one without issue gave base fee. Brenock v. Brenock, 230 Ill. 519, 82 NE 816. A devise by terms describing a fee simple, or from which a purpose to devise a fee simple is inferable, followed by a limitation over in the event that the devisee shall die "without issue," or "without children," or "without descendants," or "without heirs of his body," or "without legitimate heirs," or the like, such limitation over is on a definite failure of issue surviving the aforesaid devisee at the time of his death; and in such case no estate is limited to such "issue" or "heir of the body" or the like, but the provision simply declares the condition or contingency upon which the limitation over shall take effect. It qualifies the fee first devised, making it, instead of an unconditional fee, as it would otherwise be, a conditional or defeasible fee. Anderson v. United Realty Co., 9 Ohio C. C. (N. S.) 473.

22. Distribution to children on their becoming of age, but to survivors if any should die without heirs, gave absolute and not a defeasible fee to survivors though they should subsequently die without issue. Deskins v. Williamson [Ky.] 106 SW 258.

23. Pearson v. Hanson, 230 Ill. 610, 82 NE 813. Estates will be held vested at testator's death if reasonably consistent with his intention. In re Carney's Estate [Ind.] 84 NE 506; Duzan v. Chappel [Ind. App.] 84 NE 775; Ross v. Ayrhart [Iowa] 115 NW 906, French v. Logan's Adm'r [Va.] 60 SE 622. At death of life tenant property to be divided "among her issue according to statute of descent and distribution" held to vest remainder at testator's death. Id. Deed to wife and grantor's and grantee's heirs held to create life estate in wife, with remainders vesting in grantor's heirs at his death, subject to life estate. Ackerman v. Ackerman, 34 Pa. Super. Ct. 162. Estates vest immediately unless contrary intent is clearly shown. Boston Safe Deposit & Trust Co. v. Blanchard [Mass.] 81 NE 654. Will held to create vested interests in nephews at testator's death, gift not taking effect on uncertain event, but being only defeasible on daughter marrying and having issue. Stringer v. Young, 190 N. Y. 545, 83 NE 690.

trol in this as in other matters.[24] If futurity is made of the substance of a gift or devise, the vesting is suspended;[25] otherwise if it relates only to the time of payment or division.[26] Under a direction for payment to or division among a class, only those who are members of the class at the time fixed for payment or division take, and their interests do not vest until that time.[27] An estate to one if or when he shall attain a given age, with limitation over on his death under such age, is vested and defeasible only in the event of such death.[28] That implications may raise an estate, they must be necessary to carry out the intention of the testator.[29] Where a life estate is devised or conveyed with absolue power of disposition, it amounts to the creation of a fee,[30] but not where the power is qualified or contingent.[31] Power to

Held to create vested interests in grandsons in fund for education and advancement subject only to divestiture by death under 21, entitling them to enjoy same after arriving at that age. Hayes v. Robeson [R. I.] 69 A 686.

24. Trust estate to be divided among such of children as might survive wife who was life tenant gave children only contingent remainders. Brechbeller v. Wilson, 228 Ill. 502, 81 NE 1094. Will construed to pass interests to children only after widow's death or remarriage, so that one becoming of age had no right to possession or income. Bean's Committee v. Megular [Ky.] 107 SW 1186. Construed not to give vested interests to persons provided for in residuary clause until death of beneficiary in trust created by previous paragraph. In re Murphy, 121 App. Div. 426, 106 NYS 183. Interest on trust fund to one for life, principal then to heirs of testator's body then surviving, did not vest title to fund until death of life beneficiary. In re Wilson, 53 Misc. 238, 104 NYS 480. Certain annuities held a mere charge upon property and not intended to postpone vesting of fee until death of annuitants. Driggs v. Plunkett [Ky.] 105 SW 976. A legacy is vested rather than contingent when intention is doubtful. Crawford v. Engram [Ala.] 45 S 584.

25. A legacy will be held contingent when the time of division is of its substance. Crawford v. Engram [Ala.] 45 S 584. Where only words of gift are a direction to pay or divide at a future time, gift is future and contingent. Olsen v. Youngerman [Iowa] 113 NW 938; Hess v. Zahm, 57 Misc. 515, 107 NYS 951. Where, however, postponement is merely to let in a preceding estate, gift is vested though no words of present gift are used, as an estate to a wife for life or widowhood, and in case of her death or remarriage whole estate to be divided between testator's surviving children. Runyon v. Grubb, 119 App. Div. 17, 103 NYS 949.

26. Gift of money to daughter to be paid in future held vested futurity, being annexed merely to enjoyment and not to gift itself. Hall v. Ayers' Guardian [Ky.] 105 SW 911. Vested if mentioned only as qualifying clause of payment or division. Crawford v. Engram [Ala.] 45 S 584. Where a gift is to legatees by name, it will not be held contingent so as not to vest until arrival of time for payment or division, especially where the will shows a different intent. Id. Direction to sell after death of wife and divide proceeds among named children created vested interests in children. Id. Where will gave property in trust for ten years, one-half of income to be paid annually to four children, other half to be added to principal, one-half of which was to be paid to them at end of the ten years, and provided that remainder should be so paid at end of twenty years, the share of any one deceased to be paid to his heirs, children took vested devisable interests. Pearson v. Hanson, 230 Ill. 610, 82 NE 813. Devise in trust for the benefit of four persons, or upon their death for their heirs, held to give a vested interest. Id. Where possession of an estate is fixed at a future time and the reason for the postponement is the position of the fund, the estate in remainder is vested. Id. But if the postponement is controlled by the position of the devisee, a contingent remainder is devised. Id. After death of sons principal to go "to their living children, at the age of twenty-one," vested title to principal in children on death of both sons, with right to interest from that time and to possession of principal on arriving at 21, thus making their interests contingent until death of life tenants and vested from that time on. In re Benner's Will [Wis.] 113 NW 663.

27. Income to son for life, then to his children surviving and children of any deceased children. Bascom v. Weed, 53 Misc. 496, 105 NYS 459. Presumption that a bequest vests at death of testator must yield to rule stated in text. In re Benner's Will [Wis.] 113 NW 663. Estate to children living at termination of life estate is contingent. Id.

28. Storrs v. Burgess [R. I.] 67 A 731.

29. Will devising property to daughter after death of son held not to give life estate to son. In re Vreeland's Estate [N. J. Eq.] 65 A 902. In case of wife's death without child, fund to be part of residue held to vest fund in child surviving. Newcomb v. Fidelity Trust Co. [Ky.] 108 SW 911.

30. Reid v. Singer Mfg. Co. [Ky.] 107 SW 310; Wills v. Wills [N. J. Err. & App.] 69 A 256; McKnight v. McKnight [Tenn.] 107 SW 682. Power in devisee to sell when in her judgment sale is necessary is without limitation. Wills v. Wills [N. J. Err. & App.] 69 A 256.

31. Authority to only devise. McKnight v. McKnight [Tenn.] 107 SW 682. Limited power of sale. Harris v. Rhodes, 130 Ill. App. 233. General terms apparently giving a life tenant unlimited power of disposition will confer a power coextensive only with the estate granted. Widow held not to have power of disposal in fee. Warden v. Seventh

use the principal of real and personal property given for life includes power to convey the realty.[32] A void provision for a fee after a fee will be treated as if not written.[33] A conveyance to a woman and her children creates a life estate in the mother with remainder to the children.[34] A husband's deed to his wife, her and his heirs and assigns, creates a life estate in the wife with remainders vesting in interest in his heirs at his death, subject to the life estate.[35] A devise during widowhood, but in case of marriage then over, vests in remainder on death of the widow though she did not marry.[36] A devise to a widow conditioned only against remarriage vests a fee title in her descendible to her heirs where the condition is observed.[37] A power of appointment does not necessarily convert a life estate into a fee.[38] A provision that if a devisee should sell a portion of the proceeds shall go to another does not require the devisee to sell.[39]

The rule in Shelley's case See 8 C. L. 1677 gives the ancestor the whole estate when it is limited to him and his heirs or the heirs of his body,[40] but the two estates must be of the same quality,[41] and words of progeny will not invoke the rule unless used in the sense of heirs generally.[42] It is a rule of law, not of construction,[43] hence a testator's intent is immaterial in cases clearly within its operation. "Heirs" is a word of limitation,[44] and "children" one of purchase,[45] except where other words show that it was used in the sense of heirs.[46] The rule has been abolished in New

Day Baptist Memorial Board, 232 Ill. 606, 83 NE 1077.

32. All real and personal property to wife for life, with power to use part of principal if necessary, and direction for sale of all real and personal estate not used by wife, authorized wife to convey the realty. Kennedy v. Pittsburg, etc., R. Co., 216 Pa. 575, 65 A 1102.

33. To son absolutely after death of wife and daughter, "or" in case he should die before that time to his heirs at law, to be distributed as if it were his intestate property, held to give son a vested remainder in fee. Cody v. Staples [Conn.] 67 A 1.

34. Salyer v. Johnson [Ky.] 107 SW 210.

35. On death of life tenant, children of husband's child by a first wife, such child having died intestate, were entitled to a share. Ackerman v. Ackerman, 34 Pa. Super. Ct. 162. Deed did not create a fee simple in wife or in wife and living children of grantor and grantee in common. Id.

36. Haab v. Schneeberger, 147 Mich. 583, 14 Det. Leg. N. 13, 111 NW 135.

37. Busby v. Busby [Iowa] 114 NW 559.

38. Where owner conveyed in trust for own use for life, remainder to heirs subject to disposition by will or deed in nature of will. Frank Fehr Brew. Co. v. Johnston, 30 Ky. L. R. 211, 97 SW 1107.

39. On his death without sale, interest of legatee ceased. In re Walker's Estate [Pa.] 68 A 53.

40. Held applicable: To S for life, then to his legal heirs to do with as they see proper. Garver v. Clouser, 218 Pa. 611, 67 A 909. "Heirs of his body" unqualified vested fee simple in grantee. Scott v. Brin [Tex. Civ. App.] 107 SW 565. "During his lifetime and after his death to descend to his heirs," gave fee. Brokaw v. Brokaw [Iowa] 113 NW 469.

41. Will held to create a trust in favor of son, with legal remainders to his children, barring rule. Xander v. Easton Trust Co., 217 Pa. 485, 66 A 769.

42. "Issue" held used in sense of "children," barring estate of inheritance in first taken. Faison v. Adam, 144 N. C. 107, 56 SE 793. Deed to H and her two children and any succeeding heirs of her body to have and hold to them "and their heirs and assigns" gave children and afterborn children an interest as purchasers. Southern R. Co. v. Hayes [Ala.] 43 S 487. Where testator bequeathed property to his children and provided that on the death of the last survivor it should then be divided between "the children, the lawful heirs of my aforesaid children," rule in Shelly's Case was inapplicable, and testator's children did not take life estate in possession with inheritance in remainder. Reilly v. Bristow, 105 Md. 326, 66 A 262. To two sons "in trust to make their living" and to their children after them creates life estate in sons, with fee remainder to children. Emerick v. Emerick [Pa.] 68 A 183.

43. Jones v. Rees [Del.] 69 A 785.

44. Connor v. Gardner, 230 Ill. 258, 82 NE 640.

45. Unless context of will leaves no doubt of contrary intention. Connor v. Gardner, 230 Ill. 258, 82 NE 640.

46. Grant in trust to wife for life, with fee to children "and heirs of her body," held to create an estate tail in wife, on death of husband, which by statute was enlarged into a fee. Wilson v. Heilman [Pa.] 68 A 674. To devisee for life "and heirs of her body" at her decease, and if she "or her children" die without issue then over, gave fee under statute making fees tail fee simple. Hastings v. Engle, 217 Pa. 419, 66 A 761. Will held to give fee simple shares to children after death of wife though testator used words child and children. Connor v. Gardner, 230 Ill. 258, 82 NE 640.

Jersey only with respect to estates created by will.[47] It does not extend to personalty.[48]

§ 4. *Covenants and restraints. A. Restrictive covenants* See 8 C. L. 1678 are very often building restrictions.[49] While an owner who files a map of his land showing its division into lots and streets and sells lots as shown thereon does not thereby covenant not to sell the land except in parcels deliniated on the map [50] or to retain the land for private uses,[51] he does covenant not to use the land designated as streets,[52] and a purchaser of a lot may enjoin a change either in the location or width of the streets.[53]

(§ 4) *B. Covenants running with the land.* See 8 C. L. 1678—A party wall agreement [54] or a covenant in a lease providing for an extension of the term [55] runs with the land, but not a covenant or agreement which creates no interest in the land itself.[56]

(§ 4) *C. Restraints.* See 8 C. L. 1678—The rights of the owner of a specified legal estate are defined by law, and any attempt by a grantor or donor to impose repugnant restraints is futile,[57] but in Massachusetts a donor may create such equitable rights in property as he may desire without regard to rights incidental to the several legal estates.[58]

Restraints on alienation must be consistent with the estate given [59] and must not exceed the limit prescribed by the rule against perpetuities.[60]

§ 5. *Rents and charges.* See 8 C. L. 1677—A charge in favor of heirs of whom the owner of the land is one is binding in toto upon a purchaser at orphan's court sale after death of the owner where he agrees that the same shall remain unaffected.[61]

§ 6. *Mutual and relative rights and remedies of present and future tenants.* See 8 C. L. 762—A life tenant is a quasi trustee for the remaindermen.[62] While he is

47. Applicable to trust clause providing for sale of land after death of life beneficiary and distribution to certain sons and daughters "and to their heirs and assigns." Armour v. Murray [N. J. Law] 68 A 164.

48. Jones v. Rees [Del.] 69 A 785.

49. See Buildings and Building Restrictions, 9 C. L. 441.

50. He may subdivide and sell in smaller parcels. Herold v. Columbia Inv. & Real Estate Co. [N. J. Err. & App.] 67 A 607.

51. May devote to streets, parks, etc. Herold v. Columbia Inv. & Real Estate Co. [N. J. Err. & App.] 67 A 607.

52. Herold v. Columbia Inv. & Real Estate Co. [N. J. Err. & App.] 67 A 607.

53. Not necessary to first show depreciation in value of lot purchased. Herold v. Columbia Inv. & Real Estate Co. [N. J. Err. & App.] 67 A 607.

54. Ferguson v. Worrall, 31 Ky. L. R. 219, 101 SW 966.

55. Grantee subject to lease held bound to renew. Leominster Gaslight Co. v. Hillery [Mass.] 83 NE 870.

56. Agreement to abstain from sale of liquor. Sjoblom v. Mark [Minn.] 114 NW 746, and authorities reviewed. Under Civ. Code, § 1462, a covenant running with the land must be made in a grant of an estate in realty (Pomona Land & Water Co. v. San Antonio Water Co. [Cal.] 93 P 881), hence an agreement that waters of a stream should be divided for use of landowners on both sides was not such covenant (Id.). There must be land in the hands of the covenantee for the covenant to run with (Baker v. Davis, 127 Ga. 649, 57 SE 62), hence where timber lessee after assignment of lease purchased from owner right to cut timber after expiration of term of lease, such right did not go to assignee of lease (Id.).

57. Dunn v. Dobson [Mass.] 84 NE 327. Provisions calculated to deprive fee simple estates of their incidents are void. Johnson v. Preston, 226 Ill. 447, 80 NE 1001.

58. Dunn v. Dobson [Mass.] 84 NE 327.

59. Limitations tending to deprive an estate in fee simple of the interests appertaining thereto are void. Johnson v. Preston, 226 Ill. 447, 80 NE 1001. A testator may not create an interest which vests at his death and also prohibit the alienation thereof. Ross v. Ayrhart [Iowa] 115 NW 906.

60. Devise to executor in trust for period of 25 years, to take effect from the date of probate of will, is in violation of the rule against perpetuities. Johnson v. Preston, 226 Ill. 447, 80 NE 1001. See Perpetuities and Accumulations, 10 C. L. 1167.

61. Charge payable on death of a life beneficiary. Purchaser liable for payment of share due owner. Dull v. Slater, 31 Pa. Super. Ct. 488.

62. A widow to whom property was devised for life, with power of disposition "for her use and benefit," the residue at her death to be divided among the testator's children, is a quasi trustee for said children, and must answer to their charge that she has improvidently and wastefully used sums in excess of the reasonable expense of her support, moved out of the state, and is dissipating the estate. Hobson v. Lower, 10 Ohio C. C. (N. S.)

entitled to rents and profits,[63] emblements,[64] and sometimes to minerals,[65] he may not impair or dispose of the corpus of the estate,[66] since this must be held intact for the remaindermen.[67] It follows that he is liable to the remaindermen for waste,[68] and his interest may be terminated if the damages exceed the value of the life estate.[69] So, also, a life tenant will not be permitted to acquire an outstanding title and hold it adversely to the remaindermen.[70] Equity will enjoin equitable waste by an owner of a base or determinable fee only when the determining contingency is reasonably sure to happen and the waste is of a character to charge the owner with wanton and unconscientious abuse.[71]

Under the Wisconsin statute, tenants in common of a life estate may have par-

323. Widow to whom legacies were bequeathed for life, remainder to others, held to hold property in trust for remaindermen, so that her executor could sue for accounting and direction of court as to proper disposition of fund. Leggett v. Stevens, 185 N. Y. 70, 77 NE 874.

63. Life beneficiaries for whose sole benefit property was to be held in trust held entitled to entire income, and same could not be added to corpus. Sevier v. Woodson, 205 Mo. 202, 104 SW 1. Where will gave wife a life estate, she was entitled to the income and to dispose of such income, and if she gave same to her daughter it could not be charged against daughter's interest in the estate left after wife's death. Gibbes v. Watson [Miss.] 45 S 5. The fact that in proceedings by a judgment creditor of the life tenant a portion of rents and profits which might have been appropriated in satisfaction of the judgment are directed to be paid by a receiver to the remaindermen will not relieve the latter from a contract obligation to turn them over to the life tenant. Ellis v. Cole, 188 N. Y. 395, 81 NE 230. Interest on mortgage which had been satisfied by proceeds of sale of a parcel as provided in contract between father and daughters. Id.

64. See, also, Emblements and Natural Products, 9 C. L. 1072. Civ. Code 1895, § 3092, relating to right of life tenant to emblements, is merely declaratory of common law. Story v. Butt, 2 Ga. App. 119, 58 SE 388. The legal representatives of a life tenant who appoints the fee by will are entitled to growing corps. Keays v. Blinn [Ill.] 84 NE 628. Exercise of power did not enlarge life estate. Id. Life tenant is not liable to remainderman for crops used for his support and maintenance. Wilson v. Gordon [S. C.] 61 SE 85. Where, on death in August of life tenant of agricultural land a son took entire title and possession subject to charge of one-half its value in favor of a daughter, he was liable for interest on the daughter's share from beginning of next calendar year. Bowen v. True, 74 S. C. 486, 54 SE 1018.

65. Where grantee of land on which was an open coal mine agreed that grantors could remain on the premises during their natural lives, and they remained and mined coal for 11 years, one claiming under grantee could not dispute grantors' life interest in the coal. Robb v. New York & Cleveland Gas Coal Co., 216 Pa. 418, 65 A 938.

66. McDonald v. Jarvis [W. Va.] 60 SE 990. That will directed that entire estate should be controlled and managed for use and support of wife did not authorize executors to burden corpus if rent and uses should prove insufficient. Lester v. Kirtley, 83 Ark. 554, 104 SW 213. A provision in a will that life tenants shall not dispose of the principal or have any power of anticipation until of age does not authorize them, after becoming of age, to dispose of the estates of the remaindermen. Code Pub. Gen. Laws, art. 16, § 213, must be resorted to. Murphy v. Cole [Md.] 68 A 615. Life tenant's surrender of deed and procuring grantor to convey to another held ineffective to bar children who were remaindermen. Slayer v. Johnson [Ky.] 107 SW 210.

67. An expectant estate cannot be defeated or barred by transfer or other act of the owner of the intermediate or precedent estate not authorized by the instrument creating the estates. Conditional devisee for life who was to take after expiration of prior life estate in testator's widow could not during latter's life defeat his son's expectant estate by conveyance. Laws 1896, c. 547, § 47. Green v. Head, 54 Misc. 454, 104 NYS 383. None of the parties having any vested interest in remainder, partition would not lie. Id. A life tenant who is also trustee and who converts the land into money is entitled to only income from the fund thus substituted, and on his removal as trustee he must turn over the fund to his successor. Beach v. Beers [Conn.] 68 A 990.

68. Removal of timber by life tenant held waste. McCartney v. Titsworth, 119 App. Div. 547, 104 NYS 45. Ky. St. 1903, §§ 2328, 2329, authorizing remaindermen to recover against life tenants for waste, does not authorize a mere contingent remainderman to resist recovery for lumber cut and sold by life tenant, or give him an action against life tenant for waste. Taylor v. Harvey, 30 Ky. L. R. 1045, 100 SW 258.

69. McCartney v. Titsworth, 119 App. Div. 547, 104 NYS 45.

70. Widow taking patent from state with money belonging to estate did not acquire fee. Slusher v. Slusher, 31 Ky. L. R. 570, 102 SW 1188. If land is sold at foreclosure owing to failure of a life tenant to pay off debts as provided in a will, a subsequent purchase by the tenant inures to the benefit of the remaindermen. On death of life tenant, remaindermen become entitled to all his interest in contract of purchase. Lewis v. Wright, 148 Mich. 290, 14 Det. Leg. N. 78, 111 NW 751.

71. Fifer v. Allen, 228 Ill. 507, 81 NE 1105.

tition of the life estate, but not of the interests of reversioners.[72] Land in possession of a life tenant should not be sold and proceeds reinvested unless it is shown that minor remaindermen will be benefited thereby.[73] Under a statute merely authorizing a sale of real estate for investment of the proceeds in other property, the court may not divide the proceeds between life tenant and remainderman and reinvest only the remainderman's portion.[74] In the absence of a contrary understanding, the relation of life tenant and remainderman will continue as to new property bought with the proceeds of the old.[75] Under statute, when land has been converted into cash by forced sale, a life tenant may be paid a gross sum as the value of his interest without the consent of the remaindermen.[76]

In the absence of statute,[77] death of a life tenant terminates his lessee's right of possession,[78] such right going to the reversioner subject to the lessee's right to reenter for the purpose of cultivating and harvesting growing crops.[79] Where the life tenant dies during a term created by him, neither the remainderman nor the estate of the life tenant could recover unaccrued rents at common law, but in Ohio the rent will be apportioned between remaindermen and the estate of the life tenant according to equity.[80] A life tenant who is also trustee with full power of disposition for purposes of income may make a lease of reasonable duration which will not expire upon his death though it occur before the last year of the term,[81] and the rights of a transferee of the rents will be superior to those of the remaindermen even after death of the life tenant.[82] Remaindermen are not entitled to possession until the death of the life tenant.[83] The remedy of a life tenant for the recovery of possession from the remainderman is adequate at law.[84]

Possession is not adverse to remaindermen See 8 C. L. 762 pending the life tenancy,[85] and hence limitations will ordinarily not run against them until the death of the life tenant;[86] but this rule does not apply under statutes authorizing suits by remaindermen to quiet title during the continuance of the particular estate.[87]

72. St. 1898, § 3101. Plano Mfg. Co. v. Kindschi, 131 Wis. 590, 111 NW 680.

73. Proof insufficient to authorize sale under Civ. Code Prac. § 492, subsec. 4. Lilly v. Clay, 31 Ky. L. R. 317, 102 SW 278.

74. Civ. Code Prac. § 491. Lilly v. Clay, 31 Ky. L. R. 317, 102 SW 278.

75. Evidence held not to authorize court's reversal of referee's finding that father and son did not intend that new property purchased with proceeds of land of which father was life tenant should belong to son absolutely. Jenson v. Jenson [Kan.] 91 P 86.

76. Chancery act, Revision 1902, § 60 (P. L. 531, 532), passed after accrual of husband's interest as remainderman, held not unconstitutional. Leach v. Leach [N. J. Eq.] 66 A 595.

77. By statute in some states a lessee of a life tenant is entitled to the land until the end of the year upon compliance with the contract with the tenant for life, and notwithstanding the latter dies during the year. Under Civ. Code 1895, § 3093, if undertenant complies with contract with life tenant, he is not accountable to remainderman for any portion of year's rent, though life tenant dies before crops are sown. Story v. Butt, 2 Ga. App. 119, 58 SE 388.

78, 79. Edghill v. Mankey [Neb.] 112 NW 570.

80. No statute being applicable. Capelle v. Wieman, 9 Ohio C. C. (N. S.) 412.

81, 82. Hines v. McCombs, 2 Ga. App. 675, 58 SE 1124.

83. Could not sue to recover property converted by life beneficiary until latter's death. Putnam v. Lincoln Safe Deposit Co. [N. Y.] 83 NE 789.

84. McDonald v. Jarvis [W. Va.] 60 SE 990.

85. Gholson v. Desha [Ky.] 107 SW 330. Suit by remaindermen against trustee and life beneficiary to determine rights in trust property. Putnam v. Lincoln Deposit Co., 118 App. Div. 468, 104 NYS 4. Widow's possession of homestead held not adverse to devisee so as to start limitations against him, though husband had given his wife void deed of the property. Hollenbeck v. Smith, 231 Ill. 484, 83 NE 206.

86. Where widow's deed amounted to only a conveyance of her homestead and dower rights, remaindermen could not have possession until death of widow, hence were not barred by limitations. Willhite v. Berry, 232 Ill. 331, 83 NE 852. Suit by remaindermen to quiet title held not barred where 15 years had not elapsed since death of life tenant. Belcher v. Polly [Ky.] 106 SW 818. Remaindermen not affected by adverse possession against life tenant. Mitchell v. Cleveland, 76 S. C. 432, 57 SE 33. Limitations held not to run against remaindermen until death of life tenant who had procured conveyance to another. Salyer v. Johnson [Ky.] 107 SW 210. Held not to run against remaindermen

Improvements, taxes, incumbrances, etc.[See 8 C. L. 782]—Improvements made by a life tenant inure to the benefit of the remaindermen.[88] As a general rule a life tenant must stand claims for ordinary repairs, taxes, insurance and interest on incumbrances,[89] but where by force of circumstances an investment is changed from personalty to realty and yields no income for many years above what is necessary to preserve the fund for the remaindermen, the life tenant will not be required to stand such expense,[90] and there should be an equitable apportionment between life tenants and remaindermen as to municipal assessments [91] and other governmental imposts of mutual benefit.[92] A statute providing for the forfeiture of a life tenant's estate to the remainderman on failures to pay taxes and redeem after a valid tax sale would seem to be ineffective in any case to vest title in the remainderman.[93] A life tenant is not required to pay the principal of a mortgage.[94] If he does so for his own protection he will be subrogated to the rights of the mortgagee,[95] and since in the making of interest payments he represents the entire estate,[96] such payments operate as new admissions of indebtedness, postponing limitations of his suit against the remaindermen to foreclose.[97]

§ 7. *Rights and remedies between third persons and present and future tenants.*[See 8 C. L. 782]—While at common law a life tenant cannot maintain trover for conversion of trees [98] nor trespass de bonis,[99] both life tenant [1] and remaindermen [2] may sue third persons for injury to the inheritance. A remainderman has no present right to be injured by mere laches in one to assert courtesy against life tenants.[3]

Under a deed signed by a life tenant and his heirs in remainder, all improve-

during existence of life tenancy. Penn v. Rhoades, 30 Ky. L. R. 997, 100 SW 288; Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984. Some courts hold that a suit by a remainderman for **conversion by life tenant** will not lie until the latter's death (Putnam v. Lincoln Safe Deposit Co. [N. Y.] 83 NE 789), others that it will. Remaindermen in stock had cause of action for sale thereof before death of life tenant, and could be barred by limitations. Yeager v. Bank of Kentucky [Ky.] 106 SW 806.

87. Comp. St. 1903, c. 73, §§ 57, 59, 61. First Nat. Bank v. Pilger [Neb.] 110 NW 704; Hobson v. Huxtable [Neb.] 112 NW 658. In such case, limitations will commence to run at the time adverse claim attaches. First Nat. Bank v. Pilger [Neb.] 110 NW 704; Hobson v. Huxtable [Neb.] 112 NW 658. Rehearing denied. First Nat. Bank v. Pilger [Neb.] 111 NW 361.

88. Vanatta v. Carr, 229 Ill. 47, 82 NE 267; Gaulbaugh v. Rouse, 31 Ky. L. R. 1195, 104 SW 959. Where husband of life tenant borrowed money on note of himself, life tenant, and one of possible remaindermen, and improved property therewith, notes could not be paid out of proceeds of property on sale for reinvestment, though improvements enhanced value. Frederick v. Frederick's Adm'r, 31 Ky. L. R. 583, 102 SW 858.

89. In re Menzie's Estate, 54 Misc. 188, 105 NYS 925. Must pay taxes while in possession and has no claim therefor. Gaulbaugh v. Rouse, 31 Ky. L. R. 1195, 104 SW 959. Ordinary taxes and expenses of upkeep must be paid by the life tenant. Brown v. Brown [N. J. Eq.] 65 A 739. His duty to pay interest on mortgages. Bonhoff v. Wiehorst, 108 NYS 437. Where a life tenant is authorized to make certain expenditures and charge them to the corpus of the estate, he must keep a strict account thereof in order to charge them against the estate at the expense of the remaindermen. Vanatta v. Carr, 229 Ill. 47, 82 NE 267.

90. In re Menzie's Estate, 54 Misc. 188, 105 NYS 925.

91. Brown v. Brown [N. J. Eq.] 65 A 739.

92. Where board of health required fencing in of certain lots. Brown v. Brown [N. J. Eq.] 65 A 739.

93. Rev. St. Ohio, § 2852. Anderson v. Messenger [C. C. A.] 158 F 250. At any rate, statute was inapplicable to sales for special assessments. Id.

94, 95. Bonhoff v. Wiehorst, 108 NYS 437. Remainderman entitled to proceeds of corpus less mortgage payments. Cumberland University v. Roberson, 30 Ky. L. R. 947, 99 SW 1152.

96, 97. Bonhoff v. Wiehorst, 108 NYS 437.

98, 99. C. W. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 S 858.

1. Life tenant may sue to recover rental damages from elevated railroad operated in front of premises. Goggin v. Manhattan R. Co., 54 Misc. 472, 104 NYS 548. May maintain trespass quare clausum. C. W. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 S 858.

2. Could sue to restrain maintenance of elevated railroad and for damages though there was an intervening life estate and life tenant could have recovered rental damages. Muller v. Manhattan R. Co., 55 Misc. 133, 102 NYS 454; Goggin v. Manhattan R. Co., 54 Misc. 472, 104 NYS 548. Action for injury by construction and operation of elevated railway. Muller v. Manhattan R. Co., 108 NYS 852.

3. Davis v. Fenner, 30 Pa. Super. Ct. 389.

ments pass with the property conveyed.[4] Where a widow's conveyance is in legal effect only a grant of her homestead and dower rights, the fact that the grantees make improvements and do not have notice of the rights of the remaindermen cannot operate to defeat such rights.[5] Infant contingent remaindermen conveying their interests are not bound to disaffirm on arriving at age pending the life tenancy.[5a] Children who are remaindermen may be concluded by a conveyance by order of court.[6] A statute absolving a purchaser from a trustee from the duty of looking to the application of the proceeds applies where a life tenant is authorized to sell on condition that the proceeds be reinvested.[7]

§ 8. *Proof of title to realty.*[8]—A warranty deed without proof of possession or title in the grantor is not proof of title in the grantee,[9] neither is a tax deed without proof of judgment or precept.[10] However, a warranty deed with proof of continuous possession and payment of taxes for twelve years is sufficient evidence of title as against one asserting no title.[11] By statute a certified copy of a will is prima facie evidence of title.[11a] Tax receipts are admissible to show that the party making the payments claimed the land.[12] Title to land cannot be established by parol evidence.[13]

§ 9. *Merger and abandonment.*[See 8 C. L. 1679]—Merger is the annihilation of a lesser estate by union with a greater in the same person or right.[14] A life estate may merge in the fee to the destruction of an intervening contingent remainder.[15] A limited estate may be converted into a fee where absolute power of disposition is given,[16] but statutes so providing do not apply where title is vested in a trustee and a subordinate power is given to the beneficiary,[17] and a provision that a life tenant may convey the fee if a remainderman dies before maturity does not vest the fee in the life tenant on death of remainderman after maturity.[18] Merger will not take place contrary to the intention of the parties,[19] and this rule obtains both at law and in equity.[20] Per contra, equity will not keep alive a mortgage acquired by the owner of the fee where to do so would give effect to a fraudulent act.[21] Intention to prevent merger need not be proven by express agreement.[22]

4. Gaulbough v. Rouse, 31 Ky. L. R. 1195, 104 SW 959.

5. Willhite v. Berry, 232 Ill. 331, 83 NE 852.

5a. Steele v. Poe [S. C.] 60 SE 951.

6. Where in suit to quiet title plaintiff alleged that proceedings were begun by married woman holding land for life, with remainder to children, on behalf of herself and children, to obtain order to make a conveyance, and that she had advice of counsel who prepared petition for her, children could deny that attorney had authority to file petition, and set up that they were not bound. Morehead v. Allen, 127 Ga. 510, 56 SE 745.

7. Ky. St. 1903, § 4846. Stevens v. Smith, 30 Ky. L. R. 995, 99 SW 1160.

8. See, also, the different actions affecting realty, such as Ejectment, 9 C. L. 1026; Quieting Title, 10 C. L. 1347, etc.

9, 10. Metropolitan West Side El. R. Co. v. Escher, 232 Ill. 210, 83 NE 809.

11. City of Charleston v. Newman, 130 Ill. App. 6.

11a. Under Shannon's Code, §§ 3929, 3930, 3931, an heir seeking to establish title to land may proceed on certified copy of the will which when duly attested is prima facie though not conclusive evidence of validity of will. Grier v. Canada [Tenn.] 107 SW 970. While it may be shown that will was not formally executed and attested, an issue of devisavit vel non cannot be raised. Id.

12. Langston v. Cothran [S. C.] 58 SE 956.

13. Montijo v. Sherer [Cal. App.] 92 P 512.

14. Held unnecessary to determine whether will gave wife only a life estate where she was sole heir at law and there was no devise over. Smith v. Moore, 129 Ga. 644, 59 SE 915. Death of remainderman before life tenant held to pass remainder to his heirs who held fee after acquiring life tenant's interest. Hunt v. Phillips [Ky.] 105 SW 445. A power for the benefit of the donees who own the fee and another is merged in the fee by that other's death. In re Rathyen, 115 App. Div. 644, 101 NYS 289.

15. Estate to A for life, then to living issue, but in default of such to B. McCreary v. Coggeshall, 74 S. C. 42, 53 SE 978.

16. Real Prop. Laws 1896, p. 580, c. 547, § 131. Where devisee was authorized to use as much of proceeds of sale as he might desire. Ryder v. Lott, 108 NYS 46.

17. Where beneficiary was given power of appointment by will. Dudley v. People's Trust Co., 57 Misc. 230, 107 NYS 930.

18. Mitchell v. Cleveland, 76 S. C. 432, 57 SE 33.

19. Evidence held to show intention against merger of life estate and fee so as to destroy intervening remainder. McCreary v. Coggeshall, 74 S. C. 42, 53 SE 978.

20. McCreary v. Coggeshall, 74 S. C. 42, 53 SE 978.

21. Rohde v. Rohn, 127 Ill. App. 579. See, also, Mortgages, 10 C. L. 855.

Abandonment See 8 C. L. 1677 must be established by legal and satisfactory evidence.[23]

REASONABLE DOUBT; RECAPTION; RECEIPTORS; RECEIPTS, see latest topical Index.

RECEIVERS.

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Rules peculiar to receivers of foreign [24] or domestic [25] corporations and to those appointed in mortgage foreclosure [26] or supplementary proceedings [27] are treated elsewhere.

§ 1. *Nature, grounds, and subjects of receivership.* See 8 C. L. 1680—The word "receiver" is defined by statute in some states.[28] Receivership proceedings being ancillary, appointment will not ordinarily be granted where that is the ultimate relief sought.[29] The purpose of a receivership is to preserve the property pendente lite until the final disposal of all questions involved in the action,[30] and it will not be allowed in the absence of reasonable probability that the party seeking it is entitled to the ultimate relief sought.[31] The appointment of a receiver rests in discretion [32]

22. McCreary v. Coggeshall, 74 S. C. 42, 53 SE 978.

23. That witness had heard owner had written a letter saying he did not claim the land held not sufficient to sustain claim of abandonment. Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

24. See Foreign Corporations, 9 C. L. 1395. Also see particular corporation articles, such as Railroads, 10 C. L. 1365; Street Railways, 8 C. L. 2004, etc.

25. See Corporations, 9 C. L. 733. Also particular corporation articles, such as Railroads, 10 C. L. 1365; Street Railways, 8 C. L. 2004, etc.

26. See Foreclosure of Mortgages on Land, 9 C. L. 1378.

27. See Supplementary Proceedings, 8 C. L. 2046.

28. Under Ballinger's Ann. Codes & St. § 5455, a receiver is a person appointed by the court or judicial officer to take charge of property during the pending of a civil action, etc., and to manage and dispose of it as the court or officer may direct (Libert v. Unfried [Wash.] 91 P 774), so that a person appointed by the court to take charge of mortgaged chattels pending foreclosure proceedings, whether appointed under § 5456, providing generally when receivers may be appointed, or §§ 5877 and 5878, relative to chattel mortgages, is a receiver (Id.).

29. Refused where the only valid ground given was insolvency and the proceeding was not ancillary to another action. Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94, 89 P 866. Receivership held not to be sole object of the suit, but to be to some extent ancillary to a decree for an accounting and the ascertainment of the complainant's share of rents wrongly collected and appropriated by his cotenants. Bilder v. Robinson [N. J. Eq.] 67 A 828. The appointment being ancillary to the main action, it was held that the court had jurisdiction to make it. Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474.

30. West v. Mercer [Ga.] 60 SE 859.

31. A receiver will not be appointed in a partnership case unless the partner applying is entitled to a dissolution of the partnership. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849. The question of appointment is addressed primarily to the discretion of the court which is to be exercised in view of the probability or improbability of the success of the applicants and many other facts which might bear upon the question. West v. Hermann [Tex. Civ. App.] 104 SW 428.

32. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849; Lamp v. Homestead Bldg. Ass'n [W. Va.] 57 SE 249. That discretion is not unlimited and is to

which will not be controlled by mandamus,[33] nor will it be disturbed on appeal unless clearly abused.[34] The remedy lies in the extraordinary power of chancery [35] and will not be exercised if any other remedy is adequate [36] or if the necessity is not imperative [37] or the inconveniences attending such appointment would be very great.[38] Like other equitable remedies it must be sought with diligence.[39] A receiver will ordinarily be appointed only on behalf of one having a property right [40] or lien,[41] or entitled to satisfy his claim from a particular fund.[42] The remedy is most frequently granted in case of insolvency [43] or to preserve rights in property in danger of loss from waste or removal.[44] Appointment is usually authorized by statute in connec-

be exercised in much the same manner as in applications for injunctions. McClure v. McGee [Ky.] 108 SW 341. Burns' Ann. St. 1901, § 1236, provides for the appointment of a receiver where in the discretion of the court it is necessary to secure ample justice to the parties. Sallee v. Soules, 168 Ind. 624, 81 NE 587.

33. Harding v. Garber [Okl.] 93 P 539.

34. Appointment of a special receiver held to have been warranted. Lamp v. Homestead Bldg. Ass'n [W. Va.] 57 SE 249. Held that there was no abuse of discretion in refusing to appoint a receiver. J. Goodrum Tobacco Co. v. Potts-Thompson Liquor Co. [Ga.] 61 SE 13. Held that it was not shown that the court erred in appointing a receiver. Krotz v. Louisiana Const. Co. [La.] 45 S 276; Lamp v. Homestead Bldg. Ass'n [W. Va.] 57 SE 249.

35. McClure v. McGee [Ky.] 108 SW 341.

36. McClure v. McGee [Ky.] 108 SW 341. Mere recklessness of a pleader in concluding that salaries are excessive will not justify the appointment of a receiver where there is nothing to show that the plaintiff's rights cannot be fully secured without such arbitrary action. Hastings v. Tousey, 121 App. Div. 815, 106 NYS 639.

37. It must be shown that the defendant is insolvent or that some other reason exists rendering the other remedies open inadequate. McClure v. McGee [Ky.] 108 SW 341.

38. Court refused to appoint receiver to execute a farming lease which contained no provision for rescission, forfeiture or reentry for breach thereof. Conover v. Tansey [N. J. Eq.] 67 A 1013.

39. Court refused to appoint a receiver to execute a farming contract where the complainant delayed nearly five months and in the meantime the farmer had planted and partly harvested the crops. Conover v. Tansey [N. J. Eq.] 67 A 1013.

40. The interests of a stockholder, other than as a stockholder, are not involved in a suit brought by him, in theory on behalf of the corporation, against a corporation and its officers, asking for a receiver. Hastings v. Tousey, 121 App. Div. 815, 106 NYS 639.

41. Appointment of receiver for certain crops refused on ground that there was no llen or interest in the crops. Ibbetson v. Pearson [Cal. App.] 94 P 252. The defense that the complainants are not judgment creditors may be waived. Pennsylvania Steel Co. v. New York City R. Co., 157 F 440. Held to be waived by appearance and answer confessing debt and insolvency and joinder in the prayer for a receiver. Horn v. Pere Marquette R. Co., 151 F 626. The consent of the defendant to the appointment of receivers without setting up the defense that the complainants were not judgment creditors who had issued an execution which was returned unsatisfied, in whole or in part, held to amount to a waiver of the defense. In re Reisenberg, 28 S. Ct. 219. Intervening creditors are concluded thereby. Horn v. Pere Marquette R. Co., 151 F 626.

42. Being simple creditors, the property held not to be special fund for their peculiar protection. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78.

43. Where there was no insolvency, at most only a danger of it, the court expressed grave doubts as to the propriety of the appointment. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78. A partner who is excluded from partnership management and control need only prove that fact, without evidence of the insolvency of the copartner. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849. Allegations of insolvency and imminent insolvency, with danger of dissipation and sacrifice of assets held sufficient to warrant the appointment. Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474. In California a court has no inherent power to appoint a receiver of an insolvent corporation merely because it is insolvent, notwithstanding Code Civ. Proc. § 564, subd. 6, since such appointment is only made ancillary to another action brought. Hobson v. Pacific State Mercantile Co., 5 Cal. App. 94, 89 P 866. Appointment refused where the only other averment besides insolvency was a prayer for a judgment for a certain sum with no sufficient allegations to support the action. Id.

44. This is provided by Burns' Ann. St. 1901, § 1236. Sallee v. Soules, 168 Ind. 624, 81 NE 587. Appointment held proper. Id.; Krotz v. Louisiana Const. Co. [La.] 45 S 276. Where at most there was only a danger of insolvency, but there were a large number of suits and consequent waste and exhaustion of assets, the court expressed grave doubts as to the propriety of the appointment. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78. Rev. St. 1895, art. 1465, authorizes the appointment of a receiver in a partnership action on the application of a partner whose right or interest in the property is probable and it is shown the property is in danger of being lost, removed or materially injured. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849. Court held to have power to appoint a receiver for oil lands at the instance of party who appeared to have an interest under Rev. St. 1895, art. 1465. West v. Hermann [Tex. Civ. App.] 104 SW 428. Appointment of receiver of community property on application

tion with the dissolution of firms or corporations;[45] such receiverships being more fully treated in other topics.[46] The propriety of appointing a receiver cannot be collaterally questioned.[47]

of wife, where part had been removed from the state and the rest was about to be disposed of, held proper under Texas statute authorizing the appointment of a receiver in an action between joint owners where there is danger of removal. Merrell v. Moore [Tex. Civ. App.] 104 SW 514. Receiver appointed where there was a contest over the estate of a decedent, the property was in danger of loss owing to tax sales and threatened foreclosure, with no one to protect it. McCarter v. Clavin [N. J. Eq.] 66 A 599. Appointment held proper where the defendant had wrongfully delayed the lawful sale of land 7 years and the land had so diminished in value that there was danger of loss to the execution creditor. Smith v. Zachry, 128 Ga. 290, 57 SE 513. Appointment of receiver by the judge in vacation held warranted. McKee v. Murphy [Iowa] 113 NW 499. As a general rule, where a mortgagee is in peaceable possession, a receiver will not be appointed unless the mortgagee is irresponsible, or it appears that the rents and profits will be lost, or that the mortgagee is committing waste and materially injuring the property. Harding v. Garber [Okl.] 93 P 539. Court found that there was no actual wrong, injustice or injury in the management of the business and refused to appoint a receiver. Green v. Felton [Ind. App.] 84 NE 166. Receiver for a corporation at the instance of a stockholder refused where it was not shown that the corporation and its officers are insolvent, where no rights of creditors are involved or any danger of removal or loss. Hastings v. Tousey, 121 App. Div. 815, 106 NYS 639. Civ. Code Prac. § 298, providing that the court "may" appoint a receiver where thers is danger of loss, removal or injury, construed, and held that "may" is not equivalent to "must" and that an appointment was improper where remedies of claim and delivery and special attachment were open to the plaintiff. McClure v. McGee [Ky.] 108 SW 341. Appointment held proper where one partner fraudulently conspired to defraud the other of his interest in certain land and in the partnership. Whipple v. Lee, 46 Wash. 266, 89 P 712. Mandate by superior to inferior court directing an order which will not disturb the possession of a mortgagee held not to deprive the court of the power to appoint a receiver for the property if grounds therefor existed. Harding v. Garber [Okl.] 93 P 539. A corporation was organized by the heirs and legatees of an estate to bid at executor's sale such of the property as might otherwise be sold at a sacrifice. Subsequently certain of the heirs brought action against the executors and the corporation for accounting, cancellation of sales, appointment of a receiver, and other relief. The court enjoined sale of any of the real estate until final decree and required defendants to give bond, but refused to appoint a receiver. The executors were men of ample means to secure all claims of the estate. Held that the court did not abuse its discretion in refusing receiver for the corporation. West v. Mercer [Ga.] 60 SE 859. Receiver should not be appointed to take the assets out of the hands of legally appointed representatives except in case of manifest danger of loss or destruction or material injury to the assets. Id. Code Civ. Proc. § 713, providing that a receiver may be appointed before final judgment "on the application of a party who establishes an apparent right to, or interest in, the property, where it is in the possession of an adverse party and there is danger that it will be removed beyond the jurisdiction of the court, or lost, materially injured or destroyed," excludes every other case and prohibits an appointment except as authorized. Hastings v. Tousey, 121 App. Div. 815, 106 NYS 639.

45. Appointment of a receiver on the application of the state for a corporation whose permit to do business in the state has been dissolved held authorized by act of April 11, 1907. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 107, 105 SW 851. Court held to have authority to appoint receiver also by virtue of Sayles' Rev. Civ. St. 1897, art. 1465, subd. 3, which provides that a receiver may be appointed where a corporation is dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights. Id. Under Rev. St. 1895, art. 1465, providing that a receiver may be appointed for corporations which have forfeited their corporate rights, a receiver may be appointed for a corporation which has failed to pay its franchise tax. Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474. Under Code Civ. Proc. § 1810, the court may appoint a temporary receiver of the property of a corporation against the directors of which the attorney general has brought action under § 1781 to account for their official conduct, etc., as authorized by § 1782. People v. Hasbrouck, 57 Misc. 130, 107 NYS 257. Under Rev. St. 1895, art. 1465, authorizing the appointment of a receiver in partnership actions where there was danger of the property being lost, removed or materially injured, and art. 1492, providing that nothing in the act of 1887, of which art. 1465 is part, shall prevent a partner from having a receiver appointed when a cause of action arises, it is not necessary to prove that the property is in danger of being lost, etc., proof of exclusion from partnership management is sufficient. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 844.

46. See Partnership, 10 C. L. 1100; Corporations, 9 C. L. 733.

47. An appointment under Code Civ. Proc. § 564, authorizing a receivership in certain actions between partners, cannot be attacked collaterally except upon the ground of want of jurisdiction. Title Ins. & Trust Co. v. Grider. [Cal.] 94 P 601. The allegation in the complaint that the order of appointment was "duly made" was held, under Code Civ. Proc. § 456, equivalent to an averment that all jurisdictional prerequisites to the appointment of a receiver existed. Id. The legality of an appointment of a

Liability for wrongful appointment.[See 8 C. L. 1683]—One who procures the appointment of a receiver is liable for the legitimate expenses of the receivership if the appointment is wrongful.[48]

§ 2. *Appointment, qualification and tenure of receivers. A. Proceedings for appointment and qualifications.*[See 8 C. L. 1683]—Except in cases of emergency, notice of the application must be given.[49] The failure to give notice may be cured.[50] In Illinois the giving of notice by the auditor to a bank whose capital stock has become impaired is a condition precedent to an application for appointment of a reciver to wind up its affairs.[51] The Federal statute providing for appeals from interlocutory orders appointing receivers affords sufficient relief to defendant where receivers are improperly appointed without notice,[52] except in a case of collusion between the parties.[53] Where, upon the application of foreign plaintiffs, the Federal court has

receiver by the comptroller of the currency cannot be attacked either collaterally or directly by a debtor of the bank. Lyons v. New York Bank of Discount, 154 F 391. Where the averments in the petition were of such a character as to authorize the appointment and a demurrer thereto was not well taken, it was held that the evidence being conflicting the discretion of the court would not be interfered with. Burgess v. Simpson Grocery Co., 128 Ga. 423, 57 SE 717.

48. Where a temporary receiver was improperly appointed ex parte, the plaintiffs were taxed with all the costs of every nature and kind from the date of appointment to the time when the defendant acquiesced in a decree making the appointment permanent. Huff v. Bidwell [C. C. A.] 151 F 563.

49. The power should be exercised only in a clear case of imperious necessity when the rights of the plaintiff and the relief to which he shows himself entitled can be secured and protected in no other way. Huff v. Bidwell [C. C. A.] 151 F 563. No such necessity shown in bill or record. Id. Appointment will not be made without notice save in the case of irreparable injury. Hobson v. Pacific States Mercantile Co., 5 Cal. App. 94, 89 P 866. Complaint held insufficient to justify an appointment without notice in that it did not show that irreparable injury or any loss or destruction of property would have resulted if notice had been given. Continental Clay & Min. Co. v. Bryson, 168 Ind. 485, 81 NE 210. Civ. Code Ga. 1895, § 4904, providing that under extraordinary circumstances a receiver may be appointed without notice, is confirmatory merely of the principle of equity procedure. Mann v. Gaddie [C. C. A.] 158 F 42. Appointment without notice held improper where it appeared that the defendant was solvent and willing to give a bond to secure complainant's interests. Id. The rule applies to a receivership suit between partners. Id. An appointment without notice may be made where the defendant is beyond the jurisdiction of the court or cannot be found (Id.; Henderson v. Reynolds, 168 Ind. 522, 81 NE 494), or where interference, before notice can be given, is necessary to prevent waste, destruction, or loss of the property (Mann v. Gaddie [C. C. A.] 158 F 42; Henderson v. Reynolds, 168 Ind. 522, 81 NE 494), or where notice will jeopardize the safety of the property (Id.). Burns' Ann. St. 1901, § 1244 (Rev. St. 1881, § 1230 and Homer's Ann. St. 1901), requires sufficient cause to be shown by affidavit. Continental Clay & Min. Co. v. Bryson, 168 Ind. 485, 81 NE 210; Henderson v. Reynolds, 168 Ind. 522, 81 NE 494. An affidavit that statements "are true to the best of the knowledge and belief of the affiant," or "to the best of his information and belief," held insufficient. Id. Allegations held to be mere statements of opinion which in the absence of an affidavit of facts were insufficient to justify the appointment without notice. Continental Clay & Min. Co. v. Bryson, 168 Ind. 485, 81 NE 210. An appointment, without notice, was set aside where the solvency of the defendant was not denied and allegations of the danger of the conversion of and removal of the property from the jurisdiction were vague and unsupported by facts. Dickens v. Dickens [Ala.] 45 S 630; Henderson v. Reynolds, 168 Ind. 522, 81 NE 494. One may not by his own delay or failure to act promptly create an emergency which will excuse his giving the required notice. Henderson v. Reynolds, 168 Ind. 522, 81 NE 494. In mortgage foreclosure, the court may appoint a receiver without notice, although the parties have stipulated that notice should be given (Woerishoffer v. Peoples, 120 App. Div. 319, 105 NYS 506), but, in such a case, either inability to give notice or that the plaintiff will be prejudiced by the delay should be made to appear (Id.). Order appointing receiver without notice reversed. Id.

50. Where, after joint receivers were appointed without notice, one resigned and the remaining one was made sole receiver, the defendant appearing before the latter appointment, it was held that the error was cured (Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474) and that in the absence of collusion or fraud such appearance concluded the creditors, the rule as to notice applying only to the defendant (Id.).

51. Hurd's Rev. St. 1905, § 11, c. 16a, so construed. People v. Milwaukee Ave. State Bk., 230 Ill. 505, 82 NE 853.

52. Act March 3, 1891, c. 517 (26 Stat. 828; 1 U. S. Comp. St. 1901, p. 550), allowing appeals and providing that proceedings in other respects should not be stayed unless otherwise ordered by the court, held to afford defendant sufficient relief. Mann v. Gaddie [C. C. A.] 158 F 42.

53. Act of Mar. 3, 1875, § 5 (18 Stat. 470, c. 137; U. S. Comp. St. 1901, p. 511). In re

appointed a receiver for a domestic corporation operating properties under lease from another domestic corporation, it is without authority to extend the receivership to include the lessor corporation upon the application of such corporation to be allowed to intervene as defendant or upon the application of a third domestic corporation when there is no diversity of citizenship or cause of action under Federal laws and the action is in no sense ancillary and relief could be granted in the state courts.[54] A Federal court has jurisdiction of a proceeding for the appointment of a receiver based on diverse citizenship, although the defendant admits the allegations of the bill and unites in the application for receivers.[55] Where a state court and a Federal court [56] or co-ordinate state courts may each take jurisdiction to appoint a receiver, the court which first acquires jurisdiction holds it to the exclusion of the other until its duty is fully performed,[57] which is retained by an appellate court during appeal,[58] and the actual seizure of the property by the receiver is not necessary to give the exclusive jurisdiction.[59] The remedy for the unlawful interference with such exclusive jurisdiction, by co-ordinate court, is by a writ of prohibition.[60] A foreign court having jurisdiction of the parties and the subject-matter, and having in the exercise of its discretion appointed a receiver, his appointment will not be questioned in an action in another court.[61] The question of venue is governed by statute,[62] and rights as to venue may be waived.[63] Ordinarily a receiver will not be appointed where the averments of the bill are denied.[64] Where an ex parte application is made, the usual mode of procedure is to set a time for the hearing of the application and meantime, if the necessities of the case are shown to require it, to appoint a temporary receiver.[65] An order vacating an ex parte appointment is not appealable,[66] and in Indiana no

Reisenberg, 28 S. Ct. 219. Evidence held not to show collusion. Id.

54. People v. Hasbrouck, 57 Misc. 130, 107 NYS 257.

55. In re Reisenburg, 28 S. Ct. 219. Held that there was no collusion. Pennsylvania Steel Co. v. New York City R. Co., 157 P 440.

56. State court held to have obtained exclusive jurisdiction. State of Texas v. Palmer [C. C. A.] 158 F 705. Decree of Federal court appointing receiver held materially to interfere with the jurisdiction of the state court, the decrees being equally broad. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 840, 103 SW 836.

57. State v. Reynolds [Mo.] 107 SW 487. Where such a court takes jurisdiction, there remains nothing to which the jurisdiction of another court can attach. Id.

58. Although because of the supersedeas bond the receiver was unable to take possession, it was held that by reason of his qualification he was so far subject to the jurisdiction of the appellate court, which held the trial court's jurisdiction of the res, that he could be directed by it to appear before the interfering Federal court and urge and insist upon the jurisdiction of the state court. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 840, 103 SW 836.

59. Filing the petition, issuance of notice, its service and the formal order appointing the receiver and granting an injunction, held to be sufficient. State of Texas v. Palmer [C. C. A.] 158 F 705. The fact that the Federal receiver was first appointed and in possession held immaterial. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 840, 103 SW 836.

60. State v. Reynolds [Mo.] 107 SW 487.

61. Jenkins v. Purcell, 29 App. D. C. 209.

62. A suit to have the property of a railroad lying in different Federal districts in the same state is one of local character, and under Rev. St. § 742 (U. S. Comp. St. 1901, p. 588) may be brought in any of such districts. Horn v. Pere Marquette R. Co., 151 F 626.

63. Where, in a proceeding for the appointment of a receiver in a county other than that in which the corporation had its principal office, the officers and directors waived issuance of service and appeared, it was held that that settled the question of venue. Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474. If the court has jurisdiction, the statutory right of being sued in a special district is the personal privilege of the defendant and may be waived. Horn v. Pere Marquette R. Co., 151 F 626. It is waived by appearance, answer to the merits and joinder in the prayer for the appointment of a receiver. Id. Third person not parties, but intervenors, held bound by waiver. Id.

64. Where the sole question was as to the priority of liens, which were not disputed by the owner of perishable chattels, case held to be an exception to the rule. Harned v. Rowand [N. J. Eq.] 69 A 181.

65. Under Act 159, p. 313, of 1898, § 2, requiring return to be made within 10 days from the date of the order unless circumstances require, in the judgment of the court, a shorter delay, the court may, in its discretion, order the return to be made the day after the order was signed. Krotz v. Louisiana Const. Co. [La.] 45 S 276.

66. Despite Ballinger's Ann. Codes & St. § 6500, subd. 5, as amended by Laws 1901,

right of appeal is given from an order overruling a motion to vacate the appointment of a receiver.[67] If on appeal from an order appointing a receiver it appears that there is no equity in the bill[68] or that the court has no jurisdiction, the appellate court should make final disposition of the case.[69] An appeal from an order appointing a receiver merely suspends the functions, but does not vacate the appointment of the receiver.[70] After an appeal from an interlocutory order appointing a receiver has been perfected, filing a motion in the lower court to set aside the interlocutory decree appealed from is not a waiver of the appellant's right further to prosecute the appeal.[71] On an appeal from an interlocutory decree appointing a receiver, the question of the consolidation of two suits will not be considered.[72] Simply to file affidavits used on the application for a receiver with the clerk is not the proper manner to bring them before the appellate court.[73] The question whether a receiver can be reinstated after an order discharging him should be considered in an appeal and not in a writ of certiorari and prohibition.[74] An order of appointment may be conditioned on the filing of the bill and answer.[75] In a supplemental proceeding for the appointment of a receiver, the court may take judicial notice of the facts established in the main case.[76] An application for the appointment of a receiver must be predicated upon pleading in the nature of a petition or bill.[77] The court appointing a receiver has power to accept his resignation[78] or remove him and appoint a

p. 28, c. 31, authorizing an appeal from an order appointing or removing receiver, since an ex parte appointment is only temporarily valid as an emergency order until notice can be given, an order vacating it is not appealable, as the court could not restore or continue the emergency order. Libert v. Unfried [Wash.] 91 P 774.

67. Where exception to the overruling is made, the appeal is not from the ruling on the motion, but from the order appointing the receiver. Continental Clay & Min. Co. v. Bryson, 168 Ind. 485, 81 NE 210.

68, 69. Mann v. Gaddie [C. C. A.] 158 F 42.

70. Where, after the appointment of a receiver by a state court, the defendant appealed as provided by Rev. St. Tex. 1895, art. 1404, and filed a supersedeas bond, called for by art. 1383, it was held that the jurisdiction of the state court was not lost or abandoned by the appeal and supersedeas. State of Texas v. Palmer [C. C. A.] 158 F 705. An appeal with supersedeas merely suspends the power of the lower court to make any order tending toward an execution or enforcement of the order appealed from, but does not interfere with the power of the court to give orders to its receivers looking toward the preservation of the fund. McKinnon-Young Co. v. Stockton, 53 Fla. 734, 44 S 237. The legal custody of the property is not lost by the granting of an appeal from the appointment. State v. Reynolds [Mo.] 107 SW 487.

71. On an appeal from an interlocutory decree appointing a receiver, no question will be considered except such as immediately led to the appointment, leaving all other matters in the court below. Continental Clay & Min. Co. v. Bryson, 168 Ind. 485, 81 NE 210.

72. Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474.

73. They should be either briefed and included in the bill of exceptions as exhibits duly identified by the presiding judge, or included in a brief of evidence approved and made a part of the record. Smith v. Zachry, 128 Ga. 290, 57 SE 513.

74. Proceedings transferred to an appeal in the same case which being compromised never was tried. First Nat. Bk. v. Powell Bros. & Sanders Co. [La.] 44 S 997

75. Where a judge in chambers appointed a receiver, on a bill and answer joining in the application, to take effect on the filing of the bill and answer, it was held that when the papers were so filed the appointment became effective (Horn v. Pere Marquette R. Co., 151 F 626), and any delay in the record of it by the clerk (Id.) or delay in giving the bond was of no practical moment (Id.).

76. It need not rehear and review the facts. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 107, 105 SW 851. A certification of the court that it has so taken judicial notice in effect holds that the facts were sufficient to authorize the appointment. Id. A presumption in favor of the action of the court appointing exists in the absence of evidence to rebut it. Id.

77. Document filed by the state held to be in the nature of a pleading. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 107, 105 SW 851.

78. In Texas, where the resignation of one of two joint receivers is accepted and an order made appointing the remaining one sole receiver, a transcript filed within twenty days of the last order is sufficient to carry up the order for review. Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474. Circumstances surrounding resignation of old receiver and appointment of new held not to warrant the setting aside of the orders in relation thereto. Daniel v. Citizens' Mut. Fire Ins. Co., 149 Mich. 626, 14 Det. Leg. N. 525, 113 NW 17.

successor.[79] Where joint receivers become hostile, they should be removed.[80] A receivership may be extended to an intervening defendant.[81] In some states, in certain cases, the court may appoint a receiver of its own motion independent of any request.[82] The appointment of receivers by judges in vacation,[83] or in chambers, is governed by statute.[84]

Bonds.[See 8 C. L. 1684]—Where a receiver is appointed, the court should require a bond to be filed.[85]

(§ 2) *B. Who may be appointed.*[See 8 C. L. 1684]—As a rule the receiver should be a person wholly impartial and indifferent towards all parties interested in the fund or property.[86] Whether a party should be appointed receiver, however, rests in the discretion of the court.[87]

(§ 2) *C. Tenure of receiver.*[See 6 C. L. 1255]

§ 3. *Title and rights in and possession of the property. A. Title in general.*[88] The effect of the appointment of a receiver is not to oust any party of his right to the property but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it,[89] whose rights and interests are paramount to those of the receiver,[90] nor does the appointment extinguish titles or rights.[91] The qualified title

79. It is a discretionary matter. State v. Reynolds [Mo.] 107 SW 487.

80. Where joint receivers could not agree upon their counsel, it was held that they should have been ordered to agree upon one and failing that should have been removed. People v. Brooklyn Bk., 109 NYS 534.

81. Such an order is not of a jurisdictional nature, but discretionary. In re Reisenberg, 28 S. Ct. 219. Extension to a second street way so tied up with the first that that extension was necessary, upheld. Id. Where a lessee street railway was in the hands of a receiver, it was held proper to allow the lessor to intervene and extend the receivership to it. Pennsylvania Steel Co. v. New York City R. Co., 157 F 440.

82. In Texas, where there is a judgment forfeiting corporate rights, the court may, in the exercise of its judicial discretion, appoint a receiver without a request therefor. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 18 Tex. Ct. Rep. 840, 103 SW 836.

83. Iowa Code, § 3822, expressly authorizes it in a proper case. McKee v. Murphy [Iowa] 113 NW 499.

84. By Rev. St. § 638 (U. S. Comp. St. 1901, p. 519), and Rule 3 of supreme court equity rules, in a pending case, Federal judges may appoint receivers in chambers. Horn v. Pere Marquette R. Co., 151 F 626, A circuit judge may do chamber business of this nature at any place within his circuit, regardless of the district where the case is pending (Id.), or on a bill and sworn answer joining in the application (Id.).

85. An ex parte appointment, which in substance directs the receiver to seize and retain the property without giving bond, is void. Libert v. Unfried [Wash.] 91 P 774.

86. Generally speaking, the officers and directors of the corporation involved in insolvency, should not be appointed receivers. Coy v. Title Guarantee & Trust Co., 157 F 794. Receiver who was only nominally director and vice-president, but had given his name and assent to objectionable policy, removed. Id. While this rule is not inflexible, officers and directors of an insolvent concern who by their bad management contributed to its ill success should not be appointed. Id.

87. While a trustee will not ordinarily be appointed receiver of the trust estate, this rule may be departed from if it appears that such appointment would be for the best interest of the estate. Patterson v. Northern Trust Co., 230 Ill. 334, 82 NE 837. Legal ownership of property does not render the owner ineligible to appointment as receiver of an equitable interest of another therein, especially where the owner's interests do not conflict with the interests of the creditors of the other. Jenkins v. Purcell, 29 App. D. C. 209.

88. See 8 C. L. 1684. See, also, Abatement and Revival, 9 C. L. 1.

89. Case held to be one where equity could appropriateiy intervene to convert perishable property into cash, in order that the fund might remain intact for distribution to those entitled, as their rights were ascertained. Harned v. Rowand [N. J. Eq.] 69 A 181. In a petition for a receiver of a partnership, the court will not pass on questions of rights between the partners, the sole object being to protect and retain the assets for the benfit of those to whom they belong. Rische v. Rische [Tex. Civ. App.] 19 Tex. Ct. Rep. 383, 101 SW 849. The effect upon the creditor of the taking over by the receiver of the general assets of the debtor is to substitute for a right of action, in personam, theretofore existing, a right to a proportional part of the impounded assets, a right to receive such part thereof as its total proved demand bears to the total of all proved demands, unaffected by fact that it holds security for a part or all of its debt. In re Bement's Sons, 150 Mich. 530, 114 NW 327.

90. If the receivers cannot subordinate their views to such paramount rights, the court should change the receivers. People v. Brooklyn Bk., 109 NYS 534.

91. The possession of the receiver is but the possession of those having a right to the property, and does not defeat any title

of a receiver [92] and his right to possession relates back to the time of his appointment,[93] although proceedings may not be perfected until a later date.[94] A receiver has no power to take possession of property outside of the jurisdiction in which he is appointed.[95] The appointment of a receiver is an equitable attachment of the defendant's property.[96] A receiver by taking possession of demised property does not become the assignee for the term, and is entitled to a reasonable time in which to ascertain the value of the lease and determine whether or not he will accept it.[97]

(§ 3) *B. Rights as between receivers, claimants, or lienors.* See 8 C. L. 1885—As before stated, the appointment of a receiver in no way affects the title to the property,[98] all interests and valid liens thereon being preserved,[99] as of the date of the appointment.[1] While the property is in the custody of the court by the receiver, a lien cannot be perfected without permission of the court,[2] the proper procedure being a petition in intervention setting up the lien.[3] A license to use lands is terminated by the appointment of a receiver.[4] Actual manual seizure by the receiver is not essential to prevent the acquisition of liens after the appointments.[5] An assignment by a corporation to its receiver has no extraterritorial force.[6] A receiver appointed in a

claim or right in the fund. Horn v. Pere Marquette R. Co., 151 F 626. See infra, subd. C.

92. Horn v. Pere Marquette R. Co., 151 F 626. Under § 3488 of Ind. Ter. Ann. Sts. 1899, a receiver has full possession, custody and control of the property and is vested with the title so far as it is necessary to collect debts and preserve the assets and property for the benefit of creditors and all persons interested. Ardmore Nat. Bk. v. Briggs Machinery & Supply Co. [Okl.] 94 P 533.

93. Ardmore Nat. Bk. v. Briggs Mach. & Supply Co. [Okl.] 94 P 533. This same is true, where he is required to give bond and security, after he qualifies by so doing. Horn v. Pere Marquette R. Co., 151 F 626.

94. His title and possession during the interval between the original order and decree perfecting his appointment are superior to those of a judgment creditor who levies upon the property under his judgment during such interval. Ardmore Nat. Bk. v. Brigg's Mach. & Supply Co. [Okl.] 94 P 533.

95. Property of Carthusian monks in the United States held not to pass to French receiver. Baglin v. Cusenier Co., 156 F 1076. Assignee of receiver enjoined from confiscating trade mark. Id.

96. Where a receiver is appointed in one of several Federal districts in the same state, the appointment is an equitable attachment of the defendant's property in all the districts. Horn v. Pere Marquette R. Co., 151 F 626.

97. Marshall v. Walter A. Caverly Co., 5 Ohio N. P. (N. S.) 185.

98. See ante, subd. A, this section.

99. A special deposit in a bank was allowed to be followed into the hands of a receiver and charged with the trust. Shopert v. Indiana Nat. Bk. [Ind. App.] 83 NE 515. A lienholder held not to have waived its rights, as against a lienholder whose lien did not attach until after the appointment of a receiver, by intervening and praying for foreclosure and later amending its plea and asserting title and right to possession of the property. Ardmore Nat. Bk. v. Briggs Mach. & Supply Co. [Okl.] 94 P 533. Under the circumstances, it was held that property subject to a judgment lien, the order of sale for which was dated the same day as the appointment, was properly included in the receivership but that the lienholder's rights should be protected. Ripy v. Redwater Lumber Co. [Tex. Civ. App.] 106 SW 474.

1. The receiver takes the property subject to such equities, liens, or incumbrances, whether created by operation of law or by the act of the corporation which existed at the date of his appointment. Ardmore Nat. Bk. v. Briggs Mach. & Supply Co. [Okl.] 94 P 533.

2. Holding funds by receiver after the appointment of a receiver for the funds on which a lien is claimed and preventing the receiver from obtaining the possession he was appointed to receive is a defiance of the court's order. Horn v. Pere Marquette R. Co., 151 F 626.

3. Horn v. Pere Marquette R. Co., 151 F 626. The recognition by a state court of a lien for coal furnished a vessel given by 2 Gen. St. p. 1961 on a fund in the hands of receivers arising from a sale of the vessel and the ordering of payment of it therefrom to the lien holder held not to involve the exercise of any of the powers which are vested exclusively in the Federal admiralty courts. Russel v. Myer's Excursion & Transfer Co. [N. J. Eq.] 67 A 1016.

4. A verbal agreement to gather and box turpentine held to be a mere license which was terminated and became void upon the appointment of a receiver. McKinnon-Young Co. v. Stockton, 53 Fla. 734, 44 S 237.

5. Such as liens by assignment, judgment, execution or attachment. Horn v. Pere Marquette R. Co., 151 F 626.

6. An Illinois receiver held to have no power to sue for property in Tennessee assigned to him but never taken possession of by him. Dillingham v. Traders' Ins. Co. [Tenn.] 108 SW 1148. Attachment of credits of insurance company made prior to notice of an assignment thereof to a foreign receiver held superior thereto. Id. Foreign receiver not allowed to intervene. Id.

mortgage foreclosure is entitled to hold the property as against a trustee in bankruptcy who is only entitled to the excess value above the mortgage debt.[7]

(§ 3) *C. Possession and restitution.*[See 8 C. L. 1885]—A receiver is an officer of the court appointing him,[8] his possession being deemed that of the court.[9] Where property or its proceeds in the possession of a receiver is claimed by a third person, a petition should be made to the court appointing for an order for its restitution,[10] but interest will not necessarily be allowed.[11]

§ 4. *Administration and management of the property. A. Authority and powers in general.*[See 8 C. L. 1880]—A receiver represents both the insolvent [12] and the creditors.[13] A receiver is an officer or agent of the court [14] and has only such authority or powers as are conferred on him by said court.[15] Where legal services are required, a receiver may retain counsel without previous authority from the court.[16]

7. Chalmers v. Littlefield [Me.] 69 A 100. See, also, Foreclosure of Mortgages on Land, 9 C. L. 1378; Bankruptcy, 9 C. L. 342.

8. Defendant held not to be a receiver put in possession by the court and acting as its officer, but was merely a defendant who by stipulation was allowed to continue the collection of rents. Naughton v. Elliott [N. J. Eq.] 65 A 858. The receiver is an arm or officer of the court and whatever he does under the order of the court regarding the property involved is the act of the court. State v. Reynolds [Mo.] 107 SW 487. Is an "arm of the court." International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78; Coy v. Title Guarantee & Trust Co., 157 F 794.

9. Steel rails held to be in custodia legis and a seizure and sale of them without permission of the court illegal and void. Chalmers v. Littlefield [Me.] 69 A 100. Where a bank which held notes of the defendant received money for deposit after the appointment of the receiver, held that such money was the property of the receiver, and the bank could not apply it on the notes. Horn v. Pere Marquette R. Co., 151 F 626. This is so although the third party claims a lien on the money. Id. The legal custody of the court is not disturbed by the removal of one receiver and the appointment of another (State v. Reynolds [Mo.] 107 SW 487), nor by the granting of an appeal from the second appointment (Id.), especially where the appeal was not allowed until after the term of court had expired at which the final decree was rendered (Id.), and in such a case it is improper for the court after allowing an appeal from the second appointment to order the property turned over to the defendant (Id.). A receiver may bring an intervening petition in the court appointing him to require a third party to show cause why it should not surrender to the receiver money received by it after his appointment and why it should not be punished for contempt. Horn v. Pere Marquette R. Co., 151 F 626. An interference with his possession will be enjoined upon application of the receiver. McKinnon-Young Co. v. Stockton, 53 Fla. 734, 44 S 237.

10. Where receivers converted and sold lumber belonging to a third person and had the proceeds in their possession, held that they should be decreed said proceeds. Brazelton v. J. I. Campbell Co. [Tex. Civ. App.] 108 SW 770. Where a verbal contract with the company in the hands of the receiver was asserted, it was held that the proper course to pursue was to apply to the court appointing for leave to consummate such verbal agreement or have the same put in tangible binding form. McKinnon-Young Co. v. Stockton, 53 Fla. 734, 44 S 237.

11. Where a third party sought to hold receivers officially for the conversion and sale of their property, interest was denied them on the ground that the tort being the individual act of the receivers the estate was not responsible therefor. Brazelton v. J. I. Campbell Co. [Tex. Civ. App.] 108 SW 770.

12. Ardmore Nat. Bk. v. Briggs Mach. & Supply Co. [Okl.] 94 P 533.

13. Unrecorded chattel mortgage held a valid security after the property came into the hands of a receiver on the ground that he represented both the insolvent and the creditors. Ardmore Nat. Bk. v. Briggs Mach. & Supply Co. [Okl.] 94 P 533.

14. A receiver appointed by the comptroller of currency is not the officer of any court, but is the agent or officer of United States. Lyons v. Bk. of Discount, 154 F 391.

15. Without the orders and directions of the court, the receiver is powerless to do anything. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78. Release under seal given by receivers held to be unauthorized and ineffectual. Murphy v. Penniman, 105 Md. 452, 66 A 282.

16. Hulings v. Jones [W. Va.] 60 SE 874. In New York it is against public policy for a receiver of an insolvent corporation to employ, as counsel, a deputy attorney general, although he resigns his office to become counsel. People v. Brooklyn Bk., 109 NYS 534. The attorney general is charged with general oversight of insolvent corporations and corporation receiverships, being vested with certain discretion in regard to applications therefor. And as by Laws 1883, p. 558, c. 378, as amended by Laws 1906, p. 898, c. 349, § 2a, no employment of counsel can be approved by the court or payment made to him without notice to the attorney general, his affirmative duty to guard the corporations from improvident charges makes the employment of counsel intimately connected with his office improper and against public policy. Id.

In New Jersey, by statute, a receiver of a corporation has power to summon and examine persons as to the corporation's affairs,[17] but this power is no broader than the analogous power vested in the courts.[18] In some Federal circuits, it is not the practice for receivers to concern themselves for plans for reorganization.[19] A corporation and its receiver cannot act jointly in the operation of corporate property, and hence cannot be jointly guilty of tort in such operation.[20]

(§ 4) *B. Payment of claims against receiver or property.* See 8 C. L. 1687—A receiver has no discretion, generally speaking, as to the application of funds which are in his hands by virtue of the receivership. He holds them strictly subject to the order of the court to be disposed of as the court may direct.[21] It is for the court appointing and that court alone to determine who are creditors and what is due to them respectively.[22] Whether a debt sought to be proved is or is not barred by limitation depends upon its status at the date of the decree sequestrating the assets.[23] The right of a receiver to compromise claims and suits with the sanction of the court is generally recognized.[24] A secured creditor is entitled to receive dividends on his entire demand as proved until the dividends, together with collateral collected, have extinguished the entire debt, principal and interest.[25] As a rule a receivership suspends the running of interest even as to secured claims.[26] Claims for injuries received in the operation of a road before a receivership are claims against the property and rank with claims of general creditors.[27] It is within the discretion of the court to refuse to allow a third person to intervene and take testimony after it has acted on a claim.[28] A claim for improvements to property, made by a claimant thereto without

17. P. L. 1896, p. 200, provides for this and also that if the person summoned refuses to be sworn the court of chancery may, on the receiver's report, commit such person to prison. Fidelity & Casualty Co. v. MacAfee Co. [N. J. Eq.] 65 A 879.

18. Where the service was made by the receiver on a person without the state, the court had no jurisdiction to commit the person for failure to appear. Fidelity & Casualty Co. v. MacAfee Co. [N. J. Eq.] 65 A 879.

19. Circuit S. D. of New York. Their sole function is to hold the property intact, operate it as efficiently as possible, ascertain the liabilities, marshal the assets, and eventually sell it to the best advantage and apply the proceeds ratably to the payment of the liabilities. Pennsylvania Steel Co. v. New York City R. Co., 157 F 440.

20. Eckels v. Farley, 131 Ill. App. 557

21. Though money in the hands of a receiver may be applicable to the payment of a judgment against him, yet the order of the court protects him for expenditures made in reliance upon it during its life, though it may be later reversed. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

22. While judgments against the corporation in courts of another state without order of the court appointing cannot be proved against the funds in the hands of the court appointing, through its receiver (Attorney General v. Supreme Council A. L. H. [Mass.] 81 NE 966), yet the claim which is the basis of the judgment is not so merged in the judgment that it can not be proved in the court appointing (Id.), and so much of the claim as appears to that court to be due may be proved (Id.). If the judgments had been obtained before the date of sequestration of the funds by the court, they would have been provable under the provisions of the constitution of the United States. Id.

23. Claim held not to be barred. Attorney General v. Supreme Council A. L. H. [Mass.] 81 NE 966.

24. Agreement of compromise, made with sanction of the court, held to be within power of receiver to make. Alexander v. Maryland Trust Co. [Md.] 66 A 836. Where a receiver agreed to pay a claimant, in consideration of his release of a right to certain stock, so much of a certain sum, supposed to be due a third person, as should be nonpayable because of counterclaims, he was held entitled to dividends on the sum whether the sum was really due the third person or not. Id.

25. It is immaterial to the receiver how the proceeds of collateral are applied up to the point where the dividends with the proceeds of the collateral extinguish the entire debt. In re Bement's Sons, 150 Mich. 530, 114 NW 327. Under the "Mississippi rule," a secured creditor must first credit his claim with the value of the securities held by him and may then share in the dividend declared by the receiver as to the balance. Kretschmar v. First Nat. Bk. [Miss.] 43 S 474.

26. Dictum to the effect that the case was an exception to the rule, the alleged mortgage being executed to secure interest as well as principal, and the lien would attach on the proceeds of a sale of the mortgaged property for the interest. Brazelton v. J. I. Campbell Co. [Tex. Civ. App.] 108 SW 770.

27. Whether suits are pending or not yet brought. Pennsylvania Steel Co. v. New York R. Co., 157 F 440. Unless on argument they are given some general or qualified preference. Id. Decree gives directions as to adjustment of both classes. Id.

28. Where a party to the cause has been

an order of court, will not be allowed.[29] In a receivership for the settlement of a partnership, claims of third parties should be adjudicated and settled before the discharge of the receiver.[30] Money in the hands of a receiver which by decree is payable to a plaintiff will not be impounded upon the application of a general creditor of the plaintiff, without judgment or other lien or interest in the fund, until such creditor can institute suit for judgment.[31]

Debts created by receiver and expenses of administration. See 8 C. L. 1688—Taxes and levies due the state and its municipalities have priority over claims of a receiver and creditors.[32] Courts of equity have the power to appoint receivers and direct them to care for, protect, and preserve the property and decree the charges and expenses therefor as prior or preferred liens,[33] but except in the case of a public service corporation, have no authority to direct the receiver to carry on the business of the insolvent and charge the expenses of the business and operations as a prior or preferred lien on the property over that of prior existing liens thereon.[34] Legitimate expenses of a receivership should be taxed as costs.[35] A receiver should be allowed all disbursements properly made.[36] A receiver wrongfully appointed cannot be allowed to reimburse himself and pay expenses of receivership out of the funds improperly in his possession.[37] While the cause is still pending, an order directing a receiver to reimburse himself and pay expenses of receivership out of funds in his possession is not final and appealable.[38] The expenses of a receiver for the settlement of a partnership should be borne by both parties equally.[39] The complainant is not personally liable for the costs and expenses of a receivership where the assets are insufficient therefor,[40] but may be held for the costs and expenses of a receivership where the appointment was wrongful,[41] and where he is privy to a wrongful and ille-

misled by the conduct of other parties and has failed to take testimony, the court should see he is not prejudiced thereby. Alexander v. Maryland Trust Co. [Md.] 66 A 836.

29. A claimant whose title to personal property is being litigated in the receivership proceedings, who obtains possession of the property by order of court and without further order voluntarily improves the same, will not be allowed therefor upon his return of the property to the receiver. Hulings v. Jones [W. Va.] 60 SE 874.

30. Decree ordered to be modified in this respect. Costello v. Scott [Nev.] 94 P 222.

31. Error for chancellor to grant. Spence v. Solomons Co., 129 Ga. 31, 58 SE 463.

32. Va. Code 1904, § 492b, forbids any payment or distribution of funds, etc., in the hands of a receiver until all taxes, etc., are paid or payment provided for. Taylor v. Sutherlin-Meade Tobacco Co. [Va.] 60 SE 132.

33. Where a receiver is appointed at the instance and for the benefit of lien creditors, all proper charges, expenses and liabilities incurred incident to the receivership are held a first charge, not only on the current earnings, but also on the **corpus** of the estate. Hulings v. Jones [W. Va.] 60 SE 874. Receivers directed to devote receipts from operation of cars, first, to maintenance, including repairs and replacements and to operation, including employes, materials and supplies, and adjustment of claims arising from the operation, and taxes, etc., and the expenses of the receivership (Pennsylvania Steel Co. v. New York City R. Co., 157 F 440); second, to certain fixed charges in the nature of rentals and interest (Id.). The court may in its discretion prefer unpaid claims for current expenses incurred in the ordinary operation of a railroad within a limited time, usually six months before the receivership, to a prior mortgage. Rodger Ballast Car Co. v. Omaha, etc., R. Co. [C. C. A.] 154 F 629. If the claim is not part of the current expenses of the ordinary operation of the mortgaged property, but is extraordinary, the fact that it tended to conserve and improve the property for the mortgagee and was necessary to keep it a going concern is immaterial. Id. A claim for 32 ballast cars bought by a railroad operating 168 miles of road held not a current expense in the ordinary operation. Id.

34. Without the consent of the lien holders. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78.

35. Rev. St. 1899, § 3101. In re Bk. of Newcastle [Wyo.] 89 P 1035.

36. Ruprecht v. Henrici, 127 Ill. App. 350. Should be allowed his personal expenses. Strauss v. Casey Mach. & Supply Co. [N. J. Eq.] 66 A 958.

37, 38. Dalton v. Zimmer, 131 Ill. App. 490.

39. Decree ordering that "plaintiffs are entitled to their costs herein expended" construed to impose the receiver's expenses wholly on the defendant. Decree ordered modified to one-half only. Costello v. Scott [Nev.] 94 P 222.

40. Atlantic Trust Co. v. Chapman, 28 S. Ct. 406, overruling [C. C. A.] 145 F 820. The costs and expenses included receiver's certificates, time checks, etc. Id.

41. McLean v. Gillespie, 130 Ill. App. 356.

gal act by receiver, committed for his benefit and resulting in losses, he is liable for such losses,[42] but where the appointment was legal and warranted, he cannot, in the absence of fraud or collusion, be held for indebtedness created by the receiver in the management of the property.[43] An action against a receiver in his official capacity for misrepresentation of a sale merely establishes the amount of the claim against him as receiver,[44] and ordinarily such a claim is not entitled to preference over other creditors in the same class.[45]

A receiver's certificate See 8 C. L. 1690 is not payable by the complainant personally where the assets of the receivership are insufficient.[46] The holder of receiver's certificates need not, upon foreclosure, show the application of the proceeds thereof.[47] In the case of receiverships of public and quasi public corporations, the court may authorize the issuance of receiver's certificates for carrying on the business,[48] but in the case of private corporations that power is restricted to the issuance of certificates for expenses arising out of the administration and preservation of the property only,[49] except by consent of the lienholders.[50] The purchaser of corporate property at mortgage foreclosure subject to claims, if any, on certificates issued by a receiver of the corporation in sequestration proceedings, has the same defenses against the certificates, as did the mortgagees, and no more.[51]

Counsel fees See 8 C. L. 1690 constitute part of the costs [52] and should be allowed out of the assets in the receiver's hands [53] before other demands.[54] The question of their allowance is in the first instance, solely for the court which appointed the receiver,[55] and in the absence of statute, the question of amount is within the jurisdic-

42. Liable for procuring contract whereby receiver turned management of property over to third party, resulting in loss. McLean v. Gillespie, 130 Ill. App. 356.

43. McLean v. Gillespie, 130 Ill. App. 356.

44, 45. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

46. Atlantic Trust Co. v. Chapman, 28 S. Ct. 406.

47. Rochester Trust & Safe Deposit Co. v. Oneonta, etc., R. Co., 122 App. Div. 193, 107 NYS 237. When the mortgagees have received the proceeds of mortgage sale without diminution, they cannot be heard to object to the allowance of receiver's receipts which were prior claims to the mortgage. Id.

48. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78. While the Hepburn Act of June 29, 1906. (34 Stat. 584, c. 3591), forbidding railroad companies to transport from state to state any commodity received or produced by it or in which it has an interest, applies to a receiver, yet it is no ground for forbidding the receiver to issue certificates and expend money to open and develop a new mine and extend the railroad where it does not appear that the receiver of the railroad which owned all the stock in a mine could not market the coal within the state or sell the stock. Central Trust Co. v. Pittsburg, etc., R. Co., 52 Misc. 195, 101 NYS 837. Receiver's receipts may issue under some contingencies for additional construction and equipment when necessary for the protection and preservation of the property. Rochester Trust & Safe Deposit Co. v. Oneonta, etc., R. Co., 122 App. Div. 193, 107 NYS 237. Bondholders of a corporation who, although not made parties to sequestration proceedings, have been made parties to the application for the issuance of receiver's receipts, and have in effect joined therein by failure to object, are estopped from questioning the validity of the certificates in a collateral proceeding. Id.

49. The court is without authority, in the case of private corporations, except by the consent of the mortgage lienholders to supplant their liens by receiver's certificates issued for any obligations other than those arising by way of expenditures for realization and preservation of the property while the business is in course of administration under the receivership. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78.

50. Subordinating liens without consent held to be a patent irregularity. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78.

51. Rochester Trust & Safe Deposit Co. v. Oneonta, etc., R. Co., 122 App. Div. 193, 107 NYS 237.

52. In re Bk. of Newcastle [Wyo.] 89 P 1035.

53. Berry v. Rood [Mo.] 108 SW 22. They should be allowed out of the general assets. In re Bk. of Newcastle [Wyo.] 89 P 1035.

54. They are preferred on the theory that the services rendered are for the benefit of creditors or those otherwise interested in the property, and therefore payment for the same is a proper charge on their interest. Berry v. Rood [Mo.] 108 SW 22. Counsel fees are part of the receivership expenses and are to be paid prior to other liens on the property. Hulings v. Jones [W. Va.] 60 SE 874.

55. Not the court where a suit to enforce stockholders' liability is pending (Berry v. Rood [Mo.] 108 SW 22), although after al-

tion of that court.[56] The court may, in its discretion, grant additional allowances for extraordinary services of counsel made necessary in the progress of the receivership.[57]

(§ 4) *C. Sales by receivers.* See 8 C. L. 1690—The power to order a sale rests in the sound discretion of the court.[58] The purchaser at a receiver's sale cannot demand damages for breach of contract where there is a defect in the title, but must rely on the court to do equity.[59] Without the consent of the parties to the suit or

lowance has been made by the court appointing, the receiver may ask the court in the other case for a judgment against the stockholders to cover said allowances (Id.). A receiver is entitled to be allowed for fees of foreign counsel. Strauss v. Casey Mach. & Supply Co. [N. J. Eq.] 66 A 958.

56. It should be judicially determined and allowed upon a basis of what is reasonable and commensurate with services rendered and to be rendered. In re Bk. of Newcastle [Wyo.] 89 P 1035.

57. While the allowance of compensation to receivers and their attorneys, fixed by the act of appointment, may generally be considered sufficient fully to compensate them, it is with the discretion of the court to make additional allowances for extraordinary services. State v. Germania Bk. [Minn.] 114 NW 651.

58. Discretion held to be abused because of the questionable irregularity in the appointment of the receiver and in allowing him to issue certificates for carrying on the business which supplanted mortgage liens without holders' consent and because of the existence of alleged adverse claims and undetermined priorities. International Trust Co. v. Decker Bros. [C. C. A.] 152 F 78.

59. It is within the discretion of the court to allow compensation (People v. New York Bldg. Loan Banking Co., 189 N. Y. 223, 82 NE 184) and to disallow counsel fees under Code Civ. Proc. § 3240 (Id.), and also to disallow interest and costs of examining title, etc. (Id.), and the matter being discretionary cannot be reviewed by the appellate court (Id.).

NOTE. Nature of receivers' contracts of sale: The English and American courts agree that a receiver in making contracts cannot be considered as the agent of the defendant. Burt v. Bull, L. R. 1 Q. B. 276; Riggs v. Pursell, 66 N. Y. 193. The English courts hold further that "it is of course impossible to suppose that the relation of principal and agent exists between" the receiver and the court, and that it must therefore be the intention that the receiver contracts on his own responsibility, "because otherwise no one would be responsible for his acts." Burt v. Bull, L. R. 1 Q. B. 276. The American courts almost uniformly state that a receiver contracts as agent of the court (Lehigh, etc., Co. v. Central R. Co., 35 N. J. Eq. 426; People v. Open Board, etc., Co., 92 N. Y. 98), and that a contract is entered into between the court and the purchaser. If the court be conceived of as an entity capable of holding property in trust (Laws N. Y. 1893, c. 701, § 1; McCosker v. Brady, 1 Barb. Ch. [N. Y.] 329, 343), no reason appears why it may not have the capacity to contract. That one of the parties muts adjudicate on its terms and in case of breach award damages (Wampler v. Shipley, 3 Bland [Md.] 182), is perhaps not an insuperable objection to the theory of the existence of a contract, as the court is of course bound to determine in accordance with the law. Nor the fact that the purchaser might be powerless to compel performance by the court, for this would simply be due to the failure of the court to exercise its ordinary judicial functions, and not to the lack of any binding quality in the contract under the rules of law. The public policy which might refuse to uphold a contract where one of the parties to it is the arbitrator would doubtless not extend to the case where such party is a court and perfectly disinterested. Such a contract would exist, nevertheless, only in abstract logic, and is entirely without the scope of ordinary contracts.

Although damages have sometimes been awarded as if a contract actually existed (People v. Open Board, etc., Co., 92 N. Y. 98; Drake v. Goodridge, 6 Blatchf. 531), the general attitude of the courts and the decisions are inconsistent with the contract conception. Sales are set aside at the request of the purchaser where the latter would have no right to demand relief under the principles of equity as applied to ordinary contracts. Fisher v. Hersey, 78 N. Y. 387; Clayton v. Glover, 3 Jones Eq. 371; 3 Columbia L. R. 593. And although it is generally held that mere inadequacy of price is not a sufficient ground for setting aside (Strong v. Catton, 1 Wis. 471, 496), yet if any other ground appear which makes such action equitable, this ground is seized upon, and sales are set aside, after confirmation, and over the objection of the purchaser, under circumstances which would not warrant a court of equity in canceling a contract between private parties. Mound City Life Ins. Co. v. Hamilton, 3 Tenn. Ch. 228, 231; Bean v. Haffendorfer Bros., 84 Ky. 685. The purchaser alone is bound, not the court. The statement made in the cases that the purchaser buys subject to the future order of the court upon the equities of the parties to the suit would seem to refute any idea of a contract. Downer v. Cross, 2 Wis. 371; Lupton v. Almy, 4 Wis. 242.

The results reached in the cases necessitate the conclusion that a receiver's sale is merely a judicial means of transferring the interest of the defendant in the property, "whether it may be" (Arnold v. Donaldson, 46 Ohio St. 73), without a contract arising at any time. The purchaser becomes a quasi party to the action (Blossom v. Milwaukee, etc., R. Co., 1 Wall. [U. S.] 655, 17 Law. Ed. 673; Porter v. Hanson,

statutory provision therefor, the court has no jurisdiction to make an order of sale outside the county in which the action is pending.[60] A deed of a receiver is not admissible in evidence without proof of his authority to execute it.[61] While a receiver is prohibited from purchasing any of the property himself,[62] yet a sale in which the receiver is interested is not void per se,[63] but voidable merely at the election of the beneficiary.[64] A deposit at a receiver's sale which the court declares forfeited becomes part of the receivership assets.[65] Upon a motion to set aside a receiver's sale, the court may, in the absence of any statute, in a proper case, direct a reference or jury trial,[66] or deny the motion with leave to bring an independent suit in equity.[67] The expenses of a receiver's sale, which is, in fact, a conversion of a third party's property, cannot be charged against the third party.[68]

(§ 4) *D. Actions by and against receivers.*See 8 C. L. 1691—The court which appoints a receiver holds and administers the estate through the receiver as its officer and must decide whether it will determine for itself all claims or allow them to be litigated in other courts.[69] Generally, where it is desired that a receiver shall bring suit, application is made to the court of his appointment setting out the grounds for suit, and upon proper showing the court passes an order giving direction to the receiver.[70] Where a receiver is made a party to an action by leave of court, he is in the

36 Ark. 591), and submits himself to the decrees of the court (Matter of Attorney General v. Continental, etc., Co., 94 N. Y. 199; Allen v. East, 4 Baxt. [Tenn.] 308), which acts on general equitable principles irrespective of contract (Fisher v. Hersey, 78 N. Y. 387; Strong v. Catton, 1 Wis. 471). A recent case in New York (People v. New York Building-Loan Banking Co., 189 N. Y. 233, 82 NE 184), inconsistent with a previous holding (People v. Open Board, etc., Co., 92 N. Y. 98), illustrates this theory. A purchaser asked to be relieved from his purchase because of defect of title. The court set aside the sale and ordered the repayment of the deposit, but refused interest thereon and costs of examination of title and of the action, saying that "the purchaser cannot demand damages as for breach of a contract made by the court through its officer or agent, but has to rely on the court to do equity under the circumstances." Therefore his claim for compensation "is founded upon equity and not upon the breach of contract."—From 8 Columbia L. R. 46.

60. The consent of the parties should appear as of record. Atlantic Nat. Bk. v. Peregoy-Jenkins Co. [N. C.] 61 SE 68. Motion and order of sale made without notice and outside of county where case pending held void. Id. Such a motion is one in the cause, as distinguished from a motion for ancillary remedy, which may be made by the judge anywhere in the district. Id.

61. The bare recitals in the deed are insufficient to prove his appointment and authority. Hagan v. Holderby [W. Va.] 57 SE 289. Enough of the record of the court appointing must be introduced to show that the court did authorize the conveyance of the property in question, that it had jurisdiction of the person whose property is ordered to be conveyed, and jurisdiction of the subject-matter (Id.), and also that the receiver qualified by giving bond, a certificate of the clerk of court to the fact of such qualification being insufficient (Id.).

62. On the ground of public policy Jackson v. First State Bk. [S. D.] 113 NW 876.

63. Jackson v. First State Bk. [S. D.] 113 NW 876.

64. Under Rev. Civ. Code, § 1619, by which a beneficiary, having capacity to contract, with full knowledge of the motives of his trustee and of all the facts, may allow the latter to take part in a transaction in which he has an interest hostile to the beneficiary, it was held that where the stockholders of a bank allowed the assets to be purchased by a bank in which the receiver was interested, or were not injured thereby, the sale would not be vacated because of the receiver's interest. Jackson v. First State Bk. [S. D.] 113 NW 876.

65. Bidder failed to comply with his bid and his deposit was declared forfeited. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

66. Where there was contradictory testimony or the credibility of witnesses was involved. Jackson v. First State Bk. [S. D.] 113 NW 876.

67. Where grave and doubtful questions of fact are involved. Jackson v. First State Bk. [S. D.] 113 NW 876. In such case the court may also determine the facts on ex parte affidavits or require oral testimony. Id.

68. Brazelton v. J. I. Campbell Co. [Tex. Civ. App.] 108 SW 770.

69. It is discretionary. Attorney General v. Supreme Council A. L. H. [Mass.] 81 NE 966.

70. Receiver held powerless to collect unpaid subscriptions without an order of court. Strauss v. Casey Mach. & Supply Co. [N. J. Eq.] 66 A 958. Where it was distinctly alleged in the declaration that the receiver was empowered by the court to bring suit, it was held that a demurrer should have been overruled. Kretschmar v. Stone [Miss.] 43 S 177. Where a receiver has unsuccessfully contested claims in the courts of another state to final judgment without leave of the court appointing him, that court may in its discretion enter an order nunc pro

same position as any other litigant.[71] In the absence of some conveyance or statute vesting the property of the debtor in the receiver, he cannot sue in courts of a foreign jurisdiction upon the order of the court appointing him to recover property of the debtor.[72] The right to object to the maintenance of an action by a foreign receiver may be lost by estoppel.[73] In an action by a receiver to recover property of the debtor, the complaint should allege with sufficient clearness that the property in suit was included in the order of appointment.[74] A receiver may sue stockholders on their statutory liability in a forum other than that in which he is appointed if he is authorized so to do by statute,[75] or where he is appointed as part of a procedure to enforce the liabilities of stockholders,[76] but an order in receivership proceedings will not bind stockholders not served with process or appearing unless the corporation can be considered as representing them.[77] The necessity for and the amount of an assessment on stockholders levied by the court after the appointment cannot be attacked in a collateral proceeding.[78] The statute of limitations does not begin to run

tunc submitting the question so litigated to the court where the action was brought and allowing the judgments to be proved. Attorney General v. Supreme Council A. L. H. [Mass.] 81 NE 966. Where the legal title to personal property which was converted was in a corporation, a receiver thereafter appointed was held entitled to sue for the conversion. Smith v. Texas, etc., R. Co. [Tex.] 108 SW 819. A receiver appointed by the comptroller of currency by virtue of the national banking act may sue in any Federal court for the collection of assets. Lyons v. Bank of Discount, 154 F 391.

71. Where a receiver was made party defendant, held that the other parties could file cross bills against him without leave of the court appointing. Venner v. Denver Union Water Co. [Colo.] 90 P 623. Under Mills' Ann. Code, § 222, providing that judgment may be given for or against one or more of several defendants, and when justice requires it the ultimate rights of parties on each side, as between themselves, may be determined, it was held proper where a receiver was a party to determine the ultimate rights of all the parties in the subject-matter of controversy. Id.

72. In New Jersey a foreign receiver, appointed by a court having jurisdiction of the parties and subject-matter, to whom the corporation has delivered all its property and who is authorized to bring suit by the court appointing, may bring suit in that state if the policy of state in protecting resident creditors is not infringed. Edwards v. National Window Glass Jobber's Ass'n [N. J. Law] 68 A 800. Comity requires the various states to allow foreign receivers to exercise their powers therein (Stone v. New Jersey & H. R. R. & Ferry Co. [N. J. Law] 66 A 1072), provided no disadvantage to resident results thereby (Id.). A foreign receiver cannot sue in another state to recover property which was never in his individual possession. Dillingham v. Traders' Ins. Co. [Tenn.] 108 SW 1148. A foreign receiver has no right to bring suit in a foreign jurisdiction, it being a matter of comity whether he will be permitted to or not. Hazlett v. Woodhead [R. I.] 67 A 736. Where a foreign receiver brought suit without permission, and the court did not deny him the privileges of a suit, but considered his case, the appellate court will not pass on the question of his right to sue. Id. A foreign receiver cannot maintain a plea of intervention to vacate a final judgment, although he was an intervening party in the suit in which the judgment was rendered. Malone v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 255, 101 SW 503.

73. Right held not to be lost by the mere fact that the foreign receiver was allowed to intervene without objection and make an agreement to an order of court not going to the merits. Malone v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 255, 101 SW 503.

74. Complaint held sufficient in the absence of a demurrer for uncertainty. Title Ins. & Trust Co. v. Grider [Cal.] 94 P 601.

75. Receiver held entitled to sue outside of Minnesota by virtue of Minn. Gen. Laws 1899, c. 272, as being a quasi assignee and representative of the creditors. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163.

76. Receiver appointed to enforce liability arising under Neb. Const. art. 11b, § 7, held to hold legal title to the trust fund created, and entitled to sue in Texas. Goss v. Carter [C. C. A.] 156 F 746.

77. Nonresident stockholders in a Nebraska corporation held to be represented by it and bound by valid proceedings in reference to it. Goss v. Carter [C. C. A.] 156 F 746. Const. of Neb. art. 11, § 4, prescribes a time when cause of action against stockholders of an insolvent corporation accrues, and applies to the liability of stockholders of a bank under § 7, so that the appearance of stockholders, in an action to determine the insolvency of a bank and for the appointment of a receiver before such accrual, is premature and ineffectual. Hazlett v. Woodhead [R. I.] 67 A 736. A proceeding instituted, touching the individual liability of stockholders, is not a corporate matter, and stockholders are entitled to notice of the pendency of the same. Id. Declaration held bad on demurrer to allege that stockholders had notice of or were parties to action in Nebraska establishing their liability. Id.

78. A bill of review does not lie where the assessment is excessive. Daniel v. Citizens' Mut. Fire Ins. Co., 149 Mich. 626, 14

in favor of a stockholder until the decree of assessment is rendered and the receiver appointed.[79] The court may in a proper case direct its receiver to dismiss a suit brought by him.[80] Where it is sought to bring an action against a receiver as such, permission of the court appointing must be obtained,[81] but failure to obtain leave of court which appointed receiver to commence suit against him does not oust other state courts of jurisdiction,[82] and objection on that ground may be waived by the receiver, or by the court where the action is brought in the court controlling the receiver, or by a deprivation of his possession of the receivership property.[83] The power to grant leave that a receiver may be made a party defendant in the forum of his appointment or elsewhere carries with it the authority to revoke such leave.[84] Suits in respect to acts or transactions of the receivers in carrying on the business [85] and suits for damages resulting from the operation of a road by receivers may be brought against the receivers in any court without leave of the court appointing.[86] The court which appoints the receiver has jurisdiction to determine all claims against him and provide for payment thereof.[87] The rule of the Federal courts is that a receiver is not personally liable for injuries, arising through negligent operation of the property, not due to his personal negligence;[88] an action for such injuries being against the receivership[89] and a judgment therein payable only from the funds in the receiver's hands.[90] Such a suit is not maintainable against the receivers after the termination of the receivership and transfer of the property,[91] but may be maintained against the purchaser of the property in certain cases.[92] A receiver may not be both party plaintiff and party defendant.[93] In New Jersey the right of set-off

Det. Leg. N. 525, 113 NW 17. Adequate relief can be had by vacating it or securing proper distribution of the funds raised by the assessment. Id.

79. Goss v. Carter [C. C. A.] 156 F 746. The cause of action does not accrue so as to set the statute of limitations running against the receiver's right to sue for an assessment until the receiver can sue upon the assessment after the stockholder's failure to pay as required by order of court. Bernheimer v. Converse, 206 U. S. 516, 51 Law. Ed. 1163. Minnesota receiver held to have six years after the action accrued, under Code Civ. Proc. § 382. Id. N. Y. Laws 1892, c. 688, § 55, limiting the right to sue a stockholder for a debt of the corporation to two years after the defendant ceased to be a stockholder, held to apply only to stockholders in domestic corporations. Id.

80. Court refused to direct an ejectment suit for property alleged to have been brought with money of the company to be dismissed unless it was clearly established that the property was not so purchased. Pakradooni v. Storey Cotton Co., 151 F 607.

81. Action of trover brought without court's permission held not maintainable. Chalmers v. Littlefield [Me.] 69 A 100. The fact that the suit was brought against the receivers as individuals only held immaterial, as it was not disputed that the acts were done by them in their official capacity. Id.

82, 83. Shedd v. Seefeld, 230 Ill. 118, 82 NE 580.

84. Held error to withdraw leave to bring replevin against a receiver and grant permission to bring a proper action in equity where from the nature of the case no equitable action lay. Atlantic Realty Co. v. Wlodar, 119 App. Div. 850, 104 NYS 843.

85. Act August 13, 1888, c. 866, § 1 (25 Stat. 433; U. S. Comp. St. 1901, p. 508). The suit, however, is subject to the general equity jurisdiction of the court appointing. Hallowell v. Williams, 217 Pa. 501, 66 A 864. Affidavit of defense of a receiver sued in a state court on a contract in regard to carrying on the business held insufficient which showed no equities superior to the plaintiff's and no resort to the Federal court of appointment for equitable relief was had. Id.

86. Pennsylvania Steel Co. v. New York City R. Co., 157 F 440.

87. Held to have jurisdiction to determine claim for injury to goods stored in warehouse under control of receiver. Shedd v. Seefeld, 230 Ill. 118, 82 NE 580.

88. He is chargeable solely in his official capacity. Gray v. Grand Trunk Western R. Co. [C. C. A.] 156 F 736.

89, 90, 91. Gray v. Grand Trunk Western R. Co. [C. C. A.] 156 F 736.

92. Where, by the local law, the obligation assumed by the purchaser who takes over the fund or property from a receivership is a direct liability, and not merely equitable, for the payment of claims chargeable against the fund, the direct liability so affixed determines the nature of the cause of action in the Federal court and is enforceable then at law against the purchaser alone. Gray v. Grand Trunk Western R. Co. [C. C. A.] 156 F 736. Declaration held not bad on ground of duplicity. Id.

93. Bill by receivers to enforce directors' liability held not demurrable on the ground that one of the receivers was a director, since the suit was brought by counsel, by order of court, in the name of the receivers who were technical plaintiffs only. Murphy v. Penniman, 105 Md. 452, 66 A 282.

against a receiver does not rest upon the statute of set-off, but upon the provisions of the corporation act as to settlement of debts by receivers.[94] The defense of accord and satisfaction is open to a receiver.[95] A judgment against a receiver which disposes of all the parties and issues involved and provides methods for its execution is a final judgment [96] and cannot be vacated at a subsequent term by plea intervention.[97]

§ 5. *Accounting by receivers.* See 8 C. L. 1693—The court appointing has and retains exclusive jurisdiction to settle or adjust the accounts of a receiver,[98] and the exercise of it will not be interfered with by an appellate court unless there has been an abuse of discretion.[99] Due notice of the filing of accounts by receivers, must be given.[1] In a proper case, a receiver is not accountable for uncollected book accounts [2] or for failure to recover unpaid subscriptions.[3] In certain cases a master will be appointed to take evidence with reference to a receiver's account and report to the court.[4] An account must be alleged in order to relieve the receiver from liability for a balance shown in a prior account.[5] If the account of a receiver is correct and undisputed, he is not accountable for the misapplication of money paid by him to the plaintiff's attorneys,[6] nor for the costs of the reference.[7]

§ 6. *Compensation of receivers.* See 8 C. L. 1694—A receiver is entitled to reasonable compensation for the services performed,[8] to be determined by the appointing court.[9] An order allowing compensation to a receiver requires notice to parties in-

94. A member of an insolvent mutual insurance company not allowed to set off a debt due him for a loss against an assessment due from him (Stone v. New Jersey & H. R. R. & Ferry Co. [N. J. Law] 66 A 1072), and the fact that the suit is brought by a foreign receiver is immaterial (Id.).

95. Held that there was no accord and satisfaction. Attorney General v. Supreme Council, A. L. H. [Mass.] 81 N. E. 966.

96. Such a proceeding will be regarded as an original proceeding for review, especially by a foreign receiver, against objections of another party, although he was an intervening party to the suit. Malone v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 255, 101 SW 503. The fact that the suit is retained on the dockets for the purpose of carrying out the judgments and to wind up the receivership held immaterial. Id.

97. Malone v. Johnson [Tex. Civ. App.] 18 Tex. Ct. Rep. 255, 101 SW 503.

98. No other court has concurrent or other jurisdiction. State v. Germania Bk. [Minn.] 114 NW 651. This exclusive authority and jurisdiction includes the surcharging of the accounts for losses incurred through the mismanagement or negligence of the receiver. Id. The final accounting shall include all charges of mismanagement by which the estate is alleged to have suffered loss, chargeable to the receiver. Id. This question should have an important bearing on the amount of the receiver's compensation (Id.), and is essential to fixing the liability of the receiver's bond (Id.). Controverted questions as to the receiver's negligence may be submitted to a jury (Id.), but the issue should be framed and jury impaneled in the particular proceeding and not referred to another action (Id.). It was held error for court to refuse to determine the question as to whether the receiver's accounts should be surcharged. Id.

99. Where an account has been allowed and the items are supported by evidence, abuse of discretion must be shown. Hulings v. Jones [W. Va.] 60 SE 874.

1. In proceedings to homologate a receiver's account, the legal notice given by advertisement is the citation prescribed. Payne v. Schaeffer-Gaiennie Co., 119 La. 382, 44 S 134. The statement of the judg in the judgment of homologation that due proof had been made of the advertisement of the account must be given effect, and an action of nullity will not lie. Id. A list of creditors filed the day before the account was homologated, of which no notice was given, held not to be part of the account and not binding, and special order of homologation entered after judgment of homologation of the account held to be null. Id.

2. Strauss v. Casey Mach. & Supply Co. [N. J. Law] 66 A 958.

3. Where court directed suits for unpaid subscriptions to be held in abeyance and made no further order, the receiver was powerless to act. Strauss v. Casey Mach. & Supply Co. [N. J. Eq.] 66 A 958.

4. Master appointed where on application for receivers to pay interest on bonds a report of assets and liabilities was made for the bondholders, but no accountant was applied for on behalf of the stockholders. Pennsylvania Steel Co. v. New York City R. Co., 158 F 460.

5. Where a prior account showed a balance of $1,200, a subsequent account, which was not allowed, showing an expenditure of more than that sum, is ineffectual. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

6. Not account for a balance due on a judgment where the plaintiff's attorneys used part of the money paid them to pay their fees. Adams v. Elwood. 108 NYS 138.

7. Adams v. Elwood, 108 NYS 138.

8. Ruprecht v. Henrici, 127 Ill. App. 350.

9. In the absence of statute, the question of amount is within the jurisdiction of the

terested and a hearing at which they may be heard.[10] The compensation of a receiver should be taxed as part of the costs,[11] and as a general rule should be paid out of the funds in his hands,[12] and is a preferred claim.[13] Interest is not allowable on the compensation of a receiver which is classed as court costs.[14] A receiver may waive or limit his right to compensation.[15] A final order denying or allowing compensation to a receiver is appealable.[16] A receiver is not entitled to commissions both on the property received and on money afterwards paid in lieu thereof.[17] The compensation of a receiver for the settlement of a partnership should be borne by both parties equally.[18] The question of the receiver's negligence and mismanagement has an important bearing on the amount of his compensation.[19]

court (In re Bk. of Newcastle [Wyo.] 89 P 1035), and should be judicially determined and allowed upon a basis of what is reasonable and commensurate with the services rendered and to be rendered (Id.). While the court may order compensation by partial allowance from time to time, it may not fix compensation for services to be rendered (Riordan v. Horton [Wyo.] 94 P 448); such compensation does not accrue and become a charge against the property until the services have been rendered (Id., in effect overruling statement in In re Bk. of Newcastle [Wyo.] 89 P 1035). An understanding between the receiver and the stockholders and creditors that when the work was done the court would then fix a reasonable fee held not to preclude the allowance of partial compensation from time to time. Riordan v. Horton [Wyo.] 94 P 448. The law does not prescribe what a receiver's compensation shall be or provide that he shall receive any. This matter, however, is left to the discretion of the court under which he receives his appointment, and the latter has power to make such allowance as will be reasonable and adequate, considering the duties required. Jones v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 944, 105 SW 328. The only court that can in the first instance pass on the question of allowances to the receiver as compensation is the court that appointed him (Berry v. Rood [Mo.] 108 SW 22), and even then the allowances are not binding on stockholders, because they were not parties to the suit (Id.). Held improper for court, in a separate suit to enforce stockholder's liability, to provide for a fund out of which compensation is to be paid, if ever it is allowed, and the surplus, if any, to be returned to the stockholders, since the court appointing had not passed on the question. Id. After the allowances are made, a receiver will be authorized to come into the court where a suit to enforce stockholders' liability is pending and ask for judgment to satisfy the allowance (Id.), and the court will then decide whether the stockholders are liable and what is a reasonable amount (Id.). An interlocutory decree ordering the payment of the costs of the hearing and of the compensation of the temporary receiver is not so connected with the judgment of appointment as to be the subject of a fast writ of error. Burgess v. Simpson Grocery Co., 128 Ga. 423, 57 SE 717.

10. Where plaintiffs moved to vacate orders as being granted ex parte and without jurisdiction, and the merits as well as the jurisdictional grounds were tried and decided adversely to them, it was held that they had thereby cured the jurisdictional defect, the proceeding constituting a general appearance, and a writ of error to review the original order would not lie. In re Bk. of Newcastle [Wyo.] 89 P 1035.

11. Jones v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 944, 105 SW 328. Rev. St. 1899, § 3101. In re Bk. of Newcastle [Wyo.] 89 P 1035. Allowance of receiver's compensation as costs is a matter of discretion with the court appointing. Costello v. Scott [Nev.] 94 P 222.

12. Rev. St. 1899, § 3101. In re Bk. of Newcastle [Wyo.] 89 P 1035. Sayles' Rev. Civ. St. art. 1472, relating to the application of money in receivers' hands, provides that they shall be applied first to pay costs, etc., which shall be a preference lien on money which is earnings. Jones v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 944, 105 SW 328. Where an order allowing partial compensation was silent as to whether it was to be paid out of the corpus or from the earnings, reserving the right to determine this later, and no further order was made, it was held that by virtue of the statute it would be assumed that the allowance was made against the earnings. Id.

13. Berry v. Rood [Mo.] 108 SW 22.

14. Where a receiver failed to appropriate what the court had allowed, it was held that he could not thereafter claim interest on the sum so allowed. Jones v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 944, 105 SW 328.

15. Where a receiver before appointment waived what he supposed was the statutory fee, agreeing that it was excessive, it was held that there being in fact no statutory fee he was entitled only to a reasonable compensation, which should be less than the sum deemed excessive. Riordan v. Horton [Wyo.] 94 P 448.

16. Held unnecessary in view of other phases of the case, to enter into the question as to how an appeal may be taken. In re Bk. of Newcastle [Wyo.] 89 P 1035.

17. Adams v. Elwood, 108 NYS 138.

18. Decree that "plaintiffs are entitled to their costs herein expended" construed to impose the fees and expenses of the receiver on the defendant alone. Decree ordered modified so as to impose only one-half on the defendant. Costello v. Scott [Nev.] 94 P 222.

19. If negligence is found, the court may surcharge his account, although by a previ-

§ 7. *Liabilities and actions on receivership bonds.*[20]—Before resort may be had to the sureties on a receiver's bond, all available remedies against the receiver must be exhausted,[21] and there must be an accounting and a decree establishing the inability of the receiver to pay.[22] Sureties on a receiver's bond are not concluded by a judgment recovered against him in his official capacity,[23] nor are they responsible for his failure to pay a judgment recovered against him personally,[24] nor for his application of funds which are not assets of the receivership.[25]

§ 8. *Foreign and ancillary receivers.*[26]—Ancillary receivers will be appointed by state [27] or Federal courts when necessary.[28] In Massachusetts by statute, the appointment of an ancillary receiver dissolves an attachment made within four months of the appointment,[29] and in such case the ancillary receiver may not remit assets to the receiver in another jurisdiction, leaving resident creditors whose attachments are dissolved unpaid or unsecured.[30] The orders and decrees of the court which appointed the receiver in the original action bind the court of another state which appointed an ancillary receiver.[31] An ancillary receiver takes only the assets to which the defendant has title at the time of the appointment.[32] The appointment of a foreign receiver has no effect on actions against the defendant, either pending [33] or brought subsequent to the appointment, provided the defendant corporation is not dissolved as well.[34] A foreign receiver or assignee cannot hold property of which he

ous order it had fixed the compensation at a certain rate. State v. Germania Bk. [Minn.] 114 NW 651.

20. See 8 C. L. 1695. Liability of **railroad receivers,** see Railroads, 10 C. L. 1365. **Validity of bonds,** see note, § 2A.

21. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

22. A judgment against a receiver, at most, establishes his official obligation, and it is primarily collectible from the receiver. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659. Where, after a judgment against a receiver, an order was made for him to pay it upon notice to him, but not to his sureties, and without any accounting or ascertainment of the condition of the fund, the order was ineffectual against the sureties. Id. Where a prior account showed a balance of $1,200, a subsequent account, which was not allowed, showing an expenditure of more than that sum, held ineffectual to support an action against the sureties. Id. Complaint in an action against sureties held insufficient in not alleging that an accounting had been had, or a lack of assets in the receiver's hands or his inability to pay. Id. The question of the mismanagement or negligence of a receiver is essential to fixing the liability on his bond. State v. Germania Bk. [Minn.] 114 NW 651. It should be determined in the final accounting in the court appointing. Id.

23. Their undertaking being that the receiver "shall faithfully discharge the duties of his trust," they are entitled to contest the judgment on a suit upon the bond (Coe v. Patterson, 122 App. Div. 76, 106 NYS 659),and they may introduce evidence by way of defense that the sum recovered was not in fact due in that amount (Id.).

24, 25. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

26. See 6 C. L. 1267. Suits by and against foreign and ancillary receivers, see ante, § 4D.

27. Stone v. New Jersey & H. R. R. & Ferry Co. [N. J. Law] 66 A 1072.

28. Public notice of the application must first be given. Haydock v. Fisheries Co., 156 F 988. There is no necessity for the appointment of an ancillary receiver by a Federal court in one of the several districts in the same state. Horn v. Pere Marquette R. Co., 151 F 626. His authority runs through the various districts and such ancillary appointment but confirms his authority. Id.

29. Rev. Laws, c. 167, § 126, held to include an ancillary receivership. Second Nat. Bk. v. J. C. Lappe Tanning Co. [Mass.] 84 NE 301.

30. The words "fully distributed," in Rev. Laws, c. 167, § 127, providing that where an attachment has been dissolved by the appointment of a receiver the receiver shall not be discharged until all the assets which came into his hands have been fully distributed, are not satisfied by a remission to the receiver in another jurisdiction (Second Nat. Bk. v. J. C. Lappe Tanning Co. [Mass.] 84 NE 301), but require a division, apportionment, and delivery of the assets (Id.).

31. The appointment in New York being in recognition of and subsidiary to the appointment in New Jersey, the New York court was held bound by the decrees of the New Jersey court. Coe v. Patterson, 122 App. Div. 76, 106 NYS 659.

32. Where a foreign corporation upon the appointment of a foreign receiver transferred all its assets there and elsewhere to said receiver, it was held that there were no assets for an ancillary receiver subsequently appointed to take. Chicago Title & Trust Co. v. German Ins. Co., 119 App. Div. 347, 104 NYS 253.

33. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

34. The fact that the receiver is not made a party does not render the judgments obtained nullities. Venner v. Denver Union Water Co. [Colo.] 90 P 623.

has not obtained possession in the jurisdiction appointing him as against attaching creditors of the insolvent estate who are citizens of this state,[35] but if he has taken possession of the property or has given notice to the debtors of the estate, his claim, if not resulting from proceedings contrary to the public policy of this state, will be protected against attachment unless the attachment is by a citizen of this state.[36] He cannot defeat a garnishment by attaching creditors unless he has given notice of his claim to the debtors of the estate,[37] nor can he obtain the assistance of the courts of this state to secure the possession of chattels within their jurisdiction.[38] A foreign assignee or receiver whose office and power are statutory and to whom no voluntary conveyance is made cannot effectively convey real estate in this state.[39]

RECEIVING STOLEN GOODS.

§ 1. Nature and Elements; Other Crimes Distinguished, 1484. | § 2. Indictment and Prosecution, 1484.

Matters applicable to crimes generally are elsewhere treated.[40]

§ 1. *Nature and elements; other crimes distinguished.* See 8 C. L. 1696—The offense consists in receiving[41] stolen goods[42] with felonious intent,[43] knowing[44] or believing[45] them to be stolen, acting either for self or as agent of another.[46] At common law it is essential that the intent[47] and the guilty knowledge[48] shall be concurrent with the act, but where statutes define the offense as "receiving or concealing," subsequent knowledge may support a conviction.[49]

§ 2. *Indictment and prosecution. Indictment.* See 8 C. L. 1696—Information or indictment must allege that the goods were stolen[50] and must describe the property as particularly as indictment for larceny.[51] While larceny is an exception to the common-law rule that indictment must be found in the county in which the offense is committed, such exception does not extend to receiving of stolen goods.[52] The common-law rule that a foreign larceny will not support the charge is not modified by a statute making the receiver accessory after the fact,[53] and a continuance of the felonious intent, not being an essential of the offense, will not give jurisdiction in the county into which goods are carried by receiver.[54]

Evidence. See 8 C. L. 1696—The prosecution must prove the essential facts of lar-

35. Smith v. Berz, 125 Ill. App. 122.

36. Smith v. Berz, 125 Ill. App. 122. The rights of a receiver who takes personal property into another jurisdiction will, upon the principle of comity, be protected in the latter jurisdiction or against a creditor of the owner seeking to attach. Jenkins v. Purcell, 29 App. D. C. 209.

37, 38. Smith v. Berz, 125 Ill. App. 122.

39. Smith v. Berz, 125 Ill. App. 122. A receiver appointed for the benefit of creditors by a consent decree is not appointed **invitum**. Id.

40. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 10 C. L. 57.

41. Owner of house into which goods are carried is not a receiver. Dalton v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 316, 103 SW 935. Control over property must be assumed. Booker v. State [Ala.] 44 S 560.

42. Wright v. State, 1 Ga. App. 158, 57 SE 1050.

43. Oddo v. State [Ala.] 44 S 646; State v. Pray [Nev.] 94 P 218.

44. Suspicion insufficient. Minor v. State [Fla.] 45 S 818; State v. Feiss [N. J. Err. & App.] 66 A. 418.

45. Commonwealth v. Kronick [Mass.] 82 NE 39. Knowledge of such circumstances as would put a man of ordinary intelligence upon inquiry. Minor v. State [Fla.] 45 S 818.

46. Commonwealth v. Kronick [Mass.] 82 NE 39.

47. State v. Pray [Nev.] 94 P 218.

48. Minor v. State [Fla.] 45 S 818.

49. Oddo v. State [Ala.] 44 S 646; Commonwealth v. Kronick [Mass.] 82 NE 39.

50. Taken "with intent to permanently deprive the owner," fatally defective. State v. Mayer [Mo.] 107 SW 1085.

51. Wells v. State [Miss.] 43 S 610.

52. State v. Pray [Nev.] 94 P 218.

53. Penal Code 1895, § 17. Golden v. State, 2 Ga. App. 440, 58 SE 557.

54. Under Crim. Prac. Act, § 85 (Comp. Laws, 4055), providing that either county has jurisdiction of a public offense committed partly in both. State v. Pray [Nev.] 94 P 218.

ceny in the original taking,[55] and usually the value of the goods is such a fact.[56] Proof of value is also essential where the punishment is prescribed or that fixed for the larceny,[57] but such evidence may be excluded if immaterial.[58] Proof of other similar offenses is admissible on the issue of scienter.[59] The owner of the stolen goods may testify as to their value,[60] but the court will not take judicial notice that a commodity is of value.[61] The thief and the receiver are guilty of separate, distinct offenses, and neither is the accomplice of the other.[62] An accessory may testify for the prosecution,[63] and circumstantial evidence of the original felonious taking is admissible.[64] The testimony of an accomplice, supported by circumstantial evidence, may sustain a conviction,[65] but mere possession, even if purchased at price far below value, is insufficient.[66] Evidence of admission of guilt by another than defendant is incompetent.[67] Admission of irrelevant testimony not tending to incriminate the defendant is harmless,[68] and error, if any, in the admission of evidence of similar offenses, immediately following the offense charged, is cured by withdrawal from the jury.[69] The offense may be established by circumstantial evidence.[70]

Instructions.[See 8 C. L. 1696]—It is sufficient if all the essentials of the offense are specified in the charge read as a whole,[71] but the omission of an essential element in in an instruction undertaking to define the offense is error.[72] It is proper to refuse a requested charge which is confused and tends to mislead the jury,[73] and a requested charge need not be given in the language in which it is framed,[74] nor is it error to refuse to call the jury's attention to a particular part of the evidence.[75]

Verdict.—In Florida the verdict must find the elements of the offense.[76]

RECITALS, see latest topical index.

RECOGNIZANCES.[77]

The scope of this topic is noted below.[78]

A recognizance is an obligation of record in a case, and the cognizors by entering into it submit themselves to the jurisdiction of the court with respect to proceedings

55. Wright v. State, 1 Ga. App. 158, 57 SE 1050. Conversation between party stealing goods and one assisting him is admissible though not had in defendant's presence. Lipsey v. People, 227 Ill. 364, 81 NE 348.

56. Wright v. State, 1 Ga. App. 158, 57 SE 1050.

57. Booker v. State [Ala.] 44 S 56.

58. Where no assessment of value was made as costs against defendant under Code 1896, § 5052. Oddo v. State [Ala] 44 S 646.

59. That defendant previously received goods of the same character from the same party. Lipsey v. People, 227 Ill. 364, 81 NE 348.

60. State v. Feiss [N. J. Err. & App.] 66 A 418.

61. Cotton. Wright v. State, 1 Ga. App. 158, 57 SE 1050.

62. State v. Scott [Iowa] 113 NW 758. Receiver not an accomplice in the larceny. Bradley v. State, 2 Ga. App. 622, 58 SE 1064.

63. Thief. Oddo v. State [Ala.] 44 S 646. Burglar. State v. Rabens [S. C.] 60 SE 442.

64. Finding of burglars tools, etc. State v. Rabens [S. C.] 60 SE 442.

65. State v. Ozias [Iowa] 113 NW 761.

66. Minor v. State [Fla.] 45 S 818.

67. By defendant's wife that she alone was guilty. Oddo v. State [Ala.] 44 S 646.

68. State v. Rabens [S. C.] 60 SE 442.

69. State v. Scott [Iowa] 113 NW 758.

70. Lipsey v. People, 227 Ill. 364, 81 NE 348. Evidence held sufficient to justify conviction in prosecution for receiving stolen goods. Id.

71. Instruction on guilty knowledge not erroneous for failure to mention other essentials elsewhere specified. State v. Feiss [N. J. Err. & App.] 66 A 418. "Undertook to deprive the owner" is not substituting a mere undertaking for the statutory essentials of buying, concealing, or receiving, Rev. Laws, c. 208, § 51, when these are sufficiently charged elsewhere. Commonwealth v. Kronick [Mass.] 82 NE 39.

72. Failure to specify felonious intent. Oddo v. State [Ala.] 44 S 646.

73. Oddo v. State [Ala.] 44 S 646.

74, 75. Commonwealth v. Kronick [Mass.] 82 NE 39.

76. Failure to find scienter, fatal. O'Neal v. State [Fla.] 44 S 940.

77. See 6 C. L. 1268.

78. **It includes** only matters relating generally to the form and enforcement of recognizances. **It excludes** the sufficiency of recognizances given in particular proceedings (see Bail, Criminal, 9 C. L. 320; Indictment and Prosecution, 10 C. L. 57) and lia-

for estreat.[79] It is not to be construed with the same strictness as a bond, but so as to give effect to the intent and meaning of the statute.[80]

RECORDARI; RECORDING DEEDS AND MORTGAGES, see latest topical index.

RECORDS AND FILES.

§ 1. What Are Records, 1486.
§ 2. Keeping and Custody, 1487.
§ 3. Publicity and Access, 1487.
§ 4. Proof of Records and Use in Evidence, 1487.
§ 5. Amendment and Cancellation, 1488.
§ 6. Crimes Relating to Records, 1489.

The scope of this topic is noted below.[81]

§ 1. *What are records.* See 8 C. L. 1897—Documents filed by order of the court, though no proceedings were had thereon, are public records,[82] but reports required to be submitted for the information of public officers are not necessarily so.[83] A document is filed when it is delivered to the proper officer and lodged by him in his office,[84] and such filing is not affected by delay or failure to make record entry,[85] and if the entry is obviously out of its proper sequence, it will be presumed that the facts occurred in their regular order;[86] but, while for many purposes judgment relates back to time of announcement and is properly entered as of that date, for purpose of appeal it has no validity until actually entered of record.[87] In the absence of statute, file marks upon the document are not essential [88] and are considered merely a private memorandum [89] or an evidence of filing.[90] While it is important that clerk of court should identify the record and attest its correctness by his signature, in the absence of

bility of cognizors not differing from those of other sureties (Suretyship, 8 C. L. 2050).

79. State v. Johnson, 77 S. C. 252, 57 SE 846. The proceeding to estreat a recognizance is not a civil action and no jurisdiction of the person need be obtained, and the rule to show cause why the recognizance should not be estreated may be served on a nonresident by leaving a copy thereof with him in another state, under Cr. Code 1902, §§ 85 et seq. Id. Where the affidavit declares the cognizor to be a resident of the state, it will be presumed that he is such at the time of estreat proceedings. Id.

80. Salomon v. Buehler, 129 Ill. App. 176. A recognizance given by several defendants to release an attachment against them is not discharged by a discontinuance of the action as to one of the defendants, since it is substituted for the attachment. Id.

81. **It includes** matters relating generally to public records and files. **It excludes** matters peculiar to judgment records (Judgments, 10 C. L. 467), records on appeal or error (Appeal and Review, 9 C. L. 108), records of title and transfer (see Notice and Record of Title, 10 C. L. 1015), municipal records (see Municipal Corporations, 10 C. L. 881), public statistics (see Census and Statistics, 9 C. L. 542), the restoring of lost or destroyed records (see Restoring Instruments and Records, 10 C. L. 1526), and the filing of motions and other proceedings in court (see Motions and Orders, 10 C. L. 873; Pleading, 10 C. L. 1173 and topics treating of particular proceedings).

82. In re Freeman [N. J. Law] 68 A 222. Affidavits in a matter of disbarment presumed to be filed by order of the court. Id.

83. Pawnbroker's reports to licensing board required by Rev. Laws, c. 102, § 42, amended by St. 1907, p. 160, c. 211, are not public records to which all persons have access and of which they may have copies under Rev. Laws c. 35, § 17, nor public records under the definition of Rev. Laws, c. 35, § 5, "papers which an officer is required to receive for filing." Round v. O'Mera [Mass.] 83 NE 412.

84. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021; Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25; Bade v. Hibberd [Or.] 93 P 364.

85. Certified copy of order valid though not yet spread on the record. Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971. Party who makes seasonable motion for judgment cannot be deprived of his exception by delay in making record of the fact. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

86. When according to transcript the court apparently ruled upon a motion before it was filed. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

87. Latter date governs time for entering appeal. Puckett v. Gunther [Iowa] 114 NW 34.

88. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021; Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25; Bade v. Hibberd [Or.] 93 P 364.

89. Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25.

90. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021. Omission does not affect the validity of the record. Bade v. Hibberd [Or.] 93 P 364.

statute it is not essential, nor will omission to sign disqualify him from subsequently certifying to the correctness of copies of the record.[91]

§ 2. *Keeping and custody.*[See 8 C. L. 1698]—The filing and custody of public records is largely regulated by statute.[92] Where the duty to keep up records is reciprocal with a duty to pay for such service, failure of the latter excuses the former.[93] The right to custody of the records kept by the clerk of the United States court of Indian Territory in his ex officio capacity as recorder, upon that office becoming functus officio by reason of the admission of Oklahoma as a state, vests in the register of deeds.[94] An officer receiving records without authority acts in his private capacity,[95] and mandamus will not lie to compel their surrender to the proper custodian.[96]

§ 3. *Publicity and access.*[See 8 C. L. 1698]—Public records other than court records are open to inspection for any lawful purpose,[97] but the court may refuse inspection of its files to one who fails to show that he is actuated by proper motives.[98]

§ 4. *Proof of records and use in evidence.*[See 8 C. L. 1701]—As in other instances, legislation controls the extent to which certified copies of records are admitted in evidence, and a constitutional provision that such copies shall be admitted in certain cases is not exclusive.[99] In certain cases the record is conclusive of the fact [1] and cannot be affected by subsequent contradictory entry [2] or varied by parol evidence,[3] but where the admission of records in evidence is regulated by statute, such records as fail to comply with statutory requirements will not be received.[4] Indorsement of filing is only prima facie evidence of the date of filing, especially when such indorsement is not required of law.[5, 6] Record of judgment in another state may be proved by

91. Thomas v. Goodwin [La.] 45 S 406.

92. Burns' Ann. St. 1901, § 6519, makes it the duty of the clerk of court to file each paper in a case. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

93. Recorder need not keep up general indexes provided for in § 1154, Rev. St., if county refuses to pay therefor as provided by § 1155, Rev. St. State v. Wickham, 77 Ohio St. 1, 82 NE 517.

94. Improperly delivered to judge of district court. Eberle v. King [Okl.] 93 P 748.

95, 96. Eberle v. King [Okl.] 93 P 748.

97. Pub. Acts 1903, p. 102, No. 76, granting public access to public records, applies to records of marriage licenses, notwithstanding Comp. Laws, § 8612 et seq., authorizing information with regard to marriage solemnized by the probate court to be withheld under certain circumstances. Kalamazoo Gazette Co. v. Kalamazoo County Clerk, 148 Mich. 460, 14 Det. Leg. N. 203, 111 NW 1070.

98. Mandamus refused to compel clerk of court to disclose affidavits filed long before in a disbarment matter upon which no proceedings were taken when applicant's only motive appeared to be political and personal animosity. In re Freeman [N. J. Law] 68 A 222.

99. Chapter 5162, p. 97, Laws 1903, making certified copies of deeds actually on record, but not acknowledged for record, admissible in certain cases, does not conflict with Const. 1885, art. 16, § 21, providing that certified copies of deeds which had been acknowledged and proved for record shall be prima facie evidence. Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 S 874.

1. Marengo Sav. Bk. v. Byington [Iowa] 112 NW 192.

2. Unqualified record of court's adjournment constitutes an adjournment of the term, notwithstanding a subsequent entry of adjournment sine die. Marengo Sav. Bk. v. Byington [Iowa] 112 NW 192.

3. Parol evidence of lost ordinance not admitted against the record in ordinance book. Fogg v. Ocean City Sewer Co. [N. J. Eq.] 66 A 609. The record of a justice court cannot be impeached by ex parte affidavits. Bade v. Hibberd [Or.] 93 P 364.

4. Error to admit notice card from land office which does not purport to be attested as required by Rev. St. art. 2306, providing for admission of land office records in evidence. Slaughter v. Cooper [Tex. Civ. App.] 107 SW 897. Court's failure to certify clerk's attestation, as required by U. S. Rev. St. § 905 (U. S. Comp. St. 1901, p. 677), fatal to proof of judgment in another state. Wolf v. King [Tex. Civ. App.] 107 SW 617. When for lack of his acknowledgment a contract is not authorized to be of record as to a party under §§ 2 and 3, Code 1899 (§§ 3075, 3076, Code 1906), a certified copy is not admissible against him under § 5, c. 130, Code 1899 (Code 1906, § 3926), regulating the admission of certified copies. Cobb v. Dunlevie [W. Va.] 60 SE 384. Since docket entry of service of summons is not required by Code Civ. Proc. § 911, specifying matters required to be entered, such record is not evidence of service under § 912, making all required entries in justice docket prima facie evidence of the fact. Ferguson v. Basin Consol. Mines [Cal.] 93 P 867.

5, 6. Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25.

certified copy conforming with Federal statutes [7, 8] or, in the absence of local regulation, by examined copy according to common law,[9] but the statute does not include the records of courts of limited jurisdiction,[10] nor does such record become the record of a court of general jurisdiction by reason of its having been filed in that court.[11] Long acquiescence in title based upon a destroyed record will raise every inference in favor of the validity and regularity of the proceedings.[12]

§ 5. *Amendment and cancellation.*—A court has the inherent right to modify its records to make them speak the truth,[13] and when such amendment is necessary it should be made by an entry nunc pro tunc [14] unless judgment is still pending.[15] In general, such amendment may be made at any time,[16] even during appeal,[17] either from the memory of the presiding judge or upon proper showing,[18] but a memorandum which would authorize an amendment after the adjournment of the term must have been made by the judge or by his order or pursuant to law [19] and should be clear, decisive and unequivocal to the effect that the written memorial does not reflect the facts.[20] In general, amendment can be made only when there is something in the record to amend by,[21] and where this rule obtains no notice to the parties is necessary upon making corrections, even after final adjournment,[22] nor is notice required when correction is made during pendency of suit; [23] but records should not be amended after a long lapse of time without notice and opportunity for hearing.[24] The power to amend and correct court records after adjournment is in the court and cannot be exercised by the clerk.[25] Failure to note time of making a nunc pro tunc entry is not an error by the clerk, and date may be supplied without regard to statutory restrictions provided in case of mistake or omission.[26] The court has no power to change its records contrary to the truth.[27] An obvious omission which the court

7, 8. U. S. Stat. § 905 (U S. Comp. St. 1901, p. 677). Wolf v. King [Tex. Civ. App.] 107 SW 617.

9. Wolf v. King [Tex. Civ. App.] 107 SW 617.

10. Neither U. S. Rev. St. § 905 (U. S. Comp. St. 1901, p. 677), nor Rev. Code 1905, § 7292, authorize admission of the record of a justice court of another state. Strecker v. Railson [N. D.] 111 NW 612.

11. Abstract of justice court record filed with and certified as of record by the district court of another state. Strecker v. Railson [N. D.] 111 NW 612.

12. Sheriff's deed of which all record has been destroyed for forty years presumed a valid title. Gallup v. Flood [Tex. Civ. App.] 18 Tex. Ct. Rep. 861, 103 SW 426.

13. Code, § 4127, is declaratory of the common law. Papot v. Howard [Ala.] 45 S 581; Puckett v. Gunther [Iowa] 114 NW 34; In re McQuown [Okl.] 91 P 689; Ashaway Nat. Bk. v. Superior Ct. [R. I.] 67 A 523.

14. Marengo Sav. Bk. v. Byington [Iowa] 112 NW 192. Clark's failure to enter a special finding may be corrected nunc pro tunc. Papot v. Howard [Ala.] 45 S 581. Failure to record a filing at the time filed. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

15. When the court upon granting a motion noted that it had been continued over the term by consent of the parties, such entry cured the omission of such consent in record of the previous term. Oak Hall Clothing Co. v. Bagley [N. C.] 60 SE 648.

16. In re McQuown [Okl.] 91 P 689.

17. That amendment was made at subsequent term and during appeal is immaterial if properly certified by the court. Papot v. Howard [Ala.] 45 S 581. Code, § 4127, permits correction of a record already submitted to the supreme court. Puckett v. Gunther [Iowa] 114 NW 34.

18. In re McQuown [Okl.] 91 P 689.

19. Wesley Hospital v. Strong, 233 Ill. 153, 84 NE 205. Private memorandum by an attorney insufficient. Id.

20. Murphy v. Junction City Citizens' Bk., 84 Ark. 100, 104 SW 187.

21, 22, 23. Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971.

24. Murphy v. Citizens' Bk. of Junction City, 84 Ark. 100, 104 SW 187.

25. Farris v. Gilder [Tex. Civ. App.] 106 SW 896. Sayles' Ann. Civ. St. 1897, arts. 1120, 1146, requires judge to correct and sign the minutes in open court. Clerk cannot amend after adjournment without order of the court. Id.

26. Code, § 4093, limiting time for correction to one year, does not apply to proceedings to supply date which are under Code, § 4127, relating to perfecting record for appeal. Puckett v. Gunther [Iowa] 114 NW 34.

27. May not change date of opening and adjourning order. Murphy v. Citizens' Bk. of Junction City, 84 Ark. 100, 104 SW 187. No authority to set aside or amplify a valid judgment record under Court and Practice Act 1905, § 428, permitting the setting aside of judgment entered by mistake or in default in certain instances. Ashaway Nat. Bk. v. Superior Ct. [R. I.] 67 A 523.

might have supplied from evidence upon the face of the record will be deemed corrected,[28] and an immaterial error may be disregarded,[29] while a useless amendment will not be granted.[30] A municipal body may not without notice amend the records of its proceedings nunc pro tunc so as to materially alter their legal effect, no facts warranting such amendment appearing of record.[31] A person deprived of private property for public use may dispute the record of an officer's ministerial acts and raise jurisdictional facts.[32] Without statutory authority a former officer may not amend records made by him while in office,[33] and statutes granting such authority must be strictly followed.[34] Equity will grant relief from a fraudulent record upon suit of one whose interests are immediately [35] or prospectively threatened [36] by enjoining the use of the record or original document in evidence, by canceling the record, and by directing the recording officer to make certificate of cancellation;[37] but injunction will not issue to prevent the collection of a judgment on account of incurable error in the record.[38]

§ 6. *Crimes relating to records.* See 8 C. L. 1702

REDEMPTION; RE-EXCHANGE, see latest topical index.

REFERENCE.

§ 1. Definitions and Distinctions, Master and Referee and Umpire or Arbitrator, 1490.
§ 2. Occasion for Reference, 1490.
§ 3. Time and Stage of Proceedings, 1491.
§ 4. Motion and Order for Reference, and Stipulations or Consents on Voluntary Reference, 1491.
§ 5. Selection and Qualifications of the Referee; His Oath and Induction Into Office, 1491.
§ 6. General Scope of Reference and Powers of Referees or Masters, 1491.
§ 7. Appearance Before Referee, Hearing and Adjournments, Trial and Practice Thereon, 1492.
§ 8. The Report, Its Form, Requisites and Contents, and Return and Filing, 1492.
§ 9. Revision of Report Before the Court, 1492.
§ 10. Decree or Judgment on the Report, Confirmation or Overruling, Recommittal or Additional Findings, Modification, Conformity of Judgment With Report, 1493.
§ 11. Appellate Review, 1494.
§ 12. Compensation, Fees, and Costs, 1495.

This topic includes only reference at common law and under the codes, reference to a master in chancery [39] and to arbitrators [40] being excluded, and references in particular proceedings [41] being more fully treated elsewhere.

28. An undated entry of filing following a dated entry of a subsequent filing when indorsement upon the filed document supplies the date. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

29. Error in setting forth place to which an examination may be adjourned under Code Civ. Proc. § 876 does not invalidate the order for examination and may be expunged under § 723, providing that defect in proceedings not affecting rights of adverse party may be disregarded, and § 724, authorizing court to correct proceedings which fail to conform to the code. Muller v. Philadelphia, 55 Misc. 30, 104 NYS 782.

30. Amendment refused, in a proceeding finally disposed of, upon grounds not involving the desired amendment. In re Jordan, 102 Me. 483, 67 A 554.

31. Findings of a board of county commissioners, subject to appeal, upon canvas of a vote, cannot be subsequently amended without notice. Brickley v. Westphal, 134 Iowa, 266, 111 NW 829.

32. Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25.

33. Baker v. Webber, 102 Me. 414, 67 A 144; Beck v. Board of Education of Rocky River Village School Dist., 9 Ohio C. C. (N. S.) 551.

34. Amendment to record by former town clerk invalid because not made under oath as required in § 10, c. 4, Rev. St. Baker v. Webber, 102 Me. 414, 67 A 144.

35. Record of birth certificate falsely imputing paternity to plaintiff. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A 97.

36. Brother of one falsely designated in birth certificate as parent. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A 103.

37. Vanderbilt v. Mitchell [N. J. Err. & App.] 67 A 97.

38. Wesley Hospital v. Strong, 233 Ill. 153, 84 NE 205.

39. See Masters and Commissioners, 10 C. L. 812.

40. See Arbitration and Award, 9 C. L. 236.

41. See Bankruptcy, 9 C. L. 343; Partition, 10 C. L. 1089; Partnership, 10 C. L. 1100, and like topics.

§ 1. *Definitions and distinctions, master and referee, referee and umpire or arbitrator.*[See 6 C. L. 1272]

§ 2. *Occasion for reference.*[See 8 C. L. 1703]—The authority of courts to appoint referees is largely statutory, although the practice of referring certain matters to them is ancient.[42] The court need not make a reference in the absence of request therefor.[43] Nor, to justify an order of reference authorized by the pleadings, need the court specifically find the facts admitted therein.[44] In the absence of statutory inhibition, the court may refer cases of doubt and difficulty where it is called upon to weigh contradictory testimony, determine the credibility of witnesses,[45] or examine a long account, and a jury trial is impracticable.[46] Compulsory reference can be made only when the case comes fairly within the statute [47] and the application therefor is addressed to the sound discretion of the court,[48] but where the whole issues should not be so tried, the court cannot refer a particular issue to a referee and leave the remainder to a jury.[49] To authorize such a reference, it must affirmatively appear that the trial will necessarily require the examination of a long,[50] complicated account [51] arising between the parties [52] and directly and not merely collaterally, involved at the trial,[53] and in New York only when the obtaining of the account is the immediate object of the suit.[54] The court may also direct a reference to take an

42. McArthur Bros. Co. v. Com. [Mass.] 83 NE 334.

43. See summary proceedlng to enforce payment under judicial sale of land. Wanser v. De Nyse, 188 N. Y. 378, 80 NE 1088.

44. Where pleadings call for partnership accounting. Blun v. Mayer, 113 App. Div. 242, 99 NYS 22.

45. Proper to determine whether recelver sold property to himself with or without consent of plaintiffs, and whether they were damaged thereby. Jackson v. First State Bk. [S. D.] 113 NW 876.

46. Claffey v. Madison Avenue Co., 109 NYS 1.

47. Under §§ 7046, 7047, Rev. Code 1905, mere failure to object insufficient to constltute waiver of statutory provisions. Smith v. Kunert [N. D.] 115 NW 76.

48. In account involving five hundred items. Fowler v. Metzger Seed & Oil Co., 131 Wis. 633, 111 NW 677. Objection of one party does not interfere wlth chancellor's discretion in appointing referee under § 275, Code Civ. Proc. 1902. Shute v. Shute [S. C.] 60 SE 961. Proper where twenty-one certiorari proceedings were instituted to review assessment of taxes involving comparison with numerous other parcels under § 253, Tax. Laws (Laws 1896, p. 883, c. 908). People v. Feitner, 53 Misc. 334, 104 NYS 794.

49. Claffey v. Madison Ave. Co., 109 NYS 1.

50. Under § 7047, Rev. Code 1905, fact that examination of long account may be required insufficient. Dreveskracht v. First State Bk. [N. D.] 113 NW 1032. Under Code Civ. Proc. § 1013, words "as prescribed in this section" refer to where trlal will require determination of long account, and in actions of both law and equity there can be no compulsory reference unless such account is involved. Roome v. Smith, 123 App. Div. 416, 107 NYS 1088. § 2864, St. 1898. Fowler v. Metzger Seed & Oil Co., 131 Wis. 633, 111 NW 677. § 3921, Code 1906. Connell v. Yost [W. Va.] 57 SE 299. § 2893, Code Civ. Proc. 1902. Greenwood Granite & Const. Co. v. Ware Shoals Mfg. Co. [S. C.] 58 SE 765.

Proper where involving numerous farming transactions, sales, work and claims for money advanced. Smith v. Kunert [N. D.] 115 NW 76. Under Code Civ. Proc. 1902, § 275, in action to quiet title where jury trial not demandable as a matter of right. Shute v. Shute [S. C.] 60 SE 961. Where involving accounting of seven years' rents and profits. Windham v. Howell [S. C.] 59 SE 852. Where necessary to determine one-tenth of proceeds of gas taken from natural gas well. Hill v. Reynolds, 119 App. Div. 691, 104 NYS 303.

Improper where proof as to number of medical calls is merely formal. Lustgarten v. Harlam, 56 Misc. 606, 107 NYS 612. Where issues were those of negligence, resulting in damage to building and interference with right of way. Roome v. Smith, 123 App. Div. 416, 107 NYS 1088.

51. Hill v. Reynolds, 119 App. Div. 691, 104 NYS 303.

52. Account arising between defendant and third person insufficient. Dreveskracht v. First State Bk. [N. D.] 113 NW 1032. Insufficient when between plaintiff and entirely disinterested third parties. Aronin v. Philadelphia Casualty Co., 54 Misc. 630, 104 NYS 810.

53. Hill v. Reynolds, 119 App. Div. 691, 104 NYS 303; Dreveskracht v. First State Bk. [N. D.] 113 NW 1032.

Improper where accounts are to be examined only as means of fixing measure of damages. Aronin v. Philadelphia Casualty Co., 54 Misc. 630, 104 NYS 810. Where account involved only as showing value of services, in suit to collect for medical attendance. Lustgarten v. Harlam, 56 Misc. 606, 107 NYS 612.

54. Hill v. Reynolds, 119 App. Div. 691, 104 NYS 303.

Improper in action on bond indemnifying against loss of merchandise claims incurred by insolvency of debtors. Aronin v. Phila-

account where necessary to do so for its information [55] before judgment or for carrying judgment into effect [56] and where a question of fact other than upon the pleadings shall arise.[57] The statute of New York authorizes evidence to be taken by a referee in cases of excessive tax assessments,[58] and in Massachusetts the appointment of a referee is not proper in case of a suit against the state.[59]

§ 3. *Time and stage of proceedings.* See 9 C. L. 1278—Where the right to a reference depends upon the determination of preliminary issues, it is error to order a reference without first determining such issues,[60] and if an order of reference is made in such a case it is immediately appealable.[61]

§ 4. *Motion and order for reference, and stipulations or consents on voluntary reference.* See 8 C. L. 1704—A party desiring to object to the form of an order of reference [62] or that it was improvidently or improperly made [63] should take such objection at the time it was made by motion, if ex parte, or by appeal, if on notice.[64]

§ 5. *Selection and qualifications of the referee; his oath and induction into office. Removals and substitutions.* See 8 C. L. 1704

§ 6. *General scope of reference and powers of referees or masters.* See 8 C. L. 1704 The powers and duties of the referee are measured by the order of reference,[65] and a referee has full power under a reference for such purpose to decide all questions arising, both of law and fact.[66] But since the referee cannot enter judgment, an order permitting such action must be deemed one only to hear and report.[67]

§ 7. *Appearance before referee, hearing and adjournments, trial and practice*

delphia Casualty Co., 54 Misc. 630, 104 NYS 810. Where main issue is whether defendant promised to pay. Lustgarten v. Harlam, 56 Misc. 606, 107 NYS 612.

55. Sullivan v. McCann, 188 NYS 909.

Proper under Code Civ. Proc. § 1015, in suit under Code Civ. Proc. § 66, authorizing court to determine and enforce attorney's lien. Sullivan v. McCann, 108 NYS 909. Under Code Civ. Proc. § 1015, on motion for writ of assistance presenting questions dependent upon conflicting affidavit, where essential that affiants be cross-examined. Neal v. Gilleran, 108 NYS 118. Under § 204, Mills' Ann. Code, where defendant has received rents and profits of land and made expenditures. Barlow v. Hitzler [Colo.] 90 P 90. Where court not satisfied with evidence before him and desired further testimony. Jones v. Haile Gold Min. Co. [S. C.] 60 SE 35.

56. Proper where involving accounting with reference to agency and trust relations and jury trial impracticable. Greenwood Granite & Const. Co. v. Ware Shoals Mfg. Co. [S. C.] 58 SE 765.

57. Code Civ. Proc. 1902, § 293. Windham v. Howell [S. C.] 59 SE 852.

58. Tax. Law, § 253. People v. Onderkirk, 120 App. Div. 650, 105 NYS 134.

59. McArthur Bros. Co. v. Com. [Mass.] 83 NE 334. Since statutes permitting suits against state permit only those incidents of ordinary procedure expressly set forth or following by necessary implication in such actions, and an auditor is not one of the inherently necessary implications of every procedure and not authorized by the statute, there is no authority to appoint one in such proceedings. Rev. Laws, c. 201, § 1, as amended by St. 1905, p. 293, c. 370. Id.

60. Gayard v. Texas Crude Oil Min. Co., 118 App. Div. 299, 38 Civ. Proc. R. 351, 103 NYS 437.

Improper: In action for specific performance and accounting to refer case where existence of agreement concerning which accounting is sought is in issue. Gayard v. Texas Crude Oil Min. Co., 118 App. Div. 299, 38 Civ. Proc. R. 351, 103 NYS 437. Code Civ. Proc. § 1013, as to reference in case of long accounts, inapplicable unless right to accounting exists. Id. Where, in action for settlement of accounts between copartners, defendant alleged full adjustment and settlement between parties. Wynkoop v. Wynkoop, 119 App. Div. 679, 104 NYS 296. Until pleas in bar going to entire matter of reference are determined. Duckworth v. Duckworth, 144 N. C. 620, 57 SE 396.

61. Duckworth v. Duckworth, 144 N. C. 620, 57 SE 396.

62. Objection that it should be in form of interlocutory judgment instead of order. Blun v. Mayer, 113 App. Div. 242, 99 NYS 22. Failure to bring in all parties. Knickerbocker Inv. Co. v. Voorhees, 121 App. Div. 690, 106 NYS 455.

63. Blun v. Mayer, 113 App. Div. 242, 99 NYS 22.

64. Blun v. Mayer, 113 App. Div. 242, 99 NYS 22. Cannot proceed thereunder and make objection on appeal from final judgment or after report of referee. Id.

65. Stewart v. Leonard [Me.] 68 A 638. A referee directed to hear evidence and submit findings cannot order judgment on pleadings. Idaho Placer Min. Co. v. Green [Idaho] 94 P 161.

66. Where referred to be heard on legal principles, judgment thereon to be final. Stewart v. Leonard [Me.] 68 A 638.

67. Cartier v. Spooner, 118 App. Div. 342, 103 NYS 505.

*thereon.*See 8 C. L. 1705—The strict rules of evidence applicable to trials do not prevail in proceedings before a referee,[68] and the admissibility of evidence is largely a matter of judgment for the referee.[69] But in Georgia it seems to be held that the ordinary rules as to the admissibility of answers to interrogatories and admissions made in another case, refreshing memory from written memorandum, and subpoenas duces tecum, apply.[70] Where a case is referred to a master to take and report testimony, he cannot order an amendment to the pleadings [71] or grant a new trial.[72] Where the Federal statute is silent as to the method of procedure on reference, it is competent for the parties to agree to proceed under the state statutes or under the common law, and when they have so agreed they are bound thereby.[73]

§ 8. *The report, its form, requisites and contents, and return and filing.*See 8 C. L. 1705—The referee must pass on all matters submitted in the manner prescribed by statute,[74] and where the statute so requires, the report of the referee which fails to state the facts found and conclusions of law separately is insufficient to constitute the basis of a valid judgment.[75] The court has no discretion in imposing the statutory penalty for failure of the referee to report his finding within the statutory period,[76] but such statutes are to be strictly construed and the motion to impose the penalty denied unless the case is clearly within the letter of the statute.[77] Such a motion will be denied where the party has not elected to terminate the reference as provided by statute [78] or has waived the right to do so [79] or the referee has in good faith held the reference open at the request of any party to enable him to submit material matter.[80] The referee must find the facts and not merely make legal conclusions.[81]

§ 9. *Revision of report before the court.*See 8 C. L. 1706—The referee should announce his findings and conclusions to the interested parties a sufficient length of time before making his report to enable the defeated party to prepare and present his exceptions and preserve his record for review.[82] The referee has authority and it is his duty where a proper bill of exception is presented to him before he files his report to allow and sign the same and file with his report.[83] Amendments to the exceptions can only be made after the statutory period therefor has expired when

68. People v. Onderkirk, 120 App. Div. 650, 105 NYS 134.

69. Refusal to receive certain evidence matter for judgment of referee. Harper Mach. Co. v. Sinclair [N. J. Law] 68 A 890. Where defendant's whole case depended upon action of court on exceptions to report of commissioner authorized to hear whole proof, defendant, on court finding some of her witnesses incompetent, could not object to determination of whole case on such exceptions and claim the right to a resubmission to enable defendant to prove same facts by other witnesses. Foley v. Dillon [Ky.] 105 SW 461.

70. Sizer v. Melton, 129 Ga. 143, 58 SE 1055.

71. Cannot amend complaint to bring in another party. Dixon v. Roessler, 76 S. C. 415, 57 SE 203. Cannot amend original answer to permit setting up counterclaim materially affecting result of action. Collins v. St. Lawrence Club, 108 NYS 287.

72. Court alone can grant new trial. Iralson v. Stang, 18 Okl. 423, 90 P 446.

73. United States v. Rameey, 158 F 488.

74. Where asked to indicate person to receive legatee's share of estate, not error for auditor to distribute share "to trustee appointed or hereafter to be appointed of legatee mentioned." Garman's Estate, 32 Pa. Super. Ct. 494.

75. Finding that plaintiff loaned, advanced, or expended certain sums scheduled for defendant, not showing where loaned, advanced, or expended, and concluding that defendant owed plaintiff gross sum claimed, sufficient under Code Civ. Proc. § 1022. Moore v. Martine, 107 NYS 652.

76. Under § 1019, Code Civ. Proc. In re Robinson, 53 Misc. 171, 104 NYS 588.

77. Section 1019, Code Civ. Proc., held not to apply to reference under approval of surrogate. In re Robinson, 53 Misc. 171, 104 NYS 588.

78. Under § 1019, Code Civ. Proc., time of report by referee not limited unless parties elect to terminate. In re Robinson, 53 Misc. 171, 104 NYS 588.

79. Where attorney authorized extension of time for filing report by conduct. In re Robinson, 53 Misc. 171, 104 NYS 588.

80. Though matter to be submitted seems unnecessary. In re Robinson, 53 Misc. 171, 104 NYS 588.

81. Finding as to the existence of a balance on several mutual accounts held one of fact. Blun v. Mayer, 189 N. Y. 153, 81 NE 780.

82, 83. Iralson v. Stang, 18 Okl. 423, 90 P 446.

some good and sufficient reason is shown why they could not have been made within that period.[84] The judge of the court has no authority to allow and sign a bill of exceptions, preserving the evidence heard before a referee, or to incorporate the same into a case made, unless first authenticated and made a part of the record by the bill of exceptions signed by the referee.[85]

§ 10. *Decree or judgment on the report, confirmation or overruling, recommittal or additional findings, modification, conformity of judgment with report.* See 8 C. L. 1708.—Since the court must determine the controversy and may order a reference only for its assistance,[86] it is necessary that the referee's report be presented to the court for confirmation.[87] And when so presented the court is called upon to confirm or reject it and decide the matter for itself [88] where it appears that the referee has acted fraudulently [89] or been guilty of gross misconduct.[90] But where the referee has acted in good faith,[91] has reported findings of fact which are certain and consistent,[92] which respond to all the issues [93] and the order of reference,[94] and the errors complained of are at most but the mistakes of an honest judgment, the statutes clearly contemplate that they can be reviewed only upon motion for a new trial [95] or upon appeal.[96] Where such is not the case, the court may refer the matter back to the referee with instructions to remedy the defects and make the findings certain and complete and comply with the original order of reference.[97] After affirmation, inaccuracies in the referee's report become immaterial,[98] and findings of fact and conclusions of law not authorized by the order of reference become binding as the determination of the court when expressly adopted thereby.[99] The referee's finding of facts and conclusions of law generally have the effect of a special verdict,[1] and in the absence of fraud, prejudice or mistake are final [2] and reviewable only by the statutory

84. Section 4589, Civ. Code 1895. Sizer v. Melton, 129 Ga. 143, 58 SE 1055.

85. Iralson v. Stang, 18 Okl. 423, 90 P 446.

86. Error to authorize referee to hear, determine and enter judgment. Cartier v. Spooner, 118 App. Div. 342, 103 NYS 505. Referee cannot decide whole matter. Sullivan v. McCann, 108 NYS 909.

87. Where reference to ascertain whether amount retained by attorney as fee is proper; judgment entered on referees' report without application for confirmation is nullity. Cartier v. Spooner, 118 App. Div. 342, 103 NYS 505.

88. Cartier v. Spooner, 118 App. Div. 342, 103 NYS 505.

89, 90, 91, 92. United States v. Ramsey, 158 F 488.

93. United States v. Ramsey, 158 F 488. Claim distinct from that in issue not allowable. Moore v. Martine, 107 NYS 652. Failure in reference in foreclosure proceedings to take proof of heirship of infant and absent defendants not error where no proof could have affected result. Franklin v. Di Clemente, 108 NYS 123.

94. Eddy v. Lamb, 150 Mich. 624, 14 Det. Leg. N. 567, 113 NW 282.

95. Rev. St. Idaho 1887, §§ 4420 et seq. United States v. Ramsey, 158 F 488.

96. United States v. Ramsey, 158 F 488.

97. United States v. Ramsey, 158 F 488. Motion for re-reference proper remedy where referee fails to find on some necessary question. Exception improper. Sizer v. Melton, 129 Ga. 143, 58 SE 1055. Court may re-refer where referee fails to find on material facts. Bossi's Estate v. Baehr [Wis.] 113 NW 433.

98. Inaccuracies in discussing what would have been measure of damages if liability existed. Sizer v. Melton, 129 Ga. 143, 58 SE 1055.

99. People v. Ouderkirk, 120 App. Div. 650, 105 NYS 134.

1. Section 4421, Rev. St. Idaho 1887. United States v. Ramsey, 158 F 488. In absence of statement in rule of reference by consent, whether award shall have effect of finding by arbitration or force of verdict, it must be treated as verdict. Harper Mach. Co. v. Sinclair [N. J. Law.] 68 A 890. Finding of referee upon whole issue shall stand as finding of court, and upon filing same with court, judgment shall be entered thereon in same manner as if action had been tried by court, unless objected to by either party by filing a motion for new trial. Peck v. Alexander [Colo.] 91 P 38. Under Mills' Ann. Code, § 212, where evidence is conflicting but sufficient to sustain findings, they are entitled to all weight of verdict of jury or findings of court based on like evidence. Id. In Idaho, statute provides that when parties agree and court upon stipulation directs that all issues of fact and of law be tried by referee, and referee hears evidence and makes and reports finding, court has power only to enter a proper judgment thereon. Sections 4414, 4419, 4420, 4421, Rev. St. Idaho 1887. United States v. Ramsey, 158 F 488. Finding for defendant against a referee's report is only to be directed where a nonsuit would have been proper had the trial been to a jury. Ansley v. Scranton, 218 Pa. 131, 67 A 51.

2. Review of findings of law and fact as to liability of officer for not serving writ of

modes of reviewing verdicts of juries and the findings of a court,[3] and the court is powerless to review the evidence on the exceptions filed.[4] In some states, however, the facts found by the referees are prima facie correct only and may be given in evidence to the court or jury trying the case [5] and will not be disturbed in the asbence of exceptions thereto.[6] Where an auditor merely finds the facts, the court may draw its own conclusion.[7] In certain instances the determination of the referee is not final on disputed claims, nor is the claimant concluded by the order approving the receiver's accounts.[8]

§ 11. *Appellate review.*[See 8 C. L. 1708]—The ordinary rules as to assignments of error apply.[9] Either party may apply to the appellate court to set aside the award and grant a new trial without first applying to the judge or justice of the court which ordered the reference.[10] Where the referee's findings are apparently inconsistent, the court will reconcile them and give effect to the real meaning and intent of the referee if possible.[11] The court will not pass upon assignments of error on the rulings of a referee in the absence of proof of the action of the lower court thereon,[12] nor consider the question of the sufficiency of the evidence to support the findings of the referee in the absence of a bill of exceptions allowed and signed by the referee preserving the evidence.[13] In the latter case the referee's finding will be presumed to have been based on sufficient evidence,[14] and the appellate court will only determine whether the conclusions of law are warranted within the pleadings by the facts found.[15] Where facts have been found and the discretion of the auditor properly exercised, and his report has been confirmed by the lower court appointing him, the general rule is that the appellate court will not interfere [16] unless the findings are

execution, except such as were by referees' report submitted to court, refused. Stewart v. Leonard [Me.] 68 A 638. In common-law reference, where referee has exercised his honest and incorrupt judgment in finding facts after full and fair hearing, court cannot decline to accept report on ground that referee erred in his judgment. United States v. Ramsey, 158 F 488. Findings of referee should not be reversed where necessary to vary findings to do so. Eddy v. Lamb, 150 Mich. 624, 14 Det. Leg. N. 567, 113 NW 282.

3. Section 4421, Rev. St. Idaho 1887. United States v. Ramsey, 158 F 488. Will be passed upon only when facts stated in reports are totally insufficient to constitute legal justification for rule applied. Finding as to practical construction of contract and waivers of certain portions thereof by parties. Eddy v. Lamb, 150 Mich. 624, 14 Det. Leg. N. 567, 113 NW 282. Where no evidence to support finding. Harper Mach. Co. v. Sinclair [N. J. Law] 68 A 890. In absence of application for new trial, findings of referee adopted by court conclusive on appeal. Nelson v. Lybeck [S. D.] 111 NW 546.

4. United States v. Ramsey, 158 F 488.

5. Connell v. Yost [W. Va.] 57 SE 299.

6. Eddy v. Lamb, 150 Mich. 624, 14 Det. Leg. N. 567, 113 NW 282. Unless errors of referee appear in bill of exceptions. Iralson v. Stang, 18 Okl. 423, 90 P 446.

7. Beers v. Wardwell [Mass.] 84 NE 306.

8. Under Laws 1902, pp. 115, 116, c. 60, §§ 5, 68, it is duty of receiver to bring to court's attention fact that claimant had no opportunity to review determination of referee rejecting claim where he had no notice thereof until after application was made for order of approval of receiver's final account or of filing account until after order of approval was made, although its attorney filed notice of general appearance on receiver's attorney. People v. Federal Bk. of New York, 122 App. Div. 810, 107 NYS 811. Where purpose is to have account so made that undisputed items on either side may be eliminated from contest and issue narrowed to questions in dispute, items of account not excepted to by either party are conclusive, but those to which exception is made are without effect. Lone Star Salt Co. v. Blount [Tex. Civ. App.] 107 SW 1163.

9. Assignments of error not specifying wherein evidence was insufficient to support findings not considered. Smith v. Kunert [N. D.] 115 NW 76.

10. Supreme court rule No. 30 held not to apply to awards by referee. Harper Mach. Co. v. Sinclair [N. J. Law] 68 A 890.

11. Moore v. Martine, 107 NYS 652.

12. Eddy v. Lamb, 150 Mich. 624, 14 Det. Leg. N. 567, 113 NW 282.

13. Iralson v. Stang, 18 Okl. 423, 90 P 446.

14, 15. Moore v. Martine, 107 NYS 652.

16. Where auditor appointed to pass upon exceptions and distribute intestate estate charges costs to estate. Garman's Estate, 32 Pa. Super. Ct. 494. Referees' finding of fact not subject to review. Eddy v. Lamb, 150 Mich. 624, 14 Det. Leg. N. 567, 113 NW 282. In absence of seasonable objection or failure by referee to pass upon all matters submitted, referee's report not strictly in compliance with statute will be deemed sufficient after exceptions taken, modification made pursuant thereto, and appeal by objecting party. In re Schroeder, 113 App. Div. 221, 99 NYS 174. Under Code Civ. Proc. §§ 1022, 2546, requiring referees to make separately numbered find-

manifestly totally unsupported by the evidence [17] or a question of law is manifestly involved.[18] If there is sufficient competent evidence to support the findings, the judgment will not be disturbed because incompetent evidence was admitted.[19] Generally an appeal from an order of reference will not be entertained unless it operates to deny a litigant the mode of trial to which he is entitled by law or unless the order is assailed for want of jurisdiction.[20] In such a case it is not necessary to make a statement of the case on appeal where the appeal itself and the exception noted in the record sufficiently raises the question of the validity of the order.[21]

In New York exceptions to referee's reports must be filed and served within eight days after service of notice of filing such report, otherwise the report becomes absolute and stands as confirmed,[22] and under the statute the court will review an order confirming a referee's report, although no case was made or exceptions taken.[23] And such an appeal brings before the appellate court both the decision of the special term on the facts and on the law, and the appellate court must correct any error and grant the proper relief.[24]

§ 12. *Compensation, fees and costs.* See 8 C. L. 1708—In some states the auditor's compensation is fixed by statute,[25] and while the appellate court will not reverse the action of the lower courts in the matter of compensation to auditors unless error clearly appears, they are nevertheless bound to do so in obedience to statute.[26] Although as a general rule all the litigants,[27] even those objecting to the reference, are liable for the fees of the referee,[28] the liability may be avoided by express contract or by stipulation of one party solely assuming them,[29] and in such a contract the attorney has power to bind his client for their payment.[30] Failure to file his report in the time prescribed by statute forfeits the referee's right to his fees.[31]

ings of law and fact where referee's report was not in strict compliance therewith. Id. Finding that certain acts of strikers were committed in the interest and for benefit of union, conclusion of law improper under reference to find facts. Russell v. Stampers & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303.

17. Preston v. Albee, 120 App. Div. 89, 105 NYS 33; Saal v. South Brooklyn R. Co., 122 App. Div. 364, 106 NYS 996. Liability established by estimate of referee without evidence not binding. Baldwin v. Patrick, 39 Colo. 347, 91 P 828.

18. Conclusion made from facts totally unsupported by evidence presents question of law. Preston v. Albee, 120 App. Div. 89, 105 NYS 33.

19. Claim for wages quantum meruit against decedent's estate held sustained by competent evidence. Bossi's Estate v. Baehr [Wis.] 113 NW 433.

20. Reference under § 293, Code Civ. Proc., does not prevent jury trial and is nonappealable. Jones v. Haile Gold Min. Co. [S. C.] 60 SE 35.

21. Duckworth v. Duckworth, 144 N. C. 620, 57 SE 396.

22. People v. Federal Bk. of New York, 122 App. Div. 810, 107 NYS 811.

23. Section 997, Code Civ. Proc., making case necessary on appeal from judgment, inapplicable to special proceedings, such as enforcing attorney's lien. Sullivan v. McCann, 108 NYS 909.

24. Disregard of certain accounts corrected. Sullivan v. McCann, 108 NYS 909.

25. Under Act June 4, 1879 (P. L. 84), five hundred dollars excessive for six days' hearing, allowing maximum of fifteen dollars per day. In re Mansfield, 34 Pa. Super. Ct. 413.

26. Where, under statute (Act June 4, 1879, P. L. 84), allowance cannot be sustained unless it be presumed that time required was beyond bounds of reason. In re Mansfield, 34 Pa. Super. Ct. 413. Compensation allowed referee within discretion of trial court and will not be disturbed in absence of abuse of discretion. Scott v. Bay City, 150 Mich. 694, 14 Det. Leg. N. 868, 114 NW 675. $1,916 not abuse of discretion for 252 2-3 days. Id. Where number of claims were referred to commissioner, held that he should have made one report covering all of them, and where he made separate reports on each it was error to allow him compensation for each. Hays v. Johnson's Adm'r, 30 Ky. L. R. 614, 99 SW 332.

27. Liability collective, not individual. Bottome v. Neeley, 109 NYS 120.

28. Bottome v. Neely, 54 Misc. 258, 104 NYS 429.

29. Where referee and stenographer agree to look to estate and not to individual litigants. Bottome v. Neeley, 109 NYS 120. Where unofficial stenographer consents that fees be made part of referee's fees, forfeiture of referee's fees under Code Civ. Proc. § 1019, forfeits stenographer's fees. Id.

30. To bind client for fees of stenographer to take minutes of proceedings before referee. Bottome v. Neeley, 54 Misc. 258, 104 NYS 429.

31. Under § 1019, Code Civ. Proc. Bottome v. Neeley, 109 NYS 120.

REFORMATION OF INSTRUMENTS.

§ 1. The Remedy, 1496.
A. Nature and Office, 1496.
B. Right to Remedy, 1496.
C. Instruments Reformable, 1498.
§ 2. Procedure, 1498.
A. Jurisdiction and Form of Proceedings, 1498.
B. Parties, 1498.
C. Pleading and Evidence, 1499.
D. Trial and Judgment, 1501.

What constitutes mistake and the proof thereof is more fully treated in another topic,[32] as is the reformation of insurance policies.[33]

§ 1. *The remedy. A. Nature and office.* See 8 C. L. 1708—The power confided to courts of equity of reforming written instruments is universally conceded to be an extraordinary one whose exercise must be guarded with zealous care and granted only in a clear case.[34] Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement previously entered into, but which by mistake either as to fact or law does not fulfill that intention, or which violates it, equity will correct the mistake so as to produce a conformity with the instrument intended.[35]

(§ 1) *B. Right to remedy.* See 8 C. L. 1709—Equity will correct a mistake of the scrivener whereby a different estate than that intended was conveyed,[36] or a misdescription occurring in all of the court papers and the master's deed if no rights of innocent third parties have intervened.[37] As between the parties, equity will grant relief at the suit of either against the mistake of both whereby the writing intended to evidence their agreement fails truly to state the terms of the contract between them [38] and also against third parties with notice,[39] but not when the rights of innocent third parties acquired for valuable consideration and without notice will be affected.[40] In general, to authorize reformation, there must be a valid agreement [41] which can be specifically enforced after reformation.[42] It should appear that the omissions were material [43] and that injury or loss will occur unless correction be made.[44]

32. See Mistake and Accident, 10 C. L. 853.

33. See Insurance, 10 C. L. 335.

34. Miller v. Stuart [Md.] 68 A 273.

35. Mere neglect, carelessness or oversight insufficient. Galley v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. Where description of property conveyed omitted one line and confused others. Smith v. Owens [W. Va.] 59 SE 762. Where instrument sought to be enforced through mistake and omissions is deed of sale, and not mortgage as intended. Nelson v. Spence, 129 Ga. 35, 58 SE 697.

36. Where by mistake of scrivener a life estate is granted when it is the intention of the respective parties to purchase and convey an estate in fee simple, equity will reform the deed. Teel v. Dunnihoo, 230 Ill. 476, 82 NE 844. Mistake in respect to land conveyed. Peacock v. Bethea [Ala.] 43 S 864. Where description of land different from that pointed out inserted without act of either party. Flynn v. Finch [Iowa] 114 NW 1053. Where deed described converging instead of square tract. Coleman v. Thibodaux, 119 La. 474, 44 S 269. Where purchaser bought lot by title bond and after building house thereon received deed incorrectly describing same and bond correctly describing was lost. Hill v. Clark [Ky.] 106 SW 805.

37. Where, through mistake common to all parties to proceedings, master's deed described less property than purchased, and purchaser took possession, equity will correct deed so as to conform to what purchaser paid for and parties interested intended commissioner to sell. Dillard v. Jones, 229 Ill. 119, 82 NE 206.

38. Evidence sufficient to show failure to include reservation of timber right in deed to land. Mattox v. Davis [Tex. Civ. App.] 20 Tex. Ct. Rep. 268, 106 SW 169.

39. Where actual notice by taking part in conversation. Mattox v. Davis [Tex. Civ. App.] 20 Tex. Ct. Rep. 268, 106 SW 169.

40. Mattox v. Davis [Tex. Civ. App.] 20 Tex. Ct. Rep. 268, 106 SW 169.

41. Evidence insufficient to show note invalid by reason of maker's intoxication and resulting insufficient mental capacity. Fagan v. Wiley [Or.] 90 P 910. Evidence insufficient to show failure of consideration. Union Ice Co. v. Doyle [Cal. App.] 92 P 112. Validity of irrigation contract held admitted by claim of rights thereunder. Fresno Canal & Irr. Co. v. Hart [Cal.] 92 P 1010.

42. Reformation of instrument invalid for want of assent, consideration and delivery refused. Nelson v. Lybeck [S. D.] 111 NW 546.

43. Omission immaterial where no loss or injury shown by complaining party. National Bk. of Kennett Square v. Shaw, 218 Pa. 612, 67 A 875.

44. Bill for reformation of bond given to release attached property, conditioned on payment of any judgment against defendant to read any judgment against third party for

In general, reformation depends upon mutual,[45] not unilateral,[46] mistake of fact,[47] or where there has been a mistake by one party, accompanied by a fraud by the other.[48] Fraud or mistake to be the basis of a reformation must be in the execution of the instrument.[49] Relief is generally withheld unless the parties can be restored substantially to their position at the time the contract was made,[50] and if this cannot be done the court will relieve only where the clearest and strongest equity imperatively demands it.[51] The complaining party must have exercised at least the degree of diligence which may fairly be expected from a reasonable person,[52] and a demand for reformation should generally be made.[53] The right may be lost by estoppel and ratification,[54] be barred by statute of limitations[55] and laches.[56] But as between the original

whom defendant was surety, insufficient where bill alleges that property attached was that of third party and not bank and there was no allegation that property attached was released after bond was given. Drovers' Live Stock Commission Co. v. Custer County State Bk. [Okl.] 91 P 850.

45. Miller v. Stuart [Md.] 68 A 273.

Held mutual: Insertion of party of first part in place of party of second part. Coggins v. Carey [Md.] 66 A 673. Erroneous description inserted without act of either party. Flynn v. Finch [Iowa] 114 NW 1058.

Evidence sufficient to show mutual omission of reservation from conveyance. Redding v. Badger Lumber Co., 127 Mo. App. 625, 106 SW 557. Mutual omission of provision of payment of taxes in deed. McAdow v. Wight [Mo. App.] 107 SW 421. Mutual omission as to method of payment. Merritt v. Coffin [Ala.] 44 S 622. Mutual omission of statement that construction of underground crossing was part consideration for conveyance. Stafford v. Big Sandy R. Co. [Ky.] 105 SW 389. Where shown that mill was constructed on disputed tract without objection of parties. Stephenson v. Garner, 84 Ark. 623, 105 SW 672.

Evidence insufficient to show mutual mistake as to parties to be bound by contract. Smith v. Interior Warehouse Co. [Or.] 94 P 508.

46. Morgan v. Owens, 228 Ill. 598, 81 NE 1135; Miller v. Stuart [Md.] 68 A 273.

Held unilateral where plaintiff signed contract to deliver 37,000 sacks wheat, intending that others than himself should furnish portion thereof, of which defendant had no knowledge. Smith v. Interior Warehouse Co. [Or.] 94 P 508. Where one party claimed reservation omitted from contract clear and definite in terms. Horne v. J. C. Turner Cypress Lumber Co. [Fla.] 46 S 1016. Where scrivener acted for one of grantees in absence of grantor. Dougherty v. Dougherty, 204 Mo. 228, 102 SW 1099.

47. Where agents signing name to contract mistook effect upon their liability of language employed and mistook form of signature as execution of contract by which their principal rather than themselves became bound, held mistake of fact. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449.

48. Sufficient where one knew other was making mistake after former's fraudulent insertion of wrong number in deed. Venable v. Burton, 129 Ga. 637, 59 SE 253. Where agent taking renewal policy on policy expiring July first dated renewal policy June 9. Flickinger v. Farmers' Mut. Fire & Lightning Ins. Ass'n [Iowa] 113 NW 824.

Insufficient. Redding v. Badger Lumber Co., 127 Mo. App. 625, 106 SW 557. To show mistake or fraud in paving contract. Fullerton v. Des Moines [Iowa] 115 NW 607.

49. Capps v. Edwards [Ga.] 60 SE 465. Mistake must be in preparation or execution. Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 SW 880.

50. Refused where corporate stock has passed into hands of new holders, ignorant of omitted conditions of deed sought to be reformed. Galley v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. Where owner of two lots is deceived by third person to believe that his deed for two lots is for one only, and purchaser deceived to believe both lots were to be sold, owner must tender purchase price and note in order to reform. Horwitz v. La Roche [Tex. Civ. App.] 107 SW 1148.

51. Refused where evidence shows lack of diligence. Galley v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533.

52. Oversight, neglect and carelessness fatal. Galley v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. Failure to read contract sought to be reformed as not containing alleged warrants, fatal. Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 SW 880.

53. Unnecessary where suit in ejectment had been previously brought. Peacock v. Bethea [Ala.] 43 S 864.

54. Where, after discovery of alleged mistake, parol agreement was entered into to purchase additional land alleged to have been intended to be included in original deed, possession taken under latter agreement and building erected. Urich v. Watts, 69 N. J. Eq. 604, 66 A 432.

55. Suit to reform deed held one for recovery of real property and within five-year period of limitation under Code Civ. Proc. § 318, not under § 338, subd. 4, limiting actions for relief from fraud and mistake to three years. Union Ice Co. v. Doyle [Cal. App.] 92 P 112. Under § 4272, Rev. St. 1899 (Ann. St. 1906, p. 2347), barred ten years after right accrues. Stark v. Zehnder, 204 Mo. 442, 102 SW 992. Statute of limitations does not bar action to reform instrument brought within ten years of date thereof and within five years of discovery of fraud which could not have been sooner discovered. Morgan v. Combs [Ky.] 108 SW 272.

56. Not barred where suit brought five days after discovery. Peacock v. Bethea

parties, no rights of third parties having intervened, mere lapse of time does not deprive one of the right to a reformation,[57] and one in possession of land as against one not in possession is not chargeable with laches,[58] nor affected by the statute of limitations, however long his delay.[59] The fact that the contract has been fully executed and delivered,[60] or that the defect might have been aided by parol and made available as a defense at law, does not necessarily bar the right.[61]

(§ 1) *C. Instruments reformable.*[See 8 C. L. 1711]—A contract[62] or deed which by fraud or mistake does not properly embrace part of the agreement may be reformed.[63] As may an insurance policy where the agent neglected to incorporate an agreement permitting concurrent insurance.[64]

It is not necessary to reform an equitable mortgage in order to enforce it.[65]

Equity has no jurisdiction to reform a sheriff's deed executed pursuant to a sale under a tax judgment, the remedy in such cases being generally prescribed by statute,[66] and as a general rule equity will not reform or correct a voluntary deed,[67] particularly where such a correction would interfere with the rights of third persons,[68] even though the recipients of the bounty had enjoyed the benefits thereof for a period of years.[69]

§ 2. *Procedure. A. Jurisdiction and form of proceedings.*[See 6 C. L. 1711]—The remedy in equity on the ground of mutual mistake is concurrent with the statutory remedy authorzing proof of the same facts when pleaded as an equitable defense.[70]

(§ 2) *B. Parties.*[See 8 C. L. 1712]—The general rule is that all parties affected by the reformation are necessary parties.[72] But this rule will not be applied to defeat

[Ala.] 43 S 864. Where relief sought promptly on discovery of excusable mistake arising from fraudulent insertion of wrong number in deed by other party. Venable v. Burton, 129 Ga. 537, 59 SE 253.

57. Not barred: Right to have deed corrected by inserting name of wife. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. Where deed to west half erroneously described east half of quarter section and vice versa. where suit to correct deed was brought eight months after discovery and owners of west half described as east had not changed position to their prejudice. Union Ice Co. v. Doyle [Cal. App.] 92 P 112.

58. Smith v. Owens [W. Va.] 59 SE 762.

59. Ten years' delay no bar to reformation by one in possession. Hill v. Clark [Ky.] 106 SW 805.

60. Where renewal fire insurance policy dated June 9th instead of July 1st, date of expiration of old policy. Flickinger v. Farmers' Mut. Fire & Lightning Ins. Ass'n [Iowa] 113 NW 824. Where alleged cause of action against sole chargeable party unaffected. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449.

61. Merritt v. Coffin [Ala.] 44 S 622.

62. Morgan v. Combs [Ky.] 108 SW 272; Reagan v. Bruff [Tex. Civ. App.] 108 SW 185. Where party of first written instead of second part. Coggins v. Carey [Md.] 66 A 673.

63. Where blind grantee accepted deed purporting to convey two separate tracts, took possession, and grantor made no claim to property omitted until after grantee's death. Gregory v. Copeland [Ky.] 107 SW 768.

64. Evidence sufficient to show intent to so incorporate. Kelly v. Liverpool & London & Globe Ins. Co., 102 Minn. 178, 112 NW 870.

65. Where instrument in form of chattel mortgage, but intended to be real estate mortgage, was sought to be foreclosed between parties thereto. Standorf v. Shockley [N. D.] 111 NW 622.

66. Under Rev. St. 1899, § 3218 (Ann. St. 1906, p. 1826), authorizes obtaining proper deed from sheriff. Dixon v. Hunter, 204 Mo. 382, 102 SW 970.

67. Voluntary deed by grantor to wife and children. Turner v. Newell, 129 Ga. 89, 58 SE 657.

68. Where lien of judgment creditor has attached before institution of suit to correct deed. Turner v. Newell, 129 Ga. 89, 58 SE 657.

69. Where grantee wife and children went into possession. Turner v. Newell, 129 Ga. 89, 58 SE 657.

70, 71. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449.

72. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449. Where husband having only life estate dies, wife may sue for reformation of exchange deed to herself and husband. Gregory v. Copeland [Ky.] 107 SW 768. Action not in rem or joining grantee in deed as party, but which joined alleged correct grantee and administrator of grantor, insufficient. Walters v. Mitchell [Cal. App.] 92 P 315. Where reformation of mortgage depends upon cancellation of deed, nonjoinder of necessary parties in action to

justice if, consistent with the merits of the case, the court can proceed to a decree as to the parties before it,[73] but in such cases, as a matter of practice, the plaintiff should amend by joining the nonresident party, make proper service, and if the party does not appear, or appears and moves to dismiss for want of jurisdiction, the court then has jurisdiction to proceed as before stated.[74] The grantor of a warranty deed which either by fraud or mistake embraces land not intended to be conveyed has the right to have the deed corrected even if he has no title to such lands.[75] A corporation's trustee in bankruptcy is a proper, if not necessary, party.[76]

(§ 2) *C. Pleading and evidence.*[See 8 C. L. 1712]—In general the allegations must be as full and satisfactory as the proof required,[77] and all essential averments[78] as that of a previous contract between the parties to the deed, founded on a valid consideration, requiring the execution of a deed of the kind, character, and terms the plaintiff claims should have been made[79] and the execution of a deed substantially different in character and terms from the one called for in the contract of the parties.[80] It must be alleged that in executing such deed all the parties thereto meant and intended thereby to execute a deed in character and terms called for by the contract between them,[81] and that a mistake common to all of the parties to the deed, either as to the legal effect of the instrument they had executed,[82] or a mistake of some fact with reference to the form, terms, or conditions contained in the instrument, was made.[83] Misrepresentation by one party of the contents of an instrument

cancel deed prevents attack on mortgage until decree of cancellation is had against necessary parties. Hagan v. McDermott [Wis.] 115 NW 138. Where bill alleges that B owning certain lots sold same to E, misdescribing block where situate, and E mortgaged same, likewise misdescribing, and error ran through foreclosure suit, decree, and deed to complainant, B and E necessary parties to reformation proceedings. Gates v. Union Naval Stores Co. [Miss.] 45 S 979.

73. Inapplicable where other persons who may be interested, but over whom court does not possess jurisdiction, are absent. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449. Since, in case of foreign corporation doing business in state interested in reformation contract of sale, such corporation though made party would not be concluded by decree in suit unless it appeared; St. 1903, p. 443, c. 437, § 58, relating to service of writs on such corporations, being inapplicable. Id.

74. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449.

75. Grantor entitled to relief from hardship of defending title to lands he did not own. Dean v. Hall, 31 Ky. L. R. 1306, 105 SW 98.

76. Where corporation defendant in suit to reform contract. Merritt v. Coffin [Ala.] 44 S 622.

77. Horne v. J. C. Turner Cypress Lumber Co. [Fla.] 45 S 1016.

78. Cannot set up deed as foundation of title and without amendment of complaint attack same by parol. Webb v. Borden, 145 N. C. 188, 58 SE 1083. Complaint seeking reformation of description in administrator's deed held to sufficiently allege essential legal steps authorizing the making of such deed and the error to be corrected. Nolan v. Hughes [Or.] 93 P 362.

79. Averment that R and wife sold and attempted to convey sufficient. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. Mere allegations of prior negotiations as basis for recoupment insufficient. Capps v. Edwards [Ga.] 60 SE 455. Allegation that plant and land in question were sold to secure payment of debt due from owners of plant sufficient allegation of receipt of consideration. Union Ice Co. v. Doyle [Cal. App.] 92 P 112. Failure to set forth precise terms of original fatal. Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 SW 880; Horne v. J. C. Turner Cypress Lumber Co. [Fla.] 45 S 1016. Contract which parties intended to make but did not cannot be set up in place of one which they did make but did not intend to make. Reagan v. Bruff [Tex. Civ. App.] 108 SW 185.

80. Averment of mistake by omitting name of wife from body of instrument held sufficient. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. That deed as executed did not express contract as understood by either. Varner v. Turner, 83 Ark. 131, 102 SW 1111. Must point out mistake in instrument. Horne v. J. C. Turner Cypress Lumber Co. [Fla.] 45 S 1016. Fatal where contract as reformed would be vague and uncertain. Id.

81. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. Allegations held sufficient for admission of evidence to show mortgage was mutually intended to cover "a stock in bulk changing in specifics, including the soda-fountain in the store." Nelson v. Spence, 129 Ga. 35, 58 SE 697.

82. Radebaugh v. Scanlan [Ind. App.] 82 NE 544.

83. Radebaugh v. Scanlan [Ind. App.] 82 NE 544. Failure to aver scriveners acted under directions of both parties so as to show mistake mutual, fatal. Dougherty v. Dougherty, 204 Mo. 228, 102 SW 1099. Complaint alleging intended transfer of east half quarter section on which ice house was situated, possession of same for years, but mis-

must be alleged,[84] but averments of freedom from negligence are unnecessary where facts in bill show that no negligence is imputable to them.[85] It is sufficient if the excuse for the nonjoinder of parties, where one party is out of the court's jurisdiction, appears generally from the bill without being specially pleaded.[86] In other cases the general rules apply.[87] The complaint should not seek the enforcement of inconsistent rights.[88] Amendments may be allowed in the court's discretion.[89]

The burden is on the party seeking reformation.[90] The testimony must be clear, precise and indubitable, and of such weight and directness as to carry conviction to the mind.[91] To entitle a party to reform a deed for mistake, it must clearly be shown

take in deed which transferred west half instead of east, sufficient to charge mutual mistake. Union Ice Co. v. Doyle [Cal. App.] 92 P 112.

84. Evidence insufficient. Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 SW 880.

85. Where averment showed that lot belonging to all partitioners was erroneously included in deed of one partitioners, and that there was specific agreement as to its partition by lot. Peacock v. Bethea [Ala.] 43 S 864.

86. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449.

87. Disclaimer by grantee of any claim of title to lands not owned by grantor, but erroneously conveyed to former by latter but only claim of title to all lands owned by grantor, insufficient to warrant judgment for grantee, since it left in issue grantor's ownership of tracts in question. Dean v. Hall, 31 Ky. L. R. 1306, 105 SW 98. Variance between allegation of complaint to corect deed, signed and acknowledged by grantor and wife, but from body of which wife's name was omitted, that they sold land, and finding that grantor sold it, immaterial, and complaint, which might after finding have been amended in that respect, will be considered as so amended on appeal. Radebaugh v. Scanlan [Ind. App.] 82 NE 544.

88. Improper to seek reformation of instrument in order to recover land and also have debt declared lien thereon. Venable v. Burton, 129 Ga. 537, 59 SE 253.

89. Where exchange deed failed to convey all property intended, and suit was brought in equity for damages and all proper relief, proper to permit amendment adding prayer for reformation, since relief could have been granted without amendment. Gregory v. Copeland [Ky.] 107 SW 768.

90. Miller v. Stuart [Md.] 68 A 273.

91. Gailey v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. Clear, exact and convincing. Id. Insufficient where testimony contradicted by notary and others. Sellers, Bullard & Co. v. Grace [Ala.] 43 S 715. Full, clear and decisive, and mistake must appear beyond reasonable controversy. Id. Mere preponderance insufficient. Arkansas Mut. Fire Ins. Co. v. Witham, 82 Ark. 226, 101 SW 721. Clearly, unequivocally and decisively. Stephenson v. Garner, 84 Ark. 623, 105 SW 572. Mere preponderance insufficient to establish mistake in description in deed. Turner v. Todd [Ark.] 107 SW 181. Mistake must be plain and proof full and satisfactory. Horne v. J. C. Turner Cypress Lumber Co. [Fla.] 45 S 1016. By preponderance which is clear, convincing and satisfactory. Id. Mere preponderance insufficient. Bushert v. A. W. Stevenson Co. [Iowa] 113 NW 916. Preponderance. Coleman v. Thibodaux, 119 La. 474, 44 S 269. Such full and strict evidence as will satisfy minds of court. Evidence sufficient where deed uncorrected is meaningless in certain particulars. Coggins v. Carey [Md.] 66 A 673. Must be of strongest character and be convincing. Miller v. Stuart [Md.] 68 A 273. Cogent and convincing. Dougherty v. Dougherty, 204 Mo. 228, 102 SW 1099. Satisfactory. Smith v. Interior Warehouse Co. [Or.] 94 P 508. Must clearly appear by testimony of witnesses who distinctly remember facts that mistake was made, and that writing does not express agreement. Gailey v. New Castle Elastic Pulp Plaster Co., 34 Pa. Super. Ct. 533. Not probability or preponderance, but certainty. Hapeman v. McNeal [Wash.] 93 P 1076. Clear, convincing and free from reasonable doubt. Smith v. Owens [W. Va.] 59 SE 762.

Evidence sufficient. Redding v. Badger Lumber Co., 127 Mo. App. 625, 106 SW 557. Where application for fire and tornado insurance shown to have been changed by agent to read fire and after agent received policy he inserted tornado therein before delivering. Arkansas Mut. Fire Ins. Co. v. Witham, 82 Ark. 226, 101 SW 721. Where contract for sale of standing timber provided for payment of balance of purchase price within ninety days, according to certain prices for timber to be cut and taken, evidence held sufficient to show that deed was to be null and void if timber not removed within ninety days. Crossley v. Newman [Ky.] 105 SW 954. Where shown that mortgage clause attached to policy not of character asked or desired by insured, but affixed by mistake. Gardner v. Continental Ins. Co., 31 Ky. L. R. 89, 101 SW 908. To show fraudulent insertion of wrong member in deed by one party. Venable v. Burton, 129 Ga. 537, 59 SE 253. Where maturity of first payment on contract furnishing water for irrigation was left blank, evidence sufficient to reform same to make maturity time when water was used. Fresno Canal & Irr. Co. v. Hart [Cal.] 92 P 1010.

Insufficient where officers of bank prepare written agreement approved by directors, and directors testify several years after of alleged omissions. National Bk. of Kennett Square v. Shaw, 218 Pa. 612, 67 A 875. To show misrepresentations as to character of slot machines. Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 SW 880. Mere declaration that he was another's agent, to establish cause for reformation rendering princi-

that the mistake was common to both parties,[92] which usually requires that the preceding agreement be shown.[93] It must be shown in the clearest and most satisfactory manner exactly and precisely the form to which the deed ought to be brought.[94] Parol evidence is admissible, not to vary or explain the terms of the instrument as executed, but to show the intention of the parties to add certain stipulations omitted by mutual mistake.[95] Delay in recording the instrument may be admissible to show fraud.[96] Self-serving declaration of grantor's agent inadmissible to show intent to convey only certain property.[97] In an action at law for an alleged breach of contract, extrinsic evidence to show that the parties to be bound made a mutual mistake, and that the written instrument embodied a different contract from that which they actually made, can be admitted only when the plaintiff pleads an equitable defense under the statute.[98]

(§ 2) *D. Trial and judgment.* See 8 C. L. 1718—An agreement may be reformed and then enforced as reformed.[99] The instrument reformed takes effect from the time when it was originally executed, except as to bona fide purchasers without notice and those standing in like relations.[1] The court is not limited to one form of remedy,[2] but may, when put in possession of the merits of the controversy, decide as to the measure of relief to be granted.[3] The decree should set out the details of the reformation so that it will show how the instrument, when corrected, will read.[4] The ordinary rules as to payment of costs apply.[5] Where the decree of reformation

pal liable. Griffin v. Societe Anonyme la Floridlenne J. Buttgenbach & Co., 53 Fla. 801, 44 S 342. To show granting of permanent instead of temporary passageway over land was mistake. Patterson v. Skaggs [Ky.] 105 SW 889. To show mutual mistake or fraud in municipal paving contract. Fullerton v. Des Moines [Iowa] 115 NW 607. To show that party signing contract of employment acted for defendant. Bushert v. A. W. Stevenson Co. [Iowa] 113 NW 916. To show intention to include adjacent lot in mortgage where lot not owned by mortgagor at time of giving original mortgage, although building of lot described extended over upon other lot at time of renewal of mortgage. Northwestern Mut. Life Ins. Co. v. Murphy [Minn.] 114 NW 360. To show actual consideration to be one hundred instead of three hundred dollars, as expressed in mortgage. Hagan v. McDermott [Wis.] 115 NW 138.

92. Evidence insufficient after death of grantee and lapse of twenty-five years. Varner v. Turner, 83 Ark. 131, 102 SW 1111. Evidence sufficient to show mutual intent that purchaser of what was to receive wheat then stored in other elevators. Smith v. Interior Warehouse Co. [Or.] 94 P 508.

93. Evidence held insufficient to show prior agreement. Dougherty v. Dougherty, 204 Mo. 228, 102 SW 1099. Evidence insufficient to show previous other agreement. Mitchell Mfg. Co. v. Kempner, 84 Ark. 349, 105 SW 880.

94. Evidence sufficient to show mistake in inserting party of first part instead of party of second part. Coggins v. Carey [Md.] 66 A 673. Decree in a former suit brought to reform a deed by striking out words inadvertently placed therein held sufficient to sustain decree in a later suit brought for the same purpose. Teel v. Dunnihoo, 230 Ill. 476, 82 NE 844. Must be shown beyond reasonable doubt. Miller v. Stuart [Md.] 68 A 273.

95. Nelson v. Spence, 129 Ga. 36, 58 SE 697.

96. Where delay might have been to prevent discovery or mistake. Morgan v. Comba [Ky.] 108 SW 272.

97. Declarations of one of plaintiff's agent to another of his agents of such a character as to serve only plaintiff, inadmissible. Horwitz v. La Roche [Tex. Civ. App.] 107 SW 1148.

98. Rev. Laws, c. 173, § 78. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449.

99. In action to reform contract of sale and specific performance as reformed. Flynn v. Finch [Iowa] 114 NW 1068.

1. Nelson v. Spence, 129 Ga. 35, 58 SE 697.

2. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449.

3. Where court declines to correct contract on account of absence of party who if within jurisdiction and served would become bound, court may enjoin defendant from using instrument to plaintiff's damage. Eustis Mfg. Co. v. Saco Brick Co. [Mass.] 84 NE 449. Where inequitable to permit enforcement of agreement which if reformed in accordance with their intention would relieve the plaintiff from all liability. Id. Where complainant sought reformation of deed, proper to reform deed to conform to whole agreement between parties, although defendant did not allege that portion set up by him was omitted by mistake or fraud. White v. Glazer [Ky.] 106 SW 289.

4. Gray v. Merchants' Ins. Co., 125 Ill. App. 370.

5. Where, in suit to reform instrument by requiring third persons to unite therein and by changing terms thereof, plaintiff was not entitled to charge, and he had not demanded correction of instrument prior to filing bill, plaintiff liable for costs. Miller v. Stuart [Md.] 68 A 273.

grants relief according to the claims of each party, it is proper that each pay his own costs.[6]

REFORMATORIES; REGISTERS OF DEEDS; REGISTRATION; REHEARING; REINSURANCE; REJOINDERS; RELATION, see latest topical index.

RELEASES.

§ 1. Nature, Form, and Requisites, 1502.
§ 2. Parties to Release, 1502.
§ 3. Interpretation, Construction, and Effect, 1502.
§ 4. Defenses to, or Avoidance of, Releases, 1503.
§ 5. Pleading, Proof, and Practice, 1503. Evidence, 1503.

The scope of this topic is noted below.[7]

§ 1. *Nature, form, and requisites.*See 8 C. L. 1714—A release is a conclusive acknowledgment of satisfaction.[8] No particular form of words is necessary, the only requirement being that it distinctly exhibit an intention to release,[9] and if it have this effect, though the purpose is not declared, it will operate as such.[10] Future possible rights or claims cannot form the subject-matter of a release.[11] A written release cannot be varied by a contemporaneous parol agreement.[12] A covenant not to sue, made anterior to or contemporaneously with a contract, must be in writing to be equivalent to a release.[13] A covenant not to sue one of two joint feasors is not a release and does not operate to release the other.[14] Seal, though requiste at common law, is usually dispensed with by statute.[15]

§ 2. *Parties to release.*See 8 C. L. 1714

§ 3. *Interpretation, construction, and effect.*See 8 C. L. 1714—A release is a complete defense as to all matters within its terms, a seal importing consideration.[16] Courts will ascertain what the parties intended in the construction of releases,[17] and so-called rules of construction are to be used merely as aids or suggestions,[18] and not to make stipulations ineffective.[19] A general release may contain an exception if such be the clear intent of the parties,[20] but will be construed strongly against the releasor,[21] and words of limitation should precede the general words.[22] A release of

6. White v. Glazer [Ky.] 106 SW 289.

7. It includes only formal releases. It excludes settlements and the effect of release as an accord (see Accord and Satisfaction, 9 C. L. 11). The rule of public policy as to release of liability for future negligence is treated generally in Contracts, 9 C. L. 654, and the application of such rule to bills of lading tickets, etc., in Carriers, 9 C. L. 466.

8. Robinson v. St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 A 814.

9. Grand Lodge Ill. Independent Order of Mut. Aid v. Peiffer, 129 Ill. App. 208.

10. Endorsement upon a beneficiary certificate of the receipt of a sum in full payment of the amount due thereunder operates as a release. Grand Lodge Ill. Independent Order of Mut. Aid v. Peiffer, 129 Ill. App. 208.

11. Notes made and delivered after release. New York County Nat. Bk. v. Helm-Campbell Co., 109 NYS 673.

12. Harley v. Riverside Mills, 129 Ga. 214, 58 SE 711.

13. Crooker v. Hamilton [Ga. App.] 59 SE 722.

14. Chicago & A. R. Co. v. Averill, 127 Ill. App. 275.

15. A statute dispensing with a formal release under seal gives effect to a receipt according to party's intention. Jordan v. McDonnell [Ala.] 44 S 101. See Names, Signatures, and Seals, 10 C. L. 915.

16. United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206 U. S. 118, 51 Law. Ed. 983; Hammond, etc., R. Co. v. Antonia [Ind. App.] 83 NE 766; Robinson v. St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 A 814.

17. Release of all claims, causes of action, etc., and describing external bruises, includes internal injuries. Hoffman v. Eastern Wisconsin R. & L. Co. [Wis.] 115 NW 383. Deed, after construction of railway, releasing grantee from future damages, does not mean that grantee might elevate grades of street and flood grantor's property. Yazoo, etc., R. Co. v. Smith [Miss.] 43 S 611.

18. Hoffman v. Eastern Wisconsin R. & L. Co. [Wis.] 115 NW 383.

19. Release of "all, and all manner of debts." United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206 U. S. 118, 51 Law. Ed. 983, rvg., William Cramp & Sons v. U. S., 41 Ct. Cl. 164.

20. Murphy v. New York, 190 N. Y. 413, 83 NE 39; United States v. William Cramp & Sons Ship & Engine Bldg. Co., 206 U. S. 118, 51 Law. Ed. 983.

21. Murphy v. New York, 190 N. Y. 413, 83

specific obligations cannot discharge other liabilities then existing [23] and leaves co-obligor liable as if no release had been given.[24] Release to one of several persons liable releases all,[25] even if the party with whom the settlement was made was not legally liable,[26] unless otherwise stipulated in the release,[27] but it must be shown that the entire claim was satisfied.[28]

§ 4. *Defenses to, or avoidance of, releases.* See 8 C. L. 1715—The essentials and proof of fraud and mistake are elsewhere treated.[29] A release under seal may be impeached for fraud in like manner as one resting in parol.[30] A release cannot be rescinded unless releasors offer to refund money received thereunder [31] promptly.[32] A jury having determined that a release was obtained by fraud, tender of sum received is not a prerequisite to the suit.[33] It is no defense to a release that a party did not read or understand its contents before signing.[34]

§ 5. *Pleading, proof, and practice.* See 8 C. L. 1717—Release as a defense must be pleaded,[35] and the pleading by one subsequently sued is treated as a ratification of a settlement.[36] Satisfaction may be pleaded as matter of inducement.[37] A release under seal can be reformed or set aside only by a court of equity.[38]

Evidence. See 8 C. L. 1717—A finding that a release as pleaded was never signed renders question of fraud immaterial.[39]

RELIEF FUNDS AND ASSOCIATIONS, see latest topical index.

RELIGIOUS SOCIETIES.

§ 1. Organization as a Corporation and Status of Society, 1503.
§ 2. Membership and Meetings, 1504.
§ 3. Ministers, 1504.
§ 4. Powers and Liabilities of Society in General, 1504.
§ 5. Property and Funds, 1505.
§ 6. Jurisdiction of Courts, 1507.
§ 7. Actions by or Against Society or Members, 1507.

§ 1. *Organization as a corporation and status of society.* See 8 C. L. 1718—Where a portion of a church's members have taken the necessary statutory steps and received a certificate of incorporation, a subsequent attempt by another portion to incorporate so as to defeat the former is void.[40] A voluntary religious association owes its ex-

NE 39. Release of joint maker of a note construed as a covenant not to sue. Will A. Watkin Music Co. v. Basham [Tex. Civ. App.] 106 SW 734.

22. "Particularly" July 5, in general release, construed as "especially." Murphy v. New York, 190 N. Y. 413, 83 NE 39.

23. Release of rent does not release liability for breach of covenant to take good cars of premises. Herrman v. Laemmle, 56 Misc. 549, 107 NYS 73. A receipt "in full eettlement of will contest" does not discharge an obligation to pay costs, as agreed. Jordan v. McDonald [Ala.] 44 S 101.

24. Will A. Watkin Music Co. v. Basham [Tex. Civ. App.] 106 SW 734.

25. Robinson v. St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 A 814. Release of joint tort feasor. The St. Cuthbert, 157 F 799. No settlement proven. Home Sav. Bk. v. Otterbach [Iowa] 112 NW 769.

26. Brewer v. Casey [Mass.] 82 NE 45; Robinson v. St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 A 814.

27. Construing statute when release not under seal. Home Tel. Co. v. Fields [Ala.] 43 S 711.

28. Snyder v. Mutual Tel. Co. [Iowa] 112 NW 776.

29. See Fraud and Undue Influence, 9 C. L. 1475; Mistake and Accident, 10 C. L. 853.

30. Pacific Mut. Life Ins. Co. v. Webb [C. C. A.] 157 F 155.

31. Harley v. Riverside Mills, 129 Ga. 414, 58 SE 711.

32. Tender when suit brought is sufficient if releasor on account of drunkenness did not know of release. Kelly v. Louisville, etc., R. Co. [Ala.] 45 S 906. But tender thres years after knowledge of release insufficient. Id.

33. Question raised on appeal. Idustrial Mut. Indemnity Co. v. Thompson, 83 Ark. 574, 104 SW 200.

34. McNamara v. Boston El. R. Co. [Mass.] 83 NE 878; Steffen v. Supreme Assembly of the Defenders, 130 Wis. 485, 110 NW 401.

35. Todd v. Crete [Neb.] 113 NW 172.

36, 37. Robinson, v. St. Johnsbury, etc., R. Co., 80 Vt. 129, 66 A 814.

38. Jackson v. Security Mut. Life Ins. Co., 233 Ill. 161, 84 NE 198.

39. Blank spaces on printed release filled after signed. Dalton v. Pacific Elec. R. Co. [Cal. App.] 94 P 868.

40. Code 1896, § 1303. Polk v. State [Ala.] 45 S 652.

istence to the compact between its members, and where a written constitution is adopted it will be presumed to contain the terms by virtue of which the association was formed and is to be conducted.[41] And a dissolution, abandonment, or substitution of another contract so essentially different as to practically constitute a new association can only be effected by the original parties, their successors, or others to whom such power has clearly been delegated,[42] or by abandonment and nonuser of its powers and privileges by all its members.[43]

§ 2. *Membership and meetings.*[See 8 C. L. 1718]—While one becoming a member of a voluntary religious organization subscribes to all its rules and regulations and consents to and is bound by the exercise of all powers conferred on its managing officers,[44] yet the fact that church members are dissatisfied with the pastor, disapprove of the control into which the church has fallen, and cease to attend services, affords no ground, without some church rule or law, for their dismissal or expulsion without notice or opportunity to appear and defend; and a vote of expulsion under such circumstances does not terminate membership.[45]

A quorum of the legal members of a church, meeting after due notice, constitutes a legal meeting with authority to do any proper acts or transact any proper business connected with church affairs.[46] The statute provides that the rector shall be the presiding officer of election meetings of the Protestant Episcopal church, and that he shall be the judge of the qualifications of the voter, receive the votes cast, and declare the result.[47] If a meeting be called without authority, matters done thereat are void.[48]

Officers.—The office of church trustee is not one coupled with such an interest that the church body in its corporate capacity may not, at a meeting of its members duly called and held, terminate the tenure of such office.[49]

§ 3. *Ministers.*[50]—A minister may be suspended by the proper church tribunal without any action on the part of the congregation.[51]

A pastor illegally suspended, by the proper church body without any action by his congregation, who obtains other employment and does not offer to resume the pastoral relation, cannot recover for his services during such suspension.[52]

§ 4. *Powers and liabilities of society in general.*[See 8 C. L. 1718]—The general powers of church officers are not materially different from those exercised by managing directors of private corporations or managing partners of a partnership association.[53] Where the powers of the various church officials and agencies are enumerated by the constitution, they possess no powers except those expressly given.[54] Hence whatever requirement the general church assembly may promulgate, it may

41, 42. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

43. Religious society which held no meetings or services for fifteen years and permitted its buildings to become untenantable is dissolved by nonuser. Miller v. Riddle, 227 Ill. 53, 81 NE 48, rvg. 130 Ill. App. 392.

44. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

45. Munsel v. Boyd, 10 Ohio C. C. (N. S.) 121.

46. May elect trustees and declare pastorate vacant. Munsel v. Boyd, 10 Ohio C. C. (N. S.) 121.

47. Under religious corporations law, Laws 1895, p. 494, § 33, c. 723, where rector receives ballot of person as elector, he cannot subsequently declare him disqualified as candidate because not a voter. In re Williams, 57 Misc. 327, 107 NYS 1105.

48. Election at meeting called by president and secretary. State v. Rombotis [La.] 45 S 43.

49. Munsel v. Boyd, 10 Ohio C. C. (N. S.) 121.

50. See 6 C. L. 1290, and as to implied agency of minister for church, see special article, 3 C. L. 136.

51. Presbytery may suspend Presbyterian ministers without action of congregation. Wallace v. Snodgrass, 34 Pa. Super. Ct. 551.

52. Wallace v. Snodgrass, 34 Pa. Super. Ct. 551.

53. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

54. Cannot unite with another denomination in absence of express authority. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

also enforce upon all subordinate bodies and members [55] on pain of expulsion,[56] but a decree made without authority is not binding and may be disregarded exactly as an unconstitutional law.[57] Since the rule that the powers bestowed in written constitutions must always be construed to have in view the preservation and continuity of the entity constituted applies to religious corporations,[58] when the power to alter or amend provisions of the organic contract is delegated to association agencies or officers it is implied that this power shall be used to further the objects for which formed and in harmony with its general plan of organization.[59] Church authorities, therefore, have no implied power to unite with another though similar denomination [60] without the consent of every member,[61] though it has been otherwise held.[62]

Where a minister is suspended by the proper church tribunal without any action by the congregation, the liability of the congregation for the minister's compensation ceases pending a determination of the regularity of the suspension.[63]

§ 5. *Property and funds.*[See 6 C. L. 1719]—The trustees of a religious society may accept a bequest in trust for the benefit of its members though the society is not incorporated.[64] The rights of members of churches in the property held for the common use is one of user only which interest cannot be assigned or transmitted by inheritance or enjoyed except as a member of the organization,[65] and whatever operates to dissolve membership, no matter what its form, ipso facto terminates and destroys the right to the use of the common property.[66] Since members of voluntary unincorporated associations can hold property in no other way than through the medium of trustees,[67] officers of a church corporation organized to support the faith and be connected with a certain ecclesiastical organization take title to the property purchased by it charged with a trust and cannot divert it to inconsistent uses against the protest of any member,[68] though the grantor imposed no such trust.[69] This right, however, is subject to the right of the authorized church judicatories to make such changes in the laws, usages, and customs as are authorized or are not fundamental departures from the general plan and purposes of the organization, and the further power to enforce upon the subordinate members of the organization due observation

55, 56. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

57. Clark v. Brown [Tex. Civ. App.] 108 SW 421. Grant of power "to concert measures for promoting prosperity of church" and "to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to its doctrine and order" confers no authority to unite with denomination having same or similar form of government, etc. Id.

58. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

59. Power to amend confers no arbitrary power to make any desired fundamental change. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

60. Clark v. Brown [Tex. Civ. App.] 108 SW 421. General assembly and Presbyteries of denomination, consisting of local churches, Presbyteries, synods, and general assembly, possesses no implied power to unite with another though similar denomination. Id. Agreement between two churches that union be perfected on doctrinal basis of one of them, and that on first meeting after union latter were to admit members of former, provides for extinction of former. Id.

61. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

62. General assembly Cumberland Presbyterian church has constitutional authority to determine whether doctrines, etc., of another organization, are in accord with it, and to unite therewith under such terms and under such name as this judgment dictates. Mack v. Kime, 129 Ga. 1, 58 SE 184.

63. Wallace v. Snodgrass, 34 Pa. Super. Ct. 551.

64. Miller v. Riddle, 130 Ill. App. 392.

65, 66, 67. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

68. Cannot divert church organized in affiliation with Evangelical creed congregation to Evangelical Lutheran Synod. Marien v. Evangelical Creed Congregation [Wis.] 113 NW 66. Where church property conveyed to one in trust for use and benefit of others, each of beneficiaries has right to insist upon use of property in accordance with plans of association, purposes for which formed, and objects sought to be accomplished. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

69. Marien v. Evangelical Creed Congregation [Wis.] 113 NW 66. Where grantor of property for religious purposes indicated purpose to establish particular religious faith which he desired to promulgate and made same condition and principal consideration of grant. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

of these changes and modifications.[70] Hence the right to property is dependent upon the right of succession, and in case of a divided congregation only that party which can identify itself with the organic continuation of the original church through its present ecclesiastical connections has the right to the use and control.[71]

Where the terms employed to designate the beneficiaries identified the body of individuals or organization that was to take, the congregation for whose benefit the conveyance was made take the property unincumbered by any conditions or trusts so far as the grantors were concerned.[72]

The funds of a club composed of members of a church, acquired for such church purposes as the club members may determine, do not belong to the congregation or the church officers, but are under the control of the club.[73]

Under the Maryland declaration of rights, a conveyance to the trustees of a church which was a religious order not sanctioned by the legislature and not showing that it was for any of the purposes named is void,[74] but in such a case title may be secured by adverse possession.[75] The courts will enforce a trust imposed upon the property of religious societies [76] and prevent a diversion of the property, from trust purposes.[77] Ordinarily, if property is acquired in the ordinary way of purchase or gift for the use of a religious society, the civil courts will only inquire as to who constituted that society or its legitimate successors and award to them the use of the property, but will not, in case of a schism in the organization, inquire into the existing religions of those who adhere to the acknowledged organization.[78] The court will, however, inquire into the religious faith or practice of the parties claiming property where necessary to prevent the diversion of property from the trust imposed,[79] the rule being that interference will only be had when it is manifest that what the church tribunals have adjudicated is not a difference of opinion as to doctrine but an attempt in the form of such adjudication to utterly abandon the purposes for which the church was organized,[80] and where the officers undertake fundamental changes affecting the status of the entire membership, the courts after proper application will

70. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

71. Where conveyance was to those composing certain church and plaintiffs are representatives of original organization, property prima facie plaintiff's. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

72. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

73. Where grantee of land purchased for site of new building for Roman Catholic church declared he held same in trust as security for the payment of price and for society on price being paid in certain time, and club composed of members of society used its funds to pay part of price and received an undivided half interest in premises, which funds did not belong to and were not under control of bishop of diocese, the bishop could not maintain bill to enforce specific performance of trust on theory that he acquired rights because of payments made by club. Eis v. Croze, 149 Mich. 62, 14 Det. Leg. N. 357, 112 NW 943.

74. Art. 38, Declaration of Rights, providing that every sale of land to every religious denomination without prior or subsequent sanction of legislature shall be void except sale not exceeding five acres for church meeting house, other house of worship, parsonage, or burying ground. Dickerson v. Kirk, 105 Md. 638, 66 A 494.

75. Possession for forty-three years gives merchantable title which purchaser must accept. Dickerson v. Kirk, 105 Md. 638, 66 A 494.

76. Marien v. Evangelical Creed Congregation [Wis.] 113 NW 66.

77. Clark v. Brown [Tex. Civ. App.] 108 SW 421. Constituted church authorities cannot entirely abandon purposes for which organized, where member's rights are involved, and divert property to other uses. Mack v. Kime, 129 Ga. 1, 58 SE 184.

78, 79. Mack v. Kime, 129 Ga. 1, 58 SE 184.

80. Mack v. Kime, 129 Ga. 1, 58 SE 184. While courts will not undertake exercise of ecclesiastical authority or review proceedings of church courts on questions involving matters of discipline or the application or enforcement of their own laws, courts will inquire into the authority of officers of religious society where a property right depends thereon. Clark v. Brown [Tex. Civ. App.] 108 SW 421. Where plaintiffs claim to be legally elected trustees of incorporated church, and ask that defendants, who also claim to be trustees and one of them to be pastor, be restrained from interfering with their control of the church property or their use of it for purposes of worship. Munsel v. Boyd, 10 Ohio C. C. (N. S.) 121.

ascertain their authority to do so.[81] The courts in determining whether there has been an abandonment of the tenets and doctrines of the church,[82] and where a right of property is dependent upon an ecclesiastical question and that question has been decided by the highest tribunal within the organization to which it has been properly carried, will accept that decision as conclusive and be governed by it in its application to the case before it.[83]

§ 6. *Jurisdiction of courts.* See 8 C. L. 1721—The constitutional guaranty of freedom of religious profession and worship forbids judicial control of proceedings of ecclesiastical bodies which do not violate civil or property rights,[84] and a bill which fails to show that property rights will be affected is demurrable.[85] It has been held, however, that mandamus will lie to secure the reinstatement of a member unlawfully expelled.[86]

§ 7. *Actions by or against society or members.* See 8 C. L. 1721—Religious associations having rights of property and of contract come before the courts in practically the same attitude as private corporations and are equally under the protection of the law and the action of their members subject to the same restraints.[87] Where a religious association acquires by gift or purchase property for the maintenance of the faith of a recognized denomination, every member thereof may resist the diversion of the property to other uses.[88] But a church officer cannot maintain an action to enforce specific performance of a trust to convey lands on payment of certain price at a certain time merely because the purpose of the trust was the benefit of the church and the money was paid by a society composed of members of the church where officer had no right to or control of funds.[89] The burden of showing that those who prima facie represent the original organization no longer are entitled to the same is on the aggressor.[90]

81. Where officers attempt to unite with another denomination, dissolving relationship heretofore existing among members and subordinate bodies. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

82. Mack v. Kime, 129 Ga. 1, 58 SE 184.

83. Mack v. Kime, 129 Ga. 1, 58 SE 184. Ecclesiastical matter is one that concerns doctrine, creed, or form of worship of church, or adoption and enforcement within religious association of needful laws and regulations for government of membership, and power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of church; and all of such matters are within the province of church courts and their decisions will be respected by civil tribunals. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

84. Courts will not interfere in matters of church organization, creed and discipline, construe constitution, canons or rules, or regulate and revise its trials or proceedings of governing bodies. Fussell v. Hail, 233 Ill. 73, 84 NE 42; Marien v. Evangelical Creed Congregation [Wis.] 113 NW 66. Court concerned only with property rights. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

85. Will not interfere to prevent union of churches with central church by Presbytery. Fussell v. Hail, 233 Ill. 73, 84 NE 42.

86. Hughes v. North Clinton Baptist Church of East Orange [N. J. Law] 67 A 66.

Note: The New Jersey courts alone seem to have held this point; the courts of the other states have refused mandamus on grounds that mandamus will not lie to restore to membership in a church when no temporal rights are involved. Hundley v. Collins, 131 Ala. 234, 90 Am. St. Rep. 33; People v. Ger. A. Ev. Ch., 53 N. Y. 103. The rights of a person who has been expelled from a religious society are to be determined by the constitution of the society. Grosvenor v. Un. Soc. of Believers, 118 Mass. 78; Merster v. Ansher Chised Congregation, 37 Mich. 542. An expulsion by the church is not a corporate act and does not affect any property interest or other valuable civil right of the expelled member. Sales v. Baptist Church, 62 Iowa, 26, 49 Am. Rep. 136; Soares v. Hebrew Congregation, 31 La. Ann. 205, 33 Am. Rep. 217. In cases of voluntary incorporated societies the courts will grant mandamus to settle controversies when the facts are important on public grounds, but first of all there must be a penal decision by the proper authorities in the society. Lamphere v. United Workmen, 47 Mich. 429; McNeill v. Bibb St. Church, 84 Ala. 23.—From 17 Yale L. J. 299.

87. Clark v. Brown [Tex. Civ. App.] 108 SW 421.

88. Marien v. Evangelical Creed Congregation [Wis.] 113 NW 66.

89. Eis v. Croze, 149 Mich. 62, 14 Det. Leg. N. 357, 112 NW 943. Evidence of purpose for which property was purchased competent in determining legal effect of action of club which contributed money toward purchase of church site now sought to be claimed by church officials. Id.

90. Clark v. Brown [Tex. Civ. App.] 108 SW 421. Complaint alleging that church

Quo warranto is the proper method of questioning the right of a church corporation to act as such.[91] Mandamus is the proper action to compel the proper official to issue a certificate of election to a church official,[92] and also to secure the reinstatement of one who has been unlawfully deposed from membership in a church without cause, without charges, and without hearing.[93] A judgment entered against an incorporated religious congregation will not be opened where it appears that the note on which the judgment was entered was signed by the president and secretary of the corporation who had full authority to execute the note, and that the note was given for a valid consideration, and that the debt which it represented was due and unpaid.[94]

REMAINDERS; REMEDY AT LAW; REMITTITUR, see latest topical index.

REMOVAL OF CAUSES.

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While the rule that a cause to be removable to a Federal court must be one within its jurisdiction is here treated, the nature and extent of that jurisdiction pertains to another topic.[95]

§ 1. *Right to remove from state to Federal court.*[See 9 C. L. 1722]—The right of a nonresident corporation to remove to the Federal courts cases commenced against it in a state court can not be restricted by the state,[96] and, at the instance of the corporation, the Federal court will restrain proceedings to enforce such a law.[97]

§ 2. *What is a "suit" or "action" so removable.*[See 8 C. L. 1723]—The phrase, "a suit of civil nature at common law or in equity," includes all proceedings at law or in equity as distinguished from proceedings in military, admiralty, and ecclesiastical courts.[98] Condemnation proceedings so partake of the character of a suit at law as to render them removable to a Federal court.[99]

§ 3. *Nature of controversy or subject-matter and existence of Federal ques-*

corporation was organized to support certain faith and be connected with certain organization, and constitution of corporation provided that church should be served by ministers who were members of organization, and that congregation had joined another organization professing different faith, sufficiently alleges diversion of property to inconsistent uses. Marien v. Evangelical Creed Congregation [Wis.] 113 NW 66.

91. Where after portion of church had completed incorporation and remainder sought another article of incorporation to defeat the former, quo warranto lies by former under Code 1896, § 1303. Polk v. State [Ala.] 45 S 652.

92. To compel recognition of duly elected warden, disqualified from holding office for reason of not being qualified voter, after rector sole judge of qualifications of voter has accepted ballot. In re Williams, 57 Misc. 327, 107 NYS 1105.

93. Hughes v. North Clinton Baptist Church of East Orange [N. J. Law] 67 A 66.

94. Kline v. St. Mary of Czestochow Polish Nat. Catholic Church, 33 Pa. Super. Ct. 578.

95. See Jurisdiction, 10 C. L. 512.

96. Chicago, etc., R. Co. v. Swanger, 157 F 783. As a condition precedent to its doing business within the state. Butler Bros. Shoe Co. v. U. S. Rubber Co. [C. C. A.] 156 F 1.

97. The suit to restrain is not a suit against the state prohibited by the 11th amendment to the United States constitution. Chicago, etc., R. Co. v. Swanger, 157 F 783.

98. It includes a suit to determine water rights begun before the state engineer and appealed to the state court, where the requisite diversity of citizenship exists. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irr. Co., 158 F 137.

99. Suit by municipality against resident and nonresident owners. Kansas City v. Hennegan, 152 F 249.

tion. See 8 C. L. 1723—Under the removal acts of congress, causes may be removed from state to Federal courts whenever the latter have original jurisdiction of the subject-matter of the action, although such jurisdiction may be concurrent with that of the state court.[1] The cause must be within the jurisdiction of the Federal court.[2] Where the right to recover rests upon the operation of the Federal statute, Federal courts have original jurisdiction,[3] and the fact that such a case might also be determined on common-law principles, and that, independent of the statute, the case presents a good cause of action, does not arrest Federal jurisdiction.[4] Over actions arising under the postal laws, the jurisdiction of state and Federal courts is concurrent.[5] The Federal court to which removal is sought is the sole arbiter of jurisdictional facts,[6] though questions of law may be determined also by the state court.[7] A case is removable as arising solely under the constitution, laws, or treaties of the United States, if from the bill it appears that some right, privilege, or immunity on which recovery depends, may be defeated or sustained by one or another construction of the constitution or laws of the United States.[8] But, to authorize removal on the ground that a Federal statute is involved, a substantial defense thereunder must be shown.[9]

§ 4. *Diversity of citizenship and alienage of party.* See 8 C. L. 1724—Diversity of citizenship, which under the removal act is an element of Federal jurisdiction,[10] exists only when all the parties on one side are citizens of different states from all the parties on the other side,[11] and, even here, the Federal court lacks jurisdiction where none of the parties are residents of the district in which suit is brought.[12] As to

1. Nichols v. Chesapeake, etc., R. Co. [Ky.] 105 SW 481.

2. Blunt v. Southern R. Co., 155 F 499. Original jurisdiction essential where neither party is a resident of the district. Goldberg, Bowen & Co. v. German Ins. Co., 152 F 831. The essential elements are: The controversy must involve more than $2,000; it must be between citizens of different states, and must be of a civil nature at common law or in equity. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irr. Co., 158 F 137.

3. Suit involving Federal Safety Appliance Act, U. S. Comp. St. 1901, p. 3174, and U. S. Comp. St. Supp. 1907, p. 885, held removable, though statute brought into the case by amendment to the original complaint. Nichols v. Chesapeake, etc., R. Co. [Ky.] 105 SW 481.

4. Whenever such question is involved, the others are incidental to it. Nichols v. Chesapeake, etc., R. Co. [Ky.] 105 SW 481.

5. And such a cause, having been removed to the Federal court, will be retained where the jurisdictional amount is involved, but a demurrer to the jurisdiction of the state court will be overruled. Lewis Pub. Co. v. Wyman, 152 F 200.

6, 7. Atlantic Coast Line R. Co. v. Bailey, 151 F 891.

8. Nichols v. Chesapeake, etc., R. Co. [Ky.] 105 SW 481. As a suit to annul a contract for the reclamation of desert lands entered into under U. S. Comp. St. 1901, pp. 1554-6-7. State of Oregon v. Three Sisters Irr. Co., 158 F 346. A suit by railway company to enjoin a nonresident telegraph company from maintaining proceedings to condemn a right of way for a telegraph line along the railroad company's right of way, in which the latter company claimed that such condemnation would obstruct and increase the dangers of its business, involves a Federal question. Georgia R. & Banking Co. v. Atlantic Postal Tel. Co., 152 F 991. While a suit to determine the validity of resolutions prohibiting the construction by a street railway company of switches on a bridge adopted by a city having power to prescribe reasonable regulations of street railways does not. Eastern Wisconsin R. & L. Co. v. Hackett [Wis.] 115 NW 376.

9. The statutes of Arkansas formerly governed actions which arose in Indian Territory, and the act of congress putting such statutes in force are not involved in such actions. Missouri, etc., R. Co. v. Hollan [Tex. Civ. App.] 107 SW 642.

10. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

11. Blunt v. Southern R. Co., 155 F 499. Alienage of a party defendant is not nonresidency nor a ground for removal. Hackett v. Kuhne, 157 F 317; Healy v. McCormick, 157 F 318. Though a foreign corporation has a branch office within a state, it is still a nonresident within the meaning of U. S. Comp. St. 1901, p. 508, providing for removal of causes. Baumgarten v. Alliance Assur. Co., 153 F 301. But when incorporated in the state in which sued, on a liability then incurred, incorporation in other states also is no ground for removal, especially when required to have for a majority of its directors residents of such state and to keep a general office there. Patch v. Wabash R. Co., 28 S. Ct. 80. By the purchase of the franchise and property of a domestic corporation, a foreign corporation itself becomes domestic, under Code 1883, § 697, of North Carolina. Carolina Coal & Ice Co. v. Southern R. Co., 144 N. C. 732, 57 SE 444.

12. Hill v. Woodland Amusement Co., 158

whether it may acquire jurisdiction by consent or waiver in such a case, the authorities are in conflict.[13] The joinder of a resident with a nonresident, when proper, and the cause is not severable, bars the latter's right to remove,[14] even though the resident was joined solely to accomplish that purpose.[15] Where the liability of the resident and nonresident is both joint and several, plaintiff may elect to sue them jointly,[16] and if he does so, the right to remove is destroyed, though they have separate defenses and might have been sued separately,[17] or even though an instructed verdict is rendered for the resident defendant.[18] Whether a case is joint or several must be determined from plaintiff's pleadings,[19] and when they fail to show [20] or the evidence to prove that any real cause of action exists against the resident defendant,[21] the mere fact of his joinder is no bar to a removal,[22] for it is the duty of the court, in determining this question, to disregard all but indispensable parties.[23]

F 530. U. S. Comp. St. 1901, p. 508. Baxter, Straw & Storrs Const. Co. v. Hammond Mfg. Co., 154 F 992; Southern Pac. R. Co. v. Burch [C. C. A.] 152 F 168. The "proper district" to which a suit may be removed is that in which plaintiff resides. Under U. S. Comp. St. 1901, pp. 508-9, §§ 1, 2, 3. Hill v. Woodland Amusement Co., 158 F 530. But, where plaintiff's assignor might have brought suit in a Federal court, the assignee may sue in the Federal court for the district of which either he or defendant is a resident, and the fact that the assignor is not a resident of the district in which suit is brought is no bar to a removal. Stimson v. United Wrapping Mach. Co., 156 F 298.

13. Waived: By failing to object and going to trial on the merits. Louisville, etc., R. Co. v. Fisher [C. C. A.] 155 F 68. By entering a general appearance, taking out an order to plead, and moving to default defendant. Corwin Mfg. Co. v. Henrici Washer Co., 151 F 938. By permitting case to remain in Federal court for five years, amending pleadings and arguing the case on demurrer. Proctor Coal Co. v. U. S. Fidelity & Guaranty Co., 158 F 211.

Not waived: By moving to remand solely on other grounds. Baxter, Straw & Storrs Const. Co. v. Hammond Mfg. Co., 154 F 992. By a general appearance and reply to certain pleas. Hill v. Woodland Amusement Co., 158 F 530.

14. Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 SE 462; Wabash R. Co. v. Keeler, 127 Ill. App. 265; Diamond State Tel. Co. v. Blake, 105 Md. 570, 66 A 631.

15. The motive is immaterial if the joinder is legal. Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469.

16. As where the injury sued for is the result of a neglect of duty resting on several persons, was no concert of action between them. Wabash R. Co. v. Keeler, 127 Ill. App. 265. Tort feasors may be sued jointly (White v. Southern R. Co. [N. C.] 59 SE 1042), and the fact that one defendant's liability is on contract and the other at common law does not, of itself, prevent their joinder (Southern R. Co. v. Miller, 1 Ga. App. 616, 57 SE 1090), nor does mere insolvency of a defendant (Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469). A train dispatcher whose negligence caused an injury is jointly liable therefor with the company. Louisville, etc., R. Co. v. Gollihur, 40 Ind. App. 480, 82 NE 492.

17. Davis v. Rexford [N. C.] 59 SE 1002.

18. Where there was reasonable cause to believe him liable. Illinois Cent. R. Co. v. Sheegog's Adm'r, 31 Ky. L. R. 691, 103 SW 323.

19. Blunt v. Southern R. Co., 155 F. 499; McAlister v. Chesapeake, etc., R. Co. [C. C. A.] 157 F 740; State of Oregon v. Three Sisters Irr. Co., 158 F 346; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469. Unless defendant in his petition for removal both alleges and proves a fraudulent joinder. Southern R. Co. v. Miller, 1 Ga. App. 616, 57 SE 1090. When this is done, the court will determine the question on its merits. McGuire v. Great Northern R. Co., 153 F 434. An allegation that defendants and each and every one of them failed to carry out and perform and has abandoned and refused further to comply with the contract, for breach of which suit is brought, states a joint liability. Davis v. Rexford [N. C.] 59 SE 1002.

20. Chicago, etc., R. Co. v. Stepp, 151 F 908; Atlantic Coast Line R. Co. v. Bailey, 151 F 891; Louisville, etc., R. Co. v. Newman, 128 Ga. 283, 57 SE 515.

21. As soon as this appears, the action should be dismissed against the resident and upon application the cause removed to the Federal court, though it does not appear until the evidence is all in. Underwood's Adm'r v. Illinois Cent. R. Co., 31 Ky. L. R. 595, 103 SW 322. Action against a company and its employe to recover damages for negligent injuries resulting in death against whom no recovery is provided for by the statute. Rev. St. 1899, § 2864, Am. Laws 1905, pp. 135-7. Chicago, etc., R. Co. v. Stepp, 151 F 908.

22. As where resident and nonresident railway companies joined in an action to recover for goods shipped under separate and distinct contracts with each, there is no joint liability, and the joinder is no bar to removal. McGuire v. Great Northern R. Co., 153 F 434. In suit to have railroad bonds declared void, joinder of resident stockholders, etc., where railroad is only necessary party, no bar to removal. Politz v. Wabash R. Co., 153 F 941.

23. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606. On a petition for removal, the court should arrange the actual parties on opposite sides of the real controversy according to their interests and if there appears to be a controversy between citizens of different states and other jurisdic-

Where the petition for removal alleges a fraudulent joinder, it must state the facts showing it,[24] and whether or not it does so may be determined by the Federal court only.[25]

A separable controversy, such as will justify removal by a nonresident defendant, notwithstanding the joinder of resident parties, exists only where the whole subject-matter of the suit can be determined without the presence of the other parties joined.[26] Determination as to whether or not a suit is seperable must be made from plaintiff's pleadings at the time of filing the petition.[27] While parties may be joined by express statutory authority, this does not, of itself, make the action inseparable.[28]

§ 5. *Prejudice and local influence and denial of civil rights.* See 8 C. L. 1726

§ 6. *Amount in controversy.* See 8 C. L. 1726—Whether the requisite jurisdictional amount is involved must be determined by the amount demanded, where the nature of the case affords no guide.[29] An allegation in the petition for removal, that the amount involved exceeds $2,000, when not denied, is sufficient and will be assumed to be true.[30]

§ 7. *Procedure to obtain and effect the removal.* See 8 C. L. 1727—Removal is consummated by filing the proper petition and bond in the state court, where the cause is a removable one [31] and the petition is seasonably filed; [32] whereupon Federal juris-

tional requisites are present should order a removal. Boatmen's Bk. v. Fritzlen, 75 Kan. 479, 89 P 915.

24. A mere general allegation is not sufficient. Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469.

25. Davis v. Rexford [N. C.] 59 SE 1002.

26. Wabash R. Co. v. Keeler, 127 Ill. App. 265.

Separable: An action to recover the purchase price of land brought against the original purchaser and his assignee who had assumed payment is separable as to the latter. Stimson v. United Wrapping Mach. Co., 156 F 298.

Not separable: Suit against tort feasors jointly. White v. Southern R. Co. [N. C.] 59 SE 1042; Blunt v. Southern R. Co., 155 F 499. Action against two railway companies to recover for death caused by negligent running of a train of one over track of the other, under a contract by which the train crew were subject to orders of either company. Johnson v. St. Joseph Terminal R. Co., 203 Mo. 381, 101 SW 641. Condemnation proceedings by a municipality having been construed by state supreme court to be an indivisible suit, though owners' interests are separate and distinct. Kansas City v. Hennegan, 152 F 249.

27. Blunt v. Southern R. Co., 155 F 499; Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469. See cases cited ante, p. 1510, and post, p. 1512.

28. Though owners are joined in condemnation proceedings, the action against each is still separate and distinct. Deepwater R. Co. v. Western Pocahontas Coal & Lumber Co., 152 F 824. Removal by one in such case does not carry with it proceedings against the others. Id.

29. Where two counts, one in contract and one in tort, each lays damages at $1,900, and the prayer is for that amount, and from the two counts but one liability in unliquidated damages arises, the amount in controversy is $1,900. Ray v. Southern R. Co., 77 S. C. 103, 57 SE 636. Since such a case is not removable, an amendment reducing the amount may be granted. Id.

30. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irr. Co., 158 F 137.

31. City of New Castle v. Western Union Tel. Co., 152 F 569; Goldberg, Bowen & Co. v. German Ins. Co., 152 F 831; McAllister v. Chesapeake, etc., R. Co. [C. C. A.] 157 F 740. Petition must state jurisdictional facts (First Nat. Bk. v. Glaser [Tex. Civ. App.] 18 Tex. Ct. Rep. 686, 102 SW 171), and in the very words of the statute (Id.). It must allege that defendant is a "nonresident," and allegation that he is a resident of another state is insufficient. De La Montanya v. De La Montanya, 158 F 117.

32. A petition for removal is filed in time if filed as soon as the record in the case or the acts of the parties show it to be removable. Boatmen's Bk. v. Fritzlen, 75 Kan. 479, 89 P 915. Under the removal act, U. S. Comp. St. 1901, p. 508, which requires the petition for removal to be filed on or before the time in which defendant must plead or answer, under rules of the state court, it must in Pennsylvania be filed on or before the time an affidavit of defense is required to be filed, since under Pennsylvania practice such affidavit is an answer to plaintiff's claim and frames the issue, though technically it is no part of the pleadings. Overhold v. German-American Ins. Co., 155 F 488. When, at close of plaintiff's testimony, verdict is directed for one defendant, the renewal of a motion, made at the beginning of the trial by the other to have the cause removed, comes too late. When he fails to file a new application and bond and plaintiff does not non pros as to the defendant for whom verdict was directed. Diamond State Tel. Co. v. Blake, 105 Md. 570, 68 A 631. An extension of the time in which to plead or answer does not extend the time in which to petition for removal to the day on which the order of extension is actualiy entered, when it is then entered

diction at once attaches, regardless of the state court's refusal to grant the order of removal,[33] and plaintiff may thereupon be enjoined from proceeding further in the state court.[34] Upon such removal, the regular course of procedure in the Federal court is stayed until the day on which the transcript is required to be filed,[35] and where the Federal court is in session at the time the application for removal is made, a transcript is filed in time if filed on the first day of the next succeeding term.[36] Removal may also be accomplished by filing in the Federal court a certified copy of the record, together with a good and sufficient bond.[37] Since the state court has no jurisdiction to determine questions of fact raised by the petition,[38] it must take the allegations thereof to be true [39] and, if a case for removal is stated on the face of the petition, the state court must order its removal,[40] but if a prima facie case is not made out, the state court retains jurisdiction.[41] Whether or not the case is removable must be determined from the pleadings and record as they appear at the time the petition is filed.[42] The rule that all parties on the side of the controversy offered to plaintiff must join in the petition for removal does not apply where the suit is separable,[43] and the fact that one not entitled to removal joins in the petition therefor does not require a removal of his case with the other where the action is divisible.[44] The

as of the day on which the motion for extension was filed. Quilhot v. Homer, 158 F 188.

33. Atlantic Coast Line R. Co. v. Bailey, 151 F 891.

34. The injunction proceeding is not against the state court (Chicago, etc., R. Co. v. Stepp, 151 F 908), until the Federal court shall hear and determine the question of its own jurisdiction (McAllister v. Chesapeake, etc., R. Co. [C. C. A.] 157 F 740). Where the injunction bill raises issues of fact. Atlantic Coast Line R. Co. v. Bailey, 151 F 891.

35. Judgment by default in the interim will be set aside. Goldberg, Bowen & Co. v. German Ins. Co., 152 F 831.

36. Such a contingency not being provided for by U. S. Comp. St. 1901, p. 512, relating to time for filing transcript. Goldberg, Bowen & Co. v. German Ins. Co., 152 F 831.

37. Stockley v. Cissna [Tenn.] 104 SW 792. When, in such case, counsel for complainant appears, moves to remand and argues the case, defendant cannot be heard to complain of a subsequent refusal to remand on petition since he has had the full benefit of a removal. Id.

38. They must be tried in the Federal court. Gibbes v. Santee River Cypress Lumber Co. [S. C.] 60 SE 689. The only question for the state court is one of law, whether, admitting the allegations of the petition to be true, the course is a removable one. Boatmen's Bk. v. Fritzlen, 75 Kan. 479, 89 P 915.

39. Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irr. Co., 158 F 137. In the absence of denial by answer or by comparison with the record. Atlanta, etc., R. Co. v. Southern R. Co. [C. C. A.] 153 F 122. An allegation that more than $2,000 is involved, though denied under oath in a replication, the latter having no place in the record in determining the question of jurisdiction, is sufficient. First Nat. Bk. v. Glaser [Tex. Civ. App.] 18 Tex. Ct. Rep. 686, 102 SW 171.

40. Allegations show that a resident co-defendant was joined for the sole purpose of preventing a removal and with no intention to prosecute the alleged cause of action against it make out a prima facie case. McAlister v. Chesapeake, etc., R. Co. [C. C. A.] 157 F 740. Whether a case is a removable one is for the Federal court to determine. Id.

41. Such a case is not made by a general allegation in the petition that more than $2,000 exclusive of interest and costs is involved where the complaint shows the amount to be less than that amount. Gibbes v. Santee River Cypress Lumber Co. [S. C.] 60 SE 689. Where the petition fails to state sufficient jurisdictional facts, the defect can not be aided by evidence. Illinois Cent. R. Co. v. Sheegog's Adm'r, 31 Ky. L. R. 691, 103 SW 323.

42. Davis v. Rexford [N. C.] 59 SE 1002. It must, as a rule, be determined solely from plaintiffs' bill or declaration. Blunt v. Southern R. Co., 155 F 499; McAlister v. Chesapeake, etc., R. Co. [C. C. A.] 157 F 740; Southern R. Co. v. Miller, 1 Ga. App. 616, 57 SE 1090; Davis v. Rexford [N. C.] 59 SE 1002. Especially where the issue arises solely under the Federal constitution, laws, or treaties of the United States. State of Oregon v. Three Sisters Irr. Co., 158 F 346. The cause is whatever plaintiff declares it to be, and denial by defendant that the tort sued upon was joint will not be considered. Hough v. Southern R. Co., 144 N. C. 692, 57 SE 469. But when the petition alleges a fraudulent joinder for the sole purpose of preventing removal, the rule that, when plaintiff's declaration makes a case joint in character, the question of proper joinder will not be considered does not apply, and the Federal court will inquire into the merits of the controversy to determine that question, and, finding the allegations of the petition true, will remand the cause. McGuire v. Great Northern R. Co., 153 F 434.

43. Wabash R. Co. v. Keeler, 127 Ill. App. 265.

44. Texas, etc., R. Co. v. Tucker [Tex. Civ. App.] 20 Tex. Ct. Rep. 689, 106 SW 764.

burden of showing jurisdictional facts in the Federal court, on the hearing of a petition to remand, is on the defendant,[45] and every inference is to be adjudged against and not in favor of Federal jurisdiction,[46] but plaintiff will not be allowed to defeat Federal jurisdiction, after removal, by reducing the amount of his claim.[47] By submitting to the jurisdiction of the state court, defendant estops himself from the right to removal,[48] and, by a fraudulent attempt to prevent a removal, plaintiff will be estopped from objecting that the petition therefor was not filed in time.[49]

§ 8. *Transfer of jurisdiction and other consequences of removal.* See 8 C. L. 1729 Where the state court has jurisdiction of a case and rightfully retains it, or where a case is remanded to it by the Federal court, the trial or hearing in such court is in no way affected by any proceedings which may have been had in the Federal court.[50] The dismissal of a suit in the Federal court is no bar to institution of the same suit in a state court, where other proper parties are joined, and there is no obligation on the one whose case has been either voluntarily or involuntarily dismissed in a Federal court to pay the costs therein accrued before commencing the same suit in a state court.[51] The removal of a cause does not estop the remover from questioning the jurisdiction of the court originally having the case.[52]

§ 9. *Practice and procedure after removal; remand or dismissal.* See 8 C. L. 1730 Upon removal of a cause, the Federal court takes it as it finds it, accepting all decrees and orders as adjudications.[53] But its own rules and practice, rather than those of the state court, will be invoked to determine the validity of service of the summons and complaint.[54] A cause improperly removed to the Federal court will be remanded to the state court,[55] and the action of the Federal court in so remanding a cause is final and conclusive upon the state supreme court.[56] While the refusal of the Federal court to remand, when based upon its judicial determination that the cause was separable as to the removing nonresident defendant, may be reviewed on

Condemnation proceedings. Deepwater R. Co. v. Pocahontas Coal & Lumber Co., 152 F 824.

45. And the mere allegation of such facts in the petition for removal is insufficient. City of New Castle v. Western Union Tel. Co., 152 F 569. An objection that the contract on which joint liability is based is void is not open to him on removal proceedings. Davis v. Rexford [N. C.] 59 SE 1002. And whether a party defendant was negligent is not a jurisdictional fact to be determined in such proceedings. Illinois Cent. R. Co. v. Sheegog's Adm'r, 31 Ky. L. R. 691, 103 SW 323.

46. De La Montanya v. De La Montanya, 158 F 117; Hill v. Woodland Amusement Co., 158 F 530.

47. Donovan v. Dixieland Amusement Co., 152 F 661.

48. After trial and appeal of a cause in and to state courts, the Federal circuit court can acquire no jurisdiction over it. Johnson v. St. Joseph Ter. R. Co., 203 Mo. 381, 101 SW 641. Nor can it acquire jurisdiction after defendant has voluntarily appeared in the state court both by demurrer and answer, and the case has been set for trial (American Bonding Co. v. Mills [C. C. A.] 152 F 107), and such defendant is not aided by a petition for removal by his co-defendant, filed after such appearance and after judgment by default had been entered against it (Id.).

49. As where he fraudulently joins a resident defendant. Boatmen's Bk. v. Fritzlen, 75 Kan. 479, 89 P 915.

50. The facts that a petition and bond for removal and transcript of record to Federal court were duly filed, and the latter assumes jurisdiction of a case, will not be considered on appeal from the state court which properly refused to transfer the case to the Federal court, and itself tried and disposed of it. Johnson v. St. Joseph Terminal R. Co., 203 Mo. 381, 101 SW 641. The fact that a case has been removed to a Federal court and there tried is no defense to a motion to dismiss in the state court after the case has been remanded by the Federal circuit court of appeals. Finney v. American Bonding Co., 13 Idaho, 534, 90 P 859.

51. Southern R. Co. v. Rowe, 2 Ga. App. 557, 59 SE 462.

52. Lewis Pub. Co. v. Wyman, 152 F 200.

53. But a motion pending at the time of removal or decided by state court without prejudice to a renewal may be heard in the Federal court. Guernsey v. Cross, 153 F 827.

54. Case v. Smith, Lineaweaver & Co., 152 F 730.

55. Blunt v. Southern R. Co., 155 F 499. As where all the property which a judgment of the Federal court could affect is in the custody of the state court. Goldberg, Bowen & Co. v. German Ins. Co., 152 F 831.

56. Stockley v. Cissna [Tenn.] 104 SW 792.

appeal or error, mandamus will not lie to compel the remand.[57] As to whether, after removal, the petition may be so amended as to show the requisite diversity of citizenship, the authorities are unreconciled.[58]

§ 10. *Transfer between courts of the same jurisdiction.* See 8 C. L. 1732—The action of a justice of one municipal court in transfering a case to another, under the Municipal Court Act of New York City,[59] will not be reviewed on mandamus, though such transfer was not applied for in season.[60]

RENDITION OF JUDGMENT; REPLEADER; REPLEGIANDO, see latest topical index

REPLEVIN.

§ 1. Nature and Form of Action, 1514.
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§ 13. Review, 1525.
§ 14. Liability of Plaintiff or His Bond, and of Receiptors, 1525.

Scope of topic.—This topic is confined to a treatment of the common-law action of replevin in its original form and as modified by statute, and of the statutory actions which are practically identical therewith, such as claim and delivery, to the exclusion of other distinctive forms of action for the possession of personalty or its value.[61] These actions, however, have many principles in common with replevin, and may be consulted to advantage in connection with the topic here treated.

§ 1. *Nature and form of action. Distinctions.* See 8 C. L. 1733—Replevin is in the nature of an action ex delicto [62] and to a certain extent in rem,[63] though, in some jurisdictions, not local.[64] The gist of the action is the unlawful or wrongful detention [65] of personal property,[66] and its primary object is the recovery of possession of such property,[67] the issue of the right of immediate possession sometimes being the only one involved,[68] though a recovery may usually be had of damages for the detention [69] and alternately for the value of the property detained,[70] and in some jurisdictions the rights and interests of the parties to and in the property sued for may and should be determined.[71] In some states the remedy exists in general and special

57. In re Pollitz, 206 U. S. 323, 51 Law. Ed. 1081.

58. **Amendment allowed.** Wilbur v. Red Jacket Consol. Coal & Coke Co., 153 F 662.
Amendment denied: Case depends solely upon papers as filed in state court. Healy v. McCormick, 157 F 318.

59. Laws 1902, p. 1497, c. 580. People v. Murray, 53 Misc. 364, 104 NYS 740.

60. There being an adequate remedy by appeal from the court to which the case was transferred. People v. Murray, 53 Misc. 364, 104 NYS 740.

61. See Conversion as Tort, 9 C. L. 722; Detinue, 9 C. L. 975; Sequestration, 8 C. L. 1874.

62. Freeman v. Trummer [Or.] 91 P 1077.

63. In Rhode Island replevin is so far a proceeding in rem that unless the res has actually been taken possession by the officer the court is without jurisdiction. In re Alton Mfg. Co., 158 F 367.

64. Replevin not local action. See Rev. St. 1899, §§ 4146, 4158, 4159. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

65. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

66. Crude turpentine in boxes attached to trees, ready for delivery, being fructus industriales, is personalty. Richbourg v. Rose, 53 Fla. 173, 44 S 69. Where property annexed to freehold is severed therefrom, it becomes personalty. Id.

67. Johnson v. Clutter Music House [Fla.] 46 S 1; Roach v. Curtis [N. Y.] 84 NE 283.

68. Where defendant made tender of money necessary to give him absolute title, though costs were not included. McWhirter v. Penny, 82 Ark. 244, 101 SW 742.

69, 70. See post, § 11, Judgment and Award of Damages.

71. Determined on equitable principles after main issue of right of possession has been determined. Wadsworth v. Owens [N. D.] 115 NW 667. Under Comp. Laws, § 10, 679, providing for defendant's recovery of

forms, with distinct differences.[72] The statutory action of claim and delivery is practically identical with replevin.[73]

§ 2. *Right of action and defenses.* See 8 C. L. 1783—The right of action in replevin is dependent upon the right to immediate possession,[74] or, as it is sometimes expressed, plaintiff must have a property interest, general or special, in the property sued for and the right to immediate possession thereof,[75] and where he has neither he has no right of action.[76] At common law an unlawful taking was essential,[77] but this element has very generally been eliminated by statute,[78] and the rule now generally obtaining is that a right of immediate possession in the plaintiff and a wrongful detention by the defendant is sufficient to sustain the action,[79] though the plaintiff has never had possession.[80] The plaintiff's right of possession, however, must be so immediate as to render the defendant's detention unlawful without any prior demand for the property,[81] or if demand is necessary to render the detention unlawful, such demand is essential to the cause of action [82] unless it has been waived; [83] as is also any other step necessary to render the detention unlawful.[84] The plaintiff's right of possession must also be exclusive.[85] The plaintiff can recover only upon the strength of his own title and right of possession,[86] and the right of possession may

property and damages for detention where plaintiff has taken possession, and § 10, 680, giving defendant right to elect between return of property and payment of its value, replevin is an action for the settling of the rights of the parties and to avoid multiplicity of suits. Cavanaugh v. Sanderson [Mich.] 115 NW 955.

72. General action of replevin and particular action under the statute in reference to distress by landlords distinguished. Bruenfield v. Hoven [Miss.] 43 S 951.

73. Action of claim and delivery under B. & C. Comp. § 284 is substantially the common-law action of replevin. Freeman v. Trummer [Or.] 91 P 1077.

74. Idaho Placer Min. Co. v. Green [Idaho] 93 P 954.

75. Refusal to give this rule to jury held cured by instructions given. Cobb v. Holloway [Mo. App.] 108 SW 109; American Metal Co. v. Dougherty, 204 Mo. 71, 102 SW 538.

76. Clark v. Anderson [Me.] 68 A 633.

77, 78. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

79. Where the plaintiff is the owner of the property and entitled to the possession thereof at the commencement of the action, the defendant's detention thereof is wrongful, and the plaintiff is entitled to recover. Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617.

80. Mortgagee after default. Boswell v. First Nat. Bk. [Wyo.] 92 P 614.

81. Demand is unnecessary **when taking was wrongful.** Klug v. Munce [Colo.] 90 P 603; Brown v. Lewis [Or.] 92 P 1058. Not necessary **where defendant claims title** and right of possession. Denver Live Stock Commission v. Parks [Colo.] 91 P 1110.

82. Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617. When mortgages allowed mortgagor to retain possession. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

In Colorado demand is sufficient if made after suit, but prior to the execution of the writ. Denver Live Stock Commission Co. v. Parks [Colo.] 91 P 1110.

83. Demand may be waived either in pais or by the defendant's attitude in the suit, as where defendant claims to be owner. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

84. One who has acquired the property of another by a wrongful exchange must restore such other's property before he can maintain replevin for his own, as where one exchanged property with another's bailee, knowing of bailor's ownership. Freeman v. Trummer [Or.] 91 P 1077. Where conditional purchaser has assigned his interest, the seller must tender amount paid on price to assignee in possession less compensation for use of and damage to the property. National Cash Register Co. v. Cervone, 76 Ohio St. 12, 80 NE 1033. If such tender is not made, the defendant is entitled to damages to extent of amount so paid. Id.

85. As general rule **one tenant in common** cannot maintain replevin against his cotenant for the former's individual interest in the common property, but this rule does not obtain when the property is alike in quality and value and readily susceptible to division by weighing or measurement (Manti City Sav. Bk. v. Peterson [Utah] 93 P 566), but in such case the plaintiff must prove that the case is within the exception (Id.). One cotenant may maintain replevin against the other for his share of the property after severance, as where apricots were cured, etc., and placed in separate piles by way of division, and defendant then appropriated the whole lot. Adams v. Thornton, 5 Cal. App. 455, 90 P 713. Joint interest as **partner** is not sufficient. Steckman v. Gault State Bk., 126 Mo. App. 664, 105 SW 674.

Beneficial ownership in common with others will not defeat right of action of holder of full legal title with right of possession. McDonald v. Daniels [Kan.] 92 P 51.

86. Richbourg v. Rose, 53 Fla. 173, 44 S 69; Northup v. Bathrick [Neb.] 113 NW 808.

depend upon title and ownership,[87] but actual possession alone is sufficient as against a wrongful dispossessor.[88] Some of the particular persons whose right to maintain the action has recently been adjudicated are: Seller of goods with reservation of title as against the purchaser;[89] seller who has fraudulently been induced to sell;[90] seller as against purchaser's receiver;[91] lienors;[92] pledgor as against pledgee;[93] personal representatives of decedents.[94]

The action does not lie to recover intangible property[95] or property capable of use only in violation of law or to the injury of morals.[96] It generally lies to recover

87. Evidence held to show that plaintiff was owner of cow. Elliott v. Elliott [Iowa] 114 NW 1074. Holder of bill of sale as security, who has received a sufficient amount of the property covered thereby to cover the debt secured, held not entitled to replevy balance. Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 SW 386. Where plaintiff held bill of sale on certain heading bolts, but the bolts were subsequently manufactured into heading which was delivered to plaintiff, such bill of sale could not sustain replevin of other bolts. Id. Motion for directed verdict and judgment non obstante for defendant held properly refused where evidence was conflicting as to whether plaintiff had **notice** of defendant's mortgage when former acquired his title. Pease v. Magill [N. D.] 115 NW 260. Lessor **estopped to assert title** as against purchaser from lessee where lessor, without objection, allowed lessee to sell the property as junk after a fire. United Shoe Mach. Co. v. Bresnahan [Mass.] 83 NE 412.

88. Taylor v. Brown [Or.] 90 P 673.

89. Replevin may be maintained upon default in payment. Roach v. Curtis [N. Y.] 84 NE 283. Seller might replevy from the purchaser property wrongfully seized by the latter contrary to the contract of sale which required payment as condition to passing of title and right of possession. Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070.

Where purchaser has transferred his interest by mortgage or sale, seller cannot replevy without tendering mortgagee or purchaser in possession the amount paid on purchase price less reasonable compensation for use of property, not exceeding 50 per cent of amount so paid, and for damages done to it while in possession of purchaser or his assigns. National Cash Register Co. v. Cervone, 76 Ohio St. 12, 80 NE 1033. A conditional **seller's assignee** may maintain replevin for the goods after breach of condition when the intent of the practice was that the assignee was to receive all the assignor's interest in the claim. Lazarovich v. Tatilbum [Me.] 69 A 275.

Evidence held sufficient to show that sale to defendant was conditional. Lazarovich v. Tatilbum [Me.] 69 A 275. Conditional seller held to have proved both title and right of possession as against purchaser. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567. Evidence held to sustain defendant's contention that purchase price had been paid at time action was brought. Gravert v. Goothard [Neb.] 115 NW 559.

Instructions held to properly state issues in replevin by conditional seller, with title reserved, against purchaser. Gravert v. Goothard [Neb.] 115 NW 559.

90. Replevin lies to recover the goods. Crawford v. Hurd [Ky.] 106 SW 849.

91. Seller cannot replevy property in hands of purchaser's receiver in bankruptcy where he has not avoided the sale prior to the appointment of the receiver. In re Alton Mfg. Co., 158 F 307.

92. Thresher's lien under Rev. Laws 1905, § 3546, when perfected according to statute, entitles lienor to possession, and hence right to replevin. Phelan v. Terry [Minn.] 112 NW 872. **Equitable lien** does not create such right to possession as will sustain an action of replevin, and hence such action will not lie at instance of **mortgagee** to recover property acquired by mortgagor after executing a blanket chattel mortgage. Morganstein v. Commercial Nat. Bk., 125 Ill. App. 397. Mortgagee entitled to possession under the terms of the mortgage may enforce such right by replevin. Ely v. Williams [Cal. App.] 92 P 393. Mortgagee's right to replevy mortgaged property pending foreclosure is not affected by Code Civ. Proc. § 726, providing that all rights under chattel mortgage must be enforced in one action, such provision being applicable to the primary rights under the mortgage, and not to collateral contracts therein. Id.

93. Claim and delivery lies by a pledgor to compel the return of the pledge upon redemption. Bell v. Bank of California [Cal.] 94 P 889.

94. An administrator may replevy property belonging to his intestate's estate. Lambert v. Tucker, 83 Ark. 416, 104 SW 131.

95. Corporate stock. Bell v. Bank of California [Cal.] 94 P 889.

96. Slot machines, being capable of use only in violation of Sess. Laws 1889, p. 389. Mullen v. Mosley, 13 Idaho, 457, 90 P 986. Gaming implements. Robertson v. Porter, 1 Ga. App. 223, 57 SE 993.

Note: "Courts are created for the upholding of the law and of morals, and will therefore decline to allow their processes used to further the maintenance of crimes and public evils. The law has the right of self-defense. It will not, by its own strong arm, assist in placing into the possession of any one instrumentalities designed for no other purpose than the breaking of the law. It will not protect the owner of a house devoted to lewd purposes, as to his rents (Ralston v. Boady, 20 Ga. 449); the mistress of a lewd house, as to her contracts with the inmates (Postelle v. Rivers, 112 Ga. 850, 38 SE 109); unlawful assemblages, as to their common fund (Regina v. Hunt, 8 Car. & P. 642); the milk dealer, as to his

personalty only,[97] but the right of action will not be defeated by the wrongful attachment of personalty to realty,[98] and in such case the personalty may be replevied even in the hands of a bona fide purchaser of the realty.[99] In order to maintain replevin for property severed from realty, the plaintiff must have had actual or constructive possession of the realty,[1] and adverse possession by the defendant will defeat the action.[2] Property in custodia legis cannot be replevied,[3] but this rule does not apply to every seizure by officers of the law,[4] and the exemption does not follow the property into the hands of private individuals claiming in their own right, though as successors to or through the legal custody.[5] Where several articles are wrongfully

milk watered in violation of law (Deems v. Baltimore, 80 Md. 164, 30 A 648, 45 Am. St. Rep. 339, 26 L. R. A. 541); the 'blind tiger' keeper, as to his liquors (State v. O'Neal, 58 Vt. 162, 2 A 586, 56 Am. Rep. 557); the indecent individual, as to his obscene prints and lascivious pictures; the gambler, as to his slot machine (Board of Police Com'rs v. Wagner, 93 Md. 182, 48 A 455, 86 Am. St. Rep. 423, 52 L. R. A. 775), or as to his poker chips (Bales v. State, 3 W. Va. 687); the burglar, as to his kit, or the counterfeiter, as to his molds and coins (Spalding v. Preston, 21 Vt. 9, 5 Am. Dec. 68); the highwayman, as to his spoils (opinion of Lord Ellenborough, referred to on page 16 of case last cited); nor will it protect the keeper of a gaming house, as to his paraphernalia and implements of crime (Kneeland v. Connally, 70 Ga. 424). This specific doctrine herein announced is not referable so directly to the legal maxim, 'Ex dolo malo non oritur actio,' which peculiarly relates to cases of contract, as to that great fundamental maxim of the law, 'Salus populi, suprema lex.' We frankly concede the correctness of the criticism, made by counsel for defendant in error, that in most of the cases cited above so much of the opinions as touch directly upon this question are obiter. However, these observations of learned judges, though they be stated merely in passing, are so well supported by good reasoning as to persuade us and to convince us."—From Robertson v. Porter, 1 Ga. App. 223, 57 SE 993.

97. Lies to recover personalty only. Richbourg v. Rose, 53 Fla. 173, 44 S 69.

98. House which was detached and a chattel was wrongfully attached to land of defendant's grantor. Eisenhauer v. Quinn [Mont.] 93 P 38.

99. Defendant's grantor wrongfully attached plaintiff's house, which was a chattel, to such grantor's land, which he then conveyed to defendant. Eisenhauer v. Quinn [Mont.] 93 P 38.

1. Richbourg v. Rose, 53 Fla. 173, 44 S 69.

2. Richbourg v. Rose, 53 Fla. 173, 44 S 69.

Instruction held erroneous as excluding defense of adverse possession. Richbourg v. Rose, 53 Fla. 173, 44 S 69.

3. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

Property replevied cannot be replevied again while in the hands of the officer. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809. Where the scope of the action has been enlarged by statute so as to make it a remedy for the determination of not only the right of possession but of the interests of the parties in the subject-matter, a **cross replevin** cannot be maintained by a party to the original action or his privies. Cavanaugh v. Sanderson [Mich.] 115 SW 955. Where after mortgagee had replevied property and sold it the replevin proceedings were quashed on appeal, the mortgagor should have obtained his remedy by judgment for property or its value as provided by Comp. Laws, § 10,679, and could not maintain replevin against purchaser. Id.

Property seized by Federal revenue collector cannot be replevied in the hands of the collector by a third party claiming to be the owner. Sheridan v. Allen [C. C. A.] 153 F 568. Where intoxicating liquors and other property are seized upon warrant issued under Gen. St. 1901, § 2494, they cannot be replevied in hands of officer pending hearing under § 2495, being in custodia legis. Greentree v. Wallace [Kan.] 93 P 598.

4. Property is not in custodia legis so as not to be repleviable by the owner where it has been **replevied by defendant from third person.** Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070. A tenant may replevy **goods distrained** where there is no rent due, but not on account of excessiveness of the levy under the distress warrant or other mere irregularity. Whitcomb v. Brant [N. J. Law] 68 A. 1102. Replevin lies against an officer who has **wrongfully attached** plaintiff's property while in his possession as the property of another. Bowen v. Harris [N. C.] 59 SE 1044.

5. Where property replevied has been turned over by the officer to the replevin plaintiff, it may be again replevied in the latter's hands. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809. Under Mansfield's Dig. of Ark. St. § 5572, providing that **property exempt from seizure** under execution or attachment may be replevied when so seized, replevin is proper remedy to recover crops of subtenant seized by a constable under a writ of attachment issued to enforce landlord's lien for rent against tenant in chief, when such crops were not subject to the lien when the attachment was issued. McFall v. Elmore [Okl.] 94 P 545. Third party claiming to be owner may replevy from **purchaser from Federal revenue collector** where the sale is under a distress warrant as distinguished from a forfeiture and sale. Sheridan v. Allen [C. C. A.] 153 F 568. Tax debtor cannot replevy the property from purchasers from the revenue collector. Id.

taken by a single trespass, the owner may maintain replevin for the part undisposed of and trover for the balance.[6]

Replevin lies only against one in possession at the commencement of the action,[7] but this rule cannot be invoked by one who has wrongfully disposed of the property of another without the latter's knowledge.[8] The defendant may defeat the action by showing title and right of possession in a third person [9] or by proof of a lien entitling defendant to retain possession of and payment out of the property,[10] but the pendency of another replevin action by the defendant against a third party is no defense.[11] A conditional purchaser cannot set up a mortgage executed by him as a defense to an action by the seller.[12] In an action by a purchaser to recover the property of which he has been dispossessed, the terms of the sale affecting the right of possession are unavailable as a defense where they have been waived by unconditional delivery,[13] and where no instalment of the purchase money is due, a seller who has taken the property from the purchaser cannot set up an equitable mortgage for the purchase money as a defense.[14] In the absence of fraud or misleading circumstances, the good faith of the defendant in seizing and causing to be seized the property of the plaintiff as that of another is no defense.[15] Set-off of accounts cannot be had.[16]

§ 3. *Jurisdiction and venue.* See 6 C. L. 1303—Jurisdiction is not dependent upon the execution and filing of papers designed to secure delivery of the property,[16a] but in some states jurisdiction is acquired only by seizure of the property, the action being to this extent in rem.[17] The amount in controversy is the value of the property seized, and not the money claim upon which the seizure was based.[18] In jurisdictions where the action is not considered as being local in its nature, the place of detention is not necessarily the venue of the action.[19]

§ 4. *The affidavit.* See 3 C. L. 1735—The essential contents of the affidavit are dependent more or less upon statutory enactment.[20] Where the affidavit is made on information and belief, the information should appear to be derived competently,[21] and the sources thereof must be disclosed in such a way as to enable the court to decide

6. Gehlert v. Quinn, 35 Mont. 451, 90 P 168.

7. Bowen v. Harris [N. C.] 59 SE 1044. Plaintiff cannot maintain action when he was in possession at time of commencement of action. Mahr v. Livingstone, 55 Misc. 133, 106 NYS 308. Chief of police held not in actual or constructive possession of dog in possession of city dog catcher. Casey v. Scott, 82 Ark. 362, 101 SW 1152. Landlord held not even in constructive possession of wheat stored on rented premises and claimed by plaintiff under agreement with tenant. Morrow v. Pryor, 125 Mo. App. 344, 102 SW 582. Evidence held to sustain finding that jewels sued for were in possession of defendant and not of his wife to whom it was claimed that he had given them. Maloney v. Neville [Mo. App.] 107 SW 4.

8. Andrews v. Hoeslich [Wash.] 91 P 772.

9. Replevin by landlord against tenant for wheat alleged to be due as rent. Northrup v. Bathrick [Neb.] 113 NW 808.

10. Attorney's lien on property and securities. Heyward v. Maynard, 119 App. Div. 66, 103 NYS 1028. Evidence held not to sustain finding of force or fraud on part of defendant, an attorney, in obtaining possession of securities upon which he claimed a lien. Id.

11. Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070.

12. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

13. Cobb v. Holloway [Mo. App.] 108 SW 109.

14. Murdouch v. Tuten, 76 S. C. 502, 57 SE 547.

15. Where prior to seizure for debt of plaintiff's vendor plaintiff was in possession and had recovered his bill of sale. Francese v. Geraty, 104 NYS 358.

16. Freeman v. Trummer [Or.] 91 P 1077.

16a. Court may try case without change of possession, though affidavit required by Kirby's Dig. § 6854, as prerequisite to an order for delivery, is not filed. Schattler v. Heisman [Ark.] 107 SW 196.

17. In Rhode Island. In re Alton Mfg. Co., 158 F 367.

18. Brumfield v. Hoover [Miss.] 43 S 951.

19. Under Rev. St. 1899, §§ 3505, 4146, 4158, 4159. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

20. It is necessary to set forth in an affidavit or in a verified petition the facts required by Code Civ. Proc. § 182, subd. 4 (Cobbey's Ann. St. 1903, § 1153), only when an order of delivery is desired by plaintiff. Racine-Sattley Co. v. Meinen [Neb.] 114 NW 602.

21. Agnew v. Latham, 54 Misc. 61, 105 NYS 366.

upon the probable truth of the statements and the authenticity of the jurisdictional facts.[22]

§ 5. *Plaintiff's bond.*[See 6 C. L. 1735]

§ 6. *The writ and its execution.*[See 8 C. L. 1735]

§ 7. *Custody and delivery of property.*[See 8 C. L. 1785]—Failure to file the affidavit required by statute as the basis of an order for the delivery of the property before the issuance of such order [23] is ground for quashing such order.[24] The remedy for a wrongful delivery by the officer is mandamus and not certiorari.[25]

Forthcoming bond.[See 8 C. L. 1786]—A forthcoming bond is generally required as a condition to the right of either party to possession.[26] The obligation of a redelivery bond filed with an affidavit of illegality is to redeliver the goods at the time and place of sale.[27] The execution of a delivery or forthcoming bond operates as an estoppel to deny the possession of the property at the time of its seizure.[28]

§ 8. *The pleadings and parties to the action.*[See 8 C. L. 1786]—The petition should contain the allegations required by statute,[29] and where demand is necessary the petition should allege it [30] or a waiver thereof,[31] or at least facts sufficient to let in proof thereof.[32] An allegation of ownership is not determinative of the right of possession,[33] and hence where the action is based on a wrongful detention, without any allegation of wrongful taking, an allegation of ownership is not alone sufficient.[34] The action, furthermore, being based solely upon the right of immediate possession at the commencement of the action, it is not sufficient to allege title and wrongful detention without alleging such right of possession.[35] The right to immediate possession need not, however, be expressly alleged where the legal equivalent thereof is alleged.[36] An allegation that plaintiff is entitled to immediate possession without any statement of general or special ownership is insufficient as being a legal conclusion,[37] as is also an allegation of ownership by virtue of an alleged conveyance.[38] An allegation of ownership by way of a conclusion from the facts recited is tested by such facts,[39] but recitals of the conveyance incorporated in the complaint cannot supply the want of allegations of ownership and possession.[40] The declaration need not anticipate and negative defendant's claim of title.[41] Failure of the plaintiff, holding full legal title, to allege beneficial interests in the property owned by others, cannot

22. Letters and conversations constituting basis of belief should be set out. Agnew v. Latham, 54 Misc. 61, 105 NYS 366.

23. Kirby's Dig. §§ 6853, 6854. Schattler v. Heisman [Ark.] 107 SW 196.

24. Schattler v. Heisman [Ark.] 107 SW 196.

25. Detroit & M. R. Co. v. Alpena Circuit Judge [Mich.] 115 NW 724.

26. Under Kirby's Dig. § 6857, plaintiff is not entitled to have property delivered to him until he has executed the bond required by the statute. Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 SW 709. Execution of bond required by Kirby's Dig. § 6857, as condition of delivery to plaintiff, held not shown by allegation in suit on officer's bond of failure to deliver "as required by law." Id. Under Comp. Laws 1897, § 10,658, as amended by Pub. Acts 1899, p. 384, Act No. 246, § 11, the property cannot be delivered to either party without defendant's written consent until expiration of forty-eight hours after appraisal. Detroit, etc., R. Co. v. Alpena Circuit Judge [Mich.] 115 NW 724.

27. Kaminsky v. Horrigan, 2 Ga. App. 332, 58 SE 497.

28. Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617.

29. Where there is no affidavit for replevin in the record, and the petition is not positively verified and omits all the allegations required by Code Civ. Proc. § 182, subd. 4, it is insufficient. Racine-Sattley Co. v. Meinen [Neb.] 112 NW 321, following J. I. Case Threshing Mach. Co. v. Rosso [Neb.] 110 NW 686.

30, 31, 32. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

33, 34, 35. Midland Contracting Co. v. Toledo Foundry & Mach. Co. [C. C. A.] 154 F 797.

36. American Storage & Moving Co. v. Harding, 126 Mo. App. 489, 104 SW 484.

37. Street v. Sederburg [Colo.] 92 P 29.

38. "That by terms of said mortgage * * * the plaintiff became and was * * * the owner," etc. Street v. Sederburg [Colo.] 92 P 29.

39, 40. Street v. Sederburg [Colo.] 92 P 29.

41. Declaration against one who took under lessor in bailment lease to recover chattels on condition broken held sufficient. Heisley v. Economy Tool Mfg. Co., 33 Pa. Super. Ct. 218.

be raised by objection to the plaintiff's capacity to maintain the action.[42] An allegation of wrongful taking should state that the property was taken from the plaintiff,[43] but a defect in this regard is cured by the verdict.[44] An allegation that the detention is "wrongful" is a sufficient allegation of the illegality of the detention.[45] A description in general terms may be sufficient where the location of the property is given,[46] and the particular nature of the property may be proved on the trial.[47] Where the plaintiff claims as owner movable property held by a third person asserting title thereto, he is bound to identify such property as that owned by him.[48] In jurisdictions where the action is not a local one, venue need not be alleged.[49] Jurisdiction in a justice's court may be conferred by a very informal pleading.[50] The plaintiff must rely on his title as alleged.[51] Unless alleged and proved, no recovery can be had for the value of the property [52] or for damages.[53] A counterclaim may or may not be necessary to authorize a recovery of damages by the defendant, according to the practice in the various courts.[54] A special denial puts in issue all the essential averments of the complaint, and puts the burden of proving them upon the plaintiff,[55] and under such denial the defendant may offer evidence to controvert plaintiff's evidence, to disprove his allegations, and to prove other and inconsistent facts.[56] Under a general denial, anything may be proved which tends to prove the defendant's right of possession or disprove that of the plaintiff.[57] An allegation that the defendant did not at any time wrongfully or unlawfully retain possession of the property is a mere conclusion.[58] An allegation that the defendant parted with possession prior to the suit raises no issue on the plaintiff's allegation that defendant had possession when the suit was brought.[59] Defendant's pleadings cannot be aided by the allegations of his claim and delivery affidavit.[60] The facts constituting a special property claimed by defendant must be fully alleged.[61]

One entitled to possession may alone maintain replevin though another holds the legal title,[62] but where the right of possession is dependent upon title, a plaintiff

42. McDonald v. Daniels [Kan.] 92 P 51.

43, 44. Brown v. Lewis [Or.] 92 P 1058.

45. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

46. Description of property as "a car plant" in defendant's possession at a certain place held sufficient. Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617.

47. Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617.

48. Daniels v. Taubenblatt [La.] 45 S 273.

49. Under Rev. St. 1899, §§ 3805, 4146, 4158, 4159, the venue of the detention need not be alleged. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

50. Paper purporting to be affidavit filed in justice's court, and claiming delivery of the property under Kirby's Dig. §§ 6853, 6854, held sufficient complaint to confer jurisdiction of the subject-matter. Schattler v. Heisman [Ark.] 107 SW 196.

51. Palmer v. Hurst [S. D.] 115 NW 516. Where plaintiffs sue as co-owners of several items of property, they can recover only upon proof of co-ownership, and not upon proof of ownership of all by one, or of sole ownership by the several plaintiffs of different items. Id.

52, 53. Hollenback v. Greene, 120 App. Div. 671, 105 NYS 915.

54. Under Rev. St. 1899, § 3921 (Ann. St. 1900, p. 2163), no counterclaim or verbal claim is necessary to a recovery of damages by the defendant in replevin in justice's court. Gurley Bros. v. Bunch [Mo. App.] 108 SW 1109. Counterclaim necessary to recovery of damages by defendant in case originating in circuit court. Id.

55, 56. Idaho Placer Min. Co. v. Green [Idaho] 93 P 954.

57. May prove his right to possession, or that he, as an officer, levied on the property at suit of a creditor of him from whom the plaintiff obtained it in fraud of creditor, or that the title is in a stranger, and may also show his own right of possession by virtue of a lien. Idaho Placer Min. Co. v. Green [Idaho] 93 P 954. A plea of not guilty puts in issue not only the possession of the property, but also the wrongful taking and detention, and under such denial the defendant may give any evidence of special matter which amounts to a defense to the plaintiff's cause of action, that is which shows that the plaintiff is not entitled to the possession of the property. Richbourg v. Rose, 53 Fla. 173, 44 S 69.

58, 59. Pratt v. Welcome [Cal. App.] 92 P 500.

60. Taylor v. Brown [Or.] 90 P 673.

61. Miller v. Jackson, 34 Pa. Super. Ct. 31.

62. Where after a sale of partnership property, with reservation of title, one of the partners sold his interest to the other, with reservation of title, the latter could replevy the property upon the purchaser's default without making the other partner

suing alone must have the sole title.[63] One having actual possession and one having constructive possession may be joined as defendants.[64] The rights of nominal parties cannot be determined.[65] A total substitution of plaintiffs cannot be allowed by way of amendment.[66] As a general rule the title and right to possession must be determined as of the date of the commencement of the action,[67] but this rule has been more or less modified by statutory provisions for intervention by parties interested.[68]

§ 9. *Evidence.*[See 8 C. L. 1737]—The plaintiff must prove his immediate right of possession.[69] The burden is also on the plaintiff to identify the property where it was in the hands of third persons when replevied.[70] Where the defendant sets up a prior title or claim, the burden is on him to prove it[71] and also plaintiff's notice thereof when he acquired his title.[72]

Possession and exercise of ownership rights is some evidence of title[73] ordinarily making a prima facie case of title in the possessor,[74] and if evidence is introduced to control it the whole evidence is to be considered.[75] Evidence that plaintiff had listed the property for taxation in severalty is admissible against his claim of co-ownership,[76] and evidence of the former possession by the plaintiff is admissible in a proper case.[77] A tender of money is not conclusive upon the issue of right of possession.[78] At best it is only an admission[79] which may be explained.[80] On an issue of abandonment of the property by the plaintiff and acceptance of its value from the defendant, the plaintiff's admissions as to the worthlessness of the property are admissible.[81]

a party. Brumfield v. Hoover [Miss.] 43 S 951.

63. A partner cannot alone maintain replevin for the partnership property. Steckman v. Gault State Bk., 126 Mo. App. 664, 105 SW 674.

64. Person who has physical possession as bailee and the person under whose directions the bailee retains possession may properly be joined as defendants. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

65. Where one claiming under assignee of conditional purchaser sued assignee of seller who had taken possession of the property under condition of contract reserving title in seller until payment, other parties who were made defendants were only nominal defendants, and neither their rights nor the rights of others in the estate of the seller could be determined in the replevin suit. Van Buren v. Stubbings, 149 Mich. 206, 14 Det. Leg. N. 402, 112 NW 706.

66. Substitution of city as plaintiff in action by its treasurer. Clark v. Anderson [Me.] 68 A 633. Rev. St. c. 84, § 11, allowing additional plaintiffs to be added by amendment of the writ, does not authorize a complete substitution. Id.

67. Lambert v. Tucker, 83 Ark. 416, 104 SW 131.

68. Under Kirby's Dig. §§ 6012, 6865, authorizing intervention by parties interested an administrator appointed after commencement of replevin by widow against heirs may intervene and recover against both. Lambert v. Tucker, 83 Ark. 416, 104 SW 131.

69. McWhirter v. Penny, 82 Ark. 244, 101 SW 742. The plaintiff must prove a general or special property interest and a right to immediate possession. American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538; Cobb v. Holloway [Mo. App.] 108 SW 109.

Instructions given held to cure refusal to give rule as to burden. Cobb v. Holloway [Mo. App.] 108 SW 109.

70. Replevy of cotton in hands of commission merchants on ground that it was covered by mortgage held by plaintiff. Lundee, Chapman & Co. v. Talbot, 83 Ark. 315, 103 SW 731. Mortgagee of cotton which mortgagor might raise or which he might acquire as rents did not sufficiently identify the cotton replevied by merely proving that it came from places more or less under mortgagor's control, when the same witnesses by whom this was proved also testified to indebtedness between the mortgagor and the persons from whom the cotton came other than indebtedness for rent. Id.

71, 72. Pease v. Magill [N. D.] 115 NW 260.

73, 74. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412.

75. Including possession and exercise of ownership rights. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412.

76. Palmer v. Hurst [S. D.] 115 NW 516.

77. That at the time of the death of the defendant's intestate the horses replevied were on a farm rented by the plaintiff from the intestate held admissible as tending to show that plaintiff had possession of the horses at such time, plaintiff claiming to have purchased them from such intestate. Cobb v. Holloway [Mo. App.] 108 SW 109.

78, 79. McWhirter v. Penny, 82 Ark. 244, 101 SW 742.

80. Explained as being merely an offer to pay plaintiff the amount constituting the basis of his claim to the property. McWhirter v. Penny, 82 Ark. 244, 101 SW 742.

81. Where it appeared that plaintiff's manager had authority to accept value of property from plaintiff's lessee and allow latter to sell such property, when damaged, as junk, statement of one designated by manager to determine whether the property was damaged by fire to such extent as to justify its abandonment, that the property was worthless, held admissible in replevin by lessor against purchaser from junk dealer.

Whether a reasonable person could have known of the plaintiff's control of the property seized as belonging to a third person calls for a mere conclusion.[82] In replevin for goods conditionally sold, receipts given to defendant by the purchaser are admissible, as admissions, on issue as to nature of the transaction,[83] but where the plaintiff claims the goods under the defendant's written order wherein title is reserved in the seller, the execution of such order must be proved as a condition to its admissibility.[84] The defendant may prove anything tending to show that the plaintiff did not have the right of possession when the action was brought,[85] and where the defendant claims under legal process against a third person, any evidence tending to show the passing of title and right of possession from the plaintiff to such person is admissible,[86] but in replevin by a third person to recover property attached, the attachment record is not admissible where the defendants do not attempt to justify the seizure under the attachment writ.[87] In replevin for property severed from realty, deeds to the realty are admissible in connection with the defendant's claim of adverse possession.[88] That defendant has mortgaged the property to a third person is without any probative force on the issue of title, and is also inadmissible as being a self-serving act.[89] Where the property is described in general or technical terms, evidence of what it consists of is admissible.[90] In connection with testimony as to the value of the use of the property, the court may sometimes take judicial notice of the adaptibility of such property to certain uses, so as to dispense with the necessity of proof thereof.[91] Where no judgment is sought or rendered for the value of property not returned, the admission of evidence as to the value of certain items is harmless to the defendant.[92] The sufficiency of the evidence is determined according to the usual rules.[93] The court is not bound by statements of any one or more witnesses, but may find the value from all the evidence.[94]

§ 10. *Trial.*[See 8 C. L. 1738]—Either party is entitled to a jury,[95] but if they agree upon the determinative facts, the judgment to be entered becomes a question of law for the court.[96]

Instructions inapplicable to the issues are properly refused.[97] It is not an invasion of the province of the jury for the court to tell the jury that the description of the property in the complaint is technical, and that such property is susceptible of detailed description.[98] Where written evidence of the plaintiff's title is admitted

United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412. Evidence that lessee paid "lease premiums" to full value of all property of lessor not insured held admissible to explain dealings of parties. Id.

82. Taylor v. Brown [Or.] 90 P 673.

83. Lazarovich v. Tatilbum [Me.] 69 A 275.

84. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

85. Idaho Placer Min. Co. v. Green [Idaho] 93 P 954.

86. In replevin by lessor to recover sheep seized under legal process as belonging to lessee, evidence that certain of the sheep had been set off to lessee pursuant to terms of lease was admissible. Lemmon v. Beattie [Colo.] 91 P 1102.

87. Taylor v. Brown [Or.] 90 P 673.

88. Richbourg v. Rose, 53 Fla. 173, 44 S 69.

89. Lazarovich v. Tatilbum [Me.] 69 A 275.

90. Where property was described as "a car plant." Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617.

91. That horse 5 or 6 years old was adaptable to use as a work horse. Gurley Bros. v. Bunch [Mo. App.] 108 SW 1109.

92. Indiana Union Trac. Co. v. Bick, 40 Ind. App, 451, 81 NE 617.

93. Held sufficient to sustain verdict for defendant. Demmons v. Booker, 128 Ga. 83, 57 SE 108.

94. Finding of $300 sustained where one witness stated value at $500 and another at $200. Pratt v. Welcome [Cal. App.] 92 P 500.

95, 96. McKinney v. Grant [Kan.] 93 P 180.

97. Where, in replevin by lessor for machinery sold by lessee after a fire, the jury was not permitted by the instructions given to find for defendant on theory that plaintiff's title was divested by acceptance of insurance, requested instructions as to effect of such acceptance under mistake as to extent of damage to the machinery were properly refused as inapplicable. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412.

98. Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617.

without proof of execution, but without objection, and the case is reported to the law court and it appears from the whole record that such evidence was duly executed, the appellate court will not consider the absence of preliminary proof of execution.[99]

Verdict and findings.[See 8 C. L. 1739]—The verdict must respond to the issues,[1] and hence where the right of possession is in issue a verdict merely for a sum of money is insufficient to sustain a judgment.[2] It must be such as to support the judgment prescribed by statute,[3] and is usually required to be in the alternative for the recovery of the property or its value,[4] and hence an assessment of value is usually required,[5] but a provision that the verdict must assess the value of the property does not require such assessment where the property has been returned to the successful party.[6] The value assessed by the verdict is presumed to have been assessed as of the time fixed by statute.[7] Where the verdict finds the value at the time of the trial the same as at the date of the replevy, the verdict carries with it a finding that there has been no intermediate depreciation in value.[8]

§ 11. *Judgment and award of damages.*[See 8 C. L. 1740]—At common law the judgment was in the alternative for the property or its value if the property itself could not be returned or obtained,[9] and this requirement has been generally retained by the statutes [10] with more or less modification,[11] but an alternative judgment is unnecessary where the property is already in the possession of the successful party [12] or where a return is not demanded [13] or is impossible.[14] In some states the judgment must be for the whole property or its value as a whole, and the various items need not be specified,[15] and special forms of judgment are sometimes provided in actions by particular persons.[16] Failure to follow the statutory form is fatal to the validity

99. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

1. Johnson v. Glaspey [N. D.] 113 NW 602. Verdict of not guilty does not determine the right to possession of property. Faxon v. Monser, 125 Ill. App. 328.

2. See Rev. Codes 1905, § 8427, relating to verdicts in suits for recovery of personalty in justice's courts. Johnson v. Glaspey [N. D.] 113 NW 602.

3. Where property has been redelivered to defendant on bond verdict merely for a money sum held insufficient. Johnson v. Clutter Music House [Fla.] 46 S 1. As to form of judgment, see post, § 11, Judgment and Award of Damages.

4. Verdict for property or its value, etc., held in alternative. Murdouch v. Tuten, 76 S. C. 502, 57 SE 547. When one receives property from another with knowledge that the latter has wrongfully taken it from a third party, both are jointly liable for the resulting injury, and hence a verdict in the alternative against both is not erroneous, though the one who seized the property has turned it over to the other. Id.

5. Under Rev. St. 1899, §§ 3921, 4473 (Ann. St. 1906, pp. 2163, 2452, 2453), verdict must assess value of property so as to enable successful party to elect between recovery of property or its value. Caldwell v. Ryan [Mo.] 108 SW 533. Where the verdict is for the aggregate value of the articles sued for according to the total sum of their separate value as alleged, and the court by instruction left it to the jury to pass on such separate values, failure to find **separate values** as required by Civ. Code Proc. § 330 was harmless. Black Raven Coal Co. v. Edmonson [Ky.] 108 SW 955.

6. Burns' Ann. St. 1901, § 558. Indiana Union Trac. Co. v. Bick, 40 Ind. App. 451, 81 NE 617.

7. Under Code Civ. Proc. § 1726, requiring value to be fixed as of time of trial, the value fixed by jury is conclusively presumed to relate to such time. Pabst Brew. Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163, afg. 54 Misc. 305, 105 NYS 962.

8. Pabst Brew. Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163.

9. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

10. Under Rev. St. 1899, §§ 4151, 4155-4158, where defendant's chattels are returned to defendant on his bond, the action may proceed as one for damages only, but either party may insist upon an alternative judgment. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

11. Under Gen. St. 1906, § 2188, par. 2, when property has been redelivered to defendant on bond, judgment for plaintiff must be against defendant for recovery of property, and against defendant and his sureties on bond for value thereof, to be satisfied by recovery of property or of amount adjudged against defendant and his sureties. Johnson v. Clutter Music House [Fla.] 46 S 1. Language of Gen. St. 1906, § 2188, par. 2, relating to judgment where the goods have been redelivered to defendant in bond, is mandatory, and a judgment is fatally defective if not in substantial compliance therewith. Id.

12, 13, 14. Boswell v. First Nat. Bk. [Wyo.] 92 P 624.

15. Jones v. Messenger [Colo.] 90 P 64.

16. Under Municipal Court Act, § 120, subd. 2, and section 123 (Laws 1902, p. 1486,

of the judgment [17] if the question is properly raised and saved.[18] A money credit cannot be allowed on a judgment for the return of the property.[19] As in other actions, the judgment is conclusive of only the issues in the replevin action [20] and upon the parties to such action and their privies.[21] In the absence of special grounds of equitable jurisdiction, equity cannot interfere with the replevin judgment.[22] As a general rule the prevailing party must accept the property if a return thereof is tendered,[23] and a proper tender of the property in a proper condition constitutes a satisfaction except as to damages for detention,[24] but the property must be returned in substantially the same condition as when taken.[25] In states where the judgment must be for the whole property and the value assessed as a whole,[26] a pro tanto satisfaction of the judgment cannot be had by a return of part of the property.[27]

It is sometimes provided that damages may be assessed without a jury.[28] Loss of profits may be considered in a proper case,[29] but such a case arises only where the loss is the necessary consequence of the wrongful seizure,[30] and the same rule applies to any other loss claimed,[31] and the plaintiff must have used reasonable diligence to avoid the loss.[32] A recovery for loss of profits which would have been earned by the use of the property precludes a recovery for the value of such use.[33] Damages for detention include depreciation in value.[34] Independently of statute, attorney's fees are not recoverable,[35] and the word "damages," as used in a statute, is not sufficiently

c. 580), one claiming lien on property for labor or material furnished thereon or therefor is only entitled to judgment for value of work or material, except that if such sum be not collected he may recover the property itself. Haehnel v. Trostler, 54 Misc. 262, 104 NYS 533.

17. Johnson v. Clutter Music House [Fla.] 46 S 1.

18. Nonconformity of the judgment to the statutory form must be objected to below in order to be available on appeal. Judgment not in alternative for value in case delivery cannot be made, as required by Mills' Ann. Code, § 227. Klug v. Munce [Colo.] 90 P 603.

19. Where purchaser recovered judgment against seller for possession of the property which latter had wrongfully seized, the latter could not be allowed credit for unpaid purchase money. Murdouch v. Tuten, 76 S. C. 502, 57 SE 547.

20. Judgment in replevin in favor of seller under conditional sale with reservation of title held not conclusive of rights of purchaser as to payments made in account of the purchase. Roach v. Curtis [N. Y.] 84 NE 283.

21. A judgment against an agent in replevin to which the principal is not a party does not bind the principal in a subsequent action of replevin by him. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

22. Allegation that complainant's inability to return whole property as required by replevin judgment was due to acts of defendant held insufficient to confer equity jurisdiction. Jones v. Messenger [Colo.] 90 P 64.

23. Under Code Civ. Proc. §§ 1722, 1725, 1726, the prevailing party must take the property if it can be had, with damages for its depreciation up to the date of the trial, subsequent injuries being remediable by action. Pabst Brew. Co. v. Rapid Safety Filter Co., 54 Misc. 305, 105 NYS 962, afd. 56 Misc. 445, 107 NYS 163.

24. Tender of property in condition at time of trial constitutes satisfaction of judgment, except as to damages for detention. See Code Civ. Proc. §§ 1722, 1725, 1726. Pabst Brew. Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163, afg. 54 Misc. 305, 105 NYS 962.

25, 26, 27. Jones v. Messenger [Colo.] 90 P 64.

28. Under Ill. Prac. Act, § 40 (3 Starr & C. Ann. St. c. 110, par. 41, p. 3031), damages may be assessed without a jury upon a default. Midland Contracting Co. v. Toledo Foundry & Mach. Co. [C. C. A.] 154 F 797. Such act is constitutional, Id. U. S. Rev. St. § 649, requiring stipulation in writing to waive jury, does not apply to defaults. Id. In absence of inconsistent provisions in Federal statutes, the Illinois practice will be followed by Federal courts in Illinois. Id.

29. Where plaintiff's team was seized and a definite loss which could not have been avoided was proved. Bowen v. Harris [N. C.] 59 SE 1044.

30. Bowen v. Harris [N. C.] 59 SE 1044.

31. Loss of logs thirty days after seizure of plaintiff's team held not shown to have been necessarily caused by such seizure. Bowen v. Harris [N. C.] 59 SE 1044.

32. Bowen v. Harris [N. C.] 59 SE 1044. Verdict for $1,250 for loss of profits caused by seizure of team, wagon and feed, and detention thereof for 18 days, held, under the evidence, excessive. Id.

33. Bowen v. Harris [N. C.] 59 SE 1044.

34. Under Code Civ. Proc. § 1722. Pabst Brew. Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163, afg. 54 Misc. 305, 105 NYS 962.

35. Gregory v. Woodbery, 53 Fla. 566, 43 S 504.

comprehensive to cover such fees.[36] Punitive damages are not recoverable in the absence of willful wrong, fraud or malice.[37] In an action by a purchaser against the seller who has seized the property, the measure of damages is not limited to the amount of the purchase money paid,[38] but where a conditional purchaser has assigned his interest, and the original seller replevies the property without tendering the amount of the purchase price paid, less compensation for use and damages, the defendant is entitled to damages to the extent of such amount.[39]

While the plaintiff may have his damages assessed in the replevin action,[40] it is held that he is not bound to do so, and, having regained possession, may maintain an independent action for his damages;[41] but on the other hand it is held that damages recoverable in the replevin action cannot be recovered in an independent action.[42] Where the judgment does not assess the value of the property, it does not bar an action against the unsuccessful party for conversion.[43]

§ 12. *Costs.*[See 8 C. L. 1741]

§ 13. *Review.*[See 8 C. L. 1741]—A judgment is not converted into a consent judgment, and as such unappealable, by a stipulation whereby a money credit is allowed to the defendant against the assessed valuation of the property.[44] A demurrer to the evidence saves the question as to the sufficiency of the plaintiff's interest,[45] and such point is not waived by subsequent requests for instructions on other theories.[46] The usual rules apply as to waiver of objections,[47] review of discretionary rulings,[48] and harmless error.[49]

§ 14. *Liability of plaintiff or his bond, and of receiptors.*[See 8 C. L. 1741]—No recovery can be had except for breach of conditions of the bond,[50] and in determining such breaches the court will look alone to the judgment in the replevin action.[51] Failure to return the property is not a breach of a condition to return it if restitution is adjudged where there is no such judgment,[52] nor is failure to pay damages a breach of a condition to perform the judgment where no damages are adjudged.[53] A condition to "duly prosecute" the action is satisfied by a prompt trial and does not extend to the success or failure on the merits.[54] In a suit on a redelivery bond, the burden is on the principal and surety to show why the identical property is not forthcoming.[55] Damages for injury to the property while in the replevin plaintiff's possession may be recovered,[56] but, under some of the statutes, damages for detention cannot be

36. As used in Rev. St. 1892, § 1724. Gregory v. Woodbery, 53 Fla. 566, 43 S 504.

37. Gregory v. Woodbery, 53 Fla. 566, 43 S 504.

38. Civ. Code 1892, § 2450, has no application. Murdouch v. Tuten, 76 S. C. 502, 57 SE 547.

39. National Cash Register Co. v. Cervone, 76 Ohio St. 12, 80 NE 1033.

40. Revisal 1905, § 570. Bowen v. Harris [N. C.] 59 SE 1044. Damages for injury to and deterioration of the property may be assessed. McDonough v. Reilly, 131 Ill. App. 553.

41. Bowen v. Harris [N. C.] 59 SE 1044.

42. Pabst Brew. Co. v. Rapid Safety Filter Co., 56 Misc. 445, 107 NYS 163, afg. 54 Misc. 305, 105 NYS 962.

43. Caldwell v. Ryan [Mo.] 108 SW 533.

44. Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 SW 386.

45. That property was not plaintiff's, but belonged to partnership of which he was a member. Steckman v. Gault State Bk., 126 Mo. App. 664, 105 SW 674.

46. Steckman v. Gault State Bk., 126 Mo. App. 664, 105 SW 674.

47. Where defendant gave redelivery bond, procured change of venue, and contests case on merits, he could not urge lack of demand for first time on appeal to the county court. Denver Live Stock Commission Co. v. Parks [Colo.] 91 P 1110.

48. The trial court is vested with a sound discretion in the matter of amendments which will not be reviewed unless abused. Refusal to allow defendants to amend by pleading attachment proceedings as justification. Taylor v. Brown [Or.] 90 P 673.

49. Defendant held not harmed by misstatement of number of steers in controversy when there was no issue as to the number. Sheffield v. Hanna [Iowa] 114 NW 24. Admission of improper evidence of damages is harmless where no damages are allowed. Brown v. Lewis [Or.] 92 P 1058.

50, 51, 52, 53, 54. Vallandingham v. Ray [Ky.] 108 SW 896.

55. Kaminsky v. Horrigan, 2 Ga. App. 332, 58 SE 497.

56. Mounts v. Murphy, 31 Ky. L. R. 1192, 104 SW 978.

allowed to the defendant unless they are assessed in the replevin action.[57] Where the defendant elects to treat the alleged wrongful seizure by the plaintiff as a conversion, of which he notifies the plaintiff, the latter may dispose of the property as his own, subject to his liability for its value when taken in the event of judgment against him,[58] and in such case interest should be allowed on such value from the time of the conversion.[59] Issue of execution against the plaintiff and return thereof unsatisfied is sometimes made a condition precedent to the right to sue the sureties.[60]

REPLICATION; REPORTED QUESTIONS; REPORTS; REPRESENTATIONS; REPRIEVES; RES ADJUDICATA; RESCISSION; RESCUE; RES GESTAE; RESIDENCE; RESISTING OFFICER; RESPONDENTIA; RESTITUTION, see latest topical index.

RESTORING INSTRUMENTS AND RECORDS.

§ 1. Evidence and Proof of Loss and of Contents, 1526.
§ 2. Proceedings to Restore Lost Papers or Instruments, 1526.
§ 3. Proceedings to Restore Lost or Destroyed Records, 1527.

The scope of this topic is noted below.[61]

§ 1. *Evidence and proof of loss and of contents.* See 8 C. L. 1742—The rule that proof of execution of a paper to be used upon is essential applies in the case of lost instruments,[62] but such proof need not be by preponderance of the evidence.[63] In proceedings to prove by circumstances the execution of a lost deed, any evidence tending to prove the main fact is admissible.[64] Another paper executed at the same time, tending to show an admission of the execution of the lost instrument by defendant, is properly received in evidence,[65] as is the testimony of a third party to whom both papers were delivered at the time as identification of the paper and to show the loss,[66] but not testimony of third party that he received a sum of money at the same time as res inter alios acta.[67] A judgment substituting lost files is conclusive and cannot be attacked by affidavit,[68] but it may be shown that such substituted files are incorrectly copied into the record.[69] In re-establishing ancient documents, the rule of strict proof is somewhat relaxed and cannot be applied with technical nicety.[70]

§ 2. *Proceedings to restore lost papers or instruments.* See 8 C. L. 1743—The court may re-establish its records in an undetermined suit and appeal from such order will

57. Under Civ. Code Proc. § 388, authorizing defendant's damages for detention to be assessed and recovered in the replevin action where the plaintiff has taken possession under bond. Mounts v. Murphy, 31 Ky. L. R. 1192, 104 SW 978.

58, 59. Blaul v. Wandel [Iowa] 114 NW 899.

60. Under Municipal Court Act, Laws 1902, p. 1531, c. 580, § 126. De Veaux v. Holliday, 107 NYS 747.

61. The admissibility of parol evidence to prove the contents of a lost instrument (see Evidence, 9 C. L. 1228) and recovery on lost instruments without restoration (see Negotiable Instruments, 10 C. L. 962, and like topics) are elsewhere treated.

62. Suit on lost note, defense non est factum. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

63. Instruction refused. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

64. Acts, claims, and general reputation of ownership by claimant and acquiescence by those who would be owners had deed not been executed. J. M. Guffey Petroleum Co. v. Hooks [Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690.

65. Contract executed at the same time as lost note. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

66. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

67. Error to admit. Martin v. Jesse French Piano & Organ Co. [Ala.] 44 S 112.

68. All papers filed in a criminal case disappeared and were substituted in part upon motion of the state and in part upon defendant's motion and judgment entered so declaring. Davis v. State [Tex. Cr. App.] 107 SW 828.

69. Davis v. State [Tex. Cr. App.] 107 SW 828.

70. Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 S 874.

not lie pending final judgment.[71] Restoration may be of separate documents and files or of the entire record,[72] but, if all proceedings have been destroyed, the court should be careful to re-establish the entire record and include records omitted in the application but necessary to complete the files, upon proper showing by the adverse party.[73] The omission of a portion of the record sought to be restored is properly set up in an answer to the application for re-establishment,[74] and the burden is then upon the applicant to show by a preponderance of the evidence that the exhibits offered are not substantial copies of the originals or that no such originals existed.[75] A court of equity has jurisdiction upon proper showing to restore a lost deed or decree a reconveyance.[76] Laches is no defense in an action to compel re-execution of a lost deed,[77] nor can it be set up that deed was withheld from record to defraud creditors when in fact no creditors were defrauded.[78] In an action to compel re-execution of a lost deed, plaintiff is not estopped to deny pecuniary consideration by reason of his declaration of consideration stated in the instrument,[79] and defendants are not entitled to a vendor's lien for the stated consideration when the absence of pecuniary consideration is shown.[80] Where statute requires indemnifying bond by one who recovers upon lost negotiable paper, it is not necessary to offer bond before commencing action.[81] Proceedings to show execution of a lost instrument by circumstances must be predicated upon a search for, and failure to find, the original.[82]

§ 3. *Proceedings to restore lost or destroyed records.*[See 8 C. L. 1743]—The Florida statute admitting in evidence certified copy of a destroyed record of deed, actually recorded for twenty years but not acknowledged or proved for record, is valid.[83] Under the California statute providing that, when public records have been destroyed, title to realty may be re-established upon suit of one in actual possession either by himself or tenant, undisturbed constructive possession and legal title is not sufficient to support action,[84] and the statute is not invalid as special legislation in that it divides property owners into two classes without natural or constitutional basis.[85]

RESTRAINT OF ALIENATION; RESTRAINT OF TRADE; RETRAXIT; RETURNABLE PACKAGE LAWS; RETURNS; REVENUE LAWS; REVERSIONS; REVIEW; REVIVAL OF JUDGMENTS; REVIVOR OF SUITS; REVOCATION, see latest topical index.

71. Restoring destroyed declaration and plea in suit pending is controlled by § 1996. Gen. St. 1906, which is declaratory of the common law so far as it relates to such re-establishment, and the order is not a final judgment from which writ of error will lie under § 1692. Sections 1997, 1998 and 1999 have no application herein. Florida Cent. R. Co. v. Bostwick, 53 Fla. 124, 44 S 31.

72. Gen. St. 1906, § 1996. Florida Cent., etc., R. Co. v. Bostwick [Fla.] 45 S 1033.

73. Error to exclude. Florida Cent., etc., R. Co. v. Bostwick [Fla.] 45 S 1033.

74. Order to strike out is error. Florida Cent., etc., R. Co. v. Bostwick [Fla.] 45 S 1033.

75. Florida Cent., etc., R. Co. v. Bostwick [Fla.] 45 S 1033.

76, 77. Shugars v. Shugars, 105 Md. 336, 66 A 273.

78. Plaintiff withheld deed from record pending judgment which was later given in his favor and pending settlement of a disputed debt, now paid. Shugars v. Shugars, 105 Md. 336, 66 A 273.

79, 80. Shugars v. Shugars, 105 Md. 336, 66 A 273.

81. Under Code Civ. Proc. § 1917, it is error to dismiss complaint before trial before plaintiff has been given opportunity to furnish bond. Church v. Stevens, 56 Misc. 572, 107 NYS 310.

82. Punchard v. Masterson [Tex. Civ. App.] 103 SW 826.

83. Chap. 5162, p. 97, laws 1903, not repugnant to Const. 1885, art. 16, § 21, admitting certified copies of records which have been acknowledged and proved for record, nor does it violate Const. 1885, art. 3, § 16, providing that the subject-matter of an act shall be expressed in its title. Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 S 874.

84. The McEnerney Act, St. Ex. Sess. 1906, p. 78, c. 59. Lofstad v. Murasky [Cal.] 91 P 1008.

85. Lofstad v. Murasky [Cal.] 91 P 1008.

REWARDS.

§ 1. Nature and Definition, 1528.
§ 2. The Offer, 1528.
§ 3. Earning Reward, 1528.

This topic treats only of rewards offered to the public generally.

§ 1. *Nature and definition.*[See 8 C. L. 1521]

§ 2. *The offer.*[See 8 C. L. 1743]

§ 3. *Earning reward.*[See 8 C. L. 1744]—Public policy forbids that an officer should claim a reward for performing an act within the scope of his duty,[86] but neither public policy nor positive law forbids him to receive a reward for an act which he is not required to perform.[87]

RIGHT OF PRIVACY; RIGHT OF PROPERTY, see latest topical index.

RIOT.[88]

Matters common to all crimes[89] and liability of municipalities for mob violence[90] are elsewhere treated.

Riot is a disturbance of the peace by three or more persons assembling with a common intent to do an unlawful act of violence or some other act in a violent and tumultuous manner.[91] Not only must there be a common intent, but it is necessary to show a concert of action in furtherance of the common purpose,[92] but positive proof of a common purpose or of predetermination to riot is unnecessary; purpose and intent may be implied from the acts of the parties.[93] Where statute prescribes a higher degree of punishment for riot when committed under enumerated aggravating circumstances, the court is without power to inflict the higher punishment when the indictment fails to charge such circumstances.[94]

RIPARIAN OWNERS.

§ 1. Persons Who Are Riparian Owners and Title to Lands Under Water, 1528.
§ 2. Rights Attendant on Change in Bed of Stream or in Shore Line, 1530.
§ 3. Rights Incidental to Riparian Ownership, 1530.
§ 4. Subjection to Public Easements, 1530.
§ 5. Action for Protection of Riparian Rights, 1530.

Scope of title.—This topic includes matter relating to ownership and use of the soil bordering on and under water, accretion, reliction, erosion, and avulsion, and rights incidental thereto. Matters relating to water, navigable or otherwise, are treated elsewhere.[95]

§ 1. *Persons who are riparian owners and title to lands under water.*[See 8 C. L.

86. Constable arresting bank robber, without warrant cannot claim he acted in his individual capacity. Somerset Bk. v. Edmund, 76 Ohio St. 396, 81 NE 641.

87. Police officer apprehending a principal on a bond can claim reward offered by the surety. Curran v. Collier [Ind. T.] 104 SW 572. Not error to refuse to direct a verdict for the defendant. Id.

88. See 8 C. L. 1744.

89. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 10 C. L. 57.

90. See Municipal Corporations, 10 C. L. 881.

91. Threats, curses and discharge of firearms before a residence by three men at night, to the terror of the inmates, is riot. Lewis v. State, 2 Ga. App. 659, 58 SE 1070.

92. Evidence insufficient to establish the offense. Stanfield v. State, 1 Ga. App. 532, 57 SE 953.

93. When the inmates of a saloon attacked a party of officers and a fatal fight resulted, held riot. State v. Seeley [Or.] 94 P 37. One voluntarily engaging in a riotous demonstration may be guilty of riot although the altercation arose from an attempt to arrest him without warrant. Id.

94. Alaska Pen. Code, §§ 111, 112, makes simple riot punishable by jail sentence, but riot with arms, etc., a penitentiary offense. Christensen v. U. S. [C. C. A.] 151 F 766.

95. See Waters and Water Supply, 8 C. L. 2262; Navigable Waters, 10 C. L. 917.

1744—A riparian owner is one whose lands border [96] upon a watercourse [97] or lake. Unless previously granted,[98] a state upon its admission into the Union becomes vested with tide lands [99] and lands under and in navigable streams [1] in trust for the public,[2] and in some states cannot dispose of the same except in furtherance of public navigation.[3] In others, however, it may convey the shore lands and subaqueous lands.[4] A change of title is effected with a change of sovereignty.[5] In some states the grant of lands bordering upon a navigable stream carries title to ordinary low-water mark,[6] but in others only to highwater-mark.[7] A deed, however, calling for the edge of a stream as a boundary passes no title to the bed.[8] Under the common law of New Jersey, a riparian owner improving the shore upon tide waters acquired title to the low-water mark.[9] So long as the title is held by the state in trust for public purposes,[10] title thereto cannot be acquired by adverse possession.[11] The ownership and control of lakes and ponds, in Maine, of more than ten acres in extent are vested in the state and hence their waters may be diverted for public uses without compen-

96. Existence of street between outer edge of upland and tide water will not separate riparian rights from upland. Ennis v. Grover, 53 Misc. 66, 103 NYS 1088.

97. Water courses made by hand of man may have been created under such conditions that, so far as rules of law and rights of public or of individuals are concerned, they are to be treated as if they were of natural origin. Stimson v. Brookline [Mass.] 83 NE 893.

98. Where island in Missouri river existed before Missouri became a state, and it was surveyed as government land and patented by United States, no title to it ever vested in state. Stoner v. Royar, 200 Mo. 444, 98 SW 601.

99. Land between lines of ordinary high and low tides are tide lands. People v. Kerber [Cal.] 93 P 878.

1. Tide lands fronting on navigable waters vest in state by virtue of its sovereignty (People v. Kerber [Cal.] 93 P 878). as well as land under the same (Hume v. Rogue River Packing Co. [Or.] 92 P 1065). Title to all of shores of sea and arm of sea covered and uncovered by ebb and flow of tide vests in state. Id. Right of states to regulate and control shores of tide waters and land under them is conceded, and is same as that exercised by crown of England. Id. U. S. has no title to islands lying in the St. Mary's river between the Michigan shore and the thread of the stream which were not surveyed nor claimed at time of its general survey, but such title, like that to the submerged land, remained in the state, and under the law of Michigan is surrendered to and vests in the owner of the adjoining shore land. United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F 25.

2. State v. Muncie Pulp Co. [Tenn.] 104 SW 437. Subject to public right of navigation. Hume v. Rogue River Packing Co. [Or.] 92 P 1065.

3. Constitution in some states provides that tide lands remaining subject to use for purposes of navigation cannot be disposed of by state in any manner except, in furtherance of purposes of navigation to which it is dedicated. People v. Kerber [Cal.] 93 P 878.

4. St. 1852, p. 110, c. 157, incorporated all residents of certain territory and authorized them to take and hold a portion of sea-shore, beach, and flats at Beverly Farms, to be used for purpose of gathering drift stuff and weeds and of boating and bathing, but expressly provided that it should not impair legal rights of any person. Held, that nothing more than possessory right was created as against individual owners. Preston v. West Beach Corp., 195 Mass. 482, 81 NE 253. Where corporation, duly organized, undertook work imposed and attempted to manage and control property, it took and held the property within the statute. Id.

5. A purported conveyance by the alcalde of the pueblo of San Diego on March 10, 1850, of tide lands passed no title since at that time title had accrued to the United States as sovereign. People v. Kerber [Cal.] 93 P 878.

6. Title to bed of stream remains in state. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

7. Hume v. Rogue River Packing Co. [Or.] 92 P 1065.

8. Fuller v. Cole, 33 Pa. Super. Ct. 563.

9. Helney v. Nolan [N. J. Law] 67 A 1008. In ejectment, involving land formerly under tide water, held error to reject defendant's offer of proof that he acquired title by reclamation under Wharf Act, March 18, 1851, § 1. Id. Court cannot assume without proof that low-water mark may not lie beyond center line of creek. Id.

10. Public use in tide lands fronting on a navigable bay may, by some lawful act of public authority, be discontinued or abandoned. and if the state holds the title it will thereafter hold it as a proprietor. People v. Kerber [Cal.] 93 P 878. The establishment of a sea-wall line has no effect whatever upon the character of the waters and tide lands between it and the shore as property devoted to use for navigation at least, until some further action is taken looking to the erection of the wall or the abandonment of the public use of the waters between it and the shore. Id.

11. Tide lands on navigable bay. People v. Kerber [Cal.] 93 P 878.

sation to abutting owners.[12] Title to lands under water may be divested by the exercise of the power of eminent domain,[13] but not otherwise.[14]

§ 2. *Rights attendant on change in bed of stream or in shore line.*[See 8 C. L. 1746] A riparian owner has no title to lands formed adjacent to his own by an avulsion,[15] but the title of the original owner follows the same.[16] Where the boundary lines between individuals, states, or nations, are marked by streams, and the location of the stream is altered by erosion and accretion,[17] it continues to be the boundary line,[18] but where the change results from an avulsion, the boundary line remains as before.[19] Where water recedes or land is formed upon the bed of navigable waters as in the case of islands, the title to such dry land is in the state,[20] but upon the drying up of a non-navigable lake, the riparian owners acquire title to the center thereof according to their respective frontage.[21] Where land becomes submerged by the gradual shifting of the river, the title reverts to the state,[22] but land lost by submergence may be regained by reliction, and its disappearance by erosion may be returned by accretion, on which the ownership, temporarily lost, will be regained.[23]

§ 3. *Rights incidental to riparian ownership.*[See 8 C. L. 1748]—An owner of flats has in them an estate in fee, subject only to the public rights of fishing, fowling, and passing over them in boats, and may maintain trespass quare clausum for any injury done to his lawful possession of said flats.[24] Where land is "granted, bargained, sold, and conveyed," it carries all water rights and riparian rights appurtenant to the land.[25] The mere fact that a water course was artificially dug would not necessarily prevent the existence of rights in it, after a long time, like those pertaining to a natural watercourse.[26]

§ 4. *Subjection to public easements.*[See 8 C. L. 1749]

§ 5. *Action for protection of riparian rights.*[See 8 C. L. 1749]—A riparian owner

12. American Woolen Co. v. Kennebec Water Dist., 102 Me. 153, 66 A 316. When legislature has directly granted authority to divert water for public purposes, without requiring as a prerequisite any proceedings for condemnation or for ascertainment and payment of damages, grantee can begin such diversion at once, and a bill in equity to restrain such diversion until such proceedings are had cannot be sustained. Id.

13. In re Water Front on North River, 105 NYS 750. The legislature in conferring authority to improve the river and create artificial freshets did not delegate to appellant the right to take or damage the respondent's property and shore rights without compensation. Kalama Elec. L. & P. Co. v. Kalama Driving Co. [Wash.] 94 P 469.

14. Where a city under the statute takes any land, property, or privileges for its waterwork's plant, it must make compensation. Beckerle v. Danbury [Conn.] 67 A 371.

15. Hence, constructive possession does not attach thereto through actual possession of the contiguous land. Stockley v. Cissna [Tenn.] 104 SW 792. Where change in channel is sudden and violent and certain in effect, it is by avulsion. State v. Muncie Pulp Co. [Tenn.] 104 SW 437. Where in two days river abandoned old channel and took an entirely new one, nearly 20 miles shorter, held, an avulsion. Id.

16. That land is swept away by an avulsion does not extinguish the owner's title, for, when the land reappears above the water, there is a restoration of title and right to possession. Stockley v. Cissna [Tenn.] 104 SW 792.

17. Where change in channel of river is made insensibly, by gradual and imperceptible washing away, it is by erosion. State v. Muncie Pulp Co. [Tenn.] 104 SW 437. Where soil is gradually and imperceptibly deposited against the shore, it is an accretion. Id.

18. State v. Muncie Pulp Co. [Tenn.] 104 SW 437; Stoner v. Royar, 200 Mo. 444, 98 SW 601.

19. State v. Muncie Pulp Co. [Tenn.] 104 SW 437. Property cut in two by high water. Stoner v. Royar, 200 Mo. 444, 98 SW 601.

20. State v. Muncie Pulp Co. [Tenn.] 104 SW 437. Soil under Mississippi river to western boundary of the state belongs to state, and whenever it is abandoned by water flowing over it, and no longer suitable or required for commerce and navigation, when not done imperceptibly and in process of accretion, may be taken in possession and disposed of by state. Id.

21. Rhodes v. Cissell, 82 Ark. 367, 101 SW 758.

22. Hume v. Rogue River Packing Co. [Or.] 92 P 1065.

23. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

24. Chase v. Cochran, 102 Me. 431, 67 A 320.

25. Rianda v. Watsonville Water & Light Co. [Cal.] 93 P 79.

26. Stimson v. Brookline [Mass.] 83 NE 893.

has the same remedies for the protection of his property as land owners in general,[27] but he cannot enjoin a threatened injury unless it will result in irreparable injury.[28] He cannot recover for an act to which he has consented.[29]

ROBBERY.

§ 1. Nature and Elements, 1531.
§ 2. Indictment and Prosecution, 1531.
A. Indictment, 1531.
B. Evidence, 1533.
C. Instructions, 1533.

Matters common to other crimes are elsewhere treated.[30]

§ 1. *Nature and elements.* See 8 C. L. 1749—Robbery, at the common law, is the felonious taking[31] from the person or possession of another[32] of goods or money to any value by violence[33] or intimidation[34] of such a nature as would overcome the resistance of a reasonably courageous person,[35] or both.[36] Attempted larceny becomes robbery when force is used to complete the unlawful act.[37] Statutory definitions of the offense are usually mere declarations of the common law.[38] Several states prescribe additional punishment for robbery by one armed with a dangerous weapon,[39] and a difference in degree is sometimes made between robbery by force and by intimidation.[40] In some instances a particular act is defined as constituting an element of the offense.[41]

§ 2. *Indictment and prosecution. A. Indictment.* See 8 C. L. 1750—Indictment or information must allege ownership[42] and all the essential elements of larceny,[43]

27. May sue in tort. Stimson v. Brookline [Mass.] 83 NE 893. One negligently placing on banks of stream sand, in such manner as to unreasonably injure riparian owner is liable for injuries sustained. Griffin v. National Light & Thorium Co. [S. C.] 60 SE 702. An electric light and power company, owning property across which a river flows and utilizing the flow to run its plant, held entitled to enjoin a driving company from interfering with plaintiff's riparian rights by storing water for artificial freshets in such a way as to compel plaintiff's plant to lie idle. Kalama Elec. L. & P. Co. v. Kalama Driving Co. [Wash.] 94 P 469.

28. Beckerle v. Danbury [Conn.] 67 A 371.

29. Where plaintiff, who is a riparian owner, consents to acts done by a city in construction and operation of its waterwork's system, he cannot recover damages. Beckerle v. Danbury [Conn.] 67 A 371.

30. See Criminal Law, 9 C. L. 851; Indictment and Prosecution, 10 C. L. 57.

31. Animus furandi essential. State v. McCoy [W. Va.] 59 SE 758. Motive of robbery not neutralized by an intent also to rape. People v. White, 5 Cal. App. 329, 90 P 471.

32. Money taken from possession though when taken it lay on the ground before the owner and another was handling it at his request. Reyes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 219, 102 SW 1156.

33. Taken by force when removed from pocket during partial incapacity of owner and over his protest and slight resistance. Williams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 211, 102 SW 1134. Force without fear. People v. Ortega [Cal. App.] 94 P 869.

34. Display of arms immediately after taking sufficient to constitute a taking by intimidation. Reyes v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 219, 102 SW 1156.

35. No robbery when grown man allowed one of two boys to pick his pocket and feigned ignorance, fearing the boys were armed. Johnson v. State, 1 Ga. App. 729, 57 SE 1056.

36. Where one intimidated complainant with a revolver while another forcibly robbed him, each is guilty of robbery, both by force and intimidation. Harris v. State, 1 Ga. App. 136, 57 SE 937.

37. Detected pickpocket used force to withdraw money from pocket. Carter v. State [Ga. App.] 60 SE 216.

38. McGinnis v. State [Wyo.] 91 P 936.

39. Tabor v. State [Tex. Cr. App.] 107 SW 1116.

40. Pen. Code 1895, § 151. Harris v. State, 1 Ga. App. 136, 57 SE 937.

41. Threat to do an illegal, injurious act constitutes intimidation. Pen. Code 1895, art. 857. Threat to do legal act held not applicable. Burnsides v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 132, 102 SW 118.

42. Failure to allege ownership fatal. McGinnis v. State [Wyo.] 91 P 936. "Felonious taking" does not imply ownership in another. Id.

Note: "It was held that under the common law it is necessary to allege and prove ownership precisely as in larceny, and that such is the rule where it is a statutory crime. State v. Wasson, 126 Iowa, 320, 101 NW 1125. In People v. Vice, 21 Cal. 344, the indictment was for robbery and charged that the defendant 'did violently and feloniously take money of the following description * * * from the person of another, to wit, from the person of Jesse A. Brandy by force, threats,' etc. The indictment was

as well as the essential facts of robbery,[44] but need not set forth nonessential particulars.[45] The offense need not be charged in the exact language of the statute if what is tantamount is fully set out,[46] and it is not sufficient to charge in the language of

not demurred to, but after a verdict of guilty defendant moved in arrest of judgment on the ground that the ownership of the property was not stated in the indictment, which motion was denied. On appeal the supreme court held the indictment fatally defective for the want of such allegation and reversed the judgment. And in People v. Jones, 53 Cal. 58, it was held that an indictment for robbery must aver every fact necessary to constitute larceny, and more. And in People v. Ammerman, 118 Cal. 23, 50 P 15, the defendant was informed against for robbery and pleaded former acquittal, once in jeopardy, and not guilty. The opinion recites that an information against the defendant for the crime of robbery involving the same transaction had previously been filed, and under it defendant was arraigned and pleaded not guilty. A jury was impaneled, the information was read, and the plea stated. After the jury was sworn, and before any evidence was offered, upon motion of the district attorney the information was dismissed and the defendant discharged. The ground for the motion was that the information did not allege the ownership of the property stolen, which was in fact true. It was held that the first information was invalid because it failed to allege the ownership of the property taken, and there was no jeopardy, and that the court did not err in instructing the jury to find for the people upon the plea of former acquittal and once in jeopardy. The California cases on the question are cited and reviewed in a later case by the court of appeal of California (People v. Cleary, 1 Cal. App. 50, 81 P 753), and it was again held that an information for robbery, which failed to allege the ownership of the property, did not charge an offense. We find nothing in the case of In re Myrtle, 2 Cal. App. 383, 84 P 335, in conflict with the rule as stated in the other California cases. It is there said: 'In the Ammerman Case the taking of the property might have been for some other purpose, for the language of the information does not intimate that the object was to steal it, any more than the mere naming the crime "robbery" might tend to indicate a theft; and there being no allegation of ownership, and no words used by which any inference could be drawn of ownership in one other than the defendant, except the mere possession Richard Johnson had of the money taken by Ammerman at the time. We think the decision in that case was correct.' Further on in the opinion, in commenting on the case of People v. Cleary, 1 Cal. App. 50, 81 P 753, it is said: 'We reiterate all that was said in this opinion of People v. Cleary as applied to the facts in that case and in all cases of like character, where there is a plea of not guilty and a motion in arrest of judgment, and we still maintain that in all cases of robbery it must appear, either from the language of the information or the plea of the defendant, that the property taken is not the property of the defendant.' If the information charged no offense, it could not be pleaded in bar of a subsequent prosecution. State v. Brown, 47 Ohio St. 102, 23 NE 747, 21 Am. St. Rep. 790. The statute of Arkansas is in substantially the same language as ours, and the supreme court of that state held an indictment for robbery insufficient in failing to allege the ownership of the money charged to have been taken. The court said: 'That allegation is found in all the common-law precedents of indictments for robbery, and we have been unable to find any adjudged case in which it has been dispensed with under a statute similar to ours.' Boles v. State, 58 Ark. 35, 22 SW 887, and cases cited in the opinion. It is stated in 18 Enc. P. & P. 1233: 'It is very generally held that a conviction for larceny may be had upon an indictment for robbery,' and authorities from many states are cited in support of the text. Without extending this opinion by further quotations from decisions, we deem it sufficient to cite the following cases, in each of which it is directly held that an indictment or information for robbery is fatally defective which fails to allege the ownership of the property alleged to have been taken: State v. Dengal, 24 Wash. 49, 63 P 1104; State v. Morgan, 31 Wash. 226, 71 P 723; Smedly v. State, 30 Tex. 214; State v. Lawler, 130 Mo. 366, 32 SW 979, 51 Am. St. Rep. 575; Commonwealth v. Clifford, 8 Cush. [Mass.] 215. We have found the contrary held in but two states, Oregon and Tennessee. In State v. Dilley, 15 Or. 70, 3 P 648, the indictment followed the form prescribed by statute for an indictment for robbery, and the court said that the statute provided in express terms what should be a sufficient statement in an indictment for robbery, being armed with a dangerous weapon, and it was upon that ground alone that the indictment was held to be sufficient, while admitting that, but for the statute, it would have been defective. In Clemons v. State, 92 Tenn. 282, 21 SW 525, the indictment was held sufficient, being in the language of the statute, and citing State v. Swafford, 3 Lea [Tenn.] 162, but no other authority, in support of the decision. In the latter case the ownership of the property was alleged to be in the person robbed."—From McGinnis v. State [Wyo.] 91 P 936.

43. McGinnis v. State [Wyo.] 91 P 936.

44. Conviction for robbery under an information sufficient to charge larceny only not sustained. People v. Ho Sing [Cal. App.] 93 P 204. Information charging taking from the immediate presence insufficient allegation of taking from possession under Pen. Code, § 211, defining robbery. Id.

45. Failure to allege degree of force immaterial, since not specified in Pen. Code, § 390, defining robbery. State v. Paisley [Mont.] 92 P 566. Means of intimidation need not be alleged. State v. Moore, 203 Mo. 624, 102 SW 537.

46. State v. Presley [Miss.] 44 S 827.

the statute unless it states all the essential elements of the offense to be punished.[47] An allegation of facts which constitute an element of the offense supplies an omission to allege that element in terms.[48] An averment of the denomination of a stolen bank bill is sufficient allegation of value.[49] Force and intimidation may be charged conjunctively under a statute using the words disjunctively,[50] or even where each constitutes a different grade of the offense.[51] Where the taking is from the person, intimidation need not be alleged.[52]

(§ 2) *B. Evidence.* See 6 C. L. 1750—Corpus delicti being established, identification by the complainant and evidence of proximity of the accused will sustain the charge of robbery.[53] Property taken at the same time though not charged in the indictment is admissible as part of the res gestae.[54] A conductor's pass issued to an alleged train robber is admissible in evidence,[55] and a display of money by complainant shortly before he was robbed may be proved,[56] as may the fact that defendant's attorney spirited away defendant's baggage, preventing search.[57] Cases involving sufficiency of evidence are cited in the note.[58] Loss of money by the victim of an unprovoked assault, together with testimony that accused put his hand into the pocket, sufficient to sustain verdict.[59]

(§ 2) *C. Instructions.* See 6 C. L. 1751—A charge that unexplained possession of stolen goods tends to show guilt is proper, especially when given in connection with an instruction that possession alone is insufficient to authorize conviction,[60] and a charge that possession was too remote to be an incriminating circumstance is properly refused where the jury is instructed upon circumstantial evidence.[61] Instructions must define the essential elements of the offense,[62] but the statutory definition is sufficient,[63] and defendant cannot be heard to complain of an instruction overstating the essential elements to the disadvantage of the prosecution.[64] As in other instances, an alternative charge may be omitted or refused when not warranted by the evidence,[65] as also may be an argumentative charge.[66] A valid theory of defense

47. McGinnis v. State [Wyo.] 91 P 936.

48. Violence and taking against the will sufficiently alleged in charge that accused unlawfully, feloniously and violently did rob and steal from the person. State v. Presley [Miss.] 44 S 827. Not necessary to allege assault where charge is of acts which are in fact an assault. Id. "Feloniously did make assault" sufficiently charges that the assault was felonious. State v. Calvert [Mo.] 107 SW 1078. Allegation that one impersonating an officer obtained money by illegal arrest and threat of imprisonment sufficiently charges a threat of illegal, injurious act under Pen. Code 1895, art 857. Burnsides v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 132, 102 SW 118.

49. Boyd v. State [Ala.] 45 S 591.

50. Rev. St. 1899, § 1893 (Ann St. 1906, p. 1259). State v. Calvert [Mo.] 107 SW 1078.

51. Pen. Code 1895, § 151. Harris v. State, 1 Ga. App. 136, 57 SE 937.

52. State v. Presley [Miss.] 44 S 827.

53. Buckley v. State [Neb.] 112 NW 283.

54. Bills of exchange taken by train robber when indictment charges money alone. Tabor v. State [Tex. Cr. App.] 107 SW 1116.

55. Tabor v. State [Tex. Cr. App.] 107 SW 1116.

56. Boyd v. State [Ala.] 45 S 591.

57. Tabor v. State [Tex. Cr. App.] 107 SW 1116.

58. Evidence held sufficient to show force and fear. People v. White, 5 Cal. App. 329, 90 P 471. Evidence sufficient to sustain verdict of robbery. Tabor v. State [Tex. Cr. App.] 107 SW 1116. Extrajudicial confession supported by corroborative evidence sufficient to sustain conviction of robbery. Shell v. State, 84 Ark. 344, 105 SW 575.

59. People v. McKenna, 118 App. Div. 766, 103 NYS 870.

60. People v. Hallam [Cal. App.] 92 P 190.

61. Tabor v. State [Tex. Cr. App.] 107 SW 1116.

62. Instruction ignoring animus furandi as an essential is fatally bad. State v. McCoy [W. Va.] 59 SE 758. Under Pen. Code 1895, art. 857, making threat to do an illegal, injurious act sufficient duress within the definition of robbery, a charge omitting the element of illegality is error. Burnsides v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 132, 102 SW 118.

63. People v. White, 5 Cal. App. 329, 90 P 471.

64. That the taking must have been by force and violence, putting in fear. State v. Calvert [Mo.] 107 SW 1078.

65. Both force and fear being shown, no error to omit charge on larceny. People v. White, 5 Cal. App. 329, 90 P 471. No error to refuse instruction on simple assault where the only evidence of assault was in connection with robbery. People v. Fitts, 4 Cal. App. 432, 91 P. 536.

66. Charge that nonpossession of the described property by complainant before and

advanced by the accused must be presented to the jury.[67] Where the evidence tends to show assault with intent other than robbery, an instruction that intent to rob is essential to conviction is not neutralized by a subsequent charge on the theory that such was the intent,[68] and an instruction that robbery might be committed though assault was begun with another motive does not advise the jury that intent to rob is nonessential.[69]

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SALES.

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The scope of this topic is noted below.[70]

§ 1. *Definition; distinction from other transactions.*[See 8 C. L. 1751]—A contract of sale is a contract by which one agrees to transfer title to a certain thing to another,

by accused after the alleged robbery might raise a reasonable doubt was properly refused. Boyd v. State [Ala.] 45 S 591.

67. Where conviction hinged upon legality of an arrest by accused, held error to ignore testimony to effect that act was done at the request of an officer. Burnsides v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 132, 102 SW 118.

68. Robbery and rape. People v. White, 5 Cal. App. 329, 90 P 471.

69. People v. White, 5 Cal. App. 329, 90 P 471.

70. **It includes** generally matters relating to private sale of chattels. **It excludes** matters common to all contracts (see Contracts, 9 C. L. 654), reality of assent (see Fraud and Undue Influence, 9 C. L. 1475; Duress, 9 C. L. 1016; Incompetency, 10 C. L. 40; Mistake and Accident, 10 C. L. 853), the validity of bulk stock sales (see Fraudulent Conveyances, 9 C. L. 1503), the operation of the statute of frauds (see Frauds, Statute of, 9 C. L. 1494), and matters peculiar to the sale of particular kinds of property, such as growing crops (see Emblements and Natural Products, 9 C. L. 1072), corporate stock (see

who engages to accept the same from him and pay a price therefor.[71] Whether a transaction is an assignment,[72] pledge,[73] option,[74] bailment,[75] or sale, is to be gathered from its terms [76] and circumstances surrounding it.[77] It is not complete so long as there is anything to be done by the seller,[78] hence, a mere agreement to sell does not constitute a sale,[79] nor is it such from the fact that a consignee may fix the price at which to sell consigned goods [80] or pay interest on the value thereon,[81] but retention of profits by the seller does not take it out of that class of transactions.[82]

§ 2. *Contract requisites of a sale.*[See 8 C. L. 1758]—The contract requisites must exist,[83] which may be determined by an inspection.[84] Though in a proper case the

Corporations, 9 C. L. 733), and standing timber (see Forestry and Timber, 9 C. L. 1408).

71. An agreement by which seller undertakes to sell an interest in his business in consideration of a certain amount cash, and buyer undertakes to pay such cash and devote his time and skill to the business, is a complete contract of sale, notwithstanding the cash to be paid is but a fraction of the true value and only a portion paid on making contract. Stum v. Hadrich [Cal. App.] 94 P 82.

72. A sale is generally distinguished from an assignment by the absence from it of the trust element. Jackson v. Citizens' Bk. & Trust Co., 53 Fla. 265, 44 S 516.

73. On transfer of shares of stock, agreement recited that transfer made, that party owner of shares of stock, that it was pledged as additional security for party's debt, that option was desired binding party to sell stock within a year. No other consideration. Held, a pledge. Keifer v. Myers, 5 Cal. App. 668, 91 P 163. Stock placed with parties who had declined to buy with express agreement to redeem is a pledge and not a sale. In re United Educational Co. [C. C. A.] 153 F 169.

74. An option is a contract by which the owner agrees to sell to another at a fixed price and time. Simpson v. Sanders [Ga.] 60 SE 541. An agreement to sell conditioned on the payment of a certain sum at a specified date, the prospective purchaser promising, in case of his failure to pay, to return the property delivered to him, is an option to purchase, and not a contract to pay the price or to return the property purchased. Smith v. Ivey Bros., 119 La. 357, 44 S 126.

75. The distinction between a bailment and sale is that in the former the identical thing delivered is to be restored or its proceeds after sale, while in the latter there is an agreement to pay money or its equivalent for the thing delivered, with no obligation to return. B. F. Sturtevant Co. v. Cumberland Dungan & Co. [Md.] 68 A 351. A contract under which is delivered property, with provision that title to it and its proceeds, when sold, remain in the party delivering, and that property is to be sold at certain prices and on certain terms, remittances, less commissions, made to party delivering, is not a contract of sale, but a bailment for sale. In re Pierce [C. C. A.] 157 F 757. That articles shipped were to be sold by consignee at not less than price stated, and until sold ownership remained in consignor and was subject to return, constituted a bailment. B. F. Sturtevant Co. v. Cumberland Dungan & Co. [Md.] 68 A 351. A contract of lease, with privilege of lessee to purchase, is a bailment and not a sale. American Car & Foundry Co. v. Altoona, etc., R. Co., 218 Pa. 519, 67 A 838.

76. Keifer v. Myers, 5 Cal. App. 668, 91 P 163; Butler Bros. Shoe Co. v. U. S. Rubber Co. [C. C. A.] 156 F 1. Delivery at a fixed price, to be paid for or returned, constitutes a sale. State v. Betz, 207 Mo. 589, 106 SW 64. Delivery of goods to one to sell on commission, proceeds to be credited on notes of the owner held by party to whom goods delivered, is not a sale. Collyer v. Krakauer, 122 App. Div. 797, 107 NYS 739. Advance of certain amount on stock of goods by auctioneer, stock to be sold at auction, with guarantee to realize a certain amount, and all over and above a certain amount to be divided, is not a sale, but an agreement to sell on commission. Caesar Misch Incorporation v. Mosheim, 123 App. Div. 322, 107 NYS 1092.

77. In re United Educational Co. [C. C. A.] 153 F 169. To constitute a sale, the parties must intend to transfer the immediate ownership in some specific thing. The question of intent is gathered from the facts and circumstances surrounding the particular case. Barber v. Andrews [R. I.] 69 A 1.

78. Such as selecting or segregating a parcel sold from a larger bulk. Pabst Brew. Co. v. Com. [Ky.] 107 SW 728. The contract becomes absolute when the bargain is struck and everything the seller has to do with the goods is completed. Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 SE 106. The main thing to be considered is the intention of the parties whose title to chattels is retained by vendor by attaching bill of lading, "order notify," to a draft for the purchase price, delivery is postponed until after payment, and the contract of sale is executory. Dilman Bros. v. Patterson Produce & Provision Co., 2 Ga. App. 213, 58 SE 365.

79. Pabst Brew. Co. v. Com. [Ky.] 107 SW 728.

80. David Bradley Mfg. Co. v. Tedford, 127 Ill. App. 1.

81. McKinney v. Grant [Kan.] 93 P 180.

82. Sale of stock, seller retaining right to dividends, for holding the stock as security for payment of notes given therefor. Stock had been transferred and purchasers had right to sell. Commercial & Sav. Bk. v. Pott, 150 Cal. 358, 89 P 431.

83. J. H. Duker Box Co. v. Dixon [Md.] 66 A 611. Where the evidence shows assent of the parties, mutuality and obligation, legal motive and obligation, the essential ele-

law will imply a contract,[85] it must be definite[86] and made by parties having authority,[87] but the seller need not inform the buyer of his ownership.[88] The contract must not be in furtherance of an illegal purpose[89] and must be free from fraud[90] or mistake.[91] However, promissory representations do not constitute fraud.[92] The contract must be mutual,[93] that is, the minds of the parties must meet,[94] but want of

ments of a contract are present. Constantine Mfg. Co. v. Reynolds, 108 NYS 36.

84. Seller agreed to deliver at a certain place, by a certain time, a certain amount of lumber, for a certain price, acknowledged receipt of $500 and signed by seller. Objection that it is not dated, no consideration, no mutuality, and signed by only one party, not tenable. Orr v. Kenny, 150 Mich. 159, 14 Det. Leg. N. 697, 114 NW 228.

85. L., having more orders for lumber than he could execute, allowed M. to fill some of them, which L.'s customer refused to pay M. for because his contract was with L., to whom he paid the purchase price of the lumber delivered by M. In action by M. against L., held that L., having received the benefits, was liable to M. Meager v. Linder Lumber Co., 1 Ga. App. 426, 57 SE 1004.

86. Contract for purchase of all scrap iron then on hand, and all after acquired in business, until agreement terminated, which could be done at will of one party, is indefinite, but enforcible for iron on hand when contract was made, such as was accepted under the contract. Bradshaw v. Terrell Foundry & Mach. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 654, 104 SW 509.

87. Ft. Smith Wagon Co. v. Baker, 84 Ark. 144, 105 SW 591; Lindlow v. Cohn, 5 Cal. App. 388, 90 P 485. The United States is responsible for paper purchased for the Philippine Islands by the division of insular affairs under order of secretary of war, no notice being given that it was acting as agent for said islands except the statement of the purpose of the purchase. United States v. Andrews, 28 S. Ct. 100. A commission allowed to one who solicits orders, upon sales effected through such orders, does not constitute or prove the solicitor to be an agent of the seller, with authority to make absolute contracts of sale. McKeige v. Carroll, 120 App. Div. 342, 105 NYS 342. Statements and declarations of an agent are not admissible to create or increase his authority. Waco Mill & Elevator Co. v. Allis-Chalmers Co. [Tex. Civ. App.] 109 SW 224. If signed by one individually, it may be shown by parol that he was acting as agent for another. Fitzgerald Cotton Oil Co. v. Farmers' Supply Co. [Ga. App.] 59 SE 713.

88. Goods sold to buyer who thought seller was acting for a corporation against which he had a claim. Buyer held liable to the seller. Pizzutielle v. Graham, 56 Misc. 584, 106 NYS 1099.

89. The rule is that though the contract is entered into by one of the parties for the furtherance of an illegal purpose the contract will not be rendered illegal as to the other party, though he had knowledge of such illegal purpose, providing he does nothing in furtherance thereof. Hollenberg Music Co. v. Berry [Ark.] 106 SW 1172.

90. Norton v. Bruce [Kan.] 95 P 389. Fraud of purchaser's agent, of which seller was ignorant, will not avoid the sale. Hayward Lumber Co. v. Cox [Tex. Civ. App.] 19 Tex. Ct. Rep. 820, 104 SW 403. A man is deemed in law to be guilty of willful falsehood when he asserts as of his own knowledge a matter of which he knows he is ignorant. United States Gypsum Co. v. Shields [Tex. Civ. App.] 20 Tex. Ct. Rep. 671, 106 SW 724. When a deliberate design and purpose to deceive are admitted and the deception is accomplished, the party guilty of the fraud will not be heard to say that the other party neglected to read the contract. Compagnie Des Metaux Unital v. Victoria Mfg. Co. [Tex. Civ. App.] 107 SW 651. The party to be affected by the false statements is not bound to inquire for himself as long as the statements are not false on their face or known to be false. United States Gypsum Co. v. Shields [Tex. Civ. App.] 20 Tex. Ct. Rep. 671, 106 SW 724. Misreading the contents of the contract by the seller is a fraud, the purchaser, though able to read, relying on the truthfulness of seller's representations. This defense may be set up against the assignee of seller. Tait v. Locke [Mo. App.] 109 SW 105. The buyer is not bound, though he failed to read the contract before executing it. Disney v. St. Louis Jewelry Co. [Kan.] 90 P 782.

91. Mistake must be mutual to merit relief. Compagnie Des Metaux Unital v. Victoria Mfg. Co. [Tex. Civ. App.] 107 SW 651. Fraud makes the contract voidable only, while mistake renders it absolutely void. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344. A party to a contract, in the absence of fraud, cannot avoid it by reason of misunderstanding it, unless it appear that his misunderstanding was not the result of his own fault or negligence. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 SE 120.

92. That a plant, with some repairs, would turn out a certain amount, held not fraudulent representation, especially where the buyer was a machinist and had every opportunity to determine its condition. Williamson v. Holt [N. C.] 61 SE 384.

93. A contract under which stock is purchased on agreement of seller to buy back within a certain time is not invalid because not mutual. Moench v. Hower [Iowa] 115 NW 229. Order for 1,000 net tons of bar iron, at a named price, "half cord extra," specifications to be furnished during balance of year, which was accepted, held mutual. Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co. [Mo.] 109 SW 47. If a salesman without authority to close a sale takes a written contract, agreeing to buy on named terms, by stipulation in the writing that it is subject to approval by salesman's principal, the writing amounts to a mere offer until approval. If such contract is within the statute of frauds, the approval must be in writing before the contract becomes mutual.

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this element in the inception of the contract may be remedied by subsequent conduct of the parties.[95] There must be a consideration,[96] but, if deliberation is essential it will be presumed to have been exercised.[97] To fully complete the contract,[98] there must be an offer [99] and acceptance,[1] promptly,[2] or within a reasonable time.[3] Both the acceptance, which is an assent to any qualifying conditions,[4] and the offer will receive a reasonable construction.[5] The offer may be withdrawn [6] or canceled before delivery [7] or before the contract becomes mutual,[8] but not before the period of acceptance has expired,[9] nor is a mere conditional threat to withdraw effective.[10] Where

Cable Co. v. Hancock, 2 Ga. App. 73, 58 SE 319. A. executed to B. an instrument, under seal, reciting that for consideration named and acknowledged A. would sell to B. certain property, to be delivered at a certain time, at certain price. B. did not agree to purchase or assume any obligation. Held, contract not being mutually binding on both, it was merely an offer or proposal to sell. Simpson v. Sanders [Ga.] 60 SE 541.

94. Parks v. Morris, Layfield & Co. [W. Va.] 59 SE 753. Letters, one of which is not a reply to the other, do not constitute a contract. Godkin v. Weber [Mich.] 14 Det. Leg. N. 860, 114 NW 924. In contract by correspondence, the seller believing the price was to be a certain amount and the buyers thinking it a different amount, there was no meeting of minds. Estey Organ Co. v. Lehman [Wis.] 111 NW 1097.

95. When so remedied, the original agreement, purged of its defect, is to be treated as valid from the beginning. Eaton v. Wear Coal Co., 125 Mo. App. 194, 101 SW 1140.

96. J. A. Fay & Eagan Co. v. Dudley, 129 Ga. 314, 58 SE 826; Globe Bk. & Trust Co. v. Rigglesberger [Ky.] 109 SW 333; Slaughter v. Ditto [Ky.] 108 SW 882. After breach by seller, caused by purchaser, a promise that seller would do all he could to perform contract, notwithstanding buyer's shortcomings, held voluntary, and to add nothing to his obligation. Townes v. Oklahoma Mill Co. [Ark.] 109 SW 548. A promise is a good consideration for a promise. But in order that it may constitute such consideration it must impose an obligation on the promisor which, if not performed, will afford the promisee a cause of action arising from its breach. Eaton v. Wear Coal Co., 125 Mo. App. 194, 101 SW 1140. The agreement to sell furnishes the consideration for the agreement to buy. Capps v. Edwards [Ga.] 60 SE 455. A pre-existing indebtedness is a valuable consideration. Virginia Timber & Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 256, 90 P 48; Bradley v. Kingman Implement Co. [Neb.] 112 NW 346. A benefit received is a valuable consideration. Purchaser bought stock on promise of president of the company to take it back. On refusal to buy back, plea of failure of consideration not sustained as, though president received no benefit, corporation did, and buyer did what he otherwise would not have done but for the promise to buy back. Moench v. Hower [Iowa] 115 NW 229. A promise to perform that which the party is already obliged to perform is not a sufficient consideration. Snyder v. Stribling, 18 Okl. 168, 89 P 222.

97. Where supervisors of a township were required to meet and deliberate before entering into a contract, it will be presumed that they did their duty. Good Roads Mach. Co. v. Union Tp., 34 Pa. Super. Ct. 538.

98. Greenwood Grocery Co. v. Canadian County Mill Elevator Co., 77 S. C. 219, 57 SE 867.

99. Parks v. Morris, Layfield & Co. [W. Va.] 59 SE 753. A proposal that a prospective purchaser buy and an acceptance do not create a contract of sale. Brokers proposed to defendant that it buy certain stock and bonds, which was accepted, but later defendant bought direct from the principal. Defendant not liable on count for goods sold and delivered. Mason v. Chicago, etc., R. Co. [C. C. A.] 156 F 959.

1. Where a contract of sale is subject to acceptance, a refusal to accept destroys the mutuality. Contract to sell 600 bags peanuts, order blank reciting that all orders subject to acceptance. Order filled for 100 bags and refused as to balance. Buyer liable for part of order received and retained, and could not defend on ground that contract was absolute as to 600 bags. Suffolk Peanut Co. v. Luden, 32 Pa. Super. Ct. 603. A mere proposal, subject to approval is not binding until approved. Waco Mill & Elevator Co. v. Allis-Chalmers Co. [Tex. Civ. App.] 109 SW 224. Whether or not an offer was accepted will be gathered from the terms of the reply. Miller v. Tanners' Supply Co., 150 Mich. 292, 14 Det. Leg. N. 739, 114 NW 61. Delivery of the goods. Victor Safe & Lock Co. v. O'Neil [Wash.] 93 P 214. To carrier consigned to party making offer therefor is an acceptance of the offer. Star Union Line v. Boston Medical Inst., 126 Ill. App. 106.

2. The word "prompt" means more expedition than reasonable time, hence a telegram, asking "prompt wire acceptance," received at 11:30, is not promptly answered at 2:45. Brewer v. Lepman, 127 Mo. App. 693, 106 SW 1107.

3. If the offer fixes no time for acceptance, it will be construed to remain open for a reasonable time. Simpson v. Sanders [Ga.] 60 SE 541.

4. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 SE 120.

5. Immaterial variance between the offer and acceptance will be disregarded. Kaw City Mill & Elevator Co. v. Purcell Mill & Elevator Co. [Okl.] 91 P 1022.

6. Morse v. Rock Springs Distilling Co. [Neb.] 112 NW 372.

7. Main v. Tracy [Ark.] 109 SW 1015; Engeldinger v. Stevens [Wis.] 112 NW 507.

8. Cable Co. v. Hancock, 2 Ga. App. 73, 58 SE 319.

9. Simpson v. Sanders [Ga.] 60 SE 541.

10. To constitute a withdrawal, there must

statute requires it must be in writing,[11] and all previous negotiations merge in the writing,[12] but a contract executed is not affected by failure to observe this requirement.[13] The signing may be admitted.[14] The contract may be made by correspondence,[15] but it must show a contractual purpose,[16] and there must appear on the face of it a clear accession by both parties to one and the same set of terms.[17]

§ 3. *Modification, rescission and revival.* See 8 C. L. 1758—Though the contract may be modified by parol,[18] if the consideration for it is valid [19] neither party, alone, has the right to do so.[20] It cannot be modified by the printed matter on the letterhead,[21] and letters containing such propositions are to be construed by the court.[22] A corporation cannot divest itself of the power to make a subsequent contract by parol.[23]

Though, when the rights and remedies can be ascertained and fixed in an action at law, rescission is not authorized,[24] yet, for fraud,[25] and some other causes, equity

be communicated a distinct, unequivocal, and unconditional statement to that effect, so definite as to leave no doubt that further relations between the parties on the subject are at an end. Victor Safe & Lock Co. v. O'Neil [Wash.] 93 P 214.

11. Contract for sale and purchase of chattels of not less than $50 not enforcible unless some note or memorandum thereof is made. Grant v. Milam [Okl.] 95 P 424.

12. Barry-Wehmiller Mach. Co. v. Thompson, 83 Ark. 283, 104 SW 137; Capps v. Edwards [Ga.] 60 SE 455; Home Gas Co. v. Mannington Co-op. Window Glass Co. [W. Va.] 61 SE 329.

13. A contract within the statute of frauds is made inforcible by delivery and acceptance. Gabriel v. Kildare Elevator Co., 18 Okl. 318, 90 P 10. The buyer is liable for such of the goods as he accepts. Grant v. Milam [Okl.] 95 P 424. After a public contract has been performed, the requirement of Rev. St. § 3744, U. S. Comp. St. 1901, p. 2510, that such contract shall be in writing and signed by the parties, is immaterial. United States v. Andrews, 28 S. Ct. 100.

14. That the contract was signed is conclusively admitted by failure to deny the fact on oath. Puritan Mfg. Co. v. Toti [N. M.] 94 P 1022.

15. Letter to seller as follows: "Price, $135. You may ship at once." Held binding contract. McCaskey Register Co. v. Truettner, 149 Mich. 241, 14 Det. Leg. N. 391, 112 NW 909.

16. L. Starks Co. v. Brewer [Kan.] 95 P 402.

17. A proposal to accept, or an acceptance on terms varying from the offer, is a rejection of the offer. The acceptance must be unqualified and no point left open for future consideration or negotiation between the parties. National Trading Co. v. Vulcanite Portland Cement Co. [C. C. A.] 159 F 403; Phinizy v. Bush, 129 Ga. 479, 59 SE 259; Lynchburg Hosiery Mills v. Chesterfield Mfg. Co. [Ga.] 57 SE 606.

18. Roquemore v. Vulcan Iron Works Co. [Ala.] 44 S 557.

19 In action to recover purchase price of heating plant sold on written contract allowing seller to have until second winter to fulfill certain warranties, held, the evidence showed valid and sufficient consideration to support subsequent oral agreement by which vendor agreed, if permitted to alter plan and scheme of the plant, to remove it at once if it failed to fulfill warranties after alterations made. Campbell v. Lodge No. 99, A. F. & A. M. [Kan.] 92 P 53.

20. B. F. Sturtevant Co v. Cumberland Dugan & Co. [Md.] 68 A 351. It must appear that it was the mutual intention of the parties to change the contract. Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 SE 200. A proposition to change the agreement, met by a counter proposition, is not sufficient to effect a modification. Talcott v. Freedman, 149 Mich. 577, 14 Det. Leg. N. 523, 113 NW 13. An offer by telegram, accepted in the same way, completes the transaction and cannot be affected by a letter sent afterwards by one party to the other setting out different terms. Greenwood Grocery Co. v. Canadian County Mill Elevator Co., 77 S. C. 219, 57 SE 867. Verbal order for specified quantity of goods, one portion to be shipped at once, followed by delivery of such portion and payment therefor, cannot be changed by a written confirmation thereof demanding shipment of the entire order at once. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391.

21. Matter not referred to in letter and inconsistent with contract. Olson v. Wabash Coal Co., 126 Ill. App. 253.

22. Talcott v. Freedman, 149 Mich. 577, 14 Det. Leg. N. 523, 113 NW 13.

23. Contract provided that all subsequent contracts must be in writing and signed by the president of the corporation. Held, such provision ineffective to preclude making of subsequent contract by parol. Nichols & Shepard Co. v. Maxon [Kan.] 92 P 545.

24. Summers Fiber Co. v. Walker [Ky.] 109 SW 883.

25. Fraud, to be the basis of rescission, must refer to the execution of the contract. Capp v. Edwards [Ga.] 60 SE 455. If seller knows some fact affecting value of property and withholds same, buyer may rescind. Marietta Fertilizer Co. v. Beckwith [Ga. App.] 61 SE 149. But to justify resoission for fraudulent representations, there must be a positive statement of a material, existing fact, present or past, made for purpose of procuring contract and relied on by other party, who was misled thereby. Home Gas Co. v. Mannington Co-op. Window Glass Co. [W. Va.] 61 SE 329.

will grant this relief [26] if asked for within a reasonable time [27] after an actual return of the property; [28] but, where time is of the essence of the contract, notice that it will be treated as breached is not required,[29] nor will the contract be held terminated unless the terms used justify such construction.[30]

§ 4. *General rules of interpretation and construction.* See 8 C. L. 1759—If the contract is capable of intelligent interpretation, its construction is for the court,[31] but where it is ambiguous [32] or the provisions indefinite, it may be left to the jury,[33] and they may also determine the meaning of certain words,[34] or which of two instruments is the contract.[35] The intention of the parties, generally founded on the usual course of affairs,[36] is the guiding star,[37] and the agreement will be so construed as to give effect to it,[38] and the evident contemplation of the parties is as much a part of

26. As a rule, equity will not avoid a contract of sale on the ground of drunkenness, but will grant relief where such is the case coupled with gross inequalities in values exchanged. Hence, where one intoxicated sold for $200 property valued at $12,000, equity will grant relief. Swan v. Talbot [Cal.] 94 P 238.

27. Buyer retained goods for more than a year before returning as unsatisfactory. No relief from liability. Rumsey & Sikemeier Co. v. Jacob [Miss.] 46 S 169.

28. An agreement to accept a return will not rescind the contract. Johnson, Berger & Co. v. Hughes, 83 Ark. 105, 103 SW 184. A rescission of a contract is an effect produced by a return of the things received under it when it can be done. Kingman-Moore Implement Co. v. Ellis, 125 Mo. App. 692, 103 SW 127.

29. Weatherford Mach. & Foundry Co. v. Tate [Tex. Civ. App.] 109 SW 406.

30. Contract to furnish 1,700 cords of brush. A telegram by buyer that another had 600 cords, and directing seller not to send more than 1,000, held not terminative. Montgomery v. Thomson [Cal.] 92 P 866.

31. Lydia Cotton Mills v. Prairie Cotton Co. [C. C. A.] 156 F 225; R. L. Moss Mfg. Co. v. Carolina Portland Cement Co., 1 Ga. App. 232, 57 SE 914.

32. W. E. Caldwell Co. v. Steckel [Iowa] 112 NW 229.

33. Ryley-Wilson Grocer Co. v. Seymour Canning Co. [Mo. App.] 108 SW 628.

34. The jury were properly left to determine the words "invoice cost" contained in the contract for the reason that the stock of goods had been sold by invoice twice, and it was an issue of fact between the parties as to which invoice was to determine the cost and value of the article. Clark v. Empire Mercantile Co., 2 Ga. App. 250, 58 SE 363.

35. On action for purchase price, buyer and seller each produced a contract, claiming the contract produced was the true one, question which instrument was the real contract left to jury. W. W. Wilson Stave Co. v. Webb, 84 Ark. 623, 105 SW 577.

36. Ryley-Wilson Grocer Co. v. Seymour Canning Co. [Mo. App.] 108 SW 628.

37. San Miguel Consol. Gold Min. Co. v. Stubbs, 39 Colo. 359, 90 P 842.

38. Ryley-Wilson Grocer Co. v. Seymour Canning Co. [Mo. App.] 108 SW 628; Lydia Cotton Mills v. Prairie Cotton Co. [C. C. A.] 156 F 225; Pontiac Buggy Co. v. Skinner, 153 F 858. On sale of piano to be tested by a party named, intention held to be that if test not satisfactory, seller to furnish a piano that would be satisfactory, or refund. Garvin v. Montenegro-Riehm Music Co., 31 Ky. L. R. 1182, 104 SW 964. Wholesaler asked for samples and prices of commission merchant, who replied, quoting grades and prices, but sending no samples. Wholesaler answered that what commission merchant said about quality and price was noted, and directed him, if he could not buy for 75 cts. to pay 77 1-2 cts., and have an attractive label. Held to constitute a full order. Rowland v. Ely, 120 App. Div. 628, 105 NYS 211. Agreement to sell goods at certain price and to carry same to a certain date, adding interest till that date, giving privilege to countermand all or part of order before then. Held, an option, and that agreement for interest was a part of price of goods. Moise v. Rock Springs Distilling Co. [Neb.] 112 NW 872. Seller wrote buyer that he had agreed with another to deliver certain character of wood, and would deliver buyer under before mentioned contract at a certain price, if advised of amount desired. Held, not an offer to sell all the wood covered by seller's contract with party furnishing wood to him. Miller v. Tanners' Supply Co., 150 Mich. 292, 14 Det. Leg. N. 739, 114 NW 61. Seller had coal stored and sought to sell to purchaser the whole lot, but no definite contract made. Later buyer told his foreman to take so much of the coal as he needed. He took some and directed carrier to bring more. Seller told carrier if any were taken, all must be. Foreman refused to receive it on this condition. Carrier said he thought it would be all right. Buyer liable only for so much coal as he took. Cunningham v. Allen, 46 Wash. 560, 90 P 920. Contract to sell and deliver at seller's factory certain tons of asphalt, to be purchased and paid for by buyer, and providing that purchaser might purchase an additional amount, is a contract of sale and not a contract to manufacture. Brown v. Trinidad Asphalt Mfg. Co. [Mo.] 109 SW 22. In action for contract price, special count alleged certain negotiations by telegram, as follows: "Will ship goods selected by D. for you at contract price f. o. b. Wire quick, if understood and satisfactory." Reply, "I think we understand each other. Let goods come on. Notify D." Defendant could not insist on demurrer to this special count that goods were sold at any other than contract price, because it appeared that

the contract as if expressly stipulated in it.[39] The nature of the contract,[40] whether divisible or entire,[41] executed or executory, is also a question of intention.[42] By applying the local law,[43] and reading the contract as a whole,[44] to arrive at this intention, the courts will consider its purpose,[45] the situation of the parties,[46] and surrounding circumstances;[47] they will also look to the construction the parties have put on it,[48] to custom,[49] to the law of the place,[50] and even to an exception in a subsequent contract.[51] But the court will not adopt a harsh or unreasonable construction,[52] nor one that will work a forfeiture or preclude the exercise of a right,[53] unless no other interpretation is reasonably possible.[54] And, where the contract is susceptible of two constructions, one of which will render it valid and the other invalid, the court will adopt the former[55] or that one which will tend to support it and carry out the intent of the parties.[56]

§ 5. *Property sold.*[See 8 C. L. 1763]—The property must be susceptible of sale[57] and

other prices had been offered by the defendants which were not accepted by the plaintiff. Daniel v. Siegel-Cooper Co. [Fla.] 44 S 949.

39. Although the contract does not provide that hemp shall be shocked, stacked, and taken care of in a prudent manner, it is the duty of the seller to do so. Summers Fiber Co. v. Walker [Ky.] 109 SW 883.

40. Missouri Smoke Preventer Co. v. St. Louis, 205 Mo. 220, 103 SW 513.

41. When an executory contract for the sale of goods provides in one distinct paragraph for the sale of articles of a given character at a stated price, to be delivered during a given period and in a stated manner, and in another distinct paragraph, beginning with the words, "we have also sold No." provides for the sale of articles of a separate and distinct character, to be delivered in a given manner, but no time for delivery stated, the contract is divisible. And this is true though it conclude with a guaranty that as to articles referred to in the second paragraph local prices shall not be less than a given amount for the balance of the season, and an agreement to handle only cash trade, except car load lots out of town. Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 SE 200.

42. The question of intent, in a case at law, is one of fact. Windmuller v. Fleming, 129 Ill. App. 476.

43. The Federal courts in construing contracts will apply the local law. In re Morris, 156 F 597.

44. Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 SW 386; San Miguel Consol. Gold Min. Co. v. Stubbs, 39 Colo. 359, 90 P 842; Brown Bros. v. Korns, 134 Iowa, 699, 112 NW 195.

45. To prevent incongruities the word "and" may be read "or," or vice versa. Manson v. Dayton [C. C. A.] 153 F 258. Whether a contract between a machine company and a dealer is a contract of sale or one of agency is to be determined from a consideration of the entire instrument. To determine its real character, its purpose rather than its name is to be looked to. Where the contract throughout indicates an absolute sale, there being no limitations or restrictions as to locality, price, terms, or conditions of resale, such contract does not become one of agency as to creditors of the dealer by reason of the single reservation that the ownership shall remain in the company and the proceeds of the sale be the property of the company. Assignment of Cook, 6 Ohio N. P. (N. S.) 298.

46. Fullam v. Wright & Colton Wire Cloth Co. [Mass.] 82 NE 711.

47. W. M. Ritter Lumber Co. v. Lestershire Lumber & Box Co. [C. C. A.] 153 F 575; San Miguel Consol. Gold Min. Co. v. Stubbs, 39 Colo. 359, 90 P 842. The contract will be read in the light of its terms and circumstances surrounding the parties at the time of its execution. Scott Supply & Tool Co. v. Roberts [Colo.] 93 P 1123.

48. David Bradley Mfg. Co. v. Tedford, 127 Ill. App. 1. Held to apply to constructions to be given term "freight on board." Harman v. Washington Fuel Co., 228 Ill. 298, 81 NE 1017.

49. Unless the language of the contract is doubtful or ambiguous, proof of usage will not be received. Birley v. Dodson [Ind.] 68 A 488; Engeldinger v. Stevens [Wis.] 112 NW 507. Evidence of custom cannot render a contract entire which the parties meant to be separable. Canton Lumber Co. v. Liller [Md.] 68 A 500.

50. In a sale of scales, a city ordinance making it unlawful to weigh articles for sale without a certificate that the scales had been inspected and found correct is a part of the contract. Wright v. Computing Scale Co. [Wash.] 91 P 571.

51. Ryley-Wilson Grocer Co. v. Seymour Canning Co. [Mo. App.] 108 SW 628.

52. McKenzie Furnace Co. v. Mallers, 231 Ill. 561, 83 NE 451. Contract that if any goods remained in hands of defendant unsold at a certain time, he would buy and pay for them one year after that time did not apply to goods which had been delivered to him in an unsalable condition. Hallowell v. Smith Agricultural Chemical Co. [Ind. App.] 83 NE 772.

53. Reeves v. Martin [Okl.] 94 P 1058.

54. New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 91 P 152.

55. Stewart v. Herron, 77 Ohio St. 130, 82 NE 956.

56. Lime Locomotive & Mach. Co. v. National Steel Castings Co. [C. C. A.] 155 F 77.

57. Title is a species of property, subject to sale and transfer. New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 91 P 152. Slag

sufficiently designated.[58] However, the seller need not have the goods in his possession,[59] but he must have a property right in the chattel,[60] and his mark on the goods is evidence of ownership.[61]

§ 6. *Transition of title.*[See 8 C. L. 1765]—The transition of title, in order to determine the locus of crime, as in sales of inhibited articles, is largely treated elsewhere.[62]

Meaning and effect of contract.[See 8 C. L. 1765]—The time when title passes,[63] and whether it does so or not, is a question of intention [64] to be left to the jury on conflict of evidence.[65] An executory sale passes no title.[66]

Separation and designation of the goods.[See 8 C. L. 1766]—Title does not pass till the goods are properly designated or segregated,[67] and whether or not there has been an appropriation is a question of fact.[68]

Payment.[See 8 C. L. 1767]—Until payment, where that is concurrent with delivery, neither title [69] nor the right of property pass,[70] unless there has been a waiver.[71]

Delivery and acceptance.[See 8 C. L. 1767]—Delivery is prima facie proof of the intention to pass title [72] and coupled with inspection and acceptance,[73] does so generally,[74] yet, while not always essential,[75] when it is so, it must be made unconditionally,[76] to the vendee,[77] in some manner,[78] at the place designated.[79]

is personal property. Manson v. Dayton [C. C. A.] 153 F 258.

58. If the designation of the goods is such that no question can arise as to the thing intended, it is sufficient. Hence, a sale of 20 tons of hay, 10,000 cubic feet from the east end of a mow is a sufficient designation of the property sold. Barber v. Andrews [R. I.] 69 A. 1.

59. Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 SE 200.

60. Defendant gave plaintiff two photographs for the purpose of making portrait from one, which he did, and it was received and paid for. Contrary to orders he made portrait from the other photograph, which he desired his patron to see. It was sent to his house and he refused to return it. In action by plaintiff to recover for goods sold, recovery denied, on the ground that he was guilty of breach of contract, trust and confidence, and acquired no property in the portrait. Klug v. Sheriffs, 129 Wis. 468, 109 NW 656.

61. Watson v. E. E. Naugle Tie Co., 148 Mich. 675, 14 Det. Leg. N. 334, 112 NW 752.

62. See Intoxicating Liquors, 10 C. L. 417.

63. On contract to make and set up show cases to be paid for when set up, title does not pass to vendee on delivering parts, which were delivered to buyer without his order, stored in his house, and, before set up, burned. Diamond Glass Co. v. Ladwig, 33 Pa. Super. Ct. 506.

64. Acme Food Co. v. Older [W. Va.] 61 SE 235. Whether title passes depends on whether there was a sale or a mere parting with possession. Hickey v. McDonald Bros. [Ala.] 44 S 201. On an agreement to sell at a fixed price, and payment made, a thing designated, described and segregated, title passes. Baars v. Mitchell [C. C. A.] 154 F 322. Where the contract is such that it is doubtful whether it is executed or executory, evidence will be admitted to show the intent of the parties. Prowers v. Nowles [Colo.] 94 P 347. A bill of sale will pass title when the intention to do so is clear. Eldridge v. McDow [Tex. Civ. App.] 18 Tex. Ct. Rep. 474, 102 SW 435. Delivery of bill of sale and consideration passed completes the sale and transfers title. James Music Co. v. Bridge [Wis.] 114 NW 1108. Under a contract of sale or return, title passes to the vendee, subject to be divested if the option of return is exercised. In re Landis, 151 F 896.

65. Watson v. E. E. Naugle Tie Co., 148 Mich. 675, 14 Det. Leg. N. 334, 112 NW 752.

66. This is the rule even in cases of a distinct and specified chattel. Windmuller v. Fleming, 129 Ill. App. 476.

67. The appropriation must be made with the consent of purchaser. American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538.

68. Contract for goods, portion to be delivered promptly, the balance later, contract numbered, packed in numbered bales, paid for as invoiced. Held, goods set apart for buyer. Schwab v. Oatman, 56 Misc. 393, 106 NYS 741.

69. Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070; Masoner v. Bell [Okl.] 95 P 239. On sale of animal, five dollars paid on purchase price, and animal left in possession of seller, where it died. In action against buyer for balance, held no recovery could be had. Sharp v. Hawkins [Mo. App.] 107 SW 1087.

70. But the seller must reclaim his goods promptly, otherwise he will be held to waive his rights. Frech v. Lewis, 218 Pa. 141, 67 A 45.

71. After three months from delivery, and treating buyer as a debtor, right of property in the chattel is waived. Frech v. Lewis, 218 Pa. 141, 67 A 45.

72. Barber v. Andrews [R. I.] 69 A 1.

73. Title does not pass bill on inspection and acceptance, and whether the inspection was fair and honest is a question of fact. Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 SW 386.

74. Delivery to be made at E., and reshipment to P. Loss after reshipment falls on purchaser. Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20.

How proved.[See 8 C. L. 1768]

Divestiture of title.[See 8 C. L. 1769]—Leaving a portion of the goods in the hands of the seller does not divest title.[80]

Ad interim damages.[See 8 C. L. 1789]

§ 7. *Delivery and acceptance under the terms of the contract. A. Necessity, time, place, amount, etc.*[See 8 C. L. 1769]—Where the contract calls for it, delivery,[81] which is a question of fact,[82] is necessary[83] to complete the sale,[84] but the intention of the parties may dispense with it.[85] Where time is not of the essence of the contract, a delivery after the designated period is not material,[86] but where it is,[87] delivery must be made according to its terms,[88] unless the time has been extended.[89] The buyer, however, does not waive his right by insisting on delivery after the time agreed on.[90] When to be made,[91] and whether made in time limited, is for

75. Acme Food Co. v. Older [W. Va.] 61 SE 235.

76. Colean Mfg. Co. v. Blanchett [N. D.] 113 NW 614. Under some circumstances, title may pass by conditional delivery, even in those jurisdictions where payment is necessary to pass title, as where possession allowed to be retained by buyer in consideration of new promise to pay. Frech v. Lewis, 218 Pa. 141, 67 A 45.

77. Lake v. Combs, 84 Ark. 21, 104 SW 544. The rule is not affected by seller receiving a small part of the purchase money at time contract executed. Young v. Edwards [W. Va.] 60 SE 992. The rule is not affected by the fact that a deed to the property was held in escrow, and purchaser in possession, conditions precedent to delivery not having been complied with. Bright v. Hanover Fire Ins. Co. [Wash.] 92 P 779. Under contract of sale and purchase in the future, title does not pass. Phenix Nat. Bk. v. Waterbury, 108 NYS 391. On sale of wool to be delivered when severed, title remains in vendor till delivery and payment. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

78. Delivery of a bill of lading passes title to the purchaser. Gass v. Astoria Veneer Mills, 121 App. Div. 182, 105 NYS 794. Unloading cargo on the wharf is such delivery as to pass title. William H. Perry Co. v. Klosters Aktie Bolag [C. C. A.] 152 F 967. Delivery to carrier, properly consigned to the purchaser, passes title. Star Union Line v. Boston Medical Inst., 126 Ill. App. 106. Fact that goods were improperly consigned is immaterial, where it is shown that the carrier was not misled thereby. Rabinowitz v. Hall, 123 Ill. App. 66. Cancellation after delivery to carrier is ineffectual to prevent transition of title. F. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391.

79. Matheson v. Southern R. Co. [S. C.] 60 SE 437.

80. Buyer bought, and paid for, a lot of goods, left a portion in hands of seller in accordance with a custom of the business. Held, buyer could recover from seller's pledgee. Schwab v. Oatman, 56 Misc. 393, 106 NYS 741.

81. Armstrong v. Poe, 35 Mont. 557, 90 P 758.

82. De Laval Dairy Supply Co. v. Steadman [Cal. App.] 92 P 877; Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 SE 106.

83. Brinn v. Cohen, 107 NYS 37. Sale of catalogues not delivered and order cancelled, when new contract made by which buyer was to pay for catalogues used. Delivery made too late to be of use. Held, not liable to seller. Chase v. Rosenwald, 107 NYS 35.

84. Pabst Brew. Co. v. Com. [Ky.] 107 SW 728.

85. Dilman Bros. v. Patterson Produce & Provision Co., 2 Ga. App. 213, 58 SE 365.

86. Montgomery v. Thomson [Cal.] 92 P 866.

87. Whether time is of the essence of the contract is a question of construction. Gude v. J. F. Bailey Co. [Ga. App.] 61 SE 135; Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 SE 200. If goods are needed by buyer in order to carry on business, time is of the essence of the contract. Biele v. Levy, 107 NYS 607. In some jurisdictions, time is not of the essence of the contract unless its terms expressly so provide. Snyder v. Stribling, 18 Okl. 168, 89 P 222.

88. Goods delivered 40 days after time specified in contract may be refused. Fountain City Drill Co. v. Lindquist [S. D.] 114 NW 1098. Contract to "deliver when and if issued," which does not entitle purchaser to any particular bonds of a street railway company, but bonds of the general issue, and a certain time within which to issue specified. Sellers are not obliged to deliver before that time. Zimmermann v. Timmermann, 120 App. Div. 218, 105 NYS 443. Buyer, April 28, ordered goods to be delivered within six weeks, order accepted and delivery made. May 8, buyer went to seller and on bottom of order of April 28 ordered another amount of goods, which were not delivered within six weeks. Held, buyer had right to reject. Robert Gair Co. v. Armstrong, 107 NYS 5.

89. The time for delivery may be extended by agreement based on a consideration. Gude v. J. F. Bailey Co. [Ga. App.] 61 SE 135.

90. Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 14 Det. Leg. N. 626, 113 NW 591.

91. Under written contract for sale of cotton seed meal, and hulls, "to be hauled out as early as convenient," it is for the jury to be decided in the light of all the surrounding circumstances and the exigencies of the contracting parties, as to when delivery was to take place. Fitzgerald Cot-

the jury.[92] When delivery is dependent on some concurrent act of the buyer, it need not be made until such act is performed,[93] nor is the seller chargeable with delay caused by the purchaser,[94] and where delivery has been delayed by the buyer, the seller is entitled to reasonable notice of the time it is required.[95] Where delivery is to be made shortly,[96] or no time is fixed for it or the demand therefor,[97] a reasonable time is allowed.[98] What is a reasonable time for delivery, and the sufficiency of the demand therefor, usually depend on the circumstances of the particular case.[99] And whether the time is unreasonable is a question for the jury,[1] as are the terms of the demand, in the light of the contract.[2] Where no place of delivery is agreed upon, the place of sale is the place of delivery,[3] but this rule may be made to yield to circumstances.[4] Authority in an agent to contract as to the place of delivery may be inferred by the jury.[5] The quantity or amount to be delivered is governed by the contract.[6] If the contract is entire and all the goods cannot be delivered, the seller need not deliver a part,[7] but a continued delivery, after breach, is no waiver of rights

ton Oil Co. v. Farmers' Supply Co. [Ga. App.] 59 SE 713.

92. Purchasers wrote seller, "If you will get up this material promptly, however, there will be no question of damages of any kind, and we hope you will do so." Held, for jury to say, in light of circumstances and exigencies of parties, whether delivery was within time limited. Gude v. J. F. Bailey Co. [Ga. App.] 61 SE 135.

93. Contract to deliver lambs, when price of them was to be credited on note held by purchaser. Seller not bound to deliver while note out of possession of buyer, hence out of his power to make the credit. Longfellow v. Huffman [Or.] 90 P 907.

94. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826.

95. Contract to purchase potatoes to be delivered on cars Nov. 1, or before, buyer to take them as soon as price advanced. Price advanced a week before Nov. 1, but potatoes not called for till Oct. 28. Sellers were entitled to notice of arrival of cars. Pinkham v. Haynes [Me.] 68 A 642.

96. Where delivery is to be made "shortly," the seller has a reasoanble time. Cincinnati Glass & China Co. v. Stephens [Ga. App.] 60 SE 360. "As soon as possible" means "without unreasonable delay." Childs v. Omaha Paraphernalia House [Neb.] 114 NW 941.

97. Bearden Mercantile Co. v. Madison Oil Co., 128 Ga. 695, 58 SE 200.

98. I. H. Earl Mfg. Co. v. Summit Lumber Co., 125 Ill. App. 391; Robinson-Clay Product Co v. American Locomotive Co., 56 Miss. 589, 107 NYS 69; Standard Interlock Elevator Co. v. Wilson, 218 Pa. 280, 67 A 463. Contract to deliver a specified number of tons of coal between two dates may be performed at any time up to the latter date, though it contemplated delivery from time to time. Harman v. Washington Fuel Co., 228 Ill. 298, 81 NE 1017.

99. Order to ship "earliest possible" meant as soon as seller could send them. Order, Nov. 19, delivery, Dec. 29. Buyer had notice delay might be necessary. Held, delivery in reasonable time. Robinson Clay Product Co. v. American Locomotive Co., 56 Misc. 589, 107 NYS 69.

1. Olson v. Wabash Coal Co., 126 Ill. App. 253.

2. Buyer had three contracts for goods deliverable at his option. Demand for delivery of all the goods contracted for covered the goods to be delivered under all the contracts. American Linseed Co. v. Eberson, 126 Mo. App. 426, 104 SW 121.

3. Contract for suit of clothes, place of delivery not agreed upon, and payment to be made at seller's store. Halvordson v. Grossman, 107 NYS 627; Baxley Tie Co. v. Simpson, 1 Ga. App. 670, 57 SE 1090.

4. Some other place may be required by the nature of the property sold, or by the usage of the trade or the previous course of dealings between the parties. Farmers' Cotton Oil Co. v. Wilson [Tex. Civ. App.] 19 Tex. Ct. Rep. 641, 103 SW 1184.

5. Seller's general agent had no authority to contract for delivery but at one place, where were local agents, but at time of sale goods were in possession of local agents, and general agent was empowered to aid local agent in sales. In suit for price by seller, the jury could infer there was no limitation on the general agent in making sale after goods had been consigned and delivered to local agents, to contract for delivery at another place. McCormick Harvester Mach. Co. v. Lowe [Ala.] 44 S 47.

6. Purchase of certain barrels of oil, to be taken during Nov. and Dec., at buyer's option. Subsequent purchase of other barrels to be delivered between Oct. 1 and Jan. 30, at buyer's option. Subsequent purchase of other barrels, to be delivered during period from Oct. 1 to Jan. 30, at buyer's option. He was entitled to deliveries within the times specified to suit his convenience, or could have demanded delivery of all of it within those dates. American Linseed Co. v. Eberson, 126 Mo. App. 426, 104 SW 121. Contract for sale of a number of articles, which provides that the number between the minimum and maximum number specified shall be delivered as needed by buyer up to a certain date, contemplates the delivery of only as much above the minimum and below the maximum number as the buyer may need during that period. Park Steel Co. v. Staver Carriage Co., 125 Ill. App. 105.

7. Pinkham v. Haynes [Me.] 68 A 642.

under the contract.[8] A proper delivery pursuant to order constitutes an executed sale.[9]

(§ 7) *B. Sufficiency of delivery; actual, symbolical.* See 8 C. L. 1771—The delivery must be of the thing agreed on,[10] and when made at the place designated, after inspection and acceptance, it is complete,[11] but where the goods are in the hands of the buyer, no further delivery is required.[12] A delivery made in the same manner as others, which had been accepted, is sufficient,[13] and a delivery of a bill of lading is an actual delivery of the goods.[14] Delivery of a warehouse receipt is constructive delivery,[15] so, also, in the absence of instructions,[16] is delivery to a carrier,[17] designated by the purchases and acceptance of the bill of lading by him,[18] subject, however, to vendor's right of stoppage in transitu.[19] Whether or not there has been a delivery may depend on the contract of sale.[20]

(§ 7) *C. Acceptance; necessity; time; what is.* See 8 C. L. 1771—Acceptance which is necessary to consummate the sale,[21] unless waived,[22] means retention of the goods and acknowledgment that the delivery is satisfactory.[23] It must be made by one having authority,[24] within a reasonable time after delivery,[25] and follows neces-

8. After breach by buyer, if seller continues to deliver and deliveries are accepted, there is no waiver by seller. Graves v. Melia, 81 Ark. 347, 99 SW 80.

9. Engeldinger v. Stevens [Wis.] 112 NW 507.

10. Delivery of the thing purchased means delivery of that answering description in the agreement, and any other delivery is no delivery at all. Roquemore v. Vulcan Iron Works Co. [Ala.] 44 S 557. Purchaser is not bound to accept wet, dirty potatoes when contract called for dry and clean. Gaines v. Perry Bros. [Tex. Civ. App.] 18 Tex. Ct. Rep. 649, 102 SW 755.

11. Watson v. E. E. Naugle Tie Co., 148 Mich. 675, 14 Det. Leg. N. 334, 112 NW 752.

12. Godkin v. Weber [Mich.] 14 Det. Leg. N. 860, 114 NW 924.

13. Montgomery v. Thomson [Cal.] 92 P 866.

14. Gass v. Astoria Veneer Mills, 121 App. Div. 182, 105 NYS 794.

15. Constructive delivery will not suffice if actual delivery at time of sale is impossible. Livingston v. Anderson, 2 Ga. App. 274, 58 SE 505.

16. The railroad company is buyer's agent to receive and carry the goods, but not to inspect and pass upon the quality. Bloom's Son Co. v. Haas [Mo. App.] 108 SW 1078. A delivery to the carrier, with instructions to deliver on seller's order, is not, in law, a delivery to purchaser. Lepman v. Woldert Grocery Co., 133 Ill. App. 362.

17. Olson v. Wabash Coal Co., 126 Ill. App. 253. The bill of lading is evidence of delivery to carrier, and failure to receive does not show nondelivery. Main v. Jarrett, 83 Ark. 426, 104 SW 163. This is not affected by the fact that the freight is subject to adjustment after arrival of the car at its destination. Chicago Lumber & Coal Co. v. McCann [Wash.] 93 P 216. When a purchaser, living in a local option district, orders, in writing by mail, from a person lawfully engaged in the liquor business outside of such district, a package of liquor to be sent to him for his own use by express C. O. D. to a station within the prescribed district, and such purchaser received such package, pays the price for the same and charges for the return of the money to the express company for the seller, the sale is complete upon the delivery of the package to the express company by the seller and he does not violate the law in the prescribed district. Mullen v. State, 10 Ohio C. C. (N. S.) 417.

18. United States v. Andrews, 28 S. Ct. 100; Rhodes, Dolvin & Co. v. Continental Furniture Co., 2 Ga. App. 116, 58 SE 293.

19. Gulf, etc., R. Co. v. Rotter Bros. [Tex. Civ. App.] 19 Tex. Ct. Rep. 824, 104 SW 402.

20. Order, to be delivered on conditions specified; seller refused to accept till opportunity to test; new contract embodying same terms except buyer given right to test and notes and mortgage given in escrow to abide test; test unsatisfactory and machine returned. In action by seller, held no delivery. Colean Mfg. Co. v. Blanchett [N. D.] 113 NW 614.

21. Sale of goods, if satisfactory. On rejection by buyer, accepted by seller, goods remain property of seller. Virginia-Carolina Lumber Co. v. Elsinger, 29 App. D. C. 531.

22. Laing v. Pelton Water Wheel Co., 122 App. Div. 677, 107 NYS 686.

23. The context of the agreement may vary the meaning of the term. Victor Chemical Works v. Hill Clutch Co. [C. C. A.] 152 F 393.

24. An agent to weigh and receive goods only has no authority to accept. Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 SE 106.

25. Inspection two months after delivery held unreasonable. Guggenheim v. Hoffman, 128 Ill. App. 289. What is a reasonable time may be shown by evidence of custom and usage. Id. What is an unreasonable delay is for the jury. Godkin v. Weber [Mich.] 14 Det. Leg. N. 860, 114 NW 924. When time is of the essence of the contract, tests must be made within the time limited. Missouri Smoke Preventing Co. v. St Louis, 205 Mo. 220, 103 SW 513.

sarily on the impossibility of rejecting.[26] The buyer may reject if delivery is postponed an unreasonable time [27] or if goods are not within the contract,[28] or he may accept the goods ordered and reject those not ordered [29] unless the contract is entire.[30] Reasonable notice of rejection must be given,[31] and if goods are delivered under a parol sale, void under the statute of frauds, it is the buyer's duty to repudiate immediately.[32] The buyer is not bound to inspect, before acceptance, goods sold under an express warranty,[33] but where acceptance depends on the result of inspection, such inspection must be conducted in accordance with the contract of sale,[34] and an inspection by an agent of both parties is conclusive in the absence of fraud.[35] Generally the question of acceptance is one of fact.[36] It may be implied [37] from conduct of purchaser,[38] and receiving and using the article had been held an acceptance,[39] but whether payment will constitute an acceptance may depend on circumstances.[40]

(§ 7) *D. Excuses for and waiver of breach.*[See 8 C. L. 1773]—Delivery is excused

26. If seller delivers exactly what he has contracted to deliver as to quantity and quality, at the stipulated time and place, and for the stipulated price, the buyer has no right to object, nor any reason for inspection. Jackson v. Porter Land & Water Co., 151 Cal. 32, 90 P 122; Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 SE 106.

27. Where delivery to be made "shortly," a delivery made after 9 or 10 weeks was properly rejected. Cincinnati Glass & China Co. v. Stephens [Ga. App.] 60 SE 360.

28. Eddy v. Fay Fruit Co. [R. I.] 67 A 586. Contract provided for sale of lumber, and excluded mill culls that might be among it. The buyer had the right to reject the culls. Godkin v. Weber [Mich.] 14 Det. Leg. N. 860, 114 NW 924.

29. Goldstandt-Powell Hat Co. v. Cuff [Okl.] 91 P 862. If the contract is severable, the buyer may accept a part and reject a part. Canton Lumber Co. v. Liller [Md.] 68 A 500.

30. Contract for lumber to be shipped 2,000 miles to purchaser is an entire contract. Pacific Timber Co. v. Iowa Windmill & Pump Co. [Iowa] 112 NW 771. Purchaser is not obliged to accept a portion if the contract be entire. Main v. Simmons, 2 Ga. App. 821, 59 SE 85.

31. What is reasonable notice is ordinarily a mixed question of law and fact. Missouri Smoke Preventing Co. v. St. Louis, 205 Mo. 220, 103 SW 513. The right to reject for unreasonable delay is not waived by failure to give the seller notice of rejection. Cincinnati Glass & China Co. v. Stephens [Ga. App.] 60 SE 360.

32. Godkin v. Weber [Mich.] 14 Det. Leg. N. 860, 114 NW 924.

33. If, upon receipt of the goods, he does inspect and discovers defects before acceptance, it is his duty to reject them. Christian v. Knight, 128 Ga. 501, 57 SE 763.

34. Action for damages for alleged breach of contract in sale of lumber. Canton Lumber Co. v. Liller [Md.] 68 A 500.

35. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 106 SW 930.

36. Keeping a horse beyond 48 hours, the limit allowed by the seller's custom, held an acceptance. Fiss, Doerr & Carroll Horse Co. v. Kiernan, 108 NYS 1105. Shipment to and possession by a third person, to whom buyer had ordered goods delivered, and part payment by buyer, shows an acceptance. Mississippi Lumber Co. v. Smith [Ala.] 44 S 475. Buyer contracted for monument of best Westerly granite. Being ignorant of such goods he paid for same. Later, learning the granite was not according to contract, he directed the seller to remove it. In action to recover, held there was no acceptance. Tompkins v. Lamb, 121 App. Div. 366, 106 NYS 6. In action for price of goods sold and delivered, and defense that goods sued for were not the goods ordered, and were returned to seller, and the evidence conflicting, the question is one of mixed law and fact which the jury must decide. Goldstandt-Powell Hat Co. v. Cuff [Okl.] 91 P 862. Whether reasonable opportunity for inspection was given, or whether it was waived, or whether it was in a careless manner or whether buyer exercised ordinary care and prudence, are questions of fact to be determined in each and every case according to its peculiar facts. Kronman v. Roush Produce Co. [Ga. App.] 59 SE 320.

37. The failure to reject within the time limited or within a reasonable time is an acceptance, and title passes to the vendee Missouri Smoke Preventing Co. v. St. Louis, 205 Mo. 220, 103 SW 513.

38. Bill of lading received and held for several days, buyer intending to receive goods and making no objection until after injury to goods. Held, an acceptance. Murphy v. American Can Co. [Md.] 67 A 17. Acceptance cannot be inferred from the mere receipt of the goods. Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 SE 106.

39. Privilege given the buyer by seller to use temporarily does not confer the right to use until the article is practically worn out. Noel v. Kauffman Buggy Co. [Ky.] 106 SW 237; Fox v. Wilkinson [Wis.] 113 NW 669.

40. Buyer contracted for granite shaft of certain quality, to be paid for one-half when ready for shipment, the balance when set up. The payments were made as per contract. On action by buyer for breach, held not to be an acceptance, it being made before he was aware of the defects. Tompkins v. Lamb, 121 App. Div. 366, 106 NYS 6

by buyer's refusal to perform [41] or by declaration of a breach,[42] and the seller is not bound to deliver goods not contemplated by the contract.[43] Under some circumstances, impossibility of delivery is no excuse,[44] nor is failure to pay when payment is to be made as goods are delivered,[45] nor is want of notice where the true cause is the seller has not the goods; [46] but whether a strike will excuse delivery depends on the wording of the contract.[47] Though the buyer cannot take advantage of a breach caused by his own conduct,[48] a mere acceptance does not waive damages for failure to deliver [49] in the absence of contract.[50] A premature delivery, however, may be waived by acceptance,[51] but an offer to waive on certain conditions becomes valid only on compliance with the conditions.[52] The burden of proving waiver by the buyer is on the seller.[53]

§ 8. *Warranties and conditions. A. In general.* See 8 C. L. 1774—The warranty is the contract upon which the purchaser relies.[54] It is a statement or representation of facts made by vendor as to character and quality of article sold or title thereto, whereby he promises that it is or shall be as represented.[55] It need not be simultaneous with the sale,[56] though it has been held otherwise in some jurisdictions,[57] nor are any particular words required to constitute it, though whatever the seller represents at the sale is a warranty as a general rule,[58] but mere seller's talk is not a war-

41. Refusal to accept excuses delivery. Felsberg v. Moore, 84 Ark. 399, 106 SW 197. Where contract repudiated, seller is absolved from making further deliveries. Ingram v. McCaskey Register Co. [Ga. App.] 60 SE 291. A tender of the goods is not required where the buyer has given notice that he will not perform. Wood, Curtis & Co. v. Seurich, 5 Cal. App. 252, 90 P 51; Carolina Portland Cement Co. v. Columbia Imp. Co. [Ga. App.] 60 SE 279; Longfellow v. Huffman [Or.] 90 P 907.

42. That seller used all possible diligence to deliver, and before he was able to do so buyer declared a breach, is a good defense. Seller claimed that delivery was to have been made to purchaser as soon as he could make a delivery to a third person, that he used all diligence in his power to do this, but before he could do so buyer declared a breach and sued. If such defense established, seller entitled to verdict. Earnest v. Waggoner [Tex. Civ. App.] 108 SW 495.

43. If an order for a large number of like articles as given is in part clearly beyond or outside of the contract under which parties are dealing, the seller is under no duty to separate the necessary from the unnecessary number, but may safely refuse the whole order. Park Steel Co. v. Staver Carriage Co., 125 Ill. App. 105.

44. Where party by his own contract puts an obligation on himself without qualification or exception, he is held liable for nonperformance, though performance becomes impossible. Ryley-Wilson Grocer Co. v. Seymour Canning Co. [Mo. App.] 108 SW 628.

45. Felsberg v. Moore, 84 Ark. 399, 106 SW 197.

46. San Jacinto Oil Co. v. Texas Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 187, 105 SW 1163.

47. A contract excusing seller "during any portion of time prevented by strikes" applied to strikes affecting the handling of the output of seller's own mine only. Consolidated Coal Co. v. Jones & Adams Co., 232 Ill. 326, 83 NE 851.

48. Nor is his breach waived by seller's promising to do the best he could to perform contract. Townes v. Oklahoma Mill Co. [Ark.] 109 SW 548.

49. Gude v. J. F. Bailey Co. [Ga. App.] 61 SE 135; Ledgerwood v. Bushnell, 128 Ill. App. 555; Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 14 Det. Leg. N. 626, 113 NW 591.

50. A provision in the contract that acceptance shall constitute a waiver of all claims for damages by reason of delay is valid. Victor Chemical Works v. Hill Clutch Co. [C. C. A.] 152 F 393.

51. The question of acceptance is for the jury, under proper instructions. Jacksboro Stone Co. v. Fairbanks Co. [Tex. Civ. App.] 107 SW 567.

52. Gude v. J. F. Bailey Co. [Ga. App.] 61 SE 135.

53. Fountain City Drill Co. v. Lindquist [S. D.] 114 NW 1098.

54. Ford v. Smith [Wash.] 93 P 909.

55. When seller said that goods should be of certain kind and quality and that they should be as represented, it is a warranty. Afflick v. Streeter, 125 Mo. App. 703, 103 SW 112. The terms "warranty" and "guaranty" are identical in significance and effect. Branch v. James [Ga. App.] 60 SE 1027.

56. Warranty that goods in future would be all right, that seller would guarantee them to be all right, held to be a continuing guaranty and to cover goods bought within a reasonable time thereafter. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682.

57. On sale of horse, statements made by the sellers as to his character the day previous to sale is immaterial. Sherwood v. Hullett [Wis.] 114 NW 1111.

58. The statement that goods shall be made in careful, workmanlike, and skillful manner, and that they should do what was intended to be done by them, is a warranty.

ranty, express or implied,[59] nor is a mere delivery of the goods.[60] The warranty may be made by an agent[61] and may be by parol,[62] notwithstanding oral and implied warranties are merged in the writing.[63] And while the extent of the warranty is to be gathered from its terms[64] and its existence from the contract,[65] yet, an express warranty may be created by particularity of description,[66] and fraud may be equivalent to an express representation.[67] While the terms of it may be shown by parol,[68] a warranty can neither be introduced nor modified in that way.[69] Whether representations constitute a warranty,[70] or whether the warranty has been complied with, is

Mastin v. Bartholomew [Colo.] 92 P 682; Heath Dry Gas Co. v. Hurd, 108 NYS 410. Offering food for sale is in itself a representation that it is believed to be sound. But where there is no implied term or condition of soundness, the seller is not liable unless he knew of the fact that the food sold was not fit to be eaten. Farrell v. Manhattan Market Co. [Mass.] 84 NE 481. Stipulations to ship in a manner designated and at a special time are usually treated as warranties. Fountain City Drill Co. v. Lindquist [S. D.] 114 NW 1098.

59. On sale of automobile, buyer was told it had been run about 500 miles, used as a demonstrating car, and was in first class condition. Seller not liable in action to recover purchase price. Morley v. Consolidated Mfg. Co. [Mass.] 81 NE 993.

60. There is no express warranty that goods are of weight and size invoiced, and where seller was informed they were for making seed bags, it will not be implied from that and the mention of the weight that they are fit for that purpose. Merriam Paper Co. v. New York Market Gardener's Ass'n, 108 NYS 1038.

61. An agent to sell may make warranty and bind his principal even though he exceed his authority. Haynor Mfg. Co. v. Davis [N. C.] 61 SE 54.

62. That the warranty was oral while the order was in writing does not affect it. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682.

63. Where article sold under written contract which contains warranties of quality, workmanship, or performance, oral and implied warranties are merged therein. Sullivan Mach. Co. v. Breeden, 40 Ind. App. 631, 82 NE 107. A letter and bill of parcels are not a formal contract of such dignity as necessarily to indicate that all previous negotiations are merged in them. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682.

64. Warranty that furnace was to be practically smokeless, or sufficiently so as to comply with city ordinance, was broken by smoking so much as to violate the ordinance. Dorrance v. Dearborn Power Co., 233 Ill. 354, 84 NE 269. Where seller of clothing exhibits to customer a number of suits of clothes as samples and stipulates to sell others as good in quality, such stipulation amounts to an express warranty that the clothing sold and to be delivered will be of as good quality as samples. Christian v. Knight, 128 Ga. 501, 57 SE 763. Contract to furnish glue for specific use known to seller provided that quality was to be "up to standard, or the same as has been delivered during past 60 days. Held a warranty that glue would be equal to that furnished during existing period. American Glue Co. v. Rayburn, 150 Mich. 616, 14 Det. Leg. N. 809, 114 NW 395. Where one goes to a seed store to purchase a certain variety of a species of seeds, and they are given him without comment, with the name printed on the package in which they are contained, the sale is without warranty either that the seeds will grow or that they are of the variety stipulated. But if there was a warranty, it would not be found in the name of the seeds printed in bold letters on the package, but in all the printed matter found on the package, which in this case included the express statement that the seed was not guaranteed, and if not found as represented would be replaced with other seed of like value. Calhoon v. Brinker, 5 Ohio N. P. (N. S.) 122.

65. Berger v. Standard Oil Co., 31 Ky. L. R. 613, 103 SW 245. Whether or not there was a warranty and the nature of it is to be gathered from the contract. Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20. Contract providing that goods furnished by vendor should be carefully selected to meet the demand of buyer's vicinity held not a warranty, but an agreement to exercise due care in the selection. Wm. S. Merrell Chemical Co. v. A. Spiegel Co., 131 Wis. 272, 112 NW 136.

66. Buyer specified he wanted standard Alabama No. 1 soft pig iron, and standard Alabama No. 2 foundry pig iron. Delivery under order was express warranty that goods were of those grades. De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co., 2 Ga. App. 493, 58 SE 790.

67. Where one party to contract knows the other is laboring under mistake respecting material fact affecting value of property, and not only keeps silent but by artifice adds color and credence to the delusion or mistake, he is guilty of fraud equivalent to express representation. Marietta Fertilizer Co. v. Beckwith [Ga. App.] 61 SE 149.

68. Where memorandum of sale did not purport to be a full and complete contract. Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co., 134 Iowa, 252, 111 NW 935.

69. In absence of fraud, accident or mistake, if a writing exists between the parties, and it contain no warranty, none can be introduced, or if it contain a warranty it cannot be extended, enlarged or modified by parol. Electric Storage Battery Co. v. Waterloo, etc., R. Co. [Iowa] 116 NW 144.

70. Larson v. Calder [N. D.] 113 NW 103.

for the jury,[71] but the construction of the contract, unless dependent upon conflicting extrinsic facts, is for the court.[72]

(§ 8) *B. Express and implied warranties and fulfillment or breach thereof.* See 8 C. L. 1775—Express warranties are gathered from the terms used by the seller.[73] An implied warranty is a guaranty against latent defects,[74] and whether or not there is such warranty depends on the terms used by the seller.[75] There can be no implied warranty, however, if there is an express one,[76] nor where it is precluded by the very nature of the contract,[77] but this exclusion does not necessarily extend to every feature of the contract.[78] The mere sale of chattels in possession of the vendor implies a warranty of title[79] and the right to use.[80] The delivery of a receipt, even, warrants the articles to be in existence and in certain hands.[81] Generally the seller impliedly warrants merchantability[82] and fitness for use,[83] especially where his knowledge[84] and judgment are relied on,[85] or where the selection is left to him,[86] or where the article is food for immediate use,[87] but the burden is on the buyer to

71. Contract for certain grade of goods. What such grade meant in the trade, and whether goods were of that quality, was for jury. Rowland v. Ely, 120 App. Div. 628, 105 NYS 211.

72. Wm. S. Merrell Chemical Co. v. A. Spiegel Co., 131 Wis. 272, 112 NW 136.

73. A statement that seller had the best piece of cloth in the market is not an express warranty, but a mere expression of opinion. Strauss v. Salzer, 109 NYS 734.

74. Kronman v. Roush Produce Co. [Ga. App.] 59 SE 320; Haynor Mfg. Co. v. Davis [N. C.] 61 SE 54. Where it appeared that at time of sale the article had two infirmities, one known to purchaser, the other not, and no evidence that the unknown of itself caused any loss, and, if it contributed to any loss, no evidence to show any definite amount of damages attributable to it, purchaser could not recover. Brooks v. Camak [Ga.] 60 SE 456.

75. Application for spruce. Seller replied by offer to sell spruce pulp wood, 40 cords. This description related to description of wood in order to identify it, and was not a warranty. Rollins v. Northern Land & Logging Co. [Wis.] 114 NW 819.

76. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 SE 222; De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co., 2 Ga. App. 493, 58 SE 790.

77. As where an article is manufactured according to plans and specifications of the purchaser. The manufacturer only warrants the workmanship and material. Crankshaw v. Schweizer Mfg. Co., 1 Ga. App. 363, 58 SE 222.

78. When a known, definitely described article is purchased, the very terms of description used are, generally speaking, so far express warranties as to kind of article to be supplied that no implied warranty of its fitness for any particular use intended by the buyer arises, though seller may be cognizant of use contemplated. However, express warranties contained in ordinary descriptive words of make, size, grade, etc., are not usually so general in their relation to subject-matter of sale as to exclude implied warranty that article is merchantable and free from such inherent defects as render it worthless or not reasonably suited to purposes for which ordinary articles covered by the descriptive terms employed are designed and intended. Hawley Down Draft Furnace Co. v. E. Van Winkle Gin & Mach. Works [Ga. App.] 60 SE 1008.

79. Such warranty protects against partial defects, liens, charges and incumbrances. Clevenger v. Lewis [Okl.] 95 P 230.

80. A warranty of title and the right of use is implied in a sale of goods with a knowledge of their use. National Metal Edge Box Co. v. Gotham, 109 NYS 450.

81. Delivery of a warehouse receipt implies a warranty that the articles represented by the receipt are in existence and in custody of the bailee therein specified. Livingston v. Anderson, 2 Ga. App. 274, 58 SE 505.

82. Kimball-Fowler Cereal Co. v. Chapman & Dewey Lumber Co., 125 Mo. App. 326, 102 SW 625.

83. Ferguson Implement Co. v. Parmer [Mo. App.] 107 SW 469. A statement that seller would "make bore five inches, would guarantee 12-horse power," not express warranty. Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 14 Det. Leg. N. 626, 113 NW 591.

84. Main v. El Dorado Dry Goods Co., 83 Ark. 15, 102 SW 681.

85. Where buyer trusts to the judgment or skill of the manufacturer, there is an implied warranty of fitness for the purpose intended. Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20.

86. A dealer in food, if the selection is left to him, impliedly warrants that it is fit for food, and due care is no defense. And this whether supplied under a pre-existing contract, or in response to order not given in person, or given in person in the dealer's shop. But this is not true where the seller is not a dealer. Farrell v. Manhattan Market Co. [Mass.] 84 NE 481.

87. A dealer in food, on sale to a consumer for immediate use, impliedly warrants that it is wholesome and fit for food. But where one dealer sells to another, not for his consumption, but merely as an article of merchandise, no implied warranty that the article is good food arises. Houk v. Berg [Tex. Civ. App.] 20 Tex. Ct. Rep. 186, 105 SW 1176. This warranty exists

show that his skill and judgment were relied upon.[88] And a warranty of fitness is implied where the sale is for a particular purpose,[89] but it is otherwise if article ordered is of a general character and not for a specifically indicated purpose, although the seller may know it is to be used in the process of further manufacture,[90] or where both parties have equal means of knowledge as to its fitness,[91] or the seller is not disposing of his own manufacture.[92] But where goods are sold by description, no such warranty exists,[93] though the purchaser state it is for a particular purpose.[94] The seller of a particular kind of seed, however, warrants them as such.[95]

A warranty will be limited to the matters See 8 C. L. 1778 to which it is directed [96] or meant to apply.[97]

(§ 8) *C. Conditions and fulfillment or breach.* See 8 C. L. 1779—When there is a condition that seller have a reasonable time to remedy defects, what is a reasonable time is for the jury,[98] and acting on verbal notice of such defects waives written notice by the purchaser.[99] The seller is entitled to a reasonable time to fulfill the guaranty,[1] and whether it has been fulfilled may be left to an arbiter.[2]

where the food is purchased for stock. Id.

88. Farrell v. Manhattan Market Co. [Mass.] 84 NE 481.

89. The manufacturer or seller of goods for specific purpose known to them warrants that it is fit for that purpose. Oil Well Supply Co. v. Priddy [Ind. App.] 83 NE 623. But mere knowldge or intent to make a particular use is not alone sufficient to raise a condition or warranty. West End Mfg. Co. v. P. R. Warren Co. [Mass.] 84 NE 488. Where the manufacturer engages to supply an article for a particular purpose, and the buyer trusts to his judgment and skill, there is an implied warranty. Marbury Lumber Co. v. Stearns Mfg. Co. [Ky.] 107 SW 200. On sale of starch for making baking powder, if not reasonably fit buyer is entitled to damages as set-off against purchase price. Glucose Sugar Refining Co. v. Climax Coffee & Baking Powder Co., 40 Ind. App. 182, 81 NE 589.

90. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682.

91. Young v. Plattner Implement Co. [Colo.] 91 P 1109.

92. A merchant selling goods not of his own manufacture does not impliedly warrant quality or fitness, even as to latent defects. Strauss v. Salzer, 109 NYS 734.

93. If goods are sold by description, such description does not constitute an implied warranty of quality. Patrick v. Norfolk Lumber Co. [Neb.] 115 NW 780. Goods commonly known in trade, ordered by description, and no inspection, implied warranty that goods furnished will be merchantable under the descriptive term. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682. Where a dealer contracts to deliver to a purchaser at an agreed price a known, described and specified article manufactured generally for the trade, there is no implied warranty against latent defects of which the dealer has no knowledge. Ehrsam v. Brown [Kan.] 91 P 179. Manufacturer sells iron as standard Alabama No. 1 soft, and Alabama foundry No. 2 pig, and purchaser relies on description, no implied warranty of fitness, but only that it is equal to description. De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co., 2 Ga. App. 493, 58 SE 790.

94. There is no implied warranty in the sale of a described and specified article that it will answer the purpose intended, though such purpose was communicated to the dealer beforehand. Ehrsam v. Brown [Kan.] 91 P 179. Where a known, described, and definite article is ordered of a manufacturer, although it be stated by the purchaser that it is for a particular purpose, yet, if a known, described and particular thing, which is of the kind and quality called for by the order, be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. J. A. Fay & Eagan Co. v. Dudley, 129 Ga. 314, 58 SE 826; Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20.

95. DePew v. Peck Hardware Co., 121 App. Div. 28, 105 NYS 390.

96. A warranty that engines will develop certain power on a fixed fuel consumption is not a warranty of the fuel economy of them when carrying less load than is necessary to develop the rated power. Ames v. Norwich Light Co., 122 App. Div. 319, 106 NYS 952.

97. Warranty of title excludes any warranty of soundness. Branch v. James [Ga. App.] 60 SE 1027.

98. Hein v. Mildebrandt [Wis.] 115 NW 121.

99. Sale of machinery provided that if it did not work well written notice to be given seller. Verbal notice given, upon which seller acted. Hein v. Mildebrandt [Wis.] 115 NW 121.

1. Where there is no conflict or dispute upon the circumstances, and no opportunity for reasonable minds to differ upon the question, the court may decide what is a reasonable time, as a matter of law. Christie v. Crawford [Mich.] 15 Det. Leg. N. 324, 116 NW 202.

2. Contract provided that elevator grade of goods should be final. Buyer was bound to accept goods which had been inspected and passed on as that grade by public elevator when the grading was done honestly.

(§ 8) *D. Conditions on a warranty.*[See 8 C. L. 1780]—The contract may fix any reasonable conditions to the existence of any rights under the warranty,[3] which must be complied with,[4] but a party need not comply with an immaterial condition.[5]

(§ 8) *E. Waiver of warranties and conditions; excuse for breach.*[See 8 C. L. 1781 *Conditions.*[See 8 C. L. 1785]—The waiver of conditions or breach of warranty is a question of intent [6] to be determined by the jury.[7] While a corporation cannot divest itself of the power to waive conditions,[8] and accepting a note for the purchase price will not have that effect,[9] yet, even in case of latent defects,[10] with some exceptions,[11] a waiver of breach of warranty may be implied from the conduct of the vendee,[12] such as failure to comply with contract provisions,[13] or to inspect,[14] or to reject within a reasonable time,[15] especially where so provided by the contract.[16] As a general rule, which may be modified by the acts of the parties,[17] acceptance [18] after knowledge of defects [19] or after full opportunity to discover the condition of the goods,[20] or accep-

Brooke v. Laurens Mill. Co. [S. C.] 58 SE 806.

3. The conditions may be waived either expressly or by implication. Campbell v. Lodge No. 99, A. F. & A. M. [Kan.] 92 P 53.

4. Farmer's Loan & Trust Co. v. Shumate, 83 Ark. 422, 104 SW 164.

5. Campbell v. Lodge No. 99, A. F. & A. M. [Kan.] 92 P 53.

6. Where contract was to make and set up showcase, payment to be made when set up, the fact that buyer allowed the parts of said showcase, while in crates, to be placed in his house, is not a waiver of the duty to set up the showcase. Diamond Glass Co. v. Ladwig, 33 Pa. Super. Ct. 506.

7. Affick v. Streeter, 125 Mo. App. 703, 103 SW 112.

8. Contract of corporation provided that all subsequent contracts had to be in writing and signed by its president. Held, such provision ineffective to prevent corporation waiving notice. Nichols & Shepard Co. v. Maxon [Kan.] 92 P 545.

9. Contract that title remained in seller until payment made in money, and that note may be given for price. Acceptance of note did not waive conditions. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

10. Defendant purchased soda fountain by description and number, but accepted another of different number with full opportunity to inspect and knowledge that it was not the same as the one ordered, paid 12 purchase-money notes, without notice to vendor of defects, and then sells his interest in the fountain. In action for balance, held, waiver of defects. Liquid Carbonic Acid Mfg. Co. v. Paulk [Ga. App.] 59 SE 1125.

11. Buyer of bottles, after using them, learned they were not the size agreed on. Defect in size not apparent to the eye and seller believed when he put them in use, they were full sized. On discovering defect, notified seller. No waiver of damages for breach. North Baltimore Bottle Glass Co. v. Altpeter [Wis.] 113 NW 435.

12. Marine Iron Works v. Wiess [C. C. A.] 148 F 145.

13. Contract provided means for relief of buyer, but he failed to comply by retaining article, never moved it, or offered to do so, nor notified seller that it was held subject to his order. Held a waiver. J. L. White Furnace Co. v. C. W. Miller Transfer Co., 109 NYS 796.

14. A failure to perform the duty to inspect is a waiver of discoverable defects. But if buyer had no opportunity to inspect, or on reasonable inspection failed to discover defects, and the goods were useless to him, seller cannot recover. Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 14 Det. Leg. N. 626, 113 NW 591.

15. To arrive at what is a reasonable time within which to reject for breach of warranty, all the circumstances, the conduct of seller, and what he has said, will be looked to. Dorrance v. Dearborn Power Co. [Ill.] 84 NE 269.

16. And notice of dissatisfaction given to the seller will not affect the agreement. J. A. Fay & Eagan Co. v. Dudley, 129 Ga. 314, 58 SE 826. Where contract provides that article sold be returned within a specified time if it does not comply with warranty made at sale, failure to return it within that time unless for good cause shown waives any breach of the warranty. Hasenwinkle Grain Co. v. Dooley, 130 Ill. App. 75.

17. The fact that vendee accepted delivery of inferior box board, and with knowledge of its inferiority used it for box purposes, and for that reason vendor would not be answerable in damages for loss accruing from making the box board into boxes, has no application in a case where recoupment is not pleaded nor damages asked. While, as a general rule, a vendee cannot complain, after acceptance of an article with knowledge of its defects, that it is inferior to quality contracted for, yet, where seller upon complaint made expressly authorized vendee to use the article, admitting it was not up to warranty, and leaving the entire matter in hands of vendee, and, after knowledge that vendee claimed the goods were inferior, accepted payment on the goods sold, such state of facts presents an exception to the general rule. Burr v. Atlanta Paper Co., 2 Ga. App. 52, 58 SE 373.

18. Delay of three months in rejecting property, during which buyer operated it for his own benefit, is equivalent to acceptance, and waives defects. Jackson v. Porter Land & Water Co., 151 Cal. 32, 90 P 122.

19. Christian v. Knight, 128 Ga. 501, 57 SE 763; Sizemore v. Woolard [Ga. App.] 59 SE 833.

20. Warranty that stock would be dry

tance and user,[21] or disposing of the goods without objection,[22] operates as a waiver of open and patent defects.[23] A warranty may, however, survive the waiver,[24] and an express warranty ordinarily does so.[25] In such case the waiver goes only to the extent of purchaser's knowledge, and not to discoveries which reasonable diligence might have brought to light,[26] and does not reach defects which though patent were concealed by the ordinary method of shipment [27] or which the buyer was not in a position to detect.[28] Breach is not excused by accident or unavoidable delay due to causes existing anterior to the contract.[29]

(§ 8) *F. Remedies* See 8 C. L. 1785 on the warranty and breach of conditions are treated in other sections of this topic,[30] as are also damages for breach [31] and rights of third persons.[32]

§ 9. *Payment, tender and price as terms of the contract.* See 8 C. L. 1785—Unless waived,[33] payment is due, from which time interest is recoverable,[34] where the goods are delivered, in the absence of any agreement to the contrary,[35] and if time is of the essence of the contract, payment then is indispensable,[36] but if no time is fixed [37] or, if misled by the seller as to the manner of payment, the law will accord the purchaser a reasonable time in which to pay.[38] Where, however, there is a condition precedent,

and in condition to work was sale by words of description and not express warranty. Lestershire Lumber & Box Co. v. W. M. Ritter Lumber Co. [C. C. A.] 153 F 573.

21. Electric Storage Battery Co. v. Waterloo, etc., R. Co. [Iowa] 116 NW 144. Implied warranty may be deemed waived where the article purchased, after full opportunity for examination, discovery of defects, and rejection, is accepted and used. De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co., 2 Ga. App. 493, 58 SE 790. Defendant accepting certain corn waived right to claim that it was inferior, such inferiority, if it existed, being obvious. Brook v. Laurens Mill. Co. [S. C.] 58 SE 806.

22. Patrick v. Norfolk Lumber Co. [Neb.] 115 NW 780. Under an implied warranty of fitness, it is the duty of the buyer of goods to notify the seller of any defective condition immediately upon discovery. Hence, where the buyer of a carload of cabbages accepts the same, pays the price, and later, on discovering the cabbages to be frozen, stops payment of his check but sells a large part of the cabbages, he cannot afterwards set up an implied warranty that the cabbages should be marketable as a basis for an action for the return of the purchase price, as by his retaining and selling part he waived his rights under the warranty. Manton v. Perry, 9 Ohio C. C. (N. S.) 326.

23. Acceptance by an agent not cognizant with the terms of the contract does not affect the rule. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 106 SW 930.

24. West End Mfg. Co. v. P. R. Warren Co. [Mass.] 84 NE 488.

25. J. L. White Furnace Co. v. C. W. Miller Transfer Co., 109 NYS 796.

26. No duty rests upon a purchaser who has bought goods under an express warranty as to quality to inspect them or to exercise care in discovering defects before accepting and paying for them. He may accept and pay for them, relying on the obligation of the seller that he will deliver goods of the quality warranted, unless when he does so he had knowledge of the breach. North Georgia Mill. Co. v. Henderson Elevator Co. [Ga.] 60 SE 258.

27. In such case it is for the jury to determine from the evidence whether the defects were latent or were in fact, waived. Kronman v. Roush Produce Co. [Ga. App.] 59 SE 320.

28. Buyers dealing in lumber, on purchase of a locomotive, not estopped by acceptance. They were not experts and could not determine defects until a test was made. Marbury Lumber Co. v. Stearns Mfg. Co. [Ky.] 107 SW 200.

29. Furnace shut down for repairs which were needed before and at time of contract no excuse. Lima Locomotive & Mach. Co. v. National Steel Casting Co. [C. C. A.] 155 F 77.

30. See post, § 10, Remedies of Seller; § 11, Remedies of Purchaser.

31. See post, § 12.

32. See post, § 13.

33. Seller was paid in part, and, after delivery, was asked how he wanted balance, whether order on buyer's or in another named way, replied "that is all right, either is good." Waiver of payment in cash. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

34. This is true though no demand is made prior to action. Morrison Mfg. Co. v. Fargo Storage & Transfer Co. [N. D.] 113 NW 605.

35. Stum v. Hadrich [Cal. App.] 94 P 82; Erb-Springall Co. v. Pittsburg Plate Glass Co. [Tex. Civ. App.] 19 Tex. Ct. Rep 398, 101 SW 1165.

36. Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593, 81 NE 574.

37. Stewart v. Herron, 77 Ohio St. 130, 82 NE 956.

38. Seller when asked which of two drafts he would prefer replied, "either is good," and afterwards demanded currency. Buyer entitled to reasonable time to produce it. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

it cannot be demanded until the condition is performed.[39] A payment is effective to no greater extent than it is intended to be,[40] and its character is to be determined by the contract,[41] or may be presumed,[42] but after goods are paid for and bill settled, buyer cannot return the goods and receive a credit on another bill due,[43] nor is a promissory note a payment unless agreed that it shall be,[44] nor is a check a payment in full, though it so states,[45] unless it is accepted as such.[46] Payment made in ignorance of legal rights does not waive fraud[47] nor the right to recover damages for a breach.[48]

Tender of payment is unnecessary until delivery[49] or when it would be useless.[50] Tender of a check is not sufficient.[51]

The contract may furnish evidence of the price to be paid,[52] if not, the law does not fix one, if there is a misunderstanding as to it;[53] but by receiving and retaining the goods, the buyer is estopped to question the price of them.[54]

§ 10. *Remedies of the seller. A. Rescission and retaking of goods or action for conversion. Rescission.*[See 8 C. L. 1787]—The right to rescind depends on the nature of the contract, whether divisible[55] or separable.[56] It may be waived by the seller's

39. Where, in a contract for sale of goods, seller agreed to send to the bank for the buyer a bond, in which seller was to guarantee gross profits in sales by buyer to certain amount upon condition that buyer pay for goods at fixed time, the sending of bond by such fixed time was condition precedent to requirement of payment. Equitable Mfg. Co. v. J. B. Davis Co. [Ga.] 60 SE 262.

40. Conditional sale of elevator and mortgage on building where installed, and property in hands of receiver. Purchase price $2,400. Receiver paid seller $500 for release of lien. Held not a release of claim for balance of purchase money. Reedy Elevator Co. v. Berman, 107 NYS 59.

41. In re People's Department Store Co., 159 F 286; Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

42. Where sale is to be completed by delivery, the presumption is that payment is to be made in cash at the time and place of delivery. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

43. Roach v. Warren, Neely & Co. [Ala.] 44 S 103.

44. But an action may be maintained on the note, even though property never delivered and title never passed. Acme Food Co. v. Alder [W. Va.] 61 SE 235.

45. It was undisputed that the indebtedness was greater than amount of check. Roach v. Warren, Neely & Co. [Ala.] 44 S 103. The fact that buyer remitted check reciting "In full to date," which was accepted by seller, does not constitute payment of a disputed claim, there being no intention to offer or receive it as a compromise. Canadian Fish Co. v. McShane [Neb.] 114 NW 594.

46. A check sent in full payment for an instalment of goods, two more being due but refused because defective, which was accepted, held to be a satisfaction. Schwartz v. Hirsch, 56 Misc. 618, 107 NYS 796.

47. Slaughter v. Ditto [Ky.] 108 SW 882.

48. Seller breached contract by failure to properly care for article. Buyer had paid a large portion of the purchase price and was unable to procure a delivery so as to learn the extent of the damage. Summers Fiber Co. v. Walker [Ky.] 109 SW 883.

49. Goods to be paid for as delivered. Felsberg v. Moore, 84 Ark. 399, 106 SW 197.

50. Armstrong v. Poe, 35 Mont. 557, 90 P 758. Tender is excused where the seller has given notice that he will not perform the contract. Strum v. Hadrich [Cal. App.] 94 P. 82.

51. Valk v. Olsen, 54 Misc. 227, 104 NYS 415.

52. Contract for sale of machinery construed and held to furnish evidence of the price agreed to be paid for it. Dowagiac Mfg. Co. v. Benson, 101 Minn. 54, 111 NW 924.

53. Estey Organ Co. v. Lehman [Wis.] 111 NW 1097.

54. No agreement entered into as to price, the buyers believing it one thing, sellers another, and goods received and retained with knowledge of price seller expected to receive, and without agreeing on a different price. They could not escape payment of seller's price. Estey Organ Co. v. Lehman [Wis.] 111 NW 1097.

55. Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. [Iowa] 113 NW 827.

56. Note: The parties entered into a written agreement whereby the defendant was to sell to plaintiff all the coal it mined during the year. The plaintiff agreed to accept and pay for the same at a certain rate per ton, payments to be made each month for the coal delivered during the month immediately preceding. Later defendant refused to deliver any more coal and, in a suit brought against it for the resulting damages, it defended on the ground that plaintiff had failed to pay for the coal as agreed and that by reason thereof the contract was abrogated and defendant was released from the terms thereof. Held that the contract was separable, so that plaintiff's failure to pay for coal delivered during any one month did not authorize defendant to rescind, but that defendant was only entitled at the end of each month to sue for the price of coal previously delivered. Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. [Iowa] 113 NW 827.

The case follows the English doctrine as settled by Simpson v. Crippin, L. R. 8 Q. B. 14, viz., that the breach of one part of a divisible contract does not go to the whole

conduct,[57] but a suggestion not acted upon by the purchaser to keep the contract open,[58] or acceptance of payment, will not have this effect.[59] The seller must on rescission put the purchaser in statu quo [60] and give sufficient [61] and reasonable notice when such notice is necessary.[62] The right to rescind may arise from failure of the purchaser to comply with his contract [63] or from fraud,[64] and is not affected by the

consideration, and does not give the injured party the right to rescind the whole contract. The American cases are hopelessly in conflict, although the case of Norrington v. Wright, 115 U. S. 188, 29 Law. Ed. 366, has probably cast the weight of authority in favor of the rule that the failure on the part of one party to perform a separable part of a contract justifies the other in rescinding the entire agreement. The latter case decided that the failure of a vendor to deliver as much iron in one instalment as required by the contract released the vendee from all obligations under the agreement. It will be noted that the case involved the breach by the vendor of the agreement to deliver and not the failure of the vendee to pay for an instalment. Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434, was a case involving the identical question involved in the principal case, and was much relied on by the plaintiff in Norrington v. Wright, 115 U. S. 188, 29 Law. Ed. 366. Justice Gray, in distinguishing that case from the one then before the court, said: "But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract and to decline to make further deliveries under it." It would seem that there might have been some doubt what the court would have decided had the breach consisted in the vendee's failure to pay instead of the seller's failure to deliver. The principal case relied on the cases of Hansen v. Consumer's Co., 73 Iowa, 77; Osgood v. Bauder, 75 Iowa, 550, 1 L. R. A. 65; Myer v. Wheeler, 65 Iowa, 390, and Iowa Brick Mfg. Co. v. Herrick, 126 Iowa, 721. All the cases except Myer v. Wheeler were decided after Norrington v. Wright, 115 U. S. 188, 29 Law. Ed. 366, and all, including Myer v. Wheeler, 65 Iowa, 390, involved the failure by the vendee to pay for an instalment as agreed. It is interesting to note that the Indiana court in the case of Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593, 81 NE 574, and noted in 6 Mich. L. R. 268, came to the very opposite conclusion on exactly similar facts.—From 6 Mich. L. R. 356.

57. No notification to buyer that seller will rely on failure to pay as per contract as cause for forfeiture, and settlement after breach accepting time notes of buyer and delivering other goods. Little Rock Cooperage Co. v. Lanier, 83 Ark. 548, 104 SW 221.

58. Alpina Portland Cement Co. v. Backus [C. C. A.] 156 F 944.

59. Contract to deliver goods to be paid for as shipped and failure of buyer to pay. On refusal of seller to ship further, buyer paid up its bills. Accepting such payment was not an estoppel. Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593, 81 NE 574.

60. He must return the purchase money if paid. James Music Co. v. Bridge [Wis.] 114 NW 1108. If he has purchase-money notes of the buyer, he must return or offer to return them (Kingman-Moore Implement Co. v. Ellis, 125 Mo. App. 692, 103 SW 127), unless the buyer owes him more than he claims (Id.).

61. Letters by seller to buyer stating that buyer is not keeping up his payments as per agreement, and unless settlement is made before a stated time and assurance made that shipments will move faster shipments will be suspended and contract canceled, sufficiently definite. Port'and Ice Co. v. Connor, 32 Pa. Super. Ct. 428.

62. The dealings between the parties may make reasonable notice of rescission necessary. Agreement for payments weekly by mutual consent had become a dead letter for more than a year after contract made and for months after its modification. Bills were not presented weekly, and payments made from time to time at buyer's convenience. On seller's rescission for failure to make payments as per contract, buyer entitled to reasonable notice. Portland Ice Co. v. Connor, 32 Pa. Super. Ct. 428. Where the buyer himself has failed to perform, notice of rescission is not necessary. Wood, Curtis & Co. v. Leurich, 5 Cal. App. 252, 90 P 51. The question whether the notice to rescind is reasonable is for the jury. Portland Ice Co. v. Connor, 32 Pa. Super. Ct. 428.

63. Refusal by purchaser to pay in accordance with contract requiring delivery from time to time and payment therefor as delivered justifies abandonment of contract by vendor. Patten v. Iroquois Furnace Co., 124 Ill. App. 1. Under contract for delivery of cement, purchaser was to order in specified lots and give 30 days notice in advance. Failure to do so justified rescission by seller. Alpena Portland Cement Co. v. Backus [C. C. A.] 156 F 944. Contract for sale of goods, to be paid for on each instalment, and failure of buyer to pay as agreed. Right to rescind upheld. Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593, 81 NE 574.

64. Rescission is properly effected by an assertion of the purpose, demand for the goods, and action of replevin. Openhym v. Blake [C. C. A.] 157 F 536. To constitute a false representation, there must be something more than an expression of an opinion as to his pecuniary ability. Slayden-Kirksey Woolen Mills v. Weber [Tex. Civ. App.] 18 Tex. Ct. Rep. 534, 102 SW 471. Any statement which has the effect of suppressing the truth or which will deceive the seller or distract his attention from the real facts is a fraud. Files v. Rankin [C. C. A.] 153 F 537, Statements of future intention not amounting to fraud are not ground for rescission. James Music Co. v. Bridge [Wis.] 114 NW 1108. The mere failure to perform an executory agreement does not of itself constitute

pendency of bankrupt proceedings;[65] but the seller is not obliged to rescind for fraud of buyer's agent.[66] Mere insolvency of purchaser, however, and his concealment of the fact, will not justify rescission[67] unless the purchaser was guilty of fraud.[68]

*Recovery of chattels.*See 8 C. L. 1789—The seller cannot recover for fraud of the buyer unless it is shown that the intention not to pay existed at or prior to the sale,[69] but the right cannot be affected by a short delay unless someone is prejudiced thereby.[70] Where it is impracticable to restore the property, a personal money judgment will be rendered against the purchaser.[71]

*Replevin.*See 8 C. L. 1789—If he has title[72] the seller may maintain an action of replevin in a state court to obtain property in the possession of a bankrupt,[73] but the necessity of an affidavit and its sufficiency are to be determined from the statute,[74] and the evidence should be confined to the issue.[75]

(§ 10) *B. Stoppage in transitu.*See 8 C. L. 1789—As prerequisite to the existence of the right to stop in transit, the goods must be in the possession of a carrier between the parties and the buyer actually insolvent.[78]

(§ 10) *C. Lien.*See 8 C. L. 1355—The lien of the seller must be enforced as the statute provides.[77]

(§ 10) *D. Resale.*See 9 C. L. 1790—Where the buyer is bound to accept at place of delivery and refuses to do so, the seller may resell and recover the loss,[78] but the resale must be made without unreasonable delay, after an honest effort to get the best price obtainable,[79] and though the purchaser is not bound by a resale made before the

such fraud as will justify rescission unless there was a secret intention not to perform, the promise having been relied on by seller, and was a material inducement to the sale. Blaul v. Wandel [Iowa] 114 NW 899.

65. Openhym v. Blake [C. C. A.] 157 F 536.

66. A vendor who has made a fair contract of sale to another through the latter's agent need not rescind contract before performance on ground that he afterwards discovered fraudulent intent, in which he did not participate, on part of agent toward his principal. Hayward Lumber Co. v. Cox [Tex. Civ. App.] 19 Tex. Ct. Rep. 820, 104 SW 403.

67. Slayden-Kirksey Woolen Mills v. Weber [Tex. Civ. App.] 18 Tex. Ct. Rep 534, 102 SW 471. The seller's right to rescind and reclaim goods because of the buyer's insolvency at the time of the purchase depends on whether the buyer knew of his insolvency and inability to pay at the time the goods were delivered. There must have been an intention not to pay for them. In re Levi & Picard, 148 F 654.

68. Although under the bankruptcy act the buyer might have been declared a bankrupt, if his financial condition was such as to justify a reasonable belief that he could pay according to contract, he was not guilty of fraud. Blaul v. Wandel [Iowa] 114 NW 899.

69. The receipt of goods in the usual course of business which had been ordered months before in the ordinary course of business will not warrant finding that fraudulent purpose was entertained merely from fact firm was then insolvent. Fraud is not presumed. Ayres v. Farwell [Mass.] 82 NE 35.

70. Fraud practiced July 13, sale rescinded Aug. 21. Intervention by seller in bankruptcy proceedings Dec. 21, after partial dividend declared, not prejudicial delay. Openhym v. Blake [C. C. A.] 157 F 536.

71. Suit in equity for rescission and restoration of the property, the ownership of property having changed. Swan v. Talbot [Cal.] 94 P 238.

72. If title had been lost, the action cannot be maintained. Fagan Iron Works v. Dawson Realty Co., 109 NYS 740.

73. Action after adjudication in bankruptcy, but before appointment of trustee, maintained, the court first getting possession under its process acquiring jurisdiction. Ayers v. Farwell [Mass.] 82 NE 35.

74. It is not essential in the district court that any affidavit as contemplated by § 182 of the Code of Civil Procedure (Cobbey's Ann. St. 1903, § 1153) should be filed, nor that facts required to be set out in affidavit under 4th subdivision of § 182 should be embodied in petition. It is necessary to set out facts required by such subdivision in affidavit or petition only when order of delivery is desired. Racine-Sattley Co. v. Meinen [Neb.] 114 NW 602.

75. The issue being whether the transaction was sale or bailment, evidence of other alleged matters of defense is improper. American Car & Foundry Co. v. Altoona, etc., R. Co., 218 Pa. 519, 67 A 838.

76. James Music Co. v. Bridge [Wis.] 114 NW 1108.

77. Vendor's lien being retained is to be enforced as pledges are, and the vendor has no right without consent of vendee to purchase the property at foreclosure sale. Such purchase renders sale voidable. Reeves v. Bruening [N. D.] 114 NW 313.

78. Olson v. Wabash Coal Co., 126 Ill. App. 253.

79. Brooke v. Robson [Ga. App.] 59 SE 323. Whether this course has been pursued, if there is room for controversy, is an issue of fact. Carver, Frierson & Co. v. Graves [Tex. Civ. App.] 20 Tex. Ct. Rep. 730, 106 SW 903.

day fixed for performance,[80] the vendor is not bound to resell at the contract place nor within the contract time of delivery.[81]

(§ 10) *E. Action for the price and quantum valebat.* See 8 C. L. 1790—The form of the action will depend on whether title has passed,[82] for unless it has the price of the goods cannot be recovered.[83] In such action the seller is entitled to interest from date of sale.[84]

Right of action and conditions precedent. See 8 C. L. 1700—The party who first breaks his contract cannot recover upon it,[85] but where the seller establishes the contract and shows performance, he is entitled to recover [86] if statutory [87] and contractual conditions are complied with.[88] Hence a tender of the goods should be made to the buyer,[89] and, if the contract is entire, there must be a delivery [90] unless action is brought on an independent covenant.[91]

Defenses and election between them. See 8 C. L. 1791—Lack of information is no defense,[92] nor is ignorance in method of discounts [93] nor defects in goods, known at the time of purchase,[94] nor the fact that the buyer thought he was dealing with another party,[95] nor the violation of a penal statute by the seller and defendant's agent,[96]

80. Brooke v. Laurens Mill. Co. [S. C.] 58 SE 806.

81. North Georgia Mill. Co. v. Henderson Elevator Co. [Ga.] 60 SE 258.

82. If title passed, but goods not delivered, a common indebitatus count for goods bargained and sold is appropriate. Neither an action for goods bargained and sold nor for goods sold and delivered will lie if title has not passed. Acme Food Co. v. Older [W. Va.] 61 SE 235.

83. Contract price cannot be recovered under count in assumpsit for goods bargained and sold. The remedy is for damages for breach of contract. River Spinning Co. v. Atlantic Mills, 155 F 466. A breach of an executory contract will not support an action for the price. Dilman Bros. v. Patterson Produce & Provision Co., 2 Ga. App. 213, 58 SE 365.

84. Marx v. Raley [Cal. App.] 92 P 519.

85. Hall v. Frick Co. [Ky.] 106 SW 1186.

86. Morgan v. Heitmann, 121 App. Div. 568, 106 NYS 253.

87. Sess. Laws 1897, pp. 248, 249, c. 65, require that persons doing business as partners under any other name than the personal names of the members shall file for record in the county where the business is carried on affidavit setting out full Christian and surnames and addresses of parties represented. Until this is done, no action can be maintained. Elgin Jewelry Co. v. Wilson [Colo.] 93 P 1107. Foreign corporation is in some jurisdictions required to perform certain statutory conditions in order to sue. Generally it shall have a public office in the state, shall appoint an agent resident therein to accept service of process, and, perhaps, pay a license. But such statutes do not apply to actions in the Federal courts. Dunlop v. Mercer [C. C. A.] 156 F 545.

88. Contract recited that defendant would purchase goods in his hands on request by plaintiff. Such request was a condition precedent to right of action. Hollowell v. Smith Agricultural Chemical Co. [Ind. App.] 83 NE 772.

89. Stemmerman v. Kelly, 122 App. Div. 669, 107 NYS 379. Necessity for tender, however, is obviated by acts of the buyer, as by express refusal, in advance, to receive the goods or where he has placed himself in a position to make performance impossible. Lekas v. Schwartz, 56 Misc. 594, 107 NYS 145.

90. A transfer on the books is insufficient. Haynes v. Brown, 18 Okl. 389, 89 P 1124. The buyer may use one instalment without becoming liable for it. Schwartz v. Hirsch, 56 Misc. 618, 107 NYS 796.

91. Stipulation for certain payments on the purchase price prior to delivery of the goods. Krebs Hop Co. v. Livesley [Or.] 92 P 1084.

92. One cannot complain of a lack of information obtainable by keeping his eyes open, if there has been no unfair advantage. Hence, where one undertakes to transfer only the interest he possesses in particular property, and transferee is in position to know as well as he the extent of that interest, and both parties act in good faith, transferee has no just cause of complaint if the interest acquired proves to be less valuable than he expected. Exchange Bk. v. Williams [La.] 45 S 935.

93. Mixture of common and decimal fractions in discounts. Trade usage allowed the use of both kinds, and both were plainly used and set down in writing. Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20.

94. If purchaser of machinery inspects it, personally or by agent, buys, makes cash payment and gives notes for balance, and receives the property without objection till sued on the notes, he cannot plead the existence of patent defects rendering machinery worthless. Baxley Tie Co. v. Simpson, 1 Ga. App. 670, 57 SE 1090.

95. Corporate officer sold stone to buyer who had claim against the corporation and thought he was dealing with corporation. Held, no defense by purchaser. Pizzutielle v. Graham, 56 Misc. 584, 106 NYS 1099.

96. After acceptance and use of the goods, it is no defense that buyer's servant was paid a per cent for purchasing from the

especially if defendant knew of the intention to violate the law.[97] Whether misrepresentations and fraud are available defenses depends upon the circumstances,[98] but, that the contract proved is not the true one,[99] and, although the buyer may be estopped to set it up,[1] failure,[2] or partial failure of consideration,[3] and a return of the goods * and their acceptance are good defenses.[5]

The complaint. See 8 C. L. 1791—The complaint must state a cause of action,[6] alleging an enforcible contract [7] and charging its breach.[8] If the promise was express, it must be alleged,[9] nor will an implied promise be inferred.[10] It must state the facts upon which it is sought to recover,[11] and allege the value of the goods.[12] Excuse for nonperformance should be averred,[13] and if a rescission is relied on, a reasonable

seller in violation of a statute prohibiting the influencing of agents in relation to the master's business. Sirkin v. Fourteenth St. Store, 55 Misc. 288, 105 NYS 179, afg. 64 Misc. 135, 105 NYS 638; Ballin v. Fourteenth St. Store, 54 Misc. 359, 105 NYS 1028.

97. Ballin v. Fourteenth St. Store, 108 NYS 26.

98. False representation to be available must have been known to have been false by the seller and relied on by the buyer to his injury. Brown Bros. v. Korns, 134 Iowa, 699, 112 NW 195. Buyer may set up fraud and misrepresentation and the failure to deliver goods of the quality stipulated for and cannot be compelled to elect between them, they not being inconsistent. Disney v. St. Louis Jewelry Co. [Kan.] 90 P 782. The seller is bound by his representations if the purchaser has relied upon them. In such case it is the seller's duty to disclose truthfully his knowledge of the entire matter, and whether or not this was done is a question of fact. Evans v. Palmer [Iowa] 114 NW 912. If fraud is relied on, it must be shown that diligence and promptitude were exercised in discovering it, and this is a question for the jury. Robinson v. Roberts [Okl.] 95 P 246. Order for steel bars to cost $200, which, on arrival, cost more than $2,000. The statement as to cost did not constitute fraud, the buyer having the same means of ascertaining the weight of the steel as the seller. Dalhoff Const. Co. v. Block [C. C. A.] 157 F 227. Misrepresentation of the price is an available defense. Hence, sale at the market price, which seller averred was $1.25 per gallon, when, in fact, it was $1.05, is a fraud on the buyer. Carrara Paint Agency Co. v. Naylor, 32 Pa. Super. Ct. 329.

99. West-end Mfg. Co. v. P. R. Warren Co. [Mass.] 84 NE 488.

1. Purchaser bought article by description and number, but accepted another different article with knowledge of the fact and opportunity to inspect, paid 12 of the purchase money notes and then sold article, having never given vendor notice of defects. In action for balance, held estopped to plead partial failure of consideration. Liquid Carbonic Acid Mfg. Co. v. Paulk [Ga. App.] 59 SE 1125.

2. If article wholly worthless, action may be wholly defeated under plea of want of consideration, although buyer did not offer to rescind or return. Ferguson Implement Co. v. Parmer [Mo. App.] 107 SW 469. Failure to deliver goods contracted for. Disney v. St. Louis Jewelry Co. [Kan.] 90 P 782.

3. Partial failure of consideration may be pleaded, even though partial payment made after discovery of defects. Burr v. Atlanta Paper Co., 2 Ga. App. 52, 58 SE 373.

4. Notwithstanding contract stipulated that any article failing to wear satisfactorily would be duplicated free if returned within 5 years and might be exchanged within 12 months, and purchaser waived right to claim failure of consideration. Main v. El Dorado Dry Goods Co., 83 Ark. 15, 102 SW 681.

5. Elgin Jewelry Co. v. Wilson [Colo.] 93 P 1107.

6. Action for money due on contract, and failure to tender goods and aver damages on account of purchaser's refusal to perform, renders complaint demurrable. Rouse v. Rose [Ind. App.] 83 NE 253. Complaint that buyer agreed to purchase and seller agreed to sell a certain quantity at certain price, that seller performed, and that buyer refused to accept, to seller's damage, etc., states cause of action. Isaacs v. Terry & Tench Co., 56 Misc. 586, 107 NYS 136.

7. Gabriel v. Kildare Elevator Co., 18 Okl. 318, 90 P 10.

8. An allegation, by way of excuse for nonperformance, that the plans to be furnished by the buyer were not furnished till after time to deliver, sufficiently charges a breach of the duty to furnish. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826.

9. A mere recital of the writing sued on, though a true copy, is not sufficient. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826.

10. If there is no allegation of implied contract, none can be inferred from an attached account of articles sold. Hayward Lumber Co. v. Cox [Tex. Civ. App.] 19 Tex. Ct. Rep. 820, 104 SW 403.

11. Virginia Timber & Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 256, 90 P 48.

12. If the facts alleged make a case in which the title to the property had not passed to the purchaser at the time of the breach, the complaint is fatally defective in failing to show market value when default made. Fletcher v. Southern [Ind.] 84 NE 526. Allegation that itemized account was furnished and partial payment made does not cure defect. Sparks v. Ducas, 108 NYS 546.

13. Longfellow v. Huffman [Or.] 90 P 907.

time for performance must be shown to have elapsed.[14] While the defendant may require the plaintiff to make the complaint more definite and certain or serve a bill of particulars,[15] it is sufficient if it will apprise a person of common understanding of the nature and extent of the claim,[16] nor is he bound to anticipate answers and objections of defendant.[17] An amendment averring substantially a different cause of action will be denied.[18]

Answer and counterclaim.[See 8 C. L. 1792]—The answer must be definite,[19] alleging fraud, if relied on,[20] set up facts [21] unless the action is on contract,[22] and be verified [23] by sufficient affidavit.[24] The counterclaim must show by the facts averred that the purchaser sustained damage.[25]

Variance.[See 8 C. L. 1793]—As a variance will defeat the plaintiff's action,[26] the evidence must conform to the pleadings [27] and sustain the allegations [28] if they lie at the foundation of the action.[29]

Presumptions and burden of proof.[See 8 C. L. 1793]—An adequate consideration [30] and that vendor had the property on hand may be presumed.[31] The burden is on the party relying upon a contract [32] or defense to establish it,[33] but after a prima facie

14. Pinkiert v. Kornblum, 5 Cal. App. 522, 90 P 969.

15. In this way the seller may be required to elect his measure of damages. Isaacs v. Terry & Tench Co., 56 Misc. 586, 107 NYS 136.

16. Hanson v. Gronlie [N. D.] 115 NW 666.

17. Hastings v. Speer, 34 Pa. Super. Ct. 478.

18. Diamond Glass Co. v. Ladwig, 33 Pa. Super. Ct. 506.

19. In action for purchase price of hame hooks, answer alleging buyer had lost the cost of many hames on account of defective hooks is insufficient. Dublin Hame Works v. Ross-Mehan Foundry Co., 128 Ga. 399, 57 SE 683. An answer alleging that defendants returned the goods to the seller in rescission of the contract, and that they were accepted, sufficiently pleads a rescission. National Cash Register Co. v. Price [Ind. App.] 83 NE 776.

20. Where fraud is relied on as a defense, the scienter must be alleged. Bromonia Co. v. Greenwood Drug Co. [S. C.] 59 SE 363. Fraud must be alleged where an inspection is to be attacked on that ground. Dunham v. H. D. Williams Cooperage Co., 83 Ark. 395, 103 SW 386.

21. The plea must set up facts, and not defendant's construction of the agreement. Daniel v. Siegel-Cooper Co. [Fla.] 44 S 949.

22. Where the action is not quantum valebat, but on contract a mere denial of the purchase is sufficient. Hence in action for price of goods sold and delivered, an answer denying the purchase, but failing to deny delivery, held free from attack by demurrer. Improvement Dist. No. 1 of Wynne v. Brown [Ark.] 109 SW 1010.

23. Answer "that defendant at no time made any other or different contract with plaintiff than is set up," not being verified, raised no issue as to the execution of the written contract set up in complaint. Sullivan Mach. Co. v. Breeden, 40 Ind. App. 631, 82 NE 107.

24. Allegations in the affidavit of defense that the contract was induced by fraud is sufficient to take the case to the jury. Standard Interlock Elevator Co. v. Wilson, 218 Pa. 280, 67 A 463. Affidavit setting up defense, claim for damages for breach of contract by purchaser must allege facts showing the right to recover, and be in such form as that amount of damages may be arrived at. Benjamin v. Maloney, 155 F 494.

25. Sullivan Mach. Co. v. Breeden, 40 Ind. App. 631, 82 NE 107.

26. Allegation that seller had sold and delivered sheep at fixed price, which was unpaid. Proof showed agreement was that buyer was to pay by draft, which was never tendered or demanded. Variance amounted to failure of proof. Armstrong v. Poe, 35 Mont. 557, 90 P 758.

27. Fraud cannot be proved under a complaint which fails to set it up. Virginia Timber & Lumber Co. v. Glenwood Lumber Co., 5 Cal. App. 256, 90 P 48.

28. In action for goods sold and delivered to a corporation, plaintiff failed to prove that any dealings were ever had with defendant, but evidence showed goods sold to its president personally. Failure to prove cause of action as alleged. Thomsen v. Alexander, 107 NYS 718.

29. It is not a fatal variance that plaintiff failed to prove statements which do not lie at the foundation of his right of action. Hastings v. Speer, 34 Pa. Super. Ct. 478.

30. Agreement to sell and purchase, a fractional part of the value paid in cash. Nothing to the contrary appearing, it will be presumed that the skill and labor of the buyer was of itself sufficient to make the consideration adequate. Stum v. Hadrich [Cal. App.] 94 P 82.

31. Brown v. Trinidad Asphalt Mfg. Co. [Mo.] 109 SW 22.

32. Contract with agent of plaintiff for 600 bags peanuts. Order blank recited that all sales subject to acceptance by plaintiff. Order filled for 100 bags and declined as to balance. On suit by seller, on defense that contract was absolute for delivery of 600 bags, burden on defendant to show such

case made, the burden is shifted.[34] The burden is on the seller to establish his case by a fair preponderance of the evidence,[35] hence he must prove the contract,[36] the consideration if alleged,[37] that the goods would not have been sold but for the promise made by the seller,[38] and performance of [39] or willingness to perform the contract,[40] but the burden to show delay cannot be discharged by showing that an act of defendant caused it.[41] While the buyer is only required to introduce sufficient testimony to place the matter of the making of the contract alleged by the seller in equipoise,[42] he must establish the defenses relied on,[43] such as breach of warranty,[44] delay in delivery,[45] the right to return the goods because defective,[46] that he is an innocent purchaser without notice,[47] noncompliance with statutory regulations by seller,[48] and nonacceptance.[49]

Evidence; admissibility and sufficiency. See 8 C. L. 1794—The evidence must be both relevant [50] and material.[51] The admission of evidence of experiments is largely in the discretion of court.[52] Admissions by vender are admissible,[53] and the inducement

contract. Suffolk Peanut Co. v. Luden, 32 Pa. Super. Ct. 603.

33. San Jacinto Oil Co. v. Texas Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 187, 105 SW 1163.

34. In suit to recover value of goods sold and delivered under contract of sale, where defendant admits receipt of same and correctness of price, prima facie case is made out, and burden is shifted, and defendant must establish his plea by preponderance of evidence. Gem Knitting Mills v. Empire Print. & Box Co. [Ga. App.] 60 SE 365.

35. Helm v. Loveland [Iowa] 113 NW 1082.

36. Action for price of coal and denial of contract by defendant. Drake Coal Co. v. Croze, 149 Mich. 60, 14 Det. Leg. N. 343, 112 NW 715.

37. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex. Civ. App.] 107 SW 157.

38. Blaul v. Wandel [Iowa] 114 NW 899.

39. Lucas E. Moore Stave Co. v. M. Mosson Co., 108 NYS 883. Where goods were to be shipped according to complete figured drawings, it was for the plaintiff to show that such drawings were furnished. McNeil v. American Bridge Co. [Mass.] 81 NE 651.

40. The burden to show seller was ready to furnish another article to take the place of the one sold is not sustained by evidence that such notice was sent to purchaser by registered letter, no receipt for which was produced and notice denied by purchaser. Garvin v. Monteregro-Riehm Music Co., 31 Ky. L. R. 1182, 104 SW 964.

41. It is plaintiff's duty to measure, by competent proof, the delay in periods of days, not leaving it to be guessed at by the jury from some indefinite and uncertain evidence. Wheeling Mold & Foundry Co. v. Wheeling Steel & Iron Co. [W. Va.] 57 SE 826.

42. Helm v. Loveland [Iowa] 113 NW 1082.

43. Carbonating Apparatus Co. v. Geary, 122 App. Div. 410, 106 NYS 768.

44. Elmore v. Booth, 83 Ark. 47, 102 SW 393; Miller v. James Smith Woolen Mach. Co. [Pa.] 69 A 598. In action for price of glue sold under warranty, proof by buyer that glue was used properly and that it did not hold is sufficient evidence to go to the jury that glue was defective and not as contract called for. American Glue Co. v. Rayburn, 150 Mich. 616, 14 Det. Leg. N. 809, 114 NW 395.

45. Bruner v. Kansas Moline Plow Co. [Ind. T.] 104 SW 816.

46. To meet this burden, the testimony must, at the very least, satisfy the tribunal to which it is addressed that he could not by the exercise of reasonable care have discovered the defect within a reasonable time. Muncie Wheel & Jobbing Co. v. Finch, 150 Mich. 274, 14 Det. Leg. N. 726, 113 NW 1107.

47. Wittler-Corbin Mach. Co. v. Martin [Wash.] 91 P 629.

48. Where purchaser of fertilizers defends against payment on ground that goods were not tagged or branded as required by law before offered for sale, burden is on him to establish defense. Griner v. Baggs [Ga. App.] 61 SE 147.

49. In action for failure to deliver, plaintiff claimed contract made over telephone, defendant denying acceptance by authorized person. Star Bottling Co. v. Cleveland Faucet Co. [Mo. App.] 109 SW 802.

50. In suit for purchase price of engine, evidence of work of other engines built by plaintiff, owned by other parties and doing a different work, is not proper. Hammerschlag Mfg. Co. v. Struthers-Wells Co. [C. C. A.] 154 F 326.

51. On purchase of machinery by two supervisors, the fact that at an unsatisfactory test one of them was satisfied to accept the machine is immaterial and irrelevant. Good Roads Mach. Co. v. Union Tp., 34 Pa. Super. Ct. 538. Where the condition of the goods is in question, evidence that shipments had been formerly made to other parties from the same bulk and received without complaint is irrelevant. Bloom's Son Co. v. Haas [Mo. App.] 108 SW 1078.

52. To be admissible, there must be a substantial similarity as to the essential and material facts affecting the comparison. De Loach Mill Mfg. Co. v. Tutweiler Coal, Coke & Iron Co., 2 Ga. App. 493, 58 SE 790.

53. In action for purchase price by seller, the issues being raised that goods not delivered, plaintiff may prove admissions made by buyer in pleading filed in suit against a railroad company for failure to deliver the

to the sales and its falsity may be shown.[54] It may be shown also that the seller failed to comply with his contract[55] and the construction the parties placed on it.[56] Evidence is admissible to connect the note sued on with a purported cash sale of goods made by seller's manager in his own name.[57] A settlement by the parties to determine the question of damages may be shown.[58] It may be shown that certain property was not included in the sale,[59] or that the article exhibited to the buyer was but a sample of that intended to be delivered,[60] or that the article was defective [61] in particulars covered by the warranty.[62] Telephone communications stand on the same footing as conversations,[63] and a letter from buyer to seller demanding delivery is admissible.[64] The effect of delay may also be shown,[65] as well as that seller knew of the necessity of immediate shipment and probable loss for failure to do so.[66] Parol evidence is admissible to show that the contract sued on is not the real effective contract,[67] and though, where such evidence is admissible, it must be clear and convincing,[68] it may be introduced to prove the entire contract where the writing does not contain it [69] or where it is uncertain on its face [70] owing to the use of terms with doubtful meaning,[71] in which case custom and usage may be also relied on.[72] Parol evidence is likewise admissible to show fraud [73] where it is pleaded [74] and in issue,[75]

same goods. Seligmann v. Greif [Tex. Civ. App.] 109 SW 214.

54. In action to recover purchase price of machinery, buyer may show that purchase was made on representations of vendor that machinery would do work required and that it failed to do so. Fairbanks, Morse & Co. v. Burgert [Neb.] 116 NW 35.

55. On contract to furnish metal, seller sued buyer for breach. On denial by buyer that seller had performed, evidence that metal furnished prior to breach by buyer was unsatisfactory was admissible. Lehmaier v. Standard Specialty & Tube Co., 108 NYS 402.

56. Consolidated Coal Co. v. Jones, 232 Ill. 326, 83 NE 851.

57. Iberia Cypress Co. v. Von Schoeler [La.] 46 S 105.

58. Action for balance of purchase money and damages claimed by defendant by reason of loss incurred in settlement. Rogers v. Petrified Bone Min. Co. [C. C. A.] 158 F 799.

59. Little Rock Cooperage Co. v. Gunnels, 82 Ark. 286, 101 SW 729.

60. Action for breach of contract for failure to deliver the identical property purchased. Schwartz v. Roberts [Tex. Civ. App.] 18 Tex. Ct. Rep. 581, 102 SW 924.

61. Roquemore v. Vulcan Iron Works Co. [Ala.] 44 S 557.

62. Defendant having pleaded and relied on an express warranty. Burr v. Atlanta Paper Co., 2 Ga. App. 52, 58 SE 373.

63. Star Bottling Co. v. Cleveland Faucet Co. [Mo. App.] 109 SW 802.

64. Fitzgerald Cotton Oil Co. v. Farmers' Supply Co. [Ga. App.] 59 SE 713.

65. Buyer, in action for the price, may show that delay in delivery prevented completion of work for which goods intended, whereby damage resulted. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 106 SW 930.

66. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 106 SW 930.

67. Birley v. Dodson [Md.] 68 A 488. Evidence tending to prove which of two contracts is the true one will be admitted. W. W. Wilson Stave Co. v. Webb, 84 Ark. 623, 105 SW 577.

68. De Laval Dairy Supply Co. v. Steadman [Cal. App.] 92 P 877.

69. And if there is a collateral parol agreement as to the same matter, parol evidence is admissible if not contradictory of the writing. Roquemore v. Vulcan Iron Works Co. [Ala.] 44 S 557.

70. Ryley Wilson Grocer Co. v. Seymour Canning Co. [Mo. App.] 108 SW 628.

71. Contract to furnish "heart of yellow pine." Circumstances under which contract was made, and conversations with reference to it, to show meaning of term. San Miguel Consol. Gold Min. Co. v. Stubbs, 39 Colo. 359, 90 P 842.

72. Admissible to explain meaning of words and phrases in contract and annex to it incidents which circumstances indicate the parties intended when the words used do not necessarily exclude the operation of the usage and custom. Lima Locomotive & Mach. Co. v. National Steel Castings Co. [C. C. A] 155 F 77.

73. El Dorado Jewelry Co. v. Hopkins, 34 Pa. Super. Ct. 446; United States Gypsum Co. v. Shields [Tex. Civ. App.] 20 Tex. Ct. Rep. 671, 106 SW 724. Similar acts may be proven to show fraud in the seller when the intent is material. Compagnie Des Metaux Unital v. Victoria Mfg. Co. [Tex. Civ. App.] 107 SW 651. Action for purchase price of oil shares. Defendant set up fraud, denied by plaintiff. Evidence to show plaintiff had similar dealings with others admissible. Crosby v. Wells, 73 N. J. Law, 790, 67 A 295.

74. Generally fraud cannot be proved unless pleaded by statement of facts constituting the fraud. But notwithstanding this rule, under a written plea of non est factum it may be shown that the signature of defendant was procured through the secret and fraudulent substitution of it in the place of another which the defendant supposed he was signing. Main v. Hall, 127 Mo. App. 713, 106 SW 1099.

or to show mistake in executing the contract.[76] But this class of evidence, where the agreement is clear [77] and complete,[78] or where such agreements are waived by the writing,[79] is not admissible to vary its terms.[80] Nor, in the absence of such issue, is evidence of grade admissible;[81] nor evidence of fictitious value;[82] nor an offer to compromise;[83] nor statements of seller's agent;[84] nor recitals in a bill of lading;[85] nor a sworn account when denied.[86]

The sufficiency of the evidence to show the contract,[87] breach of warranty,[88] failure of consideration,[89] delivery [90] and value,[91] is determined in the particular case.

Trial and instructions.[See 8 C. L. 1796]—While the questions pertaining to trial and instructions are fully and more properly treated elsewhere in this work,[92] it may not be amiss to note that, where a prima facie case is made out, the complaint should not be dismissed;[93] that the instructions should not introduce issues not pleaded,[94] nor be contrary to pleading and proof,[95] nor be conflicting,[96] nor misstate the defense,[97] but clearly present the issue.[98] On issues of fact,[99] when the evidence is con-

75. Where fraud is the issue, parol evidence as to the original contract is admissible. Compagnie Des Metaux Unital v. Victoria Mfg. Co. [Tex. Civ. App.] 107 SW 651

76. Northwest Thresher Co. v. Hulburt [Minn.] 115 NW 159.

77. Morrison Mfg. Co. v. Fargo Storage & Transfer Co. [N. D.] 113 NW 605.

78. Where the contract is complete, a warranty resting in parol cannot be engrafted upon it. Johnson, Berger & Co. v. Hughes, 83 Ark. 105, 103 SW 184; Arden Lumber Co. v. Henderson Iron Works & Supply Co., 83 Ark. 240, 103 SW 185.

79. Victor Safe & Lock Co. v. O'Neil [Wash.] 93 P 214.

80. Commercial & Sav. Bk. v. Pott, 150 Cal. 358, 89 P 431.

81. Bluff City Lumber Co. v. Hilson [Ark.] 107 SW 161.

82. In sale of stock, the purchaser cannot show that stock generally may have a fictitious value. Commercial & Sav. Bk. v. Pott, 150 Cal. 358, 89 P 431.

83. Boylan v. McMillan [Iowa] 114 NW 630.

84. Statement made by an agent as to his discounts on sales of goods given generally by his principal is not admissible to contradict the terms of discount offered by the principal in a particular transaction negotiated by principal with purchaser. Bernstein v. Koken Barbers' Supply Co., 1 Ga. App. 445, 57 SE 1017.

85. Bloom's Son Co. v. Haas [Mo. App.] 108 SW 1078.

86. Pitman v. Bloch Queensware Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 789, 106 SW 724.

87. The correspondence of the parties, especially when taken with the fact that plaintiff treated the letters as a contract and attempted to carry out the agreement by filling defendant's order, is sufficient to establish a contract. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 SE 120.

88. Evidence that a horse, three weeks after purchase, showed evidence of founder, is not sufficient evidence of unsoundness at date of purchase, it being shown he was apparently well then and was exposed to rain by buyer. Wendel v. Goldsmith, 109 NYS 233.

89. On plea of failure of consideration, the evidence must show the extent of such failure. Ingram v. McCaskey Register Co. [Ga. App.] 60 SE 291.

90. An admission that the goods were received and payment made therefor is sufficient to show delivery. North Pacific Lumber Co. v. Carroll [Wash.] 93 P 212. That the goods were sold and shipped is sufficient proof of delivery in absence of evidence to the contrary. G. V. Gress Co. v. Berry Bros., 2 Ga. App. 207, 58 SE 384.

91. The jury may find the value from the price fixed by the contract. Lehigh v. Standard Tie Co., 149 Mich. 102, 14 Det. Leg. N. 283, 112 NW 481. The amount charged may afford evidence of value. Bill rendered and testimony of seller that charges were those indicated by bill. No objection by defendant that "charges" were not evidence of value made when testimony given. He is estopped to put a different construction on the term at the trial, the evidence given in deposition. Hillman v. Hulett, 149 Mich. 289, 14 Det. Leg. N. 458, 112 NW 918.

92. See Discontinuance, Dismissal and Nonsuit, 9 C. L. 982; Instructions, 10 C. L. 296; Questions of Law and Fact, 10 C. L. 1346; Trial, 8 C. L. 2161; Verdicts and Findings, 8 C. L. 2245.

93. Brown v. Grossman, 108 NYS 653; Friend v. Rosenwald, 108 NYS 701.

94. Helm v. Loveland [Iowa] 113 NW 1082.

95. Pleadings and proof showing express warranty, it is erroneous to charge that in the absence of fraud the rule caveat emptor applies, and no express warranty is pleaded. Mastin v. Bartholomew [Colo.] 92 P 682.

96. Instructions 1 and 3 told the jury that seller was bound to furnish heart of yellow pine, notwithstanding sample may not have been heart of yellow pine; by instructions 6 and 10 jury instructed that if seller furnished same quality as sample he could recover. Conflicting. San Miguel Consol. Gold Min. Co. v. Stubbs, 39 Colo. 359, 90 P 842.

97. Defense pleaded general issue, and that defendant had not agreed to deliver at any particular time. A charge that he had pleaded the general denial and that no contract had been made for delivery at any time was erroneous. Earnest v. Waggoner [Tex. Civ. App.] 108 SW 495.

98. The provisions of the contract were that the machine should be used according

flicting, the case should be submitted to the jury,[1] but on the issue only.[2] A verdict, which cannot be waived by omissions of counsel,[3] should not be directed for plaintiff if the evidence shows a rescission by defendant.[4]

(§ 10) *F. Action for breach.* See 8 C. L. 1797—The seller may sue for the breach as soon as it occurs,[5] but the complaint must allege how the damage was caused.[6]

(§ 10) *G. Action for damages for goods not accepted.* See 6 C. L. 1362

(§ 10) *H. Choice and election of remedies.* See 8 C. L. 1798—The purchaser's remedies are several, and depending on whether the purchaser refuses to accept or has been guilty of fraud.[8] The election to pursue any one of these remedies must be made within a reasonable time,[9] and, when made, he must stand upon it.[10]

§ 11. *Remedies of purchaser. A. Rescission.* See 8 C. L. 1799—A rescission is not necessary when the sale has been procured by mistake [11] or when the purchaser is under no obligation to accept,[12] and, when it is necessary, the burden is on the vendee to show sufficient cause to warrant it.[13] He must act promptly,[14] within a reasonable time,[15] and after definite [16] notice,[17] and by placing the seller in statu quo,[18] as far as

to printed directions. An instruction that "the questions are whether the machine was of good material and well made and did good work with proper management when set up and operated according to directions," was sufficient. Hein v. Mildebrandt [Wis.] 115 NW 121.

99. P. N. & F. M. Roots Co. v. New York Foundry Co., 107 NYS 742.

1. W. E. Caldwell Co. v. Steckel [Iowa] 112 NW 229; Lehigh v. Standard Tie Co., 149 Mich. 102, 14 Det. Leg. N. 283, 112 NW 481; Aultman Engine & Thresher Co. v. Boyd [S. D.] 112 NW 151. The fact of purchase, when denied, is a question for the jury. Chautauqua Lake Mills v. Hewes, 55 Misc. 634, 106 NYS 1026. The rule is that, if in any view of the evidence a verdict might have properly been rendered for the plaintiff, or if there were questions of fact which might have been determined for plaintiff and which, if determined in his favor would have entitled him to recover the case should not be taken from the jury. Lekas v. Schwartz, 56 Misc. 594, 107 NYS 145.

2. Where buyer relies on express warranty it is not proper to submit the question of implied warranty. Sherwood v. Hullett [Wis.] 114 NW 1111.

3. The omission of counsel to repeat, after verdict directed, the statement made before the ruling, is not a waiver of the right to take a verdict. Barnewitz v. Jonest, 108 NYS 997.

4. P. H. & F. M. Roots Co. v. New York Foundry Co., 54 Misc. 635, 104 NYS 785.

5. Kelly v. Pierce [N. D.] 112 NW 995.

6. Action to recover damages for breach of vendee's contract to maintain prices. It was held that, as the contract did not fix the wholesale price, complaint was defective for not alleging sales were not at wholesale prices. Grogan v. Chaffee [Cal. App.] 92 P 653.

7. The seller may store the property as agent for buyer, and sue for the purchase price, sell and recover the deficiency or keep it as his own, and recover the difference between contract price and market price at place of delivery. Isaacs v. Terry & Tench Co., 56 Misc. 586, 107 NYS 136; Id., 109 NYS 792; Lekas v. Schwartz, 56 Misc. 594, 107 NYS 145; Olson v. Wabash Coal Co., 126 Ill. App. 253.

8. For fraud of purchaser, the vendee may rescind or recover the specific property. Crawford v. Hurd [Ky.] 106 SW 849.

9. Brooke v. Robson [Ga. App.] 59 SE 323.

10. Robert v. Hefner [Neb.] 116 NW 36. If he elects to claim a lien upon the fund, he is estopped from asserting title to the property. James v. Avery [Ga. App.] 59 SE 1118. Any affirmative binding act, showing the seller elected to treat goods as his own, is inconsistent with the assertion of title in buyer, which is involved in suing for difference between contract price and that realized on sale as agent for buyer. Isaacs v. Terry & Tench Co., 56 Misc. 586, 107 NYS 136.

11. Mistake makes the contract absolutely void. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344.

12. Defects in the goods having been found before vendors gave possession, vendees were not bound to accept. Reeves v. Lamm Bros. [Iowa] 112 NW 642.

13. Smith v. Pickands, 148 Mich. 558, 14 Det. Leg. N. 267, 112 NW 122.

14. De Laval Dairy Supply Co. v. Steadman [Cal. App.] 92 P 877; Cunningham v. Wanamaker, 217 Pa. 497, 66 A 748.

15. Mastin v. Bartholomew [Colo.] 92 P 682; Field Grocery Co. v. Conley, 31 Ky. L. R. 989, 104 SW 372. Sale of goods, with right to purchaser to return if not found satisfactory or salable. Purchaser could not return after exposing for sale for months. Roach v. Warren, Neeley & Co. [Ala.] 44 S 103. Purchaser cannot rescind for defects after delay of several months, the defects being patent and no question as to latent defects nor warranty that goods would supply a specific want. Carlsen v. Ziehme, 53 Fla. 235, 44 S 181. Delay in returning the goods may be considered by the jury on the question of the buyer's good faith. Buyer obtained credit and extension of time, and made no claim for breach of warranty until answer filed in suit by seller. Such facts should be considered by the jury. Fuller v. Harris [Wash.] 93 P 1080. Where there is no conflict as to the facts, and the time which has elapsed between knowledge of defects and the attempted rescission is so

possible or the merits demand,[19] by returning [20] or offering to return the property,[21] without unreasonable delay.[22] The right may be exercised, where the vendor fails to comply with the contract [23] or has, by his own act, put it out of his power to do so;[24] or has broken the warranty;[25] or acted fraudulently;[26] but matters that have

great that under the circumstances the jury would not be warranted in holding the time reasonable, the court may decide the question as a matter of law. Mattauch v. Riddell Automobile Co. [Iowa] 115 NW 509.

16. Notice tenders assignment of all buyer's right, title and interest of, in and to bonds and order on trust company to deliver same. Insufficient as not showing what the right, title and interest was at time of notice. Erwin v. Detwiler [N. J. Law] 67 A 932. Sale by American Locomotive Co. to Robinson Produce Co. Notice to seller, signed "Van Alstyne," who sellers did not know and was unable to connect with buyer, insufficient. Robinson Clay Product Co. v. American Locomotive Co., 56 Misc. 589, 107 NYS 69.

17. Notice and return made to agent from whom purchase made, although not the agent of seller at time of the notice and return, is sufficient. Rutter v. Dowagiac Mfg. Co., 102 Minn. 367, 113 NW 910.

18. Mundt v. Simpkins [Neb.] 115 NW 325. To place in statu quo means, that the injured party shall restore whatever he has received that he can restore, and surrender any advantage he may have received. Whiting v. Derr, 121 App. Div. 239, 105 NYS 854.

19. Fairbanks, Morse & Co. v. Walker [Kan.] 92 P 1129.

20. An actual redelivery is not essential where it would be useless. Pitcher v. Webber [Me.] 68 A 593; Crosby v. Wells, 73 N. J. Law, 790, 67 A 295. The buyer need not make actual delivery to the seller of a piece of machinery weighing 18,000 pounds, erected by seller on buyer's premises (P. H. & F. M. Roots Co. v. New York Foundry Co., 107 NYS 742), nor need the vendee first repair damages which were due to the imperfections of the article (Pitcher v. Webber [Me.] 68 A 593). That purchaser turned the chattel over to the seller shows a return of it. Walker v. Grout Bros. Automobile Co., 124 Mo. App. 628, 102 SW 25.

21. The buyer is not required to make more than one tender. Robert v. Hefner [Neb.] 116 NW 36. The effect of notice and offer to return is not affected by the seller's refusal to accept a return of the property. Crosby v. Wells, 73 N. J. Law, 790, 67 A 295.

22. Sale, with right to purchaser to return if the machine could not be made to work well, return to be made immediately. Purchaser, after using machine part of two harvests, could not rescind, though it did not work well. Acme Harvesting Co. v. Carroll [Neb.] 114 NW 780. Seller cannot insist on unreasonable delay where purchaser was induced to keep article by assurances of seller that he would put it in working order and by his attempts to do so, if the article is promptly returned after his last ineffectual attempt to do so. Salina Implement & Seed Co. v. Haley [Kan.] 93 P 579.

23. The failure to furnish bond as required by contract will warrant rescission. Loveland v. Beumer, 102 Minn. 1, 112 NW 864. Sale of wood of certain quality or character. Delivery of wood not within description of that sold justifies rescission of the entire contract. Fullam v. Wright & Colton Wire Cloth Co. [Mass.] 82 NE 711. Where the article bargained for is not at time of delivery in the condition contemplated at the time of sale, the purchaser may refuse to accept them and rescind the sale. Starks v. Schlensky, 128 Ill. App. 1.

24. If the seller puts it out of his power to perform the buyer may rescind. Krebs Hop Co. v. Livesley [Or.] 92 P 1084. An assignment of payments does not put it out of the power of seller to perform, and this is true, though the contract was made nonassignable. Id. A conveyance by seller of the land upon which the article is to be grown will not justify rescission, unless such act puts it out of the power of the seller to perform. Id.

25. And this is true although the contract be severable, provided the breach goes to the entire consideration. Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co., 134 Iowa, 252, 111 NW 935. On notice to the seller of defects and an unreasonable delay in repairing, the buyer may rescind. In such case the buyer is not bound to allow seller to remedy the defects. Helm v. Loveland [Iowa] 113 NW 1082. Purchaser may rescind for failure of goods to come up to stipulated description or quality. Puritan Mfg. Co. v. Renaker [Ky.] 106 SW 813; Columbia River Packers' Ass'n v. Springfield Grocer Co. [Mo. App.] 108 SW 113. Breach of warranty is ground for rescission, but the right must be exercised within a reasonable time after breach. Mattauch v. Riddell Automobile Co. [Iowa] 115 NW 509. A buyer is not bound to rescind on the first discovery or supposed discovery of imperfection or misrepresentation. He is entitled to time for inquiries, experiments and tests. He can waive imperfections or misrepresentations first discovered, and yet be afterwards entitled to rescind upon the discovery of others. A suggestion from the vendor or his agent to inquire further would also extend the time for rescission. Pitcher v. Webber [Me.] 68 A 593.

26. The insertion of feet for inches, fraudulently by seller, buyer relying on seller to prepare the order for inches and believing it had been done will be relieved against Compagnie Les Metaux Unital v. Victoria Mfg. Co. [Tex. Civ. App.] 107 SW 651. Where purchaser knows, or may know the facts by exercising ordinary prudence, he must act on his own judgment; but if vendor knows that purchaser is not in such position, an expression of opinion by him as to value becomes statement of material fact. Champion Funding & Foundry Co. v. Heskett, 125 Mo. App. 516, 102 SW 1050. Purchaser cannot rescind a year after discovery of the fraud, he having had knowledge of it a month after the sale. Trott v. Schmitt, 119 App. Div. 474, 104 NYS 98.

been waived are not ground for rescission.[27] Demanding and receiving back the purchase money is a rescission,[28] and accepting and retaining the property returned without objection, is a consent to it,[29] where the seller becomes liable for payments made by the buyer,[30] but an unaccepted offer to return is not a rescission.[31]

(§ 11) *B. Action to recover purchase money paid or to reduce price.*[See 8 C. L. 1803]—If the right is not waived,[32] the purchase money may be recovered on breach.[33] In action for reduction of price, the liability of the vendor is measured by the difference in value between a sound and an unsound article.[34]

(§ 11) *C. Action for breach of contract.*[See 8 C. L. 1804]—If the breach, which is a question for the jury,[35] is not due to providential cause [36] or nonperformance on his part,[37] the purchaser has the right to recover for it,[38] the right accruing on failure of the seller to accept the purchase price,[39] and demand for performance is not a prerequisite to action when it is obviously useless.[40]

(§ 11) *D. Action for breach of warranty.*[See 8 C. L. 1805]—Tort for false warranty, as well as action of contract, lies for warranty broken,[41] and the vendee may sue as soon as the warranty is broken.[42]

(§ 11) *E. Recovery of chattel; replevin or conversion.*[See 6 C. L. 1870]—In an action by the buyer to recover purchased property, he must show a valid agreement for the purchase,[43] and, in replevin, unless waived,[44] the purchase price must be paid [45] or tendered before the action will lie. The buyer must also prove a general or special

27. Contract waiving all verbal agreements, verbal representations of seller's agent no ground for rescission. Victor Safe & Lock Co. v. O'Neil [Wash.] 93 P 214.

28. Matheson v. Southern R. Co. [S. C.] 60 SE 437.

29, 30. Greder v. Stehl [S. D.] 115 NW 1129.

31. R. T. Stone Tobacco Co. v. Allen, 1 Ga. App. 434, 57 SE 967.

32. Where buyer treats the property as his by directing the seller to resell, releasing seller from risk by fire, etc., he waives right to recover. Cunningham v. Wanamaker, 217 Pa. 497, 66 A 748.

33. Atkins Bros. Co. v. Landa [Mo. App.] 109 SW 88. On breach of contract that article shall be satisfactory to purchaser, the purchase money may be recovered. Walker v. Grout Bros. Automobile Co., 124 Mo. App. 628, 102 SW 25.

34. Iberia Cypress Co. v. Von Schoeler [La.] 46 S 105.

35. Little Rock Cooperage Co. v. Lanier, 83 Ark. 548, 104 SW 221.

36. While sickness or other providential cause may excuse breach of contract, this will not be the case if promisor, by ordinary care, could have foreseen and avoided results afterwards due to providential cause. Gem Knitting Mills v. Empire Printing & Box Co. [Ga. App.] 60 SE 365.

37. Contract for sale of goods to be paid for on each instalment, buyer failed to pay whereupon seller refused to deliver, and suit by buyer for breach of contract. No recovery. Ohio Valley Buggy Co. v. Anderson Forging Co., 168 Ind. 593, 81 NE 574.

38. Owner of quarry, after contracting to sell stone to another, leased the premises, the buyer assenting on condition that he be protected, which was not done. He had a right to recover at least nominal damages. Ellis v. Nowell [Mass.] 84 NE 435.

39. In action for breach of contract for sale of stock of merchandise, parties having submitted questions as to cost price and what was good bankable paper within meaning of contract to arbitrators, and arbitrators having decided that certain note was such paper, held that nothing remained but to make proper tender, and when same was refused seller became liable for resulting damages. Viker v. Lien, 99 Minn. 524, 109 NW 1135.

40. In suit for damages, a putting in default by formal demand for performance is not required as a prerequisite, where defendant denies existence of contract, or refused, or was admittedly unable to perform. Southern Sawmill Co. v. Ducote [La.] 46 S 20.

41. Farrell v. Manhattan Market Co. [Mass.] 84 NE 481.

42. Where there is an outstanding mortgage and mortgagee demands or obtains possession, vendee is not required to force mortgagee to redeem the same to final judgment before bringing action on the implied warranty, but, in such event, burden is on vendee to prove a valid pre-existing mortgage before he can recover on the warranty. Clevenger v. Lewis [Okl.] 95 P 230.

43. Flease v. Woodworth's Estate [Wis.] 114 NW 124.

44. A refusal to deliver which is absolute and unconditional and equivalent to notice to the buyer that tender of payment will not be received constitutes a waiver. Witt v. Dersham, 146 Mich. 68, 13 Det. Leg. N. 660, 109 NW 25.

45. Where agreed price of hay was to be paid by plaintiff to defendant at time of delivery, and defendant had possession under vendor's lien, held that plaintiff could not replevy hay unless he made or tendered payment. Witt v. Dersham, 146 Mich. 68, 13 Det. Leg. N. 660, 109 NW 25.

property interest in and right to the immediate possession of the goods,[46] and the defendant must be in possession.[47] The buyer may maintain trover against the seller [48] or conversion against a third party,[49] but not against the seller out of whom title has not passed.[50]

(§ 11) *F. Lien for price paid.*See 2 C. L. 1576—As between the parties, the vendee has a lien for the purchase money paid.[51]

(§ 11) *G. Recoupment and counterclaim.*See 6 C. L. 1871—Recoupment applies where the abatement claimed springs out of the very contract or transaction on which the recovery is sought,[52] but it cannot be had if the contract was abandoned through fault of the purchaser [53] or after acceptance with knowledge of the defects.[54] Demand is not required when the action is brought by the seller,[55] nor need the buyer return the goods unless at fault,[56] but whether he should give notice depends on circumstances.[57] If supported by evidence,[58] for failure to perform an entire contract the buyer may counterclaim for damages,[59] recovering the natural and proximate consequences of the breach and such as were reasonably within the contemplation of the parties at the time of the contract [60] in a separate suit.[61] In a proper case, breach of warranty may be relied on as set-off also,[62] the extent of which may be determined by the contract of sale.[63]

(§ 11) *H. Choice and election of remedies.*See 6 C. L. 1808—In the absence of agreement,[64] the buyer may elect to pursue one of several remedies,[65] and when his

46. American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538.

47. Replevin will not lie against one not in possession. Runge v. Wilson [Cal.] 95 P 178.

48. The fact that seller has parted with possession is no defense. New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 91 P 152.

49. After sale complete, seller sold goods to third party who recovered goods in action of replevin against purchaser's agent. Purchaser had right to sue for conversion. Northwestern State Bk. v. Silberman [C. C. A.] 154 F 809.

50. Hall v. Frick Co. [Ky.] 106 SW 1186.

51. Summers Fiber Co. v. Walker [Ky.] 109 SW 883.

52. Dalton v. Bunn [Ala.] 44 S 625; Gem Knitting Mills v. Empire Print. & Box Co. [Ga. App.] 60 SE 365. Suit for articles delivered under contract of Mar. 3, 1904. Counterclaim cannot be set up for failure to perform contract of Dec. 7, 1903. Barry-Wehmiller Mach. Co. v. Thompson, 83 Ark. 283, 104 SW 137.

53. The purchaser cannot have recoupment for failure to complete contract where seller properly abandons it because of his default. Patten v. Iroquois Furnace Co., 124 Ill. App. 1.

54. Purchase of stallion warranted to be certain thoroughbred stallion, imported, registered, pedigreed, and marked in a certain way. Marks did not correspond with description. Buyer having accepted, and the discrepancy being patent, he was liable for the purchase price. Northfield Nat. Bk. v. Arndt [Wis.] 112 NW 451.

55. Bailey Co. v. West Lumber Co., 1 Ga. App. 398, 58 SE 120.

56. Buyer, through no fault of his, did not discover defects until machinery had been set up and sold He was not bound to return machinery. Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 14 Det. Leg. N. 626, 113 NW 591.

57. Glue sold to buyer under warranty, buyer could use glue until satisfied that failure of work to hold was due to defects in glue, and were not bound to notify seller on the failure of the work to hold and stop investigation. American Glue Co. v. Rayburn, 150 Mich. 616, 14 Det. Leg. N. 809, 114 NW 395.

58. Moneyweight Scale Co. v. Deis, 104 NYS 456.

59. Agreement to furnish quantity of stone at fixed price, so much per day until order filled, is entire contract, and buyer may recoup for failure to perform in action to recover balance due. Prautsch v. Rasmussen [Wis.] 113 NW 416. Damages for breach of warranty are a proper subject for counterclaim. Ames v. Norwich Light Co., 122 App. Div. 319, 106 NYS 952.

60. Mitchell v. Henry Vogt Mach. Co. [Ga. App.] 60 SE 295.

61. North Baltimore Bottle Glass Co. v. Altpeter [Wis.] 113 NW 435.

62. Vendor sold shoes by sample, representing them to be leather, the falsity of which buyer did not discover until the shoes had been worn by his customers. Held a proper defense. Webb. v. Milford Shoe Co. [Ky.] 108 SW 229. Buyer may set off freight paid at request of seller where sale was on condition that goods were to be satisfactory, and rejected because not so. Virginia-Carolina Lumber Co. v. Eisinger, 29 App. D. C. 531.

63. Spirit Valley Lumber Co. v. A. H. Averill Mach. Co. [Wash.] 94 P 650.

64. Walters v. Akers, 31 Ky. L. R. 259, 101 SW 1179.

65. Buyer may rescind, return the property, and recover what he has paid; or retain the property and recover damages, the

election is made, which may be presumed from any unambiguous act,[66] he is bound thereby.[67] Where election may be made within a reasonable time, what is a reasonable time depends on the circumstances of the case,[68] and the relief given will be in accordance with the election.[69]

§ 12. *Damages for breach of sale and warranty. A. General rules.* See 8 C. L. 1808 The damages recoverable are those occurring as a natural proximate result of the breach or which were reasonably contemplated by the parties as a probable result of the breach.[70]

(§ 12) *B. Breach by seller.* See 8 C. L. 1809—Though the measure of the seller's liability may depend on whether the sale was by retail or wholesale,[71] or whether the goods can be procured or not,[72] and the buyer may show what efforts he made to procure the goods in the open market,[73] the vendee may generally recover the damages sustained [74] in the particular case,[75] together with extra expense [76] and costs incident

difference between the actual value and what the value would have been had it been as warranted. J. L. White Furnace Co. v. C. W. Miller Transfer Co., 109 NYS 796. If the sale was procured by fraud, the purchaser has his election to rescind or to accept goods and recoup in damages. Eldorado Jewelry Co. v. Darnell [Iowa] 113 NW 344. So, too, where the article does not come up to the contract. Fox v. Wilkinson [Wis.] 113 NW 669. The buyer under an executory contract may sue for breach of contract, breach of warranty, or upon rescinded contract. Tompkins v. Lamb, 121 App. Div. 366, 106 NYS 6. Where sale has been made by delivery of a warehouse receipt, the purchaser has one of two remedies. He may, on failure of actual delivery recover purchase price paid, or proceed against warehouseman. The right of action against warehouseman is not exclusive of remedy against vendor should purchaser elect to rescind because delivery was impossible at time of purchase. Livingston v. Anderson, 2 Ga. App. 274, 58 SE 505. A sale of personalty with warranty of fitness for a prescribed use may be treated as a sale upon condition subsequent, at the election of purchaser, and on breach property may be restored and sale rescinded. Mundt v. Simpkins [Neb.] 115 NW 325. Buyer may keep and use the goods and rely on the warranty. Ames v. Norwich Light Co., 122 App. Div. 319, 106 NYS 952. The purchaser may be required to elect between two classes of damages. Mitchell v. Henry Vogt Mach. Co. [Ga. App.] 60 SE 295.

66. Any unambiguous act consistent with one and inconsistent with the other remedy will be conclusive evidence of the election. Fox v. Wilkinson [Wis.] 113 NW 669. If, within a reasonable time, buyer failed to take steps toward rescission, he must be conclusively presumed to rely upon damages for breach of warranty. Mattauch v. Riddell Automobile Co. [Iowa] 115 NW 509.

67. If he elects to rescind, he cannot sue thereon for breach of warranty, and if he affirms by suing for a breach, he cannot rescind. Mundt v. Simpkins [Neb.] 115 NW 325. Where purchaser of steam tug sued in reconvention for reduction of price on account of concealed defects, he cannot recover for repairs made thereon or for damages. Having elected to keep the vessel, he is restricted to his claim for reduction of price. Iberia Cypress Co. v. Von Schoeler [La.] 46 S 105.

68. Moench v. Hower [Iowa] 115 NW 229.

69. Blaul v. Wandel [Iowa] 114 NW 893.

70. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682. Any necessary expense which is incurred in complying with the contract may be recovered. Sizer v. Melton, 129 Ga. 143, 58 SE 1055. On failure to furnish bottles by seller, buyer had to go out of business for the season. This was a proximate result of breach warranting recovery. North Baltimore Bottle Glass Co. v. Altpeter [Wis.] 113 NW 435. Contingent or problematical damages will be denied. D. A. Tompkins Co. v. Monticello Cotton Oil Co., 153 F 817.

71. Sale at wholesale. Evidence of retail price unsatisfactory unless supplemented by proof of difference between wholesale and retail prices. New Liverpool Salt Co. v. Western Salt Co., 151 Cal. 479, 91 P 152.

72. In case buyer can procure the goods on the market, the measure of damages is the additional cost. If not procurable, the damage is the loss of profit. Talcott v. Freedman, 149 Mich. 577, 14 Det. Leg. N. 523, 113 NW 13.

73. Talcott v. Freedman, 149 Mich. 577, 14 Det. Leg. N. 523, 113 NW 13.

74. On warranty that goods sold would not ignite as others had done, buyer could recover damage caused by fire and not confined to the difference between value of goods delivered and those called for by the warranty. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682.

75. Where there is a total failure of consideration, the measure of damages is the contract price. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex. Civ. App.] 107 SW 157. Where the article is not wholly worthless and is retained by vendee, the damage is the difference between the purchase price and its actual value. Ferguson Implement Co. v. Parmer [Mo. App.] 107 SW 469; Pierce v. Walker [Tex. Civ. App.] 18 Tex. Ct. Rep. 677, 102 SW 1173. Seller is liable, on breach of contract in sale of wire, for the difference between contract price and what it actually cost in open market. Albert Gas Fixture Co. v. Kabat, 109 NYS 737. Measure of damages is what buyer's net profits would have been if goods of proper quality. Goods so inferior as to justify re-

to delay.[77] Nor is eviction from use [78] or conviction of the seller a necessary prerequisite to the maintenance of the action.[79]

On the seller's failure to deliver. See 8 C. L. 1810—On full compliance by purchaser with the terms of the contract,[80] unless it is waived [81] or the goods sold under a mistake,[82] damages may be recovered for the failure to deliver within a reasonable time.[83] If the contract does not fix the damages,[84] the measure, as a general rule, is the difference between the market price at the time and place of delivery and the contract price,[85] and such as the seller had reason to know would ensue,[86] with interest thereon until the case is tried.[87] Hence, if not speculative and remote,[88] profits may be recovered,[89] but not extra clerk hire.[90]

jection, damages measured by what profits would have been if goods were quality ordered. Eddy v. Fay Fruit Co. [R. I.] 67 A 586. In addition to the excess of value the property sold would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, the buyer may recover for the breach of warranty on the sale of horses warranted against an infectious disease, cost of medicine, feed, and attendance between the time of sale and when the horse was killed, under a law providing therefor. Larson v. Calder [N. D.] 113 NW 103. The seller is not liable for damages accruing to the goods after giving them proper attention and which were due to the purchaser's failure to remove them. If, however, seller had failed to use reasonable care as to the goods, the measure of damages is the depreciation in value by reason of such failure. Summers Fiber Co. v. Walker [Ky.] 109 SW 883.

76. On sale of engine, buyer allowed to recover extra expense incident to trying imperfect cylinder at sellers request. Waynesville Wood Mfg. Co. v. Berlin Mach. Works, 144 N. C. 689, 57 SE 455.

77. Plaintiff, contractor to construct buildings, purchased lumber suitable for same which, on inspection, found unfit and obliged to purchase other lumber, and delayed in work. Canton Lumber Co. v. Liller [Md.] 68 A 500.

78. Sale of screens and paramount outstanding title or patent in a third party. National Metal Edge Box Co. v. Gotham, 109 NYS 450.

79. Conviction under a statute making sales in certain cases criminal is not necessary before an action on warranty of the soundness of a horse will lie, nor need the purchaser allege and prove the seller had knowledge of the unsoundness. Larson v. Calder [N. D.] 113 NW 103.

80. An action for damages for breach of contract for the delivery of a certain amount of coal "as ordered" must be based on full compliance by the plaintiff of all the things required of him under the contract. Risser Co. v. Hesser, 6 Ohio N. P. (N. S.) 431.

81. Buick Motor Co. v. Reid Mfg. Co., 150 Mich. 118, 14 Det. Leg. N. 626, 113 NW 591. Order to be filled Oct. 1, so as to enable buyer to do business. On failure to deliver, seller loaned buyer similar goods on the 12. Accepting loan no waiver, but may be considered in assessing damages. Biele v. Levy, 107 NYS 607.

82. No damages can be recovered for seller's failure to deliver goods sold under mistake of which the purchaser had knowledge and the seller did not. Davis v. Reisinger, 120 App. Div. 766, 105 NYS 603.

83. On sale of piano, to be replaced by another if not satisfactory, seller is liable for amount paid if article not replaced within a reasonable time. Garvin v. Montenegro Riehm Music Co., 31 Ky. L. R. 1182, 104 SW 964.

84. Wheeling Mold & Foundry Co. v. Wheeling Steel and Iron Co. [W. Va.] 57 SE 826.

85. In action for breach of contract, the failure to prove market price on date when delivery should have been made under the contract precludes recovery of more than nominal damages. Norman v. Washington Fuel Co., 228 Ill. 298, 81 NE 1017. Where delivery is to be made in instalments, the measure is the sum of the difference between the contract price and the market price at the several times for delivery. Sizer v. Melton, 129 Ga. 143, 58 SE 1055. If no market value at place of delivery, market value of nearby places will control. Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. [Iowa] 113 NW 827.

86. Vendor is liable for damages sustained by purchaser for failure to carry out a contract occasioned by delay of delivery where vendor was informed that article contracted for was to be used in carrying out the contract. Ledgerwood v. Bushnell, 128 Ill. App. 555.

87. Taylor v. McFatter [Tex. Civ. App.] 109 SW 395.

88. Cobb Chocolate Co. v. Crocker-Wheeler Co., 125 Ill. App. 241.

89. Where seller violated contract to deliver goods, purchaser may recover profits of which such failure deprived him. Southern Sawmill Co. v. Ducote [La.] 46 S 20. On manufacturer's failure to deliver, purchaser who failed to purchase other goods after diligent efforts was allowed profits he could have made on goods if delivered according to contract as well as increased market price. Robert, Wicks & Co. v. Lee, 31 Ky. L. R. 266, 102 SW 300. Buyer may recover profits on sales he would have made if seller had complied with his contract if such profits were in contemplation of both parties at the time of entering into the contract. Weatherford Mach. & Foundry Co. v. Tate [Tex. Civ. App.] 109 SW 406; Pitman v. Bloch Queensware Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 789, 106 SW 724.

90. This not an expense incident to failure to deliver. The expense would have been incurred if the goods had been delivered

(§ 12) *C. Breach by purchaser.*See 8 C. L. 1811—On breach by the purchaser, the seller may recover that which will indemnify him,[91] and this may be the contract price,[92] the difference between the market price and the contract price,[93] or, if goods are to be manufactured, the difference between the contract price and the cost of manufacture and delivery,[94] or, if the goods are not on hand, the actual profits he would have made,[95] or the cost of moving,[96] and, perhaps, interest.[97]

*For nonacceptance.*See 8 C. L. 1812—For purchaser's refusal to accept, unless such refusal was brought about by seller's conduct,[98] he may recover the full purchase amount [99] or the difference between market price and contract price [1] at time and place of delivery,[2] with interest,[3] deducting freight, where reshipment is necessary.[4] Profits may also be recovered,[5] but no recovery can be had for goods sent with the article delivered, which were returned by the buyer,[6] nor for railroad expenses incurred in the effort to collect the debt.[7]

(§ 12) *D. Breach of warranty.*See 8 C. L. 1813—The purchaser cannot multiply actionable damages,[8] and he should exercise ordinary care to render them as light as possible.[9] He cannot recover remote damages,[10] but only such as arise naturally

only. Pitman v. Block Queensware Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 789, 106 SW 724.

91. Measure of damages is that which will indemnify the seller for the failure of buyer to comply with his contract. Lehmaier v. Standard Specialty & Tube Co., 108 NYS 402.

92. On failure to execute notes for price of property purchased and delivered, the seller may recover the price agreed to be paid. Kelly v. Pierce [N. D.] 112 NW 995.

93. Sale of goods by vendor on vendee's refusal to receive them. Benjamin v. Maloney, 155 F 494.

94. Where contract is for sale of goods to be manufactured, contract being broken by vendee before goods manufactured, the damage is the difference between cost of manufacture and delivery and the contract price. Isaacs v. Terry & Tench Co., 109 NYS 792.

95. Goods ordered to be manufactured by seller. River Spinning Co. v. Atlantic Mills, 155 F 466.

96. Sale of stone, declined by purchaser, and seller took possession, made no effort to sell nor did he treat transaction as complete contract. Judgment for costs of unloading sustained. Meagher v. Cowing, 149 Mich. 416, 14 Det. Leg. N. 492, 112 NW 1074.

97. On receiving and using articles, the buyer is liable for the purchase price, with interest. Noel v. Kauffman Buggy Co. [Ky.] 106 SW 237. Interest is not recoverable as damages for nonpayment from the time the account is due. Erb-Springall Co. v. Pittsburgh Plate Glass Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 398, 101 SW 1165.

98. Felsberg v. Moore, 84 Ark. 399, 106 SW 197.

99. Victor Safe & Lock Co. v. O'Neil [Wash.] 93 P 214.

1. Acme Food Co. v. Older [W. Va.] 61 SE 235. On refusal to accept according to contract, seller is entitled to recover the difference between the contract price and the market price, if any. Brown v. Trinidad Asphalt Mfg. Co. [Mo.] 109 SW 22.

2. On failure to accept, difference between market price on day of acceptance and the price buyer contracted to pay. Brooke v. Laurens Mill. Co. [S. C.] 58 SE 806. On breach of contract to sell articles for manufacture of clothing measure of damages is difference in contract price and market value at time and place of delivery. Perlman v. Levy, 109 NYS 785. On buyer's refusal to accept, seller may sell at market value at place of delivery and recover balance of contract price. If no market at place of delivery, sale may be made at nearest and most accessible market. If no market value, then sale to be made at fair value. The burden is on seller to show the above. Texas & Louisiana Lumber Co. v. Rose [Tex. Civ. App.] 19 Tex. Ct. Rep. 519, 103 SW 444.

3, 4. Texas & Louisiana Lumber Co. v. Rose [Tex. Civ. App.] 19 Tex. Ct. Rep. 519, 103 SW 444.

5. Anticipated profits may also be recovered where knowledge of subcontracts by which the same could have been made was within the contemplation of the parties at the time of the original contract, and was known to have been made with reference thereto. Carolina Portland Cement Co. v. Columbia Imp. Co. [Ga. App.] 60 SE 279.

6. In sale of an engine, seller delivered therewith other articles which, on return of the engine, were placed upon it and delivered back to seller. No recovery for same. Spirit Valley Lumber Co. v. A. H. Averill Mach. Co. [Wash.] 94 P 650.

7. Texas & Louisiana Lumber Co. v. Rose [Tex. Civ. App.] 19 Tex. Ct. Rep. 519, 103 SW 444.

8. Purchaser, who discovered defects when article installed, cannot recover damages accruing therefrom. Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20.

9. Wright v. Computing Scale Co. [Wash.] 91 P 571.

10. No recovery for amount lost by failure to do work with machine that might have been done if it had not been for defects in machinery, nor for cost of fuel in working extra time. Elmore v. Booth, 83 Ark. 47, 102 SW 393.

from the breach, and such as may reasonably be supposed to have been in contemplation of the parties,[11] not exceeding purchase price with interest,[12] but there can be no recovery for loss of profits.[13] Nor need he, in order to recover, allege or prove the scienter,[14] nor tender back the property,[15] but he must not have brought about the breach by his negligence.[16]

(§ 12) *E. Evidence as to damages.* See 8 C. L. 1814—The question of damages cannot be left to conjecture,[17] but the burden is on the purchaser to prove them [18] by competent [19] and sufficient evidence.[20]

11. Mark v. H. D. Williams Cooperage Co., 204 Mo. 242, 103 SW 20; Wright v. Computing Scale Co. [Wash.] 91 P 571. On an express warranty, the measure of damages is the difference between the value of the article, if it had been as warranted, and the actual value. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682; Isaacs v. Wanamaker, 189 N. Y. 122, 81 NE 763; Ames v. Norwich Light Co., 122 App. Div. 319, 106 NYS 952; Mayer v. Automobile Exch., 125 Ill. App. 648. Where goods of specified grade are sold and inferior goods delivered, the damages to buyer is the difference in price between the two grades. A mistake in delivering the inferior grade is no defense. Missouri & Illinois Coal Co. v. Consolidated Coal Co., 127 Mo. App. 320, 105 SW 682. On sale of hose, the damage is the difference between the market price, had it come up to the warranty, and its market value in the condition it was delivered. In the absence of proof it will be presumed the market value had it complied with the warranty, was the contract price. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex. Civ. App.] 107 SW 157. On the purchase of a locomotive, measure of damage is difference between value, if it had been as warranted, and its value as delivered, together with reasonable costs in giving it a test, but no damages because sawmill was stopped for want of logs. Marbury Lumber Co. v. Stearns Mfg. Co. [Ky.] 107 SW 200. Seller held liable for license tax paid by purchaser to dispose of goods. Hayner Mfg. Co. v. Davis [N. C.] 61 SE 54. On breach of warranty of seed, buyer may recover damage for loss of use of land and cost of putting it back in former condition. Or, he may recover the difference in value between the crop grown and that which would have been grown had the seeds been as warranted. Depew v. Peck Hardware Co., 121 App. Div. 28, 105 NYS 390. On sale of range with warranty that if it did not bake and cook well seller would refund money, on breach buyer properly recovered price and freight charges. Failure of either of the warrantles constituted a breach. Thompson v. O'Neil [Ala.] 46 S 229. Machine, warranted for one year, got out of order soon after delivery, and returned after unsuccessful attempts to remedy it. Beecroft v. Van Schaick, 104 NYS 458. Where buyer paid $200 and executed his notes for the balance, which notes were never paid, a judgment including the notes is erroneous, the buyer being entitled to recover the $200, only. Strumpf v. Jordan, 104 NYS 766. On breach of warranty of machinery, the damages recoverable by buyer are the difference between that to be furnished and the one actually furnished or, if that furnished not fit for practical use, the cost of procuring another of the capacity stated in contract. Barry-Wehmiller Mach. Co. v. Thompson, 83 Ark. 283, 104 SW 137. Where buyer purchased goods covered by a patent in third party, seller knowing thereof and the use goods were intended for, he could recover of seller the amount paid to patentee on compromise of claim for infringement, seller having notice to defend, and refusing. National Metal Edge Box Co. v. Gotham, 109 NYS 450.

12. On sale of a horse for breeding purposes, the buyer's damages, or failure of warranty, are the value of a horse of same breeding and price as the one sold, not to exceed purchase price, with interest from time horse should have been replaced. Christie v. Crawford [Mich.] 15 Det. Leg. N. 324, 116 NW 202.

13. The seller is not liable for loss of profits, in an action for breach of warranty of sawmill machinery, in goods contracted to be sold if the contract was not known to seller. Waynesville Wood Mfg. Co. v. Berlin Mach. Works, 144 N. C. 689, 57 SE 455.

14. Ford v. Smith [Wash.] 93 P 909.

15. Mayer v. Automobile Exch., 125 Ill. App. 648.

16. Seller sold mechanical fish, warranted to run a certain length of time, and warned the buyer's agent that they had to be handled carefully. Instead they were negligently handled. Seller should not be prejudiced by buyer's negligence. E. B. Constantine Mfg. Co. v. Reynolds, 108 NYS 36.

17. Brown v. Trinidad Asphalt Mfg. Co. [Mo.] 109 SW 22.

18. Brooks v. Camak [Ga.] 60 SE 456. Plaintiff should show the amount of goods purchased and their cost. Albert Gas Fixture Co. v. Kabar, 109 NYS 737. Evidence must be introduced to show the weight of the article, when that is necessary, to determine the damages. Pierce v. Waller [Tex. Civ. App.] 18 Tex. Ct. Rep. 677, 102 SW 1173. The evidence must show the price for which the property sold. Action for failure to accept goods alleged to have been contracted for, and subsequent sale by seller through auctioneer. Perlman v. Levy, 109 NYS 785.

19. In action for breach of warranty it is error to exclude evidence of damages sustained thereby. Mayer v. Automobile Exch., 125 Ill. App. 648. Evidence as to the market price of the article is competent. Lizer v. Melton, 129 Ga. 143, 58 SE 1055; Consolidated Coal Co. v. Jones & Adams Co., 232 Ill. 326, 83 NE 851. Evidence of the price of the article at the place of delivery is admissible. Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. [Iowa] 113 NW 827. Ac-

§ 13. *Rights of bona fide purchasers and other third persons.*[See 8 C. L. 1615]—Innocent purchasers take a good title,[21] notwithstanding fraud of the vendee,[22] unless the article was stolen, when no title passes as against the true owner.[23]

§ 14. *Conditional sales. Definition, validity and formation.*[See 8 C. L. 1816]—A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent.[24] In determining the nature of the contract, courts will look beyond the mere terms used,[25] to the intent of the parties [26] as evidenced by the contract [27] and the local law.[28] An actual delivery is not necessary,[29] nor does it avoid the contract that the seller is doing business in the state in violation of statute.[30] And while a contract for "sale or return" [31] or that the vendee may sell the property in the usual course of business is valid,[32] a reservation in a sale to a retailer that the title shall remain in the seller until the goods are paid for is not.[33] The validity of so-called conditional sales is denied in some jurisdictions.[34]

tion for failure to deliver rice, letter of buyer's correspondent in London as to price not competent. Davis v. Reisinger, 120 App. Div. 766, 105 NYS 603. Where the purchaser is not a retail dealer, the retail price of the goods cannot be shown. Tuttle-Chapman Coal Co. v. Coaldale Fuel Co. [Iowa] 113 NW 827.

20. Davis v. Reisinger, 120 App. Div. 766, 105 NYS 603. Buyer proved, in action for breach of contract to sell and deliver tamarack timber, that he made diligent effort to procure the timber according to the contract, but failed and obliged to buy hemlock, the cheapest he could procure to take the place of the tamarack at a certain price. Held sufficient evidence of amount of damages. Orr v. Kenny, 150 Mich. 159, 14 Det. Leg. N. 697, 114 NW 228.

21. S sold tobacco to N, who notified S that it was held subject to his order, but got no reply. He sold to C, who sold to D, and D to E. In suit by S against E, held not entitled to recover. R. T. Stone Tobacco Co. v. Allen, 1 Ga. App. 434, 57 SE 967; Runge v. Wilson [Cal. App.] 95 P 178.

22. Hickey v. McDonald [Ala.] 44 S 201.

23. Unger v. Abbott [Miss.] 46 S 68.

24. Contract by which title retained by seller until goods paid for, and buyer permitted to sell in regular course of trade on condition that he apply proceeds in payment or as security for purchase price, is a valid agreement of conditional sale. Dunlop v. Mercer [C. C. A.] 156 F 545.

25. The fact that it is called a rent contract does not make it other than a conditional sale. A. G. Rhodes & Son Furniture Co. v. Jenkins, 2 Ga. App. 475, 58 SE 897. A contract purporting to be a lease or bailment will be construed to be a conditional sale if it appear that the terms used were employed as a disguise of the real intent of the parties. In re Morris, 156 F 597.

26. A stipulation reserving title until sale or until paid for, and providing that proceeds of sale shall be and remain property of vendor until accounted for, are consistent with a conditional sale. Morrison Mfg. Co. v. Fargo Storage & Transfer Co. [N. D.] 113 NW 605. Order for goods stipulating that title to remain in seller until paid for in money constitutes a conditional sale. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

27. Racine-Sattley Co. v. Meinen [Neb.] 114 NW 602. An option in the purchaser to pay, or refuse to pay, for the goods, is not an indispensable element of a conditional sale. Dunlop v. Mercer [C. C. A.] 156 F 545. Contract for sale of engine provided for payments running for six months, that when payments made bill of sale to issue, engine to be exempted from claims of landlord, on failure to pay according to lease payments made to be forfeited and engine returned. Held a bailment. Miller v. Douglas, 32 Pa. Super. Ct. 158. Goods shipped under contract that retention for a given time should constitute an acceptance is a conditional sale. In re Burt, 155 F 267. Agreement to furnish articles, title to remain in seller until purchase-money notes paid, and if either note not paid when matured entire debt due and seller may take possession, but if notes paid, title to vest in buyer, is conditional sale. Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 SE 909. A provision that the purchaser is to hold the property as collateral security for the seller will not affect its character. Pontiac Buggy Co. v. Skinner, 158 F 858. A provision that the seller may resell the article in the usual course of business does not affect the contract as a conditional sale. In re Pierce [C. C. A.] 157 F 755. A delivery of personal property for sale, or to be dealt with in a way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, is not a conditional sale. In re Hassam, 153 F 932.

28. In re Newton [C. C. A.] 153 F 841.

29. Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 SE 909.

30. That a foreign corporation has failed to perform certain acts required by statute as a condition precedent to doing business within the state does not annul the contract. Dunlop v. Mercer [C. C. A.] 156 F 545.

31. Greacen v. Poehlman [N. Y.] 84 NE 390.

32. In re Newton [C. C. A.] 153 F 841.

33. In re Gilligan [C. C. A.] 152 F 605.

34. A sale by which the vendee is to become at once unconditionally bound for the price, and the vendor is to continue to be

Rights of parties to the contract.[See 8 C. L. 1817]—Unless the contract is rescinded,[35] payment which is a question of fact [36] and may be made by note [37] is necessary to pass title [38] if not waived.[39] If not accepted, the vendor should return the goods within a reasonable time [40] and may be estopped to deny delivery,[41] nor can he set up as a defense a mortgage lien created by himself.[42] Vendee may recover the money paid if the goods have been retaken by vendor and he fails to resell them [43] or makes an illegal sale of them,[44] the value of the articles being left to the jury.[45] Unless he has waived title [46] or unless caused by himself,[47] default of the vendee entitles the vendor to the posssion of the property,[48] which he may take in replevin,[49] the jurisdiction being fixed by statute [50] and trial by jury denied unless there is an issuable defense.[51] The burden is on plaintiff to show title.[52] The seller may also sell the property and recover the difference if the contract so provides,[53] but he cannot keep the goods and

the owner until the price is paid, is not possible under the laws of Louisiana. Barber Asphalt Pav. Co. v. St. Louis Cypress Co. [La.] 46 S 193.

35. A mere demand for the return of the goods is not a rescission of the contract. Reedy Elevator Co. v. Berman, 107 NYS 59.

36. Black Raven Coal Co. v. Edmonson [Ky.] 108 SW 955.

37. Sale on condition that title remain in vendor until paid for; vendee liable on notes, though property burned in hands of vendor, Whitlock v. Auburn Lumber Co., 145 N. C. 120, 58 SE 909.

38. Dunlop v. Mercer [C. C. A.] 156 F 545. Sale for cash on delivery, the payment stipulated for is condition precedent to passing title. Sprague Canning Mach. Co. v. Fuller [C. C. A.] 158 F 588. Sale of horses for which notes given to which was attached statement that title remained in seller until note fully paid. Title did not pass to buyer on payment of any one of the notes. Haynes v. Temple [Mass.] 84 NE 467.

39. Refusal to take pay for the article sold unless seller was paid another debt, and holding the article for both claims, waives tender. Kindelberger v. Kunow, 122 App. Div. 158, 106 NYS 597. Contract providing that title remains in seller until price fully paid, and if payment not made when due, or buyer becomes insolvent, or for any reason seller in danger of losing goods, right to reclaim may be exercised, is a valid contract of conditional sale. Mishawaka Woolen Mfg. Co. v. Smith, 158 F 885. If chattels be sold on condition that they are to be paid for on delivery, and delivered on the faith of that condition, and performance refused upon demand in a reasonable time, no title passes to the buyer, and trover will lie to recover the goods or their equivalent. Starnes v. Roberts, 128 Ga. 718, 58 SE 348.

40. Whether the reasonableness of the time is a question of law or fact depends on circumstances. When it depends on inferences from peculiar, numerous, or complicated circumstances, it is usually a question of fact. Greacen v. Poehlman [N. Y.] 84 NE 890.

41. Purchaser paid a portion and executed notes for balance, and in suit pleaded certain portions of the article had not arrived at date of notes, and did not arrive until after unreasonable delay. Held estopped. Moore v. H. B. Smith Mach. Co. [Ga. App.] 60 SE 1035.

42. Purchaser mortgaged property sued for by seller. Such mortgage no defense to the action. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

43. Statute provides for recovery by vendee in the event that the goods are retaken and failure to resell by vendor, and the right is not affected by the recovery by vendor in replevin, nor a provision in the contract that goods might be sold at private sale. Roach v. Curtis [N. Y.] 84 NE 283. The right is not affected by the fact that contract was in form a lease and payments denominated rent. Hoffman v. White Sewing Mach. Co., 108 NYS 253.

44. Seller caused property to be attached and under void sale became the purchaser. A. G. Rhodes & Son Furniture Co. v. Jenkins, 2 Ga. App. 475, 58 SE 897.

45. Conditional sale of chattels. An attempted removal by vendee, retained by seller, and action by vender to recover. Black Raven Coal Co. v. Edmonson [Ky.] 108 SW 955.

46. Frederickson v. Schmittroth [Neb.] 112 NW 564. The seller waives the right to retain title by suing for the purchase price and foreclosure of his statutory lien. Elwood State Bk. v. Mock, 40 Ind. App. 685, 82 NE 1003. Sale of chattels, reserving title; notes given by purchaser. On default, suit on note not inconsistent with position that title to chattels was not yet in plaintiff. Haynes v. Temple [Mass.] 84 NE 467.

47. Vendor at time purchase price was demanded did not have marketable title. Gennelle v. Boulais [Wash.] 93 P 421.

48. Dunlop v. Mercer [C. C. A.] 156 F 545; Kindelberger v. Kunow, 122 App. Div. 158, 106 NYS 597. Contract retaining possession and right to property on failure to pay instalments reserved. Berger v. Miller [Ark.] 109 SW 1015.

49. On sale reserving title until payment of purchase money, and buyer becomes wrongfully possessed of it, seller may recover in replevin. Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070.

50. Jacob v. Columbia Storage Warehouses, 109 NYS 1015.

51. If the plea insufficient in law is filed, the status is the same. Moore v. H. B. Smith Mach. Co. [Ga. App.] 60 SE 1035.

52. Anderson Carriage Co. v. Bartley, 102 Me. 492, 67 A 567.

53. Property conditionally sold and notes given, wherein it was stipulated that seller on failure to pay could retake the property,

also recover the contract price therefor,[54] nor recover rent for the chattel while in possession of the buyer,[55] nor retake the property and recover unpaid instalments unless such was the agreement;[56] nor, after property is paid for by purchaser, will advancements thereafter made to him by seller be a charge against it,[57] and when he takes possession the vendee is relieved of liability.[58]

Rights of third persons. See 8 C. L. 1820—Contracts of conditional sale cannot affect innocent third persons,[59] nor does the fact that the purchaser from the conditional vendee offered to assist the vendor to collect the unpaid money affect his purchase,[60] but where the contract is recorded, the vendor's rights cannot be affected by a subsequent mortgage [61] unless he consented to it,[62] or by a lien [63] or attachment,[64] and he may recover the property even against a purchaser at judicial sale.[65] An assignee of the purchase-money note [66] or of the instrument upon which a conditional sale is based takes title to the property.[67] The description should be such as to designate the property.[68] A deed must be signed by the seller,[69] but it need not be witnessed or acknowledged,[70] and whether it should be recorded depends on the jurisdiction.[71] Failure to record does not affect the title as between seller and purchaser's trustee in bankruptcy.[72]

SALVAGE; SATISFACTION AND DISCHARGE, see latest topical index.

sell it, and apply proceeds as credit on note. The law in this case would not imply a revocation of sale by the taking and selling, nor that there was no consideration remaining to support a recovery in action on note for balance due. Christie v. Scott [Kan.] 94 P 214.

54. The most seller can recover is damages for the breach. Rouse v. Rose [Ind. App.] 83 NE 253.

55. This, in effect, would permit the seller to retake the property and recover the purchase price. Hoffman v. White Sewing Mach. Co., 108 NYS 253.

56. The double remedy is so harsh and unjust that courts will not enforce it unless so clearly provided for as to have no reasonable doubt of the intention of the parties. Manson v. Dayton [C. C. A.] 153 F 258.

57. Black Raven Coal Co. v. Edmonson [Ky.] 108 SW 955.

58. Vendor, pending action on purchase-money note, took possession of the property, with consent of vendee to repair and deliver to surety and failed to redeliver to vendee. Vendee was relieved of obligation to pay. Fredrickson v. Schmittroth [Neb.] 112 NW 564.

59. Sale of goods, title to remain in seller until paid for, and contract unrecorded, passes title to buyer as to third persons. In re Perkins, 155 F 237; In re Burt, 155 F 267; In re Morris, 156 F 597.

60. The fact that the purchaser without record notice of a conditional vendee in possession, such possession having remained more than two years before purchase, tenders his good offices in assisting the conditional vendor to collect the unpaid money, does not avoid the latter purchase. Onyx Soda Fountain Co. v. L'Engle, 53 Fla. 314, 43 S 771.

61. And this is true though the contract of conditional sale is not filed, a mortgagor not being a purchaser within the meaning of the statute. Racine-Sattley Co. v. Meinen [Neb.] 114 NW 602.

62. Where seller consents to a mortgage on the property sold, there is a waiver of his rights as against the mortgagee. Hyatt v. Bell, 83 Ark. 360, 103 SW 748.

63. Seller having recorded his contract of sale, it cannot be defeated by a subsequent lien for necessaries and supplies furnished vendee. Tift v. Moultrie Lumber Co., 1 Ga. App. 608, 57 SE 1053.

64. Where goods are sold and delivered on condition that the title shall not pass to vendee until price paid, vendee has no attachable interest until performance of condition, and when attached by creditors, vendors may recover them. McIver v. Williamson-Halsell-Frazier Co. [Okl.] 92 P 170.

65. James v. Avery [Ga. App.] 59 SE 1118.

66. An unconditional assignment of note given for purchase of personalty, wherein seller retains title to property until paid for, does not extinguish security, but carries it along, and title retained by seller vests in assignee until purchase debt is paid. Laurens Banking Co. v. Bales [Ga. App.] 60 SE 1014.

67. Lazarovich v. Tatilbum [Me.] 69 A 275.

68. A description, "130-horse power stationary, side crank, slide valve engine, complete with all fittings including governor and throttle, band wheels, lubricator, oil cups, and all steam connections," is sufficient. Wittler-Corbine Mach. Co. v. Martin [Wash.] 91 P 629.

69. Under the statute avoiding contracts of conditional sale when possession remains in vendee for two years, "unless such reservation or limitation of use or property were declared by will or deed in writing proved and recorded," a deed by vendee only, acknowledging reservation of title in vendor, does not satisfy the statute. Onyx Soda Fountain Co. v. L'Engle, 53 Fla. 314, 43 S 771.

70. S. Twichell Co. v. First Nat. Bk., 18 Okl. 375, 90 P 14.

71. Not required. In re Newton [C. C. A.] 153 F 841. Required. Bradley v. Kingman Implement Co. [Neb.] 112 NW 346. In some

SAVING QUESTIONS FOR REVIEW.

§ 1. Inviting Error, 1572.
§ 2. Acquiescing in Error, 1574. Change of Theory, 1577.
§ 3. Mode of Objection, Whether by Objection, Motion, or Request, 1578.
§ 4. Necessity of Objection, 1579.
§ 5. Necessity of Motion or Request, 1582.
§ 6. Necessity of Ruling, 1586.
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§ 8. Form and Sufficiency of Objection, 1589.
§ 9. Sufficiency of Exception, 1593.
§ 10. Waiver of Objections and Exceptions Taken, 1595.

Scope of title.—This title covers the things that must be done in the lower court to save matters for review in the appellate court. It does not, however, include bills of exceptions, statements of the case, or any of the formal steps incidental to the transmission of the case to the appellate court;[78] nor does it include the manner of objecting to pleadings.[74] Objections to jurisdiction and waiver thereof are more fully treated elsewhere.[75]

§ 1. *Inviting error.*[See 8 C. L. 1822]—A party cannot complain of error which he himself invites.[76] He cannot complain of instructions given at his own request,[77]

jurisdictions, the failure to record makes the sale voidable as to bona fide purchasers, attaching creditors, and judgment creditors only. Dunlop v. Mercer [C. C. A.] 156 F 545.

72. Statute requiring recordation as to subsequent creditors without notice, purchasers and incumbrancers, does not apply to trustees in bankruptcy, they being neither of these, and taking just such title as bankrupt had. In re Pierce [C. C. A.] 157 F 755.

73. See Appeal and Review, 9 C. L. 108.

74. See Pleading, 10 C. L. 1173.

75. See Jurisdiction, 10 C. L. 512; Appearance, 9 C. L. 232.

76. Malcom Sav. Bk. v. Cronin [Neb.] 116 NW 150; Chicago, etc., R. Co. v. Stillwell [Tex. Civ. App.] 19 Tex. Ct. Rep. 760, 104 SW 1071. Error in a decree entered by consent or invited by a party will not be reviewed. Martin v. Houck Music Co., 79 Ark. 95, 94 SW 932. A party cannot complain of offer to introduce evidence where such offer was provoked by the complaining counsel. City of Chicago v. Didier, 131 Ill. App. 406. Permission of court that papers introduced could be considered as read cannot be objected to on appeal, where done by agreement of parties. Arkansas S. W. R. Co. v. Dickinson, 78 Ark. 483, 95 SW 802. He cannot complain of rulings similar to those which he induced court to make. Reisch v. People, 229 Ill. 574, 82 NE 321. Bringing about false issue to be tried. Aetna Indemnity Co. v. J. R. Crowe Coal & Min. Co. [C. C. A.] 154 F 545. Errors in a judgment invited by instructions. Judgment in replevin failing to read in the alternative. Boswell v. First Nat. Bk. [Wyo.] 92 P 624. Implied admission of fact held to render failure of proof thereof immaterial. Giacoma v. New York, etc., R. Co. [Mass.] 81 NE 899. If a party mislead the court, he must abide the result, whether it be done intentionally or unintentionally. By modifying instruction leading court and opposing counsel to think same waived. Pearce v. Greek Boys' Min. Co. [Wash.] 92 P 773. One cannot complain of remarks of the court caused by his attorney's own questions. Where counsel asked the court what it would do if a verdict was rendered in his favor and the court replied "set it aside." Bugg v. Seay [Va.] 60 SE 89. Cannot complain of judgment in foreclosure proceedings subjecting land to debt, where such a judgment was asked for in her answer. Pinckney v. Young [Tex. Civ. App.] 107 SW 622. In an action on an insurance policy, defendant by asking for a credit for unpaid premiums held barred from objecting that premiums had not been paid. Clark v. Home Fund Life Ins. Co. [S. C.] 61 SE 80. Error induced by the adoption of his theory of the case. City of Chicago v. University of Chicago, 228 Ill. 605, 81 NE 1138. Where party prevented amendment of bill of particulars, he cannot complain of variance which would have been obviated thereby. McKinnie v. Lane, 230 Ill. 544, 82 NE 878. Appellants held not prejudiced by instruction relative to the measure of damages, since they requested and the court gave a special instruction embracing the same proposition as to liability. Missouri, etc., R. Co. v. Kyser [Tex. Civ. App.] 15 Tex. Ct. Rep. 891, 95 SW 747. Requiring an injunction bond differently conditioned from that originally approved is no ground for complaint in error, where such prerequisite was complied with and such new bond given. Reed v. New York Nat. Exch. Bk., 131 Ill. App. 434.

77. Hamill v. Joseph Schlitz Brew. Co. [Iowa] 115 NW 943; McDermott v. Mahoney [Iowa] 115 NW 32; Lally v. The New Voice, 128 Ill. App. 455; Hummer's Ex'x v. Louisville, etc., R. Co. [Ky.] 108 SW 885; Lacks v. Butler County Bk., 204 Mo. 455, 102 SW 1007; Ziehme v. Harris [Mo. App.] 108 SW 131; Chicago, etc., R. Co. v. Stillwell [Tex. Civ. App.] 19 Tex. Ct. Rep. 760, 104 SW 1071; Smith v. Ogden, etc., R. Co. [Utah] 93 P 185. Charge not specific. Goode v. Eslow [Mich.] 14 Det. Leg. N. 845, 114 NW 859. Could claim that instruction precluded rendering verdict on any other theory. Meyers v. Syndicate Heat & Power Co. [Wash.] 91 P 549. A party may not complain on appeal of the submission of an issue where such submission was requested by him. Southern Pac. Co. v. Godfrey [Tex. Civ. App.] 107 SW 1135.

or of instructions substantially the same as those which he himself has requested,[78] or subject to the same objection,[79] or which are in accord with his own theory of the case,[80] A party requesting the court to charge on a subject may complain that the court erroneously stated the law, where it was not stated as requested.[81] The rule that one party cannot complain of the giving for the other of an instruction like the one given for him does not apply to an instruction directing a verdict, if the jury find certain facts, omitting facts essential to recovery.[82] A party cannot complain of evidence which he himself introduces,[83] or which is similar to that which he introduces,[84] or for which he opens the way,[85] or which he himself brings out,[86] or of the absence of evidence excluded on his own objection,[87] or invitation.[88] One cannot com-

78. Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 SE 106; Chicago City R. Co. v. Hagenback, 228 Ill. 290, 81 NE 1014; Mitchell v. Chicago, etc., R. Co. [Iowa] 114 NW 622; Smart v. Kansas City, 208 Mo. 162, 105 SW 709; Lange v. Missouri Pac. R. Co., 208 Mo. 458, 106 SW 660; Spaulding v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1049; Gulf, etc., R. Co. v. Farmer [Tex. Civ. App.] 108 SW 729; Poindexter v. Receivers of Kirby Lumber Co. [Tex.] 107 SW 42; Texas, etc., R. Co. v. Tucker [Tex. Civ. App.] 20 Tex. Ct. Rep. 689, 106 SW 764; Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707; Thompson v. Planters' Compress Co. [Tex. Civ. App.] 106 SW 470. That institutions submitted propositions of law to the jury. Sawyer v. Walker, 204 Mo. 133, 102 SW 544. A party cannot complain of an expression in an instruction used in instructions given at his request. Wallace v. Farmington, 231 Ill. 232, 83 NE 180. One cannot question the correctness of a charge given at his own importunity. Way v. Greer [Mass.] 81 NE 1002. Where the undisputed evidence showed plaintiff to have been injured, it was not reversible error for court in instruction to assume the existence of the injury as not in issue, especially where defendant in written requests assumed such facts. Georgia Southern, etc., R. Co. v. Stanley, 1 Ga. App. 487, 57 SE 1042.

79. One requesting argumentative instructions calling attention to his own evidence cannot complain of similar instructions calling attention to his opponent's evidence. Perkins v. Wabash R. Co., 233 Ill. 458, 84 NE 677.

80. Gate City Cotton Mills v. Cherokee Mills, 128 Ga. 170, 57 SE 320; Ziehme v. Harris [Mo. App.] 108 SW 131; Lauderdale v. King [Mo. App.] 109 SW 852. Assuming question whether storm was unusual was for the jury. Richards v. Ann Arbor [Mich.] 115 NW 1047. In accord with admissions in his own instructions. Hale Bros. v. Milliken, 5 Cal. App. 344, 90 P 365. Accords with evidence introduced without objection. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227. Where certain issue was eliminated by agreement but defendant introduced evidence thereon over plaintiff's objection, held it could not complain of the court's instructing on such issue. Fireman's Fund Ins. Co. v. Northern Pac. R. Co., 46 Wash. 635, 91 P 13.

81. Smith v. Ogden, etc., R. Co. [Utah] 93 P 185.

82. Other party procured instructions containing the same omissions. Pittman v. Chicago, etc., R. Co., 231 Ill. 581, 83 NE 431.

83. Smith v. Ryan [Iowa] 112 NW 8; Rosenberg v. Feiering, 121 App. Div. 190, 105 NYS 812; Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889; Seaboard Air Line R. Co. v. Chamblin [Va.] 60 SE 727.

84. Joseph v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1055; Barber Asphalt Pav. Co. v. O'Brien [Mo. App.] 107 SW 25; Douglas Land Co. v. T. W. Thayer Co. [Va.] 58 SE 1101. Explaining ambiguous word in contract. Scott Supply & Tool Co. v. Roberts [Colo.] 93 P 1123.

85. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227. Evidence technically erroneous but given on an issue raised by the parties. Wallace v. New Albion, 121 App. Div. 66, 105 NYS 524. Evidence to rebut improper evidence introduced by objector. Myers v. Oceanside [Cal. App.] 93 P 686. Cannot complain of testimony on cross-examination given in reply to teetimony in chief. Milhous v. Southern R. Co., 76 S. C. 492, 57 SE 474. Introducing subpoena for witness after opponent had brought out that witness was not subpoenaed. Southern R. Co. v. Cunningham [Ala.] 44 S 658. Evidence being admitted without objection, similar evidence is admissible. Hall v. Jennings [Tex. Civ. App.] 19 Tex. Ct. Rep. 602, 104 SW 489; H. C. Jaquith Co. v. Shumway's Estate [Vt.] 69 A 157; Douglas Land Co. v. T. W. Thayer Co. [Va.] 58 SE 1101.

86. Mine La Motte Lead & Smelting Co. v. Consolidated Anthracite Coal Co. [Ark.] 107 SW 174. On cross-examination. Archibald Estate v. Matteson, 5 Cal. App. 441, 90 P 723. See Katahdin Pulp & Paper Co. v. Peitomaa [C. C. A.] 156 F 342.

87. American Structural Steel Co. v. Rush, 107 NYS 3; Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838; McClanahan v. Caul [W. Va.] 60 SE 382. Where similar evidence had previously been offered by objector and rejected. Wees v. Page [Wash.] 91 P 766. Cannot complain of exclusion of evidence similar to evidence which was excluded at his request. Shedd v. Seefeld, 126 Ill. App. 375. Where evidence as to spiritualistic belief is excluded on objection, objector cannot claim that testator was insane because of his belief in matters not shown by evidence to be part of spiritualistic belief. Owen v. Crumbaugh, 228 Ill. 380, 81 NE 1044.

88. Limiting sustaining of objection to evidence. Ranous v. Seattle Elec. Co. [Wash.] 92 P 382.

plain of a nonsuit,[89] or of judgments [90] or orders which he, himself, invites. One cannot complain of an order vacating a verdict and judgment, the order being entered on his own motion.[91]

§ 2. *Acquiescing in error.* See 8 C. L. 1824—As a general rule there can be no error in the absence of an asserted right,[92] and only questions raised in the trial court will be considered on appeal.[93] Some of the questions to which this rule has been applied are: Qualification of the trial court or tribunal;[94] prematurity;[95] laches;[96] status

89. Patterson v. Sams, 2 Ga. App. 755, 59 SE 18. Voluntary nonsuit. Adamson v. Metropolitan St. R. Co., 126 Mo. App. 127, 103 SW 1097. Plaintiff taking a nonsuit upon court declaring its intention to give an instruction in the nature of a demurrer. Lewis v. Center Creek Min. Co., 199 Mo. 463, 97 SW 938.

90. A railroad company having in its petition to condemn for its right of way part of the right of way of another company, prayed that damages be ascertained, it cannot ask for review of the court's order that the other company be compensated for any damages it may sustain. North Coast R. Co. v. Northern Pac. R. Co. [Wash.] 94 P 112.

91. Josias v. Nivois, 107 NYS 19.

92. Masterson v. Southern R. Co. [Ind. App.] 81 NE 730.

93. Huffner v. Sawday [Cal.] 94 P 424; Jackson v. Denver [Colo.] 92 P 690; National Automatic Furnace Co. v. Wilmer [Colo.] 92 P 702; Barham v. Weems, 129 Ga. 704, 59 SE 803; Acme Harvester Co. v. Chittick, 230 Ill. 558, 82 NE 647; Keil v. Wright [Iowa] 112 NW 633; Western Union Tel. Co. v. Lehman [Md.] 67 A 241; Holmes v. Smith, 149 Mich. 327, 14 Det. Leg. N. 447, 112 NW 912; Peet v. East Grand Forks [Minn.] 112 NW 1003; National Soc. of U. S. Daughters of 1812 v. American Surety Co., 56 Misc. 627, 107 NYS 820; Wright v. State Board of Canvassers, 76 S. C. 574, 57 SE 536; Thompson v. Seaboard Air Line R. Co. [S. C.] 58 SE 1094; Town of Oceana v. Cook [W. Va.] 60 SE 145. See, also, City Council of Greenville v. Earle [S. C.] 60 SE 1117. Grounds for demurrer. Virginia R. Co. v. Hollingsworth [Va.] 58 SE 572. Grounds urged on motion. Davis v. Reynolds, 77 S. C. 255, 57 SE 850. Points argued on motion for new trial. Code Civ. Proc. § 661, construed. Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 P 1090. Question raised by cross appeal. Schmidt v. Olympia L. & P. Co., 46 Wash. 360, 90 P 212. Lien for taxes by unsuccessful claimant for land. Holly St. Land Co. v. Beyer [Wash.] 93 P 1065. Whether alteration of note material. Nottingham v. Ackiss [Va.] 57 SE 592. That claim of surviving wife for allowance and in lieu of exempt property created a necessity for administration. Goldstein v. Susholtz [Tex. Civ. App.] 105 SW 219. That all of debt garnished was not due. W. S. Danby Millinery Co. v. Dogan [Tex. Civ. App.] 105 SW 337. In an action to enforce an equitable mortgage against the mortgagor's purchasers, an objection to a defect in the acknowledgment as affecting the validity of the notice imparted by recording. Stark v. Kirkley [Mo. App.] 108 SW 625. Validity of part of mortgage. Albes v. Keith, Simmons & Co. [Ala.] 44 S 693. Direct verdict. Molle v. Kewaskum Mut. Fire Ins. Co. [Wis.] 114 NW 798. Defense of statute of fraud. Obenauer v. Solomon [Mich.] 15 Det. Leg. N. 31, 115 NW 696; Schuyler v. Wheelon [N. D.] 115 NW 259. Objection in garnishee action that judgment had not been entered in principal action. Mahon v. Fansett [N. D.] 115 NW 79. Sufficiency of affidavit in garnishee action. Id. Service of petition in proceedings under Code, § 4087. McKee v. Murphy [Iowa] 113 NW 499. Whether act was a rescission of a void contract. Benson v. Bawden, 149 Mich. 584, 14 Det. Leg. N. 522, 113 NW 20. Sufficiency of notice to quit in forcible entry proceedings. McLain v. Nurnberg [N. D.] 112 NW 243. Right to recover on certain items. Israels v. MacDonald, 123 App. Div. 63, 107 NYS 826. No objection to oral statement before jury of offer to prove being taken, there is no error in not having the same reduced to writing. Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co., 134 Iowa, 252, 111 NW 935. Restriction of evidence to specific purpose. Aughey v. Windrem [Iowa] 114 NW 1047. Sale in bulk of property foreclosed on. Copper Belle Min. Co. v. Costello [Ariz.] 95 P 94. An appellate court will not consider an alleged error not in any way brought to the attention of the trial judge and not shown in the state of the case to have been in any way raised before him. Osborn v. Gurtner [N. J. Law] 66 A 1086. Appellate court will not of its own motion review questions which were not insisted on by appellants in the trial court and which have ceased to be of substantial interest to the parties and to have any bearing on the merits of the appeal. Stiles v. Galbreath [N. J. Err. & App.] 67 A 181. Where defendant to a bill for recovery of oil lands, claiming title thereto, allows a decree to be entered placing his machinery, used about the same, in the hands of the receiver, without objection. Sult v. A. Hochstetter Oil Co. [W. Va.] 61 SE 307. Where, in a suit to compel specific performance of a contract to sell land, objection is made to the introduction of the contract because of insufficient description of the land, the court on appeal can determine such question, though the statute of frauds was not pleaded and the question was not raised on demurrer. Barnes v. Hustead [Pa.] 68 A 839. The appellate court will not reverse a judgment under review because of an alleged error involving a judicial action therein unless such action was decided upon the ground relied upon which was distinctly and plainly made known to the court below. Bell v. Mecum [N. J. Err. & App.] 68 A 149. Questions not raised in the appellate court cannot be considered in the supreme court. Reisch v. People, 229 Ill. 574, 82 NE 321.

94. See Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971.

of parties;[97] joinder and nonjoinder of parties;[98] misnomer of party;[99] manner of procedure;[1] wrongful election of remedies;[2] sufficiency[3] and verification[4] of pleadings; order of reference;[5] errors of referee;[6] right to set off;[7] failure to swear a witness;[8] admission, exclusion, sufficiency[9] and competency[10] of evidence; credibility of witness;[11] variance between pleadings and proof;[12] indefiniteness in stipulations;[13] misconduct of party;[14] arguments and remarks of counsel;[15] remarks of trial judge,[16] including misstatements in the charge;[17] giving and refusal of instruc-

Contra: The disqualification of the judge may be raised for the first time on appeal. Bliss v. Caille Bros. Co., 149 Mich. 601, 14 Det. Leg. N. 590, 113 NW 317.

95. Tanenbaum v. Federal Match Co., 189 N. Y. 75, 81 NE 565.

96. Not regarded with favor. Helm v. Brewster [Colo.] 93 P 1101.

97. Right of consignor to sue for injury to freight. Brennisen v. Pennsylvania R. Co., 101 Minn. 120, 111 NW 945. Right of bank to sue on notes indorsed to its cashier individually. First Nat. Bk. v. McCullough [Or.] 93 P 366. Right of county commissioners to raise question as to constitutionality of statute. State v. Holmes, 53 Fla. 226, 44 S 179. That complainant in an action to cancel a deed could not bring the action as executor of the deceased grantor. Beason v. Coleman [Miss.] 46 S 49. Failure of plaintiff to prove its corporate existence. Combs v. Virginia Iron, Coal & Coke Co. [Ky.] 106 SW 815. Legal incorporation of defendant company. Fact of incorporation being admitted in pleadings. South East R. Co. v. Evansville R. Co. [Ind.] 82 NE 765.

Note: In Beason v. Coleman [Miss.] 46 S 49, the court says: "Of course, in any case where the subject-matter of the litigation was such that a final decree could not be made without materially affecting the interest of parties not before the court, it would make no difference when the objection might be taken so far as its effectiveness would be concerned."

Questions of the character in which plaintiff sues cannot be raised for the first time on a motion for judgment non obstante. Speckman v. Smedley Bros., 153 F 771.

98. See post, § 4, Necessity of Objection To Parties.

99. University of Louisville v. Hammock [Ky.] 106 SW 219.

1. Failure to first file an account in proceedings for dissolution of partnership. Kliger v. Rosenfeld, 120 App. Div. 396, 105 NYS 214. By motion or petition. David Bradley Mfg. Co. v. Burrhus [Iowa] 112 NW 765. That issues raised on cross complaint and answer were not tried before the issues raised by the complaint and answer. Garvey v. La Shells, 151 Cal. 526, 91 P 498. On motion instead of on trial on pleading. Ellison v. Focke [Kan.] 94 P 805. A property owner who has submitted without exception to a joint trial for the assessment of damages for various properties appropriated for railway purposes cannot be heard to complain in the reviewing court that he was not given a **separate trial.** Cincinnati Iron Store Co. v. Trustees Cincinnati Southern R. Co., 9 Ohio C. C. (N. S.) 103.

2. Action for rescission instead of breach Krebs Hop Co. v. Livesley [Or.] 92 P 1084.

3. See post, § 4, Necessity of Objection To Pleadings.

4. Phenix v. Bijelich [Nev.] 95 P 351.

5. West v. Fry, 134 Iowa, 675, 112 NW 184.

6. Errors by referee must be first attacked in trial court. Howe v. Hobart, 18 Okl. 243, 90 P 431.

7. State v. Dickman, 124 Mo. App. 653, 102 SW 44.

8. The failure of a party or his counsel to object to allowing a witness, who has inadvertently not been sworn, to testify, amounts to a waiver. Such witness may be recalled and sworn, and though merely asked if what he had previously stated was true, he answering that it was, this furnishes no ground for reversal in the absence of objection. Southern R. Co. v. Ellis, 123 Ga. 614, 51 SE 594.

9. See post, § 4, Necessity of Objection To Evidence.

10. McLain v. Nurnberg [N. D.] 112 NW 243. Competency of a party as a witness. Willhite v. Berry, 232 Ill. 331, 83 NE 852.

Contra: Incompetency of witness may be raised for the first time on appeal. Woodville v. Woodville [W. Va.] 60 SE 140.

11. Dueber v. Wolfe [Wash.] 92 P 455.

12. Crittenden v. Cobb, 156 F 535; Dalton v. Ogden Gas Co., 126 Ill. App. 502; Continental Casualty Co. v. Maxwell, 127 Ill. App. 19; Hartford Fire Ins. Co. v. Northern Trust Co., 127 Ill. App. 355; Lehigh Valley Transp. Co. v. Post Sugar Co., 228 Ill. 121, 81 NE 819; Illinois Cent. R. Co. v. Heath, 228 Ill. 312, 81 NE 1022; Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836; Sample v. Chicago, etc., R. Co. [Ill.] 84 NE 643; Taylor v. Southerland [Ind. T.] 104 SW 874; McDermott v. Mahoney [Iowa] 115 NW 32; Van Cleve v. Radford, 149 Mich. 106, 14 Det. Leg. N. 376, 112 NW 754; Von Trebra v. Laclede Gaslight Co. [Mo.] 108 SW 559; Moore v. Martine, 107 NYS 652; Devlin v. Charleston, etc., R. Co. [S. C.] 60 SE 1123. That justification proved in slander was not alleged. Hammond v. Porter, 150 Mich. 328, 14 Det. Leg. N. 733, 114 NW 64. Whether evidence followed pleadings. Busch v. Interborough Rapid Transit Co., 187 N. Y. 388, 80 NE 197. A complaint may be considered as amended after judgment to conform to evidence introduced without objection. Bynum v. Brady [Ark.] 100 SW 66.

13. McLain v. Nurnberg [N. D.] 112 NW 245.

14. Hartzell v. Murray, 224 Ill. 377, 79 NE 674, afg. 127 Ill. App. 608; Knight v. Collings, 227 Ill. 348, 81 NE 346.

15. Paige v. Illinois Steel Co., 233 Ill. 313, 84 NE 239; Chicago Union Trac. Co. v. McClevey, 126 Ill. App. 21; Galveston, etc., R. Co. v. Worth [Tex. Civ. App.] 20 Tex. Ct. Rep. 772, 107 SW 958.

16. Gehlert v. Quinn, 35 Mont. 451, 90 P

tions;[18] defects in verdict,[19] and irregularities in receiving same,[20] rendering a judgment non obstante;[21] form,[22] provisions[23] and amount of judgment;[24] costs;[25] attorney's fees;[26] defects in a motion for a new trial,[27] or bond on appeal;[28] failure to give a cost bond;[29] sufficiency of motion to dismiss appeal;[30] and in general all clerical misprisions.[31] One is estopped to predicate error upon matters to which he has, with knowledge of the facts,[32] consented,[33] or in some[34] but not all[35] cases upon rul-

168. Statement of case to jury. Rimmer v. Wilson [Colo.] 93 P 1110; Eckels v. Muttschall, 230 Ill. 462, 82 NE 872.

17. Unimportant fact. Pennsylvania R. Co. v. Donora Southern R. Co. [Pa.] 68 A 845.

18. Dotson v. Milliken, 28 S. Ct. 489; Taylor v. Barnett, 39 Colo. 469, 90 P 74; Greenlee Bros. v. Eggert [Iowa] 113 NW 489; Fields v. Sizemore [Ky.] 105 SW 438; Johnson v. Capital Fire Ins. Co., 218 Pa. 421, 67 A 748. See Tucker v. American Car & Foundry Co., 218 Pa. 323, 67 A 616. Failure to request limiting instruction to specific issue. Lord v. Manchester St. R. Co. [N. H.] 67 A 639. Giving requested instructions, not designating particular question of the special verdict to which they were directed. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738. An instruction containing a statement which is merely inaccurate, not prejudicial, must be specially objected to in the lower court. Graves v. Melia, 81 Ark. 347, 99 SW 80.

19. Unsigned or improperly signed. Austin v. Austin [Colo.] 94 P 309. Amount of verdict exceeds sum demanded. McLain v. Nurnberg [N. D.] 112 NW 243.

20. Irregularities in mode of receiving and publishing verdict. Sizer v. Melton, 129 Ga. 143, 58 SE 1055.

21. Based on special interrogatories. Masterson v. Southern R. Co. [Ind.] 84 NE 605.

22. That judgment did not conform to Mills' Ann. Code, § 227. Klug v. Munce [Colo.] 90 P 603.

23. Austin v. Austin [Colo.] 94 P 309.

24. Glove v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 13, 105 SW 539; Rust v. Fitzhugh [Wis.] 112 NW 508. Interest. Quigg v. Monroe County [Wis.] 113 NW 723.

25. Lone Star Salt Co. v. Blount [Tex. Civ. App.] 107 SW 1163; Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 20 Tex. Ct. Rep. 462, 107 SW 698. That proponent of contested will be allowed costs and attorney's fees. Bache v. Ward, 128 Ill. App. 614. Where question was but inferentially presented, if at all, in pleadings and requested charge. Seal v. Holcomb [Tex. Civ. App.] 20 Tex. Ct. Rep. 808, 107 SW 916. On review of taxation of costs, only items objected to below will be considered. Fourteenth St. Bk. v. Strauss, 54 Misc. 688, 104 NYS 956. Ambiguities, etc., in decree of lower court or to costs according to directions of judgment on appeal. Cauthen v. Cauthen [S. C.] 61 SE 112.

26. Bache v. Ward, 128 Ill. App. 614. That solicitors were allowed larger fees than claimed in petition. Assets Realization Co. v. Defrees, 127 Ill. App. 454.

27. Failure to name all the defendants in the caption. Brandt v. Hall, 40 Ind. App. 651, 82 NE 929. Not made in time. Paster v. Meyer, 107 NYS 736.

28. Wolfer v. Hurst [Or.] 91 P 366; Goldstein v. Susholtz [Tex. Civ. App.] 105 SW 219.

29. Nonresident. Payton v. M. Spiesberger & Son Co. [Colo.] 90 P 605.

30. In re Paige's Estate, 12 Idaho, 410, 86 P 273.

31. Misspelling party's name in judgment. I. Droege & Sons Foundry Co. v. Robert Field Sales Agency, 31 Ky. L. R. 1247, 104 SW 1007. Order substituting party plaintiff not entered of record. Berry v. Rood [Mo.] 108 SW 22. Failure to enter statement of findings on minutes of court. Matthews v. Southern R. Co., 148 Ala. 667, 41 S 662.

32. Allowing jury to retire and reconsider sealed verdict after communicating with court held reviewable, counsel having had no knowledge of such communication. Dralle v. Reedsburg [Wis.] 115 NW 819.

33. One cannot complain of error in which he has acquiesced. Sale of partnership property to surviving partners on their ex parte petition. French v. Vanatta, 83 Ark. 306, 104 SW 141. Consenting to court adjusting controversey without objection held to bar right to raise claim that equity court had no jurisdiction because of adequate remedy at law. Young v. Potter, 150 Mich. 375, 14 Det. Leg. N. 660, 114 NW 215. Continuing motion for new trial over the term with consent of opposing party. Bailey v. McCormick [Wis.] 112 NW 457. Hearing petition in vacation and entering decision as of last day of preceding term. In re Gurdy [Me.] 69 A 546. By agreeing to partition and sale, held to waive right to raise point that title being an equitable one should be tried out in chancery, and not in a court of law. Hiler v. Cox [Mo.] 109 SW 679. Consent to judgment held to waive right to have it reversed as an entirety. Id. On appellant paying off a money judgment or consenting that a judgement be executed and agrees to abide by the execution, he thereby "kills" any issue on appeal going to the validity of the judgment. Id. The trial judge having instructed without objection that both parties conceded the contract sued on was not fully expressed in writing, defendants may not on appeal complain of the admission of evidence tending to show the real contract. Collins v. Carlin, 121 App. Div. 524, 106 NYS 235. Where a plaintiff asks leave to amend his petition, "either by interlineation or by filing such other pleading, as the court may order," and complies without objection or exception with an order requiring him to file an amended petition, he cannot afterwards complain of such order. Hackler v. Miller [Neb.] 114 NW 274.

34. By amending petition, waives right to say amendment unnecessary. Brantley Co. v. Southerland, 1 Ga. App. 804, 57 SE 960. Accepting terms of continuance estops one from denying authority of court to impose such terms. Bashore v. Tulare County Super. Ct. [Cal.] 91 P 801. Where complainant in

ings to which he has submitted. Exceptions to conclusions of law admit the correctness of findings of fact.[36]

Questions involving fundamental errors apparent on the face of the record will be considered though not saved below.[37] But an objection made for the first time on appeal is not favored though it is one which may be properly raised at any time during the case.[38] When evidence is received or pertinent to the issues in a given case, and that evidence would also be pertinent to another issue which might have been, but was not, made by the pleadings, its reception is no waiver of an objection to the consideration of such other issue.[39]

Change of theory.[See 8 C. L. 1826]—The case will be tried on appeal on the same theory on which it was tried below,[40] whether such theory relates to the pleadings,[41] the evidence,[42] the issues,[43] grounds of recovery[44] or defense,[45] dismissal of parties,[46]

bill for injunction gives bond required by court, he cannot on appeal claim that it is excessive. Reed v. New York Nat. Exch. Bk., 230 Ill. 50, 82 NE 341.

35. That counsel stated to jury that court had ruled against his client and they should find for the opposing party held not to estop him from complaining of the judgment as to errors in the submission. Mexican Cent. R. Co. v. De Rosear [Tex. Civ. App.] 109 SW 949.

36. Hamrick v. Hoover [Ind. App.] 84 NE 28. See Henry v. Central Trust Co., 40 Ind. App. 369, 82 NE 120.

37. Though no motion in arrest or review was made below. Walton v. Catron, 125 Mo. App. 501, 102 SW 1058. Failure to object to oral evidence held not to waive benefit of statute of frauds, answer denying existence of any contract and complaint showing on its face a contract within the statute. Bradley Real Estate Co. v. Robbins [Ind. T.] 103 SW 777. That tax deed did not contain indorsements specifically and expressly required by Rev. Code 1880, § 562. McLemare v. Anderson [Miss.] 43 S 878. Statement in claim against state showing on its face that it was not allowable. Beall v. Graham, 125 Mo. App. 38, 102 SW 636. Diversity of citizenship; Federal court. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

38. Edward Malley Co. v. Londoner [Colo.] 93 P 488.

39. Hostetter v. Illinois Cent. R. Co. [Minn.] 115 NW 748.

40. Mabry v. Randolph [Cal. App.] 94 P 403; Stratton Cripple Creek Min. & Development Co. v. Ellison [Colo.] 94 P 303; Henry County v. Citizens' Bk., 208 Mo. 209, 106 SW 622; City of St. Louis v. G. H. Wright Cont. Co. [Mo.] 109 SW 6; Carlson v. Barker [Mont.] 93 P 646; National Soc. U. S. Daughters of 1812 v. American Surety Co., 57 Misc. 627, 107 NYS 820; Pease Piano Co. v. Sarles, 109 NYS 313; Blackwell, etc., R. Co. v. Gist, 18 Okl. 516, 90 P 889. Trial of plea in bar without referring it to the merits. Gilbert v. Mazerat [La.] 46 S 47. Action at law for damages arising from nuisance cannot be changed to one in equity for abatement. Cushing-Wetmore Co. v. Gray [Cal.] 92 P 70. That one partner cannot bind another to a guaranty. Adler v. Miles, 108 NYS 1011. Suit in equity transferred to common-law docket but tried as an equitable action. Phillips v. Stewart, 29 Ky. L. R. 1199, 97 SW 6.

41. Studabaker v. Faylor [Ind.] 83 NE 747; Oolitic Stone Co. v. Ridge [Ind.] 83 NE 246. Where a cause was tried on the theory that it was brought under Burns' Ann. St. 1901, § 7083, subd. 2, that theory must be adhered to, and the act being unconstitutional, a judgment for plaintiff cannot be sustained. Id. Sufficiency of indictment. Great Northern R. Co. v. U. S., 28 S. Ct. 313. That issue raised by reply was a departure. Dodd v. Pittsburg, etc., R. Co. [Ky.] 106 SW 787. Court's misinterpretation of **disclaimer.** Cochran v. Moerer [Tex. Civ. App.] 105 SW 1138. That amendment has been regularly made. McLain v. Nurnberg [N. D.] 112 NW 243. See, also, Shaw v. Pope [Conn.] 67 A 495.

42. That evidence introduced before amendment of pleadings was properly in case. Niagara Fire Ins. Co. v. Williams, 1 Ga. App. 603, 57 SE 1018. On appeal in an action against a coal mine operator, under Hurd's Rev. St. 1905, c. 93, § 20, cl. g., for injury to a miner, held the operator may not assert that under § 33 plaintiff should have shown a violation of the statute by evidence convincing beyond a reasonable doubt. Davis v. Illinois Collieries Co., 232 Ill. 284, 83 NE 836.

43. Hooker v. Forrester, 53 Fla. 392, 43 S 241; McDermott v. Mahoney [Iowa] 115 NW 32; Drovers' Live Stock Commission Co. v. Charles Wolff Packing Co., 74 Kan. 330, 86 P 128; Jacobs v. St. Joseph [Mo.] 102 SW 988; Joseph v. Metropolitan St. R. Co. [Mo. App.] 107 SW 1055; Deatrick's Adm'r v. State Life Ins. Co. [Va.] 59 SE 489. Or if issue was joined by the pleadings. Hardeman v. Williams [Ala.] 43 S 726. That answer failed to respond to allegations of amended petition. Bell v. Casey [Ky.] 108 SW 261. Treating allegations of complaint as controverted. Venner v. Denver Union Water Co. [Colo.] 90 P 623. Treating reply as filed and trying issues that would have been raised thereby. Van Vranken v. Granite County, 35 Mont. 427, 90 P 164; Butts v. Peoria County, 226 Ill. 270, 80 NE 765. That allegations of cross complaint were traversed. Tubbs v. Roberts [Colo.] 92 P 220. That intervening petition, unanswered and not demurred to, should be taken as true. Guarantee Gold Bond Loan & Sav. Co. v. Edwards [Ind. T.] 104 SW 624. From conversion to assumpsit. Himmelman v. Des Moines Ins. Co., 132 Iowa, 668, 110 NW 155. Where parties by conduct and in argument of counsel indicated no contest on a certain

measure of damages,[47] or effect of decree.[48] Statement by counsel on the trial as to his understanding of the law does not estop him from urging on appeal that the law is not in harmony with that understanding.[49]

Under the same rule only such objections will be considered on appeal as are urged below.[50]

§ 3. *Mode of objection, whether by objection, motion, or request.* See 8 C. L. 1830. Misjoinder of parties apparent on the face of the record should be raised by de-

point, failure to prove such point will not warrant reversal. O'Keefe v. United Railways Co., 124 Mo. App. 613, 101 SW 1144. Where one tried case on the theory that policy of insurance had been forfeited and forfeiture waived, he cannot raise the issue on appeal that policy had not been forfeited. Industrial Mut. Indemnity Co. v. Thompson, 83 Ark. 574, 104 SW 200. Grounds for objecting to guardian's account. Hudson v. Newton, 83 Ark. 223, 103 SW 170. Action to enforce stockholder's liability; question of whether or not corporation's stock was subject to assessment not raised. Neff v. Lamm, 99 Minn. 115, 108 NW 849. Evidence being introduced without objection cannot urge that findings based thereon are not responsive to the issue. Colegrove Water Co. v. Hollywood, 151 Cal. 425, 90 P 1053. Effect of deed. Ault v. Hillyard [Iowa] 115 NW 1030. A motion to certify an unlawful detainer action to the county court on the ground the title is in issue, under Gen. St. 1883, § 1495, should be made before a trial on the merits and appeal from an adverse judgment. Bonnell v. Gill [Colo.] 92 P 13. That district court should try case de novo. In re McVay's Estate [Idaho] 93 P 28. That both sides desired case treated as involving questions of law alone. Dolsen v. Phoenix Preferred Acc. Ins. Co. [Mich.] 14 Det. Leg. N. 894, 115 NW 50. Suit to quiet title based on a delinquent tax sale cannot be changed so as to rest on sale under abatement act and on limitations. Kennedy v. Sanders [Miss.] 43 S 913.

44. Westinghouse, Church, Kerr & Co. v. Remington Salt Co., 189 N. Y. 515, 81 NE 766. Slander. Laughlin v. Schnitzer [Tex. Civ. App.] 20 Tex. Ct. Rep. 830, 106 SW 908. Grounds of invalidity of bonds. Streator v. Linscott [Cal.] 95 P 42. Action for money lent cannot be changed so as to recover for failure of defendant to account as agent. Young v. Anthony, 119 App. Div. 612, 104 NYS 87.

45. Hayes v. Atlanta, 1 Ga. App. 25, 57 SE 1087. Matters not pleaded as a defense can not be taken as ground for reversing the judgment. Haywood v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 427, 102 SW 469. Payment. Marshall v. U. S. Acc. Ass'n [Mich.] 14 Det. Leg. N. 892, 114 NW 1028. Duress. Friedman v. Erste Kaiser Franz Joseph Unterstutzungs Verein, 104 NYS 908. Slander; words privileged. Slater v. Walter, 148 Mich. 650, 14 Det. Leg. N. 314, 112 NW 682. Whether defense of self-defense could be asserted under a general denial. Mitchell v. United Railways Co., 125 Mo. App. 1, 102 SW 661. Construction of lease. Gensler v. Nicholas [Mich.] 15 Det. Leg. N. 13, 115 NW 458. That defense of assumption of risk was properly raised without special plea. Gainer v. Southern R. Co. [Ala.] 44 S 652. That property conveyed to wife to escape execution against it was in payment of preferred claim. Hill v. Siffermann, 230 Ill. 19, 82 NE 338.

46. Objection to dismissal of party bars contention on appeal that such party was unnecessary. Steele v. Darner, 124 Mo. App. 338, 103 SW 582.

47. Durkee v. Chino Land & Water Co., 151 Cal. 561, 91 P 389. Construction of terms of contract as to price. Thomas Bridges' Son v. Evansville Pressed Brick Co. [Ky.] 105 SW 946. Though rule prescribed by contract was different and a general denial was interposed. Gratiot St. Warehouse Co. v. Missouri, etc., R. Co., 124 Mo. App. 545, 102 SW 11. If a cause of action for injury to real property by occasional flooding be tried on the theory that the damages are original, the parties will be bound thereby. Harvey v. Mason City, etc., R. Co., 129 Iowa, 465, 105 NW 958. The defendant, having successfully interposed an objection to the introduction of testimony as to the value of the house and lot, will not thereafter be heard to complain that the recovery may be for a much larger sum than the value of the house and lot. Clark v. Boltz, 10 Ohio C. C. (N. S.) 1.

48. Winnard v. Clinton, 233 Ill. 320, 84 NE 261.

49. People v. Armstrong, 116 App. Div. 103, 101 NYS 712.

50. Cross v. Aby [Fla.] 45 S 820; Lynch v. Chicago, etc., R. Co., 205 Mo. 1, 106 SW 68; McKenzie v. King [N. M.] 93 P 703. Evidence. United States Gypsum Co. v. Shields [Tex. Civ. App.] 20 Tex. Ct. Rep. 671, 106 SW 724; Hubbard v. Lee [Cal. App.] 92 P 744; City of Madison v. Thomas [Ga.] 60 SE 461; Smith v. Chicago, etc., R. Co., 127 Mo. App. 160, 105 SW 10; Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251; Compagnie Des Metaux Unital v. Victoria Mfg. Co. [Tex. Civ. App.] 107 SW 651; Kansas City Consol. Smelting & Refining Co. v. Taylor [Tex. Civ. App.] 107 SW 889. Objection must be presented in same way. Id. When specific objections to evidence are made, all others are waived. Southern R. Co. v. Dickens [Ala.] 44 S 402. Instructions. Laughlin v. Schnitzer [Tex. Civ. App.] 20 Tex. Ct. Rep. 830, 106 SW 908. See, also, Jacobson v. Hobart Iron Co. [Minn.] 114 NW 951. Grounds for **nonsuit.** Caldwell Banking & Trust Co. v. Porter [Or.] 95 P 1. Failure to have jury resworn after filing of amendment. Indianapolis St. R. Co. v. Fearnaught, 40 Ind. App. 333, 82 NE 102. See, also, post, § 18, Waiver of Objections and Exceptions Taken.

murrer.[51] Capacity of parties' plaintiff to sue should be raised by demurrer or by answer.[52] The question of variance is not raised by a demurrer to the pleadings.[53] An order denying a motion for leave to file an amended complaint is as effectively excepted to by mandamus proceedings to compel the trial judge to vacate the order as though it had been formally excepted to on the record.[54] The improper character of evidence not appearing until after its admission, it may be reached by a motion to strike out.[55] A motion to strike out the testimony of a witness should be denied if any part is admissible for any purpose,[56] the proper method being to strike out merely the inadmissible part.[57] In some states, improper argument being made to the jury, a motion for a mistrial should immediately be made.[58] The remedy for a failure to make findings is by a motion therefor.[59]

§ 4. *Necessity of objection. In general.* See 8 C. L. 1832—A timely [60] objection is essential to the preservation of questions for review, and only such questions as are thus saved will be considered by the reviewing court,[61] though in some states a motion for a new trial will raise the question.[62] Where a motion for a new trial has been made, overruled and exception taken, further objection to the ruling of the court is unnecessary.[63] Failure to object to remarks by the court is not excused because of the belief of counsel that to make objection would make a bad matter worse.[64] It has been stated that objections and exceptions do not lie to the admission of points constituting mere argument to the court.[65]

To jurisdiction. See 8 C. L. 1832—An objection below is essential to the saving of certain questions as to jurisdiction,[66] but not questions relating to jurisdiction of the subject-matter.[67]

51. Waived by answering over. Rev. St. 1899, § 598 considered. Hudson v. Wright, 204 Mo. 412, 103 SW 8.

52. Not by demurrer to the evidence. Maelzer v. Swan, 75 Kan. 496, 89 P 1037.

53. Ryan v. Rogers [Idaho] 94 P 427.

54. Jones v. Pendleton [Mich.] 15 Det. Leg. N. 49, 115 NW 468.

55. If objectionable character of evidence given in chief does not appear until cross-examination, it may be reached by motion to strike out. Chicago Union Trac. Co. v. Giese, 229 Ill. 260, 82 NE 232. Where the **answer of a witness,** as distinguished from the question asked, is objectionable, the remedy of the party complaining is by motion to strike the answer. Supple v. Suffolk Sav. Bk. [Mass.] 84 NE 432; Smith v. New York Anti-Saloon League, 121 App. Div. 600, 106 NYS 251. Where whole answer of witness was objectionable. O'Brien v. New York City R. Co., 55 Misc. 228, 105 NYS 238. An exception does not lie to an improper answer to a proper question. Sheldon v. Wright, 80 Vt. 298, 67 A 807. So, also, **testimony which becomes incompetent by reason of an amendment** of the pleadings should, on motion to strike out, be withdrawn from the jury. Thaxter v. Missouri Pac. R. Co., 123 Mo. App. 636, 100 SW 1102.

56. Platt v. Rowand [Fla.] 45 S 32.

57. Keys v. Winnsboro Granite Co., 76 S. C. 284, 56 SE 949.

58. Southern R. Co. v. Dean, 128 Ga. 366, 57 SE 702.

59. Eagle Min. & Imp. Co. v. Hamilton [N. M.] 91 P 718.

60. See post, this section, subd. Time of Objection.

61. Egoff v. Children's Guardians of Madison County [Ind.] 84 NE 151; Hansen v. Kline [Iowa] 113 NW 504; Redfield v. Reid, 148 Mich. 545, 14 Det. Leg. N. 281, 112 NW 124; Boswell v. First Nat. Bk. [Wyo.] 92 P 624. Improper argument of counsel. Southern R. Co. v. Dean, 128 Ga. 366, 57 SE 702; Pierson v. Illinois Cent. R. Co., 149 Mich. 167, 14 Det. Leg. N. 405, 112 NW 923. Eminent domain proceedings; allowance for interruption of business. West Chicago Park Com'rs v. Boal, 232 Ill. 248, 83 NE 824. So held where no objection was made to referee's report, appeal being from judgment entered thereon. Armstrong v. Munster [Me.] 67 A 573. Action to enforce stockholder's liability. Question of whether or not corporation's stock was subject to assessment not raised. Neff v. Lamm, 93 Minn. 115, 108 NW 849. Misstatement in charge. Pennsylvania R. Co. v. Donora Southern R. Co. [Pa.] 68 A 845. Under code, objections to granted prayers on the ground that they submitted a question of law to the jury are not available on appeal where the record fails to show that special exceptions were filed to the prayers or that such objections were made in the court below. Code Pub. Gen. Laws, §§ 298, 299, 299a. Dexter Sulphite Pulp & Paper Co. v. McDonald, 103 Md. 381, 63 A 958.

62. Instructions. Salmon v. M. E. Blasie Mfg. Co., 108 NYS 448.

63. Chadister v. Baltimore, etc., R. Co. [W. Va.] 59 SE 523. Need be no exception to rendering of judgment. Parks v. Morris, Layfield & Co. [W. Va.] 59 SE 753.

64. Drumm-Flato Commission Co. v. Edmisson, 28 S. Ct. 367.

65. Rosenberg v. Feierling, 121 App. Div. 190, 105 NYS 812.

66. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. That court of law

*To parties.*See 8 C. L. 1833—An objection below is necessary to save any question or to the joinder or nonjoinder [68] of all but, perhaps, necessary parties.[69]

*To pleadings.*See 8 C. L. 1833—As a general rule, objections to pleadings [70] and to rulings thereon [71] cannot be made for the first time on appeal. No objection below is necessary, however, to save the question as to whether the declaration or complaint states a cause of action,[72] though, if it is apparent from the complaint that the defects were passed over when they might have been cured by amendment during trial, the parties will not be permitted to take advantage of them on appeal.[73] Pleadings

has no jurisdiction because controversy involves a partnership account. Fish v. Lapsley, 128 Ill. App. 611. That cause is not within jurisdiction of a court of equity. Shedd v. Seefeld, 126 Ill. App. 375.

67. City of Aurora v. Schoeberlein, 230 Ill. 496, 82 NE 860; Steinmetz v. G. H. Hammond Co., 167 Ind. 153, 78 NE 628; Baltimore, etc., R. Co. v. Hollenberger, 76 Ohio St. 177, 81 NE 184; Hunter v. D. W. Alderman & Sons Co. [S. C.] 61 SE 202; West v. Martin [Wash.] 92 P 334. See, also, Cable v. Duke, 208 Mo. 557, 106 SW 643. Want of jurisdiction may be raised at any time. Schaller v. Marker [Iowa] 114 NW 43. But see United States Health & Acc. Ins. Co. v. Clark [Ind. App.] 83 NE 760.

68. Dowie v. Sutton, 227 Ill. 183, 81 NE 395; Taylor v. Southerland [Ind. T.] 104 SW 874; Haley v. Cochran, 31 Ky. L. R. 515, 102 SW 852; Bauman v. Kuhn, 108 NYS 773; Henderson v. Rushing [Tex. Civ. App.] 20 Tex. Ct. Rep. 115, 105 SW 840; Budlong v. Rudlong [Wash.] 94 P 478. That defendants were not joined as parties plaintiff. Van Gordon v. Goldamer [N. D.] 113 NW 609. Counsel representing defendant had admitted upon the trial that right parties had been named defendants. West Chicago St. R. Co. v. Muttschall, 131 Ill. App. 639. In an action against insane person's trustee and committee. Objection that insane person was not a party. Cecil's Trustee v. Robertson [Ky.] 105 SW 926. Failure to demur to misjoinder of parties plaintiff waives right to move to dismiss the action on that ground on trial. Wolverton v. Rogers, 123 App. Div. 45, 107 NYS 883.

69. Objection held not indispensable to taking advantage of absence of indispensable party. McConnell v. Dennis [C. C. A.] 153 F 547. Want of necessary parties is not waived by failure to assign it specially as a ground of demurrer, and when a demurrer has been interposed and overruled and a decree entered without such special assignment either on the demurrer or at the hearing, it may nevertheless be relied upon in the appellate court. Thompson v. Hern [W. Va.] 59 SE 504.

70. Union Sav. Bk. v. Rinaldo [Cal. App.] 92 P 873; Brady v. Ranch Min. Co. [Cal. App.] 94 P 85; Cone v. Knight, 52 Fla. 247, 42 S 460; Macon, etc., R. Co. v. Moore, 125 Ga. 810, 54 SE 700; United States Fidelity & Guaranty Co. v. State, 40 Ind. App. 136, 81 NE 226; Burgess v. Alcorn, 75 Kan. 735, 90 P 239; Michaels v. McRoy, 148 Mich. 577, 14 Det. Leg. N. 272, 112 NW 129; First Nat. Bk. v. Hilliboe [N. D.] 114 NW 1085; Sylvester v. State, 46 Wash. 585, 91 P 15. Statement before justice not signed. Nichols v. Hicklin, 127 Mo. App. 672, 106 SW 1109. Defective description of land. Rooks v. Tucker, 129 Ga. 744, 59 SE 778; Farmers' Co-op. Ditch Co. v. Riverside Irr. Dist. [Idaho] 94 P 761. Failure to allege nonpayment. Action on insurance policy. National Mut. Fire Ins. Co. v. Sprague [Colo.] 92 P 227. Preliminary objection. Stimmel v. Benthall [Va.] 60 SE 765. Carrying demurrer back to former pleading. United States Fidelity & Guaranty Co. v. Paxton [Ky.] 106 SW 841. Ambiguity in complaint. San Gabriel Valley Bk. v. Lake View Town Co., 4 Cal. App. 630, 89 P 360. Right to counterclaim. Barry-Wehmiller Mach. Co. v. Thompson, 83 Ark. 283, 104 SW 137. Answer not replied to. Louisville, etc., R. Co. v. Bell [Ky.] 108 SW 335. Petition demurrable. Nichols-Shepard Co. v. Ringler [Iowa] 112 NW 543. Duplicity, no demurrer being interposed. Paine v. Kelley [Mass.] 83 NE 8. Indefiniteness. Carlson v. Barber [Mont.] 93 P 646. Multifariousness. Litz v. West Hammond, 230 Ill. 310, 82 NE 634. Question whether contempt proceedings were properly entitled. Porter v. State [Wyo.] 92 P 385. That recovery can be had under declaration. Joliet Stove Works v. Kiep, 230 Ill. 550, 82 NE 875. Failure of foreign corporation to allege compliance with domestic statutes. Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765. Going to trial without objection waives question of sufficiency of information and affidavits. Contempt proceedings. Aaron v. U. S. [C. C. A.] 155 F 833. Sufficiency of specifications in hearing before civil service commission. Sullivan v. Lower, 234 Ill. 21, 84 NE 622. Sufficiency of a complaint which, aided by the evidence admitted, states a cause of action, cannot be attacked for the first time on appeal. Budlong v. Budlong [Wash.] 94 P 478.

71. Striking out allegations of amended complaint on the ground that they state a cause of action different from that embodied in original complaint. Foley v. Coon [Colo.] 93 P 13.

72. Edward Malley Co. v. Londoner [Colo.] 93 P 488; Valley Lumber & Mfg. Co. v. Driessel, 13 Idaho, 662, 93 P 765; Cartwright v. Liberty Tel. Co., 205 Mo. 126, 103 SW 982; Maginn v. Schmick, 127 Mo. App. 411, 105 SW 666. Failure to state a cause of action may be noticed by appellate court on its own motion. H. W. Metcalf Co. v. Martin [Fla.] 45 S 463. Divorce proceedings. Failure to allege residence for statutory period. Rumping v. Rumping [Mont.] 91 P 1057. But see Michaels v. McRoy, 148 Mich. 577, 14 Det. Leg. N. 272, 112 NW 129.

73. Edward Malley Co. v. Londoner [Colo.] 93 P 488.

attacked for the first time on appeal will be liberally construed [74] and, in some instances, formal amendments will be considered as made.[75]

To evidence.[See 8 C. L. 1834]—The admission [78] and sufficiency [77] of evidence will not be reviewed on appeal when no objection was made below, though in some states a motion for a new trial will raise the question.[78] Where in an equity suit an exception is reserved to the judgment and properly preserved, the evidence as a whole is reviewable to determine whether it sustains the judgment, though no objection was interposed to its reception.[79] The judgment should be objected to in the trial court.[80]

Time of objection.[See 8 C. L. 1835]—Objections must be timely.[81] Objections to

74. Carlson v. Barker [Mont.] 93 P 646; Nelson v. Modern Brotherhood of America [Neb.] 110 NW 1008.

75. United States Fidelity & Guaranty Co. v. State, 40 Ind. App. 136, 81 NE 226.

76. Powers v. Hatter [Ala.] 44 S 859; In re Johnson's Estate [Cal.] 93 P 1015; Union Sav. Bk. v. Rinaldo [Cal. App.] 92 P 873; Boone v. Bevis, 53 Fla. 642, 43 S 770; Cross v. Aby [Fla.] 45 S 820; Legris v. Marcotte, 129 Ill. App. 67; Chesapeake, etc., R. Co. v. Perkins, 31 Ky. L. R. 1350, 105 SW 148; Dolsen v. Phoenix Preferred Acc. Ins. Co. [Mich.] 115 NW 50; Von Trebra v. Laclede Gaslight Co. [Mo.] 108 SW 559; Forest v. Rogers [Mo. App.] 106 SW 1105; Hancock v. Beasley [N. M.] 91 P 735; Boyd v. St. Louis S. W. R. Co. [Tex.] 108 SW 813; Mings v. Griggsby Const. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 268, 836, 106 SW 192; Massucco v. Tomassi, 80 Vt. 186, 67 A 551; Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. Competency of witness. Mitchell v. Chicago, etc., R. Co. [Iowa] 114 NW 622. Testimony taken at former trial. Anthes v. Schroeder [Neb.] 112 NW 593. Not within pleadings. Louisville R. Co. v. Gaddie [Ky.] 105 SW 454; Dunn v. Taylor [Tex. Civ. App.] 107 SW 952. A challenge to the sufficiency of the evidence must be denied if the evidence makes a case against the challenging party whether such case falls strictly within the pleadings or not. Meyers v. Syndicate Heat & Power Co. [Wash.] 91 P 549. Method of proving mortgage. Neff v. Elder, 84 Ark. 277, 105 SW 260. No objection. No motion to exclude evidence introduced on same issue. Taliaferro v. Shepherd [Va.] 57 SE 585. Oral evidence to contradict written contract. Jackson v. Till, 103 NYS 110. Failure to object to the admission of evidence renders it discretionary with the trial court whether it will afterwards strike out such evidence. Hitt v. Woolever [N. J. Err. & App.] 68 A. 237. An objection that a hypothetical question calls for an answer which would invade the province of the jury should be made in trial court (Chicago Union Trac. Co. v. Roberts, 131 Ill. App. 476), and its ruling thereon is not subject to review (Hitt v. Woolever [N. J. Err. & App.] 68 A 257). Not error to refuse to strike it out. Churchill v. More, 4 Cal. App. 219, 88 P 290.

Contra. Evidence rendered incompetent by statute. See Patrick v. Kirkland, 53 Fla. 768, 43 S 969.

77. Armstrong v. Fernandez, 28 S. Ct. 419; Newton v. Cardwell's Blue Print & Supply Co. [Colo.] 92 P 914. Personal injury action against street railway company. No proof that plaintiff was a passenger. Kramer v. Brooklyn Heights R. Co., 190 N. Y. 310, 83 NE 35. Insufficiency of evidence to sustain verdict. McLain v. Nurnberg [N. D.] 112 NW 243. Failure of plaintiff to prove its corporate existence. Combs v. Virginia Iron, Coal & Coke Co. [Ky.] 106 SW 815. Where evidence corresponds to pleadings, and the latter were not demurred to. Burr v. Atlanta Paper Co., 2 Ga. App. 52, 58 SE 373. To support submission of question of adverse possession. Tilton v. Tilton [N. H.] 68 A 867. That signature was not shown to have indicated defendants. Adler v. Miles, 108 NYS 1011. Whether evidence of damages is too indefinite. Vandalia R. Co. v. Hinds, 130 Ill. App. 9. Where no objection is made to evidence showing special damages, a finding thereon is conclusive. Moody v. Peirano, 4 Cal. App. 411, 88 P 380. In an action at law when no instructions are asked or given, and no exceptions saved to the admission or rejection of evidence, the court on appeal, will not weigh the evidence. American Metal Co. v. Daugherty, 204 Mo. 71, 102 SW 538.

78. Competency of evidence. Salmon v. M. E. Blasier Mfg. Co., 108 NYS 448.

79. Tubbs v. Roberts [Colo.] 92 P 220.

80. Where, in an action against connecting carriers for injuries to a shipment of horses, no objection was made by plaintiffs, nor by the initial carrier, in the trial court, to the rendition of judgment in favor of the delivering carrier, such judgment will be affirmed on a writ of error sued out by the initial carrier under Code 1904, § 3395, though the judgment against initial carrier is reversed. Southern R. Co. v. Forgey, 105 Va. 599, 54 SE 477.

81. After overruling of demurrer and plea made to the merits, objection that **name of plaintiff** does not import a corporation, natural person or partnership, held too late. Gate City Cotton Mills v. Cherokee Mills, 128 Ga. 170, 57 SE 320. Objection that **defendant is sued by the wrong name** comes too late at the trial on the merits. North American Restaurant & Oyster House v. McElligott, 129 Ill. App. 498. Over three years' delay in objecting to action of court in refusing to **transfer cause to the Federal courts** held too late. Maysville, etc., R. Co. v. Willis, 31 Ky. L. R. 1249, 104 SW 1016. Question whether **alteration of note is material** or not is raised too late after verdict and on motion for a new trial. Nottingham v. Ackirs [Va.] 57 SE 592. Objection in the form of a **plea in abatement** comes too late if made after general appearance. Too late after motion for change of venue. Keokuk & Hamilton Bridge Co.

amendments of pleadings must be asserted when the amendment is allowed.[82] An objection to the form of the remedy first made on a motion for a new trial is too late.[83] Objections to arguments and remarks of counsel should be taken when the cause of objection arises.[84] Objections to evidence should be made when the evidence is offered,[85] and a ground of objection not urged at such time will not be considered.[86] So, also, an objection to a question must be made after the question is put[87] and before it is answered[88] unless answered so quickly as to preclude a prior objection.[89] Where, however, it is not apparent from a question the answer will be inadmissible, the question need not be objected to, to entitle the opposing party to move to strike out the answer.[90] Where evidence is introduced which surprises a party, he should move for a continuance of the trial, and not wait until after verdict against him and then apply for a new trial.[91] Objections to instructions should be made at time the instructions are given.[92] Objections to the verdict should be made before the jury is discharged.[93]

§ 5. *Necessity of motion or request. In general.* See 8 C. L. 1838—Errors correctible on motion below are not reviewable where no such motion was made,[94] and a mo-

v. Wetzel, 228 Ill. 253, 81 NE 864. Objection to **exhibits attached to deposition** should be made at the time the deposition was taken if the party objecting is present. McIlwain v. Gaebe, 128 Ill. App. 209. Objections to **master's fees** is timely if made after his report is returned into court. Gottschalk v. Noyes, 225 Ill. 94, 80 NE 72 Where the court **appoints a person to point out property in controversy** to a jury during a view, objections to the personnel of the person appointed or that he was not sworn must be taken at the time of the appointment. In re Jackson St. in Seatttle [Wash.] 91 P 970.

82. Burdette v. Crawford, 125 Ga. 577, 54 SE 677.

83. American Tobacco Co. v. Werckmeister, 28 S. Ct. 72.

84. Southern R. Co. v. Dean, 128 Ga. 366, 57 SE 702. Too late after verdict. Cleveland, etc., R. Co. v. Hadley [Ind.] 82 NE 1025. Complaint of opening statement of counsel, not being made until the motion for a new trial, is too late. Hilt v. Griffin [Kan.] 90 P 808.

85. Birmingham R., L. & P. Co. v. Wise [Ala.] 42 S 821; Southern R. Co. v. Hardeman [Ga.] 60 SE 539. Qualification of witness to give an opinion. Pratt v. Welcome [Cal. App.] 92 P 500. After evidence has been offered and admitted without objection, it is, unless counsel were unaware of the ground of objection, too late for the court to instruct the jury that it was not admissible or to grant a motion to strike it out. Darrin v. Whittingham [Md.] 68 A 269. Objection to competency is waived where not made until after witness has given considerable of his testimony. Adams v. Atlas Mut. Ins. Co. [Iowa] 112 NW 651. Cannot complain of denial of subsequent motion to strike out. Aughey v. Windrem [Iowa] 114 NW 1047. Cannot have it struck out as a matter of right. Platt v. Rowand [Fla.] 45 S 32. Motion denied when made after admission of testimony without objection and after witness had been examined and cross-examined. Id. Not error to strike it out. Not best evidence. Giffen v. Selma Fruit Co., 5 Cal. App. 50, 89 P 855.

86. Birmingham R., L. & P. Co. v. Taylor [Ala.] 44 S 580. Oral evidence without sufficient proof of loss of instrument. Holly St. Land Co. v. Beyer [Wash.] 93 P 1065.

87. Objection to testimony before question is put to witness is unavailing. Pennsylvania Co. v. Barton 130 Ill. App. 573.

88. Birmingham R., L. & P. Co. v. Turner [Ala.] 45 S 671; Baltimore, etc., R. Co. v. State [Md.] 69 A 439. Motion to strike ineffectual. Spiking v. Consolidated R. & Power Co. [Utah] 93 P 838. A party suffering an improper question to be asked a witness without objecting thereto may not afterwards complain of an unfavorable answer. Seevie v. Brewer [Colo.] 90 P 508.

89. See Birmingham R., L. & P. Co. v. Turner [Ala.] 45 S 671.

90. Johnson v. Beadle [Cal. App.] 91 P 1011.

91. Jones' Adm'r v. Louisville, etc., R. Co. [Ky.] 108 SW 865.

92. Johnson v. Capital Fire Ins. Co., 218 Pa. 421, 67 A 748.

93. Form of verdict. Marianna Mfg. Co. v. Boone [Fla.] 45 S 754. To courts receiving general verdict and in not requiring jury to answer special questions submitted. Taylor v. Barnett, 39 Colo. 469, 90 P. 74; Kuhl v. Supreme Lodge Select Knights & Ladies, 18 Okl. 383, 89 P 1126.

94. Motion to modify essential to change (Beck v. Knoblauch, 96 Minn. 532, 104 NW 1149), the form (Broeker v. Aetna Life Ins. Co. [Ind. App.] 83 NE 756) of the judgment. Motion to modify is essential to present the question that a personal judgment should not have been rendered in a mechanic's lien suit. Home Brew. Co. v. Johnson [Ind. App.] 83 NE 358. Failure to reswear the jury after the allowance of an amendment to the complaint at the close of the evidence. Parry Mfg. Co. v. Eaton [Ind. App.] 83 NE 510. Failure of court to inform jury that they were not entitled to take depositions with them. Maffi v. Stephens [Tex. Civ. App.] 108 SW 1008. Sale in bulk of property foreclosed on. Copper Belle Min. Co. v. Costello [Ariz.] 95 P 94. To open default judgment on ground of accident. New York Life Ins. Co. v. Herbert [Tex. Civ. App] 20 Tex. Ct. Rep.

tion or request is often necessary to invoke the action of the court so as to predicate error upon its failure to act.[95]

Motion for judgment or nonsuit, or direction of verdict.[See 8 C. L. 1836]—The rule that a plaintiff failing to ask for a nonsuit cannot complain of a directed verdict against him does not apply, where the failure to make out the case is caused by rulings of the court excluding evidence of plaintiff.[96] A motion for a nonsuit or a directed verdict is necessary to save any question as to the sufficiency of the evidence.[97] A motion for a nonsuit must specify the grounds on which it is demanded,[98] and grounds not specified will not be considered on appeal.[99]

Motion to strike out.[See 8 C. L. 1836]—A motion to strike is necessary where the grounds of objection do not appear until the evidence is in,[1] or even in some cases where the question has been objected to,[2] or where the evidence was admitted temporarily or subject to agreement to furnish other evidence.[3] The rule that a motion to strike out is essential to preserve the right to complain of a ruling admitting an answer to a question, over a general objection, is applicable only when it is not apparent from the question alone that the answer thereto will not be admissible and the inadmissibility is disclosed for the first time by the answer itself,[4] and, where applicable, the rule applies to questions in a deposition.[5] A motion to strike out evidence must be predicated upon some feature of irrelevancy, incompetency, legal inadmissi-

234, 106 SW 421. An appeal, under § 795, of the General Statutes of 1902, as from the finding or refusal to find certain facts as requested by the trial court, is defective unless based on a motion to correct made in the trial court. Jacobs v. Reilly [Conn.] 68 A 251.

95. Peremptory instruction. Louisville & N. R. Co. v. Davis [Ky.] 105 SW 455. Right to punitive damages claimed. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. Absence of a witness is not ground for reversal, counsel failing to ask for a postponement of the trial or to show what he expected to prove by the witness. State v. Powell [Iowa] 113 NW 761. Failure to have jury resworn after filing of amendment. Indianapolis St. R. Co. v. Fearnaught, 40 Ind. App. 333, 82 NE 102. A party who wishes the court, under Code 1899, c. 116, § 31 (Code 1906, § 3731), to state to the jury that a juror knowing anything relative to a fact in issue must disclose the same in open court must ask the court to make the statement. Truex v. South Penn Oil Co. [W. Va.] 59 SE 517. Where after rejection of a certain paper counsel states that others are similar, and the court offers to rule on them one at a time but no others are tendered, complaint of erroneous ruling is without merit. Bird v. Benton, 127 Ga. 371, 56 SE 450. Where one withdrew objection and asked that evidence be admitted subject to a motion to strike out, and no such motion made, he cannot complain of error in admission. In re Dominici's Estate, 151 Cal. 181, 90 P 448. A question not presented to the trial court on a motion in arrest cannot be considered in reviewing the court's ruling on the motion. Massucco v. Tomassi, 80 Vt. 186, 67 A 551.

96. Proctor & Gamble Co. v. Blakely Oil & Fertilizer Co., 128 Ga. 606, 57 SE 879.

97. Illinois Southern R. Co. v. Hayer, 225 Ill. 613, 80 NE 316; Dowie v. Sutton, 227 Ill. 183, 81 NE 395; Coles v. Boston, etc., R. Co. [N. H.] 68 A 868; Entzminger v. Seaboard Air Line R. Co. [S. C.] 60 SE 441; Sun Pub. Co. v. Lake Erie Asphalt Block Co. [C. C. A.] 157 F 80. Defendant failing to request a directed verdict, refusal to grant a judgment non obstante is not error. Missouri, etc., R. Co. v. Collier [C. C. A.] 157 F. 347. In a trial by the court without a jury, a question of law is reviewable upon a motion for judgment, a request for a declaration of law, or any other action in the trial court which fairly presents the issue for determination before trial ends. United States Fidelity & Guaranty Co. v. Com'rs of Woodson County [C. C. A.] 145 F 144. A general exception to the verdict does not bring up the question of the sufficiency of the evidence to sustain the submission of certain issues to the jury. Tilton v. Tilton [N. H.] 68 A 867. Request for directed verdict for defendant saves question whether there is any evidence, with inferences therefrom fairly tending to support recovery. Elgin, etc., R. Co. v. Myers, 226 Ill. 358, 80 NE 897.

98, 99. Meier v. Northern Pac. R. Co. [Or.] 93 P 691.

1. Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251. Where no motion was made to strike out unresponsive answers, they cannot be urged as error however improper. City of Chicago v. Didier, 131 Ill. App. 406. That it was leading. Stephens v. Elliott [Mont.] 92 P 45; Murphy v. Metropolitan St. R. Co., 125 Mo. App. 269, 102 SW 64.

2. Walker v. Baldwin [Md.] 63 A 25; Knickerbocker Ice Co. v. Gardiner Dairy Co. [Md.] 69 A 405; Dunn v. Taylor [Tex. Civ. App.] 107 SW 952. Repealed ordinance introduced. Adams v. Metropolitan St. R. Co., 126 Mo. App. 471, 103 SW 583.

3. Galveston, etc., R. Co v. Janert [Tex. Civ. App.] 107 SW 963.

4, 5. Short v. Frink, 151 Cal. 83, 90 P 200.

bility, or impertinency in the evidence itself, and not upon the ground that it is not sufficient.[6] In some states, a motion to strike out is necessary to review instructions based on improper evidence,[7] but the rule is otherwise as to surplusage in a judgment.[8] The motion must be definite and specific.[9]

Motion for continuance.—In some states a refusal to grant new trial on the ground of accident or surprise cannot be reviewed unless motion for continuance is made.[10]

Motion for new trial.[See 8 C. L. 1836]—Lack of uniformity in the practice in the several states precludes the formulation of any general doctrine as to the necessity of a new trial, and the local statutes and decisions must be consulted in this regard.[11]

6. Platt v. Rowand [Fla] 45 S 32.

7. Donk Bros. Coal & Coke Co. v. Thil, 228 Ill. 233, 81 NE 857.

8. Myers v. Lederer, 119 App. Div. 332, 104 NYS 236.

9. A motion to strike out "the latter part" of a long explanatory answer is too indefinite. Colorado Springs Elec. Co. v. Soper, 38 Colo. 141, 88 P 165. Motion to strike out all of certain evidence is too broad, where part of the evidence is admissible. Darrin v. Whittingham [Md.] 68 A 269. Motion to strike out evidence of delivery of goods in controversy on the ground of a variance between declaration and proof does not reach objection that declaration pleads a joint contract. Lehigh Valley Transp. Co. v. Post Sugar Co., 228 Ill. 121, 81 NE 819. Ground of a motion to strike out an amended statement before a justice that no statement had been filed on which to base an amendment, and the amended complaint did not state a cause of action, held insufficient to raise the objection that the statement was not signed. Nichols v. Hicklin, 127 Mo. App. 672, 106 SW 1109.

10. Young v. Davidson, 129 Ill App 657.

11. **Arkansas:** Necessary to save specific objections to rulings admitting a rejecting testimony. Sadler-Lusk Trading Co. v. Logan, 83 Ark. 512, 104 SW 205. The hearing of a preliminary motion to dismiss the action because of the illegality of plaintiff's guardian's appointment is not such a trial of the case as to require a motion for a new trial before appealing from a judgment dismissing the action. Kirby's Dig. § 6215 construed. Hare v. Shaw, 84 Ark. 32, 104 SW 931.

California: Quaere whether necessary to review objection that decision is against the law. Pratt v. Welcome [Cal. App.] 92 P 500.

Colorado: A motion for a new trial and a request for findings different from those given in an equity suit is necessary for a review of evidence on appeal only where the court has referred issues to the jury. Tubbs v. Roberts [Colo.] 92 P 220.

Federal courts: Not necessary. Aaron v. U. S. [C. C. A.] 155 F 833.

Florida: To review instructions. Stearns & Culver Lumber Co. v. Adams [Fla.] 45 S 847.

Georgia: If the case proceeds to verdict for the plaintiff, the defendant may waive his right to a motion for a new trial, and except directly to the refusal of the court to grant a nonsuit. Rice v. Ware [Ga. App.] 60 SE 301.

Illinois: A motion for new trial is not necessary to review rulings on pleadings (Swift v. Gaylord, 126 Ill. App. 281), nor instructions to find for defendant (Hill v. Chicago City R. Co., 126 Ill. App. 152). It is necessary to review rulings on admissibility of evidence (Elliott v. Egyptian Power Co., 128 Ill. App. 159; Variety Mfg. Co. v. Landaker, 129 Ill. App. 630) and refusal to exclude testimony (Fish v. Lapsley, 128 Ill. App. 611). Failure to make motion for new trial waives right to review admissibility of evidence and its sufficiency and propriety of instructions. Derby v. Peterson, 128 Ill. App. 494. Necessary to review improper remarks of trial court (Chicago Union Trac. Co. v. Giese, 130 Ill. App. 608), and to raise question of propriety of permitting jury to take contested will with them upon retirement (Trubey v. Richardson, 224 Ill. 136, 79 NE 592), and to review award of damages (Thomas v. Wightman, 129 Ill. App. 305), and the findings of the court, where the basis upon which trial court has figured amount of judgment has not been preserved (Alexander v. Loeb, 230 Ill. 454, 82 NE 833). A motion for a new trial in a case tried before the courts without a jury is not necessary, and in case such motion is made it does not supply the omission to submit written propositions of law. Jacobson v. Liverpool & London & Globe Ins. Co., 231 Ill. 61, 83 NE 95. A motion for a new trial and an exception thereto are necessary to the review of a judgment based upon a verdict of a jury. McKay v. Prindle, 131 Ill. App. 566. A motion for new trial need not be in writing unless the court or opposite party so require. Modern Woodmen of America v. Graber, 128 Ill. App. 585.

Indiana. Ross v. Becker [Ind.] 81 NE 478. Necessary to review ruling excluding evidence (Ayers v. Hobbs [Ind. App.] 84 NE 554), and excessiveness of recovery (Id.). Necessary to review of judgment. Egoff v. Children's Guardians [Ind.] 84 NE 151.

Iowa: Instructions. Hibbets v. Threlkeld [Iowa] 114 NW 1045.

Kentucky: Necessary to review error. Bankers' Fraternal Union v. Donahue [Ky.] 109 SW 878. Errors in admission or rejection of testimony. Marcum v. Hargis, 31 Ky. L. R. 1117, 104 SW 693. Refusal of instructions. Louisville & N. R. Co. v. Davis [Ky.] 105 SW 455.

Michigan: Necessary to raise question as to whether verdict is excessive. Brockmiller v. Industrial Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688. Where attorney became disconcerted, and out of diffidence

Where the motion is required, the grounds of objection must be specifically stated therein,[12] though in some states general grounds are sufficient, proper objections and exceptions having been saved.[13] The grounds stated must be sufficiently broad to cover the errors assigned.[14]

Request for instructions.[See 8 C. L. 1838]—As a general rule, error cannot be predicated upon failure to give instructions in the absence of a request therefor,[15] though

neglected to offer evidence which he might otherwise have offered, and inadvertently failed to except to ruling, and such reasons were not raised on the motion for a new trial, held no ground for objection on writ of error. North Michigan Land & Live Stock Co. v. Kneeland, 149 Mich. 495, 14 Det. Leg. N. 509, 112 NW 1114.

Missouri: Necessary to review errors committed by trial court. Grisham v. National Life Ins. Co. [Mo. App.] 109 SW 96; Meissner v. Standard R. Equipment Co. [Mo.] 109 SW 730. Change of venue. Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 SW 43. Necessary in equity case. Berry v. Rood [Mo.] 108 SW 22. Failure of court to rule on motions. Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070. To review matters of exception occurring on the trial. Cantwell's Adm'x v. Cassville [Mo. App.] 108 SW 1084. Necessary to review improper conduct of counsel. St. Louis Belt & Terminal R. Co. v. Cartan Real Estate Co., 204 Mo. 565, 103 SW 519. Necessary to review refusal to compel plaintiff to elect whether to proceed on contract or quantum meruit. Phillips v. Geiser Mfg. Co. [Mo. App.] 107 SW 471. Necessary to review alleged errors not appearing on the face of the record. Lynch v. Chicago & A. R. Co., 208 Mo. 1, 106 SW 68.

Montana: Necessary to review sufficiency of evidence. Harrington v. Butte & Boston Min. Co., 35 Mont. 530, 90 P 748.

Nebraska: Shelton Implement Co. v. Parlor Furniture & Mattress Co. [Neb.] 112 NW 618. Errors in instructions must be called to the attention of the trial court in the motion for a new trial, before they will be considered on appeal. Tarpenning v. Knapp [Neb.] 112 NW 290.

New York: Instructions. Smith v. New York Anti-Saloon League, 121 App. Div. 600, 106 NYS 251.

North Dakota: To raise question of insufficiency of evidence. McLain v. Nurnberg [N. D.] 112 NW 243.

Ohio: The filing of a motion for a new trial and the entering of exceptions to its overruling is indispensable to a review of findings of facts on a petition in error. Cincinnati, etc., R. Co. v. Kellsall, 6 Ohio N. P. (N. S.) 487.

Oklahoma: Grounds for a new trial will not be considered on appeal unless presented by a motion for a new trial. Misconduct of counsel. Woods County Bk. v. Bensing [Okl.] 91 P 842. The rulings, findings, and report of a referee can only be made the subject of review in an appellate court when first presented to the trial court by a motion for a new trial, or by motion to set aside and vacate the findings and conclusions for errors set forth in such motion. Howe v. Hobart, 18 Okl. 243, 90 P 431.

Texas: A motion for a new trial must point out specifically the grounds of objection to the verdict sought to be raised on appeal. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 SW 61. Amount of damages. Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134. To review sufficiency of the evidence. Ellis v. Brooks [Tex.] 18 Tex. Ct. Rep. 448, 102 SW 94. Unnecessary to review sufficiency of the evidence in cases tried without a jury. West Bros. v. Thompson [Tex. Civ. App.] 20 Tex. Ct. Rep. 788, 106 SW 1134. Overruling demurrer need not be presented by motion for a new trial. Stockton v. Brown [Tex. Civ. App.] 20 Tex. Ct. Rep. 678, 106 SW 423.

Wisconsin: Excessiveness of verdict. Howard v. Beldenville Lumber Co. [Wis.] 114 NW 1114.

Wyoming: Errors in excluding evidence and misconduct of counsel not assigned in motion for new trial not reviewable. Chicago, etc., R. Co. v. Pollock [Wyo.] 93 P 847.

12. Smith v. White [W. Va.] 60 SE 404. When based on refusal to grant charges, requests should be set out. Southern R. Co. v. Kirsch [Ala.] 43 S 796. Ground that one had failed to establish her right to sue for wrongful death of son held insufficient, it not specifying the defect. Lynch v. Chicago & C. R. Co., 208 Mo. 1, 106 SW 68. Must specify wherein evidence is insufficient. Lund v. Upham [N. D.] 116 NW 88. Must show that objection was made at the time of the admission of evidence and that it was admitted over objection. Thompson v. Lanfair, 127 Ga. 557, 56 SE 770. Must disclose objection made when evidence was admitted, and, the evidence being written, the contents of the writing. Ketron v. Sutton [Ga.] 61 SE 113. To review admission of evidence over objection, a ground that the verdict "is against the law" is insufficient. Dreyfus v. St. Louis & S. R. Co., 124 Mo. App. 585, 102 SW 53. That verdict is contrary to and against the law and the evidence and unsupported thereby is too general. International, etc., R. Co. v. Vandeventer [Tex. Civ. App.] 107 SW 560. That "verdict is contrary to law" does not raise the question of excessiveness of the verdict. Howard v. Beldenville Lumber Co. [Wis.] 114 NW 1114. "Errors at law occurring at the trial" held too indefinite to reach specific objection complained of. Chicago, etc., R. Co. v. Morris [Wyo.] 93 P 664. Grounds complaining of the admission of testimony should contain such recitals as will show with definiteness, independently of other portions of the record, the nature of the errors complained of. Southern R. Co. v. Miller [Ga. App.] 59 SE 1115.

13. Collier v. Catherine Lead Co., 208 Mo. 246, 106 SW 971.

14. That court admitted improper evidence, if made ground for motion for new trial, is sufficiently broad to preserve exception to motion to strike out. Chicago Union Trac. Co. v. Giese, 229 Ill. 260, 82 NE 232.

15. Western Coal & Min. Co. v. Burns, 84

the general rule is that the court must give proper instructions on all the issues, whether requested or not, a failure to instruct with reasonable fullness being prejudicial error.[16] This rule is peculiarly applicable to errors of omissions in the instructions given,[17] but the rule is not without exception.[18] A request is likewise necessary to invoke a more specific instruction.[19]

*Request for findings.*See 8 C. L. 1840—Error cannot be predicated upon failure to make findings of fact when none were requested.[20]

Propositions of law under Illinois practice.—Where a jury case is by consent tried without a jury,[21] questions of law other than those relating to pleadings and the admission and sufficiency of the evidence [22] can be preserved only by submitting propositions of law,[23] and this requirement is not obviated by the fact that the case was submitted on a stipulation of facts.[24]

§ 6. *Necessity of ruling.*See 8 C. L. 1840—Questions not presented to nor ruled on in the trial court will not be considered on appeal.[25]

Ark. 74, 104 SW 535; Felsberg v. Moore, 84 Ark. 399, 106 SW 197; Newton v. Cardwell Blue Print & Supply Co. [Colo.] 92 P 914; Savannah Elec. Co. v. Crawford [Ga.] 60 SE 1056; Pierson v. Illinois Cent. R. Co., 149 Mich. 167, 14 Det. Leg. N. 405, 112 NW 923; Sutton v. Great Northern R. Co., 99 Minn. 376, 109 NW 815; Joy v. Cale, 124 Mo. App. 569, 102 SW 30; O'Flynn v. Butte [Mont.] 93 P 643; Whitaker v. Michigan Mut. Life Ins. Co., 77 Ohio St. 518, 83 NE 899; Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644; Smith v. Western Union Tel. Co., 77 S. C. 378, 58 SE 6; Scrimshire v. Smith [Tex. Civ. App.] 19 Tex. Ct. Rep. 18, 103 SW 1110; St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736; Butler v. Anderson [Tex. Civ. App.] 107 SW 656; Weatherford Mach. & Foundry Co. v. Tate [Tex. Civ. App.] 109 SW 406. Rev. St. 1895, art. 1316, as amended by Laws 1903, p. 55, c. 39, does not change rule precluding a party from complaining of the court's failure to submit an issue, in the absence of a special request therefor. Ft. Worth, etc., R. Co. v. Walker [Tex. Civ. App.] 20 Tex. Ct. Rep. 261, 106 SW 400. Request not in conformity with Mills' Ann. Code, § 187. Taylor v. Barnett, 39 Colo. 469, 90 P 74. Right to nominal damages. Peck v. Tribune Co. [C. C. A.] 154 F 330.

16. Capital City Brick & Pipe Co. v. Des Moines [Iowa] 113 NW 835. In a suit by a contractor for extra work, failure of the trial court to properly instruct on an issue held reviewable on appeal. Id.

17. Louisville, etc., R. Co. v. Ponder, 31 Ky. L. R. 878, 104 SW 279; Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229, 113 NW 575; Miller v. Union R. Co. [N. Y.] 83 NE 583; Dempsey v. Western Union Tel. Co., 77 S. C. 399, 58 SE 9; Texas & Louisiana Lumber Co. v. Rose [Tex. Civ. App.] 19 Tex. Ct. Rep. 519, 103 SW 444; Runnells v. Pecos, etc., R. Co. [Tex. Civ. App.] 107 SW 647; Missouri, etc., R. Co. v. Blachley [Tex. Civ. App.] 109 SW 995; Galveston, etc., R. Co. v. Bonn [Tex. Civ. App.] 17 Tex. Ct. Rep. 793, 99 SW 413; Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29; Toledo, etc., R. Co. v. Reardon [C. C. A.] 159 F 366. Elements of damage. Dreyfus v. St. Louis & S. R. Co., 124 Mo. App. 585, 102 SW 53; Lake Shore, etc., R. Co. v. Botefuhr, 10 Ohio C. C. (N. S.) 281.

18. Failure to instruct on issue clearly and distinctly raised. Seaboard Air-Line R. Co. v. Bostock, 1 Ga. App. 189, 58 SE 136.

19. Stewart v. Walker, 82 Ark. 603, 102 SW 696; Bodcaw Lumber Co. v. Ford, 82 Ark. 555, 102 SW 896; Wholesale Mercantile Co. v. Jackson, 2 Ga. App. 776, 59 SE 106; New York, etc., R. Co. v. Flynn [Ind. App.] 81 NE 741; Mitchell v. Chicago, etc., R Co. [Iowa] 114 NW 622; Aughey v. Windrem [Iowa] 114 NW 1047; Hammond v. Porter, 150 Mich. 328, 14 Det. Leg. N. 733, 114 NW 64; Goode v. Eslow [Mich.] 14 Det. Leg. N. 845, 114 NW 859; Kostrzeba v. Hobart Iron Co. [Minn.] 114 NW 949; Waters-Pierce Oil Co. v. Snell [Tex. Civ App.] 20 Tex. Ct. Rep. 190, 106 SW 170; Maffi v. Stephens [Tex. Civ. App.] 108 SW 1008.

20. Armstrong v. Fernandez, 28 S. Ct. 419; Edgemont Imp. Co. v. N. S. Tubbs Sheep Co. [S. D.] 115 NW 1130.

21. Laws 1907, p. 456, providing for the submission of propositions of law, applies only to cases wherein the parties were entitled to a jury trial. People v. Chicago, etc., R. Co., 231 Ill. 112, 83 NE 120.

22. Jacobson v. Liverpool & London & Globe Ins. Co., 231 Ill. 61, 83 NE 95; Mutual Protective League v. McKee, 223 Ill. 364, 79 NE 25. Where no propositions of law are submitted and no question is raised as to the admissibility of evidence and the findings are excepted to, the only question raised is whether the evidence supports the judgment. Watt v. Schlafly, 128 Ill. App. 303; Burgener v. Lippold, 128 Ill. App. 590.

23. Where no propositions of law are submitted, no exceptions are taken to rulings on evidence, only questions of fact are presented for review. First State Bk. of Chester v. Noser, 128 Ill. App. 157; Downing v. Kirkpatrick, 125 Ill. App. 542; Tucker v. Duncan, 224 Ill. 453, 79 NE 613.

24. Mutual Protective League v. McKee, 223 Ill. 364, 79 NE 25. Cannot complain of variance, where instructions requested by him reviewed evidence not justified by the pleadings. Donk Bros. Coal & Coke Co. v. Stroetter, 229 Ill. 134, 82 NE 250. Request for instruction that if servant knew dangers of his position he could not recover, sufficiently raises question of assumed risk. Elgin, etc., R. Co. v. Myers, 226 Ill. 358, 80 NE 897.

25. Fidelity & Casualty Co. v. Thompson

§ 7. *Necessity and time of exceptions.*[See 8 C. L. 1841]—Generally a ruling must be excepted to in order to be reviewed.[26] That taking an exception may prejudice

[C. C. A.] 154 F 484; Barham v. Weems, 129 Ga. 704, 59 SE 803; Gillette v. Aurora Railways Co., 228 Ill. 261, 81 NE 1005; Legris v. Marcotte, 129 Ill. App. 67; Hammond, etc., Elec. R. Co. v. Antonia [Ind. App.] 83 NE 766; Pierson v. Illinois Cent. R. Co., 149 Mich. 167, 14 Det. Leg. N. 405, 112 NW 923; Williams v. Lansing [Mich.] 115 NW 961; Coles v. Boston, etc., R. Co. [N. H.] 68 A 868; Westinghouse, Church, Kerr & Co. v. Remington Salt Co., 189 N. Y. 515, 81 NE 766. Review is confined to the issues joined and decided below. Plummer v. Reeves, 83 Ark. 10, 102 SW 376; Howard v. Trustees of School Dist. No. 27, 31 Ky. L. R. 399, 102 SW 318; Jenkins v. Chesapeake & O. R. Co., 61 W. Va. 597, 67 SE 48. Admissibility of evidence. West Coast Lumber Co. v. Griffin [Fla.] 45 S 514. Demurrer. Stockton v. Brown [Tex. Civ. App.] 20 Tex. Ct. Rep. 678, 106 SW 423. Question as to insurable interest. Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 SE 929; Dolvin v. American Harrow Co., 125 Ga. 699, 54 SE 706. Unanswered question. Bright v. Hanover Fire Ins. Co. [Wash.] 92 P 779. Right to punitive damages. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644. Evidence excluded by consent of both parties. Park v. Park [Colo.] 91 P 830. Motions to bring in party plaintiff and consolidate suit. Coleman v. Reynolds, 207 Mo. 463, 105 SW 1070. Assignments not passed on by intermediate appellate court. Ellis v. Brooks [Tex.] 18 Tex. Ct. Rep. 448, 102 SW 94. Defense of statute of frauds. Schuyler v. Whelon [N. D.] 115 NW 259, citing 6 C. L. 1404. Sale in bulk of property foreclosed on. Copper Belle Min. Co. v. Costello [Ariz.] 95 P 94. Questions not raised by mandamus return and not considered below not reviewable. People v. Cahill, 188 N. Y. 489, 81 NE 453, rvg. 116 App. Div. 885, 102 NYS 325. Court will not consider sufficiency of whole evidence unless trial court was requested to give an instruction involving a consideration of all the testimony. First Nat. Bk. v. McCullough [Or.] 93 P 366. Constitutionality of statute relied on as ground for mandamus not involved when refusal of writ was based solely upon nonapplicability of the statute. School Dist. of Neptune v. Mannion, 73 N. J. Law, 816, 65 A 440. Where by agreement certain articles should have gone to the jury, error cannot be assigned because they were not so taken where no request therefor was made to the court and no ruling made. Sun Pub. Co. v. Lake Erie Asphalt Block Co. [C. C. A.] 157 F 80. Prayer held too general and indefinite to call for any decision by the trial court. Acker, Merrall & Condit Co. v. McGaw [Md.] 68 A 17. In reviewing the action of the trial court in refusing a change of venue on the ground of the prejudice of the inhabitants of the county, the record of the examination of the veniremen, taken upon the impanelment of the jury, cannot be considered as tending to show popular prejudice in the county, same not having been before the court upon the hearing on the motion for the change of venue. Croft v. Chicago, etc., R. Co., 134 Iowa, 411, 109 NW 723. A demurrer incorporated in the body of an answer, but not mentioned or referred to in the caption thereof or any decree or order in the cause, will be disregarded as not having been brought to the attention of the court and treated as a fugitive paper. Pheasant v. Hanna [W. Va.] 60 SE 618. If a party wishes to rely upon an exception to a deposition, he must bring it to the attention of the trial court so that it may be acted on, and, unless the record shows that this has been done, it will be by the appellate court deemed to have been waived. Kirchner v. Smith, 61 W. Va. 434, 58 SE 614. Where the only ruling made by the court below was upon a motion to dismiss a writ of review for insufficiency of the petition, the merits of the case cannot be considered on appeal. Holmes v. Cole [Or.] 94 P 964.

26. Belding v. King [C. C. A.] 159 F 411; Gillett v. Chicago Title & Trust Co., 230 Ill. 373, 82 NE 891; Egoff v. Children's Guardians [Ind.] 84 NE 151; Hansen v. Kline [Iowa] 113 NW 504; Lewis v. Center Creek Min. Co., 199 Mo. 463, 97 SW 938; Shelton Imp. Co. v. Parlor Furniture & Mattress Co. [Neb.] 112 NW 618. Record on appeal failed to show that charge to jury was excepted to. Sternberg v. Sklaroff, 32 Pa. Super. Ct. 116. No exception to order overruling motion for a new trial, nor to charge of court to the jury. Hentzler v. Weniger, 32 Pa. Super, Ct. 164. No exception was taken to the general charge of the court, or to the refusal of defendant's points, or to the order discharging the rule to show cause why judgment non obstante veredicto should not be entered. Dietrick v. Farmers Union Mut. Fire Ins. Co., 32 Pa. Super. Ct. 234. Defendant below assigns for error the court's answer to a certain point or request for instructions presented by plaintiff. Docket shows no written point presented to the judge. Petri v. Carracciolo, 33 Pa. Super. Ct. 312. When a cause is tried by a court without a jury, a motion for a new trial is unnecessary, but to review proceedings, there must have been an exception to the findings of the court and to the judgment, at least to the judgment. No exception taken. Sprague's Mercantile Agency v. McClintock, 131 Ill. App. 208.

Instructions. Missouri, etc., R. Co. v. Bratton [Ark.] 108 SW 518; Plumlee v. St. Louis S. W. R. Co. [Ark.] 109 SW 515; Taylor v. Barnett, 39 Colo. 469, 90 P 74; Newton v. Cardwells Blue Print & Supply Co. [Colo.] 92 P 914; Sun Pub. Co. v. Lake Erie Asphalt Block Co. [C. C. A.] 157 F 80; Stearns & Culver Lumber Co. v. Adams [Fla.] 45 S 847; Eklund v. B. R. Lewis Lumber Co., 13 Idaho, 581, 92 P 532; Hibbets v. Threlkeld [Iowa] 114 NW 1045; Hamill v. Joseph Schlitz Brew. Co. [Iowa] 115 NW 943; Louisville & N. R. Co. v. Taylor's Adm'r, 31 Ky. L. R. 1142, 104 SW 776; Fields v. Sizemore [Ky.] 105 SW 438; Travelers' Ins. Co. v. Bingham [Ky.] 105 SW 894; Beissel v. Vermillion Farmers' Elevator Co., 102 Minn. 229, 113 NW 575; Smith v. New York Anti-Saloon League, 121 App. Div. 600, 106 NYS 251; Edel v. Hillenbrand, 107 NYS 30; Statler v. George A. Ray Mfg. Co., 109 NYS 172; Cleveland & E. Elec. R. Co. v. Hunter, 10 Ohio C. C. (N. S.) 564; Palmer v. Hurst [S. D.] 115 NW 516; Greder v. Stahl

one's case before the jury makes no difference.[27] In some jurisdictions, however,

[S. D.] 115 NW 1129. See Wallace v. New Albion, 121 App. Div. 66, 105 NYS 524. Instructions not written. Molt v. Hoover [Ind. App.] 81 NE 221. Admitting or rejecting **evidence.** Sun Pub. Co. v. Lake Erie Asphalt Block Co. [C. C. A.] 157 F 80; Martin v. Hertz, 224 Ill. 84, 79 NE 558; City of Chicago v. McNally, 128 Ill. App. 375. Exclusion of evidence. Cook v. Enterprise Transp. Co. [Mass.] 83 NE 325; Gorlitzer v. Levenson, 107 NYS 130. Admission of evidence. Cleveland, etc., R. Co. v. Hadley [Ind.] 82 NE 1025; Chesapeake & O. R. Co. v. Perkins, 31 Ky. L. R. 1350, 105 SW 148; Daniel v. Atlantic Coast Line R. Co., 145 N. C. 51, 58 SE 601. Rulings on objections to testimony taken by a master. Patrick v. Kirkland, 53 Fla. 768, 43 S 969. Objections taken to testimony before a master should be called to the attention of the court before final hearing, and exceptions duly reserved to the rulings thereon. Id.

Jurisdiction over subject-matter. United States Health & Acc. Ins. Co. v. Clark [Ind. App.] 83 NE 760. Denial **of new trial** (Elliott v. Egyptian Power Co., 128 Ill. App. 159; Graham v. Grady, 121 Ill. App. 400; Moffet v. Sebastian, 149 Mich. 451, 14 Det. Leg. N. 511, 112 NW 1120), except where the cause is tried without a jury (Myreen v. Smith, 127 Ill. App. 426). To reasons contained in decision denying new trial. Taylor v. Ziem, 148 Mich. 329, 14 Det. Leg. N. 235, 111 NW 1076.

Nonsuit. Adamson v. Metropolitan St. R. Co., 126 Mo. App. 127, 103 SW 1097. Denial of motion for **directed verdict.** Fidelity & Casualty Co. v. Thompson [C. C. A.] 154 F 484. Granting motion for **judgment on interrogatories.** Masterson v. Southern R. Co. [Ind. App.] 81 NE 730.

Remarks or argument of counsel. Paige v. Illinois Steel Co., 233 Ill. 313, 84 NE 239; Bennett v. Greenwood [Mich.] 14 Det. Leg. N. 940, 114 NW 1019; Latimer v. Metropolitan St. R. Co., 126 Mo. App. 70, 103 SW 1102; Overton v. White, 124 Mo. App. 489, 105 SW 309.

Remarks of trial judge. Hough v. Clayton, 127 Ill. App. 294; Variety Mfg. Co. v. Landaker, 129 Ill. App. 630, afd. 227 Ill. 22, 81 NE 47; Gehlert v. Quinn, 35 Mont. 451, 90 P 168; Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. Statement of case by court to jury. Rimmer v. Wilson [Colo.] 93 P 1110. Overruling of **special exceptions** to prayers. Baltimore Briar Pipe Co. v. Eisenhauer [Md.] 66 A 623. Failure of jury to answer **special interrogatories.** Preferred Masonic Mut. Acc. Ass'n v. Harrington, 10 Ohio C. C. (N. S.) 134. Refusal to require **physical examination.** City of Cedartown v. Brooks, 2 Ga. App. 583, 59 SE 836. To plaintiff constantly **weeping in sight and hearing of jury.** Warren, etc., R. Co. v. Shine [Tex. Civ. App.] 20 Tex. Ct. Rep. 47, 105 SW 518. That **judgment** was for less than he was entitled to. Gloor v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 13, 105 SW 539. Judgment for both husband and wife. Henderson v. Rushing [Tex. Civ. App.] 20 Tex. Ct. Rep. 115, 105 SW 840.

Dismissal of suit against a codefendant though appellant subsequently made motion to have said codefendant joined as a party. Sexton Rice & Irr. Co. v. Sexton [Tex. Civ. App.] 20 Tex. Ct. Rep. 697, 106 SW 728. Order **dismissing appeal** from justice court. Jenkins v. Hand, 126 Ill. App. 630.

Items of accounting before referee. Lone Star Salt Co. v. Blount [Tex. Civ. App.] 107 SW 1163. Change **of venue.** Gibney v. St. Louis Transit Co., 204 Mo. 704, 103 SW 43. Trial court's action in **placing party under the rule.** Bonneville v. Dum [Tex. Civ. App.] 18 Tex. Ct. Rep. 875, 103 SW 431. Allowing **amendment** to attachment proceedings. Overruling motion to dismiss attachment proceedings. Carolina Locust Pin & Mica Co. v. Chattanooga Mach. Co. [Ga. App.] 60 SE 375. Where court sustained objection to argument and instructed jury to disregard it, but denied motion for **mistrial,** held that question whether action of court was sufficient to remove prejudice should have been brought up for review by exception to charge as insufficient for that purpose, and assignment based on insufficiency. Seaboard Air Line R. Co. v. Smith, 53 Fla. 375, 43 S 235.

Findings. Cavanaugh v. Patterson [Colo.] 91 P 1117; Smith v. Ernest [Tex. Civ. App.] 19 Tex. Ct. Rep. 422, 102 SW 129; Pierce v. Pettit, 46 Wash. 668, 91 P 190; Ferdig v. Simpson [Wash.] 92 P 370; Roach v. Sanborn Land Co. [Wis.] 115 NW 1102. Declaration of law. Empire Bldg. Co. v. Hopkins, 204 Mo. 643, 103 SW 66. Findings of referee. Berry v. Rood [Mo.] 108 SW 22; Jones & Dommersnas Co. v. Crary, 234 Ill. 26, 84 NE 651.

Failure to file conclusions of law and fact (Haywood v. Scarborough [Tex. Civ. App.] 19 Tex. Ct. Rep. 427, 102 SW 469) during the term (Lumpkin v. Marress [Tex. Civ. App.] 19 Tex. Ct. Rep. 486, 102 SW 1169). Failure to take exception to a conclusion of law waives any question of the sufficiency of the finding to sustain the conclusion. Henry v. Central Trust Co., 40 Ind. App. 369, 82 NE 120. Where, on a trial by the court, no exceptions are taken to the findings of facts, the appellate court cannot review the facts found or determine whether the findings are supported by the evidence; and, where no exceptions are taken to the findings of law or fact, the only question that can be considered in the appellate court is whether the findings support the judgment, and it will not be disturbed unless there was reversible error on the trial or a total want of evidence to support it. Rice v. Muskegon, 150 Mich 679, 14 Det. Leg. N. 820, 114 NW 661. To review question whether previous appeal proceedings operated as **res judicata.** In re Gurdy [Me.] 69 A 546. Exception to final judgment in action for unlawful detainer is essential in order to have **sufficiency of evidence** reviewed. Bonnell v. Gill [Colo.] 92 P 13. Where no exception is taken to the **charge of the court under a certain question** of a special verdict, the answer to the question must be considered as a verity. Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 NW 443.

27. Admission of evidence over objection. It makes no difference that defendant might have prejudiced its case before the jury had it stated the reasons for the objection and excepted to the court's action in asking

certain matters need not be excepted to.[28] In some states and cases,[29] but not all,[30] specifications of error on a motion for a new trial may take the place of exceptions. In others, by statute, exceptions are only necessary to save and bring up errors transpiring upon the trial that cannot be preserved in the record without a bill of exceptions.[31] On a trial de novo, exceptions to the rulings of the lower courts are generally,[32] though not always,[33] unnecessary.

Time of taking exceptions.[See 8 C. L. 1843]—Exceptions must be timely,[34] though delay in making a record of the exception will not necessarily vitiate it.[35] Failure to except to an order denying a motion informally entered does not waive the right to present it on appeal where proper exceptions were afterwards taken to a formal denial of the motion.[36]

§ 8. *Form and sufficiency of objection.*[See 8 C. L. 1848]—An objection must not be

questions. Dreyfus v. St. Louis & S. R. Co., 124 Mo. App. 585, 102 SW 53.

28. Findings of fact in a case tried without a jury. Witte v. Koerner, 108 NYS 560. Exceptions to **manner of reducing verdict** are not necessary. One excepting to denial of motion for a new trial. Seaboard Air Line R. Co. v. Randolph, 129 Ga. 796, 59 SE 1110. The fact that no exception was taken to the **charge** of the court does not prevent the raising of the question on review as to whether the verdict was contrary to law where it was apparently the result of erroneous instructions. Todd v. East Liverpool Pub. Co., 9 Ohio C. C. (N. S.) 249.

Errors apparent upon the judgment roll or record of a cause will be considered on appeal, although no exceptions were taken thereto in the trial court. Goodwin v. Bickford [Okl.] 93 P 548. A **judgment pronounced on motion to quash** a notice for judgment may be reviewed without exception being taken. State v. Keadle [W. Va.] 60 SE 798. Where record shows **court was fully advised** and matter was urged, held **objection to jurisdiction** was not waived though record did not show a formal exception. West v. Martin [Wash.] 92 P 334. Exception is unnecessary to preserve a ruling on **pleadings.** George B. Swift Co. v. Gaylord, 126 Ill. App. 281. Where, in cause tried by jury, exception is taken to order denying motion for new trial, an exception to the **entry of judgment** is unnecessary. Myreen v. Smith, 127 Ill. App. 426.

29. Salmon v. M. E. Blasier Mfg. Co., 108 NYS 448. Sufficiency of evidence to sustain findings. Henry v. Central Trust Co., 40 Ind. App. 369, 82 NE 120. Under court and practice act and Rule 17 of rules of practice of the superior courts, sufficiency of verdict may be considered on appeal, though appellant's attorney was absent when it was rendered and entered no exceptions to it at the time, the objection being urged in his motion for a new trial and in the bill of exceptions which was allowed by the court without comment. Reid v. Rhode Island Co. [R. I.] 67 A 328.

30. Where cause is tried without a jury and no exception is taken to the entry of judgment, exception to the order overruling motion for new trial is unavailing. Myreen v. Smith, 127 Ill. App. 426. The failure to except to ruling on a motion to dismiss is not cured by motion for a new trial and arrest of judgment and exceptions to orders denying them. Gillette v. Aurora R. Co., 228 Ill. 261, 81 NE 1005.

31. So held under B. & C. Comp. § 172. Louie Chung v. Stephenson [Or.] 89 P 805. Failure of trial court to find on a counterclaim may be reviewed on appeal without exception. Id.

32. So held in equity appeals except where court refused to permit testimony offered to be taken over its rulings. B. & C. Comp. §§ 406, 555, construed. Sutherlin v. Bloomer [Or.] 93 P 135.

33. In equity cases triable de novo, a ruling upon a demurrer cannot be reviewed upon appeal unless an exception is taken to the ruling and error assigned thereon. Exception to decree in fact overruling demurrer held insufficient. Warner v. Trustees of Norwegian Cemetery Ass'n [Iowa] 112 NW 176.

34. London v. Crow [Tex. Civ. App.] 19 Tex. Ct. Rep. 451, 102 SW 177. At time ruling is made. Empire Bldg. Co. v. Hopkins, 204 Mo. 643, 103 SW 66. To charge and to refusal to give counsel substance of instructions before argument too late if taken after verdict and discharge of jury. Malt v. Hoover [Ind. App.] 81 NE 221. Exception to remarks of court during the trial, made after the charge, is too late. Pelton v. Spider Lake Sawmill & Lumber Co. [Wis.] 112 NW 29. Exceptions to auditor's report should be filed within 20 days (Civ. Code 1895, § 4589) and certainly cannot be filed thereafter without good reason for the delay being shown. Sizer v. Melton, 129 Ga. 143, 58 SE 1055. An exception to the overruling of a motion filed to set aside an order is ineffective in the absence of an exception taken when the original order was made. Carter v. Louisiana Purchase Exposition Co., 124 Mo. App. 530, 102 SW 6. Where no order was made directing the entry of judgment at the time a verdict was rendered, but defendant's counsel took an exception as soon as a nunc pro tunc order was made, and he became aware of the direction that judgment be entered, the exception was in time. Berry v. Equitable Gold Min. Co. [Nev.] 91 P 537.

35. A party who makes a seasonable motion for judgment cannot be deprived of his exception by delay in making a record of such fact. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

36. Gillette v. Aurora R. Co., 228 Ill. 261, 81 NE 1005.

a mere statement as to future actions [37] and must point out specifically the matter objected to and the grounds of the objection.[38] All the grounds of objection which a party wishes to urge on appeal should be specified, for only those grounds urged below will be considered.[39]

To evidence.[See 8 C. L. 1844]—Objections to evidence must designate the evidence objected to and specifically point out the ground of objection,[40] general objections on

37. Statement by counsel that he will object to a given line of testimony is insufficient. City of Charleston v. Newman, 130 Ill. App. 6.

38. Brady v. Ranch Min. Co. [Cal. App.] 94 P 85; Hammond, etc., R. Co. v. Antonia [Ind. App.] 83 NE 766; Chicago Tel. Supply Co. v. Marne & Elkhorn Tel. Co., 134 Iowa, 252, 111 NW 935; Smith v. Chicago, etc., R. Co., 127 Mo. App. 160, 105 SW 10; Hagins v. Aetna Life Ins. Co., 75 S. C. 225, 55 SE 323. The constitutionality of a statute is not raised by a mere objection that it is unconstitutional without mentioning any article or section of the state or federal constitution alleged to have been violated. State v. Heffernan [R. I.] 65 A 284.

39. See ante, § 2, Acquiescing in Error. Subd., Change of Theory. An objection must state the ground upon which it was made. District of Columbia v. Duryee, 29 App. D. C. 327. Where a variation is asserted, counsel should specifically point out in what respect. Chicago Union Trac. Co. v. Roberts, 131 Ill. App. 476. In action for accounting of moneys claimed to have been delivered to defendant to be held in trust for plaintiff, held that demand for jury trial was not sufficient to point out that complaint was defective in that existence of trust was only alleged inferentially. Dillon v. Cross, 5 Cal. App. 766, 91 P 439.

40. Birmingham R., L. & P. Co. v. Landrum [Ala.] 45 S 198; Mushet v. Fox [Cal. App.] 91 P 534; Katahdin Pulp & Paper Co. v. Peltomaa [C. C. A.] 156 F 342; Smith v. Pilcher [Ga.] 60 SE 1000; Donk Bros. Coal & Coke Co. v. Tetherington, 128 Ill. App. 256; City of Chicago v. Didier, 131 Ill. App. 406; Baltimore & O. R. Co. v. State [Md.] 69 A 439; Churchill v. Mace, 148 Mich. 456, 14 Det. Leg. N. 213, 111 NW 1034; Harker v. Detroit United R. Co., 150 Mich. 697, 14 Det. Leg. N. 871, 114 NW 657; Taylor v. Jackson [Mich.] 115 NW 977; Wilson v. Moss [S. C.] 60 SE 313; Plunkett v. Clearwater Bleachery & Mfg. Co. [S. C.] 61 SE 431; Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453; State v. Hood [W. Va.] 59 SE 971. Admission of deposition. King v. Green [Cal. App.] 94 P 777. Testimony read from a deposition. Short v. Frink, 151 Cal. 83, 90 P 200. General objection does not reach improper cross-examination (Levering v. Miller, 127 Ill. App. 235), an improper case for an hypothetical question (Chicago Union Trac. Co. v. Roberts, 229 Ill. 481, 82 NE 401), that question is leading (Hilton v. Santelman, 129 Ill. App. 109), propriety of attaching exhibit to deposition after the taking thereof had been closed (McIlwain v. Gaebe, 128 Ill. App. 209; Dillard v. Olalla Min. Co. [Or.] 94 P 966), and does not invoke the best evidence rules (Merchants' & Farmers' State Bk. v. Dawdy, 230 Ill. 199, 82 NE 606). Objection that evidence was immaterial and irrelevant held insufficient to raise rule of inadmissibility of counsel fees as an element of damage in a suit on an injunction bond. National Soc. of U. S. Daughters of 1812 v. American Surety Co., 56 Misc. 627, 107 NYS 820. In an action by an executor for the recovery of money alleged to belong to the estate of the testatrix, an objection to certain questions, as calling for "personal communications inadmissible under the provisions of § 829 of the Code," is sufficient to challenge the competency of the defendant to testify as to a gift of the money to her by the testatrix. Morgan v. Foram, 120 App. Div. 185, 104 NYS 1084. Objection that it had not been proved that attesting witnesses were beyond jurisdiction of the court and that no sufficient reason was shown why they were not present does not raise objection that proof of the genuineness of the signatures of the parties to the instrument were insufficient. Boswell v. First Nat. Bk. [Wyo.] 92 P 624. Objection that affidavit was "incompetent, immaterial, and irrelevant, and not admissible under the pleadings," does not raise the issue that it was not certified by the secretary of the corporation. Union Sav. Bk. v. Rinaldo [Cal. App.] 92 P 873. Objection that evidence was incompetent and too remote held to raise the question that it was incompetent for any purpose. O'Flynn v. Butte [Mont.] 93 P 643. To make available an exception to the admission of testimony on the ground that it calls for the witness' opinion and usurps the province of the court or jury, the objection should be specifically taken that the question calls for a fact not provable by opinion. Ft. Collins Development R. Co. v. France [Colo.] 92 P 953. In an action for damages to land, answer of witness as to amounts of depreciation of land held properly admitted over general objection and that witness was not shown to be qualified Id. An objection to evidence as incompetent, irrelevant, and immaterial, is too general to suggest the objection that the evidence is incompetent as relating to a transaction with a deceased person whose executor and heirs at law are parties to the action. First Nat. Bk. v. Hilliboe [N. D.] 114 NW 1085. Objections to the admission in evidence of a deposition on the grounds that no legal proceedings had been taken, that it was without authority at law, and was inadmissible, irrelevant, and immaterial, held too general to call the court's attention that the deposition was taken under a commission directed to any notary public, etc., and not to a judge, justice of the peace, or commissioners elected by the court issuing it, as required by Code Civ. Proc. § 2024. King v. Green [Cal. App.] 94 P 777. A specification in a notice of motion to withdraw an execution that there was a material variance between the judgment and the execution was insufficient to present an objection to the trial court that the execu-

account of irrelevancy, immateriality, and incompetency, being insufficient unless the evidence is inadmissible on any ground or for any purpose whatever,[41] and a general objection being held sufficient when and only when the evidence is wholly inadmissible for any purpose whatever.[42] But the mere fact that an objection is specific does

tion was irregular, in that it provided for the collection of a compound interest or justify a review thereof on appeal. Doehla v. Phillips, 151 Cal. 488, 91 P 330. An objection to evidence of plaintiff's earning capacity as **"too remote"** held to mean that the time and place of such earning are too distant in time and space from where he was injured to have any relevancy to the issue as to impairment of earning capacity by reason of his injuries. El Paso Elec. R. Co. v. Murphy [Tex Civ. App.] 109 SW 489. An objection to a **hypothetical question** must state why the question is not proper, what necessary essentials are omitted, and what it etates which is not proven. Orr v. Bradley, 126 Mo. App. 146, 103 SW 1149.

41. Short v. Frink, 151 Cal. 83, 90 P 200; Platt v. Rowland [Fla.] 45 S 32; John Schoen Plumbing Co. v. Empire Brew. Co., 126 Mo. App. 268, 102 SW 1064; Noyes v. Clifford [Mont.] 94 P 842; Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453; Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 18 Tex. Ct. Rep. 890, 103 SW 428.

42. Bodcaw Lumber Co. v. Ford, 82 Ark. 555, 102 SW 896; Galveston, etc., R. Co. v. Janert [Tex. Civ. App.] 107 SW 963. When a question is susceptible of a good answer, general objections are insufficient. Nevers Lumber Co. v. Fields [Ala.] 44 S 81. Objections must separate admissible matter from the inadmissible. Objections to interrogatories. Goodloe v. Goodloe [Tex. Civ. App.] 19 Tex. Ct. Rep. 960, 105 SW 533. An objection to evidence as a whole is not tenable where part of it is admissible. Wandelohr v. Grayson County Nat. Bk. [Tex. Civ. App.] 20 Tex. Ct. Rep. 270, 106 SW 413; International, etc., R. Co. v. Cuneo [Tex. Civ. App.] 20 Tex. Ct. Rep. 572, 108 SW 714. Objection to whole document, part being admissible. Eisiminger v. Stanton [Mo. App.] 107 SW 460; Boylan v. McMillan [Iowa] 114 NW 630. Letter considered and general objection held good. Id. Part of a letter being objectionable as hearsay, the objection must be specific. Cobb v. Dunlevie [W. Va.] 60 SE 384.

43. Objection that no foundation is laid does not reach speculative character of expert testimony. Chicago City R. Co. v. Foster, 128 Ill. App. 571, afd. 226 Ill. 288, 80 NE 762. Objections held not to raise the point that statement by injured person made to a physician were made during the course of an examination arranged for the purpose of making the declaration. El Paso, etc., R. Co. v. Polk [Tex. Civ. App.] 108 SW 761. On objection to admission of exemplification of the record of a court of a sister state, an objection that the court had no jurisdiction to enter a decree affecting real estate in Missouri held not to otherwise challenge the jurisdiction of the court. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997. Nor to raise the question that the decree was not final. Id. Nor that the record showed that the decree had been appealed from. Id. An objection to the relevancy, competency, and materiality of the subject-matter of a question waives any defect in its form. Hildebrand v. United Artisans [Or.] 91 P 542. An objection to a question asked of an expert on the ground that he was not qualified to testify did not include an objection that the proper hypothesis has not been given. Id. In an action to establish a disputed boundary line, objections to surveyor's report that surveyor had made errors, etc., go to the weight of the evidence, and not its admissibility. McDonald v. McCrabb [Tex. Civ. App.] 105 SW 238. Objection to evidence as being irrelevant and immaterial does not present the question that it is not the best evidence. Place v. Place, 122 App. Div. 363, 106 NYS 781. Objection to relevancy does not reach incompetency of evidence. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265. That question was incompetent and not part of the res gestae held not sufficient to raise question that, though question was asked for purpose of impeachment, no proper foundation had been laid. Keyes v. Geary St., etc., R. Co. [Cal.] 93 P 88. Qualification of witness to testify as to value is not raised by objection that testimony is irrelevant and immaterial. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453. Objections going only to the weight of the evidence are ineffective on the question of its admissibility. International, etc., R. Co. v. Jackson [Tex. Civ. App.] 19 Tex. Ct. Rep. 671, 103 SW 709. Objection that evidence was "irrelevant and immaterial" is insufficient though it is stipulated that evidence taken on interrogatories submitted to witnesses should be read in evidence, "questions of relevancy and competency only being reserved." Marshall v. Grand Lodge A. O. U. W., 40 Ind. App. 123, 81 NE 106. Objection that question is leading, incompetent, irrelevant, and immaterial is not equivalent to an objection that the party is seeking thereby to discredit or impeach his own witness. H. F. Cady Lumber Co. v. Wilson Steam Boiler Co. [Neb.] 114 NW 774. An objection that evidence is incompetent and immaterial is insufficient to include the objection that no foundation for the admission of the evidence had been laid. Goss v. Goss, 102 Minn. 346, 113 NW 690. Where a plaintiff in replevin pleads general ownership, and at the trial it is developed that, while he holds the full legal title thereto, he is obliged to account to another for a portion thereof, the question whether it was necessary for him to have set out in his petition the full facts regarding his ownership cannot be raised by an objection that such facts show that he is not the real party in interest and is not entitled to recover all the property. McDonald v. Daniels [Kan.] 92 P 51. Where the only objection made to a deposition was that "no legal, sufficient, necessary, and competent foundation" had been laid therefor, one cannot on appeal object thereto on the ground that the certificate of the notary should have been produced, offered and read in evidence, and the

not necessarily make it sufficient, since it may fail to reach the point desired to be saved,[43] and only grounds properly specified below will be considered on appeal.[44] In the absence of the opposing counsel calling for a statement of the objections, a general objection has been held sufficient, the evidence being objectionable on any ground,[45] and where its admissibility depends upon whether the jury believes certain other testimony, an instruction conditioning its consideration upon such belief is necessary.[46] An objection to an improper question is all that is necessary.[47] Where after objection the court suggests that the question be changed and as so changed, it is asked without objection, error in its admission will not be considered.[48] One sufficiently raising objections to a certain line of evidence need not keep continually repeating his objection to each question.[49] The same rules also apply to objections to the sufficiency of the evidence.[50] Where a stenographer's report of evidence at a former trial is introduced on a subsequent trial and objected to generally, it will be presumed on appeal that the party making the objection intended to incorporate the ground of objection made by him at the former trial as set forth in the stenographer's report.[51]

To exclusion of evidence.[See 8 C. L. 1846]—As a foundation for the predication of error upon the exclusion of evidence, an offer of proof must be made showing what the evidence is,[52] its relevancy,[53] and its purpose,[54] though the latter has been held unnecessary in the absence of a request.[55] However, it is not in every case of rejected testimony that the party is concluded by failing to state what he expects to prove, for if the question propounded and the trend of the examination clearly indicate and disclose that the answer will be pertinent and material, the matter is open for review in the appellate court,[56] and where the counsel for the party complaining states to the trial court that he desires to prove an affirmative answer to each of the questions propounded, the exclusion is reviewable.[57] The offer must be limited to the specific testimony in general.[58] Being necessary, the offer must be made a part of the record.[59]

indorsements of the clerk on the deposition should have been produced, offered, and read in evidence. Krause v. Redman, 134 Iowa, 629, 112 NW 91. Demurrer to the evidence authorizes defendant urging on appeal that plaintiff had no right to sue. Steckman v. Gault State Bk., 126 Mo. App. 664, 105 SW 674.

44. See ante, § 2, Acquiescing in Error. Subd., Change of Theory.

45. Harris v. Hirsch, 121 App. Div. 767, 106 NYS 631.

46. Wood v. Duffy, 127 Mo. App. 543, 106 SW 82.

47. Need not object to responsive answer. Galveston, etc., R. Co. v. Powers [Tex.] 19 Tex. Ct. Rep. 990, 105 SW 491.

48. Seeley v. Swift [Mich.] 15 Det. Leg. N. 60, 115 NW 414.

49. Scott v. Dillon, 109 NYS 877.

50. Objection to insufficiency of proof held sufficiently raised by two motions to dismiss and objections to evidence. Reich v. Maryland Casualty Co., 54 Misc. 585, 104 NYS 984.

51. Hardin v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 108 SW 490.

52. Nevers Lumber Co. v. Fields [Ala.] 44 S 81; Bernhardt v. Dutton [N. C.] 59 SE 651; Goldstein v. Susholtz [Tex. Civ. App.] 105 SW 219; Douglas Land Co. v. T. W. Thayer Co. [Va.] 58 SE 1101; Chlopeck v. Chlopeck [Wash.] 91 P 966. See Seibert v. Hatcher, 205 Mo. 83, 102 SW 962; Madson v. Rutten [N. D.] 113 NW 872; St. Louis, etc., R. Co. v. Gunter [Tex. Civ. App.] 17 Tex. Ct. Rep. 571, 99 SW 152. Expert testimony. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 825, 104 SW 397. An exception cannot be sustained to a refusal to permit a question to be put unless the substance of the evidence which is expected in reply is stated to the court Cook v. Enterprise Transp. Co. [Mass.] 83 NE 325.

53. Bernhardt v. Dutton [N. C.] 59 SE 651.

54. Salmon v. Rathjens [Cal.] 92 P 733; East Coast Lumber Co. v. Ellis-Young Co. [Fla.] 45 S 826; Goyette v. Keenan [Mass.] 82 NE 427; Williams v. Lansing [Mich.] 115 NW 961. Or it being a preliminary question it should be followed by an attempt to show by the witness the matters concerning which the preliminary question was propounded. East Coast Lumber Co. v. Ellis-Young Co. [Fla.] 45 S 826.

55. Dunman v. Murphey [Tex. Civ. App.] 20 Tex. Ct. Rep. 575, 107 SW 70.

56, 57. Ahlfeldt v. Mexico [Mo. App.] 108 SW 122.

58. Offer of entire testimony in justice court held too general. Wood v. Washington [Wis.] 115 NW 810. An offer of evidence "because it bears on witness' credibility" is a general offer and enables the party to sustain his exception to its exclusion by showing

*To instructions.*See 8 C. L. 1847—An objection to instructions must be specific,[60] an objection to an instruction as a whole not reaching particular defects therein.[61] Where evidence is admissible for a limited purpose, objection should be made by requesting an instruction limiting it to such purpose.[62]

§ 9. *Sufficiency of exception.*See 8 C. L. 1847—Formal exceptions may be dispensed with in the discretion of trial court.[63] Under some circumstances an objection may be treated as an exception.[64] An exception must point out specifically the error complained of,[65] the reason on which it is based,[66] and should not be in gross.[67] But in some cases the exception not being sufficiently definite, the remedy is by motion.[68] Exception to order denying a motion preserves all questions raised by the motion,[69] though the court pretermitted the grounds on which it was made.[70] As a general rule exceptions only lie to rulings of the court.[71] Though an appeal is dismissed as premature, its entry may be equivalent to "noting an exception." [72] Failure of the court to hear the exception is immaterial.[73]

To evidence.—An exception to the admission of evidence relevant to any issue generally raises no question of law.[74]

that it contradicted any material evidence by the witness. Gorham v. Moor [Mass.] 84 NE 436.

59. Chlopeck v. Chlopeck [Wash.] 91 P 966.

60. Beck v. Umshler [Iowa] 116 NW 138. Must point out error in instructions given or show correctness or application to the evidence of instructions refused. Sample v. Chicago, etc., R. Co. [Ill.] 84 NE 643. Although an instruction was not in good form in the absence of a specific objection calling the court's attention to the particular matter of objection, there was no prejudicial error. Eureka Stone Co. v. Knight, 82 Ark. 164, 100 SW 878. To be available on error, record must not only show that the ruling complained of was objected to, but also that the ground of objection relied upon for reversal was fully presented to the court below. Stein v. Goodenough, 73 N. J. Law, 812, 64 A 961.

61. Inaccuracy of certain words. Midland Valley R. Co. v. Hamilton, 84 Ark. 81, 104 SW 540.

62. Bodcaw Lumber Co. v. Ford, 82 Ark. 555, 102 SW 896.

63. City of Chicago v. McNally, 128 Ill. App. 375.

64. Where the parties treat objections to master's report as exceptions, they will be so treated here. Otis v. Cottage Grove Mfg. Co., 121 Ill. App. 233.

65. Harper v. Raisin Fertilizer Co., 148 Ala. 360, 42 S 550; Clark v. New York Cent., etc., R. Co. [N. Y.] 84 NE 397; Davis v. Reynolds, 77 S. C. 255, 57 SE 850; Douglas Land Co. v. Thayer Co. [Va.] 58 SE 1101. Exception that the court "erred in admitting in reply anything not strictly in reply to the testimony not given in direct evidence," held too general. Wilson v. Moss [S. C.] 60 SE 313. Specific exception followed by general exception to judgment is sufficient. Lyndon v. Georgia R. & Elec. Co., 129 Ga. 353, 58 SE 1047.

66. Katahdin Pulp & Paper Co. v. Peltomaa [C. C. A.] 156 F 342. In the taking of testimony the occasional ejaculation of the word "exception" is merely in the nature of a running and unfavorable comment on the proceedings; it raises no question for the decision of the court and reserves nothing Sheldon v. Wright, 80 Vt. 298, 67 A 807.

67. Separate exceptions to overruling of demurrer to each paragraph of complaint held not in gross. Evansville, etc., R. Co. v. Yeager [Ind.] 83 NE 742.

68. Exception to paragraph of return in habeas corpus proceedings that paragraph did not state facts sufficient to constitute a defense to petitioner's writ held sufficient in the absence of a motion to make more definite. Kemper v. Metzger [Ind.] 81 NE 663.

69. Exception to order denying motion for directed verdict preserves question whether declaration states a cause of action and whether the evidence fairly tends to support plaintiff's cause of action. Atchison, etc., R. Co. v. People, 227 Ill. 270, 81 NE 342. Exception to denial of motion for a directed verdict raises question of sufficiency of evidence. Wolf v. Chicago Sign Print. Co., 233 Ill. 501, 84 NE 614; Clark v. Chicago, etc., R. Co., 231 Ill. 548, 83 NE 286. Where in an action the jury renders a general verdict and answers interrogatories, it is proper practice for each party to move for judgment, and an exception by one party to the overruling of his motion or to the sustaining of his adversary's motion equally presents the question on appeal. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

70. The fact that court pretermitted grounds of motion to dismiss does not preclude party from advancing such grounds on appeal if exception was to order denying the motion. Gillette v. Aurora Railways Co., 228 Ill. 261, 81 NE 1005.

71. An exception does not generally lie to the **remarks of counsel,** but to the refusal of the court to instruct the jury in regard to such remarks when requested to do so. Pressey v. Rhode Island Co. [R. I.] 67 A 447.

72. Gray v. James [N. C.] 60 SE 906.

73. It is the duty of the court to hear and understand the record which is being made by the attorneys in his presence and exceptions dictated to the stenographers in open court are sufficient though the judge did not hear them. Ongaro v. Twohy [Wash.] 94 P 916.

74. Robinson v. Stahl [N. H.] 67 A 577.

To instructions.[See 8 C. L. 1847]—Exceptions to instructions must designate the particular instruction or part thereof excepted to [75] and must state the grounds of exception,[78] and must not be multifarious [77] or indefinite,[78] and apply to the instruction taken as a whole.[79] Except, perhaps, as to instructions given at the request of the parties,[80] a general exception will not be considered.[81] The ruling of the court involving several propositions, a general exception is available only when the entire ruling is erroneous.[82] Exceptions should be taken to instructions separately,[83] a general exception being insufficient unless the entire charge is erroneous.[84] A special exception to a charge will not be extended beyond the precise point to which it refers.[85] While an exception to a refusal of rulings is not an exception to instructions given on matters to which the rulings relate,[86] still where an instruction

75. Dotson v. Milliken, 28 S. Ct. 489; Timlan v. Dillworth [N. J. Law] 67 A 433; Pease v. Magill [N. D.] 116 NW 260. General exception to denial of several requests held insufficient. Southern R. Co. v. Miller [Ga. App.] 59 SE 1115. Must challenge the propriety or legal accuracy of some definite proposition in the charge. Flannigan v. Stauss, 131 Wis. 94, 111 NW 216. Doubt as to the application of an exception defeats it. Clark v. New York Cent, etc., R. Co. [N. Y.] 84 NE 397. Exception to charge held insufficient in an action for injuries due to defects in car couplings. Id In an action against a railroad exception held too general to raise question as to whether words "depot grounds" were the most appropriate to be used in a question of a special verdict. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738; Timlan v. Dillworth [N. J. Law] 67 A 433.

76. Austin v. Austin [Colo.] 94 P 309; Wilson v. Moss [S. C.] 60 SE 313. That a party "excepts" to instructions is insufficient. Higgins v. Street [Okl.] 92 P 153. Exception to charge "for errors contained therein" is insufficient. Streator v. Streator, 145 N. C. 337, 59 SE 112. That court charged in respect to matters of fact. Love v. Turner [S. C.] 59 SE 529. Exception to charge as not being "full enough to clearly explain to the jury the law as to the distinction between a corporation and a partnership, and did not fully set forth the contention of the defendant" held insufficient. Davidson v. Waxelbaum, 2 Ga. App. 432, 58 SE 687.

77. Timlan v. Dillworth [N. J. Law] 67 A 433.

78. Exceptions containing only extracts from a charge will not be reviewed unless they contain only a single proposition, the mere reading of which would indicate the point on which the opinion of the court is sought. Fludd v. Equitable Life Assur. Soc., 75 S. C. 315, 55 SE 762.

79. Held untenable where objection did not apply to instruction as a whole. Graham v. Edwards [Tex. Civ. App.] 99 SW 436.

80. Miller v. Fireman's Fund Ins. Co. [Cal. App.] 92 P 332. So held where exception was "To the giving of the foregoing instructions and to each and every portion thereof, the defendant excepts." Waldteufel v. Pacific Vineyard Co [Cal. App.] 92 P 747.

81. Graves v. Waitsfield [Vt.] 69 A 137. Insufficient as to those given by the court of its own motion. Miller v. Fireman's Fund Ins. Co. [Cal. App.] 92 P 332. An exception "to the refusal of the court to charge as requested and to the charge as given, upon the subject of the requests, and to those portions of the charge detailed herein," is too general to allow of consideration, except as to those portions of the charge detailed therein and called to the attention of the court. Williams v. Norton Bros. [Vt.] 69 A 146. Mere general exception to charge covering seven requests held insufficient. Kiley v. Rutland R. Co., 80 Vt. 536. 68 A 713. An exception is too general to require consideration where one submitted several requests to charge, and excepted the failure to comply with the requests that were not complied with, without designating any that he claimed were not complied with. Drouin v. Wilson, 80 Vt. 325, 67 A 825.

82. A general exception which specifies no ground to a charge or a portion of a charge to a jury, which embodies several propositions of law, is futile if any of the propositions are sound. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F 365. A general exception to a refusal to submit to the jury a number of special interrogatories is insufficient if any one of them be improper. Arkansas Valley & W. R. Co. v. Witt [Okl.] 91 P 897.

83. McCabe & Steen Const. Co. v. Wilson, 28 S. Ct. 558. If there be more than one erroneous proposition, the safe way is to file an exception to each. Flannigan v. Stauss, 131 Wis. 94, 111 NW 216. If an instruction contains two or more distinct propositions of law, and is excepted to as an entirety, the exception must fail if any one of the propositions is correct. Atlantic Coast Line R. Co. v. Crosby, 53 Fla. 400, 43 S 318. Although the bill of exceptions does not recite that instructions refused were separately requested but each instruction shows that it was separately considered and marked "Refused," the ruling on each instruction is reviewable. Louisville & N. R. Co. v. Mertz, Ibach & Co. [Ala.] 43 S 7.

84. Midland Valley R. Co. v. Hamilton, 84 Ark. 81, 104 SW 540. An exception to all of the instructions numbered is an exception in gross, and to avail, all must be bad. Power v. Beattie, 194 Mass. 170, 80 NE 606. A mere general complaint in a motion for a new trial that a quoted excerpt from an instruction was erroneous was without merit, when the portion of the instruction excepted to stated a correct abstract principle of law. Whitehead v. Pitts, 127 Ga. 774, 56 SE 1004.

85. Graves v. Waitsfield [Vt.] 69 A 137.

86. Quimby v. Jay [Mass.] 82 NE 1084. If

as given is defective and a requested but refused instruction would have cured the error, an exception to such refusal saves the question.[87] An exception to an instruction, generally, will not avail as an exception to such instruction as subsequently modified.[88] Exceptions must be preserved in the statutory manner.[89]

To the findings and judgment.[See 8 C. L. 1848]—An exception to the findings or judgment must be specific.[90]

§ 10. *Waiver of objections and exceptions taken.*[See 8 C. L. 1849]—Objections and exceptions may be waived by compliance with [91] as distinguished from mere submission to [92] the ruling, by withdrawing the grounds of objection,[93] by failure to follow up the objection or insist upon similar objections in subsequent proceedings,[94] answering over,[95] going to trial on the merits,[96] making inconsistent objections,[97] by the introduction of evidence,[98] by assuming inconsistent positions,[99] submitting ques-

a prayer is rejected and in lieu thereof an instruction is given by the court, an exception to the refusal of the prayer will not bring up for review the correctness of the instruction. Baltimore Briar Pipe Co. v. Eisenbauer [Md.] 66 A 623.

87. In re Rogers' Will, 80 Vt. 259, 67 A 726.

88. Defendant having excepted generally to an instruction, the jury were recalled and a proviso added. Held that such exception availed nothing. Ward's Adm'r v. Preferred Acc. Ins. Co., 80 Vt. 321, 67 A 821.

89. Though the instructions requested are not among those given if the record does not disclose the entry of any exceptions to the giving or refusal of instructions, and does not show any exceptions in writing to the giving or refusal of instructions, exceptions to the refusal to give instructions are not saved in the manner prescribed by Acts 1903, p. 338, c. 193, § 1. Delaware & Madison Counties Tel. Co. v. Fiske, 40 Ind. App. 348, 81 NE 1100; Indianapolis Trac. & T. Co. v. Miller, 40 Ind. App. 403, 82 NE 113. Exceptions to instructions cannot be considered unless entered on the margin as required by Burns' Ann. St. 1901, § 544, and dated and signed. Petrie v. Ludwig [Ind. App.] 83 NE 770; Grand Rapids & I. R. Co. v. King [Ind. App.] 83 NE 778.

90. General exceptions to judgment held not to embrace specific findings of fact (St. Louis, etc., R. Co. v. White [Tex. Civ. App.] 19 Tex. Ct. Rep. 664, 103 SW 673), nor the sufficiency of the evidence (Id.) Assignment held a complaint based on the sufficiency of the evidence. Id. Exception to finding that parties entered into a "contract of sale" held sufficient to raise question whether contract was within statute of fraud. Bradley Real Estate Co. v. Robbins [Ind. T.] 103 SW 777. Exceptions to master's report in specific performance held not to raise any question as to the construction of the contract. Rosenberg v. Heffernan [Mass.] 83 NE 316.

91. Amending pleading to obviate objection waives exception to prior sustaining of objection. Hackler v. Miller [Neb.] 114 NW 274.

92. By submitting to the ruling of the court, a defendant does not become estopped to object on appeal that the court erred in overruling a demurrer to the evidence. Kenefick v. Norwich Union Fire Ins. Soc. [Mo.] 103 SW 957. Where justice ruled that defendant could not be heard on defenses until he paid certain motion costs, it was not necessary for him to appear at inquest. Goldberg v. Wood, 50 Misc. 618, 98 NYS 200.

93. By withdrawing counts of complaint, one waives a review of rulings sustaining demurrer to such counts. Duncan v. St. Louis, etc., R. Co. [Ala.] 44 S 418.

94. Error cannot be predicated on the refusal of the court to strike items from the complaint and on the overruling of a demurrer to the complaint on the ground that such items are not recoverable, as defendants may raise the same points by objections to evidence, exceptions to the charge authorizing such recovery and by special charges. Southern R. Co. v. Coleman [Ala.] 44 S 837. Where issue was execution of instrument by mark, objection to permitting plaintiff to make his mark in the presence of the jury held not to raise a material question, no objection being made when the paper was submitted to the jury for inspection. Hammond, etc., R. Co. v. Antonia [Ind. App.] 83 NE 766.

95. Waives overruling of demurrer. Seerie v. Brewer [Colo.] 90 P 508.

96 By going to trial on merits does not waive duly reserved exception of no cause of action. Rogers v. Southern Fiber Co., 119 La. 714, 44 S 442. Exception to denial of motion for change of venue is not waived by going to trial on the merits. Gillette v. Aurora R. Co., 228 Ill. 261, 81 NE 1005.

97. Objection to witness answering hypothetical question on the ground that he had only heard part of the evidence is rendered nugatory where offer to read such evidence is objected to as immaterial. Smart v. Kansas City, 208 Mo. 162, 105 SW 709.

98. Overruling demurrer. McCabe & Steen Const. Co. v. Wilson, 28 S. Ct. 558. Opinion of expert. Southern R. Co. v. Cunningham [Ala.] 44 S 658. Examining on contents of instrument waives objection to similar examination by opponent. Savannah Elec. Co. v. Crawford [Ga.] 60 SE 1056. Defendant by introducing evidence on his own behalf waived the point that plaintiff should have declared in case instead of in trespass. Slye v. Guerdrum, 29 App. D. C. 550. A demurrer to the evidence on motion for judgment by plaintiff is waived by defendant's subsequent introduction, on his own behalf, of evidence to the merits. United States Fidelity & Guaranty Co. v. Com'rs of Woodson County [C. C. A.] 145 F 144. Where records do not disclose certain facts, but parties introduced evidence on the subject, and ques-

tions to the jury,[1] by requested instructions,[2] by filing motion for a new trial,[3] and by failure to report the objection [4] or renew the motion.[5] Giving bond for interest and amount of verdict is a waiver of errors.[6] Reiteration of an exception is not al-

tion was argued, the court will assume that objections were waived. Proctor v. Maine Cent. R. Co., 101 Me. 459, 64 A 839. Admission of similar evidence. Southern R. Co. v. Hansbrough's Adm'x [Va.] 60 SE 58. Any error in permitting a witness to answer over objection, a leading and suggestive question, was cured by his subsequent testimony to the same effect in answer to questions not objected to. Hammond v. Decker [Tex. Civ. App.] 18 Tex. Ct. Rep. 556, 102 SW 453. Objection to introduction of sewer commissioner's report is waived by calling a commissioner and examining him on the same subject. Fugere v. Cook [R. I.] 69 A 556. Party introducing deed in evidence waives objection to its being previously admitted. Jenkins v. Salmen Brick & Lumber Co. [La.] 45 S 435. Waives refusal to direct verdict. Fidelity & Casualty Co. v. Thompson [C. C. A.] 154 F 484; Langan v. Enos Fire Escape Co., 233 Ill. 308, 84 NE 267; Hansen v. Kline [Iowa] 113 NW 504; Madson v. Rutten [N. D.] 113 NW 872; Pease v. Magill [N. D.] 115 NW 260; Missouri, etc., R. Co. v. Saunders [Tex. Civ. App.] 18 Tex. Ct. Rep. 882, 103 SW 457; Wees v. Page [Wash.] 91 P. 766. An objection to the competency of a witness to testify as to transactions with a decedent is waived by cross-examining him on the same subject. Ables v. Ackley, 126 Mo. App. 84, 103 SW 974. If a witness be incompetent, and if the party insisting on his incompetency nevertheless examines him on new matter not touched or brought out in chief, then as to such new matter, his incompetency is waived. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997. A party's exceptions to the introduction of testimony are waived by his subsequent cross-examination on the same subjects. Gautieri v. Romano [R. I.] 66 A 652; Finnegan v. Waterhouse [R. I.] 67 A. 427.

Not waived: Exception to husband testifying for wife in suit by latter held not waived by bringing out on cross-examination that he signed her name to claim presented in her behalf to defendant for damages sued for. Gardner v. St. Louis, etc., R. Co., 124 Mo. App. 461, 101 SW 684. Objections to admission of improper evidence not waived by attempting to meet it and to make a case under such ruling. In re Manhattan Bridge No. 3, 108 NYS 366.

99. Allowing similar evidence to be introduced without objection waives previous objections. McDonald v. McCrabb [Tex. Civ. App.] 105 SW 238; Galveston, etc., R. Co. v. Gillespie [Tex. Civ. App.] 20 Tex. Ct. Rep. 747, 106 SW 707. Objecting to the striking out of evidence on motion of opponent waives objection to refusal to strike out. Salmon v. Rathjens [Cal.] 92 P. 733. Where on plaintiff's objection the court refuses to allow defendant to withdraw, before the final submission of the case, evidence admitted subject to plaintiff's exception, plaintiffs could not on appeal insist on their exception. Spinney v. Meloon [N. H.] 68 A 410. Objections to evidence as being conclusions of the witness will not be ground for reversal where the same line of questioning was pursued by defendant. Kirby v. Manufacturers' Coal & Coke Co., 127 Mo. App. 588, 106 SW 1069. Exceptions to ruling of court in allowing counsel to read to jury refusal to answer certain interrogatories held not waived by arguing to the jury. Minihan v. Boston El. R. Co. [Mass.] 83 NE 871. The benefit of a party's exception is not waived where after a book has been admitted and marked in evidence over his objection and exception he asked that it be shown to the jury. Zimmerman v. Shapiro, 55 Misc. 299, 105 NYS 104.

1. The submission of a question of fact to the jury does not waive the question of law passed on by the court on its refusal to direct a verdict where the rights of the party making the motion were properly reserved. Wolf v. Chicago Sign Printing Co., 233 Ill. 501, 84 NE 614.

2. Admission of evidence. McDermott v. Mahoney [Iowa] 115 NW 32. Where evidence, objected to when offered, is limited to its application by an instruction requested by the objecting party, the objection to the admission of the evidence is deemed waived. Oglebay v. Tippecanoe Loan & Trust Co. [Ind. App.] 82 NE 494. Asking instructions on other theories held not to waive benefit of demurrer to the evidence. Steckman v. Gault State Bk., 126 Mo. App. 664, 105 SW 674.

3. When based on ground that there is no evidence to sustain plaintiff's action, waives exception to denial of motion to direct a verdict. Barstow v. Turner [R. I.] 69 A 340.

4. The granting of a rule to show cause why a new trial should not be granted is a waiver of all bills of exception held by the party applying for the rule which are not therein expressly reserved. Haden v. Bamford Bros. Silk Mfg. Co. [N. J. Err. & App.] 67 A 107. Grounds for new trial not stated in the motion are waived. Fish v. Lapsley, 128 Ill. App. 611; Variety Mfg. Co. v. Landaker, 129 Ill. App. 630. Modification of requested instruction. Kimball-Fowler Cereal Co. v. Chapman & Dewey Lumber Co., 125 Mo. App. 326, 102 SW 625. Where no charge of misconduct of the prevailing party is made in a motion for a new trial, misconduct of counsel will not be reviewed from that standpoint. Cleveland, etc., R. Co. v. Hadley, 40 Ind. App. 731, 82 NE 1025. Where assignments of error in appellant's brief in the giving and refusal of instructions are not made in his statement on motion for a new trial, they will be considered as though the record contained only the judgment roll without the evidence. Haggerty Bros. v. Lash, 34 Mont. 517, 87 P. 907. Error in instructions not urged in motion for new trial is not reviewable. Southern R. Co. v. Shumate [Ky.] 107 SW 737. A ruling refusing an instruction not made one of the grounds of the motion for a new trial cannot be considered on appeal. Montgomery Trac. Co. v. Haygood [Ala.] 44 S 560.

5. Denial of motion to direct verdict must be renewed at close of evidence. Greder v. Stahl [S. D.] 115 NW 1129.

6. Giving bond for payment of interest and amount of verdict on an injunction staying

ways necessary.[7] Modifying an objection waives it as first made.[8] The exception must be to the ruling of the court as finally made.[9] Generally,[10] though not always,[11] a motion for a directed verdict or to dismiss at the close of plaintiff's evidence, if overruled, must be renewed at the close of all the evidence in order to be reviewable on appeal,[12] unless defendant introduces no evidence.[13]

Savings Banks; Scandal and Impertinence; School Lands, see latest topical index.

SCHOOLS AND EDUCATION.

§ 1. **The School System in General, 1597.**
§ 2. **Right, Privilege and Duty of Attendance, 1597.** Separate Schools for Races, 1598. Vaccination of Pupils, 1598. Duty to Furnish School Facilities, 1598. Change of Text Books and Publisher's Bonds, 1599.
§ 3. **School Districts, Sites and Schools, 1599.** Formation, Alteration, Consolidation, and Dissolution of Districts, 1600. Establishment of High Schools, 1603. Sites, 1603.
§ 4. **Organization, Meetings, and Officers, 1604.**
§ 5. **Property and Contracts, 1606.**
§ 6. **Funds, Revenues and Taxes, 1608.** Debt Limit, 1608. Tuition and Incidental Fees, 1608. Levy and Collection of Taxes, 1609. School Bonds, 1611. Orders and Warrants for Payment of Claims. 1612. Apportionment of Funds, 1612. Appropriations, 1613. Disbursements, 1613.
§ 7. **Teachers and Instruction, 1613.** Contracts of Employment, 1613. Licenses and Certificates, 1613. Dismissal, Suspension and Reassignment, 1614. Breach of Contract, 1614. Salary, 1614. Offenses by Teachers or Applicants for Teachers' License. 1616.
§ 8. **Control and Discipline of Scholars and Regulation of Attendance, 1616.** Fraternities, 1616. Religious Exercises, 1616. Corporal Punishment, 1616.
§ 9. **Torts and Liability for the Same, 1617.**
§ 10. **Offenses, 1617.**
§ 11. **Decisions, Rulings, and Orders of School Officers, and Review of the Same, 1617.**
§ 12. **Actions and Litigation, 1617.**
§ 13. **Libraries, Reading Rooms and Other Auxiliary Educational Instructions, 1618.**
§ 14. **Private Schools, 1618.**

The scope of this topic is noted below.[14]

§ 1. *The school system in general.* See 8 C. L. 1851—The establishment and conduct of public schools is generally governed by statute.[15]

§ 2. *Right, privilege and duty of attendance.* See 8 C. L. 1851—Statutes in many states require attendance of all children under a specified age[16] and attendance at

proceedings in law just before entry of judgment is a waiver and release of any errors in law action up to the granting of the injunction. Leigh v. Kewanee Mfg. Co. [C. C. A.] 147 F. 693.

7. Where the court, at the request of plaintiff's counsel, gave a certain instruction to the jury, which was excepted to, and, after a colloquy between the court and counsel, the court substantially reiterated the requested instruction, the same was subject to defendant's exception. Dubnow v. New York City R. Co., 122 App. Div. 723, 107 NYS 729.

8. Pearce v. Greek Boys' Min. Co. [Wash.] 92 P 773.

9. Where after exception a charge is modified, failure to take a new exception waives any defect. Ward's Adm'r v. Preferred Acc. Ins. Co., 80 Vt. 321, 67 A 821.

10. Rogers v. Gladiator Gold Min. & Mill. Co. [S. D.] 113 NW 86.

11. A defendant may assign for error the overruling of a motion to dismiss, made at the close of plaintiff's evidence, on the ground that there was no issue of fact for submission to the jury, although such motion was not renewed at the conclusion of all the evidence where the only question in issue under the evidence was the proper construction of a written contract plain in its terms, upon which defendant's evidence had, and could have, no bearing. Lydia Cotton Mills v. Prairie Cotton Co. [C. C. A.] 156 F 225.

12. Rogers v. Gladiator Gold Min. & Mill. Co. [S. D.] 113 NW 86.

13. An exception to the ruling of the court denying a motion to direct a verdict for defendant, made at the close of plaintiff's evidence, is not waived where the defendant does not thereafter introduce any evidence, and a formal announcement that he rests his case is not necessary. Kinnear Mfg. Co. v. Carlisle [C. C. A.] 152 F 933.

14. It includes matters relating to common schools, private schools, and public educational facilities, such as libraries. **It excludes** institutions of higher learning (see Colleges and Academies, 9 C. L. 575). It also excludes health regulations (see Health, 9 C. L. 1586) and matters relating generally to the public domain (see Public Lands, 10 C. L. 1296), public officers (see Officers and Public Employes 10 C. L. 1043), and the like.

15. Laws 1902, p. 1341, c. 560, provide board of education to be head of public instruction and superintendent, and relates to matters pertaining to state common schools, including those of second class cities. Harris v. Draper, 109 NYS 983. Under public school legislation, amended charter of Troy, and constitution providing establishment of public schools, schools of Troy are part of common school system. Id.

16. Rev. Laws, c. 42 §§ 1, 2; c. 44, § 1, 2, 3. Commonwealth v. Connecticut Valley St. R. Co. [Mass.] 82 NE 19.

private schools is not always permitted as an equivalent.[17] In North Carolina the compulsory education law applies to Indian children,[18] and hence a law creating a special school district and requiring Indian children residing therein to attend school is not invalid because applying only to one locality,[19] nor as class legislation.[20] The New York statute opening the public schools to persons "residing" in the district is not restricted to those domiciled therein,[21] and an orphan child sojourning in the district is entitled to school privileges although the term of his abode in the district is not determined.[22]

Separate schools for races.[See 8 C. L. 1851]—In the absence of statutory authority no child can be excluded from any public school solely because of its color.[23]

Under the Oklahoma separate school law, separate school buildings erected by the board of county commissioners are under the control of the district school officers,[24] and when the county commissioners have only complied with the law by acquiring a site and erecting a school building thereon, and the same has been accepted, furnished and made use of by the district, the authority of the county commissioners over such building is concluded so long as used for the purpose for which erected.[25]

Vaccination of pupils.[28]

Duty to furnish school facilities.[See 8 C. L. 1852]—The statutes of some states provide that if there are children for whom it will be more convenient, by reason of distance, to attend school in another district,[27] or there will be a saving of expense to the district and the children will secure increased advantages,[28] the annual school meeting may order them sent to some other convenient school district and issue warrants for the extra expense not exceeding a certain amount.[29] However, a trustee of a school district whose school has been abandoned cannot be compelled to furnish a conveyance for pupils to another district school.[30] But unless the conditions of the statute are fulfilled the district to which they are sent need not admit such children,[31] and where a parent seeks to avail himself of such a statute, he must show that the board found that the statutory requirements would be satisfied.[32] The remedy on the

17. Attendance at industrial, nautical, evening schools, etc., authorized by §§ 10, 11, 12, 15, 16, c. 42, does not take place of attendance at public schools. Commonwealth v. Connecticut Valley St. R. Co. [Mass.] 82 NE 19.

18. Laws 1905, p. 227, c. 213, requiring certain Indian children to attend school, not invalid. State v. Wolf, 145 N. C. 440, 59 SE 40.

19. State v. Wolf, 145 N. C. 440, 59 SE 40. Where law does not compel attendance at government school maintained within district, but permits them to be sent to some other school. Id.

20. State v. Wolf, 145 N. C. 440, 59 SE 40.

21. Laws 1894, p. 1225, c. 556, tit. 7, § 36. People v. Hendrickson, 54 Misc. 337, 104 NYS 122, afg. 109 NYS 403.

22. Orphan child placed in district by society furnishing its board and clothing. People v. Hendrickson, 54 Misc. 337, 104 NYS 122, afg. 109 NYS 403.

23. Chapter 227, p. 329, Laws 1889, special act making full provision for Wichita public schools, renders all other statutory provisions inapplicable and does not authorize maintenance of separate schools for white and colored children. Rowles v. Board of Education of City of Wichita [Kan.] 91 P 88.

24. School Dist. No. 71 v. Overholser, 17 Okl. 147, 87 P 665.

25. School Dist. No. 71 v. Overholser, 17 Okl. 147, 87 P 665. County commissioners cannot sell, dispose of, or exchange same as county property or direct which class of children shall attend either building, or in any manner interfere with school district officers in their control and management. Id.

26. See 8 C. L. 1852. See, also, Health, 9 C. L. 1586.

27. School Dist. No. 12 v. Hill [Kan.] 90 P 768.

28. Code, § 2774; Queeny v. Higgins [Iowa] 114 NW 51.

29. Under Gen. St. 1901, § 6133, order of meeting showing intention to allow such extra expense sufficient, though minutes not full and specific. School Dist. No. 12 v. Hill [Kan.] 90 P 768.

30. Nelson v. State [Ind.] 81 NE 486.

31. Under Rev. St. § 4022a, board of education need not admit children unless school in their own district is more than mile and half from their residence and more remote than school to which admission is sought. Boyce v. Mt. Carmel Special School Dist. Board of Education, 76 Ohio St. 365, 81 NE 437.

32. Must show board found statutory requirements of saving expense and increased advantages satisfied. Queeny v. Higgins [Iowa] 114 NW 51.

board's refusal to make such arrangements is by appeal to the county superintendent.[33]

Change of text books and publisher's bonds.[See 8 C. L. 1858]—In Ohio text books adopted at a regular meeting of a board of education cannot be lawfully changed within a certain period from the date of such adoption except by a three-fourths vote of all the members of the board at a regular meeting of the board,[34] and an injunction will lie to prevent making a change under an illegally adopted order.[35] A publisher having a contract with a school board cannot compel such board to continue or renew his contract on the ground that the board has changed books without a sufficient vote.[36] Nor can a majority of the patrons of a school district determine what books shall be used in opposition to the will of the teacher where the directors, if possessed with power, failed to select books.[37]

In Missouri the statute now leaves such matters to a school book commissioner.[38]

In Kentucky the publisher is required to give a bond to guarantee the quality of the books furnished [39] and that they will be sold at as low a price as the publisher sells them for anywhere in the country.[40] It has been held that the judicial forfeiture of such bonds and the infliction of the full penalty for a breach is not denying the publisher the equal protection of the laws [41] or depriving him of property without due process of law.[42] Only one recovery may be had on the same bond, but an action as to a breach in county as to one book is not barred by the pendency of a prior action in another county for a breach as to another kind of book,[43] and the amount recovered goes to the school fund of the county first obtaining judgment.[44] In action for breach of such bond, it is proper to exhibit the books and to permit persons who have used them or were familiar with them, the date of purchase or extent of their use, to state how they had been used, and to permit others who had bought and used books to testify as to the character and quality of binding, although the books were not exhibited to the jury.[45] It is also proper to permit the defendant's representative to testify that book binderies, including his own company, occasionally sent out imperfectly bound books,[46] and it is immaterial in such an action whether the board of examiners in the county where the breach occurred took oath of office when they were appointed or whether the superintendent of common schools in the county after the adoption of the book as to which the breach occurred caused it to be adopted in all common schools of the country.[47]

§ 3. *School districts, sites and schools.*[See 8 C. L. 1853]—The power to establish

33. Mandamus not remedy, since matter involves discretion and judgment of board. Queeny v. Higgins [Iowa] 114 NW 51.

34. Majority vote insufficient to change within five years. Lenhart v. Board of Education, 5 Ohio N. P. (N. S.) 129.

35. Where action was not taken at regular meeting of board. Lenhart v. Board of Education, 5 Ohio N. P. (N. S.) 129.

36. Provision requiring certain number of votes was to prevent frequent changes solely in interest of public and not to subserve ends of publishers. Ginn v. School Book Board [W. Va.] 59 SE 177.

37. Parents cannot resist selection of teacher where directors failed to act under § 9764, Ann. St. 1906, p. 4478. State v. Millsap [Mo. App.] 108 SW 1133.

38. State v. Millsap [Mo. App.] 108 SW 1133.

39. Rev. St. 1903, §§ 4423-4. Rand, McNally & Co. v. Com. [Ky.] 108 SW 892.

40. Ky. St. 1903, § 4424. Maynard, Merrill & Co. v. Chowning, 31 Ky. L. R. 1340, 105 SW 114.

41, 42. Rand, McNally & Co. v. Com. [Ky.] 108 SW 892.

43. Ky. St. 1903, § 4424. Maynard, Merrill & Co. v. Chowning, 31 Ky. L. R. 1340, 105 SW 114; Burton v. Maynard, Merrill & Co., 31 Ky. L. R. 1342, 105 SW 115.

44. Burton v. Maynard, Merrill & Co., 31 Ky. L. R. 1342, 105 SW 115.

45. Action on bond guaranteeing quality. Rand, McNally & Co. v. Com. [Ky.] 106 SW 238.

46. Where representative previously testified that books conformed to contract in all respects, though he had no knowledge of quality of work done upon each book sold by his company. Rand, McNally & Co. v. Com. [Ky.] 106 SW 238.

47. Maynard, Merrill & Co. v. Chowning, 31 Ky. L. R. 1340, 105 SW 114.

public schools within its borders may properly be included in municipal powers.[48] The directors of a school district cannot erect a school [49] or make any alterations or enlargements [50] without submitting the question to the voters for their approval,[51] but in Illinois the cost of the building need not be submitted to the voters.[52] The Kentucky statute provides that when the county superintendent notifies the trustees that a new site is necessary, a school house or inclosures have been condemned and need repairing or additions, or that the furnishings are insufficient, the trustees shall levy a capitation or ad valorem tax, or both, to be applied to the purposes required,[53] or they may do so in their own discretion without order from the superintendent.[54] In Indiana proceedings to erect a graded school building for the use and at the expense of one school township are not governed by statutory provisions concerning the erection of joint school buildings or joint graded school buildings by more than one school corporation or a graded high school building by a single township.[55] In Nevada the board of school trustees is authorized and required to supply school houses with necessary furniture and to pay for the same out of the county school moneys belonging to the district.[56]

Formation, alteration, consolidation and dissolution of districts. See 6 C. L. 1853 The formation and conduct of school districts are generally governed by statute.[57] In Texas the constitution authorizes the formation of school districts within all or any of the counties of the state by general or special law without the local notice required in other cases of special legislation,[58] and having this power, the legislature also can by general statute validate all such corporations which for any reason are not valid;[59] with the exception that the legislature cannot create a new district and make part of the indebtedness of the old district a charge upon the taxpayers of the added territory not originally liable for its payment without their consent,[60] nor incorporate a district containing more than a certain area.[61] The petition for the

48. Act Mar. 27, 1907, art. 1, § 3, constitutional. Malone v. Williams [Tenn.] 103 SW 798.

49. People v. St. Louis, etc., R. Co., 230 Ill. 61, 82 NE 305.

50. Where voters of school district authorized enlargement board cannot contract for alterations at cost of more than one-third entire sum voted for enlargement and so extensive as to constitute remodeling of entire interior of building. Union Free School Dist. No. 4 v. Grear, 109 NYS 931.

51. Approval of enlargement does not authorize alteration. Union Free School Dist. No. 4 v. Grear, 109 NYS 931. Must submit question of erecting school to voters. People v. St. Louis, etc., R. Co., 230 Ill. 61, 82 NE 305.

52. People v. St. Louis, etc., R. Co., 230 Ill. 61, 82 NE 305.

53. Ky. St. 1903, § 4440. Creech v. Common School Dist. No. 15 Trustees, 31 Ky. L. R. 379, 102 SW 804.

54. Creech v. Common School Dist. No. 15 Trustees, 31 Ky. L. R. 379, 102 SW 804.

55. State v. Johns [Ind.] 84 NE 1.

56. Comp. Laws Nev. §§ 1294, 1298. Whittaker & Ray Co. v. Roberts, 155 F 882.

57. Mercer school district formed under Act of May 13, 1856, P. L. 574, is independent school district within Act of May 8, 1855, P. L. 509. Nelson's Contested Election, 34 Pa. Super. Ct. 591. Any town or village mentioned in Rev. St. 1895, art. 616a, as amended by Laws 1897, p. 45, c. 45, whether situated in two counties or not, may incorporate for school purposes as provided by law provided territory does not exceed twenty-five square miles. Act 1st Sess. 27th Leg. § 2, Laws 1901, p. 29, c. 15. Parks v. West [Tex. Civ. App.] 108 SW 466. Act creating Jenkinsville school district, Acts 1905, p. 473, repealed by act providing for creation local tax districts. Acts 1905, p. 425, as amended by Acts 1906, p. 61, latter act is constitutional. Edalgo v. Southern R. Co., 129 Ga. 258, 58 SE 846. Art. 11, § 10. Const., authorizing legislature to constitute any city or town a separate and independent school district, though not expressly repealed by amendment of Sept. 25, 1883, was superseded thereby. Cummins v. Gaston [Tex. Civ. App.] 109 SW 476.

58. Art. 7, § 3, Const., as amended in 1883. Parks v. West [Tex. Civ. App.] 108 SW 466; Snyder v. Baird Independent School Dist. [Tex. Civ. App.] 109 SW 472. In absence of constitutional inhibition, legislature may create by special law incorporated independent school districts, or authorize incorporation thereof by general statute. Parks v. West [Tex. Civ. App.] 108 SW 466.

59. Laws 1905, p. 303, c. 124, § 151. Parks v. West [Tex. Civ. App.] 108 SW 466.

60. Sp. Laws 1907, p. 139, c. 8, unconstitutional. Cummins v. Gaston [Tex. Civ. App.] 109 SW 476.

61. Under Laws 1901, p. 29, c. 15, territory incorporated in school district cannot exceed twenty-five square miles. Parks v. West [Tex. Civ. App.] 108 SW 466.

formation of such a district bearing the required number of signatures is sufficient under the statute whether the signers reside in the different counties or all in the same county,[62] and when an independent school district has been incorporated under color of authority, its corporate existence cannot be collaterally questioned in any event,[63] but only in a direct proceeding instituted for that purpose.[64]

In Kentucky the statute provides that no school district established shall have less than forty-five pupils except in extreme emergencies,[65] and leaves the determination in such cases to the county superintendent who acts judicially, subject to an appeal to the superintendent of public instruction,[66] and when these officials have acted, the courts will not interfere unless the power to act did not exist for lack of statutory notice or unless the power was manifestly abused.[67] The statute also requires certain specifications as to boundary in the petition for the formation of the district.[68]

In Iowa the school board to whom a petition to form a school is addressed has no alternative but to proceed in accordance therewith and follow the lines marked out by the statute where the petition is in proper form, properly signed and presented to the proper board as directed by statute.[69] In such a case an independent district may be formed including territory theretofore part of a school township even though the board of directors of the school corporation out of which the new district is formed do not concur in the formation.[70]

In Minnesota, where boards of county commissioners have acted upon a petition to organize a new school district out of parts of other districts lying in different counties, appeal may be taken by any qualified person residing in any part of the proposed new district to the district court of any county in which is located any part of the new territory,[71] and where an appeal is thus perfected, that court acquires jurisdiction of the subject-matter and the county commissioners of the other counties have no interest therein,[72] and on such appeal it will be presumed that the acts of the board were properly and regularly taken;[73] but in Indiana such an appeal should be to the county superintendent.[74]

62. Act 1st Sess. 27th Leg. § 2 (Laws 1901, p. 29, c. 15) makes no distinction in ordering, holding, and declaring result of election to incorporate town or village located near county line so as to embrace parts of two or more counties and incorporation of independent school district wholly in one county. Parks v. West [Tex. Civ. App.] 108 SW 466.

63. Cannot be attacked in suit to restrain trustees thereof from issuing bonds and levying tax to pay same. Parks v. West [Tex. Civ. App.] 108 SW 466.

64. Parks v. West [Tex. Civ. App.] 108 SW 466. Can be complained of only by state in quo warranto proceedings, and not in suit by taxpayers to enjoin issue of bonds. Snyder v. Baird Independent School Dist. [Tex. Civ. App.] 109 SW 472.

65. Under Ky. St. 1903, § 4428, where parent of three children necessary to bring number to more than forty-five lived in district, fact that children were outside immaterial in absence of evidence of intention not to return. Gividen v. Trustees of Common School Dist. No. 54, 31 Ky. L. R. 633, 102 SW 1191.

66. Gividen v. Trustees of Common School Dist. No. 54, 31 Ky. L. R. 633, 102 SW 1191.

67. Even though number of children in district be less than forty-five as required by statute. Ky. St. 1903, § 4428. Gividen v. Trustees of Common School Dist. No. 54, 31 Ky. L. R. 633, 102 SW 1191.

68. Where boundaries were described not by courses and distances but according to well known roads and dividing lines between certain well known farms, and survey subsequently made, on which order establishing district was founded, described same by metes and bounds and courses and distances and embraced territory within boundary described in petition, district was legally established according to boundaries set out in petition. McGinnis v. Board of Trustees [Ky.] 108 SW 289.

69. Petition sufficient. School Tp. of Bloomfield v. Independent School Dist. of Castalia, 134 Iowa, 349, 112 NW 5.

70. Code, § 2794. School Tp. of Bloomfield v. Independent School Dist. of Castalia, 134 Iowa, 349, 112 NW 5.

71. Chapter 125, p. 152, Laws 1901. Bloomquist v. Washington County Com'rs [Minn.] 112 NW 253.

72. County commissioners not chargeable with expense of litigation, and it is of no importance that notice of appeal not properly served and no bond filed therein by them. Bloomquist v. Washington County Com'rs [Minn.] 112 NW 253.

73. Though minutes of county board did not state precise question acted upon, it not appearing that board lost jurisdiction after receiving petition, by failing to cause proper notices to be published and posted, it will be presumed that board retained jurisdiction, considered petition on its merits, and denied

School trustees have no authority whatever of their own motion to make any changes in the boundary of school districts,[75] the statute providing that no change shall be made unless petitioned for by the majority of the voters of the district and limiting the power of the board to the granting or refusing of the particular change petitioned for without change.[76] The boundary of a school district cannot be changed unless notice in writing be given to the trustees of the affected districts,[77] or if the town board contemplates the change they must notify the clerks of the affected district stating therein when and where they will be present to decide upon such change,[78] and such clerks shall immediately notify the other members of the board.[79]

In Kentucky the authority to canvass the returns of the election for a change of boundary and make the certificate showing the amount of tax voted as well as the names of the trustees elected has been vested in the board of election commissioners.[80]

A petition in compliance with the statute signed by a certain number of voters residing in any district affected thereby [81] is necessary to confer jurisdiction on the board of trustees to consolidate school districts.[82] The notice in such a proceeding is sufficient, where showing how the district is to be affected and what particular territory will be lost,[83] and need embrace the disposition of the property in the old districts only when the new district intends to surrender to the old districts all its claim thereto.[84] At an election to consolidate districts lying in different counties, polls should be opened in each county, but failure to do so is immaterial where it does not appear that the result could have been changed [85] since the constitutional provision requiring an elector to vote in his own precinct is inapplicable in such cases.[86] The board of arbitrators provided for by the statute permitting an appeal to arbitrators in such proceedings need not be sworn;[87] and they acquire jurisdiction only after certain statutory requirements have been satisfied,[88] but their action is then conclusive in the absence of fraud.[89]

same on ground appealed from, namely, that it was not in accord with best interests of inhabitants of proposed new district. Bloomquist v. Washington County Com'rs [Minn.] 112 NW 253.

74. Under Burns' Ann. St. 1901, § 6028, authorizing appeals from township trustees to county superintendent, remedy of persons aggrieved by refusal to establish new school district is to county superintendent, and not by mandamus. Nelson v. State [Ind.] 81 NE 486.

75. Nolting v. Batterton, 231 Ill. 394, 83 NE 179.

76. Petition cannot confer authority upon trustees to make such changes as in their discretion they may deem best, or authorize trustees, if they do not grant its prayer, to take some other action. Trustees can only do specific thing petitioned or refuse petition. Nolting v. Batterton, 231 Ill. 394, 83 NE 179.

77. Under Ky. St. 1903, § 4427, proper notice served only on chairman sufficient. Givlden v. Trustees of Common School Dist. No. 54, 31 Ky. L. R. 633, 102 SW 1191.

78. Under St. 1898, § 418, record should show at least written proof or admission of service of notice on district school clerk. State v. Cary [Wis.] 112 NW 428. Affidavit by A that notice incorporated was true copy of notice served on school clerk named in pleadings insufficient under St. 1898, § 418, for failure to state time, place or manner of service, and does not purport to be made by party serving same. Id.

79. State v. Cary [Wis.] 112 NW 428.

80. Subsection 5, § 4463a, Ky. St. 1903; § 4468, not county superintendent. McGinnis v. Board of Trustees [Ky.] 108 SW 289.

81. Need not be signed by ten voters residing in each district affected but by ten voters residing in any affected district. State v. Job, 205 Mo. 1, 103 SW 493.

82. Nolting v. Batterton, 231 Ill. 394, 83 NE 179.

83. Notices specifying things to be considered to be whether two districts be consolidated and to decide change in boundary lines sufficient under Rev. St. 1899, § 9742. State v. Job, 205 Mo. 1, 103 SW 493. Petition filed by five out of nine districts, asking for consolidation without any definite plan, and asking board of trustees to act to consolidate part if they refused to consolidate all, insufficient. Nolting v. Batterton, 231 Ill. 394, 83 NE 179.

84. State v. Job, 205 Mo. 1, 103 SW 493.

85. Parks v. West [Tex. Civ. App.] 108 SW 466.

86. Constitutional provision requiring elector to vote in precinct of residence does not forbid elector of one county to vote in another on all questions affecting interest of school, or to determine whether any given territory shall be incorporated as to all such questions, such territory constitutes residence voting precinct for all electors residing therein. Parks v. West [Tex. Civ. App.] 108 SW 466.

87. Rev. St. 1891, § 9742. State v. Job, 205 Mo. 1, 103 SW 493.

88. Acquire jurisdiction where voters had

*Establishment of high schools.*See 8 C. L. 1854—In Montana the establishment of county high schools is generally provided for by statutes,[90] which require a submission of the matter to a popular vote after the issuance of the required proclamation and notice [91] distinctly specifying the places which are candidates in the forthcoming election.[92] Such election shall be conducted in accordance with the general election laws of the state.[93] In California all defects in the organization of high schools have been cured by statute.[94]

*Sites.*See 8 C. L. 1854—Prior action by a majority of the voters and taxpayers in the district is generally required [95] both as to the designation of the school site and the authority to purchase the same.[96] In Nebraska the removal of the school house to a new site can only be authorized by a two-thirds vote,[97] after which the directors may accept a site as a gift, though they may not purchase one with school funds unless authorized to do so.[98] While a school district may authorize the removal of a school house to a new site before acquiring title to same and may thereafter authorize the acquisition of title, it cannot remove the schoolhouse to such site until title is acquired.[99] In Iowa the statute prohibits a school district from holding land within a certain distance of the residence of one objecting to its nearer location.[1] The statute provides for the review of the act of the school directors fixing a new school site by the county superintendent [2] and, where their action is reversed on appeal, the district no longer has any right to hold or use the site purchased.[3] In Texas, however, the appeal in such cases is taken to the superintendent of public instruction, and from his decision to the state board of education,[4] and a petition for an injunction to restrain the change of location must allege that such appeal had been taken.[5]

The statute may confer upon city school boards and their successors the power

ample information as to proposition to be voted upon, election was held, all districts affected did not favor change, and where by reason of election there was difference to be settled and matters were referred to county commissioner who took appropriate steps for arbitration. State v. Job, 205 Me. 1, 103 SW 493.

89. Quo warranto will not lie to review. State v. Job, 205 Mo. 1, 103 SW 493.

90. Const. art. 11, §§ 1, 11, provides for creation of county free high school by legislature. Evers v. Hudson [Mont.] 92 P 462.

91. Sess. Laws 1907, p. 51, § 3. Evers v. Hudson [Mont.] 92 P 462.

92. Failure to specify places candidate for location, or fact that location would be voted upon, fatal. Evers v. Hudson [Mont.] 92 P 462.

93. Failure to issue election proclamation fatal, and notice of election provided for by Sess. Laws 1907, p. 50, § 3, is not a substitute therefor. Evers v. Hudson [Mont.] 92 P 462.

94. St. 1901, p. 299, c. 140, and Acts 1905, amending Pol. Code, § 1671, subd. 11, legalize all procedure for formation of high school districts and establishment of district high schools, making them duly organized regardless of defects within St. 1905, p. 58, c. 65, providing for distribution of high school fund only to duly organized schools. Board of Education of San Francisco v. Hyatt [Cal.] 93 P 117. Defects in Humbolt Evening high school San Francisco held cured. Id.

95. Under Rev. St. 1899, § 9772 (Ann. St. 1906, p. 4483), majority of those present and voting insufficient. School Dist. No. 3 v. Oellien [Mo.] 108 SW 529.

96. Under Comp. Laws, § 4665, 4728-9 proceedings to condemn by officers without such prior actions, unsustainable. Board of Education of Detroit v. Moross [Mich.] 14 Det. Leg. N. 683, 114 NW 75.

97. Majority insufficient. MacMahon v. School Dist. No. 66 [Neb.] 113 NW 1046.

98. Cobbey's Ann. St. 1903, § 11038. MacMahon v. School Dist. No. 66 [Neb.] 113 NW 1046.

99. Cobbey's Ann. St. 1903, §§ 11036, 11038. MacMahon v. School Dist. No. 66 [Neb.] 113 NW 1046.

1. Under Code, § 2814, amended by Laws 1907, p. 152, c. 153, authorizing school corporations to hold within certain limitations land for school house sites at least thirty rods from residence of any owner objecting to its being placed near, "owner" means owner of residence within thirty rods of site and not to owner of site only, and prohibition applies to school house sites however acquired. Mendenhall v. Board of Directors of Independent School Dist. [Iowa] 115 NW 11.

2. Code, §§ 2773, 2818. Independent School Dist. v. McClure [Iowa] 113 NW 554.

3. Independent School Dist. v. McClure [Iowa] 113 NW 554.

4. Acts 29th Leg., p. 271, c. 124, § 25. Caswell v. Fundenberger [Tex. Civ. App.] 20 Tex. Ct. Rep. 64, 105 SW 1017.

5. Failure to amend so as to do so on exception thereto where answer denies every material allegation thereof fatal. Caswell v. Fundenberger [Tex. Civ. App.] 20 Tex. Ct. Rep. 64, 105 SW 1017.

to condemn land for public school purposes,[6] and the conferring of such powers upon existing boards of education in cities is not special legislation as to cities.[7]

§ 4. *Organization, meetings, and officers.*[See 8 C. L. 1854]—The statute generally designates the person or persons who should give, and prescribes the form and manner of giving notice of a call of regular and special school meetings ordered to be made by the board.[8]

Trustees and boards of education.—The central board of education of a city is a creation of the legislature and has only those powers authorized by statute,[9] and powers given to it requiring the exercise of its discretion cannot be delegated.[10]

A town school district under the statute is a corporate body by necessary implication, separate and distinct from the town whether coterminous with it or not[11] with authority to contract in its own name.[12] Such districts have only those powers specifically prescribed by statute,[13] cannot exercise the powers conferred upon them in any other mode than that prescribed by the statute,[14] and are generally limited to controlling such matters as relate either wholly or partially to the administration of school affairs during the particular school year and within the particular district in and for which the board was organized.[15] The fact that the directors of a school district had no notice of a meeting is immaterial if they were all present at the meeting and participated therein,[16] and the recital of the record book of common school district trustees required to be kept by statute that a meeting was held after due notice may be attacked only for fraud or mistake.[17] In Ohio the

6. Wendel v. Board of Education of Hoboken [N. J. Law] 66 A 1075.

7. Where open to all cities for their adoption and inoperative unless adopted. Wendel v. Board of Education of Hoboken [N. J. Law] 66 A 1075.

8. B. & C. Comp. § 3380 does not grant officials mentioned discretionary power to call meeting but merely prescribes form and manner of giving notice of call. Riggs v. Polk County [Or.] 95 P 5. Under B. & C. Comp. § 3380, providing that all regular and special school meetings must be convened by written call, signed by chairman of board and district school clerk or majority of district school board, "chairman of board" does not mean "chairman of district school board meetings" provided for in B. & C. Comp. § 3388, and hence call signed by such person and acts done at such meeting are invalid. Id.

9. Act Feb. 12, 1869 (P. L. 150), creating central board of education of Pittsburg, gives same no power to appoint salary commission and delegate to it power to examine teachers and fix salaries. Houston v. Central Board of Education [Pa.] 68 A 1036. Cannot in absence of express authority so exercise power as to deprive directors of subdistrict schools of power to elect, supervise, and discharge teachers by fixing salary of such teachers dependent upon its judgment of their qualifications. Id. Under general school act 1903 (P. L. 1903, p. 5), members board of city education became body corporate. Wendel v. Hoboken Board of Education [N. J. Law] 66 A 1075. Pol. Code, § 1616, declares that boards of education shall be elected in cities under laws governing such cities, and their powers and duties shall be as prescribed therein except as otherwise provided in such chapter. Board of Education of San Francisco v. Hyatt [Cal.] 93 P 117.

10. Cannot delegate power to fix salaries to commission under Act Feb. 12, 1869 (P. L. 150). Houston v. Central Board of Education [Pa.] 68 A 1036. Where private incorporated school and city high school are administered together former being exclusively controlled by board of trustees and latter by school committee of city, neither board may delegate its powers to other though both schools were housed in same building and instructed by same teachers. Dickey v. Putnam Free School Trustees [Mass.] 84 NE 140.

11. Where property left in trust to school districts of town was unequally divided, town liable for money improperly paid by it as trustee. North Troy Graded School Dist. v. Troy, 80 Vt. 16, 66 A 1033. Under Comp. Laws Nev. § 1294, board of school trustees is body corporate and for many purposes it represents and acts as the district. Whitaker Co. v. Roberts, 155 F 882.

12. Under Ky. St. 1903, § 4437, trustees body corporate and politic. Gividen v. Trustees of Common School Dist. No. 54, 31 Ky. L. R. 633, 102 SW 1191.

13. Incompetent to act as trustee of bequest to church. Childs v. Waite, 102 Me. 451, 67 A 311.

14. Cannot be compelled to act and will not be permitted to act until the law is complied with. Nolting v. Batterton, 231 Ill. 394, 83 NE 179.

15. Murray v. Wilkes-Barre Tp. School Dist., 33 Pa. Super. Ct. 373.

16. Evidence sufficient to show all present and participating, where all discussed question of hiring certain teacher, her wages, qualifications, etc. School Dist. No. 68 v. Allen, 83 Ark. 491, 104 SW 172.

17. Under Ky. St. 1903, § 4438, order showing meeting held after due notice presumed correct until overthrown as against allegation that director had no notice. Crech v.

statute authorizes the boards to fix the time of their meetings by resolution.[18] The legal adoption of a resolution by a board of education can only be shown by the entry upon the minutes of the names of the members of the board voting "aye" and the names of members voting "nay," [19] and a clerk of a board of education cannot by his own act, after the expiration of his term, lawfully correct his official entries in public records when he has failed to comply with this requirement.[20] In Oregon, although the statute nowhere expressly provides that there shall be such an office as chairman of the school board, such office is held to be implied by the statute.[21] In Kentucky certain irregularities in the selection of trustees do not affect the validity of their proceedings.[22]

Selection of officers. See 8 C. L. 1858—The appointment of one to be a school district trustee is a nullity where no vacancy exists in the office.[23] In Illinois while the general election of school directors must take place on the third Saturday of April,[24] and elections to fill vacancies must also be held on a Saturday,[25] the manner and legality of the election of school directors cannot be collaterally attacked.[26]

Qualification of officers. See 8 C. L. 1856—In Michigan the office of county commissioner of schools is a statutory office and certain statutory qualifications are requisite to eligibility.[27] The Iowa statute requires the county superintendent to be the holder of a first grade certificate, or a state certificate, or a life diploma,[28] and in California he must be a resident of the county where elected.[29]

Tenure of officers. See 8 C. L. 1856—Under the North Dakota statute holding over pending the election and qualification of a successor is as much a part of the term of office to which the superintendent is elected as are the first two years where he continues in office.[30] In Pennsylvania the tenure of the officers of altered or detached districts is governed by statute.[31]

Board of Trustees, 31 Ky. L. R. 379, 102 SW 804.

18. Under resolution providing that meetings shall be held on first Monday in each month while schools are in session and on alternative months after schools are closed for year, meeting held on first Monday of month in which any schools of township are in session is regular meeting. Lenhart v. Board of Education, 5 Ohio N. P. (N. S.) 129. Meeting held after all but one school was closed held regular. Id. Second adjourned meeting from a called meeting not regular meeting. Id.

19. Under Rev. St. § 3982, statement in minutes that all members were present at roll-call and later on that all voted "aye" on given question, insufficient. Beck v. Rocky River Village Board of Education, 9 Ohio C. C. (N. S.) 551.

20. Where law required names of members voting "aye" and "no" to be entered in record, clerk cannot amend record to show votes after expiration of office. Beck v. Rocky River Village Board of Education, 9 Ohio C. C. (N. S.) 551.

21. Implied from B. & C. Comp. § 3380 providing for signature of chairman to calls for school meetings, § 3388 providing that oldest director in point of service shall be chairman, § 3389, subd. 16 authorizing chairman to draw warrants, and subd. 31 providing that all bonds shall be signed by chairman. Riggs v. Polk County [Or.] 95 P 5.

22. Where trustees cast lots to determine length of respective terms, and all were duly elected and qualified, and term of no one had expired at time of proceeding in question, any irregularity in regard to length of their terms could in no way affect validity of proceedings. McGinnis v. Board of Trustees [Ky.] 108 SW 289.

23. WcGlone v. Zarnes [Ky.] 107 SW 329.

24. Peterson v. People, 129 Ill. App. 55.

25. Sections 88 and 126, School Law. Peterson v. People, 129 Ill. App. 55.

26. McDaniel v. District No. 16 School Directors, 125 Ill. App. 332.

27. Under Comp. Laws, § 4810, prescribing certain qualifications and also that persons who held office under Act No. 147, p 183, Pub. Acts 1891, shall be eligible, person once elected under such act always eligible to office. Attorney General v. Lewis [Mich.] 14 Det. Leg. N. 840, 114 NW 927.

28. Under Acts 31st Gen. Assem. p. 87, c. 122, expressly repealing code §§ 2735-2737, one holding two years' certificate issued under § 2737, ineligible to office county superintendent. State v. Huegle [Iowa] 112 NW 234.

29. Successful contestant for office of county superintendent of schools did not disqualify himself to hold office because pending determination of election contest he went to adjoining county to teach, where he owned house and personalty in county of contest, left portion of household goods, claimed county as residence, and name remained registered as voter and he returned at expiration of school. People v. Wilson [Cal. App.] 91 P 661.

30. Under § 764, Rev. Codes 1905, superintendent holds over after election of disquali-

In Kentucky when one duly elected has qualified as school trustee, he cannot be deprived of office through any failure of the superintendent to perform ministerial or clerical duties respecting the recording of the election and qualification.[32] In such a case a school district trustee does not forfeit his office by temporarily removing his residence onto or near the district line.[33] Where the statute indicated no method of determining which of two trustees was elected for the longer term, an agreement between the trustees was a proper method of deciding the question.[34]

*Salaries.*See 8 C. L. 1856—The payment of salary and expenses to an illegal body to which a board of education has attempted to delegate its powers is unlawful.[35] In Arkansas, in the absence of legislation so providing, the board of school directors have no authority to vote a director appointed clerk under the statute a salary.[36] And in North Dakota a county superintendent lawfully holding over and continuing to perform the duties of the office is entitled to the compensation provided by law for the incumbent of such office.[37]

*Bonds.*See 8 C. L. 1857—In Illinois where the bond offered by township treasurer is twice the amount of money and effects on hand when offered, the superintendent cannot refuse to approve it on the ground that a larger sum will come into his hands at a later period.[38] The Wisconsin statute requiring the director of a school district to prosecute an action on the treasurer's bond for a breach thereof and authorizing a school district meeting to make necessary provisions for such prosecution, requires a director to sue on the treasurer's bond and prosecute it only until the electors of the district take control.[39]

*Supervisory control of officers.*See 8 C. L. 1857—In Illinois trustees of schools may remove a township treasurer without formal charge, notice, or trial, and their action in that connection is not subject to review.[40] Also city boards of education have power to try charges against a civil service employe in its service notwithstanding his failure to contribute to the school employe's pension fund.[41]

§ 5. *Property and contracts.*See 8 C. L. 1857—Persons dealing with the officers of a school board are charged with notice of the scope of its authority.[42] A school dis-

fied superintendent, woman elected not being qualified elector of district. State v. Fabrick [N. D.] 112 NW 74.

31. Act April 11, 1862, P. L. 471, which provides that, where portion of a district is detached, alteration shall not take effect for school purposes until commencement of school year next after end of that in which it shall have been decreed and confirmed, and that directors of detached portion shall continue to exercise their office until end of year in which alteration occurred, includes appointees of school directors for no fixed term, but not election officers disqualified by fact of such detachment. Commonwealth v. Topper [Pa.] 68 A 666. Where office of township collector of taxes including school taxes becomes vacant through collector's loss of residence in district to which elected, under Act July 2, 1895 (P. L. 434). Id.

32. McGlone v. Zornes [Ky.] 107 SW 329. Where school trustee was elected to three year term and election was certified to county superintendent, it was not invalidated by latter's failure to record election as being for such term. Gilbert v. Lucas [Ky.] 107 SW 751.

33. McGlone v. Zornes [Ky.] 107 SW 329.

34. Fact that one received larger number of votes did not entitle him to longer term. Gilbert v. Lucas [Ky.] 107 SW 751.

35. Houston v. Central Board of Education [Pa.] 68 A 1036.

36. Under Kirby's Dig. §§ 7630-1, takes position with all burdens without pay. Clarke v. School Dist. No. 16, 84 Ark. 516, 106 SW 677.

37. Where woman elected was disqualified in that she was not qualified elector. State v. Fabrick [N. D.] 112 NW 74.

38. Hertel v. Boismenue, 229 Ill. 474, 82 NE 298.

39. Under Rev. St. 1898, §§ 442, 430, subd. 17, orders of directors to discontinue suit binding on district attorney prosecuting when court will permit dismissal as not prejudicing public's right. School Dist. No. 11 of Town of Madison v. Clifcorn [Wis.] 112 NW 1099.

40. Hertel v. Boismenue, 229 Ill. 474, 82 NE 298.

41. Section 16 of school employes' pension Act of 1903, § 8 of the teachers' and employes' pension act of 1905, and § 12 of the civil service act, construed. People v. Brenan, 125 Ill. App. 29.

42. Vendor of site to school director charged with notice that contract was subject to condition precedent that reversal of director's action by county superintendent on appeal would invalidate same. Independent School Dist. v. McClure [Iowa] 113 NW 554.

trict cannot acquire, hold or bind the district to pay for real property acquired for any purpose other than as a school site,[43] and where their action in acquiring school sites may be reversed, such reversal prevents title from vesting in the school district and the situation is the same as if no deed had been given or the property had been abandoned,[44] in which case the district is not bound to tender a reconveyance before maintaining a suit to recover the price from the seller.[45] In Illinois the trustees of a school may accept and dispose of notes, bonds and other negotiable securities.[46] In Wisconsin, as an incident to the power to erect buildings and provide for payment therefor, the school district may contract for the protection of third persons furnishing materials to the principal contractors to be used in the erection of such building,[47] although where a school building is being built by a contractor, the laborers and materialmen have no right to a lien upon the property of the district.[48]

School lands.[See 8 C. L. 1857]—Under the statute of Arizona, providing that actual or bona fide settlers placing improvements on the land shall have the preferred right to lease the same, improvements are defined as anything permanent in character, the result of labor and capital, which enhances the value of the land.[49] In Nebraska the board of educational lands and funds is vested with discretionary power in passing on appraisements of school lands,[50] but such discretion must be fairly and reasonably exercised, and the arbitrary or unreasonable refusal of the board to approve of a fair appraisement will not justify the commissioner of public lands and buildings in refusing to issue a certificate of purchase which the purchaser would otherwise be entitled to receive.[51] In Texas all matters pertaining to the sale and lease of school lands are strictly regulated by statute or constitution.[52] The constitution, however, does not contemplate that the sale of county school lands shall be made directly by the commissioner's court, but that it may sell the same in such manner as it may direct.[53] If the commissioners in good faith sell the land for its market value, when

43. Code, § 2743, authorizing districts to hold property, etc., only confers power to do so for purposes specified by statute. Independent School Dist. v. McClure [Iowa] 113 NW 554.

44, 45. Independent School Dist. v. McClure [Iowa] 113 NW 554.

46. Scott v. Goode, 128 Ill. App. 26.

47, 48. Connor Co. v. Olson [Wis.] 115 NW 811.

49. Rev. St. 1901, §§ 4035-4037. Schley v. Vail [Ariz.] 95 P 113. Failure to allege improvements are result of labor and capital, enhance value of land, and are such as cannot be removed, fatal. Id. Settler placing barns, house, corrals, fences, and cleaning undergrowth to prepare ground, and using for grazing purposes or for farming, has preferred right. Id. House placed on blocks or pillars not appurtenant or improvement. Id. Frame house firmly constructed valuable improvement, and building may be used by settler for warehouse in which to store supplies for use on adjacent property or for saloon to invite patronage of adjacent employes. Id.

50. In case of application by lessee to purchase. State v. Eaton [Neb.] 112 NW 592.

51. Where previous appraisement was raised by two hundred dollars and ground for rejecting was not unfairness of appraisers but belief that land was worth more, rejectment unreasonable. State v. Eaton [Neb.] 112 NW 592.

52. Under Laws 30th Leg. p. 490, c. 20, sale may be made in whole surveys only, though it might be leased in two or more tracts and tracts not yet sectionized may be sold in entire sections. Ford v. Terrell [Tex.] 107 SW 40. Where part of section of school lands was under lease and therefore not subject to sale when remainder was advertised, sale of remainder was unauthorized under act 1907 (Laws 30th Leg. p. 491, c. 20), § 5, requiring sales to lessees and their assignees in whole surveys only, and this though half of section had been previously sold under law permitting such sale, sale having been canceled and land restored to state. Id. Where lessee of whole section and other sections applied to purchase lands embraced in lease, including east half of such section, and commissioner thereafter during term of lease canceled sale, west half of section remained subject to lease and could not be sold. Id.

53. May appoint agents to make sales on specified terms, convey lands, receive purchase money, deposit same to credit of school fund and county treasurer, and make annual report of their transactions pursuant to written contract. Matagorda County v. Casey [Tex. Civ. App.] 108 SW 476. Stipulation in contract with agents for sale of county school lands agreeing to pay them 10 per cent of gross amount of sales, to be paid as purchase money comes in, is not agreement to pay them out of proceeds of sale, and hence on its face unauthorized diversion thereof, but is undertaking to pay

sold the fact that the purchaser in addition released a claim for damages against the county does not invalidate the sale,[54] nor does the fact that the land is subsequently found to have been worth more than it was sold for where sale was fairly made.[55]

Validity of contracts in general. See 8 C. L. 1858

Manner of contracting. See 8 C. L. 1858

Contractor's bonds. See 8 C. L. 1859

Contracts for text books, etc.[56]

Ratification of action of officers. See 8 C. L. 1859

§ 6. *Funds, revenues and taxes.* See 8 C. L. 1860—In Idaho it is the duty of municipal officers to pay one-half of all money collected from fines, penalties and all licenses to the trustees of the school districts within their limits, and the fact that a school district comprises a larger territory than the city is no defense for a nonpayment of such money.[57]

Debt limit. See 8 C. L. 1860—The school board cannot levy a tax to pay an indebtedness incurred in excess of the limit fixed by the constitution,[58] but in North Carolina the county commissioners may, where the tax levied by the state for the support of public schools is insufficient, levy a special tax sufficient to maintain a school for four months in each year, though it exceeds the limitations fixed in the constitution.[59] In Kentucky the constitution provides that no taxing district shall be permitted to become indebted in any year to an amount exceeding the income and revenue provided for that year without the consent of two-thirds of the voters, at an election held for that purpose.[60]

Tuition and incidental fees. See 8 C. L. 1880—Statute sometimes renders school districts which do not maintain certain schools liable for the tuition of scholars who have never completed a course in any such school [61] and gives parents and school districts which maintain such schools an action against school districts which neglect or refuse to pay such tuition.[62] The Wisconsin statute authorizes the board furnishing such tuition to charge it against the district sending the pupils and entitles it to

them out of proper funds in amount equal to 10 per cent. Id.

54. Although county commissioners' court are trustees of county free school land and funds, rule that, if trustee so contracts in disposing of trust property as to derive benefit himself, his self-interest renders the transaction voidable at the election of the beneficiary, does not apply to sale of such school lands, since validity of sale depends upon sale in good faith for full market value and application of all proceeds to school fund as required by Const. 1876, art. 7, § 6. Taber v. Dallas County [Tex.] 20 Tex. Ct. Rep. 309, 106 SW 332. Where purchaser in addition released claim for damages against county, sustained by reason of its failure to give him possession under former lease to him, and also agreed to recover possession at his own expense. Id.

55. Taber v. Dallas County [Tex.] 20 Tex. Ct. Rep. 309, 106 SW 332.

56. See 8 C. L. 1859. See, also, § 2, supra.

57. School Dist. No. 27 v. Twin Falls, 13 Idaho, 471, 90 P 735.

58. People v. Toledo, etc., R. Co., 229 Ill. 327, 82 NE 420. Township advisory board has no power to make appropriation for construction of school house unless there are funds on hand available for that purpose, or to create or authorize creation of indebtedness in excess of constitutional debt limit. State v. Johns [Ind.] 84 NE 1. Bill praying for mandamus defective in failing to allege funds on hand available, and that appropriation would not create indebtedness in excess of limit under art. 13, § 1, Const. Id.

59. Collie v. Franklin County Com'rs, 145 N. C. 170, 59 SE 44.

60. Under Const. § 157, failure to submit question to voters fatal. Howard v. Trustees of School Dist. No. 27, 31 Ky. L. R. 399, 102 SW 318.

61. Under Laws 1901, p. 588, c. 96, amended by Laws 1903, p. 117, c. 118, not liable for tuition of pupils after graduation from course in approved school. New Hampton Inst. v. Northwood School Dist. [N. H.] 68 A 538. Laws 1901, p. 234, c. 188, amended by Laws 1903, p. 525, c. 329, making districts having no high school liable for high school tuition. City of Columbus v. Fountain Prairie [Wis.] 115 N. W. 111.

62. Laws 1901, p. 588, c. 96, § 2, does not give academies and approved schools right of action as such in addition to right of parents and school district furnishing tuition. New Hampton Inst. v. Northwood School Dist. [N. H.] 68 A 538.

have the amount due entered on the tax roll against such district,[63] but such tuition is payable to the high school district in which the education is furnished, and not to the city which contains such district.[64]

Levy and collection of taxes. See 8 C. L. 1860—A tax levy under a void election is void.[65] The amount and rate of the school tax which may be raised in any year is generally limited by statutory or constitutional provisions.[66] Where the statute so provides, land adjoining a city, included in the city school district, is liable to the city school tax levied by the city trustees.[67] The remedy for correcting omissions of property from taxation is by mandamus to compel proper public officials to assess the property as required by law.[68] In Florida the county commissioners cannot revise the decision of the county board of public instruction as to the millage required for the maintenance of the necessary county schools when the millage is within constitutional limits and the estimates contain nothing illegal.[69] In Georgia a law repealing an act permitting the raising of certain taxes for certain purposes will not be given a retrospective operation where it would impair the obligation of a contract.[70] In Illinois all questions in reference to the levy and collection of taxes are statutory.[71]

63. Laws 1903, p. 525, c. 329, § 2. City of Columbus v. Fountain Prairie [Wis.] 115 NW 111.

64. Action must be brought by district, and not by city, although the two may be coterminous, though money is to be paid to city treasurer, ex officio treasurer of district, and into city treasury. City of Columbus v. Fountain Prairie [Wis.] 115 NW 111.

65. Tax held void for failure to issue proper proclamation and notice of election. Evers v. Hudson [Mont.] 92 P 462

66. Const. art. 7, § 3, as amended Sept. 25, 1883, authorized creation of two distinct classes of independent school districts. First, class in which incorporated city or town may be included, together with contiguous territory outside of its limits, in which district trustees could levy special tax, not to exceed 20 cents on $100, provided that two-thirds of taxpaying voters voted such tax; and, second, class in which limits of school district were confined to those of municipality, to which district constitutional limitation of 20 cents per $100 did not apply, hence tax in district of first class in excess of 20 cents per $100 was void. Cummins v. Gaston [Tex. Civ. App.] 109 SW 476. Limitation under Const. art. 7, § 3, of tax to not more than 20 cents on $100, applies to all districts common or independent except only those independent school districts that have assumed charge of other schools and whose district limits are coincident with their municipal limits. Snyder v. Baird Independent School Dist. [Tex. Civ. App.] 109 SW 472. Const. art. 7, § 3, as amended in 1883, applies not only to cities and towns incorporated for municipal purposes and constituting separate school districts, but also to towns and villages incorporated as independent school districts, but not for municipal purposes. Parks v. West [Tex. Civ. App.] 108 SW 466. School law, Hurd's Rev. St. 1905, c. 122, § 202, providing that not exceeding 2 1-2 per cent can be levied upon in any given year for educational purposes, limits amount of taxation to 2 1-2 per cent for both common and high schools where high school district and common school district are coterminous. People v. Read, 233 Ill. 351, 84 NE 214.

67. Pol. Code, §§ 1576, 1670, held constitutional. Visalia Sav. Bk. v. Visalia [Cal.] 94 P 888. In action to have city school tax levied on land adjoining city declared void and enjoin sale of lands to pay tax, where answer set up school district composed of territory inside and outside, including plaintiff's land, and that tax was levied on such land as part of district, averment of existence of school district sufficient as against general demurrer. Id.

68. Judicial department cannot act through bill in chancery to have decree entered finding amount which would have been levied against property if levied in proper district and ordering owners to pay over to proper county sum ascertained, and on default that county clerk extend amount as taxes against owners. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849. Fact that district treasurer omits to furnish taxing officer with complete list no ground to enjoin collection of taxes correctly listed, since omission may be corrected by mandamus or otherwise. Creech v. Trustees of Common School Dist. 15, 31 Ky. L. R. 379, 102 SW 804. Where all property of nonresidents omitted. Id.

69. Itemization of county board held not subject to revision, but to have been made only to determine amount needed. Tomasello v. Santa Rosa County Board of Public Instruction [Fla.] 45 S 886.

70. Where school board contracted with teacher who rendered services before repeal of act and other sources of revenue were exhausted, council will be compelled to levy tax under repealed law where it appears full tax recommended is necessary to discharge teacher's contract. Dennington v. Roberta [Ga.] 61 SE 20.

71. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849. Hurd's Rev. St. 1905, c. 122, § 202, providing for levy of school taxes in general, did not repeal Private Laws 1869, p. 168, creating special charter for Peoria and providing for levy of school taxes for such city.

The various needs of the school district should be met by the levy of the proper kind of a tax,[72] and the directors are the authorities to levy school taxes.[73] Equity will not enjoin the collection of taxes levied by the board of education because of mere irregularity in the certificate of tax levy,[74] nor where upon objections to the application the defects could be cured by amendment;[75] neither does the fact that the amount for which a school district tax was levied is in excess of its outstanding indebtedness render it void, there being no evidence that it had no other indebtedness.[76] Where property located in one district has been by mistake taxed in another, the former cannot recover the amount of the tax from the latter.[77] The Kentucky constitution provides that every resolution passed by any county, city, town or other municipality levying a tax shall specify the purpose for which the tax is levied,[78] and that any contract or indebtedness contracted in violation of the section shall be void, and that the collection of such a tax may be enjoined by the taxpayers,[79] but the trustees may subsequently make a valid levy to correct the prior invalid one.[80] In Louisiana a special election held to levy a tax for schools cannot be contested after three months.[81] In order that a voter may vote at such election, the same qualifications as are required for other elections exist.[82] The purpose for which the tax is intended shall be submitted to a vote of the property taxpayers entitled to vote under the election laws of the state,[83] though the statute may provide for the ratification of action taken without regard to such provisions.[84] In Nebraska, in order to restrain the act of the board of county commissioners in repaying school taxes alleged to have been illegally collected, the petition must show that the board acted without jurisdiction,[85] and where a mistake is the ground for such repayment, it must be made clear that such was the fact.[86] In New Jersey, where the amount necessary for the purchase of land and erection of a schoolhouse has been properly fixed and determined, it is mandatory under the statute for the body having the power to make the appropria-

Gray v. School Inspectors, 231 Ill. 63, 83 NE 95.

72. Expenses for repairs, grading and tiling around school house should be provided for by tax for school purposes, and not by tax for building purposes. People v. Toledo, etc., R. Co., 231 Ill. 514, 83 NE 193.

73. Hurd's Rev. St. 1905, c. 120, §§ 276, 277; c. 122, §§ 202, 203. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849.

74. Shriver v. McGregor, 224 Ill. 397, 79 NE 706. Fact that certificates of tax levy were not signed by majority of board not conclusive that they were not made and tax levied by acts and authority of board. Id. Where school tax was levied by officers authorized to make levy, mere irregularities in proceedings insufficient to confer jurisdiction on court of equity to restrain collection of tax. Gray v. School Inspectors, 231 Ill. 63, 83 NE 95.

75. Shriver v. McGregor, 224 Ill. 397, 79 NE 706.

76. People v. St. Louis, etc., R. Co., 230 Ill. 61, 82 NE 305.

77. Where property taxed in wrong district due to mistake or misprision in map of district. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849.

78. Resolution of trustees of school district under Const. § 180, omitting to state purpose thereof, void. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926.

79. In suit to enjoin collection, taxpayers not estopped by fact that they had notice of creation of debt and paid taxes without complaint for two years. Howard v. Trustees of School Dist. No. 27, 31 Ky. L. R. 399, 102 SW 318.

80. Where five years' taxes declared void, subsequent levy for entire time proper. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926.

81. Act. No. 106, p. 140, 1892. Baucum v. Police Jury, 119 La. 532, 44 S 289.

82. Must have paid poll tax two preceding years. Gruner v. Police Jury, 119 La. 551, 44 S 295.

83. Const. art. 232. Gruner v. Police Jury, 119 La. 551, 44 S 295.

84. Cannot question failure to include object and amount of tax to be raised in taxpayer's petition for special election as required by Act No. 101, p. 127, 1898, ratified by Act. No. 146, p. 318, 1904. Baucum v. Police Jury, 119 La. 532, 44 S 289.

85. Section 10561, Cobbey's Ann. St. 1903. School Dist. No. 25 v. De Long [Neb.] 114 NW 934.

86. Where alleged in petition that taxes were by mistake collected as for district 33 in order to restrain action of county commissioners in repaying taxes collected for such district, petition must allege that there was no such district. School District No. 25 v. De Long [Neb.] 114 NW 934.

tions of money raised by tax to cause the amount to be raised by tax or to borrow the same and secure its repayment by an issue of bonds.[87] In Texas, where the purpose of an election is to determine both whether bonds shall be issued and a tax levied, the exact rate and amount of the tax and the amount of the bonds must both be stated in the order,[88] and where such a proposition shall be defeated, no election shall be ordered for that purpose until after the expiration of one year,[89] but the order for such second election may be made before the expiration of the year.[90] It is no defense to such taxes when duly levied that during the previous scholastic year the treasurer of the district paid out on vouchers issued by the board of trustees more than he received, which was more than the district's claim against him for taxes.[91]

*School bonds.*See 8 C. L. 1864—In Kentucky, where the question of a bond issue is submitted in the language of the statute, it is sufficient.[92] The county school superintendent has power to canvass the returns of the election in regard to the issuance of bonds and decide the vote,[93] and it is proper for the board to provide for a sinking fund for the redemption of a certain number of bonds each year.[94] In Nebraska a purchaser of bonds payable to bearer, reciting the purpose of their issue, bearing the proper certificates for registration and issuance, before maturity in the regular course of business for practically their face value in reliance upon such certificates and recitals, is a bona fide purchaser [95] and is not chargeable with notice of a pending suit brought to contest the election at which the bonds were authorized.[96] In Oregon the fact that the plaintiff, in an injunction suit to restrain the issuance of alleged illegally authorized bonds, had knowledge of the meeting authorizing the issuance thereof and participated therein is a matter of defense only by way of estoppel and is not available in such a proceeding.[97] At an election in Texas to determine whether bonds should be issued, polls should be opened in each county affected, but the failure to do so is immaterial where it does not appear that the result could have been changed,[98] and it is also immaterial to the validity of such an election that the word bond, instead of coupon bond, was used in the order of election.[99]

87. "May" as used in § 76, School law (P. L. 1903, 2d Sp. Sess. p. 28), mandatory and not permissive. Town Council of Montclair v. Baxter [N. J. Law] 68 A 794; Board of Education v. Town Council [N. J. Law] 68 A 795. Resolution of board of school estimates fixing and determining sum conditional on erection of school containing twenty units insufficient under P. L. 1903, 2d Sp. Sess. p. 28, § 76, and mandamus refused. Id.

88. Order that tax should not exceed twenty-five cents on one hundred dollars fatal to election. Parks v. West [Tex. Civ. App.] 108 SW 466.

89. One year, ten days, sufficient. Parks v. West [Tex. Civ. App.] 108 SW 466.

90. Order made at such time before expiration of year as would enable election immediately after expiration thereof sufficient. Parks v. West [Tex. Civ. App.] 108 SW 466.

91. Rev. St. 1895, tit. 86, c. 15. Massie v. Palo Pinto Independent School Dist. [Tex. Civ. App.] 20 Tex. Ct. Rep. 90, 105 SW 821.

92. Rate of interest and term of bonds need not be given since statute limits same, and trustees should be untrammeled in securing best possible sale. McGinnis v. Trustees of Bardstown [Ky.] 108 SW 289.

93. McGinnis v. Trustees of Bardstown [Ky.] 108 SW 289.

94. Under § 4482, Ky. St. 1903, need not create sinking fund and loan money out or invest in other securities but may retire two bonds annually. McGinnis v. Trustees of Bardstown [Ky.] 108 SW 289.

95. School Dist. No. 11 v. Chapman [C. C. A.] 152 F 887.

96. School Dist. No. 11 v. Chapman [C. C. A.] 152 F 887. Not chargeable with constructive notice of pending suit brought under statute of state authorizing such contest but containing no provision for superseding result of any election as declared by canvassers pending such suit, nor is such purchaser chargeable with constructive notice of temporary injunction granted in such suit restraining issuance of such bonds, they having in fact been issued in due form. Id. Purchaser not chargeable with actual notice of suit brought to enjoin registration and certification of bonds already registered, certified, and sold, where told that such suit had been dismissed though in fact it had not been dismissed but injunction had been granted. Id.

97. Riggs v. Polk County [Or.] 95 P 5.

98. Parks v. West [Tex. Civ. App.] 108 SW 466.

99. Where issue provided on their face for payment of interest and were in substantial compliance with statute. Parks v. West [Tex. Civ. App.] 108 SW 466.

Orders and warrants for payment of claims.[See 8 C. L. 1864]—The Illinois statute provides that, whenever there is not sufficient money in the treasury of any school district to meet current expenses, the proper authorities may provide a fund to meet such expenses by issuing warrants in anticipation of taxes levied by them,[1] and defectively issued warrants may sometimes be ratified.[2] The board of school trustees is one of the school authorities authorized to issue such warrants.[3] In Indiana a township warrant standing alone creates no liability against the township, and, in order to sustain an action based upon it, the complaint must show by proper averment what it was given for, and, if for goods of any character, that they were suitable, useful, and necessary for the township and that the township received and used them.[4] In Nebraska there is no restriction in the school law upon the power of school district officers to issue warrants for proper purposes, and warrants issued for such purposes may be paid out of funds derived from taxes levied and collected during the current year [5] or, if not paid for want of funds, they may be registered under the provisions of the warrant act and paid in the order of their registration upon the accumulation of money in the fund upon which they are drawn.[6]

Apportionment of funds.[See 8 C. L. 1864]—The census required to be made by statute annually of the children in the district must be certified to by the majority of the trustees at a meeting of which all had notice.[7] In Iowa, since the county auditor merely acts ministerially in apportioning the school tax in proportion to school census taken, he cannot review the census nor be restrained from acting on the census because of the misconduct of any village secretary.[8] In California the act providing for the distribution of the state high school fund limits the distribution to schools which have been established according to statutory provisions,[9] and which have maintained the grade of instruction required by law.[10]

1. Hurd's Rev. St. 1905, c. 146a, § 2, confers power on corporation to defray and meet all ordinary expenses by money borrowed on warrants in anticipation of taxes within limit specified, providing warrants are so drawn as to be payable solely from taxes when collected, and such taxes are set apart to pay them. Gray v. School Inspectors of Peoria, 231 Ill. 63, 83 NE 95. Hurd's Rev. St. 1905, c. 146a, § 2, authorizing issuance of warrants in anticipation of taxes levied, not available in anticipation of taxes for building purposes but only for taxes levied to establish and support schools. Id.

2. Fact that city board of school directors delegated to the finance committee determination of amount of money to be raised by sale of warrants, and that warrants themselves were defectively issued and executed, would not invalidate them where board has unanimously ratified them after issuance by vote at regular meeting. Gray v. School Inspectors of Peoria, 231 Ill. 63, 83 NE 95.

3. Under Hurd's Rev. St 1905, c. 146a, § 2, board of school trustees, and not council, is proper body to issue warrants. Gray v. School Inspectors of Peoria, 231 Ill. 63, 83 NE 95.

4. Complaint based on township warrant issued in payment of material only defective for failure to make required averments. Mitchelltree School Tp. v. Carnahan [Ind. App.] 84 NE 520. Issuance of school township warrant for goods sold and delivered to township does not merge oral contract by which goods were sold in written contract. Id. Complaint, showing issuance of township warrant for bill of material supplied school district, not bad for also setting forth contract by which goods were sold. Id. School township warrant given for goods sold and received by township does not amount to payment of account nor constitute even prima facie evidence thereof. Id.

5. Proper to issue warrants to pay teacher's wages and current expenses. State v. Gardner [Neb.] 112 NW 373.

6. Under §§ 10850-1, Cobbey's Ann. St. 1903, mandamus will not lie to compel appropriation of entire revenue of district to pay registered warrants, but only such part of revenue not necessary to maintain common school for shortest statutory period may be used for such purpose. State v. Gardner [Neb.] 112 NW 373.

7. Under Ky. St. 1903, §§ 4449, 4434, 4437, census certified to only by chairman insufficient and county superintendent cannot make it part of his record. Short v. Langston, 31 Ky. L. R. 388, 102 SW 236.

8. Where district secretary improperly included inmates of state asylum. Judson v. Agan, 134 Iowa, 557, 111 NW 943.

9. Under Const. art. 9, § 6, public school system includes primary, grammar, and such high schools, commercial, evening, and technical schools, as legislature, municipal or district authority may establish, and words "evening" school merely obviates doubt as

*Appropriations.*See 8 C. L. 1865

Disbursements.—Unless the claim is approved and allowed in the manner and by each and all of the various officials and boards as provided in the statutes, it cannot be regarded as approved or allowed in any respect or to any degree as against the district or its property,[11] but, if the boards or persons whose approval is required refuse to approve the payment of a valid judgment or just claim wherein the directors' liability has been established, they may be compelled to do so by mandamus [12] except that no purchase of school furnishings shall be valid unless approved by a majority of a board of three citizens and taxpayers of such district.[13]

§ 7. *Teachers and instruction.*See 8 C. L. 1885 *Contracts of employment.*—Where the directors meet together and participate in the selection of a teacher and a written contract is subsequently signed, the contract is valid,[14] but where school trustees in their individual capacity agree to employ one as teacher and afterwards as a board repudiate the agreement, such person is without redress since the agreement was void as against public policy,[15] as is also a contract requiring the teacher not to exact pay for attending a teachers' institute.[16] In certain exceptional cases, a school board is authorized to enter into contracts not to be fully performed during the school year in which the contract was made.[17] But it has been held that the Ohio statute in this regard does not authorize the binding of the district by a contract for a period beginning in a subsequent school year, but only for a term beginning with the year during which directors are in office.[18]

Licenses and certificates.—The issuance of teachers' certificates is generally governed by statute,[19] and a certificate issued as provided for in the law after the law

to power to establish same and does not prevent their conduct as part of public schools and their sharing in high school fund. Board of Education of San Francisco v. Hyatt [Cal.] 93 P 117. Under St. 1871-2, p. 846, c. 576, San Francisco board of education may maintain existing schools and establish required new ones including high schools. Held that Humboldt evening high school organized thereunder has been organized under the law of the state so as to share in state high school fund. Id.

10. Under Act Mar. 6, 1905, p. 58, c. 65, requiring at least two duly certified high school teachers and regular average attendance of twenty or more pupils, and Pol. Code, § 1670, subd. 12, requiring course of study to be such as will prepare graduates for admission to state university, evening high school maintaining two courses only one of which satisfied statutory requirements must show the requisite number of instructors and pupils. Board of Education of San Francisco v. Hyatt [Cal.] 93 P 117. Fact that sessions are of shorter duration than those of other high schools does not prevent evening high school from participating in high school fund. Id. Under Pol. Code, § 1670, subd. 12, providing that course of study fitting students for entrance to university shall not be less than three years, fact that course in evening high school extended for five years does not affect right to share in state high school funds. Id.

11. Approval of board of trustees without other approval and in absence of judgment against the district board of school trustees will not afford any support to an order of this court directing the defendants to approve and allow complainant's claim. Whitaker & Ray Co. v. Roberts, 155 F 882. Power of such bodies to allow or reject claims, discretionary and will not be disturbed in absence of fraud or other improper motives. Id. Comp. Laws Nev. §§ 1287, 1338, provides that no money can be paid out except on warrants issued upon orders of county superintendent of public schools, and, if in his opinion bill is exorbitant, he may refuse to draw his order until ordered to do so by board of county commissioners who shall act as auditors of all bills rejected by county superintendent. Id.

12. Whitaker & Ray Co. v. Roberts, 155 F 882.

13. Act Feb. 13, 1905, p. 23, § 9. Whitaker & Ray Co. v. Roberts, 155 F 882.

14. Under Kirby's Dig. § 7615, providing that directors shall hire licensed teacher and make a written contract specifying time of employment, wages per month, etc. School Dist. No. 68 v. Allen, 83 Ark. 491, 104 SW 172.

15. McGinn v. Willey [Cal. App.] 91 P 423.

16. Under Rev. St. § 4091, attendance at teachers' institute required, and contracts to contrary illegal and void as against public policy. Burton v. Elizabeth Tp. Board of Education, 5 Ohio N. P. (N. S.) 294.

17. Act June 25, 1885, P. L. 175, permits election of teachers having requisite qualifications for two and three successive school terms. Murray v. Wilkes-Barre Tp. School Dist., 33 Pa. Super. Ct. 373.

18. Where directors elect teacher for one term, they cannot extend contract for two additional terms under Act June 25, 1885, P. L. 175. Murray v. Wilkes-Barre Tp. School Dist., 33 Pa. Super. Ct. 373.

19. Under Acts 31st General Assembly,

was passed, but before it went into effect, is not equivalent to the certificate provided for under the act.[20] In New York the board of examiners of the board of education may exercise its discretion and judgment in determining the character of the experience of a teacher in different schools, both rural and urban,[21] and the refusal to issue a certificate as provided for by statute will not be reviewed by certiorari.[22]

Such a license may generally be revoked only for some statutory cause and if action is attempted on other grounds the action is without jurisdiction and equity may interfere, but where the county superintendent proceeds to hear a charge within the statute and on reasonable notice, the accused must follow the procedure provided in the school laws, and if aggrieved must prosecute an appeal to the state superintendent,[23] since by accepting and acting under a license the licensee consents to all conditions imposed thereby, including provisions for its revocation.[24] Such statutes do not deny access to the courts for injury done to person, property or reputation within the meaning of the constitution, deprive the licensee of his property without just compensation, nor confer judicial power upon a ministerial officer.[25] The Indiana statute authorizes a teachers' license to be revoked for general neglect of the business of his school,[26] and where a county superintendent has jurisdiction of a proceeding to revoke a teacher's license, his bias and want of judicial capacity are not grounds for interference by the courts.[27] In Arkansas the statute requires county examiners to stand the same examination as is required of applicants for first grade teachers' licenses, and provides for the revocation of their licenses by the state superintendent of public instruction, and while the issuance of licenses to such county examiners is not expressly provided for, it is required by implication.[28]

Dismissal, suspension and reassignment. See 8 C. L. 1865

Breach of contract. See 8 C. L. 1865

Salary. See 8 C. L. 1866—The right of a teacher to recover compensation for serv-

p. 87, c. 122, taking effect Oct. 1, 1906, providing for issuance of first-grade certificates under specified conditions, and for removals of first-grade certificates issued prior to the taking effect of the act, one holding two years' certificate issued Aug. 30, 1906, is not entitled to a renewal thereof under act before same went into effect. State v. Huegle [Iowa] 112 NW 234. Ballinger's Ann. Codes & St. §§ 2322, 2416, provide that no person shall be accounted qualified teacher who has not first received certificate from state board of education, and provide for their issuance to any teacher to whom certificate has been granted by any county board of examiners. Kester v. School Dist. No. 34 [Wash.] 93 P 907. Under Laws 1897, p. 388, c. 378, § 1081, amended by Laws 1901, p. 469, c. 466, § 1089, provision relating to those duly licensed prior to date of act relates to those teaching in the city at time act took effect, and does not entitle one licensed in 1871, and again in 1879, not teaching in city when act took effect, to have name placed on such list. In re Walker, 120 App. Div. 571, 105 NYS 533.

20. Where holding first-grade certificate under Act 31st General Assembly, p. 87, c. 122, required of all county superintendents, one issued prior to taking effect of law insufficient. State v. Huegle [Iowa] 112 NW 234.

21. Action of board in refusing applicant credit for work in rural schools not exercise of judicial determination, but within their discretion. People v. Maxwell, 108 NYS 49.

22. Under Laws 1901, p. 473, c. 466, § 1091, refusal to issue certificate that relator's previous experience was equivalent to certain period of experience in New York not reviewable. People v. Maxwell, 108 NYS 49.

23. Stone v. Fritts [Ind.] 82 NE 792.

24. License does not confer absolute right, but only personal privilege to be exercised under reasonable restrictions and such as may subsequently be reasonably imposed. Stone v. Fritts [Ind.] 82 NE 792.

25. Stone v. Fritts [Ind.] 82 NE 792.

26. Under Burn's Ann. St. 1901, § 5905f, failure to attend township and county institutes, failure to open school at reasonable hour because living outside district, and failure to make daily preparation, sufficient ground. Stone v. Fritts [Ind.] 82 NE 792.

27. Stone v. Fritts [Ind.] 82 NE 792.

28. Kirby's Dig. §§ 7559, 7562, 7565. Brown v. Smith [Ark.] 106 SW 679. Act of May 6, 1905, p. 753, § 7, authorizing state superintendent of public instruction to revoke license of any county examiner for failure or neglect to comply with provisions of act or perform duties required by law, and declaring that on notice of revocation of license of county examiner county judge shall appoint another within 20 days, and section 8 repealing conflicting acts, repealed Kirby's Dig. § 7583, authorizing county judge to remove any county examiner for incompetence or frequent neglect of duty. Id. Judge alone cannot remove. Id.

ices depends upon a contract, express [29] or implied,[30] but an action will not lie to recover salary as a school teacher unless the plaintiff shows that he is regularly licensed to teach as provided by law.[31] In Ohio a teacher required to do janitor work without specially contracting to do so for compensation in addition to that received for teaching may recover the reasonable value of such services in an action against the board,[32] and also recover compensation from the board of education for time occupied in attendance at a teachers' institute, which right of recovery is not affected by the fact that the institute was held during the summer vacation.[33]

Greater New York charter operates to permanently protect teachers appointed either before or after the passage of the act in the tenure of their positions unless removed or reassigned for cause and as provided by law,[34] though the right to a certain position thereunder and the salary attached thereto may be waived,[35] and that statute also provides a minimum salary which can be paid certain teachers.[36] It has been held, however, that the provisions of the statute respecting salary and tenure of office must be construed in connection with the provisions respecting appointment and assignment.[37] Under this statute a retired teacher, never removed or reduced in rank, is not compelled to resort to mandamus for reinstatement before enforcing her right to back salary and pension to which she is entitled.[38] This act, however, does not apply to evening schools or their teachers and,[39] in such a case,

29. Where private and public school in same building employed same teachers, former paying portion of salary of teachers satisfactory to them, where former notified latter of refusal to pay any portion of salary, teacher cannot sue on express contract. Dickey v. Trustees of Putnam Free School [Mass.] 84 NE 140.

30. Where private and public school were administered together, and former though notifying latter of refusal to pay any portion of certain teacher's salary failed to notify him of such decision, but accepted his services, visited his school, signed diplomas with him, etc., he may recover salary on implied contract. Dickey v. Trustees of Putnam Free School [Mass.] 84 NE 140.

31. Mere letter from superintendent stating that applicant's papers are sufficient to entitle to temporary certificate, and that it will be granted on application as provided by statute, insufficient. Kester v. School Dist. No. 34 [Wash.] 93 P 907.

32. Reid v. Muhlenberg Tp. Board of Education, 6 Ohio N. P. (N. S.) 526.

33. May recover under Rev. St. § 4079 if actually engaged in teaching at time or began teaching within three months after institute closed. Reid v. Muhlenberg Tp. Board of Education, 6 Ohio N. P. (N. S.) 526.

34. Laws 1897, p. 404, c. 378, § 1117. Moore v. New York Board of Education, 121 App. Div. 862, 106 NYS 983.

35. Teacher transferred before passage of act from position as principal to that of teacher in another school and on demand recognized as head of department and was paid and accepted and receipted in full for all claims due from board the statutory salary of latter position, right to be retained as principal and receive salary attached to that office waived. Sheehan v. New York Board of Education, 120 App. Div. 557, 104 NYS 1002. Mere acceptance and receipting for a salary and pension by retired teacher at lower than statutory rate not waiver of right to compensation at higher rate where right did not rest on contract, but was provided by statute. Moore v. New York Board of Education, 121 App. Div. 862, 106 NYS 983.

36. Under Laws 1897, p. 394, c. 378, § 1091, unnecessary that salaries be uniform and no minimum salary, but as amended by Laws 1899, p. 883, c. 417, and Laws 1900, p. 1607, c. 751, fixed a minimum. Sheehan v. New York Board of Education, 120 App. Div. 557, 104 NYS 1002. Laws 1900, p. 1607, c. 751, § 4, amending Laws 1897, p. 394, c. 378, § 1091, provided that no female teacher of girls' graduating class should receive less than $1,440 per annum after ten years' service and on retirement to pension of half that amount, and fact that during part of time she taught in connection with graduating class a class not so far advanced did not affect right. Moore v. New York Board of Education, 121 App. Div. 862, 106 NYS 983.

37. Salary and tenure under act insured only to those appointed in prescribed manner. Hoefling v. New York Board of Education, 120 App. Div. 545, 104 NYS 941. Teacher acting as principal, but not appointed in compliance with Laws 1901, p. 477, c. 466, § 1090, not entitled to salary of principal but only to that of position to which she was appointed in compliance to law. Id.

38. Where teacher receipted for and accepted less than statutory compensation both before and after retirement. Moore v. New York Board of Education, 121 App. Div. 862, 106 NYS 983.

39. Teacher in evening school not public officer, nor is he within Laws 1900, p. 1605, c. 751, fixing the minimum salary of day school teacher, but is employed to perform services for such compensation as is fixed by contract, and in absence of any agreement can only recover what his services are reasonably worth. Morris v. New York Board of Education, 54 Misc. 605, 104 NYS 979.

both parties must be held to have entered into the contract with knowledge of the board's power to reduce the compensation as provided by its by-laws,[40] which authority may be implied from the matter of the by-law, although not expressly granted,[41] and also from the fact that the power conferred upon board to establish such schools involved the exercise of judgment and discretion in their establishment and management.[42]

Offenses by teachers or applicants for teacher's license. See 8 C. L. 1866

§ 8. *Control and discipline of scholars and regulation of attendance.* See 8 C. L. 1866 *Fraternities.*—If it is the judgment of the school board that membership in secret societies known as Greek letter fraternities or sororities is detrimental to the best interests of the schools, they may adopt reasonable rules and regulations to meet such conditions, and may [43] refuse public recognition to such secret societies, refuse to allow their meetings to be held in the school buildings or to allow the name of any school to be used by them,[44] and may require teachers to refuse to allow a member of a fraternity or sorority to represent his school in any literary or athletic contest or in any other public capacity,[45] but may not deny them any natural right or unlawfully discriminate against them.[46] And such regulations will not be interfered with nor set aside by the courts unless there is a clear abuse of the power and discretion conferred.[47]

Religious exercises.—The laws of Texas neither require nor forbid the use of the bible in the public schools, and the court will not declare its use unlawful simply because there is misapprehension that the school authorities may abuse its use by attempting to teach a sectarian view.[48]

Corporal punishment. See 8 C. L. 1866—The presumption is that punishment of a scholar by a teacher was in the exercise of lawful authority and it does not devolve upon the teacher to show his innocent intention [49] and, if the punishment was inflicted in good faith without intention to injure the scholar but only to enforce the rules of the school, the teacher is not guilty of assault though he used more force than necessary.[50] On the trial of such case, evidence that the scholar was obedient during preceding years while another person was teacher is inadmissible.[51]

40. Morris v. New York Board of Education, 54 Misc. 605, 104 NYS 979. Where by-laws authorized establishment of evening schools and provided for discontinuance of class and discharge of teachers and fixed salary and provided that no by-law could be suspended or repealed except by two-thirds vote of members and that every amendment should be referred to committee on by-laws established by by-law, board could by unanimous vote reduce salaries without reference to committee on by-laws. Id. Where notice of appointment merely fixed term of service and teacher accepted, he cannot complain of decrease in salary in accordance with by-laws. Id.

41. By-law authorizing establishment of evening schools, their discontinuance and discharge of teacher if attendance decreased to certain extent, implies power to change compensation, since reserve of power to discharge implies that to change compensation. Morris v. New York Board of Education, 54 Misc. 605, 104 NYS 979.

42. Laws 1901, p. 456, c. 466. Morris v. New York Board of Education, 54 Misc. 605, 104 NYS 979.

43, 44, 45. Wilson v. Chicago Board of Education, 233 Ill. 464, 84 NE 697.

46. Rule denying no privilege allowed pupils not members, except that of representing schools in literary, athletic or other public capacity, and not denying them membership in associations for literary, musical, social, or athletic exercises, and not prohibiting them from receiving same benefits as those not members of societies received but only preventing their representing schools in public capacity valid. Wilson v. Chicago Board of Education, 233 Ill. 464, 84 NE 697.

47. Only question for court, whether rule adopted to prevent or remedy supposed evil was reasonable exercise of board's power and discretion. Wilson v. Chicago Board of Education, 233 Ill. 464, 84 NE 697.

48. Church v. Bullock [Tex. Civ. App.] 18 Tex. Ct. Rep. 33, 100 SW 1025. Holding of morning exercises in schools, consisting of reading by teacher without comment of nonsectarian extracts from Bible, King James' version, and by repeating Lord's prayer and singing appropriate songs in which pupils are invited but not required to join, does not constitute public schools a place of worship nor render them sectarian nor convert them into religious seminary against prohibition of Const. art. 1, §§ 6, 7; art. 7, § 5. Id.

49. Greer v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 397, 106 SW 359.

50. Jury, in determining whether teacher

§ 9. *Torts and liability for the same.* See 8 C. L. 1868—Under the statute an action may be maintained against a school district for an injury arising from its tortious act or omission,[52] and such a statute applies to governmental as well as other duties since it was intended to remove the limitations of the common law and make the district generally responsible for omissions of duty.[53]

§ 10. *Offenses.*—In Mississippi the statute provides that any person who sells, offers to sell, or give away the examination questions or answers to the same, properly prepared by the proper authorities for the examination of teachers of public schools before the date of the examination, shall be guilty of a misdemeanor.[54] And in Pennsylvania, an act prohibiting school officers of institutions receiving state appropriations from selling or acting as agents for the sale of supplies to institutions of learning has been held constitutional,[55] and to apply to private schools receiving money from legislative appropriations.[56]

§ 11. *Decisions, rulings, and orders of school officers, and review of the same.* See 8 C. L. 1867—Since the jurisdiction of the commissioner of education applies to the common schools of cities of the second class, an appeal from an order dismissing a proceeding to remove a superintendent of schools is properly taken to such commissioner.[57] In New Jersey the state school superintendent is clothed with authority to decide all controversies and disputes arising under the school laws subject to appeal to the state school board,[58] and the prerogative writs of the state should not be awarded until the remedies provided by the school law have been exhausted.[59] Since the term "public school," as used in the constitution of Oklahoma, does not include the state university, the state board of education is not vested with supervision over the university of Oklahoma.[60]

§ 12. *Actions and litigation.* See 8 C. L. 1868—A school district is a corporation, and may sue in any court of the state having competent jurisdiction,[61] and like other

was guilty of assault, must consider acts of both and teacher's guilt must not be measured alone by severity of punishment but by his intention in inflicting it. Greer v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 397, 106 SW 359.

51. Greer v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 397, 106 SW 359.

52. Under Ballinger's Ann. Codes and St. §§ 5673, 5674, district liable for scalding child through overturning of unguarded bucket of boiling water negligently left on register. Redfield v. School Dist. No. 3 [Wash.] 92 P 770.

53. Redfield v. School Dist. No. 3 [Wash.] 92 P 770.

54. Under Code 1906, § 4546, conviction not sustained where not proved that questions were prepared by state superintendent, sealed and sent to county superintendent as provided by Code 1906, § 4539. Bryant v. State [Miss.] 46 S 247.

55. Act April 23, 1903, P. L. 285, preventing officers or members of boards of managers of institutions receiving appropriations of state money from selling supplies to such institutions, or acting as agent for sale of same constitutional. East Stroudsburg State Normal School v. Yetter, 33 Pa. Super. Ct. 557.

56. Private corporation operating state normal school and receiving moneys from legislative appropriations is within statute, and breach of contract for failure to fulfil such contract unenforcible. East Stroudsburg State Normal School v. Yetter, 33 Pa. Super. Ct. 557.

57. Under Laws 1894, p. 1181, c. 556, amended by Laws 1904, p. 94, c. 40, appeal from proceedings to remove superintendent of schools in Troy properly taken to superintendent of public instruction. Harris v. Draper, 109 NYS 983.

58. P. L. 1903, 2d Sp. Sess. p. 7, § 10. Town Council of Montclair v. Baxter [N. J. Law] 68 A 794.

59. Certiorari dismissed where granted before appeal to state school board as provided under P. L. 1903, 2d Sp. Sess. p. 7, § 10, where body having power to make appropriations of money raised by taxes fails to provide for amount fixed by proper body. Town Council of Montclair v. Baxter [N. J. Law] 68 A 794.

60. Art. 13, § 5, Const. Regents of University v. Board of Education [Okl.] 95 P 429. No repugnancy between § 5, art. 13, and art. 17, c. 77, Wilson's Rev. and Ann. St. Okl. 1903, establishing state university nor was it locally inapplicable but was, by § 2, schedule of constitution, extended to and put in force in state until it expires or is altered. Id.

67. Kirby's Dig. § 7541. Clarke v. School Dist. No. 16, 84 Ark. 516, 106 SW 677.

corporate bodies, a service of process upon the chief executive is deemed sufficient,[62] though in New York a service of an alternative writ of mandamus upon a majority of the members of a board of education is also sufficient.[63] The school district is a necessary party to all actions seeking to render it liable on any contract or entering any judgment requiring it to pay out money on property.[64] A taxpayer may maintain an action to restrain a board of education from exceeding its statutory powers.[65] Where the county treasurer has disbursed money illegally, neither the school district nor the state is a necessary party in a suit by him to recover from the person illegally paid, though the school district may not be an improper party.[66]

In Illinois an action of forcible entry and detainer may be brought by the school directors, but actions involving title to land must be brought by the trustees.[67]

§ 13. *Libraries, reading rooms and other auxiliary educational institutions.* See 8 C. L. 1869

§ 14. *Private schools.* See 8 C. L. 1869

SCIRE FACIAS.[68]

Scire facias to revive a judgment [69] or to enforce a recognizance of bail [70] are treated in appropriate topics.

SEALS; SEAMEN, see latest topical index.

SEARCH AND SEIZURE.

§ 1. What is an Unreasonable Search and Seizure, 1618.
§ 2. Procedure for Issuance, and Execution of Search Warrants, 1619.

Seizure of property used in violation of law [71] and search of arrested persons [72] are treated in other topics, except that their validity is considered generally here.

§ 1. *What is an unreasonable search and seizure.* See 8 C. L. 1870—The inhibition against unreasonable searches and seizures applies to the state, and not to unauthorized acts of individuals,[73] and in Georgia it is held, contrary to the general rule, that evidence obtained by unlawful search is not admissible in a criminal prosecution.[74] An act providing for the production of books and papers of a corporation, to be used as evidence before a grand jury,[75] and a proceeding in effect the same as sub-

62. Givіden v. Trustees of Common School Dist. No. 54, 31 Ky. L. R. 633, 102 SW 1191.

63. Under Code Civ. Proc. § 2071, fact that two members of board were succeeded by new members after commencement of proceeding, and relator failed to continue proceeding against new members, not fatal where service had been on majority as constituted after election of new members and the return did not plead the election of new members in abatement. People v. Hendrickson, 54 Misc. 337, 104 NYS 122, afd. 109 NYS 403.

64. Necessary party in suit for mandamus to compel other boards and persons whose approval is required to approve claim based on contract of school district trustees and approved in whole by them but disapproved in part by others whose approval was necessary. Whitaker & Ray Co. v. Roberts, 155 F 882.

65. To enjoin unlawful delegation of power to and payment of salaries and expenses of salary commission. Houston v. Central Board of Education [Pa.] 68 A 1036.

66. Suit to recover funds illegally paid clerk of board of school directors as salary. Clarke v. School Dist. No. 16, 84 Ark. 516, 106 SW 677.

67. McDaniel v. District No. 16 School Directors, 125 Ill. App. 332.

68. See 8 C. L. 1870.

69. See Judgments, 10 C. L. 500.

70. See Bail, Criminal, 9 C. L. 320.

71. See Betting and Gaming, 9 C. L. 388; Intoxicating Liquors, 10 C. L. 417.

72. See Arrest and Binding Over, 9 C. L. 249.

73. Court will not form collateral issue as to method of obtaining evidence. Imboden v. People [Colo.] 90 P 608.

74. Hammock v. State, 1 Ga. App. 126, 58 SE 66; Hughes v. State, 2 Ga. App. 29, 58 SE 390.

75. Order definite and books sufficiently described. In re Consolidated Rendering Co., 80 Vt. 55, 66 A 790.

poena duces tecum,[76] are not unreasonable searches and seizures. Neither is an act providing for summary seizure of gambling implements invalid.[77]

§ 2. *Procedure for issuance, and execution of search warrants.* See 8 C. L. 1488

SEAWEED; SECONDARY EVIDENCE; SECONDHAND DEALERS; SECRET BALLOT; SECURITY FOR COSTS, see latest topical index.

SEDUCTION.

§ 1. Nature and Elements of the Tort, 1619.
§ 2. Civil Remedies and Procedure, 1619.
§ 3. The Crime, 1619.
§ 4. Indictment and Prosecution, 1619. Suspension of Prosecution by Marriage 1620. Burden of Proof, Evidence, and Instructions, 1620.

Related torts[78] and crimes[78] are treated in other topics. The measure of damages is excluded.[80]

§ 1. *Nature and elements of the tort.* See 8 C. L. 1671

§ 2. *Civil remedies and procedure.* See 8 C. L. 1871—A statute giving a right of action to the parents though there is no loss of service does not abrogate the common-law right of action[81] which may be maintained by another than the parent who has suffered loss of services.[82]

Pleadings. See 8 C. L. 1871—A declaration may be good as one for fraud and deceit though insufficient as one for seduction.[83]

Evidence and trial. See 8 C. L. 1871—When determining the issue of chastity the jury must be confined to direct testimony of acts of sexual intercourse or to circumstantial evidence from which such acts may be inferred.[84] Evidence that the unmarried female seduced swore is inadmissible to prove that such female was unchaste.[85] Alleged issue of the intercourse may be produced in court.[86]

§ 3. *The crime.* See 8 C. L. 1872—Seduction is a statutory and not a common-law offense.[87] Previous chastity of the female alleged to have been seduced is required by some statutes,[88] while others require only good repute, which may exist notwithstanding previous unchastity.[89] If the promise of marriage induced the female to consent, it need not have been made contemporaneously therewith.[90]

§ 4. *Indictment and prosecution.* See 8 C. L. 1872—An indictment which charges the offense with the degree of certainty required by the law is sufficient,[91] and there-

76. Act applied to corporation, and also failed to provide for defendant's expenses in appearing with books. In re Consolidated Rendering Co., 80 Vt. 55, 65 A 790.

77. Mullen v. Mosley, 13 Idaho, 457, 90 P 986.

78. See Breach of Marriage Promise, 9 C. L. 407; Assault and Battery, 9 C. L. 257 (civil liability for ravishment); Husband and Wife, 10 C. L. 7.

79. See Abduction, 9 C. L. 7; Rape, 10 C. L. 1440.

80. See Damages, 9 C. L. 869.

81. B. & C. Comp. § 35. Anderson v. Aupperle [Or.] 95 P 330.

82. Grandmother in whose home female lived. Anderson v. Aupperle [Or.] 95 P 330.

83. Declaration for inducing plaintiff to enter into marriage relation by representations that defendant's former marriage was void, and promise to have public ceremony later, held to state a good cause of action for fraud and deceit so as not to be demurrable as one for breach of promise or seduction. Sears v. Wegner, 150 Mich. 388, 14 Det. Leg. N. 714, 114 NW 224.

84. So held where there was no competent evidence of the reputation for chastity of the female seduced. Anderson v. Aupperle [Or.] 95 P 330.

85. Anderson v. Aupperle [Or.] 95 P 330.

86. Though under three months old. Anderson v. Aupperle [Or.] 95 P 330.

87, 88. Kerr v. U. S. [Ind. T.] 104 SW 809.

89. Cooper v. State [Ark.] 109 S. W. 1023; State v. Fogg, 206 Mo. 696, 105 SW 618.

90. State v. Raynor, 145 N. C. 472, 59 SE 344.

91. Under Mansf. Dig. § 2106 (Ind. T. Ann. St. 1899, § 1449), an indictment for seduction alleging that on a certain date defendant did unlawfully, etc., obtain carnal knowledge of the prosecutrix, a female not his wife, by virtue of certain feigned and pretended marriage between them, and by virtue of a false and express promise of marriage, was held sufficient. Tedford v. U. S. [Ind. T.] 104 SW 608.

fore an indictment in the language of the statute is good.[92] It is not necessary to aver that teacher and pupil were not husband and wife.[93]

*Suspension of prosecution by marriage.*See 8 C. L. 1872—In some states, prosecution for seduction may be stopped by marrying the woman alleged to have been seduced and giving bond for her support,[94] but the fact that the man has subsequently discovered proof exonerating him of the crime is no ground for canceling such bond executed under the statute.[95] Nor will a subsequent offer of marriage excuse or defeat the prosecution.[96]

*Burden of proof, evidence and instructions.*See 8 C. L. 1872—In a trial for seduction, the state need not prove previous chastity of the prosecutrix.[97] She is presumed to be virtuous, and the burden is on the defendant to prove her want of chastity at the time of the alleged intercourse [98] by a preponderance of the evidence,[99] but unchastity once shown is presumed to continue.[1] The presumption of previous chaste character of the female seduced is not overcome by the presumption of the defendant's innocence.[2] Testimony of prosecutrix as to the parties' conduct toward each other [3] and as to whether she believed at the time that defendant and she were to become man and wife, whether the day of marriage had been set, and whether the time was fixed according to his or her suggestions, is admissible; [4] nor is it reversible error to admit her testimony on the point that prosecutrix welcomed the accused to her home and that he was treated well.[5] Evidence of a former engagement between prosecutrix and the defendant, which had been broken before the alleged seduction, may be introduced.[6] Evidence of subsequent illicit intercourse and the birth of a child resulting therefrom is admissible to corroborate the prosecutrix in the statement respecting the initial act.[7] Frequent acts of sexual intercourse between a teacher and his female pupil at times other than that charged in the indictment for such an offense, if such acts are continuous and consecutive with the act charged, may be given in evidence on the trial under such an indictment as reflecting light on the relations between the parties.[8] Evidence as to the character of prosecutrix after the seduction is inadmissible,[9] but the admission of evidence as to the reputation of the prosecutrix after the date of the first intercourse has been held not prejudicial error.[10] The character of members of the family may be shown.[11] It is not error to

92. Indictment did not allege that prosecutrix was of previous chaste character. Kerr v. U. S. [Ind. T.] 104 SW 809.

93. Indictment under § 7024, Rev. St., charging a teacher with having sexual intercourse with a pupil. Esley v. Ohio, 10 Ohio C. C. (N. S.) 169.

94. Griffin v. Griffin [Ga.] 61 SE 16.

95. Ga. Pen. Code 1895, § 388. Griffin v. Griffin [Ga.] 61 SE 16.

96. Subsequent offer made. Code 1906, § 1372, Ann. Code 1892, § 1298, defined the offense as the obtaining of carnal knowledge of a woman of previous chaste character through a false or feigned promise of marriage, etc. Williams v. State [Miss.] 45 S 146.

97. Wilhite v. State, 84 Ark. 67, 104 SW 531.

98. Tedford v. U. S. [Ind. T.] 104 SW 608; Kerr v. U. S. [Ind. T.] 104 SW 809.

99. Wilhite v. State, 84 Ark. 67, 104 SW 531.

1, 2. Kerr v. U. S. [Ind. T.] 104 SW 809.

3. As to whether defendant appeared affectionate or loving, kind, and true towards the prosecutrix. Faulkner v. State [Tex. Cr. App.] 109 SW 199.

4. Such testimony held not irrelevant and immaterial. Faulkner v. State [Tex. Cr. App.] 109 SW 199.

5. Howe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 152, 102 SW 409.

6. So held where prosecutrix had testified to the existence of an engagement between them at the time of the seduction. Faulkner v. State [Tex. Cr. App.] 109 SW 199.

7. Where intercourse was continued after the seduction and was induced by the same seductive promises. State v. Nugent, 134 Iowa, 237, 111 NW 927.

8. Esley v. State, 10 Ohio C. C. (N. S.) 169.

9. On an issue of previous chastity of the prosecutrix, letters written subsequently to the surrender of her virtue to the accused and indicating that her thoughts were bent to sexual intercourse with him are inadmissible. Wilhite v. State, 84 Ark. 67, 104 SW 531.

10. Court permitted testimony to go to the jury as to the reputation of prosecutrix after the date of the first intercourse. Tedford v. U. S. [Ind. T.] 104 SW 608.

11. So held where sister had been unchaste for two or three years and the witness knew of her unchaste acts when the sisters re-

refuse to admit testimony of physicians to the effect that it was impossible for a woman to carry a child to birth without knowing it.[12] In a prosecution for seduction under promise of marriage, the testimony of prosecutrix that she yielded on defendant's promise of marriage is competent.[13] Admitting testimony of the mother of the prosecutrix that the father of the prosecutrix was dead and had been fifteen years is not reversible error.[14] The positive testimony of a witness of an act of sexual intercourse between a teacher and a female pupil that such act occurred at a certain place on Wednesday is sufficient to sustain a verdict of guilty, even though the complaining witness testified that no such act occurred at that place except on Sunday.[15]

A judgment of conviction of a teacher of music of the crime of having sexual intercourse with a female pupil will not be reversed because the evidence fails to disclose that the term of employment was for a definite length of time.[16] Where proof of promise of marriage aside from prosecutrix's statement largely depended on evidence contained in defendant's letters, written subsequent to the alleged seduction and birth of a child, the court erred in refusing to charge that defendant could not be convicted on promise made subsequent to the birth of the child, and that such testimony could be used only to corroborate the prosecutrix's,[17] and where prosecutrix had several recent acts of intercourse with others than the accused, it was error for the court to instruct the jury that if she had reformed and was leading an absolutely virtuous life at the time defendant became engaged to her, and she had intercourse with him solely because of his promise of marriage, defendant was guilty.[18] Prosecutrix must be corroborated both as to the prior promise of marriage and the act of intercourse,[19] but where defendant admits promise of marriage and sexual intercourse, no other corroboration of the prosecutrix on these points is necessary.[20] The question as to whether or not there is sufficient corroborative evidence of the promise of marriage is for the jury.[21]

sided together. Jeter v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 598, 106 SW 371.

12. It was immaterial whether prosecutrix knew she was pregnant or not. Kerr v. U. S. [Ind. T.] 104 SW 809.

13. State v. Raynor, 145 N. C. 472, 59 SE 344.

14. Howe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 152, 102 SW 409.

15. Such testimony will not be excluded as not corroborative of the complaining witness. Esley v. State, 10 Ohio C. C. (N. S.) 169.

16. Conviction was under § 7024. Word "term" as used in the statute was not intended to mean a definite period of time, but the time within which he continues to fill his engagement. Esley v. State, 10 Ohio C. C. (N. S.) 169.

17. Kerr v. U. S. [Ind. T.] 104 SW 809.

18. Instruction was inapplicable to the case. Kerr v. U. S. [Ind. T.] 104 SW 809.

19. Instructions on the trial for seduction that to constitute seduction it must appear that the carnal intercourse was accomplished by means of a prior promise to marry prosecutrix, that she was an accomplice, and that defendant cannot be convicted on her testimony unless coroborated, are correct. Howe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 152, 102 SW 409. Instruction as to necessity of corroboration held sufficient. State v. Fogg, 206 Mo. 696, 105 SW 618. A requested instruction that it was not sufficient corroboration of the testimony of prosecutrix to show that defendant had promised to marry her was refused as misleading. Where there was evidence not only of such statements to the mother when alone with the prosecutrix, but also that statements of the seduction and promise to marry had been made by prosecutrix to her mother in the presence of the defendant without contradiction by him. State v. Raynor, 145 N. C. 472, 59 SE 344. Evidence held sufficient to corroborate testimony of the prosecutrix as to the renewal of an engagement which had been broken before the act of seduction took place so as to sustain a verdict of guilty. Faulkner v. State [Tex. Cr. App.] 109 SW 199. Defendant's letters, his demeanor on the witness stand, and his admissions, all pointing to his guilt, held sufficient. Howe v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 152, 102 SW 409. Evidence held sufficient to sustain a conviction of seduction. State v. Fogg, 206 Mo. 696, 105 SW 618. Where the mother of prosecutrix testified that defendant admitted in her hearing the promise and the seduction, the testimony of prosecutrix is sufficiently corroborated. State v. Raynor, 145 N. C. 472, 59 SE 344. The testimony of prosecutrix as to the promise of marriage and the carnal intercourse is sufficiently corroborated by proof of circumstances showing the relation and conduct of the parties to each other. Cooper v. State [Ark.] 109 SW 1023.

20. Wilhite v. State, 84 Ark. 67, 104 SW 531.

21. Mansf. Dig. § 1587 (Ind. T. Ann. St. 1899, § 930) provides that no person shall be

Prosecutrix in a seduction case may have her baby with her while testifying.[22]

An instruction that "chastity" means "virtue" and that the woman must have been "chaste and virtuous" at the time she was seduced in order to justify a conviction is proper.[23]

SELF-DEFENSE; SENTENCE; SEPARATE PROPERTY; SEPARATE TRIALS; SEPARATION, see latest topical index.

SEQUESTRATION.[23a]

In New Jersey.—The statute of New Jersey provides that the rents and other receipt from lands held by a cemetery association may be sequestered and applied to judgments recovered against the association [24] and a court of chancery may appoint a receiver for such purpose.[25]

In Texas. See 8 C. L. 1874—One not seeking to recover property purchased but to recover damages for defendant's failure to deliver the same is not entitled to sequestration.[26] The statute provides that an officer retaining sequestered property shall receive compensation and reasonable charges therefor, to be taxed and collected as other costs,[27] and, where plaintiff's right to possession of sequestered property is not disputed and no evidence is offered traversing the affidavit for the writ, he is entitled to the costs of the proceedings.[28] Since sequestration is an ancillary writ, the sureties of a replevin bond may only attack defects in the affidavit and bond and errors in rendering judgment against them without condemning the principal.[29] An interchange of letters in the name of the principal is not necessarily fatal to such bond [30] nor is the use of an improper connection between synonymous words in the affidavit.[31]

Damages for wrongful sequestration. See 8 C. L. 1875—A suit for damages for wrongfully suing out or levying a writ of sequestration may be brought in the county from which the writ issued, where the levy was made, or other county where any defendant resides.[32] Exemplary damages will not be awarded where there was probable cause for suing out the writ of sequestration,[33] and where malice, express or implied,

convicted of having carnal knowledge of any female under promise of marriage unless the female's testimony is corroborated. Tedford v. U. S. [Ind. T.] 104 SW 608.

22. State v. Fogg, 206 Mo. 696, 105 SW 618.

23. Kerr v. U. S. [Ind. T.] 104 SW 809.

23a. See, also, Attachment, 9 C. L. 282; Receivers, 10 C. L. 1465.

24. Under Act Mar. 21, 1881 (P. L. 1881, p. 158, Gen. St. p. 353, § 18), where sale of entire tract unused for cemetery purposes, insufficient. Spear v. Locust Wood Cemetery Co. [N. J. Eq.] 66 A 1068.

25. Spear v. Locust Wood Cemetery Co. [N. J. Eq.] 66 A 1068.

26. Houston v. Booth [Tex. Civ. App.] 20 Tex. Ct. Rep. 795, 107 SW 887.

27. Where defendant is entitled to recover money paid sheriff to regain possession of sequestered property, item should be taxed as costs and not determined by jury, under Rev. St. 1895, art. 4871. Rudolph v. Snyder [Tex. Civ. App.] 20 Tex. Ct. Rep. 720, 106 SW 763.

28. Rudolph v. Snyder [Tex. Civ. App.] 20 Tex. Ct. Rep. 720, 106 SW 763.

29. Sureties not parties to try title to property or liable to judgment unless judgment went against principal. Wandelohr v. Grayson County Nat. Bk. [Tex. Civ. App.] 20 Tex. Ct. Rep. 270, 106 SW 413, afd. [Tex.] 20 Tex. Ct. Rep. 926, 108 SW 1154.

30. Where caption in bond gave correct style of case and plaintiff's name was correctly stated in beginning and correctly signed by him, but in portion stating condition "Hulbert" was written instead of "Hurlbut," bond not rendered invalid thereby. Hurlbut v. Gainor [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 SW 409.

31. Affidavit that defendant will use possession to convert fruits "or" revenue produced by property, not indefinite for use of word "or," since words "fruits and revenues" used in sequestration statute are synonymous. Hurlbut v. Gainor [Tex. Civ. App.] 18 Tex. Ct. Rep. 142, 103 SW 409.

32. Subdivision 8, Sayle's Ann. Civ. St. 1897, art. 1194, not being mandatory in requiring suit to be brought in county of issuance or execution of writ, does not prevail to exclusion of subdivision 4 providing that, where two or more defendants reside in different counties, suit may be brought in any county where one defendant resides. Thomason v. Crawford [Tex. Civ. App.] 18 Tex. Ct. Rep. 675, 103 SW 191. Where defendants, residents in one county, employed by sheriff of another county to remove property levied upon under writ of sequestration. Id.

33. Possession of house and lot by defendant under void contract sufficient justification where plaintiff had legal title. Cobb v. Johnson [Tex.] 20 Tex. Ct. Rep. 709, 108 SW 811.

is shown, evidence relating to injury to defendant's credit, loss of trade and customers, is admissible on the question of exemplary damages.[34]

Where judgment is for actual damages only, it will be presumed that evidence not relating to actual damages was not considered in arriving at a decision,[35] and hence, in such a case, all damages in excess of the actual damages are excessive.[36]

Where a vendor, retaining a lien on land sold, wrongfully sues out a writ of sequestration, the court should allow the purchaser credit on the unpaid notes for the value of the timber cut, and rent while the vendor was wrongfully in possession.[37]

In Louisiana. See 8 C. L. 1875—Since the court may ex officio direct the sequestration of property to protect the right of property,[38] sequestration is proper for wasting revenues thereof or other act rendering sequestration advisable in the interest of the owner.[39] The statute provides that any sequestration of real property whether judicial or otherwise, except in cases of failure, may be released by bond,[40] except that, in the case of joint owners as in the case of a partnership, the trial judge may in his discretion refuse to dissolve the writ on bond.[41]

There is no law or precedent for supplementing a writ of sequestration by a bill of discovery, or order on the defendant to deliver property disclosed by the evidence to be in his possession [42] since the defendant is under no legal obligation to produce property in order that it may be seized,[43] but it is the business of the officer to whom such writs are directed to find and seize the same.[44] A writ of sequestration, therefore, can be enforced only by the process of contempt issued in aid of the writ not directed to the defendant and not commanding him to do anything.[45] Even where the ownership has been adjudicated and the defendant ordered to deliver a specific object to the plaintiff, the writ of possession is the only mode of executing judgment,[46] and where the defendant conceals the object or carries it out of the jurisdiction of the court, the remedy is by action of damages or writ of distringas.[47]

SERVICE, see latest topical index.

SET-OFF AND COUNTERCLAIM.

§1. Nature and Extent of Right in General, 1624.
§ 2. To be Available as a Set-off or Counterclaim, a Demand Must, Ordinarily, Have Been a Vested and Subsisting Cause of Action at the Time of the Commencement of Plaintiff's Suit, 1626.
§ 3. Demands Must Be Mutual, and the Parties Must Stand in the Same Right and Capacity, 1626.
§ 4. To Admit of Set-Off or Counterclaim the Main Action Must be Similar in Form and Remedy to That Required for the Other, 1627.
§ 5. Pleading and Practice, 1628.

34. Falls City Clothing Co. v. Cannon [Tex. Civ. App.] 20 Tex. Ct. Rep. 103, 106 SW 189.

35. Evidence relating to injury to defendant's credit, loss of trade, customers, etc., presumed to have been ignored. Falls City Clothing Co. v. Cannon [Tex. Civ. App.] 20 Tex. Ct. Rep. 103, 106 SW 189.

36. Four hundred dollars held excessive where plaintiff sold stock of goods, sequestered same after defendant became financially involved, broke into building with sheriff, boxed up goods and defendant replevied before removal. Falls City Clothing Co. v. Cannon [Tex. Civ. App.] 20 Tex. Ct. Rep. 103, 106 SW 189.

37. Moore v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 700, 103 SW 242.

38. Code Prac. 273. Interstate Land Co. v. Doyle [La.] 44 S 918.

39. Under Code Prac. art. 274, where attempt is made to end indivision of ownership where each of joint owners claims possession of undivided half and there was contention that revenues were wasted. Interstate Land Co. v. Doyle [La.] 44 S 918.

40. Concluding paragraph Code Prac. 274, controlled by Code Prac. 279. Jackson v. Crillton [La.] 46 S 101.

41. Interstate Land Co. v. Doyle [La.] 44 S 918.

42. Where defendant refused to deliver certain stock. Ansley v. Stuart, 119 La. 1, 43 S 892.

43, 44, 45. Ansley v. Stuart, 119 La. 1, 43 S 892.

46. Civ. Code, 634. Ansley v. Stuart, 119 La. 1, 43 S 892.

47. Civ. Code, 635. Ansley v. Stuart, 119 La. 1, 43 S 892.

Set-off of judgments [48] and effect of failure to assert set-off [49] are elsewhere treated.

§ 1. *Nature and extent of right in general. Equitable set-off.* See 8 C. L. 1875—Courts of equity are particularly liberal,[50] in so far as consistent with the rights of third parties, in allowing set-offs to minimize loss from insolvency.[51] The right of set-off against the receiver of an insolvent corporation rests upon the receiver's right to settle debts and allow just set-offs under corporation acts,[52] and whether a set-off is just or not depends upon the contractual relations between the parties.[53] Mere nonresidence of plaintiff is not a ground for this sort of relief,[54] nor can unliquidated damages [55] or a claim which requires adjudication in a law court be set off in an equitable suit; [56] nor, where he has been compensated by the value of timber converted, has one evicted a claim for taxes paid [57] or for attorney's fees,[58] nor can unpresented claims be availed of; [59] but the mere fact that counterclaims might have been set up in a former suit does not bar the right to enforce them in a subsequent suit between the same parties.[60]

Statutory set-off and counterclaim. See 8 C. L. 1876—The right to set-off and counterclaim is now in most states entirely statutory, and such statutes are to be strictly construed.[61] It is generally provided that a counterclaim or set-off must be either a cause of action arising out of the transaction set forth [62] in the complaint as a basis of plaintiff's claim [63] or connected with the subject of the action,[64] or in an action

48. See Judgments, 10 C. L. 467.

49. See Former Adjudication, 9 C. L. 1422.

50. Citizen's Bk. of Greenville v. Kretschmar [Miss.] 44 S 930.

51. Childress v. Jordan [Va.] 58 SE 563. Where one partner buys out another, assuming the indebtedness, and subsequently becomes insolvent, whereupon the retiring partner pays the indebtedness out of a sum which he owes the insolvent, he is entitled in equity to have the sum so paid applied on his indebtedness. Id.

52. Not controlled by the statute of set-off. Stone v. New Jersey, etc., R. & Ferry Co. [N. J. Law] 66 A 1072.

53. Loss covered by a mutual insurance company cannot be set off in an action by the receiver to recover assessments. To allow this would be a preferment of creditors. Stone v. New Jersey, etc., R. & Ferry Co. [N. J. Law] 66 A 1072.

54. Where there is an agent within the state upon whom service might be made. Plattner Implement Co. v. Bradley, Alderson & Co. [Colo.] 90 P 86. Set-off, however, did not arise from the cause of action sued upon. Id.

55. Bramblett v. Slemp [Ky.] 108 SW 339.

56. Adjudication that an estate is liable on a claim. Ostheimer v. Single [N. J. Eq.] 68 A 231.

57, 58. Citizens' Bk. v. Jeansonne [La.] 45 S 367.

59. In an action by an executor or administrator, claims are not available as set-off which have not been presented for allowance. Moore v. Gould, 151 Cal. 723, 91 P 616. But in an action to foreclose a vendor's lien by vendor's executor, equity will permit defendant to set off damages sustained from breach of warranty though he has not filed his claim therefor against vendor's estate, since both demands arise from the same transaction. Crawford v. McDonald, 84 Ark. 623, 106 SW 206.

60. Especially where, in the former suit the corporation defendant was misrepresented by negligent directors and judgment confessed. Elliott v. Farmers' Bk. of Philippi, 61 W. Va. 641, 57 SE 242.

61. D'Amelio v. Abraham, 54 Misc. 386, 105 NYS 1019. A statute providing that where there shall have been mutual dealing between parties and one shall die before an adjustment thereof the lawful demands of each parties against each other shall be a set-off to the amount thereof, notwithstanding the estate of the deceased person shall be insolvent, does not include a demand entirely disconnected with the transaction from which the demand sued upon arises. And such demand to be available must have been probated. Cohn v. Carter [Miss.] 46 S 60. Other provisions are that where an action is founded upon a contract which has been assigned, other than a negotiable promissory note or bill of exchange, a demand existing at the time of the assignment and belonging to defendant before notice of the assignment must be allowed as a counterclaim against the assignee if it might have been so allowed against the party to the contract at the time of the assignment (D'Amelio v. Abraham, 54 Misc. 386, 105 NYS 1019); that where two causes of action in which a party is plaintiff in one and defendant in the other, and vice versa, have been reduced to judgments and executions thereon placed in the hands of the sheriff, they off set each other to the extent of their amounts (Caldwell v. Ryan [Mo.] 108 SW 533). And this right of set-off is not barred by the fact that one of the judgments is for the wrongful conversion of exempt property, the statute of set-off being of equal dignity with that of exemption. Id.

62. Uvalde Asphalt Pav. Co. v. Morgan Cont. Co., 120 App. Div. 498, 104 NYS 1118.

63. Damages for breach of contract may be set up as counterclaim in an action by a

on contract any other cause of action also on contract and existing at the commencement of the action,[65] and that it must tend to diminish or defeat plaintiff's recovery.[66] Counterclaims will only be allowed to an amount equalling the plaintiff's demand.[67] A statement of facts sufficient to constitute a cause of action is not alone sufficient,[68] nor is it sufficient to state a cause of action identical with plaintiff's.[69] A statute extending the rights to set-off does not alter or modify a statute limiting the right of set-off, in an action against principal and surety, to cases in which the demand is due the principal.[70] The right given by statute to plead, in mitigation of damages, liens which have been extinguished by conversion, is not affected by the statute defining matters which may be pleaded as counterclaims.[71] In Alabama any demand capable of measurement in a legal sense by a pecuniary standard, not sounding in damages merely, may be set off against that claimed whether the action be ex contractu or ex delicto.[72] Suit upon an open account is not upon a certain demand,[73] and a counterclaim for unliquidated damages may be pleaded thereto.[74]

subcontractor against the contractor to recover material left at the place of work, under § 5069, Rev. St. Ohio, 1906, since both causes of action arise from the same transaction. Baer v. Sleicher [C. C. A.] 153 F 129. In an action to recover the price of goods sold by defendant for plaintiff, defendant cannot off set commissions due him under a separate contract for purchasing goods for plaintiff, since this claim does not arise out of the transactions sued upon and is not connected with the subject of the suit as required by Code Civ. Proc. § 96. Allen v. Hodge [Ky.] 106 SW 255. Where the subject-matter of suit is the nonpayment of a claim, damage caused by the method of enforcing payment cannot be set off. Uvalde Asphalt Pav. Co. v. Morgan Cont. Co., 120 App. Div. 498, 104 NYS 1118. § 501, Code Civ. Proc. A cause of action arising out of a modification of the contract sued upon is within such a provision where the original contract is the foundation upon which both parties rely for recovery. Mills' Ann. Code, § 57, subd. 1. Bannerot v. McClure, 39 Colo. 472, 90 P 70.

64. This does not require that the connection exists at every point of the relief sought by plaintiff. It is sufficient if the facts constituting the counterclaim will defeat or diminish plaintiff's recovery and are such as entitle defendant to affirmative relief. Telulah Paper Co. v. Patten Paper Co. [Wis.] 112 NW 522. If connected with the subject of the action, it need not arise out of the contract or transaction set forth in the petition. Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544. The subject of plaintiff's action is his right and the invasion of that right by the defendant. Brahm v. M. C. Gehl Co. [Wis.] 112 NW 1097. A counterclaim is "connected with the subject" of plaintiff's suit and is available where in an independent action on the affirmative defense the facts of plaintiff's case would necessarily be involved. Reynolds v. Dickson [Wash.] 93 P 910. In an action for rescission of sale of farm on cancellation of mortgage, defendant may set off damages for nonpayment of incumbrance on farm and ask for foreclosure of mortgage. Id. Claims connected merely with the physical property or with the relief involved in plaintiff's action may not be counterclaims. Brahm v M. C. Gehl Co. [Wis.] 112 NW 1097. In an action on notes for money loaned, a claim for damages arising from plaintiff's false statements of the solvency of a partnership, by which defendant was induced to become a member thereof, is not connected with the subject of the suit. Kirby's Dig. § 6098. Daniel v. Gordy, 84 Ark. 218, 105 SW 256. In a suit to adjudge fraudulent certain shares of stock, etc., by a corporation, the latter cannot plead in counterclaim that plaintiff holds funds in trust for it, this not being connected with the subject of the suit. § 2656, St. 1898. Brahm v. M. C. Gehl Co. [Wis.] 112 NW 1097.

65. In an action for goods sold and delivered, defendant may set off unearned commissions advanced to plaintiff's assignor under another contract than the one sued upon. Kowdy v. Sav. Fund Loan Ass'n, 31 Pa Super. Ct. 52. But a cause of action arising out of a contract independent of the contract sued upon is not a proper counterclaim under this provision where it does not defeat or diminish plaintiff's claim. Mill's Ann. Code, § 57, subd. 2. Bannerot v. McClure, 39 Colo. 472, 90 P 70. Damages for breach of certain covenant of lease may be set off in an action by lessee to recover money deposited as security for the performance of other conditions of the lease which were performed. Code Civ. Proc. § 501, subd. 2. Jacobowitz v. Strasbourger, 108 NYS 698. In an action for conversion of a trust fund, defendant cannot set off an indebtedness from plaintiff to himself in existence prior to the deposit of the trust fund in the absence of any agreement to that effect, though both claims are on contract. Randolph v. Walker [S. C.] 59 SE 856.

66. Mills' Ann. Code, § 57. Bannerot v. McClure, 39 Colo. 472, 90 P 70.

67. Municipal Court Act, Laws 1902, p. 1539, c. 580, § 152, subd. 3. Cebrelli v. Franklin Cont. Co., 107 NYS 566.

68. Greene v. Hereford [Ariz.] 95 P 105.

69. A counterclaim is in the nature of a cross bill in equity. White v. Smith [Wis.] 114 NW 106.

70. Sections 3298, 3299, Code 1887. Stimmel v. Benthall [Va.] 60 SE 765.

71. Such liens are not properly counterclaims. Force v. Peterson Mach. Co. [N. D.] 116 NW 84.

72. Section 3728, Code of 1896. Morris v.

Recoupment.[See 8 C. L. 1878]—Recoupment is entirely unlike set-off which is in the nature of a cross action and may rest on an independent demand where it does not sound in damages merely.[75] It is also to be distinguished from failure of consideration [76] which may be shown under a plea of nonassumpsit.[77] Damages which may be recouped are only those which flow from the identical contract breached,[78] and the contract for a breach of which damages are asked in recoupment must arise from or be related to the very contract or transaction sued upon.[79] A special plea of recoupment is good as a notice of recoupment if it in fact notifies plaintiff of the claim [80] though not filed until the first day of the trial.[81]

§ 2. *To be available as a set-off or counterclaim, a demand must, ordinarily, have been a vested and subsisting cause of action at the time of the commencement of plaintiff's suit.*[See 8 C. L. 1878]—A claim which cannot be adjudicated until the happening of a future event is not a subject of set-off.[82] Nor is an unliquidated demand, the amount of which must be determined in another proceeding.[83] Set-off against an insolvent will be allowed if it was due when the creditor's rights attached whether the debt sued on was due at the same time or matured subsequently.[84]

§ 3. *Demands must be mutual, and the parties must stand in the same right and capacity.*[85]—The cause of action alleged in a counterclaim must exist in favor of the defendant who pleads it [88] and against the plaintiff,[87] though, in an action by

Bank of Attalla [Ala.] 45 S 219. A claim for conversion of chattels by plaintiff may be set off in an action for the conversion of other chattels. Id.

73. Suit upon an open account is not upon a certain demand within Rev. St. 1895, art. 754, providing that when plaintiff's suit is on a certain demand defendant shall not be permitted to set off an uncertain demand founded on tort or breach of covenant. Hallinan v. Levytansky [Tex. Civ. App.] 18 Tex. Ct. Rep. 479, 102 SW 463.

74. Hallinan v. Levytansky [Tex. Civ. App.] 18 Tex. Ct. Rep. 479, 102 SW 463. Verification of the account does not make it a certain demand. Id.

75. Dalton v. Bunn [Ala.] 44 S 625.

76. In an action on notes given for the purchase price of a saloon and for the rent of a saloon and the privilege of re-renting, a plea alleging damage from plaintiff's failure to accord such privilege sets up failure of consideration and not recoupment. McClanahan v. Caul [W. Va.] 60 SE 382.

77. McClanahan v. Caul [W. Va.] 60 SE 382.

78. Gem Knitting Mills v. Empire Print. & Box Co. [Ga. App.] 60 SE 365. So where there are several shipments of goods, each under a separate contract, damage from delay in one cannot be set off in an action for the purchase price of another. Id. Overpayments may be recouped in an action to recover wages. Wiseberg v. Novelty Hat Mfg. Co. [Ga. App.] 59 SE 1112.

79. A plea which fails to state facts showing this is demurrable. Dalton v. Bunn [Ala.] 44 S 625.

80. McClanahan v. Caul [W. Va.] 60 SE 382.

81. Since the time of notice required is not specified and plaintiff, if surprised, may have a continuance. McClanahan v. Caul [W. Va.] 60 SE 382.

82. In dower proceeding, a claim against the estate cannot be set off before final administration. Ostheimer v. Single [N. J. Eq.] 68 A 231.

83. Payment of a partnership debt by one partner cannot be set off by him where sued by the other partner on his individual notes because the amount of his liability on the indebtedness is undetermined. Reim v. Bissinger [N. J. Law] 68 A 88. Under Rev. St. § 1059, U. S. Comp. St. 1901, p. 734, a demand in favor of the United States may be set off against a claim filed previous to its existence. Allen v. U. S., 204 U. S. 581, 51 Law. Ed. 634.

84. Citizens Bk. v. Kretchmar [Miss.] 44 S 930.

85. See 8 C. L. 1878. Such demands as would sustain mutual actions against each other. Yet whenever there is a practicability of avoiding circuity of actions and needless costs, or a special equity to be subserved, without prejudice to third parties, set-off will be allowed though the case is not within the statute. Craighead v. Swartz [Pa.] 67 A 1003.

86. Rogers v. Kelsey, 105 NYS 119. A debt due a firm cannot be set off in an action against individual members. Though, when a judgment for plaintiff would in effect be against the firm, the other partners may be made parties and the partnership claim set off. State v. Allen, 124 Mo. App. 465, 103 SW 1090. Stockholders sued by a creditor of the corporation to recover unpaid subscriptions cannot set off an indebtedness of the creditor to the corporation also for unpaid subscriptions. Blood v. La Serena Land & Water Co., 150 Cal. 764, 89 P 1090. In an action for work and labor, defendant cannot set off damage to another's building. Rogers v. Kelsey, 105 NYS 119. But the rule that a counterclaim must be available to all defendants does not apply to a party named as defendant but not served with process. Richardson v. Richardson, 134 Iowa, 242, 111 NW 934.

87. Craighead v. Swartz [Pa.] 67 A 1003. A

an assignee, defendant may avail himself of any defense he might have against the assignor,[89] and in an action by undisclosed principal he may set-off any claim he may have against the agent.[89] It is the duty of a personal representative to avail himself of any counterclaim existing in favor of the testator.[90] Though a counterclaim exceeds plaintiff's demand, judgment for such excess may not be had in certain cases.[91] The rule that mutual obligations for the payment of money cancel each other is not altered by the insolvency of either party.[92]

§ 4. *To admit of set-off or counterclaim the main action must be similar in form and remedy to that required for the other.*[See 9 C. L. 1879]—A claim in contract will not off-set one in tort,[93] nor will unliquidated damages, sounding either in tort [94] or breach of covenant,[95] be set-off in an action ex contractu, unless both causes of action arise out of or are incident to the same transaction.[96] A claim is liquidated whenever the amount thereof is agreed upon by the parties or fixed by operation of law.[97] Damages incapable of liquidation [98] are never matter of set-off [99] unless

counterclaim against a husband is not available in an action brought by the wife unless the husband is made a party. Campbell v. Kerns, 13 Idaho, 287, 90 P 108. Nor can a claim be set off against a partnership which is not against the firm. Clevenger v. Galloway [Tex. Civ. App.] 19 Tex. Ct. Rep. 858, 104 SW 914. In an action against a sheriff for damages for wrongful sale of property, he cannot set off the amount realized on the sale, since the judgment creditor is not a party to the suit. The judgment creditor's rights cannot be interposed, he not being a party to the suit. State v. Dickman, 124 Mo. App. 653, 102 SW 44. But in an action for the purchase price of ties, conversion of them by a third party who claimed title is a proper matter of set-off, since the demand is directly connected with the subject-matter of the action. Hall v. Ayer & Lord Tie Co., 31 Ky. L. R. 508, 102 SW 867.

88. Durant Lumber Co. v. Sinclair Lumber Co., 2 Ga. App. 209, 58 SE 485. Action for goods sold by one who has filled orders taken by his predecessor in business. Id. Maker of notes may set off liability incurred as indorser of payee when sued by assignee of notes. Craighead v. Swartz [Pa.] 67 A 1003. In suit on a promissory note by a holder with notice against the maker, the latter may set off any claim against the payee to the extent of the amount due on the note which is in any way connected with the debt sued on or the transaction from which it sprung. Civ. Code 1895, §§ 3750, 4944. Butler v. Mitchell, 128 Ga. 431, 57 SE 754. And if the holder is the receiver of an insolvent bank against which defendant also has a claim, and there is an issue as to the bona fides of the holder, and it is rendered doubtful whether defendant will be able to set off the demand against the payee, he may plead both demands by way of counterclaim and receive judgment for the excess. Id. But defendant cannot set off claims against the assignor which he has bought after notice of the assignment, though he may set off claims bought up against the assignee. Bramblett v. Slemp [Ky.] 108 SW 339. Nor, in an action by assignees to enforce a judgment for the price of land, can defendant off set unliquidated damages arising from trespass to the land by the assignors, in the absence of proof that it was committed prior to the assignment, and that assignors were insolvent at the time of the assignment. Id.

89. Whether or not it arises out of the contract sued upon. Durant Lumber Co. v. Sinclair Lumber Co., 2 Ga. App. 209, 58 SE 485.

90. Ft. Miller Pulp & Paper Co. v. Bratt, 119 App. Div. 684, 104 NYS 350. § 505, Code Civ. Proc. Damage to land from flowage caused by a mortgagee occurring both prior and subsequent to mortgagor's death, may be set off against the mortgage. Id.

91. In an action against a city to recover damages for lowering the grade of a street, the city cannot recover over on a counterclaim for benefits even if the property was rendered more valuable. City of Owensboro v. Yewell, 31 Ky. L. R. 858, 104 SW 284. In an action on an apportionment warrant, by assignees thereof, to recover the costs of a grade, defendant cannot recover on a counterclaim for any amount greater than the assignees would be entitled to upon the warrant. Nell v. Power [Ky.] 107 SW 694.

92. Citizens' Bk. v. Kretchmar [Miss.] 44 S 930.

93. Though the statute provides that debts of a different nature may be off set against each other. Ann. St. 1906, p. 2457. Caldwell v. Ryan [Mo.] 108 SW 533. Demand in contract not available in action for conversion. Goldberger v. Leibowitz [Colo.] 93 P 1108. But see Baer v. Sleicher [C. C. A.] 153 F 129, where damages for breach of contract were counterclaimed in replevin.

94. In an action on notes given for the purchase price of timber, damage arising from a subsequent tortious sale of the land can not be set off (McLendon Bros. v. Finch, 2 Ga. App. 421, 58 SE 590), nor can the sum received on the sale of the land be set off where none of it was paid for the timber (Id.).

95. Brooks Tire Mach. Co. v. Shields [Tex. Civ. App.] 108 SW 1005.

96. Brooks Tire Mach. Co. v. Shields [Tex. Civ. App.] 108 SW 1005. In an action on a note and to foreclose a lien, defendant may counterclaim for unliquidated damages for negligent injury to defendant's crops growing on premisses rented of plaintiff where there is sufficient association between the two claims. Steiner v. Oliver [Tex. Civ. App.] 20 Tex. Ct. Rep. 573, 107 SW 359.

97. As where an agreed price is sought to

the parties have agreed that they shall be,[1] nor are vague and speculative damages.[2] In an action on contract, damages arising from its breach may be counterclaimed,[3] as may any demand, usually growing out of the transaction sued upon;[4] and, on the other hand, to be a subject of set-off or counterclaim, the demand must arise from the transaction sued upon or be connected therewith,[5] though a bank may set-off a matured claim due it from a customer against his general deposit.[6] A claim resting in parol may be set-off in a proceeding by scire facias on a mortgage,[7] and two distinct causes of action may compensate each other when consolidated.[8] While it has been held that a counterclaim is not a defense which defeats a cause of action, although it may defeat recovery by way of recoupment,[9] it has also been held that it may be a defense, and the fact that it is one is no objection to its being used as a counterclaim.[10] Set-off lies for overpayments,[11] and one claim sounding in tort off-sets another when coincident to it.[12]

§ 5. *Pleading and practice.* See 8 C. L. 880—Matters of set-off and counterclaim must be pleaded to be available.[13] The plea must state facts showing a cause

be recovered. Brooks Tire Mach. Co. v. Shields [Tex. Civ. App.] 108 SW 1005.

98. As where the amount depends upon the testimony of witnesses. Clevenger v. Galloway [Tex. Civ. App.] 19 Tex. Ct. Rep. 858, 104 SW 914.

99, 1. Somerset Colliery Co. v. John [Pa.] 68 A 843.

2. Evans v. Lyon, 33 Pa. Super. Ct. 255.

3. Jones v. Hoffman, 150 Mich. 129, 14 Det. Leg. N. 647, 113 NW 316. Expenses incurred by defendant in endeavoring to carry out a contract after breach by plaintiff. Evans v. Lyon, 33 Pa. Super. Ct. 255. Where time is of the essence of the contract, damage for failure to deliver on the agreed date. Biele v. Levy, 107 NYS 607. And where it is agreed that a certain sum due on a contract shall be retained as security for performance, damages for nonperformance are a proper set-off against such sum. Schoenfeld v. Karnes City Independent School Corp. [Tex. Civ. App.] 109 SW 406.

4. In an action to recover goods sold, the value of goods given in exchange may be recovered by defendant. Jesse French Piano & Organ Co. v. Williams [Tex. Civ. App.] 102 SW 948. In an action to recover real estate, facts showing title in defendant, derived from plaintiff's assignor to whom plaintiff had assigned as security, are matters of counterclaim, since they are connected with the transaction sued upon. Gray v. Granger [Wash.] 93 P 912.

5. In an action for the purchase price of goods, defendant cannot set up breach of warranty of other goods sold under a separate contract. Brooks Tire Mach. Co. v. Shields [Tex. Civ. App.] 108 SW 1005. In an action to recover attorney fees for purchasing land, defendant may not set up as a counterclaim plaintiff's failure to deed other lands purchased for defendant. Greene v. Hereford [Ariz.] 95 P 105. In an action on a judgment by assignees thereof, attorney fees which are not lien on the judgment are not matter of set-off. Bramblett v. Slemp [Ky.] 108 SW 339.

6. Bank of Lawrenceville v. Rockmore, 129 Ga. 582, 59 SE 291.

7. The fact that there was a parol agreement that the claim should be an off-set on the mortgage does not bring the case within the parol evidence rule since, under the defalcation act, any claim which is a proper subject of set-off, may be so used. Somerset Colliery Co. v. John [Pa.] 68 A 843.

8. Harpold v. Moss [Tex.] 109 SW 928.

9. Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544.

10. Telulah Paper Co. v. Patten Paper Co. [Wis.] 112 NW 522.

11. In an action to recover wages. Wiseberg v. Novelty Hat Mfg. Co. [Ga. App.] 59 SE 1112. Overpayments made by the United States to an officer in an action to recover fees. Allen v. U. S., 204 U. S. 581, 51 Law. Ed. 634.

12. Assault and battery following a trespass. Morgan v. Langford, 126 Ga. 58, 54 SE 818.

13. In an action for goods sold proof of a return of a portion of them, of damages, and of the giving of a check, which was never presented for payment, to plaintiff's assignor, for the difference between the value of the goods and claims owing defendant, are matters of set-off and cannot be shown under a plea of payment. Thalmann v. Lewis, 121 App. Div. 836, 106 NYS 1056. The plea may be in the form of a notice accompanying the general issue or plea of payment. Wilson v. Wilson, 125 Ill. App. 385. Claims in the nature of a set-off, such as rent overpaid in an action of assumpsit to recover proceeds from sale of land, cannot be raised under the general issue alone, though demands connected with the transaction sued upon which merely reduce plaintiff's claim, such as payments on account, may be. Sawyer v. Van Deren [N. J. Err. & App.] 66 A 393. In action to recover for services, defendant cannot under the general issue set up debts owing him by plaintiff, which do not arise out of the subject-matter of the suit. Wilson v. Wilson, 125 Ill. App. 385. However, a failure to object to evidence of a garnishee defendant's set-off against the principal debtor on the ground that it was inadmissible because no off-set had been pleaded waives such defect, the technical rules of set-off not being applied in such a case. Mei-

of action in favor of the party alleging it,[14] and is governed as to its sufficiency by the same rules as govern the averments of a declaration.[15] While it has been held unnecessary to repeat in each counterclaim all the facts necessary to make it complete,[16] other courts hold that a counterclaim must be complete in itself and that a reference to matter pleaded elsewhere in the same pleading is not sufficient;[17] and where a plea of counterclaim is entirely dependent upon a preceding paragraph which is stricken, it is properly disposed of in the same manner;[18] it should also be stricken when fully covered by another plea.[19] Mere recitals or conclusions are insufficient.[20] Where both motion and demurrer are urged against a counterclaim, it is immaterial by which it is disposed of.[21] Strict rules of pleading do not apply to defense by way of set-off,[22] though, where a statute requires a statement of the items of set-off to be filed with the plea, the statement is essential,[23] and the plea cannot be amended by filing the statement after the cause is at trial.[24] However, a defective affidavit of defense may be cured by a supplemental one.[25] Error in overruling a demurrer to a counterclaim is waived by answering to the merits,[26] while by moving for an instructed verdict and obtaining a favorable ruling, defendant waives his counterclaim.[27] A counterclaim, defective in that it does not arise out of the transaction sued upon, may become available by the admission without objection, of testimony in its support.[28] Under a statute authorizing the court to allow distinct causes of action between the same parties to be consolidated in one suit,[29] plaintiff, after abandoning his cause of action to which set-off has been interposed, may be permitted on motion to reinstate his complaint,[30] and plaintiff will be credited with the amount due him on a contract which is a part of defendant's counterclaim, though not al-

ton Hardware Co. v. Heidelberg [Miss.] 44 S 857.

14. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871; Cobb Chocolate Co. v. Crocker-Wheeler Co., 125 Ill. App. 241. Where its failure to do so is called to defendant's attention upon the trial and he fails to move to amend, he thereby loses the right. Thalmann v. Lewis, 121 App. Div. 836, 106 NYS 1056. In an action to cancel a lease for breach of contract, allegations by defendant of performance, setting forth dealings of the parties, and asking for specific performance make a good counterclaim. Merrill v. Hexter [Or.] 94 P 972.

15. Where based on damages, it is defective if it fails to state the damages suffered. Cobb Chocolate Co. v. Crocker-Wheeler Co., 125 Ill. App. 241. The mere showing of a defect in work performed under the contract sued upon is not sufficient. McKeige v. Carroll, 120 App. Div. 342, 105 NYS 342. A mere conclusion, unsupported by allegations of fact showing the extent of the damage, is insufficient. Nell v. Power [Ky.] 107 SW 694. A counterclaim may be sufficient as against a general demurrer though lacking in clearness and precision of statement. Fish v. First Nat. Bk. of Seattle [C. C. A.] 157 F 87.

16. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871. If this is not done there must be an intelligible reference to other parts of the plea for such facts. A reference to contracts containing guaranties and alleging a breach thereof is sufficient without setting forth the contracts, providing they appear elsewhere in the plea. Id.

17. Aetna Life Ins. Co. v. North Star Mines Co., 56 Misc. 164, 107 NYS 140.

18. Brooks v. Boyd, 1 Ga. App. 65, 57 SE 1093.

19. Moore v. Gould, 151 Cal. 723, 91 P 616.

20. Groton Bridge & Mfg. Co. v. American Bridge Co., 151 F 871. It must state the facts from which the claim arises. Aetna Life Ins. Co. v. North Star Mines Co., 56 Misc. 164, 107 NYS 140; Cobb Chocolate Co. v. Crocker-Wheeler Co., 125 Ill. App. 241.

21. Greene v. Hereford [Ariz.] 95 P 105.

22. Stimmel v. Benthall [Va.] 60 SE 765.

23. Battey v. Warner [R. I.] 67 A 63.

24. Battey v. Warner [R. I.] 67 A 63. This decision seems to have been somewhat induced by the fact that testimony in regard to the items of set-off went to the jury anyway. Id. The affidavit of defense should state the exact amount of set-off claimed, unless, for reasons shown, this is impossible. Joseph Schlitz Brew. Co. v. Rosenbluth, 33 Pa. Super. Ct. 303. But a failure to do so will not cause a reversal where the amount is positively asserted to be greater than the amount of the balance of the claim for which judgment had not been taken before the rule to show cause why the affidavit should not be dismissed was granted. Id.

25. Evans v. Lyon, 33 Pa. Super. Ct. 255.

26. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 NW 820.

27. Miller v. McGannon [Neb.] 113 NW 170.

28. Reynolds v. Dickson [Wash.] 93 P 910.

29. Gen. St. 1902, §§ 712-765. Boothe v. Armstrong [Conn.] 67 A 484.

30, 31. Boothe v. Armstrong [Conn.] 67 A 484.

leged in his complaint.[31] Judgment on a counterclaim will not be given without a trial merely because plaintiff has withdrawn his complaint,[32] and the withdrawal does not oust the court of jurisdiction to try the issues raised by the counterclaim.[33] A counterclaim may be docketed as a separate cause of action.[34] Defendant, in an action by the state, may maintain a counterclaim, though he could not have set it up as an original cause of action, for the reason that a citizen cannot sue the state without its consent.[35] One is not obliged to plead his counterclaim, but may reserve it for a cross action.[36] Any claim arising from failure to charge an indorser must be asserted either in an independent action or by way of counterclaim.[37] One pleading an assigned claim as set-off should allege ownership thereof.[38] Where cross complaints have been abolished, the designation of a counterclaim as such is not material when not misleading.[39] The appellate court will not qualify or limit defendant's proof or define the extent of the counterclaim.[40] Whether a demand is liquidated so as to bar the off-set of an unliquidated demand must be determined from the petition alone.[41] The rule that a demurrer reaches the first bad pleading does not apply to a demurrer to a counterclaim.[42]

Jurisdiction.—The district court has jurisdiction to determine the cause of action set up in the counterclaim.[43]

*Evidence.*See 8 C. L. 1332

*Instructions.*See 8 C. L. 1448

*Limitations.*See 8 C. L. 1446—The claim may be barred by the statute of limitations,[44] hence, an off-set based on the conversion of property is barred in two years,[45] but in an action of accounting, a counterclaim which accrued during the period for which an account is ordered is not barred by the statute of limitations.[46] A counterclaim may be set up by an amendment to the answer after a judgpent in defendant's favor has been reversed and the cause remanded for a new trial.[47]

SETTLEMENT OF CASE; SETTLEMENTS; SEVERANCE OF ACTIONS, see latest topical index.

32. Balleisen v. Schiff, 121 App. Div. 285, 105 NYS 692.

33. Balleisen v. Schiff, 121 App. Div. 285, 105 NYS 692. In an action involving title to real estate when defendant alleges affirmative matter and title in himself, plaintiff can not nonsuit. Gray v. Granger [Wash.] 93 P 912.

34. Thereby jurisdiction may be obtained over a nonresident who is plaintiff in the original action. § 5089, Rev. St. Ohio, 1906. Baer v. Sleicher [C. C. A.] 153 F 129.

35. Commonwealth v. Barker, 31 Ky. L. R. 648, 103 SW 303.

36. Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544. When this is done, §§ 817, 818, Code Civ. Proc., does not authorize consolidating the actions since the plaintiffs are not the same. Miller v. Baillard, 108 NYS 973. And the rule that defendant cannot recover his costs in such cross action does not apply where he had no notice of the original action. Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544.

37. Not by vacation of judgment. Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544.

38. Bramblett v. Slemp [Ky.] 108 SW 339.

39. Merrill v. Hexter [Or.] 94 P 972.

40. Miller Pulp & Paper Co. v. Bratt, 119 App. Div. 684, 104 NYS 350.

41. Brooks Tire Mach Co. v. Shields [Tex. Civ. App.] 108 SW 1005.

42. Aetna Life Ins. Co. v. North Star Mines Co., 56 Misc. 164, 107 NYS 140.

43. That a probate court has no jurisdiction to determine matters pleaded in counterclaim is no objection to such a plea in an action in a district court against executore for the establishment of a claim. Iowa-Minnesota Land Co. v. Conner [Iowa] 112 NW 820.

44. In an action to foreclose a mortgage, claims for attorney's fees and for goods sold and delivered, are not such cross demands as compensate the mortgage debt pro tanto, under § 440, Code Civ. Proc., and when barred by the statute of limitations are unavailable. Moore v. Gould, 151 Cal. 723, 91 P 616. See Code Civ. Proc. § 438, subd. 2.

45. Clevenger v. Galloway [Tex. Civ. App.] 19 Tex. Ct. Rep. 858, 104 SW 914.

46. Code Civ. Proc. § 440. Dillon v. Cross, 5 Cal. App. 766, 91 P 439; Elliott v. Philippi Farmers' Bk., 61 W. Va. 641, 57 SE 242; Schubert v. State Banking & Trust Co., 6 Ohio N. P. (N. S.) 544.

47. Counterclaim is really an independent action and a failure to plead it in the first instance is not a bar. Commonwealth v. Barker, 31 Ky. L. R. 648, 103 SW 303.

SEWERS AND DRAINS.

§ 1. State and Municipal Authority and Control, 1631.
§ 2. General Powers Under the Various Statutes, 1631.
§ 3. Independent Organizations Controlling Drainage, Reclamation, and Sanitation, 1632.
§ 4. Procedure in Authorization and Construction of Sewers and Drains, 1633.
§ 5. Compensation to Property Owners for Lands Taken or Damaged, 1640.
§ 6. Provision for Cost, 1641.
§ 7. Management and Operation; Duty to Properly Construct, Maintain, and Repair Works, and Provide Drainage, 1646.
§ 8. Private and Combined Drainage, 1647.
§ 9. Obstruction of Drains, 1648.

The scope of this topic is noted below.[47a]

§ 1. *State and municipal authority and control.* See 8 C. L. 1882—Public drainage legislation based upon the inherent police power of the state is generally held to be constitutional.[48] The fact that the portion of the statute providing for the assessment of damages for land condemned by the district is unconstitutional, does not render the entire act void.[49] In Indiana it has been held that contribution by a county to the construction of bridges forming part of the highway affected by a drain does not deprive the legislature of power to establish the drain in a proceeding to which the township is a party.[50]

§ 2. *General powers under the various statutes.* See 8 C. L. 1883—The Wisconsin statute provides that, where the proceedings to establish a drainage district under an old law replaced by a new one have not been completed, they may be carried to completion under the new law in case the court shall so order.[51] In Illinois the commissioners of one drainage district may enlarge any channel within another district by agreement with the commissioners of the latter, and incidental thereto obligate themselves to construct a bridge across the drain.[52] Under the Minnesota statute, when in the opinion of the county board, benefits of a private nature accruing to the people in the vicinity are of a certain value, or when the public health demands, it is their duty to order the construction of a drainage ditch.[53] The Nebraska drainage acts do not permit the organization of a corporation in furtherance of private inter-

47a. Matters relating to eminent domain proceedings (see Eminent Domain, 9 C. L. 1073), public contracts (see Public Contracts, 10 C. L. 1285), public works and improvements in general, including special assessments therefor (see Public Works and Improvements, 10 C. L. 1307), the pollution of streams by sewage (see Waters and Water Supply, 8 C. L. 2262), and to drainage district bonds (see Municipal Bonds, 10 C. L. 875), are more fully treated elsewhere.

48. Acts Feb. 23, 1905 (P. L. 22), providing for formation of sewer districts, does not exceed general powers of taxation conferred on legislature. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115. Minn. Laws 1905, c. 230, p. 303, relative to construction of drainage ditches, constitutional. Miller v. Jensen, 102 Minn. 391, 113 NW 914. Georgia act of 1903, amending charter of Macon, not unconstitutional as imposing upon residents of annexed territory penalties for failure to make sewer connections not imposed on other residents of the city. Smith v. Macon, 129 Ga. 227, 58 SE 713. Nebraska constitution does not prohibit contemporary legislative acts providing different modes for formation of drainage districts. State v. Hanson [Neb.] 116 NW 294. Act Feb. 23, 1905 (P. L. 22), not unconstitutional in giving townships of first class power to divide township into sewer districts and provide for alternative methods of assessment on properties benefited. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115. Statute not unconstitutional in providing that all taxation shall be uniform, where it refers only to taxes of general nature (Act Feb. 23, 1905 [P. L. 22]). Id.

49. Levee and drainage act of 1879 held void only in part. People v. Munroe, 227 Ill. 604, 81 NE 704; Smith v. Claussen Park Drainage & Levee Dist., 229 Ill. 155, 82 NE 278.

50. American Steel Dredge Works v. Board of Com'rs of Putnam County [Ind. App.] 84 NE 19.

51. Under Laws 1905, p. 718, c. 419, § 39, in proceeding to establish drainage district under prior statute, court may, after dismissing appeal from order appointing commissioners, order them to proceed under Laws 1905, p. 687, c. 419. In re Horicon Drainage Dist. [Wis.] 116 NW 12.

52. Under Farm Drainage Act, §§ 41, 74 (Hurd's Rev. St. 1905, pp. 810, 824, c. 21). People v. Commissioners of Lake Fork Drainage Dist., 231 Ill. 435, 83 NE 172.

53. Injunction restraining defendants from constructing drainage ditch through plaintiff's land dissolved and Laws 1905, c. 230, p. 303, held constitutional. Miller v. Jensen, 102 Minn. 391, 113 NW 914.

ests, the taking of property for private purposes,[54] nor changing the channel nor diverting the flow of running streams or natural surface drains for the purpose of relieving riparian proprietors lower down the stream from periodical overflows.[55]

A sanitary or drainage district generally has power to acquire lands and rights of way.[56] In Illinois a drainage district should condemn property under the Eminent Domain Act, and may do so independently of any provision of the act under which it was created.[57]

Under some statutes the power and duty to lay out, make, maintain, and repair common sewers in a city is vested in the city council,[58] and where such is the case, necessity of a sewer improvement is a question for the discretion of the council in the exercise not only of the taxing power, but also of the police power delegated to it by the code,[59] and its decision is conclusive upon the people [60] and is not exhausted by the establishment of districts and the partial construction of sewers in a district as provided for by a plan for sewers therein.[61] Some states hold that such power, where expressly vested by statute in a designated body, cannot be delegated [62] A city, however, is not under obligation to provide a system of sewerage sufficient to carry off surface water.[63] In Kansas a city of the second class has control of the alleys therein and may extend sewers thereunder.[64]

§ 3. *Independent organizations controlling drainage, reclamation, and sanitation.*[See 8 C. L. 1883]—Drainage statutes commonly provide for the establishment of drainage, reclamation, or sanitation districts to which are entrusted the construction of drains and the reclamation of waste lands.[65]

54. Phrase "with view to promote interest of said drainage district" used in Laws 1907, c. 153, relative to duties of county commissioners in establishing district, means public interest and not private advantage to be gained by any property owner. State v. Hanson [Neb.] 115 NW 294.

55. Laws 1881, p. 236, c. 51. Campbell v. Youngson [Neb.] 114 NW 415.

56. May acquire lands upon which to erect embankments to prevent damage to lands not taken. Sanitary Dist. of Chicago v. Martin, 129 Ill. App. 308. Drainage and levee district is clothed with power of eminent domain. Smith v. Claussen Park Dralnage & Levee Dist., 229 Ill. 155, 82 NE 278. Where drainage commissioner fails to obtain right of way from landowner for improvement of ditch, he is justified in proceeding to compel improvement in acordance with Comp. Laws, §§ 4322, 4325, 4326. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

57. Provisions of the drainage act for taking of land thereunder held unconstitutional. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 NE 836.

58. Googin v. Lewiston [Me.] 68 A 694. Legislature may confer authority on municipalities for creation and maintenance of sewerage system. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115. Kentucky statute provides that board of council in cities of fourth class shall have power within city to construct and maintain sewers without limitation, except as to amount of indebtedness that may be incurred. Tipton v. Shelbyville [Ky.] 107 SW 810. Fact that village is connected with sanitary district of Chicago does not deprive it of right to construct relief sewers where it appears that it will take many years before benefits of sanitary district will be available to it. Gage v. Wilmette, 230 Ill. 428, 82 NE 656; Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

59. King v. Dayton, 6 Ohio N. P. (N. S.) 369.

60. Tipton v. Shelbyville [Ky.] 107 SW 810. Finding as to necessity of sewer system will not be disturbed where evidence on that question is conflicting. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

61. Act April 16, 1890 (2 Acts 1889-90, p. 602, c. 807). The city may subsequently complete the system as originally established, but has no power thereafter to add other streets or sewers. Silva v. Newport, 31 Ky. L. R. 897, 104 SW 314.

62. Power to locate sewers in cities of third class expressly vested in council by Rev. St. 1899, § 5777 (Ann. St. 1906, p. 2956, cannot be delegated to city engineer. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86.

63. While a municipality may not discharge sewage or by constructing streets and gutters collect in a body surface water which would naturally flow in another direction and discharge it upon private property, it is not liable for damage caused by discharge of surface water which is the result solely of grading streets and highways in pursuance of legislative authority. Prime v. Yonkers [N. Y.] 84 NE 571.

64. City of Cherryvale v. Studyvin [Kan.] 91 P 60.

65. Term "marsh or swamp lands," as used in drainage act of 1881, construed. Campbell v. Youngson [Neb.] 114 NW 415. Under Pol. Code, § 3454, trustees of levee district are authorized to take materials for and construct levee for purpose of reclaiming and keeping reclaimed land within the district. Reclamation Dist. No. 551 v. Superior Ct. of Sacramento County, 151 Cal. 263, 90 P 545. Nebraska statute, Laws 1881, p. 236, c. 51, au-

*Organization and officers.*See 8 C. L. 1884—The proceeding for the formation of such a drainage district is sometimes considered analogous to a civil action in equity.[66] Such a drainage district is not considered such a legal entity as to be a proper party to a suit.[67] Under the Michigan statute, where a drain commissioner is disqualified, a special county drain commissioner must be appointed to act in his stead.[68] In Illinois, upon the organization of a drainage district, the highway commissioners become vested with the powers of drainage commissioners.[69] The fact that a drainage district organized under the levee act was previous to its organization under that act illegally created does not give ground for ouster.[70] Under the act of providing for drainage for agricultural and sanitary purposes, a district comprising two or more towns is illegally organized,[71] but the legality of the organization of a drainage district cannot be questioned in condemning proceedings instituted by it.[72]

Under a statute requiring the town clerk to keep a record of the proceedings of drainage commissioners,[73] the record of the proceedings of the town commissioners kept by the town clerk constitutes the only lawful evidence of the acts referred to, and may not be contradicted or supplemented by parol.[74]

*Limitation of drainage districts.*See 8 C. L. 1885—In some states a drainage district may include a portion of a city not organized as any part of a district for drainage purposes,[75] but in Nevada it may not include a railroad company's right of way, depot grounds, and appurtenances.[76] In the latter state the establishment of the boundaries of a proposed drainage district is prima facie evidence that the county commissioners proceeded regularly in the establishment thereof, and that all conditions precedent have been complied with.[77]

*Combined systems.*See 8 C. L. 1885—Watercourses which empty one into another and that one into a third are not separate watercourses within the meaning of the statutes relating to the construction or improvement of public ditches, and may be joined in one improvement.[78]

§ 4. *Procedure in authorization and construction of sewers and drains.*See 8 C. L. 1885—These proceedings being based entirely on statute must be in strict conformity

thorizes creation of drainage districts for purpose of draining "marsh or swamp lands," by county authorities. Campbell v. Youngson [Neb.] 114 NW 415. Legislature may validly authorize creation of subdistricts for purpose of making additional ditches for benefit of lands inadequately drained, and provide for organization of drainage districts. Dewell v. Com'rs Sny Island Levee Drainage Dist., 232 Ill. 215, 83 NE 811. Act (c. 215, p. 306, Laws 1905) authorizes the formation of districts to include lands subject to injury and damage from overflow as well as lands subject to actual overflow. Roby v. Shunganunga Drainage Dist. [Kan.] 95 P 399. Levee constructed by reclamation district on right of way procured for that purpose is part of works and is public property acquired by the state for state purposes. Reclamation Dist. No. 551 v. Superior Ct. of Sacramento County, 151 Cal. 263, 90 P 545.

66. Confirmation of commissioner's report in the one is analogous to announcement of court's findings in the other as regards termination of rights of petitioners to withdraw from such proceeding and cause its discontinuance. In re Central Drainage Dist. [Wis.] 113 NW 675.

67. Gish v. Castner-Williams & Askland Drainage Dist. [Iowa] 113 N. W. 757.

68. Under Pub. Acts 1901, p. 41, No. 27, supreme court cannot assume that owner of mortgage upon land liable to assessment for drain may not be, for that reason alone, disqualified within meaning of statute. Tuttle v. Bishopp [Mich.] 14 Det. Leg. N. 735, 114 NW 69.

69. Section 15a of the Farm drainage act of 1855, as amended, held repealed by act of May 11, 1901 (Sess. Laws 1901, p. 157). Patton v. People, 229 Ill. 512, 82 NE 386.

70. People v. Schafer, 228 Ill. 17, 81 NE 785.

71. Hurd's Rev. St. 1905, c. 42, § 76. People v. Schafer, 228 Ill. 17, 81 NE 785.

72. Smith v. Claussen Park Drainage & Levee Dist., 229 Ill. 155, 82 NE 278.

73, 74. People v. Carr, 231 Ill. 502, 83 NE 269.

75. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 NE 836; People v. Munroe, 227 Ill. 604, 81 NE 704. May embrace parts of incorporated cities with other territory. Roby v. Shunganunga Drainage Dist. [Kan.] 95 P 399.

76. Barnes v. Minor [Neb.] 114 NW 146.

77. State v. Hanson [Neb.] 115 NW 294.

78. Anderson v. Hicksville, 4 Ohio N. P. (N. S.) 545.

thereto, at least as to all substantial matters.[79] There being no common-law right to construct drains over the lands of others,[80] the repeal of a statute authorizing the establishment of a ditch destroys pending causes not already merged in judgment, unless they fall within some saving provision contained in the repealing act.[81] The provisions of the civil code of Indiana are to be resorted to to supply omissions in the drainage statutes,[82] and the rules of practice prescribed thereby are applicable to proceedings to establish drains.[83]

Due process of law; notice. See 8 C. L. 1886—A drainage board has no authority to destroy private property without due process of law.[84] Notice to the persons whose property is to be affected in substantial compliance with the statute, and sufficient to constitute due process, is essential [85] except in certain cases.[86] Otherwise, there is a taking of property without due process of law.[87] The Oklahoma act is not unconstitutional in not providing for notice of construction to property holders other than the notice imparted by the passing of the ordinance, and other proceedings designated in the act.[88] In Illinois the notice may be made returnable on any day far enough in the future to permit the statutory notice to be given prior thereto.[89] The Michigan statute requiring notice to be given nonresidents of the time and place of letting contracts for the construction of drains [90] does not require personal service of citation [91] upon them. Persons liable to be assessed under the drainage laws but whose

79. Gable v. Deal, 150 Mich. 430, 14 Det. Leg. N. 734, 114 NW 214. Proceedings required by Acts 1901, p. 402, c. 179, § 3, as to survey and report of engineer to town board of proposed sewer to be constructed by incorporated town, are jurisdictional, and noncompliance renders void subsequent action of board relating thereto. Leibole v. Traster [Ind. App.] 83 NE 781. Ordinance providing for sewers to carry surface water into Lake Michigan is not contrary to spirit of Sanitary District Act, it appearing that sewer is so constructed that it can be connected with Sanitary District Channel when completed. Gage v. Wilmette, 230 Ill. 428, 82 NE 656.

80. Hart v. Scott, 168 Ind. 530, 81 NE 481; Kline v. Hagey [Ind.] 81 NE 209.

81. Jaqua v. Harkins, 40 Ind. App. 639, 82 NE 920. Under Acts 1905, p. 456, c. 157, repealing all prior laws on drainage, but providing that pending proceedings shall not be affected, where there is no attempt to, or which will not lower or affect any lake or body of water that does not exceed ten acres of surface at high-water mark, where proposed drainage did not affect any lake, proceedings, though not having progressed to final judgment when the act took effect, were not annulled. Kline v. Hagey [Ind.] 81 NE 209.

82. Hart v. Scott, 168 Ind. 530, 81 NE 481.

83. Clarkson v. Wood, 168 Ind. 582, 81 NE 572.

84. Mandatory injunction issued, ex parte, commanding such destruction by owner, or in default his action by sheriff, within 24 hours, is not due process of law. Board of Com'rs of Petite Anse Drainage Dist. v. Iberia, etc., R. Co., 117 La. 940, 42 S 433. Sections 4483 and 4484, providing procedure for petitioning by municipality, through its mayor, for improvement of county ditch lying partly within municipal limits, is not unconstitutional for failure to provide for notice to property owners, or for appeal, or for jury, inasmuch as these sections are to be taken as part of entire chapter applying to ditches wherein provisions are made for such matters. McCaslin v. Perrysburg, 10 Ohio C. C. (N. S.) 325.

85. Iowa Code, § 971, providing for notice by publication, not unconstitutional in not providing opportunity for taxpayer to be heard. Reed v. Cedar Rapids [Iowa] 111 NW 1013. Notice should be signed by clerk of county court. People v. Munroe, 227 Ill. 604, 81 NE 704.

86. The notice required to be given to the owners of property to be benefited of resolutions and proceedings for the construction of a sewer system is not applicable where council is proceeding to construct a sewer that is a part of a general system that has already been planned and provided for by proper proceedings. Kohler Brick Co. v. Toledo, 10 Ohio C. C. (N. S.) 137.

87. Statute authorizing including of lands in subdistricts without notice to owners would be taking property without due process, and invalid, though notice was actually given. Dewell v. Com'rs Sny Island Levee Drainage Dist., 232 Ill. 215, 83 NE 811.

88. City of Perry v. Davis, 18 Okl. 427, 90 P 865.

89. Fact it was not made returnable on first day of term or on day fixed as return day for any term of court does not deprive of jurisdiction. People v. Munroe, 227 Ill. 604, 81 NE 704.

90. Nonresident not served with notice required by Acts 1899, p. 462, No. 272, may enjoin levy of taxes for such construction. Hoffman v. Shell [Mich.] 15 Det. Leg. N. 189, 115 NW 979. Probate court order appointing commissioner in proceeding to establish county drain held sufficient to show service of notice on nonresident owner. Id.

91. Comp. Laws, § 4324, construed. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

lands are not traversed thereby have no constitutional right to be heard upon the necessity for the drain and consequently need not be notified.[92]

Notice of drainage proceedings being given to the proper township, the court may adjudicate both matter of benefits and damages to highways affected.[93] Notice to a property owner within the district is sufficient to apprise him that his property is to be assessed, where the description embodied in the notice embraces the entire district in which his property is located.[94]

Petition or application. See 8 C. L. 1886—Under special statutes a petition is not a prerequisite to the laying out of a sewer, the city council having power to act of its own motion.[95]

In Illinois the certificate of the filing of the petition should be signed by the clerk of the county court.[96] The description of land together with the map attached thereto should be at least sufficient to enable a surveyor to locate it definitely,[97] but the failure of the petition to sufficiently state the purpose of the proposed work does not go to the jurisdiction of the court and does not give basis for quo warranto proceedings.[98] A petition for constructing additional drains must show the character and location of the improvement with sufficient definiteness so that objecting land owners can ascertain what property will be taken,[99] and the plans and specifications should be sufficient to enable jury to determine the damage to land not taken.[1] It is unnecessary, however, in this state to file plats and profiles in a proceeding to levy an additional assessment to complete an improvement originally proposed.[2]

The statutes of Michigan require an application for locating and establishment of a drain to be signed by not less than ten freeholders of the township or townships in which the drain or the lands to be drained are located,[3] but the fact that some of the freeholders signed the application under a misapprehension of its effect, where that fact does not appear on the face of the paper, does not render it ineffective to confer jurisdiction upon the commissioner.[4] An application which gives a general description of the begininng, the route, and the terminus of a drain is sufficient.[5]

It is not within the spirit of the drainage law of Iowa that the petition filed contain an accurate description of the lands to be affected, and that no less and no more can be selected to constitute the district.[6] In Ohio petitioners for the im-

92. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

93. American Steel Dredge Works v. Board of Com'rs of Putnam County [Ind. App.] 84 NE 19.

94. King v. Dayton, 6 Ohio N. P. (N. S.) 369.

95. Googin v. Lewiston [Me.] 68 A 694.

96. People v. Munroe, 227 Ill. 604, 81 NE 704. Not insufficient because signed by "County Clerk" instead of the "Clerk of the "County Court," one party holding both offices. Id.

97. Smith v. Claussen Park Drainage & Levee Dist., 229 Ill. 155, 82 NE 278.

98. People v. Munroe, 227 Ill. 604, 81 NE 704.

99. Profiles and plats insufficient. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 NE 780.

1. Plans and specifications informing owners of width, depth, and course of ditch, and quantity of dirt taken, sufficient. Smith v. Claussen Park Drainage & Levee Dist., 229 Ill. 155, 82 NE 278.

2. Commissioners of Fountain Head Drainage Dist. v. Wright, 228 Ill. 208, 81 NE 849.

3. Under Comp. Laws, § 4319, three of signers of application for improvement of established drain must be owners of lands liable to assessment or benefits, but need not be resident freeholders. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742. Not necessary that there be ten freeholders from each township. Id. Under Comp. Laws, § 8787, every tenant by entireties is freeholder. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676. Female owning lands affected by construction of drain is freeholder and may sign petition for improvement. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742. Not necessary that deed to grantee be recorded in order to make him freeholder. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

4, 5. Hinkley v. Bishop [Mich.] 14 Det. Leg. N. 813, 114 NW 676.

6. Under Code, tit. 10, c. 2, matter of exact boundary is to be determined upon engineer's survey and report. Mackay v. Hancock County [Iowa] 114 NW 552. Under Iowa statute, office of petition is to point out locality to be drained, in general way, and to indicate those who are to give security for preliminary costs and expenses to be paid in event petition shall be rejected by board of supervisors. Zinser v. Buena

provement of a public ditch may become sureties on the bond for payment of costs which it is required shall be filed with the petition, and the failure of the county auditor to endorse his approval on such a bond is immaterial, where a bond properly executed was filed with him for approval, and he identifies it as the bond then on file, and testifies that he did approve it.[7] Under the Oklahoma act, a general sewer system may be established and the construction of sewer districts proceeded with when necessary, without a petition by a majority of the resident property holders.[8] Under the Indiana statute, after the dismissal or withdrawal of the only petitioners for a drain, who own land benefited outside the city limits, the remaining petitioners cannot maintain the proceedings.[9]

The Wisconsin statute provides for the withdrawal of a petitioner before final action [10] but does not prescribe the practice to be followed in all details,[11] but the right to withdraw after the filing of the commissioner's report, merely because of his having changed his mind, is subject to payment of costs incurred up to the time of such withdrawal, if such withdrawal renders a dismissal of the proceedings necessary.[12] Under the Michigan statute freeholders who have signed an application for the improvement of a township drain, and launched the proceeding, cannot discontinue it by protesting against the taking of further steps therein.[13]

Remonstrances. See 8 C. L. 1887—A remonstrance which is sufficient to tender an issue is subject to amendment after expiration of statutory period for filing.[14] Under the Indiana statute, where the benefits to a highway are to be assessed to the proper township, such township is a proper party to the proceedings, but a county is not a landowner within the statute.[15] Under the Minnesota statute the right to be heard in proceedings for the establishment of a county ditch is not confined to those who are strictly parties, but extends to landowners with a well grounded claim for damages, though it may not certainly appear that such damages are recoverable at law,[18] and landowners not served with notice or named in drainage proceedings and whose lands are not referred to therein, and remonstrating on ground that water would be brought in damaging quantities on premises, are not restricted to an appeal from the determination of the board to proceed with construction,[17] nor is certiorari the only alternate remedy.[18] Jurisdiction to order the construction of a drain is acquired by

Vista County Sup'rs [Iowa] 114 NW 51. Under Acts 30th Gen. Assem. (Laws 1904, p. 61) c. 68, § 2, petition is mere preliminary paper and need not be exact with respect to land to be benefited by improvements. Id. Landowners held estopped to claim inclusion of their lands was without authority of law because not mentioned or described in petition. Mackay v. Hancock County [Iowa] 114 NW 552.

7. Anderson v. Hicksville, 4 Ohio N. P. (N. S.) 545.

8. Mayor and city council have authority to so proceed. Sess. Laws 1903, art. 1, c. 6, p. 93. City of Perry v. Davis, 18 Okl. 427, 90 P 865.

9. Burns' Ann. St. 1901, § 5623, as amended by act March 10, 1903 (Acts 1903, p. 504, c. 232). Ownership of outside lands is requisite to court's jurisdiction. Pavey v. Braddock [Ind.] 84 NE 5.

10. Chapter 54, St. 1898, authorizes withdrawal before approval of petition as warranting appointing of commissioners and thereafter, until final decision upon commissioner's report, qualified right to withdraw analogous to that of complainant in civil action in equity to dismiss bill. In re Central Drainage Dist. [Wis.] 113 NW 675. Right of withdrawal of petitioner in drainage proceeding after filing of commissioner's report is subject to judgment of court as to its reasonableness under circumstances, and terms requisite to protect other parties concerned from being unduly prejudiced. Id.

11. Such statute should be supplemented by established practice in that class of civil actions having characteristics most nearly like those for formation of such districts. In re Central Drainage Dist. [Wis.] 113 NW 675.

12. In re Central Drainage Dist. [Wis.] 113 NW 675.

13. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

14. Clarkson v. Wood [Ind.] 81 NE 572.

15. Burns' Ann. St. 1901, § 5630. American Steel Dredge Works v. Putnam County Com'rs [Ind. App.] 84 NE 19. County named in preliminary report of surveyor is not landowner within provisions of Act 1905, p. 471, c. 157, § 9, requiring dismissal of petition on remonstrance of landowners affected. Honnold v. Endicott [Ind.] 83 NE 502.

16, 17, 18. Bilsborrow v. Pierce [Minn.] 112 NW 274.

the filing of a petition of the requisite number of landowners and an order of the drainage board establishing the drain after a hearing on the petition upon due notice to all concerned,[19] and where jurisdiction is so acquired and the board of drain commissioners has taken action thereunder, it cannot be divested of jurisdiction by action of petitioners in withdrawing their names from the petition.[20]

Report of viewers or commissioners.[See 8 C. L. 1887]—Under the Ohio acts the county commissioners may locate a ditch substantially along the line of the channel of or adjacent to or in the valley of a living stream or watercourse, though they have no power to convert a living stream of water into a ditch by proceedings for the location and construction of a ditch.[21] The viewers are given thirty days from the time of their appointment to act and report and are not limited to thirty days from the filing of the petition.[22] It is not contemplated that the commissioners shall actually set foot on the whole line of the ditch, but that they will at the beginning of the improvement hear the complaints of the persons affected and thereafter view the line of the ditch in such a manner that they will understand the situation and can determine the necessity of the improvement and make a proper apportionment of the costs.[23] Under the Iowa statute it is improper for the engineer's return to include all lands within the watershed to be drained without showing which will be particularly benefited.[24] In Iowa it is discretionary with the board of supervisors to refuse to order an improvement where the cost of construction and the amount of damages are more than should be borne by the land.[25]

Order, ordinance, or resolution for work.[See 8 C. L. 1880]—Sewers in incorporated cities can only be constructed in pursuance of an ordinance passed by the council for that purpose.[26] An order that a sewer on a designated street be continued to a designated street is sufficiently definite as to the termini.[27] A sewer district is not charged by a reference in the resolution of necessity to a part of the territory only, leaving the remainder for future description and improvement.[28]

A drainage district ordinance should describe the drainage district.[29] A variance between the resolution and the ordinance in that the former did not and the latter did create and describe a drainage district is immaterial, the statute not requiring that the former do so.[30] The fact that the ordinance provides that the work shall be done under the supervision of and to the satisfaction of a designated board does not render it invalid,[31] nor does the fact that a member of the board of drainage commissioners owns land in the drainage district benefited by the drain render the proceedings in which he participated void as fraudulent.[32] A provision allowing an appeal from the order of county commissioners requiring the construction of a drain by land owners who are benefited is not invalid as devolving legislative functions on a judicial tribunal.[33]

Validity and performance of contracts.[See 8 C. L. 1888]—These subjects are con-

19, 20. Sim v. Rosholt [N. D.] 112 NW 50.

21. Mason v. Fulton County Com'rs, 10 Ohio C. C. (N. S.) 201.

22. Rev. St. § 4510. Commissioners of Crawford County v. Huron County Com'rs, 10 Ohio C. C. (N. S.) 16.

23. Rev. St. § 4452. Anderson v. Hicksville, 4 Ohio N. P. (N. S.) 545.

24. Under Acts 30th General Assembly (Laws 1904, p. 61, c. 68, § 2), return which fails to show such lands as will be affected and state how they will be affected is fatally defective. Zinser v. Buena Vista County Sup'rs [Iowa] 114 NW 51.

25. Zinser v. Buena Vista County Sup'rs [Iowa] 114 NW 51.

26. Whitworth v. Webb City, 204 Mo. 579, 103 SW 86.

27. Googin v. Lewiston [Me.] 68 A 694.

28. King v. Dayton, 10 Ohio C. C. (N. S.) 522.

29. Description held sufficient. Gage v. Wilmette, 230 Ill. 428, 82 NE 656; Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

30. MacChesney v. Chicago, 227 Ill. 215, 81 NE 410.

31. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

32. State v. Fisk, 15 N. D. 219, 107 NW 191.

33. Kansas county drainage act (Gen. St. 1901, §§ 2251-2566). Shreves v. Gibson [Kan.] 92 P 584.

trolled largely by the general rules governing public contracts [34] and public works and improvements.[35] Provisions in a statute that the engineer in his report of survey and specifications on which contracts are let shall specify the date for completion of the work does not preclude the letting of contracts after such time.[36]

*Defects and irregularities in general.*See 6 C. L. 1888—A radical departure by the engineer and county commissioners from the line of a public ditch as demanded by the petition may render the order of the commissioners laying out the ditch and all subsequent proceedings entirely void.[37] As to what is a sufficient filing of a plat or schedule for the construction of a sewer, see notes.[38] It is not error for a probate court to refuse to send the jury in a ditch improvement proceeding back for a second view of the proposed outlet, though opposing landowners were not satisfied with the first view.[39] Where the record made by the council of proceedings showed that the sewer was petitioned for as required by statute the proceedings were not defective because such fact was not also shown in the record of the resolution or because the resolution itself did not refer to the petition.[40]

*Waiver of irregularities.*See 3 C. L. 1889—One who had notice of drainage proceedings and was present during the construction of the improvement is estopped from questioning the constitutionality of the statute under which the proceeding was instituted.[41] The failure of county commissioners to find affirmatively and enter upon their docket that a ditch improvement is conducive to the public health, convenience and welfare is an irregularity that may be disregarded or cured, and is not necessarily fatal to the validity of the proceedings.[42]

*Attack on proceedings.*See 8 C. L. 1889—In proceedings to establish a drain, an aggrieved landowner must follow the remedy prescribed by statute.[43] Where the proceedings are regular upon their face, the burden is upon the objectors to show their invalidity.[44] A party will not be allowed to object to construction of drains on the ground that no right of way therefor has been or can be acquired in the absence of a showing that his property has been or will be taken.[45] An individual taxpayer of an unincorporated village having no solicitor cannot bring action in his own name solely on behalf of the municipality and against the county commissioners to restrain them from proceeding under provisions for the improvement of a county

34. See Public Contracts, 10 C. L. 1285.

35. See Public Works and Improvements, 10 C. L. 1307.

36. Where contracts were so let and the work completed in accordance with terms and approved by the engineer without objection, a county could not avoid payment on the ground that the letting was illegal. Interstate Drainage & Inv. Co. v. Frseborn County Com'rs [C. C. A.] 158 F 270.

37. Where petition under § 3, c. 258, p. 414, Laws 1901, as amended by Laws 1902, p. 90, c. 38, calls for laying out of public ditch and designates source and proper outlet, engineer and commissioners have no authority to abandon terminus as petitioned and establish same upon land of private owner. Jurries v. Virgens [Minn.] 116 NW 109. Where such engineer and commissioners abandoned terminus designated in petition as outlet, and located same upon premises of private owner upon supposition that such owner would construct sufficient outlet, such owner whose lands were damaged by reason of fact that outlet was insufficient to carry off waters was not estopped from enjoining contractors from constructing and maintaining ditch as ordered, even though he voluntarily constructed across his own land that part of the ditch so abandoned. Id.

38. A plat and schedule for the construction of a sewer having been prepared by city engineer and filed in office of city recorder, an objection is without merit that filing was insufficient under Code, § 965, directing that plat be filed in office of clerk or recorder, where engineer afterwards took plat and schedule in his own office in same building where it was accessible to recorder's office. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

39. Wood County Com'rs v. Shinnew, 10 Ohio C. C. (N. S.) 554.

40. Code, §§ 793, 811. Hardwick v. Independence [Iowa] 114 NW 14.

41. Mackay v. Hancock County [Iowa] 114 NW 552.

42. Rev. St. §§ 4490, 4431. Mason v. Fulton County Com'rs, 10 Ohio C. C. (N. S.) 201.

43. Filing of defective petition in probate court does not give equity jurisdiction to vacate such proceedings. Hoffman v. Shell [Mich.] 15 Det. Leg. N. 189, 115 NW 979.

44, 45. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 NE 780.

ditch lying partly within the limits of a municipality.[46] Where an appeal is taken in proceedings to establish public drains, the court may hear oral evidence and determine as a question of fact if an appeal bond has been filed with the auditor.[47] A complaint attacking drainage proceedings collaterally, for lack of notice, must show the contents of the record in such proceedings respecting notice.[48] Under the statutes of some states, drains established for a certain time are conclusively deemed to have been regularly established.[49] In a proceeding to establish a drainage ditch if the county board possesses jurisdiction and authority to act in the premises, injunction will not lie on account of mere irregularities in the exercise of the power conferred.[50] Where there is no appeal therefrom, the order of the board of supervisors based upon the engineer's report establishing the district is conclusive that all the lands included therein will be benefited by the improvement.[51] In Illinois the finding of the county court that the petition was signed by a majority of landowners representing at least one-third in area of the lands affected is conclusive in quo warranto testing the legality of the organization;[52] as is also the judgment of the county court as to whether certain landowners had so connected their ditches as to make application to be annexed to an irrigation district in such a proceeding.[53]

Incidental remedies and review.[See 8 C. L. 1869]—An appeal from the decision of the county commissioners that the ditch is necessary, if premature, may be dismissed.[54] Injunction will not lie at the instance of county commissioners to prevent the removal or destruction of bridges in the construction of a drainage ditch [55] or to restrain the construction of a ditch merely because lands are subject to assessments for benefits,[56] but continuance and use of a sewer illegally constructed on one's land is a trespass entitling the owner to injunctive relief.[57] Under the Ohio statute the final order or judgment from which an appeal lies is the one finally determining that the proposed ditch is necessary and will be conducive to public health, convenience or welfare, that it is the best route, and also determining claims for damages and compensation,[58] and such an appeal involves the inquiry as to the sufficiency of the outlet of a drainage ditch.[59] In a proceeding before the probate court by landowners on the ground of the insufficiency of the outlet, the jury, having viewed the entire ditch and the outlet and having heard the evidence introduced at the trial, is in a better position to say whether or not the outlet is sufficient than a reviewing court having before it only a transcript of the evidence produced at the trial, and the finding of the jury will not be disturbed when not manifestly opposed to the evidence appearing in the

46. Rev. St. § 1778. McCaslin v. Perrysburg, 10 Ohio C. C. (N. S.) 325.

47. Smith v. Gustin [Ind.] 81 NE 722.

48. Complaint failing to make such showing was insufficient. American Steel Dredge Works v. Putnam County Com'rs [Ind. App.] 82 NE 995.

49. Under Comp. Laws, § 4381, in proceedings to formally establish several township drains, validity of proceedings is not questionable, where public has been in possession of and exercised dominion over same for 15 years. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

50. Held that county board of Kearney County is without jurisdiction to change channel and divert waters from their natural flow for purpose of preventing overflows, nor has it authority to take part of plaintiff's land against his will for purpose of draining lands within proposed drainage district. Campbell v. Youngson [Neb.] 114 NW 415.

51. Zinser v. Buena Vista County Sup'rs [Iowa] 114 NW 51.

52. People v. Munroe, 227 Ill. 604, 81 NE 704.

53. People v. Schafer, 228 Ill. 17, 81 NE 785.

54. Atley v. Clinton County Com'rs, 77 Ohio St. 285, 82 NE 1079.

55. American Steel Dredge Works v. Putnam County Com'rs [Ind. App.] 82 NE 995.

56. Sudberry v. Graves, 83 Ark. 344, 103 SW 728.

57. Leibole v. Traster [Ind. App.] 83 NE 781. Construction or use of a sewer by incorporated town without having complied with Acts 1901, p. 401, c. 179, is such trespass as entitles injured landowner to injunctive relief. Id.

58. Atley v. Clinton County Com'rs, 77 Ohio St. 285, 82 NE 1079.

59, 60. Wood County Com'rs v. Shinnew, 10 Ohio C. C. (N. S.) 554.

record.[60] The statute of Michigan authorizes a review of proceedings to establish drains by a writ of certiorari within ten days after the order of final determination is filed.[61] In proceedings for the improvement of a drainage ditch, the court cannot review the facts or evidence upon certiorari.[62] The Wisconsin law authorizes an appeal from an order of the drainage commissioner confirming the preliminary report.[63]

*Costs.*See 8 C. L. 1890—Under the Michigan statute, petitioners to construct a drain are liable for the costs on the dismissal of the proceedings,[64] but not on a subsequent petition to establish a drain for expenses incurred on a prior petition.[65] A statute providing for costs in proceedings to condemn land for railroad purposes is inapplicable to the drainage laws.[66]

§ 5. *Compensation to property owners for lands taken or damaged.*See 8 C. L. 1899—In Ohio applications for compensation and damages by landowners in ditch proceedings are required to be made on or before the day set for hearing of application for compensation and damages and for approval of the report of the county surveyor, and are not barred if not made on or before the day set for hearing upon the petition for the improvement.[67]

*For what allowed.*See 9 C. L. 1890—Loss of profits from failure to complete a ditch within the time specified cannot be recovered by landowners from the contractor and his bondsmen.[68]

*Amount and ascertainment thereof.*See 6 C. L. 1890—Township commissioners may be authorized to appoint viewers to ascertain the benefits of sewer improvements.[69] Under the North Carolina act the commissioners are not required to set out the amount to be paid by each landowner, but merely his proportion.[70] Under the Iowa statute the assessment commissioners cannot be appointed until after the drainage district has been established [71] and it is not contemplated that the commissioners shall survey the lands though they are not prohibited from doing so,[72] nor is it essential that the engineer appointed to survey the lands be designated as one of the assessment commissioners.[73] In Illinois it should be shown that there was an attempt to agree with the property holders before the commencement of condemnation proceedings.[74] A stipulation by the drainage district for the erection of suitable bridges across its ditch is admissible in evidence as mitigating the damages.[75] Under the Pennsylvania statute the foot-front rule may be applied to densely populated sewer districts,[76] and the costs assessed, where the properties are of a rural character, accord-

61. Comp. Laws 1897, § 4346, operates to bar a suit brought to enjoin the extension of a new drain upon grounds that it was really a new drain after ten days from such final order. Clarence Tp. v. Dickenson [Mich.] 14 Det. Leg. N. 906, 115 NW 57.

62. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

63. In re Horicon Drainage Dist. [Wis.] 116 NW 12.

64. Petitioners held responsible under § 4319 where failure to construct drain was not due to fault of drain commissioners. Gable v. Deal, 150 Mich. 430, 14 Det. Leg. N. 734, 114 NW 214.

65. Gable v. Deal, 150 Mich. 430, 14 Det. Leg. N. 734, 114 NW 214.

66. Comp. Laws, § 6240, as amended by Pub. Acts 1899, p. 447, No. 266, § 15, construed. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

67. Cleveland, etc., R. Co. v. Joint Board County Com'rs, 5 Ohio N. P. (N. S.) 145.

68. Laws included in drainage district. Gen. Laws 1901, c. 258, p. 413. Grams v. Murphy [Minn.] 114 NW 753.

69. Act Feb. 23, 1905 (P. L. 22), providing for the construction of sewers and drains, not unconstitutional because authorizing township commissioners, instead of the courts, to appoint viewers. Anderson v. Lower Merlon Tp., 217 Pa. 369, 66 A 1115.

70. Adams v. Joyner [N. C.] 60 SE 725.

71, 72, 73. Zinser v. Buena Vista County Sup'rs [Iowa] 114 NW 51.

74. Evidence held sufficient to show attempt to agree with property holders before commencement of condemnation proceedings. Smith v. Claussen Park Drainage & Levee Dist., 229 Ill. 155, 82 NE 278.

75. Smith v. Claussen Park Drainage & Levee Dist., 229 Ill. 155, 82 NE 278.

76. Act. Feb. 23, 1905 (P. L. 22). Anderson v. Lower Merion Tp. 217 Pa. 369, 66 A 1115.

ing to the benefits.[77] Under the Nebraska statute one whose land is traversed by a drainage ditch is entitled to recover the value of the land taken therefor, together with special damages, if any to the balance of his land caused by the construction of the improvement.[78] Under the drainage statute of Iowa the board of supervisors has no power to pay a claim for damages to land outside the county caused by establishing a district within the county,[79] and in condemnation proceedings for drainage purposes, damages should be assessed at the difference between the value of the land immediately before and after the construction of the ditch.[80] In North Dakota the assessment of damages to real estate resulting from the construction of a drain, by a jury, and the benefits to the same property by the drain commissioners, is not unconstitutional.[81]

Appeals. See 8 C. L. 1891—The Iowa statute provides that on final action on a petition to establish a drainage district any party aggrieved may appeal from the finding of the board of supervisors in allowing damages within ten days.[82] A county has no appeal from the judgment of a district court on appeal from the action of the board of supervisors in assessing damages due to establishment of a drainage ditch.[83]

§ 6. *Provision for cost. Bonds.* See 8 C. L. 1891—Under the Iowa statute the boards of supervisors of two counties into which a drainage district extends may jointly determine the statutory method by which funds shall be raised to meet the expense apportioned to each county.[84] A city having express statutory authority to construct sewers has power to borrow money to construct a sewerage disposal plant.[85] A city ordinance requiring an appropriation before proceeding to construct a sewer does not apply to a sewer constructed by the city council,[86] nor is a similar statutory provision applicable to a sewer constructed many years before its enactment.[87] Obligors on a bond to secure a county for the expense of establishing a drainage ditch in the event that the petition is denied are not liable in proportion to the amount of benefit each would have received had the ditch been ordered constructed.[88] Under the Wisconsin statutes the amount of damages allowed to the owner of property shall be paid or tendered before the commissioners shall be authorized to enter upon the lands for the construction of any work proposed thereon.[89] Where petitioners seek to establish a drain under the provisions of a statute, a bond given by them to pay

77. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115.

78. Under §§ 5500-5527, Cobbey's Comp. St. 1907, he cannot recover in such proceeding the damages he may have theretofore sustained by reason of neglect of county board to keep a previously established ditch free from any debris, and in a suitable condition to serve the purpose for which it was constructed. Gutschow v. Washington County [Neb.] 116 NW 46.

79. Acts 30th General Assembly, p. 61, c. 68, construed. Clary v. Woodbury County [Iowa] 113 NW 330.

80. Rule that damages shall be assessed as of time of appropriation is inapplicable under Acts 30th General Assembly, p. 63, c. 68, § 7. Gish v. Castner-Williams & Askland Drainage Dist. [Iowa] 113 NW 757.

81. Rev. Codes 1905, c. 23, known as the Drainage Law, does not contemplate the assessment of benefits from the construction of a drain by a jury. Ross v. Prante [N. D.] 115 NW 833.

82. Under Acts 30th General Assembly, c. 68, p. 62, § 6, appeal taken within ten days after ditch is finally located and established is sufficient. Clary v. Woodbury County [Iowa] 113 NW 330. Upon such appeal, district is not proper party defendant. Id.

83. Gish v. Castner-Williams & Askland Drainage Dist. [Iowa] 113 NW 757.

84. Temple v. Hamilton County, 134 Iowa, 706, 112 NW 174.

85. City has power to borrow money for purpose of constructing plant for disposition of sewer, under authority of Iowa Code 1897, §§ 791, 794, 796, 810, 820, 831, 841. Glucose Sugar Refining Co. v. Marshalltown, 153 F 620.

86, 87. Googin v. Lewiston [Me.] 68 A 694.

88. Bond under Gen. Laws 1901, p. 413, c. 258. Gugisberg v. Eckert, 101 Minn. 116, 111 NW 945.

89. Under St. 1898, §§ 1379-11-24-26-31, report of commissioners held void because instead of determining damages to railroad company's right of way it postpones ascertainment thereof and attempts to bind district for expenses of changing roadbeds, etc., by reason of construction of drainage ditches. Chicago, etc., R. Co. v. Lemonweir River Drainage Dist. [Wis.] 115 NW 825.

all costs in case of refusal of supervisors to grant the petition is not sustained where such statute is declared unconstitutional.[90]

Local assessments See 8 C. L. 1891 are treated more extensively elsewhere.[91] Meetings of the drainage commissioners for the levy of assessments should be held within the boundaries of the drainage district.[92]

Power to assess and property liable. See 8 C. L. 1891—Lands included in drainage districts may be assessed in proportion to benefits received.[93] Landowners who are injured and not benefited by the construction of a sewer are limited in their relief to enjoining the assessments on their land.[94] The lien of an assessment for construction of a drainage ditch becomes fixed on the filing of the report of the commissioners, though subject to release by the court.[95] County commissioners are without power to assess for ditch purposes a greater sum than the amount of benefits conferred by the improvements.[96] Assessments of benefits are not valid where the sewer passes through private lands.[97] Special assessments should be levied upon the land itself, and not upon the improvements thereon.[98] In Illinois lands taken for the construction of ditches for drainage purposes cannot be assessed,[99] nor can a drainage district without its consent assess a city for benefits accruing to its streets,[1] and under the Illinois Levee Act, apportioning the costs of ditches draining beneficially public roads to the state, county or township, counties not under township organization are included, though a provision is specifically made for a tax levy to pay an assessment if made against a township, and such provision is omitted in other cases.[2] In Ohio it is competent for a municipalty to improve with a sewer the unsewered portion of a street or some part of the unsewered portion of a street and assess the cost thereof upon the property abutting on the part of the street so improved.[3] Where the county commissioners clean and enlarge that part of a joint county ditch lying within their county so that better drainage is provided for an upper county, contribution may be had from such upper county to meet the cost of improvement,[4] or

90. Under Code, § 1940, petitioners held not liable to reimburse county for preliminary expenses incurred on petition. Carroll County v. Cuthbertson [Iowa] 114 NW 17.

91. See Public Works and Improvements, 10 C. L. 1307.

92. People v. Carr, 231 Ill. 502, 83 NE 269.

93. Lands included within drainage districts found under Act 1905, c. 215, p. 306, which are not, never have been, and can never be, subject to overflow, may nevertheless be lawfully assessed in proportion to benefits to pay for improvements authorized by the act if they are subject to injury and damage from the overflow of other lands. Roby v. Shunganunga Drainage Dist. [Kan.] 95 P 899. Under Acts 30th General Assembly (Laws 1904, p. 645, c. 68, § 12), the benefits for which lands may be assessed must be special, and not those which are enjoyed by all citizens alike. Zinser v. Buena Vista County Sup'rs [Iowa] 114 NW 51. Under Acts 30th General Assembly (Laws 1904, p. 64, c. 68, § 12), such commissioners are to assume that all land within district is benefited and to classify and assess accordingly. Id.

94. Such landowners cannot go to the extent of restraining the public improvement itself and the bonding of the district as provided by law. Coffman v. St. Francis Drainage Dist., 83 Ark. 54, 103 SW 179.

95. Pierse v. Bronnenberg's Estate, 40 Ind. App. 662, 82 NE 126.

96. State v. Pacific County Com'rs [Wash.] 93 P 326.

97. Act Feb. 23, 1905 (P. L. 22), so providing, held unconstitutional. Anderson v. Lower Merion Tp., 217 Pa. 369, 66 A 1115.

98. McGilvery v. Lewiston, 13 Idaho, 338, 90 P 348.

99. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 NE 836.

1. Section 40, Farm Drainage Act (Hurd's Rev. St. 1905, c. 42, § 114), construed. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 NE 836.

2. Levee Act 1885, § 55 (2 Starr & C. Ann. St. 1896, p. 1528, c. 42, par. 86). People v. Nortrup, 232 Ill. 303, 83 NE 843.

3. Erkenbrecher v. Cincinnati, 10 Ohio C. C. (N. S.) 103.

4. Commissioners of Crawford County v. Huron County Com'rs, 10 Ohio C. C. (N. S.) 16. Where it was decided, during proceedings by and before the boards of commissioners of three counties convened for the purpose of improving a joint county ditch, that the lower county should do certain work upon the ditch in that county, reserving all rights as to compensation from the other counties, the court of common pleas has jurisdiction, by virtue of § 4488a, of an action against the other counties for an apportionment of the cost of the improve-

where by reason of artificial improvements on their own lands above parties helped make it necessary for the protection of the lands below that improvements be made in a ditch watercourse, they should contribute toward payment therefor,[5] but where an upper proprietor has drained his lands without exceeding his legal rights and no advantage results to him from a township ditch which he did not enjoy before it was constructed, he is not chargeable with any part of the assessment for the cost of such an improvement, and an injunction will lie against the collection of an assessment levied on his land.[6] A property owner who is provided with a drain leading to a cesspool on his own property is not, on the ground that he is already provided with local drainage, exempt from assessment for a sewer laid in the street, having a proper outlet, and built in conformity with the requirements of the statute.[7] Also, where the sewer is adequate and so located that it may be utilized in the future, the lands must be regarded as specially benefited, notwithstanding the property is not so improved as to make sewer connections available.[8] In this state a pumping station is a necessary part of a sewer equipment and its cost may be included in the assessment.[9] In Pennsylvania there can be no assessments of benefits in sewer cases to individual owners to pay land damages.[10] Under the statutes of Washington providing for the construction of drains and for the levying of assessments for the cost thereof, where in an action to compel the county commissioners to levy a special assessment it is shown that the project is abandoned, the court may direct the commissioners to levy the assessment or proceed to acquire by condemnation or otherwise property necessary to the completion of the ditch, and then levy the assessment as provided by statute.[11]

Procedure. See 8 C. L. 1892—It appearing that provision has been made for the extension of a water service to every part of a constructed sewer, the benefits conferred may be computed on the basis of the complete water service.[12] In proceedings to have lands drained, matters constituting estoppel or res adjudicata should be pleaded prior to the order appointing commissioners, or at least before final judgment.[13] Under the Indiana statute the filing of the petition and the report of the commissioners is notice to all whose lands are named therein.[14] In Illinois drainage commissioners of a district organized under the levee act of 1879, who are landowners in the district, cannot make an assessment where their decision on the hearing of objections as to the amount of an assessment was final,[15] nor create in advance an indebtedness for completing an improvement and then levy an assessment to meet it.[16] No benefits can be assessed by the commissioners until the damages caused by the

ment; and voluntary submission to the jurisdiction of such court, by tender of issues in pleadings without questioning jurisdiction therein and by assenting to the journal entries, is equivalent to an agreement by a majority of the boards of commissioners of the several counties under which the alternative procedure may be had in the court of common pleas under § 4510-10 to compel contribution for the expense of constructing or improving an outlet for waters from other counties. Id.

5. Mason v. Fulton County Com'rs, 10 Ohio C. C. (N. S.) 201.

6. Pontifical College v. Kleeli, 5 Ohio N. P. (N. S.) 241.

7. Kibler v. Newark, 4 Ohio N. P. (N. S.) 641.

8, 9. King v. Dayton, 10 Ohio C. C. (N. S.) 522.

10. Presumption raised by assessment of a large sum against the city was that land damages were included in amount, and not on property owner. Reynolds St. Sewer (No. 1.), 34 Pa. Super. Ct. 209.

11. Any objection by owners of benefited property that the condemnation proceedings and the construction of the ditch have not been completed should not be deemed any defense to the right to make the assessment to pay warrants issued several years before to pay for construction of the ditch. State v. Lewis County, 45 Wash. 423, 88 P. 760.

12. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

13. Adams v. Joyner [N. C.] 60 SE 725.

14. Notice that their lands are to be assessed in the amounts named in the report to pay for drain. Pierse v. Bronnenberg's Estate, 40 Ind. App. 662, 82 NE 126.

15, 16. Vandalia Levee & Drainage Dist. v. Hutchins, 234 Ill. 31, 84 NE 715.

taking of the property have been assessed by a jury,[17] nor can any benefits be assessed where the determination of the jury is other than that no damages have accrued.[18] In Iowa under a provision for an assessment in proportion to special benefits conferred on property and not in excess of such benefits, the frontage of the property may be considered.[19] So also in Ohio, where the amount of a sewer assessment does not exceed the special benefits to the land, the assessment is not rendered invalid because levied in terms by the abutting foot.[20] It is not necessary, under the Michigan statute, that the commissioner file his record with the county commissioner's clerk before the assessment is made by the commissioners.[21] A board of supervisors are not justified in refusing to spread upon the rolls the tax assessed for the cleaning out of an existing drain, because of the omission of the drain commissioner to declare the contract void on account of the failure of the contractors to do the work,[22] but in Pennsylvania an assessment for cost of a sewer upon abutting property owners according to the foot-front rule is void where the power to so levy is based on an act in conflict with constitutional restriction relating to laws local and special, regulating the affairs of cities.[23]

Validity of assessment and objections thereto. See 8 C. L. 1892—To be valid, a special drainage assessment must be levied in accordance with the statute authorizing it.[24] So, also, one aggrieved by assessment proceedings has no relief in a court of equity unless he makes use of the statutory remedy.[25] A special assessment for a sewer is not affected by invalidity of a general sewer ordinance where the proceedings were referable to a statute providing a detailed method of procedure for construction of sewers.[26] Where the provision of a statute for notice is mandatory, assessments against landowners not notified are void.[27] Under the Illinois statute, it is essential to the legality of an assessment that there be a legal meeting of the com-

17. Assessment of benefits, without any proceedings to ascertain damages, are void. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 NE 836.

18. Question of damages is for the jury; that of benefits for the commissioners. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 NE 836.

19. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

20. Kibler v. Newark, 4 Ohio N. P. (N. S.) 641.

21. Jones v. Gable, 150 Mich. 30, 14 Det. Leg. N. 623, 113 NW 577.

22. Drain commissioner held not to be liable for services of contractor. Nash v. Kenyon [Mich.] 14 Det. Leg. N. 924, 115 NW 45.

23. Scranton City v. Ansley, 34 Pa. Super. Ct. 133. Scranton through growth of population became a city of the second class. Cities of the third class had power to levy on the front foot basis. Act of March 7, 1901, Art. XX, P. L. 20, provided that all the laws relating to cities of the third class shall continue and apply to cities of that class which have passed or may pass into a city of the second class, which law is void as conflicting with constitutional restriction affecting local and special laws regulating the affairs of cities. Id.

24. Where not levied at a legal meeting of the drainage commissionsrs and of which no legal record was kept, as required by Hurd's Rev. St. 1905, c. 42, § 76, assessment was void. People v. Carr, 231 Ill. 502, 83 NE 269. Under Hurd's Rev. St. 1905, c. 42, § 76, authorizing the levying of assessments by drainage commissioners in order to make a legal assessment, there must be not only a legal meeting of the board but the record thereof must be preserved by the clerk in his book of records, such record being the only evidence of the legal actions of the board. People v. Warren, 231 Ill. 518, 83 NE 271. In an improvement ordinance passed subsequent to March 25, 1904, provision was properly made for an assessment under § 1536-250, notwithstanding the adoption of the resolution of necessity was prior to that date. King v. Dayton, 6 Ohio N. P. (N. S.) 369.

25. Remedy provided for by Acts 1899, p. 464, No. 272, is exclusive. Jones v. Gable, 150 Mich. 30, 14 Det. Leg. N. 623, 113 NW 577.

26. General ordinance held unnecessary. Hardwick v. Independence [Iowa] 114 NW 14.

27. Kirby's Dig. §§ 1422, 1423, providing for establishment of drainage ditches, and declaring that on the filing of the report of viewers the county clerk shall immediately set the hearing for the first day of the next regular term of the county court, and summons persons interested, and that the court, having first determined whether the required notice has been given, shall examine the report of the viewers and the apportionment made by them, and, if fair and just, approve and confirm the same, is mandatory. Van Etten v. Daugherty, 83 Ark. 534, 103 SW 737.

missioners,[28] and that the record thereof be preserved as therein provided.[29] A special assessment for drainage of lands is void in the absence of an affirmative showing of strict compliance with the statute.[30] An objection that damages were not properly ascertained in making the original assessment cannot be interposed in a proceeding for an additional assessment to carry out the proposed improvement.[31] Where it appears that, if necessary, the sewer system can, by expenditure of a small amount, be made to comply with a contract with an adjoining municipality, the fact that it does not is not a valid objection in proceedings for the confirmation of an assessment for the construction of such system.[32] In Ohio an assessment for a county ditch is not rendered invalid by reason of failure to serve notice on the property owners of intention to tile the ditch or its laterals.[33] The mere fact that property is supplied with adequate surface drainage is not sufficient to exempt it from a proper sewer assessment.[34] In Pennsylvania a property owner assessed for benefits cannot be heard to object that separate juries were not appointed for a trunk sewer and its lateral branches.[35]

Waiver or correction of irregularities. See 8 C. L. 1456—Where a landowner defers his attack upon the legality of an assessment until he has secured a benefit from the full or partial completion of the work for which he was assessed, his laches forbids an equitable redress.[36] Defective descriptions in the notice of intention to levy a sewer assessment may be waived.[37] General appearance to object to judgment for sale of property for delinquent assessment waives any variance between the delinquent list and published notice of application for sale.[38] Where statutory notice is given to one of proceedings for assessment to extend a drain and he waives any objection, he cannot defeat a sale of land for nonpayment of taxes for the cost of the work if the drain commissioner followed the old drain.[39] An assessment for a sewer will be regarded as having been made with reference to benefits when the proceedings with reference thereto are all regular, and the property owner enters no complaint until he seeks to enjoin collection of the assessment and there is no showing of fraud or evidence that the assessment as laid unquestionably exceeds the special benefits to the property.[40]

Review of assessment proceedings. See 8 C. L. 1893—The proceedings of drainage commissioners, who have not acted in accordance with the statute, may be reviewed upon the common-law writ of certiorari,[41] or they may be compelled to comply with such statute to lay a foundation for the statutory writ of certiorari.[42] Where plaintiffs in certiorari to review proceedings to establish a drain occupy the position of affirming the existence of facts not appearing by the files and records in the proceedings, which facts are alleged as reasons why the court should declare the proposed

28. Hurd's Rev. St. 1905, c. 42, § 100. People v. Carr, 231 Ill. 502, 83 NE 269.

29. Hurd's Rev. St. 1905, c. 42, § 2, provides that such record be preserved by the clerk in the book of records. People v. Carr, 231 Ill. 502, 83 NE 269.

30. Will be so declared on application for judgment. People v. Carr, 231 Ill. 502, 83 NE 269.

31. Commissioners of Fountain Head Drainage Dist. v. Wright, 228 Ill. 208, 81 NE 849.

32. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615.

33. Grove v. Delaware County Com'rs, 5 Ohio N. P. (N. S.) 521.

34. Kling v. Dayton, 6 Ohio N. P. (N. S.) 869.

35. Ordinance provided for a trunk sewer with lateral branches, and work as a whole was let to one firm of contractors. Reynolds St. Sewer (No. 1), 34 Pa. Super. Ct. 209.

36. Rule does not depend upon failure to avail himself of statutory remedy. Jones v. Gable, 150 Mich. 30, 14 Det. Leg. N. 623, 113 NW 577.

37. Reed v. Cedar Rapids [Iowa] 111 NW 1013.

38. Waite v. People, 228 Ill. 173, 81 NE 837.

39. Auditor General v. Crane [Mich.] 115 NW 1041.

40. Kibler v. Newark, 4 Ohio N. P. (N. S.) 641.

41, 42. Auditor General v. Crane [Mich.] 115 NW 1041.

improvement to be illegal, the court will not review the facts.[43] Substantial compliance with a statute requiring a written notice of appeal is sufficient.[44] An order of the county court confirming the report of viewers of apportionment of costs in a proceeding to open a public ditch is not a final order,[45] and an order setting aside an order of confirmation of the viewer's report is not a final order from which an appeal can be prosecuted to the circuit court.[46] Under the Illinois statute objection by a property owner, after the special assessment is levied, can first be heard when the matter comes up on application for judgment of sale,[47] and an order amending and modifying the report of the commissioners and approving it as modified is not appealable.[48] Under the Michigan statute a landowner aggrieved by the action of the board of review in drainage proceedings may appeal to the town board.[49] In Ohio there is no jurisdiction in a court of equity to reduce a sewer assessment which is not grossly excessive.[50] In that state, also, provision is only made by statute for proceedings between the board of county commissioners of the different counties interested in a suit for contribution for a ditch improvement, and the owners of lands affected by the improvement cannot join in the action and become parties thereto.[51]

Collection.[See 8 C. L. 1893]—A suit to enforce levee taxes is the nature of a suit in rem.[52] A judgment for sale of land for delinquent assessment not signed by the judge until after the term of court at which it was rendered and after the expiration of his term as judge is invalid.[53] One who is benefited by a drain is not entitled to an injunction restraining the collection of a special tax to pay the cost of construction.[54] In Illinois no demand need be made for payment of drainage assessments extended on the collector's books with state, county and other taxes.[55] The Arkansas statute, authorizing the directors of a levee district to enforce the collection of levee taxes in chancery courts, provides that, any time within three years after the rendition of the final decree of the chancery court, the owner of the land proceeded against may show that the taxes on the land have been paid, and have the decree set aside.[56]

§ 7. *Management and operation; duty to properly construct, maintain, and repair works, and provide drainage.*[See 8 C. L. 1894]—Failure of a city to maintain a sewer constructed by it, in a reasonable state of efficiency, is negligence for which it is liable in damages to parties injured.[57] The New Jersey borough act does not re-

43. Tuttle v. Bishopp [Mich.] 14 Det. Leg. N. 735, 114 NW 69.

44. Under a statute requiring a written notice of appeal to the county clerk, a notice otherwise sufficient delivered to the clerk is not void because addressed to the commissioners. Shreves v. Gibson [Kan.] 92 P 584.

45, 46. Tillie v. Mitchell, 31 Ky. L. R. 389, 102 SW 263.

47. People v. Carr, 231 Ill. 502, 83 NE 269.

48. Hurd's Rev. St. 1905, § 25, c. 42, provides for review only of judgments confirming assessment and ordering it spread on the records. Drainage Com'rs of Union Drainage Dist. No. 1 v. Milligan, 227 Ill. 303, 81 NE 382.

49. Comp. Laws, §§ 4344, 4345. Clinton Tp. v. Teachout, 150 Mich. 124, 14 Det. Leg. N. 246, 111 NW 1052.

50. King v. Dayton, 10 Ohio C. C. (N. S.) 522.

51. Commissioners of Crawford County v. Huron County Com'rs, 10 Ohio C. C. (N. S.) 16.

52. So held under the provisions of the act of 1895, hence a sale thereunder passes title to all persons. Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

53. Waite v. People, 228 Ill. 173, 81 NE 837.

54. Collection of special assessments, as provided in Act 1905, c. 215, p. 306, should not be enjoined where the property so assessed may possibly be benefited by the proposed improvement, and there is no claim that the board acted fraudulently or oppressively in determining the facts and making the assessment. Roby v. Shunganunga Drainage Dist. [Kan.] 95 P 399.

55. Hurd's Rev. St. 1905, § 179, c. 20, held to that extent repealed by Hurd's Rev. St. 1905, § 145, c. 52. Waite v. People, 228 Ill. 173, 81 NE 837.

56. Act 1895, p. 88, runs from the date of decree declaring the lien and ordering a sale of the land. Chapman & Dewey Land Co. v. Fickinger [Ark.] 107 SW 1176.

57. Cairns v. Chester City, 34 Pa. Super. Ct. 51. City liable for injuries caused by overflow due to insufficient sewerage system, although premises injured would have been subject to overflow if sewers had not been constructed. City of Louisville v. Knighton, 30 Ky. L. R. 1037, 100 SW 228.

quire sewage disposal works to be constructed to tidewater.[58] The proper location of sewage disposal works is determined by public necessity and convenience,[59] such location being discretionary with the public authorities of the borough,[60] whose decision is conclusive.[61] A city is liable for injuries due to the want of proper maintenance or repair of the public sewers by the board of public works, or other municipal agency charged with the duty of maintenance and repair.[62] A city is not liable for damages resulting from an overflow from an unusual flood, in the absence of a showing of defects in the sewer or of defects in its construction, or any obstructions removable after notice.[63] Under the Massachusetts statute authorizing the use of a brook for sewerage purposes by a city, a riparian proprietor injured thereby can recover for loss from the pollution, and not for diversion of water, where a diversion has not been assumed.[64] If a city in making an improvement collects surface water which would otherwise find an outlet without injury to property, it becomes its absolute duty both to provide and maintain an adequate outlet for such water.[65] Where a city is negligent in failing to keep its drainage system in repair, the burden of proof is upon it to establish by a preponderance of evidence the defense that damage to the plaintiff was caused without the concurrence of such negligence.[66] A city is not liable to an individual for damages in consequence of an abutment left in a waterway upon the reconstruction of an avenue, unless it has been guilty of negligence in constructing the same.[67] There is no objection to a single proceeding by the county drain commission to open, widen, straighten, deepen, and extend three drains established by township drain commissioners, where it appears that they, in fact, constitute one drainage canal, no portion of which can be disturbed without affecting the entire drain.[68] In Ohio where a county ditch has once been established by law, and has been used for a period of over seven years, it does not become a public watercourse in the sense that the right to improve it as an established county ditch no longer exists.[69]

§ 8. *Private and combined drainage.*[See 8 C. L. 1696]—Where several property owners join in the building of a sewer for the drainage of their property, and enter into a contract for the maintenance and repair thereof, they severally acquire no

Gutter beside a highway is not a "sluice way" within Laws 1893, p. 47, c. 59, § 1, rendering towns liable for injuries from defective sluiceways. Drew v. Bow [N. H.] 65 A 831.

58. Section 87, borough act 1897 (P. L. p. 327). Philadelphia Trust, Safe Deposit & Ins. Co. v. Merchantville [N. J. Law] 68 A 170.

59, 60, 61. Philadelphia Trust, Safe Deposit & Ins. Co. v. Merchantville [N. J. Law] 68 A 170.

62. Googin v. Lewiston [Me.] 68 A 694.

63. Judas v. New York, 55 Misc. 259, 105 NYS 96.

64. Mass. St. 1867, p. 541, c. 106, authorizing a city to fix the boundaries of a brook, to change its course, and use for sewerage purposes. Stevens v. Worcester [Mass.] 81 NE 907.

65. Under South Carolina Code 1902, § 2023, providing that any person who shall receive damages through a defect in any street by reason of mismanagement of anything under the control of the corporation through its negligence may recover the same, where the negligent construction by a city in laying drain pipes so that the water ponded on a lot by raising the street grade was not carried off, but collected thereon, rendering the premises sickly and uninhabitable, the city is liable in damages to the owner. Mayrant v. Columbia, 77 S. C. 281, 57 SE 857. A city cannot discharge sewage into a river so that it will be carried undiluted and deposited on land of riparian owner, producing noxious and unhealthy gases (Platt v. Waterbury [Conn.] 67 A 508), and it is no defense that city charter authorizes construction of sewers and condemnation of necessary land for such purposes (Id.).

66. Instruction held not erroneous. City of McCook v. McAdams [Neb.] 114 NW 596.

67. Prime v. Yonkers [N. Y.] 84 NE 571.

68. Patterson v. Mead, 148 Mich. 659, 14 Det. Leg. N. 326, 112 NW 742.

69. Rev. St. § 4510 ineffective to constitute. Commissioners of Crawford County v. Huron County Com'rs, 10 Ohio C. C. (N. S.) 16. Although statutes provide that uninterrupted use of established ditch for seven years constitutes natural watercourse, notwithstanding errors, defects, or irregularities in location, establishment, or construction thereof, it was not designed to take away rights which public had acquired over it as ditch or drain. Rev. St. § 4500. Mason v. Fulton County Com'rs, 10 Ohio C. C. (N. S.) 201.

rights in the property of the others save a mere easement for drainage purposes.[70] By statute in Illinois, whenever drains have been constructed by mutual consent, none of the interested parties may thereafter fill up or interfere with them without the consent of all.[71] Where a city permits property owners to lay a drain in a public street, and such drain becomes a nuisance, the city is liable for negligence in not abating it.[72] Persons discharging sewage into a stream, which intermingles and causes an actionable nuisance, are not liable jointly in the absence of a common design or concerted action, but are liable for proportionate damages.[73] Although a contract for the privilege of constructing a sewer may be in the name of the agent, yet where paid for by the principal, the apparatus does not belong to the agent.[74]

§ 9. *Obstruction of drains.*[See 8 C. L. 1896]—In making repairs a municipality is liable for injuries occasioned by stopping up a private pipe lawfully connected with a public sewer.[75] A railroad company which destroys a drain constructed under a state law is liable to the owner of lands rendered untillable by the act.[76] One building a dam across a ditch upon his own property is not liable where the ditch is left open and unobstructed.[77] It is a complete defense to a suit to restrain interference with an outlet to a tile drain that defendants were acting for the owner of the land.[78]

SHAM PLEADINGS; SHELLEY'S CASE, see latest topical index.

SHERIFFS AND CONSTABLES.

§ 1. The Office, Election or Appointment, 1648.
§ 2. Powers, Duties, and Privileges, 1649.
§ 3. Compensation, 1649.
§ 4. Deputies, Undersheriffs, and Bailiffs, 1650.
§ 5. Liabilities and Rights, 1651.
A. Liability in General, 1651.
B. Failure to Execute Process or Insufficient Execution, 1651.
C. Failure to Return Process and False Return, 1652.
D. Failure to Take Security, 1652.
E. Wrongful Levy, Sale or Arrest, 1652.
F. Misappropriation of Proceeds, 1653.
G. Rights of Levying Officers, 1653.
§ 6. Liability on Bonds, 1654.

The scope of this topic is noted below.[1]

§ 1. *The office; election or appointment.*[See 8 C. L. 1897]—In South Carolina a practicing attorney cannot hold the office either of sheriff or deputy sheriff.[2] In Mississippi a sheriff cannot succeed himself in office.[3] In New York a deputy sheriff being required to pass the civil service examination must, in his petition for re-

70. Each may dispose of property at will, and where one dedicates his property to municipality, sewer within such land is not wrongfully appropriated by city so long as there is no interference with drainage easement of other property owners. But as to party sewer on private property of one of parties to contract, city acquires no right under dedication and is liable for damages for wrongful appropriation thereof. Kinney v. Cincinnati, 6 Ohio N. P. (N. S.) 137.

71. Hurd's Rev. St. 1905, p. 832. Construction of independent open ditches or tile drains by owners of adjoining lands, and subsequent connection so as to form a continuous system of drainage across the lands of several owners, brings system within act by mere acquiescence without special agreement. Funston v. Hoffman, 232 Ill. 360, 83 NE 917.

72, 73. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631.

74. Jones v. Adair [Kan.] 91 P 78.

75. Injuries by private pipe filling and bursting. Googin v. Lewiston [Me.] 68 A 694.

76. Kelsay v. Chicago, etc., R. Co. [Ind. App.] 81 NE 522.

77. Asbley v. Fitzwilliams, 127 Ill. App. 291.

78. Orcutt v. Woodard [Iowa] 113 NW 848.

1. **It includes** the office, powers, compensation, and liabilities of sheriffs and constables. **It excludes** the duties of sheriffs in particular matters (see Attachment, 9 C. L. 282; Executions, 9 C. L. 1328, and like topics) and matters common to all officers (see Officers and Public Employes, 10 C. L. 1043).

2. Section 829, Civ. Code 1902. State v. Boyles [S. C.] 60 SE 233.

3. But the first sheriff of a newly created county who serves less than the full term may be re-elected at the first general election, § 135 of the Const. not being applicable to such a case. Bozeman v. Laird [Miss.] 45 S 722.

instatement, show that fact and also that he held the office lawfully.[4] In Missouri a vacancy in the office of sheriff is filled by special election, called by the county court.[5] Whether one actually holds the office of deputy sheriff, in the absence of positive proof, may be determined by reference to the statute defining the number of appointments permitted.[6] The giving of a bond is not a condition precedent to a sheriff's authority to perform the duties of his office.[7] And a constable, though elected by the voters of a town, is an officer of the entire county.[8]

§ 2. *Powers, duties and privileges.*[See 8 C. L. 1897]—Under a statute providing that no officer is required to arrest a debtor on execution unless direction to do so is indorsed on the writ,[9] he may nevertheless arrest without such indorsement.[10] The right to require the indorsement is merely a personal privilege which the officer may waive,[11] and waiver estops him from claiming absence of the indorsement as a defense to his liability for failure to serve.[12] A sheriff or deputy may not make an arrest without a warrant for an offense which is neither a breach of the peace nor a felony.[13] In Montana certain deputy sheriffs act as jailors and the appointment of such deputies by the sheriff must be approved by a board of commissioners.[14]

§ 3. *Compensation.*[See 8 C. L. 1897]—Fees are governed by the statute in force when the services are rendered.[15] A sheriff may be allowed compensation for caring for property,[16] and where special care is required he will be allowed an adequate amount for that.[17] But he can recover only for the period during which the property was actually in his custody,[18] and as to the length of such period he is conclusively bound by his return.[19] A sheriff is entitled to his fees for executing process regular on its face though subsequently vacated,[20] and such fees must be paid by the party on whose initiative the levy was made.[21] He may hold an attachment until fees are paid,[22] but is not entitled to an order requiring their payment until a determination has been reached as to the party liable therefor.[23] A sheriff will not be permitted to

4. A statement that he was duly appointed is a mere conclusion and insufficient. Meehan v. Flaherty, 119 App. Div. 128, 103 NYS 1058.

5. The amendment (Rev. St. 1899, § 10,048), providing for appointment of a sheriff pending the result of the special election (State v. Patterson, 207 Mo. 129, 105 SW 1048), did not repeal §§ 2 and 3 of Acts 1887, p. 281, providing for the manner and means of holding such election (Id.) The expiration of the time in which the special election may be ordered (Act 1887, p. 281, as amended, Rev. St. 1899, § 10,048) does not deprive the supreme court of the power to compel by mandamus an order to hold it thereafter, under Const. art. 4, § 3. Id. It is governed by the general election law, not the primary. Id.

6. Argument on the statute may be made to jury. Texas, etc., R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240.

7. In Georgia by Acts 1896, p. 287, the sheriff of Johnson county is ex officio sheriff of the city of Wrightsville, so his deputy can serve process from such court without filing a bond there. Smith v. Davis [Ga. App.] 60 SE 199.

8. Greenberg v. People, 125 Ill. App. 626, afd. 225 Ill. 174, 80 NE 100.

9. Section 5, c. 117. Rev. St. of Maine. Stewart v. Leonard [Me.] 68 A 638.

10. Stewart v. Leonard [Me.] 68 A 638.

11. Waived by failure to return to plaintiff for indorsement and failure to serve solely on another ground. Stewart v. Leonard [Me.] 68 A 638.

12. Stewart v. Leonard [Me.] 68 A 638.

13. Such as trespassing in a railroad yard and entering a car for the purpose of taking a ride. Texas, etc., R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240. He has no greater rights than others except when in discharge of official business, though hired by the company to enforce the law. Id.

14. When a statute required appointments of jailers to be approved by commissioners in amendment to the effect that the sheriff may appoint deputies who shall act as jailers does not rest such appointment in the sheriff absolutely, but merely increases the number of deputies which he may appoint subject to approval of the commissioners. Hogan v. Cascade County [Mont.] 92 P 529.

15. Rev. Code 1852, requiring payment of **dollarage** to sheriff on sales of land, is repealed by Act March 29, 1907. In re Crossgrove [Del.] 67 A 159.

16. Dudley v. Clevenger [Okl.] 91 P 908.

17. Such as crude oil. Crusel v. Brooks [La.] 46 S 224.

18, 19. Dudley v. Clevenger [Okl.] 91 P 908.

20, 21. Bradley v. Blue Ridge Hosiery Mill, 56 Misc. 125, 106 NYS 1107.

22. Sec. 709, Code Civ. Proc. Jones v. Gould, 119 App. Div. 817, 104 NYS 935.

23. Jones v. Gould, 119 App. Div. 817, 104 NYS 935.

recover payments for legal advice, since he is entitled to advice from the court.[24] A statute authorizing sheriffs to demand in advance fees allowed by law, and, for convenience, to receive from suitors reasonable deposits in advance, requires only a payment of those fees actually demandable, and it is optional with suitors whether they deposit a greater amount.[25] The obligation of paying for the care and custody of prisoners and witnesses, both Federal and state, rests solely upon the county,[26] and it may recover surplus fees paid a sheriff for such purpose though voluntarily paid with full knowledge of the facts.[27] A sheriff in Ohio is not entitled to poundage on sale of real estate where the purchasers thereof are entitled to the whole of the proceeds arising from the sale and no amount over and above their claim, except expenses and costs of sales, is paid to, or could have been demanded by, the sheriff.[28] A statute which provides compensation for "maintaining" horses and vehicles necessary in the performance of a sheriff's duty does not authorize their purchase at the county's expense.[29] Sheriff fees in tax proceedings are such only as are provided for in the tax law,[30] and where no fee is provided for there, he is not entitled to recover under the general law relating to sheriff's fees,[31] and though fees for giving election notices are allowed and paid by the county and required to be taxed by law, they belong to the county and not the sheriff, where the statute does not expressly provide that they shall be the property of the sheriff.[32] "In and out fees," so-called, received by the sheriff from the county for committing to and discharging persons from jail, are the property of the county and must be paid by the sheriff to its treasurer.[33] In Iowa under the maximum compensation act, the maximum is not to be received unless the receipts of the office are equal thereto.[34] Fees received by the sheriff when acting as constable are to be considered in fixing his salary under such act.[35]

§ 4. *Deputies, undersheriffs and bailiffs.*[See 8 C. L. 1899]—A deputy sheriff may hold other offices not incompatible therewith[36] and lawfully receive the emoluments

24. Crusel v. Brooks [La.] 46 S. 224.

25. P. L. 1905, p. 19, § 3. Brockhurst v. Kaiser [N. J. Law] 67 A 75. An offer to pay the demandable fees is a sufficient basis for amercement where the sheriff refuses to state them and to proceed without a larger deposit. Id.

26. Board of Chosen Freeholders of Hudson County v. Kaiser [N. J. Law] 69 A 25. The custody of Federal prisoners or witnesses by a sheriff is as sheriff and not as agent of the United States marshal. Id.

27. The rule governing individuals in this regard does not apply. Board of Chosen Freeholders of Hudson County v. Kaiser [N. J. Law] 69 A 25. In New Jersey after the law of 1905, P. L. p. 18, went into effect, sheriffs were no longer entitled to any fees under former laws. Consequently, though entitled under former laws to surplus from remaining money paid him for care and maintenance of detained witness, the salary provided in this act is in lieu thereof. Id. Where by a mistake of law a sheriff is overpaid, the county may recover back the excess. Jones County v. Arnold, 134 Iowa, 580, 111 NW 973.

28. As expressly provided by § 1730, Rev. St. 1906. The word "party" in this statute means the purchaser whether a party to the foreclosure proceedings or not. Major v. International Coal Co., 76 Ohio St. 200, 81 NE 240.

29. Section 1296-29 (98 O. L. 96). State v. Mahoning County Com'rs, 10 Ohio C. C. (N. S.) 398.

30. Chapter 11, Rev. Laws 1905. Mieson v. Ramsey County [Minn.] 112 NW 874.

31. For serving citations in proceedings to recover delinquent taxes, though his fees are included in the judgments, he is entitled to nothing. Miesen v. Ramsey County [Minn.] 112 NW 874. West Virginia Code 1906, § 737, relating to compensation for collection of taxes, is an exception to and exclusive of the general law (Code 1906, §§ 822-857), and no commission provided by the old law may be received. Hawkins v. Bare [W. Va.] 60 SE 391.

32. Burns' Ann. St. 1901, §§ 6405, 6541. Smith v. State [Ind.] 82 NE 450.

33. Under §§ 6405-6541, Burns' Ann. St. 1901. Smith v. State [Ind.] 82 NE 450.

34. Under Code Supp. 1902, § 510a, providing that in counties of between 11,000 and 28,000 inhabitants the sheriff shall receive $2,000 per year in full compensation, to be paid out of the receipts of office, and that in counties of less than 28,000, in which the receipts of office do not amount to $1,800, the supervisors shall allow a sum equal to the difference between $1,800 and those receipts, $1,800 is the highest sum a sheriff of such county may receive. Dallas County v. Hanes [Iowa] 113 NW 345.

35. Jones County v. Arnold, 134 Iowa, 580, 111 NW 973.

36. May be both deputy sheriff and court

peculiar to each provided he is not paid twice for the same service.[37] The appointment of deputy bailiffs of the municipal court of Chicago is not controlled by the "Act to regulate the civil service of cities."[38]

§ 5. *Liabilities and rights. A. Liability in general.* See 8 C. L. 1899—Injury to the plaintiff is a necessary ingredient of a sheriff's liability.[39] A sheriff is liable to account to a principal for money taken on regular process from its agent where process was subsequently vacated.[40] It is a sheriff's duty to give the execution debtor notice of his exemption before levy, and for failure to do so he is liable on his bond,[41] and for a levy so grossly excessive as to be oppressive he is liable.[42] The collection of fees by a sheriff from the county is not an act in his official capacity and by virtue of his office.[43] The acceptance of a nonstatutory bond in lieu of a fine does not relieve the sheriff from liability to account for the fine, though the bond may be good as a common-law obligation.[44] A sheriff is chargeable with interest on a balance due from him only from the time demand is made or suit brought.[45] A forthcoming bond payable to others besides the plaintiff in the execution is not a statutory bond, and mere irregularities therein cannot be taken advantage of.[46] Rules against a sheriff are not governed by rules relating to ordinary pleadings, but are under the discretion of the court.[47] Every allegation in a sheriff's answer to a rule nisi is to be taken as true until traversed.[48] The fact that the offense is punishable as a crime does not relieve the sheriff from liability to be removed therefor.[49] Where a justice court cannot entertain proceedings for removing a sheriff from office,[50] the circuit court acquires no jurisdiction on appeal, and any sentence imposed by either court will be annulled.[51] In New Mexico a sheriff or constable is removable from office for official misdoings committed by him the previous term, there being no intervening term held by another.[52]

(§ 5) *B. Failure to execute process or insufficient execution.* See 8 C. L. 1900—After execution is placed in the sheriff's hands, it is his duty to levy it if defendant has property subject thereto unless directed otherwise by the court, or plaintiff, or plaintiff's attorney.[53] Whenever a sheriff fails to properly levy an execution, the law presumes that the plaintiff is injured,[54] and when such failure is unwarranted,

constable. State v. Shaffer, 6 Ohio N. P. (N. S.) 219.

37. Rev. St. § 18. State v. Shaffer, 6 Ohio N. P. (N. S.) 219.

38. McGann v. People, 228 Ill. 203, 81 NE 847.

39. Prince v. Walker, 1 Ga. App. 282, 58 SE 61.

40. Bradley v. Blue Ridge Hosiery Mill, 56 Misc. 125, 106 NYS 1107.

41. State v. Dickman, 124 Mo. App. 653, 102 SW 44.

42. On $7,500 worth of property to satisfy a $189.81 judgment. State v. Dickman, 124 Mo. App. 653, 102 SW 144.

43. Within the meaning of Rev. Laws 1905, § 4077, providing that liability for such acts is barred in three years. Megaarden v. Hennepin County, 102 Minn. 134, 112 NW 899.

44. As required by Kirby's Dig. §§ 7191-7193. Wilson v. White, 82 Ark. 407, 102 SW 201.

45. In default only after order from the court to pay has been served upon him. State v. Keadle [W. Va.] 60 SE 798.

46. Code 1896, § 1916. Burns v. George [Ala.] 45 S 421.

47. When ordered to answer instanter, he may be permitted, upon failure to do so, to answer at a subsequent term. Hixon v. Callaway, 2 Ga. App. 678, 58 SE 1120.

48. Read Phosphate Co. v. S. Weichselbaum Co. [Ga. App.] 58 SE 122.

49. Territory v. Sanches [N. M.] 94 P 954. Removal proceedings are so far civil as to give the trial judge the right to direct a verdict where the evidence warrants it, and, if the facts thus found constitute any of the grounds for removal, to order it. Id.

50. Const. § 175. Moore v. State [Miss.] 45 S 866.

51. Though the sheriff had resigned. Moore v. State [Miss.] 45 S 866. Though a fine in such case may be valid, it will also be annulled when the affidavit fails to state the precise offense charged. Id.

52. Territory v. Sanches [N. M.] 94 P 954.

53. Advice and direction by the county solicitor is of no authority though the county would have a beneficial interest in the debt. Commonwealth v. Osler, 34 Pa. Super. Ct. 138. A supersedeas in a criminal case cannot stay execution in a civil case or excuse the sheriff's failure to make the money thereon. Id.

54. Hixon v. Callaway, 2 Ga. App. 678, 58 SE 1120.

the sheriff is liable for the damage sustained [55] and subject to amercement.[56] Proof that an execution was placed in the sheriff's hands for levy and that defendant had sufficient property subject to levy to satisfy it establishes a prima facie right to recover the full amount of the judgment on which execution issued,[57] but this is rebutted by proof that the property was of less value than the amount of the judgment.[58] An unusual delay in making service raises a presumption of negligence.[59] Failure to execute process for the reason that the property had been taken on another execution of higher dignity at least shows good faith,[60] and paramount title in another is valid excuse for failure to deliver property seized.[61] But the fact that one having a superior lien took the property away from the sheriff is no defense to an action by the execution creditor to recover for failure to execute the process,[62] nor is the fact that plaintiff never pointed out the property to him.[63] A sheriff has no right to apply property seized on execution to payment of plaintiff's indebtedness to a third party.[64] Failure to return property seized upon the owners filing an exemption claim, in the absence of bond from plaintiff, is a breach of duty, and an action therefor, though on the bond, is ex delicto in nature, and no demand for the property is necessary.[65] In such case if the execution is against joint debtors, either may alone sue the officer,[66] and his liability is not modified by the fact that an undivided interest in the property was not subject to be claimed as exempt.[67] In Alabama the equitable owner of a judgment may sue in his own name for a failure to make the money on an execution thereon.[68]

(§ 5) *C. Failure to return process and false return.* See 8 C. L. 1900

(§ 5) *D. Failure to take security.* See 8 C. L. 1462

(§ 5) *E. Wrongful levy, sale or arrest.* See 8 C. L. 1901—An officer is liable in damages to the owner of property wrongfully levied [69] and sold.[70] It is unnecessary to make a third party claimant in such case in order to recover.[71] The owner may also recover the reasonable cost of proceedings to remove a cloud upon title wrongfully created by the sheriff.[72] And, in an action on the sheriff's bond to recover for such wrongful levy, the fact that recovery on a nonstatutory forthcoming bond, given in the original proceedings, had been unsuccessfully attempted, is not available as a defense by the sheriff.[73] But money voluntarily paid to prevent an attachment can-

55. Including costs and attorney's fees incurred in supersedeas proceedings. Burns v. George [Ala.] 45 S 421. Liable to defendant's bondsmen who, by reason of the failure to levy, were compelled to pay the debt. Commonwealth v. Osler, 34 Pa. Super. Ct. 138.

56. Brockhurst v. Kaiser [N. J. Law] 67 A 75.

57. Hixon v. Callaway 2 Ga. App. 678, 58 SE 1120.

58. Prince v. Walker, 1 Ga. App. 282, 58 SE 61.

59. Brantley Co. v. Southerland, 1 Ga. App. 804, 57 SE 960.

60. An answer alleging such fact should not be stricken. Read Phosphate Co. v. S. Weichselbaum Co. [Ga. App.] 58 SE 122.

61. Hixon v. Callaway, 2 Ga. App. 678, 58 SE 1120.

62. Where landlord of owner takes the crops. Prince v. Walker, 1 Ga. App. 282, 58 SE 61.

63. Brantley Co. v. Southerland, 1 Ga. App. 804, 57 SE 960.

64. It is no defense to an action of conversion though the value of the property was less than the indebtedness. Smith v. Hilton, 147 Ala. 642, 41 S 747.

65. Code 1896, § 2049. Williams v. Ragan [Ala.] 45 S 185.

66, 67. Williams v. Ragan [Ala.] 45 S 185.

68. Code 1896, § 14. Burns v. George [Ala.] 45 S 421.

69. Actual damage for lack of ordinary care. Gay v. Mitchell [N. C.] 60 SE 426. General allegation of damage makes out a case for nominal damages at least. O'Brien v. Quinn, 35 Mont. 441, 90 P 166.

70. Owner may join him and party who procured him to make the sale. Fite v. Briedenback [Ky.] 105 SW 1182. The mere fact that the owner was in possession of the property at the time of its seizure entitles him to recover where the officer fails to introduce in evidence his process and the judgment on which it issued. McCune v. Peters, 54 Misc. 165, 105 NYS 896.

71. O'Brien v. Quinn, 35 Mont. 441, 90 P. 166.

72. State v. Dickman, 124 Mo. App. 653, 102 SW 44.

73. Since nothing but a statutory bond could authorize him to deliver the prop-

not be recovered,[74] and the owner may estop himself to dispute the rightfulness of the levy.[75] An allegation that the sheriff levied upon and seized personal property under a writ of attachment shows an invasion of plaintiff's possession and is sufficient.[76] A sheriff's liability in excess of the amount of the bond cannot be recovered in an action against him and his sureties.[77] Where property is taken on valid execution, the sheriff may show, in detinue, that it is the property of the one against whom execution issued,[78] and, though property is taken on a void execution, the officer may defend under a levy on a subsequent valid execution,[79] though it has been held that matters occurring subsequent to a seizure and sale cannot be shown in evidence to establish its validity.[80] Advice of an attorney is no defense to an action for wrongful levy,[81] nor is the fact that the officer acted without malice.[82] Such seizure is not justified by the fact that the property is in the execution debtor's possession and that the writ is fair and regular on its face.[83] The officer's liability is not changed by application of the proceeds of such a sale to a debt due the owner,[84] nor is he protected from liability for levy and sale of a stranger's property by a bond given by the creditor obligating himself to pay any claimant the damage suffered by such levy and sale.[85] And though the seizure may be lawful, the officer is liable for a subsequent conversion.[86] Such conversion can be accomplished only by a positive tortious act, but it need not extend to a physical taking of the property.[87]

(§ 5) *F. Misappropriation of proceeds.*[See 8 C. L. 1902]—A sheriff is liable for misappropriation of a fund in his possession though made in good faith.[88] But amercement will not lie where the thing misapplied was something other than money.[89] One who ratifies an unauthorized application of proceeds cannot subsequently object.[90]

(§ 5) *G. Rights of levying officers.*[See 8 C. L. 1902]—A sheriff is entitled to an order of court as to payment of money held by him.[91] After accounting for a fine, in lieu of which the sheriff has taken a common-law bond, he becomes subrogated

erty to the execution creditor. William v. Ragan [Ala.] 45 S 185.

74. To entitle one to a recovery it must appear that payment was necessary to prevent an unlawful detention, that it was paid under protest, and that the detention of the property was attended with circumstances of hardship or inconvenience for plaintiff. O'Brien v. Quinn, 35 Mont. 441, 90 P 166.

75. Where neither the judgment debtor nor the owner objected at the time of a levy on property of the latter, they are estopped to later assert that title was not in the debtor. Zuehlke v. Stone, 148 Mich. 478, 14 Det. Leg. N. 203, 111 NW 1065.

76. Since the only method of attaching personal property is by taking actual possession. O'Brien v. Quinn, 35 Mont. 441, 90 P 166.

77. Though Kirby's Dig. § 6079 provides for joinder of several causes of action. Albie v. Jones, 82 Ark. 414, 102 SW 222.

78, 79. Pruitt v. Gunn [Ala.] 44 S 569.

80. Albie v. Jones, 82 Ark. 414, 102 SW 222.

81. Where attorney was not representative of defendant in giving the advice, and levy was not shown to have been induced thereby, these facts must be alleged in the answer. Williams v. Ragan [Ala.] 45 S 185.

82. State v. Dickman, 124 Mo. App. 653, 102 SW 44.

83. Where another has interest under a trust deed. Albie v. Jones, 82 Ark. 414, 102 SW 222.

84. The measure of damages is the value of the property. Nash v. Noble [Tex. Civ. App.] 18 Tex. Ct. Rep. 543, 102 SW 736.

85. Being unauthorized by Civ. Code Prac. § 211, under which it was taken. Fite v. Briedenback [Ky.] 105 SW 1182.

86. Christensen v. Beebe [Utah] 91 P 129.

87. As when notified that property belongs to a third person he treats the property as levied on, accepts an indemnity bond, and transfers property to defendants' trustee in bankruptcy to be sold. Rogers v. King [Ala.] 44 S 655.

88. A sheriff who receives a note for land sold on partition proceedings is guilty of a misapplication of funds by giving the note to one of several entitled to receive the fund, and is liable therefor to the others. Shewry v. Shewry, 6 Ohio N. P. (N. S). 238.

89. The statute providing for the amercement of a sheriff being quasi penal must be strictly construed, and does not permit of the word "money" as used in the statute being construed as the equivalent of a mortgage note, which may prove to be uncollectible or of less value than its face. Shewry v. Shewry, 6 Ohio N. P. (N. S.) 238.

90. Ratified by acceptance. Shewry v. Shewry, 6 Ohio N. P. (N. S.) 238.

91. State v. Keadle [W. Va.] 60 SE 798.

to the rights of the county on such obligation.[92] Where there is any reasonable doubt as to ownership of property [93] or a bona fide doubt as to the validity of the judgment,[94] the officer is entitled to indemnity before executing his process. In Arkansas a sheriff is not required to deliver to plaintiff property seized in replevin until the latter gives the required bond.[95] Plaintiff's failure to give indemnity bond upon demand postpones the lien of the execution to one junior thereto upon which levy has been made and indemnity given.[96] The giving of a forthcoming bond admits the value of the property, constitutes the giver the sheriff's agent for the production of the property, and is an estoppel to a denial of the sheriff's authority.[97] A levy on goods, in small causes, which are claimed by a third party as provided by law,[98] may be completed by sale, where such party makes no application to have his claim heard in court, as though no claim had been made.[99]

§ 6. *Liability on bonds.*[See 8 C. L. 1902]—Liability on the bond extends only to a breach of those conditions therein named in substantial compliance with the statute.[1] The bond covers only official misdoings [2] or, at least, the act complained of must have been colore officii.[3] A sheriff is liable on his bond for failure to give notice of exemption to the execution debtor.[4] Recovery for wrongful seizure and sale of property is limited to the penalty named in the bond, though several of its conditions are broken and regardless of the amount of damages shown.[5] The return of a sheriff [6] and recitals in the judgment obtained in the suit out of which liability arose [7] are prima facie evidence even against the sureties, and testimony of a witness that he knows the value of the property and names it is sufficient evidence of the value of defendant's interest.[8] Advantage will not be permitted to be taken of mere irregularities,[9] but in a suit on a sheriff's bond to recover for nondelivery of property seized in replevin, the complaint must allege that the replevin suit has been prosecuted to final judgment.[10] Evidence tending to show a payment of the judgment on

92. Wilson v. White, 82 Ark. 407, 102 SW 201.

93. Baker v. Duddleson, 125 Ill. App. 483.

94. In an action for refusal to levy on this ground, the only question is one of good faith. Crane v. Crane [Ky.] 105 SW 370.

95. Kirby's Dig. § 6857. And the fact that the bond was given must be alleged positively and not by inference, in the complaint, in a suit against the officer for nondelivery. Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 SW 709.

96. Baker v. Duddleson, 125 Ill. App. 483.

97. Obligor liable to sheriff for failure to produce. Smith v. Davis [Ga. App.] 60 SE 199.

98. P. L. of N. J. p. 270. Masters v. Champion [N. J. Err. & App.] 69 A 224.

99. The fact that the goods were in claimant's possession is immaterial. Masters v. Champion [N. J. Err. & App.] 69 A 224. The fact that the written claim was delivered on Sunday does not prevent the estoppel in favor of the constable from operating. Board of Chosen Freeholders of Hudson County v. Kaiser [N. J. Law] 69 A 25.

1. City of Cambridge v. Foster, 195 Mass. 411, 81 NE 278.

2. Under Comp. Laws 1897, § 844. Misdoings such as partiality, oppression, corruption, extortion, etc. Territory v. Sanches [N. M.] 94 P 954. Any malicious and wrongful act directly connected with the performance of an official act. Greenberg v. People, 125 Ill. App. 626, afd. 225 Ill. 174, 80 NE 100. An assault committed by a constable while levying an execution is official misconduct. Hurd's Rev. St. 1905, p. 1272, c. 79, § 9. Greenberg v. People, 225 Ill. 174, 80 NE 100. See following note.

3. An assault by a constable not colore officii, in the service of civil process, or an assault in punishment for opposition to such service, is not misconduct in office. City of Cambridge v. Foster, 195 Mass. 411, 81 NE 278. See preceding note.

4. State v. Dickman, 124 Mo. App. 653, 101 SW 44.

5. Albie v. Jones, 82 Ark. 414, 102 SW 222.

6. Where return upon writ of attachment states positively that the property atached belonged to defendant. Phillips v. Eggert [Wis.] 113 NW 686.

7. A recital in the judgment in the main action of attachment procuring that personal service of summons was made upon defendant was prima facie evidence and sufficient to show that fact. Phillips v. Eggert [Wis.] 113 NW 686.

8. Phillips v. Eggert [Wis.] 113 NW 686.

9. A failure to set out all the names of all the parties in the execution as was done in the judgment on which it issued is a mere irregularity of which no advantage can be taken in a suit on the bond for breach of duty. Burns v. George [Ala.] 45 S 421.

10. Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 SW 709.

which the wrongful sale was made does not bar the right to recover, in the action on the bond, the sums paid for a reconveyance.[11] Evidence tending to establish several breaches of the bond should go to the jury.[12] A failure to move to set aside a wrongful levy and sale does not estop proceeding to recover on the bond.[13]

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SHIPPING AND WATER TRAFFIC.

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Matters relating to the jurisdiction of courts of admiralty and the practice and procedure therein,[14] and to the obstruction of navigable waters,[15] are treated elsewhere, as are matters relating to carriers generally,[16] or peculiar to the operation of ferries.[17]

§ 1. *Public control and regulation; extent of state jurisdiction.*[See 8 C. L. 1904]—The sovereignty of the state extends to its vessels upon the high seas.[18]

§ 2. *Nationality, registration, enrollment, and ownership.*[See 8 C. L. 1904]—The title to a vessel, which must be clearly established,[19] is, if in several, presumed to be held by them in common.[20] The record title will control in the absence of evidence to the contrary.[21]

§ 3. *Master and officers.*[See 8 C. L. 1904]—The master has entire charge of the navigation of the vessel.[22]

§ 4. *Seamen. Shipping articles.*[See 8 C. L. 1905]—The shipping articles, which determine where and when the services of the seamen terminate,[23] must be in writing and indicate the nature of the intended voyage.[24]

Wages and subsistence.[See 8 C. L. 1905]—The seaman is entitled to support,[25] and

11. State v. Dickman, 124 Mo. App. 653, 102 SW 44.
12. In the absence of proof that it was paid to settle the judgment and actually did settle it, or that plaintiff had such a settlement in mind when he made the payment. State v. Dickman, 124 Mo. App. 653, 102 SW 44.
13. State v. Dickman, 124 Mo. App. 653, 102 SW 44.
14. See Admiralty, 9 C. L. 29.
15. See Navigable Waters, 10 C. L. 917.
16. See Carriers, 9 C. L. 466.
17. See Ferries, 9 C. L. 1359.
18. Old Dominion Steamship Co. v. Prinius Gilmore, 28 S. Ct. 133.
19. In a libel for possession, the claimant must clearly establish his title. The Robert R. Kirkland [C. C. A.] 153 F 863.
20, 21. Brig Sally, 41 Ct. Cl. 431.
22. This includes the time and manner of leaving port, equally with the course of sailing and the sail to be carried. Hanson v. Haywood Bros. [C. C. A.] 152 F 401.
23. The August Belmont, 153 F 639.
24. The rights of the parties cannot be avoided or changed by parol evidence. Turtle v. Northwestern Steamship Co., 154 F 146.
25. Pacific Mail S. S. Co. v. Iverson [C. C. A.] 154 F 450.

wages, though they may not be paid in advance [26] for the time of service,[27] but damages for withholding them may be disallowed,[28] and it depends on circumstances whether they have been released [29] or satisfied.[30] On a wrongful discharge, which is a question for the jury,[31] the seaman may recover return passage, if he shipped for the round trip,[32] and, if he consent to discharge, it may be conditional.[33]

Expenses in enlisting seamen may be recovered of the master.[34]

Care of injured seamen. See 8 C. L. 1906—Unless necessary, a master is not bound to depart from his course to procure aid for an injured seaman,[35] and whether he is at fault for not doing so depends on the circumstances.[36]

§ 5. *Mortgages, bottomry, maritime, and other liens on the vessel, craft, or cargo.* See 8 C. L. 1906—A maritime lien, which is treated fully in other sections,[37] is a lien, the subject-matter of which is a vessel,[38] and must be construed stricti juris.[39] A bottomry bond is subordinate to a claim for salvage of the vessel.[40]

§ 6. *Charter party.* See 8 C. L. 1908—The letting or demise of a vessel is a parting with the whole possession and control of it for all lawful purposes,[41] one of the important factors of the contract being promptness in loading, sailing and discharging.[42] On breach of it, damages are estimated as circumstances warrant,[43] but that the owner orders the vessel not to enter a certain port is not a breach.[44] The consignees

26. Money paid for a seaman before he has earned any wages may be recovered by him. The August Belmont, 153 F 639.

27. And this, though discharged because of fault on his part. The Sentinel, 152 F 564.

28. Claimant showing reasonable grounds for disputing claim, even if not able to make out defense sufficient to prevent recovery on part of libelant. The Sentinel, 152 F 564.

29. If contract remained in force, an order never collected or negotiated, and although tendered to defendant at trial was refused, did not constitute a release, as it was unsealed. Boston v. Ocean S. S. Co. of Savannah [Mass.] 83 NE 1116.

30. Upon variant evidence, it is a question of fact if plaintiff who is illiterate, without money, and away from home, after having been denied further recognition as member of the ship's company, agreed to receive a week's wages in full satisfaction of his claim. Boston v. Ocean S. S. Co. of Savannah [Mass.] 83 NE 1116.

31. Whether the discharge was wrongful, the evidence being conflicting, is a question for the jury. Boston v. Ocean S. S. Co. of Savannah [Mass.] 83 NE 1116.

32. Boston v. Ocean S. S. Co. of Savannah [Mass.] 83 NE 1116.

33. If it be found that the consent was conditional upon receiving a full month's wages, which were not paid, the defense fails. Boston v. Ocean S. S. Co. of Savannah [Mass.] 83 NE 1116.

34. Master applied to plaintiff to procure seamen and plaintiff procured same through general ship brokers, incurring $120 expenses in railroad fare, telegrams, shipping fees, etc., but charging nothing for services. The money paid was not violative of Fed. Ann. St. vol. 6, p. 909, and recoverable of master. Maffitt v. Hammerland [N. C.] 60 SE 713.

35. Small bone in seaman's leg broken, set, and doing well. He was given good care. Vessel not bound, weeks afterwards, to go far out of its course to obtain medical treatment, it not being known, even, that it could be obtained. The Drumelton, 158 F 454.

36. Seaman injured by dislocating shoulder, believed by the master at the time to be a sprain. Injury sustained at point where a return of 70 miles to procure medical attention would involve risks to vessel and cargo. Vessel not liable. Case distinguished from The Sarnia [C. C. A.] 147 F 106. The Cuzco [C. C. A.] 154 F 177.

37. See §§ 12, 13, post.

38. The Robert R. Kirkland [C. C. A.] 153 F 863.

39. The James T. Furber, 157 F 126.

40. The Launberga [C. C. A.] 154 F 959.

41. The consequences flowing from a letting of a ship as distinguished from a contract for her services are that in the former case the relation between owner and charterer becomes that of bailor and bailee, whereas, in the latter, the relation is that of shipper and carrier. The Santona, 152 F 516. When a charter party gives the charterer the full capacity of the ship, the owner is not a common carrier, but a bailee to transport as a private carrier for hire. The Fri [C. C. A.] 154 F 333.

42. Adler v. Galbraith, Bacon & Co., 156 F 259.

43. Plaintiff chartered tugs and barges to carry coal and, on failure of defendant to furnish same, had to transport by sailing vessel so much a ton, tugs nor barges impossible to be had. Damages, difference between rate plaintiff compelled to pay and what would have paid under charter. Metropolitan Coal Co. v. Boutell Transp. & Towing Co. [Mass.] 81 NE 645.

44. Charter term had expired and vessel on way home directed by charterer to put in at certain port without any reason. Another boarded vessel before coming in and directed vessel to home port. Held, not a breach. Manha v. Union Fertilizer Co., 151 Cal. 581, 91 P 393.

may waive the obligtion to complete the voyage,[45] and whether a port is en route between two points is open to testimony.[46] The charter party, which determines the rights and liabilities of the parties,[47] and the terms of which, as between themselves, cannot be affected by a bill of lading,[48] or a custom,[49] is governed by the laws of the country where made,[50] and will be construed according to the evident intention of the parties,[51] in the light of ordinary conditions and the peculiar construction of the vessel.[52] If the contract, the validity of which is determined by its contents and the circumstances under which it was executed,[53] be oral, it, as well as claims for expenses under a written agreement,[54] must be established by sufficient evidence;[55] if in writing, it must be signed by the parties to be bound[56] or someone having authority,[57] and must be mutual,[58] and free from fraud.[59] A written offer to charter

45. But they cannot waive as to merchandise consigned to other points. The Eva D. Rose, 153 F 912.

46. Nova Scotia not a port on route between New York and Brazil. Glasgow Steam Shipping Co. v. Tweedie Trading Co., 154 F 84.

47. The Bodo, 156 F 980. Contract bound vessel to discharge night and day, if required, and gave charterer option to provide stevedore for discharging, vessel agreeing to pay not to exceed certain rate. Charterer not entitled to charge exceeding such rate for night work, he having earned dispatch money. Under clause providing that freight should be in full of port charges, vessel liable for extra port charges by reason of night work. The Bencliff, 155 F 242. Under contract requiring reasonable dispatch of vessel, consignee may recover demurrage paid by it to another vessel by reason of the occupation by the first of a wharf for an excessive period. He may also recover extra sum paid stevedore for lost time. The Heathdene, 155 F 368. Charter providing "vessel to be consigned to charterer's agents at port of discharge paying usual commissions not exceeding 2 1-2 per cent at this port." etc. Such commission did not cover attendance fee of charterer's agents at port of discharge and they had the right to collect it. The Lady Palmerston, 155 F 250. Where owners and consignees of cargo were required by charter party to furnish vessel with reasonably safe berth for discharge, they are liable for failure to do so. The master of vessel, port being new to him, may assume that the invitation to come to proper place and discharge was assurance of safety. Nor does he, by lying there after hearing a rumor of his unsafe position, waive his right to look to owners and consignees of cargo for suitable berth. Carroll v. Halway, 158 F 328. A provision that the owner was to receive a share of profits for charter of vessel does not constitute charterer his agent or render him liable for wages of crew or expense of venture. Charterer had entire charge of vessel, was authorized to fish where he desired, to employ and discharge crew, sell, catch, collect proceeds and divide same. Adams v. Augustine, 195 Mass. 289, 81 NE 192. Charter party provided steam winches to be at charterer's disposal during loading and discharging, steamer to provide men to work same. Provision met by tendering competent seamen to work winches, and if services refused, steamer not liable. Constantine & Pickering S. S. Co. v. Tweedie Trading Co. [C. C. A.] 159 F 706. Where coal remaining in the bunkers and on redelivery is to be paid for by charterer, he is liable for its actual market value. Glasgow Steam Shipping Co. v. Tweedie Trading Co., 154 F 84.

48. The bill of lading may be resorted to to resolve doubts, if any there are, in particulars as to which the charter party is ambiguous. The Fri [C. C. A.] 154 F 333.

49. Contract providing for delivery alongside, within reach of the vessel's tackles, cannot be overcome by proof as to custom which is opposed to the agreement. Hammett v. Chase, Talbot & Co., 158 F 203.

50. Adler v. Galbraith, Bacon & Co., 156 F 259.

51. Provision that lay days to commence at 12 o'clock noon after steamer is ready to load and discharge. Held, that when steamer was not ready to receive and discharge until after 12 o'clock noon, lay day did not begin until the following day at 12 o'clock noon. Earn Line S. S. Co. v. Ennis, 157 F 941; Leonard v. Bosch [N. J. Eq.] 68 A 56.

52. A charter reciting that the dredge shall be able to deposit on shore 300 cubic yards of material an hour, covered dredging material ordinarily found in such operations, and for which such a dredge by reason of its peculiar construction was adapted. Bowers Hydraulic Dredging Co. v. Federal Cont. Co. [C. C. A.] 153 F 870.

53. Adler v. Galbraith, Bacon & Co., 156 F 259.

54. Charter providing that owner was to provide gear. Testimony that gear was in accordance with contract, though charterer claimed he had to furnish it because ship's gear insufficient. Held claim not established. Glasgow Steam Shipping Co. v. Tweedie Trading Co., 154 F 84.

55. Bleakley v. Sheridan, 120 App. Div. 471, 104 NYS 1060.

56. Socleta v. U. S., 155 F 245.

57. A general manager of a transportation and towing company has authority to contract for the charter of its vessels. Metropolitan Coal Co. v. Boutell Transp. & Towing Co. [Mass.] 81 NE 645.

58. Unless the minds of the parties met and there was mutual assent to every one of its terms, the instrument is entirely void. Adler v. Galbraith, Bacon & Co., 156 F 259.

59. Adler v. Galbraith, Bacon & Co., 156 F 259.

may be accepted verbally,[60] and, when in writing, will be construed as a whole, in connection with the offer.[61] Having accepted and used the vessel after full opportunity to know its condition, the charterer is liable for its hire,[62] nor will claim for loss of service of vessel through its lawful detention,[63] nor shortage paid consignee,[64] nor wages paid for services done for charterer's own convenience, be allowed,[65] but the owner is not entitled to hire while he is deciding about fittings [66] and each party is liable for his surveyor's fees.[67]

§ 7. *Navigation and collision. A. Rules for navigation and their operation in general.* See 8 C. L. 1914—Vessels navigating according to rules, a violation of which is a question of fact,[68] may fairly suppose that other vessels they meet will so navigate,[69] but a perverse adherence to them is not justifiable when it is manifest that such a course will result in disaster,[70] nor should a vessel delay unduly to avoid a collision.[71] Inevitable accident, however, may exonerate a vessel from liability.[72] A moving vessel is required to keep out of the way of a stationary object, such as a beacon,[73] and on hearing a whistle in a dense fog, it is its duty to stop and navigate cautiously until danger of collision has passed,[74] but a steamer approaching a pilot boat fulfills her entire duty by maintaining a reasonable speed and a fixed course.[75] Vessels should be governed by the narrow channel rule, when applicable, in navigating East river.[76] Where there is a current, the descending steamer has right of way,[77]

60. If it turns out that through an unguarded expression in the writing the writing is not, although it was intended to be, an acceptance, the oral acceptance, which is not open to that objection, is good. Metropolitan Coal Co. v. Boutell Transp. & Towing Co. [Mass.] 81 NE 645.

61. Metropolitan Coal Co. v. Boutell Transp. & Towing Co. [Mass.] 81 NE 645.

62. In action for hire of a vessel, the charterer, who was well acquainted with it, and had every opportunity to learn of any defects and not being misled in any way by the owner cannot defend by setting up its unseaworthiness. Andrews v. San Juan Fish Co., 46 Wash. 481, 90 P 643.

63. Contract reciting that hire to be paid after vessel placed at charterer's disposal. Charterer not allowed deduction for 36 hours' quarantine detention. The Santona, 152 F 516..

64. Shortage paid consignee by the charterer cannot be set off against the charter hire. The Santona, 152 F 516.

65. Where owners agreed to provide men to work winches day and night, and did so wages of shore winchmen employed by the charterer will not be allowed against the owner. The Santona, 152 F 516.

66. The Disa, 153 F 322.

67. Difference in estimate of quantity of coal in bunkers on redelivery, and each party called in surveyor, each should bear his own expense. Glasgow Steam Shipping Co. v. Tweedie Trading Co., 154 F 84.

68. The Islander [C. C. A.] 152 F 385.

69. Unless something occurs, such as failure to answer a signal received or a failure to conform to a signal blown to indicate that the contrary may be anticipated. The W. N. Bavier [C. C. A.] 153 F 970.

70. Special circumstances may require a departure from rules, as where accident is certain to follow an observance of them. The Mauch Chunk [C. C. A.] 154 F 182.

71. A steamer which had an obstruction in the channel in view for 2 1-2 miles, and only acted to avoid collision when the emergency became imminent, was at fault. The Westhall, 153 F 1010.

72. "Inevitable accident" does not mean an accident unavoidable under any circumstances, but one which the party accused cannot prevent by the exercise of ordinary care, caution and maritime skill. The Blackheath, 154 F 758.

73. The Blackheath, 154 F 758.

74. A ferry boat, near center of East river in a dense fog, hearing whistle, is at fault in failing to stop and exercise caution until danger is over. City of Lowell [C. C. A.] 152 F 593. While it is the duty of a large steamship in passing out from East river in a dense fog to navigate with great care, it is not necessary to stop and anchor in the fairway. Id. In the nighttime and thick fog, the navigating officer of a steamer is not justified in assuming he has fixed the precise location of a horn when he has heard only one blast. Palmer v. Merchants' & Miners' Transp. Co., 154 F 683. In a fog the steamer should so reduce her speed that steamers free from blame shall not be injured if fog dense, this rule may require both vessels to stop. If lighter fog, it might authorize them to keep engines in sufficient motion to preserve steerage way. Smith v. Norfolk, etc., R. Co., 145 N. C. 98, 58 SE 799.

75. This does not mean that the course shall be unchanged from the time the vessels sight each other miles apart, but that it shall not be so changed as to embarrass the pilot boat in her endeavors to approach. The Monterey, 153 F 935.

76. This rule does not apply between the Battery and Blackwell's Island, but that part of the river is governed by local rules requiring vessels to keep in the center if possible. The Bay State, 153 F 973. A large steamer should keep near the middle of the channel of East river during a dense fog.

but violation of the statute is not material if the fault in no way contributed to the accident.[78] In case of collision, a satement thereof and the circumstances under which it occurred shall immediately be entered in the log book.[79]

(§ 7) *B. Lights, signals and lookouts.*[See 8 C. L. 1915]—Unless the error is made in extremis,[80] proper lights[81] and signals[82] must be given and replied to,[83] nor can they be changed unless necessary,[84] but whether a vessel was at fault in that respect is a question of fact.[85] Fog signals need not be given, however, to apprise people on constructions near shore of the proximity of a vessel.[86] Proper lookouts should also be kept,[87] but they are not necessary on scows at permanent moorings.[88]

(§ 7) *C. Steering and sailing rules.*[See 8 C. L. 1918]—Passing vessels, after exchanging signals, should navigate in conformity thereto,[89] and when consent is necessary to justify a course of navigation, it is a fault not to first obtain it;[90] hence before one passes another on the starboard side, from a head to head position, its consent should be obtained.[91] When two steam vessels are meeting end on, or nearly so, which involves risk of collision, each shall alter her course to starboard so as to pass on the port side of each other,[92] but when their situation and course are so far

City of Lowell [C. C. A.] 152 F 593. The statutory rule requiring vessels to keep in the middle of East river has not been changed by the pilot rules. Act June 7, 1897, c. 4, 30 Stat. 96 (U. S. Comp. St., 1901, p. 2876). The Maine, 153 F 635. North river, from 23d St., N. Y., to the upper bay, is not a narrow channel. The Islander [C. C. A.] 152 F 385.

77. Descending steamer shall give signal indicating preference. Wineman v. Drake [C. C. A.] 154 F 933.

78. Steamer colliding with a tug's tow not chargeable with contributing fault in not navigating nearer the center of East river, the tug's fault causing the accident. The W. N. Bavier [C. C. A.] 153 F 970.

79. An entry may be so meager, evasive and destitute of statements of the real circumstances as to be a violation of duty imposed by statute. Such statement will afford grounds for the inference that the master, when entry was made, knew his vessel to be in fault. The Seneca, 159 F 578.

80. Palmer v. Merchant's & Miners' Transp. Co., 154 F 683. An improper signal, given in extremis, is not chargeable as a contributing fault, the other vessel being responsible for the accident. The Pacific [C. C. A.] 154 F 943. On collision of steamer and schooner, primary fault shown to be in steamer, and schooner not at fault in display of signal misleading steamer, it having been done in extremis. The Furnessia [C. C. A.] 154 F 348.

81. A schooner becalmed and drifting at night, and being the overtaken vessel, should exhibit a white light or flare astern, her side lights not being visible to approaching vessel. The Baltimore [C. C. A.] 155 F 405. The United States regulations require dredges in the Delaware river to have in view one white and four red lights, the latter to be displayed on the side on which it is desired vessels should pass. The Henry O. Barrett, 156 F 417. Rowboat on river at night without proper signal and injury to occupant. Though the master of the steamer was guilty of negligence in not keeping a proper lookout, there could be no recovery. Mooney v. Carter [C. C. A.] 152 F 147.

82. Rule 15 (U. S. Comp. St. 1901, p. 2868) prescribes that a sailing vessel under way in fog shall sound, when on starboard tack, one blast; when on port tack, two blasts; when with wind abaft the beam, three blasts. The Seneca, 159 F 578.

83. A steamer failing to answer signals is at fault for the collision that follows. The H. B. Rawson, 152 F 1001.

84. A vessel, after giving a passing signal which is assented to has no right to change it unless necessary to do so. The William Chisholm [C. C. A.] 153 F 704.

85. Evidence examined and held not to show vessel in fault, that she was a privileged vessel, kept her course, and gave proper signals. Palmer v. Merchants' & Miners' Transp. Co., 154 F 683.

86. Graham & Morton Transp. Co. v. Chicago, 126 Ill. App. 113.

87. The Violetta [C. C. A.] 153 F 1023. In passing up North river, a steamer should have a lookout. The H. B. Rawson, 152 F 101. The absence of a lookout is immaterial if the collision could not have been prevented by one. The Georg Dumols [C. C. A.] 153 F 833; In re Eastern Dredging Co., 159 F 541.

88. In re Eastern Dredging Co., 159 F 541.

89. A tug, on passing a steamer, held to be at fault in starboarding after having exchanged one whistle with the steamer and porting for a time. The W. N. Bavier [C. C. A.] 153 F 970.

90. Steamer bound down East river, and tug with carfloat in tow going to dock 4, Long Island Railroad slips. Steamer attempted to cross to Brooklyn side, between Blackwell's Island and Manhattan, without consent of tug which was attempting to enter her slip. The Bay State, 153 F 973.

91. If given, it should be promptly communicated. The Maine, 153 F 635.

92. Rules for Great Lakes, Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 645 (U. S. Comp. St. 1901, p. 2891). The rule has reference to the positions when they will be meeting and not when signals are given. The William Chisholm [C. C. A.] 153 F 704.

on the starboard of each other that they cannot be considered as meeting head to head, they should pass on the starboard side of each other.[93] Ten or eleven knots an hour at night in a dense fog, in frequented waters, is not a moderate speed for a steamer,[94] but, for a schooner under such circumstances, four knots is.[95] There is no difference in the obligations of vessels, whether navigating harbor or river, in respect of displacement of waves,[96] and they are bound to consider the effect of their swell on other craft and act accordingly.[97] The duty is the same toward a floating dry dock.[98] Whether the accident was due to swells from the steamer or negligence of libelant,[99] and the identity of the vessel causing the swells will be determined from the evidence adduced.[1]

(§ 7) *D. Vessels anchored, drifting, grounded.*[See 8 C. L. 1921]—Anchoring in navigable waters is not forbidden except where to do so will prevent passage or render it unsafe.[2] What care is necessary in order to keep the moorings properly adjusted and the strains equalized depends on circumstances.[3] A schooner is not liable for collision caused by its projecting anchor, the other vessel not having exercised ordinary care.[4] Vessel's owner may show that the drifting was the result of inevitable accident.[5]

(§ 7) *E. Tugs and tows, pilot boats, fishing vessels, etc.*[See 8 C. L. 1923]—As between a burdened tug and a steamer, the former has the right of way.[6] It is the tug's

93. The Phonix [C. C. A.] 154 F 474.

94. The rule provides that "every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard to the existing circumstances and conditions. Palmer v. Merchants' & Miners' Transp. Co., 154 F 583.

95. Palmer v. Merchants' & Miners' Transp. Co., 154 F 683.

96. The Hendrick Hudson, 159 F 581.

97. The rule seems to be that boat causing injury must be responsible for failure to appreciate reasonable effect of its own speed and motion through water at particular place and under particular circumstances when accident occurred; that craft in neighborhood, which may reasonably be expected to be affected by the swells of the steamer causing the injury, are to be considered, and officers of steamer must use reasonable judgment and care, not only to see whether such an accident is likely to happen, but whether they have taken all reasonable precaution to avoid such accident, even where result of former experience has shown that in ordinary and usual course of events the craft passed is likely to escape injury; that the tug or small craft, properly managed, with tow properly arranged, had the right to assume that large craft will observe such precautions as are reasonable to avoid inflicting injury, and that these precautions will not be merely such as would be sufficient to produce ordinary and customary circumstances of passing; that tug or smaller craft, relying on presumption that larger craft will take precautions, is under no obligation to warn larger craft, if tug or smaller craft is in proper place and navigated properly, according to general rules. Hence large steamer, propelled screw, creating considerable swell passing up East river, within 75 or 100 feet of scows, at speed of 15 to 18 miles per hour, held liable for damage to scow, caused by its swell, scow in proper place and properly managed. The Chester W. Chapin, 155 F 854.

98. In this case, however, as the dock owner was not free from negligence, the rule of divided responsibility and divided damages was applied. Shewan v. New England Navigation Co., 155 F 850.

99. Evidence examined, and held accident due to faulty makeup of tow, there being space of only one and one-half feet between them, not in position to resist swells that might have been anticipated. La Savoie, 157 F 312. Canal boat at dock injured by swells from steamer, and later sunk near edge of canal. While in this situation, same steamer passed again, her swells causing boat to break line and slip into deep water, a total loss. While steamer liable for first accident, not liable for second, swells not being proximate cause thereof, the boat not having received proper attention, in that she was insecurely fastened. The Hendrick Hudson, 159 F 581.

1. New York Cent., etc., R. Co. v. Maine S. S. Co., 156 F 984; The Gladys [C. C. A.] 159 F 698.

2. The Caldy [C. C. A.] 153 F 837. The fact that other vessels had anchored at that point and that no damage resulted does not prove the vessel not at fault in so anchoring. Id.

3. An unusually large vessel, carrying a heavy cargo, requires constant vigilance. The William E. Reis [C. C. A.] 152 F 673.

4. The anchor, though by exercising proper prudence should have been inboard, was in plain view. The William J. Quillin, 153 F 1019.

5. Petitioner must show that he was prevented from mooring or keeping the vessel moored by causes not to have been anticipated or prevented by exercise of reasonable skill and diligence. In re Eastern Dredging Co., 159 F 541.

6. The steamer should do more than merely shape her course to avoid collision. She

duty to exercise ordinary care and vigilance for the safety of her tow,[7] and, so long as she is not going into danger, it is the duty of the tow to follow her and conform to her movements.[8] That she was at fault must be shown[9] or determined from the evidence[10] and facts of the particular case.[11] She is not liable for a collision caused by the slipping of the hauser on her tow,[12] but she must take precautions to prevent passing vessels from being misled.[13] A pilot, when he loses control of his boat or sees she does not answer her helm, should stop and let go the anchor,[14] and he should not, without a lookout, approach a steamer and cross her bow.[15]

(§ 7) *F. Sole or divided liability and division of damages.*[See 8 C. L. 1925] While the fault which must have contributed to the collision[16] will be determined from the facts and circumstances,[17] it may, in some cases, be presumed,[16] but the

should allow sufficient margin for safety, taking into consideration all the impending contingencies of navigation. That the tug was on wrong side of channel will not prevent recovery. The Westhall, 153 F 1010.

7. The Printer, 155 F 441; The Oak [C. C. A.] 152 F 973.

8. The Henry O. Barrett, 156 F 417. The burden of proof is on the libelant. The C. Van Cott, 152 F 1016.

9. Where she passed safely the object collided with by her tow, the burden is on the tow to establish the tug's alleged negligence. Presumption of fault is against the tow. The Henry O. Barrett, 156 F 417.

10. The Ferguson [C. C. A.] 153 F 366.

11. A tug, having in tow a laden barge, also a schooner, going eight or ten miles an hour, suddenly slacking speed, resulting in injury to barge by schooner, is at fault. The Theodore Roosevelt, 154 F 155.

12. Damage to steamboat in tow. In action against tug therefor, held duty of steamer to see to proper fastenings of lines to her own bitts. The H. B. Moore, Jr., 155 F 380.

13. Tug stopping in the channel to take one of its scows alongside and shorten the hauser of the other should have lookout constantly on duty and be ready to answer and give signals and act promptly. The Umbria [C. C. A.] 153 F 851.

14. The Blackheath, 154 F 758.

15. The Monterey, 153 F 935.

16. The Pacific [C. C. A.] 154 F 943.

17. Wineman v. Drake [C. C. A.] 154 F 933. On hearing fog bell of vessel in open ocean, though approaching steamer stop, if, on seeing one of the anchor lights, she move ahead again at greater speed, she is at fault in violating rule 16, U. S. Comp. St. 1901, p. 2869. The Persian, 159 F 788. A vessel is at fault for going not less than eight knots an hour and hearing, apparently forward of her beam, fog signal of a vessel, position of which was not ascertained, she does not stop engines and navigate with caution until danger of collision is over. The Seneca, 159 F 578; The Persian, 159 F 788. A steamship out of her course, which fact is not excused or accounted for by atmospheric conditions existing at the time, is at fault for colliding with a barge safely and properly anchored. Hamburg-American Packet Co. v. Rich [C. C. A.] 159 F 667. If a sailing vessel by unnecessary deviation from its course renders a collision with a steamer unavoidable, the latter is not liable. The Georg Dumois [C. C. A.] 153 F 833. A tug having barges in tow which on meeting another tug with barges, followed by schooner, though her tows were sagging in that direction, went to port of second tug, forming a pocket for the schooner and causing collision, held in fault. The Richmond [C. C. A.] 155 F 112. Collision between tows of tugs Transit and No. 32 in channel between Shooter's Island and Corner Stake Light. Latter going west. In passing island, failed to learn presence of other tow, her signal not heard because of high wind. In failing to learn way was clear before venturing beyond island, No. 32 at fault. The Tug No. 32, 157 F 252. While a steamer was towing barge through a narrow canal, and on the approach of another steamer warned her of danger, but the latter in attempting to force the narrow passage collided with the former, no agreement by the former that the passage should be made, the latter was solely at fault. The Waverley, 155 F 436. An approaching vessel, not understanding the course of another, failing to signify such fact by signal, or attempting to pass on the starboard hand when astern without consent, is at fault. Gring v. Boyer [C. C. A.] 157 F 220. Tug meeting schooner at night holding her course directly toward schooner too long, and then attempting to take wrong side, solely responsible for collision between schooner and her tow. The Marie Palmer, 155 F 894. Vessel overtaking tug is under duty to keep out of the way, and under such circumstances, where tug is caused to sheer, resulting from collision of overtaking vessel and tug, the latter is not at fault for damage to meeting tow, the tug not being properly manned and navigated. The Luzerne [C. C. A.] 157 F 391. Where schooner towed by tug, by failure to follow tug, notwithstanding its warning of vicinity of dredge displaying proper lights, collided with dredge, she was solely at fault. The Henry O. Barrett, 156 F 417. A pilot who fails to observe the rule that "the vessel which is to keep out of the way shall avoid crossing ahead of the other vessel, and, if necessary, shall slacken her speed, stop, or reverse," is at fault for resulting collision. Guy v. Donald [C. C. A.] 157 F 527. Vessels proceeding in diagonal courses, and New Brunswick had Scandinavia on her starboard hand. On failure of former to avoid latter, she was at fault. The Scandinavia [C. C. A.] 158 F 96. Collision between descending flotilla in tow and ascending tug in East river. Ascending tug in fault for failure to allow

burden is on libelant to identify the vessel causing injury.[19] If both the colliding vessels are at fault, they will be held companions in liability,[20] and where by the fault of two vessels a collision takes place, whereby damage is done to a third, recovery may be had against both,[21] but the vessel entirely free from fault will not be held responsible in any way,[22] nor is a change of course, made in a position of peril, a fault for which the vessel is responsible if such position was not brought about by herself.[23]

(§ 7) *G. Ascertainment and measure of damages.*See 8 C. L. 1925—A double charge is improper.[24] The allowance of interest is entirely within the discretion of the court [25] and it is the usual custom to allow it,[26] and when the injury is repaired, interest runs from the time repairs become payable.[27]

(§ 7) *H. Common-law liability for negligent navigation.*See 8 C. L. 1926—Liability is put on the party whose negligence is the proximate cause of the injury.[28]

§ 8. *Carriage of passengers.*See 8 C. L. 1928—The carrier must exercise the utmost care consistent with the nature of the undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business,[29] hence,

room for passing. The Hustler [C. C. A.] 159 F 121. Tugs with tows, meeting in the Kills opposite Elizabethport, N. J. Tug going east, with flood tide failing to keep tows on starboard side of channel, at fault. Thames Towboat Co. v. Pennsylvania R. Co., 157 F 305. A vessel knowing of deflecting boils and currents which fails to avoid them, collision with a vessel safely anchored resulting, is at fault. Christie v. Fane S. S. Co. [C. C. A.] 159 F 648. The fact that scow was adrift, deserted and unlighted at time of collision puts the owner in fault. In re Eastern Dredging Co., 159 F 541. Tug ascending river with tow, on crossing failed to shorten up until in middle of river. Steamship coming down, half mile distant when tow started across, no signals, but steamship starboarded helm, slowed, but did not reverse until tug stopped, and collided with tow. Both tug and steamship at fault. Tows not at fault. The Algeria, 155 F 902. Collision in dense fog between steamer and schooner. Schooner giving proper signals and going at rate of between five and six knots per hour. Steamer, though reversing, at fault for not hearing or undertanding signals. Schooner at fault for sailing too fast. The Sif, 157 F 454. Ferry boat left slip, signaling, at full speed. Beyond slip in front of boat, pier extended 180 feet, past which steamer was moving too close and without giving signal or heeding signal of ferry boat. Both in fault. The Fearless, 156 F 428. Tugs, one navigating without helper and lookout in 40 mile wind, the other not paying proper attention to tow and bearing to port soon after passing former. Mutual fault. The Pencoyd, 157 F 134. Vessels moving in same direction, each insisting on her own right of way, and no reason why either could not have moved out of the other's way. Mutual fault. Steamtug No. 15, 157 F 142. Tug with tow going down river on right side, and launch going up on same side. Both at fault, tug in being on wrong side, and launch in persisting in her course. The Taurus, 156 F 838. Tugs with barges in tow meeting in dense fog, signaling, and failing to stop, both at fault. Barge not at fault for error made in extremis. The John A. Hughes, 156 F 879.

18. A vessel under way which collides with a vessel at anchor is presumably at fault. The Persian, 159 F 788. The actual violation at the time of the collision of a statutory rule intended to prevent collisions is presumably a fault, and if not the sole cause of the collision may contribute to it. The Ellis [C. C. A.] 152 F 981. Where one vessel, clearly shown to have been guilty of a fault adequate in itself to account for the collision, seeks to impugn the management of the other vessel, there is a presumption in favor of the latter which can be rebutted only by clear proof of a contributory fault. The William Chisholm [C. C. A.] 153 F 704; The Pacific [C. C. A.] 154 F 943; The Westhall, 153 F 1010.

19. The Ramleh, 157 F 769.

20. The Caldy [C. C. A.] 153 F 837. Tug negligent for anchoring vessels so close together that one wrecked could not use proper length of anchor chain, and for leaving them without seeing both were securely anchored. Wrecked vessel at fault because of defective and insufficient anchor chain. The Printer, 155 F 441.

21. The Maine, 153 F 635; The Umbria [C. C. A.] 153 F 851.

22. The Theodore Roosevelt, 154 F 155.

23. The Richmond [C. C. A.] 155 F 112.

24. Injured vessel under charter at fixed rate required to pay and subsist officers and crew. Decree for damages for loss of charter money pending repair and wages of officers and crew and costs of subsistence of crew during same time, improper. Christie v. Fane S. S. Co. [C. C. A.] 159 F 648.

25. Hamburg-American Packet Co. v. Rich [C. C. A.] 159 F 667.

26. The William Chisholm [C. C. A.] 153 F 704.

27. The Sitka, 156 F 427.

28. Action prosecuted in state court for alleged negligence. Rules obtaining in courts of admiralty in such cases do not apply. Hence, though vessel is going faster than rules allowed, the vessel changing her course is in fault. Smith v. Norfolk, etc., R. Co., 145 N. C. 98, 58 SE 799.

29. Errors of judgment in an emergency is

carrier must take due and proper care to provide for passengers, landing;[30] sufficient watchmen must be provided,[31] and lack of viligance on the part of such watchman may be inferred.[32] It is negligence, liability for which may be limited[33] to the appraised value of the vessel and freight,[34] to allow a passenger to leave a wrecked vessel in a small boat without a competent seaman in charge,[35] so, too, is the failure to provide inside bolts to stateroom doors,[36] but a passenger is not entitled to the exclusive use of a stateroom containing two berths.[37] The damages will be commensurate with the injury.[38]

§ 9. *Carriage of goods.*[See 8 C. L. 1930]—The carrier is bound to provide against such conditions at sea as might be expected,[39] and whether the damage was due to careless stowing,[40] condition of the vessel, or perils of the sea, is a question of fact,[41] the burden being on the vessel to show the damage resulted from a peril of the sea.[42] It is the duty of the owner to report disabilities of the vessel,[43] and the shipper may be required to make claim within a limited time[44] and to give notice of damage,[45] the sufficiency of which notice may be determined by circumstances.[46] The bill of lading, which may give the vessel the right to deviate,[47] will be construed in the light of

not necessarily negligence or fault. The City of Boston, 159 F 261.

30. Where steamer carried passenger to wharf of destination, removed gangway railing, did not inform him that steamer would stop at any other pier, but told him gang plank would not be put out, allowed other passengers to jump to wharf, and allowed him to do so without warning, it was negligence. The Ocracoke, 159 F 552.

31. Steamboat with 343 staterooms on two decks negligent in providing only one watchman. The Western States [C. C. A.] 159 F 354.

32. The fact that an oiler could leave his quarters below, go over part of well lighted steamboat where he had no right to be, accomplish robbery and get away without being seen, shows lack of vigilance. The Western States [C. C. A.] 159 F 354.

33. The proceedings might properly embrace all loss, damage, or injury to any person or persons during the same trip, whether sustaining at the same time or at different times, and whether due to one instance of negligence or to different instances. The City of Boston, 159 F 261.

34. Application of Rev. St. §§ 2283-2285 (U. S. Comp. St. 1901, pp. 2943, 2944). The Southside, 155 F 364.

35. The Erastus Corning, 158 F 452.

36. The reason for not doing so, that they might embarrass passengers in case of fire or sudden danger, is wholly unsatisfactory. The Western States [C. C. A.] 159 F 354.

37. Ticket entitled passenger to a berth. Not entitled to compartment with two berths because there were vacant staterooms. Basnight v. Norfolk, etc., R. Co. [N. C.] 60 SE 899.

38. The most favorable view of the evidence showing a wrecked passenger had lost $500 in money and effects, and that his medical bill, and pain and loss of time amounted to $300, these sums were allowed. The Erastus Corning, 158 F 452. Libelant seriously hurt, suffered greatly and permanently disfigured; head torn, and life endangered; confined to house some weeks; from business about a month; man of large business affairs; incurred doctor's bill, $185; lost some effecte. Damages $1,700, reasonable. The Ocracoke, 159 F 552.

39. The Olympia, 156 F 252; The Ninfa, 156 F 512.

40. Dowgate Steamship Co. v. Arbuckle, 158 F 179.

41. Gough v. Hamburg Amerikanische Packetfahrt & Aktiengeselischaft, 158 F 174.

42. Where damage was caused by sea water, bill of lading exempting carrier from damage caused by perils of the sea, burden is on carrier to show water entered as result of peril of the sea. The Folmina [C. C. A.] 153 F 364.

43. If the owner fails to report the disability of the vessel on arrival, liability for legal damages for failure to carry or delay ensues. The Ask, 156 F 678. The owner is not liable to the charterer for failure to give notice of break down, no provision of the charter requiring such notice. The Disa, 153 F 322.

44. Such stipulations will be recognized by the courts, if a reasonable time is given to comply with conditions. The requirement as to presentation of claim and suit thereon may be waived by carrier by entertaining same and negotiating concerning adjustment. Pacific Coast Co. v. Yukon Independent Transp. Co. [C. C. A.] 155 F 29.

45. The requirement to give notice is not binding unless, under the circumstances, it is just and reasonable. The Persiana, 156 F 1019.

46. Notice given as soon as damages discovered, before vessel leaves port, is sufficient, especially when carrier already knew of damage, and the charterers, where vessel is operated by time charter, may be agents of owner for purpose of receiving notice. The Persiana, 156 F 1019.

47. Deviation is a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the voyage; but, after arriving at the port of delivery, to return to the port of shipment and thence make a second voyage to the port of delivery, is not a deviation. Pacific Coast Co. v. Yukon Independent Transp. Co. [C. C. A.] 155 F 29.

conditions and circumstances which the evidence shows were known and in contemplation of the parties,[48] but if it does not correctly represent the facts, it is not binding on the parties.[49] The liability once fixed, unless the measure of damages is stipulated, in which event no other measure is permissible,[50] the shipper may recover damages commensurate with his loss.[51] He may recover damages for refusal of carrier to transport a portion of the cargo,[52] and the ship is liable for the cargo received,[53] nor will an advance made by the insurance company to the shipper extinguish his liability,[54] but he is not liable for a shortage not existing though master gave a general receipt for the cargo,[55] nor when goods are shown to have been delivered in the same condition as when received,[56] nor for hire, in the absence of a mutual understanding or agreement.[57]

The Harter Act.[See 8 C. L. 1931]—The Harter Act, providing exemption in certain cases, applies to the vessel on which the merchandise is being transported.[58] Under this act, if the vessel is seaworthy and properly manned, etc., the owners are not liable for loss or damage resulting from perils of the sea, where the master has been negligent in putting out,[59] but to avail himself of the exemption, the owner must show by affirmative proof that the vessel was seaworthy, or that due diligence was used to make her so,[60] where, by contract, the obligation to provide a seaworthy vessel has been limited to the exercise of such diligence.[61] Negligent stowing is not within the protection of the act,[62] nor does it exempt from the consequences of unseaworthiness,[63] and under it, too, the master must sign the bill of lading.[64]

§ 10. *Freight and demurrage. Freight.*[See 8 C. L. 1932]—Actual freight will be

48. Pacific Coast Co. v. Yukon Independent Transp. Co. [C. C. A.] 155 F 29; United States Shipping Co. v. U. S., 146 F 914.

49. If signed by shipper under protest, such protest will preserve his rights. The Citta Di Palermo, 153 F 378.

50. The Ask, 156 F 678.

51. The shipper is entitled to recover for property lost the value of it at the place of shipment, and the freight paid thereon. The Olympia, 156 F 252. The shipper, for breach of contract, is entitled to damages for loss of market, with a view to which the contract was made. Pacific Coast Co. v. Yukon Independent Transp. Co. [C. C. A.] 155 F 29. Where the cargo is damaged through fault of the carrier, the measure of damages is the difference between the value of the goods in their damaged state and their value at port of destination, delivered in good order with interest from time of delivery. Other items occasioned by damage, moving goods, wharfage, storage, and commissions on sale, may be added. The Berengere, 155 F 439.

52. The Citta Di Palermo, 153 F 378.

53. But it may be shown that the quantity stated in the bill of lading was not received on board. A suggestion, however, of mistake in tallying at place of loading will not overcome the prima facie case made by the bill of lading. Dowgate S. S. Co. v. Arbuckle, 158 F 179.

54. Bradley v. Lehigh Valley R. Co. [C. C. A.] 153 F 350.

55. Claim for shortage in goods handled altogether by charterer's agents, and none lost, jettisoned, or used during voyage. Glasgow Steam Shipping Co. v. Tweedie Trading Co., 154 F 84.

56. The Amsterdam, 156 F 850.

57. Tug owner has no lien for towage service at so much per day, it appearing that credit was extended to the owner and not to the dredges towed. The Alligator, 153 F 216.

58. Where the entire transportation is made up of successive stages by successive vessels, the act applies to the particular vessel whose navigation or management has been faulty or erroneous. If the voyage has not commenced, the cargo not yet all on board, nor the vessel ready to sail, the benefit of the act cannot be claimed. Ralli v. New York & T. S. S. Co. [C. C. A.] 154 F 286.

59. The owners are not liable for loss resulting from the master's failure to regard the warnings of the weather bureau. Hanson v. Haywood Bros. & Wakefield Co. [C. C. A.] 152 F 401.

60. The affirmative proof cannot be supplied by inferences or presumptions. Bradley v. Lehigh Valley R. Co. [C. C. A.] 153 F 350. The burden of proof is on the owner to show seaworthiness, or due diligence to ascertain that fact. The Ninfa, 156 F 512.

61. This latter obligation cannot, however, under any condition, be relieved against. The Ninfa, 156 F 512.

62. The Persiana, 156 F 1019.

63. A ship is seaworthy if it is reasonably fit to carry the cargo which it has undertaken to transport. The Ninfa, 156 F 512.

64. Under provisions of § 4, Act of Congress Feb. 13, 1893 (27 Stat. 445, c. 105, U. S. Comp. St. 1901, p. 2947), master of vessel engaged by charter for transportation of cargo is not authorized to refuse to sign bills of lading because claim for demurrage claimed to be due vessel not paid. Pendleton Bros. v. Atlantic Lumber Co. [Ga. App.] 60 SE 377.

computed on the amount carried and not on the vessel's tonnage,[65] and where the bill of lading provides for it, pro rata freight may be charged,[66] but dead freight is not recoverable,[67] and, on abandonment of the vessel, the lien is lost and cannot be resumed.[68] The shipper may recover freight charges paid in excess of those earned.[69]

Demurrage. See 8 C. L. 1933—Demurrage, the probable net earnings of the vessel during the period of delay,[70] exclusive of interest,[71] the rate of which and the time of detention may be left to the finding of a commissioner,[72] if not precluded by the terms of the charter,[73] will be allowed for delays caused by charterer's fault,[74] but not for delays caused by the master,[75] and, under contract, the consignee may recover demurrage paid another vessel.[76] There is, however, no liability for demurrage because of delay in discharging, reasonable regulations as to which should be anticipated by the shippers,[77] if it is carried on with reasonable dispatch [78] after arrival,[79] and though liability for delays caused by quarantine may be governed by the contract,[80] if no time be fixed for the loading [81] or discharge, a reasonable time is implied,[82] and in the absence of a contrary showing, the party who is to load the vessel will be

65. Proof showing amount of cargo carried. Brig Sally, 41 Ct. Cl. 431.

66. Bill of lading provided that in event of sale due to damage short of destination, carrier should be paid pro rata for that part of transportation completed. Freight pro rata itineris properly paid from sale of damaged goods. Ralli v. New York & T. S. S. Co. [C. C. A.] 154 F 286.

67. Dead freight is not recoverable where there was an adjustment before sailing that none was due. The Drottning Sophia, 153 F 1017.

68. Abandonment of cargo to salvage by underwriters is relinquishment of possession and consequent waiver of lien for freight. Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co., 158 F 113.

69. The Citta Di Palermo, 153 F 378.

70. This may be ascertained by finding the gross freight which it would under ordinary circumstances, in the usual course of employment have earned, and deducting therefrom what it would have expended in earning it. United States Shipping Co. v. U. S., 146 F 914.

71. The Sitka, 156 F 427.

72. Tweedie Trading Co. v. Strong & Trowbridge Co., 157 F 304.

73. Pendleton Bros. v. Atlantic Lumber Co. [Ga. App.] 60 SE 377.

74. Charter obliged to furnish safe berth from which to discharge, but failing to do so vessel damaged and sunk in consequence. Charterer liable for resulting delay in discharging. Carroll v. Holway, 158 F 328. Charterer had right to move vessel from one berth to another, pursuant to which right he ordered vessel moved, and master, being unable to obtain tug on the evening ordered to move, moved on next morning, but found berth directed to move to occupied, causing several days' delay. Charterer liable. Hammett v. Chase, Talbot & Co., 158 F 203.

75. Claim for demurrage for delay in clearing port, caused by efforts of master to collect another claim for demurrage, even though latter be just, not chargeable to charterer nor collectible by law. Pendleton Bros. v. Atlantic Lumber Co. [Ga. App.] 60 SE 377.

76. Under contract for reasonable dispatch for a vessel, consignee may recover demurrage paid to another vessel by reason of the occupation by the first of a wharf for an excessive period. The Heathdene, 155 F 368.

77. United States Shipping Co. v. U. S., 146 F 914.

78. United States Shipping Co. v. U. S., 146 F 914. When the lay days begin is determined by the character of the bill of lading, hence, under old bill of lading, vessels were required to have actually arrived at wharf before lay days began. Under new bill, lay days begin 24 hours after arrival in port and reporting. Carroll v. Holway, 158 F 328. The term "discharge continuously" will be given its reasonable and evident meaning, hence, continuously means during the working hours of working days. Tweedie Trading Co. v. Pitch Pine Lumber Co., 156 F 88.

79. On the question of demurrage, "arrival" means arrival at a place where discharge is possible, hence, a loaded ship has not arrived at her destination in respect of the discharge of her cargo until she is where the work of unloading may be actually begun. Tweedie Trading Co. v. Pitch Pine Lumber Co., 156 F 88.

80. Glasgow Steam Shipping Co. v. Tweedie Trading Co., 154 F 84. Under provisions "that in event of loss of time from deficiency of men," etc., "preventing working of vessel for more than twenty-four hours, payment of hire should cease," where vessel was discharged of its sick seamen by quarantine officers and others put on, a deduction was allowed for detention at quarantine. Tweedie Trading Co. v. George D. Emery Co. [C. C. A.] 154 F 472.

81. The inability of the party who is to load to get cargo to his docks is not sufficient excuse for failure to load. Peck v. U. S., 152 F 524.

82. What constitutes a reasonable time depends upon the circumstances of the particular case, the facilities for diecharge, the nature of the cargo, the weather, etc. United States Shipping Co. v. U. S., 146 F 914.

deemed the agent of the charterer.[83] Notice of arrival, no particular form of which is required, may be given on Sunday.[84]

§ 11. *Pilotage, towage and wharfage.* See 8 C. L. 1933—Pilots, whose occupation requires skill,[85] may be regulated by the states [86] in so far as its laws conflict with no Federal statute.[87] Such acts include all vessels [88] and will be liberally construed [89] with reference to their purpose.[90] Acting under such laws, the board of pilot commissioners, the time of making whose appointment is merely directory,[91] may, within the power conferred upon it, adopt reasonable rules,[92] which acts are not judicial in character,[93] and impose penalties for their breach.[94] The applicant for a license, which is property,[95] but will not authorize him to operate in waters within the limits of another state,[96] may be required, without violating the constitution, to be a qualified voter.[97] Their fees may be fixed and their number limited,[98] and while a duly authorized pilot on offering his services to vessels subject to pilotage regulations is entitled to the fees, though his services are refused,[99] the ship is answerable for his fault,[1] and he is liable over to it if it has been compelled to pay damages because of such fault,[2] and want of notice and delay in asserting the claim, injury not having resulted, is no defense.[3]

Towage service, the costs of which will be adjusted as equity dictates,[4] is one which is rendered for the purpose of expediting a vessel's voyage.[5] The tug's duties and responsibilities are well defined,[6] for a breach of which it is liable,[7] though the tow is made up in an unusual way, against its protest.[8] The negligence must

83. Peck v. U. S., 152 F 524.

84. Carroll v. Nolvay, 158 F 328.

85. This occupation and situation implies skill and knowledge of the waters he undertakes to navigate, knowledge of the channel, current, tides, shoals, etc. And a failure to exert that needful skill and knowledge, either because it is not possessed or from inattention or error of judgment, is a fault. The Blackheath, 154 F 758.

86. State v. Leech, 119 La. 522, 44 S 285; St. George v. Hardie [N. C.] 60 SE 920.

87. Congress, so far, has confined itself to regulation of pilotage as to vessels engaged in coastwise or interior commerce, as to which its laws are supreme. The states, therefore, are free to enact laws regulating pilotage of vessels engaged in foreign commerce, and to that extent such laws are valid. State v. Ames [Wash.] 92 P 137.

88. Laws 1887-88, p. 175, c. 93. State v. Ames [Wash.] 92 P 137.

89. St. George v. Hardie [N. C.] 60 SE 920.

90. People v. Gunner, 108 NYS 726; St. George v. Hardie [N. C.] 60 SE 920.

91. Under statute providing for appointment of commissioners of navigation on or before April 5, 1907, term to begin April 15, appointment March 13, 1907, was valid, statute being in existence at that time. St. George v. Hardie [N. C.] 60 SE 920.

92. Virden v. Pilot Com'rs [Del.] 67 A 975.

93. The making of rules for the government of pilots by port wardens is not a judicial act. People v. Gunner, 108 NYS 726.

94. Unless authorized by the legislature, the board cannot impose a forfeiture, and a court of equity will restrain the enforcement of it. Virden v. Pilot Com'rs [Del.] 67 A 975.

95. The board of pilot commissioners have not the authority to forfeit such license as a penalty for a breach of its rules. Virden v. Pilot Com'rs [Del.] 67 A 975.

96. State v. Leech, 119 La. 522, 44 S 285.

97. State v. Ames [Wash.] 92 P 137.

98. This power can only be called in question by those who assert that some constitutional right of theirs is infringed. St. George v. Hardie [N. C.] 60 SE 920.

99. St. George v. Hardie [N. C.] 60 SE 920.

1. The Blackheath, 154 F 758.

2. This liability is not affected by the fact that the vessel paid damages without suit. Guy v. Donald, 157 F 527.

3. Guy v. Donald, 157 F 527.

4. Lynch v. Chew, 159 F 182.

5. The S. C. Schenk [C. C. A.] 158 F 54.

6. She is bound to know the channels, the depth of water, the risk which she undertakes. She must use skill, caution, and attention to her duties, and she is responsible for the care of boat she is towing until destination is reached in so far as that care is dependent upon the skill, knowledge, and attention with which she and her officers perform their work. The Flushing, 159 F 570; Baltimore & Boston Barge Co. v. Knickerbocker Steam Towage Co., 159 F 755.

7. A tug is liable for negligently drawing its tow upon rocks, causing injury. Farrell v. Port Johnston Towing Co., 156 F 871. A tug is at fault in starting at too late an hour. The rule is not affected by the fact that start was delayed at request of owner of tow. Baltimore & Boston Barge Co. v. Knickerbocker Steam Towage Co., 159 F 755. Tug company undertook to deliver leaking tow at wharf by two tugs, but sent only one, whose pumping apparatus was so defective that it broke and tow sank. Held liable for resulting damages. Farrell v. Port Johnston Towing Co., 156 F 871.

8. Barge towed with tug on either side, instead of one tug forward on short hauser and the other on port side. Baltimore & Boston Barge Co. v. Knickerbocker Steam Towage Co., 159 F 755.

be shown, however,[9] and the burden of proof is on libelant.[10] The damages for which tug is liable for negligent loss of her tow's cargo is the market value of cargo at port of shipment and carrying expenses incurred,[11] but evidence of selling price of similar vessels is inadmissible.[12]

Wharfage is a mere charge made by the owner of the soil or shore for the use of a portion of it,[13] liability for which may be governed by general custom.[14] Where the charterer is bound to furnish a berth for the vessel, he is liable for extra wharfage.[15]

§ 12. *Repairs, supplies, and like expenses.*[See 8 C. L. 1984]—The lien, the duration of which is fixed by statute,[16] enforcible by proceedings in rem only in a Federal admiralty court,[17] and notice of which must be filed as required by statute[18] unless suit to foreclose has been instituted,[19] exists only where credit has been given the vessel,[20] the minds of the parties having met upon the common understanding that the vessel's credit is pledged for the supplies.[21] And since evidence that supplies were furnished on the credit of the vessel is not entitled to controlling weight unless corroborated by other competent evidence of surrounding circumstances,[22] the lien cannot be established by proving an account stated,[23] nor will it be presumed from the mere fact that the supplies were delivered to the ship that they were furnished

9. Tug took scows to dumping ground. Weather cold and sea high. On signal for dumping scows, one replied that it had dumped; no reply from other scow which had not been dumped except rear pocket, and on way back capsized due to dumping rear pocket first. No negligence in tug's failure to ascertain scow's condition sooner, nor could she have assisted in dumping scow under weather conditions had she known of its condition nor was she negligent in returning. The John D. Dailey, 157 F 477. Scow towed to dumping grounds sank because of failure of after pocket to dump. Though sea was too high to permit tug to assist in dumping, it was not so high as to render it negligent to take her out. Scowman had charge of scow and did not dump on order of tug. Tug not negligent. The John A. Hughes [C. C. A.] 158 F 94. A tug which takes scow to the place directed, especially when the place is an ordinarily safe one, performs her duty and is not liable for what occurs subsequently. The Alice, 157 F 984. The mere fact of sheering does not prove it, for it is quite as likely to come from fault of tow as from that of barge. Baltimore & Boston Barge Co. v. Knickerbocker Steam Towage Co., 159 F 755. Tug guilty of negligence in improperly securing tow line. The S. C. Schenk [C. C. A.] 158 F 54.

10. The Flushing, 159 F 570; Baltimore & Boston Barge Co. v. Knickerbocker Steam Towage Co., 159 F 755.

11, 12. The Oceanica, 156 F 306.

13. The owner has right to make charge though price, perhaps, may be subject to municipal regulation. The right to charge may be claimed upon an express or implied contract, according to circumstances. Riddick v. Dunn, 145 N. C. 31, 58 SE 439.

14. It seems to be the rule of law as well as custom for consignee to pay wharfinger. Riddick v. Dunn, 145 N. C. 31, 58 SE 439.

15. Hammett v. Chase, Talbot & Co., 158 F 203.

16. The statute gives materialmen a lien for thirty days. Therefore such lien expires at the end of that time unless the items can be considered as part of a running account, but in order to constitute a running account there must be an uninterrupted and connected series of transactions. The Golden Rod [C. C. A.] 153 F 171.

17. The legislature may create the lien, but cannot provide for its enforcement by a proceeding strictly in rem. Russel v. Myers Excursion & Transfer Co. [N. J. Eq.] 67 A 1016.

18. Statute provides that notice shall be filed within thirty days after debt contracted. The fact that debt not due does not affect time of filing. In re Fremont, 109 NYS 1073.

19. The Golden Rod [C. C. A.] 153 F 171.

20. The Gen. J. A. Dumont, 158 F 312. A claim for lien will be sustained if it is shown the supplies were furnished and charged to the vessel. The J. S. Warden, 155 F 697. The rule is not altered by reason of the fact that the vessel proceeded against is under charter or in possession of a prospective purchaser. The William P. Donnelly, 156 F 302. Delivering goods to a carrier in New York or in Providence for transportation to a vessel in Bangor is not furnishing the goods to the vessel. The goods must be actually put on board the ship or else brought within the immediate presence and control of its officers. The Cimbria, 156 F 378.

21. Vessel, whose home port was in Maine, taken to Boston, where operated and where president and manager of company owning vessel also went and maintained offices. Supplies furnished by Maine parties on his order. No maritime lien on vessel in absence of proof of common understanding to that effect. The Cimbria, 156 F 378.

22. Nor is the fact that the supplies were charged on the books against the purchaser entitled to great weight. The William P. Donnelly, 156 F 302; The Cimbria, 156 F 378.

23. The J. S. Warden, 155 F 697.

on her credit.[24] The contract must be with one having authority,[25] and whether made with the proper party, expressly or by implication, will be determined upon the case presented.[26] The master's authority to pledge the credit of the ship, however, is limited to the rule of necessity,[27] and while all of his power in this respect cannot be delegated, he may request others to act in his behalf as agent.[28] As the rights of materialmen furnishing necessaries to a vessel in her home port may be regulated by each state,[29] no lien can be acquired for supplies for such vessel unless one is given by the local law,[30] and where repairs are made by order of the owners in a foreign port, the presumption is against the right to lien.[31] The services which will give rise to a lien must be such as would be rendered by a mariner,[32] as for labor done on the vessel preceding its final laying up,[33] and all proper costs for keeping a libeled vessel will be allowed.[34] But a ship broker has no lien for commissions or money advanced to pay the obligations of a vessel,[35] nor can one who furnishes supplies to a vessel under charter, with notice thereof, hold the vessel liable,[36] nor can he hold the vessel for repairs where the contract obligates the charterer to pay all expenses of it,[37] but such a provision will not be allowed to work injustice to one furnishing repairs,[38] nor will it affect the seaman's right to wages.[39] On sale of the vessel under libels, the lien is transferred to the fund.[40]

§ 13. *Salvage.*[See 8 C. L. 1938]—Salvage is a compensation for maritime services voluntarily rendered[41] in saving property or rescuing it from impending peril on the sea or wrecked on the coast of the sea or on a public navigable river or lake where interstate or foreign commerce is carried on.[42] Therefore it must appear that

24. The William P. Donnelly, 156 F 302.

25. The Robert R. Kirkland [C. C. A.] 153 F 863; The Heathglen, 153 F 213.

26. Evidence reviewed, and held that authorized agent of owner expressly or impliedly directed repairs. The Rockaway, 156 F 692.

27. For money advanced to master of ship on his representations only that it was for the ship's wants and which was not used for her benefit, lender has no lien. The Charles E. Falk, 157 F 780. The master has authority to incur obligations for necessary port charges of the vessel and its outfitting for the voyage. Commercial Nat. Bk. v. Sloman, 121 App. Div. 874, 106 NYS 508.

28. While master, as agent for owners, cannot delegate all his authority, he may request ship's brokers to bargain for vessel's outfitting and incur obligations in his behalf as agent therefor. Obligations incurred for outfitting of vessel are thus incurred by master himself, notwithstanding fact he is aided in obtaining delivery by pledging credit of ship brokers, who bargain, however, in behalf of vessel and master. Whatever is done, therefore, in this respect, is done through the master. Commercial Nat. Bk. v. Sloman, 121 App. Div. 874, 106 NYS 508.

29. When such lien exists, it is the duty of the Federal court to enforce it. The Rockaway, 156 F 692.

30. Supplies and equipment furnished to domestic vessel in Maine by parties without the state. Received and used by vessel. Under Maine statute, vessel subject to lien. The Cimbria, 156 F 378.

31. The burden is on libelant to show the contrary. The Heathglen, 153 F 213.

32. Services rendered a domestic vessel in her home port, after she had gone out of commission for the season, are not such services. The James T. Furber, 157 F 124.

33. The Cimbria, 156 F 378.

34. Charges for a keeper and extra labor for pumping to keep vessel afloat are proper. The Robert R. Kirkland [C. C. A.] 153 F 863.

35. Commercial Nat. Bk. v. Sloman, 121 App. Div. 874, 106 NYS 508.

36. The libelant is chargeable with such notice as diligent inquiry would have elicited. The Mt. Desert, 158 F 217; The Gen. J. A. Dumont, 158 F 312.

37. The Gen. J. A. Dumont, 158 F 312.

38. Such a provision will not affect the vessel's liability to one who repaired her after a collision where the owner supervised the work and received damages for the work done. The Mt. Desert, 158 F 217.

39. The lien in seaman's favor is given by law, based upon the necessity of the service rendered by one of this class, favored by the law because of the hazards they encounter and hardships they endure in the interest of the ship and her owner and the furtherance of commerce. The Gen. J. A. Dumont, 158 F 312.

40. In such case a state court may order it paid. Russel v. Myers Excursion & Transfer Co. [N. J. Eq.] 67 A 1016.

41. The S. C. Schenk [C. C. A.] 158 F 54; City of Puebla, 153 F 925.

42. It follows that there must have been a sea peril from which the vessel was rescued and the vessel itself must have been at the time the subject of a sea peril in order to support a maritime lien and afford jurisdiction in rem in the admiralty. The Jefferson, 158 F 358. The perils of the vessel saved and the circumstances under which assistance is rendered determine whether

except for the service the property would have been lost [43] or that assistance was rendered at some stage of the rescuing service which in some way contributed to the final safety of the rescued ship [44] and, though all the other elements be present, lack of success alone will defeat the claim.[45] A vessel is not a derelict until abandoned,[46] but, prima facie, if found at sea in a situation of peril with no one aboard of her, she is.[47] A burning vessel at a burning dock is a subject of salvage service,[48] but not if burning in a dry dock.[49] The master may, when in command and control, reject salvage services,[50] but when no adequate or reasonable means of assistance exist at the time, he cannot repudiate them when the danger has passed.[51] The award is apportioned as the circumstances of the case may justify,[52] and may by the conduct of the parties be lessened [53] or forfeited.[54] The amount thereof is left very much to the discretion of the court.[55] It should be liberal, but not extravagant, and depends on several considerations,[56] illustrations of which are given in the notes.[57] Remote and conjectural

the service was salvage service or not. The S. C. Schenk [C. C. A.] 158 F 54.

43. The New Haven, 159 F 798.

44. Where a vessel took a line from the disabled vessel, which line broke, and no other assistance was given, claim disallowed. The City of Puebla, 153 F 925.

45. The S. C. Schenk [C. C. A.] 158 F 54.

46. The Launberga, 154 F 959.

47. Where master and crew leave a vessel temporarily, without intention of final abandonment, for the purpose of obtaining assistance, and with the intent to return and resume possession, she is not technically derelict. The Shawmut, 155 F 476.

48. The Indian [C. C. A.] 159 F 20.

49. The Jefferson, 158 F 358.

50. The Indian [C. C. A.] 159 F 20.

51. The Ragnarok, 158 F 694.

52. Where crew worked for wages, ran no eminent risk, nor performed no act of heroism, daring or courage, one-fourth of the award held sufficient. The Launberga, 154 F 959.

53. An exaggerated claim will have the effect of lessening the amount of the award. The Ragnarok, 158 F 694.

54. Whether an act is a spoliation that will forfeit salvage depends on circumstances. Wine drifting in casks at sea and salved, salvors drilling holes in casks, presumably to test whether it had been affected by the salt water. Not a spoliation forfeiting salvage. Merritt & Chapman Derrick & Wrecking Co. v. About 400 Barrels Wine [C. C. A.] 159 F 406. Negligence of the rescuing vessel may result in both forfeiture of right to salvage and damage. Hence, when a distinguishable injury has resulted from the negligence of one undertaking a salvage service, there may not only be forfeiture of all claim to salvage, but an affirmative award of damages against the salving vessel. When, however, this liability is sought to be fixed solely because the service was ineffectual, no independent injury having been caused, there is no responsibility if the salvor acted in good faith without clear evidence of culpable negligence or willful misconduct. The S. C. Schenk [C. C. A.] 158 F 54.

55. Rescued steamer had 185 passengers and was valued at $225,000, cargo and freight $86,488. Salvors were valued respectively at $100,000 and $121,000, the former carrying eight passengers. Allowance to first $10,500, to second $9,500. The City of Puebla, 153 F 925.

56. First, the extent and danger of the services; second, the risk to which the vessel and other property employed in the service were exposed; third, the value of the property saved and the risk of destruction by which it was imperiled. The City of Puebla, 153 F 925. Whether the aided vessel could have saved herself or was in probable danger of destruction or serious damage, and, if so, her value, what was the degree of danger to the vessel aided and what was saved; also whether the salvage service was rendered with promptitude, skill, vigor, and energy, and was successful, what was the danger and hazard in rendering the service, and what was the value so risked, the time spent, its value, and the damages or loss to the vessel rendering the service. To this enumeration may be added that admiralty awards are not confined by the rule of quantum meruit, but perilous services voluntarily rendered should be liberally rewarded as an inducement to similar services by others. The Western Star, 157 F 489; The Priscilla, 153 F 476. There may be considered, also, the ship's business, the character of peril, and its locality. The Jefferson, 158 F 358.

57. Where there is no great risk of life or property, the service is of a low order. The Launberga, 154 F 959. A steamer which was requested by a vessel to lie by and protect it from fire awarded $75 as salvage. The River Belle, 153 F 475. Stranded vessel 60 feet long, worth $6,500, in Delaware river. Eight days' work by salvor. No danger. Award of $750 sufficient. The Lizzie Crawford, 156 F 201. Salvor worth $88,000, eight hours' service, sustaining injury. Rescued vessel worth $265,000, damaged by stranding $8,000, and though not in immediate danger was in considerable peril. Award of $5,000 and $150 damage to equipment. The Western Star, 157 F 489. Salved vessel valued at $16,000, salvor at $325,000, with earning capacity of $700 per day. Salved vessel in peril, but services rendered by salvor not perilous and the risk insignificant. Award of $1,300. The Pelican, 158 F 183. Six hundred dollars was properly allowed as salvage for recovering, under danger and hardship, $1,900 worth of wine from the sea. Merritt & Chapman Der-

claims will not be allowed,[58] nor, except in some cases,[59] will interest or damage for delay.[60] The rule of diligence obligatory upon salvors in making the rescue is that of ordinary care,[61] but what was an exercise of proper care and skill is determinable from the facts and circumstances.[62] The salvor must also use reasonable care to protect the property after its rescue.[63]

§ 14. *Vessels or persons liable for loss and expense, and limitation of liability therefor.* See 8 C. L. 1938—The liability of pilots and towing companies, or vessels, is treated in another section.[64] It is the carrier's duty to minimize loss,[65] and the captain's failure to protect the vessel may go to a reduction of damages for her injury.[66] For destruction of the vessel while in his possession, the hirer is liable.[67]

Limitation of liability. See 8 C. L. 1939—The statute limiting liability of the owner to the amount or value of his interest in the vessel and her pending freight [68] was meant to apply to losses due to the negligence of an employe,[69] or by striking an unknown obstruction under the water,[70] but it does not extend to services rendered by a towing company under contract.[71] The validity of a condition restricting liability is determined by the law of the place of contract,[72] and will apply only to the voyage contemplated in the agreement.[73]

§ 15. *General average.* See 8 C. L. 1940—General average contribution, which is not affected by stipulations in a bill of lading exempting carrier from losses in certain cases [74] and for which the master and shipowner may be responsible to the full amount,[75] is based on a voluntary sacrifice of a portion of the marine risk, which

rick & Wrecking Co. v. About 400 Barrels of Wine [C. C. A.] 159 F 406. Vessel salved was burning at a burning dock and valued at $463,229.17; salvors valued at $155,000 and $80,000, respectively. Award to former $5,000, to latter $7,500, the master and men of the latter having gone aboard of burning vessel and rendered valuable service with hose. The Indian [C. C. A.] 159 F 20. Vessel salvaged worth $65,000, service lasting 20 minutes. No danger or hardship to salvor, while danger to salved vessel imminent, but not extreme. Award $1,200. The Ragnarok, 158 F 694. The amount of the award may be modified by the conduct of the owners in their efforts to resume possession, as where vessel was abandoned temporarily to procure assistance, in which promptness and intelligence were exercised, and considerable expense incurred. The Shawmut, 155 F 476.

58. The Pelican, 158 F 183.

59. In view of the long delay, an allowance in the shape of interest was held not to be inequitable. Merritt & Chapman Derrick & Wrecking Co. v. About 400 Barrels of Wine [C. C. A.] 159 F 406.

60. The Western Star, 157 F 489.

61. The law does not and should not scrutinize too narrowly a service begun with meritorious motive to save property exposed to destruction. So long as the salvor acts in good faith and exercises the skill and care which a prudent man would employ in preserving his own property, his right to compensation will not be defeated by a showing that a greater degree of skill might have avoided any possible peril. The Shawmut, 155 F 476.

62. The Launberga, 154 F 959.

63. The S. C. Schenk [C. C. A.] 158 F 54.

64. See ante, § 11.

65. He is not entitled to a deduction for money paid out in rescuing the cargo or expenses incurred in drying it and putting it in condition for sale. Ralli v. New York & T. S. S. Co. [C. C. A.] 154 F 286.

66. Where owner of vessel furnishes captain also, it is his duty to care for it, although contract broken by charterer. Bleakley v. Sheridan, 120 App. Div. 471, 104 NYS 1060.

67. Lessees liable for launch burning while in their possession and through their negligence, they being under obligation to return it in good order or satisfactorily account for its loss. Foret v. Mathes [C. C. A.] 159 F 128.

68. Ralli v. New York & T. S. S. Co. [C. C. A.] 154 F 286.

69. In re Eastern Dredging Co., 159 F 541.

70. Liability will be limited when loss was not caused by manning or outfitting, or any negligence on board, but by striking an unknown obstruction under the water. The Norge, 156 F 845.

71. Such contract is binding on owner though made by the managing agent. Great Lakes Towing Co. v. Mill Transp. Co. [C. C. A.] 155 F 11.

72. When contract made in a foreign country, where legal, it may be enforced in the courts of the United States, no part of it to be performed in this country, and transportation made on foreign vessel. Such contract is not public policy of this country. The Fri [C. C. A.] 154 F 333.

73. They do not relieve the carrier from liability occasioned by abandonment of voyage, and return of vessel to point of shipment. Pacific Coast Co. v. Yukon Independent Transp. Co. [C. C. A.] 155 F 29.

74. The Santa Ana [C. C. A.] 154 F 800.

75. If the master fails to exercise the lien which by law he has on goods of all shippers for their proportion in general average

must have been made for the common benefit of the joint enterprise, and for no other purpose.[76] The presumption is in favor of the adjustment,[77] and the burden is on the party charging to impeach it for fraud.[78]

§ 16. *Wreck.* See 4 C. L. 1487

§ 17. *Marine Insurance.* See 8 C. L. 1040—The object of insurance on disbursements is to insure the owner the recovery of additional sums beyond the amount covered by his insurance on ships and freight, and it is made against total loss only.[79] The risk must be accepted before the insurer is bound,[80] and the subject of it depends on the intention of the parties as evidenced by the language of the policy.[81] While the shipper cannot be required to procure insurance for his benefit,[82] the carrier may have an insurable interest in the cargo,[83] and the presence of this interest determines whether a wagering policy is void,[84] but a splitting up of the voyage and separating the insurable risks will not invalidate it.[85] The liability of insurer, which ends when the vessel reaches her port of destination,[86] and whether the contract is one of indemnity or insurance,[87] may be determined by its terms.[88] The loss, which it is proper to show has been paid the owner by the carrier,[89] and as to which subrogation between insurers results by operation of law from the mere act of paying it [90] in full,[91] and which may depend upon the character of the policy, whether valued or

contribution, and delivers goods without requiring payment or bond, or other security for payment thereof, he and owner of ship become personally liable for full amount which all interests should pay to persons aggrieved. It will not be presumed, in the absence of proof, that consignees were unable to give security. The Santa Ana [C. C. A.] 154 F 800.

76. The sacrifice must have been made by order of the owner, master, or authorized representative. Hence, no recovery where city firemen poured water into burning vessel. Minneapolis, etc., S. S. Co. v. Manistee Transit Co., 156 F 424.

77. In the absence of evidence to the contrary, it will be assumed that the adjustment was made as it should have been on damages from steam and water only, and on proper consideration of the law and applicable rules. The Santa Ana [C. C. A.] 154 F 800.

78. The Santa Ana [C. C. A.] 154 F 800.

79. Brown v. Merchants' Marine Ins. Co. [C. C. A.] 152 F 411.

80. Quill v. Boston Ins. Co. [Mass.] 83 NE 401.

81. The terms "freight on board, or not on board," held not intended to include prepaid freight. New York & Cuba Mail S. S. Co. v. Royal Exch. Assur. [C. C. A.] 154 F 315.

82. Bradley v. Lehigh Valley R. Co. [C. C. A.] 153 F 350.

83. A towing company has an insurable interest in the goods it carries, if liable to the owner for its loss. Western Assur. Co. v. Chesapeake Lighterage & Towing Co., 105 Md. 232, 65 A 637.

84. Whether a wager policy is void or not depends on whether the insured has an insurable interest. Brown v. Merchants' Marine Ins. Co. [C. C. A.] 152 F 411.

85. St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. [C. C. A.] 157 F 625.

86. An unexpected deviation, not contemplated when insurance was written, nor assented to will relieve insurer. In this case the 3rd section of the Harter act cannot be relied on. Alaska Banking & Safe Deposit Co. v. Maritime Ins. Co., 156 F 710.

87. A clause declaring the object of the deposit to be, "that it is to be held to indemnify you (the owners) in case of loss of the cargo," is an agreement to indemnify and not one of insurance. Leonard v. Bosch [N. J. Eq.] 68 A 56.

88. Loss sustained by capsizing. Insurance policy provided against perils "of the seas, lakes, rivers," etc., and "all other perils, losses and misfortunes occasioned by perils of the sea, that have or shall come to the hurt, detriment, or damage" of the goods. Western Assur. Co. v. Chesapeake Lighterage & Towing Co., 105 Md. 232, 65 A 637. Insurer stipulated that liability should attach when caused by collision or stranding, provided that tug should be well found in anchors and that injuries to tow should be received while alongside or attached to hauser. Tows injured while at anchor, for which tug held liable. No recovery on the policy. Barber v. Home Ins. Co., 154 F 87. The term "collision," as used in the insurance policy, is not limited to fortuitous and injurious contact. If negligence of a vessel's navigator causes injurious contact between two other vessels, that vessel from which the negligence proceeded may be said to have come into collision, unless the navigator's control be merely intellectual or if there be no control. Western Transit Co. v. Brown, 152 F 476.

89. Western Assur. Co. v. Chesapeake Lighterage & Towing Co., 105 Md. 232, 65 A 637.

90. This right is not affected by the fact that the insurer issued a disbursement policy, or delay in paying, or refusal to participate in proceedings to recover damages from the owner. Brown v. Merchants' Marine Ins. Co. [C. C. A.] 152 F 411.

91. The Bodo, 156 F 980.

open,[92] is generally the value of the cargo at the place of shipment, not including loss of profits.[93] The insurer is not liable for expense of litigation [94] nor damages resulting from a maritime tort not covered by the terms of the policy,[95] but sums paid out to avert loss that, if it had occurred, would have fallen on the underwriter may be brought within the meaning of the "sue and labor" clause.[96] Though the presumption is, that the vessel is seaworthy,[97] adjusters cannot decide questions of law where they are the sole questions in controversy.[98]

§ 18. *Maritime torts and crimes.*[See 8 C. L. 1942]—For an assault upon a seaman by the master, action for which must be in personam only,[99] or for a tortious injury to him,[1] and for negligent damage to other vessels, the owner is liable,[2] nor will a fault which does not contribute to produce the injury be ground for division of damages.[3] And though it is not always essential that direct or specific contractual relations exist between the libelant and the ship or her owners,[4] and though he must make his case reasonably probable and certain,[5] the owner, since he must render his vessel safe for workmen,[6] is liable to them, they assuming no unknown risks,[7] for injuries resulting from his negligence,[8] which will not be presumed from the mere happening of the accident,[9] but will be determined from the facts and circumstances of the case.[10] The damages allowed for such injuries, not exceeding the amount and

92. The difference in effect between a valued and open policy is that under an open policy in case of loss the assured must prove the actual value of the subject of insurance; in a valued policy he need never do so, the valuation in the policy being conclusive between the parties. New York & Cuba Mail S. S. Co. v. Royal Exch. Assur. [C. C. A.] 154 F 315.

93. On a valued policy, the recovery would be for the whole amount as the agreed value of the property. Leonard v. Bosch [N. J. Eq.] 68 A 56.

94. Policy insured tug against liability for loss or damage caused to tows by collision or stranding. No liability on insurer for litigation expenses in defending tug for stranding tow. The "sue and labor" clause has relation only to the subject-matter of insurance. Munson v. Standard Marine Ins. Co. [C. C. A.] 156 F 44.

95. If, through faulty navigation, one vessel causes another, over which it has no control, to collide with a third, the insurer is not liable under the clause insuring against damage paid as a result of collision. Western Transit Co. v. Brown, 152 F 476.

96. St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. [C. C. A.] 157 F 625.

97. Whether the evidence removes this presumption is a question for the jury. Western Assur. Co. v. Chesapeake Lighterage & Towing Co., 105 Md. 232, 65 A 637.

98. St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co. [C. C. A.] 167 F 625.

99. Libel against the vessel will not lie. The Sallie Ion, 153 F 659.

1. Through a deviation from the voyage specified in the articles, seaman suffered mentally and physically on homeward trip, for which recovery allowed, nor did acceptance of wages work an estoppel of the right to recover. Turtle v. Northwestern S. S. Co., 154 F 146. Whether the damages are proper depends on the facts and circumstances of the case. Hence, where owner wrongfully left sailors in foreign port, before term of service expired, he was liable for their support while there and for loss and damage consequent upon his refusal to return them to home port. Pacific Mail S. S. Co. v. Iverson [C. C. A.] 154 F 450.

2. The vessel owners are liable for damage to other vessels caused by the unlawful and negligent obstruction of a wharf. The J. G. Lindauer, 158 F 449.

3. If no person in position to make response, failure of vessel to give warning of her coming into slip, if a fault, is not a contributing one. The J. G. Lindauer, 158 F 449.

4. Vessel liable for injuries to employe of stevedore resulting from its negligence. The Wyneric, 156 F 276.

5. Johnson v. Leyland [C. C. A.] 153 F 572.

6. The Ranza, 156 F 373. It is the duty of a vessel to render her safe for workmen to enter her holds and perform services ordinarily required of them. The Wyneric, 156 F 276.

7. Morel v. Lehman [C. C. A.] 159 F 124.

8. A vessel unlawfully obstructing the approach to wharf by a hauser, from which personal injuries to the captain of an incoming boat resulted, is liable. The J. G. Lindauer, 158 F 449. Engine cover, falling from deckhouse, because of defective cleat, a permanent fitting of the vessel, and injuring seaman. Vessel liable whether cleat was fastened by officers of vessel or shipwright. The Drumelton, 158 F 454. Master must provide suitable machinery, means, appliances, fellow-servants, a sufficient number to do the work, a reasonably safe place to work, and, if peculiar dangers, give warning in advance. To place an inexperienced man at work on complicated and dangerous machinery, without instructions or warning, is negligence. Pennsylvania R. Co. v. Hartell [C. C. A.] 157 F 667.

9. Leyland v. Holmes [C. C. A.] 153 F 567.

10. New York, etc., R. Co. v. De Noyelles [C. C. A.] 153 F 543. Held, tug not negligent in failing to seek lost barge when every reason to believe it sunk the night before; and that burden was on libelant to show

value of the owner's interest in the vessel and her freight pending,[11] will be commensurate to the injury,[12] and may be recovered in full.[13]

Toward a stevedore and his employes, actions by whom are to be determined by the ordinary rules governing the relation of master and servant,[14] the owner of a vessel owes a personal duty [15] and is liable for injuries to them through instrumentalities with which they have no connection,[16] and for those resulting from his negligence,[17] but not where their negligence contributes to [18] and is the immediate and proximate cause of the injury.[19] Where the vessel and the stevedore are joint tort feasors, release of the latter will release the former.[20]

SIDEWALKS; SIGNATURES; SIMILITER; SIMULTANEOUS ACTIONS; SLANDER, see latest topical index.

SLAVES.

A slave cannot be the beneficiary of a trust.[21]

Peonage See 8 C. L. 1945 is the status or condition of compulsory service based upon the indebtedness of the peon to the master,[22] and violates the thirteenth amendment of the constitution,[23] securing to every person within the jurisdiction of the United

tug at fault. Towing barge out of true course. The Asher J. Hudson [C. C. A.] 154 F 354.

11. A stream hoist, or derrick, on a full scow, though removable, is a part of the vessel, within the meaning of Rev. St. § 4283 (U. S. Comp. St. 1901, p. 2943). The Buffalo [C. C. A.] 154 F 815.

12. Able bodied longshoreman, permanently crippled, properly allowed $3,500. Morel v. Lehman [C. C. A.] 159 F 124. Captain of tug, salary $100 per month, having jaw broken, teeth knocked out, and other injuries, suffering great pain and expense, and permanent disfigurement, allowed annuity of $2,000, time for ten months at $100 per month, and $1,500 for pain and expense. The J. G. Lindauer, 158 F 449.

13. Old Dominion S. S. Co. v. Gilmore, 28 S. Ct. 133.

14. Libelant receiving personal injuries being merely a stevedore or longshoreman employed by the vessel, the case is to be determined by ordinary rules governing the relation of master and servant. The Buffalo [C. C. A.] 154 F 815.

15. Owners of vessels owe a personal duty to members of a stevedore's gang to provide reasonable security against danger to life and limb and warn them of latent danger. Leyland v. Holmes [C. C. A.] 153 F 557. The vessel owes a personal duty to stevedores employed to load and unload its cargoes to provide reasonable security against injury, and also to warn them of any latent danger caused by the vessel for which the latter is responsible. Hence where stevedores were working in hold and struck, incidentally, bottom of skid attached to hatchway, which fell, resulting in injury, the burden is on vessel to explain the accident. The Chicago, 156 F 874. The vessel must furnish stevedore employed upon vessel a safe place to work, in so far as construction of vessel and its various parts is concerned, and inspection and care of these parts bound to have been such that no hidden defect (which was or should have been known to the officers) is allowed to exist and continue without warning stevedore. This, of course, does not include latent defect, not discoverable by reasonable inspection. Wholey v. British & Foreign S. S. Co., 158 F 379.

16. Longshoreman employed to stow away cotton injured by breaking of fall with which he nor anyone associated with him as fellow-servants had any connection. The Evelyn, 152 F 847.

17. Ship not negligent for stevedore's improvident selection of rope, the breaking of which caused injury. The St. Gothard [C. C. A.] 153 F 855. Vessel seaworthy, owner not liable for injuries resulting in negligent handling of hatch coverings. Bettis v. Leyland [C. C. A.] 153 F 571.

18. Wholey v. British & Foreign S. S. Co., 158 F 379. The vessel is not liable for an injury caused by defective appliances where libelant had knowledge of the defect and was warned to keep out of the way. The Tripoli, 156 F 223. Libelant covered hatchway, preparatory to unloading, with fore and afters which did not fit, placing them catacornered. On stepping on them, they gave way, causing him to fall through, sustaining injury. Because of negligence, no recovery. The Ranza, 156 F 373.

19. Employe of tug, using ladder, defects in which were known to him, cannot recover for resulting injuries, he having assumed the risk. The Scandinavia, 156 F 403. Scowman, in handling hauser, knowing the effect of starting to tow with it, and who could have kept out of the way, not entitled to damages. The John K. Gilkinson, 156 F 868.

20. The St. Cuthbert, 157 F 799.

21. Nona Mills Co. v. Wright [Tex.] 18 Tex. Ct. Rep. 637, 102 SW 1118.

22. United States v. Cole, 153 F 801.

23. Statute to secure performance of agricultural labor required by contract by providing penalties for violation is unconstitutional. Ex parte Drayton, 153 F 986. Advances by surety to pay fine and costs and living expenses under a contract for service constitute debt, and defendant cannot be

States the right to freedom from slavery or involuntary servitude;[24] but voluntary service by the debtor is lawful.[25]

Slave marriages, their offspring, and inheritance. See 8 C. L. 1945—Existent slave marriages were rendered valid by a Federal statute which was retroactive in effect,[26] and a statute of Mississippi provided that persons living together as man and wife be held in law as married.[27] Also, in South Carolina, it was declared that solemnization was not essential,[28] but the statute did not extend to legitimatize the issue of meretricious intercourse between slaves.[29]

SLEEPING CARS; SOCIETIES, see latest topical index.

SODOMY.[30]

SOLICITATION TO CRIME; SPANISH LAND GRANTS; SPECIAL ASSESSMENTS AND TAXES; SPECIAL INTERROGATORIES TO JURY; SPECIAL JURY; SPECIAL VERDICT, see latest topical index.

SPECIFIC PERFORMANCE.

§ 1. **Nature and Propriety of Remedy in General, 1674.**
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§ 1. *Nature and propriety of remedy in general.* See 8 C. L. 1946—Specific performance being a purely equitable remedy, the granting of such relief rests upon the discretion of the court,[31] and the fact that plaintiff is able to establish a valid contract at law is not alone sufficient,[32] and, per contra, equity may give relief though the contract is not legally enforcible.[33] Such discretion is not arbitrary, but controlled by settled principles of equity.[34] Relief will be denied where specific per-

convicted for failure to perform as provided by Code. Elston v. State [Ala.] 45 S 667. Offense indictable under U. S. Rev. St. § 5508. Smith v. U. S. [C. C. A.] 157 F 721.

24. Smith v. U. S. [C. C. A.] 157 F 721.

25. United States v. Cole, 153 F 801. Contract to work in payment of fine. Dorsey v. Redwine, 1 Ga. App. 626, 57 SE 1073.

26. Pub. Laws 1866, p. 99, c. 40. Children legitimate though husband deserted wife after act took effect and returned to a former reputed wife. Nelson v. Hunter, 144 N. C. 763, 56 SE 506.

27. Laws 1865, p. 82, c. 4. Haines v. Haines [Miss.] 43 S 465.

28. 13 Stat. pp. 291, 393. Ex parte Romans [S. C.] 58 SE 614.

29. Watson v. Ellerbe, 77 S. C. 232, 57 SE 855.

30. No new cases have been found for this topic during the period covered by volume 10. See 8 C. L. 1946.

31. Offutt v. Offutt [Md.] 67 A 138; George Gunther, Jr., Brew. Co. v. Brywczynski [Md.] 69 A 514; Stevens v. Trafton [Mont.] 93 P 810; Pickett v. Michaels, 120 App. Div. 357, 105 NYS 411; Roberts v. Braffett [Utah] 92 P 789; Kittredge v. Kittredge, 79 Vt. 337, 65 A 89; Clinchfield Coal Co. v. Powers [Va.] 59 SE 370; Heflin v. Heflin [W. Va.] 59 SE 745. Contract may be valid in law and not subject to cancellation in equity, and yet all the circumstances connected therewith may be such as to require the court to deny specific performance. Marks v. Gates [C. C. A.] 154 F 481. There are many cases in which a court of equity will not exert its powers to enable a party to acquire title to a thing and yet will refuse to disturb a title already acquired without its agency. George Gunther, Jr., Brew. Co. v. Brywczynski [Md.] 69 A 514. Will decree performance of contract to convey land for railroad right of way where large expense incurred in reliance thereon and if left to a jury in condemnation proceedings they might not deem construction of road necessary or assess excessive damages. Chicago, etc., R. Co. v. Lane, 150 Mich. 162, 14 Det. Leg. N. 532, 113 NW 22. The right to specific performance is to be granted or withheld upon consideration of all the circumstances and in the exercise of a sound discretion. Sprickerhoff v. Gordon, 120 App. Div. 748, 105 NYS 586.

32. Gottfried v. Bray, 208 Mo. 652, 106 SW 639.

33. May enforce parol contract to convey lands to prevent frauds. Kingston v. Walters [N. M.] 93 P 700. See § 3, post.

34. Taylor v. Florida East Coast R. Co.

formance would be harsh, inequitable and unjust [35] or where the complainant has an adequate remedy at law.[36] Where specific performance would result in damages to defendant largely in excess of benefits to the complainant, damages will be awarded in lieu thereof.[37] Relief will not be granted unless complainant's right thereto is shown by clear and satisfactory evidence.[38] Specific performance will not be decreed in case of inability to perform [39] or where performance has become impossible,[40] but where a contract is entered into which one of the parties cannot fulfill in full, the other may have such specific performance if he desires of so much as the party is capable of performing.[41] Equity will not, however, decree enforcement of part of a contract in and of itself apart from the entire agreement.[42] Contracts hav-

[Fla.] 45 S 574; Godwin v. Springer, 233 Ill. 229, 84 NE 234; George Gunther, Jr., Brew. Co. v. Brywczynski [Md.] 69 A 514.

35. Where the trustee of infant owners of land made a contract to transfer land, but later decided he had made a mistake in so doing, and it would have been to the prejudice of the infant owners, equity will not decree specific performance, but leave vendees to remedy at law. Givens v. Clam [Va.] 59 SE 413. Where an auctioneer sold property to one bidder, not hearing a higher bid of another party, and his attention was called to the mistake, but he refused to open the sale, equity will not enforce the contract with the first bidder, for it was the auctioneer's plain duty to ascertain which would pay the most for the property. Byrne v. Fremont Realty Co., 120 App. Div. 692, 105 NYS 838. Performance will not be decreed where it would operate as a hardship due to some act of the complainant. Hefiin v. Hefiin [W. Va.] 59 SE 745. See further § 3D, Legality and Fairness of Contract.

36. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574.

Remedy at law held inadequate: Where a railroad asks for and receives land upon which to construct its road, and as a consideration therefor agrees to maintain a spur track and depot at a certain spot upon lands given for that purpose, and the party giving the land relying on the promise incurs great expense in improving his property for use in connection with the maintenance and operation of the track and depot, and a breach of the promise results in injury not to be adequately compensated for in damages, equity may enforce performance of the promise, at least in the absence of any showing of superior rights of the public. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. A decree for specific performance will not be denied to a purchaser because the seller is possessed of sufficient property to respond in the event that a judgment for damages should be recovered against him. Schippicasse v. Church, 9 Ohio C. C. (N. S.) 166. Where in a contract with a city to establish waterworks the paramount consideration in view was fire protection, the city may have specific performance. Bounds v. Hubbard City [Tex. Civ. App.] 19 Tex. Ct. Rep. 755, 105 SW 56. A contract to convey real estate will be specifically enforced despite the fact that the vendor is financially responsible. Demurrer to complaint for failure to allege that there was no adequate remedy at law overruled. Belanewsky v. Gallaher, 55 Misc. 150, 105 NYS 77.

37. Where cost of levee and bridge that defendant was required under the contract to build is largely in excess of damages sustained by grantee. Sanitary Dist. of Chicago v. Martin, 227 Ill. 260, 81 NE 417, afg. 129 Ill. App. 308.

38. Evidence held insufficient to justify decree of specific performance. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709. Where it appears doubtful whether contract was made to sell one of two lots or both of them, complainant asking performance as to one and defendant denying any contract except for the sale of both, specific performance will not be decreed. Sugar v. Froehlich, 229 Ill. 397, 82 NE 414; Pickett v. Michaels, 120 App. Div. 357, 105 NYS 411. Specific performance of a contract is decreed as a matter of favor rather than a strict legal right, and, if any of its material terms be uncertain, such extraordinary relief in equity must be withheld. Chambers v. Roseland [S. D.] 112 NW 148.

39. Bill against husband and wife, but evidence showed contract signed by A., a broker who was authorized by husband alone to sell joint property of self and wife. Contract not binding as to wife, and husband could not convey joint property. Beattie v. Burt, 122 App. Div. 473, 107 NYS 153.

40. Whalen v. Baltimore & O. R. Co. [Md.] 69 A 390. An agreement between parties that a certain judgment of confirmation should be set aside cannot be specifically enforced after the term of court at which it was rendered. Noonan v. Thompson, 231 Ill. 588, 83 NE 426. Specific performance of a contract to convey real estate will not be decreed when the vendor in consequence of a defect in his title is unable to perform. Where ejectment proceedings were pending, specific performance could not be decreed to await the outcome of ejectment. Rosenberg v. Haggerty, 189 N. Y. 481, 82 NE 503.

41. Millard v. Martin [R. I.] 68 A 420. Contract for sale of real estate by cotenant, though not binding as to other cotenants, will be enforced to the extent of the interest of the contracting tenant. Moore v. Garriglietti, 228 Ill. 143, 81 NE 826. Specific performance may be decreed against one tenant in common under an agreement to convey lands which is void as to cotenant. Campbell v. Hough [N. J. Eq.] 68 A 759. See further post, § 5, subsec. Relief Granted.

42. Contract to convey containing an agreement as to resetting a fence. Specific performance of the agreement to reset could not be enforced apart from rest of contract.

ing such terms that equity cannot carry into effect its decree cannot be specifically enforced.[43] Specific performance may be enforced between husband and wife.[44] Relief may be had from a subsequent purchaser with notice,[45] but not against a subsequent bona fide purchaser.[46] A party insisting upon specific performance must make out a complete equity.[47] To be entitled to specific performance one must show himself to have been ready and desirous,[48] for the right to relief may be barred by laches.[49] A bill for specific performance of a contract by one of the defendants, an

Rosenberg v. Wilson, 120 App. Div. 554, 104 NYS 1087. Where for a gross consideration defendant agreed to transfer a tract of land and timber on another tract and the description of the timber was too uncertain to warrant specific performance, neither part of the contract can be specifically enforced since the consideration cannot be separated. Fordyce Lumber Co. v. Wallace [Ark.] 107 SW 160.

43. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53. Contract for sale of the product of a distillery for five years with the privilege of the buyer to buy the product for an additional period of five years, according to conditions specified, binding the distiller to manufacture a specified number of barrels during each distillery season with the option of the buyer to require more and to establish and maintain a bottling room, etc. Edelen v. Samuels, 31 Ky. L. R. 731, 103 SW 360. Contract provided for an official survey of land located in Cuba and it appeared that there was no certainty that a survey by which good title could be given and recorded could be obtained. Cuban Production Co. v. Rodriguez, 108 NYS 785.

44. A wife conveyed a portion of her farm to her husband in consideration that he would join her in deeding the remainder to her children. Kittredge v. Kittredge, 79 Vt. 337, 65 A 89.

45. Evidence held to show that defendant did not take without notice. Booth v. Yenney [N. J. Eq.] 66 A 1092. Property transferred to one member of a partnership for partnership purposes and subject to right of other partner to have it transferred to him. Those taking from him were subject to a suit for specific performance by the other partner. Whitney v. Dewey [C. C. A.] 158 F 385.

46. Where one has recorded option to purchase, he cannot compel specific performance by a prior grantee of an unrecorded deed where both parties have acted in good faith. Lindley v. Blumberg [Cal. App.] 93 P 894.

47. George Gunther, Jr., Brew. Co. v. Brywczynski [Md.] 69 A 514. Evidence held to warrant findings of failure to do what was necessary by complainants to preserve their rights as purchasers and that they were acting in bad faith. Washburn v. White [Mass.] 84 NE 106. Plaintiff is not entitled to performance or return of payments after refusing to accept title at the time agreed and failing to sue for eighteen months, during which time defendant has spent $4,000 in improvements. Woodenbury v. Spier, 122 App. Div. 396, 106 NYS 817. A party refusing an offer of the adverse party to perform a contract in a certain manner has no right to compel specific performance after he has refused such offer, claiming the contract to call for a different performance. Hammond v. Noble, 150 Mich. 269, 14 Det. Leg. N. 693, 114 NW 58. A trustee holding in trust the title to land which he has voluntarily undertaken cannot be forced to specifically perform a contract to sell the land to another who knew at the time that the cestui que trust had been in adverse possession for years. Cyrus v. Holbrook [Ky.] 106 SW 300. Where defendants agreed to purchase plaintiff's land, though advised of the presence of squatters, and made no objection to the title on that account at the time, but thereafter refused to pay the purchase money because of such possession, they were not later entitled to specific performance. Allen v. Treat [Wash.] 94 P 102. Where, under a ten year lease with a right to purchase, the lessees at the end of five years brought a bill and were decreed to have specific performance, but failed to purchase and left the land, and then a second time, a few days before the lease expired, brought a bill for specific performance, they having left the land in the meantime and failed to pay rent, and the land having also increased in value, specific performance will not be granted, their conduct having made it inequitable. Kentucky Iron, Coal & Mfg. Co. v. Adams [Ky.] 106 SW 1198.

48. Clinchfield Coal Co. v. Powers [Va.] 59 SE 370; Heflin v. Heflin [W. Va.] 59 SE 745; Crawford v. Workman [W. Va.] 61 SE 319. Conditional grantor promptly repudiates contract and the grantee delays for more than three years to enforce, during which values fluctuate. No relief. Hathcock v. Societe Anonyme La Floridienne [Fla.] 45 S 481.

49. Where the delay of a party seeking performance is for speculative purposes, to await until time shall determine whether or not the contract is to his advantage, equity will not aid him by any relief against his failure to perform. Failure for five years to purchase mineral land, during which time railroads had been constructed and values immensely increased. Crawford v. Workman [W. Va.] 61 SE 319. Where a plaintiff under a contract of lease for four years with option to buy, did not exercise his option until the last day of the lease, he is not guilty of laches, and the land not having greatly increased in value the option will be enforced. Kerr v. Moore [Cal. App.] 92 P 107. Relief not to be given where it would violate familiar principles of equity jurisprudence, as where there has been abandonment and acquiescence brought about or participated in by those seeking to enforce. Restrictions on building which had been abandoned by allowing an owner to violate them would not be enforced as to another. Scharer v. Pantler, 127 Mo. App. 433, 105 SW

employe of the complainant, to assign to complainant a patent for an invention, the application for which patent had been assigned to a codefendant, states a cause of action.[50] The parties may in their agreement provide for the measure of damages in case of a breach and the means of satisfying the same, and they are then bound thereby to the exclusion of the remedy of specific performance.[51] Where a penalty for failure to perform is provided for, equity will not permit a defendant to elect to pay the penalty and thus avoid performance.[52] Where a vendee's agent without authority returned to the vendor a deed on the ground that it was not properly acknowledged, the vendee's remedy was not specific performance whatever may have been his rights to a return of the deed.[53]

§ 2. *Subject-matter of enforcible contract.* See 8 C. L. 1950—Generally speaking, any fair and valid contract [54] may be specifically enforced [55] if the elements of equity

668. Under the rule that specific performance cannot be granted unless the right thereto rests on clear and certain proof, the privilege of purchase forming the basis of the action in the present case cannot be enforced after the expiration of the fifteen year period. Frechtling v. Jacobs, 9 Ohio C. C. (N. S.) 554. Where payments were delayed because the vendor did not furnish a perfect title, it is no defense that since the contract was entered into the property had greatly increased in value where payments were not delayed from motives of speculation. Walton v. McKinney [Ariz.] 94 P 1122. A vendee in possession holding with the vendor's consent is not barred by lapse of time from demanding the legal title. Nuttall v. McVey [W. Va.] 60 SE 251.

NOTE. Laches: A tract was sold by A. to B. and C., each to own a half. Thirteen years after division, C. having meanwhile made valuable improvements, rich mineral deposits were discovered. Thereupon B., claiming that there had been a mistake as to the quantity of land, and that the allotment had ben incorrect, sued A. and C. for rectification and specific performance. Held, since the delay of the plaintiff was unexcused and hardship caused by the change in circumstances would ensue, equity should deny relief. Heflin v. Heflin [W. Va.] 59 SE 745.

Although some authorities maintain that the parties assume the risk of any contingencies that may later arise, and that chancery should, therefore, exercise jurisdiction only where hardship arises from the agreement itself (Fry, Spec. Perf. [3d Am. Ed.] § 397 et seq.; Lawder v. Blachford, Beat. 522; Marble Co. v. Ripley, 10 Wall. [U. S.] 339, 356, 19 Law. Ed. 955, 960), the apparent weight of authority takes account also of subsequent extrinsic circumstances where such could not reasonably (Franklin, etc., Co. v. Harrison, 145 U. S. 459, 473, 36 Law. Ed. 781) have been foreseen (City of London v. Nash, 3 Atk. 512; Webb v. Direct, etc., R. Co., 1 DeG. M. & G. *521; Willard v. Taylor, 8 Wall. [U. S.] 557, 19 Law. Ed. 501; Leicester Piano Co. v. Front, etc., Co., 55 F 190; Stokes v. Stokes, 155 N. Y. 581, 590; cf. Prospect, etc., R. Co. v. Coney Island, etc., R. Co., 144 N. Y. 152, 26 L. R. A. 610. The latter position is sounder since to look at the full relative effects of a decree on the parties all circumstances, collateral as well as intrinsic, should be taken into account. See 8 Columbia L. R. 41. Under this theory, the unforeseen rise in value and the discovery of valuable mineral deposits make out a sufficiently strong equity in the defendant's favor, alone to justify the result reached. The ratio decidendi, however, rested not merely on this, but also on the additional factor of the plaintiff's delay which, apart from the suspicion cast thereby on his good faith (Ford v. Euker, 86 Va. 75), might have warranted per se a refusal of relief on the distinct ground of laches. 6 Columbia L. R. 578. See Darling v. Cumming's Ex'r, 92 Va. 521.—From 8 Columbia L. R. 322.

50. Thompson v. Automatic Fire Protection Co., 155 F 548.

51. Contract for sale of mining claims provided that in the event of a breach purchaser should forfeit all machinery, etc., in full liquidation of all claims. Mallory v. Globe Boston Copper Min. Co. [Ariz.] 94 P 1116.

52. Powell v. Dwyer, 149 Mich. 141, 14 Det. Leg. N. 301, 112 NW 499.

53. Ryder v. Johnston [Ala.] 45 S 181.

54. See post, § 3.

55. Illustrations: An agreement to settle litigation. Bache v. Scauble, 154 F 859. A restrictive building covenant against a prior grantee from a common grantor where complainant shows that the covenant was made for the benefit of his land. McNichol v. Townsend [N. J. Eq.] 67 A 938. A contract with a city to establish waterworks. The paramount consideration in view was fire protection. Bounds v. Hubbard City [Tex. Civ. App.] 19 Tex. Ct. Rep. 755, 105 SW 56. A contract to allow a party an interest in the profits of timber lands purchased as the result of such party's investigation. Henderson v. McRae, 148 Mich. 324, 14 Det. Leg. N. 239, 111 NW 1057. The condition in a mortgage, given to a brewing company for a sum of money advanced by it to enable the mortgagor to build a saloon upon the mortgaged premises, that the mortgagor shall not for a period of twelve years, sell upon the mortgaged premises any beer, ale or porter except that manufactured by the mortgagee, is founded upon a valuable consideration, is not against public policy as in restraint of trade, and may be enforced by injunction to prevent the sale on the premises of other brews than that of the mortgagee. Cleveland & Sandusky Brew. Co. v. Demko, 9 Ohio C. C. (N. S.) 130. The resident assignee of an alien may enforce spe-

jurisdiction are present.[56] Thus equity will enforce performance of a mutual contract to purchase and sell real estate on which each party is equally bound with the other,[57] but the evidence must be very clear and convincing to show execution of a contract to convey a homestead before it will be specially enforced.[58] Principles guiding a court of equity are the same in decreeing specific performance of contracts relating to personalty as to those relating to realty,[59] but since damages are usually readily ascertainable in case of a breach of contract for the sale of personalty, equity in such cases withholds relief.[60] Where, however, the legal remedy is inadequate, contracts for the sale of chattels will be enforced,[61] as for instance the transfer of corporate stock where it has no provable value.[62] Contracts providing for the disposition of property by will are clearly enforcible,[63] but are subject to the same rules as apply to the enforcement of contracts for the disposal of property during life.[64] So, too, equity will enforce contracts to dispose of property in a particular way, as for future support of the plaintiff,[65] and may enforce a contract to adopt a child

cifically a contract to convey more than 500 acres of land, though under Civ. Code 1902, § 1795, no alien can own or control more than 500 acres. Tucker v. Atlantic Coast Lumber Co. [S. C.] 59 SE 859. Agreement that on dissolution one partner was to be entitled to an assignment of all the other partner's interest. Whitney v. Dewey [C. C. A.] 158 F 385.

56. See ante, § 1.

57. Staples v. Mullen [Mass.] 81 NE 877. Specific performance of contracts to convey land may be had, for the exact counterpart cannot be gotten anywhere. Mellin v. Woolley [Minn.] 116 NW 654. Contract for sale of coal under land. Clayton v. Lemen, 233 Ill. 435, 84 NE 691. A contract to convey certain lands at $2 per acre provided the entire sum was paid within three years and reciting payment of $25 "by way of earnest" was not a mere option, but a contract of sale which could be specifically enforced. Davis v. Martin [N. C.] 59 SE 700. Evidence sufficient to sustain a decree for specific performance of a contract to sell real estate. Merrill v. Hexter [Or.] 94 P 972.

58. Thompson v. Foken [Neb.] 115 NW 770.

59. Curtice Bros. Co. v. Catts [N. J. Eq.] 66 A 935.

60. Curtice Bros. Co. v. Catts [N. J. Eq.] 66 A 935; Loar v. Wilfong [W. Va.] 61 SE 333.

61. Contract to supply a canning factory with tomatoes where there is no other certain source of supply. Curtice Bros. Co. v. Catts [N. J. Eq.] 66 A 935. There is no fundamental distinction between contracts involving realty and those involving personal property, in so far as the remedy of specific performance is concerned, for the right is based upon the equitable principle that the ordinary common-law remedy of damages for breach will not afford full and adequate remedy for the injury arising from the failure to carry out its terms. Edelen v. Samuels, 31 Ky. L. R. 731, 103 SW 360. Contract to deliver certain notes which plaintiff was desirous of obtaining in furtherance of his plan to become owner of a hotel upon which they were a first lien. O'Donnell v. Chamberlin, 36 Colo. 395, 91 P 39.

62. Baumhoff v. St. Louis & K. R. Co., 205 Mo. 248, 104 SW 5. Where one advances money to purchase mines under an agreement that he shall receive a proportionate share of the capital stock of a corporation to be formed, he may sue for specific performance where the stock has no known value and the enterprise being uncertain his damages cannot be ascertained. Rau v. Seidenberg, 53 Misc. 386, 104 NYS 798. A bill for specific performance to compel the delivery of certain stock without the payment of the balance of the purchase price on the ground that defendants had misstated the liabilities will be dismissed where there is some evidence that the alleged misstatements were true. Jutte v. Pfeil [Pa.] 69 A 59. A stockholder entitled to his share of the issue of new stock who offers to pay the price fixed and gives a check therefor is entitled to compel delivery of the stock, since it has no market value and could not be readily obtained elsewhere and was withheld by the officers of the corporation to keep control thereof. Schmidt v. Pritchard [Iowa] 112 NW 801. The purchaser of stock may under certain circumstances be compelled to take the same. Stock had no market value, the principal asset of the corporation being a patent. The defendant procures assignments of interests in the patent which the contract of purchase provides were to be obtained by the seller and forms another corporation to take over the patent. Hills v. McMunn, 232 Ill. 488, 83 NE 963.

63. Stewart v. Smith [Cal. App.] 91 P 667; Oswald v. Nehls, 233 Ill. 438, 84 NE 619; Colt v. O'Connor, 109 NYS 689. Where personal services fully performed under the contract are incapable of compensation in money. Flood v. Templeton [Cal.] 92 P 78. Plaintiffs took care of deceased during last sickness at his request and on his agreeing to transfer his property. Cook v. Ely [Iowa] 116 NW 129. An agreement by a man and wife that if a person become a member of the family such person would be left all their property by will may be enforced where there has been a full performance by such person. Bichel v. Oliver [Kan.] 95 P 396.

64. Stewart v. Smith [Cal. App.] 91 P 667. Evidence did not show any consideration for agreement. Colt v. O'Connor, 109 NYS 689.

65. Husband after a divorce agreed to take care of his former wife and provide for her in his will if she would refrain from suing

and make it a legal heir.[66] Contracts that any inventions or devices made by an employe which result from the employment and are useful to the employer are to be patented and to be the property of the employer may be specifically enforced.[67] Contracts made in contemplation of marriage and respecting the property of either of the parties, though released or extinguished at law, are held good in equity, and will be enforced against the heirs of the party in default.[68] Equity will not decree specific performance of an agreement to put in writing an oral amendment to a contract to convey.[69] An agreement for employment cannot be specifically enforced.[70] While equity will not ordinarily decree the specific performance of contracts requiring continuous acts involving skill, judgment, and technical knowledge,[71] yet contracts relating to the operation of railroads have been specifically enforced in a number of cases.[72]

§ 3. *Requisites of contract. A. Necessity of contract.* See 6 C. L. 1951—It is not essential that the contract which it is sought to enforce, be one which would support an action at law,[73] but there must be an agreement which must be distinctly proved.[74] A promise of a gift of land will not be enforced,[75] but where the promisee accepts the promise, enters into possession and makes improvements on the land or does other acts on the faith of the promise, materially changing his position, the promisor will be required to make good the gift.[76] One not a party or privy to a contract cannot be compelled to carry it out[77] nor can he maintain an action for its specific performance.[78] Where lands were conveyed to a husband and wife, their heirs, etc., in fee

for her dower rights. Kundinger v. Kundinger, 150 Mich. 630, 14 Det. Leg. N. 789, 114 NW 408. The remedy for breach of a covenant to support in consideration of the conveyance of land by deed absolute on its face is not an action for cancellation of the deed, but for damages or specific performance. Elliott v. Elliott [Tex. Civ. App.] 109 SW 215.

66. Suit by heirs of an adopted child against the estate of the adoptive parent to specifically enforce an agreement between the natural parents and adoptive parents making the adopted child a legal heir. Evidence insufficient to establish the agreement. Smith v. Lull [Mich.] 115 NW 1002.

67. Defendant invented secretly feed pumps, valves and carburetors at his home and induced certain of plaintiff's employes to leave and organized a company and transferred his inventions to it. Detroit Lubricator Co. v. Lavigne Mfg. Co. [Mich.] 115 NW 988.

68. Offutt v. Offutt [Md.] 67 A 138.

69. Rosenberg v. Wilson, 120 App. Div. 554, 104 NYS 1087.

70. Agreement in a sale of mining claims to employ the seller at the mines. Mallory v. Globe-Boston Copper Min. Co. [Ariz.] 94 P 1116.

71. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. Contracts for personal services where acts stipulated for involve skill, personal labor and cultivated judgment, so that full performance rests in the individual will of the contracting party, cannot be specifically enforced. Edelen v. Samuels, 31 Ky. L. R. 731, 103 SW 360. Contracts which by their terms require the performance of a succession of acts not to be consummated by one transaction will not be specifically enforced. Contract to construct and operate a railroad. Pacific Elec. R. Co. v. Campbell-Johnston [Cal.] 94 P 623.

72. Railroad in consideration of conveyance of land agrees to operate and maintain a track and depot in a certain locality. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. The contracts of quasi public corporation relating to operation have been specifically enforced. Edelen v. Samuels, 31 Ky. L. R. 731, 103 SW 360.

73. Offut v. Offut [Md.] 67 A 138.

74. Clinchfield Coal Co. v. Powers [Va.] 59 SE 370.

75, 76. Coleman v. Larson [Wash.] 95 P 262.

77. The conveyance of the inchoate interest of a spouse not a party to the contract cannot be compelled. Casstevens v. Casstevens, 227 Ill. 547, 81 NE 709. One contracting to purchase land of an agent without authority cannot compel specific performance, where the owner has transferred to a third party having no notice of the agent's contract. McCullough v. Connelly [Iowa] 114 NW 301. Where A. agreed to sell land to B. and then on discovery that his brother was a part owner obtained a power of attorney from him and then executed a deed but B. objected to the deed because the power of attorney was not properly acknowledged, and before it could be changed A. died, B. could not have specific performance against the brother for there was no contract relation between them. Ryder v. Johnston [Ala.] 45 S 181. Equity cannot enforce the specific performance of a contract to sell real estate against several joint owners where all the joint owners werer not parties to the contract. Part of joint owners were infants without ability to sell, which purchaser was bound to know. Gault Lumber Co. v. Pyles [Okl.] 92 P 175.

78. Where a person purchased land for a firm of which he was a member and the firm dissolved before a deed was obtained, de-

upon the death of the wife, the husband takes an estate in severalty and may compel a purchase by one contracting so to do.[79] Where, before the purchase money is paid but while the plaintiff is in possession, the defendant, who is the grantee of the owner subject to plaintiff's contract, without the plaintiff's knowledge induces the owner to make the deed not to himself but to his father, the plaintiff's remedy of specific performance is not defeated for the father is a mere volunteer not a party to the contract and not having paid value.[80] Where a will provides for the payment of pecuniary legacies, there is an implied power of sale of real estate conferred on the executor and specific performance will be decreed by one contracting to purchase of the executor.[81] A contract, however, made by a properly authorized agent may be specifically enforced,[82] but not a contract by an unauthorized agent[83] unless ratified.[84] Only the contract actually entered into can be specifically enforced,[85] and all conditions precedent must have been performed before performance of the contract can be compelled,[86] but the defendant may, by parol, show that through the mistake of both or either of the parties the writing does not express the real agreement[87] or that the agreement itself was entered into through a mistake as to its subject-matter or terms.[88]

(§ 3) *B. Mutuality of contract.*[See 8 C. L. 1953]—A contract to be specifically enforcible must be mutually binding upon the parties to it,[89] for mutuality in the

fendant could not obtain a decree vesting the title in him for his own use unless he showed that under the dissolution agreement he became sole owner of the land. Chouteau Land & Lumber Co. v. Chrisman, 204 Mo. 371, 102 SW 973. Where a vendor contracted with a purchaser for the sale of land and executed a deed sent to him by the purchaser but in favor of a third party as grantee, whereupon the purchaser called attention to a defect in the title and the vendor then refused to perfect the title, there was no contract between vendor and grantee which could be enforced. Doyle v. Birdsell [S. D.] 112 NW 855. A contract made by the plaintiff's agent in his own name and not as agent cannot be enforced by principal. Heenan v. Parmele [Neb.] 114 NW 639.

79. Kunz v. Kurtz [Del.] 68 A 450.

80. Pearson v. Courson, 129 Ga. 656, 59 SE 907.

81. Leeds v. Sparks [Del.] 68 A 239.

82. Written contract of agency giving exclusive authority to sell land and agreeing to convey to the person designated. Littlefield v. Dawson [Wash.] 92 P 428. May enforce a contract made with a duly authorized agent upon payment of the balance of the consideration. Chouteau Land & Lumber Co. v. Chrisman, 204 Mo. 371, 102 SW 973.

83. Bill against husband and wife. Contract signed by A, a broker, who received authority from husband alone. Beattie v. Burt, 122 App. Div. 473, 107 NYS 153. The ordinary power of a real estate broker to find a purchaser for real estate does not authorize him to execute a contract of sale that can be enforced in an action for specific performance. Sylliaasen v. Hansen [Wash.] 94 P 187. A parol agrement for the sale of land made by A with the vice-president of a corporation which was never ratified or acquiesced in such a way as to create an estoppel by the board of directors would not entitle A to have the corporation specifically perform such a contract. Jennings v. Brown [Okl.] 94 P 557.

84. The assignee of a patent as trustee, who later also becomes a beneficiary without the power to sell, cannot be compelled to convey the same where he has made a contract to convey, the purchaser having full knowledge of his title without proof of ratification by the other beneficiaries. McDuffee v. Hestonville, etc., R. Co., 154 F 201.

85. Property offered for a lump sum on the theory that it had a certain frontage. After survey it was found to be less, and plaintiff sought to enforce performance for a less sum on the ground that the purchase price should be reduced at the rate per foot that the original lump sum bore to the original estimated dimensions. Whitaker v. Newburger [La.] 45 S 264. A vendee, who has not contracted for an acknowledged deed, cannot reject a valid deed, refuse to pay, and then file a bill for specific performance in order to get an acknowledged deed. Ryder v. Johnston [Ala.] 45 S 181.

86. Contract by a city to purchase land if it received authority eo to do before a certain date. Lighton v. Syracuse, 188 N. Y. 499, 81 NE 464. Where a petition alleges that plaintiff has elected to accept an option whereby under a contract with the defendant to deliver lumber an additional 5,000,000 feet were to be delivered at prices to be fixed under certain conditions by a third party and there is no allegation that the prices have been fixed and the plaintiff seeks judgment condemning defendant to deliver the lumber, an exception of "no cause of action" should be sustained, and if upon trial on the merits no more is proved than is alleged, the demand is properly rejected. Southern Sawmill Co. v. Baldwin Lumber Co. [La.] 45 S 961.

87, 88. Gottfreid v. Bray, 208 Mo. 552, 106 SW 639.

89. Kerr v. Moore [Cal. App.] 92 P 107; Oswald v. Nehls, 233 Ill. 438, 84 NE 619; Chambers v. Roseland [S. D.] 112 NW 148. Civ. Code Cal. § 3336. Contracts to convey a right of way in consideration of the build-

specific performance of contract is one of the essential equitable rules.[90] Mutuality is to be determined as of the time the contract was made,[91] but even where mutuality is lacking at the time of making the contract, it is supplied upon the offer of plaintiff to perform, since thereby the remedy to enforce it becomes mutual.[92] An option to purchase land, although unilateral, may be enforced after acceptance, for the party accepting then becomes bound to perform.[93] Although unilateral contracts are enforced against the party signing, the court exercises its discretion as to specific performance of such contracts with great caution.[94] A contract to sell or lease mining lands for a share of what is produced may be specifically enforced, for where no express words are used it will be implied that the vendee or lessee is to operate within a reasonable time and to dig such a quantity of ore as was within the reasonable contemplation of the parties.[95]

(§ 3) *C. Definiteness of contract.*See 8 C. L. 1954—The contract must be certain and definite in its terms [96] as in its description of the subject-matter.[97] Where the

ing and construction of a railway which latter equity could not enforce. Pacific Elec. R. Co. v. Campbell-Johnston [Cal.] 94 P 623. The remedy as well as the obligation must be mutual to entitle to specific performance. Id. Agreement to settle claim against one where property is received from such person under a will. Colt v. O'Connor, 109 NYS 689. Where a contract for the sale of land provided that no action should be brought by the vendor against the purchaser and no such restriction was imposed upon the purchaser, the purchaser could not enforce. Wadick v. Mace [N. Y.] 83 NE 571. Will not enforce contract to employ plaintiff as general manager where there is nothing in the contract binding on the plaintiff which could be enforced if he declined to serve. Dimmick v. Stokes [Ala.] 43 S 854. One cannot enforce a contract made without his knowledge and authority and which does not bind him in any way. Milling v. Sulphur Timber & Lumber Co., 119 La. 585, 44 S 307. Use of word trustee after name of vendee was descriptive only and hence binding on him. Bridgman v. McIntyre, 150 Mich. 78, 14 Det. Leg. N. 614, 113 NW 776. A promise by a legatee to provide for testator's children out of testator's legacy to him and in consideration of which promise testator did not change his will but left the bulk of his property to this legatee and three others as tenants in common, was not a contract which could be specifically enforced, for no consideration was received from the other legatees. Heinisch v. Pennington [N. J. Eq.] 68 A 233. A receipt for part payment on account of price of land which it describes, stating the price and balance to be paid on delivery of good and sufficient warranty deed, was not lacking in mutuality and is a proper subject of specific performance. Jasper v. Wilson [N. M.] 94 P 951.

90. Contract made by agent binding on his principal but not on the second party. Stengel v. Sergeant [N. J. Eq.] 68 A 1106.

91. The fact that, after refusal to pay the balance, the vendor could elect to declare the contract void did not render it unenforcible for want of mutuality. Ochs v. Kramer [Ky.] 107 SW 260.

92. Plaintiff spent $600 in improvements on land with defendant's knowledge. Kerr v. Moore [Cal. App.] 92 P 107. Want of mutuality in the inception of a contract may be removed by a full or substantial performance of the contract. Pacific Elec. R. Co. v. Campbell-Johnston [Cal.] 94 P 623. Contract to render personal services if property left by will. Personal services having been fully rendered, specific performance could be decreed. Oswald v. Nehls, 233 Ill. 438, 84 NE 619.

93. Taylor v. Newton [Ala.] 44 S 583. Option to purchase land will be specifically enforced. George Wiedemann Brew. Co. v. Maxwell [Ohio] 84 NE 595. Four years after option given, plaintiff demanded deed but made no tender. Levy v. Lyon [Cal.] 94 P 881. Will enforce an option based on a valid consideration where it is accepted and complainant makes an unconditional and continuing tender of the stipulated purchase price. Crovatt v. Baker [Ga.] 61 SE 127. Options for purchase of land based on a valid consideration are valid contracts and may be specifically enforced. Solomon Mier Co. v. Hadden, 148 Mich. 488, 14 Det. Leg. N. 216, 111 NW 1040. Where the grantee in an option for the purchase of land contracted during the period of the option to sell the land to a third party, he might maintain an action for specific performance for the remedy at law was not adequate. Id. An option contract for the sale of real estate is valid and may be specifically enforced after the party holding such option has, within the time specified, elected to purchase and pays or tenders the purchase price. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53.

94. Stengel v. Sergeant [N. J. Eq.] 68 A 1106.

95. National Light & Thorium Co. v. Alexander [S. C.] 61 SE 214.

96. Offutt v. Offutt [Md.] 67 A 138; McMillan v. McMillan, 77 S. C. 511, 58 SE 431. From the evidence it was not clear that there had been a meeting of minds as to land to be conveyed. Clinchfield Coal Co. v. Powers [Va.] 59 SE 370. Will not enforce a vague and indefinite contract. Carr v. Carr [R. I.] 68 A 582. Agreement by one later deceased to provide for complainant and family in his will. Heinisch v. Pennington [N. J. Eq.] 68 A 233. Words "not to deal in" and "stock cattle" held not to be indefinite and ambiguous. Wilson v. Delaney [Iowa] 113 NW 842.

description of land to be conveyed is omitted altogether, the omission cannot be supplied by parol for the purpose of identifying the property.[98] Where, however, the subject-matter of a contract may be identified by reference to an external standard, it is sufficiently definite to be enforced,[99] and, if a contract to convey land is uncertain in its description but the complainant takes possession with the assent of the defendant, specific performance will be enforced.[1] The statement of consideration must also be clear and definite, but where the consideration is not definitely stated but can be readily figured, the contract may be enforced.[2]

(§ 3) *D. Legality and fairness of contract.*[See 8 C. L. 1955]—Equity will withhold relief where the contract is illegal [3] or void,[4] or where it is of such a character [5]

Contract sought to be substituted in place of a will, not sufficiently definite. Sarasohn v. Kamaiky, 120 App. Div. 110, 105 NYS 53. Evidence must show a clear definite contract. Pickett v. Michaels, 120 App. Div. 357, 105 NYS 411. The contract must be so clearly proven as to satisfy the court that it constitutes the actual agreement between the parties. Offutt v. Offutt [Md.] 67 A 138. A dated instrument reciting "Rec'd of C. $25. On purchase price $400. Cash value for land described R to furnish a war'ty deed and sale to be completed in 30 days or contract forfeited and C. shall receive a commission of $25," is too uncertain to be specifically enforced. Chambers v. Roseland [S. D.] 112 NW 148.

97. Impossible to determine accurately the lands intended to be included. Wadick v. Mace [N. Y.] 83 NE 571. Words of description which are not definite enough so that the parties themselves can locate the land are not sufficient to base a decree for specific performance. Barnes v. Hustead [Pa.] 68 A 839. Description of timber so indefinite as not to be capable of location. Fordyce Lumber Co. v. Wallace [Ark.] 107 SW 160. Description definite, and it was sought by parol to show the subject of the contract to be an entirely different piece of land. Willmon v. Peck, 5 Cal. App. 665, 91 P 164. Where two separate tracts are to be transferred for a gross consideration and the description of one is not sufficiently definite to permit specific performance, neither part can be enforced, for the consideration cannot be separated. Fordyce Lumber Co. v. Wallace [Ark.] 107 SW 160. Specific performance will be denied where the alleged contract aided by extrinsic evidence of surrounding circumstances is indefinite and uncertain in description of the land and refers to nothing by which it may be identified with reasonable certainty. Guinn v. Warbutton [W. Va.] 60 SE 1100. Uncertainty as to property or estate therein to be conveyed not capable of being removed by extrinsic evidence is fatal to any suit for specific performance. Crawford v. Workman [W. Va.] 61 SE 319.

98. Agreement to turn over all real estate. Graham v. Graham [Ark.] 108 SW 835.

99. "Situate in the city of Newport, County of C. and state of Kentucky now being A and heirs' property located at 116 East 8th St., Newport, Ky." Ochs v. Kramer [Ky.] 107 SW 260.

1. Right of way of "two rods of land lying northeast and south of proposed right of way of Belt Line R. R. as per survey," etc. Chicago, etc., R. Co. v. Lane, 150 Mich. 162, 14 Det. Leg. N. 532, 113 NW 22.

2. Contract to sell for a railway right of way a certain amount of land, price to be computed upon cost of land per acre to the vendors with 7 per cent interest from date of purchase and pro rata of taxes paid. Chicago, etc., R. Co. v. Lane, 150 Mich. 162, 14 Det. Leg. N. 532, 113 NW 22.

3. Agreement between white man and Indian to procure title to Indian lands for speculation. Sayer v. Brown [Ind. T.] 104 SW 877.

4. In Florida, where statute permits a married woman to own separate property, equity will not enforce an agreement by which a husband and wife undertake to convey lands owned by the latter separately, and as to which she has not made her statutory acknowledgment on a separate examination, although the plaintiff has paid the consideration and is in possession. Taylor v. Mathews, 53 Fla. 776, 44 S 146. A court will not decree specific performance of a stipulation which is in conflict with a valid statute and void. Noonan v. Thompson, 231 Ill. 588, 83 NE 426. Courts of equity will refuse to enforce a contract, although lawful and enforcible in the courts where it is entered into and is to be performed, if it is against the policy of the state in which it is sought to enforce it. Federal court will not compel a telegraph company to carry out its contract to furnish grain quotations, etc., where the state law, where it is sought to enforce it, prohibits such transactions. Logan v. Postal Tel. & Cable Co., 157 F 570. A contract by a homesteader to alienate a portion of the tract while occupied by him as such when he shall acquire title from the United States is against public policy and void and no action either at law or equity can be predicated thereon. Prince v. Gosnell [Okl.] 92 P 164.

5. Gottfreid v. Bray, 208 Mo. 652, 106 SW 639; Clinchfield Coal Co. v. Powers [Va.] 59 SE 370. Unless it appears from the covenant in a lease by express terms or clearly by implication that the lessee is entitled to a renewal for all time, equity will not decree specific performance of the covenant for that purpose, for a perpetuity is contrary to the policy of the law. Drake v. St. Louis Board of Education, 208 Mo. 540, 106 SW 650. Where vendee agreed to take a certain tract of land at a specified price per acre and a railroad right of way ran through the tract, the contract to purchase will not be specifically enforced where there was nothing to show that vendee intended

or the circumstances under which it was entered into are such as would render it unconscionable to enforce it.[6] Actual fraud need not be shown to resist a decree for specific performance,[7] but it is sufficient if there is a substantial misrepresentation innocently made which induced the defendant to enter into the contract,[8] and whether the facts would entitle defendant to rescind the contract is not the test of plaintiff's right to specific performance.[9] Mere inadequacy of consideration is not itself ground for withholding specific performance [10] unless it is so grossly inadequate as to render the contract unconscionable.[11]

(§ 3) *E. Necessity of written contract.* See 8 C. L. 1956—Courts of equity are as much bound by the statute of frauds as courts of law,[12] but they have always been

to pay for the land embraced in the right of way and where he refused to accept the deed requiring such payment. Jones v. Prewitt [Ky.] 108 SW 867. It is a principle of equity that specific performance of a contract to convey land will not be decreed unless it is just and reasonable and based upon adequate consideration. Where a party purchased land at $4 an acre and gave plaintiff an option to purchase an undivided half interest at $4 an acre, the contract, if construed to give a right of purchase at $2 an acre, will not be enforced. Stein v. Archibald, 151 Cal. 220, 90 P 536. Contracts requiring a breach of trust, if carried out, will never be specifically enforced. Givens v. Clem [Va.] 59 SE 413. If parties make a contract in defraud of creditors of one of them, such contract, while executory, cannot be enforced by either against the other. Sewell v. Norris, 128 Ga. 824, 58 SE 637. Contract must be free of any suspicion of its bona fides. George Gunther, Jr., Brew. Co. v. Brywczynski [Md.] 69 A 514. Will not aid unconscionable bargain though the contract possesses all technical requirements. Contract for an exchange of farms, where it appeared that defendant's farm was worth $25,000, and the plaintiff's worth little if anything above incumbrances, which defendant assumed. Koch v. Streuter, 232 Ill. 594, 83 NE 1072. Where a railroad company covenanted to maintain a siding at a certain place and to stop trains there but later, for the purpose of straightening its line and improving its service, relocated its main line one-fourth of a mile away from the siding and it was impossible to erect a siding on the new line, equity would not compel operation of the abandoned line past the siding and relief must be sought at law for damages. Whalen v. Baltimore, etc., R. Co. [Md.] 69 A 390. Agreement to exchange lands and by the plaintiff to execute an option to the city to buy part of the property for a park thus possibly enhancing the value of defendant's adjoining land. Plaintiff executed an option but did not state any price thus leaving it open for him to charge a prohibitive price rendering it of no effect, hence, defendant would not be compelled to convey. Godwin v. Springer, 233 Ill. 229, 84 NE 234.

6. The mere fact of the existence of a valid contract is not sufficient, but court has regard for the conduct of the parties and circumstances outside the contract. George Gunther, Jr., Brew. Co. v. Brywczynski [Md.] 69 A 514. Will not enforce defendant's contract to convey land worth $20,000 and pay $10,800 in consideration for plaintiff's land worth $16,000, and the assumption of a $3,000 debt, defendant having relied on plaintiff's representation that land was worth $29,300. Riggins v. Trickey [Tex. Civ. App.] 19 Tex. Ct. Rep. 496, 102 SW 918. Defendant agreed to transfer land to plaintiff on the understanding that plaintiff would assign to him his option on other land while the plaintiff had as a matter of fact already determined to take up the option but gave defendant the idea that he did not want it. Rudisill v. Whitener [N. C.] 59 SE 995. Specific performance should always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practice. Complainants caused changes greatly in his favor to be made in his contract with the defendants who were foreigners. Blondel v. Bolander [Neb.] 114 NW 574. A decree of specific performance will not be made against a vendor when the circumstances would make it unconscionable to enforce the contract. Latta v. Hax [Pa.] 68 A 1016. Where a contract is tainted with fraud practiced by the vendee and the price agreed to be paid was not the full value of the premises and the defendant was not able to convey a marketable title, performance was rightly denied. Webster v. Gibson [Cal. App.] 93 P 1040.

7. Rudisill v. Whitener [N. C.] 59 NE 995.

8. Flynn v. Finch [Iowa] 114 NW 1058. The inequality may result from old age, mental weakness, poverty, ignorance, inexperience, sex, etc., or from the terms of the contract being indefinite or assented to with lack of caution. Starcher Bros. v. Duty, 61 W. Va. 373, 56 SE 524. Specific performance will not be granted where one of the parties misleads the other, whether innocently or not. Size of lot of land. Allen v. Kirk [Pa.] 69 A 50.

9. Riggins v. Trickey [Tex. Civ. App.] 19 Tex. Ct. Rep. 496, 102 SW 918.

10. Marks v. Gates [C. C. A.] 154 F 481.

11. Defendant agreed for $12,000 to transfer a fifth interest to complainant of all lands or interests therein which he might acquire in Alaska, which later amounted to the value of $750,000. The court held that, as there was no limit in time or any other manner to the contract, it was inequitable. Marks v. Gates [C. C. A.] 154 F 481.

12. Kingston v. Walters [N. M.] 93 P 709. Where it appears from a bill that there is no sufficient contract in writing as required by the statute of frauds, a demurrer is proper. Miller v. Burt [Mass.] 82 NE 39.

clothed with the salutary power of preventing fraud, or affording positive relief against its consequences and this power they have exercised by compelling the specific execution of a verbal contract to which the provisions of the statute of frauds apply where the refusal to exercise it would amount to practicing fraud,[13] as where there has been a part performance by the purchaser which relates to such agreement exclusively.[14] Payment of the purchase money alone is not such part performance as will support an action for specific performance of a parol contract to convey land [15] nor is possession alone sufficient,[16] but, as a general rule, payment of the purchase price and change of possession are necessary [17] or some act of the purchaser showing with equal clearness an assertion of dominion over the land in his own right as purchaser, as for instance the making of improvements,[18] and of such acts the vendor must have notice.[19] Such part performance must be clearly proven to be possession

13. Kingston v. Walters [N. M.] 93 P 700.

14. Part performance must be with a view to carrying out contract. Pearsall v. Henry [Cal.] 95 P 154. A parol contract for conveyance of land which has been partly performed will be enforced. White v. White, 231 Ill. 298, 83 NE 234. If an agreement is parol, plaintiff must show a clear, definite, unequivocal agreement together with acts of performance or part performance which relate to such agreement exclusively. Crawford v. Crawford, 77 S. C. 205, 57 SE 837. Before there can be specific performance of an oral contract to convey land, there must be a part performance thereof under the California code. Civ. Code, § 1741. Meridian Oil Co. v. Dunham, 5 Cal. App. 367, 90 P 469. By statute, in some states it is provided that the statute of frauds shall not abridge the power of courts of equity to compel specific performance where there has been a part performance. Civ. Code, § 2342. Stevens v. Trafton [Mont.] 93 P 810. Where there is a parol contract to exchange lands which has been performed by one party, it may be specifically enforced by him. Pearsall v. Henry [Cal.] 95 P 154. Where a widow agreed, if the children transferred all their interest in their father's estate to her for life, she would bequeath it all with increase and accumulations real and personal to them and the children did transfer their interest, this is a part performance by them and the statute of frauds was no defense. Kingston v. Walters [N. M.] 93 P 700. A lessee, who claims under an oral covenant of renewal invalid under the statute of frauds, cannot compel performance on the theory that he has fully performed his obligations under the lease. Rogan v. Arnold, 233 Ill. 19, 84 NE 58.

15. McMillan v. McMillan, 77 S. C. 511, 58 SE 431.

16. Cobb v. Johnson [Tex.] 20 Tex. Ct. Rep. 709, 108 SW 811. Payment of the purchase price does not constitute part performance, but such payment must be accompanied by a change of possessions or an expenditure of money on the property. Civ. Code, § 1741. Meridian Oil Co. v. Dunham, 5 Cal. App. 367, 90 P 469. A. orally agreed to transfer land subject to a mortgage to the defendants upon payment of the mortgage by them and through execution by them of a second mortgage. Defendants paid part of mortgage interest and taxes only and did not execute the second mortgage. They cut some of the timber and surreptitiously moved onto the land without A's knowledge who meanwhile transferred to the plaintiff. Held that defendants were not entitled to specific performance against plaintiffs. Case v. Perrigo [Wash.] 92 P 432.

17. McMillan v. McMillan, 77 S. C. 511, 58 SE 431. Parol contract will be enforced where price paid and possession taken. Webb v. Marlar, 83 Ark. 340, 104 SW 144. Oral purchase of farm and lease back of same to vendor is not possession sufficient to take out of statute of frauds. Muir v. Chandler [N. D.] 113 NW 1038. Where an authorized agent directed payment by check to be deposited with a third party to await delivery of deed and authorized purchaser to take possession which he did by paying rent and utilizing the timber thereon, there was a part performance entitling to specific performance. Arkadelphia Lumber Co. v. Thornton, 83 Ark. 403, 104 SW 169.

18. McMillan v. McMillan, 77 S. C. 511, 58 SE 431. To decree performance of an oral contract, it is not essential that the whole of the purchase money should have been paid if complainant has been given possession under the contract and made improvements. Taylor v. Mathews, 53 Fla. 776, 44 S 146. If a father make a parol gift of land to a child, who enters into possession and upon faith of the gift erects valuable improvements, equity will decree specific performance. Civ. Code of 1895, § 4039. Garbutt v. Mayo, 128 Ga. 269, 57 SE 495. There is a part performance of an oral contract for sale of land authorizing specific performance where in addition of payment of earnest money the buyer with the acquiescence of the vendor sets out large shade trees in front of the property though his actual occupancy commences after the refusal to perform. Stewart v. Tomlinson [S. D.] 112 NW 849. The erection of a $15 henhouse on land to be purchased for $1,100 is not such an improvement as would entitle the grantor to specific performance of an oral contract to convey. Cobb v. Johnson [Tex.] 20 Tex. Ct. Rep. 709, 108 SW 811. Making substantial improvements is sufficient part performance to take an oral lease for five years out of the statute of frauds. Improvements to the extent of $1,000 made. Schirmer v. Rehill, 109 NYS 745.

19. McMillan v. McMillan, 77 S. C. 511, 58 SE 431; Stewart v. Tomlinson [S. D.] 112 NW 849.

taken under the agreement relied on and in part performance of it and improvements made under the contract itself and not otherwise.[20] The right to apply for a decree is complete if made as soon as improvements are erected, without reference to the duration of time that has elapsed after the gift was made.[21] Where the acts performed by the plaintiff tend to show not only that there was an agreement but throw some light on the nature of that agreement, the evidence cannot be said to rest wholly in parol; the parol evidence being auxiliary to the proof afforded by the case itself.[22] If a parol agreement is not valid, equity will not make it so by decreeing that it be put in writing.[23] The oral contract must be established clearly and fully.[24]

§ 4. *Performance by complainant.*[See 8 C. L. 1957]—One seeking specific performance must show that he has performed,[25] but this is ordinarily satisfied by a showing of willingness and ability to perform.[26] Where, however, there is any doubt as to the ability of the complainant to perform, he cannot have specific performance,[27] but it is the practice in equity to require specific performance if the title is good at the time of the trial even though defective at the time fixed for performance of the

20. Statements by a father to third parties of an intention to convey to a son and that he knew the son was spending a lot of money in making improvements is not such clear and definite proof as is required. Ranson v. Ranson, 233 Ill. 369, 84 NE 210.

21. Garbutt v. Mayo, 128 Ga. 269, 57 SE 495.

22. Son having learned trade of plumber gave it up and went to live alone with his father the evidence being that the father requested him to do it agreeing to give him the farm on his death. Harrison v. Harrison [Neb.] 113 NW 1042.

23. Rosenberg v. Wilson, 120 App. Div. 554, 104 NYS 1087.

24. See post, § 5, subsec. Evidence.

25. Olympia Min. Co. v. Kerns, 13 Idaho, 514, 91 P 92. Where time is not of the essence of a contract for sale of realty or where time has been waived, a vendor seeking to enforce the contract must show a tender of a deed and demand for payment, and the purchaser seeking to place the vendor in default must tender the amount due and demand a deed. Spolek v. Hatch [S. D.] 113 NW 75. No tender of the purchase price. Horn v. Graffagnino [La.] 46 S 305. The buyer of land must prove that he has complied with all needful requirements on his part to complete the sale. Stafford v. Richard [La.] 46 S. 107. Where a contract for conveyance of land provided that the whole of the purchase money should be paid before conveyance was made, the purchaser is not entitled to a decree unless he can show performance. Moseley v. Witt [S. C.] 60 SE 520. Sale of insurance agency. Plaintiff violated some of the terms of sale. Grubb Bros. v. Moore, Clemens & Co. [Va.] 60 SE 757. Full payment of the purchase money with nothing more to be done by the purchaser, entitles him to the remedy of specific performance. Civ. Code, § 4037. Pearson v. Courson, 129 Ga. 656, 59 SE 907. Evidence held sufficient to show performance by the complainant of his contract to sell lots, for which he was to receive other lots in payment. Muir v. Beck [Wash.] 91 P 552. Where vendee went to vendor and tendered him the purchase price and requested him to execute a deed which he had prepared, and on vendor's refusal placed the money in a bank to be delivered on receipt of a deed, this was a sufficient tender although the deposit of the money was to the credit of vendor or a third party. Kerr v. Moore [Cal. App.] 92 P 107.

26. Taylor v. Newton [Ala.] 44 S 583; Olympia Min. Co. v. Kerns, 13 Idaho, 514, 91 P 92. A buyer who is in possession of land and who has paid in addition to the earnest money an amount on the remainder of the price may have a deed after proof of his willingness and ability to pay the remainder or possibly a deposit of the remainder in court. Stafford v. Richard [La.] 46 S 107. A tender need not be a strictly valid tender under the law; it is sufficient if there is a present readiness, willingness, and ability to perform. Taylor v. Mathews, 53 Fla. 776, 44 S 146. A formal tender of purchase price is not a prerequisite to the compelling in equity of specific performance of a contract to convey where the purchaser was at the place where the conveyance was to be made, ready and willing to perform, but the seller was not ready to perform. Roche v. Osborne [N. J. Eq.] 69 A 176. Performance not necessary where there is a willingness, readiness and ability to perform, all communicated to the other party, and a tender of performance by complying with the contract so far as it is practicable at time and place agreed upon. George Wiedemann Brew. Co. v. Maxwell [Ohio] 84 NE 595.

27. Where vendor is unable to make a good title as agreed, he cannot in general compel the vendee to observe the agreement. McKinnon v. Johnson [Fla.] 55 S 451. A vendor is not entitled to specific performance of a contract to buy land providing for delivery of deed and possession on a certain date where, owing to the occupancy of vendor's tenants on that date, he was unable to deliver possession. Buxbaum v. Devoe, 123 App. Div. 653, 107 NYS 1053. A court of equity will not make a decree for the specific performance of a contract to convey land at the suit of the vendor where there is any doubt as to the legal sufficiency of the title. Complainant's grantor was a corporation whose charter had expired before taking. Diamond State Iron Co. v. Husbands [Del.] 68 A 240.

contract, where the vendor has upon discovering defects exercised diligence in remedying the same, if there has been no change in the circumstances or position of the parties by which performance will become inequitable.[28] Courts of equity regard with more favor actions to enforce specific performance where there has been performance in part than where nothing has been done by either party.[29] If time is essential, the stipulation of the contract must be exactly complied with, and the failure to perform on the exact day cuts off the rights of the defaulting party [30] unless a legal excuse appears.[31] Where time is not of the essence of the contract, so long as both parties take no steps to demand performance, the vendor to tender deed and demand payment, or the vendee to tender the purchase price and demand a deed, the contract continues to subsist until barred by the statute of limitations.[32] By statute in Montana, time is never of the essence of a contract unless expressly stated so to be, and performance may be had at any time if the demand is accompanied by an offer of compensation for delay.[33] Time may be limited, however, by the party making a tender and stating a time after which he will refuse to perform.[34] The fact that complainant errs in his construction of a contract as to certain necessary acts to be done by him does not prevent him from obtaining specific performance on the part of the defendant, on the contrary the fact that he is without legal remedy is frequently a sufficient reason for the interposition of courts of equity.[35] Performance is excused where it would be useless to attempt it.[36] A party who has once refused to perform cannot come into court later and seek to compel performance,[37] and where there

28. Mortgage on land was payable in instalments, whereas the contract called for a straight mortgage. Vendor induced mortgagee to agree to accept payment of the mortgage. Hugel v. Habel, 56 Misc. 402, 106 NYS 581.

29. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 NE 701.

30. Roberts v. Braffett [Utah] 92 P 789. Contract for sale of real estate to be completed within thirty days. Chambers v. Roseland [S. D.] 112 NW 148. Contract for the sale of land requiring payment on a certain date, otherwise the vendor not to be bound. Machold v. Farnan [Idaho] 94 P 170.

31. Financial stringency no excuse for failure to make payment when due. Machold v. Farnan [Idaho] 94 P 170.

32. Kessler v. Pruitt [Idaho] 93 P 965; Roberts v. Braffett [Utah] 92 P 789.

33. Stevens v. Trafton [Mont.] 93 P 810.

34. Kessler v. Pruitt [Idaho] 93 P 965. Where a vendor was unable to place a mortgage as required by a contract of sale and several adjournments were had of the time of sale to allow him to obtain such mortgage and a final extension was had on the understanding that it was the last, he cannot have specific performance where he was unable to perform at that time and the vendee refused to consent to a further extension. Leinhardt v. Solomon, 109 NYS 144. Notice by letter that money must be paid by a certain date or disposal would be made to another party. Roberts v. Braffett [Utah] 92 P 789.

35. St. Regis Paper Co. v. Santa Clara Lumber Co., 186 N. Y. 89, 78 NE 701.

36. Where a vendor has declared a rescission, the purchaser need not tender the purchase money or keep good the tender made as a condition precedent to specific performance. Bruggemann v. Converse [Wash.] 92 P 429. Performance excused where after part performance further performance is refused by the other party. Taylor v. Newton [Ala.] 44 S 583. Where a vendee in a contract for the sale of land requested an extension of time and then at the expiration thereof refused to perform, the vendor need not tender a deed as a condition of his right to sue for specific performance. Staples v. Mullen [Mass.] 81 NE 877. Where service of notice has been made of a desire to perform, after a prior oral notice and a demand for an abstract, where the defendnt had previously refused to carry out his contract to convey land, an offer in the bill to pay the purchase price and to bring it into court is a sufficient allegation of an offer to perform. Solomon Mier Co. v. Hadden, 148 Mich. 488, 14 Det. Leg. N. 216, 111 NW 1040. Tender of bond excused where informed that party did not intend to perform. George Wiedemann Brew. Co. v. Maxwell [Ohio] 84 NE 595.

37. At the time for taking title, certain defects appeared and the time was continued to a day certain to allow the defects to be remedied, but the purchaser did not appear at the appointed time, but later sought to enforce performance. Klingenstein v. Alexander, 109 NYS 143. Under a contract allowing vendee a return of his down payment in case of defective title, if he rejects title offered, he cannot, when sued later to quiet title against the contract, claim specific performance on payment of the balance of purchase price. Welr Inv. Co. v. Scattergood [Colo.] 94 P 19. Where plaintiff refused to perform because of an imperfect title, he cannot later compel specific performance. Webster v. Gibson [Cal. App.] 93 P 1040. Where a vendee with knowledge of the facts bearing on the title of his vendor declines a warranty deed to the land agreed to be conveyed in a unilateral contract and rescinds the agreement, he cannot thereafter

is some dispute as to the terms of the contract or the possibility of performance by the defendant, the complainant may refuse to further perform until that question is determined.[38]

§ 5. *Actions. Jurisdiction.*[See 8 C. L. 1959]—A court of chancery in a proper case has power to compel a conveyance of lands situated in another country or state where the persons interested are within the jurisdiction of the court.[39] Where plaintiff brings a bill to compel performance and the defendant brings a cross bill alleging default by the plaintiff and return of the deposit money, and the plaintiff then withdraws his demand for performance, having sold the property, the court still has jurisdiction to try the issue raised by the cross bill.[40] Where a bill for specific performance prays for damages as an alternative, it cannot be maintained where there is no jurisdiction to decree specific performance, for there is an adequate remedy at law for damages.[41] A suit to enforce specific performance of a contract to convey property purchased at a receiver's sale not being a suit to set the sale aside need not be brought in the court having such jurisdiction.[42]

Parties.[See 8 C. L. 1969]—A decree for specific performance does not affect the interests of one not made a party.[43] A party beneficially interested is a proper party to bring suit to specifically enforce the contract.[44] In some jurisdictions the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others.[45] The executor is not a necessary party to an action to enforce performance of a contract to dispose of property by will.[46] Where all the stockholders of a corporation contract for the transfer of all the corporate property, the corporation is not a necessary party to a bill for specific performance.[47] Where vendors have parted with their interest to third parties, they are proper though not necessary parties in a suit for specific performance in which their privies are joined.[48] The cestui que trust is a proper though not necessary party to a bill for specific performance of a contract to convey, made by the trustee as such.[49] Where performance

recall the rescission and demand conveyance from his vendor of such title as he possesses. Walton v. McKinney [Ariz.] 94 P 1122.

38. Where there is a possible cloud upon title, the complainant may refuse to further perform until that question is determined. Complainant demanded information as to A's title, which did not appear of record, before payment of the balance of the purchase price. Taylor v. Newton [Ala.] 44 S 583. It was improper to refuse specific performance of a contract to sell land for a railroad right of way on the ground that complainant had abandoned the construction of a road which it was bound by the contract to build where it had completed a part at large expense and only refused to proceed until defendants should give deeds according to the contract. Chicago, etc., R. Co. v. Lane, 150 Mich. 162, 14 Det. Leg. N. 532, 113 NW 22.

39. Fall v. Fall [Neb.] 113 NW 175.

40. Balleisen v. Schiff, 121 App. Div. 285, 105 NYS 692.

41. Van Keuren v. Siedler [N. J. Eq.] 66 A 920.

42. Miller v. Drought [Tex. Civ. App.] 19 Tex. Ct. Rep. 416, 102 SW 145.

43. Decree for specific performance to convey land not binding on one having a prior contract for a conveyance who was not made a party. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F 820. In a suit by the vendee for specific performance, a bill alleging a prior contract to convey to a third party to be on record is demurrable, for the validity of the prior contract cannot be determined unless the third party is a party to the bill. Van Keuren v. Siedler [N. J. Eq.] 66 A 920.

44. An agent acting under agreement with the owner of corporate stock to sell such stock on a consideration that he receive part of the net proceeds and one-half the remaining stock is a proper party to bring suit for performance. Hills v. McMunn, 232 Ill. 488, 83 NE 963.

45. Where defendant bought land of A on credit on the understanding that no assignment should be made thereof without A's consent, but defendant sold an interest to plaintiff with the agreement that A should execute a deed. Defendant then sold a half interest to B. Held that in a suit for specific performance A was not a necessary party under Kirby's Dig. § 6011, providing that the court may determine any controversy between parties before it when it can be done without prejudice to the rights of others or by saving their rights. Sproull v. Miles, 82 Ark. 455, 102 SW 204.

46. Stewart v. Smith [Cal. App.] 91 P 667.

47. McCullough v. Sutherland, 153 F 418.

48. Taylor v. Newton [Ala.] 44 S 583.

49. Bridgman v. McIntyre, 150 Mich. 78, 14 Det. Leg. N. 614, 113 NW 776.

would be decreed between the original parties, it will be decreed against their privies.[50] After performance by the complainant, he may compel performance by a third party who has taken title as a mere substitute for the defendant or as a depositary for the record title.[51] If, however, it is alleged that the deed was never delivered to the second defendant, then the original grantor is a necessary party, for the record title would still be in him.[52] Where plaintiff has an executory contract for a deed and the owner gives title to a third person subject to plaintiff's rights, who in turn contracts to sell to one of the defendants subject to the same rights, and such defendant requests that title be given in the name of his father, the other defendant, such third party is not a necessary party, as he has no interest involved.[53] Where one affixes to his name a descriptive word, such as executor, he may bring a bill individually for performance.[54]

Defense. See 8 C. L. 1960—It is a good defense that the contract does not call for the performance prayed for by the bill.[55] The defendant's subsequent default should be no defense in his behalf against the vendor's right.[56] The complainant's laches may be a defense.[57] A prior agreement to convey to a third person not a party is no defense to a bill for specific performance of a contract to convey lands.[58] Where a contract for the sale of land provides against assignment without consent of the vendor and vendee sells to A, the vendee cannot take advantage of the fact that A could not compel a deed from the original vendor in order to defeat specific performance of such subsequent contract against the original vendee.[59] In an action for specific performance of a contract for the sale of realty, the title to which plaintiff refused to accept, the acts of defendant in giving bond to pay any judgment which might be recovered against him and subsequently conveying the property to others did not prevent him from asserting the sufficiency of his title and plaintiff's refusal to accept as a defense to a recovery by plaintiff of the amount paid by him as a deposit.[60] Where in a contract for the sale of land it is provided that if the vendor is unable to give a clear title a part payment is to be returned and all obligations be canceled, he cannot justify nonperformance by showing the existence of attachments if there is nothing to show they are incumbrances on the property.[61] Where payment is made and accepted, it is no defense to an action to obtain specific performance that subsequent loans have been made and that the property is being held as security for payment of such claims.[62] A bill to enforce a contract to convey to a vendee described as trustee without expressing the trust is not objectionable as an attempt to

50. Taylor v. Newton [Ala.] 44 S 583.

51, 52, 53. Pearson v. Courson, 129 Ga. 656, 59 SE 907.

54. Clexton v. Tunnard, 119 App. Div. 709, 104 NYS 665.

55. Option on coal deposits. South Penn Coal Co. v. Smith [W. Va.] 60 SE 593.

56. Ochs v. Kramer [Ky.] 107 SW 260. If an individual without title to property enters into a contract to sell and convey it, he cannot avoid the consequences of his contract by subsequently informing the purchaser that he had no title to the premises, and the plaintiff may sue in equity for specific performance to determine whether or not the defendant is able to transfer, with a prayer for alternative relief for the return of money paid on account with interest and expenses. Defendant as administrator made a contract to sell his deceased wife's land, but later finding he had no authority refused to convey and tendered a return of a payment down and expenses. Plaintiffs refused this and brought bill for specific performance or damages. Elliott v. Asiel, 120 App. Div. 829, 105 NYS 655. Performance will be decreed although the vendor has placed himself in a predicament preventing him from making the conveyance as he had expected. Unrecorded mortgage which vendor hoped to have transferred to another piece of property, but mortgagee refused and put his mortgage on record. Roche v. Osborne [N. J. Eq.] 69 A 176.

57. See ante, § 1, Nature and Propriety of Remedy.

58. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F 820.

59. Sproull v. Miles, 82 Ark. 455, 102 SW 204.

60. Weissberger v. Wallach, 108 NYS 887.

61. Rosenberg v. Heffernan [Mass.] 83 NE 316.

62. Stock in corporation issued to defendant in payment of land. Stock used to raise funds by defendant for plaintiff and refused to transfer land until payment made of money raised. Meridian Oil Co. v. Dunham, 5 Cal. App. 367, 90 P 469.

enforce a parol trust.[63] Where the time of performance is extended by agreement, the defendant is estopped to set up the failure to perform within the time required by the contract.[64] Where the insufficiency of title is the only defense to a bill to enforce performance of a contract to purchase land and the answer itself sets forth the title from which it appears that it is good, the answer presents no valid defense.[65] The fact that defendant acted on advice of counsel in refusing to carry out his contract and that he had invested elsewhere the funds with which he intended to perform does not constitute any defense.[66] Mutual abandonment is a good defense.[67]

*Pleading.*See 8 C. L. 1961—It is incumbent on the plaintiff to show, both in averments of his pleading and in evidence at the trial, that he is entitled to the equitable relief which he seeks.[68] The complaint must state the facts showing adequacy of consideration.[69] This rule does not apply where the agreed consideration is accepted and retained, for its adequacy cannot then be questioned.[70] The bill must allege title in the defendant, but need not allege good title.[71] An allegation of readiness and willingness to perform and a tender pursuant to contract is a sufficient allegation of ability to perform.[72] Where a complaint alleges that defendant refused to perform and to comply with the preliminary terms of the contract and tendered back the deposit paid when the contract was signed, it sufficiently shows that complainant was entitled to sue at once, despite date when contract was to be completed.[73] The complaint need not allege that there is no adequate remedy at law.[74] A complaint which alleges the death of the vendee and that plaintiffs are his heirs is defective for failing to specify whether or not plaintiffs are his only heirs.[75] Complaint by a vendor need not allege approval of the title by a title insurance company as provided for in the contract, such clause imposing no condition on the vendor, it being for the vendee to have the title examined.[76] A bill to enjoin the infringement of patent rights by a license held not a bill for specific performance to compel the manufacture of the patented articles.[77] The plaintiff need not allege in his complaint the ability of the defendant to perform.[78] Where a case for specific performance has been made out, a general prayer for relief is sufficient,[79] and in such a case equity will hesitate to deny

63. Bridgman v. McIntyre, 150 Mich. 78, 14 Det. Leg. N. 614, 113 NW 776.

64. Contract to convey land upon removal of buildings thereon within 30 days. Defendant agreed to an extension of this time and then refused to perform. Spencer v. McCament [Cal. App.] 93 P 682.

65. The answer is demurrable. Ochs v. Kramer [Ky.] 107 SW 260.

66. Ochs v. Kramer [Ky.] 107 SW 260.

67. It must be specially pleaded. Lipscomb v. Amend [Tex. Civ. App.] 108 SW 483.

68. Statement that consideration was "not disproportionate to the value of said lands" is a sufficient allegation. Kerr v. Moore [Cal. App.] 92 P 107.

69. Value of land. Meridian Oil Co. v. Dunham, 5 Cal. App. 367, 90 P 460. Allegation as to a adequacy held sufficient. Kerr v. Moore [Cal. App.] 92 P 107.

70. Stock in a corporation issued to and accepted by defendant who executed a deed to part of the land. Meridian Oil Co. v. Dunham, 5 Cal. App. 367, 90 P 469.

71. An allegation that defendant was or pretended to be seized and possessed in fee simple, sufficient. Loar v. Wilfong [W. Va.] 61 SE 333.

72. Ability to perform might come about at time of trial and decree. Clexton v. Tunnard, 119 App. Div. 709, 104 NYS 665. Upon demurrer, specifications of tender held to be sufficient. Crovatt v. Baker [Ga.] 61 SE 127. An allegation of a tender of the purchase price is not necessary where the same is to be paid after a deed and title guarantee are ready for delivery and the vendor refuses to obtain the title guarantee and tender a deed and the complainant alleges willingness to perform and an offer to pay into court the purchase money. Meckel v. Johnson, 231 Ill. 540, 83 NE 209.

73. Demurrer on ground that action prematurely brought. Belanewsky v. Gallaher, 55 Misc. 150, 105 NYS 77.

74. Complaint for the specific performance of a contract to convey real estate need not allege that there is no adequate remedy at law. Belaneswsky v. Gallaher, 55 Misc. 150, 105 NYS 77. Contract for sale of land. Bishop v. Tartt [Tex. Civ. App.] 107 SW 359.

75. Wilcox v. Scanlon [Wis.] 113 NW 948.

76. Downs v. Lehman, 123 App. Div. 11, 107 NYS 329.

77. Indiana Mfg. Co. v. J. I. Case Threshing Mach. Co. [C. C. A.] 154 F 365.

78. Defendant might not be able to perform at time of filing complaint, but be able to at time of decree. Clexton v. Tunnard, 119 App. Div. 709, 104 NYS 665.

79. Wilkins v. Somerville, 80 Vt. 48, 66 A 893.

relief on the ground that proper allegations have not been made in the bill without an opportunity to the orator to amend his bill.[80] In order to obtain specific performance to convey against one tenant in common, the agreement being void as to the other, such relief must be specially prayed for,[81] and, if such is not done in the first instance, the complainant may apply to amend.[82] Where it appears from a bill that there is no sufficient contract in writing as required by the statute of frauds, a demurrer is proper.[83] The statute of frauds must, however, be specially pleaded, for the court cannot of its own motion invoke its protection for one not claiming it.[84] The mere filing of a general denial does not entitle defendant to judgment, for the court is entitled to know defendant's version of the contract to determine the facts necessary to a full performance by plaintiff before refusing the relief to which his showing entitles him.[85] If the vendor relies upon mutual abandonment as a defense, he must plead it.[86] Any defect in the complaint for want of definiteness and certainty must be reached by motion to make more definite, and is not properly raised by demurrer.[87] Strictly speaking, there is no such thing as a motion for a nonsuit in equitable proceedings under the Montana practice.[88] Where the complaint on its face shows that a contract is within the statute of frauds, and defendants denied the existence of any contract, they did not waive their right to require proof of a valid written contract, in order to entitle complainant to recover, by failing to object at the trial to evidence of the making of an oral contract.[89] Where a vendee objects to performance because of a failure of the vendor to comply with the contract, he should not be held on appeal to have waived the objection because he gave the wrong reason for it.[90] Facts not pertinent to the issue may be stricken from the answer on motion.[91] An answer presenting no valid defense is demurrable.[92] A judgment and decree which does not require performance of conditions precedent before declaring specific performance will be set aside.[93]

Evidence.[See 8 C. L. 1982]—It is incumbent on the plaintiff to show, both in averments of his pleading and in evidence at the trial, that he is entitled to the equitable relief which he seeks.[94] Evidence as to all matters relating to the contract is proper in an action to specifically perform a contract of sale.[95] A parol contract within the statute of frauds must be proved by clear and unequivocal evidence,[96] but it is not es-

80. Bill did not show that the orator was ready and willing or offered to perform his part of the contract. Wilkins v. Somerville, 80 Vt. 48, 66 A 893.

81, 82. Campbell v. Hough [N. J. Eq.] 68 A 759.

83. Miller v. Burt [Mass.] 82 NE 39.

84. Parol contract for sale of coal under lands. Statute not pleaded and contract considered as though written. Clayton v. Lemen, 233 Ill. 435, 84 NE 691. Where the petition fails to show affirmatively that the contract rested only in parol, it will be presumed on demurrer that it was in writing. Crovatt v. Baker [Ga.] 61 SE 127.

85. Stevens v. Trafton [Mont.] 93 P 810.

86. Lipscomb v. Amend [Tex. Civ. App.] 108 SW 483.

87. Wilcox v. Scanlon [Wis.] 113 NW 948.

88. Stevens v. Trafton [Mont.] 93 P 810.

89. Bradley Real Estate Co. v. Robbins [Ind. T.] 103 SW 777.

90. Koch v. Streuter, 232 Ill. 594, 83 NE 1072.

91. Defendant set out that he acted on advice of counsel in refusing to perform and that he had invested elsewhere the funds with which he had intended to perform. Ochs v. Kramer [Ky.] 107 SW 260.

92. Insufficiency of the title was the only defense and the answer itself set forth good title. Answer was demurrable. Ochs v. Kramer [Ky.] 107 SW 260.

93. Olympia Min. Co. v. Kerns, 13 Idaho, 514, 91 P 92.

94. Statement that consideration was not disproportionate to the value of said lands is a sufficient allegation. Kerr v. Moore [Cal. App.] 92 P 107.

95. Contract to convey land purchased by defendant at a judicial sale. Downing v. Ernst [Colo.] 92 P 230.

96. West v. Washington, etc., R. Co. [Or.] 90 P 666; Bell v. Whitesell [W. Va.] 60 SE 879; Crawford v. Crawford, 77 S. C. 205, 57 SE 837. Alleged contract to convey land after death in payment of services. Evidence insufficient. Collins v. Collins [Iowa] 114 NW 1069. The views of the various courts of the United States as to the enforcement of parol agreements to convey land cannot be reconciled, but in some states it is well settled that such an agreement will be specifically enforced where the evidence is clear and the plaintiff has fully

sential that it be established by direct evidence.[97] In some jurisdictions, it is necessary to prove an oral contract for transfer of land so clearly and strongly as to leave no reasonable doubt as to the agreement.[98] Where the description of land to be conveyed is omitted altogether, the omission cannot be supplied by parol for the purpose of identifying the property.[99] In an action to enforce an oral testimentary agreement, the testimony must be clear and satisfactory.[1] Where defendant denies that there was any contract of sale, the burden is on the plaintiff to establish a written, and not a parol, agreement.[2] Where a return of deposit money is sought as an alternative to specific performance because of a defect in title not disclosed of record, the plaintiff must prove the facts dehors the record relied upon as affecting the title.[3] Evidence of abandonment, where the same is not pleaded as a defense, cannot be admitted as tending to show original bad faith of the vendee and as affecting the credibility of his testimony where the case was clearly not one of the vendee's original bad faith.[4]

The relief granted. See 8 C. L. 1962—The courts in awarding relief generally look at conditions existing at the close of the trial and adapt their relief to those conditions.[5] Where a court properly acquires jurisdiction of a cause to enforce specific performance of a contract, the court will proceed to administer complete justice by adjudicating all matters properly presented and involved in the case,[6] and injunctions

performed his part. A parol contract for conveyance of land must be established with clearness and satisfaction before it will be enforced. Harrison v. Harrison [Neb.] 113 NW 1042; White v. White, 231 Ill. 298, 83 NE 234.

97. Bichel v. Oliver [Kan.] 95 P 396.

98. Evidence not sufficient. Redman Bros. v. Mays, 129 Ga. 435, 59 SE 212. This is not the rule in Oregon. West v. Washington, etc., R. Co. [Or.] 90 P 666.

99. Graham v. Graham [Ark.] 108 SW 835.

1. Record in this case not sufficient. Rau v. Rau [Neb.] 113 NW 174.

2. Bradley Real Estate Co. v. Robbins [Ind. T.] 103 SW 777.

3. Witte v. Koerner, 108 NYS 560.

4. Lipscomb v. Amend [Tex. Civ. App.] 108 SW 483.

5. If a vendor has not a perfect title until after commencement of action, he can still be compelled to convey. Walton v. McKinney [Ariz.] 94 P 1122. Equity renders judgment according to the situation at the time of trial and specific performance will be decreed where such becomes possible after entry of the complaint and no change in the situation of the parties has occurred rendering such a decree inequitable. Plaintiff's title not marketable, but cloud removed pending trial of complaint for specific performance. Whalen v. Stuart, 108 NYS 355. It is the practice in equity to require specific performance if the title is good at the time of the trial even though defective at the time fixed for performance, where the vendor has upon discovering defects exercised diligence in remedying the same, if there has been no change in the circumstances or position of the parties by which performance will become inequitable. Mortgage on land was payable in instalments, whereas the contract called for a straight mortgage. Vendor induced mortgagee to agree to accept payment of the mortgage. Hugel v. Habel, 56 Misc. 402, 106 NYS 581.

6. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. After defendants had contracted to convey land to the plaintiff, they conveyed without consideration to a third party on the advice of his attorney to avoid carrying it out, who conveyed it to the attorney who conveyed to a bank to secure prior loans, the bank not looking up the record title. The bank made a further small loan, but not on the strength of this security; also a loan was made by another bank prior to any knowledge by it that the borrower had received a deed to the property in question. Held that the plaintiff was entitled to specific performance of his contract, with a provision that the entire price should be paid to the original owners of the property, and denying any relief to the banks. White v. Matzger [Wash.] 92 P 341. Where defendant claims that plaintiff has not paid or tendered the purchase price, and hence is not entitled to specific performance, the court may properly settle the account between the parties and decide if the purchase price has been paid. Webb v. Marlar, 83 Ark. 340, 104 SW 144. Where the vendee takes possession, but does not pay the purchase price, equity may decree compliance with the contract or make such other decree as the facts may warrant. McKinnon v. Johnson [Fla.] 45 S 451. Where there was a contract for the exchange of lands and payment of a balance and the land of one grantor was subject to an unrecorded mortgage which he expected the mortgagee would be willing to transfer to the land taken in exchange, but the mortgagee refused and put his mortgage on record, whereupon the grantee sought to make arrangements by which grantor would perform, and to that end offered to take back a second mortgage on other property. Held that, in the absence of any unfairness in the contract between the parties, complainant was entitled to specific a performance by defendant of the contract as made, free of incumbrances, and,

both mandatory and restraining may be granted,[7] and damages may be awarded when necessary to do complete justice.[8] A court of equity will not grant pecuniary compensation in lieu of specific performance unless the case presented is one for equitable interposition such as would entitle the plaintiff to performance but for intervening facts.[9] A prayer for general relief will not authorize the granting of any relief which is not germane to the prayer for specific performance,[10] and where specific performance is denied because the contract is illegal, a part payment of consideration cannot be recovered under the prayer for general relief.[11] Performance can only be decreed of the actual contract made, and the court is not entitled to decree performance of a different one in lieu of the original agreement which cannot be performed.[12] The court may require a party to elect between two or more certain, feasible and proper alternatives contained in his agreement.[13] The parties may provide for the measure of damages in case of breach and the means of satisfying the same and they are then bound thereby to the exclusion of the remedy of specific performance,[14] but where a penalty for failure to perform is provided for, equity will not permit a defendant to elect to pay the penalty and thus avoid performance.[15] Specific performance will not be decreed in case of inability to perform,[16] yet where complete performance is rendered impossible, complainant may have performance of what can be done if he desire it,[17] and have an abatement out of the purchase money

in case of defendant's failure to remove the incumbrance, the court might render, in addition to the decree for specific performance, a decree against him for the amount of the incumbrance. Roche v. Osborne [N. J. Eq.] 69 A 176.

7. A temporary injunction will not issue to enforce specific performance unless the allegations of the bill warrant a decree of specific performance, nor unless it also appears that an injunction is appropriate and just. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. Specific performance may frequently be enforced either by a direct decree to that effect or by an injunction restraining the party from doing what he has agreed not to do. Grubb Bros. v. Moore, Clemens & Co. [Va.] 60 SE 757. A temporary injunction against defendant entering into a lease with any one else should not be granted in a suit for specific performance of a contract to lease. Josey v. Perlstein [Tex. Civ. App.] 107 SW 558.

8. Taylor v. Florida East Coast R. Co. [Fla.] 45 S 574. Where, at the time a bill is filed, complainant is not aware of the impossibility of performance, the court may decree compensation. Logan v. Flattau [N. J. Eq.] 67 A 1007.

9. Such as the destruction of property, the conveyance to an innocent third party, or the refusal of the vendor's wife to join in a conveyance. Marks v. Gates [C. C. A.] 154 F 481.

10. White v. Sikes, 129 Ga. 508, 59 SE 228.

11. Sayer v. Brown [Ind. T.] 104 SW 877.

12. Contract to exchange land for personal property. The personal property was taken under a mortgage foreclosure, and in an action for performance the judge was not entitled to decree a transfer of the land upon payment of a sum of money in lieu of the personalty. Constantine v. Caswell, 46 Wash. 651, 91 P 7.

13. Taylor v. Mathews, 53 Fla. 776, 44 S 146.

14. Mallory v. Globe Boston Copper Min. Co. [Ariz.] 94 P 1116.

15. Powell v. Dwyer, 149 Mich. 141, 14 Det. Leg. N. 301, 112 NW 499.

16. Beattie v. Burt, 122 App. Div. 472, 107 NYS 153.

17. Contract to convey land by special warranty deed. Defendant divested of title to part of land by a judgment. Baldwin v. Brown [Wash.] 93 P 413. Where a vendor's covenant is broken, the vendee may enforce specific performance as far as vendor can perform. Latta v. Hax [Pa.] 68 A 1016. Specific performance may be enforced as to a part of contract capable of being performed. Mundy v. Shellaberger, 153 F 219; Millard v. Martin [R. I.] 68 A 420. Where after a contract to convey land is made the vendor's wife refuses to release dower, it is proper in an action for specific performance to deduct from the price the value of such dower and require a bond of the purchaser secured by a mortgage for that amount until the dower vests or ceases to exist, the husband being entitled to the interest during the life of his wife (Wannamaker v. Brown, 77 S. C. 64, 57 SE 665), but where a husband contracted for the sale of land and was not joined by the wife, releasing homestead, the entire contract is void, and specific performance cannot be decreed of a portion of the land less the homestead (Mundy v. Shellabarger, 153 F 219). Specific performance may be decreed against one tenant in common under an agreement to convey lands which is void as to cotenant. Campbell v. Hough [N. J. Eq.] 68 A 759. Vendee took a decree in a lower court without objection, vesting title in him, and would be held to have waived the covenant for warranty or abstract of title. Jasper v. Wilson [N. M.] 94 P 951. May enforce partial performance. Walton v. McKinney [Ariz.] 94 P 1122. Where D became the owner of a one-third interest in a patent and contracted to sell all right, title and interest, etc., in the pat-

for any deficiency of title or quantity or other matters touching the estate,[18] but performance of part of a contract will not be decreed apart from the entire agreement.[19] It is proper to render a personal judgment for the balance of the purchase money remaining unsatisfied after sale of the land to enforce the judgment.[20] An agrement

ent, the purchaser having full knowledge of his title, such purchaser is entitled to enforce performance on its agreement to accept whatever title D was able to convey. McDuffee v. Hestonville, etc., R. Co., 158 F 827.

18. Latta v. Hax [Pa.] 68 A 1016; McDuffee v. Hestonville, etc., R. Co., 158 F 827. From one cotenant despite repudiation of authority by the other to contract for both. Mellin v. Woolley [Minn.] 115 NW 654.

19. Rosenberg v. Wilson, 120 App. Div. 554, 104 NYS 1087.

20. Ochs v. Kramer [Ky.] 107 SW 260.

NOTE. Specific performance with compensation: At law a vendor of land would be nonsuited were he to attempt to enforce a contract which he was unable to perform on his part. Where the failure of performance as to quality (Drewe v. Corporation, 9 Ves. 368) or quantity (Calcraft v. Roebeck, 1 Ves. Jr. 221; Foley v. Crow, 37 Md. 51) is unsubstantial, equity will hear the vendor's suit, since chancery, looking to the substance (Batten, Spec. Perf. 122; Dyer v. Hargrave, 10 Ves. 505), and holding it unconscionable to take advantage of trivialities (Stewart v. Allston, 1 Mer. 25), will not permit the forms of law to be instruments of injustice (Halsey v. Grant, 13 Ves. 73). Compensation is given as incidental (Beyer v. Marks, 2 Sweeney [N. Y.] 715) to complete the equitable relief and avoid circuity of action (Erwin v. Meyer, 46 Pa. 96). This relief will be refused, however, unless two conditions are present (Guynet v. Mantel, 4 Duer [N. Y.] 86; Beyer v. Marks, 2 Sweeney [N. Y.] 715). First, the defect must be immaterial; secondly, it must be measurable in money. The former is based on the consideration that equity will not enforce a contract never intended; were the defect material, the vendee probably would not have entered into the agreement. Thomas v. Deering, 1 Keen. 729; Stewart v. Allston, 1 Mer. 25. In the earlier cases the materiality of the deficiency was often ignored. Drewe v. Hanson, 6 Ves. 675. See King v. Wilson, 6 Beav. 124. But this looseness has been repudiated because of the dangers inherent in its enforcement. Halsey v. Grant, 13 Ves. 73. See King v. Barbeau, 6 Johns. Ch. [N. Y.] 38. If the land is sold by metes and bounds, acreage may be treated as mere description, and no compensation will be given (Moses v. Wallace, 7 Lea [Tenn.] 413; Meek v. Bearden, 5 Yerg. [Tenn.] 467), provided the boundaries were as represented (Voorhees v. DeMeyers, 2 Barb. [N. Y.] 37). When the vendee seeks compensation for a contract not performable in specie, the vendor's plea is that his purchaser rescind or pay in full. Such a plea relieving the vendor because he has charged himself with a liability greater than he can assume is overruled. Bogan v. Daughdrill, 51 Ala. 312; Western v. Russell, 3 V. & B. 187. It would be unjust to allow him thus to shield himself behind his own default (Waters v. Travis, 9 Johns. [N. Y.] 450; Erwin v. Meyers, 46 Pa. 96), and he must therefore convey with an abatement of the purchase price, irrespective of the materiality of the defect (Graham v. Oliver, 3 Beav. 123; Bennett v. Fowler, 2 Beav. 302. But see Chicago R. Co. v. Durant, 44 Minn. 361; cf. Wheatley v. Slade, 4 Sim. 126). The argument that because the vendor intended to sell all he intended to sell any part of his land (Jones v. Evans, 17 L. J. Ch. 469; Erwin v. Meyers, 46 Pa. 96) or, as often expressed, that "he cannot aver that he sold less than the whole" (Mortlock v. Buller, 10 Ves. 292, 315; Marshall v. Cauldwell, 41 Cal. 611), is based upon a misstatement of fact. Its fallaciousness is shown in cases where the defect arises subsequent to the contract. The result reached, however, is proper, for the equity of the vendee should override the vendor's plea for either a cy pres execution or a suit at law. This equity of the vendee, though not easily classifiable, appears to spring from the circumstances of the case. By construing a dictum of Lord Eldon in Mortlock v. Buller, 10 Ves. 292, 315, the foundation for this bar to the plea of the vendor has been sought in the doctrine of estoppel (Rudd v. Lascelles [1900] 1 Ch. 815; Weatherford v. James, 2 Ala. 170). Lord Eldon's remarks, it is submitted, may more readily be explained as applying to a bar due to the equities of the situation rather than as furnishing a grounding for an estoppel in pais. On principle it does not appear that an estoppel is a satisfactory explanation since, even though the representation be true when made and the deficiency have resulted later, the plea of the defendant would still be barred. Cf. Brown v. Ward, 110 Iowa, 123; Bass v. Gilliland, 5 Ala. 761. The vendee's notice of the falsity of the representation will bar an abatement (Campbell v. Hay, 2 Moll. 102; Knox v. Deans, 23 Fla. 64), since the offer of the vendee was probably the less because he knew the defect and to award him compensation would give a double allowance (Peeler v. Levy, 26 N. J. Eq. 330; Dyer v. Hargrave, 10 Ves. 505). Thus if there is a material deficiency, the vendor cannot secure equitable relief, but the vendee may. This situation is regarded as an exception to the rule of mutuality (Palmer v. Gould, 144 N. Y. 671; cf. Lawrenson v. Buller, 1 Sch. & L. 13), but the situation would be reconcilable with a test of mutuality recently suggested (Prof. J. B. Ames, 3 Columbia L. R. 1; 1 Illinois L. R. 548). It has been stated that the rule of mutuality has no application here. Sutherland v. Briggs, 1 Hare, 26. It is admittedly difficult to distinguish the situation under discussion from a case of hardship where one party may enforce a contract and the other cannot. But were the mere presence of an equity in one party's favor, ipso facto, to take the case beyond the purview of the rule of mutuality, a doctrine would exist both difficult in its enforcement and dangerous to the continuance of the rule. The remaining condition necessary to support

may be reformed and then enforced as reformed.[21] Where a decree is rendered for a vendee in an action by a vendor, the court should also order the return of the money paid by the vendee on the contract with interest and attorney's fees incurred in examination of title.[22] Where there is a contract for the sale of land free from incumbrances, equity will not compel a discharge of the same by the vendor out of his own funds prior to passing title, in the absence of proof that the vendor was unwilling to have them discharged from the purchase money.[23] A judgment and decree should require performance of conditions precedent before declaring specific performance.[24] Where a vendor had no title at the time of making the contract and does not subsequently acquire it, the vendee may sue for specific performnace to determine whether or not the defendant is able to transfer, with a prayer for alternative relief for the return of money paid on account, with interest and expenses.[25] Where a decree provided that it should be suspended pending ejectment proceedings against the vendor, it was improper for the court to fix in the decree the time when the ejectment should be considered as determined, it being sufficient for the purpose of specific performance that it should appear that the action had ceased to be pending and that the lis pendens had been canceled.[26] Where one is unable to produce sufficient evidence of a contract to convey, he may still recover for the value of permanent improvements made on the property in question.[27] Where defendant occupies with notice of complainant's rights, he cannot recover for improvements made,[28] but where there is an innocent person in possession for use and occupation, performance can only be had against him upon payment to such party of the amount by which the value of the land has been enhanced by improvements made by such party.[29]

this jurisdiction, that the defect must be measureable in money, is based on the conception that otherwise equity in its endeavor to do right might well work injustice. Where the difficulty arises as to defects of title (Seaman v. Vaudrey, 16 Ves. 390), a reasonable estimate must suffice because an accurate estimate is impossible. Compensation allowed. Ramsden v. Hirst, 4 Jur. (N. S.) 200; compensation refused. Cato v. Thompson, 9 Q. B. Div. 616. Because of the inherent difficulty of estimation, courts are divided as to awarding compensation for inchoate dower rights, see Wilson v. Williams, 3 Jur. (N. S.) 810. Contra, Riesz's Appeal, 73 Pa. 485. If the vendee knew, however, of the vendor's marriage, compensation is always refused. Lucas v. Scott, 41 Ohio St. 636; cf. Emery v. Wase, 8 Ves. 505. As to defects in the quantity of land, the measure of abatement generally followed (Powell v. Elliott, L. R. 10 Ch. App. 424) is that adopted by a recent decision. Baldwin v. Brown [Wash.] 93 P 413. Such proportion of the total purchase price will be deducted as the value of such proportion bore to the value of the entire tract at the time of purchase. The difficulties of estimation in cases of defect in quantity will rarely be as great as those recognized as not insuperable in cases of defect in quality, and hence in the former cases the vendee may nearly always obtain specific performance with compensation.—From 8 Columbia L. R. 309.

21. Clayton v. Lemen, 233 Ill. 435, 84 NE 691; Flynn v. Finch [Iowa] 114 NW 1058. Agent of defendant authorized to sell land for a certain amount cash, or part cash and balance on time, with 6 or 7 per cent interest, made a contract to plaintiff for such amount cash, or, at vendor's option, part cash, balance on time, with 5 per cent interest, and that by mutual mistake the writing was merely for part cash and balance on time, with 5 per cent interest. Bishop v. Tartt [Tex. Civ. App.] 107 SW 359.

22. Leinhardt v. Solomon, 109 NYS 144.

23. Van Keuren v. Siedler [N. J. Eq.] 66 A 920.

24. Olympia Min. Co. v. Kerns, 13 Idaho, 91 P 92.

25. Defendant as administrator made contract to sell his deceased wife's land, but later finding he had no authority refused to convey tendered return of payment down and expenses. Plaintiff refused this and brought bill for specific performance and damages. Elliott v. Asiel, 120 App. Div. 829, 105 NYS 655.

26. Rosenberg v. Haggerty, 189 N. Y. 481, 82 NE 503.

27. Where a son took possession of land under an oral contract with his father that, if he would occupy and improve another tract, both tracts would be his at his father's death, on failure to establish such part performance as would entitle the son to specific performance, he is entitled to compensation for the value of permanent improvements and to have a lien on the land therefor, but is not entitled to payment for clearing and breaking out new ground, but must sue the estate in an action of law for such services. Ranson v. Ranson, 233 Ill. 369, 84 NE 210.

28, 29. Alston v. Connell, 145 N. C. 1, 58 SE 441.

Equity will not do a vain or useless thing by rendering a decree which may be set aside by one of the parties at will.[30]

Decree. See 8 C. L. 1964—A decree granted in one state to convey lands situated in another cannot be enforced in such other state if the parties refuse to perform.[31]

Appeal. See 8 C. L. 1964—While the sufficiency of the evidence to warrant specific performance rests largely with the trial court yet it is open to review, and upon appeal the court must be satisfied that the facts warrant the relief granted.[32] An exception to a finding that defendant entered into a contract of sale with plaintiff by the terms of which he agreed to sell plaintiff certain specified land in controversy was sufficient to raise the question whether the contract was void under the statute of frauds.[33] Where on appeal from a decree refusing specific performance the evidence is not reported, the findings of the court are not reviewable.[34] Where no findings of fact or of law were made, the only question open on an appeal is whether upon all the evidence the decree was plainly wrong.[35]

SPENDTHRIFTS, see latest topical index.

STARE DECISIS.

§ 1. The Doctrine and Its Application, 1695.
§ 2. Decisions and Obiter Dicta, 1696.
§ 3. Rules of Property, 1697.
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A. Inferior and Appellate, 1697.
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D. Different State Courts, 1701.

Conclusiveness of adjudication of fact is elsewhere fully treated,[36] as is the binding effect of a previous decision on a subsequent review of the same case.[37]

§ 1. *The doctrine and its application.* See 8 C. L. 1965—While the doctrine of stare decisis is recognized by all courts, it is less rigidly adhered to in some jurisdictions than in others. It has been held to prevent a re-examination by the highest court of a state of questions previously decided by it;[38] on the other hand it has been held not to prevent a re-examination of principles previously announced.[39] Long acquiescence in a decision strengthens it as a precedent,[40] while strong dissenting opinions therein weaken it.[41] Decisions relating merely to form and procedure have been distinguished

30. Cancellation clause in a contract provided that defendant might surrender a lease for cancellation upon payment of a dollar. Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 84 NE 53. Equity should not decree specific performance where it is not clear that it may be carried into effect. Contract provided for an official survey of the premises located in Cuba, and it appeared that there was no certainty that a survey by which good title could be given and recorded could be obtained. Cuban Production Co. v. Rodriguez, 108 NYS 785.

31. Grindling v. Rehyl, 149 Mich. 641, 14 Det. Leg. N. 572, 113 NW 290.

32. Held, evidence of a stenographic report of a conversation by defendant, making admissions as to an oral contract sought to be enforced, was insufficient. Pickett v. Michaels, 120 App. Div. 357, 105 NYS 411. Evidence will be considered on appeal and new trial ordered if decree was not justified. Evidence considered and held not to sustain the finding that the property be purchased and held by the parties as tenants in common. Molloy v. Dean, 120 App. Div. 482, 104 NYS 1071.

33. Bradley Real Estate Co. v. Robbins [Ind. T.] 103 SW 777.

34. Rosenberg v. Heffernan [Mass.] 83 NE 316.

35. Staples v. Mullen [Mass.] 81 NE 877.

36. See Former Adjudication, 9 C. L. 1422.

37. Appeal and Review, 9 C. L. 108.

38. That a decree is void. Boynton v. Chicago Mill & Lumber Co. [Ark.] 105 SW 77.

39. Commonwealth v. Walsh [Mass.] 82 NE 19.

40. The supreme court of a state will not overrule a former decision that certain bonds constitute an indebtedness which has been followed and relied on for fifteen years. Chase v. Superior [Wis.] 114 NW 437. The construction of a statute of a state given by its highest court and concurred in for over 20 years will not be overruled unless clearly erroneous. Halsey v. Superior Ct. of San Francisco [Cal.] 91 P 987.

41. Collie v. Franklin County Com'rs, 145 N. C. 170, 59 SE 44.

from those involving substantive rights, each in different cases having been held the more weighty precedent.[42] In regard to the former class of decisions, some cases say that they should be followed without hesitation,[43] and others, that they are in no sense binding.[44] And decisions involving constitutional rights to personal liberty are less controlling than those involving the fixedness of property rights.[45] In Georgia any ruling of the supreme court concurred in by the entire bench can be overruled upon review only by a concurrence of the entire bench.[46] And generally, nothing short of the strongest conviction of fundamental error in the decisions of the highest court of a state will warrant their reversal.[47] Until overturned, judicial decisions are as binding as legislative enactments.[48] But that which controls as a precedent is not so much the particular form of a controversy as the principle involved in it.[49] A decision upholding the validity of a statute as against the objections raised to it is not conclusive of other objections raised in a subsequent action.[50] The construction placed upon a provision of a constitution by the supreme court of its state when such provision is not uncertain or ambiguous, which is contemporaneous with a like construction by the legislature by way of amendment to a statute, will not be set aside out of deference to views expressed by the framers of the constitution made on a proposed amendment to the provision where such views are not necessarily adverse [51]

§ 2. *Decisions and obiter dicta.* See 8 C. L. 1965—The doctrine of stare decisis applies only to questions arising and decided, and the precedent includes only decisions upon questions in issue.[52] Any distinct decision upon such questions can in no sense be regarded as dictum.[53] And where the principles involved in a case were fully discussed in a former decision such discussion will be held to be an expression of opinion upon a point deliberately passed upon, and not obiter dictum, and will control the case at bar.[54] The fact that a case is decided upon two grounds, either of which alone would dispose of the case does not make either decision obiter dictum.[55] But general language in an opinion which goes beyond the question in issue,[56] statements regarding the rights of a party not in court,[57] and all expressions of opinion

42. Form and procedure the more controlling. Ex parte Hollman [S. C.] 60 SE 19. Where a decision relating to one constitutional provision does not involve rights of the citizen, it will not be allowed to obstruct the carrying out of another. Collie v. Franklin County Com'rs, 145 N. C. 170, 59 SE 44.

43. Murphy v. Willow Springs Brew. Co. [Neb.] 115 NW 761.

44. A previous allowance of mandamus to vacate order extending time of appeal from justice's court, the impropriety of which is not suggested, is not such a decision as the court is bound to follow. Cosgrove v. Wayne Circuit Judge, 144 Mich. 682, 13 Det. Leg. N. 311, 108 NW 361.

45. Ex parte Hollman [S. C.] 60 SE 19.

46. Hart v. Atlanta Terminal Co., 128 Ga. 754, 58 SE 452.

47. Ex parte Hollman [S. C.] 60 SE 19.

48. Chandler v. St. Louis, etc., R. Co., 127 Mo. App. 34, 106 SW 553.

49. State v. Southern R. Co., 145 N. C. 495, 59 SE 570.

50. Hall v. Tarver, 128 Ga. 410, 57 SE 720. But where two cases involving practically the same questions are under submission at the same time, considered together and decided the same day, one will be authority for the construction of a statute in the other though the former was decided upon other grounds. Halsey v. Superior Ct. of San Francisco [Cal.] 91 P 987.

51. The construction was that under art. 6, § 5, the legislature might permit or prohibit judicial business on legal holidays. Ex parte Smith [Cal.] 93 P 191.

52. Criticism of a case in an opinion in another not in point does not overturn it. Koerner v. St. Louis Car Co. [Mo.] 107 SW 481.

53. New York Cent., etc., R. Co. v. Price [C. C. A.] 159 F 330; Spratt v. Helena Power Transmission Co. [Mont.] 94 P 631. And the mere failure to carry the decision of a question raised and a disposal of which was necessary into the syllabus of the case as reported does not make it dictum. Isom v. The Low Fare R. Co., 10 Ohio C. C. (N. S.) 89.

54. People v. Read, 233 Ill. 351, 84 NE 214.

55. Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744. The fact that a case, decided on its merits, is also disposed of on technical grounds, is no reason for not giving full force and effect to the judgment. Id.

56. Commonwealth v. Barker, 31 Ky. L. R. 648, 103 SW 303.

57. In adverse proceedings against an applicant for a patent to a mining claim, the decision being based upon the statute regu-

unnecessary to a decision of the case are obiter dictum.[58] Dicta from the United States supreme court is entitled to special consideration,[59] but is not binding upon other courts.[60] It has been held, however, that obiter dicta, not inadvertently made, and upon which the Federal supreme court intends to bind itself, will be unhesitatingly followed by the lower courts.[61] Dicta from the highest state tribunal is also entitled to respectful consideration by the lower courts, but it has not the same weight as an actual decision,[62] and upon that court itself it is in no sense binding.[63]

§ 3. *Rules of property.* See 8 C. L. 1966—Decisions which have become rules of property will not be overruled,[64] particularly when of long standing [65] and recognition,[66] although the present court is not in accord with the reasoning on which such decisions are based,[67] and contractual rights acquired in reliance upon decisions of courts of last resort will be protected,[68] even as to those not strictly parties to the suit.[69] State decisions which have become a rule of property will be followed by Federal courts in cases involving property rights in such state.[70] But, where property rights have not accrued on the faith of previous decisions, there is no impropriety in overruling them if erroneous.[71]

§ 4. *Courts of different jurisdictions. A. Inferior and appellate.* See 8 C. L. 1965

lating this, anything said by the court regarding the rights or forfeiture of an applicant in such proceedings is dictum in a case not based on such proceedings. Nash v. McNamara [Nev.] 93 P 405.

58. Littler v. Dielmann [Tex. Civ. App.] 106 SW 1137; Allen v. Texas & P. R. Co. [Tex.] 18 Tex. Ct. Rep. 231, 101 SW 792; Board of Com'rs of Hartford County v. Tome [C. C. A.] 153 F 81. Expression of the individual view of the judge, who writes the opinion upon a point, unnecessary to decide because excluding by a finding of fact. Huston v. Scott [Okl.] 94 P 512. Even though such opinion relates to a point upon which the case might rest, where it in fact turns upon another. Toher v. Crounse, 57 Misc. 252, 107 NYS 990.

59. Nash v. McNamara [Nev.] 93 P 405.

60. Nash v. McNamara [Nev.] 93 P 405. In a case decided by the Federal supreme court involving only the question as to whether a state statute is invalid as a regulation of intrastate commerce, expressions of opinion that it is also invalid in its regulation of intrastate commerce are obiter dictum and not binding on a state court in its decision of the latter question. Allen v. Texas & P. R. Co. [Tex.] 18 Tex. Ct. Rep. 231, 101 SW 792; Board of Com'rs of Hertford County v. Tome [C. C. A.] 153 F 81. Opinions expressed in a decision of the Federal supreme court on a matter of Federal jurisdiction though not dicta are not authority in a case in a state court involving different issues. Shelby Ice & Fuel Co. v. Southern R. Co. [N. C.] 60 SE 721.

61. That lynching a prisoner by a mob does not deprive him of the privilege of trial by due process of law. United States v. Powell, 151 F 648. Whether it so intended to bind itself can be determined by that court only, and the lower court will solve its doubts on the matter by such decision as permits the speediest appeal consistent with what it deems the rights of the parties. Id.

62. Toher v. Crounse, 57 Misc. 252, 107 NYS 990. Mere criticism by a state supreme court, not amounting to a decision, is not binding upon the lower courts. People v. Ryan [Cal.] 92 P 853.

63. Littler v. Dielmann [Tex. Civ. App.] 106 SW 1137.

64. That, where a contract for public improvement and the resolution of intention and the intermediary intentions of the final award of the contract are based upon specifications that all loss or damage arising from the nature of the work to be done shall be sustained by the contractor, the bonds issued in pursuance of the contract and the property assessments are void. Joyce v. Newmark [Cal. App.] 93 P 1041.

65. Grandjean v. Beyl [Neb.] 114 NW 414.

66. That the boundary formed by the Mississippi river is a line equidistant from its visible, defined and substantially established banks. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

67. Grandjean v. Beyl [Neb.] 114 NW 414.

68. When decisions upholding the validity of a statute authorizing the contract are subsequently overruled, though the doctrine on which this case is based is distinguished from stare decisis. Thomas v. State, 76 Ohio St. 341, 81 NE 437.

69. Where the decision is one affirming the validity of bonds, notes, or bills of a limited amount, the issue of which has been in terms authorized by statute. Vail v. Ter. of Arizona, 28 S. Ct. 107.

70. Whether a deed contains an implied covenant to sustain surface. Kuhn v. Fairmont Coal Co., 152 F 1013.

71. Particularly where, in the former decisions, the court was not aided by argument of counsel. Becker v. Santa Clara County Super. Ct., 151 Cal. 313, 90 P 689. In determining the beneficiaries in a life insurance policy a court of last resort is not bound by its former decision announced after the contract of insurance was made. Diehm v. Northwestern Mut. Life Ins. Co. [Mo. App.] 108 SW 139. The doctrine of lis pendens does not apply in an action to abate a nuisance, and a purchaser is not affected by the judgment therein. Ackerman v. True, 120 App. Div. 172, 105 NYS 12.

A decision by the appellate division of the supreme court of New York is controlling on all lower courts.[72] The St. Louis court of appeals is bound by the decisions of the supreme court of the state rather than by its own previous decisions.[73] Decisions of the supreme court of Oklahoma Territory are not binding on its supreme court after admission to statehood since such court is a successor to the territorial court.[74] The construction of the statutes of a state by its highest court should be followed by its other courts rather than the construction of a Federal court sitting for the same jurisdiction,[75] and generally decisions of the appellate court are conclusive upon the trial court.[76] By the adoption of a decree of the trial court the supreme court does not bind itself to every sentence found therein.[77] So lower Federal courts will follow the direction of the Federal supreme court in regard to the form of its orders, etc.[78] But the lower state courts are not bound by decisions of the highest state court, rendered in cases where the issues raised in the case at bar were not involved,[79] nor is mere criticism by an appellate court of the conduct of trial courts at all controlling as a precedent.[80]

Foreign judgments.—A foreign judgment is conclusive upon the courts of this country in the absence of proof of want of jurisdiction, of fraud, or that the country of the judgment does not give full force and effect to judgments of the courts of the United States.[81]

(§ 4) *B. Federal and state courts. When Federal courts follow state decisions.*See 8 C. L. 1967—Federal courts are not bound to follow the decisions of state courts as to the construction and effect of commercial contracts,[82] nor as to the common law liability of a master for injuries caused by negligence of a fellow-servant.[83] But the decisions of the highest court of a state are controlling as to the meaning and effect of its constitution and statutes,[84] as to the principles of its local law,[85] property

72. That, though a city charter requires a unanimous vote of all members of the council to authorize a street improvement, a unanimous vote of eight members present is sufficient though the whole number is ten. Bussing v. Mt. Vernon, 121 App. Div. 502, 106 NYS 195.

73. Where to follow its former decision would, under the decisions of the supreme court, deprive a party of vested property interests. Diehm v. Northwestern Mut. Life Ins. Co. [Mo. App.] 108 SW 139.

74. Section 18 of the enabling act, and § 17 of the act amendatory thereto, approved March 4, 1907. Frick Co. v. Oats [Okl.] 94 P 682. And though such a decision is in construction of a statute preserved in force upon the admission to statehood, it is not binding under the rule that a state which adopts a statute from another state adopts the construction placed upon it by the courts of the latter, because the statutes of the territory were not adopted by the state but merely preserved in force. Id.

75. The Federal courts themselves should follow such construction. In re Interborough Metropolitan Co., 56 Misc. 128, 106 NYS 416.

76. The facts of a case being substantially the same upon two trials, the law as indicated by the court of appeals in the first trial is the law upon the second trial. Louisville & N. R. Co. v. Molloy's Adm'x [Ky.] 107 SW 217. Where the supreme court of a state has decided a law conferring jurisdiction in certain cases on county courts to be unconstitutional, such a case subsequently instituted must be dismissed. Gower v. Fowler, 1 Ga. App. 814, 57 SE 1054. Where a complaint in a former action between the same parties for the same cause was held good, a complaint, substantially the same in the subsequent action, must be held good as against the same objections as were raised to it in the first suit. Cleveland, etc., R. Co. v. Schneider, 40 Ind. App. 524, 82 NE 538.

77. Powers v. Smith [S. C.] 61 SE 222.

78. Douglas Park Jockey Club v. Grainger, 146 F 414.

79. Where the question whether a certain act was performed by a certain officer, a decision that, if made by him, it is valid is not binding. O'Brien v. New York, 108 NYS 611. Even though in its decision the lower court must either affirm or refute the principle announced by the higher court. Board of Com'rs of Hertford County v. Tome [C. C. A.] 153 F 81.

80. When such conduct was not actually decided to be fatal until after the occurrence of the particular instance complained of. People v. Ryan [Cal.] 91 P 853.

81. Its correctness, either in law or fact, cannot be questioned. Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744.

82. Where the decisions of the state courts are not based on any statute, custom, or usage having the force of local law. Johnson v. Charles D. Norton Co. [C. C. A.] 159 F 361; In re Hopper-Morgan, 154 F 249.

83. Though a statute defining the liability must be followed. Kinnear Mfg. Co. v. Carlisle [C. C. A.] 152 F 933.

84. Even upon the United States supreme court. Northwestern Nat. Life Ins. Co. v.

rights,[86] and the right to enforce certain remedies.[87] Yet state decisions construing local statutes have been accorded great, if not controlling weight,[88] and the supreme court of the United States has defined them as very persuasive.[89] And there are cases in which Federal courts must construe state constitutional provisions independently of state decisions, as where Federal constitutional rights are involved,[90] and, though the decision of a state court is affirmed, in such a case, by the Federal court, it may not be because the latter is bound to do so, but because, by the exercise of its independent judgment, it arrives at the same conclusion.[91] Where a statute has been adopted by one jurisdiction from another Federal courts will follow the construction placed upon it by the former rather than that of the latter,[92] though where such statute has been materially altered by the state of its adoption the converse is true.[93] In the decision of a question which does not involve the construction of a statute, the Federal court is not bound by the state decision,[94] and Federal courts must determine for themselves whether a state law conflicts with the Federal constitution.[95] In the determination of Federal questions by Federal courts, Federal law controls,[96] and state decisions are no more than advisory.[97] A state statute giving a remedy at law

Riggs, 203 U. S. 243, 51 Law. Ed. 168; Buck v. Beach, 206 U. S. 392, 51 Law. Ed. 1106; Board of Education v. Illinois, 203 U. S. 553, 51 Law. Ed. 314; Sauer v. New York, 206 U. S. 536, 51 Law. Ed. 1176. But where the opinion declaring such construction was not concurred in by a majority of the justices, it is not controlling San Jose-Los Gatos Interurban R. Co. v. San Jose R. Co. [C. C. A.] 156 F 455. Unless in conflict with the constitution laws or treaties of the United States. Zeiger v. Pennsylvania R. Co. [C. C. A.] 158 F 809. And whether such construction is founded upon considerations of public policy or upon a construction of the language of the statute is unimportant. Id. Though they may deem such construction narrower than warranted. New York Cent., etc., R. Co. v. Price [C. C. A.] 159 F 330. But when such decisions are not in cosntruction of the particular statute in question they are not controlling. State decisions are nevertheless entitled to high respect as authorities. Lyman v. Hilliard [C. C. A.] 154 F 339. That the indeterminate sentence act of 1903 (P. A. No. 136) was not repealed as to those sentenced under it by the act of 1905 (P. A. No. 184), and that as to them the latter act has no application. Ughbanks v. Armstrong, 28 S. Ct. 372. A rule of state courts that an engrossed act of the Legislature, duly approved, signed and filed, is conclusive evidence of its contents, is one relating to the construction of a state statute and binding on Federal courts. United States v. Andem, 158 F 996. Where the state court has not determined as to the validity of a statute, the Federal courts will decide the question independently. Douglas Park Jockey Club v. Grainger, 146 F 41. Construction by state court is not binding on Federal court where Federal constitutional question is involved. Id.

85. Sauer v. New York, 206 U. S. 536, 51 Law. Ed. 1176. Under Acts Ind. 1901, p. 565, c. 247, § 1, providing that decisions of the appellate court shall be final except where the case is transferred to the supreme court, etc., it is the duty of a Federal court sitting in such state to follow decisions of the appellate court when not plainly in conflict with those of the supreme court. In re Gilligan [C. C. A.] 152 F 605.

86. Defining cloud on title, what may constitute title, etc. Acord v. Western Pocahontas Corp., 156 F 989.

87. Right of party to sue upon contract made by another for his benefit. Bethlehem Iron Co. v. Hoadley, 152 F 735. Will be enforced if appropriate. Douglas Park Jockey Club v. Grainger, 146 F 414.

88. Lewis v. Herrera, 28 S. Ct. 412.

89. Construing the statutes of Arizona not to authorize an alien attachment. Crary v. Dye, 28 S. Ct. 360.

90. That a statute is not unconstitutional. Board of Com'rs of Hertford County v. Tome [C. C. A.] 153 F 81.

91. On a question involving the constitutionality of a statute. Board of Com'rs of Hertford County v. Tome [C. C. A.] 153 F 81. Such a case is where a decision of the state court that a statute is not valid because not passed in the manner provided by the constitution, where the effect of such decision is to impair the obligations of a contract between residents and nonresidents. Id.

92. The United States court of appeals for Indian Territory will follow the decisions of the Arkansas supreme court in the construction of an Arkansas statute made applicable to the territory. Western Inv. Co. v. Davis [Ind. T.] 104 SW 573.

93. Lewis v. Herrera, 28 S. Ct. 412.

94. Whether promoters of a corporation are liable as partners before filing their articles. Western Inv. Co. v. Davis [Ind. T.] 104 SW 573.

95. Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 51 Law. Ed. 168. In that it impairs the obligation of a contract. Omaha Water Co. v. Omaha [C. C. A.] 147 F 1.

96. Kessler v. Armstrong Cork Co. [C. C. A.] 158 F 744; Chandler v. St. Louis, etc., R. Co., 127 Mo. App. 34, 106 SW 553.

97. Northwestern Nat. Life Ins. Co. v. Riggs, 203 U. S. 243, 51 Law. Ed. 168. Whether a state statute authorizing arrest of a judgment debtor in certain cases has been superseded by the Federal bankruptcy law. Johnson v. Crawford, 154 F 761.

does not oust a Federal court of equity jurisdiction,[98] and in actions at law they follow the practice of the state in which they are sitting [99] and when sitting in chancery to determine the validity of wills and administer estates must observe the public policy of the state in which the property in suit is situated and in which the suit is brought.[1] But rules of the United States supreme court in regard to granting equitable relief in Federal courts govern when applicable.[2]

When state courts follow Federal decisions. See 8 C. L. 1968—Where a Federal question is involved, the decisions of the Federal courts thereon are binding upon state courts,[3] and state courts of intermediate appellate jurisdiction must follow such decisions though contrary to the previous law of their state,[4] as must also state courts of last resort, though thereby required to reverse themselves.[5] Decisions of Federal courts involving an interpretation of the Federal constitution,[6] or Federal statutes,[7] or involving a question of interstate commerce,[8] are conclusive on state courts. The ultimate determination of causes arising in Indian Territory lies with the Federal supreme court, and its decisions must be accepted as the highest evidence of the common law of the territory.[9] Decisions of the United States supreme court were controlling on the courts of Indian Territory, and will be followed by the supreme court of Oklahoma in a case tried in Indian Territory before its admission to statehood, but presented to the supreme court thereafter,[10] though such court is of the opinion that such decision is erroneous.[11] But state courts are not bound to follow Federal decisions except as to the Federal questions involved.[12] A decree in the Federal

98. Action for equitable relief where statute gave right to bring ejectment. Acord v. Western Pocahontas Corp., 156 F 989.

99. Acord v. Western Pocahontas Corp., 156 F 989. The Federal statute making laws of the states rules of decisions in Federal courts in trials at common law has no application to criminal offenses against the United States. Rev. St. § 721 (U. S. Comp. St. 1901, p. 581). United States v. Central Vermont R. Co., 157 F 291.

1. Will follow the state statutes of repose. Palmer v. Bradley [C. C. A.] 154 F 311.

2. And facts not essential in the state court may be required for the granting of relief in the Federal court. Venner v. Great Northern R. Co., 153 F 408.

3. As to application and interpretation of the interstate commerce clause in the Federal constitution. State v. Intoxicating Liquors, 102 Me. 385, 67 A 312. Decision that a statute is unconstitutional binding in effect to be given a similar statute by a state court. State v. Great Northern R. Co. [N. D.] 116 NW 89. A decision of the Federal supreme court that a state statute is invalid as to certain parties in that it deprives them of Federal constitutional rights will control the decisions of a state court as to its effect on other parties in the same position. Acts 29th Leg., p. 324, c. 133, imposing penalty on railroads for failure to maintain water closets. State v. Texas, etc., R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 550, 103 SW 653.

4. As to the scope of the full faith and credit clause of the Federal constitution. Drake v. De Silva, 108 NYS 1039.

5. That, as between two assignees, the one who first gives notice to the debtor has priority. Jack v. National Bk. of Wichita, 17 Okl. 430, 89 P 219. As to forfeiture under a land grant. Spokane, etc., R. Co. v. Washington, etc., R. Co. [Wash.] 95 P 64.

6. A decision under the 5th amendment with respect to proceedings in the exercise of the power of taxation under an act of congress, applicable to the District of Columbia, is direct authority under the 14th amendment in proceedings under the laws of New York. In re Water Front on North River in New York, 105 NYS 750.

7. Construing the bankruptcy act. Hamilton v. Smith [Mont.] 92 P 32. Relating to the location of mining claims. Nash v. McNamara [Nev.] 93 P 405.

8. A law requiring the stopping of a through train is a regulation of interstate commerce and void. St. Louis, etc., R. Co. v. State [Ark.] 107 SW 989. Prosecution under Ky. St. 1903, § 257, of a person on whose premises liquor is sold in violation of law, involving an interstate shipment. Louisville & N. R. Co. v. Com., 31 Ky. L. R. 683, 103 SW 349; Shelby Ice & Fuel Co. v. Southern R. Co. [N. C.] 60 SE 721.

9. Missouri, etc., R. Co. v. Wise [Tex.] 109 SW 112. In a cause of action arising in Indian Territory, involving only questions of general law, decisions of the Federal courts are controlling and not those of Arkansas. Liability of master for negligence of a fellow-servant. Chandler v. St. Louis, etc., R. Co., 127 Mo. App. 34, 106 SW 653.

10. Sullivan v. Mercantile Town Mut. Ins. Co. [Okl.] 94 P 676.

11. Admission of parol evidence to show agent's knowledge of the existence of a mortgage on insured property at the time he delivered the policy. Sullivan v. Mercantile Town Mut. Ins. Co. [Okl.] 94 P 676.

12. Not where the question is one of jurisdiction depending upon the interpretation of a state statute. Southern Pac. Co. v. Allen [Tex. Civ. App.] 20 Tex. Ct. Rep. 202, 106 SW 441. Cases in state courts involving the Mississippi river boundary line are not controlled by decisions of the Federal supreme

circuit court sustaining a demurrer to a bill of complaint, if it goes to the merits of the cause, precludes the parties or their privies from instituting the same suit, either at law or in equity, in a state court.[13] The rule that in an action on an injunction bond given and sued in a Federal court, counsel's fees are not recoverable as an element of damage prevails, where the action on such bond is in a state court.[14] Federal courts can not stay proceedings in a state court in the prosecution of its criminals.[15]

(§ 4) *C. Different Federal courts.*See 8 C. L. 1969—Federal courts of one circuit follow the decisions of the court of appeals of another circuit when not in conflict with the decisions of their own appellate tribunal.[16] But an appellate court of one district is not bound by the decision of that of another district given in a distinct and separate case though the subject-matter of the actions is the same.[17] Decisions of the lower Federal courts will be adhered to in the Federal circuit court until and unless corrected on review.[18]

(§ 4) *D. Different state courts.*See 8 C. L. 1969—Courts of one state, in construing the statutes of another, will follow the decisions of the courts of that state,[19] and the construction of a state constitution by its courts is conclusive upon the courts of other states,[20] nor can the judgments of the courts of one state be attacked collaterally in another.[21] The construction of a statute by the supreme court of its state is binding upon the courts of another state which has adopted it,[22] but if the decision is merely declaratory of the common law it is not binding.[23] In construing a statute, the court of one state is not bound by the construction placed upon an identical statute by the court of another state,[24] nor are courts of one state bound by rules of evidence obtaining in another,[25] and where the common law prevails the courts of that jurisdiction are precluded from accepting as governing authority decisions based on the civil law.[26]

Courts of co-ordinate jurisdiction.—Where a local act extends over the territory of two courts of co-ordinate jurisdiction, a decision of one affecting its validity will

court thereon based upon principles of international law and not in construction of treaties defining such boundary line. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

13. Though where the decree is qualified by the clause "without prejudice to any action at law," it is no bar to such an action. Smith v. Cowell [Colo.] 92 P 20.

14. National Soc. of U. S. Daughters of 1812 v. American Surety Co., 56 Misc. 627, 107 NYS 820.

15. Except in cases of peculiar urgency involving Federal questions. State v. Southern R. Co., 145 N. C. 495, 59 SE 570.

16. In re Baird, 154 F 215. Whenever they can form a precedent. Gill v. Austin [C. C. A.] 157 F 234.

17. Though it would be bound in the same suit. Illinois Cent. R. Co. v. Hecker, 129 Ill. App. 375.

18. United States v. Central Vermont R. Co., 157 F 291.

19. As to whether it provides for contractual or penal liability. Where liability accrues under the statute of another state, that statute controls in an action to recover therefor. Klages v. Kohl, 127 Ill. App. 70.

20. Authority of legislature to enlarge remedy by which nonresident stockholders can be reached under art. 10, § 3, Minn. Const. Converse v. Ayer [Mass.] 84 NE 98.

21. Judgment against a corporation by a court of the state of its residence cannot be attacked collaterally in a suit in another state, where the court had jurisdiction and there was no fraud. Converse v. Ayer [Mass.] 84 NE 98.

22. Such decisions in Arkansas were binding on the courts of Indian Territory. Le Bosquet v. Myers [Ind. T.] 103 SW 770.

23. While by act of Congress May 2, 1890, c. 182, § 31, 26 Stat. 94, the statutes of Arkansas were adopted to Indian Territory, and among them the statute which in general terms adopts the common law, decisions of the supreme court of Arkansas declaratory of the common law do not extend to Indian Territory, though the statutes were adopted with the construction placed upon them by the Arkansas courts, since such decisions are not in construction of any statute. Missouri, etc., R. Co. v. Wise [Tex.] 109 SW 112.

24. Such decision extends no further than the state in which it was given. Lynch v. Knoop, 118 La. 611, 43 S 252.

25. Governed by rules established by their own legislature. Malcolm Sav. Bk. v. Cronin [Neb.] 114 NW 158.

26. Relating to dominant and servient tenement. Chicago, etc., R. Co. v. Groves [Okl.] 93 P 755.

be followed by the other, though the latter court is of the unanimous opinion that such decision is erroneous.[27]

STATE LANDS; STATEMENT OF CLAIM; STATEMENT OF FACTS, see latest topical index.

STATES.

§ 1. Boundaries, Jurisdiction, and Sovereignty. 1702.
§ 2. Property, 1702.
§ 3. Contracts, 1703.
§ 4. Officers and Employes, 1703.
§ 5. Fiscal Management, 1703.
§ 6. Claims, 1704.
§ 7. Actions by and Against State, 1704.

Matters common to public bodies in general,[28] the constitutional limitations on the legislative power,[29] the respective powers of the state and Federal governments,[30] and the extent and exercise of the taxing power,[31] are elsewhere treated.

§ 1. *Boundaries, jurisdiction and sovereignty. Boundaries.* See 8 C. L. 1970—Where a navigable river dividing the territory of two states changes its course by accretion and erosion, the state boundaries follow the thread of the river,[32] but boundaries remain unchanged when an avulsion takes place.[33] A navigable stream as a boundary line between two states is construed to be the middle of the bed of the river, a line equidistant from the respective banks.[34] The presumption is in favor of permanency of boundary lines,[35] and long acquiescence and other circumstances will establish a controlling boundary, immaterial of treaties and legislation defining the same.[36]

Jurisdiction and sovereignty. See 8 C. L. 1970—The jurisdiction of a state is supreme within its boundaries [37] and is confined thereto.[38] The retention of jurisdiction over "Indian lands" by the United States upon the admission of a state does not signify the retention of jurisdiction over crimes of a local nature or character.[39]

§ 2. *Property.* See 8 C. L. 1510—In its capacity as a quasi-sovereign, the state has an interest, independent of its citizens' titles, in all the earth and air within its domain.[40] It holds property devoted to a public use in trust for the public,[41] but

27. Supreme courts. Appellate division of New York city. People v. Dayton, 120 App. Div. 814, 105 NYS 809.

28. See Public Lands, 10 C. L. 1296; Public Contracts, 10 C. L. 1285; Officers and Public Employes, 10 C. L. 1044.

29, 30. See Constitutional Law, 9 C. L. 610.

31. See Taxes, 8 C. L. 2058.

32, 33. State v. Muncie Pulp Co. [Tenn.] 104 SW 437; Stockley v. Cissna [Tenn.] 104 SW 792.

34. State v. Muncie Pulp Co. [Tenn.] 104 SW 437. "Channel of the river" and "bed of the river" ordinarily mean the same, and describe the depression on the earth's surface where the waters ordinarily flow. Id. A grant of land bounded by a stream, whether navigable or not, carries with it the bed of stream to center. United States v. Chandler-Dunbar Water Power Co., 28 S. Ct. 679.

35. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

36. Suits by Arkansas and Tennessee against private persons naming "middle of river" established boundary. State v. Muncie Pulp Co. [Tenn.] 104 SW 437.

37. Power of congress over arid lands not superior. Kansas v. Colorado, 206 U. S. 46, 51 Law. Ed. 956.

38. Central R. Co. v. Jersey City, 28 S. Ct. 592. Construing law of Louisiana to govern Mississippi river to state of Mississippi. State v. Leech, 119 La. 522, 44 S 285. In a compact as to boundary waters, "exclusive jurisdiction" was given to New York with property in land, fisheries, etc., in New Jersey. The latter state retained power of taxation. Central R. Co. v. Jersey City, 28 S. Ct. 592.

39. The admission of a state is the creation of an agency which punishes such crimes. Higgins v. Brown [Okl.] 94 P 703. Collating provisions in enabling acts of various states. Id.

40. Copper plant may be enjoined from making sulphurous fumes. Georgia v. Tennessee Copper Co., 206 U. S. 230, 51 Law. Ed. 1038.

41. Tide lands. People v. Kerber [Cal.] 93 P 878. Soil under navigable waters. State v. Muncie Pulp Co. [Tenn.] 104 SW 437; Stockley v. Cissna [Tenn.] 104 SW 792. Beds and shore waters. Kansas v. Colorado, 206 U. S. 46, 51 Law. Ed. 956. May grant bed of a navigable river to private parties, the interest of the public not being lost (United

may become an absolute owner of such property [42] and be subject to the law of private ownership.[43] Upon the admission of a state into the union, concurrent action by the state and the United States is required to make a transfer of records effectual.[44] The state may administer its property through a municipality.[45] Statutes depriving the state of property are not to be construed strictly against the state.[46]

§ 3. *Contracts.* See 8 C. L. 1971—The state may contract through the legislature [47] or an agent.[48] A breach of contract by the state creates a valid cause of action.[49]

§ 4. *Officers and employes.* See 8 C. L. 1971—Public officers are created in the interests of the general public,[50] to be filed in the manner prescribed by the constitution,[51] and no one in possession has a property right to remain therein.[52] The state is not responsible for the misfeasance of its officers.[53] The state has no power to impart to an officer immunity from the supreme Federal authority,[54] and its officers and agents are liable for tort.[55] The examination of the accounts of state officers is to be determined by the legislature,[56] and when a fund is appropriated to defray expenses of an officer of the state, he is limited to that sum [57] and cannot reimburse himself for moneys paid out to meet expenses, beyond such limit.[58]

§ 5. *Fiscal management.* See 8 C. L. 1974—No money can be drawn from a state treasury except under appropriations made by law,[59] for governmental purposes,[60] and constitutional provisions must be observed.[61] So, also, amount, time, and man-

States v. Chandler-Dunbar Water Power Co., 28 S. Ct. 579), but cannot be obtained by adverse possession (People v. Kerber [Cal.] 93 P 878).

42. Public use abandoned. People v. Kerber [Cal.] 93 P 878. Establishment of seawall line has no effect. Id. Where water recedes or land forms in the bed of navigable streams. State v. Muncie Pulp Co. [Tenn.] 104 SW 437. Dry river bed public property of state. Capable of occupation and by Tennessee statute not to be granted. Stockley v. Cissna [Tenn.] 104 SW 792.

43. Statute of limitations. People v. Kerber [Cal.] 93 P 878. Coupon bond of the state a negotiable instrument, and state by its issuance submits itself to laws that govern individuals in that respect. Ehrlich v. Jennings [S. C.] 58 SE 922. Kansas may maintain action for unreasonable use of water in Arkansas river by Colorado, as other riparian owners. Kansas v. Colorado, 206 U. S. 46, 51 Law. Ed. 956.

44. Eberle v. King [Okl.] 93 P 748.

45. Dedication to "people of N. O." complies with constitution, since those who will may become "people of N. O." Saucier v. New Orleans, 119 La. 179, 43 S 999.

46. Construing incorporating act of city of San Diego and former conveyance of alcalde as of no effect. People v. Kerber [Cal.] 93 P 878. Distinction between debts of decedents due individuals and those due the state abolished in Pennsylvania. Koering's Estate, 34 Pa. Super. Ct. 425. Title to funds derived from taxation to defray the cost to the state of the collection and disbursement of money necessary to pay registered municipal bonds is in the state. Whittemore v. People, 227 Ill. 453, 81 NE 427.

47. Contract for purchase of Annotated Statutes, evidenced by "House Roll No. 57," enforcible by mandamus. State v. Junkin [Neb.] 115 NW 546. Employment of an officer by a committee pursuant to act of the legislature and services rendered imply an agreement that state will pay for same. Nussbaum v. State, 119 App. Div. 755, 104 NYS 527.

48. Charitable corporation, with power to erect buildings. Burr v. Massachusetts School for Feeble Minded [Mass.] 83 NE 883.

49. Unenforcible because of state's immunity. Quayle v. State [N. Y.] 84 NE 583.

50. Eckerson v. Des Moines [Iowa] 115 NW 177.

51. Filling of vacancies in state offices by governor only power given for general convenience until elective power acts. In re Railroad Com'r [R. I.] 67 A 802. Appointments "with consent of senate" rigidly construed. Cannot be made by governor alone when senate is in session. Id.

52. Eckerson v. Des Moines [Iowa] 115 NW 177. See Constitutional Law, 9 C. L. 610.

53. Surety of bond of bank selected as state depositary cannot avoid penalty by claim that treasurer deposited larger sum than law provided. State v. Pederson [Wis.] 114 NW 828. State not bound by misrepresentations of one of three prison commissioners as to value of business purchased. Albin Co. v. Com. [Ky.] 108 SW 299.

54. Officer seeking to enforce unconstitutional act is stripped of official character and liable for his own acts. Ex parte Young, 28 S. Ct. 441. Has no authority. Ware Shoals Mfg. Co. v. Jones [S. C.] 58 SE 811. May be restrained by Federal court of equity. Ex parte Young, 28 S. Ct. 441; Hunter v. Wood, 28 S. Ct. 472.

55. Injunction will lie though acts are authorized. Western Union Tel. Co. v. Andrews, 154 F 95.

56. Governor under provisions of law might employ foreign corporation to examine. Haskins v. Kelly [Kan.] 93 P 605.

57, 58. Whittemore v. People, 227 Ill. 453, 81 NE 427.

59. Const. art. 4, § 19, in Nevada. State v. Eggers [Nev.] 91 P 819.

60. People v. Brooklyn Cooperage Co. [N. Y.] 79 NE 866.

61. Act appropriating money for society

ner of payment should be specific and certain,[62] and there is no limit to the discretion of the state in imposing conditions and conferring discretion on its fiscal agent as to disbursements.[63] The imposition of a duty pertaining exclusively to fiscal administration is an executive duty.[64]

§ 6. *Claims.*[See 6 C. L. 1519]—States being immune from actions for claims have generally provided tribunals where claims may be heard.[65] Some claims rest on moral or equitable obligations and may be recognized or refused by the state at its pleasure.[66] Provision for payment is made by the legislature by statute.[67]

§ 7. *Actions by and against state.*[See 6 C. L. 1974]—The state may sue in the supreme court as an individual [68] or in her capacity as quasi-sovereign.[69] In other respects the statutes generally provide for the prosecution of suits,[70] but the use of the name of the state to enforce an unconstitutional act is a proceeding without authority, and does not affect the state in its sovereign capacity.[71] Provision for suits against a state may be made by a statute,[72] but otherwise a sovereign state cannot be sued except by its own consent,[73] and the question is not always determined by the nominal parties on the record.[74] There is some doubt whether the exemption applies

whose object is to stimulate corn crop, unconstitutional. Moore v. Alexander [Ark.] 107 SW 395; Michigan Corn Imp. Ass'n v. Auditor General, 150 Mich. 69, 14 Det. Leg. N. 613, 113 NW 582. Act authorizing university to acquire forest lands at expense of state, and to raise, cut, and sell timber for purpose of obtaining and imparting scientific knowledge concerning forests, does not violate a constitutional prohibition against loan of credit or money of state for private purposes. People v. Brooklyn Cooperage Co. [N. Y.] 79 NE 866.

62. Bill to pay traveling expenses, not stating maximum sum, invalid. State v. Eggers [Nev.] 91 P 819.

63. State v. Murray [S. C.] 60 SE 928.

64. Statute empowering governor to contract for transportation of certain officers. In re Opinion of Justices [N. H.] 68 A 873.

65. Code Civ. Proc. § 264. Nussbaum v. State, 119 App. Div. 755, 104 NYS 527. Const. § 18, art. 4, and Sess. Laws 1905, p. 366, authorized governor, secretary of state and attorney general to act as board of examiners and hear all claims against state. Disallowment of claim for salary within their power. Bragaw v. Gooding [Idaho] 94 P 438.

66. Quayle v. State [N. Y.] 84 NE 583.

67. Warrants issued by auditor and filed by treasurer when no funds. State v. Searle [Neb.] 112 NW 380. Comptroller of New York authorized to audit bills. Quayle v. State [N. Y.] 84 NE 583.

68. Kansas v. Colorado, 206 U. S. 46, 51 Law. Ed. 956. Pecuniary interest not necessary. Id.

69. Original bill in equity for injunction where copper company polluted air in Georgia. Georgia v. Tennessee Copper Co., 206 U. S. 230, 51 Law. Ed. 1038.

70. Statute authorizing state treasurer to sue by private attorney when attorney general refused. State v. Pederson [Wis.] 114 NW 828.

71. Attorney general seeking to enforce unconstitutional rates. Ex parte Young, 28 S. Ct. 441; Ware Shoals Mfg. Co. v. Jones [S. C.] 58 SE 811.

72. Code Civ. Proc. § 1579 provides that state may be party defendant in action for partition of real estate. Haley v. Sheridan, 190 N. Y. 331, 83 NE 296. N. Y. Code Civ. Proc. § 264 provides for hearing private claims accrued within two years. Nussbaum v. State, 119 App. Div. 755, 104 NYS 527. Moneys unpaid upon contract for work within jurisdiction of court of claims. Quayle v. State, 108 NYS 361. Claim subject to defense, counterclaim, etc., by special enabling act, and judgment is binding if state defends. Nussbaum v. State, 119 App. Div. 755, 104 NYS 527.

73. Nussbaum v. State, 119 App. Div. 755, 104 NYS 527. Secured from legislature. McArthur Bros. Co. v. Com. [Mass.] 83 NE 334. Suit by state construed as consent to maintenance of defendant's counterclaim. Commonwealth v. Barker, 31 Ky. L. R. 648, 103 W 303. Right to waive exemption not derived from constitution. Hood v. State [La.] 45 S 733. Consent may be withdrawn or modified at any time. State v. Murray [S. C.] 60 SE 928. Rule of "respondeat superior" does not apply to state. Martin v. State, 120 App. Div. 633, 105 NYS 540.

74. Suit against attorney general and others a suit against state. State v. Southern R. Co., 145 N. C. 495, 59 SE 570. Suit against governor is one against state and prohibited. Central of Georgia R. Co. v. McLendon, 157 F 961. Suit against attorney general not against state. Ex parte Young, 28 S. Ct. 441. Allegations in bill against dairy and food commission does not show suit against state. Scully v. Bird, 28 S. Ct. 597. State is real party in interest when the relief sought insures to it alone or when action will deprive state of its funds or property. Western Union Tel. Co. v. Andrews, 154 F 95. Public corporation acting as agent for state and holding property in such capacity cannot be sued, it being manifest that state is the real party. Hopkins v. Clemson Agricultural College, 77 S. C. 12, 57 SE 551. Voluntary assumption of defense does not make it the real party. Western Union Tel. Co. v. Andrews, 154 F 95. In an action against an executive board administering public works of the state, where the relief asked is to compel the said board to change the character of public works as es-

to colleges.[75] The statute of limitations does not apply to a state,[76] but this privilege may also be waived.[77] An action to prevent the enforcement of an unreasonable and confiscating tariff against the administrative agents of the state is not one against the state when the act is void as to plaintiffs,[78] but the rule is otherwise when the proceeding is against officers of a state merely to test the constitutionality of a statute in the enforcement of which the officers act only as attorneys for the state by formal judicial proceedings.[79] The question of jurisdiction should be raised by demurrer.[80]

STATUTES.

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C. Aids to Interpretation, 1718.
D. Words, Punctuation, and Grammar, 1720.
E. Exceptions, Provisos, Conditions, and Saving Clauses, 1720.
F. Mandatory or Directory Acts, 1721.
G. Strict or Liberal Constructions, 1721.
H. Partial Invalidity, 1722.
§ 6. Retrospective Effect, 1723. Curative Acts, 1724.
§ 7. Repeal, 1724.
A. In General, 1724.
B. Implied Repeal, 1725.

The scope of this topic is noted below.[81]

§ 1. *Enactment.*[See 8 C. L. 1977]—An act does not become effective until approved by the executive[82] or the expiration of the time within which the veto power must be exercised,[83] and in some states its effectiveness is postponed for a specified time thereafter.[84] Approval by the acting governor precludes subsequent veto by the governor.[85] The veto power is not an inherent right of the executive and can be exer-

tablished by them and their predecessors in the exercise of their official discretion as necessary and proper for officially accomplishing the objects for which said works were constructed, the state is the real party in interest, and the action cannot be maintained without the consent of the state. Ley v. Kirtley, 6 Ohio N. P. (N. S.) 529.

75. Public corporation and exempt. Hopkins v. Clemson Agricultural College, 77 S. C. 12, 67 SE 551. Medical college of Georgia designated part of University of Georgia by statute. State had no control and might withdraw bounty. Held, private corporation. Medical College of Georgia v. Rushing, 1 Ga. App. 468, 57 SE 1083.

76. People v. Kerber [Cal.] 93 P 873. The statute of limitations cannot operate against a state to prevent forfeiture of land titles for nonentry for taxation. Lewis v. Yates [W. Va.] 69 SE 1073.

77. By statute. State v. Chicago, etc., R. Co. [Wis.] 112 NW 515.

78. Western Union Tel. Co. v. Andrews, 154 F 95; Louisville & N. R. Co. v. Railroad Commission, 157 F 944.

79. Attempt to enjoin attorneys of Arkansas from instituting suits for penalties. Western Union Tel. Co. v. Andrews, 154 F 95. Suit to enjoin prosecuting officers of state from instituting criminal proceedings. Logan v. Postal Tel. & Cable Co., 157 F 570.

80. Scully v. Bird, 28 S. Ct. 597.

81. **It includes** the general rules as to the enactment, amendment, interpretation and repeal of statutes, and the rules as to special or local legislation subjects and titles. **It excludes** constitutional limitations generally (see Constitutional Law, 9 C. L. 610) and the interpretation of particular statutes (see topic dealing with subject to which statute relates).

82. "Immediately on becoming a law" means when signed by governor. Parker v. Evening News Pub. Co [Fla.] 44 S 718. The time specified within which a governor shall sign a bill or veto it is a matter of privilege and may be waived by him, and he may validly sign a bill at any time within the period allowed. Powell v. Hayes, 83 Ark. 448, 104 SW 177.

83. Atlantic Coast Line R. Co. v. Mallard, 63 Fla. 515, 43 S 755. Const. Mont. art. 7, § 12. Evers v. Hudson [Mont.] 92 P 462.

84. Ninety days after passage unless an emergency is shown. State v. Pacific Exp. Co. [Neb.] 115 NW 619. Const. Tex. art. 3, § 39. Ninety days after adjournment of session of enacting legislature. Missouri, etc., R. Co. v. State [Tex.] 17 Tex. Ct. Rep. 936, 100 SW 766.

85. Powell v. Hayes, 83 Ark. 448, 104 SW 177.

cised only when sanctioned by a constitutional provision.[86] A bill must be adopted by a majority vote.[87] Amendments in one house must be concurred in by the other.[88]

The motive of the legislature in enacting a law does not affect its validity.[89]

Special sessions.[See 8 C. L. 1977]

The journals.[See 8 C. L. 1977]—Courts do not take judicial notice of the contents of the journals of the general assembly.[90] The journals are usually required to show the legislative history of the act,[91] but an enrolled bill will not be invalidated for deficiency of general entries as to its passage.[92] A slight variance between an enrolled bill and an original bill due to mere clerical error may be ignored.[93]

Submission to popular vote.[See 8 C. L. 1978]—An act adopted by the people after submission to popular vote does not need executive sanction.[94]

Presumptions and evidence as to passage.[See 8 C. L. 1978]—All constitutional requirements as to the passage of an act are presumed to have been complied with [95] unless the journal shows the contrary,[96] and the burden is upon one asserting contrary contentions [97] to establish the same by competent proof.[98] The legislative records import absolute verity as to matters relating to enactment.[99]

Publication [See 8 C. L. 1979] is in many states prerequisite to effectiveness.[1]

§ 2. *Special or local laws. In general.*[See 8 C. L. 1979]—Special legislation is prohibited by the constitutions of many states,[2] but this does not render a general law local in application,[3] or which was occasioned by a particular contingency,[4] unconstitutional unless intended to be limited to such single application or contingency. A statute which applies to all persons or things of the same class is general,[5]

86. State v. Kline [Or.] 93 P 237.

87. A bill becomes a law when on a tie vote the presiding officer casts the final "aye." Kelley v. Secretary of State, 149 Mich. 343, 14 Det. Leg. N. 351, 112 NW 978.

88. Moore v. Neece [Neb.] 114 NW 767.

89. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. And see Constitutional Law, 9 C. L. 614.

90. Erford v. Peoria, 229 Ill. 546, 82 NE 374.

91. Notice to allow a special law to be passed. Ex parte Kelly [Ala.] 45 S 290. Yeas and nays. School Dist. No 11 v. Chapman [C. C. A.] 152 F 887; Rio Grande Sampling Co. v. Catlin [Colo.] 94 P 323. Three readings. School Dist. No. 11 v. Chapman [C. C. A.] 152 F 887. Captions and titles need not be given in full in journals. State v. Swiggart, 118 Tenn. 556, 102 SW 75. Where name was wrong through clerical error made by record clerk of house, held it did not invalidate law providing for three readings where outside of record it was clear bill had three readings. Lumberton Imp. Co. v. Robeson County Com'rs [N. C.] 59 SE 1014.

92. Stratton v. State [Neb.] 112 NW 361; School Dist. No. 11 v. Chapman [C. C. A.] 152 F 887.

93. Where word "thousand" in brackets was left out through clerical error. Board of Control of Michigan State Prison v. Auditor General, 149 Mich. 386, 14 Det. Leg. N. 467, 112 NW 1017.

94. State v. Kline [Or.] 93 P 237.

95. Cox v. Mignery [Mo. App.] 105 SW 675; Cox v. Pitt County Com'rs [N. C.] 60 SE 516; State v. Burr [N. D.] 113 NW 705; State v. Swiggart, 118 Tenn. 556, 102 SW 75. It is presumed that the law as certified to by the secretary of state is in the same form that it was when passed by the legislature. Erford v. Peoria, 229 Ill. 546, 82 NE 374.

96. Lee v. Tucker [Ga.] 60 SE 164.

97. Erford v. Peoria, 229 Ill. 546, 82 NE 374.

98. The contrary can only be shown by strong evidence, usually in the form of the records of passage in the journal with its defects. Cox v. Mignery [Mo. App.] 105 SW 675. An entry in a record book by governor or his assistante showing presentation of bill on certain day held evidence competent and sufficient to prove presentation. Wrede v. Richardson, 77 Ohio St. 182, 82 NE 1072.

99. Wrede v. Richardson, 5 Ohio N. P. (N. S.) 127.

1. Wrede v. Richardson, 77 Ohio St. 182, 82 NE 1072.

2. Held prohibited. Erford v. Peoria, 229 Ill. 546, 82 NE 374. General provision of constitution with reference to special and local legislation is addressed to judgment and discretion of legislature (People v. Chicago Election Com'rs, 221 Ill. 9, 77 NE 321), but inhibition as to the cases enumerated therein is mandatory (Id.). Local and special laws having the effect of regulating county or township affairs are void. Id.

3. Stanton v. Essex County Sup'rs [N. Y.] 84 NE 380.

4. Act general in form relating to persons, places or things as a class, is not special though enacted to aid in administering of a particular charitable trust. St. John v. Andrews Inst. for Girls [N. Y.] 83 NE 981.

5. Laws applicable to cities, villages and towns are general though they exclude all other municipal corporations. Erford v. Peoria, 229 Ill. 546, 82 NE 374. A law which, within the sphere of its operation, affects

but one which embraces only particular persons or things of a class is special.[6] The character of a law will be determined from its substance and effect rather than from the language used.[7] In some states, however, a special law may be passed relating to

all persons similarly situated is not class legislation. Wilson v. Edwards, 32 Pa. Super. Ct. 295. Law is none the less general by reason of special legislation previously passed which may restrict its operation in certain instances. Sheraden Borough, 34 Pa. Super. Ct. 639. The rule that a statute should not be held inoperative merely because every conceivable class to which it relates is not specifically mentioned renders good against demurrer an indictment charging a wrongful conversion by a trustee of an Odd Fellows Lodge, where drawn under § 6842 as it stood prior to the amendment of 1902. State v. Bell, 6 Ohio N. P. (N. S.) 475.

6. People v. Earl [Colo.] 94 P 294; Manowsky v. Stephan, 233 Ill. 409, 84 NE 365; Wallis v. Williams [Tex.] 20 Tex. Ct. Rep. 606, 108 SW 153.

7. People v. Chicago Election Com'rs, 221 Ill. 9, 77 NE 321.

Void as special legislation: Act Feb. 21, 1899; Acts 1893, p. 73, c. 53, § 5589a; Burns' Ann. St. 1901, relating to **erection of court houses** in certain counties. Macy v. Miami County Com'rs [Ind.] 83 NE 718. Act of April 13, 1900 (94 Ohio Laws, p. 137), relating to rights of litigants in courts on **appeal from certain circuits** in partition cases. Wallace v. Leiter, 76 Ohio St. 185, 81 NE 187. Acts 1905, p. 158, relating to **jurisdiction of municipal courts** in certain limited contract cases. Chudnovski v. Eckels, 232 Ill. 312, 83 NE 846. P. L. 1904, p. 201, N. J., relating to **taxation of building and loan associations** in Monmouth County. Hartshorne v. Avon-by-the-Sea [N. J. Law] 67 A 935. Act N. J. 1906, § 5 (P. L. 1906, pp. 199-205), relating to **methods of appointments** in cities where excise boards are appointed. Decker v. Daudt [N. J. Err. & App.] 67 A 375. Act March 25, 1904 (P. L. p. 94), providing for **election of mayors** in towns of 10,000 or over. State v. Riordan [N. J. Law] 69 A 495.

Not void as special legislation: Act March 28, 1905, **invalidating bulk stock sales** without notice to creditors. Wilson v. Edwards, 32 Pa. Super. Ct. 295. P. L. 1896, p. 53, N. J. **Sale of liquor** within one mile of any land controlled by an incorporated camp meeting association for religious worship not special as regulating internal affairs of cities. Sexton v. Excise Com'rs of Asbury Park [N. J. Law] 69 A 470. Local Laws 1907, p. 981, No. 684, creating **juvenile court** exempting certain children. Robison v. Wayne Circuit Judges [Mich.] 14 Det. Leg. N. 945, 115 NW 682. Act March 6, 1903, P. L. 18, regulating **care of paupers,** is not local and class legislation by reason of fact that in certain counties it is inoperative by reason of previous special legislation accomplishing same end. Pulaski Tp. Poor Dist. v. Lawrence County, 34 Pa. Super. Ct. 602. Sess. Laws 1905, p. 500, c. 105, § 1, giving **trackage and switch rights** to patrons at intersections with other lines. State v. Missouri Pac. R. Co. [Neb.] 115 NW 614. Laws 1895, p. 349, c. 165, imposing **treble damages** for timber removed from state lands. State v. Shevlin-Carpenter Co., 102 Minn 470, 113 NW 634. Act 1906, p. 115, c. 22, art. 3, § 1, relating to **taxation,** held not special legislation even if it does not apply to every county of state. Eastern Kentucky Coal Lands Corp. v. Com. [Ky.] 106 SW 260. Laws 1905, p. 57, c. 94, providing for **board of supervisors** in counties having 250,000 or more population. State v. Groth [Wis.] 112 NW 431. Act Nov. 22, 1905 (Laws 1905, p. 410), providing for **improvement of roads at expense of lands benefited** thereby on petition of a majority of landowners. St. Benedict's Abbey v. Marion County [Or.] 93 P 231. Act Feb. 28, 1907, and Act Aug. 8, 1907, providing for **holding court** under certain circumstances. Ex parte Kelly [Ala.] 45 S 290. Act May 10, 1907 (Laws 1907, p. 257), prohibiting **dram shop** within 5 miles of educational institution, which has 1,500 or more students, there being only one school. State v. Turner [Mo.] 107 SW 1064. Act of Aug. 15, 1903 (Acts 1903, p. 90), making it illegal to **obtain money** with intent to defraud. Vance v. State, 128 Ga. 661, 57 SE 889. Where law giving **vote** to all who had resided 90 days in territory held operated uniformly and was not class legislation, but proper classification of voters. Wheeler v. Herbert [Cal.] 92 P 353. Provision that legislature may by general legislation **create new counties** does not prevent local or special acts being passed to change county boundaries. Id. May also provide means of having boundaries changed. Id. St. Ex. Sess. 1906, p. 78, c. 59, providing for system of procedure in **establishing title to property where records are destroyed,** does not provide for two classes of property holders, hence is not invalid as class legislation. Lofstad v. Murasky [Cal.] 91 P 1008. Act March 17, 1897 (St. 1897, p. 138, c. 110), prescribing proceeding in rem to **establish land titles** and for registration thereof. Robinson v. Kerrigan, 151 Cal. 40, 90 P 129. Acts 1900, p. 173, c. 134, attempting to **amend a city charter.** Monette v. State [Miss.] 44 S 989. Act March 6, 1907 (St. 1907, p. 122, c. 101), relating to **wasting of water** of artesian wells. Ex parte Elam [Cal. App.] 91 P 811, 25 Stat. p. 731, extending **boundaries of school district.** State v. McCaw, 77 S. C. 351, 58 SE 145. Act March 4, 1907 (St. 1907, p. 104, c 80), **limiting its application to bonds sold after passage** and for not less than par, is not special. City of Redlands v. Brook, 151 Cal. 474, 91 P 150. Burns' Ann. St. 1901, § 5173, authorizing cities not working under a special charter to **require railroads to light street crossings,** held not violative of Const. art. 11, § 13, prohibiting creation of corporations by special act. Pittsburgh, etc., R. Co. v. Hartford City [Ind.] 82 NE 787. Act March 6, 1905 (Acts 1905, p. 370, c. 129, city and towns act), § 207, providing **special compensation for certain officers** of certain counties. Truelove v. Washington [Ind.] 82 NE 530. Laws 1905, p. 227, c. 213, **creating special school district** for Indian children. State v. Wolf, 145 N. C. 440, 59 SE 40. Act April 18, 1904

matters not covered by any general law [8] upon due notice [9] being given.[10] In some states, special legislation of a particular character is prohibited, as the creation of corporations,[11] laws for the conduct of elections,[12] etc. Again, special laws relating to special matters are sometimes expressly allowed.[13] Laws of a general nature [14] must have a uniform operation in some states.[15] In Arizona, however, special statutes may be passed, and these are held to control a general statute on the same subject.[16]

Classification. See 8 C. L. 1980—A classification must be based upon substantial differences in situation and need.[17] A classification which excludes even one proper member from its class is, with rare exceptions, held unconstitutional.[18]

(97 Ohio Laws, p. 111, as amended by 98 Ohio Laws p. 53), **creating a court house building commission** in a certain county. Mackenzie v. State, 76 Ohio St. 369, 81 NE 638. Acts 1907, p. 7, c. 5, Ind., **establishing superior courts** in designated counties. Board of Com'rs v. Albright, 168 Ind. 564, 81 NE 578. Supplement to act to **authorize formation of gaslight corporations** and to regulate same approved March 1879 (P. L. 1879). Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co. [N. J. Law] 67 A 1005. Act May 23, 1889, Pa. (P. L. 277, art. 12, § 2), allowing cities of third class having water works to **create a department of water** where act excluded the city of Erie. Commonwealth v. Heller [Pa.] 67 A 925. P. L. N. J. 1893, p. 302; Gen. St. p. 3235, § 120, conferring right to traction companies to **operate cars on existing trackage** on streets. Jersey City v. North Jersey St. R. Co. [N. J. Err. & App.] 67 A 113. Sections 38, 39, P. L. 1903, p. 17, conferring power on **municipal school boards** to condemn lands. Wendel v. Hoboken Board of Education [N. J. Law] 66 A 1075.

8. Forman v. Hair [Ala.] 43 S 827; Miller v. Wicomico County Com'rs [Md.] 69 A 118. Law establishing city court had provisions relating to hire of convicts and payment for their services. Held special legislation and as contravening a general law relating to convicts. Binns v. Ficklen [Ga.] 60 SE 1051. Sunday barber law invalid as special, covered by general Sabbath breaking law. Armstrong v. State [Ind.] 84 NE 3.

9. What notice must contain. Ex parte Kelly [Ala.] 45 S. 290. Notice held sufficient. Ex parte O'Neal [Ala.] 45 S. 712. Law held invalid, establishing police commission in certain sized cities, because of failure to give proper notice. State v. Weakley [Ala.] 45 S 175. Unnecessary signatures do not invalidate notice. Ex parte Kelly [Ala.] 45 S 290.

10. By express provision of Const. art. 7, § 3, as amended, independent school districts may be created by special law without notice. Snyder v. Baird Independent School Dist. [Tex. Civ. App.] 109 SW 472. Where no notice was given, held not void where voters voted to request passage of act and there was otherwise no necessity for its publication. Forman v. Hair [Ala.] 43 S 827. Journals of legislature conclusive as to proper notice given for a special law. Ex parte Kelly [Ala.] 45 S 290.

11. Const. Ind. art. 11, § 13, Burns' Ann. St. 1901, § 5113, empowering certain city councils to adopt certain regulatory measures, held not to come under provision. Pittsburgh, etc., R. Co. v. Hartford City [Ind.] 82 NE 787. Acts 1832, p. 144, c. 138, as amended by Acts 1873, p. 162, c. 65, held violation of provision. Marion Trust Co. v. Bennett [Ind.] 82 NE 782. Acts 1873, p. 162, c. 65, authorizing particular insurance company to increase capital stock by vote of stockholders, held to violate Const. art. 11, § 13. Id. Act incorporating a city as municipal corporation held invalid as violating statute providing that no "corporation" shall be chartered by special acts. Farrell v. Port of Columbia [Or.] 91 P 546.

12. Registration acts, Laws 1905, p. 188, c. 100, as amended by Laws 1907, p. 321, c. 147, held not within Const. art. 5, § 25, subd. 15. People v. Earl [Colo.] 94 P 294.

13. Ellis county road law held valid under art. 8, § 9, as amended in 1890, authorizing local laws for maintenance of public highways. Young v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 130, 102 SW 117. Acts 1901, p. 189, creating city court of Vienna and conferring jurisdiction, held within exception. McDonald v. Vaughn [Ga.] 60 SE 1060.

14. A law which effects jurisdictions of courts is of general nature and must operate uniformly. Wallace v. Leiter, 76 Ohio St. 185, 81 NE 187.

15. Act March 6, 1907 (St. 1907, p. 122, c. 101), relating to wasting of water from artesian wells, held not violative of Const. art. 1, § 11. Ex parte Elam [Cal. App.] 91 P 811.

16. Crowell v. Davenport [Ariz.] 94 P 1114.

17. Hayes v. Walker [Fla.] 44 S 747. Occupation tax on "all persons owning or controlling pipe lines" held valid. Texas Co. v. Stephens [Tex.] 18 Tex. Ct. Rep. 775, 103 SW 481. Where it relates to persons, places and things as a class, though it is primarily created only to aid in the incorporation of a corporation to administer a certain trust, held valid. St. John v. Andrews Inst. for Girls [N. Y.] 83 NE 981. Statute providing for different rights of suffrage in different localities is void. People v. Election Com'rs of Chicago, 221 Ill. 9, 77 NE 321. A law which benefits a class possessing some disability attribute or qualification, or being in some condition marking them as proper objects in whom to vest the specific right granted, is valid. Jones v. Chicago, etc., R. Co. 231 Ill. 302, 83 NE 215.

18. Act May 23, 1889, P. L. 277, art. 12, § 2 (Pa.), allowing cities of third class owning water works to create department of water, held not special because it excluded one city (Erie), because by statute existing exceptions are not immediately abolished. Commonwealth v. Heller [Pa.] 67 A 925.

Based on population. See 8 C. L. 1980—The classification of cities by population, if based upon a rational difference of conditions, is valid [19] provided the act relates to matters incident to the population,[20] but if clearly designed to apply to but a single city, a pretense of classification will not save the act.[21]

Other classifications See 8 C. L. 1981 have been made and are sustained or not according as they are fair and rational.[22]

Local option laws. See 8 C. L. 1981—Local option laws are usually held valid.[23]

County and township affairs See 8 C. L. 1981 frequently fall within general prohibitions,[24] and, in addition, constitutions often forbid special legislation to apply to one township or county only.[25]

Municipalities. See 9 C. L. 1981—Special acts conferring special powers on municipalities,[26] regulating internal affairs of towns and cities,[27] chartering cities,[28] or amending city charters,[29] are usually prohibited; but such an inhibition is usually held not to apply to school districts.[30]

Taxation See 9 C. L. 1982 must be by general law [31] except where classification is proper.[32]

Courts See 8 C. L. 1992 may sometimes be created by special act.[33]

Special privileges See 8 C. L. 1992 cannot be granted to a person or class.[34]

19. Act April 3, 1903, P. L. 136 (Pa.), relating to counties of over 500,000 and under 1,000,000 population. Yoho v. Allegheny County, 218 Pa. 401, 67 A 648. Local Improvement Act, § 94 (Hurd's Rev. St. 1904, c. 24, § 600), providing for additional assessment in cities, towns and villages of less than 100,000 inhabitants to defray cost of levy and collection, is valid. Northwestern University v. Wilmette, 230 Ill. 80, 82 NE 615. Act April 3, 1903, P. L. 136 (Pa.), allowing commissioners in counties having population of over 500,000 and under 1,000,000 to erect memorial halls, held valid. Yoho v. Allegheny County, 218 Pa. 401, 67 A 648.

20. P. L. p. 394 (N. J.), leasing of wharves not incident to population. Oliver v. Burlington [N. J. Law] 67 A 43.

21. Acts 1907, p. 402, to establish police commissions in cities of certain population, evident clearly that law was applicable to but one city, held invalid. State v. Weakley [Ala.] 45 S 175.

22. Section 5, Act of 1906, P. L. 1906, pp. 199-205, (N. J.), relating to appointive officers in cities where excise boards are appointive, invalid. Decker v. Daudt [N. J. Err. & App.] 67 A 375.

23. Local option law. Ex parte Dupree [Tex.] 19 Tex. Ct. Rep. 851, 105 SW 493. Local option law not special. Baxter v. State [Or.] 88 P 677; Eckerson v. Des Moines [Iowa] 115 NW 177.

24. See ante, this section.

25. P. L. 1904, p. 201 (N. J.), relating to taxation of building and loan associations in Monmouth county. Hartshorne v. Avon-by-the-Sea [N. J. Law] 67 A 935.

26. Sections 38, 39, P. L. 1903, p. 17 (N. J.), conferring power on municipal school board to condemn lands. Wendel v. Hoboken Board of Education [N. J. Law] 66 A 1075.

27. "An act concerning the government of cities of the first class relating to powers of certain courts. McCarthy v. Queen [N. J. Law] 69 A 30. Legislation dividing paupers into two classes, those who have and those who have not settlement within the state, is not invalid as class legislation. Pulaski Tp. Poor Dist. v. Lawrence County, 34 Pa. Super. Ct. 602.

28. Special charters to cities invalid. People v. Earl [Colo.] 94 P 294.

29. Monette v. State [Miss.] 44 S 989. Does not apply to cases where act merely allows bond issues to take up expiring bond issues, and does not in any way alter charter. Buist v. Charleston City Council, 77 S. C. 260, 57 SE 862.

30. Only to private and quasi public corporations. State v. McCaw, 77 S. C. 351, 58 SE 145. Authorizing high schools in San Francisco. Board of Education of San Francisco v. Hyatt [Cal.] 93 P 117. Empowering city of Memphis to establish and maintain public schools. Malone v. Williams [Tenn.] 103 SW 798.

31. Special date for delinquency of special taxes in certain city held class legislation. Malone v. Williams [Tenn.] 103 SW 798. Act providing for collection of delinquent taxes and striking of all taxes due prior to 1888 not special. Territory v. Gaines [Ariz.] 93 P 281.

32. Railroad and canal property comes under one class because of its similar, general use. United New Jersey R. & Canal Co. v. Parker [N. J. Err. & App.] 69 A 239. Act 1884 (P. L. p. 142), taxing canal and railroad property, as amended by P. L. pp. 121-220, not in violation of statute granting equal protection of laws. United New Jersey R. & Canal Co. v. Baird [N. J. Err. & App.] 69 A 472.

33. Ex parte O'Neal [Ala.] 45 S. 712. Acts 1907, p. 7, c. 5, Ind. Board of Com'rs of Elkhart County v. Albright, 168 Ind. 564 81 NE 578.

34. P. L. 1879, p. 316, Gen. St. p. 1613, § 30, authorizing formation of gaslight corporations, is not exceeding of legislative power as to special privileges, as it tended to prevent creation of a monopoly. Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co. [N. J. Law] 67 A 1005. Restricted to car lines whose tracks run outside of the limits

Police power.[See 8 C. L. 1932]

§ 3. *Subjects and titles. In general.*[See 8 C. L. 1932]—Some states provide for the method or style or language in general to be used in titles to acts.[35] Constitutions usually provide that a law shall embrace but one subject, which must be expressed in its title,[36] but such provisions should be liberally construed to effectuate

of a single city. Held valid. State v. Taylor [Tenn.] 104 SW 242. Lien law, allowing attorney's fees as costs to lienholders, held class legislation. Manowsky v. Stephan, 233 Ill. 409, 84 NE 365.

35. All to begin "Be it enacted by the general assembly of the state of Tennessee." State v. Burrow [Tenn.] 104 SW 526.

36. Rouse v. Thompson, 228 Ill. 522, 81 NE 1109; Jeffers v. Annapolis [Md.] 68 A 361. This provision is designed to prevent fraudulent legislation and to fairly apprise the people of the purpose of the legislation. Rouse v. Thompson, 228 Ill. 522, 81 NE 1109. Things necessary to the accomplishment of the purpose of an act are properly included as a part thereof. Commonwealth v. Immel, 33 Pa. Super. Ct. 388. Title of Laws 1887, p. 242, c. 165, held broad enough to include provision to authorize taxing of **attorney's fees as costs.** Ex parte Ellis [Kan.] 91 P 81. Laws 1903, p. 30, **defining "estrays"** and providing penalty for taking them up, void as having more than one subject. State v. Cunningham, 35 Mont. 547, 90 P 755.

Held valid: Sess. Laws 1903, p. 309, c. 138, **regulating hours of employment** of women and children. Burcher v. People [Colo.] 93 P 14. Acts 1903, pp. 92, 94, c. 36, **conferring power of eminent domain** on street and interurban railways, held sufficient as to title. Mull v. Indianapolis & C. Trac. Co. [Ind.] 81 NE 657.

Hunting and fishing and the regulation thereof are to be regarded as a single subject for statutory regulation within the purview of the constitution. Commonwealth v. Rothermel, 27 Pa. Super. Ct. 648. Act of 1903 (24 Stat. p. 81), regulating manner in which **common carriers** shall adjust freight rates and freight losses and damage claims, held not plural subject. McTeer v. Southern Exp. Co. [S. C.] 58 SE 930. "Act June 7, 1901 (P. L. 514), amending prior acts relating to **street railway companies,"** sufficiently covers a provision in the Act of March 23, 1886 (P. L. 299), prohibiting laying of tracks on Broad street, Philadelphia. Commonwealth v. Broad Street Rapid Transit St. R. Co. [Pa.] 67 A 958. Act classifying an **action for annulment of marriage** with an action for divorce not invalid for embracing more than one subject in title. Piper v. Piper, 46 Wash. 671, 91 P 189. Laws 1900, p. 453, c. 307, Md., **conferring additional powers on railway company** and changing its name. Jeffers v. Annapolis [Md.] 68 A 361.

Property rights: Sess. Laws 1903, p. 311, c. 139, expressed as "an act concerning land titles," held sufficiently clear to embrace registration under Torrens System. People v. Crissman [Colo.] 92 P 949. Act March 17, 1897, Cal. (St. 1897, p. 138, c. 110), relating to proceedings to register lands through courts. Robinson v. Kerrigan, 151 Cal. 40, 90 P 129. Laws 1855, p. 854, c. 475, act to widen and extend an avenue and to ratify agreement with railway and cession of rights between railway and city, held embraced in one subject. Leffmann v. Long Island R. Co., 120 App. Div. 528, 105 NYS 487. Acts 1905, p. 521, c. 167, Ind., entitled "An act concerning highways," is broad enough to cover a provision authorizing road to secure highway rights. South East, etc., R. Co. v. Evansville, etc., R. Co. [Ind.] 82 NE 765. Gen. Laws 1903, p. 305, act relating to **registration of deeds,** held to violate rule of one subject in single act which provides certain deeds can be filed at end of a year and others at end of two years. Carpenter v. Joiner [Ala.] 44 S. 424.

Governmental and judicial: Laws 1900, p. 457, c. 307, § 10, Md., **delegating franchise powers to counties.** Jeffers v. Annapolis [Md.] 68 A 553. Laws 1903, p. 71, c. 86, **fixing salaries of judges,** title clearly expressed and not double subject of title. Marioneaux v. Cutler [Utah] 91 P 355. St. 1907, p. 260, **c. 214,** changing **boundary lines of counties.** Wheeler v. Herbert [Cal.] 92 P 353. Title to c. 93, p. 214, Laws 1871, embraces penalties clause **establishing insurance department** and providing for regulation of insurance companies. Harrod v. Latham Mercantile & Commercial Co. [Kan.] 95 P 11. Laws 1907, p. 352, c. 160, relating to change of office of **county surveyor,** powers and duties, etc., embraces fixing of salary. State v. Pierce County Com'rs [Wash.] 93 P 920. Laws 1905, p. 188, c. 100, and Laws 1907, p. 321, c. 147, concerning **election in all counties and municipalites,** held to authorize appointment of registration committees. People v. Earl [Colo.] 94 P 294. Local Acts 1903, p. 141, No. 326, entitled "An act to provide for the selection of candidates for election by popular vote," embraces regulation of primaries. Dykstra v. Holden [Mich.] 14 Det. Leg. N. 942, 115 NW 74. Acts 1901, p. 369, c. 173, establishing a board of children's guardians in each county, embraces powers to care for children and provide suitable maintenance. Egoff v. Madison County Children's Guardians [Ind.] 84 NE 151. Chapter 141, p. 241, Laws 1897, Kan., relating to **public buildings** in counties. State v. Butler County Com'rs [Kan.] 94 P 1004. Act April 3, 1903, P. L. 136, amending Act May 22, 1905, authorizing erection of memorial halls in certain cities and counties. Yoho v. Allegheny County, 218 Pa. 401, 67 A 648. Laws 1907, p. 27, c. 34, authorizing cities having population of 50,000 to erect city hall, etc., broad enough to include levy of special tax to pay for said buildings. Beaner v. Lucas [Iowa] 112 NW 772. Act Feb. 13, 1907, authorizing **issuance of bonds** to pay maturing bonded debt, has but one title expressed. Buist v. Charleston City Council, 77 S. C. 260, 57 SE 862. Ordinance providing for issue of seventy-five bonds of $1,000 each to meet city's part of thirty-two sewer and street improvements, which are not more particularly

named, is not violative of requirement of § 1694, Rev. St., because containing more than one subject not clearly expressed in title. Heffner v. Toledo, 9 Ohio C. C. (N. S.) 1. Act to **annex certain territory** to Detroit and to apply laws to govern the territory held one subject in the title only. Village of Fairview v. Detroit, 150 Mich 1, 14 Det. Leg. N. 595, 113 NW 368. Title of Laws 1899, p. 79, entitled "An act to amend * * * relating to **bonds of officers** and other bonds," held not to embrace undertakings on appeal. Russell v. Chicago, etc., R. Co. [Mont.] 94 P 501. An act to amend Code 1896, §§ 897, 911, which divides courts into 13 districts and **fixes time for holding courts,** is not broad enough to include fixing time of holding court in fifteenth circuit. Louisville & N. R. Co. v. Grant [Ala.] 45 S 226. Rev. St. 1895, art. 397, relating to **elections** to fill vacancies in offices of incorporated cities. Cofield v. Britton [Tex. Civ. App.] 109 SW 493. Act March 27, 1907, relating to **change of form of government of city** of Memphis, held to embrace matter not expressed in title. Malone v. Williams [Tenn.] 103 SW 798.

Held not valid: Local Acts 1907, p. 133, No. 411, held to create a new board for directing **local improvements** not indicated in title. McDonald v. Springwells Tp. [Mich.] 115 NW 1066. Laws 1901, p. 129, c. 101, relating to **liens for government work,** held to embrace but one subject in title. Powers Elevator Co. v. Pottner [N. D.] 113 NW 703. Act March 17, 1897 (Sess. Laws 1897, p. 328, c. 112), as amended, authorizing **ownership by cities of sewerage systems,** waterworks, light and power plants, cable and electric railways, and other public utilities, held to embrace but one general subject relating to powers of government of cities. Aylmore v. Seattle [Wash.] 92 P 932. Local Laws 1907, p. 981, No. 418, relating to delinquent children, **establishing juvenile court,** instituted rules to govern, etc., held but one title. Robison v. Wayne Circuit Judges [Mich.] 14 Det. Leg. N. 945, 115 NW 682. Acts 1907, p. 700, c. 5857, entitled "An act to **extend corporate limits of the city of** Tampa," expresses one general subject, and a provision for taxation of certain territory only to pay bonds held germane to subject. Hayes v. Walker [Fla.] 44 S 747. Laws 1907, p. 167, c. 113, relating to return by elevator companies of **elevator inspection certificate** to local buyer. State v. Minneapolis & Northern Elevator Co. [N. D.] 114 NW 482. Laws 1907, p. 255, c. 161, defining **boundary districts of second, eighth and ninth judicial districts,** and providing for terms of court, but one title. State v. Burr [N. D.] 113 NW 705. Sess. Laws 1905, p. 157, c. 77, providing for **punishment of lawyers practicing without a license,** embraces clause to prohibit advertising, etc., by unlicensed attorney. People v. Erbaugh [Colo.] 94 P 849. Act April 16, 1873 (Laws 1873, p. 113; Kirby's Dig. § 2707), to provide **jurisdictions of courts** and to provide for sale by courts of realty to apportion dower, held but one subject in title. Johnson v. Johnson, 84 Ark. 307, 105 SW 869. Provisions of Sess. Acts 1906, p. 12, c. 4, act to **change circuits of courts,** create new ones, and provide new judges, held all germane to the general subject. Brown v. Moss, 31 Ky. L. R. 1288, 105 SW 139. Acts 29th Leg. p. 220, c. 112, § 5, relating to **court reporters** and duties and how reports can be used in courts, held but one subject in title. Newnom v. Williamson [Tex. Civ. App.] 19 Tex. Ct. Rep. 532, 103 SW 656, Laws 1903, p. 97, c. 5162, **making copies of records evidence** in reestablishment proceedings, has but one subject in title. Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 S 874. Act Feb. 18, 1897 (Gen. St. 1896-97, p. 1377), an act "to **regulate the business of insurance** in this state," covers who may insure life, amount exempt from assured's creditors, etc. Rayford v. Faulk [Ala.] 45 S 714.

Criminal: Acts 1874, p. 220, fixing rates of fees for magistrates and providing for payments of **costs in criminal cases,** held plural subject in title. Christie v. Miller, 128 Ga. 412, 57 SE 697.

Police regulation: Act of March 12, 1907, which provides for setting apart **Sunday** as day of rest, closing saloons and places of business, preventing sale of liquors, closing places of amusement and other things, and providing penalties for violation, held to embrace but one subject, and is valid. State v. Dolan, 13 Idaho, 693, 92 P 995. Act No. 211, Pub. Acts 1893, p. 421, providing **standard of pure stock food** and means to prevent deception in sale, and appointment of dairy and food commissioner, held only one subject embraced in title. Pratt Food Co. v. Bird, 148 Mich. 631, 14 Det. Leg. N. 304, 112 NW 701. Laws 1905, p. 161, § 13 (Ann. St. 1906, p. 3608), relating to preservation, propagation and protection of **game** animals, held but one subject, and broad enough to embrace both tame and wild deer. State v. Weber, 205 Mo. 36, 102 SW 955. Act No. 48, p. 106 of 1904, providing for preservation of birds, held title expressed properly, and broad enough to cover killing, purchase of dead birds, and hunting, as well as providing punishment therefor. In re Schwartz, 119 La. 290, 44 S 20. Laws 1887-88, p. 175, c. 93, entitled "An act to establish **pilots** and pilot regulations for the straits," etc., sufficiently broad to embrace clause prescribing penalty. State v. Ames [Wash.] 92 P 137.

Intoxicating liquors: 3 Ballinger's Ann. Codes & St. § 2944a, providing for **seizure of liquors,** void for having more than one subject in title. State v. Moran, 46 Wash. 596, 90 P 1044. Act March 4, 1903, Idaho, (Laws 1903, p. 346), entitled "An act to **prohibit the sale of spirituous, vinous and malt liquors** near public works and grading camps of canals and railroads and other kindred enterprises, held too narrow to include provisions for sale and regulating of liquors. Gerding v. Idaho County Com'rs, 13 Idaho, 444, 90 P 357. Laws 1887, p. 179, local option law. Section prohibiting giving away of liquors by private individual held not embraced. State v. Fulks, 207 Mo. 26, 105 SW 733. Title to Laws 1887, p. 233, c. 165, held to embrace provision **requiring mayors of cities to notify county attorneys** of violations of liquor laws. State v. Everhardy, 75 Kan. 851, 90 P 276. Acts 1906, p. 114, providing for **local option** and to determine status of county after election, and mode of changing same, held not plural subject, nor improperly titled. City of Barnesville v. Means, 128 Ga. 197, 57 SE 422. Acts 1907, p.

the enactments of the legislature.[37] This provision applies to the body of the bill

518, regulating **opening and closing of saloons,** etc. Fourment v. State [Ala.] 46 S 266.

Taxation: Acts 1905, p. 1152, c. 513, to equitably assess interurban electric lines and to provide mode of collecting taxes from them, held to embrace also electric light and power plants owned by such railways. State v. Taylor [Tenn.] 104 SW 242. Gen. St. 1901, §§ 7672, 7673, authorizing county commissioners in certain cases to sell delinquent tax sold property certificates and providing for redemption of such property, held not double subject. Lincoln Mortg. & Trust Co. v. Davis [Kan.] 92 P 707. Code, § 1530, entitled "County road fund, how levied and paid out," includes streets of cities in the county. City of Newton v. Jasper County Sup'rs [Iowa] 112 NW 167. "An act to establish a board of revenue for H. county" provides for election of boards, grants powers, and fixes status of board members. State v. Brackin [Ala.] 45 S 841. Revenue act of 1906 has but one subject in title. Eastern Kentucky Coal Lands Corp. v. Com. [Ky.] 106 SW 260.

City charters: Acts granting city power to govern itself and control its different agencies held properly to embrace rights to build and maintain highways. Nalle v. Austin [Tex. Civ. App.] 18 Tex. Ct. Rep. 54, 103 SW 825.

Amendments were properly entitled in the following cases: Amended bill did not refer to old bill in head, but held valid amendment. Zimmerman v. Trude [Neb.] 114 NW 641. "An act to repeal * * * of the Code * * * title 'Revenue and taxes,' subtitle 'Tax on mortgages and to re-enact same with amendments,'" held sufficient title. Miller v. Wicomico County Com'rs [Md.] 69 A 118. Acts 1903, p. 579, amending charter of city of Macon, held not to contain variant matter. Smith v. Macon, 128 Ga. 227, 58 SE 713. Amendment authorizing special terms of court, and providing regular judge may appoint special judge, held applied same subject. Louisville & N. R. Co. v. Herndon's Adm'r, 31 Ky. L. R. 1059, 104 SW 732. Act to establish courts of chancery appeal, and amendment increased its number of judges, changed its name, and enlarged jurisdiction, held related to same subject. Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460. "An act to amend * * *, entitled 'Dower,' by adding a new section to be known as," etc., held to embrace any new interest conferred on husband in estate of wife. Ferguson v. Gentry, 206 Mo. 189, 104 SW 104. "An act to amend an act * * * 'to prescribe the parties to and venue of suits against railroad * * * over whose lines * * *' where any * * * cause of action arises, out of * * *, and providing for apportionment of damages" from connecting carriers, and providing for additional means of obtaining service on nonresident corporations, held within one subject. Texas Cent. R. Co. v. Marrs [Tex. Civ. App.] 18 Tex. Ct. Rep. 229, 101 SW 1177. An act to amend * * *, relating to change of venue, held to embrace change in providing four days' notice of appeal for change of venue instead of ten days. State v. Hunter [S. C.] 60 SE 226. "An act to amend and re-enact § 655 of the Code in regard to when deed made to purchaser, clerk to make it, what to contain, fee for clerk," is not violation of single subject rule. Kelly v. Gwatkin [Va.] 60 SE 749. Act Feb. 20, 1899 (Gen. Acts 1898-9, p. 32), entitled "An act to amend Code 1896, § 1441, regulating actions for slander and libel," merely substituting for certain words of the original section, a provision clearly pertinent to the general subject of the section. Comer v. Age-Herald Pub. Co. [Ala.] 44 S 673. An amendment making live stock insurance companies subject to general law of insurance companies under a section of the statute which was disposed of when the amendment was enacted did not bring the company under liability under the disposed of section. State v. Burgess [Tex. Civ. App.] 107 SW 366. "An act to amend and re-enact § 112 of Act 45 of 1896 so as to provide for the lease" of certain property. Saucier v. New Orleans, 119 La. 179, 43 S 999. "An act to amend § 24 of an act entitled 'An act to provide,' etc., is sufficient description to authorize the changes made by amendment in § 24." School Dist. No. 27 in Cassia County v. Twin Falls, 13 Idaho, 471, 90 P 735. Act relating to appointment of officers by governor in case of vacancies held embraced in title of amendment. State v. Herring, 208 Mo. 708, 106 SW 984. County option law for one specified county passed, identically worded with general act, but after general act was passed was valid. City of Barnesville v. Means, 128 Ga. 197, 57 SE 422. Section 15, p. 85, P. L. 1900, as amended by P. L. 1906, p. 99, being an act to regulate the ascertainment and payment of compensation for property condemned or taken for public use, held to embrace sufficient notice of last clause permitting abandonment of proceedings. In re Port Reading R. Co. [N. J. Law] 68 A 219. "An act to amend * * * so as to except Marion County from the provisions thereof" not sufficient to include a provision excepting Fairfield county. State v. Burley [S. C.] 61 SE 255. Section 143e, 143f, etc., in amendatory act to Code Pub. Gen. Laws, act 23, relating to insurance corporations, embraces but one subject. Himmel v. Eichengreen [Md.] 69 A 511.

37. Jeffers v. Annapolis [Md.] 68 A 361; Joliff v. State [Tex. Cr. App.] 109 SW 176. Title sufficient if after eliminating meaningless words a clear expression can be found. Evers v. Hudson [Mont.] 92 P 462. Since regulation is made effective only through penalties, a title expressing a purpose to regulate implies such penalties, and penalty need not be stated in title. Commonwealth v. Rothermel, 27 Pa. Super. Ct. 648. Merely failure to mention penalty clause in title does not invalidate act for lack of expression of subject in title. State v. Merchant [Wash.] 92 P 890. If real purpose of such an act is apparent on its face, it is valid. Spratt v. Helena Power Transmission Co. [Mont.] 94 P 631. In whatever sense the title of an act should naturally and generally be taken is ordinarily the meaning that should be held to be expressed in it. Griffith v. Trenton [N. J. Law] 69 A 29.

only.[38] It is usually sufficient if the title directs the attention of a person interested in the subject-matter to the act,[39] and need not express the means whereby the indicated result is to be attained.[40] While in Illinois two germane subjects may be enacted under one title,[41] the title must be sufficiently broad to cover both.[42] Whether the subject-matter of the statute is expressed within the title must be determined from the contents of the statute without regard to the source of the power of which the statute is an expression.[43] Where every section of an act refers to and is germane to the subject-matter described in the title, the title need not give an abstract of the contents of the act, nor mention the means and methods by which the general purpose is to be accomplished.[44] In determining whether the title is sufficient, the object to be accomplished by the act may be considered.[45] The rules governing construction of title and other matters apply to amendatory acts just as if they were part of the act itself.[46] The title of an amendatory act is sufficient if it recites the title or substance of the original act and the amendment itself is germane to and embraced in the title to the original act.[47] Supplementary acts must be embraced in the title of the original acts and be germane to the subject of the act to be valid.[48] Where an act has been approved by a court, the title of an amendatory act thereto is sufficient if it clearly specifies the particular sections of said act to be amended and is germane to the subject stated in the original act.[49] An act not amendatory need not recite other acts of same nature in its title.[50] A court cannot by construction enlarge a title to an act.[51]

38. No objection if caption is broader than enacting part and covers subject expressed in title. City of Knoxville v. Gass [Tenn.] 104 SW 1084.

39. Title is sufficiently explicit if it clearly expresses the purpose of the act when interpreted by a man of ordinary intelligence. Commonwealth v. Black Co., 34 Pa. Super. Ct. 431. "An act to provide for the adoption of trade marks * * * and to regulate the same" not defective for failure to express penalty for counterfeiting. Commonwealth v. Meads, 29 Pa. Super. Ct. 321. "An act relative to the sale * * * of merchandise * * * not in the ordinary course of business * * *, imposing certain duties on the seller," not defective for failure to express duty of the buyer. Wilson v. Edwards, 32 Pa. Super. Ct. 295. The title must substantially correspond to and fairly point out the subject-matter thereof. Rouse v. Thompson, 228 Ill. 522, 81 NE 1109.

40. Title of act for preservation and propagation of fish not defective for failure to indicate the provision forbidding deposit of poisonous substances in streams. Commonwealth v. Immel, 33 Pa. Super. Ct. 388.

41. Rouse v. Thompson, 228 Ill. 522, 81 NE 1109.

42. An act providing for "holding and regulation of primary elections of delegates to nominating conventions," providing in addition for holding primary elections for the purpose of nominating candidates of the different political parties, is void. Primary Election Law of July 1, 1906. Rouse v. Thompson, 228 Ill. 522, 81 NE 1109.

43. Burcher v. People [Colo.] 93 P 14.

44. Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 S 874; Jeffers v. Annapolis [Md.] 68 A 553. "Act to annex the territory of the township of Grasse," etc., to Detroit, held to contain matter not germane to title. Village of Fairview v. Detroit, 150 Mich. 1, 14 Det. Leg. N. 595, 113 NW 368. Sess. Laws 1907, p. 50, authorizing establishment of certain schools and providing a tax for their support, held properly under one title. Evers v. Hudson [Mont.] 92 P 462. Acts 1907, p. 307, held valid though title made misnomer simply by calling place "town of" where it should have been "city of," the essential element being only the identity which was clear from the act. Lee v. Tucker [Ga.] 60 SE 164. Laws Neb. 1887, p. 597, c. 76. Where title referred to "Revised Statutes" without stating which ones, held obvious error did not produce any uncertainty, as act otherwise indicated which one was meant. School Dist. No. 11 v. Chapman [C. C. A.] 152 F 887.

45. Evers v. Hudson [Mont.] 92 P 462.

46. Validity presumed until reverse is proven. Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 461. Where object to be accomplished can be determined from title after meaningless words are eliminated, it is sufficient. Evers v. Hudson [Mont.] 92 P 462.

47. "Act April 3, 1903, P. L. 136, amending Act May, 22, 1905, authorizing erection of soldiers' monuments," and reciting the title of such amended act in its own title, sufficient notice of a provision allowing counties of certain size to erect memorial buildings. Yoho v. Allegheny County, 218 Pa. 401, 67 A 648. Acts 1899, p. 889, c. 381, amending Acts 1897, p. 257, c. 106, relating to cutting of timber on lands of another, etc., held void for failure to recite title or substance of amended act. State v. Smith [Tenn.] 105 SW 68.

48. McCleary v. Babcock [Ind.] 82 NE 453.

49. Settlers' Irr. Dist. v. Settlers' Canal Co. [Idaho] 94 P 829.

50. State v. Taylor [Tenn.] 104 SW 242.

51. Gerding v. Idaho County Com'rs, 13 Idaho, 444, 90 P 357.

*Partial invalidity.*See 8 C. L. 1985—Generally where part of a law is embraced in a title and part not, the part embraced is held valid even though other part is not [52] unless the parts cannot well be separated.[53]

§ 4. *Amendments and revisions.*See 8 C. L. 1986—An amendment of a nonexisting act is ineffectual.[54] Where an enactment indicates an intention to create an act complete in itself, the fact that it modifies an existing statute by implication does not make it an amendment.[55] Where an entire act relates to a single subject-matter, a void portion may be cured by an amendment relating solely to such portion.[56] An amendatory act may be made effective without submission to the people though the amended act became operative only upon adoption by them.[57]

*Reference to act amended.*See 6 C. L. 1986—It is generally provided that an act cannot be amended or revived by reference to its title only,[58] but such act must be set forth in the amending statute.[59] This rule does not apply to supplemental measures,[60] nor those amended by implication only,[61] nor to statutes which merely provide a rule of construction for another act.[62] This supplementary matter however must be germane to the subject of the act so that if it were contained in the original act it would be embraced in its title.[63] Where the legislative intent to amend an act clearly appears, the fact that its section number is erroneously stated does not invalidate the amendment.[64] Where the intention of the legislature to re-enact a statute is plainly shown, the fact that the act does not expressly provide for re-enactment is immaterial.[65] An amendment to an amendatory act need not refer to the original act.[66] Some states also require acts revised or amended to be re-enacted and published at length to become valid new laws.[67]

52. Donovan v. State [Ind.] 83 NE 744. Although penal clause is invalid, rest of act is valid and penalty will be afforded by general penal acts. State v. Ames [Wash.] 92 P 137.

53. Hayes v. Walker [Fla.] 44 S 747.

54. An attempt to amend sections of the code after their repeal at the same session is ineffectual. Schamblin v. Means [Cal. App.] 91 P 1020.

55. Constitutional provisions as to describing and identifying act to be amended do not apply. Erford v. Peoria, 229 Ill. 546, 82 NE 374.

56. Original act not required. Edalgo v. Southern R. Co., 129 Ga. 258, 58 SE 846.

57. Dykstra v. Holden [Mich.] 14 Det. Leg. N. 942, 115 NW 74.

58. People v. Chicago Election Com'rs, 221 Ill. 9, 77 NE 321. Const. art. 4, § 21 (Ind.), Acts 1907, p. 7, c. 5, do not come under this rule. Harlin v. Schafer [Ind.] 81 NE 721. "An act amending the charter of the city of S. by prescribing method of electing," etc., held not amendment by reference to title only. City of St. Petersburg v. English [Fla.] 45 S 483.

59. Reincorporation act for city of Pamplin City, Va., held void. Beale v. Pankey [Va.] 57 SE 661. An act of the legislature touching upon the subject of a former act and amending it by implication is not within the constitutional provision that the new act shall contain the section or sections amended. First Nat. Bk. v. Pearce [Kan.] 92 P 53. Where the amendatory act correctly states the date of the approval of the act amended, the fact that it is incorrectly stated in the title is immaterial. Patton v. People, 229 Ill. 512, 82 NE 386.

60. Acts 1903, p. 233, c. 134, held supplemental and not amendatory of Act May 12, 1869, Laws 1869, p. 92, c. 44. McCleary v. Babcock [Ind.] 82 NE 453. Where there is an established system of procedure in certain cases, a new act extending such system, by a general reference to it, to a new class of cases is not a violation of a constitutional provision that acts revived, amended, or extended must be re-enacted and published at length. Commonwealth v. Samuel W. Black Co., 34 Pa. Super. Ct. 431.

61, 62. City of St. Petersburg v. English [Fla.] 45 S 483.

63. Settlers' Irr. Dist. v. Settlers' Canal Co. [Idaho] 94 P 829; McCleary v. Babcock [Ind.] 82 NE 453; Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460. Where act related to selection, drawing, and summoning of jurors, and amendment was in regard to omissions in preparing jury list and boxes, held same subject and proper. State v. Franklin [S. C.] 60 SE 953.

64. Amendment of June 10, 1897, held to amend § 152 of the Drainage Act (Laws 1885, as amended by Laws of 1895, p. 166), though designating it as § 89a. Patton v. People, 229 Ill. 512, 82 NE 386.

65. Patton v. People, 229 Ill. 512, 82 NE 386.

66. Amendatory act takes the place of original. West v. Latah County Com'rs [Idaho] 94 P 445.

67. City of St. Petersburg v. English [Fla.] 45 S 483. Code Civ. Proc. § 234, authorizing governor to appoint extraordinary terms of supreme court, was re-enacted by its amendment in 1895. Laws 1895, p. 808, c. 946, § 234. People v. Neff, 122 App. Div. 135, 106 NYS 747.

*Effect.*See 9 C. L. 1987—An amendatory act supersedes the amended portion of the original act.[68] The true intent of the legislature in an amendment must be gathered from the whole scope of the enactment and the reasons which appear for making the enactment,[69] and the new and the old laws must be construed together to determine the intent of the legislature.[70] Where the title of an act provides for amending another act and adding thereto a section, and the body of the act provides for the amendment but makes no addition of the section, the amendment is still valid.[71]

*Identification.*See 8 C. L. 1987

*Revisions.*See 8 C. L. 1987—Where in a revision of the statutes the phraseology of a section is changed and the obvious effect is to give it a different meaning, the courts cannot give the old meaning to the new section,[72] but where codification merely changes section numbers the law and its interpretation remains the same.[73] Where a legislature re-adopts laws in a codified form and changes from the old law are made before adoption of the revision, the old interpretation is not binding on the courts.[74] Where commissioners to codify laws have no right to codify any but "enrolled bills," and a general law is not enrolled, the law cannot become a part of the codification.[75] Acts passed subsequent to a codification and not contained therein are not part of adopted codification and its construction must be in its original form as enacted without reference to the codification.[76] Revisions sometimes repeal old laws by implication, where the revision clearly indicates an intent to change the old existing law.[77] Where a general law is passed embracing all the provisions of numerous old special laws, the new general act really amends and supersedes the old laws.[78] A chapter in a codification which completely covers the subject-matter of a former chapter supersedes it.[79]

§ 5. *Interpretation. A. Occasion for interpretation. Unambiguous statutes.* See 8 C. L. 1987—Where the language of a statute is incapable of more than one construction and it does not lead to an absurd result, a court has no power to go beyond the expressed meaning.[80]

*Who may invoke interpretation.*See 2 C. L. 1728—One who makes application for a license and has complied with all preliminary statutory requirements may question constitutionality and obtain a construction of the license act.[81]

68. P. L. 1903, p. 711, amending § 178, Elections Act, 1898, p. 316, as amended by P. L. 1903, p. 628, relating to fees of election inspectors. Vanderveer v. Herbert [N. J. Law] 68 A 909; Dimpfel v. Beam [Colo.] 91 P 1107.

69. Omission showed intent to establish commencement of term of office in the future and as no time was mentioned it was evident that intention was not to create new office. State v. Clausen [Wash.] 91 P 1089; Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011.

70. State v. McMillan [Fla.] 45 S 882; Attorney General v. Lewis [Mich.] 14 Det. Leg. N. 840, 114 NW 927; Reusch v. Lincoln [Neb.] 112 NW 377; Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011.

71. West v. Latah County Com'rs [Idaho] 94 P 445.

72. State v. Ritchie [Utah] 91 P 24.

73. Strottman v. St. Louis, etc., R. Co. [Mo.] 109 SW 769.

74. State v. Burgess [Tex.] 109 SW 922.

75. Postal Tel. Co. v. Shannon [Miss.] 44 S 809.

76. Rayford v. Faulk [Ala.] 45 S 714.

77. Even though contains no express words of repeal. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011.

78. Allaby v. Mauston Elec. Service Co. [Wis.] 116 NW 4.

79. Where new chapter makes specific and comprehensive regulations regarding the old chapter. Hawkins v. Bare [W. Va.] 60 SE 391.

80. Franklin Sugar Refining Co. v. U. S., 153 F 653; United States v. Colorado, etc., R. Co. [C. C. A.] 157 F 321; Diedrich v. Rose, 228 Ill. 610, 81 NE 1140; Chudnooski v. Eckels, 232 Ill. 312, 83 NE 846; Yerger v. State [Miss.] 45 S 849; Ex parte Brown [S. D.] 114 NW 303; Fire Ass'n of Philadelphia v. Love [Tex.] 20 Tex. Ct. Rep. 579, 108 SW 158.

A court should never construe a law so as to extend its meaning beyond a fair and reasonable interpretation of its terms because of some settled policy or because the legislature did not use proper words to express its meaning. Flowing Wells Co. v. Cullin [Ariz.] 95 P 111.

81. "Dram shop within five miles of university" act. State v. Turner [Mo.] 107 SW 1064.

(§ 5) *B. General rules.*[See 8 C. L. 1887]—Statutes should be so construed as to render them valid if reasonably susceptible thereof,[82] but where a law appears unconstitutional beyond a reasonable doubt, it is the court's duty to declare it so.[83] Statutes of general application ordinarily apply to persons sui juris and not to those under a disability.[84] The expression of one thing in a statute is to the exclusion of others not expressed, but this like other rules of construction is a guide and not a hard and fast rule.[85] That which is implied in a statute is as much a part of it as if it were declared in express terms,[86] and where a power is conferred by a statute, it must be construed impliedly to contain everything necessary to carry out the power and make it effectual.[87] Where the state statutes are a re-adoption of the common-law, the statutes must be construed with reference to the common law.[88] Statutory rules of construction rather than common-law rules are to be applied to statutes which are substitutes for statutes which were part of the common law.[89] Though not conclusive, the construction placed upon a statute by the legal profession generally [90] or the department charged with its enforcement [91] may be considered.

Intention to be reached.[See 8 C. L. 1888]—The fundamental rule is to reach the intention of the law makers [92] or, in the case of the constitution, of the will of the people adopting it [93] and to so construe as to give effect thereto.[94] A legislative purpose expressed in a bill is not binding on courts where it appears that the real intent was not that expressed in the bill.[95] Where there is a general as well as a particular intention expressed, the latter being incompatible with the first, the particular intention will be considered an exception to the general one and, by allowing the latter to operate according to its special purposes, the two acts can stand together.[96] The purpose of a statute in whatever language it is couched must be determined by its

82. Chicago, etc., R. Co. v. State, 84 Ark. 409, 106 SW 199; Wellmaker v. Terrell [Ga. App.] 60 SE 464; Mason v. State [Ind.] 83 NE 613; Kraus v. Lehman [Ind.] 83 NE 714; City of Fairfield v. Shallenberger [Iowa] 113 NW 459; Commonwealth v. Ledman [Ky.] 106 SW 247; Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460; People v. Feitner [N. Y.] 83 NE 592; Missouri, etc., R. Co. v. State [Tex. Civ. App.] 109 SW 867. A construction which will render the act unconstitutional properly refused. Scranton City v. Ansley, 34 Pa. Super. Ct. 133.

83. State v. McMillan [Fla.] 45 S 882.

84. Texas Southern R. Co. v. Harle [Tex.] 20 Tex. Ct. Rep. 32, 105 SW 1107.

85. City of Lexington v. Commercial Bk. [Mo. App.] 108 SW 1095.

86. State v. Harden [W. Va.] 58 SE 715. Where the intention of the law makers can be implied. State v. Reynolds [Mo.] 107 SW 487; State v. Wiggins Ferry Co., 208 Mo. 622, 106 SW 1005.

87. State v. Cain [S. C.] 58 SE 937.

88. Perry v. Strawbridge [Mo.] 108 SW 641.

89. Ross v. State [Wyo.] 93 P 299.

90. Practice in Chicago regarding construction of confirmation of judgment for assessments, held not binding in court who could construe it properly without regard to practice. City of Chicago v. Becker, 233 Ill. 189, 84 NE 242.

91. In Federal courts great weight is given to departmental constructions of statutes. United States v. Cerecedo Hermanos Y Compania, 28 S. Ct. 532.

92. Davis v. Thomas [Ala.] 45 S 897; Genilla v. Hanley [Cal. App.] 92 P 752; In re Alexander, 53 Fla. 647, 44 S 175; Roberts v. State [Ga. App.] 60 SE 1082; Truelove v. Washington [Ind.] 82 NE 530; Boyer v. State [Ind.] 83 NE 350; First Nat. Bk. v. Farmers' & Merchants' Nat. Bk. [Ind. App.] 82 NE 1013; Hasely v. Ensley, 40 Ind. App. 598, 82 NE 809; Jones v. Leeds [Ind. App.] 83 NE 526; Eastern Kentucky Coal Lands Corp. v. Com. [Ky.] 106 SW 260; Ellis v. Boer, 150 Mich. 452, 14 Det. Leg. N. 701, 114 NW 239; Detroit & M. R. Co. v. Alpena Circuit Judge [Mich.] 15 Det. Leg. N. 81, 115 NW 724; Perry v. Strawbridge [Mo.] 108 SW 641; State v. Wilder, 206 Mo. 541, 105 SW 272; State v. Gmelich, 208 Mo. 152, 106 SW 618; Keeney v. McVoy, 206 Mo. 42, 103 SW 946; State v. Burr [N. D.] 113 NW 705; Fremont, etc., R. Co. v. Pennington County [S. D.] 116 NW 75; Freeman v. Collier Racket Co. [Tex. Civ. App.] 105 SW 1129; State v. Harden [W. Va.] 58 SE 715; St. Louis, etc., R. Co. v. Delk [C. C. A.] 158 F 931; Great Northern R. Co. v. U. S. [C. C. A.] 155 F 945.

93. State v. Harden [W. Va.] 58 SE 715.

94. A widow, whose only offspring is a married daughter, held to be "an unmarried person not having any child" the word "child" herein construed to be a child which can become a burden to the district by reason of parent's settlement. Turbett Tp. Overseers of the Poor v. Port Royal Borough Overseers of the Poor, 33 Pa. Super. Ct. 520.

95. State v. Redmon [Wis.] 114 NW 137.

96. Paul v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 320, 106 SW 448. Gen. Laws 1896, c. 203, § 17 (R. I.), providing for means of revoking wills, held construed without reference to common law. Bates v. Hacking [R. I.] 68 A 622.

natural and reasonable effect [97] in the absence of evidence that the language used was in a restricted or peculiar sense.[98] Where a statute deals with a genus and the thing which afterward comes into existence is a species thereof, the language of the statute will generally be extended to a new species though it was not known and could not have been contemplated by the legislature when the act was passed.[99]

Whole act to be considered.[See 8 C. L. 1988]—The whole act and the several parts thereof are to be considered,[1] but where there is an irreconcilable conflict between the different parts the last in order of position controls.[2] The preamble can be taken in connection with other parts of the statute in determining its construction.[3]

All language to be effectuated.[See 8 C. L. 1988]—Where a general purpose has been ascertained from a statute, general words may be restricted to a particular meaning and those of restricted meaning expanded so as to embrace the general purpose and effectuate it,[4] but only where the intent is clearly shown either from other provisions of the act or recourse to an examination of the legislative journals.[5]

Avoiding hardship or absurdity.[See 8 C. L. 1989]—In construing, an absurd purpose should not be attributed to the law makers.[6]

Ejusdem generis.—Where a general word follows particular and specific words of the same nature as itself, it takes its meaning from them and is presumed to be restricted to the same genus as those words. This rule is but an aid in determining legislative intent and does not confine operation of a statute within narrower limits than the legislature intends.[7] Where specific terms of an act signify subjects different from one another, the rule of ejusdem generis does not apply.[8]

Presumption of legislative knowledge of the law.[See 8 C. L. 1989]—The legislature

97. State v. Peet, 80 Vt. 449, 68 A 661.

98. In re Opinion of Justices [N. H.] 68 A 873.

99. McCleary v. Babcock [Ind.] 82 NE 453.

1. Chicago, etc., R. Co. v. State, 84 Ark. 409, 106 SW 199; Peterson v. People, 129 Ill. App. 55; Truelove v. Washington [Ind.] 82 NE 530; Boyer v. State [Ind.] 83 NE 350; Strottman v. St. Louis, etc., R. Co. [Mo.] 109 SW 719; Wehrenberg v. New York, etc., R. Co., 108 NYS 704; State v. Hanson [N. D.] 113 NW 371; Riggs v. Polk County [Or.] 95 P 5. Regard must be had to other clauses in construing first clause. United States v. Baltimore, etc., R. Co. [C. C. A.] 159 F 33. Except where part is invalid then valid parts are to be considered, invalid ones to be disregarded. Trustees of Village of Saratoga Springs v. Saratoga Gas, Elec. L. & P. Co., 122 App. Div. 203, 107 NYS 341. Including every word of section. Hasely v. Ensley, 40 Ind. App. 598, 82 NE 801. "Wharf or place of storage, or any warehouse, mill, store, or other building" in Hurd's Rev. St. 1905, c. 38, § 124, defining offenses of warehousemen, held to apply to all buildings in which goods are stored and not merely to those in which they are kept for hire. McReynolds v. People, 230 Ill. 623, 82 NE 945.

2. Great Northern R. Co. v. U. S. [C. C. A.] 155 F 945; Peterson v. People, 129 Ill. App. 55.

3. Though preamble is not a necessary part of a statute. Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460.

4. Lewis v. Northern Pac. R. Co. [Mont.] 92 P 469; Ford v. State [Neb.] 112 NW 606; State v. Burr [N. D.] 113 NW 705; State v. Harden [W. Va.] 58 SE 715.

5. As in case of mistake in wording. State v. Brackin [Ala.] 45 S 841; State v. Rat Portage Lbr. Co. [Minn.] 115 NW 162. Where there was doubt as to what numbered districts were intended in act appointing certain members of boards in districts and there was a conflict in the journals as to districts held, act was inoperative. Id.

6. Advisory Board of Coal Creek Tp. v. Levandowski [Ind. App.] 84 NE 346; In re Howard's Estate, 80 Vt. 489, 68 A 513. When legislative intent can be collected from a statute words may be modified or supplied to avoid absurdity, repugnance, or inconsistency. Id. Constructions which favor a few are, wherever possible, to be discarded in favor of broad interpretations favorable to all persons engaged in similar calling. Revenue acts. Commonwealth v. Nunan, 31 Ky. L. R. 1090, 104 SW 731. The fact that a certain construction causes inconvenience cannot effect the judicial termination of a case involving such a construction. Buggeln v. Cameron [Ariz.] 90 P 324; State v. Rat Portage Lumber Co. [Minn.] 115 NW 162.

7. Pein v. Miznerr [Ind. App.] 83 NE 784; State v. Mudie [S. D.] 115 NW 107. Especially applicable in cases of construction of statutes defining crimes and punishments. Ex parte Muckenfuss [Tex. Cr. App.] 107 SW 1131.

8. "Wharf or place of storage, or any warehouse, mill, or store" do not limit the meaning of the term "or any other building" which follows it. McReynolds v. People, 230 Ill. 623, 82 NE 945.

9. State v. Harden [W. Va.] 58 SE 715. Legislative knowledge of law and decisions of courts affecting the law. In re Martin's Estate [Cal.] 94 P 1053.

is presumed to have full knowledge of all the acts passed by it, particularly as to the subject-matter of those acts,[9] and this applies to all existing law.[10]

General and particular provisions.[See 8 C. L. 1989]—Where an expression is special or particular but the reason general, the special words should be deemed general.[11]

(§ 5) *C. Aids to interpretation. The title.*[See 8 C. L. 1989]—Where a legislative act is general its title may be resorted to for the purpose of ascertaining its proper limitations,[12] but as the title is not a part of the act itself it should not be resorted to for the purpose of interpretation until there is absolute doubt as to interpretation of the body of the act.[13]

Marginal notes.[See 2 C. L. 1728]

Legislative history.[See 8 C. L. 1990]—A court in construing an act may consult its history and the reports of committees in charge of it.[14]

Contemporaneous interpretation [See 8 C. L. 1539] can be invoked only where the act is ambiguous,[15] but in such case may be resorted to [16] and a construction long acquiesced in will not be lightly disturbed.[17]

Official construction.[See 8 C. L. 1990]—Legislative interpretation of prior acts can have no retrospective operation [18] and is not condusive.[19] Where a legislative construction of a prior statute is contradictory to the terms of the statute construed, the construing statute must be taken as a new enactment changing the prior law,[20] but if the statute declaratory of a former one has the same effect on the construction of the former act, in the absence of intervening rights, it must be treated as if the declaratory act had been embodied in the original act when passed.[21] Executive construction of the language of an act should be given great weight.[22]

Surrounding conditions.[See 8 C. L. 1990]—In seeking the meaning and intent of a statute, regard must be had to the subject-matter and to all the surrounding circumstances.[23]

Prior acts.[See 8 C. L. 1990]—Prior acts and their interpretation are properly considered in aid of construing a statute.[24] It is proper to consider a repealed act in arriving at a particular construction of existing acts.[25]

10. Legislature to legislate only with reference to it. State v. Southern R. Co., 145 N. C. 495, 59 SE 570; Sikes v. St. Louis, etc., R. Co., 127 Mo. App. 326, 105 SW 700.

11. Interstate Drainage & Inv. Co. v. Freeborn County Com'rs [C. C. A.] 158 F 270.

12. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. [C. C. A.] 155 F 842; In re Hayden [Minn.] 111 NW 278; State v. Fort [Mo.] 109 SW 737.

13. Forman v. New Orleans Sewerage & Water Board, 119 La. 49, 43 S 908.

14. United States v. Chicago, etc., R. Co., 157 F 616. Speeches and progress through legislature. Truelove v. Washington [Ind.] 82 NE 530; People v. Butler, 109 NYS 900. In construing a statute, courts will take judicial notice of history of subject-matter to which act relates, and to relevant facts which are matters of common knowledge, and will seek aid in ascertaining intention of legislature by assuming that body was familiar with such history and facts and had them in mind when statute was enacted. Reid v. Muhlenberg Tp. Board of Education, 6 Ohio N. P. (N. S.) 526.

15. Fact that statute plainly deprives officers of perquisites prohibits adoption of interpretation given it by such officers which in effect permits the operation of the terms of the act. Whittemore v. People, 227 Ill. 453, 81 NE 427.

16. Board of Com'rs v. Branaman [Ind.] 82 NE 65; Williams v. State [Tex. Cr. App.] 107 SW 1121.

17. McChesney v. Hager, 31 Ky. L. R. 1038, 104 SW 714; Bates v. Hacking [R. I.] 68 A 622; State v. Davis [W. Va.] 60 SE 584.

18. McCleary v. Babcock [Ind.] 82 NE 453; Great Northern R. Co. v. Snohomish County [Wash.] 93 P 924.

19. More advisory than mandatory. Slutts v. Dana [Iowa] 115 NW 1115.

20, 21. McCleary v. Babcock [Ind.] 82 NE 453.

22. Except where language is not ambiguous. Fire Ass'n of Philadelphia v. Love [Tex.] 108 SW 810; Reeve's Appeal, 33 Pa. Super. Ct. 196.

23. City of Lexington v. Commercial Bk. [Mo. App.] 108 SW 1095; State v. Harden [W. Va.] 58 SE 715.

24. Board of Com'rs v. Branaman [Ind.] 82 NE 65; Eckerson v. Des Moines [Iowa] 115 NW 177; Campbell v. Youngson [Neb.] 114 NW 415. Where a supplemental act is questioned the court should consider all steps taken and all amendments, repeals, and other acts constituting present supplemental acts. United New Jersey R. & Canal Co. v. Parker

*Original act.*See 4 C. L. 1585—Courts generally hold that when the meaning of a statute is in doubt recourse shall be had to the original statute to determine the legislative will.[26]

*Re-enactment statutes.*See 8 C. L. 1991—Where a law is simply a re-enactment of an old statute, the presumption is that the legislature intended the same construction for the old as the new law.[27] The same is true where a legislature re-enacts a statute after a supreme court has construed it, unless it is clearly shown that the legislature intended a different construction,[28] and the same applies to a provision in a constitution.[29] Where a legislature has re-enacted a bill at various times for forty years and officers, whose duty it was to enforce this law, have interpreted it one way for forty years, their interpretation should be adopted rather than some new construction indicated by the words of the statute.[30] A re-enactment by congress, without change, of a statute which previously had executive construction, is an adoption of that construction by congress.[31]

Statutes adopted from other states See 8 C. L. 1991 are presumed to have been adopted in view of the interpretation there given them.[32] This rule does not apply where the act had not been construed previous to its adoption [33] and where the courts of this state have construed the act prior to its construction in the state where it was originally enacted.[34]

[N. J. Err. & App.] 69 A 239. Later statutes which do not abrogate settled practice or repeal former statutes are to be expounded or near to the use and reason of the prior law as can be without violation of their intent. Peoples' Trust, Sav. & Deposit Co. v. Ehrhart, 34 Pa. Super. Ct. 16. The scope of a new criminal act in the absence of special indication of changed intent will embrace only the same classes and persons, construed to be affected in the old act. Johnson v. State, 1 Ga. App. 195, 58 SE 265.

25. Southern R. Co. v. McNeill, 155 F 756.

26. Taylor v. Caribou, 102 Me. 401, 67 A 2. Presumption that revisors gave act no change. Block v. American Ins. Co. [Wis.] 112 NW 45. In cases of uncertainty or doubt as to meaning of compiled or revised statutes. Thomas v. U. S. [C. C. A.] 156 F 897.

27. Acts 1905, p. 709, c. 169, § 534 (Burns' Ann. St. Supp. 1905, § 2179). Sopher v. State [Ind.] 81 NE 913. Re-enacted with construction of former law placed upon it. Pavey v. Braddock [Ind.] 84 NE 5. What is a re-enactment. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011.

28. Acts 1907, p. 238, c. 148, § 1, subd. 14. Cronin v. Zimmerman [Ind.] 81 NE 1083; Wood-Dickerson Supply Co. v. Cocciola [Ala.] 45 S 192; McIntire v. State [Ind.] 83 NE 1005; Taylor v. Matteawan, 122 App. Div. 406, 106 NYS 841; Pennington v. Gillespie [W. Va.] 61 SE 416.

29. McIntire v. State [Ind.] 83 NE 1005.

30. State v. Sheldon [Neb.] 113 NW 208.

31. Copper Queen Consol. Min. Co. v. Arizona Territorial Board of Equalization, 206 U. S. 474, 51 Law. Ed. 1143; United States v. Cerecedo Hermanos Y Compania, 28 S. Ct. 532.

32. Copper Queen Consol. Min. Co. v. Arizona Territorial Board of Equalization, 206 U. S. 474, 51 Law. Ed. 1143; O'Neill v. Potvin, 13 Idaho, 721, 93 P 20; Rhoads v. Chicago & A. R. Co., 227 Ill. 328, 81 NE 371; Bostic Co. v. Eggleston [Ind. T.] 104 SW 566; Knight v. Rawlings, 205 Mo. 412, 104 SW 38; Ex parte Wisner [Mont.] 92 P 958; National Live Stock Commission Co. v. Taliaferro [Okl.] 93 P 983; Missouri, etc., R. Co. v. Wise [Tex.] 109 SW 112; Red River Nat. Bank v. De Berry [Tex. Civ. App.] 20 Tex. Ct. Rep. 385, 105 SW 998; Manitowoc Clay Product Co. v. Manitowoc, etc., R. Co. [Wis.] 115 NW 390. The New York construction will govern in Michigan so far as it determines that the statute must be aided by the common law, but the Michigan statute regarding interpretation of common-law statutes will govern actual construction. Bliss v. Caille Bros. Co., 149 Mich. 601, 14 Det. Leg. N. 590, 113 NW 317. Where congress put in force, in a territory, statute law of a state, the construction of that state will be followed. Snellen v. Kansas City Southern R. Co., 82 Ark. 334, 102 SW 193; Iarussi v. Missouri Pac. R. Co., 155 F 654; Le Bosquet v. Myers [Ind. T.] 103 SW 770. Need not be a literal copy of law of another state, but containing same substance or some controlling word. State v. Miles [Mo.] 109 SW 595. In so far as not inharmonious with spirit and policy of own laws. Atlantic Coast Line R. Co. v. Beazley [Fla.] 45 S 761; Western Inv. Co. v. Davis [Ind. T.] 104 SW 573. Rule that where legislature of Ohio adopts a law of another state it should be given the same construction in Ohio which it had theretofore received in state of its origin requires that business of insurance should be excluded from operation of Valentine anti-trust law in Ohio, as was done in Texas under prototype of this law. State v. Bovee, 6 Ohio N. P. (N. S.) 337. Laws N. H. 1905, p. 432, c. 40. Where law was adopted from identical law in Massachusetts and that state's courts had passed on law and found it valid; law had been re-enacted even to sectional arrangement. Mann v. State Treasurer [N. H.] 68 A 130.

33. Rhoads v. Chicago & A. R. Co., 227 Ill. 328, 81 NE 371.

34. Construction given in other states to

State statutes in Federal courts. See 8 C. L. 1991

Enforcement. See 8 C. L. 1540—Where there is an act prohibiting a certain thing and another act enforcing by penalty the first act, the two may be construed together in an enforcement of a penalty for the act.[35]

Laws in pari materia See 8 C. L. 1991 will be construed together.[36] The rule that statutes upon the same or similar subjects should have like interpretation is inapplicable where the provisions of a later statute are positive and explicit and also where subjects are different.[37]

Acts of same date. See 8 C. L. 1992—Where two acts to take effect on the same date are repugnant, the last one approved repeals the first one.[38]

Acts of same session. See 2 C. L. 1728—Acts passed at the same session when relating to the same subject are to be considered together and should be construed wherever possible so that both may stand.[39]

(§ 5) *D. Words, punctuation and grammar.* See 8 C. L. 1992—The words of a statute are to be construed in their popular, natural, and ordinary sense unless upon their face it appears that they were not intended to bear that construction,[40] and in general the natural, common, or obvious meaning of the language of a law must be preferred, save in rare and exceptional cases,[41] such as where technical construction is indicated.[42] A word is construed in connection with the words with which it is associated, and where several things are referred to, they are presumed to be of the same class when connected by a copulative conjunction, unless a contrary intent appears.[43] Where in a constitution a word is repeated at various places in some of which its meaning is clear and others not, the clear meaning will be followed in all parts.[44] A court may supply missing words in a statute, where the omission was clearly the result of a clerical error,[45] and may disregard surplus words.[46] A court's construction of words will prevail over popular conception.[47] While punctuation is subordinate to the text and can never control its plain meaning, yet in cases of doubt it may aid in its construction.[48] Courts are not bound to use rules of grammar and may disregard the rules to give effect to manifest legislative intent.[49]

(§ 5) *E. Exceptions, provisos, conditions and saving clauses.* See 8 C. L. 1992—

statutes from which Hurd's Rev. St. 1905, p. 11, § 2, c. 70, was taken, as to right of relatives of deceased who suffered no pecuniary loss because of his death, to recover damages, is not followed in this state. Rhoads v. Chicago & A. R. Co., 227 Ill. 328, 81 NE 371.

35. Commonwealth v. Herald Pub. Co. [Ky.] 108 SW 892.

36. State v. McMillan [Fla.] 45 S 882; Board of Com'rs of Jackson County v. Branaman [Ind.] 82 NE 65; Eckerson v. Des Moines [Iowa] 115 NW 177; State v. Patterson, 207 Mo. 129, 105 SW 1048; Ebling Brew. Co. v. Nimphius, 109 NYS 808. Local option law valid and does not interfere with city charters, but should be construed with them. Baxter v. State [Or.] 88 P 677.

37. United States v. Colorado, etc., R. Co. [C. C. A.] 157 F 321; State v. Wirt [W. Va.] 59 SE 884, 981.

38. Garrison v. Richards [Tex. Civ. App.] 107 SW 861.

39. Moss v. U. S., 29 App. D. C. 188; Eckerson v. Des Moines [Iowa] 115 NW 177; State v. Corning State Sav. Bk. [Iowa] 115 NW 937; Paul v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 320, 106 SW 448; Garrison v. Richards [Tex. Civ. App.] 107 SW 861.

40. Chudnovski v. Eckels, 232 Ill. 312, 83 NE 846; Boyer v. State [Ind.] 83 NE 350; State v. Wilder, 206 Mo. 541, 105 SW 272; State v. Goodrich [Wis.] 113 NW 388; Davis v. State [Wis.] 115 NW 150.

41. United States v. Colorado, etc., R. Co. [C. C. A.] 157 F 321; Truelove v. Washington [Ind.] 82 NE 530; Ex parte Brown [S. D.] 114 NW 303.

42. City of Maysville v. Maysville St. R. & Transfer Co. [Ky.] 108 SW 960; Sharpe v. Hasey [Wis.] 114 NW 1118.

43. Carson v. Shelton [Ky.] 107 SW 793.

44. State v. Skeggs [Ala.] 46 S 268.

45. Commonwealth v. Herald Pub. Co. [Ky.] 108 SW 892. But not so as to include a class in a law which clearly is not in contemplation of law maker. Ex parte Brown [S. D.] 114 NW 303.

46. Settlers' Irr. Dist. v. Settlers' Canal Co. [Idaho] 94 P 829.

47. Nephi Plaster & Mfg. Co. v. Juab County [Utah] 93 P 53.

48. Where punctuation is clear and plain in meaning, it cannot be rejected. Taylor v. Caribou, 102 Me. 401, 67 A 2.

49. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 621, 106 SW 918.

A proviso will be construed so as to effectuate the intention of the legislature though tantamount to an original enactment.[50] The scope of a proviso is to be determined by its words and import rather than by its connection with a subdivision of the statute.[51] Provisos in the nature of general legislation must be construed and treated the same as though they were separate and independent enactments and not confined in their application to the subject-matter generally dealt with in the act,[52] but this is not true where the intent of the legislature is plain that they must be construed together.[53]

(§ 5) *F. Mandatory or directory acts.*[See 8 C. L. 1993]—Whether statutes shall be construed as mandatory or directory depends on circumstances and the intention of the law makers.[54] As a general rule mandatory provisions of a statute must be strictly construed; while directory provisions should be liberally construed.[55] Where an act authorizes a public officer to perform certain duties, the performance may be mandatory when he is called upon to act.[56] Officers cannot wholly disregard a mere directory statute. Such statute must be substantially complied with though strict technical compliance is not necessary.[57] Statute prescribing the manner, form and time of execution of functions by public officers are directory unless the statute itself indicates a mandatory intent.[58] Laws regarding the title of a law expressing clearly the subject of the act, and the act being only to cover a single subject, are generally held mandatory.[59] Laws delegating a power the exercise of which is important for the protection of public or private interests are usually mandatory.[60]

(§ 5) *G. Strict or liberal constructions.*[See 8 C. L. 1993]—Statutes delegating powers are strictly construed.[61] A liberal rule should be applied in general where the constitutionality of the legislative act is in question, and every reasonable doubt should go to favor the validity.[62] Statutes depriving the state of its property must be construed favorably to the state, or at least not strictly against it.[63] Statutes affecting vested rights under existing laws should, if valid at all, be given strict construction.[64]

50. Proviso that no action shall be brought in this state to recover for death inflicted in another held to apply to such actions generally, and not limited to the right of action given in the statute proper. Stephen v. Illinois Cent. R. Co., 128 Ill. App. 99.

51. A proviso in a tariff act may be construed to relate to other provisions also. United States v. Scruggs, Vandervoort & Barney Dry Goods Co. [C. C. A.] 156 F 940.

52. U. S. Comp. St. 1901, p. 639, not limited in its application to criminal cases, but limits fees of marshal in all cases. National Bank of Commerce v. Cleveland, 156 F 251.

53. Marioneaux v. Cutler [Utah] 91 P 355. Proviso must be construed with reference to preceding part of clause to which it is attached. Advisory Board of Coal Creek Tp. v. Levandowski [Ind. App.] 84 NE 346. Example of proviso of limited effect. State v. Wilder, 206 Mo. 541, 105 SW 272.

54. Burns' Ann. St. Ind. 1901, § 5386, providing that boards shall do certain things at first session "in June," held merely directory, and board does not lose jurisdiction by failure to act at that time. Duncan v. Cox [Ind. App.] 82 NE 125. Laws Or. 1907, p. 399, providing for carrying into effect of referendum and initiative powers reserved to people, is directory in its warning clause, and a referendum omitting that clause was fatally defective. Stevens v. Benson [Or.] 91 P 577. Pol. Code Mont. § 4645, providing for duties of clerk of courts and county treasurer in re payment of jurors, held mandatory. Ex parte Farrell [Mont.] 92 P 785. While initiative petition is required to contain a correct copy of the title of the act, a referendum petition without title, but containing the act itself, is sufficient. Palmer v. Benson [Or.] 91 P 579.

55. People v. Earl [Colo.] 94 P 294.

56. McConnell v. Allen, 120 App. Div. 548, 105 NYS 16.

57. Evers v. Hudson [Mont.] 92 P 462.

58. People v. Earl [Colo.] 94 P 294.

59. Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460.

60. Even where word "may" is used. Queeny v. Higgins [Iowa] 114 NW 51.

61. Authority to commissioners to lease land does not carry power to provide in lease that if premises are not relet to tenant improvements thereon shall be taken by the new tenant at appraised value. Diedrich v. Rose, 228 Ill. 610, 81 NE 1140.

62. Campbell v. Skinner Mfg. Co., 53 Fla. 632, 43 S 874.

63. People v. Kerber [Cal.] 93 P 878. Code Pub. Laws Md. art. 81, § 160, relating to stock assessments, there being no such presumption at law. Schley v. Lee [Md.] 67 A 252.

64. Treated as embracing only such mat-

Statutes changing the common law.[See 8 C. L. 1993]—Statutes in derogation of the common law are to be construed only as to matters strictly within the letter of the statute,[65] but, as a rule, statutes in general derogation of the common law have a general strict construction.[66] Some states have abolished this rule by statute.[67]

Penal statutes.[See 8 C. L. 1993]—Penal statutes [68] as a general rule are strictly construed,[69] but courts now go into the intent of the law makers carefully before they use this construction.[70] In the absence of formal expression, it is presumed that a legislature intended the scope of a penal statute to extend to classes or persons in an old act even where a new act is passed after well settled constructions of the old act have long been considered as settled.[71]

Various other strict constructions.[See 8 C. L. 1994]—Strict construction will not be allowed to defeat an intention of a legislature.[72] Statutes passed in exercise of the police power restricting or regulating property rights or the pursuits of lawful occupations and callings should be strictly construed,[73] and also laws relating to municipal improvements.[74] Laws relating to the imposition or collection of taxes are to be strictly construed.[75]

Remedial statutes.[See 8 C. L. 1994]—A statute which is highly remedial is to be liberally construed [76] to accomplish the desired result.[77]

Revisions.[See 4 C. L. 1538]—Revised statutes sometimes provide for their own liberal construction.[78]

Other liberal constructions.[See 4 C. L. 1538]—Any statutes relating to matters involving public benefit and use are to be liberally construed.[79]

(§ 5) *H. Partial invalidity.*[See 8 C. L. 1994]—Where an act is unconstitutional in part, the remainder will be upheld [80] unless the parts cannot be separated and

ters as come clearly within the scope and purpose of the legislation. Peet v. East Grand Forks [Minn.] 112 NW 1005.

65. Cleveland, etc., R. Co. v. Henry [Ind.] 83 NE 710.

66. Richardson v. Ainsa [Ariz.] 95 P 103; Strattman v. St. Louis, etc., R. Co. [Mo.] 109 SW 769; State v. Shapiro [R. I.] 69 A 340; Kellar v. James [W. Va.] 59 SE 939. Especially where it is in derogation of common right and common decency. Perry v. Strawbridge [Mo.] 108 SW 641.

67. Young v. Madison County [Iowa] 115 NW 23; Campbell v. Youngson [Neb.] 114 NW 415; Galveston, etc., R. Co. v. Walker [Tex. Civ. App.] 20 Tex. Ct. Rep. 740, 106 SW 705.

68. A penal statute is one which imposes a penalty for doing what is forbidden by statute or not doing something which the statute requires to be done. People v. Crucible Steel Co. of America [Mich.] 115 NW 705.

69. Texas & P. R. Co. v. Blocker [Tex. Civ. App.] 20 Tex. Ct. Rep. 514, 106 SW 718. But not to defeat intention of congress in a Federal act. United States v. Lonabaugh, 158 F 314. Especially one authorizing cumulative penalties. United States Condensed Milk Co. v. Smith, 116 App. Div. 15, 101 NYS 129. Any provision not within its intent will be disregarded. People v. Sturgis, 121 App. Div. 407, 106 NYS 61.

70. State v. Goodwin [Ind.] 82 NE 459; State v. Peabody [Me.] 69 A 273; International, etc., R. Co. v. Voss [Tex. Civ. App.] 109 SW 984. Scope not enlarged through liberal construction. Young v. Madison County [Iowa] 115 NW 23. Not strictly construed if legislative obvious or expressed intent might be defeated by a strict construction. Boyer v. State [Ind.] 83 NE 350.

71. Johnson v. State, 1 Ga. App. 195, 58 SE 265.

72. Wildharber v. Lunkenhelmer [Ky.] 108 SW 327.

73. People v. Sommer, 55 Misc. 55, 106 NYS 190.

74. Hyland v. Ossining, 57 Misc. 212, 107 NYS 225.

75. National Loan & Inv. Co. v. Linn County Sup'rs [Iowa] 115 NW 480.

76. In re Johnson [Cal. App.] 94 P 592; State v. Lynch [R. I.] 68 A 315. Statutes providing for an action in the nature of interpleader, such statute being remedial. Brown v. Clark [Conn.] 68 A 1001.

77. Board of Com'rs of Clinton County v. Given [Ind.] 82 NE 918. Even if result seems contrary to usual rules of construction or strict letter of statute. Knight & Wall Co. v. Tampa Sand Lime Brick Co. [Fla.] 46 S 285.

78. Rev. St. Tex. 1895, final title, § 3. Berry v. Powell [Tex. Civ. App.] 19 Tex. Ct. Rep. 932, 105 SW 345.

79. Spratt v. Helena Power Trans. Co. [Mont.] 94 P 631. Alien naturalization law. In re Polsson, 159 F 283.

80. Fourment v. State [Ala.] 46 S 266; District of Columbia v. Green, 29 App. D. C. 296; Lee v. Tucker [Ga.] 60 SE 164; Smith v. Claussen Park Drainage & Levee Dist., 229 Ill. 155, 82 NE 278; Harlin v. Schafer [Ind.] 81 NE 721; Southern R. Co. v. Hunt [Ind. App.] 83 NE 721; Robison v. Wayne Circuit Judges [Mich.] 115 NW 682; McDonald v.

one would be absurd or ineffective without the other,[81] but where the intention was clearly to have the act take effect in entirety, any part being unconstitutional renders the whole act inoperative.[82]

§ 6. *Retrospective effect.* See 8 C. L. 1995—A statute is usually given a prospective effect unless its terms clearly show that it should operate retrospectively.[83] No new law will be given a retrospective operation which will divest previously acquired rights or impair the obligation of a contract lawfully made and pending under and

Springwells [Mich.] 115 NW 1066; In re Port Reading R. Co. [N. J. Law] 68 A 219; United New Jersey R. & Canal Co. v. Parker [N. J. Err. & App.] 69 A 239; New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909; Brennan v. New York, 122 App. Div. 477, 107 NYS 150; State v. Peet, 80 Vt. 449, 68 A 661. Unconstitutionality of the provisions of Levee Act (Hurd's Rev. St. 1905), providing for assessment of damages to landowners, does not render the entire act void. People v. Monroe, 227 Ill. 604, 81 NE 704. Provisions relating to searching and seizures in local option law invalid, but balance of act was valid. Ex parte Dupree [Tex.] 19 Tex. Ct. Rep. 851, 105 SW 493. Vt. Act. Dec. 10, 1906, p. 114, No. 117, requiring certain corporations to pay employes weekly, even if it includes corporations it should not include, is not void on that account as to a railroad company as to which it is otherwise valid. Lawrence v. Rutland R. Co., 80 Vt. 370, 67 A 1091. Attempt to confer on courts other than properly authorized ones powers in case of enforcement of local option laws held invalid, but rest of act was valid. Meyers v. State [Tex. Civ. App.] 105 SW 48. Ind. Acts 1907, p. 7, c. 6, creating a superior court circuit, was not unconstitutional as a whole because of an invalid provision giving to such superior court exclusive jurisdiction of appeals from inferior courts in certain townships. Board of Com'rs v. Albright, 168 Ind. 564, 81 NE 578. Act March 18, 1901 (Laws Wash. 1901, p. 349, c. 172), providing for licensing of barbers, is not as a whole invalid because § 10 is void for being unreasonable and arbitrary. State v. Walker [Wash.] 92 P 775. "An act to protect stockholders and persons dealing with a corporation" held invalid as relates to part providing a punishment for officer of corporation to publish certain false statements because it is not embraced in title. The rest of the act, however, covered by the title, is valid. State v. Merchant [Wash.] 92 P 890. Section 1 of act of congress of March 1, 1899 (30 Stat. 959, c. 326), punishing owners who after notice fail to cut weeds, etc., held not invalidated by fact that § 2 discriminates between resident and nonresident owners in assessment of charges. District of Columbia v. Green, 29 App. D. C. 296.

81. Hayes v. Walker [Fla.] 44 S 747; Louisville, etc., R. Co. v. Herndon's Adm'r, 31 Ky. L. R. 1059, 104 SW 732; Morrow v. Wipf [S. D.] 115 NW 1121; Malone v. Williams [Tenn.] 103 SW 798. Section 22, Laws 1871, p. 224, c. 93, is invalid but is separable from rest of act. Harrod v. Latham Mercantile & Commercial Co. [Kan.] 95 P 11. Unconstitutional section was the consideration of the whole act and was so interwoven that whole act must fail. State v. Nash [Mo.] 108 SW 563. Employer's liability act entirely invalid because valid and invalid parts could not be separated. Atchison, etc., R. Co. v. Mills [Tex. Civ. App.] 108 SW 480.

82. Acts 1890, p. 198, c. 128, Md., unconstitutional for attempt to postpone vested rights of others while giving priorities to some claims. Maryland Jockey Club v. State [Md.] 67 A 239. Sp. Laws 1907, p. 139, c. 8, creating new school district and imposing pre-existing indebtedness on taxpayers thereof, held rendered void by invalidity of latter provision, there being no way of determining whether legislature would have created district without such provision. Cummins v. Gaston [Tex. Civ. App.] 109 SW 476.

83. Rev. St. c. 46, § 2, relating to rates of interest on mortgages, as amended by Pub. Laws 1905, p. 42, c. 90. Held amendment is prospective and does not apply to payments made before enactment of amendatory statute. City of Colorado Springs v. Neville [Colo.] 93 P 1096; People v. Gage, 233 Ill. 447, 84 NE 616; Carr v. Judkins, 102 Me. 506, 67 A 569; Adams & Freese Co. v. Kenoyer [N. D.] 116 NW 98; Denny v. Bean [Or.] 93 P 693; Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011; Texas, etc., R. Co. v. Wells-Fargo Exp. Co. [Tex. Civ. App.] 108 SW 172; Barker v. Hinton [W. Va.] 59 SE 614. Laws 1906, p. 548, c. 255, amending Code Civ. Proc. § 3400, allowing state to be made party to an action. Held act was not retrospective. J. J. Newman Lumber Co. v. Wemple, 56 Misc. 168, 107 NYS 318. Acts 1907, p. 511, c. 342, providing for distribution of tax funds, is prospective in operation, and does not cover money received for roads prior to adoption of act. Corporation Elizabeth City v. Pasquotank County Com'rs [N. C.] 60 SE 416. Where new law repealed old law, an offense committed before the new law became effective and decided after that was punishable under the old law. State v. Williams [S. C.] 60 SE 229. Prosecution based on transaction in 1904 is not covered by Crimes Act of 1905, but by Code Cr. Proc. 1831 and amendments in force in 1904. Eacock v. State [Ind.] 82 NE 1039. Quarterly tax law approved and in effect April 17th where quarter began Apr. 1 and ended July 1st. Held tax must be paid for quarter from April to July. Texas Co. v. Stephens [Tex.] 103 SW 481. Amendatory act, c. 778, 33 Stat. 811 (U. S. Comp. St. Supp. 1905, p. 493), held not retrospective. United States v. U. S. Fidelity & Guaranty Co., 80 Vt. 84, 66 A 809. Exemption of certain cases from retroaction of the statute not sufficient to express intent that it is retroactive in all other cases. Neeld v. Cunningham, 216 Pa. 523, 65 A 1095.

by virtue of the old law which is repealed.[84] All new, re-enacted or amendatory acts relating to the statute of limitations are given prospective effect unless especially otherwise provided.[85] Remedial statutes are usually retroactive.[86] Where a remedy has once been barred by statute, a subsequent enactment establishing a longer period of time in which the remedy may be enjoyed will not be given retroactive construction to revive the lost remedy unless that intention is affirmatively expressed in the act.[87] An act making taxation retrospective is valid.[88] In Missouri no law is valid which has retroactive effect.[89] Acts dealing with substantive rights usually are not given a retroactive effect, particularly in matters involving procedure.[90]

*Curative acts.*See 8 C. L. 1988—A curative act will be given retrospective effect if it is intended to give effect to past acts which are ineffective because of some failure to adopt some legal requirement.[91] Where a curative act passes just after a decision in court affecting the subject-matter of the act, it may be reasonably presumed that the legislature intended the application of the act to be limited to cases implied by the decision.[92]

§ 7. *Repeal. A. In general.*See 8 C. L. 1898—A statute cannot be repealed by a subsequent unconstitutional enactment.[93] A statute is not repealed by a subsequent statute unless expressly mentioned [94] or the provisions thereof are so inconsistent as to work a repeal by implication.[95] Where two acts take effect on the same day, the last one approved repeals the former [96] unless no reference is made in the last to the first and the two acts were not necessarily inconsistent.[97] A statute revising the whole subject-matter of a former one becomes a substitute.[98] An act declared in its title to be an amendment of other acts, but which provides a complete new scheme of

84. City of Colorado Springs v. Neville [Colo.] 93 P 1096; Dennington v. Roberta [Ga.] 61 SE 20; Denny v. Bean [Or.] 93 P 693.

85. Crowell v. Davenport [Ariz.] 94 P 1114.

86. St. 1906, p. 345, c. 370, relating to damages for conscious suffering, held retroactive because in its nature remedial. Bartley v. Boston & N. St. R. Co. [Mass.] 83 NE 1093.

87. Denny v. Bean [Or.] 93 P 693.

88. Eastern Kentucky Coal Lands Corp. v. Com. [Ky.] 106 SW 260.

89. Const. Mo. art. 2, § 15, where law provided dower interest of one-half for husband in wife's property, held not applicable as to wife who was married and owned lands before enactment of this law. Ferguson v. Gentry, 206 Mo. 189, 104 SW 104.

90. United States Fidelity & Guaranty Co. v. U. S., 28 S. Ct. 537.

91. Act validating bonds already issued after proper authorizing vote of freeholders. City of Redlands v. Brook, 151 Cal. 474, 91 P 150.

92. Swartz v. Andrews [Iowa] 114 NW 888.

93. People v. Chicago Election Com'rs, 221 Ill. 9, 77 NE 321. Where void act, amendatory of previous valid statute, contains section attempting to repeal such previous valid statute, said repealing section is also void and said previous valid statute remains in full force and effect as it was prior to said attempted amendment unless it clearly appears that it was intention of legislature to repeal said former statute without reference to whether attempted amendment was valid or not. State v. Schoepf, 5 Ohio N. P. (N. S.) 161.

94. Act for propagation of fish by restricting times and methods of catching which repeals all sections of a prior general statute which are supplied by the new law held not to repeal section relating to fishing on Sunday. Commonwealth v. Rothermel, 27 Pa. Super. Ct. 648. Where a general repealing law is passed repealing all general laws not codified by new code, a general law not in codification is repealed. Postal Tel. Co. v. Shannon [Miss.] 44 S 809. A repealing clause is subject to construction as other provisions of a statute, and even an express declaration of a repeal will not be given that effect when it is apparent that the legislature did not so intend. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030.

95. See this section, subd. B.

96. Garrison v. Richards [Tex. Civ. App.] 107 S 861. Laws 1899, p. 1514, c. 690 (antimonopoly act), did not repeal Laws 1892, p. 1834, c. 690 (Stock Corp. Law), because not repugnant and because was subsequently re-enacted. In re Consolidated Gas Co., 56 Misc. 49, 106 NYS 407.

97. Detroit United R. Co. v. Barnes Paper Co., 149 Mich. 675, 14 Det. Leg. N. 558, 113 NW 285. Of two statutes dealing with the same subjects, neither conflicting with the other, the later will not repeal the earlier. In re Quinette [Neb.] 115 NW 545.

98. State v. Harden [W. Va.] 58 SE 715. Where it is determined that purpose of the new law is to cover the whole subject-matter of the old law. State v. Henderson [La.] 45 S 430. Act regulating time a railroad may require its employes to work is not made ineffective by the passage of a similar act not yet effective. State v. Northern Pac. R. Co. [Mont.] 93 P 945.

legislation, is not an amendment, but a repeal.[99] Where a repealing statute expressly repeals certain specified sections of a former statute, it will be presumed that no further repeal was necessary or intended.[1] In construing repealing statutes, general saving clauses prescribing effects on various acts must be considered unless such construction would entirely defeat the intent of the repealers.[2]

*Effect on vested rights.*See 8 C. L. 1996

*Effect on penalties.*See 8 C. L. 1997—While the mere passage of an act repealing a penal statute does not affect rights under the same,[3] after such law has become effective no penalty can be recovered [4] in the absence of a saving clause.[5]

*Effect on pending actions.*See 8 C. L. 1997—If a statute on which an action is based is repealed, the suit is abated.[6] An amendment or revision of the statute being a continuation of existing laws does not at common law abrogate or terminate proceedings pending when the amendment or revision goes into effect.[7]

*Repeal of repealing statutes.*See 2 C. L. 1783—An act to repeal another act held unconstitutional will not effect old acts not in conflict.[8] While the repeal of a repealing statute does not revive the old law, the repeal of a statute merely limiting the operation of another leaves the latter in full force.[9]

(§ 7) *B. Implied repeal.*See 8 C. L. 1997—To establish a repeal of an act by implication, it must be shown that a later statute employs language broad enough to cover the old act. It must also appear that the two acts cannot stand together,[10] and

99. Malone v. Williams [Tenn.] 103 SW 798.

1. State v. Patterson, 207 Mo. 129, 105 SW 1048.

2. Great Northern R. Co. v. U. S., 28 S. Ct. 313.

3. Burns' Ann. St. Supp. 1905, § 1880 (Acts 1905, p. 637, c. 169). Thurman v. State [Ind] 82 NE 64.

4. Western Union Tel. Co. v. Morgan [Miss.] 45 S 427; Miller v. Chicago, etc., R. Co. [Wis.] 113 NW 384. The general rule is that where a statute imposing a liability is repealed by a subsequent act containing no saving clause all rights under the repealed statute are lost, but this rule has been abrogated in some states by statute. Laws Colo. 1891, p. 366, § 1. Cavanaugh v. Patterson [Colo.] 91 P 1117.

5. Clause in repealing act which gave state right to recover for offenses committed before act was repealed gave right of action herein. Waters-Pierce Oil Co. v. State [Tex. Civ. App.] 20 Tex. Ct.. Rep. 621, 106 SW 918. Not effect penalty under Hepburn law. Great Northern R. Co. v. U. S., 28 S. Ct. 313.

6. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011.

7. Revised Laws Minn. 1905. State v. McDonald [Minn.] 112 N. W. 278.

8. An act relating to payments by corporations in script to employes being unconstitutional and repealing only acts in conflict with it does not repeal an old act relating to redemption of scrip and not in conflict with repealing act. Union Sawmill Co. v. Felsenthal [Ark.] 108 SW 217.

9. Dykstra v. Holden [Mich.] 14 Det. Leg. N. 942, 115 NW 74; State v. Wirt County Ct. [W. Va.] 59 SE 884, 981.

10. Great Northern R. Co. v. U. S. [C. C. A.] 155 F 945; Johnson v. Shea [Mass.] 84 NE 606; Mathews v. Wagner [Mont.] 94 P 759; Allen v. Kennard [Neb.] 116 NW 63; People v. Metz, 119 App. Div. 271, 104 NYS 649; Reeves v. Bruening [N. D.] 114 NW 313; Williams v. State [Tex. Cr. App.] 107 SW 1121; Joliff v. State [Tex. Cr. App.] 109 SW 176. Sp. Laws 1871, p. 282, c. 73, relating to county board of commissioners of Ramsey county, not repealed by Rev. Laws 1905. State v. Peter [Minn.] 112 NW 866. Act May 6, 1905, p. 753, § 7, relating to revocation of licenses of county examiners, repealed Kirby's Dig. § 7583. Brown v. Smith [Ark.] 106 SW 679; Ex parte Ackerman [Cal. App.] 91 P 429. Act providing for aggrieved person's recovery on liquor dealer's bond for sales to person under 21 years not repealed by law with same provisions and also making a continuation of its provisions. Price v. Wakeham [Tex. Civ. App.] 107 SW 132. Act providing for payment of expenses of a judge holding court away from home, repealing old act. State v. Wilder, 206 Mo. 541, 105 SW 272. Act authorizing sale of real estate in allotment for dower by circuit court held not repealed by act changing jurisdiction of circuit court. Johnson v. Johnson, 84 Ark. 307, 105 SW 869. Repeal, amendment and re-enactment distinguished. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011. Acts changing name of court and increasing jurisdiction not in such conflict with original act as to repeal it by implication. Memphis St. R. Co. v. Byrne [Tenn.] 104 SW 460. Code Civ. Proc. § 234 not impliedly repealed by Const. art. 6, § 2, relating to courts and court terms. People v. Gillette [N. Y.] 83 NE 630. Land fraud sale law not impliedly repealed. Huston v. Scott [Okl.] 94 P 512. So far as concerns towns of the sixth class, Pol. Code Cal. § 3366, restricting power of municipalities over certain lines of business, was repealed by implication by Laws 1883, p. 270, c. 69, § 862, subd. 10. Ex parte Mogensen, 5 Cal. App.

the implied repeal does not extend beyond the sections repugnant to each other.[11] A new act which extends and enlarges before existing rights impliedly repeals the law by which the right was created or given.[12] An inference of an intention to repeal arising from subsequent inconsistent legislation is greatly diminished and of less force when the inconsistency arises between a subsequent general and a prior special statute.[13] Repeals by implication are not favored by the courts,[14] but where a new statute is intended to furnish the exclusive rule on a certain subject or where the whole subject of the old law is covered, it is the duty of the court to construe the new law as an implied repeal of the old law.[15] Where the same act is made both a felony and a misdemeanor in different acts, both cannot be enforced, but the last one receiving consideration of the legislature repeals the other.[16] Repeal by implication may occur through the adoption of a revision.[17] A new law which completely covers an old law and provides a new or different remedy impliedly repeals the old law.[18]

General and special laws. See 8 C. L. 1998—A special or local law is not repealed by a later general law unless specifically mentioned or the intention so to do is manifest.[19]

STATUTORY CRIMES; STAY LAWS, see latest topical index.

STAY OF PROCEEDINGS.

Grounds for Stay, 1726.
Power to Grant, 1727.
Proceedings to Obtain a Stay, 1727.
Effect of Stay, 1727.
Waiver of Stay, 1727.

Stay pending appeal[20] and stay of execution[21] are elsewhere treated.

Grounds for stay. See 8 C. L. 1999—The effect of supersedeas bond is treated elsewhere.[22] The pending of another action,[23] if in such action all the rights of the parties may be determined and the controversy in both disposed of by one judgment, is ground for a stay,[24] and a stay may also be granted where the judgment sought

596, 90 P 1063. Ball. Ann. Codes & St. § 2934 not repealed by implication by Ball. Ann. Codes & St. § 1011, subd. 10, relating to powers of mayors, etc., to regulate sales of liquor. State v. Franklin County Super. Ct. [Wash.] 94 P 1086. Where a new remedy or mode of procedure is authorized without an express repeal of a former one relating to the same subject, and the new remedy is not inconsistent with the former one, the latter act will be regarded as creating a concurrent remedy and not as abrogating the former mode of procedure. Arzonico v. Board of Education of West New York [N. J. Law] 69 A 450. An amendment though so named in its title may in reality be in effect a repeal. Malone v. Williams [Tenn.] 103 SW 798.

11. State v. Wells [Mo.] 109 SW 758.

12. Garrison v. Richards [Tex. Civ. App.] 107 SW 861.

13. State v. Peter [Minn.] 112 NW 866.

14. City of Fairfield v. Shallenberger [Iowa] 113 NW 459; Eckerson v. Des Moines [Iowa] 115 NW 177; In re Quinette [Neb.] 115 NW 545; People v. Metz, 119 App. Div. 271, 104 NYS 649; Reeves v. Bruening [N. D.] 114 NW 313; Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011; Williams v. State [Tex. Cr. App.] 107 SW 1121; Mathews v. Wagner [Wash.] 94 P 759. Laws 1899, p. 222, c. 121, § 15, requiring pharmacist to register in book sales of intoxicating liquor, does not impliedly repeal Ball. Ann. Codes & St. § 2937, authorizing sale of liquor. City of Seattle v. Foster [Wash.] 91 P 642.

15. Findling v. Foster [Ind.] 84 NE 529.

16. State v. McKee, 126 Mo. App. 524, 104 SW 486.

17. Jessee v. De Shong [Tex. Civ. App.] 20 Tex. Ct. Rep. 22, 105 SW 1011. Parts of a statute omitted from a revision are to be considered repealed and are not to be revived by construction. Reeves' Appeal, 33 Pa. Super. Ct. 196; Commonwealth v. Immel, 33 Pa. Super. Ct. 388.

18. Mills' Ann. St. Colo. § 1332, providing punishment for working "confidence game." Lace v. People [Colo.] 95 P 302.

19. State v. Peter [Minn.] 112 NW 866; Paul v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 320, 106 SW 448. Act for consolidation of adjacent territory within the city of Pittsburg not repealed by general law relating to annexation of territory to cities. Sheraden Borough, 34 Pa. Super. Ct. 639.

20. See Appeal and Review, 9 C. L. 108.

21. See Executions, 9 C. L. 1328.

22. See Appeal and Review, 9 C. L. 108.

23. Reese v. Waller [Ala.] 45 S 468.

24. Stay allowed plaintiff in action for work and material till after trial of his action to foreclose mechanic's lien based on same contract. Teeman v. Lustbader, 55 Misc. 535, 105 NYS 941.

may be used as a set-off or counterclaim,[25] but will be denied where recovery does not depend on the result of the other action.[26] If a stay is asked because of the pendency of bankruptcy proceedings, the applicant must show good reasons,[27] and a stay for this cause will not be granted a codebtor against whom there are no such proceedings.[28] A trial court may, in its discretion, stay proceedings till the costs of a former suit have been paid,[29] and it is no exception to the rule that the party is unable to pay such costs.[30] A stay will be granted pending settlement of a case,[31] but the insanity of a defendant with a duly appointed committee is no ground for a stay.[32]

*Power to grant.*See 8 C. L. 2900—The court may, in the interests of justice, stay a trial,[33] but the exercise of this power on the principle of comity between courts of different sovereignties is purely discretionary where neither has possession of the res.[34] The power to stay proceedings must be exercised in the action itself,[35] and will not be granted for a longer time than it has been applied for.[36]

*Proceedings to obtain a stay.*See 8 C. L. 2000—A formal motion should be made for the stay,[37] and before defendant is entitled to it, complainant should be indemnified against any loss arising by reason of it.[38]

*Effect of stay.*See 8 C. L. 2000

*Waiver of stay.*See 8 C. L. 2001

STEAM.

When a machine adapted to retain steam under pressure, apparently in good condition and capable of withstanding an ordinary pressure, suddenly explodes with violence, it is fair to infer that the explosion was caused by an extraordinary pressure from the steam supplied.[39]

STENOGRAPHERS.

Generally litigants are liable to the stenographer for services under a reference [40] but the liability may be avoided by express contract or by stipulation.[41] The compensation fixed by contract cannot be regarded as compensation of officers fixed by law.[42]

25. Decree of foreclosure stayed until judgment can be rendered in pending action at law by defendant to recover damages for breach of covenant in the deed. Bergman v. Fortescue [N. J. Eq.] 69 A 474.

26. Shattuck v. Guardian Trust Co., 123 App. Div. 406, 107 NYS 1043.

27. In order to obtain a stay by reason of the pendency of bankruptcy proceedings, it must be shown that the debt sued on is one for which a discharge would be a release, or that application for a discharge had been made, or that the time for such application had not elapsed. Johnson v. Waxelbaum Co., 1 Ga. App. 511, 58 SE 56.

28. Section 16 of act of 1898 expressly providing that liability of codebtor shall not be altered by discharge of bankrupt. Johnson v. Waxelbaum, 1 Ga. App. 511, 58 SE 56.

29. Order should be entered only where second suit is vexatious and without merit. Brinsfield v. Howeth [Md.] 68 A 566. Under the New York code provision for stay of proceedings until the costs of a motion have been paid, where a former action was dismissed on failure to appear, a stay will be granted till payment of costs in such suit. Code Civ. Proc. § 779. Wilner v. Independent Order of Ahawas Israel, 122 App. Div. 615, 107 NYS 497.

30. Wilner v. Independent Order Ahawas Israel, 122 App. Div. 615, 107 NYS 497.

31. Verdict for plaintiff set aside by trial court and complaint dismissed, appeal and verdict reinstated, defendant moved for new trial and stay pending settlement of case. Brown v. Grossman, 109 NYS 670.

32. Grant v. Humbert, 114 App. Div. 462, 100 NYS 44.

33. To obtain evidence in such form that it may be read on the trial as a matter of right. Decauville Automobile Co. v. Metropolitan Bk., 108 NYS 1027.

34. Action in state court not stayed because question of title raised in Federal court. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 119 La. 864, 44 S 510.

35. Gilroy v. Everson Hickok Co., 120 App. Div. 207, 105 NYS 188.

36, 37. Decauville Automobile Co. v. Metropolitan Bk., 108 NYS 1027.

38. Bergman v. Fortescue [N. J. Eq.] 69 A 474.

39. Corbett v. Lymansville Co. [R. I.] 69 A 69.

40. Bottome v. Neeley, 109 NYS 120.

41. An unofficial stenographer consented that his fees on a referee's hearing be made part of the referee's fees. Referee's fees under Code Civ. Proc. § 1019 were forfeited

The trial court may properly issue an order nunc pro tunc directing the official court reporter to take notes of a trial,[48] and the stenographer's notes may be relied upon by a trial judge.[44]

Mandamus lies to compel a court stenographer who reported the case to transcribe his notes of the evidence and charge of the court and file the same in the office of the clerk of the court,[45] but a court stenographer is entitled to a reasonable time within which to make and file a transcript.[46]

In chancery courts the evidence and proceedings may be taken down by unofficial stenographers employed by the parties.[47]

STIPULATIONS.

Right to Make and Form and Construction, 1728. | **Enforcement and Effect, 1729.**

Right to make and form and construction. See 8 C. L. 2001—Stipulations of counsel as to matters relating to the conduct of the case [48] bind their clients although such attorneys may have failed to observe special private instructions,[49] and such stipulations are competent evidence on the tract of the cause if no revocation of counsel's authority is shown.[50] A statement incorporated in the record based on a conversation which occurred between the court and counsel, imperfectly remembered and not of record, is not sufficient to sustain a waiver,[51] but in the absence of statutory or prac-

by failure to file his report in time. Held no liability to the stenographer. Bottome v. Neeley, 109 NYS 120.

42. Claim by stenographer for mileage held fixed by contract and therefore state auditor could not be required to draw a warrant for the same. State v. Edwards [Utah] 93 P 720.

43. Defendant, upon being sued by the stenographer for taking notes, denied having requested her services. Plaintiff's testimony was corroborated by two witnesses and judge issued order. Sebree v. Rogers, 31 Ky. L. R. 476, 102 SW 841.

44. When a stenographer was asked for by either party it was held that the judge need sign no other bill of exceptions than those found in the notes. Sebree v. Rogers, 31 Ky. L. R. 476, 102 SW 841.

45. Under Penal Code of 1895, § 981, when the defendant is indicted for a felony, it is the duty of the court to require the court reporter to report the case. Williams v. Cooley, 127 Ga. 21, 55 SE 917.

46. When stenographer was busy with other matter, 15 days' time was held unreasonable. Smith v. Smith, 132 Iowa, 700, 109 NW 194.

47. The chancery courts had no official stenographers. Jamison v. Jamison [Miss.] 46 S 83.

48. That an order appointing an administrator may be affirmed by the circuit court. In re Skelly's Estate [S. D.] 113 NW 91. Sole issue according to stipulation was whether a tenant had the right to terminate a lease. Failure to submit other issues held not error. Penn Mut. Life Ins. Co. v. Fulton [Ga] 60 SE 1061. By reason of stipulation, defendant was allowed to claim the right to an allowance for the increased value of lands by reason of improvements erected by him. Overturf v. Martin [Ind.] 84 NE 531. Court erred in allowing testimony beyond that stipulated for. Levine v. Fourteenth Street Bk., 108 NYS 1009. Answers to interrogatories by a party to a suit, sworn to in response to the prayer of complainant's bill, are evidence on the trial of a cause as made by an amended bill, to which the interrogatee is not made a party within the meaning of a stipulation providing that evidence in the original suit might be used by either party under the amended bill. Reeves v. McCracken [N. J. Err. & App.] 69 A 247. Order of court carrying out terms of an offer of settlement made by one party to a suit and properly accepted by the adverse party, held proper. Case v. Beloe, 109 NYS 168. That the event of one suit shall determine another between the same parties. Commercial Union Assur. Co. v. Chattahoochee Lumber Co. [Ga.] 60 SE 554.

49. Counsel signed agreed statement of facts without having submitted it to the associate counsel according to special instructions. Harrill Bros. v. Southern R. Co., 144 N. C. 542, 57 SE 382.

50. Counsel stipulated as to certain facts and no revocation of authority was shown. Westheimer v. State Loan Co., 195 Mass. 510, 81 NE 289. Stipulation entered into between plaintiff and defendant providing for the reading of a transcript of testimony taken in another action without laying proper foundation is inadmissible as against a garnishee in the action. Evans-Montague Commission Co. v. Spaulding, 229 Ill. 405, 82 NE 404.

51. Claimed that a city had waived right to an easement. Hathaway v. Milwaukee [Wis.] 112 NW 455.

tice provisions [52] an oral stipulation, made in open court and entered in the minutes, is enforcible.[53] By stipulation a person may waive the right to recover upon a quantum meruit.[54] A stipulation should be so construed as to effectuate the object had in view.[55]

Enforcement and effect.[See 8 C. L. 2062]—A general stipulation made in a trial as to facts [56] as well as one providing that a certain order may be affirmed, extends through the litigation.[57] Evidence otherwise objectionable may be introduced under a stipulation.[58] The express terms of a stipulation of facts bind the parties [59] unless, from the manner in which the cause was tried, the stipulation was ignored,[60] but they do not necessarily bind as to the conclusions of law that they embrace.[61] The parties to an action cannot bind the court by a stipulation to the effect that, if a certain motion to dismiss be denied, the cause should be remanded to the general calendar, and that, on the cause being again brought on for trial, the motion should not be renewed,[62] nor is a probate court bound by stipulations of the nominal parties in interest to the effect that the testator was mentally incompetent.[63] Stipulations by

52. General rules of practice of the municipal court. Rules 11 and 17. Carpenter v. Pirner, 107 NYS 875. Under Code Civ. Proc. 1902, § 144, allowing a trial out of court by consent of the parties, and Civ. Code 1902, § 2736, allowing a trial at chambers by consent of parties, the consent may be oral. Rule of court, Circ. Ct. Rule, 14, requiring stipulations to be in writing, held not applicable where the agreement has been admitted or carried into effect. Pearson v. Breeden [S. C.] 60 SE 706.

53. Carpenter v. Pirner, 107 NYS 875. Agreement in open court not to question validity of an attachment nor any portion of costs, held binding. Rossow v. Doebling [Ind. App.] 83 NE 248. An agreement to discontinue an action made out of court and not acted on by it nor properly presented by party seeking enforcement of it is ineffective. Snyder v. De Forrest Wireless Tel. Co., 154 F 142. An oral agreement between counsel, no steps having been taken in pursuance thereof, held not sufficient to amount to a binding stipulation. Pinnebad v. Pinnebad, 129 Ga. 267, 58 SE 879.

54. By stipulation plaintiff agreed in open court to rest his right to recover solely upon an express contract. McLoughlin v. Belmont, 105 NYS 362.

55. Treadwell v. Clark, 108 NYS 730. Stipulation to the effect that three actions should be consolidated, held amounts not merged so as to oust court of jurisdiction. Wisdom v. Bille [La.] 45 S 554. Stipulation in a boundary line dispute that plaintiffs were owners by regular chain of title from the sovereignty of the soil, construed so as not to preclude proof of title by limitation. Selkirk v. Watkins [Tex. Civ. App.] 20 Tex. Ct. Rep. 586, 105 SW 1161. An agreement to postpone the trial of a case until the determination of another specified case construed an agreement to delay the trial for a reasonable time only. Martin v. Martin [Ky.] 107 SW 771. A stipulation by the parties to the effect that the allegations in the answer setting forth relator's objections to an assessment were "proven" is not equivalent to an admission that the improvement was in fact no benefit. Stipulation was entered into by the city attorney of Mankato, on the hearing of an application for an order confirming a re-assessment. State v. Blue Earth County Dist. C., 102 Minn. 482, 113 NW 697.

56. Donovan v. Twist, 119 App. Div. 734, 104 NYS 1.

57. In re Skelly's Estate [S. D.] 113 NW 91.

58. In a libel suit depositions taken for use in another action was introduced under a stipulation to prove that the publication was without malice. Butler v. Gazette Co., 119 App. Div. 767, 104 NYS 637.

59. Penn Mut. Life Ins. Co. v. Ornauer, 39 Colo. 498, 90 P 846. A stipulation of the parties reciting that a bill of particulars correctly sets forth the merchandise sold and delivered, and the amount unpaid is an admission by the defendant of the receipt of the goods and the balance due therefor. Shaw-Walker Co. v. Fitzsimmons, 148 Mich. 626, 14 Det. Leg. N. 362, 112 NW 501. By stipulation appellants admitted appellee's cause of action and therefore could not question sufficiency of evidence in proof of the cause. Taylor v. Reynolds [Tex. Civ. App.] 19 Tex. Ct. Rep. 792, 105 SW 65. Plaintiff not allowed to prove other damages than those fixed in stipulation. Doolittle v. Adams [Miss.] 43 S 951. $245.13 allowed plaintiff as per stipulation. Title Guaranty & Trust Co. v. Withers, 105 NYS 195. Oral testimony could not be introduced to contradict stipulation. Andrews v. Moore [Idaho] 94 P 579. Stipulated that amount sued for was the correct amount. Brady v. Ranch Min. Co. [Cal. App.] 94 P 85.

60, 61. Lyon v. Robert Garrett Lumber Co. [Kan.] 92 P 589.

62. Trial resumed de novo and stipulation was introduced. Manhasset Point Co. v. Wright, 109 NYS 959.

63. In re Dardis' Will [Wis.] 115 NW 332.

64. Thus held where no error was actually disclosed on examination of the record and where great injustice would be done to parties financially interested in the result of the litigation if the stipulations were enforced. Van Gordon v. Goldamer [N. D.] 113 NW 609.

the parties to the effect that error has been committed by the trial court do not bind the appellate court,[64] nor will that court on appeal determine whether or not a certain notice was given for a particular purpose under an oral agreement that the case would not be tried without further notice.[65] Mistake furnishes ground for equitable relief against stipulations [66] but, where agreements are made out of court between attorneys concerning the course of proceedings, a clear case must be made out before relief will be granted.[67] A stipulation on which a judgment is rendered is merged in the judgment.[68]

STOCK AND STOCKHOLDERS; STOCK EXCHANGES; STOCK YARDS; STOPPAGE IN TRANSIT; STORAGE; STORE ORDERS, see latest topical index.

STREET RAILWAYS.

§ 1. The Franchise or License to Operate a Street Railway and Regulation of Its Exercise, 1730.
§ 2. Property and Acquirement Thereof, 1738.
§ 3. Taxes and License Fees, 1739.
§ 4. Street Railway Corporations, 1739.
§ 5. Location and Construction, 1740.
§ 6. Injuries to Passengers, 1741.
§ 7. Injury to Employes, 1741.
§ 8. Injuries to Persons Other Than Passengers or Servants, 1741.
A. General Rules as to Negligence and Contributory Negligence, 1741. "Last Clear Chance" Doctrine, 1743.
B. Travelers on Highway, 1744. Injuries to Pedestrians, 1744. Children Run Over, 1747.
C. Accidents to Drivers of Occupants of Wagons, 1748. Imputed Negligence, 1750. Driving on or Near the Tracks, 1750. Frightening Horses, 1752.
D. Bicycle Riders; Automobiles; Animals, 1752.
§ 9. Damages, Pleading and Practice in Injury Cases, 1752.
§ 10. Statutory Crimes, 1759.

The liability of street railways as common carriers [69] and to their employes [70] is treated in other topics, as are matters applicable to corporations generally [71] and those interurban electric railways which are held to be governed by the general railroad law.[72]

§ 1. *The franchise or license to operate a street railway and regulation of its exercise.*[See 6 C. L. 2094]—While the term "railroad" is generic and includes street railroads,[73] a distinction is usually made between so called commercial railroads and street railways,[74] and in determining the character of a particular corporation, reference must be had to its charter rather than to the relation it may have established with a city.[75]

65. Elliott v. Quinn [Colo.] 90 P 607.

66. Stipulation was to the effect that a certain person was dead. Mistake as to death. Donovan v. Twist, 119 App. Div. 734, 104 NYS 1.

67. Commercial Union Assur. Co. v. Chattahoochee Lumber Co. [Ga.] 60 SE 554.

68. Stipulation allowed the court to render judgment against defendant insane and appoint for him a certain guardian. Gressly v. Hamilton County [Iowa] 114 NW 191.

69. See Carriers, 9 C. L. 466.

70. See Master and Servant, 10 C. L. 691.

71. See Corporations, 9 C. L. 733.

72. See Railroads, 9 C. L. 1365.

73. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457.

74. Held commercial railroad: Where electric railway company was chartered under general railway act, and, by its charter, was authorized to operate between two cities and transport passengers, mail, express, and other matter. City of Aurora v. Elgin, A. & S. Trac. Co., 227 Ill. 485, 81 NE 544. Underground tunnel railroad with large portion of its route beneath East river, and much of it built on private property, is not a street railway within Laws 1886, p. 919, c. 642, re-enacted as Laws 1890, pp. 1108, 1109, c. 565, §§ 91, 92, 93, relating to street surface railroads. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909.

Held a street railway: Organized under general street railway law, running between contiguous towns, and carrying passengers, property and mail. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650. Electric railway is none the less a street railway within city limits under ordinance authorizing it to use certain streets, etc., because when it leaves city it becomes interurban railway. Jeffers v. Annapolis [Md.] 68 A 361.

75, 76. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457.

While the franchise to construct and operate a street railway can be granted only by the state,[76] municipalities are frequently made its agent for the purpose of granting the right to occupy its streets,[77] possessing only such powers in respect thereto as are expressly conferred.[78] The right of occupation, however, can be conferred only upon a corporation authorized to construct and operate a street railway in the city.[79] Permission to construct a railway in the streets must be given by the proper municipal officers[80] in due form.[81] Municipal permission to occupy the

77. City authorities have no legal power to create corporations or to grant franchises. This can be done by the state alone, but the city can concede the right of way through her streets. Such right is not a franchise in law. The privileges conceded are "secondary franchises," instrumentalities by means of which the corporate owners granted by the charter may be exercised. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457. Granting of licenses by city is the exercise of governmental power, in which municipality acts as agent or representative of state, and not in a private capacity. Potter v. Calumet Elec. St. R. Co., 158 F 521. Statutes held to confer upon mayor and city council of Annapolis power to grant franchise. Jeffers v. Annapolis [Md.] 68 A 361. City in granting franchise is an agency of state, and, if there is any conflict between granting ordinance and general laws of state, the state laws will govern. Los Angeles R. Co. v. Los Angeles [Cal.] 92 P 490. Where mayor and city council have power to grant franchises, its exercise cannot be defeated or restrained by any considerations of policy or expediency, or by any mere regard for the preference of property holders. Jeffers v. Annapolis [Md.] 68 A 361.

78. Village of Phoenix v. Gannon, 108 NYS 255. Railroad Law, Laws 1890, held not to authorize municipality to give franchise to individual, but only to corporation. Id. Where granted to individual for construction of a street surface railway by a corporation to be thereafter organized, such franchise is not void in hands of individual before it is turned over to corporation, though operation of street surface railroads is by statute confined to corporations. Village of Phoenix v. Gannon, 55 Misc. 606, 106 NYS 927. Civ. Code Cal. § 499 does not deprive a city of power to grant to two railways having tracks of different width the right to operate cars on same street for a distance not exceeding five blocks, each occupying middle of street and contributing to cost of paving. San Jose-Los Gatos Interurban R. Co. v. San Jose R. Co. [C. C. A.] 156 F 455. Civ. Code Cal. § 499 provides that "two lines of street railway, operated under different managements, may be permitted to use the same street, each paying equal portion for construction of tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway, operated under different managements, occupy and use same street or tracks for a distance of more than five blocks consecutively." Held that such provision does not deprive municipal authorities of a city of power to grant to two railways, having tracks of different width, right to operate their cars on same street for distance not exceeding five blocks, each occupying middle of street, and each paying equal portion of cost of paving between and beside tracks as required by § 498. Id.

79. If its charter does not cover proposed streets, there must be filed in the office where the certificate of incorporation is filed a statement of the names of the streets upon which it is proposed to build the road, and the consent of the local authorities and property owners must be obtained. Trojan R. Co. v. Troy, 109 NYS 779.

80. Words "local authorities" as used in Const. 1870, art. 11, § 4, and "corporate authorities" as used in 2 Starr & C. Ann. St. 1896, p. 2110, c. 66, par. 3, held synonymous and to refer to representatives of people in municipal government. Potter v. Calumet Elec. St. R. Co., 158 F 521. Where street railway company was enjoined from operating railroad in street because necessary consent of county court had not been obtained, it was not error to refuse to modify decree so as to allow company permission to use one side of street instead of center, since such modification would be granting them a right which they could obtain only from county court. Swinhart v. St. Louis, etc., R. Co., 207 Mo. 423, 105 SW 1043.

81. Potter v. Calumet Elec. St. R. Co., 158 F 521. License must be by ordinance passed by yeas and nays, concurred in by a majority of members, and approved by mayor. Id. Under Act April 21, 1896 (p. 4, 1896, p. 329), requiring permission to be granted by ordinance, after public notice and hearing and upon filing of certain consent of owners of property fronting upon street to be used, a resolution authorizing a company to construct turnouts adopted without such hearing, notice and consent, is invalid. Specht v. Central Passenger R. Co. [N. J. Law] 68 A 785. Where ordinance granted right to construct street railroad on certain streets and avenues of a city, and provided that railroad company should be liable for and pay into city treasury $50, and no more, as an annual license fee for each and every car used by the company, contract executed by corporation and mayor on behalf of city to induce mayor to sign ordinance, providing that railway company should pay $50,000 in instalments within 20 years for right secured, constituted such a modification or amendment of ordinance that both could not be executed as a whole. Potter v. Calumet Elec. St. R. Co., 158 F 521. Informal acceptance of contract by city council and ordering of same filed held ineffective as amendment. Id. Held that validity of consent of park commissioners to construction of street railway through park approach is not af-

streets may be given by acquiescence or may be waived by the city.[82] A legislature cannot preclude its successors from granting further franchises within the same territory.[83] In some states the franchise to occupy the streets of cities of a certain class [84] must be sold at public auction to the highest bidder,[85] but generally, after the acceptance of a bid, an ordinance expressly granting the franchise is necessary.[86] Where a street railway company has enjoyed a franchise, it is generally estopped to assert the invalidity of a contract executed as an inducement.[87]

In some states the consent of the electors must be obtained before a street railway can occupy a street,[88] while by the constitution [89] or statutes [90] of others only

fected by fact that it differs in its terms from consent of common council, especially where its terms are more rigorous. Kuhn v. Knight, 190 N. Y. 339, 83 NE 293. Owners of property abutting upon a street held entitled to right to prosecute a writ of certiorari to review action of a city council in granting by resolution right to a street railway company to construct turnouts in said street. Specht v. Central Passenger R. Co. [N. J. Law] 68 A 785.

82. North Jersey St. R. Co. v. Newark St. & Water Com'rs [N. J. Eq.] 67 A 691.

83. Act June 7, 1901 (P. L. 514), opened Broad street to occupation by "any railway corporation chartered under this act, or by any company which had abandoned or discontinued use thereof." Held that 13th and 15th Streets Ry. Co. which, under Act of March 27, 1873 (P. L. 435), surrendered its claims to lay tracks on Broad street on consideration that no other street railroad should be permitted to do so, did not, under Act of 1901, acquire superior right to use of Broad street, but privilege of using it was open to all on equal terms. Commonwealth v. Broad St. Rapid Transit St. R. Co. [Pa.] 67 A 958.

84. Railroad Law, Laws 1890, p. 1109, c. 565, § 93, provided that no consent of local authorities in city of 1,250,000 population to occupation of street for railroad purposes shall be valid unless it provides for sale of franchise at public auction to highest bidder. As amended by Laws 1901, p. 1229, c. 494, the section still provided in first sentence thereof that condition should be attached to consent of local authorities in cities of 1,250,000 inhabitants, but in body of amendment, one of main features of which was the confirmation of consents and extension of consents theretofore given by local authorities to construction of street railroads in cities of first class, appeared declaration that provisions of section as amended should apply to all cities of first class. Held, the provision in amended portion of law that it should apply to all cities of first class had reference only to provision for confirmation of consents, etc., theretofore given by local authorities, and not to entire law. Kuhn v. Knight, 190 N. Y. 339, 83 NE 293.

85. Laws 1893, p. 373, c. 182, § 19, as amended by Laws 1906, p. 88, c. 52, relating to government of cities of second class, provides that city, under proper regulations for its protection, may sell a franchise at public auction to highest bidder upon due notice, which sale must be approved by the board of estimate and apportionment. Held that personnel of bidders is immaterial, but, if there is a compliance with terms of sale, bids must be acted upon and highest bid accepted subject to appeal of board; and hence, where individual was highest bidder, he was entitled to franchise though he was himself under law unable to construct and maintain road, and he could either organize a corporation to construct and maintain it or could assign his bid to another who would do so. Trojan R. Co. v. Troy, 109 NYS 779.

86. St. 1901, p. 265, c. 103, St. 1903, p. 90, c. 82, and city charter of Los Angeles, construed, and held that franchise does not vest in applicant upon acceptance of his bid, but only upon due passing of ordinance. City of Los Angeles v. Davidson, 150 Cal. 59, 88 P 42.

87. Agreed to pay city $50,000 in instalments. Potter v. Calumet Elec. St. R. Co., 158 F 521.

88. Where no termini are named in notice of election and the consent is granted generally, company lay tracks in only such streets as are used within reasonable time. State v. Lincoln St. R. Co. [Neb.] 114 NW 422. Where electors are invested with power of extending to street car company right or privilege of entering on streets, an irregular exercise of such power will not, under all circumstances, be held void. Where company, under belief that it is authorized so to do under vote of electors, expends money in construction of its line, considerations of public policy may require the court to protect it in possession and use of road so far as constructed and in operation when its right to use of streets of city is brought in question. State v. Citizens' St. R. Co. [Neb.] 114 NW 429.

89. Laws 1880, p. 872, c. 582, provided for construction of underground street railways, but substituted favorable determination of commissioners when confirmed by general term for consent of local authorities having control of street and of owners of one-half in value of property bounded on it, as required by Const. art. 3, § 18. Held that the unconstitutional provision for substitute may be stricken from act without affecting remainder, to which may be applied constitutional provisions relating to consent. New York, etc., R. Co. v. O'Brien, 121 App. Div. 819, 106 NYS 909.

90. Rev. St. §§ 1536—188, 1536—189, requiring written consents of owners of more than one-half of frontage of lots and lands abutting on street along which it is proposed to construct street railway, do not create a favored class upon whom privilege

the consent of the owners, or a majority of them, of property abutting on the street in which the proposed tracks are to be laid, is required.[91] Consents to the extension of an existing street railway cannot be used by a third party,[92] and consents once acted upon by the council lose their vitality in Ohio.[93] Statutory requirements for obtaining the franchise in the first instance are not usually applicable to a renewal [94] or an extension.[95] In New York a certificate of public necessity must be obtained from the commissioners.[96]

Street railways are subject to the police power, and municipalities may impose reasonable regulations in the exercise thereof.[97]

is bestowed to exclusion of others having equal rights, and is not an arbitrary classification of individuals, but is valid and constitutional exercise of legislative power. Isom v. Low Fare R. Co., 10 Ohio C. C. (N. S.) 89.

91. Where street railway tracks occupy street unlawfully by reason of fact that term for which grant was made has expired, exception found in Rev. St. § 1536—189, making it unnecessary to procure consents from abutting owners under certain conditions, is not operative, and consents are required before new tracks can be laid in place of old. Isom v. Low Fare R. Co., 10 Ohio C. C. (N. S.) 89. Act April 21, 1896 (P. L. 1896, p. 329), requires consent of abutting property owners before ordinance granting permission to construct street railway may be adopted, and under § 1 city council may either, when such permission is given or afterwards, fix by resolution the location of the rails or tracks, etc. Held that such section did not authorize council to grant permission by resolution, and without property owners' consent, to a street railway company to construct turnouts where a previous ordinance permitting road to be constructed fixed with precision the location of tracks, turnouts, etc., and did not include turnouts covered by resolution, and where between acceptance of ordinance and the adoption of resolution the membership of the council was changed. Specht v. Central Passenger R. Co. [N. J. Law] 68 A 785. Laws 1899, c. 497, in effect authorized construction of a new railroad when none existed before, which could only be accomplished by a compliance with constitutional provision requiring consent of adjoining owners or in lieu thereof consent of appellate division and of local authorities in charge of street. In re Long Island R. Co., 189 N. Y. 428, 82 NE 443.

92. Who is a stranger to franchise of existing company. Isom v. Low Fare R. Co., 10 Ohio C. C. (N. S.) 89.

93. Cannot be again used as basis of a second grant to another company. Isom v. Low Fare R. Co., 10 Ohio C. C. (N. S.) 89.

94. Requirements as to securing of consents from abutting property owners for establishment of street railway route, giving of notice of application for franchise, and its award to individual or corporation agreeing to carry passengers for lowest rates of fare, held not to apply. City of Lima v. Cramer, 5 Ohio N. P. (N. S.) 113.

95. That original line of street railway company was but about 3 miles long, while proposed additional line is about 15 miles long, is insufficient of itself to constitute such addition a "new road" and not "extension," within Railroad Law, Laws 1890, p. 1108, c. 565, § 90, permitting a street surface railroad company to "extend" its lines without obtaining a certificate of board of railroad commissioners that public convenience and necessity require same. Roberts v. Huntington R. Co., 105 NYS 1031.

96. On hearing as to necessity of an extension before commissioners, evidence that from point where proposed extension ends petitioner owns a right of way along street for a long distance, and that it is proposed in time to extend road along such right of way to and beyond city limits is proper to be considered as one of circumstances bearing on necessity for such extension. In re United Trac. Co., 119 App. Div. 806, 104 NYS 377.

97. A regulatory ordinance is presumptively reasonable. North Jersey St. R. Co. v Jersey City [N. J. Law] 67 A 1072. Burden of proof is upon person attacking same. Id. Ordinance regulating car service during "rush hours" held not unreasonable as to Pennsylvania terminal. Id. Ordinance requiring fenders upon traction cars is reasonable and valid, but a provision therein with respect to position and height of such fenders, if impracticable, is void. Chicago, etc., R. Co. v. Freeman, 125 Ill. App. 318. Held that primary purpose of act 1907, p. 238, c. 157, § 4, was to enable steam railroads to avoid stopping their trains at crossings without incurring penalty provided by § 2293, and that it does not apply to crossings of electric street railroads within limits of a street or highway. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650. St. 1906, p. 743, c. 520, § 3, authorizing Boston Elevated Railway Company to construct subways in city of Cambridge, provides that a plan of proposed route, with location of stations and approaches, is to be filed with railroad commissioners, within a year after acceptance of act by company and before work is begun, for their approval or alteration, "whether the mayor has or has not approved it," which plan shall, after notice and hearing, be approved by board or altered as it deems nceessary. § 13, p. 748, provides for location by company of subway stations and aproaches at convenient points, subject to approval of mayor. § 14 gives company a right of appeal to railroad commissioners if mayor refuses to approve the plan submitted to him. Held that the number of stations to be established was a

The right to declare a forfeiture depends largely upon the terms of the franchise.[98] Where the failure to commence construction or to complete the system within a specified time ipso facto works a forfeiture,[99] a default [1] forecloses all rights.[2] A default, however, may be waived,[3] and likewise, the right to contest the company's occupation may be lost by estoppel or laches.[4]

Rights and duties under franchise. See 8 C. L. 2007—Where a franchise or right to occupy the streets has been legally granted and acted upon, a contract is created [5] which cannot be changed [6] except by mutual consent [7] unless the right is reserved in

question to be determined by railroad commissioners, and not by mayor, whose only authority was to approve or disapprove locations of stations after determination by board as to their number, and, in case of his refusal to approve, his decision was subject to review by board. Wardwell v. Railroad Com'rs [Mass.] 83 NE 869.

98. Fact that corporation authorized by Comp. Laws, § 6234, par. 5, to construct its railroad on streets pursuant to the consent of the municipality, and possessing a franchise to operate a street railroad in a city pursuant to an ordinance imposing the conditions on which the railroad should be operated, carried freight not authorized, and charged excessive fares, and obstructed the street of the city, was not a cause for the forfeiture of the franchise, but called for a regulation of the business done by the corporation. Attorney General v. Toledo & M. R. Co. [Mich.] 15 Det. Leg. N. 46, 115 NW 422. Where ordinance giving street railway company right to use street contained no clause of forfeiture, agreement of company with mayor, at time of signing ordinance, to arbitrate any difficulty with another street railway company seeking to use street, did not give city right to forfeit franchise because its arbitrator was unable to agree with the second arbitrator in the choice of a third. Chester City v. Union R. Co., 218 Pa. 24, 66 A 1107.

99. Held to ipso facto work forfeiture. Los Angeles R. Co. v. Los Angeles [Cal.] 92 P 490.

1. Franchise construed and held that company was not entitled to extension of time because it failed to obtain consent of property owners or the right of way through private property where it had legal right to force its way. Attorney General v. Toledo, etc., R. Co. [Mich.] 15 Det. Leg. N. 46, 115 NW 422.

2. Where right of way was granted on condition that road should be completed within two years, but company took no steps within that time, it lost all rights (Attorney General v. Toledo, etc., R. Co. [Mich.] 15 Det. Leg. N. 46, 115 NW 422), and fact that franchise provided for giving bond, and that highway commissioners attempted to waive time for filing it on application of company made after expiration of two years, could have no effect so far as extending franchise was concerned (Manton v. South Shore Trac. Co., 121 App. Div. 410, 106 NYS 82). City cannot be restrained from interfering with laying of tracks thereon or from removing tracks unlawfully laid, railroad not being in possession and having no right to lay tracks thereon. Los Angeles R. Co. v. Los Angeles [Cal.] 92 P 490. Where street railway company does not begin to construct its road until after its franchise therefor has expired, a tax payer and owner of property abutting on line of proposed road under process of construction is entitled to continuance of temporary injunction during pendency of an action to perpetually enjoin construction of road. Manton v. South Shore Trac. Co., 121 App. Div. 410, 106 NYS 82.

3. Where authorities consented to building of railroad on condition that consent should not be operative until road should give bond indemnifying town against all damages arising from construction and on condition that one track should be in operation within two years and that acceptance of consent should be filed within specified time, and there was due acceptance, but road failed to begin construction work or to give bond within required two years, but upon application authorities waived defaults and extended time, and road was not in fault under amended consent owner of property abutting on one of the streets involved cannot enjoin construction of road on ground that default could not be waived. Manton v. South Shore Trac. Co., 104 NYS 612.

4. Mere fact that abutting owners remain silent for two years while street railway company unlawfully constructs and operates railroad in street does not estop them from disturbing company's possession. Swinhart v. St. Louis, etc., R. Co., 207 Mo. 423, 105 SW 1043. Courts will apply doctrine of laches to case in which state is party plaintiff where for long series of years it has stood silent and seen corporation expend large sums in acquisition of property and improvements made thereon under claimed right so to do under its charter. State v. Lincoln St. R. Co. [Neb.] 114 NW 422.

5. A suit to restrain passage of a municipal ordinance repealing a prior ordinance granting franchise to street railroad company, which had been accepted by company, is one involving question of impairment of obligation of contract in violation of constitutional rights of company, and is within jurisdiction of a federal court regardless of citizenship of the parties. Missouri, etc., R. Co. v. Olathe, 156 F 624. Ordinance requiring elevated railroad to construct its girders specified distance above surface rail of any steam railroad precludes acquisition of right to use any space less that such specified distance above surface of rails. Peabody Coal Co. v. Northwestern El. R. Co., 230 Ill. 214, 82 NE 573.

6. Township held without power to

the granting ordinance.[8] The rights and obligations of a street railway company are largely controlled by its franchise.[9] A contract provision for the benefit of another

change location. Asbury Park, etc., R. Co. v. Neptune Tp. Committee [N. J. Eq.] 67 A 790.

7. It is competent for municipal council and street railway company to terminate, in part or in its entirety, rights of company under previous grant and to renew grant for period of twenty-five years, provided company is not released from any obligation or liability under old grant, and renewal will, in opinion of council, prove beneficial to public. City of Lima v. Cramer, 5 Ohio N. P. (N. S.) 113. Route of street railway may, by agreement with a company owning other routes, be extended by ordinance over all or a part of such other routes. Id. Grant to construct tracks in street cannot be duplicated over same right of way, even with consent of company to which right was first given, unless consent is that of stockholders given in way provided by statute. Isom v. Low Fare R. Co., 10 Ohio C. C. (N. S.) 89.

8. Reservation of power to repeal said ordinance in case of breach of its conditions by company does not authorize city to repeal ordinance at its pleasure without assigning any breach, and when there has, in fact, been none. Missouri, etc., R. Co. v. Olathe, 156 F 624.

9. Term "right of way" as used in franchise of elevated railway regulating height of its superstructure means always occupied and used for track and operation of trains. Peabody Coal Co. v. Northwestern El. R. Co., 230 Ill. 214, 82 NE 573. Though rights of street railway company and city are governed by contract contained in a franchise granting right of way, provisions of Civ. Code, § 502, relating to such franchises, enters into contract and must be considered in construing it. Los Angeles R. Co. v. Los Angeles [Cal.] 92 P 490. Provision in contract between city and street railroad company that city should not reduce fares below five cents was not abrogated by subsequent contract providing that "in construction, maintenance and operation" of its lines company should be subject to all present or future ordinances of city. Minneapolis St. R. Co. v. Minneapolis, 155 F 989. City gave by ordinance a street railway company right to use particular street, reserving right to grant to any other railway company rights in same street. Mayor required railroad company in consideration of ordinance to agree to arbitrate any dispute with another company to which right to street might be granted. Held that company could not allege that agreement for arbitration, not being a part of the ordinance, was not binding on it. Chester City v. Union R. Co., 218 Pa. 24, 66 A 1107. Acts 1905, p. 148, No. 101, approved May 10, 1905, and given immediate effect, authorized street railroad companies with consent of proper authorities to construct their lines in, on, above or under the streets and ways of a city and village, but not to construct and operate elevated railroads, so called, and only to authorize the operation of street railroads above the streets and highways and over railroads by means of trestles. The act approved May 18, 1905 (Acts 1905, p. 182, No. 133), conferred on street railways the right of eminent domain, but did not refer to the limitations described in the former act. Held that the latter act did not repeal the former so as to authorize a street railroad to condemn land for an overhead "embankment" crossing certain streets and another railroad. Detroit United R. Co. v. Barnes Paper Co., 149 Mich. 675, 14 Det. Leg. N. 558, 113 NW 285. City of New York leased subway to railroad company without restriction as to right of lessee to maintain in its stations weighing and vending machines. Held that lessee had right to maintain such machines as is custom of railroads where they were purposely placed so that their obstructing or interfering with public was absolutely impossible. City of New York v. Interborough Rapid Transit Co., 53 Misc. 126, 104 NYS 157. Where a street railway company incorporated under P. L. 1886, p. 185, providing for incorporation of street railway companies and their regulation, on application pursuant to P. L. 1889, p. 100, has been granted permission to lay its tracks along a certain route on condition that it pay annually a certain per cent of its gross receipts to township, and under such provision has laid its tracks, repeal of ordinance granting such permission and consequent removal of company's tracks on ground that it has failed to perform its agreement as to payment may be enjoined on condition that company account to township for compensation provided for. Asbury Park, etc., R. Co. v. Neptune Tp. Committee [N. J. Eq.] 67 A 790. Where, at time of adoption of ordinance conferring on street railway authority to use certain streets upon which to construct a street railway system, it was not known where railway's power house could be located, and ordinance did not require railway to construct plant on any of streets over which such use was granted, express authority carried with it right to make use of such other streets for transmission of electric power as was essential to enjoyment of authority expressly granted. Beaumont Trac. Co. v. Brock [Tex. Civ. App.] 20 Tex. Ct. Rep. 239, 106 SW 460. Chartering act and amendments held to show sufficient right in complainant, as successor to another, to maintain certain curved rail connections (North Jersey St. R. Co. v. Newark St. & Water Com'rs [N. J. Eq.] 67 A 691), and showed such right as entitled it, pending final determination of its right, to enjoin their removal (Id.). Company was granted location for its tracks through township, route being 2 23-100 miles in length, on condition that it pay to township annually 5 per cent of its gross receipts. At that time township claimed jurisdiction over whole distance, but thereafter, when accounting was sought as to such compensation, only 42-100 of a mile of railway lay within township's

street railway company cannot be enforced by the city.[10] The right granted by electors of a municipality to occupy the streets may be transferred.[11] A bond for the faithful discharge of its obligation is not affected by a change in the route.[12]

A street railway company may restrain an unreasonable use of the street which will interfere with its use and injure its property,[13] or may make reasonable regulations [14] and agreements [15] in respect thereto. Though a building being moved across the tracks is an unlawful obstruction, the company cannot willfully injure it.[16]

Mortgages.—In some states mortgage bonds can be issued only with the approval of the railroad commissioners,[17] and an agreement to issue as security does not create a preference over general creditors.[18] Although the company possesses no tangible property, it may give a mortgage on property to be acquired.[19] The mortgage trustee may represent the bond holders in proceedings pertaining to the bonds

boundaries. Before accounting, company, desiring to lay a double track through twe boroughs, which at time of grant were embraced in such township, agreed to pay to each of them annually certain amounts, and at time of accounting and previous thereto 2 23-100 miles of track of such company had been operated im connection with another road, their total mileage being 6 90-100 miles, but receipts of two roads were not kept separate. Held, on accounting for such compensation, that township should be compensated on basis of entire 2 23-100 miles, and that amount on which township's percentage should be calculated was that amount which bore same proportion to the total receipts as 2 23-100 miles to 6 90-100 miles, or 223-690 of the total receipts, from which should be deducted payments theretofore made to the township and payments made to the boroughs. Asbury Park, etc., R. Co. v. Neptune Tp. Committee [N. J. Eq.] 67 A 790.

10. Where city gave railway company by ordinance permission to use street in question, with provision therein reserving right to another company to use same street, city cannot maintain bill in equity to compel first company to permit second company to use street, party aggrieved in such case being second company. Chester City v. Union R. Co., 218 Pa. 24, 66 A 1107.

11. Right of street car company to occupy streets of city granted by vote of electors is, if nothing more, a license coupled with an interest, and such license is transferable. State v. Citizens' St. R. Co. [Neb.] 114 NW 429.

12. Where street railroad ordinance required defendant's predecessor to execute a bond for $500 that it would comply with ordinance in good faith and construct a road within a specified time, subsequent change in route by amendment of ordinance granted by town on application of railway company did not terminate principal's liability on bond so that on a breach thereof action was maintainable against defendant as railway company's successor in interest. Choctaw R. & Lighting Co. v. McAlester [Ind. T.] 104 SW 821.

13. Where street railroad has been authorized to construct a line on a city street and has made compensation for any injury resulting to abutting property, it is entitled to restrain moving of a house lengthwise on street, which cannot be done without occupying company's track, destroying its trolley wire, and interrupting for a considerable time operation of its cars, as rule that citizens may use streets to same extent as a railway company does not authorize unreasonable occupation of streets to exclusion of others or in such manner as to unreasonably prevent passage of cars (Ft. Madison St. R. Co. v. Hughes [Iowa] 114 NW 10), and where suit was dismissed, defendants, to recover on injunction bond, having no right to move house along track, must prove that they had not threatened to tear down railway company's overhead construction or to use company's track as alleged (Id.).

14. Requirement that moving of a building across its track shall be done in nighttime would be a reasonable requirement if insisted on by company. Toledo, B. G. & S. Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200.

15. Refusal by owner to pay in advance $10 demanded, after consent to move building across railway track and bringing of building to track, did not justify railway employes in resisting passage of building in absence of previous notice that such a demand would be made or of ground for believing that the $10 could not be subsequently collected from the owner. Toledo, B. G. & S. Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200.

16. Ran into it instead of moving it off. Toledo, B. G. & Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200.

17. Rev. Laws Mass. 1902, c. 112, § 23. Augusta Trust Co. v Federal Trust Co. [C. C. A.] 153 F 157.

18. Provision in notes by which it agreed to issue to holder as security certain of its bonds secured by mortgage previously executed as soon as a further issue of bonds thereunder should be authorized by commissioners does not place notes on equality with bonds previously issued, nor entitle holders to any preference over general creditors where no further issue of bonds was authorized and company has become insolvent and is in course of administration, although the circumstances were such as to create an equitable lien as between parties which courts would enforce in absence of the statute. Augusta Trust Co. v. Federal Trust Co. (C. C. A.) 153 F 157.

19. To raise funds for construction. Chalmers v. Littlefield [Me.] 69 A 106.

where it is impracticable to bring all the bond holders into court.[20] A trustee may be authorized by the court to release certain property from the mortgage where the bond holder's interest will be promoted thereby.[21] A purchaser at a mortgage foreclosure acquires the property subject to all the franchise restrictions.[22]

Right of roads inter se.—The mutual rights and obligations of street railway companies are frequently regulated by contract,[23] but such contracts must be authorized of law.[24] Authority to construct a line carries the implied power to cross other roads,[25] and a municipal body authorized to grant the use of a highway may authorize an intersection on such highway.[26] The manner of crossing is frequently regulated by statute or ordinance.[27] The right to acquire and operate existing roads [28] and the right to consolidate [29] or connect [30] are usually controlled by statute.

20, 21. Proceeding to release part of property. City of Baltimore v. Baltimore United Railways & Elec. Co. [Md.] 69 A 436.

22. Asbury Park, etc., R. Co. v. Neptune Tp. Committee [N. J. Eq.] 67 A 790.

23. Grant to company possessing franchise to operate cars by horse, cable or electric power, of right to use tracks of another company under agreement fixing annual compensation therefor, and stipulating that, if latter company changes its power to a cable, it will haul cars of former company and receive therefor an additional annual compensation, gives to former right to employ horse power over tracks of latter by paying annual consideration until latter company changes its motive power to cable, in which case latter company must haul cars of former company by cable for the increased compensation, and equity will not give to the former company the right to use a trolley system on the tracks of the latter company. Kavanaugh v. St. Louis Trac. Co., 127 Mo. App. 265, 105 SW 278.

24. Hurd's Rev. St. 1905, c. 114, § 44, authorizing railroads to make contracts with one another for the running of their roads, does not authorize street railway to grant use of its tracks to commercial railroad. City of Aurora v. Elgin, A. & S. Trac. Co., 227 Ill. 485, 81 NE 544. Franchise to lay tracks in street and to operate street cars thereon, does not authorize street car company to grant use of its tracks to interurban company for entrance to city. Id. Though only such vehicles may be used upon street railway tracks as their special charters or general law under which they are organized permit, a traffic agreement whereby one company operates cars of another company of same kind as those first company is entitled to use over its lines is valid. State v. Atlantic City & S. R. Co. [N. J. Law.] 69 A 468.

25. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 So. 457.

26. Title of Acts 1905, p. 521, c. 167, entitled "An act concerning highways," is broad enough to cover a provision authorizing interurban electric railroad to build its road on any public highway on procuring consent of board of county commissioners, right of interurban electric railroad to use steam railroad track at a highway crossing being incident to franchise granted to operate electric road on a public highway. South East, etc., R. Co. v. Evansville, etc., R. Co. [Ind.] 82 NE 765.

27. Ordinance forbidding use of any space under specified distance over tracks of "any existing steam railways" includes all tracks over which ordinary cars run whether owned by a railway company or not. Peabody Coal Co. v. Northwestern El. R. Co., 230 Ill. 214, 82 NE 573.

28. Traction companies act of March 14, 1893 (P. L. 1893, p. 302; Gen. St. p. 3235), authorizes companies incorporated thereunder to acquire and operate actually existing street railways whether or not they are at the time being operated with legal authority. Jersey City v. North Jersey St. R. Co. [N. J. Err. & App.] 67 A 113. Under express terms of General Corporation Act, § 51 (P. L. 1896, p 294), every domestic corporation, no matter under what law it may have been organized, may acquire and hold stock and bonds of any other corporation, domestic or foreign, even to extent of acquiring controlling interest; and hence a corporation organized under general railroad law may acquire bonds of and a controlling interest in stock of corporation organized under street railway law. State v. Atlantic City & S. R. Co. [N. J. Law] 69 A 468.

29. Where consolidation of domestic street and interurban railway corporations with similar foreign corporation is authorized by law, and an alleged consolidated company made a bona fide attempt to organize under law, and actually exercised corporate functions, fact that domestic corporation which attempted to enter consolidation did not have any railway constructed and in operation, as contemplated by Laws 1901, p. 181, c. 94, authorizing consolidation, would not prevent consolidation corporation from being a de facto corporation; and under Burns' Ann. St. 1901, § 5468j, relating to powers of consolidated street railways providing that nothing therein contained shall be construed to abridge any power, privilege, or franchise to them belonging by their respective acts of incorporation, etc., in an action to enjoin interference with a plaintiff railway, it must be assumed that a de facto consolidated street and interurban railway is entitled to the rights and privileges of a domestic street and interurban railway. Cleveland, etc., R. Co. v. Feight [Ind. App.] 84 NE 15. Where defendant does not pretend that route of plaintiff corporation outside of city limits is parallel with and competes with its own, or that its business is affected by the fact that plaintiff is a

Actions involving franchise rights.—Where a street railway's franchise is being contested, it cannot maintain a suit in equity to enjoin another company from occupying the street.[31] Ordinarily, only the city can contest the legal right of occupation of the streets,[32] but the city solicitor cannot predicate a suit for injunction upon anticipated injury to private parties.[33] Under the rule that a party need not prove a negative in a suit against a street railway, it generally devolves upon it to prove consent,[34] but one claiming the consent omitted statutory conditions must point out and prove the same.[35]

Rates, fares and transfers.[36]

§ 2. *Property and acquirement thereof.* See 8 C. L. 2010—The power of eminent domain may be vested in a street railway [37] and private property can be acquired only in the exercise thereof or by grant.[38] The use of a street by a street railway company imposes no additional servitude,[39] and hence it may cross the tracks of a steam railroad at street intersections [40] without acquiring the right by grant or condemnation [41] and without compensating the railroad.[42]

corporation resulting from consolidation of two corporations operating lines of street cars in city of Shreveport, defendant has no interest in contesting consolidation of two companies on ground that lines of two companies in city were to some extent parallel and competing with each other. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457.

30. Connection of tracks of same street railway company lying on two different streets is not within ordinance prohibiting any connection of one railroad with another without consent of council. North Jersey St. R. Co. v. Newark St. & Water Com'rs [N. J. Eq.] 67 A 691.

31. Tacoma R. & Power Co. v. Pacific Trac. Co., 155 F 259.

32. Private individual cannot maintain bill in nature of quo warranto. Thirteenth & Fifteenth Sts. Pass. R. Co. v. Broad St. Rapid Transit St. R. Co. [Pa.] 67 A 901. Where individuals have filed articles of association with secretary of commonwealth in order to procure a charter as a street railway company, they have no standing before letters patent have been issued to file a bill under Act June 19, 1871 (P. L. 1360), to question the right of a street railway to maintain extensions secured as provided by statute. Andel v. Duquesne St. R. Co. [Pa.] 69 A 278.

33. Such injury is of private character and remedy is in owners. Extension of street railway franchise. City of Lima v. Cramer, 5 Ohio N. P. (N. S.) 113.

34. The assent of the county court to the use of a highway by a street railway company is in the nature of a license, and must be shown by one claiming its protection. Swinhart v. St. Louis, etc., R. Co., 207 Mo. 423, 105 SW 1043.

35. Manton v. South Shore Trac. Co., 104 NYS 612.

36. See 8 C. L. 2009. See, also, Carriers, 9 C. L. 466.

37. Quasi public corporation. Minneapolis St. R. Co. v. Minneapolis, 155 F 989.

38. A street railway company cannot lay its tracks on overhead railroad bridge built by steam railroad company across its tracks in street without either agreeing with steam railroad company on the amount of compensation to be paid and on question of location of tracks or having same determined by commissioners in accordance with railroad law, Laws 1890, p. 1087, c. 565, § 12, notwithstanding Laws 1897, p. 794, c. 754, vesting determination of manner in which crossings shall be made, whether above, below, or at grade, in state board of railroad commissioners. Lake Shore, etc., R. Co. v. Chautauqua Trac. Co., 54 Misc. 275, 104 NYS 550.

39. Hence, abutting owners may not restrain construction of such road, company being liable at law, under express terms of Code Pub. Gen. Laws, art. 23, § 255, for any injury arising in constructing or operating the road. Jeffers v. Annapolis [Md.] 68 A 361.

40. Cleveland, etc., R. Co. v. Feight [Ind. App.] 84 NE 15; South East, etc., R. Co. v. Evansville, etc., R. Co. [Ind.] 82 NE 765. Has same right of passage as any recognized mode of highway travel. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650. Acts 1901, p. 461, c. 207, and Acts 1903, pp. 92, 125, cc. 34, 59, providing for proceedings and compensation for crossing of steam railroad tracks by tracks of electric interurban roads at places not within limits of any highway, and declaring that acts shall not abridge right, under existing laws, of interurban road to locate its road on a public highway crossing tracks of any steam railroad at a highway intersection without special proceedings relate wholly to crossings of interurban railroads with other railroads at other places than highway intersections, and do not grant an interurban road right to cross a steam railroad at a highway crossing, and court on determining right of an interurban road to cross a steam railroad at a highway crossing will not determine constitutionality of the act. South East, etc., R. Co. v. Evansville, etc., R. Co. [Ind.] 82 NE 765.

41. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650.

42. South East, etc., R. Co. v. Evansville, etc., R. Co. [Ind.] 82 NE 765. A steam railroad company may not complain of excava-

§ 3. *Taxes and license fees.* See 8 C. L. 2010—Municipalities are usually authorized to impose franchise taxes.[43] The taxation of street railroads is largely regulated by statute.[44] The property of a street railway located in a street is not taxable for the improvement of such street.[45]

§ 4. *Street railway corporations.* See 8 C. L. 2010 *Insolvency and receivership.*—A street railway and an electric railroad designed to run beyond the municipal limits may be incorporated under a single charter.[46] The Massachusetts statute making directors liable for all "debts and contracts" to the extent of the capital stock, unless the same has been paid in full, does not apply to torts.[47] The question of ultra vires can be raised only by one injured thereby and who has a sufficient status.[48]

While a court in possession through a receiver may ordinarily handle and dispose of the property to the best interest of the creditors,[49] it has no power to displace contract liens except for running expenses.[50] Where it appears that lessor will be placed in a position of temporary insolvency by the default of lessee in rentals, it may intervene in a suit by a receiver against the lessee and surrender its property in the receivership.[51] Receivers have no occasion to appear pending investigation by a state

tion of soil, and of cutting of its rails by street railroad company in crossing its tracks at a street crossing, such acts not being encroachment upon its private rights, but an inconvenience and interference incidental to a proper use of street, which must have been contemplated when steam railroad company opened street across its tracks. Michigan Cent. R. Co. v. Hammond, etc., R. Co. [Ind. App.] 83 NE 650.

43. In absence of some constitutional provision, there is no objection to municipality imposing a franchise tax if authorized by its charter to do so, since real consideration for such tax is use of streets and not merely right to use them which may never be exercised. City of Baltimore v. United Railways & Elec. Co. [Md.] 68 A 557.

44. Acts 1882, p. 357, c. 229, provided that in lieu of the 12 per cent. tax theretofore paid, certain street railway companies should pay City of Baltimore for use of park fund a tax of 9 per cent. on their gross receipts accruing from passenger travel on railways within city limits. Acts 1888, p. 113, c. 98 (Annexation Act), provided that all streets, etc., in annex which shall have been legally condemned as streets under provisions of statutes relating to streets in Baltimore county, shall be held to be validly constituted streets of Baltimore City in all respects as if the same had been legally condemned as such by mayor and city council of Baltimore. Act 1894, p. 837, c. 550, provided for inspection of books of railway companies by park commission, and that upon default by any of companies operating street railway lines within present city limits in payment of park tax of 9 per cent. of gross receipts for all street railway lines within present city limits, a penalty of 30 per cent should be imposed. Held, that, tax having been imposed as an equivalent for grant of privilege to use streets for railway purposes, street railway company was not liable to pay a tax on gross receipts derived from passenger traffic lines within city limits constructed on company's private rights of way (City of Baltimore v. United Railways & Elec. Co. [Md.] 68 A 557), but was liable for tax on gross receipts derived from lines on public streets of city, including those lines constructed under private grants on what became public streets of Baltimore county, and those constructed under grants from the legislature and the county commissioners of Baltimore county before annexation (Id.).

45. In re City of Seattle [Wash.] 94 P 1075.

46. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La 759, 44 S 457. Even if the plaintiff consolidated railroad had been irregularly organized, its incorporation was validated by Act No. 120, p. 281, of 1904. Id.

47. Held not liable under Rev. Laws, c. 112, § 19, on judgment in action for personal injury. Savage v. Shaw, 195 Mass. 571, 81 NE 303.

48. Publisher of newspaper held to have no standing to contest the right to post advertisements in cars, Burns v. St. Paul City R. Co. [Minn.] 112 NW 412.

49. Held under facts that court had power to lease to reorganized company. Guaranty Trust Co. v. Chicago Union Trac. Co., 158 F 913. Held under facts to have power to turn over to reorganized company pending sale. Guaranty Trust Co. v. Chicago Union Trac. Co., 158 F 1015.

50. Merchants' Loan & Trust Co. v. Chicago Railways Co. [C. C. A.] 158 F 923. A court is without power to direct its receivers in possession to lease the properties of street railroad companies, having more or less relation to each other, for a term of years to a single reorganized company, and to authorize such company to issue mortgage bonds to an indefinite but necessarily large amount to cover the cost of replacing, re-equipping, extending, and improving the properties under the direction of a board of engineers representing the city, and not the owners, and to make such mortgage a first lien over the objections of prior mortgagees whose liens are thereby displaced. Id.

51, 52. Pennsylvania Steel Co. v. New York City R. Co., 157 F 440.

commission in respect to improvements to be made and its method of operation.[52] Property in possession of a receiver [53] is not subject to an execution issuing in a suit brought without leave of court.

§ 5. *Location and construction. Location.*[See 8 C. L. 2011]—Locating is frequently left to municipal control,[54] but the power of location is exhausted where once exercised.[55] While a city may authorize the location of poles and feed wires in the street,[56] general permission to locate along a street does not authorize the company to so locate as to unnecessarily interfere with the public use thereof.[57]

Construction.[See 8 C. L. 2012]—A street railway cannot so construct its system as to destroy the practical usefulness of the street.[58] The construction of a railway without legal right which will result in irreparable injury may be enjoined [59] and an abutting owner may recover for injury to his property during construction unless he has precluded himself.[60] In the absence of legislative authority, courts cannot require an overhead crossing.[61] Under statutes and municipal ordinances street car companies are usually required to keep in repair a certain portion of the street,[62] and such duty may be enforced by mandamus where of legislative as distinct from contractual character.[63] An ordinance requiring the top of the rails to be on a level with the surface of the street relates to the grade as it exists rather than to the true grade as fixed.[64] Where the company is given the express power to construct two tracks the construction of a single track does not exhaust its power.[65] In Chicago an elevated

53. Certain steel rails, included in a mortgage of after-acquired property, held legally in custody of receivers of the road, and therefore not subject to seizure and sale on execution, and a suit brought without leave of court held not maintainable. Chalmers v. Littlefield [Me.] 69 A 100.

54. Where city ordinance granted street railway authority to erect a system of overhead wires for purpose of conducting electricity to operate motors and "to properly cross from such electric current generating station as may be required * * * they are hereby authorized to erect poles to place the wires upon," etc., and at time ordinance was adopted location of generating station had not been determined, railway was authorized to erect its wires over such streets as might be required to properly conduct current from power plant to motors, although streets so selected were not any of those designated for construction of railway system. Beaumont Trac. Co. v. Brock [Tex. Civ. App.] 20 Tex. Ct. Rep. 239, 106 SW 460.

55. Asbury Park, etc., R. Co. v. Neptune Tp. Committee [N. J. Eq.] 67 A 790.

56. Beaumont Trac. Co. v. Brock [Tex. Civ. App.] 20 Tex. Ct. Rep. 239, 106 SW 460.

57. Lambert v. Westchester Elec. R. Co. [N. Y.] 83 NE 977.

58. May be enjoined by parties injured thereby. Swinhart v. St. Louis & S. R. Co., 207 Mo. 423, 105 SW 1043.

59. Where it is not clear that a street railway corporation is without legal right to build its road, or that its building will work irreparable injury to an adjoining owner, a motion to continue a temporary injunction pending trial will be denied. Roberts v. Huntington R. Co., 105 NYS 1031.

60. Plaintiff is not prevented from recovering from a street railway company for injury to his property through an excavation made in an abutting street in the construction of the line because when he acquired the property he knew that the line was to be constructed and because he did not object to the excavation until it was nearly completed, no waiver of his right to recover being shown. Somerset Water, L. & Trac. Co. v. Doyle [Ky.] 107 SW 208.

61. Cannot annex to expropriation of a grade crossing condition that plaintiff shall, in present or future, cross by means of overhead bridge. Shreveport Trac. Co. v. Kansas City, etc., R. Co., 119 La. 759, 44 S 457.

62. Under railroad law, Laws 1890, p. 1112, c. 565, § 98, requiring a railroad company to keep in repair that portion of the street "between its tracks, the rails of its tracks, and two feet in width outside of its tracks," is required to keep in repair a space two feet outside of each rail. City of Amsterdam v. Fonda, etc., R. Co., 119 App. Div. 680, 104 NYS 411.

63. Distinction pointed out between ordinances creating merely private rights and those having legislative force. Borough of Pleasantville v. Atlantic City & Suburban Trac. Co. [N. J. Law] 68 A 60.

64. Ft. Worth, etc., R. Co. v. Hawes [Tex. Civ. App.] 107 SW 556.

65. A street railway incorporated under the special act of March 23, 1865, P. L. (1866) 1199, with power to construct between points designated "a railway with one or more tracks," does not exhaust its power by the construction of a single track railway, but it may, more than three years after the passage of the act, construct a double track railway to provide for the increasing needs of the public. There is nothing in the act of March 23, 1865, which requires the consent of a borough mentioned in the act as one of the terminals, to the construction of such railway within the bor-

railway may maintain its station in a private building adjacent to its line and connect the same by a passageway,[66] provided it retains its public character,[67] and does not constitute an unlawful obstruction.[68]

§ 6. *Injuries to passengers.*[69]

§ 7. *Injury to employes.*[70]

§ 8. *Injuries to persons other than passengers or servants. A. General rules as to negligence and contributory negligence.* See 8 C. L. 2015—A company which has leased its road with legislative authority [71] or a construction company which has turned over the system [72] is not liable for negligence in the operation thereof. The legislature in Maine has no power to exempt a particular railway from the general law of liability for negligence. At common law a street railway company is under no obligation to keep the street in safe condition,[74] but it must keep its track in such condition [75] and the portion of the street occupied thereby.[76] Since street railways enjoy the use of streets in common with the public generally,[77] they must exercise reasonable care [78] in the equipment,[79] maintenance,[80] and operation [81] of their cars

ough limits, nor is the company required to take out a permit under an ordinance of the borough "regulating excavations in streets and requiring permits therefor." Dunmore Borough v. Scranton R. Co., 34 Pa. Super. Ct. 294.

66. Rothschild v. Chicago, 227 Ill. 205, 81 NE 407.

67. Fact that ticket office is located in passageway, and not in store or waiting room, does not make use of store or waiting room private rather than public. Rothschild v. Chicago, 227 Ill. 205, 81 NE 407.

68. If passageway from waiting room in store to elevated railroad station is in fact an unlawful obstruction, city is not estopped to remove it, having made a proposition to permit its use for a money consideration where such proposition was not accepted, nor deprived of its right to remove it by an agreement to permit its construction and use for a money consideration. Rothschild v. Chicago, 227 Ill. 205, 81 NE 407.

69. See Carriers, 9 C. L. 466.

70. See Master and Servant, 10 C. L. 691.

71. Bensiek v. St. Louis Transit Co., 125 Mo. App. 121, 102 SW 587.

72. Company organized for purpose of building and selling street railways is not liable for injuries from operation thereof after road has been delivered to a purchaser, in absence of a showing that it was not properly constructed at time of delivery. Pugh v. Texarkana L. & Trac. Co. [Ark.] 109 SW 1019.

73. An act of legislature that no action shall be maintained against a particular street railway company therein named for injuries caused by its neglect of duty to keep in repair those parts of a street of a town occupied by its tracks, unless one of directors had 24 hours' actual prior notice of defect and subsequent notice of injury within 14 days, is to that extent unconstitutional and void. Milton v. Bangor R. & Elec. Co. [Me.] 68 A 826.

74, 75. Chicago Union Trac. Co. v. Case, 129 Ill. App. 451.

76. Bound to use ordinary care to keep that portion of street occupied by its roadbed in a reasonably safe condition for public travel. Owensboro City R. Co. v. Barber Asphalt Pav. Co. [Ky.] 107 SW 244. Liable for injuries resulting from its failure to perform its absolute duty of keeping part of street occupied by its tracks in a reasonably safe condition. Pugh v. Texarkana L. & Trac. Co. [Ark.] 109 SW 1019. Acceptance by a street railway company of franchise to occupy portions of streets of town with its railroad, coupled with duty of keeping such portions of streets in repair, gives a right of action against company to a traveler injured by its neglect of duty. Milton v. Bangor R. & Elec. Co. [Me.] 68 A 826.

Evidence held sufficient to go to jury on questions whether defendant failed to keep street surface in repair about its tracks, and whether such failure was proximate or concurring cause of plaintiff's injury. Pugh v. Texarkana L. & Trac. Co. [Ark.] 109 SW 1019.

77. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838; Eckels v. Muttschall, 230 Ill. 462, 82 NE 872. Company has no superior right. Smith v. Connecticut R. & Lighting Co. [Conn.] 67 A 888. Company is charged with knowledge that public may lawfully use entire street, and it must use reasonable means to prevent injury to others rightfully using that part of street occupied by its tracks. West Chicago St. R. Co. v. Muttschall, 131 Ill. App. 639.

78. El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415. Charge that defendant company was required to do everything and anything to stop and avoid hurting anybody was erroneous, since it placed upon defendant duty to exercise extraordinary precaution. Heckmuller v. New York City R. Co., 54 Misc. 541, 104 NYS 679. Street car company owes to those having right to common use of the streets with it only that degree of care that person of ordinary prudence would exercise under like circumstances. Lexington R. Co. v. Woodward [Ky.] 106 SW 853. Owes very high degree of care. Barstow v. Capital Trac. Co., 29 App. D. C. 362. It is duty of street railway to so construct its road and equip and operate its cars that latter may be readily controlled by operators, under all conditions and in all situations reasonably to be

and in the employment of efficient servants.[82] The particular vigilance required in the exercise of ordinary care varies with circumstances.[83] No liability attaches, how-

anticipated. Percell v. Metropolitan St. R. Co., 126 Mo. App. 43, 103 SW 115.

79. Modifying the requested instruction of defendant, in an action for the collision of a street car with a buggy, that, if defendant's employes in charge of the car, as soon as they discovered the dangerous position of plaintiff, used ordinary care to prevent the collision, defendant would not be liable for any collision which might have been prevented, if such employes had had other appliance than what they had for preventing a collision, by adding the words, "unless a mere running of the car, without having it provided with such additional appliances, if they were any, would in itself have amounted to wanton and reckless conduct on the part of the defendant," was not error. Scott v. San Bernardino Valley Trac. Co. [Cal.] 93 P 677. Whether it is negligence to operate a street car without a fender held question for the jury. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265. Company is only required to adopt methods, machinery and appliances in accordance with ordinary usage of business. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838. Rule that it is necessary to prove that certain appliances are in general use by street railway companies before negligence can be predicated on omission to supply them does not apply to appliances, the use of which is a matter of common knowledge. Id. As applied to street railway cars, fender is a guard or protection against danger to pedestrians coming in contact with a car. Id.

80. Negligence in lighting held for jury. Kaselicska v. Pittsburg Railway Co. [Pa.] 68 A 1018. That car runs 150 feet after brakes are set is evidence that car's equipment for stopping was ineffective. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265. Where car escaped control held to show defective apparatus or negligence in operating. Schimmack v. Washington, etc., R. Co., 33 Pa. Super. Ct. 653.

81. It is the duty of operators of car to keep it under reasonable control while passing through well-populated districts, and especially while approaching street crossings. Grout v. Central Elec. R. Co., 125 Mo. App. 552, 102 SW 1026. Reasonableness of speed is measured by relation of speed to circumstances under which it is maintained, having regard to view and crowded condition of thoroughfare. Smith v. Connecticut R. & Lighting Co. [Conn.] 67 A 888. Must use ordinary care to avoid injury, regardless of whether rate of speed has been limited by statute or ordinance, or not. Wolf v. City R. Co. [Or.] 91 P 460.

Negligence: Stopping a car in middle of a block and starting it suddenly without warning is negligence. Chicago City R. Co. v. Strong, 129 Ill. App. 511. To run car along city streets on a dark and stormy night at rate of 15 miles an hour without a headlight, and without sounding a gong or whistle at street crossings. Nelson v. Chicago, etc., R. Co. [Ind. App.] 83 NE 1019. Ram car down steep grade without conductor being at grip. Percel v. Metropolitan St. R. Co., 126 Mo. App. 43, 103 SW 115. Speed of from 15 to 40 miles an hour along street in populous part of a city without reducing speed at street intersection is not only negligence but is a wanton and reckless act. Grout v. Central Elec. R. Co., 125 Mo. App. 552, 102 SW 1026. High speed by car unloading passengers. Hammond, etc., R. Co. v. Blockie, 40 Ind. App. 497, 82 NE 541. Whether unusual speed on dark and stormy night was negligence, as a matter of law, depends upon circumstances of case. Cincinnati Trac. Co. v. Kroger, 10 Ohio C. C. (N. S.) 64.

Negligence for jury: Speed of 26 or 29 miles an hour at a much-used crossing. Wolf v. City R. Co. [Or.] 91 P 460.

No negligence: Evidence held insufficient to justify a finding of negligence on part of company. Kochesperger v. Philadelphia Rapid Transit Co., 217 Pa. 320, 66 A 547. Where plaintiff stepped into danger immediately in front of car. Heinel v. People's R. Co. [Del.] 67 A 173. Speed of eight or ten miles an hour in country between two villages late at night is not excessive, where track is on side of road and it does not appear that there was any travel at the time. Kupiec v. Warren, etc., R. Co. [Mass.] 82 NE 676.

82. Placing of inexperienced motorman in charge of car, accompanied by skilled motorman to teach him, and to see that no harm will come from his inexperience, is not negligence. Columbus St. R. & Light Co. v. Reap, 40 Ind. App. 689, 82 NE 977.

83. Greater degree of care is required in thickly settled districts. Chicago & J. Elec. R. Co. v. Wanic, 230 Ill. 530, 82 NE 821. Servant in charge of suburban car, which is behind time and is proceeding along a road where he may expect to meet or overtake loaded teams, and where to his knowledge the road is so blocked with snow as to render it practically impassable for teams except along the track, is required to use more than ordinary care. Jenison v. Rhode Island Suburban R. Co. [R. I.] 67 A 867. Motorman in operating car through thickly settled part of city must keep a lookout for pedestrians traveling on intersecting streets. Remillard v. Sioux City Trac. Co. [Iowa] 115 NW 900. Principles of law governing management of trains propelled by steam power and those propelled by electricity are not identical. Wolf v. City R. Co. [Or.] 91 P 460. Where street was habitually crossed between crossings, must exercise care required at crossing. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838. Motorman operating car on right of way inclosed by fences is under no obligation to keep lookout for trespassers. His duty is to sound his gong or blow his whistle when he sees trespassers on track, and to take all precautions possible to stop his car on discovering that they are not aware of his approach. Wade v. Detroit, etc., R. Co. [Mich.] 15 Det. Leg. N. 88, 115 NW 713. Company operating its cars over public highway is required to

ever, unless the negligence proximately results in injury,[85] and the party injured is free from contributory negligence.[86] Contributory negligence is no defense against willful negligence.[87] The company's negligence need not be the sole cause of the injury.[88] The violation of a statute or ordinance enacted in the interest of public safety is prima facie negligence,[89] and a party injured thereby may predicate an action thereon.[90] The company may be negligent in fact though there is no ordinance [91] or in running within the speed limit.[92]

"Last clear chance" doctrine.[See 8 C. L. 2019]—Contributory negligence of plaintiff is no bar to recovery where the company, after it discovers,[93] or by the exercise of due care could have discovered,[94] his perilous position,[95] could by the exercise of reason-

keep lookout for travelers on highway, but no such duty is required at points along its track outside the highway. Birmingham R., L. & P. Co. v. Brown [Ala.] 44 S 672.

84. Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367. Question is for the jury where motorman was negligent and ran into pedestrian. Shirley v. Rhode Island Co. [R. I.] 67 A 585. Failure to give signals is immaterial where it appears that plaintiff saw car before attempting to cross tracks. Elgin, A. & S. Trac. Co. v. Brown, 129 Ill. App. 62. Defect in pavement and not open switch held proximate cause. Chicago Union Trac. Co. v. Case, 129 Ill. App. 461.

85. No recovery can be had for negligence not resulting in injury. Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367.

86. Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367. Where a trolley company applies a lubricant to its tracks along a public street in order that its cars may pass around a curve more easily, it is its duty to make the application in such manner as not to endanger safety of persons entitled to use street, and plaintiff crossing a public street at a corner, unless warned to the contrary, has a right to assume that place is safe, and is not guilty of contributory negligence in stepping upon the lubricant and being thrown down and injured. Slater v. North Jersey St. R. Co. [N. J. Err. & App.] 69 A 163.

87. Birmingham R., L. & P. Co. v. Brown [Ala.] 44 S 572.

88. Must be proximate but need not be sole cause. Miller v. Boston, etc., R. Co. [Mass.] 83 NE 990. In action by teamster for injuries caused by collision, instruction that, while burden was upon defendant to establish plaintiff's contributory negligence, it did not relieve plaintiff of burden of proving that his injuries were solely caused by defendant's negligence, and that if plaintiff's injuries were caused by mutual and concurring negligence of plaintiff and defendant's motorman, and negligence of neither without concurring negligence of other would have caused injury, then plaintiff was not entitled to recover, was erroneous, since defendant might be liable even if accident was not caused by its sole negligence. Zander v. St. Louis Transit Co., 206 Mo. 445, 103 SW 1006.

89. Chicago, etc., R. Co. v. Freeman, 125 Ill. App. 318. Village adopted ordinance fixing maximum speed of street cars. Subsequently it granted franchise to company to operate street railroad in village. Company obtained similar authority from outlying township, pursuant to Comp. Laws, § 6446, authorizing company to operate street railway on highways of any township on conditions agreed on by company and township board. Territory belonging to township was subsequently attached to village. Held, that ordinance was effective in attached territory. Deneen v. Houghton County St. R. Co., 150 Mich. 235, 14 Det. Leg. N. 670, 113 NW 1126.

90. Deneen v. Houghton County St. R. Co., 150 Mich. 235, 14 Det. Leg. N. 670, 113 NW 1126.

91. Fact that speed of cars in sparsely settled districts is not regulated by ordinance does not relieve against requirement of ordinary care in their operation. Chicago, etc., R. Co. v. Wanic, 230 Ill. 530, 82 NE 821.

92. Instruction held not objectionable as ignoring principle. Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 SW 48.

93. Must show that peril was discovered. San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64. Negligence in failing to discover is not sufficient. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032. Negligence must be subsequent to discovery (San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64), hence, cannot base recovery on negligent speed (Gabriel v. Metropolitan St. R. Co. [Mo. App.] 109 SW 1042). Mere fact that person is on street with evident purpose of crossing it while car is approaching is no evidence in itself that he intends to place himself in a position of peril. Id.

94. Liable, where in exercise of due care by motorman danger might have been discovered in time to have avoided calamity. Doherty v. Des Moines City R. Co. [Iowa] 114 NW 183. Instruction in action for death of one struck by a street car, that as to charge of negligence, in that motorman failed to stop car after plaintiff's son was in a position of peril, this principle of law did not apply unless plaintiff's son was in such position a sufficient length of time to enable those in charge of car to stop or to check same so as to avoid striking him in exercise of ordinary care, and with means at hand for stopping car, was not erroneous as leaving out of consideration duty of motorman to be on lookout to discover peril. Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 SW 48.

95. Inference that one in charge of a

able care [90] have prevented the injury,[97] the failure to exercise such care being regarded as the sole proximate cause.[98]

(§ 8) *B. Travelers on highway. Injuries to pedestrians.*[See 8 C. L. 2020]—While both [99] the street car company [1] and the pedestrian [2] must exercise reasonable care in

street car saw person walking along track ahead of car does not necessarily carry with it further inference that he realized that person would not leave track in time to avoid being injured, but on contrary he would ordinarily have right to assume that person would get off track and avoid injury. San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64. Instruction that plaintiff could recover if motorman saw, or should have seen, his wagon on track, and thereafter could have prevented collision by taking proper steps to stop car but negligently failed to do so, was not erroneous as imposing on motorman duty of stopping car upon seeing wagon on track, instead of after he realized danger of a collision. Prendeville v. St. Louis Transit Co. [Mo. App.] 107 SW 453.

96. Instructions to find for plaintiff, unless motorman, after he saw, or by exercise of ordinary care could have seen danger of a collision, "used such means as were at his command," to avoid it, are erroneous, where it appeared that there were two ways of stopping car, by reversing current and by applying brake, since jury may have been misled to believe that he did not use both means at his command, and that he was negligent in not doing so, while law only requires that he use ordinary care in exercise of means at his command to avoid danger, etc. Lexington R. Co. v. Woodward [Ky.] 106 SW 853. Where only negligence of street car company, if any, was in failing to make a timely stop of car, and motorman testified that he used emergency stop instead of brake, instruction that, if motorman could have seen team on track in a dangerous position, it was his duty to use all appliances at his command to prevent collision, and, if he did not do so, jury might find him negligent, was objectionable, for failure to confine jury's attention to question whether in exercise of reasonable care car in question could not have been stopped soon enough to have avoided the accident. Ramsey v. Cedar Rapids, etc., R. Co. [Iowa] 112 NW 798.

97. Heinel v. People's R. Co. [Del.] 67 A 173; Powers v. Des Moines City R. Co. [Iowa] 115 NW 494; Louisville R. Co. v. Hutchcraft [Ky.] 105 SW 983; Bensiek v. St. Louis Transit Co., 125 Mo. App. 121, 102 SW 587. Where there was no evidence authorizing inference that negligence of driver of vehicle contributed to injury after employes in charge of car saw, or by exercise of ordinary care could have seen, his perilous situation, instructions that, if motorman in charge of car saw, or by exercise of ordinary care could have seen, vehicle on track and in a position of peril in time to have avoided collision by exercise of ordinary care and he nevertheless negligently permitted car to run against vehicle, verdict should be for plaintiff, was not erroneous for failing to require jury to find that plaintiff was exercising ordinary care after going on track and before collision. Bensiek v. St. Louis Transit Co., 125 Mo. App. 121, 102 SW 587.

Doctrine held inapplicable: Where evidence showed due care after discovering peril. Doherty v. Des Moines City R. Co. [Iowa] 114 NW 183. In action for injuries received by being run down by car, evidence adduced by plaintiff in chief examined and held insufficient to go to jury on issue of discovered peril. San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64. Case of one, who, having been standing on hub of wagon wheel close to track, was struck by car just as he was alighting, even if his position on hub was a perilous one, it not being peril of that position alone, at least, from which he was injured, and there being no evidence that motorman saw, or could have seen, him start to step down in time to stop car before it struck him. State v. Cumberland & W. Elec. Railways Co. [Md.] 68 A 197.

Evidence held not to show negligence after discovering child. Gabriel v. Metropolitan St. R. Co. [Mo. App.] 109 SW 1042. Where driver of team drove unexpectedly upon tracks, instruction was held correct which stated, "If the jury believe from the evidence under the instructions of the court that as said train of cars approached the place in question it was being operated with ordinary care, and that said C. drove his team in the way of the car so suddenly that the gripman had no such notice of any danger to said C. as to give him an opportunity to avoid the danger by the exercise of such presence of mind and of such ordinary care as is to be expected from a man of ordinary coolness and prudence, and under such circumstances as were then surrounding him there the court instructed the jury to find the defendant not guilty." Chicago City R. Co. v. Strong, 127 Ill. App. 472.

98. Pilmer v. Boise Trac. Co. [Idaho] 94 P 432. Negligence of plaintiff is not proximate cause. Grass v. Ft. Wayne & W. V. Trac. Co. [Ind. App.] 81 NE 514. Collision with buggy. Smith v. Connecticut R. & Lighting Co. [Conn.] 67 A 888. Whether negligence of motorman was proximate cause of injury held question for jury, where on street 50 feet wide, there being no other pedestrians, cars, or vehicles in sight, a child started to run across the street when a street car, which was late and running at a speed of 12 to 15 miles an hour, was 50 feet away, and was struck by the car which had given no warning signal, and went 120 feet beyond the place of collision before it was stopped. Gormley v. Union R. Co. [R. I.] 67 A 584.

99. Rights and duties are reciprocal. Pilmer v. Boise Trac. Co. [Idaho] 94 P 432. Railway company is charged with knowledge that others may use entire street upon which its tracks are located, and must use

all reasonable means to void injuring them. Chicago, etc., R. Co. v. Barrows, 128 Ill. App. 11. Charge that street car company has no right to exclusive use of that part of a street upon which its tracks are laid, but that pedestrian has equal right to its use in traveling over and across it, is erroneous, since, while in certain sense pedestrian has common right with a street car company to use part of a street occupied by its tracks, he has no right by walking thereon to hinder progress of a car, and it is his duty, if he is where he can safely do so, to step aside and let it pass at its usual speed. San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64.

1. Negligent: In starting car before plaintiff who had crossed ahead had reached place of safety. Mittleman v. New York City R. Co., 56 Misc. 599, 107 NYS 108. Fact that motorman could see one on track one and one-half blocks away, and did not see any one at crossing, warrants finding that motorman was negligent in not discovering decedent and in colliding with him. Remillard v. Sioux City Trac. Co. [Iowa] 115 NW 900. In action against street railway company and railroad company for wrongful death from a collision, evidence held not to show freedom of street railway from negligence proximately contributing to injury. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030.

For jury: Negligence of motorman in regard to speed and lookout. Merkl v. Jersey City, etc., R. Co. [N. J. Err. & App.] 68 A 74.

Not negligent: Failure to give signals where giving thereof could not have averted accident. Chicago Union Trac. Co. v. Daly, 129 Ill. App. 519. In failing to detect prostrate form in darkness. Kupiec v. Warren, etc., R. Co. [Mass.] 82 NE 676. It appearing merely that intestate attempted to cross in front of car and miscalculated distance or speed of car, and it not appearing that his intention to cross was manifest to motorman in time for him to avoid accident. Heeran v. Rhode Island Co. [R. I.] 67 A 447.

2. In action for death of plaintiff's intestate while endeavoring to cross tracks and assist his brother across, instruction that deceased was not necessarily guilty of contributory negligence in endangering his own life to save his brother was erroneous as omitting qualification that action of deceased must have been compatible with a reasonable regard for his own safety, and if his own negligence contributed to placing himself and his brother in a dangerous situation, fact that he then suddenly attempted to save his brother would not absolve him from contributory negligence. Miller v. Union R. Co. [N. Y.] 83 NE 583.

Held negligent: In attempting to pass ahead of known approaching car. Grout v. Central Elec. R. Co., 125 Mo. App. 552, 102 SW 1026. Attempted to pass in front of car 6 or 7 feet away. Long v. Union R. Co., 122 App. Div. 564, 107 NYS 401. Saw car approaching 60 or 80 feet away and attempted to cross. Robinson v. Union R. Co., 121 App. Div. 558, 106 NYS 203. Negligent as matter of law in not looking carefully or in not looking at proper place. Beirne v. Lawrence, etc., R. Co. [Mass.] 83 NE 359. Crossed behind one car and stepped in front of another. Van Ness v. North Jersey St. R. Co. [N. J. Law] 67 A 1027. Workman killed while not aware of his nearness to track. Kelly v. Boston El. R. Co. [Mass.] 83 NE 865. In walking on track in drunken condition without heeding cars. San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64. In attempting to cross knowing that car was approaching not far off. Glasco v. Jersey City, etc., R. Co. [N. J. Law] 68 A 1074. Workman stood on track with back toward approaching cars, paying no attention. Brockschmidt v. St. Louis, etc., R. Co. [Mo.] 103 SW 964. In walking along between track. Mey v. Seattle Elec. Co. [Wash.] 92 P 283. In passing behind one and being struck by one on adjoining track. Ross v. Metropolitan St. R. Co., 125 Mo. App. 614, 102 SW 1036. Failed to show affirmative freedom from negligence where he looked and then proceeded diagonally across without looking again. Ayres v. Forty-Second St., etc., R. Co., 54 Misc. 639, 104 NYS 841. With view unobstructed, stepped in front of well lighted car. McAuliffe v. New York City R. Co., 122 App. Div. 633, 107 NYS 522. Car being in plain sight, although he testified that he looked and saw no car. Piatt v. Pittsburg Railways Co. [Pa.] 69 A 72. In failing to wait for car from which he alighted to move on so as to enable him to look with effect along other track, and that fact that approaching car was running at excessive speed did not relieve him of the charge of negligence. Shuler v. North Jersey St. R. Co. [N. J. Err. & App.] 69 A 180. Where, in action for injuries to pedestrian in a collision with street car, it was not shown that plaintiff knew or relied on use of searchlights by company on its cars, it was no excuse for plaintiff's failure to discover car in time to avoid being struck by it that it was only equipped with incandescent light on dashboard, instead of searchlight in use on some of defendant's cars for a year prior to the accident. Beirne v. Lawrence, etc., R. Co. [Mass.] 83 NE 359. Where at night he attempted to cross track in front of car when it was from 8 to 15 feet distant, headlight plainly visible, and gong ringing. Higgins v. Los Angeles R. Co., 5 Cal. App. 748, 91 P 344.

Negligence held for jury: Killed while crossing. Remillard v. Sioux City Trac. Co. [Iowa] 115 NW 900; Murphy v. Interurban St. R. Co., 56 Misc. 598, 107 NYS 96; Spiking v. Consol. R. & P. Co. [Utah] 93 P 838. Walking on public foot path between tracks and struck by car temporarily on wrong track. Lamb v. Union R. Co., 109 NYS 97.

Held not negligent: Pedestrian desiring to take car standing on opposite track was entitled to hastily cross intervening track on which car was approaching provided he exercised ordinary care for his own safety in view of the surroundings. Spiking v. Consol. R. & P. Co. [Utah] 93 P 838. Person is not bound to wait because car is in sight, but if car is at such distance that he has time to cross, if it is run at usual speed, it is not negligence, as matter of law, to attempt to do so. Wolf v. City R. Co. [Or.] 91 P 460. Person crossing a street has a right to assume that approaching street

view of the surrounding conditions [3] to avoid injury, the latter may assume that the former will exercise such care [4] unless he knows or is charged with knowledge to the contrary,[5] but this does not absolve him from the duty of exercising due care for his own safety.[6] While the motorman on approaching a place where the presence of persons is to be anticipated must keep a lookout and give warning,[7] he need not stop or lessen speed until danger becomes apparent.[8] A pedestrian may rely upon known [9] customs.[10] While one crossing a street car track is not required to exercise the same vigilance as in crossing railroad tracks,[11] he must use his sense of sight and hearing

car a block away is running at a lawful rate of speed, and if he could cross in safety before car running at that speed could reach him, he is not guilty of contributory negligence in crossing without stopping to look just before reaching track unless he becomes aware that car is running at a greater speed. In absence of any direct evidence as to whether he knew speed of car, the fact that he was struck was not conclusive evidence of contributory negligence, as presumption that he would exercise care for his safety would negative any knowledge on his part of speed at which car was coming. Powers v. Des Moines City R. Co. [Iowa] 115 NW 494.

3. Where decedent was killed in collision with street car, and court called attention to particular circumstances of case, instruction that decedent was required to use his senses and exercise that degree of care that men of ordinary prudence would have exercised under particular circumstances of case as disclosed by evidence, was not objectionable as requiring too low a degree of care, in view of evidence that decedent was familiar with surroundings and conditions prevailing at place of accident. Spiking v. Consol. R. & P. Co. [Utah] 93 P 838.

4. Pilmer v. Boise Trac. Co. [Idaho] 94 P 432; Sandberg v. Brink's Chicago City Exp. Co., 126 Ill. App. 175; Indianapolis St. R. Co. v. Hoffman, 40 Ind. App. 508, 82 NE 543; Percell v. Metropolitan St. R. Co., 126 Mo. App. 43, 103 SW 115. Person crossing in front of street car while at standstill has a right to assume that it will not be started or so operated as to strike her until she has had a reasonable opportunity to pass point of danger. Mittleman v. New York City R. Co., 56 Misc. 599, 107 NYS 108. Traveler is not negligent in makng use of a street with reliance on observance of ordinary care by operators of street cars thereon, though approaching car is coming rapidly from more or less distant point. Frank J. Lennon Co. v. New York City R. Co., 108 NYS 995. In action for injuries in being struck by a car while crossing defendant's track, instruction that "when one attempts to cross the tracks of a street car, and has approached the track at such a distance from the approaching car that he has reasonable ground to suppose that he will be able to cross the track, it is the duty of the street car driver to give him a reasonable opportunity to cross, and if for that purpose it is necessary for him to stop his car for a time, it is his duty to do so," and that the jury must determine whether when he approached the track the car was such a distance away as led him to believe that he could cross in safety, and that if he did not so believe he could not recover, "because he accepted himself the risk he then took," was erroneous inasmuch as it largely left the standard of the motorman's care to the apprehension of plaintiff, who had no more right to indulge the assumption that the motorman would stop than the motorman that plaintiff would keep out of the way of the car. Purcell v. Union R. Co., 108 NYS 1068.

5. Special finding held not to show that plaintiff knew or ought to have known of excessive speed. Indianapolis St. R. Co. v. Hoffman, 40 Ind. App. 508, 82 NE 543.

6. Grout v. Central Elec. R. Co., 125 Mo. App. 552, 102 SW 1026.

7. Louisville R. Co. v. Hofgesand, 31 Ky. L. R. 976, 104 SW 361; Zalotuchin v. Metropolitan St. R. Co., 127 Mo. App. 577, 106 SW 548. And exercise ordinary care to avoid collision with them. Paducah City R. Co. v. Alexander's Adm'r, 31 Ky. L. R. 1043, 104 SW 375. Where street car approached vehicle on track, it was motorman's duty to have car under reasonable control, to keep a lookout ahead to avoid a collision, to give notice of presence of car by ordinary signals, and to exercise ordinary care to avoid a collision and consequent injury to persons or vehicles. Louisville R. Co. v. Hutchcraft [Ky.] 105 SW 983.

8. While a motorman need not stop or slow up his car on seeing a vehicle on track, however distant, it is his duty to do so in time to prevent a collision. Prendeville v. St. Louis Transit Co [Mo. App.] 107 SW 453. It cannot be said as a matter of law that it is duty of motorman to stop his car when within 35 or 40 feet of vehicle on track. Wright v. Fries Mfg. & Power Co. [N. C.] 61 SE 380.

9. Instruction permitting recovery for plaintiff if he was injured by reason of defendant's failure to stop cars according to custom, without requiring further finding that plaintiff had knowledge of custom or that he relied on it, was prejudicial error. Percell v. Metropolitan St. R. Co., 126 Mo. App. 43, 103 SW 115.

10. Evidence that plaintiff had worked in that locality for some weeks and had noticed that it was customary for cars to use their gongs when men were near track, but that for hours at a time he would not notice whether cars rang their gongs or not, but that when he did notice cars rang their gongs when men were near track, is insufficient to establish a custom to sound a gong or to show any excuse for a failure to use his own senses for his protection. Kelly v. Boston El. R. Co. [Mass.] 83 NE 865.

11. Spiking v. Consol. R. & P. Co. [Utah] 93 P 838.

to avoid injury.[12] Where one is killed by a street car, there is a presumption against suicide.[13] Where its tracks are habitually crossed at a private point, the company owes the same duty as at public crossings.[14]

Children run over.[See 8 C. L. 2025]—A child under seven years of age is generally conclusively presumed to be incapable of appreciating and avoiding danger,[15] but a child sui juris,[16] while not held to the degree of care exacted of an adult,[17] must exercise such care as can be reasonably expected of one of his age and discretion.[18] Negligence of the parents in exposing a child to danger generally precludes a recovery on their part.[19] While a street railway company is bound to recognize the inatten-

12. Percell v. Metropolitan St. R. Co., 126 Mo. App. 43, 103 SW 115. One who in alighting from wagon steps so near track of a suburban electric railway as to be struck by a car is guilty of contributory negligence in not looking for a car before so alighting. State v. Cumberland & W. Elec. Railways Co. [Md.] 68 A 197. Failure to look and listen is not negligence as a matter of law. Pilmer v. Boise Trac. Co. [Idaho] 94 P 432; Chicago, etc., R. Co. v. Wanic, 230 Ill. 530, 82 NE 821.

13. Lamb v. Union R. Co., 109 NYS 97.

14. Instruction exacting care owed at crossings held correct. Spiking v. Consol. R. & P. Co. [Utah] 93 P 838.

15. Sullenberger v. Chester Trac. Co., 33 Pa. Super. Ct. 12. 5 or 6 years old. Chicago, etc., R. Co. v. Freeman, 125 Ill. App. 318. 16 months old. Birmingham R., L. & P. Co. v. Jones [Ala.] 45 S 177. Finding that child was about 5 years and 10 months old, of average intelligence, was not equivalent to finding that child was capable of exercising some care for her own safety. Hammond, etc., R. Co. v. Blockie, 40 Ind. App. 497, 82 NE 541.

16. Whether a child of 5 years and 10 months old is sui juris is for the jury. Hammond, etc., R. Co. v. Blockie, 40 Ind. App. 497, 82 NE 541.

17. In action by parent for injuries to his minor son struck by a street car, requested instruction that jury, in determining whether or not plaintiff's son was aware of danger of crossing in front of moving car, and whether or not he saw car while in place of safety and took his chances in crossing, jury might consider son's admission that he knew danger and took chances, is erroneous in placing boy on equality with adult, and properly refused. Brown v. St. Louis & S. R. Co., 127 Mo. App. 499, 106 SW 83.

18. Kostenbaum v. New York City R. Co., 120 App. Div. 160, 105 NYS 65. Question of whether child of tender years has exercised such care as would reasonably be expected from person of his age and capacity is question for jury, to be determined by the circumstances of particular case. Barstow v. Capital Trac. Co., 29 App. D. C. 362. In action against street railway company for running over four year old child, it is not error to assume that, as to her curb line of city street is danger line in crossing street. Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51.

Held negligent: Boy of nine who ran directly in front of street car. Sobol v. Union R. Co., 122 App. Div. 817, 107 NYS 656. Eleven year-old child when she saw car approaching in full view and with full knowledge of danger and without necessity attempted by hurrying to cross track in front of it. Casey v. Boston El. R. Co. [Mass.] 83 NE 867. Boy 14 years old who enters on a railroad right of way enclosed by fences, with knowledge of running of cars thereon and danger incident to walking on track, is a trespasser, and must keep a careful watch for approaching cars, and failure to take glance which would have revealed approaching car in time to have enabled him to step off the track is contributory negligence, precluding a recovery for his death caused by being struck by car. Wade v. Detroit, etc., R. Co. [Mich.] 15 Det. Leg. N. 88, 115 NW 713.

Negligence held for jury: Where girl 16 years of age was riding in vehicle which her stepfather drove into position of danger, whether she was negligent in not taking precautions to avoid injury. Zalotuchin v. Metropolitan St. R. Co., 127 Mo. App. 577, 106 SW 548. Boy six years old killed in collision. Chicago City R. Co. v. Strong, 230 Ill. 58, 82 NE 335.

Whether six year-old child was guilty of negligence in crossing street in front of approaching street car, by which she was struck and injured. Van Salvellergh v. Green Bay Trac. Co. [Wis.] 111 NW 1120. Due care of child killed by street car. Beale v. Old Colony St. R. Co. [Mass.] 81 NE 867. Evidence, in action for death of plaintiff's intestate, a child run over by a street car, held not to warrant a peremptory instruction for street railway company. Lexington R. Co. v. Van Laden's Adm'r [Ky.] 107 SW 740. Where evidence tended to show that boy approached car while in conversation with motorman. Barstow v. Capital Trac. Co., 29 App. D. C. 362.

Held not negligent: An adult, much less a child, is not necessarily negligent in failing to anticipate negligent operation of a street car. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265.

19. In action against street railway company for running over plaintiff's four year-old child, it was not error to instruct that, in determining whether plaintiffs by their negligence in custody and care of child contributed to her injury and death, jury was to consider whether or not they exercised that degree of care, caution, and watchfulnss over child, which was reasonable and proper for parents in their circumstances of life, as shown by the evidence. Cornovski v. St. Louis Transit Co.,

tiveness of children to their personal safety and to exercise corresponding care,[20] it ordinarily owes no duty to maintain a lookout for trespassers.[21]

(§ 8) *C. Accidents to drivers or occupants of wagons.*[See 8 C. L. 2026]—While a street car generally has the right of way over ordinary vehicles [22] except at street crossings,[23] each must have due regard for the rights of the other.[24] The motorman

207 Mo. 263, 106 SW 51. Where parents of boy five years old knew that once or twice he had gone to home of his aunt nearby, but did not know he was in habit of doing it, father of the boy is not precluded from recovering for injuries to boy on street on ground that he had permitted his son to go on street in the business part of city unattended. Saxton v. Pittsburg Railways Co. [Pa.] 68 A 1022. Where child under seven years of age is sent by its mother on errand which involves child in peril of crossing busy street on which street cars, wagons and other vehicles constantly pass, and child steps directly in front of street car and is killed, parents are guilty of contributory negligence and cannot recover from street car company damages for death of child. Sullenberger v. Chester Trac. Co., 33 Pa. Super. Ct. 12.

20. Higher care is owed to children than to adults. Barstow v. Capital Trac. Co., 29 App. D. C. 362.

Held negligent: Running of street car at high and dangerous speed. Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 SW 109. Running of street car, without giving any warning of its approach, over a crossing in thickly populated locality. Id. Failure of motorman to keep vigilant watch for persons on or approaching track, and failure to stop car when first seeing child approaching track in shortest time and space possible consistent with safety of passengers and the means under control, resulting in the killing of the child. Id.

Negligence held for jury: Failure to sound gong. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265. In not seeing boy. Brown v. St. Louis & S. R. Co., 127 Mo. App. 499, 106 SW 83. In action for injuries inflicted by a street car upon six year-old deaf and dumb boy, negligence of motorman in not properly controlling speed of his car. Hodges v. Metropolitan St. R. Co., 125 Mo. App. 583, 102 SW 1086. In action to recover for injuries to boy 5 years old, injured while riding on step of platform of car, question of defendant's negligence, on conflicting evidence. Saxton v. Pittsburg Railways Co. [Pa.] 68 A 1022. Gross negligence of motorman. Beale v. Old Colony St. R. Co. [Mass.] 81 NE 867. Evidence in action for death of boy seven years old, who, having been sitting with other boys at a place where boys usually congregated at that time of day, on a street fence watching a steam engine just outside the street, alighted and stepped in front of or against a street car, on a track six feet from the fence, held sufficient to go to the jury on the questions of negligence and contributory negligence; there being evidence of fast driving of the car, of omission to give warning of its approach, and that the motorman looked away from the track as the car approached the place. Madigan v. Berlin St. R. [N. H.] 67 A 404.

Held not negligent: Ran immediately in front of car. Lexington R. Co. v. Van Laden's Adm'r [Ky.] 107 SW 740. No failure to keep proper lookout. Kostenbaum v. New York City R. Co., 120 App. Div. 160, 105 NYS 65.

21. Sixteen months-old child lying on ties held a trespasser to whom no duty of keeping lookout was owed unless circumstances suggested presence. Birmingham R., L. & P. Co. v. Jones [Ala.] 45 S 177.

22. Gilman v. New York City R. Co., 107 NYS 770. Traveler on street in which street cars are operated must, on passing a car, keep out of its way, and at curves in street he must drive further from car than at other points, and where he does not make a sufficient allowance for swing of car and drives so close to it that it in turning strikes his vehicle he is guilty of contributory negligence, precluding a recovery. South Covington, etc., R. Co. v. Besse [Ky.] 108 SW 845. True rule is that driver of wagon has right of way if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he reaches the point of crossing in time to safely go upon the tracks in advance of the approaching street car, the latter being sufficiently distant to be checked, and, if need be, stopped before it reaches him. A request to charge on the subject of the right of way which ignored the limitations of that rule is properly refused. Daggett v. North Jersey St. R. Co. [N. J. Err. & App.] 68 A 179.

23. Both must use reasonable care to avoid an accident under all circumstances of case, and each must exercise his right to highway with due regard for rights of other. Wilmington City R. Co. v. White [Del.] 66 A 1009.

24. Persons in charge of car must keep lookout for persons and vehicles on street and exercise ordinary care to avoid injuring them, and travelers on street must keep a lookout for cars and exercise ordinary care to keep out of their way. South Covington, etc., R. Co. v. Besse [Ky.] 108 SW 848. In action for injuries to person and property caused by a collision between defendant's car and plaintiff's wagon, evidence examined and held not so conclusive in regard to plaintiff's want of due care or absence of negligence on part of defendant as to warrant direction of a verdict for latter. Le Baron v. Old Colony St. R. Co. [Mass.] 83 NE 674. In action for damages to gig caused by a collision with defendant's car, it was held that defendant's negligence and driver's contributory negligence were questions for jury. Kear v. New York City R. Co., 104 NYS 444. In action for injury to fireman struck by trolley pole while riding on a fire patrol

must exercise reasonable care to see whether the track is clear [25] and to avoid injury.[26] The questions of negligence [27] and of contributory negligence [28] are generally of fact.

wagon, whether railway company was negligent in locating pole near a driveway, and whether fireman was guilty of contributory negligence, held questions for the jury. Lambert v. Westchester Elec. R. Co. [N. Y.] 83 NE 977. Held error to instruct "that when one attempts to cross the track of a street car, and has approached the track at such a distance from the approaching car that he has reasonable ground to suppose that he will be able to cross the track, it is the duty of the motorman to give him a reasonable opportunity to cross, * * * and the person crossing the track has the right, without being charged with contributory negligence, to assume that that duty will be performed." Geisendorfer v. Union R. Co., 109 NYS 68.

25. Chicago, etc., R. Co. v. Barrows, 128 Ill. App. 11. In action against street railway, court instructed that if while plaintiff was on street motorman and employes in charge of car knew, or by ordinary care could have known, of his presence in time to stop said car and avoid injuring him, and while plaintiff was in exercise of ordinary care said car was run against him to his injury, to find for plaintiff. Held that instruction was not subject to objection that it did not base defendant's liability on discovery of plaintiff's peril or negligent failure to discover his peril, but told jury that, if plaintiff was on track or sufficiently near to be struck, and his presence was known or could have been, etc., defendant was liable. South Covington, etc., R. Co. v. Eichler [Ky.] 108 SW 329.

26. Must give warning to persons ahead who are likely to cross the tracks in front of the car. Chicago, etc., R. Co. v. Barrows, 128 Ill. App. 11.

27. Held negligent: Evidence held to show negligence. Young v. Metropolitan St. R. Co., 126 Mo. App. 1, 103 SW 135. Motorman who started street car from standing position and ran into plaintiff's vehicle, which was crossing street at intersection, without giving signal and in broad daylight, was negligent. McGurgan v. New York City R. Co., 121 App. Div. 519, 106 NYS 201. Street railway company is liable for injuries to one struck by its car where, when she drove upon track, car was not dangerously near, and when she and her driver discovered it, it was far enough away to have been avoided by turning off track to left if it had been coming within speed allowed by ordinance, it appearing that plaintiff could only avoid the car by turning off track to the left Butler v. Rhode Island Co. [R. I.] 68 A 425. In action against street railway company to recover damages for personal injuries, case is for jury, and verdict and judgment for plaintiff will be sustained where evidence tends to show that plaintiff while driving in a buggy stopped at a street crossing to permit a car to go by, and after looking and not seeing another car started to cross, and that the buggy had nearly cleared the tracks when it was struck by a car going at such speed that it was not stopped until it had run 260 feet beyond point of accident. Finefrock v. United Trac. Co., 33 Pa. Super. Ct. 638. Evidence of motorman's negligence in not properly controlling speed of his car held to justify a verdict for plaintiff on theory that motorman was negligent. Agnew v. Metropolitan St. R. Co., 125 Mo. App. 587, 102 SW 1041.

Held for jury: Whether motorman was negligent in failing to discover that team was without a driver, and in not stopping his car in time to prevent a collision. Harker v. Detroit United R. Co., 150 Mich. 697, 14 Det. Leg. N. 871, 114 NW 657. Whether failure to ring bell in face of fact that vehicle is attempting to cross tracks ahead of an approaching car is negligence. Chicago, etc., R. Co. v. Barrows, 128 Ill. App. 11. Whether motorman kept vigilant watch for driver and vehicle and at first appearance of danger exercised ordinary care to check speed of car and avert collision. Hall v. St. Louis & S. R. Co., 124 Mo. App. 661, 101 SW 1137. Where there is evidence that when horse turned onto track car was 70 feet distant and could have been stopped within twenty-five feet, and that motorman was in middle of car. Wehr v. Carbon County Elec. R. Co., 217 Pa. 490, 66 A 743. Where, in action for injuries to fireman in collision between hook and ladder truck and defendant's street car, there was evidence that speed of car was much too high to prevent timely stop of car after danger to truck became apparent, and that with any proper use of appliances at motorman's command, after peril arising from truck could have been discovered, car might have been stopped, such facts were sufficient to require submission of issue of defendant's negligence to the jury. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 SW 621. In action against street railway company for injuries to traveler in a collision with car, evidence of defendant's negligence. Deneen v. Houghton County St. R. Co., 150 Mich. 235, 14 Det. Leg. N. 670, 113 NW 1126.

28. In action for personal injuries caused by a collision between a street car and a team which plaintiff was driving, instruction leaving jury to determine whether ordinary care would require plaintiff to ascertain whether he could cross safely, by use of his senses of sight and hearing, was error, as plaintiff was bound in law to ascertain whether or not it was safe to attempt a crossing. Doherty v. Des Moines City R. Co. [Iowa] 114 NW 183.

Held negligent: Saw car block away but paid no heed thereto. Davis v. Coeur D'Alene & S. R. Co. [Wash.] 91 P 839. Horses not under control. Leister v. Philadelphia Rapid Transit Co., 217 Pa. 652, 66 A 866. Saw car 50 feet away when 20 feet from track and did not look again. Gilman v. New York City R. Co., 107 NYS 770. In failing to look second time on approaching nearer track. Baxter v. Auburn, etc., R. Co., 190 N. Y. 439, 83 NE 469. Drove in front of approaching car. Unghere v.

Imputed negligence.[See 8 C. L. 2031]—In general the negligence of the driver of a vehicle cannot be imputed to the occupants,[29] especially where they exercise no control over him,[30] and, in any event, such negligence must be the proximate cause of the accident to defeat recovery.[31]

Driving on or near the tracks.[See 8 C. L. 2031]—One may drive upon the tracks of a street railway in the street as a matter of right,[32] and hence the track must be maintained [33] and the cars operated [34] with due regard to such right. On the other hand,

New York City R. Co., 107 NYS 610. Drove slowly across tracks without any regard for safety. Lee v. Chicago City R. Co., 127 Ill. App. 510. Held negligent as matter of law in turning horses onto track without looking or taking any precautions. Metropolitan R. Co. v. Fonville [Okl.] 91 P 902.

Negligence held for jury: Collision. Deneen v. Houghton County St. R. Co., 150 Mich. 235, 14 Det. Leg. N. 670, 113 NW 1126. Whether or not plaintiff was guilty of contributory negligence in not seeing approaching car and thus avoiding the collision. Doherty v. Des Moines City R. Co. [Iowa] 114 NW 183. Whether one who, on busiest street in city, at busiest time, in driving across a street car track, had hind wheel of his buggy struck by a street car going up a slight grade, at a speed of four miles an hour, without warning and without attempting to stop it until it was within five or six feet of buggy, was guilty of contributory negligence, though when he got into buggy and started horse car, not seen by him, was standing at crossing with its front end fifty-nine feet from where he must cross track, and though, while he listened attentively, without hearing anything, he did not look beyond the side curtains of his buggy so as to see the car until his horse was across the track. Scott v. San Bernardino Valley Trac. Co. [Cal.] 93 P 677. Whether driver of ice wagon, all but the rear part of which got over tracks when it was struck by a street car, was negligent, is a question for the jury, the place being near the office, barns and scales of the ice company, and the driver testifying that before he started to cross he looked back a distance of two or three hundred feet and saw no car, and car having neither given any signal nor slackened its speed. Jeddrey v. Boston, etc., R. Co. [Mass.] 84 NE 316.

Held not negligent: In crossing in front of standing car and in not watching same until safely across. McGurgan v. New York City R. Co., 121 App. Div. 519, 106 NYS 201. Driving of fire engine to fire at greater speed than private carriages. Chicago City R. Co. v. McDonough, 125 Ill. App. 223. One driving across a street car track at a time when approaching car is 350 feet away is not, as matter of law, guilty of contributory negligence, though paving between track rails and adjacent thereto had been removed, leaving a space about six inches deep for vehicle, ordinary carriage, to pass over. Hall v. St. Louis & S. R. Co., 124 Mo. App. 661, 101 SW 1137. Plaintiff, while returning from fire on fire truck, was injured in a collision between his truck and approaching street car. Plaintiff was not driving and only saw street car when fifty feet away by looking over top of truck, after which he attempted unsuccessfully to get away. Held that it was not incumbent on plaintiff to keep a vigilant watch for cars, and that he was not negligent as matter of law. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 SW 621. Driver who looked and listened for car prior to going on street car track, and who neither saw nor heard a car, was not negligent as a matter of law for not looking for car within minute thereafter while driving 470 feet along track. Bensiek v. St. Louis Transit Co., 125 Mo. App. 121, 102 SW 587.

29. Eckels v. Muttschall, 230 Ill. 462, 82 NE 872.

30. Doctrine does not apply as between driver and his companion where driver, with respect to whom negligence is alleged, was not agent or controlled by such companion. Donnelly v. Chicago City R. Co., 131 Ill. App. 302; Feingold v. New York City R. Co., 108 NYS 509.

Held not imputable: Mere passenger in automobile. Ward v. Brooklyn Heights R. Co., 119 App. Div. 487, 104 NYS 95. Servant in wagon driven by master. Doctoroff v. Metropolitan St. R. Co., 55 Misc. 216, 105 NYS 229. Girl in rear seat of vehicle driven by father. Zalotuchin v. Metropolitan St. R. Co., 127 Mo. App. 577, 106 SW 548. Fireman on truck driven by regular driver. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 SW 621. Teamster's helper on wagon driven by teamster. Agnew v. Metropolitan St. R. Co., 125 Mo. App. 587, 102 SW 1041. In action against a street railroad company for injuries received while driving on track, defendant's request for a ruling that, if plaintiff intrusted care of horse to driver, in order to recover she must show that he exercised due care and diligence, is properly refused when court instructed that, if plaintiff had authority or control over driver, she could not recover where he was at fault, but if she had no authority or control, and was under no duty to warn him, and had no reason to suspect want of care and skill on his part, she could recover although he was at fault. Miller v. Boston & N. St. R. Co. [Mass.] 83 NE 990.

31. If a motorman was negligent in not ringing bell or making an effort to reduce speed after a collision became imminent, negligence of driver of vehicle in which plaintiff was riding would not relieve railway company from liability on ground that negligent acts of its servant were remote cause of plaintiff's injury. Zalotuchin v. Metropolitan St. R. Co., 127 Mo. App. 577, 106 SW 548.

32. Not a trespasser or licensee. Loofourow v. Utah L. & R. Co. [Utah] 94 P 981.

33. Where sleigh caught in a switch,

however, the user must exercise commensurate care for his own safety,[35] and must leave the track as soon as he reasonably can [36] upon being warned of the approach of a car. Likewise one near the track must exercise reasonable care.[37]

question whether bad condition of road was due to defendant's negligence held one of fact for jury. Miller v. Boston, etc., R. Co. [Mass.] 83 NE 990.

34. Street railroad company, though entitled to paramount right of way over portion of street upon which its rails are laid, has not such exclusive right to its tracks as to permit it negligently to run into a truck without giving driver thereof reasonable opportunity, in exercise of reasonable care, to get off the track, although motorman was under no obligation to stop car unless he saw, or in due performance of his duty should have seen, that there was danger of collision. Doctoroff v. Metropolitan St. R. Co., 55 Misc. 216, 105 NYS 229. Where plaintiff, while at his horse's head attempting to back wagon to curbing to unload goods, was struck by a passing street car, plaintiff was lawfully on street and had right to use any part of it subject to defendant's superior right of way, defendant was entitled to use of the tracks, but it was duty of those in charge of car to keep a lookout for persons on or near track and exercise ordinary care to avoid injuring them. South Covington, etc., R. Co. v. Eichler [Ky.] 108 SW 329.

Held negligent: While plaintiff was at his horse's head attempting to back wagon to curbing for purpose of unloading goods on pavement, one of defendant's cars, propelled at a high rate of speed, without sounding a gong or giving warning, struck him. It was sufficiently light for motorman to see plaintiff and wagon and to realize his dangerous position. South Covington, etc., R. Co. v. Eichler [Ky.] 108 SW 329. In case of injury to driver of wagon where one-half highway was obstructed by company's shifting its tracks, held to be no evidence of negligence on part of company. Leister v. Philadelphia Rapid Transit Co., 217 Pa. 652, 66 A 866.

Negligence held for jury: Collision. United Railways & Elec. Co. v. Colman [Md.] 69 A 379. In action for personal injuries sustained in collision between a street car and plaintiff's wagon, whether defendant was negligent and whether plaintiff in driving south on north-bound track exercised due care. Geohegan v. Union R. Co., 122 App. Div. 646, 107 NYS 503.

35. In action by teamster for injuries caused by a collision with a street car, instruction that if car could have been seen or heard by plaintiff in time to have avoided collision, had he looked or listened, then fact that he says he did look and listen and did not see or hear car, in absence of some obstacle to prevent his seeing or hearing, has no probative force to prove that he looked and listened and did not see or hear car, was erroneous where night on which accident happened was so dark that he might have looked and not have been able to see the car. Zander v. St. Louis Transit Co., 206 Mo. 445, 103 SW 1006.

Held negligent: Unnecessarily drove on track though he could not see more than thirty or forty feet. Memphis St. R. Co. v. Roe, 118 Tenn. 601, 102 SW 343. Struck from rear while driving on track. Shatzman v. New York City R. Co., 55 Misc. 300, 105 NYS 115. While it is not negligence per se to drive along a street railway track in direction traveled by cars, **presumption of negligence** is raised by admission of driver that he traveled for three hundred feet at a slow trot without looking behind for approaching car, and that his only reason for being in that position rather than on side of street was that wagon ran more easily on tracks. Cincinnati Trac. Co. v. Kroger, 10 Ohio C. C. (N. S.) 64.

Negligence held for jury: Where the easterly track of a street railway was obstructed and driver of a wagon turned across westerly track, and while returning to proper side of street was struck by a car 100 feet distant when wagon reached track. Brauner v. Third Ave R. Co., 122 App. Div. 572, 107 NYS 759. Where it appeared that plaintiff was driving wagon on a dark and foggy night on one of defendant's double tracks on which he would face approaching car. Condition of other track and part of cartway not occupied by tracks was such as to make it dangerous to drive thereon. At moment plaintiff went upon track in question he checked speed of his horse and looked and listened for approaching car, but could see or hear nothing. Immediately afterwards car appeared ahead of him with a signal light shining, but no gong sounding. Plaintiff attempted to leave track, but his wagon was caught and he was injured. He testified that car was going between 12 and 20 miles an hour. There was evidence that gong was last rung when plaintiff was 500 feet away. Plaintiff stated that he had been a brakeman on a steam railroad and that his estimate of the car's speed was based on his experience. Rote v. Pennsylvania & M. V. R. Co., 34 Pa. Super. Ct. 508.

Held not negligent: In driving on track, road being almost impassable because of snow, part of which was thrown there by company. Miller v. Boston, etc., R. Co. [Mass.] 83 NE 990. Where condition of street will not permit driving outside car track, it is not negligent to drive in easterly direction on east bound track with curtains of wagon fastened down. United Railways & Elec. Co. v. Cloman [Md.] 69 A 379. Person driving along public street on which there is street railway track is not required to look behind him constantly for cars, nor to look and listen for approach of cars before driving over track where he has no warning of their approach. Zander v. St. Louis Transit Co., 206 Mo. 445, 103 SW 1006.

36. But where he is prevented from leaving track on one side by deep snow and on other side by approach of a car from opposite direction, right of way of car coming in his rear on same track is not paramount.

Frightening horses.[See 8 C. L. 2032]—Persons in charge of a car may assume that a horse approaching or near the track will not be frightened thereby,[38] and need not stop or lessen the speed unless the circumstances indicate danger.[39]

(§ 8) *D. Bicycle riders; automobiles; animals.*[See 8 C. L. 2033]—A bicycle rider [40] or the driver of an automobile [41] and the employes in charge of a car [42] must each exercise reasonable care to avoid injury. A street car company is liable for the negligent killing of animals.[43]

§ 9. *Damages, pleading and practice in injury cases.*[See 8 C. L. 2034]

Damages.[44]

Pleadings.[See 8 C. L. 2034]—The general rules of pleading relating to amendments,[45] consistency of allegations,[46] control of general allegations by specific,[47] etc.,

Dietrich v. Brooklyn Heights R. Co., 108 NYS 158.

37. Where plaintiff was injured in a collision with a street car as he was assisting in loading a van with furniture in street in front of his residence, rights of plaintiff and owners of street car to use street were reciprocal, each being bound to use due care under all circumstances of the case. Heinel v. People's R. Co. [Del.] 67 A 173. Right to stop wagon, for purpose of unloading, near a street railway track, is subordinate to right of way of railroad company. It is duty of person so unloading wagon to get out of way to allow a car to pass, and duty of motorman to approach carefully, with his car under control, so that he can stop promptly to prevent accident. Each has right to assume that other will do his duty, but neither has right to so act that if other does not do his duty a collision will follow. Volosko v. Interurban St. R. Co., 190 N. Y. 206, 82 NE 1090. Held negligent as matter of law in not seeing approaching car while unloading wagon just off track. Id. When driver of a team allowed it to stand near a street railway track and it was run into by a car, negligence held to be for jury. Sampsell v. Rybczynski, 229 Ill. 75, 82 NE 244.

38. And that it is properly tied if standing. Columbus St. R. & L. Co. v. Reap, 40 Ind. App. 689, 82 NE 977.

39. Though he notices that horse is frightened. Mahoning Valley S. E. R. Co. v. Houston, 9 Ohio C. C. (N. S.) 408. In case of horse frightened by a street car, due care of driver of horse and negligence of company held for jury. Metropolitan St. R. Co. v. Fawcett [Kan.] 92 P 543.

40. Though a bicyclist riding along a street railway track is bound to exercise such care to protect himself from injury as is appropriate to case, a failure to maintain constant watch and to listen for cars approaching in either direction is not negligence as a matter of law he being required to use reasonable care in exercise of his faculties, and whether he did so being a question of fact. Hamlin v. Pacific Elec. R. Co., 150 Cal. 776, 89 P 1109. Where in daytime a bicyclist rode about a block and a half along a straight street car track, though there was ample room for him in roadway, and was struck by a car, he was guilty of contributory negligence barring recovery, it appearing his failure to see or hear the car resulted from absolute inattention to his situation and surroundings and through his failure to exercise any care whatever. Id. Held not to conclusively show negligence in attempting to cross ahead of car. Youngquist v. Minneapolis St. R. Co., 102 Minn. 501, 114 NW 259.

41. One driving automobile backward in principal street of town onto electric railway track collided with car. He expected a car to pass about that time. After starting backing he did not look where car was though there was nothing to obstruct his view to rear. Car, before colliding with automobile, stopped to take on passengers. Held that he was guilty of contributory negligence as a matter of law, though he looked when starting backward and the car was not then in sight. Birch v. Athol, etc., R. Co. [Mass.] 84 NE 310.

42. In action for injuries to plaintiff's automobile caused by a collision with a street car, evidence held sufficient to take question of defendant's negligence to jury. Lehman v. New York City R. Co., 107 NYS 561. In action for injuries to plaintiff's automobile, resulting from collision with defendant's car, held that motorman had right to presume that there was no danger of a collision and was not guilty of negligence. Sharpnack v. Des Moines City R. Co. [Iowa] 115 NW 475. Evidence sustains finding of jury that proper signals were not given and that appellant's repair car was not under proper control as it approached street which respondent was crossing. Youngquist v. Minneapolis St. R. Co., 102 Minn. 501, 114 NW 259. In action against street railway for injuries to plaintiff's intestate, received in collision between automobile in which intestate was riding and one of defendant's cars, evidence held to be for jury on question of defendant's negligence and intestate's contributory negligence. Ward v. Brooklyn Heights R. Co., 119 App. Div. 487, 104 NYS 95.

43. Evidence held to sustain a judgment for killing a dog. Jackson Elec. R., L. & P. Co. v. Waycaster [Miss.] 46 S 135.

44. See Damages, 9 C. L. 869.

45. In action for collision between defendant's car and plaintiff's carriage, caused by careless driving at excessive speed of defendant's car, amendment of declaration, showing a difference in description of plaintiff's position and direction in which her carriage was proceeding,

apply. Negligence,[48] wantonness[49] and "discovered peril"[50] must be pleaded by a

did not state a new cause of action. Butler v. Rhode Island Co. [R. I.] 68 A 425. Where father sued alone for negligence causing death of his son, it was proper to allow amendment, joining mother with him after period of limitation had run, cause of action under amended petition being identical cause of action counted on in original. Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 SW 109.

46. In action for death of a four year-old child struck by defendant's electric car, allegation of petition that defendant's agents in charge of car by exercise of ordinary care might have seen child in time to have prevented its death, and that child's position on or near track in a place of danger was known to such agents, or could by exercise of ordinary care have been known to them, in time to have stopped car or slackened its speed, and to have notified child in time to have avoided its injury, is inconsistent with another allegation that defendant's agents ran car at such a high rate of speed that its control was lost, and it was beyond power of brakes to stop car in time to have avoided injury after they knew child was upon track, or by exercise of ordinary care might have known that she was on track. Gabriel v. Metropolitan St. R. Co. [Mo. App.] 109 SW 1042.

47. In petition for injuries to plaintiff by alleged joint negligence of two defendants, allegations of joint negligence in general terms were controlled by averments of specific acts of negligence which followed. Ramsey v. Cedar Rapids, etc., R. Co. [Iowa] 112 NW 798.

48. Petition alleging that by reason of defendant's negligence in operation of its road, its equipment, its trains, and cars running thereon, its negligent failure to stop one of its cars before crossing a street, etc., plaintiff was injured, included defendant's negligent act in making a premature start at top of a hill on descent whereof plaintiff was injured, permitting train to attain too rapid rate of speed in descent, negligent handling of brakes, failure to apply sand to rails to prevent wheels from sliding on them, and negligent overloading of defendant's cars, whereby they could not be controlled. Percell v. Metropolitan St. R. Co., 126 Mo. App. 43, 103 SW 115. Petition alleged that defendant was negligent in not stopping car before striking plaintiff. Held, sufficient allegation to raise question whether defendant, with knowledge of plaintiff's danger due to his own negligence, used reasonable precautions to avoid injuring him. Powers v. Des Moines City R. Co. [Iowa] 115 NW 494. Complaint which alleges that company ran its car after dark without a headlight, that no signal was given as car approached crossing, that car ran at a dangerous speed, and that it negligently ran car against pedestrian, injuring him, when liberally construed as required by Burns' Ann. St. 1901, § 379, sufficiently charges negligence as against a demurrer on a motion to make more definite and certain. Grass v. Ft. Wayne & W. V. Trac. Co. [Ind. App.] 81 NE 514. Acts of negligence not being dependent on one another, separate causes of action are set up by a complaint alleging circumstances of killing by a street car of a child while crossing a street, and averring that car was run at a dangerous and unreasonable speed, and a greater rate than allowed by ordinance that only means of stopping car was a hand brake, which was insufficient for such purpose; that while street was straight and level a long distance, and child was in plain view of motorman, car was run to within 50 feet of child at said high rate of speed, and until it was too late to stop it; that no warning signal was given; that there was no guard or fender on front of car; and that its vestibule did not afford motorman a proper lookout. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265. Under Rev. St. 1899, § 3852 (Ann. St. 1906, p. 2135), providing that no formal pleadings shall be required in justice's court, but that plaintiff shall file a statement of facts constituting cause of action, a statement in action in justice's court against a street railway company for injuries to a vehicle in collision with a car, alleging that company was indebted to plaintiff for damages sustained by reason of a collision on specified date and place in breaking a vehicle for a certain amount, sufficiently charges that damage was negligently inflicted by company as against objection raised for first time by motion in arrest of judgment. Hall v. St. Louis & S. R. Co., 124 Mo. App. 661, 101 SW 1137. Petition in action for injuries to fireman in collision between street car and fire truck charged that motorman was negligent in running car at speed in excess of rate fixed by city ordinance so as to be dangerous to persons lawfully using street. A finding of negligence because speed of car exceeded ordinance limit, and in consequence of such high speed car collided with truck, was within scope of petition. Burleigh v. St. Louis Transit Co., 124 Mo. App. 724, 102 SW 621. Cause of action held based on the charge of negligence rather than on the charge that collision with a wagon caused plaintiff to be thrown from the car. Chicago Union Trac. Co. v. Hamps, 130 Ill. App. 596. Paragraph directly charging defendant with negligence and charging that decedent met his death by reason of negligence of defendant as therein alleged was sufficient, though it did not allege that defendant's servants were at time in line of their duty. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030.

49. Count alleging that injury resulted from wanton and willful negligence of defendant's servants in control of car sufficiently charged that plaintiff's injuries were wantonly or intentionally inflicted. Birmingham R., L. & P. Co. v. Brown [Ala.] 44 S 572. Counts bad as counts for wanton injuries held sufficient as counts for simple negligence and open to defense of contributory negligence. Birmingham R., L. & P. Co. v. Jaffee [Ala.] 45 S 469. When count alleged that injury was wantonly inflicted, but did not state facts in which wantonness consisted, plea of contributory

proper allegation of facts.[51] Defendant's negligence must be shown to be the proximate cause of the injury.[52] While a general custom need not be pleaded, a local one must.[53]

Burden of proof and evidence. See 8 C. L. 2035—Except as to matters judicially noticed,[54] the burden rests upon plaintiff to prove his entire cause of action, including defendant's negligence [55] and that it proximately caused the injury,[56] but in some states a prima facie case of negligence is established by showing that the injury was occasioned by a car.[57] Where distinct acts of negligence are alleged, plaintiff need prove but one [58] or may bring the case within the scope of the doctrine of "res ipsa

negligence was no defense, and a demurrer to such plea was properly sustained. Id.

50. In action against street railway for injuries received by plaintiff while attempting to cross a track in front of defendant's car, a petition alleging that motorman of car could have prevented injury by stopping car or checking speed had it been operated at a reasonably careful rate of speed was insufficient to state a cause of action predicated on a violation of duty of defendant to stop car after seeing plaintiff in a place of danger, although plaintiff was guilty of contributory negligence in placing himself in a dangerous position. Grout v. Central Elec. R. Co., 125 Mo. App. 552, 102 SW 1026.

51. Complaint alleging that defendant so carelessly, etc., managed its cars that by reason of its negligence one of them ran against plaintiff, who was then on highway, whereupon, etc., was fatally defective for failure to allege facts from which negligence arose. Lynchburg Trac. & L. Co. v. Guill [Va.] 57 SE 644.

52. In action for wrongful death, complaint alleged that while one of defendant railroad company's locomotives on which decedent, an employe, was riding westerly, was approaching a street crossing, defendant street railway company whose tracks crossed railroad tracks negligently ran its car upon crossing without sending its conductor ahead, as required by a city ordinance, to ascertain whether locomotives or cars were approaching; that a collision ensued and to escape injury decedent jumped from locomotive; that at same time another of defendant railroad company's locomotives, which was running easterly on a parallel track at speed in violation of a city ordinance, struck street car, and decedent was killed. Held that these averments did not show that first collision was a remote rather than a proximate cause of injury, in view of a direct averment of negligence of street railway company as cause of accident. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030.

53. Evidence of custom of those in charge of street railway cars to allow funeral processions to pass held admissible, though not pleaded. Wilmington City R. Co. v. White [Del.] 66 A 1009.

54. Where negligence, in action for death of a pedestrian by being struck by a street car, was predicated entirely on omission to provide car with any fender or guard whatever court was entitled to take judicial notice of purpose of fenders as applied to street cars, such appliances being in common and general use on street cars. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838.

55. Heinel v. People's R. Co. [Del.] 67 A 173. Charges did not cast burden on defendant of proving that motorman did not see plaintiff's peril. El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415.

56. Man on cold night, lying upon trolley track, was pushed some four feet by fender of a slowing-down car. He was found to have a fractured skull and died four days later. Deceased on that night was driving open ice wagon and his team was seen going at a slow trot, driverless, a short distance from where he lay. Held that his condition of involuntary unconsciousness or helplessness raised so strong a presumption that injury existed before impact of fender of car that a verdict for the plaintiff should be set aside. Brink v. North Jersey St. R. Co. [N. J. Law] 67 A 705.

57. Where plaintiff showed injury occasioned by car of defendant company, burden of proof was shifted to defendant, and it became incumbent upon it to show that plaintiff consented to injury or could have avoided it by use of due care, or that employes of company exercised all ordinary and reasonable care and diligence, and verdict of jury that defendant failed to carry successfully this burden is fully supported by evidence. Augusta R. & Elec. Co. v. Arthur [Ga. App.] 60 SE 213.

58. Where plaintiff alleged that defendant's car proceeded to cross railroad track without sending some one ahead, as required by a city ordinance, to look for approaching trains, and complaint contained independent charge that defendant negligently failed to make proper investigation to ascertain whether trains were approaching, and negligently ran its car in front of locomotive, held that proof of violation of ordinance was not essential to plaintiff's recovery. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Where plaintiff alleged negligence in that track at point where accident occurred did not conform to surface of street as required by a city ordinance, and also alleged negligence in speed of car, he was not confined to either allegation, but was entitled to have both submitted to jury, so that if his proof failed as to one, he might still recover on other. Ft. Worth, etc., R. Co. v. Hawes [Tex. Civ. App.] 107 SW 556. To recover for killing of child under complaint alleging acts of negligence not dependent on each other, it is not necessary to prove each independent act of negligence, but proof of one suffi-

loquitur.[59] Except in a few states,[60] the burden of proving contributory negligence rests upon the defendant,[61] but such negligence may be shown by circumstantial evidence.[62] Where a defective condition is shown to exist a few days before the accident, the defendant must adduce evidence of repair.[63] There must be no variance between the allegations and proof.[64] The general rules relating to the admissibility [65]

cient to, and which did, bring about death independent of any other, is enough. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265.

59. Car derailed and struck plaintiff's wagon. Chicago Union Trac. Co. v. Giese, 229 Ill. 260, 82 NE 232.

60. Plaintiff must show freedom. Baxter v. Auburn, etc., R. Co., 190 N. Y. 439, 83 NE 469. **Contra.** Baxter v. Auburn, etc., R. Co., 190 N. Y. 439, 83 NE 469.

61. Augusta R. & Elec. Co. v. Arthur [Ga. App.] 60 SE 213; Pilmer v. Boise Trac. Co. [Idaho] 94 P 432; Nelson v. Chicago, etc., R. Co. [Ind. App.] 83 NE 1019. Acts 1899, p. 58, c. 41. Louisville & S. I. Trac. Co. v. Short [Ind. App.] 83 NE 265.

62. Freedom from contributory negligence may be shown from circumstances from which the jury may fairly infer such fact. Baxter v. Auburn, etc., R. Co., 190 N. Y. 439, 83 NE 469. Where dissevered body and mutilated remains of plaintiff's intestate were found at night, scattered on and along defendant's tracks in public highway, just after its car had struck and run over him, it was held that **circumstances raised no legal presumption** that the deceased had been guilty of contributory negligence such as would bar recovery. Merkl v. Jersey City, etc., R. Co. [N. J. Err. & App.] 68 A 74.

63. Where brakes and signal apparatus of car were out of order up to 10 days before accident, burden was on company to show that car was not defective at time of accident. Frankfort & V. Trac. Co. v. Hulette [Ky.] 106 SW 1193.

64. Where count charged simple negligence and alleged that collision occurred at point where defendant's track was on public highway, but proof showed that wagon was struck while on defendant's track, not on a highway, there was a fatal variance as to such count. Birmingham R., Light & Power Co. v. Brown [Ala.] 44 S 572. Where count alleged that injuries were inflicted intentionally, it could not be supported by proof of failure to discover plaintiff's peril, but was dependent on failure of defendant's employes to use proper means to stop car after actually discovering such peril. Id. Complaint alleged that while decedent, in exercise of due care, was driving a heavily loaded wagon, defendant negligently ran one of its cars against wagon in which decedent was driving, throwing him from seat and permanently injuring and disabling him. Held that evidence that decedent was thrown from wagon and injured during flight of his horse, which became frightened by impact of car with wagon, which impact was produced by negligence of servants of street railroad company, was not at variance with allegations of complaint; gravamen of declaration being that decedent was thrown to ground by wrongful act of defendant in running its car negligently against decedent's wagon. Memphis St. R. Co. v. Berry, 118 Tenn. 581, 102 SW 85. Proof of incompetency of defendant's servant's is inadmissible unless there is a charge of liability on that ground. Elgin, A. & S. Trac. Co. v. Brown, 129 Ill. App. 62.

65. Res gestae: Groans and exclamations held not part of res gestae. Donnelly v. Chicago City R. Co., 131 Ill. App. 302. Motorman's treatment of signal of danger and his remark made in connection therewith are competent as part of res gestae. Chicago City R. Co. v. McDonough, 125 Ill. App. 223.

Opinions and conclusions: A nonexpert witness possessing usual knowledge of time and distance is competent to give his opinion of speed. Hall v. St. Louis & S. R. Co., 124 Mo. App. 661, 101 SW 1137. Passenger can testify whether car stopped suddenly or gradually and whether he was thrown forward when it was being stopped. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032. Evidence "that there were persons on platform and that conductor evidently was talking to some one on platform" was properly excluded as conclusion of witness. Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 SW 48. Conclusion of witness as to cause of falling of son of plaintiff held properly excluded. Id.

Expert evidence: In action against electric railway company for injury to one crossing track, motorman could state whether he used most effective method of stopping car as quickly as possible, he being expert and having detailed what he did to stop car. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032. Where evidence showed that car was actually stopped within distance stated by a witness or even less, qualifications of witness as expert to testify as to distance within which a car could be stopped were immaterial. Hedges v. Metropolitan St. R. Co., 125 Mo. App. 583, 102 SW 1086.

Prior acts and conditions: Admissibility of evidence showing negligent condition existing prior to accident depends upon degree of probablity afforded in each case that such condition continued up to time of accident. Frankfort & V. Traction Co. v. Hulette [Ky.] 106 SW 1193. Held proper to prove by former employes of defendant who had acted as motorman on same car until within ten days and two months, respectively, of collision, that brakes were worn out so car could not be stopped within 150 feet and that bell would not ring. Id. In action brought by driver of carriage for personal injuries resulting from collision, evidence is pertinent of management of car and of conduct of driver from time horse manifested such fear of approaching car as should have attracted attention of motorman to time of collision. Metropolitan St. R. Co. v. Fawcett [Kan.] 92 P 543.

and sufficiency [66] of evidence are applicable. While negative evidence is usually of less probative force than positive evidence,[67] the weight to be given it is for the jury.[68]

Instructions. See 6 C. L. 2037—Instructions should be clear,[69] consistent,[70] and fairly

Rules and regulations and customs: Rules and regulations of traction company known as well to party injured as to servant alleged to have caused injury and which were promulgated for guidance in such a contingency as that existing at time of accident are competent upon question of contributory negligence of one and negligence of other. Chicago City R. Co. v. McDonough, 125 Ill. App. 223. Where, in action for death of pedestrian in collision with street car, there were several eyewitnesses to occurrence who testified, evidence that decedent was a careful and cautious man was inadmissible. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838.

Admissible on particular issues: Plaintiff's intoxicated condition may be shown on question of contributory negligence. Elgin, A. & S. Trac. Co. v. Brown, 129 Ill. App. 62. Where declaration alleged that injuries were due to company's breach of a municipal speed limiting ordinance, ordinance is admissible in evidence. Deneen v. Houghton County St. R. Co., 150 Mich. 235, 14 Det. Leg. N. 670, 113 NW 1126. Evidence as to amount of travel on street for two hours, including time of accident, held competent, although not pleaded, in case of collision between car and carriage in funeral procession. Wilmington City R. Co. v. White [Del.] 66 A 1009. Receipts written by one admitted to be a special agent of defendant, and signed by plaintiff's son, acknowledging receipt from company of horse plaintiff was driving at the time of collision and articles which she had at time, which receipts stated were taken charge of October 20, 1906, after "collision with 931 car, Federal street line," were admissible as tending to show that there had been a collision between car and plaintiff's wagon. United Railways & Elec. Co. v. Cloman [Md.] 69 A 379.

Experiments and measurements: Admission of testimony as to experiments must largely rest in discretion of trial judge, and exercise of this discretion will not be controlled unless manifestly abused. Weight to be attached to such testimony is for jury and varies according to circumstances of similarity which jury may find to exist between experiment made or observation taken and actual occurrence whose facts and features are under investigation. Opinions of witnesses as to speed and distance are admissible in evidence, and computation of time and distance for purpose of comparison is not objectionable where it tends to enhance accuracy and correctness of opinion submitted. Augusta R. & Elec. Co. v. Arthur [Ga. App.] 60 SE 213.

Rebuttal: Where defendant's motorman had testified that brakes on car by which plaintiff was injured were new and in perfect condition, question to defendant's manager as to what was done with car after accident, which elicited information that it was dismantled shortly thereafter and the brakes and iron work sold, was proper as being in rebuttal of motorman's testimony. Frankfort & V. Trac. Co. v. Hulette [Ky.] 106 SW 1193.

66. Evidence sufficient to go to jury: Evidence of insufficient lookout. Brauner v. Third Ave. R. Co., 122 App. Div. 572, 107 NYS 759. Contributory. Chicago, etc., R. Co. v. Wanic, 230 Ill. 530, 82 NE 821.

Held sufficient to show: Negligence in making curve at excessive rate of speed. DeKalb-Sycamore Elec. Co. v. McCartney, 129 Ill. App. 149. That one making statements admissible as part of res gestae was conductor of street car. United Railways & Elec. Co. of Balitmore City v. Cloman [Md.] 69 A 379. That at time pedestrian was struck by street car there were seven persons at or near crossing authorized a finding that street was much used. Wolf v. City R. Co. [Or.] 91 P 460. Where, in action for injuries sustained in a collision between coal team plaintiff was driving and a car, plaintiff's witnesses were corroborated as to circumstances of collision in some respects by several of defendant's witnesses, and evidence against plaintiff was uncertain, evidence supported verdict for plaintiff. Haskins v. Rhode Island [R. I.] 69 A 335.

Evidence held for jury: Where several witnesses testified that car was operated on company's tracks, that it was same color as its cars, and bore its name painted on one side thereof, held that issue whether company was operating car was for jury. Hall v. St. Louis & S. R. Co., 124 Mo. App. 661, 101 SW 1137.

Held insufficient to show: Vague and self-contradictory evidence of a single witness held insufficient to show negligence on part of company. Kochesperger v. Philadelphia Rapid Transit Co., 217 Pa. 320, 66 A 547. Where street car collided with automobile and president of another street railway company testified that on day of accident street car was owned and operated by his road and that it was not under control of defendant or operated by its servants, a verdict for plaintiff was held to be against weight of evidence. City of New York v. New York City R. Co., 107 NYS 748.

67. Testimony of witnesses that they heard car bell ring held to be of more weight than testimony of witnesses who did not hear it. Wilmington City R. Co. v. White [Del.] 66 A 1009.

68. Van Salvellergh v. Green Bay Trac. Co. [Wis.] 111 NW 1120.

69. Instruction held not erroneous in failing to define term "accident" employed therein. Larsen v. Chicago Union Trac. Co., 131 Ill. App. 286. Instruction held to sufficiently submit causal connection though words "proximate cause" were not used. Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51.

70. Charge that if motorman saw buggy in dangerous proximity to track and saw that plaintiff was in a perilous position and failed to use all power to stop car consistent with safety of car and passengers, and such failure caused plaintiff's injuries,

submit the issues [71] raised by the pleadings [72] and supported by the evidence,[73] but must not assume facts in dispute,[74] invade the province of the jury,[75] or be upon the

plaintiff should recover, was not inconsistent with another charge that if motorman did not see that buggy was in dangerous proximity to track and that plaintiff was in peril, or if he did and did not have time to prevent a collision by use of means within his power, plaintiff should not recover. El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415. Instruction based on theory that even if plaintiff was not exercising ordinary care at time of accident, if motorman saw, or should have seen, plaintiff's dangerous position, and thereafter negligently failed to take steps to prevent a collision, defendant was liable, was not inconsistent with instruction framed on theory that plaintiff could recover if he was using ordinary care and if motorman saw or should have seen him on track and thereafter negligently failed to use proper appliances to prevent a collision. Prendeville v. St. Louis Transit Co. [Mo. App.] 107 SW 463. Instruction that if jury found owners of coach and street railway company were jointly negligent and were also separately negligent, and that joint and concurrent negligence brought about accident and injury, plaintiff could recover, was objectionable for failure to define what would authorize a finding of negligence either joint or separate. Ramsey v. Cedar Rapids, etc., R. Co. [Iowa] 112 NW 793.

71. Instruction is not erroneous which permits jury to render a verdict for plaintiff if it is found that his injuries were sustained on account of negligence of defendant "as set forth and claimed in his declaration or some count thereof," even if certain counts of declaration have been dismissed from consideration of jury where dismissal of such counts is called to attention of jury by other instructions. Chicago City R. Co. v. Hagenback, 131 Ill. App. 537. Instruction that it was a motorman's duty to exercise ordinary care to discover persons on track and to avoid colliding with such persons was held not erroneous for omitting clause "to use ordinary care" before words "to avoid," etc. Paducah City R. Co. v. Alexander's Adm'r, 31 Ky. L. R. 1043, 104 SW 375. Where plaintiff charged that both owner of coach and street car company were jointly and concurrently negligent, but averred different and specific acts of negligence against each, instruction that if defendants were jointly negligent, and also separately negligent, and joint and concurrent negligence caused injury, plaintiff could recover, was erroneous as against street car company for failure to present epecific negligence charged against it to jury and for failure to define and limit railroad company's duty in premises. Ramsey v. Cedar Rapids, etc., R. Co. [Iowa] 112 NW 798.

72. Where several allegations of negligence in a petition are all predicated upon a preceding allegation that plaintiff was injured by a street car while walking over and along a certain street, it is error to give a charge based upon hypothesis that plaintiff, when injured, was lying on street with his feet on one of rails of car track. San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64. Where there is no averment that motorman knew or should have known of plaintiff's peril, a charge is erroneous which makes defendant company liable for resulting injury if jury find from evidence that motorman might have stopped car after he became aware, or by exercise of reasonable care might have become aware, of danger to which plaintiff was exposed. Cincinnati Trac. Co. v. Johnson, 10 Ohio C. C. (N. S.) 467. In action for negligence, refusal to give instruction on contributory negligence is not error when that issue is not pleaded. Zalotuchin v. Metropolitan St. R. Co., 127 Mo. App. 577, 106 SW 548.

73. Evidence held to call for specific instruction as to contributory negligence, grouping facts shown. Northern Texas Trac. Co. v. Nelson [Tex. Civ. App.] 20 Tex. Ct. Rep. 75, 105 SW 846. Where there was no evidence of contributory negligence, it was not error to refuse to instruct on that subject. Indianapolis Union R. Co. v. Waddington [Ind.] 82 NE 1030. Where, in action for injuries to minor struck by a street car running at unlawful rate of speed, minor admitted that he knew danger and took his chances in endeavoring to cross in front of car, a requested instruction calling upon jury to consider admissions of minor in determining whether he knew danger and took his chances in crossing is properly refused, there being no evidence that he knew that car was being run at an unlawful rate of speed. Brown v. St. Louis & S. R. Co., 127 Mo. App. 499, 106 SW 83. Where there was no evidence authorizing instruction on question of negligence of intestate's parents, instruction thereon was properly refused. Lexington R. Co. v. Van Laden's Adm'r [Ky.] 107 SW 740. To have instructed jury that a street railway company is not responsible for injuries caused by the fright of horse arising from the ordinary use of its car, where there was no evidence tending to show that there was anything in appearance of car which would tend to frighten a horse of ordinary gentleness, and instructions could have no application to the issues made by pleadings, would have been improper. Cleveland, etc., R. Co. v. Hunter, 10 Ohio C. C. (N. S.) 564. An instruction that "there was no evidence tending to show that defendant was guilty of negligence in any of the respects charged in plaintiff's petition in running its car at the time and place and under the circumstances of this case prior to the time that the motorman discovered or by use of ordinary care might have discovered the fright of the horse," where the negligence was subsequent thereto, is within the rule stated in the preceding paragraph. Id.

74. In action for injury to married woman caused by a collision between a car and a buggy, instruction to find for plaintiff, though husband was guilty of negligence contributing to his injury, if wife was not negligent, was properly refused as assum-

weight of the evidence,[76] and must not ignore [77] or withdraw [78] issues or evidence, or be misleading.[79] Instructions must be considered as a whole.

ing that she was injured. Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367. Where it was undisputed that R. drove vehicle in which plaintiff's wife was riding when injured, court did not err in assuming as a fact that he was driving vehicle at time of collision causing such injury. Ft. Worth, etc., R. Co. v. Hawes [Tex. Civ. App.] 107 SW 556. Where fact that fenders were generally used on street cars was treated as a matter of general knowledge, of which court would take judicial notice, and proof thereof was excluded for that reason, court was entitled to assume that such fact existed, in its instructions, as if it had been proved. Spiking v. Consolidated R. & Power Co. [Utah] 93 P 838. Instruction that plaintiff had right to drive down street, if he did so, with his buggy wheels between rails, was not erroneous as assuming as a fact that he did so drive down street. Frankfort & V. Trac. Co. v. Hulette [Ky.] 106 SW 1193. Instruction that if motorman in charge of car saw, or by keeping a vigilant watch, would have seen, plaintiff's intestate crossing street, and in a position of danger, etc., did not assume that curb line of a city street was danger line for child. Cornovski v. St. Louis Transit Co., 207 Mo. 263, 106 SW 51. Where evidence showed that street was unimproved, that in center was embankment in which tracks were laid, that on one side was a spring used by people to get water, that they walked along embankment until they got opposite to it, when they went down to it, instruction that if there was a pathway across tracks leading to spring, which pathway was used by persons going to and coming from spring, which fact was known to company, it must exercise ordinary care to have cars approaching pathway under control, and to give signals of their approach thereto, etc., was not objectionable as assuming that there was a pathway along or across the tracks, but imposed on the company the duty of exercising care. Louisville R. Co. v. Hofgesand, 31 Ky. L. R. 976, 104 SW 361.

75. Question of negligence of defendant's motorman having been submitted to jury, they desired further instructions "whether the evidence was clear enough to decide whether this motorman was in fault or not," to which judge replied, "I think there is testimony in case from which you might find defendant guilty of negligence, but that depends on whose evidence you believe." Held that court's charge was not improper as being to find for plaintiff if they believed plaintiff's witnesses, and for defendant if they did not. Harker v. Detroit United R. Co., 150 Mich. 697, 14 Det. Leg. N. 871, 114 NW 657. Where, in action for injuries to a horse and carriage in collision, there was evidence that motorman intentionally ran car into carriage, it was for jury to determine whether motorman acted within scope of his employment, and charge authorizing recovery if motorman intentionally ran car into carriage was erroneous. Ahrens v. Union R. Co., 108 NYS 590.

76. If instruction would admit of construction of submitting issue as to whether motorman exercised ordinary care to discover plaintiff's presence on track, it would be upon weight of evidence, since it would involve assumption that discharge of duty would result in his discovery of peril. San Antonio Trac. Co. v. Kelleher [Tex. Civ. App.] 107 SW 64. Where it appears that plaintiff saw approaching car, it is error to instruct that he was not bound to look and listen before attempting to cross the tracks. Elgin, A. & S. Trac. Co. v. Brown, 129 Ill. App. 62.

77. In action for negligent death of a child killed by a street car, instruction that, if child passed suddenly upon defendant's track in front of its car, and so close thereto that it was impossible for motorman to stop car in time to avoid collision with him, then there can be no recovery, was properly refused because ignoring question of defendant's negligence and every element in case leading up to child's death, except his getting on track so close that car could not be stopped in time to save him. Cytron v. St. Louis Transit Co., 205 Mo. 692, 104 SW 109. Instructions which ignored questions of proximate cause, contributory negligence, and injury, held properly refused. Feille v. San Antonio Trac. Co. [Tex. Civ. App.] 107 SW 367. Instruction to find for plaintiff if accident occurred at a street intersection and car was not under such complete control that it could be immediately stopped was properly refused as eliminating questions of proximate cause, contributory negligence, and injury. Id. Instruction to find for plaintiff if motorman did not sound bell at least 75 feet before reaching street intersection where accident happened, and did not continue to sound it until intersection was crossed, such failure being negligence per se, was properly refused as ignoring questions of proximate cause, contributory negligence, and injury. Id.

78. Where petition alleges that railroad company knew or should have known that at a certain defined crossing children were in habit of crossing tracks, and evidence shows that injury was caused within limits described by petition, instruction that jury could not consider fact that children were in habit of crossing at other places was properly refused. Brown v. St. Louis & S. R. Co., 127 Mo. App. 499, 106 SW 83. Instruction that if traveler crossed track so close to approaching car that motorman could not, with exercise of ordinary care, stop car in time to prevent collision, company was entitled to a verdict, called attention of jury to selected facts, and was properly refused, since it eliminated negligence of motorman in running his car at uncontrollable rate of speed, in failing to give signals of car's approach, and in failing to exercise reasonable care to stop car after discovering pedestrian's peril. Louisville R. Co. v. Bossmeyer, 31 Ky. L. R. 997, 104 SW 337. Defendants, having objected to evidence that street cars generally were equipped with fenders, on the theory that

§ 10. *Statutory crimes.*[See 8 C. L. 2040]—The state may enact reasonable police regulations.[81] All facts necessary to bring the case within the statute or ordinance must be shown.[82]

STREET; STRIKES; STRIKING OUT; STRUCK JURY, see latest topical index.

SUBMISSION OF CONTROVERSY.[83]

The submission of a controversy differs from an agreed statement of facts filed by parties to an action, the jurisdiction attaching only to the precise facts submitted.[84]

such fact was a matter of common knowledge, which objection court sustained, requested instruction that there was no evidence that at time of accident fenders were in general use, and that there was no proof of negligence because car that struck decedent was without a fender. Court charged that if jury found that car did not have a fender they could not find against defendants on that alone unless they also found that if the car had a fender the "accident" might have been averted thereby. Held that, term "accident" having been used in instructions and evidence to refer to collision itself, instruction given in effect told jury that fender was not in case as effectually as if word "collision" had been used. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838.

79. Held not error to refuse, as liable to mislead, instruction that burden of establishing by a preponderance of proof state of facts alleged in declaration was on plaintiff, "and, if the testimony in this case should be such as to leave the minds of the jury in a state of even balance as to the truth of the allegations in the declaration, the verdict must be for defendant." United Railways & Elec. Co. v. Cloman [Md.] 69 A 379. Where there was no evidence that brakes were defective or out of repair, and defendant's evidence showed that they were in perfect condition, it was error to submit that question to the jury and was calculated to confuse and mislead them. Lexington R. Co. v. Van Laden's Adm'r [Ky.] 107 SW 740. Where plaintiff claimed that collision was caused by negligence of a street railway company in failing to keep a proper lookout, in using too bright a search light, by placing trolley pole too near traveled highway, and by running at a dangerous and unlawful rate of speed, it was proper to charge in relation to rate of speed that, if jury found that car when approaching point where trolley pole was set was running at rate claimed by plaintiff, it would be for them to determine whether its speed was or was not excessive; that they were judges of what was proper speed under all circumstances; that it was for them to decide whether actual speed was material in its bearing on the proof of negligence; and that plaintiff was bound to establish by a fair preponderance of evidence that defendant was negligent, substantially as alleged in complaint. And instructions seeking to make whole case turn as a matter of law on sufficiency of proof of a great and unreasonable rate of speed, and that such speed was a material element in producing accident, were properly refused, since to center attention on such questions as necessarily decisive of the case would have been misleading. Garfield v. Hartford, etc., R. Co. [Conn.] 67 A 890.

80. Where court reiterated in different parts of its charge that a street car motorman after discovering peril of a person in close proximity to track should use all means in his power to prevent a collision, "consistent with the safety of the car and the passengers," failure to incorporate quoted portion in one paragraph of its charge was not prejudicial error. El Paso Elec. R. Co. v. Kelly [Tex. Civ. App.] 109 SW 415. Where court repeatedly charged that decedent was required to use all his senses to avoid collision with a street car by which he was killed, and that, unless he did so, plaintiffs could not recover, instruction was not objectionable in use of expression "observing the car," instead of requiring decedent to have "looked for car" before attempting to cross track. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838.

81. Act April 3, 1903 (Acts 28th Leg. p. 178), providing that each street car shall be equipped during winter months with a vestibule to protect motorman, is within police power of state, and is valid. Beaumont Trac. Co. v. State [Tex. Civ. App.] 19 Tex. Ct. Rep. 513, 103 SW 238. Code 1896, § 5368, making it offense for conductors to run trains without sufficient good drinking water thereon, does not apply to conductors of electric motor cars on a street railway extending between cities 12 or 13 miles apart, time in making a run being from 30 to 45 minutes. Dean v. State [Ala.] 45 S 651.

82. Under a city ordinance making it duty of every street railway company to cause a red light to be placed at crossing and intersection of other street railways at all curves of their own roads, in such a manner as to give warning to motormen and citizens, it was necessary in order to support a conviction for violation of ordinance to show that the crossing and intersection at which defendant was alleged to have failed to place a light was made by lines of separate companies. People v. Detroit United R. Co. [Mich.] 15 Det. Leg. N. 234, 116 NW 186.

83. See 8 C. L. 2040.

84. State v. McCune [Mo. App.] 107 SW 1030. Demurrers and all issues of pleading are waived by a submission, but this rule is not applicable to the question of jurisdiction. Continental Casualty Co. v. Morris [Tex. Civ. App.] 18 Tex. Ct. Rep. 646, 102

and being confined wholly to questions of law,[85] arising from the agreed facts [86] which must be complete [87] and clearly stated.[88] It must be signed by the parties or by an authorized person whose authority must be shown.[89] The contract to submit an agreed case may be cancelled by suit in equity for fraud, duress, or mutual mistake.[90]

SUBPOENA, see latest topical index.

SUBROGATION.

§ 1. Definition and Noture, 1760.
§ 2. Right to Subrogation, 1760.
§ 3. How Forfeited or Lost, 1761.
§ 4. Remedies and Procedure, 1761.

§ 1. *Definition and nature.* See 8 C. L. 2041—Subrogation occurs where one pays a debt for which another was justly liable, and the payment is made to discharge the property of the payor from an incumbrance.[91] The right is purely equitable in its nature,[92] to the end that a debt shall be ultimately discharged by him who in good conscience ought to pay it.[93] It is not confined to cases of suretyship, or contract.[94] The rights claimed may be asserted only after subrogation has actually taken place.[95] Subrogation to a state's rights in a claim includes the right of the state to be exempt from the statute of limitations.[96] Binding provisions against subrogation may be inserted in a mortgage.[97]

§ 2. *Right to subrogation.* See 8 C. L. 2041—A person in some wise liable for a debt who pays the same is entitled to subrogation to the creditor's rights,[98] and the right may be enjoyed successively.[99] An irregular or void sale under mortgage places the

SW 773. Insufficient facts deprive court of jurisdiction. Neustaedtler v. Wiener, 108 NYS 650.

85. N. Y. Code Civ. Proc. § 1279 construed. Marx v. Brogan, 188 N. Y. 451, 81 NE 231.

86. Garner v. Freeman, 118 La. 184, 42 S 767.

87. Garner v. Freeman, 118 La. 184, 42 S 767; Williamsport v. Lycoming County, 34 Pa. Super. Ct. 221. Record did not show form of action. Rockwell v. Warren County, 34 Pa. Super. Ct. 581.

88. Rockwell v. Warren County, 34 Pa. Super. Ct. 584. Statement of remarriage of husband, by divorced wife accepted as proof, though presenting a legal conclusion. Pelton v. Macy, 108 NYS 713.

89. Minors and nonresidents seeking determination of questions under will. Angell v. Angell [R. I.] 67 A 325.

90. State v. McCune [Mo. App.] 107 SW 1030.

91. Alberti v. Moore [Okl.] 93 P 543. To avoid levy of execution. In re Bruce, 158 F 123. Distinguishing contribution from subrogation. Jewett v. Matham, 109 NYS 1000.

92. National Surety Co. v. State Sav. Bk. [C. C. A.] 156 F 21; Day v. McPhee [Colo.] 93 P 670. Moring v. Privott [N. C.] 60 SE 509. Not applicable when there is remedy at law. Carstenbrook v. Wedderien [Cal App.] 94 P 372. No equities to lay foundation for subrogation. McLean v. Hughes, 102 Minn. 174, 112 NW 1013.

93. National Surety Co. v. State Sav. Bk. [C. C. A.] 136 F. 21; In re Bruce, 158 F. 123; Brinckerhoff v. Holland Trust Co., 159 F 191. Indorser subrogated to rights of holder of note. Smith v. Shippers' Oil Co. [La.] 45 S 533.

94. Negligence sounding in tort. Brinckerhoff v. Holland Trust Co., 159 F 191.

95. Day v. McPhee [Colo.] 93 P 670.

96. Pond v. Dougherty [Cal. App.] 92 P 1035.

97. Guarantor subrogated only upon assignment. Advance Thresher Co. v. Hogan, 74 Ohio St. 307, 78 NE 436.

98. Collateral security held. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303. Grantee of quitclaim deed, who has paid valid claims against property, subrogated to those claimant's rights. Lowden v. Wilson, 233 Ill. 340, 84 NE 245. Purchaser of land having satisfied mortgage thereon is subrogated to mortgagee's rights against alleged claims of grantor's widow. Overturf v. Martin [Ind.] 84 NE 531. Assignee of claims for goods delivered. Buchholz v. Damick, 115 App. Div. 843, 101 NYS 17. Life tenant by payment of mortgage is subrogated to mortgagee's rights, payment being primarily for use of remainderman. Bonhoff v. Wiehorst, 108 NYS 437. Mortgagor subrogated to creditor's rights in foreclosure of mortgage given to secure third person's debts. Bechtel v. Wier [Cal.] 93 P 75. Holder of certificate under void sale to enforce bond becomes, by subrogation, holder of bond. Ellis v. Witmer, 148 Cal. 528, 83 P 800. Sureties of deputy sheriff who paid defalcation are subrogated to rights of sheriff or state and county. Hill v. Flemming [Ky.] 107 SW 764. Grantees of mortgagee in possession, though affected with notice, are subrogated to their grantor's rights. Francis v. Francis [S. C.] 58 SE 804.

99. Two or more persons liable for another's debt. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303.

purchaser in the position of the mortgagee,[1] and a chattel mortgage may be kept alive after payment to secure another creditor of the mortgagor.[2] The purchaser of mortgaged lands who pays off the prior incumbrance is entitled to subrogation [3] though not against a junior mortgagee.[4] Also a surety by paying the debt of the principal debtor is subrogated to the creditor [5] and entitled to all rights, liens, or securities of the creditor [6] not only against the principal, but third parties,[7] but payment of a note by a surety does not entitle the surety to be subrogated to the payee's rights.[8] An agent, who by mismanagement is compelled to reimburse his principal, is entitled to subrogation against the one primarily causing the loss,[9] even though his acts are in the nature of tort [10] unless his conduct is such that he is not entitled to the consideration of equity.[11] The entire debt must be fully satisfied [12] though not by a stranger,[13] and the right may be destroyed.[14] Also the right must be assumed with the incidental burdens incurred [15] and does not extend to all property.[16] A trust estate can be made liable by subrogation to the trustee's rights, only, when the trustee is insolvent as established by exhaustion of legal remedies, when the estate is indebted to him, and when advancements inured to the benefit of the estate.[17]

§ 3. *How forfeited or lost.*[See 8 C. L. 2043]—The right of subrogation may be lost by participating in the trial of an action in which it might have been asserted and failing to do so.[18]

§ 4. *Remedies and procedure.*[See 8 C. L. 2043]—If the right of subrogation is questioned, the remedy is in equity [19] and may be barred by laches or the statute of limitations [20] but when conceded, the right of realizing the value of the subject-matter is triable by a court of law.[21]

SUBSCRIBING PLEADINGS, see latest topical index.

1. Cavanaugh v. Sanderson [Mich.] 15 Det. Leg. N. 190, 115 NW 955.

2. Not applicable when mortgagor holding one-third interest seeks to defraud coowner. Longley v. Sperry [N. J. Eq.] 66 A 1062. See Chattel Mortgages, 7 C. L. 634.

3. Moring v. Privott [N. C.] 60 SE 509. Person with subsequent interest but not principal debtor. Hughes v. Howell [Ala.] 44 S 410. Subrogated as against judgment lien. Capitol Nat. Bk. v. Holmes [Colo.] 95 P 314. No notice of vendor's lien. Neff v. Elder, 84 Ark. 277, 105 SW 260. Evidence sufficient to show subrogation to vendor's rights where mortgagee paid balance of purchase money. Pearson v. Vance [Ark.] 107 SW 986.

4. Ragan v. Standard Scale Co., 128 Ga. 544, 58 SE 31.

5. Stehle v. United Surety Co. [Md.] 68 A 606.

6. Surety completing abandoned work of contractor is entitled to balance due. Stehle v. United Surety Co. [Md.] 68 A 600; American Nat. Bk. v. Fidelity & Deposit Co., 129 Ga. 126, 58 SE 867. Share of dividends received in bankruptcy. Schmitt v. Greenberg, 109 NYS 881.

7. Surety having paid sum appropriated by an auditor may recover from bank which was primarily liable. National Surety Co. v. State Sav. Bk. [C. C. A.] 156 F 21. Surety paying debt of principal is subrogated to rights of creditor against cosureties as well as debtor. Construing Code §§ 1432 2849. Pond v. Dougherty [Cal. App.] 92 P 1035.

8. Obligation extinguished. Bray v. Cohn [Cal. App.] 93 P 893.

9. Brinckerhoff v. Holland Trust Co., 159 F 191.

10. Negligence in management of building association. Brinckerhoff v. Holland Trust Co., 159 F 191.

11. Depends on character of acts. Brinckerhoff v. Holland Trust Co., 139 F 191.

12. McClure's Ex'r v. King, 31 Ky. L. R. 1085, 104 SW 711. Equity of surety or guarantor in creditor's collateral. Advance Thresher Co. v. Hogan, 74 Ohio St. 307, 78 NE 436. Underwriter did not pay loss in full. The Bodo. 156 F 980.

13. Note paid by mistake. Charnock v. Jones [S. D.] 115 NW 1072.

14. Release of assets by creditor. Day v. McPhee [Colo.] 93 P 670.

15. Tender of debt in suit to foreclose mortgage without costs, insufficient. Kadin v. Samuels, 55 Misc. 442, 106 NYS 559. Statute of limitations bars action. American Nat. Bk. v. Fidelity & Deposit Co., 129 Ga. 126, 58 SE 867; Price v. Big Sandy Co. [Ky.] 107 SW 725.

16. Widow's year's allowance cannot be obtained. Dienst v. Fischmann Loan & Bldg. Co., 10 Ohio C. C. (N. S.) 46. Where sum obtained under mortgage cannot be traced to general creditors. Id.

17. Dantzler v. McInnis [Ala.] 44 S 193.

18. Schumacher v. Wolf, 125 Ill. App. 81.

19. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303.

20. Bill filed in 20 years not barred according to Code 1896, § 2794, subd. 3.

SUBSCRIPTIONS.

§ 1. Nature, Requirements, and Sufficiency as a Contract, 1762.
§ 2. Rights and Liabilities Arising From Subscriptions, 1762.
§ 3. Enforcement, Remedies, and Procedure, 1762.

§ 1. *Nature, requirements, and sufficiency as a contract.*See 8 C. L. 2044—A mutual subscription for a common object is valid and collectible.[22] A single promise not made to one performing or expected to perform anything in reliance thereupon is not enforcible as a subscription.[23]

§ 2. *Rights and liabilities arising from subscriptions.*See 8 C. L. 2044

§ 3. *Enforcement, remedies, and procedure.*See 8 C. L. 2045—If by the agreement a person named is to receive and disburse the money subscribed, he alone may sue to collect subscriptions.[24] Where the full sum subscribed is paid by part of the subscribers, no action can be maintained against the others.[25]

Substitution of Attorneys; Substitution of Parties; Subway; Succession, see latest topical index.

SUICIDE.[26]

The presumption of law is against suicide.[27]

Summary Proceedings; Summary Prosecutions; Summons, see latest topical index.

SUNDAY.

§ 1. Sunday as Dies Non Juridicus, 1762.
§ 2. Violation of Sunday Laws as Defense to Actions, 1762.
§ 3. Sunday Laws and Prosecutions for Their Violation, 1763.

§ 1. *Sunday as dies non juridicus.*See 8 C. L. 2045—An award made, published, and delivered upon Monday is not invalid for having been discussed and practically agreed upon on Sunday.[28] In the absence of statutory prohibition a ministerial act may be lawfully performed on Sunday.[29] A verdict may be rendered in open court on Sunday.[30]

§ 2. *Violation of Sunday laws as defense to actions.*See 8 C. L. 2045—A contract for labor in violation of a Sunday law is void to the extent that it contemplates such violation,[31] and one may not recover for services performed on that day contrary to statute.[32] The statutory exception in favor of works of necessity and charity cannot cover acts of mere convenience.[33] The court will not aid a party to recover on a

Hughes v. Howell [Ala.] 44 S 410. Brought within reasonable time. Neff v. Elder, 84 Ark. 277, 105 SW 260.

21. Polhemus v. Prudential Realty Corp. [N. J. Err. & App.] 67 A 303.

22. Agreement of children for support of mother. Worth v. Daniel, 1 Ga. App. 15, 57 SE 898. Contract of citizens to pay sum to aid in erection of mill and power plant is valid. Sutton v. Rann, 149 Mich. 35, 14 Det. Leg. N. 330, 112 NW 721.

23. Bond conditioned on construction of certain bridge. Danby Tp. v. Beebe, 147 Mich. 312, 110 NW 1066.

24. Dunnigan v. Kathan, 56 Misc. 103, 106 NYS 1111.

25. Hastings Industrial Co. v. Baxter, 125 Mo. App. 494, 102 SW 1075.

26. See 8 C. L. 2045.

27. Lamb v. Union R. Co., 109 NYS 97.

28. Arbitration in partnership accounting. Ehrlich v. Pike, 53 Misc. 328, 104 NYS 818.

29. Publication of legal notice valid. Nixon v. Burlington [Iowa] 115 NW 239.

30. Tuttle v. Tuttle [N. C.] 59 SE 1008.

31. Actors contract for Sunday performances. In re Hammerstein, 108 NYS 197; La Crandall v. Ledbetter [C. C. A.] 159 F 702.

32. Barney v. Spangler [Mo. App.] 109 SW 855.

33. No recovery when Sunday labor was voluntary outside the contract of employment and not necessary to be done on that day. Barney v. Spangler [Mo. App.] 109 SW 855. No recovery for Sunday labor which could have been done on Monday by employing more men. Bidwell v. Grand Trunk Western R. Co., 148 Mich. 524, 14 Det. Leg. N. 279, 112 NW 122.

Sunday transaction [84] but it will not treat as a nullity that which was done on Sunday in performance of a valid contract.[85] A negotiable instrument, void because delivered on Sunday, is valid in the hands of a bona fide purchaser for value without notice.[86] Affirmance on a subsequent week day validates a Sunday contract.[87]

§ 3. *Sunday laws and prosecutions for their violation.* See 8 C. L. 2045—At the common law all acts not unlawful per se may be lawfully performed on Sunday,[88] but statutes and ordinances restricting various occupations upon that day have been generally adopted.[89] The primary purpose of such laws is not the protection of servants and the prohibition of servile labor.[90] The New York statute prohibits labor upon Sunday except works of necessity and charity, and specifically forbids certain acts declared to be interruptions of the repose and religious liberty of the community.[91] The validity of this law is maintained [92] but upon its construction the courts are at variance. Public base ball games are held illegal irrespective of whether admission is charged [93] but especially where there is charge for admission [94] or a voluntary contribution.[95] To what extent equity will enjoin the police from interference under this statute with various Sunday amusements is not settled,[96] and whether orderly exhibitions and amusements not specifically forbidden come within the prohibitions of

34. Payee of Sunday delivered check has no recourse to the maker on failure of bank to pay. Gordon v. Levine [Mass.] 83 NE 861.

35. Payment is valid as a payment. Gordon v. Levine [Mass.] 83 NE 861.

36. Check. Gordon v. Levine [Mass.] 83 NE 861.

37. J. B. Bostic Co. v. Eggleston [Ind. T.] 104 SW 566. Telegram filed on Sunday and delivered on week day rendered company liable for delay in transmission. Hoyt v. Western Union Tel. Co. [Ark.] 108 SW 1056.

NOTE. Ratification of Sunday contract: The invalidity of Sunday contracts is based on statute, since at common law no contract was void because made on Sunday. Drury v. Defontaine, 1 Taunt. 131. In the interpretation of such statutes great conflict occurs. Some courts hold that statutes forbidding "labor" or "common labor" on Sunday do not include the mere execution of a contract, because this is more properly classified as "business," and so is valid. Richmond v. Moore, 107 Ill. 429, 47 Am. Rep. 445; Birks v. French, 21 Kan. 238; Roberts v. Barnes, 127 Mo. 405, 30 SW 113, 48 Am. St. Rep. 640; Horacek v. Keebler, 5 Neb. 355; Bloom v. Richards, 2 Ohio St. 387, 15 Am. Dec. 567. Other courts support the decision in Bostic Co. v. Eggleston [Ind. T.] 104 SW 566, holding such contracts invalid. Reynolds v. Stevenson, 4 Ind. 619; Tucker v. West, 29 Ark. 386. In fact the Bostic case follows the Arkansas holding because the statute here construed is taken from a statute of Arkansas. As to the question of ratification, it is the general rule that a contract which is void cannot be ratified or affirmed. But many courts, perhaps a majority hold that a Sunday contract is not void in the sense that it cannot be ratified because such a contract, unlike most contracts forbidden by statute is not in itself illegal, but is rendered so only because it is made at an improper time; therefore Sunday contracts are declared to be an exception to the general rule. Bostic Co. v. Eggleston [Ind. T.] 104 SW 566; Russell v. Murdock, 79 Iowa, 101, 44 NW 237, 18 Am. St. Rep. 348; Cook v. Forker, 193 Pa. 461, 44 A 560, 74 Am. St. Rep. 699; Adams v. Gay, 19 Vt. 358.—From 6 Mich. L. R. 270.

38. Eden Musee American Co. v. Bingham, 108 NYS 200.

39. Act of March 12, 1907, declaring Sunday a day of rest and forbidding specific employments on that day, is constitutional. State v. Dolan, 13 Idaho, 693, 92 P 995. It is competent for the legislature to regulate Sunday observance. Pen. Code, § 253,-277. Moore v. Owen, 109 NYS 585. Sunday is a civil institution of the state and the legislature has power to regulate its observance. Greater New York Charter, Laws 1897, p. 522, c. 378, § 1481. In re Hammerstein, 108 NYS 197. Gen. St. 1902, § 1369, prohibits secular labor on Sunday except works of necessity and mercy. State v. Ryan [Conn.] 69 A 536. Rev. St. 1899, §§ 2243, 2244 (Ann. St. 1906, pp. 1421, 1422), forbidding sales of merchandise, etc., on Sunday, are constitutional. State v. Campbell, 206 Mo. 579, 105 SW 637.

40. Gen. St. 1902, § 1369. State v. Ryan [Conn.] 69 A 536.

41. Pen. Code, §§ 259-277. United Vaudeville Co. v. Zeller, 108 NYS 789.

42. In re Hammerstein, 108 NYS 197; Moore v. Owen, 109 NYS 585.

43. Paulding v. Lane, 55 Misc. 37, 104 NYS 1051.

44. Sunday baseball not illegal per se but becomes so when public is admitted or admission charged. Ontario Field Club v. McAdoo, 56 Misc. 285, 107 NYS 295. Admission is charged where only those buying score cards are admitted. Id.

45. Public freely admitted, but box for voluntary contributions placed at the gate. People v. Demerest, 56 Misc. 287, 107 NYS 549.

46. Injunction refused. Paulding v. Lane, 55 Misc. 37, 104 NYS 1051; Moore v. Owen, 109 NYS 585; Economopoulos v. Bingham, 109 NYS 728.

Injunction granted. Eden Musee American Co. v. Bingham, 108 NYS 200; People v.

the statute when held within theatres or halls is a mooted question.[47] It seems to be conceded that out door shows and exhibitions of any kind are illegal [48] as are acts which come within the prohibitions of the statute irrespective of how quietly they may be carried on.[49] The Greater New York charter forbidding certain specific amusements "and any other entertainment of the stage" on Sunday applies to every performance in a place of public amusement and cannot be construed under the rule ejusdem generis.[50] It is within the discretion of the legislature to designate the occupations to be included within the prohibition of Sunday labor and the courts will not interfere so long as no constitutional provision is violated.[51] Sunday laws usually except works of necessity and charity from their prohibitions.[52] The operation of railway trains is not per se a work of necessity [53] though it may become so.[54] The operation of railway trains fall within a statute forbidding Sunday labor [55] but is sometimes specifically forbidden. Under the Georgia statute relative to the running of trains on Sunday, a train running on a schedule which does not require Sunday operation may, if unavoidably delayed, complete its scheduled run on Sunday,[56] good faith and honest endeavor to avoid delay rather than "ordinary care" being required,[57] and the operation of the entire system being considered in determining the necessity of delay.[58] The burden is on the carrier to show that the delay was unavoidable,[59] not only as regards the train in question but as regards the cause of its delay.[60] Where the law excepts such work as is required in the maintenance and operation of railways, such exception refers to work which is necessary to be done on Sunday,[61] and that certain work is required by law does not authorize it to be done on Sunday if it can be done on another day.[62] Barbering also is held not to be a work of necessity [63] and in some states is specifically prohibited.[64] Certain occupations are

Flynn, 108 NYS 208; Keith & Proctor Amusement Co. v. Bingham, 108 NYS 205.

47. Held forbidden: Moving picture show. United Vaudeville Co. v. Zeller, 108 NYS 789. Moving picture show in connection with confectionery store. Economopoulos v. Bingham, 109 NYS 728. Moving picture show, or any performance in theater. Moore v Owen, 109 NYS 585. Any performance in theater. In re Hammerstein, 108 NYS 197.

Held not forbidden: Museum with no music or stage performance. Eden Musee American Co. v. Bingham, 108 NYS 200. Moving picture show accompanied by lecture and music. Keith & Proctor Amusement Co. v. Bingham, 108 NYS 205. Automatic slot machine picture and music devices, the music being audible to the person alone who operates the machine. People v. Flynn, 108 NYS 208. Stereopticon exhibition and lecture. People v. Lynch, 108 NYS 209.

48. Moore v. Owen, 109 NYS 585; Keith & Proctor Amusement Co. v. Bingham, 108 NYS 205; Eden Musee American Co. v. Bingham, 108 NYS 200.

49. United Vaudeville Co. v. Zeller, 108 NYS 789.

50. Laws 1897, p. 522, c. 378, § 1481. In re Hammerstein, 108 NYS 197.

51. State v. Dolan, 13 Idaho, 693, 92 P 995.

52. Selling tickets to a moving picture show not an act of necessity or mercy under Gen. St. 1902, § 1369. State v. Ryan [Conn.] 69 A 536. The work of keeping up power for the supply of public light and water is a work of necessity. Turner v. State [Ark.] 107 SW 388. Cleaning boilers used in part for the supply of public light and water held, under the circumstances, to be a work of necessity. Id.

53, 54. Barefield v. State [Ark.] 107 SW 393.

55. Kirby's Dig. § 2030 prohibits Sunday labor generally. It is within the power of the legislature to prohibit the operation of trains on Sunday. Barefield v. State [Ark.] 107 SW 393.

56. Brand v. State [Ga. App.] 60 SE 339.

57. Instruction held erroneous. Brand v. State [Ga. App.] 60 SE 339.

58, 59. Brand v. State [Ga. App.] 60 SE 339.

60. If due to delay of other trains, must show that their delay was unavoidable, particularly where evidence showed no effort to remedy schedule which past experience showed to be productive of delay. Brand v. State [Ga. App.] 60 SE 339.

61. Weeding, mowing, and whitewashing not necessary. Commonwealth v. Chesapeake, etc., R. Co. [Ky.] 108 SW 851.

62. Setting crossing signs. Commonwealth v. Chesapeake, etc., R. Co. [Ky.] 108 SW 851.

63. Barbering as a matter of convenience is not an act of necessity or charity within the meaning of Rev. St. 1899, § 2240 (Ann. St. 1906, p. 1420). State v. Schatt [Mo. App.] 107 SW 10. Court will take judicial notice that shaving is not a work of necessity. McCain v. State, 2 Ga. App. 389, 58 SE 550.

64. Rev. St. 7033—1 prohibiting barbering on Sunday is a valid police regulation. Stanfeal v. State [Ohio] 84 NE 419. Rev. St. 1906, § 7033—1, prohibiting barbering on Sunday, is not unconstitutional as class legislation nor because it fails to specify

sometimes forbidden during certain hours.[65] Selling fruit from a fruit stand on Sunday is in violation of a law forbidding any store or shop to keep open for the sale of merchandise on that day,[66] but the sale of lemons is held to come within the exception allowing drugs and immediate necessities to be exposed and sold.[67] A club may not be incorporated for the purpose of violating the Sunday laws,[68] and under a law forbidding the pursuit of one's ordinary calling on Sunday, a barber may not go to a club room and shave its members,[69] it being no defense that compensation was voluntary and not compulsory.[70] Employe as well as employer is liable to the penalty for breach of a Sunday law prohibiting labor or the employment of labor,[71] and each actor who performs on Sunday contrary to law is liable to punishment.[72] Where the statute imposes a penalty for each offense of employing labor on Sunday, the state may bring action upon several simultaneous offenses in one suit and is not required to elect a separate cause of action.[73] In Virginia the penalty for breach of the Sunday law is too trifling to bring the offense within criminal jurisdiction.[74] An affidavit charging the performance of common labor on Sunday is defective if it does not contain the averment that the work complained of was not work of necessity or charity, or if the performing of common labor on Sunday and the having of a place open for the transaction of business on Sunday is charged as one offense.[75] An affidavit charging the accused with violation of a Sunday closing ordinance is insufficient unless it charges knowledge and criminal intent.[76]

SUPERSEDEAS; SUPPLEMENTAL PLEADINGS, see latest topical index.

SUPPLEMENTARY PROCEEDINGS.

§ 1. Nature, Occasion and Propriety, 1765.
§ 2. Proceedings Necessary on Which to Base Remedy, 1766.
§ 3. Application for Examination of Defendant and Debtors, 1766.
A. Affidavit and Opposition to Same, 1766.
B. Order and Citation Process on Warrant, 1766.
§ 4. Procedure At and After Examination, 1767.
§ 5. Relief Against Defendant, 1767.
A. Order for Payment or Delivery, 1767.
B. Receivership or Other Equitable Relief, 1767.
C. Contempt, 1767.

§ 1. *Nature, occasion and propriety.* See 8 C. L. 2047—Under the New York code, supplementary proceedings are special proceedings [77] instituted and continued before a judge as a separate tribunal [78] out of court,[79] and the authority is conferred on

a maximum penalty. Id. Acts 1907, p. 89, c. 64, closing barber shops on Sunday, is in violation of Const. art. 4, §§ 22, 23, forbidding special legislation on crimes and misdemeanors when general laws are applicable, since the general Sunday closing law, Acts 1905, p. 629, c. 169, applies in this case. Armstrong v. State [Ind.] 84 NE 3.

65. St. Louis ordinance forbidding sale of meat after 9 o'clock Sunday morning is not invalid because less restrictive than the general statute forbidding Sunday labor (Rev. St. 1899, § 2243), nor for imposing a higher penalty, although Const. art. 9, § 23, provides that the ordinances of the city shall be in harmony with the laws of the state. City of St. Louis v. De Lassus, 205 Mo. 578, 104 SW 12.

66. City of Gulfport v. Stratakos [Miss.] 43 S 812.

67. Rev. St. 1899, §§ 2243, 2244 (Ann. St. 1906, pp. 1421, 1422). State v. Campbell, 206 Mo. 579, 105 SW 637.

68. Proprietor of soda fountain incorporated a club for sale of refreshments to members on Sunday. Charter anulled. Hanzer v. Com. [Va.] 60 SE 67.

69. Pen. Code, 1895, § 422. McCain v. State, 2 Ga. App. 389, 58 SE 550.

70. Tips only. McCain v. State, 2 Ga. App. 389, 58 SE 550.

71. Code 1904, § 3799. Puckett v. Com. [Va.] 57 SE 591.

72. In re Hammerstein, 108 NYS 197.

73. Section gang working on railway. Commonwealth v. Chesapeake, etc., R. Co. [Ky.] 108 SW 851.

74. Code 1904, § 3799, inflicts two dollars fine only and criminal warrant will not lie for the breach. Wells v. Com. [Va.] 57 SE 588; Hanzer v. Com. [Va.] 60 SE 67.

75. Kimmerline v. State, 5 Ohio N. P. (N. S.) 417.

76. Daugherty v. Dennison, 11 Ohio C. C. (N. S.) 13.

77. Code Civ. Proc. §§ 2433, 3333, 3334, 3343. Harris v. Weiss, 105 NYS 8.

78. No other judge may interfere unless

judges as separate judicial officers.[80] In Washington court commissioners are empowered to hear the proceedings.[81] The court has only such jurisdiction as is conferred by the statute.[82] The remedies provided are concurrent with those in judgment creditors' actions,[83] and the right to examine is not waived by the creditor's action.[84] Also, the remedy will pass to an assignee of a judgment.[85]

§ 2. *Proceedings necessary on which to base remedy.* See 8 C. L. 2047—The proceedings may be instituted after return of an execution or after the issuing and before the return of an execution.[86] In New York the proceeding must be based on a judgment for not less than $25,[87] and this refers to the total judgment;[88] also, the proceedings are not authorized when based upon a judgment against a domestic corporation [89] or against a foreign corporation doing business or having an agency in the state,[90] except in proceedings brought by or against the people.[91]

§ 3. *Application for examination of defendant and debtors. A. Affidavit and opposition to same.* See 8 C. L. 2047—The proceedings may be maintained though the true Christian name of the judgment debtor is unknown,[92] but when the parties agree on the true name, the proceedings will be deemed amended, and subsequently the true name will be used.[93] An averment that the debtor resided in the county to which execution was issued at time of issue is necessary.[94]

(§ 3) *B. Order and citation process on warrant.* See 8 C. L. 2047—Facts requisite to show jurisdiction must be set forth [95] and the order issued by the judge before whom the proceeding was commenced.[96] An order entitled as in an action should be vacated,[97] though the authorities are not entirely in harmony on this point,[98] The debtor cannot object to a second order upon the ground that a prior proceeding is pending.[99] The order for examination may be set aside on motion,[1] but where the motion raises questions of law and fact, the parties should be left to their remedy by action.[2] If entry of an order dismissing the proceedings was required, it should be made by the prevailing party.[3] The order to apply property is an order affecting a substantial right and is appealable.[4]

statute provides. McAlpin v. Stoddard, 54 Misc. 647, 105 NYS 9.

79, 80. McAlpin v. Stoddard, 54 Misc. 647, 105 NYS 9.

81. Howard v. Hanson [Wash.] 95 P 265.

82. Mede v. Meyer, 55 Misc. 621, 105 NYS 957.

83, 84. In re Albright, 55 Misc. 324, 105 NYS 486.

85. In re American Fidelity Co., 122 App. Div. 93, 106 NYS 738.

86. Mede v. Meyer, 55 Misc. 621, 105 NYS 957.

87. Civ. Code Proc. § 2458. Mede v. Meyer, 55 Misc. 621, 105 NYS 957.

88. Judgment for $23.57, $2 costs and $3.01 prospective fees, an adequate basis. Mede v. Meyer, 55 Misc. 621, 105 NYS 957.

89, 90, 91. Keystone Pub. Co. v. Hill Dryer Co., 55 Misc. 625, 105 NYS 894.

92. Minsky v. Stransky, 107 NYS 220. Judgment under fictitious Christian name. Smith v. Josephson, 66 Misc. 120, 107 NYS 221.

93. Minsky v. Stransky, 107 NYS 220. Where a judgment against "Hill Dryer Co." which was not a corporation, but natural person, the court held proceedings unauthorized (Keystone Pub. Co. v. Hill Dryer Co., 55 Misc. 625, 105 NYS 894), but subject to amendment (Id.).

94. Allegation that execution "has been issued" to sheriff of county where debtor "resides" insufficient. Kelly v. Bell [Ind. App.] 83 NE 773.

95. Keystone Pub. Co. v. Hill Dryer Co., 55 Misc. 625, 105 NYS 894.

96. Where special term of city court vacated a stay of examination, it was irregular to direct the judgment debtor to appear, and the creditor should obtain the order from the city court justice fixing a new date. McAlpin v. Stoddard, 54 Misc. 647, 105 NYS 9. Remitted to county court to designate time and place of hearing. In re American Fidelity Co., 122 App. Div. 93, 106 NYS 738.

97. Harris v. Weiss, 105 NYS 8.

98. McAlpin v. Stoddard, 54 Misc. 647, 105 NYS 9.

99. Debtor made motion and it was immaterial that order had not been entered. McAlpin v. Stoddard, 54 Misc. 647, 105 NYS 9.

1. In re American Fidelity Co., 122 App. Div. 93, 106 NYS 738.

2. Judgment debtor in action by state excise officer objects to assignment to surety on bond on question of agreement for bond. In re American Fidelity Co., 122 App. Div. 93, 106 NYS 738.

3. McAlpin v. Stoddard, 54 Misc. 647, 105 NYS 9.

4. Ryland v. Arkansas City Milling Co.

§ 4. *Procedure at and after examination.* See 8 C. L. 2048—The court has no power to order a debtor to apply property in payment of the judgment when it appears the title is in a third party or not under the debtor's personal control,[5] but the courts are not in harmony as to the remedy in such cases.[6] New York holds that the judgment creditor should be remitted to an action through the medium of a receiver.[7] An order issued to the debtor of a judgment debtor is in all respects of the same character as an order to a garnishee, and operates only as an attachment, and is in no sense a judgment. It follows that, in an action to enforce payment under such an order, a mere recital of the order made with a prayer for judgment is insufficient, but it is necessary to further aver that at the time the order was made the defendant was actually indebted to the judgment debtor.[8] It is too late to move to vacate the order for examination on account of irregularity at the end of the examination,[9] and a judgment requiring the debtor to pay the costs into court is erroneous.[10]

§ 5. *Relief against defendant. A. Order for payment or delivery.* See 8 C. L. 2048 In New York the earnings of a judgment debtor are exempt from execution and supplementary proceedings,[11] but it must appear "that those earnings are necessary for the use of a family wholly or partly supported" by the debtor.[12] The earnings in a business are the net profits,[13] and the exemption should be liberally construed in favor of the judgment debtor.[14]

(§ 5) *B. Receivership or other equitable relief.* See 8 C. L. 2049—A receiver appointed in supplementary proceedings simply takes possession for the purpose of satisfying the judgment.[15] He does not acquire any title to the real property of a judgment debtor,[16] nor any power to sell or transfer such real property,[17] and his interest is terminated by the sale under execution and delivery of a deed to the purchaser [18] or by the expiration of the ten years during which the judgment was a lien on the premises.[19]

(§ 5) *C. Contempt.* See 8 C. L. 2049—Punishment for contempt in failing to appear for examination must be based on sufficient evidence,[20] and the same rule applies where moneys are disbursed subsequent to a restraining order.[21] The code of New York provides that where such failure was calculated to or actually did impair the

[Okl.] 92 P 160. The provision for an appeal in § 6680-5 applies to the proceedings that are provided for in that section, and not to proceedings under § 6680-4, relating to the order for payment. Morrow v. Blue, 5 Ohio N. P. (N. S.) 17. Subrogation of surety paramount to lien of bank secured by assignment from defaulting contractor. Henningsen v. United States Fidelity & Guaranty Co., 28 S. Ct. 389.

5. Ryland v. Arkansas City Milling Co. [Okl.] 92 P 160, collating decisions construing similar statutes of various states. Substantial dispute as to ownership. Ghersin v. Thuor, 56 Misc. 465, 107 NYS 195.

6. Ryland v. Arkansas City Milling Co. [Okl.] 92 P 160.

7. Ghersin v. Thuor, 56 Misc. 465, 107 NYS 195.

8. Morrow v. Blue, 5 Ohio N. P. (N. S.) 17.

9. Irregularity in entry of judgment. Gerhard Mennen Chemical Co. v. Dressner, 53 Misc. 370, 104 NYS 749.

10. Ballinger's Ann. Codes & St. § 5327. Sheriff pays costs when directed out of money received. Howard v. Hanson [Wash.] 95 P 265.

11. Code Civ. Proc. § 2463. Earnings rendered within 60 days preceding. Twelfth Ward Bk. v. Hamilton, 109 NYS 21; Murray Hill Co. v. Kuhnle, 109 NYS 669.

12. Proof that debtor had wife and two children and supported a home, while earning over $200 each month, insufficient. Twelfth Ward Bk. v. Hamilton, 109 NYS 21.

13. Where receipts of contractor paid for material, there was no ground for contempt. Murray Hill Co. v. Kuhnle, 109 NYS 669.

14. Murray Hill Co. v. Kuhnle, 109 NYS 669.

15, 16. Hall v. Senior, 54 Misc. 463, 106 NYS 29.

17. Hall v. Senior, 54 Misc. 463, 106 NYS 29. One buying mortgaged chattels at a sale of a receiver was bound to take notice that court had no jurisdiction to make order of sale. Boswell v. First Nat. Bk. [Wyo.] 93 P 661.

18, 19. Hall v. Senior, 54 Misc. 463, 106 NYS 29.

20. Insufficient where creditors might find debtor who had also appeared when required. Bernstein v. McCahill, 56 Misc. 460, 107 NYS 161.

21. Evidence sufficient, there being no proof that earnings were exempt. Goldberger v. Tack, 108 NYS 1047.

rights of a party to an action a fine may be imposed [22] irrespective of proof of actual damage,[23] but not as indemnity only,[24] and such punishment may be waived.[25]

SUPPORT AND MAINTENANCE; SURCHARGING AND FALSIFYING, see latest topical index.

SURETY OF THE PEACE.[26, 27]

SURETYSHIP.

§ 1. Definitions and Distinctions, 1768.
§ 2. The Requisites of the Contract, 1768.
§ 3. The Surety's Liability, 1769.
§ 4. The Surety's Defense, 1770.
A. Legal Defenses to Surety's Liability, 1770.
B. Defenses Based on Extinguishment or Absence of Principal's Liability, 1770.
C. Defenses Based on Change of Contract or Increase of the Risk, 1771.
D. Defenses Arising Out of Forbearance or Suspension of Liability of Principal, 1772.
E. Defenses Based on Impairment of Surety's Secondary Remedies Against Principal or Collateral Securities, 1772.
F. Defenses Based on Fraud or Concealment by Creditor of Material Facts, 1772.
G. Other Defenses, 1773.
§ 5. Rights of Surety Against Principal and Cosurety, 1773.
§ 6. Security Held by Surety and Rights Therein, 1774.
§ 7. Remedies and Procedure, 1774.

§ 1. *Definitions and distinctions.* See 8 C. L. 2050—A surety is one who is as between himself and the primary obligor secondarily liable to pay an obligation, but is as to the creditor primarily obligated.[28] It has been said that if the consideration for the contract moves to the principal, the contract is one of suretyship, if for the benefit of the guarantor the contract is one of guaranty.[29] But some courts do not seem to recognize this test.[30] A retiring partner becomes a surety on partnership debts on the dissolution of a partnership and assumption of partnership debts by the other partner.[31] On cumulative fidelity bonds, the sureties on each stand in the relation of cosureties to those on all the others.[32]

§ 2. *The requisites of the contract.* See 8 C. L. 2050—Credit given to the principal is ample consideration to support a contract of suretyship.[33] Want of consideration is no defense to a liability of sureties on a fidelity bond to the public.[34] A contract to

22. Fine equal to judgment and costs. In re Seitz, 56 Misc. 616, 107 NYS 593.

23. Statute remedial to preserve rights of parties to an action. In re Seitz, 56 Misc. 616, 107 NYS 593.

24. Proof that no damage at all was suffered. Bernstein v. McCahill, 56 Misc. 460, 107 NYS 161.

25. Creditor's attorney informed debtor that order would not be insisted on for thirty days. In re Seitz, 56 Misc. 616, 107 NYS 593.

26, 27. No new cases have been found for this topic during the period covered. See 8 C. L. 2050.

28. Held immaterial whether sureties were designated as such, where in fact it appeared that there was a principal obligor. Reissaus v. Whites [Mo. App.] 106 SW 603. One signing a joint obligation to pay for milk held not a surety. Gustafson v. Swanson, 131 Ill. App. 585. A wife joining husband in execution of mortgage on homestead to secure his debt held not a surety. Omlie v. O'Toole [N. D.] 112 NW 677. Prima facie case made out by showing that proceeds of note signed by husband and wife went to husband. Black v. McCarley's Ex'r, 31 Ky. L. R. 1198, 104 SW 987. Evidence held sufficient to show that defendant signed a note not for the accommodation of the plaintiff as surety but as cosurety with plaintiff. Carstens v. Gerdes [Iowa] 115 NW 1009.

29. Wording of contract was in form of a guarantee but consideration flowed to principal. Suretyship, Schlittler v. Deering Harvester Co. [Ga. App.] 59 SE 342.

30. Where there was a valid consideration for the contract, it was held wholly immaterial whether the defendant, who guaranteed payment of goods and sold to his son, did so as a guarantor or as a surety. A. B. Small Co. v. Claxton, 1 Ga. App. 83, 57 SE 977.

31. Schmitt v. Greenberg, 109 NYS 881. See Partnership, 8 C. L. 1261.

32. National Surety Co. v. Di Marsico, 55 Misc. 302, 105 NYS 272.

33. A. B. Small Co. v. Claxton, 1 Ga. App. 83, 57 SE 977. Making a loan to one upon the credit of all the signers of the note held sufficient consideration. Carstens v. Gerdes [Iowa] 115 NW 1009.

34. National Surety Co. v. Di Marsico, 55 Misc. 302, 105 NYS 272.

pay another to become surety or to lend one his credit is lawful [35] and based on a sufficient consideration.[36]

§ 3. *The surety's liability.*See 8 C. L. 2051—While it is commonly said that the undertaking of a surety is to be strictly construed in his favor,[37] this means no more than that it is limited to the precise obligation undertaken [38] and the amount therein specified,[39] and in determining the meaning of the contract, it is to be reasonably construed [40] and the rule of strictness does not apply to matters pertaining rather to the remedy than the extent of liability.[41] A surety cannot question the validity of a bond voluntarily entered into [42] nor deny recitals therein, after the principal has enjoyed its benefits and a breach has occurred.[43] In order to recover against a surety, default by the principal within the terms of the contract must be shown.[44] In some states a surety is entitled to have the property of the principal first applied to the discharge of the obligation before recourse can be had against property pledged,[45] but payments to a creditor by a principal in the course of current business

35, 36. Givens v. Gridley [Ky.] 106 SW 1192.

37. Phoenix Mfg. Co. v. Bogardus, 231 Ill. 528, 83 NE 284; Fancher v. Keenan, 5 Ohio N. P. (N. S.) 614. Surety entitled to benefit of doubt, if any, as to liability. American Surety Co. v. Koen [Tex. Civ. App.] 107 SW 938.

38. Judgment in the aggregate for compensatory and punitive damages in a previous action held insufficient to establish a cause of action against the sureties on attachment bond. Johnston v. Sexton [C. C. A.] 159 F 70.

Building contracts: Sureties liable for rental value of building during delay, having contracted for completion within a certain time. Tally v. Ganahl, 151 Cal. 418, 90 P 1049. Sureties liable for reasonable attorney's fees to owner of building under a bond providing that building should be delivered to owner free from any lien or claim when owner had to defend a lien claim suit. Id. Where a building contract provided that the architect should certify any expense or damage incurred by the owner because of the contractor's failure to perform, the contractor abandoned the work and the architect was discharged, a certificate of damages signed by a new architect, the old one's whereabouts being unknown, was sufficient. Id. Where bond was executed with reference to contract, plans and specifications and contract relieved owner of building from responsibility for injuries to a tenant, sureties were held liable for injuries resulting to such tenant through contractor's negligence. McArthor v. McGilvray, 1 Ga. App. 643, 57 SE 1058.

39. The amount thereof should be limited to the exact terms of the contract. Prescott Nat. Bk. v. Head [Ariz.] 90 P 328. The amount of damages caused by violation of law held immaterial, amount of bond being fixed. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971. Surety liable for exact amount even though bond was without authority under statute reduced in amount. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665. Recovery of amount larger than contract covered held error. Bernhardt v. Dutton [N. C.] 59 SE 651. The rejection, in compliance with statute, of an account of an Indian agent which contains material misrepresentations of fact in regard to the amounts due and paid, is not the imposition of a penalty but is the enforcement of a statutory rule of accounting which becomes a part of the contract of the agent's surety to which his obligation is subject. Act July 4, 1884, § 8 (23 Stat. 97, c. 180). United States Fidelity & Guaranty Co. v. U. S. [C. C. A.] 150 F 550.

40. Van Buren County v. American Surety Co. [Iowa] 115 NW 24; Martin v. Whites [Mo. App.] 106 SW 608.

41. Notice of default pertains to the remedy and is not as strictly construed as the conditions involving the essence of the agreement. Van Buren County v. American Surety Co. [Iowa] 115 NW 24.

42. United States Fidelity & Guaranty Co. v. U. S. [C. C. A.] 150 F 550; Town of Point Pleasant v. Greenlee [W. Va.] 60 SE 601. Note signed by cashier of bank, surety estopped to deny cashier's authority to sign for bank. Johnson County v. Chamberlain Banking House [Neb.] 113 NW 1055. Complaint that did not allege that the bond was delivered by sureties with knowledge that principal had not signed or that they had waived such signature but which alleged the delivery by defendants, held not demurrable. Surety waived signature. People v. Carroll [Mich.] 115 NW 42.

43. Where bond recited execution of contract on one date, surety could not show execution on another. Red Wing Sewer Pipe Co. v. Donnelly, 102 Minn. 192, 113 NW 1.

44. Evidence held insufficient to establish a default and the amount thereof against the guardian. Rouse v. Payne, 120 App. Div. 667, 105 NYS 549.

45. White v. Rovall, 121 App. Div. 12, 105 NYS 624. Rev. Civ. Code, § 2006. A husband gave a note signed by his wife as surety to a payee who was the state treasurer. The wife to secure it mortgaged her separate property. Husband was a surety on the payee's bond as state treasurer, who became a defaulter and assigned the note to the state, and it obtained a judgment on his bond. Husband with wife's consent transferred to the state all his property under an agreement that wife's property should be preserved for her. State applied it on the judgment. Held error. State v. Mellette [S. D.] 113 NW 83.

will not on the application of a surety be applied to the surety debt.[46] A surety has a right to contract that his liability shall be subject to reasonable conditions [47] and that he become a surety for other sureties, or limit the extent of his liability with respect to other sureties,[48] but to constitute an apparent maker of a note a cosurety with another signing as surety, there must be a mutual understanding between the parties to that effect.[49] No understanding between the sureties on different fidelity bonds will limit the liability of sureties to the public.[50] Where the effect of the undertaking of a surety is that he shall be liable for the result of a suit against his principal, he is conclusively bound by the judgment in such suit even though he is not a party to and have no notice of it.[51] A surety on a bond conditioned that the principal shall faithfully discharge the duties of his office, but not containing any contract of indemnity, is not conclusively bound by a settlement made by the principal under a statute,[52] but the sureties on a bond given by the defendant to secure the observance of an order are not entitled, on certiorari, to question the regularity of a judgment upon which the order is based.[53] A judgment against the principal is prima facie evidence against the surety who had notice of the pending of the action against the principal.[54]

§ 4. *The surety's defense. A. Legal defenses to surety's liability.* See 8 C. L. 2052—A surety may set up as a defense the nonfulfillment of any condition precedent to his liability, such as notice of default within a certain time [55] and failure to sue at surety's request, under statute.[56]

(§ 4) *B. Defenses based on extinguishment or absence of principal's liability.* See 8 C. L. 2053—Verdict in favor of the maker of a note on his plea, of failure of consideration extinguishes the obligation of the sureties on such note.[57] Obligee's acceptance of a new firm as primary debtors on a note does not of itself work a release of the retired members from their liability as sureties for the debt.[58] The discharge

46. Exchange Bk. v. McMillan, 76 S. C. 561, 57 SE 630.

47. Conditioned that suit should not be brought later than six months and that liens secured against should be valid ones. McGarry v. Seiz, 129 Ga. 296, 58 SE 856.

48. Citizens' Nat. Bk. v. Burch, 145 N. C. 316, 59 SE 71.

49. Surety, without knowledge of the fact that one of signers was a surety, could not be held as a cosurety with such signer. Citizens' Nat. Bk. v. Burch, 145 N. C. 316, 59 SE 71.

50. National Surety Co. v. Di Marsico, 55 Misc. 302, 105 NYS 272.

51. Town of Point Pleasant v. Greenlee [W. Va.] 60 SE 601. Decree of court requiring one Abbott to pay a certain sum held conclusive upon a surety in a receiver's bond. State v. Abbott [W. Va.] 61 SE 369.

52. Officer had made settlement under Code 1887, § 862 (Va. Code 1904, p. 408). United States Fidelity & Guaranty Co. v. Jordan [Va.] 58 SE 567.

53. Defendant was convicted for neglecting to support his wife and an order to pay $15 weekly to him was signed by Boyle et al as sureties. Eckerson v. Boyle [N. J. Law] 68 A 796.

54. Henry v. Heldmaier, 129 Ill. App. 86, afd. 226 Ill. 152, 80 NE 705. In an action on a liquor dealer's bond, sureties are not estopped from showing that their principal had not violated the law. City of Paducah v. Jones, 31 Ky. L. R. 1203, 104 SW 971.

55. Van Buren County v. American Surety Co. [Iowa] 115 NW 24. Under a bond securing the performance of a building contract by Sept. 15, where notice of default was first given Nov. 22, a surety is released for failure to complete the building in time but not for damages arising from lien claims for labor or material, by failure to give notice of default at an earlier date. Monro v. National Surety Co. [Wash.] 92 P 280. Under obligation to report any default on the part of a bridge company, county was not obliged to discover and report a fraud as soon as it occurred. Van Buren County v. American Surety Co. [Iowa] 115 NW 24. Notice of default required by bond held not to be due before county was appraised of the default, or should have known of it, in the exercise of reasonable diligence. Id. Notice given as soon as county discovered a fraud in the construction held sufficient. Id.

56. Rev. St. 1901, par. 3551. Notice in words of statute held sufficient. Prescott Nat. Bk. v. Head [Ariz.] 90 P 328.

57. No consideration for note on which defendants were sureties. Schlittler v. Deering Harvester Co. [Ga. App.] 59 SE 342.

58. Plaintiff was holder of a note executed by a firm. Two members of the firm sold their interests therein to the third member thereof and a stranger, the vendees assuming the debts of the firm. Akin v. Van Wirt, 108 NYS 327.

of one of several sureties from a joint or several obligation, with an express reservation as to the other obligors, does not release the other sureties or the principal,[59] nor does the discharge of the principal in bankruptcy relieve the surety from liability for the balance due.[60]

(§ 4) *C. Defenses based on change of contract or increase of the risk.* See 8 C. L. 2058—Any material change in the terms of the contract discharges the surety [61] unless he consents to such alterations [62] and it makes no difference whether the change is for the surety's benefit or not,[63] but the change must be in the subject-matter of the contract and the rule does not extend to independent contracts entered into between the same parties pertaining to additional subject-matter.[64] In building contracts mere immaterial variation and insubstantial deviation which do not in any manner prejudice the right or encroach upon the liability of the surety are insufficient to work a discharge.[65] Changes made wholly at the obligee's expense, when they do not add to the surety's liability, do not discharge the surety from liability.[66] Ordinarily any

59. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

60. Bankr. Act July 1, 1898, c. 541, § 16, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3429). Schmitt v. Greenberg, 109 NYS 881.

61. Chesapeake Transit Co. v. Walker, 158 F 850. Surety held entitled to demand performance of the contract with respect to provisions relating to partial payment as the work progresses. People v. Banhabel [Mich.] 14 Det. Leg. N. 821, 114 NW 669. No time being set for payment except that they should be made only on estimates made about each thirty days, a surety will not be discharged because one estimate was paid a week before usual period. Id. Change in the contract by substitution of a stone wall for a wooden girder, a change as to the character of a skylight, etc., without surety's consent, discharged sureties on contractor's bond, since by the wording of the contract such changes were not authorized. Reissaus v. Whites [Mo. App.] 106 SW 603. An agreement to postpone payment for a short time held not to be such a material change as would discharge surety where bond provided that it should cover any further agreement not materially different in terms. Powell v. Fowler [Ark.] 108 SW 827. The acceptance by creditor of new note in which the surety's note is pledged as collateral does not release the surety. Skinner v. Sullivan, 127 Ill. App. 657. Giving a note by a contractor for government in the amount of an account rendered for materials furnished does not release the surety on his bond. Bond pursuant to Act Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2533). Action on bond was based on the account, and not on note. United States v. Axman, 153 F 982. Instruction of court as to release of surety by change of contract held proper. Powell v. Fowler [Ark.] 108 SW 827. Surety held to be discharged by change in contract although he received compensation for signing bond. Lonergan v. San Antonio Loan & Trust Co. [Tex.] 19 Tex. Ct. Rep. 732, 104 SW 1061.

62. A building contractor gave a bond conditioned on his paying for the material and labor entering into the work. On threatening to discontinue the work, a new arrangement for its completion was made, and the contractor and sureties joined in a letter reciting that the contract was binding. Sureties estopped. People v. Banhagel [Mich.] 14 Det. Leg. N. 821, 114 NW 669. Surety held to have tacitly consented to withholding of an advancement and hence he could not repudiate contract. Powell v. Fowler [Ark.] 108 SW 827. Surety consented to change but not to interlineation, not discharged. Martin v. Whites [Mo. App.] 106 SW 608. Surety estopped to claim discharge by reason of departures from contract having assented to them. Kneisley Lumber Co. v. Edward B. Stoddard Co. [Mo. App.] 109 SW 840. Sureties could not claim prejudice on account of extending time for collecting debt where stipulation was signed consenting to it. Shenkberg Co. v. Porter [Iowa] 114 NW 890.

63. Provision in building contract that no changes in the work should be made could not be disregarded by obligee without discharging sureties. Lonergan v. San Antonio Loan & Trust Co. [Tex.] 19 Tex. Ct. Rep. 732, 104 SW 1061.

64. United States Fidelity & Guaranty Co. v. American Blower Co. [Ind. App.] 84 NE 555. For an additional sum a heating company had agreed to connect a certain heating plant with another building. Id.

65. Martin v. Whites [Mo. App.] 106 SW 608. Change in contract of substituting inferior and lighter materials without the surety's consent and without knowledge and consent of the obligee. Van Buren County v. American Surety Co. [Iowa] 115 NW 24. Bridge company surety was not discharged from liability where the contractor fraudulently substituted lighter materals and, by virtue of a conspiracy between it and county's engineer, bills were presented in excess of amount of materials but not in excess of materials if as agreed upon in specification. Id. Failure of the obligee on a bond, conditioned on a contractor in a building contract performing the contract and paying materialmen, to retain the stipulated per cent of the contract price until the completion of the work is not such an alteration of the contract as will release the surety from his liability to materialmen. United States Fidelity & Guaranty Co. v. American Blower Co. [Ind. App.] 84 NE 555. Contract held not to be changed so as to increase risk. Adams v. Haigler, 2 Ga. App. 99, 58 SE 330. Premature payments under a building contract held no defense. Monro v. National Surety Co. [Wash.] 92 P 280.

66. Prescott Nat. Bk. v. Head [Ariz.] 90 P

act of the creditor which injures the surety or increases his risk or exposes him to greater liability will discharge him,[67] but some courts hold that when the contract of suretyship is specific, injury to the surety is not the test of his release.[68] The renunciation of a surety's defense of unauthorized change in contract rests on the doctrine of waiver, and the elements of knowledge and intent are essential.[69]

(§ 4) *D. Defense arising out of forbearance or suspension of liability of principal.* See 8 C. L. 2055—Extending time for payment by the creditor with knowledge of the existence of the suretyship discharges the sureties,[70] but the extension must be based upon a valuable consideration [71] and for a definite time.[72] Generally, leniency extended to the principal debtor without the surety's consent releases the surety.[73]

(§ 4) *E. Defenses based on impairment of surety's secondary remedies against principal or collateral securities.* See 8 C. L. 2055—The release by a creditor of security to which a surety has a right to resort upon paying the debt releases the surety to the extent that he is deprived of indemnity thereby.[74] Mere failure to foreclose a mortgage securing a debt in accordance with the surety's demand will not relieve the surety where, with full knowledge of such failure, the surey continues for years to join in the renewal of notes.[75] A surety cannot complain of the failure to give him notice of his principal's default where no damage resulted from the failure to give such notice [76] or where he had full knowledge of the fact.[77]

(§ 4) *F. Defenses based on fraud or concealment by creditor of material facts.* See 8 C. L. 2056—A surety who signs on representation that the signature of the prin-

328. Changing detail of construction of a tunnel from a curved to a straight line without the sureties' consent not such noncompliance with, or change of contract as would release the sureties. Change decreased trouble and expense. City of Middleton v. Aetna Indemnity Co., 121 App. Div. 589, 106 NYS 374.

67. Cloud v. Scarborough [Ga. App.] 59 SE 202. Failure to record a contemporaneous mortgage, given to secure the same debt, held to increase risk and hence discharge surety. Proof of loss not necessary under Civ. Code 1895, § 2972, acts of creditor being distinct. Id. Accepting a new note for an old, will not absolve sureties from liability unless the new extinguishes the old. Bank of Benson v. Jones [N. C.] 61 SE 193. Giving principal further credit does not discharge sureties in the absence of an agreement to that effect. Exchange Bk. v. McMillan, 76 S. C. 561, 57 SE 630.

68. Notes given were not of the character and form prescribed in the agreement and surety was released. Guardian Trust Co. v. Peabody, 122 App. Div. 648, 107 NYS 515.

69. No knowledge of changes made in specifications and surety was held not to have renounced defense. Cleveland, etc., R. Co. v. Moore [Ind.] 82 NE 52.

70. Hoffman v. Habighorst [Or.] 91 P 20. Extending time of payment on promissory note released surety. Cambria Sav. Bk. v. Lanier [Iowa] 112 NW 774.

71. Barlow v. F. Stearns [Tex. Civ. App.] 17 Tex. Ct. Rep. 43, 98 SW 455. A mere promise to extend when not based a consideration and when never carried out is insufficient. Id. Mere statement that extension has been granted is insufficient. Church v. John E. Burns Lumber Co., 127 Ill. App. 451.

72. Levy v. Roth, 31 Ky. L. R. 704, 103 SW 292. Mere payment of interest after it was due and when no time for payment was set held no extension. Id.; McCrery v. Nivin [Del.] 67 A 452.

73. Schmitt v. Greenberg, 109 NYS 881. Delay by the principal in efforts to enforce collection of a debt from January to July, held not to be such an extension of time of payment as to discharge where it did not appear, when payment was due, what circumstances caused the delay or whether there was any express or whether the delay was with the surety's consent. Id.

74. Day v. McPhee [Colo.] 93 P 670. The release of a surety on a former bond, to which defendant as surety might have resorted, released surety on appeal bond. Id. Judgment creditor holding two bonds could not proceed against one of them when by affirmative act he had destroyed surety's right to be subrogated to the only available security. Id. In determining the equities between a creditor and sureties on a bond where the creditor's acts in releasing security, to which the surety might have resorted on payment of a debt, would have resulted in loss to the surety, the result of the creditor's action was held persuasive in adjusting the equities. Id. In an action on a joint and several bond signed by defendants as sureties, where the act of defendant corporation in signing the bond was not necessarily ultra vires the release of defendant corporation did not discharge the other surety. Brewing Company signed saloonkeeper's bond and law required two good, sufficient, and lawful sureties. Munoz v. Brassel [Tex. Civ. App.] 108 SW 417.

75. Clark v. Smallwood, 156 F 409.

76. Gustafson v. Swanson, 131 Ill. App. 585.

77. Dienst v. Fischman Loan & Bldg. Co., 10 Ohio C. C. (N. S.) 46.

cipal [78] or of another surety [79] is to be procured cannot be held unless such signature is obtained, but neither such representation [80] or any other misrepresentation will avail unless brought home to the obligee.[81] The mere fact that a creditor does not voluntarily and without solicitation announce to a proposed surety the insolvency of the principal does not relieve the surety.[82]

(§ 4) *G. Other defenses.*See 8 C. L. 2050—Mere supineness and delay in pursuing the principal, unless the inaction be in disregard of an express request of the surety or there be some circumstance which makes it the imperative duty of the creditor to diligently seek payment, will not release the surety [83] but where a creditor has the means of satisfaction in his hands but suffers it to pass into the hands of the principal debtor, the surety is discharged.[84] A person bound as surety in a written instrument for the payment of money to avail himself of the defense of having given notice to sue under statute must show a strict compliance with such statute.[85] That the creditor, who presented his claim in bankruptcy, did not insist that individual and firm assets be separated and claims assigned accordingly is no defense to a retired partner in the absence of a showing that the creditor lost anything thereby.[86] Where one executed a note as surety under an agreement that the maker would execute a mortgage, an assignment of which was to be accepted in discharge of the surety's obligation, and such mortgage was executed and assigned, it became collateral security and the surety was released.[87] It is no defense that imprudent payments have been made, if made in strict accordance with the contract.[88] Solvency of an administrator at the time he is also appointed guardian will not relieve sureties on the administrator's bond for failure to turn over funds to himself as guardian.[89] The maker of a note in a suit by the assignee may set off a liability against the maker as surety for the payee on the note in suit.[90]

§ 5. *Rights of surety against principal and cosurety.*See 8 C. L. 2057—Upon payment of the full amount of the liability of the principal, a surety is subrogated to creditor's right against the principal surety [91] and the cosureties for their proportional

78. Obligee could not show that he had no knowledge where contract provided for another's signature. Crawford v. Owens [S. C.] 60 SE 236.

79. Bank of Benson v. Jones [N. C.] 61 SE 193.

80. Johnson County v. Chamberlain Banking House [Neb.] 113 NW 1055.

81. County judge made misrepresentation to surety company that accounts of a certain trustee were correct and that proper securities and funds were in his hands. United States Fidelity & Guaranty Co. v. Com., 31 Ky. L. R. 1179, 104 SW 1029.

82. Sebald v. Citizens' Deposit Bk., 31 Ky. L. R. 1244, 105 SW 130.

83. Griesmere v. Thorn, 32 Pa. Super. Ct. 13. Mere failure to follow up a general lien of a fieri facias by a levy upon and sale of the property of a principal, even where the principal has, at the time the writ was in the sheriff's hands, sufficient personal property to satisfy a judgment rendered against him, did not release the surety. Id. Omission of plaintiff to give surety notice concerning surrender of note, and of the contest as to its payment, did not dissolve sureties' liability on note. Hier v. Harpster [Kan.] 90 P 817.

84. Failure to levy on principal's goods. Griesmere v. Thorn, 32 Pa. Super. Ct. 13.

85. Rev. St. 1892, § 5833. Where creditor was a married woman, notice directed to and served on her husband was insufficient. Moorman v. Voss, 77 Ohio St. 270, 83 NE 76.

86. Akin v. Van Wirt, 108 NYS 327.

87. Hunter v. Porter, 133 Iowa, 391, 109 NW 283.

88. Payments made strictly in accordance with contract cannot be taken advantage of by a surety on the ground that the estimates were fraudulently exaggerated in the interest of the contractor. Van Buren County v. American Surety Co. [Iowa] 115 NW 245. Obligee relied on an express agreement in contract and bond and waived the right to withhold, for his own protection, money due contractor. Rawson v. Grant [Iowa] 115 NW 909.

89. Administrator solvent when appointed guardian. State v. Whitehouse [Conn.] 67 A 503.

90. So held, where the payee of the note assigned it when insolvent and when note was over due. Craighead v. Swartz [Pa.] 67 A 1003.

91. See Subrogation 10 C. L. 1760. As a general rule, the right of a surety on an appeal bond with respect to any security which the judgment creditor may subject to the payment of his judgment is to resort to it himself on paying the judgment, not to compel the creditor to resort to it. Day v. McPhee [Colo.] 93 P 670.

share of the indebtedness.[92] The right of contribution to a surety secondarily liable attaches immediately upon payment of the charged liability by him and is not affected by a subsequent attempt of the obligee to discharge the surety primarily liable.[93] A surety to be entitled to contribution must give credit to his cosureties for money received in performing the contract upon which the bond is based.[94] The surety on a promissory note takes all the rights of the payee upon the assignment to him of such note before maturity.[95] A surety who pays a note secured by a mortgage cannot maintain an action against the mortgagee for negligently permitting the security to lapse on the ground that it is the duty of the indorsee to preserve and enforce the mortgage.[96] Where a surety's obligation to pay becomes absolute, he may file a bill against the principal debtor to compel an exoneration, although the creditor has not demanded payment from him.[97] He may also file a bill to compel payment of the debt [98] and the defense that the creditor may, by reason of his laches, lose his right of action against the surety is not available.[99] The discharge of either a principal or a surety on a bond will not deprive another surety, who has subsequently paid the debt of his remedy against the principal for indemnity or the cosurety for contribution.[1] Sureties on different bonds given to secure the performance of the same duty are liable to contribution, even though they become sureties at different times and without knowledge of each other,[2] and when the bonds are in different amounts, the sureties are liable to contribute in proportion to the amounts of the obligations signed by them, respectively.[3]

§ 6. *Security held by surety and rights therein.* See 8 C. L. 2058—The surety on the bond of a public contractor, conditioned for the faithful performance of the contract, and the prompt and full payment of laborers and materialmen, has an equity, under the doctrine of subrogation,[4] in the sums due from the government under the contract which is superior to the claim of a bank under an assignment from the contractor to secure the repayment of money loaned.[5] On insolvency of the principal the surety may retain moneys in his hands to the amount of his indebtedness as a fund for his indemnity.[6]

§ 7. *Remedies and procedure.* See 8 C. L. 2058—A surety's remedy upon payment of a note is on the implied obligation of the principal to reimburse him,[7] and upon a fraudulent conveyance by the principal, a suit to have such conveyance set aside.[8] A cause of action against a surety accrues simultaneously with that against the princi-

92. Sanders v. Herndon [Ky.] 108 SW 908. Court erred in not giving judgment for plaintiff where plaintiff and defendant were cosureties and former had paid judgment rendered against principal and sureties. Id.

93. Day v. McPhee [Colo.] 93 P 670.

94. Labbe v. Bernard [Mass.] 82 NE 688. So held, although the principal, after beginning work under the contract and before abandoning it, borrowed money of such surety to enable him to carry out the contract, and as security therefor assigned all claims and demands under it, surety, on failure of contractor, completed building and received balance of contract price but failed to credit cosureties with amount received. Id.

95. Danker v. Jacobs [Neb.] 112 NW 579.

96. Surety, on being sued, paid note and now seeks damages against the principal. Roberts v. First Nat. Bk. of Yale, 149 Mich. 507, 14 Det. Leg. N. 507, 112 NW 1129.

97. Craighead v. Swartz [Pa.] 67 A 1003.

98. Holcombe v. Fetter, 70 N. J. Eq. 300, 67 A 1078.

99. Bill held to be a quia timet bill and court's jurisdiction rests on the fact that there is a debt due. Holcombe v. Fetter, 70 N. J. Eq. 300, 67 A 1078.

1. Lane v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 526, 103 SW 211.

2. National Surety Co. v. Di Marsico, 55 Misc. 302, 105 NYS 272; Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

3. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

4, 5. Henningsen v. U. S. Fidelity & Guaranty Co., 28 S. Ct. 389.

6. Craighead v. Swartz [Pa.] 67 A 1003

7. So held, notwithstanding Civ. Code, §§ 2848, 2849, providing that a surety on satisfying the obligation is entitled to all of creditor's remedies and securities. Bray v. Cohn [Cal. App.] 93 P 893.

8. Civ. Code Prac. § 237. Administrator's fraudulent conveyance set aside. Sample v. Rogers [Ky.] 107 SW 222.

pal.[9] Sureties in proper cases may be allowed set-offs.[10] In an action on a bond against sureties, their guarantors,[11] and in an action on a guardian's bond against his executrix, all the sureties on the successive bonds [12] may be joined as parties defendant. By virtue of statutes, suit may be maintained on a guardian's bond against the sureties alone, when the guardian is dead and his estate is unrepresented.[13] Suit may be maintained against the principal and surety jointly in any county wherein jurisdiction of the surety may be obtained,[14] and where the complaint alleges that one of two cosureties is absent from the state and without the jurisdiction of the court, it is unnecessary to make such absentee a party defendant in order to recover a personal judgment against the other.[15] The petition or complaint in an action against a surety [16] or by a surety against the principal [17] must show all facts necessary to establish suretyship, payment, delivery, etc. Where one sued as principal has pleaded that he is not a principal but only a surety, it is improper for a court to refuse the surety's amendment offering a good defense.[18] Persons sued as principals may show by parol that they are mere sureties.[19] The consideration that induced sureties on notes to sign may be shown by parol.[20]

SURFACE WATERS; SURPLUSAGE; SURPRISE; SURROGATES; SURVEYORS; SURVIVORSHIP; SUSPENSION OF POWER OF ALIENATION; TAKING CASE FROM JURY, see latest topical index.

9. McGovern v. Rectanus [Ky.] 105 SW 965. In an action against the sureties of a policeman for illegal arrest and assault by him, brought more than seven years after the assault, an appeal in a previous action against the policeman, which protracted the litigation past the seven year period of limitation, will not stop the running of the statute of limitations in favor of the sureties. Id. Ky. St. 1903, § 2552, not applicable. Id. To hold, surety's action must be brought within time specified by statute or by agreement. Monroe v. National Surety Co. [Wash.] 92 P 280. An action brought by service of summons and complaint on the surety on March 12th, where the bond provided that no action should be maintained unless it were brought within six months after Sept. 15th, is brought in time. Id. Principal's payment of interest upon surety's request is not payment by surety through the principal as agent so as to toll limitations. Akin v. Van Wirt, 108 NYS 327.

10. Willoughby v. Ball, 18 Okl. 535, 90 P 1017. Before a surety, when sued, can set off a debt due from the plaintiff to his principal, he must both plead and prove that his principal is insolvent, and that should he be denied the set-off, he cannot recover back from his principal the amount which he may be compelled to pay. Id. A surety on a building contractor's bond, requiring the contractor to discharge all material liens, may assert such a lien held by himself. Prescott Nat. Bk. v. Head [Ariz.] 90 P 328.

11. Selby v. New Orleans, 119 La. 900, 44 S 722.

12. Moore v. Hanscom [Tex. Civ. App.] 19 Tex. Ct. Rep. 707, 103 SW 665.

13. Civ. Code 1895, §§ 2535. Demand on surety unnecessary before suit in such case. United States Fidelity & Guaranty Co. v. Davis, 2 Ga. App. 525, 58 SE 777.

14. Principal resided in De Kalb County, surety in New York, and venue laid in Fulton county. Morris v. George [Ga. App.] 59 SE 1116.

15. Tally v. Ganahl, 151 Cal. 418, 90 P 1049.

16. San Francisco Sulphur Co. v. Aetna Indemnity Co. [Cal. App.] 93 P 888. A petition in an action against a surety on a bail must allege that debt or obligation has not been paid or satisfied. Cole v. Regan [Ky.] 107 SW 756. To charge a surety on account of a claim of a materialman, the bill must show that the complainant has paid the bill and that the claim of the materialman was a valid lien upon the property. McGarry v. Seiz, 129 Ga. 296, 58 SE 856. The complaint against a surety must allege that the defendant executed or delivered the undertaking sued on. Action on an undertaking to procure the release of an attachment. Complaint held demurrable for failure to show execution by defendant. San Francisco Sulphur Co. v. Aetna Indemnity Co. [Cal. App.] 93 P 888. A declaration in an action on a bond alleging the execution of the contract and bond at the same time, and that the bond was given to secure performance of the contract, is not demurrable. Identity of contract with the one mentioned in bond was subject of proof on the trial. People v. Carroll [Mich.] 14 Det. Leg. N. 921, 115 NW 42.

17. A petition for indemnity by a surety against a principal must show the nature of the obligation or claim so as to sufficiently identify it. Claim insufficiently described. Lossie v. Frederick [Ky.] 108 SW 885.

18. Amendment showing usury and waiver of homestead should have been admitted since plea could have been proved by parol. Whilden v. Milledgeville Banking Co. [Ga. App.] 59 SE 336.

19. The presumption that a wife is the principal debtor, arising from the fact that her name appears first on a note, may be rebutted by parol proof of surrounding circumstances indicating the contrary. Wife held to be a surety and under Ky. St. 1903, § 2127, relieved from liability for husband's debts. Hart v. Bank of Russellville [Ky.] 105 SW 934. Sureties on notes could show by parol that they were mere sureties and

TAXES.

§ 1. Nature and Kinds, and Power to Tax, 1776. Municipal Corporations, 1779. Construction of Tax Laws, 1780.

§ 2. Persons, Objects and Interests Taxable, 1781.

A. Taxable Property and Its Classification, 1781.

B. The Persons Liable, 1783.

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§ 16. License Taxes, 1840.

§ 17. Income Taxes, 1841.

§ 18. Distribution and Disposition of Taxes Collected, 1841.

The scope of this topic is noted below.[21]

§ 1. *Nature and kinds, and power to tax.* See 8 C. L. 2059—A tax is not a debt in the ordinary sense of the latter word,[22] but is, strictly speaking, an exaction of the sovereign power from the individuals subject thereto for the purpose of the support

that plaintiff with knowledge of the fact extended time of payment. Hoffman v. Habighorst [Or.] 91 P 20.

20. Promise on part of creditor to employ principal debtor and apply his salary to payment of notes, held admissible. Underwood v. Bass, 1 Ga. App. 623, 57 SE 953.

21. This topic is confined to the treatment of taxes levied by the state and subdivisions thereof (see Internal Revenue Laws, 10 C. L. 413; Intoxicating Liquors, 10 C. L. 417, and similar topics) for the purposes of revenue. As to taxes so-called imposed in exercise of police power, see Licenses, 10 C. L. 622; Foreign Corporations, 9 C. L. 1395; Insurance, 10 C. L. 335; Corporations, 9 C. L. 733; Animals, 9 C. L. 100, etc. As to special assessments for local and public improvements, see Public Works and Improvements, 10 C. L. 1307. See, also, the topics devoted to particular kinds of public works and improvements, such as Bridges, 9 C. L. 408; Highways and Streets, 9 C. L. 1588; Sewers and Drains, 10 C. L. 1631. This topic purports to cover the entire subject of taxes in the strictly proper sense of the word, when imposed by the states and subdivisions thereof, but particular topics may be referred to with advantage in many instances. See such titles as Corporations, 9 C. L. 733; Foreign Corporations, 9 C. L. 1395; Railroads, 10 C. L. 1365; Street Railways, 10 C. L. 1730. Taxes being dependent, moreover, upon statute, topics dealing with the construction and validity of statutes should also be consulted. See Constitutional Law, 9 C. L. 610; Statutes, 10 C. L. 1705.

22. United States v. Chamberlin [C. C. A.] 156 F 881. See post, § 11 B, Methods of Collection.

and conduct of the government;[23] and while other exactions, more or less in the nature of taxes, are made by the sovereign power,[24] the distinguishing feature of a tax is that it is imposed for the support of the government, that is for revenue, and a general tax is presumed to be for revenue, in the absence of anything to indicate a contrary intent.[25] Taxes, in this sense, may be divided into three general classes, to wit, property taxes in general;[26] inheritance and transfer taxes;[27] and income taxes.[28] Within the first of these divisions, the most natural division is according to the objects or persons taxed,[29] which includes the particular methods that may be adopted as to particular objects or persons.[30]

The power to tax is an attribute of sovereignty, inherent in the legislature, and is limited only by the nature of the government[31] and subject only to constitutional limitations,[32] such as those relating to the character of laws by which taxes must be imposed,[33] purposes of the tax,[34] equality and uniformity,[35] double taxation,[36] obliga-

23. Quaere whether supplement April 20, 1906, to general tax law 1903, relating to taxes on property of counties and taxing districts in other taxing districts, really relates to a tax, since it merely requires one governmental agency to contribute to support of another. Essex County Park Commission v. West Orange [N. J. Law] 67 A 1065. See post, § 2D, Public Property.

24. See Licenses, 10 C. L. 622; Foreign Corporations, 9 C. L. 1395; Corporations, 9 C. L. 733, etc. Per capita tax on dogs sustained as valid exercise of police power. State v. Sharp [Ind.] 81 NE 1150. Receipt for dog tax under Acts 1897, p. 174 (Burns' Ann. St. 1901, § 2847), held personal to owner or custodian at time of payment, and subsequent owner or custodian acquiring title or possession during current year must also pay the tax. Id. One acquiring dog born after annual assessment must pay the tax thereon. Id.

25. Robinson v. Norfolk [Va.] 60 SE 762.

26. See post, § 2, Persons, Objects and Interests Taxable.

27. See post, § 15, Inheritance and Transfer Taxes.

28. See post, § 17, Income Taxes.

29. See post, § 2, Persons, Objects and Interests Taxable.

30. See post, § 2A, Taxable Property and its Classification.

31. Wolfe County v. Beckett [Ky.] 105 SW 447.

32. State v. Marion County Com'rs [Ind.] 82 NE 482; Judy v. Beckwith [Iowa] 114 NW 565; Wolfe County v. Beckett [Ky.] 105 SW 447. Acts 1905, pp. 427, 428, §§ 3, 4, providing for levying and collection of local tax by school districts laid off in manner prescribed, held contrary to Const. art. 7, § 2, par. 1. Green v. Hutchinson, 128 Ga. 379, 57 SE 353. Pol. Code, § 4637, providing for fees to be collected by county clerk for letters of administration, held to impose a tax for general revenue purposes, and hence contrary to Const. art. 12, § 4, prohibiting legislature from imposing tax on inhabitants of or property in any county, city, etc., for county, town, or municipal purposes. Hauser v. Miller [Mont.] 94 P 197. Courts will not interfere on account of amount if no constitutional limitations are violated. Hager v. Walker [Ky.] 107 SW 254. An excise tax prohibiting other taxes upon railroads is constitutional. Const. pt. 2, c. 1, § 1, art. 4, requires excise taxes to be reasonable, but not proportional. In re Opinion of Justices [Mass.] 84 NE 499; In re Railroad Taxation [Me.] 66 A 726. Since Ky. Act March 29, 1902, taxing liquors in bonded warehouse to warehouseman, and giving him lien for repayment, etc., does not contemplate the enforcement of the tax so long as the control of the Federal government continues, such act is valid and does not conflict with jurisdiction of Federal governments. Thompson v. Kentucky, 28 S. Ct. 533. Laws 1903, p. 375, c. 253, changing railroad gross earning tax, sustained. State v. Duluth, etc., R. Co., 102 Minn. 26, 112 NW 897.

33. Taxes must be imposed by general laws of uniform operation. United New Jersey R. & C. Co. v. State Board of Assessors [N. J. Law] 67 A 438. Const. amend. 1875. Hartshorne v. Avon-by-the-Sea [N. J. Law] 67 A 935. "Uniform" rules means only the basic general rules of taxation. Central R. Co. v. State Board of Assessors [N. J. Law] 67 A 672. Pol. Code, § 4637, relating to clerk's fees for letters of administration, etc., held void under Const. art. 12, § 11, providing that taxes shall be levied and collected under general laws. Hauser v. Miller [Mont.] 94 P 197.

Special tax levy may be made by legislature, but a system of special taxation not controlled by general laws cannot be created. Moore v. Alexander [Ark.] 107 SW 395. Act March 10, 1874 (P. L. 1874, p. 388), relating to taxation of building and loan associations in county of Monmouth, held repealed by provision of Const. amend. 1875, requiring property to be taxed by general laws. Hartshorne v. Avon-by-the-Sea [N. J. Law] 67 A 935. Attempt to revive such act by Act March 28, 1904 (P. L. 1904, p. 201), held open to same objection. Id. Act 1884 (P. L. 142) held a "general law" imposing a "uniform state tax" on railroad and canal property, within transit act, Act March 4, 1869 (P. L. 226), and superseded such transit act. United New Jersey R. & C. Co. v. Baird [N. J. Err. & App.] 69 A 472. Act April 5, 1906 (P. L. 1906, p. 21), supplementing and amending Act 1884 (P. L. 142), changing rate of taxation on railroad and canal property except realty outside of main stem of water course, held not in violation of Const. art. 4, § 7, par. 12. United New Jersey R. & C. Co. v. Parker [N. J. Err. &

tion of contracts,[37] due process of law,[38] and equal protection of the laws.[39] Absolute uniformity is unattainable and impracticable, and hence a reasonable classifica-

App.] 69 A 239; United New Jersey R. & C. Co. v. Baird [N. J. Err. & App.] 69 A 472. Provision of supplement (P. L. 220) that passenger stations shall be regarded as realty outside main stem sustained. United New Jersey R. & C. Co. v. Parker [N. J. Err. & App.] 69 A 239; United New Jersey R. & C. Co. v. Baird [N. J. Err. & App.] 69 A 472. There being no general law for taxation of **mortgages** in Wicomico county, Act 1906, p. 1320, c. 794, providing therefor, is not in conflict with Const. art. 3, § 33. Miller v. Wicomico County Com'rs [Md.] 69 A 118.

34. Taxing power can be exercised for public purposes only. Sutter County v. Nicols [Cal.] 93 P 872; Hauser v. Miller [Mont.] 94 P 197.

35. Const. §§ 171, 172, 174. Hayes v. Walker [Ky.] 107 SW 254. The general purpose of constitutional limitations is to equalize the burden of taxation in proportion to ability to bear the same. Const. pt. 2, c. 1, § 1, art. 4. In re Opinion of the Justices [Mass.] 84 NE 499. Tax must operate uniformly throughout the state or subdivision thereof imposing the same. Hager v. Walker [Ky.] 107 SW 254. Taxes must be uniform throughout taxing district. Schley v. Lee [Md.] 67 A 252. Pol. Code, § 4637, relating to clerks' fees for letters of administration, etc., held void under Const. art. 12, § 11, relating to uniformity, etc. Hauser v. Miller [Mont.] 94 P 197. Laws 1898, p. 23, c. 5, § 66, imposing additional privilege tax on railroads claiming exemption from state supervision, etc., held void as being discriminatory, even though it be considered as an ad valorem tax. Gulf, etc., R. Co. v. Adams [Miss.] 45 S 91.

Arbitrary classification is contrary to Const. § 174, requiring equality in taxation. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926. An arbitrary rate is not necessarily unconstitutional, but is valid where burden imposed on property subject thereto is not greater than on other property. United New Jersey R. & C. Co. v. Parker [N. J. Err. & App.] 69 A 239. It is not unconstitutional to tax a certain class of property at the **average rate** prevailing in the state, instead of at a rate definitely fixed by statute. Act April 5, 1906 (P. L. 121), supplementing and amending Act 1884 (P. L. 142), relating to railroad and canal property, sustained. Id. "Uniform state tax" in **transit duties law** (P. L. 1869, p. 226) means rule of taxation throughout all taxing districts of state relating to railroad and canal property. United New Jersey R. & Canal Co. v. State Board of Assessors [N. J. Law] 67 A 438.

Exemptions cannot be granted conditioned upon the payment of an arbitrary percentage not proportional to the rate imposed on other property. See Const. pt. 2, c. 1, § 1, art. 4, requiring excise taxes to be proportional. In re Opinion of the Justices [Mass.] 84 NE 499.

36. Taxation of cash not invalidated by subsequent application thereof to payment for land upon which purchaser has agreed or does agree with seller to pay the tax, such tax not being assessed to purchaser. White v. Lincoln [Neb.] 112 NW 369. Laws 1898, p. 23, c. 5, § 66, imposing additional tax on railroads claiming their charter exemption from state supervision, held void if considered as an ad valorem tax on such exemption, since under the laws relating to assessment of railroads it must be presumed that the value of such exemption has already been considered by the railroad commission in assessing railroads as required by law. Gulf, etc., R. Co. v. Adams [Miss.] 45 S 91. Pol. Code, § 2176, imposing **liability for care of insane persons** on relatives, held not unconstitutional as imposing double taxation. State Commission in Lunacy v. Eldridge [Cal. App.] 94 P 597.

37. Laws 1898, p. 23, c. 5, § 66, imposing additional privilege tax on railroads claiming exemption from state supervision, etc., held void as impairing obligation of contract, etc. Gulf, etc., R. Co. v. Adams [Miss.] 45 S 91. Laws 1899, p. 44, c. 41, placing arbitrary limit on amount of levy, held violative of Const. art. 6, § 12, forbidding violation of obligation of contracts, and of article 13, § 5, requiring levy sufficient to pay indebtedness and making laws providing therefor irrepealable contracts. Fremont, etc., R. Co. v. County of Pennington [S. D.] 116 NW 75. No contract impaired by taxation of property in a city annexed to another city for the larger needs of the enlarged city. Hunter v. Pittsburg, 28 S. Ct. 40. Laws 1906, p. 1448, c. 532, superseding Laws 1905, p. 2059, c. 729, and rendering mortgages previously executed subject to general taxation, held not to impair obligation of contract. People v. Dimond, 121 App. Div. 559, 106 NYS 277.

38. Arbitrary classification is contrary to provisions of 14th Amend. Fed. Const., relative to due process, etc. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926. Privilege Tax Law 1898 (Laws 1898, p. 23, c. 5), § 66, imposing additional tax on railroads claiming exemption from state supervision, etc., held void as taking property without due process, etc. Gulf, etc., R. Co. v. Adams [Miss.] 45 S 91. Involuntary annexation of smaller to larger city pursuant to election under Pa. Act. Feb. 7, 1906, and subjection of property in smaller city to taxation for the purposes of the enlarged city, held not to constitute denial of due process. Hunter v. Pittsburg, 28 S. Ct. 40.

39. Arbitrary classification is contrary to 14th Amend. Fed. Const., guaranteeing equal protection of laws, etc. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926. Act April 5, 1906 (P. L. 1906, p. 121), supplementing and amending Act 1884 (P. L. 142), and changing rate on railroad and canal property other than realty outside of main stem or waterway, sustained. United New Jersey R. & C. Co. v. Parker [N. J. Err. & App.] 69 A 239; United New Jersey R. & C. Co. v. Baird [N. J. Err. & App.] 69 A 472. Act Ky. March 29, 1902, making bonded warehouseman liable for state taxes, with lien on property in his favor for repayment, held not denial of equal protection of laws. Thompson v. Kentucky, 28 S. Ct. 533.

tion is permissible [40] as to persons [41] and property,[42] and the state may be divided into taxing districts.[43] Nor is absolute equality always obtainable in the actual result,[44] and a taxpayer cannot complain where the inequality is in his favor.[45]

The levying and assessment of taxes are legislative and administrative functions, not judicial.[46] The state is not estopped to tax lands merely by a claim of ownership thereof.[47]

Municipal corporations See 8 C. L. 2061 can levy only such taxes as they are authorized to levy by charter or statute,[48] and, subject to constitutional limitations,[49]

40. Reasonable classification for purpose of municipal taxation is permissible. Hayes v. Walker [Fla.] 44 S 747. Test of validity of classifications is good faith and not wisdom. Id. A tax is uniform if applicable equally and uniformly to all of a class. Atlantic, etc., R. Co. v. Newbern [N. C.] 60 SE 925.

41. Uniformity with respect to persons and property required by Const. art. 7, § 9, held not violated by Laws 1905, p. 140, c. 75, § 1, imposing street poll tax and exempting **females** and males under age. Town of Tekoa v. Reilly [Wash.] 91 P 769. Property of **corporations** such as **railroad and canal companies** may be classified in any way provided the classification rests on reasonably appropriate distinction of general application. Central R. Co. v. State Board of Assessors [N. J. Law] 67 A 672. Act May 18, 1906 (P. L. 571), subdividing property already classified as property used for railroad or canal purposes, and subjecting the two divisions, one of which is taxed under a scheme created by the statute, and the other part according to the general law, held invalid, but not to affect the act of 1884 which it supplemented and the several other supplements thereto. United New Jersey R. & C. Co. v. Parker [N. J. Err. & App.] 69 A 239, rvg. [N. J. Law.] 67 A 686. Act April 5, 1906 (P. L. 1906, p. 121), amending Act 1884 (P. L. 142), changing rate on railroad and canal property, except realty outside of main stem or waterway, held not contrary to Const. art. 4, § 7, par. 12. United New Jersey R. & C. Co. v. Parker [N. J. Err. & App.] 69 A 239. Provisions of act (P. L. 220) that passenger stations shall be regarded as realty outside main stem held valid. Id. Laws 1905, c. 91, supplementing P. L. 1905, p. 189, relating to taxation of "second-class" railroad property, held not in violation of Const. art. 4, § 7, par. 12, relating to uniformity and general laws. Law which changed old law to allow each taxing district to assess its regular taxes on railroad "second-class property" in such district held not discrimination. Bergen & D. R. Co. v. State Board of Assessors [N. J. Err. & App.] 67 A 668; Central R. Co. v. State Board of Assessors [N. J. Law] 67 A 672. Law taxing railroads and canal companies the "average rate of taxation," to be ascertained from tax rates prevailing in the districts by computation, held constitutional. Id. Revisal 1905, § 5290, providing for assessment of railroad property by a commission, held not contrary to Const. art. 5, § 3, requiring uniformity of taxation. Atlantic, etc., R. Co. v. Newbern [N. C.] 60 SE 925. Acts 1905, p. 1152, c. 513, providing for assessment of **interurban and street railroads,** construed and sustained as a proper classification. State v. Taylor [Tenn.] 104 SW 242. Classification by Laws 1903, p. 407, c. 73, of "every person, company, **or corporation engaged in the business of buying and selling grain** for profit," as "grain brokers," for purposes of assessment, held constitutional. Central Granaries Co. v. Lancaster County [Neb.] 113 NW 199. Ownership of lands by counties or other **municipal corporations** constitutes a reasonable basis of classification. Supplement, April 20, 1906, to geneal tax law of 1903, sustained. Essex County Park Commission v. West Orange [N. J. Law] 67 A 1065.

42. The legislature has the right to impose different rates of taxation on different pieces of property. Sams v. Fisher [Md.] 66 A. 711. The constitutional requirement of uniform rules of taxation is satisfied by a uniformity that obtains without discrimination throughout a class of property set apart on reasonable grounds for separate treatment. Central R. Co. v. State Board of Assessors [N. J. Law] 67 A 672. Different kinds of property may be classified arbitrarily for the purpose of separate valuation and different rates imposed on each class. United New Jersey R. & C. Co. v. Parker [N. J. Err. & App.] 69 A 239. Unimproved, outlying or **rural property** within city limits as distinguished from improved or urban property therein. Acts 1888, c. 98, Baltimore Annexation Act, making distinctions between "landed" property within annexed territory and other property, sustained. City of Baltimore v. Gail [Md.] 68 A 282.

43. Taxing districts for road improvement may be created regardless of boundaries of counties, townships or other municipalities. State v. Marion County Com'rs [Ind.] 82 NE 482. Act 1906, p. 1320, c. 794, providing for taxation of **mortgages in certain counties,** held not in violation of Bill of Rights, § 15, relating to uniformity. Miller v. Wicomico County Com'rs [Md.] 69 A 118.

44, 45. State v. Cudahy Packing Co. [Minn.] 116 NW 1039.

46. Silven v. Osage County Com'rs [Kan.] 92 P 604.

47. Chicago, etc., R. Co. v. Douglas County [Wis.] 114 NW 511.

48. City of second class held to have no power to levy gross earnings tax against electric light company. City of Scranton v. Scranton Elec. Light & Heat Co., 33 Pa. Super. Ct. 431. Authority of city of Peoria under Priv. Laws 1869, p. 172, § 12, to levy school taxes, held not repealed by Hurd's Rev. St. 1905, c. 122, § 202, providing for general school taxes. Gray v. School Inspectors of Peoria, 231 Ill. 63, 83 NE 95. Metropolitan police and its governing board having been abolished, the duty of the city

the territorial limits of their taxing power is entirely dependent upon charter or statute,[50] as is also the purposes for which the tax may be levied.[51] The power to levy is, of course, also subject to constitutional limitations as to the amount.[52] A tax levied by a city under an unconstitutional amendment to its charter will be sustained where the city had power to levy the tax under its original charter and the levy is made by the duly and legally constituted authorities.[53] Where local acts are repealed or superseded by general or classification acts, the local acts become subordinate and are extinguished by the general acts.[54] The determination of whether certain property comes within exemptions from local taxation relates to the matter of classification, which is treated of in a subsequent section.[55] One may be estopped to question the existence of the municipality levying the tax.[56] The power or duty to levy a special tax for a special purpose is exhausted by its exercise.[57] Agricultural lands within limits of city are not exempt from municipal taxation, though they derive no benefit from the municipal government.[58]

Construction of tax laws. See 8 C. L. 2081—Tax laws as a rule are construed on the same general basis and under the same rules as laws in general,[59] and a statute im-

to levy a tax for the support of such police cannot be invoked except by or for benefit of third parties with whom such board has made contracts depending upon such taxes. State v. New Orleans, 119 La. 624, 44 S 321. The power to levy and collect taxes is one of the corporate powers of cities of third class. City of Harrisburg v. Harrisburg Gas Co. [Pa.] 67 A 904. By Acts 1906, p. 88, c. 22, authority of city of second class under Ky. St. 1903, § 2984a, to assess **corporate franchises,** was repealed. City of Covington v. Covington & Cincinnati Bridge Co., 31 Ky. L. R. 630, 103 SW 248. Where a municipal franchise tax is based on the use of the municipal streets, the municipality may levy such tax on a corporate franchise even where it is granted by the legislature, if municipal charter permits such levy. City of Baltimore v. United R. & Elec. Co. [Md.] 68 A 557.

49. "Territorial limits" of counties, etc., as used in constitutional provision relative to division of state for purpose of taxation, held to mean actual boundaries. Robinson v. Norfolk [Va.] 60 SE 762. Const. § 157, applicable to cities of fourth class, held not modified by §§ 158, 159. Tipton v. Shelbyville [Ky.] 107 SW 810.

50. Municipalities cannot levy taxes on property outside of its jurisdiction. Hemple v. Hastings [Neb.] 113 NW 187. Pol. Code, §§ 1576, 1670, authorizing city trustees to levy school tax on lands within city, school district, though outside of corporate limits of city, held constitutional. Visalia Sav. Bank v. Visalia [Cal.] 94 P 888. A municipality can only fix tax rates and enforce tax levies in the territory which the statute or its charter allows, and where borough boundary was high-water mark of a bay, it could not enforce levee on land and piers outside high-water mark. Central R. Co. v. Atlantic Highlands [N. J. Law] 66 A 936.

51. Under Code, § 406, county supervisors cannot tax property in cities of first class for building bridges outside thereof. Slutts v. Dana [Iowa] 115 NW 1115.

New county was created by act approved Aug. 18, 1905, and was organized on Dec. 6, 1905. Authorities of county from which portion of territory of new county was taken, on Sept. 9, 1905, made tax levy which embraced amounts necessary to pay for erection of new bridges, contracts for which were entered into after date of act creating the new county. Held that the property owners of the new county were not liable for that portion of the tax levy necessary for purpose of erection of such bridge. Yow v. Sullivan, 129 Ga. 187, 58 SE 662.

52. Harper v. Catlettsburg, 31 Ky. L. R. 293, 102 SW 294.

53. Pamplin city had authority to levy tax prior to enactment of Act 1906, p. 90, under which the levy purported to have been made, and the levy was made by officers elected pursuant to Code 1904, § 1021, such officers being same persons appointed as the temporary authorities by the Act of 1900. Held that the tax was valid. Beale v. Pankey [Va.] 57 SE 661.

54. City gas plant under general tax law not special local law. City of Harrisburg v. Harrisburg Gas Co. [Pa.] 67 A 904. Act March 19, 1860 (P. L. 175), and Act April 22, 1868 (P. L. 1136), authorizing city of Harrisburg to tax corporate property for general revenue purposes, held repealed by Act May 23, 1874 (P. L. 230), and Act May 23, 1889 (P. L. 277). Id. Act March 10, 1874 (P. L. 1874, p. 388), applying only to taxation of building and loan associations, held repealed by provision of Const. 1875, requiring property to be assessed by general law and under uniform rules. Hartshorne v. Avon-by-the-Sea [N. J. Law] 67 A 925.

55. Sec post, § 2A, Taxable Property and its Classification.

56. Neither existence of city nor validity of annexation proceedings can be questioned in suit for city taxes when such proceedings have been acquiesced in and taxes paid for several years. State v. Several Parcels of Land [Neb.] 113 NW 810.

57. Metropolitan police tax. State v. New Orleans, 119 La. 624, 44 S 321.

58. Moore v. Harrodsburg [Ky.] 105 SW 925.

59. Intent of law makers to be sought

posing taxes must be interpreted in connection with other tax laws, prior and contemporaneous,[60] and also in the light of the contemporaneous and subsequent practical understanding of such statute by the taxing officers and the public,[61] but executive construction is not conclusive upon the courts.[62] Tax laws are presumptively prospective in their application, and not retrospective,[63] and are construed strictly against the state,[64] especially to avoid double taxation [65] or to prevent a forfeiture.[66] Under well defined limitations, the Federal courts will follow the decisions of the state courts construing state taxing statutes.[67]

§ 2. *Persons, objects and interests taxable. A. Taxable property and its classification.* See 8 C. L. 2061—A tax will not be held to be imposed upon property except by language clearly indicating the intent of the legislature to render the same subject to the tax,[68] but as a general rule all property within the jurisdiction of the taxing power is subjected to taxation,[69] regardless of whether such property receives any special benefit or not,[70] property intended to be relieved from the burden of taxation being protected by special exemptions based on the purposes for which it is used.[71]

The power to classify property for the purpose of taxation has already been considered.[72] One of the most frequent classifications is with reference to the mode of assessment,[73] as where certain properties are subjected to a single tax to be assessed in a certain manner, in lieu of all other taxation.[74] Another common classification

primarily. Taylor v. Caribou, 102 Me. 401, 67 A 2.

60, 61. Inhabitants of East Livermore v. Livermore Falls T. & B. Co. [Me.] 69 A 306.

62. Imposition and collection, for many years, of tax on telegraph line owned and used by railroad company, but leased to telegraph company, upon theory that such line was railroad property and taxable under Code, §§ 1334, 1336, instead of § 1328. Chicago, etc., R. Co. v. Rhein [Iowa] 112 NW 823.

63. Corporation Elizabeth City v. Com'rs Pasquotank County [N. C.] 60 SE 416.

64, 65. Inhabitants of East Livermore v. Livermore Falls T. & B. Co. [Me.] 69 A 306.

66. Baker v. Webber, 102 Me. 414, 67 A 144.

67. Decision of Kentucky court of appeals as to when Act Ky. March 1906, (Acts 1906, p. 134, c. 22), went into effect held binding on Federal courts. Hager v. American Nat. Bk. [C. C. A.] 159 F 396.

68. People v. Duffy-McInnery Co., 122 App. Div. 336, 106 NYS 878.

69. Under Const. pt. 2, c. 1, § 1, art 4, authorizing proportional and reasonable taxes, all property available to increase the owner's ability to bear a proportionate share of the burden of government should be taxed. In re Opinion of Justices [Mass.] 84 NE 499; Moore v. Harrodsburg [Ky.] 105 SW 925.

70. Agricultural lands within the limits of a city are subject to municipal taxation, though they derive no benefit from the municipal government.

71. See post, § 3, Exemptions From Taxation. See, also, this section, subsec. D, Public Property.

72. See ante, § 1, Nature, Kinds, and Power to Tax.

73. State board of tax commissioners have power under Laws 1905, p. 2215, c. 115, § 2, subd. 2, to classify inter-county railroads and assess property thereof. Great Northern Railway Co. v. Snohomish County [Wash.] 193 P 924. Assessment by county assessor of railroad property held invalid for inequality and failure to follow directions of state board of tax commissioners. Id.

74. Mortgages already executed were rendered subject to general taxation as provided by Tax Law, §§ 2, 3, by Laws 1906, p. 1448, c. 532, superseding Laws 1905, p. 2059, c. 729. People v. Dimond, 121 App. Div. 559, 106 NYS 277.

Railroad and canal property. See P. L. 1888, p. 285, § 28 (Gen. St. p. 3324). In re New York Bay R. Co. [N. J. Law] 66 A 916. Statutes relating to taxation of **railroad property** construed. Great Northern R. Co. v. Snohomish County [Wash.] 93 P 924. Bridge and railroad terminal held taxable under Burns' Ann. St. 1901, § 8428, to corporation as a railroad company and not as a bridge company. City of Jeffersonville v. Louisville & J. Bridge Co. [Ind.] 83 NE 337. Under Act 1884 (P. L. 142), as amended by Act 1888 (P. L. 269), four elements enter into assessment of railroad property, namely: (1) Main stem, which is defined to be "the roadbed not exceeding 100 feet in width, with its rails and sleepers, depot buildings used for passengers connected therewith; (2) Other real property; (3) Tangible personal property; (4) Franchise. Each of such elements is inherent in the property owned by each railroad organized under the laws of the state. Jersey City v. State Board of Assessors [N. J. Err. & App.] 68 A 227. Failure of a railroad company to pay a proper percentage of the earnings of a portion of its property does not render it subject to general taxation. State Board of Equalization v. People, 229 Ill. 430, 82 NE 324. Where railroad company has not completed its road, the exemption from local taxation extends to property within right of way not actually used for other purposes during work of construction, where the work is not unreasonably delayed, but not otherwise. In re New York Bay R. Co [N. J. Law] 66 A 916. Where statute allowed a road to simply pay on states gross earnings

tax for property under construction for new line instead of city taxes, the land is exempt only during construction or a reasonable time after, and where construction is stopped and work discontinued and property held for other purposes, the city taxes will be deemed properly assessed until the road will again begin work of construction. Id. Taxes provided for by P. L. 1869, p. 226, known as Transit Act, continued until completion of assessment under P. L. 1884, p. 142, imposing uniform tax on railroads. State v. United New Jersey R. & C. Co. [N. J. Law] 68 A 796. Railroad built by company organized under Comp. Laws 1897, c. 167, in city streets to carry freight, held not locally taxable, being railroad property within Pub. Acts 1901, p. 245, No. 173, as amended by Pub. Acts 1903, p. 57, No. 45. City of Detroit v. Detroit Manufacturers R. Co., 149 Mich. 530, 14 Det. Leg. N. 548, 113 NW 365. Bridge owned by railroad company, but also used for teams, etc., held "railroad property" within Const. 1891, § 182, authorizing general assembly to provide for taxation of railroads and railroad property. Board of Equalization of Campbell County v. Louisville, etc., R. Co. [Ky.] 109 SW 303. Right of railroad company to own such bridge could not be determined upon issue as to right of county board to tax same instead of state board. Id. Under Acts 1877-78, p. 82, c. 764, Act April 19, 1882 [Laws 1881-82, p. 66, c. 790] Acts 1906 p. 139, c. 22, and Const. 1891, § 182, a bridge constituting part of railroad system was taxable by the railroad commission and not by county authorities. Id. Lower floor room on ferry station for vehicles, accommodation for local passengers, etc., was subject to local tax, but restaurant upstairs, ferry house teminals, etc., was railroad property. In re United New Jersey R. & C. Co. [N. J. Law] 68 A 167. Part of land under water being reclaimed for terminal purposes, held property taxable by local authorities and part not so taxable. In re New York Bay R. Co. [N. J. Law] 67 A 513. Under Rev. St. 1899, c. 12, §§ 1163, 9338, 9339, 9344 [Ann. St. 1906, pp. 988, 4294, 4295, 4296], railroad ancillary to ferry and owned by ferry company held assessable by state board of equalization and not by city assessor. State v. Wiggins Ferry Co., 208 Mo. 622, 106 SW 1005. Railroad ancillary to ferry held assessable as a railroad under Rev. St. 1899, c. 149, art. 8 [Ann. St. 1906, pp. 4293-4315]. Id. There must be a **"main stem"** to every line no matter how long or short the line is. Jersey City v. State Board of Assessors [N. J. Err. & App.] 68 A 227. In default of proof of facts changing the presumption arising from organization of a railroad company, the presumption is that the roadbed, as laid, under the route as filed, is "main stem," whether railroad conducts passenger or freight business or both. Id. To tax property other than main stem where it is within the 100 feet of roadbed, it is necessary to show affirmatively facts which establish that it is not being used for passenger or freight service. Id. Under Gen. St. p. 3325, § 214, as amended by Laws 1906, c. 122, P. L. 1906, 220, the "main stem" of a railroad does not extend beyond the roadbed, though the bed be less than 100 feet wide. In re New York Bay Co. [N. J. Law] 67 A 1049; In re United R. &. C. Co. [N. J. Law] 67 A 1075. Under Act March 27, 1888 [P. L. 270], for taxation of railroad and canal property, there is no distinction between main line and a lawfully authorized branch, and the property of each must be assessed in part as "main stem" and in part as "other real estate used for railroad purposes," according to the circumstances of the property. Jersey City v. State Board of Assessors [N. J. Err. & App.] 69 A 200. Collateral property of branch lines not including roadbed are usually held not "main stem" property though roadbed is. In re New York Bay R. Co. [N. J. Law] 67 A 1049. Parcels of land owned by United New Jersey Railroad & Canal Co. and, upon which railroad tracks are maintained which originally formed part of main line of New Jersey R. & C. Co., located under its charter March 7, 1832 [P. L. 1832, p. 96], and which were left out of main line by a straightening of tracks pursuant to Act Apr. 15, 1868 [P. L. 1868, p. 1037], but are continued in operation for railroad purposes pursuant to last cited act, held not to form parts of "main stem" of principal line of railroad, and not to be branch roads having their own main stem. Jersey City v. State Board of Assessors [N. J. Err. & App.] 69 A 200. Branch road of United New Jersey R. & Canal Co., known as Harsimus Branch, constructed under Act March 30, 1868, and Act March 24, 1869 [P. L. 1868, p. 551; P. L. 1869, p. 560], held to be a branch road established and operated as such by legislative authority, and its property thereupon assessable in part as "main stem" and in part as "other property," etc. Id. Where roadbed is less than 100 feet in width, all land adjoining it used for railroad purposes is **"second-class"** railroad property and locally taxable. In re United R. & C. Co. [N. J. Law] 67 A 1075. Ferry building and slips leading from terminal station to ferry operated in connection with road held not locally assessable as "second-class" railroad property. In re Long Dock Co. [N. J. Law] 68 A 126.

Merged lines had same tax laws and rates as each passed at time of merger. Jersey City State Board of Assessors [N. J. Err. & App.] 68 A 227.

Gross earnings tax imposed on railroads by Rev. St. 1898, §§ 1211-1213, is a tax as distinguished from a license fee. State v. Chicago, etc., R. Co. [Wis.] 112 NW 515. Laws 1903, p. 375, c. 253, changing gross earnings tax on railroads to four per cent., held applicable to defendant railroad. State v. Duluth, etc., R. Co., 102 Minn. 26, 112 NW 897. An approach to a railroad bridge is a switch or sidetrack and as such comes within the statute imposing a tax on the gross receipts of the company in lieu of other taxes. State Board of Equalization v. People, 229 Ill. 430, 82 NE 324. Tax imposed by Code 1904, art. 81, § 164, on gross receipts of certain corporations, held to apply to such receipts, regardless of source thereof, and not to require or authorize the segregation of such receipts according to their source, and imposition of taxes at different rates according to the source of the various receipts. State v. Central Trust Co. [Md.] 67 A 267. "Merchandise" as used in St. 1903, p. 452, c. 437, § 74, relating to **excise**

is with reference to the rate of taxation.[75] Under some circumstances an exception to the rule as to ejusdem generis is indulged in construing and classifying statutes.[76] A finding by the taxing officers of the state that a company should be treated as a foreign corporation and the acceptance of reports from year to year and assessments thereon by the secretary of state does not conclude the right of the state to its proper tax.[77]

(§ 2) *B. The persons liable.*[See 8 C. L. 2062]—It may be predicated as a general rule that property is taxable to its owner, but this rule is too general to be of any particular value, the real controverted questions that arise being with relation to who is deemed to be the owner for the purpose of taxation.[78] Where one, in order to save his property, is compelled to pay taxes for which his predecessor in title was person-

tax on corporations, includes all tangible personalty subject to sale, including vessels plying between domestic ports. New England & S. S. S. Co. v. Com., 195 Mass. 385, 81 NE 286. Under Rev. St. c. 8, § 41, providing for excise tax on **telephone and telegraph companies** "in lieu of all taxes upon * * * its property used in the conduct of its telephone or telegraph business, including poles, wires, insulators," telephone and telegraph conduits laid in street held not taxable, being property used in business of company, though not expressly included in the list of exempted property, such conduits not being in use as a method of conveying wires at time of passage of the act. City of Portland v. New England Tel. & T. Co. [Me.] 68 A 1040. Telegraph line owned by railroad company, and leased to telegraph company, held taxable under Code, § 1328, relating to taxation of **telegraph companies,** and not under §§ 1334, 1336, as railroad property, though used by railroad in connection with its business. Chicago, etc., R. Co. v. Rhein [Iowa] 112 NW 823.

75. Whether property is **urban or rural** depends upon circumstances, location and use. No avenues or streets cut through, simply a 1,000,000 square foot tract bounded by one street and two old roads, held not urban and county not city rate applies. City of Baltimore v. Schafer [Md.] 68 A 138. Under Acts 1888, p. 127, c. 98, § 19, annexing certain territory to city of Baltimore, and providing that property in such territory shall be taxed same as "similar property" within prior city limits, would, without any proviso, impose full city rate on the property in such territory without reference to improvements, but under the proviso of such section and under amendatory act 1902, p. 199, c. 430, landed property was rendered taxable after 1900 under county rate until it became urban, that is until streets, alleys, etc., should have been opened, etc. City of Baltimore v. Gail [Md.] 68 A 282. "Landed" and "urban" property distinguished, and part of property in question held to be "urban" and part held to be "landed" within meaning of act. Id. Wholly unimproved lot bounded by two streets and an alley and contiguous to a 28 acre tract with no visible boundary is not urban property. Id. Lot bounded by four streets, three of which are paved, in a residential section with police and fire protection, is urban property. Id. When property in annex reaches required standard of development, it becomes subject to regular city rate. Sams v. Fisher [Md.] 66 A 711; City of Baltimore v. Gail [Md.] 68 A 282. Under Act July 11, 1842 [P. L. 331, § 59], as amended by Act Apr. 25, 1850 [P. L. 572, § 15], where a farm is situated partly in a borough or city and partly in a township, the whole tract is to be assessed together when the mansion house is on ths part located in the township but where the mansion house is situated in the borough or city, the land in the township must be assessed by the township authorities and the balance by the borough or city authorities. Follett v. Butler County [Pa.] 69 A 76. Act 1850 applies, regardless of number of townships in which land outside borough or city may be located. Id. Compliance by **foreign insurance company** with laws of its domicile relative to deposit to secure all policy holders, thus entitling the company, under Act Apr. 24, 1907, c. 170, § 6, to exemption for two years from requirement of the act as to investment and deposit of 75 per cent. of reserve on policies on lives of citizens of the state, does not, under Act May 17, 1907, § 8, entitle the company to the rate fixed by the Act of Apr. 24, 1907. Kansas City Life Ins. Co. v. Love [Tex.] 109 SW 863.

76. Classification of Const. art. 13, § 4, of mineral deposits, held to include, under phrase "other valuable mineral deposits," gypsum, which was not known as subject of mining at time of enactment of act. Nephi Plaster & Mfg. Co. v. Juab County [Utah] 93 P 53.

77. State v. Covington & C. Bridge Co., 6 Ohio N. P. (N. S.) 55.

78. See post, the particular subdivisions of this subsection.

Money on deposit is taxable to the depositor, notwithstanding the bank's right to apply such money to the depositor's notes held by the bank, where it has not exercised such right. Commonwealth v. Wathen, 31 Ky. L. R. 980, 104 SW 364. Joint custody and control of bonded warehouse by Federal storekeeper and warehouse proprietor, as provided by Rev. St. U. S., §§ 3271-3275, does not constitute such change of possession of the **liquors** stored as to destroy presumption of ownership by distillers. Hannis Distilling Co. v. Berkeley County Court [W. Va.] 59 SE 1051; Id. [W. Va.] 59 SE 1054.

ally liable, he may recover from the latter the amount so paid in an action of assumpsit.[79]

*Vendor and vendee.*See 8 C. L. 2062

*Lessor and lessee.*See 8 C. L. 2062—The lessee is taxable for the value of the lease without reference to the fee value of the property.[80] Where the tax is collected from the lessee, it cannot be assessed again and collected from the lessor.[81] The owner of land subject to ground rent is liable for the taxes thereon.[82]

*Principal and agent.*See 8 C. L. 2062

*Mortgagor and purchaser under mortgage sale.*See 8 C. L. 2063—A purchaser from the mortgagor, subject to the mortgage, is liable for the taxes assessed subsequently to his purchase and prior to execution of the deed on foreclosure.[83]

*Trust property.*See 8 C. L. 2063

*An assignee.*See 8 C. L. 2063

*A life tenant.*See 8 C. L. 2063

*Husband and wife.*See 8 C. L. 2063

*Estates of decedents.*See 8 C. L. 2063—The personal representatives of a decedent are sometimes rendered liable for the taxes on the estate.[84]

Property of nonresidents.[85]

A tenant in common is not entitled to contribution for the payment of void assessments.[86]

As between a bailor and bailee the property is generally taxable to the former.[87]

(§ 2) *C. Corporations, and corporate stocks and property. Corporate franchises and privileges.*See 8 C. L. 2063—A tax may be levied on a corporate franchise as such,[88] though the other property of the franchise holder is also taxed,[89] unless it is exempt by law,[90] in which case the exemption is generally based upon an excise tax

79. Owner of land subject to ground rent held liable to landlord for taxes assessed prior to default in rents and acquisition of absolute title by landlord. Frank v. McCrossin, 33 Pa. Super. Ct. 93.

80. People v. Barker, 121 App. Div. 661, 106 NYS 336. Under Ky. St. 1903, § 4020, and § 4039, as reenacted by Acts 1906, p. 93, c. 22, § 20, **oil or gas wells,** held under lease continuing as long as oil or gas is found in paying quantities, are taxable to the lessee, Wolfe County v. Beckett [Ky.] 105 SW 447. Form of contract is immaterial whether by deed or lease, just so title to oil and gas is vested in the lessee so long as such substances are found in paying quantities. Id. Amount of product reserved by lessee should be deducted from amount taxed to lessee. Id. Under Ky. St. 1903, §§ 4023, 4079, the tangible property of a **railroad company** operated by another company is assessable to latter. Commonwealth v. Kinniconick, etc., R. Co., 31 Ky. L. R. 859, 104 SW 290. Fact that after railroad commission had properly assessed tangible property of railroad company the board of valuation gave an improper credit did not invalidate the assessment, the effect being merely to assess the franchise of the lessor at less than its assessable value. Id.

81. Railroad franchise tax. Commonwealth v. Chicago, etc., R. Co. [Ky.] 105 SW 127.

82. Frank v. McCrossin, 33 Pa. Super. Ct. 93.

83. Where mortgagor sold property subject to the mortgage, which was thereafter foreclosed and the mortgagor became the purchaser, the estate of the purchaser was liable for taxes assessed after the sale by the mortgagor and prior to execution of deed on foreclosure sale. In re May's Estate, 218 Pa. 64, 67 A 120.

84. Where administrators are assessed with estate in their hands as required by Laws 1896, pp. 800, 809, c. 908, §§ 8, 32, they are personally liable for the tax, and cannot escape such liability by distribution. City of New York v. Goss 109 NYS 151.

85. See 6 C. L. 1607. See post, § 4, Place of Taxation.

86. Cole v. Cole, 108 NYS 124.

87. Evidence held to show that wheat taxed to elevator owner belonged to depositors. State v. Northwestern El. Co. [Minn.] 112 NW 68. Elevator owner held not estopped to assert that wheat taxed to it really belonged to depositors. Id.

88. Provisions of Willis Law relating to taxation of corporate franchise are not in conflict with constitution of Ohio or of the constitution of United States, and said act is a valid, constitutional law. State v. Covington & C. Bridge Co., 6 Ohio N. P. (N. S.) 55.

89. Franchise tax may be levied on railroads, though a separate tax is levied on the roadbed, rolling stock, and fixtures at their cash value. In re Railroad Taxation [Me.] 66 A 726. Railroad franchise held taxable though company's road was operated by another road. Commonwealth v. Kinniconick, etc., R. Co., 31 Ky. L. R. 859, 104 SW 290.

90. Under supplement of April 11, 1866, to Gen. Tax Law of 1846 (P. L. 1866, p. 1078;

already imposed [91] in lieu of all other taxes,[92] but such is not always the case.[93] The authority of municipal corporations to impose franchise taxes has already been considered.[94] The imposition of license fees, in the nature of taxes, but in the exercise of the police power, is treated elsewhere,[95] as is also licenses and taxes upon special privileges and franchises as distinguished from the corporate franchise proper.[96]

Stocks.[See 8 C. L. 2084]—Shares of corporate stocks are taxable to the owner as personal property,[97] though the property of the corporation is also taxed to the corporation,[98] unless exempted by statute.[99]

Banks and trust companies.[See 8 C. L. 2064]—The applicability of statutes relative to the taxation of banks and trust companies is a matter of construction.[1]

Gen. St. p. 3292, § 62), corporate franchises are not taxable. North Jersey St. R. Co. v. Jersey City [N. J. Err. & App.] 67 A 33.

91. See North Jersey St. R. Co. v. Jersey City [N. J. Err. & App.] 67 A 33.

92. Gross earnings tax is an excise tax upon a railroad's franchise, measured as to amount by gross earnings. In re Railroad Taxation [Me.] 66 A 726. Excise tax on railroad sustained. Id. In order to avoid double taxation, the legislature may exempt the property of corporations upon which an excise tax is imposed. In re Opinion of Justices [Mass.] 84 NE 499.

93. Under General Tax Law 1903 [P. L. 1903, p. 396, § 3, par. 8], exempting from taxation thereunder "all offices and franchises," and all railroad and canal property, "the taxation of which is provided for by any other law," franchises and offices are absolutely exempt. North Jersey St. R. Co. v. Jersey City [N. J. Err. & App.] 67 A 33.

94. See ante, § 1, Nature, Kinds, and Power to Tax, subd. Municipal Corporations.

95. See Licenses, 8 C. L. 734.

96. See Foreign Corporations, 9 C. L. 1395; Insurance, 10 C. L. 335; Corporations, 9 C. L. 733; Railroads, 10 C. L. 1365; Street Railways, 10 C. L. 1730; Telegraphs and Telephones, 8 C. L. 2096; Waters and Water Supply, 8 C L. 2262; and other topics dealing with public service privileges.

97. Hasely v. Ensley, 40 Ind. App. 598, 82 NE 809.

Foreign stocks are taxable when owned by residents. Judy v. Beckwith [Iowa] 114 NW 565. Code, § 1313, provided for assessment of corporate stock "not otherwise assessed," and "except as otherwise provided," does not exempt shares in foreign corporation owned by resident. Id.

Such taxation is not contrary to the usual **constitutional limitations,** such as those relative to uniformity, privileges, and immunities of citizens, and equality of taxation as between corporations and individuals. (Judy v. Beckwith [Iowa] 114 NW 565), nor double taxation (Id.).

As between pledgor and pledgee: Under Sanborn's Supp. St. 1906, § 1044 [Laws 1899, p. 382, c. 229, and Laws 1903, p. 678, c. 417], and § 1044a [Laws 1899, p. 382, c. 229; Laws 1903, p. 678, c. 417, and Laws 1905, p. 945, c. 508], pledged stock is assessable to pledgee. City of Milwaukee v. Wakefield [Wis.] 113 NW 34.

National bank stock is taxable to the owner. Weiser Nat. Bk. v. Jeffreys [Idaho] 95 P 23. See post, this subsection, subdivision Banks and Trust Companies.

98. Foreign stocks held taxable under Burns' Ann. St. 1901, §§ 8410, 8411, 8422, 8460, 8463, 8523, 8528, 8561, 8566, regardless of whether the property of the corporations was also taxed. Hasely v. Ensley, 40 Ind. App. 598, 82 NE 809.

99. Shares of corporations other than banks are not taxable. See Act 1898, No. 170, p. 363, §§ 27, 28. Chassanoil v. Board of Assessors [La.] 45 S 604; Allgeyer v. Board of Assessors [La.] 46 S 134. Shares in all corporations not required to report to auditor, but to list and pay taxes upon their property, held not taxable in hands of individual owners. Commonwealth v. Ames [Ky.] 106 SW 306; Commonwealth v. Steele, 31 Ky. L. R. 1033, 104 SW 687. Under Ky. St. 1903, § 4085, exempting shares of stock where corporation has paid taxes required to be assessed against it, shares of stock cannot be assessed to holders thereof until the corporation has first been proceeded against, and state must show this fact. Id. Shares held not exempt under St. 1903, § 4088, unless corporation has paid taxes on all of its property within state. Commonwealth v. Walsh's Trustee [Ky.] 106 SW 240. Such section would be void under Const. art. 171, requiring uniformity, etc., if it exempted shares in corporations which have paid taxes on only part of their property in the state. Id. Shares of stock of domestic corporation, whose property is required by law to be returned for taxation, are not taxable in hands of shareholders and hence such corporations are not liable for shares held by them in other corporations of same class. City of Atlanta v. Bankers' Financing Co. [Ga.] 61 SE 122. Such exemption applies to **shares in foreign corporations** as well as domestic. Commonwealth v. Ledman [Ky.] 106 SW 247.

Stock in foreign corporation, which corporation has within 12 months paid taxes on its property in its own state, is exempt as personal property under P. L. 1903, p. 394, though stocks are not expressly mentioned in such act, which, however, was a revision and reenactment of Act 1866 [P. L. p. 1078], which expressly exempted such stock. Inhabitants of City of Trenton v. Standard Fire Ins. Co. [N. J. Law.] 68 A 1111.

Shares of holding company held not taxable where its only assets were stock of other company, where latter company had paid taxes on all its property, though nominal capital of former company exceeded that of latter. Commonwealth v. Ledman [Ky.] 106 SW 247.

1. Code 1904, art. 81, § 164, imposing tax on gross receipts of domestic safe deposit,

A state cannot tax a national bank without the consent of congress,[2] and hence state taxation of such banks must conform to the limitations prescribed by the act of congress giving such consent.[3]

Corporate capital and other property. See 8 C. L. 2064—The capital stock of a corporation is taxable as distinguished from its shares of stock,[4] though a tax is imposed also upon such shares [5] and upon the franchise of the corporation.[6] It has been held, however, that taxing corporate stock to the shareholders in addition to a tax on the property of the corporation is, in effect if not in theory, double taxation,[7] and hence where such shares are so taxed the property of the corporation cannot be taxed unless explicitly so provided by statute.[8] Statutory provision is sometimes made for the taxation of surplus and undivided profits.[9]

Foreign corporations. See 8 C. L. 2065—The franchise of a foreign corporation is not taxable,[10] but a tax may be imposed on property of a foreign corporation in the state, though it has paid a license tax,[11] unless it comes within some statutory exception or exemption.[12]

(§ 2) *D. Public property.* See 8 C. L. 2065—The general rule is that public property and the various instrumentalities of the government are not subject to taxation,[13] such immunity resting upon the fundamental principles of government, being

trust, guaranty, and fidelity company, held applicable to a company empowered by statute to receive money for deposit, articles for safe keeping, act as agents of purchasers, deal in realty on own account, execute trusts, and serve as executor, etc. State v. Central Trust Co. [Md.] 67 A 267.

2. People v. Feitner [N. Y.] 83 NE 592.

3. People v. Feitner [N. Y.] 83 NE 592. Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], is measure of power of state to tax national banks. Weiser Nat. Bk. v. Jeffreys [Idaho] 95 P 23; First Nat. Bk. v. Albright, 28 S. Ct. 349.

Capital stock of national banks is not taxable. Weiser Nat. Bk. v. Jeffreys [Idaho] 95 P 23. Tax imposed by Act Ky. 1906, on "each one hundred dollars of value of the shares" of state and national banks, held, under state decisions and also upon independent consideration, a tax upon the shares and not upon corporate assets. Hager v. American Nat. Bk. [C. C. A.] 159 F 396. Laws 1906, p. 134, c. 22, subd. 2, held to provide for assessment of national bank shares and not their assets, and hence is not in violation of Act June 3, 1864, c. 106, 13 Stat. 99, U. S. Comp. St. 1901, p. 3454. Hager v. Citizens' Nat. Bk. [Ky.] 105 SW 403. Assessments of national banks for 1906 were governed by Laws 1906. p. 134, c. 22, subd. 2, the prior law being invalid as to such banks. Id.

Rule against discrimination prescribed by Rev. St. U. S. § 5219, held not violated by New York bank stock tax, though dedication of personal indebtedness of stockholder is not allowed to be deducted, the flat rate specified being even more advantageous than the ordinary rate with such deductions. People v. Feitner [N. Y.] 83 NE 592; Id., 120 App. Div. 838, 105 NYS 993. Discrimination forbidden by the act of congress does not result from isolated cases, where the rule specified does not discriminate in its general application. Id.

4. Term "capital stock" as used in revenue law does not mean "shares of capital stock" but actual money or property paid in and possessed by the corporation. Weiser Nat. Bk. v. Jeffreys [Idaho] 95 P 23.

5. See ante this subsection, subdivision, Stocks.

6. Tax may be lawfully levied not only upon the franchise of a railroad but also separate tax upon roadbed, rolling stock, and fixtures at their cash value. In re Railroad Taxation [Me.] 66 A 726.

7, 8. Inhabitants of East Livermore v. Livermore Falls Trust & Banking Co. [Me.] 69 A 306.

9. Notes and bonds of borrowers are not taxable as surplus or undivided profits, under St. 1903, §§ 4093, 4094. Commonwealth v. Home & Sav. Fund Bldg. Ass'n [Ky.] 106 SW 221. Proceeds of mortgage bond issue held not taxable as surplus or undivided profits in absence of showing that such proceeds were of such character. Id.

10. American Glue Co. v. Com., 195 Mass. 528, 81 NE 302.

11. British-American Mortgage Co. v. Jones, 77 S. C. 443, 58 SE 417. A foreign corporation is not entirely exempt from taxation on the ground that all its capital is employed in another state, and that the amount sought to be taxed is a part of its surplus. People v. Wilson, 121 App. Div. 376, 106 NYS 1. It is immaterial that the capital is expended upon leased premises and that the structures erected may become the property of the owner of the ground. Id.

12. Acceptance by telegraph company of Act July 24, 1866, c. 230, 14 Stat. 221 [U. S. Comp. St. 1901, p. 3579], relating to construction etc., of telegraph lines over public domain, does not exempt such company from taxation by states other than the state of its incorporation. Western Union Tel. Co. v. Wright, 158 F 1004. Rule is same even if tax imposed is in direct terms a franchise tax. Id.

13. Penick v. Foster, 129 Ga. 217, 58 SE 773. Contract between owner and national bank for use of **government bonds** by lat-

necessary in order that the functions of government be not unduly impeded, and that the government be not forced into the inconsistency of taxing itself in order to raise money to pay over to itself,[14] and constitutions and statutes relative to taxation must be construed in the light of such principles.[15] Municipal property used for public purposes is exempt from taxation,[16] though the legal title is in a private individual or corporation,[17] but the acquisition by a city of all the stock of a corporation does not necessarily exempt the property of such corporation.[18] The exemption of public property from taxation is destroyed by the acquisition of such property by private individuals,[19] but such is not the effect until there has been at least a complete equitable transfer.[20] Certain rights in connection with government lands are taxable, however, though the government still holds the title to the land.[21]

ter to deposit with government, etc., held not a sale such as to render the said contract a taxable credit. Clark v. Gault, 77 Ohio St. 497, 83 NE 900.

14. Penick v. Foster, 129 Ga. 217, 58 SE 773.

15. Penick v. Foster, 129 Ga. 217, 58 SE 773. Word "property" as used in constitution does not require taxation of public property. Id.

16. Municipal bonds issued as evidence of loan to municipality held exempt. Penick v. Foster, 129 Ga. 217, 58 SE 773. Exemption of municipal bonds sustained, though effect is to place heavier burden on those owning no such bonds. Buist v. City Council of Charleston, 77 S. C. 260, 57 SE 862. Inasmuch as municipal, county, and township bonds were not exempt from taxation at the time par. 16 of § 2737, Rev. St., was enacted, these classes of bonds cannot be included in the term "bonds or other securities of the state" as used in that act, and there having been since amendment of constitution, exempting these bonds from taxation, no legislative enactment requiring that average monthly amount of moneys invested in such securities be listed by the taxpayer, such average monthly amounts are not subject to taxation. Whitely v. Arbogast, 6 Ohio N. P. (N. S.) 313. Since amendment of constitution exempting municipal bonds from taxation, a person is not required, under par. 16, § 2737, to list "the monthly average amount or value, for time he held or controlled the same, within the preceding year, of all moneys, credits or other affects within that time invested in, or converted into bonds of any municipality of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April," etc. Whitely v. Arbogast, 9 Ohio C. C. (N. S.) 584. City's, **fire, electric light plant, poles, realty and personalty** used for public, held not taxable for state or county purposes. Commonwealth v. Paducah, 31 Ky. L. R. 528, 102 SW 882. City **water works** held exempt under Const. § 170, as public property used for public purposes. Commonwealth v. Covington [Ky.] 107 SW 231. Payment of rents by users of water does not destroy such exemption. Id. Fact that some revenue is incidentally derived from pipe lines outside city does not destroy the exemption. Id.

Streets and alleys are exempt, and no rights are acquired by anyone by payment of taxes assessed thereon. Boise City v. Hon [Idaho] 94 P 167.

17. Property of bridge company created by Acts 1851-52, p. 521, c. 222, held by such company as agent for cities between which bridge was built, held not taxable for state and county purposes. Commonwealth v. Newport & Covington Bridge Co. [Ky.] 105 SW 378.

18. Property of water company. Bell v. Louisville [Ky.] 106 SW 862.

19. Successor to railroad grantee of land in state grants, by Laws 1874, p. 186, c. 126, ratified and confirmed by Laws 1880, pp. 19, 210, cc. 29, 262, held beneficial owner so as to render land taxable to it. Chicago, etc., R. Co. v. Douglas County [Wis.] 114 NW 511. Issuance and delivery of deed to lot by board of town site trustees, appointed pursuant to Act Cong., May 14, 1890, c. 207, 26 Stat. 109 [U. S. Comp. St. 1901, p. 1463], render such lot at once liable for taxee same as other realty, notwithstanding pendency of controversy between individual adverse claimants therefor. Brooks v. Garner [Okl.] 94 P 694.

20. Unsurveyed lands of the United States are not taxable, and the survey is not complete until the same is accepted by the land department. Clearwater Timber Co. v. Shoshone County, 155 F 612. The exceptional rule that where congress has prescribed the conditions upon which portions of the public domain may be alienated and provided that upon the performance of such conditions a patent shall issue to the purchaser, such property is taxable by the state though no patent has issued, does not apply until all the conditions have been complied with so that nothing remains to be done on the part of the purchaser before he is entitled to the legal title, and hence where government delivered possession of property to purchaser, but reserved title until full payment, and only part payment had been made, the property was not taxable. Mint Realty Co. v. Philadelphia, 218 Pa. 104, 66 A 1130. Public lands received under Act March 2, 1899 [30 Stat. 993, c. 377], and Act June 4, 1897 [30 Stat. 34, c. 2, U. S. Comp. St. 1901, p. 1538], in exchange for lands relinquished for forest reserve, are not taxable, at least until the equitable title passes out of the government, which is not until the transaction has been approved by the proper officers. Clearwater Timber Co. v. Shoshone County [Idaho] 155 F 612. Fact that party making the relinquishment conveys the lands received or to be received in return prior to the approval of the exchange does not render the property conveyed subject to taxation. Id.

(§ 2) *E. Realty.*[See 6 C. L. 2066]—Interests in realty [22] are taxable as realty when so provided by statute.[23] Standing timber is taxable as a part of the land unless otherwise provided by statute.[24] Express provision is sometimes made for the assessment of buildings and structures attached to realty.[25] Otherwise the intention with which an article is annexed to a freehold is the cardinal rule and most important criterion by which to determine its character.[26]

(§ 2) *F. Personalty.*[See 6 C. L. 2066]—Taxable personalty includes money,[27] contracts,[28] and credits,[29] but not the mere right to hold property.[30]

A grantee in a deed purporting to convey lands, the legal and equitable title to which is in the United States, is **not estopped to assert exemption** of such lands from a tax imposed with full knowledge of the condition of the title. Clearwater Timber Co. v. Nez Perce County, 155 F 633.

21. Right of possession of lode mining claim upon land, the title to which is still in the United States, is taxable under Colo. Laws 1887, pp. 340, 341, and such taxation is not in violation of 18 Stat. at L. 474, c. 139, § 4. Elder v. Wood, 28 S. Ct. 263.

22. An **undivided interest** in land or minerals lying thereunder cannot be properly entered upon the land book for taxation. Toothman v. Courtney [W. Va.] 58 SE 915.

23. Mortgagee's interest taxable, under Rev. Laws, c. 12, § 16. Sullivan v. Boston [Mass.] 84 NE 443. Where statement of mortgagee's interest required by Rev. Laws, c. 12, § 45, is fatally defective, the assessors may nevertheless assess such interest to mortgagee, using such statement for what it is worth, and assess value of land to mortgagor less the mortgagee's interest. Id.

Mortgage on leasehold estates held subject to mortgage tax under the statute. People v. Gass, 120 App. Div. 147, 104 NYS 885. Under Mortgage Tax Law, Laws 1906, p. 1448, c. 532, a five year **lease** of realty is a chattel real and taxable as such. People v. Gass, 53 Misc. 363, 104 NYS 884. Under Hurd's Rev. St. 1905, c. 120, § 60, **leasehold estate in exempt realty** is expressly made taxable as realty and not as personalty. People v. International Salt Co., 233 Ill. 223, 84 NE 278. The owner of **mineral rights** held not affected by question whether in previous assessment against owner of land the coal rights were included. People v. O'Gara Coal Co., 231 Ill. 172, 83 NE 140. Where one purchases coal rights after quadrennial assessment, he may be assessed thereon before the next quadrennial assessment. Id.

24. Acts 1906, p. 38, c. 50, amending Code 1904, § 437a, and providing for assessment of standing timber apart from land, held repealed by Acts 1906, p. 555, c. 319, again amending Code, § 437a. Vansant Kitchen & Co. v. Com. [Va.] 60 SE 753.

25. "Superstructures" as used in Revisal 1905, § 5290, requiring assessment of railroad right of way and superstructures thereon, includes all buildings on right of way. Atlantic, etc., R. Co. v. Newbern [N. C.] 60 SE 925.

26. City of Portland v. New England Tel. & T. Co. [Me.] 68 A 1040.

Improvements placed on realty by the owner are assessable as a part thereof. People v. Wells, 54 Misc. 322, 105 NYS 1006. Property substantially completed may be assessed, as where building was all finished but a little plastering, and fixtures were already being installed, held taxable. Isaac Hamburger v. Baltimore [Md.] 68 A 23.

Telephone and telegraph conduits laid in street held not taxable as realty. City of Portland v. New England Tel. & T. Co. [Me.] 68 A 1040. Telephone wires and poles, even though on private ground, held not assessable by town as real estate. People v. Hall, 109 NYS 402.

27. Money on deposit and subject to demand, whether held in depositor's own right or in a representative character. Union Central Ins. Co. v. Hynicka, 5 Ohio N. P. (N. S.) 255. Bank deposits evidenced by certificates of deposit payable on demand held liable to assessment as money, and not as a credit, under Cobbey's Ann. St. 1903, § 7777. White v. Lincoln [Neb.] 112 NW 369.

28. Contract between partners and deceased partner whereby latter transferred his interests to former. City of Port Huron v. Wright, 150 Mich. 279, 14 Det. Deg. N. 720, 114 NW 76.

29. Gift by decedent of his interest in partnership to copartners on condition of payment of certain instalments to former's executor, and retention of possession and part payment by copartners held to create a contract taxable to decedent's estate as a credit. City of Port Huron v. Wright, 150 Mich. 279, 14 Det. Leg. N. 720, 114 NW 76. Decision of probate court in computing inheritance tax held not res adjudicata of taxability of such contract as a credit under Comp. Laws, § 3837, subd. 6. Id.

Notes for advancements to heirs by administrator who held property in trust for certain term held taxable to estate as credits. In re Seaman [Iowa] 113 NW 354.

Policy loans made by insurance company and premium lien notes accepted by it held merely advanced payments on earned value of policies, and hence not taxable to company as credits. New York Life Ins. Co. v. Assessors for Parish of Orleans, 158 F 462.

Option on land held not taxable credit. In re Shields Bros., 134 Iowa, 559, 111 NW 963. Credit listed as a land contract may be shown by parol to be a mere option. Id.

Fictitious credits entered up merely for the purpose of bookkeeping need not be listed. Hoagland v. Merrick County [Neb.] 115 NW 537.

30. Under Const. pt. 2, c. 1, § 1, art. 4, authorizing excise tax on produce, goods, wares, merchandise, and commodities, such tax cannot be imposed on mere right to hold property. In re Opinion of Justices [Mass.] 84 NE 499.

§ 3. *Exemption from taxation.*[See 8 C. L. 2067]—A state or territory has power to exempt certain persons or property from taxation,[31] but such power is subject to constitutional limitations.[32] Where an exemption is claimed under statute or constitution, the question is one of construction.[33] Exemption from taxation involves the finances of a municipality within a requirement as to how such matters must be transacted.[34] Exempting statutes are strictly construed, and the exemption will not be recognized unless clearly conferred.[35] An exemption attaches as of the date on which the status of the property is fixed for taxation,[36] and is not removed, so as to render the property taxable for the same year, by subsequent conveyance during the year to one in whose hands the property is not exempt.[37] A lessor cannot claim an exemption personal to the lessee by reason of his business,[38] but the exemption may by statute be perpetuated in the hands of the successor or assignee of the original exemptioner.[39] Where a fund is invested in exempt securities, and the proper allowance is made for such securities, the fund itself cannot be allowed as a further deduction.[40]

The property usually exempted is that used for religious,[41] educational,[42] chari-

31. Power of territory to grant exemption by way of amendment to existing charter of college held not taken away by Act March 2, 1867, c. 150, 14 Stat. 426, prohibiting territories from granting private charters or special privileges. Trustee of Whitman College v. Berryman, 156 F 112.

32. Exemption under Acts 1907, p. 700, c. 5857, of certain property annexed to an existing municipality, held not unreasonable classification. Hayes v. Walker [Fla.] 44 S 747. Acts 1904, p. 474, c. 263, exempting from taxation the revenue producing property of a church, while similar property of other churches is taxable, is invalid for discrimination under Declaration of Rights, art. 15. City of Baltimore v. Starr Methodist Protestant Church Minister & Trustees [Md.] 67 A 261. Such act held a special law, and since Code, art. 81, § 4, provides for exemption of buildings used exclusively for public worship, etc., such special law is invalid under Const. art. 3, § 33. Id. Hurd's Rev. St. 1905, c. 120, exempting parsonages owned by churches, held invalid under Const. art. 9, § 1, requiring all persons and corporations to pay taxes on all their property, and a parsonage as such not being properly used for "religious purposes" within Const. art. 9, § 3. People v. First Congregational Church of Oak Park, 232 Ill. 158, 83 NE 536.

33. Tax Act 1903 (P. L. 394) repealed all exemptions of property from taxation except those allowed by the act itself, so far as legislature had power to do so. Hanover Tp. v. Camp Meeting Ass'n of Newark Conference [N. J. Law] 68 A 753. Exemption under charter of Cooper Union for the advancement of science and art held repealed pro tanto by mortgage tax act, Laws 1906, p. 1447, c. 532. People v. Gass, 190 N. Y. 323, 83 NE 64. Public school tax authorized by Const. art. 232, held not a special assessment, and hence properly exempted from taxation by constitution is not subject to it. Louisiana, etc., R. Co. v. State Board of Appraisers [La.] 45 S 394.

34. Contract under which borough consented to vacation of cemetery within same, thus exempting the property occupied thereby from taxation, must be made by ordinance. Schinkel v. Fairview [N. J. Law] 69 A 313.

35. Schley v. Lee [Md.] 67 A 252; Portsmouth Shoe Co. v. Portsmouth [N. H.] 66 A 1045; Young Women's Christian Ass'n v. Spencer, 9 Ohio C. C. (N. S.) 351.

36. Under Idaho laws, the date is the second Monday in January. Clearwater Timber Co. v. Nez Perce County, 155 F 633.

37. Clearwater Timber Co. v. Nez Perce County, 155 F 633.

38. Under Pub. St. c. 55, § 11, authorizing exemption by towns of manufacturing establishments, lessor cannot be exempted from taxation on property otherwise taxable because it is leased to one entitled to exemption, though lessee agreed to pay the tax. Portsmouth Shoe Co. v. Portsmouth [N. H.] 66 A 1045. Under Hurd's Rev. St. 1905, c. 120, § 60, leasehold estate in railroad right of way held assessable to lessee. People v. International Salt Co., 233 Ill. 223, 84 NE 278.

39. Act 19th Leg. p. 6, No. 3, § 8, was not intended as an attempt to prevent legislature in future from exempting property in hands of successor of exempt owner. Grand Canyon R. Co. v. Treat [Ariz.] 95 P 187. Nor does § 2 of Act No. 28, attempt to prevent such exemptions. Id. Act 20th Leg. p. 79, No. 68, held to perpetuate exemption of railroad property in hands of successors in interest of original owner of road constructed under the act. Id. Corporation organized by purchase of original road at mortgage foreclosure held "successors," within the act. Id.

40. When the amount of exempted securities allowed to an insurance company exceeds its reinsurance reserve, it will be presumed, in absence of a contrary showing, that such reserve is invested in such securities. Inhabitants of Trenton v. Standard Fire Ins. Co. [N. J. Law] 68 A 1111.

41. Parsonage owned by church, used by pastor as residence, held not exempt as property used for "religious purposes," under Const. art. 9, § 3. People v. First Congregational Church, 232 Ill. 158, 83 NE 536. Parish houses, that is houses occupied by Roman Catholic priests, held not exempt

table,[43] benevolent,[44] and cemetery [45] purposes. Exemptions are sometimes allowed to encourage certain industries,[46] to prevent double taxation,[47] and in favor of per-

under Const. art 12, § 2, or Rev. St. 1906, § 2732, subd. 6, exempting houses used exclusively for public worship, though such parish houses are used largely by their inhabitants for church and charitable functions. Watterson v. Halliday, 77 Ohio St. 150, 82 NE 962. Bequest to Roman Catholic church for masses for repose of testator's soul held exempt from transfer tax under Transfer Tax Law, c. 908, p. 869, § 221, as being to a religious body, notwithstanding the incidental use of the bequest which would eventually go to the priest saying the masses. In re Didion's Estate, 54 Misc. 201, 105 NYS 924.

42. When a college is required by law to use all its property, including income and proceeds thereof, for educational purposes, and all such property is exempted in consideration of such use, property used as source of income is exempt as well as that used directly for college purposes, such as occupancy by college buildings, etc. Trustees of Whitman College v. Berryman, 156 F 112. Since Laws 1905, p. 829, c. 368, amending Laws 1896, p. 869, c. 908, § 221, relative to exemptions from transfer tax, transferred "educational" corporations from the limited to the total exemption class, and retained "library" corporations in the limited class, a library corporation, though educational in a broad sense, is not an educational corporation within the meaning of the statute. In re Francis' Estate, 121 App. Div. 129, 105 NYS 643. Private school having grades, actually pursued by some of its pupils, higher than public schools, held exempt as institution of learning, though majority of pupils pursued lower grades. People v. St. Francis Xavier Female Academy, 233 Ill. 26, 84 NE 55. Bequest to **library corporation** held exempt under Laws 1905, c. 308, p. 827, § 221. In re Higgins' Estate, 55 Misc. 175, 106 NYS 465.

43. Rule that statutes exempting property from taxation should be strictly construed does not permit exemption of vacant lot, owned by a charitable organization and upon which it is proposed to erect building to be used for charitabe purposes, notwithstanding funds wherewith lot was purchased were exempt, and lot, as well as the building, will be exempt as soon as a building has been erected. Young Women's Christian Ass'n v. Spencer, 9 Ohio C. C. (N. S.) 351.

Parish houses occupied by Roman Catholic priests held not exempt under Const. art. 12, § 2, or Rev. St. 1906, § 2732, subd. 6, as property of institution of purely public charity. Watterson v. Halliday, 77 Ohio St. 150, 82 NE 962. Bequest to **children's home** held exempt under Laws 1905, c. 368, p. 827, § 221. In re Higgins' Estate, 55 Misc. 175, 106 NYS 465. Corporation whose sole business is to provide **home for destitute widows and orphans** of deceased Odd Fellows held exempt under Const. § 170, as an "institution of purely public charity." Widows' and Orphans' Home of Odd Fellows v. Com., 31 Ky. L. R. 775, 103 SW 354.

Hospital held, under evidence, within Hurd's Rev. St. 1905, c. 120, § 2, cl. 7, exempting property of institutions of public charity actually used exclusively for charitable purposes and not for profit. Sisters of Third Order of St. Francis v. Review of Peoria County, 231 Ill. 317, 83 NE 272; German Hospital v. Review of Cook County, 233 Ill. 246, 84 NE 215; Proctor Hospital v. Review of Peoria County, 233 Ill. 583, 84 NE 618. Hospital and training school for nurses held exempt under such statute. Review of Cook County v. Provident Hospital & Training School Ass'n, 233 Ill. 242, 84 NE 216. Hospital, training school for nurses, and dispensary, held exempt under such statute. Review of Cook County v. Chicago Policlinic, 233 Ill. 268, 84 NE 220. Bequest to city hospital held exempt under Laws 1905, c. 308, p. 827, § 221, such exemption which was repealed by Laws 1900, p. 917, c. 382, § 4, being restored. In re Higgins' Estate, 55 Misc. 175, 106 NYS 465. Property of public hospital maintained by a sisterhood, the members of which received no compensation, held exempt, though money was received from some of the patients, such money being devoted to the maintenance of the institution. Hot Springs School Dist. v. Sisters of Mercy of Female Academy, 84 Ark. 497, 106 SW 954.

44. Comp. Laws, § 3832, subd. 1, exempting personal property of **benevolent societies** created under laws of Michigan, held not to apply to foreign benevolent society. City of Port Huron v. Wright, 150 Mich. 279, 14 Det. Leg. N. 720, 114 NW 76. Property of Plattsmouth Lodge, No. 6, Ancient Free and Accepted Masons, held, under stipulated facts, exempt. Plattsmouth Lodge No. 6, A. F. & A. M. v. Cass County [Neb.] 113 NW 167.

45. Personal property of cemetery association held not exempt under Const. art. 10, §§ 6, 7 (Ann St. 1906, pp. 280, 282), or under Rev. St. 1899, § 9119 (Ann. St. 1906, p. 4199). State v. Carey [Mo.] 109 SW 1. Mere fact that a cemetery association, authorized to acquire and hold land for cemetery purposes only, receives a small revenue for the temporary use of a portion of its land for other purposes, does not constitute such an abandonment as to destroy the exemption of such property. People v. Stillwell, 190 N. Y. 284, 83 NE 56.

46. An exemption under Const. art. 230, in favor of **manufacturers** of articles of wood, will not be perpetuated in futuro by injunction. Shreveport Creosoting Co. v. Shreveport, 119 La. 637, 44 S 325. Application of creosoting process to cross ties already existing held not manufacture of articles of wood within Const. art. 230. Id. Act April 18, 1884 (P. L. p. 232; Supp. Rev. 1886, p. 1016), does not exempt manufacturing companies which have no plant and which are not actually employing capital in manufacturing in the state, either directly or through another manufactory for them and at their cost Alton Mach. Co. v. State Board of Assessors [N. J. Law] 69 A 451. Stone quarry, not in present use, but not shown to have been permanently abandoned by **railroad,** though company sold privilege of taking ice therefrom, held prop-

sons unable to pay.[48] A change in a corporation's by-laws cannot relieve it from a tax previously assessed and from which it was not at the time exempt.[49] Only such property as is exempted by Federal statute is free from taxation by a state or territory because located within territory under Federal control.[50] Salaries of Federal officers are not exempt after payment.[51] The exemption of public property has already been considered.[52]

Contracts of exemption. See 8 C. L. 2068—Contracts of exemption may be made and are entitled to protection of the Federal constitution,[53] and, where rights of third parties are involved, a reservation of the right to repeal corporate charters does not apply,[54] but the legislature cannot barter away the constitutional right of a subsequent legislature to amend or alter corporate charters and thus to repeal exemptions granted thereby,[55] and exemptions granted as mere gratuities may be repealed at the will of the legislature.[56]

§ 4. *Place of taxation.* See 8 C. L. 2069—The situs of personal property for the purpose of taxation is, as a general rule, though not without exception,[57] at the own-

erty used in connection with railroad for railroad purposes, and exempt under Priv. Laws 1851, p. 72, § 22. People v. Illinois Cent. R. Co., 231 Ill. 151, 83 NE 132. Property occupied by **gas plant** and other property used to receive cinders, etc., from such plant, held exempt as property reasonably necessary for manufacture etc., of gas. Pittsburg v. Consolidated Gas Co., 34 Pa. Super. Ct. 234.

47. Personal property taxed in other states while therein is exempt under P. L. 1903, p. 394. Inhabitants of Trenton v. Standard Fire Ins. Co [N. J. Law] 68 A 1111.

Shares of stock, see ante, § 2, subsec. C, subd. Stocks.

48. Discretion of court under Laws 1901, p. 395, c. 466, § 934, Greater New York charter, to dismiss proceedings to collect tax where it is satisfied that the taxpayer is unable to pay, held improperly exercised in suit against administrators where there was no evidence of inability of the estate to pay the taxes. City of New York v. Goss, 109 N. Y. S. 151.

49. Philadelphia v. Masonic Home, 33 Pa. Super. Ct. 382.

50. Personalty of private individuals located on Fort Sill military reservation, and wholly within Comanchie county, held taxable by such county. Rice v. Hammonds [Okl.] 91 P 698.

51. Salary of Federal officer not exempt after payment to him. Dyer v. Melrose [Mass.] 83 NE 6.

52. See ante, § 2D, Public Property.

53. Chicago, etc., R. Co. v. Douglas County [Wis.] 114 NW 511.

54. Under Laws 1859, p. 630, c. 279, providing for conveyance, by individual to corporation created thereby, of property, and that the property of the corporation shall be exempt, a mortgage held by such corporation held exempt, notwithstanding Const. and 1 Rev. St. p. 600, pt. 1, c. 18 tit. 3, § 8, reserving right to repeal incorporating acts. People v. Gass, 119 App. Div. 280, 104 NYS 643.

55. Constitutional right to amend or alter, existing at time of granting of exemption, enters into and qualifies the exemption. People v. Gass, 190 N. Y. 323, 83 NE 64.

56. Provision in charter of camp meeting association of Newark conference (P. L. 1869, p. 484), was a mere gratuity. Hanover Tp. v. Camp Meeting Ass'n of Newark Conference [N. J. Law] 68 A 753.

57. Some of exceptions stated: Hunt v. Turner [Fla.] 45 S 509. Unless the property is visible and found in the taxing district on the day prescribed by law for commencing the assessment. American Mail S. S. Co. v. Crowell [N. J. Law] 68 A 752. Unless otherwise provided by statute. Commonwealth v. Northwestern Mut. Life Ins. Co. [Ky.] 107 SW 233. Under 4 Burns' Ann. St. 1905, § 8421, exception, 7, property **in hands of agent** in one county, the owner living in another county, is taxable in the former county. Nyce v. Schmoll, 40 Ind. App. 555, 82 NE 539.

58. Commonwealth v. Northwestern Mut. Life Ins. Co. [Ky.] 107 SW 233; American Mail S. S. Co. v. Crowell [N. J. Law] 68 A 752. Under Code, § 1313, requiring moneys and credits to be taxed where owner "lives," such items must be taxed at his "residence." Cover v. Hatten [Iowa] 113 NW 470.

Residence means permanent abode as distinguished from temporary sojourn. Brookover v. Kase [Ind. App.] 83 NE 524.

"Inhabitant" as defined by Burns' Ann. St. 1901 § 240, and as used in § 8421, relating to place of taxation, means one who has his domicile or permanent place of abode in a particular place. Schmoll v. Schenck, 40 Ind. App. 581, 82 NE 805. Question determined as to whether one was "inhabitant" of a certain city. Id. Evidence held to show that appellant was **resident of city** of Lincoln, and liable to assessment as such. White v. Lincoln [Neb.] 112 NW 369.

Residence continues in absence of evidence of change. Cover v. Hatten [Iowa] 113 NW 470. Burden is on the taxpayer to show change. Id. Mere intention to change insufficient. Id. Domicile continues until another is acquired. Schmoll v. Schenck, 40 Ind. App. 581, 82 NE 805. Under Acts 1903, p. 70, c. 29, § 30, subd. 5, personalty of **insane person** under guardianship is taxable for city purposes in city where ward resides Brookover v. Kase [Ind. App.] 83 NE 524. Residence of parents or surviving parent is residence of insane child even after he attains his majority. Id. Residence of parents or

er's residence,[58] even though such property is in fact in another state.[59] On the other hand, a state may tax personal property brought within its jurisdiction from another state, though it has already been taxed by such other state for the same year.[60] The property of nonresidents is therefore taxable by the state in which it is situated,[61] but the taxing state must have jurisdiction of either the property taxed [62] or of the person of its owner,[63] and where it has jurisdiction of neither, there is nothing upon which to exercise the taxing power.[64] Taxation of subjects of interstate commerce is treated elsewhere.[65]

surviving parent is residence of **minor children.** Id. A guardian may change his **ward's residence,** as where insane child removed to city with guardian's consent. Id.

Corporations are taxable on personalty in district where chief office is located. P. L. 1903, p. 404, § 16. American Mail S. S. Co. v. Crowell [N. J. Law] 68 A 752.

Vessels owned by a domestic corporation having its office in one county are not taxable in a municipality in another county, though registered therein pursuant to act of congress. American Mail S. S. Co. v. Crowell [N. J. Law] 68 A 752. Under Pub. St. 1901, c. 56, § 12, and Laws 1905, p. 414, c. 25, § 1, making vessels taxable at owner's place of residence, a steamboat company's residence is its principal place of business, regardless of other offices or of the designation by its articles of some other place of business. Woodsun Steamboat Co. v. Sunapee [N. H.] 69 A 577. Place of residence of corporate owner of vessels, held to be town from which boats left in morning and to which they returned at night, and at which they remained when not in use. Id. As a general rule, if a person is domiciled in a state, his personal property, in contemplation of law, has its situs in such state, and is taxable there. Hunt v. Turner [Fla.] 45 S 509.

59. Money on deposit in Chicago bank or in hands of brokers for speculation held taxable in Florida. Hunt v. Turner [Fla.] 45 S 509. Promissory notes belonging to resident of Kansas, given by residents of Missouri, and secured by trust deeds of real estate in Missouri, which never have been brought into Kansas, but which are left for safe keeping only in vault of bank in Missouri, constitute personal property in the state of Kansas, which has its location in the county, township, and school district of the residence of its owner. Com'rs of Johnson County v. Hewitt [Kan.] 93 P 181.

60. Personal property assessed in another state on Jan. 1st of a given year held taxable in Oklahoma if it acquires a situs in such state prior to March 1st of such year. Spaulding Mfg. Co. v. Kendall [Okl.] 91 P 1031. "Transient property act." Wilson's Rev. & Ann. St. 1903, § 5919, does not apply to property brought into the state after March 1, property which has acquired a situs in the territory on March 1 being taxable under § 5931. Id.

61. **Capital of nonresident's business** in the state may be taxed. Money in bank and accounts accumulated in business conducted in state held taxable under Ky. St. 1903, § 420, providing that all personalty in the state shall be taxed. Commonwealth v. R. G. Dun & Co., 31 Ky. L. R. 561, 102 SW 859. Debts due on open account to a nonresident are taxable at the domicile of the debtor, where they arose out of a business carried on in the state and constitute a part of the capital of such business. National Fire Ins. Co. v. Board of Assessors [La.] 46 S 117; General Elec. Co. v. Board of Assessors [La.] 46 S 122. Under Const. § 172, and Ky. St. 1903, c. 108, §§ 4020, 4022, 4058, securities owned by nonresident, **in hands of resident trustee** for investment, are taxable at residence of the trustee. Higgins v. Com., 31 Ky. L. R. 653, 103 SW 306. Estate of nonresident in hands of resident trustee held taxable in county of trustee's residence, and not in the county where the trust was created by judgment of circuit court thereof. Commonwealth v. Simpsons' Trustees, 31 Ky. L. R. 880, 104 SW 274. Under Ky. St. 1898, § 1040, **grain stored in elevator** held taxable in district where elevator is located, and not in district where agent of the owner, a foreign corporation, resides. State v. Patterson [Wis.] 114 NW 441. Nonresident lessee's **interest, by way of royalties, in oil wells,** held taxable in county where wells are located. See Ky. St. 1903, § 4039. Mt. Sterling Oil & Gas Co. v. Ratliff, 31 Ky. L. R. 1229, 104 SW 993.

62. Property, in order to be taxable in a state, must have acquired a local situs therein. Lehigh & Wilkes-Barre Coal Co. v. Junction [N. J. Err. & App.] 68 A 806.

Money in bank in one state solely for transmission to another state is not taxable in the former state. New York Life Ins. Co. v. Assessors for Parish of New Orleans, 158 F 462. The mere physical presence of **evidences of debt** in the state does not authorize their taxation, as where notes and mortgage on land in another state, and executed and payable in such state, were sent into Indiana to an agent merely to avoid taxation in such other state. Buck v. Beach, 206 U. S. 392, 51 Law. Ed. 1106.

Notes and mortgages owned by nonresident held not "within the state," within meaning of Const. § 171, and St. 1903, § 4020, because of mere fact that they are physically within the state. Commonweaith v. Northwestern Mut. Life Ins. Co. [Ky.] 107 SW 233. Coal shipped by coal company in one state to coal storage plant in another state, there to await orders to be filled from the **coal stored,** held to have acquired situs in latter state. Lehigh & Wilkes-Barre Coal Co. v. Junction [N. J. Err. & App.] 68 A 806; Susequehanna Coal Co. v. South Amboy [N. J. Law] 69 A 454.

63. Where it is shown that the person assessed is a nonresident, and hence not subject to the tax, he need not show further that his property is elsewhere assessed. Shirk v. Township Review of Monmouth [Iowa] 114 NW 884.

64. An attempt of the state, where the owner of a vessel is a nonresident, to tax

The physical location of land is its situs for the purpose of taxation.[66]

A district tax can be levied only upon property within the assessment district.[67]

§ 5. *Assessment, rating, and valuation. A. Necessity for assessment.* See 6 C. L. 2070—A legal assessment is essential to a valid tax.[68]

(§ 5) *B. Assessing officers.* See 8 C. L. 2070—The appointment of assessing officers,[69] and their compensation,[70] are regulated by statute.

(§ 5) *C. Formal requisites.* See 8 C. L. 2070—Statutory requirements [71] must be complied with strictly,[72] but the presumption is in favor of such compliance.[73]

Notice. See 8 C. L. 2070—A sufficient notice [74] is essential to a valid assessment,[75] but a judicial hearing is not essential to constitute due process of law in taxation proceedings.[76] The notice need not be personal.[77] It may be by general statute, which is notice to all,[78] but it must afford a reasonable opportunity to be heard,[79] and

such vessel when it has never been in the waters of the state, is invalid under 14th amendment, as deprivation of property without due process of law. American Mail S. S. Co. v. Crowell [N. J. Law] 68 A 752.

65. See Commerce, 9 C. L. 583.

66. Land adjoining city and included in city school district held liable for city school tax. Pol. Code, §§ 1576, 1670. Visalia Sav. Bk. v. Visalia [Cal.] 94 P 888. General averment of existence of such school district held sufficient on general demurrer. Id.

67. Assessment by school trustees must be upon property within assessment district. Saranac Land & Timber Co. v. Roberts, 109 NYS 547.

68. City of Covington v. Carroll [Ky.] 108 SW 295. Revenue system of Minnesota contemplates original assessment by assessor, correction by auditor, and equalization by various boards. State v. Cudahy Packing Co. [Minn.] 115 NW 1039. Assessment made by town before annexation to city cannot be used as basis of levy by city after such annexation. City of Covington v. Carroll [Ky.] 108 SW 295.

69. Under Revenue Act 1898, § 3 (Hurd's Rev. St. 1905, c. 120, § 297), county board of assessors in counties having more than 125,000 inhabitants, acts as township assessor. People v. International Salt Co., 233 Ill. 223, 84 NE 278. Under Acts 1897, p. 102, c. 5, § 1, the members of the state board of railroad commissioners created by c. 10, p. 113, became ex officio state tax assessors. State v. Taylor [Tenn.] 104 SW 242. Under Laws 1905, pp. 835, 841, c. 388, §§ 229, 234, state comptroller can appoint transfer tax assistant only upon recommendation of surrogate and while he is not bound by such recommendation and may rsfuse to appoint the person recommended, the office will remain vacant until an appointment has been made by the co-operative action of the comptroller and surrogate. Duell v. Glynn [N. Y.] 84 NE 282, afg. 56 Misc. 41, 122 App. Div. 314, 106 NYS 716.

70. Where tax roll consists of several columns in which the general tax and special taxes are respectively set out, there are as many extensions as there are columns for the amounts of the respective taxes, within Laws 1892, p. 1750, c. 686, § 23, allowing each supervisor one cent for each "line of the tax roll" extended. Pearsall v. Brower, 120 App. Div. 584, 105 NYS 207.

71. Acts 1905, p. 1152, c. 513, relating to assessment of interurban and street railroads, sustained. State v. Taylor [Tenn.] 104 SW 242.

72. Hough v. North Adams [Mass.] 82 NE 46. City charters relative to taxation held not to apply to **bank stock,** latter being taxable under the general law. People v. Feitner [N. Y.] 83 NE 592.

Time: Annexation of town to city did not authorize city to assess the annexed property except on Sept. 15th, as provided by St. 1903, §§ 3176, 3178-3183. City of Covington v. Carroll [Ky.] 108 SW 295. An assessment takes effect as of the date specified by law for its completion, though it be not in fact made until after such date. Hough v. North Adams [Mass.] 82 NE 46. Assessment is considered as made as of the date fixed by statute, though not actually completed until thereafter. See Laws 1897, p. 401, c. 414, § 104, as amended by Laws 1905, p. 570, c. 300 relating to village assessments. People v. Keefe, 119 App. Div. 713, 104 NYS 154. In ascertaining whether certain real estate mortgages recorded under mortgage tax law, and on which tax had been paid up to July 1, 1906, were exempt from village taxation for 1906. Id.

73. In the absence of a contrary showing, it will be assumed that assessing officers endeavored to do their duty. City of Port Huron v. Wright, 150 Mich. 279, 14 Det. Leg. N. 720, 114 NW 76. Performance of its duties by the state board of equalization in assessment of railroads, presumed. State v. Wiggins Ferry Co., 208 Mo. 622, 106 SW 1005.

74. Under Pub. Acts 1899, p. 232, No. 154, § 152, requiring five days' notice of hearing before state board, notice published on May 13th of hearing on May 18th held sufficient. City of Port Huron v. Wright, 150 Mich. 279, 14 Det. Leg. N. 720, 114 NW 76. Assessment without notice is not invalid when notice is given before the valuation is fixed. Laws 1896, p. 815, c. 908, §§ 36, 54, held not unconstitutional. People v. Supervisors of Nassau County, 54 Misc. 323, 104 NYS 353.

75. People v. Feitner [N. Y.] 83 NE 592, rvg. 120 App. Div. 838, 105 NYS 993. Notice, either in the tax proceedings or in the courts, is essential to due process of law. Central of Georgia R. Co. v. Wright, 28 S. Ct. 47.

76. Trainor v. Maverick Loan & Trust Co. [Neb.] 114 NW 932.

77, 78, 79, 80. People v. Feitner [N. Y.] 83 NE 592.

be of such a character that compliance therewith is possible, so that the taxpayer may object or protest, even though he have no just ground for doing either.[80] Statutes relating to notice will be construed, if possible, so as not to deny such opportunity to be heard.[81] Failure of the taxing officers to put the statutory provisions as to notice into effect will not invalidate the statute but only the tax.[82] Notice will not be presumed where the proceedings followed require no notice.[83] In the matter of assessing national bank shares, it is not necessary to give notice to the individual shareholders.[84] Provision is sometimes made for notice to the taxpayer of the assessment made, the accrual of the taxpayer's liability being dependent upon such notice.[85]

The roll or list.[See 8 C. L. 2070]—The assessment roll or list must be made by the proper officer,[86] be verified when so required,[87] and must designate the year for which the tax is levied,[88] the amount of the tax,[89] and must sufficiently describe the property taxed,[90] with reference to plats, blocks, lots, and boundaries,[91] amount and sub-

81. General provisions of tax laws as to notice in cities held not to apply to assessment of bank stock in New York City, since such an application would deny taxpayer opportunity to be heard. People v. Feitner [N. Y.] 83 NE 592. Tax Laws, Laws 1901, pp. 1349, 1350, c. 550, §§ 23, 24, held not invalid as failing to provide for notice. Id.

82. People v. Feitner [N. Y.] 83 NE 592.

83. Where school trustees copied last assessment roll of town as authorized by Laws 1864, pp. 1259, 1260, §§ 67, 68, in assessing realty of nonresidents. Saranac Land & Timber Co. v. Roberts, 109 NYS 547.

84. Sufficient where bank appeared. First Nat. Bk. v. Webster County, 113 NW 190.

85. Under Ky. St. 1903, §§ 4103, 4084, state auditor held bound to give railroad company notice of state taxes only. Chesapeake, etc., R. Co. v. Vanceburg & S. L. Turnpike Road Co., 31 Ky. L. R. 1163, 104 SW 951.

86. An assessment by an assistant, approved and corrected by the assessor, is equivalent to an assessment by the latter. Reed v. Cedar Rapids [Iowa] 116 NW 140. Original assessment lists made and sworn to by assessor, as required by Code, § 1365, held to constitute assessment roll, which, under § 1366, must be submitted to board of review. Id. Signature by assessor's clerk at former's request and in his name held sufficient. Id.

87. Absence of verification is defense to collection of tax under Laws 1903, p. 213, c. 161. Grand Forks County v. Fredericks [N. D.] 112 NW 839. Ordinance of city of sixth class held not to have adopted Pol. Code, § 3732, relative to authentication of assessment roll. City of Escondido v. Wohlford [Cal.] 94 P 232. Failure of town assessors to verify roll held jurisdictional. People v. Golding, 55 Misc. 425, 106 NYS 821.

88. Caption of pages as 1904-1905 held, in view of fact that fiscal year began Jan. 1, 1904, and of assessor and clerk's affidavit, not to make it uncertain that book was for 1904. City of Escondido v. Wohlford [Cal.] 94 P 232. Where there is but one assessment a year, a statement that an assessment is for a certain year is sufficient, thou the fiscal year begins after the first of the calendar year and runs over into the next calendar year. Chapman v. Zobelian [Cal.] 92 P 188.

89. Where land owned by one person is assessed with land owned by another, so that neither can determine the amount for which his land is liable, the whole tax is void. Hart v. Murdock [Neb.] 114 NW 268.

90. Description sufficient if such that competent surveyor can locate land therefrom People v. International Salt Co., 233 Ill. 223, 84 NE 278. Description of land must be sufficient to enable both owner and prospective purchasers to identify the same. Grand Forks County v. Fredericks [N. D.] 112 NW 839.

Land must be sufficiently described. State Finance Co. v. Trimble [N. D.] 112 NW 984; State Finance Co. v. Mulberger [N. D.] 112 NW 986. Description by block and dimensions of lot and name of owner, though number of lot was not given, **held sufficient.** Slaughter v. Dallas [Tex.] 20 Tex. Ct. Rep. 443, 107 SW 48. Description of land held sufficient for identification. Gonzales v. Saux, 119 La. 657, 44 S 332.

Held insufficient. Woodall v. Edwards, 83 Ark. 334, 104 SW 128. Entry, "Foreman-Douglas Swamp to be listed by the register," held sufficient to sustain assessment as upon **"unlisted lands."** Greenleaf v. Bartlett [N. C.] 60 SE 419. Sufficient as to the owner is sufficient as to a **subsequent purchaser.** Slaughter v. Dallas [Tex. Civ. App.] 18 Tex. Ct. Rep. 689, 103 SW 218.

91. **Held insufficient:** Description according to a plat not of record renders the assessment void. Joliet Stove Works v. Kiep, 230 Ill. 550, 82 NE 875. "Part lot 35, 127 acres." People v. Stillwell, 190 N. Y. 284, 83 NE 56. Description as "N. E. Part lot 2, on A. K. Barnes plat 1-26," the 1-26 referring to volume and page of plat book, held insufficient where there was no such plat on record, and since there was no specification of how much of lot was assessed. Matteson v. Warwick & Coventry Water Co. [R. I.] 68 A 577. "In Los Angeles County. In Electric Ry. Homestead Ass'n Tr. Lot. 17, Block 20," held insufficient without further evidence to make it more certain, there being no presumption, in absence of reference that any map is referred to. Fox v. Townsend [Cal.] 91 P 1004. Designation by name of tract and number of lot insufficient in absence of reference to map or other matter more particularly identifying the tract and lot. Chapman v. Zobelen [Cal.] 92 P 188. "Pipes in street, 60,000," held too indefinite, especially in view of fact that other companies than one assessed had pipes in street

divisions,[92] taxed or taxable,[93] and ownership,[94] but an insufficient description may be supplemented by extrinsic evidence.[95] The roll can be amended after completion only as authorized by statute.[96] The extension of taxes on the roll or list [97] has been held to pertain to collection and not to levy and assessment.[98]

to greater amount than latter. Matteson v. Warwick & Coventry Water Co. [R. I.] 68 A 577. Description as "N. 23x200 ft.," said lot being about 600 feet long and extending in a northeasterly direction, held insufficient, though owner is correctly named. Grand Forks County v. Fredericks [N. D.] 112 NW 839.

92. Designation as part of a larger tract without identifying what part is insufficient. Miller v. Daniels [Wash.] 92 P 268. Where owners divided vacant land into lots, some of which they sold, a tax against balance of lots was valid, especially in absence of objection that it should have been upon property as a whole. Sullivan v. Boston [Mass.] 84 NE 443. Where a tract of land comprises smaller tracts owned by different persons, each of such smaller tracts must be assessed separately. Assessment of large tract as a whole is a nullity. State Finance Co. v. Myers [N. D.] 112 NW 76. Laws 1897, p. 292, c. 126, § 96, and Laws 1890, p. 376, c. 132, § 92, do not apply to division of valuations where no transfer of the land has been made after assessment of the taxes. Id.

93. Failure to designate nontaxable parts of single tract and unoccupied parts held jurisdictional defect. People v. Golding, 55 Misc. 425, 106 NYS 821.

94. Where the tax is a personal charge against the owner, assessment in the wrong name is fatal. Collins v. Reger [W. Va.] 57 SE 743. Distinct pieces of property belonging to different persons cannot be assessed in the name of one of them. Such assessment and sale thereunder is void as to all the parties. Head v. Howcott Land Co., 119 La. 331, 44 S 117. Fact that owner is not misled is immaterial. Grand Forks County v. Fredericks [N. D.] 112 NW 839. Under Act 1882, No. 96, p. 119, an assessment of land not in name of owner of record is an absolute nullity, and a tax sale thereunder is void. See Const. 1879. In re Sheehy, 119 La. 608, 44 S 315. Assessment of estate of Lucinda A. Cole as estate of Chester Cole held absolutely void. Cole v. Cole, 108 NYS 124. Where one has always paid his taxes upon his entire property, a sale under another assessment in the name of another person is an absolute nullity, though description in assessment against owner contained error. Bernstine v. Leeper, 118 La. 1098, 43 S 889; Honor v. Fellman, 119 La. 1061, 44 S 887. The rule as to **idem sonans** is inapplicable to assessment rolls. Collins v. Reger [W. Va.] 57 SE 743. An assessment of land to a **bankrupt** after the recordation of the adjudication in bankruptcy and the appointment of the trustee in the proper office for the recordation of deeds, etc., is invalid. Hough v. North Adams [Mass.] 82 NE 46. Property **owned in common** may be assessed jointly to the owners thereof. Sullivan v. Boston [Mass.] 84 NE 443. Description by block and dimensions but without number of lot, where there were other lots in same block of same dimensions, and assessment was to **"unknown"** owner. Slaughter v. Dallas [Tex.] 20 Tex. Ct. Rep. 443, 107 SW 48. Under Rev. St. 1893, § 277, lands may be listed as property of "unknown" persons, and such listing is prima facie sufficient. Koth v. Pallachucola Club [S. C.] 61 SE 77. Assessors not required by Ballinger's Ann. Codes & St. § 1699, to use due diligence to ascertain names of true owners. If he knows them he must state them, but if he does not know them he may so state, and his statement will be conclusive. Shipley v. Gaffner [Wash.] 93 P 211. Leaving owner's name blank amounts to statement that it is unknown. Id. Tax assessed to unknown owner is not invalid, even though officer knew name of real owner. Id. Civ. Code 1902, § 269, requiring estates administered to be listed as property of decedent's estate, does not apply where there is no administration, and in such case a listing in name of heirs of decedent, without naming them, will sustain a tax sale. Koth v. Pallachucola Club [S. C.] 61 SE 77. Under Civ. Code 1902, §§ 269, 270, an administrator must list lands of his decedent as land of such **decedent's estate,** and such lands are taxable as belonging to the estate and not to the heirs at law. Pollitzer v. Beinkempen, 76 S. C. 517, 57 SE 475.

Owner not "aggrieved" by assessment of property to one who was neither the record owner nor in occupation on date fixed for listing of property and owners for assessment. Hough v. City of North Adams [Mass.] 82 NE 46.

95. Slaughter v. Dallas [Tex. Civ. App.] 18 Tex. Ct. Rep 689, 103 SW 218. Description, with assistance of extrinsic evidence, held sufficient. Id.

Parol evidence. Chapman v. Zobelein [Cal.] 92 P 188. Maps to which reference is made. Davis v. Le Mesnager [Cal.] 92 P 76. The **burden** is on the party seeking to uphold the sale to supplement the insufficient description. Chapman v. Zobelein [Cal.] 92 P 188.

96. Clerk cannot make change in roll after delivery thereof to town treasurer, except as authorized by statute. State v. Krumenauer [Wis.] 115 NW 798. Laws 1905, p. 204, c. 134, authorizing clerk to correct "mistake," does not authorize adding of property intentionally omitted. Id. Under Rev. St. c. 41, § 10, the roll or list once made up can usually be amended if upon oath the amendment is noted by the person whose duty it is to make the lists correctly. Limited to amendments made under sanction of the oath. Baker v. Webber, 102 Me. 414, 67 A 144.

97. Failure to extend tax after preparation of roll held jurisdictional. People v. Golding 55 Misc. 425, 106 NYS 821. Where the evidence fails to disclose any irregularity in the extension of a tax, objections thereto are properly overruled. People v. St. Louis, etc.. R. Co., 230 Ill. 61, 82 NE 305.

98. Under this ruling taxes for 1907 were

*Irregularities.*See 8 C. L. 2071—All irregularities tending to mislead the owner are fatal, at least in the absence of a showing that he was not misled,[99] but irregularities are immaterial if harmless,[1] and certain irregularities are sometimes declared harmless by statute.[2] One cannot complain of irregularities in an assessment made pursuant to his own request.[3]

*Lists by taxpayers.*See 8 C. L. 2071—In most of the states provisions exist for the listing of property by the taxpayers,[4] and while such lists are usually for the convenience of the assessor, and not a condition precedent to a valid assessment,[5] or conclusive upon the assessor,[6] for the failure of the taxpayer to list his property,[7] provided he has had a sufficient opportunity to do so,[8] some penalty is usually imposed upon him, such as a waiver of irregularities,[9] a survey at the owner's expense,[10] an ex parte assessment,[11] or a forfeiture to the state.[12]

properly extended on original roll, as required by Laws 1907, p. 453, § 14, and not upon transcript as provided by B. & C. Comp. St. 30, c. 6, the continuation of the provisions of the former law as to levy and assessment by § 80 of the new law not being applicable. Waterhouse v. Clatsop County [Or.] 91 P 1083.

99. Assessment in wrong name. Collins v. Reger [W. Va.] 57 SE 743.

1. Classifying property generally as personalty and failure to designate actual and taxable value held harmless. In re Seaman [Iowa] 113 NW 354. Failure to set out actual and **taxable value** as required by Code Supp. 1902, § 1305, and merely stating "value of personalty," held harmless where it was evident that the taxable value was meant. Id. A taxpayer can complain of a **delay in assessment** by which he was not prejudiced. Delay in assessing national banks under Laws 1906, p. 134, c. 22, subd. 2. Hager v. Citizen's Nat. Bk. of Lebanon [Ky.] 105 SW 403. Suit to enforce tax lien not defeated by clerical error in **description of property** where land can be identified from the description. Hart v. Murdock [Neb.] 114 NW 268. Point of compass named in survey may be construed to mean different or opposite direction, where it appears to be clerical error, and is so inconsistent with remaining parts of description as to demonstrate that such different or opposite direction was intended. Id. In some states an assessment upon land is valid where the land is correctly described, though the owner is incorrectly named. Commercial Nat. Bk. v. Schlitz [Cal. App.] 91 P 750.

2. Under Pol. Code, § 3885, providing that assessment shall not be invalid for informality, etc., failure of clerk of county supervisors to verify assessment roll before delivery to county auditor, and failure of auditor to verify it before delivery to collector, as required by §§ 3682, 3746, held not fatal where such **verifications** were made before payment or protest and taxpayer was not injured. Miller v. Kern County, 150 Cal. 797, 90 P 119. Failure of collector to give notice to taxpayers required by Pol. Code, § 3746, not being a fatal defect, fact that affidavits were not attached until after such notice had been given did not invalidate the tax. Id. Laws 1901, p. 329, c. 920, § 4, providing that no "defect in description" shall be taken advantage of by any taxpayer unless he shall have brought to assessors a true and exact account of his ratable estate, do not apply to a misdescription whereby one is taxed for land not owned by him. Matteson v. Warwick & Coventry Water Co. [R. I.] 68 A 577. Insufficient description of property not cured by Laws 1903, p. 232, c. 166, relating to defective assessments. Grand Forks County v. Fredericks [N. D.] 112 NW 839

3. Where lands were not assessed in manner provided by Rev. St. 1899, § 9177 [Ann. St. 1906, p. 4226], relative to assessment of united property. Kansas City v. Holmes, 127 Mo. App. 620, 106 SW 559.

4. Under Ky. St. 1903, § 4241, **suit to compel listing** of property does not abate on death of revenue agent who instituted it. Commonwealth v. Southern Pac. Co. [Ky.] 105 SW 466. Statute contemplates only one suit at same time and prior suit abates subsequent one. Id. Proceedings by revenue agent for state at large before board of tax supervisors to obtain property list held not suit under St. 1903, § 4241. Id. Attorney general not authorized by St. 1903, §§ 113, 114, to join with state revenue agent in suit to compel listing of property. Id.

5. Assessment not invalidated by failure to advertise for lists as required by Rev. St. 1899, § 5575. State v. Casey [Mo.] 109 SW 1.

6. Verified return by taxpayer, required by Code 1899, c. 29, § 1-100 [Code 1906, §§ 821-1 to 821-105], is not conclusive upon assessor, but merely to aid him, and is not a condition precedent to a valid assessment. Younger v. Meadows [W. Va.] 59 SE 1087.

7. Penalty under Code, § 1357, for refusal to furnish statement, does not apply to making of false statement, remedy for latter, if any, being under § 1358, relating to perjury by false affidavit. Stein v. Local Board of Review [Iowa] 113 NW 339.

8. Provisions of General Laws 1896, c. 46, § 6, for notice to taxpayers to present accounts, before assessment of tax, held mandatory. Matteson v. Warwick & Coventry Water Co. [R. I.] 68 A 577. Under Gen. Laws 1896, c. 46, § 6, date for presentation of accounts by taxpayers must follow date fixed, under authority of §§ 1-4 for determination of ownership and valuation. Id.

9. Where notice to bring in account was invalid, taxpayer was not precluded by Laws 1901, p. 329, c. 920, § 4, from taking advantage of an insufficient description. Matteson v. Warwick & Coventry Water Co. [R. I.] 68 A 577. Taxpayer must make a

(§ 5) *D. Valuation of taxable property. In general.*[See 8 C. L. 2072]—As a general rule property is taxable at its true value.[13] One taxpayer, therefore, cannot complain that his property is assessed at its full value, while that of another is assessed at

return to the assessing body in order to avail himself of **right to appeal** in case of over assessment. Id.

10. Provision of Act March 27, 1907, art. 5, § 11, authorizing survey at expense of owners to be added to assessment, where owners refuse to furnish list of unplatted lots, **held unconstitutional.** Malone v. Williams, 118 Tenn. 390, 103 SW 798.

11. Under Rev. Laws, c. 12, § 45, where mortgagor did not file statement of interest of mortgagee, and the statement filed by mortgagee fatally misdescribed the property, the tax was properly assessed to owners without reference to mortgagee's interest. Sullivan v. Boston [Mass.] 84 NE 443. Where mortgagee's statement of interest is insufficient, the assessors may nevertheless consider same in reaching an independent determination as to his interest. Id. Law of Georgia requiring taxpayer to return all his property, whether its liability to taxation is fairly contestable or not, upon pain of ex parte valuation against which there is no relief in the tax proceedings or in the courts, except in case of fraud or corruption, **held a denial of due process.** Central of Georgia R. Co. v. Wright, 28 S. Ct. 47.

12. Const. 1899, art. 13, § 6 [Code 1906, pp. lxxxiv, lxxxv]. Lewis v. Yates [W. Va.] 59 SE 1073. It is the **duty of owner** to see that his land is entered on the land books. Fay v. Crozer, 156 F 486. Landowner's duty to ascertain whether he has title so as to require entry on land books in his name. Id.

Constitutionality: Acts 1906, p. 115, c. 22, art. 3, §§ 1, 2, 3, relative to listing and assessment of real property and forfeiture for failure to list, held not contrary to Const. § 227, in that it curtails powers of the assessor, a constitutional officer, since such section of constitution does not define duties of assessor or deprive legislature of power to provide for assessment by other person, § 172 even seeming to recognize such power. Eastern Kentucky Coal Lands Corp. v. Com. [Ky.] 106 SW 260. Such act held not contrary to Const. § 59, relative to local and special laws, though it may not apply to every county in the state. Id. Such act held not contrary to Const. § 51, relative to title of acts. Id. Such act held not contrary to "Virginia Compact," whereby titles from state of Virginia were protected from invasion by proposed state of Kentucky. Id. Requirement of Acts 1906, p. 115, c. 22, art. 3, § 1, requiring claimants of land forfeited for failure to list to pay all taxes for 1901-1905, regardless of whether such taxes have been assessed to or paid by another, held not invalid as double taxation. Id. Act sustained. Kentucky Union Co. v. Com. [Ky.] 108 SW 931. Act held not ex post facto. Id. If provision for heavier penalties than provided for by former laws were unconstitutional, the rest of the act was not affected. Id. Not unconstitutional as a deprivation of property without due process of law. Const. W. Va. 1872, art. 13, § 6 [Code 1906, p. lxxxv], sustained. Fay v. Crozer, 156 F 486. Act expressly recognizes and conserves the rights of occupants, and hence does not repeal or affect the act against **champerty.** Kentucky Union Co. v. Com. [Ky.] 108 SW 931. Under a provision for forfeiture for omission of real estate from the land books for a certain length of time, the **time** does not begin to run until the date specified by law for the furnishing by the clerk to the assessor a list of transfers, etc., as shown by such books. See Code Va. 1860, c. 35, §§ 6, 10. Fay v. Crozer, 156 F 486.

Petition to enforce forfeiture provided for by the Kentucky act need not show what part of land was held by occupant pursuant to § 6 of article 3 of such act. Kentucky Union Co. v. Com. [Ky.] 108 SW 931. Court should, in rendering **judgment of forfeiture,** specify what parts of land should be sold, having in mind the best interests of the state. Id. Owner having right to purchase back the land at any time before or during the term of court next succeeding the entry of the judgment of forfeiture, a judgment for the sale of the land at the same term at which the judgment of forfeiture was entered was void. Id. Under St. 1903, § 950, court of appeals held to have jurisdiction of **appeal** from circuit court on appeal from refusal of county court to list lands for taxation. Under Acts 1906, p. 118, c. 22, art. 3, § 2, on ground that petition was insufficient, the jurisdiction of court of appeals as conferred by St. 1903, § 950, being curtailed by Act 1906 only to extent that findings of circuit court as to value. Eastern Kentucky Coal Lands Corp. v. Com. [Ky.] 106 SW 260. Petition held defective in that it failed to sufficiently identify portion of land claimed or owned by petitioner. Id. Fact that petitioner was unable to give sufficient description or that he could not afford to obtain one did not cure defect in description. Id.

Land acquired by adverse possession forfeited for nonentry for five years. Lewis v. Yates [W. Va.] 59 SE 1073. Forfeiture of title to **mineral lands** for nonentry on land books cannot be predicated on mere severance in title of minerals from surface and lapse of time, since presumptively the land was taxed as a whole when the severance occurred, and has since been carried on the land book in same manner and taxes paid. Sult v. Hochstetter Oil Co. [W. Va.] 61 SE 307.

Statute of limitations does not run against state so as to prevent forfeiture under Const. 1899, art. 13, § 6, or transfer of forfeited titles under § 3. Lewis v. Yates [W. Va.] 59 SE 1073.

Taxation in name of former owner prevents forfeiture for nonentry as against such former owner. Blake v. O'Neal [W. Va.] 61 SE 410. Forfeiture for failure to enter land on land books for more than five years and failure to pay taxes for forty-seven years **not prevented by void sale to state,** in whose hands land was not taxable, during such term. Fay v. Crozer, 156 F 486.

13. State v. Cudahy Packing Co. [Minn.] 115 NW 645.

less than its value,[14] the rule being that an assessment is not rendered unequal in a legal sense by the mere fact that other property is assessed at a smaller proportion of its real value,[15] and the burden is upon the party complaining to show that such inequality is so general as to subject his property to more than its just proportion of the aggregate tax.[16] Where, however, such general disproportion is shown, the tax will be modified.[17] Where the valuation is not disproportionate,[18] excessive valuation is not alone ground for vacating the assessment.[19] Valuations made by the duly authorized officers are not open to collateral attack in a suit to collect the tax.[20]

It is not impossible to arrive at the true value of land separate from the improvements thereon.[21] Debits are usually deductible from taxable credits.[22] In New Jersey it is expressly provided that the face value of a mortgage cannot be deducted from the value of the property.[23] Properties constituting parts of a single system must be valued with relation to the whole system, and not as segregated therefrom.[24]

Criterion of value: Selling price, that is market value, and not cost price, whether original or of reproduction, is criterion of value within revised tax act of 1903 (P. L. 1903, p. 398, § 6) (Turnley v. Elizabeth [N. J. Law] 68 A 1094; In re Opinion of the Justices [Mass.] 84 NE 499), and neither the courts nor any state official can change this rule (State v. Cudahy Packing Co. [Minn.] 115 NW 645).

14. State v. Cudahy Packing Co. [Minn.] 115 NW 645.

15, 16. People v. Summerville, 56 Misc. 300, 107 NYS 575.

17. People v. Summerville, 56 Misc. 300, 107 NYS 575. General disproportion held shown. Id.

18. Appraisal by assessor at 50 per cent of value to enable other tax officials to perfect such appraisal and to produce a tax on full value does not necessarily result in imposition on taxpayer a greater proportional burden than he should bear. State v. Cudahy Packing Co. [Minn.] 115 NW 1039.

19. People v. Supervisors of Nassau County, 54 Misc. 323, 104 NYS 353.

Remedy for excessive valuation is by a petition for abatement. Sullivan v. Boston [Mass.] 84 NE 443.

20. City of Port Huron v. Wright, 150 Mich. 279, 14 Det. Leg. N. 720, 114 NW 76.

21. Supplement Apr. 20, 1906, to general Tax Law 1903, held not in violation of Const. art. 14, § 7, par. 12, requiring property to be taxed at true value. Essex County Park Commission v. West Orange [N. J. Law] 67 A 1065.

22. "Credits" as used in Laws 1903, p. 389, c. 73, Cobbey's Ann. St. 1903, § 10427, providing for assessment of "credits," held to mean "net credits." Scandinavian Mut. Aid Ass'n v. Kearney County [Neb.] 116 NW 155; Oleson v. Cuming County [Neb.] 115 NW 783. Under Rev. St. c. 9, § 5, debts may be deducted from **money out on interest and credits,** no distinction being made between the last two items. Taylor v. Caribou, 102 Me. 401, 67 A 2.

Note and mortgage taken in exchange for property is not "money loaned or invested" within taxing statute, but is a credit, from which holder may deduct just debts. Oleson v. Cuming County [Neb.] 115 NW 783.

Mutual insurance company, organized under laws of the state for mutual benefit of its members and not for profit, held entitled to set off amount of outstanding benefit certificates against securities in its reserve funds set apart and devoted exclusively to the payment of such certificate. Scandinavian Mut. Aid Ass'n v. Kearney County [Neb.] 116 NW 155.

Fictitious debits to oneself, constituting merely a part of a system of bookkeeping, cannot be deducted. Even though the corresponding fictitious credit has been turned in for taxation in another county, the taxpayer not being bound to turn in such credit. Hoagland v. Merrick County [Neb.] 115 NW 537. Under Laws 1896, p. 800, c. 208, § 6, providing that **indebtedness for exempted property** shall not be deducted, indebtedness for money borrowed to purchase seat in stock exchange held not deductible, though, in order to secure the exchange's consent to transfer of the seat, an arrangement was made with lender whereby the seat was not chargeable with such indebtedness. People v. Commissioners of Taxes, 53 Misc. 336, 104 NYS 756.

Outstanding checks which have been certified cannot be deducted from a balance in bank in determining the amount to be returned. Union Cent. Life Ins. Co. v. Hynicka, 5 Ohio N. P. (N. S.) 255. Indebtedness evidenced by notes may be proved by parol, same being best **evidence,** and notes being merely corroborative. Stein v. Local Board of Review [Iowa] 113 NW 339. Fact that less amount was claimed as deduction upon prior assessments is admissible on issuing of fraud in claiming deduction for certain notes, but not alone sufficient to sustain finding against the validity of such claim. Id. Where indebtedness claimed as deduction is alleged to be to nonresidents, certificate of a county clerk in the state of the alleged creditor's residence that no such credit has been given in by such alleged creditor is not admissible in absence of proof that such creditor resided in such clerk's county or that the latter was authorize to make the certificate. Id.

23. Rev. Tax Act 1903. Hartshorne v. Avon-by-the-Sea [N. J. Law] 67 A 935.

24. Bridge and railroad terminals owned by same corporation held taxable as a unit. City of Jeffersonville v. Louisville & J. Bridge Co. [Ind.] 83 NE 337. In assessing property constituting a part of a **system extending into other districts or jurisdictions,** the property assessed should be considered

Special statutory rules are often provided for the valuation of particular kinds of properties.[25] A valuation applicable to property when used by its owner as distinguished from its valuation when leased to others may apply though the property is not in active use.[26]

Valuation of corporate property, stock, and franchises.[See 8 C. L. 2073]—The value of the capital stock of a corporation is determined with reference to its entire property, tangible and intangible,[27] with such deductions as are allowed by law.[28] The

in its relation to the whole property. Western Union Tel. Co. v. Dodge County [Neb.] 113 NW 805. On assessment of interstate bridge and railroad terminals, portions thereof in another state held proper to be considered in assessing balance. City of Jeffersonville v. Louisville & J. Bridge Co. [Ind.] 83 NE 337. In assessing the property of an interstate railroad corporation in the state, such property must be considered as an integral part of the whole system. State v. Wiggins Ferry Co., 208 Mo. 622, 106 SW 1005. Held error to exclude evidence that ferry company owned all stock of two railroad companies, and that such railroads were operated with ferry as single system. Id. Error not cured by subsequent proof of such facts. Id. In valuing telegraph property of an interstate company, the property should be considered as a whole, and then the property in the state with reference to such whole. Western Union Tel. Co. v. Dodge County [Neb.] 113 NW 805. Total gross and net receipts of the system as a whole, as well as in particular district, may be considered, and so also may the amount of company's stock and bonds and market value thereof. Id.

25. In estimating the **railroad** mileage tax provided for by Code 1906, § 3856 [Ann. Code 1892, § 3379], the number of tracks upon a single right of way is not to be considered. Adams v. Illinois Cent. R. Co. [Miss.] 46 S 50. Where **coal land** was covered by a lease of 100 years, such period being necessary to mine all the coal under present conditions, only such portion as was opened up by mining entries was assessable as "improved and under development." Commonwealth v. Pocahontas Coal & Coke Co. [Va.] 60 SE 84. Average capital of **grain dealers,** within Laws 1903, p. 407, c. 73, § 66, is not average of total capital in business, but is excess of such capital over real estate and other tangible property which can be viewed by assessor and "assessed separately." Central Granaries Co. v. Lancaster County [Neb.] 113 NW 543. Average capital is not average purchases nor average sales, and cannot be found by adding together the amount of sales or amount of purchases during year and dividing by an arbitrary divisor. Id. Average capital is average cash and all other property of every kind used in carrying on the business, and if there is an excess of this average over real estate and other tangible property, then such excess is to be added to assessment. Id. Under Laws 1903, p. 407, c. 73, defining average capital of grain dealer as average amount by which total investment in business exceeds tangible property which can be separately assessed, the assesor, from examination prescribed by statute, must find what capital of the business there was, if any, from time to time during tax year, not including tangible property on hand and capable of assessment at the time of assessing, and the average or mean of the capital so found to be assessed as property in addition to tangible property. Central Granaries Co. v. Lancaster County [Neb.] 113 NW 199.

26. Under Gen. St. 1902, § 2344, water power connected with and available for operation of owner's mills held assessable as incident to the machinery which it was adapted to operate, though mills were not in active use or were permanently idle. Hazard Powder Co. v. Enfield [Conn.] 69 A 16.

27. Under St. 1903, § 4079, all property of railroad corporation, tangible and intangible, must be considered in valuation of its capital stock. Commonwealth v. Ledman [Ky.] 106 SW 247.

Evidence of profits several years after date in issue held inadmissible. People v. Barker, 121 App. Div. 661, 106 NYS 336. Speech of president at stockholders' meeting several years after date on which value was in issue held not admissible. Id. Value of shares held not conclusive of value of capital stock. Commonwealth v. Ledman [Ky.] 106 SW 247. Bank's realty is assessable at its real value, regardless of the value shown by bank's books. First Nat. Bk. v. Webster County [Neb.] 113 NW 190. Under Laws 1896, p. 802, c. 908, § 12, requiring corporation's capital stock to be assessed at actual value, a corporation which, as part of rental, has paid tax on **leased property** cannot be again compelled to pay tax on fee value thereof. People v. Barker, 121 App. Div. 661, 106 NYS 336. Fact that lessor paid tax on less than actual value of leased property did not authorize taxing any of such value to lessee. Id. Where entire capital stock of **foreign corporation** was invested in another state, and the amount invested in New York was out of its surplus, in assessing such corporation in New York dividends should be considered as being paid from the total of the two amounts thus invested. People v. Wilson, 121 App. Div. 376, 106 NYS 1.

28. In determining the value of the capital stock of a domestic corporation, the actual value of its real estate may be included, deducting merely the assessed value thereof. People v. O'Donnell, 54 Misc. 5, 105 NYS 457. License fees authorized by Laws 1899, p. 1593, c. 712, § 46, to be deducted by corporations from general taxes, include only cash paid as license fee and not value to city of use of corporation's subway. In re Consoldiated Tel. & Elec. Subway Co., 119 App. Div. 835, 104 NYS 922. Obligation imposed on railroad company by Laws 1891, p. 706, c. 362, § 13, for debts of company merged according to provisions of act, held

particular statutes must be referred to with reference to the valuation of particular items of corporate property,[29] or the property of particular corporations,[30] where such matters are the subject of special statutory provisions.

The market value of shares of stock, for the purpose of assessment, includes their face as well as their premium value.[31] Special provisions are often made for the valuation of corporate stocks,[32] and special deductions are allowed.[33] National bank stock must be valued with reference to the limitations upon the state's power to tax such stocks.[34] Such banks may be required to furnish information for the purpose of assessing their shares.[35]

not debt contracted for purchase of property, within Laws 1896, p. 800, c. 908, § 6, prohibiting deduction of debts for purchase of nontaxable property. People v. Barker, 121 App. Div. 661, 106 NYS 336. In some states statutes provide that a corporation which holds as assets stocks on which a tax is already paid or payable may offset the amount of this stock in paying taxes on its assets. Code Pub. Laws, art. 81, § 160. But this does not authorize taxing officer to deduct value of stock held by national banks, the stock being exempt under Federal statutes. Schley v. Lee [Md.] 67 A 252.

Foreign corporations not entitled to deduct debts not shown to have any relation to the property within the state and which is assessed. People v. Raymond, 54 Misc. 330, 105 NYS 1007. General indebtedness of foreign corporation is deductible from value of property in the state only in its proportionate part. People v. Miller, 109 NYS 866.

29. The date as of which **surplus and undivided profits** are valued may be fixed regardless of the date of the corporation's distribution. See St. 1903, § 4094, providing for taxation of surplus and undivided profits of building and loan associations as of Sept. 1. Commonwealth v. Home & Sav. Fund Co. Bldg. Ass'n [Ky.] 106 SW 221. Under St. 1903, § 4226, imposing tax on amounts **of insurance premiums** received "in cash or otherwise," a company was not liable on renewal premiums to tax on contingency excess stipulated for in policy but not actually collected except upon first payments, such excess being merely an overcharge never actually received after first year. Mutual Benefit Life Ins. Co. v. Com. [Ky.] 107 SW 802. Accumulated deferred dividends or undivided profits of life insurance company form no part of reserve fund of company, and are not a debt of company, but constitute one of taxable assets of the company and must be returned by it for taxation. Union Cent. Life Ins. Co. v. Hynicka, 5 Ohio N. P. (N. S.) 255.

30. No presumption of general raise in county assessment will be indulged to support assessment by county assessor of **railroad property** in excess of value fixed by state board. Great Northern R. Co. v. Snohomish County [Wash.] 93 P 924. Manner of assessments for other than state purposes held immaterial upon inquiry as to assessment of national bank by state board of valuation under Laws 1906, p. 134, c. 22, subd. 2, since power of board was confined to assessment for state purposes. Hager v. Citizens' Nat. Bk. of Lebanon [Ky.] 105 SW 403.

31. Commonwealth v. Steele, 31 Ky. L. R. 1033, 104 SW 687. To determine the value of bank stock, the market or intrinsic value should be taken, from which deductions can be made for reasonable fluctuation and actual conditions. Schley v. Montgomery County Com'rs [Md.] 67 A 250.

32. Charter provisions as to general taxation held not to apply to taxation of **bank stock,** latter being contracted by the general law (Laws 1896, p. 810, c. 908). People v. Feitner [N. Y.] 83 NE 592; Id., 120 App. Div. 838, 105 NYS 993. Holders of **building and loan shares** are taxable under St. 1903, § 4093, upon only the excess of amount paid in over amount borrowed or withdrawn. Commonwealth v. Home & Sav. Fund Co. Bldg. Ass'n [Ky.] 106 SW 221.

33. Under Bill of Rights, § 15, the legislature cannot authorize the tax commissioner in making the assessment to deduct from value of shares or assets of a corporation the **amount of any investment liable to taxation** unless its taxation for that purpose has been otherwise provided for. Schley v. Lee [Md.] 67 A 252. Amount of recorded mortgages on which **privilege taxes on recorded mortgages,** imposed by Code 1896, § 3911, subd. 7, as amended by Acts 1903, p. 227, are paid, cannot be deducted from valuation of corporate shares under Acts 1903, p. 187, § 9, authorizing deduction of aggregate amount at which the corporation's realty and personalty is assessed. State v. Sellers & Orum Co. [Ala.] 44 S 548. Under P. L. 1905, p. 457, the total valuation of **bank stock** assessed against the stockholders is subject to deduction of assessed valuation of bank's real property and also the value of its nontaxable securities. Lippincott v. Lippincott [N. J. Err. & App.] 69 A 502. The **value of nontaxable United States bonds** held by a **national bank** and contributing to the value of its stock need not be deducted from the assessed valuation of such stock. Hager v. American Nat. Bk. [C. C. A.] 159 F 396.

34. Value of national bank stock held properly fixed by state board of equalization. First Nat. Bk. v. Estherville [Iowa] 112 NW 829. Assessment held not discriminative against national bank shares. Id. Information upon which state board of valuation based assessment of national bank shares held immaterial where only question was right to deduct value of United States bonds. Hager v. Citizens' Nat. Bk. [Ky.] 105 SW 403.

35. Hager v. Citizens' Nat. Bk. of Lebanon [Ky.] 105 SW 403. Under Code, §§ 1305, 1322, 1370, 1371, **assessors not concluded by statements of bank** relative to value of its stock.

The rules for the valuation of corporate franchises are often prescribed by statute.[36] The value of a corporate franchise is not dependent upon the amount expended in obtaining it.[37] A corporation cannot complain of the consideration of property reported by it, in ascertaining the value of the franchise.[38]

(§ 5) *E. Reassessment; omitted property.* See 8 C. L. 2073—The reassessment of property is usually provided for by statute,[39] and in a proper case may be compelled by mandamus.[40] A revaluation of the same property cannot be made in the same year,[41] except, of course, by way of correction or review as provided by law,[42] and where an assessment has been made upon property for a given year and collected, the property cannot be reassessed in the name of another, though the latter be the real owner.[43] The most frequent occasion for reassessment is where property is omitted from the regular assessment,[44] and such an assessment is not precluded by the fact

First Nat. Bk. v. Estherville [Iowa] 112 NW 829.

36. Company engaged in manufacturing refrigerator cars which it leased to packing company in another state held assessable under St. 1903, § 4081, though not expressly included therein. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926. Only such cars as were operated within the state by the car company were taxable. Id. Under Acts 1903, p. 449, c. 437, § 74, the whole of the real estate, machinery, merchandise, and securities of the corporation, wherever found, is the basis of the computation upon which the franchise tax is based, and not merely such real estate, etc., situated in one state. American Glue Co. v. Com., 195 Mass. 528, 81 NE 302. The franchise of a corporation not being taxable as such in other states, no **deduction** is allowable under Acts 1903, p. 448, c. 437, § 72, on account of the franchise of the corporation as separate property in another state and there subject to taxation. Id.

37. Commonwealth v. Ledman [Ky.] 106 SW 247.

38. Railroad company cannot urge as defense to franchise tax that it was not owner of a certain line which it reported as being owned by it and upon which report the tax was based. Illinois Cent. R. Co. v. Com. [Ky.] 108 SW 245.

39. Reassessment by state board not precluded by fact that original assessment has been passed on by county board and also by state board and certified back by latter to former. Smoky Mountan Land, Lumber & Imp. Co. v. Lattimore [Tenn.] 105 SW 1028. Reassessment for back taxes, under Acts 1903, pp. 660, 671, c. 258, §§ 31, 38, subd. 11, held not precluded by Acts 1901, p. 337, c. 174, § 33, and Acts 1903, p. 667, c. 258, § 33, relative to conclusiveness of findings of county board of equalization, nor by Acts 1901, p. 346, § 38, subd. 10, and Acts 1903, p. 674, c. 258, § 38, subd. 10, relative to findings of state board of equalization. State v. Taylor [Tenn.] 104 SW 242. Reassessment of **property illegally assessed** may be provided for by statute. Laws 1896, p. 815, c. 908, § 54, held to authorize reassessment by Nassau county lands originally assessed illegally by Queens county out of which latter county the former county was created. People v. Supervisors of Nassau County, 54 Misc. 323, 104 NYS 353. Statutes usually allow reassessments to be made where the assessing body believes certain property has been **assessed too low,** the reassessment being merely a carrying out of a previously determined upon idea that after due investigation valuations were too low. Jersey City v. Equalization of Taxes [N. J. Err. & App] 67 A 38

40. Mandamus by state revenue agent to compel county trustee to reassess property, as provided by Acts 1903, p. 660, c. 288, § 31, subd. 2. State v. Taylor [Tenn.] 104 SW 242. Remedy is not by a bill in equity but by mandamus to require the proper officers to make the assessment, where property is assessed in wrong district on account of error in assessment maps. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849.

41. Commonwealth v. Ledman [Ky.] 106 SW 247.

42. See post, § 6, Equalization, Correction, and Review.

43. Where franchise tax was collected from railroad lessee, it could not be reassessed as belonging to lessor. Commonwealth v. Chicago, etc., R. Co. [Ky.] 105 SW 127.

44. Where an assessment at a **gross undervaluation** is induced by fraud of the taxpayer, a reassessment may be made as for omitted property. In re Seaman [Iowa] 113 NW 354. Under Hurd's Rev. St. 1905, c. 120, § 306, Revenue Act 1898, § 12, providing for listing of realty becoming taxable during the time intervening between quadrennial years, **realty erroneously omitted from quadrennial** assessment may be listed and assessed. People v. International Salt Co. 233 Ill. 223, 84 NE 278. Power given to county clerk by Gen. St. 1901, § 1669, to assess **personalty overlooked by the assessor,** is no more extensive than that granted by § 7599, authorizing county clerk or board of commissioners, upon notice to property owner, to correct the assessor's return at any time before settlement with the county treasurer. County Com'rs of Douglas County v. Lane [Kan.] 90 P 1092. Since Gen. St. 1901, § 7599, expressly provides that the taxes on realty which has escaped taxation in former years shall be added to the tax for the current year, and makes no such provision as to personalty, the statute merely authorizes the listing of omitted personalty for the current year. Id. Where, under color of Gen. St. 1901, §§ 1669, 7599, the county clerk and board of commissionsrs

that all property was listed that the assessor thought was assessable.[45] The owner is usually held to be entitled to notice of such a reassessment,[46] but such notice is not necessary in the original reassessment proceedings, where a sufficient notice is provided for on review thereof.[47] One cannot complain that the statute was not followed where the assessment is pursuant to his own request.[48] Interest may be added to an assessment of omitted property when so authorized by statute.[49]

Appeals.[See 8 C. L. 2074]—Reassessments are usually reviewable by appeal or in some proceedings analogous thereto.[50]

§ 6. *Equalization, correction, and review.*[See 8 C. L. 2074]

The powers and jurisdiction of state and municipal boards of equalization.[See 8 C. L. 2075]—The membership,[51] powers,[52] and procedure of state boards,[53] and the com-

attempt to charge a person with the amount of a personalty tax which ought to have been assessed against him in a former year, but was not so assessed, such proceeding is wholly void. Id. St. 1903, § 4241, authorizing sheriff or auditor's agent to list omitted property. held to apply to only state, county, and district taxes to exclusion of **city taxes,** cities having ample power in the premises with respect to their own taxes. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926. Under Kentucky statutes, a city may retrospectively assess personalty as well as realty. Hagan v. Louisville [Ky.] 106 SW 805.

Variance between treasurer's assessment of omitted property and that made by assessor held not fatal. In re Seaman [Iowa] 113 NW 354. Board of equalization of city of Lincoln, in assessing omitted property, may reach their conclusions from **evidence** given on investigation in nature of judicial proceedings. White v. Lincoln [Neb.] 112 NW 369.

45. Hegan v. Louisville [Ky.] 107 SW 809.

46. Under Const. art. 1, § 17. owner held entitled to notice of assessment on unlisted property under Revisal 1905, § 5232, though such statute makes no provision for such notice. Caldwell Land & Lumber Co. v. Smith [N. C.] 59 SE 653. Law making assessor's valuation of omitted property without notice to the taxpayer conclusive upon the taxpayer in both the tax proceedings and in the courts is unconstitutional as denying due process of law. Central of Georgia R. Co. v. Wright, 28 S. Ct. 47. Under Code Supp. 1902, § 1407a, treasurer may specify **place** where objections to listing of omitted property will be heard, as distinguished from assessment by auditor who, under § 1385b, is required to hear objections at his office. In re Seamon [Iowa] 113 NW 354. Assessment of omitted property without notice required by Ky. St. 1903, §. 4122, held void, and not cured by § 4128, relative to irregularities. Mt. Sterling Oil & Gas Co. v. Ratliff, 31 Ky. L. R. 1229, 104 SW 993.

47. Owner not entitled to notice of assessment of omitted property under Revenue Act 1898, § 12 (Hurd's Rev. St. 1905, c. 120, § 306), sufficient notice being given by §§ 23, 25, 35 (Hurd's Rev. St. 1905, c. 120, §§ 317, 319, 329), relating to revision and correction of assessments. People v. International Salt Co., 233 Ill. 223, 84 NE 278.

48. Kansas City v. Holmes, 127 Mo. App. 629, 106 SW 559.

49. Hurd's Rev. St. 1905, c. 120, 276. People v. Chicago & A. R. Co., 228 Ill. 102, 81 NE 813.

50. Order of county court that taxpayer did not fail to list his property **held appealable** under Ky. St. 1903, § 4241, as being a decision that the property is not liable to the assessment. Commonwealth v. Lexington Roller Mills Co., 31 Ky. L. R. 924, 104 SW 318. Amendment of statement in proceedings under Ky. St. 1903, § 4241, to assess omitted property, could not be considered on appeal where court refused to allow it to be filed and it was not made part of record by **bill of exceptions.** Commonwealth v. Kinniconick, etc., R. Co., 31 Ky. L. R. 859, 104 SW 290. Under St. 1903, § 4241, county court acts ministerially in assessing omitted property, and the collection of the tax thus assessed is not upon a judgment, and hence no **damages** can be awarded on supersedeas and affirmance. Bank of Kentucky v. Com. [Ky.] 107 SW 812.

51. Under Acts 1897, p. 113, c. 10, the board of railroad commissioners created by c. 10, p. 113, became ex officio members of state board of railroad commissioners. State v. Taylor [Tenn.] 104 SW 242.

52. State board has power to make **apportionment of taxes** for state purposes among the several counties, and county clerk must either raise assessment or rate so as to raise amount apportioned to his county, except as to railroad property. Atchison, etc., R. Co. v. Sumner County Com'rs [Kan.] 92 P 590. Duties formerly imposed on state auditor by Rev. Laws 1905, § 801, in matter of grievances relative to taxation on account of **excessive valuation** or for other cause, were imposed upon Minnesota tax commission by Gen. Laws 1907, c. 408, p. 576. State v. McVey [Minn.] 115 NW 647. Under Ariz. Rev. St. § 3880, the territorial board of equalization may increase total valuation of property in territory above sum of returns from boards of supervisors of several counties. Copper Queen Consol. Min. Co. v. Arizona, 206 U. S. 474, 51 Law. Ed. 1143. The board of review cannot, in intervening years, **increase assessed value of real estate,** unless it is based upon new buildings or improvements after April 1st of the year of general assessment, and cannot increase assessed value of land because coal mines have been discovered in its vicinity. People v. St. Louis, etc., R. Co., 230 Ill. 61, 82 NE 305. Under P. L. 1905, p. 126, state boards of equalization cannot review actions of state board of assessors respecting **valuations of franchises and property used for railroad**

pensation of members thereof,[54] can be determined only by reference to the particular statutes and the decisions construing the same. Except on such review as is authorized by statute or constitution,[55] the findings of such a board are usually conclusive in the absence of fraud,[56] especially as against objections not presented to the board,[57] and are not subject to collateral attack for nonjurisdictional irregularities.[58] Such boards are, moreover, bound by the fundamental limitations upon the taxing power as defined by constitution and statute, such as that property must be taxed at its real value,[59] and where there is no appeal from the acts of a state board, or any way to review the same except by resort to the courts for relief, its action is the action

and canal purposes. Tuckerton R. Co. v. State Board of Assessors [N. J. Law] 67 A 69.

53. The rules governing the present boards of review are those formerly governing decennial boards of equalization, as found in Rev. St. § 2814. National Land & Investment Co. v. Davies, 9 Ohio C. C. (N. S.) 90.

Complaint mentioned in statute as prerequisite to revaluation by board of review must be substantial complaint, made by a taxpayer or party in interest, and coming to board of review, and not instituted by it or by its direction. Id. Under Act Feb. 25, 1893, Laws 1893, p. 48, c. 48, § 26, changes made by boards of equalization must be enrolled by the clerks of such boards, notwithstanding former statutes requiring **enrollment of changes** to be made by the auditors. State v. Carson & Colorado R. Co. [Nev.] 91 P 932. Under Ariz. Rev. St. § 3880, board of equalization need not deal with county as a whole in increasing or diminishing the valuation of property therein, but **may deal with particular classes of property** within the county. Copper Queen Consol. Min. Co. v. Arizona, 206 U. S. 474, 51 Law Ed. 1143. Taxpayer is entitled to hearing before **quorum** of state board of equalization as constituted by Acts 1903, p. 632, c. 258, such quorum being, according to § 38, subsec. 1, a majority of such board, and a decision by one member only of the three and the private secretary of another member was invalid when the taxpayer did not know that such secretary was not a member. Smoky Mountain Land, Lumber & Imp. Co. v. Lattimore [Tenn.] 105 SW 1028. In such case, objection was not waived by failure to interpose it before such purported board. Id. The board, at a properly constituted meeting, may reopen a judgment rendered without a quorum and render a new judgment. Id. In equalizing values and correcting errors made by the decennial appraisers, a board of review must at all times be guided and controlled by **values** as they existed at the time of making the decennial appraisement, and not by values as at present existing. Id. Equalization boards of a taxing district may obtain **information of value** of the taxable property under consideration from the best and most reliable source at their command, and strict rules of evidence applied by courts in ordinary cases are not applicable to evidence offered or received by such boards. Western Union Tel. Co. v. Dodge County [Neb.] 113 NW 805.

54. Act to amend Rev. St. 1898, § 2583, as amended by Laws 1901, § 2050, Laws 1907, p. 30, c. 28, relative to salaries of members of state board of equalization, sustained. State v. Edwards [Utah] 95 P 367.

55. See post, this section, subdivision Review by Courts.

56. Under Burns' Ann. St. 1901, § 8547, decision of state board of assessors is conclusive in absence of fraud. City of Jeffersonville v. Louisville & J. Bridge Co. [Ind.] 83 NE 337. Findings of state board of tax commissioners upon questions of fact are conclusive upon the courts in absence of fraud. Baltimore, etc., R. Co. v. Oregon Tp. of Clark County [Ind.] 84 NE 529. In absence of fraud, the findings of the state board of tax commissioners upon the report filed by railroad company pursuant to Burns' Ann. St. 1901, § 8503, are conclusive. Id.

57. Laws 1903, p. 446, c. 284, § 2, amending St. 1898, § 1061, and cutting off all objections to valuation of personalty not presented to board of review, will be given no broader construction than absolutely necessary. City of Milwaukee v. Wakefield [Wis.] 115 NW 137. Though under St. 1898, § 1061, as amended by Laws 1903, p. 446, c. 284, § 2, the conclusiveness of valuation, in absence of objections before board of review, is conditioned upon giving of notice required by § 1056 (Laws 1903, p. 601, § 378), since such notice is necessary only when the assessment exceeds the sworn statement of the taxpayer, one who has made no sworn statement is concluded by failure to object, though he was given no notice. City of Milwaukee v. Wakefield [Wis.] 113 NW 34; Id. [Wis.] 115 NW 137. As to money and credits, the assessor is required to demand a sworn statement, and hence taxpayer of whom no such statement is demanded may, under the statutory exemptions, in case of omission of duty on part of assessor, question the assessment, though he has filed no objections before board of review. City of Milwaukee v. Wakefield [Wis.] 115 NW 137, vacating opinion in Id. [Wis.] 113 NW 34.

58. State v. State Board of Equalization & Assessment [Neb.] 115 NW 789; Smoky Mountain Land, Lumber & Imp. Co. v. Lattimore [Tenn.] 105 SW 1028. Whether there was evidence to sustain finding as to whether taxpayer had violated any provisions of Acts 1903, p. 671, c. 258, § 38, subsec. 1, held a jurisdictional fact reviewable only by certiorari. Smoky Mountain Land, Lumber & Imp. Co. v. Lattimore [Tenn.] 105 SW 1028.

59. Rules of state board requiring assessment in excess of real value held invalid and inoperative. Richards v. Harlan County [Neb.] 113 NW 194.

of the state,[60] and therefore subject to the constitutional limitations on the acts of the state.[61] Where one appears before the county board and appeals from its decision to the state board, the latter has jurisdiction of his person.[62] Judicial notice is taken of the reports of the state board of assessors.[63]

As in the case of state boards which have just been considered,[64] the membership,[65] powers,[66] and procedure [67] of municipal boards are entirely dependent upon statute. A periodical equalization, intended to establish the basis of all levies during the next ensuing period, cannot be disturbed by a local or municipal board except as clearly authorized by law.[68]

Notice. See 8 C. L. 2075—While it is held in some states that provisions requiring notice of the meetings of boards of correction and equalization are directory only,[69]

60. Raymond v. Chicago Union Trac. Co., 28 S. Ct. 7.

Federal question is involved in claim that action of state board of equalization is action of state and violates U. S. Const. 14th Amend., relative to due process and equal protection of law. Raymond v. Chicago Union Trac. Co., 28 S. Ct. 7.

61. Subject to U. S. Const. Amend. 14. Raymond v. Chicago Union Trac. Co., 28 S. Ct. 7. Taxation of corporations in different manner from way other corporations are taxed, thus causing disparity, etc., held violation of U. S. Const. Amend. 14. Id.

62. Smoky Mountain Land, Lumber & Imp. Co. v. Lattimore [Tenn.] 105 SW 1028.

63. City of Jeffersonville v. Louisville & J. Bridge Co. [Ind.] 83 NE 337.

64. See ante, this subdivision.

65. Under Const. art. 7, § 12, the county commissioners for the several counties, constitute boards of equalization. Weiser Nat. Bk. v. Jeffreys [Idaho] 95 P 23.

66. Under Comp. Laws, §§ 1084, 1081, 1079, county board of equalization may **increase valuation of railroad property** where the value thereof has increased beyond amount fixed by state board, as by change from narrow to broad gauge road, notwithstanding Act March 16, 1901, p. 61, c. 50, § 1, as amended by St. 1903, p. 95, c. 69, prohibiting county board from equalizing taxes on railroads except where no valuation has been fixed by state board. State v. Carson & Colorado R. Co. [Nev.] 91 P 932. Minneapolis board of equalization has power to **add taxable property** not included in assessor's list. State v. Cudahy Packing Co. [Minn.] 115 NW 645. Appeal tax court of city of Baltimore has jurisdiction to **reclassify property** in annexed territory when same has become "urban" as distinguished from "landed" within Baltimore annexation act, Acts 1888, c. 98, and Act 1902, amendatory thereof. City of Baltimore v. Gail [Md.] 68 A 282; Sams v. Fisher [Md.] 66 A 711. County auditor **cannot review finding of state board** of tax commissioners upon report filed by railroad company pursuant to Burns' Ann. St. 1901, § 8503. Baltimore, etc., R. Co. v. Oregon Tp. of Clark County [Ind.] 84 NE 529.

67. Methods of equalization provided by Sess. Laws 1901, p. 251, apply only to property subject to the taxing power. Weiser Nat. Bk. v. Jeffreys [Idaho] 95 P 23. Under Kirby's Dig § 7004, a **gross increase** is invalid, and where such an increase is attempted, it cannot be corrected, after board has performed its functions for that year, by adding such increase to one of the items. Board of Equalization of Saline County v. Hughes, 84 Ark. 347, 105 SW 577. Such gross increase is "obvious error," authorizing correction by county court. Id. A county board in correcting the assessor's valuation may increase same by a general percentage on the total valuation, leaving it to the assessor to apply the increase to particular properties. Wayne Tp. Passaic County v. Laflin & Rand Powder Co. [N. J. Law] 68 A 909. Recitals of judgment of board of supervisors in matter of assessment cannot be contradicted by parol **evidence.** Panola County v. Carrier [Miss.] 45 S 426. In proceedings before county court to correct assessment on ground that petitioner did not own the property, he must establish such contention and prove title in others as alleged by such proof as would be required in a contest between him and a claimant of the property. Hannis Distilling Co. v. Berkeley County Ct. [W. Va.] 59 SE 1051; Id. [W. Va.] 59 SE 1054.

68. Where decennial appraisement has been made of real estate in a municipality and equalized according to the statutes, a municipal board of review cannot, under Rev. St. § 2819-1 (95 Ohio Laws, p. 481), during the decennial period, increase valuation of certain realty, except for new structures not returned, or for omitted lands, new entries and additions, or gross inequalities in existing valuations. Davies v. National Land & Investment Co., 76 Ohio St. 407, 81 NE 755. Under Rev. St. § 2819-1 (95 Ohio Laws, p. 481), a municipal board of review cannot disturb the decennial assessment and equalization except upon complaint of interested real estate owners. Id.

69. Provisions relative to notice of meetings of municipal and state boards. State v. Cudahy Packing Co. [Minn.] 115 NW 645. Comp. Laws § 1098, providing for notice of increase of valuation. State v. Carson & Colorado R. Co. [Nev.] 91 P 932.

70. Owner entitled to notice of original assessment by board of review. People v. International Salt Co., 233 Ill. 223, 84 NE 278. Owner entitled to notice of proceedings before municipal board of review, under Rev. St. § 2819-1 (95 Ohio Laws, p. 481), to change valuation fixed by decennial assessment and equalization. Davies v. National Land & Investment Co., 76 Ohio St. 407, 81 NE 755. Baltimore city charter, § 157, Laws 1898, p. 332, c. 123, held to provide for **sufficient notice** to property owner

notice of proceedings to equalize or correct assessments must usually be given to both the taxpayer [70] and the state or subdivision thereof by which the tax was imposed.[71] Failure to give notice is not fatal to the validity of the tax unless such failure is shown to have resulted prejudicially to the taxpayer,[72] but notice of a reassessment after it has been made is not equivalent to notice before the making of such reassessment.[73] Actual notice may, for some purposes, be equivalent to the notice required by the statute.[74] An adjournment of the board from the day specified in the notice to another day cannot be proved by parol or extrinsic evidence.[75]

Irregularities.—As in case of original assessments, mere irregularities do not vitiate the corrected assessment.[76]

Review by the courts. See 8 C. L. 2075—Provision is usually made for review by the courts of the decisions of boards of equalization and correction;[77] more or less specific provision being also made as to the modes [78] and scope [79] of review, parties,[80]

in territory annexed by Acts 1888, 1902, of proceedings in city appeal tax court to assess his property at the regular city rate, such property having reached the required stage of development to be subject to such rate. Sams v. Fisher [Md.] 66 A 711.

71. County board of taxation created by Act April 14, 1906, p. 210), has no jurisdiction in New Jersey to reduce an assessed valuation, in the absence of both constructive and actual notice to the township or its representatives of hearing, on appeal of owner to reduce. Eatontown Tp. v. Monmouth Elec. Co. [N. J. Law] 68 A 342.

72. State v. Cudahy Packing Co. [Minn.] 115 NW 645.

73. Though opportunity to object to the reassessment made is given. Jersey City v. Equalization of Taxes [N. J. Err. & App.] 67 A 38.

74. Where notice of retrospective assessment on omitted personalty was not given as required by St. 1903, § 2991, and hence petition to correct such assessment could not be filed within thirty days after such notice, as provided by § 2992, the taxpayer was bound to file such petition within thirty days after actual notice, and not having done so could not have the collection of the tax enjoined. Hegan v. Louisville [Ky.] 107 SW 809.

75. Cannot be proved by testimony of presiding officer or minutes of unofficial stenographer. Delray Land Co. v. Springwells Tp., 149 Mich. 397, 14 Det. Leg. N. 483, 112 NW 1132.

76. If, by proceedings under Gen. St. 1901, § 7599, authorizing correction of false tax statements, it appear that owner who appears and resists inquiry omitted to list specific items of taxable personalty in statement which he gave to assessor, and such property is duly valued, and proper amount of taxes thereon is charged against owner on tax roll, omission of county clerk to formally correct assessor's return is a mere irregularity which does not vitiate the tax. Com'rs of Johnson County v. Hewitt [Kan.] 93 P 181.

77. Royal Mfg. Co. v. Rahway [N. J. Law] 67 A 940.

78. Certiorari. Royal Mfg. Co. v. Rahway [N. J. Law] 67 A 940. Assessment not being a judicial function. Gen. St. 1905, § 8343, authorizing appeal from county board of equalization to district court, is unconstitutional and void. Silven v. Osage County Com'rs [Kan.] 92 P 604. Whereas assessment has been appealed to and successively passed upon by county board of taxation and state board of equalization, certiorari will not lie to the local authorities, the proper procedure being to bring up the judgment of the state board and the proceedings before such board. Susquehanna Coal Co. v. South Amboy [N. J. Law] 69 A 454. Certiorari lies to review an assessment made by the assessors. State v. Casey [Mo.] 109 SW 1. Where assessing officers have jurisdiction, review must be had by certiorari, and not by **mandamus.** People v. Keefe, 119 App. Div. 713, 104 NYS 154. Where proofs, upon question whether certain property of branch railroad is assessable by state board of assessors as "main stem" property, or assessable under P. L. 1906, p. 571, by local board of assessors as second-class railroad property, were submitted upon reasonable assumption that the matter would be decided by supreme court upon basis of rule promulgated by such court in two cases of Jersey City v. Assessors, 73 N. J. Law, 164, 63 A 21, and Id., 73 N. J. Law, 170, 63 A 23, and court of errors and appeals having, since agreement in case at bar, reversed the judgment of the supreme court in the prior cases, laying down a different rule for determining whether land occupied by roadbed of branch road is to be assessed as main stem or as second class, application for summary **review** of such question as prescribed by Tax Law 1888, § 28 (Gen. St. p. 3332, p. 239), should be dismissed, without prejudice to right of railroad company to take further proceedings for review of disputed taxes. In re Belvidere-Delaware R. Co. [N. J. Law] 67 A 1058. Whether summary review as to double taxation of railroad or canal property, as prescribed by Tax Laws 1888, § 28 (Gen. St. p. 3332, par. 239, may be invoked by railroad company for purpose of determining whether property used is "main stem" or "second-class" railroad property, quaere. Id. There is no jurisdiction for a **writ of error** from supreme court to circuit court to review decision upon appeal from county court in proceedings under Code 1899, c. 29, § 129, as that section appears in Acts 1905, p. 347, c. 35 (Code 1906, § 815), brought in county court by corporation to be released from an alleged erroneous

procedure,[81] and the scope of the relief which may be granted.[82] The general rules

assessment of its property returned for taxation, because of refusal of county court and assessor to deduct indebtedness of such corporation from its money, credits, and investments. Bluefield Waterworks & Imp. Co. v. State [W. Va.] 60 SE 403. Under Sess. Laws 1905, p. 341, certificates of error may be issued by board of county commissioners in certain specified cases, but cannot be issued in cases not specified. Bostick v. Noble County Com'rs [Okl.] 91 P 1125. Action of state board of equalization and assessment is in nature of a final order, and is reviewable by petition in error. State v. Board of Equalization & Assessment [Neb.] 115 NW 789.

79. Except as authorized by the legislature, the courts cannot review the wisdom, justice or equity of an authorized tax. State v. Marion County Com'rs [Ind.] 82 NE 482. Facts not reviewable **on appeal** under Baltimore city charter, § 170, to court of appeals from Baltimore city court on appeal from appeal tax court as to assessment. Hamburger v. Baltimore [Md.] 68 A 23. Order of city court that "it appearing to the court that the property in question as shown by the evidence was so far completed," etc., as to be assessable, and that it was legally assessed, held not to present a question of law as to validity of assessing ordinance. Id. Statutory appeal of the taxpayer from the action of the board of assessors brings up only the question of his own individual assessment. Other assessments cannot be considered for purpose of reducing the official valuation below the standard of the actual cash value as fixed by law. Pons v. Assessors for parish of Orleans, 118 La. 1101, 43 S 891. Where county board of taxation increased valuation, thus reducing rate, and assessor sent bills not based on original rate and increased valuation, on appeal by township from action of state board of equalization in correcting and increasing the valuation of a taxpayer's property and decreasing his rate, the court had no authority to review the action of county board in making such increase of valuation. Wayne Tp. Passaic County v. Laflin & Rand Powder Co. [N. J. Law] 68 A 909. Appeal from treasurer's assessment of omitted property is of same scope as appeal from board of review, the whole matter of making the assessment being open to inquiry. In re Seaman [Iowa] 113 NW 354. On appeal from local board of review the district court may consider objection that appellant is nonresident and not subject to the tax. Shirk v. Monmouth Board of Review [Iowa] 114 NW 884. Allocatur to writ of **certiorari** denied to bring up question of valuation where no principle of law was involved and question of fact had been passed upon adversely to prosecutor by county board of taxation and state board of equalization. Colonial Trust Co. v. Scheffey [N. J. Law] 69 A 455. Certiorari to review assessment is, under the statute, substantially a new trial, the petition being the complaint, and the return the answer, and general rules of pleading being applicable. People v. Stillwell, 190 N. Y. 284, 83 NE 56.

80. Under Acts 1898-99, p. 188, and Gen. Acts 1903, pp. 225, 297, either party may appeal to circuit court from decision of county commissioners in proceedings by state to raise an assessment. State v. Allen [Ala.] 44 S 564.

"Person aggrieved," as used in Rev. Laws, c. 12, § 73, means one whose pecuniary interests are adversely affected by the assessment. Hough v. North Adams [Mass.] 82 NE 46. While certiorari is not available to one as being aggrieved where the assessment is such as clearly not to amount to an assessment, one whose name is on a roll apparently made pursuant to statute, and which seems to be a judgment or a basis for a judgment against him for the amount of the tax, is entitled to certiorari as being one aggrieved. Under Laws 1896, p. 882, c. 908, § 250. People v. Davenport, 119 App. Div. 790, 104 NYS 332.

81. Where it is not otherwise provided, the general rules of pleading are applicable, and on certiorari to review assessment, averments of petition not denied by return, either generally or specifically, are admitted. People v. Stillwell, 190 N. Y. 284, 83 NE 56. Allegations as to value in petition for certiorari under Laws 1896, p. 882, c. 908, § 250, may be upon information and belief. People v. Ouderkirk, 120 App. Div. 650, 105 NYS 134. On certiorari to review an assessment, the return of assessors is not conclusive, the return being merely an answer to the petition considered as a complaint. People v. Stillwell, 190 N. Y. 284, 83 NE 56. Return held part of record and to supply omission of assessment record recitals as to notice where only objection for want of such notice was that "it does not appear" that such notice was given. District of Columbia v. Brooke, 29 App. D. C. 563. District court, on appeal from district board of equalization, may consider **evidence** of any pertinent fact tending to show the value of the property. Western Union Tel. Co. v. Dodge County [Neb.] 113 NW 805. Strict rules of evidence not applicable on certiorari under Laws 1896, p. 882, c. 908, § 250, to review assessment made by assessors. People v. Ouderkirk, 120 App. Div. 650, 105 NYS 134.

82. Favorable recommendation of county board and auditor of county in which property is situated is a general **condition precedent** to favorable action by the tax commission on application for abatement of taxes on ground of excessive valuation. State v. McVey [Minn.] 115 NW 647. Taxpayer entitled to no relief where city board of abatement acted favorably on application, but county auditor failed to join in recommendation for abatement. Id. Under Rev. Tax Act, § 38 (P. L. 1903, p. 418), the court may make **correction of assessment.** Royal Mfg. Co. v. Rahway [N. J. Law] 67 A 940. Courts have no jurisdiction to correct assessments except as provided by statute. Action to recover taxes paid on ground of excessive assessments held action to correct assessment. First Nat. Bk. v. Hopkinsville [Ky.] 108 SW 311. See post, § 10, subd. Recovery Back of Payments. Under Code, § 1373, the court, on appeal from board of equalization, can only review, and cannot make **new assessment.** First Nat. Bk. v. Estherville

as to saving questions for review apply quite generally,[88] including those as to invited error [84] and presumptions in favor of the decision below.[85]

The jurisdiction of the Federal courts is controlled by the same considerations as in other cases.[86]

§ 7. *Levies and tax lists.*[See 8 C. L. 2076]—The word "levy," as applied to taxes, is commonly employed to designate several different proceedings, from the laying or imposing of the tax to its collection.[87] All of these proceedings are treated in other sections,[88] except the original laying or imposing of the tax, which is here treated. Subject to constitutional limitations,[89] the levy of taxes is entirely statutory [90]

[Iowa] 112 NW 829. Circuit court, upon sustaining an appeal under Ky. St. 1903, § 4241, assessment of omitted property, will not assess it, but will leave the assessment to the county court. Commonwealth v. Paducah, 31 Ky. L. R. 528, 102 SW 882. On appeal from board of county commissioners, the district court takes appellate jurisdiction only, and cannot grant **equitable relief,** and thus assume a jurisdiction which the inferior tribunal did not have. Bostick v. Noble County Com'rs [Okl.] 91 P 1125.

83. Time of objection: An objection to a taxpayer's statement, filed with the assessors on "grievance" day, should be made when filed, and cannot be made after such statement has been acted upon. People v. Ouderkirk, 120 App. Div. 650, 105 NYS 134.

Questions not raised below: Petition and return on certiorari must not only raise an issue but must show one raised before the assessors in order to authorize a re-examination by the reviewing court, and where no such issue is disclosed, such court will determine the case solely upon the evidence adduced before the assessors. People v. Hall, 109 NYS 402. On certiorari under Laws 1896, p. 882, c. 908, § 250, hearing on petition, writ and return does not involve question of petitioner's residence where only objection before assessors and in petition was one of overvaluation. People v. Kaufman, 121 App. Div. 599, 106 NYS 305. On certiorari, under Laws 1896, p. 882, c. 908, § 250, requiring application for correction to proper officers as condition precedent to review by certiorari, only such objections as are presented to such officers will be reviewed. People v. Supervisors of Nassau County, 54 Misc. 323, 104 NYS 353. Violation of Rev. St. U. S. § 5219, relating to taxation of national bank stock, cannot be raised for first time, in argument upon merits, on appeal from state board of equalization. First Nat. Bk. v. Estherville [Iowa] 112 NW 829. Requests for special findings may be presented to state board of equalizaton and assessment, but rulings thereon will not be reviewed on error unless saved by **bill of exceptions** settled and allowed as provided by statute. State v. Board of Equalization & Assessment [Neb.] 115 NW 789. Mandamus will not lie to compel board to spread on record matters not properly a part thereof, remedy being by bill of exceptions. Id.

84. Reduction of assessment asked for on ground of disproportionate valuation refused on certiorari where taxpayer refused to appear before assessors as required by them pursuant to Laws 1896, p. 810, c. 908, § 36, to be examined as to his complaint, though he appeared by attorney, especially as latter stated that his client would not agree to giving any further inventory and stated that he, the attorney, knew nothing about the value of the property. People v. Ferguson, 120 App. Div. 563, 105 NYS 388.

85. Assessment presumed correct until proved otherwise. Pons v. Assessors for Parish of Orleans, 118 La. 1101, 43 S 891. Assessment, as ultimately fixed by state board, is final, except upon appeal to the district court, and should not be disturbed even on such appeal unless it clearly appears that it is erroneous. First Nat. Bank v. Webster County [Neb.] 113 NW 190. An increase of valuation by a duly authorized board will be presumed, in the absence of a contrary showing, to have been made upon a determination of the necessity therefor. Wayne Tp. Passaic County v. Lafiin & Rand Powder Co. [N. J. Law] 68 A 909. On certiorari, relator has the **burden of overcoming presumption** in favor of correctness of assessment. People v. O'Donnell, 54 Misc. 5, 105 NYS 457. Appellant has burden of overcoming presumption in favor of findings of board of equalization. First Nat. Bk. v. Estherville [Iowa] 112 NW 829.

Evidence held to sustain finding of district court on appeal from district board of equalization. Western Union Tel. Co. v. Dodge County [Neb.] 113 NW 805. Where, however, an assessment appears to be arbitrary, capricious and wholly without justification, it will not be sustained. Where town board of assessors assessed telephone company with realty, notwithstanding that it was proved, without contradiction, that the company had no realty, poles or wires assessable by such board. People v. Hall, 109 NYS 402.

86. Federal question as to impairment of obligation of contract and denial of due process by taxation of property in city annexed to another city under Pa. Act Feb. 7, 1906. Hunter v. Pittsburgh, 28 S. Ct. 40.

87. "Levy" as applied to taxes, is given a variety of meanings, such as: "To impose or assess;" "to impose, assess and collect under authority of law;" "to raise by assessment;" "to charge a sum of money already ascertained against a person or property subject to the charge;" "to determine by vote the amount of tax to be raised;" "to fix the rate at which property is to be assessed." Under some of these meanings the board of school inspectors of Peoria held to be the authority which "levies" the city school tax, under Priv. Laws 1869, p. 172, § 12. Gray v. School Inspectors of Peoria, 231 Ill. 63, 83 NE 95.

88. See ante, §§ 5, 6, and post, §§ 11, 12.

89. Levy of tax by school district held in accordance with Const. art. 10, § 12 (Ann.

and must be made as provided by statute,[91] the primal elements of the levy, aside from the power to levy [92] and the formal requisites of the levying statute or ordinance,[93] being the time,[94] purposes,[95] amount,[96] and rate,[97] and the persons [98] and

St. 1906, p. 287). Black v. Early, 208 Mo. 281, 106 SW 1014.

90. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849. Cannot be made by a court of equity. Id.

91. Levy held in language of code and sufficient. Yow v. Sullivan, 129 Ga. 187, 58 SE 662. Order of county authorities of Franklin county of July 4, 1906, providing for levy for expenses of county for 1905, held not a new and independent levy for 1906, but an amendment of the levy of Sept. 9, 1905, making same conform to law as laid down when this case was before supreme court on former occasion. Id. Evidence held to show that a **road and bridge tax** was properly levied under § 139, c. 121, H. R. S. 1905, governing towns under the cash system. People v. Chicago, etc., R. Co., 228 Ill. 102, 81 NE 813.

92. See ante, § 1, subd., Power to Levy. Commissioners of roads and revenues of Hall county have discretionary power to levy **tax for construction of public bridge.** Gaines v. Dyer, 128 Ga. 585, 58 SE 175. Levy of special tax by road and revenue commissioners for construction of a bridge was not invalidated by fact that levy for same purpose had been made previously and partly collected, and afterwards adjudged invalid and set aside. Id. Levy of special tax for construction of bridge held authorized by law without recommendation of grand jury. Id.

93. Tax invalid where ordinance authorizing same was filed with county clerk without being certified as true copy, as required by Hurd's Rev. St. 1905, c. 24. People v. Belleville, etc., R. Co., 232 Ill. 454, 83 NE 950. Certificate required by Hurd's Rev. St. 1905, c. 24, is a condition precedent to the filing, and its absence cannot be cured by a subsequent amendment attaching the required certificate to the ordinance. Id.

94. Tax levy ordinance passed before an appropriation ordinance becomes effective is void. People v. St. Louis, etc., R. Co., 230 Ill. 61, 82 NE 305. Gross earnings tax levied by ordinance approved Nov. 4, 1901, expressly to take effect on April 1, 1902, held to impose tax for year beginning Apr. 1, 1903. City of Scranton v. Scranton Elec. Light & Heat Co., 33 Pa. Super. Ct. 431.

95. Estimate of expenses required by Civ. Code 1902, § 799, to be furnished by board of county commissioners to general assembly as basis of levy of county taxes, held to include past indebtedness approved by such board. State v. Goodwin [S. C.] 59 SE 35. Claims not proved as required by law need not be included in such estimate, though audited and allowed by county board. Id.

Statement of purpose: Levy of school tax without stating purpose thereof, as required by Const. § 180, held void. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926. Certificate of highway commissioners that an additional levy was needed to meet amount "due on outstanding orders" **held insufficient** to sustain levy to meet "contingency" authorized by Hurd's Rev. St. 1905, c. 121, § 14. People v. Kankakee, etc., R. Co., 231 Ill. 109, 83 NE 115. Certificate that additional levy was needed "to build a bridge," "to pay for the old iron bridge," "for the sole purpose of purchasing and placing an iron bridge" across a stream, held insufficient. People v. Cairo, etc., R. Co., 231 Ill. 438, 83 NE 116. Mere opinion of commissioners that levy is insufficient will not authorize additional levy. Id. "To build two bridges" held insufficient. People v. Kankakee, etc., R. Co., 231 Ill. 490, 83 NE 117. Statement that bridges were becoming unsafe and needed repair held insufficient. People v. Toledo, etc., R. Co., 231 Ill. 125, 83 NE 118. "Repairing bridges" held insufficient. People v. Cincinnati, etc., R. Co., 231 Ill. 363, 83 NE 119. "For specific and sole purpose of paying damages and opening up new roads that are laid out in the township, and building bridges," held insufficient. People v. Toledo, etc., R. Co., 231 Ill. 390, 83 NE 186. For "purpose of repairing bridges" held insufficient. People v. Chicago, etc., R. Co., 231 Ill. 454, 83 NE 213. "Outstanding indebtedness for steel bridges, grader, and grading roads," and "buying and placing as crossings," over certain river "two iron bridges," etc., held insufficient. People v. Belleville, etc., R. Co., 232 Ill. 454, 83 NE 950. Statement of one of purposes of tax as "general fund" held not sufficiently specific under Hurd's Rev. St. 1905, p. 1662, c. 120, § 121. People v. Cleveland, etc., R. Co., 231 Ill. 209, 83 NE 111; People v. Toledo, etc., R. Co., 231 Ill. 498, 83 NE 113. "Contingent expenses" held insufficient. People v. Cleveland, etc., R. Co., 231 Ill. 209, 83 NE 111. "General expenses" held insufficient. Id. "For payment of contingent expenses incurred for the use and benefit of the town" held insufficient. People v. Toledo, etc., R. Co., 231 Ill. 498, 83 NE 113. "Unpaid claims" held insufficient. People v. Illinois, etc., R. Co., 231 Ill. 377, 83 NE 113. "Coal, light and water" held insufficient. Id. "For contingent" held insufficient. Id. "For judiciary and boarding prisoners" held insufficient. Id. "Building and incidental expenses" held insufficient. People v. Kankakee, etc., R. Co., 231 Ill. 109, 83 NE 115; People v. Cincinnati, etc., R. Co. 231 Ill. 363, 83 NE 119. "Ordinary expenses" insufficient. People v. Cairo, etc., R. Co., 231 Ill. 438, 83 NE 116. Tax for repairs, grading, and tiling around schoolhouse should be provided for by tax levied for "school purposes" and not "for building purposes." People v. Toledo, etc., R. Co., 231 Ill. 514, 83 NE 193. "Ordinary expenses" held insufficient. People v. Belleville, etc., R. Co., 232 Ill. 454, 83 NE 950. To meet expense of protection of piers and placing lights on bridge in accordance with Federal regulations, and to provide for protection of bridge approaches, **held sufficient,** except as to protection of bridge approaches. People v. Peoria, etc., R. Co., 232 Ill. 540, 83 NE 1054. Levy of extra tax for construction of bridge held substantially in

property subjected thereto.[99] The rate may be increased at the beginning of a new fiscal year, though such date is the middle of a calendar year to which the former rate applied,[1] and in such case it is within the discretion of the legislative body whether equitable provision shall be made for the unexpired year.[2] Curative statutes do not generally cure fundamental defects,[3] but the making of a void levy does not preclude a subsequent valid levy.[4]

Mandamus [5] lies to compel a municipality to exercise its taxing power in a proper case.

The record. See 8 C. L. 2077—The jurisdiction of equity cannot be invoked to correct a tax record made by a tribunal competent to correct its own records, especially where such correction has already been made.[6]

§ 8. *Payment and commutation.* See 8 C. L. 2077—Payment need not always be made in money.[7] Payment may be proved by the original receipt,[8] or by any other evidence, oral or documentary, sufficient to satisfy the court.[9] Where the taxpayer testifies that he paid all the taxes demanded of him, testimony as to the amount of the check given by him in making such payment is admissible.[10] Where the plaintiff claims to have lost his tax receipt, evidence of the form of receipts given at the collector's office is inadmissible where it is not proposed to show the contents of the

language of Pol. Code 1895, § 404, par. 2, and to sufficiently specify the purpose for which it was levied. Gaines v. Dyer, 128 Ga. 585, 58 SE 175.

96. Authority under Hurd's Rev. St. 1905, c. 121, § 13, to levy additional highway and bridge tax upon commissioners' certificate of contingency, extends only to amount necessary to meet the contingency. People v. Peoria, etc., R. Co., 232 Ill. 540, 83 NE 1054. Limitation placed on amount of levy by Laws 1899, p. 44, c. 41, includes sinking fund levies. Fremont, etc., R. Co. v. County of Pennington [S. D.] 116 NW 75. Law requires the different percentages to follow each item, and the aggregate, as indicated by the addition of these percentages, is the valid tax, and any other statement conflicting therewith is mere surplusage. Yow v. Sullivan, 129 Ga. 187, 58 SE 662. Levy by city in excess of limit fixed by Const. § 157, is void. Harper v. Catlettsburg, 31 Ky. L. R. 293, 102 SW 294.

97. Tax on railroad property is levied by the general law of the state, and mere fact that order of county authorities apparently limited the tax to property upon the digest of the county does not prevent the rate therein fixed from being the basis upon which the comptroller general fixes the amount due by a railroad company. Yow v. Sullivan, 129 Ga. 187, 58 SE 662. Order of county authorities held sufficient to authorize a certificate to comptroller general of amount of tax levy for the year, and with that certificate before him he had authority to ascertain amount of taxes due by railroad company. Id.

98. See ante, § 2B, The Persons Liable.

99. See ante, § 2, Persons, Objects, and Interests Taxable. Highway and bridge contingency tax under Hurd's Rev. St. 1905, c. 121, §§ 13, 16, must be levied on all property within town, whether such town contain city of 35,000 population or not. People v. Peoria, etc., R. Co., 232 Ill. 540, 83 NE 1054.

1. Congress has such power in District of Columbia. American Security & Trust Co. v. District of Columbia, 29 App. D. C. 265.

2. Where trust company had paid whole of its taxes prior to July 1, 1902, for calendar year beginning Jan. 1, 1902, at rate obtaining prior to Act July 1, 1902, it was liable for tax for such year at increased rate fixed by such act, less the amount paid under old rate. American Security & Trust Co. v. District of Columbia, 29 App. D. C. 265; Union Trust Co. v. District of Columbia, 29 App. D. C. 270.

3. Assessment of tract as whole to owner of smaller tract comprised therein not cured by Laws 1903, p. 232, c. 166. State Finance Co. v. Myers [N. D.] 112 NW 76.

4. Where school tax levy was void for failure to state purpose, as required by Const. § 180. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926.

5. See 8 C. L. 2077. To compel levy of special tax to pay judgment against city. City of San Antonio v. Routledge [Tex. Civ. App.] 19 Tex. Ct. Rep. 457, 102 SW 756. To compel levy to pay a judgment against a county. Lake County Com'rs v. Schradsky [Colo.] 95 P 312. Funding bond act 1899 (3 Mills' Ann. St. Rev. Sup. § 780a et seq.) does not forbid mandamus in such case. Id.

6. Where clerk of county court made false entry of cancellation of tax, and such entry was expunged by the county court. Multnomah County v. Portland Cracker Co. [Or.] 90 P 155.

7. Sheriff or collector of state, county, or district taxes, is bound to accept county orders in payment of such taxes, where he has in his hands money belonging to the general fund of his county. State v. Melton [W. Va.] 57 SE 729. That such orders were drawn in a fiscal year prior to that for which the taxes are due is no ground for refusal to accept them. Id.

Mandamus lies to compel acceptance of such orders. State v. Melton [W. Va.] 57 SE 729.

8, 9. Keys v. Fink [Neb.] 116 NW 162.

10. As bearing on his credibility. Trexler v. Africa, 33 Pa. Super. Ct. 395.

receipt which was given.[11] Payment in the wrong place does not preclude collection in the right place,[12] nor does the voluntary payment of a void tax constitute payment of a valid tax upon the same property.[13] The taxpayer, however, is not chargeable with the mistakes of the collector,[14] but the state is not estopped to apply payments as required by law by the acts of its officers in accepting check vouchers calling for a different application,[15] nor by the failure to enforce the penalties for the nonpayment of the taxes thus rendered in arrear.[16] Where the tax receipts do not indicate any other appropriation, payments must be applied to liabilities in order of date.[17] Apportionment of taxes between the subdivisions of a tract assessed as a whole is sometimes provided for by statute,[18] and so also as to the listing of persons who have paid their taxes.[19] An executive officer charged with the duty of receiving payment of taxes must accept such payment when tendered without regard to controversies as to the ownership of the property.[20]

Unless clearly so authorized by statute,[21] neither state nor municipal officials can release taxpayers from liability for taxes accrued,[22] and even the power of the state in this regard is subject to constitutional limitations.[23]

11. Trexler v. Africa, 33 Pa. Super. Ct. 395.

12. Payment in county other than that of residence. Cover v. Hatten [Iowa] 113 NW 470.

13. Payment of tax on telegraph line owned and used by railroads but leased to telegraph company for commercial business, erroneously returned by railroad as railroad property, held not to bar recovery of tax on such line as telegraph property under Code, § 1328. Chicago, etc., R. Co. v. Rhein [Iowa] 112 NW 823.

14. Tax lien held discharged by payment of amount stated by treasurer as the amount due on two tracts of land. Trexler v. Africa, 33 Pa. Super. Ct. 395. Where owner inquired as to what taxes were due on land he had purchased and paid all that he was apprised of, sale for other taxes, of which he was not informed, was void. Taylor v. Debritz [Wash.] 93 P 528. Where taxpayer sent treasurer more than enough money to pay the tax, the tax and lien thereof were discharged. Loving v. McPhail [Wash.] 92 P 944.

15. Whether payments were applicable to tax under tenant act of 1869 or railroad tax act of 1884. State v. United New Jersey R. & C. Co. [N. J. Law] 68 A 796.

16. Payments made applied to taxes due under transit act 1869, and taxes under railroad tax act 1884, thus rendered in arrears. State v. United New Jersey R. & Canal Co. [N. J. Law] 68 A 796.

17. State v. United New Jersey R. & C. Co. [N. J. Law] 68 A 796.

18. Mandamus lies to compel city council of Bayonne to apportion taxes among proper subdivisions of parcels of real estate as provided by P. L. 1903, p. 414, the charter of such city, and by Martin Act. Morris & Cummings Dredging Co. v. Bayonne [N. J. Law] 67 A 20.

19. Supreme court has no jurisdiction of suit by citizens and taxpayers to compel compliance with law requiring list of those who have paid poll taxes to be filed in office of clerk of court, such a suit not being one of which the court has jurisdiction, regardless of amount in controversy, and the amount not being sufficient. State v. Briede, 119 La. 161. 43 S 992. In such case an affidavit that more than $2,000 is involved is a mere conclusion. Id.

20. Where an assignee of an original or prior certificate of sale of school lands tenders to the county treasurer of the county in which the land is located payment of delinquent taxes on the land, it is the duty of the treasurer to receive and receipt for the money, even though such treasurer may know that forfeiture proceedings have been had to bar the rights of the certificate holder and that the lands have been resold and may believe the second purchaser to have the better right thereto. Beatty v. Smith, 75 Kan. 803, 90 P 272.

21. County officers held to have had power to effect compromise according to which portion of taxes were remitted, where county had purchased the property on foreclosure of the tax lien. Multnomah County v. Dekum [Or.] 93 P 821, following Multnomah County v. Title Guarantee Co., 46 Or. 523, 80 P 409, which was decided under B. & C. Comp. §§ 912, 913, 2518. Compromise sustained. Multnomah County v. Dekum [Or.] 93 P 821. County held charged with notice of affirmance of decree in its favor in suit to cancel tax certificate to which suit it was a party, and taxpayer held not charged with fraud by reason of his failure to inform county officials of such affirmance. Id.

22. Neither state treasurer nor comptroller can release liability for taxes. State v. United New Jersey R. & C. Co. [N. J. Law] 68 A 796. State board of valuations cannot release railroad company from payment of final assessments for previous years in consideration for payment of assessment for current year. Illinois Cent. R. Co. v. Com. [Ky.] 108 SW 245. Board of county supervisors held not authorized by Rev. St. 1901, par. 973, to compromise action for taxes. Territory v. Gaines [Ariz.] 93 P 281. Compromise subsequent to Laws 1903, p. 168, No. 92, but not conforming to conditions imposed by act, held void. Id.

23. Legislature held prohibited by Const. art. 4, § 31, relative to gifts by state, from releasing succession tax, the right to which

§ 9. *Lien and priority.*[See 8 C. L. 2078]—Compliance with statutory requirements is essential to the creation of a lien for taxes.[24] When once created, however, the only way to discharge it is to pay the taxes.[25] A sale of the property for the taxes does not discharge [26] or affect [27] such lien, except that it is transferred to the purchaser.[28]

Liens created before the tax lien attaches take precedence over such lien.[29]

§ 10. *Relief from illegal taxes.*[See 8 C. L. 2078]—Equity will not interfere with the collection of a tax in the absence of some recognized ground for equitable relief,[30] such as lack of adequate remedy at law [31] and irreparable injury.[32] Accordingly, an injunction will not be granted on account of nonjurisdictional irregularities,[33] nor on account of excessiveness of the assessment [34] or overvaluation of the property,[35] especially where such injunction would invalidate the whole levy,[36] nor to restrain the collection of a personal property tax,[37] except in rare instances,[38] nor can the existence of a de facto taxing district be collaterally attacked in a suit to restrain the collection of the tax.[39] The complainant must, moreover, have paid or tendered such portion of the taxes as were equitably due.[40] Where the case is properly

has vested in state. In re Martin's Estate [Cal.] 94 P 1053.

24. Filing with treasurer of tax list without warrant required by Laws 1879, p. 307, § 83, does not create lien upon personal property under § 139, since "tax books" as used in latter section means such list with warrant attached. Platte Valley Mill. Co. v. Malmsten [Neb.] 113 NW 229.

25. Holbrook v. Kunz [Ind. App.] 83 NE 730.

26. City Safe Deposit & Agency Co. v. Omaha [Neb.] 112 NW 598.

27. Sale of land pursuant to Laws 1899, p. 410, c. 322, does not change date of lien of state for prior delinquent taxes, where they and judgments therefor are valid. In re Brodie [Minn.] 113 NW 2.

28. See post, § 14B, Rights and Estate Acquired by the Purchaser.

29. Lien of chattel mortgage, taken before tax books are delivered to treasurer, is superior to lien of taxes for that year created by such delivery, under Laws 1879, p. 332, § 139. Platte Valley Mill. Co. v. Malmsten [Neb.] 113 NW 229.

30. Decision of board of equalization held final in absence of fraud or other grounds authorizing resort to equity. Finney County Com'rs v. Bullard [Kan.] 94 P 129. Injunction will not be granted in absence of such grounds. Id.; Gray v. School Inspectors of Peoria, 231 Ill. 63, 83 NE 95.

31. Hallett v. Arapahoe County Com'rs [Colo.] 90 P 678.

32. Hallett v. Arapahoe County Com'rs [Colo.] 90 P 678. Fraud in the assessment, if ground for injunction regardless of the legal remedy, is not ground for such relief in the absence of injury. Id.

33. Gray v. Inspectors of Peoria, 231 Ill. 63, 83 NE 95. Equity will not enjoin the tax merely on the ground that it was illegally levied, but will remit the objector to his remedy at law, it appearing that the tax is not illegal and that the authorities had power to impose it. Shriver v. McGregor, 224 Ill. 897, 79 NE 706.

34. Finney County Com'rs v. Bullard [Kan.] 94 P 129. Excessiveness is not of itself fraud. Id. While equity will not review assessments on the ground that they are excessive unless the assessment is grossly out of proportion to the value of the property assessed. Bates v. Barker, 227 Ill. 120, 81 NE 334.

35. Tax based on assessment made by state board of assessors, under Burns' Ann. St. 1901, § 8547. City of Jeffersonville v. Louisville & J. Bridge Co. [Ind.] 83 NE 337.

36. Finney County Com'rs v. Bullard [Kan.] 94 P 129.

37. Remedy against illegal tax on personalty is by payment under protest and suit to recover such payment back. Lewis v. Eagle [Wis.] 115 NW 361.

38. Seizure and sale of personalty for taxes will not be enjoined except in rare cases involving personalty of peculiar value, even though the collector is acting without lawful authority. H. W. Metcalf Co. v. Martin [Fla.] 45 S 463.

39. Validity of de facto school district which levied the tax cannot be collaterally attacked in suit to restrain collection of the tax. Black v. Early, 208 Mo 281, 106 SW 1014. Voluntary appearance by school district, thus making itself a party to the suit, and tender of issue of its corporate existence, does not preclude it from benefit of doctrine that its existence cannot be attacked collaterally. Id.

40. Black v. Early, 208 Mo. 281, 106 SW 1014. Injunction for failure to follow Pol. Code, §§ 3628, 3650, as to assessing lands by sections, in assessing a mortgage interest in lands, refused where owner of such interest failed to pay or tender any tax whatever to the collector. Savings & Loan Soc. v. Burke, 151 Cal. 616, 91 P 504. Excessive valuation is not ground for equitable relief in the absence of any offer to pay any amount at all, remedy in such case is by application to board of equalization. Reed v. Cedar Rapids [Iowa] 116 NW 140.

Unconditional tender is necessary. City of Jeffersonville v. Louisville & J. Bridge Co. [Ind.] 83 NE 337.

Where tax was not levied against plaintiff but merely constitutes a lien on his property, his duty to pay them is purely legal, and no offer to pay them is essential to equitable relief from other taxes over which his claim or title takes priority. In such case court may require payment of taxes constituting a lien as condition to

one of equitable cognizance, there being no adequate remedy at law,[41] injunction is the proper remedy against the collection of the tax,[42] as where the assessment was fraudulently made,[43] or without jurisdiction,[44] or levied under an unconstitutional law,[45] or upon exempt property,[46] or upon property not owned by the complainant,[47] or where the taxes have been paid.[48] Federal courts have jurisdiction to enjoin the enforcement of state taxes in violation of the Federal constitution,[49] such a suit not being a suit against the state,[50] but in the absence of fraud or a clear showing of the adoption of wrong principles, a Federal court will not enjoin the collection of a state tax on account of the methods pursued by the state board in valuation of the property.[51] The owner may sue to restrain a sale under an illegal levy, though he was not the owner when the levy was made,[52] and so also an owner of land may sue to enjoin the collection of illegal taxes on permanent improvements placed thereon by a lessee thereof, such taxes being in effect a tax on the land or at least on the rents.[53] The collector is a proper party defendant,[54] and the assessing authorities may be brought in at their own request.[55] Most of the questions relative to pleading in such suits may be solved by the application of the general principles of pleading.[56] The jurisdictional amount involved in a suit to restrain the enforcement of a tax upon exempt property is the value of the exemption.[57] The court will not go outside of the record to ascertain if the tax can be sustained upon grounds or

relief. Platte Valley Mill. Co. v. Malmsten [Neb.] 113 NW 229.

41. Existence of adequate remedy by way of suit to recover back the taxes paid held negatived by allegations of bill. Raymond v. Chicago Union Trac. Co., 28 S. Ct. 7.

42. City of Baltimore v. Gail [Md.] 68 A 282. Under Const. 1895, art. 5, § 4, supreme court has jurisdiction where no other remedy has been provided by statute, to enjoin collection of illegal tax, notwithstanding Code 1902, § 412, providing that collection of taxes shall not be impeded by injunction, etc. Ware Shoals Mfg. Co. v. Jones [S. C.] 58 SE 811.

43. Will enjoin assessment of taxes upon credits fraudulently added to the schedules by the assessor. Bates v. Parker, 227 Ill. 120, 81 NE 334.

44. Judgment of state board of equalization rendered without a quorum. Smoky Mountain Land, Lumber & Imp. Co. v. Lattimore [Tenn.] 105 SW 1028. Municipal tax was levied on property outside of its jurisdiction. Hemple v. Hastings [Neb.] 113 NW 187. Preliminary injunction granted for lack of notice to taxpayer. Caldwell Land & Lumber Co. v. Smith [N. C.] 59 SE 653. Injunction proper where notice of assessment was not given as required by Ky. St. 1903, § 4122, though taxpayer had remedy under § 4128 by application to county judge. Mt. Sterling Oil & Gas Co. v. Ratlipp, 31 Ky. L. R. 1229, 104 SW 993.

45. Green v. Hutchinson, 128 Ga, 379, 57 SE 353.

46. University of the South v. Jetton, 155 F 182; Bates v. Parker, 227 Ill. 120, 81 NE 334.

47. Will enjoin collection of taxes where board of review arbitrarily added a large sum to his assessment. Bates v. Parker, 227 Ill. 120, 81 NE 334.

48. Payment by complainant's agent in another county where property was located. See 4 Burns' Ann. St. 1905, § 8421, exception 7. Nyce v. Schmoll, 40 Ind. App. 555, 82 NE 539. Where taxes which were levied on property as realty have been paid as a tax on personalty. Hanberg v. Western Cold Storage Co., 231 Ill. 32, 82 NE 842.

49. On ground that collection of tax imposed by statute impairs contract of exemption. University of the South v. Jetton, 155 F 182; Whitman College Trustees v. Berryman, 156 F 112. Jurisdiction not affected that the unconstitutionality complained of lies in the erroneous interpretation of the statute by the state officers. University of the South v. Jetten, 155 F 182.

50. University of the South v. Jetten, 155 F 182.

51. Western Union Tel. Co. v. Wright, 158 F 1004.

52. Clearwater Timber Co. v. Shoshone County, 155 F 612.

53. University of the South v. Jetten, 155 F 182.

54. Sheriff held proper party to suit to enjoin collection of tax upon unlisted property in his hands for collection. Caldwell Land & Lumber Co. v. Smith [N. C.] 59 SE 653.

55. County commissioners. Caldwell Land & Lumber Co. v. Smith [N. C.] 59 SE 653.

56. The facts supporting an allegation of fraud and arbitrary action in making the assessment must be stated. Hallett v. Arapahoe County Com'rs [Colo.] 90 P 678. Failure of the complainant to allege ownership of the property is cured by proof of such ownership without objection to the pleadings. Clearwater Timber Co. v. Shoshone County, 155 F 612. Complaint in suit for injunction on ground of payment and subsequent assessment in another county held sufficient after judgment. Schmoll v. Schenck, 40 Ind. App. 181, 82 NE 804.

57. Not amount of particular tax. Whitman College Trustees v. Berryman, 156 F 112.

under statutes other than those upon which it is expressly based and upon which it is expressly founded.[58] A finding as to the amount due for back taxes cannot be corrected by the trial court after affirmance and remand.[59]

As a general rule equity will not interfere by injunction where no attempt has been or is being made to collect the taxes,[60] especially where there would be other adequate remedies if collection should be attempted,[61] and, a fortiori, an assessment will not be enjoined in anticipation that it will be made in an illegal manner,[62] but in some cases a proposed illegal valuation will be enjoined.[63]

Injunction is not the only equitable remedy available against illegal taxes, and in a proper case a suit to remove the cloud created by such taxes on realty may be maintained,[64] and a preliminary injunction may issue therein.[65] A court of equity cannot correct errors in an assessment map.[66]

Recovery back of payments. See 8 C. L. 2079—The right to recover back taxes paid under compulsion is not entirely dependent upon statute,[67] but such right has very generally been recognized by statute [68] and more or less enlarged.[69] Illegal taxes, therefore, may be recovered back by the taxpayer,[70] provided they were paid under such duress [71] or protest [72] as renders the payment, in legal contemplation, involun-

58. University of the South v. Jetten, 156 F 182.

59. Such finding not correctible as clerical misprision. City of Lexington v. Walsh's Trustee, 31 Ky. L. R. 446, 102 SW 891.

60. Mere claim of right to collect taxes not sufficient. Hallett v. Arapahoe County Com'rs [Colo.] 90 P 678.

61. Injunction will not lie to restrain levy of municipal tax, the taxpayer having adequate remedies either at law or in equity in case of the attempted collection of such tax. Payment under protest and suit to recover back tax on personalty, and suit to remove cloud if such levy is made upon realty, are adequate remedies. Lewis v. Eagle [Wis.] 115 NW 361. Levy of income tax under Civ. Code 1902, §§ 328-331, will not be enjoined, remedy being under Civ. Code 1902, § 413, by payment under protest and action to recover back. Fleming v. Power, 77 S. C. 528, 58 SE 430. Possibility of subsequent assessments under the invalid levy, notwithstanding the decision of the court allowing a recovery back of the payments on the ground that the levy was invalid, is too remote to constitute ground for injunction. Id.

62. Assessment of national bank stock and realty. First Nat. Bk. v. Albright, 28 S. Ct. 349.

63. Where illegal methods are proposed to assess corporate stock and taxpayer has no appeal. Schley v. Montgomery County Com'rs [Md.] 67 A 250.

64. Proper to cancel levy of tax to pay water rents under contract with water company canceled by city. Regan Land Co. v. Carthage [Mo. App.] 108 SW 589. Water company and tax collector held not necessary parties defendant to such suit. Id. Such suit held proper remedy against certificates of delinquency issued under laws of Washington. Whitman College Com'rs v. Berryman, 156 F 112.

Other remedies: Right under St. 1898, § 1164, to pay tax on realty under protest, etc., and recover same back, held not exclusive of jurisdiction of equity to remove cloud created by spreading of tax on tax roll, and incidentally to prevent collection of the tax. A. H. Stange Co. v. Merrill [Wis.] 115 NW 115. No adequate remedy at law against illegal certificates of delinquency of several lots, bearing exorbitant rate of interest, and constituting lien on lots under law of Washington. Whitman College Com'rs v. Berryman, 156 F 112.

65. A. H. Stange Co. v. Merrill [Wis.] 115 NW 115.

66. See Const. art. 9, § 1, and Hurd's Rev. St. 1905, c. 120, §§ 276, 277. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849.

67. A. H. Stange Co. v. Merrill [Wis.] 115 NW 115.

68. See act 1870. A. H. Stange Co. v. Merrill [Wis.] 115 NW 115.

69. A. H. Stange Co. v. Merrill [Wis.] 115 NW 115.

70. Railroad required to pay taxes levied by county for state purposes may recover same back. Atchison, etc., R. Co. v. Sumner County Com'rs [Kan.] 92 P 590. Petition held to state cause of action. Id. Taxpayer may recover excess collected over and above the limit of fifty cents on the $100 fixed by Const. § 157. Boone v. Powell County [Ky.] 108 SW 251.

71. An involuntary payment such as will authorize the recovery back of the payment if the tax is illegal is payment under duress of process against the person or property. The payment must be necessary to prevent execution of the process and the only way to avoid the same. Nashville, etc., R. Co. v. Marion County [Tenn.] 108 SW 1058. A mere protest against payment of tax prior to date on which it is collectible by distress is insufficient. Id.

72. Protest of illegality or notice of intention to sue to recover them back constitutes a sufficient foundation for a suit to recover back taxes paid. Herold v. Kahn [C. C. A.] 159 F 608. A fortiori may such a suit be maintained where the taxes are paid upon demand of the collector, complied with threats of enforcement with penalties. Id.

tary,[73] and provided the plaintiff has complied with the conditions precedent required by law,[74] and, where the assessment is intrinsically illegal, such recovery is not precluded by failure to take advantage of the usual remedies for correction or review,[75] or by the fact that the plaintiff has been guilty of fraud in connection with his assessment and will thereby escape the payment of his just proportion of the public expenses.[76] Nor is a national bank estopped by the act of its cashier in listing its capital stock from recovering back the tax paid thereon under protest.[77] A recovery cannot be had, however, on account of mere irregularities not invalidating the tax [78] and not affecting its equity or justness,[79] especially where the taxes are voluntarily paid.[80] Where a taxpayer sues for himself and all other taxpayers of the county, the fact that his proportion of the tax is very small will not preclude him from maintaining the suit.[81] The incapacity of a county to be sued extends to a suit to recover taxes paid by mistake,[82] but the collecting or disbursing officer having possession of the taxes collected may be sued therefor.[83] Where the assessor is not bound to accept the taxpayer's statement as to ownership of the property, the former is not personally liable to the latter for taxes erroneously assessed in disregard of such statement.[84] Where the case made by the pleadings is for the recovery back of taxes paid, and it appears that they have not been paid, the court cannot enjoin their collection.[85] In a statutory action for the recovery back of taxes paid, interest is not recoverable except as authorized by the statute.[86] On appeal it will be presumed, in the absence of a contrary showing, that the tax was regularly levied.[87]

Payment to prevent threatened levy held sufficient foundation, under St. 1898, § 1164. A. H. Stange Co. v. Merrill [Wis.] 115 NW 115. Since under the statute a mere protest of illegality and notice of intention to sue to recover the taxes back is sufficient, it is immaterial whether there was personalty subject to levy and an impending levy thereon. Id. Evidence held to sustain finding for recovery of taxes paid under protest. Rice v. Muskegon, 150 Mich. 679, 14 Det. Leg. N. 820, 114 NW 661.

73. Invalid taxes voluntarily paid cannot be recovered back. City of Eugene v. Lane County [Or.] 93 P 255. Where notice to file account of ratable property specified date prior to date for determination of ownership and valuation, as required by Gen. Laws 1896, c. 46, § 6. Matteson v. Warwick & Coventry Water Co. [R. I.] 68 A 577.

74. Under Los Angeles City Charter, §§ 208, 209, 216, 222, suit under Pol. Code, § 3819 to recover back taxes paid under protest, cannot be maintained in absence of allegation and proof of presentation of the claim to the city and the rejection of such claim. Farmers' & Merchants' Bk. v. Los Angeles, 151 Cal. 655, 91 P 795.

75. Where plaintiff had no property liable to assessment. Rice v. Muskegon, 150 Mich. 679, 14 Det. Leg. N. 820, 114 NW 661.

76. Where plaintiff, under duress of void warrant, paid taxes on personalty originally omitted through his own fraud, Rev. St. 1901, §§ 1669, 7599, making no provision for assessment of omitted personalty. Douglas County Com'rs v. Lane [Kan.] 90 P 1092.

77. Weiser Nat. Bk. v. Jeffreys [Idaho] 95 P 23.

78. Tax must be void, a mere nullity. Steele v. San Luis Obispo County [Cal.] 93 P 1020. Under Pol. Code, § 3819, no recovery can be had merely because clerk of board of supervisors failed to attach his affidavit to assessment book before delivering same to county auditor as required by Pol. Code, § 3682. Id.

79. Where owner paid amount necessary to redeem property sold for tax assessed irregularly, but amount paid was justly due. Kansas City v. Holmes, 127 Mo. App. 620, 106 SW 559. No equity entitling plaintiff to recovery was presented by claim that on day fixed by law for listing of property the school district which made the levy was not in existence, where it was duly organized when the levy was made, and the property was in its territory on the day fixed for listing, and there was no claim of taxation elsewhere. Atchison, etc., R. Co. v. School Dist. No. 99 of Neosho County, 75 Kan. 843, 89 P 1018.

80. Irregularities in assessment are waived by payment without protest. Lack of sufficient notice of date to present accounts, as required by Gen. Laws 1896, c. 46, § 6. Matteson v. Warwick & Coventry Water Co. [R. I.] 68 A 577. See post, § 10, subd., Recovery Back of Payments.

81. Ratliff's Ex'rs v. Com., 31 Ky. L. R. 154, 101 SW 978.

82, 83. First Nat. Bk. v. Christian County [Ky.] 106 SW 831.

84. Dog tax. Hopkins v. Leach, 109 NYS 713.

85. Nashville, etc., R. Co. v. Marion County [Tenn.] 108 SW 1058.

86. Under Pol. Code, § 3819, interest is not recoverable on taxes paid under protest until judgment for return of such taxes. Miller v. Kern County, 150 Cal. 797, 90 P 119; Kern Valley Water Co. v. Kern County, 150 Cal. 801, 90 P 121.

87. Assessment of railroad. Baltimore, etc., R. Co. v. Oregon Tp. of Clark County [Ind.] 84 NE 529.

Refunding. See 8 C. L. 2079

§ 11. *Collection. A. Collectors; their authority, rights and liabilities.* See 8 C. L. 2089—Specific statutory provisions cover most of the questions relative to the appointment,[88] term,[89] authority,[90] duties,[91] liabilities,[92] and compensation [93] of tax collectors. A collector cannot act outside of the territorial limits of his authority.[94] He holds the funds collected in trust for the state or municipality, as the case may be,[95] and such funds may be followed into the hands of parties receiving them with notice.[96] A collector may be compelled by mandamus to apply tax collections as required by law.[97] Under statutory provisions, a collector's settlement may be assailed by excep-

88. Under Act July 2, 1895 (P. L. 434), court of quarter sessions may appoint new collector when office of township collector is vacated by creation of borough out of part of township wherein collector resides. Commonwealth v. Topper [Pa.] 68 A 666. Under general authority conferred by Const. art. 9, § 14, to provide for county officers not specified by constitution, the general assembly had power to enact Rev. St. 1899, § 7028, relative to filling by appointment by governor of vacancy in office of county revenue collector created by § 9203. State v. Herring, 208 Mo. 708, 106 SW 984. Under Ky. St. 1903, § 4131, the authority of the county to appoint collector of county taxes where there is no sheriff extends to appointment of only one collector at the same time, and separate collectors cannot be appointed for general and special taxes. Commonwealth v. Wade's Adm'r, 31 Ky. L. R. 1185, 104 SW 965.

89. Under Act July 2, 1895 (P. L. 439), where borough is created out of part of township, and township collector resides in part so taken, his office becomes vacated, the act, by implication, disqualifying the incumbent. Commonwealth v. Topper [Pa.] 68 A 666. Term commences at time and continues for the term prescribed by statute. Rev. St. 1897, §§ 9203, 9267, 9247, 7028, relative to term of county revenue collector construed, in view of Const. art. 9, § 14, limiting terms of county officers to four years. State v. Herring, 208 Mo. 708, 106 SW 984.

90. Under act June 25, 1885 (P. L. 187), the collectors of taxes are only ones authorized to collect township and borough taxes respectively, to exclusion of powers, etc., of collector of school tax under former system. Commonwealth v. Topper [Pa.] 68 A 666. Under City and Towns Act, Acts 1905, pp. 239, et seq., c. 129, §§ 43, 195, 197, 200-208, city taxes are collected by county treasurer and turned over to city treasurer, by former, in county seat cities of first, second and third classes, being also city treasurer ex officio. Truelove v. Washington [Ind.] 82 NE 530. Under Ky. St. 1903, § 4129, providing that sheriff shall collect state, county and district taxes unless some other officer is directed by "law" to collect same, the sheriff, if there be one, must collect such taxes unless some other officer is designated by statute for such purpose. Commonwealth v. Wade's Adm'r, 31 Ky. L. R. 1185, 104 SW 965. Under Laws 1895, p. 25, c. 4322, § 36, it is not necessary for tax collector to obtain a warrant from county commissioners unless there has been a total failure or omissions on part of collector to obey command of warrant issued by assessor. Hunt v. Turner [Fla.] 45 S 509.

91. County collector has no discretion under Rev. St. 1901, par. 3917, as amended by Laws 1903, p. 165, No. 92, as to whether or not he must sue for taxes, but must sue as required by act. Territory v. Gaines [Ariz.] 93 P 281. It is the duty of the sheriff or collector, in the absence of statute to the contrary, to take notice of the levy of taxes by the fiscal court, and a special certification of a county levy is not necessary to charge him with the duty of collecting it. Commonwealth v. Wade's Adm'r, 31 Ky. L. R. 1185, 104 SW 965. Territory, being interested to extent of one-third of county taxes, may, as a party beneficially interested, maintain **mandamus** to compel county collector to enforce payment of taxes. Territory v. Gaines [Ariz.] 93 P 281.

92. Town treasurer under Vt. St. 480 can only be held to account for the amounts of tax bills committed to him in excess of the money actually received by him. Town of Brookfield v. Bigelow, 80 Vt. 428, 68 A 656. Under Code 1892, §§ 3819, 3820, 3824, collector is liable for breach of bond where he fails to repay, upon redemption, an overbid by the purchaser. Bank of Indianola v. Dodds [Miss.] 44 S 767. Tax collector not liable for interest on such overbids. Id.

93. Under St. 1903, §§ 1884, 4148, compensation of collector of county taxes is to be computed upon aggregate amount, 10 per cent on first $5,000, and 4 per cent on balance. Green County v. Howard [Ky.] 105 SW 897. Ordinance giving collector a per cent on collections for one year after expiration of his term held to cover only collections by or through proceedings begun or had during his term. City of Covington v. Zeisz [Ky.] 108 SW 349. Commissions on capitation taxes provided for by Code 1906, c. 29, § 53, are in full of sheriff's compensation for collection, and he is not entitled to further compensation under chapter 30. Hawkins v. Bare [W. Va.] 60 SE 391.

94. Collector of one county cannot execute process in another county. Russell v. Robinson & Co. [Ala.] 44 S 1040.

95. Deputy sheriff holds collections in trust for county. Hill v. Flemming [Ky.] 107 SW 764.

96. Creditor of deputy sheriff held to have notice from fact that check received by him was signed "Deputy Sheriff." Hill v. Flemming [Ky.] 107 SW 764.

Sureties who have paid the amount of the deficit created by breach of trust may follow the funds. Hill v. Flemming [Ky.] 107 SW 764.

97. Where tax to pay judgment was spread upon tax rolls and collected by the city treasurer and kept separate from taxes for other city purposes, the treasurer could not

tion [98] or by suit to surcharge the same.[99] A collector is not liable for expense of setting aside judgment of tax foreclosure caused by his failure to give the owner credit for taxes paid.[1] He is liable on his bond for a refusal to discharge his duties [2] and for all deficits and defaults in his account,[3] but his sureties are not liable for collections which he was not legally bound to make [4] and are entitled to the benefit of all payments legally made.[5] Where the bond is given to the state for the benefit of all subdivisions thereof, one of such subdivisions may intervene by scire facias on a judgment in favor of other subdivisions.[6] In the absence of any showing of error, a county is bound by a payment by a surety accepted as in full of his liability under a judgment against him and his principal,[7] and the statements of the county treasurer at the time of such payment are admissible against the county.[8] Payment of a tax judgment to one unauthorized to collect it will not be enjoined.[9] A petition by an officer for commissions must disclose facts entitling him to such commissions.[10]

(§ 11) *B. Methods of collection in general.*[See 8 C. L. 2089]—A tax, not being a

defend a mandamus suit by judgment creditor on ground that tax was not levied strictly according to the statute. See Comp. Laws, § 3983. Montpelier Sav. Bk. & Trust Co. v. Quinn, 149 Mich. 701, 14 Det. Leg. N. 551, 113 NW 308.

98. Action of court upon exceptions to collector's settlement under St. 1903, § 4146, is conclusive upon all parties, if not appealed from, as to matters involved in the exception, but if there are other mistakes in the settlement which are not discovered by county attorney or not presented in exceptions filed by him, such matters may be presented by any party in interest in a suit to surcharge the settlement. Green County v. Howard [Ky.] 105 SW 897. Such suit to surcharge collector's account is founded on fraud or mistake within limitations prescribed by St. 1903, § 2519. Id. Right of action in such case does not accrue until confirmation of settlement. Id. Limitations cannot be presented by demurrer to petition in such a suit, but must be pleaded. Id. Reply to plea of limitations is demurrable if it does not avoid the plea. Id. Reply held insufficient. Id. Burden of proof as to matters in avoidance of the limitation is upon party alleging them. Id.

99. Mutual mistake of sheriff and county commissioners in allowing sheriff to retain certain moneys collected, on theory that he was entitled to such moneys, held sufficient to sustain suit. Davis v. Com. [Ky.] 107 SW 306. The rule that when a settlement has been had with the collector and a balance found due the county no action can be maintained for such balance without a prior demand therefor by someone appointed to receive the same does not apply to a suit to surcharge former sheriff's settlement on ground of fraud or mistake. Id. Such suit not barred by failure of county attorney to except to settlement as provided by St. 1903, § 4146. Id. Such suit not barred by recording of settlement as provided by St. 1903, § 4146. Id. Such suit is not a collateral attack, and hence is not barred by St. 1903, § 4146. Id. Such suit is authorized by St. 1903, § 4146, where no appeal has been taken Id.

1. Such failure held not proximate cause of the injury. Coleman v. Lytle [Tex. Civ. App.] 107 SW 532.

2. Collector appointed under Ky. St. 1903, § 4131, where there was no sheriff, held liable on bond for refusal to collect special tax to pay judgment. Commonwealth v. Wade's Adm'r, 31 Ky. L. R. 1185, 104 SW 965.

3. Under Act May 25, 1887 (P. L. 271), action by a township against defaulting tax collector of local taxes is in assumpsit against collector and bondsman. Commonwealth v. Perrego, 218 Pa. 314, 67 A 621. Act April 16, 1845 (P. L. 532), as supplemented by Act April 21, 1846 (P. L. 413), and Act April 21, 1857 (P. L. 266), providing for certification of claims due commonwealth to attorney general for collection, held not applicable to township taxes. Id. Collector is not relieved from liability for the amount reported by the county auditors merely because no mention of such amount is made in subsequent reports. Commonwealth v. Maxwell, 34 Pa. Super. Ct. 631.

4. Sureties on sheriff's bond not liable for amount of taxes collected in excess of limit of levy fixed by Const. § 157. Boone v. Powell County [Ky.] 108 SW 251. Sureties on city collector's bond not liable for collections in excess of constitutional limit. Harper v. Catlettsburg, 31 Ky. L. R. 293, 102 SW 294.

5. In suit on sheriff's bond, the sureties were entitled to have claims paid by sheriff out of levy for 1905 where such claims were payable out of levies for prior years, but could not be credited thereon because paid out at 1905 levy. Aetna Indemnity Co. v. Lawrence County [Ky.] 107 SW 339. On remand, the sureties could amend their pleadings so as to obtain benefit of such credits. Id.

6. Though such judgment is by confession. Commonwealth v. Maxwell, 34 Pa. Super. Ct. 631. Poor district held not concluded as to liability of collector to it by report of county auditors that county treasurer was not charged with any balance in hands of borough collector. Id.

7, 8. Lycoming County v. Straub, 33 Pa. Super. Ct. 441.

9. Since there is no injury to municipality from such payment, the judgment not being discharged thereby. Stringer v. Holley [Tex. Civ. App.] 20 Tex. Ct. Rep. 178, 105 SW 1146.

10. City of Covington v. Zeisz [Ky.] 108 SW 349.

debt in the ordinary sense of the latter word,[11] cannot, unless expressly so provided by statute, be enforced by the forms of action ordinarily applicable for the recovery of a debt,[12] but the same considerations do not render such forms of action inapplicable after judgment adjudicating the liability.[13] Statutes relative to the collection of taxes must conform to constitutional limitations.[14] The power to provide for collection is implied from the power to assess.[15] In some cases an accounting may be had.[16] A national bank may be required to pay the tax on its shares of stock, its recourse being against the stockholders.[17]

(§ 11) *C. Procedure to enforce collection. Limitations.*[See 8 C. L. 2081]—The limitation upon a suit to collect a tax may depend upon the nature of the liability therefor, as whether it is contractual [18] or is a liability created by statute.[19] A limitation imposed by a statute providing the mode of collection does not apply to a tax not enforcible by such mode.[20] The question as to whether the limitation has run necessarily involves questions as to the accrual of the cause of action [21] and the tolling of the statute.[22]

Notification.[See 8 C. L. 2081]—Three kinds of notice are involved in the collection of taxes, viz.: Notice of delinquency, notice of judicial proceedings to enforce the tax, and notice of sale.

The notice of delinquency, commonly called the delinquent list, must conform to statutory requirements both as to formal matters, such as verification [23] and

11. See ante, § 1.

12. Indebitatus assumpsit not applicable. United States v. Chamberlain [C. C. A.] 156 F 881.

13. Judgment and order for sale of land and forfeiture to state. People v. International Salt Co., 233 Ill. 223, 84 NE 278.

14. Laws 1903, p. 162, No. 92, held a **general law.** Territory v. Gaines [Ariz.] 93 P 281. Act March 27, § 1907, art. 5, § 24, providing for **sale of corporate stock** on which taxes are not paid by Sept. 1, in any year, held contrary to Const. art. 11, § 8, relating to class legislation, all other property being delinquent July 1, in any year. Malone v. Williams, 118 Tenn. 390, 103 SW 798. Act March 27, 1907, art. 5, § 23, authorizing **districts** for personalty taxes assessed against persons about to move out of city, etc, whether delinquent or not, held violation of Const. art. 11, § 28, prohibiting class legislation, and of Const. art. 1, § 8, relating to due process of law. Id. Laws 1905, p. 502, c. 328, § 3, authorizing **discovery** in action to enforce railroad annual gross earnings tax, held valid, notwithstanding that discovery cannot be had in other suits, Rev. St. 1899. § 4096, having abolished bills of discovery. State v. Chicago & N. W. R. Co. [Wis.] 112 NW 515. Statute held not invalid as discriminative, since it applies to all railroads. Id.

15. County commissioners have implied power to authorize sheriff to collect taxes assessed against unlisted property. Caldwell Land & Lumber Co. v. Smith [N. C.] 59 SE 653.

16. Complaint in action to collect gross railroad earnings tax imposed by Rev. St. 1898, §§ 1211-1213, held to state cause of action for accounting in equity. State v. Chicago & N. W. R. Co. [Wis.] 112 NW 515.

17. Hager v. Citizens' Nat. Bank [Ky.] 105 SW 403; Hager v. American Nat. Bk. [C. C. A.] 159 F 396.

18. Action to collect railroad gross earnings tax imposed by Rev. St. 1898, §§ 1211-1213, held action based on contract, and subject to six-years statute of limitations, §§ 4222, 4229. State v. Chicago & N. W. R. Co. [Wis.] 112 NW 515.

19. Suit for railroad franchise tax under Laws 1891-92-93, p. 331, c. 103, art. 8, § 3, held governed by St. § 2515, as being upon a liability created by statute. Illinois Cent. R. Co. v. Com. [Ky.] 108 SW 245.

20. Suit for franchise tax on railroad under Laws 1891-92-93, p. 331, c. 103, art. 8, § 3, could not be brought under Laws 1889-90, p. 149, c. 1763, and hence was not subject to limitations prescribed by the last mentioned act. Illinois Cent. R. Co. v. Com. [Ky.] 108 SW 245.

21. Cause of action for annual railroad gross earnings tax accrues as to each annual tax upon default in payment thereof at time prescribed for such payment. State v. Chicago & N. W. R. Co. [Wis.] 112 NW 515.

22. State held not misled as to accuracy of reports of railroad filed in connection with annual gross earnings tax imposed by Rev. St. 1898, §§ 1211, 1213, so as to toll statute. State v. Chicago & N. W. R. Co. [Wis.] 112 NW 515. Limitation on action for false reports in connection with gross earnings tax imposed on railroads by Rev. St. 1898, §§ 1211-1213, is not within § 4222, subd. 7, relative to actions based on fraud. Id.

23. Delinquent list void if not verified by sheriff as required by Code 1906, § 843. Devine v. Wilson [W. Va.] 60 SE 351. Return of delinquent list absolutely void where sheriff filled out the return, but failed to swear to it before someone authorized by law to administer oaths, as required by Code 1906, § 844, and such omission cannot be supplied or the record subsequently corrected. Wilkinson v. Linkous [W. Va.] 61 SE 152. Such return not cured by Code 1906, § 884. Id. On trial of ejectment by tax sale purchaser

filing,[24] and as to matters of substance, such as description of the property [25] and the amount due.[26] The rule as to idem sonans is inapplicable to delinquent lists.[27] Where the record does not show what rate was extended, the collector's delinquent list is presumed to be correct.[28]

Notice of proceedings to collect taxes is essential to due process of law [29] and to the jurisdiction of the court,[30] but it may be waived [31] and is not invalidated by harmless irregularities.[32] Published notice of tax foreclosure proceedings must conform to statutory requirements,[33] but such service is presumed proper where it is authorized by law in certain cases and there is nothing to show that it was not proper in the particular case,[34] and the presumption of jurisdiction arising from the judgment recital of notice is not necessarily overcome by defects in the record.[35] Tax foreclosure proceedings being in rem, the property owner is bound to take notice thereof, regardless of the persons to whom the property is assessed,[36] but for the same reason the notice must sufficiently describe the property.[37]

Notice of sale is treated elsewhere.[38]

Parties. See 8 C. L. 2032—Suit for taxes upon the property of an unincorporated association should be against the persons holding the legal title.[39]

Pleading. See 8 C. L. 2032—Defenses must be pleaded as required by statute.[40] Exemptions claimed constitute matter of defense to the cause of action and should be pleaded as such.[41] Formal defects are not available on demurrer.[42]

against one claiming under former owner, a certified copy of delinquent list, void for failure of sheriff to verify it, is admissible to impeach the deeds. Id.

24. Mere errors in the filing date of the certificate of delinquency may be corrected by order nunc pro tunc after judgment of foreclosure. Peabody v. Meacham [Wash.] 95 P 322.

25. Designation as part of larger tract, without identifying what part, is insufficient, such as "25 A, in § 14, Twp. 20, Rang 3, Acres 25, year 1894." Miller v. Daniels [Wash.] 92 P 268.

26. Delinquent list need not state separately the items of taxes, penalties and costs charged against the property. Statement of total sum is sufficient. Chapman v. Zobelein [Cal.] 92 P 188. Failure of delinquent list to contain characters representing dollars and cents not fatal where the meaning was apparent from the contract. Id.; Fox v. Wright [Cal.] 91 P 1005.

27. Collins v. Reger [W. Va.] 57 SE 743.

28. People v. St. Louis, etc., R. Co., 230 Ill. 61, 82 NE 305.

29. Notice of proceedings to foreclose tax lien, afforded by Mich. Laws 1893, No. 206, held due process of law. Longyear v. Toolan, 28 S. Ct. 506.

30. Lands not described in warning order cannot be proceeded against. Foohs v. Bilby, 83 Ark. 234, 103 SW 386.

31. Irregularity in waiver of service in statutory suit, in that waiver was endorsed on petition instead of on summons, held not to subject judgment to collateral attack. Walker v. Mills [Mo.] 109 SW 44.

32. Surplus directions to sheriff in citation in suit under Sayles' Civ. St. 1897, art. 5232, against unknown owner, held not misleading to owner, and hence not to invalidate the citation. State v. Unknown Owner [Tex. Civ. App.] 19 Tex. Ct. Rep. 1, 103 SW 1116. One defendant in statutory suit for enforcement of taxes against land cannot complain of failure to serve a codefendant. Walker v. Mills [Mo.] 109 SW 44.

33. Under Laws 1897, p. 182, c. 71, § 97, and Ballinger's Ann. Codes & St. § 4878, providing that defendant shall be required to appear within sixty days from date of first publication a summons by publication in tax foreclosure, requiring appearance within sixty days after service on defendant, exclusive of day of service, is insufficient to confer jurisdiction. Bartels v. Christensen, 46 Wash. 478, 90 P 658. Laws 1897, p. 182, c. 71, § 97, making provisions as to service in action in superior court applicable to tax foreclosure proceedings, was not changed or affected by Laws 1899, p. 285, c. 141. Id.

34. In tax foreclosure proceedings. Peterson v. Lara, 46 Wash. 448, 90 P 596.

35. Defective affidavit of service by publication in tax foreclosure proceedings. Peterson v. Lara, 46 Wash. 448, 90 P 596.

36. Shipley v. Gaffner [Wash.] 93 P 211. Ball. Ann. Codes & St. § 1749, requiring treasurer to state on stub of delinquency certificate name of owner, refers to owner as stated on tax list or roll. Id. Stub may state either name on roll for year for which tax is delinquent or on roll at time of making of certificate. Id.

37. Description of property held insufficient to give owner notice, and hence foreclosure was invalid. Welch v. Beacon Place Co. [Wash.] 93 P 923.

38. See post, § 12A, Prerequisites of Sale.

39. Should have been against board of managers. Nunn v. Louisville, 31 Ky. L. R. 1293, 105 SW 119.

40. Defense of excessive valuation must be set up as provided by Comp. Laws, § 1124, specifying defenses available. State v. Carson & Colorado R. Co. [Nev.] 91 P 932.

41. Should be set up in answer and not in rejoinder. Citizens' Nat. Bk. v. Com. [Ky.] 108 SW 231.

42. Failure of complaint, in action to collect railroad gross earnings tax imposed by

Evidence.[See 8 C. L. 2088]—It is incumbent upon the taxpayer to show irregularities and defects in the levy or assessment [43] and prejudice therefrom.[44] Where an assessment has become final by operation of law, its finality cannot be affected by extrinsic evidence.[45]

Judgment.[See 8 C. L. 2088]—Where the description of the property is denied, the court has jurisdiction to ascertain the true boundary and to enter a decree accordingly.[46] Where the proceedings are in personam, persons not parties thereto are not bound by the judgment or decree.[47] There is some conflict as to the effect of the judgment or decree upon persons not parties where the proceedings are in rem, such conflict being the result of the difference between the statutes of the various states as judicially construed, it being held on the one hand that, while the judgment or decree in the statutory suit is against the property and does not otherwise bind the parties,[48] the interest of one not a party is not affected,[49] while on the other hand it is held that all persons, whether parties or not, are bound by such judgment or decree.[50] In Washington one who has paid his taxes may collaterally attack a tax judgment taken upon default on constructive service.[51] A judgment foreclosing a tax lien is not subject to collateral attack because the petition did not state a cause of action.[52]

Execution.[See 8 C. L. 2083]—A tax execution must be issued by the proper officer [53] in his official capacity,[54] and must recite the jurisdictional facts.[55] The misspelling of the collecting officer's name in the tax execution does not necessarily invalidate it.[56] The levy of an execution should be signed by the levying officer,[57] but he need not sign by his own personal act.[58]

Rev. St. 1898, §§ 1211-1213, to state tax for each year separately, is defect of form only, and cannot be considered on demurrer. State v. Chicago & N. W. R. Co. [Wis.] 112 NW 515.

43. State v. Backus-Brooks Co., 102 Minn. 50, 112 NW 863. In suit to collect highway tax, burden is on defendant to show that township had not legally adopted labor system under which it was acting and mere inability of clerk to find petition for such system on record was not sufficient to sustain such burden. People v. Toledo, etc., R. Co., 231 Ill. 390, 83 NE 186. Presumption of legal levy of township highway tax under labor system not rebutted by failure to find petition on which such system is required to be based, after lapse of twenty-three years. People v. Toledo, etc., R. Co., 231 Ill. 514, 83 NE 193. Where clerk testified that he found a petition, but only one, and that one was insufficient, the burden was sustained of proving that labor system had not been legally adopted. Id. Burden on defendant, in suit under "Scavenger Act," to prove lack of authority to levy city tax. State v. Several Parcels of Land [Neb.] 113 NW 810. Under so-called "Scavenger Act," Cobbey's Ann. St. 1903, § 10651, petition for tax foreclosure is prima facie evidence of legality of taxes sought to be foreclosed, and in absence of evidence to overcome such petition, every step necessary to levy a valid tax will be presumed to have been taken. State v. Several Parcels of Land [Neb.] 113 NW 248.

44. State v. Backus-Brooks Co., 102 Minn. 50, 112 NW 863. Irregularities in method of keeping and making record of state board held not prejudicial. Id.

45. Testimony of ex-member of board of valuation that assessment was not intended to be final. Illinois Cent. R. Co. v. Com. [Ky.] 108 SW 245.

46. Medland v. Van Etten [Neb.] 112 NW 362.

47. Suit in chancery by levee board as authorized by act 1893. Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

48. Walker v. Mills [Mo.] 109 SW 44.

49. Walker v. Mills [Mo.] 109 SW 44. Interests of remaindermen. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997.

50. Sale for levee taxes. Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

51. Under Laws 1897, p. 190, c. 71, § 114, making judgment conclusive of prior proceedings except when taxes have been paid. Bullock v. Wallace [Wash.] 92 P 675.

52. Because petition failed to allege antecedent sale, though it was also alleged that the party claiming under the foreclosure decree knew of such sale. Cass v. Nitsch [Neb.] 115 NW 753.

53. Under law in force in 1888, a tax execution against unreturned wild land held properly issued by tax collector. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

54. Addition of letters "T. C." to signature to tax execution sufficiently indicates that the official who issued it did so in his capacity as tax collector. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

55. Tax execution held to sufficiently recite the jurisdictional facts. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

56. Where it appears that the officer authorized another to sign it in his presence, or actually adopted the signature and acted

Costs See 8 C. L. 2083 are entirely statutory.[59]

Appeal. See 8 C. L. 2083—The appellate court will not review questions of practice in the trial court [60] or finding of fact supported by the evidence.[61] As in other cases, questions determined on a former appeal constitute the law of the case.[62]

(§ 11) *D. Interest and penalties.* See 8 C. L. 2084—Interest may usually be recovered on delinquent taxes,[63] but not on statutory penalties.[64] Interest is not allowable where a valid tender of the taxes has been made when due.[65] Payments are applicable first to accrued interest.[66] The right to penalties incurred on account of the nonpayment of a county tax belongs to the county.[67]

§ 12. *Sale for taxes. A. Prerequisites to sale.* See 8 C. L. 2084—The first essential of a valid tax sale is a valid,[68] unpaid,[69] delinquent [70] tax. The sale must be under an existing law,[71] and since statutes relating to the forfeiture or sale of property for taxes are strictly construed in favor of the property owner,[72] the sale must be in strict conformity with statutory requirements,[73] such as those relating to the delin-

upon it. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

57. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

58. May adopt signature made by another. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44.

59. In suit under Acts 1897, p. 136, c. 103, § 9, costs of suit to collect tax on several unimproved town lots owned by same person must be taxed the same as if such lots constituted a single tract though they were assessed separately to "unknown" owner. Raht v. State [Tex. Civ. App.] 20 Tex. Ct. Rep. 746, 106 SW 900.

60. Question whether objections to village taxes can be filed in same series with objections to road and bridge taxes. People v. Chicago, etc., R. Co., 231 Ill. 454, 83 NE 213.

61. Findings as to ownership of property and notice of increase of valuation. State v. Carson & Colorado R. Co. [Nev.] 91 P 932.

62. Where on former appeal it was held that tax deed was evidence of preparation of delinquent list and that copies of delinquent list for certain years were in evidence and, in absence of direct evidence to contrary, established existence of originals, and such copies were again in evidence on new trial, such copies, together with presumptions arising from deed, established as law of the case, in absence of direct evidence to contrary, the existence of the originals. Davis v. Pacific Imp. Co. [Cal. App.] 94 P 595.

63. Where one delays the collection of a tax by appealing from the assessment, he is liable on affirmance to legal interest on the amount of the tax from the date of the assessment. Bank of Kentucky v. Com. [Ky.] 107 SW 812.

64. Penalty of 20 per cent provided for by St. 1903, § 424, upon assessment of omitted property. Bank of Kentucky v. Com. [Ky.] 107 SW 812.

65. Where taxpayer makes sufficient tender of general taxes, which is refused because of failure to pay invalid special tax, interest should not be charged in suit under "Scavenger Act." State v. Several Parcels of Land [Neb.] 114 NW 283.

66. Where taxes were paid, without interest, after dissolution of injunction against collection, such payment was applicable pro tanto to principal and interest accrued to date, leaving an interest-bearing principal still unpaid. Commonwealth v. Louisville & N. R. Co., 31 Ky. L. R. 819, 104 SW 267.

67. Davis v. Com. [Ky.] 107 SW 306.

68. Sale under assessment in wrong name held absolutely void. See Act 1882, No. 96, p. 119. In re Sheehy, 119 La. 608, 44 S 315. Sale based on assessment under Madison act held void, such act being unconstitutional. Eastland v. Yazoo Delta Lumber Co. [Miss.] 43 S 956. Sale of lands in unorganized county upon an assessment by comptroller without compliance with Rev. St. 1895, art. 5141, as to comparison of lands rendered to assessor of county to which unorganized county was attached with list previously rendered to him by nonresidents, etc., held void. Keenan v. Slaughter [Tex. Civ. App.] 108 SW 703. Where land is sold for the aggregate taxes assessed at different times, the sale will be invalidated by the invalidity of any of such taxes. Saranac Land & Timber Co. v. Roberts, 109 NYS 547. Sale of undivided half of land held void because taxes had been paid. Page v. Kidd [La.] 46 S 35. Sale of other undivided half held also void. Id.

69. Sale for double assessment after payment of one tax on land held void. People v. Golding, 55 Misc. 425, 106 NYS 821.

70. Where owner's failure to pay was due to mistake of county treasurer, a foreclosure was void. Bullock v. Wallace [Wash.] 92 P 675.

71. Laws 1892, p. 58, c. 39, relating to tax sales in Browne county, were repealed by general tax law (Laws 1896, p. 795, c. 908), and sale under the special law was void. In re McIntyre, 108 NYS 242. Order of court confirming title of purchaser in such case held absolutely void, though consented to by owner. Id.

72. Baker v. Webber, 102 Me. 414, 67 A 144.

73. It must appear that assessor made proper record of assessment or committed to collector a proper list of assessments, comprising an assessment of the land in question. Baker v. Webber, 102 Me. 414, 67 A 144. Sale void where clerk of court fail to make and certify a record, before the day of sale, of list of delinquent lands and notice of sale as required by Kirby's Dig. § 7086. Townsend v. Penrose, 84 Ark. 316, 105 SW 588. Sale under Rev. Laws, c. 13, § 41, au-

quent list,[74] notice of time and place for payment of taxes,[75] demand for payment,[76] and notice of sale.[77] A sale under a judgment or decree of court [78] is not invalidated by nonjurisdictional irregularities.[79] Judicial notice is taken of the invalidity of sales previously declared void by the same court.[80]

(§ 12) *B. Conduct of sale.*[See 8 C. L. 2085]—Statutory requirements as to the conduct of the sale must be strictly complied with.[81] The sale must be made by a duly authorized officer [82] at the place designated by law [83] and for the proper amount,[84] including only such items as are properly chargeable against the property.[85] Only the

thorizing sale of whole or such undivided portion as may be necessary, etc. Williams v. Bowers [Mass.] 84 NE 317. Sale held void because record did not show filing and authentication of delinquent list, as required by Kirby's Dig. § 7083, and such list was in fact not filed within time specified by such section. Boyd v. Gardner, 84 Ark. 567, 106 SW 942. Deed based on sale which is based on unverified delinquent list is void. Devine v. Wilson [W. Va.] 60 SE 351.

74. Sufficiency of delinquent list is treated elsewhere. See ante, § 11C, subd. Notification.

75. Notice to residents of the time and place when and where taxes will be received before making the levy and sale is absolutely necessary to the validity of the sale, unless excused by a demand and an unequivocal refusal to pay. Brush v. Watson [Vt.] 69 A 141.

76. Collector went to residence of deceased owner and heirs told him lands were sold. Collector failed to try to locate new owners or ascertain name and made no demand. Held not sufficient to authorize a tax sale under Act Apr. 29, 1844, § 41 (P. L. 501), relating to "seated" lands. Norris v. Delaware, etc., R. Co., 218 Pa. 88, 66 A 1122.

77. Eames v. Woodson [La.] 46 S 13.

Affidavit of making or delivery of paper containing notice of sale to subscribers held insufficient. Mitchell v. Knott [Colo.] 95 P 335. Since Tax Laws, Laws 1896, p. 833, c. 908, § 151, provided merely that **publication** of notice of sale by county treasurer shall be made in certain newspapers without specifying what part thereof, § 157, providing that provisions as to sales by state comptroller shall apply to sales by county treasurers except as otherwise provided, does not require notice of sale by county treasurer to be published in body of paper as distinguished from supplement as required of sales by comptroller by § 120. Morton v. Horton, 189 N. Y. 398, 82 NE 429. Sale void where clerk failed to make **record of certificate showing publication of notice.** Osceola Land Co. v. Chicago Mill. & Lumber Co., 84 Ark. 1, 103 SW 609.

Description of property held sufficient. Best v. Wohlford [Cal.] 94 P 98. Notice must sufficiently describe the land. State Finance Co. v. Mulberger [N. D.] 112 NW 986. Notice must definitely describe the land so that it can be located. People v. Golding, 55 Misc. 425, 106 NYS 821; State Finance Co. v. Trimble [N. D.] 112 NW 984. Under Rev. Laws, c. 13, § 38, requiring notice of sale to contain a substantially accurate description of the rights, lots, or divisions of land to be sold, the description must be sufficient to enable owner and bidder to locate the property. Williams v. Bowers [Mass.] 84 NE 317. Description of property as part of lot, without sufficient data to designate what part, held insufficient. Id. Under U. S. 504, requirement of notice to **nonresidents** held mandatory. Brush v. Watson [Vt.] 69 A 141.

78. Sale of land under original judgment instead of under certified copy thereof will not render the sale void. State Finance Co. v. Trimble [N. D.] 112 NW 984.

79. Sale not invalidated by fact that judgment for sale was not against each lot separately as it should have been, such irregularity not affecting jurisdiction of court. Walker v. Mills [Mo.] 109 SW 44. Jurisdiction to enter a decree of sale is not affected by the inclusion of an erroneous item of taxes. Blanchard v. Young [Mich.] 15 Det. Leg. N. 254, 116 NW 189. Where court was in session on day set for hearing of petition for sale, and for three days thereafter, decree held not invalidated because chancery journal showed entry of decree on day after adjournment. Temple v. Preston, 150 Mich. 486, 14 Det. Leg. N. 772, 114 NW 336.

80. Judicial notice taken by supreme court that sales in 1873 for 1872 taxes are invalid as previously decided by it. Files v. Jackson, 84 Ark. 587, 106 SW 950.

81. Preston v. Hirsch, 5 Cal. App. 485, 90 P 965.

82. Collector making sale must have been legally elected and qualified. Baker v. Webber, 102 Me. 414, 67 A 144.

83. Sale on other day held void. Kennedy v. Sanders [Miss.] 43 S 913. Must be made on the day fixed by statute or a day to which a legal adjournment is had. McLemore v. Anderson [Miss.] 43 S 878. Sale of lands in unorganized county at place other than that provided by Rev. St. 1895, art. 5145. Keenan v. Slaughter [Tex. Civ. App.] 108 SW 703.

84. Sale void where not conducted as required by Laws 1901, p. 198, c. 154, providing that each tract shall be struck off to the bidder who will agree to accept the lowest rate of interest, etc. Youker v. Hobart [N. D.] 115 NW 839. Compromise act, Gen. St. 1901, §§ 7672, 7673, authorizing county commissioners, where property offered at tax sale remains unsold for three years for want of buyers, to cause a certificate to be issued for less than full amount due thereon, does not violate constitutional requirements that rate shall be equal, nor is its title insufficient, nor is it void as attempt to devolve judicial powers upon administration officers. Lincoln Mortgage & Trust Co. v. Davis [Kan.] 92 P 707.

85. Land held properly sold for costs amounting to eighty-five cents. Sibly v. Carson [Ark.] 109 SW 1007. Sale not invalidated by inclusion of clerk's transfer fee

property covered by the assessment can be sold,[86] and usually only so much thereof can be sold as is necessary to pay the taxes,[87] and due regard must be had for divisions and subdivisions when a separate sale is practicable,[88] especially where such divisions are owned by different persons.[89] Separate sales are also sometimes required for special and general taxes.[90] The officer making the sale acts as a ministerial officer in making a levy and sale,[91] being constituted by law the agent of the owner without the latter's consent,[92] and it is such officer's duty to act fairly in conducting such levy and sale so as not to cause an unnecessary sacrifice of the property,[93] and while gross inadequacy of price will not alone invalidate the sale, it may do so in connection with other irregularities.[94] The court is sometimes vested with power to accept or reject bids and to vacate erroneous or improvident orders made during the progress of the sale.[95] A record of the sale is usually required to be made or filed.[96] A tax sale certificate must be in proper form [97] and must state the year of the assessment,[98] sufficiently describe the property sold,[99] state the amount for which the sale was made,[1] and fix the date of the expiration of the period of redemption.[2] Such a certificate

though clerk failed to make transfer after sale as required by statute. Id.

86. Sale of more land than assessed held void. People v. Golding, 55 Misc. 425, 106 NYS 821.

87. Under V. S. 498, requiring sale of only so much land as is necessary, etc., a sale of 108 acres of land worth $4,000, when tax was only $20, held invalid. Brush v. Watson [Vt.] 69 A 141.

88. City or town lots must be sold separately. Keller v. Hawk [Okl.] 91 P 778. Under Com. St. 1887, fifth div., and Rev. St. 1879, fifth div., noncontiguous city lots cannot be sold en masse. North Real Estate Loan & Title Co. v. Billings Loan & Trust Co. [Mont.] 93 P 40.

De facto town lots must be sold separately, though the town is not incorporated and there is no plat of lots on file, the property, however, being in fact divided into lots. La Cotts v. Quertermous, 83 Ark. 174, 103 SW 182. A general **allegation** that land sold en masse could have been sold in parcels held sufficient on demurrer. Francis v. Sandlin [Ala.] 43 S 829.

89. Sale en masse of land of nonresidents having different interests thereon, without specifying owners or their interests, held fatally defective. People v. Golding, 55 Misc. 425, 106 NYS 821.

90. Under Eau Claire Charter (Laws 1899, vol. 2, p. 597, c. 184), sale for special assessment must be made separately from sales for general taxes, and a sale is void if the two are included in sale by city treasurer, he, furthermore, having no authority to sell for special taxes. Williams v. Eau Claire County [Wis.] 115 NW 140.

91, 92. Younger v. Meadows [W. Va.] 59 SE 1087.

93. Must not make unreasonable levy and must sell property in separate parcels when susceptible of division. Younger v. Meadows [W. Va.] 59 SE 1087.

94. Younger v. Meadows [W. Va.] 59 SE 1087. Sale held void by reason of unlawful arrangement between bidder, causing **elimination** of competitive bidding. Youker v. Hobart [N. D.] 115 NW 839.

95. Such powers held not affected by provisions of "Scavenger Act." Act, Cobbey's Ann. St. 1903, § 10644-10691. State v. Several Parcels of Land [Neb.] 116 NW 40.

96. Report of sale indorsed "Received and filed," and signed by county clerk as such, held sufficient to show filing in county clerk's office. Temple v. Preston, 150 Mich. 486, 14 Det. Leg. N. 772, 114 NW 336. Assessment, return of collector, and conveyance by treasurer, must show a sufficient description of the same property so that record will identify property sold. Norris v. Delaware, etc., R. Co. 218 Pa. 88, 66 A 1122. Description of coal and seated lands after death of owner and severance of coal held insufficient. Id. Sale held void where clerk of court fails to keep record thereof as required by Kirby's Dig. § 7092. Townsent v. Penrose, 84 Ark. 316, 105 SW 588. But see Sibly v. Cason [Ark.] 109 SW 1007, where it was held that sale was not invalidated by failure of clerk to transfer land to purchaser on land books as required by Kirby's Dig. § 7092.

97. Certificate of sale not rendered void on its face by fact that portions of blank form, under Laws 1897, p. 76, c. 67, which apply to sale under different conditions, are not erased before delivery. State Finance Co. v. Trimble [N. D.] 112 NW 984.

98. Preston v. Hirsch, 5 Cal. App. 485, 90 P 965. Omission in this regard not cured by caption. Id. Pol. Code, § 3885, providing that mere irregularities shall be disregarded, does not cure failure to state year of assessment. Id.

99. Sufficient where county was named and only one tract in county answered the description, though base and meridian were not given. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936.

1. Only amounts required by statute to be stated in a tax sale certificate need be stated therein. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936. Under express provision of Pol. Code, § 3776, only amount required to be stated is amount of assessment, and amount of penalties, costs, and charges need not be separately set forth. Id.

2. St. 1903, p. 63, c. 59, expressly cured errors in fixing such date. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936.

may be assignable [3] and is evidence of prior proceedings,[4] provided it is not void,[5] and sometimes may even overcome the recitals of the tax deed.[6]

(§ 12) *C. Return of sale and confirmation thereof.* See 8 C. L. 2085—The return of sale must be made and filed as required by statute.[7] The rule as to idem sonans cannot be invoked to avoid the effect of a misnomer of the owner.[8] The scope of the hearing on an application to confirm a tax sale depends upon the provisions of the statute.[9] The court retains jurisdiction until confirmation to correct error as to matters not settled by the decree of sale.[10] A confirmaion decree is not binding upon persons not parties to the proceedings,[11] and while it cures mere irregularities,[12] it does not cure intrinsic defects.[13]

§ 13. *Redemption.* See 8 C. L. 2085—Only such persons may redeem from tax sale as come within the terms of the statute, such as the owner [14] and persons having an estate or interest in the land.[15] The statutory limitation upon the time for redemption [16] is not a limitation of action.[17] A limitation of the time as of the date of the execution of the tax deed does not apply where the deed is void,[18] nor is the right to redeem extended by the wrongful refusal of the purchaser's demand for a deed,[19]

3. Tax sale certificate issued under compromise act, Gen. St. 1901, §§ 7672, 7673, is assignable. Lincoln Mortg. & Trust Co. v. Davis [Kan.] 92 P 707.

4. Prima facie evidence of what occurred at sale. Keller v. Hawk [Okl.] 91 P 778.

5. Certificate void for insufficient description of property is not evidence of the levy and assessment. State Finance Co. v. Mulberger [N. D.] 112 NW 986.

6. Where deed was executed by another treasurer four or five years after sale and his authority was negatived by the certificate. Keller v. Hawk [Okl.] 91 P 778.

7. Under law of West Virginia, the failure of recorder, apparent on face of record, to note on lists of sales the day on which the sheriff returned such sales to recorder's office, and absence of date to sheriff's affidavit to such lists, and absence of sheriff's signature to certificate, renders sale void. Fay v. Crozer, 156 F 486. Return of sheriff required by B. & C. Comp. § 3118, and record by clerk as provided for by Laws 1893, p. 87, cannot be **amended** by inserting block number so as to affect bona fide purchaser from owner without notice, where property was sold to state at tax sale and thereafter resold, as provided by Laws 1893, p. 28, and B. & C. Comp. §§ 3131, 3134, the sheriff's deed on such resale also omitting the block number. Hall v. O'Connell [Or.] 94 P 564. Failure of sheriff to verify return of sales held **cured** by Code 1906, § 884. Wilkinson v. Jinkens [W. Va.] 61 SE 152.

8. Collins v. Reger [W. Va.] 57 SE 743.

9. On application to confirm sale under decree in "Scavenger Suit," validity of taxes may be attacked. State v. Several Parcels of Land [Neb.] 113 NW 243.

10. Where the amount and existence of the tax is not put in issue as a controverted question prior to decree in suit under the scavenger act, the court retains jurisdiction until confirmation of the sale for purpose of correcting mistakes and preventing injustice. State v. Several Parcels of Land [Neb.] 113 NW 196.

11. Osceola Land Co. v. Chicago Mill. & Lumber Co., 84 Ark. 1, 103 SW 609.

12. Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606.

13. Confirmation by decree in proceedings under Kirby's Dig. §§ 661, 675, does not validate a void tax title. Updegraff v. Marked Tree Lumber Co., 83 Ark. 154, 103 SW 606. Tax title based upon an unconstitutional act cannot be validated by confirmation by decree of court. Mason v. Gates, 82 Ark. 294, 102 SW 190.

14. One who has possessed a tract of land as owner for a number of years is considered in law a provisional owner, with exclusive rights of entry and possession, and is entitled to redeem from tax sale. Bentley v. Cavallier [La.] 46 S 101.

15. Husband held not to have such "estate or interest" in land of wife as to give him status to redeem land of wife assessed to him, though there was birth of issue. Eames v. Armstrong [N. C.] 59 SE 165. Inchoate right of dower held not estate in land within Laws 1885, p. 699, c. 405, § 7, authorizing redemption of land by persons having estate therein. Rosenblum v. Eisenberg, 108 NYS 350.

16. Owner has three years and any additional time until execution of tax deed. Pierce v. Adams [Kan.] 93 P 594. Has one year after recording of tax deed. Gonzales v. Laux, 119 La. 657, 44 S 332. Time for redemption does not expire until six months after the sheriff's return of service of the statutory notice has been filed. Holmes v. Loud [Mich.] 14 Det. Leg. N. 474, 112 NW 1109.

17. Hence does not come within Const. § 104, providing that limitations shall not run against state or county, etc., and a county is barred from redemption if it does not redeem within the statutory time. Tallahatchie County v. Little [Miss.] 46 S 257.

18. See Rev. Pol. Code, § 2205, prescribing such limitation. Battelle v. Wolven [S. D.] 115 NW 99.

19. Mills' Ann. St. § 3905, authorizing redemption at any time within three years after sale or at any time before execution of a deed to the purchaser, does not apply where the three years have expired and the purchaser has demanded a deed and such de-

and where an absolute period is also prescribed the owner has no additional time to redeem where the deed is executed on the last day of such period.[20] The time may be extended by reason of the acts and agreements of the purchaser.[21] A valid tender works a redemption the same as a payment,[22] and the redemptioner may rely on the statements of the duly authorized officer as to the amount due.[23] In redeeming from a first sale, the landowner need not tender the amount paid by the purchaser at subsequent tax sales at which he purchased.[24] A purchaser who accepts payment and deeds the property to the original owner waives all irregularities in the redemption.[25] The purchaser is sometimes required to execute a quit claim deed upon redemption.[26] Redemption merely restores to the party redeeming the title which he previously held.[27]

Notice of the expiration of the period of redemption. See 8 C. L. 2086—Such notice is essential to due process of law,[28] and statutory provision is usually made therefor,[29] and such acts may be retrospective as well as prospective.[30] Failure to give the required notice is a fatal defect in the purchaser's claim or title.[31] Such notice must be given to all persons entitled thereto,[32] and must sufficiently describe the property [33]

mand has been wrongfully refused. Pollen v. Magna Charta Min. & Mill. Co. [Colo.] 90 P 639.

20. Pierce v. Adams [Kan.] 93 P 594.

21. Where purchaser agrees to furnish redemptioner with statement of amount necessary to redeem, which latter does not know, the time for redemption will be extended until such statement is furnished. Succession of Sportono v. Howcott, 119 La. 1032, 44 S 855.

22. Bentley v. Cavallier [La.] 46 S 101.

23. Register in chancery being custodian of all the papers relative to amount due, and being authorized to receive payment, the owner may rely on his statement as to amount due. O'Connor v. Gottschalk, 148 Mich. 450, 14 Det. Leg. N. 244, 111 NW 1048.

24. In re Brodie [Minn.] 113 NW 2.

25. Acceptance of tax, with 100 per cent additional and costs. Holmes v. Loud [Mich.] 14 Det. Leg. N. 474, 112 NW 1109.

26. Under Acts 1898, p. 85, the purchaser must execute a quitclaim deed upon redemption, whether he has received a deed or not. Elrod v. Owensboro Wagon Co., 128 Ga. 361, 57 SE 712. Where land was redeemed by holder of mortgage, it was no defense to a suit by such party to compel execution of such deed that purchaser had formerly owned the land and had been defrauded out of it by defendant in the tax fi. fa., or her husband under whom she held, when neither of such latter parties was party to the suit and no proceedings had been instituted to set aside the sale. Id.

27. Does not divest purchaser of any independent title which he may hold. Elrod v. Owensboro Wagon Co., 128 Ga. 361, 57 SE 712.

28. Act March 14, 1879 (Acts 1879, p. 69), providing for conveyance of land to anyone redeeming after second year of delinquency, held unconstitutional for lack of notice to owner, and thus authorizing appropriation of property without due process of law. Mason v. Gates, 82 Ark. 294, 102 SW 190.

29. Under Comp. Laws 1897, §§ 3959, 3960, 3961, purchaser held not entitled to possession until expiration of six months after "filing" of sheriff's return of notice to redeem. White v. Shaw, 150 Mich. 270, 14 Det. Leg. N. 700, 114 NW 210. Statute requires separate notice to redeem, when published, to be given to the owner. Ambler v. Patterson [Neb.] 114 NW 781.

Title of Acts 1901-02, p. 779, c. 658, held sufficient under Const. 1869-70, art. 5, § 15. Kelly v. Gwatkin [Va.] 60 SE 749. Acts 1901-02, p. 779, c. 658, when read in connection with Code 1904, § 3207, held not invalid for **indefiniteness.** Id.

30. Acts 1901-02, p. 779, c. 658, requiring certain notice, held retrospective as well as prospective, and in its particular application, a period of over eleven months held sufficient time for purchaser at sale prior to act to comply with the same. Kelly v. Gwatkin [Va.] 60 SE 749. Such act held not invalid as impairing obligation of contract when applied retrospectively. Id.

31. Failure to give notice required by Pol. Code, § 3785, as amended by St. 1891, p. 133, c. 121, rendered deed executed, while such law was in force, void. King v. Samuel [Cal. App.] 93 P 391. Held void where notice required by Laws 1855, p. 781, c. 427, was not given. People v. Ladew, 189 N. Y. 355, 82 NE 431.

32. Under Laws 1855, p. 781, c. 427, requiring notice to **occupant,** such notice was essential, regardless of the title of the occupant, and without such notice a tax deed was void. People v. Ladew, 189 N. Y. 355, 82 NE 431. Successor in title to one entitled to notice, who proved title against original **owner by adverse possession,** held entitled to assert invalidity of tax deed for want of notice. Id. Notice required by Tax Law, § 140 (Comp. Laws, § 3959, as amended by Pub. Acts 1899, p. 318, No. 204), must be served on each of several **tenants in common** in order to bar his right to redeem the land from sale by entirety. White v. Shaw, 150 Mich. 270, 14 Det. Leg. N. 700, 114 NW 210. General assignment of **corporate owner** did not prevent giving of notice, where such corporation was still in existence. Kelly v. Gwatkin [Va.] 60 SE 749. Service on **owner of void tax title** is ineffectual for any purpose. State Finance Co. v. Mulberger [N. D.] 112 NW 986.

33. State Finance Co. v. Mulberger [N. D.] 112 NW 986. Notice under the "Wood Law"

and state the amount necessary, to be paid.[84] When so required by statute the notice must be recorded [85] and must be proved as required by law.[86] Such a notice does not confer jurisdiction to grant a writ of assistance to the purchaser.[87]

§ 14. *Tax titles. A. Who may acquire.* See 8 C. L. 2086—One under a moral or legal obligation to pay taxes cannot become a purchaser, either directly or indirectly,[88] and if he attempts to do so his purported purchase will merely amount to a payment of the taxes.[89] Where the consideration consists partly of taxes which the purchaser was bound to pay and partly of taxes he was not bound to pay, the whole title is invalid, no apportionment of the consideration being allowable.[40] The relation of principal and agent between the owner and the original purchaser cannot be invoked as ground of attack as against a bona fide purchaser from the latter,[41] but the successor in title of a life tenant cannot, as against the remainderman, acquire a title based on a sale for taxes which became delinquent through the fault of his predecessor.[42] One cannot acquire a valid title by making a false return of the property of another and then buying it in.[43]

is insufficient where it erroneously describes the land and does not clearly apprise the owner that his land has been sold and that the time of redemption is about to expire. State Finance Co. v. Trimble [N. D.] 112 NW 984. Notice to several different persons, and describing different tracts in which each have a separate estate, is insufficient. Ambler v. Patterson [Neb.] 114 NW 781.

34. Under Comp. Laws, § 3959, notice must state amount paid for each parcel and not aggregate amount paid for several parcels. G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 NW 1091. Notice stating taxes for which land was sold, and an amount in addition thereto as for delinquent taxes, held void where there were no delinquent taxes, the certificate holder having paid them. Minnesota Debenture Co. v. Harrington [Minn.] 115 NW 746. Need include only such amounts as are necessary to a valid redemption, and hence amounts paid by purchaser at subsequent tax sales need not be included in notice to redeem from first sale. In re Brodie [Minn.] 113 NW 2.

35. Under Laws 1855, p. 781, c. 427, record of tax deed without record of service of notice to redeem on occupants of land was absolutely void. People v. Ladew, 189 N. Y. 355, 82 NE 431. Record in such case being wholly void was not aided by **curative acts,** Laws 1896, p. 795, c. 208, § 132. Id.

36. Under Laws 1883, p. 104, c. 114, § 5, affidavit of service on widow, children, etc., of deceased owner, held sufficient though not stating source of knowledge. Hobbs v. Scott, 122 App. Div. 399, 106 NYS 836.

37. G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 NW 1091.

38. Brooks v. Garner [Okl.] 94 P 694.

Tenant under contract to pay taxes cannot acquire title therefor. St. Clair v. Craig [Kan.] 94 P 790. Tax deed to former tenant of premises will not be set aside on ground of indebtedness of such tenant to owner for rent. Manning v. Oakes [Neb.] 114 NW 604.

Mortgagee in possession and claiming title cannot allow property to be sold and acquire title, either directly or indirectly. Barlow v. Hitzler [Colo.] 90 P 90. Mortgagee cannot acquire a tax title as against a comortgagee under the same mortgage. Gilman v. Heitman [Iowa] 113 NW 932. Demand by mortgagee for accounting and settlement from comortgagee who has acquired tax title held not within limitations prescribed by Code, § 1448, relative to recovery of realty sold for taxes. Id. Mortgagee of life estate who is in possession of the property, enjoying income thereof, cannot, as against remainderman, acquire tax title based on taxes accruing during his occupancy. Wiswell v. Simmons [Kan.] 95 P 407.

Assignor of mortgage and note secured thereby who guaranteed payment of the mortgage debt held entitled to purchase land covered by the mortgage. Cones v. Gibson [Kan.] 94 P 998. Tax sale of community realty held void as fraud upon heirs of wife where the purchaser, an **employe in the office of tax collector,** colluded with the surviving husband to have the property sold for taxes under an agreement to pay the husband the full value of the property after acquisition of the tax title. Babin's Heirs v. Daspit [La.] 45 S 597. In view of duties of **chancery clerk** under Code 1880, §§ 524, 531, 532, with respect to tax sale conveyances, he cannot become a purchaser at tax sale. Barker v. Jackson [Miss.] 44 S 34. One is not precluded from purchasing by fact that he was **attorney for tax collector** when proceedings for sale were begun, where he is not attorney for the collector at time of sale. Walker v. Mills [Mo.] 109 SW 44.

39. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997; Brooks v. Garner [Okl.] 94 P 694.

40. Where one who is disqualified to acquire a tax title based upon current taxes takes an assignment of an outstanding tax title as to which no such disqualification exists, and thereafter pays subsequently accruing taxes and causes them to be endorsed upon the tax certificate, a tax deed issued therein will convey no title. Wiswell v. Simmons [Kan.] 95 P 407.

41. St. Louis & Arkansas Lumber & Mfg. Co. v. Godwin [Ark.] 108 SW 516.

42. Wiswell v. Simmons [Kan.] 95 P 407.

43. Tenant retained property as belonging to "unknown." Hudson v. Schumpert [S. C.] 61 SE 104.

(§ 14) *B. Rights and estate acquired by purchaser at sale.*[See 8 C. L. 2087]—Prior to the expiration of the period for redemption, the purchaser's title is inchoate as to persons authorized by law to redeem,[44] but absolute as to all others.[45] The various statutes must be consulted as to the right to possession, rents and profits pending redemption,[46] and also as to the rights of the purchaser as against lienors.[47] The rights of the parties where the sale is invalid are usually determined as of the date of the sale,[48] statutes changing such rights being ordinarily prospective only,[49] but it is within the power of the legislature to impose additional burdens upon the owner in respect to prior sales.[50] The purchaser at a void sale cannot recover from the taxpayer in the absence of statutory provisions to this effect,[51] but such provisions exist in many jurisdictions, the purchaser being subrogated to the lien of the state [52] and in such case only a real party in interest can ask for a reversal of a judgment foreclosing such lien in the purchaser's favor.[53] Provisions as to redemption from the tax sale do not apply to a sale upon foreclosure of the lien of the holder of an invalid tax title.[54] A tenant who is under no obligation to pay the taxes on the property and

44. Owner. Elrod v. Owensboro Wagon Co., 128 Ga. 361, 57 SE 712. Purchaser acquires title subject to redemption by the owner and other persons authorized by law to redeem. Chandler v. Clark [Mich.] 14 Det. Leg. N. 931, 115 NW 65.

45. Chandler v. Clark [Mich.] 14 Det. Leg. N. 931, 115 NW 65. One holding title acquired by fraud is a stranger to the title. Id.

46. Purchaser has no right of possession pending redemption. Elrod v. Owensboro Wagon Co., 128 Ga. 361, 57 SE 712. Under Tax Act, § 56 (P. L. 1903, p. 430), purchaser entitled to rents and profits of land where he has recorded his certificate as a mortgage as provided by the act, and need not account to owner of property upon redemption. Anson v. Elwood [N. J. Law] 68 A 784.

47. Burns' Ann. St. 1901, § 8623, providing that purchaser shall take absolute estate in fee simple, merely defines quality of estate without reference to liens. City of Indianapolis v. City Bond Co. [Ind. App.] 84 NE 20. Under Kirby's Dig. § 7105, a valid tax title vests in holder not only interest of former owner but of all others. Osceola Land Co. v. Chicago Mill & Lumber Co., 84 Ark. 1, 103 SW 609. Valid tax sale of property itself, without reservation, is a sale of the whole title, and cuts off all prior claims and encumbrances not specially excepted by statute, such sale being new and complete title emanating from the sovereign. Frederick v. Goodbee [La.] 45 S 606.

48. Jenks v. Henningsen, 102 Minn. 352, 113 NW 903.

49. Rev. Laws 1905, § 969, which is substantially the same as Laws Spec. Sess. 1902, p. 31, c. 2, § 62, giving purchaser lien in place of former right to refundment, applies, by its very terms, only prospectively. Jenks v. Henningsen, 102 Minn. 352, 113 NW 903. Laws 1903, p. 479, c. 73, Cobbey's Ann. St. 1903, § 10641, saves to the purchasers, at sales prior to the enactment of such act, all rights, vested or otherwise, extended to them by the statute in force when the purchase was made. Whiffin v. Higginbotham [Neb.] 114 NW 599.

50. Rev. Laws 1905, § 969, giving purchaser at invalid sale a lien, with twelve per cent interest, would be invalid as to the interest if applied to prior sales. Jenks v. Henningsen, 102 Minn. 352, 113 NW 903.

51. Mitchell v. Minnequa Town Co. [Colo.] 92 P 678.

52. Files v. Jackson, 84 Ark. 587, 106 SW 950; Pierce v. Adams [Kan.] 93 P 594; Coner v. Gibson [Kan.] 94 P 998; City Safe Deposit & Agency Co. v. Omaha [Neb.] 112 NW 598. Where property is sold for less than amount of taxes due. Holbrook v. Kunz [Ind. App.] 83 NE 730. Recitals of tax deed held sufficient, under Burns' Ann. St. 1901, §§ 3529, 4247, 8672, to establish purchaser's lien. Id. One deriving title from tax sale purchaser held entitled to be paid amount paid tax collector, with damages and interest provided by Code 1880, § 536, upon quieting of title against his claim under his tax deed, as to lots purchased at tax sale, but was entitled to interest at only six per cent on cost of redeeming another lot sold for taxes at time when it was not taxable. McMahon v. Yazoo Delta Lumber Co. [Miss.] 46 S 57. Where excess is turned over to owner, he, and not county, is liable for return of whole purchase money upon vacation of sale. Hitchcock County v. Cole [Neb.] 114 NW 276. The owner of property sold under a void assessment is liable to the purchaser for **taxes and interest paid subsequent to acquisition of tax title,** and, in an action to recover therefor, the illegality of the sale may be shown **de hors** the record of the county clerk showing that it was illegally made. Joliet Stove Works v. Kiep, 230 Ill. 550, 82 875. Act March 27, 1907, art. 5, § 46, providing that if claimant of realty in city of Memphis, under tax deed, be defeated in suit for recovery thereof, the successful party shall pay him the amount paid by him at tax sale and for subsequent taxes, with interest, costs, etc., held invalid as **class legislation** and as deprivation of property without due process. Malone v. Williams, 118 Tenn. 390, 103 SW 798.

53. Holbrook v. Kunz [Ind. App.] 83 NE 730.

54. Redemption act, Laws 1893, p. 188, c. 109, has no application to sale under foreclosure of lien of holder of invalid tax deed. Davidson v. Plummer [Kan.] 92 P 705.

who acquires a tax deed valid on its face is entitled to the benefit of the occupying claimant law.[55]

The steps necessary to perfect the title of the purchaser depend upon statute,[56] and he must pursue his statutory remedy to oust the former owner.[57] A suit to quiet title cannot be maintained by the holder of a void title [58] unless so authorized by statute.[59]

(§ 14) *C. Tax deeds.*[See 8 C. L. 2088]—The prime essential of a valid tax deed is that it be supported by a valid [60] sale.[61] The deed must, furthermore, be in substantial [62] conformity with the statutory form,[63] and due regard must be had for requirements such as those relative to signature,[64] acknowledgment,[65] sealing [66] and filing.[67] The deed must be executed in the name of the proper party [68] and to the person entitled thereto.[69] It must also bear the proper date,[70] sufficiently describe the property,[71] having due regard for the amount sold [72] and for the classification of the

55. Entitled to compensation for lasting improvements made while claiming under deed valid on its face, but invalid in fact as a conveyance. Fitch v. Douglass [Kan.] 90 P 769.

56. Adjudicatee at tax sale may obtain title though he fails to pay city taxes. Lavedan v. Choppin, 119 La. 1056, 44 S 886.

57. South Louisiana Land Co. v. Norgress [La.] 45 S 49.

Trespass cannot be maintained against former owner who has been allowed to remain in possession several years after sale. South Louisiana Land Co. v. Norgress [La.] 45 S 49.

58. Mason v. Gates, 82 Ark. 294, 102 SW 190.

59. See Youker v. Hobart [N. D.] 115 NW 839. Purchaser seeking to enforce his rights by statutory action to quiet title must prove a sufficient title before defendant is required to prove his claim. Id.

60. See ante, § 12, Sale for Taxes. Deed invalid where consideration therefor includes fee of ten cents per lot for printing tax sale notices, when proof of publication had not been returned and filed with county treasurer within required time. Grimstead v. Cooper [Kan.] 95 P 401. Where a county prematurely brought an action to foreclose a tax lien, and secured decree and sale of land, payment of taxes by owner to treasurer in ignorance of the suit by the county and acceptance by sheriff, before confirmation of sale, operated to satisfy the decree, and entitled owner, who still had possession, to have deed set aside. Squire v. McCarthy [Neb.] 112 NW 327.

61. Conveyance, after withdrawal of property from sale and without sale, held void. People v. Golding, 55 Misc. 425, 106 NYS 821.

62. Failure to follow the exact statutory form will not render the deed void where all the essential statutory requirements are observed. Havel v. Decatur County Abstract Co. [Kan.] 91 P 790.

63. Held insufficient and void. Battelle v. Wolven [S. D.] 115 NW 99, following King v. Lane [S. D.] 110 NW 37.

64. Under Ann. Code 1892, § 3817, unsigned deed is void. Rainey v. Lamb Hardwood Lumber Co. [Miss.] 45 S 367. Recital at beginning of tax deed that "I, Lent I. Rice, the tax collector of the county of T., did" sell the land, etc., held not a signature. Id.

65. Deed acknowledged before notary, instead of clerk of district court, as required by Rev. St. 1887, § 3832 (Rev. St. 1899, § 1897), held void. Mathews v. Blake [Wyo.] 92 P 242. Under Act April 3, 1804, and amendatory acts, including Act April 3, 1894 (4 Smith's Laws, p. 201; 2 Purd. Dig. [12 Ed.] p. 2057), tax deed is invalid and worthless even as notice to subsequent purchaser where it is not acknowledged in open court and such acknowledgment entered of record therein. Osmer v. Sheasley [Pa.] 68 A 965.

66. Tax deed held not void because attested by seal of county clerk instead of seal of county where such collections appeared to have been almost universally customary in such county. Jackson v. McCarron [Kan.] 95 P 402.

67. Under Code 1906, § 4338 (Ann. Code 1892, § 3823), requiring tax collector to "file" tax deeds in chancery clerk's office, the conveyance must be endorsed "filed." Brannon v. Pringle [Miss.] 46 S 161.

68. Tax deed issued in 1898 in name of county instead of name of state is void. State Finance Co. v. Mulberger [N. D.] 112 NW 986.

69. Deed held properly executed to widow and heirs of deceased holder of tax sale certificate. Gannon v. Moore, 83 Ark. 196, 104 SW 139. Under Laws 1885, p. 698, c. 405, § 6, providing for delivery of tax deed to purchaser, his "legal representatives" or assigns, delivery to purchaser's sole devisee held proper. Rosenblum v. Eisenberg, 108 NYS 350.

70. Should bear the date advertised for the sale, and deed bearing any other date is void. Glos v. Cass, 230 Ill. 641, 82 NE 827.

71. Under Mills' Ann. St. §§ 3893, 3897, 3901, property **must be described in sale clause.** Limes v. Digges [Colo.] 95 P 341. Where all or whole of property is sold, **reference to prior description** of property assessed by some such clause as "the property above described," or "the whole of said property," sufficient. Id. Description by reference to prior description of property assessed by clause "the said property * * * which was the least quantity bid for" held sufficient. Id. Rule that where a recital is necessary only under particular state of facts, and such state of facts does not exist, the omission of the recital is immaterial, held inapplicable. Id. Description of property may be **supplemented by maps** to which

property for the purpose of taxation,[73] and must contain all the recitals required by law,[74] substantial compliance, however, with such requirements being sufficient.[75] The deed may include a number of lots or parcels of land sold to the same person.[76]

In the absence of statutory rule to the contrary, a tax deed is construed strictly in favor of the taxpayer,[77] and one claiming under such a deed has the burden of proving the regularity of every antecedent act necessary to validity of the tax, the levy and the sale,[78] and a fortiori will such a deed or conveyance be declared invalid for intrinsic defects apparent on its face,[79] but under the various statutes the deed is not invalidated by mere irregularities in prior proceedings,[80] being itself evidence of the

reference is made. Davis v. Le Mesnager [Cal.] 92 P 76.

Held sufficient. New Orleans Land Co. v. National Realty Co. [La.] 46 S 208.

Held insufficient. Woodall v. Edwards, 88 Ark. 334, 104 SW 128; Gannon v. Moore, 83 Ark. 196, 104 SW 139. "Lot 38, except lots sold R., G. survey, section 8, Tp. 8, R. 11," held insufficient without further showing by way of explanation. Boone v. Wells [Miss.] 45 S 571. "Strip of fifty acres on north line of fractional N. W. one-quarter of section 7." Commercial Nat. Bk. v. Schlitz [Cal. App.] 91 P 750.

72. Deed held to show that whole lot was sold, and hence not subject to objection that the least part which purchaser was willing to take for the taxes, as recited in deed, was not described, the whole lot being described. Best v. Wohlford [Cal.] 94 P 98. Conveyance of land "with appurtenances" conveys no more or less than the property covered by the certificate of sale. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936. Deed to general mass of land without specification of **excepted portions** held fatally defective. People v. Golding, 55 Misc. 425, 106 NYS 821.

73. Tax deed held insufficient alone to show that property covered thereby belonged to class covered by abatement act. Kennedy v. Sanders [Miss.] 43 S 913.

74. The fact that a tax deed is based upon proceedings under the compromise act, Gen. St. 1901, §§ 7672, 7673, does not change rule that it is not rendered void upon its face by failure to disclose the **residence of grantee.** Lincoln Mortg. & Trust Co. v. Davis [Kan.] 92 P 707. Deed not void for failure to recite residence of purchaser. Havel v. Decatur County Abstract Co. [Kan.] 91 P 790. Deed not showing **amount for which land was sold** is void. Lowenstein v. Sexton, 18 Okl. 322, 90 P 410. Must show on its face the amount for which the parcel or tract of land was sold. Otherwise it is void. Eldridge v. Robertson [Okl.] 92 P 156. Under St. 1898, § 1178, requiring recital of name of purchaser, the word "purchaser" means one who has made and completed a purchase, and not merely a bidder who has defaulted. Herbst v. Land & Loan Co. [Wis.] 115 NW 119. Where pleading alleges execution of tax deed in form required by law, it will be presumed, in absence of pleading and proof to contrary, that deed named purchaser and that the grantor therein is such purchaser's assignee. Id. Tax deed of record less than five years which recites that land was bid off, by county treasurer, but fails to state for whom it was bid off, held void. Jackson v. McCarron [Kan.] 95 P 402; Grinstead v. Cerpee [Kan.] 95 P 401. Requirement that deed shall recite the **recitals of tax sale certificate** need not be complied with where there is no provision requiring the giving of such certificate. Schamblin v. Means [Cal. App.] 91 P 1020. Deed held void as failing to recite, as required by Pol. Code, § 3786, the matters recited in the tax sale certificate as required by § 3776. Preston v. Hirsch, 5 Cal. App. 485, 90 P 965. Deed cannot be aided by reference to the certificate. Id. Deed held to sufficiently recite specification of certificate of sale as to time when purchaser would be entitled to deed, as required by St. 1887, pp. 39, 40, c. 34, §§ 27, 30, and St. 1897, p. 271, c. 189. Bert v. Wohlford [Cal.] 94 P 98.

75. Certificate and deed held to substantially comply with Pol. Code, §§ 3776, 3785, as to recital of delinquency of taxes. Phillips v. Cox [Cal. App.] 94 P 377.

76. But must show in its face that such lots or parcels were sold separately, and also the amount for which each was sold. Eldridge v. Robertson [Okl.] 92 P 156.

77. Rainey v. Lamb Hardwood Lumber Co. [Miss.] 45 S 367.

78. Brush v. Watson [Vt.] 69 A 141. In action by one so claiming to quiet title, plaintiff had burden of proving notice to non-resident owner required by Vt. St. 504. Id. That only so much of land as was necessary to pay tax, etc., was sold, as required by Vt. St. 498. Id. Tax deed not evidence of title in absence of proof of judgment, precept, notes, etc. Glanz v. Ziabek, 233 Ill. 22, 84 NE 36; Metropolitan West Side El. R. Co. v. Eschner, 232 Ill. 210, 83 NE 809. Absence of any showing of judgment, precept or affidavit supporting tax deed recited in abstract and of any showing of possession upon which title by adverse possession could be based held ground of objection to abstract by vendee. Koch v. Streuter, 232 Ill. 594, 83 NE 1072.

79. Tax lease which shows on its face that statute was not complied with held void. Obermeyer v. Behn, 108 NYS 289. Deed showing that city or town lots were not sold separately, as required by law, is void. Keller v. Hawk [Okl.] 91 P 778.

80. After confirmation of sale under so-called "Scavenger Act," the deed to purchaser will not be set aside for irregularity in the levy. Ambler v. Patterson [Neb.] 114 NW 781. Under Const. art. 233, lack of notice of **assessment** must be clearly alleged. Gonzales v. Saux, 119 La. 657, 44 S 332. Under Revisal 1905, § 2894, deed not invalidated by fact that land was listed to wrong person unless owner has listed such land and paid taxes thereon. Eames v. Armstrong [N. C.] 59 SE 165. Defect in tax title in that property sold was an undivided interest in land which was

regularity of such proceedings,[81] thus casting the burden upon the attacking party to show irregularity therein [82] and thus to overcome the statutory presumption.[83] The legislature may even make a tax deed conclusive of any matter which it might have dispensed with in the first instance.[84] In some states the probative effect or conclusiveness of a tax deed depends upon whether it has been recorded for a certain period,[85] such deed being evidence though not recorded for such period,[86] but being strictly construed in such case [87] and liberally construed where it has been recorded for such period.[88] The conclusiveness of the deed is also sometimes made to depend

attempted to be assessed separately held not cured by Code 1899, c. 31, § 25 (Code 1906, § 884). Toothman v. Courtney [W. Va.] 58 SE 915. Where land was assessed to estate of decedent, failure to change it after heirs went into possession was cured by Const. art. 233. Gonzales v. Saux, 119 La. 657, 44 S 332. Where description in assessment was sufficient to identify land, any objection thereto was cured by Const. art. 233. Id. Inclusion of item of void special tax in **sale** held not to invalidate deed after confirmation of sale under "Scavenger Act." Ambler v. Patterson [Neb.] 114 NW 781. Under Const. art. 233, failure to sell least quantity that anyone would purchase for the taxes is not fatal to deed. Gonzales v. Saux, 119 La. 657, 44 S 332.

Constitutionality of statute: Act March 27, 1907, art. 5, § 151, rendering immaterial all errors in assessment, land tax book, personal tax book, notices, etc., held invalid as deprivation of property without due process. Malone v. Williams, 118 Tenn. 390, 103 SW 798.

81. Burns' Ann. St. 1901, § 8624, expressly provides that tax deed shall constitute prima facie evidence of the regularity of sale and all prior proceedings. Holbrook v. Kunz [Ind. App.] 83 NE 730. Under 14 Stat. at Large, p. 27, as amended by 15 Stat. at Large, p. 163, a tax deed valid on its face is prima facie evidence of the regularity of the proceedings under which the sale was made. Heyward v. Christensen [S. C.] 61 SE 399. Deed is evidence that **delinquent list** was prepared. Davis v. Pacific Imp. Co. [Cal. App.] 94 P 595. Matters not shown on face of deed are not ground for **objection to introduction of deed** as prima facie evidence of proceedings prior to and including assessment as provided by St. 1897, p. 271, c. 189, § 48. Best v. Wohlford [Cal.] 94 P 98. Deed sent by sheriff to auditor held sufficient attempt at compliance with Act 1886, No. 98, p. 151, § 54, to make it part of record in auditor's office, and hence **copy** thereof was admissible in evidence. Gonzales v. Saux, 119 La. 657, 44 S 332.

82. Under Pol. Code, § 3786, making tax deed primary evidence that taxes were levied as required by law, burden is on one attacking such deed to show that taxes were not levied for process in question. Davis v. Pacific Imp. Co. [Cal. App.] 94 P 595. Statutes making tax deeds prima facie evidence of title place the burden of showing the invalidity of such deeds upon the persons attacking them. St. 1903, § 4030. Wildharber v. Lunkenheimer [Ky.] 108 SW 327.

83. Deed not overcome by fact that after six years from date when delinquent lists should have been prepared they could not be found. Davis v. Pacific Imp. Co. [Cal. App.] 94 P 695. Under Pol. Code, §§ 3759, 3761, 3762, 3764, delinquent lists are not required to be kept in auditor's office, and failure to find them there after six years did not overcome deed. Id.

Statement of grantor that assessment was under a certain act under which it would have been irregular held inadmissible to contradict recital of deed that it was under another act, since law makes such deed prima facie evidence of regularity of assessment. Commercial Nat. Bk. v. Schlitz [Cal. App.] 91 P 750. Unless prima facie case thus made is overcome, it is sufficient to warrant **taking case from jury.** Wildharber v. Lunkenheimer [Ky.] 108 SW 327.

84. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936. See post, this section, subsection E, Acquisition of Title by State or Municipality and Transfer Thereof. Under provision making deed conclusive as to all matters from assessment to sale, a deed is conclusive of only such matters as the legislature might have dispensed with, and thus construed such provision is constitutional. Phillips v. Cox [Cal. App.] 94 P 377.

85. Tax deeds which have not been of record for three years may be attacked. Roach v. Sanborn Land Co. [Wis.] 115 NW 1102. In making **computation of time of record,** suit against holder of tax deed is deemed to have been instituted as of date on which he is brought into court, regardless of where it was instituted against other defendants. Gibson v. Freeland [Kan.] 94 P 782.

86. Tax deed, though recorded less than five years, is prima facie valid unless void on its face. Pierce v. Adams [Kan.] 93 P 594.

87. Omissions cannot be supplied by inference, nor defects cured by presumption. Grinstead v. Cooper [Kan.] 95 P 401. Must contain substantially all **recitals** required by statute, unaided by presumptions arising from record for five years. Dye v. Midland Valley R. Co. [Kan.] 94 P 785. Deed which has not been recorded five years is void on its face where it conveys several separate tracts of land and does not show the amount for which each tract was sold. Id. Deed issued under compromise act, Gen. St. 1901, § 7672, which has not been recorded five years, is void where it does not show that each tract conveyed thereby was sold for a sum not in excess of the tax and interest due thereon. Id.

88. Rynearson v. Conn [Kan.] 94 P 205. Record for five years entitles deed to every reasonable presumption in its favor which can be deduced upon a liberal construction thereof. Dye v. Midland Valley R. Co. [Kan.] 94 P 785. Statutory presumption of regularity after deed has been recorded five years

upon the date of the attack with reference to the expiration of the period of redemption.[89] The probative value and the conclusiveness of a tax deed must be determined with reference to existing laws.[90] When the statutory prima facie presumption, arising from a deed valid on its face, as to prior proceedings, has become conclusive by reason of the running of the statute of limitations, a Federal court will not take jurisdiction on account of any question in connection with such prior proceedings.[91] The presumption of regularity of the acts of an officer cannot be invoked in aid of the deed until the authority of the officer has been shown,[92] nor is a deed void on its face of any probative value whatever,[93] though it is sometimes held to create an equitable title in the grantee.[94] Authority to issue a second deed to cure defects in the first[95] cannot be exercised to overcome by false recitals the record upon which the conveyance is based.[96]

(§ 14) *D. Remedies of original owner, and others claiming under or through him.*[See 8 C. L. 2089]—The remedies against a tax sale[97] are available only to those hav-

held to overcome any presumption from peculiarity of contour that several contiguous subdivisions sold as one tract did not constitute a single tract. Carson v. Platt [Kan.] 92 P 705. Tax deed executed under compromise provision (Laws 1893, c. 110, § 4) and in substantial compliance with requirements of such provision, and which is attacked more than five years after it was recorded, is not void on its face because the granting clause fails to specify the particular **years for which taxes were levied.** Gibson v. Freeland [Kan.] 94 P 782. Where deed covers several tracts, failure to add statutory form, which includes but one **description of property,** words showing explicitly that the recitals are meant to apply to the tracts severally and not collectively, is at most a mere ambiguity, and is not fatal. Lincoln Mortg. & Trust Co. v. Davis [Kan.] 92 P 707.

Recitals: Deed held not void on account of certain recitals. Rynearson v. Conn [Kan.] 94 P 205.

Mode of assessment and sale of separate tracts presumed to have been proper, that is by separate assessment and separate sale. Gibson v. Larabee [Kan.] 94 P 216. Deed not void on its face because it does not recite **amount of bid** by county treasurer for county, where it does recite that the treasurer did, nearly three years thereafter, assign a tax certificate thereon for certain sum, "being equal to cost of redemption at that time," on certain date, and when such deed further recites the amount of delinquent taxes for each year, the amount for which treasurer bid in land being, under the recitals, a mere matter of computation. Gibson v. Ast [Kan.] 94 P 801. Deed not void for failure to recite county and state of **residence of assignee of sale certificate.** Stevenson v. Carson [Kan.] 94 P 796.

89. Under Gen. Laws 1896, c. 24, Laws 1896, p. 841, c. 908, §§ 131, 132, a tax deed is not conclusive of regularity of sale, etc., in action to cancel same, on ground of constitutional defects of jurisdiction where such action is brought within five years after expiration of the redemption period. Adirondack League Club v. Keyes, 122 App. Div. 178, 106 NYS 963.

90. Though a different statutory rule prevailed when the deed was executed. Heyward v. Christensen, [S. C.] 61 SE 399. St. 1903, § 4030, making tax deeds prima facie evidence of title, etc., held applicable to deeds made before its enactment, as well as those made thereafter. Wildharber v. Lunkenheimer [Ky.] 108 SW 327. Requested instructions as to deeds executed under law different from law controlling in case at bar held properly refused. Heyward v. Christensen [S. C.] 61 SE 399.

91. Publication in newspaper published only on Sunday, as denial of due process, not reviewable on writ of error from U. S. supreme court. Elder v. Wood, 28 S. Ct. 263.

92. Sale by comptroller of lands in unorganized county. Keenan v. Slaughter [Tex. Civ. App.] 108 SW 703.

93. Mathews v. Blake [Wyo.] 92 P 242. Deed void because not supported by a sale held not conclusive evidence of title under Laws 1885, p. 758, c. 448, and Laws 1896, p. 841, c. 408, § 132. People v. Golding, 55 Misc. 425, 106 NYS 821.

94. See ante, this section, subsec. B, Rights and Estate Required by the Purchaser. Tax deed by commissioner executed pursuant to Acts 1881, p. 70, § 15, except that it was not examined and approved by the court as provided by Kirby's Dig. § 6323, held to convey equitable title, though such section is rendered applicable to tax deeds by Act 1881, and provides that commissioner's deed shall convey no title until examined and approved by court. St. Louis & Arkansas Lumber & Mfg. Co. v. Godwin [Ark.] 108 SW 516.

95. Grantee may take second deed after expiration of period for redemption. Pierce v. Adams [Kan.] 93 P 594.

96. Keller v. Hawk [Okl.] 91 P 778.

97. Suit to remove the cloud created by a void tax deed. Collins v. Reger [W. Va.] 57 SE 743. Under B. & C. Comp. §§ 3124, 3125, 3127, the right to redeem is entirely cut off by execution of deed after expiration of three years, and if the sale is invalid the remedy of the owner is at law unless he is in a situation to maintain a suit to quiet title or determine an adverse claim to the property. See B. & C. Comp. § 516. Hendershott v. Sagsvold [Or.] 90 P 1104.

Remedies where purchase is by state or municipality are considered elsewhere. See post, this section, subsec. E.

ing the proper legal status.[98] The rules in the various states are not altogether in harmony as to the necessity of the payment of the purchase money and taxes as condition precedent to the right to sue to vacate the sale, such payment being necessary in some jurisdictions,[99] but not in others,[1] while in still others a distinction is made between cases where there has been a valid assessment and where there has been no such assessment,[2] or the necessity of such payment or tender depends upon the form of action or the relief sought.[3] Tender prior to suit is waived by the purchaser's refusal on other grounds to allow the redemption,[4] and when the sale is made under a void decree an offer by the owner to pay such sum as the court may find due to the defendant will constitute a sufficient offer to do equity.[5] Rents and profits accruing while one is in possession under a void tax deed may be set off against taxes paid by him,[6] but the value of improvements may be awarded to the purchaser.[7] The defendant, in an action by the holder of the tax title, cannot attack the tax sale on the ground of inadequacy of the price unless such defense is pleaded,[8] but where the defendant asserts a tax title, the plaintiff may reply by a general denial and also by attacking the tax deed on specific grounds.[9] Where land is sold for less than the amount of taxes due the owner may discharge the purchaser's lien by payment of the

98. A party bringing action to cancel a tax deed **must show title in himself** to the property involved therein. Glos v. Holmes, 228 Ill. 436, 81 NE 1064. Evidence held to show title in plaintiff in action to remove tax deeds as clouds thereon. Id. Under Revisal 1905, § 2909, a husband to whom purchaser at tax sale of wife's property conveyed such property, in order to clear title and enable husband and wife to sell the property, cannot urge invalidity of the tax deed as ground for suit for breach of covenant of seisin, title, etc., to property, etc., at time of tax sale, being, under the statute, a condition precedent to right to attach the tax deed. Eames v. Armstrong [N. C.] 59 SE 165. Under Kirby's Dig. § 7105, one attacking tax title must prove ownership in himself or one under whom he claims at time of sale. Osceola Land Co. v. Chicago Mill & Lumber Co., 84 Ark. 1, 103 SW 609. A general **allegation of ownership** is sufficient, on demurrer, to give the plaintiff status to ask relief from the sale. Harrington v. Hayes County [Neb.] 115 NW 773.

Vendor under bond for deed may sue to remove tax deed as a cloud on his title though purchaser has gone into possession. Glos v. Cass, 230 Ill. 641, 82 NE 827.

Transferee of mortgage notes without indorsement held entitled to sue to vacate tax deed on property as real party in interest, after demand upon transferror to sue and his refusal. Roach v. Sanborn Land Co. [Wis.] 115 NW 1102.

99. Void deed will be set aside only upon payment of the purchase money, with interest and costs. Collins v. Reger [W. Va.] 57 SE 743. One seeking to set aside a tax deed must pay or tender the taxes subsequently paid. Toothman v. Courtney [W. Va.] 58 SE 915. See the W. Va. statute [Ed.].

1. Tender of amount of taxes paid by purchaser at void sale held not condition precedent to ejectment by owner against such purchaser. Keller v. Hawk [Okl.] 91 P 778. Neither redemption nor tender of taxes is a condition to the right of the owner to relief against the holder of a void tax sale certificate. Preston v. Hirsch, 5 Cal. App. 485, 90 P 965.

2. Where there has been a valid assessment and levy and there are no other jurisdictional defects, equity will require the payment of the tax as a condition precedent to relief. State Finance Co. v. Trimble [N. D.] 112 NW 984. Payment of taxes will not be required as a condition precedent to equitable relief from a tax deed where there has been no assessment for want of a sufficient description of the land. Id. No tender is essential to relief where the assessment is inherently defective. State Finance Co. v. Myers [N. D.] 112 NW 76.

3. Ejectment is not within Ballinger's Ann. Codes & St. § 5079, requiring complaint, in action to recover property sold for taxes, to set forth payment or tender of the tax. Bullock v. Wallace [Wash.] 92 P 675.

4. Kelly v. Gwatkin [Va.] 60 SE 749.

Amendment stating more particularly the plaintiff's attempts to redeem held proper. Kelly v. Gwatkin [Va.] 60 SE 749.

5. Payne v. Anderson [Neb.] 114 NW 148.

6. Dimpfel v. Beam [Colo.] 91 P 1107.

7. Where one purchased a tax title in good faith, and then mortgaged it, upon setting aside of the tax sale the mortgage debtor is entitled to the improvements placed on the property by him, subject to the claim of the mortgagee. Page v. Kidd [La.] 46 S 35.

8. Walker v. Mills [Mo.] 109 SW 44. Such defense cannot be urged by one who gave notice of the sale that it was void for want of service in the proceedings on which the sale was based. Id.

9. Mitchell v. Knott [Colo.] 95 P 335.

In ejectment against holder of tax title, plaintiff is put to the proof of his title by a denial thereof, and defendant need not plead evidence of his title. Wildharber v. Lunkenheimer [Ky.] 108 SW 327. Invalidity of tax lease void on its face may be shown by plaintiff **in partition** under denial of existence of tax leases set up by defendant. Obermeyer v. Behn, 108 NYS 289.

amount paid by such purchaser,[10] but the original owner's title is not reinstated by assessment to him after the sale where the taxes thus assessed are paid by the purchaser.[11] The former owner is not entitled to the benefit of curative provisions of statutes.[12] Where the sale is set aside on the ground that the foreclosure decree is void, the owner will not be required to pay the costs of the foreclosure proceedings.[13]

Limitations.[See 8 C. L. 2090]—Under the various acts relative to limitations upon attacks upon tax titles,[14] the limitation begins to run from notice of the sale,[15] or possession by the purchaser,[16] or the accrual of the attacking party's right of possession,[17] or the expiration of the time for redemption.[18] The recording of a tax by a tenant is notice of a disclaimer of tenancy and starts the statute to running in favor of the deed,[19] but such is not the effect of the recording of an invalid deed [20] or of one obtained by fraud.[21] Disability does not prevent the running of the statute unless so provided,[22] and only such persons can avail themselves of the statute as have a proper status to do so.[23] Limitations against the foreclosure of a mortgage on the property sold can be pleaded only by one in privity with the mortgagor.[24]

A valid title may be acqured by limitations, notwithstanding irregularities in the sale,[25] but limitations cannot be invoked in aid of a tax deed void on its face,[26] or

10. Holbrook v. Kunz [Ind. App.] 83 NE 730.

11, 12. Lavedan v. Choppin, 119 La. 1056, 44 S 886.

13. But only the amount of such decree, with interest, etc. Wagner v. Lincoln County [Neb.] 114 NW 574.

14. Acts 1895, c. 4322, p. 1, held a complete revision of and substitute for the former statute, Acts 1887, p. 1, c. 3681. Dees v. Smith [Fla.] 46 S 173. Act April 3, 1804, § 3, 4 Smith's Laws, 201, prescribing limitation on **suit to recover land** sold for taxes, held not applicable where sale was void on account of taxes having been paid. Trexler v. Africa, 33 Pa. Super. Ct. 395. Limitations under Acts 1895, p, 39, c. 4322, § 64, applies only where purchaser goes into possession, and **bars only suits for possession,** and is not applicable to suits to remove cloud. Dees v. Smith [Fla.] 46 S 173.

15. Under the statute making limitations run from notice of sale, such limitations run from actual notice, regardless of when notice is given of expiration of time for redemption. Hall v. Miller, 150 Mich. 300, 14 Det. Leg. N. 641, 113 NW 1104.

16. Limitations prescribed by Code 1896, § 4089, does not begin to run until purchaser takes possession. Long v. Boast [Ala.] 44 S 955.

17. Limitations prescribed by Kirby's Dig. § 5061 held not to begin to run against heirs of decedent until their right of possession accrued by death of children of deceased holding homestead estate therein for life. Gannon v. Moore, 83 Ark. 196, 104 SW 139.

18. Beatty v. O'Harrow [Tex. Civ. App.] 109 SW 414.

19, 20. Hudson v. Schumpert [S. C.] 61 SE 104.

21. Recording a tax deed which has been fraudulently obtained by a tenant does not impart notice of such fraud to the owner who is a nonresident of the state and has no knowledge of or reason to suspect the existence of such fraud. St. Clair v. Craig [Kan.] 94 P 790.

22. Limit of period of redemption fixed by Kirby's Dig. § 7095 held applicable to married women as well as to others. Sibly v. Cason [Ark.] 109 SW 1007.

23. Former owner is not entitled to prescription prescribed by Const. art. 233. Lavedan v. Choppin, 119 La. 1056, 44 S 886.

Purchaser from complainant pendente lite held not entitled to invoke limitations against cross bill filed by defendant, attacking complainant's title. McLemore v. Anderson [Miss.] 43 S 878. Limitation **pleaded by tenant** in favor of his landlord is available to the latter in a suit against both, without being pleaded by the latter. Wildharber v. Lunkenheimer [Ky.] 108 SW 327. The benefit of the statute may be **lost by laches** on the part of the purchaser and the intervention of the rights of third parties. Head v. Howcott Land Co., 119 La. 331, 44 S 117.

24. One who has procured a tax deed to a tract of land is not a privy in title to the former owner, and where latter has executed a promissory note, secured by mortgage on the land, the holder of the tax deed cannot plead the statute of limitations as defense in action by holder of the note and mortgage to foreclose the mortgage. Gibson v. Ast [Kan.] 94 P 801. Limitations **against guaranty of mortgage** debt may be pleaded by assignee of certificate of tax sale issued to guarantor. Cones v. Gibson [Kan.] 94 P 998.

25. Code 1896, § 4089, prescribing three years' limitation. Long v. Boast [Ala.] 44 S 955. Two years' limitation under Kirby's Dig. § 7103 held applicable where **description of property** in granting clause was correct, though the description in the reciting clause was insufficient. Gannon v. Moore, 83 Ark. 196, 104 SW 139

Substitution of name of county as purchaser for that of defaulting purchaser held not such fraud or irregularity as not to be covered by St. 1898, § 1188, prescribing limitation as to vacation of tax deeds. Herbst v. Land & Loan Co. [Wis.] 115 NW 119. Tax deed held color of title as basis for adverse possession, though it was invalid for **failure of sheriff to bid in property as required** by

where the description is fatally defective,[27] or where the taxes have been paid,[28] or where the assessment is based on an unconstitutional statute,[29] or by one having no right to acquire the property,[30] or by one who has obtained the title by fraud.[31] A priori, the limitation cannot be invoked in cases expressly excepted.[32] Color of title necessary to sustain adverse possession must be such evidence of title as is recognized by law,[33] and it is generally held that adverse possession cannot be predicated upon a deed void on its face,[34] but it is held that an innocent purchaser of an apparently valid title may predicate an adverse possession thereon,[35] and it is even declared generally that a void sale is color of title.[36] Since a void sale passes neither title nor right of possession, a statutory adverse possession cannot be predicated thereon where the owner retains possession.[37]

Laws 1881, p. 218, c. 117, § 36, where no one is willing to pay taxes for less than whole of property. Greenleaf v. Bartlett [N. C.] 60 SE 419.

Failure to record tax receipt, as required by statute, goes to invalidate deed, but does not affect it as color of title. Greenleaf v. Bartlett [N. C.] 60 SE 419.

Suit to quiet title may be maintained by purchaser after three years' possession. Long v. Boast [Ala.] 44 S 955. Under Code 1896, § 4067, authorizing assignment of tax sale certificate, and § 981, relating to alienation of lands, holder of quitclaim deed from tax sale purchaser may sue to quiet title after three years' possession. Id.

26. Dimpfel v. Beam [Colo.] 91 P 1107; Lowenstein v. Sexton, 18 Okl. 322, 90 P 410; Keller v. Hawk [Okl.] 91 P 778; Battelle v. Wolven [S. D.] 115 NW 99; Mathews v. Blake [Wyo.] 92 P 242. Where sale was on **wrong date.** Kennedy v. Sanders [Miss.] 43 S 913. Limitation of two years in which to redeem has no application to **sale made under void decree.** Payne v. Anderson [Neb.] 114 NW 148.

Unsigned deed held not notice to taxpayer or anyone else. Rainey v. Lamb Hardwood Lumber Co. [Miss.] 45 S 367.

27. Gannon v. Moore, 83 Ark. 196, 104 SW 139. Neither special limitations provided by Rev. St. 1892, § 400, nor those provided by Gen. St. 1906, § 591, applies to suit to set aside tax deed where the calls in the deed are materially different from the lands described on assessment roll and sold by collector. Saddler v. Smith [Fla.] 45 S 718. Deed void for uncertainty of description of land held not basis for two-year statute of limitations, and possession, in order to give title, must continue the same length of time as if possessor had no deed, that is for seven years. Woodall v. Edwards, 83 Ark. 334, 104 SW 128.

28. Action for trespass on land held not action to recover land within Act April 3, 1804, § 3, 4 Smith's Laws, 201. Trexler v. Africa, 33 Pa. Super Ct. 395.

29. Code 1880, § 539, not applicable where assessment was under unconstitutional act. Eastland v. Yazoo Delta Lumber Co. [Miss.] 43 S 956.

30. Chancery clerk, having no right to purchase, cannot invoke statute of limitations. Barker v. Jackson [Miss.] 44 S 34. Where **tenant** under contract to pay taxes failed to do so, allowed property to be sold, and became the purchaser. St. Clair v. Craig [Kan.] 94 P 790. Occupancy of realty by one claiming under **owner of life estate** will not be converted into an adverse possession, so as to set statute of limitations to running against remainderman, by occupants taking and recording a tax deed, where his relation to the property disqualifies him from acquiring title in such manner. Wiswell v. Simmons [Kan.] 95 P 407. While **co-owner** cannot acquire title as against his co-owners, he may, as against state and third persons, acquire title which may be perfected by prescription prescribed by Const. art. 233. Harris v. Natalbany Lumber Co., 119 La. 978, 44 S 806.

31. Babin's Heirs v. Daspit [La.] 45 S 597.

32. Constitutional limitation expressly excepts cases where owner has paid his taxes, and hence excepts case where owner had paid taxes on his entire property and his land was sold under another assessment against another person. Bernstine v. Leeper, 118 La. 1098, 43 S 889; Honor v. Fellman, 119 La. 1061, 44 S 887.

33. Tax sale certificate is not color of title under Kirby's Dig. § 5057, relative to adverse possession of unimproved and unenclosed lands. Townsend v. Penrose, 84 Ark. 316, 105 SW 588.

34. Keller v. Hawk [Okl.] 91 P 778; Mathews v. Blake [Wyo.] 92 P 242.

Adverse possession cannot be sutained under tax lease void on its face. Obermeyer v. Behn, 108 NYS 289.

35. Third person, purchasing real estate upon faith of an apparently valid tax title, as disclosed by public records, and holding actual possession for three years, is protected by the prescription established by Const. art. 233 from attacks arising out of equities between apparent and nonapparent owner. Harris v. Natalbany Lumber Co., 119 La. 978, 44 S 806.

36. Tax title under void sale held color of title as basis for statutory adverse possession for seven years. Osceola Land Co. v. Chicago Mill & Lumber Co., 84 Ark. 1, 103 SW 609. But see Woodall v. Edwards, 83 Ark. 334, 104 SW 128, where it is declared that possession under deed void for insufficient description is same as possession without any deed.

37. Const. 1898, art. 233, held inapplicable. In re Sheehy, 119 La. 608, 44 S 315. Constitutional prescription of three years not applicable to sale void for lack of notice of sale, where widow in community continued in possession of the property. Eames v. Woodson [La.] 46 S 13.

The right to attack a tax title may be lost by laches, independently of statutory limitations.[38]

Limitations where the state or municipality is purchaser are treated elsewhere.[39]

(§ 14) *E. Acquisition of title by state or municipality and transfer thereof.*[See 8 C. L. 2091]—A tax sale to the state will not be invalidated by surplus recitals as to the amount for which the sale is made.[40] The rights of the owner after sale to the state depend upon the statute,[41] and so also as to his remedies.[42] A time limit is usually imposed upon the right to attack the state's title,[43] but provisions cutting off such rights and remedies usually apply only where there has been a valid sale.[44] Such statutes, even though not applicable to prior sales,[45] may be invalid because of the failure to give the owner a remedy against the state.[46] Curative acts may apply to sales to the state as well as to individuals.[47] Such acts are sometimes retrospective.[48] Neither the former owner nor one claiming under him can invoke prescription by reason of the state's delay in taking possession after sale and conveyance thereto.[49]

The right of a municipality to purchase must be expressly conferred [50] and must

38. Former owner's right to attach tax deed held barred by laches and intervention of rights of third parties. Woodfolk Heirs v. Witkowski [La.] 45 S 401. Suit held barred after seventeen years, during which rights of third parties had intervened. St. Louis & Arkansas Lumber & Mfg. Co. v. Godwin [Ark.] 108 SW 616. Owner who, without being misled, allowed property to be sold and purchaser to take possession, could not after twelve years question constitutionality of statute under which sale was made. Bacon v. Rice [Idaho] 93 P 511.

Doctrine not applicable to suit to remove a cloud of tax title where notice to redeem was invalid and the purchaser never acquired right of possession. G. F. Sanborn Co. v. Johnson, 148 Mich. 405, 111 NW 1091.

39. See post, this section, subsec. E.

40. Tax sale certificate to state held not rendered invalid by recital that amount for which land was sold was for "taxes of every kind charged against said property and penalties, costs and charges," the addition of word "charges" adding nothing to the amount and not charging the items thereof. Chapman v. Zobelein [Cal.] 92 P 188.

41. Under Pol. Code, § 3817, owner is entitled to **possession,** with right of redemption until land is sold by the state. Teich v. Arms, 5 Cal. App. 475, 90 P 962.

42. Under Laws 1855, p. 781, c. 427, as amended by Laws 1885, p. 763, c. 453, § 93, owner may sue comptroller to vacate sale of wild, vacant, or forest lands to state on ground that sale is void. Saranac Land & Timber Co. v. Roberts, 109 NYS 547. Remedy by application to comptroller under Laws 1885, p. 758, c. 448, relating to sale of lands of nonresidents, held not available to owner. Id.

43. General Tax Laws, § 127 (Pub. Acts 1893, p. 406), as amended by Act No. 107 (p. 150, Pub. Acts 1899), making it duty of auditor general and commissioner of state land office to determine when state tax land became state homestead lands, held to relate merely to classification of lands, and not invalid as delegation of judicial powers to such officers, the owner, after expiration of period of redemption, having no rights in the property. Griffin v. Kennedy, 148 Mich. 583, 14 Det. Leg. N. 317, 112 NW 756. Act held not deprivation of property without due process because it requires, § 127, determination of such officers to be assailed in six months, if assailed at all, as applied to case of one in possession, but having no rights in or to the property. Id. Delay in executing and recording of auditor general's land held not to affect limitations imposed by § 127. Downer v. Richardson, 148 Mich. 596, 14 Det. Leg. N. 371, 112 NW 761.

44. Rev. St. 1895, arts. 4266, 5147, providing that lands bid in for state by comptroller shall become vacant if not redeemed, etc., held to apply only to valid sales. Keenan v. Slaughter [Tex. Civ. App.] 108 SW 703. Laws 1885, p. 758, c. 448, practically re-enacted by Laws 1896, p. 841, c. 908, § 132, making conveyance to state conclusive after two years, etc., held not applicable as a limitation where sale was void, since such statute provides no remedy in such case and remedies provided cannot be enforced by owner against state. People v. Golding, 55 Misc. 425, 106 NYS 821.

45. Laws 1896, p. 830, c. 908, making conveyance to state conclusive, etc., held not applicable as statute of limitations as to conveyances recorded prior to such act. People v. Golding, 55 Misc. 425, 106 NYS 821.

46. Laws 1896, p. 830, c. 908, making conveyances to state conclusive after certain time, etc., held unconstitutional. People v. Golding, 55 Misc. 425, 106 NYS 821.

47. Curative provisions of Code 1906, § 884 (Code 1899, c. 31, § 25), apply as well where state is purchaser as where the purchaser is an individual. Collins v. Reger [W. Va.] 57 SE 743.

48. Validating act of 1903 held applicable to deed to state made June 28, 1901, and showing by its recitals that the tax sale was made June 27, 1896, the finding of the court being that five years had elapsed between date of sale and date of execution of deed. Schamblin v. Means [Cal. App.] 91 P 1020.

49. Citizens' Bk. v. Marr [La.] 45 S 115.

50. Rush v. Lewis & Clark County [Mont.] 93 P 943.

be exercised in the manner [51] and subject to the restrictions [52] prescribed by the existing statute.[53]

Where the state has acquired the right to transfer property acquired by it for taxes,[54] the validity of such a transfer depends upon whether there has been a sufficient compliance with the statutory requirements as to such transfers, such as those relative to notice,[55] consideration,[56] and form and recitals of the deed.[57] In the absence of constitutional limitation, the state may designate anyone it deems proper as its agent to transfer the title to lands acquired by it for taxes.[58] Generally, a conveyance from the state passes only such title as the state holds at the time,[59] but a

51. Failure to recite for whom or for how much property was bid off by county treasurer held to invalidate deed when attacked within five years. Grinstead v. Cooper [Kan.] 95 P 401. Deed to county showing on its face that it was executed to county after enactment of Laws 1903, p. 428, § 1, substituting assignment of tax sale certificates for deeds to county. Dimpfel v. Beam [Colo.] 91 P 1107.

52. Sale to county as a competitive bidder is void. Keller v. Hawk [Okl.] 91 P 778. Under Pol. Code, § 3882, county cannot be a competitive bidder, and deed showing that county was such bidder is void. Rush v. Lewis & Clark County [Mont.] 93 P 943. Such deed not sustainable by presumption of regularity or by Pol. Code, § 3897, relating to tax deed as evidence. Id. Deed to county must show its right to purchase and that it was not a competitive bidder. Id.

53. 2 Mills' Ann. St. § 3900, providing for tax deeds to county, held superseded by Laws 1903, p. 428, § 1, providing for assignment of tax sale certificate to county in lieu of deed. Dimpfel v. Beam [Colo.] 91 P 1107.

54. Whether or not state has acquired right to sell property acquired by it for taxes is determined by proceedings prior to the transfer of title, by deed or otherwise, pursuant to the original tax sale. Chapman v. Zobelein [Cal.] 92 P 188.

55. Under Pol. Code, § 3897 (St. 1897, § 436, c. 267), the **contents of the notice** need not include statement of name of person owing delinquent taxes against the property, or the taxes, costs, penalties, and expenses accrued to date. Chapman v. Zobelein [Cal.] 92 P 188.

Publication once a week for four successive weeks, the respective publications being exactly one week apart, held sufficient. Chapman v. Zobelein [Cal.] 92 P 188. Publication once a week for three successive weeks in daily newspaper held publication for three weeks prior to resale by state, as required by Pol. Code, § 3897. Fox v. Wright [Cal.] 91 P 1005. Daily publication of paper not presumed from use of word "Daily" as part of name of paper. Id.

56. State may provide for sale of its title for highest price offered, regardless of the amount of the taxes, etc. Chapman v. Zobelein [Cal.] 92 P 188. No objection to deed that it shows that sale was to highest bidder and for sum largely in excess of amount for which land was sold to state. Id. "Highest bidder" as used in Pol. Code, § 3897, relating to sale by state, held to mean person bidding largest amount of money for whole property, and not one who will pay taxes for least amount of property. Fox v. Wright [Cal.] 91 P 1005. Expression "cost of redemption" as used in Gen. St. 1901, § 7649, means amount land sold for, with interest added, and does not include the fee of the county treasurer for the certificate of assignment or his fee for certificate of redemption. Phares v. Cortwright [Kan.] 90 P 784.

57. Clause in statutory form of tax deed, relating to payment of subsequent taxes by the purchaser, should be inserted upon sale to county and assignment of certificate only when the purchaser has paid taxes subsequent to the assignment of the certificate. Pierce v. Adams [Kan.] 93 P 594. Such deed need not contain separate statement of amount of taxes for each year, if there be more than one, which constitute the consideration for the assignment, the statutory form requiring merely the gross sum, equal to amount necessary to redeem, to be stated. Id. Deed by tax collector is not within Pol. Code, §§ 3785, 3786, 3787, relating to conveyances to the state of land purchased by it at tax sales, and under §§ 3897, 3898, such deed need only recite so much of proceedings, after sale, to state as is necessary to show authority of collector to make the deed. Chapman v. Zobelein [Cal.] 92 P 188.

58. Const. art. 5, § 14, requiring grants and commissions to be signed by governor, etc., held not applicable to tax lands. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936. Constitutional requirement that all grants, etc., by the state shall be in name of people and signed by governor, does not apply to conveyances of lands purchased by state for taxes. Phillips v. Cox [Cal. App.] 94 P 377. Deed made by tax collector held sufficient, a patent signed by governor not being necessary. Chapman v. Zobelein [Cal.] 92 P 188.

59. Proceedings by commissioner of school lands, under Code 1899, c. 105 (Code 1906, §§ 3513-3535), are incompetent to reach back and perfect a void title acquired by the state under former tax proceedings, so as to divest the title of the true owner not a party to the suit; and the proceedings and deed of the commissioner of school lands pass to a purchaser only such title as the state originally acquired and still held at the time of the latter sale, the statute giving the remedy not being intended to create any new right or title in the state. Collins v. Reger [W. Va.] 57 SE 743. Deed from state conveys any title which the state has, regardless of **recitals as to date of sale,** though sale on date recited was void. McLemore v. An-

validating act may reach back to a former conveyance.[60] One who acquires his title by fraud is not entitled to redeem from the purchaser of the state's title,[61] nor can one charged with the duty of paying the taxes acquire title as against the owner by redeeming from such purchaser.[62] A conveyance sufficient as to part of the lands purporting to be conveyed is not invalidated by its insufficiency to convey the other portions.[63] Under some of the statutes, the purchaser is entitled to compensation where the title fails [64] or acquires an equitable title.[65] Where a municipality, pursuant to statute, acquires a fee simple absolute and free from liens, etc.,[66] the original owner has no interest in the proceeds of a subsequent sale by the municipality.[67] Under the various statutes, the deed itself is evidence of regularity in prior proceedings,[68] and after the expiration of a fixed time limit [69] may not be attacked for certain defects,[70] but the purchaser cannot invoke a limitation in favor of the state after such limitation has been waived by statute.[71] The right to attack the state's deed may be lost by laches.[72]

derson [Miss.] 43 S 878. Proof of sale at earlier date than one recited not alone sufficient to establish a misrecital. Id.

60. Validating act of 1903 held to validate deeds as of date of execution, and hence purchaser from state prior to enactment of such act procured good title thereunder. Schamblin v. Means [Cal. App.] 91 P 1020.

61. Chandler v. Clark [Mich.] 14 Det. Leg. N. 931, 115 NW 65.

62. Where tenant or agent charged with duty of paying tax allowed property to be sold to state, a subsequent redemption in his own name constitutes him a trustee as to title thus acquired for benefit of landlord or principal. Blake v. O'Neal [W. Va.] 61 SE 410.

63. Francis v. Sandlin [Ala.] 43 S 829.

64. Under Laws 1894, p. 574, c. 317, § 5, relating to state public lands, purchaser of tax title from state held entitled to recover compensation from state where the title fails, notwithstanding a provision in the patent that same should not operate as warranty. Wheeler v. State, 190 N. Y. 406, 83 NE 54. Warranty being negatived by patent, the measure of compensation in such case is the purchase price and interest thereon. Id.

65. May sue under Comp. Laws, § 448, to establish his title. Horton v. Helmholtz, 149 Mich. 227, 14 Det. Leg. N. 422, 112 NW 930. A purchaser under a void deed from the state, which previously acquired a valid tax title, may acquire a valid title by subsequent purchase at a tax sale. Purchaser holding apparent title, unquestioned, under deed from state void for erroneous computation of interest, held to have acquired valid title, subject to reassessment for the deficiency of interest, by purchase at subsequent tax sale. Id.

66. Title acquired by township by deed taken pursuant to Act May 18, 1898, § 9 (P. L. 451), as amended in 1902 (P. L. 555), is in fee simple, absolute, free, and discharged from any lien or charge on estate in favor of any person made a party to the proceedings. Wood v. Buena Vista Tp. [N. J. Law] 69 A 205.

67. Money arising from sale of lands by virtue of deed taken under Act May 18, 1898 (P. L. 451), as amended in 1902 (P. L. 1902, § 555), belongs to township, and no part is required to be paid into circuit court for benefit of original owner. Wood v. Buena Vista Tp. [N. J. Law] 69 A 205.

68. Under Pol. Code, § 3787, making deed from state conclusive evidence of nonessential details, a tax deed is not invalidated by failure of notice of sale to state name of persons to whom delinquent taxes for former years were assessed as required by § 3897. Fox v. Wright [Cal.] 91 P 1005. Under Pol. Code, § 3787, making deed from state conclusive evidence of regularity of proceedings prior thereto, such deed cannot be attacked for failure to stamp or endorse tax bills subsequent to sale to state with "Sold for taxes," etc., as required by statute. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936. State having power in first instance to dispense with such endorsements, etc., had power to make deed from state conclusive that such requirements were complied with. Id.

69. General Tax Laws, § 127 (Pub. Acts 1893, p. 406), as amended by Act No. 107 (p. 150, Pub. Acts 1899), authorizing auditor general and commissioner of state to determine when state tax lands become state homestead lands and fixing limitation upon attack upon such determination, held to relate merely to classification of state lands, and not to affect dispositon of state tax lands. Griffin v. Kennedy, 148 Mich. 583, 14 Det. Leg. N. 317, 112 NW 756.

70. Tax deed recorded more than five years before attack thereon held not void because it omits the word "publicly" from clause in statutory form "at the sale begun and publicly held," etc.; or because it substituted for words "said property could not be sold," in stating necessity of sale to county, the words "no person bid;" or because instead of using statutory language relating to assignment of tax sale certificate and all the right, title, and interest of the county in the property it merely states that the county duly assigned all the right, title, and interest of the county in the property. Baughman v. Harvey [Kan.] 93 P 146.

71. Purchaser from state cannot invoke limitations prescribed in favor of state by Act 1860 and Rev. Code 1871, § 1709, where such purchase is subsequent to Laws 1888, p. 42, § 5, waiving such limitations. McLemore v. Anderson [Miss.] 43 S 878.

72. Owner's mortgagee held barred after

§ 15. *Inheritance and transfer taxes. A. Nature of and power to impose.* See 8 C. L. 2002—An inheritance tax is not a tax on the property but upon the privilege of inheriting the same,[73] and hence is not subject to the constitutional limitations applicable to property taxes.[74] Such taxes, however, must not exceed the constitutional limitations applicable thereto,[75] and a vested property right acquired by will cannot be burdened with a transfer tax subsequently imposed.[76] The fact that two states, each dealing with its own law of succession, both of which laws the heir or devisee must invoke in order to obtain his rights, have taxed the rights which they respectively confer, gives no cause of complaint on constitutional grounds.[77]

(§ 15) *B. Successions and transfers taxable, and place of taxation.* See 8 C. L. 2093—The scope and applicability of statutes imposing inheritance and transfer taxes are necessarily matters of statutory construction,[78] as are also exemptions therefrom.[79] Where the tax applies to estates under the control of the probate court at the time the act imposing the tax becomes effective,[80] a prior voluntary distribution will not prevent the statute from applying.[81] Transfers evading an unconstitutional inheritance tax law must be considered as though there were no inheritance tax law at the time.[82]

fifteen years after sale and purchase by state and over ten years after conveyance by stats to an individual, neither the owner nor the mortgagee having paid taxes since the sale, nor offered to pay them. Citizens' Bk. v. Marr [La.] 45 S 115.

73. In re Touhy's Estate, 35 Mont. 431, 90 P 170. Collateral inheritance tax is not a tax upon the property but on the devolution or succession thereof. Fisher v. State [Md.] 66 A 661; Neilson v. Russell [N. J. Law] 69 A 476.

74. In re Touhy's Estate, 35 Mont. 431, 90 P 170.

75. Act No. 109, p. 173, of 1906, in imposing inheritance tax on "all successions not finally closed or in which the final account has not been filed," does not violate either state or Federal constitution. Succession of Stauffer, 119 La. 66, 43 S 928.

76. In re Ripley's Estate, 122 App. Div. 419, 106 NYS 844. Tax imposed by Act 1906, p. 173, No. 109, is on transmission of property, or, in other words, on the succession, and affects all property under administration at date of passage of such act, but cannot be enforced against property already delivered to the heirs and legatees without divesting vested rights. Succession of Stauffer, 119 La. 66, 43 S 928.

77. In re Rogers' Estate, 149 Mich. 305, 14 Det. Leg. N. 444, 112 NW 931.

78. Commissions on renewals of insurance policies paid to agent's heirs pursuant to agreement with insurance company held liable to inheritance tax, though tax is paid on the premiums of such renewals and the commissions are computed only after deduction of such taxes from such premiums. In re Succession of Fell, 119 La. 1037, 44 S 879. Monthly income bequeathed in consideration of legatee taking of certain person held taxable as property transferred by will. In re Eaton's Estate, 55 Misc. 472, 106 NYS 682. No collateral succession tax under Rev. Laws, c. 15, § 1, on brother's estate in remainder in realty. Dow v. Abbott [Mass.] 84 NE 96. Laws 1904, p. 57, No. 30, § 81, providing that taxes upon all persons receiving property passing from decedents shall apply to all "persons" dying between the passage of the act, etc., refers to "persons" who were decedents, and not beneficiaries. In re Howard's Estate, 80 Vt. 489, 68 A 513. Sum paid sole heir in addition to allowance made him by the will, in consideration of withdrawal of contest of will, held taxable under Laws 1902, p. 49, c. 3. People v. Rice [Colo.] 91 P 33.

79. Under Laws 1896, p. 869, c. 908, § 221, as amended by Laws 1905, p. 829, c. 368, § 221, a devise or devolution of property to one to whom the deceased stood in relation of parent for ten years is not entitled to the exemption provided by the statute unless both of the parents of the heir or devisee were dead when the relation between him and the deceased began. In re Harder's Estate, 108 NYS 154. Under Const. art. 236, ordaining that the inheritance tax shall not be enforced against property which has borne its just proportion of taxes, when it is admitted that all the property belonging to a commercial partnership has been regularly assessed and all taxes thereon duly paid, the interest of a partner in the same property is not a distinct and separate taxable entity as in case of a stockholder in a corporation. Succession of Stauffer, 119 La. 66, 43 S 928. Exemptions provided for by Laws 1904, p. 39, No. 30, §§ 82-85, continuing, with certain changes, Laws 1896, p. 38, § 46, held not applicable to proceeds of debt collected from nonresident. In re Howard's Estate, 80 Vt. 489, 68 A 513. Certain religious institutions held exempt from tax imposed by Laws 1898 (P. L. p. 106). In re Jones' Estate [N. J. Eq.] 67 A 1035.

80. Under Code 1897, § 1486, an estate under control of probate court when act became effective, April 8, 1898, held subject to tax imposed thereby, though decedent died in 1897. Montgomery v. Gilbertson, 134 Iowa, 291, 111 NW 964.

81. Estate held under control of probate court where executors' account was not approved until after enactment of the act, notwithstanding a prior unauthorized distribution by the executors without order of court. Montgomery v. Gilbertson, 134 Iowa, 291, 111 NW 964.

82. State v. Probate Ct. of Washington

A tax is sometimes imposed upon the transfer of corporate stocks.[83]

Powers of appointment. See 8 C. L. 2093—Where the will of the donee of the power neither adds to nor takes from any of the final beneficiaries the benefits which the original will confers, such beneficiaries are not liable to a transfer tax as taking under the will of the donee,[84] but the rule is otherwise where the final beneficiaries take by virtue of the donee's will.[85]

Place of taxation. See 8 C. L. 2093—While the residence of the decedent is generally determinative of the place of taxation[86] a succession tax attaches to all successions within the category of the statute, regardless of the residence of the decedent,[87] but as the only ground upon which a tax can be imposed upon the succession of a nonresident is that the property is within the jurisdiction of the state,[88] the test as to whether successions and transfers of the property of a nonresident decedent can be taxed must depend upon the location of the property,[89] and the law of equitable conversion cannot be invoked to bring the property within the jurisdiction of the state levying the tax.[90] The liability of the property of a nonresident decedent cannot be evaded by the application thereof to his debts to the exclusion of other property,[91] nor can a succession tax upon the portion of one distributee be evaded by the payment of all the estate in the state to another distributee,[92] but under some of the statutes

County, 102 Minn. 268, 113 NW 888. Such transfers are not affected by subsequent enactment of a valid law. Id.

83. Original issue of corporate stock held not within Laws 1905, p. 474, c. 241, as amended by Laws 1906, p. 1008, c. 414. People v. Duffy-McInnerny Co., 122 App. Div. 336, 106 NYS 878.

84. Where a remainder is created by a will, subject to change or modification by donee of power, an exercise of such power in such manner as not to change the original devise will not render such devise subject to tax under will of such donee. In re Spencer's Estate, 119 App. Div. 883, 107 NYS 543. Where bequest of property to a grandson provided that same should, on his death, go to his lawful issue "unless otherwise disposed of," and the grandson died leaving a will bequeathing such property to his widow and children in equal parts, the children took directly under grandfather's will, and not under power of appointment within Laws 1896, p. 868, c. 908, as amended by Laws 1897, p. 150, c. 284, § 220, subd. 5. In re Ripley's Estate, 122 App. Div. 419, 106 NYS 844. Children had right, in such case, to elect to take directly under their grandfather's will. Id.

85. See In re Spencer's Estate, 119 App. Div. 883, 107 NYS 543, and cases there cited and distinguished. Residuary estate disposed of by will of widow pursuant to power granted by husband's will held liable to tax imposed by Code Pub. Gen. Laws, art. 81, § 117. Fisher v. State [Md.] 66 A 661.

86. Deposits in foreign savings banks made by resident of a state are property within the state and taxable under collateral inheritance tax law. Mann v. State Treasurer [N. H.] 68 A 130. Under Laws 1896, p. 38, No. 46, as changed by Laws 1904, p. 40, No. 30, §§ 1, 3, 5, a tax may be imposed on distributees of proceeds of notes against nonresidents secured by mortgage on land outside the state held within the state by decedent at time of his death and collected by the resident administrator outside the state, distributees being collateral relatives and no tax having been paid outside the state. In re Howard's Estate, 80 Vt. 489, 68 A 513.

87. Neilson v. Russell [N. J. Law] 69 A 476.

88. McCurdy v. McCurdy [Mass.] 83 NE 881.

89. Shares of stock in domestic corporation held "property within this state," within P. L. 1894, p. 318, § 1, without regard to stockholder's residence, place of deposit of certificates, location of corporation's property, or its place of business. Neilson v. Russell [N. J. Law] 69 A 476; In re Delano's Estate [N. J. Eq.] 69 A 482. Stock of railroad corporation incorporated and doing business not only in Massachusetts but also in other states held property within jurisdiction of Masachusetts, within Rev. Laws, c. 15, § 1, St. 1905, p. 481, c. 470, and St. 1906, p. 453, c. 436. Kingsbury v. Chapin [Mass.] 82 NE 700. Under Pub. Laws 1903, No. 195, p. 277, **mortgages, notes and land contracts** upon and relating to land in the state owned by a nonresident are subject to inheritance tax, though such papers are in decedent's hands at his residence at time of his death. In re Rogers' Estate, 149 Mich. 305, 14 Det. Leg. N. 444, 112 NW 931.

90. McCurdy v. McCurdy [Mass.] 83 NE 881.

91. All property must be subjected ratably to debts. Kingsbury v. Chapin [Mass.] 82 NE 700. Personal property in the decedent's domicile should not be used to relieve property subject to a succession tax under the ancillary administrator of another state by discharging liens upon it for the purpose of increasing the succession tax. McCurdy v. McCurdy [Mass.] 83 NE 881. The proper rule is that the tax is to be estimated with reference to the property within the jurisdiction of the state at the time of decedent's death. Id.

92. Each distributee takes undivided interest in whole estate, and hence tax under Laws 1896, p. 868, c. 908, § 220, on succes-

no tax can be imposed where all the estate within the state is consumed by local debts.[93]

(§ 15) *C. Accrual of tax.*[See 8 C. L. 2094]—The law in force at the time of decedent's death controls in determining the amount of the tax,[94] and the tax is generally held to accrue upon such date where the interest or estate is one of present enjoyment;[95] but under some of the statutes, the tax upon the transfer of an estate in remainder does not accrue until the remainderman comes into possession.[96]

(§ 15) *D. Appraisal and collection.*[See 8 C. L. 2094]—Appraisal proceedings are entirely statutory,[97] specific provisions being made as to the rate of the tax,[98] and the mode of ascertaining the amount thereof.[99] Where the estate is one of present enjoyment, it is usually appraised as of the date of the death of the decedent,[1] but provision is sometimes made for a tax on the increase between such date and the date of distribution.[2] Estates in remainder are usually subject to appraisal as of the date when the remainderman comes into possession or enjoyment thereof.[3] The tax is

sion of portion of nonresident's estate found in state going to one distributee, cannot be avoided by payment of all of estate within the state to another distributee. In re Ramsdill's Estate, 190 N. Y. 492, 83 NE 584.

93. Transfer tax imposed by Laws 1896, p. 868, c. 908, § 220, as amended by Laws 1897, p. 150, c. 284, on devises, bequests, and devolutions when any person or corporation becomes "beneficially entitled" to the property, held not applicable where a nonresident's estate within the state is applied to debts owed to residents as required by § 2701, and is entirely consumed by such application. In re Grosvenor's Estate, 108 NYS 926. Fact that application to debts due to residents is indirect by payment with funds brought into state by executor held not to change this rule. Id.

94. In re Woodard's Estate [Cal.] 94 P 242.

95. In re Lander's Estate [Cal. App.] 93 P 202; McCurdy v. McCurdy [Mass.] 83 NE 881. Under Laws 1902, p. 49, § 3, **interest** held chargeable upon tax from date of testator's death, if such tax was not paid within six months after such date, though the tax was not ascertainable within such period by reason of litigation, which was finally compromised and which, if successful, would have rendered the estate insolvent, the statutory provision for interest not being in the nature of a penalty. People v. Rice [Colo.] 91 P 33.

96. Under St. 1902, p. 381, c. 473, as amended by St. 1903, p. 234, c. 276, tax on real estate in remainder. Dow v. Abbott [Mass.] 84 NE 96. Remainderman has option of paying tax at any time after deducting value of life estate. Id.

97. Under statutory construction law, Laws 1892, p. 1485, c. 677, the transfer tax act of 1885 was continued in force, notwithstanding that it was repealed, without savings clause, by Laws 1892, p. 814, c. 399, and under statutory construction act, § 31, proceedings pending at the time were not suspended. In re Jones' Estate, 54 Misc. 202, 105 NYS 932. Under Laws 1892, p. 818, c. 399, § 11, the time within which the surrogate shall make **appointment of appraiser** is within his sound discretion. Id. Jurisdiction of surrogate held not dependent upon appointment of special guardian for infant legatee pending appraisal, such appointment not being necessary under Laws 1899, p. 1481, c. 672, until surrogate's order upon report of appraiser is entered. Id.

98. Under Laws 1896, p. 867, c. 908, § 221, as amended by Laws 1905, p. 829, c. 368, a devise or devolution to one to whom deceased stood in relation of parent for ten years is not entitled to rate prescribed thereby unless both parents of heir or devisee were dead when relation between him and deceased began. In re Harder's Estate, 108 NYS 154. Under Laws 1896, p. 874, c. 908, § 230, as amended by Laws 1901, p. 385, c. 173, a bequest of a monthly sum to husband and wife in consideration that they take care of certain person for life, and in event of death of wife the whole compensation to go to husband, held taxable to husband and wife at five per cent, and not to executor at 1 per cent. In re Eaton's Estate, 55 Misc. 472, 106 NYS 682.

99. Amount of collateral inheritance tax on life estate is ascertained according to Rev. Laws, c. 15, § 16, as amended by St. 1905, p. 290, c. 367. Dow v. Abbott [Mass.] 84 NE 96.

1. Collateral inheritance tax on **life estate** under Rev. Laws, c. 15, § 16, as amended by St. 1905, § 290, c. 367. Dow v. Abbott [Mass.] 84 NE 96. Under Code Pub. Gen. Laws, art. 81, § 117, tax on **residuary estate disposed of by will of donee of power,** with right to select final beneficiaries, held ascertainable as of date of donee's death and not the death of original testator. Fisher v. State [Md.] 66 A 661.

2. Under Sess. Laws 1897, p. 83, § 1, providing that inheritance tax shall be collected upon "increase of all property arising between the date of death and the date of the decree of distribution," such increase includes increase of value as well as of kind. In re Touhy's Estate, 35 Mont. 431, 90 P 170.

3. Under St. 1902, p. 381, c. 473, as amended by St. 1903, p. 234, c. 276, tax on real estate in remainder is ascertained with reference to value at time when remainderman comes into actual possession. Dow v. Abbott [Mass.] 84 NE 96. Remainderman has option of paying tax at any time, deducting value of life estate. Id. Tax on remainder in personalty is payable as provided by Act 1903, if remainderman has given bond,

upon the estate as the beneficiary takes it, that is upon what he receives,[4] and it would seem to follow, and is so held, that where the estate descends to two or more persons, legal exemptions should be allowed to each;[5] but under a statute exempting transfers of less than a certain value, it is held that the total amount of the decedent's personal estate must be considered.[6] In any case, the statutory provisions control.[7] Where the property is committed to a trustee to be thereafter distributed his compensation cannot be deducted.[8]

A reappraisal may be had in a proper case,[9] and provision is usually made for an appeal.[10]

The collection of an inheritance or transfer tax will not necessarily be defeated by the failure of the statute to provide for such collection.[11] Some of the methods commonly employed are collection by the personal representative from the beneficiary,[12] refusal of order of distribution until the tax is paid,[13] and deduction of the tax from funds in the hands of the court.[14] Where a will provides that all taxes shall be paid out of the income of the estate, the tax on a devise of the use of property is payable out of the residuary estate,[15] and a tax on a bequest in trust to pay income to certain person is payable out of the corpus of the bequest, and not out of the income.[16]

§ 16. *License taxes.*[17]

but if he has not given bond such tax is due and payable as provided by Rev. Laws, c. 15, § 4. Id. Where remainderman has not given bond, the tax on remainder in personalty is ascertainable and payable as of date of decedent's death, and ascertained according to method provided by Rev. Laws, c. 15, § 2, and St. 1903, p. 234, c. 276. Id. Where appraiser appraised both life estate and remainder during life of the life tenant, and without notice to remainderman, such appraisal was not **res adjudicata** and binding on the state as to value of the remainder. See Laws 1897, p. 150, c. 284, providing that estate in remainder shall be appraised at full value when person entitled comes into beneficial enjoyment thereof, without diminution on account of prior valuation of particular estate. In re Mason, 120 App. Div. 738, 105 NYS 667.

4. Debts of community must be deducted before fixing amount of tax on succession of wife's share in community which she wills to husband. Succession of May [La.] 45 S 551.

5. State v. Probate Court of Hennepin County [Minn.] 112 NW 878.

6. Under the New York transfer tax act, the amount of a decedent's personal estate and not the amount passing to the individual legatees determines whether the individual legacies shall be taxed. In re Costello's Estate, 189 N. Y. 288, 82 NE 139.

7. Where railroad company is incorporated and does business not only in Massachusetts but in other states, but has only one issue of **stock**, such stock, for purpose of valuation under Massachusetts law, must be considered with reference only to property of company within such state. Kingsbury v. Chapin [Mass.] 82 NE 700.

8. State v. Probate Ct. of Hennepin County [Minn.] 112 NW 878.

9. Surrogate may, on order to show cause, set aside his order assessing tax for error in assessing at too low a rate, and may order a reappraisal. In re Eaton's Estate, 55 Misc. 472, 106 NYS 682.

10. Under Laws 1896, c. 908, § 232, **notice** of appeal from decision of appraiser as to amount of transfer tax must state grounds of appeal. In re Stone's Estate, 56 Misc. 247, 107 NYS 385. Under Transfer Tax Act, Laws 1896, p. 874, c. 908, §§ 231, 232, no appeal lies to appellate division from decision of surrogate acting as an assessor, the proper **practice** being to appeal to surrogate to review his decision and then to appeal from his decision on such appeal. In re Costello's Estate, 189 N. Y. 288, 82 NE 139.

11. Fisher v. State [Md.] 66 A 661.

12. Under Rev. Laws, c. 15, § 5, a collateral inheritance tax on realty should be collected by the administrator from beneficiary, as provided by the act. Dow v. Abbott [Mass.] 84 NE 96.

13. Mode of collecting succession taxes provided by Act 1893, and amendments, held continued in force by Act 1905, and hence under latter act, and Code Civ. Proc. § 1669, as amended by St. 1905, p. 83, c. 85, § 1, the court should refuse decree of distribution until satisfied that succession tax has been paid and may order executor to deduct such taxes from the legacies upon which they are due. In re Martin's Estate [Cal.] 94 P 1053. Distribution refused where tax has not been paid, regardless of whether repealing statutes have left any remedy for collection of tax. In re Lander's Estate [Cal. App.] 93 P 202.

14. Where proceeds of sale by executor are in court, the title is not rendered defective by state's lien for inheritance tax. Mandel v. Fidelity Trust Co. [Ky.] 107 SW 775.

15, 16. In re Bass, 109 NYS 1084.

17. See 8 C. L. 2095. See Licenses, 10 C. L. 622. See, also, such titles as Foreign Corporations, 9 C. L. 1395; Street Railways, 10 C. L. 1730; Attorneys and Counselors, 9 C. L. 300; Peddling, 10 C. L. 1159.

§ 17. *Income taxes.* See 6 C. L. 1663

§ 18. *Distribution and disposition of taxes collected.* See 8 C. L. 2095—Statutes relative to the distribution of taxes must conform to constitutional limitations.[18] There seems to be some conflict as to the right of one municipality or taxing district to recover from another taxes which should have been levied and collected by the former, but which have erroneously been levied and collected by the latter.[19] The right of a city to a portion of taxes collected by a county may be lost by laches.[20]

One entitled to a portion of taxes collected may enforce his claim in a proper case by mandamus.[21]

TELEGRAPHS AND TELEPHONES.

§ 1. Franchises and Licenses, Property and Contracts, and Corporate Affairs, 1841.
§ 2. Construction and Maintenance of Lines, and Injuries Thereby, 1843.
§ 3. Telegraph Messages, 1843.
A. Duty and Care, 1843. Transmission, 1844. Delivery, 1844. Delivery to Others for Addressee, 1845. Spurious Messages, 1845.
B. Injury and Damages, 1845. Conflict of Laws, 1845. General and Special Damages, 1845. Mental Anguish, 1846. Exemplary Damages, 1847.
C. Procedure, 1848.
D. Penalties, 1848.
§ 4. Telephone Service, 1849.
§ 5. Quotations and Ticker Service, 1849.
§ 6. Rates, Tariffs, and Rentals, 1849.
§ 7. Offenses, 1849.

§ 1. *Franchises and licenses, property and contracts, and corporate affairs.* See 8 C. L. 2096—A telephone company must obtain its right of way either by grant or license from the state or, if upon private property, by purchase or condemnation,[1] and franchises and rights on public ways must be granted by the state except as its

18. State v. Butler County Com'rs [Kan.] 94 P 1004. Provision of Laws 1907, p. 241, c. 141, § 1, providing for appropriation of surplus funds of county for purpose of erecting permanent county buildings, held not in violation of Const. art. 11, § 4, relative to **subjects and titles of statutes.** Id.

19. One school district cannot recover from another taxes erroneously collected by the latter, on ground of mistake or misprision in making of district maps. School Directors Dist. No. 153 v. School Directors Dist. No. 154, 232 Ill. 322, 83 NE 849. City held entitled to recover city road taxes erroneously levied and collected by the city where such taxes were voluntarily paid. City of Eugene v. Lane County [Or.] 93 P 255.

20. Where county has collected taxes for road purposes, and city claims portion thereof for street purposes, such claim will not be enforced in equity where the city has for several years neglected to make demand for its proportion of such taxes until same has been disbursed by county under statutory authority. City of Sanford v. Orange County [Fla.] 45 S 479.

21. Petition to compel tax collector to pay certain per cent of taxes pursuant to contract with county held sufficient, though details of contract were not set out. Bailey v. Aransas County [Tex. Civ. App.] 18 Tex. Ct. Rep. 664, 102 SW 1159. Duty of collector to pay such per cent as provided by the contract was not affected by fact that he was not party to contract. Id. Under Rev. St. 1895, art. 828, county commissioners may order tax collector to pay a third party a certain per cent of taxes collected as compensation for services rendered in collecting such taxes pursuant to contract with such commissioners. Id. Right of one to per cent of taxes under contract with and pursuant to order of commissioner's court, as compensation for enforcing payment of such taxes, to mandamus to compel collector to make such payment, held not affected by question of **adequacy or remedy at law.** Id.

Commissioners may join in petition for mandamus to compel collector to pay petitioner certain per cent of taxes collected as compensation for services rendered in making such collection. Bailey v. Aransas County [Tex. Civ. App.] 18 Tex. Ct. Rep. 664, 102 SW 1159. Held within discretion of court to grant mandamus to compel county treasurer to apply proceeds of special assessments in his hands to payment of assessment certificates, though statute under which assessments were made and certificates issued did not expressly direct treasurer to make such application. People v. Treasurer of Monroe County [N. Y.] 83 NE 661. Mandamus granted to compel application of tax to judgment, regardless of irregularities in the assessment. See Comp. Laws, § 3983. Montpelier Sav. Bk. & Trust Co. v. Quinn, 149 Mich. 701, 14 Det. Leg. N. 551, 113 NW 308.

1. Northwestern Tel. Exch. Co. v. St. Charles, 154 F 386. Grant of use of streets for telephone system, a public purpose. City of Plattsmouth v. Nebraska Tel. Co. [Neb.] 114 NW 588. An ordinance granting a telephone company the right to use streets of a municipality under certain conditions does not grant a franchise but merely a license. City of Chicago v. Chicago Tel. Co., 230 Ill. 157, 82 NE 607,

power has been delegated,[2] a franchise from an unauthorized municipality giving no rights.[3] Municipal assent may arise by estoppel [4] and is irrevocable,[5] but entry without payment of license fees does not exempt the company from license,[6] and occupation, in the face of constitutional prohibition, gives no rights [7] though it was with municipal permission.[8] Legislative franchises are subject to the municipal police power.[9] A municipality authorized to grant a franchise may penalize occupation of the streets without franchise,[10] may annex lawful conditions,[11] and revoke the franchise for their violation,[12] and the corporation having accepted the franchise is bound by its conditions.[13] There is no presumption that a grant is unlimited [14] or exclusive.[15] A franchise is exhausted by the installation of a system thereunder, and a second one cannot be installed under the same franchise.[16] While the maintenance of a telephone line on a highway, where the owner holds the fee to the center of the road, is an additional burden not within the scope of public use,[17] such maintenance in a city street is within the public easement and a proper street use,[18] but the telephone company must show by franchise, a right to the easement.[19] The enlargement of a telephone line is an increased burden upon land.[20] A deed to a water company of right of way for laying pipes "with" right to erect telephone or telegraph line is construed in a limited sense for the water company only,[21] and is not broad enough to confer a right of way on a telephone company, when assigned.[22] A telephone company, that is a mere licensee of a town which had only an easement in the streets, is liable for damages to trees of abutting property owners.[23] A contract giving a telephone company a monopoly of service is unenforcible, being against pub-

2. Construing ordinance. City of Texarkana v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 734, 106 SW 915; Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67. Power to grant franchises can be exercised only under authority of the state. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108. License subject to control of state. Northwestern Tel. Exch. Co. v. St. Charles, 154 F 386. Immaterial that it is a **foreign** company. State v. Western Union Tel. Co., 75 Kan. 609, 90 P 299. Rights to the use of the streets from the legislature, and the function of the probate court, is limited strictly to mode of use. Cleveland Tel. Co. v. South Newburgh, 4 Ohio N. P. (N. S.) 624.

3. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

4. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67.

5. Consent by city, irrevocable. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67.

6. State v. Western Union Tel. Co., 75 Kan. 609, 90 P 299.

7. Rival company disconnected service. Rural Home Tel. Co. v. Kentucky & I. Tel. Co. [Ky.] 107 SW 787.

8. Const. §§ 163, 164, is mandatory. Rural Home Tel. Co. v. Kentucky & I. Tel. Co. [Ky.] 107 SW 787.

9. Wires excluded from certain streets. Rochester Tel. Co. v. Ross, 109 NYS 381; City of Texarkana v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 734, 106 SW 915; State v. Milwaukee [Wis.] 113 NW 40. Ordinance requiring underground conduits, unreasonable when poles did not endanger public. City of Plattsmouth v. Nebraska Tel. Co. [Neb.] 114 NW 588.

10. Ordinance valid. Northwestern Tel. Exch. Co. v. St. Charles, 154 F 386.

11. Rates. Moberly v. Richmond Tel. Co., 31 Ky. L. R. 783, 103 SW 714. May not exclude company, under guise of regulation. State v. Milwaukee [Wis.] 113 NW 40. Must not burden company with unreasonable demands. City of Plattsmouth v. Nebraska Tel. Co. [Neb.] 114 NW 588.

12. People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

13. Cumberland Tel. & T. Co. v. Cartwright Creek Tel. Co. [Ky.] 108 SW 875.

14. Grant to long distance company does not include local rights. State v. Thief River Falls, 102 Minn. 425, 113 NW 1057.

15. Ordinance granting use of streets, with no provision to exclude other companies does not grant an exclusive privilege. City of Plattsmouth v. Nebraska Tel. Co. [Neb.] 114 NW 588.

16. Eby v. Lathrop [Mo. App.] 107 SW 410.

17. Gannett v. Independent Tel. Co., 55 Misc. 555, 106 NYS 3. Increased danger from lightning not an element in determining damages. Shuster v. Central Dist. & Print. Tel. Co., 34 Pa. Super. Ct. 513.

18. Gannett v. Independent Tel. Co., 55 Misc. 555, 106 NYS 3.

19. Injury to shade trees. Cartwright v. Liberty Tel. Co., 205 Mo. 126, 103 SW 982.

20. Larger poles and more wires. Northwestern Tel. & T. Co. v. Hepburn [N. J. Err. & App.] 69 A 249.

21. Northwestern Tel. & T. Co. v. Hepburn [N. J. Err. & App.] 69 A 249.

22. Not intent of parties. Northwestern Tel. & T. Co. v. Hepburn [N. J. Err. & App.] 69 A 249.

23. A trespass, and act is violation of statute protecting trees. State v. Graeme [Mo. App.] 108 SW 1131.

lic policy,[24] but a contract, whereby a city grants a telephone company the right to install a system and the latter agrees to pay a percentage of gross earnings, is binding.[25] The remedy of quo warranto is appropriate to oust a company from exercising an invalid franchise [26] and such proceeding may be brought by a private person.[27]

Consideration. See 8 C. L. 1866

License fees and taxes. See 8 C. L. 2098—A telegraph company, deriving its franchise from an act of the United States, is not exempt from taxation in other states.[28] Injunction against assessments will be granted only in cases of fraud.[29]

Transfers, line contracts, leases, and mortgages. See 8 C. L. 2098—A telephone company, having received its franchise under agreement to connect with private lines, is estopped from repudiation of such contract.[30] The union of two systems of telephones without written or verbal agreement does not constitute a contract for continuous service.[31] Some companies secure franchises by executing a penal bond not to sell or part with control. A lease in such instances may be a violation of the condition.[32] In Montana a local telephone company can invoke the right of eminent domain to acquire connection and use of another company's lines.[33]

§ 2. *Construction and maintenance of lines, and injuries thereby.* See 8 C. L. 2098 The use of streets should not interfere with other public uses,[34] and the right to maintain telegraph lines does not import an unlimited number of wires.[35] A telegraph company cannot be deprived of the lawful use of a bridge,[36] but the county can maintain an action for damages for that use.[37] A telephone company maintaining wires along a public highway must exercise reasonable care to avoid injuring travelers,[38] and the question of inspection should be submitted to a jury.[39] This duty of inspection depends upon character of soil, weather, season of the year, and like circumstances.[40]

§ 3. *Telegraph messages. A. Duty and care.* See 8 C. L. 2100—A telegraph company is a private corporation performing a public duty,[41] and is charged with the

24. Exclusive rights to hotel. Central New York Tel. & T. Co. v. Averill, 55 Misc. 346, 105 NYS 378.

25. Charter gave city right to exclude company. City of Jamestown v. Home Tel. Co., 109 NYS 297.

26. St. 1898, § 3466. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108; People v. Central Union Tel. Co., 232 Ill. 260, 83 NE 829.

27. Action by taxpayer, when attorney general refused to act. State v. Milwaukee Independent Tel. Co. [Wis.] 114 NW 108.

28. Immaterial that tax is designated as franchise tax. Western Union Tel. Co. v. Wright, 158 F 1004; State v. Western Union Tel. Co., 75 Kan. 609, 90 P 299.

29. Western Union Tel. Co. v. Wright, 158 F 1004.

30. Offer to build after construction of private line. Cumberland Tel. & T. Co. v. Cartwright Creek Tel. Co. [Ky.] 108 SW 875.

31. Rural Home Tel. Co. v. Kentucky & I. Tel. Co. [Ky.] 107 SW 787.

32. Affidavit of defense sufficient. Ridley Park Borough v. United Tel. & T. Co., 33 Pa. Super. Ct. 230.

33. Const. Mont. art. 15, § 14. "Use" means right to have business efficiently cared for. Billings Mut. Tel. Co. v. Rocky Mountain Bell Tel. Co., 155 F 207.

34. Moving a building, an extraordinary use and might be enjoined. Kibbie Tel. Co. v. Landphere [Mich.] 14 Det. Leg. N. 953, 115 NW 244. Mode of use of streets by telephone company does not apply to moving of building. Cleveland Tel. Co. v. South Newburgh, 4 Ohio N. P. (N. S.) 624.

35. Northeastern Tel. & T. Co. v. Hepburn [N. J. Err. & App.] 69 A 249.

36. Bridge part of highway. Beaver County v. Central Dist. & Print. Tel. Co. [Pa.] 68 A 846.

37. Beaver County v. Central Dist. & Print. Tel. Co. [Pa.] 68 A 846.

38. Crawford v. Standard Tel. Co. [Iowa] 115 NW 878. Evidence showing wire broken by thunderstorm at 9 P. M., and accident at 6 A. M., did not show prima facie case of negligence. Parmelee v. Tri-State Tel. & T. Co. [Minn.] 115 NW 1135.

39. Crawford v. Standard Tel. Co. [Iowa] 115 NW 878. Evidence of storm on Oct. 20th, and accident Nov. 10. Bishop v. Rocky Mountain Bell Tel. Co. [Utah] 94 P 976.

40. Delay of 7 days in repairing pole is negligence. Harton v. Forest City Tel. Co. [N. C.] 59 SE 1022. Subscriber presumed to know that wires get down in severe weather or that service may be interrupted. Eastern Kentucky Tel. & T. Co. v. Hardwick [Ky.] 106 SW 307.

41. Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 SE 189. A common carrier. Western Union Tel. Co. v. Caldwell, 31 Ky. L. R. 497, 102 SW 840.

duty to act impartially to all,[42] to provide safe and decent access to places of business,[43] and to transmit and deliver messages with reasonable diligence.[44] An act of God will excuse nondelivery, if it is the sole preventing cause.[45] Reasonable regulations by the company may be enforced,[46] though in many jurisdictions it is held that it cannot exempt itself from liability for negligence.[47] The sender of a message is chargeable with notice of conditions printed on the telegraph blank.[48] Whether such regulations have been waived is a question for the jury.[49]

*Transmission.*See 8 C. L. 2101—In transmission of a message, the telegraph company is the agent of the sender,[50] the addressee's right of action being usually sustained only as ex delicto.[51] Ordinary care must be used in transmission.[52] Messages are accepted subject to reasonable regulations as to office hours,[53] but the provision may be waived.[54] A contract to deliver messages on Sunday is void, but is ratified by transmission later.[55]

*Delivery.*See 8 C. L. 2102—The obligation to deliver rests not only on contract but on public duty.[56] Reasonable diligence must be exercised,[57] and in determining what is diligence, all the circumstances including the place of the addressee's residence,[58] misspelling of the addressee's name,[59] or other neglect of the sender,[60] and the contents of the message as imparting to the company notice of its urgency,[61] may be

42. Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 SE 189.

43. Sender insulted with remarks of agent. Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 SE 189.

44. Western Union Tel. Co. v. Caldwell, 31 Ky. L. R. 497, 102 SW 840; Glover v. Western Union Tel. Co. [S. C.] 59 SE 526; Western Union Tel. Co. v. True [Tex.] 20 Tex. Ct. Rep. 298, 106 SW 315.

45. No presumption of exercise of due care. Fail v. Western Union Tel. Co. [S. C.] 60 SE 697.

46. Company exempt from liability for unrepeated message. Halsted v. Postal Tel. Cable Co., 120 App. Div. 433, 104 NYS 1016.

47. Exemption, if message was not repeated, unavailing in case of negligent failure to deliver. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265; Postal Tel. Cable Co. v. Nichols [C. C. A.] 159 F 643.

48. Did not read "no defense." Postal Tel. Cable Co. v. Nichols [C. C. A.] 159 F 643.

49. Wheelock v. Postal Tel. Cable Co. [Mass.] 83 NE 313. Receipt for transmission of message by telephone held to waive conditions on message blank. Bowie v. Western Union Tel. Co. [S. C.] 59 SE 65.

50. Damages for error in transmission. Western Union Tel. Co. v. Cooper, 2 Ga. App. 376, 58 SE 517.

51. See post, § 3C.

52. Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251. A long unexplained delay raises the presumption of negligence. Kirby v. Western Union Tel. Co., 77 S. C. 404, 58 SE 10. Recovery for error in transmission where message to buy cotton at 9 1-8 cents was delivered to read 9 1-4 cents. Western Union Tel. Co. v. McCants [Miss.] 46 S 535.

53. Bolton v. Western Union Tel. Co., 76 S. C. 529, 57 SE 543; Smith v. Western Union Tel. Co., 77 S. C. 378, 58 SE 6.

54. Bolton v. Western Union Tel. Co., 76 S. C. 529, 57 SE 543. Evidence that rule as to office hours had been habitually disregarded when important messages arrived. Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251.

55. Hoyt v. Western Union Tel. Co. [Ark.] 108 SW 1056.

56. Western Union Tel. Co. v. Caldwell, 31 Ky. L. R. 497, 102 SW 840.

57. Western Union Tel. Co. v. Morgan [Miss.] 45 S 427; Western Union Tel. Co. v. True [Tex. Civ. App.] 18 Tex. Ct. Rep. 991, 103 SW 1180. Company failed to advise that transmission and delivery charges were guaranteed. Edward v. Western Union Tel. Co. [N. C.] 60 SE 900. Question submitted to jury. Glover v. Western Union Tel. Co. [S. C.] 59 SE 526. Evidence conflicting as to efforts of messenger boy to deliver but verdict upheld. Smith v. Western Union Tel. Co., 77 S. C. 378, 58 SE 6. "Delivery" may mean the whole transaction, including transmission. Kirby v. Western Union Tel. Co., 77 S. C. 404, 58 SE 10.

58. Rule applies, though addressee outside of free delivery limits. Western Union Tel. Co. v. Ayres [Tex. Civ. App.] 20 Tex. Ct. Rep. 227, 105 SW 1165. Evidence of location of sendees, admissible to show lack of reasonable care in delivery. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 20 Tex. Ct. Rep. 489, 107 SW 570.

59. Message to Gamble whose right name was Gambill did not relieve company of liability Western Union Tel. Co. v. Gamble [Tex. Civ. App.] 18 Tex. Ct. Rep. 126, 101 SW 1166.

60. Question for jury whether negligence of addressee's agent contributed to failure of delivery. Hise v. Western Union Tel. Co. [Iowa] 113 NW 819.

61. Western Union Tel. Co. v. Lehman [Md.] 67 A 241; McLeod v. Pacific Tel. Co. [Or.] 94 P 568. Person in telegraph office at station presumed in company's employment to receive notice. Bolton v. Western Union Tel. Co., 76 S. C. 529, 57 SE 543. Receipt by company at unusual hours, with other circumstances, showed notice. Id. Telegram, "Counter proposition not unfavor-

considered, and having such notice of the urgency of a message, notice must be given to the sender, if delivery cannot be made.[62]

Delivery to others for addressee.[See 8 C. L. 2103]—The duty of a telegraph company to deliver is personal [63] and is not fulfilled, as a matter of law, by delivery to a third person [64] in the absence of contract.[65]

Spurious messages.[See 6 C. L. 1672]

(§ 3) *B. Injury and damages. Conflict of laws.*[See 8 C. L. 2104]—The sender's right of action is governed by the law of place of contract.[66] The addressee's right is generally held to be governed by the law of the place of delivery,[67] but in those states which hold that the sender's contract rights inure to the addressee, the law of the place of contract controls.[68]

General and special damages.[See 8 C. L. 2104]—Recovery can only be had for such damages as are naturally and probably consequent upon failure to deliver,[69] and

able. Imperative you come," was notice to company of importance. Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134. Message, "If you want cattle, come here," not notice. Western Union Tel. Co. v. True [Tex.] 20 Tex. Ct. Rep. 298, 106 SW 315, rvg. [Tex. Civ. App.] 18 Tex. Ct. Rep. 991, 103 SW 1180. In a city office with many employees, a company not chargeable, from fact that several messages were sent, of importance, of last telegram. Western Union Tel. Co. v. Weniski, 84 Ark. 457, 106 SW 486. No notice inferred from "You can make big money next month, come at once" that failure to deliver would cause damage through loss of commissions in real estate transaction. Western Union Tel. Co. v. Twaddell [Tex. Civ. App.] 18 Tex. Ct. Rep. 986, 103 SW 1120. Telegram, "we will pay draft," not notice. Cason v. Western Union Tel. Co., 77 S. C. 157, 57 SE 722. That company knew business of sender did not impute knowledge of importance of message. Wheelock v. Postal Tel. Co. [Mass.] 83 NE 313.

Cypher messages: Cipher telegram is, especially, notice that message is important. Smith v. Western Union Tel. Co. [Neb.] 114 NW 288. Cipher telegram, notice that message is important. Bashinsky v. Western Union Tel. Co., 1 Ga. App. 761, 58 SE 91.

62. Postal Tel. Cable Co. v. Nichols [C. C. A.] 159 F 643. A "death" message. Potter v. Western Union Tel. Co. [Iowa] 116 NW 130. A telegraph company, finding that addressee lives beyond free delivery limits, is relieved from liability only by notifying sender of claim for additional compensation. Lyles v. Western Union Tel. Co., 77 S. C. 174, 57 SE 725. Notice of nondelivery to sender. Western Union Tel. Co. v. Garrett [Tex. Civ. App.] 18 Tex. Ct. Rep. 532, 102 SW 456. Payment of charges, consideration for notice of nondelivery, where telegraph company informs sender that notice will be given. Lyles v. Western Union Tel. Co., 77 S. C. 174, 57 SE 725.

63. Glover v. Western Union Tel. Co. [S. C.] 59 SE 526. Delivery to an unauthorized person. Id.

64. Glover v. Western Union Tel. Co. [S. C.] 59 SE 526.

65. Contract to deliver by telephone. Lyles v. Western Union Tel. Co., 77 S. C. 174, 57 SE 725.

66. Western Union Tel. Co. v. Garrett [Tex. Civ. App.] 18 Tex. Ct. Rep. 532, 102 SW 456. As to right to recover for mental anguish. Western Union Tel. Co. v. Hanley [Ark.] 107 SW 1168; Ligon v. Western Union Tel. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 473, 102 SW 429.

67. Balderston v. Western Union Tel. Co. [S. C.] 60 SE 435.

68. Contract made in Tennessee inures to addressee's benefit in Arkansas, though no negligence was shown in latter state. Western Union Tel. Co. v. Woodard, 84 Ark. 323, 105 SW 579.

69. Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 SE 189; Seifert v. Western Union Tel. Co., 129 Ga. 181, 58 SE 699; Wheelock v. Postal Tel. Cable Co. [Mass.] 83 NE 313; Kirby v. Western Union Tel. Co., 77 S. C. 404, 58 SE 10; Purdom Naval Stores Co. v. Western Union Tel. Co., 153 F 327. St. 1898, § 1778. Barker v. Western Union Tel. Co. [Wis.] 114 NW 439; Smith v. Western Union Tel. Co. [Neb.] 114 NW 288. Inconveniences not resulting from failure to deliver. Cason v. Western Union Tel. Co., 77 S. C. 157, 57 SE 722. Wife cannot maintain action for damages for husband's salary lost through company's negligence. Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 SE 83. Exposure resulting from negligence in delivering message. Dempsey v. Western Union Tel. Co., 77 S. C. 399, 58 SE 9. Failure to transmit correctly caused pecuniary loss. Telegram by bank changed in transmission so signature was maker's. Baird v. Western Union Tel. Co. [S. C.] 60 SE 695. Negligence of brother in delivering. Gerock v. Western Union Tel. Co. [N. C.] 60 SE 637. Mental suffering proximate result of delayed message. Western Union Tel. Co. v. Rowell [Ala.] 45 S 73; Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134. Delay till addressee was inaccessible by failure of telephone service. Western Union Tel. Co. v. Gulick [Tex. Civ. App.] 20 Tex. Ct. Rep. 745, 106 SW 698. Failure to ship body to another state not a proximate result from message "send some one to me." Western Union Tel. Co. v. Tandry [Tex. Civ. App.] 108 SW 461. Where sale of horse was lost, damages could be recovered for difference in value by subsequent sale, keeping of horse, and other necessary expenses. Hoyt v. Western Union Tel. Co. [Ark.] 108 SW 1056. Message "company shut down, cannot do anything for you," notice that damages

speculative damages are not recoverable,[70] but subsequent greater profits to plaintiff by failure to deliver does not excuse the company's negligence.[71] General damages are recoverable, there being a breach of contract,[72] unless there is a new and independent cause intervening,[73] but the company is not liable for special damages unless notice is given.[74] The sender of a telegraph message should use ordinary care to minimize damages, which he realizes may happen,[75] and the costs of lessening such damages should be borne by the telegraph company.[76] Nominal damages are recoverable for failure to transmit.[77]

Mental anguish. See 8 C. L. 2105—The courts are in hopeless conflict [78] but the doctrine is recognized by South Carolina [79] and North Carolina,[80] and in Texas, the words "personal injuries" in the statute are interpreted to include mental suffering.[81] In Alabama damages for mental suffering in actions of tort cannot be recovered where there is no claim or proof of physical injuries,[82] but in actions of contract, when only nominal damages are sustained, there may be recovery.[83] While the Georgia decisions preclude the allowance of damages for mental anguish,[84] the damage for sending of libelous message is allowable.[85] A statute in Arkansas now permits the allowance of damages for mental anguish.[86] To permit of the recovery of such damages, the significance of the telegram and the relation of the parties must be brought to the knowledge of the company.[87] In Kentucky damages for mental anguish are

would result. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265. Inspection of mules before shipping a proximate result when delivery of telegram would have prevented shipment. Id. Loss of profits by company's negligence. Western Union Tel. Co. v. Lehman [Md.] 67 A 241.

70. Western Union Tel. Co. v. Lehman [Md.] 67 A 241; Purdom Naval Stores Co. v. Western Union Tel. Co., 153 F 327; Postal Tel. Cable Co. v. Nichols [C. C. A.] 159 F 643. Not speculative, though delivery of message to physician would merely have enabled him to make contract. Barker v. Western Union Tel. Co. [Wis.] 114 NW 439. Damages can not be recovered for failure to deliver a mere proposal to contract. Bashinsky v. Western Union Tel. Co., 1 Ga. App. 761, 58 SE 91.

71. Hise v. Western Union Tel. Co. [Iowa] 113 NW 819.

72. Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 SE 83. Measure of damages in mistake of message is difference between market value and price named in message. Bowle v. Western Union Tel. Co. [S. C.] 59 SE 65.

73. Third person negligently replaced fallen pole. Harton v. Forest City Tel. Co. [N. C.] 59 SE 1022.

74. Kirby v. Western Union Tel. Co., 77 S. C. 404, 58 SE 10. Notice of mental anguish, where person was prevented from going to dying daughter-in-law, not communicated. Amos v. Western Union Tel. Co. [S. C.] 60 SE 660. No notice that special damages would result. Western Union Tel. Co. v. Twaddell [Tex. Civ. App.] 18 Tex. Ct. Rep. 986, 103 SW 1120. Message in cryptogram; evidence of notice to fix company with liability for substantial damages. Smith v. Western Union Tel. Co. [Neb.] 114 NW 288.

75. Question for jury. Hocutt v. Western Union Tel. Co. [N. C.] 60 SE 980. Question whether addressee used ordinary care to reach depot after death message. Western Union Tel. Co. v. Johnsey [Tel. Civ. App.] 109 SW 251.

76. Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134.

77. Agent, by mistake, thought addressee elsewhere. Hocutt v. Western Union Tel. Co. [N. C.] 60 SE 980.

78. Potter v. Western Union Tel. Co. [Iowa] 116 NW 130. See special article, 6 C. L. 1678.

79. Bowen v. Western Union Tel. Co., 77 S. C. 122, 57 SE 674. Part negligence in Georgia, but jury based verdict on negligence in S. C. Fall v. Western Union Tel. Co. [S. C.] 60 SE 697.

80. Company liable for failing to deliver "death message" promptly. Edwards v. Western Union Tel. Co. [N. C.] 60 SE 900.

81. Sayles' Ann. Civ. St. 1897, § 3353a. Western Union Tel. Co. v. Kauffman [Tex. Civ. App.] 107 SW 630.

82. Western Union Tel. Co. v. Rowell [Ala.] 45 S 73.

83. Complaint construed in contract. Western Union Tel. Co. v. Rowell [Ala.] 45 S 73.

84. Seifert v. Western Union Tel. Co., 129 Ga. 181, 58 SE 699; Glenn v. Western Union Tel. Co., 1 Ga. App. 821, 58 SE 83, followed previous decisions with reluctance and suggestive legislation.

85. Dunn v. Western Union Tel. Co., 2 Ga. App. 845, 59 SE 189.

86. Kirby's Dig. § 7947. Western Union Tel. Co. v. Hollingsworth, 83 Ark. 39, 102 SW 681.

87. Notice on face of telegram in "death" message. Western Union Tel. Co. v. Caldwell, 31 Ky. L. R. 497, 102 SW 840. "Nellie worse, smallpox. Sent to pesthouse," notice to company. Thurman v. Western Union Tel. Co. [Ky.] 105 SW 155.

recoverable only when the relationship is of the first degree,[88] and in Alabama, the recovery is restricted to exceptional events between persons of close relationship,[89] but in Arkansas it is said that the limitation to "social and personal matters as distinguished from business affairs [90] is more in accord with sound reason." [91] This rule is followed in South Carolina, the company having notice of the nature of the message,[92] and the fact that the relation was of a tender and affectionate nature must be shown.[93] More latitude is allowed in Texas, where it is sufficient that a telegram suggest a near relationship [94] or that oral notice is given.[95] Mental suffering over suppositions or imaginary conditions is not a recoverable element,[96] and the suffering must result proximately from the company's negligence.[97] In South Carolina an action for mental anguish is an action ex delicto,[98] and contributory negligence will defeat recovery.[99]

Exemplary damages. See 8 C. L. 2108—Punative damages, being allowed only for reckless or willful injury,[1] are almost universally denied in actions ex contractu,[2] and mere delay in delivering a message is not sufficient [3] effort to deliver. The ques-

88. Death of fiancee not ground for recovery. Randall v. Western Union Tel. Co. [Ky.] 107 SW 235.

89. Western Union Tel. Co. v. Sledge [Ala.] 45 S 59. Evidence of condition of sick wife admissible on proof of mental anguish, where telegram was undelivered. Western Union Tel. Co. v. Rowell [Ala.] 45 S 73. Undelivered message "meet me tonight," causing lady to be deprived of brother's escort 5 1-2 blocks, not mental anguish. Western Union Tel. Co. v. Westmoreland [Ala.] 44 S 382.

90. Western Union Tel. Co. v. Shenep, 83 Ark. 476, 104 SW 154.

91. Western Union Tel. Co. v. Hanley [Ark.] 107 SW 1168. Near relationship and notice on face of telegram. Western Union Tel. Co. v. Galledge, 84 Ark. 501, 106 SW 957. Nondelivery of message causing plaintiff to wait three-quarters of an hour in poorly heated and deserted depot, with wet shoes, etc., and suffering mental anguish are sufficient grounds of recovery. Western Union Tel. Co. v. Hanley [Ark.] 107 SW 1168. Message "if you can, come at once," signed "Pa.," not notice sufficient to entitle plaintiff to special damages. Western Union Tel. Co. v. Weniski, 84 Ark. 457, 106 SW 486.

92. Death of husband. Lyles v. Western Union Tel. Co., 77 S. C. 474, 57 SE 725.

93. Amos v. Western Union Tel. Co. [S. C.] 60 SE 660. Evidence of worry over wife and children, inadmissible when telegram gave no notice of them. Todd v. Western Union Tel. Co., 77 S. C. 522, 58 SE 433. Code Laws 1902, § 2223. No recovery where relationship of affinity, unless company notified. Butler v. Western Union Tel. Co., 77 S. C. 58, 57 SE 757. Delayed telegram that husband would not return caused wife to drive at night through forest suffering mental anguish. Cloy v. Western Union Tel. Co. [S. C.] 58 SE 972. Damages recovered for failure to deliver death message to plaintiff's husband, depriving her of comfort. Bolton v. Wetsern Union Tel. Co., 76 S. C. 529, 57 SE 543. Not presumed in relation of father-in-law to daughter-in-law. Amos v. Western Union Tel. Co. [S. C.] 60 SE 660. Not presumed from plaintiff's failure to attend sick brother-in-law. Evidence excluded where no allegations of tender or of affectionate relation. McDowell v. Western Union Tel. Co. [S. C.] 60 SE 662; Little v. Western Union Tel. Co. [S. C.] 60 SE 663. Evidence of mental anguish introduced. Doster v. Western Union Tel. Co., 77 S. C. 56, 57 SE 671; Gerock v. Western Union Tel. Co. [N. C.] 60 SE 637.

94. "Mother very low" suggested addressee's mother, not mother-in-law. Western Union Tel. Co. v. Blackmer, 82 Ark. 526, 102 SW 366. Message that husband was "very low, send some one to me," is notice of close relationship. Western Union Tel. Co. v. Landry [Tex. Civ. App.] 108 SW 461. Death of brother, telegram undelivered. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 107 SW 570.

95. Western Union Tel. Co. v. O'Fiel [Tex. Civ. App.] 19 Tex. Ct. Rep. 653, 104 SW 406.

96. Western Union Tel. Co. v. Hollingsworth, 83 Ark. 39, 102 SW 681. Fear of being discharged from position. Western Union Tel. Co. v. Shenep, 83 Ark. 476, 104 SW 154.

97. Reasonably prompt service would not have enabled plaintiff to reach sick child. Sabine Valley Tel. Co. v. Oliver [Tex. Civ. App.] 18 Tex. Ct. Rep. 579, 102 SW 925. Mental suffering not caused by nondelivery of message. Thurman v. Western Union Tel. Co. [Ky.] 105 SW 157.

98. Balderston v. Western Union Tel. Co. [S. C.] 60 SE 435.

99. Addressee of delayed death message made no attempt to take noon train for funeral. Edwards v. Western Union Tel. Co. [N. C.] 60 SE 900. Addressee negligent. Western Union Tel. Co. v. Gulledge, 84 Ark. 501, 106 SW 957.

1. Cases of reckless disregard of sender's rights. Bowen v. Western Union Tel. Co., 77 S. C. 122, 57 SE 674.

2. Cumberland Tel. & T. Co. v. Cartwright Creek Tel. Co. [Ky.] 108 SW 875; Western Union Tel. Co. v. Westmoreland [Ala.] 44 S 382.

3. Todd v. Western Union Tel. Co., 77 S. C. 522, 58 SE 433. Where effort to deliver was made, $850 verdict excessive as punitive. Cloy v. Western Union Tel. Co. [S. C.] 58 SE

tion must be decided in each case upon its own merits.[4] The issue, in a trial, may be eliminated by nonsuit.[5]

(§ 3) *C. Procedure.*See 8 C. L. 2108—The real sender may recover though the name of another was signed to the message,[6] though the telegraph company had no notice of his rights.[7] And by the weight of authority, the addressee may recover for failure to deliver a telegram [8] or on the theory that the sender is his agent.[9] The right is sustained on various grounds,[10] either ex delicto for breach of a public duty [11] or that the sender's contract rights inure to the benefit of the addressee.[12] A cause of action for breach of contract against the telegraph company is not relieved by fact that a cause of action had accrued against the addressee.[13] Stipulations requiring presentation of claims within a certain time are enforcible.[14] A stipulation on a message limiting the company's liability is unavailable as defense on appeal,[15] and "failure to repeat" must be specially pleaded.[16] Complaint for breach of contract may allege negligence in delivery,[17] and evidence tending to explain the act of delivery is admissible.[18]

(§ 3) *D. Penalties.*See 8 C. L. 2113—A penalty for failure to transmit is provided by statute in some states [19] and such regulations are within the power of the

972. Evidence of effort to deliver. Butler v. Western Union Tel. Co., 77 S. C. 148, 57 SE 757. Long unexplained delay raises presumption of negligence. Glover v. Western Union Tel. Co. [S. C.] 59 SE 526. Question submitted to jury, on willfulness of delay. Doster v. Western Union Tel. Co., 77 S. C. 66, 57 S. E. 671. Delay of 17 hours, question for jury. Dempsey v. Western Union Tel. Co., 77 S. C. 399, 58 SE 9. Exemplary damages not recoverable where act by agent was unauthorized and not ratified. Western Union Tel. Co. v. Landry [Tex. Civ. App.] 108 SW 461. Suggestion that message blown in waste-basket exhibits reckless disregard of sender's rights. Balderston v. Western Union Tel. Co. [S. C.] 60 SE 435. Submitted to jury. Bolton v. Western Union Tel. Co., 76 S. C. 529, 57 SE 543.

4. One thousand dollar verdict not excessive, where addressee was attached to mother and prevented from attending death. Western Union Tel. Co. v. Caldwell, 31 Ky. L. R. 497, 102 SW 840. Seven hundred seventy dollars and fifty-two cents damages not excessive, there being strong evidence of wanton and reckless disregard of plaintiff's rights. Western Union Tel. Co. v. Gilstrap [Kan.] 94 P 122. Verdict of $1,354, excessive, where undelivered message prevented attendance at brother's funeral and brother had not resided with plaintiff for several years. Western Union Tel. Co. v. Weniski, 84 Ark. 457, 106 SW 486. Four hundred dollars and twenty-five cents, verdict not excessive. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 20 Tex. Ct. Rep. 695, 106 SW 1147.

5. Smith v. Western Union Tel. Co., 77 S. C. 378, 58 SE 6.

6. Signing of name to message, merely evidence. Western Union Tel. Co. v. Troth [Ind. App.] 84 NE 727. Though an agent sends a telegram, the undisclosed principal may sue for damages for delay in delivery. Seifert v. Western Union Tel. Co., 129 Ga. 181, 58 SE 699.

7. It is not essential to an action by a partnership that the telegraph company be informed that a message addressed to one partner was for the firm. Postal Tel. Co. v. Levy [Tex. Civ. App.] 19 Tex. Ct. Rep. 447, 102 SW 134.

8. Western Union Tel. Co. v. Woodard, 84 Ark. 323, 105 SW 579. Addressee has right to sue and recover damages for the negligence of company in not delivering the message. McLeod v. Pacific Tel. Co. [Or.] 94 P 568. Sendee cannot maintain action ex contractu without proving contract to which he is a party. Western Union Tel. Co. v. Adams [Ala.] 46 S 228.

9. Message for benefit of both, no ground for contract action. Western Union Tel. Co. v. Adams [Ala.] 46 S 228.

10. Western Union Tel. Co. v. Woodard, 84 Ark. 323, 105 SW 579.

11. Western Union Tel. Co. v. Cooper, 2 Ga. App. 376, 58 SE 517.

12. Western Union Tel. Co. v. Woodard, 84 Ark. 323, 105 SW 579.

13. Western Union Tel. Co. v. True [Tex. Civ. App.] 18 Tex. Ct. Rep. 991, 103 SW 1180.

14. Postal Tel. Cable Co. v. Nichols [C. C. A.] 159 F 643. Sixty days. Wheelock v. Postal Tel. Cable Co. [Mass.] 83 NE 313. Required by statute imposing penalties. Western Union Tel. Co. v. Troth [Ind. App.] 84 NE 727. Suit is presentation for claim in writing, within 60 days stipulation. Smith v. Western Union Tel. Co., 77 S. C. 378, 58 SE 6.

15. Western Union Tel. Co. v. Lehman [Md.] 67 A 241.

16. Postal Tel. Cable Co. v. Sunset Const. Co. [Tex. Civ. App.] 109 SW 265.

17. Not misjoinder, but states the mode of breach. Western Union Tel. Co. v. Garthright [Ala.] 44 S 212.

18. Unauthorized statement of messenger boy at time of delivery admissible as part of res gestae. Glover v. Western Union Tel. Co. [S. C.] 59 SE 526. A message delayed in delivery is admissible as evidence. Western Union Tel. Co. v. Westmoreland [Ala.] 43 S 790.

19. Western Union Tel. Co. v. Troth [Ind. App.] 84 NE 727.

state.[20] A statute to secure impartial service to the public and penalizing acts of bad faith is strictly construed.[21]

§ 4. *Telephone service.* See 8 C. L. 2114—A telephone company is a common carrier, a public service corporation, and is required to transmit messages if within its power to do so.[22] Courts will take judicial notice of the nature, operation, and uses of telephones.[23] Where a telephone message is sent over a number of lines owned by different companies, the succeeding companies are not liable unless partnership or agency is shown.[24] In an action for interrupted service, the measure of damages should be for the service lost after expiration of a reasonable time after notice to the company.[25]

§ 5. *Quotations and ticker service.* See 6 C. L. 1677

§ 6. *Rates, tariffs, and rentals.* See 8 C. L. 2114—A state has power to regulate charges for telephone service,[26] which power may be delegated to municipalities [27] or a commission,[28] and is an exercise of the police power [29] not to be bargained away.[30] Rates must not be fixed arbitrarily [31] but on careful and thorough investigation of facts,[32] and the value of the company's property, though important, is not the sole factor in determining their reasonableness.[33] A citizen is entitled to enforce a rate contract between the city and the company.[34] The company may prescribe reasonable rules and charges,[35] and refuse service for good cause.[36] Physicians having connecting offices and using one phone in common are "copartners" within a schedule of rates.[37]

§ 7. *Offenses.* See 8 C. L. 2114—In Missouri, willful and malicious injury to lines, posts, or other property of telephone and telegraph companies is a felony.[38]

20. Statute does not regulate commerce, though addressee out of state. Western Union Tel. Co. v. Chiles [Va.] 57 SE 587.

21. Gifford v. Glen Tel. Co., 54 Misc. 468, 106 NYS 53. Penalty for failure to maintain stations at county seat. State v. Western Union Tel. Co., 75 Kan. 609, 90 P 299.

22. McDaniel v. Faubush Tel. Co. [Ky.] 106 SW 825.

23. Conversation admissible in evidence though the other party is unidentified. Western Union Tel. Co. v. Rowell [Ala.] 45 S 73. Telephone messages subject to recovery for mental anguish. Sabine Valley Tel. Co. v. Oliver [Tex. Civ. App.] 18 Tex. Ct. Rep. 579, 102 SW 925.

24. Urgency of message not repeated to second company. Sabine Valley Tel. Co. v. Oliver [Tex. Civ. App.] 18 Tex. Ct. Rep. 579, 102 SW 925.

25. Eastern Kentucky Tel. & T. Co. v. Hardwick [Ky.] 106 SW 307.

26. Power continuous. Home Tel. & T. Co. v. Los Angeles, 155 F 554.

27. Includes power to pass ordinance requiring companies to report value of plant, receipts, etc. Home Tel. & T. Co. v. Los Angeles, 155 F 554. A contract, whereby a telephone company secured rights and agreed to charge only certain rates, cannot be repudiated by the company, questioning city's right to make grant. Rochester Tel. Co. v. Ross, 109 NYS 381. A city having charter power to regulate rates may pass ordinance fixing rate without notice. Home Tel. & T. Co. v. Los Angeles, 155 F 554. Rates fixed by franchise for city, silent as to other territory gave telephone company right to charge more for county service. Moberly v. Richmond Tel. Co., 31 Ky. L. R. 783, 103 SW 714.

28. Cumberland Tel. & T. Co. v. Railroad Commission, 156 F 823. Regulations as to service ultra vires and void. Western Union Tel. Co. v. Railroad Commission [La.] 45 S 598.

29. Home Tel. & T. Co. v. Los Angeles, 155 F 554.

30. Can be lost only by express abandonment. Home Tel. & T. Co. v. Los Angeles, 155 F 554.

31. Order fixing rates void, not being based on investigation. Cumberland Tel. & T. Co. v. Railroad Commission, 156 F 823. Different rates prescribed for two companies in a city does not show unlawful discrimination. Home Tel. & T. Co. v. Los Angeles, 155 F 554.

32. No presumption in favor of commission which fixed rates. Cumberland Tel. & T. Co. v. Railroad Commission, 156 F 823.

33. Cumberland Tel. & T. Co. v. Railroad Commission, 156 F 823.

34. Rochester Tel. Co. v. Ross, 109 NYS 381.

35. Installation of switchboard and charge of 2c. per message, reasonable though stockholders had free service before. McDaniel v. Faubush Tel. Co. [Ky.] 106 SW 825.

36. Several rural telephone associations consolidated and maintained a switchboard in opposition to certain members. Such members could not be deprived of service in the original association, but could be denied the switchboard. Middle Branch Mut. Tel. Co. v. Jones [Iowa] 115 NW 3.

37. Partners in "minor surgery," but had separate practice. Manning v. Interstate Tel. & T. Co. [N. C.] 60 SE 1134.

38. Ann. St. 1906, p. 1324. State v. McKee, 126 Mo. App. 524, 104 SW 486.

TENANTS IN COMMON AND JOINT TENANTS.

§ 1. **Definitions and Distinctions; Creation of Relation, 1850.**
§ 2. **Rights and Liabilities Between Tenants, 1850.** Possession, 1851. Adverse Possession, 1851. Rents, Profits, and Proceeds, 1852. Contribution, 1853. Agency, 1853. Conversion, 1853. Trespass and Waste, 1853. Actions, 1853. The Rights and Remedy of Partition, 1854.
§ 3. **Rights and Liabilities as to Third Persons, 1854.**

§ 1. *Definitions and distinctions; creation of relation.* See 8 C. L. 2114—Unity of interest and possession creates a tenancy in common,[39] hence, anything that operates to destroy it dissolves the cotenancy.[40] When ownership is claimed by several, the presumption is that they are tenants in common.[41] By virtue of statutes, every interest in real estate granted or devised to two or more persons is deemed to be a tenancy in common, unless expressly declared to be a joint tenancy.[42] One of several corporate indorsees or bearers of a negotiable instrument is not a "joint tenant" in such sense that it may not sue thereon as co-obligee joined as plaintiff.[43] In some states where grantees are husband and wife, an estate by the entirety arises,[44] in other states tenancy by the entirety is abolished.[45] The nature of the title of husband and wife is more fully treated elsewhere.[46] Joint tenancies of savings bank deposits may be created.[47] Some states have abolished the doctrine of survivorship in joint tenancies except as between husband and wife.[48]

§ 2. *Rights and liabilities between tenants.* See 8 C. L. 2115—One tenant in common may confer a right of entry without the consent of his cotenant.[49] A tenant in common can convey no greater right in the common property than he has,[50] and a conveyance by one of a divided portion of the whole is void.[51] In the absence of

39. Devisee of fee and widow of testator, who had renounced the will, held tenants in common. Laughlin v. O'Reily [Miss.] 45 S 193. Plaintiff and defendant made simultaneous entries upon school lands, expended the same amount of money, etc. Erskin v. Wood [Kan.] 95 P 413. Husband and wife become tenants in common during their joint lives upon a conveyance to them. Bilder v. Robinson [N. J. Eq.] 67 A 828. Holders of options held tenants in common. Varley Dupiex Magnet Co. v. Ostheimer [C. C. A.] 159 F 655. Grantees, who live together as husband and wife, but not legally married, hold as tenants in common and not by the entirety. Wright v. Kayner, 150 Mich. 7, 14 Det. Leg. N. 631, 113 NW 779. Parties held not tenants in common where one's title was paramount in time and wholly distinct from and hostile to that of the other. Partition denied. Preston v. Virginia Min. Co. [Va.] 57 SE 651. Where land subject to life estate was not sold by trustees under will, children of life tenant took as tenants in common entitled to partition. Bascom v. Weed, 53 Misc. 496, 105 NYS 459. Plaintiff, who resided on a farm, contracted to let defendant occupy, free of rent, one of his tenement houses on the farm and carry on the same for a term of years. Each party was to furnish certain things for the farm and each have produce for his family use without accounting for it. Defendant was to sell everything produced and divide the profits with plaintiff. Held tenants in common of the products of the farm. Mead v. Owen, 80 Vt. 273, 67 A 722. Where a grantor conveys the fee in land to himself and others, he becomes a tenant in common with other grantees. Green v. Cannady, 77 S. C. 193, 57 SE 832.

40. Sutton v. Jenkins [N. C.] 60 SE 643. Sale by judicial sale and entry under it. Id.

41. McVay v. Central California Inv. Co. [Cal. App.] 91 P 745.

42. Cohen v. Herbert, 205 Mo. 537, 104 SW 84. Rev. St. 1899, § 4600 (Ann. St. 1906, p. 2499). Id. Kirby's Dig. § 739. Lester v. Kirtley, 83 Ark. 554, 104 SW 213.

43. Its position is more like that of a tenant in common. Burns' Ann. St. 1894, § 8136. Thomas v. Green County [C. C. A.] 159 F 339.

44. Holmes v. Kansas City [Mo.] 108 SW 9. Entirety not abolished by § 8844, Rev. St. 1889. Id.

45. Green v. Cannady, 77 S. C. 193, 57 SE 832.

46. See Husband and Wife, 10 C. L. 6.

47. Husband deposited money in savings bank in his and his wife's name. Although there was no delivery so as to create a joint tenancy, survivorship was held to be intended and, on death of husband and wife, wife's administratrix could sue and recover account. West v. McCullough, 108 NYS 493.

48. Ky. St. 1903, §§ 2348, 2349. Wirth v. Wirth's Guardian, 30 Ky. L. R. 960, 100 SW 298.

49. Lee v. Follensby, 80 Vt. 182, 67 A 197.

50. Manti City Sav. Bk. v. Peterson [Utah] 93 P 566. A mortgage on sheep held to pass mortgagor's interest but not cotenant's. Id. Conveyance by tenant after death of cotenant passed only tenant's interest. Wright v. Kayner, 150 Mich. 7, 14 Det. Leg. N. 631, 113 NW 779.

51. Benjamin v. American Tel. & T. Co. [Mass.] 82 NE 681. Rule applies to conveyance of an easement for the reason that it would be equally prejudicial to cotenant. Unrecorded deed of cotenant held void as to a purchaser without knowledge from tenant

special agreement tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property,[52] but while in possession they must pay taxes and ordinary repairs.[53] The liability of the survivor of community property to heirs of the deceased spouse in respect to rents of community property is that of a tenant in common and not that of a trustee.[54] Instruments, under which tenants in common hold title, operate in favor of a tenant obtaining title by adverse possession so as to extend his possession to uninclosed lands.[55]

Discharge of incumbrances, purchase of adverse titles, rights of cotenants.[See 8 C. L. 2116]—The benefit of a purchase under a trust deed by a tenant inures to the benefit of his cotenants.[56] The survivor of a community estate has the right to sell community property for the purpose of paying community debts,[57] or he may agree with a creditor of the estate to pay interest on the whole amount due in consideration for an extension of notes given for community debts.[58]

Possession.[See 8 C. L. 2117]—Cotenants have a mutual right to a joint possession [59] and, generally, the possession of one tenant in common is the possession of his cotenant.[60]

Adverse possession.[See 8 C. L. 2117]—The possession of the entire joint property by one tenant in common is not adverse to the other tenants in common unless there be ouster,[61] but possession may be made adverse by the tenant repudiating the relation of tenancy by act or conduct signifying his intention to hold and enjoy the premises exclusively when other tenants have notice thereof.[62] The adverse holding must be for

and cotenant. Such deed was not ratification of tenant's deed. Id. Where decedent, as W's attorney in fact conveyed 482 acres to B, who afterwards conveyed an undivided half interest to decedent, decedent's subsequent conveyance as such attorney in fact of 200 acres of the same tract to others passed only his interest in the 200 acres, not affecting B's interest. Eason v. Weeks [Tex. Civ. App.] 19 Tex. Ct. Rep. 863, 104 SW 1070.

52. Compensation for services in operating a mine refused. Wolfe v. Childs [Colo.] 94 P 292.

53. Payment of void assessment did not render cotenants liable for any part of assessment. Cole v. Cole, 108 NYS 124.

54. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242.

55. Russell v. Tennant [W. Va.] 60 SE 609.

56. Beaman v. Beaman [Miss.] 44 S 987. Rule applies as well where wife of tenant purchases the land. Id. Where one joint tenant or tenant in common acquires title from a sale under a deed of trust made by all the cotenants for a debt binding all, and the sale is caused by tenant's failure to pay his share of the debt, he cannot, under his right so derived, hold the land against his cotenants. Reed v. Bachman, 61 W. Va. 452, 57 SE 769.

57. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242.

58. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242. Held immaterial how the application of the community property to extinguishment of indebtedness is made, if applied in good faith and at its fair value. Having mingled individual accounts with community was immaterial where community fund as insufficient to pay community debts. Id.

59. People v. Golding, 55 Misc. 425, 106 NYS 821. Tenant could not by injunction exclude his cotenant from occupation of land held in common. Id.

60. Merolla v. Lane, 122 App. Div. 535, 107 NYS 439. Where M., the husband of a cotenant, went into possession in right of his wife, and also rented out the land as administrator for heirs and at various times took deeds for the shares of some of the heirs, he recognized the cotenancy, and his possession was that of his cotenants. Mott v. Carolina Land & Lumber Co. [N. C.] 60 SE 423.

61. Merolla v. Lane, 122 App. Div. 535, 107 NYS 439. By conveyance grantee became a tenant in common with a trustee and the cestuis que trustent, and possession by him was held not adverse. Id. Limitation does not run against one cotenant and in favor of another. No application for the statute since claimant under appellee and appellant were joint owners. Baker v. Royal Lead & Spar Co. [Ky.] 107 SW 704. Tenant did not lose his right by mere laches in failing to demand admission into joint possession. Reed v. Bachman, 61 W. Va. 452, 57 SE 769. Continued possession by a son and thereafter by his heirs held to have ripened into adverse possession as against his sister or her heirs, possession held to be an ouster of cotenants. Schenck v. Egbert, 56 Misc. 378, 107 NYS 787.

62. Russell v. Tenant [W. Va.] 60 SE 609. Possession of one tenant, asserting an exclusive right to the land under a deed conveying the land to him by specific description, is adverse to cotenant having notice of the deed, and recorded deed from co-tenant is notice of cotenant's claim. Ames v. Howes, 13 Idaho, 756, 93 P 35. The statute of limitation

the statutory length of time.[63] The joint occupancy of a tenant in possession and a stranger is not adverse to cotenants out of possession.[64] To warrant the presumption of a valid deed after the expiration of the statutory time for adverse possession in favor of a tenant in common against cotenants, the possession must be open, hostile, and adverse during such time [65]

Ouster.[See 8 C. L. 2118]—Ouster must be an actual exclusion [66] or acts equivalent thereto in law.[67] Color of title and mere possession thereunder by one or more of a number of tenants in common is no "disseisin" of the cotenants out of possession, and is therefor not adverse,[68] but a void deed, executed by one tenant in common to another, is sufficient to prove a disseisin of the party who executed it.[69] A tenant in common or a stranger may disseise one cotenant without disseising all.[70]

Notice.[See 8 C. L. 2119]—A notice of adverse holding must be actual,[71] and that of ouster must reach the cotenants.[72] Actual notice of ouster is unnecessary.[73] Knowledge of one tenant in common cannot be imputed to the others,[74] but where persons are jointly pursuing the common purpose of acquiring title to land by purchase as tenants in common, notice to one concerning the condition of the title is notice to all.[75]

Rents, profits, and proceeds.[See 8 C. L. 2119]—A cotenant is under no obligation to

will run in favor of tenants in adverse possession, even against cotenants. Casserly v. Alameda County [Cal.] 94 P 765. Adverse possession does not run against tenants in common until notice of adverse holding or such conduct as would reasonably put him upon notice of ouster by cotenants. McSurley v. Venters, 31 Ky. L. R. 963, 104 SW 365. Statute of limitation had run, acts of tenant was sufficient to give notice of adverse holding to his cotenant. Chicago, etc., R. Co. v. Tice, 232 Ill. 232, 83 NE 818. Adverse possession for twenty-four years, and cotenants recognized rights of the possessor. Sires v. Melvin [Iowa] 113 NW 106. Open, notorious, and hostile possession for 10 years. Preston v. Virginia Min. Co. [Va.] 57 SE 651. Assertions of title, made by a tenant in common to a stranger, are not admissible to show adverse possession against a cotenant, but statements of tenant claiming to have acquired title by adverse possession, recognizing the title of her cotenant, are admissible as admissions against interest. Loranger v. Carpenter, 148 Mich. 549, 14 Det. Leg. N. 273, 112 NW 125.

63. Revisal 1905, § 384, requires 20 years adverse possession. Only 16 years adverse holding shown. Mott v. Carolina Land & Lumber Co. [N. C.] 60 SE 423.

64. Russell v. Tennant [W. Va.] 60 SE 609.

65. Possession was notorious, open, etc., and established presumption of a grant. Powers v. Smith [S. C.] 61 SE 222.

66. Where land is redeemed by one cotenant in behalf of all, and he takes deed thereto in his own name and thereafter held exclusive possession, openly claiming it as his own, such acts do not constitute ouster as to cotenants who had knowledge that the interest was acquired in their behalf. Donason v. Barbero, 230 Ill. 138, 82 NE 620.

67. Reed v. Bachman, 61 W. Va. 452, 57 SE 769. There can be no adverse possession against a cotenant until actual ouster or exclusive possession after demand or express notice of adverse possession. Id. A conveyance alone, without possession, is insufficient. Putting a deed for the whole tract on record is no ouster unless the cotenant knows of the adverse claim. Id. Occupancy in the right of his wife, one of the cotenants, and taking conveyances from others, held no ouster. Mott v. Carolina Land & Lumber Co. [N. C.] 60 SE 423. Conveyance of the entire tract held ouster. Id. An ouster may be effected by mere acts or matter in pais, unwitnessed by any written memorial thereof, such as a verbal partition, or exclusive occupation of the premises with notice of hostility of claim. Void deed held notice to grantor. Russell v. Tennant [W. Va.] 60 SE 609.

68. Russell v. Tennant [W. Va.] 60 SE 609.

69. Held to be a memorial of a hostile claim asserted by the grantee and notice thereof to the grantor. Russell v. Tennant [W. Va.] 60 SE 609.

70. Either may add an act of ouster to occupancy and thus defeat title to one ousted. Russell v. Tennant [W. Va.] 60 SE 609.

71. Fact that adverse holder as codefendant with cotenants in action for partition by another cotenant filed answer claiming absolute ownership is not notice, the suit being discontinued without trial and it not being shown that they knew such answer had been filed. Donason v. Barbero, 230 Ill. 138, 82 NE 620. Where one cotenant takes a deed conveying to him a part of real estate owned by cotenants and records said deed in the proper office, such recordation is notice of the cotenant's claim to the real estate. Ames v. Howes, 13 Idaho, 756, 93 P 35.

72. Adverse possession by cotenant, however long continued, does not constitute ouster unless cotenants are given notice tnat actual disseisin is asserted against them. Donason v. Barbero, 230 Ill. 138, 82 NE 620; Reed v. Bachman, 61 W. Va. 452, 57 SE 769.

73. Open notorious and adverse holding is sufficient. Powers v. Smith [S. C.] 61 SE 222.

74. Varley Duplex Magnet Co. v. Ostheimer [C. C. A.] 159 F 655.

75. Chargeable with knowledge of a mortgage. Neff v. Elder, 84 Ark. 277, 105 SW 260.

account for rents and profits unless there is an agreement to that effect,[76] or such cotenant denies the other tenants the equal enjoyment of the common property in his possession,[77] but if he rents out the property and receives rent therefor, he must account to his cotenants for his portion of the rents.[78] Courts of equity are very reluctant in undertaking permanently through a receiver or otherwise to collect rents of land held by tenants in common who cannot agree on the management of their estate.[79] An heir in possession of real estate after death of the ancestor, if liable for rent, is liable to the other heirs and not to the administrator.[80]

*Contribution.*See 8 C. L. 2118—In the absence of an agreement, one tenant in common is not entitled to compensation for collecting rents belonging to himself and cotenants.[81] While a tenant advancing money for the preservation and improvement of common property is entitled to contribution therefor,[82] yet, he cannot call upon cotenants for contribution for expenses incurred in unsuccessfully operating the same.[83]

*Agency.*See 8 C. L. 2120

*Conversion.*See 8 C. L. 2120

*Trespass and waste.*See 8 C. L. 2120—Courts of equity will not interfere by injunction to prevent waste in cases of tenants in common, copartners, or joint tenants, except in special cases, as where the party committing waste is insolvent or where the waste is destructive to the estate.[84] A tenant in common cannot be punished as a trespasser for cutting trees on common property.[85] Action under statute to recover for waste must be brought before the tenant's interest in the premises is extinguished.[86]

*Actions.*See 8 C. L. 2120—Tenants in common may join in an ejectment suit and recover the whole property demanded as held by them in common[87] or one may sue separately, and recover possession of the entire estate, in subordination, however, to the rights of his cotenants.[88] Suit in equity may be maintained by one joint tenant against another and those acting under him for an account of rents and profits taken in excess of his right while occupying the whole common property.[89] Each tenant in common is entitled to sue according to his own capacity, regardless of the disabilities of others.[90] Where a husband and wife have an estate by the entirety, the wife may

76. Owings v. Owings, 150 Mich. 609, 14 Det. Leg. N. 787, 114 NW 393; Autry v. Reasor [Tex.] 108 SW 1162.

77. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242. Denied cotenant's right in land and pleaded limitations, hence, held liable for rent. Autry v. Reasor [Tex.] 108 SW 1162.

78. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242.

79. Bilder v. Robinson [N. J. Eq.] 67 A 828.

80. Administrators held not proper party to join with heirs in partition, merely for the purpose of compelling defendant to account for rents and profits. Owings v. Owings, 150 Mich. 609, 14 Det. Leg. N. 787, 114 NW 393.

81. Cole v. Cole, 108 NYS 124.

82. Wolfe v. Childs [Colo.] 94 P 292. Where amount received by the survivor of community estate as rents therefor was less than amount expended by him in improving the property, he was not liable to heirs of deceased spouse for rents. Morris v. Morris [Tex. Civ. App.] 19 Tex. Ct. Rep. 809, 105 SW 242.

83. Operation of a mine. Wolfe v. Childs [Colo.] 94 P 292.

84. Burris v. Jackson [Del.] 68 A 381.

85. Paepcke-Leicht Lumber Co. v. Collins [Ark.] 108 SW 511. The liability of a tenant in common of land valuable for timber, who cuts the same believing he was the owner of all of it, is for the value of the share of the other tenant of timber in the trees at the time it was cut with interest, and not what he would have recovered against a trespasser. Id. Action to enjoin interference with possession by trespasser dismissed when defendant proved not a trespasser but a tenant in common. Board of Education of Glynn County v. Day, 128 Ga. 156, 57 SE 359.

86. Code Civ. Proc. § 1652. Hoolihan v. Hoolihan, 104 NYS 551.

87. Cotenants sued jointly. De Bergers v. Chaves [N. M.] 93 P 762.

88. De Bergere v. Chaves [N. M.] 93 P 762. One tenant in common may recover land owned by several tenants in common since the claimant would recover the whole land for himself and his cotenants. Gorham v. Settgast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 SW 665.

89. Reed v. Bachman, 61 W. Va. 452, 57 SE 769.

90. Instruction of court to that effect held proper. Merryman v. Hoover [Va.] 59 SE 488.

sue for possession thereof as against all persons except her husband.[91] All surviving co-obligees of negotiable instruments must join in suits thereon.[92]

The rights and remedy of partition. See 8 C. L. 2120—A court of equity has power to make a decree for sale in partition without issuing a writ in partition.[93] Partition of coal, gases, salt-water, oil, and minerals owned by co-owners separate from the surface cannot be decreed, except by sale and division of the proceeds.[94] A tenant in common may recover his undivided interest in lands against his cotenant who denies his right thereto,[95] or under statute, one or more tenants in common may recover in partition according to his or their respective rights.[96] Heirs to an estate may proceed in partition before settlement of the estate.[97] An executor when a tenant in common is a proper party plaintiff in partition proceedings.[98]

§ 3. *Rights and liabilities as to third persons.* See 8 C. L. 2121—An action by a single tenant in common is maintainable for his interest in property converted.[99]

TENDER; TERMS OF COURT, see latest topical index.

TERRITORIES AND FEDERAL POSSESSIONS.

§ 1. Acquisition and Political Status, 1854.
§ 2. Organization and Government, 1854.
§ 3. Jurisdiction, Powers, Duties, and Liabilities, 1854.
§ 4. Local Laws and Practice; Territorial Courts, 1855.

§ 1. *Acquisition and political status.* See 8 C. L. 2121—A citizen of Porto Rico is not an alien.[1]

§ 2. *Organization and government.* See 8 C. L. 2122—Congress is the sole lawmaking power of the District of Columbia [2] and its power to enact laws is not merely local in effect,[3] but such laws may be enforcible throughout the union.[4]

§ 3. *Jurisdiction, powers, duties, and liabilities.* See 8 C. L. 2122—The legislative and political jurisdiction of the United States [5] over buildings and "places" purchased for governmental purposes [6] may be acquired by cession from a state,[7] and

91. Wife held to have had a substantial and recognized interest in the inheritance, and entitled to compensation before it can be taken or damaged for public purposes. Holmes v. Kansas City [Mo.] 108 SW 9.

92. Personal representative of deceased held an improper party. Thomas v. Green County [C. C. A.] 159 F 339.

93. Green v. Cannady, 77 S. C. 193, 57 SE 832.

94. Plaintiff had a one third interest in above mentioned articles and sought partition. Held not subject to partition. Robertson Consol. Land Co. v. Paull [W. Va.] 59 SE 1085.

95. Erskin v. Wood [Kan.] 95 P 413.

96. Kirby's Dig. § 5770. Lester v. Kirtley, 83 Ark. 554, 104 SW 213.

97. Owings v. Owings, 150 Mich. 609, 14 Det. Leg. N. 787, 114 NW 393.

98. Laughlin v. O'Reily [Miss.] 45 S 193.

99. Plaintiff's intestate owned an undivided half of timber converted by defendants. Intestate's cotenants not necessary parties. Ayer & Lord Tie Co. v. Witherspoon's Adm'r, 30 Ky. L. R. 1067, 100 SW 259.

1. May maintain action in United States court of claims. Basso v. U. S., 40 Ct. Cl. 202.

2. Lyons v. New York Bk. of Discount, 154 F 391.

3. General power co-extensive with entire United States may be invoked in aid of local power. Lyons v. New York Bk. of Discount, 154 F 391.

4. Where Act June 25, 1906, 34 Stat. 458, provided that banks and trust companies be subject to the national banking act and comptroller of currency, it was within the latter's power to appoint receiver and sue to collect assets in any Federal court in the United States. Lyons v. New York Bk. of Discount, 154 F 391.

5. Constitution, art. 1, § 8, cl. 17. United States v. Andem, 158 F 996.

6. Power of Federal government to exercise exclusive jurisdiction over fort's arsenal "and other needful buildings" includes post office. United States v. Andem, 158 F 996.

7. Const. art 1, § 8, cl. 17. United States v. Andem, 158 F 996. Where the United States purchased property for a post office, New Jersey ceded jurisdiction, though retaining civil process in all cases and criminal process in cases of malicious injury to grounds or buildings. Id. Cession of sovereignty over Philippine Islands provided that property rights should not be impaired, but such provision did not apply to the right to practise law. Bosque v. U. S., 28 S. Ct. 501.

reverts when the government abandons the use.[8] The power over territories[9] is subject only to the restrictions of the constitution.[10] Jurisdiction over Indian lands may be retained, when a territory is changed to a state.[11] Also, since congress may delegate legislative authority to any agent[12] or territory,[13] it follows that a ratification of an illegal act is valid.[14]

§ 4. *Local laws and practice; territorial courts.* See 8 C. L. 2122—Generally, the territorial governments are vested with plenary legislative power[15] equal to that of a state,[16] which cannot be delegated.[17] The powers[18] are subject to inhibitions of congress,[19] but a variance may, after lapse of time, be presumed approved.[20] Territorial courts[21] cease to exist when the territory becomes a state,[22] and the acts of officers become the acts of individuals.[23] The prosecutions are transferred to the state or Federal courts.[24]

TESTAMENTARY CAPACITY; THEATERS; THEFT, see latest topical index.

THREATS.[25]

Some states provide that the sending of a threatening letter which tends to a breach of the peace, shall be punishable.[26] Threats to accuse of crime are not ordinarily within these statutes.[27]

TICKETS; TIDE LANDS, see latest topical index.

8. United States v. Andem, 158 F 996.

9. Kansas v. Colorado, 206 U. S. 46, 51 Law. Ed. 956. Extends over territories in spite of power delegated to territorial government. Board of Trustees of Whitman College v. Berryman, 156 F 112; Sawyer v. El Paso, etc., R. Co. [Tex. Civ. App.] 108 SW 718. By virtue of Const. art. 4, § 3, congress has full power over arid lands in territories, but when arid lands are in states the state's rights must be observed. Kansas v. Colorado, 206 U. S. 46, 51 Law. Ed. 956.

10. Kansas v. Colorado, 206 U. S. 46, 51 Law. Ed. 956.

11. Does not include jurisdiction of crimes against the state. Higgins v. Brown [Okl.] 94 P 703.

12. United States v. Heinszen, 206 U. S. 370, 51 Law. Ed. 1098.

13. Legislative authority and right to establish seat of government and erect buildings implied right to acquire land. Sylvester v. State, 46 Wash. 585, 91 P 15. Grant did not terminate by territory being changed to state. Id.

14. The illegal collection of duties on imports to the Philippine Islands levied by the president's order, between the ratification of the treaty with Spain and the passage of an act enacting a tariff, was rendered valid by Act June 30, 1906 (34 Stat. 636, cl. 3912). United States v. Heinszen, 206 U. S. 370, 51 Law. Ed. 1098.

15. Sawyer v. El Paso, etc., R. Co. [Tex. Civ. App.] 108 SW 718.

16. Territory might make the performance of certain acts a condition precedent to right to sue. Sawyer v. El Paso, etc., R. Co. [Tex. Civ. App.] 108 SW 718.

17. On same footing as state, and immaterial that power be derived from people or congress. Thalheimer v. Maricopa County Sup'rs [Ariz.] 94 P 1129.

18. Delegated by organic act. Board of Trustees of Whitman College v. Berryman, 156 F 112.

19. Sawyer v. El Paso, etc., R. Co. [Tex. Civ. App.] 108 SW 718. Act March 2, 1867, c. 150 (14 Stat. 426), provided that territorial legislatures grant no private charters or special privileges, but the act was not construed to deprive a legislature of the power to amend an existing charter of an educational corporation by exempting its property from taxation. Board of Trustees of Whitman College v. Berryman, 156 F 112.

20. Sawyer v. El Paso, etc., R. Co. [Tex. Civ. App.] 108 SW 718. Rev. St. § 1850 provided that laws be submitted to congress and if disapproved be void, but where a statute remained for several years without disapproval, it was presumed valid. Board of Trustees of Whitman College v. Berryman, 156 F 112.

21. Where the war department established a provisional court in Porto Rico and made the statutes of the United States the limit of its criminal jurisdiction, such statutes were to be applied as interpreted by the court of last resort of the United States. Basso v. U. S., 40 Ct. Cl. 202.

22, 23. Eberle v. King [Okl.] 93 P 748.

24. Cases where Federal court would have had jurisdiction if crime committeed in a state are transferred to Federal courts. Higgins v. Brown [Okl.] 94 P 703.

25. See 6 C. L. 1697.

26. Johnson v. State [Ala.] 44 S 670. Kuklux act, to prevent lynching. Commonwealth v. Patrick [Ky.] 105 SW 981. Threatening letter of a jealous woman in the nature of blackmail not within the code. Id.

27. State v. Schultz [Wis.] 114 NW 505.

TIME.[28]

The established general rule for the computation of time is that the first day be excluded and the last day included,[29] unless the terms used require a different construction.[30] Ordinarily a contract by the day means the calendar day,[31] and the rule that fractions of days are not recognized in law [32] does not apply to notices measured by hours.[33] Where a contract expires "at noon," [34] the New York statute provides that eastern standard time shall prevail.[36] The day of doing an act may be included or excluded, so as to operate favorably to a party so entitled.[36] When an act is required to be done in a certain number of days exceeding a week, Sunday is not excluded,[37] but when the last day falls on Sunday, it is usually excluded.[38]

TIME TO PLEAD; TITLE AND OWNERSHIP; TITLE INSURANCE, see latest topical index.

TOBACCO.[39]

The state in the exercise of its police power may prohibit the sale of "cigarettes," [40] and in determining what are cigarettes, within such a statute, the common acceptation of the term will be adopted.[41]

TOLL ROADS AND BRIDGES.

§ 1. Franchises and Rights of Way, and Acquisition by Public, 1856.
§ 2. Public Aid and Immunities, 1857.
§ 3. Establishment, Construction, Location, and Maintenance, 1857.
§ 4. Right of Travel and Tolls, 1857.

§ 1. *Franchises and rights of way, and acquisition by public.* See 8 C. L. 2123—A franchise is limited to the corporate life of the company,[42] and may be revoked [43] by a proper proceeding involving judicial inquiry.[44] The powers granted should be strict-

28. See 8 C. L. 2123.

29. "From" Nov. 5 "to" Dec. 5, included Dec. 5. State v. Elsom, 77 Ohio St. 489, 83 NE 904. "Until July 10th" permitted acceptance on that day. Hatfield v. Clovis [Pa.] 68 A 43. Appeal Jan. 25, 1907, from decree rendered Jan. 25, 1906, was taken in time under statute requiring that certain appeals be taken "within one year." Boyett v. Frankfort Chair Co. [Ala.] 44 S 546. Notice of tax sale on June 18, given May 28, was sufficient under statute requiring at least twenty-one days' notice. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P 936. Filing of pledge Jan. 2, for election Jan. 7, was a filing "five days before." Holt v. Settlemeyer [S. C.] 60 SE 659.

30. "From" is a term of exclusion, and "to," "till," or "until," inclusive. State v. Elson, 77 Ohio St. 489, 83 NE 904. "From and after" a day excludes that day. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778.

31. Hours are those ordinarily used. Collins v. Carlin, 121 App. Div. 524, 106 NYS 235.

32. Policy did not expire till 12 P. M. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778.

33. In re Schnapka, 149 Mich. 309, 14 Det. Leg. N. 448, 112 NW 949. Statute regarding working of public roads, where overseer on account of rain may adjourn part of one day to another. State v. Cayton [N. C.] 60 SE 415.

34. Where noon time at Iron Gate, Va., occurred 19 minutes later, the application of such time was reversible error, the contract having been made in New York. Globe & Rutgers Fire Ins. Co. v. David Moffat Co. [C. C. A.] 154 F 13.

35. Seventy-fifth meridian of longitude west from Greenwich. Globe & Rutgers Fire Ins. Co. v. David Moffat Co. [C. C. A.] 154 F 13.

36. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778.

37. Craig v. U. S. Health & Acc. Ins. Co. [S. C.] 61 SE 423.

38. Aetna Life Ins. Co. v. Wimberly [Tex. Civ. App.] 108 SW 778.

39. See 6 C. L. 1698.

40. Laws 1907, p. 265 of Illinois, prohibit sale of cigarettes made of drugged or impure tobacco, or other substances deleterious to health. People v. Busse, 231 Ill. 251, 82 NE 175. Code Iowa, § 5006, provides penalty of fine and imprisonment for sale of cigarettes in violation of its provisions, and § 5007 provides an annual tax on every cigarette dealer. In re Otto F. Lange Co., 159 F 586.

41. Tobacco in cigar leaf wrapper of same size as cigarette is not included in St. 1898, § 4608f. State v. Goodrich [Wis.] 113 NW 388.

42. "Perpetual succession" implies continuity only. State v. Scott County Macadamized Road Co. [Mo.] 105 SW 752. Legislature did not contemplate perpetual corporation. State v. Cape Girardeau & Jackson Gravel Road Co., 207 Mo. 85, 105 SW 761.

43. Failure to complete, or keep road in repair. Bridge St. & Allendale Gravel Road Co. v. Hogadone, 150 Mich. 638, 14 Det. Leg. N. 851 114 NW 917.

44. Bridge St. & Allendale Gravel Road Co.

ly construed.[45] The termination of a franchise removes the burden of tolls from the public highway,[46] and neither adverse possession, laches, nor estoppel are applicable to bar the public's right in a toll road.[47]

Abandonment and forfeiture. See 8 C. L. 2124

Acquirement by public. See 8 C. L. 2124—In condemnation it is proper to consider both local interests and the benefit to the public at large.[48] In Ohio, county commissioners are authorized to purchase toll roads upon which traction railroads are constructed [49] and maintain them as free turnpikes.[50]

§ 2. *Public aid and immunities.* See 8 C. L. 2124—Bridges [51] and turnpike roads are public highways,[52] and the fact that the road company acquired a fee to the land does not change its character.[53]

§ 3. *Establishment, construction, location, and maintenance.* See 8 C. L. 2124—A failure to keep roads in repair may cause a forfeiture of the right to collect tolls [54] after judicial inquiry.[55] The remedy for failing to keep the road in repair is quo warranto to forfeit the franchise of the company,[56] but substantial conformity to the statute is sufficient.[57] In Missouri, county courts are responsible for the maintenance of toll roads.[58]

Personal injuries. See 8 C. L. 2124

§ 4. *Right of travel and tolls.* See 8 C. L. 2125—Payment for the use of a road cannot be refused on account of its condition.[59] In Kentucky the rates are regulated by statute.[60]

TONTINE INSURANCE; TORRENS SYSTEM, see latest topical index.

TORTS.

§ 1. Elements of a Tort, 1858.
§ 2. What is an Injury or Wrong, 1861.
§ 3. What Is Damage, 1861.
§ 4. Parties in Torts, 1861.
§ 5. Pleading and Procedure, 1862.

v. Hogadone, 150 Mich. 638, 14 Det. Leg. N. 851, 114 NW 917.

45. Right to collect toll from certain vehicles and animals did not include automobiles. Mallory v. Saratoga Lake Bridge Co., 53 Misc. 446, 104 NYS 1025.

46. State v. Scott County Macadamized Road Co. [Mo.] 105 SW 752.

47. State v. Cape Girardeau & Jackson Gravel Road Co., 207 Mo. 85, 105 SW 761.

48. Purpose being to make road free. Pattonville & Woodbury Turnpike Road Co., 32 Pa. Super. Ct. 122.

49. The act of April 25, 1904 (97 O. L. 414), authorizing purchase of toll roads upon and along which suburban and interurban railroads are constructed. Ferris v. Clermont County Com'rs, 9 Ohio C. C. (N. S.) 169.

50. The authority granted by act April 25, 1904 (97 O. L. 414), is not limited to purchase of toll roads having both termini within the county; it does not, by authorizing the purchase of roads upon which traction companies have secured rights of way, make possible such a joint ownership as is forbidden by the constitution; but it does authorize the purchase of appurtenances of the road such as toll-houses. Ferris v. Clermont County Com'rs, 9 Ohio C. C. (N. S.) 169.

51. Subject to right of tolls, granted by legislature. Mallory v. Saratoga Lake Bridge Co., 53 Misc. 446, 104 NYS 1025.

52. Subject to easement of toll company which expires when charter ends. State v. Scott County Macadamized Road Co. [Mo.] 105 SW 752.

53. Construed only an easement. State v. Cape Girardeau & Jackson Gravel Road Co., 207 Mo. 85, 105 SW 761.

54. Provided by statute after due investigation. Bridge St. & Allendale Gravel Road Co. v. Hogadone, 150 Mich. 638, 14 Det. Leg. N. 851, 114 NW 917.

55. In court of chancery. Besson v. Crapo Toll Road Co., 150 Mich. 655, 14 Det. Leg. N. 858, 114 NW 924; Bridge St. & Allendale Gravel Road Co. v. Hogadone, 150 Mich. 638, 14 Det. Leg. N. 851, 114 NW 917; State v. Scott County Macadamized Road Co. [Mo.] 105 SW 752.

56. Legislature may prohibit taking of tolls till road repaired. State v. Schenkel [Mo. App.] 108 SW 635.

57. Road less than twenty feet wide in a few places. State v. Schenkel [Mo. App.] 108 SW 635.

58. State v. Schenkel [Mo. App.] 108 SW 635.

59. State v. Schenkel [Mo. App.] 108 SW 635. Remedies provided by statute should be followed. Burton v. Monticello & Burnside Turnpike Co. [Ky.] 109 SW 319.

60. Roads built by public aid. Burton v. Monticello & Burnside Turnpike Co. [Ky.] 109 SW 319.

The scope of this topic is noted below.[60a]

§ 1. *Elements of a tort.*[See 8 C. L. 2125]—A "tort" is any civil wrong or injury not involving a breach of contract for which an action lies.[61] The essential elements of a tort are a wrongful act or omission of duty by defendant, and damage or loss to the plaintiff in consequence of such act or omission.[62] The existence of a legal duty is prerequisite.[63] A tort may result from the violation of a duty which is itself the consequence of a contract,[64] but mere violation of a contract when there is no duty imposed by law, furnishes no basis for a tort action,[65] and generally

60a. Includes only the more general rules applicable to all torts, matters relative to particular torts (see Assault and Battery, 9 C. L. 257; Conversion As Tort, 9 C. L. 722; Trespass, 8 C. L. 2147, and similar topics), to the liability of a principal or master for the acts of his agent or servant (see Agency, 9 C. L. 58; Master and Servant, 10 C. L. 691), negligence (see Negligence, 10 C. L. 962; Carriers, 9 C. L. 466; Master and Servant, 10 C. L. 691; Railroads, 10 C. L. 1365; Street Railways, 8 C. L. 2004), and the right to elect whether to sue in tort or on contract (see Election and Waiver, 9 C. L. 1037) being treated in separate articles.

61. Jewett v. Ware [Va.] 60 SE 131. "A tort is a legal wrong committed upon the person or property independent of contract, and which may be the violation of some private obligation by which damage accrues to the individual." Civ. Code of 1895, § 3807. Wolff v. Southern R. Co. [Ga.] 60 SE 569.

A person commits a tort who commits some act not authorized by law, or who omits to do something which he ought to do by law, and by such an act or omission either infringes some absolute right to the uninterrupted enjoyment of which another is entitled or causes to such other person some substantial los of money, health, or material comfort, beyond that suffered by the rest of the public. Acker, Merrall & Condit Co. v. McGaw [Md.] 68 A 17.

62. Acker, Merrall & Condit Co. v. McGaw [Md.] 68 A 17. Breach of trust by director of plaintiff corporation by taking lease of premises for himself if he could have taken it for corporation for same rental. Id.

63. The mere use by street railway company of a pole wrongfully erected and maintained by a telephone company did not render the former liable when pole was not under its control and could not be abated by it. Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497. Question as to whether defendant was guilty of negligence properly left with jury. May v. Hill [Mich.] 115 NW 1064. No evidence showing negligence toward plaintiff. Munk v. Maryland Casualty Co., 122 App. Div. 487, 107 NYS 215. The plaintiff while visiting the defendant's janitor was taken sick with a contagious disease. The defendant expelled her. Held, the defendant was not liable for the aggravation of her illness. Tucker v. Burt [Mich.] 15 Det. Leg. N. 83, 115 NW 722.

Note: The disability of another will not create a duty unless there is an existing relation between the parties. Lord v. De Witt, 116 F 713; Griswold v. B. & M. R. Co., 183 Mass. 434. Thus a master must care for a disabled seaman. Scarff v. Metcalf, 107 N. Y. 211, 1 Am. St. Rep. 807; and see Raasch v. Elite Laundry, 98 Minn. 357, 7 L. R. A. (N. S.) 940; Stager v. Troy Laundry Co., 38 Or. 480, 53 L. R. A. 459. Similarly it has been held that a railroad, having, without fault, run over a trespasser, owes him a duty of care (Whitesides v. Southern R. Co., 128 N. C. 229), but the weight of authority is contra (Griswold v. B. & M. R. Co., 183 Mass. 434). However, sickness may increase the degree of care due one party from another. R. R. Co. v. Salzman, 52 Ohio St. 558, 49 Am. St. Rep. 745, 31 L. R. A. 261; O'Mara v. Hudson River R. Co., 38 N. Y. 445, 98 Am. Dec. 61. While a trespasser or a licensee may be expelled by an occupant, reasonable care in the manner of the expulsion must be used. Weymire v. Wolfe, 52 Iowa, 533. Though the occupant is liable for excessive violence in expelling a trespasser (Montgomery's Case, 98 Va. 840), he is not liable for the consequences of the necessary force used (Hannabalson v. Sessions, 116 Iowa, 457, 93 Am. St. Rep. 250). So if the intruder be sick or infirm, the occupant is liable for lack of care in his treatment of the invalid, but not for damages resulting from the necessary consequences of the exercise of his right (McHugh v. Schlosser, 159 Pa. 480, 39 Am. St. Rep. 699, 23 L. R. A. 574), the only limitation upon which is that he do not act with wilful disregard of human life (De Pue v. Flateau, 100 Minn. 299, 8 L. R. A. [N. S.] 485; Bradshaw v. Frazier, 113 Iowa, 579, 86 Am. St. Rep. 394, 55 L. R. A. 258). Since in the principal case reasonable care was used in the expulsion, the result is sound.—From 8 Columbia L. R. 513.

64. Wolff v. Southern R. Co. [Ga.] 60 SE 569. Defendant left two photographs with plaintiff for the purpose of having a portrait painted. Portrait was made, delivered, and paid for, but artist painted a second one without defendant's permission or request. Held, a breach of trust and of the implied contract. Klug v. Sheriffs, 129 Wis. 468, 109 NW 656.

65. Glenn v. Hill [Mo.] 109 SW 27. Landlord failed to repair as he had contracted to and death to a tenant resulted. Landlord was sued in tort, under Rev. St. 1899, § 2865 (Ann. St. 1906, p. 1644), giving right of action for death due to wrongful act. Held, not a tort, plaintiff's remedy was for breach of contract. Id. Action not maintainable, controversy resting wholly on the ground that appellee had been damaged by breach of a contract. Jewett v. Ware [Va.] 60 SE 131. Breach of legal duty with reference to a contract for the transportation of cotton. Liability was one in tort and, hence, the cause could not be joined with one in

there must be some active negligence or misfeasance shown.[66] Generally speaking, maliciously interfering with another's business,[67] inducing one bound by a contract to violate such contract,[68] and interfering with one's right of privacy,[69] are actionable

contract. Wolff v. Southern R. Co. [Ga.] 60 SE 569.

66. Graff v. Lemp Brew. Co. [Mo. App.] 109 SW 1044. Landlord negligently failed to repair as per covenants, and through such negligence plaintiff was injured. Liable in damages. Id. Mere violation of contract where there is no general duty is not a tort. Dustin v. Curtis [N. H.] 67 A 220.

67. Barnes & Co. v. Chicago Typographical Union, No. 16, 232 Ill. 424, 83 NE 940. Defendants to coerce plaintiffs to submit to certain demands established a picket system around plaintiff's shops, enticed away their employes, and resorted to threats, intimidation, and assault, to accomplish their ends. Held illegal, and injunction restraining him issued. Id. Evidence held insufficient to show that defendant maliciously interfered with contract of copartnership between plaintiff and another. McPherson v. Kenney [Mass.] 84 NE 463.

68. Roberts v. Clark [Tex. Civ. App.] 19 Tex. Ct. Rep. 563, 103 SW 417. Defendant's act in inducing an ice company to break its contract with plaintiff though not malicious was unlawful and therefore actionable. Knickerbocker Ice Co. v. Gardiner Dairy Co. [Md.] 69 A 405. A receipted bill signed by the ice company for ice sold to plaintiff under the alleged contract held admissible to show existence of the contract. Id. Plaintiff had obtained from a certain hotel its exclusive agency for the New England states to solicit patronage. Defendant persuaded hotel to break this contract and give him right also to solicit patronage. Injunction granted to restrain defendant from acting as agent, damages being inadequate. Beekman v. Marsters, 195 Mass. 205, 80 NE 817. Procuring discharge of an employe with intent to injure held an actionable wrong. Gibson v. Fidelity & Casualty Co., 232 Ill. 49, 83 NE 539. Not liable, even though he acted with malicious motive, for inducing the breaking of a contract to sell lands, since parties to contract were not bound to perform it. Roberts v. Clark [Tex. Civ. App.] 19 Tex. Ct. Rep. 563, 103 SW 417. Whoever intentionally and without legal justification or excuse procures an employer to discharge employe to latter's damage is liable to action for damages at suit of employe, though there was no binding contract of employment. Brennan v. United Hatters of North America, Local No. 17, 73 N. J. Law, 729, 65 A 165. Interference with contract rights is not actionable unless maliciously done. Legris v. Marcotte, 129 Ill. App. 67.

Note: It has been doubted whether any action lies for inducing a breach of contract unless unlawful means have been used (Boyson v. Thorn, 98 Cal. 578, 21 L. R. A. 233), or unless the relation of master and servant existed (Chambers v. Baldwin, 91 Ky. 121, 34 Am. St. Rep. 165, 11 L. R. A. 545). While in some cases in which the rule has been broadly stated, other elements were present (Temperton v. Russell, 1 Q. B. 715 [coercion]; Angle v. Chicago, etc., R. Co., 151 U. S. 1, 38 Law. Ed. 55 [fraud]; Walker v. Cronin, 107 Mass. 555), it must be admitted that in England, and in many jurisdictions in this country, the procurement of a breach by lawful means is actionable, if without justification (South Wales, etc., v. Glamorgan Coal Co. [1903] A. C. 239. Bitterman v. Louisville, etc., R. Co., 207 U. S. 205, 52 Law. Ed. ——; see 8 Columbia L. R. 225), irrespective of the special relation of master and servant (Bowen v. Hall, L. R. 6 Q. B. D. 333; Jones v. Stanley, 76 N. C. 355). Though still rejected in some jurisdictions (Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559; Boyson v. Thorn, 98 Cal. 578, 21 L. R. A. 233), the English rule is gaining increased recognition (Beekman v. Marsters, 195 Mass. 205, 80 NE 817; Flaccus v. Smith, 199 Pa. 128, 85 Am. St. Rep. 779, 54 L. R. A. 640; Thacker Coal Co. v. Burke, 59 W. Va. 253, 5 L. R. A. [N. S.] 1091). The courts generally proceed upon the ground that to induce the commission of a legal wrong is a tort. Lord Watson in Allen v. Flood [1898] A. C. 1, 96. But the action seems only on application of the broader theory, that a cause of action exists "whenever one person" damages "another willfully and intentionally, and without just cause or excuse." Bowen, L. J., in Skinner v. Shrew, [1893] 1 Ch. 413, 422; cf. Holmes, 8 Harv. L. Rev. 1; Wigmore, Ibid. 200. Upon the same theory an action lies for interfering with contracts unenforceable under the statute of Frauds (Rice v. Manley, 66 N. Y. 82, 23 Am. Rep. 30), contracts terminable at will (Berry v. Donovan, 188 Mass. 353, 108 Am. St. Rep. 499, 5 L. R. A. [N. S.] 899), or an established course of dealing (Quinn v. Leathem [1901] A. C. 495). It must appear that there was a reasonable probability of the continuance of the relation; otherwise, no damage is shown. Benton v. Pratt, 2 Wend. [N. Y.] 385, 20 Am. Dec. 623. Since the defendant is liable only if he is the proximate cause of the harm, some courts refuse to entertain an action unless the will of the immediate actor has been overcome by coercion or fraud. Chambers v. Baldwin, 91 Ky. 121, 34 Am. St. Rep. 165, 11 L. R. A. 545. The objection that in any other case the cause of the damage is the voluntary act of the person induced seems of doubtful validity. Though fraud were used he may have acted voluntarily; e. g., where induced by fraudulent statements of the plaintiff's solvency; yet if fraud were used, the action would concededly lie. Burdick, Torts, 70. Moreover, procurement of the commission of a tort, as of the publication of a libel, by persuasion, is generally admitted actionable. Schoefflin v. Coffey, 162 N. Y. 12. Accordingly, by the better view, the defendant is held responsible if his interference was calculated in the ordinary course of events to damage, and has in fact damaged, the plaintiff. Bowen, L. J., in Mogul S. S. Co. v. McGregor, 23 Q. B. D. 598, 613. Cf. "Squibb Case." Mere advice, Coleridge, J., dissenting, in Lumley v. Gye

wrongs. If a person does only that which he has a legal right to do, violating no legal duty or obligation, the motive which prompts him is immaterial,[70] but the protection of one's own property does not justify injury to that of an innocent person.[71]

[1853] 2 E. & B. 216, or a bare offer to purchase goods already contracted for (Beekman v. Marsters, 195 Mass. 205, 800 NE 817), would not ordinarily constitute the defendant the proximate cause. Whether the defendant in fact procured the breach, is a proper question for the jury (Doremus v. Hennessey, 176 Ill. 608, 68 Am. St. Rep. 203, 43 L. R. A. 797). Assuming damage and the defendant's responsibility, the defendant is liable unless justification or excuse appears. South Wales, etc. v. Glamorgan Coal Co., [1903] A. C. 239. Here is a legitimate field for conflict of opinion. Excuse and justification are matters of public policy. Divergencies in the authorities are attributable to different views thereof. The present tendency is toward a broader conception of civil duty. Pollock, 24 Law Quart. Rev. 109; cf. Rich. v. N. Y. etc., R. Co., 87 N. Y. 382; London Guaranty, etc., Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185. The use of fraud or physical intimidation has always been regarded unjustifiable (Burdick, Torts, 70, 71), likewise, on principle, moral coercion (National Prot. Ass'n v. Cumming, 170 N. Y. 315, 88 Am. St. Rep. 648, 58 L. R. A. 135). On the other hand, fair competition excuses interference with contracts terminable at will (Allen v. Flood [1898] A. C. 196), or with an established course of dealing (Mogul S. S. Co. v. McGregor [1892] A. C. 25). American courts, contrary to the English view (Allen v. Flood [1898] A. C. 1, 96), incline to make motive material (London Guaranty, etc., Co. v. Horn, 206 Ill. 493, 99 Am. St. Rep. 185; Berry v. Donavan, 188 Mass. 353, 108 Am. St. Rep. 499, 5 L. R. A. [N. S.] 899; Huffcut, 18 Harv. L. R. 439), an extension perhaps verging upon paternalism. Where a binding contract exists, however, no legitimate interest of competition is subserved by excusing interference. At least, in England, it would seem (Lumley v. Gye, [1853] 2 E. & B. 216), and in Massachusetts (Beekman v. Marsters, 195 Mass. 205, 80 NE 817), competition is no defense. No doubt, however, under some circumstances, still unsettled, inducing a breach may be justifiable (Cf. South Wales, etc. v. Glamorgan Coal Co., [1903] A. C. 239). A recent English case (National Phonograph Co. v. Edison-Bell, etc., Co., 77 Law J. Ch. 218), involved the application of these principles to a novel set of facts. The plaintiff, a manufacturer, sold phonographs to B under an agreement not to resell to any blacklisted retailer. The defendant, plaintiff's competitor, obtained phonographs, first, from B through agents who fraudulently posed as independent retailers, and, second, without fraud, through one Ell, a retailer, who did not know that the defendant was blacklisted. It was held that, in the first transaction, irrespective of whether B had broken his contract, the defendant was liable for having fraudulently induced B to act contrary to the contractual duty which B owed the plaintiff; that in the Ell transaction there was no liability since no contract between Ell and the plaintiff was shown or, conceding a contract, no fraud was present. Assuming, first, that in both transactions a contract was broken, the distinction based upon the presence or absence of fraud is unsupported by the English authorities, for, if a breach is induced, the means used are immaterial. Assuming, however, that contracts existed, but were unbroken, the result in the principal case seems sound. Competition justified interference except where fraud was present; for the duty violated by the defendant was not the duty to refrain from inducing a breach of contract, and the stricter protection demanded by policy in the latter case is not in the principal case required. The decision, viewed in this light, is a further step in the development of the broader theory of tort. Pollock,—From 8 Columbia L. R. 496.

69. Klug v. Sheriffs, 129 Wis. 468, 109 NW 656. Making a second photograph by an artist held not to violate plaintiff's right of privacy. Id. Publication of a person's photograph without his consent in a daily newspaper in connection with items of news when not libelous is not covered by Laws 1903, p. 308, c. 132, prohibiting the use of a person's portrait and name for purposes of trade. Moser v. Press Pub. Co., 109 NYS 963.

70. Biggers v. Matthews [N. C.] 61 SE 55. Defendant sold the standing timber on his land, and plaintiff contracted with the purchasers to saw it into lumber. After plaintiff had taken his mill to the land and begun sawing, defendant purchased the interest of one of the purchasers in the timber and took an assignment thereof with intent to prevent plaintiff sawing the timber, and forbade plaintiff sawing it and enjoined the other purchaser and his employes. Held no actionable wrong since no legal duty was violated. Id. Lumber Company retained part of employe's wages for medical services, Employes selected physician (plaintiff) and notified employer to pay hospital dues to him. Physician issued to employes certificates of treatment to his hospital. Employer refused to pay the dues to the physician and notified employes that they would be paid to a hospital and any employe not consenting to such payment would be discharged. Doctor sought damages for interference with contract but was denied. No duty violated. Banks v. Eastern R. & Lumber Co., 46 Wash. 610, 90 P 1048.

71. The rafts of the plaintiff, a logging company, threatened the defendant's bridge, the repair of which temporarily obstructed the stream. To avert injury the defendant cut the rafts causing loss to the plaintiff. Held the defendant could not thus destroy property to save his own. Meadows v. Gulf, etc., Co. [Tex. Civ. App.] 107 SW 83.

Note: Self-help may be exercised in defense of property to prevent a threatened unlawful injury (Aldridge v. Wright, 53 N. H. 398, 16 Am. Rep. 339), which legal process would be ineffectual to avert (Graves v.

One who fraudulently makes a second deed of conveyance of land,[72] and one who conspires to defraud creditors,[73] commit actionable wrongs against persons injured. Neither negligence nor willfulness is necessary to make a trespass on real estate a tort.[74] The wrong must not be too remote, indefinite, and contingent.[75]

§ 2. *What is an injury or wrong.*[See 8 C. L. 2127]—There is no liability for acts or omissions in the discharge of governmental duties.[76]

§ 3. *What is damage.*[See 8 C. L. 2127]—Damages cannot be recovered for violation of legal rights to which plaintiff has assented.[77]

§ 4. *Parties in torts.*[See 8 C. L. 2127]—Tort feasors are jointly and severally liable [78] for the whole amount of damage irrespective of the degree of culpability,[79] but to hold them jointly or severally liable, community or concert of action must be shown or each is liable only for his proportion of damages.[80] Tort feasors may be sued separately or jointly at the election of the party injured,[81] and if he elects to sue them jointly he has the right to have the case tried as for a joint tort.[82] If he

Shattuck, 35 N. H. 257, 69 Am. Dec. 536), where the comparative values are not unreasonably disproportionate (Morse v. Nixon, 6 Jones Law [N. C.] 293, 296; Russell v. The Mayor, 2 Denio [N. Y.] 461, 488), or where a nuisance is shown (Toledo, etc., R. Co. v. Loop, 139 Ind. 342). Logging companies using navigable streams are liable for injuries they occasion either by negligence or unreasonable use (Coyne v. Miss., etc., Lumber Co., 72 Minn. 533, 71 Am. St. Rep. 508, 41 L. R. A. 494; Hunter v. Lumber Co., 39 Or. 448; Lumber Co. v. Keel, 125 Ala. 603, 82 Am. St. Rep. 265; Outterson v. Gould, 77 Hun [N. Y.] 429), and are held to have construotive notice of lawful obstructions (The Echo, 19 F 453). As in the principal case the bridge repairing was a lawful obstruction (Green & B. R. Nav. Co. v. Chesapeake, etc., R. Co., 88 Ky. 1, 12 L. R. A. 540), the threatening of the bridge was unlawful since it would have been unreasonable if with actual knowledge. The principal case seems, therefore, unsound in denying the defendant his right of self-help. —From 8 Columbia L. R. 414.

72. McLendon Bros. v. Finch, 2 Ga. App. 421, 58 SE 690. Action brought being ex contractu damages for fraudulent conveyance could not be set off. Id.

73. Raymond v. Blancgrass [Mont.] .93 P 648. A judgment creditor could not recover against one who conspired to defeat his judgment because no special injury different from that suffered by others was shown. Id.

74. Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67.

75. Raymond v. Blancgrass [Mont.] 93 P 648. One who has obtained a decree against her husband for separate maintenance cannot sue others to recover damages for conspiracy during the pendency of that suit to defeat the suit and make ineffective the decree which might be obtained therein by removing the property of plaintiff's husband, but had such person been a creditor he might have recovered for property put beyond his reach. Id. Damages resulted in failure to repair premises. Held, not too remote. Graff v. Lemp Brew. Co. [Mo. App.] 109 SW 1044.

76. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631. While a municipality is liable for failure to abate a nuisance resulting from pollution of a stream due to the use of a drain as a sewer where such drain is laid in a public street by its permission (Id.), it is not liable for mere failure on its part to exercise its police power to prevent such stream from being made a nuisance. (Id.).

77. Evidence showed knowledge and acquiescence by plaintiff to defendant's act in encroaching 10 inches in plaintiff's property by partition wall. Sharpless v. Boldt, 218 Pa. 372, 67 A 652.

78. Frank Parmelee Co. v. Wheelock, 127 Ill. App. 500; Clinger's Adm'x v. Chesapeake & O. R. Co. [Ky.] 109 SW 315. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934. Plaintiff, who was injured in a collision due to the joint concurrent acts of negligence of defendants, was not confined to recovery against the defendant who had "last clear chance" to avoid collision. Cordiner v. Los Angeles Trac. Co., 5 Cal. App. 400, 91 P 436; Price v. Clapp [Tenn.] 105 SW 864.

79. Marriott v. Williams [Cal.] 93 P 875; Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497.

80. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631. Plaintiff suffered injuries on account of defective premises. Defendant did not own premises nor have them under his control. Held no liability. Mead v. Ph. Zang Brew. Co. [Colo.] 95 P 284; Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934.

81. Indianapolis Trac. & T. Co. v. Holtsclaw, 40 Ind. App. 311, 81 NE 1084; White v. Southern R. Co. [N. C.] 59 SE 1042; Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497. A railway corporation was jointly sued with three of its servants when it was sought to hold corporation liable only by reason of the negligent acts of its said servants in the operating of a train under their management and control. Southern R. Co. v. Miller, 1 Ga. App. 616, 57 SE 1090; Clinger's Adm'x v. Chesapeake & O. R. Co. [Ky.] 109 SW 315.

82. Held no separable controversy was presented within the meaning of the removal act (Act March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]). White v. Southern R. Co. [N. C.] 59 SE 1042.

brings action against all in one suit, he cannot, after judgment, sue them separately,[83] nor can he first bring suit against them separately or against part of them only, and then, after judgment, maintain a new action against one sued separately by merely joining others therein.[84] Neither an agreement not to sue one joint tort feasor [85] nor the mere acceptance of payment from one operates to release the remainder.[86] Where a tort is in fact several when committed, it does not become joint because afterwards its consequences unite with the consequences of several others.[87] No right of contribution exists among joint tort feasors.[88] In some states the husband is liable for his wife's torts.[89]

§ 5. *Pleading and procedure.* See 8 C. L. 2129—Liability is governed by the law of the time and place of commission of the tort.[90] Unless there be community of interest, parties cannot be joined as defendants.[91] A judgment against one joint trespasser is no bar to a suit against the others for the same trespass,[92] but granting a new trial to one of several joint tort feasors entitles the others to a new trial also.[93] Two causes of action are stated in a declaration of tort if the act which caused the injury is alleged to be negligent and willful.[94] To the count in simple negligence contributory negligence of the person injured is pleadable,[95] but to the one for willfulness and wantonness, contributory negligence is no defense.[96] It is not necessary to set out all the allegations of negligence on the part of defendants.[97] On a count in simple negligence there can be no recovery, where the testimony adduced tends to establish only an intentional or wanton wrong.[98] A court cannot properly direct a ver-

83. Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497. One suing tort feasors jointly is limited to one recovery and cannot have rendered separate judgments against each. Indianapolis Trac. & T. Co. v. Holtsclaw, 4 Ind. App. 311, 81 NE 1094. In attachment proceedings judgment was rendered in favor of plaintiff, intervener, who claimed property. Attached property was given in satisfaction of the judgment. Plaintiff seeks damages against sheriff resulting from attachment, former satisfaction held bar to recovery. Jones v. Allen, 38 Colo. 512, 88 P 387.

84. Moore v. Chattanooga Elec. R. Co. [Tenn.] 109 SW 497. A judgment, in an action against a telephone company for injury to a street railway conductor, held conclusive of a subsequent joint action against it and the street railway company. Id.

85. Chicago, etc., R. Co. v. Averill, 127 Ill. App. 275.

86. Unless there is a release or an accord and satisfaction, a payment from one joint tort feasor cannot be a release of the others. Brennan v. Electrical Installation Co., 120 Ill. App. 461. Steamship and stevedors were joint tort feasors, plaintiff received satisfaction from stevedors and released them. Held he had discharged steamship. The St. Cuthbert, 157 F 799.

87. Torts committed by other persons. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934.

88. City of Seattle v. Puget Sound Imp. Co. [Wash.] 91 P 255. Owner of premises abutting on a street placed trap doors in the side-walk and, owing to unsafe condition of doors, a pedestrian was injured and recovered damages against city. City held not a joint tort feasor and deprived of indemnity against owner. Id.

89. Wife uttered a libel without her husband's knowledge or participation. Held husband and wife jointly for compensatory damages but wife alone for punitive damages. Price v. Clapt [Tenn.] 105 SW 864.

90. Missouri, etc., R. Co. v. Wise [Tex.] 109 SW 112. Torts committed in the Indian Territory held to be governed by the laws of the territory at the time, and not that of Arkansas, notwithstanding Act Cong. May 2, 1892, c. 182, § 31, 26 Stat. 94, which put in force in the Indian Territory statutes of Arkansas including the one which in general terms adopts the common law. Id.

91. Pipe lines are laid by different oil companies, each acting for itself, which obstructed flow of surface waters misjoinder of party defendant. Sun Co. v. Wyatt [Tex. Civ. App.] 107 SW 934.

92. Johnson v. McKenna [N. J. Eq.] 67 A 395.

93. Jury rendered a general verdict against joint tort feasors on the theory that they were jointly liable. New trial was granted one, but refused to others. Held error. Bamberg v. International R. Co., 121 App. Div. 1, 105 NYS 621.

94. Actual damages allowed on proof supporting the charge of negligent injury to real estate. Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67.

95. Louisville & N. R. Co. v. Perkins [Ala.] 44 S 602.

96. Louisville & N. R. Co. v. Perkins [Ala.] 44 S 602; Birmingham, R. L. & P. Co. v. Brown [Ala.] 44 S 572.

97. Southern R. Co. v. Miller, 1 Ga. App. 616, 57 SE 1090.

98. Nothing to show that negligence proximately caused death of intestate, error in not charging that no recovery could be had under count. Louisville & N. R. Co. v. Perkins [Ala.] 44 S 602.

dict for defendant if there is any evidence legally sufficient from which a breach of duty on defendant's part and consequent damages might be reasonably inferred.[99]

TOWAGE, see latest topical index.

TOWNS; TOWNSHIPS.

§ 1. Creation, Organization, Status, and Boundaries, 1863.
§ 2. General Powers and Exercise Thereof, 1863.
§ 3. Property, 1864.
§ 4. Contracts, 1864.
§ 5. Officers and Employes, 1864.
§ 6. Fiscal Management, 1864.
§ 7. Claims, 1865.
§ 8. Actions by and Against, 1865.

Matters common to all municipal corporations are elsewhere treated.[1]

§ 1. *Creation, organization, status, and boundaries.*[See 8 C. L. 2130]—Some states have provided for the classification of townships according to population.[2] In Wisconsin [3] and Illinois, the county board is empowered to detach or annex territory.[4] The incorporation of a town cannot be attacked collaterally.[5]

§ 2. *General powers and exercise thereof.*[See 8 C. L. 2131]—Expressly conferred powers [6] should be construed in the interests of the public.[7]

Town meetings.[See 8 C. L. 2132]—Town meetings have only a definite present existence,[8] and it follows that a vote of indefinite postponement of a matter is equivalent to a negative vote.[9] The proceedings are presumed to be regular.[10]

99. Acker, Merrall & Condit Co. v. McGaw [Md.] 68 A 17. Court erred in directing verdict for defendant where evidence tended to show breach of trust and duty on the part of directors of a corporation. Id. Evidence fairly tended to prove cause of action, and motion to direct verdict was properly denied. Gibson v. Fidelity & Casualty Co., 232 Ill. 49, 83 NE 539.

1. See Municipal Corporations, 8 C. L. 1056.

2. Travis v. Lehigh Coal & Nav. Co., 33 Pa. Super. Ct. 203. Assessment of corporation not for benefit of Bardwell, a sixth class town with its own fiscal system. Morrell Refrigerator Car Co. v. Com. [Ky.] 108 SW 926.

3. No vote of electors necessary to authorize change of boundaries, unless area is less than 36 acres. State v. Lippels [Wis.] 113 NW 437.

4. Township Organization Law (Act March 4, 1874; Rev. St. 1874, c. 139, § 37), art. 3, § 12. People v. Clark County Sup'rs, 234 Ill. 62, 84 NE 695.

5. Curative act has remedied defects in Indiana. Daly v. Gubbins [Ind.] 82 NE 659.

6. Where statute conferred the right to issue licenses a town could not enforce an article prohibiting nonresidents from taking claims. State v. Peabody [Me.] 69 A 273.

7. Power to improve streets not limited to one block at a time. Daly v. Gubbins [Ind.] 82 NE 659. Trustees may sell and convey real estate owned by the township when it is for the best interest of the township. Trustees of Harrison Tp. v. Harrison Tp., 5 Ohio N. P. (N. S.) 354. Execution of a power may be insisted upon as duty, thought statute be permissive. McConnell v. Allen, 120 App. Div. 548, 105 NYS 16.

8. "A town meeting is a single gathering of the voters of a town, called for the purpose of considering only those subjects distinctly set forth in the warrant by which the citizens are summoned. Such a meeting, although commonly consisting of but a single session, may be adjourned from time to time and order to finish its business. It is not self perpetuating nor is it a legislative body with fixed sessions. It passes out of existence with the performance of the particular duties which called it into being. Its dissolution without affirmative action as to any of the matters properly before it, is ordinarily equivalent to their rejection. The meeting dissolved can never be brought into being again. Other business of the town can be transacted only at a new meeting called upon another warrant which will set forth only the subjects it can pass upon. It is not a representative body, but a pure democracy where the citizens, as to matters within their jurisdiction, administer the affairs of the town in person. It exercises both legislative and executive functions. The freest discussion prevails, yet in some respects its proceedings are inherently somewhat summary. The technical rules of parliamentary law, designed for the regulation of deliberative assemblies, are in some respects ill adapted for the transaction of the affairs of a town meeting. Hence, although in general the action of town meetings conforms to parliamentary procedure, it never has been held that they are governed by the strict rules of legislative practice." Wood v. Milton [Mass.] 84 NE 332.

9. Rejection of a way, laid out by selectmen, precludes second action by town without new lay-out. Wood v. Milton [Mass.] 84 NE 332.

10. Posting of notices may be proved by clerk's record; closing of polls at noon not material; or use of word "freeholders," instead of "qualified voters." Lewis v. Eagle [Wis.] 115 NW 361.

§ 3. *Property.*See 4 C. L. 1688

§ 4. *Contracts.*See 8 C. L. 2132—Contracts may be implied,[11] but a township cannot disregard a statute and then become liable for debt on a fictitious implied contract.[12] Express contracts [13] should be entered into only after proper meeting of the board,[14] and due deliberation,[15] but the holding of such meeting is presumed.[16] Statutes must be observed [17] and an incomplete contract cannot be enforced.[18]

§ 5. *Officers and employes.*See 8 C. L. 2133—Those dealing with selectmen are charged with knowledge of the extent of their powers.[19] Where residence is a qualification for office, a change in the line of the township will create a vacancy.[20] An unexpired term may be filled by appointment.[21] The power of boards of town auditors in New York is solely derived from the statute; [22] the members act in semi-judicial capacity [23] and their decisions are irrevocable.[24] The board of commissioners [25] and the advisory board, provided for in Indiana, has only statutory power.[26] The question of interest or bias of an officer charged with performance of a certain act may be a private matter,[27] but when constitutional or statutory provisions forbid such an officer from acting, he transgresses the public policy of the state.[28] In Iowa township trustees are forbidden from becoming parties to any contract to furnish labor.[29] Disqualifications of this nature may be waived, however.[30] Compensation is regulated by statute.[31]

§ 6. *Fiscal management.*See 8 C. L. 2134—Appropriations can only be made when

11. Where labor is furnished at request of road supervisor. State v. York [Iowa] 113 NW 324.

12. Where an act required the lowest bidder to sign contract and give bond before commencing work, the selectmen could not waive these conditions, and the town was not liable on implied contract. Kelley v. Torrington [Conn.] 68 A 855.

13. Pursuant to decision of electors. Lewis v. Eagle [Wis.] 115 NW 361.

14. Lewis v. Eagle [Wis.] 115 NW 361.

15. In absence of fraud to cause supervisors to forego deliberation, presumption prevails that duty was done. Good Roads Mach. Co. v. Union Tp., 34 Pa. Super. Ct. 538.

16. Good Roads Mach. Co. v. Union Tp., 34 Pa. Super. Ct. 538; Lewis v. Eagle [Wis.] 115 NW 361. Order for traction engine by one supervisor ratified by acceptance of both. Geiser Mfg. Co. v. Frankford Tp., 34 Pa. Super. Ct. 146.

17. Bonds sealed with the commissioner's individual seals were valid, since the statute did not expressly require corporate seal. Smythe v. New Providence Tp., 158 F 213. The provisions of §§ 2834b, Rev. St. requiring that before any contract is entered into by township trustees the clerk shall file a certificate stating that there is in the treasury, and unappropriated, funds sufficient to meet the obligation proposed, is a general provision relating to townships and applies to the letting of contracts in all townships of the state. Broken Sword Stone Co. v. Monroe Tp. Trustees, 5 Ohio N. P. (N. S.) 573.

18. Where on recommendation of council the town meeting appropriated money for a low bid for certain work, mandamus would not lie to compel the council to accept that bid. Putnam Found. & Mach. Co. v. Barrington Town Council [R. I.] 67 A 733.

19. Kelley v. Torrington [Conn.] 68 A 855; People v. Parker, 231 Ill. 478, 83 NE 282. Agents cannot exceed their authority. Board of Com'rs of Jay County v. Pike Civil Tp., 168 Ind. 535, 81 NE 489.

20. Residence, essential qualification of tax collector, construing statutes. Commonwealth v. Topper [Pa.] 68 A 666.

21. Construing Const. § 152. Provence v. Lucas [Ky.] 107 SW 755.

22, 23. Central Bk. of Westchester County v. Shaw, 121 App. Div. 415, 106 NYS 94.

24. Cannot reconsider, revise, review or annul their own judicial action. Central Bk. of Westchester County v. Shaw, 121 App. Div. 415, 106 NYS 94.

25. Board acts in judicial capacity. Duncan v. Cox [Ind. App.] 81 NE 735.

26. Advisory Board of Coal Creek Tp. v. Levandowski [Ind. App.] 84 NE 346.

27. In the absence of prohibitory legislation. Daly v. Gubbins [Ind.] 82 NE 659.

28. Daly v. Gubbins [Ind.] 82 NE 659.

29. Code Supp. § 468a. State v. York [Iowa] 113 NW 324.

30. Estoppel will apply. Daly v. Gubbins [Ind.] 82 NE 659. The fact that one of the township trustees is a stockholder and director in a bank situated within the township, which has submitted the highest bid for the usage of the township funds, and to act as depository under the provisions of § 1513, does not, under the provisions of § 6976, disqualify the bank from so acting, and injunction will not lie to prevent the award. Richardson v. Sycamore Tp. Trustees, 6 Ohio N. P. (N. S.) 505.

31. Town law, Laws 1890, p. 1236, c. 569, § 178, amended by Law 1904, p. 836, c. 312, construed. Wilson v. Bleloch, 109 NYS 340; Travis v. Lehigh Coal & Nav. Co., 33 Pa. Super. Ct. 203.

there are funds available [32] for corporate purposes [33] or for ends which are expressly or impliedly authorized, within the scope of the legislature's constitutional powers.[34] Prerequisite conditions must be complied with, also,[35] and may be questioned by a taxpayer [36] by proper proceedings.[37] Surplus moneys should be used in accordance with statute.[38]

§ 7. *Claims.*See 8 C. L. 2135—Money raised to discharge a claim should be applied to that purpose.[39] A town is not bound by the acts of an agent in allowing the payment of a claim not legally chargeable to it.[40]

§ 8. *Actions by and against.*See 8 C. L. 2138—In Iowa, a civil township is not a corporation and cannot be sued.[41] In the case of highways and bridges, the liability of each town is several, as to the portion within the boundary,[42] but there is no liability in case of accident.[43] The township is a proper party in a suit to enjoin the collection of a tax on the ground that the act authorizing it was constitutional.[44]

TRADE MARKS AND TRADE NAMES.

§ 1. Definition, and Words or Symbols, Available, 1865.
§ 2. Acquisition, Transfer, and Abandonment, 1867.
§ 3. Infringement and Unfair Competition, 1868.
§ 4. Remedies and Procedure, 1869.
§ 5. Statutory Registration, Regulation, and Protection, 1871.

The scope of this topic is noted below.[44a]

§ 1. *Definition, and words or symbols available.*See 8 C. L. 2137—A trade mark is an arbitrary, distinctive name, symbol, or device, to indicate or authenticate the origin of the product to which it is attached.[45] The product itself cannot constitute a trade mark.[46] Neither can the trade mark exist apart from its application to a

32. Advisory board can not make appropriation for school unless funds are on hand. State v. Johns [Ind.] 84 NE 1.

33. Resolution allowing sum to officer in excess of salary was invalid. People v. Parker, 231 Ill. 478, 83 NE 282.

34. Township may be authorized to subscribe for railroad stock and issue bonds therefor. Smythe v. New Providence Tp., 158 F 213. Police officer may be indemnified for expenses in defending an action of malicious prosecution after failing to enforce liquor law. Leonard v. Middleborough [Mass.] 84 NE 323. Under the Indiana "Township Reformation," Act 1899, p. 154, c. 105, § 6, an appropriation for new school house was void, there being no evidence of necessity. Advisory Board of Coal Creek Tp. v. Levandowski [Ind. App.] 84 NE 346.

35. Under Burns' Ann. St. 1901, § 5386, the right of board of commissioners to appropriate is based on election, and its validity must be determined. Duncan v. Cox [Ind. App.] 81 NE 735.

36. May object to validity of proceedings of board of commissioners. Duncan v. Cox [Ind. App.] 82 NE 125.

37. An assessment for street improvement confirmed by the trustees cannot be attacked collaterally for illegality or inaccuracy. Daly v. Gubbins [Ind.] 82 NE 659.

38. Damages recovered from New York City should be invested in securities according to Laws 1905, c. 396, p. 925. McConnell v. Allen. 120 App. Div. 548, 105 NYS 16.

39. Immaterial that claim was illegal. Wunderlich v. Kalkofen [Wis.] 113 NW 1091.

40. May be recovered. Board of Com'rs of Jay County v. Pike Civil Tp., 168 Ind. 535, 81 NE 489.

41. Austin Western Co. v. Weaver Tp. [Iowa] 114 NW 189.

42. Where a person sustained injuries on bridge connecting two towns, it was necessary to prove where defect was located, though both were defendants. Haley v. Calef [R. I.] 67 A 323.

43. No liability where stumbling horse caused occupant to fall, and road was in good condition. Elseeck v. Capwell [R. I.] 67 A 421.

44. Railroad company beneficiary. McCleary v. Babcock [Ind.] 82 NE 453.

44a. Excludes matters relating to personal (see Names, Signatures, and Seals, 10 C. L. 915), corporate (see Corporations, 9 C. L. 733), firm (see Partnership, 10 C. L. 1100), and associate (see Associations and Societies, 9 C. L. 274) names, and the protection of trades union labels (see Trade Unions, 8 C. L. 2142), and society emblems (see Associations and Societies, 9 C. L. 274). Reference should also be had to the topics copyrights (9 C. L. 730), Patents (10 C. L. 1127), and Good Will (9 C. L. 1539).

45. American Brew. Co. v. Bienville Brewery, 153 F 615; Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413.

46. Uncopyrighted post cards held not entitled to protection as trade marks, either singly or collectively. Bamforth v. Douglass Post Card & Mach. Co., 158 F 355.

vendible commodity,[47] though a different rule is applied to trade names and advertising symbols.[48] Words merely descriptive are not subjects of trade mark [49] unless, by reason of long use, they have acquired a secondary meaning and become associated in the mind of the public with such article exclusively.[50] No trade mark can be acquired in the use of a color not connected with some symbol or design,[51] and a geographical name cannot be used exclusively as a trade mark.[52] An arbitrary or fanciful word may be adopted.[53] A proper name which has acquired a secondary meaning cannot be used except in a manner which will inform the public that the article is not that made by the person originally using the same.[54] Every person has the right to the use of his own name as a trade mark,[55] even though he may thereby incidentally interfere with and injure the business of another having the right to use the same name,[56] but cannot use such name as a cloak to cover an intended fraud

47. Grocers' Journal Co. v. Midland Pub. Co. [Mo. App.] 105 SW 310.

48. A trade name or symbol may be protected though not used in connection with any article of manufacture. Name and symbol of insurance company. Atlas Assur. Co. v. Atlas Ins. Co. [Iowa] 112 NW 232. Purchaser of the rights of the manufacturers of "Woodbury's Facial Soap" held entitled to restrain such original manufacturers from subsequently manufacturing and selling a soap known as "Woodbury's New Skin Soap." Andrew Jurgens Co. v. Woodbury, 56 Misc. 404, 106 NYS 571. The name of a newspaper is in the nature of a trade mark, and passes by assignment with the business in which it is used, but, apart from the business, it confers no right of ownership. Seabrook v. Grimes [Md.] 68 A 883.

49. "Radium" as applied to silk is not descriptive. Eiseman v. Schiffer, 157 F 473. "Bohemian" used in reference to beer is descriptive. American Brew. Co. v. Bienville Brewery, 153 F 615. "Stud" used to designate a belt fastener is descriptive. Greene, Tweed & Co. v. Manufacturers' Belt Hook Co., 158 F 640. "Oriental cream," as applied to cosmetic, held descriptive. In re Hopkins, 29 App. D. C. 118. "Standard," as applied to phonograph, held descriptive. In re National Phonograph Co., 29 App. D. C. 142.

50. Bill filed by manufacturer of a wood, filler, or coating, which consists principally of a mixture of turpentine and shellac, and designated as "Turpentine shellac," held to state a case of unfair competition. Standard Varnish Works v. Fisher, Thorsen & Co., 153 F 928. Although the word "sterling" is ordinarily descriptive of quality, a manufacturer, who has adopted it to designate a particular ale, will be entitled to protection against its use in such manner as to create confusion of the two ales. Worcester Brew. Corp. v. Rueter [C. C. A.] 157 F 217.

51. Manufacturer of drawers under a patent which covered the insertion in the seams of a strip of elastic, the natural color of which is yellow or buff, the body of the garment being white jean, has no monopoly on such color, when markings of goods were such as to negative any intention to deceive purchaser. J. A. Scriven Co. v. Morris, 154 F 914.

52. Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413. The names "Rischon-C. Zion" or "Carmel" may be adopted as trade marks for sale of wines, and their use by defendants on labels for other wines held to constitute unfair competition. Jewish Colonization Ass'n v. Solomon, 154 F 157. The word "American" being geographical "American Wine Company" cannot be appropriated as a trade mark. American Wine Co. v. Kohlman, 158 F 830. "La Carolina" used as a trade mark for cigars is not invalid as a geographical name, and is infringed by the use of such name by defendant to designate his cigars. Havana Commercial Co. v. Nichols, 155 F 302. "Chartreuse" is not a place name and may be appropriated as a trade mark. Baglin v. Cusenier Co., 156 F 1016. "White House" and picture of White House held to constitute valid trade mark for plaintiff's coffee. Dwinell-Wright Co. v. Co-op. Supply Co., 155 F 909. "Oriental" held geographical. In re Hopkins, 29 App. D. C. 118.

53. "Sapolio." Enoch Morgan & Sons Co. v. Ward [C. C. A.] 152 F 690.

54. "Old Crow Whiskey," held to be an infringement, where predecessors of complainant manufactured whiskey under same name and process which had become well known in trade as designating complainant's goods exclusively (Gaines v. Kahn, 155 F 639), and the fact that defendants put upon the market a whiskey of their own make called "P. Crow" and "J. W. Crow," prior to leasing of distillery by complainant's predecessor, where "Old Crow" whiskey was made, does not give them right to claim such name as trade mark (Id.).

55. J. F. Rowley Co. v. Rowley, 154 F 744; International Silver Co. v. Rogers [N. J. Err. & App.] 67 A 105. The name "La Carolina" used as a trade mark for cigars is not invalid as an individual name, and is infringed by the use of such name by defendant to designate his cigars. Havana Commercial Co. v. Nichols, 155 F 302.

56. International Silver Co. v. Rogers [N. J. Err. & App.] 67 A 105. The successor to the good will of a business conducted in the name of the founder cannot restrain the use by the founder's sons of their own names in a competing business. Donnell v. Herring-Hall-Marvin Safe Co., 28 S. Ct. 288.

upon the rights of another,[57] and may be required to so mark his product as to distinguish it from that of the prior user.[58]

§ 2. *Acquisition, transfer and abandonment.* See 8 C. L. 2138—Any person or corporation capable of holding title to personal property may acquire the right to a trade mark.[59] The right to a trade mark used to identify a patented article expires with the patent.[60] Likewise, a proper name used to describe a copyrighted work becomes public property when the copyright expires,[61] and a publisher may be enjoined from advertising that he has the exclusive right to use the name in such connection.[62] Irrespective of any question of right protected by patent,[63] or copyright, a party cannot appropriate to his own use a label in prior use and especially appropriated to another, where such act deceives the public.[64] The right to a trademark may be acquired by assignment,[65] and by statute in New York every registered trade mark shall be assignable in connection with the good will of the business in which the mark is used.[66] The assignee of a business with the right to use in connection therewith the trade mark under which the business is known, will be protected against the use thereof by subsequent assignees of the assignor.[67] But such assignment must be accompanied by the use of the trade mark in the manner and for the purposes that it was used by the assignor.[68] Upon the sale and delivery of a news-

57. Manufacture of artificial limbs under name of "Rowley Artificial Limbs" in competition with manufactures of "Rowley" legs held to constitute unfair competition. J. F. Rowley Co. v. Rowley, 154 F 744. Thus one cannot mislead the public as to the identity of the business firm or establishment, or of the article produced by them, and thus produce injury to the other beyond that which results from the similarity of name. International Silver Co. v. Rogers [N. J. Err. & App.] 67 A 105. Where an article has come to be known by a personal name, one may not use that name, even though it be his own, to palm off his goods as the goods of another who has first adopted it, and by which appellation the goods have come to be known, when the use of his own name for such purpose works a fraud. Id. Use by corporation of which patentee was president of name of patentee to designate shoes manufactured by the corporation held fraudulent and unfair as against assignee of former patent. Dr. A. Reed Cushion Shoe Co. v. Frew, 158 F 552.

58. Where the name is one which has frequently thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied with any precaution or indication is an artifice calculated to produce such confusion. International Silver Co. v. Rogers [N. J. Err. & App.] 67 A 105. The words "not connected with any other of the same name," or words of similar import, do not suffice. Id. Required to use such words in connection with such name as will indicate that their's is not the original business or ite successor. Herring-Hall-Marvin Safe Co. v. Hall's Safe Co., 28 S. Ct. 350.

59. Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413.

60. Greene, Tweed & Co. v. Manufacturers' Belt Hook Co., 158 F 640. No one can be restrained from making the patented article, though it had become known to the public by the name of the manufacturer, provided he marks it with his own name and does not palm it off as the goods of the manufacturer. J. A. Scriven Co. v. Morris, 154 F 914. The name of the patentee by which the article of a new and original type has become known to the public, may be used by any dealer to designate articles of that type. Greene, Tweed & Co. v. Manufacturers' Belt Hook Co., 158 F 640.

61. Right to use of name "Webster" used in connection with dictionaries became public, after expiration of copyright, although such name had acquired a secondary meaning, indicating a particular book published and sold by such owner. G. & C. Merriam Co. v. Ogilvie [C. C. A.] 159 F 638.

62. Competing publisher of "Webster's Dictionary" or "Webster's Imperial Dictionary" may be enjoined from issuing circulars and advertisements showing an intention to trespass upon original publishers and deceive the public into the belief that they were buying one of series published by original publisher. G. & C. Merriam Co. v. Ogilvie [C. C. A.] 159 F 638.

63. Where after expiration of plaintiff's patent upon drill chucks known as "Little Grant Improved" and "Little Grant Double Grip" defendant proceeded to duplicate them, plaintiff is not entitled to damages without proof that the public was deceived into believing that the article sold by it was that of plaintiff, and evidence that defendant undersold plaintiff is not sufficient. Westcott Chuck Co. v. Oneida Nat. Chuck Co., 122 App. Div. 260, 106 NYS 1016.

64. G. & C. Merriam Co. v. Ogilvie [C. C. A.] 159 F 638.

65. Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413.

66. A trade mark registered under act of Feb. 20, 1905, c. 592, 33 Stat. 727 (U. S. Comp. St. Supp. 1907, p. 1013), cannot be assigned unless the good will is also transferred. Eiseman v. Schiffer, 157 F 473.

67. Burrow v. Marceau, 109 NYS 105.

68. Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413.

paper, the name and good will thereof, the plant, and all things appertaining to the title of the newspaper as a trade mark, passes therewith.[69] After the abandonment of a trade mark by the owner, he is not entitled to injunctive relief against the use thereof by another,[70] but the fact that one has abandoned his right to use a trade mark does not justify another in using such mark on his own product representing it as the product of the original maker.[71] The abandonment by a manufacturer of the dress by which his goods have become known to the public will not give a competitor the right to unlawfully imitate such dress,[72] nor will a modification thereof give such competitor the right to imitate the earlier dress.[73] A firm's right to use a trade mark is opened to the public by its dissolution, and one claiming to be the assignee of the firm but who is not its legal successor cannot maintain a suit on a promise not to infringe made to the firm.[74]

§ 3. *Infringement and unfair competition. Infringement.* See 8 C. L. 2139—The imitation of any part of a trade mark is a technical infringement, and the imitation need not be exact or perfect.[75] The test of infringement is whether the resemblance is calculated to deceive the ordinary buyer.[76] To constitute an infringement of a trade mark, it is not essential to show that any one has actually been deceived, or an intent to deceive,[77] but where one continues to use a symbol which he in good faith be-

69. Grocers' Journal Co. v. Midland Pub. Co. [Mo. App.] 105 SW 310.

70. Facts held to constitute abandonment of registered trade mark after assignment thereof by proprietor. Eiseman v. Schiffer, 157 F 473.

71. Baglin v. Cusenier Co., 156 F 1015, 1016.

72, 73. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 159 F 292.

74. Deitsch v. George R. Gibson Co., 155 F 883.

75. Such infringement may be as to color, size, and form of the objects or packages, the color and appearance of the label, or the words or part of the words designating the article to be sold, but there can be no infringement unless the trade mark is used on a similar class of goods (Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413), and any use of the key or catchword in a trademark in any way calculated to deceive is an infringment (Id.).

76. Atlas Assurance Company and Atlas Insurance Company. Atlas Assur. Co. v. Atlas Ins. Co. [Iowa] 112 NW 232. An infringement of a trademark consists in the use of the genuine upon substituted goods, or of an exact copy or reproduction of the genuine or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead, so that the goods to which the spurious trade mark is affixed are likely to be mistaken for the genuine product. American Brew. Co. v. Bienville Brewery, 153 F 615.

Held to infringe: "Sapolio" with picture of man observing his reflection in pan, infringed by "sopono" with picture of woman observing her reflection in pan. Enoch Morgan & Sons Co. v. Ward [C. C. A.] 152 F 690. Defendant enjoined from selling shoes under name of "Queen Quality" which complainant used to designate shoes of superior grade. Thomas G. Plant Co. v. May Mercantile Co., 153 F 229. Letters "M. F." in monogram inclosed within a circle adopted as trademark by manufacturers to designate terne plate cannot be used by another to designate a different plate either alone or in connection with other letters. American Tin Plate Co. v. Licking Roller Mill Co., 158 F. 690. Manufacturer of "Rushmore" search light lamp may enjoin manufacturer of an inferior lamp under that name but which in appearance was the same. Rushmore v. Saxon, 154 F 213. "Georgia Coon," adopted by wholesale grocer to designate his syrups, held to be infringed by "New Coon." Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413. Evidence held sufficient to establish prima facie case of infringement by defendants of plaintiffs' trademarks, styles of packing, and labeling boxes, entitling latter to temporary injunction. Boker v. Korkemas, 122 App. Div. 56, 106 NYS 904.

Held not to infringe: "New York City Car Advertising Company" not infringement on "Car Advertising Company." Car Advertising Co. v. New York City Car Advertising Co., 57 Misc. 105, 107 NYS 547. "Motor Boating Magazine" not infringement of "Motor Boat." Motor Boat Pub. Co. v. Motor Boating Co., 57 Misc. 108, 107 NYS 468. The use of the term "Morris Web Seam Drawer," to designate drawers made by defendants, is not a simulation of complainants' designation of "Elastic Seam Drawer." J. A. Scriven Co. v. Morris, 154 F 914. Design of black bear standing on all fours on ground not infringed by polar bear standing on hind feet on cake of ice. Bear Lithia Springs Co. v. Great Bear Springs Co. [N. J. Err. & App.] 68 A 86. Labels used upon beer by competitors compared and held not to resemble each other in such way as to deceive an ordinary purchaser. American Brew. Co. v. Bienville Brewery, 153 F 615.

77. Such facts are pertinent in their having a tendency to show that the particular mark used and complained of is calculated to deceive. American Tin Plate Co. v. Licking Roller Mill Co., 158 F 690.

lieved he owned by virtue of an assignment, but disclaimed all title thereto and ceased to use it, upon objection by the complainants equity will refuse injunctive relief,[78] and where it is not manifest to the court, upon inspection of the label, that the public would be imposed upon by the dress of the article, there should be proof of actual mistake by purchasers.[79] That two trade marks, a name and a device, were used together by the owner makes it none the less infringement for another to use one alone.[80] A trade mark designates an article of commerce and is affixed thereto, being general or universal, accompanying the article, and may be infringed anywhere,[81] while a trade name applies to a business and is as a rule local, and may be infringed only in the locality of the proprietor.[82] Confusion of trade names is sufficient ground for equitable protection.[83]

Unfair competition See 8 C. L. 2189 is not predicated on any exclusive right to the use of a name or device,[84] and consists in any marking, coloring, or advertising by which the goods of one are sold for, and on the reputation of those of another.[85]

§ 4. *Remedies and procedure.* See 8 C. L. 2140—The injured person has an election of remedies. He may sue at law for damages or he may proceed in equity for an accounting and injunction,[86] but to entitle a person to the protection in the use of a name as a trade mark, his right to use it must be exclusive,[87] and a clear show-

78. Van Raalt v. Schneck, 159 F 248.

79. American Brew. Co. v. Bienville Brewery, 153 F 615.

80. Enoch Morgan & Sons Co. v. Ward [C. C. A.] 152 F 690.

81. Ball v. Broadway Bazaar, 121 App. Div. 546, 106 NYS 249. A certain order established in France, sold a liquor under name of "Chartreuse," in the United States where such name was registered as a trade-mark. The order was expelled from France and a receiver appointed who continued manufacture of a similar liquor which he sold under that name. Held that action of French government and court did not affect trademark rights of order in United States, and it was entitled to injunction restraining sale of receiver's products in this country under their trademark. Baglin v. Cusenier Co., 156 F 1016.

82. Held, that defendant engaging in business of making and selling children's clothing in New York City, now borough of Brooklyn, under trade name and sign of "Broadway Bazaar-Brooklyn's Best Lilliputian store, 1185 Broadway, Brooklyn," was not an infringement upon plaintiff engaged in same kind of business at a store on Twenty-third street in former city of New York under trade name and sign of "Best & Co., Lilliputian Bazaar," with street and store numbers and name "New York" added. Bell v. Broadway Bazaar, 121 App. Div. 546, 106 NYS 249.

83. Atlas Assur. Co. v. Atlas Ins. Co. [Iowa] 112 NW 232. Decree enjoining defendant from "using the word or device 'Atlas' in its present form," altered, in that court did not intend to hold that such device cannot be used where it does not deceive or mislead those seeking insurance. Atlas Assur. Co. v. Atlas Ins. Co. [Iowa] 114 NW 609.

84. American Brew. Co. v. Bienville Brewery, 153 F 615; Grocers' Journal Co. v. Midland Pub. Co. [Mo. App.] 105 SW 310. Though there is no right to exclusive use of any element of a package if the ensemble has been identified by usage with the goods of the first user, he will be protected. Enoch Morgan & Sons Co. v. Ward [C. C. A.] 152 F 690.

85. Manufacturer of locks held chargeable with unfair competition in copying a higher priced lock, made by another manufacturer, in form, size, coloring, lettering, and details of finish. Yale & Towne Mfg. Co. v. Alder [C. C. A.] 154 F 37. Advertisement by defendant that certain salesman of recognized standing and with circle of acquaintance in trade in which plaintiff and defendant were engaged, and who was formerly in employ of plaintiff who was known to public as "George's" and "Fisher's," announced that he could be found at "Balsam's Misfit Parlors." Balsam being defendant's surname. Held that equity would not restrain use of "George's" and "Fisher's" there being nothing in contents of advertisement calculated to deceive public. Sultzbach Clothing Co. v. Balsam, 56 Misc. 324, 107 NYS 622. Held to constitute unfair competition where, after complainant successfully advertised and sold medicine under name of "Alpenkrauter," defendants advertised a similar remedy called "St. Bernard Alpen Krauter." Dr. Peter H. Fahrney & Sons Co. v. Ruminer [C. C. A.] 153 F 735. The mere making and sale of repair parts for a well-known machine, the patents on which have expired, by other than the makers who also sell such parts, is not an act of unfair competition unless they were put out as the goods of the original patentee. Bender v. Enterprise Mfg. Co. [C. C. A.] 156 F 641; George Frost Co. v. Estes, 156 F 677. Use of name of individual to designate article held under the evidence unfair competition. Dr. A. Reed Cushion Shoe Co. v. Frew, 158 F 552.

86. Hagan & Dodd Co. v. Rigbers, 1 Ga. App. 100, 57 SE 970. Improper to dismiss action for damages because involving equity. Id.

87. Bamforth v. Douglas Post Card & Ma-

ing is prerequisite to a temporary injunction,[88] but such relief will not be granted where the complainant itself has by its own acts created in great part the very confusion of which it complains.[89] The fact that defendant ceased to infringe another's right to a trade mark before suit was brought will not defeat the latter's right to an injunction, where defendant continued the use of such trade mark after notice to desist and contested a suit brought to compel it to do so.[90] In an action to recover for defendant's unlawful use of plaintiff's name in connection with the manufacture and sale of an article, plaintiff may recover profits on sales unlawfully made;[91] and also for losses in his own business caused by such unfair competition.[92] The good faith of the defendant will be considered in connection with the allowance of a recovery for profits.[92a] A court of equity will restrain the use of an infringing mark regardless of the intent with which it is being used,[93] but one seeking equitable relief against infringement must come into court with clean hands.[94] The defense of

chine Co., 158 F 355; American Wine Co. v. Kohlman, 158 F 830.

88. In a suit for unfair competition by defendant in selling typewriter below established prices, complainant held, upon showing, not to be entitled to injunction in advance of a full hearng on the merits. Oliver Typewriting Co. v. American Writing Mach. Co., 156 F 177. Upon affidavits submitted by defendant, complainant denied injunction to restrain former from using name "muresco" to indicate a wall finishing product. Moore v. Auwell, 158 F 462.

89. Bear Lithia Springs Co. v. Great Bear Spring Co. [N. J. Err. & App.] 68 A 86.

90. Thomas G. Plant Co. v. May Mercantile Co., 153 F 229.

91. Cutter v. Gudebrod Bros. Co., 190 N. Y. 252, 83 NE 16. In such action, no damages being allowed and plaintiff only recovering profits ascertainable at time of sale, interest may be awarded from time of commencement of action. Id. In taking account of profits made by defendant in unlawful competition with plaintiff, it is not to be assumed that all profits in defendant's business were through such unlawful competition, and a finding by the master that certain profits were not so made will not be set aside in absence of convincing evidence to contrary. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 69 A 569. Sales made by defendant, under a trade mark resemblance plaintiffs, to persons who knew the goods were manufactured by defendant, and sales made to persons at a distance who had no knowledge of plaintiff's existence, cannot be assumed to be injurious to plaintiff if the goods themselves are not impressed with deceptive marks. Id. In determining profits made by a defendant corporation in unfair competition with plaintiff it is proper to include in cost of manufacture and sale reasonable sums paid in good faith as salaries to managing officers, unless such officers are practically the corporation and the parties really guilty of the unfair competition. Id.

92. If such loss results partly from such unfair competition and partly from other causes independent of defendant and his acts, the plaintiff can recover only for so much of the loss as he shows to have resulted from defendant's unlawful acts. W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. [Me.] 69 A 569. If master in chancery rules in such case that he cannot allow for any such loss because the evidence does not enable him to draw definite line between loss resulting from the unlawful acts of defendant and that resulting from concurrent causes for which the defendant is not responsible, such ruling is erroneous as being too strict, and the case should be recommitted to him to make, if possible, a reasonable probable estimate of such loss. Id.

92a. Accounting for profits denied where unfair competition consisted of use of name, etc., with certain changes which, under a prior decision, the defendant was justified in believing gave him the right to use such name. Dr. A. Reed Cushion Shoe Co. v. Frew, 158 F 552.

93. Testimony of defendant in such suit as to intent with which infringing trade mark was adopted, or what suggested it, is immaterial. Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413.

94. Fay v. Lambourne, 108 NYS 874; Moxie Nerve Food Co. v. Modox Co., 153 F 487. Complainant will not be refused relief merely because for several years he circulated catalogues and price lists containing false statements as to his exclusive right to the name, where it is not proved that the trade name owes its value in a material degree to the false representations and the publication has ceased prior to the filing of the bills. Johnson v. Seabury [N. J. Err. & App.] 67 A 36. Where a wholesale grocer adopted the trade mark "Georgia Coon" to designate his syrups but used the words "Genuine Molasses" in connection with such trade mark on molasses which were not pure, held that such use was not such deception as to prevent the grocer from obtaining equitable relief against one infringeing such trade mark. Western Grocer Co. v. Caffarelli Bros. [Tex. Civ. App.] 108 SW 413. The fact that plaintiff sold pills under name "Beecham's Patent Pills," but which were not patented, the word "patent" being used in a proprietary sense and to indicate that they were made according to Beecham's secret formula, will not preclude plaintiff from equitable relief against infringement by defendant. Beecham v. Jacobs [C. C. A.] 159 F 129. Where the buyer of a newspaper known as the "St. Louis Grocer and General Mer-

unclean hands, to avail, must be based upon conditions existing at the time when the party applies for equitable relief.[95] That a complainant has been guilty of fraudulent misrepresentations need not be pleaded.[96] Laches may bar one's right to equitable relief [97] but is not a defense to a suit to restrain future infringements.[98] While mere delay or acquiescence will not defeat the remedy by injunction, it may afford good grounds for denial of preliminary injunction to stop an established business prior to a final hearing.[99] In an action to restrain unfair competition in the manufacture and sale of an article, a supplemental answer setting up a patent secured by defendants, is not frivolous where some of the acts of unfair competition may be justified by the patent.[1] A Federal court of the United States has jurisdiction to grant relief, where the acts of fraud and unfair competition are not committed solely in a foreign country, but have their inception and are in part performed in this country.[2]

§ 5. *Statutory registration, regulation and protection.* See 8 C. L. 2141—The power of the general government does not extend to trade marks under any express provision of the constitution, and the power of congress over such subject extends only so far as may be incidental to other subjects over which it has jurisdiction.[3] Registration is permissive and not necessary.[4] Descriptive [5] or geographical names [6]

chant" discontinued such title, but listed the name as a going paper and thereby obtained patronage, he cannot restrain the publication of another newspaper on the grounds of the similitude of its name to "St. Louis Grocer and General Merchant." Grocers' Journal Co. v. Midland Pub. Co. [Mo. App.] 105 SW 310. Manufacturer of butter, who allowed another to wrap a different butter in his wrapper and sell it as his butter, cannot, after registration of the wrapper as a trade mark, recover for infringement thereof. Castroville Co-op. Creamery Co. v. Col [Cal. App.] 92 P 648. Complainants manufactured and sold a patent medicine called "Alpenkrauter," which they represented to cure many diseases which it did not do. Complainant's witness refused to disclose ingredients of the medicine or to state from what herb, houses, or firm, herbs were purchased. Held not to show that defendant came into court with unclean hands and therefore not entitled to relief against defendant's unfair competition. Dr. Peter H. Fahrney & Sons Co. v. Ruminer [C. C. A.] 153 F 735. A court of equity will not protect against injury or invasion of a business of selling a medicine which has been built up and is being maintained by fraudulent representations as to its ingredients. Memphis Keeley Institute v. Leslie E. Keeley Co. [C. C. A.] 155 F 964. Evidence held to show that proprietor of secret remedy was chargeable with fraudulent misrepresentations, in that it did not contain gold or chloride of gold as represented. Id.

95. The fact that a manufacturer of an article built up its business in part upon misrepresentations made upon its labels and wrappers, and in advertisements respecting medicinal properties of such article, will not debar it from relief in equity where it has permanently discontinued such misrepresentations, and makes only such representations as is warranted by substantial amount of medical opinion. Moxie Nerve Food Co. v. Modox Co., 153 F 487.

96. If such matter appears from record, it will be given effect because of the public. Memphis Keeley Institute v. Leslie E. Keeley Co. [C. C. A.] 155 F 964.

97. Dr. Peter H. Fahrney & Sons Co. v. Ruminer [C. C. A.] 15. F 735. Held that proprietor of Hunyadi Janos Springs in Buda Pesth, Hungary, was not entitled to enjoin sale of water made in America under label "Carbonated Artificial Hunyadi, conforming to Fresenius' Anaylsis of the Hunyadi Janos Springs," there being nothing in the name to mislead purchasers or make a case of unfair competition. Saxlehner v. Wagner [C. C. A.] 157 F 745. Complainant held under circumstances of case to be barred by its laches from right to accounting for profits. Worcester Brew. Corp. v. Rueter [C. C. A.] 157 F 217.

98. Dr. Peter H. Fahrney & Sons Co. v. Ruminer [C. C. A.] 153 F 735.

99. Havana Commercial Co. v. Nichols, 155 F 302.

1. Silver v. Waterman, 122 App. Div. 373, 106 NYS 899.

2. So held where oils shipped by New Jersey corporation to its manager in Hamburg, Germany, and there marked and labeled with brand previously used exclusively by complainant to designate its oils which were sold largely in Europe. Vacuum Oil Co. v. Eagle Oil Co. [C. C. A.] 154 F 867.

3. Fraiser v. J. W. Doty Cigar Co. [Mass.] 84 NE 462.

4. Act Cong. Feb. 20, 1905, c. 592, 33 Stat. 724 (U. S. Comp. St. Supp. 1907, p. 1008), providing for the registration of trade marks is permissive only, and by § 23 (33 Stat. 730) expressly preserves to owners of unregistered trade marks all rights which they would have had if the act had never been passed. Fraiser v. J. W. Doty Cigar Co. [Mass.] 84 NE 462.

5. "Standard," as applied to phonograph, descriptive though applied to inferior machines. In re National Phonograph Co., 29 App. D. C. 142. "Oriental cream" applied to a cosmetic of creamy appearance descriptive. In re Hopkins, 29 App. D. C. 118.

cannot be registered under the Federal statute. Only final orders of the commissioner of patents are appealable,[7] and discretionary orders will not be interfered with except for abuse of discretion.[8] State courts have jurisdiction to protect marks registered under the Federal statute.[9]

TRADE SECRETS, see latest topical index.

TRADE UNIONS.

§ 1. Nature of Trade Unions, 1872.
§ 2. The Union and the Public, 1872.
§ 8. The Union and Its Members, 1873.

The scope of this topic is noted below.[9a]

§ 1. *Nature of trade unions.*[See 8 C. L. 2142]—A law prohibiting employers from entering into any contract with employes, wherein the latter agree to become or not to become members of a labor organization, is unconstitutional,[10] as is one forbidding the discharge of employes because of membership in such unions.[11] Officers [12] and committees of a trade union have only such authority as the union may confer upon them.[13] In arbitration proceedings under the Federal statute,[14] which provides for hearing by the circuit court on exceptions to the award, and for an appeal therefrom within ten days, judgment on the award, either in whole or in part, cannot be entered until after the appeal has been determined or the time for taking it has expired.[15] Such an arbitration rests solely upon the agreement therefor.[16] Such agreement will be interpreted by the ordinary and accepted meaning of the terms used, and will not be broadened to authorize the determination of questions submitted only inferentially.[17]

§ 2. *The union and the public.*[See 8 C. L. 2143]—In furtherance of their undoubted right to peaceably quit their employment [18] for any ground that seems to them sufficient,[19] members of a union may select committees to confer with their employer,[20] and may seek and follow the advice of officers of the union as to the advisability of continuing work.[21] But nonunion men have a right to seek and gain employment and to come and go without being compelled to listen even to persuasion,[22] so any conduct by a union or its members which amounts to an infringement

6. Act Feb. 20, 1905. In re Hopkins, 29 App. D. C. 118. "Oriental" held geographical. Id.

7. Order dissolving interference but not refusing registration not final. Union Distilling Co. v. Schneider, 29 App. D. C. 1.

8. Order requiring applicant to strike out the description of his device and refer only to the drawings. In re Atkins, 29 App. D. C. 385.

9. Fraiser v. J. W. Doty Cigar Co. [Mass.] 84 NE 462.

9a. Reference should also be had to the topics Associations and Societies, 9 C. L. 274; Corporations, 9 C. L. 733; Conspiracy, 9 C. L. 600; Injunction, 10 C. L. 246.

10. Laws Nevada 1903, p. 207, c. 111, § 1. Contrary to the constitutional provision that "no one shall be deprived of life, liberty or property without due process of law," in that it deprives the employer of the right of contract. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

11. Act June 1, 1898. Adair v. U. S., 28 S. Ct. 277.

12. Directors who are only authorized to confer with employers as to terms which may be agreed upon exceed their authority by executing a contract. Barnes v. Berry, 157 F 883.

13. Agreement held not ratified by union. Fell v. Berry, 108 NYS 669.

14, 15. U. S. Comp. St. 1901, p. 3205. In re Southern Pac. R. Co., 155 F 1001.

16. This determines the rights of the parties and the extent of the power of the arbiters, and is to be construed under rules governing construction of contracts rather than those applicable to pleadings. In re Southern Pac. R. Co., 155 F 1001. Matters inquired into and evidence admitted by arbiters held **within scope** of agreement. Id.

17. In re Southern Pac. R. Co., 155 F 1001.

18. Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 NYS 438.

19. Members may refuse to do the work of other members who have struck, and may lawfully quit work also upon being required so to do. Though working for a different employer than those who first struck. Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 NYS 438.

20, 21. Delaware, etc., R. Co. v. Switchmen's Union of North America, 158 F 541.

22, 23. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

of this right becomes intimidation and is unlawful.[23] The maintenance of a boycott effected by coercion will be enjoined.[24] Contracts between trade unions and employers cannot be enforced indirectly by an injunction,[25] but officers of a trade union may be enjoined from inciting a strike for an eight hour day and a closed shop when there is an existing contract not providing therefor.[26] While peaceful picketing is permissible,[27] it is not presumed to be peaceable, and the mere massing of an unusual number of union men at points where nonunion men must pass, is itself intimidation;[28] and where, in addition, there is some evidence as to the use of threats and violence, a proper case is made for the granting of injunctive relief.[29] But where the affidavits alleging violence are on information and belief and those denying it are positive and in detail, an injunction will not issue.[30] A union and all the members thereof may be bound by service on the officers,[31] and a suit to enforce a contract between a voluntary association of employers and representatives of a voluntary labor association may be maintained by a few members of the former in behalf of all against the executive officers of the latter, or such members as fairly represent its interests.[32] The capacity of the union to be sued cannot be raised on information for contempt in violating an injunction.[33]

§ 3. *The union and its members.*[See 8 C. L. 2145]—Where a trade union has no right to interfere with a laborer, the fact of noninterference is no consideration for the payment of initiation fees,[34] and such fees may be recovered after the prospective member has been rejected.[35] Provision in the constitution of a trade union, that a member's fees shall be forfeited for any misrepresentation in his application, applies only to a representation in regard to an existing state of facts.[36] By-laws providing for payment of strike benefits require such payment only where needed through lack of employment.[37]

TRADING STAMPS; TRANSFER OF CAUSES; TRANSITORY ACTIONS, see latest topical index.

24. Booth v. Burgess [N. J. Eq.] 65 A 226. Tortiable coercion is not that which results from the voluntary exercise of the absolute right to refrain from contracting, but is the compulsion to so refrain against the will. Id. A boycott by a trade union which restrains the manufacture of goods intended for transportation beyond the state and which restrains the purchase, or negotiation for transportation, of such goods, by the nonresident vendees, is unlawful. Is "restraint of trade or commerce among the several states" prohibited by the antitrust act of July 2, 1890 (U. S. Comp. St. 1901, p. 3200). Loewe v. Lawlor, 28 S. Ct. 301.

25. Members will not be compelled to work a certain number of hours per day, and if they strike upon being required to do so the association will not be enjoined from paying them strike benefits. Barnes v. Berry, 157 F 883.

26. The "closed shop" is contrary to public policy, while the demand for an immediate eight hour day is violative of the contract. Contract between "typothetae" and International printing-pressmen and assistants' union. Barnes v. Berry, 156 F 72. Injunction refused on appeal on the ground that contract void, and even if valid could not be thus indirectly enforced. Barnes v. Berry, 157 F 883.

27. By a reasonable number and only for the purpose of observation and of seeking by pursuasion and argument to restrain others from working, but even here an injunction will issue to restrain future violence. Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 NYS 433.

28. Such massing of from thirty to seventy men eight hours an established picket system. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500. In such case whether the union itself is an original conspirator, or becomes one later by co-operation and supervision, it is equally responsible. Id.

29. Goldfield Consol. Mines Co. v. Goldfield Miners' Union No. 220, 159 F 500.

30. Though peaceable picketing is admitted. Searle Mfg. Co. v. Terry, 56 Misc. 265, 106 NYS 438.

31. Strike injunction. Russell v. Stampers & Gold Leaf Local Union No. 22, 57 Misc. 96, 107 NYS 303.

32. Under Equity Rule 48. Barnes v. Berry, 156 F 72.

33. Barnes v. Chicago Typographical Union No. 16, 232 Ill. 402, 83 NE 932.

34. So the fact that he worked with members of the union is no "protection" as that word is used in the constitution of the union. Levin v. Cosgrove [N. J. Law] 67 A 1070.

35. Where so provided in the constitution. Levin v. Cosgrove [N. J. Law] 67 A 1070.

36. Statement that one can command the average wages is merely an assertion of belief. Levin v. Cosgrove [N. J. Law] 67 A 1070.

37. A by-law of an engravers' union pro-

TREASON.[38]

TREASURE TROVE, see latest topical index.

TREATIES.[39]

The scope of this topic is noted below.[39a]

Treaties and statutes are of equal dignity, so a treaty may supersede a prior statute [40] and a statute may supersede a prior treaty,[41] but the obligation of a nation to respect a treaty is at least equal to that which rests upon individuals to observe the terms of a private contract,[42] so acts of congress pertaining to the subject-matter of a treaty do not abrogate the latter unless clearly inconsistent therewith.[43] A statute passed for the purpose of executing a treaty expresses the only effect which such treaty shall have, to the extent of the subject-matter of the act.[44] A treaty becomes presently effective when its purpose is so expressed in the same manner as a statute [45] and thereupon becomes a municipal law as well as an international contract, and is paramount over state constitutions and laws and must be enforced by state as well as Federal courts; [46] but courts can give no redress to a party who is injured through failure of his government to respect a treaty.[47] Treaties must have a liberal construction, even at variance with the apparent meaning as interpreted according to rules of common law, since some parties thereto may have been unacquainted with the common law and its phraseology,[48] and their interpretation should be in a spirit of the utmost good faith and in a manner to carry out their manifest purpose.[49] But grounds of national comity or altruism will not be permitted to extend the scope of a treaty beyond its obvious limits in derogation of clear rights of the United States,[50]

viding for payment of full wages from its funds to members discharged from employment because on committee sent to confer with employers, until they should again obtain steady employment, refers not only to employment at engraving, but at any occupation. Donavan v. Friendly Society of Engravers [R. I.] 69 A 554.

38. No cases have been found during the period covered.

39. See 8 C. L. 2146.

39a. Reference should also be had to the topics Extradition, 9 C. L. 1347; Indians, 10 C. L. 51; and to topics dealing with the particular matters covered by the treaty in question.

40. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. [C. C. A.] 155 F 842. The fact that the constitution commits to congress power to secure to authors and inventors exclusive rights to their respective writings and discoveries does not raise such statutes above the dignity of others or of treaties because all powers of congress are specially vested, either directly or indirectly. Id.

41. United Shoe Mach. Co. v. Duplessis Shoe Mach. [C. C. A.] 155 F 842. Statute abrogates treaty as a municipal law when inconsistent. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

42. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

43. Act Cong. March 3, 1899, c. 425, preserving to the United States control over navigable waters within the states, and authorizing the secretary of war to determine whether any proposed enterprise will divert waters or otherwise affect navigation, is not inconsistent with the Webster-Ashburton treaty of 1842, art. 2 (7 Fed. St. Ann. p. 582), declaring the right of citizens of both countries to free and open navigation of boundary waters. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

44. The Act of March 3, 1903 (32 Stat. 1225, c. 1019), declared the treaty signed at Brussels, December 14, 1900 (32 Stat. 1936), not to be retroactive so that the provision therein in regard to patents did not apply to those then existing, and consequently they expired as provided by the law in force at the time of their issuance. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. [C. C. A.] 155 F 842.

45. Not required that it be enacted into a statute. Art. 4 bis, 32 Stat. 1943, Act 1, p. 1939, went into effect Sept. 14, 1902. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. [C. C. A.] 155 F 842.

46, 47. Minnesota Canal & Power Co. v. Pratt [Minn.] 112 NW 395.

48. The meaning may be derived from reports of commissioners who were present at a former convention which discussed the same matters involved in the later treaty. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co. [C. C. A.] 155 F 842.

49. Tucker v. U. S. [C. C. A.] 157 F 386.

50. The amount of an appeal bond given by a citizen of Russia in habeas corpus proceedings wherein his discharge was reversed and bond forfeited, rightfully and equitably belongs to the United States, the obligee therein and not to Russia whose agent caused an arrest and prosecuted the appeal, under art. 9 of the treaty of 1882 (8 Stat. 448), since the purpose of the bond

or of its citizens,[51] or in exclusion of the jurisdiction of Federal courts to arbitrate controversies between domestic and foreign subjects.[52] An act cannot be a tort in violation of a treaty of the United States where the executive, congress and the treaty-making power have all adopted it.[53] The treaty of 1799 between the United States and Prussia expired June 2, 1810, and the provision therein that each nation should protect the effects of citizens of the other within its jurisdiction was not revived by the treaty of May, 1828.[54]

TREES, see latest topical index.

TRESPASS.

§ 1. Acts Constitution Trespass and Right of Action Therefor, 1875.
§ 2. Actions, 1878.
A. At Law, 1878.
B. In Equity, 1885.
§ 3. Damages and Penalties, 1886.
§ 4. Criminal Liability, 1888.
§ 5. Trespass to Try Title, 1889.

The scope of this topic is noted below.[54a]

§ 1. *Acts constituting trespass and right of action therefor.* See 8 C. L. 2147—The general rule may be stated to be that trespass lies for any unlawful invasion of possessory rights, either in real or personal property,[55] and this may be accomplished

was to secure the prisoner's appearance and not to reimburse the Russian government for the costs of prosecutions. Tucker v. U. S. [C. C. A.] 157 F 386.

51. Though the treaty of May 1, 1828, with Prussia is still in force, the right thereunder of citizens of Prussia to attend to their affairs in the United States and in so doing to enjoy the same security and protection as citizens of the United States is not infringed by refusal of a state court to subject by garnishment to the payment of an indebtedness due a Prussian subject a fund within the state to which a citizen thereof also asserts a claim, where the effect of doing otherwise would be to remove the fund to Prussia to be administered among creditors there. Disconto Gesellschaft v. Umbreit, 28 S. Ct. 337.

52. The treaty of December 11, 1871 (17 Stat. 928), with Germany, providing that consular agents of either country shall have exclusive charge of the internal order of ships of their nation and exclusive power to determine all differences between officers and crews does not include claims for tort by a United States citizen against a German vessel so as to exclude the jurisdiction of Federal courts. The Baker, 157 F 485.

53. No cause of action against the governor-general of Cuba for abating the right to maintain a public slaughter house in Havana, which right was hereditary under Spanish rule. O'Reilly De Camara v. Brooke, 28 S. Ct. 439.

54. Disconto Gesellschaft v. Umbreit, 28 S. Ct. 337.

54a. Includes all matters relating to trespass as a tort or crime, and actions of trespass to try title. As to trespasses resulting from the violation of a particular relation see also such topics as Adjoining Owners, 9 C. L. 28; Landlord and Tenant, 10 C. L. 571; Tenants in Common and Joint Tenants, 10 C. L. 1850. Reference should also be had to the topics Injunction, 10 C. L. 246, and Nuisance, 10 C. L. 1031.

55. Trespass lies: For deprivation of the use of land during the pendency of eminent domain proceedings, where defendant is justified in refusing the first award. Moll v. Sanitary Dist. of Chicago, 228 Ill. 633, 81 NE 1147. For forcibly entering into possession of property and barring the owner from admission thereto. Charron v. Thivierge [R. I.] 67 A 585. For departing from established road across private property and making a new one. Gosdin v. Williams [Ala.] 44 S 611. For continuance of entry for an unreasonable time after expiration of a permit. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872. For erection of a telephone pole on a private alley without permission. If it constitutes a nuisance, it may, after reasonable notice to remove, be cut down by the one whose rights are invaded, and no liability arises for injury to a transmitter and cross-arms attached thereto, where the act was not done in a wanton and reckless manner. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358. By owner of flats for location of a public way without legislative authority. Chase v. Cochran, 102 Me. 431, 67 A 320.

Trespass does not lie against a municipality to recover for injuries to property abutting a public street caused by change of grade. Authority to pave implies authority to grade, and unauthorized acts of city officers in grading may be ratified. Deer v. Sheraden Borough [Pa.] 69 A 814. For using as a public way the whole of an apparently public alley even though the technically legal boundary is overstepped. Everett v. Foley, 132 Ill. App. 438. Nor to recover for injuries to a steam conduit in a public street caused by vibration and sinking of earth as a result of constructon of city improvements, there being no negligence. New York Steam Co. v. Foundation Co., 108 NYS 84.

without an actual entry upon the land of another.[56] When the entry is unlawful, the purpose of the entry,[57] good faith,[58] malice,[59] wilfullness,[60] and negligence,[61] are immaterial. Where the trespass is a continuing one,[62] successive actions lie for each.[63]

Trespass to the person.[64]

Right of entry and matters of justification. See 8 C. L. 2148.—Liability for trespass to the property of individuals may be avoided by the owner's acquiescence in the entries,[65] and no liability is created by entry under a license or permit from one having authority to grant the same.[66] But a license affords protection only for the period named therein,[67] or, if none is named, then only for a reasonable time [68] and extends only to the act or acts specified [69] at the time it came into defendant's possession.[70] A license is no justification for the trespass if fraudulently obtained.[71] The rights and liabilities of licensees are more fully treated in another topic.[72] Where the trespass is upon state lands, the fact that defendant has been led to believe that his permit would be extended,[73] that he acted in good faith,[74] or that the state received and retained payment for the timber taken upon such entry,[75] is no defense.[76] The action of trespass may be successfully defended by proof of user as a public highway,[77] proof that the alleged trespass was authorized by law,[78] that it was not upon plaintiff's land,[79] or that plaintiff has no sufficient right or interest in the prop-

56. By pumping water therefrom. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872. By shooting into another's building. McGehee v. Norfolk, etc., R. Co. [N. C.] 60 SE 912. By removal of that portion of a dwelling house inadvertently built upon one's land. Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 SW 1079. By conversion of another's property unlawfully upon one's own land. Graham v. Purcell, 110 NYS 813.

57. Entry to recover one's own property. Wright v. Willoughby [S. C.] 60 SE 971.

58. Gosdin v. Williams [Ala.] 44 S 611.

59. Williams v. Simon, 1 Ga. App. 321, 57 SE 1009. Except where punitive damages are sought to be recovered. Toledo, Bowling Green & Southern Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200.

60. In trespass to land. Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67.

61. Kellar v. Central Tel. & T. Co., 53 Misc. 523, 105 NYS 63; Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67.

62. Such as pumping water at various times from plaintiff's land. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

63. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

64. See 8 C. L. 2148. See, also, Assault and Battery, 9 C. L. 257, and False Imprisonment, 9 C. L. 1351.

65. Mere silence is not acquiescence however. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

66. Title by prescription in defendant's lessor from whom he obtained permission to cut timber is a valid defense. Ford v. Rountree [Ga. App.] 59 SE 325. By owner of reversion. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358.

67. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

68. Does not justify cutting and removal of timber fifty-one years after grant of the license. Goodson v. Stewart [Ala.] 46 S 239.

69. A grant of the right to pump water out of one of several springs does not justify pumping from all. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

70. Where defendant seeks to justify a trespass by a judgment in its favor against plaintiff on a contract, of which it became assignee, giving it a right to do the act complained of, plaintiff may show a modification of the contract before assignment and the judgment is no bar to recovery, the points in one suit not being involved in the other. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

71. To erect telephone line. Baldwin v. Postal Tel. & Cable Co. [S. C.] 59 SE 67; Burnett v. Postal Tel. & Cable Co. [S. C.] 60 SE 1116; Dobson v. Postal Tel. & Cable Co. [S. C.] 60 SE 948.

72. See Licenses to Enter on Land, 10 C. L. 630.

73. Section 24, c. 163, p. 362, Laws of Minn. 1895, limits a permit to take timber to the period of two logging seasons, with authority in timber commission to extend for one year. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

74, 75. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

76. Such matters do not work an estoppel against the state. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

77. User while land was government property. Montgomery v. Somers [Or.] 90 P 674. The width of the highway is determined by the user, but the user must be over a certain well defined line of travel, not, however, all the land over which stock may have been promiscuously driven though in a general uniform direction. Id.

78. Anything which impedes or seriously inconveniences travel along a highway may be summarily removed by the proper town officer. Under § 1326, St. 1898 of Wisconsin, and trespass will not lie therefor. Jones v. Tobin [Wis.] 115 NW 807.

79. In trespass against a superintendent of streets for making an excavation, defendant may justify by proving that the excavation was within the limits of a street and

erty to entitle him to complain.[80] But defendant cannot justify a trespass on the ground that he was acting within his authority as an officer of the state,[81] or that he was acting for a municipality, when the latter had no power to authorize the act complained of,[82] or that other causes combined with his wrongful act to bring about the injury.[83] Where the trespass consisted in the use of plaintiff's land as a highway, the fact that the land was so used by the public is no defense;[84] nor is it material that there was a legally established highway and that defendant acted in good faith, when he traveled outside such highway.[85] The fact that one's right of user is paramount to another's gives no right to unnecessarily injure the latter's property.[86] Attorney and client joined in an action of trespass for the wrongful seizure of goods upon attachment cannot avail themselves of the sheriff's immunity under valid process.[87] A void tax title gives no right of entry even though plaintiff is not in possession,[88] nor does right to possession under a mortgage give a right to enter the close of one who is not the mortgagor.[89] Persons running and reclaiming logs have no right of entry upon the land of abutting owners which authorizes interference with such owners' dominion over their own property.[90] Failure to abate a trespass is not justified by pendency of a suit for that purpose.[91] An owner of flats is not estopped by petitioning for a highway,[92] nor by any declaration, of which he had no notice, of a grantor in possession at time of the conveyance,[93] nor by statements not acted upon,[94] from subsequently objecting to the legality of the highway's location. Notice that a trespass has been committed is necessary to a waiver of right to recover damages therefrom.[95]

Parties in the tort. See 8 C. L. 2149—One who directs or authorizes a trespass is equally liable with him who commits it.[96] But one cannot be held liable for the trespass of another which he did not direct or instigate, though the cause of the trespass is his wrongful act,[97] or though the trespass was committed in his interest by his em-

made in repair thereof. Harriman v. Whitney [Mass.] 82 NE 671.

80. The owner of an easement in property in possession of a mere squatter incurs no liability in cutting off the latter's access thereto, in the absence of proof of malice. Doty v. Chicago, etc., R. Co. [Iowa] 114 NW 522.

81. Mere averment in plea that the act was committed on behalf of the state does not make the suit one against the state. Elinore v. Fields [Ala.] 45 S 66.

82. Chase v. Cochran, 102 Me. 431, 67 A 320.

83. Blunk v. Chicago, etc., R. Co. [Iowa] 115 NW 1013. One is not deprived of his right to property by the fact that he trespassed in placing it upon the land of another, so he may recover for its conversion. Graham v. Purcell, 110 NYS 813. One may recover for removal of that portion of a dwelling house inadvertently though wrongfully built upon another's land. Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 SW 1079.

84. Where user is insufficient, the road must be legally established. Gosdin v. Williams [Ala.] 44 S 611.

85. Gosdin v. Williams [Ala.] 44 S 611.

86. Telephone company liable for accidental injury to shade trees while constructing lines along street. Kellar v. Central Tel. & T. Co., 53 Misc. 523, 105 NYS 63.

87. The contrary rule prevails in some States. Williams v. Inman, 1 Ga. App. 321, 57 SE 1009.

88. Trexler v. Africa, 33 Pa. Super. Ct. 395.

89. Plaintiff in possession under bill of sale executed subsequent to foreclosure of defendant's mortgage. Kennedy v. Hoyt [Mass.] 83 NE 862.

90. Pub. Act 1905 of Michigan, p. 279, No. 189, which attempts to give this right without providing for compensation is invalid. Garth Lumber & Shingle Co. v. Johnson [Mich.] 14 Det. Leg. N. 898, 115 NW 52.

91. Where the trespasser is notified of an intention to abandon the suit and to personally remove the nuisance, especially where it shows no disposition to await the determination in court of its rights. Maryland Tel. & T. Co. v. Ruth [Md.] 68 A 358.

92. Chase v. Cochran, 102 Me. 431, 67 A 320.

93. Instructions to selectmen to lay out road just as you think best. Chase v. Cochran, 102 Me. 431, 67 A 320.

94. Expression of satisfaction with opening in a bridge. Chase v. Cochran, 102 Me. 431, 67 A 320.

95. Not waived by taking deed. Neuman v. Mountain Park Land Co. [Ark.] 107 SW 391.

96. Chase v. Cochran, 102 Me. 431, 67 A 320. Not entitled to an instructed verdict on the ground that the agents who committed the trespass acted outside the scope of their authority and duty. Jesse French Piano & Organ Co. v. Phelps [Tex. Civ. App.] 19 Tex. Ct. Rep. 889, 105 SW 225.

97. Where defendant sold standing timber to one and subsequently conveyed the land

ployes.[98] However, a tort for one's benefit may be ratified and thereupon the ratifier becomes liable to the same degree as if he had commanded the act.[99]

§ 2. *Actions. A. At law.*[See 8 C. L. 2150]—The remedy for an entry by a foreign corporation under a permit fraudulently obtained,[1] or upon land not included in the permit,[2] is an action of trespass and not condemnation proceedings.[3] Where the trespass is of a permanent character,[4] but one cause of action arises, which accrues immediately upon its commission.[5] A statute, limiting the time during which land sold for taxes can be recovered, has no application to actions of trespass for injuries to land.[6] In many cases the action of trespass may be waived and another remedy pursued.[7]

Actual possession or title.[See 8 C. L. 2150]—The gist of the action of trespass quare clausum fregit is the disturbance of possession,[8] and so possession, whether under color of title [9] or standing alone,[10] will generally support the action as against a mere trespasser. But proof of an outstanding title superior to plaintiff's is a complete defense to an action of trespass to recover damages for cutting timber,[11] whether such title rests in defendant or another.[12] Whether, however, defendant fails to connect himself with the outstanding title, plaintiff may acquire it after com-

with full warranties to another without disclosing to either his transaction with the other. Lamb v. Willis, 109 NYS 75.

98. Toledo, Bowling Green & Southern Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200.

99. Civ. Code 1895, § 3820. Crockett Bros. v. Sibley [Ga. App.] 60 SE 326.

1. Civ. Code 1902, § 2211. Baldwin v. Postal Tel. & Cable Co. [S. C.] 59 SE 67. Motion for nonsuit on ground that trespass does not lie where entry is by permit will be denied in such case. Dobson v. Postal Tel.-Cable Co. [S. C.] 60 SE 948.

2. Condemnation proceedings against a foreign corporation apply only where the acts complained of are incident to the right granted by the owner. Burnett v. Postal Tel. & Cable Co. [S. C.] 60 SE 1116.

3. Not necessary to show that compensation was demanded and refused. Dobson v. Postal-Tel. Cable Co. [S. C.] 60 SE 948.

4. Construction of a railroad. Cobb v. Wrightsville, etc., R. Co., 129 Ga. 377, 58 SE 862.

5. And the statute of limitations at once begins to run. Cobb v. Wrightsville, etc., R. Co., 129 Ga. 377, 58 SE 862.

6. Act of April 3, 1804, § 3, 61 Sess. L. 201. Trexler v. Africa, 33 Pa. Super. Ct. 395.

7. One having title by prescription may sue either in trespass or detinue to recover for the unlawful cutting of timber. Taylor v. Burt & Brabb Lumber Co. [Ky.] 109 SW 348. Plaintiff may waive the trespass and sue for the recovery of the specific property, or its value, or he may sue in trover for its conversion. Dennis Bros. v. Strunk [Ky.] 108 SW 957.

8. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872; Munsey v. Hanly, 102 Me. 423, 67 A 217.

9. Possession by one claiming title. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044. Possession under color of title is sufficient to support an action to recover the statutory penalty for cutting trees. Carpenter v. Savage [Miss.] 46 S 537. An administrator, who being one of the heirs, enters land and holds of his own right, may maintain action, though his proper title is defective. Benjamin v. Slaughter [Ala.] 44 S 468. Possession of land and ownership of the trees thereon will support an action to recover the statutory penalty for boxing trees for turpentine without the owner's consent, under Code 1906, § 4983. Harrison Naval Stores Co. v. Johnson [Miss.] 45 S 465. Owner of flats has such an estate therein as entitles him to maintain the action against public officers acting without authority. Chase v. Cochran, 102 Me. 431, 67 A 320.

10. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872; Merwin v. Backer [Conn.] 68 A 373. An Indian may recover damages in an action of trespass brought in a state court for injury to land allotted to him by the government, and which he occupies, though the latter holds in trust the legal title. The executive department, though bound to protect Indians on the reservations, affords no remedy in such a case. Smith v. Mosgrove [Or.] 94 P 970. And since title is not necessarily involved, the trial of the case is not an interference with Federal control over the Indian or his land. Lessee of tide lands may enjoin others from digging clams. Sequim Bay Canning Co. v. Bugge [Wash.] 94 P 922. Possession by tenant sufficient as against tort feasor, under Iowa code 1897, § 3639 (Blunck v. Chicago, etc., R. Co. [Iowa] 115 NW 1013), and the extent of interest of tenant in the land or crops is immaterial (Id.).

11. Burt & Brabb Lumber Co. v. Hurst [Ky.] 110 SW 242. Widow cannot before assignment of dower maintain action against heir though she is in possession. Munsey v. Hanly, 102 Me. 423, 67 A 217.

12. Where two patents cover the same land, a person holding under the earlier one is not liable to the other for cutting trees on a portion of such land, though his title under the patent does not extend to such portion, his liability being to the holder of title under the earlier patent. Burt & Brabb Lumber Co. v. Hurst [Ky.] 110 SW 242.

mencement of suit, and thereby perfect his right of action.[13] While possession may [14] or may not [15] be essential, its absence necessitates proof of title.[16] Plaintiff must have been the owner, or in possession, at the time of the trespass, to entitle him to sue,[17] but alienation pendente lite does not bar the action.[18] In the absence of actual possession the law invests the owner with constructive possession.[19] Where plaintiff's title is denied, its acquisition by adverse possession [20] or by government certificate [21] may be shown. Where defendant claims title under plaintiff, he is estopped from denying plaintiff's title.[22] Possession is not essential to a recovery for trespass to personalty, so the action lies for conversion of property which is on defendant's land,[23] and does not lie merely for disturbance of possession uncoupled with right or title,[24] unless such disturbance amounts to a breach of the peace.[25]

Joint actions. See 8 C. L. 2151—Parties having a joint interest in the damage flowing from an injurious act may join as plaintiffs in one suit to recover therefor, though they are not joint owners.[26] While separate liability of trespassers is pre-

13. Where one is in actual, rightful possession at commencement of suit, claiming the land as his own against all except persons claiming under a mortgage, with which mortgage defendant does not pretend to connect himself, and subsequently such interest also passes to plaintiff, his title is sufficient to maintain trespass. Benjamin v. Slaughter [Ala.] 44 S 468.

14. In Louisiana, to maintain trespass, plaintiff must prove possession at the time of disturbance and during the year preceding, and that the disturbance took place within a year prior to bringing the action. Garland v. Wunderlich, 117 La. 346, 41 S 644. Must show actual possession. Riding on the land a few times and paying taxes, insufficient. Powers v. Hatter [Ala.] 44 S 859. Improvement of land shows it is in actual possession of someone, so plaintiff cannot rest on his title but must show that the possession is his. Hess v. Sutton, 33 Pa. Super. Ct. 530. The purchaser of a tax title cannot maintain trespass against the tax debtor in possession, where he has no possession adverse to the latter, his remedy being a direct proceeding under the statute. South Louisiana Land Co. v. Norgress [La.] 45 S 49.

15. Prima facie title sufficient. Trexler v. Africa, 33 Pa. Super. Ct. 395. Owner may recover for cutting timber whether in possession at the time or not. Taylor v. Burt & Brabb Lumber Co. [Ky.] 109 SW 348. If there is no actual possession, plaintiff can recover by proving title. Powers v. Hatter [Ala.] 44 S 859.

16. Either title or possession. Newman v. Mountain Park Land Co. [Ark.] 107 SW 391. Kirby's Dig. § 7976, imposing treble damages for cutting timber growing on the land of another, does not do away with the common-law necessity for title or possession, so one holding under an unperformed contract and not in possession cannot maintain the statutory action. Id.

17, 18. Knight v. Empire Land Co. [Fla.] 45 S 1025.

19. Newman v. Mountain Park Land Co. [Ark.] 107 SW 391. Presumption to that effect in regard to unimproved lands. Hess v. Sutton, 33 Pa. Super. Ct. 530.

20. Adverse possession, under a deed by plaintiff and his grantors for twenty years coupled with a claim of ownership, will support an action for trespass committed on any part of the land included in the deed. Taylor v. Burt & Brabb Lumber Co. [Ky.] 109 SW 348. Adverse possession for ten years establishes title under Gen. Laws 1896, c. 205, § 21, and is a defense to an action of trespass, though possession commenced under the old law requiring a period of twenty years. Pike v. Wilbur [R. I.] 69 A 849. In an action for trespass upon unoccupied lands, proof of an unbroken chain of title for thirty years next preceding the trespass is **presumptive** evidence of ownership. Code Civ. Proc. § 960. Evidence held sufficient to establish such presumption and to be unrebutted. Ridgway v. Hawkins, 123 App. Div. 15, 107 NYS 416. Occupancy of a part of a tract does not aid in establishing title to the whole. Hess v. Sutton, 33 Pa. Super. Ct. 530.

21. A regular certificate from the government of the location of the land by plaintiff confers upon him full title, and coupled with possession entitles him to maintain the action. Code 1906, § 1955. Johnson v. Davis [Miss.] 45 S 979.

22. C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533.

23. Where a common grantor, owning two parcels of land and a railroad connecting them, sells one parcel and the road to plaintiff and the other parcel to defendant, the latter by tearing up the tracks on his parcel, becomes liable in trespass. Empire Steel & Iron Co. v. Lawrence, 27 Pa. Super. Ct. 320; Graham v. Purcell, 110 NYS 813; Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 SW 1079.

24. No recovery for conversion of goods, to only a part of which plaintiff shows title taken by lawful entry (Kennedy v. Hoyt [Mass.] 83 NE 862), and even though the entry was unlawful, plaintiff may recover for only that portion of the goods to which he shows title (Id.). One may peaceably recover his property in the possession of another without becoming liable in trespass. Wright v. Willoughby [S. C.] 60 SE 971.

25. Wright v. Willoughby [S. C.] 60 SE 971.

26. Where some are owners in fee and others are remaindermen, the difficulty of apportioning the damages cannot be relied on by defendant, since he is protected by the

sumed,[27] two corporations, each interested in the result of a trespass and each composed of the same members, are properly joined,[28] and attorney and client are jointly liable for a trespass committed by the latter through the former.[29] But in an action by vendee against vendor in a land contract for cutting and removing timber, one not a party to the contract is not a proper party to the action.[30] A lessee of state lands may maintain the action of trespass without making the state a party defendant.[31] Suits against joint trespassers, residing in different counties, may be brought in the county of which either is a resident.[32] In Alabama trespass and case may be joined where they relate to the same subject-matter.[33]

Pleading, issues and proof. See 8 C. 5. 2151—A complaint stating only one primary right and its invasion states but one cause of action.[34] If it contains allegations which admit of the necessary proof of plaintiff's interest,[35] and defendant's injury thereto,[36] it is not subject to a general demurrer.[37] A permit to enter land set up in justification of a trespass may be attacked for fraud, although the complaint does not allege giving it, nor that it was obtained by fraud.[38] Statutes awarding treble damages for cutting trees in no way affect the cause of action but merely go to the relief,[39] so where a declaration to recover treble damages is defectively framed for that purpose,[40] but states a sufficient cause of action to restrain the trespass complained of, the allegations under the statute will be treated as surplusage, and the case retained.[41] When the action is for cutting timber plaintiff must aver and prove ownership of the property.[42] Any description which so identifies the locus quo as to put defendant on notice is sufficient,[43] and only a general allegation of the aggregate damage is required.[44] Where the complaint alleges a cause of action in trespass[45]

judgment. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266.

27. A complaint against two defendants must allege a joint liability and pray judgment in solido. Breaux Bridge Lumber Co. v. Herbert [La.] 46 S 206.

28. **Evidence** held sufficient to show joint interest. Heybrook v. Index Lumber Co. [Wash.] 95 P 324.

29. For wrongful seizure of goods on attachment. Williams v. Inman, 1 Ga. App. 321, 57 SE 1009.

30. Newman v. Mountain Park Land Co. [Ark.] 107 SW 391.

31. Sequim Bay Canning Co. v. Bugge [Wash.] 94 P 922.

32. Civ. Code 1895, § 5872. Williams v. Inman, 1 Ga. App. 321, 57 SE 1009.

33. Code 1896, § 3293. A count alleging damage caused by pumping water from plaintiff's springs, and a count alleging damage from the negligent pumping of such water, properly joined. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

34. Malice in aggravation of the injury does not constitute another cause of action. Bright v. Willoughby [S. C.] 60 SE 971.

35. An allegation that plaintiffs are "the owners of and are in actual possession of the property injured is an allegation of ownership but does not necessarily imply that plaintiffs are joint holders of the title. So it will support proof that some are owners in fee and others in remainder. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266. And, if the proof shows that each plaintiff has some interest in the whole land and their combined interests comprise the full fee simple title, there is no variance in pleadings and proof. Id.

36. Allegations that defendant entered upon and took possession of premises, dug a channel through the center thereof and covered the remainder with broken rock, state a good cause of action as against a general demurrer. Moll v. Sanitary Dist., 228 Ill. 633, 81 NE 1147.

37. Moll v. Sanitary Dist., 228 Ill. 633, 81 NE 1147.

38. Voyles v. Postal Tel. Cable Co. [S. C.] 59 SE 68.

39. So a declaration stating a common-law action of trespass may be amended by claiming treble damages. Eklund v. B. R. Lewis Lumber Co., 13 Idaho, 581, 92 P 532.

40. Under § 348, B. & C. Comp. of Or. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

41. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

42. Johnson v. Eversole Lumber Co. [N. C.] 60 SE 1129.

43. Need not describe lands by metes and bounds or by government survey in action for cutting timber. Elmore v. Fields [Ala.] 45 S 66.

44. Where plaintiff broke into plaintiff's house and removed a piano and other things it is not necessary to enumerate and give the value of each missing article. Jesse French Piano & Organ Co. v. Phelps [Tex. Civ. App.] 19 Tex. Ct. Rep. 889, 105 SW 225.

45. A count alleging damage from the wrongful pumping of water from plaintiff's lands and filling his springs states a cause of action in trespass and is not demurrable. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872.

limitations of the action of waste do not apply.[46] A plea controverting neither plaintiff's title nor possession is demurrable.[47] Under a statute authorizing defendant to set up as many defenses as he may have,[48] a demand that plaintiff be declared a trustee for defendant's benefit is not a waiver of his denial of plaintiff's title.[49] Demurrer to a defect of parties will be sustained only when there is a deficiency of necessary parties, not where there is a misjoinder.[50] In Pennsylvania "not guilty" is the only plea allowed in an action of trespass,[51] and by it plaintiff is put on proof of his possession as well as of the injury alleged.[52] Where plaintiff's recovery depends upon the establishment of a line to which his title runs such line must be definitely shown.[53] Where both plaintiff and defendant claim under patents, defendant's being of an earlier date, and it is undisputed that the land upon which the alleged trespass was committed was included in plaintiff's patent, the sole issue presented is whether or not it is also included in the patent under which defendant claimed.[54] In an action to recover the statutory penalty for cutting trees it is the office of plaintiff, after the evidence is all in, to show by a preponderance of the whole evidence that the cutting was done either willfully or with culpable negligence,[55] but by a default defendant admits the presence of such elements.[56] Where the trespass is alleged to have been wilful but negligence is not alleged, and the proof shows the act was negligent but not willful, no recovery can be had.[57] In an action for injury to a crop it will be presumed that it would otherwise have matured and been harvested without loss.[58] In Louisiana the action of trespass for injury to land, timber or property is barred in one year from the date that the owner receives notice thereof,[59] and where defendant pleads the limitation the owner has the burden of proving such date.[60] If he fails to do this with certainty, notice will be presumed to have been coincident with the commission of the tort.[61]

Evidence.[See 8 C. L. 2152]—The general rules of evidence respecting relevancy,[62]

46. Allegations that defendant, a stranger to a mortgage, entered upon the mortgaged premises and fraudulently and unlawfully removed timber therefrom, thereby reducing the value of the security to less than the amount of the debt, that debtors were insolvent, and that defendant well knew such fact state a cause of action in the nature of trespass on the case and limitations of the code in regard to actions of waste do not, therefore, apply. Morgan v. Waters, 122 App. Div. 340, 106 NYS 882.

47. A plea merely setting up title and possession of land in vicinity of that in suit as being in the state. Elmore v. Fields [Ala.] 45 S 66.

48. Though inconsistent under Revisal N. C. 1905, § 482.

49. Johnson v. Eversole Lumber Co. [N. C.] 60 SE 1129.

50. The proper remedy for the misjoined defendant is to demur on the ground of no cause of action. Wright v. Willoughby [S. C.] 60 SE 971. The misjoinder of a defendant both as an individual and as trustee may be cured by awarding damages against him individually and not as trustee. Id.

51. Act May 25, 1887, P. L. 271. Hess v. Sutton, 33 Pa. Super. Ct. 530.

52. Hess v. Sutton, 33 Pa. Super. Ct. 530.

53. Boundary by "unseated mountain land" where no lines or corners are fixed is insufficient and occupancy of a part of the premises does not aid. Hess v. Sutton, 33 Pa. Super. Ct. 530.

54. If it is defendant is not liable though title under the earlier patent is in a third party. Burt & Brabb Lumber Co. v. Hurst [Ky.] 110 SW 242.

55. Rector v. Shippey, Outzen & Co. [Miss.] 46 S 408.

56. Action under § 4531, Rev. St. of Idaho 1887. Eklund v. B. R. Lewis Lumber Co., 13 Idaho, 581, 92 P 532.

57. Except in trespass to land where actual damages, on such pleadings and proof, are recoverable. Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67.

58. Possible chances of loss incident to harvesting a crop of hay will not be gone into for the purpose of mitigating damages. Blunk v. Chicago, etc., R. Co. [Iowa] 115 NW 1013.

59. Act No. 33, p. 41 of 1902, being an exception to Merick's Rev. Civ. Code, arts. 3536, 3537. Citizens' Bk. v. Jeansonne [La.] 45 S 367; Antrim Lumber Co. v. S. H. Bolinger & Co. [La.] 46 S 337.

60. Citizens' Bk. v. Jeansonne [La.] 45 S 367; Antrim Lumber Co. v. S. H. Bolinger & Co. [La.] 46 S 337.

61. Consequently where tort was committed more than one year before commencement of suit the action is barred. Antrim Lumber Co. v. S. H. Bolinger & Co. [La.] 46 S 337.

62. In trespass for cutting timber, evidence that defendants' agent had, prior to the trespass, made overtures with reference to purchasing the timber, is irrelevant and

competency,[63] rebuttal testimony,[64] opinion testimony,[65] declarations,[66] qualification [67] and impeachment of witness,[68] proof of value,[69] title,[70] and damage,[71] are applicable. And so the sufficiency [72] or insufficiency [73] of the testimony on such ques-

inadmissible. C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533. Statements of account in such case, introduced to show a compromise, but which do not amount to admissions are not admissible. Id. Testimony of one of defendant's employes as to scaling timber is inadmissible unless such timber is identified as the timber in suit. Id.

63. Evidence of malice and of damage held incompetent. Doty v. Chicago, etc., R. Co. [Iowa] 114 NW 522. And where a portion of the timber was destroyed without the statutory period, testimony as to the difference in the value of the land before and after the trespass is incompetent, since this takes into consideration the value of that timber, a recovery for which, is barred even though it may not have rotted or decayed until within the statutory period. Park v. Northport Smelting & Refining Co. [Wash.] 92 P 442. Proof by the owner of the loss of a permit which he obtained from the mayor for the moving of a building was competent in action for preventing the moving, both for the purpose of showing the contents of the permit, and that the owner was not trespassing in the use which he was making of the street. Toledo, Bowling Green & Southern Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200.

64. In an action to recover damages for trespass to land founded on alleged ownership and possession, in which defendants allege title and ask to be adjudged owners evidence of plaintiff's title is admissible in rebuttal though they did not pray to be adjudged owners. Frederick v. Goodbee [La.] 45 S 606.

65. Opinions as to issues of fact are inadmissible. Witness can not testify that land was damaged. Gosdin v. Williams [Ala.] 44 S 611. Evidence calling for description of a tree after injury did not call for an opinion and was admissible. Delaware & Madison Counties Tel. Co. v. Fisk, 40 Ind. App. 348, 81 NE 1100.

66. Declarations of a remote grantor in regard to the location of a boundary line are inadmissible for the purpose of determining that question. Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 SW 1079. In an action against a principal for trespass, declarations of its agent while engaged in employment connected with the trespass, the agency having been established, are admissible. Brickell v. Camp Mfg. Co. [N. C.] 60 SE 905.

67. Witneses may testify as to facts which have come within their observation. As to sufficiency of passageways for water under railroad bridge in an action for trespass for flooding. Blunck v. Chicago, etc., R. Co. [Iowa] 115 NW 1013. Where the timber is destroyed by fumes and smoke from a smelter a witness is competent to testify to such fact from his own observation, even though he may not be able to explain the chemical process by which the destruction is wrought. Park v. Northport Smelting & Refining Co. [Wash.] 92 P 442. Testimony of a witness, that he measured felled timber and then counted the total number of trees, qualifies him to testify as to the total amount of timber on the land, a formal cruise by an expert not being required. Id. A witness who is only qualified as to land values is incompetent to testify as to its value before and after the destruction of certain timber thereon, since this calls for a valuation of the timber. Id.

68. Evidence of a pending suit against one of defendant's witnesses for the conversion of the timber involved in the action of trespass is admissible to show bias. But where the form of the question does not necessarily imply that such suit was by plaintiff, there is no error in rejecting it. Gosdin v. Williams [Ala.] 44 S 611.

69. One laying a foundation of sufficient experience and knowledge may testify as to the value of timber cut (C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533), and testimony as to the market value of logs at the place of shipment and destination and cost of transportation is admissible as furnishing data from which the value at the place of the conversion can be arrived at (Id.) In trespass to recover for unlawful and negligent injury to a growing tree, evidence of the value of the land before and after the injury is admissible. Delaware & Madison Counties Tel. Co. v. Fisk, 40 Ind. App. 348, 81 NE 1100. A witness may testify as to the condition of the land before and after the trespass and as to its value as tending to enable the jury to form an opinion as to whether an entire tract is affected. Plaintiff is not confined to proof of the value of the land physically trespassed upon. Gosdin v. Williams [Ala.] 44 S 611.

70. In an action of trespass for cutting timber, a void deed thereof is admissible to explain a subsequent valid deed ratifying and extending the void one. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. Under a special plea, that land is the separate property of the wife, in defense of an action to try title, evidence of an agreement between husband and wife, that if the latter paid for the land with her separate money it should be hers, is admissible. It is not necessary to plead the evidence relied on. Allen v. Allen [Tex. Civ. App.] 105 SW 53. Evidence of survey held admissible. Lindsay v. Latham [Ky.] 107 SW 267.

71. In an action for unlawfully breaking and entering plaintiff's house and for the value of goods found missing, evidence, that the doors and windows were unfastened upon plaintiff's return some time afterward and as to the goods found missing is admissible. Jesse French Piano & Organ Co. v. Phelps [Tex. Civ. App.] 19 Tex. Ct. Rep. 889, 105 SW 225.

72. Evidence held sufficient: To show date of notice of trespass. Antrim Lumber Co. v. Bolinger [La.] 46 S 337. To authorize a finding by the jury that trespass was committed on plaintiff's property and not in a public street. Harriman v. Whitney [Mass.] 82 NE 671. To show a modification of the

tions is determined by ordinary rules. Evidence as to any injury alleged in the complaint is competent,[74] and where there is any testimony tending to show a trespass to plaintiff's land to his injury it is error to grant a nonsuit.[75] Evidence as to good faith is admissible to show the character of the trespass,[76] and defendants' justification may be impeached.[77] Parol proof is never admissible to destroy or take away title,[78] but occupancy of real estate may be proved by parol, though the lease under which the land is held has been reduced to writing.[79] In the absence of a showing to the contrary it will be presumed that there was evidence to support the verdict.[80] Harmless error in the admission or rejection of testimony is not a ground for reversal.[81]

Instructions and jury questions. See 8 C. L. 2153—Instructions which, in the light of the whole charge, fairly submit the issues [82] are unobjectionable, though not con-

contract on which defendant sought to justify a trespass and that he had knowledge thereof. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811. To support verdict for damages. Delaware & Madison Counties Tel. Co. v. Fisk, 40 Ind. App. 348, 81 NE 1100. To go to the jury on the question of whether or not a permit to enter was fraudulently obtained. Voyles v. Postal Tel. Cable Co. [S. C.] 59 SE 68. To show a perfect chain of title from commonwealth to defendant. Courtney v. Ashcraft, 31 Ky. L. R. 1324, 105 SW 106. Evidence that a portion of a highway had been fenced in by plaintiff shows an obstruction although there is no proof of any actual disturbance of any vehicle. Jones v. Tobin [Wis.] 115 NW 807. An objection to the sufficiency of evidence of plaintiff's title is without merit where defendant claims under plaintiff, since he cannot deny plaintiff's title. C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533.

73. Evidence held insufficient: To warrant a finding that trespass was wilfully committed. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634. To estop plaintiff from suing in trespass to recover damage for injury to land without the scope of a permit to enter given defendant foreign corporation. Burnett v. Postal Tel. & Cable Co. [S. C.] 60 SE 1116. To show title in plaintiff by adverse possession. Courtney v. Ashcraft, 31 Ky. L. R. 1324, 105 SW 106. To show title in defendant. Frederick v. Goodbee [La.] 45 S 606. To support the verdict for damages. Ketron v. Sutton [Ga.] 61 SE 113.

74. As to ditches and holes in action for cutting timber and laying railroad tracks. Brickell v. Camp Mfg. Co. [N. C.] 60 SE 905.

75. Burnett v. Postal Tel. & Cable Co. [S. C.] 60 SE 1116. Where justification fails. Goodson v. Stewart [Ala.] 46 S 239.

76. Evidence of contents of lost permit. Toledo, B. G. & S. Trac. Co. v. Sterling, 9 Ohio C. C. (N. S.) 200. Where it is shown that notices were posted on plaintiff's land forbidding the use of a road or otherwise trespassing, evidence that defendant read them is competent to show both the character of the trespass and that the use of the road was merely permissive. Gosdin v. Williams [Ala.] 44 S 611. It being especially erroneous to reject such testimony on cross-examination where the question was gone into on direct examination. Id. Where defendant has testified that he did not know whose land he was on, it is error not to allow, on cross-examination by plaintiff, the question "Did you try to find out whose land you were on?" Id.

77. Where public user of road is relied on, plaintiff may show that notices forbidding travel were posted thereon. Gosdin v. Williams [Ala.] 44 S 611.

78. Declarations of heirs made to widow that the land is hers. Munsey v. Hanly, 102 Me. 423, 67 A 217.

79. Blunck v. Chicago, etc., R. Co. [Iowa] 115 NW 1013.

80. That there was evidence of the yield of a crop, for the injury to which trespass was brought and evidence as to the cost of harvesting. Where defendant's bill of exceptions does not contain all the testimony nor any statement that such evidence was not introduced. Montgomery v. Somers [Or.] 90 P 674.

81. Harmless error: That plaintiff is confined to proof of the value of timber at the time of cutting, excluding present value. Davis v. Miller Brent Lumber Co. [Ala.] 44 S 639. The admission of testimony to the effect that an entry was made with insult is harmless where plaintiff is nonsuited as to punitive damages. Voyles v. Postal Tel. Cable Co. [S. C.] 59 SE 68. Error in permitting a witness to give his opinion as to the amount of damages suffered is harmless where it appears not to have influenced the verdict. Montgomery v. Somers [Or.] 90 P 674. The admissibility of a diagram of land, not offered until defendant's testimony is closed, and not in rebuttal, is within the discretion of the court. Gosdin v. Williams [Ala.] 44 S 611.

82. The failure to charge that tax receipts may be considered as admissions in regard to the extent of damage is not error where an instruction was given that they are to be considered as circumstances from which to determine the damage. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266. In trespass against a railway company for causing a fire, it must show an exercise of ordinary care in keeping its right of way clear of combustible matter, but not that it was kept absolutely clean. Instruction, taken as a whole, held to convey this to the jury. Id. In trespass against a railroad company for injury to crops, an instruction that in building its road across streams it must provide passageways for the water, and in so doing must make provision for such floods as may

veyed in technically correct terms [83] or in the language of a controlling statute.[84] Instructions must not ignore the issues,[85] enter the province of the jury,[86] pretermit the consideration of any evidence proper under the pleadings,[87] submit questions of law,[88] or an incorrect rule of damages,[89] or be argumentative,[90] conflicting,[91] misleading,[92] or too stringent.[93] Instructions as to matters not in evidence are properly refused.[94] An instruction as to the effect of the verdict on equitable issues, though improper, is not a ground for reversal, if unprejudicial.[95] An instruction in regard

occur in the ordinary course of nature and for unusual storms, though not for unprecedented floods or storms, is fair. Blunck v. Chicago, etc., R. Co. [Iowa] 115 NW 1013. An instruction that damages should be assessed "at the value of the timber" and not "for the value of manufactured lumber," in connection that plaintiffs could recover for two-thirds of the value, is not erroneous. C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533. And, where the trespass was committed by an agent, it is proper to instruct the jury on this issue that "the principal is bound for the care, diligence and fidelity of the agent in his business." Civ. Code 1895, § 3029. Crockett Bros. v. Sibley [Ga. App.] 60 SE 326.

83. An instruction that long continued user is "sufficient" to justify a trespass was not objectionable in that it did not charge long continued user to be "essential" (Montgomery v. Somers [Or.] 90 P 674), and an instruction that, if a public user for twenty years was found, the land so used became a legal highway, is not objectionable in that it fails to charge that such user is "necessary" (Id.).

84. Where a willful trespass is committed by an agent and there is evidence that it was either commanded or assented to by the principal, the statute on the ratification of torts (Civ. Code, 1895, § 3031) is applicable to the issues. Crockett Bros. v. Sibley [Ga. App.] 60 SE 326. In giving the language of this statute in the charge, it was not error to add after the words "by his command or assented to by him" the words "or ratifies it." Since by ratifying a tort one becomes liable as if he had commanded it. Id.

85. Instruction held to ignore the issues (Lindsay v. Latham [Ky.] 107 SW 267), and an instruction that, if defendant cut and converted timber and plaintiff was in possession and had warned defendant not to enter, defendant is liable, is erroneous as ignoring the issue, where defendant's claim is that it bought the timber with the right to include and cut (Id.). Such an instruction also ignores the issue when defendant claims title under deeds in evidence. Id. Where the issue is the location of a boundary, the court should instruct the jury that, if they find it to be where defendant contends, they must find for defendant, and that if it is found to be where plaintiff contends they should find for plaintiff. Id. Instructions as to boundary. Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 SW 1079.

86. On the question of fraud in obtaining deed. Davis v. Miller, Brent Lumber Co. [Ala.] 44 S 639.

87. Instruction held good as against this objection. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266.

88. Where the only issue is whether the land trespassed upon is included in defendant's patent, an instruction that, if the jury believe that defendant cut timber on the land claimed by plaintiff and believed that the land belonged to plaintiff, it should find for plaintiff, otherwise for defendant, is erroneous as submitting questions of law. Burt & Brabb Lumber Co. v. Hurst [Ky.] 110 SW 242.

89. A charge fixing damages as the value of logs at the mill and at the highest value the logs had is erroneous, since the measure of damages was the value when severed from the land. C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533.

90. And an instruction that, if plaintiff could not read the transaction in which she deeded the timber to defendant should be more carefully scrutinized, and if a false representation was made to her as to the nature of the deed, and defendant knew its falsity and plaintiff believed it to be true, then the deed was obtained by fraud; held erroneous because argumentative and because it invades the province of the jury. Davis v. Miller, Brent Lumber Co. [Ala.] 44 S 639.

91. In an action to recover the statutory penalty for cutting trees, an instruction that burden of proof is on plaintiff throughout to show ownership and that the trespass was willful or committed with culpable negligence does not conflict with the instruction that the burden of proof is upon defendants to show that the trees were cut by mistake and with the observance of reasonable care to prevent a trespass, since, after the evidence is all in, it must preponderate in plaintiff's favor to entitle his recovery. Reeter v. Shippey, Autgen & Co. [Miss.] 46 S 408.

92. An instruction that a certain deed to timber operated as a mere license is misleading, where the pertinency of the deed depends upon a subsequent conveyance and not upon its original validity. Davis v. Miller, Brent Lumber Co. [Ala.] 44 S 639.

93. In an action of trespass against a railroad company for causing a fire, a charge in effect requiring defendant to rebut the presumption of negligence by proving both the use of ordinary care and also that it equipped its engines "with the most modern and best known appliances," is too stringent. Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044.

94. Refusal to instruct against the recovery of punitive damages, where there was no evidence of willfulness. Dobson v. Postal Tel. Cable Co. [S. C.] 60 SE 948.

95. Where the only issue is whether the alleged trespass was committed on plaintiff's or defendant's land, the evidence showing that such trespass will be continued, as

to two measures of damage is proper where each is applicable to a peculiar phase of the case.[96] The maximum width of a highway acquired by user may be fixed by the court,[97] when it is sought to justify trespass by such user.[98] Issues of fact, upon which the evidence is conflicting, are for the jury.[99]

Verdict and judgment.[See 8 C. L. 2153]—A verdict, not interfered with by the trial court, will not be disturbed on appeal,[1] where there is any evidence to support it.[2] An appellate court cannot reverse a judgment on the ground that the verdict is against the evidence,[3] or that it is excessive,[4] where, under any rule of damages, there is evidence to support the amount found.[5]

(§ 2) *B. In equity.*[See 8 C. L. 2158]—Equity will protect the right to use land for a special purpose by granting injunctive relief,[6] even to one without title in fee and not in actual possession,[7] and against those in possession.[8] Where numerous acts of trespass are being committed, though each is trifling in itself resort may at once be had to equity.[9] The holder of an equitable title, in possession, may restrain a continuing trespass by her grantor or those claiming under the grantor,[10] and in such

instruction that if verdict is rendered for plaintiff a temporary injunction will be made permanent, while if for defendant, it will be dissolved. Wood v. Pacolet Mfg. Co. [S. C.] 61 SE 95.

96. For destruction of timber may charge that the damage is the difference in the value of the land before and after, and, if there was no diminution in the value of the land, then the damage would be the value of the timber, where the evidence was conflicting as to whether the value of the land was lessened. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266. In a suit to recover damages for willful trespass in cutting timber, where the trespass was not denied but was claimed to have been unintentional, the statute (§ 3918 of the Civ. Code 1895) giving the measure of damages applicable to the two classes of trespass wa properly given in the charge to the jury. Crockett Bros. v. Sibley [Ga. App.] 60 SE 326.

97. Within the limits of § 4790, B. & C. Comp.; Sess. Laws of Or. 1903, p. 267. So an instruction that, if a trial was a legal highway, it must be considered of reasonable width not to exceed sixty feet, where the statute provides that all county roads shall be sixty feet wide unless, upon petition, the county court shall determine upon a different width of not less than forty or more than eighty feet, is not erroneous. Montgomery v. Somers [Or.] 90 P 674.

98. Though such a question is generally for the jury. Montgomery v. Somers [Or.] 90 P 674.

99. Location of a boundary line. Agnew v. Albert Lewis Lumber & Mfg. Co., 218 Pa. 505, 67 A 779. Whether an alleged trespass was committed in a public street or on private property, where there is any evidence that it was on the latter. Harriman v. Whitney [Mass.] 82 NE 671. Submission of the question of willfulness to the jury held warranted. Dobson v. Postal Tel. Cable Co. [S. C.] 60 SE 948. Where there is evidence of plaintiff's inability to read and write and also that the contract under which defendant seeks to justify the entry was not read to plaintiff, and the contract is unequal, it is a question of fact for the jury whether or not it was fraudulently obtained. Baldwin v. Postal Tel. Cable Co. [S. C.] 59 SE 67. Nonsuit properly refused where there was evidence pro and con as to whether permit was fraudulently obtained. Dobson v. Postal Tel. Cable Co. [S. C.] 60 SE 948.

1. The evidence on the issues being conflicting. Crockett Bros. v. Sibley [Ga. App.] 60 SE 326. Where evidence conflicting and charge proper. Brickell v. Camp Mfg. Co. [N. C.] 60 SE 905. Verdict held responsive to the issues submitted by the instructions. Dobson v. Postal Tel. Cable Co. [S. C.] 60 SE 948.

2. Evidence held to support verdict. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266. Must be an entire failure of evidence to support a material fact without which the verdict could not stand. Delaware & Madison Counties Tel. Co. v. Fisk, 40 Ind. App. 348, 81 NE 1100.

3. Lindsay v. Latham [Ky.] 107 SW 267.

4. Lindsay v. Latham [Ky.] 107 SW 267. Where there is testimony that the damage is $300, and the proofs warrant recovery of punitive damages, a verdict awarding $333 is not excessive. Dobson v. Postal Tel. Cable Co. [S. C.] 60 SE 948.

5. Where the evidence, under any theory as to the measure of damages, supports the amount found, such finding will be sustained. Kellar v. Central Tel. & T. Co., 53 Misc. 523, 105 NYS 63.

6. Will enjoin a hunting club from hunting on certain land where the exclusive right to use the land for such purpose rests in complainant. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

7. Lack of actual possession no defense when complainant has a claim on color of right thereto, coupled with actual possession. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

8. With a knowledge of complainant's right. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

9. Injunction against hunting club to restrain individual members from hunting. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

10. An equitable title vests in a daughter by a contract of conveyance to her of the mother's interest in consideration of an annuity which is paid, coupled with improve-

case it is not necessary for plaintiff to prove title in the one under whom the grantor claimed,[11] or to show defendant's insolvency.[12] A suit under a statute to recover treble damages for cutting timber, which fails for lack of legal title or possession, should not be dismissed but should be transferred to the chancery court, where plaintiff shows an equitable title to the land and right to the timber, and then he may recover actual damages.[13] A trespass to state lands will be restrained on behalf of a lessee.[14] Where a statute requires certain preliminary proceedings before a town may enter upon the construction of a sewer,[15] a noncompliance therewith is such a trespass as entitles an injured landowner to injunctive relief.[16] Injunction will issue to restrain waste,[17] or to prevent a multiplicity of suits.[18] But to obtain equitable relief in trespass, as in other cases, petitioner must be without adequate remedy at law,[19] and threatened with irreparable injury.[20] Equity will not protect plaintiff in a trespass, although his interests are great while defendant's are small.[21] By abiding the commands of an injunction, defendant is not estopped from appealing therefrom.[22] Where defendant justifies his right under a contract which he does not set out in his answer, a reply pleading the terms of the contract, to show that the act complained of did not come within them, is not a departure from the complaint.[23] Where a boundary line is in issue the injunction order must define such line with certainty.[24] The granting of amendments is within the discretion of the trial court.[25]

§ 3. *Damages and penalties.* See 8 C. L. 2155—Trespass quare clausum fregit gives rise to a right to recover nominal damages for the wrongful entry [28] and such actual damages as may be sustained,[27] even though the trespass is unintentional [28] and in

ments made in good faith by the daughter Loudermilk v. Martin [Ga.] 61 SE 122.

11. The question of title is one of fact pending the determination of which a preliminary injunction will issue. Loudermilk v. Martin [Ga.] 61 SE 122.

12. Insolvency not a requisite to the relief. Loudermilk v. Martin [Ga.] 61 SE 122

13. Newman v. Mountain Park Land Co. [Ark.] 107 SW 391.

14. Where trespass consisted in digging clams on state tide lands. Sequim Bay Canning Co. v. Bugge [Wash.] 94 P 922.

15. Acts 1901 of Indiana, p. 402, c. 179, § 3, requiring survey and report of engineer to town board. Leibole v. Traster [Ind. App.] 83 NE 781.

16. Leibole v. Traster [Ind. App.] 83 NE 781.

17. Cutting timber. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811. So, even though defendant has a right of entry, and a suit to restrain waste would technically be the appropriate remedy, a suit to enjoin trespass will lie since the remedies are substantially the same. Id.

18. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

19. Digging clams is a trespass for which adequate compensation in damages cannot be given. Sequim Bay Canning Co. v. Bugge [Wash.] 94 P 922. No adequate relief at law for continuing infringement of exclusive right to hunt. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

20. An injury is irreparable where it changes or destroys the property it affects, either physically or in the character in which it is held and enjoyed, or when the property has some peculiar use or quality which cannot be measured by a pecuniary value. Dunker v. Field & Tule Club [Cal. App.] 92 P 502.

21. Will not enjoin riparian owners from resisting the use of their land by others in floating logs. Garth Lumber & Shingle Co. v. Johnson [Mich.] 14 Det. Leg. N. 898, 115 NW 52.

22. Where he claims a right to cut timber of any size but being enjoined from cutting trees less than a certain diameter, he cuts trees of only that measurement or greater. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

23. Even though contract was not set forth in the complaint. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

24. Wood v. Pacolet Mfg. Co. [S. C.] 61 SE 95.

25. Roots v. Boring Junction Lumber Co. [Or.] 92 P 811.

26. For location of highways and erection of bridge on flats. Chase v. Cochran, 102 Me. 431, 67 A 320.

27. Chase v. Cochran, 102 Me. 431, 67 A 320. In the absence of proof that the possessor is the owner in fee, he is entitled to recover damages for injury to the freehold (Southern R. Co. v. Thompson, 129 Ga. 367, 58 SE 1044), and though his suit is to recover treble damages for injury to trees and fails in that regard because he is not the owner in fee, he may nevertheless recover the actual damages sustained for injury to trees (Kellar v. Central Tel. & T. Co., 53 Misc. 523, 105 NYS 63).

28. Negligence is not an element of trespass. Wood v. Pacolet Mfg. Co. [S. C.] 61 SE 95.

good faith.[29] But no recovery can be had for theoretic or speculative damages,[30] or for injured feelings and mental anguish.[31] And though an entry may be lawful, subsequent negligence gives rise to liability for resulting injuries.[32] The measure of damages for trespass to land is the difference in the value of the land before and after the injury.[33] For cutting timber the measure of damages has been held to be the value of the logs when severed from the land,[34] the fair market value of the timber,[35] a reasonable compensation,[36] the depreciation in the value of the land,[37] or either the amount in which the land has depreciated in value or the value of the timber [38] as plaintiff may elect.[39] And where the element of wilfullness is present, the value of the lumber into which the logs were manufactured is recoverable.[40] Damages can not be recovered, however, for removal of timber cut under a license, though the license had expired at the time of such removal.[41] The measure of damages for destruction of a matured crop is its actual value.[42] Damages for a trespass committed with plaintiff's permission cannot be recovered in an action for damages for an extension of such trespass.[43] Mesne profits are not recoverable in trespass to recover for injury to land caused by a permanent nuisance.[44] Only those damages, caused by a continuing nuisance which have accrued at the time of bringing suit, are recoverable.[45] In Nevada a provision for the recovery of an attorney fee by the party recovering damages against one unlawfully grazing stock upon his land was held to be a proper police regulation and constitutional.[46] A trespasser is liable for all loss to which his act gives rise.[47] No recovery can be had by a trespasser for injury by reason of the dangerous condition of the premises trespassed upon.[48] An owner can-

29. Compensatory damages will not be considered punitive merely because the trespass was committed under a bona fide claim of title. Wood v. Pacolet Mfg. Co. [S. C.] 61 SE 95.

30. Obstruction to navigation of stream which plaintiff never had used but had indefinite plans to use in future. Chare v. Cochran, 102 Me. 431, 67 A 320.

31. For removing household goods under a writ of possession. Owsley v. Fowler, 31 Ky. L. R. 1154, 104 SW 762.

32. Officer and plaintiff in a writ of possession are liable for negligence in removing household goods thereunder. Owsley v. Fowler, 31 Ky. L. R. 1154, 104 SW 762.

33. Gosdin v. Williams [Ala.] 44 S 611. Cutting timber and laying railway tracks. Brickell v. Camp Mfg. Co. [N. C.] 60 SE 905.

34. C. W. Zimmerman Mfg. Co. v. Dunn [Ala.] 44 S 533.

35. And the jury may, in its discretion, award interest from the date of cutting. Burt & Brabb Lumber Co. v. Hurst [Ky.] 110 SW 242.

36. Including injury to young timber and to the land. Lindsay v. Latham [Ky.] 107 SW 267.

37. Where the action is for trespass quare clausum fregit and not for trespass de bonis asportatis. Davis v. Miller, Brent Lumber Co. [Ala.] 44 S 639.

38. Western, etc., R. Co. v. Tate, 129 Ga. 526, 59 SE 266.

39. Park v. Northport Smelting & Refining Co. [Wash.] 92 P 442. And the difficulty of proving such damages as accrued within the period of the statute of limitations, from the destruction of timber by fumes and smoke is no bar to a recovery under either rule. Id.

40. As where the cutting extended over twenty or thirty acres of plaintiff's land, when the timber was thickest, the boundary lines being clearly marked and the cutting being under direction of an experienced foreman. Emporia Lumber Co. v. League [Tex. Civ. App.] 20 Tex. Ct. Rep. 196, 105 SW 1167.

41. The title to the timber is not lost by the delay. Goodson v. Stewart [Ala.] 46 S 239.

42. Value of a hay crop determined by estimating the yield in tons per acre and taking the prevailing market price therefor in the vicinity less cost of harvesting. Blunck v. Chicago, etc., R. Co. [Iowa] 115 NW 1013.

43. Widening, without premission, a ditch lawfully on plaintiff's land. Ketron v. Sutton [Ga.] 61 SE 113.

44. Recovery cannot be had for the entire value of property taken by a railroad and depreciation in value of other land and also for loss of use of the land taken and depreciation in value of other land up to the time of bringing suit. Cobb v. Wrightsville, etc., R. Co., 129 Ga. 377, 58 SE 862.

45. Ketron v. Sutton [Ga.] 61 SE 113.

46. Laws 1893, p. 30, c. 31. This act was not repealed by Laws 1903, p. 47, c. 28, which omits any provision in regard to attorney's fees. Pyramid Land & Stock Co. v. Pierce [Nev.] 95 P 210.

47. One who breaks into another's house, removes property and leaves the doors unfastened is liable in damages for all goods subsequently found missing, though the proof fails to show who took them. Jesse French Piano & Organ Co. v. Phelps [Tex. Civ. App.] 19 Tex. Ct. Rep. 889, 105 SW 225.

48. Injurles consequent upon shooting into building filled with dynamite, located on

not be made answerable in damages for dispossessing a trespasser without any title.[49] Though excessive damages are awarded,[50] the judgment may nevertheless be sustained upon plaintiff's remission of the excess.[51]

*Punitive.*See 8 C. L. 2156—Punitive damages are usually recoverable when the trespass is willful or malicious,[52] or accompanied by circumstances of aggravation.[53] Where there is evidence tending to show a warning, it is open for the jury to find malice.[54] Exemplary damages may be awarded without any finding of actual damages.[55]

*Multifold.*See 8 C. L. 2156—Statutes, giving the owner of property the right to recover treble damages against one maliciously doing injury thereto, apply only to the owner in fee.[56] Where trespass on state timber land is committed involuntarily and in good faith, no more than double damages can be recovered.[57] Where the action is to recover statutory penalties only, for cutting trees, and there is neither malice nor appreciable damages, the statute will be strictly construed.[58] The Minnesota statute subjecting trespassers upon state timber lands to double or treble damages is constitutional.[59]

§ 4. *Criminal liability.*See 8 C. L. 2156—Willfulness[60] is an ingredient of the statutory crime of trespass for cutting trees.[61] Oak and hickory trees growing on the border of a public highway and upon the land of an abutting owner are shade trees within the meaning of the Kentucky statute prohibiting cutting down shade trees,[62] and permission from the supervisor of roads to cut them down is no defense to a prosecution therefor.[63] Where trees were cut while changing the course of a telephone line, the fact, that permission was granted to construct the original line, is no defense,[64] nor is the fact, that plaintiff had recovered damages for the original construction.[65]

railroad right of way, where company had no reason to contemplate such a trespass. McGehee v. Norfolk, etc., R. Co. [N. C.] 60 SE 912.

49. Not liable in treble damages, under § 1669, Code of Civ. Proc., for entering own premises and removing plaintiff's goods unlawfully stored there. Schrier v. Shaffer, 123 App. Div. 543, 107 NYS 1107.

50. A verdict of $600 damages for grazing about 360 acres of plaintiff's land in the month of February, where it appeared that the feed was as good as usual ninety days thereafter and that plaintiff that year derived his customary use and benefit from the land, was held excessive. Pyramid Land & Stock Co. v. Pierce [Nev.] 95 P 210.

51. Judgment sustained on condition that plaintiff remit $200 from the verdict $600. Pyramid Land & Stock Co. v. Pierce [Nev.] 95 P 210.

52. Where two adjoining owners are unagreed as to the boundary line between them and one adopts an arbitrary standard, not sanctioned by usage or law, and, against the other's protest, cuts timber up to the line so established, which included some of plaintiff's land, the trespass was not casual or involuntary, and entitles plaintiff to treble damages. Heybrook v. Index Lumber Co. [Wash.] 95 P 324.

53. One who removes that portion of a dwelling which has been built in good faith upon his land is liable in damages, both actual and vindictive. Quere as to the measure thereof. Bollinger v. McMinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 762, 104 SW 1079.

54, 55. Goodson v. Stewart [Ala.] 46 S 239.

56. Code Civ. Proc. §§ 1667, 1668. Kellar v. Central Tel. & T. Co., 53 Misc. 523, 105 NYS 63. Rev. Pen. Code, § 712. One merely in possession may recover actual damage only. The fact that he is the owner of a fence surrounding the property, which is also slightly injured does not bring him within the statute. Scott v. Trebilcock [S. D.] 112 NW 847.

57. Under Minn. Laws 1895, c. 163, p. 349. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

58. Where trespass was continuing at the time plaintiff acquired possession, and she did not request its abatement, a presumption of permission was raised and recovery barred. Cumberland Tel. & T. Co. v. Martin [Miss.] 46 S 247.

59. Chapter 163, p. 349, Laws of 1895. State v. Shevlin-Carpenter Co., 102 Minn. 470, 113 NW 634.

60. The word "willful" as used in the Geo. Pen. Code 1895, § 219, par. 1, means "intentionally, malevolently, with a bad purpose, an evil purpose, without ground for believing the act lawful." Black v. State [Ga. App.] 59 SE 823.

61. Trespass held not willful. Black v. State [Ga. App.] 59 SE 823.

62. Ky. St. 1903, § 1257. Russellville Home Tel. Co. v. Com. [Ky.] 109 SW 340.

63. Trees not being in highway. Russellville Home Tel. Co. v. Com. [Ky.] 109 SW 340.

64, 65. Russellville Home Tel. Co. v. Com. [Ky.] 109 SW 340.

*Pleading and procedure.*See 8 C. L. 2157—Venue must be correctly laid,[66] and under some statutes, the indictment must allege that defendant is not the owner,[67] and the affidavit must designate whether plaintiff and defendant are individuals,[68] firms, or corporations.[69] It is not necessary to state in the affidavit that defendant had been ordered to leave, where it is averred that he had been warned not to enter,[70] nor it is error to allow one count in an affidavit to be amended to state that defendant entered without having been warned.[71] In a prosecution for hunting birds without written permission from the owner,[72] it is unnecessary to allege in the affidavit that defendant was hunting birds protected by the statute.[73] Where there is no evidence that it was necessary to cross plaintiff's premises, the question of "legal excuse" is not before the court, and a question as to the necessity of going to defendant's destination is irrelevant.[74] Where defendant has already testified on a matter, there is no error in sustaining an objection to a question calling for a repetition of such testimony.[75] One having sufficient interest in the commission of a trespass by another may himself be liable.[76] Expression of an opinion as to a fact by the court to the jury, where clearly supported by the evidence, is unprejudicial.[77] An appeal may be had on incomplete proceedings,[78] and judgment will not be reversed on the ground that it was entered on a verdict not in accordance with the charge.[79]

§ 5. *Trespass to try title.*See 8 C. L. 2157—Mere possession, either actual,[80] or constructive,[81] entitles plaintiff to recover as against a trespasser, but will not sup-

66. Testimony by a witness that he is superintendent of the prosecuting company, that he had authorized the one making the arrest to do so, and that the place of arrest was in possession of the company at the time, sufficiently shows the venue. Morrison v. State [Ala.] 44 S 43.

67. B. & C. Comp. § 1830. An allegation that the premises were then and there the property of another does not sufficiently negative the fact that defendant might also have been the owner, since the term owner is not limited to the holder of the fee, but also includes the holder of a usufructory interest. Binhoff v. State [Or.] 90 P 586.

68. An affidavit in a prosecution for trespass which names the defendant as "E. C. Morrison," sufficiently charges that he is an individual. Morrison v. State [Ala.] 44 S 43.

69. An averment in the affidavit that complaining witness is "a corporation" sufficiently charges that fact. Morrison v. State [Ala.] 44 S 150.

70. Under § 5606, Code 1896. Morrison v. State [Ala.] 44 S 150.

71. Morrison v. State [Ala.] 44 S 150.

72. Alabama Gen. Acts of 1907, p. 94. Hyde v. State [Ala.] 46 S 489.

73. Section 45 1-2 of the foregoing act limits its application to birds named in the act, and is construed as a proviso, so that one may hunt other birds without permission and the fact that the birds hunted were not protected would be a matter of defense. Hyde v. State [Ala.] 46 S 489.

74. Morrison v. State [Ala.] 44 S 43.

75. As to what he was doing at the place of arrest. Morrison v. State [Ala.] 44 S 43.

76. Evidence held sufficient to show such an interest in the trespass on the part of defendant as to make it responsible, though committed by the employees of another company acting under direction of the latter. Russellville Home. Tel. Co. v. Com. [Ky.] 109 SW 340.

77. Where the evidence shows the prosecutor's right to order defendant away from the place of arrest, and that there was no justification for defendant's refusal to obey a statement by the court to the jury, upon their request for information, that he was inclined to believe that the place was not a public place is unprejudicial. Morrison v. State [Ala.] 44 S 43.

78. A verdict of guilt, an assessment of a fine of one cent, a judgment of guilt on the verdict, and an order of recovery of fine and costs, will support an appeal, though there is no confusion of judgment for the fine, nor sentence to hard labor to pay fine and costs. Morrison v. State [Ala.] 44 S 43.

79. Though the court directs a verdict for defendant on one count of an indictment for trespass, yet if the jury returns a verdict of guilty thereon, no motion is made to set it aside, and the court renders judgment in accordance therewith it will not be reversed. Morrison v. State [Ala.] 44 S 43.

80. Unnecessary for plaintiff to prove that owners were under no disability during his possession. Romine v. Littlejohn [Tex. Civ. App.] 20 Tex. Ct. Rep. 767, 106 SW 439.

81. Plaintiff who has been ousted of possession by sequestration proceedings, dismissed by defendant after possession obtained, is entitled to recover on his former possession where defendant fails to show title, such possession not having been interrupted in the eyes of the law, and defendant being a trespasser. McAdams v. Hooks [Tex. Civ. App.] 19 Tex. Ct. Rep. 628, 104 SW 432. A mere naked claim to the land without anything to show where it was located further than that it included improvements was not sufficient to extend plaintiff's possession beyond the land inclosed. Id.

port an action against a holder of title,[82] though one having a right to possession may restrain one holding color of title from interference therewith.[83] One in whom is lodged the naked title may recover from a trespasser.[84] The owner of an undivided interest in land, with,[85] or without[86] color of title to the whole,[87] may recover the whole from one having no title whatever. Title by limitation may be acquired by anyone not a co-tenant.[88] The three year statute of limitations is unavailable to one claiming under a deed which conveys neither title nor color of title[89] and who has paid no taxes on the land,[90] nor is the five year statute available where it appears upon the face of such deed that the land was the separate property of a married woman,[91] or where the taxes have not been paid concurrently.[92] An innocent purchaser of the legal title may recover as against the holder of an equitable title,[93] though the latter may show by circumstances that the purchase was with notice.[94] A wife's title and possession under an express trust, effected by an agreement with the husband, cannot be divested by those claiming under him.[95] The title whether legal or equitable, of one holding under a contract to convey, in which receipt of the purchase price is acknowledged will support or defend an action to try title.[96]

Pleadings, issues and proof. See 8 C. L. 2157 *Pleading.*[97]—While the petition must sufficiently describe the land to enable its identification,[98] a defective description may

82. Mere possession of a street by an individual subsequent to its dedication to a city, and to which the city has title, will not support an action against the city for reopening the street. Plaintiff must either show title by adverse possession, that there never was a dedication or that the city had lost title. City of San Antonio v. Rowley [Tex. Civ. App.] 106 SW 753.

83. A mining licensee may restrain a trespass upon his possession. Integrity Min. & Mill Co. v. Moon [Mo. App.] 109 SW 1057.

84. The fact that title was conveyed to plaintiff for the purpose of bringing suit is no defense. Dean v. Jagoe [Tex. Civ. App.] 18 Tex. Ct. Rep. 676, 103 SW 195. Owner of the fee in a public street may recover title and possession. Right of city to use street not affected, it not being a party to the suit. Cocke v. Texas, etc., R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 577, 103 SW 407.

85. But if defendant can show title by limitation as against the co-tenants of plaintiff's grantor, plaintiff can recover only the interest held by his grantor. Hutcheson v. Chandler [Tex. Civ. App.] 19 Tex. Ct. Rep. 630, 104 SW 434.

86. Branch v. Deussen [Tex. Civ. App.] 108 SW 164.

87. Defendants claiming from a common source of title with plaintiff, through an insufficient conveyance, are mere trespassers. Branch v. Deussen [Tex. Civ. App.] 108 SW 164.

88. The owner of an undivided interest, claiming the whole under a deed which purports to convey it, may acquire title to the whole by limitation, since he is not a cotenant. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015.

Requisites of title by limitation under the five year statute on a deed registration thereof, possession, payment of taxes, and either cultivation, use or enjoyment, all continued in connection for the full period of five years. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015. The period of limitation need not immediately precede commencement of suit. Texas, etc., R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140.

89. A deed defective because of defective certificate of acknowledgment conveys color of title upon parol proof that a proper acknowledgment was in fact made. Veeder v. Gilmer [Tex. Civ. App.] 19 Tex. Ct. Rep. 957, 105 SW 331.

90. Mars v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430.

91. The deed being defective by rea on of defective certificate of wife's acknowledgment. Veeder v. Gilmer [Tex. Civ. App.] 19 Tex. Ct. Rep. 957, 105 SW 331.

92. The rule, that taxes must be paid concurrently with the other acts of dominion over the land, requires that they be paid for each year when due and demandable or within such reasonable time thereafter as is usual and customary in the payment of taxes. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015.

93. Wallis, Landes & Co. v. Dehart [Tex. Civ. App.] 108 SW 180; North v. Coughran [Tex. Civ. App.] 108 SW 165.

94. The **burden of proof** of such notice is upon the holder of the equitable title (Wallis, Landes Co. v. Dehart [Tex. Civ. App.] 108 SW 180), and the circumstances must point with some probative force to its existence (Id.).

95. An express agreement between husband and wife that if the latter pay for certain land with his separate money it shall be his, though effected subsequent to investiture of the legal title in the husband constitutes an express trust. Allen v. Allen [Tex. Civ. App.] 105 SW 53.

96. Kirby v. Cartwright [Tex. Civ. App.] 20 Tex. Ct. Rep. 509, 106 SW 742.

97. See, also, Pleading, 10 C. L. 1173.

98. Petition demurrable for defective description. Thomas v. Tompkins [Tex. Civ. App.] 20 Tex. Ct. Rep. 61, 105 SW 1175.

be remedied by allegation and proof of extraneous facts.[99] No relief can be granted the right to which is not shown by the petition.[1] Where plaintiff merely pleads seizin and right to possession, stating the extent of his interest, as he may do,[2] he is entitled to prove any character of title acquired at any time, except that resting upon limitation alone.[3] In such case an admission by defendant that plaintiff has stated a cause of action,[4] covers every evidence of title which might have been shown under the petition,[5] and relieves plaintiff of the duty of proving any affirmative fact showing origin or character of title.[6] A special plea of title by either party limits the pleader to proof of that title.[7] The defense of limitation in trespass to try title is in no sense a confession and avoidance,[8] but is, on the contrary, an assertion of affirmative title.[9] It admits proof of estoppel,[10] and it is immaterial whether or not defendant has parted with his interests in the land since commencement of suit.[11] Where limitation under color of title is shown, the recovery is coextensive with the boundaries specified in the instrument of title.[12] But failure to pay taxes and knowledge by defendant's predecessors that the land was not in their tract according to survey, weakens this defense.[13] The statute of limitations under which one party claims title continues to run as against the title claimed by the other until such title is pleaded.[14] Where land is purchased as an entire tract limitations run against the whole.[15] Under a plea of not guilty, defendant may show estoppel[16] and that he is an innocent purchaser.[17] If joined with a general denial

99. But where the petition contains no such allegations the appellate court cannot act upon evidence in the record which would authorize a finding as to the correct description and inform and affirm a judgment which followed the description in the petition. Thomas v. Tompkins [Tex. Civ. App.] 20 Tex. Ct. Rep. 61, 105 SW 1175.

1. In an action for trespass to try title to land, where plaintiff failed to show in his petition that he is entitled to a decree protecting him in a certain easement, proof of such easement does not entitle him to recover anything. Pouns v. Zachery [Tex. Civ. App.] 18 Tex. Ct. Rep. 687, 103 SW 234.

2. Meade v. Logan [Tex. Civ. App.] 110 SW 188. Not required to plead title specially. Robbins v. Hubbard [Tex. Civ. App.] 108 SW 773.

3. Robbins v. Hubbard [Tex. Civ. App.] 108 SW 773.

4. Under district and county courts Rule No. 31. Robbins v. Hubbard [Tex. Civ. App.] 108 SW 773.

5. Robbins v. Hubbard [Tex. Civ. App.] 108 SW 773.

6. Entitles defendant in such case to open and close. Robbins v. Hubbard [Tex. Civ. App.] 108 SW 773.

7. This rule applies alike to plaintiff and defendant, and to all pleas except that of limitation. Hutcheson v. Chandler [Tex. Civ. App.] 19 Tex. Ct. Rep. 630, 104 SW 434. Where plaintiff bases his right to recover on a deed, which is attacked as a forgery, he cannot show a right by virtue of an express trust. Robbins v. Hubbard [Tex. Civ. App.] 108 SW 773. A special plea of title by defendant does not relieve plaintiff of the necessity of showing title. Hutcheson v. Chandler [Tex. Civ. App.] 19 Tex. Ct. Rep. 630, 104 SW 434.

8. Does not admit title in plaintiff. Meade v. Logan [Tex. Civ. App.] 110 SW 188.

9. Under it title by adverse possession to the fee of a street may be shown as against anyone but the municipality. Rev. St. 1895, amended by Act 1887; protecting municipalities, does not apply to individuals. Cocke v. Texas, etc., R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 577, 103 SW 407.

10. Though defendant has informed plaintiff's counsel that his claim would probably rest solely upon limitation, proof of estoppel does not amount to such fraud or concealment as entitles plaintiff to a new trial. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553.

11. Texas, etc., R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140.

12. Where defendant shows title by adverse possession held under an instrument of title duly recorded his right of recovery is not restricted to the land inclosed nor to 160 acres to which title by adverse possession alone is limited. State Nat. Bk. v. Roberts [Tex. Civ. App.] 18 Tex. Ct. Rep. 714, 103 SW 454.

13. Hunter v. Malone [Tex. Civ. App.] 108 SW 709.

14. Where plaintiff claims whole tract through deed from a cotenant and fails to set it up in his complaint, statute continues to run until he pleads it by amendment, but such plea does not stop the statute running against the interest of the other cotenants. Hutcheson v. Chandler [Tex. Civ. App.] 19 Tex. Ct. Rep. 630, 104 SW 434.

15. Where the owner of land in fencing it incloses by mistake another tract, and upon discovery of such mistake purchases the whole tract and pays taxes thereon, limitations at once begin to run as to the whole, though only the portion inclosed is cultivated and used. Holland v. Ferris [Tex. Civ. App.] 107 SW 102.

16. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. So evidence of declarations of common grantor to defendant at time of conveyance to him are admissible

the burden of showing title is on plaintiff and until he establishes it prima facie, defendant's title is not to be considered.[18] If acompanied by a special plea of title, the plea of not guilty has no other effect than to put upon plaintiff the burden of proving a prima facie right to the property.[19] All affirmative matter admitted in evidence under this plea may be avoided without additional pleadings.[20] A disclaimer entitles plaintiff to a recovery extensive therewith.[21]

Issues and proof. See 8 C. L. 2157 Plaintiff must establish title in order to recover land which has never been occupied,[22] and he must recover, if at all, on the strength of his own title, and not on the weakness of defendant's;[23] hence proof of a superior outstanding title defeats his claim.[24] But when plaintiff formerly occupied the land that fact alone is sufficient evidence of title to enable him to recover from a trespasser.[25] Where title depends upon whether the land is, or is not, within a certain lot,[26] or survey,[27] the burden is upon plaintiff to prove his claim. Where administration proceedings are relied on their validity cannot be impeached.[28] The right to

if material to such transaction. Mars v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430. A charge that if the common grantor represented to defendant that the land in controversy was included in the land conveyed to him, and defendant relied on such representation and was thereby induced to purchase he is entitled to recover, is correct. Id.

17. North v. Coughran [Tex. Civ. App.] 108 SW 165.

18. Jaggers v. Stringer [Tex. Civ. App.] 20 Tex. Ct. Rep. 661, 106 SW 151.

19. Not entitled to attack a deed under which plaintiff claims and to which defendant has made no reference in his plea. Garrison v. Richards [Tex. Civ. App.] 107 SW 861.

20. Avoidance of a judgment showing title superior to plaintiff. Robbins v. Hubbard [Tex. Civ. App.] 108 SW 773.

21. Pouns v. Zachery [Tex. Civ. App.] 18 Tex. Ct. Rep. 687, 103 SW 234.

22. Brown v. Orange County [Tex. Civ. App.] 20 Tex. Ct. Rep. 533, 107 SW 607. That land had been appraised and placed on the market will be presumed from the fact that it had been awarded to plaintiff by the commissioner of the general land office. Smyth v. Laigling [Tex. Civ. App.] 110 SW 550.

Requisites of title to school lands, see Smyth v. Saigling [Tex. Civ. App.] 110 SW 550.

23. Slusher v. Pennington, 31 Ky. L. R. 950, 104 SW 354; Jaggers v. Stringer [Tex. Civ. App.] 20 Tex. Ct. Rep. 661, 106 SW 151. Where plaintiff seeks to overcome a definite description in his deed so as to include a larger tract, he must show the existence of the object mentioned in his field notes and that it is in conflict with the calls for course and distance, and that by clear and convincing evidence. Id. Where plaintiff fails to connect himself, by a complete chain of title with the common source he cannot recover (San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770), and where the connection of grantors in certain deeds with the common source is not shown, the fact that such deeds are also introduced by defendant is of no aid to plaintiff (Id.).

24. Mars v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430. But defendant must show that such title is valid. Holland v. Ferris [Tex. Civ. App.] 107 SW 102. Proof that title was at one time in another than the common grantor is insufficient, since it is **presumed** that he acquired title. There must be prima facie proof that title was not in the common grantor. Cocke v. Texas, etc., R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 577, 103 SW 407. Where plaintiff relies upon a patent and there is no evidence of possession by either party, a showing of a superior title in others, whether in defendant or not entitles defendant to a verdict. Slusher v. Pennington, 31 Ky. L. R. 950, 104 SW 354.

Evidence that, after giving to those having titles superior to plaintiff the amount they were entitled, there would be none left for plaintiff, accompanied by evidence that boundaries to the land of the others had not been so fixed as to exclude any claim by them to the land in controversy is admissible as tending to show a superior outstanding title, but if not supported by the latter testimony it should be stricken on motion. Mars v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430.

25. The fact that he has not been in possession for several years is immaterial, nor is the presumption of superior title from possession overcome by proof of a grant from the state to one with whose patent plaintiff's chain of title does not connect. Teagarden v. Patten [Tex. Civ. App.] 107 SW 909.

26. Where the parties stipulate that if in a certain designated lot title is in plaintiff, the burden is upon him to prove that it is in that lot (Cochran v. Kapner [Tex. Civ. App.] 103 SW 469), and where it is shown to be in another lot, if the survey as represented by the plat was actually made, the burden is upon plaintiff to show that the plat does not represent the survey (Id.). Proof that there is no evidence aside from the surveyor's certificate attached to the plat is insufficient, since the certificate raises a presumption that the plat is correct. Id.

27. Newnom v. Williamson [Tex. Civ. App.] 19 Tex. Ct. Rep. 532, 103 SW 656.

28. Since to do would be to attack collaterally. Holland v. Ferris [Tex. Civ. App.] 107 SW 102.

29. As, where defendant purchased land

maintain the action may be lost by estoppel.[29] But laches can not be urged against a defendant who seeks no affirmative relief.[30]

*Procedure.*See 8 C. L. 2157—A grantee may accept that one of two boundaries named in a deed which is most favorable to him.[31] Boundaries are to be ascertained from a construction of the deed [32] in the light of the interpretation put upon it by the parties interested.[33]

*Evidence.*See 8 C. L. 2157—Evidence of any probative force, in support of title, is admissible.[34] Deeds, valuless as conveyances of title, may be admissible under the plea of limitation [35] or estoppel,[36] or as a basis for the admission of other deeds in a claim of title.[37] Recitals in defective ancient deeds may,[38] or may not,[39] be admissible in support of title. An apparent defect in a deed may be cured by parol proof.[40]

from a third person in reliance upon a disclaimer by plaintiff's grantor who subsequently conveys to plaintiff, the latter cannot assert title adverse to defendant. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. Where plaintiff in a forcible entry and detainer suit against him relinquishes all right to the land in controversy to defendant, a directed verdict against him is proper in trespass to try title, in which suit he testifies that the same land is involved in both suits, though the description of the land in the latter suit differed from that in the former. Motl v. Stephens [Tex. Civ. App.] 108 SW 1018. Heirs who have accepted the benefits of an administrator's sale cannot maintain the action against the grantee, though his deed is invalid. Wilkin v. Owens [Tex. Civ. App.] 110 SW 552.

30. Where defendants rest upon their title under a contract, neither laches in perfecting it, or state demand, or the ten-year statute of limitation can be availed of is against them. Kirby v. Cartwright [Tex. Civ. App.] 20 Tex. Ct. Rep. 509, 106 SW 742.

31. Such as "sea and highway," "bank and highway," "beach and highway." The terms "beach" and "bank," might be construed to mean the beach between high and low water mark. Merwin v. Backer [Conn.] 68 A 373.

32. In order for the one relying on the deed to obtain a greater interest than passed between the original parties, he must be an innocent purchaser without knowledge that such language was used in a restricted sense. West v. Hermann [Tex. Civ. App.] 104 SW 428. Where plaintiff's grantor owned in fee a railroad right of way, and conveyed land by a deed calling for a boundary on the "east by" the railroad, and the other boundaries were given as lands of different parties, the deed conveyed the fee to the railroad right of way. Wright v. Willoughby [S. C.] 60 SE 971.

33. To determine meaning of "the bank lot." Merwin v. Backer [Conn.] 68 A 373.

34. Gray v. Fussell [Tex. Civ. App.] 20 Tex. Ct. Rep. 266, 106 SW 454. Evidence of title, introduced by both plaintiff and defendant, in an action of trespass to try title, should be submitted to the jury under instructions covering the presumptions which legitmately arise. Tompkins v. Creighton-McShane Oil Co. [C. C. A.] 160 F 303.

35. A deed which fails to convey even color of title, by reason of nonjoinder of wife in conveyance of community property. Sanders v. Word [Tex. Civ. App.] 110 SW 205. May be looked to as such memorandum of title as would enlarge the extent of a recovery under the ten year statute, which would otherwise be limited to 160 acres by art. 3344, Sayles' Ann. Civ. St. 1897. Id. A deed not void on its face, but which conveys no title, is admissible in an action to try title, as a basis of acquisition of title under the five-year limitation statute. Art. 3344, Rev. St. 1895. State Nat. Bk. v. Roberts [Tex. Civ. App.] 18 Tex. Ct. Rep. 714, 103 SW 454.

36. An administrator's deed, on which defendant bases title, is admissible in evidence, though neither the application and order for the sale or the order confirming the sale describe the land, when the conduct of the heirs amounts to a ratification of the sale. Wilkin v. Owens [Tex. Civ. App.] 110 SW 552.

37. Brown v. Orange County [Tex. Civ. App.] 20 Tex. Ct. Rep. 533, 107 SW 607

38. A recital in an ancient deed that the grantor had acquired the interest of plaintiff's ancestor and conveyed it with his own is admissible, in connection with other evidence showing assertion of ownership by grantor and nonassertion of any claim by ancestor or those claiming under her, in support of the presumption that her title passed to the grantor and to establish execution of the deed. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015. In a suit between grantees of heirs and grantees of an administrator, a deed of the administrator, more than sixty years old, reciting an order to sell land was admissible and passed title, though it did not appear that any report of the sale had been made to the court, this being overcome by the fact that the court house and records had been burned many years before, and by the presumption that requirements of law necessary to the validity of a sale were complied with. Fields v. Burnett [Tex. Civ. App.] 108 SW 1048.

39 Recitals in an ancient deed held no evidence of title as against strangers though possession held thereunder for over thirty years. Teagarden v. Patten [Tex. Civ. App.] 107 SW 909.

40. To support of the three year limitation, may show that a deed was in fact properly acknowledged, where the certificate is defective. Veeder v. Gilmer [Tex. Civ. App.] 19 Tex. Ct. Rep. 957, 105 SW 331.

Where a deed is in evidence conduct thereunder may be inquired into.[41] Evidence inadmissible to show title,[42] or loss of it,[43] may be allowed to show the general situation and surroundings of the locus.[44] On the issue of adverse possession evidence of payment of taxes,[45] and acts of dominion,[46] or nondominion [47] over the land, may be shown. Where a boundary line is in dispute, evidence tending to show a compromise,[48] or recognition of a certain line,[49] is competent.[50] Where evidence cannot be considered on appeal it will be presumed that it sustained the judgment.[51] Whether evidence is sufficient,[52] or insufficient,[53] to sustain the issues, depends upon the cir-

41. Where a deed from a common grantor is in evidence, it is competent to ask defendant, on cross-examination, whether he went into possession of the entire tract including that portion in controversy, under such deed. Mars v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430.

42. Certain evidence in support of defendant's title, inadmissible. Mars v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430.

43 Testimony of defendant's president that he had sold out his interest in the land in controversy before suit was commenced does not show that defendant lost its interest. Texas, etc., R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140.

44 Cultivation by plaintiff's predecessor in title of shore land in front of upland owned by plaintiff, in trespass to try title to the shore land, is admissible for such purpose and, when not received to show that the predecessor had thereby acquired title, evidence that his right to such shore land was disputed at the time is not admissible Merwin v. Backer [Conn.] 68 A 373. Where in such case defendant testifies that as agent for another he called upon plaintiff to purchase such land and that plaintiff told him he did not claim such land, rejection of testimony by the principal in regard to his instructions is not reversible error, where plaintiff denied having made such statement. Id.

45. The comptroller's certificate showing rendition of the land for taxes by defendant and that it was not rendered for plaintiff is also admissible. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015. Payment of taxes on a list in which the land in suit was specifically described, and on other lists in which it was included, may be shown on the issue of adverse possession. Merwin v. Backer [Conn.] 68 A 373.

46. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015.

47. Nonclaim and nonassertion of any interest of plaintiff, or those under whom she claims, for thirty years. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015.

48. Evidence of location of lines by surveyors under agreement of parties is competent to show a compromise, but no construction put upon a deed by one party alone can avail against the other. Wright v. Willoughby [S. C.] 60 SE 971.

49. Where a boundary line was in dispute, testimony of plaintiff's tenant that defendant, in a conversation with him, had recognized plaintiff's rights and offered to buy the land was admissible, though there was uncertainty as to the time the conversation took place and defendant claimed it occurred after hie title had become perfected by limitation, where the jury were instructed that if defendant's title was perfected when the conversation occurred, they should disregard it. Hunter v. Malone [Tex. Civ. App.] 108 SW 709.

50. To establish a boundary by agreement or estoppel, someone must have been misled to their injury, mere acquiescence short of the longest period of limitation is insufficient. Hunter v. Malone [Tex. Civ. App.] 108 SW 709. An owner is not bound by agreements between his tenant and an adjoining owner as to the boundary line, even though the tenant has placed a fence upon the agreed line. Id.

51. And so it must be presumed that the court did not err in directing a verdict. Newnom v. Williamson [Tex. Civ. App.] 19 Tex. Ct. Rep. 532, 103 SW 656.

52. Evidence sufficient to show title in defendant by **adverse possession** for ten years. Texas, etc., R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140. To show **prior entry** by defendant, time of entry being the issue. Smyth v. Saigling [Tex. Civ. App.] 110 SW 550. To show an **abandonment** of land by a grantee under whom plaintiff claimed as heir. Evans v. Ashe [Tex. Civ. App.] 108 SW 1190. To prove that defendant was **bona fide purchaser** under warranty deed from holder of legal title. North v. Coughran [Tex. Civ. App.] 108 SW 165. To sustain findings that a certain **deed was executed** and delivered to plaintiff's ancestor at a certain time and that a quitclaim deed from the same grantor to plaintiff was made to ratify the deed to the ancestor. Jackson v. Tonahill [Tex. Civ. App.] 108 SW 178. As to **description** in deed. West v. Houston Oil Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 286, 102 SW 927 To go to jury on question of **execution of deed.** Gray v. Fussell [Tex. Civ. App.] 20 Tex. Ct. Rep. 266, 106 SW 454; Taliaferro v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 865, 103 SW 464. To show **title** was, at the time in **third party,** and that plaintiff could recover only as his vendee. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. To show that the person under whom plaintiffs claimed title was the one to whom a **bounty warrant** issued from the state. Sanger v. McCan [Tex. Civ. App] 20 Tex. Ct. Rep. 824, 106 SW 752. To go to the jury on the question as to whether land in suit was a **homestead** at the time plaintiff's husband conveyed it to defendant. Gray v. Fussell [Tex. Civ. App.] 20 Tex. Ct. Rep. 266, 106 SW 454. To warrant submitting to the jury the issue of title by **limitation.** Hutcheson v. Chandler [Tex. Civ. App.] 19 Tex. Ct. Rep. 630, 104 SW 434. To go to jury on the question of **forgery** where deed

cumstances of each particular case. As in other cases, erroneous rulings on the evidence will not be considered when harmless.[54]

Instructions.[See 8 C. L. 2157]—Instructions must not be obscure,[55] contradictory [56] on the evidence [57] outside the issues,[58] nor based upon a false assumption of fact [59] or law; [60] nor should they impose unnecessary burdens upon the jury.[61] A requested charge, presenting affirmatively defendant's theory of defense on an issue raised by the evidence should be granted.[62] Immaterial findings of fact are properly

evidencing plaintiff's title was attacked on that ground. West v. Houston Oil Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 286, 102 SW 927. To warrant a refusal to **direct a verdict** for plaintiff for all the land in controversy. Texas, etc., R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140. To support no other **verdict** than one for defendant. Frugia v. Trueheart [Tex. Civ. App.] 20 Tex. Ct. Rep. 535, 106 SW 736.

53 Evidence insufficient to establish plaintiff's **title.** Brown v. Orange County [Tex. Civ. App.] 20 Tex. Ct. Rep. 533, 107 SW 607. To show **unbroken chain** of title. State Nat. Bk. of New Orleans v. Roberts [Tex. Civ. App.] 18 Tex. Ct. Rep. 714, 103 SW 454. To **defeat title admitted** by answer under District and County Court's Rule No. 31. Meade v. Logan [Tex. Civ. App.] 110 SW 188. To show such **possession** as would support the action. Romine v. Littlejohn [Tex. Civ. App.] 20 Tex. Ct. Rep. 767, 106 SW 439. To show **purchase with notice** of an outstanding equitable title. Wallis, Landes & Co. v. Dehart [Tex. Civ. App.] 108 SW 180. To warrant a finding that the land in dispute was **located in a certain lot** as designated on a plat. Cochran v. Kapner [Tex. Civ. App.] 103 SW 469. To show such **diligence** in an effort to find a **lost deed** as to authorize parol proof of its contents. Taliaferro v. Rice [Tex. Civ. App.] 18 Tex. Ct. Rep. 865, 103 SW 464. To sustain **verdict** for defendant. Id. As to **title** to authorize a **directed verdict** for either party. City of San Antonio v. Rowley [Tex. Civ. App.] 106 SW 753. Testimony by a tenant that an adjoining owner had pointed out the boundary line, but showing no agreement that it should be placed at that point is insufficient **to establish the boundary by agreement or to create an estoppel.** Hunter v. Malone [Tex. Civ. App.] 108 SW 709.

54. Harmless rulings. Where defendant recovers on the ground of estoppel, the admission of self-serving declarations in support of the defense of limitations was harmless error. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. Admission of evidence as to matters which induced the commission of a trespass is unprejudicial to defendant. Jesse French Piano & Organ Co. v. Phelps [Tex. Civ. App.] 19 Tex. Ct. Rep. 889, 105 SW 225. Where plaintiff establishes title by adverse possession, the admission of ancient deeds and devises, subject to subsequent proof of plaintiff's title under them and of the identity of the land described in them, is unprejudicial. Merwin v. Backer [Conn.] 68 A 373. Exclusion of evidence of possession, outside the period to which the proof is limited by an instruction, is harmless. Texas, etc., R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140. Admission of evidence that defendant's grantors had told him that they were the only heirs of deceased owner is immaterial where defendant has shown title by adverse possession. State Nat. Bk. v. Roberts [Tex. Civ. App.] 18 Tex. Ct. Rep. 714, 103 SW 454

55. Held, not to be obscuring. Williams v. Clawson [Tex. Civ. App.] 110 SW 103.

56. Where abandonment and rescission of sale before full payment of purchase price by plaintiff's predecessor in title, is the defense, an instruction on the question of payment, to the effect that the burden was on plaintiff to show it, was not prejudicial or contradictory of an instruction that the burden of proving payment, cancellation of sale, and abandonment of property was on defendant, where the evidence is clear that payment was never made. Evans v. Ashe [Tex. Civ. App.] 108 SW 1190.

57. Instruction held good as against the objection that it was on the evidence, and so framed as to convey a distrust of plaintiff's as compared with defendant's. Wilkins v. Clawson [Tex. Civ. App.] 110 SW 103.

58. For jury to find whether deed embodied all the land intended to be conveyed, where there is no evidence of a mutual mistake. Mars v. Morris [Tex. Civ. App.] 20 Tex. Ct. Rep. 374, 106 SW 430.

59. Where plaintiff fails to show title from a common source, and there was evidence that defendant's grantor held the land as tenant at will of plaintiff's predecessor in interest but this ground of recovery was presented to the jury, an instruction to find for plaintiff, unless defendant had proved title by limitation, must rest upon the false assumption that plaintiff had proved superior title under a common source, and is ground for a new trial. San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770.

60. An instruction that under pleas of limitation of five or ten years the adverse possession must have been for five or ten years next preceding commencement of suit is erroneous. Texas, etc., R. Co. v. Texas Tram & Lumber Co. [Tex. Civ. App.] 110 SW 140. It is error to charge that cultivation, use, and enjoyment are essential to acquisition of title by limitation. Hirsch v. Patton [Tex. Civ. App.] 108 SW 1015.

61. Instruction that if jury found for plaintiff to describe the land found for him as against each defendant, held unprejudicial as against the objection that it was obscuring and called for needless difficulty in stating plaintiff's right, nor did it require the jury to fix the boundary of each portion claimed by the several defendants. Wilkins v. Clawson [Tex. Civ. App.] 110 SW 103.

62. San Antonio Mach. & Supply Co. v. Campbell [Tex. Civ. App.] 110 SW 770.

refused.[63] It is not material error to give an unnecessary instruction where it is harmless.[64] Whether a question is one of law,[65] or fact,[66] depends upon the evidence is each particular case.

Improvements.[67]—No recovery can be had for improvement, as to the amount and value of which there is a variance in pleadings and proof,[68] nor for improvements erected without using the slightest diligence to ascertain the boundaries,[69] nor in trespass to try title to one tract can recovery be had for improvements upon another.[70]

TRESPASS ON THE CASE; TRESPASS TO TRY TITLE, see latest topical index.

TRIAL.

§ 1. Joint and Separate Trials, 1896.
§ 2. Course and Conduct of Trial, 1897.
§ 3. Reception and Exclusion of Evidence, 1900. The Order of Proof, 1902. Timely Objection, 1904. Cumulative Testimony, 1904. Stipulations or Admissions, 1905. Evidence Admissible for One Purpose Only, 1905.
§ 4. Custody and Conduct of the Jury, 1905. It is Largely Discretionary With the Trial Court What Papers Shall be Taken Out by the Jury, 1906. Allowance of a View, 1906.

Scope.—Many important and really distinct matters of trial procedure are given separate treatment in Current Law. Thus the law relating to dockets, calendars and trial lists,[71] continuance and postponement,[72] argument of counsel and the right to open and close the same,[73] examination of witnesses,[74] making of objections and taking of exceptions,[75] trial by jury,[76] questions of law and fact,[77] instructions,[78] directing verdict and demurrer to evidence,[79] discontinuance, dismissal and nonsuit,[80] and verdicts and findings,[81] has been excluded from this article, which includes principally only such matters as do not readily lend themselves to such separate treatment. The subjects of evidence,[82] pleading,[83] and witnesses,[84] are also fully treated elsewhere. As to the hearing in equity, see article Equity,[85] and for matters peculiar to criminal trials, see Indictment and Prosecution.[86]

§ 1. *Joint and separate trials.*[See 8 C. L. 2161]—While in Missouri consolidation

63. Plaintiff being estopped, a finding as to whether defendant had used diligence in ascertaining the true owner before purchasing was unnecessary. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553.

64. An instruction as to the relative dignity of calls in field notes in ascertaining location of survey, though unnecessary, is harmless where the law is correctly stated and the jury is charged in the same paragraph to follow all the evidence. Wilkins v. Clawson [Tex. Civ. App.] 110 SW 103.

65. Under the facts in the case the question as to whether one acquired title by limitation was one of law. Holland v. Ferris [Tex. Civ. App.] 107 SW 102.

66. Whether plaintiff had acquired title to land, held, under the evidence, a question for the jury. City of San Antonio v. Rowley [Tex. Civ. App.] 106 SW 753. Where, in trespass to try title to real estate, there is evidence pro and con as to defendant's title by adverse possession, the question is properly submitted to the jury. Wright v. Willoughby [S. C.] 60 SE 971.

67. See 8 C. L. 2160, n. 55 et seq.

68. Veeder v. Gilmer [Tex. Civ. App.] 19 Tex. Ct. Rep. 957, 105 SW 331.

69. Though plaintiff made no objection to the erection of such improvements, he in no way induced them, and his wife made objection, so plaintiff was not estopped from asserting the true boundary. Workheiser v. Foard [Tex. Civ. App.] 108 SW 983.

70. Rev. St. 1895, Art. 5277, providing for recovery for improvements made under adverse possession in good faith for one year of the land in suit, is not applicable, because the land on which the improvements were made is not the land in suit. Overton v. Meggs [Tex. Civ. App.] 19 Tex. Ct. Rep. 896, 105 SW 208.

71 See 9 C. L. 1008.

72. See 9 C. L. 649.

73. See 9 C. L. 239.

74. See 9 C. L. 1312.

75 See Saving Questions for Review, 10 C. L. 1572.

76. See Jury, 10 C. L. 541.

77. See 10 C. L. 1346.

78. See 10 C. L. 296.

79. See 9 C. L. 975.

80. See 9 C. L. 982.

81. See 8 C. L. 2245.

82. See 9 C. L. 1228.

83. See 10 C. L. 1173.

84. See 8 C. L. 2347.

85. See 9 C. L. 1110.

86. See 10 C. L. 57.

is permitted only in certain specific statutory instances,[87] the general rule elsewhere is that its allowance is within the discretion of the presiding judge.[88] Causes of action of a like nature or relative to the same question may be consolidated when it appears expedient to do so [89] or where the rights of claimants are so interwoven that confusion and conflict must otherwise inevitably ensue,[90] and the court's action, if reviewable, will not be disturbed unless there is an improper exercise of discretion.[91] But where the issues are kept separate and distinct,[92] or where either the plaintiffs or defendants in the two actions are different,[93] the two actions may not be consolidated but merely for convenience and to save costs tried together. Mere delay in making a motion to consolidate until both causes are at issue but neither have been reached for trial is not necessarily ground for denying the motion.[94]

§ 2. *Course and conduct of trial.*[See 8 C. L. 2162]—The conduct of the trial and the general course of the examination of the witnesses generally rests within the sound discretion of the trial judge and the exercise of such discretion is not review-

87. Permitted under Rev. St. 1899, § 749 (Ann. St. 1906, p. 745), only. Whenever several suits founded alone on liquidated demands shall be pending in same court by same plaintiff against same defendant or whenever several such suits are pending in such court by same plaintiff against several defendants, the court may when expedient in its discretion order the suits to be consolidated into one action. Improper to consolidate actions in ejectment and to set aside alleged invalid deed brought by plaintiffs against different defendants though some of questions involved were the same. Priddy v. Mackenzie, 205 Mo. 181, 103 SW 968.

88. Jones v. Boston [Mass.] 83 NE 309.

89. Under Acts 1905, p 798, actions against railroad by members of section crew discharged by same employe of defendant at same time to recover wages and penalty thereon under Kirby's Dig. § 6649 properly consolidated. St. Louis, etc., R. Co. v. Broomfield, 83 Ark. 288, 104 SW 133.

90. Where rights of mortgage and lien claimant are so interwoven and consolidation was necessary to settle ramifications without conflict. Chicago Title & Trust v. Chapman, 132 Ill. App. 55.

91. Jones v. Boston [Mass.] 83 NE 309. Possibility or conjecture that separate trial might result differently no warrant for holding judge abused discretion. American Window Glass Co. v. Noe [C. C. A.] 158 F 777.

Proper: Where one of two plaintiffs only slightly and other hopelessly injured. American Window Glass Co. v. Noe [C. C. A.] 158 F 777. Under Rev. St. § 921 (U. S. Comp. St. 1901, p. 685) in action in damages for wrongful death of three persons involving same transaction and witnesses. Diggs v. Louisville, etc., R. Co., [C. C. A.] 156 F 564. Under § 921, Rev. St. (U. S. Comp. St. 1901, p. 685), where all questions except amounts of claim are covered by same evidence. American Window Glass Co. v. Noe [C. C. A.] 158 F 777. Where municipality and individuals are sued for same injury and cases depended on same facts. Jones v. Boston [Mass.] 83 NE 309. Since action including counterclaim shall be tried as entirety and not as separate suits unless withdrawn under Cobbey's Ann. St. 1903, § 1126 before final submission and tried as separate action under statute and motion to direct verdict without introducing evidence as to counterclaim forfeits same. Miller v. McGannon [Neb.] 113 NW 170. Where person who should have joined split joint demands and being separate suits. Under Cobbey's Ann. St. 1903, § 1150, Code, § 150, to enfroce penalty for excessive fees taxed as costs against joint defendants. Downey v. Coykendall [Neb.] 116 NW 503. Where plaintiff sued to recover two installments due when complaint was verified but before service remaining installments became due and plaintiff brought second suit therefor and defense in second was same as that in first except setting up pendency of first. Wilson v. Locke, 116 App. Div. 421, 101 NYS 831. Where two actions for libel between same parties based on separate publication relating to single official act by plaintiff. Cohalan v. Press Pub. Co., 123 App. Div. 487, 107 NYS 962. Under complaint alleging injury occasioned by failure of two defendants separately sued to adopt reasonable system for operation of cars at crossing. Martin v. Seaboard Air Line R. Co. [N. C.] 61 SE 625.

Refused to consolidate ejectment from strip of land with equity suit to quiet title. Keller v. Harrison [Iowa] 116 NW 327. Rev. St. 1895, art. 1454. Refusal to allow consolidation of actions on notes given for separate tracts of realty held not an abuse of discretion. Bolden v. Hughes [Tex. Civ. App.] 107 SW 91.

92. No consolidation where causes were tried and considered together for purpose of trial, issues being separate and distinct. Arcadia Cotton Oil Mill & Mfg. Co. v. Fisher [La.] 46 S 28.

93. Proper under Acts 1905, p. 798 to consolidate for purposes of trial action for damages by father and daughter where both were injured by falling in hole on platform while father was carrying invalid daughter from train. St. Louis, etc., R. Co. v. Harden, 83 Ark. 255, 103 SW 614. Motion to submit last two of three cases on evidence of first does not constitute consolidation. La Fitte v. Ft. Collins [Colo.] 93 P 1098.

94. Where successive claims under contract are otherwise proper to be consolidated and delay was not prejudicial. Wilson v. Locke, 116 App. Div. 421, 101 NYS 831.

able on a writ of error.[95] While the court may in its discretion defer the making of a ruling,[96] this power should not be so exercised as to deprive a party of opportunity to meet the rulings [97] and objections of law which if sustained are fatal to the action should if made at the outset be determined before going into the merits.[98] The court should hear courteous objections whether he deems them tenable or not.[99] Presentations of prayers for rulings should be made at a proper time and not when they will interfere with the business of the court.[1] Generally, where courts render decisions in the absence of counsel, they should direct notice to be to them,[2] but in Georgia in certain instances judgment may be rendered upon demurrer in the absence of counsel without leave, without even allowing time to amend the petition.[3] Among the specific things not necessarily improper are for the judge in his discretion to permit plaintiff's counsel to confer privately with one of defendant's witnesses before entering on the cross-examination of such witness,[4] arresting a witness who comes into court in a drunken condition though done in the presence of the jury,[5] and also the absence of the court during the argument of counsel, and the reading of the court's instructions to the jury by the clerk where these latter irregularities are waived.[6]

*Remarks and conduct of judge.*See 8 C. L. 2163—It is improper for the judge in the jury's presence to comment on the evidence,[7] make statements of facts,[8] or discuss

95. Crosby v. Wells, 73 N. J. Law, 790, 67 A 295.

96. Court may reserve construction of instrument until situation of parties and circumstances surrounding case are revealed in order to aid in arriving at grantor's expressed intent in case where validity depended on construction of power of attorney offered in evidence. Shaw v. Pope [Conn.] 67 A 495.

97. When decision is reserved upon question of admitting evidence that fact should be announced in order that both sides may introduce proof which may be necessary in anticipation of ultimate ruling on its admission. Tepfer v. East Side Metal Spinning Co., 110 NYS 482. Where trial court excluded evidence necessary to plaintiff's right of recovery and later found for plaintiff, cannot be assumed in absence of anything to show fact that court reserved decision as to admission. Id. Where reservation of ruling on objections to evidence would deprive losing party of opportunity to supply evidence through unobjectionable means, and early and timely ruling had been requested and denied such ruling might be prejudicial error. Preston v. Hirsch, 5 Cal. App. 485, 90 P 965. But where objections are specific and defendant was fully apprised of grounds and had opportunity of placing views before court and evidence was matter of official record and could be supplied in no other way than that resorted to and delay in ruling was with consent of both parties fact, that court did not give its reason for making its ruling, not prejudicial. Id.

98. Exception of no cause of action, which has been referred to the merits and which has not been waived by answer but on contrary has been duly reserved should be passed on before passing on merits, regardless of what evidence may have been with or without objection admitted on the merits. Rogers v. Southern Fiber Co., 119 La. 714, 44 S 442. Error to pass on exception after merits in case where corporation is sued for value of counterfeit stock issued by president. Id.

99. Error to refuse to hear objections and to refuse to sign bill of exceptions. McLellan v. Brownsville Land & Irr. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 522, 103 SW 206.

1. Presentations of prayers for rulings and request that court pass upon them in midst of examination of witness wholly irregular. Wood v. Skelley [Mass.] 81 NE 872.

2. Where court directed such notice and record failed to show clerk did not give same plaintiff not entitled to more than statutory time in which to file costs bill. Linville v. Scheeline [Nev.] 93 P 225.

3. Where under Civ. Code 1895, § 5045, judge has heard demurrer at first term and rendered judgment in same term. Lomar, Taylor & Riley Drug Co. v. First Nat. Bk., 127 Ga. 448, 56 SE 486.

4. Out of ordinary course but not necessarily improper where circumstances in court's judgment justified it. Kirby v. Manufacturers' Coal & Coke Co., 127 Mo. App. 588, 106 SW 1069.

5. Presence of witness under such circumstances offense against court and jury and contempt. Marcum v. Hargis, 31 Ky. L. R. 117, 104 SW 693.

6. Pennsylvania Co. v. Barton, 130 Ill. App. 573.

7. Held proper: "I don't see where this testimony can do any harm" held harmless. Ball v. Skinner, 134 Iowa, 298, 111 NW 1022. Statement that private memorandum introduced had no weight to bind defendant unless brought to his attention, that it did not show in any way that defendant paid money and only use was basis for inference that plaintiff continued to hold defendant responsible. Fuller v. Johnson [Conn.] 68 A 977. Reprimand of witness not containing in any way comment on weight or credibility of evidence and provoked by persistent refusal to answer question directly. Griffing

conclusions from facts proven,[9] but unless there has been prejudice or the possibility thereof to the unsuccessful party the court will not be justified in interfering.[10] It is not, however, beyond judicial proprieties for a judge in a proper case to seek to end litigation by suggesting action which the law does not call for,[11] but it is improper

Bros. Co. v. Winfield, 53 Fla. 589, 43 S 687. Where court stated "he would overrule objection as he had admitted other evidence of drawn line hut thought there had been brought much evidence into case that had no bearing or relevancy to issue." City of Americus v. Tower [Ga. App.] 59 SE 434. Inquiry of witness as to part of his testimony with statement that it sounds incredible not error where witness was confused and thereupon corrected testimony. Elgin, etc., R. Co. v. Lawlor, 229 Ill. 621, 82 NE 407. Remarks made by trial judge which were part of discussion ensuing suggestion made by complaining counsel. Elgin, etc., R. Co. v. Lawlor, 132 Ill. App. 280. Where counsel based right to admission of conversation on its being part of res gestae and court asked if it was part of res gestae. Id. Where jury understood purpose of court in saying testimony did not seem credible was to afford opportunity of correcting apparent confusion. Id. Remark "I think this evidence under whole record now disclosed is proper; and ruling at time was reserved in order to ascertain if evidence would show full extent of agent's authority. I think this evidence was proper and motion is overruled." Fritz v. Chicago Grain & Elevator Co. [Iowa] 114 NW 193. Court's remark in line with instruction. Barney v. Spangler [Mo. App.] 109 SW 855. Duty of judge is to rule on admissibility of evidence without comment or suggestion as to its weight or effect. St. Louis, etc., R. Co. v. Lane [Tex. Civ. App.] 110 SW 530. Remark "I think doctor gives very fair and unbiased statement." Edwards v. Cedar Rapids [Iowa] 116 NW 323. Where in action against physician for negligently applying solution made by druggist to plaintiff's ankle, court sustained objection to question whether physicians generally relied on druggist for proper compounding, and also stated his own observation and knowledge to be that they compounded their own drugs and made same ruling when substantially same question was asked of another witness. Ball v. Skinner, 134 Iowa, 298, 111 NW 1022. Error not cured by finally admitting testimony of latter witness and reasserting truth of former remarks, Id; St. Louis, etc., R. Co. v. Lane [Tex. Civ. App.] 110 SW 530. In action for damages to cattle error for court to state that testimony of plaintiff as to claim made by him in nature of admission and not compromise would not control in determining measure of damages since if jury believed that claim made by plaintiff immediately after injury was true one it should have controlled. Id. Remark that he did not think it was very material or entitled to much weight but that jury might consider it objectionable under Const. art. 4, § 16. Schneider v. Great Northern R. Co. [Wash.] 91 P 565.

8. Statement, that judge did not know how any one was to find out who engine setting fire belonged to if agent of company did not know not improper as charge on facts. Stroud v. Columbia, etc., R. Co. [S. C.] 60 SE 963. In action to recover damages for defendant's refusal to receive lumber ordered of plaintiff which latter was forced to resell, there was testimony that there was market for lumber on its arrival at place of delivery and no evidence that place where plaintiff resold it was nearest and most accessible market, improper for court to remark in presence of jury that evidence showed no market at place of delivery when defendant refused to accept lumber, and that place of resale was nearest and most accessible. Texas & Louisiana Lumber Co. v. Rose [Tex. Civ. App.] 19 Tex. Ct. Rep. 519, 103 SW 444.

9. Where issue whether there was agreement for grade crossing was not raised by answer and there was no evidence that grade crossing was agreed upon court did not err in ruling on motion to direct verdict by remarking that defendant was in no position to avail himself of agreement for grade crossing if made and that in any event the point was in dispute. Herrstrom v. Newton, etc., R. Co., 129 Iowa, 507, 105 NW 436. Where, though made in jury's presence, remark that while court had grave doubts of plaintiff's right to recover it would refuse nonsuit and submit to jury was not made to jury who were later instructed that they alone were judges of facts, Const. Art. 4, § 22, prohibiting charges as to matters of fact inapplicable, since it applies only to remarks to jury. McFeat v. Philadelphia, etc., R. Co. [Del.] 69 A 744.

10. Fact that one of witnesses talked to judge about case before rendition of decision insufficient where verdict not affected and judge endeavored to avoid discussion. Wood v. Holah [Conn.] 68 A 323.

Held harmless: Where counsel of defeated party persisted in asking questions after court had ruled them improper courts remark that after court had ruled with reference to question it was unprofessional and discourteous to persist in putting the question, that counsel had record covering point and must not offend that way again. Hein v. Mildebrant [Wis.] 115 NW 121. Where judge stated witness answered question asked on cross examination but, being assured answer had not been given directed counsel to try it again whereupon counsel withdrew question and excepted to remark and judge promptly suggested that if there was any doubt as to his being correct counsel would better correct it then. Richards v. Ann Arbor [Mich.] 115 NW 1047. Use by court of "This man" to designate plaintiff and "Mr. Johnson" to designate defendant. Fuller v. Johnson [Conn.] 68 A 977. Where court rebuked witness for making answer not responsive and complaining party did not move to strike out. Western Union Tel. Co. v. Johnsey [Tex. Civ. App.] 109 SW 251.

11. In action of trespass based on allegation that defendant's building extended upon

to mention or comment to the jury upon the failure of one of the parties to adopt the court's suggestion.[12] The trial judge should not in the absence of counsel go to the jury room and communicate with them while they are deliberating.[13]

§ 3. *Reception and exclusion of evidence.*[See 8 C. L. 2164]—It is the province and duty of the court to determine the relevancy and admissibility of evidence only where the same is offered and objections are interposed thereto,[14] though it may also exclude the testimony itself on any legal ground,[15] or restrict the inquiry into a collateral matter.[16] However, the fact that evidence is admitted without objection does not necessitate its consideration by the trial court though statutory provisions exist providing that objections cannot be made for the first time on appeal,[17] and the court cannot require counsel as the condition for permitting him to make an objection to admit a contention of the opposite party.[18] Where an offer of proof couples admissible and inadmissible matters, that which is admissible may, though it need not, be received,[19] but where evidence is clearly objectionable and there is no suggestion

plaintiff's land presiding judge did not exceed his authority in suggesting that parties permit jury to assess entire damages sustained by plaintiff. Allen v. Kidd [Mass.] 84 NE 122.

12. Improper to tell jury party refused to adopt court's suggestion. Allen v. Kidd [Mass.] 84 NE 122. Improper to refer to refusal in such a way as might lead jury to believe court thought that plaintiff was stubborn and action brought for spite. Id.

13. Reversible error for judge to go to jury room, though taking stenographer with him to report what he said, and caution them with reference to their conduct while going to remaining at or returning from meal and where on jurors' statement that they failed to reach agreement on certain point said they undoubtedly would on further consideration. Du Cate v. Brighton [Wis.] 114 NW 103.

14. Stearns & Culver Lumber Co. v. Adams [Fla.] 46 S 156. Evidence though immaterial and confusing need not be excluded unless its admission is objected to the responsible ity of objecting resting with counsel. Lifshitz v. Schwartz, 107 NYS 579. Proper to exclude thirty-eight patents some of which were long and complicated and which were admissible only to show probability of contentions of respective parties and more apt to mislead than to aid. United Shoe Mach. Co. v. Bresnahan Shoe Mach. Co. [Mass.] 83 NE 412.

15. Not error for court to sustain objection, not good in itself where it might properly have excluded evidence for other reasons. Baker v. Mathew [Iowa] 115 NW 15. Though the objection to testimony states an insufficient ground, the court may strike it out if improper on other grounds. Richardson v. Agnew, 46 Wash. 117, 89 P 404. Though party cannot complain of admission of testimony in support of irrelvant allegations he has allowed to remain in pleading, court may exclude same. Bromonia Co. v. Greenwood Drug Co. [S. C.] 59 SE 363. Where undisputed circumstances show testimony of witness cannot by any possibility be true, it is duty of court to withdraw such testimony from jury. Wolf v. City R. Co. [Or.] 91 P 460. Trial court may strike out words from answer of witness on cross-examination although counsel made no objection to question, but this should be rarely done and with utmost care and caution in civil cases. Baltimore, etc., R. Co. v. State [Md.] 69 A 439. Held proper on question whether witness heard train strike vehicle and answer "no sir I did not. It would be impossible because engine had passed," to strike all but "no sir I did not." Id.

16. Restriction of inquiry as to number of men employed in certain process in factory where of no probative force in any issues. Leavitt v. Fiberloid Co. [Mass.] 82 NE 682. Whether in eminent domain proceedings to secure land for municipal water supply purposes special value due to chance that land be used for such purposes is admissible or incompetent as involving trial of collateral issues depends on discretion of court. Sargent v. Merrimac [Mass.] 81 NE 970.

17. So held as regards evidence of statements of testatrix to show an intention with reference to a legacy. Code Pub. Gen. Laws, art. 93, §§ 317, 318 requiring a will and the revocation thereof or of any part thereof to be in writing. Lowe v. Whitridge, 105 Md. 183, 65 A 926.

18. Where contestants at hearing on administratrix's account objected generally to jurisdiction of court to hear personal claim of administratrix to all the property returned as assets but claimed to have been given to administratrix by decedent, objection to court's jurisdiction not admission that administratrix was entitled to property as gift or waiver of contestant's claim that property was asset of estate and court cannot require admission to that effect as condition of objection. In re Cavanagh, 121 App. Div. 200, 105 NYS 850.

19. In will contest where questions asked attorney as to what testator said concerning his will when making it and answer was refused on ground of privileged communication, fact that offer of proof contained some immaterial matter did not exclude proof of what appeared material. In re Young's Estate [Utah] 94 P 731. Not error to overrule motion to exclude answer going beyond legitimate response to question and volunteering conclusion where part of answer was good. Atlanta, etc., R. Co. v. Wheeler [Ala.] 46 S 262. Where issue is whether party as-

that it may become competent through circumstances not then disclosed, it is improper to admit it subject to the objection,[20] or, if the inadmissibility of evidence appear after it has been received, it should be stricken.[21] While an objection to a question on certain specified grounds which do not appear on its face should be overruled [22] and sustained where there is no statement of what a question is expected to prove,[23] the propriety of refusing to permit counsel to make a formal offer of testimony because a similar offer has been made and refused must be left to the sound discretion of the trial judge,[24] and it is no abuse of that discretion to permit a correction of defects in the first offer by a second and more complete one.[25] Evidence may be withdrawn subject to exception at any time before the case is submitted,[26] but testimony unfavorable to a party given by one of its witnesses on direct examination and reiterated on cross-examination will not be struck out on his party's motion.[27] Testimony may be stricken out where after its receipt it appears that the facts involved in it were in writing, unless the writing is produced or its absence is accounted for so as to authorize secondary evidence,[28] but the motion to strike must be confined to the objectionable testimony and ordinarily should not be granted if it appeared when the testimony was offered that the facts were in writing and the testimony was not objected to.[29] It is improper for the court to limit the number of witnesses which may be called where those witnesses who are called appear to be hostile.[30] In a trial by the court, the formalities in the introduction of evidence need not be strictly followed where it is shown that the evidence was before the court,[31] and while all evidence clearly incompetent and immaterial should be rejected, a liberal practice should be adopted in admitting evidence in such cases.[32] The removal of the jury from the court room during argument addressed to the court is within the discretion of the court.[33] Where both parties agree that the jury may remain

sumed mortgage indebtedness and some of testimony as to conversations was admissible in corroboration. Herrin v. Abbe [Fla.] 46 S 133.

20. Where, being evidence as to communications pertaining to transactions between witness and deceased son and wife as to which opposite party had no evidence, it was clearly incompetent under St. 1898, § 4069. Hagan v. McDermott [Wis.] 115 NW 138.

21. Where physician testified that he had seen and known case where epilepsy followed from injury to head seven years thereafter and on cross examination it appeared he had never treated epilepsy but had been told that an epileptic had been hit on head seven years before. Defguard v. New York, etc., R. Co. [N. J. Err. & App.] 67 A 609.

22. Seaboard Air Line R. Co. v. Scarborough, 52 Fla. 425, 42 S 706.

23. Where one of defendant's witnesses was asked by counsel whether he heard occupant of vehicle say anything just after accident. Pronskevitch v. Chicago, etc., R. Co., 232 Ill. 136, 83 NE 545. Not error in will contest for court to refuse to allow question calling for conversation had between testatrix and one of legatees prior to execution of will in absence of offer of proof stating what was proposed to be proved thereby. Seibert v. Hatcher, 205 Mo. 83, 102 SW 962.

24. Sprague v. Reilly, 34 Pa. Super. Ct. 332.

25. Error to refuse second and proper offer to prove facts constituting complete defense. Sprague v. Reilly, 34 Pa. Super. Ct. 332.

26. Spinney v. Meloon [N. H.] 68 A 410.

27. El Paso, etc., R. Co. v. Smith [Tex. Civ. App.] 108 SW 988.

28. Mount Vernon Brew. Co. v. Teschner [Md.] 69 A 702.

29. Refusal proper where letters subsequently produced by witness on stand. Mt. Vernon Brew. Co. v. Teschner [Md.] 69 A 702.

30. Improper to limit defendant to six witnesses when they appear to be hostile to his cause. Sanitary Dist. of Chicago v. Curran, 132 Ill. App. 241.

31. Where the lease was not formally introduced record showed that judge had read and considered all portions thereof relevant to controversy. Cohn v. Naughton, 127 Mo. App. 204, 104 SW 1158.

32. So that in case of appeal all material facts before lower court for consideration will appear and thus avoid necessity of remanding cause for admission of material evidence erroneously rejected. Degginger v. Martin [Wash.] 92 P 674.

33. Proper where defendant's attorney endeavored as part of law in case to bring before jury facts in another case with comments of supreme court thereon. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399. Where defendant excepted to court's refusal to permit witness to answer certain questions objected to, it was within court's discretion to permit defendant to make its offer of proof in

while the discussion is going on, no matter germane to the matter under consideration can be complained of.[34] The court may sometimes properly require the statement of questions whose competency is doubtful privately to the court and if he thinks them incompetent dictate them to the official stenographer and show the objections of the defendants, the ruling of the court, the avowals of the plaintiffs and their exceptions.[35]

The order of proof See 8 C. L. 2165 rests in discretion,[36] and the court may permit in rebuttal matters proper in chief,[37] or allow the case to be reopened for additional

presence of jury for purpose of reserving its exceptions. Moss v. Gulf, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 706, 103 SW 221. No abuse where in suit for damages due to overflow by railroad embankment and defendant questions asking concerning damage done two and one-half miles above stream and on objection was allowed to state that he expected to show same sort of damage there. Id.

34. Where court was merely calling attention that certain facts would not be considered because under the agreed theory upon which case was tried they would not be pertinent to issues to be submitted to jury. Moore v. Rose [Mo. App.] 108 SW 1105.

35. Proper where plaintiff's attorney persisted in asking in presence of jury numerous incompetent questions which with objections coming from defendant would be calculated to influence jury to defendant's prejudice notwithstanding prompt action of court in sustaining objections. Marcum v. Hargis, 31 Ky. L. R. 1117, 104 SW 693.

36. Floto v. Floto, 233 Ill. 605, 84 NE 712; Noyes v. Clifford [Mont.] 94 P 842. Where plaintiff in replevin alleges ownership and right to possession which defendant claims through valid sale or bona fide purchase from fraudulent purchaser, that the proof of fraud in illegal sale is not part of plaintiff's prima facie case and is available only in reply is mere matter of order of proof and admission of evidence of fraud in sale in support of plaintiff's case is not error. Wendling Lumber Co. v. Glenwood Lumber Co. [Cal.] 95 P 1029. Not error to admit evidence of subsequent transfer of land before tracing title from government. Richbourg v. Rose, 53 Fla. 173, 44 S 69. Order of introduction of deeds constituting links in chain of letter. Dannelly v. Russ [Fla.] 45 S 496. Right to anticipate defense by offer of evidence in chief case rests in discretion. City of Decatur v. Vaughan, 233 Ill. 50, 84 NE 50. Court may permit introduction of evidence as to injury upon undertaking to give proof of cause thereof. City of Chicago v. Saldman, 129 Ill. App. 282. Proper to permit city to introduce evidence tending to lower award of commissioners in condemnation proceedings before owners have attacked same as too low. City of Decatur v. Vaughan, 233 Ill. 50, 84 NE 50. Not error to show act of agent in making contract and acting thereunder before proof of agent's authority. Firtz v. Chicago Grain & Elevator Co. [Iowa] 114 NW 193. Where vein of mineral does not fall within statutory exception from inclusion in patent unless it contained valuable minerals in such quantities and value as to justify effort to utilize it, such evidence may be taken up before patent proceeding to determine whether it was known to exist when patent issued and hence to have been excluded. Noyes v. Clifford [Mont.] 94 P 842. Whether fact of agency and its scope should be proved before introduction of matters incidental thereto not imperative and for court. American Car & Foundry Co. v. Alexandria Water Co., 218 Pa. 542, 67 A 861. Not error to permit introduction of evidence tending to show notes sued on were agreed to be canceled by original payee without showing that cashier of bank to whom they had been endorsed had knowledge thereof. First Nat. Bk. v. McCullough [Or.] 93 P 366. Whether evidence should have been reserved for rebuttal within court's discretion. Tucker v. Rhode Island Co. [R. I.] 69 A 850. Deeds need not be introduced in order of execution but may be introduced in order of convenience subject to direction and discretion of court. Frugia v. Trueheart [Tex. Civ. App.] 20 Tex. Ct. Rep. 535, 106 SW 736. Declaration of partner may be received to become competent against himself and remaining partner should partnership relation become later established. Richardson v. Pierce [N. M.] 93 P 715.

37. Where diagram offered in rebuttal was properly part of main case, exclusion in court's discretion not error. Gosdin v. Williams [Ala.] 44 S 611. Plaintiff having right during introduction in chief of her evidence to assume defendant would read deposition it had caused to be taken no abuse of discretion on defendant's failure to do so to allow plaintiff to read it after defendant and concluded introduction of testimony. Western Union Tel. Co. v. Hanley [Ark.] 107 SW 1168. Where plaintiff made out prima facie case which was vigorously attacked by defendant, not error to permit plaintiff to introduce additional testimony in support and rebuttal though such evidence might have been adduced on first examination. Southern R. Co. v. Clay [Ga.] 61 SE 226. In proceeding to set aside will on ground of testamentary incapacity where contestant first brings out evidence that decedent had unfounded delusions as to his wife's infidelity based upon reports it was proper to allow proponent to show in rebuttal that after investigation decedent believed reports unfounded. Floto v. Floto, 233 Ill. 605, 84 NE 712. Not improper for court to permit counsel for plaintiff to swear that he had tendered repayment of certain money to defendant where defendant had put tender in issue in its rejoinder which was not in papers of case and plaintiff's attorney consequently had no knowl-

proofs,[38] or allow plaintiff to introduce evidence on an uncontested point after he has rested his case.[39] This discretion, however, should be so exercised that neither party will be taken by surprise or deprived of an opportunity without notice to introduce evidence in contradiction,[40] and when properly exercised will not be reversed unless it has been abused [41] and the objecting party has suffered prejudicial

edge that it had been made. Louisville R. Co. v. Williams [Ky.] 109 SW 874. Where party alleging due execution of deed establishes prima facie case by proof of acknowledgment of deed and adverse party offers proof to contrary the party may fortify his prima facie case by other proof of the signing and delivery of deed. Burk v. Pence, 206 Mo. 315, 104 SW 23. Whether evidence should have been introduced as direct or rebuttal evidence. Crosby v. Wells, 78 N. J. Law, 790, 67 A 295. Proper for plaintiff to testify in rebuttal that certain words on check introduced in evidence by defendants were not there when delivered. Bade v. Hibberd [Or.] 93 P 364. In action against carrier where defendant relied upon limited liability contract, though entitled to introduce contract as part of its case it could not do so as part of plaintiff's cross-examination or ask plaintiff whether at any time prior to the shipment his attention was directed by carrier's agent or by any one to any of the printed matter on the back of the contract. McGregor v. Oregon R. Co. [Or.] 93 P 465. Where payment not pleaded as defense and court ruled burden to be on defendant and defendant introduced evidence showing less indebtedness than claimed by plaintiff proper to permit plaintiff to introduce proof of amount due. Higgins v. Street [Okl.] 92 P 155. Where defendants theory was that claim was based on entirely feigned symptoms and offered testimony that plaintiff immediately after accident said he was not hurt and worked on farm as usual plaintiff might in rebuttal introduce evidence that witness appearing on scene seven months after accident heard him complain of back. St. Louis S. W. R. Co. v. Garber [Tex. Civ. App.] 108 SW 742.

38. Southern R. Co. v. Clay [Ga.] 61 SE 226; Hall v. Jensen [Idaho] 93 P 962; Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139. If adverse party is denied opportunity to present material matter upon any issue by reason of amendment to conform complaint to proof he should apply to have case reopened to introduce such evidence. Hedstrom v. Union Trust Co. [Cal. App.] 94 P 386. Rule not one of arbitrary right on part of plaintiff or his counsel but judge has discretion in matter under facts of each case especially after announcement has been made that nonsuit will be granted. Penn v. Georgia, etc., R. Co., 129 Ga. 856, 60 SE 172. Error for judge to hold after plaintiff has closed defendant moved for nonsuit and court orally stated he would grant it that it is too late to move that case be reopened. Id. Generally when counsel for plaintiff has announced plaintiff's evidence closed but has omitted to introduce evidence by reason of accident inadvertence or even because of mistake as to necessity of doing so to make out prima facie case on motion presiding judge will allow case to be reopened and additional evidence introduced in order to prevent nonsuit. Id. Whether case shall be reopened after motion to nonsuit has been made discretionary. Moore v. Central of Georgia R. Co., 1 Ga. App. 514, 58 SE 63.

Reopened in trial by court. Burgener v. Lippold, 128 Ill. App. 590. Where defendant announced that no proofs would be offered on its part, permissible to recall plaintiff to offer proofs considered as rebuttal during trial. Brockmiller v. Industrial Works, 148 Mich. 642, 14 Det. Leg. N. 336, 112 NW 688. To permit recall of plaintiff after defendant has rested to change his testimony where change is not radical. Eberts v. Detroit, etc., R. Co. [Mich.] 115 NW 43. Not error to permit on recall testimony that agreement otherwise implied was express. Id. Where cause was taken under advisement by judge and continued from one term to next, not error to receive in evidence certified copy of order of probate court appointing administrator. Gross v. Watts, 206 Mo. 373, 104 SW 30. Where no controversy as to number of car or amount of wheat therein to allow respondent to prove same after resting his case. Schott v. Swan [S. D.] 114 NW 1005. To permit proof of market value of cattle at place of destination after argument was begun. St. Louis, etc., R. Co. v. Cassidy. Southwestern Commission Co. [Tex. Civ. App.] 107 SW 628. Where after defendants refused to introduce testimony and moved and had judgment plaintiff within two days moved to reopen court's former oral announcement did not deprive it of right to grant motion in exercise of discretion. Reiff v. Coulter [Wash.] 92 P 436. To admit testimony corroborative of plaintiff that certain summons had not been served upon him at time alleged. Hall v. Jensen [Idaho] 93 P 962.

Reopening denied: Where great number of expert and ordinary witnesses were heard during fifteen days. Succession of Jones [La.] 45 S 965. Where in suit for injuries received by breaking chain there was no evidence that chain was defective or insufficient for purpose or improperly used refusal of court during motion for nonsuit to call another employe to ascertain whether he had chain in his possession in order to offer it in evidence. Finn v. Oregon Water Power & R. Co. [Or.] 93 P 690. After case has been closed but before argument where witnesses have left court room to permit introduction of evidence as to value of work performed where only evidence introduced on trial was upon question whether contract to perform work for certain price had been performed. Wood v. Washington [Wis.] 115 NW 810.

39. Schott v. Swan [S. D.] 114 NW 1005.

40. Floto v. Floto, 233 Ill. 605, 84 NE 712.

41. Penn v. Georgia, etc., R. Co., 129 Ga. 856, 60 SE 172; First Nat. Bk. v. McCullough [Or.] 93 P 366.

error,[42] but the court may not advance the order of proof so as to deprive a party of his legal right to rebut after the defense has closed.[43] Where the trial judge does not refuse in terms to open the case as a matter of discretion, his consent to open the case is implied.[44] In California on application to reopen a case after amendment to make pleadings conform to proof, the application must show that the complaining party was misled or prevented from introducing evidence to rebut that upon which the amendment was based, and if the case be reopened he will be able to present testimony to overcome the same.[45]

Timely objection See 8 C. L. 2186 must be made to improper questions,[46] but where the inadmissibility first appears by the answer,[47] or it was admitted on an assurance of other proof or connection which was not supplied,[48] or the witness made an irresponsive answer putting before the jury what the court had properly ruled could not be shown, such testimony should be stricken out on motion.[49]

Cumulative testimony See 8 C. L. 2186 may be limited or excluded,[50] though it may not be error to admit it.[51]

42. Where in ejectment plaintiffs introduced original patent and record of subsequent deeds and rested and defendant's thereupon introduced one of locators of lode within boundaries of patented land such evidence not objectionable because introduced prior to proof that vein or lode was known to exist at date of application for patent. Noyes v. Clifford [Mont.] 94 P 842.

43. Where opportunity was given to introduce rebuttal before defense had rested or any evidence whatever had been put in and plaintiffs failed to avail themselves thereof, this does not deprive them of legal right to rebut after defense had closed. Allen v. Phoenix Assur. Co., 12 Idaho, 653, 88 P 245.

44. Moore v. Central of Georgia R. Co., 1 Ga. App. 514, 58 SE 63.

45. Hedstrom v. Union Trust Co. [Cal. App.] 94 P 386.

46. See Saving Questions for Review, 10 C. L. 1572. When apparent that answer will contain evidence necessarily inadmissible motion to strike comes too late unless preceded by an objection to question. Spiking v. Consolidated R. & P. Co. [Utah] 93 P 838. No abuse of discretion to refuse to strike answer that man was very careful to question if he was careful in personal injury action. Id. Where evidence has been admitted without objection, court may refuse to strike merely cumulative testimony along same line. Skinner Mfg. Co. v. Danville [Fla.] 44 S 1014. Evidence showing activity of real estate broker, in action for brokerage commissions. Id. Hearsay introduced to show activity of broker in procuring sale where evidence is close and conflicting and hearsay likely to be damaging should be struck. Id.

47. Johnston v. Beadle [Cal. App.] 91 P 1011. Where on cross-examination statements of personal experience made in direct examination are shown to be unsubstantiated. Defguard v. New York, etc., R. Co. [N. J. Err. & App.] 67 A 609. Where defendant testifies as of his own knowledge and subsequent answers shows information based on hearsay. Holman v. Edson [Vt.] 69 A 143.

48. If party clearly makes purpose for which evidence is offered appear and promises to follow it up and connect it with other evidence which would make it material and relevant, trial court may recieve it conditionally. Stearns & Culver Lumber Co. v. Adams [Fla.] 46 S 156. Where several written instruments are successively offered in evidence for stated purpose of showing certain timber rights were vested in defendant, and such instruments taken as entirety fail to show such rights and no offer or promise is made to connect proffered instruments with other testimony so as to make them material and relevant, they are properly excluded. Id. Letters admitted upon promise of proof of authority of agent to write them should be stricken where such authority is not shown. Frorer v. Landon, 130 Ill. App. 93. In action for libel for charging plaintiff as village attorney with giving dishonest advice to council, testimony that after beginning of libel suit plaintiff was employed to collect claim against village admitted on promise of counsel to connect it with plaintiff's relation with party owning claim before suit and while village attorney properly stricken out on failure to do so. Smith v. Hubbell [Mich.] 14 Det. Leg. N. 874, 114 NW 865. Declaration of alleged agent not connected as promised, properly struck. Gieger v. Levin, 110 NYS 203.

49. Where general financial condition immaterial and witness asked "during period you have been dressmaker state means of support" answer "I have no other means or resources," properly stricken as irresponsive and inadmissible. Johnston v. Beadle [Cal. App.] 91 P 1011.

50. Testimony fully covered by other testimony may be excluded. Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488. Court may exclude testimony of witness at former trial, substantially the same as that given at pending trial. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 96 SW 53. Striking out portion of answer merely reiterating what witness already testified to and which was not in dispute proper. Seivert v. Galvin [Wis.] 113 NW 680. Testimony tending to establish relevant fact may not be excluded as cumulative because similar, but independent facts are already in evidence. Ogden v. Sover-

Stipulations or admissions. See 8 C. L. 2166—If a party make an admission in a plea either by himself or his attorney and subsequently amend the pleading and strike it, it can be introduced in evidence as an admission on his part made either by himself or his attorney,[52] and while, when so stricken out, he is no longer conclusively bound by it, may be introduced in evidence as an admission of fact,[53] but a mere statement of counsel made in argument, touching the construction of a paper, will not estop his client from contending for a different construction in a subsequent litigation, it not appearing that the court acted on such construction or adjudicated it to be correct.[54]

Evidence admissible for one purpose only See 8 C. L. 2166 may be admitted without limitation where the objection to it is general.[55] Evidence competent against one defendant though incompetent against codefendants is properly admitted.[56]

§ 4. *Custody and conduct of the jury.* See 8 C. L. 2167—The evidence of misconduct by or affecting the jury must be clear and convincing.[57] The conduct of the court or its officers should not be such as may tend to coerce a verdict,[58] and the

eign Camp, Woodmen of World [Neb.] 113 NW 524. Where employment to act as broker was conceded evidence tending to show such facts, properly excluded. Rawland v. Hall, 121 App. Div. 459, 106 NYS 55.

51. Not error to permit doctor signing proofs of death previously introduced in evidence and uncontradicted to testify to same facts. Haapa v. Metropolitan Life Ins. Co., 150 Mich. 467, 14 Det. Leg. N. 775, 114 NW 880. In suit on life insurance policy, plaintiff cannot complain that large number of witnesses, many of them of great weight, testified. Taylor v. Security Life & Annuity Co., 145 N. C. 383, 57 SE 139.

52, 53. Fitzgerald Cotton Oil Co. v. Farmers' Supply Co. [Ga. App.] 59 SE 713.

54. Particularly where it does not appear that adverse party was misled or was intended to rely on it, or that he did in fact rely upon it and act to his injury. Baker v. Davis, 127 Ga. 649, 57 SE 62. Party to timber lease held not estopped by construction placed thereon by his counsel in argument on application for ad interim injunction. Id.

55. Evidence that one claiming strip of land by adverse possession said that if there were not certain amount of land on one side of fence, fence properly belonged sufficient distance over to make that amount admissible to show no adverse claim. Schaubuch v. Dillemuth [Va.] 60 SE 745.

56. Hansen v. Kline [Iowa] 118 NW 504.

57. Village of Genoa v. Riddle, 132 Ill. App. 637.

Sufficient misconduct where juror unknown to parties or court view alleged defective switch. Floody v. Great Northern R. Co., 102 Minn. 81, 112 NW 875. Verdict will not be set aside because one of jurors visited scene of accident pending trial and reported results, where each juror deposes that his verdict was based solely on evidence and instructions and that alleged visit was not discussed by jurors or urged in their deliberations. Dittman v. New York, 110 NYS 40.

Misconduct insufficient where affidavit's conflict and alleged misconduct might have occurred after labors were ended or have been ineffective upon verdict. Strand v. Grinnell Automobile Garage Co. [Iowa] 118 NW 488. Verdict will not be set aside upon mere suspicion of misconduct, as where two equally credible witnesses contradict each other as to circumstances complained of. Village of Genoa v. Riddle, 132 Ill. App. 637. Action of jury in sending out for refreshments while deliberating. Long v. Davis [Iowa] 114 NW 197. Publication during progress of criminal case, in paper of large circulation in municipality where trial is held, of articles in which it is charged that attempts to have been made to bribe jury together with pictures of certain jurors alleged to have been offered bribes, and appearance of copies in court room, does not afford ground for granting motion to discharge jury where there is no evidence offered that papers came into hands of any jurors or were read by them. Ryan v. State, 10 Ohio C. C. (N. S.) 497. Fact that jury is taken from consideration of cause which has been continued to next day, and sworn in other causes, not ground for reversal in absence of showing of improper conduct by jurors in interim. Haines v. Thompson, 129 Ill. App. 436.

58. Where, after jury had deliberated two hours, court called them in, asked if they had agreed or were likely to do so and how they voted, without saying in whose favor and sent them back and twice repeated proceeding, held not coercion of verdict. Winn v. Ingram, 2 Ga. App. 757, 59 SE 7. Where judge jocularly remarked to foreman out of hearing of the jurors that he would hold jury for two weeks and take them with him to another place, not ground for reversal where though repeated to other jurors it was understood as a joke and did not affect verdict. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 110 SW 199. Verdict set aside where court on jury reporting inability to agree after having considered case for about ten hours urged them to attempt to agree and thereby save county costs of second trial and suggested that a compromise verdict would be valid. Cornelison v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 14, 103 SW 1186. Statement of court to jury after day of deliberation that they should go over matters patiently, that twelve men could only ar-

lawyers should keep away from jurors when out of the court room during trial and not converse with them beyond the exchange of the usual salutations of the day.[59] Where the court enters an order that the jury remain together, they should not be allowed to become separated even before the instructions are given by the court and the case put into their hands to consider their verdict,[60] but their disobedience is harmless where no injury resulted.[61] The length of the confinement of the jury[62] and recalling them to interrogate them as to what evidence they considered in arriving at a verdict is within the court's discretion.[63]

It is largely discretionary with the trial court what papers shall be taken out by the jury. See 8 C. L. 2166—The statutes of some states provides that the jury may take with them all books of account and all papers which have been received in evidence, except depositions.[64] In Iowa this statute is construed to be permissive and not to make it the duty of the court in the first instance to send out the papers introduced, but when requested by either party the papers should be sent out and failure to do so constitutes error,[65] but unless the error is prejudicial it is not ground for reversal.[66]

Allowance of a view See 8 C. L. 2166 ordinarily rests in the discretion of the court,[67]

rive at verdict by freely discussing subject before them, that it took time, etc., not coercive. Houston, etc., R. Co. v. Darwin [Tex. Civ. App.] 20 Tex. Ct. Rep. 30, 105 SW 825. That bailiff in response to question from juror said "disagreement unknown to the court" and "judge once kept jurors sixty-four hours because they would not agree," insufficient to warrant reversal. Larson v. Chicago Union Trac. Co., 131 Ill. App. 286.

59. Where one of defendant's counsel played cards with some of jurors after evidence closed and arguments partly made, verdict set aside. Austin v. Langlois [Vt.] 69 A 739.

60. In re Abel's Estate [Nev.] 93 P 227.

61. Harmless where not shown jurors were tampered with, improperly influenced, and no circumstances indicate any rights were violated or damage suffered. In re Abel's Estate [Nev.] 93 P 227.

62. Confinement of twenty-four hours not abuse where evidence is conflicting and case was on trial for ten days. Chicago City R. Co. v. Shreve, 128 Ill. App. 462. That jury remained in retirement but ten minutes, insufficient to impeach or weaken verdict. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Civ. Rep. 818, 104 SW 399.

63. In personal injury suit where lower court denied motion because it did not appear justice required recall. Curtis v. Laconia Car Co. Works [N. H.] 67 A 220. Proper to permit jury to take pleadings in slander case. Raynold v. Vinier, 109 NYS 293.

64. Code, § 3717. McMahon v. Iowa Ice Co. [Iowa] 114 NW 203. Under Rev. St. 1895, art. 1303, where abstract of title is introduced in evidence independently of attached deposition also introduced to show abstract was made from records, abstract is independent piece of written evidence and may be taken by jury. Frugia v. Trueheart [Tex. Civ. App.] 20 Tex. Ct. Rep. 535, 106 SW 736. Under Rev. St. 1895, art. 1303, where witness testified with reference to certain telephone calls in controversy from slips containing marks and abbreviations which were unintelligible except as explained by them, such slips were mere memoranda and not written evidence contemplated by statute and court did not err in refusing to let jury take them out in retirement. Wiggs v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 110 SW 179.

65. McMahon v. Iowa Ice Co. [Iowa] 114 NW 203.

66. Error in not sending written statement of witness that he had been drinking some, not prejudicial where jury had fact before them properly otherwise. McMahon v. Iowa Ice Co. [Iowa] 114 NW 203.

Proper for jury: Mere calculation of what plaintiff claimed to be due him under evidence. Person & Riegel Co. v. Lipps [Pa.] 67 A 1081. Statement of particulars of account which will afford salutary assistance to jurors. Id. On issue of ownership of team report signed by defendant to casualty company stating he owned team. Sibley v. Nason [Mass.] 81 NE 887. Under § 12, c. 31, code 1899 (Code 1906, § 3982) proper to take certain letters introduced without taking all. Cobb v. Dunlevie [W. Va.] 60 SE 384. Magnifying glass used by court and witnesses in connection with evidence of alleged alteration of instrument. Grand Lodge A. O. U. W. v. Young, 128 Ill. App. 628.

Improper: Not error to refuse to send out bill of particulars. Citizens' Sav. Loan & Bldg. Ass'n v. Weaver, 127 Ill. App. 252. Proper to refuse to permit jury to take certain memoranda from which witnesses testified containing unintelligible and unexplained entries from which the jury might have drawn improper inferences. Wiggs v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 110 SW 179.

67. Cobbey's Ann. St. 1903, § 1268. Beck v. Staats [Neb.] 114 NW 633. Properly refused where jury on inquiry of court said they understood situation from drawing, and distance to place of view was great. Stephens v. Elliott [Mont.] 92 P 45. Whenever in opinion of court it is proper that jury should have view of real property which is subject of litigation, it may order jury to be conducted in custody of proper officer thereto and place shall be shown to them by the judge or by a person appointed

and its action will be reviewed only in case of abuse.[68] The Nebraska statute in this connection has been held to authorize them to be sent anywhere within the jurisdiction of the state even though without the county and jurisdiction of the court.[69]

View by court. See 8 C. L. 2168

TROVER; TRUST COMPANIES; TRUST DEEDS, see latest topical index.

TRUSTS.

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This article does not treat, except in a general way, of trust deeds, so called, given as security for a debt or, more accurately, security deeds with power of sale,[70] or charitable gifts,[71] or the construction of the trust as violating the law of perpetuities and accumulations,[72] nor does it treat of trustees of bankrupts,[73] or incompetents;[74] nor of the trust relations of attorney and client,[75] guardian and ward,[76] parent and child,[77] partners,[78] or personal representations.[79] The obligation of the state as to lands held for public use is also excluded.[80]

§ 1. *Definitions and distinctions.* See 8 C. L. 2169—A confidence reposed in one

by court for that purpose. In re Jackson St. In Seattle [Wash.] 91 P 970. Ballinger's Ann. Codes & St. § 4998, held applicable to condemnation proceedings. Id. Not improper for court to appoint as person to accompany jury person who was officer and witness for city in condemnation proceedings, where rights of complaining party were not prejudiced. Id.

68. Stephens v. Elliott [Mont.] 92 P 45. Not error where jury would not have been aided and judges refused view on account of doubt as to whether jury might go outsie of county and court's jurisdiction. Beck v. Staats [Neb.] 144 NW 633.

69. Beck v. Staats [Neb.] 114 NW 633.

70. See Chattel Mortgages, 9 C. L. 560; Foreclosure of Mortgages on Land, 9 C. L. 1378; Mortgages, 10 C. L. 855.

71. See Charitable Gifts, 9 C. L. 555.

72. See Perpetuities and Accumulations, 10 C. L. 1167.

73. See Bankruptcy, 9 C. L. 343.

74. See Infants, 10 C. L. 238; Insane Persons, 10 C. L. 287.

75. See Attorneys and Counsellors, 9 C. L. 300.

76. See Guardianship, 9 C. L. 1551.

77. See Parent and Child, 10 C. L. 1072.

78. See Partnership, 10 C. L. 1100.

79. See Estates of Decedents, 9 C. L. 1154.

80. See Riparian Owners, 10 C. L. 1528 as to shore lands; see also Parks and Public Grounds, 10 C. L. 1079; Dedication, 9 C. L. 939.

to whom an estate in property is conveyed or set over, that he will permit another to take the profits and enjoy the estate according to terms agreed upon, is a trust.[81] Voluntary trusts are simply devices by which donors effectuate gifts, either of property or its beneficial use and enjoyment, to a designated donor,[82] and transfer by a living person of all of his property is a general trust.[83] Trusts are classified generally as express,[84] implied,[85] and resulting trusts.[86]

§ 2. *Express trusts. Definition and elements.* See 8 C. L. 2170—Express trusts are those which are created by the direct and positive acts of the parties by writing,[87] or parol.[88] A designated trustee and a property given him to manage for a beneficiary are the essentials,[89] the subject-matter and beneficiaries must be described with certainty,[90, 91] the trustee[92] must be definitely designated, but equity will not ordinarily allow a trust to fail for want of a trustee.[93] That the settlor reserves some control over the property,[94] or the power of revocation,[95] does not affect the validity of the trust. The beneficiary's right of enjoyment need not be immediate.[96] A gift to a third person for the benefit of another is sufficient,[97] but a mere employment is not.[98] There must be an intent to create a trust,[99] and a transfer of title [1] for a valid consideration,[2] but such transfer need not be by express terms.[3]

Declaring or creating the trust. See 8 C. L. 2170—Any one seized of the fee may declare a trust.[4] A minor may do so, subject to his own power of avoidance.[5] The instrument must disclose an intent to create the trust,[6] and where such intent is

81. Wilson v. Kennedy [W. Va.] 59 SE 736.

82. In re Podhajsky's Estate [Iowa] 115 NW 590.

83. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

84. See post, § 2.

85. Express and implied trusts are distinguishable in that the latter arises from circumstances provable by any legal evidence, while the former is created by agreement which, though not necessary to be in writing, must be manifested or proved by writing. Eagle Min. & Imp. Co. v. Hamilton [N. M.] 91 P 718. See post, §§ 3, 4.

86. Express and resulting trusts are to be distinguished in that in the former the trust relation is rightful and permanent, while in the latter there is no such element of right and permanency. Butts v. Cooper [Ala.] 44 S 616. See post, § 4.

87. Ames v. Howes, 13 Idaho, 756, 93 P 35.

88. Eagle Min. & Imp. Co. v. Hamilton [N. M.] 91 P 718. See post, this section "Necessity of Writing."

89. Putnam v. Lincoln Safe Deposit Co. [N. Y.] 83 NE 789; Ranney v. Byers [Pa.] 68 A 971.

90. Brown v. Brown's Adm'rs [Ky.] 110 SW 831. The fact that creator of trust fund may during his life time consume it does not render the trust void for uncertainty. Keyes v. Northern Trust Co., 130 Ill. App. 508, afd. 227 Ill. 354, 81 NE 384.

91. Seabrook v. Grimes [Md.] 68 A 883.

92. Tremenheere v. Chapin, 56 Misc. 208, 107 NYS 166.

93. Trusts conferring discretionary powers will not be defeated because trustee fails to exercise such powers, either from inability, legal disability, or refusal to act. Childs v. Waite, 102 Me. 451, 67 A 311. Fact that will does not name trustee, and does not permit appointment by county court, does not defeat will as a trustee will be appointed by chancery. Duyer v. Cahill, 228 Ill 617, 81 NE 1142.

94. Mersereau v. Bennett, 108 NYS 868.

95, 96. Noble v. Learned [Cal.] 94 P 1047.

97. Hall v. Hall [Kan.] 93 P 177.

98. An employment to sell real estate, and discharge certain indebtedness with the proceeds, is not an express trust, but merely the creation of the relation of principal and agent. Forest v. Rogers [Mo. App.] 106 SW 1105.

99. The intent to create a trust is requisite to its creation. Noble v. Learned [Cal.] 94 P 1047; Seabrook v. Grimes [Md.] 68 A 883. Whether a trust was intended is a question of fact. Noble v. Learned [Cal.] 94 P 1047.

1. A letter to son by father that he had retained certain of his mother's stock for him in such manner that the creditors of neither could touch it, but who exercised full control over it and never transferred it to the name of the son, does not create a trust. Paine v. Paine [R. I.] 67 A 127.

2. An agreement, when carried out, to help the settler, is a sufficient consideration. Lee v. Hamilton, 218 Pa. 468, 67 A 780.

3. A writing, under which the trustee acted, which recited that, "I authorize my said attorney to sell any and all of the above mentioned stocks and property if he deem it necessary to my best interests, and I hereby constitute and appoint him my true and lawful attorney to sign my name, receive for me the moneys and receipt for same and perform for me and in my stead any and all acts necessary to accomplish the sale and transfer of said stocks and property, and to invest all and any moneys which he holds for me as my attorney as he may deem best for my interests," is sufficient. Mersereau v. Bennett, 108 NYS 868.

4. One to whom real estate is conveyed by the trustee and beneficiary. Hiss v. Hiss, 228 Ill. 414, 81 NE 1056.

5. Eldriedge v. Hoefer [Or.] 93 P 246.

6. Testator, by will devised husband life

clear, no particular form of words is necessary,[7] the words "trust" or "trustee" not being indispensable.[8] And though a declaration in pleadings may suffice,[9] there must be an explicit declaration of trust, or circumstances which show beyond a reasonable doubt that a trust was intended to be created.[10] Hence, an ineffectual attempt to make a gift will not create a trust,[11] nor will a mere declaration of a purpose to create one,[12] nor will indefinite and unsigned memoranda.[13]

*Spendthrift trust.*See 8 C. L. 2172—A gift of an income, with protection from alienation or claims of creditors, is a spendthrift trust,[14] and so is one created for the purpose of protecting the settlor against his own incompetency.[15]

estate in certain lands, and provided he should control and have possession thereof until his death for his support and maintenance, free from any debts, etc., against him, in order that he might protect, care for, and support himself and daughter. He was appointed executor. Execution against him was levied on life estate in the lands and claim interposed by him as executor of wife. A year had not elapsed after his qualification. Case submitted on agreed statement of facts, in which it was stated that husband and daughter had been living on land since death of testatrix, and were so living at time of trial. Held, that will created no trust in executor as such in regard to life estate, his duty was only that of administering the property under the will. Day, Avery & Co. v. Cox. [Ga.] 61 SE 121. The purpose to create it may be gathered from the language of the instrument by giving to the words employed their customary significance. Martin v. Preston [Wash.] 94 P 1087.

7. Putnam v. Lincoln Safe Deposit Co. [N. Y.] 83 NE 789. Any words that indicate with reasonable certainty the intent of the settlor to create the trust and the subject, purpose and beneficiary are sufficient. Noble v. Learned [Cal.] 94 P 1047. It is sufficient if the writing contains the substantial terms of the trust, or at least sufficient to identify the subject-matter by writing. And the trust may be established from a series of writings. Nolan v. Garrison [Mich.] 14 Det. Leg. N. 915, 115 NW 58. Intention of suitor must control, and where he gives to person to whom he delivers possession of property power to sell and receive proceeds, power to invest such proceeds and power to exercise usual acts of ownership, with specific directions as to how the property and its income is to be disposed of, a trust is created. Mersereau v. Bennett, 108 NYS 868. Recitals showing a valuable consideration and that grantee purchased as agent are sufficient. Greenleaf v. Land & Lumber Co. [N. C.] 60 SE 424. It is enough if it be clearly stated or declared in writing or orally, if the property be personal, that it is held or deposited in trust for the person named. In re Podhajsky's Estate [Iowa] 115 NW 590. A deed granting lands to one for the use of another, vesting the legal title in the trustee and the equitable title in the cestui qui trust, creates a trust. Blake v. O'Neal [W. Va.] 61 SE 410. A will reciting the conveyance of property to testator in trust for the benefit of grantor sufficiently manifests the existence of the trust. Hiss v. Hiss, 228 Ill. 414, 81 NE 1056. A declaration that suitor holds an undivided part of certain lands in trust for named beneficiary, their sole use and benefit, and further covenants to convey same to him, is sufficient. Lee v. Hamilton, 218 Pa. 468, 67 A 780. Declaration that "arrangement with Mr. B. is this: All money invested by him in Byers' place to be placed to his credit to bear interest from date credit given till paid. When total principal and interest paid, residue or remainder of property to belong to C. W. & R. B. R.," and signed sufficient. Ranney v. Byers [Pa.] 68 A 971. Where, at sale of land under judicial decree to satisfy claims of judgment creditors, third person agrees with owner, in consideration of $100, and payment to him by latter of purchase money, to bid in the land and convey it to wife of owner, such third person is thereby constituted trustee of express trust in favor of beneficiary so designated in said agreement. Ruckman v. Cox [W. Va.] 59 SE 760. A paragraph of a will reciting that, "I will that John L. Herrick shall have the rent of my farm free of cost for the term of ten years for paying the taxes. This is for improvement that he has made and will make before my decease. The said John L. Herrick shall have the privilege of purchasing the farm at the end of ten years for $1,000; and at the end of ten years from my decease, I will that the farm, or the $1,000, if sold, shall be divided, one-half to my brother, Benjamin E. Low and his heirs, and the other half equally divided between Evans A. Lawson, Addie E. Anns and John E. Herrick and their heirs," created a trust. Herrick v. Low [Me.] 69 A 314. Immaterial discrepancies in the description will be discarded to give effect to the intention of the settlor. Nona Mills Co. v. Wright [Tex.] 18 Tex. Ct. Rep. 637, 102 SW 1118.

8. Immaterial that trustee is styled "committee." Boreing v. Faris, 31 Ky. L. R. 1265, 104 SW 1022. Trustee designated as attorney. Mersereau v. Bennett, 108 NYS 868.

9. Bridgman v. McIntyre, 150 Mich. 78, 14 Det. Leg. N. 614, 113 NW 776.

10. McKee v. Allen, 204 Mo. 655, 103 SW 76.

11. Noble v. Learned [Cal.] 94 P 1047.

12. Brown v. Brown's Adm'rs [Ky.] 110 SW 831.

13. Unsigned memoranda, not purporting to state any agreement in reference to the fund or liability, nor tending to manifest or prove a trust, not sufficient. Humphrey v. Hudnall, 233 Ill. 185, 84 NE 203.

14. Olsen v. Youngerman [Iowa] 113 NW 938.

15. Hackley v. Littell, 150 Mich. 106, 14 Det. Leg. N. 636, 113 NW 787.

*Bank deposits in trust.*See 8 C. L. 2173—Before one will be held to have made bank deposits as a trustee, his intent to so do must appear.[16] A deposit in trust is merely tenative [17] until made irrevocable.[18] The question of title to the fund cannot be decided on petition for an order to deliver the bank books.[19]

*Active and passive trusts.*See 8 C. L. 2175—Where the trustee has duties to perform in executing it, the trust is active.[20] A naked trust for the execution of the power to sell and divide cannot be created.[21]

Separable trusts.—A separable trust may be created for each beneficiary, whose interests may be separate and distinct.[22]

*Validity.*See 8 C. L. 2170—The validity of a trust in real estate is determined by the law of the situs of the real estate.[23] It is not essential to its validity that its continuance should be dependent upon the life of a beneficiary,[24] but a trust by which real property is devised to trustees in fee, to be conveyed by them to the beneficiaries, is void,[25] nor can one declare a trust in his own property, reserving to himself an interest which cannot be reached by a judgment creditor,[26] nor can a trust be raised if a gift was intended.[27] Intestacy, however, does not necessarily follow from the fact that the trust is void.[28]

*Construction.*See 8 C. L. 2173—In every case, so far as it can be ascertained,[28] the intent of the settlor must prevail,[30] unless it is repugnant to some rule of law.[31] To

16. Rambo v. Pile [Pa.] 69 A 807.

17. Such a deposit by one in his own name in trust for another is merely tentative. The fact of withdrawal is a decisive act of disaffirmance. Tierney v. Fitzpatrick, 122 App. Div. 623, 107 NYS 527.

18. It can be made irrevocable only in one of two ways: First, by some unequivocal act (such as delivery of pass book to beneficiary) or declaration by depositor in his lifetime or, second, by death of depositor, before beneficiary, without revocation, or some decisive act or declaration of disaffirmance. The fact of withdrawal is a decisive act of disaffirmance. Tierney v. Fitzpatrick, 122 App. Div. 623, 107 NYS 527. Depositor directed depositary to add the name of another to his as owner and creditor, and authorized signatures of depositor and such third person were delivered to depositary. Bank book was changed by adding name of third person, and "payable to either or survivor of either." Trust irrevocable. Kelly v. Albany Trust Co., 108 NYS 214. Depositor changed pass book and account, adding name of another with hers; also, ordered bank to pay certain sum to that other, with interest, which was full amount of deposit. Depositor thereafter drew interest from time to time, and other party also drew interest, giving her receipt. Latter had no other fund in bank. Drew her check as owner of account. Trust irrevocable. Kelly v. National Sav. Bk., 108 NYS 216.

19. Testator deposited money in bank in name of an incompetent in trust for testator. Committee of incompetent could not compel testator's executor to deliver to him the bank book. In re Woltman, 120 App. Div. 798, 105 NYS 665.

20. A trust directing property to be held by trustees for benefit of son, to be expended by them as needed, and if he marries and has issue, to use the income, or principal, if necessary, for their support is an active trust. Parker, Holmes & Co. v. Bushnell [Conn.] 67 A 479. Where a special duty is to be performed by the trustee in respect to the estate, the trust is active. Such as to collect rents and profits, to sell the estate, etc. Webb v. Borden, 145 N. C. 188, 58 SE 1083. Trust to manage estate, keep it in repair and make periodical payments to the beneficiaries, is active. Matthern v. Rankin, 228 Ill. 318, 81 NE 1024.

21. In re Murray, 108 NYS 1047.

22. As where settlor directs trustee to divide the estate devised to him into as many equal portions as suitor should leave issue surviving. In re Murray, 108 NYS 1047.

23. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184.

24. Stringer v. Young, 190 N. Y. 545, 83 NE 690.

25. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184.

26. Hackley v. Littell, 150 Mich. 106, 14 Det. Leg. N. 636, 113 NW 787.

27. The gift having failed because attempted in a wrong mode, cannot be carried into execution as a trust. Pennell v. Ennis, 126 Mo. App. 355, 103 SW 147.

28. In re Heberle's Estate [Cal.] 95 P 41.

29. Instrument directing all dividends, on stock, whether in money or scrip, to go to life tenant, intended that dividend obligations were to go to such life tenant. In re Robinson's Trust, 218 Pa. 481, 67 A 775.

30. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076. Trust for the benefit of R. for life and at his death, for benefit of his children "now living," for their lives, does not embrace children of R. born after execution of the deed. Angell v. Angell [R. I.] 68 A 583. Settlor, widow, 75 years old, paralyzed, with two daughters, one of which nursed and cared for her, the other not having shown any kindness to her for many years, deeded to former certain property "in trust for myself during the term of my natural life, and upon and after my death, in trust

arrive at this intent, the whole instrument [32] in all its parts must be considered.[33] It is permissible to transpose two clauses which declare the trust,[34] or consider several instruments,[35] and the construction of the parties may be considered.[36] The scope and duration of the trust will not be extended by implication beyond the plain and reasonable construction of the language employed.[37] The term, "next of kin," does not include the widow of the beneficiary,[38] nor do the words, "pay over," necessitate the construction that the estate must be converted into money.[39]

Establishment. See 8 C. L. 2173—Though the rule does not prevail in all jurisdictions,[40] it is settled law, even though the deed be absolute on its face,[41] that a trust may be established by parol,[42] but the rule must not be so applied as to permit the passing of title by mere parol agreement.[43] The evidence must clearly establish the trust; [44] it must be precise and unequivocal,[45] strong and unquestionable,[46] full and explicit, and not open to grave doubts, contradictions and circumstances.[47] It may be established by letters between the parties,[48] or the evidence of one interested witness,[49] but the uncorroborated testimony of husband and wife is insufficient to establish it in favor of the latter,[50] and declarations and admissions are either not admissible [51] or received with caution.[52]

Necessity of writing. See 8 C. L. 2178—A trust in personalty [53] and, in some juris-

for the benefit of said grantee, and her heirs and assigns forever." Construed to be a grant upon a trust, or a use upon a use, which remained unexecuted. Lima v. Cook [Mass.] 83 NE 12.

31. Pope v. Patterson [S. C.] 58 SE 945.

32. Bascom v. Weed, 53 Misc. 496, 105 NYS 459; In re Froelich's Estate, 122 App. Div. 440, 107 NYS 173.

33. A declaration, "wishing to provide as safely and permanently as possible for their comfort, maintenance and support," shows clearly that the intention was to provide, not only for the maintenance, but also for the comfort of those mentioned, and further that the provision should be permanent. Parrish v. Mills [Tex.] 20 Tex. Ct. Rep. 342, 106 SW 882.

34. Pope v. Patterson [S. C.] 58 SE 945.

35. Contract to pay annuity, and will declaring real estate conveyed at the same time to be held in trust for the payment thereof, may be construed together to establish the trust. Hiss v. Hiss, 228 Ill. 414, 81 NE 1056.

36. Poland v. St. Joseph's Orphan Asylum Ass'n of Cincinnati, 9 Ohio C. C. (N. S.) 535.

37. Seabrook v. Grimes [Md.] 68 A 883.

38. United States Trust Co. v. Miller, 109 NYS 938.

39. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

40. Bell v. Edwards [S. C.] 59 SE 535.

41. Verbal testimony is admissible to ingraft a parol trust upon a deed absolute on its face. Whitfield v. Diffie [Tex. Civ. App.] 19 Tex. Ct. Rep. 935, 105 SW 324.

42. In re Washington's Estate [Pa.] 69 A 747. Where the writing is complete parol evidence is admissible to identify the subject-matter. Otherwise, if incomplete, as where no subject-matter is named. Ranney v. Byers [Pa.] 68 A 971. The statute could have been taken advantage of and the evidence excluded, but the matter was waived by failure to object. Forest v. Rogers [Mo. App.] 106 SW 1105.

43. Allen v. Allen [Tex.] 20 Tex. Ct. Rep. 479, 107 SW 528.

44. Saunders v. Wells [Iowa] 112 NW 205. A trust will not be declared on vague and uncertain evidence. Leatherwood v. Richardson [Ariz.] 94 P 1110. Father conveyed son land absolutely and afterwards included it in mortgage to third persons. Held that fact that father occupied premises for short time, and that deed was possibly without consideration not sufficient to establish trust. Erwin v. Lutz [Iowa] 112 NW 785.

45. On a very close case, evidence held sufficient, there being evidence among other things, of declarations by legatee that she held legacy in trust. In re Washington's Estate [Pa.] 69 A 747; Hudkins v. Crim [W. Va.] 61 SE 166.

46. Tuite v. Tuite [N. J. Eq.] 66 A 1090.

47. Suit to establish trust thirty-four years after date of deed. Crawford v. Workman [W. Va.] 61 SE 322. Conflicting and inconsistent evidence and averments are insufficient to establish a parol trust as against the testimony of the grantee and the recital of the deed. Stillwagon v. Coe, 6 Ohio N. P. (N. S.) 149.

48. Eagle Min. & Imp. Co. v. Hamilton [N. M.] 91 P 718.

49. Whitfield v. Diffie [Tex. Civ. App.] 19 Tex. Ct. Rep. 935, 105 SW 324.

50. Property in name of husband, and creditors seeking to subject it for his debts. Cheuvront v. Horner [W. Va.] 59 SE 964.

51. Mooney v. Mooney [Conn.] 68 A 985. Declarations by grantor, after conveyance, that grantee holds in trust for him, are not admissible. Crawford v. Workman [W. Va.] 61 SE 322.

52. Evidence of admissions by the party holding the legal title should be received with great caution, unless corroborated by circumstances. Hudkins v. Crim [W. Va.] 61 SE 166.

53. Mersereau v. Bennett, 108 NYS 868; Noble v. Learned [Cal.] 94 P 1047.

dictions, in real estate[54] may be created by parol, but even in these jurisdictions, where land is conveyed to one for valuable consideration paid by him, coupled with a trust to hold for the use of a third person who pays nothing, such trust must be declared or proved by writing.[55] In other jurisdictions a trust cannot be created except by writing,[56] though it need not be embraced in a single instrument.[57] In the absence of a contrary showing, a writing will be presumed.[58] Nevertheless, fraud,[59] accident or mistake,[60] partial,[61] or complete performance, will prevent the application of the statute.[62]

*Recording.*See 6 C. L. 2176—Recordation is necessary as against third persons.[63]

§ 3. *Implied trusts, generally.*See 6 C. L. 2177—Whether precatory words create a trust depends on several considerations,[64,65] and a trust will not be implied unless it clearly appear that it was testator's intention to create it.[66]

§ 4. *Constructive trusts. A. Trusts raised where property is held or obtained by fraud.*See 6 C. L. 2177—A constructive trust arises where there is no express or implied, written or verbal, declaration of the trust,[67] and the same circumstances that create it with reference to realty will do so as to personalty.[68] Since trusts are not within the statute of frauds,[69] equity impresses with a trust property obtained by fraud actual or imputed,[70] and a purchaser with notice of the fraud may be held as

54. Express trusts in land are not within the statute of frauds, and can exist and be proved by parol. Sullivan v. Fant [Tex. Civ. App.] 110 SW 507. Section 7 of the statute of Elizabeth not enacted in West Virginia. Hudkins v. Crim [W. Va.] 61 SE 166. The rule that the facts which show a trust in land must exist at the instant title passes, and that no prior or subsequent, verbal agreement will create it, is true only of resulting trusts. Parol express trusts invariably grow out of prior oral agreements. Henderson v. Rushing [Tex. Civ. App.] 20 Tex. Ct. Rep. 115, 105 SW 840. Husband having purchased land for which he could not pay, agreed with his wife that if she would make the payments, land should be hers, which she did. Held to create an express trust. Allen v. Allen [Tex. Civ. App.] 105 SW 53.

55. This rule holds where there is an absolute deed, though not upon valuable consideration, upon oral trust to hold for use of grantor, and to convey it to him on request. Crawford v. Workman [W. Va.] 61 SE 322. The declaration of trust must be evidenced by writing, otherwise they are void. Budnek v. Budnek [Mo. App.] 107 SW 458. The writing as evidence of a trust or acknowledgment thereof must manifest a previous trust. Mere vague and ambiguous words capable of an inference which negatives a trust cannot be regarded as a complience with the statute. Bell v. Edwards [S. C.] 59 SE 535. While the trust need not be created in writing, it must be manifested by writing signed by the party holding the title. Ranney v. Byers [Pa.] 68 A 971; Ostheimer v. Single [N. J. Eq.] 68 A 231.

56. Cardiff v. Marquis [N. D.] 114 NW 1088.

57. Wilson v. Kennedy [W. Va.] 59 SE 736.

58. Logan v. Brown [Okl.] 95 P 441.

59. Chadwick v. Arnold [Utah] 95 P 527.

60. Logan v. Brown [Okl.] 95 P 441.

61. Kennedy v. Anderson [Wash.] 94 P 661.

62. Hence, where one, as agent, takes title to real estate under parol agreement, and sells it, he is liable for the proceeds. Logan v. Brown [Okl.] 95 P 441.

63. Putnam v. Southworth [Mass.] 83 NE 887.

64, 65. The rule seems to be that, "in order to create a trust and make precatory words operative in a will, it must appear that the estate is not absolute, and that the disposition thereof is not unrestricted; that the subject of the devise and the devisors must be certain, and the trust definite, and the language used must be positive and imperative, and not such as would indicate a mere wish or desire on the part of the testator, which might be complied with or not at the pleasure or discretion of the legatee." Hence, where testator devised to his wife absolutely, requesting that his law library be kept intact for five years, and if, at that time his brother showed in his wife's judgment, sufficient promise, that she give said library to him; and that if wife die without heirs of her body, and the estate devised to her be intact, she will, with the exception of a certain named sum, devise remainder to such of his brothers and sisters as may seem proper to her, does not create a precatory trust. Wood v. Wood [Ky.] 106 SW 226.

66. In re Murray, 108 NYS 1047.

67. A constructive trust arises when one person, occupying a fiduciary position, or having placed himself in such position in relation to another, that good faith requires him to act for the other and not himself, acquires the title to property in himself, in place of in the cestui que trust. These cases involve fraud, or a breach of trust in acquiring the title to the property in himself. Butts v. Cooper [Ala.] 44 S 616.

68. Brissell v. Knapp, 155 F 809.

69. Russell v. Wade [N. C.] 59 SE 345; Swick v. Rease [W. Va.] 59 SE 510.

70. Powell v. Yearance [N. J. Eq.] 67 A 892; Sullivan v. Fant [Tex. Civ. App.] 110 SW 507. Where one has obtained the prop-

trustee.[71] The fraudulent procuring or diversion of a devise or bequest is a common example of the fraud which will create a constructive trust.[72] The principal is also applied where a grantee has fraudulently procured property,[73] and, if the grantor re-

erty of another by fraud, equity will impress upon it a constructive trust, until it reaches the hands of an innocent purchaser. Brissell v. Knapp, 155 F 809. A trust ex maleficio arises wherever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and then retains the property as his own. There must be an element of positive fraud accompanying the promise and by means of which the acquisition of the legal title is wrongfully consummated. Chadwick v. Arnold [Utah] 95 P 527. O. W. and S. agreed to purchase land in partnership, O. buying with his own money and taking title in himself, agreeing orally, to hold for W. and S. and to convey two-thirds on payment by them for such interest. Later there was a written agreement in form of ordinary contract of sale to convey W. and S. each one-third on payment of their shares. This agreement was subsequently enforced in suit for specific performance. Held, facts not raise constructive trust ex maleficio. Ostheimer v. Single [N. J. Eq.] 68 A 231. Parties entered into parol agreement by which one was to locate and mark mining claims and prepare notices, the other party to record them at his own expense, each to have a half interest. Claimant located claims and delivered notices for recordation by defendant, but he failed to record them within the time limited, and relocated the claims for his own benefit. The failure to record, and the relocation, was fraud on claimant, and defendant held interests as trustee for claimant. Casaden v. Dunbar [C. C. A.] 157 F 62. Guardian agreed to turn over property for benefit of sureties, but being pressed for money, afterwards conveyed it all to one of the sureties for a sum much less than its value. Held, a trustee ex maleficio for benefit of other sureties. McDonald v. Tyner, 84 Ark. 189, 105 SW 74.

71. Tye v. Manley [Ind. T.] 104 SW 636.

72. Mother who had made will in favor of her son, was induced to make a new will leaving property to her brother, who agreed to make codicil to his own will giving property derived from sister to her son. Property so derived impressed with trust in favor of testator's son. Jimmerson v. Ferguson, 109 NYS 845. Testator desiring P. to have certain house he supposed he owned, wished to alter will so as to include it, the will having been prepared for signing; on being advised he could not devise house to P. because owned by Y., proposed to change will so as to give P. sum equal to value of house, but Y., with object of inducing him to sign will as drawn, and not delay to make change, assured him this would be all right. Held to impress a trust on portion of Y. Powell v. Yearance [N. J. Eq.] 67 A 892. Where husband holds legal title to real estate belonging to wife, and to prevent her making a will devising estate to another promises to convey it to such other, and she, relying on the promise does not make will, and dies, the refusal of husband to make conveyance is such fraud as will create constructive trust on property wife refrained from devising. Gemmel v. Fletcher [Kan.] 92 P 713. A statement by the legatee that "I will provide for her well."—meaning the claimant—should not be considered sufficient to deprive a legatee of the benefit of the statute of wills. The sole equitable basis of depriving a legatee or devisee of full protection of the statute of wills is, that by reason of a promise to testator made by legatee or person through whom legacy was given, testator was induced to make, or leave unaltered legacy or devise and the equitable remedy for the purpose of preventing said statute from becoming means of fraud is that of impressing property received by legatee under will, with a trust arising ex maleficio, and converting legatee as a holder of property bequeathed, into a trustee. Heinisch v. Pennington [N. J. Eq.] 68 A 233. Lands descending to an heir will be impressed with a trust in favor of an intended beneficiary, where it appears that the heir fraudulently prevented a devise to the beneficiary. It must appear, however, that decedent relied on the heir's representations. Tyler v. Stitt [Wis.] 112 NW 1091.

73. Where a mother during her last illness, believing she will not recover, conveys all her real estate to her husband at his request, upon his oral promise to devise said real estate to their demented child, and care for him during father's natural life, though no express trust is created, a court of equity will interpose to prevent a wrong, and declare the grantee a trustee ex maleficio for the protection of grantor's intended beneficiary, and though father, day succeeding execution of deed, made will, complying with that part of agreement, deed and will were parts of same transaction, and grantee will not be permitted to revoke will or incumber or dispose of said real estate to detriment of incompetent child. Schneringer v. Schneringer [Neb.] 116 NW 491. If it appear that the parol promise induced the execution of the conveyance, and it is specifically averred that grantee made promise fraudulently, intending not to comply with it, and did not comply with it an act of bad faith is shown. Smith v. Smith [Ala.] 45 S 168. Grantor conveyed to grantee certain property, on condition that grantee give him support and home for life on sale of property and refusal of grantee to comply with conditions grantor entitled to proceeds of sale on ground of the trust relation. Grote v. Grote, 121 App. Div. 841, 106 NYS 986. Grantee secured conveyance by causing grantors to believe that it was made to cure defects in their former conveyances. Virginia Pocahontas Coal Co. v. Lambert [Va.] 58 SE 561. The court will presume that grantor's intentions were consistent with a prudential regard for his own interests as well as with the utmost good faith toward his creditors. Chamberlain v. Chamberlain [Cal. App.] 95 P 659.

lied on his representations, it is no defense that he, by his grant, wronged others,[74] but a trust will not be raised by the breach of a mere verbal promise to purchase land and convey it on request.[75] Such trust may also be impressed on lands purchased at judicial sales,[78] or procured under an option.[77] Another illustration may be found in advantages derived through fiduciary, or confidential, relations,[78] and where such relations are shown, the burden of proving good faith rests on defendant.[79] But no trust is impressed on lands held under decisions of the land office,[80] or decrees of the probate court procured by fraud,[81] unless the fraud was extrinsic or collateral.[82] In

74. That grantor desired to protect his property against creditors cannot be set up by the trustee. Chamberlain v. Chamberlain [Cal. App.] 95 P 659.

75. There must have been an original misrepresentation by means of which the legal title was obtained, and an original intention to circumvent and get a better bargain by the confidence reposed. Smith v. Smith [Ala.] 45 S 168.

76. In a chancery suit instituted for that purpose land of H. decreed to be sold to satisfy a judgment held by S. Shortly after entry of decree S. by written agreement with H. becomes owner and assumes possession of the land. Subsequently, upon advertisement for sale by commissioner appointed R. enters into verbal agreement with S. and the commissioner to buy in the land for S. at a sum sufficient merely to cover costs and expenses of sale, and, upon repayment to him by S. of such purchase money, to convey ths land to S. R. bids in the land, pays agreed price, and obtains from commissioner conveyance of legal title. Held, relation of trustee and cestui qui trust is thus created between R. and S., and any purchaser from R., with notice thereof, must account to the holder of equitable title. Swick v. Pease [W. Va.] 59 SE 510. Under oral agreement to attend judicial sale and purchase for another and hold it as security for payment of price, owner did not attend, relying on promise. Purchase made by promisor and title taken in own name. Trust declared in favor of owner statute of frauds not applying, relief not based on the agreement, but on chilling of bidding at sale, resulting from conduct of defendant. Jarrot v. Kuker [S. C.] 59 SE 533.

77. One who procures the execution of an option to himself which it was agreed should be executed to him and another will be considered, the trustee of the other to the extent of his interest. Russell v. Wade [N. C.] 59 SE 345.

78. Where one, through the influence of confidential relations acquires title to property which he cannot conscientiously retain, the court will impress a trust upon it. Sloan v. Macartney, 108 NYS 840. But the principle which forbids one from holding property acquired through a fiduciary relation does not denounce or destroy all rights and titles thus acquired. It is that one who occupies a fiduciary relation to another in respect to business or property, who by the wrongful use or knowledge he obtains through that relation, or by the betrayal of confidence reposed in him under it, acquires a title or interest in the subject-matter of the transaction antagonistic to that of his correlate, thereby charges his title or interest with a constructive trust for benefit of latter, which cestui qui trust may enforce or renounce at his option. The test of such a trust or prohibition is the fiduciary relation and a betrayal of the confidence reposed, or some breach of duty imposed under it. Howe v. Howe & Owen Ball Bearing Co. [C. C. A.] 154 F 820. Where purchaser at public sale assumed to act as agent, or sustained a confidential relation to the owner of land, equity will impress, for latter's benefit, constructive trust on land on tender of purchase money. Carr v. Graham, 128 Ga. 622, 57 SE 875. An agent purchasing property for himself under circumstances violative of the good faith with which an agent is charged in his dealings as such with his principal, will be considered a trustee. Curry v. King [Cal. App.] 92 P 662. Mother who was aged and feeble, residing with defendant, owned money in bank. Defendant drew money on mother's check and deposited it in another bank to credit of himself in trust for her. Later he withdrew it and redeposited it in his own name individually. Fiduciary relations existed and he held money as her trustee. Gick v. Stumpf, 110 NYS 712. Where a conveyance of real estate is delivered by daughter to father under oral contract that it is in trust for daughter, and contract proven by declarations of father at time deed delivered, and it is shown trust not carried out, a court of equity will enforce trust, as refusal to carry it out is constructive fraud, based on relations of confidence existing between the parties. It is immaterial whether fraud intended or not, or whether it existed at time conveyance delivered. In such case courts of equity do not enforce the trust in violation of statute of frauds but relief granted as based on constructive fraud and the confidential relation. Cardiff v. Marquis [N. D.] 114 NW 1088. Where trustee under deed for benefit of creditors took no personal beneficial interest in the estate conveyed the rule governing transactions between parties occupying relation of confidence does not apply. Boddie v. Ward [Ala.] 44 S 105.

79. Curry v. King [Cal. App.] 92 P 662.

80. Decision of Land Office that lands in controversy wers mineral and issued patent to defendant after claimant's grantor had applied to purchase said lands as agricultural. No claim that patent obtained through mistake or misapplication of law. No averments of fraud extrinsic to the proceedings. Cragle v. Roberts [Cal. App.] 92 P 97.

81. This rule is absolute, at least in every case where there has been no breach

no event will the trust be impressed on property other than that obtained by the fraud,[83] nor can it affect persons not in privity with the fraud.[84] An actual fraudulent intention is not necessary;[85] the fraud must be clearly shown.[86]

(§ 4) *B. Trusts by equitable construction in the absence of fraud.*See 8 C. L. 2179 The rule that equity will charge with a constructive trust one who takes, however innocently, the property of another, applies no less to judicial than private sales,[87] and though a trust will not be impressed upon what appears by deed alone to be an absolute title, without clear proof showing a beneficial interest in another, as well as its nature, character, and extent,[88] where it appears that one has acquired title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner.[89] Hence, a trust will be impressed on a patent,[90] on property taken under agreement to satisfy owner's obligations,[91] on lands sold for delinquent taxes and redeemed,[92] on lands held by vendor for vendee,[93] on lands in possession of parties whose rights were recognized,[94] on land conveyed by father to son with a verbal agreement that upon the former's death the property will be conveyed to his daughters,[95] and a husband holding property belonging to his wife's separate estate is presumed a trustee.[96] If the grantor was mentally weak, the burden to show his capacity and the fairness of the transaction is on defendant.[97] No trust will be impressed on property purchased by life tenant with funds in his possession as such,[98] nor will a mother, who purchases from bidder at foreclosure sale of her husband's lands, be held an involuntary trustee for her children,[99] nor will a mere overdraft by one member of a partnership, in the absence of fraud, impress property purchased with a trust in favor of the remaining partners.[1]

§ 5. *Resulting trusts.*See 8 C. L. 2180—A resulting trust, is not within the statute

of duty arising from a fiduciary relation on the part of those securing the probate of the will. Forgery of the will, is no ground upon which to found the trust, as this could have been set up in the probate court. Tracy v. Muir, 151 Cal. 363, 90 P 832.

82. Trustees of void trust concealed facts from probate court, and under its order sham sale had and decree of distribution to themselves, equitable relief granted. Campbell-Kanannanakoa v. Campbell [Cal.] 92 P 184.

83, 84. Powell v. Yearance [N. J. Eq.] 67 A 892; Heinisch v. Pennington [N. J. Eq.] 68 A 233.

85. Gemmel v. Fletcher [Kan.] 92 P 713.

86. Butterfield v. Nogales Copper Co. [Ariz.] 95 P 182; Wright's Adm'r v. Wright [Ky.] 108 SW 266; Jenson v. Jenson [Kan.] 91 P 86; Heinsch v. Pennington [N. J. Eq.] 68 A 233. The age of claimant and the confidence he reposed in grantee may be sufficient in connection with other evidence, to justify the charge of constructive fraud. Chamberlain v. Chamberlain [Cal.] 95 P. 659.

87. Purchasers of an insurance policy at judicial sale must account to beneficiaries for surplus over what he paid for policy and interest. Irons v. U. S. Life Ins. Co. [Ky.] 108 SW 904.

88. Sloan v. Macartney, 108 NYS 840.

89. White v. Whitcomb, 13 Idaho, 490, 90 P 1080.

90. Where a patent is issued to one party when it should go to another, a trust will be declared. Brooks v. Garner [Okl.] 94 P 694.

91. McCutchen v. Roush [Iowa] 115 NW 903.

92. A tenant or agent whose duty it was to pay the taxes on land, and who, neglecting to do so, allowed it to become delinquent for nonpayment of same and to be sold to the state at sheriff's sale, and, in suit by state to sell it for benefit of school fund, redeemed it in his own name, took such title as he thereby acquired from state in trust for benefit of landlord or principal. Blake v. O'Neal [W. Va.] 61 SE 410.

93. Where agreement relative to conveyance of real estate is executed by one and executory on part of other, latter holds his interest by operation of law, in trust for former in accordance with terms of contract. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

94. To place a son in possession, after making a deed which was never delivered, and on his death, recognize the right of his children to the land, allowing their guardian to control it will constitute the father a constructive trustee. Cyrus v. Holbrook [Ky.] 106 SW 300.

95. Hilt v. Simpson, 230 Ill. 170, 82 NE 588.

96. The question in such cases is whether the evidence of the transaction and its surrounding circumstances clearly shows the intention of the wife to change the status of the property. Title Ins. & Trust Co. v. Ingersoll [Cal.] 94 P 94.

97. Sloan v. Macartney, 108 NYS 840; Gick v. Stumpf, 110 NYS 712.

98. Vanatta v. Carr, 229 Ill. 47, 82 NE 267.

99. Williams v. Nierenberg [N. D.] 115 NW 510.

1. Stone v. Baldwin, 127 Ill. App. 563.

of frauds,[2] and unless abolished by statute,[3] arises by operation of law, where the consideration is paid by one and the title is conveyed to another,[4] and this is true, although the title be taken in the name of another than the purchaser.[5] But to have this effect, the conveyance must be so taken without the knowledge of the party furnishing the consideration,[6] and it will be presumed the trustee took the title in his own name without such knowledge.[7] The trust arises, if at all, at the very time the legal title passes.[8] It goes only to the extent of the consideration paid,[9] nor

2. Reemsnyder v. Reemsnyder, 75 Kan. 565, 89 P 1014.

3. It is provided by statute in some jurisdictions that no use or trust shall result in favor of the person making payment. Wipfler v. Wipfler [Mich.] 15 Det. Leg. N. 341, 116 NW 544. Where trusts of this character have been abolished, the party furnishing the consideration may recover it on the implied promise raised by law. Brooks v. Brooks, 31 Ky. L. R. 969, 104 SW 392.

4. Butts v. Cooper [Ala.] 44 S 616. The trust results by presumption of law, and without any agreement. Casciola v. Donatelli, 218 Pa. 624, 67 A 901; De Roboam v. Schmidtlin [Or.] 92 P 1082. A resulting trust arises in favor of one who pays the purchase money and takes title in the name of another, because of the presumption that he who pays intends a beneficial interest in the thing purchased for himself, but this presumption cannot arise when a contrary intent appears. Bell v. Edwards [S. C.] 59 SE 535. That, when it is shown that a party pays his money for land, but takes the deed in the name of another a trust results, is no longer a subject of doubt. Johns v. Carroll [Md.] 69 A 36. Property purchased with the separate estate of a wife will be impressed with a trust. Hudson v. Wright, 204 Mo. 412, 103 SW 8. A trust results where a debtor, to secure a loan, purchases and has the conveyance made to his creditor. When the debt is paid the trust is enforcible. Hall v. O'Connell [Or.] 95 P 717. A trust results on recovery by grantee of damages reserved by grantor. On conveyance grantor reserved right to damages to property conveyed by railroad company, said damages having been recovered by grantee after conveyance. Wehrenberg v. Seiferd, 56 Misc. 356, 106 NYS 901. Where the weight of evidence indicates that gifts of money were intended to be for the use and enjoyment of two persons, and it is invested in real property and the title taken in the name of one of them, and their conduct at the time and for a period thereafter indicates that the ownership of the property was regarded by both of them as joint, a resulting trust will be implied which may be established by parol. Coolidge v. Smith, 5 Ohio N. P. (N. S.) 481. A railroad company furnishing consideration for land for use by it, the legal title taken in another to hold for its use and to be conveyed to it whenever it was ready to use it, a resulting trust is created. Birmingham, etc., R. Co. v. Louisville, etc., R. Co. [Ala.] 44 S 679. They cannot grow out of a contract to hold title for a third person who advances the purchase money. Butts v. Cooper [Ala.] 44 S 616. A mere promise to buy land for another, the purchaser furnishing the consideration, will not raise a trust. Mitchell v. Wright [Ala.] 46 S 473. Where the testimony shows an agreement beyond what the law would imply, it involves an express agreement inconsistent with a resulting trust. Bell v. Edwards [S. C.] 59 SE 535. The title to realty purchased with funds of another which the purchaser had no right to use for that purpose does not vest in those whose funds were used. In this instance the widow, at a sale made by administrator to pay debts, bid in her individual name, upon a piece of real estate. It was adjudicated to her in her individual name, and deed so executed to her as purchaser. By adjudication she became personally bound for price. The fact that, after purchase, administrator instead of requiring her to pay cash credited her with amount of bid, taking her receipt for amount corresponding to her bid, cannot be invoked by children as having the effect of making them purchasers of the land. Warner v. Hall & Legan Lumber Co. [La.] 46 S 108. Where, from a bill to enforce an alleged trust, it appears that one of defendants owned a half interest in real estate and the other two defendants owned the other half interest, and that the one who owned the half interest agreed with complainant to purchase the other half interest owned by other defendants for joint benefit of complainant and such defendant, but failed to carry out his agreement with complainant and purchased said half interest for his own benefit alone, and it does not appear such defendant occupied any sort of fiduciary relation to complainant, and complainant did not furnish any of the money for such purchase and had no legal interest or contract right in the property, and defendant was not agent of complainant in management or control of the property, no constructive or resulting trust is shown. Parramore v. Hampton [Fla.] 45 S 992.

5. F., occupying fiduciary relations to C., with C.'s money purchased lands which were conveyed to F.'s infant son. Fowler v. Alabama Iron & Steel Co. [Ala.] 45 S 635.

6. If consideration is paid by one, a deed to another does not vest absolute title in him, unless such title was taken with knowledge or consent of him who furnished the consideration. Perkinson v. Clarke [Wis.] 116 NW 229. A trust will not result where claimant had knowledge of the transactions and acquiesced in them. Bertelsen v. Bertelsen [Cal. App.] 94 P 80; Porter v. Douglass [Cal. App.] 94 P 591. Purchase by guardian with ward's money, title in name of guardian's mother without consent of ward. Resulting trust. Manahan v. Holmes, 110 NYS 300.

7. Perkinson v. Clarke [Wis.] 116 NW 229.

8. Allen v. Allen [Tex. Civ. App.] 105 SW 53.

9. Lindley v. Blumberg [Cal. App.] 93 P

can it arise at all unless the claimant has furnished in some form [10] the entire consideration,[11] though he need not have paid it all.[12] The rule that it must be paid in full at the time the title vested [13] is not inflexible,[14] or general,[15] and it will be presumed he furnished it,[16] nor will he be debarred from testifying as to his intentions when he gave the money.[17] The trust cannot arise if the money was loaned,[18] or the purchase made for claimant's benefit, or on his account.[19] Though the cestui que trust has an equitable estate in the land which may be dealt with as property,[20] the right to call upon another to execute the trust is a mere right and not an estate,[21] nor can relief be obtained upon a statutory bill merely.[22]

Presumption of gift or advancement. See 8 C. L. 2182—When the deed is taken in the name of one whom the person paying the purchase money is under a legal or moral duty to provide for, the presumption is that the purchase was intended as an advancement or settlement.[23]

Establishment. See 8 C. L. 2183—While resulting trusts may be shown by parol [24] and even established by the evidence of claimant,[25] the burden of doing so is on such claimant [26] and is not successfully borne by the introduction of vague and unsatisfactory evidence,[27] but, on the contrary, the evidence must be clear,[28] strong, unequivocal and unmistakable,[29] satisfactory [30] and convincing [31] beyond doubt.[32] Any

894; Bell v. Edwards [S. C.] 59 SE 535. Purchase by guardian with joint funds of herself and wards, trust resulted to extent of ward's funds used. Hix v. Armstrong [Tex. Civ. App.] 108 SW 797.

10. The purchase money, or some definite portion of it, should be paid at the time of conveyance in some form or other. A common understanding that though debt contracted was to be regarded as claimant's debt, upon paying which certain rights were to arise to him in reference to the land, is not sufficient. Crawford v. Crawford, 77 S. C. 205, 57 SE 837. It is indispensable to the establishment of a trust that payment of the purchase price should actually be made by the person asserting the trust, or a binding obligation therefor incurred by him as part of the original transaction at or before the time of conveyance. Payment at a subsequent time is not sufficient. De Roboam v. Schmidtlin [Or.] 92 P 1082. The consideration may be a bond or mortgage. Casciola v. Donatelli, 218 Pa. 624, 67 A 901.

11. Storm v. McGrover, 189 N. Y. 568, 82 NE 160.

12. Freeman v. Freeman [C. C. A.] 153 F 337.

13. A subsequent payment of the purchase money notes is not sufficient. Allen v. Allen [Tex.] 107 SW 528.

14. The rule that payment of money by the cestui que trust at the time of the purchase is indispensable to the creation of a trust does not apply to a trustee who already had in himself the title to property of the cestui que trust, which it had been agreed should be sold and the proceeds invested in other property. Coolidge v. Smith, 5 Ohio N. P. (N. S.) 481.

15. The consideration need not have been paid by claimant at the precise time the deed was executed. Freeman v. Freeman [C. C. A.] 153 F 337.

16. Stambaugh v. Lung, 232 Ill. 373, 83 NE 922.

17. Bertelsen v. Bertelsen [Cal. App.] 94 P 80.

18. Stambaugh v. Lung, 232 Ill. 373, 83 NE 922; Bell v. Edwards [S. C.] 59 SE 535.

19. Where purchase is made by one with his own money and title taken in his own name, a trust cannot be raised in favor of another by reason of the existence of a parol agreement by purchaser that he would make purchase for benefit of another and permit him to thereafter make payment. Subsequent payment will not by relation attach resulting trust to purchase. Ostheimer v. Single [N. J. Eq.] 68 A. 231.

20. Birmingham, etc., R. Co. v. Louisville, etc., R. Co. [Ala.] 44 S 679.

21. Hence, a conveyance by such person will not carry as appurtenant any easement he does not own. Latta v. Catawba Elec. & P. Co. [N. C.] 59 SE 1028.

22. Fowler v. Alabama Iron & Steel Co. [Ala.] 45 S 635.

23. This presumption may be overcome by evidence, but to have that effect the evidence must be of the most convincing and satisfactory kind. De Roboam v. Schmidtlin [Or.] 92 P 1082. Where the conveyance is made to purchaser's wife, it is presumed a gift. This is merely a presumption, and, though strong, is not conclusive, subject to give way before evidence, the burden resting, however, on those who seek to establish the trust. Casciola v. Donatelli, 218 Pa. 624, 67 A 901.

24. Such trust is exempt from the operation of the statute of frauds and may be shown by parol. Johns v. Carroll [Ind. App.] 69 A 36; De Roboam v. Schmidtlin [Or.] 92 P 1082; Holly St. Land Co. v. Beyer [Wash.] 93 P 1065; Freeman v. Freeman [C. C. A.] 153 F 337.

25. Claimant having paid consideration and gone into possession. City Nat. Bk. v. Crahan [Iowa] 112 NW 793.

26. Scott v. White [Or.] 91 P 487; Laughlin v. Laughlin [Pa.] 69 A 288.

27. Couch v. Sizemore [Ky.] 106 SW 801.

28. Johns v. Carroll [Md.] 69 A 36; Feaster v. Kendall [S. C.] 61 SE 260.

29. Bell v. Edwards [S. C.] 59 SE 535.

30. Siffermann v. Hill, 131 Ill. App. 174;

legal evidence is admissible,[33] and, hence, declarations and conduct of the parties,[34] or whatever occurs at time of the purchase relating to the payment of the consideration by the claimant, may be testified to,[35] and a written agreement between the parties may disprove the existence of the trust.[36]

§ 6. *The beneficiary. Who may be.* See 8 C. L. 2183—A slave could not be a beneficiary.[37]

His estate, rights, and interests. See 8 C. L. 2183—The rights of the parties to declaration of trust are determined by its terms.[38] The beneficiary is not bound by the declaration in the absence of his assent,[39] though an acceptance of its benefits may be presumed.[40] His rights accrue when the instrument is delivered,[41] in the absence of a manifested intent to postpone the enjoyment.[42] His interest immediately vests,[43] placing in him a legal estate in the property as against all persons except the trustee.[44] Where a bequest amounts merely to a dry trust, the beneficiary is entitled to the

Lowry v. Tivy [N. J. Err. & App.] 69 A 172. Where evidence is doubtful, and not entirely clear and satisfactory, or is capable of reasonable explanation upon theories other than that of the existence of resulting trust, such trust will not be held sufficiently established. Stambaugh v. Lung, 232 Ill. 373, 83 NE 922.

31. In such a case the degree of proof required is, perhaps, exhausted by reason of the latitude allowed in admitting evidence to prove fraud. Scott v. White [Or.] 91 P 487.

32. Bell v. Edwards [S. C.] 59 SE 535. The evidence to establish the trust must be clear and convincing, and when the testimony is in doubt or conflicting, the legal title must prevail. De Roboam v. Schmidtlin [Or.] 92 P 1082.

33. Facts by which a trust by implication of law arises may be established by parol evidence or by proof partly in parol and partly in writing and where the claim is that the purchase of the land was made by and for the benefit of several, and the conveyance taken in the name of only one, any writing prepared at the time as well as the negotiations of the parties, their acts and conduct, and all the circumstances in connection with the transaction tending to prove a trust, may be shown in evidence. Piper v. Piper [Kan.] 95 P 1051.

34. Declarations of wife, in whose name property transferred, that same was in her name, but property of husband, and husband's receiving money for it in presence of wife and retaining it, his wife saying nothing, admissible. Casciola v. Donatelli, 218 Pa. 624, 67 A 201. Declarations of a husband that he was trustee for his wife, and what he did and wanted done in connection with its management are admissible. Laughlin v. Laughlin [Pa.] 69 A 288.

35. This parol evidence is admissible, not only against the face of the deed, but in opposition to the answer denying the trust. Sutton v. Whetstone [S. D.] 112 NW 850.

36. A written agreement, made subsequent to purchase, wherein purchaser agreed to convey to parties for whom trust is claimed to exist a portion of land on payment of proportional share of purchase price, is inconsistent with existence of trust. Such agreement had also been enforced as an agreement for sale. Ostheimer v. Single [N. J. Eq.] 68 A 231.

37. The burden was on the one claiming the trust void for this reason to prove the fact. Nona Mills Co. v. Wright [Tex.] 18 Tex. Ct. Rep. 637, 102 SW 1118.

38. Cunniff v. McDonnell [Mass.] 81 NE 879; Hayes v. Robeson [R. I.] 69 A 686. Trust deed providing for sale of land when trustee deems it expedient, or upon direction of the **cestuis que trustent,** conveys no title to the beneficiaries which they could convey. Johnson v. Lee, 228 Ill. 167, 81 NE 834. Though the legal title be vested in the trustee, it may be provided that the cestui que trust shall have certain rights and privileges in the property. Mobile Transp. Co. v. Mobile [Ala.] 44 S 976. Deed created trust for benefit of wife for life, fee to her children and heirs of the body. Held, "children" word of limitation, and, on death of husband, wife took estate tail, converted by statute into fee simple. Wilson v. Heilman [Pa.] 68 A 674. Devise to C. certain share of estate, to be invested and annual interest paid to C., and on his death share to be divided among his children, creates life estate only. Xander v. Easton Trust Co., 217 Pa. 485, 66 A 759. Devise for life, power to lease, collect rents, and sell, distributing proceeds between two daughters gives life estate to tenant. Jennings v. Talbert, 77 S. C. 454, 58 SE 420

39. Such assent may be absolute or conditional. If absolute, a condition cannot be afterwards annexed without consent of other parties. Cunniff v. McDonnell [Mass.] 81 NE 879.

40. In re Podhajsky's Estate [Iowa] 115 NW 590.

41. New York Life Ins. & Trust Co. v. Cary [N. Y.] 83 NE 598.

42. And where the time of payment or distribution is merely postponed for the convenience of the fund or property, or to let in others, the vesting will not be deferred until that period. Williams v. Williams [Wis.] 115 NW 342.

43. That the trust is voluntary does not affect the rule. In re Podhajsky's Estate [Iowa] 115 NW 590.

44. In re Barclay's Estate [Cal.] 93 P 1012.

legacy free from any trust,[45] nor does he dispose of his interest by accepting a personal bond of the owner.[46]

The statute of uses, when the trustee has no duty to perform, operates to vest the title in the cestui que trust,[47] and the object in executing the use is to free the estate from the control of the trustee, and this cannot be effected by a mere substitution.[48] A deed to one person for the use of another, vesting the equitable title in the cestui que trust and the legal title in the trustee, creates a trust which is not executed in the former by the statute of uses.[49]

Rights between beneficiaries.[See 8 C. L. 2184]—As between life tenant and remaindermen, stock dividends are income and belong to the former.[50] One beneficiary is liable to the others for her proportional share of expenses assumed in their declaration of trust, if she assented to such declaration.[51] The statute of limitations does not begin to run till the beneficiary's death.[52]

Income and principal.[See 8 C. L. 2184]—On the death of the beneficiary, the income accrued will be paid in accordance with the intent of the settlor,[53] and if the trustee is required to pay it pendente lite, it must be subject to the legal consequences flowing therefrom.[54] The beneficiary cannot assign his interest in an income,[55] nor the principal, especially when precluded by decree of court,[56] nor can he assign the bond and mortgage securing his interest in the trust estate.[57]

Rights of creditors, and grantees.[See 8 C. L. 2185]—Creditor's cannot subject a trust fund set aside for the personal support of a beneficiary,[58] nor the principal or income of a spendthrift trust fund,[59] nor is the cestui que trust liable for money advanced by third persons to trustee with which to pay taxes,[60] and while a beneficial vested interest in his income,[61] and the income reserved to the settlor, may be reached, the principal cannot.[62] Where there is but one beneficiary,[63] or, where the power to sell for his own benefit is given absolutely to one of the beneficiaries, a sale by him will pass title, though the purchaser be such beneficiary.[64]

45. Guild v. Allen [R. I.] 67 A 855.

46. By accepting the personal bond of the owner as security for his beneficial interest in the trust estate, the cestui que trust does not dispose of such interest. In re Kirby's Will, 113 App. Div. 705, 100 NYS 155.

47. Pope v. Patterson [S. C.] 58 SE 945.

48. Young v. McNeill [S. C.] 59 SE 986.

49. Blake v. O'Neal [W. Va.] 61 SE 410.

50. Hyde v. Holmes [Mass.] 84 NE 318.

51. Cunniff v. McDonnell [Mass.] 81 NE 879.

52. Putnam v. Lincoln Safe Deposit Co. [N. Y.] 83 NE 789.

53. Property in trust, income payable to beneficiary, at whose death principal payable to surviving issue. On death of beneficiary, income properly payable to his issue. Bassett v. Wells, 56 Misc. 81, 106 NYS 1068.

54. The cestui que trust has no right in such case to an order for payment without prejudice to his rights. In re Ungrich, 122 App. Div. 49, 106 NYS 1051.

55. This rule applies whether the income is from real or personal property. Stringer v. Young, 190 N. Y. 545, 83 NE 690.

56. Hackley v. Littell, 150 Mich. 106, 14 Det. Leg. N. 636, 113 NW 787.

57. In re Kirby's Will, 113 App. Div. 705, 100 NYS 155.

58. Under a trust directing the fund to be expended for beneficiary, as he may need, for his, and, if he has any wife and issue, their comfort and support, creditors of his in a business venture, cannot subject the fund. Parker, Holmes & Co. v. Bushnell [Conn.] 67 A 479.

59. Castres v. Shotwell [N. J. Eq.] 68 A 774. Devise, income payable to children for fifteen years, realty not liable for any debts of any of them, no right in children to sell, pledge, or anticipate income, or incumber realty, the share of one dying descending to heirs or devisees, creditors of deceased child had no claim as against devisees. In re Fleming's Estate [Pa.] 68 A 960.

60. The trust estate can be made liable by subrogation to the trustee's rights only where he is insolvent, and, on settlement of his administration, the estate is indebted to him and only then when the advancement made by creditor has inured to benefit of trust estate or cestui que trust. Dantzler v. McInnis [Ala.] 44 S 193; Field v. Yeaman, 31 Ky. L. R. 12, 101 SW 368.

61. Cecil's Trustee v. Robertson [Ky.] 105 SW 926.

62. Egbert v. DeSolms, 218 Pa. 207, 67 A 212.

63. Bernheim v. Heyman, 31 Ky. L. R. 984, 104 SW 388.

64. Husband conveyed land in trust for wife, and at her death to children, and pro-

Liability of beneficiary for use of funds.[See 8 C. L. 2186]—A beneficiary, taking part of the trust fund into his possession, is liable therefor to the remainderman,[85] but the inventory is not evidence against him.[86]

Application of statute of limitations to beneficiaries.—Whenever the trustees holding the legal title is barred, their cestuis que trustent are barred also.[87]

§ 7. *The trustee. Judicial appointment.*[See 8 C. L. 2187]—As a trust should not fail for want of a trustee,[88] a beneficiary having an interest in the source of his income may apply for the appointment of a trustee therefor,[89] but the court cannot appoint a trustee to prosecute an appeal, the trust having terminated by the death of appellant trustee.[70] The probate court [71] of any county in the state may appoint a testamentary trustee.[72] The rules governing them being the same as those governing guardians and the administration of estates.[73]

Who considered trustee.[See 8 C. L. 2187]—An executor,[74] or administrator de son tort,[75] voluntary transferee,[76] a vendor, or a vendee's security,[77] life tenant's[78] devisee,[79] or one given full charge of an interest, may be considered trustees,[80] and acceptance may be shown by express promise or implied from silence,[81] or acts,[82]

vided that during his life dispose of the property as she might desire. Wife sold during husband's life, the grantee, on the same day, conveying to wife. Mandel v. Fidelity Trust Co. [Ky.] 107 SW 775.

65. With respect to what she had taken, she became trustee de son tort, and accountable with the trustee. Putnam v. Lincoln Safe Deposit Co. [N. Y.] 83 NE 789.

66. An inventory prepared by or for the trustee, unless acquiesced in by the beneficiary, is not evidence against him in an action for conversion of trust property. Putnam v. Lincoln Safe Deposit Co. [N. Y.] 83 NE 789.

67. So, too, where trustees hold as tenants in common, if one is barred, his cotrustees are also barred. Pope v. Patterson [S. C.] 58 SE 945; Webb v. Borden, 145 N. C. 188, 58 SE 1083.

68. Herrick v. Low [Me.] 69 A 314.

69. Beneficiary, having mortgage on real estate to secure bond for payment of annuity, has such interest in the realty as will entitle him to trustee therefor. In re Kirby's Will, 113 App. Div. 705, 100 NYS 155.

70. Hayford v. Municipal Officers of Bangor [Me.] 69 A 688.

71. In re Cary's Estate [Vt.] 69 A 736.

72. Where a testamentary trustee has been appointed by a probate court of the county where the will creating the trust was probated, the probate court of any county of the state where such will has been admitted to record has jurisdiction to appoint a testamentary trustee under said will, provided that at the time of the application for such appointment the beneficiary of the trust is a bona fide resident of the county in which the application is made. Boals v. Clingan, 6 Ohio N. P. (N. S.) 609.

73. The rules governing testamentary trusts and trustees are the same as those governing guardians and the administration of estates and the provisions of § 5981 and § 5986 are simply directory as to what court shall appoint such a trustee. Boals v. Clingan, 6 Ohio N. P. (N. S.) 609.

74. In a general sense, every executor is a trustee. In re Roach's Estate [Or.] 92 P 118.

75. An administrator de son tort will be considered a trustee of the property he assumes control of. Rougtell v. Strode, 126 Mo. App. 348, 103 SW 510.

76. A voluntary transferee, with or without knowledge of the trust, may be charged as a trustee. Chamberlain v. Chamberlain [Cal. App.] 95 P 659.

77. The vendor, on a contract for sale and purchase, is a constructive trustee of the purchaser, and a surety of the purchaser who pays purchase-money notes and takes conveyance in his name, knowing the facts, stands in no better position than the vendor, and he will be compelled to convey on payment to him of amount of notes. Stubbs v. Pitts, 84 Ark. 160, 104 SW 1110.

78. A widow to whom property was devised for life, with power of disposition "for her use and benefit," the residue at her death to be divided among the testator's children, is a quasi trustee for said children, and must answer to their charge that she has improvidently and wastefully used sums in excess of the reasonable expense of her support, moved out of the state and is dissipating the estate. Hobson v. Lower, 10 Ohio C. C. (N. S.) 323.

79. Although devisees are not designated as such, they may be regarded as trustees. Clause reads: "And it is my will that upon my death my said executors forthwith enter into possession of my estate and the whole thereof, and that absolute title rest in my said executors, hereinafter named; in trust however as hereinbefore provided." The legal estate vested in devisees as trustees. Korsstrom v. Barnes, 156 F 280.

80. One who is given full charge and control of another's interest is, as to that, a trustee. Westport Lumber Co. v. Harris [Mo. App.] 110 SW 609.

81. The acceptance of a trust may be shown by express promise of the legatee, or his assent may be implied from silence. In re Washington's Estate [Pa.] 69 A 747.

but, unless there is a contract to that effect, a debtor is never a trustee for his creditor.[83]

Succession and appointment.[See 8 C. L. 2187]—On the death of one trustee, the trust, powers, and duties fall to the survivor.[84] Though the settlor has the right to direct methods for filling vacancies and the appointment of successors in trust,[85] and the trustees, if given authority, may appoint their successors, subject to the final action of the court,[86] on the death [87] or incompetency of a trustee, the court may make, an appointment,[88] nor is it bound to follow the wishes of the parties.[89] The executor of the last testamentary trustee may ask for the appointment of such trustee's successor,[90] nor are contingent remaindermen necessary parties to the proceeding,[91] and if the parties interested in the appointment proceedings appear, it is immaterial that the citation was defective.[92] The appointment relates back to the inception of the trust,[93] and a trustee improperly appointed will be protected.[94]

Resignation, declination, or repudiation.[See 8 C. L. 2187]—The retiring trustee need not convey the trust property to his successor,[95] and the costs of his resignation will be paid by the estate.[96] Failure to give bond will not operate as a declination of the trust,[97] nor will a trustee be heard to repudiate the trust, if such act will work a fraud or wrong on beneficiaries.[98]

Removal.[See 8 C. L. 2187]—The power of removal must be exercised sparingly,[99] hence, trustees will not be removed because they are personally interested in a company, stock of which is in their hands as such trustees,[1] but they may be removed if insane.[2] A motion for removal may be decided without taking proof,[3] and when re-

82. An acceptance of a legacy under a decree of distribution is an acceptance of the trust. Decree gave property to distributee in trust, he having knowledge of its provisions. St. Mary's Hospital v. Perry [Cal.] 92 P 864.

83. Brackett's Adm'r v. Boreing's Adm'r [Ky.] 110 SW 276.

84, 85. Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 83 NE 166.

86. Selleck v. Thompson [R. I.] 67 A 425.

87. Where the duties imposed can only be performed by a trustee, on his death the court has power to appoint another. Appointment by will of same party as executor and trustee. Executor having performed his duties as such and died, remaining duties were those of trustee, and district court had power to appoint a successor to such trustee. McClelland v. McClelland [Tex. Civ. App.] 18 Tex. Ct. Rep. 120, 101 SW 1171. On the death of a sole surviving trustee of a testamentary trust, the supreme and the surrogate courts may appoint a successor. In re Brady's Estate, 110 NYS 755. But this jurisdiction is only so far as may be consistent with the power of the surrogate, not only to entertain a proceeding for appointment but to follow such proceeding during his judicial opportunity and leisure to a final determination. Tonnele v. Wetmore, 109 NYS 349.

88. Childs v. Waite, 102 Me. 451, 67 A 311.

89. It is proper, however, that he should listen to them and consult their interests in selecting a proper person for the position. Coster v. Coster, 109 NYS 798.

90. In re Brady's Estate, 110 NYS 755.

91. Whallen v. Kellner, 31 Ky. L. R. 1285, 104 SW 1018.

92. In re Brady's Estate, 110 NYS 755.

93. Parkhill v. Doggett [Iowa] 112 NW 189.

94. If improperly appointed, he should be protected to the extent, at least, of disbursements made in good faith. Coster v. Coster, 109 NYS 798.

95. Instrument provided trustees, and their successors in trust should act. Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 83 NE 166.

96. The costs of a proceeding to obtain approval of the trustee's resignation should be paid out of the trust estate. Richmond v. Arnold [R. I.] 68 A 427.

97. To have that effect, it must appear he refused to give bond when required. Attwill v. Dole [N. H.] 67 A 403.

98. Sullivan v. Fant [Tex. Civ. App.] 110 SW 507.

99. There must be a clear necessity for interference to save the trust property. Hence, where there is no want of integrity or capacity, security of property not endangered, remainderman whose interests are more substantial than life tenant's offer no objection, trustee having acted in good faith in investments and estate suffered no loss, he will not be removed at suit of life tenant, though his delay in converting certain securities into cash may invite criticism. Wiggins v. Burr, 54 Misc. 149, 105 NYS 649.

1. All but one of the beneficiaries, including the chief beneficiary of the trust, ask for trustees' retention, trustees having acted in good faith. In re Warren, 109 NYS 202.

2. Lunacy is not the same as death. Bascom v. Weed, 53 Misc. 496, 105 NYS 453.

3. In re Warren, 109 NYS 202.

moved, the trustee must pay over the principal to his successor and make good any deficit.[4]

§ 8. *Establishment and administration of the trust. A. Nature of trustee's title and establishment of estate.* See 8 C. L. 2188—The trustees have such title as is necessary to carry out the purposes of the trust,[5] which is generally determined from the terms of the instrument declaring the trust[6] and, unless there is a provision to the contrary, they hold as joint tenants.[7] A substituted trustee takes title by virtue of his appointment and not through conveyance.[8]

(§ 8) *B. Discretion and general power of trustees and judicial control.* See 8 C. L. 2189—The discretion of the trustee may be as large as that of the proprietor of the property,[9] but is limited to the granted powers.[10] It must be exercised always for the best intersets of the beneficiaries.[11] A power given as a personal trust and confidence, cannot be exercised by a substituted trustee,[12] and, where there is more than one trustee, all must join to make their action legal,[13] but testator may empower them to act by a majority.[14] While the court will execute the trust where the trustee has failed to do so, it will not exercise this power where the trust could not have been executed in the lifetime of the beneficiary[15] nor, ordinarily, where the trust is discretionary,[16] but if no security is exacted by the settlor, the court may in its dis-

4. Beach v. Beers [Conn.] 68 A 990.

5. The trustee takes that quantity of estate which the purposes of the trust require. Martin v. Preston [Wash.] 94 P 1087; Collins v. Crawford [Mo.] 103 SW 537. The trustee takes the quantum of legal estate necessary to the discharge of his declared powers and duties, regardless of technical terms. Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 83 NE 166; Noble v. Learned [Cal.] 94 P 1047. As between grantor and trustee, a deed granting and selling land to the latter for the use of a third person vests the legal title in him. Blake v. O'Neil [W. Va.] 61 SE 410.

6. Where, by terms of will, executor and trustee is invested with management and direction of real property of testator, and required to devote sufficient of rents and profits to support of widow and daughter during life, and to furnish aid to father and mother if required, retaining surplus not required for such purposes until sufficient is accumulated to discharge a mortgage on home of widow, legal title vests in executor and trustee until the trust created is discharged. Clark v. Fleischmann [Neb.] 116 NW 290. Trustee directed to use and manage estate as he thinks best, and to pay son income from certain portion yearly, and in his discretion pay him from time to time such part of said portion as in his trustee's judgment is proper for son's comfort and support, until said portion is all paid. Trustee took present vested legal estate, subject to execution of trust. Williams v. Williams [Wis.] 115 NW 342. Devise "for uses and purposes" named does not vest absolute title in trustees. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

7. Nothing passes to the heir or personal representative of a deceased joint trustee. Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 83 NE 166.

8. Coster v. Coster, 109 NYS 798.

9. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

10. Under power confiding property to be dealt with as his judgment deems advisable. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076. Cannot guarantee to a life tenant a fixed income. Beach v. Beers [Conn.] 68 A 990. Cannot divert the fund to any other use than that designated. A fund to be expended by trustees for the personal comfort and support of a particular beneficiary cannot be diverted by him to any other use. Parker, Holmes & Co. v. Bushnell [Conn.] 67 A 479.

11. Hayes v. Robeson [R. I.] 69 A 686. In case of an imperative trust, the trustee should execute it when the necessity arises. Bailey v. Worster [Me.] 68 A 698.

12. Smith v. Floyd, 57 Misc. 196, 107 NYS 231. A succeeding trustee, if the trust is not a personal one, may exercise his discretion as to the time and manner of expending the trust fund. Hayes v. Robeson [R. I.] 69 A 686.

13. Any attempted departure from this rule by direction of the testator must be strictly construed, and the power to act by less than the full number must be limited to the acts specifically designated, and may not be enlarged by implication. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

14. "Majority" has reference to a majority of the survivors, and not to majority of full number originally named. Bascom v. Weed, 53 Misc. 496, 105 NYS 459.

15. Trustee willing to do his duty, but beneficiary objected. Bailey v. Worster [Me.] 68 A 698.

16. Where a trust is discretionary a court of equity has no jurisdiction to interfere with its exercise so long as the trustee acts in good faith, either in exercising or in refusing to exercise the power vested in him. Givens v. Clem [Va.] 59 SE 413. The burden is on the party asking such control to show bad faith or abuse of confidence. Trout v. Pratt, 106 Va. 431, 56 SE 165.

cretion require it,[17] and, when necessary, direct the trustees to make proper allowances to the beneficiaries [18] or review a division of the trust fund.[19]

Instructions to trustee. See 8 C. L. 2190—The jurisdiction of equity to entertain bills for advice and direction is firmly established,[20] and when so exercised its instructions will be directed to carrying out the intent of the settlor to the best interests of the beneficiaries.[21] In such proceeding the estate should bear the expense.[22]

(§ 8) *C. Management of estate and investments.* See 8 C. L. 2190—It is the duty of the trustee to invest the fund in the manner authorized by law [23] and directed by the settlor,[24] but if power is not given to invest, and the interest of the trust estate requires such action it is the right and duty of the trustee to apply to the court for leave so to do.[25] Unless given by the will or the probate court, the trustee has no power to change the investment,[26] nor, if the will gives no general power of sale and re-investment, will the court imply any,[27] but if it deems the investment improper, it may order it changed,[28] though when this power is given by the court it is limited by the decree.[29] Under some circumstances, the beneficiary has the right of election on a change of the investment,[30] but such election is not necessarily binding on other

17. Life tenant, not kindly disposed toward remainderman; she had no property, except legacy; did not live in state; had made certain investments, without personal investigation; property in her hands, money and securities. Security proper. Scott v. Scott [Iowa] 114 NW 881.

18. In re Goodwin's Estate, 122 App. Div. 800, 107 NYS 784.

19. Fund left to town in trust, division of same by selectmen not final. North Troy Graded School Dist. v. Troy, 80 Vt. 16, 66 A 1033.

20. When the meaning of a will, deed, contract, or other instrument relating to the subject-matter of a trust is doubtful, and, by reason of such doubt, the trustee is embarrassed or exposed to danger in the execution of his trust, and the law affords him no remedy by which his rights, powers, and liabilities may be defined, and his duty indicated, a court of equity will construe the instrument, and declare its legal force and effect by way of advice and instruction. McDonald v. Jarvis [W. Va.] 60 SE 990.

21. Angell v. Angell [R. I.] 68 A 583. Where testator bequeathed fund of $25,000 in trust for wife, to be invested in good securities, of which the nature and character was "suggested, but not enjoined," income to be paid her during life, and residue of estate was held under will by same trustee for benefit of testator's children, with simliar directions as to investment, upon bill for instructions filed by trustee, who had been appointed by chancellor it was held, (1) that under special circumstances of the case trustee was authorized to keep fund for widow as part of general estate, without setting apart specific securities, and pay her an amount equal to six per centum per annum on principal after deducting certain fixed charges as directed in will; (2) that, although will directed payment of income of residuary trust fund to be paid yearly to and among children, trustee should pay guardian of child, there being but one, only so much income as was necessary for its maintenance, education, and support, and keep invested remainder of income as part of trust fund; (3) that interest paid to widow, upon amount of trust fund bequeathed for her benefit, should be computed from the day of death of testator. Baker v. Fooks [Del.] 67 A 969.

22. Bailey v. Worster [Me.] 68 A 698.

23. If the settlor had funds invested in securities a trustee is not authorized by law to invest in, it is his duty to convert them into cash and invest the proceeds as authorized. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

24. Power to invest in property suitable for a home, and to be used for that purpose, limits the power of investment to the purpose designated. Nor can an increase in the fund, as where it had been augmented by sale, be separated from the principal. Coleman v. Grimes [Ky.] 110 SW 349.

25. Branch v. De Wolf [R. I.] 68 A 543.

26. Bremer v. Hadley [Mass.] 81 NE 961.

27. The will provided that, "as money is paid into the hands of my executors, trustees or managers, I direct that it shall be invested in good dividend-paying stocks and not in real estate. Branch v. De Wolf [R. I.] 68 A 543.

28. In re Menzie's Estate, 54 Misc. 188, 105 NYS 925.

29. Trustee had no power under the will to change investment, and probate court authorized to sell and make a purchase. When sale and purchase made, power under decree exhausted, and he held new security on same terms he held old, to wit, under terms of will, without power of sale. Bremer v. Hadley [Mass.] 81 NE 961.

30. Where a change in the investment of a trust fund has been made by the trustee without any specific designation of the new investment at the time of the change as that of the trust fund, but leaving it open so as to make it possible for him to claim it as his own should it be profitable, or treat it as the trust should it prove disastrous, the cestuis que trustent can elect whether they will consider the investment as made of the trust fund, or require the trustee to account for the trust and a reasonable income from it. Brown v. Williams, 9 Ohio C. C. (N. S.) 307.

beneficiaries.[31] It is the duty of the trustee to provide from the income a fund to protect the principal from loss through premiums on investments.[32]

(§ 8) *D. Creation of charges, mortgage and lease of estate.* See 8 C. L. 2191

Leases. See 8 C. L. 2191—The trustee must act with fidelity,[33] and if the power to do so is given, he may lease for any number of years,[34] but what is a reasonable term must depend on circumstances.[35]

Mortgages. See 8 C. L. 2191—In the face of an express prohibition against incumbrance, a power to sell does not carry power to mortgage.[36]

(§ 8) *E. Sale of property.* See 8 C. L. 2192—A conditional sale should not be made,[37] and though a power of sale may be implied [38] or read from the terms of the entire instrument,[39] it does not exist unless granted.[40] The power should not be exercised against the objection of a beneficiary who is sui juris.[41] A court of equity may order a sale of the land,[42] even though it lies beyond its jurisdiction,[43] but in a

31. Where the income of a trust fund is bequeathed to a legatee, her share at her death to go to her surviving children, such children are not, after the death of the mother, bound by any election or ratification of changes in the investment of the trust fund which prove injurious to them. Brown v. Williams, 9 Ohio C. C. (N. S.) 307.

32. Dexter v. Watson, 54 Misc. 484, 106 NYS 80.

33. In leasing property, the trustee must act with equal fidelity toward the remaindermen and those entitled to the rents. In re Hubbell Trust [Iowa] 113 NW 512.

34. The terms, however, should be reasonable, and essential to proper care and income; nor should lease extend beyond term of trust, unless reasonably necessary to effectuate its purposes. But if lease extends unreasonably beyond period of trust, the excess only will be void. In re Hubbell Trust [Iowa] 113 NW 512.

35. What is the character of property, use to be made of it, income to be derived, local customs in renting, and the improvements contracted. A lease, however, which extends many years after termination of trust is unreasonable. In re Hubbell Trust [Iowa] 113 NW 512.

36. Kenworthy v. Equitable Trust Co., 218 Pa. 286, 67 A 469.

37. A conditional sale should not be made unless it clearly appears that the interests of the beneficiaries will be promoted thereby. Smith v. White [Va.] 59 SE 480.

38. Clark v. Fleischman [Neb.] 116 NW 290. Direction to divide estate into four equal parts and put each share out at interest, and pay over interest and dividends, discloses clear intention that real estate should be sold. Casselman v. McCooley [N. J. Eq.] 67 A 436.

39. Hence, under a provision that trustee "shall have power from time to time, when it shall be deemed for the best interests of my estate to sell any part or parts thereof for the improvement and benefit of remainder," trustee has power to sell when such condition arises. Beach v. Beers [Conn.] 68 A 990. Will provided: For purpose of managing and preserving property bequeathed, a named person is appointed trustee to manage and control the property and also as testamentary guardian to superintend, control, and direct the education and maintenance of the beneficiaries, hereby visiting and clothing him as such trustee with full force, whenever he shall deem the interests of the trust estate requires it, to sell any part or portion of the estate, and reinvest it for the benefit and use of the beneficiaries, at his discretion, subject to use and limitation before specified. I further give him full power to invest the money portion of estate, in bonds, etc., as well as the profit or income in such manner as he may deem most conducive to the interests of the estate and to carry out the purposes of the trust. Held, that trustee named could sell property without order of court, but a successor would not be so authorized. A deed from such successor, however, if taken in good faith, will serve as color of title. Maynard v. Greer, 129 Ga. 709, 59 SE 798.

40. Clark v. Fleischmann [Neb.] 116 NW 290. A deed in violation of the trust is invalid. Cooper v. Harvey [S. D.] 113 NW 717. Power to "stand possessed" of trust fund and "pay over the income and produce" to beneficiaries until termination of trust and distribution does not give the power to sell. Property consisted of stocks and notes secured by mortgages. Bremer v. Hadley [Mass.] 81 NE 961. It is not conferred by authority to manage and control for a limited time. Kennedy v. Pearson [Tex. Civ. App.] 109 SW 280.

41. Bailey v. Worster [Me.] 68 A 698.

42. If showing be made that property is wasting and that its sale is essential to preservation, or if it be shown that the purposes for which trust was created would fail unless sale be authorized, and that particular property be converted into money or other character of property, a court of equity may order sale, though not provided for by the instrument. Kennedy v. Pearson [Tex. Civ. App.] 109 SW 280.

43. Court of chancery has plenary power to affect title to real estate beyond its jurisdiction by sale and conveyance thereof by its master in suits to execute trusts, whenever it has acquired jurisdiction of the persons of the parties interested in such estate, because equity acts through the person. Byrne v. Jones [C. C. A.] 159 F 321. In a proper action brought for that purpose, the probate court of the county appointing a testamentary trustee has jurisdiction to order the sale of real estate belonging to the

proper case will postpone it till an accounting is had.[44] The power must be exercised as directed,[45] but a sale may be valid though made after the time specified.[46] On the death of the trustee having power to sell, no valid sale can be had till the appointment of another,[47] nor has such other the power unless his predecessor had it,[48] nor even then if a personal confidence was reposed in the original trustee.[49] Neither does the power of sale survive the death of the beneficiary.[50] Though a conveyance, passing only the trustee's individual interest, is not an execution of the power of sale,[51] under the power given with no limitations, he may convey a fee simple title,[52] divesting the contingent remainderman of all interest.[53] Whether or not there was a sale is a question of fact.[54]

(§ 8) *F. Payments or surrender to beneficiary.* See 8 C. L. 2194—Though the beneficiary cannot be compelled to accept the benefits of the trust,[55] it is the duty of the trustee to turn over to those entitled the trust fund, on settlement of his final account,[56] or upon termination of the trust,[57] but, though it cannot be exercised to delay it beyond a reasonable time,[58] in the absence of a provision as to the time of payment, the trustee must exercise a reasonable discretion.[59] Payment to the beneficiary of income from bonds may be governed by the nature of the bonds and the circumstances.[60]

trust located in another county of the state. Boals v. Clingan, 6 Ohio N. P. (N. S.) 609.

44. Where accounting and sale of property are required, settlement of account and determination of rights of parties in the property under interlocutory decree before final decree of sale made is preferable in ordinary cases to decree of sale before accounting, because, in that way parties may have benefit of knowledge of extent of interests before sale, and because this course permits review by single appeal of questions, which two appeals are necessary to challenge where decree of sale precedes settlement of accounting. Byrne v. Jones [C. C. A.] 159 F 321.

45. If the power of sale exists for the purpose of paying legacies, it cannot be made to pay debts, except under decree of court. Humphrey v. Hudnall, 233 Ill. 185, 84 NE 203. Testator's wife named as executrix, with another, but she only qualifying. Sale directed to be made with wife's consent, which was to be set forth and appear, and that she had to sign conveyance and acknowledgment of execution, as executrix. She, alone, could not sell. Hilton v. Sowenfeld, 53 Misc. 152, 104 NYS 942.

46. Graham v. Ackerly, 120 App. Div. 430, 105 NYS 51.

47. The power does not pass to a substituted administrator cum testamento annexo. Casselman v. McCooley [N. J. Eq.] 67 A 436.

48. Dexter v. Watson, 54 Misc. 484, 106 NYS 80.

49. Unless a personal confidence is reposed, when the question to be determined in each case is as to the list which the donor of the power intended should be determinative as to its exercise. Creation of trust for payment of income; trustee given power to apply to use of beneficiary such of capital as they might deem advisable. No condition suggested as criterion by which their discretion was to be controlled. Substituted trustee had no power of sale. Smith v. Floyd, 108 NYS 775.

50. If the corpus is not disposed of, the power of sale does not survive the death of the beneficiary. Wells v. Brooklyn Union El. R. Co., 121 App. Div. 491, 106 NYS 77. Trustee has no authority to sell the trust estate, after the death of the beneficiary, to satisfy claims against her. Bailey v. Worster [Me.] 68 A 698.

51. Merolla v. Lane, 122 App. Div. 535, 107 NYS 439.

52. Under power to sell and no limitation on the estate devised, the trustee may convey a title in fee. Savage v. Savage [Or.] 94 P 182.

53. Whallen v. Kellner, 31 Ky. L. R. 1285, 104 SW 1018.

54. French v. Hall [Mass.] 84 NE 438.

55. Bailey v. Worster [Me.] 68 A 698.

56. In re Cary's Estate [Vt.] 69 A 736.

57. Upon the termination of the trust, equity will compel the delivery of the trust fund to the beneficiary. If it be stock, the trustee will be compelled to convey when the conditions of the trust are fulfilled. Leigh v. Laughlin, 123 Ill. App. 564.

58. This discretion is subject to the control of the court, upon suitable proceedings, in case of unreasonable detention of income. Angell v. Angell [R. I.] 68 A 583.

59. The matters to be considered are the nature and amount of income, the time available for distribution, the circumstances of beneficiaries, and possibly other circumstances. Angell v. Angell [R. I.] 68 A 583.

60. While no rule should be adopted respecting the duty of a testamentary trustee in the disposition as between life tenant and remaindermen of the income from premium bonds received from the testator's estate, which will not yield to the intention of the testator when discoverable from proper sources, it may be stated as a general proposition, supported by both reason and authority, that when a testamentary trustee receives bonds from the estate of a testator as a part of a fund or property, the interest or income of which he is to pay to the life tenants with remainder over, and which, either by authority of the will or by law,

§ 9. *Liability of trustee to estate and third person.*[See 8 C. L. 2194]—In the absence of a clear and unequivocal statement to that effect, a trustee is not exempt from liability,[61] but if there is no negligence or mismanagement on his part, he will not be charged with a personal liability,[62] and it may be presumed that a deceased trustee owed the estate nothing.[63] Yet he must have sole warrant or authority to pay out trust funds,[64] and he may be held liable for breach of trust though his act was sanctioned by the beneficiary.[65] If he loans money without due security, he is liable in case of loss by insolvency,[66] or, he is liable to third persons for money wrongfully paid him as such,[67] or he may be personally liable for negligent injury,[68] and where the breach of trust is participated in by more than one trustee, the liability is both joint and several.[69] The measure of damages for breach may be the amount actually lost to the estate or gained by the trustee,[70] and in jurisdictions where a parol trust is not enforceable, the grantor on its repudiation may recover the value of the estate conveyed,[71] but a surviving trustee's liability is the estate which remains in his hands intact on the death of his cotrustee.[72] Death, however, operates at law to discharge the trustee's estate from responsibility, but a liability in equity at once attaches, available to the parties directly in interest.[73]

§ 10. *Liability on trustee's bond.*[See 8 C. L. 2194]—In an action on his bond, the trustee is, as a general rule, chargeable with the amount of the inventory and appraisment filed in the trust.[74]

§ 11. *Personal dealings with estate.*[See 8 C. L. 2194]—Under some circumstances, the trustee may buy directly from the beneficiary,[75] and a gift by beneficiary to the

he may properly retain, as a part of the trust estate, and such bonds, either at the time of, or after the testator's death, are at a premium, it is the duty of the trustee to pay the entire income to the life tenants, without any deduction to meet depreciation of premium, unless a different intention of the testator may properly be gathered from the language of the will. In re Connecticut Trust & Safe Deposit Co. [Conn.] 69 A 360.

61. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

62. In re Froelich's Estate, 122 App. Div. 440, 107 NYS 173; In re Menzie's Estate, 54 Misc. 188, 105 NYS 925. While the fund is kept intact as a trust fund, the trustee is not liable if he exercise the care of a prudent and diligent man. If the fund is deposited to the personal credit of the trustee, the beneficiary may treat it as property of trustee and hold him personally. Baughman v. Lowe [Ind. App.] 83 NE 255.

63. It will be presumed that a deceased trustee owed the estate nothing from the facts that no demand was ever made on his estate by his cotrustees, and that no part of the trust fund went into his hands. The fact that no fund came into his hands will not exempt his estate if it was from neglect of duty that none did so and loss befell the trust estate in consequence. In re Graham's Estate, 218 Pa. 344, 67 A 458.

64. A trustee paying a note not a renewal of any note existing at the time of making declaration of trust, and not contemplated by it, must either be surcharged with such payment, or must, as between the parties thereto, charge the same against the distributive share of him who was benefited by the payment. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

65. Where the evidence compels the belief that a mother acted with full knowledge of the essential facts when she acquiesced in the misappropriation of her trust estate by her son while acting as her trustee, the law will uphold her act, but without sanction of his breach of trust. In re Estate of Koehnken, 9 Ohio C. C. (N. S.) 383.

66. In re Roach's Estate [Or.] 92 P 1118.

67. Field v. Yeaman, 31 Ky. L. R. 12, 101 SW 368.

68. Where all the duties which would devolve upon the owner of the property are duties of trustee, and if, through his negligence, any person be injured, he is personally liable for resulting damages. Everett v. Foley, 132 Ill. App. 438.

69. General Proprietors of Eastern Division v. Force [N. J. Eq.] 68 A 914. For a misapplication of trust funds by one trustee, the other is not liable unless it occurred through his fault. In re Graham's Estate, 218 Pa. 344, 67 A 458.

70. General Proprietors of Eastern Division v. Force [N. J. Eq.] 68 A 914.

71. Hill v. Hill [Mass.] 82 NE 690.

72. In re Graham's Estate, 218 Pa. 344, 67 A 458.

73. But in order to charge the estate, it must appear that the loss occurred in trustee's lifetime. In re Graham's Estate, 218 Pa. 344, 67 A 458.

74. But there may be an exception, as where, on suit for breach of bond, and the findings show that trustee was not so charged in making calculation to determine the amount converted, there should be a definite finding of the amount of property received. American Bonding Co. v. State, 40 Ind. App. 561, 82 NE 548.

75. A trustee may buy from the cestui que trust, provided there is a distinct and clear contract ascertained after a jealous and

trustee of trust property is not voidable at the beneficiary's election.[76] The general rule is, however, that he will continue to hold under the trust,[77] but, while a purchase by the trustee of the trust property at public sale is presumed to be for the benefit of the trust,[78] the court may, in a proper case, authorize him to make the purchase.[79] A cotrustee is not liable for a devastavit by the other, if such devastavit was committed while the fund was held by such other as executor.[80]

§ 12. *Actions and controversies by and against trustees.* See 8 C. L. 2106—Though a suit at law will lie in certain cases, after the termination of the trust,[81] generally, matters of trust are cognizable only in equity,[82] hence, a trustee cannot be sued at law by his beneficiary,[83] and where he dies without making settlement, and his executor fails to do so, the only remedy for the new trustees is a suit to have the trust settled,[84] but the surviving trustees alone have the right to compel an accounting by the representative of a deceased cotrustee.[85] Trustees, lawfully appointed, and vested with the care, control and management of the estate, are entitled to sue,[86] and, if bound to protect the estate against illegal alienation,[87] or, if his interests are in-

scrupulous examination of all the circumstances, that cestui que trust intended trustee to buy, and there is a fair consideration and no fraud, no concealment, no advantage taken by trustee of information acquired by him as such. Trustee must clear the action of every shadow of suspicion. Flowers v. Flowers, 84 Ark. 557, 106 SW 949. A trustee may purchase trust property from cestui que trust sui juris, on condition that latter intends that former shall buy, that former disclose to latter before contract made, every fact he has learned in his fiduciary relation which is material to sale, that he exercise utmost good faith, that no advantage be taken by misrepresentation, concealment of, or omission to disclose, important information gained as trustee, and that entire transaction is fair and open. This condition is inexorable. If not complied with cestui qui trust may avoid sale. Hence, trustee, residing in Arkansas, to hold and sell lands situated there and in Texas for himself and cestui qui trust in Massachusetts, sold right of way to railroad for $725, and without disclosing facts bought interest of cestui qui trust for $7,500. Sale void. Byrne v. Jones [C. C. A.] 159 F 321.

76. It may only be set aside for fraud, undue influence, or unfairness. The burden of proof is on trustee to show transaction was free and fair. But this rule as to the burden of proof does not apply after a considerable delay. Anderson v. Fry, 123 App. Div. 46, 107 NYS 916.

77. When a trustee deals with the beneficiary, he is in the same position as to that matter as if it were put in his hands as such by a third person. Beneficiary sold horse, not included in trust fund, to trustee, who did not pay money, but held it as trustee. Estate of trustee liable for price with interest thereon. Boreing v. Faris, 31 Ky. L. R. 1265, 104 SW 1022; Stark v. Love [Mo. App.] 106 SW 87. And this may be true, although the title may have been acquired in proceedings unassailable at law or in equity. Terrell v. Eagle [Ark.] 107 SW 670. When trustee mingles his own funds with the trust funds, the burden is on him to show clearly the amount for which he is entitled to credit. Vanatta v. Carr, 229 Ill. 47, 82 NE 267. The purchase by trustee of a title that cures or completes one he holds in trust will be presumed to have been made in aid of the former trust. Vulcan Detaining Co. v. American Can Co. [N. J. Err. & App.] 67 A 339.

78. Kenworthy v. Equitable Trust Co., 218 Pa. 286, 67 A 469.

79. Court of chancery has power to authorize trustee to bid in and take title to real estate sold under mortgage held by him as trustee, though will did not authorize him to invest in real estate provided that authority asked for by trustee is clearly required for benefit of all interested and for preservation of corpus of trust fund. In re Bellah [Del.] 67 A 973; In re Baker [Del.] 68 A 449.

80. Fleming v. Walker [Ala.] 44 S 536.

81. When a fund has been placed in hands of trustee for investment, and specific application of the income, and principal sum made payable to beneficiary on happening of certain event, and purpose of trust has been carried out and beneficiary entitled to fund, it may be recovered in action at law, though the ascertainment of the amount requires the adjustment of claim for compensation. Snyder v. Parmalee, 80 Vt. 496, 68 A 649.

82, 83. Snyder v. Parmalee, 80 Vt. 496, 68 A 649.

84. In such case no affidavit or demand is necessary. Boreing v. Faris, 31 Ky. L. R. 1265, 104 SW 1022.

85. In re Graham's Estate, 218 Pa. 344, 67 A 458.

86. Reichert v. Missouri & Illinois Coal Co., 231 Ill. 238, 83 NE 166. In a collateral proceeding that trustee's right to sue cannot be questioned on the ground that he had not given bond before acting. Id. Whenever the trust has been terminated, the trustees may sue the beneficiaries for a proportional share of expenses and this though the property has been bid in for the benefit of trustees, and such of the cestuis as choose to join them. Cunniff v. McDonnell [Mass.] 81 NE 879.

87. And this is true, though the beneficiary assignor, who illegally assigned an interest, which was sustained by the court, did not contest the right of the assignee nor

juriously affected as to his own share of the estate, may appeal from the judgment or decree.[88]

§ 13. *Compensation and expenses. Commissions and salary.* See 8 C. L. 2198—The discretion of the court in the matter of compensation is unfettered by statute,[89] and, where not waived,[90] is based upon the nature and amount of services rendered and the risk incurred by the trustee.[91] Hence, the court may allow a commission in excess of the legal rate,[92] or will allow commissions on securities accepted as cash,[93] and may give a deceased trustee's estate full commissions, though the fund was not paid out by him,[94] or will allow them on the value of the personal property contained in the fund, but it will not allow any on the value of the real estate included in such fund.[95] In no event may the trustee have more commissions on principal than is fixed by the court,[96] nor will he be allowed them unless he has settled annually,[97] nor if he has been guilty of fraud or misconduct in the management of his trust.[98] Whether double commissions will be allowed depends on circumstances,[99] but a salary, in addition to the compensation provided for, will not be allowed, unless the duties performed were outside those imposed.[1]

Attorney's fees. See 8 C. L. 2197—The allowance of attorney's fees is within the discretion of the court,[2] and will be ordered in a proper case,[3] but no interest will be given on money so paid.[4]

appeal. Stringer v. Young, 190 N. Y. 545, 83 NE 690.

88. Though a trustee cannot act contrary to the interests of his trust, a trustee and executor, whose share is injuriously affected by an order, may appeal from such order in his individual capacity, the cestuis que trustent having employed his own counsel and the estate not yet settled. Boyce v. McLeod [Md.] 68 A 135.

89. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

90. Where trustee pays to beneficiary for eighteen years the whole of the income, retaining no commissions, he loses them. Olcott v. Baldwin, 190 N. Y. 99, 82 NE 748.

91. Where estate was very large and varied, and was in trustee's hands about nine years, he performing unique duties, 4 per cent on principal was allowed. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

92. As where the management has extended over a period of four years, calling for constant and careful attention, attended with success and profitable results to beneficiaries. In re Ashman's Estate, 218 Pa. 509, 67 A 841.

93. Where executors deliver to themselves, as trustees, securities, the amount of value of which constitutes the principal of trust fund, they assume a new position with distinct duties and responsibilities, and commissions are allowed for receiving and paying out same as principal. Olcott v. Baldwin, 190 N. Y. 99, 82 NE 748.

94. As commissions are allowed for care and management of estate, and as executor will have fund to pay out on decease of trustee, full commissions allowed. In re Wilcox, 109 NYS 564.

95. In re Hunt, 121 App. Div. 96, 105 NYS 696.

96. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

97. Where the trustee has not annually rendered and settled his account he is not entitled to full commissions based upon annual accountings. In re Norton's Accounting, 110 NYS 474.

98. Comingor v. Louisville Trust Co. [Ky.] 108 SW 950.

99. To entitle a person acting as trustee and executor to double commissions, he must have actually entered on his duties as trustee. Olcott v. Baldwin, 190 N. Y. 99, 82 NE 748. An accounting and transfer is best evidence that duties of one has ended and duties of other begun. Id. Whether double commissions will be allowed depends on whether or not the duties of executor and trustee are distinct. Id. Double commissions to the same person, acting as executor and trustee, will be awarded only when the will contemplates a separable and separate action in each capacity. This intention must not only be manifested, but possession and holding of the trust estate must be changed, either expressly or by implication, from that as executor only to that of trustee of the trust. In re Hunt, 121 App. Div. 96, 105 NYS 696.

1. In re Froelich's Estate, 122 App. Div. 440, 107 NYS 173.

2. Case v. Beloe, 109 NYS 168. Allowance of attorney's fees is, to a considerable extent, within discretion of court, and, as a rule, a reasonable allowance is made unless bad faith or culpable mismanagement appears. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

3. Lawyer engaged in making transfer and declaration of trust and giving advice as to proper way to accomplish object of settlor. Also, fees in suit to construe declaration of trust allowed. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076. Where one of the beneficiaries to a trust fund recovers trust property and bears the burden and expense of the litigation for the benefit of others as well as himself, a reasonable fee will be allowed to his attorney as a part of

Expenses.[See 8 C. L. 2197]—Usual costs and disbursements should be allowed.[5]

§ 14. *Accounting, distribution, and discharge.*[See 8 C. L. 2198]—An action for accounting, one of the objects of which is, that the property be divided and distributed,[6] is the proper remedy to reach a share of trust funds in the hands of a trustee.[7] The courts will hold trustees to a rigid fulfillment of their duties as such,[8] but before the right to an accounting exists there must be a trust relation,[9] and it must appear that the cestui que trust has not been paid in full.[10]

Jurisdiction of accounting and distribution.[See 8 C. L. 2198]—The courts of equity [11] of the trustee's domicile,[12] such as courts of probate,[13] the surrogate's court,[14] and supreme court,[15] have jurisdiction of trustees' accountings, unless the right of action is lost by laches or the statute of limitations.[16]

Credits and charges.[17]—On the accounting, the trustee may be credited with commissions paid real estate agents [18] advances made to protect one of the beneficiaries [19] expense of maintaining them from his own means,[20] and a claim for money

the costs. Harris v. Harris, 5 Ohio N. P. (N. S.) 239.

4. Wehrenberg v. Seiferd, 56 Misc. 356, 106 NYS 901.

5. In re Hunt, 121 App. Div. 96, 105 NYS 696. Where a trustee uses his own funds for the purposes of a trust, he is entitled to reimbursement. American Bonding Co. v. State, 40 Ind. App. 561, 82 NE 548. If the deed is silent as to reimbursement, it will be implied that the trustee shall be reimbursed any necessary expenses as made in the discharge of his duties. Louisville, etc., R. Co. v. Schmidt [Ky.] 107 SW 745. A trustee of a resulting trust will be allowed necessary disbursements in recovering the trust fund, but no fees as trustee. Wehrenberg v. Seiferd, 56 Misc. 356, 106 NYS 901. Trustee will be allowed expenses by way of costs incident to a suit for the construction of the declaration of the trust. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

6. In re Hunt, 121 App. Div. 96, 105 NYS 696.

7. Adams v. Purser, 110 NYS 167.

8. The trustee will not be allowed to take refuge behind limited restrictions of an agent. In re Menzie's Estate, 54 Misc. 188, 105 NYS 925.

9. Yuengling v. Betz, 120 App. Div. 709, 105 NYS 815.

10. A cestui qui trust having been paid in full as evidenced by his receipts is not entitled to an accounting. In re Kirby's Will, 113 App. Div. 705, 100 NYS 155.

11. Though party to be charged bears the relation of a quasi-trustee only toward claimant, the cause is one for court of equity. Grote v. Grote, 121 App. Div. 841, 106 NYS 986. Courts of equity have jurisdiction over all trusts for the purpose of compelling accounting, and the exercise of any confidential or fiduciary relation is sufficient to invoke such jurisdiction whenever the duty arising out of such relation rests upon one of the parties to render an account to the other. A quasi trust relation is sufficient. Wilson v. Kennedy [W. Va.] 59 SE 736.

12. The fact that trustee's receipt to some extent, are from land in other states does not affect the question. Courts of domicile and probate will pass on all items of account both as to charge and discharge. Marsh v. Marsh's Ex'rs [N. J. Eq.] 67 A 706.

13. It has no jurisdiction of controversies that arise when one has unlawfully received trust funds from the trustee. In re Cary's Estate [Vt.] 69 A 736.

14. The surrogate's court has jurisdiction over the accounting of testamentary trustees. In re Hunt, 121 App. Div. 96, 105 NYS 696.

15. The supreme court will take jurisdiction of accountings of testamentary trustees only when the surrogate's court cannot give appropriate relief. Post v. Ingraham, 122 App. Div. 738, 107 NYS 737. Action against executrix of deceased trustee and others for accounting of rents of realty in possession of trustee, resort to surrogate's court being abortive. Fogarty v. O'Reilly, 56 Misc. 192, 107 NYS 234.

16. Beneficiary silent for twenty-five years after coming of age, and until after death of trustee, it appearing also there was no concealment or contrivance to prevent inquiry. Proceedings dismissed. In re Rahm's Estate [Pa.] 68 A 186. Where stock in a turnpike company, not paying dividends, was assigned by sisters to their brother for the purpose of enabling him to be elected to the salaried position of secretary and treasurer of the company, and he thus held the stock for many years and until it became valuable, he will not be heard in an action by the sisters for an accounting to plead laches or the statute of limitations, but under the evidence in this case a trust is fastened by parol, and an accounting will be ordered. Bonneli v. Brown, 11 Ohio C. C. (N. S.) 58.

17. See 8 C. L. 2198. See, also, ante, § 13.

18. Trustee may be allowed commissions paid real estate agents for selling the property, and any effect which the rendering of these services by others should have upon the amount to be allowed, trustee will be taken into account in fixing his commissions. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

19. Trustee advanced money, at request of beneficiary, to purchase judgment against her husband, the transaction resulting in material benefit to her and family. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

20. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

paid by life tenant for the benefit of the estate, and assigned to him,[21] but he cannot have credit for a loss sustained in making an investment,[22] nor for personal services in the support of beneficiary,[23] and, in the absence of an accurate account, and doubt as to how the account in truth stands, equity will give him no relief against the cestui que trust.[24, 25] The trustee must account for what he received,[26] but will be charged with interest only when the circumstances of the case render it right and just to do so.[27] Whether he will be charged with depreciation in the value of securities may depend on circumstances.[28] General charges of the trustee cannot be, on the mere option of either party, appropriated to any one particular class of income.[29]

*Procedure.*See 8 C. L. 2199—In an action for accounting, the auditor's jurisdiction is confined to the account he is directed to audit,[30] and the presumption is that the trustee did his duty,[31] but the burden is not on those claiming cestui que trust's interest to show the money was invested in a particular way,[32] nor is the plaintiff required to allege or prove fraud.[33] Though, in some cases, the beneficiary may sue for an accounting,[34] all interested are necessary parties.[35]

*Decree.*See 8 C. L. 2199—The decree should be definite and complete.[36]

Costs See 8 C. L. 1299 of a master's report should not be taxed until it has come in.[37]

§ 15. *Establishment and enforcement of trust and remedies of beneficiary.* *A. Express trusts.*See 8 C. L. 2200—A court of equity is the proper tribunal to determine whether property is held in trust[38] and to enforce the same,[39] even though the

21. Beach v. Beers [Conn.] 68 A 990.

22. Investment before termination of trust, and sale afterwards. In re Murray, 108 NYS 1047.

23. Son, made trustee, with beneficiaries resided on settlor's farm. Beneficiaries supported by farm, of which son was manager. Not entitled to credit for personal services. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

24, 25. Potter v. Porter [Ky.] 109 SW 344.

26. Deed of trust recited delivery of certain bonds to trustee, for the purpose of securing the payment of which the conveyance was made, "it being understood that said bonds are given for the purpose of a sale of them so as to realize the money" for the grantors. Held that trustee was required to account for full amount realized from sale of bonds. Garth v. State Street Baptist Church, 29 Ky. L. R. 1176, 96 SW 1124.

27. Albert v. Sanford, 201 Mo. 117, 99 SW 1068.

28. That trustee commingled his money with the trust fund does not show a dereliction of duty. In re Menzie's Estate, 54 Misc. 188, 105 NYS 925. Will gave discretion as to investments, and did not impose duty of providing sinking fund to reimburse principal for premiums paid in purchase of other securities. In re Hawk's Estate, 54 Misc. 187, 105 NYS 856. Trustee, a trust company should not be surcharged with difference in value where, by a scheme to obtain control of the company issuing the stock, it was made to depreciate in value, it not being chargeable to the trustee that he should have known this would be the result. But said trustee should be surcharged if the stock was such as he was not authorized to hold under the law. He will be chargeable with the difference between the price it sold for and the market value at time he should have sold. Babbitt v. Fidelity Trust Co. [N. J. Eq.] 66 A 1076.

29. Marsh v. Marsh's Ex'rs [N. J. Eq.] 67 A 706.

30. In re Ashman's Estate, 218 Pa. 509, 67 A 841.

31. Aldridge v. Aldridge [Ky.] 109 SW 873.

32. Such parties being entitled to recover on exhibition of the will and a showing that trustee received the money. Aldridge v. Aldridge [Ky.] 109 SW 873.

33. Logan v. Brown [Okl.] 95 P 441.

34. Death of testamentary trustee and no successor appointed. Beneficiary may sue executrix of decedent for an accounting. Fogarty v. O'Reilly, 56 Misc. 192, 107 NYS 234.

35. All those entitled to a share are necessary parties. Adams v. Purser, 110 NYS 167. In an action against trustees for an accounting, if the right of contribution exists, all are necessary parties. People v. Equitable Life Assur. Soc., 109 NYS 453.

36. In the absence of written consent or showing that sale would result in loss, the decree should not merely designate the fractional shares and direct a transfer in bulk. In re Hunt, 121 App. Div. 96, 105 NYS 696.

37. Richmond v. Arnold [R. I.] 68 A 427.

38. Sanborn v. Loud, 150 Mich. 154, 14 Det. Leg. N. 586, 113 NW 309.

39. Malone v. Malone [Mich.] 115 NW 716; Wilson v. Kennedy [W. Va.] 59 SE 736. The enforcement of a trust created by will is within the jurisdiction of the probate court. In re Cary's Estate [Vt.] 69 A 736. An action at law fails to afford an adequate remedy for refusal to execute trust because it will not place the parties in same situation in which they were before agreement made, and because it is not prompt, complete and efficient. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606. The owner of equitable title, having right to call in legal title, may come into court of equity to compel conveyance of legal title to him and cancel invalid instruments constituting clouds there-

party to be charged is but a quasi-trustee.[40] Though the rule of laches applies to express trusts,[41] the statute of limitations, as between trustee and cestui que trust, does not,[42] except when the demand is cognizable either at law or in equity at the election of the beneficiary,[43] nor then until a breach [44] or some act on the part of the trustee which puts an end to the relation of trustee and beneficiary.[45] The beneficiaries [46] or an assignee of a part interest may enforce the trust,[47] and the parties alleged to hold as trustees must be before the court,[48] but one who has assigned all his interest need not [49]

(15) *B. Implied trusts generally.*[50]

(§ 15) *C. Constructive trusts.* See 8 C. L. 2201—A beneficiary without the legal title [51] may sue in equity to establish a constructive trust.[52] The general rules of evidence apply,[53] and the court may decree a return of the specific property.[54] The statute of limitations [55] which begins to run on breach [56] unless there has been fraudulent concealment of the cause of action,[57] as well as laches, apply to actions of this character,[58] but the latter cannot be pleaded unless defendant has suffered prejudice [59] or loss thereby.[60]

(§ 15) *D. Resulting trusts.* See 8 C. L. 2202—Suits to enforce resulting trusts

on, although, trust being dry, he might maintain ejectment on presumption that legal title had been conveyed to him, or the rule that stranger cannot maintain his possession against superior title on mere defects in claim of opposite party. Blake v. O'Neal [W. Va.] 61 SE 410.

40. As where grantee of realty agrees to support grantor as a consideration and fails to do so. Nor will sale of the property offer any obstacles if it appear the proceeds can be traced and identified. Grote v. Grote, 121 App. Div. 841, 106 NYS 986.

41. Acquiescence in the acts of a trustee for thirty-three years is such laches as to defeat the action. Sprinkle v. Holton [N. C.] 59 SE 680. Infancy will free claimant from the charge of laches. Patrick v. Stark [W. Va.] 59 SE 606.

42. Ames v. Howes, 13 Idaho, 756, 93 P 35.

43. Patrick v. Stark [W. Va.] 59 SE 606.

44. Cause of action accrues on the trustee's breach of trust. Sprinkle v. Holton [N. C.] 59 SE 680.

45. The statute does not begin to run until disavowal or adversary holding. Dixon v. Dixon, 145 N. C. 46, 58 SE 604. Statute does not begin to run until by some declaration or act of the trustee an end is put to the relation of trustee and beneficiary and the latter is put to his action. Greenleaf v. Land & Lumber Co. [N. C.] 60 SE 424. Neither the statute of limitations nor laches apply to express trusts until and from the time the trustee repudiates the trust by unequivocal words or acts and such repudiation is so brought to the notice of the beneficiary as to call upon him to promptly assert his equitable rights. Ruckman v. Cox [W. Va.] 59 SE 760.

46. Parmenter v. Homans, 109 NYS 800.

47. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

48. Sanborn v. Loud, 150 Mich. 154, 14 Det. Leg. N. 586, 113 NW 309.

49. Rogers v. Penobscot Min. Co. [C. C. A.] 154 F 606.

50. See 4 C. L. 1755. See, also, the matter, ante and post, within this section.

51. Nor is he required to sue for damages. Brissell v. Knapp, 155 F 809.

52. Action lies in equity to establish a constructive trust and to recover the subject thereof where property wrongfully obtained, in specie or in its converted form, remains in possession of wrongdoer; it also lies for its establishment and for an accounting even though the property wrongfully obtained is personal and, in specie or in some new form into which it can be definitely traced, is within reach of a remedy at law, where it is necessary, in order to complete justice, for equity jurisdiction to deal with the situation. The better rule is that the cestui que trust may always sue in equity for an accounting. Borchert v. Borchert [Wis.] 113 NW 35.

53. A claimant to trust fund cannot testify as to statements of trustee and settlor, both being dead. Heinisch v. Pennington [N. J. Eq.] 68 A 233.

54. Suit, subject-matter of which was capital stock. Brissell v. Knapp, 155 F 809. The remedy for enforcing such a trust is to seize the property in the hands of the trustee or those who hold for him. Heinisch v. Pennington [N. J. Eq.] 68 A 233.

55. Failure for twenty years to enforce trust will bar the claim, no concealment or fraud being shown. Heinisch v. Pennington [N. J. Eq.] 68 A 233.

56. Castro v. Adams [Cal.] 95 P 1027.

57. Ames v. Howes, 13 Idaho, 756, 93 P 35.

58. Unexplained delay to sue till after death of trustee and witnesses will defeat the action. Heinisch v. Pennington [N. J. Eq.] 68 A 233.

59. The mere fact that property obtained by fraud has since become immensely valuable is not sufficient to justify the doctrine of laches. Brissell v. Knapp, 155 F 809.

60. The doctrine of laches does not apply where defendant is in possession and loses nothing by delay. Chamberlain v. Chamberlain [Cal. App.] 95 P 659.

are cognizable in equity alone,[61] and the action may be maintained where defendant is found,[62] but the right may be waived [63] or barred [64] or lost by laches.[65]

§ 16. *Following trust property.* See 8 C. L. 2203—Though to charge a third person it must be shown he knowingly benefits by the breach of trust [66] and though a trust fund is not a general lien on bank assets superior to that of general creditors,[67] until the right is lost or the transfer ratified [68] the parties in interest [69] may follow the trust fund or its proceeds,[70] so long as identification can be accomplished,[71] but though identification does not require the identical bills or coins to be discovered,[72] the fund must be identified [73] and distinctly traced in its original or substituted form.[74] If the facts justify, the bill may be so amended as to claim alternate relief,[75]

61. Patrick v. Stark [W. Va.] 59 SE 606.

62. Stone v. Fowlkes, 29 App. D. C. 379.

63. A waiver of the right of entry and failure to take action within the statutory period will defeat the right to charge a patentee with a resulting trust. Holt v. Murphy, 28 S. Ct. 212.

64. The statute does not begin to run until knowledge that deed was taken in name of another hence purchase made by guardian, grantor, guardian's mother, claimant had no means of knowledge until he became of age. Manahan v. Holmes, 110 NYS 300.

65. Equity will not enforce a resulting trust after unreasonable delay, hence suit brought thirty-seven years after right accrued, and trust openly repudiated for fifteen years, too late. Hamilton v. Hamilton, 231 Ill. 128, 83 NE 125. The rule of laches will be applied to claims instituted after the death of alleged trustee and beneficiary and twenty-five or thirty years after the transaction. Williams v. Risor, 84 Ark. 61, 104 SW 547. Laches will not be imputed to the claimant, wife of trustee, where she files her claim within less than a year after trustee's death. Laughlin v. Laughlin [Pa.] 69 A 288.

66. To charge a third person as a party to misappropriation of a trust fund, it must be shown that he knowingly partakes in the breach of trust. Perry v. Oerman [W. Va.] 60 SE 604.

67. To obtain preference, claimant must show that person having charge of assets of insolvent bank has in his hands some of the fund, or property purchased by it, or into which such fund has been changed or invested. Hill v. Miles, 83 Ark. 486, 104 SW 198.

68. Property may be followed and reclaimed until the right to do so is lost or the transfer is ratified by the court. McCutcheon v. Roush [Iowa] 115 NW 903.

69. A cestui que trust may annul a fraudulent disposition of the trust property and follow the property or its proceeds. Agne v. Schwab, 108 NYS 487. A trust fund may be followed by those interested as beneficiaries, so long as it can be identified, and may be appropriated by the court to the uses intended. Sargent v. Wood [Mass.] 81 NE 901. Trust funds wrongfully deposited may be recovered by the proper owner; hence county treasurer wrongfully depositing taxes as general deposit in bank, bank acquires no title, as against county, and money may be recovered from receiver. Board of Com'rs of Crawford County v. Strawn [C. C. A.] 157 F 49.

70. It is now well settled that as between cestui que trust and trustee, and all parties claiming under trustee otherwise than by purchase for valuable consideration without notice, all property belonging to a trust, however much it may be changed or altered in its nature or character, and all the fruit of such property, whether in its original or altered state, continues to be subject to or affected by the trust. Hill v. Flemming [Ky.] 107 SW 764.

71. A trust fund may be followed and recovered so long as it may be identified. Shopert v. Indiana Nat. Bk. [Ind. App.] 83 NE 515. Complainant bought lot and planned to build thereon. E sold complainant lot and undertook to advise and assist her. Contractor refused to sign building contract, whereupon E did so, though not a builder, but contractor constructed building, E giving his personal attention, directing complainant to make checks payable to him, E informing complainant he, E, was responsible to her, and she might rest assured he would look after everything. In accordance with instructions complainant remitted to E a few days before he died, $2,000, which he deposited in his own name, under such circumstances that it was clearly earmarked, death occurring before money disbursed. Held, complainant entitled to recover unexpended balance. Cochran v. Evans, 154 F 674. Satisfaction may be had out of a mortgage interest owned by the joint tort feasor. Trustee abstracted $20,000 from the estate, placed the same under control of wife, who used $15,000 thereof to purchase two $10,000 mortgages, paying $10,000 for one and $5,000 for the other, the remaining $5,000 being borrowed from third person. The money first mentioned, the $20,000, was turned over to her without consideration. She had no other property than the mortgages. The court properly applied the interest in the mortgage purchased with the borrowed money to the satisfaction of the debt, she having used the whole of the $20,000. Sargent v. Wood [Mass.] 81 NE 901.

72. The ascertainment of the fund into which it has entered and lodged is sufficient. Shopert v. Indiana Nat. Bk. [Ind. App.] 83 NE 515.

73. Emigh v. Earling [Wis.] 115 NW 128.

74. It must be clearly identified or distinctly traced into the property, chose in action, or fund which is to be made the subject out of which the trust fund is to be replaced. Watts v. Newberry [Va.] 57 SE 657. In case of blended moneys in bank account, from which there have been drawings

or, when the trust property cannot be followed, an action for damages will lie.[76] Where neither the depositary of the fund nor depositor's representative are at fault, the claimant, on its recovery, pays the costs.[77]

Bona fide purchasers See 8 C. L. 2205 without notice are protected.[78]

§ 17. *Termination and abrogation of trust.* See 8 C. L. 2205—Though the trust continues so long as the trustee has duties to perform,[79] and though the terms of the will may preclude the termination of the trust before the death of all of settlor's children,[80] or, if it was created for benefit of woman's children, it will not be terminated so long as she may bear them,[81] it cannot exceed the period limited for trusts which suspend the power of alienation.[82] In some cases, courts of equity may dissolve trusts before the expiration of the term for which created,[83] and parties without interest cannot object.[84]

from time to time, it will be presumed that sums thus drawn were from moneys which tort feasor had right to expend in his own business, and that balance remaining included trust fund he had no right to use. If, however, during currency of mingled accounts, the drawings out have left balance less than trust money, trust money must be regarded as dissipated except as to this balance, the sums being subsequently added to account from other sources not being attributed to trust fund. The mere misapplication of the fund does not create a general lien on tort feasor's estate. Board of Com'rs of Crawford County v. Strawn [C. C. A.] 157 F 49. The trustee is presumed to have made general payments from his own fund, hence, when moneys belonging to other persons are received and mingled in a general fund with moneys belonging to the trustee, and then such trustee pays out generally from such fund for his own purposes, there is a presumption of law that such payments are made from the moneys in said fund belonging to him, and do not constitute a wrongful misappropriation of the moneys of the cestui que trust. This presumption is possible of complete effect, however, only so long as the fund is large enough to contain all the moneys of the cestui que trust and some of the moneys of the trustee. Emigh v. Earling [Wis.] 115 NW 128.

75. Sargent v. Wood [Mass.] 81 NE 901.

76. When trustee, in violation of his trust, so disposes of the trust estate that it cannot be followed, either in its original or substituted form, beneficiary may sue at law to recover damages for the breach of trust, for he is then forced to rely on personal liability of trustee and has no claim upon his estate superior to ordinary creditor. Snyder v. Parmalee, 80 Vt. 496, 68 A 649.

77. Cochran v. Evans, 154 F 674.

78. A trust fund cannot be recovered from a bona fide purchaser without notice. Shopert v. Indiana Nat. Bk. [Ind. App.] 83 NE 515; Macomber v. French [Mass.] 84 NE 328. A trust fund which is applied by a creditor to the trustee's debt without notice that it was a trust fund cannot be followed. Mooney v. Chicago, etc., R. Co., 125 Mo. App. 651, 103 SW 119. Where widow appears on face of succession records, and records dehors succession, as legal owner of land, and no equities in favor of children appear in any way, third persons buying the property from her in good faith are protected from attack of the children under claim by them of ownership. Warner v. Hall & Legan Lumber Co. [La.] 46 S 108. A check signed by debtor with the words "deputy sheriff" following, is sufficient to put the creditor on notice that the fund on which it is drawn is a trust fund. Hill v. Flemming [Ky.] 107 SW 764. One purchasing from a guardian trustee cannot be an innocent purchaser simply for want of notice. Such transaction does not fall within the registration statutes, and therefore the defense of innocent purchaser does not apply, there being no act of the claimants that would estop them from claiming land. Hix v. Armstrong [Tex. Civ. App.] 108 SW 797.

79. Trust created for lives of beneficiaries is not terminated until the death of the last of them, nowithstanding a power of appointment by will given to the beneficiaries. Dudley v. People's Trust Co., 57 Misc. 230, 107 NYS 930.

80. Without disposing of the corpus, testator devised residue of estate in trust to pay income to wife for life, and, at her death, payment to be made to his five children, share and share alike, and to issue of any deceased child, providing that upon decease of either without leaving lawful issue, and having husband or wife surviving, then trustee to pay one-half of deceased child's share of rents, etc., of residuary estate to surviving husband or wife for term of natural life. Remaining half of such deceased child's share to go to and be divided equally among remaining chilren and issue of deceased child or children in manner aforesaid. Codicil revoked gift to husbands and wives of deceased children, whole share to be divided between surviving children. Trust existed as long as any child lived. Gibbons v. Connor [Pa.] 69 A 820.

81. A life tenant holding in trust for her children is not entitled to have the trust discharged and the property distributed though she has reached the age of sixty years. Bailey's Trustee v. Bailey, 30 Ky. L. R. 127, 97 SW 810.

82. Stringer v. Young, 190 N. Y. 545, 83 NE 690.

83. But such power will not be exercised save in exceptional cases, where impossible of performance because of conditions unforeseen or where the estate has vested and all the parties in interest consent, and other similar situations. Olsen v. Youngerman [Iowa] 113 NW 938.

84. Angell v. Angell [R. I.] 68 A 583.

Acts of the settlor. See 8 C. L. 2205—The trustor, unless he has reserved the power to do so, cannot revoke the trust.[85]

Acts of the beneficiary. See 8 C. L. 2206—A beneficiary, having an absolute title to the remainder, not subject to be divested or to diminution, has the right to terminate the trust,[86] and a conveyance by him, united in by the settlor, will extinguish it.[87]

Death or divorce. See 8 C. L. 2206—Though there are some exceptions,[88] and whether or not the death of one of several beneficiaries terminates the trust may be gathered from the terms used by the settlor,[89] the general rule is that on the death of the beneficiary the trust terminates,[90] but the death of settlor does not terminate the trust if after that event the trustee has duties to perform,[91] nor will divorce have this effect.[92]

Termination where purposes accomplished. See 8 C. L. 2208—A termination will be decreed where there is no good reason for its further continuance [93] or the beneficiary has reached the age designated.[94]

Union of titles See 8 C. L. 2207 terminates the trusts.[95]

TURNPIKES; TURNTABLES; ULTRA VIRES, see latest topical index.

85. And this is none the less true where the trust is entirely voluntary, nor is the rule affected by the fact that the trust cannot be administered and settled until after the death of trustee. In re Podhajsky's Estate [Iowa] 115 NW 590.

86. Connolly v. Connolly, 122 App. Div. 492, 107 NYS 185.

87. Trust deed made by S. M. and T. M., her husband, conveyed certain lands to M. M., one of grantor's children, upon trust to receive the rents, etc., and apply them to use of grantor, S. M., during her life, and at her death trustee empowered to sell lands and out of proceeds pay Jas., Jno. and Daniel M., sons of grantors, and their heirs and assigns, each sum of $200, and divide remainder of proceeds with her two sisters, Annie and Sarah M., daughters of grantors, and to their heirs, etc., share and share alike. T. M. having died, leaving S. M., widow, surviving, M. M., trustee, and her sister Sarah having died, unmarried and intestate, leaving their brothers, Jas., Jno. and Daniel and sister Annie as their sole heirs, held that a deed of conveyance made in lifetime of S. M., grantor, and in which she united with her sons, Jas., Jno., and Daniel and her daughter Annie, would operate to extinguish the trust and to convey an absolute title in the land to a third party. Armour v. Murray [N. J. Law] 68 A 164.

88. Where a remainder after a life estate is devised in trust for a person living at the death of testator, and the equitable interest thereby created is vested, the death of cestui que trust prior to termination of life estate does not defeat or terminate trust in the sense that the object of testator in creating trust has failed, and the trust property becomes intestate property of testator. Williams v. Williams [Wis.] 115 NW 342.

89. One item of will provided that "until the expiration of twenty years after my decease, or until the death of my daughters L. and J., whichever event shall first happen," the income to be paid in equal proportions "to my said three daughters, J., L. and C." On the expiration of the twenty years, or upon the death of survivor of L. and J., trustees to convey estate to J., L. and C., in equal proportions. Another item provided that "in case any of said daughters die before the termination of said trust without leaving issue surviving," one-third to go to such person as such daughter shall by last will make devise or appoint. C. died before termination of trust, after bequeathing her share to her husband. Her death did not terminate trust. Levi v. Scheel, 109 NYS 182.

90. Wells v. Brooklyn Union El. R. Co., 121 App. Div. 491, 106 NYS 77. Testator gave estate to four sons as trustees to pay income to certain parties during life, then to divide whole of net income remaining at his decease among said sons, or those living, share of each son to cease at death and be divided among survivors, last survivor to inherit all. On death of all beneficiaries except one son, trust terminated. Treadwell v. Williams [N. H.] 67 A 947.

91. Mersereau v. Bennett, 108 NYS 868.

92. A trust for the life of beneficiary's husband is not terminated by divorce. Pelton v. Macy, 108 NYS 713.

93. Angell v. Angell [R. I.] 68 A 583.

94. A trust created for the benefit of a beneficiary until he reach majority terminates at that time. The trustor still living, a conveyance from the trustee is unnecessary. In re Murray, 108 NYS 1047.

95. Trust created for married woman's sole and separate use as protection against improvidence of husband ceased on his death, and legal estate vested in her. Wilson v. Heilman [Pa.] 68 A 674. The principle is that where property is given to individuals to be used for their benefit and in such manner as no other persons have, or can have, any interest in it, they thereby become, in effect, the absolute owners of it and may exercise all of the rights belonging to them in that relation. Olsen v. Youngerman [Iowa] 113 NW 938.

UNDERTAKINGS.[96]

The chief distinction between a statutory bond and a statutory undertaking is that in the former the principal must be a party while in the latter the person on whose behalf it is executed need not join.[97] In other respects the terms "bond" and "undertaking" may, for many purposes, be regarded as synonymous and convertible.[99]

UNDUE INFLUENCE; UNFAIR COMPETITION; UNION DEPOTS, see latest topical index.

UNITED STATES.

§ 1. Proprietary Rights, 1935.
§ 2. Contracts, 1935.
§ 3. Officers and Employes, 1935.
§ 4. Claims, 1936.
§ 5. Actions by and Against, 1936.

The scope of this topic is noted below.[98a]

§ 1. *Proprietary rights.*See 8 C. L. 2207—There can be no adverse possession as against the United States.[99] The Federal act, providing that no land shall be purchased on account of the United States except under a law authorizing such purchase, does not apply to executed contracts so as to defeat the title of the United States to lands it has paid for.[1]

§ 2. *Contracts.*[2]—The usual rules of interpretation apply to contracts with the United States.[3] The invalidity of a contract on account of noncompliance with a statute is immaterial after the contract has been performed.[4]

§ 3. *Officers and employes.*[5]—A Federal statute prohibits officers and employes of the United States from soliciting or receiving any political contributions from any

96. See 4 C. L. 1760. See, also, Bonds, 9 C. L. 394. For the necessity and sufficiency of undertakings in particular proceedings see topics dealing with such proceedings, as Appeal and Review, 9 C. L. 108; Attachment, 9 C. L. 282, and the like.

97. An undertaking filed in an appeal proceeding as required by Code Civ. Proc. § 1724, not void for lack of appellant's signature, such not being required by § 1725 which provides that such undertaking shall be executed on behalf of appellant by two sureties. Russell v. Chicago, etc., R. Co. [Mont.] 94 P 501. Laws 1899, p. 79 entitled "An act to amend §§ 1053, 1057, 1059, 1067, 1072 and 1084 * * * Pol. Code * * * relating to bonds of officers and other bonds," requiring that official bonds shall be executed by both principal and sureties (§ 2) and that the provision of this article shall apply to all bonds and undertakings given in judicial proceedings (§ 7), is repugnant to Const. art. 5, § 23, in so far as it is construed to affect Code Civ. Proc. §§ 1724, 1725 relating to undertakings in appeal proceedings, for the reason that the subjects embraced in the act are not expressed in the title. Id.

98. Russell v. Chicago, etc., R. Co. [Mont.] 94 P 501.

98a. Property rights in the public domain (see Public Lands, 10 C. L. 1296; Mines and Minerals, 10 C. L. 839), matters relating to territories and Federal possessions (see Territories and Federal Possessions, 10 C. L. 1854), and matters relating to the rights, duties, and liabilities of public officers (see Officers and Public Employes, 10 C. L. 1043), and to public contracts generally (see Public Contracts, 10 C. L. 1285), have been excluded.

99. Frick v. Harper [Ala.] 46 S 453.

1. Rev. St. § 3736 (U. S. Comp. St. 1901, p. 2507). Act authorizing a public improvement and appropriating money therefor is sufficient authority for the purchase of land necessary or proper to such improvement. Burns v. U. S. [C. C. A.] 160 F 631.

2. See 8 C. L. 2207. See, also, Public Contracts, 10 C. L. 1285.

3. United States v. Hoyt, 158 F 162. Defendant was appointed the disbursing member of a board of three commissioners to negotiate Indian treaties at $8 per day and traveling expenses. The instructions given the board required a study of the special needs of the Indians in each case. Defendant held entitled to pay for time "employed" including time of receiving instructions, and not only for time "actively employed." Id. Commissioner held bound to account to the government for money wrongfully paid out. Id. The United States and not the government of the Philippine Islands was held to be purchaser of paper to be used by public printing office in those islands, where the Division of Insular Affairs, under an order of the secretary of war, conducted negotiations for purchase with no intimation that it was acting for the government of the Philippine Islands. United States v. Andrews, 28 S. Ct. 100.

4. Rev. St. § 3744 (U. S. Comp. St. 1901, p. 2510). Objection that contract was not "reduced to writing and signed by contracting parties with their names at the end thereof," unavailable. United States v. Andrews, 28 S. Ct. 100.

5. See 8 C. L. 2208. See, also, Officers and Public Employes, 10 C. L. 1043.

of its clerks and employes, and it also prohibits all other persons from soliciting such contributions in any room or building occupied by officers, etc.[6] A distress warrant cannot be levied on a Federal officer's person after termination of his term.[7]

§ 4. *Claims.*[See 8 C. L. 2209]—The mere recital in an act that a claimant "had a prior lien" is not conclusive, unless it is clear that congress intended that the recital should be accepted as a fact in the case.[8] Motion under Federal act for a new trial on behalf of the United States may be filed before the court of claims at any time within two years from rendition of judgment,[9] and the court may thereafter hear and decide the case at its convenience.[10]

§ 5. *Actions by and against.*[See 8 C. L. 2209]—The United States in seeking the enforcement of its own rights is not barred by limitations nor by the laches of its officers.[11] The government's remedies, under Federal acts for the collection of internal revenue, are concurrent.[12]

UNITED STATES COURTS, see latest topical index.

UNITED STATES MARSHALS AND COMMISSIONERS.[13]

United States commissioners are neither judges nor courts, and although they sometimes act in a quasi judicial capacity, they do not hold court nor do they possess the power of courts except in so far as acts of congress confer the same.[14] They may properly grant an order to discharge a prisoner at a preliminary proceeding when commitment has completely served its purpose.[15] All proceedings other than by petition in bankruptcy to secure the release from arrest or imprisonment upon a writ from the Federal courts must be taken before a United States commissioner.[16] The act, limiting the amount of mileage recoverable by marshals and deputy marshals, limits the fees in both civil and criminal cases.[17] A deputy marshal is chargeable with constructive knowledge of the conditions attached to his appointment.[18]

UNIVERSITIES, see latest topical index.

6. No violation of this act (Jan. 16, 1883, c. 27, § 11, 22 Stat. 407; U. S. Comp. St. 1901, p. 1223), by defendant to send a letter for contribution addressed to an internal revenue employe at his office in a Federal building. Defendant was not a Federal officer. United States v. Thayer, 154 F 508.

7. Rev. St. § 3625 (U. S. Comp. St. 1901, p. 2418). Writ issued against collector of revenue who had defaulted after expiration of term. Prisoners released. Ex parte Dillin, 160 F 751.

8. Act of May 27, 1902 (32 Stat. at L. 207, 243 c. 887). Congress intended that claim was to be judicially investigated and determined according to all the facts. Blacklock v. U. S., 28 S. Ct. 228.

9. Sanderson v. U. S., 28 S. Ct. 661. U. S. Rev. St. § 1088 (U. S. Comp. St. 1901, p. 745). Motion made nearly two years after judgment was entered. Id. Claims under Indian depredations act are embraced by provisions of this act. Id.

10. Decision nearly a year and a half after filing of motion for a new trial held in time. Sanderson v. U. S., 28 S. Ct. 661.

11. Execution was caused to be issued by the United States on a judgment in its favor in a purely governmental suit. Limitations and laches were pleaded. United States v. Noojin, 155 F 377.

12. Remedy by distraint. Act of July 13, 1866 (14 Stat. at L. 98, 107, 108, c. 184, U. S. Comp. St. 1901, pp. 2073-74-77). Suit in Equity under Act of July 20, 1868 (15 Stat. at L. 125, 167, c. 186, U. S. Comp. St. 1901, p. 2081) § 106. Blacklock v. U. S., 28 S. Ct. 228.

13. See 8 C. L. 2210. See, also, Reference, 10 C. L. 1489.

14. United States v. Tom Wah, 160 F 207. Commissioner had no power to compel a witness to be sworn, or to commit or punish him for contempt. Id.

15. Defendants were charged with conspiracy to defraud the United States of public lands, and at preliminary proceeding, commissioner discharged them on conclusion of district judge that there was no "probable cause." United States v. Black [C. C. A.] 160 F 431.

16. Rev. St. § 991 [U. S. Comp. St. 1901, p. 709]. Judgment debtor was arrested on a writ issued out of the Federal court on the ground that he had property which he refused to apply to a judgment against him. Petition for discharge. Johnson v. Crawford, 154 F 761.

17. Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 416 [U. S. Comp. St. 1901, p. 639]. Act allows but one mileage, irrespective of the number of writs executed in making such travel. National Bk. of Commerce v. Cleveland, 156 F 251.

18. Claimant was appointed deputy marshal and is chargeable with notice of the

UNLAWFUL ASSEMBLY.[19]

USAGES; USE AND OCCUPATION, see latest topical index.

USES.[20]

What constitutes active and passive uses and the execution thereof is elsewhere treated.[21]

USURY.

§ 1. In General; Definitions; Elements and Indicia, 1937.
§ 2. The Defense of Usury, 1940.
§ 3. The Effect of Usury, 1940.
§ 4. Affirmative Relief and Procedure, 1941.
Crimes, 1942.

§ 1. *In general; definitions; elements and indicia.* See 8 C. L. 2211—Usury is purely statutory, being unknown to the common law.[22] Whether a particular contract or transaction is usurious is a mixed question of law and fact.[23] The law of the place where the contract is made and to be performed [24] as it existed at the time the contract was made [25] controls.

Usury is an illegal profit required and received by a lender of a sum of money from the borrower.[26] To constitute usury there must be a loan or forbearance, the loan must be of money or something circulating as money, it must be repayable absolutely and at all events, and something must be exacted for the use of the money in excess of the interest allowed by law.[27]

Intent. See 8 C. L. 2211—Some courts include an unlawful intent of the parties as an element of usury; [28] others hold that the intention of the parties as shown by the facts and circumstances [29] may be considered in connection with other evidence in determining whether elements of usury exist in a particular case. Some courts hold that an unlawful intent will be presumed where the contract is usurious on its face.[30] The existence of an intent to take as interest an amount greater than the law allows

fact that he was to have no pay for services as crier in courts, as per the conditions of the appointment. Allen v. U. S., 41 Ct. Cl. 235.

19. No cases have been found during the period covered.

20. See 8 C. L. 2211.

21. See Trusts, 10 C. L. 1907.

22. Exchange Bk. v. McMillan, 76 S. C. 561, 57 SE 630; Banov v. Bk. of Charleston [S. C.] 60 SE 942.

23. Exchange Bk. v. McMillan, 76 S. C. 561, 57 SE 630. Question of fact where there is sufficient but conflicting evidence. Elwell v. Lund, 102 Minn. 166, 112 NW 1009.

24. An action to recover usury on notes embracing contract made in Georgia, to be performed in Georgia and payable in Georgia, would be adjudicated under the Georgia usury laws. Exchange Bk. v. McMillan, 76 S. C. 561, 57 SE 630. See, also, Conflict of Laws, 9 C. L. 596.

25. Contract held prior to statute and not usurious thereunder. Exchange Bk. v. McMillan, 76 S. C. 561, 57 SE 630.

26. Clemens v. Crane, 234 Ill. 215, 84 NE 884. Usury, generally speaking, is the exacting of a greater than the legal rate of interest. But it is not usury in every instance to take more than the law allows, since it is not interest to charge an additional and reasonable sum for incidental service or expense, provided the sum so charged does not exceed the amount of the loan and is not a cover for usury. Darden v. Schuessler [Ala.] 45 S 130. Interest taken after a loan of money in consideration of an extension of time for payment is usurious under Missouri statute making usury an offense. State v. Haney [Mo. App.] 108 SW 1080.

27. Clemens v. Crane, 234 Ill. 215, 84 NE 884.

28. See Clemens v. Crane, 234 Ill. 215, 84 NE 884. Also, post, and 8 C. L. 2211. There must be an intent to take more interest than law allows. Furr v. Keesler [Ga. App.] 59 SE 596. Where note is given for sum in excess of that actuallly received and proper interest, the unlawful interest is "knowingly" reserved and all interest forfeited under Rev. St. U. S. § 5198. Wagoner Nat. Bk. v. Welch [Ind. T.] 104 SW 610.

The intent is immaterial under the Missouri statutes making the taking of excessive interest an offense. State v. Haney [Mo. App.] 108 SW 1080.

29. Clemens v. Crane, 234 Ill. 215, 84 NE 884. The intention to take a higher rate of interest than that allowed by law and the device by which such excessive interest is taken or reserved may be shown by circumstantial as well as by direct evidence. Furr v. Keesler [Ga. App.] 59 SE 596.

30. Darden v. Schuessler [Ala.] 45 S 130.

makes the transaction usurious [31] though there is no corrupt intent to take illegal interest and no knowledge that the contract is contrary to law.[32] But the collection of an excess of interest through a mistake in computation or other error in fact contrary to the intention of the party will not support a charge of usury.[33] Similarly, it is held that the use of a standard and reasonably correct method of computing interest for periods of less than a year is not unlawful, though the result is the collection of a slight excess over the lawful amount of interest,[34] since the usury statute was not intended to overthrow the customary and standard mode of computation.[35] To render a contract usurious, there must be an agreement at the time it is made to pay and receive an unlawful amount of interest.[36] Subsequent conduct of the parties cannot render the contract usurious.[37] The form of the contract is not conclusive; the real character of the transaction will be looked to regardless of any device or cover of the parties,[38] and extrinsic evidence may be resorted to to determine the question.[39] A contract will be construed as legal if such construction is possible.[40]

There must be a loan or forbearance.[41]—The transfer of negotiable paper, valid in the hands of the original holder, at a discount greater than the legal rate of inter-

31. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621. The fact that it was the custom of banks to use a mode of computing interest which resulted in an unlawful overcharge would not relieve the transaction from usury if method was unlawful. Id.

32, 33. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621.

34. Not usury to charge highest amount of interest on short loans based on calculation treating thirty days as a month and 360 days as a year. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621.

35. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621.

36. Ardmore Loan & Trust Co. v. Dillard [Ind. T.] 104 SW 814.

37. Ardmore Loan & Trust Co. v. Dillard [Ind. T.] 104 SW 814. Where it was claimed that a contract to sell and deliver cotton, and providing for liquidated damages for breach, was a cover for usury, mere fact of payment on contract was not alone proof of usurious agreement. Instruction held erroneous. Id.

38. Clemens v. Crane, 234 Ill. 215, 84 NE 884. All schemes and devices by which money lenders attempt to collect an illegal rate of interest are closely scrutinized and will not be allowed to defeat the laws against usury which are always strictly enforced. Emig's Adm'r v. Mutual Benefit Life Ins. Co. [Ky.] 106 SW 230. The law will look to the real character of the transaction and go behind any device or shift of the lender to evade the usury law. Elwell v. Lund, 102 Minn. 166, 112 NW 1009. Execution of cotton contract for alleged advances **held a mere cover for usury.** Gage v. J. F. Smyth Mercantile Co. [C. C. A.] 160 F 425. Where mortgage stipulated the mortgages should have reasonable rent of premises as interest on the loan, the transaction was held a cover for usury, and, on accounting, mortgagor was allowed amount of rents over 6 per cent. Sebree v. Thompson, 31 Ky. L. R. 1146, 104 SW 781. Loan secured by assignment of wages and providing for interest held a cover for usury, and not a purchase of plaintiff's time at a discount. Brandt v. Hall, 40 Ind. App. 651, 82 NE 929. Held amount contracted for and borrowed was loan and not sale of wages. King v. Cantrell [Ga. App.] 61 SE 144.

39. Whether or not contract is ambiguous. Clemens v. Crane, 234 Ill. 215, 84 NE 884.

40. Where a contract is susceptible of an innocent construction and can be construed as unlawful and usurious only by giving the facts forced and unnatural construction, it will be held valid. Clemens v. Crane, 234 Ill. 215, 84 NE 884. In the absence of proof, the court will not presume that interest is paid under an illegal contract. Where a note called for eight per cent, payable semi-annually until maturity, and thereafter at the rate of eight per cent per annum, and the maker made semiannual payments after maturity, the court refused to presume a new contract for eight per cent interest, the law then allowing but six per cent. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718. Contract construed as a partnership, one party to furnish funds and receive a certain percentage as profits, and **not a usurious loan.** Clemens v. Crane, 234 Ill. 215, 84 NE 884.

41. See 8 C. L. 2212. Where one person hazards, in a business to be conducted by himself and others jointly or by such others for his benefit, money which is by agreement subjected to the risks of the business, the law as to usury does not apply. Boone v. Andrews, 10 Ohio, C. C. (N. S.) 377. An agreement whereby the first party thereto advances sums of money to be used by the second parties in conducting a business of making usurious loans and purchasing time certificates of wage earners, the profits and losses of such business to be divided and borne equally by such parties, is not usurious and is not made so by subsequent amendment whereby the first party promises to accept a stated per cent on the moneys so advanced, as liquidated profits, or in lieu of profits. The original agreement as to apportionment of losses remained unchanged. Id.

est, is not usurious,[42] although the transferror may have indorsed it, and such transfer does not deprive the transferee of the protection of a bona fide purchaser.[43] While it is lawful and not usurious to charge one price for property sold for cash and a higher price if sold on credit,[44] yet if the contract for sale is at a cash valuation, and certain payments are to be deferred in consideration of a greater amount of interest than that allowed by law, the transaction is usurious.[45]

The aggregate of the exactions must exceed the legal rate, See 8 C. L. 2212 that is, the rate allowed by law.[46] Legal interest paid for a sum of money for a certain length of time becomes usurious if the principal is not retained for the full length of time contracted for.[47] Interest on interest not paid when due is not usury if the debtor has the absolute right to discharge and satisfy the contract at maturity by paying the principal debt and lawful interest.[48] A contract to pay compound interest is not usurious and will be enforced but not in excess of the amount of simple interest computed at the maximum rate.[49] A renewal note which includes principal and interest, due and unpaid, is not usurious and is enforcible.[50] Under the South Carolina act, eight per cent may be collected provided an agreement to that effect is in writing.[51] It is held that a check for the amount charged is a compliance with the statute.[52]

Discounts, bonuses, commissions and other deductions and charges. See 8 C. L. 2212 Interest exacted in the form of a commission is usury if excessive.[53] If an agent intrusted with money to invest at legal interest exacts a bonus for himself as the condition of making a loan without the knowledge or authority of his principal, such circumstance does not constitute usury in the principal nor affect the security in his hands.[54]

The parties may remove the taint of usury See 8 C. L. 1776 by a rescission of that part of the agreement providing for usury.[55] Usury does not attach to a note given in payment and satisfaction of a note tainted with usury.[56]

42, 43. Woodall v. People's Nat. Bk. [Ala.] 45 S 194.

44. Bird v. Benton, 127 Ga. 371, 56 SE 450.

45. Evidence held to show that amount added to deferred payments was for interest which exceeded lawful rate. Bird v. Benton, 127 Ga. 371, 56 SE 450.

46. Loan usurious when given in consideration of payment of another loan, besides interest. Darden v. Schuessler [Ala.] 45 S 130. On $5,000 loan, with interest at 12 per cent, maximum rate, lender exacted also an interest bearing note for $1,000, which was found to be interest. Contract was usurious. Libert v. Unfried [Wash.] 91 P 776. It is usury to discount a note at 8 per cent where it provides for interest at 8 per cent only after maturity. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621.

47. Anderson v. Griffith [Or.] 93 P 934.

48. A note is not usurious bearing 10 per cent interest and payable 12 months after date which provides that interest unpaid annually shall be considered principal and bear the same rate of interest. Carney v. Matthewson [Ark.] 109 SW 1024. A promissory note which provides that it shall be payable one year after date with eight per cent interest to be paid annually, interest and principal after maturity to bear eight per cent annual interest to be paid semi-annually, is not usurious. Firestone v. Dellenbaugh, 10 Ohio C. C. (N. S.) 153.

49. Sanford v. Lundquist [Neb.] 114 NW 279. Where original note bears interest at maximum rate, a renewal note including interest on interest will be enforced for the amount of it less the interest on interest. Id.

50. But mere oral promise to pay interest on interest for an indefinite forbearance is not enforcible. Sanford v. Lundquist [Neb.] 114 NW 279.

51. Civ. Code 1902, § 1662. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621.

52. Being a written admission of liability. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621.

53. A contract is usurious where plaintiff, for services in procuring a loan, exacted a commission from defendant, which commission added to the interest amounted to more than the maximum legal rate of interest. France v. Munro [Iowa] 115 NW 577.

54. Franzen v. Hammond [Wis.] 116 NW 169. The presumption that the principal had knowledge of the act of agent to exact usury from borrower is rebuttable. Id.

55. A rescission of an usurious agreement entitles plaintiff to legal interest on note sought to be affected by usurious agreement. Anderson v. Griffith [Or.] 93 P 934.

56. Merchants' & Planters' Bk. v. Sarratt, 77 S. C. 141, 57 SE 621.

Usury statutes. See 8 C. L. 2218

Usury laws as applied to building and loan association contracts.[57]

§ 2. *The defense of usury.* See 8 C. L. 2214—Usury is a defense available only to the debtor or his privies.[58] A purchaser of land subject to a usurious mortgage may not set up the defense of usury if the amount of the mortgage debt has been deducted from the price.[59] If the amount is not so deducted, the purchaser may, in the foreclosure, defend against the usury on the ground that he stands in privity of contract and estate with the mortgagor.[60] Under the banking and negotiable instruments law of New York, it is held that the defense of usury is not available where a state bank has in good faith discounted negotiable paper for value, without notice that it was void for usury; but such defense is available in an action by a receiver of a state bank on notes purchased with knowledge that they were void, as between the original parties because including usury.[61]

Pleading and proof. See C. L. 2214—The defense of usury is not available unless specially pleaded,[62] though it may be interposed on the trial where the defendant was mislead by the pleading of his adversary.[63] The burden of proving facts constituting usury rests upon defendant who pleads it.[64]

§ 3. *The effect of usury.* See 6 C. L. 2214—A contract is not void for usury unless the statute so expressly provides.[65] Forfeiture of interest, and similar penalties, do not invalidate the contract as a whole.[66] The power of sale in a mortgage is not rendered void by reason of the fact that the debt secured by it is tainted with usury.[67] A sale may be had for the purpose of collecting the principal and lawful interest on the debt.[68] The exaction of usurious interest, unknown to the surety on a note, releases the surety.[69]

Forfeitures. See 4 C. L. 1768—The effect upon the amount recoverable by the lender depends upon the terms of the statute.[70] Under some, principal and legal interest is

57. See 6 C. L. 1777. See also, Building and Loan Associations, 9 C. L. 437.

58. Defendants may not plead usury as defense where they are not in privity with nor creditors of the investment company, debtor of the complainant. Grubb v. Stewart [Wash.] 91 P 562; Aggleson v. Middle States Loan, Bldg. & Const. Co., 61 W. Va. 139, 56 SE 177. If debtor ratifies the usurious transaction, others cannot assume a contrary attitude. Grove v. Great Northern Loan Co. [N. D.] 116 NW 345. A defense must fail which alleges assignment of mortgage to plaintiff securing a usurious loan but omitting to show interest of defendant. Biedler v. Malcolm, 121 App. Div. 145, 105 NYS 642.

59. Grove v. Great Northern Loan Co. [N. D.] 116 NW 345. One who purchases land, which is subject to an usurious trust debt, and assumes the payment of such debt as part of the consideration for his purchase, cannot be relieved from the usury. Aggleson v. Middle States Loan, Bldg. & Const. Co., 61 W. Va. 139, 56 SE 177. Usury cannot be set up as a defence by a purchaser of lands subject to a mortgage, in an action to foreclose. Tidball v. Schmeltz [Kan.] 94 P 794.

60. Grove v. Great Northern Loan Co. [N. D.] 116 NW 345.

61. Construing various statutes. Schlesinger v. Lehmaier [N. Y.] 83 NE 657.

62. Grubb v. Stewart [Wash.] 91 P 562.

63. Defendant was misled and failed to plead usury; he was allowed to set it up when the issue was raised at the trial. Anderson v. Griffith [Or.] 93 P 934.

64. Exchange Bk. v. McMillan, 76 S. C. 561, 57 SE 630. Where usury is pleaded as a defense to a written instrument in contradiction to the terms of such instrument, the burden is on the party so asserting it, and the plea must be supported by clear and satisfactory evidence. Boone v. Andrews, 10 Ohio C. C. (N. S.) 377. When the plea of usury is relied upon as a defense, it is incumbent upon the party making it to furnish sufficient testimony to enable the court to determine from the record the amount of usury, if any, embraced in the transaction so that the court may correctly or approximately adjudge the rights of the parties. Oman v. American Nat. Bk. [Ky.] 106 SW 277.

65. Usurious mortgage is not void. Grove v. Great Northern Loan Co. [N. D.] 116 NW 345.

66. Grove v. Great Northern Loan Co. [N. D.] 116 NW 345.

67. Payton v. McPhaul, 128 Ga. 510, 58 SE 50.

68. Debtor may plead usury and have amount recovered reduced. Payton v. McPhaul, 128 Ga. 510, 58 SE 50.

69. Plea held to state sufficient facts to show such defense by surety. Furr v. Keesler [Ga. App.] 59 SE 596.

70. Where transaction is a mere subterfuge to conceal usury, only the original amount of the obligation with legal interest can be recovered. Brandt v. Hall, 40 Ind.

recoverable; under others, all interest is forfeited;[71] while some provide, in addition, for a deduction from the principal of double the interest actually paid[72] and allow defendant his costs in the action for the debt.[73] In Louisiana, one who has paid excessive interest may recover, either by direct action or by way of defense when sued, excessive payments within twelve months prior to the making of judicial demand therefor,[74] but the owner or holder of a note may recover the full amount thereof, though it includes interest greater than eight per cent per annum.[75]

Application of usurious payments.[See 8 C. L. 1779]—In some jurisdictions, sums paid in excess of legal interest are deemed payments and credits on the principal and legal interest.[76] In the absence of any direction by the debtor, the creditor cannot apply a payment on a usurious debt in preference to a valid debt.[77] Where a payment is made upon a usurious indebtedness, the law requires application of the payment on the valid portion of the debt, and will not permit the creditor to appropriate it on the unlawful portion.[78] But the debtor may voluntarily pay the usurious indebtedness, and when he does so, he cannot recover back any portion of such payment on the ground of usury,[79] nor is he entitled to have such a voluntary payment applied upon another valid debt,[80] at least in those jurisdictions where usury can be interposed only as a defense.[81]

§ 4. *Affirmative relief and procedure.*[See 8 C. L. 2214]—An injunction restraining collection of a usurious debt cannot be maintained unless the amount admitted to be due is tendered or paid.[82] An assignment of wages which is in the nature of a chattel mortgage to secure usurious interest, is invalid and illegal in Missouri,[83] and may be cancelled by a court of equity without payment of the debt.[84]

Recovery of usury.[See 8 C. L. 2215]—Usurious interest voluntarily paid cannot be recovered back.[85] But where a usurious note has been assigned before maturity to an innocent purchaser and the defense of usury cut off, the maker, compelled to pay the note to the assignee, may recover the usurious interest from the original payee.[86] Where plaintiff in his petition offers to pay what is due, equity will require him to pay legal interest.[87]

App. 651, 82 NE 929. Where calculation showed usury, appellate court affirmed judgment of trial court, after reducing amount awarded by the amount above legal interest. Crabtree's Adm'r v. Sisk, 31 Ky. L. R. 206, 101 SW 886.

71. Charging a rate of interest greater than that allowed by law, and "knowingly done," works a forfeiture of the entire interest. Rev. St. U. S. § 5198. Wagoner Nat. Bk. v. Welch [Ind. T.] 104 SW 610.

72. Under 3 Ball. Ann., Codes and St. § 3671, where a contract is usurious, lender can recover only the principal less accrued interest, and less twice the amount of interst actually paid. Statute applied. Libert v. Unfried [Wash.] 91 P 776.

73. Defendant, in action on usurious contract, is entitled to certain deductions from the principal and may recover costs, but not attorney's fees. 3 Ball. Ann. Codes and St. § 3671. Libert v. Unfried [Wash.] 91 P 776.

74. Civ. Code, art. 2924. Huntington v. Westerfield, 119 La. 615, 44 S 317.

75. Civ. Code, art. 2924. Huntington v. Westerfield, 119 La. 615, 44 S 317. But where the borrower, in a series of transactions, gave new notes and paid a usurious interest in cash in advance, which was not included in the notes given, the borrower was entitled to recover excessive interest so paid, since the case did not come within the statutory exception. Id.

76. Payments made under cotton contract which was cover for usury applied on legal indebtedness under Rev. St. Mo. 1899, § 3709. Gage v. J. F. Smyth Mercantile Co. [C. C. A.] 160 F 425.

77. Anderson v. Griffith [Or.] 93 P 934.

78, 79. Drake v. Lux, 233 Ill. 522, 84 NE 693.

80. Voluntary payment on usurious note could not afterwards be applied on note not tainted with usury. Drake v. Lux, 233 Ill. 522, 84 NE 693.

81. This is Illinois rule. Drake v. Lux, 233 Ill. 522, 84 NE 693.

82. Rush v. Pearson [Miss.] 45 S 723.

83. Rev. St. 1899, § 3710. Henderson v. Tolman [Mo. App.] 109 SW 76.

84. Payment is not condition precedent to such relief. Henderson v. Tolman [Mo. App.] 109 SW 76.

85. Culver v. Osborne, 231 Ill. 104, 83 NE 110. Payment made to an innocent holder is not voluntary (Pearce v. Martin, 130 Ill. App. 24), and may be recovered from the party who exacted the usurious interest (Id.).

86. Payment is regarded as compulsory in such case. Culver v. Osborne, 231 Ill. 104, 83 NE 110.

87. Garlick v. Mutual Loan & Bldg. Ass'n, 129 Ill. App. 402.

An action to recover a penalty See 8 C. L. 2215 must be brought within the time limited by law.[88] All the makers of a joint and several note are necessary parties to an action to recover usurious interest paid on the note.[89] In such action, there is no variance between an allegation of payment of a certain amount by plaintiffs and proof of several amounts paid by each.[90] Failure to assert the defense of usury in an action on the debt bars a separate action to recover the penalty.[91] The pleading must state facts showing a cause of action under the statute,[92] which must be sustained by the proof.[92]

Crimes. See 8 C. L. 2215—An indictment, under the Missouri statute making usury an offense, is good if it follows the language of the statute.[94]

VAGRANTS.[95]

Vagrancy ordinarily consists in habitual idleness and want of visible means of support.[96] Where power is given a municipality to define vagrancy and to punish the same, an action under the ordinance must be brought in the name of the municipality.[97] A minor is not without a means of support unless her parents are unable to support her.[98] Contrary to the general rule, it is held in Georgia that under an arrest without a warrant evidence obtained by unlawful search and seizure is inadmissible.[99]

VALUES; VARIANCE; VENDITIONI EXPONAS, see latest topical index.

VENDORS AND PURCHASERS.

§ 1. The Contract for the Sale of Land, 1943.
A. General Nature, Requisites and Validity, 1943.
B. Reformation and Cancellation, 1945.
C. Statute of Frauds, 1945.
D. Options to Buy or Sell, 1945.
§ 2. Condition, Quantity, and Description of Lands, 1947.
§ 3. Title, Deed, and Incumbrances, 1948.
§ 4. Price and Payment, 1950.
§ 5. Time, 1951.

88. A suit brought to recover double the amount of usurious interest paid, authorized under Rev. St. U. S. § 5198, must be begun within two years from the occurrence of the usurious transaction. Banov v. Bank of Charleston [S. C.] 60 SE 942.

89. Under Rev. St. 1895, art. 3106, permitting recovery of double amount of interest paid. Alston v. Orr [Tex. Civ. App.] 19 Tex. Ct. Rep. 892, 105 SW 234.

90. Obligation on note being joint, payments would enure to benefit of all. Alston v. Orr [Tex. Civ. App.] 19 Tex. Ct. Rep. 892, 105 SW 234.

91. A separate action to recover the penalty for collecting attorney's fees in a foreclosure suit as a device for exacting usurious interest is barred by the judgment in foreclosure. Strait v. British & American Mortg. Co., 77 S. C. 367, 57 SE 1100.

92. In action under Rev. St. U. S. § 5198 to recover double the amount of usurious interest paid, the complaint must allege that the interest was "knowingly" taken. Banov v. Bank of Charleston [S. C.] 60 SE 942. Allegation that note for $393 was taken for loan of $350 for three months is sufficient allegation that unlawful interest was "knowingly" reserved. Wagoner Nat. Bk. v. Welch [Ind. T.] 104 SW 610.

93. Under Rev. St. 1895, art. 3106, providing that on a usurious contract the penalty shall be double the amount of interest received or collected, the penalty is not incurred where the interest is contracted for but not collected. Clayton v. Ingram [Tex. Civ. App.] 107 SW 880.

94. State v. Haney [Mo. App.] 108 SW 1080.

95. See 8 C. L. 2215.

96. Harris v. State [Ga. App.] 60 SE 207. One may work one or two days in a week and remain idle the remainder of the week without necessarily becoming a vagrant. Erroneous instructions given. Id. Evidence insufficient to sustain conviction. Lewis v. State [Ga. App.] 59 SE 933; Miller v. State [Ga. App.] 61 SE 494. The fact that a party is black and ragged and asleep at night and has not worked for four days, although he may have no money, will not of itself authorize a conviction for vagrancy. Gainer v. State, 2 Ga. App. 126, 58 SE 295.

97. Action in police court under ordinance was prosecuted in the name of the City of Butte. Defendant's contention was that it should have been brought in the name of Montana. State v. Second Judicial Dist. Ct., [Mont.] 95 P 811.

98. In Georgia inability of the parents to support a child over sixteen and under twenty-one years of age is essential to a conviction of the child for vagrancy. Acts 1905, p. 110, § 8. Turner v. State, 2 Ga. App. 386, 58 SE 492; Rogers v. State [Ga. App.] 61 SE 496.

99. Evidence that person had no money was unlawfully obtained. Conviction contrary to law. Gainer v. State, 2 Ga. App. 126, 58 SE 295.

§ 6. Conditions, Covenants, and Warranties, 1952.
§ 7. Demand, Tender, and Default, 1952.
§ 8. Forfeiture, Rescission, and Waiver, 1954.
§ 9. Interest in the Land Created by, and Rights and Liabilities Under the Contract, 1957.
§ 10. Liability Consequent on Breach, 1959.
§ 11. Rights After Conveyance, 1962.
§ 12. Vendor's Liens and Their Enforcement, 1962.
A. Express, 1962.
B. Implied, 1962.
C. Remedies, 1963.
§ 13. Enforcement of the Contract of Sale, 1964.

The scope of this topic is noted below.[1]

§ 1. *The contract for the sale of land. A. General nature, requisites, and validity.* See 6 C. L. 2216—A contract of sale of land [2] transfers for money the right to the title thereto and is to be distinguished from a deed,[3] and option,[4] an agreement for brokerage,[5] an exchange,[6] a mortgage,[7] a lease,[8] and a license.[9] The contract may be effected through agent [10] and it is not essential to the validity thereof that the vendor own the land at the time of contracting,[11] but where a party undertakes absolutely to convey, impossibility of performance does not ordinarily relieve him.[12] Like contracts generally, it must be supported by a consideration [13] and be free from fraud,[14] duress,[15] etc., and may be modified [16] or abrogated [17] by the parties thereto.

1. Scope of title is confined to contracts for sale of land and excludes Notice and Record of Title (see 10 C. L. 1015) and Deeds of Conveyance (see 9 C. L. 943).

2. While a contract to furnish water for irrigation is not a grant of realty within recording statutes (Stanislaus Water Co. v. Bachman [Cal.] 93 P 858), an agreement of water company to furnish through its canal from certain river to landowner, his heirs and assigns, water for irrigation, contract to be a covenant running with land and canal, held in force and effect a sale of realty, and binding on company's successor acquiring canal with notice (Id.).

3. See Deeds of Conveyance, 9 C. L. 943. Instrument held not to amount to a deed, but merely contract to convey. Powell v. Hunter, 204 Mo. 393, 102 SW 1020.

4. See 8 C. L. 2216, n. 38. See, also, Contracts, 9 C. L. 654.

5. See Brokers, 9 C. L. 413. Evidence held to sustain finding that defendant never agreed to purchase on own account, but merely undertook to negotiate a sale. Keel v. Schaupp [Colo.] 93 P 1094.

6. See Exchange of Property, 9 C. L. 1325.

7. See Mortgages, 10 C. L. 855. Whether conveyance with agreement to reconvey on payment of stated sum is conditional sale sale or mortgage depends upon whether such sum is a continuing debt. Francis v. Francis [S. C.] 58 SE 804. Held a mortgage. Id.

8. See Landlord and Tenant, 10 C. L. 571.

9. See Licenses to Enter on Land, 10 C. L. 630. Contract held to pass interest in land itself, and not mere revocable license to mine. National L. & T. Co. v. Alexander [S. C.] 61 SE 214.

10. For all matters relating to agents, as authority, affect on contract of agent's attempt to act for both parties, etc., see Agency, 9 C. L. 58.

11. Donovan v. Hanauer [Utah] 90 P 569. Held contact whereby he could acquire land. McNenny v. Campbell [Neb.] 116 NW 671. Contract to convey homestead is not invalid because wife did not join therein. White v. Bates, 234 Ill. 276, 84 NE 906.

12. His vendor defaulted. Marsh v. Johnston, 109 NYS 1106. Complaint held not demurrable for failing to allege that defendant represented that he owned an interest, etc., and that plaintiff relied thereon. Foster County Implement Co. v. Smith [N. D.] 115 NW 663.

13. Evidence held to sustain finding that conveyance from husband to wife was for a valuable consideration. Lindley v. Blumberg [Cal. App.] 93 P 894. Fact that agreed price represented an inflated and speculative value does not affect vendor's right to enforce payment. Gilman v. Heitman [Iowa] 113 NW 932.

14. See Fraud and Undue Influence, 9 C. L. 1475. While purchaser ordinarily owes no duty to disclose facts affecting value of property, he must not mislead vendor. Hays v. Meyers [Ky.] 107 SW 287. Where one knowing of dying condition of life tenant seeks out remainderman, who is ignorant thereof, for purpose of buying his interest, and being asked how the life tenant and her husband were getting along answered that "he thought they were getting along a little smoother than they had been," held to authorize rescission. Id.

15. See, Duress, 9 C. L. 1016. Where vendor accepts a lease from vendee and holds possession thereunder for three years, he cannot avoid sale on ground of duress. Harvin v. Blackman [La.] 46 S 525.

16. Where parties enter into subsequent agreement as to who should pay cost of procuring certain rights from third party, proper construction of provision of original contract relative thereto is immaterial. Rosenberg v. Heffernan [Mass.] 83 NE 316. Evidence held not to show that deed to land was made in satisfaction of a contract to convey another piece. Kirby v. Cartwright [Tex. Civ. App.] 20 Tex. Ct. Rep. 509, 106 SW 742.

17. Evidence held to sustain finding that contract had been abrogated by consent and another entered into. Patterson v. Rubenstein [Cal. App.] 92 P 401. Where contract of sale provided for payment of certain sum

Substitution of vendors is effected by a conveyance of the land, with the purchaser's consent, to one who agrees to fulfill the contract.[18]

*Certainty and definiteness.*See 8 C. L. 2217—The contract must be certain and definite,[19] but it is sufficient if it provides the means whereby it can be made certain.[20]

*Offer and acceptance.*See 8 C. L. 2217—As in other contracts, the minds of the parties must meet upon all the essential elements of the contract.[21] An offer [22] and an acceptance [23] create a contract [24] provided the acceptance is unqualified [25] within the terms of the offer [26] and is made before its withdrawal.[27] Though offer is unilateral, it cannot be withdrawn after acceptance.[28]

monthly, title to be conveyed upon full payment, and vendor thereafter orally agreed to advance money for construction of house, monthly payments to be increased held that such agreement did not rescind original contract. Greenwood v. Beeler [Cal.] 93 P 98.

18. Pearson v. Courson, 129 Ga. 656, 59 SE 907. Where vendee under bond for deed, vendor and third person agreed that latter should pay balance due, take title, and upon vendee's paying to him of such balance convey to vendee, held that third person assumed position of vendor towards vendee. Id. See, also, Mortgages, 10 C. L. 855.

19. Where contract is clear and distinct in itself, fact that it is part of larger transaction involving several tracts is immaterial. Moore v. Price [Tex. Civ. App.] 18 Tex. Ct. Rep. 693, 103 SW 234. Instrument reciting, "Received of C $25 on purchase price of $400, cash value for" land described, R to furnish warranty deed, held too indefinite as to parties to be specifically performed, it appearing that C was acting for some one else. Chambers v. Roseland [S. D.] 112 NW 148. Agreement that vendor would, in consideration of certain payments and services to be rendered during his life, have papers fixed so that vendee should not be disturbed, and that vendee should have premises when he was through with them, held sufficiently definite to be valid. Northrup v. Mead, 121 App. Div. 385, 106 NYS 150. Lease containing option to purchase held sufficiently definite to be specifically enforced. Kerr v. Moore [Cal. App.] 92 P 107. For sufficiency of description, see post, § 2.

20. Schuyler v. Wheelon [N. D.] 115 NW 259. Executory contract for sale of townsite, not to exceed 30 acres to be selected by grantee from specified tract, held sufficient. Id.

21. Minds held to have not met on specific location and boundary. Wadick v. Mace [N. Y.] 83 NE 571. Evidence held to show that vendor did not know at time of executing contract that it contained provision requiring him to accept as cash any contracts of sale which vendee might make, and hence to entitle him to cancellation unless vendee would eliminate such provision. Stone v. Moody [Wash.] 91 P 644. Where purchaser believed that she was purchasing 85 acres when in fact there were only 70, and vendor did not know at the time that she was laboring under false impression, held that plaintiff could not recover damages, but could rescind, minds having not met. Railey v. Roberts [Ky.] 109 SW 903. And it was error to dismiss where petitioner asked for general relief as well as for damages. Id.

22. Where special agent exceeded his authority in effecting sale, deposit with bank of which agent was cashier with notice by agent to principal that money would be turned over as soon as abstract showing title, etc., was sent, held not a payment to agent as such, but amounted merely to offer to purchase. Brown v. Grady [Wyo.] 92 P 622.

23. Plaintiff, desiring to buy made offer of $65 per acre. Owner replied by letter that he would not accept, but added: "I may be willing to take $1,000 for the land. * * * If you are willing to pay this price, please let me know, and I will write you acceptance." Plaintiff replied that he would give $1,000, but owner rejected officer. Held no contract. Lucas v. Patton [Tex. Civ. App.] 20 Tex. Ct. Rep. 796, 107 SW 1143. Letter of principal to agent enclosed deed and directed him to accept plaintiff's offer, but agent, in the mean time having received a better offer, communicated it to principal who accepted it. First acceptance was never communicated to plaintiff. Held no acceptance of plaintiff's offer (Madden v. Cheshire Provident Institution [Kan.] 94 P 793), and plaintiff has no cause of action against principal or agents (Id.).

24. Offer and acceptance held to constitute sale. Stafford v. Richard [La.] 46 S 107. Evidence held to show parol sale through agent. Arkadelphia Lumber Co. v. Thornton, 83 Ark. 403, 104 SW 169.

25. Beiseker v. Amberson [N. D.] 116 NW 94. Acceptance, provided title is good, is not qualified, since law will imply such qualification in any event. Ryder v. Johnston [Ala.] 45 S 181. Where plaintiff accepted offer, but asked that deed be sent to one of two banks to be held in escrow, and that insurance policies be assigned, held not an unconditional acceptance. Beiseker v. Amberson [N. D.] 116 NW 94.

26. Owner offered to sell at $800 net, and offeree telegraphed: "Offer accepted. Lot sold. Send abstract," and owner wired: "Awaiting guarantee $800 cash net. I will send abstract." Purchaser deposited $800 in local bank, and bank notified owner of deposit. Held that minds had never met, as owner did not agree to deposit. Foss Investment Co. v. Ater [Wash.] 95 P 1017.

27. Where offer was without consideration and was not acted upon for 15 years and until withdrawn, held that no rights could be acquired. Spafford v. Hedges, 231 Ill. 140, 83 NE 129.

28. Offeror accepted part payment. Taylor v. Newton [Ala.] 44 S 583.

*Mutuality.*See 8 C. L. 2218—Although the contract must ordinarily possess mutuality at the time of execution,[29] performance by the party not bound, if timely,[30] creates a mutuality which relates back.[31]

*Construction.*See 8 C. L. 2218—The execution of formal papers merge all prior agreements in the absence of fraud.[32] While parol evidence is inadmissible to supply essential elements [33] or to contradict the written instrument [34] except as to the recital of the consideration,[35] the circumstances and facts surrounding and known to the parties at the time of execution may be shown to explain ambiguities,[36] especially if latent.[37] Where a contract is susceptible of two constructions, that which renders it most reasonable, fair, and just should be adopted.[38]

(§ 1) *B. Reformation and cancellation.*[39]—Related papers and endorsements may be construed together.[40]

(§ 1) *C. Statute of frauds.*[41]

(§ 1) *D. Options to buy or sell.*See 8 C. L. 2218—An option is a contract whereby one acquires the right for a specified time to enter into a contract of sale at his election,[42] but passes no interest in the land itself,[43] being a mere standing offer [44] which

29. Contract held to lack mutuality, vendee not being bound thereby. Unoin Sawmill Co. v. Lake Lumber Co. [La.] 44 S 1000. Contract for sale of mining rights providing for a lease on royalty basis in case vendor could not procure release of incumbrance held not lacking in mutuality, though it did not expressly require vendee to operate mines in latter event. National L. & T. Co. v. Alexander [S. C.] 61 SE 214. Mutuality created by promise to convey at specific price and promise to pay same held not destroyed by provision that purchaser could terminate same by failure to pay interest for 60 days. Taber v. Dallas County [Tex.] 20 Tex. Ct. Rep. 309, 106 SW 332.

30. Where contract lacked mutuality in that vendee was not bound thereby, held that he could not hold same open for two years and then make it binding by acting thereunder. Union Sawmill Co. v. Lake Lumber Co. [La.] 44 S 1000.

31. Although contract for sale of certain land if vendor acquire same at foreclosure did not obligate vendor to so purchase, lack of mutuality could not be asserted after she had purchased. Bryan v. Carroll, 122 App. Div. 301, 106 NYS 668. Where contract of sale implied that purchaser would place improvements thereon which were to be forfeited upon nonpayment of interest, vendor could not assert after improvements were made that there was want of mutuality, since performance of that upon which mutuality depended related back. Taber v. Dallas County [Tex.] 20 Tex. Ct. Rep. 309, 106 SW 332.

32. Bond for payment of balance of price stipulating for interest held to merge prior agreement that no interest should be charged until removal of a mortgage. Buchanan v. Dawson, 34 Pa. Super. Ct. 400.

33. In absence of fraud or mistake, extrinsic evidence is not admissible to supply names of contracting parties. Chambers v. Roseland [S. D.] 112 NW 148.

34. Where written contract provided that if vendor's title should be defective earnest money should be returned, oral agreement that if it proved defective vendor should cure defect held without force. Reiff v. Coulter [Wash.] 92 P 436. Where deed was unambiguous and purported to convey a present title, parol evidence held inadmissible to show that it was to become binding only upon happening of future contingency. Williams v. Smith, 128 Ga. 306, 57 SE 801. Where nothing is said in written contract about restrictions, parol evidence is admissible to show that purchaser knew thereof at time of contracting. Swartz v. City & Suburban Realty Co. [Md.] 67 A 283.

35. Parol evidence is admissible to show that amount recited as received was not in fact received, although contract contains statement of amount remaining unpaid. Brixen v. Jorgensen [Utah] 92 P 1004.

36. Stein v. Archibald, 151 Cal. 220, 90 P 536.

37. Where contract describes property as "about" 60 feet on named street and "about" 200 feet deep, which would convey only part of building thereon, but remainder of description is sufficiently broad to cover entire property, held that parol evidence was admissible to show intent. Harten v. Loffler, 29 App. D. C. 490.

38. Stein v. Archibald, 151 Cal. 220, 90 P 536.

39. See 6 C. L. 1783. See, also, Reformation of Instruments, 10 C. L. 1496; Cancellation of Instruments, 9 C. L. 454.

40. Contract stipulated that if title was unmarketable, etc., sum deposited by vendee with vendor's attorneys should be returned. On contract was indorsed an acknowledgment of deposit in accordance with terms of contract, to be held in escrow until delivery of deed. Held that contract and indorsement should be construed together. Kister v. Pollak, 109 NYS 204.

41. See 8 C. L. 2218. See, also, Frauds, Statute of, 9 C. L. 1494.

42. Cameron v. Shumway, 149 Mich. 634, 14 Det. Leg. N. 584, 113 NW 287. Whether instrument is a conveyance, agreement to convey or option to purchase depends upon intention of parties, as shown by instrument, and, if that is doubtful, from attending circumstances. McHenry v. Mitchell [Pa.] 68 A 729.

Held an option and not a sale. Kessler v.

may be converted into a contract of sale [45] by an acceptance in the manner designated,[46] within the time specified,[47] and upon the terms given.[48] It must be supported by a consideration [49] and satisfy the statute of frauds.[50] An option is frequently given in leases.[51] An option by its terms binding upon the optionor, his heirs, repre-

Pruitt [Idaho] 93 P 965; John v. Elkins [W. Va.] 59 E 961. Agreement to convey certain land for $10,000, if complainants desired to purchase after completion of oil well on adjoining land. Laughner v. Smith, 232 Ill. 534, 83 NE 1052. Contract in form of an absolute conveyance but ending with provision that upon nonpayment of consideration same should become null and void and all liabilities extinguished. McHenry v. Mitchell [Pa.] 68 A 729. Agreement to sell with provision that, if first payment was not made on named day "or within ten days thereafter, this agreement shall be considered rescinded and neither party bound." Barnes v. Rea [Pa.] 68 A 836; Barnes v. Hustead [Pa.] 68 A 839. After institution of action to foreclose mortgage, mortgagor conveyed property to mortgagee under agreement by latter to reconvey to mortagor upon payment of specified sums within two years. Neeson v. Smith [Wash.] 92 P 131. Fact that optionor in suit by optionee for specific performance referred to it as a conditional sale held immaterial where facts alleged showed it to be an option. Id.

Held a sale and not an option: Contract binding plaintiffs to convey to defendant interest in mines in consideration of $500, etc., and binding defendant to pay all taxes during "life of this option." Chenoweth v. Butterfield [Ariz.] 94 P 1131. Agreement embodied in letter, stating that writer will give $250 for tract of land, $100 payable on or about a specified date and balance on another date, and offering to give notes, and reply reciting willingness to sell on terms proposed and enclosing notes for price. Roberts v. Braffett [Utah] 92 P 789. Contract to convey certain described land for $2 per acre provided payment was made within three years, and reciting payment of $25 "by way of earnest." Davis v. Martin [N. C.] 59 SE 700.

Agency and not option: Writing authorizing brokers to sell land for $1000, or as much less as owner might take, and binding brokers to accept as remuneration any sum in excess of that stipulated. Tate v. Aitken, 5 Cal. App. 505, 90 P 836.

43. Principle that prospective vendor holds estate for vendee does not apply. Thacher v. Weston [Mass.] 83 NE 360. Contract providing that party and his heirs shall have a right to purchase for specified price at any time within ten years gives no interest until purchase is made, though it provides that it shall be covenant running with land. Kadish v. Lyon, 229 Ill. 35, 82 NE 194. Contractual penalty for failure of vendee to complete railroad within specified time held dependent upon purchasing, and, hence, no liability where option was not exercised. John v. Elkins [W. Va.] 59 SE 961.

44. Adams v. Peabody Coal Co., 230 Ill. 469, 82 NE 645; Barnes v. Rea [Pa.] 68 A 836. Option does not become contract to convey until accepted. Barnes v. Rea [Pa.] 68 A 836; Barnes v. Hustead [Pa.] 68 A 839.

45. Whether original contract be regarded as option or contract of sale, held that payment made thereunder created a contract of sale. Menzel v. Primm [Cal. App.] 91 P 754.

46. Where payment of portion of purchase price is required, written notice is insufficient. Barnes v. Rea [Pa.] 68 A 836. Where option is to be exercised by payment of purchase price, attempt to sell land at auction not an election. Thacher v. Weston [Mass.] 83 NE 360. Notice of acceptance of option given by husband and wife, read in presence of both and stated to be intended for both, is sufficient though directed to wife only. Thompson v. Willard [Pa.] 68 A 46.

47. Time is of essence of option. Smith v. Howard [Ky.] 105 SW 411. Fact that optionor was unable to convey during option period does not extend time thereof. Id. Failure to exercise option within time for exercise forecloses all rights, although time is not expressly made of its essence. Neeson v. Smith [Wash.] 92 P 131. Where optionee was to have ten days after completion of well on adjoining farm within which to examine title and close deal, and oil well was completed on May 3rd, tender of money on June 7, held too late, optionor having demanded that it be closed by May 19th. Laughner v. Smith, 232 Ill. 534, 83 NE 1052. Where option provided for payment of portion of consideration for conveyance within three months upon presentation of deed, and that upon nonpayment as provided contract was to become void, held that no forfeiture could be declared for nonpayment within the time, unless vendor presented deed. McHenry v. Mitchell [Pa.] 68 A 729. Written notice of election to exercise option held sufficient to require optionor to present deed. Id.

48. Acceptance on different terms constitutes new offer to purchase. Millard v. Martin [R. I.] 68 A 420.

49. Sum of $1.00 is sufficient. Adams v. Peabody Coal Co., 230 Ill. 469, 82 NE 645. Option without consideration may be withdrawn at any time before acceptance, and sale to another repudiates option, and motive is immaterial. Noble v. Mann [Ky.] 105 SW 152. Contract by M. to sell land to plaintiff at specified price and to convey to any one to whom plaintiff may sell upon payment of such price, reciting consideration of one dollar and requiring payment of balance within twelve months, but not binding plaintiff, held an option without consideration. Id.

50. See Frauds, Statute of, 9 C. L. 1494. Option given by defendant to promotor of plaintiff corporation was insufficient as to description. Lease sufficient as to description was executed by defendant to plaintiff, but did not mention option. Held that they could not be construed together so as to aid option. Broadway Hospital & Sanitarium v. Decker [Wash.] 92 P 445.

51. See Landlord and Tenant, 10 C. L. 571. Evidence held to establish making of oral

sentatives and assigns does not expire with the death of the optionor.[52] The optionor has a reasonable time after notification of election to purchase within which to execute the deed.[53] The rights and obligations of the parties to an option depend upon the terms thereof,[54] but a bare option carries no right of possession.[55] A valid assignment [56] invests the assignee with the rights of the assignor.[57] Where land is sold subject to an option, the vendor and optionee cannot vary the terms thereof without the consent of the purchaser.[58] Upon breach of the contract by the optionor,[59] unless caused by the optionee,[60] or optionee has previously renounced the option,[61] a cause of action accrues for the damage suffered. The fact that optionee persuaded optionor to reduce price by a false representation as to what he could sell the property for does not entitle optionor to more than the agreed price.[62]

§ 2. *Condition, quantity, and description of lands.* See 8 C. L. 2220—Where land is sold by government subdivisions, the purchaser cannot complain that it includes swamp land.[63]

Description. See 8 C. L. 2220—The contract must describe the land with sufficient particularity for identification.[64]

contract to lease with option to purchase. West v. Washington, etc., R. Co. [Or.] 90 P 666.

52. Adams v. Peabody Coal Co., 230 Ill. 469, 82 NE 645.

53. Failure to have deed ready at time held not to entitle optionee to treat contract as broken. Lumaghi v. Abt, 126 Mo. App. 221, 103 SW 104.

54. Option to purchase contained in lease held to require optionee to pay taxes upon electing to purchase and not as they became due as condition precedent. Brink v. Mitchell [Wis.] 116 NW 16. Where vendor agrees to sell on payment of purchase price within specified time, and purchaser within time pays price and receives a conveyance, vendor complies with his agreement. Thacher v. Weston [Mass.] 83 NE 360. Plaintiff leased premises for five years, lease containing option. He built barn and paid rent for three years. Held that cost of barn and rent paid were not payments on purchase price. Lindley v. Blumberg [Cal. App.] 93 P 894.

Forfeiture: Option contract providing that upon nonpayment of portion of purchase price within specified period shall render same void, is forfeiture by nonpayment. Barnes v. Hustead [Pa.] 68 A 839. Where option was to become null and void if payment of portion of purchase price was not made within specified period, acknowledgment and recordation of contract after such period held a waiver of right to declare a forfeiture. Barnes v. Rea [Pa.] 68 A 836; Barnes v. Hustead [Pa.] 68 A 839.

55. In forcible entry and detainer, evidence of extension of option held immaterial. Kissack v. Bourke, 132 Ill. App. 360.

56. Though option was not assignable, acceptance of part performance from assignee ratifies assignment. Taylor v. Newton [Ala.] 44 S 583.

57. Acquires only rights of assignor and obtains no interest in land unless he accepts option within time specified. Cameron v. Shumway, 149 Mich. 634, 14 Det. Leg. N. 584, 113 NW 287.

58. Purchased on different terms. Millard v. Martin [R. I.] 68 A 420.

59. Evidence that, when demand was made for conveyance as required by option, vendor stated that he had an indemnity bond to secure him against pecuniary loss occasioned by refusal is admissible to show that refusal was willful and not based on inability to perform. Brown v. Honiss [N. J. Err. & App.] 68 A 150. Statement by agent of option that unless an extension of option was granted deal was off, held not a waiver of provision that optionor should furnish abstract. Hampton Stave Co. v. Gardner [C. C. A.] 154 F 805. Existence of past due lien of less than amount of stipulated price held not such a defect as to render optionor unable to perform. Smith v. Howard [Ky.] 105 SW 411. Allegation that certain small defects existed in title which optioner refused to cure, without allegation of facts, held a mere conclusion. Id.

60. Fact that optionee failed to return upon demand plat furnished with incomplete abstract, held not to excuse failure to furnish complete abstract as required. Hampton Stave Co. v. Gardner [C. C. A.] 154 F 805.

61. Statement by agent of optionee upon being refused an extention of time that unless option was extended so as to enable optionee to examine lands, the deal was off, held not a renouncement of option, especially where followed by demands for abstract as provided therein. Hampton Stave Co. v. Gardner [C. C. A.] 154 F 805.

62. Especially where he ratifies transaction by proceeding to carry out option. Clark v. Kurtz [Pa.] 69 A 811.

63. Especially where given thirty days to make a survey before accepting title. Board of Com'rs of Caddo Levee Dist. v. Glassel [La.] 45 S 370.

64. Heenan v. Parmele [Neb.] 114 NW 639. Description is sufficient if identification is reasonably possible. Hantz v. May [Iowa] 114 NW 1042. Deed conveying all of west half of a quarter section lying north of existing public highway held sufficient. Id. Agreement to convey as soon as boundaries could be ascertained, part to be conveyed to commence at lowest point on tract and to include a portion of a certain section, being 120 acres in all, held too indefinite to give color of title. Dickson v. Sentell, 83 Ark.

Quantity. See 8 C. L. 2220—One receiving a conveyance with distinct boundaries of a portion of a tract is not affected by a provision in a conveyance of the other part providing for a re-establishment of the boundary line if the parts are not equal, there being no such provision in his conveyance.[65] Where lots are sold by actual measurement from designated corner, the rule for apportionment of surplus in block does not apply,[66] but a conveyance of a designated number of acres from a larger tract entitles the purchaser to such number though the entire tract does not contain as much as supposed.[67]

§ 3. *Title, deed, and encumbrances. What title was sold.* See 8 C. L. 2220—A conveyance by quitclaim deed purports to convey no particular title but only such as the vendor has.[68]

Sufficiency of title tendered. See 8 C. L. 2221—In the absence of an agreement, the parties are presumed to have contracted with reference to an unincumbered and indefeasible title,[69] but ordinarily the contract stipulates for a particular title,[70] such as a "good title," [71] "marketable title," [72] or title free from incumbrances and adverse

385, 104 SW 148. Contract describing property as "situate in the city of Newport, county of C., and state of Kentucky, and being A and heirs' property, located at 116 East 8th St., Newport, Kentucky," held sufficient to support action for specific performance. Ochs v. Kramer [Ky.] 107 SW 260.

65. Heflin v. Heflin [W. Va.] 59 SE 745.

66. Atkins v. Pfaffe [Iowa] 114 NW 187.

67. Sale to each of several grantees. First Nat. Bk. v. Crawford [W. Va.] 60 SE 781. One who purchases by acre interest of one of said grantees and subsequently acquires other interests in whole tract is not entitled to abatement of purchase money from such grantee. Id.

68. Vendor under quitclaim deed is not liable to purchaser for purchase money upon failure of title. Board of Directors of St. Francis Levee Dist. v. Cottonwood Lumber Co. [Ark.] 110 SW 805.

69. Taylor v. Newton [Ala.] 44 S 583. Especially where land was free from encumbrance at time of contracting. Emerick v. Hackett [N. Y.] 84 NE 805. Where optionor's title did not appear of record, optionee, after paying part of price to bind bargain, held entitled to demand evidence of title as condition precedent to performance. Taylor v. Newton [Ala.] 44 S 583.

70. Agreement to convey by good and sufficient quitclaim deed, reciting that vendors acquired title at foreclosure sale, held to call for conveyance of entire estate. Brink v. Mitchell [Wis.] 116 NW 16. Contract to convey good title free from incumbrances calls for title free from hostile claims and possible litigation, and title by adverse possession held properly refused where record owner is asserting claims. Hoffman v. Titlow [Wash.] 92 P 888.

71. **Held good title:** Where testator left land to wife so long as she remained his widow, but upon remarriage, to go to such children as should then be living, held that deed from wife and children conveyed good title. Ochs v. Kramer [Ky.] 107 SW 260.

Held insufficient: Abstract containing no other proof of title by limitation than by affidavit of vendor. Moore v. Price [Tex. Civ. App.] 18 Tex. Ct. Rep. 693, 103 SW 234. Abstract showing that undivided interest was in inmate of insane asylum, and that nearest relatives have executed warranty deeds, held not to show good title, since such persons might not be heirs at time of death, and state may have claim against estate under Rev. St. 1895, arts. 136, 137. Id.

72. **Held to call for marketable title:** Agreement to convey free and clear of incumbrances. Van Keuren v. Siedler [N. J. Eq.] 66 A 920. Contract "that the said party of the first part has this day bargained to sell unto party of the second part and unto her heirs and assigns the following described property. Vaughan v. Butterfield [Ark.] 107 SW 993.

Held marketable: Although some deeds in vendor's chain described lot as one foot narrower than it really is, evidence held to show marketable title to full width by adverse possession. Taub v. Spector, 108 NYS 723. Mere possibility that notice of tax sale was not given to all parties interested as required by Laws 1885, p. 699, c. 405, § 7, held under facts not to render title unmarketable. Rosenbium v. Eisenberg, 108 NYS 350. Validity of partition sale in action by successor to interest of one heir as against contention that will placed property in trust held under facts not so uncertain as to render title unmarketable. Tolosi v. Lese, 120 App. Div. 53, 104 NYS 1095. Will vesting life estate to realty in husband and containing a power of sale in his discretion held to empower him to convey a marketable title. Odell v. Claussen, 120 App. Div. 635, 104 NYS 1104. Abstract is not objectionable because deed in chain by husband and wife does not show that they released homestead rights therein, where it further appears that they were living in another state and that husband died leaving homestead there. White v. Bates, 234 Ill. 276, 84 NE 906.

Held unmarketable: Where error in name of a grantee in vendor's chain could be proved by parol. Walters v. Mitchell [Cal. App.] 92 P 315. Title depending upon default judgment in action to quiet title, where petition therein failed to allege jurisdictional facts of possession for one year in plaintiff and assertion of title by defendant, as required by Code Civ. Proc. § 1638 and § 1639, subd. 3. Lese v. Metzinger, 54 Misc.

claims,[73] and the vendor must tender the title called for [74] unless waived by the purchaser.[75] The title must be fairly deducible of record.[76] A perfect title by adverse

151, 105 NYS 888. Encroachment of adjoining building of three inches in front and one and one-half inches in rear rendered title unmarketable. Reynolds v. Wynne, 105 NYS 849. Where testator devised realty to executors and executrix, his wife, to hold in trust to apply proceeds to support of wife, and authorized executors with wife's consent to sell same, sale by wife, who alone qualified, together with quitclaim deeds from her and remaindermen. Hilton v. Sowenfeld, 53 Misc. 152, 104 NYS 942. Where wife refuses to relinquish dower. Vaughan v. Butterfield [Ark.] 107 SW 993. Prior recorded contract to convey. Van Keuren v. Siedler [N. J. Eq.] 66 A 920. Where executor sold to himself through third person (Weintraub v. Siegel, 109 NYS 215), and fact that executor was charged with price in his accounting does not by estoppel render title marketable in absence of showing that parties interested were aware at time of the facts (Id.). Abstract showing tax deeds, but no judgment, precept, or affidavit upon which they were based. Koch v. Streuter, 232 Ill. 594, 83 NE 1072. Where deed by heirs created trust in favor of creditors of ancestor and only four years have elapsed, held that it cannot be said as matter of law that creditors would be barred by laches or limitations so as to render title marketable. Id. Abstract failing to show title from United States to state. Id.

73. Held an incumbrance: Lease for five years. Foland v. Italian Sav. Bk., 108 NYS 57.

Party wall agreement to pay one-half of cost thereof upon using same which ran with the land and bound the heirs and assigns of respective parties held incumbrance which could not be removed, since time of payment and person entitled to receive same cannot be ascertained. Hoffman v. Dickson [Wash.] 92 P 272. Held inequitable and impractible to deduct one-half of cost from purchase price. Id. Where vendor agreed to convey premises described as thirty-one feet nine inches in front and rear and seventy-five feet in depth, failure of title to triangular piece five and one-half inches by nineteen feet eleven inches because of **encroachment of adjoining building** held to justify vendee rejecting deed. Kaplan v. Bergmann, 122 App. Div. 876, 107 NYS 423. Encroachments of eaves and projections of house on adjoining lot held to authorize rejection of deed though owner stated that he would remove same at any time. Walters v. Mitchell [Cal. App.] 92 P 315. Action for partition attacking vendor's title as procured through fraud and undue influence in which **lis pendens** was filed held a cloud on title. Whalen v. Stuart, 108 NYS 355.

Title held sufficient: Where executors of a former purchaser had reconveyed property to vendor in full satisfaction of all claims, fact that purchase-money mortgage was not canceled of record held no valid objection to title. Clody v. Southard, 109 NYS 411. Vendee cannot refuse conveyance on ground of existing mortgage where mortgagor conveyed mortgaged property to mortgagee and latter sold same by warranty deed, since such acts wipe out mortgage. Greenfield v. Mills, 123 App. Div. 43, 107 NYS 705. Vendee cannot refuse conveyance on ground of existing mortgage where twenty years have elapsed since maturity, as same will be presumed paid. Id. A **lis pendens** in action for enforcement of Tenement House Act, Laws 1901, p. 889, c. 334, where filed after defendant named had sold premises and recorded deed and where no complaint has been filed or served, held not an incumbrance. Woodenbury v. Spier, 122 App. Div. 396, 106 NYS 817.

Projecting of binders of foundation wall of building on adjacent lot of five inchee, but removable at cost of $8 and without trespassing, held not to authorize rejection of deed. Geffin v. Schneidler, 105 NYS 1035. Abstract showing will of testatrix devising "her farm situated in the state of Iowa," and affidavits recorded under Code, § 2957, showing that she owned only land in question in Iowa, held sufficient. Hantz v. May [Iowa] 114 NW 1042. That **water closets exist in violation of Tenement House Act,** Laws 1901, p. 889, c. 334, held not a defect in title. Woodenbury v. Spier, 122 App. Div. 396, 106 NYS 817.

Encroachment of retaining wall on adjoining lot of five inches and of foundation wall of adjoining building of one to two inches held not substantial considering the slight cost of removal. Ungrich v. Staff, 119 App. Div. 843, 105 NYS 1013.

74. Damages: Vendee in contract to convey free from incumbrances is entitled to nominal damages only where limitations and restrictions do not affect market value. Portsmouth Sav. Bk. v. Yeiser [Neb.] 116 NW 38. Testatrix left property to daughter for life, then to daughter's two sons for life, with remainder to sons' children, or, if there be no children, to testatrix's brother and heirs. Daughter and one son transferred their interest to other son. Held that son had only life estate, hence could not specifically enforce sale calling for fee simple. Forsman v. Hofstetter [Ky.] 107 SW 796.

75. Evidence held insufficient to show that vendee ratified unauthorized waiver of defect in title by his attorney, if there was a waiver. Weintraub v. Siegel, 109 NYS 215. Where vendee accepted deed of husband without dower renouncement, with full knowledge of facts, he will be deemed to have waived objection and to have relied on warranties. Coleman v. Whittle [S. C.] 60 SE 523. Where, in action by vendee for specific performance or damages, vendee in complaint places rejection of offered deed solely upon ground that it did not correspond to contract in that mortgages were past due, thereby refusing to recognize extensions, he waives objection that extension agreement contained tax law clause authorizing mortgagee to declare same due upon enactment of tax law. Rosenberg v. Feiering, 121 App. Div. 190, 105 NYS 812. Where purchaser justifies refusal on ground that abstract does not show good marketable title in that clause in deed in chain creates condition subsequent, he does not waive objection that such clause creates a trust.

possession is usually sufficient.[77] A purchaser is not bound to accept an incumbered title though the vendor offers to deduct the amount thereof from the purchase price.[78] While a purchaser assuming a mortgage is not obliged to accept one of a different character than that agreed upon,[79] where he is to assume a mortgage in a named amount it is no objection that the debt is represented by two mortgages.[80] Where the title is to be satisfactory to the purchaser's attorney, he must act in good faith.[81] A contract calling for a conveyance free from incumbrances relates only to the time of performance.[82] The burden of proving a defective title rests on the objector.[83]

Where no particular kind of deed is stipulated for, a deed sufficient to pass title must be accepted,[84] though improperly acknowledged.[85] While equity may require a grantor to execute a deed properly acknowledged,[86] it cannot correct mistakes in the certificate of acknowledgment.[87]

§ 4. *Price and payment.* See 8 C. L. 2222—The time,[88] manner,[89] and amount[90]

Koch v. Streuter, 232 Ill. 594, 83 NE 1072. Where vendee held contract of executors to convey one piece of property and contract of heirs for another, objection to deed tendered by executors that contracts were interdependent and that title to property to be conveyed by heirs was unmarketable held not to waive objection that title tendered was unmarketable where defect could not have been removed. Whalen v. Stuart, 108 NYS 355.

76. Not required to accept title depending on matters resting in parol. Walters v. Mitchell [Cal. App.] 92 P 315.

77. Title perfect except as against possible outstanding title in heirs or successors of owner who died 100 years ago held marketable. Wormser v. Gehri, 55 Misc. 147, 106 NYS 295. Right of way reserved in deeds executed fifty years ago, but which has been in adverse possession of vendor for twenty-five years, held not valid objection. Clody v. Southard, 109 NYS 411.

78. Unpaid taxes. Berger v. Crist, 121 App. Div. 483, 106 NYS 107. Unpaid water rent and taxes. Mandel v. Hess, 57 Misc. 240, 107 NYS 766.

79. Where contract specifies that mortgages to remain on land contain "usual clauses," by specific mention it impliedly excludes those that are unusual. Elterman v. Hyman [N. Y.] 84 NE 937. Clauses assigning rent upon breach of any covenant in bond, maturing mortgage upon threatened demolition of any building on premises, and requiring mortgagor to certify amount due within specified time after notice, held unusual. Id. Where he was to assume mortgage having at least one year to run, fact that mortgage contained clause authorizing mortgagee to mature same on thirty days' notice if legislature should increase taxes held not to justify vendee in refusing to perform where legislature had just enacted a recording fee in lieu of all taxes and would not be likely to change within one year. Frank v. Frank, 108 NYS 549. Where he was to assume mortgage due at future date, fact that mortgage was past due and extension was by cestui que trust by attorney, it not being shown that trustee had assigned mortgage to cestui que trust or that attorney had authority to extend same, held to authorize rejection of deed. Piza v. Lubeisky, 121 App. Div. 734, 106 NYS 481. Assumption of mortgage past due does not require assumption of one upon which suit has been commenced. Wacht v. Hart, 120 App. Div. 189, 105 NYS 78.

80. Greenfield v. Mills, 123 App. Div. 43, 107 NYS 705.

81. Plaintiff and his attorney may testify that they acted in good faith, such question being on issue. Smith v. Lander [Tex. Civ. App.] 20 Tex. Ct. Rep. 777, 106 SW 703.

82. Smith v. McMahon [Mass.] 83 NE 9. Hence where purchaser before time for performance repudiates contract on insufficient ground, vendor is entitled to earnest money, notwithstanding existence of incumbrances. Id.

83. Rosenblum v. Eisenberg, 108 NYS 350. Where vendors claim forfeiture of earnest money because of vendee's rejection of deed, they must show that such deed would have conveyed property and possession of whole thereof free from projections of adjoining house. Walters v. Mitchell [Cal. App.] 92 P 315. Materiality of objection that title is unmarketable is a question of fact to be determined from all the circumtances. Rosenblum v. Eisenberg, 108 NYS 350.

84. Not bound to deliver warranty deed. Emerick v. Hackett [N. Y.] 84 NE 805. Where plaintiff agreed to transfer to defendant half interest in line fence in consideration of an acre of land and nothing was said as to transfer of interest in fence by writing, held that plaintiff could maintain action for specific performance without first tendering written conveyance. Ready v. Schmith [Or.] 95 P 817.

85. Ryder v. Johnson [Ala.] 45 S 181.

86. Where vendor executed deed containing a defective acknowledgment, judgment compelling him to execute a perfect conveyance in effect requires reacknowledgment. Leavitt v. Thornton, 108 NYS 162.

87. Leavitt v. Thornton, 108 NYS 162.

88. Where part of purchase price was reserved under agreement whereby vendor was to pay one-half cost of party wall, cost to be assessed by appraisers, but both build at same time, employing same contractor, who, in submitting estimates, assigned half of cost to each, held that remainder was due without appraisement. Wilson v. Hughes [Iowa] 115 NW 490. Where sale purports to have been made for cash but no money was paid, held that court should fix reasonable

of payment are usually controlled by express stipulations in the contract, and a vendor cannot be compelled to accept payment before maturity.[91] Where the deed contains no covenants,[92] vendee cannot, at common law, avoid payment of price on the ground that the vendor had no title [93] in the absence of fraud or estoppel,[94] but, where a part of the land is taken under a superior claim, a credit for the value thereof is usually allowed.[95] Where the purchaser has accepted a deed with full warranties, he cannot ordinarily, have an abatement of the price for outstanding incumbrances,[96] but, in some states, a breach of covenants [97] may be interposed as a defense. A bill for abatement of price will not lie where there is an adequate remedy at law.[98] Where the vendor has placed it out of his power to perform, he cannot recover on a check given in part payment.[99]

§ 5. *Time.*[See 8 C. L. 2228]—While time is not ordinarily of the essence of the contract,[1] it may be made so by the terms thereof [2] or by reasonable notice,[3] in which

time within which vendee was to pay price or contract be dissolved. Harvin v. Blackman [La.] 46 S 525. See post, § 5.

89. Informal contract construed and held that vendee was not entitled to have formal contract so drawn as to require vendor to secure three mortgages for $15,000 on land in lieu of cash payment. Tabachnick v. Brand, 108 NYS 40.

90. Agreement to convey undivided half interest to one, provided he should "at any time within three years * * * pay * * * $4 per acre for the undivided one-half," held to require payment of $4 and not $2 for whole number of acres, especially when construed in light of surrounding circumstances. Stein v. Archibald, 151 Cal. 220, 90 P 536.

91. Due in installments. Moseley v. Witt [S. C.] 60 SE 520.

92. Transfer by street railroad of its franchises held in effect a quit claim deed, and, hence, fact that franchise was void held no defense to action for purchase price. O'Sullivan v. Griffith [Cal.] 95 P 873.

93. O'Sullivan v. Griffith [Cal.] 95 P 873.

94. Fact that vendee was led to believe that property belonged to wife and that she was selling same, held not such fraud or equitable estoppel as to authorize abatement of price because of dower interest, where at time of consummation he knew that husband was owner and dower was not renounced. Coleman v. Whittle [S. C.] 60 SE 523.

95. Debt of ancestor. Johnson v. Eversole [Ky.] 104 SW 1026.

96. Especially until he has extinguished same or been evicted. Coleman v. Whittle [S. C.] 60 SE 523.

97. Entry, after vendee has been placed in possession, by one having no title is not a breach of covenants. Smith v. Moore, 31 Ky. L. R. 838, 104 SW 265.

98. Where vendee is indebted for larger part of purchase price, bill for abatement because of fraud and misrepresentations as to quantity and quality, since, under Code 1852, § 2240, it may be asserted as set-off. Williams v. Neal [Ala.] 44 S 551.

99. In suit on check held error to exclude evidence as to time of sale of property by plaintiff. Horwitz v. Frankel, 54 Misc. 651, 104 NYS 743.

1. Davis v. Martin [N. C.] 59 SE 700. Time will not be held of the essence unless it clearly appears from character of property or acts of parties that it was so intended. Kessler v. Pruitt [Idaho] 93 P 965. Where time for performance is named, equity will treat it as formal and not as of the essence unless such intention is manifest. Roberts v. Braffett [Utah] 92 P 789. At law, time is considered of the essence, and in action for recovery of down money defendant held in default where he did not appear until a couple of hours after time set and vendee had departed. Kaufman v. Brennan, 108 NYS 503.

2. Held of the essence: Where title was to be made satisfactory to purchaser within fixed time, or money paid returned. Meyers v. Catawissa Coal Co. [Pa.] 67 A 904. Contract providing that sale shall be completed within thirty days or contract forfeited. Chambers v. Roseland [S. D.] 112 NW 148.

Held not of the essence: Containing provision that deed should be delivered and money paid at certain time and place. Staples v. Mullen [Mass.] 81 NE 877. Contract providing for payment of balance at stated time held not to make time of the essence of contract under Civ. Code, §§ 2223, 2027. Stevens v. Trafton [Mont.] 93 P 810.

3. Roberts v. Braffett [Utah] 92 P 789. Where, after time for payment of note, vendor frequently demanded payment and finally gave reasonable notice to pay or contract would be rescinded, and upon default notified vendee of rescission, held that vendee could not thereafter tender money and compel specific performance. Id. Letter by vendor to vendee, after time for closing title, that he must make additional payment otherwise vendor would offer property for sale, held insufficient to constitute notice of time and place of closing title so as to make time of the essence and put vendee in default. Foland v. Italian Sav. Bk., 108 NYS 57. Where upon taking adjournment for closing title vendor notified vendee that title must be closed on such adjourned day held that time was made the essence. Klingenstein v. Alexander, 109 NYS 143. Where several adjournments were had to allow vendor opportunity to place a mortgage as agreed, but vendee consented to final adjournment with understanding that title must be closed thereat, held to make time of essence of contract. Leinhardt v. Solomon, 109 NYS 144.

case performance must be made within the time fixed or the defaulting party loses all rights,[4] except in the extreme cases where equity will grant relief.[5] However, essence may be waived [6] and the extension of time [7] usually has such effect,[8] unless expressly reserved.[9] A delay for mutual benefit does not foreclose the rights of the nonperforming party.[10]

§ 6. *Conditions, covenants, and warranties.* See 8 C. L. 2224—The parties may make any stipulation they see fit if not contrary to law,[11] and, hence, the terms of the contract are largely determinative of their rights.[12] An agreement to assign the insurance on the property sold does not include forwarding of the same to the company for its consent.[13] A sale by an administrator may be made contingent upon a favorable order of the court.[14] In the absence of express agreement, the vendor cannot insist that the purchaser secure earnest money deposited with his own agents.[15] While an owner, who plats land and sells lots with reference thereto, impliedly covenants to allow use of the streets as passageways,[16] he does not impliedly covenant not to sell except in parcels as delineated.[17] Where purchaser assumes a lien, the vendor cannot sue for the benefit of the lienor.[18]

§ 7. *Demand, tender, and default.* See 8 C. L. 2225—Where time of performance by one is not of the essence of the contract,[19] or, being of the essence, the contract is still treated as existing though time of performance is past,[20] and the obligations are mu-

4. Machold v. Farnan [Idaho] 94 P 170.

5. Financial inability held insufficient excuse. Machold v. Farnan [Idaho] 94 P 170.

6. As where contract is thereafter treated as existing. Stewart v. Ellis [Ga.] 61 SE 597.

7. Where purchaser secures oral extension, he cannot complain that extension was not in writing as required by contract. Staples v. Mullen [Mass.] 81 NE 877.

8. Failure to perform within extended time held not to foreclose rights. Spolek v. Hatch [S. D.] 113 NW 75.

9. Machold v. Farnan [Idaho] 94 P 170.

10. Failure to furnish abstract and tender deed on day specified is no defense for refusal to accept deed at later day though time was of essence where delay was for mutual benefit and both waived performance on day specified. White v. Bates, 234 Ill. 276, 84 NE 906.

11. Union Sawmill Co. v. Lake Lumber Co. [La.] 44 S 1000. Where contract provides that it shall become null and void if certain railroad is not completed to certain points within a stated time, it is immaterial that another road equally advantageous has been completed. Id.

12. Contract to convey certain tract of land within forty days, providing that, if vendor should not be able to deliver deed therefor within the time, he should be at liberty to convey like quantity of equal value in some other part of state, held not to authorize substitution unless vendor was not able to get title (Kirby v. Cartwright [Tex. Civ. App.] 20 Tex. Ct. Rep. 509, 106 SW 742), and even not to substitute adjoining piece (Id.). Upon acquiring property within stated time, it inured to purchaser. Id. Provision in contract of sale of land for reservoir site allowing purchaser to retain price of certain houses to be paid when purchaser completed reservoir without any adverse title being asserted, held not to relieve purchaser from paying entire amount upon adverse title being asserted, but only to extent of injury. Choctaw, etc., R. Co. v. Bond [C. C. A.] 160 F 403.

13. So as to constitute consideration for promise so to do. Brawn v. Lyford [Me.] 69 A 544.

14. Contract to give deed "as soon as possible after estate is advertised and the deed can be given," both parties knowing that order of court was necessary, held to make contract contingent upon such favorable order (Wilson v. Root [Conn.] 67 A 482), and administrator is not personally liable though he, as administrator, presents fact which causes court to deny order (Id.).

15. Stafford v. Richard [La.] 46 S 107.

16. Closing or changing of streets may be enjoined. Herold v. Columbia Inv. & Real Estate Co. [N. J. Err. & App.] 67 A 607. See Easements, 9 C. L. 1017.

17. May sell lots singly or in bulk, or may subdivide again. Herold v. Columbia Inv. & Real Estate Co. [N. J. Err. & App.] 67 A 607.

18. Municipal liens and county taxes. Reis v. McDevitt [Pa.] 68 A 1012.

19. Where time of payment by vendee is made of the essence, tender of performance by vendor is not necessary. Machold v. Farnan [Idaho] 94 P 170. Failure of purchaser to pay as stipulated held not to authorize forfeiture by vendor without tender of deed. Spolek v. Hatch [S. D.] 113 NW 75.

20. Where time is of essence of contract but neither party has elected to declare contract at an end, neither party, where obligations to pay and to deliver deed are mutual and concurrent, can place other in default without tender of performance. Robert v. Braffett [Utah] 92 P 789. Neither party can place other in default and end contract without tender of performance and notice to comply or contract will be rescinded. Kessler v. Pruitt [Idaho] 93 P 965. Where performance is deferred indefinitely by common consent, neither can place other

tual and concurrent,[21] a tender and a demand is necessary to place the other party in default,[22] unless he has unqualifiedly repudiated the contract,[23] or is not in a position to perform.[24] One need not make a tender where the first act of performance rests with the other party,[25] nor need one go outside of the state to make a tender.[26] An offer of performance to one authorized to accept the same [27] is sufficient without an actual tender.[28]

in default without signifying his readiness to perform and demanding performance within a reasonable time. Kister v. Pollak, 109 NYS 204.

21. Where contract is silent as to time for delivery of deed, it will be regarded as deliverable at time of payment of price. Menzel v. Primm [Cal. App.] 91 P 754. Where vendor agrees to furnish abstract showing good and sufficient title upon payment of balance of purchase money, obligation to furnish same and to pay are concurrent. Kessler v. Prultt [Idaho] 93 P 965. Contract to pay $1,500 on specific date and 150,000 shares of stock, if corporation was perfected by that time, and if not, within a reasonable time thereafter, upon doing of which vendor was to convey, etc., held to require such payment without tender of deed by vendor and though he did not have title at such time. Donovan v. Hanauer [Utah] 90 P 569.

22. Kessler v. Pruitt [Idaho] 93 P 965; Moseley v. Witt [S. C.] 60 SE 520; Pfeiffer v. Wilke [Tex. Civ. App.] 107 SW 361. Deed must be tendered before suit on note can be maintained. Menzel v. Primm [Cal. App.] 91 P 754. Where note given for option was to be applied to first payment on purchase price if optionee elected to purchase and he did so, recovery cannot be had thereon without tender of deed. Lumaghi v. Abt, 126 Mo. App. 221, 103 SW 104. Where vendor agrees that vendee shall have premises after his death, demand on vendor's heirs for performance is necessary to place them in default so as to allow a rescission. Northrup v. Mead, 121 App. Div. 385, 106 NYS 150. Petition for specific performance held insufficient, there being no allegation of tender of money. Mitchell v. Wright [Ala.] 46 S 473. Under contract whereby one party guaranteed that there were a certain number of feet of timber on land and to make up deficiency and other agreed that when such number was sawed or deficiency made up he would convey certain property, held that tender of deed was condition precedent to right to recover for deficiency. Bryant v. Turner, 110 NYS 594. Where plaintiff agreed to remove certain buildings and pay therefor a certain sum, held that he could not maintain action for breach without proof of tender of said sum. Volk v. Olsen, 54 Misc. 227, 104 NYS 415.

23. Matteson v. U. S. & Canada Land Co. [Minn.] 115 NW 195; Horwitz v. Frankel, 54 Misc. 651, 104 NYS 743. Refused to recognize validity of contract. Degginger v. Martin [Wash.] 92 P 674. Notified other party that he would not perform and commenced suit to rescind. Merrill v. Hexter [Or.] 94 P 972. Refused further performance on erroneous ground that he was not getting water rights to which he was entitled. Brixen v. Jorgensen [Utah] 92 P 1004. Allegation that defendant "failed and definitely and specifically refused to perform the contract and declared its inability to do so" held to show such repudiation as to relieve necessity of tender. Matteson v. U. S. & Canada Land Co. [Minn.] 115 NW 195.

Held not unqualified: Refusal based upon prior rights of another purchaser but adding that if sale was not effected, plaintiff would be notified. Beiseker v. Amberson [N. D.] 116 NW 94. Mere refusal to perform before time for performance does not obviate necessity of tender. Matteson v. U. S. & Canada Land Co. [Minn.] 115 NW 195. Where vendor contracted to convey on receipt of purchaser's bond and mortgage, a repudiation of assignment to plaintiff, coupled with statement that he would not convey to plaintiff nor accept a bond and mortgage from it, held not such final refusal to perform as would excuse tender of performance on plaintiff's part, since vendor had right to insist on personal security of purchaser's bond. Manhasset Point Co. v. Wright, 109 NYS 959. Recognition of assignment to extent of accepting cash payments from assignee held not entire substitution of assignee so as to authorize him to tender his own bond in lieu of original purchasers. Id. Allegation that vendor refused to accept a bond and mortgage from plaintiff cannot be construed to mean that delivery of bond executed by original purchaser secured by mortgage would be refused if tendered by plaintiff. Id.

24. Kister v. Pollak, 109 NYS 204. Where vendor sells property to innocent third person, tender of performance by vendee is not necessary. Munson v. McGregor [Wash.] 94 P 1085. Vendor acknowledged his inability to perform. Duval Inv. Co. v. Stockton [Fla.] 45 S 497. Fact that mortgages to be assumed by vendee contained the "Brundage Clause" and the "estoppel certificate clauses" held not such defects that they might not be removed upon objection. Rosenberg v. Jacobson, 56 Misc. 693, 107 NYS 595. Where purchaser pointed out defects in title and notified vendor that he would perform on receiving a perfect title, but vendor did not cure defects within time required, purchaser was not required to tender purchaser money and demand a deed before bringing suit to recover earnest money. Walters v. Mitchell [Cal. App.] 92 P 315.

25. Blunt v. Egeland [Minn.] 116 NW 653. Petition alleging that defendant failed, neglected, and refused to perform, held sufficient. Id.

26. Degginger v. Martin [Wash.] 92 P 674.

27. Tender to agent making sale is sufficient if he had authority to sell. Degginger v. Martin [Wash.] 92 P 674.

28. Offer of payment of money and execution of notes held sufficient without actual production. Foster County Implement Co. v. Smith [N. D.] 115 NW 663. Where vendee tenders to bank holding deed in escrow a

Default.—Where no time for performance is fixed, the parties have a reasonable time within which to act.[29] A party inexcusably [30] in default [31] cannot compel the other to perform. One who cannot perform his part cannot in general compel the other to observe his agreement.[32] Substantial performance is all that is usually required.[33] One cannot complain of a default where he rendered compliance impossible.[34]

§ 8. *Forfeiture, rescission, and waiver. Forfeiture.*[See 8 C. L. 2225]—While default [35] is frequently made a ground of forfeiture,[36] it cannot be invoked by the party first in default,[37] or by one whose own acts contributed to the other party's default.[38] A tender of performance after notice of forfeiture is too late.[39] In some states a notice of forfeiture [40] is required by express statute,[41] but, in the absence thereof, it is necessary where the right is optional.[42] A forfeiture may be waived by

check which bank offers to cash, tender is sufficient. Kessler v. Pruitt [Idaho] 93 P 965.

29. Where contract was made Sept. 24, and suit was instituted Oct. 29, held that defendant had had a reasonable time. Foster County Implement Co. v. Smith [N. D.] 115 NW 663.

30. Where vendee did not appear at time set for performance, fact that clerical error had been found in vendor's chain of title and that corrected deed had not been received by vendor at time held not to excuse default. Dwork v. Weinberg, 120 App. Div. 507, 105 NYS 504.

31. Where vendor was present at 5 o'clock, time for conveying, but vendee did not appear until 6 o'clock, at which time vendor had gone. Vendee again returned about 8 o'clock, but was notified that he was in default and that no one was present to close title. Held that vendee and not vendor was in default. Dwork v. Weinberg, 120 App. Div. 507, 105 NYS 504. In action on note given for option which was to be applied to purchase price if optionee elected to buy, held error to exclude evidence that optionee visited office of optionor on day option expired and notified person in charge of election to purchase, since it constituted tender of performance and called for tender of performance by optioner before suing on note. Lumaghi v. Abt, 126 Mo. App. 221, 103 SW 104. Where in suit to cancel, based on default in payments, it appears that defendant discharged all obligations with possible exception of $3,600 and that if he did not pay such sum he apparently had adequate reason, in that it appears that he failed to get 560 acres warranted, he will not be held in default, no claim having been asserted for thirty years. Whitfield v. Lyon [Miss.] 46 S 545.

32. Where vendor cannot convey good title, he cannot in general compel vendee to observe his agreement. McKinnon v. Johnson [Fla.] 45 S 451.

33. Where liens were discharged by vendor, failure to procure funds with which to pay them at a bank specified in contract is immaterial. McKinnon v. Mickelberry, 228 Ill. 460, 81 NE 1072.

34. Failure to have abstract show that certain liens were discharged does not justify refusal of performance where vendee refuses to permit abstract to be continued and has notice of the discharge of such liens. McKennan v. Mickelberry, 228 Ill. 460, 81 NE 1072. Evidence held to show that parties understood that defendant, in agreeing to donate site for mill if plaintiff would locate same in town, was acting merely as agent of business men of town, and that land was to be obtained from owner, and that plaintiff prevented fullfillment by premature abandonment. Lard v. Colbert [La.] 45 S 946.

35. Forfeiture of contract for nonpayment of notes held not sustained where notes were not produced or accounted for and not shown to have been paid, especially where lapse of time raises presumption of payment. Roberts v. Kirkpatrick, 132 Ill. App. 584.

36. Evidence held to show forfeiture of contract rights under terms of contract. McPherson v. Garbutt [Cal. App.] 89 P 991.

37. Where covenant against incumbrances in a land contract is breached by existing mortgage, vendor cannot forfeit it for nonpayment by vendee. Bartlett v. Smith, 146 Mich. 188, 13 Det. Leg. N. 713, 109 NW 260.

38. Where vendor, entitled to payment of notes at office, had been accustomed to send to local agent, but just before maturity of third note assigned same without notice to purchaser who supposed that it would be payable as to the others, and immediately sought assignee, who acquiesced in purchaser's promise to pay in few days, but refused to accept when tendered, held that forfeiture could not have been forced. Bowman v. Banks [Ark.] 104 SW 209.

39. Thiry v. Edson, 129 Ill. App. 128.

40. Demand of possession preliminary to forcible detainer suit is sufficient. Thiry v. Edson, 129 Ill. App. 128.

41. Provision in contract that it should become null and void upon default in payment held not to relieve vendor from necessity of giving notice, as required by Laws 1897, p. 431, c. 223, to effect a forfeiture. Finnes v. Selover, Bates & Co., 102 Minn. 334, 113 NW 883.

42. Must give notice of election. Murphy v. McIntyre [Mich.] 15 Det. Leg. N. 315, 116 NW 197. Where contract makes time of the essence and expressly provides that default shall forfeit contract, notice of forfeiture is not necessary, especially where vendor is given right to take possession without notice. Gilbert v. Union Pac. R. Co. [Neb.] 112 NW 359.

the party in whose favor it operates.[43] A forfeiture ordinarily terminates purchaser's interest in the land.[44]

Rescission.[See 8 C. L. 2226]—The contract may always be rescinded with the mutual consent of the parties thereto.[45] It may also be rescinded for fraud [46] unless ratified,[47] and where the other party thereto has expressly repudiated [48] or refused to perform.[49] A material deficiency in quantity,[50] or an incurable defect in the title,[51] provided it constitutes a cloud [52] and is not the result of the party's own acts,[53] authorizes a rescission. In Louisiana the vendor may rescind where the contract price is less than one-half of the value of the property,[54] as may a vendor in Texas upon default in payment by the vendee [55] where he has reserved a lien,[56] unless the pur-

43. Offer to give deed upon payment of amount due held not a waiver of forfeiture, not being acted upon. Gilbert v. Union Pac. R. Co. [Neb.] 112 NW 359.

44. Where contract for sale of 160 acres was forfeited for nonpayment of instalment of purchase price after death of purchaser, but a sale was effected of sixty acres through administrator, whereupon 100 acres were deeded to administrator for remainder of agreed price, all of which transaction was approved by court, held that heirs had no equity in sixty acres. Harris v. Graf [Iowa] 111 NW 434.

45. Where contract was modified by escrow agreement that unless a certificate showing unincumbered title should be signed by abstract company within specified time transaction should be at an end, and plaintiff refused to accept title as shown by certificate, whereupon papers were surrendered at request of parties, held to show rescission. Webster v. Gibson [Cal. App.] 93 P 1040. Where shortly after sale reserving vendor's lien vendee abandoned land and vendor took possession, and no claim was asserted by purchaser or those claiming under him for thirty-six years, held that purchaser will be presumed to have acquiesced in rescission. Evans v. Ashe [Tex. Civ. App.] 108 SW 398. Evidence held to show that purchaser agreed to cancellation and executed lease with cancellation clause therein. Irish v. Martin [Iowa] 113 NW 470.

46. Where vendor agreed to sell three tracts but fraudulently included only two in deed and refused to convey third on demand, held that court properly rescinded contract and adjudged a lien on land for purchase price. Gayle v. Troutman, 31 Ky. L. R. 718, 103 SW 342. One who has sold property for particular purpose by fraudulent representations cannot defend suit to rescind on ground that if it is put to another purpose grantee will lose nothing. Steen v. Welsten [Or.] 94 P 834.

47. Employment of agent to care for property after acquiring knowledge of fraud amounts to ratification. Stackpole v. Schmucker, 225 Ill. 502, 80 NE 314.

48. Mere failure to pay purchase money according to terms of contract held not such a repudiation as to authorize vendor to rescind. Kessler v. Pruitt [Idaho] 93 P 965.

49. Where parties executed written memorandum sufficient to satisfy statute of frauds but which did not purport to embrace entire contract, refusal of vendor to execute formal contract as agreed held a ground for rescission. Hebrew Pub. Co. v. Reibstein, 110 NYS 660.

50. Purchase of lot extending back from street "105 feet more or less" to railroad right of way held not entitled to rescind because lot lacked sixteen feet on one corner and thirty-four feet at other of being 105 feet deep, he having seen lot before purchasing and knowing that it extended only to right of way. Tepper v. Niemeier [Ky.] 105 SW 896. Fact that house encroaches fourteen inches on adjoining lot held not to authorize purchaser to rescind, where adjoining lot owner was not objecting and purchaser was protected by warranty. Id.

51. Failure of vendor to cure defects in title because of defective acknowledgment of deed in chain, existence of unpaid matured taxes, and because mortgage cannot be paid off as contract requires, held to authorize vendee to rescind. Berger v. Crist, 121 App. Div. 483, 106 NYS 107. Evidence of promise by one holding interest in part of strip to release same held too indefinite as to whether before or after rescission to be admissible to corroborate statement of vendor that he offered to cure defect. Hoffman v. Titlow [Wash.] 92 P 888. Fact that names of abutting streets were interchanged in description held not to entitle purchaser to rescission, the obvious error being corrected by a particular description. Tepper v. Niemeier [Ky.] 105 SW 896.

52. Tax deed to vigintillienth portion of lot does not constitute cloud. Petty v. Beers, 127 Ill. App. 593.

53. Where he induces a co-owner with vendor to create indebtedness which becomes a lien thereon. McKennan v. Mickelberry, 228 Ill. 460, 81 NE 1072.

54. Rev. Civ. Code, arts. 1861, 1862, 2589, 2590. Girault v. Feucht [La.] 46 S. 26. Burden rests upon vendor to prove such fact. Id. Evidence held insufficient, estimated value by witnesses differing greatly. Id.

55. Can only be exercised where all or part of price remains unpaid. Evans v. Ashe [Tex. Civ. App.] 108 SW 398. Where vendee shortly after sale abandoned land and vendor went into possession and no claim had been asserted by purchaser or those claiming under him for thirty-six years, general presumption of payment from elapse of time is overcome by presumption of nonpayment arising from facts. Id.

56. Bolden v. Hughes [Tex. Civ. App.] 107 SW 91. Where deed reserves vendor's lien, superior title remains in vendor until payment of purchase price, and in case of default in payment vendor may take possession or

chaser has such equities as to invoke equitable relief.[57] Where the agent of the vendor held himself out as a copurchaser in the negotiations, the contract may be rescinded,[58] and the fact that the true relation was known to one of the purchasers does not prevent a rescission by the others.[59] Relief will be granted by rescission where the minds of the parties met upon a particular piece,[60] but another was substituted therefor which cannot be conveyed.[61] Rescission will be denied where it will be inequitable,[62] where the parties cannot be placed in statu quo,[63] or where the one seeking the relief has unduly delayed after discovering the ground therefor.[64] Due notice is usually necessary to effect a rescission.[65] By ratifying [66] the assignment of a rescinded contract by the purchaser, the vendor may estop himself from asserting rescission.

Right of parties after rescission. See 8 C. L. 2227—Upon rescission [67] each party must be placed in statu quo,[68] hence, where the vendee is in possession, he is liable

sell to another. Evans v. Ashe [Tex. Civ. App.] 108 SW 398. Where conveyance reserved vendor's lien, written instrument is not necessary to divest vendee's rights upon default. Id.

57. Where there was no proof that purchaser paid part of price at time of purchase, that he made any improvements, and he interposed limitations as against lien, held that he showed no equities entitling him to pay any sum adjudged to be due and prevent rescission. Smith v. Owen [Tex. Civ. App.] 107 SW 929.

58, 59. Houts v. Scharbauer [Tex. Civ. App.] 19 Tex. Ct. Rep. 556, 103 SW 679.

60. Evidence held to show that minds of parties had met upon a different piece than that described. Abbott v. Dow [Wis.] 113 NW 960. Findings of lower court in light of evidence held not to mean that minds of parties had never met before execution of paper on particular quarter, but that transactions prior thereto had not reached stage of legal contract. Id.

61. Abbott v. Dow [Wis.] 113 NW 960. May rescind without regard to relative value of pieces omitted and substituted. Selby v. Matson [Iowa] 114 NW 609.

62. Denied where vendee by mismanagement after discovering fraud caused land to deteriorate. Sipola v. Winship [N. H.] 66 A 962. Where payments were accepted long after due and vendee, an aged and uneducated negro, relied on vendor to keep account and thought he had paid in full, held that vendor could not rescind. Moore v. Brown [Tex. Civ. App.] 18 Tex. Ct. Rep. 700, 103 SW 242.

63. Gullfoyle v. Pierce, 109 NYS 924. Property sold. Maass v. Rosenthal, 109 NYS 917. Vendee must surrender possession before he can maintain action for rescission. Northrup v. Mead, 121 App. Div. 385, 106 NYS 150. Where vendee in possession seeks to rescind contract because of defect in title, he must surrender possession, but where he received nothing thereunder and asserts fraud and title in himself he need not. Phenix v. Bijelich [Nev.] 95 P 351.

64. Delay of three months after knowledge of fraud before bringing action to rescind held not undue delay, action having in meantime been commenced in Federal court but dismissed on defendant's plea to jurisdiction. California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P 593. Rescission because wrong piece was substituted held not barred by laches where it appeared that there was nothing to suggest examination of plaintiff's duplicate and he acted promptly on discovering mistake. Abbott v. Dow [Wis.] 113 NW 960. Where vendee delays rescinding for seventeen months, in meantime continuing to work mine, etc., and asserting a claim against agent for sum which he received from vendors and against vendors for money paid in excess of value, held not entitled to rescind. Old Colony Zinc & Smelting Co. v. Garrick [C. C. A.] 153 F 173.

65. Where vendor's right to rescind sale under contract reserving lien was promptly exercised on nonpayment of price, and purchaser and those claiming under him asserted no claim for thirty-six years and until all connected with transaction are dead, it is not necessary to prove notice to purchaser of vendor's right to rescind. Evans v. Ashe [Tex. Civ. App.] 108 SW 398.

66. Where, after contract had been rescinded and abandoned, vendee assigned same, acceptance by clerk of vendor of payments from assignee in ignorance of facts held not a ratification of assignment where money was promptly tendered back upon discovery and notice of rescission given. Cutright v. Union Sav. & Investment Co. [Utah] 94 P 984.

67. Termination of contract as to future by one party because of default of other is no rescission. Elterman v. Hyman. [N. Y.] 84 NE 937. Action upon default of vendor to recover money paid and to enforce lien therefor and money expended in examining title held not a rescission. Id. Acts of vendor held to show a forfeiture under contract and not a rescission, hence vendee was not entitled under contract to return of payments on theory of rescission. Oursler v. Thacher [Cal.] 93 P 1007.

68. Rescission held not improperly allowed purchasers because they did not account for rent rice delivered by vendor to another for them, it not appearing that they received same or knew of such delivery. Houts v. Scharbauer [Tex. Civ. App.] 19 Tex. Ct. Rep. 556, 103 SW 679. Platting of land held not to preclude rescission, where there was no dedication of streets, which vendor could not ignore. Id. Where one deeded property in consideration of lease of academy, which was executed in violation of trust, held that, on setting aside of lease, deed should be can-

for its reasonable rental value [69] and the vendor is entitled to a writ of possession,[70] but it should not issue until the purchaser has had a reasonable time to mature and remove his crops.[71] The purchaser, on the other hand, may recover all purchase money paid,[72] together with the value of improvement,[73] but he has no lien on the land therefor.[74] Where the purchaser rescinds the contract because of the insufficiency of the vendor's title, he cannot thereafter demand such title as he has.[75]

Abandonment See 8 C. L. 2228 is a question of intention determinable from all the facts and circumstances surrounding the transaction.[76]

§ 9. *Interest in the land created by, and rights and liabilities under the contract.* See 8 C. L. 2228—The contract is largely determinative of the rights of the parties thereto.[77] Upon the execution of a contract of sale the vendor becomes a trustee of the legal title for the benefit of the purchaser,[78] who becomes the equitable owner [79] of everything belonging to the inheritance,[80] and hence the taking of the property

celled. Hendrix College v. Arkansas Townsite Co. [Ark.] 108 SW 514.

69. Gayle v. Troutman, 31 Ky. L. R. 718, 103 SW 342. Rent should be set off against purchase money paid. Id.

70, 71. Gayle v. Troutman, 31 Ky. L. R. 718, 103 SW 342.

72. Tucker v. Denton [Ky.] 106 SW 280; Davis v. William Rosenzweig Realty Operating Co. [N. Y.] 84 NE 943. Where contract is rescinded and cancelled, debt of purchaser is discharged. Wheeler v. Preston [Ky.] 107 SW 274. Where rescission is allowed, vendor could not escape liability for purchase money on ground that it was paid to him for former owner, where he had arranged to purchase and closed deal with the money. Houts v. Scharbauer [Tex. Civ. App.] 19 Tex. Ct. Rep. 556, 103 SW 679. In action to rescind sale and recover land, evidence held to show that rents and profits more than offset value of improvement, purchase money paid, and interest. May v. May [Ky.] 110 SW 808.

73. Upon rescission of contract, purchaser is only entitled to recover value of improvements made less value of improvements removed by him. Wheeler v. Preston [Ky.] 107 SW 274.

74. No lien for money paid. Davis v. William Rosenzweig Realty Operating Co. [N. Y.] 84 NE 943.

75. Walton v. McKinney [Ariz.] 94 P 1122.

76. Where contract of sale does not require purchaser to remain in possession, vacation of premises does not constitute an abandonment of contract. Pfeiffer v. Wilke [Tex. Civ. App.] 107 SW 361. Where contract provided for forfeiture for nonpayment of instalments and vendee went to vendee, refused to make further payment, declared his intention of abandoning contract and tendered key and possession, which were accepted, held that there was complete rescission or abandonment. Cutright v. Union Sav. & Inv. Co. [Utah.] 94 P 984. Evidence held to sustain finding of abandonment by mutual consent. Saxon v. White [Okl.] 95 P 783.

77. Where at time of completing contract providing that if title shown by abstract to be furnished was not good or could not be made good payments were to be returned, vendee knew that vendor held only a contract for title, he could not recover payments on abstract showing such fact. Pierce v. Pettit, 46 Wash. 668, 91 P 190. W contracted to take plaintiff's land in part payment for other land, provided he could get owner's consent, which was not obtained. W then sold plaintiff's land to defendants under agreed condition to return purchase money paid if plaintiff would not consent. Held that defendants acquired no interest in plaintiff's land, he refusing to assent and are not entitled to a lien for return of money paid to W. Andrews v. Goy [Iowa] 112 NW 825. Evidence in action to quiet title held insufficient to show terms of sale. Lanham v. Bowlby [Neb.] 112 NW 324.

78. Stubbs v. Pitts, 84 Ark. 160, 104 SW 1110; Finkbohner v. Glen Falls Ins. Co. [Cal. App.] 92 P 318; Clarke v. Long Island Realty Co., 110 NYS 697. Vendor of land under executory contract retains title only to secure payment of purchase price. Brown v. Canterbury [Tex.] 19 Tex. Ct. Rep. 721, 104 SW 1055. Upon payment of purchase price vendee is entitled to deed. Chouteau Land & Lumber Co. v. Chrisman, 204 Mo. 371, 102 SW 973.

79. Royce v. Carpenter, 80 Vt. 37, 66 A 888. May maintain suit to remove cloud. Coel v. Glos, 232 Ill. 142, 83 NE 529. Mechanic's lien may attach. Salzer Lumber Co. v. Claflin [N. D.] 113 NW 1036. Bond for title to husband and wife held to create equitable estate by the entirety, so that survivor could complete purchase and take full title. Roach v. Richardson, 84 Ark. 37, 104 SW 538. Where beneficiary, under a trust deed which authorized trustee to convey with beneficiary's consent requested in writing that trustee convey to a certain person and trustee executed bond for title instead of a deed, under which possession was taken, held that bond vested equitable title in obligee sufficient to sustain subsequent conveyance as against judgment creditor of beneficiary. Oder v. Jump [Ky.] 108 SW 292.

80. May enjoin legal owner from cutting timber therefrom. Loudermilk v. Martin [Ga.] 61 SE 122. Refusal of vendor to make deed does not affect right. Id. Purchaser may recover of vendor for trees cut. Newman v. Mountain Park Land Co. [Ark.] 107 SW 391. Acceptance of deed does not waive recovery for trees cut by vendor after contract of sale was executed, especially where purchaser did not know thereof. Id. One not a party to contract cutting trees held not a proper party. Id.

under the power of eminent domain does not abrogate the contract.[81] Except as affected by the doctrine of bona fides,[82] a purchaser takes the title of his vendor subject to all existing equities.[83] In the absence of a provision to the contrary, the vendor may retain possession[84] until performance,[85] but where the purchaser is entitled to possession, the vendor cannot maintain ejectment against a stranger.[86] While, ordinarily the possession of land by the purchaser under a contract of sale is not adverse,[87] it becomes so upon full performance.[88] Where the contract calls for a perfect title, an outstanding title purchased by the vendee during the executory period inures to the benefit of the vendor.[89] Where a vendor retaining the legal title as security obtains judgment on the purchase-money note and levies upon and sells his vendee's interest, the purchaser thereof acquires the interest both of the vendor and the vendee.

While a purchaser in possession cannot ordinarily retain possession and repudiate his obligations,[91] the rule applies only where possession is taken under the contract,[92] and to the land embraced therein,[93] and equity may disregard the rule to effect justice.[94] Nonpayment of deferred payments does not affect the sale.[95]

81. Award becomes subject-matter of conveyance. Clarke v. Long Island Realty Co., 110 NYS 697.

82. See Notice and Record of Title, 10 C. L. 1015.

83. Outstanding contract for sale of timber. Acree v. Rozzell [Ky.] 108 SW 846. Purchaser with notice that property is affected with a trust holds in trust for beneficiaries. Turner v. Edmonston [Mo.] 109 SW 33; Chadwick v. Arnold [Utah] 95 P 527. Evidence held to show notice. Chadwick v. Arnold [Utah] 95 P 527. Volunteer grantee takes subject to existing bond for a deed. Pearson v. Courson, 129 Ga. 656, 59 SE 907. Purchaser knowing of an existing escrow stands in the same equity as his vendor. Specific performance compelled. Wilkins v. Somerville, 80 Vt. 48, 66 A 893. Purchaser, knowing of prior void mortgage foreclosure sale, cannot object that mortgagee and foreclosure purchaser is estopped to have a second foreclosure in equity. Craig v. Meriwether, 84 Ark. 298, 105 SW 585. In order that subsequent purchaser may acquire a greater interest than his vendor acquired under an ambiguous deed, he must establish his bona fides and be without notice that words were used in a sense other than usual and regular meaning. West v. Hermann [Tex. Civ. App.] 104 SW 428. One who seeks to ingraft on legal title a secret equity must prove that purchaser of legal title had notice thereof. Middleton v. Johnston [Tex. Civ. App.] 110 SW 789. Evidence held to sustain judgment for plaintiff on theory that sale to defendant was subsequent to sale to plaintiff. Crane v. Cheney [Kan.] 91 P 67.

84. Teller v. Schulz, 108 NYS 325. Vendor's reply that he would vacate provided vendee closed title held not an incumbrance which justified vendee in refusing to proceed. Teller v. Schulz, 108 NYS 325.

85. Vendor retaining possession after performance by vendee is a trespasser and not a tenant at will. Teller v. Schulz, 108 NYS 325.

86. Under Comp. Laws, § 10,949. Kulte v. Lage [Mich.] 15 Det. Leg. N. 241, 116 NW 467.

87. Until conditional sale vendee in possession has performed, vendor may convey title to another. Donnelly v. Russ [Fla.] 45 S 496.

88. Dickson v. Sentell, 83 Ark. 385, 104 SW 148.

89. Vendee purchasing outstanding undivided interest held not entitled to possession as tenant in common without paying contract price. Only entitled to reimbursement. Garvey v. La Shells, 151 Cal. 526, 91 P 498.

90. Brown v. Canterbury [Tex.] 19 Tex. Ct. Rep. 721, 104 SW 1055.

91. Where vendor is unable to convey perfect title, he must pay the price and take such title as he has or surrender possession and seek other remedies. Garvey v. La Shells, 151 Cal. 526, 91 P 498. Where one of six heirs bought in property at tax sale and sold to defendant for $1,500, who upon becoming dissatisfied with title bought out the other heirs and mortgaged entire tract showing an acceptance of deed, held that, where in action for price plaintiff abandoned tax title, judgment was properly rendered for one-sixth of $1,500 in absence of evidence of amount paid to other heirs. Connolley's Ex'r v. Beckett [Ky.] 105 SW 446.

92. Inapplicable where vendee does not claim possession under contract but asserts that contract was fraudulent and that vendor never had any title. Phenix v. Bljelich [Nev.] 95 P 351.

93. Applies only to land included in contract or which is taken possession of under contract and is not clearly excluded therefrom. Butterfield v. Nogales Copper Co. [Ariz.] 95 P 182. Where property was not described in contract by metes and bounds but by patent description and no possession was taken, held that vendee was not estopped from acquiring adjoining property which vendor supposed to be and intended to include in patent. Id. Purchaser cannot be in constructive possession of land not included in description of some muniment of title held by him. Id.

94. Where contract required vendor to make sufficient deed and to furnish abstract showing perfect title, demurrer to cross petition alleging that vendor had failed to ten-

As the vendor may sell the land subject to the contract,[96] likewise may the purchaser ordinarily assign his interest.[97] As between the purchaser and his assignee, the terms of the assignment fix their respective rights.[98] Where the purchaser assigns only an interest in the contract, upon acquiring the legal title he holds it in trust to the extent of the interest.[99]

Interest, rents, and profits.[See 8 C. L. 2229]—A conveyance of the fee by operation of law transfers all rents thereafter accruing,[1] and a purchaser who has completed his contract and is entitled to a deed is entitled to the rents.[2]

Insurance.—Unless otherwise specified, insurance maintained on the premises by the purchaser is for his own benefit.[3]

§ 10. *Liability consequent on breach.*[See 8 C. L. 2230]—Where a contract is made in one state for the sale of land in another, the money to be paid in the former, the lex loci contractus controls as to rights growing out of a breach thereof.[4]

Rights of the vendor.[See 8 C. L. 2230]—The contract by express stipulations may fix the rights of the parties upon a breach thereof.[5] By express provision in the contract,

der sufficient deed, that abstract disclosed outstanding claim, holder of which threatened to eject defendant and had commenced action, that plaintiff had refused to correct defect and averring willingness to perform, held properly overruled case to be retained until equitable rights of parties could be determined. Brown v. McCrie [Kan.] 94 P 144.

95. Where no part of price is payable in cash and vendee, who is in possession at time of sale, continues, sale and delivery of possession are not rendered less complete by nonpayment of deferred instalments. Wells v. Blackman [La.] 46 S 437.

96. Conveyance does not of itself constitute a repudiation. Hall v. Northern & Southern Co. [Fla.] 46 S 178.

97. Bond for deed. Royce v. Carpenter, 80 Vt. 37, 66 A 888. Indorsement on bond, "I, the said O. L. Coolidge, transferred to said J. M. Dyer, June 11, 1900," accompanied by delivery to Dyer, held sufficient in equity. Id. Obligee in bond who assigned same, and knowing of its delivery by another to assignee acquiesces in delivery, thereby ratifies same. Sheffield v. Hurst, 31 Ky. L. R. 890, 104 SW 350. Plaintiff held contract for purchase which was assigned as security. Held in action to establish equity in land and for right to redeem, evidence showed agreement whereby plaintiff sold and surrendered all his interest. Ferris v. Jensen [N. D.] 114 NW 372.

98. C, vendee in contract for sale of "hotel property" and "D farm," assigned contract in consideration that assignee would convey to C "D farm" upon completing contract, and it was provided that, upon default, assignee would reassign contract. Thereafter C and assignee entered into new contract, whereby C leased to assignee certain property and released interest in "D farm," and it was provided that, upon default in respect to new contract, assignee was to acquire and convey "D farm" to C. Held upon default C only acquired right to farm and not to reassignment of original contract. Crownhart v. Tracy, 119 App. Div. 628, 104 NYS 206. Assignee of bond for title assigned same for specific consideration and took back an agreement that if he repaid consideration within specified time assignee would reassign. Held that transaction was in form a conditional sale, and equity will not treat same as mortgage where parties have treated it as a conditional sale for many years. Sheffield v. Hurst, 31 Ky. L. R. 890, 104 SW 350. Obligee in bond for title assigned same to son, giving him one-half of land absolutely and agreeing to give other half at death. Son assigned bond to another under conditional sale contract, and later agreed to surrender land absolutely in payment of debt. Obligee acquiesced therein and surrendered possession. Held that he could not revoke his action after land had increased in value. Id.

99. Wolfe v. Childs [Colo.] 94 P 292.

1. Taylor v. Southerland [Ind. T.] 104 SW 874.

2. Completed contract but had not received deed. Brown v. Grady [Wyo.] 92 P 622.

3. Is entitled to proceeds thereof as against vendor. Zenor v. Hayes, 130 Ill. App. 113.

4. Finnes v. Selover, Bates & Co., 102 Minn. 334, 113 NW 883. Held that Laws 1897, p. 421, c. 223, requiring notice before forfeiture, applied contract executed in Minnesota conveying land in Colorado. Id. Complaint to damage for nonperformance showing that no such notice had been given at time of tender of amount due, held not demurrable. Id.

5. Where contract provided that if purchaser failed to comply therewith $100 paid should be forfeited as liquidated damages, and that, if he failed to pay balance of price within certain time, contract to be void at vendor's option, held that vendee had no option to avoid contract by forfeiting the $100. Ochs v. Kramer [Ky.] 107 SW 260. Instrument, executed as part consideration for a conveyance, binding vendee to offer a specified sum for the land of another at specified time, held not to obligate him to pay such sum absolutely, but merely to "offer" to buy. Richards v. Gee [Tex. Civ. App.] 107 SW 61. Measure of damages for breach is difference between market value at time specified and agreed sum, and if market value equals or excels same, there is no cause of action. Id.

a vendee in possession may become liable as a tenant upon default,[6] but there seems to be a conflict of authorities as to whether he may be so held in the absence of such provision.[7] The North Carolina summary proceeding, however, is inapplicable unless the relation has become purely one of landlord and tenant.[8] Upon the wrongful refusal of the purchaser to perform, the vendor is entitled to the earnest money.[9] Where the purchaser, relying on the vendor's assurances that he could convey good title, rents the land but, upon discovering that the title was defective, notifies the vendor to look to the tenant for rent, he is not liable therefor.[10] Upon default the vendor cannot sell the property at public sale and hold the purchaser for the difference between the agreed price and the sale price.[11]

Rights of the vendee. See 8 C. L. 2230—Where the contract provides for the rights of the parties, it is conclusive.[12] Under a contract stipulating for a return of the earnest money upon vendor's failure to perform, the vendors are jointly and severally liable.[13] Upon a breach of the contract by the vendor,[14] the purchaser may recover the purchase money paid, and he has an equitable lien upon the land for the same,[15] but not for the cost of examining the title.[16] The fact that vendor agrees to convey only by a special warranty deed does not prevent the purchaser from deducting value of land lost through matters occurring prior to acquisition of the title by the vendor.[17] A purchaser rejecting a defective title, not knowing of the true condition thereof, may thereafter demand the same upon learning of the facts.[18]

Measure of damages.[19]

6. Whereby contract vendor was authorized to treat vendee in possession as tenant holding over upon default and to take immediate possession, ninety days' notice to vacate is not necessary. Murphy v. McIntyre [Mich.] 116 NW 197.

7. Becomes tenant at will independent of stipulations upon forfeiture of contract. Murphy v. McIntyre [Mich.] 116 NW 197. Defaulting purchaser in possession is a trespasser under claim of title, and seller cannot effect forfeiture of contract by mere service of notice and thereafter treat purchaser as tenant liable for rent, unless assent on his part to be so regarded can be shown. Geil, Jr. v. Lehr, 4 Ohio N. P. (N. S.) 638.

8. Purchaser, who gave notes secured by mortgage, failed in payment and reconveyed, vendor giving a lease and option to purchaser. Purchaser held possession and paid part of price, receipts for which recognized original notes and mortgage as existing. Held that, though parties could only assert rights under lease and option, summary proceedings under landlord and tenant act, Revisal 1905, § 2001, et. seq., could not be maintained. Hauser v. Morrison [N. C.] 59 SE 693.

9. In hands of broker as vendor's agent. Smith v. McMahon [Mass.] 83 NE 9.

10. Hall v. Huffhines [Tex. Civ. App.] 20 Tex. Ct. Rep. 12, 105 SW 522.

11. Swartz v. City & Suburban Realty Co. [Md.] 67 A 283.

12. Where contract provided that purchasers were to have five days within which to examine abstract, vendors to have thirty days after notice to correct flaws, earnest money to be returned if flaws were not so corrected, but to be forfeited if vendee defaulted, held that, where no objection to title was made for twenty-three days after delivery of abstract and no opportunity of correcting flaws was given, vendee could not recover earnest money. Kane v. Jones, 46 Wash. 631, 91 P 2. Where deposit is made by purchaser to be forfeited if he defaulted, such deposit may be recovered where he refused to take because of vendor's inability to convey good title as agreed. Hall v. Huffhines [Tex. Civ. App.] 20 Tex. Ct. Rep. 12, 105 SW 522. Where land was deeded to purchaser under contract that, if abstract did not show good title, purchase price would be returned etc., held that collection of rent note delivered with deed and offer of sale did not waive purchaser's right to recover purchase price (Moore v. Price [Tex. Civ. App.] 18 Tex. Ct. Rep. 693, 103 SW 234), nor estop purchaser from recovering same, since vendor did not change position (Id.).

13. Smith v. Lander [Tex. Civ. App.] 20 Tex. Ct. Rep. 777, 106 SW 703.

14. Where purchaser was to pay $5 per month, rejection of payments tendered by vendor, telling him he would be notified when further payments would be accepted, held not a breach of contract. Lakoschowsky v. Utopia Land Co., 110 NYS 182. Where vendee's objections to title tendered were trivial and vendor was able and willing to remedy such as were tangible, vendee cannot reject title and recover money paid. Greenspan v. Saladino, 110 NYS 240.

15. Though not in possession and having no special equity. Elterman v. Hyman [N. Y.] 84 NE 937. Equitable lien not depending upon express contract. Id.

16. Ungrich v. Shaff, 119 App. Div. 843, 105 NYS 1013.

17. Though special warranty covers only defects arising under warrantor. Baldwin v. Brown [Wash.] 93 P 413.

18. Where contract has been partially performed and time is not of the essence thereof. Walton v. McKinney [Ariz.] 94 P 1122.

19. See 8 C. L. 2231. See, also, Damages, 9 C. L. 869.

Deficient quantity or other partial failure of consideration.[See 8 C. L. 2232]—Where the sale is in gross,[20] in the absence of fraud[21] or gross mistake,[22] the purchaser is not entitled to an abatement in the price for a deficiency in quantity,[23] but where the sale is by the acre,[24] he may recover for a material shortage.[25] A distinction, however, must be observed between a deficiency in quantity and a failure of title to a portion of the land sold.[26] Where quantity is referred to, the sale will be presumed to have been by the acre, unless the contrary appears.[27] The rights of the parties are frequently regulated by special covenants.[28] Where the vendor's title fails to a portion, the amount deducted should be such proportion of the whole price as the value of such portion bears to the value of the whole tract.[29] A material shortage may justify the purchaser in refusing the deed and authorize an action as upon default.[30]

20. Evidence held to show that sale was in gross. Emerson v. Stratton [Va.] 58 SE 577. Contract for sale of certain city lots construed as sale of entire lot for gross sum and not a sale according to quantity. Urbach v. Pye, 109 NYS 207. Where designated tract is sold as a whole for gross sum without warranty as to quantity, sale is in gross. Brassell v. Fisk [Ala.] 45 S 70. Where track is specifically bounded and quantity is mentioned without any covenant, the whole must be considered as descriptive. Id. Where purchase money is not an equimultiple of number of acres, it is strongly persuasive of sale in gross. Emerson v. Stratton [Va.] 58 SE 577. Where, after discovering a shortage, vendee procured material alterations in the contract without anything being said about the shortage, held, while not a waiver of shortage, as a matter of law, to land to show that vendee did not regard shortage as vital and that she understood that she was purchasing lots as they were. Urbach v. Pye, 109 NYS 207.

21. Where vendee does not know of extent of acre as it appears, he may rely on statement of vendor as to number. Misstatement may constitute fraud. Sipola v. Winship [N. H.] 66 A 962.

22. Where there has been a mutual mistake in estimated quantity, recovery must be had, in first instance, against immediate vendee. Emerson v. Stratton [Va.] 58 SE 577.

23. Brassell v. Fisk [Ala.] 45 S 70. Where there is a surplus or a deficiency in quantity in a sale in gross, there is no fixed rule by which to determine the relief, the relative extent not being always controlling, and the date of the contract, conduct of the parties, value, quantity, quality, location of land, etc., should be considered. Freeman v. Bow [Ky.] 109 SW 877. Where tracts estimated to contain 1,540 acres were sold in gross, fact that purchaser after surveying stated that vendor had no title to certain sixty acre tract leaving 1,480 acres, though fraudulently referring to actual acreage instead of estimated, and procured an abatement therefor, does not warrant recovery thereof, though there still remained 1,480. Brassell v. Fisk [Ala.] 45 S 70.

24. Conveyance of timber containing statement that there were certain number of "acres of said land, which at $9 per acre amount to" a certain sum, "and when that amount shall have been paid * * * stumpage of all timber hereby sold shall be deemed to be fully paid for," held to show sale by acre and not in gross (Ackley & Co. v. Hunter, Benn & Co. [Ala.] 45 S 909), and fact that contract specifically fixed damages in case certain portion of land should turn out to belong to grantees, held not to make sale in gross (Id.).

25. Giving of bond in specific amount to cover such contingency does not limit purchaser to such penal sum. Wolcott v. Frick, 40 Ind. App. 236, 81 NE 731.

26. Where heir sold interest in 200 acre tract, and fifty acres thereof was sold to satisfy judgment against all the heirs, held that, under facts, purchaser was entitled to a reduction. Freeman v. Bow [Ky.] 109 SW 877.

27. Emerson v. Stratton [Va.] 58 SE 577. Evidence is admissible to rebut presumption, since it relates to collateral understanding. Id.

28. Deed conveyed for gross sum, undivided half in specifically located tracts, description being followed by clause "the total acreage herewith conveyed being 1,540 acres more or less." Second deed conveyed undivided half interest in same lands, except that sixty acres located in M. county were omitted, total acreage being stated as 1,480 more or less. Held that deeds did not impart warranty as to quantity. Brassell v. Fisk [Ala.] 45 S 70. Action held based upon special covenant to refund for shortage and not on general covenants of warranty, hence, vendee need not wait until eviction. Holt v. Mynhier's Adm'x, 29 Ky. L. R. 819, 96 SW 477. Action based on special covenant to refund for shortage is not barred on five year statute of limitations for implied assumpsit, but by fifteen year statute. Id.

29. Baldwin v. Brown [Wash.] 93 P 413. Where vendor fraudulently represented that there was no highway, vendee may recover portion of purchase money representing value of land over which highway lies. Kevil v. Wilford, Stunston & Co., 31 Ky. L. R. 1000, 104 SW 348.

30. Discrepancy held to justify refusal to perform, where lots described as being 25.3 by 81, 25.2 by 101, and 25.2 by 97, were 24.11 by 80.1 3-4 by 76.5, 25 by 97.5 1-2, 24.10 3-4 by 93.9. Urbach v. Pye, 55 Misc. 465, 105 NYS 143. One contracting for purchase of premises known "71 P. St. * * * the same having frontage of 27 feet 6 inches," held justified in refusing deed describing premises as having frontage of 27 feet 1 1-2 inches. Floeting v. Horowitz, 120 App. Div. 492, 104 NYS 1037. Dimension shortage of city lots held not to justify vendee in refusing to accept, there being no proof that frontage excess did not more than offset in

§ 11. *Rights after conveyance.*[See 8 C. L. 2232]—A contract for a deed merges in the deed [31] and, although it called for a good and sufficient title, the purchaser must rely on the covenants in his deed.[32] Where the vendor remains in possession after execution of a warranty deed, he is presumptively a tenant of the purchaser.[33]

§ 12. *Vendor's liens and their enforcement. A. Express.*[See 8 C. L. 2234]—A vendor's lien expressly reserved to secure a loan is superior to homestead rights, though the money was not furnished by the vendor and was not a part of the purchase price.[34] Where vendor, to accommodate the purchaser and those to whom he has resold a part of the land, releases the lien on the part sold, but expressly reserves it as to the remainder, he has a lien on the remainder for all of the unpaid price.[35]

(§ 12) *B. Implied.*[See 8 C. L. 2234]—A lien is implied in every sale for a definite sum [36] of money [37] where the consideration has not been paid [38] unless waived,[39] expressly or impliedly, as where other security is taken.[40] No affirmative act on the part of the vendor is necessary to create it,[41] and it is not destroyed by the fact that the note is payable to a third person where so made payable with the vendor's consent.[42] Where the vendor has been induced by fraud to accept a worthless note and mortgage, he may tender them back and assert a vendor's lien for the amount thereof.[43]

In some states the conveyance of the legal title is essential to a vendor's lien.[44]

value the rear shortage. Urbach v. Pye, 109 NYS 207. Where contract bounded land and stated that it contained about eighty acres, price to be $1,000 per acre, a survey to be made, held that fact that there were 95 and fraction acres did not justify refusal of vendee to accept. Sheindelman v. Colyer, 122 App. Div. 379, 106 NYS 762.

31. Although bond for deed showed husband to be purchaser, yet where deed conveyed to husband and wife for life, with remainder to their daughter, children by former wife could not claim interest therein. Noble v. Noble, 30 Ky. L. R. 629, 99 SW 339.

32. Wheeler v. State, 190 N. Y. 406, 83 NE 54.

33. Cannot set up independent title in himself without showing ouster of landlord. Blake v. O'Neal [W. Va.] 61 SE 410.

34. Kalteyer v. Mitchell [Tex. Civ. App.] 110 SW 462.

35. Smith v. Owen [Tex. Civ. App.] 107 SW 929.

36. Vendor has lien only when amount remaining is a liquidated amount. Ross v. Clark, 126 Ill. App. 460, afd. 225 Ill. 326, 80 NE 275. Fact that notes were each for sum of two thousand silver dollars of the coinage of the republic of Mexico held not to destroy lien expressly reserved. Evans v. Ashe [Tex. Civ. App.] 108 SW 398. Where vendor conveyed for named sum in cash and for further sum in case of a sale, held that he had no lien upon money received on sale. Neil v. Rosenthal, 120 App. Div. 810, 105 NYS 681.

37. Where in exchange of goods and property value of each was specified, but mistake was made in adding invoice of goods, placing value too high, held that money and not goods was due. Hodgson v. Smith [Iowa] 114 NW 39.

38. Subject to strict foreclosure. Aycock Bros. Lumber Co. v. First Nat. Bk. [Fla.] 45 S 501. Purchase money is a lien upon equitable interest of purchaser under contract of sale, and may be enforced by sale of equitable interest. Stubbs v. Pitts, 84 Ark. 160, 104 SW 1110. Lien is preserved upon equitable presumption that there was no intention that vendor should part with title without payment of purchase price. Wendell v. Pinneo, 127 Ill. App. 319. Intestate, in possession of land made contract with mortgagee's executrix, whereby latter agreed to sell to him upon purchasing at foreclosure. Executrix purchased land, but did not receive deed though entitled thereto. On her death daughter acquired all interest in her estate and mortgagee's estate and secured deed. Executrix, her daughter, and daughter's executor, have offered to perform. Held that executor may foreclose interest of intestate's heirs and sell property for amount due, fact that daughter received deed being immaterial. Bryan v. Carroll, 122 App. Div. 301, 106 NYS 668.

39. Expressly or by implication. McKinnon v. Johnson [Fla.] 45 S 451. By exhausting his remedy at law, vendor does not waive his lien. Zeigler v. Valley Coal Co., 150 Mich. 82, 14 Det. Leg. N. 603, 113 NW 775. Where vendor was to be paid cash, acceptance of due bill from one who was to furnish balance of money as a memorandum, until he could get the money, held under facts not a waiver. Bennett v. Murphy, 108 NYS 231. Vendor accepting note of third person waives his lien unless expressly reserved or unless the inference of waiver is overcome by facts. Id.

40, 41. Wendell v. Pinneo, 127 Ill. App. 319.

42. McCrory v. Guyton [Ala.] 45 S 658. Bill showing a reservation of lien in favor of wife vendor, and note payable to husband, held demurrable as failing to show that lien was shifted by some act of wife. Id.

43. Rhodes v. Arthur [Okl.] 92 P 244.

44. McKinnon v. Johnson [Fla.] 45 S 451.

The lien is superior to homestead rights [45] and to any interest subsequently acquired in the land with notice,[46] but unenforcible against a bona fide purchaser.[47] The lien passes with the assignment of the debt.[48] The lien may be extinguished by merger.[49] While a surety on a purchase-money note who pays the same succeeds to the vendor's rights, the rights of the purchaser are not divested [50] in the absence of an agreement.[51]

(§ 12) *C. Remedies.*See 8 C. L. 2235—The action to enforce the lien must be timely brought,[52] and all persons having an interest which may be affected thereby must be made parties.[53]

The bill must allege a willingness on the part of petitioner to perform all the obligations imposed upon him by the contract,[54] and, if the purchaser relies upon a waiver of the lien, he must plead the same.[55]

Unless admitted,[56] the petitioner must prove the amount due.[57] The party asserting a waiver has the burden of establishing the same [58] by clear and convincing proof.[59]

A deficiency decree cannot be rendered in a suit to foreclose a vendor's lien,[60] but a provision should be made requiring the vendor to make a conveyance upon payment of the judgment.[61] The judgment is conclusive as to the amount of the indebtedness and, for the purpose of appeal, on all litigated questions, but as to questions incident to the sale, it is interlocutory.[62] Where the order of sale only directs the sale of sufficient to pay the debt and all is not required, the commissioner should sell that desig-

45. Smith v. Owen [Tex. Civ. App.] 107 SW 929.

46. Code, § 2924. Hodgson v. Smith [Iowa] 114 NW 39. Mortgage with notice of unpaid purchase price. Bennett v. Murphy, 108 NYS 231. Assignee for benefit of creditors is charged with knowledge of grantor. Hodgson v. Smith [Iowa] 114 NW 39.

47. Vendor's lien not expressed on face of deed is unenforcible against one purchasing land without notice. Neff v. Elder, 84 Ark. 277, 105 SW 260.

48. Aycock Bros. Lumber Co. v. First Nat. Bk. [Fla.] 45 S 501.

49. Where holder of vendor's lien purchases interest in property, only that portion of indebtedness which was charge on land is extinguished. Stone v. Pettus [Tex. Civ. App.] 18 Tex. Ct. Rep. 863, 103 SW 413.

50. Stubbs v. Pitts, 84 Ark. 160, 104 SW 1110. Equity will compel him to convey upon being reimbursed. Stubbs v. Pitts, 84 Ark. 160, 104 SW 1110.

51. Evidence held to sustain finding that there was no agreement between vendor, purchaser, and surety on note that if latter paid same she should have title absolutely. Stubbs v. Pitts, 84 Ark. 160, 104 SW 1110.

52. Held not barred by laches, purchaser having in no way changed his position, and having mortgaged land, knowing of unpaid price. Chisholm v. Crye, 83 Ark. 495, 104 SW 167. Where action to enforce lien was brought six years after last note matured, held that rights of adult heirs of deceased vendor were postponed because of laches to mortgagee who had taken mortgage without notice, since they could have procured appointment of administrator to sue thereon, but not as to one reaching majority within year before suit. Id. Where action by nonresident heirs of intestate, who was a nonresident, was brought against resident to recover on purchase-price notes and to enforce lien, laws of state will govern their rights as to laches and limitations. Id.

53. Where, by agreement between vendor, purchaser, and third person, property was placed in hands of certain managers to be operated by them and proceeds turned over to third person, in action to enforce vendor's lien held that managers were not necessary parties. Golden Cross Min. & Mill. Co. v. Free Gold Min. Co. [C. C. A.] 154 F 441.

54. To give sufficient deed. Powell v. Hunter, 204 Mo. 393, 102 SW 1020.

55. Zeigler v. Valley Coal Co., 150 Mich. 82, 14 Det. Leg. N. 603, 113 NW 775.

56. Where, in suit to foreclose vendor's lien, vendee seeks enforcement of contract and pleads tender of sum to pay balance, he admits vendor is entitled to decree of foreclosure for amount tendered. Portsmouth Sav. Bk. v. Yeiser [Neb.] 116 NW 38.

57. Evidence held to sustain finding as to amount due. Kentucky Mut. Bldg. & Loan Ass'n Trustee v. Hall, 31 Ky. L. R. 626, 102 SW 1175.

58. Wendell v. Pinneo, 127 Ill. App. 319; Zeigler v. Valley Coal Co., 150 Mich. 82, 14 Det. Leg. N. 603, 113 NW 775.

59. Zeigler v. Valley Coal Co., 150 Mich. 82, 14 Det. Leg. N. 603, 113 NW 775.

60. Decree absolutely void, not merely irregular, and subject to collateral attack. Johnson v. McKinnon [Fla.] 45 S 23.

61. Portsmouth Sav. Bk. v. Yeiser [Neb.] 116 NW 38.

62. Hence Revisal 1905, § 391, limiting time for suing on judgments, does not affect right to sale. Williams v. McFadyen, 145 N. C. 156, 58 SE 1005. Where, in action to enforce vendor's lien, a sale was decreed, but none has been made, plaintiff's remedy to enforce a sale is by motion in the cause. Id.

nated by the purchaser.[63] Where the purchaser agreed with the vendor to let the sale go on under an agreement that the latter should purchase and resell upon payment of the debt and costs,[64] he cannot set aside the sale for irregularities.[65]

§ 13. *Enforcement of the contract of sale.*[See 8 C. L. 2235]—Where the contract has been repudiated,[66] suit may be instituted before time for performance.[67] Persons directly affected by or interested in the action should be made parties thereto.[68] The complaint must allege performance by plaintiff of all conditions precedent [69] and must show a default on the part of defendant.[70] Where the contract is pleaded by way of inducement only, the same particularity is not required as if it were the basis of the action.[71] Abandonment of the contract by plaintiff is defensive matter which should be pleaded in the answer.[72] Plaintiff must prove all facts essential to place defendant in default [73] and to show a cause of action in himself.[74] The usual rules of evidence [75]

63. Asked in pleadings to have home excepted. Wheatly v. Hardin Nat. Bk. [Ky.] 106 SW 289.

64. Evidence held to authorize court to assume such agreement. Williams v. Burke [Tex. Civ. App.] 20 Tex. Ct. Rep. 816, 108 SW 160.

65. Williams v. Burke [Tex. Civ. App.] 20 Tex. Ct. Rep. 816, 108 SW 160. In pleading such defense, it need not be alleged that purchaser held land subject to sale for stipulated period. Id.

66. Mere refusal of vendor to accept tender of deferred payments does not amount to repudiation. Hall v. Northern & So. Co. [Fla.] 46 S 178. Before repudiation can be based upon failure to give possession, it must appear that contingency had expired which gave right to possession and that it had been demanded and refused. Id. General allegations that vendor refused to carry out contract should be construed with specific allegations. Id. Conveyance to third party repudiates contract to convey at future time. Wolff v. Meyer [N. J. Law] 66 A 959.

67. Wolff v. Meyer [N. J. Law] 66 A 959.

68. In action by vendee against depositary of part of purchase price for conversion by refusing to return same, vendor should be joined where question is as to who is entitled to the money under contract. Vanoni v. Aiter, 107 NYS 880.

69. Under Code Civ. Proc. § 533, allegation that plaintiff has "duly performed each and every one of the terms of the agreement, on her part to be performed," held a sufficient allegation of tender of deed. Murphy v. Hart, 122 App. Div. 548, 107 NYS 452. Bill alleging contract of sale, possession by vendee and his administrator and nonpayment of price held insufficient to sustain decree for vendor's lien for specific performance or for balance due, there being no showing of good title or tender of conveyance to defendant administrator. McKinnon v. Johnson [Fla.] 45 S 451.

70. Complaint for damages for breach held sufficient. Foster County Imp. Co. v. Smith [N. D.] 115 NW 663. Complaint held to state cause of action for breach of executory contract for sale. Matteson v. U. S. & Canada Land Co. [Minn.] 115 NW 195. Complaint held good against general demurrer. Blunt v. Egeland [Minn.] 116 NW 653. Where vendor was to deliver land upon payment of $100 and complaint in action for damages shows that money was paid and delivery was not made, it is sufficient without alleging that time for delivery of deed had arrived. Duval Investment Co. v. Stockton [Fla.] 45 S 497.

71. Petition held for money had and received. Allegations that money was paid as part of consideration for certain land, that defendant had conveyed to another, etc., held mere matters of inducement. Pfeiffer v. Wilke [Tex. Civ. App.] 20 Tex. Ct. Rep. 875, 107 SW 361.

72. Pfeiffer v. Wilke [Tex. Civ. App.] 20 Tex. Ct. Rep. 875, 107 SW 361.

73. Premises described in contract as bounded "by land of Division avenue." Evidence in action for damages for failure to give marketable title held not to show that there was no such avenue. Witte v. Koerner, 108 NYS 560. Vendees were to receive particular month's rents and vendor agreed to make good rents paid to a particular person. Held that burden was on plaintiff suing on such promise to prove payment to such person. Fensterheim v. Abeles, 105 NYS 280. Receipts and statements of such person held hearsay. Id. Testimony of vendee that he had made arrangement with third person for money with which to make payments and testimony of the third person to same effect held to show vendee's ability to perform. Munson v. McGregor [Wash.] 94 P 1085. In action against estate for sum due on farm and on agreement to pay price due on undivided interest of another, directed verdict is proper where no liability for latter is made out and evidence does not show amount due on former. Hopkins v. Wise, 33 Pa. Super. Ct. 544.

74. Where land was purchased on behalf of a firm which has been dissolved, member thereof is not entitled to decree vesting title in him in absence of proof that under dissolution agreement he became sole owner. Choteau Land & Lumber Co. v. Chrisman, 204 Mo. 371, 102 SW 973.

75. In action to recover purchase money paid to settler for rights in public land, because state refused to allow substitution, evidence that plaintiff took steps to secure award from state is admissible (Slaughter v. Cooper [Tex. Civ. App.] 107 SW 897), but not letter of land commissioner to plaintiff's attorney (Id.).

Declarations of vendor's agent to vendor that vendee wanted more time to perform and could not or would not make payments

and instructions [76] apply. In an action to recover earnest money on the ground that defendant does not have legal title, a finding that he does not have title is sufficient without a finding as to who has the same.[77] The fact that a vendor in a bond for a deed conveyed the land in order that an execution issuing on a judgment on purchase-money note could be levied thereon as the property of the purchaser does not invalidate the levy.[78]

VENDORS' LIENS, see latest topical index.

VENUE AND PLACE OF TRIAL.

§ 1. The Proper Venue, 1965.
A. The Nature of the Action, 1965.
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§ 1. *The proper venue. A. The nature of the action.* See 6 C. L. 1806

(§ 1) *B. Local or transitory actions.* See 8 C. L. 2236—At common law, and generally, an action affecting real estate is local,[79] and must be brought in the county where the property or a part thereof [80] is situated, but in Oklahoma the rule is otherwise.[81] In the case of incorporeal hereditaments, the proper venue is where the right is to be exercised.[82] Action having been properly brought in the county where land is situated in part, jurisdiction is not lost by failure of proceedings with regard to the portion of the land so situated [83] or by raising issues which standing alone would properly be triable in another jurisdiction,[84] nor does a local action become

held inadmissible against vendee in absence of showing of authority from vendee to represent him. Munson v. McGregor [Wash.] 94 P 1085. Evidence as to whether an attorney who had examined title would pass same is inadmissible on issue of marketability, **being an opinion.** Walters v. Mitchell [Cal. App.] 92 P 315. On issue as to whether whole or only part of lot was sold, deed tendered by vendee with purchase money and testimony of agent as to what vendor told him he wished to sell held admissible. Harten v. Loffler, 29 App. D. C. 490. Understanding between vendor and his wife as to amount sold held immaterial on issue of what was sold. Id.

76. Instruction held erroneous as requiring jury to find that purchase-money note sued on was without consideration, was obtained by duress, and that plaintiff was insolvent, whereas lack of consideration is in itself a defense. Hoffman v. Lemm [Tex. Civ. App.] 20 Tex. Ct. Rep. 431, 106 SW 712.

77. Though alleged to be in particular person. Walters v. Mitchell [Cal. App.] 92 P 315.

78. Note indorsed by payee and judgment obtained by indorsee. Stocking v. Moury, 129 Ga. 257, 58 SE 712.

79. Action on contract for the removal of standing timber. Seymour v. La Furgey [Wash.] 92 P 267. A statutory proceeding for the partition of land. Douglas v. Johnson [Ga.] 60 SE 1041. Suit to compel conveyance to principal of real estate, bought by agent in his own name, falls under Rev. St. 1901, § 1294, subd. 12, providing that actions concerning real estate must be brought in the county in which the real estate is situated. Greene Cattle Co. v. Hereford [Ariz.] 94 P 1127. An action of accounting involving the question whether certain real estate is copartnership property is an action involving the title to real estate, and under Code Civ. Proc. § 982 must be tried in the county in which the property is situated. Chappell v. Chappell, 109 NYS 648.

80. Hilt v. Griffin [Kan.] 90 P 808. Where a portion of mortgaged property is released and land in another county is transferred to mortgagee in lieu thereof, foreclosure may be had in either county as if the land last conveyed had been part of the original mortgage. Id.

81. Actions affecting real estate must be brought in the county where the defendants or any of them reside. Organic Act, § 10. Mouldin v. Rice [Okl.] 91 P 1032.

82. Plaintiff claimed prior right by appropriation to divert water for irrigation in Nevada as against a similar diversion by defendant. Action to quiet title properly brought in Federal courts in Nevada. Rickey Land & Cattle Co. v. Miller & Lux [C. C. A.] 152 F 11.

83. Having acquired jurisdiction, the court will retain it till the issues are disposed of. Long v. Garey Inv. Co. [Iowa] 112 NW 550.

84. A cross bill filed with regard to that part of the lands outside the county of venue will be adjudicated notwithstanding dismissal of the action as regards the lands within such county. Long v. Garey Inv. Co. [Iowa] 112 NW 550.

transitory by reason of issues of a transitory nature raised during trial,[85] but an action begun as transitory may become local from issues so raised.[86] By statute, in most states, actions against public officers for acts done by virtue of the office are local and must be brought in the county in which the cause of action arose [87] or the defendant holds office.[88] United States officers come within this rule,[89] but it does not apply to acts of misfeasance or nonfeasance not directly interfering with the rights of third parties,[90] nor can it deprive the supreme court of its original jurisdiction which extends throughout the state.[91] Venue of transitory actions is largely governed by statute and is usually in the county where defendant resides,[92] or where he may be found,[93] or where the cause of action arose,[94] or in county of plaintiff's residence.[95] Although summons is served elsewhere,[96] the residence of a party for the purpose of determining venue is the permanent, not temporary place of residence.[97] Two causes of action arising out of the same transaction may be tried jointly, although venue is improper as to one of them if standing alone.[98] In some states action against a nonresident [99] or a defendant whose residence is unknown [1] may be brought in any county plaintiff may select. An action to recover a personal judgment or decree is transi-

85. The matter was inseparably connected with the subject-matter, and moreover the fraud was done in the county of venue. Kelsey v. Collins [Tex. Civ. App.] 108 SW 793.

86. Where issue as to real estate was raised by answer, venue properly changed to county where same was situated. Chappell v. Chappell, 109 NYS 648.

87. Civ. Code Proc. § 983. Wrongful assessment of property of nonresident. Conley v. Carney, 110 NYS 528.

88. Rev. St. 1901, par. 1294, subd. 16. Territory v. Gaines [Ariz.] 93 P 281.

89. Civ. Code Prac. § 63. U. S. marshal sued for failure to care for boat, held under admiralty process. Layne v. Sharp [Ky.] 105 SW 373.

90. Making contract for public supplies. Civ. Code Proc. § 393. Bonestell, Richardson & Co. v. Curry [Cal.] 95 P 887.

91. Mandamus to tax collector. Territory v. Gaines [Ariz.] 93 P 281.

92. Bales v. Cannon [Colo.] 94 P 21. Code Civ. Proc. § 395, subject to express exceptions and rights of change of venue for cause. Bonestell, Richardson & Co. v. Curry [Cal.] 95 P 887. Gen. St. 1906, § 1383, unless cause of action accrued or property in litigation is situated in another county. E. O. Painter Fertilizer Co. v. Du Pont [Fla.] 45 S 507. Sayles Ann. Civ. St. 1897, art. 1194, subject to exceptions. Lumpkin v. Story [Tex. Civ. App.] 108 SW 485. Action by an agent in the name of his principal, under Laws 1902, p. 1136, c. 482, is improperly brought in the county of residence of the principal when both agent and defendant live in other counties and change of venue will be granted to county of defendant's residence. Walsh v. Maroney, 53 Misc. 369, 104 NYS 758.

93. In any county in which defendant can be served with process. Sandoval v. Randolph [Ariz.] 95 P 119. Action for personal injuries may be brought whenever the defendant is found. Southern Pac. R. Co. v. Godfrey [Tex. Civ. App.] 107 SW 1135. Suit against nonresident ex delicto may be brought in any county in which proper service may be made. Lytle v. Southern R. Co. [Ga. App.] 59 SE 595.

94. Where a warranty was made that an animal would pass inspection at a certain place, on failure of warranty, the cause of action arose at the place of failure and not at the place where warranty was made. Larkin v. Sheldon, 109 NYS 1105. Action on an award in an arbitration for damages for cutting timber held that cause of action accrued in precinct where trees were cut and award granted, and venue was properly laid there. Moody v. Huntoon [Ala.] 46 S 452. Action for breach of contract of employment is transitory, and proper venue is in the county in which the cause of action arose, when it is obvious that such is the residence of a majority of the witnesses. Pinkus v. United Suit & Cloak Co., 108 NYS 932.

95. McCullen v. Seaboard Air Line R. Co. [N. C.] 60 SE 506; Gulf, etc., R. Co. v. Overton [Tex. Civ. App.] 107 SW 71. Mills' Ann. Code, § 27, providing that suit may be brought when contract is to be performed, does not give defendant an absolute right to change of venue to that county. May be laid in county of defendant's residence at inception of suit or in county of plaintiff's residence if summons is served on defendant in that county. Bales v. Cannon [Colo.] 94 P 21.

96. Cecil's Trustee v. Robertson [Ky.] 105 SW 926.

97. Not when party resided for the care of an invalid relative. Gulf, etc., R. Co. v. Overton [Tex. Civ. App.] 107 SW 71.

98. McCullen v. Seaboard Air Line R. Co. [N. C.] 60 SE 506. On an action to recover a piano, defendants make counterclaim for old piano given in part payment, held that both claims grew out of the same transaction and the counterclaim was properly tried in county of defendant's residence and on the same action. Jesse French Piano & Organ Co. v. Williams [Tex. Civ. App.] 102 SW 948.

99. B. & C. Comp. § 44. Brown v. Lewis [Or.] 92 P 1058.

1. Code Civ. Proc. § 395. Mahler v. Drummer Boy Gold Min. Co. [Cal. App.] 93 P 1064.

tory,[2] although arising out of an interest in real property.[3] Suit under and for the enforcement of Federal laws may be brought in any Federal district where defendant may be found.[4] Action may be brought in a municipal court of New York, in a district in which neither of the parties reside.[5] The proper statutory venue cannot be changed by a rule of court.[6] Joint defendants may be sued in any county in which jurisdiction can be obtained of either of them,[7] and failure of suit against resident defendant need not defeat jurisdiction as to the other.[8]

(§ 1) *C. Special actions and proceedings and equitable proceedings.* See 8 C. L. 2238—In disbarment proceedings the state is party plaintiff and is entitled to change of venue as in other actions.[9] A joint proceeding may be brought where either of the respondents resides.[10] A proceeding to enforce a mechanic's lien is properly brought in the county in which the work out of which the lien grew was done.[11] On a suit to foreclose vendor's lien notes, defendants who did not sign the notes have the privilege of being sued in the county of their domicile rather than where the notes are to be paid.[12] When contempt is committed in the presence of the court, it is properly tried by the court and change of venue will not be granted on ground of prejudice.[13] Cause of action for libel accrues in any county in which the libel is circulated, irrespective of domicile of publisher and place of first publication.[14] Action upon an adjustment of loss in fire insurance is properly brought in the county where the award

2. To compel delivery of stock in mining corporation by pledgee. Eddy v. Houghton [Cal. App.] 91 P 397. Prior to enactment of c. 384, p. 587, Laws 1903, specific preference of a contract was an action in personam and could only be brought in the county in which the defendants or any of them resided. Horner v. Ellis, 75 Kan. 675, 90 P 275.

3. An action upon breach of covenant in a lease. Clement v. Stanger [N. J. Law] 68 A 97. To recover on an agreement to pay for half, a party wall should be brought, under Code Civ. Proc. § 395, in county of defendant's residence rather than under § 392, relating to venue in actions involving real property. Anaheim Odd Fellows' Hall Ass'n v. Mitchell [Cal. App.] 92 P 331. Specific performance of a contract to convey land is an action in personam, and Hartley's Digest art. 667, excepting from those actions which must be sued in defendant's domicile actions for the recovery of land or for damage thereto, does not apply. Lucas v. Patton [Tex. Civ. App.] 107 SW 1143.

4. Action to enjoin a railway from putting a freight tariff into effect, pending the decision of the interstate commerce commission. Kalispell Lumber Co. v. Great Northern R. Co., 157 F 845.

5. In re Nitchie, 109 NYS 758.

6. St. 1903, § 980, provides that case shall be docketed at county seat, unless defendant resides nearer to a city of the second class. The court cannot rule that defendant must file a statement to be entitled to the privilege. Petty v. Wilbur Stock Food Co. [Ky.] 107 SW 699.

7. When there are resident and nonresident obligors, suit may be brought in any county in which jurisdiction can be obtained over the nonresident defendant. Morris v. George [Ga. App.] 59 SE 1116.

In the domicile of either. Hopkins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598; Texas, etc., R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240. Under Civ. Code 1895, § 5872. Williams v. Inman, 1 Ga. App. 321, 57 SE 1009. Under § 395, Code Civ. Proc. Sullivan v. Lusk [Cal. App.] 94 P 91. Under Sayles' Ann. Civ. St. 1897 art. 1194, subd. 4, and not subject to subd. 8, referring to cases of damages for wrongful sequestration, which latter section is not mandatory. Thompson v. Crawford [Tex. Civ. App.] 18 Tex. Ct. Rep. 675, 103 SW 191.

8. It is the good faith allegation of a cause of action against the resident defendant which authorizes the joinder of the nonresident defendant, and not the successful supporting of those allegations upon final trial. Toland v. Sutherlin [Tex. Civ. App.] 110 SW 487. Discharge in bankruptcy on a bar to suit against resident defendant cannot be pleaded by nonresident defendant to defeat jurisdiction. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 107 SW 598.

9. Under Burns' Ann. St. § 988, disbarment is an adversary proceeding. In re Darrow [Ind. App.] 83 NE 1026.

10. Under Burns' Ann. St. 1901, § 988, providing that in disbarment proceedings trial may be had as in other cases and Id. § 314, providing that action may be brought in the county of residence of any one of joint defendants, disbarment proceedings are properly brought against several attorney's co-defendants in a county in which any of them reside. In re Darrow [Ind. App.] 85 NE 1026.

11. Is a proceeding in rem, under Comp. Laws, § 10714, 10719. Prather Engineering Co. v. Detroit, etc. R. Co. [Mich.] 116 NW 376.

12. Lumpkin v. Story [Tex. Civ. App.] 108 SW 485.

13. Motion for change of venue properly overruled. Connell v. State [Neb.] 114 NW 294.

14. Merriwether v. Geo. Knapp & Co. [Mo.] 109 SW 750.

was granted, though the policy was made elsewhere.[15] When suit is predicated upon defendant's fraud, venue may be had outside the county of defendant's residence.[16] In some states divorce suits must be brought in the county of defendant's residence and defendant cannot waive proper venue.[17] In Texas a garnishee may answer in the county of original venue but, if answer is controverted, jurisdiction at once shifts to county of garnishee's residence and is not waived by the answer.[18]

Actions for penalties.[See 8 C. L. 2238]—An action for a statutory penalty may be joined with an action for damages growing out of the same transaction and proper venue of the latter may control both.[19]

Injunctions.[See 8 C. L. 2239]—A stranger to a judgment, standing upon his rights and not seeking to attack the judgment, may enjoin its execution in the county where levy is to be made and need not proceed in the county of the judgment.[20]

(§ 1) *D. Suits by and against corporations*[See 8 C. L. 2239] are regulated by statute,[21] and may usually be brought in any county in which cause of action accrues,[22] or where the corporation has an agent,[23] or does business,[24] or maintains its principal place of business,[25] but when alternative places of venue are designated, the corporation has no absolute right to change from any one of them,[26] and a foreign

15. German Ins. Co. v. Hazard Bk., 31 Ky. L. R. 1126, 104 SW 725.

16. Rev. St. 1895, art. 1194, § 7. Galveston Shoe & Hat Co. v. Rowe [Tex. Civ. App.] 109 SW 1101.

17. Const. art. 6, § 16, par. 1, held mandatory. Watts v. Watts [Ga.] 61 SE 593.

18. Rev. St. 1895, art. 245, 247-251. American Surety Co. v. Bernstein [Tex.] 20 Tex. Ct. Rep. 1, 105 SW 990.

19. McCullen v. Seaboard Air Line R. Co. [N. C.] 60 SE 506.

20. Seeligson v. Gifford [Tex. Civ. App.] 19 Tex. Ct. Rep. 511, 103 SW 416.

21. Rev. St. 1899, § 997 (Ann. St. 1906, p. 878), regulating venue of actions against corporations, cannot be attacked by a corporation chartered subsequent to its enactment upon the ground that it is class legislation and denies the corporation the privileges of an individual. Julian v. Kansas City Star Co. [Mo.] 108 SW 496. A foreign corporation doing business in Alabama consents to the provisions of Const. 1875, art. 14, § 4, Code 1896, § 4207, regulating venue in the case of foreign corporations. Kibbler v. St. Louis, etc., R. Co., 147 F 879.

22. Winter v. Union Packing Co. [Or.] 93 P 930. Rev. St. 1895, art. 1194, § 23. Galveston Shoe & Hat Co. v. Rowe [Tex. Civ. App.] 109 SW 1101. Civ. Code 1895, § 2334. Brooke v. Louisville & N. R. Co. [Ga. App.] 60 SE 218. Under § 997, Rev. St. 1899 (Ann. St. 1906, p. 878), a corporation may be sued in the county when cause of action accrued though it may be the residence of neither party. Julian v. Kansas City Star Co. [Mo.] 107 SW 496. A corporate newspaper publisher may be sued for libel in any county in which the libel is circulated. Meriwether v. Knapp & Co. [Mo.] 109 SW 750; Julian v. Kansas City Star [Mo.] 107 SW 496. Action properly brought against corporation in county where the contract in all its essential elements was to be performed notwithstanding the fact that process was served in another county. Code Civ. Proc. § 72 and § 51, subd. 3. Glassblock v. Louisville Tobacco Warehouse Co., 31 Ky. L. R. 702, 103 SW 319.

23. Under Rev. St. 1895, art. 1194, subd. 25. Southern Pac. Co. v. Godfrey [Tex. Civ. App.] 107 SW 1135. Subordinate lodges and deputy grand masters are representatives of a fraternal benefit association within Gen. St. 1894, § 5185, providing that a corporation shall be deemed a resident of any county where it has an office, agent, or place of business. Taylor v. Grand Lodge A. O. U. W., 98 Minn. 36, 107 NW 545.

24. Under Alabama Const. 1875, art. 14, § 4 and Code 1896, § 4207, providing that corporation may be sued in any county in which it does business, suit cannot be brought elsewhere without corporation's consent. Kibbler v. St. Louis, etc., R. Co., 147 F 879.

25. A transitory action must be brought against a domestic corporation either in the county where it has its principal office or in the county where the cause of action arose. Winter v. Union Packing Co. [Or.] 93 P 930. Where a corporation is sued in a county other than that of its residence, the defect is of subject-matter and is not waived by answer to the merits. Code Proc. § 146 held mandatory. Nixon v. Piedmont Mut. Ins. Co., 74 S. C. 438, 54 SE 657. Suit against domestic corporations brought outside its county of residence is a defect of subject-matter, and jurisdiction may be challenged at any time, even after appeal. Hunter v. Alderman & Sons Co. [S. C.] 61 SE 202.

26. Const. art. 12, § 16, authorizes suits against corporation where contract was made or to be performed, when cause of action accrued or at its principal place of business. Eddy v. Houghton [Cal. App.] 91 P 397. Under Civ. Code Prac. § 73, permitting action to be brought against a carrier in county of plaintiff's residence, inter alia, venue is proper in the county of plaintiff's residence when suit is instituted although the wrongful act resulting in death of plaintiff's intestate, the residence of plaintiff's intestate, the residence of plaintiff at the time of the wrongful act, and the principal office of the defendant were all in another county. Louisville, etc., R. Co. v. Hoskins' Adm'r [Ky.] 108 SW 305. Acts

corporation is not necessarily a resident, for the purpose of determining venue, of the county wherein it maintains its principal place of business as required by statute,[27] nor can it maintain action in that county as against a defendant resident of another county.[28] Where jurisdiction of a corporation is restricted by statute to certain counties, it cannot be sued in a Federal court having no jurisdiction in such counties.[29] In some states a foreign corporation may be sued in any county which plaintiff elects.[30] Suit against a person and a corporation joint defendants may be brought in any county where jurisdiction may be had of either.[31] A railway company may be sued in any county in which it operates,[32] or in which the cause of action accrues,[33] or in the county nearest to plaintiff's residence,[34] wherein defendant maintains an agent.[35] A nonresident may sue a railway for personal injuries in any county in which the road runs, operates, or has an agent.[36] Suit may be brought against connecting carriers jointly in any county in which either of them is situated,[37] or where the initial contract of shipment was made.[38] Where the insurance commissioner is ex officio agent of a foreign beneficiary society for the purpose of receiving service of processes, his residence does not determine the proper venue of actions against the corporation.[39]

(§ 1) *E. Effect of improper venue and taking of objections.* See 8 C. L. 2240—Improper venue may warrant dismissal of the action [40] upon motion [41] or at the initi-

1898, art. 105, p. 132, provides that insurance company may be sued at its domicile or place of loss and in case of life insurance at domicile of deceased. Where death and domicile of deceased were in the same parish, no question of jurisdiction arises. Lesseps v. Fidelity Mut. Life Ins. Co. [La.] 45 S 522.

27, 28. Starke Advertising Agency v. Adams [N. J. Law] 64 A 990.

29. Ala. Const. 1875, art. 14, § 4, Code 1896, § 4207, restricts jurisdiction of corporations to counties where they do business. Kibbler v. St. Louis, etc., R. Co., 147 F 879.

30. Code Civ. Proc. 1902. Elms v. Southern Power Co. [S. C.] 68 SE 809.

31. Texas, etc., R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240.

32. Jurisdiction is not obtained over a railway company in an action brought in the county where the principal offices of the company are situated, if the line of the road does not pass through that county. Johnson v. Toledo & Ohio Cent. R. Co., 5 Ohio N. P. (N. S.) 347. The provision in § 5024, Rev. St. that an action against a railway company may be brought in any county through which the road passes, is not a mere extension of the general jurisdiction provided as to corporations in § 5023, but in each of these sections the word "may" must be read "must." Id.

33. Under Civ. Code, 1895, § 2334, it must affirmatively appear from the evidence that cause of action accrued in the county of venue. Brooke v. Louisville & N. R. Co. [Ga. App.] 60 SE 218. Transferee of bill of lading, whereby railway company agrees to deliver goods to a connecting carrier, may maintain action for failure to deliver a portion of the goods in the county where such failure took place. Askew & Co. v. Southern R. Co., 1 Ga. App. 79, 58 SE 242. Evidence held to show that mule was killed in Dearborn county where action was brought. Cleveland, etc., R. Co. v. Miller, 40 Ind. App. 165, 81 NE 517. Where railroad violates statute requiring it to maintain station at certain place, offense is committed in county where such place is located and not in county where principal office is situated. Louisiana, etc., R. Co. v. State [Ark.] 106 SW 960.

34. Gen. Laws 1901, p. 31, c. 27, § 1. Doster v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 107 SW 579.

35. An agent of another company selling interchangeable tickets good over defendant's road is not an agent of defendant within the meaning of the statute. Doster v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 107 SW 579.

36. Laws 1901, p. 31, c. 27. Plaintiff held nonresident under the statute. Ft. Worth, etc., R. Co. v. Monell [Tex. Civ. App.] 110 SW 504.

37. Gen. Laws 1905, p. 29, c. 25, is valid and operative even when one of the carriers is not situated within the state (St. Louis, etc., R. Co. v. White [Tex. Civ. App.] 19 Tex. Ct. Rep. 664, 103 SW 673), and is not a discriminatory burden upon interstate commerce (St. Louis, etc. R. Co. v. Moon [Tex. Civ. App.] 19 Tex. Ct. Rep. 10, 103 SW 1176).

38. Illinois Cent. R. Co. v. Curry [Ky.] 106 SW 294.

39. Laws 1901, p. 360, c. 174, § 6, making insurance commissioner attorney for foreign beneficiary society, does not constitute him statutory agent within Ballinger's Ann. Codes and St. § 4854, providing that proper venue in the case of foreign corporation is where it has a statutory agent or place of business within the state. Butler v. Supreme Ct. I. Order O. F. [Wash.] 93 P 66.

40. In action for personal injury where it does not appear that suit is brought in county where tort occurred or in county where principal office of defendant is located, and that there is no agent of defendant in county where tort was committed, nonsuit is

ative of the court,[42] but it may be waived by failure to object,[43] or by general appearance and participation in the proceedings,[44] if the court has jurisdiction of the subject-matter,[45] and such waiver may render it mandatory upon the court to proceed to adjudication.[46] But where defect is of the subject-matter, venue cannot be waived.[47] A defendant, as to whom venue is proper, cannot be heard to object to venue as to another defendant,[48] but neither of joint defendants can, by submitting to jurisdiction, waive proper venue as to the other.[49]

§ 2. *When change is allowable, necessary, or proper.* See 8 C. L. 2240—The right to change of venue is purely statutory and statutes conferring that right must be strictly construed.[50] Whether an application for change will be granted is within the discretion of the court where it involves the determination of a question of fact,[51] and the ruling will not be disturbed upon review in the absence of gross abuse,[52] but when a proper showing has been made the court not only has discretion but it is its duty to grant change of venue,[53] and must grant change upon proper motion,[54] or of

proper. Tatum v. Seaboard Air Line R. Co., 128 Ga. 813, 58 SE 465.

41. Where there was no resident defendant and summons was served in another county, action will be dismissed either on plea in abatement or motion to quash. Netter-Oppenheimer & Co. v. Elfant [W. Va.] 59 SE 892. On failure to affirmatively show cause of action in county of venue, case dismissed on motion. Brooke v. Louisville & N. R. Co. [Ga. App.] 60 SE 218.

42. Priddy v. Mackenzie, 205 Mo. 181, 103 SW 968. Under constitutional provision that divorce suits must be brought in county of defendant's residence, an action brought in another county may be dismissed on the court's own motion at any time in which suit is pending. Watts v. Watts [Ga.] 61 SE 593.

43. Revisal 1905, § 425. Action not brought in the proper county may, nevertheless, be tried therein, in the absence of a demand for change in venue. McArthur v. Griffith [N. C.] 61 SE 519; McCullen v. Seaboard Air Line R. Co. [N. C.] 60 SE 506.

44. Winter v. Union Packing Co. [Or.] 93 P 930. Answer to the merits waives jurisdiction of the person. Stons v. Union Pac. R. Co. [Utah] 89 P 715. Objection to the jurisdiction of a Federal court on the ground that neither party is a resident of the district is waived by a general appearance and an application for continuance and extension of time to plead. Midland Cont. Co. v. Toledo Foundry & Mach. Co. [C. C. A.] 154 F 797. Where foreign corporation was doing business in state under permit and was served by service on agent in one county as garnishee in suit in another county, appeared and answered, it submitted to the jurisdiction of the court for all purposes. Hockwald v. American Surety Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 521, 102 SW 181. By appearing and answering on the merits, a foreign corporation waives the privilege of being considered a domestic corporation for purpose of suit, although it has complied with the statute providing for domestication. Elms v. Southern Power Co. [S. C.] 58 SE 809.

45. The court, having jurisdiction of the subject-matter appearance to move change of venue, is a general appearance and waives jurisdiction of the person. Julian v. Kansas City Star Co. [Mo.] 107 SW 496. A statute, providing that suit against a corporation shall be brought at its principal place of business, does not go to the jurisdiction of the subject-matter but merely confers a privilege which may be waived by defendant. Laws 1903, p. 76, c. 92. Stone v. Union Pac. R. Co. [Utah] 89 P 715.

46. Where parties voluntarily appeared, it was error for municipal court to transfer the case to another district. Universal Cutter Co. v. Emden, 107 NYS 669.

47. Improper venue under Code Proc. § 146 is defect of its subject-matter. Nixon v. Piedmont Mut. Ins. Co., 74 S. C. 438, 54 SE 657; Hunter v. Alderman & Sons Co. [S. C.] 61 SE 202.

48. Allen-Fleming Co. v. Southern R. Co., 145 N. C. 37, 58 SE 793.

49. Venue improperly laid as against defaulting county officer and his surety. His waiver of jurisdiction cannot involve the surety. Whitman County v. Raby [Wash.] 94 P 906.

50. State v. Denton, 128 Mo. App. 304, 107 SW 446.

51. Kerr v. Burns [Colo.] 93 P 1120. Change of venue for convenience of witness under Code Civ. Proc. § 397, subd. 3. Ennis-Brown Co. v. Long [Cal. App.] 94 P 250.

52. Ennis-Brown Co. v. Long [Cal. App.] 94 P 250; Kerr v. Burns [Colo.] 93 P 1120; In re Darrow [Ind. App.] 83 NE 1026. No abuse to refuse change becauss five years previous the judge had acted as attorney in an action involving the same rights. Kerr v. Burns [Colo.] 93 P 1120. Order for change on ground of disqualification of judge, when made by judge of circuit to which venue is transferred sitting in circuit of original venue, will not bs disturbed when the selection was neither improper nor prejudical to the parties and ths judge was neither a party nor influenced by improper motives. Daniel v. Citizens' Mut. Fire Ins. Co., 149 Mich. 626, 14 Det. Leg. N. 525, 113 NW 17.

53. Case remanded with order to grant change. Gandy v. Bissell's Estate [Neb.] 115 NW 571. And when disqualification is clear under ths statute, the judge is without discretion. Ordering change to the nearest and most accessible court where a like objection does not exist, as provided in Civ. Code Proc. § 398, is not an act of discretion upon the

its own initiative.[55] Change of venue will be granted to the county of residence of a defendant from the county wherein plaintiff, a foreign corporation, has its principal place of business within the state.[56] A corporation is entitled to change of venue as well as an individual.[57] Statute permitting change of venue for convenience of witnesses and to promote the ends of justice must be construed as one ground for change and is not separable.[58] Under such statutes the place where cause of action arose and a majority of the material witnesses reside is usually considered the proper venue.[59] Where the witnesses are equally divided within the state, the nature of their employment,[60] or the convenience of a foreign witness who must necessarily be present, may be considered,[61] but transportation facilities which make the county of original venue as convenient as that of witnesses' residence are not sufficient to justify denial of change.[62] Prejudice of trial judge is ground for a change of venue,[63] but such prejudice must be personal and not a possible incidental opinion growing out of business relations of a similar nature.[64] The right to change of venue may be waived by laches [65] or general appearance,[66] and after such waiver the grant of a change as a favor is an abuse of discretion,[67] but continuance at the instance of the plaintiff or the court, the defendant not being present, is without prejudice to defendant's privilege.[68] A cross bill after dismissal, alleging damages for wrongful suit, is in the

part of a disqualified judge. Parrish v. Riverside Trust Co. [Cal. App.] 93 P 685.

54. Denial held error. Miehle Printing Press & Mfg. Co. v. Arkulas, 131 Ill. App. 461.

55. Rev. St. 1899, § 819 (Ann. St. 1906, p. 791). Priddy v. Mackenzie, 205 Mo. 181, 103 SW 968.

56. Starke Advertising Ag. v. Adams [N. J. Law] 64 A 990.

57. First Nat. Bk. of Morris v. Levinson, 129 Ill. App. 173.

58. The court must inquire not only as to the convenience of witness but whether the ends of justice will be promoted. Larkin v. Sheldon, 109 NYS 1105. Change improperly granted under Code Civ. Proc. 1902, § 147, to promote the ends of justice, convenience of witnesses not being considered. Castles v. Lancaster County, 74 S. C. 512, 55 SE 115.

59. **Proper to grant change:** To county where cause of action arose and majority of witnesses reside. Exl v. Gordon, 108 NYS 1062; Lambert Snyder Co. v. Smith, 108 NYS 992; Pinkus v. United Suit & Cloak Co., 108 NYS 932; Hurn v. Olmstead, 55 Misc. 504, 105 NYS 1091. To county where contract sued upon was made and performed and where majority of material witnesses reside. Gen. Rule of Prac. 48. Jacobson v. German-American Button Co., 108 NYS 795. To defendant's residence where services sued upon were performed and a majority of material witnesses reside. Harrison v. Holahan, 122 App. Div. 740, 107 NYS 741. To place where the work sued upon was completed and a majority of witnesses to such completion reside. Aldine Mfg. Co. v. Duffy-McInnerney Co., 109 NYS 596. Where defendant alleged six witnesses at place where assault was committed and filed affidavit of merit, while plaintiff denied defendant's allegation and alleges one witness at place of original venue but failed to file affidavit of merit. Fuchs v. Fitzer, 109 NYS 1024.

Improper to grant change: From county of plaintiff's residence where cause of action arose and majority of witnesses reside. Brady v. Cohen, 109 NYS 628.

60. Public officers. Larkin v. Sheldon, 109 NYS 1105.

61. Larkin v. Sheldon, 109 NYS 1105.

62. Lambert Snyder Co. v. Smith, 108 NYS 992.

63. First Nat. Bk. of Morris v. Levinson, 129 Ill. App. 173.

64. In an action to foreclose a mortgage, where defense is usury, the fact that the judge holds stock in a corporation which indulges in practices such as are herein alleged to be usury is not sufficient to disqualify. Purvis v. Frink [Fla.] 46 S 171. The trial of right of property is a "proceeding at law" within the meaning of the statute allowing change of venue on the ground of prejudice of judge. First Nat. Bk. of Morris v. Levinson, 129 Ill. App. 173.

65. Smith v. Pelton Water Wheel Co., 151 Cal. 399, 90 P 932. As indicated by frequent adjournments, stipulations for trial and other proceedings clearly looking toward a trial in the place of original venue. Schaaf v. Denniston, 121 App. Div. 504, 106 NYS 168.

66. Under Mill's Ann. Code, § 429, providing that judge shall not sit in an action in which he has been an attorney without consent of the parties, the right to change is waived by consent when the parties appear and submit to trial without protest. Kerr v. Burns [Colo.] 93 P 1120. The right to have a Federal suit determined in a district wherein one of the parties resides is a mere personal privilege and is waived by the interposition of a general demurrer (McPhee & McGinnity Co. v. Union Pac. R. Co. [C. C. A.] 158 F 5), unless the court is without jurisdiction of the subject-matter (Hunter v. D. W. Alderman & Sons Co. [S. C.] 61 SE 202). Domestic corporation sued in a county other than its residence, the defect is of the subject-matter. Hunter v. D. W. Alderman & Sons Co. [S. C.] 61 SE 202; Nixon v. Piedmont Mut. Ins. Co., 74 S. C. 438, 54 SE 657.

67. Schaaf v. Denniston, 121 App. Div. 504, 106 NYS 168.

68. Through mistake of clerk defendant was without notice of trial day and con-

nature of a new action in which plaintiff becomes defendant and is entitled to venue in the county of his residence,[69] but a counterclaim growing out of the same transaction as the original cause of action does not entitle plaintiff to a change of venue.[70] A statute permitting change of venue in civil actions includes all actions not criminal.[71] A statutory right to change of venue cannot be abrogated by rule of court.[72] Under statute authorizing the judge ad hoc, to transfer a recused case when trial is not had within nine months of recusation or mistrial, the appellate court is without authority to order a transfer before the nine months have elapsed.[73]

On appeal from inferior courts. See 8 C. L. 2242

§ 3. *Procedure for change.* See 8 C. L. 2242—Motion for change of venue should be made in apt time,[74] but where for failure to move in time the motion has been overruled, it is not improper to make a second motion if impropriety of venue makes it incumbent upon the court to grant change of its own initiative.[75] Change is obtained by motion in an action[76] or plea in abatement,[77] and not by injunction in another action[78] or by demurrer,[79] and a prayer for dismissal or stay until a suit in another county is determined is not a demand for change of venue.[80] A plea in abatement to the venue filed with pleas to the merits should not be stricken as prejudicial to a fair trial,[81] and the filing of the plea to the merits does not waive the plea in abatement.[82] All parties properly made defendants[83] must join in an application for change of venue,[84] unless good reason can be shown why they do not,[85] but a defendant improperly joined cannot resist change desired by the other defendants.[86] Where plaintiff may select the county of venue if defendant's residence is unknown, due diligence in seeking such residence must be shown before plaintiff may exercise the privilege.[87] Change is not limited to an adjoining county when the conditions mak-

tinuance was had in his absence. Garrett v. Galveston, etc., R. Co. [Tex. Civ. App.] 108 SW 760.

69. Seeligson v. Gifford [Tex. Civ. App.] 19 Tex. Ct. Rep. 511, 103 SW 416.

70. Jesse French Piano & Organ Co. v. Williams [Tex. Civ. App.] 102 SW 948.

71. Rev. St. 1899, § 818, includes certiorari proceedings. State v. Denton, 128 Mo. App. 304, 107 SW 446.

72. Circuit court rule No. 58 (108 N. W. v), requiring motion for change of venue to be entered within ten days after the cause is at issue, applies only to proceedings in court and does not abrogate or qualify Comp. Laws 1897, § 10106, authorizing application for change of venue to be made to a circuit court commissioner or to a circuit judge of an adjoining circuit. Mandamus issued to judge of adjoining circuit. Comstock v. Connine [Mich.] 115 NW 974.

73. State v. Reid [La.] 45 S 103.

74. Promptly. Smith v. Pelton Water Wheel Co., 151 Cal. 399, 90 P 932.

In municipal court on or before the joinder of the issue. Universal Cutter Co. v. Emden, 107 NYS 669. Motion made over six weeks prior to call of case for trial is in apt time. Miehle Printing Press & Mfg. Co. v. Arkulas, 131 Ill. App. 461. Properly refused when not made till day of trial, although the parties well knew of disqualification of the judge long before. Priddy v. Mackenzie, 205 Mo. 181, 103 SW 968.

75. Priddy v. Mackenzie, 205 Mo. 181, 103 SW 968.

76. Reis v. Graham, 122 App. Div. 312, 106 NYS 645. Court may change place of trial for convenience of witnesses upon motion though no demand has been made. Cronin v. Manhattan Transit Co., 108 NYS 963.

77. E. O. Painter Fertilizer Co. v. Du Pont [Fla.] 45 S 507.

78. Action instituted in one county and injunction issued to restrain the prosecution of suit already commenced in another county, injunction dissolved. Reis v. Graham, 122 App. Div. 312, 106 NYS 645.

79. McCullen v. Seaboard Air Line R. Co. [N. C.] 60 SE 506.

80. Under Revisal 1905, § 425. McArthur v. Griffith [N. C.] 61 SE 519.

81. E. O. Painter Fertilizer Co. v. Du Pont [Fla.] 45 S 507.

82. Laws 1907, chap. 5637, p. 125. E. O. Painter Fertilizer Co. v. Du Pont [Fla.] 45 S 507.

83. Nonjoinder of defendant who has no interest in subject-matter cannot affect rights of the real party at interest. Anaheim Odd Fellows' Hall Ass'n v. Mitchell [Cal. App.] 92 P 331.

84. Code Civ. Proc. § 395. Mahler v. Drummer Boy Gold Min. Co. [Cal. App.] 93 P 1064. One defendant cannot of his own motion obtain change from county of residence of other. Sullivan v. Lusk [Cal.] 94 P 92.

85. Under Code Civ. Proc. § 395. Sullivan v. Lusk [Cal. App.] 94 P 91.

86. Defendant against whom no cause of action is stated. Eddy v. Houghton [Cal. App.] 91 P 397.

87. Under Code Civ. Proc. § 395. Mahler v. Drummer Boy Gold Min. Co. [Cal. App.] 93 P 1064.

88. Remanded with order to grant change

ing such change necessary exist also in such adjoining county.[88] A petition for change of venue on behalf of a corporation may be verified by its authorized agent.[89] Application must usually be accompanied by affidavit of merits,[90] and by affidavits setting forth the disqualification of the court,[91] prejudice,[92] convenience of witneses,[93] or other facts relied upon to support the motion,[94] and must affirmatively show the impropriety of original venue.[95] Where a defendant is fraudulently joined for the purpose of preventing venue at the residence of the true defendant, an application for change of venue is proper procedure,[96] but the grounds for change must be clearly stated or plaintiff will not be required to prove the allegations of his complaint showing cause of action against the resident defendant.[97] The nature of the action as affecting venue must be determined from the complaint alone and neither the affidavit nor answer will be considered except as to the question of residence.[98] Prayer for change of venue may be abandoned by failure to press or to take exception,[99] but an exception preserves all rights,[1] and a plea of privilege, if insisted upon, is not lost by an amendment to plaintiff's pleading changing the nature of the action from one in personam to one in rem.[2] An order denying change of venue is not appealable.[3] Failure of the clerk of court to transmit the papers will not render the proceedings void.[4] It is the duty of the court to consider the last of successive motions for change of venue with reference to conditions which then obtain and not with regard to con-

of venue to some county other than ones specified wherein the case has been widely discussed. Gandy v. Bissell's Estate [Neb.] 115 NW 571.

89. Verification must show authority of agent. First Nat. Bk. of Morris v. Levinson, 129 Ill. App. 173.

90. Affidavit which avers that the party has fully stated "the case" to counsel instead of "the facts of the case" is sufficient. Eddy v. Houghton [Cal. App.] 91 P 397. An affidavit of merits which alleges that deponent has fully and fairly stated the case to counsel is not invalidated by additional allegations not tending to qualify the essential statement. Hurn v. Olmstead, 55 Misc. 504, 105 NYS 1091. Failure to allege advice of counsel. Fuchs v. Fitzer, 109 NYS 1024.

91. Affidavit setting up court's abstract interest in the question of law involved not sufficient. Purvis v. Frink [Fla.] 46 S 171. Under Code Civ. Proc. § 170, requiring judge to consider affidavits of disqualification and counter affidavits, successive affidavits of disqualification of judges in adjoining counties, though not counter to the original affidavit, were properly considered, the statute not limiting the court to consideration of the original. Parrish v. Riverside Trust Co. [Cal. App.] 93 P 685.

92. Under Code Civ. Proc. 1902, § 88, subd. 19, affidavit must set forth statement sufficient to form basis of an indictment for perjury. Mayes v. Evans [S. C.] 61 SE 216. Prejudice must be attested by two credible witnesses. Credibility not sustained. Bruner v. Kansas Moline Plow Co. [Ind. T.] 104 SW 916. Interest of the inhabitants of a school district in a suit in which the district is defendant is too slight and remote to warrant a change on ground of prejudice. Rand, McNally & Co. v. Com. [Ky.] 106 SW 238.

93. Showing insufficient to warrant change for convenience of witnesses under Code Civ. Proc. § 397, subd. 3. Enis-Brown Co. v. Long [Cal. App.] 94 P 250. Allegation of residence of one material witness and denial of adverse party's allegation of residence of six witnesses not sufficient to support change in the absence of affidavit of merits. Fuchs v. Fitzer, 109 NYS 1024.

94. Allegation of facts "which he will prove by witnesses" sufficient allegation of expectation that the witnesses will testify to the facts claimed in support of charge. Kalbfleisch v. Rider, 120 App. Div. 623, 105 NYS 539.

95. Application by a joint tort feasor for change to his domicile faulty for failure to show that the county of venue was not the residence of the other. Texas, etc., R. Co. v. Parsons [Tex. Civ. App.] 109 SW 240.

96, 97. McDonald v. California Timber Co., 151 Cal. 159, 90 P 548.

98. Eddy v. Houghton [Cal. App.] 91 P 397.

99. McArthur v. Griffith [N. C.] 61 SE 519.

1. Proceeding to trial thereafter, even without protest, does not constitute waiver. Miehle Printing Press & Mfg. Co. v. Arkulas, 131 Ill. App. 461.

2. Lumpkin v. Story [Tex. Civ. App.] 108 SW 485.

3. Affidavit of prejudice being filed, the court denied change of venue on the ground of no jurisdiction. Appeal was taken on the ground that the order practically determined the case and prevented judgment from which appeal might be taken under Stat. 1898, § 3069. Held that the affidavit of prejudice left the trial court no power beyond granting change of venue or calling on another judge and that hence the question of jurisdiction was not before the court and the order appealed from was simply a denial of change of venue which is not appealable. Laws 1895, ch. 212, p. 356. In re Fraser's Will [Wis.] 116 NW 3.

4. Kirby's Dig. § 8000, relating to clerk's fees, is for protection of the clerk and not jurisdictional. Fritz Bros. v. Wells, 83 Ark. 124, 103 SW 168.

ditions existing at the time of original demand.[5] Mandamus will not issue to compel a court to grant change of venue when an effective remedy lies in appeal.[6] The municipal court of New York cannot transfer place of trial except by consent of the parties or on statutory demand.[7] In Wisconsin a change of venue on account of prejudice of judge will not be granted until after the lapse of a term at which the case is triable to permit a substitute judge to hear the case at original venue.[8] The right to contest a change of venue is lost by failure to object and by appearance in the new court,[9] and by standing upon objections and failing to file affidavit of merits, plaintiff concedes that a motion for change may be granted if defendant has made any case, however slight.[10]

§ 4. *Results of change of venue.*See 8 C. L. 2244—A court to which an action is properly removed by change of venue acquires jurisdiction of the cause and subject-matter coextensive with the court of original venue,[11] and the court of original venue has thereafter no jurisdiction for any purpose until the action is finally adjudicated.[12] Where a plea of statutory right to change of venue is filed with a plea to the merits, a directed verdict on the plea in abatement leaves the plea to the merits undisposed of.[13]

VERBAL AGREEMENTS, see latest topical index.

VERDICTS AND FINDINGS.

§ 1. Definitions and Nature, 1974.
§ 2. General Verdicts, 1975.
§ 3. Special Verdicts and Interrogatories, 1976.
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§ 9. Findings by Court or Referee, 1986. Propositions of Law Under the Illinois Practice, 1991.
§ 10. Objections and Exceptions, 1991.

§ 1. *Definitions and nature.*See 8 C. L. 2245—It is the office of a special finding to find and state the issuable facts in a case as the same have been proven by the evidence.[14]

The term "special verdict" as used in the California Code does not mean a finding on every material issue but has for its object to determine whether a general verdict is against the law.[15]

5. Right to change lost by laches before last motion was made. Smith v. Pelton Water Wheel Co., 151 Cal. 399, 90 P 932.

6. Hamilton v. Smart [Kan.] 95 P 836.

7. Demand under Municipal Court Act, § 25, subd. 4 (Laws 1902, p. 1497, c. 580). In re Nitchie, 109 NYS 758; Universal Cutter Co. v. Emden, 107 NYS 669.

8. Under St. 1898, § 2625, amended by Laws 1901, p. 128, c. 101, and Laws 1905, p. 422, where after affidavit of prejudice had been filed at a term at which case was no triable but substitute judge attended at the end of term to hear the cause and stands ready to hear it at any future term, mandamus will not issue to compel change. State v. Clementson [Wis.] 113 NW 667.

9. Cook v. Penrod [Mo. App.] 108 SW 583; Kruegel v. Daniels [Tex. Civ. App.] 109 SW 1108. No record of objection court will presume change was made by consent. Universal Cutter Co. v. Emden, 107 NYS 669.

10. Hurn v. Olmstead, 55 Misc. 504, 105 NYS 1091.

11. Action to set aside a deed and partition property amended after change of venue to include ejectment. Young v. McWilliams, 75 Kan. 243, 89 P 12.

12. Correction of records of proceedings before change made nunc pro tunc by the court to which action was transferred. United Zinc & Chemical Co. v. Morrison [Kan.] 92 P 1114.

13. Judgment not res adjudicata as to the merits. E. O. Painter Fertilizer Co. v. Du Pont [Fla.] 45 S 507.

14. Not promise of special findings to state and exhibit, as part of record, rulings of court in making up issues of cause, or in respect to action taken by court in denying or permitting amendments to pleadings. Pavey v. Braddock [Ind.] 84 NE 5.

15. Under Code Civ. Proc. § 625, special findings test general verdict as to whether

§ 2. *General verdicts.*See 8 C. L. 2245—A general verdict is a finding of every fact properly averred in the complaint and every fact essential to sustain the action reasonably inferable from the facts properly averred therein.[16] The form of the verdict rendered by the jury is immaterial where both parties consent that the jury may return a verdict upon a single issue in the language suggested by the court, where such language is sufficiently intelligible to support a legal judgment.[17] It must, however, be responsive to the issues,[18] and the instructions[19] should be definite and certain[20] and signed by the foreman.[21]

Verdicts are to receive such reasonable construction as will carry out the intention of the jury, the test of the validity of a verdict being whether or not it is an intelligible answer to the issue submitted to the jury.[22] Matters immaterial and not

it was result of misapplication of law to findings in material conflict with findings implied from general verdict. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56.

16. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56; Mitchell v. Tell City [Ind. App.] 83 NE 735; Hunter Realty Co. v. Spencer [Okl.] 95 P 757. Where answers to special interrogatories contain nothing regarding speed of defendant's car, its negligence stands admitted as concerning its motion for judgment in verdict, and general verdict for plaintiff authorizes presumption that car was running at highest speed within averment of complaint. Indianapolis St. R. Co. v. Hoffman, 40 Ind. App. 508, 82 NE 543. General verdict for plaintiff held to negative defendant's claim that certain house was transferred as part of consideration in joint purchase of certain property and to affirm plaintiff's claim that same was sold. Martin v. Hoffman [Kan.] 93 P 625. Where no finding on alleged breach of warranty general verdict for contract price of engine construed to be finding against defendant on plea of breach of warranty. Liljeblad v. Sasse [Tex. Civ. App.] 108 SW 787. General verdict for plaintiff negatives defense of fraud and agreement not to collect certain subscription. Warburton v. Trust Co. [C. C. A.] 158 F 969. Verdict "for eight hundred dollars" for punitive damages not illegal as excluding idea of actual damages, since general verdict implies idea of some actual damages, however slight, regardless of characterization of damages as punitive by jury. Fields v. Lancaster Cotton Mills, 77 S. C. 546, 58 SE 608. General verdict for pedestrian suing railroad company for injuries in collision with train is finding of exercise of due care. Lowden v. Pennsylvania Co. [Ind. App.] 82 NE 941. General verdict in employe's favor implies finding that shaft causing injury was improperly guarded. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981.

17. Where, if two separate and independent contracts were entered into, verdict should be for plaintiff, but if only one contract, entire in nature and terms, verdict should be for defendant, verdict "we find in favor of entire contract," sufficient to authorize judgment in favor of defendant. Cameron v. American Soda Fountain Co. [Ga. App.] 60 SE 109.

18. In action for price of cash register, where defendant alleged rescission for fraud and breach of warranty, jury not authorized to fix terms of compromise by verdict but may only find on issues. National Cash Register Co. v. Price [Ind. App.] 83 NE 776.

19. Verdict in disregard of instructions should be set aside by court. Bentley v. Brossard [Utah] 94 P 736. Where court charged jury that if they found for plaintiff verdict should be for certain amount and jury returned verdict for plaintiff in less amount, court properly refused to receive verdict. Hines v. Royce, 127 Mo. App. 718, 106 SW 1091. Where no dispute under evidence as to amount plaintiff was entitled to recover, if at all, and jury had been properly instructed, no error to decline to receive verdict for half amount, reinstructing them on this point and directing their further consideration of case, but without attempting to direct them as to how main issue should be resolved. Chandler v. Hinds [Wis.] 115 NW 339.

20. Informal to render verdict for principal sum and provide for interest at specified rate; interest should be computed by jury and verdict rendered for aggregate amount. Minnesota Mut. Life Ins. Co. v. Welsh, 131 Ill. App. 103. Under Lien Law (Laws 1897, c. 418, § 30, p. 526), providing that lien may be had "for work done or material or other articles furnished for or towards," etc., finding that material was used in or towards not equivocal but tautological and sufficient. In re Froment, 109 NYS 1073. Verdict for specified sum "with interest" not subject to accurate computation in absence of date from which interest is computed, that complaint claims interest from certain date not warranting inference that jury had that date in mind. Delafield v. J. K. Armsby Co., 109 NYS 314. In suit on surviving partner's bond, judgment charging her with conversion not sustained where findings fail to disclose with certainty various amounts from which sum actually converted can be determined. American Bonding Co. v. State, 40 Ind. App. 561, 82 NE 548.

21. Where verdict was signed by one of jurors with letters F. M. following signature, verdict sufficient, statute not expressly requiring word "foreman" to be attached. St. Louis S. W. R. Co. v. Hawkins [Tex. Civ. App.] 108 SW 736.

22. Where action is originally brought against railroad company and another company brought in as defendant admitted it was in control of car at time of injury and issue was whether second corporation was guilty, verdict that defendant was guilty not defective because in title of case name of defendant originally sued appeared, and not

involved in the controversy or beyond the legitimate province of the jury should be disregarded as surplusage.[23]

§ 3. *Special verdicts and interrogatories. When proper.* See 8 C. L. 2246—In some states the requiring of special verdicts,[24] or the submission of questions calling for special findings whenever a general verdict is rendered, is within the discretion of the trial court,[25] whose action is reviewable only in case of abuse,[26] but in others the court is required to submit special interrogatories whenever property required by a party to do so.[27] However, special interrogatories are properly refused where the facts elicited by them are practically brought out by answers to other interrogatories,[28]

name of company admitting its operation of car. Spofford v. Rhode Island Suburban R. Co. [R. I.] 69 A 2. Omission of word dollars was not such defect as to prevent rendering of judgment according to manifest intent of jury, although it might have been more regular to amend verdict before judgment. Bluestein v. Collins [Tex. Civ. App.] 19 Tex. Ct. Rep. 562, 103 SW 687. Where measure of damages to horse were separated under items of damages, the aggregate amount being amply supported by evidence and verdict when construed with reference to pleadings and evidence was sufficiently clear, definite, and certain, verdict sustained. Telfair County v. Clements, 1 Ga. App. 437, 57 SE 1059. Under Rev. St. 1899, § 595 (Ann. St. 1906, p. 622), where punitive as well as actual damages were found, and jury were instructed to separate amount of punitive from actual and separate form was given them to make their return and they followed form for actual damages, presumption was that they found only in question of actual damages and verdict was sufficient. Blair v. Paterson [Mo. App.] 110 SW 615.

23. Verdict for plaintiff for certain sum including costs not void for uncertainty, since portion regarding costs may be disregarded as surplusage. Southern R. Co. v. Oliver, 1 Ga. App. 734, 58 SE 244. Under verdict "for defendant, defendant to pay forty dollars to plaintiff, plaintiff to retain cash register," held forty dollars for plaintiff cannot be disregarded as surplusage so that unconditional judgment might be rendered for defendant. National Cash Register Co. v. Price [Ind. App.] 83 NE 776.

24. St. 1898, § 2858, as amended by Laws 1903, p. 617, c. 390, § 1. Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865.

25. Maxson v. J. I. Case Threshing Mach. Co. [Neb.] 116 NW 281; Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865. Under Acts 1899, p. 190, c. 111. Jones v. Creech [Tex. Civ. App.] 108 SW 975.

26. No abuse where answering of submitted question either way would furnish no aid to parties in court and general verdict would necessarily be answer to each question. Buel v. Chicago, etc., R. Co. [Neb.] 116 NW 299. Under Acts 1899, p. 190, c. 111, where though alleged in complaint that certain obstruction to sidewalk constituted nuisance issue of nuisance was not submitted to jury, no abuse of discretion to refuse to submit special issue. Kampmann v. Rothwell [Tex. Civ. App.] 107 SW 120. Under Rev. Code Civ. Proc. § 271, proper in action for commissions for sale of land to request jury, in addition to general verdict, to return special finding as to whether time for procuring purchaser was limited. Ewing v. Lunn [S. D.] 115 NW 527. In action to recover land, not error for court to give jury two forms of verdict and instruct them to find generally for plaintiff or defendant instead of requesting them to render general or special finding, as provided by 2 Ballinger's Ann. Codes and St. § 5021, where no special finding was requested. Stangair v. Roads, 46 Wash. 613, 91 P 1.

27. Under Practice Act 1905, § 353, error for judge to accept verdict without jury making special findings requested, since parties have right to verdict on all issues submitted. Reid v. Rhode Island Co. [R. I.] 67 A 328. Under Code Civ. Proc. § 625, request cannot be refused solely because it does not include words "in case you find general verdict," though court in giving its direction of special verdict should direct jury that they need not return finding on particular facts unless they agree on special general verdict. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56.

28. Ft. Wayne Corperage Co. v. Page [Ind App.] 82 NE 83. Particularly where court's interrogatories called for ultimate facts rather than evidence to sustain such facts Strand v. Grinnell Automobile Garage Co. [Iowa] 113 NW 488. Question whether deceased might have discovered danger by use of ordinary care held covered. Hemmingsen v. Chicago, etc., R. Co. [Wis.] 114 NW 785. Finding that defective handhold was unreasonably dangerous negatived fact that it was reasonably safe, and question covering latter point need not be given. Beach v. Bird & Wells Lumber Co. [Wis.] 116 NW 245. Where evidence centered on condition of defendant's transformer and negligence with respect to inspection thereof and question was fully covered by interrogatory given and answered, proper to refuse as too general in its terms "Did defendant do everything that could reasonably be done under circumstances to prevent injury of which plaintiff complains?" Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626. Where question whether there was failure to instruct plaintiff as to danger and court instructed jury that burden of proof was on plaintiff, and if instructions were sufficient to enable plaintiff to comprehend danger, etc., not error to refuse requested interrogatories as to whether plaintiff was warned of danger on evening of injury and whether he should have understood the warning. Gelo v. Pfister & Vogel Leather Co. [Wis.] 113 NW 69. Where court submitted questions whether employe knew or by exercise of ordinary care might have known of defect and whether he was guilty of contributory negligence

though its submission is not error,[29] and the submission of a special issue may be refused where a general verdict would necessarily find upon the issue.[30]

Request for and submission of special issues or interrogatories. See 3 C. L. 2246 The court is not required to submit special interrogatories in the absence of a request therefor,[31] but may submit them of its own motion.[32] Each party must make his own request and neither can object that the request of the other was not complied with,[33] but the request should be timely.[34] The Federal courts, however, are not governed by the state practice in this regard.[35] In Iowa special interrogatories not submitted to the attorneys of the adverse party before the argument was begun are properly refused,[36] while in California a request for a special verdict need not be submitted to the adverse party, though the court may do so,[37] and in the latter state it is also immaterial whether an issue is called a quesion of fact or vice versa in the request or whether the request relates to one or several questions.[38]

Form and requisites of special interrogatories. See 3 C. L. 2247—Special interrogatories should be confined to such questions as are controverted [39] and put in issue,[40]

and charged that assumption of risk was form of contributory negligence, refusal to submit question whether person of ordinary care ought to have anticipated such an accident as happened was proper. Zarnik v. C. Reiss Coal Co. [Wis.] 113 NW 752.

29. Where jury found plaintiff on day of and before accident did not know of dangerous condition, he cannot complain that question "was condition such as to make it apparent to one knowing its condition that it was dangerous to use" was unnecessary. Beach v. Bird & Wells Lumber Co. [Wis.] 116 NW 245.

30. Since in action for injuries general verdict for employe would necessarily find affirmative of issue of employer's negligence, refusal to submit as special issue not error. St. Jean v. Lippitt Woolen Co. [R. I.] 69 A 604. Interrogatories proper in other respects but calling for special finding on sole material issue in case properly refused. Haase v. Morton [Iowa] 115 NW 921. Proper, under Code Civ. Proc., to refuse to submit defendant's interrogatories where finding favorable to defendant would not have been inconsistent with general verdict for plaintiff. Williams v. San Francisco, etc., R. Co. [Cal. App.] 93 P 122. Where only issue was whether one's mind was so unsound as to be unable to manage her property, court properly refused to submit question "Is defendant of unsound mind," where issue whether her mind was too unsound for her to manage property was determined by general verdict. Conway v. Murphy [Iowa] 112 NW 764.

31. No error where no request and reference to pleadings show what court found as basis of decree. McKenzie v. Donnell, 208 Mo. 46, 106 SW 40.

32. Revisal 1905, § 527. Young v. Fosburg Lumber Co. [N. C.] 60 SE 654.

33. Appellant cannot object that appellee withdrew his request. Tevis v. Hammersmith [Ind. App.] 81 NE 614.

34. Request not made until after court had orally announced its decision too late. Eble v. State [Kan.] 93 P 803. Request for special findings should be made at commencement of trial, and if not then made right is waived and thereafter it lies within discretion of court whether it will make special finding. Tevis v. Hammersmith [Ind. App.] 81 NE 614. Under Burns' Ann. St. 1901, § 560, no abuse of discretion for court to refuse plaintiff's request for special finding made day set for entering finding, though defendants had made request for special findings, judge having taken notes of evidence for purpose of complying therewith, and plaintiff had no notice of withdrawal of their request until day set for decision of case, where judge resided elsewhere, and to have made special finding would have involved considerable delay and it did not appear that he had notes of evidence with him or whether they had been preserved. Tevis v. Hammersmith [Ind.] 84 NE 337, afg. [Ind. App.] 81 NE 614. Refusal to submit certain special interrogatories because not filed until during argument not error. Toledo, etc., R. Co. v. Reardon [C. C. A.] 159 F 366. Under Code Civ. Proc. § 625, request for special verdict embracing no questions that counsel for adverse party could have omitted to discuss in argument, and which were submitted to adverse counsel long enough before he commenced his argument to enable him to file his objection to allowance of request, was made in time. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56.

35. Ohio statute permitting filing of special interrogatories any time before submission of jury inapplicable. Toledo, etc., St. L. R. Co. v. Reardon [C. C. A.] 159 F 366.

36. Sarchfield v. Hayes [Iowa] 112 NW 1100.

37. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56.

38. Since, under Code Civ. Proc. § 625, special verdicts and special findings are identical in everything but name. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56.

39. Where not contended that wood pile was obstruction, nor that accident would not have happened, if horse had been under control, nor that accident was partly due to horse running away, requested special questions of fact, was wood pile obstruction, etc., would accident have happened had horse been under control, was accident due to horse running away, properly refused. Williams v. San Francisco, etc., R. Co. [Cal. App.] 93 P 122.

40. Where specific acts of negligence are in issue and specific questions covering such

should conform to the pleadings,[41] and must call for ultimate,[42] material, and pertinent facts,[43] except when such facts when found admit of more than one reasonable inference of fact, in which case an interrogatory calling for a conclusion from such inferences may be submitted and answered,[44] and should be sufficient to adequately submit the question to the jury.[45] Though questions relating to the character, con-

acts were requested, error to refuse them and submit general question whether defendant was guilty of any want of care. Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865. Where issue was whether there was sufficient threat of danger arising from smoke to justify employe to descend while it was dark, special interrogatories whether accident was caused by employer's failure to provide guards on walk, whether injury was caused by quantity of smoke about walk, whether smoke was such as to threaten employe with bodily injury and whether employe knew there were no guards on walk, held proper as directing jury to find cause of injury and determine issue. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56. Where judgment is for forty thousand dollars, fact that findings show not only forty thousand dollars damages on one transaction, but also eleven thousand seven hundred on other transaction, and there is nothing by which sum awarded can be referred to any one or more of particular transactions alleged, does not show failure to find on any issue of fact. Great Western Gold Co. v. Chambers [Cal.] 95 P 151. Where liability does not depend on whether result of negligent act could have been foreseen, special interrogatories calling for such determination are properly refused. Haase v. Morton [Iowa] 115 NW 921.

41. Finding by jury that spikes were loose in ties, and that in making use of soft wood ties not sufficient to hold spikes railroad company did not use best method of keeping track and roadbed in safe and proper condition supports allegations of negligence in complaint. Chicago, etc., R. Co. v. Brandon [Kan.] 95 P 573.

42. Interrogatory whether plaintiff proved, by preponderance of evidence whether train was standing when she alighted properly refused. Chicago City R. Co. v. Foster, 128 Ill. App. 571, afd. 226 Ill. 288, 80 NE 762. Special interrogatories not determinative of case under all issues but bearing directly upon determination of specific issues, and calling for findings as to ultimate facts essential to determination of such issues, ought to be submitted. Brown Land Co. v. Lehman [Iowa] 112 NW 185. In action against surviving parties' surety, finding that appraisement showed certain things insufficient as finding of evidentiary fact only. American Bonding Co. v. State, 40 Ind. App. 561, 82 NE 548.

43. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56. Interrogatory calling for state of mind of companions of appellee caused by action or conduct of horse while upon or approaching railroad crossing immaterial. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Under Okl. Civ. Code, § 298, in action for conversion of cattle, not error to refuse to submit interrogatory as to number of cattle shipped as applying on number delivered, since fact was only incidental. Drumm-Flato Commission Co. v. Edmisson, 28 S. Ct. 367. Not error to refuse to submit issue as to whether plaintiff with ordinary care could have known of foreman's incompetency where did not appear plaintiff knew of any specific acts in evidence tending to show such incompetency, had not worked regularly with foreman until shortly before accident, his previous employment not warranting inference that he learned how foreman performed duties. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59. Plaintiff having proved defendant negligently permitted land to become infested with cockleburrs, error to refuse special interrogatories whether defendant violated covenant to cultivate and keep premises free from burrs, whether there was increased, unusual, or excessive growth during defendant's occupancy caused by neglect and improper cultivation, whether such excessive growth of any injured premises, and whether defendant left farm in as good order and farming condition as it was when received. Brown Land Co. v. Lehman [Iowa] 112 NW 185. Where in action for injuries to passenger by collision there was evidence that collision was caused solely by failure of airbrake to work and that plaintiff prior to accident was victim of hysteria, court should have submitted special issues whether motorman did everything in his power to stop car, whether difficulty in checking car was caused by failure of air brake to work, and whether plaintiff had spasms, fits, convulsions, etc., before accident. Tucker v. Rhode Island Co. [R. I.] 69 A 850. Special interrogatory whether office was rented to defendants and another jointly should not have been submitted because, notwithstanding joint liability, suit could have been maintained against either of them if they were not partners. Rev. St. § 3, ch. 76, and jury's failure to answer same not error. Price v. Lewis, 132 Ill. App. 179. Reservation of question whether there is any evidence to be submitted to jury is a reservation of a question of law. Murphey v. Philadelphia Rapid Transit Co., 30 Pa. Super. Ct. 87.

44. But interrogatory calling for conclusion on certain assumed facts and for what ordinarily prudent man would do under all circumstances improper. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83.

45. Question of special verdict whether plaintiff sustained injuries in depot grounds sufficiently submitted question whether lawn was part of depot grounds within rule requiring railroad to keep in safe condition its depot platforms and approaches thereto and other portions of its depot grounds reasonably near. Banderob v. Wisconsin Cent. R. Co. [Wis.] 113 NW 738. Where plaintiff pleaded gross negligence of operatives of car after discovering decedent's peril in time to stop car, but failing to do so and intentionally injured deceased, question adequately submitted by questions whether before

duct, and credibility of witnesses and to the conduct of parties to the suit should not be presented to the jury for special findings,[46] it is proper to submit an issue substantially in the language of the statute,[47] and for the court to change the language of a requested issue,[48] since the form of the question is within the discretion of the judge.[49] The question should admit of a direct[50] though not necessarily categorical answer,[51] and should not assume the existence of disputed facts.[52]

Since it is the office of each interrogatory submitted to a jury to elicit a finding upon some single, primary fact, leaving the proper inferences to be drawn therefrom to the court,[53] hence two distinct issues should not be embodied in one question of a special verdict, and if they are so embodied and are expressed in the disjunctive and the error is not rendered harmless by instructions or something in the record, the defect is fatally prejudicial,[54] though it is not error to submit all the elements of a proximate cause as a single proposition.[55]

reaching crossing it appeared to motorman that decedent's team was beyond control and that in absence of effort by motorman collision was inevitable, and whether while nearing and before nearing crossing motorman intentionally refrained from making any effort in good faith to slacken speed of or stop car. Wilson v. Chippewa Valley Elec. R. Co. [Wis.] 114 NW 462.

46. Snyder v. Stribling, 18 Okl. 168, 89 P 222.

47. Proper in action under St. 1898, § 4269, for wrongfully cutting timber. Cook Land Const. & Producing Co. v. Oconto Co. [Wis.] 114 NW 823.

48. Under Code Civ. Proc. § 625, no error to change words of special interrogatory whether plaintiff furnished satisfactory proofs of loss to "whether he furnished such proofs of loss as were required by said policy." Miller v. Fireman's Fund Ins. Co. [Cal. App.] 92 P 332. Where court charged that any damage by flood not coming from cut-off or attributable to it could be considered, and if damage was caused or aggravated by backwaters independent of cut-off such damages could not be considered but only how much damage waters of cut-off caused, no error to strike out word "alone" from questions in special verdict calling for finding as to whether from the negligent construction and maintenance of cut-off alone waters damaged plaintiff's land, and to reasonable value of growing grass damaged "alone" from such waters. Neumeister v. Goddard [Wis.] 113 NW 733.

49. No abuse of discretion to precede question with words "If you answer preceding question in affirmative then answer this." Van De Bogart v. Marinette & Menominee Paper Co. [Wis.] 112 NW 443.

50. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56.

51. Under Code Civ. Proc. § 625, categorical answer not required. Plyler v. Pacific Portland Cement Co. [Cal.] 93 P 56.

52. Where question whether car had been moved after placed on spur by switchman was material and controverted special interrogatory submitting question whether member of crew immediately after placing car on spur referred to it asking if it cleared and whether switchman answered it would, erroneous for assuming car had not been moved before causing injuries. Chicago, etc., R. Co. v. Lawrence [Ind.] 82 NE 768. In action under Revisal 1905, § 2632, for delay in transporting freight issue, what amount if any is plaintiff entitled to recover of defendant on account of failure to promptly ship freight objectionable as presupposing failure of defendant to perform duty, and two issues should be submitted: Was freight transported and delivered within reasonable time; in what sum is carrier indebted to plaintiff. Davis v. Southern R. Co. [N. C.] 60 SE 722.

53. Whether one of ordinary sagacity ought to have foreseen probable consequences of act is to be inferred from consideration of all facts and circumstances surrounding case and is question for court and not proper subject for interrogatory to jury, and fact that jury drew inconsistent inference therefrom ineffective. Richmond St., etc., R. Co. v. Beverley [Ind. App.] 84 NE 558.

54. Howard v. Beldenville Lumber Co. [Wis.] 114 NW 1114. Where vital question was whether car was sufficiently ventilated and whether plaintiff knew of danger incident thereto, held error to refuse defendant's special interrogatory in special verdict whether plaintiff knew of insufficient ventilation, where questions submitted called for finding whether defendant provided car sufficiently ventilated, and whether car was of sufficient size and fourth question required jury to answer it first or second he answered "yes," whether plaintiff knew that "said insufficiency" might be proximate cause of injury to plaintiff's horses since it left jury to answer fourth question "no" if they found car either not suitably ventilated or of insufficient size. John Schroeder Lumber Co. v. Chicago, etc., R. Co. [Wis.] 116 NW 179. Where jury might have found either actual or constructive notice to highway officers of defect or might have negatived either and affirmed other submission in special verdict of question whether officers of town knew or might have known defect sufficiently long to have repaired same before accident, erroneous since after answering question in affirmative it could not be said whole jury affirmed either disjunctive propositions. Du Cate v. Brighton [Wis.] 114 NW 103. Where two propoeitions of fact are embodied in disjunctive in question of special verdict and there is not evidence as to one of them, and jury are expressly or in effect instructed to answer only as they shall find respecting other proposition, duplicity is

Answers to special interrogatories sufficiently responsive and definite to be fairly certain in meaning are sufficient,[56] and where any answer to a special interrogatory could not change the result arrived at by the general verdict, an objection to an answer to the interrogatory on the ground that it was too indefinite is immaterial.[57]

Form and requisites of special verdict. See 8 C. L. 2247—No particular form is required in the submission of special issues to the jury, and if they substantially present all the issues raised by the pleadings,[58] and every material fact necessary to support a judgment, it is sufficient.[59] A special verdict should not be continued with a general verdict.[60]

Interpretation and construction. See 8 C. L. 2248—Where a special verdict is susceptible of two constructions, one of which will support the general verdict and the other will not, that construction will be given which will support the general verdict.[61] A failure to find a special fact must be regarded as a finding against the party having the burden of establishing it.[62] While mere conclusions in a special finding of facts

harmless. Howard v. Beldenville Lumber Co. [Wis.] 114 NW 1114. Special question not objectionable as so combining foreman's want of care and his incompetency that it was impossible to ascertain which jury found to be proximate cause of injury, where on submission jury were told not to answer affirmatively if foreman merely failed to use ordinary care or if he was merely incompetent, but only if injury was caused by foreman, an incompetent person and as a result of incompetency. Young v. Milwaukee Gaslight Co. [Wis.] 113 NW 59.

55. Howard v. Beldenville Lumber Co. [Wis.] 114 NW 1114.

56. Answer to question "was steam discharging onto and across highway while plaintiff was approaching?" that "at side of highway. At times blew across" sufficient as against motion that it was not definite. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Where rule res ipsa loquitor applies, rebuttable presumption of negligence retains its original force until overcome by proof of affirmative acts of due care, and if evidence is wanting of substantial proof of anything done by defendant to prevent injury, jury are justified in response to interrogatory "Did defendant do all that could reasonably be done under circumstances in answering 'Don't know.' " Bice v. Wheeling Elec. Co. [W. Va.] 59 SE 626.

57. Ft. Wayne Cooperage Co. v. Page [Ind.] 84 NE 145, afg. [Ind. App.] 82 NE 83.

58. Ormond v. Connecticut Mut. Life Ins. Co., 145 N. C. 140, 58 SE 997. Under Rev. Code 1905, § 8427, verdict not responsive to issues, in action to recover possession, nor making and finding as to right of possession, nor specifying value of cattle, nor finding as to damages, nor amount of defendant's lien, if any, insufficient. Johnson v. Glaspey [N. D.] 113 NW 602.

59. Collins v. Whiteside [N. J. Err. & App.] 69 A 174; Aden v. Doub [N. C.] 59 SE 162; Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865. St. 1898, § 2858, as amended by Laws 1903, p. 617, c. 390, § 1. Id. Under Pennsylvania practice, special verdict must place on record all essential facts of case disputed or undisputed upon which facts alone, without inferences of further facts, judgment is to be rendered. Elliott v. Miller & Co., 158 F 868. Where case is submitted generally, fact that certain disputed questions of fact were also submitted for findings thereon does not render verdict special one. Id. One suing to foreclose mechanics' lien for goods sold under contract, title to remain in him until price paid, entitled to recover, though special findings do not state that he elected to treat sale as absolute. Elwood State Bk. v. Mock, 40 Ind. App. 685, 82 NE 1003. In summary proceedings against attorney for failure to pay over money on demand, finding that movant demanded of defendant money collected with no further special finding that he failed to pay same over insufficient. McCarley v. White [Ala.] 45 S 155.

60. Rowley v. Chicago, etc., R. Co. [Wis.] 115 NW 865.

61. Where complaint alleged car was motionless and plaintiff was alighting therefrom and about time she placed one foot on pavement car started, special finding that when car started plaintiff had both feet on steps not contrary to general verdict for plaintiff where that car was started while plaintiff was alighting was gist of negligence charged. Grant v. Spokane Trac. Co. [Wash.] 91 P 553. Where liquor license was revoked and business was transferred to another person and whisky ordered by former licensee was transferred to latter by manufacturer who sued former licensee on latter's failure to pay therefor, finding that third person bought liquor and agreed to pay therefor was finding that sale of liquor business was not bogus, relieving former from liability on that ground. Bretzfelder, Bronner & Co. v. Waddle, 122 Mo. App. 462, 99 SW 806.

62. Pittinger v. Ramage, 40 Ind. App. 486, 82 NE 478; Hamrick v. Hoover [Ind. App.] 84 NE 28. Where court submitted issue of rents generally and jury found general verdict for plaintiff, verdict equivalent to finding against defendant on counterclaim as to rents. Harris v. Jackson [Tex. Civ. App.] 20 Tex. Ct. Rep. 470, 106 SW 1144. Finding of specific sum for each plaintiff as damages to land without any mention in verdict of claim for damages to crop equivalent to finding against plaintiffs on latter issue. San Antonio, etc., R. Co. v. Keirsey [Tex. Civ. App.] 20 Tex. Ct. Rep. 186, 106 SW 163.

are to be disregarded if after conclusions are eliminated sufficient remains to constitute a finding,[63] and while nothing is inferred by the court in aid of facts specially found, inferences by the jury, where the facts in the absence thereof are uncertain, may become ultimate, essential facts.[64] Error in the classification of findings as of law or fact does not prevent the appellate court from classifying them in accordance with their actual character.[65]

§ 4. *Conflicts between verdicts and findings. General verdicts.* See 8 C. L. 2249—*General verdicts and special findings.* See 8 C. L. 2249—Where the special findings are in irreconcilable conflict with the general verdict, the former must control,[65a]

63. Finding that message written by plaintiff and delivered to defendant was message from plaintiff to person named, and that in sending message plaintiff acted for himself and was sender of message, sufficient finding of fact that plaintiff was sender of message. Western Union Tel. Co. v. Troth [Ind. App.] 84 NE 727.

64. Zeller v. Wright [Ind. App.] 83 NE 1030.

65. Finding that for certain period premises designated as street ceased to be traveled and used as public highway is finding of fact though included in conclusion of law. City of Buffalo v. Delaware, etc., R. Co., 190 N. Y. 84, 82 NE 513.

65a. Richmond, etc., R. Co. v. Beverley [Ind. App.] 84 NE 558; Berry v. Equitable Gold Min. Co. [Nev.] 91 P 537. Rev. St. 1899, § 3657. Chicago, etc., R. Co. v. Morris [Wyo.] 93 P 664. Kirby's Dig. § 6208 has reference particularly to verdicts of jurors but also applies to finding of fact made by trial judge. Gebhart v. Merchant, 84 Ark. 359, 105 SW 1034. Findings of probative facts can overcome express finding of ultimate fact only where probative facts are inconsistent with ultimate fact, or it appears trial court made alleged finding of ultimate fact simply as conclusion from particular facts found. Corea v. Higuera [Cal.] 95 P 882. Special findings control only when necessarily in conflict. House v. Steffy [Iowa] 113 NW 321. Answers override general verdict only when they find facts necessary to support general verdict do not exist or that some fact defeating right to recover does exist. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986.

General verdict overcome by answers to special interrogatories showing that he was directed not to attempt to repair machinery while running and was left opposite certain rolls while superior gave orders to stop machinery and before this was done decedent was caught and killed though standing in safe place when left. Robbins v. Fort Wayne Iron & Steel Co. [Ind. App.] 84 NE 514. By finding for plaintiff on particular question of fact in avoidance fatal to general verdict. Plyler v. Pacific Portland Cement Co. [Cal.] 92 P 56. By answers showing entire absence of negligence by engineer who must have caused injury. Zeller v. Wright [Ind. App.] 83 NE 1030. By finding street has been abandoned after finding public has used and travelled continuously over dock built over street. City of Buffalo v. Delaware, etc., R. Co., 190 N. Y. 84, 82 NE 513.

General verdict not overcome, where, whether it was plaintiff's duty to accompany stock was improperly submitted to jury as question of fact, their answer that there was no evidence showing such duty not prejudicial. Chicago, etc., R. Co. v. Morris [Wyo.] 93 P 664. By special findings that brakeman was at end of train being pushed up single track, picking up cars and train struck one, pushed it up hill and it ran down against train, that automatic couplers were not working and that brakeman got down gave signal to back away from car and stepped upon track to fix coupling and was struck and killed while fixing same. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021. By finding that deceased immediately before driving upon track could have seen or heard train four hundred feet away, where logic of general verdict is that deceased was in such position that he could not escape in time. Osburn v. Atchison, etc., R. Co., 75 Kan. 746, 90 P 289. By finding that jury did not know how long plank which tripped plaintiff had been there, where general finding was that it had been there long enough for city, in exercise of reasonable care, to have discovered it. City of Grand Forks v. Allman [C. C. A.] 153 F 532. General finding denied claim of homestead made by debtor or that debtor ever impressed premises claimed as homestead with character of home, by findings reciting debtor was nonresident of state, that third person had agreed to convey premises to debtor with understanding that he should make it his home, that pursuant to agreement debtor sent family to live on land that while they lived there third person conveyed to debtor and debtor intended to reside thereon, which findings only intended to express conclusion that debtor sent his family to state with intention of taking up residence in future. Gebhart v. Merchant, 84 Ark. 359, 105 SW 1034. Where in tort action jury return general verdict for nominal damages only, but in answer to special question find substantial injury was sustained, for which they assess stated compensation, and judgment was rendered by the trial court for two amounts so named. Billings v. Atchison, etc., R. Co. [Kan.] 91 P 72. By finding that telephone pole with which plaintiff collided was plainly visible in daylight, that appellee had good eyesight, had passed pole over two hundred times on car under facts in case. Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986. By finding that automobile was not operated at unlawful speed which, while conclusive as to nonviolation of Code Supp. 1907, § 1571h, acts 30th Gen. Assem. p. 55 c. 53, § 8, regulating speed of automobiles, does not negative violation of other sections of that act prohibiting persons from operating automobiles at

but all inferences, intendments, and presumptions must be indulged in support of the general verdict,[66] and a motion for judgment on answers to special interrogatories, notwithstanding the general verdict, must be decided on the special findings and the pleadings alone,[67] and unless in irreconcilable conflict with the allegations of the complaint and the facts provable under the issues and all inferences that may be given thereto,[68] together with all reasonable intendments or inferences which may be drawn from evidence legitimately admissible under the issues, the general verdict must stand.[69] On the other hand, answers to special interrogatories cannot be added

speed not reasonable with regard to traffic and use of highway and does not negative failure to stop when signaled as required by § 9 of act (Code Supp. 1907, § 1571i). Walkup v. Beebe [Iowa] 116 NW 321. By finding that proper inspection would have revealed defect in lever together with finding that witness had not, as testified by him, notified employer of danger prior to accident and that employer had no actual knowledge of defect, although there was evidence of inspection two days before. Zarnik v. C. Reiss Coal Co. [Wis.] 113 NW 752. Where finding of no contributory negligence, by special findings that he could, if he had looked, have seen approaching train five hundred feet away at distance of twenty-five feet from train, it appearing that he had stopped, looked, and listened when fifty feet away and only two or three seconds elapsed from first opportunity to see train until he was struck, and approach to crossing was narrow and steep. Wendel v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 469. Where petition alleged passenger was caused to alight at dangerous place and it appeared there were two stopping places available for persons desiring to reach her destination, by special finding that passenger informed conductor of her destination and conductor caused her to alight at first stopping place which was before her destination. Conwell v. Tri-City R. Co. [Iowa] 112 NW 546. Where alleged that will was in existence after death of testatrix and list, and paper alleged to contain substance thereof was admitted to probate and jury returned verdict that paper was not last will of testatrix, and they did not know whether paper was signed by her or in her presence, by two subscribing witnesses. Bloor v. Platt [Ohio] 84 NE 604. By special finding that steam which frightened plaintiff's horse was not escaping in greater than ordinary quantities, where main issue was one of negligence. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Where allegation that as pedestrian proceeded over crossing she continued to look and listen, by special findings of straight track for six hundred feet with pedestrian in center of track thirty feet from approaching train, that train was operated at such speed as to cover total six hundred feet in less than half minute, that street car had just passed and pedestrian could not hear approaching train on account of noise. Lowden v. Pennsylvania Co. [Ind. App.] 82 NE 941. Where jury in action on insurance policy, though returning general verdict for plaintiff, found specially that statements in application concerning insured's vision and surgical treatment were not true but that he answered all questions truthfully and had no knowledge of false answers, and loss of one of his eyes was plainly noticeable and untruthfulness might have been due to way agent recorded answers. United States Health & Acc. Ins. Co. v. Clark [Ind. App.] 83 NE 760.

66. Wendel v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 469; Indianapolis Trac. & T. Co. v. Holtsclaw [Ind. App.] 82 NE 986; Mitchell v. Tell City [Ind. App.] 83 NE 735. Where negligence was fairly alleged in maintaining ditch at crossing and it is inferable that ditch was in line of travel and open without warning signals, general verdict not overthrown by special findings from which it may be inferred there was bridge across ditch. Mitchell v. Tell City [Ind. App.] 83 NE 735.

67. Court cannot consider sufficiency of evidence to support general verdict. Lowden v. Pennsylvania Co. [Ind. App.] 82 NE 941. Must be determined from complaint, answer, general verdict, interrogatories and answers thereto. Robbins v. Fort Wayne Iron & Steel Co. [Ind. App.] 84 NE 514.

68. Allegation that injured child was too young to be capable of appreciating danger or to have caution and discretion and answer to special interrogatory, that child was five years ten months old and of average intelligence and ordinary judgment for a girl of her age, not in conflict with general verdict as to defeat same. Hammond, etc., R. Co. v. Blockie, 40 Ind. App. 497, 82 NE 541. Every issue raised by pleading and not eliminated by instructions will be presumed to have been found on sufficient evidence for party in whose favor general verdict is rendered, and special findings can be given effect only so far as necessarily negativing finding assumed in support of general verdict. Conwell v. Tri-City R. Co. [Iowa] 112 NW 546. Judgment cannot be attacked merely because complaint and findings contain in addition showing of probative facts, which taken alone might not support judgment. Corea v. Higuera [Cal.] 95 P 882.

69. Special finding that escaping steam frightened horse which had been driven around threshing machine but was not used to steam, railroads or sawmills which plaintiff knew, that he knew location of mill and that escaping steam would likely blow across road and frighten colt, that jury did not know whether plaintiff was paying attention to surroundings, not inconsistent with verdict for plaintiff and that he was not guilty of contributory negligence. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Answers to interrogatories override general verdict only when both cannot stand, and antagonism is apparent on face of record and incapable of removal by any evidence legitimately admissible on the issues. Wen-

by presumptions,[70] and unless it appear from all of such interrogatories taken together that such conflict exists,[71] that the special issues if true are decisive of the case,[72] and that the answers to interrogatories are not inconsistent with each other, contradictory or uncertain, the general verdict must stand.[73]

In Iowa it is not within the discretion of the trial court to grant a new trial instead of rendering judgment on the special verdict, notwithstanding the general verdict,[74] and in Indiana the rendition of a judgment for defendants on answers to special interrogatories, notwithstanding a general verdict for plaintiff, ipso facto annuls the general verdict and leaves no basis for subsequent motions for judgment on the general verdict and for judgment for answers to the interrogatories.[75]

*Between special findings.*See 8 C. L. 2250—Presumptions and intendments arising in support of a general verdict cannot be indulged to establish a contradiction in the answers to special interrogatories, but, except in cases of doubt, that construction should be adopted which probably sustains the verdict.[76] Answers to special interrogatories which are contradictory neutralize each other.[77]

§ 5. *Separate verdicts as to different counts, causes of action, or parties.*See 8 C. L. 2250—In some states separate verdicts as to several defendants are required,[78] while in others separate findings on separate issues or causes of action may be required when properly requested.[79] The general rule is that where there are several counts in

del v. Clevland, etc., R. Co. [Ind. App.] 82 NE 469.

70. Statements in special finding that car was forced up grade and ran down grade, merely recitals as to grade of track at that point and not equivalent to direct finding that employe, injured, knew that track was not level. Masterson v. Southern R. Co. [Ind. App.] 82 NE 1021.

71. Proc. act, § 337, Rev. St. 1876, p. 172. New York, etc., R. Co. v. Hamlin [Ind.] 83 NE 343.

72. Issues held immaterial and indecisive and mere attempt to have jury decide conflicting pathological theories, and failure of jury to find immaterial. Reid v. Rhode Island Co. [R. I.] 67 A 328. Where answers to interrogatories exhibit only part of circumstances bearing on question, they are insufficient to overthrow general verdict finding nonexistence of contributory negligence. United States Cement Co. v. Cooper [Ind. App.] 82 NE 981.

73. Richmond, etc., R. Co. v. Beverley [Ind. App.] 84 NE 558. No presumption in favor of contradictory answers to interrogatories. Wendel v. Cleveland, etc., R. Co. [Ind. App.] 82 NE 469.

74. Where under Code, § 3728, notwithstanding general verdict for plaintiff, special verdict that defendants did not employ plaintiff was sufficient to determine issues in defendant's favor. House v. Steffy [Iowa] 113 NW 321.

75. Masterson v. Southern R. Co. [Ind.] 84 NE 505.

76. Where jury found that coupling could not have been safely made without injury to plaintiff by his going in advance of moving car and opening knuckle on standing car because there was insufficient time and plaintiff had back to moving train, held, it appearing jury had nearness of cars together in mind while answering question, not to conflict with answer that plaintiff could not have made coupling with safety by going in advance, opening knuckle, and stepping outside track to let cars come together. New York, etc., R. Co. v. Hamlin [Ind.] 83 NE 343.

77. Ft. Wayne Cooperage Co. v. Page [Ind. App.] 82 NE 83. Answer to one special interrogatory that defendant cut timber in good faith believing its title to be good, and answer to second involving good faith that defendant was notified after most, if not all, was cut but before any was removed, inconsistent. Cook Land Const. & Producing Co. v. Oconto Co. [Wis.] 114 NW 823. Finding that machine was not dangerous machine, and finding that machine was not safe and proper one upon which plaintiff should work, inconsistent. Fortune v. Hall, 122 App. Div. 250, 106 NYS 787. Evidence sufficient to sustain finding for a party as to all relief asked will sustain finding as to part thereof, and, hence, finding for such party in part not necessarily inconsistent. Dillon v. Cross, 5 Cal. App. 766, 91 P 439.

78. In action against several carriers for injuries to live stock in absence of special contract extending liability beyond end of lines controlled by them, jury should be instructed to find separate verdict against each carrier for damages accruing on its lines. Illinois Cent. R. Co. v. Curry [Ky.] 106 SW 294.

79. Where in action for injuries to employes declaration contained several counts some of which alleged defects in employer's machinery and appliances or neglect in manner of operation of machine, employer was on request entitled to instruction directing jury to find separately on issue presented in each count, unless employe discontinued one or more of accounts or particular negligence alleged in each count was succinctly stated as issue for jury. St. Jean v. Lippitt Woolen Co. [R. I.] 69 A 604. In action on rent notes in which counterclaim was interposed, verdict that value of claim relied on to establish counterclaim was equal to amount of notes,

an indictment a general verdict of guilty is valid if there be one good count though the others be defective,[80] but this rule does not apply when there are two counts in the indictment, one good and the other fatally defective, and where a demurrer to the defective count has been improperly overruled,[81] or there is no evidence to sustain one of them.[82] In an action based on several counts, a finding for plaintiff on a number of the counts is equivalent to a finding for defendant on the remaining counts,[83] and a verdict which ignores one of several defendants is construed as a finding in his favor.[84] Where one of two defendants is entitled to a directed verdict, action thereon should be withheld until the close of the case.[85] In some states if more than one plea is filed to an action, the court should, upon timely request from the plaintiff,[86] cause the jury in case they find for defendant to specify upon which one or more of the pleas the verdict is rendered.[87]

The form of verdict in the Federal court is not dictated by the state practice, and a general verdict is permissible in the discretion of the court in an action at law unless the statutes of the United States otherwise direct.[88]

§ 6. *Submission to jury, rendition and return.* See 8 C. L. 2251—A quotient verdict is void [89] where the jurors agree to abide by the result so obtained.[90] The jury

and finding issues for tenant, sufficient as against objection that it did not make separate findings on petition and counterclaim. Lauderdale v. King [Mo. App.] 109 SW 852.

80. Seaboard Air Line Co. v. Smith [Ga. App.] 59 SE 199. Error, if any, in overruling demurrer to first count in declaration, and in sustaining demurrer to plea to said count, held not cause for reversal in view of Code Pub. Gen. Laws, 1904, art. 5, § 17, providing that no judgment or verdict shall be reversed for any defect in any count, if there is one good count in declaration. Alvey v. Hartwig [Md.] 67 A 132.

81. Seaboard Air Line R. Co. v. Smith [Ga. App.] 59 SE 199. A general verdict of guilty cannot be sustained since it is impossible to know on which count it was rendered, and if rendered on both verdict of necessity must be invalid. Id. Refusal to sustain demurrer to bad paragraph of complaint held reversible error where it did not affirmatively appear on which of two paragraphs verdict rested. Lake Erie, etc., R. Co. v. Moore [Ind. App.] 81 NE 85.

82. Where negro ejected from restaurant sued on counts of assault and battery and refusal of equality of civil rights and there was no evidence to sustain latter count, general verdict cannot stand since it cannot be determined upon which count it was rendered. Chase v. Knabel, 46 Wash. 484, 90 P 642.

83. Phillips v. Geiser Mfg. Co. [Mo. App.] 107 SW 471. Where declaration contains two counts and verdict finds for plaintiff on one specified count for amount less than was claimed in that count, and verdict does not mention other count, such verdict is in law effectual finding for defendant on count not mentioned. Marianna Mfg. Co. v. Boone [Fla.] 45 S 754.

84. Wabash R. R. Co. v. Keeler, 127 Ill. App. 265.

85. Jury should not be called upon to render two verdicts at different times. Lehigh Valley Transportation Co. v. Post Sugar Co., 128 Ill. App. 600.

86. Request timely where before verdict has been finally received and jury has dispersed. Crockett & Co. v. Garrard & Co. [Ga.] 61 SE 552.

87. Civ. Code, 1895, § 5330. Crockett & Co. v. Garrard & Co. [Ga.] 61 SE 552. Where complaint was in two counts, first on express contract and second on quantum merult, and court charged plaintiff could not recover on first general verdict in favor of plaintiff, held uncertain as a matter of record whether issues under first count were not bound for plaintiff. Shaw v. Pope [Conn.] 67 A 495. Objection to verdict, on ground that it does not advise court on which of two causes jury found against defendant, not well taken when manifest from inspection of pleadings and verdict that jury found for full amount upon both causes. Michigan Mut. Life Ins. Co. v. Whittaker, 9 Ohio C. C. (N. S.) 126.

88. General verdict in several counts in complaint and several counterclaims in answer, sufficient in Federal court in law action although several or special verdicts are required in such cases in state in which trial was had. City of St. Charles v. Stookey [C. C. A.] 154 F 772.

89. Paper found in jury room tending to show quotient verdict, and disputed claim that counsel appropriated paper found in jury room, insufficient to show verdict was improperly reached where papers do not appear to have been written upon by jurors and juror swears verdict not fixed by quotient. Birmingham R. L. & P. Co. v. Turner [Ala.] 45 S 671. Quotient verdict, obtained by jury agreeing beforehand that verdict should be sum several jurors thought proper, divided by twelve, properly set aside. Milburn v. Robinson [Mo. App.] 110 SW 598.

90. Where jury agreed to write amount each was willing to assess, that amounts should be added and divided by twelve and that result should be their verdict, verdict must be set aside, but where no agreement to abide by such result was had and it was afterwards agreed on as verdict, it will be sustained. Missouri, etc., R. Co. v. Hawkins [Tex. Civ. App.] 109 SW 221.

should not attempt to apportion the amount of damages awarded between joint tort feasors.[91] That a jury remained in retirement only ten minutes before returning their verdict is insufficient to impeach or weaken it.[92] Where the answer of each juror clearly indicates that the verdict was at the time of polling and at the time of rendition the verdict of each juror, the manner of polling is immaterial.[93] While in Georgia it is better practice for the jury to write their verdict upon the initial pleading properly dated and signed by the foreman, none of these details are essential to a legal verdict.[94] In this state also the presiding judge may in his discretion designate the foreman.[95]

§ 7. *Amendment and correction.* See 8 C. L. 2251—The authorities agree that until the verdict is actually agreed upon, returned into, and received by the court recorded and the jury discharged from its consideration, the jury has control over it and may withdraw it or amend or change it as it may decide, except in cases of sealed verdicts where the jurymen have dispersed.[96] The Illinois practice, however, makes certain exceptions to this rule.[97] A clerk has no right after a trial has terminated to change the verdict for plaintiffs as recorded in his minutes by adding words thereto, even though they were contained in the verdict as announced by the foreman where the jurors assented to the verdict as originally recorded.[98] The trial court, however, may amend a verdict so as to make it conform to the intent of the jury and effectuate its real meaning,[99] both as to matters of form and substance, at any time during the term either by reference to the judge's notes taken at the trial or by other satisfactory evidence,[1] but the court may not inquire as to the method used in reach-

91. Where both defendants were found guilty of gross negligence causing decedent's death, and damages were assessed at five thousand and jury undertook to apportion damages between defendants, so much of verdict as apportioned damages should be disregarded as surplusage, and judgment rendered for plaintiffs against both defendants for full amount fixed by verdict. San Marcos Elec. L. & Power Co. v. Compton [Tex. Civ. App.] 107 SW 1151.

92. Gulf, etc., R. Co. v. Harrison [Tex. Civ. App.] 19 Tex. Ct. Rep. 818, 104 SW 399.

93. Chicago City R. Co. v. Shreve, 128 Ill. App. 462. Where verdict returned was peculiar and uncertain, the court could in its discretion, in addition to usual question, "Is this your verdict?" permit jury to be asked, "Are you still satisfied with the verdict?" the question not calling for explanation of verdict, nor reasons for returning it. State Life Ins. Co. v. Postal [Ind. App.] 84 NE 156.

94. Unsigned verdict not illegal. Southern Exp. Co. v. Maddox [Ga. App.] 59 SE 821. Fact verdict was written in plea, immaterial. Sapp v. Parrish [Ga. App.] 59 SE 821.

95. Southern Exp. Co. v. Maddox [Ga. App.] 59 SE 821.

96. Where disclosed before verdict was fully received and recorded that it did not meet approval of whole panel and jury had not left box, it could be sent back for further deliberation and its subsequent verdict could be received and acted upon as its final determination. State Life Ins. Co. v. Postal [Ind. App.] 84 NE 156. Until jury is actually discharged, they may be sent back after giving verdict, and before it is recorded not only to correct mistake in form or make plain what was osbcure, but to alter it in substance if they so determine and agree. Salemon v. New York City R. Co., 56 Misc. 502, 107 NYS 58. Proper to send jury back when they report verdict found for plaintiff, because defendant put in no evidence and require them to find verdict according to evidence introduced and under instruction regardless of absence of evidence by defendant. Id. Where jury by agreement returned sealed verdict and separated, and such verdict was opened in absence of jury, likewise by agreement, not error for court to fail to send back jury to answer special interrogatories which they had failed to answer, where motion to send them back was not made when entire panel was present so that court could grant such motion. Price v. Lewis, 132 Ill. App. 179.

97. Not error to reconvene jury after they have returned verdict to correct obvious error therein, which foreman called to attention of court immediately after they had taken their seats in court room, although verdict had been stated and jury had separated for night since signing same. Nolan v. East, 132 Ill. App. 634.

98. Clerk cannot add words "with interest." Delafield v. J. K. Armsby Co., 109 NYS 314.

99. Where, at close of plaintiff's evidence, court instructed verdict for one of defendants, and other renewed motion to remove case on grounds that it was only defendant, and jury clearly understood proceedings, not error for court to amend verdict by inserting name of remaining defendant after words "Judgment nisi on the verdict for plaintiff for $——." Diamond State Tel. Co. v. Blake, 105 Md. 570, 66 A 631.

1. Where jury found issues generally for plaintiff and found for certain amount with interest without stating date when interest commenced and pleading asked interest from

ing the verdict,[2] nor as to what evidence was considered,[3] and where the finding contains all the facts proved which are material to the proper presentation of the questions of law raised by the appeal, there is no error in refusing to make the corrections asked for,[4] neither is it error to overrule a motion for a more specific answer to a special interrogatory which should not have been given.[5] The time limited by statute for a motion to set aside a verdict or vacate a judgment cannot be extended under the guise of a motion for a reargument.[6]

In Wisconsin the findings in an equity suit may be amended by the court within one year after the entry of judgment.[7]

§ 8. *Recording, entry, and effect of verdict.* See 8 C. L. 2252—All questions of fact fairly presented are determined by the verdict.[8]

§ 9. *Findings by court or referee. Referee.* See 8 C. L. 2252—Findings of a referee must be upon the issues of the case and a referee should not allow a claim forming a cause of action distinct from the one on which issue was taken.[9]

Findings by the court. See 8 C. L. 2252—The findings must be based upon and as broad as the material issues[10] and defenses involved,[11] unless a finding thereon

certain date, court might amend so as to make award draw interest from that date which was fixed as date of breach of contract on which award was made. Miller v. Steele [C. C. A.] 153 F 714; Harrington v. Butte, etc., R. Co. [Mont.] 93 P 640. Where no notice of question of interest on plaintiff's claim was taken until after verdict was rendered and jury discharged court, cannot on motion after term at which cause was tried correct entry of verdict by making order including interest on plaintiff's claim in such verdict. Fleming v. Jacob, 109 NYS 658. Where judgment is for incorrect amount but correct amount is apparent from record, appellate court, under Hurd's Rev. St. 1905, p. 602, §§ 26, 27; p. 599, § 7; p. 1542, § 80, may enter judgment for correct amount. Minnesota Mut. Life Ins. Co. v. Welsh, 131 Ill. App. 103. Where damages are unliquidated and verdict for plaintiff failed to state any amount, court had no power to correct verdict by inserting as damages entire sum claimed by plaintiff. Amory v. Washington Steamboat Co., 120 App. Div. 818, 105 NYS 999. Verdict for certain sum "with interest" not illegal, where amounts of principal and interest sued for were definitely set out in summons, and pleading may always be examined to give intendment to verdict. Southern Exp. Co. v. Maddox [Ga. App.] 59 SE 821. Presiding judge may cause verdict actually rendered to be signed by one of jurors as foreman. Id.

2. Under Code Civ. Proc., § 1090, court on return of verdict may not make inquiries and on ascertaining that it had been reacted by quotient method, direct jury to retire and return verdict by deliberating and reasoning. Harrington v. Butte, etc., R. Co. [Mont.] 93 P 640.

3. In personal injury action not error to refuse to recall jury and interrogate them as to what evidence they considered in arriving at verdict. Curtis v. Laconia Car Co. Works [N. H.] 67 A 220.

4. Swain v. O'Loughlin [Conn.] 67 A 480.

5. Where whether car had been moved or not was material on question of contributory negligence and was controverted, error to give interrogatory, assuming it had not been moved and not error to refuse to have answer made more specific. Chicago, etc., R. Co. v. Lawrence [Ind.] 82 NE 768.

6. Municipal court act, Laws 1902, p. 1563, c. 580, § 254. Applebaum v. Bonagur, 56 Misc. 615, 107 NYS 635.

7. St. 1898, § 2832 in suit to reform application and insurance policy. Costello v. Grant County Mut. Fire & Lightning Ins. Co. [Wis.] 113 NW 639.

8. Skinner v. Sullivan, 127 Ill. App. 657.

9. Moore v. Martine, 107 NYS 652.

10. Freeman v. Trummer [Or.] 91 P 1077. Findings of court should cover all material issues. Garvey v. La Shells, 151 Cal. 526, 91 P 498; Towle v. First Nat. Bk. [C. C. A.] 153 F 566. Rev. Code Civ. Proc. §§ 276, 277. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67.

Findings held within issues. Wilkinson v. Bethel, 113 Idaho, 746, 93 P 27. In action on notes for unpaid price of land answer alleged defendant had possession of premises as tenant in common with third person to whom, prior to conveyance, undivided interest had been awarded, and that plaintiff could not recover in any other way and reply formed issues, finding that immediately after conveyance defendant was given possession and that he had been ever since in exclusive and peaceable possession thereof was within issue. Mauzy v. Flint [Ind. App.] 83 NE 757.

Findings held not within issues: Where issue raised by pleading was amount of sales and payments after certain date, finding of sales and payments, both prior and subsequent to that date, and judgment for difference not within pleadings. Los Angeles Brew. Co. v. Klinge [Cal.] 95 P 44. Where plaintiff failed to allege ownership of land in fee but defendants made averments from which fact might be inferred, and evidence in support of title was introduced without objection, defendants on appeal cannot object that finding was not responsive to issues. Colegrove Water Co. v. Hollywood, 151 Cal. 425, 90 P 1053. In action to recover partner's interest in another partnership under claim that same had been acquired with partnership funds, and in trust for partner-

would not affect or control the judgment or call for a different judgment than authorized by the finding made.[12] Findings should also be definite and certain[13] and should be ultimate[14] rather than evidentiary matters,[15] and must be based upon the

ship and respondents alleged interest was personal from its inception, finding that same was in trust for firm for certain period and then sold by firm to partner personally not within issues, nor tried with other party's consent. Treacy v. Power [Minn.] 114 NW 760. Where, in action to rescind contract and recover consideration paid thereon, there was no claim by vendor for use of land by purchaser nor evidence of value thereof, or that purchaser used or rented land, no error for court to refuse to find value of use of land during period between transfer of same and trial. Wilfinger v. Thomas [S. D.] 115 NW 100.

Issue material: Findings held not to imply finding on material issue, whether guarantee contemplated loans made to individuals as copartners or also covered loans made to either, provided it was borrowed for partnership. Towle v. First Nat. Bk. [C. C. A.] 153 F 566. Findings that plaintiff purchased rope with warranty that rope parted but that plaintiff failed to prove that it was defective, insufficient to support judgment for defendant as issues as to purchase in reliance on warranty, breaking of rope in lowering safe, or negligence of plaintiff are not covered. Oregon Auto-Dispatch v. Portland Cordage Co. [Or.] 94 P 36.

Issues Immaterial: Where court found defendant so negligently conducting itself that goods were destroyed by fire April 19, 1906, and suit was brought and judgment recovered April 9, 1907, finding that it was agreed that goods should be delivered by carrier April 16, "1907" immaterial. Morris v. Bekins Van & Storage Co. [Cal. App.] 92 P 362. In action on life insurance policy assigned and delivered to plaintiff to secure note, where insurance company paid money into court and had insured's administrator insured as defendant, and court found that note was not paid but failed to find whether barred by limitations, held issue immaterial. defendant not being entitled to possession of policy and money paid into court should be deemed in plaintiff's possession for purpose of action. Puckhaber v. Henry [Cal.] 93 P 114. After finding sufficient facts and finding judgment for telephone company, and restraining it from preventing company from constructing, maintaining, and operating line according to previous consent of city, additional finding that, if city were allowed to carry out its intention in debarring company from operating its line within city, company would be financially damaged and it would be difficult to ascertain amount of such damage and company had no adequate remedy at law, was immaterial since court on other findings was authorized to grant relief. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67.

11. Plea of want of consideration is affirmative defense on which defendant is entitled to finding, if there is any evidence in support thereof. Mushet v. Fox [Cal. App.] 91 P 534. Where, under Rev. St. 1887, §§ 4036, 4037, in action to quiet title to easement in ditch and right to use waters flowing therein, defense of statute of limitations is interposed. Village of Hailey v. Riley [Idaho] 95 P 686. Where court found defendant relied on fact third person who subsequently conveyed to plaintiff disclaimed title and paid full value prior to plaintiff's purchase thereof, failure to make findings that defendant inquired of third person about his title with view of searching for true record owner, and whether defendant, when he purchased, believed his grantor had title other than by limitations, are unnecessary and not reversible error. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553. Must find on issues raised by counterclaims regardless of insufficiency of evidence on complete lack of evidence. Everett v. Jones [Utah] 91 P 360. Where there is evidence to support plea of estoppel, failure to find thereon error. Banning v. Kreiter [Cal.] 94 P 246. Finding that damages sought to be recovered accrued within period covered by statute of limitations immediately prior to commencement of action, where such statute is made defense is sufficient finding on such defense and negatives it. Shurtliff v. Extension Ditch Co. [Idaho] 94 P 574. Where in trespass to try title, defendant relied on estoppel and limitations and court found in his favor on issue of estoppel, finding on issue of limitations unnecessary. Daugherty v. Templeton [Tex. Civ. App.] 110 SW 553.

12. Village of Hailey v. Riley [Idaho] 95 P 686.

13. Finding that all allegations of complaint are true, sufficiently definite, and certain to constitute finding as to alleged assignment. Young v. Clark [Cal. App.] 93 P 1056. Where necessary to examine large mass of figures and make extended mathematical computations, specific findings of fact should be made and account stated showing what items were allowed to respective parties, since in such way only could appellate court upon written record intelligently review evidence or determine whether proper allowance were made. Hottel v. Poudre Valley Reservoir Co. [Colo.] 92 P 918.

14. After finding that defendant's dam had not been raised, not reversible error to refuse to find upon issue whether water had in fact, by some means, been raised under plaintiff's mill, since fact could not have affected ultimate fact found against plaintiff. Tew v. Webster [Minn.] 114 NW 647. Finding or allegation that plaintiff owned right of way across defendant's land, and that it was appurtenant thereto, sufficient statement of ultimate facts to be established and not conclusion of law. Corea v. Higuera [Cal.] 95 P 882.

15. Where issuable or ultimate fact that city was incorporated is found, unnecessary to state evidentiary matter as to incorporation or as to annexation of territory. Pavey v. Braddock [Ind.] 84 NE 5. Requests styled by plaintiff "matters of law," but based on aspects of evidence, which court was not bound to believe and did not believe, prop-

evidence.[16] If findings support a judgment and conform to the theory of the prevailing party,[17] or sufficient probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient,[18] but where the findings made are not conclusive against plaintiff's right to recover, findings upon other issues necessary to support the judgment must be made.[19] Where the answer consists of denials only, a general finding that all allegations of complaint are true is sufficient.[20] Though the judge is not required to sign his decision,[21] it should be in writing;[22] the facts found and the conclusions should be stated separately,[23] though the separate finding of facts on each of several counts need not be separately stated,[24] and this statement, together with the judgment of the court, must be entered on the minutes.[25] A refusal or failure to find on any material issue, however,[26] or the denial of a

erly refused. Schlatter v. Young [Mass.] 83 NE 2.

16. In action for injuries to shipment by carrier, finding not based on any pleading or evidence, that stipulation requiring notice within ten days of claim for damages is reasonable is mere conclusion of law without effect. Houtz v. Union Pac. R. Co. [Utah] 93 P 439. Refusal to make requested findings of fact not proved by undisputed testimony is not reviewable. Williams v. Merritt [Mich.] 116 NW 386. In absence of evidence as to what plaintiff would have received from certain items, it is error for court to find that value plaintiff would have received from such items would have more than compensated him for cost of keeping his brothers. Somers v. Musolf [Ark.] 109 SW 1173. Where complaint contains no allegation as to compliance by foreign corporation with constitution and statutes of state, and defendant pleads affirmatively in his answer that such corporation had not complied with law, burden of proof is on defendant to show noncompliance, and finding by court that defendant introduced no evidence to show noncompliance on part of corporation sufficient to support judgment in plaintiff's favor. Kiesel v. Bybee [Idaho] 95 P 20. Where real issue is as to accord and satisfaction discharging portion of price of coal, immaterial that declaration of law given by court mistakenly assumed that there was evidence of controversy as to amount due for coal sold during the two months. Missouri & Illinois Coal Co. v. Consolidated Coal Co., 127 Mo. App. 320, 105 SW 682.

17. In replevin, findings support judgment for defendant, where conforming to new matter averred in answer and disprove plaintiff's right, though there are no findings conformable to complaint, no request having been made therefor. Freeman v. Trummer [Or.] 91 P 1077. Sufficient if facts found are not legally inconsistent with conclusion. Brown v. Clark [Conn.] 68 A 1001. Facts held sufficient to show none of money on deposit to belong to defendant. Id.

18. Later v. Haywood [Idaho] 93 P 374. To sustain plea of statute of limitations, court need not find in direct language that action is barred, where facts are found which show it is barred. O'Neill v. Quarnstrom [Cal. App.] 92 P 391.

19. Later v. Haywood [Idaho] 93 P 374.

20. Immaterial that general finding in such case in addition to general finding finds certain specific findings of fact covered by general finding. Chatfield v. Continental Bldg. & Loan Ass'n [Cal. App.] 92 P 1040. Where alleged that plaintiffs exhibited to defendant assignment of contract to them, and defendant ratified same and authorized plaintiff to proceed under contract and court did not specifically find as to ratification but found all allegations of complaint true, point that findings were not coextensive with complaint not well taken, but point held covered by general findings. Id.

21. Under Rev. St. 1887, §§ 4406, 4407, finding of facts signed, conclusion of law unsigned, and formal judgment signed, and all filed at same time, sufficient to clearly show conclusion of law. Shurtliff v. Extension Ditch Co. [Idaho] 94 P 574.

22. Rev. Code Civ. Proc. §§ 276, 277. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67. Under Ballinger's Ann. Codes and St. § 5029 (Pierce's Code, § 645), there is no decision until making of written findings, hence, court by orally giving opinion to effect that judgment will go to defendant, and thereon plaintiff moving for judgment notwithstanding opinion, entering written findings and conclusions on which judgment is rendered for plaintiff, does not reverse and review decision. Russell v. Schade Brew. Co. [Wash.] 95 P 327. Statement made by court in deciding case tried without jury and taken down by reporter is not written finding of fact required by court, rule 26, of party desiring to have court's action reversed. Rice v. Muskegon, 150 Mich. 679, 14 Det. Leg. N. 820, 114 NW 661.

23. Rev. Code Civ. Proc. §§ 276, 277. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67. Burns' Ann. St. 1901, § 560. Tevis v. Hamersmith [Ind. App.] 81 NE 614. Ballinger's Ann. Code and St. § 5029. State v. Grover [Wash.] 91 P 564. In action to have holder of legal title of certain real estate adjudged mere holder of title in trust for plaintiff by reason of verbal contract between plaintiff and defendant's grantor, who agreed to convey to plaintiff a receipt of certain sum, finding that no enforcible contract existed between plaintiff and such person insufficient, under Rev. St. 1898, § 3169, requiring separate statement of law and facts. Chadwick v. Arnold [Utah] 95 P 527.

24. Where petition for disbarment contained two distinct charges or specifications. State v. Grover [Wash.] 91 P 564.

25. Code 1896, § 3320. Papot v. Howard [Ala.] 45 S 581.

26. Where none of affirmative defenses have been established, failure to find on all material issues presented held prejudicial er-

request to state findings and conclusions separately, must be prejudicial before a judgment will be reversed because of such denial.[27]

Where a case has been submitted upon an agreed statement of facts, the findings are necessary, the only question being what is the law applicable to the facts,[28] but where additional facts are found which do not materially change the facts as stipulated, they are not reversible error.[29] Special findings are not required to be simultaneous with the renditon of a judgment, but it is sufficient if they are found and made a part of the record before the judgment becomes final by adjournment or operation of statute.[30] Where an agreed statement of facts was adopted by trial court as its conclusions of fact and same was sent to court of civil appeals as full statement of facts to be considered on appeal, appellant was not injured by the trial judge's refusal to file specific conclusions of law.[31] A party may, after the court trying the cause without a jury has made his findings, request additional findings.[32]

Parties have no right to require a Federal court in hearing a law case without a jury to make a special finding.[33]

Interpretation and construction. See 8 C. L. 2253—Though a referee's findings are apparently inconsistent, the appellate court should reconcile them if possible and give effect to the referee's real intent in making them.[34] In some courts findings of fact made by a court when an action is tried without the intervention of a jury are equivalent to special verdicts,[35] and are to receive such construction as will uphold rather than defeat the judgment.[36] The finding of ultimate facts includes the finding

ror. McPherson v. Swift [S. D.] 116 NW 76. Where trial court fails to find on all material issues, judgment will be reversed unless finding thereon either for or against successful party would not affect judgment entered. Later v. Haywood [Idaho] 93 P 374. Where court fails to find on material issues in case and, if finding had been made thereon, judgment might have been different, it is reversible error. Id. Under Rev. St. 1899, § 695 (Ann. St. 1906, p. 704), where case merely recites in ordinary judgment at law certain findings of fact without request from either party, rulings on declarations of law must be treated as material. Lewis v. Muse [Mo. App.] 108 SW 1107.

27. No error to refuse findings where issues were few and simple, request came too late, and findings embodied in journal entry cover substantially all essential questions of fact. Eble v. State [Kan.] 93 P 803. Equity cases being triable de novo in an appeal and supreme court being required to examine evidence and draw its own conclusions of fact and law, party to such appeal is not prejudiced by trial court's refusal to make separate findings of fact and law, under Rev. St. 1899, § 695 (Ann. St. 1906, p. 704). Miller v. McCaleb, 208 Mo. 562, 106 SW 655.

28. Knight v. Cohen [Cal. App.] 93 P 396. Order of county court appointing administrator having been affirmed by circuit court by stipulation, no findings were necessary as basis of order of affirmance. In re Skelly's Estate [S. D.] 113 NW 91. Where issues made by pleadings were eliminated by stipulation of facts on which it was expressly agreed that court might make its conclusions and render judgment, conclusions of law were properly based on stipulation and findings of fact were unnecessary. Cable Co. v. Rathgeber [S. D.] 113 NW 88.

29. Where findings, though unnecessary and perhaps improper and erroneous, do not materially change stipulated facts, which facts are sufficient to support judgment, judgment will stand. City of Los Angeles v. Los Angeles Farming & Mill. Co. [Cal.] 93 P 869.

30. Under Act Feb. 1889 (Weakley's Loc. Laws Jefferson County, p. 704, § 11; Loc. Laws 1888-89, p. 801), where special findings are filed with clerk within statutory period, failure of clerk to incorporate them in minutes is omission which may be corrected nunc pro tunc. Papot v. Howard [Ala.] 45 S 581.

31. Fidelity & Deposit Co. v. National Bk. of Commerce [Tex. Civ. App.] 106 SW 782.

32. Refusal improper. Rogers v. Ayres [Tenn.] 104 SW 521.

33. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F 728.

34. No evidence being disclosed on appeal and no objection to testimony appearing, it must be assumed finding was based on testimony admitted either properly or without objection and that facts proved good cause of action without objection, and, where findings are apparently without issues, case may be disposed of as if pleadings had been amended. Moore v. Martine, 107 NYS 652.

35. Glade v. Emerson Illinois Min. Co. [Mo. App.] 107 SW 1002; Oregon Auto-Dispatch v. Portland Cordage Co. [Or.] 94 P 36; Freeman v. Trummer [Or.] 91 P 1077. Act Mar. 3, 1865, c. 86, 13 Stat. 501, Rev. St. 1878, § 649 (U. S. Comp. St. 1901, p. 525). Towle v. First Nat. Bk. [C. C. A.] 153 F 566.

36. In action to foreclose mechanic's lien, where owner, who was absent, did not post statutory notice disclaiming responsibility therefor, finding that owner had knowledge without stating when same was obtained will be construed to mean knowledge specified in such statute. Pacific Lumber Co. v. Wilson [Cal. App.] 92 P 654. Where, in suit

of all probative facts necessary to sustain the findings of ultimate facts,[37] but evidentiary matters in special finding must be rejected.[38] Findings of fact on request, whether incorporated in the decision proper or not, are for the consideration of the appellate court, and where findings are so inconsistent that it is impossible to harmonize them, it is the duty of the court to accept those most favorable to the appellant as he is entitled to rely upon them in aid of his exceptions.[39] The court on appeal may treat a conclusion of law as a finding of fact where in reality it is such, but the court should not be astute to construe as a finding of fact what was never intended to be such.[40] Particular findings which have been construed are collated in the notes.[41]

Signing, filing, and entering. See 8 C. L. 2254—The constitution does not require a decision of a case within a specified time after its submission to the judge, and the matter of time when a judge may decide a case is as much a matter of judicial discretion as how he shall decide it,[42] but where a judge abuses his discretion in the matter of the time when a cause should be decided by delaying his decision to an unreasonable length of time so that his conduct may be said to involve an abuse of discretion, he may in a proper proceeding be compelled to decide but not in a particular way.[43]

for loss of goods, court found all allegations of complaint true, one of which was that value of goods was $1,000, such finding sufficient to support judgment for $786.45, though court otherwise found value of goods to be $——. Morris v. Bekins Van & Storage Co. [Cal. App.] 92 P 362. Where complaint was filed July 25, 1906, and judgment was rendere i April 9, 1907, finding that agreed date in controversy was April 16, 1907, clerical misprision where complaint alleged date was April 16, 1906. Id. Finding that value of goods sued for "was sum of $——" can only be construed to mean that goods had no value. Id. General verdict having found facts averred in complaint to be true, and answers to interrogatorles do not conflict therewith in construing such answers, they must be taken as true. Richmond, etc., R. Co. v. Beverley [Ind. App.] 84 NE 558.

37. Later v. Haywood [Idaho] 93 P 374. Where ultimate question was how much party had expended in purchasing land and court found on sufficient evidence the amount expended, error in finding as to price per acre immaterial. Pearsall v. Henry [Cal.] 95 P 154.

38. Pavey v. Braddock [Ind.] 84 NE 5.

39. Elterman v. Hyman [N. Y.] 84 NE 937. Under Code Civ. Proc. §§ 1022, 1023, court not required to incorporate in its decision requested findings so far as granted and party requesting them is not deprived of benefit of such requests because they are not incorporated in the findings of court. Bremer v. Manhattan R. Co. [N. Y.] 84 NE 59. Finding of fact on request, though not embodied in formal decision, is part of judgment, and, where inconsistent with other findings, appellant has right to rely upon it as more favorable to his contention. Hamlin v. Hamlin [N. Y.] 84 NE 805. Where trial court, in reaching legal conclusion that deeds in question were null and should be canceled, found no intent to deliver or acceptance of them as effective deeds, and yet as special finding found that plaintiff delivered deeds covering both premises to defendant. Id.

40. Finding as conclusion of law that acts referred to in his findings of fact did not constitute a breach of contract, without finding of his willingness to carry same out, cannot be construed as finding of fact rather than law. National Cont. Co. v. Hudson River Water Power Co. [N. Y.] 84 NE 965.

41. Finding that, after plaintiff had entered land and began to build house, defendant asked him to locate house so as not to obstruct defendant's view, and that plaintiff did so, is finding of fact and not finding that plaintiff entered on land in pursuance of plaintiff's permission or his subsequent occupation also with his permission. Spencer v. Merwin [Conn.] 68 A 370. Where defendant in condemnation proceeding claimed that by erecting dam plaintiff destroyed rapid current in river which could have been utilized to irrigate land not taken, finding of jury, unexcepted to that current had no value, was in effect finding that it could not be used for irrigation purposes and was conclusive on that question. Inland Empire R. Co. v. McKinley [Wash.] 94 P 644. Where cross complaint filed April 9, 1898, set up claim for various items of services, dates of some of which were not specified and most of services antedated April 28, 1895, finding that services were rendered at time alleged did not amount to finding that items were not barred by statute of limitations. Novak v. Novak [Iowa] 115 NW 1. Finding that certain acts performed by commissioner of public works amounted to approval of drawings, and order in writing to do work as shown by drawings was finding of fact, though it was also conclusion. Roemheld v. Chicago, 231 Ill. 467, 83 NE 291. Finding that each and every allegation contained in complaint is true, but express finding of that which is impliedly found by judgment for plaintiff on pleadings. Bailey v. Aetna Indemnity Co., 5 Cal. App. 740, 91 P 416.

42. Const. art. 6, § 24, merely imposes pen-

*The amendment of findings.*See 8 C. L. 2254—Where court trying case without jury inadvertently marked declaration of law requested by defendant as given instead of refused as intended, the court had power during the pendency of a motion for a new trial to correct the error.[44] A motion to modify, amend, or add to the courts special finding of fact will not lie,[45] but the rule is otherwise in North Dakota.[46] In Rhode Island the court cannot amend a valid decision merely to amplify it unless necessary and done on the day of the decision.[47]

*Conclusions of law.*See 8 C. L. 2254—Conclusions of law must be based upon the evidence [48] and findings within the issues presented by the pleadings.[49] It is proper to refuse to make conclusions of law where they are unnecessary or inapplicable to the facts and questions involved.[50] In South Dakota the only conclusion required is the opinion of the court as to what relief either party is entitled to on the facts, and where the relief granted is warranted by the facts, it is not material whether the right reasons or any reasons were assigned for granting it.[51]

*Propositions of law under the Illinois practice.*See 8 C. L. 2254—Where the time is not limited by the court, it must receive propositions of law at any time rendering decision.[52] Propositions of law not supported by any evidence are properly refused,[53] as are those which question the sufficiency of the evidence.[54] In a trial of a cause in the Federal circuit court without a jury, the court cannot be required to hold specific propositions of law presented by the parties.[55]

§ 10. *Objections and exceptions.*See 8 C. L. 2255—Objections to the form of a ver-

alty for failure to decide within certain time. Wyatt v. Arnot [Cal. App.] 94 P 86.

43. Complaint alleging cause was submitted Sept. 27th, that judge was elected judge of another county at Nov. general election and Nov. 7th resigned to accept such position without first deciding cause, there being nothing to warrant conclusion that judge before resignation had so mastered record as to justify decision, held complaint states no cause of action. Wyatt v. Arnot [Cal. App.] 94 P 86.

44. Glade v. Eastern Ill. Min. Co. [Mo. App.] 107 SW 1002.

45. Meridian Life & Trust Co. v. Eaton [Ind. App.] 81 NE 667.

46. While action in which jury trial was waived is still pending in court, court has power to correct its own errors and may, in its discretion on notice and motion, vacate its findings and judgment and make new findings and enter new and different judgment. Plano Mfg. Co. v. Doyle [N. D.] 116 NW 529.

47. Ashaway Nat. Bk. v. Superior Ct. [R. I.] 67 A 523. Under Court and Practice Act 1905, § 303, providing that, in any case tried to court, court shall briefly note conclusions of law and fact on its docket, or file same with papers of case, and such record shall be known as decision, entry in charge of unfaithful administration in words, "heard and decision for appellant exceptions," held full and complete, and hence court had no power to treat as ineffective, and later enter new decision "That appellee was guilty of unfaithful administration as stated in complaint. Appellee's execution noted." Id.

48. Refusal to hold fraud proven as matter of law proper where not proved by evidence. Workarton v. Trust Co. of America [C. C. A.] 158 F 969. On findings by court that certain sum is due plaintiff from defendant but that plaintiff is indebted to defendant in larger sum as shown by his petition, a conclusion of law that plaintiff is not entitled to recover is correct. Fordtran v. South End Land Co. [Tex. Civ. App.] 105 SW 323.

49. Under complaint in action on county auditor's bond containing no charge whatever on account of moneys received as clerk of board of turnpike commissioners, but based wholly on moneys received by auditor from other accounts, not only failing to charge that auditor as such, drew his warrant to himself for any sum of money allowed him as such clerk, but containing no allegation that he ever allowed or received any money for such services finding that auditor collected and received for services as clerk an amount specified is entirely outside issues. Boyd v. State [Ind. App.] 84 NE 350.

50. Refusal proper where no facts presented to which rulings as requested could apply. Downing v. Ernst [Colo.] 92 P 230.

51. Under Rev. Code Civ. Proc. §§ 276, 277, best form of decision by trial judge is statement of facts established by pleadings and evidence followed by conclusion that upon facts so found plaintiff, or defendant, is entitled to judgment, specifying in general terms nature of judgment. Missouri River Tel. Co. v. Mitchell [S. D.] 116 NW 67. Where the court makes full findings of fact conclusion of law: "Wherefore, from foregoing, court finds plaintiff entitled to judgment prayed for" is sufficient. McVay v. Bridgman [S. D.] 112 NW 1138.

52. Held that lapse of eight months between trial and submission of propositions does not justify refusal. Western Valve Co. v. Weils, 127 Ill. App. 655.

53, 54. Schell v. Weaver, 128 Ill. App. 106.

55. Southern R. Co. v. St. Louis Hay & Grain Co. [C. C. A.] 153 F 728.

dict should be made before the jury is discharged,[56] and where counsel knew of the irregularity of the jury in rendering a verdict before it was received by the court, he must object to its reception before it is received or waive the irregularity.[57] The remedy for the failure of the judge trying the cause without a jury to make a finding on a material issue is by a motion for further findings.[58] Where the trial court expressly declines to pass upon a question of fact involved in the litigation before it, it is unnecessary after its decision has been made and filed to apply for amended findings covering the question the court declined to pass upon.[59]

VERIFICATION

Necessity. See 8 C. L. 2255—In actions at law, verification is often required by statute.[60] Other statutes require verification to put in issue particular matters, such as the genuineness of the instrument sued on,[61] and the statutes apply equally to instruments set up by answer.[62] Failure to deny under oath ordinarily admits the execution of the instrument,[63] though under some statutes such failure merely admits the in-

56. Marianna Mfg. Co. v. Boone [Fla.] 45 S 754.

57. Where, by agreement of counsel, judge instructed sheriff that, if jury found verdict by certain time, judge and council should be notified and court would reconvene to receive same, but, if verdict was found at later time, they should prepare sealed verdict and disperse for night, and verdict should be returned into court on following day, and where jury found before time fixed and turned in sealed verdict and dispersed without communicating with judge or counsel and on following morning were called into box and verdict published in their presence by clerk, if counsel knew facts it was incumbent on them to object to the reception and publication of verdict before it was done. If they failed to do so it was a waiver of the irregularity. Robert R. Sizer & Co. v. Melton, 129 Ga. 143, 58 SE 1055. Where there was no dispute as to amount due and court charged jury, if they found for plaintiff, to find for certain sum, and jury ignored charge and court refused to correct same on motion and no exception was taken, special term is powerless to interfere. Isbell-Parter v. Broker, 120 App. Div. 384, 105 NYS 1103.

58. Remedy not by appeal. Eagle Min. & Imp. Co. v. Hamilton [N. M.] 91 P 718.

59. Where court declined to pass upon receiver's negligence in failing to enforce stockholder's liability before barred by limitation. State v. Germania Bk. [Minn.] 114 NW 651.

60. Pleading in an action of slander must be verified. Whittaker v. McQueen [Ky.] 108 SW 236. Code 1904, § 3286, provides that, in actions of assumpsit, an affidavit be filed. Moreland v. Moreland [Va.] 60 SE 730.

Effect of failure to verify general issue denying joint liability leaves burden of proof upon the defendants. Martin v. Trainer, 125 Ill. App. 474. In Colorado it was error to deny motion for judgment on pleadings where replication was not verified (Hill Brick & Tile Co. v. Gibson [Colo.] 95 P 293), but in Oklahoma facts in an answer which contained only verification of denials were put in issue by a reply not verified (Western Union Tel. Co. v. Pratt, 18 Okl. 274, 89 P 237).

61. Crockett & Co. v. Garrard & Co. [Ga.] 61 SE 552; Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 SW 906; Clymer v. Terry [Tex. Civ. App.] 109 SW 1129. Answer, not verified, raises no issue. Sullivan Mach. Co. v. Breeden, 40 Ind. App. 631, 82 NE 107. Improperly verified answer sufficient to put in issue execution and delivery of instrument. La Plant v. Pratt-Ford Greenhouse Co., 102 Minn. 93, 112 NW 889. Affidavit of one of twenty defendants denying execution of note sufficient to put validity of note in issue. First Nat. Bk. v. Shaw, 149 Mich. 362, 112 NW 904. Unsigned contract not purporting to be completed instrument need not be denied under affidavit. Tonopah Lumber Co. v. Riley [Nev.] 95 P 1001. An explanatory letter not containing a contract is not written instrument to be denied under Code Civ. Proc. § 448. Marx v. Raley & Co. [Cal. App.] 92 P 519. Code 1895, § 3628, requires affidavit of forgery of deed to raise issue as to genuineness, but section is inapplicable to fi. fa. and entry of levy in connection with sheriff's deed. Vickers v. Hawkins, 128 Ga. 794, 58 SE 44. Applies only to suits where principal obligor issued on contract purporting to have been executed by authorized agent. Owens v. Caraway [Tex. Civ. App.] 110 SW 474.

62. Failure to verify replication of general denial. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

63. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545; Landt v. McCullough, 121 Ill. App. 328; Tate v. Wabash R. Co. [Mo. App.] 110 SW 622. Failure to file affidavit in ten days. Reynolds v. Pennsylvania Oil Co., 150 Cal. 629, 89 P 610. Note proper evidence when non est factum not sworn to. Hall v. Rea [Ark.] 107 SW 1176. Deeds admitted by failure to deny under oath. Rianda v. Watsonville Water & Light Co. [Cal.] 93 P 79. Note offered in evidence without proof of execution, when no plea under oath denies it. Bolden v. Hughes [Tex. Civ. App.] 107 SW 91. Verified account attached to complaint properly admitted as evidence, when answer did not under oath deny its correctness. Richardson v. Pierce [N. M.] 93 P 715; Rust v. Sanger [Tex. Civ. App.] 19 Tex. Ct. Rep. 744, 105 SW 66. An

strument in evidence and does not preclude its impeachment[64] or the defense of fraud.[65] In others, an averment of failure of consideration,[66] or plea of fraud, must be verified.[67] In some states a plea to the jurisdiction of the court is in the nature of plea in abatement and need not be verified,[68] while in others verification is essential.[69] A plea in abatement denying partnership of defendants must be under oath.[70] An alternative statute in New Jersey provides for a suitable affidavit annexed to the plea, or an exemplification of the record.[71]

In equity. See 8 C. L. 2250—An equitable petition praying for an injunction should be verified.[72] When discovery is merely incidental, the bill need not be verified.[73]

By whom. See 8 C. L. 2257—When several parties united in interest plead together, the verification may be made by one of them.[74] An answer in behalf of a corporation may be verified by an agent who can and will depose positively to the facts stated.[75]

Form and positiveness. See 8 C. L. 2256—Substantial compliance with the statute is sufficient,[76] though in some states the affidavit must strictly conform with the requirements of the law.[77] The allegations in a verified petition used as an affidavit must be construed as those of an affidavit.[78] A denial upon information and belief[79] will raise the issue as to regularity, institution, and prosecution of summary proceedings.[80]

isolated transaction by which one article was sold at an agreed price is not such an account as may be verified under statute and proof dispensed with. Jacksboro Stone Co. v. Fairbanks Co. [Tex. Civ. App.] 107 SW 567. In Illinois filing of verified plea denying execution of insurance policy merely entitles defendant to introduce evidence to meet prima facie case of other party (Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897), while in New Mexico execution was admitted notwithstanding sworn answer denying "each and every allegation of complaint" (Puritan Mfg. Co. v. Toti [N. M.] 94 P 1022).

64. Failure to verify general denial, where answer pleaded a written instrument, which was basis of bond sued on, only admitted execution and delivery of instrument, issue as to basis being open to contest. Aetna Indemnity Co. v. Crowe Coal & Min. Co. [C. C. A.] 154 F 545.

65. California Packers' Co. v. Merritt Fruit Co. [Cal. App.] 92 P 509; St. Louis Jewelry Co. v. Bennett, 75 Kan. 743, 90 P 246.

66. Must be verified. Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 SW 906.

67. Stouffer v. Smith-Davis Hardware Co. [Ala.] 45 S 621.

68. Beck & Pauli Lithographing Co. v. Monarch Brew. Co., 131 Ill. App. 645; Pooler v. Southwick, 126 Ill. App. 264. Plea in abatement to jurisdiction of court may be filed without also filing affidavit as required by code in action of assumpsit. Netter-Oppenheimer & Co. v. Elfant [W. Va.] 59 SE 892.

69. Bell v. New Orleans, etc., R. Co., 2 Ga. App. 812, 59 SE 102.

70. D. T. Crockett & Co. v. Garrard & Co. [Ga.] 61 SE 552.

71. Statute as to dilatory pleas modeled after St. 4 Anne, c. 16, § 11. Lyons v. Allen [N. J.] 69 A 642.

72. Empire Guano Co. v. Jefferson Fertilizer Co. [Ala.] 45 S 657; McLauchlin v. McLauchlin, 128 Ga. 653, 58 SE 156. In a suit for divorce, a cross petition praying for alimony and injunction should be verified. Id.

73. Hall v. McKellar [Ala.] 46 S 460.

74. First Baptist Soc. v. Dexter, 193 Mass. 187, 79 NE 342; Ewing v. Lamphere, 147 Mich. 659, 14 Det. Leg. N. 28, 111 NW 187; First Nat. Bk. v. Shaw, 149 Mich. 362, 112 NW 904; Connolly v. Schroeder, 121 App. Div. 634, 106 NYS 303.

75. Verification of answer of garnishee by timekeeper. Walker v. Swift Fertilizer Works [Ga. App.] 59 SE 850. The provisions of § 5109, Rev. St., regarding verification of pleadings by agents and attorneys, apply to the pleadings of corporations as well as those of natural persons. Bulloch-Beresford Mfg. Co. v. Hedges, 10 Ohio C. C. (N. S.) 14.

76. Affidavit that "contents * * * are true in fact and in substance" complies with statute requiring dilatory pleas to be verified by affidavit proving the truth thereof. Lyons v. Allen [N. J. Law] 69 A 642. Petition signed by plaintiff and jurat of proper officer appended is sufficient. Chancey v. Allison [Tex. Civ. App.] 107 SW 605.

77. Affidavit failing to show knowledge of facts and matters in bill, and what matters are stated upon information and belief, is insufficient in petition to reopen judgment. Sperry v. Sperry [Tex. Civ. App.] 18 Tex. Ct. Rep. 876, 103 SW 419. Requirement of verified denial of verified account does not apply when the account is not verified by original affidavit. General Specialty Co. v. Tifton Ice & Power Co. [Ga. App.] 60 SE 121. An answer filed to an amended complaint and verified prior to date of verification of amended complaint properly disallowed. Pettit v. Seligman, 54 Misc. 249, 104 NYS 397.

78. Must be statement of fact as would be proper in oral testimony of witness. Conclusions of law incompetent. State v. Parsons [Kan.] 95 P 391.

79. A denial by attorney upon information and belief is not a denial upon oath and affidavit as required by statute. La Plant v. Pratt-Ford Greenhouse Co., 102 Minn. 93, 112 NW 889.

80. Connolly v. Schroeder, 121 App. Div. 634, 106 NYS 303.

Defects, objections and amendments; waiver.[See 8 C. L. 2257]—Lack of verification must be promptly raised [81] by notice of rejection [82] or motion to strike.[83] The objection may be met by amendment,[84] and a judgment may be vacated when a party has not been allowed a reasonable time to cure a defect in verification.[85] A defect of an affidavit in the original bill cannot be relied upon to cure defective verification in the answer.[86] An amendment to a pleading may be made without verification,[87] when the merits of the controversy are not affected.[88]

VETO; VIEW; VOTING TRUSTS; WAIVER, see latest topical index.

WAR.[89]

WAREHOUSING AND DEPOSITS.

Definitions and elements.[See 8 C. L. 2258]—Warehousemen are bailees for hire [90] engaged in a business of a quasi public nature.[91] Common carriers,[92] including express companies [93] and stockyard companies,[94] are usually deemed warehousemen as to goods in their hands at destination after a reasonable time for their removal, but a milling concern receiving wheat to be manufactured into flour is not a warehouseman.[95]

Licensing and public regulation.[See 8 C. L. 2259]

Warehouse receipts.[See 8 C. L. 2259]—Statutes in many states make warehouse receipts negotiable,[96] though the facts may be such that the receipts are not entitled to the status of negotiable instruments.[97] Since delivery of warehouse receipt is constructive delivery of the article it represents.[98] the bona fide holder is vested with

81. Verification of pleadings is not jurisdictional and failure to verify is waived unless objection is made before trial. Northrup v. Bathrick [Neb.] 113 NW 808. Cannot be raised for first time on appeal. First Baptist Soc. v. Dexter, 193 Mass. 187, 79 NE 342.

82. Must specify faults. Rosenthal v. Cohn, 55 Misc. 533, 105 NYS 943.

83. Stouffer v. Smith-Davis Hardware Co. [Ala.] 45 S 621; McLauchlin v. McLauchlin, 128 Ga. 653, 58 SE 156; Keller v. Harrison [Iowa] 116 NW 327; Petit v. Seligman, 54 Misc. 249, 104 NYS 397.

84. Hall v. McKellar [Ala.] 46 S 460; McLauchlin v. McLauchlin, 128 Ga. 653, 58 SE 156. Under Comp. Laws, § 10718, objection to bill to enforce mechanic's lien, not verified, may be met by amendment after expiration of year. Prather Engineering Co. v. Detroit, etc., R. Co. [Mich.] 116 NW 376.

85. Rosenthal v. Cohn, 55 Misc. 533, 105 NYS 943.

86. Defect should be pointed out. Empire Guano Co. v. Jefferson Fertilizer Co. [Ala.] 45 S 657.

87, 88. Keller v. Harrison [Iowa] 116 NW 327.

89. No cases have been found for this subject since the last article. See 8 C. L. 2257.

90. United States v. Oregon R. & Nav. Co., 159 F 975.

91. United States v. Oregon R. & Nav. Co., 159 F 975. The warehouseman's obligations appertaining to his business are, when he receives grain on storage, to issue receipts therefor as required by law, and to deliver the grain to the holder of the receipt or receipts upon his demand, the holder, of course, complying with the conditions of the receipt before being entitled to delivery. If cars are furnished by the holder, the delivery is made by loading the grain upon the cars, and with this service terminates the warehouseman's duty with reference to the bailment. These warehouses, although conducted in private capacity, are nevertheless in a sense public concerns. By the custom of the country, producers having grain to dispose of take it to these depositories and store it pending sale or shipment, and all persons are permitted to store upon like terms and conditions. Id.

92. Campbell v. Missouri Pac. R. Co. [Neb.] 111 NW 126; Moyer v. Pennsylvania R. Co., 31 Pa. Super. Ct. 559. After arrival of goods and reasonable time for removal, the liability of carriers is reduced to warehouseman. Hutchinson v. U. S. Exp. Co. [W. Va.] 59 SE 949.

93. Failure to find consignee. Hutchinson v. U. S. Exp. Co. [W. Va.] 59 SE 949.

94. Carrying on of stockyards at commercial center is a business with public interest and subject to regulation as to rates. Ratcliff v. Wichita Union Stockyards Co., 74 Kan. 1, 86 P 150.

95. Warehouse receipts or tickets immaterial. Ex parte Bellamy [N. D.] 114 NW 376.

96. May be pledged and pledgee is bona fide holder. Bank of Sparta v. Butts [Ga. App.] 61 SE 298; United States v. Oregon R. & Nav. Co., 159 F 975.

97. Goods retained by owner in property ostensibly the owner's, though in fact leased to warehousemen. Security Warehousing Co. v. Hand, 206 U. S. 415, 51 Law. Ed. 1117.

98. Does not relieve seller from actual de-

an indefeasible title.[99] The receipt should contain a statement of advances made, if any, to the owner.[1]

Contracts of warehousing in general.[See 8 C. L. 2250]—A contract to store may be implied from the circumstances.[2]

Care and protection of goods stored.[See 8 C. L. 2260]—A warehouseman is bound only to use ordinary care of the goods stored [3] and to provide a reasonably safe place of deposit.[4]

Insurance.[See 8 C. L. 2260]

Charges and lien therefor.[See 8 C. L. 2260]—The lien of a warehouseman is in some states extended to cover advances as well as charges.[5] The lien does not take precedence of a prior chattel mortgage by the depositor.[6]

Trover and conversion.[See 8 C. L. 2261]—The owner may maintain an action of trover though the goods were deposited by another person.[7] The right of a third person to whom the warehouseman has delivered goods may be considered as a defense to trover.[8]

Actions and procedure.[See 8 C. L. 2261]—The purchaser of a warehouse receipt who fails to receive the goods deposited may rescind the contract and sue the seller or maintain trover against the warehouseman.[9]

Crimes and penalties.[See 6 C. L. 1883]—The refusal to deliver grain deposited is a crime in North Dakota.[10] In Illinois a statute prohibits the removal of goods deposited after issuance of a receipt.[11]

WARRANT OF ATTORNEY; WARRANTS; WARRANTY, see latest topical index.

WASTE.[12]

Any injury to the inheritance constitutes waste.[13] Equity will enjoin the commission of waste, in a suit between tenants in common,[14] where there is statutory au-

livery. Livingston v. Anderson, 2 Ga. App. 274, 58 SE 505.

99. Cannot be incumbered by warehouseman for advances. Bank of Sparta v. Butts [Ga. App.] 61 SE 298; United States v. Oregon R. & Nav. Co., 159 F 975.

1. Bank of Sparta v. Butts [Ga. App.] 61 SE 298.

2. Owner of building notified owner of goods to remove same or they would be stored at latter's expense, which was done. Cahill v. Phelps [Mass.] 84 NE 496.

3. Not proved or pleaded. Campbell v. Missouri Pac. R. Co. [Neb.] 111 NW 126. Preponderance of evidence that goods were delivered to warehousekeeper and not returned. Wheeler v. Blumenthal, 107 NYS 57.

4. Must show that due care was exercised where piano in depot burned. McCord v. Atlantic Coast Line R. Co., 76 S. C. 469, 57 SE 477. No presumption of negligence where building is not burglar proof. Hutchinson v. U. S. Exp. Co. [W. Va.] 59 SE 949. Larceny of goods stored does not impute negligence. Moyer v. Pennsylvania R. Co., 31 Pa. Super. Ct. 559.

5. "Advances" in Laws 1902, p. 1776, c. 608, § 2, does not include loan on security of goods. Schwab v. Oatman, 56 Misc. 393, 106 NYS 741.

6. Bauman v. Kuhn, 108 NYS 773.

7. Warehouse receipt constructive delivery. Livingston v. Anderson, 2 Ga. App. 274, 58 SE 505.

8. Where a non-negotiable warehouse receipt was issued but the warehouseman was notified of pledge of goods, he was justified in delivery to pledgee on receipt of proper order. Kramer v. Haeger Storage Warehouse Co., 108 NYS 1.

9. Livingston v. Anderson, 2 Ga. App. 274, 58 SE 505.

10. Rev. Code 1905, § 2244. Ex parte Bellamy [N. D.] 114 NW 376.

11. Hurd's Rev. St. 1905, c. 38, §§ 124, 125. McReynolds v. People, 230 Ill. 623, 82 NE 945. The place of storage referred to in the statute is the building which is used as a warehouse, and it is immaterial that there was sufficient grain to discharge receipt in cars standing on tracks in elevator yard. Id. Its application is not affected by the issuance of a receipt reserving to the party in possession of the goods the right to intermingle them with others. Id.

12. See 8 C. L. 2261.

13. Life tenant may not dredge and carry away sand and gravel from shore of land bordering on stream, nor remove fast land and trees above highwater mark. Potomac Dredging Co. v. Smoot [Md.] 69 A 507.

14. Defendant may not cut every alternate tree of a line of trees growing on boundary between him and plaintiff and owned by them jointly. Scarborough v. Woodill [Cal. App.] 93 P 383.

thority for the maintenance of the suit,[15] otherwise an injunction will be granted only under special circumstances, as where the waste is destructive to the estate or where defendant is insolvent.[16] Equity will enjoin waste by the owner of a determinable fee only when the contingency which will determine it is reasonably certain to happen,[17] and where the waste is of such character as to be a wanton abuse of the owner's rights.[18] Equity has jurisdiction to restrain waste by cutting and removal of timber and incidentally for an accounting for waste already committed.[19] A general allegation of irreparable injury is sufficient in a petition for temporary injunction to restrain waste,[20] and when the injury is irreparable the solvency or insolvency of defendant is unimportant and need not be alleged.[21] The action of waste does not lie against a tenant for alterations made with the assent of the landlord.[22]

WATERS AND WATER SUPPLY.

§ 1. Definition and Kinds of Waters, 1996.
§ 2. Sovereignty Over Waters and Lands Beneath, 1997.
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§ 16. Water Service and Rates, 2024.
§ 17. Grants, Contracts and Licenses, 2027.
§ 18. Torts Relating to Waters, 2029.
§ 19. Crimes and Offenses Relating to Waters, 2030.

The scope of this topic includes the general law of waters and the use and supply thereof, except as other topics below cited [23] cover necessary exclusions.

§ 1. *Definition and kinds of waters.*See 8 C. L. 2283—A watercourse may exist though the stream is dry during the summer and the bed changes frequently.[24] Where surface water naturally collects and is discharged through a well defined channel which it has made for itself, it constitutes a watercourse.[25] An artificial ditch may acquire the dignity of a watercourse by long lapse of time.[26]

15. Code Civ. Proc. § 732, expressly authorize such suits. Scarborough v. Woodill [Cal. App.] 93 P 383.

16. Will not enjoin sale of timber under direction of will, though plaintiff contests will. Burris v. Jackson [Del.] 68 A 381.

17. Will not enjoin waste by owner of base fee at the instance of one whose estate depends upon the death of such owner without issue. Fifer v. Allen, 228 Ill. 507, 81 NE 1105.

18. Fifer v. Allen, 228 Ill. 507, 81 NE 1105.

19. Extent of cutting held sufficient to give jurisdiction. Bell v. North American Coal & Coke Co. [C. C. A.] 155 F 712.

20. Alleged continuous cutting and removal of timber. Crawford v. Atlantic Coast Lumber Corp., 77 S. C. 81, 57 SE 670.

21. Crawford v. Atlantic Coast Lumber Corp., 77 S. C. 81, 57 SE 670.

22. It lies in the absence of consent. Evidence held sufficient to show consent. Pfister & Vogel Co. v. Fitzpatrick Shoe Co. [Mass.] 83 NE 878.

23. See Bridges, 9 C. L. 408; Ferries, 9 C. L. 1359; Navigable Waters, 10 C. L. 917; Shipping and Water Traffic, 10 C. L. 1655; Wharves, 8 C. L. 2304.

24. Riparian rights may exist as to such a course. Huffner v. Sawday [Cal.] 94 P 424.

25. Chicago, etc., R. Co. v. Groves [Okl.] 93 P 755. Where surface water has been accustomed to gather and flow in a well defined channel, it may not be obstructed to the injury of a dominant proprietor. Id.

26. Where the flow of water through an artificial ditch for many years was such as would constitute it a natural watercourse if the flow had begun without artificial aid, it is a watercourse to which the same rules of law are applicable as apply to natural watercourses. Stimson v. Brookline [Mass.] 83 NE 893. Where a ditch had been dug in 1652 and so long as it remained unobstructed had carried a part of the waters of a stream but it appeared to have been obstructed for twenty years by natural and artificial causes,

§ 2. *Sovereignty over waters and lands beneath.*[See 8 C. L. 2263]—Subject to the rights of riparian owners,[27] the control of streams is vested in the state for the benefit of its people and the state may authorize improvement thereof.[28]

§ 3. *Rights in natural watercourses.*[See 8 C. L. 2264]—A riparian proprietor is entitled to the natural and unobstructed flow of the stream [29] unimpaired in quantity [30] or quality,[31] except by reasonable use by upper proprietors.[32] Ordinarily, the question whether the use of a stream by an upper riparian owner is reasonable is a question of fact,[33] but such question is limited by certain rules of law that a permanent diversion of a substantial portion of the water to the detriment of a lower owner is not reasonable.[34] The discharge of noxious substances into a stream in such quantity as to affect the purity of the water when it reaches the land of a lower owner is not reasonable,[35] but slight diversion [36] or impairment of quality, incident to use,[37] is.

The right of a riparian proprietor to a continuance of the natural flow of the stream cannot be taken without compensation,[38] and an attempt to do so may be enjoined,[39] but it may become subject to a public servitude by acquiescence and use sufficient to show prescription.[40] The right of the riparian owner to the use of the

whether it was a watercourse or a mere drainage ditch held for the jury. Id.

27. See post, § 3.

28. County commissioners have power to improve a watercourse, partly natural and partly artificial, by deepening, widening, straightening, and otherwise improving it. Greene County Com'rs v. Harbine, 74 O. S. 318, distinguished. Mason v. Fulton County Com'rs, 10 Ohio C. C. (N. S.) 201. Plaintiffs are estopped to question the right of county commissioners to establish and maintain a ditch or watercourse, which has existed for a great many years and has been improved on several occasions by proceedings instituted by the county commissioners, and the plaintiffs have in some of these proceedings paid the assessment without objection. Id. County commissioners may locate a ditch substantially along the line of the channel of, or adjacent to, or in the valley of, a living stream or watercourse, though they have no power to convert a living stream of water into a ditch by proceedings for the location and construction of a ditch. Id. Watercourses which empty one into another and that one into a third are not separate watercourses within the meaning of the statutes relating to the construction or improvement of public ditches and may be joined in one improvement. Anderson v. Hicksville, 4 Ohio N. P. (N. S.) 545.

29. A riparian proprietor has a right to insist that the water shall continue to flow as it has been accustomed. Chicago, etc., R. Co. v. Groves [Okl.] 93 P 755. An owner of land is entitled to the free and exclusive enjoyment of non-navigable watercourses flowing over his land. Seaboard Air Line R. Co. v. Sikes [Ga. App.] 60 SE 868. Each riparian owner is entitled to reasonable use of the stream consistent with corresponding use by other owners. Griffin v. National Light & Thorium Co. [S. C.] 60 SE 702.

30. See post, this section, Diversion.

31. See post, this section, Nuisance and Pollution. Where an upper owner pollutes the stream, he is liable for resulting injuries. Benjamin v. Gulf, etc., R. Co. [Tex. Civ. App.] 108 SW 408.

32. Every riparian proprietor is entitled to have water come to him in its natural condition except so far as it is affected by the reasonable use of their property by the owners above. MacNamara v. Taft [Mass.] 83 NE 310. The right of a riparian owner to the natural flow of the stream is subject to the right of each riparian owner to reasonable use of the waters thereof. Tetherington v. Donk Bros. Coal & Coke Co., 232 Ill. 522, 83 NE 1048. A state may not enjoin the appropriation of waters for irrigation by another state which is an upper riparian proprietor. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law Ed. 956.

33. MacNamara v. Taft [Mass.] 83 NE 310.

34. MacNamara v. Taft [Mass.] 83 NE 310. A riparian owner may not construct a dam so as to discontinue the flow of the water. In re Board of Water Supply, 109 NYS 1036.

35. McNamara v. Taft [Mass.] 83 NE 310. Discharge of noxious substances into a stream by a manufacturer which rendered the water unfit for stock of a lower owner to drink held unreasonable, where it was not necessary for the manufacturer to do so though it was convenient and profitable. Id.

36, 37. McNamara v. Taft [Mass.] 83 NE 310.

38. Where an electric company was a riparian owner, a boom company could not dam the stream above the plant and stop the flow of water at intervals and compel the electric plant to remain idle. Kalama Elec. L. & P. Co. v. Kalama Driving Co. [Wash.] 94 P 469. Statutory power to improve rivers did not authorize destruction of riparian rights without compensation. Id.

39. Electric company utilizing the flow of a stream held entitled to enjoin a boom company, from interfering with its rights by storing water for artificial freshets in such way as to compel the electric plant to be idle. Kalama Elec. L. & P. Co. v. Kalama Driving Co. [Wash.] 94 P 469.

40. Seaboard Air Line R. Co. v. Sikes [Ga. App.] 60 SE 868. A right acquired by the public to use a watercourse not navigable may be lost by a discontinuance of such use for a time sufficient to justify an inference of abandonment. Id.

natural water running through it is subordinate to any paramount right to the use of such water existing under the general law in some other person.[41]

Only owners of land which is riparian are entitled to riparian privileges.[42] Rights like those pertaining to a natural watercourse may exist in an artificial course after a long lapse of time,[43] and riparian rights may attach to an artificial condition created in a natural watercourse by riparian owners.[44]

Interference and obstruction. See 8 C. L. 2265—A lower riparian proprietor may not obstruct the flow of the stream to the injury of an upper proprietor [45] unless he has acquired a prescriptive right to do so,[46] or unless the upper owner is estopped to object to its maintenance.[47] Such wrongful obstruction may be enjoined,[48] or an action

41. City of Los Angeles v. Los Angeles Farming & Mill. Co. [Cal.] 93 P 869. Under the Mexican law a pueblo had power to distribute to the common lands and to its inhabitants the water of a non-navigable river on which the pueblo was situated and a riparian owner could not interfere with the common use to which a pueblo had given a stream and a city which has succeeded a pueblo holds such water rights in trust for its inhabitants. Id.

42. A nonriparian owner cannot complain that a riparian owner constructs a dam which retains the water and allows it to percolate through a riparian strip onto his land. Moore v. Berlin Co. [N. H.] 67 A 578.

43. Instruction held erroneous if by the term "natural watercourse" the court did not include any watercourse originally made by man. Stimson v. Brookline [Mass.] 83 NE 893.

44. The channel of a watercourse was altered by virtue of contract between riparian owners so as to drain upper riparian lands. The stream in its altered condition continued for several years where one who acquired an interest sought to construct a dam so as to flood such upper lands. Held injunction would issue to prevent such alteration. Cloyer v. Middebury Elec. Co., 80 Vt. 109, 66 A 1039.

45. In an action for obstructing waters of a ditch, an instruction that the fact of other obstructions in the ditch would not preclude recovery if the dam constructed by defendant operated to impede the flow was properly refused, it not appearing that the dam impeded the flow so as to injure the plaintiff's property. Stimson v. Brookline [Mass.] 83 NE 893. Where water flows from land drained by a watercourse into a watercourse and such watercourse is obstructed by a railroad company so as to cause it to flow across lower riparian lands in greater volume or by a different course than it naturally would, the railroad company is liable. Cole v. Missouri, etc., R. Co. [Okl.] 94 P 540. One engaged in public work, the construction of which involves change or restraint of the flow of water in a natural channel, is guilty of negligence if he fails to provide against consequences of such extraordinary rainfalls as experience shows are likely to occur. Fairbury Brick Co. v. Chicago, etc., R. Co. [Neb.] 113 NW 535. Where one negligently constructed and maintained a river cut-off so as to cast waters and excavated material on contiguous land in greater volume and more injurious effects than the natural flow, he is liable whether he acted as owner of the land or as licensee. Neumeister v. Goddard [Wis.] 113 NW 733. Evidence sufficient to show that the cut-off was negligently constructed and that injury to plaintiff's land was a proximate result thereof. Id. In an action against a railroad company for constructing its embankment so as to retard waters of a stream, evidence that given the same amount of rainfall witnesses had observed no greater overflow about half a mile above the embankment after it had been constructed than before held admissible. Moss v. Gulf, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 706, 103 SW 221. Where one fills the channel of a stream with earth, a cause of action for the flooding of adjacent lands accrues at the date injury is done and not at the date the channel is obstructed. McClure v. Broken Bow [Neb.] 115 NW 1081. The construction of a dam diverting water from its natural course onto the land of a riparian owner is no justification for construction by the latter of another dam which diverts water from its natural course to the injury of others. Cassidy v. Johnson [Ind. App.] 84 NE 835. The purchaser of state swamp land who holds a commissioner's certificate therefor has such title as enables him to maintain action to have removed a mill dam which floods his land. Scofield v. Schaeffer [Minn.] 116 NW 210.

46. In an action by an upper mill owner to enjoin a lower mill owner from maintaining a dam at a height which caused the water to back up under his mill, evidence sufficient to show that the height of the dam had not been changed within the period of limitations. Tew v. Webster [Minn.] 114 NW 647. A lower proprietor acquires no prescriptive right to have an upper owner maintain on his land a temporary structure which protects the lower proprietor's lands by directing flood waters from a lake into the channel of a canal. Lake Drummond Canal & Water Co. v. Burnham [N. C.] 60 SE 650.

47. An upper riparian owner whose land is flooded by the construction of a dam below him may be estopped to assert his right to a mandatory injunction to abate the dam, where he has entered into negotiations for settlement and led the owner of the dam to believe that damages would be accepted, and in reliance on such belief the dam owner has settled with other landowners and expended money in extension of his plant. Griffith v. Berkshire Power Co., 158 F 219. Injunction denied and upper owners left to their remedy at law for damages. Id. An upper mill owner who saw a lower mill owner expend

will lie for the recovery of damages for injuries sustained,[49] providing such damages are susceptible of proof.[50] Equity has jurisdiction of a suit to restrain the unlawful obstruction of a watercourse whereby lands of riparian owners are flooded, where the injury is necessarily continuous and operates prospectively so that the owners have no adequate remedy at law.[51] It is not necessary to the maintenance of such suit that the bill should charge that the conditions resulting from the obstruction were unhealthful.[52] In such suit it is not necessary that the landowner's right should be first established at law.[53] Several riparian proprietors may join in such proceeding to prevent multiplicity of suits, though each claims under a separate right and could maintain a separate suit.[54] To warrant the issuance of a mandatory injunction to compel removal of obstructions from a watercourse, the right thereto must be clear, the damage irreparable, and urgent necessity for its issuance must exist.[55]

money and labor in building a dam and did not then object but furnished material for the dam was not estopped by acquiescense from asserting his rights against the lower owner because of his setting back the water where, when he furnished the materials, he did not know what the effect would be and the lower owner did not rely on his conduct. Royce v. Carpenter, 80 Vt. 37, 66 A 888. An owner was not estopped to claim injunctive relief because he consented to the maintenance of the dam during a prior year on payment of damages. Durga v. Lincoln Creek Lumber Co. [Wash.] 92 P 343.

48. The maintenance of a dam which floods a portion of an owner's land and renders other portions of it unfit for cultivation may be enjoined. The lowering of the dam does not preclude such relief where the back water still injured the land. Durga v. Lincoln Creek Lumber Co. [Wash.] 92 P 343. Where the dam of a lower mill owner set back the water of the stream and injured the dam of an upper owner, and it appeared that water was frequently set back and would continue so long as the lower dam was maintained and there was no evidence comparative values of properties inconvenienced or affected, held the maintenance of the lower dam would be perpetually enjoined. Royce v. Carpenter, 80 Vt. 37, 66 A 888. Lower owner held barred by laches from restraining a water company from taking water from a stream. West & Co. v. Octoraro Water Co., 159 F 528.

49. In an action for destruction of crops by flooding, where it appears that they would have been destroyed by a subsequent extraordinary flood, the person whose negligence caused the first flood is not liable, since there is nothing left upon which to determine the probable yield. International, etc., R. Co. v. Jackson [Tex. Civ. App.] 19 Tex. Ct. Rep. 671, 103 SW 709. The measure of damages for flooding land by obstruction of a stream is the depreciation in the market value of the land. Louisville, etc., R. Co. v. Ponder, 31 Ky. L. R. 878, 104 SW 279. In an action for damages resulting from flooding caused by obstruction of a watercourse, evidence held to show that the obstruction by defendant was not the proximate cause of the flood which was caused by grading of a street for which defendant was not liable. Settegast v. Kapner [Tex. Civ. App.] 20 Tex. Ct. Rep. 59, 105 SW 1160. In an action for flooding crops due to negligent construction of a roadbed it is no defense that other farms both above and below were flooded where it does not appear that there was a general overflow which was inevitable or that the conditions as to such other farms were similar. St Louis, etc., R. Co. v. Saunders [Ark.] 107 SW 194. In an action for flooding land, evidence held insufficient to sustain damages for injuries to fences and diminished rental value (Cooper v. New York, etc., R. Co., 106 NYS 611), nor to support damages awarded for depreciation in the value of the land (Id.). In an action against a railroad for overflowing land, a judgment requiring the company to pay a certain sum to restore the embankments and to restore them or take a conveyance of the land is erroneous, for if it takes the land the owner is paid full value and cannot recover for restoring embankments. Id.

50. In an action for injuries to land alleged to have been caused by the act of defendant railroad company in damming a stream, where the evidence showed that the injury was the result of an extraordinary flood and the result would have been the same had the dam not been built, the company was not liable. Karchner v. Pennsylvania R. Co., 218 Pa. 309, 67 A 644.

51. Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 A 1039. In order for a riparian owner to maintain an action for obstructing the waters of a stream, he need not show present actual damages, it being sufficient to show an injurious effect produced on the property, such as a right to maintain the obstruction, would be acquired by limitation. Stimson v. Brookline [Mass.] 83 NE 893.

52. Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 A 1039.

53. It is sufficient where their title to riparian lands is admitted. Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 A 1039. The fact that riparian owners have not established their right at law is not ground for demurrer. Id.

54. Cloyes v. Middlebury Elec. Co., 80 Vt. 109, 66 A 1039.

55. Will not issue where there is a dispute as to ownership of the land, obstructions have existed for fifteen years, obstruction was costly and would require great expense to remove and interfere with business. Savage v. Port Reading R. Co. [N. J. Eq.] 67 A 436.

Bridges and culverts.[See 8 C. L. 2269]—A railroad company in constructing its embankment across streams must construct bridges and culverts of sufficient capacity to accommodate waters which flow through them at ordinary flood,[56] but they are not required to provide against unusual or extraordinary floods.[57] The sufficiency of pleadings [58] and admissibility of evidence in actions for damages [59] are governed by the general rules, and the measure of damages recoverable is the same as for any other injury to real property.[60] The burden to prove that the flood was extraordinary is on the railroad company.[61] This rule applies as to cities constructing culverts through which a stream must flow, where it also constructs storm sewers which augment the flow of the stream.[62]

Nuisance and pollution.[See 8 C. L. 2267]—An upper owner may not deposit in a

56. A railroad must so construct its culverts that water flowing in streams at ordinary highwater mark will not be obstructed. Foreman v. Midland Valley R. Co. [Ind. T.] 104 SW 806. Complaint for obstructing waters of a stream held to state a cause of action. Id. A railroad which negligently constructs a culvert or negligently allows the same to become obstructed is liable for injury resulting to crops, fences, or buildings. Wallingford v. Maysville, etc., R. Co. [Ky.] 107 SW 781. Evidence held to show that the act of a railroad company in constructing a bridge over a river and in negligently permitting driftwood, etc., to accumulate against the piers and abutments was the proximate cause of the flooding of plaintiff's lands. Houston, etc., R. Co. v. Buchanan [Tex. Civ. App.] 20 Tex. Ct. Rep. 494, 107 SW 595. Whether a railroad in constructing a bridge across a stream, negligently aligned the piers and abutments and thereby caused land adjacent to be flooded, held for the jury. Cooper v. New York, etc., R. Co., 106 NYS 611. Evidence sufficient to show a railroad company liable where it so negligently constructed a culvert where its roadbed crossed a stream as to cause adjacent land to be flooded. St. Louis, etc., R. Co. v. Brooksher [Ark.] 109 SW 1169.

57. A railroad which maintains a culvert adequate to carry off ordinary rainfall is not liable for injuries which result from extraordinary floods. Wallingford v. Maysville, etc., R. Co. [Ky.] 107 SW 781. In an action for flooding lands resulting from failure of defendant to keep a culvert open, it is admissible to show that at the time there were extraordinary rains in the neighborhood. Id. Railroads are required to so construct their bridges across natural watercourses, and their roadbeds through bottom lands as to permit passage of water which may be expected to flow, but are not required to anticipate extraordinary floods. Smith v. Chicago, etc., R. Co. [Neb.] 115 NW 755; Blunck v. Chicago, etc., R. Co. [Iowa] 115 NW 1013. Where a flood surpassed anything of the kind occurring within thirty years, the fact that a culvert was of insufficient capacity to carry off the water did not render the railroad company liable. Eagan v. Central Vermont R. Co. [Vt.] 69 A 732. The liability was not affected by the fact that a somewhat larger culvert was insufficient at the time of the flood which occurred thirty years before. Id. In an action for obstruction of a stream by insufficient culvert **evidence held insufficient** to show that the flood was extraordinary. Richards v. Ann Arbor [Mich.] 115 NW 1047.

58. Complaint in an action against a railroad for flooding lands by negligent construction of a bridge over a river held to sufficiently allege the amount of claims assigned to the plaintiff by his tenants and to state the total amount of such claims. Houston, etc., R. Co. v. Buchanan [Tex. Civ. App.] 20 Tex. Ct. Rep. 494, 107 SW 595.

59. In an action against a railroad company for damages caused by flooding due to improper construction of its roadbed, evidence as to effect on land higher up the stream is not admissible without a showing that conditions were the same. San Antonio, etc., R. Co. v. Kiersey [Tex.] 109 SW 862. In an action against a railroad for flooding caused by negligent construction of a bridge, evidence of subsequent repairs is not admissible to prove antecedent negligence. Pribbeno v. Chicago, etc., R. Co. [Neb.] 116 NW 494. In an action against a railroad for flooding a farm by failure to maintain sufficient openings through its roadbed, evidence of the cost to prepare the land to plant the crop which was of no value at the time of the flood was admissible on the issue of damages. Houston, etc., R. Co. v. Darwin [Tex. Civ. App.] 20 Tex. Ct. Rep. 30, 105 SW 825.

60. For flooding land by obstructing a watercourse, the measure of damages is the difference in value of property before and after the flooding. McClure v. Broken Bow [Neb.] 115 NW 1081. The cost of restoring the property to its former condition is to be considered, but not the possibility of future overflows. Id.

61. The landowner injured has not the burden to prove that the storm causing the flood was unprecedented. Buel v. Chicago, etc., R. Co. [Neb.] 116 NW 299.

62. Richards v. Ann Arbor [Mich.] 115 NW 1047. In action against a city resulting from flooding due to an inadequate culvert, plaintiff could show that volume of the stream was increased by storm sewers. Id. If a culvert maintained by a city was inadequate to care for ordinary rainfall, the fact that the flooding of adjacent property followed a quite severe rainstorm does not relieve the city. Id. In an action for flooding resulting from an insufficient culvert, it was admissible to show that water in an old millrace parallel to the culvert backed up so as to increase demands on the culvert, the defendant having been party to its obstruction. Id.

stream refuse matter which renders the water unfit for domestic uses by a lower proprietor.[63] This rule applies to municipal corporations which deposit sewage into a stream [64] unless they do so by virtue of statutory authority [65] or prescriptive right.[66]

63. An injurious pollution differs from "pollution," which merely consists of the presence in the water of minerals held in suspension or of minerals produced by chemical reaction whose gravity causes them to sink. Doremus v. Paterson [N. J. Eq.] 69 A 225. An upper owner may not deposit sawdust or other materials in a stream if it will pollute the water or otherwise render it unfit for use by lower owners. Horton v. Fulton [Ga.] 60 SE 1059. One has no right to use the water for such purposes as will corrupt it to the material injury of a lower owner. MacNamara v. Taft [Mass.] 83 NE 310. Where an upper owner polluted the water of a stream and thereby rendered a well on the land of a lower owner useless, a recovery could be had without reference to the question of negligence, as the gravaman of the action is nuisance and not negligence. Haynor v. Excelsior Springs L., P., H. & W. Co. [Mo. App.] 108 SW 580. Where pollution of a stream is not the necessary result of the operation by one of oil wells on his premises, but is due to his wrongful act in discharging waste water and oil into the stream, a riparian owner injured thereby may maintain action therefor. Teel v. Rio Bravo Oil Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 646, 104 SW 420.

Mining companies may use a stream for mining purposes, but may not place therein foreign substances which pollute the water and which will injure the land of a lower proprietor where it is deposited thereon by overflow of the stream. Alabama Consol. Coal & Iron Co. v. Vines [Ala.] 44 S 377. The discharging of tailings and debris from a mine into a river, whereby the bed is filled up and the waters caused to overflow adjacent lands and carry debris onto them, constitutes a nuisance unless authorized by law. Sutter County v. Nicols [Cal.] 93 P 872. Such acts were not authorized by Act Cong. March 1, 1893, relative to hydraulic mining. Id. One who places sand on the banks of a stream in such manner as to injure a lower owner and who negligently digs up swamp mud which pollutes the stream is liable in damages. Griffin v. National Light & Thorium Co. [S. C.] 60 SE 702. In an action for pollution of a stream where a dam washed away, and allowed water accumulated therein to operate a coal washer, to be precipitated over lower land, a charge held not objectionable as imposing upon the upper owner the duty of guaranteeing purity of water descending from the mine. Tethrington v. Donk Bros. Coal & Coke Co., 232 Ill. 522, 83 NE 1048.

64. Where a drain laid in a street by property owners under permission from the city empties into a natural stream and thereafter without express license from the city is used as a sewer to discharge sewage into a stream to the injury of the lower owners, the drain is a nuisance, and the city is liable in damages for not abating it. City of Mansfield v. Bristor, 76 Ohio St. 270, 81 NE 631. A charge of court with reference to the time required by a municipality to acquire by prescription the right to empty sewerage into a natural stream is erroneous and prejudical if it is nowhere stated that the time required to create the right must be at least twenty-one years. Schrenk v. Cincinnati, 10 Ohio C. C. (N. S.) 135. The privilege of discharging obnoxious sewerage into the waters of the state is a matter of public concern, and it is within the police power of the state to declare that this privilege is one which ought not to be exercised by private individuals, but only by the state or its governmental agents, the municipalities acting under direct control of the state. Power of state to enact police regulation for protection of public welfare which restricts noisome business or condition in certain districts and reserves to state or its representatives right to regulate and control such business not within prohibition of fourteenth amendment. Commonwealth v. Emmers, 33 Pa. Super. Ct. 151. Act of April 22, 1905, P. L. 260, act to preserve purity of waters of state for protection of public health, does not in §§ 4, 8, 9, 10, 11, relating to discharge of sewerage into waters of state, violate fourteenth amendment to United States constitution. Id. Alleged right of riparian owner to pollute stream flowing over his land not among privileges, etc., belonging to him as citizen of United States as opposed to rights as citizen of state, nor is such alleged right one of which he is deprived without due process of law where appeal from commissioner of health to court of common pleas is allowed by statute. Id. Act not unconstitutional for permitting water from mines, tanneries, and sewerage from public municipal sewer system discharging sewerage into waters of state when act was passed to continue while forbidding individuals, private corporations, and companies from doing so under same circumstances. Id. The classification of sewerage as different from water flowing from coal mines and tanneries is a question for the legislature, and the courts can only inquire whether such classification is founded in substantial distinctions having a reasonable relation to the subject-matter of the relation. Classification adopted by Act April 22, 1905, P. L. 260, as to character of sewerage prohibited and that exempted from provisions of law is proper, as is distinction drawn between public sewer systems owned and operated by municipalities and sewers controlled by individuals and private corporations. Id. Evidence held not to show that pollution of water of Mississippi river by Chicago sewers was cause of epidemic in St. Louis. Injunction denied. State of Missouri v. State of Illinois, 200 U. S. 496, 50 Law Ed. 572.

65. P. L. 1899, p. 536, amended by P. L. 1900, p. 113, relative to the pollution of streams from which a public supply of water is taken, by sewage makes lawful a sewage disposal plant constructed on plans and under conditions approved by the sewage commission, and removes it from the supervision of the state board of health

A city is not liable for so much of street wash as goes into a river from the surface of streets, though more would in time of rain, on account of paved surfaces preventing absorption and causing occasional diversion, find its way into the stream.[67] But it is liable for so much of street wash as it by artificial means diverts into sewers emptying into the stream.[68] The wrongful pollution of a stream by one riparian owner to the injury of others, may be enjoined[69] or an action at law for damages may be maintained,[70] and all damages proximately resulting from such pollution may be recovered.[71]

Diversion. See 8 C. L. 2268—A proprietor may lawfully change the course of a stream within the boundaries of his land,[72] but he has no right to divert the channel by a ditch so near the land of his neighbor that the water will encroach thereon and

under P. L. 1899, p. 536. Board of Health v. Vineland [N. J. Err. & App.] 68 A 110. Pub. Laws 1899, p. 73, "An act to secure the purity of public supplies of potable waters," is repealed so far as its provisions conflict with Pub. Laws 1899, p. 536, "an act to prevent pollution of waters," etc., yet permitting waste waters from washing cans and bottles in a creamery to flow into a stream from which a city takes its water supply, is not within the provisions of the latter act, and the state board of health has jurisdiction and power under the former to enjoin it. Board of Health v. Ihnken [N. J. Err. & App.] 67 A 28. The act of a city in building sewers emptying into a stream as authorized by statute did not constitute a violation of rights of riparian owners until more sewage was discharged into the stream than the stream could take care of. Doremus v. Paterson [N. J. Eq.] 69 A 225.

66. Evidence sufficient to show that a city had not acquired a prescriptive right to pollute waters of a stream. Doremus v. Paterson [N. J. Eq.] 69 A 225.

67, 68. Doremus v. Paterson [N. J. Eq.] 69 A 225.

69. Owners of land in common and in severalty may join in one action for damages to all the land. Teel v. Rio Bravo Oil Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 646, 104 SW 420. Several lower riparian owners have such a community of interest that they may join in a petition to enjoin its pollution or restraint by an upper owner. Horton v. Fulton [Ga.] 60 SE 1059.

70. In an action by an owner of a dam against an upper owner for polluting the water and causing the mill pond to be filled up with sand, an owner whose land the pond covers is not a necessary party, no relief being sought against him. Griffin v. National Light & Thorium Co. [S. C.] 60 SE 702. In an action for damages caused by pollution of a stream by coal dust and other matter which by overflow of the stream was deposited on land of an owner, evidence as to the kind of crops grown on such land subsequent to the commencement of the action is admissible to show damage to the land though only damages occurring within one year prior to the actton could be recovered. Alabama Consol. Coal & Iron Co. v. Vines [Ala.] 44 S 377.

71. Where cattle of a lower owner were injured by drinking water of the stream into which an upper owner had poured oil, he is not required to prove that the cattle were healthy before they drank the oil. Benjamin v. Gulf, etc., R. Co. [Tex. Civ. App.] 108 SW 408. Nor need he prove that he used ordinary care in handling his cattle, this being matter of defense. Id. Such cattle owner was not required to move his cattle from the premises to prevent their drinking the water unless he could do so at moderate expense, nor was he required to sell them. Id. Where an **upper owner pours oil into a stream** and the cattle of a lower owner are injured by drinking it, if it was necessary for the latter to move his cattle to prevent their drinking it he could recover extra expense, cost of moving, feeding, etc. Id. In an action for negligence in the **deposit of debris in a dam** from the construction of bridges, the plaintiff has the burden to prove what proportion of the debris resulted from floods and what proportion from the construction of the bridges. Sipe v. Pennsylvania R. Co. [Pa.] 68 A 705. Compensation of **pollution of a stream by sewage** held properly computed from the time pollution commenced. Doremus v. Paterson [N. J. Eq.] 69 A 225. In action against a city for polluting a stream, evidence held to show that pollution from its sewers amounted to three-fourths of the entire pollution of the stream. Id. Where a city is sued for polluting a stream by emptying sewers therein, it may not deduct for injury which would have resulted had there been no sewers where it cannot produce proof of the amount of such deduction. Id.

72. Where a proprietor changed the course of a stream within the limits of his own land and a railroad constructed its roadbed along the new channel so that in times of freshets the water was thrown upon lands of the owner, the company was liable in damages, irrespective of whether the change was intended as a permanent one. Cook v. Seaboard Air Line R. Co. [Va.] 57 SE 564. An upper proprietor has a legal right to a reasonable use of a natural watercourse flowing through his land, and in furtherance of such use he may change and control the natural flow of surface water, and by ditches or otherwise accelerate its flow, deepen, widen or straighten the stream, or cut a new channel for it in his own land, provided he allows the stream to pass off his land and upon the servient lands of lower proprietors substantially as before and without increasing the volume of water beyond the natural capacity of the stream. Pontifical College v. Kleeli, 5 Ohio N. P. (N. S.) 241.

cut into the same by breaking down the banks.[73] The fact that the cutting down of the banks could be prevented by a stone abutment will not authorize a continuance of such ditch, where the water of the stream is polluted by sewage and constituted a nuisance,[74] and might be enjoined.[75] One who diminishes the natural flow of a stream which supplies water power to operate a grist mill and thereby prevents the owner from operating it as fully as he might have otherwise done is liable to the mill owner for the diminished value of the use of the mill.[76]

§ 4. *Rights in lakes and ponds.*[See 6 C. L. 1848]—Under the statutes of New York a railroad company may condemn a right of way over a pond where the use of its waters by the owner is not thereby interfered with.[77] In Massachusetts great ponds belong to the state and it may deal with them in such manner as is authorized by law.[78] After a state has conveyed a great pond, it may reacquire title thereto by adverse possession.[79] A prescriptive right to maintain a pond may be acquired.[80]

§ 5. *Rights in subterranean and percolating waters.*[See 3 C. L. 2270]—Percolating waters are a part of the land and may be intercepted by an owner [81] provided in so doing he does not unreasonably injure the rights of others,[82] but a landowner has no

73, 74. Desberger v. University Heights Realty & Development Co. [Mo. App.] 102 SW 1060.

75. The fact that such nuisance would be a continuing one for which suits might be brought every day gives a court of equity jurisdiction in order to prevent multiplicity of suits. Evidence insufficient to show laches precluding relief. Desberger v. University Heights Realty & Development Co. [Mo. App.] 102 SW 1060.

76. If such diversion caused no injury, the mill owner could recover nothing. King v. Danville Board of Council [Ky.] 107 SW 1189. In an action by the owner of a grist mill for damages occasioned by the diversion of water from a stream which furnished the power to operate the mill, it is admissible to show that the value of the mill had been diminished from other causes. Id. Where a city diverted water from a stream above a mill and discharged it below the mill, it was liable for diversion of surface water which found its way into the stream through a sewer system though the amount of such water was slightly increased by the construction of streets and sidewalks. Stevens v. Worcester [Mass.] 81 NE 907. Where a city was authorized by statute to fix the boundaries of a brook and use it for sewer purposes and it increased the flow in the stream by means of reservoirs, it was not liable as to such increase where it diverted water from such brook which emptied into a stream and discharged it into the stream below a mill. Id.

77. Railroad Law 1892, p. 1386, c. 676, providing that waters commonly used for domestic agricultural, etc., purposes shall not be taken to such an extent as to interfere with such use, applies only where a railroad seeks to take water for its own use, and does not preclude condemnation of a right of way over a pond where the road is so constructed as not to interfere with the use of its waters by the owner. Erie & J. R. Co. v. Brown, 57 Misc. 164, 107 NYS 983.

78. St. 1869, p. 678, c. 384, § 8, providing that great ponds shall be public except as otherwise provided, did not forbid leases of such ponds under § 9. Attorney General v. Ellis [Mass.] 84 NE 430. Act of commissioners in leasing a great pond was an assertion of a right to do so. Id.

79. In determining whether a state acquired prescriptive title to a pond, the fact that it has been used by the public for sixty years for boating, fishing etc., may be considered with the fact that lessees of the state had held possession for twenty years. Attorney General v. Ellis [Mass.] 84 NE 430. That state's lessees of a great pond took possession under the lease and retained it for twenty years shows prima facie prescriptive title. Id.

80. Where a dam has been maintained for forty years, the pond being sufficient to float small craft, a drainage commission may not destroy it though the meandered limits of the river did not show the pond. In re Horicon Drainage Dist. [Wis.] 116 NW 12.

81. Hathorn v. Dr. Strong's Saratoga Springs Sanitarium, 56 Misc. 445, 106 NYS 553. One may sink on his own land such wells as he needs, though in doing so he causes wells of his neighbor to go dry, if he does not act maliciously. Long v. Louisville, etc., R. Co. [Ky.] 107 SW 203. Percolating waters may be developed and taken away from the land on which they flow if no injury is thereby done to adjacent lands. As where they would otherwise sink in the ground and be lost. Cohen v. La Canada Land & Water Co., 151 Cal. 680, 81 P 684. And where one owner for the purpose of collecting and carrying away such waters constructed a tunnel commencing on lands of an adjacent owner, the latter was not entitled to water which percolated into the tunnel on lands of the former. Id. An owner of land who establishes a street thereon owns the soil of the street subject to the public easement, and may enjoin the town from digging a well to strike a vein of mineral water which supplies a well on his own land for the purpose of supplying the water free to all, such act being a taking without compensation. Hamby v. Dawson Springs, 31 Ky. L. R. 814, 104 SW 259.

82. Where mineral springs had a common source and owners bore on their premises through underlying rock and diverted the

right to extract subterranean water in excess of his reasonable needs for the beneficial use of the land from which it is extracted,[83] consequently the statute enacted by the legislature of California prohibiting the waste of artesian water and making it an offense to do so is not unconstitutional.[84] An owner of land is entitled to the unrestricted use of springs thereon [85] and may enjoin the pollution thereof [86] or recover damages therefor,[87] but it has been held that there is no liability for pollution in the absence of negligence.[88] The pollution of springs furnishing water for a community is not a trivial matter.[89] One in possession of land may recover for wrongful pollution of a spring without proving title.[90]

§ 6. *Rights in tide waters.*[See 8 C. L. 2271]—Lands lying between the lines of the ordinary high and low tides and which are covered and uncovered successively by the ebb and flow thereof are tide lands.[91] Tide lands vest in the state by virtue of its

percolating waters by pumps, which caused the mineral spring of an adjacent owner to go dry, the operation of the pump may be enjoined. Hathorn v. Dr. Strong's Saratoga Springs Sanitarium, 55 Misc. 445, 106 NYS 553.

83. Ex parte Elam [Cal. App.] 91 P 811. One will not be permitted to decrease underground water which is essential to the existence of surface water and to the injury of those entitled to the surface water. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021. In a suit to restrain the taking of underground waters to the depletion of a stream, evidence held to require the court to ascertain whether the taking depleted the stream, to determine the amount of the decrease, and to enjoin the taking unless plaintiff was estopped to assert his rights. Id. To establish the right to an injunction to restrain the taking of water from an underground stream, the plaintiff is not required to prove the extent of his injury with absolute precision. Proof that the taking is wrongful, is of substantial quantity, and causes substantial injury, is sufficient. Id.

84. Does not violate the provision that all men have a right to acquire and possess property. Ex parte Elam [Cal. App.] 91 P 811. Such act is not special (Id.), nor discriminatory (Id.). Nor does it grant special privileges. Id.

85. On an issue as to whether the location of a cemetery in a certain place would pollute springs, it was not necessary to submit which spring would be polluted as the owner was entitled to the unrestricted use of all his springs. Elliott v. Ferguson [Tex. Civ. App.] 18 Tex. Ct. Rep. 858, 103 SW 453.

86. In a suit to enjoin location of a cemetery in a certain place, eviden ; held to show that the establishment of the cemetery as proposed would pollute the waters of a spring. Elliott v. Ferguson [Tex. Civ. App.] 18 Tex. Ct. Rep. 858, 105 SW 453.

87. A telegraph and telephone company which acquired a right of way over a farm is liable for destruction of a spring fed by percolating waters caused by negligence in blasting. Little v. American Tel. & T. Co. [Del.] 67 A 169. The measure of damages in such case is compensation for loss of the spring estimated in connection with the diminished value of the farm. Id.

88. One who buries the carcass of an animal on his own land is not liable if a spring on his neighbor's land is thereby polluted unless he knew that such result was likely to follow. Long v. Louisville, etc., R. Co. [Ky.] 107 SW 203. Whether he was negligent held for the jury. Id.

Note: The right to the purity of water coming to one's land, whether under or above ground, is a natural right. Goddard, Easements, 5th Ed. 96; Wood v. Waud (1849) 3 Exch. 748; Ballard v. Tomlinson (1885) L. R. 29 Ch. D. 115. This right cannot be assimilated to the right to the water itself, the same jurisdictions which allow the flow to be interrupted by an upper owner not allowing him to pollute it (Hodgkinson v. Ennor, (1863) 4 B. & S. 229; Ballard v. Tomlinson, (1885) L. R. 29 Ch. D. 115), and this in spite of the fact that the plaintiff has no property in the water when it is polluted (Womersley v. Church, (1867) 17 L. T. N. S. 190; Whaley v. Laing, (1857) 2 Hurl. & N. 476; Ballard v. Tomlinson, (1885) L. R. 29 Ch. D. 115). Some cases hold within the principal case that, in the absence of negligence, pollution is damnum absque injuria. Woodman v. Aborn, 35 Me. 271, 58 Am. Dec. 699; Dillon v. Acme Oil Co., 49 Hun [N. Y.] 565. Other cases deny liability if the pollution arises from acts done in a "suitable place." Upjohn v. Board of Health, 46 Mich. 542; Brown v. Illius, 25 Conn. 583. The weight of authority, however, is that the landowner must exclude filth entirely from his neighbor's land, any neglect to do so being actionable (Tenant v. Goldwin, 1 Salk. 360; Ballard v. Tomlinson, (1885) L. R. 29 Ch. D. 115. Haugh's Appeal, 102 Pa. 42, 48 Am. Rep. 193; Perrine v. Taylor, 43 N. J. Eq. 128), and the nuisance may be enjoined or abated if the injury is substantial (Iliff v. School Directors, 45 Ill. App. 419; Lowe v. Prospect Ass'n, 58 Neb. 94, 46 L. R. A. 237; Columbus Gas Co. v. Freeland, 12 Ohio St. 393, 400). The principal case is unsound in assimilating pollution to the appropriation of percolating water and so requiring negligence as a basis for liability, being supported neither by Kentucky decisions (Kinnaird v. Standard Oil Co., 89 Ky. 468, 25 Am. St. Rep. 545, 7 L. R. A. 451), nor by the weight of authority.—From 8 Columbia L. R. 329.

89. The principle that the balance of convenience and that an injunction should be refused if injury to plaintiff is slight compared to that of the defendant does not apply. Elliott v. Ferguson [Tex. Civ. App.] 18 Tex. Ct. Rep. 858, 103 SW 453.

90. Long v. Louisville, etc., R. Co. [Ky.] 107 SW 203.

91, 92, 93. People v. Kerber [Cal.] 93 P 878.

sovereignty [92] and cannot be acquired by private persons by adverse possession while devoted to public use.[93] But if the state abandons it and then holds as a proprietor, if limitations can run it will begin only from the date the public use ceased.[94]

§ 7. *Rights in artificial waters.*[See 4 C. L. 1881]

§ 8. *Ice.*[See 8 C. L. 2271]—The right to take ice from a lake is appurtenant to the ownership of the bank.[95]

§ 9. *Surface waters and drainage or reclamation.*[See 8 C. L. 2271]—Surface water includes water that has collected in basins or depressions which will not drain into the natural watercourse except by artificial means, and an upper proprietor has the right to make connections which will promote the drainage of such depressions, provided they are within the general watershed and the capacity of the stream is not thereby increased to such an extent as to substantially injure lower proprietors.[96] All ponds, sloughs, or lakes which are fed and maintained by surface waters do not necessarily retain their character as such and become subject to drainage.[97] The proper method for securing complete drainage for low and marshy lands where the natural outlet is not sufficient to carry off accumulated surface water is to deepen the outlet if such method is practicable.[98] The fact that an outlet is not owned or controlled by one whose lands are to be drained and that such party will be benefited more than another will be damaged does not justify him in cutting a ditch across a water shed and delivering the water into another course.[99] The right of the owner of a dominant estate to have the surface water flow from his land in its natural channel may be lost by prescription.[1] The right to maintain a ditch to carry off surface water may be acquired by prescription.[2] Unless it is the proximate cause of the over-

94. People v. Kerber [Cal.] 93 P 878. Establishment of a sea-wall line by San Diego harbor commissioners under Pol. Code, §§ 2587, 2588, held not an abandonment of tide lands between such line and the shore. Id. Under the constitution and statutes of California, so long as tide lands remain subject to navigation, they cannot be alienated by the state except for navigation purposes, and may not be acquired by adverse possession. Id.

95. In condemnation proceedings, compensation for such right was properly excluded from an award for pondage and milling rights. In re Daly, 108 NYS 635.

96. Pontifical College v. Kleeli, 5 Ohio N. P. (N. S.) 241. One may not complain of change of or acceleration in flow of surface waters caused by street improvements so long as area drained by stream is not enlarged. Richards v. Ann Arbor [Mich.] 115 NW 1047. Complaint alleging that a city by means of a sewer system collected surface water from a large area and conducted through a sewer, thereby causing premises to be flooded by waters diverted from their natural flow, held to state a cause of action. City of Garrett v. Winterich Co. [Ind. App.] 84 NE 1006.

97. Krupke v. Stockard [Minn.] 115 NW 175. Whether they become permanent bodies of water depends on the character of the reservoirs, the nature of the outlet, the topography of the country, and the length of time they have resisted the tendency to evaporate. Evidence sufficient to show that ponds were of a permanent character. Id.

98. Doctrine of Sheean v. Flynn, 59 Minn. 436, should not be applied where wet lands may reasonably be drained by deepening the natural outlet. Erhard v. Wagner [Minn.] 116 NW 577.

99. Evidence insufficient to justify digging of a ditch across a water shed. Erhard v. Wagner [Minn.] 116 NW 577.

1. Where a dominant owner has with the acquiescence of the servient owner diverted surface water from its natural channel for twenty years, reciprocal rights are acquired by limitations and the servient estate is released from the easement and the dominant owner may not restore the flow of surface water to its natural state. Broadwell Special Drainage Dist. No. 1 v. Lawrence, 231 Ill. 86, 83 NE 104. Where the owner of a servient estate repels the flow of surface water by barriers on the partition line with the knowledge of the dominant owner, for the limitation period the right of the latter to injunctive relief is barred. Thiessen v. Claussen [Iowa] 112 NW 545.

2. A railroad which maintained a culvert and ditch to carry surface water from its right of way to a natural watercourse for thirty years held to have acquired a right to maintain such ditch by prescription. Pyott v. State [Ind.] 83 NE 737. Where an owner had maintained for twenty years a ditch which carried water which collected in a sink hole on his land to a point on his land where it spread out and flowed onto the land of his neighbor, he could extend such ditch to the boundary and discharge such water on his neighbor's land in greater force, but in no greater volume than previously existed. Manteufel v. Wetzel [Wis.] 114 NW 91. Recovery from a city cannot be had by a landowner for damages caused by the flooding of his land with water from sewers constructed by the city, when such

flow, an action for damages will not lie for the building of an embankment across a ditch.[3]

*Comon-law rule.*See 8 C. L. 2271—At common law surface water is regarded as the common enemy of mankind and each owner may protect his land therefrom.[4] Surface waters may be diverted from its course and even thrown back onto the dominant estate,[5] but with certain qualifications.[6] The doctrine that the right may not be exercised, wantonly or unnecessarily, is a common-law as well as a civil law doctrine.[7]

*Civil law rule.*See 8 C. L. 2272—At civil law an owner has the right to have surface water flowing from his land follow its natural course.[8]

Railroad companies[9] in constructing their embankments must provide culverts to carry off the natural flow of surface water[10] and keep them open and in repair.[11] Failure to anticipate inundation by reason of the construction of railroad ditches and to protect his land against it does not bar recovery by landowner of damages for injury caused thereby,[12] but a grantee railroad is not liable for overflow caused by embankments constructed by its grantor unless it has received notice and an opportunity to correct the nuisance.[13]

right has been enjoyed by the city for the prescriptive period, and the damages are the natural consequences of the exercise of such right by the city. City of Norwalk v. Blatz, 9 Ohio C. C. (N. S.) 417. Where a railroad company had acquired a right by prescription to maintain a ditch across land for the purpose of conducting surface water from its right of way to a natural watercourse, it had a right to enter on the land of the owner to remove an obstruction from the ditch placed there by such owners. Pyott v. State [Ind.] 83 NE 737.

3. Ashley v. Fitzwilliams, 127 Ill. App. 291.

4. Under Hurd's Rev. St. 1905, c. 42, § 78, and at common law, the owner of a dominant estate may by ditches or drains collect surface waters falling on his land and conduct it into a natural channel, even though the quantity of water thereby cast onto the servient estate is increased. Broadwell Special Drainage Dist. No. 1 v. Lawrence, 231 Ill. 86, 83 NE 104. Evidence sufficient to show that in a state of nature land outside a drainage district was a dominant estate as to land within the district for the flowage of surface water. Id.

5. Chicago, etc., R. Co. v. Groves [Okl.] 93 P 755. Under Civ. Code 1902, §§ 1349, 1354, 1363, 1367, a county is not liable in damages where in digging ditches along a highway it drains surface water onto adjacent property. Heape v. Berkeley County [S. C.] 61 SE 203.

6. The exercise of such right must be reasonable, for proper purposes, in good faith, and with due care to inflict injury only when necessary. Chicago, etc., R. Co. v. Groves [Okl.] 93 P 755.

7. The class of cases based on the rule that no cause of action can arise for throwing back surface water onto the dominant estate is not supported by the weight of common-law authority. Chicago, etc., R. Co. v. Groves [Okl.] 93 P 755. The weight of both English and American authority is that one must use his own property with due regard to the rights of others. Id. In an action for damages alleged to have been caused by a ditch used by another in draining a pond, evidence held to show that the ditch was the cause of the injury. Jones v. Bower [Ky.] 105 SW 1189.

8. An adjacent owner has no right to interrupt such flow. Launstein v. Launstein, 150 Mich. 524, 14 Det. Leg. N. 773, 114 NW 383.

9. See 8 C. L. 2273. See, also, Railroads, 10 C. L. 1365.

10. Where negligence charged was that a railroad company dug a ditch along its track too small to carry off water which flowed into it, and that it became filled and that land was thereby flooded, plaintiff was not entitled to claim that defendant was negligent as a matter of law in failing to construct necessary culverts as required by statute. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589. In an action against a railroad company for injuries to land by obstruction of surface water, proof of plaintiff's possession of the land injured was sufficient proof of his title. Choctaw, etc., R. Co. v. Rice [Ind. T.] 104 SW 819. Under Mansf. Dig. § 566 (Ind. T. Ann. St. 1899, § 465q), a railroad company is not liable for causing by the construction of its road surface water to flow on land of another. Foreman v. Midland Valley R. Co. [Ind. T.] 104 SW 806. A railroad company liable for flooding land cannot escape liability by proving that other causes co-operated with its wrongful act. Blunck v. Chicago, etc., R. Co. [Iowa] 115 NW 1013.

11. Though a railroad ditch, as originally constructed, was sufficient to carry off water accumulating on the right of way if defendant increased the flow by raising the grade or permitting the culvert to become filled up, it would be liable for damages so caused. Galveston, etc., R. Co. v. Riggs [Tex. Civ. App.] 107 SW 589. Where negligence of a railroad in permitting its culverts to become filled up concurred with an unprecedented rainfall, the railroad would not be relieved from liability because of the character of the rainfall. Id.

12. Chicago, etc., R. Co. v. Stroud, 129 Ill. App. 348.

13. Tetherington v. St. Louis, etc., R. Co., 128 Ill. App. 139.

A landowner has no right to collect surface water in a body See 8 C. L. 2274 and cast it in undue quantities upon the land of another,[14] nor may he by artificial means drain sag holes on his land and thereby precipitate onto adjacent land a greater volume of water than would otherwise flow there,[15] and if he does the owner of the servient estate may protect his premises by dikes and ditches,[16] but an owner of a dominant estate may in the improvement of his land fill up sag holes therein, even though such improvement should cause surface waters arising from natural processes to flow onto the servient estate and incidently increase the flow.[17]

§ 10. *Lands under water.* See 8 C. L. 2275—The owner of tide flats has an estate in fee subject only to the public rights of fishing, fowling, and passing over them in boats.[18]

§ 11. *Levees, drainage, and reclamation.* See 8 C. L. 2275—A levee board has no right to appropriate soil of a private owner for the construction of a levee.[19] A levee district is not bound by the unauthorized acts of its officers.[20] Levee taxes may be enforced upon constructive service of notice on nonresident owners.[21] Under the statutes of Illinois, a landowner who has given his consent to the construction of a drainage ditch is estopped to deny the existence of a perpetual easement.[22] Congress has no jurisdiction as to the reclamation of arid lands within state limits.[23] Under the statutes of California a right of way acquired by a reclamation district is public property.[24] A conveyance of a right of way for the construction of a levee includes

14. It is not permissible for one to collect surface water in ditches and carry it through his own land and that of the next lower owner and allow it to ooze through and soak the land of another. Briscoe v. Parker, 145 N. C. 14, 58 SE 443. Such owner may sue for damages, not being restricted to proceedings under Revisal 1905, § 3983, for cutting a ditch. Id. A municipality may not collect water from a large area and by artificial means cast it upon land over or through which it would not otherwise flow. Doremus v. Patterson [N. J. Eq.] 69 A 225. Complaint against a town for collecting surface waters and permitting them to flood adjacent property held to state a cause of action. Incorporated Town of North Judson v. Lightcap [Ind. App.] 84 NE 519. A town graded streets and caused surface water to flow into another street where it was obstructed by grading thereof and flooded adjacent property. Held grading was negligently done and the town was liable. Id. The damming of a gutter along a street by embankment without providing egress for surface waters which it is known will collect is negligence for which the city is liable where water floods adjacent land. Id. A town which collects surface waters in a channel along a street and by obstructing the channel causes the water to flow onto adjacent property is liable for damages. Id.

15. Equity will enjoin one owner from draining by artificial means a sag hole on his land and thereby precipitating onto adjacent land water in a body and in greater volume than if the artificial courses had not been made. Page v. Huckins, 150 Mich. 103, 14 Det. Leg. N. 599, 113 NW 577.

16. If an owner of a dominant estate so diverts the natural flow of surface waters as to cast them onto the servient estate in another place or in greatly increased quantity, the owner of the servient estate may defend his premises by dikes or ditches. Thiessen v. Claussen [Iowa] 112 NW 545. One is justified in constructing a dam to prevent the wrongful diversion of water onto his land. Orcutt v. Woodard [Iowa] 113 NW 848.

17. Launstein v. Launstein, 150 Mich. 524, 14 Det. Leg. N. 773, 114 NW 383. Where the owner of a dominant estate rebuilt a culvert across a highway between his own land and the servient estate, the fact that it was larger than the original one did not increase the burden on the servient estate, it appearing that if flood waters did not pass through the culvert they would flow across the highway. Id.

18. Chase v. Cochran, 102 Me. 431, 67 A 320.

19. In an action for illegal appropriation of soil by a levee board who claimed the right to do so under succession of such right from the United States, evidence held not to show such succession. Board of Directors St. Francis Levee Dist. v. Hale [Ark.] 107 SW 190.

20. A levee district which quitclaims land found not to exist is not liable for purchase money under any unauthorized promise made by its secretary to the purchaser. Directors of St. Francis Levee Dist. v. Cottonwood Lumber Co. [Ark.] 110 SW 805.

21. Ballard v. Hunter, 204 U. S. 241, 51 Law Ed. 461.

22. At common law an easement for the maintenance of a drainage ditch could be obtained only by grant or prescription, but under Hurd's Rev. St. 1905, p. 832, a landowner who has given his consent to construction of a ditch across his land is estopped to deny existence of a perpetual easement. Funston v. Hoffman, 232 Ill. 360, 83 NE 917.

23. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law Ed. 956.

24. A levee constructed by a reclamation district on a right of way procured for that purpose is a part of the works which the

the right to enter upon the land and do the work in a skillful manner.[25] A statute authorizing the construction of a drainage ditch over the land of an adjacent proprietor is void as authorizing the taking of property for private use.[26] In some states the construction of drainage ditches is controlled by statute.[27]

§ 12. *Milling and power and other nonconsuming privileges; dams, canals, and races.* See 8 C. L. 2276—One who is entitled to a certain amount of water from a reservoir may use it in any manner he desires to do so.[28] The rights of flowage in one claiming under a grant rests in the terms of his grant.[29] The owner of a dam may not hold back the water to the injury of an upper proprietor.[30] An action to recover rent for a mill site and power privileges must be brought within the statutory period.[31] A conveyance of a mill site passes, as an appurtenant, flowage rights thereto attached [32] but none other.[33] The mere fact that the owner of a mill caused another person to purchase other land because at some future time he might need it for flowage purposes does not ipso facto create an easement in such property for that purpose though the mill owner paid for it.[34] Owners of land who are benefited by a

trustees are, under Pol. Code, § 3454, authorized to construct and is public property acquired for state purposes. Reclamation Dist. No. 551 v. Sacramento County Super. Ct., 151 Cal. 263, 90 P 545. Under Pol. Code, §§ 3454, 3471, authorizing trustees of a reclamation district to condemn rights of way, and Code Civ. Proc. § 1240, enumerating property which may be taken under the power of eminent domain, such right of way may be taken by a railroad company if the efficiency of the works will not be affected. Id.

25. A landowner who has granted a right of way over his premises for the construction of a levy cannot recover for injury to his land resulting from construction of the levy which was constructed in a skillful manner. Daniels v. Directors of St. Francis Levee Dist., 84 Ark. 333, 105 SW 578.

26. Ch. 191, p. 215, Gen. Laws 1907, providing for construction of ditches over lands of an adjacent owner by one seeking to drain his own lands, held to violate due process clause of the constitution, and also to permit condemnation of property for a private purpose. In re Schubert [Minn.] 114 NW 244.

27. Under Laws 1905, c. 230, p. 303, relative to public ditches, in establishing such ditch, if waters are to be diverted from their natural course, the ditch must follow the general direction of the course and terminate therein whenever practicable, otherwise there may be a departure from route of watercourse so far as is necessary. State v. Baxter [Minn.] 116 NW 646.

28. Where one was awarded the right to a certain amount of water collected in a reservoir by a dam for the operation of a grist mill, he was entitled to make such changes as were necessary to change the mill to an excelsior factory, which would not prevent the letting down of the amount of water which it had been previously determined represented the capacity of the reservoir. Hutchins v. Berry [N. H.] 66 A 1046. Where one was adjudged entitled to seventeen feet of water from a pond, a modification of the order so as to entitle a sawmill to draw down the water below the waste without limitation as to amount was erroneous as depriving him of his rights. Id.

29. In an action to enjoin the maintenance of a dam at a greater height than eighteen inches below the floor of plaintiff's penstock, evidence held to show defendant's dam was maintained several inches higher than his license granted him, and that the effect was to obstruct the operation of plaintiff's wheel. Kendrick v. Furman [Neb.] 115 NW 541. In an action by an upper owner for damages sustained by maintenance of a dam by a mill owner lower down, the judgment was held responsive to Cobbey's Ann. St. 1903, § 7316 (Mill dam Act), and therefore proper. O'Connor v. Fields [Neb.] 113 NW 528.

30. Where the state operating a dam unnecessarily raised the crest of it above high-water mark and the gate tender negligently permitted the water to rise above high-water mark and set back and destroy a wall, the rights of the owner of the wall were invaded. Fitzgerald v. State, 122 App. Div. 306, 106 NYS 620. A judgment prohibiting maintenance of a dam at a height that would cause a pond to extend at natural flow beyond a certain point is not void for indefiniteness. Meveigh v. International Paper Co., 109 NYS 574.

31. Where an owner permits another to occupy a mill site and power privileges without payment of rent, his right to recover rent was limited to two years prior to commencement of the action. Briggs v. Avary [Tex. Civ. App.] 20 Tex. Ct. Rep. 728, 106 SW 904.

32. Where land on which a mill is situated is sold, an easement in the pond above the mill to the extent that it was done at the time passes as an appurtenant. Latta v. Catawba Elec. & Power Co. [N. C.] 59 SE 1028. A covenant in a deed to a mill construed and held only to pass the right to construct dams in the river within boundaries of land conveyed. Id.

33. Where a power company gave a mortgage on its mill property and thereafter purchased other land and flowage rights, the mortgagee on foreclosure did not acquire an easement of flowage in this after-acquired land. Latta v. Catawba Elec. & Power Co. [N. C.] 59 SE 1028.

34. Where the mill owner sold his mill and water rights before he had used such

dam must share in the cost of its construction.[35] In some states mill owners are given certain rights in streams by statute.[36] Under the laws of Maine a mill owner on a stream has a right to maintain a dam on his own land and raise a head of water for the purpose of operating his mill and let it out in such quantities as is proper and reasonable for the operation of his mill,[37] but he may not hold water back when there is no need for it and let loose more than was reasonably necessary for the operation of his mill.[38] The Mill Act of Maine does not authorize a complaint for flowing lands below dam, and in an action at common law for doing so the question whether there was an unreasonable exercise of the mill owner's rights is for the jury.[39] A part owner of water power rights apportioned in different parcels to different persons in severalty need not, in a suit to restrain one using more water than he was entitled to, join prior grantees of other parcels as parties defendant, though it would be proper to do so.[40]

§ 13. *Irrigation and water supply; common-law rights and the doctrine of appropriation. A. Rights in the water.*[See 8 C. L. 2278]—At common law each riparian proprietor was entitled to the natural flow of the stream.[41] This right is a part and parcel of the land itself,[42] and a decree partitioning riparian lands and apportioning water rights does not alter its character.[43] Riparian rights are an incident of ownership and do not vest in a person until he acquires title.[44] There is no priority between the rights of riparian proprietors to the use of water of the stream.[45] Each riparian owner is entitled to reasonable use of the waters, and after rights of others are all supplied he may use their corresponding rights.[46] There is no such thing as prior riparian ownership so far as distribution of water for irrigating purposes between riparian owners is concerned.[47] The nature and extent of the right of a riparian owner cannot be measured by any fixed or definite rule, nor can the amount of water he is entitled to use be definitely fixed.[48] The doctrine of riparian rights and prior appropriation are not so antagonistic that they may not exist in the same

tract for flowage purposes, the deed did not pass an easement of flowage in such land. Latta v. Catawba Elec. & Power Co. [N. C.] 59 SE 1028.

35. Where owners of lands on both sides of a river were benefited by the construction of a new dam, and those on one side knew of and acquiesced in the project for its construction, held all owners on both sides were liable for their proportionate share of the cost of the dam. Loomis v. Loewenheim, 121 App. Div. 88, 105 NYS 735.

36. Under St. 1898, §§ 3374, 3377, 3402, authorizing construction of mill dams across non-navigable streams and providing a remedy by civil action for one whose land is flooded, provides an exclusive remedy and an action to abate a dam or enjoin its maintenance at an excessive height will not lie. Allaby v. Mauston Elec. Service Co. [Wis.] 116 NW 4.

37, 38. Barker v. French, 102 Me. 407, 67 A 308.

39. Barker v. French, 102 Me. 407, 67 A 308. One who had a power right held not to have waived any rights by acquiescence in using water power at night by another which use did not interfere with his day runs. Union Water Power Co. v. Libbey & Dingley Co., 102 Me. 439, 67 A 357.

40. Not necessary parties where, though evidence may involve examination into rights of such prior grantees, decree will not necessarily, even in form, pass upon their rights. Telulah Paper Co. v. Patten Paper Co. [Wis.] 112 NW 522.

41. See ante, § 3.

42. This right extends to an underground flow constituting part of the stream. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021.

43. Where the decree did not specifically dispose of underground waters, such water which is essential to the preservation of surface streams cannot be diminished. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021. Where lands riparian to a stream were partitioned and the waters apportioned without specifically disposing of the underground flow, held, in determining right to the underground flow, it must be treated as one stream and each party was entitled to his share except that no owner could diminish the surface stream to the injury of others. Id.

44. Under Laws 1889-90, p. 706, a mere squatter on public lands who subsequently sells or abandons his rights does not acquire riparian rights. Kendall v. Joyce [Wash.] 93 P 1091.

45, 46. Their rights are equal. Williams v. Altnow [Or.] 95 P 200.

47. Hough v. Porter [Or.] 95 P 732.

48. Depends on use by other proprietors. Williams v. Altnow [Or.] 95 P 200. A riparian owner has no title to water but only the right to reasonable use of it. Id.

locality,[49] and a settler upon a stream has an election to rely upon his rights as riparian owner or make an appropriation of water, but he cannot do both.[50] In many states, however, where water is required for irrigation purposes, this rule has been modified to meet the conditions.[51] Under this rule a riparian proprietor is not entitled to take water from a stream for use on land valueless for agricultural purposes,[52] nor is he entitled to take water from the stream and sell it.[53] The rights of proprietors to the water of a stream may be fixed by contract.[54] Right to use of waters for irrigation may be reserved in cession of lands.[55] A right to use the waters of a stream may be acquired by prescription.[56] Such rights cannot be acquired by permissive use,[57] nor by a use which does not work an injury to lower proprietors.[58] One who asserts a prescriptive right to use water has the burden to establish such right.[59]

49. See Crawford Co, v. Hathaway, 67 Neb. 325, 93 NW 781.

50. Williams v. Altnow [Or.] 95 P 200.

51. A riparian owner is entitled to the natural flow of the stream subject to reasonable use by other riparian owners. In an action to prevent diversion of a stream, a finding that plaintiff had irrigated his land from such stream for twenty-five years is immaterial. Huffner v. Sawday [Cal.] 94 P 424. A patentee of public land situated on a watercourse in a state where the common-law doctrine of riparian ownership prevails has a right to the natural flow of the stream, but such right does not accrue where state laws permit riparian owners to divert a reasonable amount of water to irrigate riparian land. City of Los Angeles v. Los Angeles Farming & Milling Co. [Cal.] 93 P 869.

52. Montecito Valley Water Co. v. Santa Barbara, 151 Cal. 377, 90 P 935.

53. Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 P 362.

54. Where by contract between two water companies one was entitled to but one-half the natural flow of a stream as it reached a dam, he had no right to waters saved by the other by impounding water above the dam and bringing it to the dam by pipe line, thus saving water which would be otherwise lost by seepage. Such water belongs to the person who develops it. Pomona Land & Water Co. v. San Antonio Water Co. [Cal.] 93 P 881. Where a contract provided that two water companies should divide the natural flow of a stream subject to the water right of another as established by a judgment, one of the companies could acquire such right without the limitations of such judgment. Id. Where riparian land was partitioned and water rights apportioned without specifically disposing of the underground flow and some of the parties at joint expense constructed a dam to intercept the underground flow, the rights of the parties to such water stated. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021. Under Civ. Code, §. 1462, covenants by a water company's predecessor held not to run with the land nor deprive it of the exclusive right to water saved and developed by it above the natural flow of a stream. Pomona Land & Water Co. v. San Antonio Water Co. [Cal.] 93 P 881.

55. Right to use waters of Milk river held reserved to Indians by agreement of May 1, 1888. Winters v. U. S., 28 S. Ct. 207.

56. Where one used a certain amount of water openly and notoriously for a purpose not authorized under his contract, he acquired a prescriptive right to so use it. Pomona Land & Water Co. v. San Antonio Water Co. [Cal.] 93 P 881. Under the statutes of Montana, adverse user of a water right of ten years ripens into title. State v. Quantic [Mont.] 94 P 491. One may establish a right to use water of a stream during one part of the year and another may acquire the right to use it during the remainder of the season. Gardner v. Wright [Or.] 91 P 286. Where one had for more than twenty years exercised his right each year to construct a temporary dam in the main channel of a river and to divert from such river a certain amount of water, he acquired a prescriptive right though others clandestinely at various times had forcibly destroyed the works. Brattain v. Conn [Or.] 91 P 458. Occupation of mill site and water power privilege held not adverse where occupancy begun under a lease. Briggs v. Avary [Tex. Civ. App.] 20 Tex. Ct. Rep. 728, 106 SW 904. Where one had taken water from a stream for several years for irrigating purposes when the supply permitted it, the fact that for several seasons the stream had been dry for a longer time each year than usual did not destroy the continuity of the use or deprive him of the right to use the amount formerly diverted if the stream should again furnish it. Huffner v. Sawday [Cal.] 94 P 424. Where in an action to prevent diversion of water from a stream it appeared that the bed of the stream was dry for sereval months during the year and that when water commenced to flow it took some time for it to reach plaintiff's land, a diversion would postpone the time required and result in injury. Id. B. & C. Comp. § 4, expressly provides that one cannot maintain an action to determine water rights unless he or his predecessors had been in complete control within ten years. Gardner v. Wright [Or.] 91 P 286.

57. A prescriptive right cannot be acquired by taking water under permission from the owner. Watts v. Spencer [Or.] 94 P 39.

58. Where in a contest between riparian owners as to their right to waters of a creek it appeared that though an upper owner had diverted a miner's inch of water, there was always water flowing down the creek, the court properly found that the upper owner had not acquired an adverse right to all the water of the creek. Gutierrez v. Wege, 151 Cal. 587, 91 P 395. One who is

An appropriation See 8 C. L. 2279 consists in the construction of appropriate ditches,[60] the conducting of water through such ditches to the place of intended application,[61] and the application of the water to a beneficial use [62] within a reasonable time.

What may be appropriated. See 8 C. L. 2279—As a general rule, all waters not subject to prior appropriation may be appropriated,[63] but water which is subject to vested rights in another,[64] or which is reserved by the government for special uses, may not be.[65] Necessity is not the sole measure of right to unappropriated subterranean waters.[66] The rights of an appropriator are not affected by the interstate character of the stream.[67]

Method of appropriating. See 8 C. L. 2280—An appropriation may be made by either the common-law or statutory method.[68] A diversion of water not applied to a bene-

granted a right to use water for a certain purpose may acquire a prescriptive right to use it for an enlarged purpose. Gurnsey v. Antelope Creek & Red Bluff Water Co. [Cal. App.] 92 P 326.

59. This burden is met by proof of continuous use as owner for the statutory period. Gurnsey v. Antelope Creek & Red Bluff Water Co. [Cal. App.] 92 P 326. Evidence sufficient to establish a prescriptive right to water. Id.

60. The right to use waters of a public stream for irrigation purposes depends on the construction of appropriate ditches. Gates v. Settlers' Mill., Canal & Reservoir Co. [Okl.] 91 P 856.

61, 62. Gates v. Settlers' Mill., Canal & Reservoir Co. [Okl.] 91 P 856.

63. Evidence insufficient to establish a prior appropriation. Watts v. Spencer [Or.] 94 P 39. Under Rev. St. § 2339, so long as land belongs to the United States as part of the public domain, the water flowing over it in non-navigable streams is subject to appropriation for recognized uses, and the mere fact that the stream borders at some point on a territory reserved for particular governmental purpose will not destroy the public character of its waters, which remain subject to appropriation the same as if the reservation had not been created. United States v. Conrad Inv. Co., 156 F 123. In an action involving alleged appropriation of water from springs, evidence held to show that the pools were not springs but nothing more than a bog caused by seepage water. Dickey v. Maddux [Wash.] 93 P 1090. There was no authority for the appropriation of such water prior to 1891, if at all. Id.

64. An Indian reservation on public lands is property of the United States within the rule that as owner of land bordering on a non-navigable stream it is entitled to the continued flow of the waters of such stream so far as is necessary for the beneficial use of the property. United States v. Conrad Inv. Co., 156 F 123. The action of the secretary of the interior in approving maps for the location of irrigation canals over public lands, as provided by 26 Stat. 1101, 1102, does not give companies constructing the same any right to appropriate waters of a stream nor estop the United States from asserting a prior right thereto. Id.

65. The creation of an Indian reservation on public lands bordering on a non-navigable stream operates as a reservation of so much of the water of the stream as may be required for use on the reservation for the benefit of the Indians. Any surplus, however, remains subject to appropriation by others. United States v. Conrad Inv. Co., 156 F 123. Under Act May 1, 1888, 25 Stat. 113-129, creating the Blackfeet Indian Reservation, held that the creation of such reservation operated to reserve so much of the waters of Birch Creek as was necessary for use by the Indians, and so long as the government was administering the affairs of the Indians it had a right to determine the quantity of water required. Id. Ball. Ann. Codes & St. § 4156, providing that a portion of the water of non-navigable streams or lakes shall be reserved for use of property abutting thereon, is not inconsistent with Act Cong. March 3, 1877, reserving such water to the appropriation and use of the public. State v. Spokane County Super. Ct. [Wash.] 91 P 968.

66. The fact that one has never taken more than he required for irrigation does not entitle him to such amount. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021.

67. Appropriator in Wyoming of waters from a stream having its source in Montana. Bean v. Morris [C. C. A.] 159 F 651.

68. One who diverts water from a stream and applies it to a beneficial use within a reasonable time makes an appropriation. Williams v. Altnow [Or.] 95 P 200. Where one in 1890 diverted all the waters of a creek and used the same for three years when a second person diverted the water and used it for a time, knowing and admitting that there was insufficient water to supply both, held the first appropriator was entitled to all the water necessary for the irrigation of his land, and the subsequent appropriator had only the right to use the excess. Wellington v. Beck [Colo.] 95 P 297. One who asserts a prescriptive right under a statute but has never complied with its requirements may not invoke it in support of his claim. Dickey v. Maddux [Wash.] 93 P 1090. Act Wyo. Ter. March 11, 1886, prescribing method of statutory appropriation, held not to prescribe an exclusive method but only to take from one who failed to file the required notice the right to claim prior to the time water was applied to the land. Bean v. Morris [C. C. A.] 159 F 651.

ficial use is not an appropriation.[69] What constitutes a reasonable time within which water must be applied to a beneficial use depends on the facts of each particular case.[70] An appropriation may be made by a ditch over vacant public land.[71] An appropriation from one river may be made by a ditch from it to another river, letting it flow down that river and diverting it therefrom.[72] Under the doctrine of "relation back," as between two persons digging ditches at the same time and prosecuting the work with reasonable diligence, the one who began work first had the prior right, though the other completed his ditch first.[73] One who settles on public lands and commences to divert water from a stream for domestic and irrigation purposes and applies it to a beneficial use and subsequently acquires a patent, his rights to the water relate back to the date of appropriation.[74]

Right to supply from water companies. See 8 C. L. 2281—The rights of parties under a contract for water supply for irrigation purposes rests in the terms of their contract.[75] The contract right of a landowner with a canal company to have water from its ditch for irrigation of his land for a term of years is a servitude on the canal and an appurtenance to the land.[76] Under the statutes of Colorado a canal company must construct a head gate for use of a consumer, however small, if it is not practicable for him to obtain his water supply through a headgate used by other consumers.[77] Where the owner of the land leased it and covenanted to supply water, such owner is the real party in interest and entitled to sue for failure of the ditch company to furnish water.[78]

Limit, measure and extent of appropriation. See 8 C. L. 2282—The rights of an ap-

69. Town of Sterling v. Pawnee Ditch Extension Co. [Colo.] 94 P 339. Filing requisite plates and notices of a water appropriation with the clerk, commencement of canal, and actual diversion of water, creates merely an inchoate right, unless the water is applied to beneficial use. Conley v. Dyer [Colo.] 95 P 304. One who files a notice that he claims a certain amount of water from a certain stream but does not divert and apply it to beneficial uses within a reasonable time acquires no rights. Kendall v. Joyce [Wash.] 93 P 1091. Laws 1891, p. 327, relative to posing of notice, does not alter this rule. Id. The fact that an original irrigation canal was decreed a priority over a continuation thereof does not give a consumer from the original canal priority over a consumer from the continuation who made prior beneficial use of the water. O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 P 849. In an action to declare rights of consumers from an original canal superior to those of consumers from an extension of such canal, evidence held insufficient to show a prior beneficial use of water by consumers from the original canal. Id. To constitute an appropriation there must be not only a diversion and carrying to the place of use but there must be a beneficial application, and the measure of the appropriation depends to some extent on the amount beneficially applied. Woods v. Sargent [Colo.] 95 P 932.

70. Conley v. Dyer [Colo.] 95 P 304.

71, 72. Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 P 862.

73. Wright v. Cruse [Mont.] 95 P 370. Where one appropriated water in Wyoming from a stream having its sources in Crow Reservation, Montana, the appropriation attached eo instante on the reservation being thrown open for settlement. Bean v. Morris [C. C. A.] 159 F 651.

74. Kendall v. Joyce [Wash.] 93 P 1091.

75. Const. 1879, art. 14, declaring use of waters appropriated for sale, rental, or distribution to be a public use subject to state regulation, does not prevent a landowner acquiring and attaching to his land a permanent water right. In the absence of exercise of the power conferred on county supervisors to control and regulate waters outside of cities, the terms of the contract for furnishing water for irrigation control the rights of the parties. Stanislaus Water Co. v. Bachman [Cal.] 93 P 858.

76. Though acquired subsequent to a mortgage, it is real estate and passes on sale under foreclosure. Stanislaus Water Co. v. Bachman [Cal.] 93 P 858. A contract between a canal company and a landowner to furnish water to him, his heirs and assigns for a term of years, held more than a mere personal covenant, but on agreement for the sale of real property binding on the successor in title of the company's plant. Id. Where the by-laws of a water company provided that water should be supplied to land to be used thereon, held the right to receive water for use on the land was an easement appurtenant within, Civ. Code, §§ 552, 801, defining rights of purchasers to use water for irrigation. Graham v. Pasadena Land & Water Co. [Cal.] 93 P 498.

77. Downey v. Twin Lakes Land & Water Co. [Colo.] 92 P 946. Owner of water right held entitled to a head gate constructed at the expense of the company where he could not obtain water through a head gate used by other consumers. Id.

78. Farmer's High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290.

propriator depend on the amount of his appropriation [79] and the amount he can apply to beneficial purposes.[80] The right to an appropriation for domestic purposes does not depend on the locus of its use for such purpose.[81] An appropriator must exercise his rights with due regard to the rights of others,[82] and must use reasonable care to prevent waste by seepage and evaporation while the water is being carried to the place of use.[83] An appropriator from a stream has no right to the use of a surplus as against subsequent claimants.[84] It is presumed that waters of a tributary stream less evaporation, if not interfered with, will reach the main stream either by surface or subterranean flow.[85] One whose water supply has ceased is not entitled to use the supply of another.[86] The measure of the rights, duties, and liabilities of the ditch company and water consumers is fixed by statutes and contract and not by rules of the company.[87] The rights of consumers of water from an original canal and an extension thereof, where different appropriations were made for the original and for the extension, are governed by their contracts with the irrigation company.[88] The right to water appropriated by a person is a property right [89] and may be dealt with as such.[90] The owner of a water right may store his water during the irrigating sea-

79. A person began irrigation ditch and drew water from a stream. He subsequently abandoned the land and another took possession and used water in the ditch by the construction of certain laterals. Held the latter person having made no appropriation from the stream and having acquired no rights by deed from the former, his right to water was measured by the quantity he diverted from the ditch by laterals and applied to a beneficial use before another appropriated water from the stream. Tubbs v. Roberts [Colo.] 92 P 220. Where one claimed that his grantor had appropriated water and deeded the same to him and sought to enjoin interferences with his rights, his right was limited to the amount appropriated by his grantor and he could not enjoin interference with the excess. Berry v. Equitable Gold Min. Co. [Nev.] 91 P 537. Under Desert Land Act 19, Stat. 377, providing for appropriation of water for irrigation, an appropriation made on a pre-emption claim purchased by an appropriator held to entitle the appropriator to sufficient water to irrigate both the pre-emption claim and desert land claim. Williams v. Altnow [Or.] 95 P 200.

80. Where one entitled to use waters of a stream has between 60 and 70 acres of land, including an orchard, it may be assumed that 60 inches of water is ample for his use. Gardner v. Wright [Or.] 91 P 286. Any certain number of inches of water awarded under a 6 inch pressure is to be determined on a basis of what is termed as "second feet" or the quantity flowing by a certain point in a given time. Id.

81. May be diverted by one not a riparian owner. Town of Sterling v. Pawnee Ditch Extension Co. [Colo.] 94 P 339.

82. Where a lower riparian owner has the right to use waters of a stream subject to use of a specified quantity by an upper owner, when water is not required by one it should be at the disposal of the other. Gardner v. Wright [Or.] 91 P 286. After the needs of a prior appropriator as measured by his original appropriation have been supplied, or when the water is not required or used by him, he must permit it to flow down to subsequent claimants as it is wont to flow. Williams v. Altnow [Or.] 95 P 200.

83. Town of Sterling v. Pawnee Ditch Extension Co. [Colo.] 94 P 339.

84. Williams v. Altnow [Or.] 95 P 200.

85. A junior appropriator who seeks to appropriate from a tributory on the ground that a prior appropriator on the main stream will not be injured has the burden to prove that he will not be injured. Petterson v. Payne [Colo.] 95 P 301.

86. Such fact is relevant only to show that appropriations of the supply of another was not from a wanton desire to injure them. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021.

87. Downey v. Twin Lakes Land & Water Co. [Colo.] 92 P 946.

88. Where after the extension was made the consumers under the original surrendered their contracts and took new ones, he latter fixed their rights, though the appropriation for the original canal was prior to the appropriation for the extension. O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 P 849. If consumers from the original canal had any superior rights under their first contracts, they were waived by entering into new contracts. Id.

89. Rights to use water for beneficial purposes are property within a constitutional provision relative to eminent domain. Town of Sterling v. Pawnee Ditch Extension Co. [Colo.] 94 P 339. Mills' Ann. St. § 4403, authorizing a town to condemn water for domestic purposes, does not authorize the taking of water previously appropriated without compensation. Id. Ball. Ann. Codes & St. § 4156, defining the extent to which water rights may be condemned, precludes the condemnation of the right of a littoral proprietor to take so much of the water as he requires for irrigating lands under cultivation or which he intends soon to cultivate. State v. Spokane County Super. Ct. [Wash.] 91 P 968.

90. Mill's Ann. St. Rev. Supp. § 2273c, providing for the exchange and loan of waters between owners of irrigation ditches taking water from the same stream, held to permit an exchange only when vested rights of

son, and use it later in the season for irrigation of crops requiring it at that time.[91] The right to change the point of diversion, or place of use, of water obtained by appropriation, is an incident of ownership which exists independent of statute.[92] In a proceeding to change point of diversion from an irrigation ditch, it is no defense that consumers in another district who are not parties would be injured.[93] It is not the duty of a water commissioner to make any division or distribution of water between users thereof from the same ditch, and he has no authority to interfere with the internal management of affairs of a ditch company,[94] but it is his duty to turn into a ditch, under decree, water necessary for the use of the consumers from such ditch, and to refuse to turn water into a ditch for the use of any one not entitled to it.[95] Double duty cannot be imposed on water rights evidenced by shares of stock in a ditch company.[96]

The right of appropriation may be lost only by abandonment or adverse possession,[97] the elements of which must be clearly established.[98] Mere nonuser of water does not show an abandonment,[99] but if continued for a long period of years it may be sufficient.[1] There must be an intent to abandon.[2] One who asserts an abandonment of an adjudicated priority has the burden to prove it.[3]

other appropriators would not be injured, and not a violation of Const. art. 16, § 6, declaring that the right to divert unappropriated waters shall never be denied. Bowman v. Virdin [Colo.] 90 P 506. A complaint to enjoin the interference with rights of one who had borrowed, which fails to allege that the water could be used without impairing vested rights of other appropriators, is fatally defective. Id. A priority to the use of water is a property right which is subject to purchase and sale, and its character and method of use may be changed provided rights of others are not injured. Seven Lakes Reservoir Co. v. New Loveland & Greeley Irr. & L. Co. [Colo.] 93 P 485. A water company may appropriate water from a stream for the purposes of sale, and in such case the appropriation belongs to it with a perpetual right vested in consumers which can be defeated only by their failure to pay water rates and comply with lawful requirements relative to its use. Farmers Cooperative Ditch Co. v. Riverside Irr. Dist. [Idaho] 94 P 761.

91. Seven Lakes Reservoir Co. v. New Loveland & Greeley Irr. & L. Co. [Colo.] 93 P 485.

92. Lower Latham Ditch Co. v. Bijou Irrigation Co. [Colo.] 93 P 483. Sess. Laws 1899, p. 235, providing for change of point of diversion, is remedial only, one of its objects being to prevent multiplicity of suits and require all persons affected to be joined. Id. Prior to the passage of such statute the owner of a water right might sue one respondent alone and have his right to a charge determined as against him alone. Id. Under Sess. Laws 1899, p. 235, providing for change in point of diversion from a ditch, the district court has jurisdiction to decree a change of such point from one district to another. Id. A prior appropriator may change his point of diversion or place of use so long as he does not prejudice rights of subsequent claimants. Williams v. Altnow [Or.] 95 P 200.

93. Lower Latham Ditch Co. v. Bijou Irrigation Co. [Colo.] 93 P 483.

94. Cache La Poudre Irrigating Ditch Co. v. Hawley [Colo.] 95 P 317.

95. Cache La Poudre Irrigating Ditch Co. v. Hawley [Colo.] 95 P 317. Where the right of a reservoir company to priorities of a ditch company depended on ownership of stock in the ditch company, the water commissioner in denying this ownership based his action on legal ground, and in refusing to turn water in such ditch for their use committed no tort. Id.

96. A contract which has the effect of imposing such duty is void. Cache La Poudre Irrigating Ditch Co. v. Hawley [Colo.] 95 P 317.

97. See 8 C. L. 2285. The term "abandonment" is applicable only to completed appropriations, and not where because of failure to apply the water to a beneficial use a fixed right was never acquired. Conley v. Dyer [Colo.] 95 P 304.

98. Nonuser alone, short of the period of limitations, is insufficient to show abandonment. Evidence insufficient to show abandonment. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112. Evidence of nonuser and similar acts before a decree is competent on an issue of abandonment to show intent not to use what was decreed where there is sufficient evidence of nonuser subsequent to the decree. Id.

99. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112; Norfolk, etc., R. Co. v. Obenshain [Va.] 59 SE 604. Mere nonuser or mere lapse of time is not sufficient to establish the same. Edgemont Imp. Co. v. N. S. Tubbs Sheep Co. [S. D.] 115 NW 1130.

1. Inchoate rights to the waters of a stream may be abandoned by failure for several years to perfect them. Gardner v. Wright [Or.] 91 P 286.

2. Watts v. Spencer [Or.] 94 P 39. Facts showing an intention to abandon must appear. In re Daly, 108 NYS 635. Right to use, raise, and lower waters of a lake running a mill not lost where the right was leased for twenty years to a city, though the city did not use it and the mill was allowed to get out of repair and for several

Adverse user for the statutory period establishes the claim,[4] but an adverse right cannot grow out of mere permissive user [5] or one which is not continuous and uninterrupted.[6] No adverse user can be initiated until the owner is deprived of his use in such manner as to notify him that his rights are invaded.[7]

(§ 13) *B. Rights in ditches and canals.*[See 8 C. L. 2285]—The perpetual right of a party and his heirs and assigns to have water for his land carried through a certain ditch is an easement appurtenant to the land in whosesoever hands it may be.[8] The right to maintain ditches over land of another rests in the terms of a grant [9] or exists by virtue of statute.[10] Such right may be acquired by prescription.[11] A covenant running with the easement in favor of land whereby the owners of a ditch are required to furnish water for owners of land is personal and a burden on owners of the

years paid no rent. Id. A transaction which fails as a sale cannot be converted into an abandonment. Watts v. Spencer [Or.] 94 P 39. There cannot be an abandonment to a certain person for a consideration. Id. The fact that a landowner having an easement in a ditch entitling him to water uses some other method of conveying water to his land for a time did not constitute an abandonment thereof. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290. A parol sale of land and an appurtenant water right is not an abandonment of the water right. Watts v. Spencer [Or.] 94 P 39.

3. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112. One who claims that another has lost by abandonment his right to use all or a portion of his decreed priorities in an irrigation ditch has the burden to prove the amount of water actually abandoned. O'Brien v. King [Colo.] 92 P 945.

4. Gardner v. Wright [Or.] 91 P 286. Evidence sufficient to establish a prescriptive right to use on one tract of land water from a ditch across another tract. Anaheim Union Water Co. v. Ashcroft [Cal.] 94 P 613. Evidence held not to show a continuous use of water for five years necessary to give a prescriptive right. Id. Use of water through a ditch of such character as to indicate that the same is being used in hostility to the right of any person to interfere with its exercise is a sufficient claim of right to ripen in prescriptive right. Id. Where the grantee of a water right permits the statutory period to elapse without regaining control of water rights which he has permitted his grantor to invade, title revests in the grantor. Gardner v. Wright [Or.] 91 P 286. Where one granted full use of a stream, that he afterwards openly used the water on land above under notices posted, with general knowledge thereof in the vicinity, while not sufficient to establish ownership, indicated adverse user against the grantee. Id. Limitations commenced to run if the intention to hold adversely was accompanied by acts of diversion sufficient to indicate his purpose. Id. Where an upper owner granted full use of the waters of a stream to sustain title to water which he claimed to have subsequently acquired by adverse user, he could show that he intended to convey no more than the surplus water. Id.

5. But the burden of proving that such use was permissive is on one seeking to defeat the claim. Gardner v. Wright [Or.] 91 P 286.

6. In a suit to determine water rights where defense was adverse user, the plaintiff may not avail himself of an interruption of defendant's use by one not a party. Gardner v. Wright [Or.] 91 P 286. Adverse use of waters may be defeated by proof that use during the irrigation season for the statutory period was not continuous or that such use did not interfere with plaintiff's rights. Id.

7. Watts v. Spencer [Or.] 94 P 39. A claim to a water right by adverse user is inconsistent with a claim that use results in no injury to the owner. Id.

8. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290.

9. Under Civ. Code, § 806, providing that terms of a servitude are determined by the terms of a grant or user by which it was acquired, where owners of lots abutting on a street before it was established as such gave a ditch right of way in the street, and a ditch already there was taken possession of and used, the grant as to the size of the ditch became fixed and it could not be enlarged nor its course changed. Kern Island Irr. Co. v. Bakersfield, 151 Cal. 403, 90 P 1052. Under this statute where one acquired a right by user to conduct water across a highway, his right was limited to a continuance of the use in the manner and to the extent which it had been enjoyed. Colegrove Water Co. v. Hollywood, 151 Cal. 425, 90 P 1053.

10. Under Act Cong. Aug. 30, 1890, c. 837, there was reserved by the United States a right to construct canals and ditches over all lands patented by it west of the 100th meridian. Green v. Wilhite [Idaho] 93 P 971. This right was perpetually reserved without reference to the time of construction. Id.

11. Where one had been in open and continuous possession of land for the statutory period and had maintained a pipe line over it for that period under a void deed, another to establish title must show that such possession was permissive. Knight v. Cohen [Cal. App.] 93 P 396. The fact that the one in possession brought condemnation proceedings to enlarge the pipe line does not estop him from asserting a prescriptive right. Id. Where the construction of a ditch in a street was unlawful and created an obstruction, the user of such ditch for a year created no prescriptive right to continue to maintain it. Kern Island Irr. Co. v. Bakersfield, 151 Cal. 403, 90 P 1052.

ditch.[12] Where seepage from an irrigation ditch injures the property of another, the ditch owner is liable only in case of negligence.[13] The fact that a municipality uses water that it conveys to place of use through a ditch across a field of another does not of itself authorize the municipality to maintain action against the owner of the land to perpetually enjoin him from allowing cattle to graze along the ditch or wade therein.[14] In such case the primary duty of protecting the water from contamination or fencing the ditch rests on the city as owner of the easement.[15]

(§ 13) *C. Remedies and procedure.*[See 8 C. L. 2287]—A bill in equity will lie to quiet title to a water right[16] or to determine rights of claimants to use of water of a stream,[17] and equity will grant an injunction to protect a water right appurtenant to land held under an equitable title.[18] A ditch company may maintain an action to protect rights of consumers without joining such consumers as plaintiffs.[19] In Colorado the district court has jurisdiction to determine priorities of appropriators from public streams.[20] In a proceeding to determine priorities as between users of water, all persons having rights should be joined.[21]

In pleading an appropriation, acts constituting such appropriation must be alleged.[22] A complaint to determine water rights by reason of an appropriation need plead only ultimate and not evidential facts.[23] A complaint to quiet title to appro-

12. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290.

13. Fleming v. Lockwood [Mont.] 92 P 962. In an action to recover damages caused by water escaping from a waste ditch and flooding lands, evidence sufficient to sustain judgment for plaintiff. Shurtliff v. Extension Ditch Co. [Idaho] 94 P 574.

14, 15. City of Bellevue v. Daly [Idaho] 94 P 1036.

16. Complaint under Mill's Ann. Code, c. 22, held sufficient though not setting up facts constituting a valid appropriation. Kimball v. Northern Colorado Irr. Co. [Colo.] 94 P 333.

17. Complaint alleging that defendants had been awarded a certain amount of water contingent on their devoting it to a beneficial use within a reasonable time, but that seventeen years had passed and defendants had made use of but a small portion of such award, and that plaintiffs had used the flow of the stream for many years, and that defendants were threatening to use their apportionment, held to state a cause for equitable relief. Conley v. Dyer [Colo.] 95 P 304. Interference by prior appropriators of a dam belonging to junior appropriators properly enjoined where it appeared that plaintiffs had not diverted any water to which defendants were entitled. Fuller v. Sharp [Utah] 94 P 813.

18. Watts v. Spencer [Or.] 94 P 39. One whose water supply is depleted by his neighbor boring wells and pumping underground water may enjoin such wrongful act, and is not limited to his remedy for damages. Facts held to warrant injunction. Verdugo Canon Water Co. v. Verdugo [Cal.] 93 P 1021. Acts of upper riparian owners in maintaining dam and reservoirs for storing water held to threaten injury to lower owners and to entitle them to equitable relief and to have rights adjudicated. Williams v. Altnow [Or.] 95 P 200.

19. Town of Sterling v. Pawnee Ditch Extension Co. [Colo.] 94 P 339.

20. Under Const. art. 6, § 11, the district court in Colorado has jurisdiction to determine claims to priorities in the appropriation of water from public streams. Kerr v. Burns [Colo.] 93 P 1120.

21. In an action to restrain maintenance of a dam and reservoir and settle rights of different riparian owners, all persons having rights in the stream should be joined, and the fact that some not injured were made plaintiffs and some who had not interfered were made defendants is immaterial. Williams v. Altnow [Or.] 95 P 200. Where diversion of water from a stream or any of its branches affects the interests of several persons, all are interested and may join as plaintiffs to secure protection of their rights. Hough v. Porter [Or.] 95 P 732. In a suit between appropriators from a stream to determine priorities, the users of water from a canal that has appropriated water for the purpose of sale **are not indispensable parties,** and a decree is valid as between parties to the action. Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist. [Idaho] 94 P 761.

22. Complaint to quiet title should state what volume of water reaches consumers under the ditch, distance it is carried, area of land, when applied, and volume actually consumed for the purpose for which it was appropriated. Town of Sterling v. Pawnee Ditch Extension Co. [Colo.] 94 P 339. Complaint to determine rights in a stream held sufficient under B. & C. Code, § 394, providing that any person may be made defendant who claims an interest or is a necessary party to the complete determination of rights involved. Hough v. Porter [Or.] 95 P 732.

23. Wutchumna Water Co. v. Pogue, 151 Cal. 105, 90 P 362. To authorize an award to one as a riparian owner of the right to take water from a stream, in an action by a lower appropriator against an upper one to determine the rights of the parties, such owner must plead his riparian rights, the amount of riparian land, and amount of water necessary to irrigate the same. Id.

priations need not allege matters of defense.[24] A complaint for flooding caused by negligence in operating a headgate must specifically allege the acts of negligence relied upon.[25] One suing to determine water rights in a stream has the burden to prove all elements essential to prior appropriations.[26] The admissibility of evidence is governed by the general rules.[27]

Where a senior seeks to enjoin a junior appropriator of water from diverting the same to the injury of the former and the junior seeks to avoid the same on the ground that if his use is restrained the senior will derive no benefit, such defense must be clearly established.[28] The proceeding to sell land for irrigation assessments is statutory.[29] In Colorado the question of abandonment cannot be determined in a proceeding to change the point of diversion.[30]

A decree determining water rights should fix the rights of the parties as nearly as possible [31] and confers no greater rights than are awarded by it.[32] A decree awarding water rights, allowing appropriators water proportionately as they increased their irrigable land, and providing that the user of additional water should be made with reasonable diligence, vested in the appropriators only an inchoate right, which became fixed only on application to beneficial use.[33] The decree should conform to the

24. That the defendant had not the right to appropriate, etc. Town of Sterling v. Pawnee Ditch Extension Co. [Colo.] 94 P 339.

25. Complaint held sufficiently specific. Dennis v. Crocker-Huffman Land & Water Co. [Cal. App.] 91 P 425.

26. Gardner v. Wright [Or.] 91 P 286. Evidence held to show that defendant's appropriation was prior. Id.

27. In an action by a later appropriator to restrain a prior appropriator from cutting off the water, it is permissible to show that the prior appropriator had relinquished his rights to the latter where the pleading bases the right upon absolute right to the use of the water. Wellington v. Beck [Colo.] 95 P 297. In adjudicating water rights in a water district, a court may not determine the amount of the appropriation of each individual, but, in an action to determine the respective rights of owners of a ditch, evidence taken before a referee in the prior proceeding held admissible. Woods v. Sargent [Colo.] 95 P 932. The fact that defendant in an action to determine rights of owners of an irrigation ditch was not a party to a prior proceeding wherein the ditch was awarded on appropriation held not to affect admissibility of his testimony taken before a referee in such prior proceeding. Id.

28. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112.

29. Sale of land under St. 1887, p. 44, for irrigation district assessment, held not void because made on two separate assessments and the amount of each was not stated in the notice or deed. Best v. Wohlford [Cal.] 94 P 98.

30. Sess. Laws 1899, p. 235, providing for changes in point of diversion where priorities have been adjudicated, does not contamplate a determination of the question of abandonment, and it is presumed until otherwise adjudicated that such rights continue to exist. Lower Latham Ditch Co. v. Bijou Irr. Co. [Colo.] 93 P 483.

31. Where a person is entitled to water developed and saved by him above the natural flow of a stream, the court must determine with such exactness as is possible how much water is saved and developed. Pomona Land & Water Co. v. San Antonio Water Co. [Cal.] 93 P 881. Where there are conflicting claims for priority in the use of waters, the court, in an application for injunction, may make equitable distribution of the waters according to the priority of claimants and the quantity each has by his labor and diligence acquired the right to divert. Gates v. Settlers' Milling, Canal & Reservoir Co. [Okl.] 91 P 856. Where a creek rose from a spring on the land of one and flowed onto the land of an adjoining owner where it was absorbed and the former had never diverted more than one miner's inch of water and only owned a few acres of land, while the latter owned a large tract, a decree awarding the former one inch and also dividing the balance between them held proper. Gutierrez v. Wege, 151 Cal. 587, 91 P 395. Where in a suit to determine water rights it was found that an upper owner was depriving a lower one of a certain amount of water, the court properly required him to deliver such amount into the lower owner's pipe line instead of allowing him to discharge it into a stream where it would be lost by percolation and evaporation. Montecito Valley Water Co. v. Santa Barbara, 151 Cal. 377, 90 P 935. In an action by a riparian owner to restrain maintenance of a dam and reservoir by an upper owner where the evidence showed that he was entitled to relief against impounding the water in reservoirs, but did not show that the dam could not be maintained without prejudice to him, a decree would be entered according to rights established. Williams v. Altnow [Or.] 95 P 200.

32. Where one claimed only a certain amount of water of a stream for irrigation of his land, a judgment awarding him that amount without showing for what purpose it might be used did not entitle him to transport it beyond the watershed for other purposes. Pomona Land & Water Co. v. San Antonio Water Co. [Cal.] 93 P 881.

33. Conley v. Dyer [Colo.] 95 P 304.

pleadings [34] and findings.[35] Impossible relief should not be decreed.[36] Where parties to a proceeding to determine water rights fix such rights by agreement and agree to a decree pursuant thereto, the court must frame its decree in accordance with such agreement.[37] If such agreement does not express the intention of the parties, the remedy is by action to correct the agreement, and not by prayer for a decree to correspond to the intention.[38] A priority decree adjudicating a certain amount of water to a particular canal does not determine the rights of consumers except incidentally as against other canal owners, nor does it attempt to attach priorities to any particular lands,[39] but such decree is res adjudicata as to all questions determined by it.[40] Such decree confers no new rights, but is merely evidence of existing ones,[41] and may be sufficient to indicate a new right if acted upon for a considerable period.[42] In Colorado a priority decree must be assailed within four years.[43] In construing a decree, the surrounding conditions are to be considered.[44]

In Idaho where the court orders a survey by the state engineer and the preparation of maps, the cost thereof is properly charged to the parties litigant in proportion to their interest.[45]

§ 14. *Irrigation districts and irrigation and power companies.* See 8 C. L. 2289—Under the statutes of Nebraska, land already under a ditch of sufficient capacity to

34. A decree attempting to adjudicate rights not within issues joined is erroneous. Conley v. Dyer [Colo.] 95 P 304. Where a prescriptive right is asserted, a decree adjudging a right by appropriation is not technically correct. State v. Quantic [Mont.] 94 P 491. If rights of consumers were dependent on individual diversions and beneficial use, their priorities could not be determined in a suit by some of the consumers from the original canal against the present owners of the entire canal and certain consumers from the extension to have rights of all consumers from the original declared superior to those from the extension since pleadings were not applicable and proper parties were not before the court. O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 P 849.

35. In an action to determine water rights, where a prescriptive right to water for a certain use was established, but there was no finding as to plaintiff's right to water for other purposes, a decree that he was entitled to water for such purposes was unwarranted. Gurnsey v. Antelope Creek & Red Bluff Water Co. [Cal. App.] 92 P 326.

36. In mandamus to compel a ditch company to transfer shares of stock and deliver water during the irrigation season of a certain year, a judgment awarding the writ rendered after the expiration of the irrigation season is erroneous, it being impossible. Agricultural Ditch Co. v. Rollins [Colo.] 93 P 1125.

37, 38. People's Ditch Co. v. Fresno Canal & Irr. Co. [Cal.] 92 P 77.

39. O'Neil v. Ft. Lyon Canal Co., 39 Colo. 487, 90 P 849.

40. All questions determined by a decree adjudicating priorities are res adjudicata in a subsequent proceeding to enjoin the taking of more water than one is entitled to under one of his priorities. Kerr v. Burns [Colo.] 93 P 1120. A statutory decree establishing priorities is res adjudicata as to the volume of water awarded in a particular ditch and is not subject to collateral attack. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112 The volume of the priority awarded a ditch in adjudication proceedings is res adjudicata, and none of the facts upon which the award is predicated can be inquired into in a collateral proceeding. O'Brien v. King [Colo.] 92 P 945.

41. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112.

42. If continued for a considerable period, coupled with acts indicating an intention on the part of the owner not to repossess himself of the right, it may be sufficient. Alamosa Creek Canal Co. v. Nelson [Colo.] 93 P 1112.

43. Mill's Ann. St. §§ 2434, 2435, prescribing a four-year limitation for claiming contrary to the effect of a final decree adjudicating priorities in a water district, bars an action after such period though the parties were not joined in the original proceeding, but their rights had been determined in separate proceeding. Ft. Lyon Canal Co. v. Arkansas Valley Sugar Beet & Irr. Land Co., 39 Colo. 332, 90 P 1023. Such statute does not deprive one of property without due process. Id.

44. Decree in an action to determine the respective rights of parties to the use of waters of a river and certain sloughs construed and held to entitle one to exclude waters of the river from entering a slough and passing to land of another during a certain portion of the year. Hartson v. Dill, 151 Cal. 137, 90 P 530. In construing such decree, it was proper to consider customs existing in the locality prior to its enactment. Id.

45. Where the court under Sess. Laws 1903, p. 250, orders a survey by the state engineer of ditches and canals diverting water from a stream and of irrigable lands thereunder and the making of maps, the cost thereof is properly charged to the litigants in proportion to water used, and it is unnecessary in such case to file a cost bill. Farmers' Co-Operative Ditch Co. v. Riverside Irr. Dist. [Idaho] 94 P 761. Rev. St. 1887, § 4912, providing for filing of cost bill, does not apply to such expenditure. Id.

irrigate it may be excluded from an irrigation district which is being created.[48] In California if the board of directors of an irrigation company refuse to levy an assessment to pay interest on bonds, it may be levied by the county supervisors,[47] in which case the expenses of the levy are properly included.[48] Mandamus is properly awarded to compel the supervisors to make the assessment, though the petitioner's demand was represented by a judgment against it on its bonds.[49] A judgment awarding the writ was not erroneous because it made no provision for other creditors.[50] The legality of the formation of an irrigation district and the proposed issue of bonds for the purchase and construction of a canal system are not affected by the fact that the canal system may water lands outside the district.[51]

§ 15. *Water companies and water supply districts. Water companies.* See 8 C. L. 2290—Corporations engaged in supplying water for public use cannot, without legislative sanction, transfer the entire property devoted to such use and the business of carrying it on,[52] but where a water company as authorized by statute transfers its property and franchise as a whole, such transfer does not relieve the franchise or property held under it from any liability.[53] A consumer who is not prejudiced may not enjoin the transfer of its system by a water company.[54] A water company may not, without

46. Comp. St. 1903, §§ 6522, 6529, providing means by which land may be excluded from an irrigation district, do not apply where land is at the time of organization of a district under a ditch already constructed of sufficient capacity to water it. State v. Several Parcels of Land [Neb.] 114 NW 283. The provision of Comp. St. 1903, § 1, art. 8, c. 93a, that where ditches have been constructed before the passage of this act of sufficient capacity to water the lands thereunder such ditches, franchises, and lands shall be exempt from the operation of this act, is for the benefit and protection of the landowner, as well as for the owner of the ditch Id. In the organization of an irrigation district, the judgment of the county board as to matters committed to it by the statute for its consideration may not be collaterally attacked. But the question whether land is under a ditch already constructed of sufficient capacity to water the same is not left to the adjudication of the county board. Comp. St. 1903, art. 3, c. 93a, expressly exempts such lands from the operation of the law. Id.

47. Under Laws 1897, p. 267, providing that if board of directors of an irrigation district refuse to levy an assessment to pay interest on bonds the supervisors of the county shall cause an assessment to be made where in mandamus to compel the supervisors to levy an assessment it appeared that all the land in the district was in such county, the petition was not bad because not alleging that the office of the irrigation district was in such county. Nevada Nat. Bk. v. Kern County Sup'rs, 5 Cal. App. 638, 91 P 122. This statute authorizing levy by the board of supervisors does not violate Const. Art. 11, § 12, declaring that the legislature shall have no power to impose taxes upon counties, etc., but may by general laws vest in corporate authorities power to levy and collect taxes. Id. Where the assessment is levied by the county supervisors, they need not make several assessments for each year, but may make one assessment for the aggregate amount due in successive years. Id.

48. In such case where levy is made by the supervisors, the expenses of the levy are properly included therein. Nevada Nat. Bk. v. Kern County Supr's, 5 Cal. App. 638, 91 P 122.

49, 50. Nevada Nat. Bk. v. Kern County Sup'rs, 5 Cal. App. 638, 91 P 122.

51. Settlers' Irr. Dist. v. Settlers' Canal Co. [Idaho] 94 P 829. Where an irrigation district has been organized in accordance with law and has voted to issue bonds for the construction of a canal system, the fact that such system will supply water to lands outside the district does not render said district or the proposed issue of bonds illegal. Id. Where bonds have been authorized by the electors of the district and benefits accruing from the works are apportioned, and the district and its officers have acted wholly with reference to land within the district, the validity of the bonds is not affected by the fact that the system furnishes water to outside lands. Id.

52. Civ. Code, § 361a, confers on a water company power to convey its property, franchise, and business as a whole. City of South Pasadena v. Pasadena Land & Water Co. [Cal.] 93 P 490. The right resulting from the laying of mains in streets is a species of real property properly designated as a franchise and is transferable under this statute. Id.

53. Such transfer is not prohibited by Const. art. 12, § 10, prohibiting the legislature from passing laws authorizing the transfer of any franchise so as to release it or the property held under it from liabilities of the grantor. City of South Pasadena v. Pasadena Land & Water Co. [Ca.] 93 P 490. Persons to whose use water is appropriated or dedicated by a water company engaged in supplying water for public use are vested under Const. art. 14, § 1, and Civ. Code, §§ 549-552, with the right to have the supply continued by whoever controls the corporation, which right may be enforced by mandamus. Id. Graham v. Pasadena Land & Water Co. [Cal.] 93 P 498.

54. Where a water company bound to supply water to land as an easement ap-

the consent of proper authorities, lay its mains in the streets.[55] The consent of a town to the laying of pipes in the streets where given without limitation as to period of continuance is not limited to work done within a reasonable time after consent is given and cannot afterwards be limited by the courts.[56] A general designation of all streets in a consent to a water company to lay pipes is equivalent to a designation of each and every street by name.[57] A water company does not exhaust its right to condemn land by a single exercise of the power of eminent domain.[58] It is the duty of a water company to construct its mains and laterals [59] and to supply water to property owners who placed pipes and fixtures in his buildings.[60] A consumer from a private pipe acquires no greater rights when such pipe is purchased by a water company.[61] Where a city has a monopoly on the right to furnish its inhabitants with water, a water company whose conduits are laid in the streets of such city cannot, without its consent, furnish water to such residents,[62] and such right does not exist under the laws of New York,[63] but such company was held to have a right to supply water to a railroad company on whose right of way its mains were laid.[64] The threat-

purtenant sought to transfer its water system subject to the rights of water consumers, a consumer could not enjoin such transfer on the ground that it would deprive him of his rights.

55. Under Gen. St. p. 2199, §§ 2, 12, relative to filing with the secretary of state, consent by corporate authorities of a town to be supplied, to the incorporation of a water company, and the consent of the town to the laying of pipes in the streets, the latter consent may be given at the same time as consent to incorporation. Woodbridge Tp. v. Middlesex Water Co. [N. J. Eq.] 68 A 464. A consent to lay pipes in streets is not illegal because given before the corporation was created by filing the organization certificate, since the consent to incorporation being given solely for the purpose of the filing takes effect only on filing and the consent to lay pipes also takes effect upon the filing. Id.

56, 57. Woodbridge Tp. v. Middlesex Water Co. [N. J. Eq.] 68 A 464.

58. May in subsequent condemnation proceedings acquire additional land reasonably required for extension or enlargement of plant necessary to enable it to discharge duty of furnishing public adequate supply of water. Keller v. Riverton Consol. Water Co., 34 Pa. Super. Ct. 301.

59. All the mains and laterals of a water system within the franchise limit belong to the company owning the franchise, and it is the duty of the company to construct the same at its own expense and connect with the pipes of the property owner at the line of his property and the limit of its franchise. Bothwell v. Consumers' Co., 13 Idaho, 568, 92 P 533.

60. Where a property owner improves his property and places water pipes and fixtures therein and tenders the water company the monthly rental, it is the duty of the company to make the necessary taps and connections and furnish water. Bothwell v. Consumers' Co., 13 Idaho, 568, 92 P 533.

61. A property owner on a street was supplied with water by a private main in that street, but service being bad he, with other residents, petitioned a water company to extend its mains along another street. The water company later purchased the private main. Petitioners for the extension paid the cost of connecting with the extension, but the plaintiff refused to do so and insisted that the company supply him with water through the old main. Held that since the plaintiff could not have compelled the former owner of the main, who was not a public service corporation, to furnish him water, and he having joined in the petition for extension, he could not compel the water company to do so. State v. Hillyard Water Co. [Wash.] 94 P 1080.

62. Laws 1903, p. 1226, c. 553, giving the city of Rochester a monopoly of the right to furnish water to its residents, prevents a private company maintaining conduits through the city from furnishing water to the residents of the city without the consent of the city of Rochester. City of Rochester v. Rochester & Lake Ontario Water Co., 189 N. Y. 323, 82 NE 154. A private water company which piped water from Lake Ontario through the city of Rochester to other cities beyond has not such a private property in the water as authorized it to furnish water to residents of Rochester along the line of its conduits without the consent of the city. Id.

63. Transportation Corporations Laws, § 82, authorizing water companies to lay pipes through streets of an adjoining city or town where the company has a permit to furnish water, does not authorize a company to sell water in a town where it has not a permit, though it is authorized to use the streets of such town to lay pipes in. City of Rochester v. Rochester & Lake Ontario Water Co., 189 N. Y. 323, 82 NE 154. Transportation Corporations Laws, § 81, requiring water companies to furnish water to residents of towns through which its mains pass, etc., does not authorize a company having mains through a city which has a monopoly on the right to supply water to its citizens to furnish water to them without the consent of the city. Id.

64. A water company which was authorized to maintain mains through a city for the purpose of supplying other towns, laid its mains on the right-of-way of a railroad company which was authorized by Laws 1890, p. 1086, to acquire a necessary water supply. Held the water company could

ened forfeiture of the contract right of a water company to maintain a dam may be enjoined.[65]

The state corporation commission of Virginia has no jurisdiction of a controversy between two water companies resulting from their laying mains in the same streets.[66]

Water franchises.[See 8 C. L. 2291]—A franchise requiring a certain pressure at a certain hydrant is not violated by a change in the system which reduces the pressure but furnishes an adequate supply.[67] An exclusive franchise to furnish water for a certain period is not violated by an ordinance which directs the purchase of the plant or the construction of another, the city having an option to purchase.[68] Where the language of an ordinance granting a waterworks franchise is ambiguous and reasonably susceptible of two constructions, the construction most favorable to the public should be adopted.[69] The grant by a city to a waterworks company of the exclusive right to the use of its streets and public places for the purpose of constructing a waterworks system does not prevent the city itself from using the street for such purpose.[70]

Water boards and districts.[See 8 C. L. 2292]—Water departments are created by statute.[71] When the meaning of a warrant for the meeting of a water district is unmistakable, it is sufficient though not in technical form.[72]

Public ownership.[See 8 C. L. 2292]—The power of a city to establish and maintain a waterworks system is statutory,[73] and in exercising such power the statutes must be

without the consent of the city, supply the railroad company water for use within the city under private contract. City of Rochester v. Rochester & Lake Ontario Water Co., 189 N. Y. 323, 82 NE 154.

65. Where a city threatens to declare a forfeiture of the contract right of a water company to maintain a dam. Eau Claire Dells Imp. Co. v. Eau Claire [Wis.] 115 NW 155.

66. Code 1904, §§ 1294b, 1313a, and Const. art. 12, § 156, does not confer on the state corporation commission jurisdiction of a controversy between two water companies resulting from one of them laying mains in streets occupied by the other. Newport News Light & Water Co. v. Peninsula Pure Water Co. [Va.] 59 SE 1099.

67. A franchise requiring a specified pressure at a certain hydrant is not violated where, with the consent of the city, the system is changed from a pumping to a gravity system, and the pressure was thereby reduced, but it appeared that the present system furnished abundant and a better supply. City of Denver v. Denver Union Water Co. [Colo.] 91 P 918.

68. Where a waterworks company had an exclusive franchise to maintain and operate waterworks in a city until 1915, the city reserving the right to purchase the plant on paying agreed or appraised value, the fact that in 1906 the city passed an ordinance directing the finance committee to take proceedings to purchase the plant or construct another did not show an intention to violate the franchise. Selma Water Co. v. Selma, 154 F 138.

69. Mitchell v. Tulsa Water, L., H. & P. Co. [Okl.] 95 P 961. In absence of express provision to that effect, exclusive grant to water company does not prevent city itself from supplying water. Rogers Park Water Co. v. Chicago, 131 Ill. App. 35. The grant of a franchise to construct and maintain a waterworks system made by a village prior to its annexation to a city does not, in the absence of express stipulation, exclude the annexing city from supplying water from its own mains within the limits formerly comprehended by such village. Id. Where village subsequently annexed granted exclusive privilege to water company, such grant in absence of express provision does not prevent city from itself supplying water. Id.

70. Mitchell v. Tulsa Water, L., H. & P. Co. [Okl.] 95 P 961. An ordinance granting the exclusive right to maintain and operate waterworks held not to grant the exclusive use of the streets for such purpose. Id.

71. Act May 23, 1889, art. 12, § 2, providing for the establishment of water departments in cities of the third class, is not mandatory, and does not repeal Local Act March 21, 1865, creating a water department for the city of Reading. Commonwealth v. Heller [Pa.] 67 A 925. Act May 23, 1889, art. 12, § 2, allowing any city of the third class owning a waterworks to create a department of water, is not void as special legislation because the city of Earle, owning waterworks, was excluded. Commonwealth v. Heller [Pa.] 67 A 925.

72. Warrant calling meeting of inhabitants of the proposed water district under Sp. Laws 1907, pp. 741-747, c. 424, held valid. Kittery Water Dist. v. Agamenticus Water Co. [Me.] 67 A 631.

73. Act March 17, 1897, amended by Sess. Laws 1905, p. 300, authorizing cities to acquire and operate waterworks and other public utilities, is not unconstitutional as embracing more than one subject. Aylmore v. Seattle [Wash.] 92 P 932. Under Ky. St. 1903, § 3058, empowering a city to provide

complied with.[74] Where a city has a right under the franchise of a water company to purchase its plant at the expiration of certain intervals, the fact that preliminary proceedings are once instituted does not exhaust the power of the city,[75] and in such case it was no objection to proceedings for appraisement to enable the city to exercise its option that the city had no funds and the creation of a debt would exceed its constitutional debt limit.[76] A city which is authorized to establish and maintain a system of waterworks is authorized to acquire by purchase an existing system constructed by private persons under authority from the city.[77] The grant to a city of power to provide water supply for its inhabitants carries with it power to perform acts incidental thereto.[78] Where a city with power to do so acquires the property and franchise of a water company, it does so subject to the obligation of the company to furnish water, which obligation the city must perform.[79] The remedy to compel the city to furnish water is by mandamus and not injunction.[80] A city which takes over the system of a waterworks company is liable for purchases made for its maintenance.[81] In the ab-

itself with water, the city has power to provide and maintain a waterworks system. Commonwealth v. Covington [Ky.] 107 SW 231. Under Gen. St. p. 2210, § 405, the city of Millville has power to contract with a water company for a supply of water and include in such contract an option to acquire the entire plant from the water company. Livermore v. Millville [N. J. Err. & App.] 67 A 605. Act Cong. May 19, 1902, c. 816, authorizing cities and towns in Indian Territory to issue bonds for construction of waterworks, does not conflict with Mansf. Dig. Ark. c. 29, § 775. Mitchell v. Tulsa Water, L., H. & P. Co. [Okl.] 95 P 961.

74. Act March 17, 1897, amended by Act March 11, 1905, requires, where a city desires to construct public works, it shall provide therefor by ordinance, specifying the system adopted, the estimated cost, etc., and submit the same to the voters for ratification. Held, where the entire scheme of a plan to construct additional waterworks was not submitted, statute was not complied with. Aylmore v. Seattle [Wash.] 92 P 932. Where the law empowering a city to acquire the system of a water company does not require that the purchase, when made, shall be approved by voters, it is immaterial so far as the purchase is concerned, whether voters, on being asked to vote for issuance of bonds to buy the system, were informed that the system was burdened with the duty of supplying water to individuals, and collateral inquiry by persons not taxpayers into the validity of the purchase cannot be made on that ground nor on the ground that bonds issued were void. Orcutt v. Pasadena Land & Water Co. [Cal.] 93 P 497.

75. Where a city ordinance granting a franchise for the establishment of a waterworks system provided that the city should be entitled to purchase, the same five years after completion of the same and at intervals of five years thereafter, the fact that the city at the end of one of such intervals instituted preliminary proceeding to purchase did not exhaust its power to institute new proceeding at the expiration of another interval. Eau Claire Water Co. v. Eau Claire [Wis.] 112 NW 458. Where a city was authorized to purchase an existing waterworks system at the expiration of any five-year interval, and after proceeding to purchase had been instituted but not consummated, an adjustment of differences was made by which the company agreed to extend its works, such agreement did not operate as a waiver of the right of the city to purchase at the expiration of the current interval. Id. Where a charter provision of water company giving the city the option to purchase the plant at five-year intervals, held the city was not bound to decide whether it would purchase until value had been appraised, and that notice served on the company to appoint appraisers four months before the expiration of the current five-year period was not premature. Id.

76, 77. Eau Claire Water Co. v. Eau Claire [Wis.] 112 NW 458.

78. Under St. 1891, p. 102, St. 1901, pp. 888-890, and St. 1905, pp. 1019, 1021, authorizing a city to maintain waterworks, etc., it has power to acquire and carry out a system outside the city, so far as necessary to accomplish its purpose of supplying its inhabitants. City of South Pasadena v. Pasadena Land & Water Co. [Cal.] 93 P 490. The mere grant of power to a city to provide a water supply for its inhabitants gives it power for that purpose to acquire water supplies without the city, it being incidental. Id. Where a city with power to acquire a waterworks system to supply its inhabitants with water purchases the plant of a water company, and as incident to this power the city has power to furnish water to others, the city is a "corporation duly incorporated" within Const. art. 11, § 19, providing that in any city where there are no municipal waterworks any such corporation may lay mains, etc. Id. The supplying of water by a city to outside territory when incidental to its main purpose of supplying water to its inhabitants is a "municipal affair" within a constitutional provision that "except as to municipal affairs" charters of cities shall be controlled by general laws. As to municipal affairs the charter of the city prevails over general legislation. Id.

79. City of South Pasadena v. Pasadena Land & Water Co. [Cal.] 93 P 490.

80. Orcutt v. Pasadena Land & Water Co. [Cal.] 93 P 497. Petition for injunction to enjoin a city from furnishing waters to outside consumers held insufficient. Id.

81. A city which takes over a waterworks

sence of charter authority, a city has no power to contract to furnish one not a resident of its territory water for use outside its territory.[82] A statute authorizing a city to take private property for its waterworks system contemplates that it shall pay therefor,[83] but a riparian owner who consents to the taking by a city of land and water rights for water supply purposes can neither obtain damages nor an injunction.[84] In the taking of property for waterworks purposes, statutes must be complied with.[85] The question of purchase or extension of a waterworks system is discretionary with the city council[86] and is not subject to judicial review.[87] A resolution of a city council to acquire the plant of a water company, provided the purchase price was fixed at a sum agreeable to the city, is, the water company assenting, a valid resolution.[88] The option of a city to acquire the plant of a waterworks company, at a price to be fixed by commissioners to be appointed by the parties, fixes in the statutory sense the terms upon which the plant is to be acquired.[89] A city issuing bonds to pay for a waterworks system has power to agree with the purchaser as to the time of payment.[90] A borough which undertakes to furnish water for its inhabitants acts in a private and not in a governmental capacity,[91] though in Kentucky it is held that a city is a political subdivision of a state and is given power to maintain a waterworks system for the comfort, health, and safety of its inhabitants,[92] and if a city waterworks system be of a governmental and public nature,[93] the fact that water rents are paid by con-

system as authorized by statute is, while it operates the same, liable for purchases made for its maintenance. Improvement Dist. No. 1 v. Brown [Ark.] 109 SW 1010.

82. Sayles' Ann. Civ. St. 1897, art. 418, does not confer such authority. City of Paris v. Sturgeon [Tex. App.] 110 SW 459.

83. A statute authorizing a city to take and hold land and privileges necessary for construction of a waterworks system and to purchase the same, and when it cannot agree with the owners, have damages fixed by appraisers, contemplates that compensation shall be made for land and privileges taken, and water may not be diverted from a stream without the consent of a riparian owner unless he is paid at least nominal damages. Beckerle v. Danbury [Conn.] 67 A 371.

84. Beckerle v. Danbury [Conn.] 67 A 371. A complaint to restrain a threatened increased diversion, but not alleging that such increase will work an irreparable injury, does not state facts warranting an injunction. Id.

85. Under St. 1905, p. 60, c. 91, § 2, providing that no source of water supply for domestic purposes shall be taken by a town without the consent of the board of health, a taking of land for water supply is not valid in the absence of such consent. Dorr v. Sharon [Mass.] 84 NE 446. "Land for holding such water" in St. 1883, p. 469, authorizing a company to take and hold water of designated streams and all lands necessary "for holding and preserving such water," means land for a reservoir. Id. Words "land for preserving such water" as used in St. 1883, p. 469, c. 177, authorizing water company to whose rights a town succeeded, to take certain waters, held to mean land for the preservation of such water as the company or town was authorized to or had acquired. Id. A water company chartered under Act May 16, 1889 (P. L. 226), amending Act April 29, 1874 (P. L. 74), has right of eminent domain. Jacobs v. Clearview Water Supply Co. [Pa.] 69 A 870.

86. Where a city maintains a waterworks system, the question of the extension of such system must be left to the sound discretion of the city authorities. Crouch v. McKinney [Tex. Civ. App.] 104 SW 518.

87. A taxpayer cannot sue to enjoin enforcement of an ordinance relinquishing the city's right to purchase. Brummitt v. Ogden Waterworks Co. [Utah] 93 P 828.

88. Livermore v. Millville [N. J. Err. & App.] 67 A 605.

90. Under Act March 17, 1897, amended by Act March 11, 1905, a city issuing bonds to pay for an additional waterworks system has power to agree with a contemplated purchaser of the bonds as to the time of payment. Aylmore v. Seattle [Wash.] 92 P 932.

91. Carlisle Gas & Water Co. v. Carlisle Borough, 218 Pa. 554, 67 A 844. A borough which purchases stock in a corporation organized to supply its inhabitants with water may sell such stock unless prohibited by statute. Id. A city which maintains a waterworks system for the purpose of supplying its inhabitants with water does not do so in its governmental capacity. It is liable for a personal injury resulting from its negligences in maintaining its system. Brown v. Salt Lake City [Utah] 93 P 570. A city which acquires the franchise and property of a water company with power to fix rates and control the manner of laying pipes acts in a proprietary capacity in carrying on the obligations of the water company and is under the obligations and possesses the rights posssessed by the company. City of South Pasadena v. Pasadena Land & Water Co. [Cal.] 93 P 490.

92. Commonwealth v. Covington [Ky.] 107 SW 231.

93. Exempt from taxation under Const. § 170, providing that property used for public purposes is exempt. Commonwealth v. Covington [Ky.] 107 SW 231.

sumers does not change its public character.[94] Revenue derived from a city waterworks system may be devoted to such purposes as the city sees fit,[95] and is not a trust fund for the payment of water bonds.[96]

Contracts for public supply See 8 C. L. 2294 are governed by the laws in effect at the time they were executed.[97] Like other contracts they must be based on a consideration,[98] and are subject to modification.[99] The general rules of construction apply.[1]

§ 16. *Water service and rates.* See 8 C. L. 2295—The power to assess and collect water rents in cities is vested in the directors of public service, and the manner in which they exercise this power is not subject to the control of the city council.[2] Authority in a city to provide a waterworks system authorizes the making of a thirty-year contract therefor which cannot be impaired.[3]

Rules and regulations of service. See 8 C. L. 2296—It is a valid regulation to require that meters be installed in certain classes of buildings.[4] A city council is empowered to fix rules and regulations for the use of water by consumers, and such rules having been provided it is the duty of the board of public service to apply them.[5]

94. Commonwealth v. Covington [Ky.] 107 SW 231. The fact that the reservoir, pumping station, and a part of the mains lie outside the municipality and in another county, and that the city may incidentally derive some revenue from persons living outside the city, does not alter its public character. Id. The sale of water by a city to its inhabitants is for a public purpose and the profits are for the benefit of the city in its public and not in its private capacity. Id. The surplus of the proceeds of a municipal waterworks system remaining after expenses of such system have been paid are current funds which the city may divert to other needs. Crouch v. McKinney [Tex. Civ. App.] 104 SW 578.

95. Fall River Ordinance November 4, § 1907, requiring water rents to be paid into the general fund of the city and expenses of the department by general appropriations, held not contrary to public policy of the state. Sinclair v. Brightman [Mass.] 84 NE 453. Power of city of Fall River to regulate and control receipts from water rents under St. 1871, p. 514, c. 133, § 17, not exhausted by original ordinance requiring rents to be kept in a special fund, and applied to payment of water bonds and expenses of water department. Id. A taxpayer being under no obligation to take city water, an ordinance requiring payment of water rates into a general fund and for payment of expenses of the water department and water bonds by general appropriations, did not create unequal taxation. Id.

96. Under St. 1871, p. 514, c. 133, §§ 16, 17, the fund raised by the city of Fall River from water rents were not trust funds for payment of water bonds. Sinclair v. Brightman [Mass.] 84 NE 453. St. 1902, p. 310, c. 393, § 23, held not to deprive city council of Fall River of power to make appropriations for expenses of water board and to dispose of net income of waterworks. Id.

97. Under Const. art. 11, § 6, prohibiting leasing of water rights by a city, an ordinance construed and held a continuation of a contract entered into before the constitution was adopted. Brummitt v. Ogden Waterworks Co. [Utah] 93 P 828. Even if it amounted to a new contract, it was not void merely because it was called a lease, because the water belonging to the city was devoted to its use. Id.

98. A contract by which a city agreed to pay a water company a specific annual hydrant rental, and the company agreed to furnish hydrants and appliances and supply water free for sprinkling streets and for public buildings, is based on a consideration. Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44.

99. An ordinance readjusting ratee and regulating relations with a water company which provides for payment of water used on school lawns during a certain season is not void merely because the company was required under a former contract to furnish such water free. Brummitt v. Ogden Waterworks Co. [Utah] 93 P 828.

1. Contract between a city and a water company construed, and held that the company had not reached the contract by failing to maintain sufficient pressure in hydrants for extinguishing fires without the use of engines, as required by the contract, where, owing to necessary extension of the pipes during the twenty-five years, such pressure could not safely be maintained. Omaha Water Co. v. Omaha [C. C. A.] 156 F 922.

2. Hutchins v. Cleveland, 9 Ohio C. C. (N. S.) 226.

3. City of Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 51 Law. Ed. 1155.

4. Greater New York Charter, Laws 1901, p. 210, c. 466, § 473, authorizing the commissioner of water to cause meters to be placed in all stores, etc., is not void and in conflict with the due process clause of the constitution. Swanberg v. New York, 108 NYS 364.

5. Hutchins v. Cleveland, 4 Ohio N. P. (N. S.) 593. Where council has by ordinance authorized the board of public service to meter buildings other than residences at its discretion, and has further declared that "residences shall be metered only on request of the consumer, provided that in case of waste or other improper or unauthorized use of water of which satisfactory proof has been furnished to the meter department a meter may be set without the consent of the consumer," an injunction will lie on petition of the owner of a residence against the installation of a meter, in the absence of any

Injuries from deficient supply, equipment, or negligence.[See 8 C. L. 2293]—A water company is not liable where loss by fire is solely the result of negligence of the city.[8] The question of negligence in allowing a watermain to burst and flood plaintiff's premises is one for the jury.[7] A water company is liable for damages caused by its failure to turn off water when so ordered.[8] Where loss by fire results from the failure of a water company to observe its contract with the municipality in which it operates, recovery cannot be had by the person who sustained such loss if such person is not a party to the contract in question.[9] A city is liable if flooding results from bursting of insufficient mains,[10] but is not liable if it exercised due care in the premises.[11] Where a citizen's property is injured by the bursting of his private service pipe, the city is not liable,[12] especially where such injury results from his own negligence.[13]

Water rates.[See 8 C. L. 2293]—Water companies are entitled to charge just and reasonable rates.[14] It is presumed that rates agreed upon between a city and a water company are fair and reasonable.[15] The fixing of rates is a governmental function

evidence of waste or other improper use of water. Id.

6. A water company is not liable where, while a citizen's property was burning, water could not be had because one cistern was covered with snow and could not be located by the firemen, and one was out of order, where it appeared that there was a sufficient supply of water in the mains and the fire cisterns were under the exclusive control of the city. Terrell v. Louisville Water Co., 31 Ky. L. R. 281, 105 SW 100.

7. Verdict of jury sustained where main had been in street nearly fifty years originally under sixty pounds pressure and more recently under one hundred and ten pounds pressure, and where for two years previous surface had settled, showing some trouble which neglected to inspect or remedy. Schwindt v. Lehigh Water Co., 33 Pa. Super. Ct. 23. Plaintiff cannot recover for damages caused by leaking watermain by merely showing construction and maintenance of pipes and injury due to leakage, but must show injuries resulting either from faulty or negligent construction of pipe or that borough after notice failed to exercise proper care, caution, and diligence in repairing leak. Herron v. Duquesne Borough, 34 Pa. Super. Ct. 231.

8. Evidence held sufficient to show that damages caused by escape of water are due to company's failure to turn it off when ordered. City Water Co. v. Silverfarb, 128 Ill. App. 215.

9. School board cannot sue to recover for loss of school building owned by city. City of Galena v. Galena Water Co., 132 Ill. App. 332.

10. In an action against a city for damages caused by flooding due to a defective watermain, evidence sufficient to establish a prima facie case against the city. Ettlinger v. New York, 109 NYS 44.

11. A city in relocating a watermain is not liable for damages caused by bursting of the main, if it failed to select the best possible route or adopt the best possible plan of construction, if those selected were reasonably safe. Kelsey v. New York, 123 App. Div. 381, 107 NYS 1089.

12. Where one's property was damaged because of the bursting of his own private service pipe, the city ws not liable unless the proximate cause can be traced to wrongful acts of water department employes. Leonhardt v. New York, 109 NYS 24.

13. Where city employers searching for a leak on a user's premises discovered it in his own private service pipe, temporarily stopped it and showed it to the user, and left the excavation open, they were justified in assuming when notified by him to close the excavation that he had repaired the leak. Leonhardt v. New York, 109 NYS 24. Even if the city employes negligently broke the pipe while searching for the leak, the user was negligent in requesting them to fill the excavation without repairing it. Id.

14. In determining the proper compensation for water furnished a borough for fire protection, the only question to determine is whether the charge, measured by the number of hydrants employed or by the rule by which the company has fixed its general schedule of rates, bears reasonable proportion to rates established for other demands. $1,100 for water for fire supply for as many hydrants, not exceeding 50, as the borough might employ, with an additional charge of $25 for each hydrant, held reasonable compensation. Leechburg Borough v. Leechburg Waterworks Co. [Pa.] 68 A 669. The fact that an ordinance authorized a water company to fix reasonable rates does not render it void, since if the rates are reasonable it is immaterial by whom they are fixed. Brummitt v. Ogden Waterworks Co. [Utah] 93 P 828. Whether water rates of an irrigation company were unreasonable held for the jury. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 109 SW 435. An irrigation company authorized to exercise power of eminent domain in furnishing water from streams which by statute belong to the public is a quasi public corporation and cannot limit its liability to the public by requiring unreasonable contracts. Id.

15. Brummitt v. Ogden Waterworks Co. [Utah] 93 P 828.

and cannot be surrendered nor suspended by a city council [16] unless such power is given a city by its charter.[17] The primary duty of causing a water rate to be established in the manner prescribed by law rests upon the company.[18] A franchise provision requiring rates to be fixed upon an impossible basis is void.[19] Buildings may be classified for the purpose of fixing flat rates.[20] Rates charged for water for domestic purposes do not include water for sprinkling lawns, for which the company is entitled to extra compensation.[21] If rates are agreed upon, they control [22] and may not be altered by the company during the existence of the contract.[23] A municipal corporation may by ordinance exempt educational and other like institutions from the payment of water rates,[24] and the fact that students are charged for the use of certain portions of the premises does not bring the institution without the operation of such ordinance.[25] Water rent is collectible by distress [26] or in any other method

16. Brummitt v. Ogden Waterwarks Co. [Utah] 93 P 828. Where an ordinance regulating relation of a city with a water company fixes rates for the entire period of the contract, that provision cannot be upheld, but the city may make temporary rates. Such provision held not to invalidate the entire ordinance. Id.

17. Under Bessemer City charter (Act December 13, 1900, Acts 1900-01, p. 444), the city may contract for water for its citizens at rates to remain in effect for a definite period, suspending the charter provision as to regulation of rates during such period. An ordinance which attempts to reduce rates during such period impairs the obligation of the contract. City of Bessemer v. Bessemer Waterworks [Ala.] 44 S 663.

18. Consequently when property owner demands water and tenders the rental fixed by the company, it may not defend on the ground that no rate has been fixed in the manner prescribed by law. Bothwell v. Consumers' Co., 13 Idaho, 568, 92 P 533.

19. A provision in a franchise requiring the company to fix a schedule of rates equivalent to an average rate existing in certain other cities for like service is void where under the existing conditions it was practically impossible to ascertain an average schedule. City of Denver. v. Denver Union Water Co. [Colo.] 91 P 918. Under a franchise requiring a water company, after five years, to fix a schedule of rates equivalent to an average rate existing in certain other cities for the same service and in a suit to determine such average rate it was found impossible to do so because of different conditions, a decree attempting to fix a schedule not based on such other rates as erroneous. Id. A determination of rates not based on the rates charged in such other cities was not within the issues. Id.

20. A private boarding house is a "dwelling" within a contract fixing a flat rate for dwellings. A plea that such houses were "public" boarding houses did not exclude them from the class of buildings known as dwellings. City of Birmingham v. Birmingham Waterworks Co. [Ala.] 44 S 581.

21. Ward v. Birmingham Waterworks Co. [Ala.] 44 S 570. In an action by a brewery to recover an excese paid for water from the rate required by ordinance for water furnished for purely manufacturing purposes, it was not necessary in order that the water be deemed to be used for purely manufacturing purposes that all of it went into the composition of the beer. American Brew. Co. v. St. Louis, 209 Mo. 600, 100 SW 1.

22. Where rates of service were fixed by the franchise and the company was authorized by ordinance to lay mains in additions to the city, contracts to furnish water consumers outside the city at different rates where not abrogated by the incorporation of such districts within the city limits. City of Denver v. Denver Union Water Co. [Colo.] 91 P 918.

23. Where a city and a water company entered into a contract for a water supply for a specified term at a yearly hydrant rental, the company could not, where it continued after the term, alter the terms of the contract within the current year. Appleton Waterworks Co. v. Appleton [Wis.] 113 NW 44. Under Appleton city charter (Laws 1895, p. 1293), and St. 1898, §§ 1780. 1081, fixing the date for levy of taxes and providing that the city shall levy enough to pay for water supply and authorizing a water company to contract to supply the city with water, the contract in existence at the time of the tax levy fixes the basis for the levy for the ensuing year and a company could not change the annual rental during such year. Id.

24. Exemption of university of Chicago, valid. City of Chicago v. University of Chicago, 131 Ill. App. 361, afd. 228 Ill. 605, 81 NE 1138. A municipality will be enjoined from cutting off the water supply of an educational institution for failure to pay charges where payment thereof is remitted by ordinance. Id. City cannot claim the right to charge for water or supply it free and at the same time contend that such ordinance is invalid. Id. Ordinance exempting educational and other like institutions with respect to buildings used in immediate conduct and carrying on of educational purposes held to include dormitories and commons, for use and enjoyment of which fees were charged by such institution. Id.

25. Where chargee made do not nearly defray expenses of operation, they do not affect the eleemosynary character of the institution. City of Chicago v. University of Chicago, 228 Ill. 605, 81 NE 1138, afg. 131 Ill. App. 361.

26. Where land adjoining lessor's canal

prescribed by statute.[27] Where a claim for water rents is against the occupant and not against the premises, a purchaser is not liable for rents due from a former tenant.[28] In New York a tenant is liable for meter charges.[29] Mandamus is the proper remedy to enforce the performance by a public board of a plain duty to cancel an illegal water lien against property.[30] A water company may refuse to install additional hydrants as required by its contract where a city has purposely defaulted in payment of hydrant rental.[31]

§ 17. *Grants, contracts and licenses.* See 8 C. L. 2298—Contracts relative to waters and water supply must possess the essentials of other contracts.[32] The usual rules of construction apply to contracts and grants pertaining to water and water rights.[33] Terms peculiar to such contracts are given their technical meaning.[34] A deed to land

was leased as a mill site, together with sufficient water from the canal to operate the mill, the rental being proportioned between the land and the water, the compensation for the water was rent collectible by distress. Wickham v. Richmond Standard Steel Spike & Iron Co. [Va.] 57 SE 647.

27. Under Comp. Laws, § 3275, providing that the board of public works may contract and provide when and to whom they shall be paid and collect the same by assumpsit on the common counts, the board may contract in its own name, though it acts as trustee and may bring suit to compel payment. Board of Public Works of Niles v. Pinch [Mich.] 15 Det. Leg. N. 289, 116 NW 408. The guarantor of a delinquent may be such in any form of assumpsit "on the common counts" as used not being mandatory. Id.

28. Hall's Ordinances of the City of Covington, § 1063, providing for the shutting off of water until back rents are paid, does not apply. City of Covington v. Ratterman [Ky.] 108 SW 297.

29. Under Greater New York Charter, § 475, amended by Laws 1902, p. 1219, c. 509, and Laws 1904, p. 1431, a tenant under a lease requiring him to pay annual water rent is liable for meter charges. Loewenthal v. Michels, 110 NYS 639.

30. Hoboken Mfrs' R. Co. v. Hoboken [N. J. Law] 68 A 1098. Under a statute which makes a lien for water depend upon its use, an attempt to impose a lien upon property where no water has been contracted for or furnished upon or for the benefit of such property is void. Id.

31. Omaha Water Co. v. Omaha, 156 F 922.

32. An agreement by which a water company argeed to furnish water for the irrigation of certain land held sufficiently definite, the company having but one canal leading from the river from which the water was to be taken, and the headgates, weirs and devices by which the water was to be delivered having been constructed. Stanislaus Water Co. v. Bachman [Cal.] 93 P 858. Where evidence shows that a party who purchased water from an irrigation company has voluntarily paid one year's maintenance charges, and there is evidence to show a contract to pay an annual maintenance fee in a suit by the company for subsequent maintenance fees, it is error to direct verdict for defendant. Farmers' & Merchants' Irr. Co. v. Brumbaugh [Neb.] 116 NW 512.

33. Deed of water power construed, and a reservation therein, and not the right conveyed, held subject to conditions, obligations, etc., applicable, contained in another indsnture. Union Water Power Co. v. Libbey & Dingley Co., 102 Me. 439, 67 A 357. **A contract between an irrigation company and a consumer** construed and held that a provision that free water should be furnished during the first irrigating season meant for the period of one year. Twin Falls Land & Water Co. v. Lind [Idaho] 94 P 164. Under a contract providing that the consumer should be exempt from payment of water rents for the "first irrigation season that water is delivered to him," held it was the intent to provide for free use of water for a definite period rather than for any particular crop. Id.

Contract for a sale of land and water rights construed and the rights of the vendee stated to be 86 2-3 shares of equalized rights in the corporation instead of 6 2-3 shares. Brixen v. Jorgensen [Utah] 92 P 1004. Whether an easement of drainage procured by contract pertained to certain land which was flooded by the removal of a certain tile drain from the servient tenement held for the jury. Funston v. Hoffman, 232 Ill. 360, 83 NE 917. Where parties entered into an **agreement fixing their rights in the waters of a stream,** and recited that nothing therein should be taken to waive the right of a riparian owner to a designated quantity of water, held that it could not be contended that the agreement positively gave such owner the right to so much water. People's Ditch Co. v. Fresno Canal & Irr. Co. [Cal.] 92 P 77.

Deeds conveying water rights construed and held to provide for division of the water on the theory that all water available should be considered to be 800 inches under a two-foot head and proportionable according to the shares of the parties as to such amount. Crane v. McMurtrie [N. J. Eq.] 68 A 892. Where one person was entitled to 300 inches of water under a specified head and two others were entitled to the remainder in the proportion of four to five, the division should be made by regulating the capacity of the turbine wheels used by the first party and by constructing weirs in the raceway opposite points of outflow to the mills of the latter. Id. Where a deed to certain land, including the right to take water for power, was based on a specified consideration and provided that the grantee should be entitled to take

which also conveyed a water right and provided that the grantee should pay a proportionate share of the expense of maintaining the dam and raceway is a grant in fee and not a mere license.[35] Where certain land was subject to an easement for the maintenance of a water conduit, whether the burden of the easement was being increased depended not on the quantity of water flowing through the conduit but on the size and character of the conduit.[36] The rights of the parties under a contract for a water supply rest in the terms of such contract.[37] An irrigation company which contracts to furnish water except under certain contingencies is liable if it fails to do so except under the contingencies specified.[38] A contract by which an irrigation company sold a consumer the right to a certain amount of water from their ditch does not entitle him to take such water from the ditch of another company in which the vendor of the right was a stockholder.[39] One city may contract with another to furnish it water where it will not interfere with the supply to its own inhabitants.[40] A

a certain amount of water from the raceway, it is presumed that the grantors obtained full compensation for such water right in perpetuity. Id. Where a contract for the settlement of disputed rights to a water course provided that in case of forfeiture of defendant's rights plaintiff's right should be the same as those guaranteed by the contract, the question of forfeiture was not material. Hutchinson v. Mt. Vernon Water & Power Co. [Wash.] 95 P 1023. It is **presumed** that water rights indefinitely described in a transfer as "any water right belonging to" a certain ditch are either rights reserved by the grantor from a prior conveyance or new rights initiated by him. Watts v. Spencer [Or.] 94 P 39.

Where a contract is ambiguous, parol evidence is admissible to explain its terms. Contract between water company and laundry for metered water, to be paid for on a sliding scale. Green Island Water Supply Co. v. Trojan Laundry Co., 110 NYS 508. Where spring owner grants **ten-year license to use water** and licensee secures privilege of laying pipes across intervening land with understanding that privilege is to last only as long as water license lasts, licensee cannot claim privilege of maintaining pipes beyond the period of the original water license, even though original license be renewed, provided there are no elements of estoppel. Bishop v. Buckley, 33 Pa. Super. Ct. 123.

34. "Shore" as used in conveyancing, when applied to tidal waters means the space between high and low water mark. Potomac Dredging Co. v. Smoot [Md.] 69 A 507.

35. Crane v. McMurtrie [N. J. Eq.] 68 A 892.

36. Crane v. McMurtrie [N. J. Eq.] 68 A 892. Water is measured for hydraulic purposes by ascertaining the number of cubic feet passing through a specified aperture, determined by taking the size and velocity of the moving column and considering the retardation by friction. Id.

37. While an irrigation company and a consumer may agree that payment under the contract should commence when the company was ready to furnish water, it is competent for them to agree that payment should commence only when the consumer should use water for irrigating his lands. Fresno Canal & Irr. Co. v. Hart [Cal.] 92 P 1010. Where a contract between a consumer and water company provided for forfeiture for failure to pay rentals, the lapse of such payment for several years, transfer of the land, and other facts, held to estop the company from enforcing forfeiture. Kimball v. Northern Colorado Irr. Co. [Colo.] 94 P 333. Where an irrigation contract provides that the company shall be entitled to ten days' written notice of water required, no damage for failure to furnish water can be recovered unless it is pleaded and proved that such notice was given, unless it clearly appears that water could not have been furnished. Mathieu v. North American Land & Timber Co., 119 La. 896, 44 S 721. The grant of a right to take water from one of several springs and to lay a pipe therefrom did not authorize the taking of water from all the springs and the placing of obstructions which caused them to be filled up. Louisville, etc., R. Co. v. Higginbotham [Ala.] 44 S 872. Where the terms of such grant are clear, parol evidence is not admissible. Id. Where one adjacent owner contracted with another for the right to connect with a drain to discharge surface waters naturally flowing in that direction, evidence held to show that he was entitled to maintain drains already constructed, but should be enjoined from making further extensions. Randau v. Stultz [Iowa] 115 NW 507.

38. Mathieu v. North American Land & Timber Co., 119 La. 896, 44 S 721. In an action by an irrigation company for water rent where there was evidence of lack of care on plaintiff's part in furnishing water, it was proper to charge relative to a counter-claim for damages for such failure. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 109 SW 435.

39. Lanham v. Wenatchee Canal Co. [Wash.] 93 P 522. The fact that the consumer was permitted to take water from such ditch for a time as accommodation would not prevent revocation of the permission. Id.

40. In making such contract, it acts in a proprietary and not in a governmental capacity. City of Colorado Springs v. Colorado [Colo.] 94 P 316. Evidence held to show that one city agreed to furnish another with free water and to its inhabitants at the same rate charged its own, in con-

contract for a perpetual supply of water from a ditch is an easement [41] and creates a covenant running with the land which is a burden on the ditch.[42] An unlimited conveyance of an easement is in law a grant of unlimited reasonable use.[43] A water right, if appurtenant, passes with a conveyance of the land to which it is attached.[44] The grant of a mill operated by water power carries right to use the watercourse furnishing the water and the canal or raceway which carries water to the mill unless expressly reserved.[45] Water applied to a desert entry for the purpose of reclaiming the same does not become inseparable therefrom and may be conveyed separate and apart from the land.[46] A transfer of a right to flow land does not divest the grantor of his fee.[47] An after-acquired right does not pass under a grant of an existing one only.[48] A water right which is of the nature of a profit a prendre may be transferred independent of the land.[49]

§ 18. *Torts relating to waters.*[See 8 C. L. 2300]—A riparian owner who suffers damage precisely like that suffered by every other riparian owner has his remedy in an action for tort.[50] Where different parties discharge sewage and filth into a stream which causes an actionable nuisance, they are not jointly liable for damages where there is no common design or concert of action, but each is liable only for his proportionate share of the damages.[51] A riparian owner who constructs a dam which

sideration of being allowed to lay mains in its streets. Id. Where such contract is made and acquiesced in for a long period of years, the city furnishing the water is estopped to repudiate it because of failure of the other to comply with the law in making the contract. Neither city appeared to have strictly complied with the law in this respect. Id.

41. A perpetual contract right to have carried by a ditch to certain lands sufficient water to irrigate them constitutes an easement in the ditch which is real estate. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290.

42. A contract between owners of an irrigation ditch and adjoining landowners by which the ditch owners covenanted to furnish water for irrigating the land, and also providing that the right to water should be perpetual, held to create an easement and covenant running with the land and binding on the owners of the ditch. Farmers' High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co. [Colo.] 92 P 290.

43. Deeds of flowage rights, though absolute in form, convey as against the servient estate right to reasonably necessary use only. Chapman v. Newmarket Mfg. Co. [N. H.] 68 A 868. In an action involving flowage rights, a question whether the use was unreasonable because of improper management of the dam was one of fact. Id.

44. Under Code 1904, § 2443, providing that a deed shall pass all appurtenances belonging to the land, a conveyance of land passes a water right reserved as an easement appurtenant to the land in a conveyance of a railway right of way. Norfolk, etc., R. Co., v. Obenshain [Va.] 59 SE 604. A parol sale of land and an appurtenant water right and a surrender of possession to the purchaser create an equitable estate in the water rights. Watts v. Spencer [Or.] 94 P 39. Where a decedent had, prior to her death, conveyed all her legal and equitable interest in certain lands to her children, her estate had no interest which authorized her administratrix to sue to set aside prior deeds to water rights appurtenant to such lands on the ground of fraud. Rianda v. Watsonville Water & Light Co. [Cal.] 93 P 79. Under Civ. Code, § 1104, providing that a transfer of land passes all easements attached, an easement in a tract over which a ditch was constructed for the benefit of other tracts held to pass under a partition decree which did not refer to the ditch or water rights to the extent that at the date of the decree such ditch was used to irrigate the tracts. Anaheim Union Water Co. v. Ashcroft [Cal.] 94 P 613.

45. Smith v. Dresselhouse [Mich.] 15 Det. Leg. N. 226, 116 NW 387. Conveyance of mill and water privileges considered and rights determined. Id.

46. Village of Hailey v. Riley [Idaho] 95 P 686.

47. The fact that riparian owners had given rights of flowage to another did not divest them of ownership of the fee. Subject to the servitude of flowage, they possessed riparian rights. Doremus v. Patterson [N. J. Eq.] 69 A 225.

48. An after-acquired title to water rights will not inure to the benefit of the grantee where he knew at the time that the grantor had no title and did not intend to procure him one, and where the title conveyed was an inchoate one dependent for completion on acts of the grantee. Gardner v. Wright [Or.] 91 P 286.

49. Where parties to the conveyance of a water right treated it as a right which might be transferred from one piece of land to another and as possessing the nature of a profit a prendre, it was not a pure easement, and could be transferred independent of the land. Crane v. McMurtrie [N. J. Eq.] 68 A 892.

50. Stimson v. Brookline [Mass.] 83 NE 893.

51. City of Mansfield v. Brister, 76 Ohio

retains water and causes it to percolate through and injure nonriparian land is not liable for injuries resulting unless the use of the stream was unreasonable or it was negligence to fail to prevent such percolation.[52] The discharge by a city of sewage into a stream which was carried down and deposited on lower riparian land, producing noxious gases, constitutes an actionable wrong.[53] It is no defense to an action for such wrong that the city's charter authorized it to construct the sewers and condemn property.[54] Any invasion of the prior rights of the United States to the waters of a stream is a trespass.[55] A municipality is not liable where a property owner by his own act causes his premises to be flooded.[56] It is no defense to an action against an irrigation company for flooding crops that the crops were destroyed by the natural overflow of waters the year before.[57] Nor is the fact that such owner did not exercise ordinary care to protect his crops a complete defense,[58] nor is it a defense that the water first flowed over lands of others.[59] An action for pollution of a watercourse must be brought within the statutory period.[60] The measure of damages for the discharge of water upon land is the depreciation in value.[61]

§ 19. *Crimes and offenses relating to waters.*[See 8 C. L. 2301]

WAYS, see latest topical index.

WEAPONS.

§ 1. The Crime of Carrying or Pointing Weapons, 2030.
§ 2. Other Police Regulations Concerning Weapons, 2032.
§ 3. Indictment and Prosecution, 2032.
§ 4. Civil Liability for Negligent Use of Weapons, 2033.

§ 1. *The crime of carrying or pointing weapons.*[See 8 C. L. 2302]—Statutes prohibiting the carrying of deadly weapons are ordinarily held not to infringe the constitutional guaranty of the right to keep and bear arms.[62] The amendment of 1898

St. 270, 81 NE 631. Several riparian owners may not join in an action against several others to enjoin the maintenance of bridges so as to flood the plaintiff's lands and for damages already sustained. Burghen v. Erie R. Co., 108 NYS 311.

52. Moore v. Berlin Mills Co. [N. H.] 67 A 578.

53. Platt Bros. & Co. v. Waterbury [Conn.] 67 A 508. The wrong done a riparian proprietor by the discharge of sewage into a stream is a continuing one, and a judgment for damages up to a certain date is not a bar to an action for damages subsequent to such date. Id.

54. No part of plaintiff's property having been condemned. Platt Bros. & Co. v. Waterbury [Conn.] 67 A 508.

55. A suit may be maintained in equity to protect the right. United States v. Conrad Ins. Co., 156 F 123.

56. While an abutting owner probably has the right to excavate under the sidewalk, he assumes all liability attaching thereto, and a claim on his part for damages will not lie against the municipality where his loss resulted from storm water which covered the street and sidewalk, and running through the gratings in the sidewalk filled the space excavated below and flooded the basement of his building. Iroquois Hotel Co. v. Columbus, 5 Ohio N. P. (N. S.) 357.

57. McLellan v. Brownsville Land & Irr. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 522, 103 SW 206. In such action, evidence that water was conveyed to plaintiff's land by a ditch constructed by himself was admissible as tending to refute the charge that defendant caused the overflow. Id.

58. Belnap v. Widdison [Utah] 90 P 393. One whose crops are destroyed by overflow caused by an irrigation company is not precluded from recovering therefor by failure to construct levees to guard against such overflow. McLellan v. Brownsville Land & Irr. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 522, 103 SW 206. In an action to recover for such damage where the company introduced evidence that other farmers protected their crops, it was improper to exclude testimony that it would have been great expense for plaintiff to have done so. Id.

59. McLellan v. Brownsville Land & Irr. Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 522, 103 SW 206.

60. Under 7 Col. Rec. 499; Revision 1821, p. 310; Pub. Acts 1879, p. 439; Gen. St. 1902, § 1111, an action for pollution of a watercourse must be brought within six years. Platt Bros. & Co. v. Waterbury [Conn.] 67 A 508.

61. Measure of damages for wrongful discharge of water upon land by construction of a drain is difference in value immediately before and after. Kopecky v. Benish [Iowa] 116 NW 118.

62. Following interpretation given constitution before its readoption. McIntire v. State [Ind.] 83 NE 1005.

to the Georgia penal code is valid.[63] Among the acts denounced as crimes by various statutes are the carrying of weapons on or about the person,[64] the carrying of concealed weapons,[65] and carrying weapons to a place of public resort.[66] Statutory exceptions are often made in favor of officers,[67] persons threatened with violence,[68] or travelers,[69] and statutes are not usually construed to prohibit mere handling [70] or transportation of weapons with no view to their use.[71] To be within the latter ex-

63. An act directing the insertion after the word "any" and before the word "pistol" the words "kind of metal knucks" is a sufficient description of the amendment. Cunningham v. State [Ga. App.] 58 SE 23. Following opinion of supreme court on Certificate. Cunningham v. State, 128 Ga. 55, 57 SE 90.

64. Weapon must have been carried as a weapon and convenient for immediate use in a fight. Easlick v. U. S. [Ind. T.] 104 SW 941. A person is not carrying a pistol in that open manner and fully exposed to view within the purview of § 341, of Penal Code 1895, who has it in his pocket in such a manner that those standing in full view of accused's person cannot see it. Brown v. State, 2 Ga. App. 417, 58 SE 549. One is guilty of carrying a weapon on or about the person who carries in the hand a basket in which a pistol is concealed. Johnson v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 882, 104 SW 902. Taking a pistol from another and firing it once or twice and handing it back is not such a carrying of a pistol as to justify a conviction. Fretwell v. State [Tex. Cr. App.] 107 SW 837. A man having on his person a knife when arrested but which is not discovered until he is lodged in jail cannot be convicted of carrying weapons in violation of statute. Tucker v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 8, 105 SW 499. Where evidence showed defendant had a pistol on his person, was not on his own premises at the time, that he was one of several who had been threatened, that he had been warned by friends and that he had made no effort to have the person making the threats placed under a peace bond though he had the opportunity, such evidence was held sufficient to sustain a conviction of carrying a pistol unlawfully. Brodie v. State [Tex. Cr. App.] 108 SW 1182. Evidence that pistol was forcibly taken from defendant as he was in the act of drawing it from his hip pocket held to sustain a conviction for unlawfully carrying a pistol. Geary v. State [Tex. Cr. App.] 108 SW 374. Evidence that witness saw accused place pistol in his pocket and was constantly in his company and that he did not again see pistol held to be sufficient upon which to base a conviction. James v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 316, 103 SW 934.

65. Anderson v. State [Wis.] 114 NW 112.

66. Under § 342 of Penal Code, making it unlawful to carry a pistol to a place of public worship, it must be shown that pistol was actually carried there by accused and that there was a gathering of persons there at the time. Amorous v. State, 1 Ga. App. 313, 57 SE 999.

67. Article 169, Pen. Code, prohibiting the carrying of weapons within one-half mile of a voting box on election day, is not violated by a special constable who has taken the oath as a peace officer under a written commission from a magistrate, and who has carried the weapon within the prohibited distance. Gonzales v. State [Tex. Cr. App.] 110 SW 740. Agreed statement that accused was an officer "at the time of arrest" held not to show he was such officer at time of carrying of weapon. McIntire v. State [Ind.] 83 NE 1005.

68. A person charged with carrying a concealed weapon may, under Rev. St. 1899, § 1863 (Ann. St. 1906, p. 1285), show a well grounded threat to do injury to his person or property. State v. Dees [Mo. App.] 109 SW 800. Carrying weapon permissible under Rev. St. 1899, §§ 1862, 1863, if done in good faith to prevent a robbery or threatened violence. State v. Roan, 128 Mo. App. 212, 106 SW 581. A weapon may be exhibited in a threatening manner toward intruders who become abusive but may not be used to inflict injury in ejecting them unless done in self-defense. State v. Lipp [Mo. App.] 110 SW 4. To intentionally point a pistol at a person is a misdemeanor unless done under a bona fide fear of violence or bodily harm. Anderson v. State [Wis.] 114 NW 112. One who has reasonable ground to fear violence upon his person is not amenable to the statute prohibiting the carrying of weapons. Curlee v. State [Tex. Cr. App.] 110 SW 65. Where defendant had been cut with a knife and subsequently received a letter threatening further violence and reasonably fearing an attack at any time, he was justified in arming himself. Johnson v. State [Tex. Cr. App.] 110 SW 451.

69. A traveler is not protected by the statute who disturbs the peace of the community by flourishing his weapon during an altercation. State v. Cousins [Mo. App.] 110 SW 607. A person is on a journey within the meaning of the exception in the statute against carrying weapons who, outside of his daily routine business, goes upon a highway far enough distant to take him beyond his circle of acquaintances and neighbors. Easlick v. U. S. [Ind. T.] 104 SW 941. Where one reaches his destination and, after putting up at a hotel, proceeds to a saloon in the town, and still in possession of his pistol, the statute ceases to extend its protection. Colson v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 10, 105 SW 507.

70. Where on a charge of carrying concealed weapons, it appeared defendant was simply examining a weapon handed to him by a third party, such evidence held not to support a conviction under Penal Code, §§ 410, 411, People v. Carvelto, 108 NYS 126.

71. Borrowing or buying a pistol and taking it home is not a violation of the law (Brooks v. State [Tex. Cr. App.] 107 SW 354), nor where defendant was on his way to pawn the pistol according to a previous arrangement (Lewis v. State [Tex. Cr. App.]

ceptions one must ordinarily proceed to his destination with reasonable dispatch and directness,[72] but reasonable stops en route for a lawful purpose do not deprive him of the benefit of the statute.[73] Carrying of weapons at one's place of business is sometimes permitted,[74] but the fact that a person is on his own premises is no defense in the absence of a statutory exception.[75] Under some statutes the carrying must have been habitual.[76] Whether the weapon carried is within the inhibition of the statute depends upon its character[77] and the terms of the statute.[78] Criminal intent is essential,[79] but may be presumed from the act of use.[80]

§ 2. *Other police regulations concerning weapons.* See 8 C. L. 2303—Discharging firearms at random,[81] or along or across a public highway,[82] is prohibited by some laws.

§ 3. *Indictment and prosecution.* See 8 C. L. 2303—Under a statute prohibiting the carrying of certain weapons or any other dangerous weapon, an indictment for carrying a weapon not enumerated must name the weapon and allege it to be dangerous.[83] If exceptions are made to the enacting part of the statute, it is necessary that the prosecution negative them.[84] Proving more than is required under the in-

19 Tex. Ct. Rep. 867, 104 SW 901). A man carrying a pistol to a town for repairs at a blacksmith shop, but, finding the blacksmith absent, carries the pistol with him to a distant town and later returns and delivers pistol to blacksmith, is not guilty of unlawfully carrying pistol. Fitzgerald v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 588, 106 SW 365.

72. A person is guilty of unlawfully carrying a pistol who goes to a certain place to get a pistol but stops at a dance on the return home. Banks v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 139, 105 SW 821.

73. A traveler, protected by the statute in carrying a pistol, does not forfeit such protection by making a brief stop on the road at the request of a creditor on a matter of business. Hunt v. State [Tex. Cr. App.] 107 SW 842.

74. Office of another used with his consent and for a specific though temporary purpose held to be user's office to justify carrying a pistol. Smith v. State [Tex. Cr. App.] 18 Tex. Ct. Rep. 787, 100 SW 155.

75. It is no defense that a person is on his own premises, in an indictment under Pen. Code, § 410, making it an offense to have or carry a pistol concealed on his person in a city. People v. Demorlo, 108 NYS 24.

76. Evidence that man on his way from business at 2 o'clock in the morning and carrying pistol, though not in the habit of so doing, is not guilty of unlawfully carrying pistol. Mathonican v. State, 51 Tex. Cr. App. 471, 19 Tex. Ct. Rep. 178, 102 SW 1123.

77. To be a defense, the plea that the weapon was **broken** must show the impossibility of using it. Smith v. State [Tex. Cr. App.] 96 SW 1086. That it is **unloaded** is no defense to a charge of carrying a pistol. Caldwell v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 349, 106 SW 343. A stick about eight inches long composed of a round chair rung with a hole through the small end through which a string is passed to attach to the wrist and the larger end having holes into which shot is placed is not a **"slung shot."** A "slung shot" is a metal ball to which a string is fastened and is used as a weapon. Geary v. State [Tex. Cr. App.] 108 SW 379. It being unlawful to carry **knuckles,** no proof that the knuckles were of a hard substance is necessary. Steele v. State [Tex. Cr. App.] 107 SW 353. A statute making it unlawful to carry knuckles as weapons is satisfied if proof shows a carrying of knuckles made of any substance. Hull v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 143, 105 SW 787. Evidence that knuckles were made of steel would support a conviction under § 338, of the Pen. Code, where it is unlawful to carry on or about the person knuckles made of any hard substance. Prater v. State [Tex. Cr. App.] 108 SW 687.

78. Army and navy pistol not prohibited in Arkansas. Vaughan v. State, 84 Ark. 332, 105 SW 576.

79. Defendant must be acquitted of a charge of unlawfully carrying a pistol where the evidence showed he had a pistol upon his person but was unaware of such fact and had no intention of violating the law. Miles v. State [Tex. Cr. App.] 108 SW 378.

80. Pen. Code, § 410. People v. Demorlo, 108 NYS 24.

81. Shooting at a definite object on a public highway does not violate a statute making it criminal to shoot at random in such a place. A shot fired at a dog on a public highway does not violate such a statute. Hslton v. Com., 31 Ky. L. R. 827, 104 SW 255.

82. Code 1896, p. 5354, making it unlawful to discharge a firearm "along or across" a public highway, is to be construed with reference to the direction fired and not to the position of the person so firing; one firing away from road not guilty. Scott v. State [Ala.] 44 S 544.

83. State v. Lett [W. Va.] 60 SE 782.

84. It is incumbent upon the state to prove accused discharged weapon on land other than his own, with fifty yards of public highway, between daylight and dark, and that it was not done in defense of person or property, on a prosecution under § 508, Pen. Code 1895. Ferguson v. State, 1 Ga. App. 841, 58 SE 57. Where statute prohibits carrying of pistol as weapon except **such as** is used in U. S. Army and Navy, the **burden** is on the state to show that pistol carried by

dictment is not fatal.[85] The venue of the crime must be proved as laid.[86] Details of an altercation may not be shown,[87] and facts entirely foreign to a prosecution for carrying a weapon are inadmissible even though the admission would incidentally establish the guilt of accused.[88] The jury are the sole judges on the questions of fact [89] and the weight of the evidence.[90]

§ 4. *Civil liability for negligent use of weapons.*[See 8 C. L. 2304]—Alleged negligent use of a weapon renders one liable only when the negligence was the cause of injury.[91]

WEIGHTS AND MEASURES.[92]

In an action to recover the penalty for short weight in selling coal, plaintiff must present the record proof provided by statute or evidence equally satisfactory,[93] since the statute contemplates that the right to recover shall be based on the official record of weight.[94] The weight of a car [95] and its contents may be proved by the testimony of the official weighmaster of the railroad company who weighed the car in the customary manner [96] while the shipment was in transit.[97] Contracts in unambiguous terms are conclusively presumed to be made in reference to an existing statute relative thereto [98] unless it is agreed otherwise in the contract, and extrinsic evidence to show usage is inadmissible.[99] But a contract providing for official weights and grades does not require weighing by an officer appointed for that purpose, where no such office exists.[1] The ordinance of New York City, inhibiting the sale of coal at a

defendant was not of that kind. Vaughan v. State, 84 Ark. 332, 105 SW 576.

85. Where evidence showed that defendant carried pistol which was the charge in the indictment and further showed that it was carried in a public assembly, such further proof would not constitute a variance to defeat a conviction under the indictment. Walker v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 851, 106 SW 1166.

86. **Under a statute of Texas,** one charged with carrying a weapon "within the county" may be convicted who is shown to have had it within 400 yards of the county line but in another county. Wylie v. State [Tex. Cr. App.] 109 SW 186.

87. In a prosecution for carrying a concealed weapon, the state may not draw from witness details of an altercation in connection with which the alleged concealed weapon was shown and later again concealed. Cook v. State [Ala.] 44 S 549.

88. It could not be shown that accused was at a hotel with a certain other person on a question of the guilt or innocence of carrying weapon. Hubbard v. State [Tex. Cr. App.] 107 SW 351.

89. Whether a person is beyond his circle of acquaintances and is carrying the weapon as a weapon are questions for the jury. Easlick v. U. S. [Ind. T.] 104 SW 941.

90. Jones v. State [Tex. Cr. App.] 107 SW 821. Evidence held to sustain a conviction for carrying concealed pistol. Rogers v. State [Ala.] 45 S 221. Evidence sufficient to show crime of carrying concealed weapon and insufficient to show statutory excuse. State v. Roan, 128 Mo. App. 212, 106 SW 581. The testimony of witnesses which removes all reasonable doubt justifies a finding of guilt on a charge of carrying concealed weapon. Reese v. State [Ga. App.] 60 SE 122.

91. Finding that policeman, firing at runaway horse in an effort to stop him, did not cause injury approved. Nelson v. McCarty, 5 Cal. App. 773, 91 P 406.

92. See 8 C. L. 2304.

93. A mere duplicate certificate of net weight, where there is a conflict as to weight of wagon and of coal, and as to weather and scale conditions prevailing at the time, is insufficient to sustain a conviction. City of New York v. Marco, 107 NYS 100.

94. City of New York v. Marco, 107 NYS 100.

95. Official weighmaster of railroad company may state his conclusion that figures painted on car to designate its weight when empty were correct, when based on his testimony that cars are weighed by a sworn weighmaster, though he does not personally known that the weigher of that particular car was sworn. Schott v. Swan [S. D.] 114 NW 1005.

96. Owing to limited capacity of scales, the car was weighed at each end by placing one-half on the scales at a time, as authorized by the Western Weighing Association. Schott v. Swan [S. D.] 114 NW 1005.

97. Where seller neglected to weigh wheat at shipping point, this is the best evidence of its weight which he can produce. Schott v. Swan [S. D.] 114 NW 1005.

98. Pol. Code of Cal. § 3209, prescribing a standard for weights and measures, and § 3222, providing that all contracts for work to be done or things to be sold must be construed by that standard. Hale v. Milliken, 5 Cal. App. 344, 90 P 365.

99. Evidence of custom among dealers in structural steel as to manner of computing weight. Hale v. Milliken, 5 Cal. App. 344, 90 P 365.

1. Held to mean such weights and goods as are determined by such persons whose

greater than the true weight or measure, does not conflict with the statute, inhibiting the sale of coal by the ton at less than the rate of 2,000 pounds to the ton.[2]

WHARVES.[3]

A wharfinger is one who maintains for hire a wharf for the purpose of accommodating vessels in loading and unloading freight and passengers.[4] A riparian owner has a right to erect and maintain wharves subject to certain instructions imposed by statute,[5] and to charge wharfage for the use thereof,[6] unless prohibited by law from so doing,[7] either under an express or implied contract.[8] The owner of the fee in a street and river front has a right to build a dock over the street to the river,[9] but the dock thereupon becomes a part of the street.[10] The character of a pier, as determining the amount to be awarded in condemnation proceedings,[11] may be determined from stipulations and agreements exacted at the time of granting a license for its alteration.[12] The party in control of a dock is liable for injuries resulting from its dangerous condition,[13] whether such dangers are known to him or should, by the exercise of reasonable care, have been discovered,[14] but this liability extends only to

certificate of weights and grades are generally accepted. Rogers & Co. v. Leach, 127 Ill. App. 199.

2. It is in accord with the purpose of Laws 1900, c. 327, § 150, which is to provide for the protection of the public. City of New York v. Marco, 109 NYS 58.

3. See 8 C. L. 2304.

4. Does not include one constructing a pier as contractor. Conklin v. R. P. & J. H. Staats Co., 155 F 818.

5. Rev. 1905, § 1696, providing that navigation must not be obstructed, etc. Riddick v. Dunn, 145 N. C. 31, 58 SE 439.

6. Wharfage is a mere charge by the owner of the soil or shore for the use of a portion of it. Riddick v. Dunn, 145 N. C. 31, 58 SE 439.

7. Const. 1901, art. 1, § 24, provides that no wharfage shall be charged for use of wharf on a navigable stream unless expressly authorized by law, so no recovery for destruction of a lien for wharfage can be had unless express legal authority to make the charge is shown. Williams v. Alabama Cotton Oil Co. [Ala.] 44 S 957.

8. Riddick v. Dunn, 145 N. C. 31, 58 SE 439. A claim for wharfage, to be well founded, must arise from a contract, express or implied, to pay the charges. Williams v. Alabama Cotton Oil Co. [Ala.] 44 S 957. In the absence of an agreement to the contrary, custom controls in the transportation and delivery of goods, and by it the carrier has the right to unload on wharf and consignee is liable for wharfage. Riddick v. Dunn, 145 N. C. 31, 58 SE 439.

9. Providing he does not interfere with the public easement. City of Buffalo v. Delaware, etc., R. Co., 190 N. Y. 84, 82 NE 513.

10. And the owner's use thereof is subject to the public right. City of Buffalo v. Delaware, etc., R. Co., 190 N. Y. 84, 82 NE 513.

11. By Greater New York Charter, Laws 1901, p. 351, c. 466, § 822, the commissioner of docks is authorized in his discretion, at any time, subject to approval of commissioners of the sinking fund, to acquire property rights in piers, and to negotiate for their purchase, and if a purchase cannot be effected to institute condemnation proceedings. In re Old Pier No. 11, East River, 109 NYS 2.

12. Agreement by owner and tenant that if pier should be condemned no additional value would be placed on it by reason of erection of shed for which license was granted authorized a refusal to award damages as for a shedded pier, or pier with irrevocable license to maintain a shed in perpetuity, and city did not become liable for shed by sale of pier with the shed on it. In re Old Pier No. 11, East River, 109 NYS 2. Where a pier is acquired by city under condemnation proceedings, a tenant who has erected sheds under a license granted on condition that they shall not be an added value to the pier is not entitled to an award for his unexpired term. Id.

13. A city acquiring a pier under Laws 1894, p. 1903, c. 758, Am. Laws 1895, p. 1946, c. 931, is not relieved of responsibility by the fact that pier was in defective condition at time of and long before it acquired ownership, and that it was not held out as a safe place. Birch v. New York, 121 App. Div. 395, 106 NYS 104. Owner is liable even to one on wharf as guest or visitor of one employed to care for wharf. Cristadoro v. Von Behren's Heirs, 119 La. 1025, 44 S 852, overruling McConnell v. Lemley, 48 La. 1432, 20 S 887, in so far as it restricted the responsibility provided by art. 2322. Civ. Code, to neighbors and passengers. That the defect or dangerous condition was open and apparent and should have been avoided is no defense. Birch v. New York, 121 App. Div. 395, 106 NYS 104; Cristadoro v. Von Behren's Heirs, 119 La. 1025, 44 S 852.

14. A railroad lessee of wharf is under the duty of knowing whether there are obstructions in a slip assigned by it to a vessel delivering goods to it, though the obstruction is some distance beneath the surface. Verdon v. Brooklyn Heights R. Co., 157 F 481. Evidence held to show an obstruction and injury thereby. Id. Owner who had removed one of the piers from a dock, leaving submerged piles, is liable for injury to a lighter resulting from grounding on such piles while properly in the dock.

those dangers which might reasonably be expected to exist,[15] and the burden of showing negligence in not discovering and removing them is on the libellant.[16] In Virginia, failure of the owner of a steamboat dock to provide suitable accommodations for patrons of boats using the dock is a misdemeanor.[17]

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WILLS.

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§ 6. Validity, Operation, and Effect in General, 2078. What Law Governs, 2078.

Scope of topic.—This topic treats of wills in general and the probate and establishment thereof. While the general rules of construction are retained, those directed solely to a determination of what estates in real[18] or personal property[19] are

Philadelphia Transportation & Litherage Co. v. Pennsylvania R. Co. 160 F 557.

15. Not to dangers arising from unusually low tide caused by exceptionally strong wind. Conklin v. R. P. & J. H. Staats Co., 155 F 818.

16. Evidence insufficient to show negligence or injury from an obstruction. Philadelphia Transportation & Litherage Co. v. Mechling Bros. Mfg. Co., 160 F 555. Evidence failed to show negligence. Conklin v. R. P. & J. H. Staats Co., 155 F 818. Evidence failed to show negligence in ascertaining hidden danger. Id.

17. Va. Code 1904, § 1294, by a proviso, does not apply to any wharf where no wharfage is charged, so the statute does not apply to lessor of wharf who receives a commission as rent, where neither lessor nor lessee exact any wharfage from the public. Hunter v. Com. [Va.] 60 SE 102.

18. See Real Property, 10 C. L. 1448.

19. See Property, 10 C. L. 1280.

created by the use of particular words, and the time of vesting of these estates,[20] are elsewhere given. Trusts as such,[21] charitable gifts,[22] annuities,[23] powers[24] equitable conversion,[25] and election for or against the will except intent to require election,[26] are also discussed at length in other articles, as well as general principles of administration and distribution.[27]

§ 1. *Right of disposal and contracts relating to it.* See 8 C. L. 2305—The right to dispose of property by will is purely statutory and may be limited or withdrawn by legislation[28] but unless so limited or withdrawn anyone possessing devisable property[29] may ordinarily dispose of it in whatever manner he pleases,[30] if he has testamentary capacity and exercises his own will and judgment,[31] and the burden of showing limitations is on the one who asserts it.[32] The statutory rights of a surviving spouse may not, however, he impaired,[33] such spouse usually having the right to elect for or against the will,[34] and in some states the right of devise or bequest has been restricted where the gift is to charity[35] or to strangers or corporations,[36] and testator leaves dependents or near relatives,[37] or where improper relations exist between him and his beneficiary.[38] Statutory provisions for posthumous children,[39] or

20. See Real Property, 10 C. L. 1448; Property, 10 C. L. 1280; Perpetuities and Accumulations, 10 C. L. 1167.

21. See Trusts, 10 C. L. 1907.

22. See Charitable Gifts, 9 C. L. 555.

23. See Annuities, 9 C. L. 108.

24. See Powers, 10 C. L. 1258.

25. See Conversion in Equity, 9 C. L. 728.

26. See Election and Waiver, 9 C. L. 1037.

27. See Descent and Distribution, 9 C. L. 970; Estates of Decedents, 9 C. L. 1154.

28. Act March 2, 1895, giving widower one-half of wife's estate where wife dies without descendants, held not invalid as depriving wife of power to dispose of property by will. Ferguson v. Gentry, 206 Mo. 189, 104 SW 104.

29. **An entryman** under United States timber culture act has no discendible and hence no devisable interest before grant of patent. Walker v. Ehresman [Neb.] 113 NW 218.

30. No objection that property is given to strangers in absence of incapacity or undue influence. Saxton v. Krumm [Md.] 68 A 1056. Equality among children is favored in construing will of parent, but rule does not extend to disposition of property by a husband or wife to the other. Hodgkins v. Hodgkins, 108 NYS 173. Testator gave nearly all property to his son and but a small amount to his widow. Lavin v. Thomas, 108 NYS 112.

31. In re Turner's Will [Or.] 93 P 461. See post, § 2.

32. Rine v. Wagner [Iowa] 113 NW 471.

33. No provision in a will can of itself defeat a widow's dower. Otts v. Otts [S. C.] 61 SE 109. A husband may not by will destroy or limit the right of his wife to allowances for maintenance pending administration of his estate where she elects to take against the will. That will provided that allowances be paid out of property therein given held immaterial. In re Bump's Estate [Cal.] 92 P 643.

34. The doctrine of election in general, see Election and Waiver, 9 C. L. 1037; intent to require election, see post, § 5d, effect on distribution, see Estates of Decedents, 9 C. L. 1154.

35. Under a statute prohibiting a gift of more than one-half of one's property to charities, a life estate given to a person should be treated as a legacy the same as amounts given to charities and other legatees. Laws 1860, p. 607, c. 360. In re Strang, 121 App. Div. 112, 105 NYS 566. Where testator gave residue of his estate to wife for life and provided that at her death it should be converted into cash, making bequests thereof to certain individuals and charitable institutions, held on settlement of executor's account after wife's death the value of life estate should be determined by the actual duration of the estate in order to ascertain whether gifts to charitable institutions exceeded statutory limit of one-half of his estate. Laws 1860, p. 607, c. 360. In re Runk, 55 Misc. 478, 106 NYS 851. Bequest to bishop to be spent in saying masses for testator's soul is not to a charitable use. In re Lennon's Estate [Cal.] 92 P 870.

36. Laws 1903, c. 334, p. 581, amending § 70, c. 46, p. 108, Laws 1889, made it unlawful for a childless spouse to will all personalty to another to exclusion of husband or wife and entitles surviving spouse to same interest in both realty and personalty, unaffected by contrary testamentary disposition. In re Hayden [Minn.] 111 NW 278. Code 1873, § 1101, limiting the power of one leaving a wife, child, or parent to devise to an institution or corporation formed under the chapter, does not apply to devises to an individual for charitable uses. Rine v. Wagner [Iowa] 113 NW 471.

37. Laws 1860, p. 607, c. 360, prohibiting a person having a wife from devising more than one-half of his estate to charity, speaks as of death of testator. St. John v. Andrew's Inst. [N. Y.] 83 NE 981. "Having a wife" means a wife "him surviving," hence statute does not apply where husband and wife die at same time. Id.

38. In Louisiana persons living in open concubinage are incapable of devising to each other any immovables and can devise movables only to the extent of the value of one-tenth of the entire estate. Civil Code, art. 1481. In re Filhiol, 119 La. 998, 44 S 843.

children omitted from the will by mistake or accident,[40] or not mentioned or provided for,[41] also indirectly affect the right of testamentary disposition. A married woman may dispose of her separate estate by will without her husband's consent.[42] Property may be willed to a corporation to be formed after testator's death provided it vests within the time allowed by law.[43]

Contracts to devise or bequeath See 8 C. L. 2306 or to allow one's property to go intestate,[44] are valid and binding [45] if sufficiently definite,[46] based upon a valuable consideration,[47] and delivered,[48] and if not objectionable as an attempted sale [49] or as being within the statute of frauds.[50] Where legal remedies are inadequate,[51] such contracts may be enforced in equity [52] by suit for specific performance,[53] if the conditions are present which are essential to the maintenance of such suits in other cases,[54] and sometimes a lien may be established or other remedy afforded.[55] Where

Evidence sufficient to show existence of relation. Id.

39. Where will showed no intent to disinherit posthumous child, and widow took under statute, widow and child are each entitled to one-half of estate. In re Hobson's Estate [Colo.] 91 P 929. The circumstances surrounding the testator when the will was executed may be considered to show the testator's intention with respect to a posthumous child. Evidence held to show intention to disinherit posthumous child. Peet v. Peet, 229 Ill. 341, 82 NE 376.

40. Child held omitted by "mistake" where omitted on statement of scrivener that omission would not cut off child's share. Bachinski v. Bachinski [Mich.] 15 Det. Leg. N. 370, 116 NW 556. Extrinsic evidence may be resorted to in determining whether testator omitted by mistake or accident to make provision for his child. Id. Proof of extent of father's estate held inadmissible. Id. Evidence that long after making of will child was in house of ill fame held inadmissible. Id.

41. Where will expressed testator's desire to make a just distribution among the members of his family and gave all the property to the wife and her heirs forever, after-born children were "mentioned" and "provided for" and hence could not take by descent. Wormser v. Groce, 120 App. Div. 287, 104 NYS 1090. Under a statute giving afterborn children the shares of an intestate unless they are provided for in the will, any words are sufficient which show that testator had such children in mind. "Afterborn children are herein provided for" held sufficient. Randall v. Dunlap, 218 Pa. 210, 67 A 208.

42. Or any authority under marriage contract. Ferrell v. Gill [Ga.] 61 SE 131.

43. St. John v. Andrews Inst. [N. Y.] 83 NE 981.

44. Jones v. Abbott, 228 Ill. 34, 81 NE 791.

45. To devise. Oswald v. Nehls, 233 Ill. 438, 84 NE 619. Contract by sole devisee to devise to another held enforcible by latter. Winn v. Schenck [Ky.] 110 SW 827. Promise of husband to provide by will for support of divorced wife after his death in consideration of her forbearance to sue for dower held valid. Kundinger v. Kundinger, 150 Mich. 630, 14 Det. Leg. N 789, 114 NW 408. Where a mother in her last illness conveys all her realty to her husband on his promise to will same to their incompetent son and care for him, the father will not be permitted to revoke a will made pursuant to such agreement or incumber or dispose of the realty to the detriment of the son. Schneringer v. Schneringer [Neb.] 116 NW 491.

46. Held too indefinite as to interest bequeathed. Sarasohn v. Kamalky, 120 App. Div. 110, 105 NYS 53.

47. Compromise of a suit involving the property mentioned in the contract is a sufficient consideration for contract to permit property to descend intestate. Jones v. Abbott, 228 Ill. 34, 81 NE 791.

48. Delivery of contract to devise held not sufficiently shown. Sarasohn v. Kamalky, 120 App. Div. 110, 105 NYS 53.

49. Contract held not invalid as one for sale of property not in existence. Stewart v. Smith [Cal. App.] 91 P 667.

50. Contract to devise all property of which promisor should die seized held not one by its terms not to be performed in a year (Stewart v. Smith [Cal. App.] 91 P 667), nor one invalid as attempted oral sale of realty, it not appearing that estate was realty (Id.). Where complainants had conveyed property to testatrix in consideration of and reliance upon her promise, contract was executed so far as to preclude defense of statute of frauds. Id.

51. On breach of the contract by conveyance, it not appearing that contractor is unable to respond in damages, a suit in equity cannot be maintained to establish a lien on premises. Lenox v. Lenox, 110 NYS 282.

52. Oswald v. Nehls, 233 Ill. 438, 84 NE 619.

53. Contract to provide by will for another's support, probate court not having adequate jurisdiction. Kundinger v. Kundinger, 150 Mich. 630, 14 Det. Leg. N. 789, 114 NW 408. Probate court had no power to determine amount required. Id. Jurisdiction not conferred by pub. acts 1899, p. 395. No. 253. Id. No misjoinder, though parties complainant were not all interested to same extent. Stewart v. Smith [Cal. App.] 91 P 667. Executor having no interest in distribution held not necessary party. Id.

54. As in other cases of specific performance, the contract to will must be just and reasonable, free from fraud or undue influence, certain and definite, must be for a valuable consideration, must not be within the statute of frauds, and its enforcement must not invade the rights of innocent parties. Stewart v. Smith [Cal. App.] 91 P 667.

55. Where on a decedent's failure to devise

a devisee agrees with testator to devise to another, the latter takes under the first will and not under the second on the question of inheritance tax.[56]

§ 2. *Testamentary capacity, fraud, and undue influence. A. Essentials to capacity.*[See 8 C. L. 2307]—Full mental vigor is not essential to capacity,[57] it being sufficient if at the time the will is made [58] one knows the natural objects of his bounty, the nature and extent of his property, and the disposition he is making of it.[59] It follows that while insane delusions may avoid a will,[60] mere mental aberrations not entering into its execution,[61] eccentricities, prejudices, or resentment against one or more relatives,[62] intoxication,[63] or failure of memory, great age, or enfeebled mind or body,[64] is not alone sufficient. While one's religious faith is no evidence of insanity,[65] one who thinks so persistenly on the subject of spiritualism as to become a

all his property in consideration of services suit is brought for their reasonable value, plaintiff is not entitled to a lien on specific property included in a will which was revoked. Johnson v. Myers [Iowa] 116 NW 600.

56. Not subject to law passed between taking effect of the two wills. Winn v. Schenck [Ky.] 110 SW 827.

57. McBride v. Sullivan [Ala.] 45 S 902. In re Tifft's Will, 55 Misc. 151, 106 NYS 362.

58. Where it was clearly shown that testator was competent when he made the will, incapacity before and after was immaterial. Lum v. Lasch [Miss.] 46 S 559.

59. McBride v. Sullivan [Ala.] 45 S 902; Owen v. Crumbaugh, 228 Ill. 380, 81 NE 1044; Terry v. Davenport [Ind.] 83 NE 636; Leibert v. Hatcher, 205 Mo. 83, 102 SW 962; King v. Gilson, 206 Mo. 264, 104 SW 52; Holton v. Cochran, 208 Mo. 314, 106 SW 1035; Shayne v. Shayne, 54 Misc. 474; 106 NYS 34; Lavin v. Thomas, 108 NYS 112.

60. Owen v. Crumbaugh, 228 Ill. 380, 81 NE 1044.

What constitutes: Insane delusion exists where one conceives the existence of something fanciful and extravagant, having no foundation in reason or fact, and is dominated and controlled by such imagination. Riddle v. Gibson, 29 App. D. C. 237. Delusion to render one incompetent must be a belief in something impossible which will not yield to evidence or reason, for if an erroneous belief has some foundation it is not an insane delusion. Bauchens v. Davis, 229 Ill. 557, 82 NE 365. Accordingly, something more must be shown than a mistaken notion on testator's part as to the feelings or intentions of his relatives towards him or his property. McBride v. Sullivan [Ala.] 45 S 902. Thus, an erroneous belief that a son lacked filial affection (Leffingwell v. Bettinghouse [Mich.] 115 NW 731), or animus toward children for sympathizing with testator's wife with whom he had trouble (Bauchens v. Davis, 229 Ill. 557, 82 NE 365), has been held not to constitute an insane delusion. The same is held with respect to erroneous beliefs based on doctrines of religion (Owen v. Crumbaugh, 228 Ill. 380, 81 NE 1044), and the fact that a childless woman bequeathed her small estate to her physician, who had been kind to her, and excluded indifferent brothers and sisters, did not show an insane delusion (Riddle v. Gibson, 29 App. D. C. 237). A testator was, however, held incapacitated where he was dominated by an unfounded delusion that children had deprived him of certain stock (Holton v. Cochran, 208 Mo. 314, 106 SW 1035), and where there is evidence of insanity and that hatred for testator's mother actuated him when he made his will, making it the result of delusions which the jury can hold to be insane delusions, they should be charged that the will may be disallowed as a product of such delusions (In re Mansbach's Estate, 150 Mich. 348, 14 Det. Leg. N. 696, 114 NW 65).

61. Owen v. Crumbaugh, 228 Ill. 380, 81 NE 1044.

62. Riddle v. Gibson, 29 App. D. C. 237.

63. A drunkard may make a valid will if at time of execution he comprehends the nature, extent, and the disposition of his estate, his relations to those who have or might have claim to his bounty, and is free from fraud and coercion. In re Tifft's Will, 55 Misc. 151, 106 NYS 362. Will admitted over the objection that by the use of intoxicating liquors testator was incompetent where draftsman (lawyer) and witnesses testify as to character of testator and as to his instructions in preparation of will. In re Feeney's Will, 55 Misc. 158, 106 NYS 464.

64. Gates v. Cole [Iowa] 115 NW 236; In re Armstrong's Will, 55 Misc. 487, 106 NYS 671. Where testatrix knew her property, amount of income, and objects of her bounty, and transacted most of her business herself, that her mind had become somewhat inert through physical illness, held insufficient to show mental incapacity. South Side Trust Co. v. McGrew [Pa.] 69 A 79. That one is extremely feeble physically and in a dying condition, though not necessarily indicative of mental incapacity, is very significant where there is also evidence of mental feebleness. In re Doolittle's Estate [Cal.] 94 P 240. To constitute **senile dementia,** the mind must be so far impaired as to deprive the testator of intelligent action. Gates v. Cole [Iowa] 115 NW 236.

65. O'Dell v. Goff, 149 Mich. 152, 14 Det. Leg. N. 399, 112 NW 736. Belief in **spiritualism** is not evidence of insane delusion. Owen v. Crumbaugh, 228 Ill. 380, 81 NE 1044. Error to exclude evidence that there was nothing irrational from standpoint of a spiritualist in testator's belief that a medium in a trance might do him harm. O'Dell v. Goff, 149 Mich. 154, 14 Det. Leg. N. 399, 112 NW 736. Error to permit witness to testify that a monomaniac would include any spiritualist who believed that he could receive

monomaniac incapable of reasoning has no testamentary capacity.[66] Incapacity renders the will not merely voidable but void.[67]

*Admissibility of evidence.*See 8 C. L. 2308—Circumstances,[68] and the conduct of testator when the will was made,[69] the disposition made by the will,[70] the conduct and declarations of testator before and after its execution,[71] if not too remote,[72] and other facts reasonably bearing on the subject of mental soundness,[73] may be shown. Nonexperts may give their opinions after stating the facts on which they are based,[74]

communications from departed ones. Id. Evidence of truth or falsity of spiritualistic faith held inadmissible. Id.

66. O'Dell v. Goff, 149 Mich. 152, 14 Det. Leg. N. 399, 112 NW 736. Where one is impelled to follow spiritualistic communications blindly, his will so made is invalid and it is immaterial whether this conclusion is based on theory of incapacity or undue influence. Id.

67. State v. Lancaster [Tenn.] 105 SW 858.

68. In re Johnson's Estate [Cal.] 93 P 1015. Proponent may show the **value and extent of testator's estate.** Hodge v. Rambow [Ala.] 45 S 678.

Financial condition of children excluded is admissible. Wallen v. Wallen [Va.] 57 SE 596. Error to exclude proof of **pecuniary condition of contesting daughter and her husband.** Rasdall v. Brush, 31 Ky. L. R. 1138, 104 SW 749.

69. In re Johnson's Estate [Cal.] 93 P 1015.

70. Reasonableness or unreasonableness of disposition may be considered in connection with other evidence, but **does not of itself establish incapacity.** Franklin v. Belt [Ga.] 60 SE 146; Bottom v. Bottom [Ky.] 106 SW 216; Wallen v. Wallen [Va.] 57 SE 596. That will was natural may be considered. Blackman v. Andrews, 150 Mich. 322, 14 Det. Leg. N. 709, 114 NW 218. A will is unnatural only where contrary to what testator from his known views and intentions would have been expected to make. In re Morgan's Estate [Pa.] 68 A 953. Not unnatural in legal sense to favor children of daughter where testator was prejudiced against son-in-law. Id. That testator whose estate was less than exemption allowed by law to widow and minor child gave estate to them could be taken into account. Hodge v. Rambow [Ala.] 45 S 678.

71. Declarations admissible. Peet v. Peet, 229 Ill. 341, 82 NE 376; O'Dell v. Goff, 149 Mich. 152, 14 Det. Leg. N. 399, 112 NW 736; Wallen v. Wallen [Va.] 57 SE 596. Conversations with testator prior to the execution of the will are competent on the subject of his mental condition. Error to exclude conversation between plaintiff contestant and testatrix. Garrus v. Davis, 234 Ill. 326, 84 NE 924. Prior declarations or wills of testator are **inadmissible** to control the operation of the will contested. Floto v. Floto, 233 Ill. 605, 84 NE 712. Instruction that fact of **testator's suicide** shortly after execution of will created no presumption of insanity properly refused, there being evidence of family predisposition to insanity. Holton v. Cochran, 208 Mo. 314, 106 SW 1035. Declarations and conduct of testator after the will is made are inadmissible in the absence of circumstances warranting the presumption that his condition was the same when the will was made. Raving spells in last illness. Leffingwell v. Bettinghouse [Mich.] 115 NW 731.

72. Evidence of testator's conduct on death of wife and father-in-law in 1891 held not objectionable for remoteness, will having been executed in 1902. Holton v. Cochran, 208 Mo. 314, 106 SW 1035. Exclusion of record in divorce suit tending to show delusion thirty years before making of will and that testator had been away from wife ever since held not reversible error. Turner v. American Security & Trust Co., 29 App. D. C. 460.

73. On claim that testator had insane delusion that a son was not his child, **a deposition** in former suit by testator for divorce containing evidence of admissions of testator's wife held admissible to prove that testator had grounds for his belief, it being presumed testator knew of the deposition. O'Dell v. Goff, 149 Mich. 152, 14 Det. Leg. N. 399, 112 NW 736. Testator's deposition given on contest of mother's will held admissible only on issue of testamentary capacity. Murphy's Ex'r v. Hoagland [Ky.] 107 SW 303. Evidence of statements and actions indicating testator's **belief that he would marry** a young girl held competent on issue of capacity. Huyck v. Rennie, 151 Cal. 411, 90 P 929. **Lease** executed by testator held admissible to show business capacity. Id. Testimony that testatrix had "acted very childish as though she had forgotten," and that every time witness had seen her for two or three years she seemed to have grown weak physically, held admissible, though in nature of conclusions. Vannest v. Murphy [Iowa] 112 NW 236. Where contestant first showed that testator had unfounded delusions as to wife's infidelity, based on reports, proponent could show in rebuttal that after investigation he believed the reports unfounded. Floto v. Floto, 233 Ill. 605, 84 NE 712. Evidence that an allowance bequeathed to contestant had been suspended pending contest held properly excluded. Walker v. Walker [R. I.] 67 A 519. Held discretionary to exclude as immaterial question asked for contestant whether witness knew of contestant finding fault with way testator's business was going. Id.

74. Brown v. McBride, 129 Ga. 92, 58 SE 702. Could state whether testator "talked rationally." Hodge v. Rambow [Ala.] 45 S 678. Witnesses may not testify that testator was incompetent in absence of evidence showing qualification to express an opinion. In re Dowell's Estate [Mich.] 115 NW 972. Where the testimony of witnesses had not the slightest tendency to show insanity, their opinions that testa-

but opinions must have reference to some specified time when witness came in contact with testator.[75] Testator's communications with his attorney who drew the will and what the latter saw or heard at the time of its execution are admissible.[76]

Sufficiency of evidence. See 8 C. L. 2810—The right of testamentary disposition, including the right of revocation, should not be imperiled by uncertain testimony.[77] The testimony of subscribing witnesses prevails over that of experts based only on hypothetical questions.[78] Where conflicting evidence does not clearly preponderate in favor of the theory of insanity, the conclusion of the trial judge will not be disturbed.[79]

Instructions See 8 C. L. 2811 should be clear on the burden of proof.[80] They should be based on the evidence [81] without invading the province of the jury [82] or discredit-

trix was incompetent were inadmissible. Blackman v. Andrews, 150 Mich. 322, 14 Det. Leg. N. 709, 144 NW 218. No fixed rule can be laid down as to just what facts are required to lay the proper foundation for expression of opinion as to capacity by lay witnesses (Turner v. American Security & Trust Co., 29 App. D. C. 460), the matter being largely left to the court's discretion, which will not ordinarily be disturbed (Id.). That the witness cannot remember minute details of conversations and incidents will not exclude his opinion. Id. Evidence held sufficient to justify expression of opinions. Id. Opinion of testator's widow as to husband's mental capacity, based on statements of physicians and others, held inadmissible. Id. One may not testify that in his opinion testator was capable of making a will. Garrus v. Davis, 234 Ill. 326, 84 NE 924.

75. Witness who did not see testator on day will was executed could not give opinion as to his condition on that day. Huyck v. Rennie, 151 Cal. 411, 90 P 929. Question calling for opinion as to capacity prior to a specified day held indefinite as to time. Id.

76. Not privileged. In re Young's Estate [Utah] 94 P 731, and authorities reviewed.

77. Home of the Aged v. Bantz [Md.] 69 A 376. A prima facie case of testamentary capacity can be overcome only by clear and weighty evidence. Where will was written at testator's dictation without outside interference, testimony of experts as to failings of age, etc., held of little weight. In re Morgan's Estate [Pa.] 68 A 953.

Evidence insufficient to show incapacity. Gates v. Cole [Iowa] 115 NW 236; Blackman v. Andrews, 150 Mich. 322, 14 Det. Leg. N. 709, 114 NW 218; In re Palmer's Estate [Pa.] 68 A 710; Walker v. Walker [R. I.] 67 A 519. Old age and peculiarities. In re Armstrong's Will, 55 Misc. 487, 106 NYS 671. Unfair disposition, old age, ill health, irascibility of temper, etc. In re Stufflebaum's Will [Iowa] 112 NW 815. Forgetfulness, untidiness, and certain statements of testatrix, and admissions of proponent. Leffingwell v. Bettinghouse [Mich.] 115 NW 731. Disposition to one who had served testator for thirty years did not indicate unsound mind where testator had no relatives except a child of whom he believed he was not father. Lum v. Lasch [Miss.] 46 S 559.

Held sufficient to show capacity. Wickes v. Walden, 228 Ill. 56, 81 NE 798; Shults v. Shults, 229 Ill. 420, 82 NE 312; Lavin v. Thomas, 108 NYS 112; In re Atchley's Will, 108 NYS 877; In re Tredwell's Will, 110 NYS 764. Evidence held to show that testator was not insane, though afflicted with hemiplegia and resultant paralysis. Ducasse's Heirs v. Ducasse [La.] 45 S 565. Evidence held to show that testatrix was not irrational at time will was made, though she might have been later. Succession of Jones [La.] 45 S 965. Testatrix's capacity shown by unusual mental capacity up to death, a clear understanding of what property she had and her relationship to objects of her bounty, and understanding of provisions of will. In re Bowman's Will [Wis.] 113 NW 956.

Evidence held to show incapacity. In re Doolittle's Estate [Cal.] 94 P 240; Holton v. Cochran, 208 Mo. 314, 106 SW 1035; In re Abel's Estate [Nev.] 93 P 227. Insufficient to support finding of competency and freedom from restraint. In re Tuttle's Will, 108 NYS 133. Under evidence held not error to refuse to direct verdict in favor of will. Morgan v. Adams, 29 App. D. C. 198. Evidence held to require submission of question of testamentary capacity to the jury. In re Eckler's Estate, 110 NYS 650.

78. In re Tifft's Will, 55 Misc. 151, 106 NYS 362.

79. Succession of Newman [La.] 45 S 928.

80. Instruction on burden of proof in suit to contest held not misleading. Bloor v. Platt [Ohio] 84 NE 604.

81. Instruction as to effect of intoxication properly refused. Wickes v. Walden, 228 Ill. 56, 81 NE 798. Instruction as to insane delusions held properly refused. Id. Bauchens v. Davis, 229 Ill. 557, 82 NE 365. Under evidence held not error to assume that testator's claim with reference to his having been deprived of certain stock was unfounded. Holton v. Cochran, 208 Mo. 314, 106 SW 1035. Charge that if any theory consistent with validity could be suggested which appeared as probable as theory on which invalidity was based will should be maintained, held erroneous as ignoring necessity that theory adopted be consistent also with the evidence. McBride v. Sullivan [Ala.] 45 S 902.

82. Charge setting out facts as of themselves raising a strong presumption of capacity held to invade province of jury. McBride v. Sullivan [Ala.] 45 S 902.

ing witnesses,[83] and should properly define testamentary capacity [84] and insane delusions.[85] It is proper to instruct as to the purposes of particular evidence.[86]

(§ 2) *B. Constituents of fraud, mistake, and undue influence.* See 8 C. L. 2311

"Undue influence" is such influence as amounts to overpersuasion, coercion, or force, overpowering and destroying the free agency and will power of the testator,[87] but any reasonable influence obtained by acts of kindness on arguments addressed to the understanding,[88] or growing out of natural affection,[89] is not in law undue. To invalidate, the influence must be such as to destroy the free agency of testator,[90] and must be the efficient cause without which the disposition would not have been made.[91]

83. Request that if dissatisfied with testimony of witnesses to will jury might reject it held calculated to discredit such witnesses. Huyck v. Rennie, 151 Cal. 411, 90 P 929.

84. An instruction is improper which does not recognize that a testator has natural objects of his bounty and owes them a duty. Rasdall v. Brush, 31 Ky. L. R. 1138, 104 SW 749. Instruction not modifying "objects" by word "natural" held defective. Murphy's Ex'r v. Hoagland [Ky.] 107 SW 303. Instruction requiring capacity to "take a rational survey of his property" not erroneous for not saying that testator must have known "the character and value of his estate." Bottom v. Bottom [Ky.] 106 SW 216. Instruction not erroneous as adding as an element of capacity testator's ability to act and comprehend "without the aid of any other person." Holton v. Cochran, 208 Mo. 314, 106 SW 1035. Not error to charge that "it is necessary a person shall have sufficient mental capacity for the transaction of the ordinary affairs of life," when this was followed in a later paragraph by the express statement that "he need not have sufficient capacity to make a contract, but must understand substantially what he is doing and the nature of the act in which he or she is engaged." Welsh Hills Baptist Church v. Wilson, 9 Ohio C. C. (N. S.) 611.

85. Instruction to find against will if testator had a certain insane delusion, though possessing "many" of the mental faculties essential to testamentary capacity, held not contradictory. Holton v. Cochran, 208 Mo. 314, 106 SW 1035.

86. Held proper to instruct that letters and statements should be considered only as bearing on condition of testator's mind and not as tending to prove their truth. Floto v. Floto, 233 Ill. 605, 84 NE 712.

87. Selbert v. Hatcher, 205 Mo. 83, 102 SW 962. Undue influence is the use, by one in whom a confidence is reposed in another, of such confidence for the purpose of obtaining an unfair advantage of the weakness of the mind of the latter or of his necessities or distress. In re Welch's Will [Cal. App.] 91 P 336. Any influence obtained over the mind of testator to such an extent as to destroy his free agency and constrain him to do against his will what he would otherwise refuse to do is undue influence, whether obtained directly or indirectly or at one time or another. Murphy's Ex'r v. Hoagland [Ky.] 107 SW 303. Bill alleging collusive pursuasion by legatee that husband intended to deprive testatrix of her child held not demurrable. Franklin v. Belt [Ga.] 60 SE 146.

88. Murphy's Ex'r v. Hoagland [Ky.] 107 SW 303. Influence will not be deemed undue which may reasonably be inferred to have been produced by the kind attentions and services of the beneficiary. Boynes v. Gibson [N. J. Eq.] 68 A 756. Advice and solicitation, though insistent, will not invalidate unless it is also shown that testator's will was thereby overcome. Gates v. Cole [Iowa] 115 NW 236.

89. Not shown by proof of influence growing out of natural affections without active exercise of over-persuasion, coercion or force, fraud or deception, impairing testator's will. Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46. Daughter's protest against disregarding promise that she have a farm held insufficient to establish undue influence. In re Bowman's Will [Wis.] 113 NW 956. Influence of affection or attachment, or the desire of gratifying the wishes of one beloved and trusted, is not undue unless will power of testator is overcome by fraud or imposition. Leibert v. Hatcher, 205 Mo. 83, 102 SW 962.

90. Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46. Free agency, liberty to act, and independent volition must have been overcome. Hart v. Hart [Tex. Civ. App.] 110 SW 91. Must be such as to overcome testator's free volition or conscious judgment and to substitute the purposes of another. In re Turner's Will [Or.] 93 P 461. Must partake of fraud and control testator's mind so as to influence him to make a will which otherwise he would not have made. In re Abee's Will [N. C.] 59 SE 700. Contestant must show that influence was exerted to such degree as to amount to force or coercion. Saxton v. Krumm [Md.] 68 A 1056. To such extent that the will was the result thereof. Gates v. Cole [Iowa] 115 NW 236. Must amount to force and coercion destroying free agency and not mere desire of gratifying wishes of another. There must be proof of coercion or importunity which could not be resisted; that instrument was made for sake of peace so that motive was tantamount to force and fear. Wallen v. Wallen [Va.] 57 SE 596.

91. In re Turner's Will [Or.] 93 P 461. The undue influence must be directly connected with the execution of the will, and operate at the time it is made. Wickes v. Walden, 228 Ill. 56, 81 NE 798; Gates v. Cole [Iowa] 115 NW 236. Evidence, that seven years before execution testator had revoked an order for tombstone for first wife, held incompetent to show undue influence on part of second wife. Floto v. Floto, 233 Ill. 605, 84 NE 712. Where there were no facts showing undue influence be-

Whether the influence was undue will depend largely upon the physical and mental strength or weakness of the testator at the time.[92]

Fraud and mistake See 8 C. L. 2312 may invalidate.[93] Proof of due execution is ordinarily sufficient to raise the presumption that testator knew the contents of the will,[94] but a will executed without reading discussion, or explanation, in the belief that it conformed to testator's directions but in fact disposing of the property in an entirely different manner, is not the will of testator [95] and cannot be upheld as such on the theory that the mistake was merely one of law or fact, as to the effect of provisions intentionally written.[96] Where a will is attacked as a forgery, the burden is on proponent to show its genuineness.[97]

Indicia of influence and admissibility of evidence. See 8 C. L. 2312—Evidence bearing on testator's susceptibility to influence [98] and his relations to his kinsfolk and legatees,[99] if not too remotely connected with the time of execution of the will,[1] may be admitted, and, also, evidence showing the financial condition of excluded persons [2] and explaining failure to provide more liberally for certain relatives.[3] While

fore execution of will, evidence of such facts after execution incompetent. Leffingwell v. Bettinghouse [Mich.] 15 Det. Leg. N. 40, 115 NW 131.

92. What would be undue influence in case of physical and mental weakness would not necessarily be such if decedent was in full possession of his faculties. In re Hoffman's Estate [Mich.] 15 Det. Leg. N. 51, 115 NW 690.

93. Bill alleging **fraudulent representations,** and pursuasions that husband intended to deprive testatrix of her child, held not demurrable. Franklin v. Belt [Ga.] 60 SE 146. Bill alleging **mistake of fact** by testatrix as to intention of husband with reference to depriving her of her child held not demurrable. Id. Contention that wife could have inquired of husband held untenable. Id.

94. Ordinarily on proof by subscribing witnesses that will was executed under the formalities prescribed by law, testator's signature is proof that will was read to him and that he knew its contents. Snodgrass v. Smith [Colo.] 94 P 312. Burden of showing knowledge of contents held sufficiently carried by proof that testator was present and signed, and was competent to read and write. Brown v. McBride, 129 Ga. 92, 58 SE 702. Usual presumption that testator knew contents of the will is not overcome by fact that a beneficiary assisted in its preparation, there being no evidence of extreme weakness or lack of capacity to understand what he was doing. McConnell v. Kein [Kan.] 92 P 540. Mere fact that testatrix **could not read** held not to raise presumption she did not know contents. Lipphard v. Humphrey, 28 S. Ct. 561. Declarations of illiterate testatrix as to disposition of property held inadmissible to show that she was ignorant of contents of will, in absence of evidence of incapacity, undue influence, or fraud. Id.

Evidence sufficient to show testator's knowledge of contents of will. McConnell v. Kein [Kan.] 92 P 540. Though she was illiterate. Bowe v. Naughton [N. J. Eq.] 67 A 184.

95, 96. Bradford **v.** Blossom, 207 Mo. 177, 105 SW 289.

97. Griffin v. Working Woman's Home Ass'n [Ala.] 44 S 605.

98. That disposition or temperament of testator was mild, peaceable, and nonaggressive, and his will power not strong, that he could usually be controlled by those in whom he had confidence, and would be influenced to do things for sake of peace and quiet, held admissible on issue of undue influence. Hart v. Hart [Tex. Civ. App.] 110 SW 91.

99. Evidence as to misunderstandings and disputes between relatives and testatrix is admissible to show that testatrix's change of feeling was not brought about by alleged influence and also to rebut contestant's proof concerning occurrences showing that testatrix was under his control. Seibert v. Hatcher, 205 Mo. 83, 102 SW 962. Testimony concerning conversations in testatrix's presence, in which a legatee participated, held admissible as showing his relations with her. Vannest **v.** Murphy [Iowa] 112 NW 236. Evidence that three nurses did not write the names of beneficiaries on a paper given attorney who drew the will, and that a niece, charged with unduly influencing testatrix, had visited her frequently, held admissible. Garrus v. Davis, 234 Ill. 326, 84 NE 924.

1. Relation of testator to his kinsfolk and beneficiaries, and the circumstances surrounding him for some time before and after the making of the will, may be considererd, and judge has rather wide direction as to limiting time. Barber v. Allen [R. I.] 68 A 366. Evidence of quarrels between husband and wife, five and eight years before execution of wife's will, held too remote. Kultz v. Jaeger, 29 App. D. C. 300. Opinion that wife was humble and intimidated before husband, based on observations over three years before execution of wife's will, held inadmissible. Id. Transactions eleven and eighteen years before execution of will held too remote, and prejudicial. Vannest v. Murphy [Iowa] 112 NW 236.

2. Contesting daughter and her husband. Rasdall v. Brush, 31 Ky. L. R. 1138, 104 SW 749. Of excluded children. Wallen v. Wallen [Va.] 57 SE 596.

3. Where testatrix and her brother and

the fact that a second will is different from the first is not of itself evidence of undue influence,[4] evidence of the contents of the former will may be material on the issues of undue influence and incapacity, and should be admitted, unless it is clear from all the circumstances that it could not affect the result of the contest.[4a] Where there are several legatees, the admissions of one of them tending to show that he unduly influenced testator is not admissible to show that he did so in the absence of proof of common design.[5] Testator's communications with his attorney who prepared the will and what the latter heard or saw at the time of its execution are not privileged in favor of either side.[6] Nonexperts may testify if the proper foundation is laid.[7] On the issue of forgery proponent may show the source of testator's property and the friendly feeling between him and testator.[8] The existence of a confidential blood, or other relation,[9] mere opportunity to exert undue influence,[10] the character of the testamentary disposition,[11] that the scrivener was executor and legatee,[12] or testator's

sister made mutual wills and testatrix survived and in her will declared that, owing to flaws in wills of brother and sister, other brothers had taken what she would otherwise have given them, evidence that at execution of the three wills it was said that survivor was to take property of the other two held admissible in contest of will to explain why other brothers were not more liberally remembered. In re Rogers' Will, 80 Vt. 259, 67 A 726.

4, 4a. In re Young's Estate [Utah] 94 P 731.

5. Declaration by legatee that excluded sister should not receive any of testatrix's property if declarant could help it. Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46. A declaration, by one charged with having exercised undue influence, that he did exercise such influence is not evidence as against other parties in interest. Gorham v. Moor [Mass.] 84 NE 436. In ejectment by an heir against devisee as sole defendant, evidence of declarations made by a legatee, who was stranger to the suit tending to unduly influence testator, is inadmissible. Myers v. Myers [N. J. Err. & App.] 68 A 82. Admission of legatee claimed to have influenced testatrix as to advancements to him held inadmissible in suit to contest. Vannest v. Murphy [Iowa] 112 NW 236.

6. In re Young's Estate [Utah] 94 P 731, and authorities considered.

7. Nonexpert, detailing facts as to temperament and disposition of testator, could give opinion as to susceptibility to influence. Hart v. Hart [Tex. Civ. App.] 110 SW 91. Could not testify that while witness knew them testator was under control of defendant. Id.

8. Could show that all the property was received by testator from his wife, who was proponent's mother, and also the friendly relations existing between testatrix and proponent. Griffin v. Working Woman's Home Ass'n [Ala.] 44 S 605.

9. Undue influence cannot be presumed from mere confidential relation (In re Turner's Will [Or.] 93 P 461), or from the mere relation of **parent and child** (Vannest v. Murphy [Iowa] 112 NW 236), or from the mere fact that a child lived with the testator and attended to business matters for him (Id.). Instruction on hypothesis that son was mother's confidential agent, held not authorized by the evidence. Id. That proponent was cousin, friend, nurse, and business partner did not give rise to fiduciary relation. Snodgrass v. Smith [Colo.] 94 P 312. Cannot be inferred from the fact that from the time of making her will until her death testatrix manifested the same affection for contestant. Blackman v. Andrews, 150 Mich. 322, 14 Det. Leg. N. 709, 114 NW 218. That old testator disposed of property to one who had taken care of him, but who was ignorant of the making of the will and had no connection with its execution, held properly withdrawn from the jury. Bauchens v. Davis, 229 Ill. 557, 82 NE 365.

Illicit relations with the beneficiary and an unnatural disposition of the property, though proper to be considered, are not of themselves evidence of undue influence. Saxton v. Krumm [Md.] 68 A 1056; Allshouse v. Kelly [Pa.] 69 A 88.

10. Opportunity not sufficient. Snodgrass v. Smith [Colo.] 94 P 312; Gates v. Cole [Iowa] 115 NW 236; Byrnes v. Gibson [N. J. Eq.] 68 A 756; In re Atchley's Will 108 NYS 877; In re Turner's Will [Or.] 93 P 461; Kultz v. Jaeger, 29 App. D. C. 300.

11. Though reasonableness or unreasonableness of disposition may be considered, it cannot of itself establish undue influence. Franklin v. Belt [Ga.] 60 SE 146; Bottom v. Bottom [Ky.] 106 SW 216; In re Armstrong's Will, 55 Misc. 487, 106 NYS 671; Wallen v. Wallen [Va.] 57 SE 596. Testator left as his next of kin one nephew and seven nieces and devised his entire property to the nephew and one of the nieces. In re Armstrong's Will, 55 Misc. 487, 106 NYS 671. That a wife devises all her property to her husband is not suggestive of fraud or undue influence. Kultz v. Jaeger, 29 App. D. C. 300. A disinheritance, though unaccounted for, is not ground for contest in the absence of fraud, deceit, or undue influence. In re Arensberg, 120 App. Div. 463, 104 NYS 1033. Though the relationship of uncle and nephew is important, the mere fact of disinheriting a nephew, an only blood relation, is not evidence of undue influence. In re Hoffman's Estate [Mich.] 15 Det. Leg. N. 51, 115 NW 690.

12. That scrivener was executor and legatee raises at most a suspicion, strong or weak, depending on circumstances, authorizing court to require evidence that tes-

declarations before and after the will was made,[13] though proper to be considered,[14] do not of themselves establish undue influence.

Sufficiency of evidence.[See 8 C. L. 2313]—The burden is on contestant,[15] but substantial gifts to a confidant is prima evidence.[16] Where there is evidence of testamentary capacity, undue influence can be shown only by convincing proof that testator's mind was controlled by another[17] but undue influence need not be proved by

tator knew contents of will and was free from undue influence. Snodgrass v. Smith [Colo.] 94 P 312. Where draftsman of a will has been an agent or attorney of testatrix and is made beneficiary under the will, courts will closely scrutinize the transaction (In re Wilcox's Estate, 55 Misc. 170, 106 NYS 468), but no presumption of undue influence necessarily arises therefrom (Id.). Undue influence will not be presumed by the mere fact that draftsman of will was made executor or trustee. In re Thompson's Will, 121 App. Div. 470, 106 NYS 111.

13. Declarations of testator made before or after making of the will, though admissible as res gestae or as showing testator's affections, are not evidence of the fact of undue influence. Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46; Byrnes v. Gibson [N. J. Eq.] 68 A 756; Wallen v. Wallen [Va.] 57 SE 596; Kultz v. Jaeger, 29 App. D. C. 300. Statement of testatrix that she had given home place to one son and rest of property to other children equally, it appearing that only a cemetery lot passed to such other children, held not substantial proof of fraud, duress, or undue influence. In re Turner's Will [Or.] 93 P 461. While declarations of the testator, indicating dislike for or distrust of beneficiaries named in his will to the exclusion of others toward whom he would seem to have been better disposed, are entitled to some weight (In re Koh's Estate [Iowa] 113 NW 563), they are not in themselves proof of undue influence (Id.), and, hence, though a contestant may show such declarations, they must be followed up by proof of undue influence as explaining a contrary disposition of the property (Id.). Instructions, cautioning against giving declarations too great weight, held proper. Id.

14. Fact that will was natural may be considered on question of undue influence. Blackman v. Andrews, 150 Mich. 322, 14 Det. Leg. N. 709, 114 NW 218. Subsequent declarations of testator explanatory of his disposition of his property, though not in themselves proof of undue influence, may be considered in connection with other facts tending to show such influence. Goodloe v. Goodloe [Tex. Civ. App.] 19 Tex. Ct. Rep. 960, 105 SW 533. Testatrix's declarations held admissible as showing condition of her mind and effect of any influence thereon. Vannest v. Murphy [Iowa] 112 NW 236.

15. In re Lockwood [Conn.] 69 A 8. Burden on contestants. Snodgrass v. Smith [Colo.] 94 P 312; Gates v. Cole [Iowa] 115 NW 236; Mowry v. Norman, 204 Mo. 173, 103 SW 15; Byrnes v. Gibson [N. J. Eq.] 68 A 756; Hart v. Hart [Tex. Civ. App.] 110 SW 91.

16. Mowry v. Norman, 204 Mo. 173, 103 SW 15; Byrnes v. Gibson [N. J. Eq.] 68 A 756; In re Rogers' Will, 80 Vt. 259, 67 A 726. Where a stranger occupying a confidential or trust relation to testator is benefited to the exclusion of his children, proponent must disprove undue influence. In re Lockwood [Conn.] 69 A 8. If a legatee is a child and not a stranger, a confidential relation with testator is not of itself sufficient to raise a presumption of undue influence. Instruction ignoring this distinction held harmful. In re Lockewood [Conn.] 69 A 8. Where relation between testator and favored daughters was not fiduciary but only such as would naturally arise between parent and child, daughters were not required to explain provisions of will to prevent presumption of undue influence. Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46. Where testatrix directed one to attend to drawing of will disposing of property in a certain manner, burden was on him to show that testatrix read will and understood its provisions and that she acted freely and without fraud or undue influence. Bradford v. Blossom, 207 Mo. 177, 105 SW 289. That testatrix's will named her attorney executor is not a suspicious circumstance and does not raise a presumption of undue influence. In re Marlor's Will, 121 App. Div. 398, 106 NYS 131. Circumstances held not suspicious so as to require proponent to negative undue influence in execution of will giving all property to wife. In re Watkin's Will [Vt.] 69 A 144. That a son lived with testatrix and attended to business matters for her is not sufficient to cast the burden on him to show absence of undue influence. Must appear that parent was imposed on or overcome before burden is shifted to defendant. Vannest v. Murphy [Iowa] 112 NW 236.

17. South Side Trust Co. v. McGrew [Pa.] 69 A 79.

Evidence sufficient to show undue influence. Holton v. Cochran, 208 Mo. 314, 106 SW 1035; In re Abel's Estate [Nev.] 93 P 227. Influence by means of spiritualistic communications. O'Dell v. Goff, 149 Mich. 152, 14 Det. Leg. N. 399, 112 NW 736. Where will was procured to be executed by sons of old and feeble woman who occupied a confidential relation to her and who were principal beneficiaries. Goodloe v. Goodloe [Tex. Civ. App.] 19 Tex. Ct. Rep. 960, 105 SW 533. Influence by wife, principal beneficiary. Holton v. Cochran, 208 Mo. 314, 106 SW 1035. Will set aside for undue influence of son. In re Carney's Will [Wis.] 116 NW 636. Evidence held to require submission of question of undue influence to jury. In re Welch's Will [Cal. App.] 91 P 336; In re Eckler's Estate, 110 NYS 650. Sufficient to warrant submission to jury. Mowry v. Norman, 204 Mo. 173, 103 SW 15.

Insufficient to show undue influence: Wickes v. Waldron, 228 Ill. 56, 81 NE 798; Floto v. Floto, 233 Ill. 605, 84 NE 712; In re Stufflebeam's Will [Iowa] 112 NW 815; Gates v. Cole [Iowa] 115 NW 236; Saxton v. Krumm [Md.] 68 A 1056; Blackman v. Andrews, 150 Mich. 322, 14 Det. Leg. N. 709, 114

direct testimony; it may be inferred from facts in evidence;[18] nor is it necessary to show that overt acts of undue influence were exercised at the time the will was executed.[19] The confidential relation of husband and wife though not raising a presumption of undue influence is important in weighing the evidence in the case.[20]

Instructions. See 8 C. L. 2314—The usual rules against confusing and misleading instructions,[21] and instructions on the weight of the evidence,[22] apply. The court should properly instruct on the burden of proof [23] and the character of influence necessary to invalidate the will.[24]

§ 3. *The testamentary instrument or act. A. Requisites, form, and validity.* See 8 C. L. 2314—A will is an instrument whereby a person makes a disposition of his property to take effect after his death,[25] which instrument is ambulatory as to all its provisions.[26] Statutory rules affecting its validity must be complied with,[27] and it must be the act of testator himself [28] showing final testamentary intent.[29] It may

NW 218; In re Dowell's Estate [Mich.] 115 NW 972; Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46; Byrnes v. Gibson [N. J. Eq.] 68 A 756; South Side Trust Co. v. McGrew [Pa.] 69 A 79; Barber v. Allen [R. I.] 68 A 366. To show undue influence by husband. Kultz v. Jaeger, 29 App. D. C. 300. By wife. White's Estate, 33 Pa. Super. Ct. 533. By testatrix's brother who was her agent. Succession of Jones [La.] 45 S 965. Issue devisavit vel non properly denied, there being no evidence of incapacity or undue influence. In re Moyer's Estate [Pa.] 69 A 757. Evidence held to show absence of undue influence. In re Turner's Will [Or.] 93 P 461. Error to direct verdict against will. Snodgrass v. Smith [Colo.] 94 P 312. Insufficient to take to jury. Wickes v. Walden, 228 Ill. 56, 81 NE 798; In re Hoffman's Estate [Mich.] 15 Det. Leg. N. 51, 115 NW 690; Leffingwell v. Bettinghouse [Mich.] 15 Det. Leg. N. 40, 115 NW 731; Ferner v. Byers [Pa.] 68 A 48; In re Schneeweiss' Estate [Pa.] 69 A 45; Walker v. Walker [R. I.] 67 A 519.

18. Mowry v. Norman, 204 Mo. 173, 103 SW 15.

19. Previously acquired undue influence that operated at time of execution will overthrow will. Mowry v. Norman, 204 Mo. 173, 103 SW 15.

20. In re Welch's Will [Cal. App.] 91 P 336.

21. Instruction on undue influence held confusing. Murphy's Ex'r v. Hoagland [Ky.] 107 SW 303. Instruction not objectionable on ground that undue influence may be established without proof of mental unsoundness where evidence did not indicate such influence as would have invalidated will had testatrix been mentally strong. In re Kah's Estate [Iowa] 113 NW 563.

22. Charge that testator's declarations though not admissible to prove actual fact of undue influence were "competent" to "establish" the effect of external acts of undue influence on testator's mind held improper as on weight of evidence. Hart v. Hart [Tex. Civ. App.] 110 SW 91.

23. Instruction erroneous and misleading. Wallen v. Wallen [Va.] 57 SE 596. Instruction that burden was on proponent to show want of undue influence held inadequate for failure to state that circumstances raised presumption of undue influence of itself, evidence to be overcome by counter proof. In re Rogers' Will, 80 Vt. 259, 67 A 726.

24. Instruction that influence must "in some measure" destroy free agency though erroneous held not reversible. Hart v. Hart [Tex. Civ. App.] 110 SW 91.

25. Noble v. Fickes, 230 Ill. 594, 82 NE 950. Father's letter to son which could not be sustained as creating a trust in stock for son's benefit held clearly not sustainable as a testamentary disposition. Paine v. Paine [R. I.] 67 A 127.

26. Revocation revoked revocation therein of former will. Bates v. Hacking [R. I.] 68 A 622.

27. Inasmuch as the testamentary disposition of property is not a natural but a legal right, the rules prescribed by the lawmaking power with reference thereto must be followed, and it is the intention of the legislature in providing such rules, and not that of the testator in the preparation of his will, which controle in determining whether a given will is a legal and valid instrument. Mader v. Apple, 6 Ohio N. P. (N. S.) 592. See post, Execution.

28. An instrument not signed by testator and which is only a recital by the signers of testator's statements with reference to the disposition of his property cannot be sustained as his will. Osborne v. Atkinson [Kan.] 94 P 796.

29. A will is not rendered conditional by subsequent extrinsic declarations. Mark on envelope in which will was found, "If I do not come back, this is my will," did not render will conditional, such writing not being signed nor referred to in will. In re Whitaker's Estate [Pa.] 69 A 89. Will found uninclosed not invalidated by provision that if the envelope inclosing it should be mutilated or opened the will should be ineffective and the property should then go to another, such provision being a mere bequest in the alternative. Ainsworth v. Briggs [Tex. Civ App.] 108 SW 753. Evidence that testator contemplated changes will not vitiate. Separate and unnumbered writing declaring that testator might change the will. La Rue v. Lee [W. Va.] 60 SE 388. That a second will was found on a table, whereas the first was found in a trunk, held of small importance in determining validity of the second. Ainsworth v. Briggs [Tex. Civ. App.] 108 SW 753. Deed, though executed in conformity with the statutory requirements as to wills, can-

consist of two testamentary instruments [30] or of several sheets either detached or loosely fastened together.[31] A requirement that the will be in "writing" includes printing,[32] and the fact that it is written by lead pencil will not affect its validity.[33] The leaving of a space between the testamentary portion and the signature of the testator, sufficient to admit of further dispositions of property or of interpolations by others, has been held fatal,[34] but mere failure to fill blanks for names of residuary legatees,[35] or the absence of an attestation clause,[36] will not invalidate. If the writing manifests the intention of the testator to make a testamentary disposition of his property, the form thereof is immaterial,[37] but parol evidence is inadmissible to establish a testamentary intent.[38] Whether an instrument is a deed [39] or trust contract,[40] or is testamentary,[41] depends upon its revocability and whether or not it takes effect before the maker's death. A joint will is valid provided it can take effect upon the death of either testator.[42] A will though not operative to dispose of property may

not be treated as a will unless its contents impart to it a testamentary character. Noble v. Ficker, 230 Ill. 594, 82 NE 950.

30. Two wills of different dates may together constitute the last will and testament of the testator. One executed in this country and one in England later. Flinn v. Frank [Del.] 68 A 196. Trust deed effective on death of maker and his will affecting same fund read together as one general scheme of disposition, though not executed at same time or though it was probable when deed was executed that trust fund would not be affected by the will. New York Life Ins. & T. Co. v. Casy, 120 App. Div. 265, 105 NYS 125.

31. A will may be evidenced by several sheets of paper not fastened together (Schillinger v. Bowek [Iowa] 112 NW 210), but where an attempt is made to incorporate into a will an instrument not itself executed as such, the will must refer to it as then in existence, identify it with reasonable certainty, and show testator's intention to make it a part of the will (Id.). Deeds referred to held executed as wills making general rule of identification inapplicable. Id. Not invalid because written on several sheets, any one of which is capable of being removed, or to which another could be substituted. Palmer v. Owen, 229 Ill. 115, 82 NE 275. A codicil need not be physically attached to a will which it unequivocally identifies. Ferrell v. Gill [Ga.] 61 SE 131.

32. Rev. St. 1892, § 5916. Sears v. Sears, 77 Ohio St. 104, 82 NE 1067.

33. That a will is written by lead pencil does not invalidate it. Smith v. Beales, 33 Pa. Super. Ct. 570. The use of a lead pencil in making or altering a will does not show want of final testamentary intent. La Rue v. Lee [W. Va.] 60 SE 388.

34. Space of twenty-three inches. Mader v. Apple, 6 Ohio N. P. (N. S.) 592.

35. Kultz v. Jaeger, 29 App. D. C. 300.

36. Will not invalidated by absence of attestation clause if surrounding circumstances indicate genuineness of the document. Where will is drawn in testator's handwriting and the word "witnesses" placed before the signature of the witnesses, and it makes such disposition of his property as would be expected of testator, it should be admitted. Mead v. Trustees of Presbyterian Church, 229 Ill. 526, 82 NE 371.

37. Noble v. Fickes, 230 Ill. 594, 82 NE 950.

38. Inadmissible to show that grantor intended deed to take effect after his death. Noble v. Fickes, 230 Ill. 594, 82 NE 950.

39. Instrument reserving life interest and providing that grantee's title should be absolute only on death of grantor held a deed and not a will. White v. Willard, 232 Ill. 464, 83 NE 954. Deed expressly recognizing grantee's right to convey by grantor's consent held not testamentary. Id. Instrument reserving right in grantor to sell if he chose held a deed. Hamilton v. Cargile, 127 Ga. 762, 56 SE 1022. Paper, in form of deed, conveying certain property "together with all rights and privileges thereto belonging, at my death, forever in fee simple," held not testamentary. Kytle v. Kytle, 128 Ga. 387, 57 SE 748. Deeds to be delivered by another to grantees after wife's death held not testamentary but took effect independent of will executed on same day. Schillinger v. Bawek [Iowa] 112 NW 210.

40. Deed to son and unsigned memorandum changing bequests, etc., held a trust contract in favor of beneficiaries and not an ineffectual testamentary disposition. Ward v. Conklin, 232 Ill. 553, 83 NE 1058.

41. Deeds not to be effective until death of grantor held properly admitted as a will. In re Dowell's Estate [Mich.] 115 NW 972. Instrument held a will where it provided that if testator's wife should survive him she should have income for life. Lindemann v. Dobossy [Tex. Civ. App.] 107 SW 111. An ambulatory disposition of property not to take effect until death of the maker is inoperative if not executed in conformity with the statute of wills. Deed not to take effect until grantor's death held void as an attempted testamentary disposition. Benner v. Bailey, 234 Ill. 79, 84 NE 638. Instrument dividing property among children reciting that conveyance was made in consideration of "will," providing that property should not be disposed of during testatrix's life, and containing a clause reciting receipt of a certain sum, which clause was inserted after execution, held testamentary and not a conveyance. Siler v. Jones [Ky.] 110 SW 255.

42. Peoria Humane Soc. v. McMurtrie, 229 Ill. 619, 82 NE 319.

be good as an appointment of an executor and as such properly admitted to probate if executed with testamentory intent.[43]

(§ 3) *B. Execution of will.* 1. *Mode of execution.*See 8 C. L. 2815—The statute controls as to execution notwithstanding testator's intention.[44] It is generally required that testator sign the will [45] at the end [46] or acknowledge his signature [47] declaring the instrument to be his will [48] in the presence of two or more [49] credible or competent witnesses [50] who thereupon [51] attest [52] in the presence of the testator,[53] and usually in the presence of each other,[54] knowing that they are signing a testamentary paper.[55] Parol proof of similarity of contents between a destroyed instrument and

43. Kultz v. Jaeger, 29 App. D. C. 300.

44. Sears v. Sears, 77 Ohio St. 104, 82 NE 1067.

45. A will must be in writing and signed by the testator or under his direction in his presence. Noble v. Fickes, 230 Ill. 594, 82 NE 950. Under Act April 8, 1833, P. L. 249, a will may be admitted to probate, though owing to extremity of illness it could not be signed by testator where it was otherwise executed in presence of witnesses and approved by decedent. Smith v. Beales, 33 Pa. Super. Ct. 570. The **making of a mark** by testator is signing within the meaning of the statute, and this though his name, leaving space for his mark, is written at end of will by another without his express direction. In re Tierney's Estate [Minn.] 114 NW 838.

46. Will held not signed at end where line for name at end of testimonium clause was left blank, though name was written in attestation clause. Sears v. Sears, 77 Ohio St. 104, 82 NE 1067. Not error to direct verdict that will was invalid. Id.

47. An acknowledgment of testator's signature to witnesses is sufficient. Signing in their presence is unnecessary where there is such acknowledgment. In re Engler's Will, 56 Misc. 218, 107 NYS 222. Sufficient if all witnesses sign in presence of testator and each other on testator's acknowledgment of having signed, though they did not see him sign. Brown v. McBride, 129 Ga. 92, 58 SE 702.

48. It is sufficient if testator by word or conduct conveys the information that the instrument is his will and that he requires the witnesses to attest, express declarations not being essential. Evidence held to warrant finding of due execution, though some witnesses could not recall what occurred. In re Johnson's Estate [Cal.] 93 P 1015.

49. Will must be attested by two or more credible witnesses. Noble v. Fickes, 230 Ill. 594, 82 NE 950. An excess in the number of witnesses does no harm. Ducasse's Heirs v. Ducasse [La.] 45 S 565.

50. "Credible" witnesses, in Rev. Code 1871, § 2388, is synonymous with "competent." Swanzy v. Kolb [Miss.] 46 S 549. One named as executor is a competent witness. In re Tierney's Estate [Minn.] 114 NW 838. "Otherwise be proved" in Rev. Code 1871, § 1101, providing that if any person shall be subscribing witness to a will giving devise or bequest to such subscribing witness, and the will cannot "otherwise be proved" the devise or bequest shall be void, refers to execution of will and not to proof of contents. Swanzy v. Kolb [Miss.] 46 S 549. Under Rev. Code 1871, §§ 1101, 2388, a will signed by three witnesses, one of whom is devisee, is not void but only the devise to the witness, and witness is competent to establish residue of will. Id.

51. Evidence sufficient to show that testatrix made her mark and executed will before signature by witnesses. Bowe v. Naughton [N. J. Eq.] 67 A 184. Presumption that testator signed before witnesses did held rebutted by proof that paper was written by third person and signed by him in testator's absence and before testator signed and that witness never saw testator after will was left with testator for execution. In re Baldwin's Will [N. C.] 59 SE 163.

52. Attestation must be on the same sheet of paper as that containing testator's signature or on some paper physically connected with such sheet. In re Baldwin's Will [N. C.] 59 SE 163. That the name of testator is incorrectly given in the attestation clause is not fatal where the witnesses are clear that all the statutory requirements were observed. In re Dirner's Estate [Neb.] 113 NW 149. A witness need not append to his signature a statement as to his residence. In re Sandmann's Will [N. J. Eq.] 68 A 754.

53. Will invalid where signed by witness at his home in absence of testator who had not yet signed. In re Baldwin's Will [N. C.] 59 SE 163.

54. It is **not necessary** that each witness to a will sign in the presence of the others if they sign in the presence of the testator. In re Engler's Will, 56 Misc. 218, 107 NYS 222.

55. One who knows that he is signing a testamentary paper and sees testator sign it **need not know its contents.** Codicil. In re Morgan's Estate [Pa.] 68 A 953. **Not necessary** that the attesting witnesses know the instrument is a will. Palmer v. Owen, 229 Ill. 115, 82 NE 275.

Evidence sufficient to sustain finding that will was duly signed by testator in presence of two competent attesting and subscribing witnesses, and duly declared and published by testator who was then of sound mind. In re Tierney's Estate [Minn.] 114 NW 838. Where attesting witnesses testified that testator declared the paper to be his will and signed it in their presence and that at his request and in his presence they each signed as witnesses, requirements were complied with in absence of fraud, etc. Palmer v. Owen, 229 Ill. 115, 82 NE 275. Evidence held sufficient to show due execution by mark and announcement that it was her will. In re Engler's Will, 56 Misc. 218, 107 NYS 222.

the one offered for probate is inadmissible to cure defects in execution by showing that the two papers were one and the same will, there being no physical connection between them.[56] The law existing at the time of execution of a will disposing of realty governs the formalities of execution and attestation.[57]

(§ 3B) *2. Nuncupative and holographic wills.*[See 8 C. L. 2316]—Nuncupative wills are generally permitted only when testator is in extremis or in the extremity of his last illness.[58] In Louisiana nuncupative wills are by public act or under private signature and differ with reference to form and execution.[59] While a holographic will is recognized and properly probated in Arkansas, it cannot alter or revoke an attested one.[60] Any presumption of incompleteness arising from an unsigned attestation clause is overcome by evidence showing that testator considered the will executed.[61]

(§ 3) *C. Revocation and alteration.*[See 8 C. L. 2316]—One lacking testamentary capacity cannot revoke a will previously made by him.[62] A joint will may be revoked by either testator,[63] and where by its terms it is to operate as the will of all or neither, a revocation by one testator revokes the will as to all.[64] Revocation may be implied of law from subsequent changes in the condition or circumstances of testator,[65] or from the execution of a second will.[66] Express revocation can be made only

56. In re Baldwin's Will [N. C.] 59 SE 163.

57. Not that at time of testator's death. Barker v. Hinton [W. Va.] 59 SE 614. Chapter 84, p. 194, Acts 1882, requiring witnesses to subscribe in "presence of each other" applies only to wills executed or re-executed or republished or revived subsequent to its enactment. Id.

58. Mellor v. Smyth [Pa.] 69 A 592. Where only issue was whether testator was in extremis, held error to inform jury that nuncupative wills are not favored. Id. Held proper to call attention of jury to interest of witnesses in result. Id. Held proper to allow witness to testify as to physical condition of decedent on day after alleged will was made. Id. Nuncupative will is made in the "last sickness" as required by the statute, though not made in extremis, if made in expectation of death which follows, and though testator thereafter had opportunity to make a written will. In re Miller's Estate [Wash.] 91 P 967.

59. The recitals in a nuncupative will by public act that the will was dictated by testator and written by the notary as dictated in the presence of witnesses, and giving the residence of the witnesses, need not be made in any particular part of the instrument, it being sufficient if made in any part thereof. Ducasse's Heirs v. Ducasse [La.] 45 S 565. Where in the presentation form testator heard the will read and declared it to be his will, that some of the clauses were not dictated by him is immaterial. Id. The requirement of presentation in making a nuncupative will under private signature is complied with by a declaration by the testator in the presence of the witnesses that the instrument is his will. Id.

60. Though probate of wills is made conclusive by statute until superseded, reversed or amended. Parker v. Hill [Ark.] 108 SW 208.

61. Where two witnesses testified that testator told them he had willed his property to person mentioned in will. Ainsworth v. Briggs [Tex. Civ. App.] 108 SW 153.

62. In re Goldsticker's Will [N. Y.] 84 NE 581. Evidence insufficient to overcome presumption of testator's capacity when he made certain cancellations. Home of the Aged v. Bantz [Md.] 69 A 376.

63. Peoria Humane Soc. v. McMurtrie, 229 Ill. 519, 82 NE 319. Subsequent marriage of either testator operates as a revocation as to him. Id.

64. Where will provided that disposition made therein should include the property of all testators and should operate in the event that all died without making an individual will, a subsequent individual will by one testator revokes the joint will. Peoria Humane Soc. v. McMurtrie, 229 Ill. 519, 82 NE 319.

65. Divorce and settlement of property rights by deeds revoked prior will in which wife was legatee. Wirth v. Wirth, 149 Mich. 687, 14 Det. Leg. N. 550, 113 NW 306. For further discussion of divorce as a revocation, see note to Estate of Jones, 211 Pa. 364, given in 69 L. R. A. 940. Under statute, a man's will is revoked by marriage, and birth of issue. Marriage of woman five years after disappearance of her first husband and birth of a child held revocation of second husband's previously executed will. In re Del. Genovese's Will, 56 Misc. 418, 107 NYS 1033. Ballinger's Ann. Codes & St. § 4598, revoking will made before marriage, where testator leaves a wife unprovided for, applies to will made by a feme sole marrying and leaving a husband. In re Petridge's Will [Wash.] 91 P 634. Marriage by one of two joint testator's worked revocation as to him. Peoria Humane Soc. v. McMurtrie, 229 Ill. 519, 82 NE 319. Held error to submit to jury whether facts and circumstances were sufficient to operate as revocation of will by operation of law. In re Winch's Estate [Neb.] 112 NW 293.

66. Wilson v. Bostick [Ala.] 44 S 389. Code, § 3276, providing that will may be revoked by execution of subsequent one. Schillinger v. Bawek [Iowa] 112 NW 210. An attested will cannot be altered or revoked by a holographic one in Arkansas.

in the manner provided by statute,[67] and intention to revoke must accompany the physical act.[68] A holographic will is not revoked by erasures by testator and his writing new portions into the will the same remaining properly signed.[69] The disposition made by the will should not be disturbed by a codicil further than is absolutely necessary to give the codicil effect,[70] and a clear disposition in the will is not revoked by doubtful or inconsistent expressions in the codicil.[71] Alterations made by strangers without testator's knowledge are mere spoliations and have no effect.[72] The doctrine of spoliation does not apply where a will is destroyed by a beneficiary pursuant to testator's instruction to hold it until another should be probated.[73] A will need not be kept in any particular place in order to preserve its validity.[74] Complete revocation destroys the will.[75] Revocation by a writing executed like a will operates presently,[76] but revocation under the same statute, by will, takes effect only on testator's death, regardless of testator's intention,[77] hence the intentional destruction of

and probate of holograph could not give it extra, statutory effect. Parker v. Hill [Ark.] 108 SW 208.

67. One of three mutual wills made under an oral agreement that they should be operative only so long as all the testators remained unmarried was not revoked by the marriage of one of the testators. In re Goldsmticker's Will, 108 NYS 489, 2 Rev. St. (1st ed.) p. 64, pt. 2, c. 6, tit. 1, § 42. In some states revocation or alteration can only be accomplished by the same formalities as were required for the execution of the will itself. An **erasure** does not work an alteration under 2 Rev. St. (1st ed.) pt. 2, c. 6, tit. 1, § 42, where statutory formalities are not complied with. In re Kissam's Will, 110 NYS 158. Erasures by hand of testator in a holographic will is a legal revocation of portions erased. La Rue v. Lee [W. Va.] 60 SE 388. And the words erased need not be **wholly illegible** if the intention was to render them nugatory. Home of the Aged v. Bantz [Md.] 69 A 376. Revocation by **burning, tearing, etc.,** by one other than testator and at his request must be proven by at least **two witnesses.** Code 1896, § 4265. Wilson v. Bostick [Ala.] 44 S 389. A revocation may be made by testator by cancellation or obliteration **without attestation.** Home of the Aged, etc., v. Bantz [Md.] 69 A 376. A clause in a will cannot be revoked by the testatrix **drawing ink lines** through the words. The erasure will be disregarded and such clause will be regarded as a valid part of the will. Porterfield v. Porterfield, 4 Ohio N. P. (N. S.) 654.

68. C tore one sheet from his will and then tore the sheet into pieces and threw it into the waste basket. The pieces were afterward rescued and put together in proper order, and the sheet in legible condition and without the knowledge of C was restored to its place in the will. At the trial, contesting the will on the ground that it had been revoked by tearing, the attorney of the testator testified as to certain conversations had by him with the testator both prior and subsequent to the tearing of the sheet from the will. Held, to effect a revocation of a will by its destruction, or by its partial destruction, cancellation or obliteration, the intention to revoke must concur with the physical act of destruction or partial destruction. Coghlin v. Coghlin, 9 Ohio C. C. (N. S.) 385. In suit for reprobate without certain cancelling lines, evidence held to show testator's intention to revoke portions cancelled. Home of Aged of Methodist Episcopal Church v. Bantz [Md.] 69 A 376.

69. La Rue v. Lee [W. Va.] 60 SE 388.

70. In re Dominici's Estate, 151 Cal. 181, 90 P 448; in re Barclay's Estate [Cal.] 93 P 1012; Wardner v. Seventh Day Baptist Memorial Board, 232 Ill. 606, 83 NE 1077. Second codicil construed not to revoke life estate given son by first. Id. Modification "so as to read as follows," by merely writing new paragraph to a clause, did not revoke other paragraphs giving executors power of sale. Meckel v. Johnson, 231 Ill. 540, 83 NE 209. Codicil revoking specific bequests made in will and previous codicil to a certain person and giving her in lieu thereof a specified sum "only," held not to show intention to deprive her of right to take as heir-at-law under residuary clause in second codicil. Wilkinson v. Rosser's Ex'r, 31 Ky. L. R. 1262, 104 SW 1019. Codicils held not to reduce widow's interest in trust fund to a life estate. Busby v. Busby [Iowa] 114 NW 559. Codicil held to revoke a $1,000 bequest. Ladd v. Ladd [N. H.] 68 A 462.

71. In re Dominici's Estate, 151 Cal. 181, 90 P 448.

72. Change in name of legatee. In re Diener's Estate [Neb.] 113 NW 149. Parol evidence will be received to show original provisions. Id.

73. In re Roger's Will, 80 Vt. 259, 67 A 726.

74. That holographic will was found in a drawer instead of in testator's tin box was immaterial. La Rue v. Lee [W. Va.] 60 SE 388.

75. A will destroyed by testator with intention to execute another is no longer a will entitled to probate. Destruction in belief that will was invalid because children were not given nominal sums. In re Emernecker's Estate, 218 Pa. 369, 67 A 701. Evidence held to warrant finding that will was not revoked prior to testatrix's death. In re Johnson's Estate [Cal.] 93 P 1015.

76, 77. Bates v. Hacking [R. I.] 68 A 622.

the revoking will leaves the former in force.[78] Cancellation of portions of a will does not revoke the entire instrument where the remaining parts can stand alone.[79] Failure to destroy a will in accordance with a promise is no ground for setting it aside after it has been probated.[80]

Evidence of revocation.—Where a will after its execution remains in the possession of the testator until his death, at which time it is found among his papers with his name erased, the presumption is that the testator erased his name and that he did so with the intention of revoking the will.[81] The declaration of the testator with reference to the will, before or after an attempt to destroy it, in whole or in part, are competent evidence in determining his intention,[82] but his conduct and declarations after the will is executed manifesting a disregard therefor are not competent to question its validity or existence.[83]

(§ 3) *D. Republication and revival.*[See 8 C. L. 2317]—Revival of a will once revoked must be in writing formally sufficient to satisfy the statute.[84] An obliteration intended as a revocation of a devise is effective though it may incidentally increase other devises,[85] but the question as to the necessity of republication of a revocation

78. Bates v. Hacking [R. I.] 68 A 622. Neither civil law nor St. 1 Vict. c. 26, § 22, on this subject, has been adopted in Rhode Island. Id. Oral evidence of contents of destroyed will held inadmissible to show revocation. Id.

Contra: A revocatory clause in a will destroys at once an earlier will and the earlier will is not revived by the destruction of the later will and testator's oral declarations of intention to revive. Danley v. Jefferson, 150 Mich. 590, 14 Det. Leg. N. 801, 114 NW 470.

79. Cancellation of disposition after death of life tenant. Home of the Aged v. Bantz [Md.] 69 A 376. That remainder would fall into intestacy immaterial. Id.

80. Rev. St. 1895, art. 5337, provides that revocation shall be written or by destruction by testator or by his order in his presence. Locust v. Randle [Tex. Civ. App.] 18 Tex. Ct. Rep. 673, 102 SW 946.

81. Crosby v. Crosby, 10 Ohio C. C. (N. S.) 57.

82. Charge restricting jury's consideration to question of intention held proper. Coghlin v. Coghlin, 9 Ohio C. C. (N. S.) 385.

83. Declarations that he had blocked out will and that his business was unattended. La Rue v. Lee [W. Va.] 60 SE 388.

84. Will revoked by subsequent will not revived by destruction of later will and oral declarations. Danley v. Jefferson, 150 Mich. 590, 14 Det. Leg. N. 801, 114 NW 470.

85. Collard v. Collard [N. J. Eq.] 67 A 190.

NOTE. Revocation amounting to new devises: A clause of a will gave testator's entire estate to his wife, C., for her life, or as long as she remained his widow, remainder to his sons upon her decease or remarriage. Testator afterwards learned that his supposed wife had a husband living whereupon he erased her name wherever it appeared in the will. The will as admitted to probate by the orphan's court in its entirety, notwithstanding these obliterations made after execution. Held that the parts of the will revoked by the testator should be refused probate. Collard v. Collard [N. J. Eq.] 67 A 190. The lower court refused to recognize the attempted revocation upon the ground that if given effect it would enlarge the estates of the other devisees, and that in such a case it would be "not simply a revocation, but a new devise or alteration of the will, which can only be made by re-execution and republication of the will in the manner provided by the statute," citing Swinton v. Bailey, 4 App. Div. Cas. 70. Larkins v. Larkins, 3 B. & P. 16; Eschbach v. Collins, 61 Md. 478, 48 Am. Rep. 123. The opinion of the prerogative court distinguishes these, as well as Jackson v. Holloway, 7 Johns [N. Y.] 395; McPherson v. Clark, 3 Bradf. Sur. [N. Y.] 99; and Wolf v. Bollinger, 62 Ill. 368, from the principal case, stating that the circumstances of these cases indicated in each an intention to make a new and different devise, and not merely to revoke a part. The position of the lower court on this point cannot be regarded as wholly unreasonable. See in re Miles, 68 Conn. 237, 36 L. R. A. 176, wherein it was said, "If the cancellation works an alteration of other portions of the instrument, either by way of addition or substitution, the attempted revocation is invalid, since if held valid it would permit a new and different testamentary disposition to be made in violation of the statute relating to the execution of wills." On the other hand, in Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32, the court held that a revocation was valid, although the legacies devised by the eliminated sections fell into the residue, thereby increasing the estate of the residuary legatee. The opinion in the principal case says, "The method of revocation is entirely statutory, and so long as it is a revocation of a devise an obliteration for such purpose appears to me to be authorized by the law, without regard to its effect upon other portions of the will. * * * The revocation of the gift to the wife was valid, and is not, under our statute, made nugatory, because the incidental effect of such revocation increases the residue of the estate given to the sons." This conclusion is not, however, made the basis of the decision. The court holds that the revocation in this case does not enlarge the estate given to the sons or make it a new

amounting to a new devise cannot arise in the case of a revocation of a devise ineffective in itself.[86]

§ 4. *Probating, establishing, and recording. A. Place of probate and jurisdiction and powers of courts.* See 8 C. L. 2818—Primary jurisdiction is in the court of testator's domicile at the time of his death.[87] It is generally limited by statute[88] and cannot be enlarged by consent of the parties.[89] Ordinarily probate courts have no power to determine title to real estate[90] or to decide issues arising from breach of contract to devise.[91] They have power to construe provisions relating to the property disposed of when necessary to the proper exercise of their ordinary powers.[92] Foreign wills cannot be admitted to probate in Illinois unless the testator was seised of real estate in that state at the time of his death.[93]

(§ 4) *B. Parties in will cases and the right to contest.* See 8 C. L. 2818—Persons interested may apply for probate.[94] In probating a will devising real property, it is unnecessary to cite the tenants of the property.[95] Only persons having a present interest in the estate may contest.[96] The state claiming by escheat may contest for incapacity or undue influence.[97] Contest of a will for alleged invalidty waives objection to proponent's authority to propound it.[98]

devise, that the words erased could have had no force in postponing the enjoyment by the sons of the estate given, since there was no wife nor one who could be his widow, and that "the effect of the revocation in this case is simply the expunging of a void legacy, which, if allowed to stand, could not affect the right of the sons to the immediate possession of the estate."—From 6 Mich. L. R. 272.

86. Obliteration of devise to widow, devisee never having been testator's lawful wife, held not to affect will on ground that it enlarged residue. Collard v. Collard [N. J. Eq.] 67 A 190.

87. In re Walker's Will, 54 Misc. 177, 105 NYS 890; Godwin v. Godwin, 129 Ga. 67, 58 SE 652. Probate not authorized in county other than that of testator's residence on his death merely because property devised was in that county and all parties in interest resided there. Id. After marriage, a resident of Monroe county moved with husband to Queen's county. About a year before her death she moved to Rochester, N. Y., in Monroe county, and declared her intention not to return to Queens county. She lived in Rochester separate from her husband. Held that she had acquired a new domicile and probate in Monroe county was allowed. In re Walker's Will, 54 Misc. 177, 105 NYS 890.

88. Surrogate courts have no jurisdiction over estates of Indians, and hence cannot probate an Indian will. In re Jack's Will, 52 Misc. 424, 102 NYS 383.

89. Provision in contract between legatee and executor that former might apply to probate court for allowance in addition to that fixed in contract between them held invalid. Hull v. Hull, 149 Mich. 500, 14 Det. Leg. N. 512, 112 NW 1126.

90. Could not decide that devisees were owners of land to exclusion of heirs who took patent after testator's death. Walker v. Ehresman [Neb.] 113 NW 218. Plaintiffs held not estopped by knowledge of transfers and of probate of will. Id.

91. See ante, § 1.

92. A surrogate has jurisdiction to construe provisions of will relating to both real and personal property when necessary to the judicial settlement of an executor's account and to distribution. In re Phillips' Estate, 56 Misc. 96, 107 NYS 388.

93. Hurd's Rev. St. 1905, c. 148, § 10. The fact that testator owned personal property in this state does not give court jurisdiction. Davis v. Upson, 230 Ill. 327, 82 NE 824. Statute providing for probate of will in any county in case testator has no place of residence in the state and disposes of no realty by will does not apply to foreign wills. Hurd's Rev. St. 1905, c. 148, § 11. Id.

94. One mentioned in will as "administrator" for certain purposes was "interested" in estate and a proper applicant. Lindemann v. Dabossy [Tex. Civ. App.] 20 Tex. Ct. Rep. 888, 107 SW 111.

95. Heirs are presumed to have been cited, and they cannot through tenant assert their rights. They must assert rights in manner provided by law. Drake v. Pechin, 109 NYS 474.

96. In re Eldredge's Estate, 55 Misc. 636, 106 NYS 1036. Where a married woman, survived by her husband and certain nephews and nieces, bequeathed more than one-half of her personalty to a religious corporation, the husband alone could object to bequest in violation of Laws 1860, p. 607, c. 360, he being entitled to all the personalty if wife died intestate. Id. Where caveator fails to answer petition of appeal from order denying probate of a will, prerogative court will admit as parties nonresident next of kin and permit them to answer, they having relied on caveator. In re Manners' Estate [N. J. Eq.] 67 A 69. Under Code Civ. Proc., § 2617, a legatee cannot intervene to oppose probate of a will in order to secure a benefit or protect a threatened right, and his application will be denied where he would acquire less under a prior will than under the one offered for probate. In re Hoyt's Will, 55 Misc. 159, 106 NYS 359.

97. State could institute escheat proceed-

(§ 4) *C. Duty to produce will.*See 4 C. L. 1890—Contest of a second will may excuse delay in producing the earlier one.[99] Penalties for failure to produce must be enforced within the time prescribed by statute.[1]

(§ 4) *D. Probate and procedure in general.*See 8 C. L. 2319—An unprobated will is not evidence of title to land [2] and by some statutes a foreign will must be probated within the state before land may be recovered thereunder.[3] Probate will, however, relate back and give effect to a conveyance previously made under the will,[4] and title of a legatee is not always dependent upon a decree of distribution.[5]

A joint will may be successively probated upon the death of each testator.[6] A copy of the will may not be probated unless the original is lost or destroyed after testator's death or without his consent.[7] While in North Carolina testator's heirs and next of kin may require probate in solemn form after probate in common form,[8] probate in common form is valid until set aside, and the right to require probate in solemn form may be forfeited by acquiescence or unreasonable delay.[9] A law allowing probate on ten days' notice is not unconstitutional as to nonresidents.[10] Where the statute prescribes what the application shall contain, other matters need not be alleged.[11] Contestants are sometimes required to file a statement of the grounds relied on.[12] Irrelevant evidence is properly excluded.[13] The will is properly admitted after identification of testator.[14] In strict probate proceedings, questions pertaining to the

ings in chancery court and obtain direction that contest be instituted in county court. State v. Lancaster [Tenn.] 105 SW 858.

98. Hodge v. Rambow [Ala.] 45 S 678.

99. H. left two wills. The later one was probated within thirty days and was contested, and after a lapse of more than three years was set aside. Immediately thereafter the beneficiary in whose custody both wills had been placed procured the probate of the earlier will. Held that the custodian of the will was not debarred under § 5743 from taking as a devisee by the fact that more than three years elapsed after the death of the testatrix before he offered it for probate. Avery v. Howard, 7 Ohio N. P. (N. S.) 97.

1. Action for penalties for executor's failure to produce will must be brought within four years from commission of offense, being purely statutory, and plaintiff's want of knowledge of offense due to testator's concealment is immaterial. Richards v. Fletcher [Vt.] 69 A 135.

2. Chidsey v. Brookes [Ga.] 60 SE 529.

3. Chidsey v. Brookes [Ga.] 60 SE 529, overruling Doe v. Doe, 31 Ga. 593.

4. Tudor v. Tudor, 80 Vt. 220, 67 A 539.

5. Ejectment maintainable for chattel real without proof of such decree. Crean v. McMahon [Md.] 68 A 265.

6. Peoria Humane Soc. v. McMurtrie, 229 Ill. 519, 82 NE 319.

7. Godwin v. Godwin, 129 Ga. 67, 58 SE 652. While proceedings were pending in one county, or after adjudication of merits there, copy could not be probated in another county. Id.

8. In re Beauchamp's Will [N. C.] 59 SE 687.

9. Forty years' knowledge of probate in common form, participation in administrator's final account, etc. In re Beauchamp's Will [N. C.] 59 SE 687. Delay not excused because applicant was feme covert, since she could have sued without joining husband (Id.), nor on ground that until Laws 1899, p. 209, c. 78, repealing as to married women, Code 1883, §§ 148, 163, suspending running of limitations, limitations did not run against her, there being no statute of limitations as to time for filing caveat until 1907 (Id.). Laws 1907, p. 1263, c. 862, requiring probate in solemn form within seven years from probate in common form, and permitting seven years after ratification of the act as to wills theretofore proven, did not revive right lost by laches. Id. On consideration of the preliminary question of unreasonable delay, issues as to execution and capacity cannot be determined. Id.

10. Code Civ. Proc. § 1303, does not deprive a nonresident heir who could not receive the notice in time to appear of due process of law. Tracy v. Muir, 151 Cal. 363, 90 P 832. Section 1304 not unconstitutional for not requiring personal notice to nonresidents of time appointed for probate. Id.

11. Not necessary to allege soundness of mind, that will was wholly in testator's handwriting, or executed in presence of witnesses. Lindemann v. Dobossy [Tex. Civ. App.] 20 Tex. Ct. Rep. 888, 107 SW 111.

12. Refusal to require contestants to file statement of grounds of contest held not reversible error where defendants relied in general on undue influence and incapacity and greatest latitude was allowed parties on both sides. Wallen v. Wallen [Va.] 57 SE 596.

13. In proceeding to probate in solemn form, held proper to exclude letters of administration and bond issued by probate court before offer of will. Brown v. McBride, 129 Ga. 92, 58 SE 702. Also written order signed by attorneys of one other than propounder, addressed to caveator, requiring him to pay certain money to creditors of estate. Id.

14. Evidence sufficient to establish identity of testatrix so as to justify admission

scope and character of the devises or bequests [15] or the validity of particular provisions [16] are immaterial. The attesting witnesses are competent to testify and give an opinion as to mental capacity,[17] and an executor who signed as witness may testify to the execution of the will, including what testator said relevant thereto, though he petitions for the probate.[18] After proof that a witness is inaccessible, his signature may be proven by others.[19] A devisee or legatee not an attesting witness may be examined in support of the will [20] except in jurisdictions where only the testimony of subscribing witnesses will be received.[21] If the evidence shows the will to be in fact different from that alleged, the court may allow amendments to conform to the facts.[22] The probate court is not bound by a stipulation by all heirs and legatees that probate be denied on the ground of incapacity.[23] An agreement by a devisee to join with the other devisees in resisting probate so as to cut off remaindermen not parties is against public policy,[24] as is also an agreement by the executor to so join.[24a] Where undue influence is claimed only on the part of proponent to whom a legacy is given and there are other distinct legacies, probate should not be refused in toto without affording the other legatees an opportunity to be heard,[25] and proponent who is executor as well as beneficiary may urge error in this regard.[26]

(§ 4) *E. Burden of proof on the whole case.* See 8 C. L. 2321—The character and extent of this burden varies somewhat in the different states.[27] Proponent must

of will in evidence. Riddle v. Gibson, 29 App. D. C. 237.

15. Question whether bequest was conditional or not, immaterial on application for probate. Ainsworth v. Briggs [Tex. Civ. App.] 108 SW 753. What property will applies to and how it shall be disposed of held not determinable in proceeding to probate (Clements v. Maury [Tex. Civ. App.] 110 SW 185), hence probate of will disposing of community property was not conclusive as to interests of heirs of deceased's first wife, though they contested on ground of attempt to dispose of their interests, especially since heirs did not claim under testator (Id.).

16. Void clause in will of married woman appointing other than husband guardian for infant son does not affect proceeding for probate of will. In re Walker's Will, 54 Misc. 177, 105 NYS 890. Validity or ineffectiveness of devises or bequests will not be determined on issues of incapacity or undue influence. Kultz v. Jaeger, 29 App. D. C. 300.

17, 18. In re Tierney's Estate [Minn.] 114 NW 838.

19. Testimony fairly construed held to mean that witness knew signature of subscribing witness and would recognize it. Brown v. McBride, 129 Ga. 92, 58 SE 702. Proof of unsuccessful diligence in ascertaining the whereabouts of a witness is equivalent to proof that witness is dead or beyond the jurisdiction of the court. Id.

20. On questions relating to manner of execution. Barker v. Hinton [W. Va.] 59 SE 614.

21. On application for probate of a will, both parties are confined to the attesting witnesses. Mead v. Presbyterian Church Trustees, 229 Ill. 526, 82 NE 371; Hill v. Kehr, 228 Ill. 204, 81 NE 848.

22. Nuncupative will. In re Miller's estate [Wash.] 91 P 967.

23. Proceedings is in rem and may affect other interests not ascertainable in advance; hence public interest requires probate of valid will. In re Dardis' Will [Wis.] 115 NW 332.

24, 24a. Cochran v. Zachary [Iowa] 115 NW 486.

25, 26. Snodgrass v. Smith [Colo.] 94 P 312.

27. Colorado: The burden is primarily on proponent to show legal execution and that instrument was free and voluntary act of testator. Snodgrass v. Smith [Colo.] 94 P 312.

Connecticut: Burden of proving due execution and competency is on proponent. In re Lockwood [Conn.] 69 A 8.

Illinois: At least two of the subscribing witnesses must declare on oath that they were present and saw testator sign the will in their presence or acknowledge the same to be his act (Hill v. Kehr, 228 Ill. 204, 81 NE 848), and that they believed testator to be of sound mind at the time of signing or acknowledging the same (Id.). Testimony of witness that he "had no reason to believe" that testator was not of sound mind is insufficient. Id.

Michigan: The burden of proving that testator possessed testamentary capacity is on proponent where such capacity is drawn in question. In re Mansbach's Estate, 150 Mich. 348, 14 Det. Leg. N. 696, 114 NW 65.

Minnesota: Evidence sufficient to make prima facie case of testamentary capacity. In re Tierney's Estate [Minn.] 114 NW 838.

Missouri: Proof of due execution and soundness of mind held prima facie case shifting burden to show incapacity or undue influence. Holton v. Cochran, 208 Mo. 314, 106 SW 1035.

Nebraska: Testimony of the subscribing witnesses tending to show that testator was capable of transacting ordinary business is sufficient to make a prima facie case of capacity. In re Powers' Estate [Neb.] 113 NW 198.

prove due execution,[28] after which many courts hold contestant has the burden of showing incapacity or undue influence,[29] the usual presumption of sanity obtaining.[30] Proof sufficient to establish a codicil is sufficient to establish a will.[31] A will is not rendered invalid because attesting witnesses have no recollection of its execution,[32] and where the will is old [33] or the witnesses dead, less evidence is required to show execution.[34] Probate is of right in some states upon prima facie showing of validity and execution.[35]

(§ 4) *F. Establishment of lost will.*See 3 C. L. 2322—Lost wills may be established and probated by courts having jurisdiction for that purpose.[36] Secondary evidence is admissible to show the contents of such a will,[37] the burden being on proponent to clearly establish its execution.[38] Where due execution is shown, revocation must be clearly proven by the other party.[39] If when last seen the will was in testator's possession, the presumption is that he destroyed it,[40] and proponent has the burden of overcoming the presumption of destruction with intent to revoke; [41] but where the will is shown to have been intrusted to a third person, the burden is on contestant to retrace it into testator's hands.[42] Declarations made by testator after execution of the will are admissible to show its existence and that it had not been destroyed or revoked,[43] and declarations indicating an intention not to adhere to the will are also admissible.[44]

28. Evidence insufficient to establish genuineness of signature. Skilliman v. Lanehart [N. J. Eq.] 67 A 182. The attestation clause, if appended in due form, prima facie shows due execution. In re Sandmann's Will [N. J. Eq.] 68 A 754. Declarations of testator that she had made the will and on one occasion given the names of witnesses and the name of the object of her bounty are competent to prove execution. In re Foley's Will, 55 Misc. 162, 106 NYS 474.

29. The burden of proving mental unsoundness is on contestants (McBride v. Sullivan [Ala.] 45 S 902; Wickes v. Walden, 228 Ill. 56, 81 NE 798; Gates v. Cole [Iowa] 115 NW 236), but once established, the condition is presumed to continue, and this presumption must be overcome by proponents (McBride v. Sullivan [Ala.] 45 S 902; Gates v. Cole [Iowa] 115 NW 236). Mere showing that testator was at times wholly insane, but at other times had sufficient mental capacity, is not sufficient to shift the burden to proponent. McBride v. Sullivan [Ala.] 45 S 902.

30. Upon proof of due execution, proponents may rest without showing sanity or absence of undue influence (Bottom v. Bottom [Ky.] 106 SW 216), unless the paper on its face manifests incapacity, as where it is irrational in its provisions or inconsistent in its structure (Id.). Mere inequality of distribution or exclusion of children or other natural objects of bounty does not show incapacity within this rule. Id. Proponent may rely on the presumption of sanity as evidence in his favor. In re Johnson's Estate [Cal.] 93 P 1015. Presumption of sanity and evidence that testatrix acted rationally held sufficient to make prima facie case of capacity. Id. Instrument executed in accordance with the statutory formalities and signed by testator raises presumption of sanity, especially where entirely in testator's writing. Wallen v. Wallen [Va.] 57 SE 596.

31. Hill v. Kehr, 228 Ill. 204, 81 NE 848.

32. Mead v. Presbyterian Church Trustees, 229 Ill. 526, 82 NE 371. Will properly admitted where it had proper attestation clause and one of the witnesses who drew will testified to execution with all required formalities, though other witness was not clear as to such execution. In re Sandmann's Will [N. J. Eq.] 68 A 754.

33. One of four mutual wills made by four sisters thirty-two years before death of testatrix held published and properly executed, though one sister testified that nothing was said that she remembered. In re Tredwell's Will, 110 NYS 764.

34. Attestation clause and surrounding circumstances held sufficient to show that testator made her mark though there was no positive proof of the fact. In re Foley's Will, 55 Misc. 162, 106 NYS 474.

35. While burden is on proponent, prima facie showing is sufficient (McConnell v. Keir [Kan.] 92 P 540), and where claim of incapacity is based solely on remote instances of conduct involving inquiries into testator's past life, will should be admitted and these questions settled in formal contest (Id.). Showing sufficient where will was executed in due form by one whom subscribing witnesses testified was of sound mind and free from restraint. Id.

36. Jurisdiction of probate court to establish and probate lost, destroyed, or suppressed wills is recognized by supreme court. Prentice v. Crane, 234 Ill. 302, 84 NE 916.

37, 38, 39. In re Miller's Will [Or.] 90 P 1002.

40. In re Miller's Will [Or.] 90 P 1002. Evidence held to show that when last seen will was in custody of testator, authorizing presumption of revocation. In re McCoy's Estate [Or.] 90 P 1105.

41. In re McCoy's Estate [Or.] 90 P 1105.

42. In re Miller's Will [Or.] 90 P 1002.

43. Declarations by decedent subsequent

(§ 4) *G. Judgments and decrees.*[See 8 C. L. 2322]—Orders should be properly entered of record [45] and must show the essentials to probate.[46] A probate decree is a judicial act binding on all the world until set aside in manner prescribed by law.[47] It becomes conclusive by failure to contest within the time prescribed,[48] and equity cannot grant relief from fraud, mistake, or forgery unless one was without knowledge of the decree admitting to probate [49] or unless he was prevented from contesting by the fraud of those who procured the probate.[50] Fraud extrinsic to the judgment is however, remediable, at least in some states.[51] Fraud in obtaining decrees of distribution which are in strict accord with the terms of the will is not ground for relief if the probate cannot be attacked,[52] and equitable relief will not be granted where

to execution of will and within a reasonable time prior to her death, showing will to have been deposited with a third person and was there to within a few days of her death, and declarations showing her affection for devisees and no change of feeling, when corroborated by direct evidence that thereafter she had no opportunity of withdrawing the will, held admissible to show that will had not been returned to her or canceled. In re Miller's Will [Or.] 90 P 1002, and authorities cited.

44. In re McCoy's Estate [Or.] 90 P 1105.

45. Discrepancies between entry in minute book of probate court of order admitting will and signed memorandum of judge filed therewith, in that entry did not have caption giving name and place of the court and did not contain the word "said," held not to invalidate entry so as to extend time for appeal until after making of another entry. Tracy v. Coffey [Cal.] 95 P 150.

46. Record in proceeding to prove holographic will, failing to show that handwriting of testator was generally known by his acquaintances and proof thereof by three credible witnesses, held defective. Grier v. Canada [Tenn.] 107 SW 970. Order reciting proof of contents of will and of testator's signature, though irregular, held not void for failure to literally comply with statute by stating that will was wholly in testator's handwriting, or if not written by him, that he or his agent subscribed, etc. Maynard v. Hatcher [Ky.] 107 SW 241.

47. Cohen v. Herbert, 205 Mo. 537, 104 SW 84. Judgment of county court admitting will where such court had jurisdiction is conclusive until set aside on appeal or by bill in chancery under the statute. Kemmerer v. Kemmerer, 233 Ill. 327, 84 NE 256. Cross bill in suit for construction of will, questioning such judgment, held not germane. Id. Determination of **genuineness of instrument** offered is exclusively for probate court, and its decision is final and conclusive and can be questioned only on appeal, and not by any other court. Tracy v. Muir, 151 Cal. 363, 90 P 832. The question of the validity of a will probated in solemn form can be raised only on bill to set aside the judgment for fraud. State v. Lancaster [Tenn.] 105 SW 858. Where the will is probated in common form only, the question may be raised only by suit to set aside the judgment or on an issue of devisavit vel non. Id.

Collateral attack: Order admitting will is a judgment, and if on face of records the elements of validity appear, it cannot be collaterally attacked. Locust v. Randle [Tex. Civ. App.] 18 Tex. Ct. Rep. 673, 102 SW 946. While ordinarily all that is essential to probate is proof of due execution and mental capacity, and the effect of an order admitting to probate is only to establish the will as an instrument of evidence (Neimand v. Seemann [Iowa] 114 NW 48), the district court sitting in the probate has jurisdiction to interpret and determine the validity of the will (Id.), and hence such jurisdiction having been invoked, its decree is conclusive on the parties until set aside or reversed on appeal (Id.), and cannot be thereafter attacked collaterally by suit on the equity side of the court to have the will declared invalid (Id.). Testatrix's will executed while she was unmarried passed interest in lands in Missouri. After her death while married will was probated at her domicile and decree filed in recorder's office in county, where land was located, but no action was brought to contest probate in time required by statute. Held, testatrix's heirs could not collaterally attack decree on ground of revocation by marriage. Cohen v. Herbert, 205 Mo. 537, 104 SW 84. Tenant could not collaterally attack the probate of a will devising the property, probate being presumptive evidence of validity of will against duly cited parties. Code Civ. Proc. §§ 2615, 2627. Drake v. Pechin, 109 NYS 474. In subsequent suit between adverse claimants to land, proof that will duly probated was not decedent's will, or proof contradicting same, cannot be admitted. P' Simer v. Steele [Ky.] 106 SW 851. What testator meant by "home farm" could be shown. Id. Proceeding to have persons adjudged trustees for having fraudulently procured administration in accordance with void trust in a will held a direct and not a mere collateral attack on judgment of probate court. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184.

48. Tracy v. Muir, 151 Cal. 363, 90 P 832.

49. Complaint in suit for relief held to raise presumption of knowledge. Tracy v. Muir, 151 Cal. 363, 90 P 832.

50. Tracy v. Muir, 151 Cal. 363, 90 P 832.

51. Procuring administration in accordance with terms of void testamentary trust by concealing facts from probate court, having sham sale, etc., held fraud extrinsic to questions determined by judgment so as to warrant equitable relief in favor of nonresident heirs. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184.

52. Tracy v. Muir, 151 Cal. 363, 90 P 832.

statutory contest is adequate.[53] Under the New York code, a decree rejecting a will is as conclusive in subsequent controversies in the surrogate's court relating to personalty as one admitting it,[54] but matters determined by the surrogate are not concluded in proceedings in the supreme court to establish validity or invalidity.[55]

(§ 4) *H. Revocation of probate* See 8 C. L. 2323 must be sought within the statutory period [56] and on grounds sufficient to confer jurisdiction.[57]

(§ 4) *I. Suits to contest or set aside.* See 8 C. L. 2323—Jurisdiction is statutory [58] and must be invoked in time.[59] Consent to entry of the probate decree will not bar the proceeding,[60] nor will contestants' dismissal of appeal from an order admitting the will preclude contest it not appearing why the appeal was dismissed.[61] That a will violates a restriction of gifts to charitable uses is not ground for revocation of probate where the statute itself provides for distribution to residuary legatees or heirs in such case.[62] Under the statutes of Ohio the right to contest is in those persons only who were interested in the will at the time of its probate,[63] and only such persons are proper parties plaintiff.[64] The right does not pass to the heirs or devisees of such persons either before or after suit brought.[65] An heir may contest under the Illinois act though the will is invalid only as to personalty because not executed in

53. One is not entitled to equitable relief for fraud in obtaining a decree sustaining the will where he has a right to contest within one year. Tracy v. Muir, 151 Cal. 363, 90 P 832.

54. Under Code Civ. Proc., § 2626. In re Goldsticker's Will [N. Y.] 84 NE 581. As evidence of revocation, a later will was offered, probate of which had been refused. Held inadmissible. In re Goldsticker's Will, 108 NYS 489.

55. In an action to establish invalidity of probate, under code, before the supreme court, decrees admitting of refusing wills are but prima facie evidence of the validity of the wills respectively passed upon. In re Goldsticker's Will, 108 NYS 489. A surrogate's decree refusing probate of will devising realty is not conclusive in action to establish validity in supreme court. Id.

56. Ten-year limitation of Shannon's Code, § 4473, applies to petition to revoke probate on ground of incompetency of testimony, probate being valid on its face. Scott v. Wagstaff [Tenn.] 107 SW 976. On collateral attack of a will in proceedings to establish title to land, an ancillary though ex parte proceeding to supply defects in the original probate will be held authorized, although brought after the lapse of many years, and is sufficient to make out a prima facie case for the beneficiary so as to cast the burden upon those who assert the invalidity of the will. Proceeding nineteen years after original probate. Grier v. Canada [Tenn.] 107 SW 970.

57. Probate court had jurisdiction to set aside probate entered in accordance with order of circuit court on appeal or where proponent had intentionally concealed existence and residence of an heir. Schofield v. Thomas, 231 Ill. 114, 83 NE 121.

58. The jurisdiction of equity to entertain a bill to contest can be exercised only in the mode and within the limits prescribed by the statute. Kemmerer v. Kemmerer, 233 Ill. 327, 84 NE 256. Partition cannot be granted in a suit to contest wherein the statutory jurisdiction is invoked. Demand therefor held improperly incorporated in bill. Tagert v. Fletcher, 232 Ill. 197, 83 NE 805. Statutes considered, and held circuit court has no jurisdiction of petition to set aside probate in county court, only remedy being by appeal. Maynard v. Hatcher [Ky.] 107 SW 241.

59. Proceeding commenced within two years of probate inures to benefit of one who intervenes after statutory period, rendering limitations unavailable as defense against such intervenor. Maurer v. Miller [Kan.] 93 P 596. Action to determine validity of probated will is not limited to one year after probate where will relates to personalty only. Code Civ. Proc., § 2653a, added by Laws 1892, p. 1136, c. 591. Action may be brought in supreme court within two years. Shea v. Bergen, 110 NYS 572. Under act June 25, 1895, P. L. 305, limiting to three years' time for contesting probate will probated in 1883 could not be challenged in ejectment in 1905. Smith v. Beales, 33 Pa. Super. Ct. 570.

60. That heirs consented held not waiver of right to institute revocation proceeding; effect of such consent being properly determinable in such proceeding. Shea v. Bergen, 110 NYS 572.

61. Murphy's Ex'r v. Hoagland [Ky.] 107 SW 303.

62. In re Lennon's Estate [Cal.] 92 P 870.

63. Rev. St. § 5858. Taylor v. Taylor, 5 Ohio N. P. (N. S.) 323. Judgment creditor of heir held interested in will within statute so as to entitle him to sue to contest. Bloor v. Platt [Ohio] 84 NE 604.

64. Rockwell v. Blaney, 5 Ohio N. P. (N. S.) 580.

65. Did not pass to heirs of one who died within two years after probate without bringing action. Taylor v. Taylor, 5 Ohio N. P. (N. S.) 323. If all the parties plaintiff die after an action is begun and before trial is had, the action cannot be revived in the names of the heirs or devisees of such deceased plaintiffs. Rockwell v. Blaney, 5 Ohio N. P. (N. S.) 580.

accordance with the laws of foreign domicile,[66] and hence, if in such case no contest is made within the time prescribed, the probate decree will be held conclusive.[67] While the affirmative is on proponents to establish execution and mental capacity,[68] the will and its probate is prima facie proof,[69] and plaintiff must overcome the presumption in favor of the will by a preponderance of evidence.[70] Whether an erasure was made before or after execution is a question of fact to be determined from all the evidence, including probate, aided by all reasonable presumptions and inferences.[71] It is improper to instruct on fraud in the absence of any evidence thereof.[72] If there is no substantial evidence to sustain the contest, the court may direct a verdict,[73] but contestants are entitled to have their evidence taken as true and to every reasonable inference in their favor.[74] The New York surrogate has no power to construe the provisions of a will in proceedings to revoke probate.[75] If in their effort to establish execution and capacity proponents bring out facts showing that the paper is not the will of decedent, the contrary cannot be adjudged though such facts are not stated in the petition of contestants.[76] That a judgment for contestants is reversed because the verdict should have been for proponents does not authorize the trial court on remand to dismiss for want of equity without a new trial where the statute requires a verdict of a jury on issues made up for submission to them.[77] A judgment for defendants in a suit to contest for undue influence is not a bar to a subsequent proceeding by plaintiffs therein to impress a trust upon the property based on promises of the devisee to the testator.[78] In Tennessee, title to land, acquired in good faith, under a will probated in common form, cannot be disturbed though subsequently the probate be annulled and the will set aside.[79]

(§ 4) *J. Suits to establish.*See 6 C. L. 1914—In a suit to establish a will and for distribution according to its terms, if it is found that a will was made but that nothing passed thereunder, the executor's attorney fees cannot be allowed out of the assets passing to defendants whose interests were adverse.[80]

(§ 4) *K. Appeals.*See 8 C. L. 2324—The time for appeal,[81] the orders appealable,[82] and procedure essential to review,[83] are matters of statutory regulation. An

66, 67. Palmer v. Bradley [C. C. A.] 154 F 311.

68. Bradford v. Blossom, 207 Mo. 177, 105 SW 289.

69. Probate prima facie evidence of due attestation, execution and validity. Scott v. Thrall [Kan.] 95 P 563. A statute providing that in an action to contest, the will and probate thereof shall be prima facie evidence of due execution, and the valid ty of the will does not apply where the will shows that it is not signed. Sears v. Sears, 77 Ohio St. 104, 82 NE 1067.

70. Code Civ. Proc. 2653a. Shayne v. Shayne, 54 Misc. 474, 106 NYS 34. Probate will be set aside only on substantial proof of mental incapacity or undue influence. Id. In suit to contest, **burden to explain an erasure** is not on defendant, but plaintiff must overcome evidence afforded by probate and show invalidity by preponderance of evidence. Scott v. Thrall [Kan.] 95 p 563.

71. Scott v. Thrall [Kan.] 95 P 563.

72. Murphy's Ex'r v. Hoagland [Ky.] 107 SW 303.

73. Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46.

74. In re Welch's Will [Cal. App.] 91 P 336; Teckenbrock v. McLaughlin, 209 Mo. 533, 108 SW 46.

75. In re Wilcox's Estate, 55 Misc. 170, 106 NYS 468.

76. Where instrument was not what testatrix was made to believe it was when she executed it. Bradford v. Blossom, 207 Mo. 177, 105 SW 289.

77. Crumbaugh v. Owen, 232 Ill. 191, 83 NE 803.

78. Smullin v. Wharton, 73 Neb. 667, 112 NW 622. For former opinion see 106 NW 577. See, also, 113 NW 267.

79. State v. Lancaster [Tenn.] 105 SW 858.

80. McCormick v. Elsea [Va.] 59 SE 411.

81. Time for appeal from order admitting will runs from entry of order in court's minute book. Tracy v. Coffey [Cal.] 95 P 150. **Infants** held barred by five-year limitation from appealing to circuit court, and could not impeach decree in equity after a year from attaining majority. Noland v. Stacy [Ky.] 110 SW 264. Appeal may be granted after the time prescribed therefor where the delay is excusable and justice requires it, as where petitioner was induced to believe that testatrix had died intestate and testamentary capacity was doubtful. Hackett v. Murphy [R. I.] 69 A 685.

82. Appeal lies to common pleas court from probate order overruling applicat'on

executor may appeal from a decree denying probate,[84] but a widow having ample remedy by election may not appeal from an order probating her husband's will.[85] Interested persons not parties to the appeal should be brought in by order of the appellate court.[86] Jurisdiction below being ousted by appeal for trial de novo, the district court is powerless to remand for defect of parties.[87] Technical rules as to formation and determination of issues do not apply to reasons of appeal from probate.[88] A claim that the will offered for probate is not the will of the alleged testator is a sufficient reason for appeal from its allowance.[89] On appeal from a judgment denying probate, questions properly arising only after probate will not be considered,[90] and where a demurrer to an application for probate is sustained matters outside the application cannot be determined.[91] Written statements of the subscribing witnesses made under oath at the preliminary offer of probate are admissible in evidence on trial de novo in the district court on appeal.[92] On appeal from grant of probate in Illinois, the evidence is confined to testimony of the attesting witnesses,[93] but on ap-

to find and establish contents of a lost will (Roth v. Siefert, 77 Ohio St. 417, 83 NE 611), but an order of court of common pleas establishing contents of such will is not reversible on petition in error (Id.). Sess. Laws 1901, § 40, c. 81, p. 158, does not allow appeal from **interlocutory orders.** In re Gentz's Estate [N. M.] 93 P 702. Order in accordance with verdict that instrument was not decedent's will **held final** though not providing for costs. Wallen v. Wallen [Va.] 57 SE 596.

83. Filing of appeal bond within 30 days after judgment in county court and of transcript in district court within 10 days thereafter is sufficient to vest district court with jurisdiction under the statute. In re Powers' Estate [Neb.] 113 NW 198. Executor in active discharge of official duties at time of vacation of order admitting to probate held not required to give **bond on appeal** to district court. Marshall v. Stubbs [Tex. Civ. App.] 20 Tex. Ct. Rep. 491, 106 SW 435. On appeal from order disallowing probate bond should be payable to contestant, not to people of the county. Schofield v. Thomas, 231 Ill. 114, 83 NE 121. Appeal bond may be approved by clerk as well as by judge of probate. Id. An appeal on an issue of fact in proceedings to prove a will must be heard on a **case made** and settled by the surrogate as provided by Code Civ. Proc. § 2576. In re Goldsticker's Will, 54 Misc. 175, 105 NYS 931. Where exceptions are taken to decision of a surrogate in proceedings to prove a will as to his findings on the sanity of decedent, **all the evidence** which any party to the proceeding may claim to be material on the question must be included in the case in order to incorporate them in the record. Id. Where on appeal from a decree in proceedings to prove a will objections were made to receiving by surrogate of testimony of witnesses over objection to their competency, all material evidence must be included in the case on appeal. Id. Where appellant failed to pay **appeal fee** which was paid by contestant and refunded him by appellant, appellate court properly refused to dismiss appeal. Schofield v. Thomas, 231 Ill. 114, 83 NE 121. On **application for leave to appeal** from a probate decree, exception must be taken to rulings on questions of law. Question whether previous appeal was bad. In re Gurdy [Me.] 69 A 546. Determination of questions of fact are conclusive. Whether delay was without fault of petitioner and whether justice required revision. Id. When leave is granted to enter and prosecute an appeal, matters of fact or law which were heard and determined by justice cannot be heard again upon a motion before him to dismiss the appeal, which he granted (Id.), the only question open being that of jurisdiction (Id.). Supreme court of probate may hear petition for appeal at term later than first one after petition is filed. Id. If justice hear petition in vacation by agreement of parties and enters decision as of last day of preceding term which he held, parties are concluded. Id. Decree that appeal be allowed held equivalent to decree that it may be entered. Id. If decree does not designate term to which appeal is to be entered, entry at next term is authorized. Id.

84. In re Eckler's Estate, 110 NYS 650.

85. Election under Ky. St. 1903, § 1404 held exclusive remedy. Mercer v. Smith [Ky.] 107 SW 1196.

86. Code Civ. Proc. § 2573. In re Hunt's Will, 105 NYS 59. District court on appeal from county court may require new parties to be joined. Marshall v. Stubbs [Tex. Civ. App.] 20 Tex. Ct. Rep. 491, 106 SW 435.

87. That sole legatee was not party to proceeding to set aside probate did not render judgment void as to executor. Marshall v. Stubbs [Tex. Civ. App.] 20 Tex. Ct. Rep. 491, 106 SW 435.

88. Reed v. Reed [Conn.] 68 A 849.

89. Managle v. Parker [N. H.] 68 A 538. Amendment setting out reasons held properly allowed. Id.

90. Matters of construction not cognizable on appeal from judgment sustaining demurrer to application. Lindermann v. Dobossy [Tex. Civ. App.] 20 Tex. Ct. Rep. 888, 107 SW 111.

91. Status of application respecting another suit. Lindermann v. Dobossy [Tex. Civ. App.] 20 Tex. Ct. Rep. 888, 107 SW 111.

92. McConnell v. Keir [Kan.] 92 P 540.

93, 94. Hill v. Kehr, 228 Ill. 204, 81 NE 848; Mead v. Trustees of Presbyterian Church, 229 Ill. 526, 82 NE 371.

peal from refusal to probate any legitimate evidence is admissible to establish the will.[94] The rule against disturbing verdicts or findings based on conflicting evidence applies in litigation over the validity of wills,[95] though in New York the appellate court has the same power to determine questions of fact as the surrogate had.[96] A finding of incapacity will support a judgment refusing probate, regardless of error below on the issue of undue influence.[97] Though the parties are usually entitled to a jury trial, the court has the same power to direct a verdict as it possesses in ordinary civil actions.[98] An appeal bond conditioned on paying "all damages" does not include appellee's attorney fees.[99]

(§ 4) *L. Costs* See 8 C. L. 2325 may be allowed out of the estate,[1] and allowance to an unsuccessful proponent [2] or contestant [3] is largely discretionary, but the court may not ordinarily direct the payment of anticipated expenses out of the estate wihout specific statutory authority.[4] An executor will be allowed his costs and counsel fees where it becomes his duty to defend the will.[5]

(§ 4) *M. Recording of foreign wills* See 8 C. L. 2325 is essential to their use as muniments of title where required by statute.[6]

§ 5. *Interpretation and construction.* See 8 C. L. 2326

Scope of section.—The first subsection embraces rules which may be called general. The four subsections following indicate four general classes of objects to which the terms of a will are addressed.

(§ 5) *A. General rules.* See 8 C. L. 2326—Testator's intention,[7] gathered from the whole intsrument,[8] controls if consistent with the law.[9] The recognized rules of

95. In re Doolittle's Estate [Cal.] 94 P 240. Conflicting evidence on questions of fact will not disturb the judgment below. Conflicting evidence as to whether testator expressly directed draftsman to sign his name to will. In re Powers' Estate [Neb.] 113 NW 198.

96. Code Civ. Proc. § 2586. Question as to competency. In re Tuttle's Will, 108 NYS 133.

97. Morgan v. Adams, 29 App. D. C. 198.

98. Snodgrass v. Smith [Colo.] 94 P 312.

99. Bond by contesting appellant conditioned on performing appellate judgment and paying all "damages" did not authorize recovery of executor's attorney's fees in resisting appeal. Williams v. Fidelity & Deposit Co. [Colo.] 93 P 1119.

1. Circuit court on appeal from will contest in probate court may order taxable costs to be paid out of estate. Goff v. Coolidge [Mich.] 115 NW 1059. Where successful caveat is filed before admission of will to probate and counsel services are rendered to parties interested as heirs, distributees or devisees, orphan's court has no jurisdiction to allow compensation out of estate. Koenig v. Ward, 104 Md. 564, 65 A 345.

2. Unsuccessful proponent may not complain that court imposed costs on him and refused to allow him his expenses. Skillman v. Lanehart [N. J. Eq.] 67 A 1034. Unsuccessful proponent held not entitled to counsel fee in appellate court on unsuccessful appeal. Id.

3. Though only extreme cases will justify allowance of costs of an unsuccessful contestant out of estate (In re Bump's Estate [Cal.] 92 P 642), the court may, under Code Civ. Proc. § 1720, order costs of widow unsuccessfully contesting husband's will, and refuse proponents their costs against contestant (Id.), and it will be presumed on appeal that court properly exercised its discretion (Id.).

4. Statutes held not to authorize order for payment to guardian ad litem of contestants of funds of estate to procure attendance of witnesses at hearing of contest. In re McNaughton's Will [Wis.] 114 NW 849. Circuit Court on appeal from will contest in probate court has no power to order allowance from estate of money to enable defeated party to appeal to supreme court. Goff v. Coolidge [Mich.] 115 NW 1059.

5. An executor who presents a will for probate and thus necessarily raises a contest of a subsequent will offered is entitled to his costs on appeal though the contest is not sustained. In re Bowman's Will [Wis.] 113 NW 956. Certain issues held raised after probate so as to entitle executor to counsel fees for defending will. Decker v. Fahrenholtz [Md.] 68 A 1048. That letters had not been granted held immaterial. Id.

6. Petition in ejectment held demurrable where silent as to record in state of foreign will on which recovery was based. Henderson v. Belden [Kan.] 95 P 1055.

7. Fifer v. Allen, 228 Ill. 507, 81 NE 1105; Vanatta v. Carr, 229 Ill. 47, 82 NE 267; Tebow v. Dougherty, 205 Mo. 315, 103 SW 985; Dickerson v. Dickerson [Mo.] 110 SW 700; United States Trust Co. v. Hogencamp [N. Y.] 84 NE 74; Stebbens v. Turner, 55 Misc. 587, 105 NYS 945; Tounele v. Westmore, 109 NYS 349.

8. Covey v. Dinsmoor, 129 Ill. App. 49; Harris v. Rhodes, 130 Ill. App. 233; Fifer v. Allen, 228 Ill. 507, 81 NE 1105; Pearson v. Hanson, 230 Ill. 610, 82 NE 813; Hayes v. Mertz [Ind. App.] 84 NE 546; Papin v. Piednoir, 205 Mo. 521, 104 SW 63; Tisdale v.

construction should be applied to arrive at this intention,[10] but not to subvert it.[11] These rules call for a reasonable and natural interpretation,[12] and often require or allow the court to disregard technical meanings [13] or inaccurate [14] or inconsistent expressions,[15] to supply, ignore, or transpose words, phrases, or punctuation,[16] and to consider void provisions.[17] Two clauses relating to the disposition of the same property to the same persons should be construed as one.[18] It is for the court to construe a will in the light of its language and the circumstances.[19]

*As to time.*See 8 C. L. 2327—A will speaks as of the time of testator's death.[20]

*Extrinsic evidence.*See 8 C. L. 2327—While the circumstances and conditions surrounding testator at the time of making the will may be shown,[21] and extrinsic evi-

Prather [Mo.] 109 SW 41; In re Froehlich's Estate, 122 App. Div. 440, 107 NYS 173; Whittle v. Whittle's Ex'rs [Va.] 60 SE 748. **All words must be given effect** if possible. Wardner v. Seventh Day Board, 232 Ill. 606, 83 NE 1077; Deskins v. Williamson [Ky.] 106 SW 258; Allen v. Allen [Ky.] 108 SW 250; McLaughlin v. Greene [Mass.] 83 NE 1112; Dickerson v. Dickerson [Mo.] 110 SW 700; Fisher v. Fisher [Neb.] 113 NW 1004; In re Maccaffil, 57 Misc. 264, 107 NYS 1115; Tyndall v. Fleming, 108 NYS 239; McDaniel v. Hays, 6 Ohio N. P. (N. S.) 435; Pabst v. Goodrich [Wis.] 113 NW 398.

9. Fifer v. Allen, 228 Ill. 507, 81 NE 1105; Vanatta v. Carr, 229 Ill. 47, 82 NE 267; In re Carney's Estate [Ind.] 84 NE 506; Boston Safe Deposit & Trust Co. v. Blanchard [Mass.] 81 NE 654; Stimpson v. Murch [Mass.] 83 NE 1107; Dow v. Abbott [Mass.] 84 NE 96; Perkinson v. Clarke [Wis.] 116 NW 229.

10. Bradshaw v. Butler [Ky.] 110 SW 420; Wills v. Wills [N. J. Err. & App.] 69 A 256.

11. All arbitrary rules must give way to the primary rule that the manifest intention of the testator must be given effect. Anderson v. United Realty Co., 9 Ohio C. C. (N. S.) 473. Where a will as a whole is plain in the light of the subjects with which it deals, no judicial construction should be attempted. Will should not be read in light of judicial construction merely because meaning is challenged. In re Benner's Will [Wis.] 113 NW 663.

12. Words should be given ordinary meaning. Orth v. Haggerty, 110 NYS 551; Pabst v. Goodrich [Wis.] 113 NW 398. The more reasonable and natural of two constructions should be adopted. In re Farmer's Loan & Trust Co., 189 N. Y. 202, 82 NE 181; In re Bergen's Estate, 56 Misc. 92, 106 NYS 1038. In construction, courts should apply natural methods of finding and weighing evidence. Wardner v. Seventh Day Board, 232 Ill. 606, 83 NE 1077. Rule that the one of two proper constructions which prefers an heir will be adopted is not applicable where there is only one proper construction. As to extent to which debts were a charge on income of land. Kincaid v. Moore, 233 Ill. 584, 84 NE 633.

13. Devise to three sons without more, then provision that they should have only "life estates" and that property should go to survivor, held to give fee to sole survivor. Smoot v. Kirk, 31 Ky. L. R. 1081, 104 SW 716. "To wife for life with right to use the estate and power to sell any of it" held only a life estate. In re Pierson, 110 NYS 476.

14. In apt terms subordinated to clear intention. Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403. Quarter of "said remainder" meant quarter of whole estate. Angell v. Angell [R. I.] 68 A 583. "Will and bequeath" construed to include realty. Barker v. Petersburg [Ind. App.] 82 NE 996.

15. Particular terms inconsistent with general intent may be rejected. Beebe v. Bellamy, 109 NYS 941. Where wife became insane, corpus of estate could be used for her maintenance where will read "if in her discretion she should find it desirable." Wording held a mere redundancy. Id.

16. The court may supply words or phrases, punctuation, or transpose sentences in order to arrive at the testator's intent. In re Farmers' Loan & Trust Co., 189 N. Y. 202, 82 NE 181. Court substituted "my decease" for "her decease" so as to eliminate all ambiguities and give effect to the design of the testator. Liebmann v. Liebmann, 53 Misc. 488, 105 NYS 403. Mere punctuation, if it renders doubtful or ambiguous the intention of the testatrix, may be disregarded if from other circumstances a reasonable construction of the testatrix's intention may be arrived at. Youtsey v. Bowman, 6 Ohio N. P. (N. S.) 381.

17. Restraint on alienation on intent to create life estate or fee. Pratt v. Saline Valley R. Co. [Mo. App.] 108 SW 1099.

18. Driggs v. Plunkett [Ky.] 105 SW 976.

19. Error to allow witness to testify as to construction. McGooden v. Bartholic, 132 Ill. App. 392.

20. As to violation of statute against perpetuities. Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698.

21. Johnson v. White [Kan.] 90 P 810; Ladd v. Ladd [N. H.] 68 A 462; In re Hermann's Estate [Pa.] 69 A 285. Relation to beneficiaries and surrounding circumstances may be considered. Papin v. Piednoir, 205 Mo. 521, 104 SW 63. Reference may be had to surrounding circumstances to determine objects of testator's bounty or subject of disposition. Felkel v. O'Brien, 231 Ill. 329, 83 NE 170. Where terms are ambiguous, the relation of the parties, nature and situation of the subject-matter, purpose of the instrument, and motives which might reasonably be supposed to influence testator, may be considered. Wardner v. Seventh Day Board, 232 Ill. 606, 83 NE 1077. In an action to construe a will, the situation of the testatrix and of the objects of her bounty can be looked to in ascertaining her intention, and the fact that the plaintiff was a foster-daughter of the testatrix can be als

dence may be admitted in cases of latent ambiguities,[22] such evidence,[23] including testator's declarations,[24] cannot be allowed to vary, explain, or contradict clear and explicit language. Extrinsic evidence is inadmissible on question whether a provision is in lieu of dower.[25] Where a latent ambiguity is established by parol testimony, which itself removes it, the language of the will controls.[26]

(§ 5) *B. Of terms designating property or funds.* See 8 C. L. 2828—Words will carry such property as in common use they import [27] and all that is incident thereto.[28] Property in which testator had no divisible interest will not pass,[29] but money apparently held in trust may be shown to in fact belong to testator,[30] and a devise of all

leged and proved as an element in determining the intention of the testatrix to prefer her. Youtsey v. Bowman, 6 Ohio N. P. (N. S.) 381.

22. "West" could be eliminated from erroneous description of realty and properly identified by parol. Whitehouse v. Whitehouse [Iowa] 113 NW 759. Parol evidence is admissible where an ambiguity is latent but not where patent. Ambiguity is patent where uncertainty arises from words themselves before attempt to apply them to object described (Jennings v. Talbert, 77 S. C. 454, 58 SE 420), latent where face of will is not defective but there is uncertainty in attempting to put it into effect (Id.). Words seemingly cutting down estate granted held to disclose patient ambiguity barring parol evidence. Id. Will held to create latent ambiguity as to legatees intended, within Civ. Code, § 1340, allowing extrinsic evidence to correct imperfect descriptions, and not a patent ambiguity within § 1318. In re Dominici's Estate, 151 Cal. 181, 90 P 448. Description in part incorrect held to create latent ambiguity rendering extrinsic evidence admissible to identify the property. Felkel v. O'Brien, 231 Ill. 329, 83 NE 170. Extrinsic evidence could be considered to show that testatrix bequeathing stock referred to stock owned by her children, which stock she had treated as her own and that she owned none other. Paulus v. Besch, 127 Mo. App. 225, 104 SW 1149. In trespass, evidence that devisee claimed and used a strip between a highway and highwater mark held admissible as explaining meaning of "bank lot." Merwin v. Backer [Conn.] 68 A 373. What testator meant by "home farm" could be shown in suit between adverse claimants after probate. P'Simer v. Steele [Ky.] 106 SW 851.

23. Extrinsic evidence will not be allowed to vary testator's express intent. As to beneficiary intended. In re Dominici's Estate, 151 Cal. 181, 90 P 448. When language is clear and unambiguous, question is not what testator intended to express but what words used actually express. Brown v. Gibson's Ex'r [Va.] 59 SE 384. Parol evidence inadmissible to show that charge in book of advancements was erroneous and that advancement had not been made. Younce v. Flory, 77 Ohio St. 71, 83 NE 305. Extraneous facts and circumstances can be considered only when there is a doubt as to the expressed intention of the testator. Harris v. Rhodes, 130 Ill. App. 233. Cannot change meaning expressed by language used, however clearly different intent appears. Where son was to have all the residue of testator's realty and no other devise was made, it could not be shown that wife was to have homestead. Hollenbeck v. Smith, 231 Ill. 484, 83 NE 206.

24. Declarations of testator are inadmissible to explain the meaning of terms used. Peet v. Peet, 229 Ill. 341, 82 NE 376; Ladd v. Ladd [N. H.] 68 A 462. Not admissible to show that wife was to have homestead to which she was given a void deed. Hollenbeck v. Smith, 231 Ill. 484, 83 NE 206. As to requiring life tenant to give security. Scott v. Scott [Iowa] 114 NW 881. Where a will without latent ambiguity expresses a clear intent, declarations of testator to his attorney who drew the will are inadmissible. In re Dominici's Estate, 151 Cal. 181, 90 P 448. Such evidence is proper only where the description of the person or property by extrinsic evidence is shown to be doubtful or imperfect. Id. Civ. Code, § 1340, prohibiting admission of testator's declarations to correct mistaken descriptions or omissions, is a limitation on rule allowing such declarations to explain latent ambiguities, and will be held to apply only to incidental utterances as distinguished from specific instructions to scrivener. Id.

25. Cowdrey v. Cowdrey [N. J. Err. & App.] 67 A 111.

26. Modern Woodmen v. Puckett [Kan.] 94 P 132.

27. Homestead with its appurtenances and necessary "provisions" held to mean food, fare, or provender. Searle v. Fieles [Mass.] 83 NE 991.

28. Devise of land subject to contract of sale carries with it the notes taken by testator in pursuance of the contract. Covey v. Dinsmoor, 129 Ill. App. 49, afd. 226 Ill. 438, 80 NE 998. A devise to a copartner of all the property used in the business passes the good will as a necessary incident. Bradbury v. Wells [Iowa] 115 NW 880.

29. "All property real and personal" did not pass proceeds of certificate of insurance with mutual benefit society, member having no devisable interest. Modern Woodmen of America v. Puckett [Kan.] 94 P 132. Damages recovered by an administrator for decedent's wrongful death do not pass under a will, since by Ky. St. 1903, § 4839, will takes effect as if executed immediately before death, and § 4825 authorizes willing of only such estate as testator was entitled to at time of death. Sturges v. Sturges, 31 Ky. L. R. 537, 102 SW 884.

30. Money deposited by testator as trustee held to pass to specific legatees of money in banks where shown to in fact belong to testator. In re Caldwell's Estate [Del.] 68 A 525.

one's realty passes land acquired after the will was made.[31] While words may not be added either to supply description or in lieu of erroneous description,[32] a word may be stricken out if the intention of the testator is thereby effectuated.[33] Where after execution of his will a testator makes a trust deed, the will operates upon what is not disposed of by the trust deed.[34] One entitled to share as legatee if a specified contingency shall happen will be entitled to share if at all, in funds coming into the executor's hands for distribution to legatees before as well as after the contingency happens.[35] Testamentary power in trustees to conclusively determine all doubtful questions of construction in the interpretation of the will authorizes the trustees to determine what property the will applies to.[36]

(§ 5) *C. Of terms disignating or describing persons or purposes.* See 8 C. L. 2329 Intent governs in determining who take [37] as members of a designated class [38] and the

31. "To husband all my real estate * * * of which I am now possessed." After-acquired property passed and word "now" did not extend meaning. 2 Rev. St. (1 st. ed.) pt. 2, c. 6, tit. 1, 5. Hodgkins v. Hodgkins, 108 NYS 173.

32. Douglas v. Bolinger, 228 Ill. 23, 81 NE 787.

33. Where testator owned but one tract of land and erroneously designated it the north one-half instead of the west one-half, and his intention to leave said property to his son is manifest, the word "north" will be stricken out so as to give the gift effect. Douglas v. Bolinger, 228 Ill. 23, 81 NE 787.

34. Trust deed and will construed. Angell v. Angell [R. I.] 68 A 583.

35. Where wife of testator's brother was entitled to share as legatee if she should survive her husband, she was entitled to share in funds coming into executor's hands for distribution before as well as since death of husband. Cooch v. Clark [Del.] 68 A 247.

36. Not limited to determination of disposition of property clearly covered. Couts v. Holland [Tex. Civ. App.] 107 SW 913.

37. Testator's scheme was to leave his property in trust for different lines of descendants, and he carefully provided in each instance save one that in case of death of the beneficiary without issue his share should vest in the survivors. Held, it could not be presumed he intended to make an exception in case of his grandchildren, and hence share of a grandchild vested in surviving beneficiaries named in the clause. Dexter v. Watson, 54 Misc. 484, 106 NYS 80. Devise to "D., deceased," held to D.'s children. Carroll v. Adams, 105 NYS 967. Residue to sister J., nephew S., and S.'s sister, testator's niece, all in L., Germany. Codicil on death of sister gave her share "to the other two residuary legatees therein named, S., and to his sister, my niece, whose name is K. and whose residence is in S., Germany." S. had only one sister always residing at L. Testator had niece named K. residing at S.'s, but had been intimate with S. family and not with K. and her parents. Held, S. acquired one-third plus one-half of one-third, and his sister one-third, and K. one-half of one-third. In re Dominioi's Estate, 151 Cal. 181, 90 P 448. Direction for division "equally, share and share alike, between all my living sisters or the lawful bodily heirs of any who may not be living," allowed such heirs to take along with surviving sisters. Hagen v. Hanks [S. C.] 61 SE 245. Provision that in case of death of a nephew or neice without children his or her share should go to the survivor or survivors of the other held to mean "other or others," and to allow children of a predeceased niece to share. In re Carey's Estate [Vt.] 69 A 736. Provision as to disposal of share of son who should die childless held to give his entire interest to trustee of another son to exclusion of children of other deceased brothers. In re Norris' Estate, 217 Pa. 548, 66 A 996. Will giving property to "my" children, and providing also for "our" children, construed so that children of first marriage were not entitled to share after death of second wife, but remainder went to children of second marriage. Cooper v. Cooper [S. C.] 58 SE 950. Where, after bequest of income to school districts of a town, number and size of such districts were changed, will held to give a smaller district one-half of income, there being only two districts. North Troy Graded School Dist. v. Troy, 80 Vt 16, 66 A 1033.

38. Provision for distribution to a class vests title in only those who are members at the time of distribution. Act July 12, 1897, P. L. 256, merely entitles issue of one within class when will was executed or afterwards, and who died before testator, to take by substitution. Todd's Estate, 33 Pa. Super. Ct. 117. Under devise to nephews and nieces, child of nephew dying before date of will held not to take. Id. **"To child or children** of my said daughter" held not to include children born to daughter after death of testator. Toher v. Crounse, 57 Misc. 252, 107 NYS 990. **"To issue"** held not to include child born after testator's death, it not being sufficient that will shows that testator had in mind possibility of children born after making of will. Stachelberg v. Stachelberg, 108 NYS 645. A bequest **to grandchildren** includes grandchildren born after testator's death in the absence of anything in the will showing intent to exclude them. Caywood v. Jones [Ky.] 108 SW 888. A direction for division among **"legal heirs"** refers to those answering that description at testator's death unless contrary intent is shown. Harris v. Ingalls [N. H.] 68 A 34. Where, in default of descendants of testator at death of wife, estate was to go to his **own right heirs** it should be distributed on happening of the

purposes of a gift,[39] if such intent can be ascertained with any reasonable degree of certainly,[40] and particular liberality is exercised to sustain charitable or educational bequests.[41] A residuary devise to "heirs at law" does not show intention to exclude specific legatees who may become such heirs.[42] The presumption is against an intention to disinherit, but this presumption does not apply where it is clear that the testator intended to favor some to the exclusion of others.[43] One not answering the description in a legacy is not entitled thereto,[44] and a donee must have capacity to take,[45] but capacity will be determined as of the date when the contingency happens upon which vesting depends.[46] The rights of pretermitted or posthumous children [47] and the construction of the words heirs, issue, children, and the like, are treated elsewhere [48] to avoid confusion and unnecessary repetition.

(§ 5) *D. Of terms creating, defining, limiting, conditioning, or qualifying the estates and interests created. Particular words and forms of expression.*[See 8 C. L. 2330]—The words "heirs," [49] "heirs at law," [50] "lawful" or "legal heirs," [51] "issue," [52]

contingency among those persons who would have been testator's own right heirs if wife had predeceased and he had died intestate at time his wife in fact died. Boston Safe Deposit & Trust Co. v. Blanchard [Mass.] 81 NE 654.

39. Will construed to create funds to be used exclusively for homes for two daughters and their families. Coleman v. Grimes [Ky.] 110 SW 349. Increase in value of property in which funds were invested held to become part of principal and subject to same trust. Id.

40. A bequest will not be declared void on the ground of uncertainty unless the conditions are such as to make it impossible to ascertain, with any degree of reasonable certainty, what testator's intention was. In re Dickinson's Estate, 56 Misc. 232, 107 NYS 386.

41. Where land was devised for site of a charity and rest of testator's property was given for the purpose of erecting a building thereon and supporting the institution, will stating "other aid may be obtained, this bequest being intended as the founding and beginning," trustees of the charity were entitled to receive the property though other property was insufficient, even for erecting necessary buildings. Kennedy's Adm'r v. Trustees of Linn Orphan Asylum, 31 Ky. L. R. 766, 103 SW 340. Bequests to religious societies by names which were not their strict corporate names, but plainly identified societies intended, held valid. In re Dickinson's Estate, 56 Misc. 232, 107 NYS 386. Where bequest was to a certain library in Phelps and there were two libraries which might have been intended, the means of knowledge of the testator as to character of the two libraries in connection with names by which they were known should be considered in determining which was the legatee intended. Id. Will construed to authorize distribution to institutions that aided orphans though they were not exclusively orphanages. Jacoby's Estate, 34 Pa. Super. Ct. 355. Will held to sufficiently identify a missionary association as legatee intended. Guild v. Allen [R. I.] 67 A 855. Also a missionary society. Id. See, also, Charitable Gifts, 9 C. L. 555.

42. Where codicil revoked specific bequests made in previous codicil and gave another sum in lieu thereof, legatee was entitled to take also as sole heir at law under residuary clause of first codicil, giving residue to "heirs at law." Wilkinson v. Rosser's Ex'r, 31 Ky. L. R. 1262, 104 SW 1019.

43. Where four-fifths of relatives were excluded from participation in personal estate. In re Norris' Estate, 217 Pa. 559, 66 A 1000. To give effect to the presumption against disinheritance, there must be expressions in the will which the court may seize hold of to prevent disinheritance. In re Keogh, 110 NYS 868.

44. "To my said wife C" was to C as testator's wife and failed where C had never been testator's lawful wife. Collard v. Collard [N. J. Eq.] 67 A 190.

45. Brooklyn had capacity to receive gift for erection of a statue, and, "when it became part of New York City, New York as successor succeeded to Brooklyn's rights. In re Harteau, 110 NYS 59.

46. Where bequest was made to a university, but was not to vest until death of testator's son, and university was at time of death capable of receiver's gift, bequest was valid. In re Durand, 56 Misc. 235, 107 NYS 393.

47. See ante, § 1.

48. See § 5D, post, Particular Words and Forms of Expression.

49. Is a word of limitation and not of purchase. Connor v. Gardner, 230 Ill. 258, 82 NE 640; McDaniel v. Hays, 6 Ohio N. P. (N. S.) 435. Statute of descent may be looked to in determining who testator meant by word "heirs," nothing appearing in will, but how these shall take should be determined from the will itself if possible. Dunihue v. Hurd [Tex. Civ. App.] 109 SW 1145. Legacy to one and his "heirs" **does not include** his **widow.** Herrick v. Low [Me.] 69 A 314. Remainder over if son should die without an "heir" meant child or its descendant, and not son's widow. Duzan v. Chappel [Ind. App.] 84 NE 775. "To W or his 'heirs' should he have died." Heirs held to mean "next of kin" or those related in blood, hence not include W's widow. Hess v. Zahn, 57 Misc. 515, 107 NYS 951. Remainder to son and daughter, to them and their "heirs, share and share alike," meant "heirs" generally, and not children. Fishburne v. Sigwald

"lawful issues," [53] "relatives," [54] "family," [55] children," [56] "share," or "equal shares," [57] will be given their ordinary meaning in the absence of statute or contrary intent. The "child or children" of others than the testator does not include an adopted child.[58]

Gifts by implication. See 8 C. L. 2331—No express words of gift are necessary if the intention to give clearly appears in the will.[59] Devise of land, on condition of pay-

[S. C.] 60 SE 1105. Bequest to a daughter, then to her heirs, and if she should die leaving no heirs of her own then to others. The first word "heirs" held to mean any persons who would succeed to her estate in case of intestacy, while "heirs of her own" held to mean issue of her body. Ahlfield v. Curtis, 229 Ill. 139, 82 NE 276.

50. Ordinarily "heirs at law" refers to those who were or will be such at death of testator or ancestor in the absence of a contrary intent. Provision for distribution among testator's heirs at law after death of life tenant referred to heirs at testator's death. Boston Safe Deposit & Trust Co. v. Parker [Mass.] 83 NE 307. Term "heirs at law" when considered with all the language of the will held to include the husband and remaining heirs of testator. Harris v. Rhodes, 130 Ill. App. 233.

51. "Lawful heir" does not mean "legitimate heir," but only person designated by law to take by descent (Harrell v. Hagan [N. C.] 60 SE 909); hence, where will provided that in event of daughter's death without "lawful heirs" property should go to sons, illegitimate issue of daughter took on her death, under statute making illegitimate children heirs of mother in absence of legitimate children (Id.). Where a testator devises a parcel of real estate to his son for life, with remainder to his lawful heirs, and the son marries after the death of the testator, held that upon the death of the son the wife takes as heir where there is nothing in the will tending to show that the testator used the words "lawful heirs" in a different sense from their strict technical import. Miller v. Miller, 9 Ohio C. C. (N. S.) 242. "Legal heirs" means those answering that description under the laws of the state. Harris v. Ingalls [N. H.] 68 A. 34. "May be held to mean children or other near relatives of a person living at testator's death if testator so intended. Id.

52. Embraces grandchildren and remoter descendants (Coyle v. Coyle [N. J. Eq.] 68 A 224) unless a restricted meaning was intended (Id.). "Issue" held equivalent to "children" only. Id. Usually means an indefinite succession of lineal descendants who are to take by inheritance; hence heirs of body. Harrell v. Hagan [N. C.] 60 SE 909. Embraces lineal descendants of every generation and must be so construed when used in a will unless intention is shown to use word in a restricted sense. "To child or in case of death of child to issue or next of kin of said deceased child." Held son and grandchildren of deceased daughter were entitled to share per capita daughter's share in testator's estate. Bassett v. Wells, 56 Misc. 81, 106 NYS 1068. Held not used in its strictly technical meaning equivalent to "descendants," but applied only to descendants of a particular class at a particular time. Kernochan v. Whitney, 109 NYS 721.

53. Illegitimate children held not entitled to take as "lawful issue." Olmsted v. Olmsted, 190 N. Y. 458, 83 NE 569.

54. Means those who would take under statute of distribution. Thompson v. Thornton [Mass.] 83 NE 880.

55. Home for daughter and her "family" held to include daughter's children. Coleman v. Grimes [Ky.] 110 SW 349.

56. Is subject to such construction as will effectuate the intention of the testator. Connor v. Gardner, 230 Ill. 258, 82 NE 640. Does not bring a devise within the rule. Id. Must be used in ordinary sense in absence of contrary intent. In re Keogh, 110 NYS 868. "Children" in substitutionary devise held not to include grandchildren. Id. Presumption against disinheritance does not apply so as to enlarge meaning of "children" to include grandchildren, in favor of persons who are grandnephews, and not grandchildren, of testator, and where question arises in respect to a substitutionary bequest. Id.

57. The word "share" does not prima facie apply to an interest in real estate, but ordinarily and naturally means a part or portion of personalty held in common by two or more persons. McDaniel v. Hays, 6 Ohio N. P. (N. S.) 435. Where a testator specifically devised real estate in remainder in fee simple to each of his two sons in the first item of his will, and in a subsequent item devised the rest and residue of his property, consisting largely of personalty, equally between them, share and share alike, and then immediately provided that if either of said sons should die before the decease of his wife then the share of the deceased son should go to his heirs, the word "share" does not include the real estate devised in the first item of the will, but refers only to the property in which each son is by express words given a share. Id. "In equal shares" will not modify what has been clearly expressed, but may be interpreted to mean with equal regard to rights of all. Thompson v. Thornton [Mass.] 83 NE 880.

58. Devise over to child or children of deceased children did not include adopted child. In re Woodcock [Me.] 68 A 821.

59. If the circumstances afford inferences as to leave no doubt as to the intention of the testator, a gift by implication will be construed. Connor v. Gardner, 230 Ill. 258, 82 NE 640. Residue to other children after son had been paid what he had paid testatrix held a legacy to son of all amounts so paid by him. In re Barclay's Estate [Cal.] 93 P 1012. Fund to be part of residue in case of wife's death without child vested in surviving child. Newcomb v. Fidelity Trust Co. [Ky.] 108 SW 911.

ment to another renders such person a legatee, though not otherwise mentioned in the will and though the devise is not accepted by the devisee.[60]

Quality of estate, whether legal or equitable, use, trust or power. See 8 C. L. 2331—Hortatory or precatory language may or may not create a mere trust estate.[61] A provision that a trustee use property as he may deem best is not a gift to the trustee individually.[62] A secret trust may not be impressed upon an absolute devise by parol evidence that the devisee promised to devise to another.[63] fully discussed elsewhere.[64]

Estates and interests created See 8 C. L. 2332 by the use of particular words are *"Interest" and "income."* See 8 C. L. 2335—Stock purchased with assets by the corporation which issued it and kept alive in its treasury must be treated and distributed as corpus under the will of a stockholder, and not as income,[65] regardless of an attempted distribution thereof as dividends by the corporation after vesting of the interests of the legatees.[66]

Legacies. See 8 C. L. 2335—"Legacy" is a generic term and includes residuary as well as general, specific, and pecuniary bequests.[67] A specific legacy is a bequest of a particular thing or money, or fund designated from all others of the same kind.[68] A legacy is general when it is so given as not to amount to a bequest of a particular thing as distinguished from all others of the class.[69] A bequest for a valuable consideration made a charge against the estate and to precede all others is a trust, and not a legacy.[70] A legacy by direction to cancel debts will not include debts owing by the legate to third persons.[71]

An annuity. See 8 C. L. 2336

Advancements. See 8 C. L. 2336—Where one disposes of his entire estate by will, the doctrine of advancements has no application unless the will specifically refers

60. Warner v. Bullen, 123 Ill. App. 138.

61. Wife to be sole heir of entire property with free disposal of same, "only to be held to leave the same to the children of our marriage when the time comes." Held latter clause did not impair previous absolute gift. Bollentin v. Bollentin, 109 NYS 21. First share "to children of my sister Sarah J. Adams, deceased; second share to my sister Rebecca A. Dean, deceased; and third share to children of my brother Horace Mead, deceased; and to six neices my wearing apparel and jewelry." Held testator's intention to give third part to Mead in trust for herself, her mother, sister, and brothers in equal shares. Carroll v. Adams, 105 NYS 967. To trustees of university of Rochester, with express desire that it should be used for female education in Rochester, under management of trustees and in connection with university. Held no trust, but an absolute gift to trustees in their corporate capacity. In re Durand, 56 Misc. 235, 107 NYS 393. "In confidence that he will use it" in the prosecution of certain work held not to create a precatory trust. Poor v. Bradbury [Mass.] 81 NE 882.

62. Direction that trustee who drew will devote any remainder to expenses "or in such other or different manner as he may deem best" held not a provision for benefit of trustee individually. Abrey v. Duffield, 149 Mich. 248, 14 Det. Leg. N. 417, 112 NW 936.

63. Under Revisal 1905, § 3118, requiring act of revocation to prevent operation of the will. Chappell v. White [N. C.] 60 SE 635.

64. See Real Property, 10 C. L. 1448; Property, 10 C. L. 1280.

65, 66. Pabst v. Goodrich [Wis.] 113 NW 398.

67. Where testator gave sister both money and one-half of residue, codicil disposing of "legacy" given to his sister to others held to include her share in residue, as well as money legacy. In re Morris's Estate, 227 Pa. 559, 66 A 1000.

68. In re Matthews, 122 App. Div. 605, 107 NYS 301.

69. The mere possession by the testator, at the date of his will, of stock of an equal or larger amount than the legacy, will not of itself make the bequest specific. In re King, 122 App. Div. 354, 106 NYS 1073. A bequest of stock without any attempt at a definite description is a general and not a specific legacy. In re Bergen's Estate, 56 Misc. 92, 106 NYS 1038.

70. Where codicil stated that a bequest therein made was for a valuable consideration and should be a charge against the estate and precede all other bequests, it created a trust for the payment of a debt, and not a legacy, and probate of the claim was unnecessary. O'Reily v. McGuiggan [Miss.] 44 S 986.

71. Direction that executor "cancel" and "surrender" all evidences of debt which might remain unpaid at testatrix's death from certain named persons held not to require executor to purchase a claim of a third person against one of the persons named and then cancel same. Brown v. Gibson's Ex'r [Va.] 59 SE 384.

thereto,[72] but an agreement that a fund shall be an advance on account of any share of donor's estate which shall "pass" to the donee applies to property directly passing by will.[73] Where the will expressly requires a legatee to account for a specific sum before taking, he cannot show by parol that he received more or less or nothing.[74] A note and mortgage held by testator against a legatee will be presumed to represent a debt, and not to include an advancement referred to in the will.[75] A mere recital that testator had already advanced a liberal share of his estate to his children does not show that a particular tract of land had been advanced.[76] An advancement voluntarily paid by a remainderman to a life tenant cannot be recovered from the life tenant's estate.[77]

*Support.*See 8 C. L. 2336—Resort may be had to corpus if needed and such intent is shown,[78] and a beneficiary who is given the right to use so much as she may find necessary may use so much as in good faith she deems necessary.[79] Trustees directed to apply so much of a child's share as may be necessary for his support and education have no discretion as to amount, but the question is one for judicial determination.[80] Support may be either for life or for a shorter period.[81]

*Release of debts.*See 8 C. L. 2337

*Cumulative legacies.*See 8 C. L. 2337

Vesting See 8 C. L. 2337 is favored,[82] and words of survivorship will generally be referred to testator's death,[83] but testator's express or implied intention to have dis-

72. Money received under previous contract providing that same should be treated as advancement on account of share niece should acquire from testatrix's estate held not chargeable against bequest to niece. Bowron v. Kent, 190 N. Y. 423, 83 NE 472. Especially so where this would impair if not destroy trust in niece's favor. Id.

73. Where it was agreed that a trust fund should be an advance on any share of estate of settler which should "pass" to defendant on settler's death, share passing directly to defendant under settler's will should be reduced by amount of trust fund, but not life income from another trust created by the will. Bowron v. Kent, 120 App. Div. 74, 105 NYS 138.

74. Dodson v. Fulk [N. C.] 61 SE 383.

75. Daughter required to account for advancement of $500 and to pay note and mortgage for $868 before recovering her share. Dodson v. Fulk [N. C.] 61 SE 383. Immaterial whether the $500 went into firm of which her husband was member. Id.

76. Especially where there was evidence of other advances. Meurin v. Kopplin [Tex. Civ. App.] 18 Tex. Ct. Rep. 601, 100 SW 984.

77. Advancements were not payable until sons received their share of estate. Hess v. Zahn, 57 Misc. 515, 107 NYS 951.

78. Real estate belonging to a decedent may be sold and the corpus, as well as the income, used for the support of an imbecile son when the language of the will indicates a purpose on the part of the testatrix to provide for the care and support of such son regardless of the interests of the remaindermen. Riley v. Riley, 7 Ohio N. P. (N. S.) 100.

Widow authorized to use corpus. Champney v. Bradford [Mass.] 81 NE. 993. Where sale was attacked for want of authority, burden was on attacking parties to show that it was not necessary to sell for maintenance. Haren v. Block, 9 Ohio C. C. (N. S.) 328.

Held not authorized. Scott v. Scott [Iowa] 114 NW 881; Bradshaw v. Butler [Ky.] 110 SW 420. That will directed executors to "manage" estate "for use and support of wife" did not confer authority to burden corpus of realty for wife's support, on rent and uses being insufficient. Lester v. Kirtley, 83 Ark. 554, 104 SW 213.

79. Life estate to wife, with privilege of using so much of principal as she might find necessary for her comfortable support, entitled her to use principal so far as in good faith she deemed it necessary for her support in comfort. Reed v. Reed [Conn.] 68 A 849. Credit as executrix for money paid for a residence not having been excepted to, expense necessary to make house comfortable should also be allowed (Id.), and she could charge repairs, taxes, etc., against principal if she should find remaining income insufficient for support (Id.), could sell stock for reinvestment and a residence for purchase of which she had sold stock (Id.).

80. In re Goodwin's Estate, 122 App. Div. 800, 107 NYS 784.

81. To husband for life, with right to use principal if needed, provided he should also provide home and maintenance for S. during her life, upon death of husband and S., remainder to go over, gave S. a life interest not cut off by husband's death. Cobleigh v. Cross [N. H.] 68 A 870. Payments for support of S. should be made from income so far as possible. Id.

82. A will shou'd be construed in favor of a first rather than the second taker, of an absolute or vested estate rather than a defeasible or contingent one, of a general or primary intent rather than a particular or secondary one. Throckmorton v. Thompson, 34 Pa. Super. Ct. 214.

83. In re Carney's Estate [Ind. App.] 84 NE 506.

tribution later will be upheld.[84] While a few cases determinative of whether an estate is vested or contingent[85] and, as incident thereto, the time of vesting,[86] are noted below, these questions are elsewhere more fully discussed.[87]

Possession and enjoyment.[See 8 C. L. 2338]—One for whose benefit property is directed to be held for life does not take in possession.[88] A devisee in remainder entitled to take subject to power of sale in the executor may convey before death of the life beneficiary, subject to the contingency.[89]

Individual rights in gifts to two or more.[See 8 C. L. 2388]—The extent of the interests given being governed by the particular expressions used,[90] it will often be materially affected according as these direct a per capita or a per stirpes distribution.[91]

84. On death or remarriage of widow. In re Carney's Estate [Ind. App.] 84 NE 506.

85. Where income is given until the time of division or payment, legacy is vested. Will construed to vest certain stock absolutely in son authorizing pledge therof when he was 21. Stiles v. Easton Nat. Bank, 33 Pa. Super. Ct. 57. Legacies, though charged on realty, will not lapse by death of the legatees before the time of payment when such time is postponed merely for the convenience of the estate and not the person to be benefited, though not bequeathed to legatees "and their heirs." Warren's Adm'r v. Bronson [Vt.] 69 A 655. Property held to vest at death of testator in legatees and devisees, all of whom were adults at time of execution of will, despite survivorship provision in case of death of any one within five years during which there was to be no division. In re Phillips' Estate, 56 Misc. 96, 107 NYS 388. Remander to nephews if life tenant should die without issue and leave a widow him surviving could not go to nephews upon death of wife or life tenant leaving him surviving, it not being then known whether life tenant would leave a widow surviving. Chesterfield v. Hoskin [Wis.] 113 NW 647.

86. Direction to sell estate and after payment of legacies and making of certain expenditures to divide proceeds among children and issue of deceased children or survivors held to postpone vesting until arrival of time for distribution. Barnes v. Johnston, 233 Ill. 620, 84 NE 610. Where one child died leaving a daughter, she took his share free from any claim by mother if daughter survived period of distribution. Id. "All property to sister for life, and 'immediately' at her death all such property * * * or proceeds, etc., to * * *." By another clause executors were directed, in case they deemed it advisable, to dispose of any part of realty and invest proceeds in securities. Held discretionary with executors to sell and that, on death of life tenant, real estate vested in the remainderman immediately." Stebbens v. Turner, 55 Misc. 587, 105 NYS 945. Will held to give adopted daughter the income on her portion of testator's estate on death of widow whether daughter was then 21 years old or not. Pabst v. Goodrich [Wis.] 113 NW 398.

87. See Real Property, 10 C. L. 1448; Property, 10 C. L. 1280; Perpetuities and Accumulations, 10 C. L. 1167.

88. Where will provided for payment and distribution of a fund among children, but subsequent clause required share of one to be held for her benefit during life, she did not take in possession, but as trust beneficiary. Hurst v. Weaver, 76 Kan. 758, 90 P 297.

89. Purchaser had immediate right to possession on the death of life beneficiary subject to contingency. Van Norden Trust Co. v. O'Donahue, 122 App. Div. 51, 106 NYS 948.

90. Charity held entitled to only five-eighths of balance after deduction of widow's statutory portion. In re Jacoby's Estate [Pa.] 69 A 46. Devise over, of property given to two nieces for life, to "their children," held to mean the children of each, and not of both as a class. In re Cary's Estate [Vt.] 69 A 736. Daughter and her heirs held to take nothing under will explaining that they had already received as much or more than testator could give to his other children, though will provided that after termination of estate for life property should go to legal heirs and representatives. Morris v. Watterson [Ga.] 60 SE 1045. Property represented by money, stock, and bonds held properly divided equally among testator's five children after widow's death, though clause directing such division may have referred only to the cash, where balance would be so divided under residuary clause. Barnes v. Johnston, 233 Ill. 620, 84 NE 610.

91. The phrase "equally to be divided" or "share equally" calls for a per capita distribution. Provision that children of testator's sister should "share equally" with his brothers called for per capita, and not per stirpes. Hagen v. Hanks [S. C.] 61 SE 245. A bequest to several in general terms gives equal shares. Whittle v. Whittle's Ex'rs [Va.] 60 SE 748. A gift to the children of several persons or to such persons and the children of another is per capita. Guild v. Allen [R. I.] 67 A 855. Residue "to be divided betwen T. and her daughters, in trust to S., and to B. and her daughters, W., J., B., and S.," gave equal shares. Whittle v. Whittle's Ex'rs [Va.] 60 SE 748. To grandson for life, but if he should die without issue one-half to H. and "other half to be equally divided between C. and, if she be dead, her children, and child or children of G.," held to require distribution per stirpes. Van Houten v. Hall [N. J. Err. & App.] 67 A 1052. Where

The right of survivorship will be recognized if provided for in the will,[92] but it may be dependent upon the happening of a specified contingency.[93]

Conditions.[See 8 C. L. 2339]—Restrictions or limitations upon devises should be enforced unless contrary to law.[94] Whether a condition is precedent or subsequent must be determined not from particular words but from the testator's intent as gathered from the whole instrument.[95] Words imposing conditions will be given their usual and ordinary meaning.[96] Where conditions precedent are imposed, they must be substantially performed,[97] and nonperformance of a condition which must be performed during the life of testator is not excused by the devisee's ignorance of the condition.[98] Waiver of a condition precedent to the vesting of a devise must generally be shown either by the will or a codicil.[99]

Intent to require election.[See 8 C. L. 2240]—It is presumed that a devise is in addition to dower and the burden is on those asserting the contrary.[1] If there is no express declaration that a provision is in lieu of dower, the question is whether such intention must necessarily be inferred from all the terms of the will and surrounding circumstances.[2] Under the Tennessee statute, any provision for the wife in her

a testator left his estate to his widow, with the remainder to her heirs, and the widow had children by a former husband, and at her death these children became her heirs, the estate goes to them by devise and not through an intestate, and they take per stirpes and not per capita. Eichenlaub v. Heschong, 5 Ohio N. P. (N. S.) 367. Where gift is to several persons or their children, the children will generally take per stirpes. Children of daughter dying before testatrix held to take per stirpes. Guild v. Allen [R. I.] 67 A 855. Devise to brother and sister by name "or their heirs," and heirs of testator's two deceased sisters, held to call for per stirpes distribution of one-fourth to each class of heirs. Dunihue v. Hurd [Tex. Civ. App.] 109 SW 1145.

92. Under Code 1849, c. 116, § 19, and Code 1887, § 2431, providing that provision abolishing survivorship between joint tenants shall not apply where will shows intent that interest of one devisee dying shall belong to the others, will held to show intent to perpetuate home for benefit of wife and daughters, so that surviving daughter took interest of sister who died. Drake v. Blythe [Va.] 60 SE 632. Bequest of $100 per annum to each of two sisters "or the survivor of them in case of death of either" did not give $200 to survivor. Diggs v. Plunkett [Ky.] 105 SW 976. Provision that on death of any child his share should go to survivors unless he had heirs did not apply to child dying, leaving husband and child. In re Barclay's Estate [Cal.] 93 P 1012.

93. Whole residue to survivor of two "in event of either dying without issue surviving" held not operative on death of one leaving issue during testator's lifetime. Disney's Will, 190 N. Y. 128, 82 NE 1093.

94. Court would not terminate trust where testatrix intended that son should not have possession of property until he was 30. Stier v. Nashville Trust Co. [C. C. A.] 158 F 601.

95. Fulfillment of contract for carrying on farm during widow's life held a condition subsequent so that title vested in son on testator's death subject to life estate and payment of legacies. Warren's Adm'r v. Bronson [Vt.] 69 A 655.

96. Fisher v. Fisher [Neb.] 113 NW 1004. Where testator provided that one should have corpus of property upon his "restoration to mental soundness and capacity,' he meant recovery in fact and not the mere making of an order purporting to declare recovery. Aldrich v. Barton [Cal.] 95 P 900.

97. Evidence insufficient to show such performance of condition that son "keep care for, and support testator." Fisher v. Fisher [Neb.] 113 NW 1004.

98. Fisher v. Fisher [Neb.] 113 NW 1004.

99. Condition that devisee support testator. Fisher v. Fisher [Neb.] 113 NW 1004.

1. Otts v. Otts [S. C.] 61 SE 109.

2. Election expressly negatived by recital that wife's share was for money she had let him have. Otts v. Otts [S. C.] 61 SE 109. Though an 88 acre tract of land was not intended to be in consideration of indebtedness (Id.), even if widow accepted such tract it was not repugnant to dower in a much larger tract (Id.). To bar a widow's dower, testator's intention to that effect must clearly appear; in case of reasonable doubt as to intention widow takes both dower and legacy. Orth v. Haggerty, 110 NYS 551. Where a bequest is made to a widow and disposition of real estate is such as to clearly indicate intention that use of one-third of it should not belong to the widow, she is put to her election. To widow income for life, real estate to great-grandchildren. Widow accepted bequest. Held she could claim no dower. Id. One-half to widow for life, remainder to children, and other half to three children, held inconsistent with widow's dower possession of one-third of all. Wilson v. Wilson, 120 App. Div. 581, 105 NYS 151. Contention that dower was a mere lien not preventing physical division directed held untenable. Id. Leaving all the property in trust held to negative dower. Id. Determination of trustees having power to construe will, that will required widow to elect between legacies and half of community estate, held not so obviously erroneous as to require interference by court. Couts v. Holland [Tex. Civ. App.] 20 Tex. Ct. Rep. 812, 107 SW 913.

husband's will, either out of real or personal estate, puts her to her election as to dower,[3] but not as to the homestead unless it plainly appears from will that such was testator's intention.[4] Children may be put to an election where the parent bequeaths property belonging to them.[5]

Charges, exonerations, and funds for payment. See 8 C. L. 2340—The personal estate, after deducting specific legacies therefrom, is the primary fund for payment of debts and general legacies,[6] and legacies are not a charge on the land unless the intention that they shall be clearly appears,[7] though the contrary has been held.[8] Where no express trust is created for the payment of legacies and a general residuary disposition of the whole estate is made, the realty as well as the personalty will be charged.[9] Whether testator intended to charge legacies or income,[10] and the extent of a charge,[11] are largely matters of construction. A devise conditioned on the pay-

3. To wife all personal property and his real estate so long as she remains single. Held put to election within year. Shannon's Code, § 4146. Chamness v. Parrish, 118 Tenn. 739, 103 SW 822.

4. Under Const. art. 11, § 11, and Shannon's Code, § 3798, husband cannot by will deprive his widow of her homestead right. Chamness v. Parrish, 118 Tenn. 739, 103 SW 822. Intention will not be implied from a mere gift by will. Id.

5. Where testatrix bequeathed stock which she believed was hers but which in fact belonged to her children to whom she gave other legacies, children taking legacies could not claim stock. Paulus v. Besch, 127 Mo. App. 255, 104 SW 1149. That testatrix used words "my stock" did not cause failure of legacy so as to relieve children of obligation to elect. Id.

6. Van Gillurve v. Becker, 56 Misc. 157, 106 NYS 1080.

7. Warner v. Bullen, 123 Ill. App. 138. General legacies cannot be charged upon lands included in a residuary clause in absence of shown intention of testator to have them so charged. Bankers' Trust Co. v. Dietz, 54 Misc. 459, 106 NYS 32. Where testator at time of execution had more than enough personally to satisfy his probable personal needs, no intent to charge general legacies on the real estate can be inferred from circumstances attending the execution of will. Van Gillurve v. Becker, 56 Misc. 157, 106 NYS 1080. Intention to charge land with wife's legacy held not to appear. Getchell v. Rust [Del.] 68 A 404. Burden is upon the legatee to show such intention. Id. Direction for payment out of the estate not always controlling. Id. Existence of residuary clause is demonstrative evidence of intention to charge legacy on land. Id. "$5,000 to named legatee as soon after decease as possible" and in residuary clause "all the remainder in trust" in one part of which the legatee had a contingent remainder. Where there was no power of sale and nothing to show intention to have legacy charged on the real estate held no charge. Bankers' Trust Co. v. Dietz, 54 Misc. 459, 106 NYS 32. Where will was silent as to realty in consequence of which testator died intestate as to it, **parol evidence** held inadmissible to show intention to charge realty with legacies. Fries v. Osborn, 190 N. Y. 35, 82 NE 716. **When intention is clearly shown,** legacies are a charge on the real estate. In re Jones' Estate, 56 Misc. 421, 107 NYS 1030. Where language blends the entire estate, both real and personal, into one residue after leaving legacies, and indicates the intention of testator to be to give, by residuary clause, only such residue as shall be found to remain after satisfaction of the previous dispositions of will, the legacies are a charge. Id. The rule compelling the lapse of specific legacies not made a charge on the realty is controlled by intent to charge the realty. Simonsen v. Hutchinson, 231 Ill. 508, 83 NE 183.

8. A legacy is chargeable on lands devised by the same will where the personalty has been exhausted. Trustees of Methodist Episcopal Church v. Hammell [N. J. Eq.] 67 A 941.

9. Where pecuniary legacies are given generally and the residue is blended in one mass, it is charged as a whole. "Residue that shall remain after" payment of legacies. Simonsen v. Hutchinson, 231 Ill. 508, 83 NE 183. Pecuniary legacies followed by a general residuary clause are charged upon the entire residuary estate, realty as well as personalty, without regard to sufficiency of personalty to meet them at testator's death or on final accounting (Paterson Gen'l Hospital Ass'n v. Blauvelt [N. J. Eq.] 66 A 1055), and hence it is immaterial that payment out of the personalty fails because such property has been wasted, embezzled, or destroyed by the executor (Id.). Certain building directed not to be sold held part of residue and chargeable with pecuniary legacies. Tyler v. Tallman [R. I.] 68 A 948.

10. Will construed to mean that liabilities of testator as member of a firm should be chargeable on trust estate created by will for full amount of obligations of firm "if creditors thereof signified such desire by presentation of their claims to the trustees." Smith v. Rhode Island Hospital Trust Co. [R. I.] 67 A 795.

11. Will construed to charge debts on rents and income of land in two counties. Kincaid v. Moore, 233 Ill. 584, 84 NE 633. Omission of unnecessary words "clear of tax" from provision for payment of interest on charge in favor of a grandson did not authorize **deduction for taxes** though quoted words were used in direction for similar payments to another grandson. Colson v. Pancoast [N. J. Eq.] 67 A 390. Where testator gave a son a lot subject to widow's life estate if son would pay certain sums to

ment of legacies charges the legacies on the property by way of an equitable lien foreclosable in equity as against the devisee and his grantees.[12] A provision charging certain legacies with the debts and exonerating others is valid as between the legatees,[13] but does not effect the rights of creditors.[14] A claim against another, in terms charged against a legacy, will be treated as a part thereof where its discharge is negatived by the terms of the will.[15] Where legacies are charged against both realty and personalty and a subsequent grantee of the land covenants to pay them, they become a charge primarily against the land as against him, and those claiming under him.[16] A purchaser under an unauthorized sale by the executor will take subject to charges.[17] A deed of gift not mentioning an incumbrance and a contemporaneous will reciting the fact of conveyance "subject to the incumbrance thereon" cannot be considered together as a specific devise free of incumbrance.[18] One who takes, as heir on testator's failure to make a valid disposition takes subject to any burden imposed by necessity of carrying out valid provisions of the will to the best advantage.[19] Children of a remainderman, to whom the estate is devised on the remainderman's death before that of the life tenant, take as devisees free from the claims of their father's creditors.[20] A widow as sole devisee is not liable for a claim against the husband's estate for failure of husband to comply with a decree of specific performance unless she receives assets to amount of the claim.[21] The executor is a necessary party in a suit to charge a legacy upon devised land.[22] Laches may bar relief.[23]

Trust estates and interests. See 8 C. L. 2341—The general subject of trusts is treated elsewhere.[24]

Powers of appointment and beneficial powers of sale. See 8 C. L. 2342—A power of

the other children, and such payments would equalize shares of all, son was not required to pay interest thereon until termination of life estate. In re Hermann's Estate [Pa.] 69 A 285. Act Feb. 24, 1834, relating to interest on legacies, did not apply. Id.

12. Warren's Adm'r v. Bronson [Vt.] 69 A 655. Under Ky. St. 1903, § 2066, where will provided that should either of two devisees die without leaving issue then her share should go to surviving devisee upon payment by her to husband of deceased devisee of a sum named, the husband of the deceased devisee had a lien upon her share of the land to secure payment of sum named. Holt's Ex'r v. Deshon, 31 Ky. L. R. 744, 103 SW 281. Legacies charged on land held a lien thereon until paid and executrix held to hold title in trust for payment thereof. Humphrey v. Hudnall, 233 Ill. 185, 84 NE 203. Unless a contrary intention appears, a devise on condition that devisee pay a sum to another constitutes that sum a charge on the land devised whether devisee accepts or not. Warner v. Bullen, 123 Ill. App. 138.

13. Whitman v. Whitman [Ind. App.] 83 NE 520. Wife held to receive one-third free of debts and expenses. Id. Power of sale was given on a particular part of property but nothing more showed intention to exonerate such property to payment of debts. In re Bergen's Estate, 56 Misc. 92, 106 NYS 1038. Stock bequeathed in trust for lives of wife and daughter held not exonerated from payment of debts in absence of express direction though realty over which executors were given general power of disposal was sufficient to pay them. Id.

14. Whitman v. Whitman [Ind. App.] 83 NE 520.

15. Claim should be assigned to legatee and kept alive where will provided that executor should not enforce it during debtor's life time. In re Buck's Will [Wis.] 113 NW 452.

16. Warren's Adm'r v. Bronson [Vt.] 69 A 655.

17. Where legacies were charged on realty, sale of land by executrix for small amount of cash and a claim against estate held violation of power of sale in will and purchasers took title charged with legacies. Humphrey v. Hudnall, 233 Ill. 185, 84 NE 203.

18. In re Well's Estate [Cal. App.] 94 P 856.

19. Bender v. Paulus, 118 App. Div. 23, 105 NYS 240.

20. Rights of judgment creditors, receivers, and purchasers at sheriff's sales terminated on father's death. Hall v. Senior, 54 Misc. 463, 106 NYS 29.

21. Ostheimer v. Single [N. J. Eq.] 68 A 231.

22. Trustees of Methodist Episcopal Church v. Hammel [N. J. Eq.] 67 A 941. Where no objection was made until all testimony was taken, complainant was allowed to amend in interest of justice. Id.

23. Suit to enforce legacy against residuary realty held not barred by laches where testatrix died in 1892, and in 1899 executor refused to pay for want of assets, suit being brought in 1906. Paterson General Hospital Ass'n v. Blauvelt [N. J. Eq.] 66 A 1055.

24. See Trusts, 10 C. L. 1907.

appointment [25] or beneficial power of sale [26] may be either limited,[27] general,[28] or implied.[29] A devise of remainders to one's children "unless otherwise disposed of by will" creates a power which may be exercised only in favor of persons who do not take under the donor's will.[30] Power to appoint to one's children does not authorize the limitation of a life estate to them with remainder to the heirs of their bodies.[31] General expressions apparently giving a life tenant unlimited power of disposal confers only such power as the life tenant can make consistently with the estate granted.[32] A provision that the widow may sell does not authorize fraudulent and simulated conveyances for the purpose of defeating the rights of residuary legatees.[33] Mere power or authority to sell is not equivalent to a mandatory direction.[34]

Lapse, failure, and forfeiture. See 8 C. L. 2342—A gift may lapse by failure of property or funds,[35] or by death of a devisee,[36] or death without issue,[37] but by statute in some states, where no provision is made for the contingency of death, the heirs of the devisee will take.[38] A devise over after termination of an interest for life will

25. See, also, Powers, 10 C. L. 1258.

26. See, also, ante this section, Support.

27. Residue to husband with full power to sell same or so much as may be needed for his support did not give unlimited power of sale and incumbrance. Hamilton v. Hamilton [Iowa] 115 NW 1012.

28. Residuary estate in trust to pay the income for life to A, and, on her decease, to convey estate or what remained in trust to such persons as A should have directed by will, and in default of a will, to convey on further trust to the same persons and in same shares as if testatrix had died intestate. Held a general power without limitation in A. Farmers' Loan & Trust Co. v. Shaw, 56 Misc. 201, 107 NYS 337. Not limited to natural persons, but included charitable corporations. Id. All realty and personalty to wife for life and "whatever may remain of said estates" to daughter, held, under circumstances, to show intention, that power of sale should extend to both realty and personalty. Young v. Hillier [Me.] 67 A 571. To trustee for sole use of beneficiary with power of sale, etc. Held to give absolute right of disposal of fee. Papin v. Piednoir, 205 Mo. 521, 104 SW 63. Will devising all property to husband to hold and enjoy income and profits for life, with remainder to two sisters, and providing that he be executor and have power to sell and give good deeds, held to empower him to give marketable title to realty. Odell v. Claussen, 120 App. Div. 535, 104 NYS 1104.

29. Implied power of sale should be clearly indicated. Allen v. Hirlinger, 33 Pa. Super. Ct. 113.

30. Grandson's children held to take directly under great grandfather's will and not under power of appointment given their father, which could be exercised only in favor of persons not provided for in great-grandfather's will. In re Ripley's Estate [N. Y.] 84 NE 574, afg. 122 App. Div. 419, 106 NYS 844.

31. Children took fee. Preston v. Preston [Ky.] 107 SW 723.

32. Will and codicils construed to give second wife no power to dispose of fee. Wardner v. Seventh-Day Baptist Memorial Board, 232 Ill. 606, 83 NE 1077.

33. Where property not consumed and remaining in widow's hands on her remarriage was to go to children, transfer by widow to another and then back to her just before remarriage did not oust children. Littler v. Dielmann [Tex. Civ. App.] 106 SW 1137.

34. Failure of husband to sell held not to lapse a certain legacy to another directed to be paid from proceeds. In re Jones' Estate, 56 Misc. 421, 107 NYS 1030.

35. Gift of money in trust for establishing room for exhibition of books, pictures, etc., failed and fell into residue where after satisfaction of specific legacies there were practically no books, etc., and income from money would not pay expenses. Gill v. Attorney General [Mass.] 83 NE 676.

36. Ordinarily a devise will lapse upon the death of the devisee before testator. Pirrung v. Pirrung, 228 Ill. 441, 81 NE 1065. Where a devise is limited to take effect on a condition annexed to a preceding estate, if the preceding estate should never arise, the remainder over will nevertheless take place, first estate being considered only as a preceding limitation and not a preceding condition to give effect to a subsequent limitation. United States Trust Co. v. Hogencamp [N. Y.] 84 NE 74. Testatrix devised all the residue of her estate to her husband for his life, and on his death one-half to her niece, or, in case of her death before the life tenant, then to her children. The husband died before the niece, and the niece died before the testatrix. Held death of husband before the niece did not prevent the estate from passing to the children. Id. Charitable gift to a corporation to be formed during lives of wife and brother or at testator's death if wife predeceased held not to lapse by death of testator and wife at same time. St. John v. Andrew's Institute [N. Y.] 83 NE 981. Where a devisee of a share in real estate dies before distribution is made, the proceeds from a sale of the property go to his heirs as personalty and should be paid to his administrator. Avery v. Howard, 7 Ohio N. P. (N. S.) 97.

37. Where a son of a testator is bequeathed a life estate in lands, with the remainder to his legal heirs, and the son dies without issue, the remainder fails and the lands go back as undevised. Miller v. Miller, 7 Ohio N. P. (N. S.) 158.

38. Devise to wife for life, remainder to

not lapse by death of the life tenant before that of testator,[39] and failure of a trust in testator's lifetime will not lapse remainders unless the trust and residuary disposition are interdependent.[40]

Partial invalidity. See 8 C. L. 2343—The valid provisions may be sustained if the general scheme of disposition is not thereby defeated,[41] otherwise they fall with the invalid ones.[42] Where a devise is void for remoteness, all limitations ulterior to or expectant on such remote devise are also void,[43] but where a limitation is to arise upon an alternative event, one branch of which is within and the other is not within the prescribed limits, it will take effect or not according to the event.[44] The legal title to property may be vested in trustees regardless of the invalidity of the disposition made of the proceeds,[45] in which case a resulting trust may arise in favor of the heirs.[46] Receiving benefits under provisions concededly valid does not estop legatees from attacking other provisions as invalid.[47]

sons, and if either son does not survive the wife his share to go to the surviving sons, held to refer to the death of son after that of testator and before death of wife and issue of deceased son take his share of the devise. H. R. S. 1905, c. 39, § 11. Pirrung v. Pirrung, 228 Ill. 441, 81 NE 1065. Issue of deceased legatee takes subject to latter's debts to testator. Tilton v. Tilton [Mass.] 82 NE 704. The provision of the statute of wills, R. S. § 5971, providing against the failure of a devise, applies to nephews and nieces as a "class" as well as to children as a class. Porterfield v. Porterfield, 4 Ohio N. P. (N. S.) 654. A husband is not a relative of his wife within the meaning of Rev. St. § 5971, and property devised by her to him does not, in the event of his prior death, pass to his children by a former marriage but goes to relatives of the wife by blood. Bernhardt v. Bernhardt, 7 Ohio C. C. (N. S.) 517; Schaefer v. Bernhardt, 76 Ohio St. 443, 81 NE 640. Under the saving clause of R. S. § 5971, to prevent the bequest from lapsing, the legatee included within the phrase "or other relatives" must be related by blood to the testator and not by marriage. Porterfield v. Porterleld, 4 Ohio N. P. (N. S.) 654; Schaefer v. Bernhardt, 76 Ohio St. 443, 81 NE 640.

39. Where remainder was to go to testator's relatives. Thompson v. Thornton [Mass.] 83 NE 880.

40. Where son for whose minority estate was to be held became of age before testator's death. In re Arensberg, 120 App. Div. 463, 104 NYS 1033.

41. Testatrix bequeathed trust moneys in hands of a trustee to her daughter with a primary purpose of providing for the welfare of the daughter with a limitation over to her child or children, and this limitation over was void for remoteness. Bequest to daughter held valid. Quinlan v. Wickham, 233 Ill. 39, 84 NE 38. Will provided that property should not be sold for less than $50,000 in five years and made provision for sale and disposition of property thereafter, but made no mention of price. Held void suspension could be disregarded and other parts given effect. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99. Clause suspending power of alienation disregarded. In re Phillips' Estate, 56 Misc. 96, 107 NYS 388. Will sustained so far as concerning trust for benefit of widow and invalid only as to subsequent trusts for children violative of rule against perpetuities. New York Life Ins. & Trust Co. v. Cary, 120 App. Div. 265, 105 NYS 125. Where a valid trust is the main purpose of a will and an unlawful accumulation thereof is incidental merely, the trust will be sustained so far as it is legal. Endress v. Willey, 122 App. Div. 110, 106 NYS 726. "Real and personal property to executors in trust to collect the income and pay with it all taxes, expenses, etc., and keep income remaining invested so as to yield a good income until death of wife and then divide balance among his three sons equally," held an unlawful accumulation, but general trust provision was legal and unaffected by accumulation, and balance of income would pass to sons under residuary clause. Id.

42. Shepperd v. Fisher, 206 Mo. 208, 103 SW 989. Homestead to widow for life and on her death to testator's daughters, and on their death to their bodily heirs, etc., portions being willed to sons-in-law conditioned upon their discharging a mortgage, such portions otherwise to be sold to pay debts, held no intention to create and dispose of separate and independent estates regardless of a general plan of disposing of his entire estate; hence valid devises fell with the invalid violating rule against perpetuities. Id. Where elimination of invalid portions of a will so changes the general scheme and purpose gathered from the whole will as would make remaining portions amount to a new and different will, the whole devise must fail. Scheme to provide for blood relatives not affected by subsequent ambiguous and void clause and therefore other parts should be given effect. Sevier v. Woodson, 205 Mo. 202, 104 SW 1.

43. Quinlan v. Wickman, 233 Ill. 39, 84 NE 38.

44. Quinlan v. Wickman, 233 Ill. 39, 84 NE 38. Bequest was to daughter on two contingencies, one depending on the death of another daughter without leaving any children, and the other depending on the last surviving child of such daughter before any of her children reached the age of 30 years. First limitation is good and the second void as against perpetuities. Id.

45. Did not go to heirs. Korsstrom v. Barnes, 156 F 280.

46. Korsstrom v. Barnes, 156 F 280.

47. Attempt was not to set will aside, but

*Residuary clauses.*See 8 C. L. 2343—No particular mode of expression is necessary to constitute a residuary clause.[48] A general residuary clause carries the property not otherwise disposed of,[49] and the burden is on him who seeks to establish a contrary construction.[50] While a clause appointing a "residuary legatee" standing by itself will give such legatee the remaining personalty only,[51] the question of whether he also takes the realty is controlled by the testator's intention as gathered from the whole will.[52] The operation of a residuary clause is not affected by the fact that no other devise is made.[53] The lapse of legacies directed to be paid from a particular fund will not throw such legacies within the operation of a clause disposing of the residue of such fund, as distinguished from a general residuary clause.[54] Property disposed of in trust goes to the estate of the beneficiary on his death and will not pass under a residuary bequest.[55]

Property not effectually disposed of See 8 C. L. 2343 goes intestate,[56] but if possible a construction will be adopted which will avoid partial intestacy.[57] After-acquired

to show that certain provisions were in contravention of statute. In re Durand, 56 Misc. 235, 107 NYS 393. A sole heir need not renounce a special legacy as a condition to his right to attack other bequests as illegal. Bequest to concubine. Succession of Filhiot, 119 La. 998, 44 S 843.

48. "I will and bequeath the residue" held sufficient to dispose of realty. Barker v. Petersburg [Ind. App.] 82 NE 996. Language in a clause "then to divide the residue and remainder of my estate equally share and share alike to sons" held to be a residuary clause just as much as if in a separate clause, and hence carried all that fell into the residue by lapse, invalid disposition or other accident. Endress v. Willey, 122 App.. Div. 110, 106 NYS 726.

49. Where a bequest is made to a certain hospital in trust for the endowment and maintenance of a free bed therein, and before the executors make the allotment the hospital ceases to exist, the amount of the bequest becomes a part of the residuum of the estate and passes to the residuary legatee as against the heirs where the residuary clause provides that the "rest and residue of my property of whatever kind" shall go to the residuary legatee. McCroskey v. McCroskey, 6 Ohio N. P. (N. S.) 121. Where will provided for disposition of remainder as provided in another paragraph, which had no provision for disposition of such property, same passed as residuc. Barnes v. Johnston, 233 Ill. 620, 84 NE 610. Residuary clause construed to include and pass testatrix's distributive share in trust fund for sister's life passing an intestate property on sister's death under will of father. In re Howland, 110 NYS 759.

50. McCroskey v. McCroskey, 6 Ohio N. P. (N. S.) 121.

51. Dann v. Canfield [Mass.] 84 NE 117.

52. Residuary legatee held to take realty also. Dann v. Canfield [Mass.] 84 NE 117.

53. All residue of realty passed to son, including homestead, which had not passed by invalid deed to wife. Hollenbeck v. Smith, 231 Ill. 484, 83 NE 206.

54. Especially where lapse of a similar legacy was provided against and will was silent as to disposition of legacy in question in case of lapse. Battle v. Lewis [N. C.] 61 SE 634.

55. Where contingency that beneficiary die before probate did not happen. Twilley v. Toadvine [Md.] 66 A 1030.

56. Legacy lapsed by death of legatee before testator. Cooch v. Clark [Del.] 68 A 247. Lapsed contingent remainder. Voorhees v. Singer [N. J. Eq.] 68 A 217. Undisposed of remainder after widow's life estate. Yeager v. Bank of Kentucky [Ky.] 106 SW 806. Income pending incorporation to take charitable gift as directed in will. St. John v. Andrews Institute [N. Y.] 83 NE 981. Property as to which life tenant did not exercise power of appointment held intestate and not intended to pass under residuary clause. Walton v. Walton [N. J. Eq.] 67 A 397. Where a trust is invalid, the property goes intestate regardless of testator's intention to disinherit his heirs. Campbell-Kawannanakoa v. Campbell [Cal.] 92 P 184. A residuary clause which provides that "whatever is left at last, if anything, you may give to the poor of the parish," is void for uncertainty and the residue of the estate must be distributed according to law. Sullivan v. Corrigan, 6 Ohio N. P. (N. S.) 606. One who takes as heir at law premises which descend to him as intestate property because of failure of testator to make valid disposition thereof by will takes such property subject to any burden imposed thereon by necessity of carrying out valid provisions of will to best advantage. Bender v. Paulus, 118 App. Div. 23, 105 NYS 240.

57. Connor v. Gardner, 230 Ill. 258, 82 NE 640; Ross v. Ayrhart [Iowa] 115 NW 906; Johnson v. White [Kan.] 90 P 810. Presumed testator intended to dispose of entire estate. Barker v. Petersburg [Ind. App.] 82 NE 996; Wood v. Wood [Ky.] 106 SW 226; Newcomb v. Fidelity Trust Co. [Ky.] 108 SW 911; Tebow v. Dougherty, 205 Mo. 315, 103 SW 985; Warren's Adm'r v. Bronson [Vt.] 69 A 655; In re Cary's Estate [Vt.] 69 A 736. Absence of residuary clause strengthens this presumption. Felkel v. O'Brien, 231 Ill. 329, 83 NE 170. Will held to dispose of entire estate P'Simer v Steele [Ky.] 106 SW 851. Doubtful will construed to give whole estate, which was very small, to a named charity, testator having numerous heirs at law and it being presumed he intended to dispose of all. In re Hegna's

property will pass where this clearly appears to have been testator's intention.[58] A widow's renunciation of a provision in lieu of dower does not necessarily render the remaining property intestate.[59]

(§ 5) *E. Of terms respecting administration, management, control, and disposal.* See 8 C. L. 2344—The particular terms of the will must be looked to in determining the existence of powers of sale [60] and trusteeships,[61] their character,[62] extent [63] and

Will [Wis.] 113 NW 982. That trust was void held, in view of other language of will, not to defeat testator's intent so as to render imperative finding of intestacy. In re Heberle's Estate [Cal.] 95 P 41. Where there is a deficiency of assets to pay all the legacies in full, but an excess of assets over what could be given to charitable legacies under Laws 1860, p. 607, c. 360, there is no intestacy as to any such excess until after payment in full of all valid legacies. In re Runk, 55 Misc. 478, 106 NYS 851. The **presumption** against partial intestacy **cannot overcome express terms** of will. Where forced construction against partial intestacy would produce an effect obviously incompatible with testator's intention, the presumption fails. Thomas v. Thomas, 229 Ill. 277, 82 NE 236. Where language is clear, meaning should not be evaded by resorting to rule that testator did not intend to die intestate. In re Disney's Will, 190 N. Y. 128, 82 NE 1093. Where there is no residuary clause in a will and no general phrase expressive of a desire of testatrix to distribute all her property, and her most valuable real estate is not referred to, no inference against intestacy will be invoked to aid in the construction of a doubtful clause, nor will any importance be attached to the fact that she made trifling pecuniary gifts to heirs. Dow v. Abbott [Mass.] 84 NE 96.

58. Will and circumstances held to show intent to pass after-acquired realty. Johnson v. White [Kan.] 90 P 810.

59. Lewis v. Sedgwick, 223 Ill. 213, 79 NE 14.

60. Language conferring authority on trustees will be strictly construed with a view of keeping their powers clearly within the limits intended (Kennedy v. Pearson [Tex. Civ. App.] 109 SW 280), and power to manage and control property for a limited time does not carry with it the power of alienation (Id.). Direction that executors divide and distribute all the residue, real and personal, among heirs and next of kin, held to charge executors with duty of distributing both real and personal property and to confer power of sale. McLaughlin v. Green [Mass.] 83 NE 1112. Executor's power of sale held not revoked by codicil. Meckel v. Johnson, 231 Ill. 540, 83 NE 209. Will construed to create a present power of sale in wife, to whom land was devised in trust. Knight v. Church [Pa.] 68 A 182. Will construed to give wife power to convey land as executrix, and not as donor of a special power, so that administrator with will annexed could convey. Harding's Adm'r v. Weisiger [Ky.] 109 SW 890. Two wills taken together held to show intention that realty be sold and that executor as trustee have **implied power of sale.** Flynn v. Frank [Del.] 68 A 196. Direction to divide and invest in securities held to imply power of sale in trustee. Casselman v. McCooley [N. J. Eq.] 67 A 436. Where making of division and establishment of a trust as provided by will required sale of realty, executor was given power by implication. Wood v. Lembcke [N. J. Eq.] 66 A 903. Power of sale in executors cannot be implied in opposition to an express device, as where it appears that testator intended to devise undivided parts. Harris v. Ingalls [N. H.] 68 A 34. Will held not to create implied power of sale and reinvestment. Branch v. De Wolf [R. I.] 68 A 543.

61. Intention to make one appointed executor trustee also should be clearly expressed. Testator appointed a person "executor and trustee" and her two daughters "executrices and trustees" in his place. Held the latter appointment was limited to that of executor only. Tremenheere v. Chapin, 56 Misc. 208, 107 NYS 166. Granting a mere naked power of sale, not absolutely, but at discretion, creates no trust. Van Norden Trust Co. v. O'Donohue, 122 App. Div. 51, 106 NYS 948. Testator made no attempt to vest title in executor in trust, but bequeathed income to one for life, and on her death gave, devised and bequeathed the entire estate, giving only a naked power of sale to executor. Held title vested on death of life tenant and power did not defeat gifts. Id. "To daughter, to be invested by executors for her benefit, and on her death without issue proceeds to be divided among her brothers and sisters," creates a trust vesting title in executors as trustees, who must on her death account to her children, not to her administrator. Close v. Farmers' Loan & Trust Co., 121 App. Div. 528, 106 NYS 329.

62. The grant of a specified period within which to sell the estate makes sale **discretionary** within that period and thereafter **mandatory.** Sale after period conveyed good title. Fredericks v. Kerr [Pa.] 68 A 835. Permissive words will not be considered mandatory when result would change testator's clearly expressed intention and render void scheme of distribution. Permission to sell given trustees or to keep property until a certain time. Held, trustees were not compelled to sell. Tonnele v. Wetmore, 109 NYS 349. Provision empowering executors to sell at such time within five years after death of testator as they could obtain $500,000 for property, or if property were unsold at expiration of five years to sell it at any time at their discretion, and until sale receive rents and profits, etc., held an **express trust,** and not a **power in trust.** Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99.

63. In determining whether testator intended to have the homestead sold for the payment of debts or only the remainder interest therein, the situation and relationship of the parties may be considered as

duration,[64] and the powers [65] and duties [66] of the executors or trustees. A personal

well as the terms of the will. Will held to require sale of remainder interest only on bond being given by wife. Marx v. Haley [Miss.] 45 S 612. Provision as to realty executors could sell construed. Lembeck v. Lembeck [N. J. Eq.] 68 A 337.

64. Where the corpus of the estate is directed to go to children at widow's death, power to sell and reinvest for increased income will be limited to widow's lifetime. Will construed to limit executors' power of sale to lifetime of widow. Tucker v. Baldwin [N. J. Eq.] 66 A 928. Executors held without power to sell after devisees had conveyed part of their interests. Van Norden Trust Co. v. O'Donohue, 122 App. Div. 51, 106 NYS 948. **Power of partition** to executors is lodged in them for a reasonable time after testator's death. Action of partition will not lie until executors have had a reasonable time within which to make partition. Fischer v. Butz, 224 Ill. 379, 79 NE 659.

65. Full power and control of all lands until the youngest child became of age gave trustee power to repair and keep premises in good condition and not only use rents and profits for maintenance of minor children. Berry v. Stigall, 125 Mo. App. 264, 102 SW 585. Executors held to have no power to make a lease beyond time allowed in will. Lease good during life of life tenant, but no longer, although executed for period of twenty years. Van Norden Trust Co. v. O'Donohue, 122 App. Div. 51, 106 NYS 948.

66. Testator devised real estate only and left personalty undisposed of, but appointed an executor. Held that by construing all provisions of will intention was clearly shown that executor should administer personalty. In re Maccaffil, 57 Misc. 264, 107 NYS 1115. One clause directs trustees to take charge of real estate, "collect rents and income thereof, etc.," and another directs them to take charge of stove business and "foundry in Brooklyn." Held that clauses should be read together, and since foundry was a necessary incident to business used by trustees, they were not required to charge business with rental value thereof. In re Froehlich's Estate, 122 App. Div. 440, 107 NYS 173. Executors held **required to sell** all of certain stock (Lembeck v. Lembeck [N. J. Eq.] 68 A 337), but to retain certain stock long enough to guarantee certain income to wife. Will held to require **conversion** of all property by executors into money as necessary to distribution. Harris v. Ingalls [N. H.] 68 A 34. Direction to executor to sell testator's land "as soon as the same can be done without sacrifice" refers to time when land can be sold, and does not lessen executor's measure of duty when land is offered for sale. In re Branch's Estate, 123 Mo. App. 573, 100 SW 516. Provision with respect to disposal of dividends by executors construed. Lembeck v. Lembeck [N. J. Eq.] 68 A 337. Direction that homestead, with its furniture and necessary provisions, be held for the use of wife and the other members of the family, held to require trustees **to keep up and repair** homestead and furniture and furnish necessary provisions for use of remaining members of the family. Searle v. Fieles [Mass.] 83 NE 991. Codicil construed to require executors to slate buildings and make repairs reasonably incident thereto. Ladd v. Ladd [N. H.] 68 A 462.

Investments and reinvestments: Power to invest and reinvest held to refer only to period while executors were settling estate, and not to apply to childrens' shares after these were ascertained and invested. Murphy v. Cole [Md.] 68 A 615. Where will provided that trustees should convert all property into money as soon as could be done without loss, and to invest the trust fund in certain specified ways, and to change investments from time to time at their discretion, whether made by testator or themselves, held to obligate the trustees to sell the real estate and personal property of the testator not invested in the manner described in the will for investment of the trust fund, and to invest the proceeds as directed by the will, even though the income from the estate was thereby decreased; the loss to which the testator referred being one of capital and not income. Curtis v. Osborn, 79 Conn. 555, 65 A 968. Directions to **"put on interest"** and pay principal and interest ordinarily relate to money and securities, and not to rents and profits of realty. Will held to require conversion of estate into money and securities. In re Benners' Will [Wis.] 113 NW 663.

Time of distribution: Where property was to be divided, after death of two children, among grandchildren then living, time for distribution would not arrive until death of both children. Kellogg v. Burnett [N. J. Eq.] 69 A 196. Residue of fund created by sale of testator's real property to be distributed among such churches as executors or a majority of them "then" acting should in their discretion deem most deserving. Held selection could not be made at testator's death, but only after sale. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99. Will bequeathing half of testator's interest in a firm and requiring business to continue under management of legatee for twenty years held not to require **accumulation** of estate's **profits,** but these should be distributed among testator's children at suitable intervals. Oram v. Pierce [N. J. Err. & App.] 67 A 1053.

Manner and order of distribution or division: Under will providing for sale of certain property and the accumulation of rents and profits until such sale, when purchase money, rents and profits were to be distributed among certain legatees in certain sums and balance to certain churches, if sale does not realize enough to satisfy provision for testator's children, the rents may be taken to an extent necessary to make up the sum and the balance distributed to churches. Stewart v. Woolley, 121 App. Div. 531, 106 NYS 99. Where executors were vested with discretion in division of the estate and three methods were possible, that they adopted that which required less cash to equalize the estate than one of the others, but more than the third, held not an abuse of discretion. Clark v.

and discretionary power of sale in the executor may not be exercised by an administrator with the will annexed.[67] The executor is the proper custodian of funds which he is directed to hold and control.[68] After disposition to specified persons, a devise of the same property to the executor for the payment of legacies and debts with discretionary power of sale does not vest title in him.[69] Where a testator directs that on the happening of a designated event there shall be transferred to a legatee shares of stock representing a book value of a specified amount, stock of the corporation purchased by itself and held as assets must be included in determining the number of shares necessary to represent the book value called for.[70] A direction that the executor manage and divide the estate without going into court or taking letters is invalid.[71] A provision assuming to appoint attorneys for the executors is not binding on the latter.[72]

(§ 5) *F. Abatement, ademption, renunciation and satisfaction.*[See 8 C. L. 2345] The estate being insufficient to pay legacies in full, they should abate proportionately,[73] but specific legacies are not subject to abatement with general legacies.[74] Specific legacies are not abated by a widow's election against the will where this contemplates their payment in full before division among residuary legatees.[75] In case

Goodridge, 52 Misc. 239, 103 NYS 36. Testatrix by her will gave, besides several specific legacies, two legacies to certain church societies, five legacies to her nephews and nieces, one to her "faithful maid," and one to plaintiff. These legacies were pecuniary and numbered in sequence. Item XIV of the will provided that any excess after paying debts and legacies should go to increase the church legacies, and then provided that "if * * * it appears that there are not sufficient funds to pay all of the said bequests and all proper charges against my estate in full, then it is my will that the bequests named in Items IV, V, VI, VII and VIII" (to the nephews and nieces) "shall be reduced ratably or if necessary canceled entirely, it being my wish that Items II and III" (to the church societies) "shall at all events be paid in full." The legacies to the plaintiff and the maid, being those in items IX and XII, were not mentioned in this item. Plaintiff was also much the largest beneficiary under the will, excepting the church societies. In an action to construe the will to determine which legacies should abate, there being a deficiency of assets, held, the church legacies should be first paid as taking precedence of all the pecuniary legacies; next in priority should be paid the legacies to plaintiff and the "faithful maid;" and lastly the other legacies, if there remained sufficient funds. Youtsey v. Bowman, 6 Ohio N. P. (N. S.) 381. A testator may provide for **distribution in accordance with the intestate laws** as they may exist at the death of life tenants. Will held to require distribution as per Rev. Laws, c. 133, § 1, cl. 5. Boston Safe Deposit & Trust Co. v. Blanchard [Mass.] 81 NE 654. Direction for division among the "legal heirs" of persons named requires division in accordance with the laws of the state for distribution of estates of decedents. Harris v. Ingalls [N. H.] 68 A 34. Devise in equal shares to "testator's relatives by right of representation under the statutes of this commonwealth" showed intention to have distribution as per intestate laws. Thompson v. Thornton [Mass.] 83 NE 880.

67. Coann v. Culver, 188 N. Y. 9, 80 NE 362.

68. Where will constituted executor's trustees to hold and control legacy to an infant until her majority or marriage, trustees, and not legatee's guardian, were proper custodians of the fund. Hall v. Ayer's Guardian [Ky.] 105 SW 911.

69. Will construed to vest title in certain devisees subject only to executor's power of sale, and not in executor. Coann v. Culver, 188 N. Y. 9, 80 NE 362.

70. Pabst v. Goodrich [Wis.] 113 NW 398.

71. Sevier v. Woodoon, 205 Mo. 202, 104 SW 1.

72. Properly regarded as expression of wish. In re Caldwell, 188 N. Y. 115, 80 NE 663.

73. O'Donnell v. McCann [N. J. Eq.] 68 A 752. It is not sufficient to prevent abatement under Code Civ. Proc. § 2721 for insufficiency of assets that a legacy is to a near relative, such as a sister, unless it also appear that such relative is "otherwise unprovided for." In re Wenner, 110 NYS 694. Under Ky. St. 1903, § 2077, heirs held required to contribute to other heirs title to whose shares in realty proved invalid, especially in view of their agreement so to do. Siler v. Jones [Ky.] 110 SW 255. Where will directs that the property be sold to pay debts, title to entire property passes by the sale, though will also provides that testator's wife shall have a life estate in one-third of it. Hamilton v. Stewart, 5 Ohio N. P. (N. S.) 553.

74. General legatees not entitled to share in proceeds of sale of real estate. In re Matthews, 122 App. Div. 605, 107 NYS 301. Dividends on stock held in trust held exempt under statute from liability for debts until after resort to proceeds of property not specifically bequeathed. In re Noon's Estate [Or.] 90 P 673.

75. Hurd's Rev. St. 1905, c. 3, § 79, held not applicable. Kincaid v. Moore, 233 Ill. 584, 84 NE 633.

of devastavit, the loss should be borne ratably by specific and residuary legatees.[76] Unbequeathed personalty goes to pay debts before devised realty.[77]

*Ademption.*See 8 C. L. 2345—While a subsequent payment to a legatee or a contract made for his benefit is presumed an ademption of the legacy pro tanto where testator stands in loco parentis to the legatee,[78] such presumption does not obtain where that relation does not exist,[79] in the absence of proof that satisfaction was intended.[80]

Renunciation.—A devisee may renounce the devise however beneficial it may be to him,[81] in which case the renunciation will relate back to the time of the gift.[82]

*Satisfaction of debts by legacies.*See 8 C. L. 2345—After judicial reduction of a universal legacy given by a will which does not recognize any debt due the legatee, the latter may not claim as creditor.[83]

(§ 5) *G. Proceedings to construe wills.*See 8 C. L. 2346—A court of equity has no inherent power to construe wills,[84] such jurisdiction being exercised only to insure the correct administration of some power or trust created by the will;[85] hence it will not attach where the time for action has not yet arrived,[86] nor where there are no difficult or doubtful questions to be determined.[87] Equity will not construe a will

76. Executor with power of sale sold testator's real estate and converted proceeds, making assets insufficient to pay specific pecuniary legacies, and such proceeds were only available fund for payment. Farmers' Loan & Trust Co. v. McCarthy, 57 Misc. 413, 107 NYS 928.

77. Unbequeathed one-ninth of proceeds of realty. Gilson v. Gilson, 11 Ohio C. C. (N. S.) 49.

78. In re Youngerman's Estate [Iowa] 114 NW 7.

79. Legacy to testatrix's grandson of $500 a year to complete a course of education held not adeemed by her contract with father that if he would pay son's board and lodging at school she would pay for books, tuition and clothing. In re Youngerman's Estate [Iowa] 114 NW 7.

80. Intention to satisfy is sufficiently indicated if subsequent benefit is the same as the testamentary one, or is in terms made a substitute, or is ejusdem generis (In re Youngerman's Estate [Iowa] 114 NW 7), but a legacy for education generally is not adeemed by a contract with legatee's father to pay for books, tultion and clothing at a particular school (Id.).

81. Bradford v. Calhoun [Tenn.] 109 SW 502.

82. Displacing creditors' levies. Bradford v. Calhoun [Tenn.] 109 SW 502. Renunciation not fraudulent as against existing creditors. Id.

83. Where in a litigation betwen a person named as universal legatee and the heirs at law the legacy is reduced to one-tenth of the estate, payable from the movables, and the will does not purport, and is not held, to recognize any debt due the legatee, it cannot have that effect attributed to it in support of a claim afterwards set up by the legatee as a creditor for services rendered testator. Succession of Landry [La.] 45 S 609.

84. Voshall v. Clark, 108 NYS 313. Construction of wills is not of itself ground of equity jurisdiction, but only incident to jurisdiction on some recognized ground of equity jurisdiction. Hart v. Darter [Va.] 58 SE 590. If in an equity suit a question arises as to validity of a devise, court may hold bill and have question settled at law, either by action or by reference, for an opinion thereon as provided by chancery act 1902, § 79. Gillen v. Hadley [N. J. Eq.] 66 A 1087.

85. Poll v. Cash, 234 Ill. 53, 84 NE 719. Equity cannot be compelled to construe a will except as incident to some relief which may be afforded by final decree (Kellogg v. Burnett [N. J. Eq.] 69 A 196), nor will it give counsel and advice to the parties generally (Id.), but only for the purpose of giving positive directions for the action of the trustee (Id.). Code Civ. Proc. 1866 gives court of equity no authority to construe will disposing of all testator's property and giving executors express power to dispose of real estate at any time and to collect rents and profits. No trust arises in such case so as to give court jurisdiction. Voshall v. Clark, 108 NYS 313. Equity has no power to construe a will leaving real property in trust where the sole purpose is not to enforce the trust but to overthrow it as violating rules of perpetuities. Tonnele v. Wetmore, 109 NYS 349. Suit by devisee not against one claiming adversely to him, but in interest of all legatees for determination of rights in presenti and futuro, executors having no special interest, held not within jurisdiction of equity. Heptinstall v. Newsom [N. C.] 60 SE 416. A temporary administrator having no authority to distribute, but only to preserve and account for the property, may not maintain an action for the construction of a will. In re Goetz, 120 App. Div. 10, 104 NYS 832.

86. Poll v. Cash, 234 Ill. 53, 84 NE 719; Kellogg v. Burnett [N. J. Eq.] 69 A 196.

87. Where it was plain that widow was to have a life estate, remainder to persons named as heirs. Poll v. Cash, 234 Ill. 53, 84 NE 719.

pending proceedings for re-examination of probate,[88] nor where the rights of the parties can be determined in ejectment,[89] nor where a final decree of distribution has been made from which appeal lies.[90] A bill not alleging any dispute as to construction, nor containing any prayer therefor, cannot be sustained as one to construe a will.[91] The court should, whenever possible under the issues made and presented, finally dispose of all questions relating to the distribution of the property.[92] The rights of contingent remaindermen not in esse may be adjudged where the remaindermen in esse are made parties as representatives of the class.[93] Costs may be awarded from the share of an unsuccessful legatee,[94] but an order directing costs of appeal to be paid out of the estate is invalid where appellants would receive nothing if the decree should be affirmed and some distributees are not parties.[95]

§ 6. *Validity, operation and effect in general.* See 8 C. L. 2346—Provisions which are contrary to public policy will not be recognized.[96] The will passes the property on the death of the testator,[97] but where contest proceedings are compromised pursuant to statute and the property distributed accordingly, the compromise rather than the will must be deemed to have passed the property.[98]

What law governs. See 8 C. L. 2347—The rights of the parties will be governed by the law in force at testator's death.[99] The lex rei sitae governs as to the construction of a devise,[1] the laws of testator's domicile being considered only for the purpose of arriving at testator's intention.[2] A will valid and duly probated in one state gives good title to personalty in another state though invalid in the latter state.[3] The Mississippi statute merely dispenses with formal proof of due execution of foreign wills duly probated in other states.[4] The will itself is treated as an original one and the rights of the parties must be derived from its terms administered according to the law of that state so far as affecting property therein.[5]

WINDING UP PROCEEDINGS; WITHDRAWING EVIDENCE; WITHDRAWING PLEADINGS OR FILES, see latest topical index.

88. Gebhard v. Lenox Library [N. H.] 68 A 540.

89. Warren v. Warren [Mich.] 14 Det. Leg. N. 869, 114 NW 867.

90. Hall v. Lawton, 80 Vt. 535, 68 A 657.

91. Partition bill subject to dismissal as involving question triable at law. Warren v. Warren [Mich.] 14 Det. Leg. N. 869, 114 NW 867.

92. Williams v. Williams [Wis.] 115 NW 342.

93. Suit held purely equitable with view to partition or removal of cloud and res judicata as to son's ability to give good title. Hunt v. Gower [S. C.] 61 SE 218.

94. Costs properly allowed from share of unsuccessful legatee, sole issue being whether she should take in possession or receive as trust beneficiary. Hurst v. Weaver, 75 Kan. 758, 90 P 297. Widow's share of estate held properly charged with share of litigation to construe will which she unsuccessfully resisted. Giger v. Bishop, 231 Ill. 472, 83 NE 289.

95. Boyce v. McLeod [Md.] 68 A 135.

96. A clause directing executor to manage, hold and divide an estate without going into court or taking letters testamentary is void. Sevier v. Woodoon, 205 Mo. 202, 104 SW 1.

97. Rights of legatees fixed at testator's death unaffected by delay in settlement or distribution. Carter v. Whitcomb [N. H.] 69 A 779. Will effective from death of testator, not from execution. Dickerson v. Dickerson [Mo.] 110 SW 700.

98. For purposes of war revenue act. McCoy v. Gill, 156 F 985.

99. Inheritance tax law. Carter v. Whitcomb [N. H.] 69 A 779. As to rule against perpetuities. Morton Trust Co. v. Sands, 122 App. Div. 691, 107 NYS 698. Construction of will not affected by repeal of statute of perpetuities after death of testator. Cody v. Staples [Conn.] 67 A 1.

1, 2. Peet v. Peet, 229 Ill. 341, 82 NE 376.

3. Beneficiary could compel issuance of new certificates of stock. Delta Trust & Banking Co. v. Pearce [Miss.] 45 S 981.

4. Code 1906, § 2004, providing for admission to probate of authenticated copies. Heard v. Drennen [Miss.] 46 S 243.

5. Heard v. Drennen [Miss.] 46 S 243. Court should appoint executor named in will if qualified in Mississippi, though disqualified in state where will was made. Id.

WITNESSES.

§ 1. **Capacity and Competency of Witnesses in General, 2079.** Insanity, 2080. Children, 2080. Persons Accused or Convicted of Crime, 2081. Persons Acting in Official Capacity at Trial, 2081.
§ 2. **Disqualification on Ground of Interest, 2081.**
§ 3. **Disqualification of One Party to Transaction or Communication, on Death or Disability of the Other, 2082.**
§ 4. **Privileged Communications, and Persons in Confidential Relations, 2089.**
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The competency, materiality, and relevancy of testimony,[6] the manner of eliciting same from witnesses,[7] and the qualification and examination of experts,[8] are treated elsewhere.

§ 1. *Capacity and competency of witnesses in general.*See 8 C. L. 2347—Personal knowledge of the facts to which he is called to testify is essential.[9] This question is one addressed largely to the discretion of the trial judge.[10] The incompetency or

6. See Evidence, 9 C. L. 1228.

7. See Examination of Witnesses, 9 C. L. 1312.

8. See Evidence, 9 C. L. 1228.

9. Where witness had no personal knowledge regarding a transfer of bills of exchange, but only such knowledge as he gained from book entries made by others, he was **not qualified** to testify in regard thereto. Woodall v. People's Nat. Bk. of Leesburg [Ala.] 45 S 194. Witness, who had only been on two of defendant's engines for a short time, held not qualified to testify to a practice of punching holes in spark arresters to make engines steam better. Hitchner Wall Paper Co. v. Pennsylvania R. Co., 158 F 1011. Clerk in office of district foreman of telephone company is not, by virtue of his position alone, competent to testify to duties of subforeman. New England Tel. & T. Co. v. Butler [C. C. A.] 156 F 321. Testimony of president of corporation that a memorandum in his possession showed certain sales inadmissible when he did not make the memorandum at the time of the sales and had no personal knowledge concerning them. Josias v. Nivois, 56 Misc. 557, 107 NYS 15. Where, in homicide case, there was a conflict as to whether deceased was shot in the back, it was proper to exclude the testimony of a witness on the issue whose only knowledge was based on seeing the undertaker probe the wound. Earles v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 522, 106 SW 138. Where witness offered to prove contents of writing, shows that he does not know its contents, his testimony is properly rejected. Smith v. Texas, etc., R. Co. [Tex. Civ. App.] 20 Tex. Ct. Rep. 66, 105 SW 528. Certain witnesses **held qualified** on question of value of goods destroyed by fire. Furlong v. North British & Mercantile Ins. Co. [Iowa] 113 NW 1084. Where the validity of an assessment for a local improvement is directly attacked in a court of equity, the members of the assessment board are competent witnesses to the method used in fixing the assessments on particular pieces of property. Kirst v. Street Imp. Dist. No. 120 [Ark.] 109 SW 526. In personal injury action, plaintiff is competent to testify to h's condition after the injury. Shaw v. Highland Park Mfg. Co. [N. C.] 59 SE 676. Manager of partnership, who was not a member of the firm, competent to testify that certain person was a member, when he had personal knowledge of the fact. Rice v. Muskegon, 150 Mich. 679, 14 Det. Leg. N. 820, 114 NW 661. Court held not warranted in assuming that two boys who had been climbing upon and standing between cars had not means, or did not use them, to know whether bell was rung. Gesas v. Oregon Short Line R. Co. [Utah] 93 P 274. Witness, physician, who knew plaintiff, also a physician, and had known him for twenty years, and had frequently been in consultation with him, held qualified to testify to the nature and extent of plaintiff's practice. Conklin v. Consolidated R. Co. [Mass.] 82 NE 23. Personal acquaintance is not necessary to qualify a witness to testify to the **reputation** of another if it appears that witness was in a position to know and had never heard such reputation questioned. Newspaper reporter properly allowed to state that he had heard no word of suspicion against a woman, having lived in same town with her all his life. Smiteley v. Pinch, 148 Mich. 670, 14 Det. Leg. N. 324, 112 NW 686. Witness to reputation of a party for chastity, whose testimony was based on his observations and not on what he had heard, held incompetent. Anderson v. Aupperle [Or.] 95 P 330.

10. Competency of witness to testify to a particular fact is a preliminary question addressed largely to the discretion of the

lack of qualification of a witness may be waived by failure to make timely [11] and proper [12] objection. A party who has used a witness in making his own case waives objections to the competency of the witness.[13]

In Wisconsin a statute provides that no person shall testify in a professional capacity as a physician or surgeon, or insanity expert, unless he has complied with the statutory provisions regulating the practice of medicine.[14] This statute is held to apply only to expert testimony, and does not exclude testimony on subjects not within the field of an expert, though the witness has not complied with the statute.[15]

Insanity. See 8 C. L. 2351—A person who has been adjudged insane is not of necessity incompetent as a witness.[16] His testimony is admissible if he has sufficient understanding to apprehend the obligations of an oath and to be capable of giving a correct account of the matters he has seen or heard in reference to questions at issue,[17] and whether he has that understanding is a question to be determined in each case, the weight to be given his testimony if admitted, being finally a question for the jury.[18] Where there is nothing in the examination of a witness to indicate insanity, the burden is upon the party against whom he is offered to prove him insane.[19]

Children. See 8 C. L. 2349—The capacity of a child to give testimony is a question addressed to the sound discretion of the trial court,[20] the tests applied being general intelligence, capacity to receive and convey just and true impressions of facts,[21] and appreciation of the distinction between truth and falsehood, and the penalties attaching to a failure to testify truthfully after being sworn.[22] It is not essential that the child should understand the meaning of the terms "oath" and "testimony" if otherwise competent.[23] It is held that every person over fourteen years of age is

trial court. Sprague v. Wisconsin Cent. R. Co. [Minn.] 116 NW 104.

11. Objections to qualifications of prosecutrix as witness waived, where not raised at trial. Childress v. State, 51 Tex. Cr. App. 455, 19 Tex. Ct. Rep. 329, 103 SW 864.

12. Evidence may be competent though the witness by whom it is offered to prove it is incompetent; an objection must in such case be made to the competency of the witness when offered, or it is waived. Milburn v. Robison [Mo. App.] 110 SW 598.

13. A party who has used a witness in making his own case cannot thereafter object that he is disqualified to give similar testimony for the other party. W. E. Caldwell Co. v. Steckel [Iowa] 112 NW 229. If a witness be incompetent, and if the party insisting on his incompetency nevertheless examines him on new matter not brought out or touched on in chief, then, as to such new matter, his incompetency is waived. McCune v. Goodwillie, 204 Mo. 306, 102 SW 997.

14. Laws 1903, c. 426. Hocking v. Windsor Spring Co., 131 Wis. 532, 111 NW 685.

15. Hocking v. Windsor Spring Co., 131 Wis. 532, 111 NW 685.

16. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 SE 983.

17. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 SE 983. The degree of insanity required to render a person incompetent as a witness is such as to render the person incapable of receiving or retaining just impressions of the transactions concerning which he is to testify, or of narrating the same intelligibly, or of understanding the nature and obligation of an oath. Batterton v. State [Tex. Cr. App.] 107 SW 826.

18. Cuesta v. Goldsmith, 1 Ga. App. 48, 57 SE 983.

19. Court properly so charged. Batterton v. State [Tex. Cr. App.] 107 SW 826.

20. People v. Collins, 5 Cal. App. 654, 91 P 158; State v. Meyer [Iowa] 113 NW 322.

21. People v. Collins, 5 Cal. App. 654, 91 P 158. Child of six competent, when found capable of receiving just impressions of facts and of understanding them so as to tell her version of them. Id.

22. If infants under fourteen have a clear apprehension of the penalties which may fall upon them in this life and the punishment which will await them after death if, after being sworn, they fail to testify truthfully, they should be allowed to testify, if mentally competent. State v. Labriola [N. J. Err. & App.] 67 A 386. Child of nine years held competent, it appearing to have sufficient knowledge of character, obligation, and effect of oath. McLain v. Chicago, 127 Ill. App. 489.

23. If a child adequately understands the impropriety of falsehood and is capable of giving an intelligent account of a transaction, she is competent, though she does not understand the meaning of the words "oath" and "testimony." State v. Meyer [Iowa] 113 NW 322. See this case for numerous illustrative cases [Ed.]. Colored witness fourteen years old, who could read and write, went to Sunday school, knew it was wrong to lie, and that she could be sent to penitentiary if she lied in court and would go to bad place, held competent, though she could not tell what was meant by the obligation of the oath. Anderson v.

presumed to be competent,[24] and that, in the case of children under fourteen, there is no presumption as to their competency, but their capacity to testify is to be determined, upon an examination, by the trial court,[25] whose decision in regard thereto is not reviewable on error unless it is plainly shown to have been made without evidence to support it.[26] The unsworn testimony of a child of tender years is inadmissible in the absence of a statute making such testimony competent.[27]

Persons accused or convicted of crime.[See 8 C. L. 2350]—The common-law disqualification of a person to testify, who has been convicted of an infamous crime, has been removed by statute in many states,[28] though conviction for perjury still disqualifies in some jurisdictions and conviction of crime may be shown in many as affecting the credibility of the witness.[29] Statutes disqualifying witnesses on account of conviction of crime have no extra-territorial force,[30] and a crime against the statutes of another state does not disqualify the witness in the state where he is offered.[31] A statute providing that one convicted of crime shall be competent as a witness is not retrospective in operation so as to make competent person previously incompetent.[32] Under the Federal act defining perjury, and disqualifying as a witness one convicted of the crime,[33] a conviction must be shown to disqualify a witness; mere proof of facts necessary to convict is not enough.[34] In Texas one jointly indicted with another is incompetent in the trial of his codefendant.[35] Under the Indiana statute providing that, where two or more persons are included in one prosecution, the court may, at any time before a defendant has entered upon his defense, order his discharge that he may testify for the state, one of two persons charged with conspiracy may be discharged and may testify for the state.[36] Conviction of crime must be shown by the record.[37]

Persons acting in official capacity at trial.[See 8 C. L. 2350]—Grand jurors are competent to testify to some matters accruing before them.[38] The exemption of common-law jurors is held not applicable to members of the appeal tax court in Maryland.[39]

§ 2. *Disqualification on ground of interest.*[See 8 C. L. 2351]—Although parties to the suit, and their wives are disqualified by the Illinois statute,[40] interest in the event

State [Tex. Cr. App.] 110 SW 54.

24, 25, 26. State v. Labriola [N. J. Err. & App.] 67 A 386.

27. Unsworn testimony of child seven and one-half years old, inadmissible. Neustadt v. New York City R. Co., 104 NYS 735.

28. Conviction of crime of perjury disqualifies in Washington, in the absence of a reversal or pardon, but there is no other disqualification of this kind. State v. Katon [Wash.] 91 P 250. Under Civ. Code, 1907, § 1795, only conviction of perjury or subornation of perjury disqualifies a witness. Wynne v. State [Ala.] 46 S 459.

29. See post, § 5B, 2.

30. State v. Landrum, 127 Mo. App. 653, 106 SW 1111.

31. Gen. St. 1865, c. 201, § 66, disqualifying as witnesses persons convicted of certain offenses, does not disqualify in Missouri one convicted of crime in Indiana. State v. Landrum, 127 Mo. App. 653, 106 SW 1111.

32. One convicted and disqualified under Gen. St. 1865, c. 201, § 66, is not made competent by Rev. St. 1879, § 1378 and Rev. St. 1899, § 4680. State v. Landrum, 127 Mo. App. 653, 106 SW 1111.

33. U. S. Rev. St. § 5425. O'Leary v. U. S. [C. C. A.] 158 F 796.

34. O'Leary v. U. S. [C. C. A.] 158 F 796.

35. In homicide case, another person indicted for same offense as defendant, but not tried, was held incompetent as a witness. Coffman v. State, 51 Tex. Cr. App. 478, 19 Tex. Ct. Rep. 701, 103 SW 1128.

36. Construing Acts 1905, c. 169, § 241. Williams v. State [Ind.] 82 NE 790.

37. Oral proof that witness had been convicted of perjury in another state is incompetent to show the incompetency of the witness; the record of his conviction is the best evidence. James v. U. S. [Ind. T.] 104 SW 607.

38. A member of the grand jury who was present and saw and heard the oath administered to the bailiff in open court is competent to prove that fact. Ziegler v. State, 2 Ga. App. 632, 58 SE 1066. Under Rev. St. 1899, § 2506, a member of the grand jury may be required to testify whether testimony of a witness before the grand jury was different from or inconsistent with that given by him at the trial. Cramer v. Harmon, 126 Mo. App. 54, 103 SW 1086.

39. Members of appeal tax court not exempt from examination as to their methods in arriving at their conclusion, the rule as to exemption of common-law jurors not being applicable. Consolidated Gas Co. v. Baltimore, 105 Md. 43, 65 A 628.

40. Under Hurd's Rev. St. 1905, c. 51, § 2, disqualification extends to wife of party.

of the suit does not as a general rule, now render a person incompetent as a witness, except in the cases discussed in the following section,[41] though interest may be shown to affect the credibility of the witness.[42] However, in some states no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief, nor in an equitable action after taking other testimony for himself in chief.[43] Spotters, detectives, or hired informers are competent witnesses for the state in criminal prosecutions.[44]

§ 3. *Disqualification of one party to transaction or communication, on death or disability of the other.*[See 8 C. L. 2351]—The disqualification of a party or other interested person to testify as to conversations or transactions with a person since deceased or who has become insane, or with a minor, is regulated entirely by statutes, which vary in the different jurisdictions. Such statutes should not be extended so as to disqualify persons or testimony not necessarily included within the terms of the statute[45] but should be strictly construed in favor of the witness.[46] Statutory provisions of this kind apply in suits in equity as well as in actions at law,[47] but not in a controversy over the probate of a will, and in such suit devisees are competent witnesses[48] and the propounders of the will are competent to prove that it was duly signed and attested.[49]

The adverse party, or party against whom the witness is offered, must ordinarily represent the decedent, or derive his interest from the decedent, or person under disability.[See 8 C. L. 2351]—Illustrative applications of this rule are given in the note.[50] A

Wickes v. Walden, 228 Ill. 56, 81 NE 798. Witness incompetent on ground of interest to testify on her own behalf cannot testify on behalf of her husband. McGoodman v. Bartholic, 132 Ill. App. 392.

41. See § 3, post. Plaintiff in a personal injury case is not disqualified by his interest to testify in his own behalf, that his testimony is self-serving does not make it incompetent. Missouri, etc., R. Co. v. Hendricks [Tex. Civ. App.] 108 SW 745.

42. See post, § 5C. The testimony of a party who offers himself as a witness is to be construed most strongly against him when it is self-contradictory, vague, or equivocal. Tuten v. Atlantic Coast Line R. Co. [Ga. App.] 61 SE 511.

43. Under Code Civ. Proc. § 606, subd. 3, not error to admit plaintiff's deposition after several witnesses had testified for her in chief, where her deposition was taken before such witnesses testified. Cumberland Tel. & T. Co. v. Overfield [Ky.] 106 SW 242.

44. Persons given money to buy liquor may testify in prosecution for violation of liquor laws. State v. O'Brien, 35 Mont. 482, 90 P 514.

45. Omlie v. O'Toole [N. D.] 112 NW 677.

46. Such statutes are to be strictly construed in favor of the witness, and classes of persons not named will not be excluded by implication, though the reasons therefor may seem as strong as those which apply to the persons expressly excluded. Construing Code Civ. Proc. § 222. Mendenhall v. School Dist. No. 83 [Kan.] 90 P 773.

47. Kirby's Dig. § 3093 construed. Bush v. Prescott, etc., R. Co., 83 Ark. 210, 103 SW 176.

48, 49. Carmical v. Carmical [Ky.] 104 SW 1037.

50. U. S. Rev. St. § 858, excluding certain testimony of parties in actions against executors, administrators, or guardians, does not exclude testimony of plaintiff in an action against a legatee of deceased to recover for services rendered deceased under contract. Miller v. Steele [C. C. A.] 153 F 714.

Alabama: Where, in ejectment, plaintiff claimed against her coheirs, under deeds from decedent, she was incompetent to testify to transactions and communications between herself and decedent relating to the execution and delivery of the deeds. Code 1896, § 1794. Napier v. Elliott [Ala.] 44 S 552.

Arkansas: The Arkansas statute applies where the administrator of the deceased is a proper party, though the only judgment which can be rendered against him is one for costs. Kirby's Dig. § 3093 construed. Bush v. Prescott, etc., R. Co., 83 Ark. 210, 103 SW 176.

Georgia: A purchaser from a trustee under a will held not incompetent to testify to transactions with trustee because of the death of one of the testator's daughters, whose administrator and her children brought suit to recover the land. Maynard v. Greer, 129 Ga. 709, 59 SE 798.

Illinois: One suing for specific performance of a parol contract whereby his father agreed to convey land to him, the land being subsequently conveyed to another, is, after the father's death, a competent witness to prove the existence of the contract, since Hurd's Rev. St. 1905, c. 51, § 2, applies only where adverse party sues or defends as heir, legatee, or devisee. White v. White, 231 Ill. 298, 83 NE 234. In action to enforce a contract to will property, relatives of deceased did not defend as heirs and legatees, but claimed under a voluntary conveyance. Held, plaintiff was a competent witness in her own behalf, Rev. St. c. 51,

party is not incompetent to give testimony in favor of the estate,[51] or aiding proof preliminary to admission of books of original entry.[52] It is held that, where there were severeal parties to the contract out of which the controversy grew, testimony regarding transactions between parties whose rights may be adjudicated without affecting the estate of the deceased, also a party to the contract, is admissible.[53] In an action against a corporation, based on the act of one of its employes, the death of the employe does not disqualify the plaintiff.[54]

Persons disqualified See 3 C. L. 2353 by statutes of this character are parties to the action, interested therein,[55] other persons not parties interested in the event of

§ 2, having no application. Oswald v. Nehls, 233 Ill. 438, 84 NE 619.

Iowa: Where a third person intervenes in an action against a debtor's administrator and claims land which has been attacked by plaintiff, the intervener is a competent witness to transactions with decedent, since the controversy is between plaintiff and intervener, and the administrator, though a party, is not interested. Code, § 4604, construed. City Nat. Bk. of Marshalltown v. Crahan [Iowa] 112 NW 793.

Michigan: Deceased took out an insurance, his mother being beneficiary. After his death, his widow claimed money under alleged agreement of her husband prior to marriage to take out the policy in her favor. Held, mother took under deceased, and his widow, complainant, could not testify to contract with husband. Franken v. Supreme Court I. O. F. [Mich.] 15 Det. Leg. N. 245, 116 NW 188.

Montana: Where an administrator sued to recover a portion of a mining claim on the ground that the intestate's deed was indefinite and inoperative, defendants' claim under the deed was not a claim against the estate so as to make them incompetent to testify to transactions occuring prior to intestate's death. Collins v. McKay [Mont.] 92 P 295.

New Jersey: Where certain parties, if brought in, could be made parties defendant, their testimony as to transactions with a deceased defendant would be admissible. General Proprietors Eastern Div. v. Force [N. J. Eq.] 68 A 914.

Texas: In a suit of trespass to try title, which had been dismissed as to one defendant, the heir and grantee of deceased, statements of deceased were admissible. McKeon v. Roan [Tex. Civ. App.] 20 Tex. Ct. Rep. 317, 106 SW 404.

Wisconsin: Under St. 1898, § 4069, persons from, through, or under whom a party derives his interest or title are precluded from giving evidence of a transaction or communication with a deceased person in a cause of action wherein the other party derives his interest or sustains his liability to the cause of action from, through, or under such deceased person. Dreger v. Budde [Wis.] 113 NW 950.

51. Continental Casualty Co. v. Maxwell, 127 Ill. App. 19. Widow may testify in favor of husband's estate. Gregory v. Estate of Gregory, 129 Ill. App. 96. Held administrator is competent witness in favor of estate, whether interested in result of suit or not. Continental Casualty Co. v. Maxwell, 127 Ill. App. 19. A defendant in a proceeding to settle partnership accounts, who had received machinery from one of the partners, since deceased, may testify for the adverse party that he purchased the machinery at a certain price, the only issue being whether he paid a certain sum to decedent, and recovery of the machinery not being sought; Civ. Code Proc. § 606 does not apply, nor does subsec. 7, relating to assignments, apply. Boreing v. Wilson [Ky.] 108 SW 914.

52. Held, in case where defendant is administrator, plaintiff may lay foundation for admission of books of original entry. McGlassen v. Housell, 127 Ill. App. 360.

53. Kirby's Dig. § 3093. Bush v. Prescott, etc., R. Co., 83 Ark. 210, 103 SW 176. For cases in other courts on same subject, see Id.

54. Plaintiff in an action for wrongful ejection from a train by defendant's conductor is not disqualified as a witness by the death of the conductor. Drew v. Wabash R. Co. [Mo. App.] 107 SW 478.

55. Witness held incompetent: Where adverse party is sued in his representative capacity. Ritzmuller v. Neuer, 130 Ill. App. 380; McGooden v. Bartholic, 132 Ill. App. 392. Original bill was filed against defendants as heirs of Maria P. Bartholic (mortgagee), asking to have note and mortgage canceled. Complainants were held not competent witnesses in their own behalf to testify to matters that occurred between them and Maria P. prior to her death. McGooden v. Bartholic, 132 Ill. App. 392. In suit by devisees to set aside a deed executed by testator and to have the land pass by the will on the ground that the deed was not delivered, the grantees in the deed, including the widow who took a life estate in lands conveyed, are incompetent to testify to delivery of deed under Hurd's Rev. St. 1905, c. 51, § 2. White v. Willard, 232 Ill. 464, 83 NE 954. But the widow was competent to testify to delivery of another deed which if upheld would deprive her of her dower and in which no estate was reserved to her. Id. In an action against the administrator of an insane person on a claim accruing against the insane person during his lifetime, plaintiff was an incompetent witness to testify in his own behalf to his employment. Burns' Ann. St. 1901, § 506. Meidrich v. Frey [Ind. App.] 83 NE 752. Held, also, an abuse of discretion to allow plaintiff to testify, under § 510, where there was no other proof to sustain his claim. Id. Where plaintiff testified voluntarily, there was no chance for the court to "require" his testimony. Id. In foreclosure action after death of mortgagor, mortgagee cannot testify preliminary agreement with mortgagor leading

the action,[56] and persons from whom a party derives his interest.[57] The assignment

up to execution of mortgage. Code, § 4604. Whitley v. Johnson [Iowa] 113 NW 550. In partition, defendant denied plaintiff's interest in the property and claimed to have purchased such interest from plaintiff's father, since deceased. Held, defendant could not testify to the alleged transaction with decedent. Hogg v. Combs, 29 Ky. L. R. 559, 93 SW 670. In action by administrator to recover value of decedent's support from son-in-law, to whom land had been conveyed in consideration of such support, the son-in-law was an incompetent witness against the estate, and his testimony that he considered the agreement for support as a mere gratuity was not to be considered. Bryson's Adm'r v. Biggs [Ky.] 104 SW 982. Under Civ. Code Prac. § 606, providing that a party may not testify for himself concerning the act or omission of one who is dead, plaintiff, in action for injuries received in runaway caused by train, cannot testify as to acts or omissions of the engineer. Illinois Cent. R. Co. v. Martin [Ky.] 110 SW 815. A claimant against an estate is not competent under Civ. Code Proc., § 606, subsec. 2, to testify to any transaction with deceased concerning which he was not questioned by the executor. Preston v. Atkins [Ky.] 106 SW 213. In a suit by the grantor to rescind her deed after the death of the grantee, the grantor is incompetent to testify as to the consideration for the deed so far as it involves anything said or done or omitted to be done by the grantee. Curd v. Bowron [Ky.] 105 SW 417. Where plaintiffs, grandchildren of decedent, sued to enforce a contract made with decedent by their mother for their benefit, they, being parties in interest, were disqualified to testify to transactions or communications with decedent, but their mother, not being interested, was competent. Atkinson v. Hardy [Mo. App.] 107 SW 466. Under Laws 1900, p. 363, § 4, complainant in an action against the executors of her deceased half-brother on a claim against him arising out of a transaction in connection with their father's will is incompetent to testify to a conversation between the two decedents. Heinisch v. Pennington [N. J. Eq.] 68 A 233. In an action against the representative of a deceased person, founded on an alleged contract between plaintiff and deceased, plaintiff is incompetent to prove delivery of contract, execution and delivery of which is denied. Russell v. Close's Estate [Neb.] 112 NW 559. Defendant in ejectment claimed possession as tenant by the curtesy of his deceased wife, and plaintiff as devisee under her will. Held, defendant's claim was adverse to the wife's right, and he was not a competent witness to facts occurring before her death, under Act May 23, 1887 (P. L. 159, § 5). Munson v. Crookston [Pa.] 68 A 962. One suing as heir of the grantee to recover land cannot testify to declarations of the grantee that the deed was a deed of gift, though reciting a consideration of $2,000. Wolf v. King [Tex. Civ. App.] 107 SW 617. In suit to quiet title against one who claims an undivided one-half of the land in question as heir of his mother, who became plaintiff's wife prior to his acquisition of the property, which was thus community property, plaintiff cannot testify that he was never married to defendant's mother. Nelson v. Carlson [Wash.] 94 P 477. In action for accounting between alleged partners, plaintiff was incompetent to testify as to who composed the partnership where the defendant, alleged to have been a partner, was insane, Ball. Ann. Codes & St. § 5991 disqualifying a party in interest to transactions with an insane person. Chlopeck v. Chlopeck [Wash.] 91 P 966. In suit to reform a mortgage, plaintiff was incompetent to testify to communications pertaining to transactions between himself and his son and son's wife, both deceased, as to which opposite party had not given evidence, to show actual consideration for mortgage. Hagan v. McDermott [Wis.] 115 NW 138. In a proceeding against heirs of a deceased person to establish heirship as the widow of deceased, petitioner is incompetent to testify in her own favor as to her marriage, under Rev. St. 1899, § 3683. Weidenhoft v. Primm [Wyo.] 94 P 453.

Witness held competent: In suit by administrator of wife's estate to recover for services rendered by his wife to her father and mother, administrator, having no personal interest in claim, could testify to father's condition and to conversations with him, action being against father's estate. In re Smith's Estate [Mich.] 115 NW 1052. Under Act May 23, 1887, P. L. 158, woman claiming to be surviving widow is a competent witness to prove her marriage with decedent. Miller's Estate, 34 Pa. Super. Ct. 385.

56. Witness held incompetent: Where claimant presented claim for goods sold to an employe of deceased for which employe would have to pay if decedent was not liable, employe was incompetent to testify for claimant as to transactions with decedent. Preston v. Atkins [Ky.] 106 SW 213. Stockholders in a corporation are so interested in an indebtedness from the corporation that they are incompetent to testify as to transactions with the deceased creditor. Leonora Nat. Bk. v. Ragland's Adm'r [Ky.] 108 SW 854. Testatrix bequeathed money to trustees for children, interest on sum to be used for clothing and necessaries. Her husband was held to be financially interested, owing to his legal liability for necessaries for such children, and not competent to testify against one claiming the amount of the legacy under testatrix's father that he had known of and acquiesced in the provision of the will, he being dead. In re Rossell, 110 NYS 706. Where if plaintiff should be defeated in ejectment, where he claimed under a deed of trust by a married woman, her widower would be entitled to a life estate in the land, the latter was interested and incompetent to testify as to a conversation with his wife relating to an abandonment of her. Revisal 1905, § 1631. Witty v. Barham [N. C.] 61 SE 372. Indirect testimony of an interested person is also excluded. Thus a party may not testify to what he heard a person interested in a suit say to a person since deceased, under whom he claimed. Id. On issue whether warranty deed was subject to a parol trust,

of a claim by a person who would be incompetent except for the assignment will not render him competent,[58] and a stockholder in a bank cannot testify to a transaction with a creditor, since deceased, in an action by the administrator against the bank, notwithstanding the assignment of his stock subsequent to the transaction in question.[59] Employes or agents of a corporation which is a party are not usually held disqualified.[60] To render a witness incompetent under the Indiana statute, he

the wife, who executed the deed with her husband, was held an interested witness and incompetent to testify against the trust as to transactions with a decedent, since the warranty in the deed was a community obligation, though a personal judgment against her could not be had thereon. Whitfield v. Diffie [Tex. Civ. App.] 19 Tex. Ct. Rep. 935, 105 SW 324.

Witness held competent: In a proceeding to divide land among joint owners, a legatee under the will by which parties acquired title was not necessarily interested and disqualified. McQueen v. Grigsby [Ala.] 44 S 961. Woman held competent to testify that she worked for her brother and made an agreement with him to hold all her wages, except enough to pay board, for her child, and that he reported that he had deposited the money in the bank in his name as agent for the child; suit being by the child after the brother's death, against his administrator, to recover the money alleged to have been withdrawn and used by him and his wife. Jackson v. Gallagher, 128 Ga. 321, 57 SE 750. Woman was neither a party nor pecuniarily interested and was not excluded by Civ. Code 1895, § 5269. Id. In suit involving title to land, plaintiffs relied on deed from husband of a defendant, and defendants claimed deed was void and that title to the land was and remained in the grantor's wife. Held, her son by the grantor was not disqualified by his relationship to testify to declarations of the grantor prior to making the deed in disparagement of his title. Floyd v. Ricketson, 129 Ga. 668, 59 SE 909. Under Burns' Ann. St. 1901, § 506, an heir who was not a party to proceeding by the administrator to have a receiver appointed for one charged with wrongfully detaining property of the estate was not disqualified as a witness to facts occurring in the lifetime of decedent. Sallee v. Soules, 168 Ind. 624, 81 NE 587. In action to recover horses sold to plaintiff by defendants' intestate, a brother of plaintiff was properly allowed to testify that deceased agreed to pay plaintiff certain wages as a farm hand where there was no evidence that witness was plaintiff's agent to hire him to deceased. Cobb v. Holloway [Mo. App.] 108 SW 109. An indorser of a note who is primarily liable thereon, and hence liable to sureties behind him, who are compelled to pay the note, has not such an interest that he cannot testify to personal transactions with one of the sureties, deceased, in an action for contribution between the representatives of that surety and another surety. Spier v. McNaught, 121 App. Div. 330, 105 NYS 1060. In action against an executrix to recover the price of stock sold by decedent by means of fraudulent representations, a witness who was present and participated in a conversation between plaintiff and decedent agreed to buy part of the stock and paid for it, but later the sale was rescinded and witness at the time of the trial had no interest in the stock nor in the litigation. Held, competent to testify to conversation. Stern v. Stern, 122 App. Div. 821, 107 NYS 900. In an action by a son-in-law of defendant's intestate on a claim against the estate, plaintiff's daughter, an heir at law and distributee, and a guardian of heirs and distributees, are competent witnesses for plaintiff. Henderson v. McLain [N. C.] 59 SE 873. One having no interest in suit involving location of boundary line, and connected with it only as surveyor and witness, may testify in regard to the direction given him by the general manager of defendant as to how the line should be run, though such manager is dead. Douglas Land Co. v. Thayer Co. [Va.] 58 SE 1101. In a suit by an infant who has been emancipated by her father to recover for services rendered a person since deceased, the father is not interested and not disqualified to testify to communications, etc., with decedent under Code 1906, § 3945. Weese v. Yokum [W. Va.] 59 SE 514. Code 1899, c. 130, § 23, does not prohibit a son of plaintiff, not a party to the suit nor interested in the event thereof, in respect to his property rights, from testifying on behalf of the plaintiff as to personal conversations or communications with a deceased person. Hollen v. Crim [W. Va.] 59 SE 172. The interest in the result of a suit which will exclude a witness under Code 1899, c. 130, § 23, must be a present, certain, vested interest, not uncertain, remote or contingent, though if so it matters not how small it is. Hudkins v. Crim [W. Va.] 61 SE 166. Husband is not incompetent to testify to wife's title to certain separate property, since his interest was contingent on her death and he had no interest whatever during her life, not even curtesy initiate. Id.

57. Witness held incompetent: A claim for wages accruing to an infant subsequent to her emancipation cannot be said to be derived from, through or under the parent, so as to disqualify the latter as a witness in a suit against the estate of the deceased person for whom the services were rendered in regard to communications, etc., with deceased. Code 1906, § 3945. Weese v. Yokum [W. Va.] 59 SE 514.

58. Leonora Nat. Bk. v. Ragland's Adm'r [Ky.] 108 SW 854.

59. Under Civ. Code Proc. § 606, subsecs. 2, 7, providing that assignment of claim does not make interested person competent. Leonora Nat. Bk. v. Ragland's Adm'r [Ky.] 108 SW 854.

60. The Kansas statute, which excludes only parties, is held not to exclude officers or agents of a corporation which is a party (Mendenhall v. School Dist. No. 83, Jewell County [Kan.] 90 P 773), nor other inter-

must be a necessary party to the issue as well as to the record, and his interest, adverse to the estate, must be certain and vested, and not remote.[61] The Kansas statute excludes only parties.[62] The North Dakota statute is held to exclude all parties [63] though aligned with the representatives of the decedent.[64] In North Carolina it is held that the interest in the result of an action to disqualify a witness must be legal, and not merely sentimental,[65] and that the witness must bear such a relation to the controversy that the verdict and judgment in the case may be used against him as a party in another action.[66] A devisee or legatee who is not an attesting witness may, in West Virginia, be examined in support of the will like any indifferent person.[67] Under some statutes a party to a contract cannot testify in regard thereto after the death of the other party.[68]

Transactions and communications to which disqualification extends. See 8 C. L. 2356 The disqualification extends to all personal transactions and communications between the witness and deceased,[69] but not to communications or transactions between dece-

ested persons who are not parties (Id.). The cashier of a national bank which is a party to an action is a competent witness to testify to the fact of the mailing of a notice to a deceased person whose executor and heirs at law are parties to the action, since Rev. Codes 1905, § 7253, prohibits evidence of parties only. First Nat. Bk. of Bottineau v. Hilliboe [N. D.] 114 NW 1085. In Florida, in an action against a corporation for the negligent death of an employe, other employes are not disqualified to testify in favor of the corporation as to transactions with deceased relevant to the issues. Atlantic Coast Line R. Co. v. Mallard [Fla.] 44 S 366.

61. Under Burns' Ann. St. 1901, § 506, minor children of a claimant for services against an estate were not disqualified as witnesses for claimant. Taylor's Estate v. Larter [Ind. App.] 82 NE 96.

62. Mendenhall v. School Dist. No. 83 [Kan.] 90 P 773.

63. The fact that a witness is a proper party to an action in which the executor, administrator or heirs of a deceased person are parties disqualifies such witness from testifying to transactions with or statements by such deceased person. Cardiff v. Marquis [N. D.] 114 NW 1088.

64. The fact that such witness is a party defendant with the personal representative or heirs of the deceased does not make him a competent witness. Cardiff v. Marquis [N. D.] 114 NW 1088.

65, 66. Henderson v. McLain [N. C.] 59 SE 873.

67. Barker v. Hinton [W. Va.] 59 SE 614.

68. Under Rev. St. 1899, § 4652, that where one of the original parties to a contract is dead the other shall not be permitted to testify in regard to it, the grantor in a warranty deed cannot, in a suit for cancellation after the grantee's death, testify as to the nature and purpose of the deed. Gibbs v. Haughwout, 207 Mo. 384, 105 SW 1067.

69. In action for wrongful death of employe, a defendant is incompetent to testify to the terms of employment of the deceased, since this would involve transactions and communications with him. Nevers Lumber Co. v. Fields [Ala.] 44 S 81. Under D. C. Code, § 1064 (31 Stat. 1357, c. 854), when one party to a contract dies, the other is incompetent to testify as to any transaction with or declaration of such deceased party in an action between the representatives of such deceased party and other party to contract. Slaughter v. Loeb, 28 App. D. C. 57. The death of the grantor of one of the parties to a litigation in regard to an alleged private way does not render the other party wholly incompetent as a witness, but only incompetent as to communications or transactions with deceased. Nugent v. Watkins, 129 Ga. 382, 58 SE 888. Where a suit is instituted or defended by the personal representative of a deceased or insane person, the opposite party is not competent to testify in his own favor to the nonexistence of transactions or communications alleged to have taken place between himself and the deceased. Webb v. Simmons [Ga. App.] 60 SE 334. Cannot testify as to conversations or admissions by husband during coverture. Gregory v. Estate of Gregory, 129 Ill. App. 96; State Bank of Otterbein v. Reardon, 130 Ill. App. 383. Party cannot refute statements of deceased to third persons as to acts done by him. Wickes v. Walden, 228 Ill. 56, 81 NE 798. Under Civ. Code Proc. § 606, in an action by the executor of the payee of a note, signed by a husband and wife, the wife is incompetent to testify that she signed the note as surety only, that she did not receive any of the proceeds of it, nor what disposition was made thereof. Black v. McCarley's Ex'r, 31 Ky. L. R. 1198, 104 SW 987. Under Code Civ. Proc. § 606, a person cannot testify for himself concerning the statements of a person who is dead. Adams v. Illinois Life Ins. Co., 31 Ky. L. R. 1041, 104 SW 718. In action on note by heirs of payee, defendant may not testify as to payments made to deceased. Jennings v. Roberts [Mo. App.] 109 SW 84. Under Pub. St. 1901, c. 224, §§ 16, 17, in action against executrix, plaintiff could not testify as to facts occurring in lifetime of deceased, as to which deceased could have testified, if living, the executrix having elected not to testify. Giles v. Smith [N. H.] 66 A 1049. Under Pub. St. 1901, c. 224, §§ 16, 17, in action against executrix, plaintiff was not only barred from testifying as to what deceased did or said but also from giving contents of letters written by plaintiff to deceased, unless it appeared that deceased had not seen the letters and could not have testified in

dent and a third person, in which witness took no part,[70] or between witness and a third person,[71] or betwen a party and a representative of a decedent, who is also a party,[72] nor to facts occurring after decedent's death.[73] Independent physical facts

regard thereto. Id. In action by widow against executor and devisees of deceased husband for an accounting, based on alleged theft by the husband from her, she was incompetent to testify to his presence at the time of the alleged theft. Ten Broeck v. Jackson [N. J. Eq.] 69 A 488. In action by administratrix to recover bank account, claimed by defendant under a gift causa mortis, it appeared defendant had received a box from deceased. Held, defendant was incompetent to prove contents of box and identify gift, thus involving a transaction between him and deceased, under Code Civ. Proc. § 829. Davis v. Davis, 104 NYS 824. In action on account stated between plaintiff and defendant's testator, plaintiff was incompetent to testify that he had never received any money on a check to his order, found in decedent's possession and signed by him. Tillman v. Rayner, 109 NYS 443. Evidence by plaintiff that he had never seen the check until after decedent's death was also incompetent. Id. Witness who is a party cannot testify to contents of lost letters written or received by witness to or from deceased, whose administrator is a party. Cardiff v. Marquis [N. D.] 114 NW 1088. Evidence that witness who is a party wrote and signed letters at the dictation of deceased whose administrator is a party is inadmissible. Id. Contractor of building, pursuant to a contract with the owner, is not a competent witness as to payments made on the contract where the owner has since died, and his executor and heirs at law are made parties defendant with the contractor in a suit by plaintiff to foreclose its lien as a subcontractor. First Nat. Bk. of Bottineau v. Hilliboe [N. D.] 114 NW 1085. In action on life insurance policy, agent of company was incompetent to testify to an agreement with deceased, whose note for premium he took, that the policy should be surrendered if the note was not paid. Civ. Code Proc. 1902, § 400. Clarke v. Home Fund Life Ins. Co. [S. C.] 61 SE 80. In action by administratrix to recover amount overpaid defendant by deceased, a question to defendant to state "all that transpired at the time of the settlement" (on dissolution of partnership) was objectionable as calling for statements of deceased. Ball. Ann. Codes & St. § 5991. Moylan v. Moylan [Wash.] 95 P 271. Trustee of estate of deceased payee of note sued on the note, and maker claimed a second note had been given for the note in suit, and had been paid. Held, defendant was incompetent to prove that he went into payee's store with $400 and came out with the note and $.00, if intended as proof of payment, this involving a transaction with deceased. St. 1898, § 4069. Jackman v. Inman [Wis.] 114 NW 489.

Statute held inapplicable: Holder of bond for title from a deceased person sued widow and children to have title decreed in him, claiming full amount due had been paid. Widow and children claimed as having the land set apart as a year's support. Holder of bond was not incompetent to testify to amount of the indebtedness to deceased. Stewart v. Ellis [Ga.] 61 SE 597. Hurd's Rev. St. 1905, c. 51, § 4, provides that a party to an action who has contracted with the agent of the adverse party cannot testify as to any admission or conversation of such agent. This does not exclude "transactions," and insured, in action on policy, may testify to delivery of policy by agent, and payment to him of premium. Helbig v. Citizens' Ins. Co., 234 Ill. 251, 84 NE 897. Where a contractor and executor and heirs of a deceased owner of a building are made defendants in a suit by a subcontractor to foreclose its lien, the contractor is competent to testify to the time of completion of the building, since this would not involve a transaction with deceased, under Rev. Codes 1905, § 7237. First Nat. Bk. of Bottineau v. Hilliboe [N. D.] 114 NW 1085. Where deed from father to son had been introduced, it was not error to allow the son to testify that he bought the land from his father, since deceased, and paid for it, since the sealed deed imported a consideration and the amount was immaterial. Langston v. Cothran [S. C.] 58 SE 956. In a suit by executors on a note, defendant claiming that he was entitled to a credit by reason of another note transferred to decedent, defendant was competent to testify that he gave certain notes to decedent's agents who failed to credit them on the note, and that he then went to decedent to adjust the controversy. Huff v. Powell [Tex. Civ. App.] 20 Tex. Ct. Rep. 570, 107 SW 364. One who makes a claim for services against an estate may himself testify to the rendition of services and their value, no transaction with decedent being involved, within St. 1898, § 4069. Bossi's Estate v. Baehr [Wis.] 113 NW 433.

70. A party may testify to transactions or communications between a decedent and third persons in which witness did not participate. Barto v. Harrison [Iowa] 116 NW 317. A beneficiary under the provisions of a will is not an incompetent witness to testify to a conversation between the testator and a third person in which the witness took no part. In re Power's Estate [Neb.] 113 NW 198. In an action upon claims against an estate, witnesses, though interested, are competent to testify to transactions between decedent and others where they do not testify to transactions between themselves and decedent. Sarchfield v. Hayes [Iowa] 112 NW 1100.

71. In an action to foreclose a deed, given as security for a debt, wherein the grantee and heirs of the grantor are adverse parties, testimony of the grantee that he paid interest on a prior mortgage and taxes on the mortgaged premises to protect the lien of his deed is competent, since it does not relate to a transaction with the decedent, but with third persons. Omlie v. O'Toole [N. D.] 112 NW 677.

72. In an action to recover horses sold by defendant's intestate to plaintiff, plaintiff

which do not involve any communication or transaction with decedent are not within the rule.[74]

Waiver or removal of disqualification.[See 8 C. L. 2360]—The disqualification is waived where the adverse party takes the stand and testifies as to matters within the protection of the statute,[75] or calls [76] or examines the interested party or witness in regard to such matters.[77]

is competent to testify to matters occurring between himself and the administrators after their appointment, under Rev. St. 1899, § 4652. Cobb v. Holloway [Mo. App.] 108 SW 109.

73. As exception to § 2, Evidence Act, where adverse party defends as administrator. Parrish v. Vancil, 132 Ill. App. 495.

74. In suit respecting alleged private way, independent acts of obstruction by defendant and his servants prior to death of plaintiff's grantor could be proved by defendant and his employes. Nugent v Watkins, 129 Ga. 382, 58 SE 888. In a suit by heirs to set aside a deed because of the mental incapacity of the grantor, evidence by the heirs as to the deceased grantor's insanity, based on their observation during her lifetime, was competent, under Burns' Ann. St. 1901, § 507. Studebaker v. Faylor [Ind.] 83 NE 747. In an action against a railroad company by an administrator for injuries received by his intestate, the administrator, who is decedent's son, may testify for the estate as to the character of the injuries received by decedent. Civ. Code Proc. § 606, subd. 2, does not exclude him. Chesapeake, etc., R. Co. v. Perkins, 31 Ky. L. R. 1350, 105 SW 148. Proof by the son that his father, since deceased, was in possession of land when he conveyed to the son, does not involve a transaction or communication with a decedent, excluded by Code Civ. Proc. 1902, § 400. Langston v. Cothran [S. C.] 58 SE 956.

75. See 8 C. L. 2361, n. 84; 6 C. L. 1984, n. 99. As exception to § 2, Evidence Act, party in interest is competent, where adverse party defends as administrator, to testify with respect to any conversations as to which such administrator has testified. Parrish v. Vancil, 132 Ill. App. 495. Under Act June 11, 1891, P. L. 287, where plaintiff is dead and two witnesses have testified on behalf of the executors as to occurrences in lifetime of deceased, defendant may also testify as to such occurrences. Smith v. Summerhill, 31 Pa. Super. Ct. 235. Act of June 11, 1891, P. L. 287, applies only where there is one witness living who testifies against surviving party. Id.

Contra: The fact that the widow of a decedent testifies fully as to transactions between her husband and a third person does not render competent such third person in an action by him against the widow as administratrix (O'Connor v. Slatter [Wash.] 93 P 1078), though such third person may testify to matters not involving any transaction or communication with deceased (Id.). He may testify that widow was not present when he received notes from decedent, but not whether notes had been changed since he received them. Id.

76. In an action on a note by the payee against the executor of the maker, the plaintiff is a competent witness when called by the executor, under Sayles' Ann. Civ. St. 1897, art. 2302. Scott v. Menly [Tex. Civ. App.] 19 Tex. Ct. Rep. 865, 105 SW 55.

77. An objection that a witness is incompetent to testify to transactions with a decedent is waived where the witness is cross-examined as to the same matter. Ables v. Ackley, 126 Mo. App. 84, 103 SW 974. Where letters written by a claimant to deceased were introduced on the cross-examination of the claimant, he was properly allowed to testify as to the circumstances under which they were written and to explain them, but could go no further. Preston v. Atkins [Ky.] 106 SW 213. Where, in proceeding on claim for services against an estate, the administrators introduced evidence that one of the claimants admitted in a conversation at a time when decedent was not present that decedent paid them a great deal of money yearly, it was error to refuse to allow such claimant to testify that such conversation never occurred. Atkinson v. Maris, 40 Ind. App. 718, 81 NE 745. In equitable action by administrator against an heir and her husband for an accounting for property claimed to have been withheld from the estate, defendants were examined by plaintiff as to their course of dealing with deceased. Held, they should have been allowed to testify for themselves as to the details of communications and transactions concerning which plaintiff had examined them. Eisentraut v. Cornelius [Wis.] 115 NW 142. Under Code Civ. Proc. § 329, an interested party may testify only to such conversations and transactions had with the adverse party's decedent as were testified to by some witness called by the representative, or to such facts as may be presented in the preserved testimony of the deceased. In re Neckel's Estate [Neb.] 113 NW 1045. Held that testimony of distributee covered only such matters as adverse parties had been allowed to testify to. Emmons v. Hawk [W. Va.] 59 SE 519.

Disqualification not waived: In will contest based on alleged incapacity and undue influence, complainants were obliged to call adverse parties to identify certain letters written to deceased. Held, this testimony did not render them generally competent in their own behalf, under Hurd's Rev. St. 1905, c. 51, § 2. Garrus v. Davis, 234 Ill. 326, 84 NE 924. Under Civ. Code Proc. § 606, subd. 2, a daughter of deceased, claiming compensation for services, is not a competent witness, nor is her testimony as to statements of deceased rendered competent by subsequent testimony of her sister, who is interested in the estate, that deceased had said he did not intend to give claimant a preference over other children. Foley v. Dillon [Ky.] 105 SW 461. In action by executor to recover money belonging to testatrix, de-

§ 4. *Privileged communications, and persons in confidential relations. A. Attorney and client.*[See 8 C. L. 2362]—Confidential communications between attorney and client, and knowledge acquired by the attorney by reason of the relation, are privileged and cannot be testified to by the attorney without the consent of the client,[78] but this privilege extends only to communications necessary to enable the attorney to properly serve his client.[79] The relation of attorney and client must, however, have existed when the communication was made,[80] and the communication must have been in fact confidential.[81] Communications between a person and an attorney with a view to the employment of the attorney are privileged.[82] An attorney employed by two or more persons to give professional advice or assistance in a matter in which they are mutually interested can, on litigation subsequently arising between such persons or their representatives, be examined as a witness, at the instance of either, as to communications made while he was acting as attorney for all,[83] although he could not disclose such communications in a controversy between his clients, or either of them, and third persons.[84] The rule of privilege will not be enforced as between attorney and client where the client charges mismanagement of his cause by

fendant was incompetent to testify to transactions and communications with deceased tending to show a gift of the money to defendant by deceased, though executor had testified to admission by defendant that she had moneys belonging to testatrix. Morgan v. Foran, 120 App. Div. 185, 104 NYS 1084. The taking of the deposition of a defendant by plaintiff, which is quashed by reason of defendant's misconduct, is not a waiver of an objection to the incompetency of such defendant when her deposition is offered by other defendants. Grieb v. Stahl [Tex.] 20 Tex. Ct. Rep. 447, 107 SW 41.

78. Where testatrix's son claimed as a gift money first entrusted to him as trustee, attorney who drew paper confirming the gift was not competent to testify concerning facts surrounding its execution. Gick v. Stumpf, 110 NYS 712. Communications between a witness and his attorney inadmissible to impeach the witness. Hardin v. State, 51 Tex. Cr. App. 559, 19 Tex. Ct. Rep. 231, 103 SW 401. In prosecution of defendant for murder of his wife, the county attorney was incompetent to testify that defendant had come to him and said his wife had consulted counsel and that defendant wanted him (county attorney) to look after his case if trouble arose between him (defendant) and his wife. State v. Blydenburg [Iowa] 112 NW 634.

79. Does not extend to statements of reasons why a will provides for only one heir. Champion v. McCarthy, 228 Ill. 87, 81 NE 808.

80. Communications in the course of ordinary conversation, when the relation of attorney and client does not exist or has terminated, are not privileged. Conversation relating to land deal which had been closed when attorney was met in the street not privileged. Hansen v. Kline [Iowa] 113 NW 504. Communications between an attorney and deceased not privileged where third person was present and attorney appeared to act for such third person and not for deceased, subject of discussion being will of deceased. In re Eckler's Estate, 110 NYS 650.

81. Communications concerning indebtedness of client to attorney are not privileged. Herrin v. Abbe [Fla.] 46 S 183. The privilege extends only to confidential communications. An attorney may be required to identify papers witnessed by him and to testify to facts learned from third persons. In re Ruos, 159 F 252. One who had been counsel for one of the parties during negotiations for a lease was not incompetent to testify to a fact necessarily known to both parties during such negotiations. Atlantic, etc., R. Co. v. Atlantic, etc., R. Co. [N. C.] 61 SE 185. A book of maps showing platting of a block and alleyway in question in suit, delivered by widow of decedent to attorney for estate, held not a "privileged communication." Myers v. Kenyon [Cal. App.] 93 P 888. Letter by attorney to client advising him of terms of injunction granted against him in a suit in which the attorney is employed is not a privileged communication and is admissible to show notice to the client of the terms of the injunction. Aaron v. U. S. [C. C. A.] 155 F 833. There can be no question of privileged communications between an attorney and his client which should prevent the former from testifying to what took place at an interview between them, on the one side, and another person, having an adverse interest, on the other. Rester v. Powell [La.] 45 S 372. A letter from a client to his attorney which is not shown to be a confidential communication and which the client may be compelled to produce is not privileged, and the attorney may be compelled to produce it. Bankers' Money Order Ass'n v. Nachod, 120 App. Div. 732, 105 NYS 773. Fact that communication was made in presence of third party may be considered as indicating it was not intended as confidential. Champion v. McCarthy, 228 Ill. 87, 81 NE 808. Communication taking place in the presence of a third party held not privileged. Kissack v. Bourke, 132 Ill. App. 360.

82. Conversation relating to land deal when attorney expected to be employed in drawing up the papers. Hansen v. Kline [Iowa] 113 NW 504.

83, 84. Kirchner v. Smith, 61 W. Va. 434, 58 SE 614.

the attorney,[85] and where it would be a manifest injustice to allow the client to take advantage of the rule of privilege to the prejudice of his attorney,[86] or when it would be carried to the extent of depriving the attorney of the means of obtaining or defending his own rights.[87]

Both at common law and under statutes which are merely declaratory of the common law, the doctrine of privilege between attorney and client is held inapplicable in will contests where the validity of the will is attacked on the ground of want of testamentary capacity and undue influence.[88] In such cases the attorney may testify to statements and communications of the testator and to what he saw and heard during the preparation of the will.[89] Similarly, in a suit involving the construction of a will, the attorney who drew it may testify to communications made to him by the testator.[90]

At common law the privilege was personal to the client and might be waived by him,[91] and the rule is the same under statutes which are merely declaratory of the common law,[92] But a waiver of the privilege at one trial will not continue to a second trial.[93] Where the client expressly refuses to waive the privileges, he does not waive it by himself giving testimony.[94] The client's privilege is not waived by the fact that the attorney is a witness to a paper drawn by him, the paper not being one requiring witnesses.[95] A waiver may be withdrawn at any time before acted upon.[96] In the case of persons deceased, the general rule is that the right of waiver when the character and reputations of the deceased are not involved, is lodged in the personal representative, that is, the executor or administrator or the heirs of the deceased,[97] The privilege must be claimed, if at all, by the client; [98] it cannot be claimed for him by the attorney.[99]

While it is not proper for an attorney to testify in a case where he is employed as counsel,[1] and while he ought properly to withdraw before becoming a witness,[2] he is competent, and the fact that he is the attorney for a party goes only to his credibility.[3]

85. Letters by client to attorney held not privileged in action by attorney to recover for services. Stern v. Daniel [Wash.] 91 P 552.

86, 87. Stern v. Daniel [Wash.] 91 P 552.

88. Cases cited and doctrine discussed. In re Young's Estate [Utah] 94 P 731.

89. So held under Rev. St. 1898, § 3414, subd. 2. Former will may also be testified to by attorney. In re Young's Estate [Utah] 94 P 731.

90. Code Civ. Proc. § 1881, subd. 2, does not apply in such case. In re Dominici's Estate, 151 Cal. 181, 90 P 448.

91. In re Young's Estate [Utah] 94 P 731.

92. Rev. St. 1898, § 3414, subd. 2, merely declares the common law. In re Young's Estate [Utah] 94 P 731. Where attorney had been allowed to testify fully as to his relations with a party and communications between them, any objection on the ground of privilege was waived. Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 SW 1118.

93. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

94. Even where client testified as to certain transactions and communications between himself and his attorney, the attorney could not be compelled to testify in regard thereto, the client having expressly refused to waive his privilege. In re Cravath, 110 NYS 454.

95. That attorney was a witness to a paper drawn by him did not waive the client's privilege where the paper was not one requiring witnesses. Under Code Civ. Proc. § 836, privilege can be waived only upon the trial, except in case of witnesses to wills. Gick v. Stumpf, 110 NYS 712.

96. Herpolsheimer v. Citizens' Ins. Co. [Neb.] 113 NW 152.

97. Where, in dispute as to validity of will, between beneficiary and heir at law, the heir offered proof of a communication between deceased and an attorney, the heir waived the privilege, and the testimony should have been received Appeal of Le Prohon, 102 Me. 455, 67 A 317.

98. As a general rule the question of privilege can be invoked only by the author of the communication. Appeal of Le Prohon, 102 Me. 455, 67 A 317.

99. It is for the client, not the attorney, to claim the privilege. Ehrhardt v. Stevenson, 128 Mo. App. 476, 106 SW 1118.

1. McConnell v. Brown, 232 Ill. 336, 83 NE 854.

2. Glanz v. Ziahek, 233 Ill. 22, 84 NE 36. When an attorney learns that it will be necessary for him to testify in a case, he should at once withdraw as counsel. Onstott v. Edel, 232 Ill. 201, 83 NE 806.

3. Glanz v. Ziabek, 233 Ill. 22, 84 NE 36. A judgment will not be reversed on account

(§ 4) *B. Physician and patient.*[See 8 C. L. 2364]—At common law, communications between physician and patient were not privileged.[4] But by statute in most states, information acquired by a physician in his professional capacity for the purpose of treating or prescribing for a patient is privileged.[5] Such statutes should not be strictly construed, but should be so applied as to foster and encourage confidence between the patient and physician.[6] To be privileged, the communication or knowledge must have been necessary and proper to enable the physician to prescribe for and treat the patient,[7] and the information must have been acquired by the physician while acting in his professional capacity,[8] during the existence of a confidential relation betwen himself and his patient.[9] When the relation of physician and patient is established, it will be presumed that information gained by the physician was necessary to enable him to treat the patient professionally.[10] The privilege extends not only to oral communications but also to information acquired by the physician from his own observation or examination, in the course of his professional duties.[11] All physicians and surgeons who attend a patient in a professional capacity are disqualified as to information acquired while so engaged, regardless of the manner in which the relation of physician and patient was established.[12] Thus, physicians and surgeons employed by a hospital where the patient is treated [13] and physicians and surgeons who attend and treat patients with the knowledge and consent of the hospital authorities [14] are disqualified. A physician employed by a railroad company who examines an injured passenger in order to prescribe for and treat him cannot testify as to information gained while so acting without the passenger's consent.[15] Statutes of this kind do not apply in a criminal prosecution for causing the death of the patient.[16] The Colorado statute is not held to apply to physicians practicing in other

of such testimony where the attorney's testimony was of the same general tenor as that of the other witnesses. McConnell v. Brown, 232 Ill. 336, 83 NE 854.

4. In re Young's Estate [Utah] 94 P 731.

5. In personal injury action, a physician who attended plaintiff after a previous injury was disqualified as to information gained in his professional capacity. Smart v. Kansas City, 208 Mo. 162, 105 SW 709. Evidence as to testator's mental and physical condition, given by physicians, properly admitted. Evidence as to confidential communications or tending to disgrace memory of deceased properly excluded. Lippe v. Brandner, 120 App. Div. 230, 105 NYS 225.

6. Rev. St. 1899, § 4659 (physician and patient), though creating an exception to the common law, should not be strictly construed, but so construed as to give effect to the purpose of the act, the fostering and encouragement of confidence. Green v. Terminal R. Ass'n [Mo.] 109 SW 715.

7. Smith v. John L. Roper Lumber Co. [N. C.] 60 SE 717. Statement by patient that he was injured because he kicked or "wrang out" a jackscrew, causing an engine to fall on him, not privileged. Id. Plaintiff's leg was smashed and he was taken to a hospital maintained by defendant and treated by surgeons employed by defendant. The mode of treatment was obvious. Held, statements by plaintiff as to his position between cars when struck, made to surgeons, were not privileged, not being necessary to enable them to treat him nor affecting treatment in any way. Green v. Terminal R. Ass'n [Mo.] 101 SW 715.

8. Smith v. John L. Roper Lumber Co. [N. C.] 60 SE 717.

9. In prosecution for statutory rape, held not error to allow physician to testify that woman concerned was pregnant, no confidential relation being shown to exist between them. State v. Winnett [Wash.] 92 P 904. Where a physician was employed by defendant to witness an operation on plaintiff and there was evidence that plaintiff did not employ him and that he took no part in consultation or operation, he was a competent witness as to what he observed. Woods v. Incorporated Town of Lisbon [Iowa] 116 NW 143.

10. Dambmann v. Metropolitan St. R. Co., 55 Misc. 60, 106 NYS 221.

11. Smith v. John L. Roper Lumber Co. [N. C.] 60 SE 717.

12. Immaterial whether patient is in residence or hospital and whether he is a poor or pay patient. Smart v. Kansas City, 208 Mo. 162, 105 SW 709.

13. Assistant physicians disqualified. Smart v. Kansas City, 208 Mo. 162, 105 SW 709. Assistant physician in hospital, in charge of hospital records, disqualified to testify to diagnosis of plaintiff's case while a patient in the hospital, before and after the injury for which suit was brought. Id.

14. Smart v. Kansas City, 208 Mo. 162, 105 SW 709.

15. Under 2 Mills' Ann. St. § 4824, Cl. 4. Colorado Midland R. Co. v. McGarry [Colo.] 92 P 915.

16. Code Civ. Proc. § 834, prohibiting disclosure by a physician of information obtained by him while attending a patient in a professional capacity, does not apply in

states, who have not complied with Colorado statutes regulating the practice of medicine.[17] Hence the affidavits of nonresident physicians were held competent.[18]

The privilege is for the benefit of the patient alone and may be insisted on or waived by him in his discretion, subject only to statutory limitations.[19] When the patient has once waived the privilege by permitting a physician to testify, he cannot subsequently prevent the physician from testifying by an objection based solely on the statutory privilege.[20] The bringing of a suit for damages for personal injuries is not a waiver of the privilege as to information acquired by physicians who treated and cared for the patient,[21] though plaintiff in such action testifies, from his own knowledge, as to the nature and extent of his injuries.[22] A patient who brings an action for malpractice against a physician waives the privilege as to the defendant and physicians with whom defendant consulted,[23] but does not waive it as to a physician who makes an independent examination subsequently for the purpose of treating plaintiff.[24] The right to waive the privilege is usually held to inure to the representatives of a deceased patient,[25] but it cannot be waived by an administrator in a suit to remove him as such, since he is sued in his individual and not his representative capacity,[26] nor can it be waived by a contestant in a suit to probate the will of the deceased patient.[27]

(§ 4) *C. Husband and wife. In civil cases.* See 8 C. L. 2365—Both at common law and by statute in many jurisdictions, confidential communications between husband and wife are privileged,[28] and this privilege is not removed by death or divorce.[29] In some states only confidential communications [30] or facts learned by vir-

a criminal prosecution for causing the death of the patient. People v. Brecht, 120 App. Div. 769, 105 NYS 436.

17. Mills' Ann. St. § 4824 construed. Colorado Springs & I. R. Co. v. Fogelsong [Colo.] 94 P 356.

18. Colorado Springs & I. R. Co. v. Fogelsong [Colo.] 94 P 356.

19. Smith v. John L. Roper Lumber Co. [N. C.] 60 SE 717. The patient when a witness may refuse to disclose confidential communications. Dambmann v. Metropolitan St. R. Co., 55 Misc. 60, 106 NYS 221. Where application for insurance contained an express waiver of the benefit of any statute making information acquired by a physician in his professional capacity privileged, the privilege was waived for insured and beneficiaries, and physician making examination of applicant could testify. Modern Woodmen of America v. Angle, 127 Mo. App. 94, 104 SW 297. Plaintiff in personal injury action called as a witness the physician who treated her after the accident. Held, she waived her privilege, and physician could be examined as to previous treatment before the accident in question. Marquardt v. Brooklyn Heights R. Co., 110 NYS 657.

20. Under Code Civ. Proc. § 836, as amended by Laws 1899, p. 69, c. 53, and Laws 1904, p. 874, c. 331. People v. Bloom, 109 NYS 344. Where patient had physicians testify in a damage suit, he could not exclude their testimony in a subsequent prosecution of himself for perjury, having forever waived his privilege. Id. When privilege has once been waived, it cannot be recalled. Marquardt v. Brooklyn Heights R. Co., 110 NYS 657.

21. Construing Rev. St. 1899, § 4659. Smart v. Kansas City, 208 Mo. 162, 105 SW 709.

22. The plaintiff in a personal injury action does not, by testifying to the nature and extent of his injuries from his own knowledge, waive the privilege so as to render competent testimony of his attending physician. Construing 2 Ball. Ann. Codes & St. § 5994. Noelle v. Hoquiam Lumber & Shingle Co. [Wash.] 92 P 372.

23. Hartley v. Calbreath, 127 Mo. App. 559, 106 SW 570.

24. Policy of statute discussed. Hartley v. Calbreath, 127 Mo. App. 559, 106 SW 570.

25. Burns' Ann. St. 1901, § 505. Scott v. Smith [Ind. App.] 82 NE 556.

26. In his individual capacity, he cannot waive the privilege. Hence error to allow physician who attended deceased to testify. Scott v. Smith [Ind. App.] 82 NE 556.

27. Contestant is an adverse party. In re Mansbach's Estate, 150 Mich. 348, 14 Det. Leg. N. 696, 114 NW 65.

28. Letter from wife to husband relating to the cause of their estrangement held privileged. Lurty's Curator v. Lurty [Va.] 59 SE 405. While one party may compel an adverse party to testify (Kirby's Dig. § 6164), yet plaintiff cannot, in an action against a husband and wife, compel the latter to testify for or against her husband or concerning any communication between them during the marriage. Mahoney v. Roberts [Ark.] 110 SW 225; Wickes v. Walden, 228 Ill. 56, 81 NE 798.

29. Wickes v. Walden, 228 Ill. 56, 81 NE 798.

30. In action on mutual benefit certificate, proof by the wife of insured, beneficiary, of facts not learned as a communication from the husband, nor by reason of the marital relation, but simply observed as any other rational person would, was admissible. Bankers' Fraternal Union v. Don-

tue of the marital relation [31] are privileged. In others all communications during the existence of the relation are privileged.[32] In many states it is the rule that either spouse may testify to the fact of agency for the other [33] and in regard to matters in which one acted as agent for the other,[34] though not as to matters outside the scope of the agency.[35]

The competency of one spouse as a witness for or against the other is largely controlled by statute.[36] In Pennsylvania husband and wife may testify against each other in divorce proceedings where there has been personal service of the subpoena.[37] The Vermont statute does not exclude testimony of the wife in favor of the husband,[38] and in Illinois a husband is a competent witness for his wife in a case concerning her separate property.[39] In New York in an action by the husband for divorce on the ground of the wife's adultery, the husband is a competent witness to prove the marriage.[40] In New Jersey neither husband nor wife is competent or compellable to give evidence for or against the other in any action for criminal conversation except to prove the fact of marriage.[41] In an action for alienation of affections, both husband and wife are competent for all purposes.[42] Where a declara-

ahue [Ky.] 109 SW 878. Rev. St. 1895, art. 2301, does not disqualify the husband or wife of a party or person interested except as to confidential communications. Hence, on issue whether certain property was a homestead, wife of owner could testify to declarations at time of purchase or making improvements, indicating an intention of occupying it as a homestead. Steves v. Smith [Tex. Civ. App.] 107 SW 141.

31. In action on life insurance policy, insured's mental condition when he committed suicide was in issue. Held, wife of insured could testify as to facts surrounding his death and his mental condition, these not being facts learned by virtue of the marital relation. Metropolitan Life Ins. Co. v. Thomas [Ky.] 106 SW 1175.

32. Under Rev. Laws 1905, § 4660, communications between husband and wife during the marriage relation cannot be proved by either, whether or not they are confidential in nature. White v. White [Minn.] 112 NW 627.

33. Husband of party competent to testify that he acted as agent for his wife. City of Joplin v. Freeman, 125 Mo. App. 717, 103 SW 130; Smith v. Travel [Okl.] 94 P 529.

34. Relation of principal and agent must exist. Fact that she, at his request, merely engaged in conversation with party with whom he was negotiating, does not render her competent. Donk Bros. Coal & Coke Co. v. Stroetter, 229 Ill. 134, 82 NE 250. Letter from husband to wife relating to sale of cattle held not privileged. Lurty's Curator v. Lurty [Va.] 59 SE 405. Husband may testify as to any business transacted by him for wife as her agent. Smith v. Travel [Okl.] 94 P 529. Where a husband acts as agent for his wife, he may testify to facts occurring when she was not present, though she also testifies in the action. Miller v. Jones [Ky.] 107 SW 783. The wife may testify as to facts becoming known to her when acting as agent for her husband, and the husband may also testify to facts known exclusively by him. So held in forcible entry action where wife made the lease in husband's absence. Monahan v. Schwartz [Ky.] 108 SW 285. In the purchase of necessaries, the wife is the agent of the husband, though she is living apart from him, and, in an action against him to recover therefor, she is competent to testify as to buying them, their purpose and necessity. Moore v. Rose [Mo. App.] 108 SW 1105.

35. In action against a wife on a special tax bill, it appeared the husband had charge of her property, but had nothing to do with the performance of the work of making sidewalks. Held, he was incompetent to testify that cement was not properly mixed, that being a matter outside the scope of his agency. City of Joplin v. Freeman, 125 Mo. App. 717, 103 SW 130.

36. In action by widow to recover money alleged to have been loaned by her to defendant, she was competent to testify that she owned the money, her husband having turned the farm over to her and given her the proceeds. Comp. Laws, § 10,213, prohibiting either spouse from testifying against the other, does not apply. Leonard v. Piggott [Mich.] 15 Det. Leg. N. 294, 116 NW 366.

37. Wife incompetent to prove desertion where there was no personal service upon husband residing in another state. Penny v. Penny, 34 Pa. Super. Ct. 88.

38. Under Acts 1904, p. 78, No. 60, that a wife cannot testify against her husband as to any conversation by him to her or to another does not exclude proof by the wife of a conversation tending to support the defense being made by her husband. Mead v. Owen, 80 Vt. 273, 67 A 722.

39. Held error to refuse testimony of husband refuting testimony of witness concerning conversation between wife and said witness. Ames v. Thren, 125 Ill. App. 312.

40. Code Civ. Proc. § 831. Suffin v. Suffin, 119 App. Div. 852, 104 NYS 839.

41. P. L. 1900, p. 363, § 5. Rust v. Oltmer [N. J. Err. & App.] 67 A 337.

42. Rust v. Oltmer [N. J. Err. & App.] 67 A 337.

tion contains a count for criminal conversation and also a count for alienating the affections of the wife, testimony of both husband and wife should be admitted,[43] but the court, in its charge, should limit the testimony as to the count for criminal conversation to the proof of the marriage.[44] Where the testimony of the husband has been received, and the count on alienation of the wife's affections has been abandoned, it is prejudicial error to refuse to so limit the husband's testimony.[45] Where one spouse calls the other as a witness, the adverse party has the right to cross-examine.[46]

In criminal prosecutions See 8 C. L. 2367 against one spouse, the other is not usually a competent witness.[47] Common-law marriages are within the rule,[48] and any doubt as to the existence of the relation should be resolved in favor of accused and against the competency of the witness.[49] Where several persons are tried together under a joint indictment, the wife of neither of the defendants is a competent witness against a codefendant of her husband where her testimony in any way affects the interests of her husband.[50] Similarly, the wife of a person charged with the same offense as defendant and whose case is pending is incompetent to testify, upon defendants' trial, to facts incriminating her husband.[51] But in a prosecution for homicide it was held that the wife of defendant's brother was competent to testify that her husband, and not defendant, did the killing.[52] A wife, testifying in behalf of her husband in a criminal prosecution, may be cross-examined as to the subject-matter of her direct examination, but not as to any new matter.[53] In Nebraska the wife may be a competent witness against the husband in statutory rape.[54] The Oregon statute making privileged communications between husband and wife is held not to apply in criminal prosecutions.[55] The practice of calling the wife to testify against the husband, thereby compelling him to object and prejudice his case is condemned in Washington.[56] As is also the practice of compelling the wife, by indirect means, to furnish evidence against her husband.[57] A statement which is a part of the res gestae may be proved in a criminal prosecution though the person making it becomes the wife of accused prior to the prosecution.[58]

43. Testimony of husband admitted, tending to show adultery by wife. Error to exclude testimony of wife. Rust v. Oltmer [N. J. Err. App.] 67 A 337.

44, 45. Rust v. Oltmer [N. J. Err. & App.] 67 A 337.

46. Where a wife calls her husband as a witness, the adverse party may cross-examine him as to all matters brought out on the direct examination. Percival v. Jack, 4 Cal. App. 199, 90 P 555.

47. Allowing wife of accused to testify against him held prejudicial error. Porter v. U. S. [Ind. T.] 104 SW 855. A **former wife** is a competent witness against her former husband in a prosecution of him for perjury in the action in which they were divorced. B. & C. Comp. § 1401 does not apply. State v. Luper [Or.] 95 P 811. Former wife could testify against her former husband, in a prosecution for perjury committed in divorce action, as to location of family dwelling and her actions and that she did not desert him, no confidential communications being involved. Id.

48. Evidence sufficient to show Indian man and woman were living as man and wife so as to constitute common-law marriage, and hence wife could not testify against husband. Porter v. U. S. [Ind. T.] 104 SW 855.

49. Whether accused was husband of female witness. Porter v. U. S. [Ind. T.] 104 SW 855.

50. Woodward v. State, 84 Ark. 119, 104 SW 1109.

51. Spencer v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 408, 106 SW 386.

52. Hardin v. State, 51 Tex. Cr. App. 559, 19 Tex. Ct. Rep. 231, 103 SW 401.

53. Since wife cannot testify against husband under Code Cr. Proc. 1895, art. 775. Stewart v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 592, 106 SW 685.

54. Harris v. State [Neb.] 114 NW 168.

55. State v. Luper [Or.] 91 P 444. Hence, in a prosecution of the husband for perjury for falsely swearing to a complaint for divorce on the ground of desertion by the wife, it was held proper to allow him to testify to statements by her indicating an intention to desert him. Construing B. & C. Comp. § 724. State v. Reyner [Or.] 91 P 301.

56. State v. Winnett [Wash.] 92 P 904.

57. In prosecution for rape where state sought to prove pregnancy of woman who had become defendant's wife, and physician had just testified thereto, it was held error to call the wife to court room ostensibly to allow the physician to identify her as the woman he had examined, since the jury could observe her condition, and she was thus compelled to testify against her husband. State v. Winnett [Wash.] 92 P 904.

58. McMichael v. State [Tex. Cr. App.] 93 SW 723.

(§ 4) *D. Miscellaneous relations.*See 8 C. L. 2388—The privacy of papers, the private nature of a witness' knowledge, or the fact that disclosure may injure a third person, are not reasons for withholding facts pertinent and material to an investigation, judicial or legislative, once the power to conduct the investigation be established.[59]

§ 5. *Credibility, impeachment, and corroboration of witnesses. A. Credibility in general.*See 8 C. L. 2366—The credibility of witnesses [60] and whether they have been successfully impeached [61] are questions for the jury. The uncorroborated testimony of witnesses believed to have willfully testified falsely to a material fact may be wholly disregarded.[62]

*Impeaching and discrediting in general.*See 8 C. L. 2370—Cross-examination for the

59. Banker cannot withhold name of person who deposits securities. Interstate Commerce Commission v. Harriman, 157 F 432.

60. Competency of witnesses is for the court; the value of weight of their testimony for the jury. Parkersburg Nat. Bk. v. Hannaman [W. Va.] 60 SE 242. Charge on credibility proper in absence of requests for more specific charge. James v. State, 1 Ga. App. 779, 57 SE 959. Preponderance of evidence alone is not determined by number of witnesses; jury may consider corroborating circumstances. Indianapolis, etc., R. Co. v. Bennett, 39 Ind. App. 141, 79 NE 389. The law does not presume that a witness tells the truth, nor does it presume the contrary. The question of credibility of testimony is for the jury, and it is error to submit the question with an instruction, in effect, that unimpeached witnesses are presumed to tell the truth. State v. Halvorson [Minn.] 114 NW 957. It is error to charge that a witness, who has not been impeached, is presumptively testifying truthfully, since his testimony may be discredited by its own inherent weakness or improbability. Elder Dempster & Co. v. Menge [C. C. A.] 160 F 341. It is the duty of the jury to reconcile conflicting evidence if possible, but if they cannot do so, they are to determine which witnesses they will believe, taking into consideration their appearance, frankness, or lack thereof, opportunity to know the facts, motive, corroboration, etc. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Jury must determine weight of testimony and may consider the appearance, demeanor, and manner of the witness, and all the facts and circumstances shown, and may disregard testimony of certain witnesses. Howard v. Louisville R. Co. [Ky.] 105 SW 932. While the state cannot impeach a witness it has introduced, unless state's counsel is shown to have been entrapped, the jury is not obliged to believe the witness and may convict defendant, though testimony of such state's witness is in his favor. Barber v. State [Ga. App.] 60 SE 285. Party testifying in his own behalf should be allowed to state where he lived and what business he was engaged in, so that jury could properly weigh his testimony. Musselliam v. Cincinnati, etc., R. Co., 31 Ky. L. R. 908, 104 SW 337. Though two witnesses for the state disagreed as to the facts and jury could acquit or convict according to which they believed, defendant was not entitled to acquittal because the state must vouch for its witness; the credibility of the witnesses was exclusively for the jury, who could believe either. Alexander v. State, 1 Ga. App. 289, 57 SE 996.

61. Instruction held not erroneous as taking from the jury the issue whether a witness had been successfully impeached. Atlanta, etc., R. Co. v. Hudson, 2 Ga. App. 352, 58 SE 500. Instruction held improper, but not reversible error, which told jury they were "sole judges of facts and of credit to be given witnesses," etc. American Forwarding & Mercantile Co. v. Lindsay Chair Co., 129 Ill. App. 548. That a witness on cross-examination testifies to matters slightly inconsistent with his testimony in chief does not warrant the court in rejecting the testimony, its weight and credibility being for the jury. Steele v. State [Neb.] 113 NW 798. Charge that, if state's witnesses exhibited bias or anger against defendant and satisfied the jury that they had not testified truly and were not worthy of belief, and the jury thought their testimony should be disregarded, they might disregard it. held proper. Burkett v. State [Ala.] 45 S 682.

62. Charge on impeachment of witness and duty of court to disregard testimony of impeached witness held to conform to Civ. Code, 1895, § 5295. Harris v. State, 1 Ga. App. 136, 57 SE 937. Instruction that "the testimony of one credible witness is entitled to more weight than the testimony of many others, if as to those other witnesses the jury have reason to believe and do believe, from the evidence and all the facts before them, that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses or by circumstances proved in the case," and that it is the duty of the jury to consider the whole of the evidence and to render their verdict in accordance with the weight of all the evidence in the case," approved as applicable to the case and correct. Kemp v. Slocum [Neb.] 110 NW 1024. Under Code Civ. Proc. § 2061, subd. 3, providing that a witness who has testified falsely in part is to be "distrusted" in other parts, an instruction that jury might "disregard" or "discard" the entire testimony of such a witness was not objectionable. Whitaker v. California Door Co. [Cal. App.] 95 P 910.

purpose of discrediting the witness is proper,[63] and the extent of such examination is largely discretionary with the trial court.[64] While in general the cross-examination should be confined to the subject of the direct examination,[65] considerable latitude is allowed when the purpose is to impeach the witness.[66] Impeaching evidence may be admitted out of the usual order of proof under certain circumstances,[67] and a witness may in the discretion of the court, be recalled to lay a foundation for impeachment,[68] but in Illinois impeaching testimony cannot be introduced in surrebuttal.[69] The more usual methods of impeaching or discrediting a witness are more fully discussed in succeeding paragraphs.[70] In general, the testimony of a witness may be discredited by proving facts contrary to those testified to by him,[71] or tending to show such testimony improbable,[72] or by showing acts [73] or statements [74] of the witness or

63. That a cross-examination of a witness shakes the credibility or demonstrates the inaccuracy and unreliability of evidence given on the direct examination is no ground for striking it out. Platt v. Rowand [Fla.] 45 S 32. Where defendant set up an alibi and testified that he was sick, state could properly cross-examine as to the nature and severity of his sickness, though his answers would tend to show that he had a discreditable disease. Moore v. State [Tex. Cr. App.] 107 SW 355. Acts and declarations of a witness, tending to show hostility or inconsistent position, may be inquired into on cross-examination and, if denied, may be proved by other witnesses. Hoagland v. Canfield, 160 F 147.

64. Southworth v. State [Tex. Cr. App.] 109 SW 133. The extent of the cross-examination for the purpose of impeaching the credibility of a witness must be left largely to the discretion of the trial court. City of Greenville v. Spencer, 77 S. C. 50, 57 SE 638. Discretion not abused in refusing to allow a general question on cross-examination as to some trouble had by witness. Griffin v. Forrester [S. C.] 61 SE 389.

65. While the accused should not be cross-examined as to matters not included in the subject-matter of his direct examination, within the limits of such matter he may be asked any question having a tendency to shake the effect of his testimony. People v. Manasse [Cal.] 94 P 92.

66. On cross-examination a considerable degree of latitude is permitted for the purpose of testing the memory, bias, accuracy, or sincerity of the witness. People v. Manasse [Cal.] 94 P 92.

67. When a witness for the state, called in rebuttal, contradicts the testimony of accused upon a material point, accused should be allowed, if he has laid a proper predicate, to impeach the state's witness. State v. Anderson [La.] 45 S 267. Defendant denied having employed an attorney and on cross-examination denied certain conversation with attorney. Held, though attorney had previously testified that he was employed, it was proper to allow him to be recalled to testify to the conversations. Rhomberg v. Avenarius [Iowa] 112 NW 548.

68. Defense should have been allowed to recall witness for state who had just left the stand to lay foundation for impeaching him. Johnson v. State [Fla.] 46 S 154.

69. Evidence held properly excluded. Illinois Steel Co. v. Ferguson, 129 Ill. App. 396.

70. See § 5, subsecs. B, C and D.

71. In action to quiet title, defendant claimed by adverse possession and testified that no one had ever before questioned her title. Held, judgment in prior action by which title was adjudged to be in plaintiff, and ejecting defendant, was admissible to contradict defendant. Nemo v. Farrington [Cal. App.] 94 P 874. Where a witness testifies to a material fact, he can be impeached by merely showing that the facts testified to are untrue. Defendant should have been allowed to contradict testimony that he had tried, through "emissaries," to induce prosecuting witness to go away. State v. Constantine [Wash.] 93 P 317. Where plaintiff, on direct examination, not only denied sale of oil shares to defendant, but also denied sale to any one, he was properly cross-examined as to sales to third persons, and third persons were properly allowed to testify to sales by plaintiff to them. Crosby v. Wells, 73 N. J. Law, 790, 67 A 295. Where, in a personal injury case, a physician testified that he had only given plaintiff two certificates, which stated that plaintiff said he was disabled, proof that he had given four, which stated that plaintiff was unable to work, was admissible to discredit him. Galveston, etc., R. Co. v. Janert [Tex. Civ. App.] 107 SW 963. Where witness testified to marriage to and cohabitation with a party, it was competent on cross-examination to ask if he had not represented himself to others as an unmarried man, and to show transactions in which he so held himself out. Stodenmeyer v. Hart [Ala.] 46 S 488. Where defendant, testifying in his own behalf in prosecution for illegal sale of liquor, claimed he had never sold intoxicants, a cross-examination in regard to previous sales was held not improper. Southworth v. State [Tex. Cr. App.] 109 SW 133.

72. A fact which bears on the improbability of evidence is competent. Eswein v. Hodgkinson, 108 NYS 531.

73. Conduct of parties inconsistent with claims made at trial may be shown. Wefel v. Stillman [Ala.] 44 S 203. Witness denied accompanying defendant, accused of rape, and prosecutrix to lodging house, and said she knew prosecutrix only slightly. Held, proper on cross-examination to ask if she had not written prosecutrix to meet her and defendant and had not tried to per-

other circumstances [75] inconsistent with his testimony,[76] or tending in some manner to discredit it. Fact that witness is paid for attendance in excess of statutory fees may be shown.[77] Facts tending to show motives for falsifying are competent.[78] The

suade her to leave the city with her. State v. Katon [Wash.] 91 P 250. Where plaintiff claimed he received certain injuries when ejected from a train, and it appeared he took a certain journey before consulting a physician, the purpose of such visit could be shown as bearing on the question whether he was exaggerating his condition. Schneider v. Great Northern R. Co. [Wash.] 91 P 565. Where two witnesses were introduced by accused to impeach the prosecuting witness, deputy sheriff, for truth and veracity, it was proper to admit a petition signed by such witnesses stating that such person was a safe, reliable, truthful and honest man, and asking his appointment as deputy. Norris v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 361, 106 SW 136.

74. See, also, post, § 5D. Mother of defendant in homicide case testified to an alibi, and denied making a statement in which she admitted that defendant did the killing. Held, state could prove that she made the statement. Holder v. State [Tenn.] 104 SW 225. Where witness said he had never advised or talked with testatrix about her will, proof that he had said the will was as he told her to make it was competent. Gorham v. Moore [Mass.] 84 NE 436.

75. In an action for injuries to one struck by a horse and wagon driven by defendant's servant, there was a conflict in the testimony of the servant and plaintiff's witnesses as to the speed at which he was driving. Held proper to prove by the servant that he was arrested for fast driving on that occasion, this tending to discredit his testimony. Mattingly v. Montgomery [Md.] 68 A 205. Where witness testifies that an adopting parent told county clerk not to record deed of adoption, evidence that parent intended to adopt the child and did everything he thought was necessary was admissible to contradict witness. J. M. Guffey Petroleum Co. v. Hooks [Tex. Civ. App.] 20 Tex. Ct. Rep. 254, 106 SW 690. In action for money loaned, defendant denied having been in needy circumstances. Held proper to prove that her church had given a party to aid her, this tending to contradict her testimony. Lincoln v. Hemenway [Vt.] 69 A 1053. Where witness testified that he had examined plaintiff, in personal injury action, proof that he had arrested the driver of the team which injured plaintiff and took him to the station house was admissible to show that he could not have accompanied plaintiff to the hospital, or known that he was unconscious. Hoagland v. Canfield, 160 F 146.

76. In prosecution for rape, certain facts inconsistent with testimony of prosecutrix held admissible as affecting her credibility. People v. Fong Chung, 5 Cal. App. 587, 91 P 105. Deposition taken in another case, but which witness had refused to sign, **held inadmissible** to contradict her. Clark v. Gurley [Tex. Civ. App.] 20 Tex. Ct. Rep. 415, 106 SW 394. A statement made by a witness and later corrected by him cannot be contradicted. Gorham v. Moore [Mass.] 84 NE 436. Certain testimony properly rejected because not in conflict with witness' testimony, sought to be impeached. Todd v. Crete [Neb.] 113 NW 172. Where witness had testified that he did not hear a certain person make a certain remark, it was proper to exclude a question on cross-examination whether he heard any person make a remark of the same kind. International, etc., R. Co. v. Howell [Tex. Civ. App.] 19 Tex. Ct. Rep. 123, 105 SW 560. Where defendant in homicide case testified in his own behalf, an affidavit for a continuance stating what defendant believed an absent witness would testify to was inadmissible to impeach defendant, though witness did not testify as defendant had stated. Baker v. State [Ark.] 107 SW 983. In personal injury action, testimony by defendant's witness that plaintiff did not tell witness he was injured, though he had ample opportunity to do so, was held not inconsistent with and hence not impeachable by testimony of plaintiff's witness that plaintiff did on some occasion, not identified as the one spoken of by defendant's witness, tell such witness of his injury. Louisville, etc., R. Co. v. Varner, 129 Ga. 844, 60 SE 162. Where plaintiff, in personal injury action, said she was injured in March and put her claim for damages in the hands of an attorney shortly thereafter, she could not be impeached by proof that no claim was made until May, her attorney being responsible for the delay. Sturgis v. Fifth Ave. Coach Co., 122 App. Div. 658, 107 NYS 270.

77. Chicago City R. Co. v. Shreve, 128 Ill. App. 462. In a personal injury action by a brakeman, it could be shown that he had made false answers, under oath, to questions asked when he was employed, as to previous litigation with other railroads. Galveston, etc., R. Co. v. Harris [Tex. Civ. App.] 20 Tex. Ct. Rep. 886, 107 SW 108. Evidence that, after witnesses were sworn and placed under the rule, defendant assaulted one of them under a pretext of trying to collect a bill, but in fact to intimidate witness and prevent his testifying, was held admissible on issue of defendant's credibility. Horsey v. Slayton & Co. [Tex. Civ. App.] 19 Tex. Ct. Rep. 611, 104 SW 513. Where, in prosecution for homicide, witness testified that he, and not defendant, did the killing, it was proper to show on cross-examination whether witness believed he could be prosecuted; also proper to show that this defense was a fabrication. Hardin v. State, 51 Tex. Cr. App. 559, 19 Tex. Ct. Rep. 231, 103 SW 401.

78. The fact that a litigant has stated his case to several attorneys, who refused to undertake it, may be considered by the jury on the issue of credibility of such party, tending to show a motive to tell a different story on the stand. Pereira v. Star Sand Co. [Or.] 94 P 835. Where the leading witness in a case, who is substantially a party, has changed his testimony upon a second trial so as to conform to the requirements of a finding on appeal from the first trial,

fact that a witness was intoxicated at the time of the happening of the events about which he testifies is relevant and may be shown without first asking the witness upon cross-examination whether he was intoxicated,[79] but the religious belief of witness is inadmissible to affect his credibility.[80] Where it is shown that a witness was coached while on the stand, it need not be shown as to what particular questions he was coached.[81] It cannot be shown that a witness refused to testify at a coroner's inquest on the ground that he might incriminate himself.[82] Alleged impeaching evidence must be directed to the testimony of some particular witness.[83]

A party cannot ordinarily impeach his own witness [84] unless he has been surprised or entrapped by the witness who has given testimony prejudicial to the party calling him,[85] in which case the latter may contradict the witness [86] by proving facts [87] or prior statements [88] inconsistent with his present testimony, but such statements,

his testimony should be received with caution. Czermak v. Wetzel, 109 NYS 698. The presumption that a witness speaks the truth may be overcome by the manner in which he testifies, by the character of his testimony, or by evidence affecting his motives. B. & C. Comp. § 695. Pereira v. Star Sand Co. [Or.] 94 P 835.

79. Bliss v. Beck [Neb.] 114 NW 162.

80. Question "Are you of Jewish faith?" held improper. Starks v. Schlensky, 128 Ill. App. 1.

81. Witness coached by nods and shakes of the head by her sister. Heath v. Hagan [Iowa] 113 NW 342.

82. Motorman testifying at trial for defendant, in action for death of child, could not be so cross-examined. Masterson v. St. Louis Transit Co., 204 Mo. 507, 103 SW 48.

83. Books of an association showing certain dealings between it and an officer held inadmissible in prosecution for asking and receiving a bribe for securing immunity from investigation for such association to impeach people's witnesses, officer not having testified in the case. People v. Emmons [Cal. App.] 95 P 1032. In rape case, proof of insane delusions of mother of prosecutrix, and an attempt to extort money by charges against another, was inadmissible, prosecutrix not being connected therewith. Battles v. State [Tex. Cr. App.] 109 SW 195.

84. See 8 C. L. 2372. A party calling a witness has no right to seek upon his redirect examination to discredit the testimony which he has given and to impugn his motives. Chicago Union Trac. Co. v. Arnold, 131 Ill. App. 599. A party is bound by the testimony of his own witnesses. Herancourt v. Taylor, 29 Ky. L. R. 1299, 97 SW 359. State improperly permitted to impeach its own witness. Scott v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 168, 105 SW 796. Where a witness was not called by plaintiff and did not testify for her, proof of statements made by him to others, offered by defendant, was inadmissible. Salchort v. Reinig [Wis.] 115 NW 132. Where a party has introduced a deposition taken by the adverse party, he makes deponent his own witness and cannot impeach him by proving by another statements denied by deponent in his deposition. Compagnie Des Metaux Unital v. Victoria Mfg. Co. [Tex. Civ. App.] 107 SW 651. Plaintiff not allowed to impeach a witness called by him, though the witness was afterwards called by defendant. Baltimore, etc., R. Co. v. State [Md.] 69 A 439. A party cannot ordinarily impeach his own witness unless he has been entrapped by the witness. Alexander v. State, 1 Ga. App. 289, 57 SE 996.

85. The state may contradict its own witness only when the witness has testified to some affirmative fact to the state's surprise. Benson v. State, 51 Tex. Cr. App. 367, 19 Tex. Ct. Rep. 257, 103 SW 911. In order that a party calling a witness may impeach him by proof of contradictory statements, it must appear that witness has given testimony adverse and damaging to the party. Testimony of engineer held damaging in personal injury case (Zipperlen v. Southern Pac. Co. [Cal. App.] 93 P 1049), and that the party has been in fact surprised thereby. Id.

86. Where a party is surprised by the answer of a witness, which is hurtful to him, he may contradict the witness. Jeter v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 598, 106 SW 371.

87. A party introducing a witness is not necessarily bound by his positive testimony to a particular fact, if the witness himself by his other testimony tends to discredit such particular statement. Rule applied where adverse party was called as witness. Cook v. Mallory, 30 Ky. L. R. 846, 99 SW 939.

88. A party producing a witness may prove previous statements contrary to his testimony. Martin v. Hill, 30 Ky. L. R. 1110, 100 SW 343. It is within the discretion of the trial court to allow counsel to ask a witness called by him, by whose testimony he has been surprised, whether the witness had not at a prior time made a statement inconsistent with his testimony. H. F. Cady Lumber Co. v. Wilson Steam Boiler Co. [Neb.] 114 NW 774. Where proponents of a will were compelled to produce a certain witness who gave testimony adverse to them, they were properly allowed to show by their attorney that witness had made a different statement to him, and that they were surprised by her testimony. In re Johnson's Estate [Cal.] 93 P 1015. Proper to allow counsel to ask hostile witness, called by his side, if he had not testified differently at prior hearing. Lynch v. Bronson [Conn.] 69 A 538. No abuse of discretion in allowing county attorney to ask a witness called by him as to prior statements, where witness appeared to

so proved, are not substantive evidence for any purpose.[89] It is held that the fact that the party has been surprised should preferably be shown by the testimony of sworn witnesses,[90] but it is not an abuse of discretion for the court to accept the unsworn statement of counsel.[91] By some courts it is held that the rule against impeachment of one's own witness denies the right to impeach the general reputation of the witness for truth [92] but does not deny the right to show that the whole or part of the testimony of the witness is untrue.[93] A party may call the attention of his witness to former testimony for the purpose of refreshing his recollection.[94] In Kentucky it is held that a party is bound by the testimony of an adverse party, necessarily called,[95] where no effort to impeach or contradict such witness in the mode allowed by statute has been made.[96] In Wisconsin where a party calls as a witness an officer of a corporation which is the adverse party, under the statute permitting examination of the adverse party, or such an officer,[97] he may thereafter rebut such witness' evidence by counter or impeaching evidence, including proof of previous inconsistent statements.[98]

A witness cannot ordinarily be contradicted or impeached as to collateral matters,[99] though the court is sometimes held to have discretionary power to allow such

be reluctant and attorney claimed surprise. Southworth v. State [Tex. Cr. App.] 109 SW 133.

89. Under Code Civ. Proc. § 596. Martin v. Hill, 30 Ky. L. R. 1110, 100 SW 343.

90, 91. Zipperlen v. Southern Pac. Co. [Cal. App.] 93 P 1049.

92. Buchanan v. Buchanan [N. J. Eq.] 68 A 780.

93. As by proving facts contrary to those testified to by the witness. Buchanan v. Buchanan [N. J. Eq.] 68 A 780. One who offers a witness may not impeach him, but may show that facts are other than what he testified to, and may do this by statements of the witness himself as well as by other witnesses, and by facts and circumstances. Smith v. Atlantic & C. Air Line R. Co. [N. C.] 61 SE 575. A party calling a witness is not precluded from proving the truth of any particular fact by any other competent testimony in direct contradiction to what such witness may have testified. Holland v. Missouri Pac. R. Co. [Mo.] 109 SW 19. The rule that a party cannot impeach his own witnesses is not infringed by propounding a question to a witness which, if answered favorably, will tend to contradict other witnesses. Seerie v. Brewer [Colo.] 90 P 508.

94. Proper to ask a witness if he had not testified to certain facts on a former hearing where he says his memory is thereby refreshed. This is not impeaching one's own witness. Mahoney's Adm'r v. Rutland R. Co. [Vt.] 69 A 652.

95. Plaintiff held bound by uncontradicted testimony of defendants whom he called. Herancourt v. Taylor, 29 Ky. L. R. 1299, 97 SW 359.

96. Civ. Code Proc. § 596 provides that a party cannot impeach his witness by evidence of bad character, unless it was indispensable that the party should produce him, but that he may contradict him by proof of previous contradictory statements or by other evidence. Plaintiff held bound by defendant's testimony when he called them and made no effort to impeach or contradict them. Herancourt v. Taylor, 29 Ky. L. R. 1299, 97 SW 359.

97, 98. St. 1898, § 4068. Corbett v. Physicians' Casualty Ass'n of America [Wis.] 115 NW 365.

99. See 8 C. L. 2374. Armstrong v. Van DeNeste, 132 Ill. App. 601; Gorman v. Moor [Mass.] 84 NE 436. Previous contradictory statements on immaterial matters do not operate to impeach a witness. Cook v. Lynch, 128 Ill. App. 117. The general rule is that the answer on the cross-examination of a witness respecting any fact irrelevant to the issue is conclusive (Adams v. State [Fla.] 45 S 494), and irrelevant questions cannot be put to a witness for the mere purpose of impeaching his credit by contradicting him. (Id.). Testimony on a collateral issue cannot be contradicted. Rice v. State, 51 Tex. Cr. App. 255, 19 Tex. Ct. Rep. 353, 103 SW 1156; Moody v. Rowland [Tex. Civ. App.] 102 SW 911; Robinson v. Kistler [W. Va.] 59 SE 505. A contradiction as to an immaterial fact does not affect the credibility of the witness. Instruction erroneous because not limiting impeachment by contradiction to contradiction on material matters. Southern R. Co. v. Hundley [Ala.] 44 S 195. A witness in a civil case cannot be discredited or impeached by requiring him to testify to discreditable acts on his part having no material bearing upon the issues. Moody v. Rowland [Tex. Civ. App.] 102 SW 911. A witness who on cross-examination has denied certain collateral facts cannot thereafter be contradicted in regard thereto. Keener v. State, 51 Tex. Cr. App. 590, 19 Tex. Ct. Rep. 313, 103 SW 904. Where the cross-examination covers collateral matters not germane to the issues or the subject-matter of the direct examination, the answers of the witness are binding on the party conducting the cross-examination. Hollen v. Crim [W. Va.] 59 SE 172. Improper to contradict defendant by showing inconsistencies in testimony before grand jury and at trial as to collateral and immaterial matters. Cramer v. Harmon, 126

a course,[1] and the fact that incompetent matters are thereby brought to the jury's attention does not render questions as to testimony given by witness at a previous trial inadmissible.[2] A witness who has testified to the bad reputation of another may be required to specify the statements of individuals on which his testimony rests,[3] though it is generally held that his statement that he heard certain persons make such statements cannot be contradicted.[4]

(§ 5) *B. Character and conduct of witnesses.* 1. *In general.* See 8 C. L. 2375 Proof of the general moral character of a witness is admitted in some jurisdictions and excluded in others.[5] Proof of particular acts of wrongdoing not amounting to crimes, connection of which may be shown under some statutes,[6] is usually excluded.[7] Evidence tending merely to degrade is incompetent.[8]

Mo. App. 54, 103 SW 1086. Where cross-examination went outside the scope of the direct examination, the witness became the witness of the party examining him, and the evidence and witness being competent, there was no reversible error. Bispham v. Turner, 83 Ark. 331, 103 SW 1135. Exclusion of evidence tending to contradict plaintiff on collateral matters held not a ground for new trial. Merwin v. Backer [Conn.] 68 A 373. Certain matter held collateral and inadmissible to contradict or impeach a witness. Pullman Co. v. Vanderhoven [Tex. Civ. App.] 20 Tex. Ct. Rep. 889, 107 SW 147. Brakeman, witness, could not be contradicted by a statement relating to an immaterial matter. Owensboro City R. Co. v. Allen [Ky.] 108 SW 357. In action by engineer against railway company for injuries received in a collision with a preceding train, the engineer denied, on cross-examination, habitual disregard of signals to stop. Held proper to exclude all questions whether he had disregarded such signals on certain occasions. Galveston, etc., R. Co. v. Quinn [Tex. Civ. App.] 19 Tex. Ct. Rep. 825, 104 SW 397. In prosecution for violating local option law, proof that witnesses for accused kept liquor in lockers for private use was inadmissible to impeach them. Ross v. State [Tex. Cr. App.] 109 SW 152, 153.

1. The extent of cross-examination on collateral matters rests in the discretion of the trial court. Carey v. Brooklyn Heights R. Co., 108 NYS 1034. Not abuse of discretion to ask witness on cross-examination if he had been drinking at time of injury in question or on day of trial. Armour v. Skene [C. C. A.] 153 F 241. The impeachment of the credibility of a witness by proof of contradictory statements is always relevant and material, and it is no objection that the impeaching statement necessarily includes some act or circumstance not independently admissible in evidence. State v. Mitchell, 119 La. 374, 44 S 132.

2. Witness may be asked if he did not testify to a certain effect at a previous criminal action, though the result of that action is inadmissible. Reisch v. People, 229 Ill. 574, 82 NE 321.

3, 4. Harms v. Proehl [Minn.] 116 NW 587.

5. Held admissible: Proof that principal witness for state visited houses of ill repute and consorted with low women held admissible under circumstances of the case. People v. Fiori, 108 NYS 416. In prosecution for rape, the credibility of the prosecuting witness may be attacked the same as any other witness, as by proof of general bad moral character. State v. Blackburn [Iowa] 114 NW 531. General bad character as a ground of impeachment refers to general bad "moral" character, the word "moral" being used in broadest sense. Instruction approved. Sparks v. Bedfo d [Ga. App.] 60 SE 809. Some inquiry may be made of every witness as to the morality of his past life on the assumption that immorality in some other respects may have a bearing upon his character for veracity. Dungan v. State [Wis.] 115 NW 350. In Missouri the general reputation of a witness respecting other traits of character may be shown as affecting his credibility. Reputation for selling liquor illegally held admissible against accused, who was a witness. State v. Oliphant, 128 Mo. App. 252, 107 SW 32. In Alabama the general bad character of a witness may be proved to impeach the witness, but the proof should be confined thereto. Thus, want of chastity of female witness cannot be shown. Swint v. State [Ala.] 45 S 901.

Held inadmissible: Evidence that a female witness' reputation for morality was bad held inadmissible. In re Durant [Conn.] 67 A 497. Defendant when sworn in his own behalf may be cross-examined as to past transactions which affect his credibility as a witness, but not as to such as affect only other traits of character. State v. Mills [S. C.] 60 SE 664. Evidence of the bad moral character of the witness is not competent to impeach him. Evidence of immoral life and character inadmissible, no attempt being made to attack character for truth and veracity. Price v. Wakeham [Tex. Civ. App.] 107 SW 132. In the impeachment of a witness, the inquiry should be confined to his general reputation for truth, and should not extend to general moral character. Proof of indictment for arson and pistol carrying held inadmissible. Missouri, etc., R. Co. v. Creason [Tex.] 20 Tex. Ct. Rep. 458, 107 SW 527. This rule extends to the cross-examination of the witness. Id. Proof that a party was a "sporting man" inadmissible to impeach him. Kalteyer v. Mitchell [Tex. Civ. App.] 110 SW 462. In action by married woman for personal injuries, proof that her first child was born three months after her marriage was inadmissible to impeach her. City of San Antonio v. Wildenstein [Tex. Civ. App.] 109 SW 231.

6. See post, § 5 B2.

7. Under Civ. Code Proc. § 597, accused

The reputation of a witness for truth and veracity See 8 C. L. 2375 may be shown.[9] The witness to such reputation must be shown to be qualified.[10] While there is no arbitrary rule fixing the limits as to time and locality within which the general reputation of a witness for truth and veracity may be inquired into,[11] the proof should, in general, be confined to a reasonably recent period.[12]

(§ 5B) 2. *Accusation and conviction of crime.* See 8 C. L. 2376—Conviction of crime may be proved in most jurisdictions as affecting the credibility of a witness.[13]

cannot be discredited by proof of particular wrongful acts, such as improper relations with a woman. Welch v. Com. [Ky.] 108 SW 863. A female witness cannot be impeached by showing that immoral relations existed between her and a third person, not a witness. City of Greenville v. Spencer, 77 S. C. 50, 57 SE 638. Whether witness has been arrested for stealing is not admissible to affect his credibility. State v. Stewart [Del.] 67 A 786. In prosecution for assault with intent to rape, proof of specific acts of adultery of prosecutrix and that she exhibited to a man a photograph of herself in the nude was inadmissible to impeach her as a witness. State v. Arnold [N. C.] 60 SE 504. Proper to reject testimony that a witness had been guilty of adultery and that her husband had punished a man found in her room, since under Code Civ. Proc. § 2051 proof of particular acts is inadmissible to impeach a witness, except conviction of a felony. People v. donreal [Cal. App.] 93 P 385. The bad character for chastity and virtue of a female witness cannot be proved. Proof should be confined to general bad character. Swint v. State [Ala.] 45 S 901. Overcertification of checks by bank cashier, for which he was tried but not sentenced, held not an offense such as to render cashier unworthy of belief as a witness. James McCreery Realty Corp. v. Equitable Nat. Bk., 54 Misc. 508, 104 NYS 959.

8. Held improper to allow husband of female witness to testify that he had been divorced from her on the ground of her willful desertion, since it tended to degrade her and was not a proper mode of impeaching her. Wallen v. Wallen [Va.] 57 SE 596.

9. Where accused sought to show testimony of prosecutrix on examining trial was different and not so full as on final trial. Brown v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 555, 106 SW 368. Accused who becomes a witness in his own behalf may, under Rev. St. 1899, § 2637, be impeached by evidence as to his reputation for truth and veracity. State v. Baker, 209 Mo. 444, 108 SW 6. Where a witness testifies that the reputation of another witness for truth and veracity in the community where he lives is bad, he may also be asked if he would believe him on oath; but exclusion of the latter evidence was held not prejudicial. People v. Ryder [Mich.] 14 Det. Leg. N. 912, 114 NW 1021.

10. Where a witness testifies that he knows the reputation of another, that it is bad, and that he would not believe him on oath, but on cross-examination it appears that his testimony is based on dealings with such other only, his testimony is properly stricken, and it is not proper to allow him to add to it on redirect examination. State v. Stewart [Del.] 67 A 786.

11. Reputation of witness at place where he lived nine months before trial, the place being not far from his residence at time of trial, held properly shown. State v. Norman [Iowa] 113 NW 340.

12. Where witness did not know another witness' reputation at time when he made deposition, but his testimony related to a period of several years before, it was inadmissible. Alexander v. Hill [Ky.] 108 SW 225. Where witness had lived in vicinity only a few weeks and had lived in a certain village many years, and then moved to another village, and lived there two or three years, up to within two years of trial, proof that his reputation for truth and veracity was bad in the two villages where he lived was admissible. People v. Mix, 149 Mich. 260, 14 Det. Leg. N. 397, 112 NW 907.

13. Where accused takes the stand in his own behalf, he may be questioned concerning a former conviction of a felony and the particular facts on which his conviction was based. Ochsner v. Com. [Ky.] 109 SW 326. Pen. Code, § 1025, providing that, where one accused of a crime and of a former conviction thereof admits the former conviction, the charge of former conviction cannot be referred to in the trial, does not prevent the people from asking him on cross-examination if he has ever been convicted of a felony for the purpose of impeaching him. People v. Oliver [Cal. App.] 95 P 172. Under Code 1907, § 1795, witness may be examined as to conviction of burglary and petit larceny to impeach him. If he denies on cross-examination, facts may be shown otherwise. Wynne v. State [Ala.] 46 S 459. Conviction of specific crime may be shown under statute. Dungan v. State [Wis.] 115 NW 350. Under Rev. St. 1899, § 4680, where a person accused of violating the local option law may on cross-examination be asked concerning former convictions under the law. State v. Oliphant, 128 Mo. App. 252, 107 SW 32. Under Rev. St. 1899, § 4680, where defendant's paramour was a witness for him in homicide case, it was proper to prove on her cross-examination, and by the justice's record of conviction, that she had pleaded guilty to and been convicted on a charge of adultery. State v. Kennedy, 207 Mo. 528, 106 SW 57. Conviction of crime may be shown to impeach a witness under B. & C. Comp. § 852. Hence judgment of conviction of assault may be considered by jury in determining the credit to be given a witness' testimony. State v. Reyner [Or.] 91 P 301. Proof that accused had been convicted of a felony six years before and had served two terms in penitentiary admissible. Davis v. State [Tex. Cr. App.] 108 SW 667.

In some states only such a conviction as would disqualify at common law may be shown;[14] in others the crime must have been a felony or an infamous one;[15] while in others the crime must have been one involving moral turpitude.[16] The record is the only competent evidence of conviction.[17] To discredit a witness by the record of his conviction of an infamous crime, the record must show the indictment and its return into court.[18] But the party introducing such record need not prove the identity of the witness with the person convicted, the name being identical,[19] although it is erroneous to show incarceration without showing the nature of the crime for which one was convicted.[20] In some states the fact of arrest or indictment for crime may be shown, though the facts establishing commission of the offense are excluded.[21] In others the fact of indictment cannot be shown.[22] In Illinois oral proof of conviction for other than an infamous crime is inadmissible.[23]

(§ 5) *C. Interest and bias of witnesses.*[See 8 C. L. 2377]—Interest in the event of the action[24] or in its prosecution,[25] and any facts tending to show bias or prejudice

14. It is only such a conviction as under the old law would have rendered a witness incompetent that can be introduced under the law as it is today to discredit him, and where, for the purpose of discrediting a witness, a record is offered of conviction of an offense which is not made a crime or misdemeanor under any statute of the state, and is in violation of a city ordinance only, it is not error to sustain an objection to its admission in evidence. August v. Finnerty, 10 Ohio C. C. (N. S.) 433.

15. Hurd's Rev. St. 1905, c. 51, permits proof of conviction of an infamous crime. Hence proof that witness for adverse party had been convicted of rape was admissible. Clifford v. Pioneer Fire Proofing Co., 232 Ill. 150, 83 NE 448. Conviction for either grand or petty larceny may be shown to discredit witness. McLain v. Chicago, 127 Ill. App. 489.

16. Only crimee involving moral turpitude can be shown, hence proof of conviction of illegal sale of liquor is not competent. Wheeler v. State [Ga. App.] 61 SE 409. In prosecution for carrying a pistol, defendant could not be impeached by proof of a former similar charge. Caldwell v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 349, 106 SW 343. A question of a witness whether he had not been indicted for murder is proper as against the objection that murder is not a crime involving moral turpitude. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. In prosecution for robbery, held proper to show on cross-examination of accused that he had been convicted of murdering his wife. Williams v. State, 51 Tex. Cr. App. 361, 19 Tex. Ct. Rep. 211, 102 SW 1134.

17. Proper mode of proving conviction of crime is by record of trial and conviction. Wheeler v. State [Ga. App.] 61 SE 409. The rule that conviction of crime cannot be shown on cross-examination of the witness, but only by the record of conviction, applies where accused is a witness in his own behalf. Commonwealth v. Walsh [Mass.] 82 NE 19.

18, 19. Clifford v. Pioneer Fire Proofing Co., 232 Ill. 150, 83 NE 448.

20. Pioneer Fire-Proofing Co. v. Clifford, 125 Ill. App. 352.

21. Witness may be impeached by showing his arrest, indictment or imprisonment for theft, but the fact of commission of the offense cannot be gone into. Goad v. State [Tex. Cr. App.] 108 SW 680.

22. Witness cannot be asked if he has not been indicted for assault with intent to murder. Watson v. State [Ala.] 46 S 232. A witness may not be discredited by proof that he has been indicted for a misdemeanor. Landy v. Moritz [Ky.] 109 SW 897.

23. Pioneer Fire-Proofing Co. v. Clifford, 125 Ill. App. 352.

24. Plaintiff's interest may be considered on weight of his testimony. Dempster & Co. v. Menge [C. C. A.] 160 F 341. Proper to permit witness to testify as to his financial interest in the result of the suit. Steve v. Bonners Ferry Lumber Co., 13 Idaho, 384, 92 P 363. Any fact which tends to show the interest or lack of interest of a witness in the result of the suit is admissible. Georgia Southern, etc., R. Co. v. Stanley, 1 Ga. App. 487, 57 SE 1042. The fact that a witness is interested in the event of the suit may be shown on cross-examination, and to bring out this fact the witness may be asked what he has done for the party for whom he testifies. Isaac v. U. S. [Ind. T.] 104 SW 588. Where, in prosecution for forging a note, a witness whose name was charged to have been forged on a note testified that she did not sign it, testimony on her cross-examination, showing a motive for falsifying in order to escape liability, should have been received. Sherrod v. State [Miss.] 44 S 813. In prosecution for murder, the interest of defendant may be considered as bearing on his credibility. Burkett v. State [Ala.] 45 S 682. In personal injury action, held proper, on cross-examination of physician who testified to extent of injuries, to ask him questions which if answered affirmatively would show that he was habitually employed by plaintiff's attorney in damage suits, and that his fees were contingent on recovery, and to name certain cases, where he said he could not remember, and ask if he had testifed in them. Horton v. Houston, etc., R. Co. [Tex. Civ. App.] 18 Tex. Ct. Rep. 870, 103 SW 467. But he could not be asked whether his opinions in such cases were correct. Id. Proof that, during trial of personal injury case, a physician who testified for defendant had

on the part of the witness,[26] such as his relations with or hostility toward a party,[27] may be shown and considered as affecting his credibility. Evidence of the hostility of a witness should be direct and positive.[28] The particulars of a difficulty between witness and a party are inadmissible.[29]

(§ 5) *D. Proof of previous contradictory statements.*[See 8 C. L. 2379]—Prior statements of witnesses inconsistent with their testimony[30] upon material issues are

suggested a compromise, was competent to show his interest in defendant's behalf. Louisville R. Co. v. Williams [Ky.] 109 SW 874. Daughter of plaintiff in personal injury action not interested so as to require instruction to that effect, no financial interest being shown. Hazen v. Bay City Trac. & Elec. Co. [Mich.] 15 Det. Leg. N. 304, 116 NW 364.

25. Wife of person accused of adultery was active in prosecution and had given damaging evidence and was active in procuring conviction. Proof that she had tried to dissuade certain persons from testifying for accused should have been admitted. State v. Koller, 129 Iowa, 111, 105 NW 391. That a witness had been asked to contribute to a fund to employ counsel to prosecute the case was immaterial where it did not appear that he in fact contributed. Robinson v. State [Ala.] 45 S 916. In prosecution of several defendants for conspiracy in trial of one, evidence that another had made an effort to stop the prosecution was admissible to impeach his testimony, though it was not competent to show a conspiracy. Napier v. Com. [Ky.] 110 SW 842.

26. Former employe of plaintiff having testified for defendant, plaintiff was properly allowed to testify that he had discharged witness and upbraided him for misappropriating funds and beating a boy. Potter v. Browne, 109 NYS 1076. In action for damages for burning plaintiff's building, plaintiff could show, on cross-examination of a witness, what a detective employed by defendant had said to witness about going to the scene of the fire, the purpose being to show bias or interest of the witness. Louisville, etc., R. Co. v. Sherrell [Ala.] 44 S 631. Where in trespass for conversion of timber a witness testified for defendant, plaintiff could show that he had a suit pending against the witness to show bias on the part of the witness. Gosdin v. Williams [Ala.] 44 S 611. Evidence tending to show feeling or bias on the part of a witness, especially if he be a party, is admissible as affecting his credibility. Goss v. Goss, 102 Minn. 346, 113 NW 690. Where witness who had testified for plaintiff said she had no interest in the case, it was proper to admit a letter written by witness to defendant practically advising him to settle with plaintiff. Schon v. Harlan, 56 Misc. 518, 107 NYS 113. Proper to show that witness for defendant had said he would testify for the side which paid him the most money. Robinson v. Stahl [N. H.] 67 A 577. Efforts of a witness to conceal the fact that he was a material witness may be shown on his cross-examination as tending to discredit his testimony. Rice v. State, 51 Tex. Cr. App. 255, 19 Tex. Ct. Rep. 353, 103 SW 1156. Proof that witness for defendant asked witness for state to give certain testimony in order to send another person (a witness for state) to the penitentiary was admissible to show animus of witness against the state. Sue v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 128, 105 SW 804. That the prosecuting witness had a civil action against defendant for damages pending at the time could be shown to show his interest, but the complaint in such action was inadmissible. State v. Constantine [Wash.] 93 P 317. Remark made by witness out of court held to have no tendency to show bias or prejudice, and hence properly excluded when offered for that purpose. May v. U. S. [C. C. A.] 167 F 1. Where witness gave material testimony for plaintiff, injured by collision with truck, defendant was properly allowed to show that witness, who was a truck driver, had called at defendant's place of business, leaving his name and address and saying "We drivers all stick together." Hoagland v. Canfield, 160 F 146.

27. In a prosecution for homicide, proof of statements by a witness out of court, showing her hostility to deceased, was admissible. Cook v. State [Ind.] 82 NE 1047. Feelings of witness toward accused may be shown, but an offer to show independent acts toward accused, not connected with any specific witness, is properly refused Coffman v. State, 51 Tex. Cr. App. 478, 19 Tex. Ct. Rep. 701, 103 SW 1128. Proper to admit evidence showing bias, prejudice and unfriendly feeling against defendant on the part of a witness for the state. Cook v. State [Ala.] 44 S 549. Error to refuse to permit accused to show that state's witness was hostile and had tried to intimidate witnesses. State v. Rutledge [Iowa] 113 NW 461.

28. Carey v. Brooklyn Heights R. Co., 108 NYS 1034. In personal injury action, it was proper to exclude a question to witness, who admitted she had had an accident, whether she had sued the railroad company. A suit against any company except defendant would not tend to show hostility of the witness. Id.

29. Particulars of difficulty between witness and defendant inadmissible to show bias of witness. Wright v. Anniston [Ala.] 44 S 151.

30. Hoagland v. Canfield, 160 F 146. Statements need not be absolutely contradictory; it is enough if they are inconsistent with testimony. Id. Witness in personal injury action testified that plaintiff asked him to testify, that he said it would be perjury, but plaintiff said he did not care. Held error to exclude affidavit made by witness that he saw accident, that plaintiff asked him to testify, and that he said he would. Novogrucky v. Brooklyn Heights R. Co., 110 NYS 28. Former testimony of attesting witness to will, offered to contradict his testimony, properly excluded because

always competent as impeaching evidence when a proper predicate has been laid.[31] Thus, oral or written statements out of court,[32] statements made as a witness in a former trial [33] or before the grand jury,[34] statements in pleadings,[35] affidavits, though

not contradictory to present testimony. Walker v. Walker [R. I.] 67 A 519. Proof of certain statements improperly admitted because not contradictory to witness' testimony. Wagner v. Com. [Ky.] 108 SW 318. Dying declarations of decedent not being introduced, and state's witnesses having testified that accused killed deceased, statement of decedent on preliminary trial that he did not know who struck him was irrelevant and did not contradict the state's witnesses. State v. Wright, 145 N. C. 490, 59 SE 541.

31. See post, § 5E.

32. Paper, signed by witness and contradicting his testimony, admissible. Hoagland v. Canfield, 160 F 146. Proof of prior inconsistent statements which witness denies having made is competent. B. & C. Comp. § 853. Dillard v. Olalla Min. Co. [Or.] 94 P 966. Proof of inconsistent statements admissible. Indian Head Coal Co. v. Miller [Ky.] 110 SW 813. Previous statements inconsistent with testimony and which witness denied making, admissible. Stone v. Com. [Ky.] 110 SW 235. Witnesses may be impeached by proof of previous contradictory statements, but such evidence is not competent to prove the facts stated. Atoka Coal & Min. Co. v. Miller [Ind. T.] 104 SW 555. Statements by witness, out of court, contrary to his testimony, held competent to discredit him. Smith v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 909, 105 SW 182. Proof of inconsistent statements of witness admissible. Colorado Midland R. Co. v. McGarry [Colo.] 92 P 915. Statements of witness for state, just after alleged offense, may be shown by defendant to contradict witness' testimony. Adams v. State [Tex. Cr. App.] 19 Tex. Ct. Rep. 953, 105 SW 197. In action for injuries to plaintiff who was struck by a train while walking on the track, where the engineer and fireman testified that they did not see plaintiff in time to avoid the accident, it was proper to ask the fireman if he had not stated on the night of the accident that the engineer was drunk and that witness had shouted to plaintiff, and to prove by another witness that the fireman made such statement. Chesapeake Beach R. Co. v. Donahue [Md.] 68 A 507. If, after prima facie proof of agency, the agent denies it, proof of prior declarations tending to show its existence is competent to impeach him as a witness. Ham v. Brown, 2 Ga. App. 71, 58 SE 316. Where, in assault case, a witness for defendant gave testimony tending to show defendant acted in self-defense, a previous statement by witness inconsistent with his testimony was admissible. Hughes v. State [Ala.] 44 S 694. Where, in controversy between donee of chattel and mortgagee, the mortgagor and donor claimed he had paid off the mortgage, and so testified, his admissions to the contrary could be proved. Speakman v. Vest [Ala.] 44 S 1021. Statements of members of train crew inconsistent with their testimony held admissible to impeach them, though not part of the res gestae. Denver, etc., R. Co. v. Mitchell [Colo.] 94 P 289. Where servant of defendant testified that he did not make a certain statement to a party, testimony of the party was properly limited to contradicting the witness, and the jury properly instructed not to consider it as substantive evidence of the facts said to have been stated. Brents v. Louisville, etc., R. Co., 31 Ky. L. R. 1216, 104 SW 961. Where, on issue of warranty of title to land, a witness testified that he had never warranted the title, deeds of trust containing warranties of title prior to the deed in question were admissible to contradict him. Larkin v. Trammel [Tex. Civ. App.] 20 Tex. Ct. Rep. 43, 105 SW 552. Where a party on his cross-examination denies having made admissions to a witness material and relevant to the issues, it is proper to prove such admissions by the witness and error to strike out proof that they were made. Wadsworth v. Owens [N. D.] 115 NW 667.

33. When a witness has testified differently at a former trial of the case as to any matter material and relevant to the issues on trial, proof of such contradictory statements is admissible. Richards v. Com. [Va.] 59 SE 1104. The record of a former suit is competent in a subsequent suit between different parties for the purpose of contradicting one of the parties as a witness. Becker v. Philadelphia, 217 Pa. 344, 66 A 564. Fact that plaintiff, claiming damages for rupture, had made same claim in another prior action against other persons, was admissible where he testified that he never had any trouble with his grain before the accident in question. Ruemer v. Clark, 121 App. Div. 231, 105 NYS 659. Evidence also admissible as bearing on credibility of witness giving it, who was plaintiff's wife, as she also had testified that her husband had had no trouble before. Id.

34. In action for malicious prosecution, where defendant testified that he had told the grand jury everything, and mentioned some things he had told them, it was proper to show by a grand juror that he had not testified to certain things as to which he testified at the trial. Cramer v. Harman, 126 Mo. App. 54, 103 SW 1086.

35. Statement in an answer in another suit may be used to contradict one as a witness. Hudkins v. Crim [W. Va.] 61 SE 166. It is generally held that abandoned or superseded pleadings are admissible to impeach or contradict a party, at least in the absence of evidence that the pleading was unauthorized. Original declaration admissible to impeach plaintiff where it appeared to have been drawn partly upon his information. Browder v. Southern R. Co. [Va.] 57 SE 572. In action against banking concern as partners, a defendant testified that they were not partners. A newspaper article referring to them as partners, and sworn pleadings setting up that they were partners, were admissible to contradict the witness. Hoskins v. Velasco Nat. Bk. [Tex. Civ. App.] 20 Tex. Ct. Rep. 462, 107 SW 598. Where a witness who has

offered by adverse party as a part of his case,[86] and in depositions,[87] have been held competent. Statements in the presence of a witness not denied by him, may also be proved.[88] A previously expressed estimate[89] or opinion[90] cannot be shown. The notes of a judge[91] and the record of a magistrate not authorized by law to reduce testimony to writing[92] have been held incompetent to impeach a witness. Only the testimony of the witness sought to be impeached should be offered.[93] Such declarations of a witness are competent only as impeaching evidence.[94] A witness, however, may be allowed to explain previous contradictory statements.[95]

(§ 5) *E. Foundation for impeaching evidence.*[See 8 C. L. 2381]—Impeaching evidence is inadmissible unless a proper predicate has been laid,[96] though no foundation need be laid for proof that facts testified to by a witness are untrue.[97] Unless the witness is a party,[98] prior contradictory or inconsistent statements cannot be proved unless the attention of the witness had been called thereto[99] and the circumstances,

verified a pleading makes statements inconsistent therewith, the pleading may be read to the jury (Lexington R. Co. v. Woodward [Ky.] 106 SW 853), but this rule does not apply to an unverified pleading which has been expressly withdrawn (Id.).

36. Held error to exclude affidavit because not offered when identified upon cross-examination. Chicago City R. Co. v. Mauger, 128 Ill. App. 512.

37. Statements by witness in a deposition taken in another cause are admissible to contradict him. Charlton v. Kelly [C. C. A.] 156 F 433.

38. Statement of conductor of train in presence of other members of the crew, not denied by them, held admissible as inconsistent with their testimony. Denver, etc., R. Co. v. Mitchell [Colo.] 94 P 289.

39. Prior affidavit of witness contained facts based only on an estimate, not intended to be treated as matters of fact. Held, though inconsistent with his testimony, it did not affect his credibility. Southern R. Co. v. McNeill, 155 F 756.

40. Witness in assault case denied having said in justic court trial that he had gone to scene of trouble because he expected there might be trouble. Held, proof that he had made such statement was inadmissible, it being mere opinion. Vanhouser v. State [Tex. Cr. App.] 108 SW 386.

41. A judge's notes are not competent evidence of testimony of a witness on a former trial. Richards v. Com. [Va.] 59 SE 1104.

42. There being no authority for a magistrate to reduce testimony of witnesses to writing, owing to omission by legislature to re-enact Dummy Code, § 1463, and Code 1892, § 1463, transcript from justice court was incompetent to contradict a witness. Scott v. State [Miss.] 46 S 251.

43. Where particular witness was sought to be impeached by testimony before a magistrate, his testimony only, and not the testimony of all the witnesses before the magistrate, should have been offered. Scott v. State [Miss.] 46 S 251.

44. Declarations of a witness may be proved only to impeach the witness after foundation duly laid. State v. Luper [Or.] 95 P 811.

45. Whether they are written or oral Cal Hirsch & Sons Iron & Rail Co. v. Coleman, 227 Ill. 149, 81 NE 21, afg. 128 Ill. App. 245.

46. Inconsistent statements inadmissible, no foundation having been laid. Larsen v. Sedro Woolley [Wash.] 94 P 938; Cal Hirsch & Sons Iron & Rail Co. v. Coleman, 128 Ill. App. 245, afd. 227 Ill. 149, 81 NE 21. Impeaching testimony held properly excluded in absence of foundation therefor. Id. No predicate having been laid, proof of contradictory statements was properly excluded. Adams v. State [Fla.] 45 S 494. Proof of contradictory statements by other witnesses properly excluded, no predicate having been laid. Strickland v. State [Ala.] 44 S 90. Impeaching questions should not be permitted when a proper foundation has not been laid therefor. Whitney v. Cleveland, 13 Idaho, 558, 91 P 176. Minutes of a justice of the peace showing testimony of a party in an action before the justice held incompetent in another action, no foundation for its admission being laid. Watkins v. Clough, 119 App. Div. 527, 103 NYS 270. Where an accused person pleads guilty and then testifies against a co-defendant, he occupies the same position as any other witness and cannot be contradicted when no foundation has been laid. State v. Boyles [S. C.] 60 SE 233.

47. State v. Constantine [Wash.] 93 P 317.

48. The rule that previous inconsistent statements of a witness cannot be proved without first calling the attention of the witness thereto does not apply where the witness is a party. Ruemer v. Clark, 121 App. Div. 231, 105 NYS 659.

49. Certain evidence inadmissible to impeach witnesses where no foundation was laid on cross-examination of such witnesses. People v. Emmons [Cal. App.] 95 P 1032. Before contradictory or inconsistent statements can be shown, the witness sought to be impeached must be interrogated as to such statements. New York, etc., R. Co. v. Flynn [Ind. App.] 81 NE 741. Where accused was asked in regard to a particular conversation and gave his version of it, it was proper to contradict him by a person who heard the conversation though defendant had not stated that such person was present. State v. Emerson [S. C.] 58 SE 974. Where witness for defendant denied making a certain statement to the county attorney, and said she had made a different statement and did not remember saying anything else, foundation was laid for proof of making the statement by the county attorney. State v. McGowan [Mont.] 93 P 552.

such as time, place, and persons present, placed before him,[50] in order that he may be given a fair opportunity to recollect and explain his former statement, if he made any.[51] Documentary evidence sought to be used for purposes of impeachment should be called to the attention of the witness [52] or some notice of its intended use should be given.[53] The fact that the witness is not available does not dispense with the necessity for such foundation being laid.[54] Where testimony of a witness at the preliminary hearing is read on the trial, and the witness was cross-examined at such hearing but no foundation laid for proof of contradictory statements, such statements cannot be proved on the trial.[55] Where it has been admitted that an absent witness will testify as stated in an affidavit for continuance, such witness cannot be impeached by proof of contradictory statements, since the proper foundation cannot be laid.[56] The impeaching statement proved should conform to the predicate laid,[57] but a variance between the foundation and the statement proved is immaterial if not such as to make the two substantially different.[58] If a witness admits having made certain statements, other proof of them is usually excluded.[59] A party cannot prove a diffi-

50. A foundation is laid by interrogating the witness in regard to the previous convicting statements specifying time, place, and person involved. Cal Hirsch & Sons Iron & Rail Co. v. Coleman, 227 Ill. 149, 81 NE 21, afg, 128 Ill. App. 245. The time when and place where such statements were made must be fixed. New York, etc., R. Co v. Flynn [Ind. App.] 81 NE 741. Questions asking witness what he said as to a certain matter, at a certain time and place, proper to lay foundation for impeachment. Owensboro City R. Co. v. Allen [Ky.] 108 SW 357. Where a witness admits that he testified at a coroner's inquest, a question if he had made a certain statement at the inquest is not objectionable as not fixing time and place. Coffey v. Omaha, etc., R. Co. [Neb.] 112 NW 589. Where witness sought to be contradicted was not asked as to the time, place, and circumstances of the alleged statement, proof of it could not be made. Gibson v. Seney [Iowa] 116 NW 325. Question on cross-examination held to have fixed sufficiently the time, place, person, and subject-matter of statement sought to be proved to contradict a witness. State v. Hampton [S. C.] 60 SE 669.

51. State v. Hampton [S. C.] 60 SE 669. Where witness, on his cross-examination, was not questioned as to previous statements, inconsistent with his testimony, and his attention was not called to time, place, or person, they could not be proved against him. State v. Meyers [La.] 44 S 1008. Where no foundation was laid for the impeachment of a witness, proof that he had stated, in the presence of plaintiff, to one who was looking up information for plaintiff, that he was not the man wanted, that he could not see the crossing, nor within 25 yards of it, was inadmissible; presence of plaintiff did not dispense with necessity for foundation being laid. Harbert v. Atlanta, etc., R. Co. [S. C.] 59 SE 644.

52. Not error to exclude contract offered as impeaching evidence where it was not shown to witness when on the stand. Tonapah Lumber Co. v. Riley [Nev.] 95 P 1001. Not error to exclude impeaching questions asked witness concerning statements made in former suit, where papers referred to were not shown him, especially where papers, subsequently introduced, showed verification by another. Id. Where witness admitted having signed a paper procured from him after being called as a witness, it was proper to ask him a question from it to lay a foundation for impeaching him. Hoagland v. Canfield, 160 F 146. Held not necessary to show witness transcript of former testimony where questions were simply preliminary and not by way of direct impeachment. People v. Hart [Cal.] 94 P 1042.

53. An affidavit need not be proved by person who made it in order to be competent as impeaching evidence, but witness should be asked concerning it on cross-examination, or some notice of its intended use should be given, in order to lay a foundation for its use as impeaching evidence. Novogrucky v. Brooklyn Heights R. Co., 116 NYS 28.

54. Proof of contradictory statements cannot be made without laying the foundation, as required by Civ. Code 1895, § 5292. Where a witness made a statement after leaving the stand, it could not be proved where she had gone away, and could not be recalled to the stand for the purpose of asking her about it. Georgia, etc., R. Co. v. Sasser [Ga. App.] 61 SE 505.

55. People v. Pembroke [Cal. App.] 92 P 668.

56. So held under Burns' Ann. St. 1901, § 413, permitting impeachment of absent witness after admission of what he would testify to if present. New York, etc., R. Co. v. Flynn [Ind. App.] 81 NE 741.

57. Where a witness, on cross-examination, denied having said that he had been convicted of murder, it could not be proved by another witness that he said he had been convicted of shooting a man, this not being in accordance with the predicate laid. Murph v. State [Ala.] 45 S 208.

58. State v. Hampton [S. C.] 60 SE 669.

59. Where a witness admits having written a letter in response to questions embodying excerpts therefrom, containing inconsistent statements, the letter itself cannot be introduced to contradict him. Lloyd v. Kerley [Tex. Civ. App.] 20 Tex. Ct. Rep. 427, 106 SW 696.

culty between a witness and a party to show bad feeling on the part of the witness toward him unless the witness denies that such feeling exists.[60]

(§ 5) *F. Corroboration and sustentation of witnesses.*[See 8 C. L. 2382]—Where no attempt has been made to impeach a witness, evidence which is merely corroborative of his testimony is inadmissible[61] though corroborative evidence, relevant on other issues, is proper,[62] and, where impeachment evidence has been offered, evidence to rebut it is competent.[63] The declarations of a witness, verbal or written, out of court, are inadmissible, as a rule, to corroborate his testimony on the trial,[64] even where evidence of contradictory statements has been offered to impeach the witness,[65] but where it is sought to be shown that a witness testified under corrupt motives, or that his testimony is a recent fabrication,[66] and is the result of some relation to the party or the cause, or of some motive or personal interest,[67] statements similar to the testimony of the witness may be shown provided it appears that the statements sought to be shown were made when the alleged motive or interest did not exist.[68] Where prior admissions or contradictory statements have been proved, evidence is competent, in

60. Proper to refuse to allow difficulty to be shown when feeling was not denied. Sasser v. State, 129 Ga. 541, 59 SE 255.

61. As a rule the mere cross-examination of a witness will not warrant introduction of testimony to sustain the witness. Warren v. State, 51 Tex. Cr. App. 598, 19 Tex. Ct. Rep. 254, 103 SW 888. In prosecution for illegal sale of liquor, held improper to admit certain testimony to corroborate prosecuting witness. Selwert v. State, 51 Tex. Cr. App. 404, 19 Tex. Ct. Rep. 135, 103 SW 932.

62. Victim of robbery told of force used. Physician properly allowed to describe victim's injuries, this corroborating the victim's testimony. People v. Whitelaw [Cal. App.] 95 P 379. Where witness testified to having paid premiums, what she formerly said concerning the matter was admissible in corroboration. Matthews v. Metropolitan Life Ins. Co. [N. C.] 61 SE 192. Witness testified that oral partnership agreement had been reduced to writing but not signed. Held writing admissible on issue of truth of his statement. Michigan Shoe Co. v. Paul, 149 Mich. 695, 14 Det. Leg. N. 554, 113 NW 810. Where defendants claimed land through a certain conveyance which plaintiffs denied, certain evidence corroborative of defendants' testimony was admissible. Powers v. Hatter [Ala.] 44 S 859.

63. Defendant sought to show bias of a witness against him by proof of a difficulty between witness and defendant's brother-in-law. Held competent for state to show in rebuttal that someone had told witness he had better not testify against defendant. Strong v. State [Ark.] 109 SW 536. Where in criminal prosecution defendant showed by a police officer, a witness, that he was anxious to convict defendant, it was proper for the state to show that his interest arose solely from a desire to discharge his duty as a police officer and his belief in defendant's guilt. People v. Wenzel, 189 N. Y. 275, 82 NE 130.

64. Written statement inadmissible. Birmingham R., L. & P. Co. v. Hayes [Ala.] 44 S 1032. Previous statements by witness tending only to corroborate him inadmissible. Slone v. Com. [Ky.] 110 SW 235. It is ordinarily incompetent to sustain a witness by proving statements made by him at other times in harmony with his testimony at the trial. Rule applied. Driggers v. U. S. [Ind. T.] 104 SW 1166. Where a person gave two depositions, and in the second gave the date of an event a year later than in the first, and explained the discrepancy and stated the former statement was wrong, statements made by her to others, to the same effect as her second deposition, were properly excluded. Breeden v. Martens [S. D.] 112 NW 960. Where character of witness had not been attacked except by questions not necessarily insinuating lack of veracity, he could not be corroborated by proof of statements out of court consistent with his testimony. Hardin v. Ft. Worth, etc., R. Co. [Tex. Civ. App.] 108 SW 490. Unless there has been a direct effort to contradict a witness by statements out of court, such statements out of court cannot be proved to support the witness' testimony. Holmes v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 844, 106 SW 1160.

65. Where evidence of contradictory statements is offered to impeach a witness, proof of former statements consistent with his testimony is inadmissible. Driggers v. U. S. [Okl.] 95 P 612.

66. Exception held inapplicable. Driggers v. U. S. [Ind. T.] 104 SW 1166. See, also, Driggers v. U. S. [Okl.] 95 P 612.

67. Driggers v. U. S. [Okl.] 95 P 612.

68. Driggers v. U. S. [Okl.] 95 P 612. Where evidence to impeach a witness, tending to show a motive for falsifying, has been introduced, proof of statement similar to testimony is admissible provided it is shown that motive to falsify did not then exist. Sullivan v. Fant [Tex. Civ. App.] 110 SW 507. In suit to enforce parol trust alleged to have been made between defendants' agent and plaintiffs, evidence of inconsistent statements of the agent, during his agency, was introduced. Held proper to exclude proof of statements consistent with agent's testimony after the agency ceased. Id.

rebuttal, to show that such statements were not made,[69] or to explain them [70] as by proof of all the circumstances [71] or the entire testimony or statement of the witness.[72]

The mere cross-examination of a witness,[73] or a mere conflict in the evidence,[74] does not warrant introduction of proof that the reputation of a witness for truth and veracity is good unless the witness is impeached in some manner recognized by the rules of evidence.[75] Evidence of the general reputation of a witness for truth and veracity is said to be admissible in support of the witness in the following cases: First, where there has been a direct or indirect attack on the character of the witness,[76] as by offering evidence tending to show that his general reputation for truth

69. Where defendant testified that plaintiff had made a certain statement, a letter containing a contrary statement was held admissible as tending to show improbability of plaintiffs making such statement in face of written statement to the contrary. Davis v. Farwell, 80 Vt. 166, 67 A 129. Where accused denied making a statement, and state proved it by witnesses, accused should have been allowed to introduce testimony in support of his denial. State v. Constantine [Wash.] 93 P 317. Where prosecution's witnesses had been impeached by evidence by a grand juror that they had testified differently before the grand jury, testimony of another grand juror that their testimony was the same was competent to corroborate them. Kennedy v. Com. [Ky.] 109 SW 313.

70. Defendant having sought to impeach plaintiff by showing inconsistent statements out of court, testimony of plaintiff was admissible in rebuttal to explain the impeaching evidence. Long v. Davis [Iowa] 114 NW 197. Held proper in view of evidence concerning the conduct and prior statements of a witness to allow her to state that she had not told what she knew and would testify to, because another had said defendant would kill her if she did, Sasser v. State, 129 Ga. 541, 59 SE 255. Where a written document is offered in evidence for the purpose of impeaching or contradicting a witness, it is error for the court to refuse such witness an opportunity to explain such written document or evidence. Idaho Placer Min. Co. v. Green [Idaho] 93 P 954. Where defendant sought to show a variance between the testimony of the state's witnesses on the trial and that given at the inquest, the state could show by the coroner that he did not take down the entire statements of the witnesses but the substance of their testimony. State v. Hampton [S. C.] 60 SE 669. Witness testified that testator was of sound mind, and, to impeach him, a contract executed by witness was introduced reciting that testator was non compos mentis. Held proper to allow witness, in explanation, to state that he did not know what "non compos mentis" meant. Brown v. McBride, 129 Ga. 92, 58 SE 702.

71. Where witness testified contrary to a written admission previously made by him, the jury were entitled to consider, on the issue of his credibility, the circumstances under which he signed the writing. Joyce v. Joyce [Conn.] 67 A 374. Where letter was introduced tending to contradict the writer's testimony, evidence of her physical condition at the time she wrote it was admissible. Faulkner v. State [Tex. Cr. App.] 109 SW 199. Proper to allow witness to explain why and on what grounds he had verified papers in another suit, introduced to impeach his testimony. Tonopah Lumber Co. v. Riley [Nev.] 95 P 1001.

72. Where accused tried to impeach a witness by showing testimony at committing trial at variance with that on trial, a written, verified statement of witness' testimony at committing trial was admissible. Falkner v. State [Ala.] 44 S 409. Where testimony of a witness on a former trial is introduced by defendant to impeach the witness, the state may introduce other parts of such former testimony to explain the contradiction, but portions having no bearing on the issues and no tendency to explain are not admissible to sustain the witness' testimony. Corpus v. State, 51 Tex. Cr. App. 315, 19 Tex. Ct. Rep. 225, 102 SW 1152. Prosecuting witness in local option case testified that he had not said that he had found the liquor, and his statement was proved against him. Held state was properly allowed to show the entire conversation, in which he afterwards confessed having bought it from defendant. Hood v. State [Tex. Cr. App.] 107 SW 848.

73. Warren v. State, 51 Tex. Cr. App. 598, 19 Tex. Ct. Rep. 254, 103 SW 888.

74. First Nat. Bk. v. Blakeman [Okl.] 91 P 868. The mere fact of a conflict between testimony of defendant and other witnesses does not authorize proof of defendant's good character or reputation for truth and veracity. Butler v. State [Tex. Cr. App.] 107 SW 840.

75. On the trial of a cause to the jury, where defendant testifies in his own behalf and is not impeached in any manner recognized by the rules of evidence, it is prejudicial error to permit him to introduce evidence of his general reputation for truth and veracity. First Nat. Bk. v. Blakeman [Okl.] 91 P 868.

76. Where the witness is a stranger and is rigidly cross-examined with a view to impeaching him, proof of his good reputation for truth and veracity is admissible. Warren v. State, 51 Tex. Cr. App. 598, 19 Tex. Ct. Rep. 254, 103 SW 888; Jeffereys v. State, 51 Tex. Cr. App. 566, 19 Tex. Ct. Rep. 334, 103 SW 886. Whenever the character of a witness for truth is attacked in any way known to the law, proof of his general reputation for truth is admissible. Such evidence admissible in regard to plaintiff where defendant's cross-examination was such as to indirectly attack his veracity. Chesapeake, etc., R. Co. v. Fortune [Va.] 59 SE 1095. Impeaching evidence having been offered, proof of good character for truth and veracity of witness attacked was

and veracity is bad;[77] second, where the witness has been impeached by evidence of particular acts of criminal or moral misconduct, either cross-examination or by record of conviction;[78] third, where impeachment is by evidence of corruption on the part of the witness in connection with the case in which he appears;[79] fourth, where impeachment is by evidence of contradictory or inconsistent statements, admitted on cross-examination or shown by the testimony of other witnesses.[80] Proof of good reputation must be made by a qualified witness.[81] Proof of general good character is admitted in some states after an attempt to impeach,[82] but is excluded in the absence of impeaching evidence.[83]

§ 6. *Privileges of witnesses.*[See 8 C. L. 2385]—Under the Federal and state constitutions no person, in a criminal case, can be compelled to give evidence against himself,[84] and no witness in any legal proceeding can be compelled to give evidence

admissible. Watson v. State [Ala.] 46 S 232. The good reputation for truth and veracity of witnesses who have not been attacked and who have not testified to facts but only to another person's reputation cannot be shown. Pratt v. State [Tex. Cr. App.] 109 SW 138.

77. This rule is unquestioned. First Nat. Bk. v. Blakeman [Okl.] 91 P 868. Where a witness' reputation for truth and veracity is attacked, testimony of one who had known him in the community where he lived for many years and had never heard his reputation for truth discussed was admissible in support of the witness. Spencer v. State [Wis.] 112 NW 462.

78, 79. Rule supported by weight of authority. Cases cited. First Nat. Bk. v. Blakeman [Okl.] 91 P 868.

80. Authorities are said to be in irreconcilable conflict on this class of cases, but rule as stated is said to be better supported by reason. Cases cited. First Nat. Bk. v. Blakeman [Okl.] 91 P 868. Where in burglary case defendant relied largely on his explanation of being found in a car, and the state attacked this explanation and also sought to impeach him directly on one point, proof of his good reputation for truth and veracity was **admissible.** Butler v. State [Tex. Cr. App.] 107 SW 840. Where accused sought to impeach prosecuting witness in rape case by proof of inconsistent testimony at preliminary hearing, evidence of her good reputation for veracity was admissible. Brown v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 555, 106 SW 368.

81. Error to receive testimony to support plaintiff's reputation for truth and veracity (after an attempt to impeach him) by a witness who did not say that he knew plaintiff's reputation in the community where he lived. Lee v. Andrews [Mich.] 14 Det. Leg. N. 811, 114 NW 672.

82. Where it is sought to impeach a witness by proof of previous contradictory statements as to relevant matters, proof of his good character is admissible. Civ. Code 1895, § 5292. Bell v. Aiken, 1 Ga. App. 36, 57 SE 1001. Where defendant examined witnesses with respect to contradictory statements made by a certain witness for the purpose of impeaching him, the state could sustain the witness by proof as to his general character. Graham v. State [Ala.] 45 S 580.

83. Where the character of a defendant has not been impeached except by proof of statements inconsistent with his testimony, evidence of his good character is inadmissible. Title Ins. & Trust Co. v. Ingersoll [Cal.] 94 P 94. Proof that prosecuting witness (in theft case) was honest and of good character inadmissible, no impeaching evidence having been introduced. Jones v. State [Tex. Cr. App.] 20 Tex. Ct. Rep. 333, 106 SW 126.

84. Accused cannot be compelled to testify on cross-examination as to the commission of another offense, under the guise of proving a motive. Welch v. Com. [Ky.] 108 SW 863. Accused, on trial for shooting another, cannot be compelled to testify as to improper relations sustained with a woman up to the time of the shooting. Welch v. Com. [Ky.] 108 SW 863. When by an unlawful search and seizure, under an illegal arrest, a person is compelled by an officer of the law to furnish incriminating evidence against himself, such evidence is not admissible against him in a criminal prosecution. Defendant was arrested without a warrant and searched, and a concealed pistol taken from him. Proof of finding the pistol was held incompetent. Hammock v. State, 1 Ga. App. 126, 58 SE 66.

Privilege held not violated: Accused was not compelled to give testimony against himself by being compelled to put his foot into track on the ground for the purpose of identifying him. Magee v. State [Miss.] 46 S 529. Where at the time accused was searched and a letter found upon him he had not been formally accused of the murder in question, an objection that he was compelled to give evidence against himself was without merit. People v. Strolle [N. Y.] 83 NE 573. A deportation proceeding against alien Chinese persons, not of exempt classes, and not entitled to remain in the country, is a civil proceeding and not a criminal one, nor one for a "penalty" or "forfeiture." Hence defendant may not refuse to become a witness against himself. United States v. Tom Wah, 160 F 207. In prosecution for selling liquor, etc., on Sunday, proof by deputy sheriff that he removed bricks from a wall in order to look into defendant's barroom, and so saw the sales made, was not incompetent as compelling defendant to testify against himself. Cohn v. State [Tenn.] 109 SW 1149. Objection that incriminating books and papers were required to be produced before grand jury under Vermont Act,

that will tend to incriminate him [85] or subject him to a criminal prosecution.[86] It is held that the constitutional provision should be applied in a broad and liberal spirit so as to secure immunity from every species of self-accusation.[87] Statutes which infringe the constitutional privilege are of course, invalid.[88] It is immaterial that no criminal prosecution has been instituted against the witness; the constitutional immunity extends to any preliminary investigation, or even collateral or independent proceeding,[89] in which it is sought to elicit evidence which may result in prosecution.[90] The privilege against self-crimination applies in all cases in which punishment may be inflicted.[91] Thus, a court officer cannot be compelled to give testimony which will render him liable to punishment for contempt,[92] but an officer may be compelled to testify to acts outside the scope of his official duties for which he cannot be punished as for contempt or otherwise.[93] Defendant in a criminal prosecution is a competent witness on the issue of former acquittal, and he may testify on that issue without being compelled to testify on the criminal issue.[94]

The privilege is personal to the witness and may be waived by him,[95] and failure to claim it is a waiver.[96] It cannot be claimed for the benefit of another.[97] When the privilege has been waived, the witness may be compelled to make full disclosures.[98] Thus, where accused persons take the stand in their own behalf, they may be fully cross-examined.[99]

October 9, 1906, without extending immunity from criminal prosecution, is not available to corporation which has been fined for contempt in failing and absolutely refusing to produce any of books and papers called for, with unimportant exceptions, and has thus prevented court from inquiring into validity of objection. Consolidated Rendering Co. v. Vermont, 28 S. Ct. 178.

85. Discovery of an instrument alleged to contain a libel will not be required, since this would compel the holder of the paper to give evidence against himself. Riddle v. Blackburne, 110 NYS 748. Manager of corporation allowed to claim privilege as to books of corporation, where object was to determine criminal liability in timber deals, and where, if books showed any criminal acts, they would involve the manager, as he had charge of the business of the corporation. Ex parte Chapman, 153 F 371.

86. Where interrogatories are submitted to a party, he may refuse to answer on the ground that he cannot be compelled to give evidence which might subject him to criminal prosecution. Morris v. McClellan [Ala.] 45 S 641. Order to produce power of attorney authorizing one to conduct a saloon in another's name held not to require witness to incriminate himself on the theory that he might be proceded against for running a saloon without a license. Hilliker v. Farr, 149 Mich. 444, 14 Det. Leg. N. 497, 112 NW 1116.

87. People v. Reardon, 109 NYS 504.

88. Under New York statutes it is a misdemeanor to sell, transfer or deliver stock without paying the tax thereon. Laws 1905, c. 241 (Tax Law 321), requires brokers to keep records of all stock transactions handled by them and all purchases and sales by them, and gives the state comptroller power to inspect such books, and makes refusal to permit inspection a misdemeanor. Held the latter statute violates Const. art. 1, § 6, providing that no person shall be compelled to be a witness against himself. People v. Reardon, 109 NYS 504. The fact that the stock tax law cannot well be enforced without some such provision as to inspection is no reason for upholding the law. Id. Laws 1905, p. 1849, c. 689, § 7, authorizes state superintendent of elections to subpoena witnesses in examination of registration lists, and provides that any person refusing to testify shall be guilty of a misdemeanor, and one testifying falsely shall be guilty of a felony. Held the statute does not prevent a witness from claiming his privilege against self-crimination and is not invalid on that ground. People v. Cahill, 110 NYS 728. Laws 1905, c. 689, § 7, giving superintendent of elections power to subpoena and examine witnesses in an examination by him of registrations, does not contemplate a criminal proceeding and is not invalid as requiring one to testify against himself in a criminal proceeding. Id.

89, 90. People v. Reardon, 109 NYS 504.

91. Louisville, etc., R. Co. v. Schwab, 31 Ky. L. R. 1313, 105 SW 110.

92. Jury commissioner need not testify to irregularity in selecting jurors. Louisville, etc., R. Co. v. Schwab, 31 Ky. L. R. 1313, 105 SW 110.

93. Clerks may be compelled to testify to assistance rendered jury commissioners at latter's request. Louisville, etc., R. Co. v. Schwab, 31 Ky. L. R. 1313, 105 SW 110.

94. Since the two issues may be tried separately. State v. White [N. C.] 60 SE 505.

95. Ex parte Hedden [Nev.] 90 P 737.

96. Even if a statute failed to give complete immunity, one compelled to testify in a special proceeding must claim his common-law privilege against self-crimination, and if he fails to do so he waives the privilege. People v. Cahill, 110 NYS 728.

97, 98. Ex parte Hedden [Nev.] 90 P 737.

99. Ex parte Hedden [Nev.] 90 P 737. If accused takes the stand in his own behalf, he subjects himself to the same rules as to

It is commonly provided by statute that the failure of accused to testify shall raise no presumption against him, and reference to or comment upon a failure to testify is prohibited.[1] Under such a statute, an instruction to the jury that the failure of the accused to testify does not relieve the state from the obligation to produce evidence which will establish guilt beyond a reasonable doubt is not reversible error.[2] Such statutes do not apply in civil actions.[3]

Where by statute absolute immunity from prosecution is guarantied to the witness in regard to anything concerning which he may testify, he may be compelled to testify,[4] but the immunity granted by statute must be as broad as the constitutional exemption itself,[5] since the legislature has no power to abridge the constitutional privilege.[6] A statute providing that testimony given by a person required to testify shall in no case be used against him is not sufficiently broad,[7] since it does not exclude use of evidence which may be discovered by means of such testimony and proved by other witnesses.[8] The North Carolina act in regard to lynchings, providing that no person shall be excused from testifying in an investigation but declaring that a witness who is examined is fully pardoned of any and all participation in the crime defined by the act, is held valid.[9] Any person examined in such an investigation is thereby pardoned and exempt from prosecution, whether or not the testimony given by him was incriminating.[10] A statute requiring witnesses to testify in certain proceedings, and granting immunity from prosecution for crimes disclosed by their testimony, does not grant immunity from prosecution for perjury committed in such proceeding.[11] If the prosecution for the crime concerning which the witness is interrogated is barred by the statute of limitations, he may be compelled to answer.[12]

If the answer of a witness may have a tendency to disgrace him and bring him into disrepute, and the proposed evidence be material to the issue on trial, the weight of authority is that he may be compelled to answer,[13] but if the answer have no effect upon the case except to impair the credibility of the witness, he may rely upon his privilege.[14]

cross-examination as any other witness. Dungan v. State [Wis.] 115 NW 350. Where defendant took the stand to rebut a charge of vagrancy and testified that he held a lease of property which he sublet to prostitutes, it was proper to compel him to testify that during the running of the lease he had no other business except gambling. People v. Craig [Cal.] 91 P 997.

1. See Rev. St. 1906, § 7286. Tate v. State, 76 Ohio St. 537, 81 NE 973.

2. Tate v. State, 76 Ohio St. 537, 81 NE 973.

3. Where a party in a civil action refuses to answer interrogatories submitted by his adversary on the ground that he might incriminate himself, interrogatories, answers and refusal to answer certain questions may be read to the jury. The rule prohibiting comment on refusal of an accused to testify does not apply in a civil action. Morris v. McClellan [Ala.] 45 S 641.

4. Ex parte Hedden [Nev.] 90 P 737.

5. Unconditional immunity from prosecution must be given. In re Beer [N. D.] 115 NW 672. Pen. Code, § 41g, gives complete immunity from prosecution to one testifying in an examination of registration by superintendent of elections, under Laws 1905, c. 689, § 7. People v. Cahill, 110 NYS 728. The statute protects against prosecution for any past crime which may be revealed by the witness' testimony so given. Id.

6. Const. N. D. § 13. In re Beer [N. D.] 115 NW 672.

7. Rev. Codes 1905, § 9383, held invalid (relates to prohibition law). In re Beer [N. D.] 115 NW 672.

8. Const. N. D. § 13 protects person from testifying to facts connecting him with crime which may be subsequently proved against him by others. In re Beer [N. D.] 115 NW 672.

9. Revisal 1905, § 3201, does not intrench upon governor's pardoning power. State v. Bowman, 145 N. C. 452, 59 SE 74.

10. State v. Bowman, 145 N. C. 452, 59 SE 74.

11. People v. Cahill, 110 NYS 728. Immunity statute has no reference to future crimes, thus, one guilty of perjury in a registration examination may be prosecuted therefor, and in such prosecution his testimony at the examination may be given against him. Laws 1905, c. 689, and Pen. Code, § 41q. Id.

12. Ex parte Hedden [Nev.] 90 P 737. Constitutional privilege cannot be invoked. When danger of prosecution has been removed by a pardon, statute of limitations, or immunity statute. People v. Cahill, 110 NYS 728.

13, 14. Ex parte Hedden [Nev.] 90 P 737.

Where, in a hearing before a master, a witness is apprehensive that some harm may be done his personal or property rights, he may decline to answer a question propounded to him and stand upon his refusal until the court has determined the question,[15] and the failure of the adverse party to press the question to a final determination is a waiver of the right to an answer.[16]

While it is the policy of the law to protect the secrecy of the ballot, a voter may waive his privilege and testify for whom he voted.[17]

A refusal to answer cannot be justified on the ground that the proceeding was not the proper one, this being a question for the court.[18]

In Michigan an assessing officer cannot be compelled to produce a return made by a property owner.[19]

§ 7. *Subpoenas, attendance, and fees.* See 8 C. L. 2389—Courts have inherent power to compel the attendance of witnesses [20] and the production of evidence.[21] Failure to obey subpoena, unless justified, is a contempt of court.[22] No employe of a corporation who may obtain possession of the corporation's books or papers, surreptitiously or otherwise, when not the legal custodian of such books and papers and when they are not in any sense his private property, can lawfully refuse to produce them when legally ordered to do so.[23] If such books and papers are turned over by one employe to another for the purpose of evading a subpoena duces tecum, it is proper for the court to order them returned to the proper custodian.[24] To entitle a party to a subpoena duces tecum requiring a witness not a party to produce books and documents in his possession, the application must set out facts showing prima facie that the books and documents desired are relevant and material.[25] A mere allegation that they are relevant and material is not sufficient.[26] The description of the books and documents wanted must be sufficiently specific to enable the witness to identify and produce them.[27] Refusal of a witness to produce documentary evidence before

15, 16. Dr. Peter H. Fahrney & Sons Co. v. Ruminer [C. C. A.] 153 F 735.

17. People v. Wintermute, 122 App. Div. 349, 106 NYS 1076. While the law does not permit the questioning of a legal voter as to how he voted, and an illegal voter might decline to answer on the ground that his answer might tend to incriminate him, yet where an illegal voter does not claim his privilege of refusing to testify, but voluntarily discloses that he did vote, he may be compelled to tell for whom he voted. State v. Markley, 9 Ohio C. C. (N. S.) 561.

18. Where surviving husband, in a show cause proceeding relating to property of the estate, refused to answer questions when required to do so, he was guilty of contempt, the court having complete jurisdiction. Husband could not determine whether proceeding was proper and thus justify his refusal. Succession of Desina, 118 La. 278, 42 S 936.

19. Comp. Laws Mich. 1897, § 3846, provides that statements by property owners to assessing officers shall be filed and shall be used for no other purpose than assessing property, and makes officers liable for damage resulting from their use for any other purpose. Held an officer cannot be compelled to produce such a statement in evidence in a state or Federal court, though no objection is made. In re Reid, 155 F 933.

20. Court has power to subpoena witness to appear before grand jury. Ferriman v. People, 128 Ill. App. 230. Party to interference proceeding before patent office appeared and testified before commissioner in his own behalf, and by successive adjournments delayed the cause until the time limited for taking evidence had expired, and then refused to appear for cross-examination. Held circuit court could, on proper application, compel his attendance. Lobel v. Cossey [C. C. A.] 157 F 664.

21. Where on examination of a witness by a referee witness admitted her memory would be refreshed by certain corporate records, the corporation being examined through witness, it was proper to issue a subpoena duces tecum for such records. Gibbons v. San Luis Min. Co., 110 NYS 96. Modification of order for examination of a witness and of a corporation through such witness by striking out requirement as to production of books of corporations is not an adjudication that such books could not be required to be produced so as to prevent issuance of subpoena duces tecum. Id.

22. Fact that sheriff served subpoena in county other than that of which he was sheriff no justification for non-attendance. Ferriman v. People, 128 Ill. App. 230.

23. Ex parte Hedden [Nev.] 90 P 737.

24. Ex parte Hedden [Nev.] 90 P 737. Custodian of books and papers was served with subpoena duces tecum and he, on order of an officer of the corporation, turned them over to another. Held proper to order the books to be returned to custodian so that they could be produced. Id.

25, 26, 27. United States v. Terminal R. Ass'n, 154 F 268.

the grand jury does not, in Nevada, authorize summary punishment of the witness as for contempt of court.[28] The witness has a right to be heard and the proceeding should comply with the statute.[29]

A person accused of crime is entitled to compulsory process for witnesses in his favor.[30] To require the court to issue compulsory process, accused must not only designate the witness but must show that such witness will testify in favor of accused and that his testimony will be material.[31]

There is a conflict of authority as to the right of an expert witness, testifying to matters involving professional knowledge, to recover compensation above the ordinary witness fee.[32] In some states it is held that an expert cannot recover extra compensation for services as a witness merely,[33] though there may be a recovery for time and services rendered in preparing to give expert testimony.[34] It is further held that a contract for extra compensation for expert testimony is invalid as against public policy,[35] and the fact that the party calling the witness knew of his custom to charge for services as a witness does not warrant a recovery.[36] Under the Minnesota statute relating to fees of expert witnesses, it is held that physicians and surgeons who testify as witnesses concerning facts coming under their observation while professionally attending a patient, and express opinions with reference thereto, are not necessarily entitled to compensation as expert witnesses,[37] but where physicians and surgeons are engaged to treat and examine an injured person for the purpose of acquiring the knowledge necessary to qualify them as expert witnesses, they are not necessarily disqualified as such by the fact that they also treated the patient professionally.[38]

In Missouri it is held that subpoenas must contain the names of witnesses to be summoned when issued by the clerk in order that witness' fees and fees of service may be recovered as costs.[39]

28. Construing Comp. Laws, § 3555. Such contempt is not in "presence of court." Ex parte Hedden [Nev.] 90 P 737.

29. Affidavit, order to show cause, etc. Order of commitment void because procedure summary. Ex parte Hedden [Nev.] 90 P 737.

30. Const. art. 1, § 18, sufficiently complied with where compulsory process was awarded and witness bound over under recognizance to appear, and bench warrant issued for arrest of witness. State v. Pope [S. C.] 58 SE 815. Under Const. S. D. art. 6, § 7, entitling accused to compulsory process for witnesses, he is entitled to have his witnesses present, if their presence can be procured, and this includes means to secure their presence or the advantages which would flow therefrom. State v. Wilcox [S. D.] 114 NW 687.

31. Construing Const. art. 1, § 18. State v. Pope [S. C.] 58 SE 815.

32. See authorities cited in Burnett v. Freeman, 125 Mo. App. 683, 103 SW 121.

33. Physician. Burnett v. Freeman, 125 Mo. App. 683, 103 SW 121. There being no statute on the subject of fees to expert witnesses in Georgia, such witnesses cannot be allowed extra compensation beyond that allowsd to ordinary witnesses for mere attendance in court in obedience to a subpoena. Schofield v. Little, 2 Ga. App. 286, 58 SE 666. One who testifies as an expert to facts within his own knowledge, and without previous preparation, cannot recover more than statutory witness' fees in absence of express agreement for more. Tiffany v. Kellogg Iron Works, 109 NYS 754.

34. Such as post mortem examinations, attendance at trials, etc. Burnett v. Freeman, 125 Mo. App. 683, 103 SW 121. For time spent in preparing to give expert testimony, such as examinations or listening to testimony as the basis for an opinion, a physician may recover extra compensation. Schofield v. Little, 2 Ga. App. 286, 58 SE 666. Where civil engineer made certain investigations in order to qualify himself as an expert witness, he is entitled to recover the reasonable value of his time and labor, even in the absence of an express promise. Tiffany v. Kellogg Iron Works, 109 NYS 754.

35. Burnett v. Freeman, 125 Mo. App. 683, 103 SW 121. But see Tiffany v. Kellogg Iron Works, 109 NYS 754; Wright v. Somers, 125 Ill. App. 256.

36. Burnett v. Freeman, 125 Mo. App. 683, 103 SW 121.

37. Anderson v. Minneapolis, etc., R. Co. [Minn.] 114 NW 744.

38. Le Mere v. McHale, 80 Minn. 410, 15 NW 682, distinguished. Decided under statute allowing expert fees. Anderson v. Minneapolis, etc., R. Co. [Minn.] 114 NW 744.

39. Construing various statutes. Lucas v. Brown, 127 Mo. App. 645, 105 SW 1089.

On the question of mileage allowance, statutes are, of course, controlling.[40] The allowance of witness' fees as costs is elsewhere discussed.[41]

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40. Ann. St. 1906, § 3259, allows 5 cents per mile for distance necessarily traveled by witnesses. This does not require use of shortest route. Mileage properly allowed in full where witness traveled by rail, though he could have gone by wagon. Ferguson & McDaris Lumber Co. v. Tiede & Co. [Mo. App.] 109 SW 850.

41. See Costs, 9 C. L. 812.

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